Implications of Court Curbing in the US States

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"[P]olitical actors – and their respective parties – have strong incentives to seat judges who share their preferences."

Bonica and Sen (2017a, p. 562)

Court curbing is any proposed policy "that threatens to restrict, remove, or otherwise limit the Court's power."

Clark (2011, p. 19)

Introduction

Court curbing aims to alter judicial behavior by proposing and enacting policy that would diminish judicial independence and court authority. Scholars have found that court curbing has implications on judicial behavior and decision-making for United States Supreme Court justices in the use their power of judicial review (see Clark 2009, 2011, Mark and Zilis 2019). However, "the uniqueness of the [Supreme Court] is a nontrivial and stubborn threat to the external validity of studies based solely on it" (Collins and Martinek 2010, p. 398). In this paper, I propose a strategy to extend the work on implications of court curbing on judicial decision-making to the US states, leveraging the substantial institutional and contextual variation present at the state level. This project is motivated by two substantive questions: 1) does court-curbing activity influence judicial decision-making and, if so, 2) why does court-curbing activity influence judicial decision-making? In other words, how

does court curbing impact judicial decision-making?

In answering these questions, I argue that court curbing does have an impact on judicial decision-making in the US states. I specifically consider how different levels of court-curbing activity influence the use of judicial review by state court of last resort justices. My theory, in brief, is as follows. Judges are motivated by policy goals in their decision-making process. Judges are constrained or empowered by levels of judicial independence and relationships with non-court actors (in particular legislators) in the policymaking environment. Policymakers can alter levels of judicial independence by proposing and passing court-curbing policies, which aim to diminish the court's power, authority, and independence.

Other policymakers will engage in higher, more intense levels of court-curbing activity when courts decide cases in a way that diverges from the preferences of other policymakers. Furthermore, the court's use of judicial review represents a threat to the legislative and executive branches of government as the court can invalidate policy in statutes that other policymakers may prefer. With greater threat to judicial independence, judges will alter their behavior and become more deferential to government action under judicial review, especially when ideological divergence remains high. My broad expectations are that if court-curbing intensity increases, then a judge will be more likely to uphold a law in judicial review. Additionally, if court-curbing likelihood increases, then a judge will be more likely to uphold a law in judicial review.

This paper proceeds as follows. First, I define and explain the concept of court curbing, my explanatory variable, and how it has been applied at the national and state levels. Second, I define and explain the concept of judicial review, my dependent variable, and how it is used in the US states. Third, I offer my theoretical explanation, which I outline above. Fourth, I present my research design of how I plan to test my theoretical expectations. Fifth, I propose my data collection strategy for this project. I focus specifically on how I conceptualize and operationalize my court-curbing intensity, court-curbing likelihood, and

judicial review measures. Finally, I offer concluding remarks on the future of this project and the study of court curbing overall.

Court Curbing in the US States

I define court curbing as **any proposed policy "that threatens to restrict, remove, or otherwise limit the Court's power"** (Clark 2011, p. 19). Court curbing presents an attack on the institutional legitimacy of courts and acts as a signal of public perceptions of judicial legitimacy (Clark 2011). Furthermore, court curbing has implications on judicial decision-making, influencing judicial behavior in a variety of ways, including in the use of judicial review (Clark 2011, Vanberg 2005). Yet, almost all scholarship on court curbing in the United States has focused on the relationship between Congress and the US Supreme Court. Important exceptions to this include studies on the United States Court of Appeals and Congress (Moyer and Key 2018) and at the state level (see Blackley 2019, Fite and Rubinstein 1936, Hack 2021, and Leonard 2016). This paper contributes to the later.

Court curbing by policymakers has implications for judicial independence and decision-making. Per the definition, court curbing aims to diminish judicial independence. Lower levels of judicial independence endanger the political rights of individuals (Hamilton 1788, Rosenberg 1994). Furthermore, when legislatures increase court-curbing activity against courts, courts tend to be more deferential to acts by legislatures when they are challenged. When legislatures engage in less court curbing activity, courts act in a less constrained manner, more willing to invalidate acts by legislatures (Clark 2009, Clark 2011, Vanberg 2001). The threat that court curbing poses to judicial independence and, by extension, political rights and judicial decision-making establishes a need to understand the motivations and implications of court curbing at all levels of the judiciary. These threats appear largely motivated by ideological and institutional factors (Mark and Zilis 2018b, Tecklenberg 2020).

As is the case with most scholarly topics on the judiciary in the United States, most of the court-curbing literature focuses on the national level. However, state courts act

as diverse laboratories in the American judicial system. The variation in institutional and contextual factors offers an analytic advantage, with plenty of variance offering opportunities to test many important hypotheses (Brace and Hall 2000, Brace, Hall, and Langer 2001). State courts hear and decide on the vast majority of cases brought to court throughout the United States. Yet, state courts remain disproportionately understudied compared to their tremendous workload and role in establishing case law (Brace and Hall 2000, Brace, Hall, and Langer 2001).

Similarly, studies on court curbing in the US have viewed the phenomenon almost entirely in a national context of the relationship between the US Supreme Court and Congress. However, a small but growing literature has benefited from the institutional and contextual variation among state judiciaries in the US not present in the more static relationship between the US Supreme Court and Congress (Fite and Rubenstein 1937, Leonard 2016, Blackley 2019, Hack 2021). Consistent with findings from national-level court-curbing literature, as ideological distance between members of the the state court of last resort and state legislators grows, the likelihood of court curbing among the US states also grows. This includes ideological divergence between state courts of last resort and legislatures as institutions (Leonard 2016, Hack 2021) and legislators as individuals (Blackley 2019).

