Congressional Reorganization of the Federal Judiciary, 1875-1891

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Abstract: As the United States emerged into an industrial nation in the late 19th century, demands on the federal judiciary increased significantly. From 1875-1891 Congress routinely considered proposals that would provide relief to an overburdened judiciary, but despite the crisis, no reforms were passed. Finally, during the lame duck session of the 51st Congress, a Republican majority managed to push through the Evarts Act creating circuit courts of appeals. We argue that Republican efforts to push through these reforms reflected calculations that the judiciary would be friendly to Republican policies.

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Scholars interested in the development and consequences of judicial power have devoted an ever-increasing amount of attention to the circumstances under which countries design judicial systems that are free of control of the elected branches. The degree to which systems are isolated from manipulation by the more political branches of government is often taken as an indicator of a state's commitment to long-term governmental stability at the expense of short-term political gain. But the degree to which the United States judiciary is free from political control has often been so overstated that it has been held up as a model of judicial independence for other nations to emulate. The Constitution's creation of life tenure for Article III judges certainly has created a judiciary that is free of one of the most obvious threats to judicial independence, but the Constitution also created a system where the federal judiciary, particularly the lower levels, was dependent on Congress for their very existence. How Congress ceded effective control to the judiciary is one of the most important yet understudied components of American institutional development. In this paper, we analyze the decisions made by Congress in the era following Reconstruction that resulted in the creation of the familiar three-tiered federal judiciary with passage of the Evarts Act of 1891. The period between 1875 and 1891 was pivotal for the expansion of the judiciary as part of a major expansion in the capacity of the federal government.

The decision by Congress to pass the Evarts Act during the 51st Congress provides an opportunity to explore the conditions under which legislatures are willing to delegate power to the judiciary. We believe the debate over the Evarts Act illustrates that members of Congress strongly prefer delegating to a judiciary that they expect will be ideologically aligned with their preferences. When faced with the prospect of a judiciary likely to be

opposed to their interests, members of Congress prefer perpetuating courts' administrative problems to solving those problems by giving them more power. As a result, we argue that legislators may approve of an independent judiciary in theory, but are not necessarily so supportive in practice. Only when they expect the judiciary to be sympathetic to their policy positions are legislators so confident in the value of an independent judiciary.

Passage of the Evarts Act has been characterized as an expansion of judicial power by a Republican Party that believed that the judiciary would ultimately prove friendly to the agenda of the party (Bensel 2000). But expansion of the judiciary during and after Reconstruction was an end in itself for the Republican Party (Gillman 2002; Hall 1975; Wiecek 1969). That is, not only did the Republican Party look forward to shaping the federal bench in its image through appointments, the mere existence of a strong federal judiciary was an important component of the Republican agenda after the Civil War (Gillman 2002). The expansion of the federal government included expanding the capacity of the federal courts and the Evarts Act ultimately increased the federal courts' ability to manage their caseload (and relieve the Supreme Court of its backlog of cases). If, however, the Evarts Act is characterized as a key component of the Republican agenda, the lack of Democratic opposition, particularly on the eve of Democratic takeover of the House following the 1890 elections, is difficult to explain. We find that the perceived absence of Democratic opposition is more illusory than real. Using debate over the Evarts Act as a case, we argue that models of congressional delegation to the judiciary which assume a "friendly" judiciary may better explain congressional behavior than models which do not assume that the preferences of Congress and the courts converge.

Why Would Congress Delegate Power to the Courts?

Several explanations have been offered as to why Congress would delegate power to the courts. Some of those explanations rest on a "friendly" judiciary—one that is generally

predisposed to uphold the decisions made by Congress—but others make no assumptions about the ideological tilt of the judiciary. Foremost among the explanations that do not require a friendly judiciary is the model developed by Landes and Posner (1976). They argue that an independent judiciary—one not beholden to the current Congress—increases the value of contracts legislators can negotiate with interest groups because an independent judiciary is less likely to invalidate a contract (legislation) at some future period. A dependent judiciary—one completely reliant on the current legislature—would be more willing to strike legislation enacted under a different party's control of the legislature. Dependent judiciaries, then, would be as prone to election returns as legislatures, making investment by interest groups less valuable. But an independent judiciary takes as its agent the legislature which appoints it, and can serve to enforce contracts made by that legislature long after the party controlling the legislature is removed from power.

More recently, Rogers (2001) argued that judicial review provides courts with two advantages over legislatures: judicial review occurs after the legislature has acted, creating an information asymmetry that advantages the courts, and the courts "acquire a different type of information in judicial proceedings relative to that acquired in legislative proceedings" (2001, 87). The legislature gains from this process because the court's informational advantage "induces the Legislature to experiment with riskier legislation that, without judicial review (or without informative review, it would not enact" (Rogers 2001, 95). Perhaps more important in the context of delegating responsibility to courts, the legislature "tolerates judicial policy making because it cannot deny independence to the Court when it has divergent policy preferences without also eliminating informative judicial review when the Court has convergent preferences" (Rogers 2001, 95). In Rogers' argument, then, judicial review functions differently for legislatures whose preferences

diverge from courts than for legislatures whose preferences converge, but both types of legislatures (convergent and divergent) stand to gain from tolerating judicial review.

While Landes and Posner and Rogers argue that legislative willingness to empower the judiciary should not depend on the alignment of preferences, other scholars have argued that more delegation to the judiciary will occur when ideological preferences converge. Dahl (1957) argues that the "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States" (285). Though his conclusion has been disputed (Adamany 1973; Casper 1976), Dahl's argument is often taken as evidence that the Supreme Court follows the election returns (Mishler and Sheehan 1993). From the perspective of congressional decision-making, though, Dahl's argument can be read as a reason to delegate power to the judiciary: if the Court can legitimate policy by providing a "judicial gloss", then a friendly judiciary enhances the credibility of policy enacted by Congress.[1] Bensel (2000) argues that this is precisely what the judiciary—particularly the Supreme Court—did in the late nineteenth century. Bensel noted that the Supreme Court, in particular, was unwilling to allow state legislatures, some of which were controlled by Populists who sought to limit the effects of the market, to erect barriers to the consolidation of the national market (2000, 321). Though the Supreme Court may have been less generous than Congress had hoped in its interpretation of the Commerce Clause, the "justices were nonetheless united on the importance of policing the boundary between state and federal authority" (Bensel 2000, 333).

