Vanderbilt Law Review

Volume 18
Issue 3 *Issue 3 - June 1965*

Article 4

6-1965

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Seven periods of intense Court-curbing have occurred in American history. Due to the Court's unavoidable involvement in the political process, conflict between the legislative and judicial branches will occur again when certain judicial provocations and catalytic factors are present. Professor Nagel examines the factors which have an affirmative correlation with the occurrence of Court-curbing bills, and the factors which have an affirmative correlation with the success of Court-curbing bills.

Due to its unavoidable involvement in the political process, the Supreme Court has often been an object of congressional attack. Excellent descriptive studies have been made of certain periods of conflict between Congress and the Court,[1] but there is a lack of writing which systematically analyzes relations between Congress and the Court throughout American history. It is the purpose of this paper to analyze in a partially quantitative manner some of the factors which seem to account for the occurrence or nonoccurrence and for the success or failure of congressional attempts to curb the Court.

I. Research Design

One hundred and sixty-five instances of bills designed to curb the Supreme Court were compiled along with information concerning their content, sponsor, and fate from a perusal of *The Congressional Record* and its forerunners and also from the previous literature in the field.[2] In order to keep the data within manageable limits, resolutions and constitutional amendments were not included although they are introduced frequently and often contain proposals which would

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1. Walter F. Murphy concentrates on the problems of the Warren Court in his book, Congress and the Court (1962) as does Pritchett, Congress Versus the Court (1960). Robert Jackson concentrates on the 1937 Court-packing plan in The Struggle for Judicial Supremacy: A Study of A Crisis in American Power Politics (1941). Walter Murphy's book was especially suggestive in writing some parts of this paper.

2. *Ibid.* See also Culp, *A Survey of Proposals to Limit or Destroy the Power of Judicial Review by the Supreme Court of the United States*, 4 Ind. L.J. 386, 474 (1929); Warren, *The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary*, 8 Mass. L.Q. 1 (1922).

substantially reduce the powers of the Court.[3] Relatively narrow bills designed to reverse a single decision were also excluded. Relying on the distribution of bills as well as the consensus of historians, seven time periods as shown in Table I were labeled high-frequency Court-curbing periods. This identification is both quantitative and qualitative. For example, the first period covering the years from 1802 to 1804, had only two instances of overt congressional attempts to curb the Court, one of which was the unsuccessful impeachment of Justice Chase. While it may well be a quantitatively marginal period, most writers agree that this was a time of high friction between the Federalists on the bench and the Jeffersonians in Congress and the Administration.

TABLE 1. HIGH AND LOW FREQUENCY PERIODS OF COURT-CURBING IN AMERICAN HISTORY

High-Frequency				Low-Frequency		
	Years	# of Bills	% of 165	Years	# of Bills	% of 165
1.	1802-1804	2	1%	1. 1789-1801	0	0%
2.	1823-1831	12	7	2. 1805-1822	0	0
3.	1858-1869	22	13	3. 1832-1857	1	1
4.	1893-1897	9	5	4. 1870-1892	8	5
5.	1922-1924	11	7	5. 1898-1921	6	4
6.	1935-1937	37	22	6. 1925-1934	2	1
7.	1955-1957	53	32	7. 1939-1954	2	1
	Total	146	87%		19	12%

A criterion by which to judge the relative success or failure of any one Court-curbing period is more difficult to establish. A total of only nine out of the 165 bills regulating the Court have passed Congress. This group of "absolutely successful" bills, representing approximately five per cent of the total instances, is too small to work with for the purposes of this study. Three criteria of "relative success" will therefore be used. First, *how many* anti-Court bills during each period were reported from committee, the lowest stage of the legislative process aside from introduction? Second, *what per cent* of the bills introduced were reported out of committee? The third criterion of success, as shown in Table 2, is that of determining whether a congressional at-

3. Twenty-five joint resolutions were proposed in 1937 while thirty-three constitutional amendments were introduced during the two year period from 1935 to 1937. Several attempts have been made, for example in 1867 and 1871, to establish via Constitutional amendment a new court representing all the states which would have jurisdiction over constitutional questions. A joint resolution in 1861 demanded the abolition of the federal judicial system.

tack has had the effect of changing within the immediate future the pattern of voting behavior of the Court on the issues which originally provoked the attack. In four of the seven attacks, the Court did retreat from its previous controversial policy by executing a tactical abstention from further similar provocation (as was the case in the years following the 1804 conflict) or by effecting a reversal of policy (as was the case in 1937). At the climax of the seventh period, the Court drew back from its stand on one of the issues which antagonized Congress—namely a broad interpretation of free speech—but remained firm on its policies toward segregation and criminal procedure which were also under congressional fire.