These state-level studies provide additional insight on factors that influence court-curbing activity and threats to judicial independence. In addition to ideological divergence, the method of selecting judges can motivate court curbing. More independent methods of judicial selection (e.g., life appointment, merit selection) tend to attract more court-curbing proposals compared to other, less independent methods of judicial selection (e.g., legislative or executive appointment) (Leonard 2016). Methods of judicial retention, on the other hand, appear to not influence decisions to propose court-curbing legislation (Hack 2021).

Legislator-specific factors can motivate individual legislators to engage in court-curbing activity. Blackley (2019) demonstrates an interactive relationship between the competitive-

ness of a state legislative district and the ideological divergence of that representative and the state court of last resort. State legislators who represent a "safe" district sponsor court-curbing bills at a lower rate than their counterparts in more "competitive" districts (Blackley 2019). However, as those legislators in "safe" seats become more ideologically divergent from state courts of last resort, they are more likely to sponsor court-curbing bills. Extending beyond sponsorship, co-sponsorship of court-curbing bills occurs more under legislatures with higher levels of legislative professionalism.

These studies explain the motivations for court-curbing activity but do not approach the implications of such court curbing on the behavior of state courts targeted and threatened. Hack (2021) does find that an increase in the number of laws invalidated by a state judiciary garners more court-curbing bills in the next year. But what of the reverse? How does court-curbing activity influence the use of judicial review (the choice of invalidating laws) by the state judiciary in the next year? In other words, how willing are state courts to invalidate state laws in years after extensive *court-curbing activity*? This manuscript aims to contribute an explanation and test to answer this question.

I emphasize *court-curbing activity* rather than *court-curbing proposals or bills*for a very important reason. Virtually all court-curbing literature in American Politics carries an assumption that all court-curbing proposals are equally meaningful to and influential on judicial independence and judicial decision-making. However, members of the judiciary do distinguish between serious and nonserious attempts to curb the court's judicial independence and authority (Mark and Zilis 2018a, 2019). Studies of court curbing must move beyond simple counts of court-curbing proposals because it is the "intensity and seriousness of attacks" on courts that matter most (Rosenberg 1992, p. 379). To this end, I construct a novel measure of court-curbing intensity that considers court-curbing efforts based on the institutional and contextual seriousness of the proposal, which I conceptualize here and operationalize in the Research Design section.

This novel measure of court-curbing intensity is distinguished from past scholarly efforts, which consider the unweighted count of court-curbing policy proposals. For instance, in Leonard (2016) the dependent variable is the "count of court-curbing bills or constitutional amendments introduced in a state year" (p.60). As a dependent variable, Leonard aggregates the number of court-curbing bills within a state by year, not accounting for the progress those bills made in the legislative process or the seriousness the institutional threat posed to the judiciary. Counts of court-curbing bills are also used as independent variables. Clark (2009) aggregates all court-curbing bills proposed in Congress each year between 1877 and 2006. He uses the count of court-curbing bills proposed by Congress as an independent variable to explain the use of judicial review by the Supreme Court. Clark assumes that the threat behind each court-curbing proposals is equally dangerous from the perspective of the Supreme Court as the justices determine whether or not to use judicial review. However, a measure of court-curbing intensity, weighting each of these proposals based on their threat, would likely yield more accurate results.

I define court-curbing intensity as **"the scope or level of institutional change of the proposed policy to the targeted judiciary, the threat of which may be actual or perceived by members of the judiciary."** And I define court-curbing likelihood as **the likelihood that the policy will be enacted based on contextual factors of the policy's proposer and progress through the policymaking process**. In other words, court-curbing intensity is the scope or extent of curbing the policy would exact on the judiciary. Meanwhile, the court-curbing likelihood entails how likely the court-curbing policy is to be enacted, largely based on the proposer and how far the proposed policy gets through the policymaking process.

Court-Curbing Intensity

Members of the judiciary are overwhelmingly concerned with threats that are most likely to reduce judicial independence (Mark and Zilis 2018a). These include changes to

the structure of the judiciary and levels of judicial discretion, both of which can enhance or diminish the judiciary's ability to realize long-term policy gains (Mark and Zilis 2018a, Mark and Zilis 2019). Therefore, the content of the bill matters, particularly when court-curbing bills are multi-faceted in their court-curbing "themes" (Elliott 1958). These court-curbing themes include changes to jurisdiction, altering judicial terms and qualifications for office, reducing court budgets, etc.

In line with Mark and Zilis (2018a) and Rosenberg (1992), I propose a novel measure of court-curbing intensity to capture important dynamics related to judicial independence and separation of powers. I define court-curbing intensity as the **scope or level of institutional change of the proposed policy to the targeted judiciary, the threat of which may be actual or perceived by members of the judiciary**. The assumptions and logic behind this measure is explained below.

First, members of the judiciary consider the actions of other political actors when the judiciary makes decisions. Members of the judiciary act strategically based on beliefs and observations of actions by the legislature and/or public (Vanberg 2001, Vanberg 2005, Whittington 2003). When the judiciary believes it has low levels of approval from the public and the judiciary sees the legislature attempting to court curbing, the judiciary is less willing to challenge the actions of the legislature.[1] In such a circumstance, the judiciary fears future retaliation that has a greater likelihood of being enacted.

Second, members of the legislature (and this applies to other relevant policymaking entities) have the choice to engage in court curbing. They may make this choice for a variety of reasons, including ideological divergence (Blackley 2019, Leonard 2016, Mark and Zilis 2018b), electoral position-taking (Clark 2011, Moyer and Key 2018), and party coalition-building (Bridge and Nichols 2016, Nichols et al. 2014).

[1] reference legislature in this and future sections in this paper. Please note that I use this term as interchangeable with other relevant policymaking entities. For example, one could insert executive or voters in the instance of a public ballot initiative.