In addition to offering judicial legitimacy to a legislative program, Whittington (2005) argues that judicial activism by a "friendly" court can provide several additional

[1] The ability of the Court to do this has been the subject of a long and rich debate. See Hoekstra (2003) for an excellent summary and the latest contribution to the debate.

advantages to a political coalition whose victory might be incomplete. First, judicial activism can help overcome problems created by a federal system of government. In this context, judicial review can be used to "bring the states into line with the nationally dominant constitutional vision" (Whittington 2005, 587). While states might be thought of as political laboratories, the Supreme Court has consistently targeted those states whose policies diverge the most from national practices (Gates 1992). Judicial review by a friendly court can also serve to overcome entrenched political interests (Whittington 2005). Because the legislative process is more costly than the judicial process, with its multiple veto points, there are occasionally majority-preferred policy outcomes that cannot be provided by the legislature. One possibility in the face of insurmountable legislative obstacles is to turn to the judicial process, where transaction costs are lower and it is more difficult for a minority to control a veto point. If one assumes that a majority of the nation (or at least a majority of the political party in power in 1954, the Republicans) preferred an end to segregated primary and secondary schools but the South used the Senate filibuster to preclude meaningful Civil Rights legislation, then resorting to the judiciary allowed civil rights activists to overcome the entrenched legislative interests. Finally, Whittington argues that review by a friendly judiciary may allow political parties to overcome internal divisions as to the direction policy should take. Whittington argues that the Court's invalidation of the income tax in *Pollock v. Farmer's Loan and Trust* (157 US 429) (1895) served this function for Grover Cleveland, whose own party maneuvered to include a permanent income tax to replace the tariff Cleveland sought to lower. The Court's decision gave Cleveland (who would lose the Democratic nomination in 1896 to William Jennings Bryan) a lower tariff without an income tax provision, the outcome he sought but could not achieve in the legislative process.

Models of congressional delegation to the judiciary divide as to the necessity that the preferences of the judiciary and the legislature converge. Whittington and Dahl argue that judicial review is attractive to legislatures when legislators are relatively certain that judicial decisions will tend to uphold legislation passed by the Congress. Rogers argues that, while legislatures would prefer an ideologically convergent judiciary, they tolerate an ideologically divergent judiciary's exercise of judicial review to preserve the utility of judicial review by a friendly Court. While all of these models suggest that Congress essentially assumes the judiciary will generally share their policy views, Landes and Posner make no such assumption. For them, legislators effectively assume they will lose power at some point in their future and the other party will gain control. Accordingly, one can infer that Landes and Posner believe efforts to expand judicial power would be cross-partisan in nature: both the minority and majority parties would support efforts to increase judicial independence because both see the value of the independent judiciary.[2] Dahl and others who see the judiciary's function as one of legitimation, on the other hand, would argue that delegation is essentially a partisan maneuver. We explore the consideration and passage of the Evarts Act to determine if its passage is more accurately characterized as a consensual, non-partisan piece of legislation. Understanding the circumstances of its passage will help shed light on congressional decisions to delegate power to another branch of government over which it has only limited control.

The Judiciary and Postwar Challenges

The federal judiciary in 1869 was largely inadequate to the task the Republican Party envisioned it would fulfill. The Judiciary Act of 1789 had given the justices circuit-

[2] A further corollary of Landes and Posner's argument is that legislative majorities will be more likely to delegate power to the judiciary when their loss of control is imminent. That was the case with the Judiciary Act of 1801 and certainly was the case with the Evarts Act of 1891, as we discuss below. It is not, however, the case for the Judges' Bill of 1925.

riding responsibility, and this responsibility simultaneously occupied substantial parts of their time and left the different districts waiting for a Supreme Court justice to come out on circuit to hear appeals. The tradition of adding circuits when new states were admitted and adding a justice to the Supreme Court responsible for that circuit threatened to make the Supreme Court unmanageable. The states admitted since 1837 (including Texas, California, Iowa and Wisconsin) were not originally added to the existing circuits and were served by circuit judges instead of Supreme Court justices riding circuit. In 1862, Congress created a Tenth Circuit (and added a tenth justice to the Supreme Court) to bring all of the states under the circuits, but this meant that at least one Supreme Court justice had to travel to California on an annual basis to hear appeals.

In 1869, Congress reduced the number of circuits to nine (and the map of those circuits looks very much like the map of the courts of appeals today) and decoupled the number of circuits from the number of Supreme Court justices. Congress proposed to allow the Court to fall to seven justices as the ten sitting justices retired (so 4 justices would have to retire before a president had a vacancy to fill). At the same time, they authorized a circuit judge for each of the nine circuits, largely relieving the Supreme Court justices of their circuit-riding responsibilities. While this may have accommodated the concerns of the Supreme Court justices, the revised system was not prepared to handle the changes to the federal judiciary that accompanied the Judiciary Act of 1875. This system had several problems. First, because the circuit judge authorized in 1869 still had to travel (and the Eighth Circuit would eventually stretch from Minneapolis to Denver) and the hearing of appeals was not centralized in one city in the circuit, circuit judges were rarely in attendance, forcing district court judges to hear most of the appeals of their own decisions. Seconds, appeals of the decisions of the circuit judge (or the district judge acting in his stead) were "statutorily foreclosed in many classes of cases. The decisions of the circuit

courts were final in almost all criminal cases and in all civil cases involving less than $5,000" (Wheeler and Harrison 2005, 12-16). Third, despite the limited class of cases, the Supreme Court's docket was overwhelmed because appeal to the Supreme Court was a matter of right for those cases where an appeal was permitted by law. By 1890, the Supreme Court's appellate docket had 1800 cases, an increase by nearly 500 cases from only six years prior (Frankfurter and Landis 1928, 86).

