Greater public confidence in the US Supreme Court predicts more jurisdiction stripping

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Abstract
A growing body of empirical research shows an association between public support for the US Supreme Court and both judicial independence and congressional court curbing activity. At the same time, studies of jurisdiction stripping show Congress' efforts to limit federal courts' jurisdiction are principally related to courts' workloads rather than ideological differences between courts and Congress. Here, the authors connect these streams of inquiry by testing the hypothesis of a negative relationship between public support for the Supreme Court and jurisdiction-stripping legislation. Contrary to prior studies, the authors find a positive relationship between Americans' confidence in the Supreme Court and jurisdiction stripping. This result indicates the need for additional research on the interactions among public opinion, federal courts, and Congress.

Numerous theoretical and historical analyses of the "political construction" of judicial independence in the United States and elsewhere have proposed a connection between public support for courts and both legislative decisions to enhance or undermine judicial power and courts' propensity to decide cases contrary to legislators' preferences (e.g., Graber, 2005; Friedman, 2009). In contrast, studies of jurisdiction stripping have found statutory limitations on American federal courts' ability to decide cases are principally related to judicial workloads rather than political factors, such as ideological differences between courts and Congress (e.g., Chutkow, 2008). Here, we bridge these studies and test the hypothesis of a *negative* relationship between public support for the US Supreme Court and jurisdiction-stripping legislation. Contrary to prior studies, though, we find a robust, *positive* relationship between Americans' confidence in the Supreme Court and jurisdiction stripping.

In this research note, we briefly introduce prior research on public opinion and judicial independence and on jurisdiction stripping, explain the data and methods we use to evaluate the association between public opinion and jurisdiction stripping, and report and discuss these unexpected results. We conclude by speculating about the origins of the political processes that generate more jurisdiction-stripping laws as positive public evaluations of the Supreme Court increase. To be clear, these results were contrary to the expectations we derived from prior theoretical and empirical studies of public opinion and judicial independence, and we do not test a new positive theory here. Our work here is *descriptive*, presenting a robust and substantively important empirical anomaly that may spark further study.

1. Public opinion and judicial independence

Although legislatures often have the authority to limit courts' independence, public opinion can constrain election-minded legislators to accept or expand judicial power. When support for courts is sufficiently high, legislators—who would otherwise prefer to make policy without the constraint of judicial review—are induced "to respect judicial decisions as well as the institutional integrity of a court…[by] fear of…a public backlash" against court curbing (Vanberg, 2001, 347). The theory of judicial independence rooted in public opinion—what (Ura and Wohlfarth, 2010, 942) call the "public support hypothesis"—is substantiated by a growing body of empirical research showing a robust, positive association between public support for the US Supreme Court and judicial independence.

Americans' confidence in the Supreme Court predicts Congress's propensity to acquiesce to judicial decisions striking down federal laws (Nelson and Uribe, 2017) as well as Congress's allocation of discretion and resources to the Supreme Court (Ura and Wohlfarth, 2010). Positive views of the Court also predict Supreme Court decisions invalidating federal laws (Clark, 2009, 2011; Merrill et al., 2017). Similar connections between public support for courts and elements of judicial independence are evident in other developed and developing democracies (Gibson et al., 1998; Vanberg, 2005; Helmke, 2010).

2. Jurisdiction stripping

At the same time, another stream of research investigates Congress's decisions to limit federal courts' jurisdiction. Congressional control of federal courts' jurisdiction is an important element of the American checks and balances system. Article III, Section 2 of the US Constitution grants Congress authority to create "regulations" and "exceptions" to the Supreme Court's appellate jurisdiction. Chutkow (2008) shows that Congress makes frequent use of this power. Between 1943 and 2004, "Congress passed 248 public laws containing 378 provisions expressly stripping jurisdiction from the federal courts" (Chutkow, 2008). Yet, analyses of the frequency of jurisdiction-stripping legislation show that statutory limits on federal courts' ability to decide cases are associated with administrative concerns (i.e., judicial workloads) rather than ideological disagreement between Congress and the Supreme Court (Chutkow, 2008; Heise, 2011; Greenfest, 2013).