Third, members of the legislature can choose from a variety of "themes" of court curbing. In other words, legislatures can curb the court through several different types of policy. This includes policy related to 1) court jurisdiction, 2) qualifications and tenure for members of the judiciary, 3) rule making authority of a court, 4) salary of members of the judiciary and budget for the judiciary as a whole, 5) selection and retention methods for members of the judiciary, and 6) structural changes to the judiciary (see Table 1 for examples of each of these types).

Fourth, in addition to choosing the type of court curbing described above, members of the legislature can also set the amount of court curbing they wish to exact on the judiciary in each individual court-curbing proposal. They may engaging in minor "tinkering" of the judiciary by making small but meaningful alterations to their state's judiciary. Or they may propose a wholesale change to their court institutions, up to removing and replacing their current judiciary with an entirely new structure with new authority. The degree of institutional change, which threatens judicial independence, can evoke differing responses from members of the judiciary (Mark and Zilis 2018a, Mark and Zilis 2019). With more substantial institutional change being proposed, members of the judiciary will likely be more attentive to the court-curbing attempt compared to those court-curbing proposals that "tinker at the margins."

Fifth, members of the legislature can also choose court curbing policy that affects a range of one (1) to all courts in a state judiciary structure. As a larger portion of the judiciary is affected, particularly those courts higher up in the judicial hierarchy, these court-curbing attempts can be considered as more intense. Court-curbing proposals that target fewer (or lower level) courts can be considered less intense. For example, a court-curbing proposal that target a single, limited-jurisdiction trial court in a state will likely not be viewed as threatening enough to a state court of last resort as to alter their decision-making. By comparison, a proposal that targets all appellate courts in the state, including the state

Table 1: Examples of Court-Curbing Bills from State Legislatures

Type of Legislation	State	Year	Bill Number	Bill Description
Jurisdiction	MO	2015	SB66	Removes Supreme Court's power to try impeachments and places it in the Senate.
Jurisdiction	WA	2017	SJR8200	Removes judiciary's power to review constitutionality of K-12 funding levels.
Qualifications/Tenure	OK	2016	SB731	Limits Supreme Court and Court of Criminal Appeals judges to 12 years in office.
Qualifications//Tenure	MA	2017	HB61	Limits judges to seven-year terms (multiple until the age of 70). Removes lifetime appointment of judges.
Rule Making Authority	AZ	2015	SCR1002	Provides Supreme Court's rule making authority but adds requirement that all rules are subject to amendment by legislature or initiative.
Rule Making Authority	NM	2018	HJR6	Constitutional Amendment: Removes Supreme Court's power to make rules of practice and procedure. Provides "The practices and procedures pertaining to the supreme court... shall be established by law."
Salary/Budget	MN	2012	SB812	Reduces all judicial and other salaries by 6%.
Salary/Budget	PA	2016	HB2024	Ends automatic cost of living adjustments for judges and other officials.
Selection	TN	2011	SB646	Requires appellate judges be retained by 75 percent of voters rather than by a majority of voters.
Selection	NM	2015	HJR11	Provides for nonpartisan judicial elections (from partisan elections).
Structure Changes	MD	2013	HB83	Increases Court of Special Appeals from 13 to 15.
Structure Changes	WV	2018	HB3040	Creates West Virginia Intermediate Court of Appeals.

court of last resort, would be more likely to evoke a meaningful response from the judiciary in terms of decision-making.

Court-Curbing Likelihood

The second measure I develop in this project is court-curbing likelihood. Again, I define court-curbing likelihood as the **likelihood that the policy will be enacted based on contextual factors of the policy's proposer and progress through the policy-making process**. I detail the logic and assumptions for this measure below.

First, not all court curbing is equally likely to be enacted. The likelier a court-curbing proposal is to be enacted, the more likely members of the judiciary will pay heed to such efforts in their decision-making. In other words, with two identical pieces of court curbing, the one that is farther along in the policymaking process (or has been enacted) will likely concern the members of the judiciary more than the piece that has not made it as far along in the policymaking process.

Second, the policymaking process contains multiple steps.[2] A proposal passing each successive step makes the proposal that much more likely to be enacted. For example, a bill that has reached a floor vote in a legislature is more likely to be enacted (and thus constitute an actual threat to judicial independence) compared to a bill that has only had a hearing in committee but no committee vote scheduled.

How far a court-curbing bill progresses through the legislative process also signals how seriousness the threat is to the judiciary. Any member of the legislature may propose a court-curbing bill for any reason. As a bill comes closer to being enacted, it poses a more serious threat than a similar bill that is farther behind in the process to enactment. A bill passing out of a legislative committee to a floor vote would be viewed by members of the judiciary as a greater threat than a mere proposal (Nagel 1965, Tecklenberg 2020).[3] A bill

[2]For the sake of ease and clarity, understand the policymaking process in this description and related examples to be the legislative process, as opposed to policymaking by executives or directly by the voters.

[3]For instance, Nagel 1965 proposes three measures of "relative success" of court curbing: 1) the number

that passes both chambers of a legislature would be viewed as a greater threat than a bill that passed a single chamber.

The bill sponsor and, to a lesser degree, co-sponsors matter in court-curbing efforts (Blackley 2019, Mark and Zilis 2018a). In particular, the bill sponsor's institutional and ideological position in the legislature send varying signals of the likelihood that the court curbing proposal could be enacted. So third, the institutional position of the policy proposer sends a signal of how likely an individual proposed policy would be to pass. Being a member of the majority party makes it easier to pass a proposed bill out of committee and through the chamber, compared to legislators in the minority. Being a member of the chamber's party leadership (especially when in the majority) could make it more likely your court-curbing bill could be enacted. Being a member of the chamber's judiciary committee (to whom many of court-curbing bills are assigned) signals that the legislator has the interest and means to oversee the judiciary and possess some expertise in policy related to the judiciary (Mark and Zilis 2018a). Finally, members of different chambers in a legislature may possess different incentives to acting on policy related to the judiciary (see especially Tecklenberg 2020, Nagel 1965).