Reforming the Judiciary

Confronted with these problems, Congress considered several options to reform the federal judiciary. Unfortunately, these considerations were invariably partisan in nature. Attempts to increase the role of the federal judiciary have their roots deep in the Republican agenda. The first post-Civil War manifestation of this desire to expand the power of the federal courts was an increase in the courts' jurisdiction. Removal, transferring cases from state to federal courts, permitted litigants with national interests, particularly corporations, to avoid the prejudices of state courts, judges and juries. The expansion of habeas corpus and the removal of cases from state courts "became two of the chief procedural supports for expanding conceptions of Fourteenth Amendment liberties" (Wiecek 1969, 334). Strengthening the federal courts, though, carried with it the problem of organizing the federal judiciary to accommodate its increased jurisdiction. Federal courts were not only being utilized by Congress as a new forum for dispute resolution, they were also officiating the rapid economic growth that occurred in the years after the Civil War. As Frankfurter and Landis argued, "the factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts, enlarged their jurisdiction, modified and expanded their structure" (1928, 59). The Republican Party commitment to national markets and nationalization more generally translated into an interest in stronger national courts.

This commitment led to passage of several major pieces of legislation during and after Reconstruction. The Judiciary Act of 1875 was probably the watershed moment in congressional attempts to make federal courts full partners in administering Reconstruction. Federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances (sic) for vindicating every right given by the Constitution, the laws and treaties of the United States" (Frankfurter and Landis 192865). The Act allowed any litigation where a federal right could be asserted to begin in federal courts; allowed removal of cases started in state courts to federal courts, and retained the diversity jurisdiction of federal courts.

Paralleling legislation to increase the power of federal courts were legislative efforts to increase the capacity of the courts to hear cases.[3] But these efforts were not nearly as successful. The 1869 legislation to ease the circuit-riding responsibilities of the Supreme Court justices, but this did little to ease the work of the Court and made life only marginally easier for the circuit courts and district court judges who still did double duty on trial courts and appeals of their own decisions. Congressional debate over the next twenty years recognized the problem of judicial capacity to manage caseloads, but there was widespread disagreement as to the best solution: in general, the Democrats, who tended to control the House, favored restricting federal jurisdiction, while Republicans, who tended to control the Senate, favored some form of judicial reorganization that increased the capacity of the federal courts. Layered on party disagreements were regional conflicts as well: "the effort to curb the federal courts was not a distinctly southern measure. A contest between eastern capital and western and southern agrarianism was at stake" (Frankfurter and Landis 1928, 91).

[3] The discussion that follows relies on chronologies provided by Frankfurter and Landis (1928) and Surrency (2002).

Legislative History of the Evarts Act

Partisan jousting over the federal judiciary is not a new development in American politics. While Republicans and Democrats in the contemporary Senate spar over nominees to the Supreme Court and courts of appeals, the battle to establish the circuit courts of appeal has been largely lost to history. With the passage of the Evarts Act in 1891, Congress established the circuit courts of appeals to help relieve some of the burden of the Supreme Court, whose ability to render decisions was limited by its enormous caseload. While the Supreme Court struggled to handle its workload, Congress considered a number of different alternatives between 1875 and 1891, but the House and Senate were never able to agree on a compromise piece of legislation. The same thing happened in the 51st Congress as the two chambers passed competing pieces of legislation, but this time House and Senate negotiators were able to bridge their differences. Passage of the Evarts Act was an important step in a series of reforms that occurred between the late 1860s and 1925 that gave form to the modern federal judiciary. Despite the importance of the Evarts Act in culminating a decade-long effort to reform the federal judiciary, it has received little attention, but we argue that political circumstances enabled Republicans to overcome significant differences between the House and Senate to pass the Evarts Act. In particular, Republicans' loss of control of the House in the 1890 elections provided an opportunity for the Senate to force the House to accept its version of the bill.

The 51st Congress (1889-1891) was a tumultuous two years as Republicans gained control of the House, Senate, and presidency. When the House of Representatives convened on December 2, 1889, Republicans held a narrow 169-161 advantage over the Democrats. In the Senate, Republicans held an expanded majority of 43 seats that would grow to 51 seats with the selective admission of western states (Stewart and Weingast 1992). Republicans had recaptured the presidency when Benjamin Harrison narrowly defeated

Grover Cleveland in the Electoral College despite losing the popular vote. Despite lacking overwhelming majorities in the 51st Congress, Republican leaders had an ambitious legislative agenda that they hoped would perpetuate Republican majorities. Most notable on this agenda were proposals to solve the race problem by enforcing suffrage rights for blacks under the Fifteenth Amendment by passing the Federal Elections Bill (Upchurch 2004). The desire of Republicans to pass the Federal Elections Bill was primarily partisan: repression of black voters in nearly 30 congressional districts in the South prevented Republicans from having a strong majority in Congress (Upchurch 2004). In addition to an aggressive policy agenda, the 51st Congress would be remembered for the decision of the new Speaker, Thomas B. Reed (R-ME), to impose a series of rules changes that would prevent the minority from engaging in dilatory tactics and allow majorities to push through their legislative agenda. The ability of the Speaker to count members present, but not voting for purposes of a quorum would be an important element of passing the Evarts Act.

Congressman John H. Rogers (D-AR) introduced H.R. 9014, "A bill to define and regulate the jurisdiction of the courts of the United States" (*Congressional Record* 4/15/1890) and the bill was reported from the Judiciary Committee on April 7, 1890. The main provisions of H.R. 9014 included fusing the existing district and circuit courts, creating nine new intermediate courts of appeals, authorizing two additional circuit judges for each circuit, and relieving Supreme Court justices from the burden of riding circuit (Frankfurter and Landis 1928). Debate over H.R. 9014 commenced during the afternoon of April 15, 1890 in the House of Representatives when Joseph Cannon (R-IL) reported a substitute resolution providing for immediate consideration of the bill in the House.

