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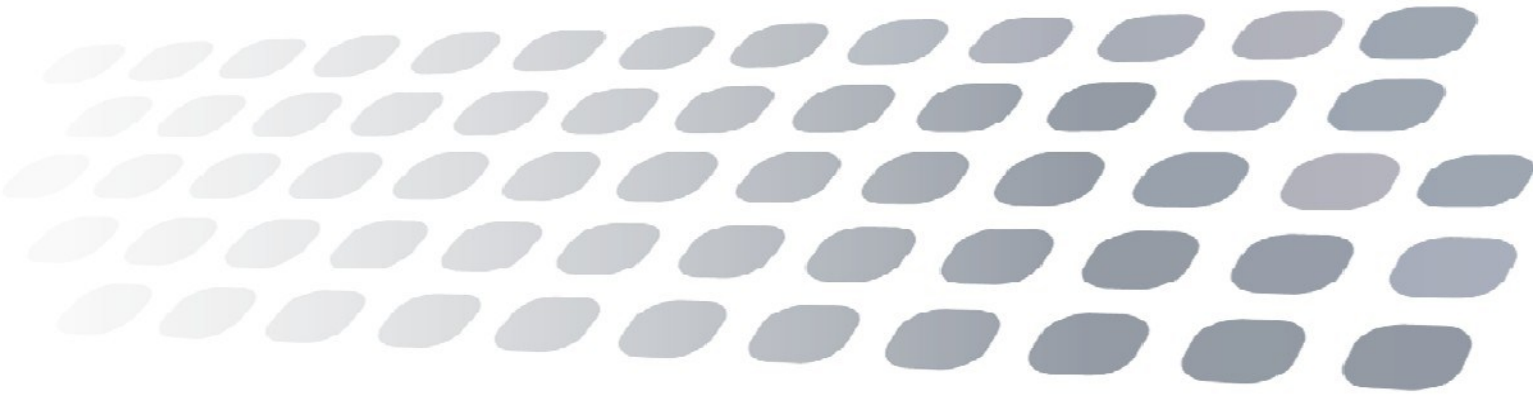

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ESSAYS

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From History to Identity: The Dynamics of Identitarian Constitutionalism in Russia

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Abstract

This article explores constitutional identity in contemporary Russia, emphasizing the interplay of historical memory, internal ethnic and cultural diversity, and international influence in shaping the country's legal and political framework. Through an analysis of Russian constitutional law, it examines how these factors affect both domestic governance and Russia's engagement in regional and global affairs. The study highlights the role of diverse communities in shaping political and legal norms and underscores the ongoing negotiation between national priorities and external expectations. Despite challenges, Russia's reflective approach to its history and social complexities signals a positive trajectory for its constitutional development.

Keywords

constitutional identity, historical memory, ethnic diversity, international influence, legal development

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1. Introduction

Constitutional law resists reduction to constitutional provisions and official state acts. What truly defines the foundations of statehood and the guiding legal principles of a nation emerges from a web of practices, historical contexts, and pressing necessities. In this sense, identitarian constitutionalism offers a way to grasp a country not merely as a legal abstraction but as a living socio-political community, whose constitutional identity is continually shaped by memory, contestation, and self-representation.

Russia certainly makes a particularly compelling case for such an investigation. As a federal, multiethnic, and multicultural state, Russia must grapple with the challenge of integrating significant internal diversity while also cultivating a sense of common constitutional belonging. Since the adoption of the 1993 Constitution, this balancing act has been visible in shifting emphases between recognition of pluralism and the drive for cohesion. These dynamics have only intensified in recent years, as constitutional discourse has become intertwined with broader debates about national identity, historical continuity, and Russia's place in the world.

The global context has also shaped the trajectory of Russian constitutionalism. Whereas in some regions constitutional identity is discussed in the context of integration, in Russia international and supranational institutions are often perceived as external actors with their own agendas. This framing places sovereignty at the center of constitutional discourse, not only as a legal principle but also as a marker of identity in an increasingly contested international environment (Laruelle 2025).

This dimension has gained particular importance over the last decade. Political developments at home and abroad, coupled with the constitutional reforms of 2020,[1] have drawn renewed attention to the foundations and future of the Russian constitutional order. The military and political crisis surrounding Ukraine, together with heightened confrontation between Russia and Western states, has deeply influenced how Russia is perceived externally and how its citizens perceive their own constitutional system. Abroad, Russia is frequently portrayed as pursuing an increasingly centralized and insulated model of governance (Treisman 2018), while inside the country, public opinion remains divided: some see the

constitution as a bulwark of stability in turbulent times, while others regard it as weakened or overshadowed by political expediency (Gel'man & Zavadskaya 2021).

These developments have created a highly polarized environment for assessing Russian constitutionalism. Internationally, debates about Russia are often framed in terms of broader geopolitical conflicts, which can overshadow more nuanced legal and historical questions (for example, Hendl et al. 2024). Domestically, official narratives stress continuity and resilience (Kononov 2024), while critical voices emphasize fragility and contestation (Klimenko 2021). For scholars, this polarization presents both a challenge and an opportunity: the challenge of disentangling constitutional dynamics from political polemics, and the opportunity to contribute a more balanced and context-sensitive perspective.

Such a perspective is especially needed because Russia complicates many conventional assumptions in comparative constitutional studies. In much of the literature, constitutional identity is associated with strengthening democratic pluralism, human rights, or shared memory of overcoming authoritarianism (Gogoase 2022; Lee 2024; Scholtes 2023). In the Russian case, however, identity is often articulated through appeals to history, unity, and cultural self-understanding. Sovereignty plays a central role here as well, serving as a lens through which constitutional selfhood is defined in relation both to internal diversity and to external pressures. This does not mean that Russian constitutionalism is unique in every respect, but it does highlight the importance of studying how different historical trajectories and political contexts shape the meaning of constitutional identity.

This article aims to explore the dynamics of identitarian constitutionalism in Russia across several interrelated dimensions. It examines how questions of diversity and pluralism are reflected in constitutional language; how historical narratives and memories of past transitions inform constitutional self-understanding; and how international debates and crises influence the ways in which Russia defines and defends its constitutional order. The goal is not to offer a celebratory or condemnatory account, but rather to situate Russian constitutionalism within a broader comparative conversation about how states craft and contest their constitutional identities.

2. Diversity and Pluralism in the Russian Constitutional Framework

Diversity and pluralism are central to Russia's political, social, and legal identity. With over 190 ethnic groups, dozens of languages, multiple religious traditions, and a wide political spectrum, the country presents complex challenges for its constitutional system in balancing formal equality with governance and social cohesion. Studying how Russia manages this diversity offers insight into broader issues of federalism, national identity, and social integration.

At the heart of the Russian Constitution is a formal commitment to equality and non-discrimination. Article 19 explicitly prohibits discrimination on the basis of nationality, language, social origin, and other factors, establishing equality under the law as a cornerstone for protecting diversity. Article 26 further guarantees the right of citizens to express their national identity and cultural heritage freely, including the choice of language used in communication and education. These provisions provide a normative foundation for the inclusion of various social groups in political, social, and cultural life. However, legal recognition does not automatically ensure effective protection, and the practical implementation of these guarantees often encounters structural and political obstacles.

The 1993 Constitution recognizes Russia's diversity by defining its citizens as a "multinational people" (многонациональный народ, mnogo-natsional'nyy narod), a deliberate phrasing that emphasizes civic inclusivity while acknowledging ethnic plurality. Linguistically and politically, this is reflected in the distinction between русский (russkiy), denoting ethnic Russians, and российский (rossiyskiy), referring to all citizens of the Federation as a civic nation. This distinction is not merely semantic; it frames debates over minority rights, national policy, and the balance between ethnic and civic identity in law and governance, with policies often prioritizing broader civic identity while public discourse and regional initiatives continue to negotiate boundaries between ethnic particularity and civic belonging (Lunkin 2008; Ostapchuk & Kamusella 2012). By framing Russia as a "multinational people" rather than a "multiethnic nation," the Constitution underlines that multiple peoples coexist within a single state rather than forming a single nation composed of many ethnicities. This raises fundamental questions about whether Russia should be considered primarily a civic or a national state. Theories of nationalism, which link the nation

to a unified political community and emphasize alignment of ethnicity with statehood (Anderson 1983; Gellner 1983), help explain the tension between the state's pursuit of national unity and its acknowledgment of multiple autonomous nations – entities with distinct cultural and political identities – thus highlighting the enduring challenge of balancing ethnic autonomy and centralized governance.

The tension between national unity and the autonomy of diverse peoples is reflected in the constitutional architecture of Russia. The Constitution acknowledges the existence of multiple peoples and provides mechanisms for their political and cultural expression through federalism, designed to balance centralized authority with regional autonomy. Article 5 defines the Federation as a union of republics, territories, regions, cities of federal significance, and autonomous units, creating a multi-tiered governance system. Republics such as Tatarstan, Bashkortostan, and Chechnya may adopt their own constitutions and establish official languages in addition to Russian (Article 68). These provisions theoretically allow for the preservation of local cultural identity within the federation.

In practice, Russian federalism is asymmetrical. While the Constitution formally distinguishes between exclusive federal jurisdiction (Article 71), shared competencies (Article 72), and residual regional authority (Article 73), in substance the balance of power heavily favors the federal center. Key areas such as foreign policy, defense, taxation, and the judiciary are reserved for exclusive federal control, while "shared powers" are largely exercised through federal legislation and oversight (Articles 76, 78, 85), leaving regions with limited room for independent action. Among the subjects themselves, there is formal equality: republics, territories, and regions all possess the same standardized set of competencies under the Constitution, apart from symbolic distinctions such as republics' constitutions and official languages. Genuine asymmetry emerged in the 1990s, when the Federative Treaty allowed certain republics, most notably Tatarstan, to exercise broader rights in areas like taxation and policing (Mitukov 2019). Although the treaty has remained in force, its practical impact was significantly reduced in the 2000s, as Federal Law No. 184-FZ standardized the distribution of powers, curtailed the scope of treaty-based arrangements, and subordinated regional legislation to federal norms. The result was a highly centralized system in which regional variation and autonomy were constrained, and the federal center consolidated its dominance over the subjects.

Language policy exemplifies these tensions. Prior to 2018, republics were required to provide instruction in local languages alongside Russian. The 2018 amendments to the federal education law (Federal Law No. 273-FZ) made the teaching of regional languages optional, subordinating minority linguistic rights to federal priorities. Legal scholars have argued that this represents a weakening of Article 68 guarantees, illustrating the asymmetry between formal constitutional recognition of diversity and its practical enforcement (Kozhevnikov et al. 2020). Incidents such as the self-immolation of Udmurt scholar Albert Razin in 2019 highlight the societal resonance of these legal and policy choices.[II]

Another important aspect of diversity in Russia is the presence of a large number of religions across its territory. Religious freedom is guaranteed by Article 28 of the Constitution, which secures freedom of conscience and the right to profess any religion or none at all. This principle is further implemented by Federal Law No. 125-FZ "On Freedom of Conscience and Religious Associations", which establishes a registration system for religious organizations and defines their rights and obligations. Paradoxically, religion in Russia remains largely detached from questions of collective identity, federalism, or societal pluralism, since the country is officially secular and society mostly adheres to secular norms (Skladanowski & Smuniewski 2023). Nevertheless, the law explicitly references the "traditional religions of Russia" – Orthodoxy, Christianity, Islam, Buddhism, and Judaism – granting them recognition and reflecting the state's aim to promote traditional values and the role of religion in public life.

In practice, Russian Orthodoxy enjoys privileged status, reflected in public ceremonies, educational content, and influence over legislation and social policy (Antonov 2022). Minority religions are legally recognized but often face bureaucratic hurdles, heightened scrutiny, or administrative obstacles, particularly "non-traditional" faiths, new religious movements, and missionary communities (Boeva 2013). These groups may encounter difficulties registering officially, accessing public space, or organizing educational and charitable activities, leading to de facto restrictions on religious practice.

Even registered groups must navigate frequent inspections, reporting requirements, and potential fines. Anti-cult rhetoric and public campaigns often stigmatize smaller religious communities, affecting social perception and participation, while Orthodox, Muslim, Buddhist, and Jewish institutions retain comparatively smooth relations with the state. Thus,

the constitutional ideal of religious pluralism is moderated by institutional preference for traditional religions and by centralized legal enforcement (Stoeckl 2020).

Women, LGBT individuals, and people with disabilities represent important dimensions of Russia's social diversity, yet these groups remain particularly vulnerable. Women are legally guaranteed equal rights in employment, education, and political participation. Despite this, issues such as domestic violence, unequal opportunities in the workplace, and underrepresentation in politics persist (Rebrey 2023). In recent years, the state has introduced several initiatives aimed at addressing domestic violence, including proposals for specialized support services, awareness campaigns, and the establishment of hotlines and shelters. However, these efforts often intersect with the promotion of traditional values, which can emphasize family cohesion and hierarchical gender roles, sometimes limiting the scope of protections for women.[III]

LGBTQ+ rights are heavily constrained by Federal Law No. 135-FZ, which bans "propaganda" of non-traditional sexual relationships among minors, limiting both civic expression and educational inclusion. Reports from human rights organizations document harassment, restricted access to community resources, and social stigma affecting LGBTQ+ individuals (Stoltz & Khlusova 2024).

People with disabilities are covered by Federal Law No. 181-FZ "On Social Protection of Disabled Persons," yet barriers to physical access, employment, and social participation remain, particularly in regions with limited administrative capacity. Municipal and regional authorities have constrained power to expand protections without federal authorization, reflecting the structural asymmetry inherent in Russian federalism. The gap between legal entitlement and social reality highlights ongoing challenges in inclusive policy implementation, and underscores the need for stronger enforcement, local advocacy, and coordination across federal, regional, and municipal levels to ensure practical access to rights (Gurina et al. 2023).

The Russian constitutional framework proclaims protections for ethnic, religious, and social diversity, and the federal system in theory allows regions to preserve local identities. In practice, however, asymmetry between the center and regions, the centralization of authority, and selective enforcement of guarantees constrain pluralism. Language, religion, and social identity often intersect with federal oversight, producing tensions between regional autonomy and central control. This unresolved balance – the "pendulum" between ethnic-

majority influence and civic inclusivity – continues to shape debates over identity and governance, while also raising broader questions of how multiethnic federations can reconcile diversity with central authority.

3. Historical Arguments and the Shaping of Constitutional Identity

Post-Soviet Russia faced the daunting challenge of forming a coherent national identity amidst a profound historical and ideological rupture. The collapse of the Soviet Union in 1991 was not only a geopolitical and economic upheaval but also a seismic cultural and ideological shift (Bassin & Kelly 2012; Kaneff & Gallinat 2022; Yurchak 2006). For decades, the Soviet regime had imposed a unifying narrative centered on class struggle, socialist internationalism, and the primacy of the Communist Party. The end of this system created a vacuum in which the symbols, values, and collective memory that had structured political and social life were destabilized.

Russia's transition required a selective retrieval of historical narratives and an effort to define nationhood in the absence of a singular ideology. The state's constitutional framework reflects both the struggle to reconcile competing historical legacies and the deliberate shaping of a legal identity grounded in historical memory. In this context, historical memory plays a pivotal role in shaping national identity, acting as a record of collective experience and a foundation for legitimizing political and legal structures. In the absence of a unifying contemporary ideology, shared – or sometimes imposed – memory provides the cohesion necessary for constitutional identity (Kurilla 2024).

This reliance on history is not unprecedented. Russia has turned to history in moments of constitutional re-foundation before. The clearest early example came under Stalin during World War II, when the Soviet regime abandoned its revolutionary internationalist rhetoric and invoked Russian patriotism, military traditions, and national heroes to mobilize the population. Later, in the 1980s, perestroika was accompanied by a profound reconsideration of Soviet history, exposing Stalinist crimes and opening public debate on the legitimacy of the Soviet project itself. In the 1990s, the young Russian Federation sought to distance itself from Soviet totalitarianism while experimenting with liberal-democratic narratives. Under Vladimir Putin, history once again became a central tool of state-building, with official

narratives selectively integrating imperial and Soviet elements into a coherent, state-approved vision of the past.

The resurrection of imperial symbols alongside selected Soviet elements illustrates the pragmatic yet contradictory use of history. After the Soviet collapse, the Russian tricolor, the double-headed eagle, and St. George the Victorious were revived, while parts of the Soviet anthem were retained with new lyrics (Matjunin 2000). This combination attempts to reconcile different historical legacies, but it also reflects tension between imperial and Soviet identities. The blended symbolism seeks to legitimize authority, foster national pride, and shape citizens' understanding of the state, while simultaneously highlighting the uneasy negotiation of Russia's past in constructing a post-Soviet national identity.

Historical narratives are also deeply embedded in Russia's management of interethnic and interreligious relations. Some scholars point to Russia's colonial past, highlighting the violent conquest and forced Russification of numerous indigenous peoples from the Volga region, the Caucasus, Siberia, and Central Asia (for example, Morrison 2021). These historical processes, though officially reframed as "integration" or "development," remain partially visible today in ongoing cultural and linguistic marginalization of minority groups.[IV] At the same time, the historical expansion of Russia eastward to the Pacific Ocean and beyond functions as a powerful legitimating narrative for the imperial component of Russian constitutional identity. It provides grounds for portraying Russia not merely as a nation-state, but as a distinct "civilization-state" with its own unique path (Bondarev et al. 2024). This framing is actively employed in political discourse, often contrasted with Western models of constitutionalism and democracy.

Such historical narratives also enable provocative political claims. They provide a discursive foundation for rhetoric about the "return of ancestral lands," most dramatically visible in Russia's claims over Ukraine, but also in references to the Baltic states, northern Kazakhstan, Belarus, and even Alaska, once part of the Russian Empire.[V] While these projects are largely rhetorical and instrumental, they reveal how the past functions as a reservoir of symbolic capital for constitutional identity and geopolitical ambition. Inside Russia, separatist or decolonizing sentiments are limited, despite occasional Western commentaries predicting fragmentation (for example, Lenton 2025). Nevertheless, the multiplicity of historical interpretations among Russian citizens remains a challenge for constitutional cohesion.

Russian society does not hold a uniform view of history. Divergent interpretations reflect a broader identity crisis. For some, especially descendants of those who suffered from political repression, the past is remembered as a source of trauma. For others, including monarchists or communists, different historical eras serve as sources of pride and legitimacy. Many citizens, however, have only fragmentary connections to their ancestry, with little awareness of their family history beyond the Soviet period. In this fragmented memory landscape, the one event that unites the overwhelming majority is the victory in World War II. This explains why May 9 – Victory Day – has become the cornerstone of contemporary Russian identity and the foundation of Putin's ideology (Danilova & Sulyak 2021). It is not merely a commemoration of the past but a state-orchestrated ritual that anchors national unity.

This politics of memory generates a paradox. On the one hand, official narratives emphasize the myth of a "thousand-year-old Russia," portraying the state as an eternal and continuous civilization stretching back to Kievan Rus'. On the other hand, the modern Russian Federation is a relatively young state, barely three decades old, still struggling with the legacies of Soviet collapse. The tension between mythic antiquity and institutional youth underscores the fragility of Russian constitutional identity.

In conclusion, history is central to Russia's constitutional identity. In the absence of a unifying post-Soviet ideology, it serves as a surrogate, providing legitimacy, social cohesion, and moral authority. Through imperial symbols, constitutional text, commemorative laws, and public rituals, historical narratives define the nation, reinforce state power, and shape citizenship. Russian elites' instrumental use of history demonstrates that constitutional identity is historically mediated, with memory and law closely intertwined. By emphasizing a heroic and triumphal past, Russia's approach contrasts with other constitutional traditions, setting the stage for examining how memories of authoritarianism influence transitions to constitutional democracy.

4. The Authoritarian Legacy and Russia's Constitutional Identity

Russia's transition to constitutional democracy has been deeply shaped by its authoritarian past, particularly the legacy of the Soviet system. The country continues to

grapple with the memory of wide-ranging historical traumas: political repression, famine, economic instability and poverty, the consequences of war and forced collectivization, as well as censorship, restrictions on freedom of expression, and campaigns against religion. These experiences remain embedded in collective memory and continue to influence Russia's constitutional identity. This is further complicated by a legal framework that both reflects and regulates the state's engagement with history. Laws, official texts, and public commemorations not only codify the past but also establish which interpretations are considered legitimate, shaping collective memory and civic identity.

After the Soviet collapse in 1991, the 1993 Constitution sought to mark a decisive departure by enshrining human rights, separation of powers, and the rule of law (Schwartz 2009). Yet the legacy of authoritarianism persisted in political culture, institutions, and public attitudes. Instead of a clean break, the 1993 Constitution preserved key elements of Russia's authoritarian heritage. While it declared human rights, separation of powers, and federalism, it also concentrated extensive authority in the presidency: Article 80 defined the president as both head of state and guarantor of the Constitution, placing him "above" the branches of power. Articles 83–90 granted the president wide powers to appoint the government, dissolve the State Duma, issue decrees with the force of law, and even initiate constitutional amendments, while parliament's ability to constrain the executive remained weak. These provisions reflected not only a rejection of Soviet totalitarianism but also a compromise with its legacy, embedding in the constitutional order the enduring preference for centralized authority and limited checks on executive power.

The concentration of political power in the presidency was a direct consequence of the constitutional crisis of October 1993, when violent confrontation between the executive and the parliament was resolved in favor of Boris Yeltsin.[VI] The new Constitution institutionalized this outcome by granting the president exceptional authority over the legislature and government, setting the trajectory of Russian constitutionalism from the very beginning. This formative moment reinforced the idea that strong, centralized leadership was essential for stability, while the legitimacy of state violence as a means of resolving political conflict became tacitly embedded in the political order. As a result, historical examples of repression and state coercion could not be officially represented as unequivocally negative, since they echoed the very logic upon which the constitutional system itself had been constructed.

The memory of repression has produced conflicting narratives across Russian society.[VII] For some citizens, these events symbolize resilience, national sacrifice, and the consolidation of the state; for others, they are injustices demanding full acknowledgment and reckoning. These divisions persist in constitutional discourse, making the realization of democratic ideals uneven and contested. This unresolved tension underscores the difficulty of forging a collective constitutional identity that can reconcile law, governance, and memory.

The Russian state has increasingly sought to regulate historical interpretation. A striking example is the 2022 Federal Law No. 103-FZ, which bans comparisons between Soviet repression and Nazi crimes. By criminalizing such equivalences, the state defends the narrative of Soviet wartime victory as a morally unique achievement, while systematically downplaying the darker aspects of Stalinism, including widespread repression, forced collectivization, and political executions. Such measures do more than shape historical memory – they actively influence constitutional identity by privileging one sanctioned version of history, thereby undermining pluralism, a cornerstone of constitutional democracy. As Nekoliak and Primbs (2025) observe, Russian memory legislation has gradually shifted from addressing explicit neo-Nazi symbolism to reinforcing the state's preferred moral framing of the Soviet past. By limiting certain historical comparisons, this legal approach reduces the scope for constitutional debate over the normative implications of state violence.

Independent initiatives, such as the Memorial Society,[VIII] have long sought to preserve the memory of repression. Activists like Yuri Dmitriev,[IX] who painstakingly documented mass graves of Stalin's victims, became symbols of resistance to state-sanctioned historical amnesia. Yet both Memorial and Dmitriev faced severe persecution, illustrating the state's hostility toward uncontrolled narratives of the past. This pattern exemplifies the broader dynamics of memory policy under Putin: as Bogush (2025) demonstrates, independent historical narratives are increasingly treated as challenges to state authority. The persecution of memory activists thus reflects a constitutional logic in which plural forms of remembrance are seen as incompatible with a centralized and loyal political order.

Symbolic spaces also play a crucial role in public memory. The Solovetsky Stone on Lubyanka Square, transported from the site of the first Soviet labor camp, stands as a memorial to political repression, and citizens regularly bring flowers there, including following the death of prominent opposition figures like Alexei Navalny, transforming it into a living site of memory (Arkhipova & Lapshin 2024).

By contrast, the fate of the Dzerzhinsky monument – removed in 1991 and still subject to debate regarding its possible restoration – reveals the contested nature of public symbols.[X] Similarly, the "Last Address" project, which installs plaques at the homes of repression victims, has faced vandalism and removal of memorial signs, underscoring the fragility of remembrance in contemporary Russia.[XI] These examples illustrate a society caught between the imperatives of remembrance and the pressures of erasure, between the urge to move forward and the persistence of unresolved trauma.

Despite individual initiatives and resistance, official state policy as a whole does not encourage a full understanding of the difficult aspects of the Soviet past. The 2012 Russian "foreign agent" law, officially titled Federal Law No. 121-FZ of July 20, 2012, came into effect on November 21, 2012. It mandates that non-governmental organizations (NGOs), media outlets, and individuals receiving foreign funding and engaging in "political activity" register as "foreign agents." This designation carries a strong negative connotation in Russian society, equating it with "traitors" or "spies." In June 2022, the European Court of Human Rights (ECHR) ruled in the case Ecodefence and Others v. Russia (Application No. 9988/13) that this law violates the rights to freedom of expression, association, and respect for private life, as enshrined in the European Convention on Human Rights. The court found that the law's application led to undue restrictions on the activities of civil society organizations and individuals, including mandatory labeling and intrusive reporting requirements, which deterred public engagement and stifled dissent. Despite this ruling, Russia's withdrawal from the Council of Europe in 2022 has rendered the ECHR's decisions unenforceable within the country.

The memory of the Holocaust adds another layer of complexity. While Russia emphasizes its pivotal role in defeating Nazi Germany, it has been slower to embrace broader European practices of Holocaust remembrance. The Holocaust is frequently framed within the context of national heroism and wartime sacrifice, rather than as a universal lesson on the consequences of authoritarianism, anti-Semitism, and human rights abuses (Pakhaliuk 2025). This selective remembrance limits the capacity of Russia's constitutional identity to internalize global norms of human dignity and minority protections, reflecting an emphasis on national narratives over universal ethical principles.

Russia's constitutional identity is deeply entangled with its authoritarian legacy, where unresolved Soviet repression continues to shape collective memory and political culture.

Many Russians prefer to "move on," yet the past refuses to disappear, leaving tensions that weaken constitutional norms and make them vulnerable to manipulation. The 1993 Constitution, particularly its first two chapters, was conceived as a declarative response to totalitarianism, proclaiming freedom, dignity, and rule of law. However, without genuine societal reckoning, these ideals remain fragile. Memorials, debates over monuments, education, and state-directed history policies reveal the ongoing struggle to balance remembrance with denial, while international actors like the UN and the ECHR play a potential role in reinforcing or challenging domestic constitutional development.

5. International and Supranational Influences on Constitutional Identity

Russia's constitutional law has long been shaped not only by internal historical and political dynamics but also through its interactions with international and supranational institutions, revealing a complex interplay between the imperatives of national sovereignty and the pressures of international legal norms. Over the past three decades, Russia has engaged with organizations such as the European Union (EU), the Council of Europe (CoE), the United Nations (UN), and various international human rights organizations. These interactions have played a significant role in shaping debates around governance, human rights, and constitutional identity. However, they have simultaneously highlighted enduring tensions between adherence to international standards and the desire to preserve domestic constitutional autonomy. The resulting dynamic is one in which international influence is both welcomed and resisted, negotiated carefully to reinforce domestic priorities while maintaining a façade of global legitimacy.

Although Russia is not an EU member, the European Union has exerted a measurable influence on its legal and political framework, particularly in the post-Soviet period. The 1994 Partnership and Cooperation Agreement (PCA) established the foundation for Russia-EU relations, creating avenues for cooperation in trade, economic regulation, political governance, and human rights promotion.[XII] Within this framework, the EU has sought to promote democratic reforms, judicial independence, and protections for political freedoms. These efforts were often presented in the form of recommendations, technical assistance programs, and conditionalities attached to trade or economic cooperation. While such

measures sought to encourage convergence with European norms, Russia's response has often been characterized by cautious engagement mixed with resistance. For instance, while some administrative and market reforms aligned with EU expectations, the Russian government has consistently resisted reforms that might diminish central control over media, political parties, or civil society organizations (Mazepus et al. 2021).

Russia's relationship with the Council of Europe and its judicial arm, the European Court of Human Rights (ECtHR), provides another crucial example of the complex interplay between international obligations and constitutional sovereignty. As a member of the CoE, Russia was bound by the European Convention on Human Rights (ECHR) and the rulings of the ECtHR. Over the years, Russian courts received thousands of cases brought by citizens claiming violations of civil and political rights, from issues of unlawful detention to restrictions on freedom of expression. The ECtHR decisions occasionally forced Russia to amend laws or compensate victims, creating moments in which international legal oversight appeared to influence domestic legal practice (Dzehtsiarou & Helfer 2022). Nevertheless, tensions escalated over time, culminating in the landmark Resolution of the Constitutional Court of the Russian Federation of 14.07.2015 N 21-P, which declared that the ECtHR's judgments could be disregarded if they conflicted with the Russian Constitution. This decision underscored a fundamental tension: while Russia formally participated in supranational institutions, it reserved the right to prioritize constitutional sovereignty whenever international norms threatened to override domestic authority. The tension came to a head in 2022, when Russia formally withdrew from both the ECHR and the CoE, severing legal ties with European human rights frameworks.

Beyond Europe, Russia's engagement with the United Nations demonstrates both selective adherence to international norms and strategic use of global governance mechanisms. As a permanent member of the UN Security Council, Russia maintains a privileged position in influencing decisions on international security, peacekeeping, and the regulation of armed conflict (Götz & Gejl Kaas 2022). Russian constitutional identity reflects its global role through strategic engagement in the United Nations, particularly via Russia's use of its veto power in the Security Council. For example, Russia has repeatedly vetoed resolutions on Syria to defend state sovereignty and prevent external intervention, demonstrating how it balances international obligations with domestic and constitutional priorities.[XIII]

A key aspect of Russia's ability to navigate these complex international interactions is its strategic deployment of political capital derived from the outcomes of World War II and its Soviet-era influence in the Global South. Russia has leveraged the narrative of the Soviet Union's decisive role in defeating Nazi Germany to maintain symbolic authority on the global stage, emphasizing historical legitimacy in international forums and public diplomacy (David-Fox 2022). Similarly, the enduring political, economic, and cultural influence established during the Soviet era allows Russia to maintain partnerships and alliances in parts of Africa, Asia, and Latin America, creating a buffer against international isolation.[XIV] This strategic positioning was particularly evident in 2022, when despite widespread sanctions and condemnation following the invasion of Ukraine, Russia was not fully isolated from the international system, largely due to these historical and geopolitical relationships.

International human rights NGOs influence Russia's constitutional discourse, though their impact on public opinion is complex. Organizations such as Human Rights Watch, Amnesty International, and Front Line Defenders monitor human rights conditions, publish reports, and advocate for judicial independence, civil liberties, and democratic reforms. While their work informs domestic debates and legal discussions, research indicates that many Russians remain indifferent, often viewing these NGOs through the lens of state propaganda portraying them as foreign agents undermining sovereignty (Gerber 2016). Nevertheless, these organizations provide resources and platforms that support civil society, subtly shaping discourse on constitutional rights despite official resistance.

This interplay between external advocacy and domestic perceptions mirrors Russia's broader engagement with international institutions. Early in Vladimir Putin's presidency, narratives emerged regarding Russia's alleged attempts to join NATO and the European Union.[XV] While often simplified in popular accounts, these episodes are significant because they illustrate the delicate and contested nature of Russia's integration into European security and economic structures. The subsequent expansion of NATO into former Warsaw Pact countries added further complexity, as Russia perceived a strategic encroachment on its traditional sphere of influence. Scholars argue that this context cannot be reduced to mere aggression; rather, it reflects a broader security dilemma shaped by historical anxieties, regional balances of power, and the evolving architecture of European defense (Chae 2024; Duke & Gebhard 2017; Israelyan 1998).

In this context, Russia's interactions with post-Soviet states, particularly the countries of the Commonwealth of Independent States (CIS) and the Baltic region, further complicate the picture. Efforts to maintain influence over these neighboring states, whether through economic, political, or security arrangements, demonstrate an ongoing concern with regional hierarchy and stability.[XVI] These interactions are closely tied to Russia's domestic constitutional narrative, which frames national sovereignty, territorial integrity, and regional influence as central pillars of state identity. Externally, Russia increasingly looks to the political and economic model of China as a reference point for governance, particularly regarding the integration of authoritarian control, economic modernization, and strategic international positioning (Pradt 2025, 245–271). This orientation is reinforced by the resource-dependent structure of Russia's economy, which links external policy directly to energy exports and natural resource diplomacy. Reliance on oil, gas, and mineral wealth shapes both domestic priorities and international strategies, constraining flexibility in policy while enabling leverage over dependent states.

International and supranational actors have shaped Russia's constitutional identity, yet their influence is constrained by domestic priorities and sovereignty concerns. Engagements with the EU, Council of Europe, and UN illustrate how external legal norms interact with Russia's self-conception, while international human rights advocacy is often framed as adversarial. These interactions influence the development of an identity-focused constitutionalism, highlighting tensions between global expectations and Russia's emphasis on national independence, state authority, and historical traditions.

6. Conclusion

Russia's constitutional identity is dynamic and evolving, shaped by historical memory, societal debate, internal diversity, and international engagement. It reflects ongoing efforts to understand the past, reconcile competing narratives, and articulate a vision for the future. Engagement with history – from the Soviet legacy and wartime achievements to contemporary governance – demonstrates a willingness to grapple with complex realities and develop a coherent constitutional self-conception.

Internal ethnic, cultural, and linguistic diversity plays a central role in shaping this identity. The presence of numerous ethnic groups, indigenous communities, and regional traditions creates both challenges and opportunities for governance. Incorporating these diverse voices encourages inclusive legal and political practices, fosters a sense of belonging, and strengthens institutional resilience, signaling that pluralism is essential to Russia's evolving legal framework.

Debates over historical interpretation, memorialization, and legal norms reflect a vibrant public sphere that promotes reflection, discussion, and gradual consolidation of constitutional principles. Engaging with competing narratives – both historical and cultural – demonstrates a meaningful commitment to self-examination and underscores that constitutional development is as much social and cultural as it is legal.

International and supranational actors have significantly influenced Russia's constitutional discourse, offering models, critique, and opportunities for collaboration. Institutions such as the European Union, the Council of Europe, and the United Nations, along with global human rights networks, shape debates on governance, human rights, and legal norms. Russia's selective engagement reflects a strategic balance between international participation and national priorities, showing that constitutional identity operates at the intersection of domestic aspiration and global interaction.

This identity is also evident in Russia's external relations. Historical experience, international role, and regional influence inform both foreign policy and global perception. By asserting its governance vision abroad, Russia contributes to regional and global dynamics. Understanding this self-conception is crucial for building constructive and mutually respectful relationships.

Ultimately, Russia's search for constitutional identity signals political and legal development. Reflection, debate, international engagement, and recognition of internal diversity demonstrate a meaningful commitment to progress. Appreciating the historical depth, pluralism, and global dimensions of Russia's constitutional identity allows scholars, policymakers, and international partners to engage with the country in a realistic, forward-looking, and constructive manner.

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[1] The 2020 Russian constitutional reform refers to a package of amendments to the Constitution of the Russian

Federation adopted through a nationwide vote in June–July 2020. The reform introduced over 200 changes, the most consequential of which were the "zeroing" of presidential terms (allowing Vladimir Putin to run again after 2024), the strengthening of presidential powers, and the reconfiguration of the relationship between domestic law and international legal norms. The amendments also included provisions emphasizing traditional values, social guarantees, and references to Russia's historical continuity, thereby reshaping both the institutional framework of governance and the symbolic foundations of constitutional identity (Partlett 2021).

[II] In September 2019, Albert Razin set himself on fire outside the State Council of Udmurtia in protest against policies diminishing the role of minority languages (Radio Free Europe/Radio Liberty (2019, September 12), Hundreds Bid Farewell To Udmurt Scholar Who Immolated Himself Protesting Russia's Language Policies, available at: https://www.rferl.org/a/hundreds-bid-farewell-to-udmurt-scholar-who-immolated-himself-protesting-russia-s-language-policies/30160616.html).

[III] In Russia, efforts to address domestic violence remain highly constrained. Legislative initiatives aimed at criminalizing all forms of domestic abuse have been delayed or blocked, reflecting the influence of traditional and religious values on policymaking. Authorities have explicitly postponed comprehensive legal reforms, citing the preservation of the "traditional family" as a priority. As a result, many cases of domestic violence continue to be treated as minor offenses with minimal penalties, leaving victims with limited protection or recourse and highlighting persistent gaps in gender equality enforcement (Meduza (2024, June 21), It could undermine the traditional family, available at: https://meduza.io/en/feature/2024/06/21/it-could-undermine-the-traditional-family).