TABLE 2. RELATIVE SUCCESS OF SEVEN HIGH-FREQUENCY COURT-CURBING PERIODS

Years	Number of Bills Out of Committee	Per cent of Bills Out of Committee	Judicial Retreat	Composite Success	Rank Order of Composite Success
1. 1802-04	1	50%	Yes	Yes	3
2. 1823-31	3	25	Yes	Yes	4
3. 1858-69	11	50	Yes	Yes	1
4. 1893-97	1	11	No	No	7
5. 1922-24	2	18	No	No	6
6. 1935-37	6	16	Yes	Yes	2
7. 1955-59	2	4	Partial	No	5
	Avg. = 3.7 (N = 26) per period	Avg. 25%	Usually Yes	Usually Yes	

The fourth column in Table 2 provides a composite index of overall success. Thus, a high-frequency period can be considered successful if it is above average on the number of bills that were reported out of committee (*i.e.*, four or more); if it is above average on the per cent of successful bills (*i.e.*, 25% or above); and if it was climaxed by retreat of the Court on the majority of the issues involved. A period will be termed relatively successful if it is above average on at least two of these three criteria. Using this composite standard, four of the seven high-frequency periods have been classified as relative overall successes, and each period has been given a rough success ranking as shown in the last column of Table 2.

The variables influencing the occurrence and success of the seven court-curbing periods seem to fit into a model like the psychological model of stimulus-organism-response. In the political phenomenon of Court-curbing, the stimulus is represented by judicial provocation.

The organism is represented by the political system which may contain certain catalytic or conditioning factors which shape the perception of the provocation and the response. The response manifests itself in certain types of Court-curbing bills and Presidential action. This response may feed back on the judiciary and thereby stimulate judicial counter-action. Having this overall model in mind helps one to see better the interrelations between the more specific variables discussed in this paper.

II. JUDICIAL PROVOCATION

A. *Quantity of Judicial Review*

To what extent does a high quantity of judicial review of legislative acts provoke Court-curbing regardless of the type of interests involved? Table 3 shows that almost 50 of the total 86 instances of judicial nullification of federal statutes in American history have occurred during or within three years prior to the seven Court-curbing periods. Thus, over half of the instances of judicial nullification have occurred during a time span equaling less than one-third of the history of the Supreme Court. The use of judicial review for the first time in *Marbury v. Madison*,[4] was certainly an irritant in the Federalist-Jeffersonian dispute over relative amounts of judicial and executive power in the early 1800's. The nullification of state bankruptcy and debtor laws as well as the invalidation of a Maryland act taxing the Bank of the United States provoked the wrath of congressmen in the 1820's.[5] The 1858 Dred Scott case[6] nullified a federal statute, and congressional anticipation of judicial review of Reconstruction legislation led to the court-packing and restrictions on habeas corpus in the 1860's. The 1890's attack was precipitated in part by the invalidation of a federal income tax law, and nullification of federal and state economic legislation led to another Progressive attack on the Court in the 1920's. The judicial review of fifteen New Deal statutes was a prime causative factor in the 1930's conflict. In the 1950's, portions of federal and state laws were held unconstitutional, and proposed legislation such as the Jenner bill was clearly aimed at several decisions. In short, all the periods of intense Court-curbing have been provoked to some degree by the judicial review of legislative acts. Nullification of federal statutes, however, seems to provide a greater provocation than nullification of state statutes since judicial review of state statutes seemed to be a prime factor only in the 1820's Court-curbing period and

4. 5 U.S. (1 Cranch) 137 (1803).
5. 17 U.S. (4 Wheat.) 316 (1819).
6. 60 U.S. (19 How.) 393 (1857).

partially in the 1950's. Congress is apparently more protective of its own lawmaking than it is of the various state legislative bodies.

TABLE 3. OCCURRENCE OF JUDICIAL REVIEW DURING AND 3 YEARS PRIOR TO THE HIGH-FREQUENCY COURT-CURBING PERIODS

Years	Instances of judicial review of federal acts during or 3 years prior
1802-04	1
1823-31	0*
1858-69	5
1893-97	3
1922-24	13
1935-37	15
1955-59	5
Total:	42

*Judicial review of state acts present

If the seven periods are divided into the periods of relatively high judicial review of federal legislation and relatively low, then as Table 4 shows, a slightly greater proportion of the relatively high review periods involved relatively successful Court-curbing bills than did the relatively low review periods. Thus, the intensity of judicial review may be a partial determinant of the success of controversial Court-curbing bills as well as a determinant of the introduction of Court-curbing bills. There are, however, more important determinants of Court-curbing success as will be shown later.