Fourth, the ideological position of the policy proposer also sends a signal of how likely an individual proposed policy would be to pass. Moderate proposers are closer to the median voter in a legislature and, thus, may be more likely to see their policy move farther in the policymaking process.

Judicial Review in the US States

I define judicial review as **"the authority of courts to uphold or invalidate statutes based on constitutional texts."** While judicial review in the United States is commonly traced back to the landmark US Supreme Court case *Marbury v. Madison*

of court-curbing bills reported from legislative committee, 2) the percentage of court-curbing bills reported out of committee, and 3) the level of affected judicial behavior.

(1803), its antecedents extend back farther. At the federal level in the United States, the Supreme Court first exercised judicial review in *Hylton v. United States* (1796), reviewing the constitutionality of the Carriage Tax Act of 1794 but deciding to uphold, rather than invalidate, the statute (Frankel 2008). Going back even further, some British colonial judges in early America were granted the formal powers to veto laws passed by colonial assemblies; this proto-judicial review would also be practiced in some states after independence but prior to the ratification of the US Constitution (Harvey 2015). Therefore, judicial review has an extensive history of use in the states, older than the United States itself, with its origins at the sub-national level.

With use of judicial review in the states occurring since before the United States as a country, state courts developed the institution of judicial review over time. State courts increased the scope of judicial review since the late 1800s, strengthening the separation of powers in state government and protecting the rights of state residents (Sheldon 1988). In the 1980s, state courts invalidated government action/statutes in approximately 20% of cases involving judicial review (Emmert 1992). This is to say that judicial review has a growing and substantial impact on state politics and policy.

State courts do not operate in a vacuum; judges consider the preferences of other policymakers and the interaction of institutions when they use judicial review. When deciding how to vote in cases involving judicial review, justices serving on state courts of last resort consider the ideological distance from other state government actors, how well institutions and rules shield the judiciary from retaliation, and the area of law being considered in the case (Langer 2002). Furthermore,

Theory - Court Curbing and Judicial Review

Judges are concerned with both policy and institutional legitimacy (Segal and Spaeth 2002, Epstein and Knight 1998). Judges wish to see their policy preferences become law. Judges also desire higher levels of judicial legitimacy, which acts as the primary enforcement

mechanism to incentivize compliance by lower courts and other actors in government. Without higher levels of institutional legitimacy, it will be more difficult for judges to see their policy through their decisions enforced (Epstein and Knight 1998).

However, judges understand constraints on their behavior, including binding precedent (Hinkle 2015), legislatures (Mark and Zilis 2018a, 2018b, 2019, Vanberg 2001), executives (Johnson 2015), retention audiences (Canes-Wrone, Clark and Kelly 2014), and legitimacy as an enforcement mechanism (Vanberg 2005). Furthermore, methods of judicial selection act as an important ex ante control mechanism over courts. Those who select judges can input judges who reflect the selecting entity's policy preferences.

Motivated by policy goals and operating in a environment with potential constraints, judges prefer higher levels of judicial independence. Higher levels of judicial independence mean there are less constraints on judicial decision-making. Judicial independence insulates judges from consequences and retaliation from other political actors due to unpopular decisions and rulings. These safeguards that establish and maintain judicial independence allow judges to act with less constraints than they would otherwise. Higher levels of judicial independence also allow judges more discretion in their decision-making, particularly when pursuing their policy goals. With a lack on constraints on judicial decision-making, judges can pursue their policy preferences.

Judges pay attention to and can react to sufficient threats to judicial independence in a way that would prevent or mitigate the attacks on judicial independence by non-court actors. Judges understand that threats to judicial independence can reduce the amount of discretion that judges possess in making decisions, which limits their ability to achieve preferred policy outcomes. A primary source of threats to judicial independence comes in the form of court-curbing policy proposal from the legislature (Clark 2011, Leonard 2016). The aim of court-curbing policy proposals is to limit judicial independence. Judges distinguish court-curbing efforts and decide to pay attention to court curbing that represents a serious

threat to judicial independence and the integrity of judicial institutions (Mark and Zilis 2018a).

These threats tend to come from political actors more ideologically divergent from judges' policy preferences. The method of judicial selection sets the stage for and influences the amount of ideological divergence between the judiciary and other political actors. In particular, it matters which set of actors play a role in the selection and which actors do not. One such actor, political parties, remains an ever-present entity in the policymaking sphere, often essential for the selection and retention of most policymakers. If a political party, who nominates most policymakers in the legislative and executive branches, can select preferred judges to the bench, then like-minded policymakers have less reason to threaten judicial independence because much ideological divergence with the court is unlikely to exist. However, if political parties exert relatively little influence in the judicial selection process, then ideological divergence may result and incentivize policymakers to propose court curbing to influence judicial behavior.

Policy goals motivate political parties (Bawn et al. 2012, Hassell 2016). Political parties pursue these policy goals through their unique function in the political environment - their ability to nominate and support candidates for elected office (Broockman 2014). Legislators, who are motivated by the goal of reelection, must act as effective agents of policy-oriented parties to retain the nomination, favor, and support of their political party in each election campaign. Political parties put forth policymakers who can pursue preferred policy or act as a check on other policymakers who have policy preferences divergent from the political party's.

Judicial review represents a threat to the legislative and executive branches and, by extension, the political parties supporting members of those branches. Specifically, judicial review threatens the policy goals of the other branches of government and political parties as courts can uphold or overturn policy in a direction that legislator and political parties do

not prefer. Judicial review establishes a constitutional basis for the court's decision meaning. Non-court actors, like the legislature, who wish to override the policy established by the court in that instance can only do so via constitutional amendment, a difficult process especially in places with entrenched judicial review like the United States (Harvey 2015).