[IV] The persistence of cultural and linguistic marginalization in contemporary Russia reflects a long-standing tension in Russian statecraft. As Alexei Miller (2008) shows, both in the Romanov Empire and today, national policy balanced coercion with selective accommodation: some minority groups were integrated through legal or cultural concessions, while others faced pressures to conform to dominant norms. Unlike classic European colonial systems, Russian policy was not purely extractive or territorial; it often combined administrative pragmatism with ideological arguments about civilizational hierarchy. Understanding this dual legacy helps explain why "integration" efforts can coexist with continued marginalization of certain ethnic communities.

[V] In the case of Ukraine, Russian President Vladimir Putin has referred to the invasion as a mission to "return Russian land," drawing parallels to historical figures like Peter the Great (The Guardian (2022, June 10), Putin compares himself to Peter the Great in quest to take back Russian lands, available at: https://www.theguardian.com/world/2022/jun/10/putin-compares-himself-to-peter-the-great-in-quest-to-take-back-russian-lands). Similarly, Russian officials have made claims about the Baltic states and northern Kazakhstan, suggesting they are historically Russian territories. Even Alaska, purchased by the United States in 1867, is occasionally mentioned in Russian discourse as part of a broader imperial nostalgia (France 24 (2025, August 14), Alaska: A source of Russian imperial nostalgia, available at: https://www.france24.com/en/live-news/20250814-alaska-a-source-russian-imperial-nostalgia).

These assertions are not merely historical reflections but are actively employed to justify contemporary geopolitical actions. For instance, during the 2025 summit in Alaska, discussions between Putin and former U.S. President Trump reportedly touched upon territorial issues, with Alaska's historical ties to Russia being part of the conversation (Time (2023), Trump and Putin's Alaska summit: A window into the Ukraine war, available at: https://time.com/7309587/trump-putin-alaska-summit-ukraine-war).

[VI] The 1993 Russian constitutional crisis was a pivotal moment in the nation's post-Soviet history, underscoring the centralization of presidential power. The conflict escalated when President Boris Yeltsin dissolved the parliament, leading to violent confrontations in Moscow. On October 4, Yeltsin ordered military forces to shell the parliament building, resulting in significant casualties. This decisive action effectively ended the power struggle, consolidating presidential authority. Subsequently, a new constitution was adopted, granting the president extensive powers and shaping Russia's political trajectory toward a more centralized governance structure (AP News (2021, August 19), Russia marks anniversary of 1991 mutiny against Yeltsin and Putin, available at: https://apnews.com/article/russia-mutiny-anniversary-putin-yeltsin-346eaba32afeac511fdf3c2b8fd33912).

[VII] According to a July 2023 survey by the Levada Center, approximately 47% of Russians express respect for Joseph Stalin, while 23% feel indifferent toward him. Notably, 54% agree that Stalin was a great leader, a sentiment that has remained consistent since 2021. Despite this admiration, over half of the respondents view Stalin's purges and repressions as unjust and criminal. This complex and contradictory perception reflects a broader ambivalence in Russian society regarding Stalin's legacy (Levada Center (2023, August 15), Attitudes toward Stalin, available at: https://www.levada.ru/2023/08/15/otnoshenie-k-stalinu/).

[VIII] Founded in 1987 by Soviet dissidents including Andrei Sakharov, Memorial is one of Russia's oldest and most prominent human rights organizations. Its mission is to preserve the memory of Soviet-era political

repression and to promote human rights and democratic values. Memorial has played a pivotal role in documenting the crimes of Stalinism, supporting political prisoners, and advocating for historical truth. In 2022, Memorial was awarded the Nobel Peace Prize alongside Ales Bialiatski and the Center for Civil Liberties for their efforts to combat authoritarianism and promote human rights (Britannica (n.d.), Memorial (Russian organization), available at: https://www.britannica.com/topic/Memorial-Russian-organization).

[IX] Yury Dmitriev is a Russian historian and human rights activist known for his work uncovering mass graves of Stalinist repression victims in Karelia, particularly in Sandarmokh. He led the local branch of Memorial and was instrumental in compiling the "Book of Remembrance" for the region. In 2016, Dmitriev was arrested on charges widely regarded as politically motivated. He was convicted in 2020 and sentenced to 13 years in prison, later increased to 15 years in 2021. International human rights organizations, including Memorial, have condemned his prosecution as an attempt to suppress historical memory and intimidate dissent (PEN America (2023), Yury Dmitriev, available at: https://pen.org/individual-case/yury-dmitriev/).

[X] In 2023, a bronze statue of Felix Dzerzhinsky, founder of the Soviet secret police, was unveiled at the headquarters of Russia's foreign spy service (SVR) in Moscow (Kim, Lucian (2020, July 21), What To Do With Toppled Statues? Russia Has A Fallen Monument Park, WUSF, available at: https://www.wusf.org/2020-07-21/what-to-do-with-toppled-statues-russia-has-a-fallen-monument-park). This monument mirrors the one that stood on Lubyanka Square until it was toppled by protesters in 1991. The installation has been interpreted as a symbolic restoration of Soviet-era authority, reflecting a broader trend of rehabilitating controversial historical figures in Russia. Critics argue that such actions undermine efforts to confront past injustices and promote democratic values.

[XI] The Last Address is a civic initiative in Russia aimed at commemorating victims of Soviet-era political repression (International Coalition of Sites of Conscience (2023), Last Address (Russia), available at: https://www.sitesofconscience.org/membership/last-address/). Inspired by Germany's Stolpersteine project, it involves installing small metal plaques at the last known residences of individuals who suffered under the regime. These plaques bear the name, birth year, profession, dates of arrest, death, and year of legal rehabilitation of the victim. As of 2023, over 1,500 plaques have been installed across Russia and in several other countries, serving as a poignant reminder of the atrocities committed during that period.

[XII] The 1994 Partnership and Cooperation Agreement (PCA) between the European Union and Russia was signed on June 24, 1994, and entered into force on December 1, 1997. This agreement established a comprehensive framework for political dialogue, trade, investment, and cultural exchange, aiming to promote mutual understanding and support Russia's transition to a market economy and democratic governance. The PCA was designed to be automatically renewed annually until replaced by a new agreement; however, negotiations for a successor were halted in 2012, leaving the PCA as the primary legal instrument governing EU–Russia relations (Council of the European Union (1997, October 30), Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, Official Journal of the European Communities, L 327, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A31997D0800).

[XIII] Since 2011, Russia has cast 19 vetoes in the UN Security Council, with 14 of these concerning Syria. These vetoes have notably blocked the condemnation of chemical weapons attacks, the cessation of a chemical weapons investigation mechanism, and the referral of Syria to the International Criminal Court. Such actions underscore Russia's prioritization of state sovereignty and its strategic interests over broader international obligations (Security Council Report (2025), The Veto, available at: https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php).

[XIV] Drawing on its Soviet-era legacy, Russia implements concrete measures to maintain influence in Africa, Asia, and Latin America. This includes bilateral agreements on military and economic cooperation, arms and energy supplies, and the promotion of anti-colonial and pro-Russia initiatives in international forums. This strategy enables Moscow to build durable alliances, resist international isolation, and expand its geopolitical influence (Sabanadze, Natalie (2024, May 16), Russia is using the Soviet playbook in the Global South to challenge the West – and it is working, Chatham House, available at: https://www.chathamhouse.org/2024/05/russia-using-soviet-playbook-global-south-challenge-west-and-it-working).

[XV] In the early 2000s, Russia pursued exploratory diplomatic contacts with Western institutions, assessing potential pathways for cooperation and integration. These efforts were driven by domestic priorities, including consolidating political authority and supporting economic modernization, as well as by strategic considerations aimed at positioning Russia within the post-Cold War European security order. While no formal accession resulted, these initiatives reflected an attempt to navigate the tension between domestic objectives and the broader international geopolitical landscape (Rankin, Jennifer (2021, November 4), Ex-Nato head says Putin

wanted to join alliance early on in his rule, The Guardian, available at: https://www.theguardian.com/world/2021/nov/04/ex-nato-head-says-putin-wanted-to-join-alliance-early-on-in-his-rule).

[XVI] Russia's relations with its post-Soviet neighbors reflect a complex mix of influence, cooperation, and contestation. In the Commonwealth of Independent States (CIS), Moscow leverages organizations such as the Collective Security Treaty Organization (CSTO) and the Eurasian Economic Union (EAEU) to maintain economic and security ties. For example, Kazakhstan and Belarus participate actively in these frameworks, while Ukraine and Georgia have sought to limit Russian influence by pursuing closer ties with the EU and NATO. In the Baltic states – Estonia, Latvia, and Lithuania – Russian influence is sharply constrained, as these countries integrate fully with Western security and economic institutions. Lithuania, for instance, has reinforced its borders with Russia and Belarus to deter potential aggression.

In the South Caucasus, Russia's role is both strategic and highly contested. Moscow maintains peacekeeping forces in Nagorno-Karabakh following the 2020 conflict between Armenia and Azerbaijan and continues to mediate energy, security, and transport corridors. Armenia remains closely aligned with Russia through the CSTO, whereas Azerbaijan leverages Russian relations pragmatically while cultivating ties with Turkey and Western partners. These regional interactions demonstrate Moscow's ongoing concern with maintaining hierarchical influence and regional stability, but they also reveal the limits of Russian power in the face of divergent national strategies and external alignments (More about this: de Waal, Thomas (2024, May 16), The End of the Near Abroad, Carnegie Europe / IWM, available at: https://carnegieendowment.org/research/2024/05/the-end-of-the-near-abroad?lang=en).

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In search of the identity of the Brazilian constitutional order: a dormant issue on this side of the Atlantic

by
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Abstract

This article aims to construct a workable concept of "constitutional identity" applicable to contemporary Brazilian constitutionalism, a topic largely dormant in the Latin America. The study navigates the complexities of applying a notion developed in the Global North to a distinct Latin American context, marked by a unique historical trajectory and the absence of a strong supranational legal order. The research adopts a dual approach, combining analytical and normative dimensions, to argue that Brazilian constitutional identity is not a static core but a dynamic, dialogical process. It is continuously constructed through the tensions between past and future, consensus and dissent. The article identifies the structural pillars of this identity within the 1988 Federal Constitution, analyzing its Preamble, Fundamental Principles, the extensive catalog of Fundamental Rights and its openness to international law, and the Eternity Clauses. The findings indicate that Brazil's constitutional identity is anchored in a deliberate break from its authoritarian past and a commitment to a democratic, pluralistic, and socially just future. This identity is defined by the centrality of human dignity, the establishment of a Democratic State under the Rule of Law, the defense of pluralism, the model of a Social State, and a unique dialogical relationship with the Inter-American Human Rights System. These elements form the normative and axiological essence of the Brazilian constitutional project.

Keywords

constitutional identity, Brazilian Constitution, Latin American constitutionalism, fundamental rights, eternity clauses

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1. Introduction

The present article aims to construct a robust concept of "constitutional identity" to serve as a foundation for its application in contemporary Brazilian constitutionalism.

This work involves at least two fundamental starting points. The first concerns understanding Brazilian constitutionalism as situated in a political space defined as "Latin American" and, thus, absorbing what from this space impacts nationally. The second is to understand the relationship of what was previously stated with a constitutional environment inaugurated, at least formally, with independence in 1822, when the bases of the state and its relationship with citizenship began to have national foundations.

This work cannot disregard a political environment surrounded, on one hand, by a plural reality in the ethnic sense, given that the foundations of the relationship between State and nation in the "New World" have little significance, due to the waves of migration that composed the Brazilian people. In this sense, understanding the regional political-constitutional context to understand the elements of Brazilian constitutionalism, and, from there, developing Brazilian constitutional identity, is a central task for the present research.

The article is structured as follows: a) it seeks to elaborate a concept of constitutional identity that serves its objectives, that is, to conceive a constitutional identity, coined by authors and institutions from the Global North; b) to present the bases of Latin American constitutionalism and situate Brazilian constitutionalism within it, with its own characteristics, derived from its singular constitutional history and its specific political and constitutional contexts; c) to understand, in the recent post-constituent reality (1987-1988) and in the development of the sedimentation of the 1988 Constitution, whether by its text or by its interpretation, what currently defines this constitutional identity.

This is an arduous task, given that the theme of constitutional identity, which develops in the European context, does not have the same meaning in Latin America and Brazil, where the reality of the relationship between regional International Law and Domestic Law presents weaker characteristics, especially if we consider this reality from the absence of a supranationality clause, as is the case with European Union Law.

The present work, therefore, navigates in less turbulent waters, in a normative sense, but, on the other hand, more unknown, given the little attention that the concept of constitutional identity receives in Latin America when compared to upon USA and Europe.

2. Constitutional Identity: In Search of an Operative Concept

When analyzing contemporary constitutionalism, it becomes clear that important transformations have affected it, since the liberal model, founded on the internationindividual, the national state, and the law (Barber, 2015), fundamentally transformed itself. Although it is not appropriate to think of a global or worldwide constitutionalism, given the various regional and national differences in terms of culture, morality, politics, law, among others, any notion of constitutionalism perceives that the struggle against the abuse of power founded on legal rules constitutes a minimum common denominator for the widespread use of the concept (Grimm, 2016).

It is meant that the concept of constitutional identity needs to be observed according to the dynamics of each national state (Polzin, 2017; Maes, 2024), although, as we will see, the international environment and international law are indispensable for conceptualizing it (Ragone, 2022).

It is true that literature on the theme of constitutional identity is also very varied and, indeed, regionalized. This can be seen, for example, by comparing the seminal works of Jacobsohn (2006) and Rosenfeld (1995), based on an analytical proposal, on the one hand, and the vast bibliography that can be explored, in the European context, focused mainly on the relationship between European law and the domestic law of national states, which has been developed from a Eurocentric background (Tushnet, 2010), more focused on a normative perspective.

For the proper development of the article, a comparison will be made of the concepts employed by two authors who try to establish an operative classification of the two "worlds," such as Rosenfeld and Jacobsohn. Furthermore, European law and the national and international jurisprudence of Europe must function, very importantly, in this process. To this end, based on the classification proposal below, the development of the work will follow

some necessary options to work with a theme that is outside the reference axis of the authors (Global North) to situate it in the Global South, more specifically in Latin America.

The first proposal for conceptual synthesis that interests us is that of Monica Polzin (2017), who elaborates five classifications (discourses) for the concept of constitutional identity. The first discourse emerges in the context of European law, centered on Article 4.2 of the Treaty on European Union. The main discussion is whether the "national identity" of Member States, understood as their constitutional identity, can serve as a justification for non-compliance with European Union Law. The second discourse, related to the first, addresses the interaction between constitutional identity and public international law. It questions whether fundamental constitutional values can legitimize the violation of international law and to what extent international bodies should consider these national norms and values, also discussing it as a theory of judicial self-restraint. The third discourse is composed of national debates, in which constitutional identity is seen as the identity of the constitution itself, a purely normative concept. This view is particularly prominent in Germany, where constitutional identity defines the immutable core of the constitution(eternity clauses), which cannot be suppressed by amendments, functioning as a last legal limit to constitutional reform and European integration. Finally, the fourth discourse understands constitutional identity as a special collective identity of a people or nation, which is expressed, determined, and shaped by its constitution, focusing on the relationship between national culture and the constitutional text, relating a fifth discourse to the theme of immigration.

In turn, Maes (2024) elaborates a more concise classification, in two parts. He divides the concepts of constitutional identity into analytical and normative senses.

Constitutional identity, in its analytical sense, is a tool for understanding the specificity of a constitution as a sociocultural and political document. It seeks to explain how a collectivity understands itself through its constitutional order. The focus here is on the dynamic relationship between a nation's culture and its constitution. It highlights the contributions of theorists such as Gary Jacobsohn and Michel Rosenfeld who argue that constitutional identity is shaped by how a society deals with multiple and, at times, conflicting interpretations of its constitutional principles over time, resulting in a continuous social and historical evolution (Jacobsohn) and, on the other hand, perceives identity as the result of the interaction between characteristics that remain constant (sameness) and those that evolve

without losing the essence of the entity (Rosenfeld). From this perspective, constitutional identity is an inherently dynamic concept, subject to constant contestations, dialogues, and compromises (Maes, 2024).

In contrast, constitutional identity as a normative concept has a binding force, capable of obliging or motivating the action of actors such as legislators, governments, and courts. This aspect is intimately linked to constitutionalism, which advocates limiting state power to protect individual liberties. The main normative application of constitutional identity is the imposition of substantive limits on constituted powers. It presupposes the existence of a "normative core" of the constitution that must be protected from the ordinary political process of changes based on majority rule. These immutable elements reflect the raison d'être or the "general spirit" of the constitution and are considered part of a substantive constitution that precedes any formal review. Consequently, any constitutional amendment must be consistent with this core; otherwise, it risks being deemed unconstitutional in the present. And any interpretation of the Constitution must preserve such meanings to the detriment of others that conflict with them. The other normative version concerns the relationship between national and international orders, in the European case, and is directed against the supranational level. In this sense, it both limits the domestic legislator in the transfer of powers to international institutions and limits these institutions in the interpretation and exercise of these transferred powers (Maes, 2024).

In the present work, when considering an operative concept of constitutional identity, the analytical and normative concepts must be complementary and not exclusive. This is because, on the one hand, to think about the person and their relationship with the State, one must take into account not only constitutional history, but also political, economic, among others, as something with a universal bias, but on the other hand, the dynamics with which the rule of law, democracy, and separation of powers present themselves in a given national state also directly impact the attempt to propose an operative concept of constitutional identity, i.e., a concept that serves the objectives of the present article. On the other hand, although the normative advances arising from European law, for example, in doctrinal, jurisprudential, and legislative senses, are central to thinking about a concept of constitutional identity in the Brazilian scenario, with themes such as the principle of supranationality of European law and its relationship with Article 4 of the Treaty on European Union, and with the multiplicity of specific decisions of European courts handling

the concept of constitutional identity, such a reality does not exist in the jurisprudential or even normative dynamics in Brazil, where the courts, especially the Supreme Federal Court(STF), do not use the concept of constitutional identity in their decisions and the doctrine is scarce.

Another important point is that it cannot be denied that other social sciences, such as politics, anthropology, economics, or sociology, also have their normative foundations, in the sense that certain elements must produce effects in the field of reality (people, markets, etc.). The use of the normative concept only for Law is something that greatly limits any conception of normativity (Bicchieri & Muldoon, 2017).

This does not mean that, as will be seen, even in a normative sense, there is no possibility of working with such a concept. This means that the construction and operability of such a concept depend almost exclusively on its creation from elements found in Brazilian constitutional identity, but which do not recognize the concept itself, and furthermore, that the concept of constitutional identity can also be constructed from the provision of Article 2 of the American Convention on Human Rights.

2.1. When the Normative and the Analytical Intersect: Some Lessons from Gary Jacobsohn and Michael Rosenfeld

In the present work, the task of finding constitutional identity initially requires knowing the role that the Constitution plays in this, whether written or not (Craig, 2019). The relationship of the constitution with itself is very complex, especially where written constitutions exist, given the multiplicity of meanings that can legitimately derive from it, which makes it always incomplete and, for this reason, other elements, such as constitutional interpretation, especially judicial, are fundamental in the search process (Rosenfeld, 1995).

Furthermore, we must analyze (a) constitutional history and (b) the objectives of the Constitution itself to discover its identity (Jacobsohn, 2006). This discovery, moreover, cannot be taken in a static sense, given that it occurs in a continuous dialogical process, in which the evolution of constitutional identity occurs interpretively and politically in courts, parliaments, and other public and private spaces (Jacobsohn, 2006).

Although there is a collective memory, in this sense, that forms a "cultural personality of a nation," a core of constitutional identity that develops over time from habits and political experiences (Jacobsohn, 2006), it is required, in such cases, to break with the past and build

a new political order as one of the means of forming a new constitutional identity, breaking with a previous collective identity, inclusive (Rosenfeld, 2010). This process also facilitates understanding what these objectives of the Constitution are, by comparing what it was to what it is from the constitutional transition.

The same can be seen with (c) constitutional reforms and their procedure. Reforms show in an asynchronous comparative perspective what is intended to be altered from what already exists at the constitutional level. This is also a good way to know about objectives. In addition to what is altered, there is also what is not allowed to be altered, that is, (d) the barriers instituted by the Constitution to its own reform (Jacobsohn, 2006), in clauses that prohibit changes (eternity clauses). They are also essential for inquiring about constitutional identity, which, in some cases, can be seen as an act of revolution and not a mere amendment to the Constitution.

Finally, (d) the interpretation of the constitution made by the Courts (Jacobsohn, 2006), which is also a fundamental piece for the formation of constitutional identity or for its change, although it cannot be considered the only actor that unilaterally promotes change (Jacobsohn, 2010).

The search for constitutional identity also points to the need to investigate the disharmony pointed out in constitutional texts, itself a facet of constitutionalism, as the incorporation of interests occurs partially in any Constitution, the result of the struggle of groups to capture its text and its interpretation. Past conflicts, for example, intertwine in the Constitution, even if the text indicates coherence, they are there, hidden (Rosenfeld, 2010).

The balance and continuity between past and future is decisive for the establishment of constitutional identity. Without a good equation between past and future, on the one hand, and without a potential for adaptation, on the other, the constitution tends to get lost in time, because flexibility is one of the main means of promoting the longevity of the Constitution (Jacobsohn 2010).

There is a constant dynamic between past and future, and one must seek not only aspirations but also the compromises reached to better understand the transformations towards the future. The preamble of a constitution, for example, can indicate important elements for this, conditioning one generation with another, which can also occur from the constitutional text that, if altered within the limits established by the constitution itself, can

signify, in the process of developing constitutional identity, a legitimate change of identity itself, in its dynamic process of changes (Jacobsohn, 2011).

Furthermore, one must understand certain constitutional contexts, such as the proper analysis of a national state's constitutional history within its political, economic, or social dynamics, along with its struggles and transformations. In this process, seeking the objectives of the constitution to discover its identity becomes an arduous but necessary process (Jacobsohn, 2006).

This is because an identity cannot persist as hegemonic for long (Rosenfeld, 1994), even when based on terms such as "people," "citizen," or others, which tend to change their meaning over time, however abstract these concepts may be and regardless of the distinct interpretations they allow. Even so, new meanings and interpretations can emerge over time, displacing others that were already established.

Another important issue is that constitutional identity is not to be confused with other identities, such as national, religious, ethnic, or cultural identity, given that the element of pluralism is fundamental within it (Rosenfeld, 1995). However, this should not be understood as a denial of the importance of national or cultural identities, for example, in the conception of constitutional identity. That would be simply to detach it completely from its social context (Rosenfeld, 1995).

This identity is not made solely of agreements but essentially depends on dissonances regarding central themes, such as fundamental rights. In addition to being based on experience rather than a rooted desire that does not transform over time through the interpretation made by political institutions and society (Jacobsohn, 2011), different cultures observe fundamental rights in contrasting and, in some cases, contradictory ways (Rosenfeld, 2012).

Furthermore, for constitutional identity to be fulfilled with better quality, such differences should emphasize certain distinctions or stress various diverse identities; that is, despite the differences, choosing a more abstract option, such as "people," for example, instead of specific identities, can mean adding a greater degree of pluralism to the definition of constitutional identity (Rosenfeld, 1994). In the case of national identity, constitutional identity may be constructed against it or live in constant tension (Rosenfeld, 2012).

Interestingly, as elusive as the concept of constitutional identity may be, constitutional theorists must realize that there is a pressing need for quality argumentation to lead the

constitutional narrative to perceive the essentiality of a constitutional preference. This would not be a mere choice or whim but part of the very construction of the concept of "people," placing such a provision among the most protected constitutional issues in a given national state (Jacobsohn, 2006).

Thus, as an initial synthesis, it is worth saying that seeking constitutional identity demands an understanding that there is a set of essential normativities, both in the textual body of the Constitution and in the interpretive dynamics held by courts, parliaments, and other institutions, in addition, of course, to the doctrinal construction in this regard. On the other hand, there are normativities arising from human relations, which are not to be confused simply with the Law. This essential normativity plays a fundamental role in the constitutional order of a given national state, given that it occupies a key role in the dynamic, circulating, and transforming construction of what is understood as primary in that constitutional order. It depends, therefore, on jurisprudence, of course, but also on other decisions, such as political and social narratives, communication produced within the community of jurists, among others. It is perceived, thus, that it demands a high degree of pluralism and tolerance when thinking about constitutional identity for democratic states, although, on the other hand, one can indeed think about autocratic states and their constitutional identities.

2.2. Advancing Normative Aspects to Rech the Use of the Concept in Brazil

As a primarily European normative issue, the theme of constitutional identity gained relevance with the transformations of European law and the discussions regarding the failed European Constitution and, later, the approval of the Treaty on European Union, which, in its Article 4.2.

This represents an important deepening, in this case, of the model of relationship between European law and the domestic law of the member states and presents itself as an institutional effort to contain excessive advances of European law over the law of the member states within the international hegemony based on the supranationality clause derived from the European Union model.

Although the provision must be thought off the already configured supremacy of European law[I], it deserves to be seen as a new reference point that touches on the intersection between such legal orders, especially in the dialogue between courts, allowing

national courts to invoke the constitutional identity clause, in certain and limited circumstances, as limits to European Union law (Von Bogdandy and Schill, 2011), thus rewriting the very idea of the supranationality of this Law.

This is not intended to mean that this procedure arises as an ideological barrier against European law, as it must find legal limits and cannot serve to simply elude the application of European law, but rather as an element with positive potential for defining the separation of powers (Bogdandy and Schill, 2011). It can function as a renewed means of substantive analysis of the relationship between European law and domestic law, as a tool for a non-hierarchical constitutionalism within the European sphere (Ragone, 2022), and as a means of self-restraint for European institutions, especially the courts (CJEU and ECHR).

This causes the provision for the constitutional identity of states to coexist with another principle already previously provided for in the regional legal order (Fabbrini and Sajó, 2019), since the Maastricht Treaty, to protect the autonomy of states: the principle of subsidiarity, more specifically in its material aspect (Fabbrini, 2014), should function as a means for European institutions to perceive that certain themes should be handled by national states due to their better position.

The same will occur in the case of the system founded on the Council of Europe. The concept of constitutional identity gains momentum and is situated alongside other mechanisms for controlling the excess of the regional institution over national spaces: the national margin of appreciation[II] (Cavallo et al. 2021). With this, even without being expressly declared, its meaning is preserved in decisions such as A., B., & C. v. Ireland, for example, or in Lautsi v. Italy, S.A.S v France, among others (Fabbrini and Sajó, 2019).

In the domestic sphere, the theme has been treated, albeit in diverse ways, by constitutional courts. The concept of constitutional identity has become a crucial tool for national courts to navigate the complex relationship with the legal order of the European Union. Although approaches vary, there is a common trend toward reinforcing judicial authority and ensuring that European integration does not override the fundamental values that define each Member State as a sovereign political community. The concept, therefore, should represent the recognition of a common standard of values, rather than deference to potentially divergent national traditions (Ragone, 2022).

In summary, let us look at manifestations from some courts. This is the case with the German Federal Constitutional Court, which, in the Lisbon Case, reaffirms its commitment

to European integration but reserves the right to protect the fundamental principles of the Basic Law, among them the eternity clause of Article 79.3. Or the Constitutional Court of Italy, which, in the Taricco case, developed the doctrine of "controlimiti" (counter-limits), which establishes "supreme principles" of the constitutional order, such as legality in criminal matters, as an insurmountable limit for EU law and a component of national identity, illustrating the complex interaction between the primacy of EU law and internal constitutional protection. In a negative sense, the use of constitutional identity can serve simply to obstruct European values, such as pluralism, in an anti-democratic movement. Two cases can serve as examples. The Polish Constitutional Tribunal uses Article 90 of its Constitution to define a core of competencies that constitutes national identity, including the protection of human dignity, the rule of law, and democratic governance, and in 2021, adopted a confrontational stance toward the CJEU, defending sovereignty and constitutional identity against what it perceives as an expansion of EU law. The Hungarian CC has also used the concept of constitutional identity in a politically instrumentalized way (Ragone, 2022; Maes, 2025).

This international normative reality also affects national legal dynamics by requiring themes such as (a) meanings of the constitutional text, (b) constitutional reforms and (c) eternity clauses, (d) legal interpretation exercised by courts, (e) legal doctrine, among others, function as tools for defining the constitutional identity of a national state. Thinking of constitutional identity solely as a direct consequence of the values of the Constitution itself (Troper, 2010) denotes not only a mistaken normative perception but one that is self-referential regarding what regional constitutional identity is (Fabbrini and Sajó, 2019).

The constructions made by such courts (Germany, Italy, Hungary, and Poland), although very diverse and with opposite meanings regarding fundamental themes such as, for example, pluralism and integration, function as mechanisms for debate, with their consensus and dissent, regarding the role of institutions and the Constitution in the process of defining constitutional identity.

3. In Search for the Definition of Constitutional Identity of the Brazilian Constitutional Order

As seen, thinking about constitutional identity depends on an analytical perspective on one hand, and a normative one on the other, such that they reciprocally nourish each other to work with constitutional identity in a complete way.

The Brazilian Constitution, as a sociocultural and political document, essentially demands the use of a diachronic analysis to analyze the past in order to understand the present (Rosenfeld, 1995) and, beyond this, to understand it as part of what is conceived as Latin American constitutionalism, comparing it with regional movements of struggle against the abuse of power. This allows for thinking about this reality also from a synchronic perspective, in which constitutional history and other elements intersect in the current moment, so that it can be perceived how a society recognizes its social and historical evolution within the Constitution (Maes, 2024). Thus, past and present meet.

The relationship between Constitution and constitutionalism here seems fundamental and, to that end, the use of Latin American constitutionalism will allow for establishing the characteristics of the Brazilian Constitution based on the circulation of traits that place it as part of a movement arising from the end of civil and military dictatorships in Latin America, starting from the late 1970s and, in Brazil, in 1985 (Conci, 2023).

3.1. Latin American Constitutionalism and the Brazilian Constitution

The relationship between constitutionalism and constitutional identity has been understood as fundamental to providing operationality to the concept of identity. Thus, the regional context—given the insertion of the 1988 Brazilian Constitution into a broad movement called Latin American constitutionalism—becomes necessary for the subsequent development of the constitutional identity of the Brazilian Constitution.

3.1.1. The Context: Brazilian Constitutionalism as Part of a Regional Movement

The third wave of regional redemocratization (Lagos, 2018)—a process represented by various concomitant movements that produce a pattern regarding the protection of rights and the control of power—puts an end to a long process of dictatorships in the region. The

path to redemocratization in Latin America opened in the 1980s with the reestablishment of constitutional orders, either through the promulgation of new Constitutions, as occurred in Brazil (1988), Colombia (1991), Peru (1993), among others, or through reforms to existing historical Constitutions, as in Argentina (1994) and Mexico (since the late 1970s). In the political and constitutional fields, there are similarities in institutional crises, fundamental rights, systems of government (with models of strong presidentialism, or hyper-presidentialism), separation of powers, corruption of state agents, marked social and economic inequalities, among other themes (Gargarella,2015) .

In Brazil, Amendment 26/1985 convened the Constituent Assembly after 21 years of dictatorship. Thus, alongside more foundational constituent processes that were considered an open break with the past—such as the Paraguayan, Venezuelan, Ecuadorian, or Bolivian cases—the Brazilian case is inserted among those with transactional, adjustment, or consensus characteristics. This is because while it sought to correct defects in the existing institutional framework, it also valued many previous traditions and preserved parts of their elements, as also seems to have occurred in Argentina (1994) and Mexico, with the transition from a hegemonic party system to a multiparty system (Uprimny, 2011). In this sense, not only the Constitution itself, in Article 8 of the Transitory Provisions Act, but also the decision of the Supreme Federal Court in ADPF 153(STF,2010), recognized amnesty effects for the previous period as part of a clear strategy to ease political tensions between the political actors involved in the constitutional transition.

3.2. Structural Elements of the Constitutional Identity of the 1988 Brazilian Constitutional Order

The construction of the concept of constitutional identity of the Brazilian Constitution finds, as previously stated, some of its structural elements in the text itself (Polzin, 2017), but it does not dispense with its development through either jurisprudence or doctrine, as we will see.

Thus, to think about constitutional identity in the case of the Brazilian Constitution, the following structural elements of the constitutional text will be analyzed, which form the basis of principles and rules that provide essential legitimacy to the Brazilian constitutional order: a) preamble; b) fundamental principles; c) fundamental rights and relationship with Inter-

American law; and d) constitutional reform and eternity clauses, coordinating them with some of their contexts.

3.2.1. Constitutional Preamble

The constitutional preamble can perform a normative or merely declaratory function, devoid of legal force, and functions as a historical narrative of a people, nation, or State, establishing a constitutional identity (Orgad, 2010). However, in research on constitutional identity, as seen, the proposal of normativity cannot be limited solely to legal normativity but must explore other forms, such as economic, sociological, anthropological, political, among others. In the Brazilian case, the preamble indicates that the Brazilian people, through their representatives, institute a Democratic State, where the exercise of social and individual rights, equality, justice, among other values, are fundamental to the new constitutional order. And there is also the indication that openness to the international scenario would have a prominent function in the new Constitution.

Despite the STF having affirmed the absence of normative force of the constitutional preamble, not serving as a paradigm for constitutional control (STF, 2003), it also stated that its values can serve constitutional interpretation and, even if not the central theme, can serve to express, help constitute, or influence national identity (Jackson, 2010), and can, in our view, do the same for constitutional identity (Corrias, 2016).

3.2.2. Fundamental Principles

Brazilian constitutional history saw the 1988 Constitution preceded by six Constitutions: 1824, 1891, 1934, 1937, 1946, and 1967. In none of them did the constitutional geography place fundamental rights and their regulation before the regulation of the State. And never before had the text opened with a specific title called "Fundamental Principles." Although we are not asserting a difference in the hierarchy of norms within the Constitution itself, there is a choice to establish materially central principles for its understanding.

The historical-constitutional cycle opened by redemocratization, aiming to overcome the preceding authoritarianism and accentuated inequalities, brought the affirmation of the Rule of Law and democracy as the supporting tripod of the new democratic order intended to be established after a cycle of autocratic civil and military regimes. The Constitution, by

stipulating its "fundamental principles" in Title I, gave meaning to the founding elements of its constitutional order.

The first of these defines that the Federative Republic constitutes a Democratic State of Law (Estado Democrático de Direito), that is, it abandons the formalistic reading of the legislative Rule of Law(Conci, 2023) to configure, as a founding principle of the new constitutional order, the requirement that legality be concomitant with legitimacy, which founds a democratic society and incorporates the people into decision-making processes (Da Silva, 2001). With it, as occurred in some other Latin American countries, mechanisms of direct democratic participation are affirmed (Uprimny, 2011), with an increase in tools for popular consultation and manifestation, including in budgetary matters, due to the need to reduce inequalities in a highly unequal society (Viciano & Martinez, 2010) . The Democratic State of Law, inspired by the Basic Law of Bonn (1949) and repeated in the Constitutions of Portugal (1976) and Spain (1978), was inserted into the constitutional text as an option for overcoming an autocratic State that did not refrain from using Law in its favour, even if independent of any remnant of legitimacy.

Another fundamental provision is the principle of human dignity (Art. 1, III, of the CF), also without previous provision in Brazilian constitutional history, which denotes a new perspective regarding the person as the center and recipient of the legal-constitutional protection of fundamental rights, or as a source-value (Reale, 1963). This is particularly significant when analyzing a constitutional order established in the aftermath of a violent dictatorshipwhite, bl. It is from this principle that the broad affirmation of old and new fundamental rights derives, whether through the constitutional text, original or reformed, or through the jurisprudence of the courts, especially the Supreme Federal Court (STF, 2010). It is also from here that this expansion of the catalog of fundamental rights involves those resulting from international treaties (Art. 5, §2 of the CF), as the human person cannot be relegated solely to the national state. This process cannot deny, on one hand, being a characteristic of regional constitutionalism, with its tendency to exalt constitutional texts—so characteristic of regional legal formalism—which is accompanied by the invocation of values proclaimed in the constitutional text (which) play a relevant symbolic role.

The defense of pluralism, also a characteristic of regional constitutionalism (Conci, 2023) , has an express reference in its fundamental principles in the Brazilian Constitution (Art. 1, V, CF). The Brazilian Constitution inserts itself into a movement seeking to overcome merely

electoral democracies through the reinforcement of pluralism in its most varied presentations (political, ethnic, religious, legal). it intends to settle on existing conflicts and strengthen the existing diversities in each national state, which also means directly affecting Black and Indigenous populations, historically excluded, who gain space in Constitutions (Uprimny, 2011). From this principle, the STF has advanced hermeneutically, for example, not only in electoral (STF, 1996) and partisan matters(STF, 2007) but also in criminal matters, based on three historically constructed racial categories (white, black, and Asianevil) to protect, by expanding the scope of the crime of racism, Jewish people(STF, 2004) and the LGBTQIA+ community (STF, 2019), in addition to confronting structural racism (STF, 2017).