TABLE 4. THE RELATION BETWEEN INTENSITY OF JUDICIAL REVIEW AND COURT-CURBING SUCCESS

	Judicial Review of Federal Acts: Relatively Low	Judicial Review of Federal Acts: Relatively High
Relatively Successful	1800's 1820's	1930's 1860's
Relatively Unsuccessful	1890's 1950's	1920's

B. *Subject of the Provoking Cases*

The specific issues over which conflict has occurred whether from judicial review cases or other cases can be divided into four categories —economic regulation, civil liberties, federal-state relations, and gen-

eral separation of powers. Table 5 indicates that first, economic regulation has been involved to some extent in four of the seven high-frequency periods. Civil liberties and federal-state relations have each been at issue in two periods, while general separation of powers at the national level has been the main controversy in only the earliest period.

TABLE 5. INTERESTS INVOLVED IN COURT-CURBING DURING AMERICAN HISTORY

Issues	Period	Overall Success
1. Economic Interests		
a. Business Regulation	1930's	Yes
	1890's	No
	1820's	Yes
b. Labor Relations	1890's	No
	1920's	No
c. Taxes	1890's	No
2. Civil Liberties		
a. Segregation	1950's	No
b. First Amendment	1950's	Partial
	1860's	Yes
c. Criminal Procedure	1950's	No
	1860's	Yes
3. Federal-State Relations		
	1800's	Yes
	1820's	Yes
4. Separation of Powers in the National Government	1800's	Yes

Trends in the frequency or occurrence of certain issues are apparent. For example, the attacks during the first half of the nineteenth-century were largely concerned with federal-state relations and separation of powers, a fact which can be explained in part by the youth of the country. At this time, the power distribution between the parts of the newly established federal system was not at all clear, this question being a dividing point between the two political parties as well as a major public issue. From the latter half of the nineteenth century through 1937, the basic issue in Congress-Court relations was that of economic regulation. Conflict over civil liberties has occurred intermittently but particularly in recent years.

From the data in Table 5 one might also be able to say that

court-curbing bills are more likely to succeed where federal-state relations or separation of powers represent the prime subject matters involved. On the other hand, where intensely held economic interests or civil libertarian interests are involved, the likelihood of court-curbing success is decreased.

C. *Unanimity of Provoking Cases*

Does the degree of conflict within the Supreme Court influence the occurrence of congressional Court-curbing? The degree of conflict within the Court can be measured by the degree of unanimity in key decisions at a given time. Using the statements of various writers and congressmen as to what cases provoked the anti-Court bills, the voting split on these controversial decisions was determined. The average degree of unanimity for all the periods was 76% which means that there was an average of two to three dissents in the cases provoking the attacks. This number contracts with the higher degree of unanimity normally found in the totality of Supreme Court cases. The results of Table 6 support the hypothesis that during periods in which there is a relatively high (*i.e.*, above average) degree of disagreement between members of the Court (and thus high controversy), congressional attack is more likely to occur.

TABLE 6. DEGREE OF UNANIMITY IN THE SUPREME COURT AND THE EFFECT ON OCCURRENCE AND SUCCESS OF COURT-CURBING

Periods	Degree of Unanimity	Relative Success
1800's	100% relatively high	Yes
1820's	89 rel. high	Yes
1860's	59 rel. low	Yes
1890's	72 rel. low	No
1920's	69 rel. low	No
1930's	69 rel. low	Yes
1950's	76 rel. high	No
	Avg. = 76%	

Contrary to what one might expect Table 6 shows that a slightly greater proportion of the high unanimity (rather than the low unanimity) periods involved relatively successful Court-curbing bills. However, the high unanimity in the 1800's and the 1820's does not necessarily indicate complete unity on the part of the Court. It may merely indicate that dissenting had not yet become an established practice.

III. CATALYTIC FACTORS

A. *Parties and Factions in Congress*

To what extent does party composition and the presence of factions in Congress during high-frequency time periods act as a catalytic or enabling factor influencing the occurrence and outcome of the attack? In five of the seven high-frequency periods, the Democratic party or its forerunners have dominated the Congress. A tabulation of the party affiliation of the individual sponsors of the bills also reveals that Democrats have sponsored over twice as much anti-court legislation than have Republicans. This relationship, however, does not mean that having a Democratic Congress is sufficient to provoke Court-curbing bills, for many Democratic Congresses have enjoyed smooth relations with the Court. It does suggest that, when other factors have been present, the existence of a Democratic Congress may have stimulated the occurrence of Court-curbing. Thus, the pattern has been such that when the Court has been defending property rights as in the 1930's and 1820's, the Democrats were more likely to attack it, and the Republicans were more likely to defend it. On the other hand, although to a lesser extent, when the Court has been defending civil liberties as in the 1950's and 1860's, the Republicans were more likely to be attacking it, and the Democrats (at least the Northern Democrats) were more likely to be defending it. This phenomenon can be explained by the socio-economic bases of the two parties, and the frequent attacks of the Democrats point up the fact that the Supreme Court has more often defended property rights than civil liberties.