The substitute resolution offered by the Rules Committee would discharge H.R. 9014 from the Committee of the Whole and, following the adoption of the resolution, the bill

would be considered in the whole House with a vote that afternoon at 5:00. Opponents of the bill immediately took to the floor. As John Carlisle (D-KY) said,

> "…I think it does not allow sufficient time for consideration of a measure of this importance. It is a measure of great importance, not only to the Supreme Court, but to the people and the bar all over the United States, and I do not think that the time intervening between now and 5 o'clock this afternoon will be at all sufficient for its proper consideration." (*Congressional Record* 4/15/1890)

William Oates (D-AL) argued against the adoption of the resolution because the bill was important and during the previous Congress a similar piece of legislation received more than 10 days of floor time. Oates added,

> "Now to take a bill like this out of the Committee of the Whole and attempt to dispose of it in the time proposed by this report is not to give it the deliberate consideration which its importance demands. A bill which revolutionizes our judicial system, which changes the jurisdiction of the circuit courts and of the district courts, vesting in the district courts the entire jurisdiction which now belongs to the circuit courts, creating a circuit court of appeal, and providing for the appointment of two additional circuit court judges for each of the nine circuits (I believe one of them has two judges now)---a bill providing for seventeen or eighteen new circuit judges and for these changes of jurisdiction is a measure that requires to be carefully considered, not to be taken up hastily and disposed of in the time proposed by this report." (*Congressional Record* 4/15/1890)

The bill was not reported unanimously from committee and members of the Judiciary Committee present on the House floor indicated that they were not expecting consideration of H.R. 9014 on April 15, 1890.[4] The bill's sponsor, Mr. Rogers (D-AR), argued that the Judiciary Committee had devoted more time to this matter than any other during the previous six years to improving the bill and making its provision so simple that all members could easily understand the provisions contained therein. As opponents continued to debate whether a sufficient amount of time was devoted to consideration of

[4] The House Judiciary Committee was stacked in favor of the Republicans as they held a 9-6 advantage when Republicans only comprised 52% of the chamber (Cannon, Nelson, and Stewart 1998).

H.R. 9014, Mr. Cannon demanded the previous question. The previous question was ordered following a 118-101 vote, which largely fell along party lines.[5]

Following the previous question, Mr. Carlisle (D-KY) moved to recommit the resolution with instructions to the Rules Committee to amend the resolution to allow for two days of debate in the Committee of the Whole. The motion to recommit with instructions failed by a vote of 106-124, also along party lines.[6] Once the motion to recommit failed, the House moved to adopt the substitute resolution which passed 112-102 and then the House finally adopted the resolution governing floor debate of H.R. 9014 with a vote of 117-100. Both of the votes on adopting the substitute and adopting the resolution fell along party lines with the exception of John Rogers (D-AR) and John Culberson (D-TX).

Once the resolution was adopted, Mr. Oates (D-AL) moved that the House adjourn, but Mr. Cannon raised a point of order against the dilatory motion, which was sustained by the Speaker. Having dispensed with the procedural maneuvering the House proceeded to a substantive discussion of H.R. 9014 and Mr. Culberson (D-TX) opened debate by offering two reasons for his support of the proposed legislation,

> "There are two reasons that induce me to support this measure; one of them is the absolute necessity, unless we are prepared to deny justice to litigants, to relieve the Supreme Court of the burden of business imposed upon it by the existing laws and the other is a supreme desire to relieve the country of the judicial despotism exercised by circuit and district judges in criminal cases and civil causes involving less value than $5,000." (*Congressional Record* 4/15/1890)

One of the major problems with the existing judicial structure was the inability of the Supreme Court to handle its increasing docket. Culberson argued on the House floor that the previous three terms of the Court, more than 1,000 cases remained on the docket at the end of the term. Given the severity of the situation where cases might languish for more

[5] One Democrat, John Rogers (AR), voted for the previous question.
[6] Two Democrats voted against the motion to recommit, John Rogers (AR) and Thomas Catchings (MS).

than three years before receiving a hearing before the Supreme Court, Culberson asked his colleagues to lay partisanship aside,

> "Whether the necessary increase of the judicial force is to be supplied from the Republican or from the Democratic party or from both is not the question before Congress or the country, but the question should be, shall the public interest, shall the interests of Democrats as well as Republicans be allowed to suffer, to waste, and decay because of an insufficient judicial force and inadequate judicial machinery?" (*Congressional Record* 4/15/1890)

Building his argument, Culberson spoke in favor of congressional reform of the judiciary by noting that it was incumbent upon Congress to provide a modern court system that could meet the demands of a changing nation. He argued that the Founders intended for a flexible judiciary and reorganizing the courts would allow the Supreme Court to return to its appellate function. Culberson continued his argument with an appeal to end the judicial despotism that existed in the United States where one judge presided over nearly 90% of the cases and in half of those, one judge was the final arbiter.

Having laid out his arguments for passing H.R. 9014, Culberson proceeded to discuss the features of the legislation. The current system was fragmented and unwieldy because there were so many terms across the country and the circuit court judges and Supreme Court justices riding circuit were unable to make many of the terms. As a cure for this problem, the proposed legislation would abolish the original jurisdiction of the circuit courts and vest their original jurisdiction in the district courts and completely reorganize the circuit courts. The revamped circuit courts would consist of the current circuit judge and two others appointed by the president. Should one of the circuit judges be absent, the senior circuit judge may assign a district judge to serve, but no district judge may hear an appeal of a case that he heard in district court.

The new circuit courts of appeal would meet once a year at a location within the circuit compared with the multiple terms that are held under the existing structure.[7] The circuit courts would have only appellate jurisdiction and this would destroy "…the one-man power in the courts of original jurisdiction…and the action of the trial court will be made subject to review upon the record before a different tribunal…" (*Congressional Record* 4/15/1890)

In addition to eliminating judicial despotism, Culberson argued that the proposed legislation would provide relief for the Supreme Court. For those cases tried in federal court because of diversity citizenship, the circuit courts of appeal would issue a final decision unless the justices on the circuit court certified that the case presented novel circumstances and should be heard by the Supreme Court. By restricting these cases from reaching the Supreme Court docket, the Court would be able to focus its attention on cases dealing with Constitutional issues and federal law. Culberson also noted that adopting H.R. 9014 would end the practice of circuit riding and allow the justices to devote their attentions fully to matters pending before the Supreme Court.