Higher levels of judicial independence allow for courts to exercise judicial review and invalidate government action (Clark 2009, Vande Kamp 2021). When policymakers, particularly the legislature, decide the judiciary has invalidated or will invalidate too many policies that policymakers prefer, then policymakers will attempt to diminish judicial independence through more intense court-curbing policy proposals. Furthermore, policymakers can push these court-curbing proposals farther through the legislative process, signaling to courts that there is an increased likelihood that the court-curbing proposals will be passed by the legislature and enacted into law. The legislature ultimately aims to incentivize the judiciary to not invalidate government action that will endanger policy preferred by legislative actors and their political party.

Therefore, with recent proposed court curbing being sufficiently intense and/or likely to be enacted, judges will alter behavior and make decisions more in line with a divergent legislature's preferences. While judges may be no less likely to exercise judicial review, they will be less willing to invalidate government action in the face of threats to their judicial independence. Based on this theory, I expect that more intense court-curbing activity will result in less invalidation of government actions by state courts of last resort. Furthermore, as court-curbing activity becomes more likely to be passed and enacted by state legislatures, state courts of last resort will be less likely to invalidate government actions through judicial review.

Expectations

$H1$: If court-curbing intensity increases, then a judge will be more likely to uphold a law in judicial review.

$H2$: If court-curbing likelihood increases, then a judge will be more likely to uphold a law in judicial review.

Research Design

I plan to test my theoretical expectations using a probit estimation method. The time frame of this study will be 2009-2019.[4] My dependent variable is binary and measures the state supreme court justice's choice in the use of judicial review (1 if a statute is overturned and 0 otherwise). My independent variables include sets of novel measures of court-curbing intensity and court-curbing likelihood. I define these variables and detail the data collection processes below. I also plan to include a set of control variables to capture potential influences on judicial decision-making in state courts of last resort. My unit of analysis is state supreme court justice-case.

Dependent Variable - Judicial Review Data Collection Process

My dependent variable is binary and measures the state supreme court justice's choice through judicial review to overturn (1) a state law, statute, or provision, or to do otherwise (0). I draw heavily from the state supreme court judicial review data collection process developed by Langer (2002, p. 135-136). I supplement this process based on the nation-level United States judicial review data collection process of Clark (2011) and state supreme court decision data collection process of Hall and Windett (2013).

The goal of my dependent variable data collection process is to collect outcomes of state court of last resort cases involving judicial review with important justice-level information for the cases collected and measured. The time frame of this data collection project covers the years 2009 through 2019. The primary variables of interest include case outcome (statute overturned or otherwise), state court of last resort justice vote (vote to overturn a statute

[4]The court curbing data I collect and use will be lagged by a year and, as a result, will extend through the time frame 2008 through 2018.

or otherwise), name of justice, identifying information for case, and the area of law the case most applies to. Below I detail each step of the data collection process, define variables, and characterize how variables are measured/coded.

1) I use the Westlaw Next online database. Westlaw Next is a searchable online database commonly used by practitioners in the legal profession, policymakers, and academics. It contains a universe of court cases, specifically cases decided by state courts of last resort, which are the set of cases of interest for this project.

2) I navigate to Westlaw Next and select the **State Materials** tab under the **Browse** menu on the main page. I select the link for the state of interest under the **State Materials** tab. I then select the link for the ***state of interest*** **supreme court** link under the heading **Cases**. The resulting from selecting that link will bring up the "10 most recent documents." To be able to make a more comprehensive search, I select the **Advanced** search link next to the page's search bar.

3) Under the Advanced Search link, enter the following search terms, which I detail further in Step 4:

advanced: (CONSTITUTIONAL! UNCONSTITUTIONAL! /5 STATUT!

LAW PROVISION) & DA(aft 12-31-2008 & bef 01-01-2020) % CI(MEMO!)

4) These search terms produce all cases that contain words with the stems **constitutional!** or **unconstitutional!** within five (5) words of words stemming from **statut!** or the words **law** or **provision**. This search results with cases decided within the years 2009 through 2019. However, this search does not include any cases with citations that include words containing the word stem **memo!**, per Langer (2002). Furthermore, unlike Langer (2002), I do not restrict my search by the topics field for specific areas of law, which means the results include all potential areas of law.

5) I download all resulting cases from the search conducted in Steps 3 and 4 as a

list of items in Microsoft Excel (CSV) document. The resulting CSV document contains identifying information on each case, which I further define (see Table 2).

Table 2: Variables from Initial Westlaw Search

Variable	Description
Type	This variable only contains cases. Categorized as **Case**.
KeyCite Treatment	Identifies cases that have received negative treatment and are no longer good law. Categories include **Red** (points in the case have been directly overturned), **Yellow** (points in the case have been treated negatively but not directly overturned), or no negative treatment.
KeyCite URL	Contains the unique URL for further information on the treatment for the case through Westlaw.
Title	Official title of the case, containing the litigants names.
Document URL	Contains the unique URL for full details on the case through Westlaw.
Court Line	The name of the court which had made the decision in the case.
Filed Date	Date the case was first filed with the state court of last resort.
Citation	Official citation for the case.
Cite Caveat	Additional information for the citation for the case.
Parallel Cite	Additional official citation for the case.
Docket Num	Docket number of the case for the state court of last resort.
Summary	Very brief summary of the case. Includes the area of law the case primarily deals with.
Search Snippet 1	A small section of the case decision opinion that contains terms from the initial search.
Search Snippet 2	An additional small section of the case decision opinion that contains terms from the initial search.

6) I exclude cases involving challenges to county or municipal ordinances and per curiam opinions, per the rationale from Langer (2002). Regarding cases involving challenges to county or municipal ordinances, state policymakers are concerned with the fate of state policy. They may care about specific county and municipal ordinances within their geographic constituency. However, cases involving those non-state-level policies do not have a direct effect on the ability of state policymakers to maintain the status quo. Per curiam opinions signal that the case is likely not confrontational nor does it contain as important of implications as those cases that prompt distinct opinion writers.

