# 1 Introduction

Conventional wisdom tells us that a legislature displeased with the judiciary can pursue a strategy of court curbing to check its independence. Indeed, since 1802 when a newly elected Congress reorganized the circuit courts and abolished the Supreme Court's August term, court curbing has been significant in American politics. Research indicates that court curbing efforts can produce their intended effect by constraining judges and resulting in less interbranch conflict (Clark, 2009). Theoretically, judges perceive legislative attacks on the judiciary as a signal of public disapproval and that they lack political support. Given that federal judges do not receive the electoral feedback of the elected branches, they rely on these signals to interpret their standing with the public. Accordingly, court curbing serves to moderate the political insulation of federal courts.

But what happens when the institutional design of the judicial branch is altered, and judges have a direct measure of public support for their actions? Do legislative signals have the same effect? This alternative institutional design exists in most state judiciaries, as most state court judges acquire or retain their seats via public approval. In this way, judicial independence in state courts is structured by the electoral accountability built into their selection and retention systems. While research confirms that judges may alter their decisions when faced with reelection, the extent to which legislative-judicial relations are affected by electoral politics is unknown.

Consider contentious legislative-judicial relations in Ohio and Pennsylvania in recent national headlines. In Ohio, the state supreme court struck down multiple iterations of the legislature's redistricting plan between 2020 and 2022, citing incompatibility with voter preferences for maps drawn without partisan favoritism. In Pennsylvania, the supreme court redrew the state's congressional districts in 2018 and declared the legislature's maps unconstitutionally gerrymandered. Each judicial rejection was high-profile, incurring vocal and public reaction from frustrated legislators. Beyond calls for the impeachment of justices, legislators retaliated each year with court curbing proposals. Ohio lawmakers proposed blatant budgetary and jurisdiction restrictions and even succeeded with altering state supreme court selection.[1] Pennsylvania legislators proposed at least 16 bills to alter judicial selection, tenure, and discretion, including a bill to allow the state legislature

[1]These bills include H.B. 620 (budget cuts), H.B. 62 and H.B. 371 (jurisdiction limits), and S.B. 80 (partisan elections).

to redraw judicial district lines as a gerrymander against unpopular judges.[2] Legislative rhetoric accompanied the proposals referencing "activist courts" and asked, "are the people getting their voice heard, or are the courts?" (Berry et al. 2022). The courts, however, did not pivot. The Ohio Supreme Court continued to strike down state legislative maps (five times) between 2020 and 2022, even as legislative court curbing proposals mounted. In the face of court curbing proposals, the Pennsylvania Supreme Court upheld maps opposed by the state legislative majority again in 2020 and created more legislative dissatisfaction with decisions about mail-in voting and election procedures.

Are the actions of these high court justices surprising? Perhaps not, given that justices in Ohio and Pennsylvania are selected in partisan elections, no different than legislators in those states. Judicial independence was in fact a rationale made by the earliest proponents of judicial elections in the mid-nineteenth century. Still, because this departs from what existing research tells us about the impact of court curbing efforts, it merits further scrutiny. Accordingly, we consider the impact of electoral politics on legislative-judicial relations. Specifically, we examine the extent to which public support, expressed through the electoral component of judicial retention, can insulate judges from the impact of legislative retaliation.

In this research, we extend existing work on court-curbing, the separation of powers, and judicial independence in American states. While existing works consider the extent to which institutional design influences judicial-executive relations (e.g., Johnson, 2014, 2015) or legislative efforts to curb courts (e.g., Leonard, 2016), comparatively little research considers how institutional design affects court or judge behavior in the legislative-judicial separation of powers context. In this piece, we specify game-theoretic models that allow for an electoral component for courts. Our formal models suggest that vulnerabilities in office, such as finite terms and a desire to remain in office, can lead courts to curtail their activism when evaluating legislative policy. Nevertheless, our models also show how private signals of legitimacy stemming from direct electoral feedback can bolster courts in the separation of powers game. We test the empirical implications of our formal models using a unique dataset of state supreme court-level decision making between 2007 and 2017. We also consider individual justice behavior and evaluate factors that might impact individual decisions to declare legislative acts unconstitutional.

[2] See `https://shorturl.at/IRlbk` (last accessed on January 1, 2025).

Our results suggest that, in the separation of powers game, courts and justices that receive electoral feedback from voters benefit compared to those that do not. We find that electoral institutions are associated with a significantly increased likelihood that both state supreme courts and individual justices will vote to invalidate legislative acts. These findings lend support to our theoretical paradigm that judicial elections can serve as independent signals of legitimacy, obviating the legislature's monopoly (and their attendant advantage in the separation of powers game) on such information. Indeed, our findings dovetail nicely with recent theoretical advancements concluding that judicial elections enhance institutional legitimacy (Gibson, 2008, 2013). Importantly, we find no support that legislative court-curbing efforts are associated with a constrained use of judicial review.

## 2 Court-Curbing and the Separation of Powers

Our research examines the influence of separated powers upon judicial behavior. Scholars have assessed the likelihood that legislative efforts to limit or punish the judiciary have some measurable influence on the exercise of judicial review (Murphy, 1962; Eskridge, 1991; Gely and Spiller, 1992; Epstein and Knight, 1998; Rogers, 2001). This research largely concludes that the threat of legislative hostility induces strategic judicial behavior, including a constrained use of judicial review. Research by Clark (2009) is particularly significant as he integrated legislative court curbing behavior into a separation of powers model. Clark (2009) argued that court curbing bills indicate public disapproval of the judiciary by giving legislators a means to provide some symbolic response to constituents or to position-take regarding judicial action (i.e., Mayhew, 1974). Accordingly, he conceived public opinion to be an indirect conditioning agent upon judicial decision-making.[3]

While the separation of powers literature informs our understanding of the political conditions that result in a less independent judiciary, a significant proportion of separation of powers work focuses on the institutional arrangement of federal courts. Still, separation of powers research at the state level is important to note. For example, analyses of court-curbing efforts at the state level consider institutional factors related to the legislative use of court-curbing bills. The most important work in this area has been advanced by Meghan Leonard (e.g., Leonard, 2016, 2022*a*,*b*), along with

[3]Segal (1997), however, found little evidence that Congress systematically constrains judicial behavior.

other recent works by Blackley (2019) and Catalano (2022). In a similar vein, Johnson (2014, 2015) finds that the institutional design of state executive departments also conditions executive-judicial relations. She finds that state courts behave more deferentially to state executives who have greater institutional control over their agencies or who have greater capacity to retaliate against unfavorable decisions. Despite these excellent analyses of interbranch relations focused upon state courts, important questions remain unaddressed.

What scholars do recognize about state judiciaries is that those not given electoral insulation like the federal judiciary can exhibit electoral accountability like their legislative counterparts. In this way, judicial independence in the states may be affected by the method that judges attain and keep a position on their courts. Generally this research concludes that appointed judges are more likely to behave according to sincere preferences (Brace and Hall, 1997; Langer, 2002; Brace and Boyea, 2008), while elected judges are more likely to incorporate public preferences into their decisions (Hall, 1992; Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014). Of course, there is some disagreement as to whether such differences can be observed when case visibility is taken into consideration (Canes-Wrone, Clark and Semet, 2018; Cann and Wilhelm, 2011), in use of judicial review specifically (Leonard, 2014), or across all types of electoral or appointive systems (Canes-Wrone, Clark and Kelly, 2014). Indeed, research finds that appointed judges can behave in similarly strategic ways (Shepherd, 2009).

Beyond differences in independent behavior across elected and appointed courts, scholars have also recognized that differences may exist in the behavior of state legislatures as they interact with these courts. This research suggests that legislative attempts at court curbing are a function of ideological distance as well as the degree of political insulation for the judiciary (Bell and Scott, 2006; Clark, 2009, 2011; Mark and Zilis, 2018). While Clark's (2009) analysis of federal courts equates political insulation with lifetime appointment, Leonard (2016) argues that political insulation may or may not be related to how a court's members are selected. Her analysis of court curbing by state legislators demonstrates that the political relationship between a state's legislative and judicial branch is more important than judicial selection methods in determining whether legislators will exhibit court curbing behavior. In what follows, we undertake a systematic analysis of the separation of powers in the states and consider the impact of court curbing at both the court level as well as the individual level.

## 3 Judicial Independence and the Separation of Powers

It is important to understand the institutional and political factors that affect judicial independence. Institutionally, judges are well-positioned to enjoy independence when they have security in office (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014; Hall, 1987). In the federal courts, judges cannot be removed from office except through impeachment and conviction, which is exceptionally rare. Without a need for reelection or reappointment, federal judges need not ordinarily concern themselves with public opinion (cf. Giles, Blackstone and Vining, 2008; McGuire and Stimson, 2004). And despite the fact that judges cannot enforce their rulings on elected officials, they may police lower court judges and even hold public officials in contempt for violating their orders (Cameron, Segal and Songer, 2000; Hall, 2014; Peltason, 1971; Songer, Segal and Cameron, 1994), regardless of public approval for their decisions.

Politics may also empower judicial discretion. An effective judiciary usually needs at least one other branch of government to support its agenda in order to play a significant policymaking role in public affairs (Rosenberg, 2008). The U.S. Supreme Court's decades' long effort to further civil rights for African Americans illustrates this point (Peltason, 1971). An independent judiciary can also further policy goals for elected elites who lack sufficient political capital to advance unpopular public policies or who face entrenched political interests (Rodgers and Bullock, 1976; Whittington, 2005).[4] Judicial independence can also be useful to political parties who compete closely with others for power, especially when opposition parties have polarized preferences (Hanssen, 2004; Stephenson, 2003, 2004). When a majority party's agenda is at little risk of being threatened by a minority party, majorities have fewer incentives to share power with courts.[5]

One additional explanation for judicial independence centers upon public opinion. There is generally strong support for American judicial institutions, even when the public disagrees with specific case outcomes (e.g., Caldeira and Gibson, 1992; Gibson, 2007). Logically, elected officials

[4]For example, during the John F. Kennedy administration, the Democratic Party was badly fractured between conservative and liberal factions, which made liberal policy-making difficult for Kennedy in Congress, especially given the many vetoes enjoyed by prominent southern Democrats. Kennedy therefore backed the U.S. Supreme Court's decision in *Baker v. Carr* (1962), which challenged racially malapportioned legislative districts in the South and paved the way for more liberal Democrats in the House of Representatives—effectively hurting his own party but furthering his ideological interests (see Whittington, 2005, 587-8). See Fox and Stephenson (2011) for a model that shows how such an arrangement can be welfare suboptimal.

[5]Indeed, Hanssen (2004) finds that American states with more homogeneous majority parties such as those in the American South are less likely to invest their judiciaries with greater independence than states with more competitive and polarized political parties.

risk voter backlash if they defy a popular court (Rogers, 2001; Vanberg, 2001, 2005). Given that courts have neither the power of the "purse nor sword," legitimacy is perhaps the most important political capital for the judicial branch.

Federal judges are often poorly informed about the state of their popular legitimacy and thus rely upon signals from other branches of government to make inferences about public support (Clark, 2009, 2011). Of course, elected officials are not strictly incentivized to be honest brokers of judicial legitimacy (Epstein and Knight, 1998). In fact, research suggests that members of Congress take advantage of this informational shortfall by sending signals of waning public support to curb the use of judicial review, even if public support for the judiciary is high (Clark, 2009, 2011). By taking advantage of informational asymmetries, elected officials can secure more-preferred outcomes (Clark, 2009, 2011; Eskridge, 1991; Gely and Spiller, 1990; Murphy, 1962; Rosenberg, 2008; Segal, Westerland and Lindquist, 2011).

But what happens in the absence of informational asymmetries? More specifically, what happens when judges have a distinct estimate of public support that does not include an indirect legislative reference point? Unlike federal courts, judges in the American states are overwhelmingly accountable either directly to voters or indirectly to other elites for their continuance in office. Arguably, such accountability mechanisms make judges acutely aware of their standing with the public. The question becomes whether the exercise of judicial review differs among institutions that make use of such accountability mechanisms compared to those that do not.

With respect to judicial review, it is possible that accountability might constrain a judiciary's ability to engage in an unfettered review of legislative acts. After all, the existence of a mechanism for institutional accountability is evidence that judges can be punished for unpopular decisions. To this end, a sizable literature demonstrates that electorally accountable judges may tailor their decision-making to win reelection (e.g. Hall, 1987)—especially for salient cases and when more proximate to retention elections (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014; Canes-Wrone, Clark and Semet, 2018; Cann and Wilhelm, 2011). This may be true in unelected courts as well as appointed, as judges who must occasionally win reappointment to serve additional terms in office exhibit similar behavior (Canes-Wrone, Clark and Kelly, 2014; Shepherd, 2009).[6]

[6]Shepherd (2009) finds, however, that appointed judges who are term limited are not so constrained.

Alternatively, judicial accountability mechanisms might benefit courts in the separation of powers insofar as they can provide unique information about legitimacy, independent of any signal sent by the legislature. Indeed, judicial elections were first adopted in the wake of Jacksonian populism in part to make judges more independent of state legislatures. They were reformed during the Progressive Era to make judges more independent of party machines, and were further refined in the latter half of the twentieth century to make judges more independent of voters themselves (Geyh, 2003; Streb, 2007). Thus, public goodwill could empower courts in their interactions with the legislative branch (Baum, 2006; Carrubba, 2009; Clark, 2009; Rogers, 2001; Staton, 2006). Recent experimental and observational research indicates that accountability mechanisms like judicial elections influence democratic engagement with courts and help to enhance judicial legitimacy (Bonneau and Hall, 2009; Gibson, 2008, 2009, 2013; Hall, 2015).[7] Survey research lends support to the idea that electorally accountable courts pose more significant roadblocks to legislatures than appointed courts (Langer and Wilhelm, 2009). For these reasons, electoral institutions might not only enhance judicial legitimacy but also judicial independence. In the following sections, we formalize these expectations with respect to judicial independence, legitimacy, and the separation of powers.