Also, among the fundamental principles, but specifically among those concerning the objectives of the Republic, is the reduction of social and regional inequalities and the prohibition of any and all types of discrimination to build a free, just, and solidary society (Art. 3). The Social State, thus, becomes the adopted model, and its actions are based on the ideal of material equality, as well, with public actions and policies aimed at tackling one of the main challenges of Latin American societies, and Brazil consequently, which are the broad inequalities affecting such societies. The State becomes an important actor in building an environment where the protection of well-being is a fundamental objective with constitutional hierarchy and normative force to transform reality.

Still among the fundamental principles, the separation of Powers finds shelter among the founding elements of the constitutional order. But the provision is a transformation of the traditional liberal model of mere division of Powers with traditional attributions for the fulfilment of the objectives provided for in Guarantee-Constitutions. This means that, in addition to typical functions, the powers must also expand their atypical functions, since the final objective is to realize the fundamental rights positivized in contemporary Constitutions (Piçarra, 1989)—increasingly conflicting—and the laws produced by the legislator—increasingly less coherent—for the reasons explained above. This is the case with the Social State judge, or the "social judge"(Bonavides, 2000) who, increasingly attentive to the content of the law, must adapt their decision-making to reinforce the social function of the legal process over the means for its achievement. Given this, beyond sanctioning conflicting parties, it seeks to arbitrate it, strengthening schemes for seeking composition between litigating parties, even if one of them is the State itself. This is a true active subject of the political process (Ost, 1997) This composition must permeate both the pre-contentious and

the contentious moment of the process, enabling the judge also to be treated as a true "social engineer." More importance is attributed to effectiveness over the validity of the law, given that the judge's activity is one of creation and, more strictly, referred to the concrete case. With this, the possibility opens up for the Judiciary, which depends on provocation, to also enter the realm of realizing social, economic, and cultural fundamental rights. It should be emphasized: even though the Legislature maintains the preference in creating public policies to realize those rights that, a priori, should be implemented by the Executive, it is the Judiciary, at this moment, that also affirms its prerogative to implement these "social" rights.

Finally, among the structural fundamental principles are those concerning the international relations of the Brazilian State.

3.2.3. Fundamental Rights and Relationship with Inter-American Law

Finally, an important characteristic of this process concerns international constitutionalism in Brazil. As in other Latin American countries, clauses of openness to International Human Rights Law were instituted. The continuity of this process relates to the advancement of reflection on the need to think of Law as a "constructive transversal network" (Neves, 2014) and, with it, to think of solutions to constitutional problems as depending on the interlacing of legal orders, implying an understanding of the limits of each of the orders.

As in the provisions of other Constitutions (Argentina, Art. 75.22; Venezuela, Art. 93; Colombia, Art. 93), a new cycle also began regarding the theme of human rights, which allows for a new international environment, especially in the Inter-American Human Rights System based in the Organization of American States, where Constitutions treat international human rights treaties generously in their constitutional texts.

After that, progress was made on the need for not only international texts but also international jurisprudence to be analyzed by jurists and judges, primarily. In some countries—Argentina, Chile, and Colombia—the issue advanced satisfactorily. In the cases of Brazil and Uruguay, the process followed more slowly. Regarding the latter, much was done in mistakenly working with International Law from the perspective of National Law—that is, from the strategy of giving an illusory interpretation to International Law (Ramos, 2005), such that the Judiciary also gave an interpretation based on domestic law to international treaties, disregarding international jurisprudence.

This has granted the bodies of the Inter-American System for the Protection of Human Rights—namely, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACHR Court)—a legal and political prominence in the region, with transformative potential on one hand, and the potential to raise conflicts with national states seeking to contain them on the other. This is evidenced by the declaration made by Paraguay, Brazil, Argentina, Chile, and Colombia in 2020, seeking to curb the judicial expansion of the Inter-American Court (Paraguay, 2020).

In this sense, the IACHR Court asserts the need for a horizontal relationship with states, treating the human person, rather than the State-party, in a dialogical relationship, configuring the individual as the foundation and recipient of the entire domestic and international apparatus for human rights protection (McGregor, 2022), within a horizontal relationship between the state and the IACHR Court.

In the Brazilian case, a dialogue between legal systems and courts has been proposed (Conci, 2015), along the lines of what has been happening with the relationship between Italy and the EU, the cooperative relationship (Drinóczi,2020), what has become known as the 'Taricco Saga' (Bonelli, 2018), as the best way to give legal force to Article 2 of the American Convention on Human Rights, which imposes the principle of subsidiarity as a means of interrelation between national and international legal systems at the regional level((Von Bogdandy and Schill, 2011).

This is a matter of great importance to constitutionalism because it restricts even the centrality of the constituent power on one hand, and of the Constitution itself on the other, since both are simultaneously conditioned by International Human Rights Law.

Historically, there has been an increase in judicial protection mechanisms for rights as a means to overcome the authoritarian reality that permeated the region in the previous period. During that time, certain social movements and human rights organizations in Latin America turned to international protection mechanisms for these rights, such as the Commission or the Inter-American Court, in order to obtain decisions or contribute to the formation of standards that they would later use internally , utilizing the strategic resource of international litigation as a means to fuel future processes at the domestic level. However, it is also possible to state that the intention was to go further, as it became clear that "constitutional processes had broader purposes, as they also sought to expand democracy and combat social, ethnic,

and gender exclusions and inequities" , which was pointed out both internally and internationally (Uprimny, 2011).

3.2.4. Constitutional Reforms and Eternity Clauses within the Brazilian Constitution

Another interesting aspect concerns the issue of constitutional reform and rigidity, including entrenched clauses (eternity clauses) in the text of the Brazilian Constitution. Although the regional scenario has brought some more powerful, albeit debatable, provisions for eternity, such as immutability clauses (Bolivia, art. 411/ Ecuador, art. 441), the Brazilian Constitution adopted a different procedure. A high quorum is required for reform (3/5 of the members of each of the two houses of the National Congress), with double approval in each house and a system whereby if the revising house alters the proposal previously sent and approved by the house initiating the constitutional reform process, the matter returns to the previous house for further analysis (art. 60 and paragraphs of the Federal Constitution).

Furthermore, it expanded the list of entrenched clauses (eternity clauses)[III], compared to what existed in the previous Constitution (Article 46, §1, of the 1967 Constitution), prohibiting the processing of amendments tending to abolish the Federation as a territorial model, direct, secret, universal and periodic suffrage, the separation of powers, and individual rights and guarantees. The abolition of the Republic ceased to be an entrenched clause (eternity clause) due to the 1993 plebiscite, which returned to the people the possibility of choosing between Republic and Monarchy and, in addition, Presidentialism and Parliamentarism.

The interpretation of the Constitution added, besides the explicit principles mentioned above, other implicit clauses, which, on a case-by-case basis, became parameters for the Constitutional Review of Amendments to the Constitution through a hermeneutical exercise to be carried out, in this case, by the Supreme Federal Court (STF,2003), expanding the eternity clauses provisions.

However, this is merely an old discussion about the democratic legitimacy of one generation limiting another in ideological terms, prohibiting changes or, on the other hand, maintaining the stipulating the relationship between the formal Constitution (legality) and the real Constitution. This means that the defense of adherence to the will of the constituent power as a means of preserving highly transformative decisions has its limitations in the field of democratic legitimacy.

In the European case, it was with the Treaty of Lisbon that the establishment of a direct relationship between constitutional identity and eternity clauses gained momentum (Drinóczi, 2020), which is perhaps the most tangible of the structuring elements of what can be called constitutional identity, given its reinforced normativity.

In the Brazilian case, since the STF has long established its legitimacy to review the constitutionality of amendments to the Constitution, it is clear that this normativity is further strengthened. Such amendments, in addition to affirming elements of the Brazilian constitutional identity, also have the power to alter that identity more significantly, especially if derived from constitutional reforms (Corbo, 2020).

4. Some Conclusions: The Continuous Construction of Brazilian Constitutional Identity

The path taken in this article highlights the inherent complexity of applying the concept of constitutional identity to the Brazilian context. The notion, largely developed within the constitutionalism of the Global North, finds in Brazil and Latin America a terrain with distinct contours, marked by a unique historical trajectory and the absence of a supranational order with the same binding force as the European Union. The difficulty, therefore, lies not only in the scarcity of explicit treatment of the subject in national and regional doctrine and jurisprudence but also in the very need to forge an operative concept that is faithful to the dynamics of regional constitutionalism and the specificities of the formation of the Brazilian State.

This work has demonstrated that overcoming such a challenge requires an approach that transcends the mere importation of models and instead combines the analytical and normative dimensions of the concept. Brazilian constitutional identity does not reveal itself as a static and predefined core, but as a dialogical process in constant construction, nourished by the tensions between past and future, and by the consensuses and dissents that shape the nation's political and social life. It is an identity discovered less in abstract definitions and more in the analysis of its structural elements, which function as vectors of meaning for the constitutional order inaugurated in 1988.

In this sense, the main point that emerges from the analysis is that the identity of the Brazilian Constitution is anchored in a set of founding elements that represent a deliberate break with the authoritarian past and a commitment to a democratic, plural, and socially just future. The article has identified and explored these pillars, which, together, form the normative and axiological essence of the Brazilian constitutional project.

This essence necessarily encompasses the Fundamental Principles. The centrality of human dignity, the establishment of a Democratic State under the Rule of Law, the defense of pluralism, and the consecration of a Social State aimed at reducing inequalities are not mere rhetorical declarations. On the contrary, they constitute the foundation upon which the entire constitutional edifice is built, guiding the interpretation and application of all other norms.

A second key aspect is the centrality of Fundamental Rights and the openness to the international sphere. The 1988 Constitution innovated by positioning its extensive list of fundamental rights and guarantees as its epicenter, linking them to an opening clause for International Human Rights Law. This feature, set within the broader context of the new Latin American constitutionalism, establishes a permanent dialogue between the domestic and regional orders, notably with the Inter-American System, thereby redefining the boundaries of sovereignty in favor of individual protection.

Furthermore, the Eternity Clauses, based on constitutional rigidity and embodied in the immutability clauses of Article 60, §4, represent the most tangible dimension of constitutional identity. By protecting the federal form of the State, direct suffrage, the separation of powers, and individual rights and guarantees, the original constituent power demarcated the fundamental core of its identity, establishing insurmountable limits for future generations and for the reform process itself. The expansive interpretation of these limits by the Supreme Federal Court only reinforces the normativity and centrality of these foundational choices.

The constitutional preamble also deserved special attention, as it calls for a transition towards Democracy and the Rule of Law. Although the Supreme Federal Court has affirmed the preamble's lack of normative force for constitutional review, its political normativity is clear and allows for an understanding of the past, present, and future of Brazilian constitutionalism and its Constitution.

In summary, the arduous process of searching for Brazilian constitutional identity—given that this is a dormant issue in both national doctrine and jurisprudence—shows that, despite the difficulty of constructing meaning and conceptual operability, it is a topic that may, in the future, gain strength and space in the national and regional legal reality, circulating to the Global South and adapting to its context.

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[I] For a jurisprudential discussion on the theme, see *Costa* v. *ENEL*, [1964]; *Simmenthal*, [1978], among others.

[II] On the theme, see AGUILAR CAVALLO, Gonzalo et al.. El control de convencionalidad: Ius Constitutionale Commune y diálogo judicial multinivel Latinoamericano. 2021.(cap. 8).

[III] Brasil. Art. 60, §4°: No proposed constitutional amendment shall be considered that is aimed at abolishing the following: I. the federalist form of the National Government; II. direct, secret, universal and periodic suffrage; III. separation of powers; IV. individual rights and guarantees.

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Towards a next generation of joint borrowing in Europe

by

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Abstract

Europe's experience with the issuance of supranational debt backed by national sovereigns has spanned over seven decades by now. Despite differing aims and designs, joint borrowing initiatives have respected clear boundaries: only temporary issuances to finance new expenditure in response to crises or ad-hoc needs, no debt mutualisation, no common Treasury with a permanent fiscal capacity, no transfer union.

This paper argues that groundbreaking geopolitical and macro-financial shifts call for reassessing at least some of these boundaries, today. In a world where the new normal is competition and confrontation with predatory superpowers along with frequent systemic shocks, joint borrowing could finance European Public Goods (EPGs) essential to Europe's autonomy and resilience – and do so, for the first time, on a *permanent, strategic* basis. We explain how a '*coalition of the willing*' open to future entrants could make headway through ad-hoc intergovernmental arrangements, going beyond Treaty-based boundaries and taking account of the broader context in which joint borrowing needs to take place.

We also explore whether, in this changed context, there may be scope – and under which conditions – for partial replacement of national debt with new European instruments with joint-and-several guarantees so as to foster financial market integration and the emergence of a genuine European safe asset. A proposal it outlined to this aim.

Ultimately, progress toward the next generation of joint borrowing in Europe will hinge not on legal design but on political will, fiscal discipline, and mutual trust – a pragmatic path toward deeper European sovereignty.

Keywords (JEL classification)

fiscal policy (E62), financial aspects of economic integration (F36), debt, debt management and sovereign debt (H63), intergovernmental relations, federalism (H77), Europe: economy and development (O52)

Non-technical summary

Europe's experience with the issuance of supranational debt backed by sovereign national guarantees dates back to the 1950s. It spans more than seven decades, from the European Coal and Steel Community to NGEU, SAFE, and the financing of Ukraine. Despite differing aims and designs, all initiatives have shared a consistent underlying logic – a 'Brussels consensus' – which has so far defined clear boundaries for collective issuance. Six interlinked features stand out:

1) Joint issuance has always been designed to address ad-hoc policy objectives or in response to shocks and crises; it has never served as a strategic, lasting goal, or as a routine fiscal instrument.
2) Each scheme was temporary, carefully avoiding steps toward a fiscal union.
3) Borrowing has financed new expenditure or lending (flow approach), but it has never replaced national sovereign debts (stock-and-flow approach).
4) Liabilities have never been fully mutualised; guarantees were pro-rata, not joint-and-several.
5) Issuance has been managed by institutions such as the European Commission or the ESM, not by a common Treasury with a permanent central fiscal capacity (CFC).
6) Initiatives have excluded any "transfer union".

Why has the EU never evolved toward a permanent and mutualised fiscal capacity? The prevailing objection has been that such a step would require transforming the Union from a confederation into a federation of states. As long as autonomous taxing rights and the related accountability remain national, moving beyond the Brussels consensus is seen as undermining democratic legitimacy. A majority view crossing both the anti-federalist and federalist camps has been that only a political union with a CFC could sustain permanent common debt. The cart of joint borrowing, it is argued, must follow, rather than precede, the horse of political union. This has been reflected in Articles 310 and 312 of the Treaty on the Functioning of the European Union (TFEU), which prevent the EU from engaging in permanent borrowing as a general fiscal function, but do not preclude exceptional borrowing backed by earmarked revenues.

Consequently, all attempts to 'cross the Rubicon' of the Brussels consensus have failed, including proposals for (i) a permanent CFC for macroeconomic stabilisation or (ii) the creation of a European safe asset designed to replace part of national sovereign debts along a stock-and-flow approach.

Yet this reasoning deserves a reassessment, today. With the start of a new historical phase where all major economies are competing to channel global savings into productive domestic investments, and where an increasingly 'Darwinian' geopolitical environment demands strategic autonomy, the rationale for joint borrowing has changed. The focus has shifted to long-term financing of *European Public Goods (EPGs)* that safeguard Europe's resilience and sovereignty. This is typically the case with transnational investments in defence, security, clean energy, digital transformation, and other high-tech industry.

In this changed context – and given that Member States' governments are not willing to establish a European federal state, nowadays – a different approach has been gaining traction: promoting a *coalition of the willing* that would initiate *permanent and strategic* common borrowing, thus changing the first two pillars of the Brussels consensus. This would be open to any Member State that wishes to join on a subsequent stage, and would represent an intermediate step between the status quo and a future federal state, as envisaged in the Schuman Declaration of 1950. Following Mario Draghi's notion of *pragmatic federalism*, willing Member States could finance the joint procurement of large-scale, innovative investment projects that no single country could efficiently undertake alone. Their fiscal multipliers would be the higher the more spending targets European goods, includes a strong R&D component, is debt-financed, and is front-loaded.

Common sovereign issuance by willing European countries can take either of two forms. (A) *enhanced cooperation* under the EU Treaties among at least nine Member States, as recently done by 24 EU countries on the occasion of a loan to Ukraine; or (B) *ad-hoc intergovernmental arrangements* outside the EU legal framework, akin to the European Stability Mechanism (ESM). We examine the main features of, and trade-offs between, these two approaches, and conclude that only Option (B) can produce a genuine shift towards a next generation of joint borrowing in Europe. We also argue that common debt issuance should not be seen in isolation, but as just one out of many public funding avenues available to complement and support the private sector in the financing of strategic investment. Common issuance,

moreover, should be integrated in a broader strategy also involving joint R&D and procurement, as well as well-thought industrial policies.

While, at least in an initial phase, participating countries would continue to only finance new expenditure on a pro-rata basis and without joint-and-several guarantees, the shift to permanent and strategic financing would mark a significant step forward, anchoring cohesion in strategic necessity.

However, funding EPGs on a flow basis alone would not suffice to integrate European financial markets and create a safe asset of global scale. The article therefore explores whether and how a coalition of the willing may also, over time, replace part of their sovereign bonds with a new common asset – thus adopting a stock-and-flow, joint-and-several approach.

A development supporting this evolution may be the recent convergence of sovereign yields across major euro area issuers. According to one view, this may reflect the emergence of a *de facto* European benchmark – not a legally joint liability, but a collectively priced confidence premium that mitigates idiosyncratic shocks. Even without full fiscal integration, investors may perceive a partial European "risk floor" that would reflect, among other factors, expectations of implicit mutual support and ECB readiness to prevent disorderly market fragmentation.

While the jury is out whether such observed yield convergence truly reflects a structural shift or, rather, is destined to break once confronted with larger economic or geopolitical shocks, the article outlines the conditions and modalities under which a coalition of the willing could pursue such an ambitious path. It shows that moving beyond some of the features (3)-(6) of the Brussels consensus would require mutual, binding commitments to fiscal sustainability, enforced through mechanisms stronger than today's EU fiscal framework. A proposal is sketched, which focuses on a stock-and-flow approach and joint-and-several guarantees.

It is clear that such an initiative would bring major benefits. The euro area still lacks a genuine safe asset comparable to U.S. Treasuries. This hinders capital market integration, limits the international role of the euro, and constrains Europe's strategic autonomy.

Ultimately, the proposals advanced in this article build on Mario Draghi's fertile idea of pragmatic federalism. Their internal logic highlights the enduring tension at the heart of European fiscal integration: balancing fiscal discipline, solidarity, and political feasibility.

These tensions are not contradictions but structural features of the European project. The success of any initiative will depend less on its legal form than on the participating states' willingness to enforce fiscal discipline and uphold mutual trust over time. Only then could a credible common European benchmark – and, with it, a genuine safe asset – gradually emerge.

1. Introduction

Europe has a long history of issuance of supranational debt, relying on the explicit or implicit backing by the participating Member States via fiscal contributions or guarantees[I]. Such joint borrowing started in the 1950s and by now spans more than seventy years of post-war integration.

At the time of the European Coal and Steel Community (ECSC), common debt issuance backed by the ECSC's own resources was used to finance investments in coal and steel industries[II]. In the years of the European Economic Community (EEC), programmes for limited amounts included the Euratom loans to finance nuclear energy projects (from 1977), the New Community Instrument to support regional development and industrial investment (1978-1981), and the Balance-of-Payment (BoP) loans to support Member States experiencing external financing stress (1975 onwards).

After the European Union (EU) entered into force in November 1993, a series of common issuances have followed one another at an increasingly frequent pace. Until Russia's war of aggression in Ukraine, the main goals of the initiatives were:

- providing non-euro area EU countries with BoP assistance during crises[III];
- since the 2010s, financial assistance to euro area members in crisis, initially via the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (EFSM) (2010-14), and then through the European Stability Mechanism (ESM, from 2013);
- in 2020-2026, funding the programmes in response to the COVID-19 pandemic, namely Support to mitigate Unemployment Risks in an Emergency (SURE, 2020-2023) and NextGenerationEU (NGEU; 2021-2026). The latter has been by far the most important initiative to date, in terms of both size and ambition. The EU's issuance volume increased massively after the launch of the programme in 2021. By early 2024, it had reached levels comparable to Spain, while remaining considerably lower than that of the three largest euro area economies (Bańkowski et al., 2024).

The war in Ukraine has in turn sparked, directly or indirectly, new European borrowing programmes:

- since 2022, the EU Macro-Financial Assistance (MFA) to Ukraine (loan component);
- the Ukraine Facility, which entered into force in March 2024 and provides stable financing for Ukraine's recovery, reconstruction, and EU accession. It amounts to €50bn, spread over four years (2024-2027);
- the SAFE (Security Action for Europe) initiative, adopted by the Council of the European Union (henceforth: Council) in May 2025. The European Commission (henceforth: Commission) committed to issue additional bills and bonds from 2025 until 2030, backed by the EU budget. The purpose is to raise up to €150 billion in capital markets, to be lent to the requesting Member States with the aim of funding common procurement of defence capabilities;
- a new package of financial support to Ukraine, amounting to EUR 90bn over 2026-2027, which the Council agreed upon in December 2025[IV]. As in previous initiatives, this support will be financed on financial markets via EU borrowing and is guaranteed by the EU budget's headroom. Most importantly, joint borrowing will for the first time be implemented under a regime of *enhanced cooperation*[V], involving in this specific case 24 out of 27 Member States. This sets an important precedent (Castaldi, 2025; Fabbrini, 2025; Fabbrini, 2026; Union of European Federalists, 2025), but does not fundamentally change the key features of EU borrowing discussed below.

Finally, the Commission has also proposed, on 16 July 2025, additional joint issuance programmes under the next EU budgetary cycle (2028-2034)[VI], but the related debate in the European Council and Parliament is ongoing and their approval cannot be taken for granted at this stage.

While these episodes of joint debt issuance have differed in their specific objectives, scope, and design, they share a common institutional and legal logic, which has set clear boundaries for collective borrowing in Europe.

Six recurring features of what we may call a 'Brussels consensus' stand out.

First, joint issuance has always been designed to *address ad-hoc policy objectives, or in response to shocks and crises*; it has never served as a strategic, lasting goal, or as a routine fiscal instrument.

Second, all schemes have been explicitly *temporary* in nature, avoiding any step toward a fiscal union.

Third, joint borrowing has financed new spending or targeted lending, but it has never mutualised or refinanced existing national debts. In technical terms, borrowing has followed a *flow approach*, not a stock-and-flow approach (Bini Smaghi, 2025; Messori, 2025).

Fourth, there has been *no full mutualisation* of national liabilities. While Member States have contributed to issuance initiatives according to pre-defined criteria (direct or indirect guarantees or, in the ESM case, paid-in capital), their guarantees have been pro rata (i.e., each country is only liable for its part), not 'joint-and-several'[VII].

Fifth, issuance has been managed by institutions such as the *Commission* or the *ESM,* not by a common Treasury with a permanent central fiscal capacity (CFC).

Sixth, while inter-country transfers have been possible and could, at times, be very significant as in the case of NGEU, *permanent fiscal transfers across countries were consistently avoided* under the principle of "no transfer union."

Against this backdrop, three questions are addressed in this article:

- In the *past*, why did the EU never 'cross the Rubicon' toward a more permanent and mutualised CFC, involving common issuance with more advanced characteristics? Section 2 focuses on this issue, also reviewing the main proposals which did not go through.
- In the *present debate*, are any new factors emerging which would push to cross the Rubicon by upgrading at least some of the six features above? This is discussed in Section 3.
- In a *possible future*, what kind of novel borrowing initiatives would look not only meaningful, but also feasible in the current political and legal environment? And how may more advanced joint borrowing be structured? A tentative reply is suggested in Section 4, where we initially postulate a discontinuation of the first two features of the Brussels consensus, and then sketch a (partial) relaxation of other features.

2. The past

2.1. Why the Rubicon has never been crossed

From an *institutional perspective*, the prevailing objection to permanent and mutualised EU debt has been that it would imply empowering the Union with autonomous taxing rights, a European Treasury[VIII], and a Parliament with full fiscal sovereignty – transforming the EU into a de facto federation. As long as citizens elect national governments responsible for taxation and debt, it is argued, going beyond the Brussels consensus would require transferring the link between democracy, taxation, and accountability also at the European level[IX].

From a *legal perspective*, this institutional setting has been reflected in Articles 310 and 312 of the Treaty on the Functioning of the European Union (TFEU), which configure EU spending not as a general function of the EU government, but only to the extent that a future stream of revenues − the EU's own resources, be them genuine EU revenues or national contributions − has been earmarked. As a result, the issuance of new EU debt has been subject to the need to pre-constitute an asset matching the liabilities incurred, in the form of additional own resources allowing for debt repayment over a specified time horizon. This principle of 'budgetary equilibrium in the medium term' implies that borrowing can only be envisaged for spending and transfers related to specific projects and pre-set time horizons: in other words, the Brussels consensus on EU borrowing is not only historically determined, but to a significant extent also grounded in the EU Treaty.

The latest decision on funding of the €90bn loan to Ukraine has been no exception to this discipline[X]. Even in a context of extreme geopolitical urgency, and with overwhelming political support (24/27), the EU had still to resort to exceptional, carefully ring-fenced borrowing, rather than acknowledging a more general debt issuance power. Yet that decision sets an important precedent insofar as it implements joint borrowing via enhanced cooperation for the first time; its possible future implications are discussed in Section 4.1.

Lacking a will by Member States to approve higher EU own resources, the current EU budget has so far been limited to slightly above 1% of EU gross national income (GNI), a share that remains virtually unchanged even in the most recent Commission's proposal for the next Multiannual Financial Framework (MFF; 2028-34). Member States accept

centralised transfers only insofar as these do not interfere with national budgetary control. Moreover, the bulk of EU revenues (around 80-85%) stem from national contributions, not genuine EU own resources. The latter are limited to specific tools and collected by national authorities on behalf of the EU (e.g., custom duties on imports from outside the EU, levy on non-recycled plastic packaging waste, etc.).

A historic opportunity to change this framework was offered when the monetary union process was initiated in the early 1990s, with the signing of the Maastricht Treaty. However, a fiscal union implying a permanent CFC was deliberately ruled out in that Treaty. In particular, Article 125 explicitly forbids the Union, or individual Member States, from assuming the debts of other Member States ('no bailout clause', as discussed e.g. in Padoa-Schioppa (2004) and Cochrane, Garicano and Masuch (2025)). In this legal context, any genuine shift at EU level to joint-and-several borrowing would require Treaty change and, in most countries, a constitutional amendment or referendum.

From an *economic* perspective, these institutional and legal reasons have been compounded, especially in 'frugal' Member States and conservative political circles, by a fiscal doctrine prioritising budgetary discipline at the *national* level ('put your house in order') along with prevention of moral hazard in the Economic and Monetary Union (EMU). As joint-and-several liability would mean that all states share the same borrowing cost regardless of national policy choices, creditor countries have feared that mutualised debt would have encouraged irresponsibility and weakened market discipline. Converting national debt into Eurobonds, moreover, would effectively socialise legacy liabilities, which fiscally conservative electorates deem unacceptable.

This contrasts with the federal fiscal model, according to which the states that are part of a federation should pursue balanced budgets, but this can *only* be credible in the presence of centralised fiscal transfers to such states along with federal spending that funds common projects on shared goals or addresses unforeseen shocks (Draghi, 2023). A federalist EMU would, therefore, entail *more*, not less fiscal discipline across EU Member States than the 'put your house in order' principle implies.

At any rate, the majority view – which has crossed both the anti-federalist and the federalist camps – has been that only a political union with permanent CFC could sustain permanent common debt. The cart of joint borrowing, it is argued, should follow rather than precede the horse of political union.

In the *political* debate, this view has been confronted with the contrarian view that permanent common debt could be created even without a fully-fledged political union. The supporters of this view have observed that, in many respects, the EU presents elements of a political union since 1979 (i.e., the direct election of the European Parliament), and even more so after the Lisbon Treaty, which entered into force in December 2009. Furthermore, especially in the federalist camp, many have considered it strategic to anticipate political outcomes, especially when they are required as a response to existential threats for the EU and its Member States – following Jean Monnet's famous statement, 'Europe will be forged in crises, and will be the sum of the solutions adopted for those crises' (Monnet, 1976). According to this view, the emergence of 'institutional contradictions' as a result of crisis-driven decisions would later require Member States to address them by adjusting the EU institutional framework[XI].

The interaction between these two views and the aforementioned legal boundaries have resulted in the Brussels consensus, implying that all attempts to cross the Rubicon have failed so far. The two most prominent, and yet unsuccessful proposals are recalled in the next sub-section as this will help better appreciate the present debate.

2.2. Failed attempts to cross the Rubicon

According to one strand of literature, common debt issuance should have funded – along with reprioritisation of the EU budget and tapping of new EU own resources – a *permanent CFC for macroeconomic stabilisation* purposes (Kenen, 1969 and subsequent literature[XII]). Cross-border fiscal transfers would have helped counteract adverse business cycle shocks on top of national fiscal policies, thereby completing EMU architecture. By fostering business cycle convergence in the euro area, this would have enhanced risk sharing and empowered the single monetary policy.

While this proposal has periodically resurfaced in EU policy debates – most notably in the Five Presidents' Report (2015) – it has been losing momentum over the past decade. As Draghi (2023) noted, three developments may have, at least to some extent, reduced the need for CFC to primarily focus on macroeconomic stabilisation:

i. *Major changes in both the reaction function of the central bank and EMU architecture.* Drawing lessons from the sovereign debt crisis of 2010-12, the European Central Bank (ECB) now sees unwarranted increases in sovereign spreads as a fundamental impediment

to the smooth transmission of its monetary policy. The announcement of the potential use of ECB instruments such as the Outright Monetary Transactions (OMT; 2012) and the Transmission Protection Instrument (TPI; 2022) has enhanced the ability of national fiscal policies to stabilise the cycle beyond the use of automatic stabilisers, thus improving monetary-fiscal interactions in the presence of shocks. Moreover, crisis-related measures such as the Pandemic Emergency Purchase Programme (PEPP; 2020-22) have usefully complemented Commission's initiatives like NGEU when the Union has been affected by major shocks like the pandemic. Finally, a large set of new initiatives, rules and institutions have been introduced since the 2010s and point to a significant upgrade of the EU economic governance, with main focus on the prevention and resolution of macroeconomic and financial crises.

ii. *Some progress made by the euro area in complying with the optimum currency area criteria* (Mundell, 1961 and subsequent literature[7]). A number of economic developments have somewhat mitigated the need for fiscal transfers within the EU for macroeconomic stabilisation purposes. Notably, business cycles tend now to be more synchronised across countries than in the past (Martinez-Martin, Saiz and Stoevsky, 2018), while supply chains have become more integrated in the Single Market (European Commission, 2023).

iii. *The changed nature of shocks in more recent years – from mostly idiosyncratic and asymmetric to increasingly common and symmetric*, as in the case of the pandemic and the war of aggression in Ukraine (Boni et al., 2025). This has shifted the emphasis from supporting struggling Member States towards addressing shared challenges, thus leading to a better alignment of political preferences.

In the light of these developments, in the past fifteen years the policy emphasis of joint issuance was not on the goal of stabilising the business cycle through a permanent CFC, but on the need to address major shocks via *temporary* tools like NGEU and SURE. According to the latest Commission's proposal on the next MFF (2028-2034), an Extraordinary Crisis Mechanism would be activated in case of severe crises, but this would, once again, require joint issuance only on an extraordinary basis.

A second, important strand of literature that has, so far, not moved forward in the policy arena, has revolved around the proposal on a *European "safe asset"*, to be jointly issued with the purpose of replacing part of national sovereign debts along a stock-and-flow approach

(see e.g. Brunnermeier et al., 2017; Leandro and Zettelmeyer, 2019; Amato et al., 2022; Blanchard and Ubide, 2025; Messori, 2025; Bini Smaghi, 2025; Sachverständigenrat, 2025). In this case, the motivation has been more financial than macroeconomic in nature: the euro area lacks a truly safe and liquid asset comparable to U.S. Treasuries[XIII]. This hinders the integration and liquidity of European capital markets, keeping them fragmented along national lines. It also limits the international role of the euro and Europe's strategic autonomy (Lagarde, 2025a and 2025b).

To address these hindrances and reduce risk across the whole spectrum of European sovereign bonds, the EU/euro area would issue common debt instruments. According to most proposals, this would happen via a supranational institution like the Commission, the ESM, or a possible new European Debt Agency. The ensuing proceeds would be used to buy or swap part of national sovereign bonds, thus transforming a portion of national debt into a single euro-area-backed safe asset.

Many different, alternative modalities have been outlined to put this scheme into effect (for a review of the main contributions and discussion of their limitations, see Messori, 2025). We focus here on two of the most influential recent proposals.

Blanchard and Ubide (2025) have suggested that the Commission issue new 'blue bonds' with senior status for the euro area. The proceeds would be used to purchase national sovereign bonds available in the market, for up to 25% of the GDP of each participating country. To make the scheme credible, each country would ring-fence a dedicated revenue stream to service the debt issued under the scheme. In this way, blue bonds would be guaranteed via ad-hoc revenues rather than joint liability, implying no full mutualisation of debt. As the Commission would be protected thanks to its status as a preferred creditor, this would not involve fiscal transfers between countries, even in the event of a default by one of them. The cost of a possible default would be borne by the other creditors. However, as the authors acknowledge, to make the blue bonds sufficiently large and safe, national governments would have to relinquish sizeable fiscal resources (e.g., a portion of the VAT revenues) to service this common issuance. This may encounter fiscal limits at country level. Moreover, while the proposal avoids full debt mutualisation, there could be political resistance as countries may indirectly fear bearing others' risks. Having said that, even as the authors envision a large-scale issuance, ideally by all euro area countries, they do not rule out that *a smaller group of willing countries could pilot it first.*

Messori (2025) has in turn identified the ESM as the body best placed to issue Eurobonds gradually replacing national debts. As the author does not foresee a flexible opt-in model, his proposal seems to apply to the whole euro area. The ESM capital that could be called in (over €600bn) and the ensuing lending power make of this institution a logical vehicle, though its 'triple A' rating and credibility would depend on strong guarantees. At the same time, Messori acknowledges that the current capital base of the ESM remains too small to support large-scale issuance, while increasing it looks politically and financially unfeasible. The only viable safeguard – introducing joint-and-several guarantees among euro area states – would entail an indirect transfer of national sovereignty, raising legal and political obstacles under the EU's framework. Consequently, while this scheme outlines a coherent path toward deeper fiscal integration, it remains legally uncertain and politically unrealistic in the current context.

Not surprisingly, several governments have opposed this kind of proposals. Low-debt countries believe that a joint debt instrument, even if mutualising sovereign risk only partially, would reduce the incentives for fiscal discipline in high-debt countries and create transfer risks from fiscally prudent to heavily indebted members. Even if framed as an asset swap with limited issuance, opponents fear a slippery slope toward full Eurobonds and quote the no-bailout clause. Many EU Member States also disagree on the significant transfer of national sovereignty to European institutions that any replacement of national debt with common debt would imply. The Commission currently cannot permanently use the EU budget as general debt collateral. Temporary exceptions, such as the Recovery and Resilience Facility (RRF) of NGEU, confirm this rule as key Member States oppose the rollover of the related debt, thus implying a reduction in the stock of EU debt. The ESM Treaty in turn allows loans with conditionality, but not large-scale asset swaps or purchases of sovereign debt.

As long as the EU treaties will not be changed, this kind of proposals would be viable *only if adopted by 'coalitions of the willing' through an intergovernmental treaty outside the EU legal order, and as long as the instrument remains institutionally and financially separate from the EU budget*. This is discussed in the remaining part of this article.

3. The present debate

3.1. What is changing today: (a) the main goal of joint borrowing and the group of potential sovereign debt issuers

From the historical excursus, legal stocktaking and review of the literature conducted in Sections 1 and 2, one may infer that joint borrowing will remain 'ad-hoc and temporary' – the first two features of the Brussels consensus – unless, in a hypothetical future of European integration, it would become the byproduct of a European federal state.