The literature evaluating the public support hypothesis suggests the model of jurisdiction stripping emerging from these studies is incomplete, though. In particular, the model takes no account of public support for the Supreme Court as a rival explanation for variance in the frequency of Congress's decisions to limit federal courts' jurisdiction. The public support hypothesis anticipates a negative relationship between Americans' confidence in the Supreme Court and laws limiting federal courts' jurisdiction; greater public support should be associated with fewer limits on courts' deciding cases. In contrast, studies of jurisdiction stripping would anticipate no significant relationship between public opinion and courts' jurisdiction; Congress limits courts' jurisdiction mostly for administrative reasons.

3. Does public opinion influence jurisdiction stripping?

To examine the linkages between jurisdiction stripping and public confidence in the Supreme Court and Congress, we analyze the frequency with which Congress limited the jurisdiction of a federal court from 1973–2014.[1] The unit of analysis is the calendar year, and the dependent

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[1]We restrict our attention to post-1972 jurisdiction stripping due to the availability of General Social Survey (GSS) data on public views of the Supreme Court and Congress. Additionally, our models that control for the ideological distance between the Court and Congress end in 2011 due to the current availability of Bailey's (2007) ideology scores.

variable is the annual number of public laws passed by Congress that contain a jurisdiction-stripping provision. Chutkow (2008) identifies every public law with explicit language that stripped jurisdiction from the federal courts from 1943 through 2004. We extend the data through 2014, applying Chutkow's (2008) search criteria in Westlaw. That is, we identified every public law (during each session of Congress) that contained at least one of the terms "court," "judicial," "review," "jurisdiction," or "conclusive," and then reviewed each of those laws to identify provisions that stripped a court's jurisdiction.

The authorization of the Medicare Advisory Board in the Patient Protection and Affordable Care Act is an example of legislation with a jurisdiction-stripping provision. The enacting Congress designed the Board to monitor Medicare growth and propose changes to Medicare spending. While Congress specified the manner in which it may review a "proposal" from the Board, it empowered the Secretary of Health and Human Services to implement a proposal should it fail to act. Yet, Congress also exempted proposals' implementation from judicial review. Specifically, §3403(e)(5) of the Act states:

> (5) LIMITATION ON REVIEW. There shall be no administrative or judicial review under section 1869, section 1878, or otherwise of the implementation by the Secretary under this subsection of the recommendations contained in a proposal.

Jurisdiction-stripping laws reveal a different aspect of congressional interactions with the federal judiciary than court curbing bill introductions, another measure of Congress's inclination to exert political control of courts (e.g., Clark, 2009).[2] Figure 1 displays the frequency of jurisdiction stripping over time. Panel (a) shows the annual percentage of public laws with jurisdiction-stripping provisions. The presence of jurisdiction stripping has varied significantly from 1973 to 2014, ranging from 0.41 to 6.62 percent of public laws.[3] Panel (b) of Figure 1 compares the annual number of jurisdiction-stripping laws from 1973 to 2014 to the number of court curbing bills proposed by members of Congress (see e.g., Clark, 2009; Mark and Zilis, 2018, 2019). Temporal variation in the annual frequency of jurisdiction-stripping laws is *negatively* related to the introduction of court curbing bills ($r = -0.53$).

To evaluate our expectations about public opinion's effects for jurisdiction stripping, we estimate a model of the number of jurisdiction-stripping laws passed each year controlling for the total number of public laws.[4] The first two substantive predictors of jurisdiction stripping reflect the degree of public support for the Supreme Court and Congress. We measure these concepts using the GSS data on respondents' confidence in each institution. The GSS asks: "I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them? (Congress/US Supreme Court)." This item is useful because it has been administered since 1973.[5] Also, studies of public perceptions of Congress and the Supreme Court have often relied on the GSS data (e.g., Clark, 2009; Ura and Wohlfarth, 2010). We measure *Court*

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[2]Court curbing bill introductions have been a focus of research on the legislative politics of judicial independence in the United States since Clark's (2009) important, early paper identified them as an indicator of Congress's view of the federal courts' public standing. Conceptually, court curbing bills include jurisdiction stripping as well as other kinds of institutional attacks. Jurisdiction-stripping laws follow from a subset of court curbing bills.

[3]The mean is 2.15 percent, and the standard deviation is 1.39 percent.