## 4 Game Theoretic Models

In this section, we outline game theoretic models of judicial independence and the separation of powers. We build most directly upon Clark's (2009) model of legislative-judicial relations.[8] We use his model as a baseline for an unelected judiciary. We then refine this baseline to allow for retention mechanisms, including the opportunity for courts to learn about the state of their legitimacy after having stood for reelection.[9] These models allow us to understand how changing institutions and informational structures influence legislative hostility to courts and judicial discretion in the

[7] One could further argue that so long as pivotal individuals who choose judges are reasonably homogeneous, and so long as term lengths aren't too long, courts should never be too unaligned with popular or elite preferences (Black, 1958; Dahl, 1957; Downs, 1957). This kind of ideological proximity should prevent courts from making too many unpopular decisions that tend to erode their legitimacy and deprive them of their independence in the separation of powers game.

[8] Other similar works that model legislative-judicial interactions, judicial review, and public opinion include Carrubba (2009), Rogers (2001), Staton (2006), Stephenson (2004), Vanberg (2001), Vanberg (2005), among others.

[9] We recognize that the term, "retention," can refer to a specific type of judicial election, especially in jurisdictions using the Missouri Plan. Nevertheless, we use the term in its more generic sense in this section to refer to any type of election mechanism by which an incumbent judge is evaluated for continuance in office.

separation of powers game. In consideration of space, we present the results from the models below, and we rigorously prove them in a supplemental appendix.[10]

### 4.1 Unelected Courts

There are two players in this version of the game, $N = \{j, l\}$, which include a judicial branch, $j$, and a legislative branch, $l$.[11] Prior to play, Nature determines $j$'s popular legitimacy probabilistically, $\Omega \in \{A, B\}$. When $\Omega = A$, the judiciary is said to be illegitimate such that unconstrained behavior fails to enjoy public support—vice versa when $\Omega = B$. The legislative branch observes this state and proceeds to send $j$ a signal relating to its institutional legitimacy, $\omega \in \{a, b\}$, where $\omega = a$ is a signal of waning public support, and $\omega = b$ one of strong support. The judiciary is imperfectly informed regarding the state of its legitimacy. Its prior beliefs are such that $Pr(\Omega = A) = p$, where $p \in (0, 1)$. It updates its beliefs via Bayes' Rules whenever possible and proceeds to evaluate the constitutional validity of a pair of legislative acts, $d \in \{c, u\}$.[12] It can either make a "constrained" choice, upholding the act's validity, or an "unconstrained" choice, striking it down. Upon making its decision, the game ends, states are realized, and payoffs accrue.

All things being equal, $j$ prefers to make an unconstrained decision when it is popularly legitimate and a constrained choice when it is not. The judiciary earns $b_j > 0$ whenever it plays $d = u$ and $\Omega = B$. It earns $-b_j$ whenever it plays $d = u$ when $\Omega = A$. Anytime $j$ plays $d = c$, it earns a payoff equal to 0. The legislative branch's payoffs are determined according to its policy and electoral benefits. The legislature earns a policy benefit of $b_l > 0$ anytime $j$ makes a constrained choice and $-b_l$ whenever it makes an unconstrained choice. The legislative branch also earns an electoral payoff of $\epsilon > 0$ if it accurately matches its signal to the state of the world ($\omega = \Omega$), and it earns $-\epsilon$ if it fails to do so. Given asymmetric information and the requirement that players update their beliefs according to Bayes' Rule, an appropriate solution concept for this game is a perfect Bayesian equilibrium, which attains when every player chooses sequentially rational strategies that

[10] Because the focus of this work is upon judicial behavior, we do not present any formal propositions with respect to legislative behavior. Regardless, we derive and prove optimal legislative behavior thoroughly in the appendix.

[11] Note that this version of the game is structurally identical to Clark's (2009) and therefore serves as our baseline model.

[12] We have the judiciary evaluate two legislative acts in this and the subsequent model so that we may draw direct comparisons between results in these and the final game, which models two periods of judicial review, punctuated by an election.

are consistent with their conjectures, when $j$ updates its beliefs according to Bayes' Rule (whenever possible), and when players' conjectures are correct.

Comparative statics stemming from our model of unelected courts are presented in the left-hand pane of Figure 1. Note that so long as $l$'s electoral incentives are sufficiently high ($\epsilon > 2b_l$), it will always truthfully convey to $j$ its popular legitimacy. Consequently, $j$ will make constrained choices if $\omega = a$, and unconstrained choices if $\omega = b$. But suppose $l$ highly values policy-based payoffs ($\epsilon < 2b_l$). If $j$'s prior belief is that it is popular ($p < \frac{1}{2}$), then $l$ will engage in a semi-separating strategy such that it reveals $j$'s legitimacy when it is low. When its legitimacy is high, $l$ will strategically bluff that it is low with probability $q^* = \frac{p}{1-p}$. As $j$ increasingly believes it is illegitimate, then it becomes more likely that $l$ bluffs when $\Omega = B$. In a semi-separating equilibrium, the probability that $j$ makes an unconstrained decision after observing $\omega = a$ is $m^* = \frac{2b_l - \epsilon}{2b_l}$. The probability $j$ makes an unconstrained decision in response to $l$'s bluffing strategy is increasing in $l$'s preference to win policy-based benefits and decreasing in $l$'s preference to win electoral benefits. This is because it is less likely $l$ bluffs when it is governed by electoral payoffs and more likely it bluffs when it is governed by policy payoffs. Finally, when $j$'s prior belief is that $l$ pursues policy-oriented benefits ($\epsilon < 2b_l$) and when $j$'s *ex ante* belief is that it is illegitimate ($p > \frac{1}{2}$), then $l$ will always signal that $j$ is illegitimate, and $j$ will always make a constrained choice.

### 4.2 Elected Courts without Feedback

Absent accountability mechanisms, the likelihood $l$ signals that the court is illegitimate is a function both of its desire to protect its legislative agenda, along with the court's prior belief it lacks legitimacy. Because these courts are disconnected from public opinion, legislatures capitalize upon information asymmetries to win at the separation of powers game. In this section, we consider how accountability mechanisms like elections affect the separation of powers game. We now amend the game such that judges must face some type of retention vote after they have considered the constitutionality of some legislation, and they must now attend to not only their preference to maintain legitimacy but also their jobs.[13]

[13]We note here that two American states, South Carolina and Virginia, subject judges to reappointment by the legislature. We do not model a scenario where the same institution that signals the court determines its retention decision. Rather, we assume that the individuals who signal the court and who determine its retention are different players.

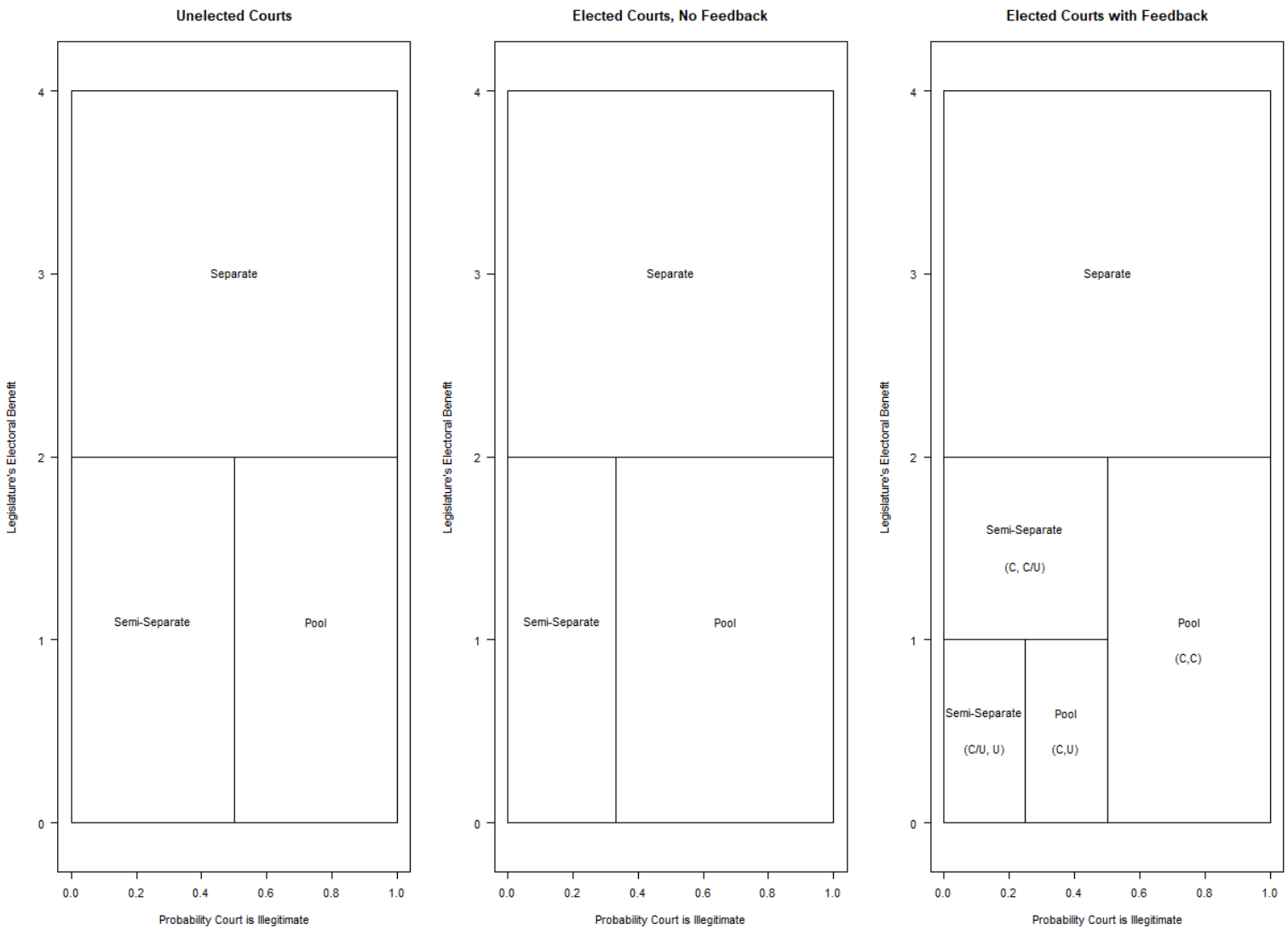


Figure 1: Perfect Bayesian equilibria across three models of legislative-judicial interactions. The $x$-axis represents the prior probability that $j$ is illegitimate ($p$), and the $y$-axis is the legislature's preference for electoral benefits ($\epsilon$). Parenthetical strategies represent the judiciary's choice in a given period such that "C" denotes a constrained decision, "U" an unconstrained one, and "C/U" a mixture. All omitted variables are held constant, $b_l = b_j = \pi = 1$.

This version of the game has three players, $N = \{j, l, v\}$, which are a judiciary, legislature, and voter, respectively.[14] We assume that $v$ derives utility from having a legitimate judiciary such that it earns a payoff of "1" if it retains $j$ given $\Omega = B$ or if it removes $j$ given $\Omega = A$. Otherwise $v$ earns a payoff of "0." The voter has some prior belief that $j$ is legitimate, $\rho > \frac{1}{2}$.[15] Therefore, $v$ would prefer to retain $j$ when $\Omega = B$, and it would prefer to remove $j$ when $\Omega = A$. Suppose that an unconstrained judicial policy reveals $j$'s type; whereas a constrained choice conceals it. Therefore, the best that $v$ can do is to retain $j$ anytime it makes a constrained choice or, provided $\Omega = B$, an unconstrained choice. The voter will remove $j$ from office if it observes unconstrained behavior when $\Omega = A$. Additionally, $j$ has preferences over voting outcomes. We assume that $j$ earns a benefit, $\pi > 0$ anytime it is retained and $-\pi$ when it is removed from office.

Beginning with $l$'s optimal strategy, we see from the middle pane in Figure 1 that, once again, so long as it has a strong preference for electoral benefits ($\epsilon > 2b_l$), it will sincerely reveal the state of the world to $j$. But as $l$ favors its policy benefits, it becomes more likely to signal the judiciary that its legitimacy has waned. Note from the figure that the area in which $l$ enforces a pooling equilibrium is strictly larger than in the game with no elections such that a pure strategy pooling equilibrium attains for all $\epsilon < 2b_l$ and $p > \frac{b_j}{2b_j+\pi}$. Breaking the latter threshold down further, we see that $l$ is strictly more likely to signal that $j$ is illegitimate as $j$ increasingly values winning retention and is less likely to do so as $j$ increasingly values making sincere declarations of legal policy. In other words, $l$ is able to use $j$'s preference to win retention against it and to enforce a larger class of pooling equilibria such that $j$ acquiesces in upholding the validity of $l$'s policies. And even when $j$ is nearly certain it is popularly legitimate ($p < \frac{b_j}{2b_j+\pi}$), $l$ is able to enforce a semi-separating equilibrium in which the probability it bluffs that $j$ is illegitimate is strictly greater than the semi-separating equilibria without judicial accountability, $q^* = \frac{p(\pi+b_j)}{(1-p)b_j}$.

Turning now to the elected judiciary's response to the legislative signal, we find that its independence is curtailed by its preference to win retention. Of course, so long as $l$ enters into a separating equilibrium, $j$ will make a constrained choice when $\omega = a$ and an unconstrained choice otherwise. But when $l$ has a strong preference for policy-based benefits, $j$ is less able to invali-

[14] We model the behavior of a single voter. Our results would be unchanged if instead we modeled an homogeneous bloc of voters with identical preferences or a heterogeneous electorate with a median, decisive voter.

[15] This assumption reflects the fact that elected officials are generally chosen by majoritarian preferences (i.e., Downs, 1957). See Maskin and Tirole (2004) for a similar modeling strategy in a game of principal-agency and information asymmetry.

date legislative acts. First, note that because $\frac{b_j}{2b_j+\pi} < \frac{1}{2}$, the judiciary upholds the constitutional validity of legislative acts for a strictly larger class of beliefs than when it is unelected. Without retention mechanisms, $j$ strikes down $l$'s policies probabilistically for all $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$, but with the introduction of elections, $j$ upholds these policies with probability 1.0. And even when $j$ is most certain it is legitimate ($p < \frac{b_j}{2b_j+\pi}$), it invalidates legislative acts with probability $m^* = \frac{2b_l-\epsilon}{2b_l}$. This likelihood is equal to the game without accountability mechanisms but covers a strictly smaller class of prior beliefs. That judicial accountability appears to cower courts in response to mounting legislative posturing leads to the following proposition:

- *Proposition 1*: For all $\epsilon < 2b_l$, the *ex ante* likelihood that $j$ plays $d = u$ is at least as small among elected courts without feedback as it is for unelected courts.