This conclusion, however, deserves re-examination today, in the light of major recent developments that have shifted the consensus on both (i) the *main goal of joint borrowing* and (ii) *the range of potential sovereign debt issuers*. This could justify a move to '***permanent and strategic' common issuance by coalitions of the willing***[XIV] as an intermediate step between the status quo and a future, but currently unrealistic federal state.

The global environment and Europe's strategic needs have been hastily changing. In a world where all major economies are competing to channel global savings into productive domestic investments, where the cooperative order that supported decades of economic integration shows signs of fragmentation (Chari et al., 2025), and where the emergence of a 'Darwinian' geopolitical context has been demanding global actors to rise to the challenge or risk extinction, the financing of European Public Goods (EPGs) has turned into priority. Recent developments related to the funding and resolution of the war of aggression in Ukraine, the future of defence in Europe, the US National Security Strategy 2025 and subsequent events (e.g., the military operation in Venezuela and the Greenland crisis in January 2026), have further added to this sense of urgency.

EPGs can be defined, following the well-known definition of Musgrave (1973), as goods which every European benefits from ('non-rivalrous') and where the benefits for one individual do not reduce the benefits for others ('non-excludable')[XV]. Today, this is typically the case with strategic transnational investments in defence, security, clean energy, digital transformation including artificial intelligence (AI), and other high-tech industry. A critical mass of such investments would enhance not only Europe's strategic autonomy but also its economic growth, given fiscal multipliers that on the whole are estimated to be larger (see Section 4.1 for further detail).

In both the policy and the academic debate, the main focus of potential joint borrowing has therefore shifted from special objectives and crisis management to contributing to the *long-term financing of EPGs* (see Panetta, 2022 and 2025; Buti and Messori, 2022; Draghi, 2024; Dorrucci et al., 2024 and 2025; Aven Janse et al., 2025).

This approach requires setting clear and ambitious objectives for mobilising resources and aligning efforts across sectors. Achieving these objectives entails a change in perspective: a *holistic, mission-oriented approach* (Mazzucato, 2021) that starts from the investment objectives and asks how the *entire* arsenal of financial instruments – at the national or EU level, existing or to be created, and whether private, public, or public-private partnerships (PPPs) – could be mobilised to achieve those objectives without undermining the sustainability of public and/or corporate debt.

Within this broader framework, joint borrowing in Europe should not be seen in isolation, but as just one of the many instruments available to boost productivity and complement the private sector in the financing of strategic investment. Accordingly, out of 172 proposals in the Draghi report on "The future of European competitiveness" (Draghi, 2024), the issuance of common debt is framed as one possible financing avenue among others, not as the backbone of the report as some have claimed. At the same time, joint borrowing offers significant comparative advantages over sole reliance on own resources in the EU budget and constitutes a necessary complement to the other instruments. Debt financing enables large-scale, rapid mobilisation of capital for EPGs – a feature that is particularly suitable for the initial ramp-up phase of EPG investments, which require high upfront costs while returns occur over the longer term. Borrowing also allows to spread financial costs over time, preventing cuts to health, cohesion, social, or other existing programmes, without requiring immediate increases in Member States' contributions.

In the same vein, Dorrucci et al. (2024 and 2025) have estimated, on the basis of official EU and NATO documents, the needs for additional strategic investments (private and public) that are required to implement the defence, green, and digital transitions. Focusing on the public funding component, they show that, even assuming that it would be possible to use all fiscal space and funding toolkit currently available at the national and Union level, a significant *funding gap* would remain for such investments. This gap cannot realistically be closed by only resorting to national solutions, such as lowering non-strategic public

expenditure and introducing ad-hoc taxation at country level. As a result, a more cohesive Europe should pragmatically be seen as a *condicio sine qua non* for strategic investment. This encompasses not only joint borrowing, but crucially also implementation of (i) the Savings and Investments Union and (ii) the Competitiveness Compass (Commission, 2025), (iii) joint procurement initiatives, and (iv) a reform of the EU budget towards a scaled-up size, reallocation of expenditure to strategic investment, and higher EU own resources.

Against this backdrop, numerous and diversified sources make the case or indirectly justify the introduction of permanent and strategic joint issuance in today's Europe (see e.g. Draghi, 2024; European Commission, 2025; Aven Janse et al., 2025; Darvas et al., 2025a; Mejino-Lopez and Wolff, 2025; Burilkov and Wolff, 2025; Dorrucci et al., 2024 and 2025; Lagarde 2025a and 2025b; NATO 2025). From a legal and institutional perspective, an ad-hoc intergovernmental arrangement would make such issuance feasible, as discussed in Section 4.

The resistance to exploring such an avenue is, therefore, mostly *political* in nature. The current German government, most notably, has reiterated the country's opposition to permanent joint debt issuance for strategic investment, even just under a flow approach – a posture that the Council's decision on Ukraine of December 2025 has not fundamentally changed. Germany prefers to rely on its own fiscal resources (Habermas, 2025), taking advantage of its relatively low public debt. With the reform of the debt brake approved in March 2025, however, the Merz government has recognised that productive investments and other strategic public spending cannot be sacrificed to the dogma of a fully balanced budget[XVI] – a conclusion that other countries would share. Germany itself is expected to experience an increase in its debt-to-GDP ratio in the coming years as a by-product of its strategic spending plans (Zettelmeyer, Darvas and Welslau, 2025)[XVII].

In this context, the idea of a *coalition of willing states* that issues joint debt on a flow basis to finance investment in EPGs has been making headway in recent times, especially, but not exclusively, in the area of defence. On top of traditionally favourable countries like France, Italy or Spain, even countries like Finland, Denmark and, more recently, the Netherlands have been embracing a more flexible position, arguing that Russia's war of aggression may validate a new way of thinking.

Several policymakers, thinktanks and academics have endorsed this idea. To quote a few, Draghi (2025a) has observed that '(…) the next logical step will be to consider common debt

for common projects, at the EU level or among a coalition of Member States.' Lane (2025) has in turn stated that '(…) in addition to initiatives at the European Union level, there could also be scope for joint issuance by subgroups of Member States in the context of investment projects that can be shared by coalitions of the willing.' Wolff, Steinbach and Zettelmeyer (2025) have proposed the creation of a European Defence Mechanism (EDM) built around the idea of market borrowing via joint bonds supported by members' capital to finance large, cross-border investment in defence-related 'strategic enablers'[XVIII]. The debt proceeds would either purchase and retain such goods on the EDM's balance sheet or be lent to members under coordinated terms. Hildebrand, Rey and Schularick (2025) in turn call for the joint issuance of 'European Future of Defence Bonds' (EFDB) by a 'Team Europe' in order to finance the next generation of defence-related strategic enablers.

The idea of coalitions of the willing to pilot further European integration has been gaining ground not only with regard to joint borrowing, but also, in more general terms, as a response to Treaty-based veto power. Lagarde (2025c) has underscored that '(…) we can intensify collaboration between groups of countries willing to progress faster, not as exclusive clubs, but as pioneers whose progress ultimately contributes to the strengthening of all'. Draghi (2025b) has further elaborated on this form of collaboration, introducing the fertile idea of ***pragmatic federalism***:

> ' (…) however desirable a true federation would be, it would require political conditions that do not exist today. And the challenges we face are too urgent to wait for them to emerge. A new, pragmatic federalism is therefore the only viable path forward. This is a federalism that is issue-based, flexible and able to act outside the slowest mechanisms of EU decision-making. It would be built by coalitions of the willing around shared strategic interests – recognising that Europe's diverse strengths do not require every country to move at the same pace. (…) Because opting in would require national governments to secure democratic support for specific shared goals, it would become a bottom-up construction of common purpose – not a top-down imposition. All those who want to join could do so – while those who seek to block progress would no longer be able to hold others back'[XIX].

3.2. What is changing today: (b) convergence of issuance costs among major European government borrowers

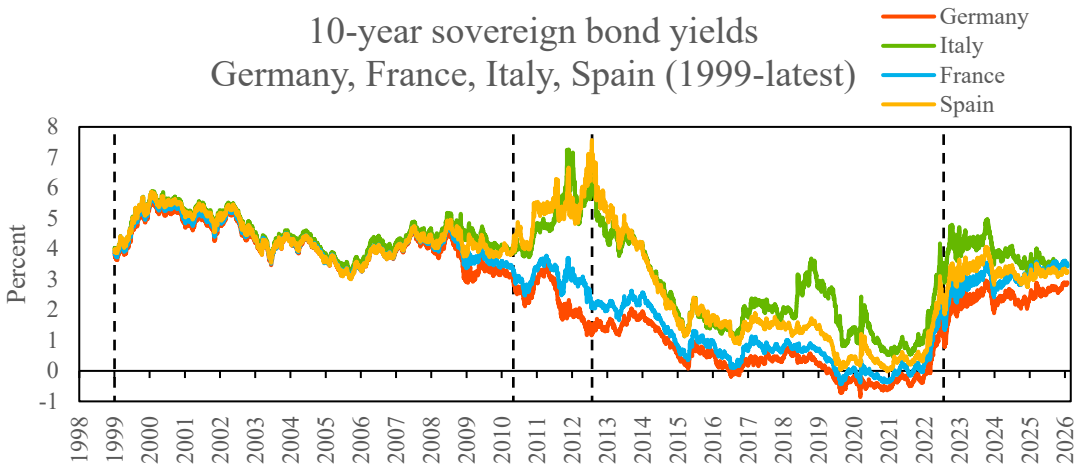
Another recent development that might set incentives for (forward-looking) leaders to promote the next generation of joint borrowing in Europe is *renewed convergence of sovereign yields across euro area issuers*. This, however, deserves further scrutiny as it is still unclear to what extent we are witnessing a structural shift or a short-lived phase.

Reflecting both global bond market trends and country-specific factors, yield curves reshaped in 2025 as euro area core rates and long-term yield benchmarks rose, but intra-area yield spreads narrowed. By mid-January 2026, German ten-year yields had increased moderately relative to end-2024, while Italian and Spanish spreads over the Bund had narrowed significantly. French government bonds in turn displayed resilience despite continued domestic political uncertainty (Charts 1 and 2).

According to one interpretation, market participants would be increasingly pricing a de facto European benchmark – not a legally joint liability, but a confidence premium that mitigates idiosyncratic shocks. Even without full fiscal integration, investors may be internalising some form of "European risk floor", reflecting not only the ECB's resolve to prevent disorderly market fragmentation, but also other factors. For instance, Lane (2025) observes that 'other national bonds also directionally contribute to the stock of safe assets as Bunds alone are too small to meet global demand'.

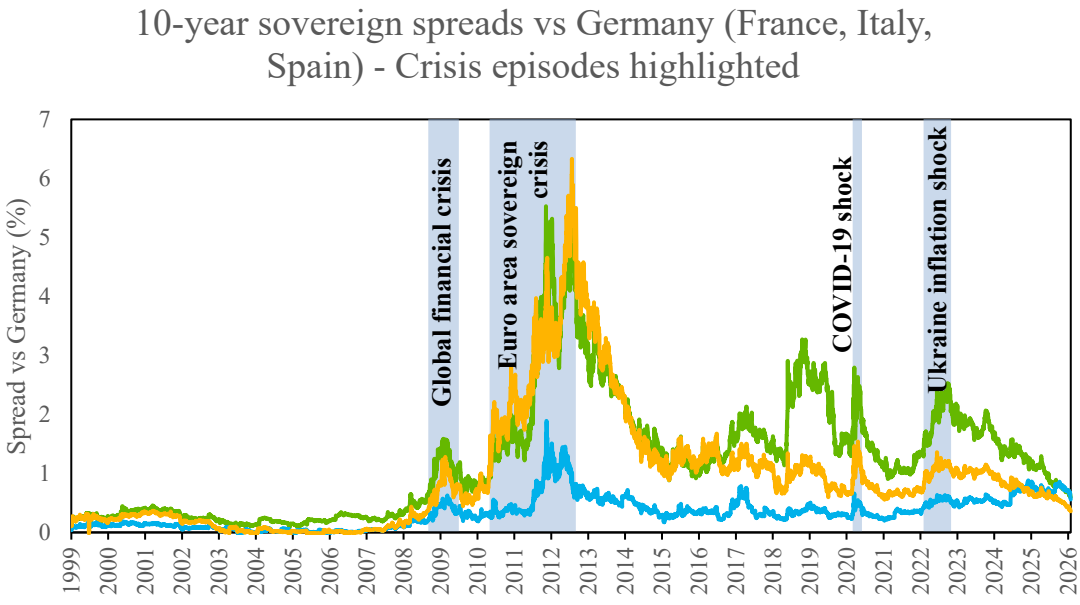
This configuration could, in principle, create more favourable conditions for coalitions of the willing to implement joint debt initiatives similar to the above-described proposal by Blanchard and Ubide (2025). This conclusion, however, warrants further analysis and supportive evidence. It remains unclear whether the observed yield convergence reflects a durable structural shift or a temporary phenomenon that could reverse in the face of larger economic or geopolitical stress.

Chart 1



Source: Bloomberg, daily data. Period: 1.1.1999 - 26.1.2026.
Notes: Vertical lines mark: a) start of the euro and the single monetary policy (1/1/1999); b) onset of euro area crisis (May 2010); c) ECB announcement of Outright Monetary Transactions (OMT, 26/7/2012); d) ECB announcement of Transmission Protection Instrument (TPI, 21/7/2022).

Chart 2



Source: Bloomberg, daily data. Period: 1.1.1999 - 26.1.2026.
Notes: Ten-year sovereign yield spreads of France, Italy and Spain vis-à-vis German Bunds. Shaded areas denote major episodes of financial stress in Europe.

Which *structural factors* may drive, today, the higher correlation, compared to the past decade, of returns among euro area sovereigns, and the substantial convergence of their yields (currently all within a range of 100 basis points for the 10-year segment)? Large institutional investors, including pension funds, insurers and exchange-traded funds (ETFs), frequently treat euro-denominated sovereign debt as a single asset class. Nenova (2025) finds that international bond portfolios handle euro area sovereigns not just individually but *substitutionally*, supporting the notion of a regional safe asset premium. Moreover, the euro area's institutional architecture has evolved significantly since the early 2010s: crisis-era debt restructurings have ended; macroeconomic adjustment programmes have largely achieved their objectives (Filip, Masuch, Setzer and Valenta, 2024); and important reforms – including the creation of the banking union, strengthened crisis-resolution mechanisms and updated fiscal governance – have all reinforced the policy framework. Recent shifts in U.S. policy may have also somewhat increased the relative attractiveness of European sovereign debt as a safe-asset alternative (Deutsche Bank, 2025; Lagarde, 2025a and 2025b; Merler, 2025; Rey, 2025).

On the other hand, *meaningful yield differentials vis-à-vis German Bunds persist* (Chart 2). International investors continue to regard German securities as the primary euro-denominated risk-free benchmark. France's public debt trajectory and political outlook remain sources of potential stress, as rating-agency assessments confirm. More broadly, Europe's fiscal and financial architecture still falls short of full integration[XX], leaving doubts about the system's capacity to deliver uniform responses under severe conditions. This underscores the continued importance of credible national policies and a fiscal and financial governance that is both coherent and enforceable.

For these reasons, it remains uncertain whether current conditions would enable the issuance of a genuinely safe common asset on a stock-and-flow basis. Nor is a parallel with the early years of the euro appropriate: back then, spreads nearly vanished because sovereign risks were mispriced, not because underlying fundamentals had converged. Today's spread compression rests on more solid foundations, but remains largely contingent on the ECB's anti-fragmentation stance and the political commitment to maintain fiscal discipline across Member States.

In sub-section 4.2 we will come back on this discussion in more operational terms.

4. Possible future developments

4.1. How could a coalition of the willing borrow to fund strategic investment in EPGs on a permanent basis?

Looking ahead, how could a coalition of the willing finance EPGs through the ***permanent and strategic*** issuance of new common debt? This sub-section follows a flow approach (Options A and B), while Section 4.2 will explore how this approach may, over time, evolve into a stock-and-flow scheme (Option C). In this perspective, the three options envisaged in this paper could also be seen as progressive steps of a process eventually aiming at the creation of a European safe asset (objective that only Option C would credibly pursue). This is summed up in Table1.

The main ***objective*** of novel issuances would be to finance the joint procurement of large-scale, innovative projects that no single European country could efficiently undertake alone. These projects would be both strategic and transformative in nature. Arguably, a critical mass of countries agreeing on joint borrowing for the financing of EPGs may be easier to achieve if the basket of projects were broad enough to capture different national perspectives.

In the area of *defence*, a pool of European sovereign borrowers could aim at 'rapidly developing joint defence assets that allow interoperability and operational efficacity of European forces without U.S. strategic enablers' (Quinet et al., 2025). Examples include an autonomous constellation of military and communication satellites, which would ensure secure connectivity independent of non-European providers; integrated anti-missile and anti-drone defence systems ('European sky shield'); hypersonic weapons and drones; strategic airlift (heavy transport aircraft and aerial refuelling systems); enhanced cybersecurity and shared intelligence capacities; and joint facilities for training and rapid deployment of armed forces (Hildebrand, Rey and Schularick, 2025; Quinet et al., 2025). Ideally, such investments would not only facilitate interoperability across national armies but also supply a multinational military force as part of a 'European Defence System' (Gallo et al., 2024; Camporini and Moro, 2025).

Beyond defence, joint sovereign borrowing could be instrumental to the public sector's efforts to support and complement the private sector in the financing of the *green and digital*

transitions – and, more generally, *investment at the technological frontier*. Typically, this would comprise the funding of cross-border clean energy (Nerlich et al., 2025) and digital infrastructure. Examples are transnational electricity grids, hydrogen transport and storage networks, critical-mineral processing technologies, advanced software, artificial intelligence (AI) factories and other infrastructure, quantum computing, cyber capabilities, robotics, and sovereign European cloud services capable of hosting sensitive data under EU jurisdiction (see e.g. Draghi, 2024).

Because strategic innovation is a continuous and dynamic process, the examples above are far from exhaustive. As the initial projects would over time evolve into new projects, the liabilities stemming from joint issuance for the financing of EPGs would preferably become permanent in nature, with the corresponding assets being allocated to the balance sheet of the common entity responsible for their use. Collectively, such initiatives would strengthen Europe's strategic autonomy, support the defence, green and digital transitions, and increase the continent's resilience to external shocks.

If properly implemented, these projects would also carry relatively high *fiscal multipliers*, thereby boosting economic growth[XXI]. Public investment in strategic innovation and infrastructure typically stimulates private investment, enhances productivity, and creates high-quality employment. In particular, spending on innovative defence and digital infrastructure can generate positive spillovers into civilian technologies, logistics, and industrial ecosystems. The cross-border scope of these projects would amplify their macroeconomic impact through positive cross-country spillovers, reinforcing economic cohesion among Member States, although incentive compatibility must be addressed to ensure incentives are well aligned to secure wider participation.[XXII]

These outcomes, however, are not automatic. The challenge is substantial and requires well-designed, comprehensive strategies (Clover et al., 2025). Military buildups, in particular, entail reallocating capital and labour from other sectors, which can be both costly and time-consuming. Under supply constraints, the relative price of military equipment may rise, meaning governments could acquire less capability for a given expenditure (Antonova, Luetticke and Müller, 2025). As Ilzetzki (2025), Checherita-Westphal et al. (2025), and Bokan et al. (2025) show, the fiscal multipliers of defence spending vary widely depending on its implementation. They tend to be higher when spending targets European-made goods, has a strong R&D component, is debt-financed, and is front-loaded rather than delayed.

Joint borrowing would be well placed to meet these conditions. It should also be coupled with *joint R&D and procurement* among participating countries. This would reduce financing costs and improve efficiency by centralising demand, allowing for better contracts and interoperability, and stimulating innovation through larger and more predictable orders that incentivise private R&D and industrial scaling. Experience from the RRF and the European Defence Fund (EDF) suggests that joint financial and procurement frameworks can leverage national and private resources while aligning incentives around shared goals. Pooling creditworthiness through common issuance would lower risk premia, allowing participants to finance strategic autonomy at lower costs than individual Member States could achieve alone.

Turning to the ***institutional and operational framework***, joint borrowing by a coalition of the willing on a flow basis could in principle be implemented through either *enhanced cooperation*, in compliance with relevant EU law (Option A), or *ad-hoc intergovernmental arrangements* outside the EU legal framework (Option B). These options, however, are not equivalent. In the following, we argue that, while more could be done under Option A than is currently the case, only Option B would allow for strategic issuance on a permanent basis.

Option A - Enhanced Cooperation

Although EU law did not preclude it, until the Council's decision on Ukraine of 19 December 2025 there was no precedent of using enhanced cooperation for joint sovereign borrowing. Even more now, with a precedent being there, the question arises to what extent could this instrument be also used to create a dedicated budgetary facility empowering a coalition of willing Member States to finance EPGs. Could the Council authorise, following a Commission's proposal, a group of willing Member States to jointly issue *European Enhanced Cooperation Bonds* (EECBs), thus enabling such countries while keeping the initiative open to future entrants? And within what limits could this happen?

Enhanced cooperation (Article 20 TEU and Articles 326 to 334 TFEU - see footnote 6) allows a sub-group of Member States – nine at least – to move forward jointly, using EU institutions under an EU legal umbrella, thereby smoothing institutional legitimacy and administrative efficiency.

However, an important implication of Option A is that *all its acts must comply with EU law in full*. This would include, among others, the above discussed Articles 310 and 312 TFEU. As a result, joint borrowing via enhanced cooperation should continue to remain *exceptional,*

project-specific, and have pre-identified repayment resources – all conditions which the funding of the loan to Ukraine fulfils. Other relevant EU provisions would be, for instance, the non-discrimination principle, the rules governing the internal market, and competence boundaries.

In the case of borrowing for defence-related EPGs, in particular, this would likely complicate the combination of joint issuances with joint procurement. In this case, the participating Member States would have to take measures to protect their essential security interests, given the sensitive nature of defence procurement. While Article 346 TFEU allows the participating Member States to derogate from EU procurement law under such circumstances, the European Court of Justice has always interpreted this possible exemption from EU procurement rules in a *narrow* way: Member States can only deviate from EU law (e.g., on competition in the internal market, including the Directive on defence and sensitive security procurement[XXIII]) on a case-by-case basis and when they are able to prove that it is necessary and proportionate for their essential security interests (Sundstrand, 2023).[XXIV] As a result, *each* Member State participating in a coalition of the willing would have to justify the use of Art. 346 for *every* specific defence-related procurement. This would strongly condition not joint borrowing per se, but the joint procurement accompanying it. The participating countries would have to either stay within EU procurement law (including, if applicable, the Directive on defence and sensitive security procurement) or each Member State would need to individually invoke Article 346 to exempt the defence procurement.

These legal considerations bring to the conclusion that *the creation of joint instruments, such as EECBs, for the funding of EPGs would well be possible, but only provided that they do not become a permanent borrowing programme financing strategic objectives on a lasting basis*. In line with Articles 310 and 312 TFEU, EECBs' issuances would have to remain exceptional, purpose-bound, revenue-backed operations. The rollover of debt over time would not be allowed. For this reason, and as discussed below under Option B, an intergovernmental arrangement would be the only way forward to mitigate these boundaries. Moreover, Option B, while remaining subject to Art. 346, would be preferable also because it could introduce ad-hoc provisions improving the overall conditions necessary for effective joint procurement in the defence sphere (Hildebrand, Rey and Schularick, 2025). This would be consistent with the principle of handling joint borrowing not in isolation, but as part of a broader package involving joint R&D, procurement and industrial policy.

Under Option A, the participating countries would continue to guarantee common debt proportionally, without crossing into joint-and-several liability. Servicing costs could be covered by dedicated own resources or national contributions linked to the mechanism, backed only by the budgets of participating states (no transfer union).

The Commission, acting on behalf of the participants and under Parliament and Council oversight, would serve as the issuing agent for EECBs. It could use the same infrastructure as existing EU borrowing programmes, such as the EU Primary Dealer Network. This would maximise investor familiarity.

Finally, while EECBs could not formally be labelled 'EU debt' (as this would require unanimity), they would likely be perceived as quasi-EU assets, earning relatively high credit ratings, though below those of Bunds.

Option B - Ad-hoc intergovernmental arrangement

If the participating Member States were prepared to move to a *new generation of joint borrowing in Europe*, involving debt issuance on a permanent basis for strategic purposes, they could complement EU law with additional, ad-hoc provisions. A coalition of the willing could thus initiate an intergovernmental arrangement outside EU law. This would allow for greater freedom of choice, flexibility and speed, though at the expense of more complex integration into the EU legal order.

Mirroring the ESM Treaty, the participating countries could establish a special-purpose financing vehicle (SPV) separate from the EU budget[XXV]. This SPV would issue *Strategic Investment Bonds* (SIBs) in its own name, guaranteed by the participating states on a several (but not joint) liability basis.

At least initially, SIBs would likely trade at higher yields than EECBs because of their legal novelty. Their market credibility would depend on the guarantee's structure and membership composition: the broader and 'fiscally healthy' the coalition, the more attractive the instrument to global investors.

Regarding the potential ***size*** of issuances, amounts would likely exceed those currently managed by the Commission, reflecting Europe's long-term investment needs. For instance, Hildebrand, Rey, and Schularick (2025) postulate a coalition of sixteen willing EU Member States and estimate that they could finance €1.8 trillion cumulatively between 2026 and 2035 through 'European Future of Defence Bonds'.

Depending on political consensus, issuance could begin with a relatively small coalition and expand gradually once the mechanism proves effective. ***Non-EU partners*** such as the United Kingdom, Norway, or Switzerland, could also be invited to co-finance specific projects, particularly in defence and security, thus reinforcing Europe's collective capacity without requiring full institutional membership.

Turning to the joint procurement aspects, Option B would be preferable. While still relying on Art. 346 for possible exemptions from internal market rules, an intergovernmental treaty could: (i) create a *dedicated joint procurement agency* that would accommodate confidentiality and other defence-specific processes; (ii) introduce *flexible procedures* tailored to e.g. military secrecy and interoperability; (iii) allow the participating countries invoking Article 346 to do so not only on an individual basis, but also *simultaneously and with a common legal justification*, thus reducing the risk of possible litigations; (iv) design procurement, its joint financing and the related industrial policies along *coherent, multi-year programmes*. This would allow for security discretion, a more flexible governance, and a better integration of different policies.

In conclusion, the choice between Option A and Option B would depend on the willingness to move towards a next generation of joint borrowing in Europe – which could only be done under Option B – as well as a careful assessment of the other described trade-offs. In particular, the design of a more comprehensive strategy, of which joint borrowing would only be one element, could be better accommodated under Option B.

If properly designed, both options may deliver to several participating countries lower borrowing costs than national issuance, while strengthening European financial markets. A deeper and more liquid market for European bonds would also enhance the international role of the euro, improve monetary transmission, and mark an intermediate step toward a genuine European safe asset – attracting global investors and reinforcing confidence in European economic governance.

4. 2 Is there any scope for a coalition of the willing to move further ahead, and how?

A key strength of the flow approach outlined in the previous section is that, *if* a coalition of the willing decided to proceed, the initiative would probably have good chances to succeed. Its main weakness, as Bini Smaghi (2025) and Messori (2025) note, is that funding EPGs on a *flow basis alone* would be insufficient to integrate European financial markets in

the short to medium term, and therefore inadequate to create a ***safe asset of sufficient international scale***.

According to Bini Smaghi (2025), the critical mass required to achieve this goal would amount to at least *€5 trillion*, or roughly one-third of euro area GDP. This figure broadly corresponds to the combined entire value of French OATs (€1.5 trillion), Italian BTPs (€2 trillion), and Spanish Obligaciones del Estado (€1.5 trillion) currently in circulation – an amount roughly twice the outstanding stock of German Bunds, and much higher than the aforementioned flow-based scenarios.

By the end of this decade and under current policy assumptions, the gross EU debt issued by the European Commission (i.e., excluding the EIB, EFSF and ESM) could amount to roughly 1.1 trillion, including SURE (€98bn), NGEU-related (€730bn) and Ukraine-related (€140bn) debt, as well as SAFE (€150bn). Such debt is temporary in nature and, in any case, insufficient to attain the required dimension (Darvas, Welslau and Zettelmeyer, 2025).

As discussed in Section 2.2, the most effective way to reach a critical mass would be replacing part of the sovereign bonds currently held by euro area Member States with a new common asset – an option that, for the foreseeable future, remains politically and institutionally unfeasible at the level of the whole euro area.

At the same time, *if* a sufficient number of euro area countries were willing to do so – in the spirit of Draghi's pragmatic federalism and taking advantage of the favourable market conditions discussed in Section 3.2 – they could launch a joint issuance plan through an SPV established *outside the EU legal framework*.

While, at first glance, this initiative might resemble Option B described earlier, in reality it would be much more complex, challenging and ambitious, as Option C below illustrates. This would involve not only permanent strategic issuance, but also relaxing or discontinuing some of the other features of the Brussels consensus, notably moving in the direction of a ***stock-and-flow approach and joint-and-several guarantees***. Such a more advanced solution would be "first best" for the purpose of creating a European safe asset and bolstering the international status of the euro.

This could be done in different ways. For example, Sachverständigenrat (2025) has recently proposed the introduction of 'European Safe Bonds' (ESBies) through which member states' government bonds would be 'pooled according to a fixed formula and

divided into safe and risky tranches'. Given the high debt burden of some EU member states, this would have to be accompanied by 'a new mechanism in case of potential defaults'.

We sketch below how, in our view, a coalition of the willing may move ahead along this avenue along a distinct Option C.

Option C – Progressive mutualisation of national liabilities

Under this proposal, the securities issued by a European coalition of the willing would be jointly and severally guaranteed by all participating countries. They would need to adopt a comprehensive common framework governing not only the instrument's architecture – its governance, issuance techniques, characteristics, emission quotas, etc. – but also, crucially, mutual and binding commitments to ensure the sustainability of national public finances.

Of course, there would be significant trade-offs depending on the group of participating countries. On one end of the spectrum of country configurations, a pool limited to the euro area members with AAA-rated bonds – Germany, the Netherlands and Luxembourg, which accounted for €2.6 trillion at the end of 2024 – would produce the safest and cheapest supranational debt, but also be relatively small, exclusive, and politically unlikely. On the other end, a pool comprising France, Italy and Spain would make sense in terms of size, market depth and policy relevance, but would necessitate a very robust framework to ensure credit enhancement and sound governance.

Without claiming to be exhaustive on such a complex and technical topic, some key features of a credible pooling scheme could be:

- an SPV established under a *new intergovernmental treaty*, enshrining fiscal discipline of the participating countries and, as a core pillar, stronger enforcement mechanisms than the recently reformed Stability and Growth Pact;
- governing bodies including:
  - a Board composed of the *Finance Ministers* of participating countries, with well-thought voting rules,
  - an independent *Fiscal Council* mandated to verify, certify and, when needed, enact compliance;
- *automatic budgetary adjustment mechanisms* in the event of significant fiscal deviations by Member States (e.g., temporary automatic increases in contributions), to be enforced by the Fiscal Council;

- issuance of bonds with irrevocable, unconditional, *joint-and-several* guarantees, with proportional country contributions (e.g. according to GDP and population weights);
- partial *backing through common revenues* (such as a defined share of national VAT) to enhance creditworthiness, with pari passu payment obligations governed by Luxembourg law;
- a *tranching plan* including:
  - a senior tranche with a pre-funded reserve that would serve as collective backstop to protect senior bond holders in case of extreme stress, and
  - a junior tranche that is sufficiently large and well capitalised[XXVI];
- incorporation of adequate *collective action clauses* (CACs);
- a predictable *public issuance* schedule;
- the creation of a *primary dealer network* and any other measures to enhance liquidity and stimulate market demand for common issuances;
- more broadly, ensuring that the bonds' governance and characteristics are sufficient for *ECB collateral eligibility* and *investment-grade status* from inception.

Regarding the *process* to set up such pooling scheme, an initial 'flow phase' could be designed to promote and establish the new common bonds on European and international markets, as discussed under Option B. A 'stock phase' would subsequently aim to replace part of existing national debt with common instruments through voluntary swaps – along lines similar to the Blanchard and Ubide (2025) proposal – or refinancing at maturity.

Participation in the SPV should remain open, allowing the market for common bonds to expand gradually as more countries join. Ideally, in a final phase these common bonds could be replaced by fully-fledged common issuances at euro area level (see Table 1). Indeed, Option C retains certain risks (such as political fragmentation in the EU bond market) and potential costs (liquidity premia for national debt due to the smaller size of national borrowing pools) that cannot be overcome until a European-level joint borrowing is established within a political union, thus making Option C a sub-optimal solution for the purpose of creating a European safe asset when compared with the creation of a federal State – but still much better than Option A and Option B.

We leave it to the readers to form their own judgement on the political feasibility of such an ambitious proposal, and under which time horizon.

Whatever the conclusion about viability, the potential benefits of Option C would be clear. If implemented, this initiative would:

- provide investors with a highly liquid, internationally credible safe asset, potentially serving as a new global benchmark[XXVII];
- mobilise savings to finance EPGs;
- help mitigate the sovereign-bank doom loop, as banks in participating countries would hold more diversified sovereign portfolios;
- strengthen the negotiating position vis-à-vis non-participating Member States on the path toward a genuine European safe asset;
- reduce issuance costs;
- lower the volatility and vulnerability of national public debts.

If one of the participating countries were to face a period of political instability, the solidarity of the other issuers, combined with the enhanced fiscal discipline embedded in the mechanism, could help stabilise confidence, thus preventing a loss of trust comparable to that experienced during the euro area sovereign debt crisis.

Quasi-federal common issuance could also act as a financial lifeline, enabling participating countries to withstand future endogenous or exogenous shocks in a context of growing international uncertainty. Being the destinies of European countries deeply intertwined, such an initiative – by strengthening market confidence and stabilising national debts – could prevent a new systemic crisis that may otherwise overwhelm the euro area as a whole.

At the same time, the degree of ambition of this proposal is evident. Its success would require strong political will, underpinned by a firm commitment to fiscal discipline from participating countries and, in the longer term, by a credible path toward political union.

5. Conclusions

The proposals and options outlined in this article can be summarised in the stylised format shown in Table 1. They point to the conclusion that, between the status quo and a

possible European federation sometime in the future, *intermediate approaches* to joint borrowing would be well possible, and, in the current geopolitical context, desirable.

Options A, B and C leverage on the fertile idea of pragmatic federalism that Mario Draghi has recently advanced. Their logical coherence should not obscure the deeper tension at the core of European fiscal integration: the balance between solidarity, fiscal discipline, and political feasibility.

The *flow* approach presented in Sections 3.1 and 4.1 and in the second and third column of Table 1 offers a pragmatic path forward by enabling a coalition of willing Member States to finance EPGs within the limits of what one may consider today's political reality. Yet, the very pragmatism of Options A and B constrains its systemic impact: without a sufficiently large and liquid market for common bonds, the flow approach cannot deliver a genuine European safe asset. Nonetheless, we believe that moving from special and temporary to permanent and strategic common issuance (Option B) would *per se* mark a major step forward in the process of European integration.

Turning to the *stock-and-flow* approach sketched in Sections 3.2 and 4.2 and the last two columns of Table 1, Option C (let alone the final goal of a federal state) would overcome the limitations of the flow approach, but only subject to the creation of a scheme that requires the very degree of trust, policy alignment and long-term commitment it is designed to foster.

These tensions should not be seen as contradictions, but as structural features of the European project itself. They reflect a process in which institutional and political convergence advance in parallel rather than sequentially. Ultimately, the success of any such initiative will depend less on its legal design than on the willingness of participating states to sustain fiscal discipline and mutual confidence over time. Only then could a credible, common European benchmark – and with it, a genuine safe asset –gradually emerge.

Table 1 - Joint borrowing in Europe: options and stages

	Today's Brussels consensus	**→ Option A**	**→ Option B**	**→ Option C**	**→ Future European Federation**
	EU-level debt (existing instruments)	*European Enhanced Cooperation Bond* (existing instrument)	*Strategic Investment Bond* (new instrument)	*European Safe Bond* (new instrument)	*European Treasury bond* (new instrument)
Can respond to shocks	∨	∨	∨	∨	∨
Investment in European Public Goods	∨	∨	∨	∨	∨
Strategic and permanent debt instrument	⊗	⊗	∨	∨	∨
Stock-and-flow approach	⊗	⊗	⊗	∨	∨
Joint and several liability	⊗	⊗	⊗	∨	∨
Enhanced enforcement of fiscal rules	⊗	⊗	⊗	∨	∨
Requiring some form of fiscal union	⊗	⊗	⊗	∨	∨
Creating a euro-denominated safe asset	⊗	⊗	⊗	∨	∨
Issued by a body with permanent CFC	⊗	⊗	⊗	⊗	∨
Estimated debt stock (illustrative orders of magnitude)	€1,100 bn *	+ €1,800 bn **	+ €1,800 bn plus **	+ €5,000 billion ***	€10,000 billion ****

* estimate of gross EU debt issued by the European Commission by 2030 under current policy assumptions, including SURE (€98bn), NGEU-related (€730bn), Ukraine-related (€140bn), and SAFE (€150bn). This figure represents a plausible upper-range estimate, not a legally-fixed ceiling, and excludes the debt issued by the EIB, EFSF and ESM. Principal reimbursement and interest payments not considered.