Mr. Oates (D-AL) opposed the bill and argued that a more economical way of solving the problems was eliminating the circuit courts and establishing an intermediate court of appeals in Washington, D.C. consisting of the nine circuit judges. As part of his argument, Oates suggested that creating the new circuit courts of appeal would impose a great expense on the federal treasury. Furthermore, Oates argued that passage of H.R. 9014 would expand federal jurisdiction and if the nation wanted to preserve itself, a reducing the jurisdiction of the federal government was a wiser strategy.

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[7] The proposed locations for the circuit courts were as follows: First (Boston), Second (New York), Third (Philadelphia), Fourth (Richmond), Fifth (New Orleans), Sixth (Cincinnati), Seventh (Chicago), Eighth (St. Louis), and Ninth (San Francisco).

Passage of H.R. 9014 would require that the president appoint two new judges for each circuit except the Second (New York).[8] As such, partisanship was an underlying concern during debate. Roger Q. Mills offered an amendment that would not allow more than one of the new judges in each circuit to be appointed from the same political party. In a story appearing on the front page of the *Dallas Morning News* on April 16, 1890, the controversy was summarized by Democrats had supported this bill in the 50th Congress while Republicans were opposed and the bottom line was about judges since Democrats do not want Republicans appointed and vice-versa. Mills defended his amendment by citing recent practice of crafting legislation where party politics would be disregarded, such as the creation of the Interstate Commerce Commission. Furthermore, Mills argued,

> "…if there is anything in our Government that ought to be elevated above and beyond all party prejudices, it is our judiciary; and the way to keep it in order and in the confidence of our people is to have the judges divided between the two great political parties, so that the decisions of the courts of the country will command the respect, confidence, and obedience of the people." (*Congressional Record* 4/15/1890)

Continuing the opposition to the bill, William C. Breckinridge (D-KY) argued that there would be a growing demand for additional circuit courts of appeals beyond the existing nine. Breckinridge believed that Congress would not be able to limit the number of courts to nine and this would strain the federal treasury. Beyond the cost involved of the new intermediate courts of appeals, Breckinridge suggested that there would be too many different decisions and a better way to provide more consistency would involve establishing a single intermediate court of appeals in Washington, D.C. Adopting a system like this would "…secure an absolutely homogenous jurisprudence and appellate courts free from danger of duplication" (*Congressional Record* 4/15/1890).

[8] The Second Circuit already had two circuit judges to help deal with the caseload.

Debate concluded in the House as the Chairman of the House Judiciary Committee, Ezra Taylor (R-OH), offered a brief rebuttal to the Mills amendment regarding the partisan appointment of judges. Rogers also responded to the criticisms levied by Oates and Breckinridge concerning the increased expense and the expansion of federal jurisdiction. The Mills amendment was defeated 94-119 along straight party lines with all Democrats voting for the amendment and all Republicans opposed.[9] Having defeated the amendment and the motion to recommit, the House voted 131-13 in favor of passage. The final passage vote was largely along party lines although eight Democrats supported the bill (Andrew (MA), Blount (GA), Culberson (TX), Lee (VA), Magner (NY), Reilly (PA), Rogers (AR), and Tracey (NY)). Owing to earlier rules changes, the Speaker counted 30 members present for purposes of a quorum including Oates and Breckinridge.

While the lopsided vote might be taken as an indicator that there was widespread consensus on the need for the legislation, we hypothesize that Democrats chose abstention over voting no, distorting the true vote total. More than half of the chamber did not vote on final passage (56% abstained). To test the proposition that those abstentions were not random absences, we estimated a probit model for the decision to participate in the final passage vote for H.R. 9014. Our dependent variable was whether the legislator voted for final passage and was coded 1 if the MC voted (either yea or nay) and 0 if the MC abstained (including those counted as present for the purposes of securing a quorum).

The independent variables were NOMINATE scores (1st and 2nd Dimensions), tenure in the House, membership on the Judiciary Committee, 1888 vote share, and caseload in the state. Caseload was calculated as a ratio of the number of cases disposed by the federal district courts in the state in the fiscal year ending June 1891 to the number of cases still

[9] David Culberson (D-TX) who supported H.R. 9014 voted for the amendment while the principal sponsor, John Rogers (D-AR), abstained on the vote.

pending at that time. A value of 1 means the court is keeping up with the number of annual filings; numbers greater than 1 indicate that more cases are being filed than decided, suggesting a backlog in the federal courts in a given state. Those representatives from states with greater backlogs should be more likely to vote if constituents are articulating a concern about the speed of the work of district courts.

The results indicate that more ideologically extreme members (first dimension DW-NOMINATE coordinates) were more likely to vote as well as members of the House Judiciary Committee.

Table 1 about here

The caseloads of the federal judiciary emerged as a significant concern, but our measure for caseloads (the ratio of new cases to cases dispensed) in each state was not statistically significant. Clearly the decision to participate in the final passage vote was an ideological one, and not due to a constituency-motivated concern that the federal courts were in any state of crisis.

Senate consideration of H.R. 9014 began in earnest on September 19, 1890 and would continue for six days. The vehicle for floor debate in the Senate was an amendment striking out the entire House bill and substituting the bill reported from the Senate Judiciary Committee. The substitute bill was sponsored by William Evarts (R-NY) retained the central idea of creating nine circuit courts of appeals, but made a number of modifications to the House version of the bill. The Evarts bill retained the district and circuit courts, but abolished the appellate jurisdiction of the circuit courts. Appeals from cases heard in the district and circuit courts would be routed to the Supreme Court for more important issues, but the less important and more numerous issues would be routed to the new circuit courts of appeal. Additionally, Evarts proposed adding only one additional judge for the new circuit courts of appeal and the third member of the court would be a

member of the Supreme Court and in the event that they were not able to attend the circuit, the circuit judges and district judges were eligible to hear cases (Frankfurter and Landis 1928).