### 4.3 Elected Courts with Feedback

The previous model showed how accountability mechanisms largely favor the legislature in the separation of powers game. Because $j$ prefers to win retention, $l$ is more likely to signal that it has lost the trust of the public, and $j$ is more likely to bend in response, upholding $l$'s policies. But let us take a moment to reflect upon why this is the case. According to the assumptions in Clark's (2009) original model, courts prefer their opinions to enjoy popular legitimacy, and to the extent that legislators are better informed than are judges on this count, courts show deference to legislative signals of waning legitimacy—even when they are baseless. We argued above, however, that this assumption may be inappropriate for elected courts. When judges stand for retention, they can receive feedback from directly from voters. To the extent that accountability could render legislative signals of popular legitimacy moot, elected courts might become more independent of the legislative branch.

To suss out these confounding issues in the separation of powers game, we modify the previous game with an elected court such that $j$ now evaluates the constitutional validity of some legislative act, stands for retention, and then evaluates the validity of some second legislative act.[16] If $j$ makes a constrained choice in its first exercise of judicial review, $v$, being unable to update its beliefs, will retain it, but unless $l$ plays a separating strategy, $j$ will remain unsure of its type too. By contrast,

[16]We assume that if $j$ loses its election, it is replaced by some behavioral type that evaluates the constitutional validity of a second act of the legislature. For simplicity, assume that this individual makes a choice that is inconsistent with $j$'s preferences such that it earns $-b_j$ from its successor's policy-making.

if $j$ makes an unconstrained choice in its first exercise of judicial review and is retained, it will have learned with certainty that it is a legitimate institution and will therefore make an unconstrained choice in its subsequent assessment of legislative policy. By allowing $j$ to make policy, learn about its legitimacy directly from voters, and then make additional policy, we are modeling a court's ability to side-step the legislature's monopoly on information and update its beliefs regarding its legitimacy from its own, independent source.

We first consider the legislature's behavior as it strategizes over the signal it sends to the judiciary. As before, so long as $l$ sufficiently values its electoral benefits ($\epsilon > 2b_l$), it will sincerely convey to the judiciary the state of its legitimacy. But as $l$ increasingly values policy benefits, we see from the right-hand pane in Figure 1 that the set of equilibria becomes significantly more nuanced. Let us begin with the case in which $l$ values its electoral payoffs more than its policy-based ones, though not so much that it separates its signal ($b_l < \epsilon < 2b_l$). The legislature's optimal strategy in this range is identical to the game without judicial accountability mechanisms. Put differently, allowing $j$ the opportunity to learn about its legitimacy directly from $v$ eliminates the informational advantage $l$ had over $j$ in the game of elections without feedback. When $j$ believes it is illegitimate ($p > \frac{1}{2}$), the legislature pools its signal that $j$ is illegitimate. And when $j$ believes it is legitimate ($p < \frac{1}{2}$), the legislature bluffs with probability $q^* = \frac{p}{1-p}$.

Next, consider the case for when $l$ strictly cares for its policy benefits more than for its electoral ones ($\epsilon < b_l$). Note immediately from the right-hand pane in Figure 1 that $l$ is more likely to pool its signal that $j$ lacks legitimacy than in either of the two previous models. So long as $p > \frac{b_j}{2b_j+2\pi}$, the legislature has no incentive to place any positive weight upon the signal $\omega = b$. As we explain below, this is due to the fact that, given the opportunity for feedback, $j$ is more likely to make unconstrained decisions after its reelection, which is especially detrimental to a legislature that highly evaluates its policy payoffs. Furthermore, note that even when $j$ is nearly certain it is legitimate, $p < \frac{b_j}{2b_j+2\pi}$, the legislature enforces a semi-separating equilibrium but only by placing a very high probability on bluffing on $j$'s legitimacy, $q^* = \frac{p(2\pi+b_j)}{(1-p)b_j}$. Note that the likelihood $l$ bluffs in this semi-separating equilibrium is strictly greater than in any of the semi-separating equilibria discussed above. It is clear, then, that when $\epsilon < b_l$, and when courts enjoy access to extra-legislative feedback, legislatures become more likely to send signals of waning legitimacy compared to unelected courts or to elected courts without feedback.

Finally, consider the judiciary's optimal response to the signals it receives from the legislature. As before, so long as $l$ plays a separating strategy, $j$ will make a constrained choice when its signal is that its legitimacy is low and an unconstrained choice otherwise. When $l$ has a weak preference for its electoral benefits ($b_l < \epsilon < 2b_l$), $j$'s optimal strategy is guided by its priors. When it believes it is illegitimate ($p > \frac{1}{2}$), it will make a constrained choice, win reelection, and then make another constrained choice. Interestingly, this behavior is identical as to when it faced no accountability whatsoever. When it believes it is legitimate ($p < \frac{1}{2}$), it enters into a semi-separating equilibrium such that it strictly makes a constrained choice prior to its election, wins reelection, and then makes an unconstrained choice afterward with probability $m^* = \frac{2b_l - \epsilon}{b_l}$. Note that this equilibrium is similar to the semi-separating equilibria identified among unelected courts except that $j$ is less likely to strike down some legislative act before its election and more likely to strike one down afterward.

Now consider the judiciary's optimal response when $l$ is highly motivated by its desire to secure favorable policy outcomes ($\epsilon < b_l$). Recall that for this class of preferences, $l$ is driven to bluff more than in any previous version of the game. But note how $j$'s response to this bluffing is more sophisticated than in previous models. This is because of its ability to condition its future decisions upon $v$'s response to its earlier ones. As before, when $j$ is, on balance, more certain it is illegitimate ($p > \frac{1}{2}$), it will only make constrained decisions. When its prior beliefs are that it is legitimate ($p < \frac{1}{2}$), however, it enters into two types of equilibria. The first is a pooling equilibrium that attains when $j$ is reasonably certain it is legitimate, $p \in \left(\frac{b_j}{2b_j + 2\pi}, \frac{1}{2}\right)$. In it, the legislature always signals $j$ that it is illegitimate, $j$ makes a constrained choice prior to its election, and then it makes an unconstrained choice afterward. This behavior resembles the pandering phenomenon observed in much of the judicial elections literature. Courts are unsure about their legitimacy, and they value their positions; therefore, they pander for retention and then exhibit unconstrained behavior afterward.

When $j$ has a very strong belief it is legitimate $\left(p < \frac{b_j}{2b_j + 2\pi}\right)$, and when it has the opportunity to confirm its beliefs via election, it behaves in some of its most unconstrained ways yet. For all $\epsilon < b_l$ and $p < \frac{b_j}{2b_j + 2\pi}$, a set of semi-separating equilibria attain such that $j$ always makes an unconstrained choice when it observes a signal of $\omega = b$. And when $l$ signals that $j$ has lost public support, the courts make an unconstrained choice prior to its election with probability $m^* = \frac{b_l - \epsilon}{b_l}$. Note that this

probability is strictly less than in any previous semi-separating equilibrium. Nevertheless, unlike the other set of semi-separating equilibria identified for elected courts with feedback, $j$ is willing to gamble on unconstrained decision-making prior to its retention decision, risking its security in office. If $j$ makes an unconstrained choice prior to its retention decision, $v$ will retain it so long as $\Omega = B$; the judiciary will learn that it is legitimate; and $j$ will continue to make unconstrained choices afterwards. If $j$ makes a constrained choice, $v$ will be unable to update its beliefs and will therefore retain the judiciary. Consequently, $j$ will proceed to make unconstrained decisions since its *ex ante* belief is that it is, in fact, legitimate. That such feedback leads elected judges to make more constrained decisions prior to their elections and more unconstrained decisions afterward leads to the following proposition:

- *Proposition 2*: The *ex ante* likelihood elected courts with feedback play $d = u$ is at least as small as all other courts prior to its retention decision and at least as great afterward.

# 5 Quantitative Analysis

In this section, we test empirical implications of the theoretical models developed above. Specifically, we are interested in how courts and judges behave in our separation of powers game when elements of accountability are introduced. We first assess behavior of American state supreme courts in evaluating the constitutionality of legislative acts. Then, because we recognize that incentives are not distributed uniformly among all members of a court, we disaggregate judicial decision-making and evaluate the behavior of individual state supreme court justices in their votes over the constitutionality of the legislative acts they review. Our conclusions follow.

## 5.1 Court-Level Behavior

The results from our formal models indicate that electoral mechanisms can have two types of effects on courts. First, the desire to continue in office could lead them to engage in more constrained behavior compared to those that are unelected. Second, the act of standing for retention in itself could provide unique information to courts directly from voters regarding their legitimacy such that they no longer need to rely upon (potentially disingenuous) legislative signals of waning public

Table 1: Descriptive statistics for supreme court year-level regressions data

| Variable | Description | Mean (Std. Dev.) |
|---|---|---|
| Total Acts Invalidated (DV) | Number of legislative acts state supreme court invalidated in a year | 0.35 (0.72) |
| Court-Curbing$_{t-1}$ | Number of court-curbing bills or amendments filed in legislature during the previous year | 6.30 (7.87) |
| Elite Distance | Absolute distance from state supreme court median ideology to state's median voter's ideology | 20.93 (13.75) |
| Voter Distance | Absolute distance from state supreme court median ideology to state elite's ideology | 24.67 (14.59) |
| Divided Government | Dichotomous: Takes a value of "1" if state's legislature and governor not controlled by same party, "0" else | 0.40 (0.49) |
| Mandatory Retirement | Dichotomous: Takes a value of "1" if state has a mandatory retirement age for supreme court justices, "0" else | 0.60 (0.49) |
| Term Length | Number of years in a full state supreme court justice's term of office | 8.41 (2.18) |
| Competitive System | Dichotomous: Takes a value of "1" if state uses competitive elections to retain justices, "0" else | 0.40 (0.49) |
| Retention System | Dichotomous: Takes a value of "1" if state uses retention elections to retain justices, "0" else | 0.36 (0.48) |
| Reappointment System | Dichotomous: Takes value of "1" if state uses reappointments to retain justices, "0" else | 0.18 (0.38) |
| Tenure System | Dichotomous (omitted category): Takes value of "1" if state affords justices undefined tenure in office, "0" else | 0.06 (0.24) |

support. In this section, we assess the effect of legislative court-curbing behavior upon courts in a separation of powers game.

Our first model analyzes the behavior of American state supreme courts. Specifically, we follow Clark (2009) and assemble a unique dataset of constitutional challenges to state legislation between 2007 and 2017 in each of the 50 states.[17] Our dependent variable is an event count of the number of legislative acts a state supreme court invalidated in a given year.[18] Declarations

[17]While it is true that two states, Oklahoma and Texas, have two state courts of last resort (one for civil appeals and one for criminal appeals), we omit the highest criminal courts of appeals for these two states.

[18]To identify cases in state supreme courts that considered a constitutional challenge to state law, we conducted searches in Westlaw. We followed the search language and methodology used by Langer (2002) in her analysis of judicial review in the state supreme courts. From this group of cases, we identified those decisions that issued a formal opinion reviewing a state law, excluding per curium opinions and challenges to county or municipal ordinances. More specifically, we used Westlaw filters to identify cases within each state high court and within our timeframe of interest. From this narrowed field, specific search language helped us obtain a full body of cases that were content-analyzed to determine if (1) A legislative act was being considered, and (2) if a declaration of unconstitutionality had occurred.

of unconstitutionality are somewhat uncommon among state courts. The average supreme court invalidated only 0.35 legislative acts in a calendar year.[19] The distribution of these declarations is right-skewed. In approximately three-quarters of all court-years, there were no declarations of unconstitutionality, and the most invalidations occurred in 2007 when the Alaska Supreme Court struck down five legislative acts.

Importantly, we are concerned with the effect that legislative signals of waning legitimacy have upon the separation of powers game. Consequently, we measure the total number of court-curbing bills or amendments state legislators introduced in the previous year.[20] Court-curbing behavior is commonplace amongst states. In a given year, the average legislature introduced 6.3 court-curbing proposals that touched on matters of judicial pay, selection methods, jurisdiction, and more. In 76.4 percent of all state-year observations, state legislatures introduced at least one court-curbing proposal, and the distribution of these proposals is right-skewed. Nevertheless, far fewer court-curbing proposals are actually passed. In a given state-year, only 0.3 court-curbing proposals cleared the legislature. If legislative signals of waning legitimacy are associated with greater judicial constraint, we would anticipate fewer declarations of unconstitutionality following greater volumes of court-curbing proposals.[21]

We are also interested in the effect institutional accountability mechanisms have upon judicial constraint. American states employ a variety of accountability methods, but they can largely be placed into one of four groups.[22] The first resembles that used at the federal level—tenure in office with no significant accountability mechanism. Judges assume a position on a state high court, and that position is theirs for an indeterminate period.[23] Another type of accountability method is reappointment. In these systems, used in only nine states, judges have a finite term. Once that

[19]For comparison, the U.S. Supreme Court, between its October 2005 and 2021 terms averaged 1.59 invalidations of congressional acts, in whole or in part, per term (a rate 354.3 percent higher than the average state high court). See `https://shorturl.at/LVub7` (last accessed 26 February 2025).

[20]To obtain this information, we follow Leonard (2016) and use data made available by the National Center for State Courts (NCSC) on the Gavel to Gavel blog. The blog includes all legislative bill introductions, enactments, and amendments related to judiciaries in the 50 states. In order to identify whether legislative action was court-curbing in nature, we follow Leonard (2016) and use coding rules that mirror those in Rosenberg (1992) and Clark (2011).

[21]The critical reader might take issue with our operationalization of the legislative signal. After all, some court-curbing proposals could be merely symbolic, meaning we ought instead to look at proposals that were actually enacted. We address some of these concerns in a supplemental appendix that re-estimates statistical models using other specifications for our court-curbing indicator. We note here that the results presented within the main text of the paper are highly robust to other measurement strategies with respect to legislative court-curbing proposals.

[22]In the supplementary appendix, we outline how we classify each state court into these various institutional types.

[23]Only three states grant their high court members tenure in office, though two of these have a mandatory retirement age, which can prevent members from serving for life.

term is complete, they must earn reappointment from elites such as the governor or legislature. Thus, these first two system types use no electoral component.