[4]We additionally estimate a model of the percentage of public laws passed by Congress each year that stripped a court's jurisdiction. This approach accounts for over-time changes in legislative productivity and offers the modeling flexibility customary with a continuous measure. (We compute the natural logarithm of this percentage to compensate for its substantially left-skewed distribution.) This latter approach leads to the same substantive inferences about the effects of public opinion and administrative demands on the production of jurisdiction-stripping legislation. We report these estimates in the online appendix.

[5]The GSS did not ask the public confidence questions in 1979, 1981, 1992, nor in odd-numbered years since 1993. We use linear interpolation to fill in the missing values.
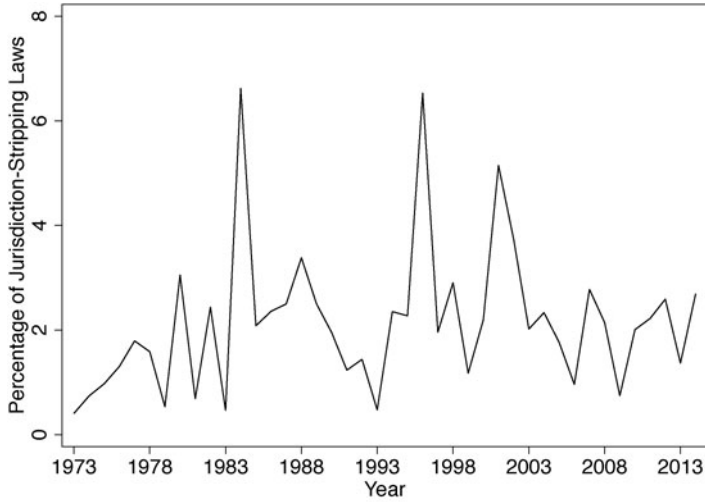
(a) Percent of Public Laws Stripping Jurisdiction
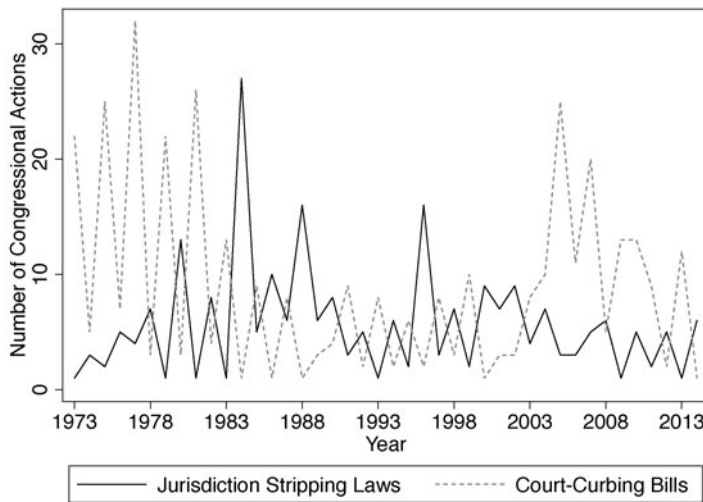
(b) Jurisdiction Stripping vs. Court Curbing

Figure 1. Congressional jurisdiction stripping laws and court curbing bills, 1973–2014.
Note: Panel (a) displays the annual percentage of public laws with a jurisdiction stripping provision; Panel (b) compares the annual number of jurisdiction stripping laws against the number of court curbing bills proposed in Congress.

Confidence and *Congress Confidence* with the proportion of respondents each year saying they have a "great deal of confidence" in each institution.[6,7]

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[6]An alternative measure of the public's confidence in the Supreme Court and Congress is the difference between the proportion of respondents who report confidence in each institution and the proportion saying they have "hardly any" confidence in them for each year. Substituting these "net" confidence measures for the Supreme Court and Congress into the statistical models described below does not affect the substantive inferences drawn from them. These alternative model specifications are reported in the online appendix.