** estimate under the assumption of a coalition of sixteen willing EU Member States, cumulatively between 2026 and 2035 and limited to 'European Future of Defence Bonds' (source: Hildebrand, Rey and Schularick, 2025); in addition to existing EU-level debt. Under Option A, the programme would be ad-hoc and end in 2035. Under Option B, the programme could continue also thereafter and be coupled with other standing programmes ('permanent and strategic approach'); the related debt would be rolled over.

*** estimate based on the illustrative hypothesis of conversion into common debt of the combined entire value of French OATs (€1.5 trillion), Italian BTPs (€2 trillion), and Spanish Obligaciones del Estado (€1.5 trillion) currently in circulation; in addition to existing EU-level debt.

**** estimate based on the illustrative hypothesis of conversion of the general government gross debt of euro area countries up to 60% of the current euro area GDP, stocked by acquiring part of national debts (today euro area public debt is around 88% of euro area GDP) through the issuance of new United States of Europe (USE) bonds. For reference, the current US gross federal debt amounts to 123% of GDP

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[I] A special case is the European Investment Bank (EIB), which was founded in 1958 under the Treaty of Rome. The EIB is an *autonomous, non-fiscal agency outside the EU budget*, and its debt is of a banking rather than budgetary nature. While its capital is subscribed by sovereigns, their guarantees are callable capital, not budgetary commitments. Different is the case of the European Stability Mechanism (ESM), which is an intergovernmental body whose decisions require national ratification and political oversight. ESM debt is fiscally backed and jointly guaranteed by the euro area Member States.

[II] The ECSC first borrowed on capital markets in 1954, when it issued a CHF 35 million bond.

[III] From 1999, euro area members shared the single currency and thus no longer had national BoP crises in the classical sense.

[IV] Pursuant to the Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation on the establishment of the Ukraine Support Loan for 2026 and 2027, presented by the Commission on 14 January 2026, it is a limited recourse loan: Ukraine will only have the obligation to repay if and when it receives reparations from Russia. Until then, the EU will roll over the underlying bonds in the markets. The interest costs and possible calls on the guarantee will be subsidised by the EU through the EU budget, with an adjustment mechanism to exclude contributions from the non-participating Member States, pursuant to Article 11 of the Making Available Regulation (Regulation EU, Euratom No 609/2014), in respect of any operational expenditure borne by the Union budget, comprising in particular debt service costs, as well as calls on the guarantee.

[V] The possibility to resort to enhanced cooperation is envisaged by Article 20 of the Treaty on European Union (TEU) and Articles 326-334 of the Treaty on the Functioning of the European Union (TFEU). According to these provisions, when, on a matter that requires unanimity, EU Member States do not manage to reach such unanimity, a group of at least 9 Member States can ask to establish enhanced cooperation to advance with the measures foreseen, despite the lack of unanimity. If the Council agrees to enhanced cooperation, the Member State(s) that opt out do not bear the financial costs and cannot take part in the decision-making related to it.

[VI] They include: (i) Catalyst Europe, consisting of up to €150bn in EU-backed loans for strategic investment; and (ii) the Extraordinary Crisis Mechanism, which would be activated in case of severe crises and consist of loans to Member States for up to €400bn.

[VII] *Joint and several*' liability means that (i) if one guarantor cannot reimburse the debt, the others remain fully liable for the entire amount, and (ii) each guarantor is individually responsible for the full debt vis-à-vis creditors. This is currently not the case in the EU. For example, under NGEU, all EU Member States are collectively responsible for ensuring repayment of the principal and interest through future contributions to the EU budget between 2028 and 2058. However, *creditors have no legal claim against individual Member States*. The debt is issued in the name of the EU and is secured by the EU budget, not by national treasuries or the own resources of specific countries. Therefore, NGEU engenders a *pro rata, EU-budget-backed liability*, not a joint-and-several liability. A full mutualisation of national debts would only be compatible with the Treaty on the Functioning of the European Union (TFEU) under Article 122, which allows financial assistance in *exceptional circumstances beyond Member States' control*. Such arrangements must remain temporary and cannot establish a permanent transfer or debt mutualisation mechanism.

[VIII] While the absence of genuine tax powers implies the absence of an EU Treasury empowered to borrow, the move to unified EU funding since 2023 has marked one significant step in that direction.

[IX] Some have criticised this argumentation. It has been pointed out that the political and institutional evolution of the EU has at the very least cast doubt on the validity of the objections to permanent and mutualised EU debt. The emergence and consolidation of European parties, the strengthening of the political dimension of the Commission, the growing relationship of trust between the European Parliament and the Commission, the politicisation of the European Parliament, and the now inextricable interconnection between the European political-institutional system and national ones have led to talk of a Euro-national "composite Constitution" (Lupo, 2019).

[X] Also in this case, borrowing is linked to a specific objective, the amount is capped, the repayment is pre-identified, and the time horizon is finite.

[XI] The best-known example has been the prioritisation of the monetary union before the creation of an economic, fiscal and financial union – which some did not see as a strategic mistake, but as a deliberate step

towards further integration deepening, required to deliver monetary stability in Europe after a series of shocks (collapse of Bretton Woods international monetary order in 1971-1973, crisis of the European Monetary System (EMS) in 1992-1993).

[XII] More recent contributions include: Beetsma, Cimadomo, and van Spronsen, J. (2022); Beetsma, Cima and Cimadomo. (2018); and Arnold, Barkbu, Ture, Wang, and Yao (2018).

[XIII] Despite their high rating, EU bonds do not behave like genuine safe assets. Being considered as supranational and not truly sovereign in nature, they are excluded from the main sovereign indices that serve as benchmarks for large institutional investors. In a market where many investors must stay close to their benchmarks, this exclusion sharply reduces the set of potential buyers (Bonfanti, 2025) and increases borrowing costs due to factors such as lower liquidity and uncertainty about the EU's consistency as an issuer (and despite strong credit ratings and established infrastructure). Moreover, debt issued by the Commission is not backed by capital as in the cases of the EIB and the ESM, and therefore usually presents relatively higher yields.

[XIV] The expression 'coalitions of the willing' has longstanding roots in defence-related literature, but its broader application to any form of European strategic autonomy was first developed in Blanchard and Pisani-Ferry (2025).

[XV] For a conceptual framework on EPGs, see Buti and Messori (2024). For a discussion of European vs. national public goods, see Claeys and Steinbach (2024).

[XVI] This reform allows for debt financing above 0.35% of GDP for defence spending that exceeds 1% of GDP. It also creates an extrabudgetary fund of €500bn to finance infrastructure projects over 12 years.

[XVII] The authors also show that the German investment plans would inevitably lead to a breach of the current EU fiscal framework.

[XVIII] In the context of European military expenditure, 'strategic enablers' refers to critical capabilities and resources that support the effective planning and execution of military operations, thereby enhancing operational readiness among the participating countries. Key examples include logistics, transport and mobility, intelligence, and cybersecurity.

[XIX] It should be emphasised that the idea of pragmatic federalism differs from that of "Europa à la carte". In the latter case, the emphasis is on the possibility to opt out from the process of integration, not on the objective of deeper integration, and on preserving the intergovernmental approach and national sovereignty, not on sharing sovereignty across countries as in Draghi's approach.

[XX] Bouabdallah et al. (2025) provide a first assessment of the fiscal and economic implications of the reformed Stability and Growth Pact over the short and medium term, in the light of the Medium-Term Fiscal Structural Plans of the EU Member States. For a broader review of the reformed EU fiscal framework in a historical perspective, see Haroutunian et al. (2024). Arampatzi et al. (2025) present an assessment of the progress made over the past decade in advancing the Capital Markets Union, the challenges encountered, and the concrete steps required to move forward.

[XXI] For a recent assessment of the macroeconomic impact of the ongoing shift in defence spending in the EU, see Croitorov et al. (2025).

[XXII] Depending on the types of EPG investment that joint borrowing by a coalition of willing states may choose to finance, this might affect the incentives of others to join later. For instance, if EPG investment focuses on energy interconnections, the resulting lower energy prices may benefit the countries outside the coalition who import energy from the coalition's members. Since such outside countries would benefit even without participating, their incentives to join the coalition might be limited. Conversely, if EPG investments are in the area of critical minerals refinement, there might be fewer positive externalities and therefore stronger incentives to join the coalition.

[XXIII] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

[XXIV] The European Court of Justice has repeatedly held that this derogation must be interpreted strictly. It may be invoked only when the application of EU rules would obstruct the protection of essential security interests, and it is up to the Member States invoking Article 346 to bear the burden of proof in showing necessity and proportionality (see Case 222/84 Johnston and later cases C-414/97, C-337/05, C-157/06, C-615/10). This is already how joint procurement works today via the European Defence Agency (EDA).

[XXV] In principle, the SPV could be housed within the ESM, which is already established via intergovernmental treaty, is experienced in bond issuance and well capitalised. Moreover, being ESM debt off member-state balance sheets, this would be "a key advantage given fiscal constraints and NATO commitments" (Hildebrand, Rey and Schularick, 2025). However, the ESM was only designed as a crisis mechanism for the euro area, not

as a general financing vehicle. This implies that the related intergovernmental Treaty would need to be significantly changed. For that reason, the creation of an ad-hoc SPV may be more feasible.

[xxvi] One drawback of such an approach is that, by increasing the riskiness of the junior tranche, such tranching also increases the risk of self-fulling runs on such tranches, especially during "risk-off" periods.

[xxvii] A key question is whether market participants would perceive coalition-issued debt as a safe asset or just a close substitute for EU supranational debt backed by all Member States. As previously discussed (see footnote 14), evidence suggests that investors differentiate among EU supranational bonds (e.g., the Commission vs., ESM/EFSF and EIB), with Commission bonds often priced less favourably than other supranational or some sovereign bonds, due to factors such as lower liquidity and uncertainty about the EU's consistency as an issuer. From this perspective, the success of this initiative would require the participation of large euro area issuers such as France, Italy and Spain, on a joint-and-several liability bases. This feature could improve the financial appeal of coalition debt, compared to the bonds currently issued by the Commission.

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Symbolic Federalism and Real Exclusion: Post-Statehood Governance in Telangana and the Limits of Subnational Transformation

by

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Abstract

The formation of Telangana in 2014 was widely celebrated as a landmark moment in the evolution of Indian federalism and as a decisive response to decades of regional neglect, socio-economic marginalisation, and political exclusion within the composite state of Andhra Pradesh. Statehood was expected to correct historical injustices by ensuring equitable access to water, public employment, development funds, and political representation. This article argues, however, that Telangana's post-statehood trajectory reflects a condition of *symbolic federalism*, wherein territorial recognition and political visibility have not fully translated into substantive institutional transformation or inclusive governance. Drawing on theories of asymmetrical federalism, recognition and redistribution, and multi-level governance, and supported by few insights from rural Telangana. This article critically evaluates governance outcomes in the decade following state formation. It demonstrates that elite domination, executive centralisation, selective welfare delivery, fiscal dependence, and weak decentralisation continue to structure governance in the new state. Marginalised communities, Dalits, Backward Castes, tenant farmers, women, and educated rural youth, remain unevenly incorporated into development processes. The Telangana experience thus highlights the limits of statehood as a stand-alone remedy for structural injustice and contributes to broader debates on federalism, subnational autonomy, and democratic deepening in India and comparative contexts.

Keywords

Telangana, symbolic federalism, marginalisation, subnational Governance, Panchayati Raj, recognition politics, institutional exclusion

1. Introduction

The creation of Telangana on 2 June 2014 represents one of the most consequential moments in the trajectory of Indian federalism since the linguistic reorganisation of states in the 1950s. The Telangana movement was a sustained political protest against regional inequality, unequal development, and political marginalisation within the composite state of Andhra Pradesh, as compared with the earlier statehood movements, which were mostly linguistic or administrative in nature. The statehood demand was expressed not just as a territorial imperative, but as a normative claim that political autonomy might serve as a redress to historical malpractice and institutional oversight (Rao, 2010; Tillin, 2014).

The Telangana movement formed a social coalition, which was unprecedentedly wide in terms of inclusion, including Dalits, Adivasis, Backward Castes, tenant farmers, women, public sector workers, students, and educated rural youth. To these groups, statehood represented more than political acknowledgement, but it also offered the promise of dignity, equal access to state-provided resources, and responsiveness to the institution. The popular slogan *Neellu, Nidhulu, Niyamakalu* (water, funds, jobs) condensed a widespread perception that governance arrangements within Andhra Pradesh systematically disadvantaged Telangana in irrigation investment, fiscal allocation, and public employment (Reddy & Reddy, 2016). Statehood, therefore, was invested with transformative expectations that extended far beyond administrative autonomy.

The governance results in Telangana are more contested a decade after its formation. As much as the state has realised increased political visibility and symbolic recognition, there is increasing disenchantment as to whether statehood has led to substantive institutional reform, decentralisation, or social inclusiveness. This article offers that the experience of post-statehood in Telangana is an example of *symbolic federalism: a kind of federal accommodation* whereby territorial recognition is provided without any substantial redistribution of power, resources, or decision-making power.

Symbolic federalism, as conceptualised in this article, refers to a form of federal accommodation in which territorial recognition is granted without a corresponding restructuring of power relations, fiscal authority, or institutional autonomy. It denotes a

condition where the formal inclusion of a region within a federal framework coexists with the centralised governance practices and limited democratic deepening.

As an analytical category, symbolic federalism enables us to examine how statehood can simultaneously produce political recognition and institutional continuity, thereby generating a gap between popular expectations of transformation and the actual outcomes of governance. In the Telangana context, this concept is used to evaluate whether state formation has translated into meaningful decentralisation, redistribution, and social justice.

The article goes as follows: Section 2 presents Telangana in the context of larger discussions about Indian federalism, underlining centralization and asymmetry in the constitution. Section 3 examines asymmetrical federalism theories to assess limits of territorial accommodation. To expand on the idea of symbolic federalism, section 4 outlines the recognition and redistribution structure. Fiscal federalism, decentralization, employment, agrarian transformation, and social justice are among the governance outcomes that are experimentally analysed in Sections 5 to 9. Telangana is contrasted to other recently formed states in Section 10, and the conclusion evaluates limitations of subnational transformation.

2. Federalism, State Formation, and the Indian Context

The underlying paradox between formal decentralization and substantive centralization is reflected in the constitutional framework of Indian federalism. Although India is referred to as a Union of States in the constitution, Parliament exclusively possesses the authority to reorganize state borders under Article 3, which restricts the autonomy of constituent states.

Debates in the Constituent Assembly reveal a deep suspicion towards classical federalism, often perceived as a potential threat to national unity. Bhattacharyya (2007) observes that federalism was at times regarded as a "recipe for disintegration," which justified the retention of strong central powers in matters of territorial restructuring. Similarly, Singh (2016) argues that the federal scheme of the Constitution is marked by an inherent asymmetry, where the Union retains decisive authority over the existence and boundaries of states. This centralising tendency suggests that state formation in India is less a negotiated

federal compact and more an instrument of political management, thereby shaping the limits within which subnational autonomy can operate.

Classical federalism theories, in particular the idea of federalism as a compromise of independent political units by Riker (1964) lays stress on negotiated power and mutual agreement. Indian federalism, on the other hand, has developed mostly through political accommodation that is controlled by the central government. State building and formation have more frequently been used to address regional dissatisfaction, social mobilisation, and electoral pressures as opposed to redistribution of power or enhanced democratic engagement (Arora, 2012).

The Telangana case exemplifies this trajectory. Although the movement expressed structural complaints based on historical inattention, disparate development, and political marginalisation, the constitutional procedure, by which statehood was provided, did not require fiscal federalism, administrative autonomy, or local government reforms. Telangana inherited the same institutional structure as any other Indian state - that of executive hegemony, bureaucratic centralism, and financial reliance on the Union. Thus, the formation of the state answered the question of territorial recognition but left the system of governance mostly the same.

3. Asymmetrical Federalism and the Limits of Territorial Accommodation

Asymmetrical federalism can offer an analytical perspective that can be used critically to understand the formation and post-statehood course of Telangana. Watts (2008) and Choudhry (2006) scholars contend that "asymmetry allows federation to embrace diversity by giving various powers, fiscal or institutional protection to those regions with historical or cultural identities". Such differentiation is permitted by the constitutional structure of India, which is manifested in the special provisions of Articles 371 and 371A -J.

The Indian Constitution provides for asymmetrical federal arrangements through Articles 371 and 371A–J, which grant specific states differentiated powers in matters such as legislative autonomy, administrative safeguards, and cultural protection. These provisions

recognise historical, ethnic, and regional distinctiveness and are designed to accommodate diversity within the federal framework.

However, Telangana's formation did not involve comparable constitutional asymmetry. Despite its distinct historical experience as part of the erstwhile Hyderabad State and its claims of systemic marginalisation, the new state was incorporated within the standard federal framework without additional safeguards or enhanced autonomy. As Nicolini (2015) argues, "asymmetry can serve as a critical instrument for managing divided societies by institutionalising difference. Its absence, however, often results in the persistence of centralised governance structures, thereby limiting the transformative potential of territorial reorganisation" (Nicolini 2015).

Telangana formation recognised the historical experience of the region, especially the annexation of the princely state of Hyderabad and its consequent marginalisation in Andhra Pradesh (Rao, 2010). Nonetheless, this concession was limited to territorial acknowledgement. The Telangana state has not been granted greater legislative power, special fiscal status, or administrative differentiation. Contrary to the meaningful asymmetry cases in comparative federations, statehood did not change the power equilibrium between the Union and the state, nor did it give authority to sub-state institutions.

This constrained form of asymmetry is indicative of a larger tendency in Indian federalism to view state creation as a culmination rather than a beginning of institutional reformation. As Tillin (2014) demonstrates, "the creation of new states in India has often functioned as a strategy for accommodating regional mobilisation and diffusing political conflict rather than fundamentally transforming institutional arrangements" (Tillin 2014). Statehood, in this sense, operates as a mechanism of political settlement, addressing demands for recognition while leaving existing structures of power and governance largely intact.

4. Recognition, Redistribution, and the Logic of Symbolic Federalism

The difference between recognition and redistribution, as developed by Nancy Fraser (2004), can offer a critical perspective on assessing the results of post-statehood in Telangana. The Telangana movement was a combination of demands for cultural-political recognition and material redistribution. The recognition dimension was achieved through

statehood, which legitimised a particular regional identity and political history. Redistributive results, however, have been imbalanced, selective, and contingent.

Post-statehood governance in Telangana has relied heavily on high-visibility welfare schemes such as *Rythu Bandhu*, *Dalit Bandhu*, *Aasara* pensions, *Kalyana Lakshmi*, *Shaadi Mubarak* and housing programmes. Although these efforts have made the state more electorally attractive and visible in its administration, they exist on more of a discretionary and personalised basis as opposed to being rights-based and universal. The welfare provision has taken the place of structural reforms in land redistribution, the creation of jobs, and institutional accountability.

This trend is an example of symbolic federalism, whereby recognition is institutionalised with symbolism of territorial autonomy and welfare, but without removing underlying relations of inequality. Without redistribution due to threats of depoliticising inequality, as Fraser (2004) warns, recognition will simply redefine structural injustice as administrative benevolence and not as a democratic right. In Telangana, welfare has served as a political technology that concentrates executive power instead of giving citizens the power through institutional rights.

5. Fiscal Federalism and State Capacity after Statehood

An often-overlooked dimension of post-statehood governance is fiscal federalism. Telangana took over a fairly good revenue base as compared to other new states like Jharkhand and Chhattisgarh. Nonetheless, this fiscal privilege has not been turned into increased decentralisation or institutional empowerment. Rather, the fiscal resources have been more centralised in the state executive, which strengthens the top-down governance.

Reliance on centrally sponsored schemes, borrowing to finance big infrastructure projects, and increasing public debt have limited policy autonomy. Intensive irrigation and welfare schemes have consumed a large portion of the government funds, restricting investments in education, health, and local government capacity. This has been aggravated by the lack of fiscal devolution to Panchayati Raj Institutions and has weakened the grassroots governance, which was the promise of participatory federalism.

6. Multi-Level Governance and the Crisis of Decentralisation

The multi-level governance (MLG) theory focuses on decentralising authority at several levels of the government to increase participation, accountability, and responsiveness of policies (Hooghe & Marks, 2003). The vision of the Telangana movement was local government decentralisation and empowered local governance.

As a matter of fact, though, the post-statehood government in Telangana has been characterised by a growing centralisation at the state level. The power to make decisions is centralised in the Chief Minister's Office, and the Panchayati Raj Institutions, Mandal Parishads, and District Planning committees are financially reliant and administratively weak (Reddy, 2019). Decentralisation requirements in the constitution have not yielded to decentralised autonomy and participatory planning.

Such a loss of decentralisation is a blow to democratic participation, especially to marginalised communities where politics is available through local institutions. Although Telangana got autonomy over its parent state, the issue of autonomy in the state is limited, which shows a basic contradiction of governance in a post-statehood era.

7. Employment, Youth, and the Politics of Post-Statehood Disillusionment

Employment generation was one of the most potent mobilising discourses of the Telangana movement, especially among educated youth in rural areas who comprised the organisational backbone of the movement. The expectation of statehood was common to redress what was seen as institutional injustices against Telangana applicants in terms of public employment, administrative assignments, as well as in higher education in the composite state of Andhra Pradesh. The growth of the state bureaucracy, establishment of new departments, and decentralisation of the administrative roles were anticipated to create a lot of jobs and bring back confidence in the institutions (Reddy & Reddy, 2016).

Nevertheless, the results of governance after 2014 indicate that the disparity between expectations and reality is increasing. Even after frequent electoral promises, the public recruitment in Telangana has been marked by extended delays, court wrangles, and vacancies.

According to the data provided by the *Centre of Monitoring Indian Economy* (CMIE), the rates of unemployment in the state are constantly high, and the unemployment of graduates and post-graduates is especially acute (CMIE, 2020). The young, highly educated, particularly rural and semi-urban, are becoming more and more not empowered by statehood but deprived of an opportunity.

Disillusionment among the youth has been seen through protests, lawsuits, and a lack of confidence in the state institutions. Researchers think that the inability to meet job expectations contributed to a broader issue of a lack of legitimacy in the post-statehood government, where there is no symbolic guarantee of autonomy and material opportunity (Deshpande, 2021). In this respect, the place of employment becomes a very significant place where symbolic federalism is unveiled: recognition without redistribution brings about political frustration and not inclusion.

8. Agriculture, Irrigation, and the Uneven Geography of Agrarian Transformation

Agriculture and water access were foundational to the Telangana movement, reflecting the region's historical experience of drought, tank neglect, and uneven irrigation investment. Large-scale initiatives such as *Mission Kakatiya* and the *Kaleshwaram Lift Irrigation Scheme* were presented by the post-statehood government as corrective interventions aimed at reversing decades of agrarian neglect (Government of Telangana, 2018). These projects were symbolically framed as evidence that statehood had finally enabled regionally responsive development.

Empirical studies indicate that the non-tenant farmers and landless agricultural workers have been marginalised by the fruits of irrigation and input subsidies, which have been unevenly distributed among landholding farmers (Reddy & Mishra, 2020). The land-linked programmes, such as the Rythu Bandhu, marginalise the tenant cultivators systematically even in cases when they are the prime participants of the agrarian economy of Telangana.

In addition, the emphasis on mass irrigation has also introduced certain new challenges to the financial sustainability, ecological impacts, and geographical imbalance. The agrarian transformation is made difficult by the rise in the level of public debt, overruns, and

environmental pressures. There is agrarian distress in terms of the indebtedness, crop failure, and farmer suicides, though there is more state money involved. This inertia points to the ineffectiveness of the infrastructure-based solutions without institutional change in land relations, land tenure, and rural credit institutions.

9. Social Justice, Caste, and the Persistence of Institutional Exclusion

The Telangana movement had marginalised communities, especially Dalits, Adivasis, and Backward Castes, as its main focus, as statehood was seen as an avenue to empowerment, representation, and substantive social justice. There are also certain welfare programmes, such as *Dalit Bandhu*, residential schools, and housing programmes, introduced as a result of post-statehood administration in order to address historical disadvantage. The political significance of these interventions has been a sign of identification and involvement in the history of state development.

Nonetheless, substantive results of social justice remain limited and uneven. The structural barriers that marginalised groups face in accessing land, quality education, labour markets, and political representation continue to influence them (Thorat and Newman, 2012). The welfare delivery may be described as discretionary operations, which enhance the dependence on the political mediation, rather than the institutional rights. These particular plans are symbolically important, according to the scholars, but do not dismantle caste-based exclusion within the institutions of the state and the market (Palshikar, 2017).

The limited capacity to dismantle caste based inequality is an indication of one of the inherent contradictions of symbolic federalism: it is recognised, but no institutional alterations that would end exclusion are made. The absence of participatory governance, law, and accountability means that social justice will be patchwork, conditional, and rebalanced politically.

10. Comparative Perspectives: Telangana in the Landscape of New States

A comparative examination of Telangana alongside other newly formed states, such as Jharkhand and Chhattisgarh, reveals striking similarities in post-formation governance trajectories. In both instances, statehood functioned as a tool of spreading discontent in the region and as a means to settle identity-based demands, but it did not essentially change the dynamics of elite domination, administrative centralisation, and unequal development (Tillin, 2014).

Jharkhand and Chhattisgarh, both created in 2000, emerged from prolonged movements centred on tribal identity, resource control, and regional underdevelopment. While statehood was expected to enable more responsive governance, both states have sometimes continued to experience political instability, elite capture, and uneven development. These trajectories suggest that the creation of new states, while addressing identity-based grievances, does not automatically translate into institutional transformation or equitable development. Telangana, despite its relatively stronger fiscal base and urban economic advantages, reflects similar patterns of executive centralisation and selective redistribution. This comparison reinforces the argument that territorial reorganisation must be accompanied by deeper reforms in decentralisation, fiscal autonomy, and institutional accountability.

The state of Telangana is not similar to these states as it has a comparatively more robust fiscal base and urban economic centres, especially Hyderabad. Nevertheless, this has not been converted into more inclusive governance. Rather, the increased fiscal capability has strengthened executive centralisation and discretion in welfare politics. According to the comparative federalism literature, institutionalised decentralisation and fiscal devolution, unless present, the new states tend to repeat the governance pathologies of their predecessors as opposed to overcoming them (Watts, 2008).

Telangana, therefore, adds to the wider comparative arguments on the state making in federations by demonstrating that even in the case of territorial reorganisation, democratic deepening and redistributive justice cannot be assured. The case highlights that the evaluation of statehood as a process that necessitates a permanent institutional reform is necessary instead of merely a recognition act.

11. Conclusion: Beyond Symbolic Federalism

More than a decade after its formation, Telangana embodies both the promise and the limits of federal accommodation in India. Statehood has provided the symbolic identity, political visibility, and regional pride. Nevertheless, all the more profound desires that inspired the movement, equity, dignity, and substantive inclusion, are still not fully achieved. The structural injustice of weak decentralisation, selective welfare provision, endemic executive centralisation, and unequal development underscores the inadequacy of the statehood as a willful solution to structural injustice.

This gap between recognition and change is manifested in the symbolic concept of federalism. Telangana demonstrates that institutional continuity, elite dominance, and democratic deficit do not conflict with territorial autonomy. Reform of fiscal federalism, decentralisation, employment policy, land relations, and rights-based welfare structure should also be provided in order to be a real instrument of social justice.

The example of Telangana teaches an important lesson to Indian federalism and comparative politics in general: subnational reorganisation is not to be regarded as an end, but as a sort of prelude to democratic deepening. The vision of statehood can never be transformative unless institutionalised and participatory governance is actualised.

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Constrained Federalism and the Limits of Urban Decentralization: Explaining India's Urban Governance Deficit through Intergovernmental Political Economy

by

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Abstract

India's urban governance reveals a central paradox of federalism: despite constitutional decentralization under the 74th Amendment, Urban Local Bodies (ULBs) continue to operate with limited autonomy. This study examines how intergovernmental power asymmetries shape urban governance outcomes and contribute to persistent infrastructure deficits. Drawing on federal political economy, fiscal federalism, and multi-level governance, it develops the concept of *constrained federal decentralization* to explain the gap between formal institutional design and actual local empowerment. The analysis shows that ULBs function within a system marked by fiscal dependency, incomplete functional devolution, and administrative centralization, producing a condition of *devolution without autonomy*. These constraints generate a misalignment between autonomy, capacity, and accountability, conceptualized as a *Federal Governance Trilemma*. By situating urban governance within intergovernmental relations, the study challenges explanations that attribute governance failures solely to local capacity deficits. It argues instead that infrastructure deficits are structurally embedded within federal political economic arrangements. The study contributes to federalism scholarship by offering a theoretically grounded framework for understanding decentralization outcomes in developing federations.

Keywords

constrained federalism; urban governance; decentralization; fiscal federalism; intergovernmental relations; urban local bodies, political economy

1. Introduction

India's experience with urban governance reveals a central paradox of federalism: formal decentralization has expanded, but substantive local authority remains limited. The 74th Constitutional Amendment Act (CAA) (1992) established Urban Local Bodies (ULBs) as the third tier of governance in the country to foster political, administrative, and fiscal decentralization (Chattopadhyay, 2025). However, India's cities still have continued to suffer from infrastructural deficiencies, fragmented governance, and poor service delivery performance. Why does decentralization under the Constitution fail to translate to real local authority? (Jacob & Jacob, 2022). Current literature on decentralization often takes a perspective that institutional design results in efficiency, accountability, and development benefits for local communities (Bardhan & Mookherjee, 2006; Azfar et al., 2018). Nevertheless, the above perspective is currently being challenged amid developing federations wherein institutional design constraints limit decentralized decision-making due to intergovernmental asymmetry of power (Rodden, 2004; Bardhan, 2002; Faguet, J. P., & Shami, 2022). In this regard, decentralization becomes more procedural as opposed to substantive. Indeed, India is experiencing significant urbanization, and its urban population is projected to grow to about 600 million by 2036, making a substantial contribution towards GDP (Verma & Singh, 2025). However, this expansion has not been matched by commensurate investments in infrastructure or institutional capacity, resulting in persistent deficits in water supply, sanitation, housing, and urban services.

The federal system in India has a crucial influence on the results of urban governance. It refers to the phenomenon of *asymmetric federalism* when constitutional norms are supplemented by unequal power allocation between various governmental tiers (Bhattacharyya, 2023). Although the 74th amendment created the legal grounds for urban decentralization in India, it occurred against the backdrop of a federal system that granted considerable discretion to state governments (Rodden, 2004; Bardhan, 2002). This study extends the previous discussion by introducing an analytical framework of *constrained federal decentralization*, which implies constitutionally grounded decentralization that is effectively constrained by power imbalances within the intergovernmental system. Contrary to traditional assumptions regarding the inadequacies of local administrations as the reason

behind poor urban governance, the proposed model places emphasis on the interconnection between urban governance outcomes and the political economy of federalism.

While Sustainable Development Goal (SDG) 11 focuses on making cities more inclusive, safe, resilient, and sustainable, the rapidly expanding urban population in developing countries has created great pressures on the current available infrastructure, leading to a non-paying supply-demand gap (Nkengla-Asi et al., 2024). As stated by the Malhotra (2023), in order to cater to these rising demands, the Indian government needs to invest in the urban infrastructure equal to about 8-10 percent of its GDP every year, which is not happening. The municipal revenues in India make up for less than 1 percent of the country's GDP whereas in the OECD countries, these are about 4 to 5 percent, revealing the major financial constraint faced by ULBs (Musthaf, 2025). Such limitations can be seen from three different interconnected perspectives. First, financial dependence still exists as the sources of revenue for ULBs constitute only a negligible part of the total municipal income (Sridhar & Ravi, 2022; Musthaf, 2025). Second, functional devolution is yet to be complete, with less than half of the functions mentioned under the 12th Schedule being transferred (Janjua & Rohdewohld, 2019). Third, administrative control continues to be centralized, as key personnel and planning authorities remain under state jurisdiction (Ho et al., 2025). These patterns collectively reinforce a system of devolution without discretion, where responsibilities are transferred without corresponding authority.

The existing literature acknowledged the importance of infrastructural development in promoting full economic development and also the sustainability of the economy (Srinivasu & Rao, 2013; Mahmood et al., 2025). However, existing evidence indicates a persistent gap in service delivery outcomes. The current system of federalism in India emphasizes that the infrastructure development is necessary to maintain the rate of economic growth and urbanization. In India, Urban Local Bodies (UBLs) as part of the Constitution recognized as urban self-governments are responsible for local administration and public service delivery. This suggests that urban development in India depends on urban governance through active functioning of ULBs (Mohanty, 2022). Particularly, in infrastructure development such as roads, water supply, sanitation, and waste management as the rate of urban population growth increases (Usman, 2025). As a result, a disparity between demand and supply is apparent in and around urban centers. This gap illustrates the real difference between the necessity for infrastructure enhancement and the ability of the current infrastructure to

support a particular population (De, 2023). Over the long term, unregulated urban growth hinders the formation of sustainable communities (Chen et al., 2022). The local authorities, however, have restricted autonomy in terms of resource mobilization and fund generation. This in turn intensifies the disparity between the need for community services and welfare programs (Ohta et al., 2021). The lack of essential infrastructure in urban areas in many developing countries has prompted policymakers to recognize the need to upgrade existing infrastructure while simultaneously seeking additional investment for new infrastructure development (Gurara et al., 2018). Against this background, the study asks: *How do intergovernmental power asymmetries within India's federal system constrain the effective empowerment of ULBs and shape urban infrastructure outcomes?* Beyond administrative decentralization, this question must be situated within India's federal structure, where urban governance is constitutionally recognized but operationally mediated by state governments. This creates a form of dependent decentralization, where local governments remain structurally subordinate within intergovernmental hierarchies (Rodden, 2004; Bardhan, 2022). As a result, the effectiveness of ULBs cannot be understood in isolation from federal political economy dynamics that shape fiscal authority, administrative control, and governance outcomes. The study adopted a multi-theoretical approach that relies on decentralization theory, polycentric governance and political economy views. To address this, the study proceeds by first situating decentralization within federal political economy debates, then developing a conceptual framework of constrained federal decentralization, and finally applying this framework to explain urban governance outcomes in India.

This study makes three contributions to federalism and urban governance scholarship. (i) it introduces the concept of *constrained federal decentralization* as a mid-range theoretical framework to explain the divergence between formal decentralization and substantive local autonomy. (ii) it develops a *Federal Governance Trilemma*, demonstrating how autonomy, capacity, and accountability are jointly shaped by intergovernmental relations rather than local institutional design alone. (iii) the study empirically explains the problems with the urban infrastructure of India in the political economy of federalism, rejecting technocratic arguments that only blame administrative inefficiency for failures in governance. The analysis is based on the institutional context of Indian federalism, however, the approach can prove to be analytically relevant for other developing federations with asymmetric intergovernmental relations. The argument developed here engages directly with broader

debates in comparative federalism by demonstrating how decentralization outcomes are shaped by intergovernmental power configurations.

2. Literature Review: Federalism, Decentralization, and Urban Governance

Scholarship on governance in urban settings and decentralization reflects the interdisciplinary nature of the field. Traditional decentralized governance theory, based on fiscal federalism, claims that the transfer of decision-making powers from higher to lower levels of government improves efficiency, accountability, and responsiveness to local interests (Oates, 1972). Modern research has developed the idea by adding that political and institutional aspects influence the effectiveness of decentralization (Faguet, 2014). Recent trends in the literature have questioned the belief that decentralization necessarily entails positive governance implications. Comparative evidence suggests that decentralization frequently has unequal consequences in developing nations, especially when institutions lack strength and intergovernmental relationships are imbalanced due to power differences (Rodden, 2004; Smoke, 2015). This concern is reflected in scholarship on "incomplete decentralization," which means the transfer of responsibilities to the grassroots without adequate fiscal and administrative authority (Smoke, 2015). In this context, local governments are held accountable to deliver services, yet they are formally connected to the central administration. The same issues are present in the literature on unfunded mandates, in which sub-national governments are given policy mandates without sufficient funding, resulting in institutional tension and lack of accountability. The sequencing and political control of decentralization reforms also suggest that these affect the actual governance outcomes to a greater degree than just constitutional design (Falleti, 2010). Administrative and politically decentralized systems that do not include substantive fiscal empowerment often result in the reintroduction of a hierarchical mode of control. These insights have also implications for explaining the lack of meaningful local autonomy in the constitutional change process in developing federations.