Perhaps a more adequate description of the groups attacking the Court would replace the party labels with conservative or liberal designations. Table 7 shows that liberal groups have attacked the Court in six of the seven periods, and conservative groups (representing a coalition between wings of the Republican and Democratic parties) attacked the Court for the first time in the 1950's. Future attacks on the Supreme Court will also probably come from conservative forces given the increased power of liberal urbanism in the United States, a power which since 1932 has been increasingly making itself felt in the electoral college system that chooses the President, and thus indirectly in the President's choices for Supreme Court Justices.

TABLE 7. THE RELATION BETWEEN PARTY IN CONGRESS AND THE OCCURRENCE OF COURT-CURBING BILLS

High-Frequency Period	Party or Faction Sponsoring Bills
1800's	Jeffersonians

1820's	Democrats
1860's	Radical Republicans
1890's	Democrats and Populists
1920's	Liberal Republicans
1930's	Democrats
1950's	Conservative Republicans & Conservative Democrats

The above discussion focused on the relation between party (or faction) and the occurrence of a Court-curbing period. There is also a relationship between the party sponsoring Court-curbing legislation and the success of the attacks. Thus, when the percentage of Democrats in Congress is high (over 65 per cent), Democratic bills are more likely to succeed, and less likely to succeed when the percentage of Democrats in Congress is low.[7] Similarly, Republican bills are more likely to succeed when the percentage of Republicans in Congress is high as is shown in Table 8. These relations, however, are much weaker than one would expect to find in a more disciplined two-party system. A group's leadership in Congress may be as important as its numerical strength and may strongly influence the cohesiveness of the group. For example, the skillful leadership of Senators O'Mahoney and Wheeler in 1937, and Lyndon Johnson in 1958, is credited by some writers as being an important factor in the defeat of anti-court legislation.[8]

TABLE 8. RELATIONS BETWEEN SPONSORING PARTY AND RELATIVE SUCCESS OF COURT-CURBING BILLS
(Where Sponsor and Party are Known)

	Democratic Bills		Republican Bills	
	65% or less Dems. in Cong.	More than 65% Dems. in Cong.	65% or less Reps. in Cong.	More than 65% Reps. in Cong.
Relative Success	6 (9%)	7 (20%)	5 (20%)	7 (44%)
Relative Failure	60 (91%)	28 (80%)	20 (80%)	9 (56%)
	66 (100%)	35 (100%)	25 (100%)	16 (100%)

7. "Per cent Democrats in Congress" equals

$$\frac{1}{2}\left(\frac{\text{House Dems}}{\text{House Dems} + \text{Reps}} + \frac{\text{Senate Dems}}{\text{Senate Dems} + \text{Reps}}\right)$$

and likewise with "per cent Republicans in Congress."

8. MURPHY, *op. cit. supra* note 1, at 249.

B. *Party and Factional Differences Between Congress and the Court*

Is there a relationship between (1) party or factional differences between Congress and the Court, and (2) the occurrence of Court-curbing bills? As Table 9 shows, a slightly greater proportion of Congresses having a dominant (*i.e.*, majority) party different from the Court's dominant party were Congresses from the Court-curbing periods. It is also relevant to note that of 142 Court-curbing bills for which the Democratic or Republican affiliation of the sponsor was known, 39 were introduced by Congressmen of the party opposite to the party that dominated the Court when the bill was introduced. Congresses where the same party did not dominate both houses of Congress were eliminated from Table 9, as were Congresses where the Court had an equal number of Democrats and Republicans.

TABLE 9. PARTY DIFFERENCES BETWEEN CONGRESS AND THE COURT DURING THE HIGH AND LOW COURT-CURBING PERIODS

	Congresses Dominated by a Party Also Dominating the Court	Congresses Dominated by a Party Not Dominating the Court
Court-Curbing Periods	12 (21%)	9 (39%)
Non-Court-Curbing Periods	44 (79%)	14 (61%)
	56 (100%)	23 (100%)

The above analysis tends to show a weak causal relation between Congress-Court party splits and an upsurge of Court-curbing bills. If, however, one hypothesizes that a party split between Congress and the Court is an important *condition* or *catalyst* rather than a cause, then Table 10 below is more relevant. It shows that all seven high frequency periods involved party or factional differences between Congress and the Court.