[7]Of course, jurisdiction-stripping legislation often affects the entire federal judiciary and not only the Supreme Court. However, there is no comparable longitudinal measure of confidence in the larger judiciary. So, we are constrained to evaluate

Federal courts' workload is another predictor. Chutkow ([2008](#)) and others show that greater case volume is associated with more jurisdiction stripping (Heise, [2011](#); Greenfest, [2013](#)). We take two approaches to measuring judicial workload. First, we follow Chutkow ([2008](#)) and measure federal courts' workload—*Judicial Workload*—as the number (in thousands) of civil cases filed the previous year in federal district courts by private parties seeking action against the United States. We retrieve these counts from the Federal Judicial Center (FJC)'s annual *Federal Judicial Caseload Statistics* (Table C-2).[8] Given the upward trend in the judiciary's workload, suggesting a unit root (confirmed by several diagnostics), we model the effect of workload's first difference (i.e., the change in workload from $t-1$ to t).[9] We count civil cases where the United States is the defendant since the decision to initiate litigation is not under the US government's direct control (Chutkow, [2008](#)).[10]

We next modify this workload variable to account for the increase in Article III federal judges over time. *Adjusted Judicial Workload* is the number of civil district court cases filed by private parties seeking action against the US government divided by the number of Article III district court judges serving each year.[11] This alternative workload predictor captures the judiciary's workload relative to the number of judges available to resolve cases.

The logic of separation of powers models suggests Congress strips jurisdiction as courts become increasingly ideologically distant (e.g., Segal *et al.*, [2011](#)). To account for this, we measure *Ideological Distance* as the absolute difference between the median Supreme Court justice's ideal point and the midpoint between the two congressional chamber medians' ideal points using Bailey's ([2007](#)) ideology measures.[12] Although jurisdiction-stripping laws may limit the authority of many federal courts, we use the spatial location of the Supreme Court because it sits atop the judicial hierarchy and is the final arbiter of disputes appealed from the lower courts (Chutkow, [2008](#)).[13]

A final control variable is the annual number (in hundreds) of public laws passed by Congress (Chutkow, [2008](#)). This variable accounts for changes in Congress' productivity that may affect the frequency of jurisdiction-stripping laws.

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our hypotheses about connections between public opinion and jurisdiction stripping with data about confidence in the Supreme Court. Nevertheless, the Supreme Court is by far the most visible element of the federal court system, and it is reasonable to assume that opinions about the Supreme Court inform and structure views about the judiciary as a whole. We, therefore, proceed on the assumption that public confidence in the Supreme Court is a reasonable proxy for confidence in the judiciary as a whole.

[8]In 1992, the FJC switched from reporting calendar-year caseload statistics to a reporting period starting in April and ending the next March. So, after 1991, the variable represents a nine month lag (instead of a one1 year) in jurisdiction-stripping models. For example, we match April 1999 through March 2000's caseload with jurisdiction stripping for the calendar year 2000.

[9]This is a departure from Chutkow ([2008](#)). She specified judicial workload in its annual levels, but differencing guards against spurious results from modeling a variable with long-term temporal dependence.

[10]Nevertheless, the impacts of confidence in the Court and Congress are even stronger when controlling for all civil cases involving the United States government (as both plaintiff and defendant).

[11]Data on the number of judges come from the FJC: https://www.fjc.gov/history/exhibits/graphs-and-maps/composition-courts. The results are robust to using the total number of all Article III judges, as well.

[12]One might alternatively use Judicial Common Space (JCS) scores (Epstein *et al.*, [2007](#)) and further control for the ideological distance between Congress and the lower courts each year (by computing the absolute difference between the spatial locations of Congress and the median federal circuit court—that is, the median of the individual federal circuit court medians). The results are substantively consistent when substituting the JCS scores and/or specifying this additional control predictor.

[13]We explore other controls, including the ideological distance between the Supreme Court and the president, the distance between the president and Congress, and divided government. All subsequent results are robust to adding one of these other controls.