The other two types of judicial accountability mechanisms used by states have an electoral component. The first involves competitive elections which allow for multiple candidates to stand before the electorate for a single judgeship. Some states allow candidates to run with a party label; others do not; while others still use partisan primaries to nominate candidates only to have them run in the general election as nonpartisan candidates. The final electoral system used by states utilizes retention elections in which voters decide to either keep or remove an incumbent judge without the possibility of a challenger. Generally, judges facing retention elections win their campaigns and by soaring margins compared to judges in competitive election states (Bonneau and Hall, 2009; Hughes, 2019; Kritzer, 2015).

The first two systems (tenure and reappointment systems) use no electoral component, while the latter two systems (contested and retention elections) allow for voter feedback through periodic elections, one of which significantly favors incumbents over the other. If our formal model above that does *not* allow for voter feedback better represents the state of the world, then we might expect justices in unelected systems to exhibit less constraint (more independence) than elected justices in the separation of powers game, invalidating increasing numbers of legislative acts. If, however, our formal model that *allows* for voter feedback better represents the state of the world, then we might expect justices with an electoral component to exhibit less constraint (more independence) than unelected justices in the separation of powers game, invalidating more acts, especially when more secure in their position.

Next, we assess the role elite or voter preferences have upon judicial constraint. First, we measure the absolute difference between the median justice of a state supreme court and the median voter in that state. For court preferences, we use PAJID data, first introduced by Brace, Langer and Hall (2000) and more recently updated by Hughes, Wilhelm and Wang (2023).[24] These scores are measured from 0 to 100 such that higher values represent greater liberalism. We also

[24]Because we are estimating models on the separation of powers dynamic in American states, along with public opinion dynamics, we require ideological estimates that are comparable across multiple branches of government and with the citizenry. For this reason, we do not utilize judicial ideological estimates by Windett, Harden and Hall (2015) as there are no estimates of legislative or public preferences in the same issue space. And while Bonica and Woodruff's (2014) CFscores would allow us to make interbranch comparisons between state courts and legislatures, they do not include a direct measure of public mood. Therefore, our use of PAJID and Berry scores are the most suitable to our purpose of drawing comparisons amongst state courts, legislatures, and voters.

measure the preferences of state voters and elites using data from Berry et al. (2010), which are measured on a 0 to 100 scale of increasing liberalism. We take the absolute difference between a court's median justice and state voters in a year, along with the absolute distance between a court's median justice and state elites in a given year.[25] In line with our game theoretic models above, we might expect that electorally accountable courts are more likely to exhibit constraint when ideologically distant from the citizenry. Similarly, we might anticipate constraint amongst unelected courts (particularly those facing reappointments) when ideologically distant from state elites. Nevertheless, part of our theoretical argument is that courts and justices should exhibit constraint when they believe they are losing popular legitimacy, so we suspect that justices on either type of court might show constraint when out of step with popular preferences.

Finally, we include additional control variables that might affect the number of legislative acts a state supreme court invalidates in a given year. First, we control for the presence of divided government as courts could make use of such division to behave in a more unconstrained manner due to the inability of the other branches of government to coordinate against it (i.e., Krehbiel, 2010). We also control for the length of high court justices' terms in each state. The shortest terms are for six years; the lengthiest terms are 14; and in some states, there is no term of office. Overall, longer or undefined terms may allow for more unconstrained behavior.[26] Lastly, we control for whether states have mandatory retirement ages for their justices. About 60 percent of states mandate retirement at a specified age (frequently 70). We provide descriptive statistics for each of our variables in Table 1.

[25]Because one might suspect multicollinearity in these ideological variables, we estimated VIF tests for every statistical model presented herein. In our event count models, no variable attains a VIF score greater than 2.75—well below the typical values scholars flag as problematic, which is around 10. In the logistic regression models in the subsequent section, we do not see any problematic VIF scores in Models 1 through 4, though the ideological variables measuring judicial distance from elites and voters achieve VIF scores slightly greater than 10. Nevertheless, because the results for these variables in Models 5 and 6 are so similar to those in Models 3 and 4, we conclude that multicollinearity is likely not an important issue for these models.

[26]In our regression models below, we omit term length from the regression with all states as states with undefined terms have missing term lengths. Thus, we only include term lengths in the regression model for states using electoral accountability methods.

Table 2: State supreme court declarations of unconstitutionality

| Variable | All States | Election States | Non-Election States |
|---|---|---|---|
| Court-Curbing Bills$_{t-1}$ | 0.017* (0.007) | 0.011 (0.008) | 0.014 (0.015) |
| Elite Distance | -0.019* (0.007) | -0.027* (0.007) | 0.005 (0.023) |
| Voter Distance | 0.022* (0.007) | 0.029* (0.007) | -0.011 (0.023) |
| Divided Government | -0.249 (0.195) | -0.173 (0.216) | 0.038 (0.379) |
| Mandatory Retirement | -0.094 (0.210) | -0.294 (0.225) | 1.231 (0.779) |
| Term Length | — | -0.092* (0.052) | — |
| Competitive System | 0.164 (0.224) | -0.690* (0.187) | — |
| Retention System | 0.635* (0.243) | — | — |
| Reappointment System | 0.133 (0.314) | — | 0.449 (0.281) |
| Intercept | -1.876* (0.288) | -0.342 (0.616) | -3.095* (0.830) |
| $N$ | 247 | 193 | 54 |
| Log-Likelihood | -197.32 | -160.23 | -32.17 |

Notes: The dependent variable is the number of legislative acts a state supreme court invalidated in a given year. Table entries are Poisson coefficient estimates (standard errors, clustered on states, in parentheses). Asterisks denote statistical significance ($p < 0.05$, one-tailed).

Because our dependent variable is an event count, we employ poisson regression techniques.[27] As an exposure term, we include the number of legislative acts a state supreme court reviewed in a given year.[28] The unit of analysis is a state supreme court-year, and because not every court heard a challenge to a legislative act in every year, we omit those observations in which the state high court reviewed the constitutionality of no legislative acts. In the regression models in Table 2, we cluster standard errors at the level of each state court, and we present the results across three models: One that includes all usable observations, one that only examines states utilizing electoral institutions, and one that examines states that do not use electoral methods.

As shown in the first column of Table 2, legislative court-curbing behavior attains statistical significance but in the wrong direction. As legislatures file increasing numbers of court-curbing bills in time $t-1$, state high courts invalidate *greater* numbers of legislative acts. This finding runs counter to what scholars like Clark (2009) have observed in the legislative-judicial game at

[27] As a robustness check, we ran the main model using a negative binomial regression technique and arrived at nearly identical results. No variable that is (or is not) statistically significant differs based on the method of regression, and coefficients exhibit no meaningly different outcomes. As an additional robustness check, we estimated zero-inflated poisson regression models. For the logistic component of the model, we included independent variables outlined in the poisson model in a piecewise fashion but found no meaningful difference in results from those presented in Table 2.

[28] The logic here is that a state supreme court cannot invalidate a legislative act until they have the opportunity to do so under the American system of adversarial justice, standing, and jurisdiction.

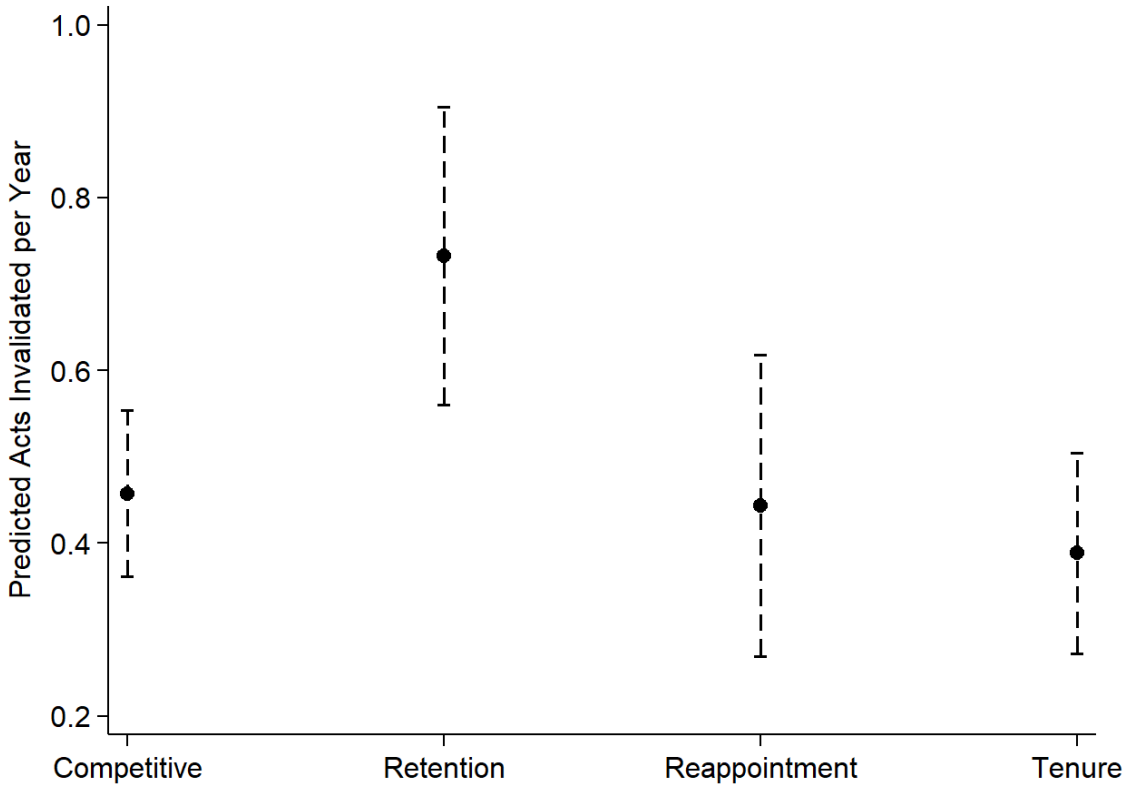


Figure 2: Predicted number of legislative acts invalidated in a given court-year across various accountability methods. Marginal effects derived from first column of Poisson regression results in Table 2.

the federal level. Such a finding could indicate that state courts do not heed court-curbing efforts as a reliable signal of waning legitimacy. Or they might indicate that state courts simply do not care about waning legitimacy. Given the absence of evidence for the hypothesized effect of court-curbing, this finding could be anomalous; however, this is a theme that we revisit in our subsequent section. Put simply, consistent with Leonard (2022*b*), we find no meaningful evidence that state high courts heed legislative signals of waning legitimacy *vis-à-vis* court-curbing legislation.

Given the absence of evidence surrounding court-curbing, state courts might enjoy private information about their legitimacy and thus not depend upon the signals they receive from legislators. To assess this claim, we turn to our analysis that includes state court methods of accountability. The first column of results in Table 2 shows that, with respect to the reference category (courts with undefined terms), courts facing retention methods are significantly more likely to engage in declarations of unconstitutionality. We depict these institutional effects in Figure 2. All things

being equal, our results show that courts utilizing retention elections are predicted to invalidate 0.73 legislative acts in a given year; courts holding competitive elections are predicted to invalidate 0.46 acts per year; courts facing elite reappointment are predicted to invalidate 0.44 acts per year; and courts with undefined terms of office are predicted to invalidate only 0.39 per year. It is interesting to note that courts with the most institutional security (those with tenure) exhibit the most constrained behavior, while courts facing retention elections are associated with the least. These results could be evidence for the idea that electoral feedback (especially when positive, as is overwhelmingly the case with retention elections) can empower courts in the separation of powers game, compared to courts that have no such opportunity.

Our formal models also indicated that courts would more likely exhibit unconstrained behavior with greater security in office, but we find limited empirical support for this. In the results summarized in Table 2, our ideological distance variables show signs of statistical significance, though largely in the wrong direction. This could simply reflect that courts out-of-step with the electorate engage in a sincere use of judicial review and invalidate laws without fear of electoral reprisals. Additionally, while court-elite distance should be associated with more constrained behavior among courts facing elite oversight, it is instead associated with more constrained behavior from courts facing electoral accountability methods. We also find that longer term lengths are associated with more constrained behavior. Finally, we find no support for our controls for divided government or mandatory retirement rules. With these results in mind, we turn to an analysis that disaggregates the behavior of state supreme courts in order to isolate factors that might lead individual justices to behave with more or less constraint in their review of legislative acts.

### 5.2 Judge-Level Behavior

By aggregating outcomes at the court-level, we potentially obscure any justice-level factors that may influence decision-making and the separation of powers. In this section, we further assess the willingness of state courts to invalidate legislative acts by focusing on the individual votes of justices along with individual-specific factors. To do so, we disaggregate our sample of cases from the previous section to focus on individual justice votes, rather than court-level outcomes.

The dependent variable here is a vote by a supreme court justice when evaluating the constitutionality of some legislative act. A code of "1" indicates a vote of unconstitutionality, "0" otherwise.

Table 3: Descriptive statistics for supreme court justice vote-level regressions data

| Variable | Description | Mean (Std. Dev.) |
|---|---|---|
| Unconstitutional Vote (DV) | Dichotomous: "1" if justice voted to invalidate legislative act, "0" else | 0.27 (0.44) |
| Court-Curbing$_{t-1}$ | Number of court-curbing bills or amendments filed in legislature during the previous year | 7.32 (8.68) |
| Elite Distance | Absolute distance from state supreme court median ideology to state's median voter's ideology | 24.21 (14.90) |
| Voter Distance | Absolute distance from state supreme court median ideology to state elite's ideology | 27.07 (13.72) |
| Divided Government | Dichotomous: Takes a value of "1" if state's legislature and governor not controlled by same party, "0" else | 0.39 (0.49) |
| Term Limited | Dichotomous: "1" if justice may not seek another term of office due to age, "0" else | 0.08 (0.27) |
| First Two Years | Dichotomous: "1" if justice is in their first two years on supreme court, "0" else | 0.18 (0.39) |
| Safe Seat | Dichotomous: "1" if justice won their last election by less than 10.0 points, "0" else | 0.82 (0.39) |
| Upcoming Election | Dichotomous: "1" justice must face reelection within next 2 years, "0" else | 0.24 (0.42) |
| Chief Justice | Dichotomous: "1" if individual is currently chief justice, "0" else | 0.14 (0.35) |
| PAJID | Justice's PAJID score (conservative-to-liberal) on a scale of 0-100 | 44.45 (28.20) |
| Dissent | Dichotomous: "1" if justice dissented in a case, "0" else | 0.11 (0.31) |
| Competitive System | Dichotomous: Takes a value of "1" if state uses competitive elections to select/retain justices, "0" else | 0.48 (0.50) |
| Retention System | Dichotomous: Takes a value of "1" if state uses retention elections to retain justices, "0" else | 0.35 (0.48) |
| Reappointment System | Dichotomous: Takes value of "1" if state uses reappointments to retain justices, "0" else | 0.11 (0.31) |
| Tenure System | Dichotomous (omitted category): Takes value of "1" if state affords justices undefined tenure in office, "0" else | 0.06 (0.23) |

In our sample of state supreme court cases between 2007 and 2017, only 27 percent of justice votes favor invalidating an act of the legislature. This indicates an overall deference to legislatures among state high court justices. As before, we control for the number of court-curbing bills the legislature filed in the previous year. Because this lagged independent variable omits many observations from our dataset, we include model results with and without court-curbing for each regression in Table 4. For other explanatory variables, we carry over several institution-level factors from the previous analysis, including accountability type and divided government. At the case-level, we include in the regressions below fixed effects for the issue area of each case.[29] The remainder of our justice-level controls are described as follows.