During the first day of debate, senators offered a number of potential alternatives that would relieve congestion in the federal courts. The chairman of the Judiciary Committee, George Edmunds (R-VT), and the ranking member, George Vest (D-MO), supported a tripartite division of the Supreme Court into three tribunals that would allow for quick disposal of cases. Vest also suggested that most justices had already decided the cases before oral argument so there was no need for all nine members of the Court to participate. In addition to expressing support for the tripartite division of the Supreme Court, which was the position of the minority on the Judiciary Committee, Vest opposed the addition of new federal judges because of their poor work ethic. Joseph Dolph (R-OR) offered a strong defense of the House bill by arguing that the nation needed a judicial system adequate to the demands of a growing nation.

When debate resumed on September 20, the Senate considered a number of potential modifications. Evarts tried to convince the chamber that the underlying bill should be passed as quickly as possible and free from extraneous provisions. In particular, Senator Dolph (R-OR) argued that he had introduced a bill earlier in the session that would establish a new Tenth Circuit to relieve some of the burden that would follow from the addition of several new states to the Union. Edward Wolcott (R-CO) and John Ingalls (R-KS) both argued that the greatest suffering actually occurred in the Eighth Circuit and the entire matter of jurisdiction should be debated. John Reagan (D-TX) announced that while he initially favored the minority report he would support the committee's version of the bill because it would limit the autocratic powers of circuit judges. He continued and argued

that the circuits should be reorganized, but there would not be any need to increase the number of circuits.

Senator Vest (R-MO) offered an amendment in the form of a substitute on September 22, 1890 that would allow the Supreme Court to sit in divisions, but that all decisions would be reviewed *en banc* and upheld if five justices concurred. Vest's amendment was purely a matter of position-taking as he stated on the Senate floor when introducing his amendment,

> "Mr. President, I desire simply to remark that my object in offering this amendment is more for the purpose of formulating and getting upon the record the opinions of the minority of the Judiciary Committee on this question than with any view of obtaining the legislation which is expressed or framed in the amendment." (*Congressional Record* 9/22/1890)

Vest continued and suggested that there were many empty seats in the Senate and the chamber should seriously consider how to deal with the delays that exist in the federal judiciary. Noting that Rhode Island and California provided for divisions of their supreme courts, Vest argued that adopting the division plan for the Supreme Court would reduce the amount of delay in the federal judicial system. As Vest and Evarts sparred on the Senate floor, the senator from Missouri said that there was a deep distrust of the federal judiciary in his state and Missouri experimented with a similar reform, the creation of an intermediate court, and it had failed. Additionally, Vest discussed the circumstances under which the bill had been forced through the House and given the importance of the problem the matter was best held for further deliberation in the next session.

Evarts responded that the public was opposed to a division of the Supreme Court and the nation demanded action and enlarging the size of the federal judiciary was a necessary evil. The Senate voted on two amendments; one by Samuel Pasco (D-FL) prohibiting district judges from serving on the courts of appeal was defeated 13-31 along party lines with only one Democrat voting against the amendment (John Morgan (AL)).

The Vest amendment in the nature of a substitute was defeated 10-36 with three Republicans joining seven Democrats favoring the amendment.

The Evarts bill received brief consideration on September 23, 1890 and most of the discussion concerned an amendment from Arthur Pue Gorman (D-MD) that would place the Fourth Circuit Court of Appeals in Baltimore instead of Richmond. The amendment received a vote the following day and was defeated 22-28 as nine Republicans joined 19 Democrats (mostly southern Democrats) in opposition to the amendment. Once the Gorman amendment was disposed of, the Senate voted 44-6 to pass H.R. 9014 as amended. The vote on final passage was largely along party lines with all 28 Republicans voting in the affirmative along with 16 Democrats. All of the opposition came from Democrats (Barbour (VA), Bate (TN), Blackburn (KY), Blodgett (NJ), Harris (VA), and Vest (MO)). After the vote, Evarts, George Hoar (R-MA), and James Pugh (D-AL) were named as conferees.

The amended bill was returned to the House on September 29, 1890 and William Breckinridge (D-KY) favored referring the bill to the Judiciary Committee and taking up the matter in the next Congress. The committee chairman, Ezra Taylor (R-OH), announced that he would not concur with the Senate amendments and given scheduling concerns, he favored sending the bill and amendments to conferees who examine them during the vacation. Mr. Breckinridge (D-KY) noted the significant differences that needed to be reconciled between the competing versions of the bill and since this was such a critical issue, the bill should be sent to the Judiciary Committee for further study.

Samuel Lanham (D-TX), speaking on behalf of Mr. Culberson, suggested that non-concurrence was the expected course of action and the House should agree to the Senate request for conferees. Mr. Breckinridge responded that he favored the principle of the

House bill, but wanted to bring the intermediate courts of appeal to Washington, D.C. rather than maintaining the circuits. He said,

> "I do know that there are other gentleman who agree with me, and they and I do not want to cut ourselves off from the privilege of advocating this in the House on a report from the Committee on Judiciary on the amendments and being compelled to vote for a conference report as a whole." (*Congressional Record* 9/29/1890)

The key concern for Breckinridge was preserving his right to offer amendments to H.R. 9014 and the committee report may not afford him that opportunity. When Mr. Taylor offered a motion of non-concurrence and asked for the appointment of conferees, Breckinridge raised a point of order that the bill must be considered in the Committee of the Whole since the Senate amendments would change the appropriations. The Speaker opposed the motion and it was defeated. Breckinridge raised another point of order under Rule XX because the amended version of the bill provided for an entirely new office. The following day the Speaker sustained Breckinridge's point of order and the bill was referred to the Judiciary Committee.