Table 1. Public Opinion and Jurisdiction-Stripping Laws (Count), 1973–2014

	(1)	(2)	(3)
Court confidence	8.37*	10.01*	9.06*
	(3.61)	(4.29)	(4.00)
Congress confidence	− 9.11*	− 8.84*	− 9.72*
	(3.60)	(3.84)	(3.59)
Δ Judicial workload (Thousands)		0.02	
		(0.02)	
Adjusted judicial workload (per judge)			24.04*
			(11.73)
Ideological distance		− 0.51	− 0.24
		(0.50)	(0.50)
Total public laws (Hundreds)	0.55*	0.51*	0.48*
	(0.09)	(0.09)	(0.09)
Constant	− 1.39	− 1.72	− 2.22*
	(0.97)	(1.12)	(1.04)
N	42	39	39
Pseudo-R^2	0.13	0.14	0.16
$\chi^2(\alpha = 0)$	11.36*	6.52*	3.77*

Table entries are negative binomial regression estimates with standard errors in parentheses; *$p < .05$ (two-tailed tests).

4. Methods and results

We use negative binomial regression to predict the annual number of jurisdiction-stripping laws.[14] Using this approach, we specify: (1) a baseline model including only the two public confidence measures; (2) a second specification including the unadjusted workload variable and all controls; and (3) a third model that substitutes the adjusted workload predictor for the unadjusted one.[15] Table 1 reports the negative binomial regression model estimates (Models 1–3).

First, the impact of *Court Confidence* on passage of jurisdiction-stripping laws is consistent across all three models. In contrast to prior research, our data show a *positive* relationship between confidence in the Supreme Court and laws stripping federal courts' jurisdiction. Panel (a) in Figure 2 illustrates these results across the observed range of public Court Confidence. The count model estimates (Model 3) predict an increase of one standard deviation (0.034) away from the mean (0.326) confidence in the Supreme Court would yield roughly 40 percent more jurisdiction-stripping laws (i.e., from approximately five to eight laws). Likewise, a shift from the minimum to maximum observed level of public confidence in the Court predicts an increase from roughly two to ten jurisdiction-stripping laws. This expected increase in jurisdiction stripping exceeds the magnitude of the effect of a min-to-max increase in *Adjusted Judicial Workload*, which predicts an increase of about six jurisdiction-stripping laws.[16] Thus, *Court Confidence* is both a statistically and substantively significant predictor of jurisdiction-stripping legislation, but in a surprising direction.

Additionally, and also in contrast to prior research, Americans' confidence in Congress is *negatively* associated with jurisdiction stripping. In other words, the higher public confidence in Congress, the fewer jurisdiction-stripping laws Congress produces. Panel (b) in Figure 2 shows predicted counts of jurisdiction-stripping laws across the observed range of GSS confidence

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[14]A likelihood-ratio test supports rejecting the null hypothesis that the dispersion parameter is zero. Therefore, a negative binomial regression is preferred to a Poisson model.

[15]The negative binomial count models exhibit no significant residual autocorrelation. Also, univariate unit root tests indicate that only the unadjusted judicial workload predictor is nonstationary.

[16]Similarly, a one standard deviation increase above the mean of *Adjusted Judicial Workload* predicts an increase of one jurisdiction-stripping law.
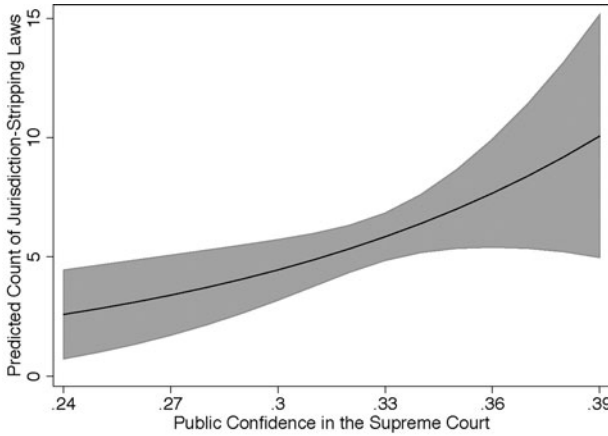
(a) Confidence in the Supreme Court (Count)
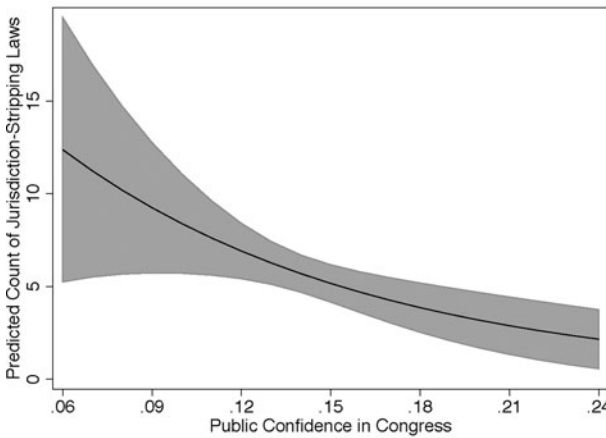
(b) Confidence in Congress (Count)