7) I categorize each case outcome with a binary variable indicating whether a statute

was overturned in the case (1) or otherwise (0).

8) In addition, I collect data on the participation, opinion writing authorship, and vote of state court of last resort justices on a case. I use the Hall and Windett (2013) coding strategy when determining how I would classify and categorize these variables. Table 3 details the variables and descriptions that capture essential information on judges, their opinion writing role, and their individual decision in a case.[5]

9) Last, I categorize the **Area of Law** based on the **Summary** column in the original resulting csv file from Westlaw. For most cases resulting from the Westlaw search, there is a designated area of law at the beginning of the text in the **Summary** column.

Independent Variables - Court Curbing Data Collection Process

I created two novel measures of court curbing, which constitute my primary independent variables - court-curbing intensity and court curbing likelihood. Again, I define court-curbing intensity as **"the scope or level of institutional change of the proposed policy to the targeted judiciary, the threat of which may be actual or perceived by members of the judiciary."** And I define court-curbing likelihood as **"the likelihood that the policy will be enacted based on contextual factors of the policy's proposer and progress through the policymaking process**." First, I operationalize court-curbing intensity with a set of variables that broadly measure: 1) the type of court-curbing policy, 2) the type(s) of court(s) targeted by the court-curbing proposal, and 3) proportion of the judiciary affected by the court-curbing proposal (See Table 4).[6]

[5]Not all of these variables would be used for this specific project on the implications of court curbing in the US states. However, capturing them may serve future scholarship on decision-making of state court of last resort justices in their use of judicial review.

[6]Future efforts in this court-curbing data collection project will also measure the extent of institutional change within the court-curbing proposal.

Table 3: Variables Added after Initial Westlaw Search

#	Variable	Description
1	Judge Last Name	Last name of state court of last resort justice - uppercase first letter, then rest is lower case. This format is consistent with the PAJID update by Hughes and Wilhelm (n.d.), which will be used to measure the ideology of judges during the time frame of interest.
2	Judge First Name	First name of state court of last resort justice. Uppercase first letter, then the rest is lowercase.
3	Judge Code	Unique three digit numeric identifier for each state court of last resort justice.
4	Set of Majority Opinion Author Last Names	Seven (7) individual indicators for justices who were opinion authors and in the majority. Contains the last name of state court of last resort justice who authored majority or concurring opinion in the case. Input with uppercase first letter, then the rest is lowercase.
5	Set of Majority Judge Code Indicators	Seven (7) individual indicators for justices who were opinion authors and in the majority. Each indicator is associated with the related **Majority Opinion Author Last Name** variable. Input the unique three digit numeric **Judge Code** identifier for the justice who authored a majority or concurring opinion.
6	Set of Dissenting Opinion Author Last Names	Seven (7) individual indicators for justices who were dissenting opinion authors and in the minority. Contains the last name of state court of last resort justice who authored majority or concurring opinion in the case. Input with uppercase first letter, then the rest is lowercase.
7	Set of Dissenting Judge Code Indicators	Seven (7) individual indicators for justices who were dissenting opinion authors and in the minority. Each indicator is associated with the related **Dissenting Opinion Author Last Name** variable. Input the unique three digit numeric **Judge Code** identifier for the justice who authored a dissenting opinion.
8	Set of Judge Vote Indicators	Eleven (11) individual binary indicators of an individual justice's vote in the case measuring whether the justice voted to overturn a statute (1) or otherwise (0). No more than one indicator for each justice who was serving on the state court of last resort that had decided on the case. The set includes eleven individual indicators to make sure there are enough indicators beyond the maximum number of justices on a state court of last resort. The current maximum is 9.
9	Set of Judge Code Vote Indicators	Eleven (11) individual indicators, no more than one for each justice who was serving on the state court of last resort that had decided on the case. Input the unique three digit numeric **Judge Code** identifier for the justice associated with the vote.
10	Set of Judge Vote Name Indicators	Eleven (11) individual indicators, no more than one for each justice who was serving on the state court of last resort that had decided on the case. Contains the last name of of state court of last resort justice associated with the vote. Input with uppercase first letter, then the rest is lowercase.

Table 4: Court-Curbing Intensity of Policy Measures

Type of Policy	1) Selection 4) Salary/Budget	2) Jurisdiction 5) Structure Changes	3) Qualification/Tenure 6) Rulemaking Authority
	Low Intensity	Moderate Intensity	High Intensity
Type of Court Targeted	General or Limited Trial Court	Intermediate Appellate Court	State Court of Last Resort
Proportion of Judiciary Affected	One Court	Multiple Courts	Entire Judiciary

Court-Curbing Intensity - Type of Policy

The type of policy indicator will be a series of binary variables, one for each of the seven (7) types defined above. A value of 1 indicates that the specific court-curbing proposal contains policy that fits the description of the specific type of policy. A proposal is able to contain multiple types of policy. In other words, value of one in one of the seven types of policy for a specific court-curbing proposal does not exclude that proposal from having a value of one in another (or multiple) types of policy indicators. For example, a bill may contain court-curbing elements that alter the structure of the judiciary and the selection method. In this example, the binary indicator for Structure Changes would equal 1, as would the binary indicator for Selection.

I consider seven types of court-curbing proposals, as used by Bill Raftery's *Gavel to Gavel* database of state legislation affecting the courts. These seven types include changes to the 1) selection (and retention) methods for a court, 2) jurisdiction of a court, 3) qualifications for judicial candidates and length of terms for members of the judiciary, 4) salary of the members of the judiciary and budget for a court, 5) structure of a court or judiciary, 6) rule making authority of a court, or 7) other important aspects of the judiciary.[7] Below I briefly

[7]Other important aspects are those court-curbing proposals that are not initially categorized into the

define each of these types of court-curbing proposals and outline the intensity within each of these types. Within these types of court curbing, different proposed policies entail more or less intense court-curbing effort.