TABLE 10. THE RELATION BETWEEN CONGRESS-COURT PARTY OR FACTIONAL SPLITS AND THE OCCURRENCE OF COURT-CURBING BILLS

High Occurrence Period	Party Sponsoring Majority of Bills	Party Dominating the Court
1800's	Jeffersonians	Federalists
1820's	States-Rights Dems.	Nationalists
1860's	Republicans	Democrats
1890's	Democrats	Republicans
1920's	Liberal Reps.	Conservative Reps.
1930's	Democrats	Republicans
1950's	Conservative Reps. and Dems.	Liberal Dems.

The degree of composite success of a congressional attack also correlates with the degree of party split between Congress and the Court. All three periods during which there was a sharp party split can be considered successful, whereas three out of the four periods during which there was not so sharp a split can be considered relatively unsuccessful as is shown in Table 11. This table like Table 9 but unlike Table 10 only considers party splits and not factional splits. The relationship between relative success and party differences can be accounted for in part by the fact that when Congress represents a different party than the Court, then legislation introduced by members of that party and particularly legislation directed against policies of the opposite party will be more apt to get out of committee than legislation introduced by the minority party. In addition, when there is a party split between Congress and the Court, public opinion is more apt to be on the side of Congress since that body, by virtue of its short terms, is more responsive to changes in the public sentiment. It follows that when the public consensus is at odds with the policies of the Supreme Court, anti-Court legislation will not only increase in volume but will have a better chance of being seriously considered.

TABLE 11. RELATION BETWEEN CONGRESS-COURT PARTY DIFFERENCES AND THE RELATIVE SUCCESS OF COURT-CURBING BILLS

	Not so sharp a split	Sharp split
Relatively Successful	1820's	1800's 1860's 1930's
Relatively Unsuccessful	1890's 1920's 1950's	

C. *Crises*

A third catalytic or enabling factor which may accelerate or decelerate congressional reaction to judicial provocation is the presence or absence of a crisis. Although the outbreak of war or depression may not directly cause attacks on the Court, one might hypothesize that when judicial provocation has first occurred, the presence or absence of a crisis may affect the speed and manner with which Congress reacts. Crisis may be defined as a period of depression, economic panic, war (including cold war), or post war readjustment. In light of these definitions, during almost all of the Court-curbing periods

some degree of crisis has been present as is shown in Table 12. The two classic examples of this relationship are the periods of the 1860's and 1930's. These attacks, which are perhaps the most famous and serious attempts to curb the Court, occurred during or just after two of the most serious crises which this country has had to suffer, the Civil War and the Great Depression.

TABLE 12. RELATION BETWEEN CRISIS AND THE OCCURRENCE OF COURT-CURBING BILLS

High Occurrence Period	Type of Crisis
1800's	None, other than establishing a federal government
1820's	None
1860's	Civil War
1890's	Economic Panic
1920's	Post-War Readjustment
1930's	Depression
1950's	Cold War

The relationship between crisis and the success of Court-curbing is more difficult to determine, but a positive correlation is suggested by the outcome of at least two of the high frequency periods. The attacks of the 1860's and 1930's which followed or accompanied great crises in American history were both highly successful in relation to the other periods. The two most unsuccessful attacks, the 1890's and 1920's, occurred during periods of low degrees of crisis. The other three Court-curbing periods, however, fail to follow this pattern.

TABLE 13. RELATION BETWEEN CRISIS AND THE SUCCESS OF COURT-CURBING BILLS

	Not so severe Crisis	Severe Crisis
Relatively Successful	1800's 1820's	1860's 1930's
Relatively Unsuccessful	1890's 1920's	1950's

D. *Public Opinion and Pressure Groups*

The element of public opinion should also be included in the discussion of catalytic or enabling factors which, through their presence or absence, accelerate or temper congressional attacks upon

the Supreme Court. The lack of extensive public opinion polls prior to recent years hinders scientific research and measurement of the impact of this factor on Court-curbing activity. An estimation of public support or disapproval for legislative policies toward the Court could be made through the rather crude method of analyzing the results of elections occurring immediately prior to or during periods of congressional attacks on the Court. An analysis of this sort would point, for example, to the landslide of 1936 which Roosevelt interpreted as a mandate for the New Deal and possibly for some kind of Court-curbing scheme. Public opinion polls taken at various stages of the fight over Roosevelt's Court-packing bill in the Senate indicate, however, that public opinion turned against his scheme after the election.[9] Another technique would involve the detailed analysis of newspaper comment, comments from the *Congressional Record,* and other contemporary publications which tend to record the issues and sentiment of the time. This type of analysis would, however, primarily reflect the sentiments of the upper, more literate classes just as election analysis would reflect the sentiment in respect to broad policy rather than the specific Court-curbing issue.