The Elections of 1890

As members of Congress left Washington at the end of September 1890 to return home and prepare for the midterm elections, few members knew what to expect. Republicans had won narrow victories in 1888 and held unified control of the House, Senate, and presidency for the first time since 1874 and this provided an opportunity for the Republicans to shape the national agenda (Upchurch 2004). Furthermore, Republicans bolstered their House majority by deciding contested elections cases in favor of Republicans, especially in the South (Jenkins 2006). Summers (2004) argued that the state elections of 1889 indicated that states Republicans had counted on in the past were in play while other states were trending Democratic. Furthermore, the effect of the Australian ballot was

unclear as it would allow members of Congress to begin building personal coalitions rather than relying on the national party (Katz and Sala 1996; Summers 2004).

Republican leaders recognized that their narrow majorities in 1888 placed greater importance on legislative accomplishments during the 51st Congress. Coupling legislative accomplishments with effective patronage, Republicans hoped to bring over the South and develop a loyal base of the support in the West (Summers 2004). Control of Congress in the 1880s alternated between Democrats and Republicans and the Democrats had reemerged as a national party able to draw support in all areas of the nation. In an effort to develop a majority, a number of southern states took additional steps to solidify their support in southern congressional races. Summers (2004) notes Democrats in Florida passed a poll tax that eliminated many Republicans from the electorate; in North Carolina, state lawmakers passed a tougher registration law that would hinder the opposition, namely Republicans, and in Tennessee, the legislature passed election law changes that required registration before every election in any town or city that cast more than 500 votes as well as a poll tax.

Democrats also strategically used redistricting to defeat incumbent Republicans. For example, Summers (2004) provides accounts of redistricting efforts in Maryland, Tennessee, and Kentucky. The efforts in all three states were designed to help the Democratic Party recapture control of the House in the 52nd Congress. However, redistricting efforts were not confined to federal elections as Democrats in New York and New Jersey redrew state boundaries in order to elect Democrats to the Senate to replace Republican incumbents (including William Evarts (R-NY)).

Republican efforts to build an electoral majority of their own included using control of Congress to pass legislation beneficial to the party. One critical development was the selective admission of western states that Republicans hoped would provide an important

margin in presidential elections and in the Senate. Shepsle and Weingast (1992) argue that Republican decisions to not follow past practice in admitting states was crucial for protecting Republican policies that had been put in place during Reconstruction. During the 51st Congress, two more Republican states, Idaho and Wyoming, were admitted to the Union and Republicans fixed the rules that ensured these states voted Republican (Summers 2004).

The legislative accomplishments of the Republican Party during the 51st Congress were not sufficient to achieve their twin goals of bringing in a Southern base and developing loyalties among western voters. One of the most significant problems that Republicans faced in the 51st Congress was agreeing on an agenda. The divisions within the Republican Party fell between the money men who wanted Congress to address economic issues, such as the tariff, and reformers, who wanted the Federal Elections Bill to be the signature accomplishment of the Republican-controlled Congress (Upchurch 2004).

Republican leaders agreed that the tariff was the most important economic issue facing the nation and an issue that affected more voters than any other. There was general agreement that raising tariffs would improve conditions for workers and this was especially important since industrial laborers outnumbered farmers (Upchurch 2004). The McKinley Tariff brought in sufficient revenue to pay for expensive new pension programs, which Bensel (2000) and others have noted were important to the Grand Army of the Republic, an important part of the Republican constituency, but many western voters were unhappy at being forced to pay higher prices that benefited manufacturing interests. Furthermore, the passage of the Sherman Silver Purchase Act of 1890 was not sufficient to stem deflationary pressures, which affected southern and western voters (Hofstadter, Miller, and Aaron 1959).

During the 1890 elections, Democrats campaigned against the Republican Congress by deriding it as the "Billion Dollar Congress" for its spending spree (Upchurch 2004). The campaign was successful as Democrats regained control of the House, winning 235 of the 332 seats (Dubin 1998). In the process of winning the election, Democrats won 70% of the open seat contests in 1890 and defeated 52 incumbent Republicans, including William McKinley, who served as chairman of the House Committee on Ways and Means and floor leader. Democratic success was so widespread that they only lost a single incumbent.

Conference Committee Negotiations

In the lame-duck session, the Republicans felt several pressures as their loss of control of the House was imminent. This forced party leaders to prioritize unfinished business, and the Evarts Act was one of their concerns. H.R. 9014 was reported from the House Judiciary Committee on February 5, 1891. Mr. Taylor (R-OH) said that the Judiciary Committee agreed that the House should not concur with the Senate amendments and the House should request a conference with the Senate. Mr. Oates (D-AL) objected to Taylor's contention that the committee report was a privileged matter and objected to Taylor's request for unanimous consent. The Speaker would not rule on the unanimous consent request for more than two weeks and announced on February 21, 1891 that House conferees for H.R. 9014 would be Taylor (R-OH), Lucien Caswell (R-WI), and John Rogers (D-AR).

There are few accounts of what transpired in the meetings between conferees, but in addition to the three senators and three members from the House, a committee of ten representatives from the American Bar Association participated in discussing compromises. According to Evarts' biographer, Evarts' views dominated the discussion and members agreed to drop the House version of the bill in favor of the amended Senate bill (Barrows 1941). Following meetings between the conferees, the Senate accepted the conference

report—which stated that the House withdrew its objections and agreed to the Senate amendments—on February 28, 1891. There was no debate on the Senate floor, but a vigorous debate on the conference ensued in the House. Mr. Rogers (D-AR) opened the debate by reminding the House that the primary concern of the legislation was relieving congestion on the Supreme Court docket and the other objects, such as divorcing the district and circuit courts were incidental to more important considerations. Furthermore, Rogers argued,

> "…that the great reservoir of original jurisdiction should rest in the district courts of the United States; that the circuit courts should be abolished, and an intermediate court of appeals established between the district courts and the Supreme Court, whose appellate jurisdiction should be final, and thereby limit the appellate jurisdiction of the Supreme Court and give it consequent relief." (*Congressional Record* 2/28/1891)

Rogers expressed his concerns with the Senate amendments especially the one that provided for appeals to the Supreme Court in all cases of capital or infamous crimes because it would overbalance the cases cut off by creating an intermediate appellate court. Thus, Rogers argued that the House bill was preferable because appeals would be directed towards the intermediate courts rather than the Supreme Court and it abolished the circuit courts.