Selection-based court curbing alters any process through which judges may be formally selected or retained, either through initial or interim methods prescribed.[8] Jurisdiction–based court curbing establishes sets of policy areas and/or laws over which a court may consider cases and have the ability to make decisions, interpretations, and applications regarding the law.[9] Qualifications/Tenure–based court curbing places constraints, which must be satisfied, in order for a judicial candidate to be able to serve on the court and the duration of a judge's individual term or tenure in office.[10]

Structure Changes–based court curbing expands or constricts the number of judges on an established court and/or creates or terminates a court in the state judicial system.[11] Salary/Budget–based court curbing reduces income, allowances, benefits, and other monies that judges may receive or are designated for court operations.[12] Rule Making Authority–based court curbing limits the power and authority of courts to promulgate rules of practice and the definition of the scope of such rules (Joiner and Miller 1957).[13]

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first 6 types by the *Gavel to Gavel* database. An example includes Illinois HB2426, where the bill proposed that all judges and justices must consent to alcohol and drug testing, stipulating punishments if judges or justices fail a test. In this instance, the bill would inserting itself into the personal lives of members of the judiciary, restricting their ability to live personally and, perhaps, altering their behavior for fear of being called in for testing. See: `https://www.ilga.gov/legislation/billstatus.asp?DocNum=2426&GAID=13&GA=99&DocTypeID=HB&LegID=87623&SessionID=88`.

[8]Example of selection-based court curbing: Tennessee SB 646 in 2011 would require appellate judges be retained by 75 percent of voters rather than by a majority of voters.

[9]Example of jurisdiction-based court curbing: Arizona HB 2024 in 2016 would prohibit state courts from enforcing U.S. Supreme Court decisions unless decision is enacted by Congress.

[10]Example of qualifications/tenure-based court curbing: Oklahoma SB731 in 2016 would limit Supreme Court and Court of Criminal Appeals judges to 12 years in office.

[11]Example of structure changes-based court curbing: Maryland HB83 in 2013 would increase Court of Special Appeals (state's intermediate appellate court) from 13 to 15.

[12]Example of salary/budget-based court curbing: Minnesota SB812 in 2012 would reduce all judicial salaries by 6%.

[13]Example of rule making authority-based court curbing: New Mexico HJR6 in 2018 would remove Supreme Court's power to make rules of practice and procedure. Provides "the practices and procedures pertaining to the supreme court and all inferior courts shall be established by law."

Court-Curbing Intensity - Type of Court Targeted

Second, I measure the type of court(s) targeted by the court-curbing proposal. The higher the level of court targeted, the more intense the court-curbing proposal. For example, a court-curbing proposal targeting the state court of last resort would be more intense than a similar proposal that targets only a state general jurisdiction trial court. I establish a set of binary indicator measuring whether a court-curbing policy targets a court in a particular level (1) or not (0). The level of courts include: limited jurisdiction trial court, general jurisdiction trial court, intermediate appellate trial court, and court of last resort. I classify courts based on their designation in the annual Book of the States. These binary indicators are not mutually exclusive; a court-curbing policy can target multiple types of courts such that multiple indicators for type of court targeted can take on a value of 1 (court is targeted) for a single court-curbing proposal.

Court-Curbing Intensity - Proportion of Judiciary Targeted

Third, as the number of courts targeted by the court-curbing bill increases, so does the court-curbing intensity. I create an indicator representing the proportion of courts affected by the specific court-curbing proposal. This proportion ranges from greater than 0 to less than or equal to 1, based on the number of courts targeted over the total number of courts in the state judicial hierarchy, excluding limited jurisdiction trial courts. I form the numerator for this proportion based on the *Court-Curbing Intensity - Type of Court Targeted* indicators detailed above and multiple those by the total number of state courts that fit that type. I source the number of courts in each type of court from the annual Book of the States for each year in this study. As an example, Texas has two state courts of last resort (Texas Supreme Court and Texas Court of Criminal Appeals), one intermediate appellate court (Texas Courts of Appeals), and one general jurisdiction trial court (Texas District Courts).[14] If a court-curbing proposal targeted only the state court of last resort level, the proportion of judiciary

[14]See the Texas State Judiciary website, which contains a pdf file for download of the structural chart of the state judiciary `https://www.txcourts.gov/about-texas-courts/`

targeted would equal 0.5. Similarly, if a court-curbing proposal targeted only the Texas Courts of Appeals, the proportion of the judiciary would equal 0.25.

Court-Curbing Likelihood - Progress through the Policymaking Process

Finally, the court-curbing likelihood measure is comprised of indicators of progress through the policymaking (legislative) process and co-sponsorship support for the court-curbing proposal (See Table 5). As a court-curbing proposal makes its way farther through the policymaking or legislative process, the more likely it becomes to be enacted. All proposals in the legislature begin by being proposed by a member of the legislature. A proposed court-curbing bill is, of course, is more likely to be enacted than no proposal at all. However, most bills do not pass through legislative committee, which is usually necessary in order to secure a floor vote. So a court-curbing bill that passes committee has a higher likelihood of being enacted than a similar proposal that does not pass a committee vote. A floor vote in a chamber is an even stronger indicator of court-curbing likelihood, especially if it passes.

Table 5: Court-Curbing Likelihood - The Legislative Process

Event	Low Likelihood	Moderate Likelihood	High Likelihood
Bill in One Chamber Farthest Extent	Proposal Committee Hearing	Passes Committee	Passes Floor Vote
Bill in Two Chamber Farthest Extent	Proposal Committee Hearing	Passes Committee	Passes Floor Vote Passed by Legislature
Signed By Governor?		No	Yes No, Veto Override
No. of Co-Sponsors	0-2	2-10	10+
Partisan Make-up of Co-Sponsors	One Party	Two Parties	

If a bill is proposed in both chambers and progresses through one or both, it possesses even higher court-curbing likelihood.[15] Given that normally bills must pass through both chambers before they can possibly be signed into law, progression through both indicate ever higher threats to the judiciary.