First, we control for a justice's ideological distance from the electorate and state elites. To do so, we calculate the absolute distance between a justice's PAJID score and a state's Berry score for voters and elites (Berry et al., 2010; Hughes, Wilhelm and Wang, 2023). As in our court-level models, we anticipate that justices should be responsive to ideologically divergent preferences between themselves and other political actors. We might anticipate that justices facing electoral accountability methods will exhibit greater constraint when ideologically distant from voters and that justices in states without elections (particularly those facing reappointments) will exhibit more constraint when ideologically distant from state elites. Overall, our models suggest that courts and justices should exhibit constraint when they believe they are losing popular legitimacy, so justices on either type of court might show constraint when out of step with popular preferences.

Next, we consider factors that might afford individual justices more leeway to cast votes invalidating acts of the legislature. First, we include a dichotomous measure indicating whether a justice is term limited due to mandatory retirement provisions. Only about eight percent of justices in our dataset are term limited at the time they cast a vote. Previous works have found that retiring and lame-duck justices exhibit more sincere behavior than others still facing accountability methods (e.g., Canes-Wrone, Clark and Kelly, 2014; Shepherd, 2009).[30] Likewise, we suspect that being

[29]To account for case issue areas, we follow the lead of The Supreme Court Database (`http://scdb.wustl.edu/index.php`, last accessed 21 March 2025) and adapt its coding scheme to matters of state law. We create a series of dichotomous indicators for each of our issue areas, which include: (1) Criminal procedure, (2) Civil rights, (3) First Amendment, (4) Due process, (5) Privacy, (6) Attorneys, (7) Unions, (8) Economic activity, (9) Judicial power, (10) State and county/municipal relations, (11) Taxation, and (12) Other. Though we do not formalize hypotheses for these effects, we note here that some issue area appeals, especially those brought by criminal defendants or others with limited resources, have exceptionally low rates of success (i.e., Galanter, 1974).

[30]Canes-Wrone, Clark and Kelly (2014) found null effects for retirement and lame duck status in their main results but write, "[I]f we exclude the state and judge effects these variables become significant" (35).

released from accountability mechanisms will enable less constrained behavior. We also include a dichotomous indicator for whether a justice is in their first two years on the supreme court.[31] We suspect that newer justices may find themselves less secure in their positions compared to more senior members, and consequently may exhibit more constrained behavior (e.g., Bonneau and Hall, 2009; Brace and Hall, 1997).

Next, we control for whether a justice is the chief justice. Chief justices have extensive administrative duties not shared by associate members on state high courts, which include making institutional requests on behalf of their branch to the legislature. Thus, these individuals might need to exercise greater restraint in the separation of powers game to better represent their institution (Vining and Wilhelm, 2023; Wilhelm et al., 2020).

Among elected justices, we control for whether their seat is "safe" or whether they have an upcoming election. We define safe seats as those in which the justice won their previous election by at least 10 percentage points. These types of positions are associated with less voter participation, a lower rate of attracting quality challengers, and a higher rate of incumbency vote-share (e.g., Bonneau and Hall, 2009; Hall, 2007). Therefore, we anticipate more unconstrained behavior amongst this group of jurists. Similarly, we account for the effect of upcoming retention decisions dichotomously such that this variable receives a "1" if a justice faces reelection within two years of casting a vote, "0" otherwise. Others have found that proximate retention decisions promote more popular behavior (e.g., Canes-Wrone, Clark and Kelly, 2014). Likewise, we anticipate more constrained behavior for justices facing near-term reelection decisions.

Finally, we include several control variables that are also likely associated with justice votes to invalidate acts of the legislature. These include whether an individual justice cast a dissenting vote and judge ideology (PAJID scores). We summarize each of the variables used in this section of the analysis in Table 3. Because our dependent variable is dichotomous (votes over a legislative act's constitutionality), we employ logistic regression techniques for each of the models summarized below, and we cluster standard errors at the level of each state court.

[31]The logic behind choosing a justice's first two years is that, had we controlled for freshman effects coded by whether a justice was in their first term, we would have highly variable lengths of freshman terms across state institutions. And given that we control for the effect of upcoming elections amongst electorally accountable courts using a two-year cutoff, a similar unit of time to account for potential freshman effects seemed most reasonable.

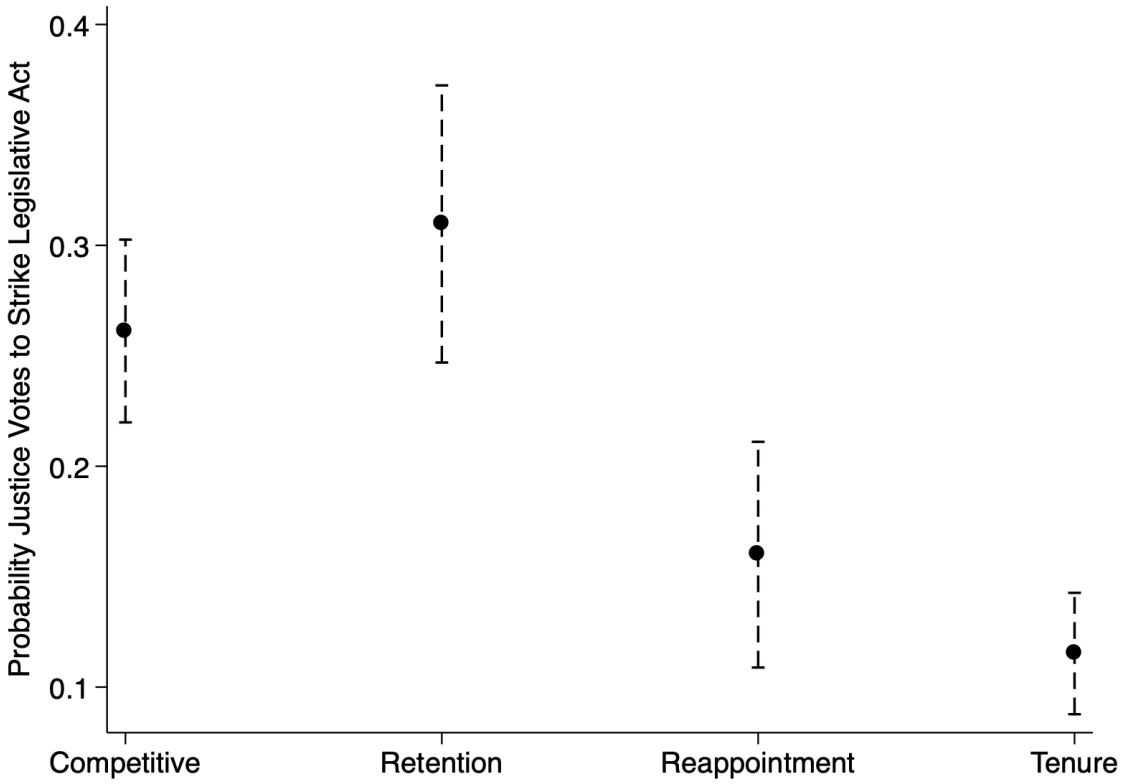


Figure 3: Predicted probability justice votes to invalidate some legislative act in a given case, across various accountability methods. Marginal effects derived from Model 1 in Table 4.

The results from our disaggregated logistic regression models appear in Table 4. Among the most notable findings, from the outset, is that legislative court-curbing efforts appear to be *no* significant deterrent in the separation of powers game in any of the six models.[32] This null result holds for our full sample of all state high court justices, our sub-sample of state court justices that potentially learn about their institutional legitimacy via direct voter feedback (elected justices), and for those that receive no such direct signal from the electorate (unelected justices).

What is to be made of these counterintuitive court-curbing results in these models and in the court-level analyses from the previous section? We believe the most plausible explanation, and one that is consistent with the anecdotes recounted in the Introduction, is that legislatures file more court-curbing bills when justices and courts issue decisions at-odds with their preferences (e.g., Blackley, 2019; Leonard, 2016), but justices and courts give little heed to these signals and continue

[32]In the supplementary appendix, we perform robustness checks on these null results for court-curbing behavior. We simply note here that our results in Table 4 are highly robust to alternative specifications in the court-curbing variable of interest.

Table 4: State supreme court justices' votes for declarations of unconstitutionality

| | All States | | Election States | | Non-Election States | |
|---|---|---|---|---|---|---|
| Variable | Model 1 | Model 2 | Model 3 | Model 4 | Model 5 | Model 6 |
| Court-Curbing$_{t-1}$ | — | 0.013 (0.012) | — | 0.011 (0.015) | — | 0.006 (0.026) |
| Elite Distance | 0.003 (0.005) | 0.004 (0.005) | 0.004 (0.005) | 0.004 (0.005) | 0.014 (0.017) | 0.035 (0.023) |
| Voter Distance | 0.005 (0.006) | 0.004 (0.006) | 0.008 ( 0.007) | 0.008 (0.008) | -0.027* (0.016) | -0.056* (0.015) |
| Divided Government | -0.391* (0.190) | -0.535* (0.232) | -0.448* (0.198) | -0.543* (0.259) | 0.307 (0.507) | -0.188 (0.779) |
| Term Limited | 0.492* (0.185) | 0.631* (0.188) | 0.595* (0.188) | 0.708* (0.195) | -0.299 (0.521) | -0.203 (0.791) |
| First Two Years | 0.113 (0.075) | 0.099 (0.092) | 0.306* (0.126) | 0.400* (0.171) | -0.408 (0.349) | -0.677* (0.410) |
| Safe Seat | — | — | 0.025 (0.190) | -0.035 (0.225) | — | — |
| Upcoming Election | — | — | 0.038 (0.107) | 0.046 (0.113) | — | — |
| Chief Justice | 0.053 (0.060) | 0.059 (0.075) | 0.108 (0.080) | 0.069 (0.091) | 0.143 (0.110) | 0.044 (0.231) |
| PAJID | 0.002 (0.002) | 0.001 (0.002) | 0.003 (0.003) | 0.002 (0.002) | -0.013 (0.010) | -0.021* (0.008) |
| Dissent | 0.255* ( 0.332) | 1.004* (0.397) | 1.222* (0.371) | 0.994* (0.431) | 1.626* (0.689) | 1.391* (0.632) |
| Competitive System | 1.082* (0.232) | 0.660* (0.237) | -0.220 (0.261) | -0.416 ( 0.306) | — | — |
| Retention System | 1.341* (0.258) | 1.085* (0.270) | — | — | — | — |
| Reappointment System | 0.409 (0.291) | 0.270 (0.346) | — | — | 0.390 (0.283) | 0.086 (0.439) |
| Issue Area Dummies | | | *Included in every model* | | | |
| Intercept | -2.772* (0.327) | -2.301* (0.362) | -1.641* (0.531) | -1.431* (0.567) | -1.120 (1.181) | 0.670 (1.354) |
| $N$ | 4,540 | 3,414 | 3,309 | 2,543 | 759 | 534 |
| Pct. Predicted | 74.98 | 73.35 | 72.53 | 71.22 | 86.43 | 85.96 |
| Log-Likelihood | -2,376.67 | -1,828.69 | -1,842.25 | -1,435.74 | -254.53 | -185.52 |

Notes: The dependent variable is whether a state supreme court justice voted to invalidate a legislative act in a case ("1" if yes, "0" else). Table entries are logistic coefficient estimates (standard errors, clustered on states, in parentheses). Asterisks denote statistical significance ($p < 0.05$, one-tailed).

without constraint, even though they are politically incongruent with the state legislature.[33] These results suggest that it is important to consider whether interbranch relations are fundamentally different in the states compared to the federal governmen.

It is worth considering whether justices use some other type of cue regarding legitimacy or the likelihood of reprisal for unconstrained behavior. If we examine the results of our institutional controls, we find significant evidence that justices on courts utilizing electoral methods exhibit more unconstrained behavior than justices who do not receive electoral feedback. We depict these results visually in Figure 3. Similar to our aggregate-level models, our justice-level models indicate that justices on courts utilizing retention elections have the highest predicted probability of casting a vote to invalidate some legislative act (0.31), followed by justices on courts utilizing competitive elections (0.26), followed by justices on courts using reappointment methods (0.16), and finally by justices on courts using tenure (0.12). These results are highly consistent with theoretical conjectures that accountability methods—especially those involving voters—provide justices with signals related to their legitimacy. Paradoxically, justices on courts utilizing tenure in office are weaker in the separation of powers game compared to their elected counterparts.

Similarly, when we turn to justice-level factors in Table 4 that might encourage less constraint, we find further support for our theory. Specifically, we find that among justices in non-election states, greater ideological distance between justices and voters is associated with more constrained behavior. Substantively, a justice one standard deviation closer to the median voter has a projected 21 percent chance of voting to invalidate a state law, but a justice one standard deviation more distant from the median voter has only an 11 percent chance of casting such a vote (a 52 percent change). Still, we find no such effect among electorally accountable justices, and in none of our models do we find any constraining influence for justice-elite ideological distance.