Pressure groups, representing certain segments of public opinion, have been active during legislative attacks upon the Court. Again, their influence cannot be measured, but general comments about their probable roles can be made. In the 1930's the American Bar Association, the National Association of Manufacturers, and the American Liberty League were the principle defenders of the Court, while the AFL-CIO was a principle attacker. In the 1950's the NAACP and ACLU defended, and the White Citizens Councils and American Legion did some of the attacking. In both of these instances, the liberal pressure groups only partly won the battle since the actual outcome was dependent on the operation of a number of variables. One can readily hypothesize, however, that when strong, prestigious groups are on the side of Congress, the attack is strengthened, and when such groups defend the Supreme Court, the attack is weakened.

E. *Regionalism*

Regionalism is a catalytic factor like political party. When a judicial policy particularly affects one region of the country, the concerted efforts of that region's congressional representatives can strengthen the negative response of Congress. For example, ten of the twelve anti-Court bills introduced during the 1820's were sponsored by

9. Murphy gives the results of Gallup polls taken during the Court fight in 1937, *op. cit. supra* note 1, at 61. Not only did the public increasingly disapprove of the Court-packing plan, but the President's personal popularity also fell during this period.

Southerners in general and Kentuckians in particular who had been provoked by the Court's invalidation of land and debtor laws. Does one region of the country generally tend to be involved in Court-curbing more than others? Table 14 indicates that of the three main regions of the country—south, west, and north—the west and north have been slightly more involved in Court-curbing than the south. This pattern is explained in part by considering the relationship between regionalism and issues. Economic issues such as those at stake in the 1890's, 1920's, and 1930's evoke a northern and western response, while the states rights issues of the 1800's, 1820's, and 1950's evoke a southern response. This relationship is explained by the socio-economic makeup of the various regions with the north and west being industrial and populist-wheat centers, while the south has been the locus of plantation agriculture and the negro problem.

TABLE 14. RELATIONSHIP OF REGIONALISM TO THE OCCURRENCE AND SUCCESS OF COURT-CURBING

Period	Regional Sponsors	Success
1800's	Southern and Western	Yes
1820's	Southern and Western	Yes
1860's	Northern	Yes
1890's	Northern and Western	No
1920's	Northern and Western	No
1930's	Northern and Western	Yes
1950's	Southerners and Northern Conservatives	No

In terms of success, the south has enjoyed success in two-thirds of its attempts to curb the Court, while the north and west have been successful in approximately half of their attempts. If the Court-curbing periods are ranked as in Table 2, however, two of the most successful periods, the 1860's and 1930's, were predominantly northern sponsored attacks. An explanation for this is the fact that the northern states are more heavily represented in Congress, and the north enjoyed an additional advantage in the 1860's conflict since the south and the Democratic Party were largely incapacitated. An analysis of regionalism points up the fact that congressional attacks upon the Supreme Court are often regional attacks, and that the Court has never really been faced with a united, national enemy which, along with public opinion and other factors, may account in part for the generally low degree of success Court-curbing bills have had.

F. *House and Senate Procedure*

The House of Representatives has been almost twice as active in Court-curbing as the Senate, sponsoring 98 bills to the Senate's 57. What accounts for the greater volume of bills originating in the House? First, the difference may not be as great as it seems. Since the membership of the House is over four times as large as that of the Senate, one would expect the House to sponsor a greater amount of bills than the Senate on any issue. Second, House members, subject to biennial elections, might be more sensitive to short-run changes of sentiment than are Senate members. In addition the smaller, more homogeneous constituencies of House members are possibly more conducive to sponsoring Court-curbing bills and other extreme legislation which would be too divisive in a larger constituency. A third factor is that Senate members may sponsor bills jointly, whereas House bills can carry the name of only one sponsor, a practice tending to produce duplicate bills. Procedure then is a catalyst tending to affect the relative volume of bills generated in each house of Congress.

The Senate, in spite of its lower number of bills, has had a greater degree of success in getting its Court-curbing legislation out of committee. Almost one-fourth of the Senate bills got out of committee while only 13% of the House bills ever did. For reasons mentioned above, the House possibly tends to introduce harsher measures which therefore have a smaller chance of success. In addition, the practice of introducing duplicate bills in the House lowers its average of success for individual bills.

IV. Congressional and Presidential Response

A. *Congressional Response*

Several courses of action are available to the congressmen seeking to attack the policies of the Supreme Court. At the local level, he can participate in nullification movements to register disapproval of a particular decision. In Congress, he can attempt retaliation via the fiscal powers, introduce restrictive constitutional amendments, sponsor legislation to overturn a statutory interpretation, initiate joint resolutions or investigations, or, if a Senator, he can attempt to block a Presidential nominee for the bench. Although these methods account for a good share of the activity during congressional attacks on the Court, this paper and the following table is concerned only with specific bills designed directly or indirectly to change some general policy of the Court.