Figure 2. The impact of public opinion on juris-diction stripping.
Note: Panels (a) and (b) display the predicted count of public laws with a jurisdiction stripping provision across the range of GSS confidence in the Supreme Court and Congress using the results from Model 3 in Table 1.

in Congress using results from Models 3. A decrease from the maximum to minimum level of public confidence in Congress predicts an increase from two to twelve jurisdiction-stripping laws. Public confidence in Congress is also a statistically significant and substantively important predictor of congressional action to limit federal courts' jurisdiction.[17]

We find mixed support for the influence of judicial workloads on jurisdiction stripping. Contrary to prior research, we find no significant relationship between the unadjusted number of federal cases filed against the United States and the number of laws passed limiting courts' jurisdiction. However, we do find a significant relationship between adjusted workload and

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[17]Kennedy (2005) shows that "wrong signed" results can be an artifact of high variance in parameter estimates from multi-collinearity among right-hand side variables. Here, confidence in the Supreme Court and confidence in Congress are reason-ably strongly correlated ($r = 0.66$). However, the variance inflation factor for all included variables in the models reported above never exceeds 2.0. So, it is unlikely that the wrong signs are merely an artifact of high variance among correlated inde-pendent variables.

jurisdiction stripping. Increases in workload relative to the number of Article III judges predicts more jurisdiction-stripping laws.

The models also show that ideological distance between the Supreme Court and Congress has no significant association with jurisdiction-stripping laws. Finally, the number of jurisdiction-stripping laws is significantly, positively related to the total number of laws passed by Congress in the count models.

5. Discussion and conclusions

Several studies find that public support for the Supreme Court predicts both expressions of judicial power and congressional support for (or acquiescence to) courts' authority and decisions. However, the association between public support for courts and judicial independence is inverted for jurisdiction stripping. Greater confidence in courts predicts more jurisdiction stripping, and greater confidence in Congress predicts less jurisdiction stripping.

Vanberg's (2001) theory of transparency in legislative-judicial interactions suggests an explanation for this anomaly. Perhaps legislation limiting courts' jurisdiction is so far removed from public view that an unpopular Congress turns to jurisdiction stripping as a way to control a popular judiciary when a more visible confrontation between the branches would be costly. So, when Congress has less leverage to obtain favorable outcomes from courts, it stealthily retreats to limiting their ability to decide cases at all.

The literature on "internal" legislative support for judicial review suggests a second possibility (e.g., Rogers, 2001). Judicial review by allied courts can advance policy goals preferred by legislators (Whittington, 2005). So, as long as a legislature and a court are sufficiently politically aligned, an unpopular legislature might have incentives to empower a relatively popular court to pursue policy goals (at least temporarily) outside its reach.

Another possibility is that some limits on deciding cases may enhance judicial independence. For example, the Supreme Court Case Selections Act of 1988 removed litigants' right to appeal certain state court decisions to the Supreme Court (although these cases could still reach the Court via writs of certiorari). The law is often interpreted as an expansion of judicial independence since it gave the Court greater freedom to select more legally and politically salient cases without the burden of deciding as many mandatory appeals. It is possible that some jurisdiction-stripping laws likewise clear out classes of unimportant cases, freeing judges to act in other areas.

Finally, it is also possible that the relationship between public opinion and jurisdiction stripping observed here is spurious and some additional factor influences public perceptions of the Court and Congress as well as Congress's production of jurisdiction-stripping legislation, although few plausible mechanisms are yet evident to us. Whatever the case, the positive association between confidence in the Court and jurisdiction-stripping legislation confounds the straightforward prediction of the public support hypothesis. These results suggest a need for continued attention to the role of public opinion in shaping interactions between federal courts and Congress (Rogers and Ura, 2020). Addressing this anomaly is an important challenge for scholars of judicial independence.

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