In keeping with our theoretical expectations, we also find that justices who cannot seek additional terms in office are more likely to engage in unconstrained behavior compared to those who may seek additional terms of office. The results in Models 3 and 4 suggest that this finding is

[33]Consider an additional example illustrative of this dynamic. Following the Tea Party wave of the early 2010s, the Republican-led government in Kansas cut education expenditures by 14.7 percent as part of a broader tax reform agenda. Parents of schoolchildren sued on the grounds that the state had violated students' constitutional rights to an adequate education. Between 2014 and 2018, the Kansas Supreme Court invalidated the state's school funding scheme six different times. In response, the state legislature filed 20 court-curbing bills in 2014 alone (400 percent the national average), and by 2017, lawmakers were forced to repeal tax cuts, bowing to the state court and popular will. For a brief history on the Kansas school funding controversy, see Smith (2022).

largely attributable to the sophisticated behavior exhibited by justices on electorally accountable courts. According to the results in Model 3, justices who are not term limited are predicted to cast a vote to invalidate a legislative act 27 percent of the time compared to 39 percent among those who are term limited (a 44 percent increase).

In terms of our remaining control variables, dissenting justices are significantly more likely to cast a vote to invalidate a legislative act. Specifically, justices voting with the court majority are projected to cast a vote of unconstitutionality 23 percent of the time, but a dissenting justice is projected to do so 49 percent of the time (a 113 percent increase). Other controls perform less consistently. We found no evidence for the impact of judicial ideology, safe seats, or upcoming elections. Our control variable for divided government does not conform to our expectations. Justices in states utilizing electoral accountability methods are significantly less likely to cast votes of unconstitutionality in conditions of divided government compared to single-party controlled government.

## 6 Conclusion

In this research, we have reconsidered the separation of powers game between courts and legislatures with an eye to the American states. While research at the federal level suggests that legislative court-curbing activity constrains judicial independence due to informational asymmetries, we find no such effect herein. What explains the patterns we have identified? In our analysis, we recognize that most American courts are not like the U.S. Supreme Court. Most judges in the United States have finite terms of office, and the vast majority must seek permission either from voters or government elites to continue in office. Given this, the primary contribution of our research has been to generalize Clark's (2009) theory to include courts that utilize accountability methods rather than life tenure.

Our formal models provided two new theoretical insights relevant to the legislative-judicial separation of powers game. The first is that, provided courts *cannot* learn from their accountability methods, the desire to continue in office favors legislatures and leads to more constraint amongst judges when evaluating the validity of legislative acts. The second is that, provided courts *can* learn about their legitimacy by standing for retention, the necessity to rely upon legislative signals

of waning support is obviated, and courts are empowered to behave with less constraint. This insight runs counter to conventional wisdom of accountable courts and their supposed institutional weakness without tenure in office. More succinctly, it conforms with the original sentiment of judicial election proponents. Our findings suggest that electoral accountability methods can actually *empower* courts to prevail over legislatures when they evaluate the constitutionality of their acts. To some extent, this turns conventional wisdom on its head.

To test the empirical implications of our formal models, we took two approaches. First, we analyzed the behavior of state supreme courts and found (1) State supreme courts do not heed legislative signals of waning legitimacy *vis-à-vis* court-curbing proposals in their evaluation of legislative acts; (2) courts subject to electoral accountability—specifically, retention elections—exhibited the highest rate of unconstrained behavior in evaluating legislative acts. Our next approach accounted for individual-level effects. Overall, we observed: (1) No evidence that justices heed legislative signals of waning legitimacy *vis-à-vis* court-curbing proposals; and (2) evidence that electoral accountability methods advantage justices in the separation of powers game.

Our findings add to a growing conversation about the implications of electoral politics on judicial independence. While critics have alleged that elections undermine judicial legitimacy, our empirical results suggest the opposite. Instead, our findings echo conclusions of Gibson's (2012) analysis of judicial campaigns that elections "boost" judicial legitimacy rather than impede it. Moreover, by expanding the analysis to consider the influence of electoral politics on legislative-judicial interactions, the evidence becomes multi-dimensional.

How do we expect the relative futility of legislative court-curbing efforts in states where judges have electoral accountability to impact separation of powers? One observation is that the frustration of legislators may increase as the independence of judges becomes more apparent, particularly in states where the highest court and state legislature are out of step. As such, we expect that interbranch tensions may result in highly visible criticism of the judiciary alongside sustained court curbing activity by lawmakers. Current events in Utah serve as illustration. In 2024 and 2025, the state supreme court issued decisions on abortion and redistricting that disappointed members of the state legislature, all while remaining unresponsive to legislative court curbing threats. Hostility between the branches became so public and vitriolic that Chief Justice Matthew Durrant spoke about it to Utah state legislatures in his 2026 State of the Judiciary address:

> The problem comes when we cross over from substantive disagreement to personal attack, to attacks on motive, integrity, and good faith. This erodes public confidence in our institutions. On those rare occasions when we strike down one of your statutes as unconstitutional, we carefully and dispassionately explain why. You will never read an opinion where we challenge your integrity or good faith. I ask that you pay us the same courtesy in challenging our decisions. Do it on the merits, not through impugning our integrity. (Durrant, 2026)

A second observation is that the futility of court curbing threat may induce more extreme court curbing tactics by state legislators. Ultimately, legislators may realize that personnel or jurisdiction changes are the only substantive way to influence court output if less consequential action induces no change. The reality of this is also evidenced in recent years. A reported by Milov-Cordoba (2025), bills targeting judicial independence were introduced in 20 states in 2024 and passed in six states.[34] New laws included jurisdiction limits passed in Kentucky, Tennessee, Utah, and Wyoming, a law to increase judicial ethics oversight by the elected branches in Louisiana, and elimination of electoral districts for judges that voted against the preferences of the state legislature in North Carolina. Importantly, justices in all these states are retained by election. Direct action to curtail judicial independence by state legislatures continued in 2025, with concerted efforts by state lawmakers to alter judicial selection, end judicial review, require supermajority retention results, and increase the number of seats on state high courts.

Ultimately, the real-world consequences of increased judicial independence for elected courts are that such courts may be subjected to "noisier, nastier, and costlier" relations with the state legislature, which has consequences for the separation of powers system in the American states.

# Appendix 1

In this Appendix, we present rigorous proofs for the game theoretic findings we presented in the main text of the paper. First, we prove results stemming from the model without accountability methods. Then we proceed to the model that includes elections without voter feedback, and then we conclude with our model on judicial elections with the opportunity for voter feedback.

[34] See `https://shorturl.at/61uqg` (last accessed 23 January 2026).

## Unelected Courts

In this section, we outline and prove the existence and conditions of the perfect Bayesian equilibria we identified within the text of the paper that pertain to unelected courts. We begin with pure strategy separating equilibria.

- *Remark 1*: For all $\epsilon > 2b_l$, a unique set of pure strategy perfect Bayesian equilibria exists such that $l$ plays $\omega = \Omega$ with probability 1.0, and $j$ makes unconstrained choices *iff* $\omega = b$.

*Proof.* Suppose $j$ forms the belief that $l$ matches its signal to the state of the world with probability 1.0. A best response for it is to make a constrained choice when it observes $\omega = a$ and an unconstrained choice when $\omega = b$. If $\Omega = A$, then $l$'s expected utility is $2b_l + \epsilon$. Any deviation makes it strictly worse off. If $\Omega = B$, then $l$'s expected utility from the separating strategy is $-2b_l + \epsilon$; whereas if it defects, it expects to earn $2b_l - \epsilon$. Therefore, no player may profitably deviate from the separating equilibrium for all $\epsilon > 2b_l$. □

- *Remark 2*: For all $\epsilon < 2b_l$, and for all $p > \frac{1}{2}$, a unique set of pure strategy perfect Bayesian equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega$, and $j$ makes constrained choices for all $\Omega$.

*Proof.* Suppose that $j$ forms the belief that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega$. Hence, $j$ is unable to update its beliefs that it is legitimate. In response to a pooling strategy, $j$'s expected utility from an unconstrained choice is $b_j(1 - 2p)$, while its expected utility from a constrained decision is 0. Therefore, $j$ will strictly prefer to make a constrained choice for all $p > \frac{1}{2}$. Assume that $p < \frac{1}{2}$. Then $l$'s expected payoff from the pooling strategy is $-2b_l - \epsilon$ when $\Omega = B$, which means it may profitably deviate from the pooling strategy. Now suppose that $p > \frac{1}{2}$. Then $l$'s expected utility when $\Omega = A$ is $2b_l + \epsilon$, so it cannot profitably deviate from the pooling strategy. And when $\Omega = B$, it earns $2b_l - \epsilon$. If it deviates from its strategy, it expects to earn $-2b_l + \epsilon$.[35] Therefore, $l$ has no unilateral incentive to deviate from its pooling strategy for all $\epsilon < 2b_l$. □

- *Remark 3*: For all $\epsilon < 2b_l$, and for all $p < \frac{1}{2}$, a unique set of semi-separating perfect Bayesian equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega = A$; where $l$ plays $\omega = a$ with probability $q^* = \frac{p}{1-p}$ when $\Omega = B$; where $j$ makes an unconstrained decision with

[35] We employ the intuitive criterion for off-equilibrium-path beliefs. If $j$ observes off-equilibrium-path signals, it rationally concludes that only the $\Omega = B$ type of legislature should defect. Therefore, $j$ makes an unconstrained choice.

probability $m^* = \frac{2b_l - \epsilon}{2b_l}$ when it observes $\omega = a$; and where $j$ makes an unconstrained decision with probability 1.0 when it observes $\omega = b$.

*Proof.* Suppose that $j$ forms the belief that $l$ plays $\omega = a$ with probability 1.0 given $\Omega = A$ but that $l$ mixes its signal when $\Omega = B$ such that $Pr(a \mid B) = q$. When it observes its signal, $j$ updates its beliefs according to Bayes' Rule such that $Pr(A \mid a) = \frac{p}{p+(1-p)q}$. The legislature puts some weight upon its signal which makes $j$ indifferent between its actions such that $\frac{-p(2b_j)}{p+(1-p)q^*} + \frac{(1-p)q^*(2b_j)}{p+(1-p)q^*} = 0$. Rearranging, we get $q^* = \frac{p}{1-p}$. In response, $j$ puts some weight on its decision to make an unconstrained choice such that $l$ is indifferent between its signals when $\Omega = B$: $-m^*(2b_l + \epsilon) + (1 - m^*)(2b_l - \epsilon) = -2b_l + \epsilon$. Rearranging, we get $m^* = \frac{2b_l - \epsilon}{2b_l}$. When both $j$ and $l$ are best responding to one other's mixtures with $q^*$ and $m^*$, neither can profitably deviate from the semi-separating equilibrium. According to the properties of $p$, $q^*$ exists for all $p < \frac{1}{2}$. And according to the properties of $b_l$ and $\epsilon$, $m^*$ exists for all $\epsilon < 2b_l$. □

### Elected Courts without Voter Feedback

In this section, we outline and prove the existence and conditions of the perfect Bayesian equilibria we identified within the text of the paper relating to elected courts that do not enjoy the benefit of extra-legislative signals of legitimacy. We begin with all separating equilibria. Note that these equilibria are identical to those in the previous game. We then proceed to the pooling and semi-separating equilibria. After analyzing the equilibria, we proceed to prove Propositions 1 and 2.

- *Remark 4*: For all $\epsilon > 2b_l$, a unique set of pure strategy perfect Bayesian equilibria exists such that $l$ plays $\omega = \Omega$ with probability 1.0; $j$ makes unconstrained choices *iff* $\omega = b$; and $v$ retains every type of $j$.

*Proof.* Suppose $j$ forms the belief that $l$ plays $\omega = \Omega$ with probability 1.0. A best response for it is to make a constrained choice when it observes $\omega = a$ and an unconstrained choice when $\omega = b$. If $\Omega = A$, then $l$'s expected utility is equal to $2b_l + \epsilon$. Any deviation makes it strictly worse off. If $\Omega = B$, then $l$'s expected utility from the separating strategy is $-2b_l + \epsilon$; whereas if it defects, it expects to earn $2b_l - \epsilon$. Therefore, no player may profitably deviate from the separating equilibrium for all $\epsilon > 2b_l$. Finally, when $\Omega = A$, $v$ cannot update its beliefs, so a rational choice is to retain $j$. And when $\Omega = B$, $v$ observes unconstrained behavior such that it believes with probability 1.0 that $j$ is legitimate, thereby retaining it. □

- *Remark 5*: For all $\epsilon < 2b_l$, and for all $p > \frac{b_j}{2b_j+\pi}$, a unique set of pure strategy perfect Bayesian equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega$; $j$ makes constrained choices for all $\omega$; and $v$ retains $j$ for all $\Omega$.

*Proof.* Suppose that $j$ forms the belief that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega$. Therefore, $j$ is unable to update its beliefs upon observing its signal. In response to $l$'s pooling strategy, $j$'s expected utility from unconstrained behavior is $(2b_j + \pi)(1 - 2p)$, while its expected utility from constrained behavior is simply $\pi$. Therefore, $j$ will strictly prefer to make a constrained choice for all $p > \frac{b_j}{2b_j+\pi}$. Assume that $p < \frac{b_j}{2b_j+\pi}$. Then $l$'s expected payoff from its pooling strategy when $\Omega = B$ is $-2b_l - \epsilon$, which means it can profitably deviate from the pooling strategy. Now suppose $p > \frac{b_j}{2b_j+\pi}$. Here, $l$'s expected utility when $\Omega = A$ is $2b_l + \epsilon$, which means it cannot profitably deviate. And when $\Omega = B$, it earns $2b_l - \epsilon$. If it instead plays $\omega = b$, it expects to earn $-2b_l + \epsilon$. Therefore, the legislature has no unilateral incentive to abandon its pooling strategy for all $\epsilon < 2b_l$. Finally, because $v$ is unable to update its beliefs, it rationally can do no better than to retain $j$. □

- *Remark 6*: For all $\epsilon < 2b_l$, and for all $p < \frac{b_j}{2b_j+\pi}$, a unique set of semi-separating perfect Bayesian equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega = A$; where $l$ plays $\omega = b$ with probability $q^* = \frac{p(\pi+b_j)}{(1-p)b_j}$ when $\Omega = B$; where $j$ makes an unconstrained decision with probability $m^* = \frac{2b_l-\epsilon}{2b_l}$ when it observes $\omega = a$; where $j$ makes an unconstrained decision with probability 1.0 when it observes $\omega = b$; and where $v$ does not retain $j$ *iff* it observes $u \mid A$.