TABLE 15. TYPES OF BILLS PROPOSED TO CURB THE SUPREME COURT

	Frequency		Relative Success	
	Number	% of 165	Number	% of Type
1. Judicial Review				
a. Special concurrence needed	41	25%	5	12%
b. Miscellaneous regulate	5	3	0	0
c. Abolish	3	2	0	0
Total:	49	30%	5	10% Avg.
2. Personnel				
a. Qualifications	24	15	0	0
b. Size of Court	13	8	5	38
c. Retirement	7	4	3	43
d. Appointing.	4	2	1	25
e. Give states equal representation	1	½	0	0
Total:	49	29½%	9	18% Avg.
3. Jurisdiction				
a. Regulate and define general appellate jurisdiction	23	14	3	13
b. Repeal Supreme Court jurisdiction over state	3	2	1	33
c. Limit jurisdiction in special cases:				
1) Habeas corpus appeals	3	2	2	67
2) Reconstruction	1	½	0	0
3) Public schools	7	4	0	0
4) Other specific areas	8	5	1	12
Total:	45	27½%	7	16% Avg.
4. Procedure				
a. General reorganization	6	4	3	50
b. Amend judicial code	4	2	2	50
c. Amend rules of practice and procedure	1	½	0	0
d. Facilitate decisions on constitutional questions	1	½	0	0
Total:	12	7%	5	42% Avg.
5. Curtail Contempt or Injunction Powers	4	2	3	75
6. Miscellaneous				
a. Let lower court ignore non-legalistic Sup. Ct. decisions	2	1	0	0
b. Change doctrine of pre-emptive federalism	1	½	1	100

c. Postpone meeting of Court	1	½	1	100
d. Impeachment	1	½	1	100
e. Give some body direct review over Sup. Ct. decisions	1	½	0	0
Overall Total:	165	100%	32	19% Avg.

After the congressman has decided to attack the power of the judges and to do it through legislative means, he still has a range of alternatives from which to choose. Table 15 indicates that about 30% of the Court-curbing bills dealt with regulating or abolishing judicial review which particularly includes bills requiring special concurrences to declare statutes unconstitutional. Another 29% dealt with matters of Court personnel, particularly qualifications (like lengthy prior judicial experience) for holding a Supreme Court judgeship. Within this 29% are also included thirteen bills designed to increase or decrease the size of the Court so as to allow a new President to make new appointments or to keep him from making new appointments. About 28% of the bills attempted to restrict the court's appellate jurisdiction, and the relatively few remaining bills dealt with various procedural and miscellaneous matters.

Some measures have been peculiar to one time period. Bills curtailing the contempt and injunction powers were predominant, for example, during the period of the Progressives' attack on the Court, particularly before the enactment of the Clayton Act.[10] Bills pertaining to the appellate jurisdiction of the Court in respect to public schools, and bills abolishing the doctrine of pre-emptive federalism were characteristic of the 1955-1959 conflict. The broad historic trend has been away from bills which would remove or circumscribe a broad area of the Court's power and toward those bills which would limit a small, more specific part of the Court's functions. For example, the only serious attempt at impeachment occurred in 1804. Bills advocating the repeal of the 25th section of the Judiciary Act of 1789 which would be tantamount to removing the Court's appellate jurisdiction over state courts were concentrated in the first half of the nineteenth century. Unsuccessful bills providing for equal representation of the states on the Court were proposed prior to 1870, and thus those groups favoring such a change have recently resorted to a constitutional amendment via a constitutional convention. In contrast, many bills proposed during the intense conflict in 1937 were designed to effect changes in the quorum, retirement of Justices, and size of the Court. In the attack on the Warren Court, many bills prescribed limitation of jurisdiction in special cases dealing with subversion,

10. 64 Stat. 1125 (1950), 15 U.S.C. § 12 (1958).

public schools, and (after 1961) reapportionment. More extreme bills in the earlier years may be attributable to the fact that in the early nineteenth century, the role of the judicial branch of the government was not yet established, and the obvious partisanship of some justices during the very early years was a hindrance to the growth of the judicial myth. In addition, history has shown that bills removing comparatively smaller amounts of the Court's power have the greatest prospect of success. Astute congressmen may well have taken note of this fact. One, however, should note that although the severity of bills during the Warren and Roosevelt courts was lower than in prior periods, the quantity of bills was higher. This possibly indicated a more widespread discontent toward specific decisions and a lack of cohesive leadership by the anti-Court forces which kept these forces from centering on one or a few bills.

With regard to the matter of success, ten of the twenty-three categories of bills had a higher percentage of relative success (*i.e.*, got out of committee) than the average of 19%. These ten types of bills included repealing jurisdiction over state supreme courts, limiting jurisdiction in regard to habeas corpus appeals, changing the rules concerning retirement and the size of the Court, restricting the Court's procedure, and limiting the Court's contempt and injunction powers. Most of the ten types could be considered as limited means of curbing the Court. The substantially higher rate of success for the relatively milder bills can be explained by the fact that during all the time periods, there has been a sizable opposition in Congress to any attempts to curb the Supreme Court—a factor which necessitates compromise.