Decentralization may result in the fragmentation of political communities, the capture of public policy by elites, and coordination problems rather than enhanced public services in

regions with poor institutional development and asymmetric intergovernmental interaction (Bardhan, 2002; Crook & Manor, 2002). Federalism studies offer an important perspective on these phenomena. Federalism's political economy explains how the allocation of fiscal responsibilities, bureaucratic control, and political motivations at various levels of government impacts governance (Rao & Singh, 2006; Weingast, 2009; Weingast, 2025). For example, the idea of vertical fiscal imbalance helps us to understand how disparities in taxing authority and spending obligations can affect local governance (Rodden, 2004). Likewise, second-generation approaches to fiscal federalism highlight the role played by incentive-compatible interactions among governments, rather than just the constitution, in determining institutional effects (Weingast, 2009).

Scholars define the Indian experience of federalism as "a holding-together system," where decentralization takes place under the structure of a strong central-state system (Steytler et al., 2021). Although the introduction of the 74th CAA aimed at entrenching urban decentralization, there are marked differences among states in respect of fiscal transfers, administrative capacity, and institutional functions (Chattopadhyay, 2025). Studies reveal shortcomings in financial structures, institutions, and services provided by municipal bodies, which imply that decentralization has failed to empower the city government (Mathur, 2024; De, 2023). Empirical evidence from India underscores the structural limitations of urban decentralization, which are responsible for delivering core urban services, remain severely constrained in fiscal and institutional capacity (Shrestha & Hankla, 2025). Municipal revenues in India account for only about 0.6-1 percent of GDP, compared to significantly higher shares in other federal systems, indicating a narrow fiscal base. This constraint is particularly striking given that urban areas contribute nearly 60 percent of India's GDP, revealing a clear mismatch between economic contribution and fiscal empowerment (Reserve Bank of India, 2022). Property tax revenues, one of the primary sources of municipal finance, remain extremely low at around 0.12 percent of GDP, reflecting weak local revenue mobilization (Mathur, 2024). As a result, ULBs rely heavily on intergovernmental transfers, with grants from central and state governments constituting a substantial share of municipal income, thereby limiting financial autonomy and long-term planning capacity (Reserve Bank of India, 2022; Mohanty, 2022). Institutional constraints further compound these fiscal limitations: less than half of the functions listed under the Twelfth Schedule have been effectively devolved in most states, and administrative control over key personnel continues to rest with

state governments, weakening local decision-making authority (Ministry of Housing and Urban Affairs, 2021). These patterns collectively demonstrate that decentralization in India remains largely procedural, with substantive empowerment of urban local governments constrained by entrenched intergovernmental asymmetries.

The research on urban governance is primarily concentrated on reforms of administration, institutional capacities, and service provision, while intergovernmental power structures remain largely unexamined in this context. This study seeks to explore an important gap in the extant literature by merging the federal political economy approach with urban governance research. For this purpose, the concept of constrained federal decentralization is introduced, highlighting both decentralization processes and constraints on reform caused by intergovernmental politics. The study develops an analytical model called *Urban Governance Trilemma* that investigates how autonomy, capacity, and accountability are jointly shaped in a federal context. By bringing the issue of urban governance into the federalism discussion, the article provides a theoretical perspective for investigating decentralization outcomes in developing federations. Specifically, this study goes beyond the current decentralization debate by showing the relevance of power asymmetries between different government levels in explaining the impact of urban governance. Consequently, decentralization is treated in the article as a matter of federal political economy rather than a problem of local institution-building. The objective of this research is not to invalidate previous decentralization models but to complement them through the consideration of power asymmetries. From the literature review, it is evident that decentralization outcomes depend very much on the political and institutional context.

3. Research Methodology

The research adopts the qualitative paradigm, where the research question involves theory development. It does not involve testing of any hypotheses. Rather, an explanation for the gap between formal decentralization and reality is to be developed through the research. Conceptually, the research belongs to comparative institutional and federal political economy approaches with reference to fiscal federalism theory, decentralization literature, and multi-level governance frameworks (Oates, 1972; Rodden, 2004; Weingast, 2009). The

approach is to be explanatory and interpretive in nature, with an intention to uncover causal mechanisms behind the impact of intergovernmental relationships on urban infrastructure performance.

The theoretical framework is based on structured reading of government reports, policy papers, and scholarly literature, including but not limited to Reserve Bank of India, Ministry of Housing and Urban Affairs; policy papers NITI Aayog, RBI, World Bank; scholarly literature. These resources will be utilized to explore three major themes of urban governance, which include fiscal autonomy, administration, and accountability. The study ensures consistent analytical approach and empirical basis through triangulation of these sources. In order to organize the research, the paper uses the conceptual-analytical framework known as the Urban Governance Trilemma. This approach makes it possible to understand the relationship between autonomy, capacity, and accountability of urban authorities in the specific context of federalism, without assuming that weak local institutions alone explain urban governance results.

The study also utilizes a comparative approach, using secondary sources from other federal states like Brazil and Germany in order to show the impact of different levels of fiscal decentralization and intergovernmental coordination on urban governance outcomes. Comparative analysis improves the external validity of the proposed conceptual-analytical framework and situates the case of India in the broader context of federalism scholarship. Although the study does not use any primary data and quantitative tools for statistical inference, it focuses primarily on theoretical generalization and causation. Consequently, the research seeks to make an important contribution to the theory of federalism and urban governance in terms of its mid-level character and analytical generality that can be applied to other developing federal states with asymmetrical intergovernmental relations. While the reliance on secondary data may limit causal inference, the study prioritizes analytical depth and theoretical coherence to identify structural patterns that are consistently observed across multiple data sources.

4. Theoretical and Conceptual Framework

The study is based on fiscal federalism, multi-level governance, decentralization theory, polycentric governance, and political economy approaches to explain the persistence of urban infrastructure deficits in India. The argument combines insights from fiscal federalism and multi-level governance to locate urban governance within India's federal structure. Fiscal federalism explains how mismatches between revenue authority and expenditure responsibilities create structural inefficiencies in multi-level governance systems (Oates, 1972; Rodden, 2004). While vertical fiscal imbalance is well-documented in federalism literature, this study extends the argument by linking it to governance outcomes through a multi-dimensional framework of autonomy, capacity, and accountability. Multi-level governance highlights the interaction between central, state, and local actors, emphasizing coordination rather than hierarchical control (Hooghe & Marks, 2010). According to the decentralization theory, political, administrative, fiscal authority should be devolved to local governments to improve efficiency, accountability, and responsiveness (Oates, 1972; Faguet, 2014). In less developed situations, the process of decentralization can produce institutional asymmetry, a condition where responsibilities are devolved to local governments without corresponding fiscal authority, administrative control, or policy discretion. The study also draws on polycentric governance (Ostrom, 2010), which focuses on the coexistence of multiple decision-making centers operating at different levels. Though polycentric systems may be more flexible and innovative, the effectiveness of such system is dependent on the ability to coordinate and institutional coherence which are not evenly strewn in the Indian context. Lastly, the political economy approach is used to place decentralization into larger power dynamics. In the Indian context, decentralization operates within what this research conceptualizes as *constrained federal decentralization*, where state governments act as gatekeepers of local autonomy. This limits the transformative potential of the 74th CAA, as local governments remain dependent on state-level political and fiscal decisions. In this respect, the results of governance are determined by institutional design as well as the political incentives, bureaucracy interests, and intergovernmental bargaining (Bardhan, 2002). This concept synthesis has supported the elaboration of the Urban Governance Trilemma Model that is expounded in the next section.

4.1. Conceptual Framework

The theoretical framework recognizes three main determinants for urban infrastructure performance: (i) *Institutional Capability*: administrative efficiency, technical capability and governance systems; (ii) *Financial Autonomy*: financial capability, intergovernmental funding and resource management practices; and (iii) *Governance Processes*: civic engagement, PPP approaches and collaboration between different agencies. These components are considered within a broader framework of political economy, which is a multi-level approach of governance and asymmetry in power relations. From an analytical point of view, this research examines the urban infrastructure outcomes, namely, the efficiency in providing service, infrastructure availability and quality of urban services, as the dependent variable. The determination of urban local bodies effectiveness as the independent variable is based on institutional capability, fiscal autonomy and governance processes (Rodden, 2004; Bardhan, 2002). According to the analysis presented above, good urban infrastructure results can be achieved only when there is a synergy of fiscal, administrative capabilities and accountability in the governance process. The casual pathway connecting ULB empowerment with better infrastructure outcomes goes in three directions. (i) Fiscal decentralization expands local resource availability and improves allocative efficiency. (ii) Administrative autonomy enables context-specific planning and quicker decision-making. (iii) Participatory governance strengthens accountability by aligning service provision with citizen needs (Rodríguez-Pose et al., 2009). To measure these relationships, urban infrastructure performance can be measured using quantifiable proxies (e.g., coverage of services, i.e. water supply, sanitation access), efficiency measures (e.g. cost recovery ratios, project completion rates), and quality measures (e.g. reliability and continuity of services) (Athar et al., 2023). In settings with limited data comparative evaluation across cities and governance settings can be provided using this proxy-based appraisal.

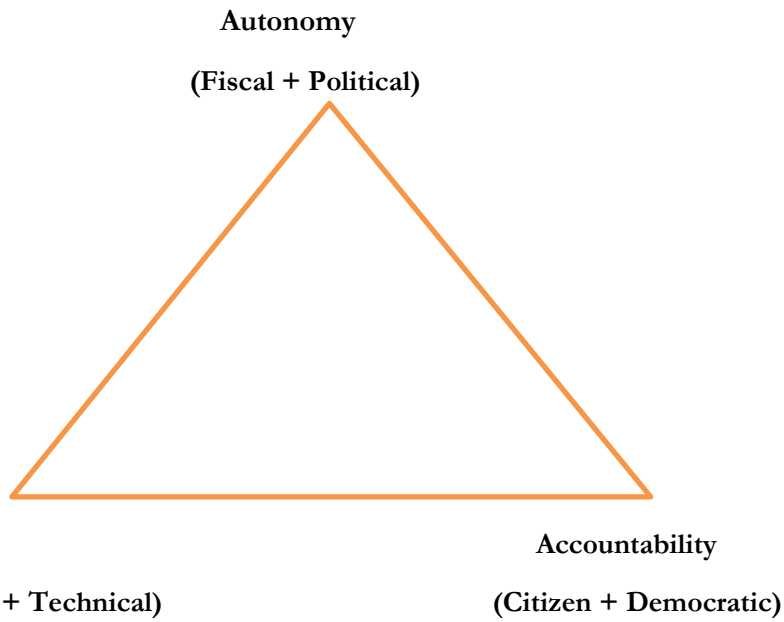
4.1. The Urban Governance Trilemma Model

On the theoretical foundations above, this study reconceptualizes the *Urban Governance Trilemma Model* within a federal framework to explain the persistence of urban infrastructure deficits in India. The model theorizes urban governance in terms of three interdependent elements: (i) Autonomy, referring to fiscal and political authority of Urban Local Bodies

(ULBs), which is contingent upon intergovernmental fiscal relations (Gogo & Ochiga, 2025); (ii) Capacity, encompassing administrative competence and institutional capability, which is shaped by state-level institutional design (Fernández et al., 2024); and (iii) Accountability, including citizen participation and democratic oversight, which is mediated through both electoral and bureaucratic structures within the federal system (Gibson et al., 2005). In this federal reinterpretation, the *Urban Governance Trilemma* can be understood as a Federal Governance Trilemma, where the balance between autonomy, capacity, and accountability is structurally conditioned by intergovernmental relations.

Unlike conventional models that treat these dimensions as locally determined, this framework emphasizes that they are shaped by vertical power asymmetries between central, state, and local governments. As illustrated in Figure 1, these dimensions constitute a trilemma framework where these dimensions are difficult to balance simultaneously within federal governance structures. The model proposes that urban outcomes depend on how autonomy, capacity, and accountability are aligned within federal arrangements. As an example, lack of administrative capacity and fiscal autonomy can result in inefficiency and lack of accountability and strong administrative systems, respectively. Likewise, participatory processes that lack substantial authority normally lead to symbolic and non-substantive governance.

Figure.1. Urban Governance Trilemma



Source: Author's' compilation

It is a multiplicative conception of urban governance in the model, according to which the results of urban infrastructure are conditional on the simultaneous alignment of autonomy, capacity, and accountability. From a federal perspective, this multiplicative relationship implies that local governance effectiveness is conditional upon the alignment of intergovernmental fiscal arrangements, administrative structures, and accountability mechanisms across different tiers of government. In this definition, inadequacy or deficiency of one dimension limits the effectiveness of governance in general. This is the reason why even with formal institutional reforms under the 74th Constitutional Amendment, decentralization in India has not led to better infrastructure results. The ULBs are based on an imbalanced system structure with low financial autonomy, ineffective administrative structures, and limited participation structures. Comparatively, the model is also useful in explaining difference in contexts of governance. For instance, in federal systems such as Brazil and Germany, stronger alignment across these dimensions is achieved through institutionalized intergovernmental coordination and fiscal decentralization, whereas in India, this alignment remains structurally weak. The relatively equitable fit of autonomy, capacity and accountability in Western states and particularly in Scandinavian welfare states leads to effective service delivery (Zimmermann & Momm, 2022). In contrast, India is a skewed decentralization, whereas many Global South nations are characterized by fragmented or transitional trilemma. Therefore, *Urban Governance Trilemma Model* has a conceptual basis and a generalizable range of limits of decentralization and the political economy of urban infrastructure deficits.

4.3. Constrained Federal Decentralization: A Conceptual Proposition

The study introduces the concept of *constrained federal decentralization* to explain the paradoxical coexistence of formal decentralization and substantive centralization within federal systems. While decentralization theory assumes that the devolution of authority enhances efficiency and accountability (Bardhan & Mookherjee, 2006), this assumption does not hold in contexts where intergovernmental power relations remain asymmetrical. Constrained federal decentralization refers to a condition in which lower tiers of government are constitutionally recognized and assigned functional responsibilities, but lack corresponding fiscal authority, administrative control, and political autonomy. In such

systems, decentralization exists in form but is limited in practice by higher-level governments that retain control over key decision-making processes. This condition is characterized by three interrelated features. Fiscal dependency remains acute, with own-source revenues forming only a small share of municipal finances. The devolution process has been incomplete in the sense that many of the functions outlined in the 12th Schedule have not been fully devolved. Further, the administrative process of decision-making has also not been decentralized, since important officials and planning are kept under the control of the state government. As distinct from the classic theory of decentralization (Oates, 1972), which presumes harmony between function and finance, constrained federal decentralization focuses on the continuance of vertical disharmony and strategic non-delegation (Rodden, 2004; Bardhan, 2002). Further, *constrained federal decentralization* stands in distinction from approaches to multi-level governance in that it stresses power asymmetry as against coordination between the various levels of government (Hooghe & Marks, 2003). *Constrained federal decentralization*, when applied to the Indian case, explains why the enactment of the 74th CAA has failed to lead to effective local autonomy. ULBs exist in a framework characterized by devolved authority, yet continued control by state governments, leading to weak institutions and deficient infrastructure.

This study presents a framework for analyzing constrained federal decentralization, based largely on the Indian federal experience and with broader comparative importance for understanding the impacts of uneven decentralization. The theory states that decentralized outcomes are neither based on institutional arrangements alone nor on fiscal, administrative, and political incentives individually. Instead, it is an outcome of the dynamic interplay among all three factors at different levels of government. In such a context, when the resource allocations and political control over decisions remain with higher-order governments but responsibility is devolved to lower levels of governance, decentralization leads to the emergence of a constrained structure rather than effective decentralization outcomes. The result of this process is an inherent structural inconsistency between institutional arrangement and governance outcomes. The theory highlights that infrastructure deficiencies in federations are not just matters of capacity problems, but an inherent feature of the political economy of federations. Such federal political economies are such that local governments are encouraged to become dependent on higher-order governments rather than

build capacity on their own, whereas higher-level governments are motivated to maintain control over the same.

However, it should be noted that the study neither denies the validity of the concept of decentralization nor the failure of decentralization per se. However merely emphasizes that the success and failure of decentralization can be attributed to the power distribution dynamics in federal structures. Thus, the notion of constrained federal decentralization moves the analysis from a focus on institutional design to inter-governmental political economy.

Based on the conceptualization above, three propositions can be generated:

P1: Decentralization without fiscal independence results in a structural weakness in local governance processes.

P2: Administrative capacity is an endogenous variable to inter-governmental power relations, not institutional design only.

P3: The effectiveness of accountability is impossible under conditions when fiscal and political authorities are not aligned.

Despite its empirical applicability specifically to India, the framework has broad relevance for other federations in which decentralization exists in asymmetric relations between federal levels. The distinction between formal decentralization and substantive empowerment is central to this framework. Formal decentralization is the constitutional or legal delegation of authority to sub-national levels; substantive decentralization is a matter of the transfer of fiscal resources, administrative autonomy and political decision-making power. What the Indian case shows is that even with decentralization in the Constitution it does not mean that there is meaningful local autonomy in place.

5. The Political Economy of Urban Governance in India

The problem of urban governance in India is better comprehended from the perspective of a federal political economy rather than simply administrative inefficiency. In this section, the empirical evidence for the main claim made in this study: that the outcomes of decentralization efforts in India have been structurally limited by intergovernmental power imbalances rather than administrative inefficiency alone will be presented. It is not to be

denied that local government lacks capacity, but it should be noted that such a deficit exists in a larger intergovernmental context which influences the extent and nature of local governance. Despite Constitutional recognition, ULBs operate within a limited intergovernmental structure (Jha, 2020). It signifies an inherent contradiction in the nature of federalism in India, as in theory, decentralization is institutionally accepted, whereas in practice, it is limited due to state dominance over financial and administrative aspects (Rao & Singh, 2005; Rodden, 2004). The constraints that exist in this regard can be best understood in the light of three different aspects.

5.1. Fiscal Dependence and Vertical Imbalance: First, financial dependence is not overcome since ULBs are dependent on grants from higher tiers of government, and internal revenues make up a small proportion of total finances of municipalities (RBI, 2022; Mathur, 2024).

5.2. Incomplete Functional and Administrative Devolution: Second, the incomplete functional devolution restricts the discretionary capacity of municipalities since several of the functions enumerated in the 12th Schedule have been partially devolved or are administered through parastatal institutions (Ministry of Housing and Urban Affairs, 2021).

In light of the insights drawn from political economy, such an approach is a reflection of incentives within a federal structure that tend to discourage devolution. As suggested by Bardhan and Mookherjee (2006), decentralization initiatives are opposed by both central and regional actors due to fears about losing their influence in terms of fiscal authority, political power, and patronage networks. In the Indian context, this leads to the practice of controlled decentralization whereby the local authorities have constitutional recognition but operate under certain restrictions. This fits into Weingast's (2009) second-generation theory of fiscal federalism that highlights the role of incentive structures underlying intergovernmental relations in shaping governance outcomes apart from institutional considerations.

5.3. Federal Governance Trilemma in Practice: All of the above issues can be viewed systematically under the lens of the *Urban Governance Trilemma* developed in this study. With regard to India, the autonomy-capability-accountability trinity is characterized by significant structural misalignments. First, the level of autonomy remains relatively low due to limited tax authority; next, the capability aspect is undermined by inadequate institutions; finally, accountability suffers due to the lack of strong participation processes.

The implications of these structural constraints become clearer when India is compared with other federal systems that institutionalized stronger intergovernmental coordination. As compared to other federal states, the situation in India shows a marked difference from those systems where intergovernmental coordination and fiscal decentralization are institutionally institutionalized. For instance, the Brazilian system where constitutionally required fiscal transfers and local taxes give rise to functioning municipalities with respect to service delivery (Zimmermann & Momm, 2022). Germany is another country which practices cooperative federalism, thereby allowing functional allocation and coordination in the administration at different governmental levels (Hesse, 2025). It can be observed that there exists more to decentralized governance than constitutional requirements; rather, fiscal and administrative authorities have to match up with each other. One can observe the results of limited decentralization in the case of India through disparities in urban development. Metropolitan cities like Mumbai, Bengaluru, and Pune provide a higher level of infrastructural services due to their greater administrative capabilities and revenue generating capacity (Shaw, 2012). Nonetheless, this variation does not signal systemic success, but rather, highlights the problem with the fact that there is no institutional capacity to uniformly provide such resources. This is reflected in national-level statistics too, whereby more than half of the functions assigned by the 12th Schedule have not been devolved in almost all states and many households in Indian cities do not have basic amenities such as sanitation services (Ministry of Housing and Urban Affairs, 2021). Altogether, these examples clearly show that the problems of urban governance in India arise from limited federalism in the country, whereby power relations between governments constrain the capacity of local governments.

6. Global Models of Urban Governance and their Relevance to the India Context

Comparative studies indicate that urban development is more influenced by fiscal-administrative integration than by formal decentralization (Pierre, 2011). This is further clarified by studies conducted in federations. For instance, Brazil represents a model of strong municipal federalism, where local governments enjoy constitutionally guaranteed fiscal autonomy and play a central role in service delivery (Souza, 2005). In South Africa,

local government is recognized as a distinct sphere within a system of cooperative governance, ensuring greater institutional clarity and accountability (Steytler, 2005). Similarly, Germany's model of cooperative federalism emphasizes strong intergovernmental coordination and clearly defined functional responsibilities across tiers (Benz & Zimmer, 2011). Urban governance in Western countries and especially in Scandinavian welfare states is typified by a high level of fiscal decentralization, high administrative capacity, and formalized citizen participation (Jouve, 2005). These systems are based on the networked system of governance, wherein local governments interact with the private actors and civil society, in well-identified regulatory frameworks. The outcome is that there is high level of coordination, effective service provision and high social accountability.

The Indian model of urban governance on the other hand is a type of partial or constrained decentralization. Though the 74th CAA formally institutionalized ULBs, they are still in a weak position, as they are functionally under-resourced, administratively fragmented and still dominated by institutions in the state. This positions ULBs as implementing agencies as opposed to independent decision-making bodies. This structural imbalance undermines their planning and effective delivery of infrastructure creating a chronic gap in service delivery despite growing policy focus and financial investments. Simultaneously, there are selective cases in India, including decentralized planning in Kerala and public-private partnership (PPP) form of service delivery in cities like Pune, which illustrate that better results can be achieved in case of the institutional capacity and governance mechanisms enhancement (Heller et al., 2007). It is further complicated by experiences in other Global South settings. South Africa post-apartheid reforms in South Africa institutionalized the concept of democratic decentralization, which focused on equity and participatory governance, yet spatial inequality and service delivery continue to be a problem (Reddy & Maharaj, 2008). Similarly, the decentralization reforms in Indonesia have helped to make the country more decentralized; however, they have also created fragmentation and unequal outcomes in the governance of the country (Nasution, 2017). In China, the opposite case has been witnessed, with robust state-based coordination paired with selective decentralization, which has facilitated a rapid infrastructure development, though with minimal participatory processes (Zhang et al., 2023).

These comparative insights reinforce the Federal Governance Trilemma proposed in this study, demonstrating that the alignment of autonomy, capacity, and accountability is

fundamentally shaped by federal institutional design. These trends are also indicative of what scholars refer to as being in fragmented decentralization whereby similar institutional reforms have a divergent result based on local political and economic conditions. This supports the point that governance reforms cannot be changed and transplanted without consideration to contextual realities. These disparities indicate the conflict between the hierarchical and network models of governance, in a theoretical perspective. Although networked arrangements enhance flexibility, innovation, and stakeholder involvement, robust institutional capacity is necessary to maintain coordination and accountability. Where such capacity is feeble as in most developing countries, hybrid forms of governance develop, which integrates components of hierarchy, markets, and networks. The comparative analysis suggests that the problem of urban governance in India is not lack of decentralization, but lack of decentralization in its totality and its skewed execution. Reform should go beyond the institutional design to substantive empowerment of ULBs by financial empowerment, institutionalized capacity building, and institutionalized citizen engagement. Table.1 summarizes the comparative nature of urban governance in various settings. Nonetheless, the applicability of these models to India is subject to the structural and institutional realities.

Table 1. Comparative Urban Governance Models

Dimension	**Scandinavian Welfare States**	**Other Western Federal Systems (e.g., Germany, Canada)**	**India**	**Global South (e.g., South Africa, Indonesia)**
Governance Model	Highly decentralized, welfare-oriented governance	Cooperative and institutionally coordinated federal governance	Semi-decentralized, state-dominated	Hybrid, transitioning governance systems
Fiscal Autonomy	Very high local revenue and fiscal discretion	Moderate to high fiscal decentralization	Limited fiscal autonomy and dependence on transfers	Moderate but uneven fiscal decentralization
Institutional Capacity	Strong administrative	Strong institutional coordination mechanisms	Weak to moderate	Variable, and often

	and technical capacity		institutional capacity	institutionally constrained
Citizen Participation	Highly institutionalized participatory governance	Formal democratic participation mechanisms	Limited and uneven citizen participation	Expanding but inconsistent participation
Role of Private Sector	Regulated and welfare-oriented partnerships	Structured public-private coordination	PPP-driven but uneven implementation	Increasing reliance on PPPs
Coordination Mechanism	Strong inter-municipal and state coordination	Cooperative intergovernmental coordination	Fragmented institutional structure	Weak to moderate coordination
Governance Outcome	High-quality and equitable service delivery.	Efficient urban governance with regional variation	Persistent infrastructure and service delivery deficits	Mixed and uneven governance outcomes

Source: Author's compilation

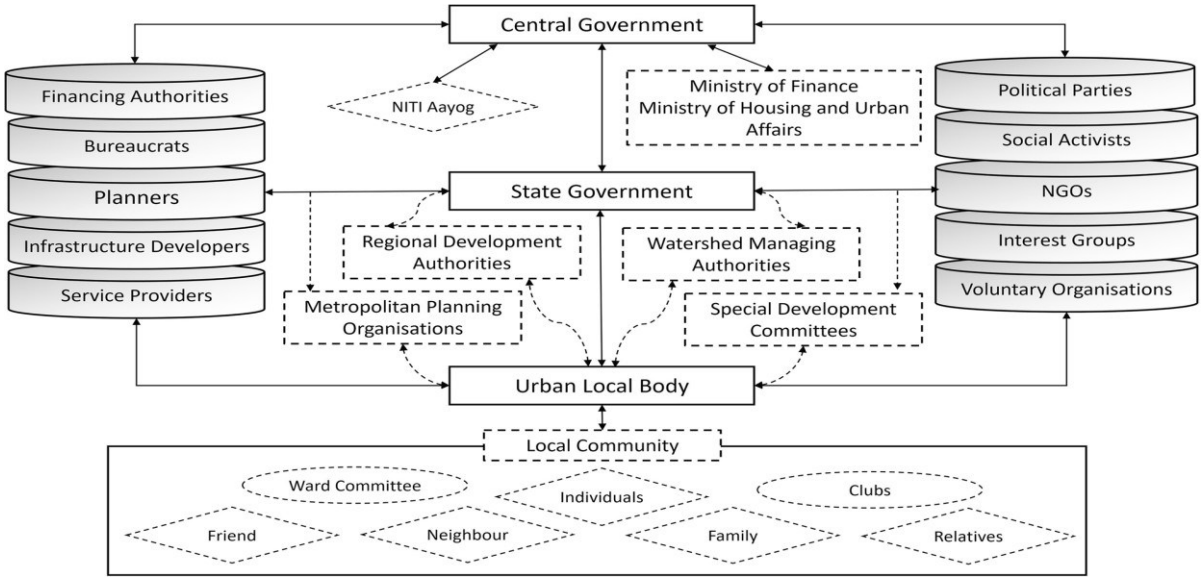
These comparative insights raise an important question regarding the adaptability of global models within the Indian context.

6.1. How far these models appropriate to Indian Context?

Regardless of the operational procedures, the backbone of sustainable urban development lies in infrastructure systems such as water supply, sanitation, transportation, waste management, and communication networks. Urban infrastructure governance models in different parts of the world are critically examined and compared with the current three-tier model in India, with the functional aspects of the three levels of government (central, state, and local) being defined in systematic way. Public-private partnerships (PPPs) have emerged as an alternative mechanism for infrastructure delivery in India (Delhi & Mahalingam, 2020). However, they require both regulatory capacity and accountability. In situations where there is little local autonomy, partnerships tend to exacerbate existing imbalances rather than address existing governance gaps (Harvey, 2005). Consequently, PPPs

cannot take the place of fundamental reforms to federal governance and must instead be part of a broader intergovernmental framework.

Figure.2: Urban Local Bodies Structure in India



Source: Authors' compilation

7. Limitations and Scope for Future Research

The current study employs a qualitative and theory-based approach, which does not involve any kind of primary empirical evidence or econometrics testing. Moreover, the theory involved focuses on theoretical generalization than context-based variations, which might affect its ability to explain things clearly in extremely heterogeneous federalism structures. Even though it helps understand concepts in-depth, the limitation is that the proposed theory cannot be statistically validated. In future research, propositions can be tested statistically to prove their validity. Other limitations are the inability to cover the variations that exist within India in terms of different states and even different cities. This will help identify the extent of constrained decentralization that takes place there. Comparative analysis across countries is needed to enhance the ability to generalize the proposed framework.

8. Conclusion

The study demonstrates that formal decentralization of power does not necessarily lead to substantive local empowerment in federal systems. The 74th Constitutional amendment established an institutional structure for urban decentralization in India, but authority over finance, administration and planning remains firmly in the hands of higher levels of government. From the results, it can be observed that ULBs are subject to constrained federalism, whereby there is dependency with respect to financial resources, administrative subordination, and limited political independence. The *Federal Governance Trilemma* that has been developed contributes to existing literature because it shows how urban governance is possible if all three components such as autonomy, capacity, and accountability are aligned in the multi-level governance context. What makes this framework different from traditional decentralization theories is the understanding that the dimensions are influenced by political economy motivations. As a result, decentralization in India has remained largely procedural, where constitutional recognition of ULBs has not been matched by substantive fiscal and administrative autonomy. In light of this, policy innovations need to go beyond decentralization and focus more on the structural obstacles faced in fiscal federalism, institutional capability, and democratic accountability. Otherwise, decentralization shall continue to serve only as a symbolical exercise of governance without achieving any transformative effect.

The Indian experience illustrates how the nature of decentralization is dependent on the federal power configuration and intergovernmental political economy. In light of this insight, there is a need to re-conceptualize decentralization not as an organizational problem but as a highly political and contentious phenomenon. Such an approach raises a more general point about the field of federalism research: decentralized arrangements have to be studied not as institutional innovation but as processes of political mediation. There are three principal contributions to the literature: (i) the study provides the concept of constrained federal decentralization as an analytical framework. (ii) it outlines a structural theory, namely, the Federal Governance Trilemma. (iii) it identifies infrastructure deficiencies as a reflection of federal political economy rather than a result of bureaucratic incapacity. All these conclusions can be confirmed in comparative studies on federal politics.

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Measuring Court-Curbing

by

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Abstract

How should we measure court curbing in light of the fact that judges distinguish between serious and nonserious court-curbing efforts and adjust judicial behavior accordingly? Past work on court curbing almost exclusively use counts of court-curbing bills proposed in the legislature with the implicit assumption that each court-curbing bill is equally meaningful. However, judges do distinguish between serious and nonserious attempts to court curb and alter their behavior accordingly (Mark and Zilis 2018). In this paper, I provided the theoretical foundation and measurement strategy for constructing court-curbing intensity measures meant to reflect this admission by judges about court curbing. Court-curbing intensity consists of two indicators. One determines the proportion of the judiciary among all courts of last resort, intermediate appellate courts, and general jurisdiction trial courts in a state targeted by a court-curbing bill. The second indicator focuses on the levels of the state judiciary targeted by a court-curbing bill and ascribing a cumulative score based on the different levels of courts targeted. I provide empirical tests of the usefulness of these measures compared to the simple count of court-curbing bills used in prior studies of court curbing.

Keywords

judicial independence, court curbing, state courts, measurement strategy

1. Introduction

Courts come under attack in countries across the globe, including the United States (Aydin-Cakir 2023, Aydin-Cakir 2024, Clark 2011, Kosař and Šipulová 2023, Lupu 2013). Policymakers engage in court-curbing activity by proposing policy that would diminish the independence of their counterparts in the judiciary; that is, proposing policy that constrains judges in their decision-making such that they are attentive to the preferences of legislators and executives. Nearly all of these studies on court-curbing assume that every court-curbing proposal is equally meaningful (Clark 2009, Clark 2011, Hack 2022, Leonard 2016, Mark and Zilis 2019).

This paper and the court-curbing intensity measures introduced extend beyond applications in political science, contributing to the scholarship on constitutions and empirical legal studies. First, regarding constitutions, US state courts have sole jurisdiction over the constitutionality of state law (as long as it doesn't implicate a federal/national question), which creates different incentives to engage in court curbing at the state and national levels (Fite and Rubinstein 1937, Richter 1913). In other words, the institutional design of constitutions may empower or discourage court curbing, such as across parliamentary and presidential democratic arrangements (Goel and Nelson 2025).

Constitutions constrain voters in elections and gains of preferred policy; courts interpret constitutions and, by extension, the limits that constitutions impose on voters (Salmon 2001). In competitive democratic settings, policymakers seek to build institutions that enhance judicial independence to safeguard policy gains when the opposition gains power (Hanssen 2004). Furthermore, democratically elected officials can use constitutionally permissible means to consolidate power. Those officials can then protect policy gains from the judiciary through constitutionally permissible court curbing, potentially converting democracy to autocracy (Çınar 2021).

This new court-curbing measure also contributes to the empirical legal studies literature. Some have argued that public support for the judiciary in the United States remains constant despite increased divisiveness and polarization in the political environment (Gibson 2007); others demonstrate that increased perceptions of a politicized judiciary translate into more pervasive calls for judicial reform and court curbing (Woodson and Parker 2025).

The connections between perceptions of specific and diffuse support for the judiciary and attempts to curb the judiciary receives support from the historical record when viewing court curbing through the empirical legal studies lens. In the United States, policy disagreements with the judiciary have been associated with diminished judicial legitimacy and increased support for court curbing and court packing, as seen in President Franklin Roosevelt's 1937 attempt to pack the US Supreme Court with more like-minded justices (Badas 2019). Political parties use court curbing to send signals to their party loyalists and to potentially new members of their party coalition. Political parties, through their policymakers, use court curbing to craft and maintain coalitional cohesion in society, build a new socio-political majority, or consolidate previous policy and legal victories (Bridge and Nichols 2016).

Looking beyond the United States, we observe that members of the legal field make decisions based, in part, on public preferences rather than solely on the law, as argued by legalism. In Northern Ireland, judges make choices based on the perceived choices and actions that Parliament, the public, and their judicial peers may pursue (McEvoy and Schwartz 2015). Therefore, studying judicial behavior requires inclusion of extra-judicial audiences (e.g., the public, legislators, executives, etc.) in order to contend with the limits of legalism (McEvoy and Schwartz 2015).

This paper develops novel measures of court-curbing intensity (scope of institutional change). This measure offers a nuanced but important advance in the study of judicial independence and attacks on courts in the United States and offers a template to measure such attacks around the world at the national and subnational levels.

2. What is Court Curbing?

Broadly speaking, court curbing consists of policies or proposals that aim to alter judicial behavior and decision-making, either through institutional change of the judiciary or as a threat of such a change. Scholars have defined court curbing in a number of ways. Early definitions of court curbing were limited to very specific instances where scholars felt the judiciary's use of judicial review would be impacted; namely, when there were attempts to increase the size of a court or necessary majority to invalidate policy (Corwin 1936).

Contemporary definitions (see Clark 2011, Leonard 2016) emphasize that court curbing: 1) limits judicial power, 2) attacks the judiciary, 3) diminishes judicial independence, and 4) targets courts as an institution, rather than individual members of the judiciary. These definitions emphasize an aim of impacting the judiciary broadly as an institution, distinct from attempts to reverse specific court decisions (for case decision reversals see Blackstone and Goelzhauser 2020, Harvey and Friedman 2006, Ignagni and Meernik 1994, Uribe et al. 2014). Furthermore, court curbing can signal the levels of legitimacy the public holds for the judiciary (Bartels and Johnston 2020, Lupu 2013, Vanberg 2001, Vanberg 2005).