*Proof.* Suppose that $j$ forms the belief that $l$ plays $\omega = a$ with probability 1.0 given $\Omega = A$ but that $l$ mixes its signal when $\Omega = B$ such that $Pr(a \mid B) = q$. When it observes its signal, $j$ updates its beliefs according to Bayes' Rule such that $Pr(A \mid a) = \frac{p}{p+(1-p)q}$. The legislature puts some weight upon its signal of waning legitimacy that makes $j$ indifferent between its actions such that $\frac{-p(2b_j+\pi)}{p+(1-p)q^*} + \frac{(1-p)q^*(2b_j+\pi)}{p+(1-p)q^*} = \pi$. Rearranging, we get $q^* = \frac{p(\pi+b_j)}{(1-p)b_j}$. In response, $j$ puts some weight on its decision such that $l$ is indifferent between its signals: $-m^*(2b_l+\epsilon)+(1-m^*)(2b_l-\epsilon) = -2b_l+\epsilon$. Rearranging, we get $m^* = \frac{2b_l-\epsilon}{2b_l}$. When both $j$ and $l$ are best responding to each other with $q^*$ and $m^*$, neither can profitably deviate from the semi-separating equilibrium. According to the definitions of $b_l$ and $\epsilon$, $m^*$ exists for all $\epsilon < 2b_l$. Additionally, $l$ is indifferent between its semi-separating and pooling strategies for all $\frac{p(\pi+b_j)}{(1-p)b_j} = 1$. Rearranging, $l$ maintains the semi-separating strategy for all $p < \frac{b_j}{2b_j+\pi}$. Finally, whenever $v$ observes constrained judicial behavior, it cannot update its beliefs and therefore can do no better than to retain $j$. When $v$ observes unconstrained

behavior, it believes with probability 1.0 that $j$ is legitimate *iff* $\Omega = B$ and retains it. If $v$ observes unconstrained behavior when $\Omega = A$, it updates its beliefs that $j$ is illegitimate with probability 1.0 and removes it from office. □

- *Proposition 1*: For all $\epsilon < 2b_l$, the *ex ante* likelihood that $j$ plays $d = u$ is at least as small among elected courts without feedback as it is for unelected courts.

*Proof.* To prove the proposition, it is sufficient to note that for no set of equilibria are elected courts without feedback more likely to make an unconstrained decision compared to unelected courts or that for some elected courts the likelihood of an unconstrained decision is less than that among unelected courts. According to Remarks 1 and 4, $j$'s optimal response to $l$'s signal is identical for all $\epsilon > 2b_l$. Therefore, we proceed to examine all $\epsilon < 2b_l$. According to Remarks 2 and 5, $j$ is equally likely to make an unconstrained choice for all $p > \frac{1}{2}$. Remarks 3 and 6 show that for all $p < \frac{b_j}{2b_j+\pi}$, both types of $j$ make identical decisions. And when $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$, the unelected $j$ makes an unconstrained decision with probability 1.0 when $\omega = b$, which is greater than the elected $j$'s probability of 0.0; and if $\omega = a$, the unelected $j$ is more likely to make an unconstrained decision if $2b_l > \epsilon$, which is true by assumption. □

### Elected Courts with Feedback

Finally, we prove the results stemming from the game with judicial elections and feedback. We outline the existence and conditions for the perfect Bayesian equilibria we identified within the text of the paper. Then we proceed to prove Propositions 3 through 5. Recall that in this version of the game, the judiciary's choice of legal policies is punctuated by the input of some voter. We begin our analysis with the pure strategy separating equilibria.

- *Remark 7*: For all $\epsilon > 2b_l$, a unique set of pure strategy perfect Bayesian equilibria exist such that $l$ plays $\omega = \Omega$ with probability 1.0, $j$ makes unconstrained choices *iff* $\omega = b$, and $v$ retains every type of incumbent judge.

*Proof.* Suppose $j$ forms the belief that $l$ plays a separating strategy such that $\omega = \Omega$. When $j$ observes $\omega = a$, its best response is to make constrained choices in every period; and if it observes $\omega = b$, its best response is to make unconstrained choices in every period. When $\Omega = A$, $l$'s expected utility from the separating strategy is equal to $2b_l + \epsilon$, which means it cannot profitably

deviate from the separating strategy. When $\Omega = B$, $l$'s expected utility is $-2b_l + \epsilon$. If it deviates, it earns $2b_l - \epsilon$. Therefore, $l$ will maintain the separating strategy for all $\epsilon > 2b_l$. Finally, when $\Omega = A$, $j$ makes a constrained decision; therefore, $v$ cannot update its beliefs, and a vote to retain is a rational choice. And when $\Omega = B$, $v$ observes an unconstrained decision that reveals $j$ to be legitimate, making a vote to retain $j$ a rational choice. □

- *Remark 8*: For all $\epsilon < 2b_l$, and for all $p > \frac{1}{2}$, a unique set of pure strategy perfect Bayesian equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega$; $j$ makes constrained choices at all times; and $v$ retains every type of $j$. For all $\epsilon < b_l$ and $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{1}{2}\right)$, a unique set of pure strategy perfect Bayesian equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 for all $\Omega$; $j$ makes a constrained choice prior to its election and an unconstrained choice afterward; and $v$ retains every type of $j$.

*Proof.* Suppose that $j$ forms the belief that $l$ plays $\omega = a$ for all $\Omega$. Then $j$ is unable to update its beliefs over the state of $\Omega$. If $p < \frac{1}{2}$, then $j$'s best response is to make an unconstrained choice after its election. Assume that $p > \frac{1}{2}$. Then $j$ will make an unconstrained choice prior to its election if $p < \frac{b_j}{2b_j+2\pi}$, which is less than $\frac{1}{2}$ if $\pi > 0$, which is true by definition. Therefore, for all $p < \frac{b_j}{2b_j+2\pi}$, a best response to $l$'s pooling strategy is to make an unconstrained choice both before and after its election. For all $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{1}{2}\right)$, $j$'s best response is to play a strategy in which it makes a constrained choice prior to its election and an unconstrained choice afterward. And for all $p > \frac{1}{2}$, $j$'s best response is to make a constrained choice at all times. Now assume that $p > \frac{1}{2}$. If $l$ maintains its pooling strategy, its expected utility is equal to $2b_l + \epsilon$ when $\Omega = A$; therefore, it cannot profitably deviate. And when $\Omega = B$, its expected payoff is $2b_l - \epsilon$. Therefore, $l$ will maintain its pooling strategy for all $p > \frac{1}{2}$ and for all $\epsilon < 2b_l$. Now suppose that $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{1}{2}\right)$. Here, $l$'s expected utility from the pooling strategy when $\Omega = A$ is equal to $\epsilon$, a payoff upon which it cannot improve it defects. When $\Omega = B$, then $l$'s expected utility is equal to $-\epsilon$. If it were to defect from the pooling strategy, it expects to earn $-2b_l + \epsilon$. Now suppose that $p < \frac{b_j}{2b_j+2\pi}$. The legislature's expected payoff is equal to $-2b_l - \epsilon$ when $\Omega = B$, which means it can profitably deviate from the pooling strategy. Finally, note that in none of these equilibria can $v$ update its beliefs; therefore, it can do no better to retain every type of $j$. □

- *Remark 9*: For all $b_l < \epsilon < 2b_l$, and for all $p < \frac{1}{2}$, a set of semi-separating equilibria exists such that $l$ plays $\omega = a$ with probability 1.0 when $\Omega = A$; $l$ plays $\omega = a$ with probability $q^* = \frac{p}{1-p}$ when $\Omega = B$; $j$ makes an unconstrained choice for all periods with probability 1.0

when it observes $\omega = b$; when $\omega = a$, $j$ makes a constrained choice with probability 1.0 prior to its election and an unconstrained choice with probability $m^* = \frac{2b_l - \epsilon}{b_l}$ afterward; and $v$ retains every $j$ regardless of $\Omega$.

*Proof.* Suppose that $j$ forms the belief that $l$ plays $a \mid A$ with probability 1.0 but that it chooses $a \mid B$ with probability $q$. If $j$ observes $\omega = b$, it updates its beliefs, concludes $\Omega = B$, and makes an unconstrained choice with probability 1.0. If, however, it observes $\omega = a$, then it updates its beliefs such that $Pr(A \mid a) = \frac{p}{p+(1-p)q}$. If $j$ had made an unconstrained choice prior to its election and finds itself called upon to evaluate the validity of some new legislative act, it updates its beliefs such that the probability $\Omega = B$ is equal to 1.0, and it makes an unconstrained choice once again. Now suppose that $j$ made a constrained decision prior to its election. Not being able to update its beliefs, $v$ would retain it. After its reelection, a constrained decision for $j$ is a rational choice for all $q < \frac{p}{(1-p)}$. Supposing this is the case, $j$ makes an unconstrained decision prior to its election if $q > \frac{p(b_j+\pi)}{(1-p)b_j}$. But because $\frac{p}{1-p} < \frac{p(b_j+\pi)}{(1-p)b_j}$, $j$ will always make a constrained choice prior to its election when $q < \frac{p}{1-p}$. The legislature, therefore, keeps $j$ indifferent between its post-election actions by playing $q^* = \frac{p}{1-p}$. Finally, $j$ keeps $l$ indifferent between its signal such that $-m^*\epsilon + (1 - m^*)(2b_l - \epsilon) = \epsilon - 2b_l$. Rearranging, $m^* = \frac{2b_l - \epsilon}{b_l}$. Finally, we find that $m^* > 0$ for all $\epsilon < 2b_l$; $m^* < 1$ for all $b_l < \epsilon$; and $q^* < 1$ for all $p < \frac{1}{2}$. □

- *Remark 10*: For all $\epsilon < b_l$, and for all $p < \frac{b_j}{2b_j+2\pi}$, a set of semi-separating equilibria exists such that $l$ plays $a \mid A$ with probability 1.0; $l$ plays $a \mid B$ with probability $q^* = \frac{p(2\pi+b_j)}{(1-p)b_j}$ when $\Omega = B$; $j$ makes an unconstrained choice for all periods with probability 1.0 when it observes $\omega = b$; when $\omega = a$, $j$ makes an unconstrained choice with probability $m^* = \frac{b_l - \epsilon}{b_l}$ prior to its election and an unconstrained choice with probability 1.0 afterward; and $v$ fails to retain $j$ *iff* $u \mid A$.

*Proof.* Suppose $j$ forms the belief that $l$ plays $a \mid A$ with probability 1.0 and $a \mid B$ with probability $q$. If $j$ observes $\omega = b$, it updates its beliefs, concludes $\Omega = B$, and makes an unconstrained choice with probability 1.0. If, however, it observes $\omega = a$, it updates its beliefs such that $Pr(A \mid a) = \frac{p}{p+(1-p)q}$. If $j$ had made an unconstrained choice prior to its election and finds itself called upon to evaluate the validity of some new legislative act, it updates its beliefs such that the probability $\Omega = B$ is equal to 1.0, and it makes an unconstrained choice once again. Now suppose that $j$ made a constrained decision prior to its election. Not being able to update its beliefs, $v$ would retain it. After its reelection, an unconstrained decision for $j$ is a rational choice if $q > \frac{p}{(1-p)}$. Assume that $q > \frac{p}{1-p}$.

Then $l$ mixes such that it makes $j$ indifferent between making a constrained and an unconstrained choice prior to its election where: $-p(\pi+2b_j)+(1-p)q^*(\pi+2b_j)=p(\pi-b_j)+(1-p)q^*(\pi+2b_j)$. Rearranging, $q^*=\frac{p(2\pi+b_j)}{(1-p)b_j}$. The legislature will abandon its semi-separating strategy if $\frac{p(2\pi+b_j)}{(1-p)b_j}=1$. Rearranging, $l$ will maintain its semi-separating strategy for all $p<\frac{b_j}{2b_j+2\pi}$. The judiciary's best response is to choose some probability of making an unconstrained decision that makes $l$ indifferent between its signals: $-m^*(2b_l+\epsilon)-(1-m^*)(\epsilon)=-2b_l+\epsilon$. Rearranging, $m^*=\frac{b_l-\epsilon}{b_l}$, which exists if $\epsilon<b_l$ (true by assumption). Finally, note that $v$ will be unable to update its beliefs whenever $j$ makes a constrained decision; therefore, a rational choice is to reelect it. Voters will learn $j$'s type with probability 1.0 whenever $j$ makes an unconstrained decision; therefore it will fail to reelect $j$ *iff* $u \mid A$. □

- *Proposition 2*: The *ex ante* likelihood elected courts with feedback play $d=u$ is at least as small as all other courts prior to its retention decision and at least as great afterward.

*Proof.* To prove the proposition, it s sufficient to show that (1) prior to its retention decision, an elected judiciary with feedback is no more likely to make an unconstrained choice compared to other courts, or for some specification an elected $j$ is strictly less likely to make an unconstrained choice; and (2) after its retention, an elected judiciary with feedback is at least as likely to make an unconstrained choice compared to other courts, or for some specification, an elected $j$ with feedback is strictly more likely to to make an unconstrained choice. First, suppose that $\epsilon>2b_l$. According to Remarks 1, 4, and and 7, every type of judiciary is equally likely to make an unconstrained decision.

Now suppose that $b_l<\epsilon<2b_l$. We begin with a comparison of unelected courts and elected courts with feedback. If $p>\frac{1}{2}$, Then $j$ makes a constrained decision at all times, regardless of its institutional type. Therefore, we proceed to the case in which $p<\frac{1}{2}$. According to Remark 9, $j$ makes a constrained choice with probability 0.0 when $\omega=b$, probability 1.0 when $\omega=a$ and $j$ has yet to stand for retention and probability $\frac{2b_l-\epsilon}{b_l}$ afterward. According to Remark 3, an unelected $j$ will make an unconstrained decision with probability 1.0 if it observes $\omega=b$ and an unconstrained decision with probability $\frac{2b_l-\epsilon}{2b_l}$ if it observes $\omega=a$. Therefore, unelected courts and elected courts with feedback are equally likely to make an unconstrained choice when $\omega=b$, but when $\omega=a$, an elected court with voter feedback is no more likely to make an unconstrained decision compared

to unelected courts prior to its election if $\epsilon \leq 2b_l$ (which is true by assumption), and an elected court with voter feedback is at least as likely to make an unconstrained decision after its retention compared to an unelected court if $\epsilon \leq 2b_l$, which is true by assumption.