B. *Presidential Response*

To what extent have Presidents become involved in Court-curbing and what effect has their participation had on the outcome of congressional court conflicts? Four Presidents have been openly critical of the Court during the high-frequency periods, *i.e.*, Jefferson, Jackson, Lincoln, and Roosevelt, but not Eisenhower or the Presidents of the 1920's or 1890's. Presidents have been hesitant to openly initiate Court-curbing legislation. FDR's Court packing plan of 1937 was an exception, but it was only one of numerous anti-Court bills introduced in the 1930's. This presidential reluctance is possibly due to a fear of alienating the Court's numerous defenders in Congress and the public (as well as a respect for the independence of the judiciary), and in some instances to a favorable presidential attitude toward the Court's policies.

With regard to the success of individual bills, Roosevelt's Court-packing bill was reported out of committee unfavorably. This is

attributable to inadequate cultivation of support in Congress and among the public and to reversals by the Court itself. In view of the Court's retreat, however, the Roosevelt period can be considered a relative success. Presidents also have administrative weapons to either thwart or aid orders of the Supreme Court, and ultimately via his appointive power the President can change the Court's policies. Nevertheless, with the astute use of his tools of leadership, the President can be a powerful figure both in the initiation and successful outcome of Court-curbing bills. With his active support Court-curbing legislation is probably more likely to pass, and without it, such legislation is more likely to fail.

V. Judicial Counteraction

The behavior pattern of the Court-curbing process does not end with the action taken by Congress and the President. The Supreme Court can affect the outcome of legislative attacks by its reaction. First, the members of the Court can individually refute the charges made by congressmen. Prior to 1937, however, the judicial myth of aloofness from political disputes was generally followed by the Court. The only exceptions to this pattern was Marshall's criticism of Jefferson in *Marbury v. Madison*, Chase's partisan opinions, and Taney's criticism of Lincoln. The 1937 conflict involved the direct participation of members of the Court and included Brandeis' testimony before the Judiciary Committee, Hughes' letter to the sympathetic leaders in Congress defending the Court, and the timeliness of Van Deventer's retirement.

Second, the Court as a whole can counteract legislative attack by retreating from the policy stand which originally provoked the attack. In terms of frequency, this has happened in four of the seven high frequency periods. The four periods involve the early 1800's conflict, the 1820's, the 1860's, and the 1930's. In 1959, the Court retreated in one of the three fields (free speech, segregation, and criminal procedure) which originally provoked the attack. In the 1890's and 1920's on the other hand, a conservative Court protected by a Republican Congress easily withstood the disorganized attacks of the Democrats, Populists, and Progressives without having to resort to a retreat. Since the composite index of success includes retreat as a major criterion, all four of the above mentioned Court-curbing periods, by definition, can be called successful. In short, when the Court removes the provocation for the conflict, the attack dissipates but can be considered a success.

VI. CONCLUSIONS

Periods of intense Court-curbing bills have occurred only seven times during the 170 year history of the United States. Nevertheless, this mode of conflict between the legislative and judicial branches will no doubt recur when certain judicial provocations and catalytic factors are present.

The factors which have an affirmative correlation with the occurrence of Court-curbing bills are (in the order presented) as follows: (1) judicial review of federal and state statutes, (2) economic issues rather than other issues, (3) low degree of unanimity within the Supreme Court, (4) Democratic or liberal Congress when the Court is conservative, (5) Republican or conservative Congress when the Court is liberal, (6) crisis present, (7) public opinion and powerful pressure groups favor the attack, (8) the process for introducing bills in the House, and (9) the lack of cohesive Congressional leadership.

The factors which have an affirmative correlation with the success of Court-curbing bills (in the order presented) are as follows: (1) sponsored by the majority party in Congress, (2) party split between the Court and Congress, (3) crisis present and allegedly made more severe by the Court's decisions, (4) public and pressure group support, (5) northern sponsored attack, (6) introduced in Senate, (7) limited in purpose, and (8) has presidential support and cohesive congressional leadership.

Although an accurate measurement of the relative importance of these factors to Court-curbing cannot be made, a behavior pattern which invariably occurs in such conflicts can be described. The sequence of events involves judicial provocation, the existence of circumstances which act as catalysts or as retarders, a set of congressional and presidential responses, and judicial counteraction. This model which is based on the psychological model of stimulus, organism, response, and feedback can perhaps also be profitably applied to analyzing other legal and political phenomena.