To measure these indicators, I have a set of binary variables for each legislative chamber in a state. The set will include indicators for each of the following steps in the policymaking process: 1) Bill Proposed, 2) Bill Received a Committee Hearing, 3) Bill Passes Committee, 4) Bill Received a Floor Vote, and 5) Bill Passes Floor Vote. If a court-curbing bill passes both chambers of the state legislature, there will be a set of binary variables related to the state executive, including: 1) Governor signed the bill, 2) Governor vetoed bill and veto was overridden, and 3) Governor vetoed bill and the veto was not overridden. The higher the cumulative number of this set of indicators, the higher the court-curbing likelihood of enactment for the specific court-curbing proposal.

Connected to the legislative process, co-sponsorship serves as another indicator of court-curbing likelihood as well. As the number of co-sponsors on a court-curbing bill increases, so do its chances of passage through a chamber. So as the number of co-sponsors on a bill increase, so does the likelihood of the court-curbing effort. Furthermore, if legislators from multiple parties co-sponsor the bill, that indicates that there may be broader (bipartisan) support for the measure. This broad support may manifest into a bill that progresses farther through the legislative process, which poses a greater threat to the judiciary.

To measure co-sponsorship, I will have two indicators. One will have a value equal to the number of co-sponsors for a court-curbing bill. The second will be a binary indicator taking a value of 1 if the court-curbing bill has co-sponsors from more than one party and a value of 0 otherwise.

[15] Nebraska would be an exception in this instance as it has a unicameral legislature.

Control Variables

I plan to control for the ideology of the justice, ideology of the median state legislator for the year of the case, the ideological divergence between the justice and the median legislator for the year of the case, and presence of divided government. Below I detail the control variables, how I measure them, and the reasoning for their inclusion in my model.

First, I control for the ideology of the justice. To measure the ideology of each justice, I use the PAJID update developed by Hughes and Wilhelm (n.d.). Their efforts encompass my time frame of interest, 2008-2019 inclusive. As a result, their dataset is more appropriate than the Bonica and Woodruff (2015) judicial ideology dataset, which would only cover the years 2008-2012, inclusive, less than half the years of interest.

Second, I control for the median state legislator ideology in the year of the case decision. I use the Shor and McCarty ([2011] 2020) dataset on state legislator ideology.

Third, I take the first two control variables, the ideology of the justice and the ideology of the median state legislator, and measure the divergence between them. The divergence between the judiciary and median state legislator correlates with increased court-curbing activity in the US states (Leonard 2016, Hack 2021). Courts may be less likely to exercise judicial review and invalidate statutes when this ideological divergence is higher due to the heightened threat of retaliation from the state legislature.

Fourth, I control for docket control and agenda setting institutions through the use of a mandatory or discretionary docket rule for the state court of last resort in the year of the case decision. I measure this with a binary variable indicating whether the state court of last resort has a mandatory (1) docket or a discretionary (0) docket rule. Possessing the discretion to hear appeals or not possessing such discretion, as is the case for those courts with mandatory docket institutions, can alter the set of cases a court considers. Courts with discretion can decide not to offer judgment on cases that may produce outcomes divergent

from the preferences of state legislators.

Last, I control for the presence of divided state government in the year of the case decision. I create a binary indicator measuring whether the state government is divided (1) or otherwise (0). I define divided government as an instance where 1) different parties hold majorities in the legislator or 2) one party holds a majority in the legislature while a different party holds the executive branch (governor). Divided government can cause gridlock in the policymaking process and may empower or constrain the ability of legislators to propose court-curbing policy. Furthermore, this may impact the intensity or likelihood of passage for such court-curbing proposals.

Conclusion

Court curbing attempts to reduce the targeted judiciary's ability to act independent from other policymakers. This project aims to demonstrate and explain the implications of court curbing in the context of the US states. I argue that state court of last resort justices will alter their behavior and become more deferential to government action in the use of judicial review with elevated threats to judicial independence due to increased court-curbing efforts. Based on my theory, I develop novel measures of court curbing (court-curbing intensity and court-curbing likelihood. Additionally, I detail my proposed data collection strategies to capture court curbing activity in the US states from 2008-2018 and the use of judicial review at the case-level by each of the 52 state courts of last resort from 2009-2019. I also provide some prospective details on research design and control variables to consider.

This project will create opportunities for the continued study of court curbing and the use of judicial review in the US states. The theoretical contributions broadly speak to the interplay between policymakers, branches of government, and the limits of judicial independence. Courts do not operate in a vacuum when creating consequential policy through their decisions in cases and the precedent they set. Their interactions with other branches and

their independence from those branches impact judicial decisionmaking, which alters policy. Furthermore, this project challenges the theoretical assumption that all court-curbing activity is equally influential by arguing for and crafting measures for novel concepts of court-curbing intensity and court-curbing likelihood.

The contribution of data more than doubles the time frame of court curbing data from 2008-2012, extending it through 2018. This court curbing data also contain characteristics about court-curbing proposals previously not measured, including progress through the policy-making process, types of state courts targeted, and proportion of state courts targeted, which comprise my novel measures of court-curbing intensity and court-curbing likelihood. The judicial review data, relying heavily on the data collection process developed by Langer (2002), extends her previous years of coverage (1970-1993). It updates data on the use of judicial review and related characteristics at the case-justice level by adding data for the years 2009-2019, inclusive.

The study of state courts remains as important as it is understudied. This project aims to give ample and robust theoretical and empirical tools to those who study state courts and judicial independence.

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