Clark (2009) defines court-curbing bills in particular as "legislative proposal[s] to restrict, remove, or otherwise limit judicial power" (p.978). This falls in line with earlier definitions of court curbing from Stumpf (1965): "[any] bill having as its purpose or effect, either expressed or implied, an alteration in the structure or functioning of [a court] as an institution" (p. 382). Others have similarly defined court curbing as attempts to limit judicial power (Bell and Scott 2006, Clark 2011, Mark and Zilis 2018a, Mark and Zilis 2018b, Nagel 1964).

Other scholars have expanded the notion of court curbing as including any "attack" on the judiciary (Bridge and Nichols 2016, Nichols et al. 2014). Attacks expand the Clark (2011) definition of court curbing to include amendments to constitutional texts, in addition to legislative policy proposals, such as bills proposed by Congress. Examples of court curbing through amendments to constitutional texts include efforts like the proposed amendment to the United States Constitution sponsored by Representative John Zwach (R-MN) in the days after the landmark United States Supreme Court decision *Roe v. Wade* (1973). The amendment would have afforded "due process and equal protection… to an individual from the moment of conception" (Bridge and Nichols 2016, p. 100, *Congressional* Record 1973, p. 2898).

Rosenberg (1992) offers perhaps the most expansive definition of court curbing. He also views court curbing as attacks on the court. But, more specifically, he defines court curbing as "legislation introduced in the [legislature] having as its purpose or effect, either explicit or implicit, Court reversal of a decision or line of decisions, or Court abstention from future decisions of a given kind, or alteration in the structure or functioning of the Court to produce a particular substantive outcome" (p. 377). This definition combines both institutional attacks and attempts to reverse policy made through specific case decisions, which most

scholars believe are distinct but related phenomena (see Blackstone and Goelzhauser 2019, Clark 2009, Rosenberg 1992).

Court curbing aims to diminish judicial independence and the separation of powers among branches of government, which poses normative concerns for United States democracy and democracies around the world. Judicial independence affords courts the ability to "make decisions in the short term without regard for the preferences of officeholders" (Rosenberg 1992, p.369). Judicial independence is an important condition to develop and safeguard political, democratic, and civil liberties (Howard and Carey 2004). James Madison (1788) and Alexander Hamilton (1788) wrote in Federalist No. 47 and 78, respectively, of the importance of the separation of powers and judicial independence. They believed, for example, that judicial independence from other political branches is "requisite to guard the Constitution against legislative encroachments" (Hamilton, 1788).

For at least a century, scholars have demonstrated the importance of studying court curbing in the United States. Early work on law and courts identified relationships between unpopular actions by the United State Supreme Court and trends of court curbing in response to those actions. For example, the 11th Amendment of the United States Constitution was ratified in response to the landmark United States Supreme Court case *Chisholm v. Georgia* (1793).[I] These scholars argue that the judiciary must maintain the scales of justice, which sometimes means rendering unpopular decisions (Sullivan 1923). When other policymakers attempt to curb the courts in response to these unpopular decisions, it lessens the ability of the judiciary to maintain this balancing act of justice. Fite and Rubinstein (1937) detail how court-curbing efforts came in response to ideologically divergent (conservative) courts from the New Deal Democratic majorities at the national and state levels. Presently, court curbing is associated with other types of democratic backsliding in the states, posing a larger danger to American democracy (Leonard 2024).

3. Court Curbing, Institutional Variation, and External Validity[II]

The "uniqueness" of the United States Supreme Court and Congress and the relationship between the two poses "a nontrivial and stubborn threat to the external validity of studies based solely on it" (Collins and Martinek 2010, p. 398). Measuring and studying court curbing

at the state level can help reduce these threats to inferences due to concerns over the external validity in the court-curbing literature dominated by studies of the United States Congress and Supreme Court. External validity can be gained by studying court curbing at the state level in a comparative way as we replicate our theoretical and methodological models to similar phenomena in various settings. Threats to external validity can occur in the interactions of the causal relationship with units, treatment variations, and settings (Shadish, Cook, and Campbell 2002, pp.86-89).

For units, inferences drawn with one kind of unit might not hold in studies of other kinds of units. Regarding interaction of the causal relationship with units, much of the contemporary theoretical developments explaining phenomenon related to court curbing derive from studies focusing on the interaction between the United States Congress and Supreme Court. However, there is only one of each of these institutions and they have varied relatively little over time in their institutional configurations, which poses a threat to external validity. The unique and relatively static nature of these two institutions calls into question the usefulness of theories tested on the United States Congress and Supreme Court when used to explain broader trends in court curbing and threats to judicial independence within the United States and around the world.

Inferences drawn from one treatment variation may not hold with other variations of that treatment (in this case, court curbing), or if combined with other treatments (Shadish, Cook, and Campbell 2002, p.88). As a threat to external validity, there is a theoretical assumption by most scholars studying court curbing that all court curbing is weighted equally by courts. For example, Clark (2011) estimates the impact of various levels of court curbing based on the number of bills proposed, regardless of the bill content, aim, progress through the legislative process, or bill sponsor.

Furthermore, members of the judiciary detail how they distinguish between what they consider "serious" and "not serious" court-curbing efforts (Mark and Zilis 2018a, Mark and Zilis 2019). The members of the judiciary interviewed by Mark and Zilis only rated this seriousness of the court-curbing threat based on the aim of the bill. This means there is variation in the effects of the "treatment" – court curbing – as judges react differently to court-curbing threats based on the perceived potential impact on judicial independence, in terms of the proposed amount of institutional change if passed.

Finally, I select the American states to contend with the threats to external validity posed by differences in settings, as inferences derived from studies in one setting may not hold if other kinds of settings are used (Shadish, Cook, and Campbell 2002, p. 89). By studying the American states, I control for important institutional factors under which all of the American states operate under the United States government and Constitution. Such controls become difficult, if not impossible, in cross-national comparative studies of court curbing.[III]

3.1. Institutional Variation in State Legislatures

State legislatures vary in important ways based on institutional design choices made throughout their histories. Different institutional arrangements (e.g., size of chambers, district size, etc.) create different incentives for representatives. State legislatures possess different powers and limits over their state judiciaries.

Institutional arrangements structure the incentives of legislators in their roles in government and as representatives. Most, but not all, state legislatures operate bicameral single-member-district-plurality electoral-representative systems. Beyond these general similarities, states vary considerably in the number of legislators in each chamber and, relatedly, the geographic size of the districts they serve. New Hampshire, for example, seats 400 members in their lower legislative chamber, nearly twice the number of the next largest state legislative chamber. With a population of approximately 1.4 million, this means there is one lower chamber representative for every 3525 persons in New Hampshire. By comparison, the most populous state (California with a population of approximately 39.5 million people) seats 80 members in their lower legislative chamber, resulting in a representative to person ration of 1: 493750. Larger district size may make it more difficult for representatives to attune to the needs of their constituents, thus affecting their behavior in pursuing policy, like court curbing (Taylor et al. 2018). Meanwhile, larger legislatures may result in less unity amongst legislators, resulting in a more difficult legislative process to pass policies like court curbing (Kaslovsky and Olson 2026).

3.2. Institutional Variation in State Judiciaries

Like state legislatures, state judiciaries vary considerably in their institutional designs, which shape methods of selection and retention of judges, the hierarchical structure of the court system, and docket control of cases considered by courts. State judges are selected via

five methods: merit selection, nonpartisan elections, partisan elections, gubernatorial appointments, and legislative appointments. In merit selection systems, a nominating commission compiles a list of potential jurists to fill a vacancy from which the state executive may appoint. In nonpartisan elections, judges run in competitive elections without a political party designation on the ballot. In partisan elections, judges run in competitive elections WITH a political party on the ballot. In gubernatorial appointment systems, the state executive nominates and appoints a jurist to a vacancy, often with approval from another body (e.g., the upper legislative chamber, state executive council, etc.). Finally, in legislative appointment systems, state legislatures vote judges into vacancies in their state courts. Whichever entity plays a role in selecting the judges can fill courts with like-minded jurists who will safeguard preferred policy (Catalano 2022).

State judicial retention systems determine how an incumbent judge can remain in office. In the United States, there are six judicial retention systems, including the aforementioned nonpartisan elections, partisan elections, gubernatorial (re)appointment, and legislative (re)appointment. In retention elections (often paired with the merit selection systems), incumbent judges run as the sole candidate (in a non-competitive election) and must earn enough "yes" votes to affirm that the electorate would like the judge to remain in office. Failing to earn enough "yes" triggers a vacancy. Finally, in a few states (e.g., Rhode Island), judges serve life tenure and do not require any approval to retain their seat after selection. Different retention methods create different incentives for judges who wish to remain in office; these judges must satisfy different audiences – voters, executives, legislators, etc. – which incentivizes different behavior in and out of the courtroom (Baum 2006).

States differ in how they arrange the hierarchical structure of the court system.[IV] The simplest state judicial hierarchical structure includes one state court of last resort and one general jurisdiction trial court, as is the case in Vermont (see Figure 1). Other states may not have an intermediate appellate court but do operate limited jurisdiction trial courts, like in Wyoming. Finally, other states may possess at least one of each type of court: a court of last resort, intermediate appellate court, general jurisdiction trial court, and limited jurisdiction trial court, as in Wisconsin. Tennessee boasts one of the more complex court systems with one court of last resort, two intermediate appellate courts, four general jurisdiction trial courts, and three limited jurisdiction trial courts. The hierarchical structure of state court systems can enhance the ability to court curb by increasing the number of targets of such

policies. It can also insulate the judiciary from attacks by creating buffers in the powers and structure of the judiciary.

Related to the hierarchical structure of state court systems, state courts of last resort vary in how much discretion they possess over the types of cases they must consider and decide on the merits of the case. Docket control can influence judicial behavior and vote choice (Hall 1985). determines the amount of discretion a state court of last resort possesses over considering an appeal and deciding it on its merits. State courts of last resort with a discretionary docket would be able to forego deciding on an appeal if the court's preferred decision would run counter to that of the legislature. States courts of last resort with mandatory docket must consider appeals on their docket without such discretion.

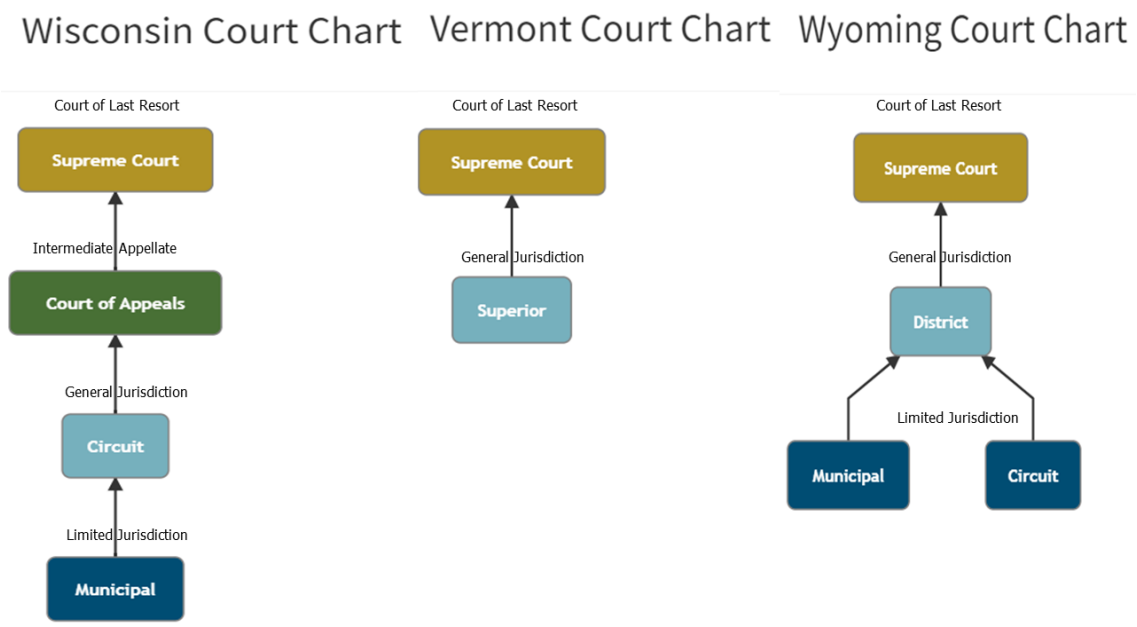

Figure 1. Types of Courts Constituting State Judiciaries

3.3. Institutional Variation in State Constitutions and Amendment Processes

Finally, each state retains the power to construct and amend their constitutions as they wish. This creates considerable variation in the length of constitutions, powers they offer to government, and process by which they are amended. According to the 2023 Book of the States (https://bookofthestates.org/tables/2023-1-3/), state constitutions ranged in length from approximately 373,000 words (Alabama) to 7,000 words (Vermont), all of which exceed

the length of the US Constitution at approximately 4,400 words. Relatedly, nearly every state possesses an easier process to amend their constitution compared to amending the US Constitution, resulting in hundreds of amendments in some states. Finally, while the US Constitution remains the oldest written constitution currently in use for nearly 240 years, about two-thirds of states have completely repealed and replaced their state constitutions, including Louisiana and Georgia, which have replaced their constitution eleven and ten times, respectively.

The ability to amend or even replace a constitution poses a threat to the judiciary and the case law they establish through their decisions. The US Supreme Court has only seen their decisions overturned via constitutional amendments a handful of times (e.g., Amendments 11, 13, 14, 16, etc.); a repeal and replace of the US Constitution is exceedingly unlikely, even in the current polarized times. Meanwhile, state judiciaries understand that state legislatures and/or voters have a history of overturning past state court precedent, sometimes fairly easily (Brown 2018). Furthermore, economic and social conditions in a state, along with how particularistic a constitution is, can increase the likelihood of constitutional change or amendments, absent any salient legal factors (Blake and Anson 2020, Blake et al. 2024, Cayton 2016).

4. Empirical Importance of Measuring Court Curbing

Empirically, data on court curbing at the state level currently exists for only a nine-year period, 2008-2016 (Leonard 2016; Leonard 2022a). I extend the time period through 2018, which captures the first two years of the Trump Presidency (see Figure 2). During this time frame, 840 court-curbing bills were proposed, with considerable variation across time and the American states (Table 1). In Table 1, we see considerably more court-curbing activity in 2014 and 2015, particularly in Southern states, compared to 2016-2018. One possible reason for this pattern is growth in ideological divergence between state courts and state judiciaries in former Democratic strongholds in the South. By 2014-2015, state legislatures previously dominated by Democrats since before the New Deal era (e.g., Alabama, Kentucky, Louisiana, Oklahoma, and West Virginia) had recently come under unified control of the Republican Party. However, state judiciaries remained solidly Democratic due to the time lag

required for new Republican majorities in the state and government to replace members of the judiciary.

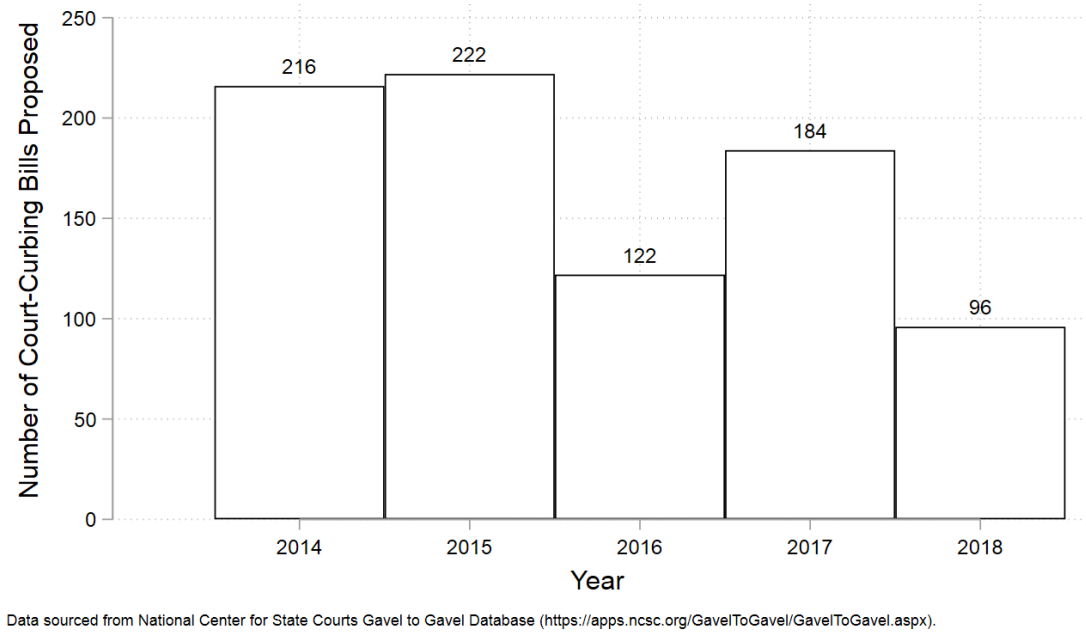

Figure 2. Number of Court-Curbing Bills Proposed by Year

State	2014	2015	2016	2017	2018	Total
Alabama	10	8	6	6	1	31
Alaska	3	1	0	1	0	5
Arizona	0	4	8	4	1	17
Arkansas	0	13	0	7	0	20
California	2	2	0	0	1	5
Colorado	0	0	1	2	1	4
Connecticut	0	5	2	5	1	13
Delaware	0	2	1	1	0	4
Florida	6	0	3	7	7	23
Georgia	5	4	2	3	2	16
Hawaii	4	1	6	4	2	17
Idaho	1	1	1	3	2	8
Illinois	1	3	3	1	2	10
Indiana	6	6	4	7	0	23
Iowa	1	5	1	7	6	20
Kansas	11	15	6	2	2	36
Kentucky	11	3	2	2	5	23
Louisiana	12	2	0	1	3	18
Maine	0	1	0	1	0	2
Maryland	3	6	4	5	5	23

Massachusetts	0	2	0	4	0	6
Michigan	2	2	0	4	2	10
Minnesota	6	4	1	0	0	11
Mississippi	14	4	2	6	1	27
Missouri	14	8	12	7	6	47
Montana	0	7	0	2	0	9
Nebraska	1	0	1	1	0	3
Nevada	0	5	0	2	0	7
New Hampshire	5	6	4	4	0	19
New Jersey	19	2	1	2	3	27
New Mexico	3	5	3	2	2	15
New York	2	3	3	3	1	12
North Carolina	3	5	0	8	5	21
North Dakota	0	2	0	2	0	4
Ohio	3	2	0	0	1	6
Oklahoma	22	12	17	13	4	68
Oregon	0	2	0	1	0	3
Pennsylvania	3	9	2	3	2	19
Rhode Island	4	1	3	1	5	14
South Carolina	1	13	7	13	4	38
Tennessee	7	4	2	0	2	15
State (Table 1 Cont.)	**2014**	**2015**	**2016**	**2017**	**2018**	**Total**
Texas	0	20	0	19	0	39
Utah	5	1	2	1	0	9
Vermont	5	1	1	1	0	8
Virginia	6	4	1	0	3	14
Washington	4	4	3	2	0	13
West Virginia	10	6	5	6	11	38
Wisconsin	1	6	1	5	2	15
Wyoming	0	0	1	3	1	5
Total	216	222	122	184	96	840

Table 1. Number of Court-Curbing Proposals by State, 2014-2018

Note: Data sourced from National Center for State Courts Gavel to Gavel Database (https://apps.ncsc.org/GavelToGavel/GavelToGavel.aspx)

5. Prevailing Strategies to Measure Court Curbing

Prevailing strategies in the literature measuring court curbing in the United States share two primary characteristics and a related assumption (see Clark 2011, Tecklenburg 2020). First, scholars have predominately studied and measured court curbing at the national level

(exceptions include Blackley 2019, Catalano 2022, Hack 2022, Leonard 2016, Leonard 2022a, Leonard 2022b, Leonard 2024, Leonard et al. Forthcoming). Second, scholars have relied on counts of court-curbing proposals (Clark 2011, Leonard 2016) or bills that have passed committee (Tecklenburg 2020). This rests on the assumption that all court-curbing proposals are equally meaningful (see Leonard 2022b as an exception to this).

The court-curbing measurement strategy developed in this paper was developed independently from but shares some similarities with the data-collection process developed by Leonard (2022a).[V] I extend beyond Leonard by measuring the levels and types of courts targeted by court-curbing bills to construct my court-curbing intensity measures outlined in this paper. Leonard (2022a) offers a measure that attempts to accomplish something similar to what I aim to do with my court-curbing intensity measures detailed in this paper. Following Bartles and Johnston (2020), Leonard indicates whether a bill is considered narrow or broad court curbing in its substance, rather than the proportion or types of courts it targets. However, it is unclear through the data-collection process details offered what constitutes narrow or broad court-curbing.

6. Is All Court Curbing Equally Meaningful?

Much of the court-curbing literature measures court curbing using a count of legislative bill proposals or, less frequently, bills that have passed legislative committee (see, for example, Tecklenburg 2020). Using a count of court-curbing bills carries with it an assumption that all court curbing is equally meaningful. With this assumption, scholarship on court curbing cannot capture the intensity (how detrimental a proposal would be for the judiciary if enacted). This assumption may not be useful, as members of the judiciary explicitly state that they distinguish between serious and non-serious court-curbing activity (Mark and Zilis 2018a). As a result, it may be less meaningful to rely on the assumption that all court curbing is created equal. Instead, it may be more useful to distinguish court-curbing attempts as judges do: based on the intensity of court-curbing activity (Rosenberg 1992).

Ultimately, what this measurement project proposes to do is as follows: It captures important institutional variation that occurs at the state level, which can illuminate broader dynamics of court curbing not observable in the relatively static environment in which

Congress and the Supreme Court exist. Most important of all, it goes beyond a simple count of court curbing by introducing my novel measure of court-curbing intensity. I continue next with the theoretical basis on which this measure of court-curbing intensity rests. Finally, I offer some empirical tests of the new measure.

7. New Court-Curbing Measurement Strategy – A Theoretical Basis

Many studies on court curbing use bills proposed in the legislature as the outcome variable, carrying the assumption that each of these bills weigh equally in how they will affect judicial behavior (an exception to this includes Leonard 2022b). Legislators can be motivated to engage in court curbing to send signals to the judiciary to alter their behavior and/or signal to their constituents and interest groups. Motivated by sending a signal to the judiciary, legislators may care more about moving their court-curbing proposal through the legislative process compared to legislators signaling to their constituents, which a simple proposal can do, regardless of how far it moves through the legislative process.

Knowing that members of the judiciary distinguish between serious threats to the judiciary and non-serious threats (Mark and Zilis 2018a), the number of court-curbing bills proposed likely does not reflect the actual or perceived level of hostility against the judiciary. Instead, "what is important is the intensity and seriousness of attacks" on courts (Rosenberg 1992, p. 379). Rosenberg (1992) does not define or distinguish intensity or seriousness of court curbing. He merely posits that a simple count of court curbing does not satisfactorily account for the effect court curbing can have on the judiciary.

Building on Mark and Zilis (2018a) and Rosenberg (1992), I explain how to measure court-curbing intensity to capture important dynamics related to judicial independence and the separation of powers. I define court-curbing intensity as – the scope or level of institutional change of the proposed policy to the targeted judiciary. I explain the assumptions and logic behind this measure below.

I measure court-curbing intensity in two ways: 1) as the grouped proportion of the judiciary targeted and 2) as a measure of the set of levels of the judiciary targeted by court-curbing bills. These two distinct but related markers of court-curbing intensity can be used to test phenomena related to court-curbing and judicial independence together or separately.

The measure of the grouped proportion of the judiciary targeted creates three categories of court-curbing intensity based on the proportion of a state's courts of last resort, intermediate appellate courts, and general jurisdiction trial courts out of the total number of those courts targeted by a court-curbing bill.[VI] This accounts for the different number of courts in each state judiciary.

Meanwhile, the value of the set of levels of the judiciary targeted by court-curbing bills designates values based on the hierarchical position of the court(s) targeted. It indicates the power differential in the judiciary of the different levels of courts in a way that the proportion of the judiciary measure cannot. Just as state judiciaries vary in the number of courts in their system, they also vary in the types of levels that comprise their judiciary.

First, members of the judiciary consider the actions of other political actors when making decisions. Members of the judiciary act strategically based on beliefs and observations of actions by the legislature and/or public (Vanberg 2001, Vanberg 2005, Whittington 2003). The judiciary typically interprets increasing levels of court-curbing activity as an indicator that public approval of the judiciary is decreasing. If public approval is high, legislators would normally fear retaliation from voters if those legislators decided to propose court-curbing bills (Vanberg 2001). However, if public approval is low, legislators would no longer fear retaliation from voters in the same way; instead, legislators would benefit from attacking the court by expressing the will of their constituents through court curbing. Believing that low levels of approval from the public manifest as the legislature attempting to court curb, the judiciary is less willing to challenge the actions of the legislature. In such a circumstance, the judiciary fears future retaliation from the legislature will continue or grow.

Second, members of the legislature have the choice to engage in court curbing. They may make this choice for a variety of reasons. Ideological divergence between the judiciary and legislature motivates the legislature as a whole to engage in more court curbing in order to bring the judiciary closer to the legislature's ideal point (Leonard 2016, Mark and Zilis 2018b). Additionally, legislators propose court-curbing bills to send signals to constituents through electoral position-taking and the courts regarding the level of approval the legislator's constituents have for the judiciary (Clark 2011, Moyer and Key 2018). At the individual legislator level, ideological divergence between the judiciary and an individual legislator motivates that individual legislator to propose more court-curbing bills as well, more so as a signal involving their constituents (Blackley 2019). A third reason is that legislators in party

leadership can use court-curbing proposals as a mechanism by using unpopular rulings to break old coalitions and establish new ones (Bridge and Nichols 2016, Nichols et al. 2014). For instance, attacks on the modern United States Supreme Court have acted as signals from party leaders at the national and subnational levels about positions on issues arising from case decisions and society in an effort to build and grow coalitions for political parties (Nichols et al. 2014).

Table 2. Examples of Court-Curbing Bills from State Legislatures

Type of Legislation	State	Year	Bill No.	Bill Description (Data Sourced from Gavel to Gavel Database)
Jurisdiction	MO	2015	SB66	Removes Supreme Court's power to try impeachments. Places it in the Senate.
Jurisdiction	WA	2017	SJR8200	Removes judiciary's power to review constitutionality of K- 12 funding levels.
Qualifications/Tenure	OK	2016	SB731	Limits Supreme Court and Court of Criminal Appeals judges to 12 years in office.
Qualifications/Tenure	MA	2017	HB61	Limits judges to seven-year terms.
Rule Making Authority	AZ	2015	SCR1002	Provides Supreme Court's rule making authority subject to amendment by legislature or initiative.
Rule Making Authority	NM	2018	HJR6	Removes Supreme Court's power to make rules of practice and procedure.
Salary/Budget	MN	2012	SB812	Reduces all judicial and other salaries by 6%.
Salary/Budget	PA	2016	HB2024	Ends automatic cost of living adjustments for judges and other officials.
Selection	TN	2011	SB646	Requires appellate judges be retained by 75 percent of persons voting rather than by a majority of voters.
Selection	NM	2015	HJR11	Provides for nonpartisan judicial elections.
Structure Changes	MD	2013	HB83	Increases Court of Special Appeals from 13 to 15.
Structure Changes	WV	2018	HB3040	Creates West Virginia Intermediate Court of Appeals.

Third, members of the legislature can choose from different types of court curbing. In other words, legislatures can curb the court through several different types of policy (see Table 2 for more examples). This includes policy related to 1) court jurisdiction, 2) the qualifications and tenure for members of the judiciary, 3) the rule-making authority of a court, 4) the salary of members of the judiciary and budget for the judiciary as a whole, 5) selection and retention methods for members of the judiciary, 6) structural changes to the judiciary, and 7) court curbing that does not fit neatly in the aforementioned types of legislation (Figure 3). Most court-curbing bills aim to alter judicial selection and retention methods, strip or alter jurisdiction for a court, or change the structure of the judiciary based on the number and types of courts and/or judges.

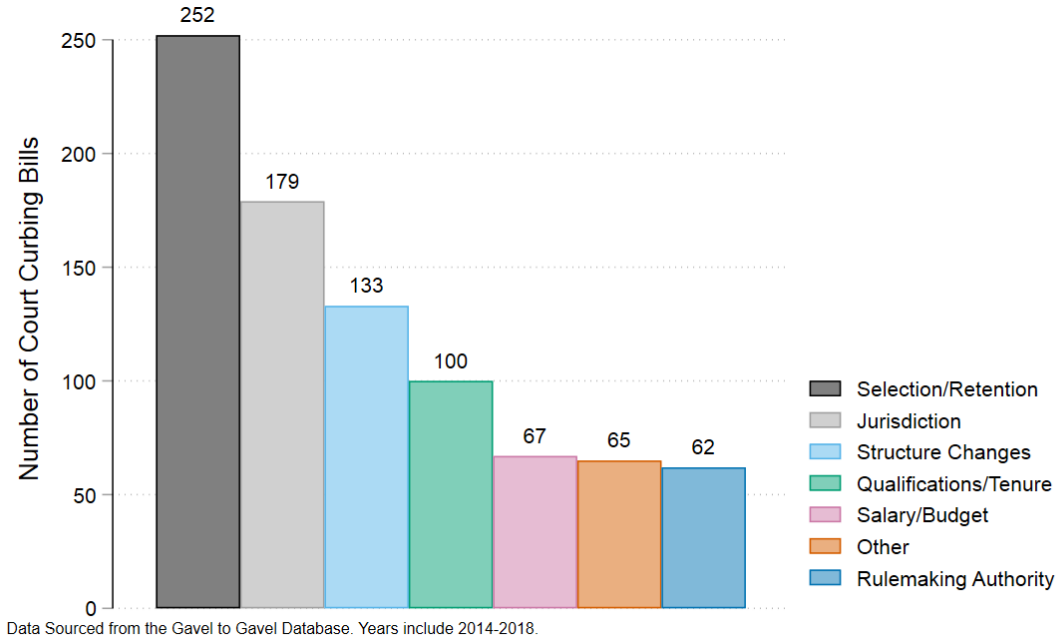

Figure 3. Number of Bills by Type of Court-Curbing Legislation, 2014-2018

Fourth, legislators set the amount of court curbing they wish to exact on the judiciary in each individual court-curbing proposal. They can engage in minor "tinkering" of the judiciary by making small but meaningful alterations to their state's judiciary, such as altering the length of terms or selection method of one court in the judiciary.[VII] Or they may propose a wholesale change to their court institutions, up to and including removing and replacing their current judiciary with an entirely new structure with new authority.[VIII] The degree of

institutional change, which threatens judicial independence, can evoke different responses from members of the judiciary (Mark and Zilis 2018a, Mark and Zilis 2019). Members of the judiciary will likely be more attentive to the more substantive court-curbing attempts compared to those court-curbing proposals that "tinker at the margins."

More intense court-curbing proposals target a larger portion of the judiciary, particularly those courts higher up in the judicial hierarchy (Figure 4). Court-curbing proposals that target fewer courts or that target only lower-level courts are less intense. For example, a court-curbing proposal that targets a single, general jurisdiction trial court in a state will likely not be viewed as threatening enough to a state court of last resort as to alter their decision-making. By comparison, a proposal that targets all appellate courts in the state, including the state court of last resort, poses a greater threat to the judiciary.

State courts of last resort serve as the apex arbiter in disputes involving judicial review of actions by the other branches of state government. State courts of last resort reside at the center of legal and political conflicts with those branches (Langer 2002). Courts of last resort act as guardians of the broader court system. In this role, members of courts of last resort must not only consider altering their own decision-making in the face of increasing court curbing, but also how such attacks may impact lower courts (Hager and Uribe-McGuire 2024).

While legislatures and courts of last resort may carry out a more visible institutional battle, lower courts incur attacks from state legislatures as well. Attacking lower courts can allow legislators to take positions against ideologically divergent portions of the judiciary in a low cost, high reward setting (Moyer and Key 2018). At the state level, while courts of last resort appear to be targeted due to ideological differences with the legislature in an inter-institutional battle. However, court curbing lower state courts appears motivated by increased professionalization of legislature, a very different motivation than that for threatening the independence of courts of last resort (Leonard et al. Forthcoming).

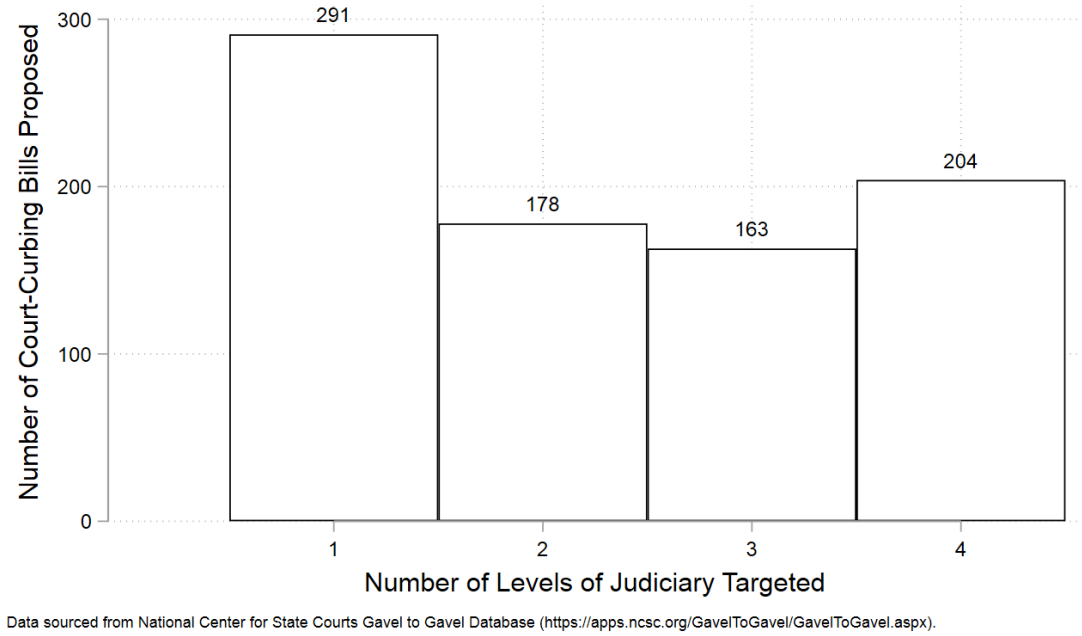

Figure 4. Number of Proposed Court-Curbing Bills based on Number of Levels of Judiciary Targeted, 2014-2018

8. Measurement Strategy – Court-Curbing Intensity

To reiterate, I define court-curbing intensity as – the scope or level of institutional change of the proposed policy to the targeted judiciary. My two measures of court-curbing intensity are distinguished from past scholarly efforts, which consider the unweighted count of court-curbing policy proposals. For instance, in Leonard (2016) the dependent variable is the "count of court-curbing bills or constitutional amendments introduced in a state year" (p.60). As a dependent variable, Leonard aggregates the number of court-curbing bills within a state by year, not accounting for the progress those bills made in the legislative process or the level of the institutional threat posed to the judiciary. Counts of court-curbing bills are also used as independent variables. Clark (2009) aggregates all court-curbing bills proposed in Congress each year between 1877 and 2006. He uses the count of court-curbing bills proposed by Congress as an independent variable to explain the use of judicial review by the Supreme Court. Clark assumes that the threat behind each court-curbing proposal is equally dangerous from the perspective of the Supreme Court as the justices determine whether to exercise judicial review. However, my court-curbing intensity measure weights each of these

proposals based on their threat to reflect the dynamics of the interbranch relationships more accurately. My court-curbing intensity measure consists of two components: 1) proportion of courts targeted and 2) the set of levels of the judiciary targeted.

8.1. Constructing the Grouped Proportion of the Judiciary Targeted Measure

As the number of courts targeted by the court-curbing bill increases, so does the court-curbing intensity. I first find the proportion of courts affected by the specific court-curbing proposal. This proportion ranges from greater than 0 to less than or equal to 1, based on the number of courts targeted divided by the total number of courts in the state judicial hierarchy. The courts in this proportion only include the number of courts of last resort, intermediate appellate courts, and general jurisdiction trial courts in a given state. State limited jurisdiction trial courts are excluded from this measure due to their low position and limited area of jurisdiction in the state judiciary hierarchy. In addition, not all state judiciaries have limited jurisdiction trial courts (e.g., California, Delaware, Minnesota). Those states with limited jurisdiction trial courts vary considerably in the number and types of different trial courts in their judiciary, e.g., Arkansas (1), Oregon (3), New York (8).