Ezra Taylor (R-OH) argued that the best strategy for the House was passing the amended version of H.R. 9014,

> "…and I say again that if we could have the House bill as reported by the gentleman from Arkansas, I would prefer it to the Senate bill. But as the gentleman himself says, at this stage of the session we have either to take the Senate bill or to take nothing; and I think the Senate bill is a great improvement upon the present law." (*Congressional Record* 2/28/1891)

David Culberson (D-TX) broke with his Democratic colleagues and announced his support for the Senate bill because it achieved the same results as the original version passed in the

House. The final vote on the amended version of H.R. 9014 was a voice vote and the tellers as well as a recorded vote were rejected.

Given that Republicans were poised to lose the majority in the House for the 52nd Congress, political expediency was the rule. There is no doubt that many members of the House favored the version passed in their chamber, but agreed to support the Senate version because of a desire to pass some kind of legislation dealing with congestion on the Supreme Court docket before the congressional session ended on March 4, 1891 (Dyer 1933).

Discussion

On the surface, passage of the Evarts Act in 1891 appears to be bipartisan since the votes were quite lopsided. A closer look at the passage of the Evarts Act reveals a more partisan and more contentious story. The reorganization of the federal judiciary was an essential, if understated, element of the Republican agenda. Bensel (2000) argues that the Supreme Court was crucial for a series of rulings that allowed a national market to develop, but reorganizing the federal judiciary by creating circuit courts of appeals was a fundamental change because it would bring cases to judges rather than having judges riding circuit. The Republican Party carried most of the burden for securing a sufficient number of votes to pass the bill, but without the adoption of the Reed Rules in 1890, it is likely that the bill never would have passed the House of Representatives.

Charles Geyh (2006) argues that the passage of the Evarts Act was an important development in the relationship between Congress and the courts for several reasons. First, Geyh argues that Congress broke with their past decisions not to alter the structure of the federal courts because of their reverence for what the Framers created. Having overcome their reluctance to alter the structure of the judiciary, members of Congress took

steps to make the courts more accountable and prevent some of the excesses that existed under the existing system of district and circuit courts. During floor debate in the House and Senate, advocates for the bill often made reference to the fact that important cases were being decided by a single judge and on appeal the district court judge was sitting on the circuit. We disagree with Geyh's interpretation of the reform efforts because if this was truly a fundamental break with past practice designed to improve the efficiency of the federal judiciary, then reform efforts should have been bipartisan. A closer look at the floor debate suggests that Democratic opponents of the legislation tried to insert killer amendments (Jenkins and Munger 2003) that would derail passage of the bill. For example, if Democrats were concerned about delays in the federal judiciary, creating one intermediate court of appeals in Washington, D.C. (the Oates Amendment) does not appear to improve the administration of justice. A second amendment that would place limits on partisan appointments (the Mills Amendment) may have been offered to split the Republican coalition that differed over solutions for economic and social issues facing the nation.

Despite the efforts to reform the structure of the federal judiciary, Congress was not able to completely dismantle the district and circuit system so the new circuit courts of appeals were layered on top of the existing structure. In some respects, the attempts to reform the judiciary reflect the same kind of *disjointed pluralism* that Eric Schickler (2001) describes in Congress. Despite the general agreement on reforming the judiciary, different interests in Congress had different goals and this contributed to the peculiar nature of the reform. This fractured reform is a rational strategy as members of Congress were unsure of the policy consequences that would follow from a reorganization of the judiciary. As such, it provides an opportunity to examine the process of the judicial reform in a broader context by examining the passage of the Judiciary Act of 1789 and the Judges Bill of 1925. As it

stands, characterizing the Evarts Act as partisan (Gillman 2002) more accurately represents the nature of the debate than those who frame the debate as reflecting some sort of consensus that the federal judiciary was in need of repair. The Democrats who supported the legislation were few and far between, and their justification for doing so reflected a concern about an agent of national power—the federal district court judge—exercising too much power over the local communities by serving as both trial judge and appellate judge in too many circumstances. But the vast majority of Democrats opposed the Evarts Act, anticipating that the judiciary would be friendly to the Republican agenda, as it ultimately proved to be.

If legislators are willing to grant the courts power to exercise judicial review and provide them with the resources to exercise that power, then they are making an assumption about the ideological alliance of that judiciary. Those theories of delegation that suggest that legislators only support judicial power when they anticipate that power will be used to promote their ideological goals are buttressed by Congress' passage of the Evarts Act. Republicans and Democrats alike knew that the post-1891 judiciary would be even more solicitous of national power than before, and this caused most Democrats to withhold their support from judicial reorganization efforts despite the admitted need for the reforms. At the same time, Republicans, aided by Reed's Rules and their pending loss of control of the House, were able to pass a reform that had been under consideration in one form or another for more than twenty years. These partisan considerations strongly suggest that legislators do care about the ideological sympathies of the judiciary they seek to empower. While Landes and Posner may have suggested that the ideological orientation of a judiciary is unimportant, Dahl, Whittington and Rogers suggest that legislators are far more willing to delegate to an ideologically convergent judiciary. These theories receive

empirical support by our findings about the nature of consideration of the Evarts Act legislation.

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Table 1: Probit Model for Voting on Final Passage of H.R. 9014 in the House of Representatives on April 15, 1890

Variable	**Coefficient (Standard error)**
First Dimension DW-NOMINATE	1.69**
	(0.197)
Second Dimension DW-NOMINATE	0.438**
	(0.165)
Member of Judiciary Committee	1.27**
	(0.428)
Percentage of vote in 1888	0.009
	(0.008)
Tenure	0.001
	(0.039)
Caseload	0.015
	(0.033)
Constant	-0.893
	(0.491)
N	323
X^2	124.80

** p<0.01
* p<0.05