Continuing with our assumption that $b_l < \epsilon < 2b_l$, we proceed to a comparison of elected courts with and without feedback. If $p > \frac{1}{2}$, then $j$ makes a constrained decision at all times, regardless of its institutional type. Therefore, we proceed to the case in which $p < \frac{1}{2}$. According to Remark 9, $j$ makes an unconstrained choice with probability 1.0 when $\omega = b$, probability 0.0 when $\omega = a$ and $j$ has yet to stand for retention, and probability $\frac{2b_l - \epsilon}{b_l}$ afterward. According to Remark 5, $j$ makes a constrained decision for all $p > \frac{b_j}{2b_j + \pi}$ given no feedback. And when $p < \frac{b_j}{2b_j + \pi}$, $j$ makes an unconstrained decision with probability 1.0 given $\omega = b$ and with probability $\frac{2b_l - \epsilon}{2b_l}$ given $\omega = a$ and no feedback. If $p \in \left(\frac{b_j}{2b_j + \pi}, \frac{1}{2}\right)$, then elected courts with feedback are equally likely to make an unconstrained choice prior to their retentions, and afterward, elected courts with feedback are at least as likely to make an unconstrained decision as one without feedback if $\epsilon \geq b_l$, which is true by assumption. Finally, if $p < \frac{b_j}{2b_j + \pi}$, then both types of $j$ are equally likely to make an unconstrained decision given $\omega = b$. Given that $\omega = a$, the type with feedback is no more likely to make an unconstrained decision prior to its election if $\epsilon \leq 2b_l$, which is true by assumption. And the court with feedback is at least as likely to make an unconstrained decision after its election if $\epsilon \leq 2b_l$, which is true by assumption.

Now assume that $\epsilon < b_l$. As before, for all $p > \frac{1}{2}$, every type of $j$ is equally likely to make an unconstrained decision. Therefore, we turn to the case for which $p < \frac{1}{2}$ and begin with a comparison of unelected courts and elected courts with feedback. According to Remark 3, $j$ makes an unconstrained choice with probability 1.0 following $\omega = a$ and probability $\frac{2b_l - \epsilon}{2b_l}$ if $\omega = a$ for all $p < \frac{1}{2}$. According to Remark 8, for all $p \in \left(\frac{b_j}{2b_j + 2\pi}, \frac{1}{2}\right)$, $j$ makes an unconstrained choice prior to its retention with probability 0.0, and after its retention it makes an unconstrained choice with probability 1.0. Therefore, an elected court with feedback is no more likely to make an unconstrained choice prior to its retention compared to an unelected court if $\epsilon \leq 2b_l$, which is true by assumption, and it is at least as likely to make an unconstrained choice after its retention if $\epsilon \geq 0$, which is true by definition. Now when $p < \frac{b_j}{2b_j + 2\pi}$, an elected court with feedback makes an unconstrained choice with probability 1.0 if it observes $\omega = b$. If it sees $\omega = a$, then according to Remark 10, it makes an unconstrained choice prior to its retention with probability $\frac{b_l - \epsilon}{b_l}$ and with

probability 1.0 after its retention. Therefore, an elected court with feedback is equally likely as an unelected court to make an unconstrained decision when $\omega = b$. And when $\omega = a$, an elected court with feedback is no more likely than an unelected court to make an unconstrained decision if $\epsilon \geq 0$, which is true by definition, and an elected court with feedback is at least as likely to make an unconstrained decision after its election if $\epsilon \geq 0$, which is true by definition.

Finally, let us compare both types of elected courts for all $\epsilon < b_l$ and $p < \frac{1}{2}$. When $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$, both types of courts are equally likely to make unconstrained decisions before retention decisions, but after its retention, the court with feedback is strictly more likely to make an unconstrained decision given it plays "u" with probability 1.0 while the court without feedback plays "u" with probability 0.0. When $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{b_j}{2b_j+\pi}\right)$, the court without feedback makes an unconstrained decision with probability 1.0 if it observes $\omega = b$, and if it observes $\omega = a$, it plays "u" with probability $\frac{2b_l-\epsilon}{2b_l}$. Suppose $j$ has observed $\omega = b$. The court with feedback is equally likely to make an unconstrained decision compared to the court without feedback according to the intuitive criterion. Now suppose $j$ has observed $\omega = a$. The court with feedback is no more likely than that without it to make an unconstrained decision prior to its retention because it makes an unconstrained decision if $\epsilon \leq 2b_l$, which is true by assumption, and the court with feedback is at least as likely to make an unconstrained decision after its election if $\epsilon \geq 0$, which is true by definition. Finally, consider $p < \frac{b_j}{2b_j+2\pi}$. The court with feedback is no more likely to make an unconstrained decision prior to its retention compared to that without feedback if $\epsilon \geq 0$, which is true by definition, and the court with feedback is at least as likely to make an unconstrained decision after its election if $\epsilon \geq 0$, which is true by definition.

□

# Appendix 2

In this supplementary appendix, we provide a detailed breakdown for how we classify state accountability mechanisms for our statistical models in the main text of the paper and in Appendix 3. Recall that we grouped state courts into one of four total institutional mechanisms: competitive elections, retention elections, reappointment systems, and tenure systems. In Table A1, we detail each state's institutional classification.

Table A1: State supreme court accountability mechanisms

| Competitive Elections | Retention Elections | Reappointment | Tenure |
|---|---|---|---|
| Alabama | Alaska | Connecticut | Massachusetts |
| Arkansas | Arizona | Delaware | New Hampshire |
| Georgia | California | Hawaii | Rhode Island |
| Idaho | Colorado | Maine | |
| Kentucky | Florida | New Jersey | |
| Louisiana | Illinois | New York | |
| Michigan | Indiana | South Carolina | |
| Minnesota | Iowa | Vermont | |
| Mississippi | Kansas | Virginia | |
| Montana | Maryland | | |
| Nebraska | Missouri | | |
| Nevada | New Mexico | | |
| North Carolina | Oklahoma | | |
| North Dakota | Pennsylvania | | |
| Ohio | South Dakota | | |
| Oregon | Tennessee | | |
| Texas | Utah | | |
| Washington | Wyoming | | |
| West Virginia | | | |
| Wisconsin | | | |

# Appendix 3

In this supplementary appendix, we provide robustness checks on statistical models presented in the body of the paper using alternative specifications for the legislative court-curbing variable. In the body of the text, we noted the null effect of court-curbing behavior on state supreme courts' use of judicial review. Here, we demonstrate that those null effects are robust to numerous other measurement strategies.

In the main text of the paper, we operationalized legislative court-curbing efforts as the total number of bills and constitutional amendments introduced in the previous year. Nevertheless, it could be the case that state courts treat some court-curbing threats as more genuine compared to others. In this supplementary appendix, we reestimate statistical models at both the court and justice-level in order to demonstrate that no alternative specification produces results that conform to theoretical expectations.

Specifically, we re-operationalize our court-curbing variable to measure the following types of legislative proposals to curb state courts: (1) Total number of bills introduced, (2) The total number

Table A2: State supreme court declarations of unconstitutionality

| Variable | Bill Intros. | Bills Passed | Amendment Intros. | Amendments Passed | All Intros | All Passed |
|---|---|---|---|---|---|---|
| Court-Curbing Bills$_{t-1}$ | 0.020* (0.008) | 0.179* (0.067) | 0.048 (0.034) | 0.382* (0.130) | 0.017* (0.007) | 0.132* (0.049) |
| Elite Distance | -0.020* (0.007) | -0.017* (0.007) | -0.017* (0.008) | -0.019* (0.008) | -0.019* (0.007) | -0.018* (0.007) |
| Voter Distance | 0.022* (0.007) | 0.019* (0.007) | 0.021* (0.008) | 0.021* (0.008) | 0.022* (0.007) | 0.020* (0.007) |
| Divided Government | -0.243 (0.120) | -0.231 (0.192) | -0.268 (0.193) | -0.222 (0.195) | -0.249 (0.195) | -0.226 (0.193) |
| Mandatory Retirement | -0.093 (0.209) | -0.037 (0.203) | -0.092 (0.216) | -0.079 (0.209) | -0.094 (0.210) | -0.046 (0.204) |
| Competitive System | 0.171 (0.224) | 0.097 (0.216) | 0.127 (0.228) | 0.074 (0.215) | 0.164 (0.224) | 0.087 (0.214) |
| Retention System | 0.640* (0.243) | 0.664* (0.241) | 0.659* (0.244) | 0.655* (0.240) | 0.635* (0.243) | 0.659* (0.354) |
| Reappointment System | 0.139 (0.312) | 0.152 (0.355) | 0.117 (0.355) | 0.119 (0.358) | 0.133 (0.314) | 0.144 (0.354) |
| Intercept | -1.897* (0.291) | -1.806* (0.263) | -1.778* (0.278) | -1.770* (0.276) | -1.876* (0.288) | -1.793* (0.265) |
| $N$ | 247 | 247 | 247 | 247 | 247 | 247 |
| Log-Likelihood | -197.20 | -197.28 | -198.66 | -196.89 | -197.32 | -197.00 |

Notes: The dependent variable is the number of legislative acts a state supreme court invalidated in a given year. Table entries are Poisson coefficient estimates (standard errors, clustered on states, in parentheses). Asterisks denote statistical significance ($p < 0.05$, one-tailed).

Table A3: State supreme court justices' votes for declarations of unconstitutionality

| Variable | Bill Intros. | Bills Passed | Amendment Intros. | Amendments Passed | All Intros | All Passed |
|---|---|---|---|---|---|---|
| Court-Curbing$_{t-1}$ | 0.016 (0.012) | 0.117 (0.146) | -0.013 (0.075) | 0.327 (0.268) | 0.013 (0.012) | 0.097 (0.104) |
| Elite Distance | 0.004 (0.005) | 0.005 (0.004) | 0.004 (0.004) | 0.005 (0.004) | 0.004 (0.005) | 0.005 (0.004) |
| Voter Distance | 0.004 (0.006) | 0.004 (0.006) | 0.005 (0.006) | 0.004 (0.006) | 0.004 (0.006) | 0.004 (0.006) |
| Divided Government | -0.535* (0.233) | -0.522* (0.230) | -0.534* (0.228) | -0.524* (0.227) | -0.535* (0.232) | -0.521* (0.229) |
| Term Limited | 0.631* (0.187) | 0.619* (0.189) | 0.608* (0.190) | 0.606* (0.189) | 0.631* (0.188) | 0.616* (0.189) |
| First Two Years | 0.100 (0.092) | 0.087 (0.090) | 0.095 (0.092) | 0.090 (0.089) | 0.087 (0.089) | 0.087 (0.089) |
| Chief Justice | 0.059 (0.075) | 0052 (0.076) | 0.052 (0.076) | 0.054 (0.076) | 0.059 (0.075) | 0.053 (0.076) |
| PAJID | 0.001 (0.002) | 0.001 (0.002) | 0.001 (0.002) | 0.001 (0.002) | 0.001 (0.002) | 0.001 (0.002) |
| Dissent | 1.005* (0.397) | 0.996* (0.394) | 1.019* (0.393) | 0.990* (0.403) | 1.004* (0.397) | 0.992* (0.398) |
| Competitive System | 0.667* (0.238) | 0.610* (0.234) | 0.651* (0.236) | 0.601* (0.230) | 0.660* (0.237) | 0.603* (0.232) |
| Retention System | 1.087* (0.271) | 1.115* (0.277) | 1.150* (0.264) | 1.111* (0.266) | 1.085* (0.270) | 1.110* (0.273) |
| Reappointment System | 0.275 (0.343) | 0.290 (0.363) | 0.298 (0.370) | 0.275 (0.363) | 0.270 (0.346) | 0.285 (0.363) |
| Issue Area Dummies | *Included in every model* | | | | | |
| Intercept | -2.314* (0.364) | -2.237* (0.351) | -2.262* (0.354) | -2.242* (0.353) | -2.301* (0.362) | -2.236* (0.351) |
| $N$ | 3,414 | 3,414 | 3,414 | 3,414 | 3,414 | 3,414 |
| Log-Likelihood | -1,827.99 | -1,829.84 | -1,832.10 | -1,827.41 | -1,828.69 | -1,828.84 |

Notes: The dependent variable is whether a state supreme court justice voted to invalidate a legislative act in a case ("1" if yes, "0" else). Table entries are logistic coefficient estimates (standard errors, clustered on states, in parentheses). Asterisks denote statistical significance ($p < 0.05$, one-tailed).

of bills passed into law, (3) The total number of constitutional amendments proposed, (4) The total number of constitutional amendments passed, (5) The total number of legislative bills *plus* the total number of constitutional amendments proposed—the measurement strategy used in the main text of the paper, and (6) The total number of bills and constitutional amendments passed.

We begin with our results related to court-level outcomes. We present Poisson model results in Table A2 such that each column of results utilizes a different measurement strategy for the court-curbing variable. The outcome variable of interest is the total number of legislative acts invalidated by a state supreme court in a given year. As with the Poisson models in the main text of the paper, we include an exposure term that captures the annual number of cases in which a state court considered the constitutionality of some legislative act. We also cluster standard errors on the level of each state court.

As can be seen in the results from the Poisson models in Table A2, our court-curbing variable achieves statistical significance in five of the six models but in the wrong direction as that was hypothesized. Recall that the theory being tested is that increasing court-curbing activity is a signal courts use to learn about their legitimacy and constrain their use of judicial review in the separation of powers game amidst greater signals of waning public support. Put simply, the results in the main text of the paper and those in Table A2 provide no support for this idea whatsoever. All things being equal, when state legislatures file and pass increasing numbers of court-curbing proposals, courts respond in the succeeding year by invalidating greater—not fewer—numbers of legislative acts.

Next, we turn to our statistical models related to justice-level outcomes in challenges to legislative acts. Here, the dependent variable is whether a state supreme court justice cast a vote to declare a legislative act unconstitutional in a given case. We present the results from these logistic regressions in Table A3. As with the results in the main text of the paper, we cluster standard errors on the level of each state court. Note immediately that none of the specifications for legislative court-curbing in any of the regressions in Table A3 achieves anything approximating statistical significance. Unlike the previous set of statistical regressions in Table A2 where court-curbing achieved statistical significance in the wrong direction, these results are simply null. Thus, we cannot conclude that either bills or amendments introduced or passed has any deterrence effect on state supreme court justices' propensity to cast a vote to invalidate a legislative act.

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