Most court-curbing bills target a high proportion or low proportion of state courts, with relatively few in the middle (Figure 5). Even with these general trends, we see considerable variation in the distribution of proportions of the judiciary targeted by court-curbing bills across the states (Figure 6). In some states, all court-curbing bills target more than 2/3 of their judiciary (e.g., Alaska, Delaware, Massachusetts, Maine, and Nebraska). Some of this may be due to the fact that some states only have one court of last resort and one general jurisdiction trial court. However, each of the states in this instance have at least three courts in their state judiciary.

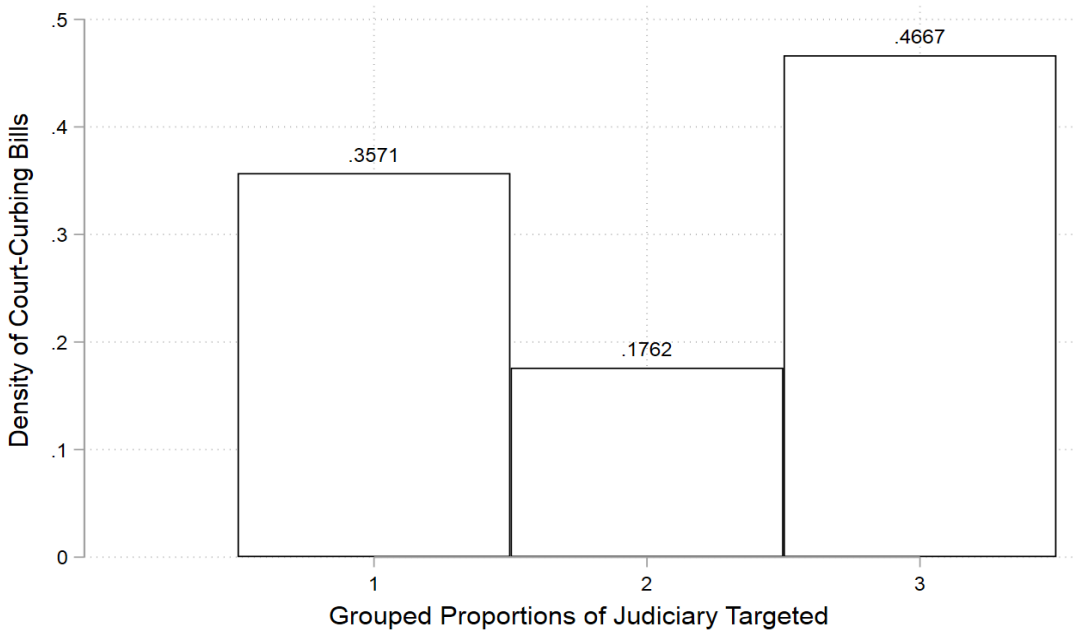

Figure 5. Grouped Proportions of Judiciary Targeted by Court-Curbing Bills, 2014-2018

The proportion of the judiciary targeted by court-curbing bills also varies by year (Figure 7). In 2016, we see the highest proportion of court-curbing bills targeting most of the judiciary (2/3 or more). No other year besides 2016 saw a majority of bills targeting so much of the state courts.

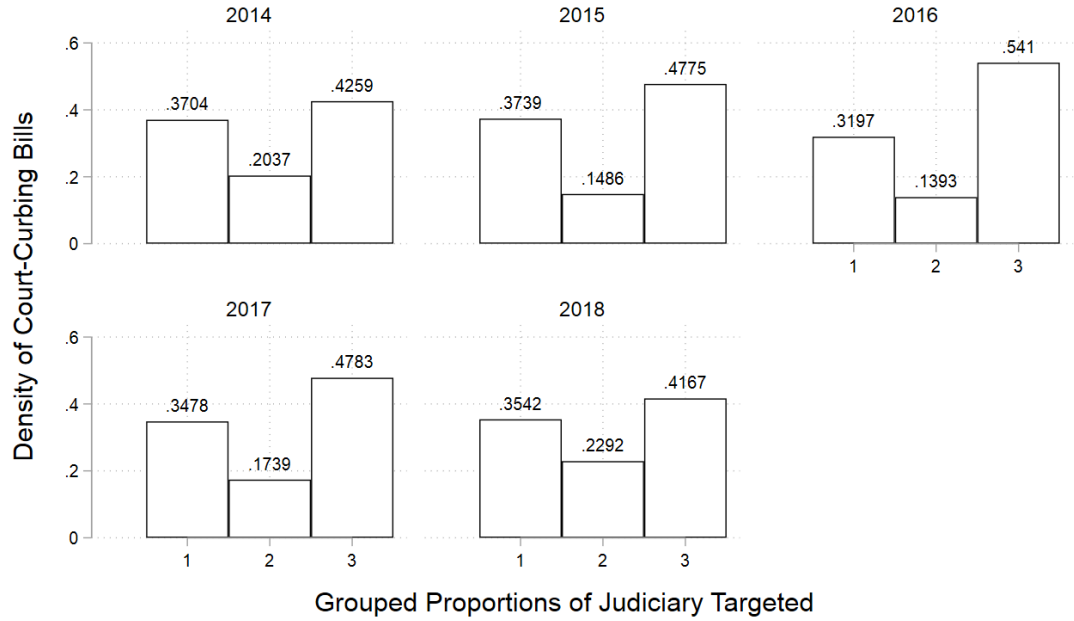

Figure 7. Grouped Proportions of Judiciary Targeted by Court-Curbing Bills by Year, 2014-2018

Note: In this figure, I grouped proportions of the judiciary targeted by court-curbing bills into three categories. If 1/3 of the judiciary was targeted by a court-curbing bill, it is categorized as 1. If more the 1/3 of the judiciary up to 2/3 of the judiciary was targeted by a court-curbing bill, it is categorized as 2. If more than 2/3 of the judiciary was targeted by a court-curbing bill, it is categorized as a 3.

8.2. Constructing the Levels of the Judiciary Targeted Measure

I measure the set of levels of the judiciary targeted by a court-curbing bill as the second court-curbing intensity measure. Targeting higher level courts in a court-curbing bill can have a broader influence on policy-making compared to targeting only lower courts by virtue of their hierarchical importance in establishing and reviewing policy. For instance, attacks on the court of last resort carry greater intensity compared to attacks only on lower courts.

Courts of last resort carry the final say on statutory and constitutional questions for a state, which carry greater consequences than rulings at any other level of the state judiciary. Limiting the ability of state courts of last resort to decide on these questions carries implications downward throughout the state judiciary in a way that the implications of limiting lower courts does not.[IX]

First, I construct a set of binary indicators, where a value of 1 for each indicator means that level or type of court is targeted and a value of 0 indicates otherwise. The levels of court included are the court of last resort, intermediate appellate courts, and general jurisdiction trial courts.

I consider the extent to which different levels of the judiciary can make policy through binding precedent for lower courts, reversing actions by the other branches of government, and advocating for reforms needed by the judiciary. Members of the judiciary at all levels (courts of last resort, intermediate appellate courts, and general jurisdiction trial courts) express concerns with court curbing that targets the different levels of the judiciary and the judiciary as a whole (Mark and Zilis 2018). This sets a baseline that court curbing can be meaningful to some degree regardless of which level(s) of the judiciary it targets.

State courts of last resort reside at the top of every state judicial hierarchy. They play an important role in setting the binding precedents that must be followed by lower courts. They are the last court for appeals of cases originating within the state, unless parties are able to appeal to the federal judiciary. State courts of last resort serve as the apex arbiter in disputes

involving judicial review of actions by the other branches of state government, setting themselves up for conflicts with those branches (Langer 2002). State courts of last resort and their chief justice act as both the administrator of the state judiciary and political advocate for the judiciary to the other branches of government (Wilhelm et al. 2019, Wilhelm et al. 2020). Additionally, courts of last resort act as guardians of the judiciary, not only altering their own decision-making in the face of increasing court curbing, but also reversing invalidations of government action by lower courts in higher numbers as well (Hager and Uribe-McGuire 2024).

Lower courts play a meaningful role in state judiciaries as well, even if they do not possess the same level of impact in the policy-making process as courts of last resort. Intermediate appellate courts review cases appealed to them by lower courts; however, cases decided by intermediate appellate courts can be appealed to higher appellate courts, like a court of last resort. Not all states have an intermediate appellate court. For those that do, the intermediate appellate court sets binding precedent that lower courts (typically general jurisdiction trial court and limited jurisdiction trial court) must follow. However, those same intermediate appellate courts are bound to precedent established by higher level state courts, like courts of last resort. In virtually every state with an intermediate appellate court, state courts of last resort have a discretionary docket with the ability to decide whether or not to consider a case being appealed.[X] This often makes intermediate appellate courts the de facto court of last resort for most appeal if they are not taken up by a higher court, as is the case in the federal judiciary (Martinek 2009).

General jurisdiction trial courts hear any civil or criminal case that is not already exclusively within the jurisdiction of another court. They consider the broadest set of cases as a court of first instance before any case can be appealed to a higher court, like intermediate appellate courts and courts of last resort.

With these different levels of the judicial hierarchy in mind, I construct the levels of the judiciary targeted measure a variable ranging from one to three based on the set of levels of courts targeted by a court-curbing bill. If a court-curbing bill targets the state court of last resort and any set of intermediate appellate courts and general jurisdiction trial courts, the levels of the judiciary targeted measure takes on a value of three (maximum). Court-curbing bills targeting only a court of last resort receives a value of two. Finally, court-curbing bills that target lower courts (intermediate appellate courts and/or general jurisdiction trial courts)

but NOT a court of last resort have a value of one (minimum). This accounts for the variation in the presence of intermediate appellate courts in some states and their absence in others.

For example, if the Wisconsin legislature proposes a bill targeting the Wisconsin Supreme Court in addition to the Wisconsin Court of Appeals (the state's intermediate appellate court) and/or Circuit Court (the state's general jurisdiction trial court), the bill has a value of three (see Table 3 Hypothetical, Examples 1, 2 and 3).

If the Wisconsin legislature proposes a bill targeting the ONLY Wisconsin Supreme Court and no lower courts, the bill has a value of two (see Table 3, Hypothetical Example 4). Finally, if a court-curbing bill in Wisconsin targets any combination of their state lower levels courts (e.g., Wisconsin Court of Appeals, Wisconsin Circuit Court) but NOT the Wisconsin Supreme Court, it receives a value of one (see Table 3, Examples 5, 6, and 7).

Level of Judiciary Targeted	*Ex. 1*	*Ex. 2*	*Ex. 3*	*Ex. 4*	*Ex. 5*	*Ex. 6*	*Ex. 7*
Court of Last Resort	Yes	Yes	Yes	Yes	No	No	No
Intermediate Appellate Court	Yes	Yes	No	No	Yes	Yes	No
General Jurisdiction Trial Court	Yes	No	Yes	No	Yes	No	Yes
Total Value of Indicator	3	3		2	1	1	1

Table 3. Hypothetical Examples Calculating Values of Court-Curbing Intensity – Set of Levels of the Judiciary Targeted

Over 55% of court-curbing bills targeted a state court of last resort and any set of lower state courts as well (Figure 8). Over 20% of court-curbing bills targeted any set of intermediate appellate courts and general jurisdiction trial courts. Finally, over ten percent of court-curbing bills targeted ONLY limited jurisdiction trial courts.

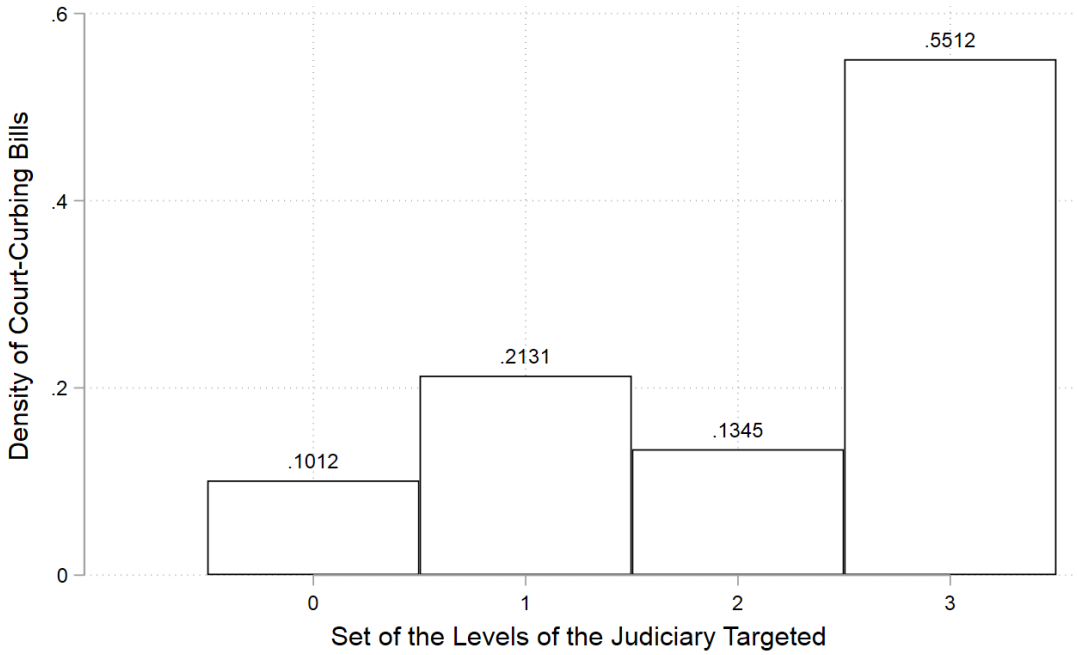

Figure 8. Set of the Levels of the Judiciary Targeted by Court-Curbing Bills, 2014-2018

Other trends emerge by state and year in terms of proposed court-curbing bills that target different sets of levels of the judiciary. While most state legislatures proposed court-curbing bills that target at least their court of last resort, some leave their state courts of last resort relatively unscathed, like California and New York (Figure 9). By comparison, some variation exists in years as 2016 and 2018 experienced the highest density of court-curbing bills targeting at least the court of last resort with over 70 percent of such bills in each year (Figure 10).

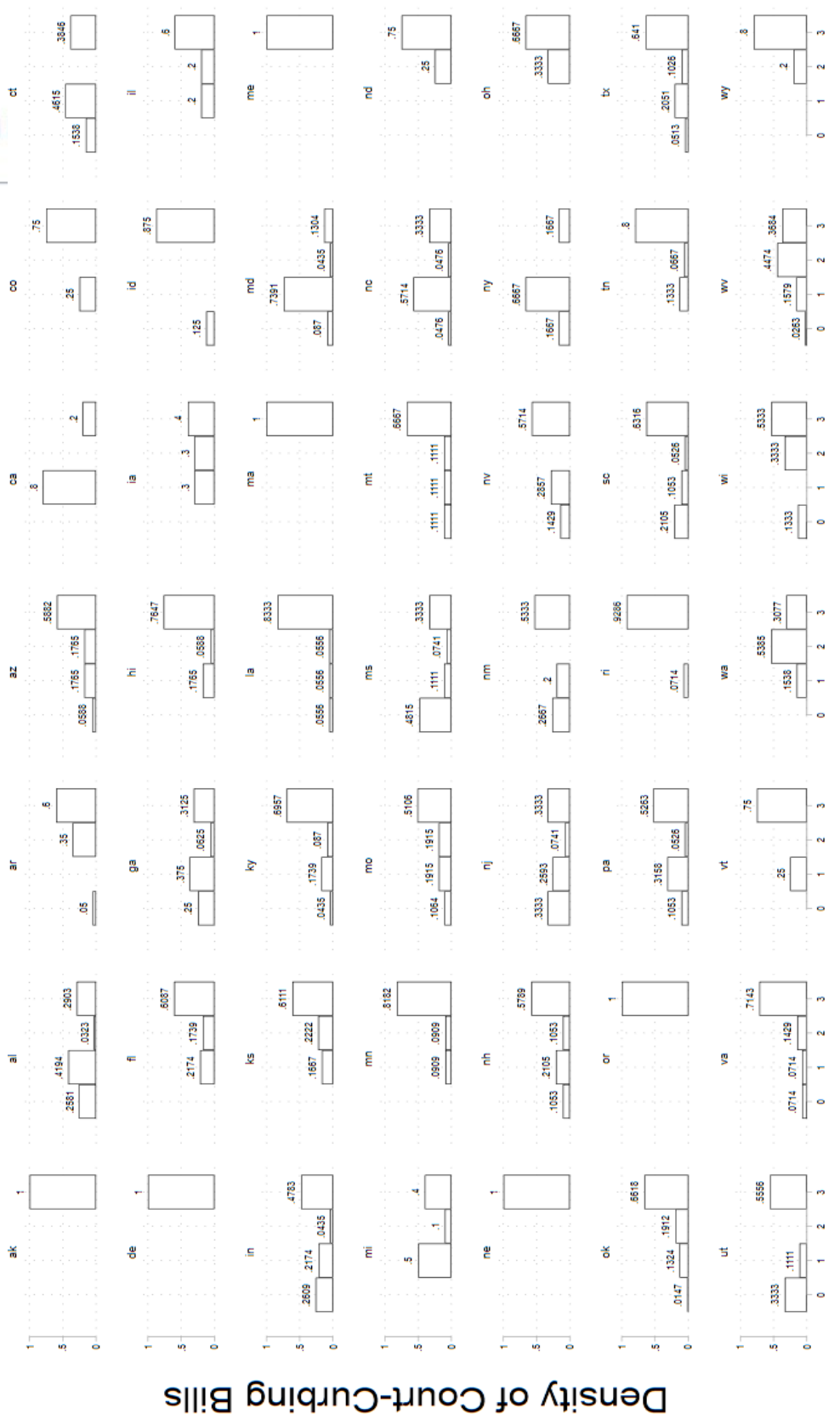

Figure 9. Set of the Levels of the Judiciary Targeted by Court-Curbing Bills by State, 2014-2018

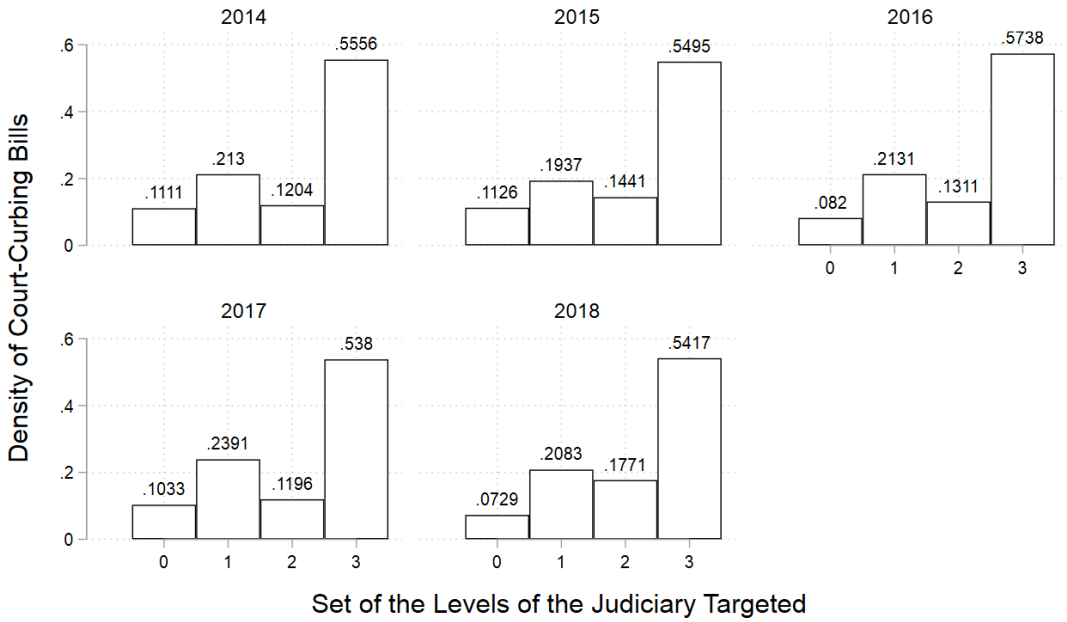

Figure 10. Set of the Levels of the Judiciary Targeted by Court-Curbing Bills by Year, 2014-2018

9. Empirical Tests and Regressions

9.1. Improvements in Measuring Court Curbing

The two court-curbing intensity measures broadly improve the conceptualization and operationalization of court curbing. Nearly all studies of court curbing use the count of court-curbing bills proposed as their measure of court curbing. However, as noted above, judges discern serious and nonserious threats to the judiciary and alter their judicial behavior accordingly (Marks and Zilis 2018a). Running correlations between the different measures of court-curbing intensity and count of court-curbing bills proposed, we see high levels of correlation (see Table 4 and Figures 11 and 12). This indicates that my measures of court-curbing intensity are reliably interchangeable with the current standard operationalization of court curbing as a count of proposed court-curbing bills.

Moving beyond this standard operationalization, the court-curbing intensity measures show their added usefulness. As court-curbing bills move further through the legislative process, they become less correlated with the court-curbing intensity measures (see Table 4 and Appendix Tables A7-A12). This indicates that the court-curbing intensity variables measure something different than a simple count of bills, rather than just offering

more precision companion to prior approaches. That "something" is the amount of institutional change to the judiciary proposed in the court-curbing bill – the outcome that judges express they are most concerned about (Mark and Zilis 2018a).

Table 4. Correlation Table for Measures of Court-Curbing Intensity and Previous Measures of Court Curbing

Correlation	Set of the Levels of the Judiciary Targeted	Grouped Proportions of the Judiciary Targeted
Court-Curbing Bills Proposed	0.9484	0.9603
Court-Curbing Bills Passed Committee	0.7024	0.6912
Court-Curbing Bills Passed Legislature	0.3565	0.3533
Court-Curbing Bills Enacted	0.3369	0.3367
Observations	253	253

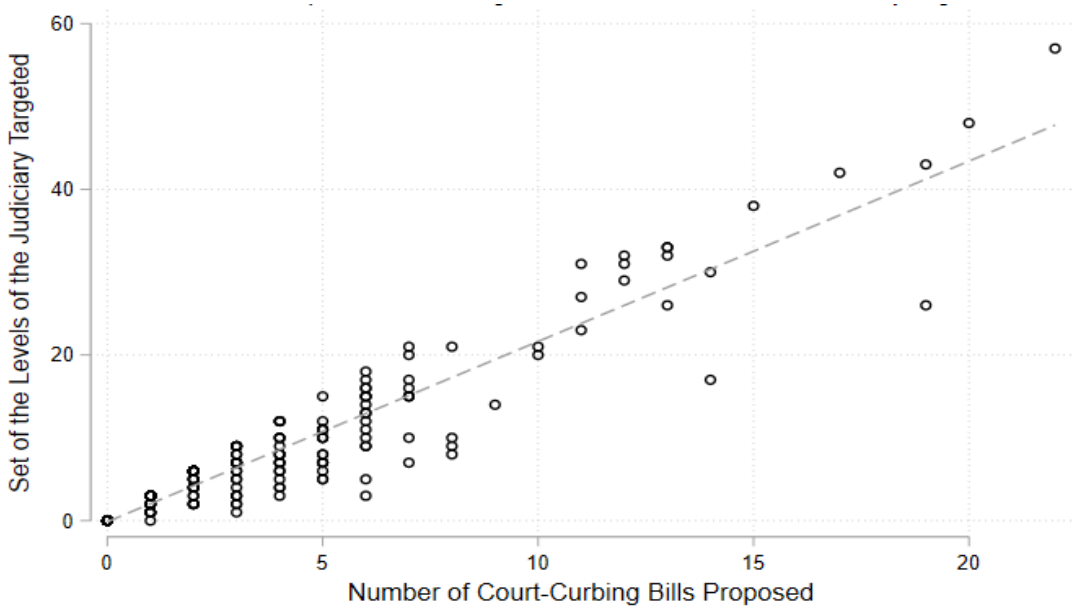

Figure 11. Number of Proposed Court-Curbing Bills and Set of the Levels of the Judiciary Targeted, 2014-2018

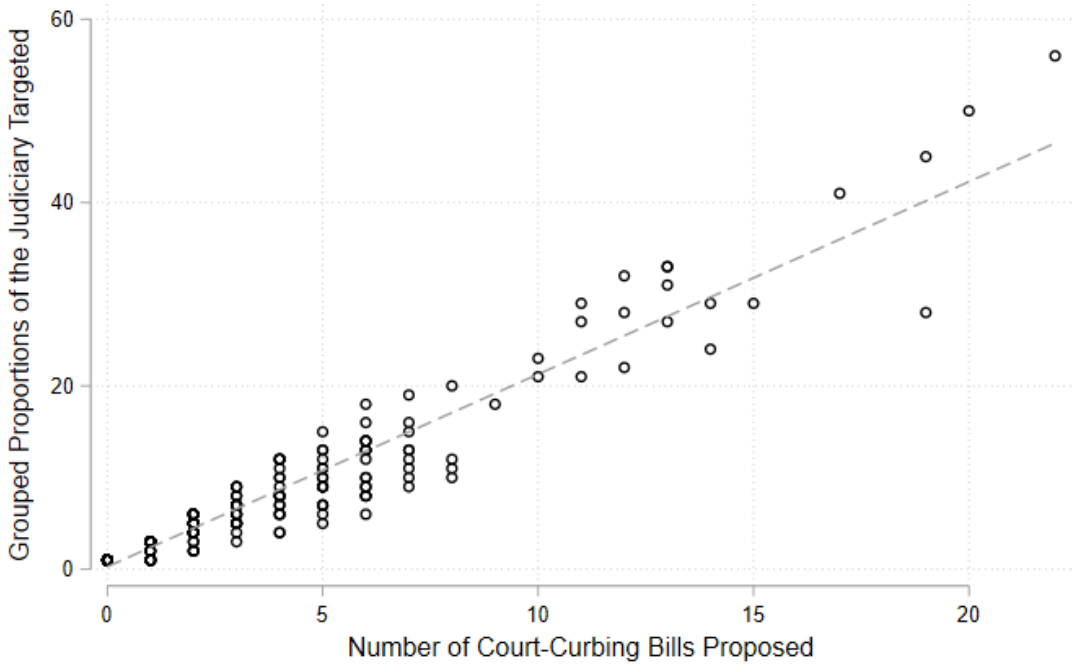

Figure 12. Number of Court-Curbing Bills Proposed and Grouped Proportions of the Judiciary Targeted, 2014-2018

9.2. Regressions and Analysis

Running empirical tests demonstrates the usefulness of the court-curbing intensity measures developed in this paper. In the successive four tables (Tables 5-8), I estimate OLS regressions with both the set levels targeted measure and the grouped proportions targeted measure, outlined in the Measurement Strategy section above, as the dependent variables. I estimate the first model with the types of court curbing indicators as the independent variables. These types include court-curbing bills that target the judiciary by altering the 1) selection and retention methods for jurists, 2) jurisdiction courts possess, 3) qualification and tenure requirements for jurists, 4) salary and budget of courts, 5) structure of the court system, 6) rulemaking authority of courts, and 7) other types of court curbing.

In all types of court curbing, except the "other" category, there is a positive relationship between the type of court curbing and the intensity of the court-curbing activity in a state-year (see Table 5). We also see differences in the results across types of court curbing and measures of court-curbing intensity. For both measures, those bills that alter the rule-making authority of courts appear to threaten the greatest amount of institutional change, compared

to other types of court curbing. Somewhat perplexing is that court-curbing bills that target the structure of the court system pose the lowest court-curbing intensity.

Table 5. OLS Regression of Court-Curbing Intensity Measures and Types of Court Curbing

VARIABLES **TYPES OF COURT CURBING**	Set Levels Targeted	Grouped Proportions Targeted
# of Selection Court-Curbing Bills	2.196***	1.914***
	(0.160)	(0.134)
# of Jurisdiction Court-Curbing Bills	2.251***	2.414***
	(0.204)	(0.171)
# of Qual/Tenure Court-Curbing Bills	1.655***	1.579***
	(0.208)	(0.175)
# of Salary/Budget Court-Curbing Bills	2.461***	2.488***
	(0.282)	(0.236)
# of Structure Court-Curbing Bills	1.134***	1.351***
	(0.282)	(0.237)
# of Rule-Making Authority Court-Curbing Bills	3.272***	2.620***
	(0.309)	(0.260)
# of Other Court-Curbing Bills	-0.100	-0.194
	(0.300)	(0.252)
Constant	-1.972	0.404
	(2.239)	(1.879)
Observations	253	253
R-squared	0.927	0.943

Standard errors in parentheses. Levels of significance: *** p<0.01, ** p<0.05, * p<0.1. Fixed-effects by state and year.

Second, in Table 6, I estimate an OLS regression for both measures of court-curbing intensity with the overall progress through the legislative process. Again, some interesting trends emerge. When looking at all court-curbing bills proposed, we see a positive relationship with both court-curbing intensity measures. However, that dissipates as court-curbing bills move through the legislative process. Bills that have been passed by the legislature and those that have been enacted show no relationship with the court-curbing intensity measures (see Table 6).

Looking within legislative chambers, we see that steps within legislative chambers and across legislative chambers may see more (or less) intense court-curbing bills make progress through (see Table 7). Consistent with the estimates in Table 6, Table 7 shows a

positive relationship between the number of court-curbing bills proposed in either legislative chamber and the court-curbing intensity of those bills. Those bills that pass a committee vote in the upper chamber tend to be less intense; no such relationship exists in lower legislative chambers. Depending on the measure, court-curbing bills that receive a floor vote in the upper house tend to have higher court-curbing intensity. This suggests different incentives and behaviors regarding court curbing in bicameral legislatures.

Table 6. OLS Regression of Court-Curbing Intensity Measures and Overall Progress through the Legislative Process

VARIABLES	Set Levels Targeted	Grouped Proportions Targeted
# of Court-Curbing Bills Proposed	2.134***	2.081***
	(0.0758)	(0.0607)
# of Court-Curbing Bills Passed	0.355*	0.114
By Committee	(0.198)	(0.159)
# of Court-Curbing Bills Passed	-0.00402	-0.377
By Legislature	(1.088)	(0.872)
# of Court-Curbing Bills Enacted	-0.517	0.117
	(1.085)	(0.869)
Constant	-6.029***	-3.107*
	(2.001)	(1.603)
Observations	253	253
R-squared	0.939	0.957

Standard errors in parentheses. Levels of significance: *** p<0.01, ** p<0.05, * p<0.1. Fixed-effects by state and year.

Table 7. OLS Regression of Court-Curbing Intensity Measures and Chamber-Specific Progress through the Legislative Process

	Set Levels Targeted		Grouped Proportions Targeted	
VARIABLES BY CHAMBER	Lower Chamber	Upper Chamber	Lower Chamber	Upper Chamber
Proposed in	2.466***	2.833***	2.381***	2.822***
	(0.155)	(0.251)	(0.137)	(0.226)
Committee Hearing	0.269	0.0357	0.179	0.0264
	(0.407)	(0.840)	(0.360)	(0.758)
Passed Committee	-0.334	-2.092*	-0.295	-2.261**
	(0.619)	(1.154)	(0.548)	(1.042)
Floor Vote	0.850	4.006**	-1.276	2.763
	(1.357)	(1.994)	(1.200)	(1.800)
Passed Chamber	-0.399	-1.640	1.837*	-0.458
	(1.225)	(1.969)	(1.083)	(1.777)
Constant	-5.440*	-4.040	-3.048	-1.325
	(2.791)	(3.719)	(2.468)	(3.357)
Observations	253	253	253	253
R-squared	0.883	0.792	0.899	0.813

Standard errors in parentheses. Levels of significance: *** p<0.01, ** p<0.05, * p<0.1. Fixed-effects by state and year.

Finally, in Table 8, court-curbing bills with a bipartisan distribution of co-sponsors tend to have higher court-curbing intensity scores compared to bills that have one (or no) party represented among its co-sponsors.

Table 8. OLS Regression of Court-Curbing Intensity Measures and Bipartisan Co-Sponsorship of Court-Curbing Bills

VARIABLES	Set Levels Targeted	Grouped Proportions Targeted
Bipartisan Co-Sponsored	2.844***	2.740***
Court-Curbing Bills	(0.737)	(0.687)
Constant	5.758	7.931
	(5.492)	(5.115)
Observations	253	253
R-squared	0.522	0.543

Standard errors in parentheses. Levels of significance: *** p<0.01, ** p<0.05, * p<0.1. Fixed-effects by state and year.

10. Conclusion

This paper outlines the theory behind and strategy for creating a novel measure of court curbing. The measures of court-curbing intensity, which I define as the scope or level of institutional change of the proposed policy to the targeted judiciary, will help move scholarship on court curbing beyond simple counts of proposals by giving weight to the intensity of attacks on judicial independence, in line with admissions by members of the judiciary in how they view such attacks (Mark and Zilis 2018a).

Court-curbing intensity consists of two indicators. One determines the proportion of the judiciary among all courts of last resort, intermediate appellate courts, and general jurisdiction trial courts in a state targeted by a court-curbing bill. The second indicator focuses on the levels of the state judiciary targeted by a court-curbing bill and ascribing a cumulative score based on the different levels of courts targeted.

This paper does not apply the measure to questions arising out of scholarship on constitutions, empirical legal studies, and other important fields. Future efforts are necessary to understand the socio-legal dimension and implications of court curbing beyond the political ones.

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[I] In *Chisholm v. Georgia* (1793), the United States Supreme Court held that federal courts possessed jurisdiction in cases between a state and a citizen of another state wherein the state is the defendant. In the subsequent year, Congress proposed the Eleventh Amendment, and it was successfully ratified by the states less than two years after that case was decided. The Eleventh Amendment to the United States Constitution reads "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[II] I include more discussion on the national-level focus of the court-curbing literature in Appendix Part B.

[III] Few studies in the court-curbing literature focus on more than one country. Exceptions include Aydin-Cakir (2024) (Hungary and Poland), Keleman (2012) (European Union and the European Court of Justice), and Kosař and Šipulová (2023) (Europe and South America).

[IV] State courts of last resort (COLR) are the terminal stop in all potential appeals of state-level cases involving the application and interpretation of state law, including judicial review. Each state has at least one court of last resort. State courts of last resort vary in name, number of authorized judgeships, number of years in a term, selection methods.

Intermediate appellate courts (IAC) are tasked with the application and interpretation of state law, including judicial review. Further appeals of decisions are possible within the state court system, usually to the state court of last resort. Not all states operate with an intermediate appellate court, while others have multiple, varying in in institutional design.

General jurisdiction trial courts (GJTC) hear and decide any civil or criminal case as a court of first instance that is not already exclusively within the jurisdiction of another court. In other words, unless a law or constitutional provision denies them jurisdiction, general jurisdiction trial courts can be the first court to hear and decide any kind of case. All states have at least one general jurisdiction trial court.

Limited jurisdiction trial courts (LJTC) only hear and decide on specific kinds of cases based on subject matter, amount in controversy, statutory grant (areas of law specified by the state constitution or state law and statutes), or administrative matters (National Center for State Courts 2017). States may have zero, one, or multiple limited jurisdiction trial courts.

[V] Not featured in this paper, I extend beyond her strategy by including the legislative committee to which the bill was referred. I also note if a court-curbing bill is explicitly connected to other court-curbing bills introduced in the legislature in the same year.

[VI] I omit limited jurisdiction trial courts from this measure. While important, limited jurisdiction trial courts do not have the substantial impact on policy-making and setting precedent as higher-level courts like courts of last resort, intermediate appellate courts, and general jurisdiction trial courts. Additionally, states vary the most in terms of the number and types of limited jurisdiction trial courts compared to any other level of the judicial hierarchy.

[VII] For example, the Maryland legislature proposed two bills recently (2016 HB448 and 2018 HB513) that would have transitioned the Maryland State Circuit Court (general jurisdiction trial court) from elections to a gubernatorial appointment (with confirmation by the Maryland State Senate) and reduced the term in office from 15 years to 10 years.

[VIII] While no state during the timeframe of this dataset has completely repealed and replaced its entire judiciary, it is theoretically possible. In some states, (e.g., Oklahoma 2014 HB3169, Utah 2014 HB336), court-curbing proposals aimed to establish task forces to reshape their state judiciaries in terms of structure, jurisdiction, and organization.

[IX] For example, the Kansas House of Representatives introduced HCR 5029 in 2018, which would have removed the state judiciary's power of judicial review over cases involving funding for education (HCR 5029 legislative information and history: https://kslegislature.org/li_2018/b2017_18/measures/hcr5029/).
The year prior, the Alaska House of Representatives proposed HB 251, which would have established a new process for judicial impeachments and removed the judiciary's ability to use judicial review over the bill if enacted (HB 251 legislative information and history: https://www.akleg.gov/basis/Bill/Detail/30?Root=HB251).

[X] The National Center for State Courts details the appellate structure of each state judiciary, noting discretionary (by permission) and mandatory (by right) appellate docket control (https://cspbr.azurewebsites.net/).

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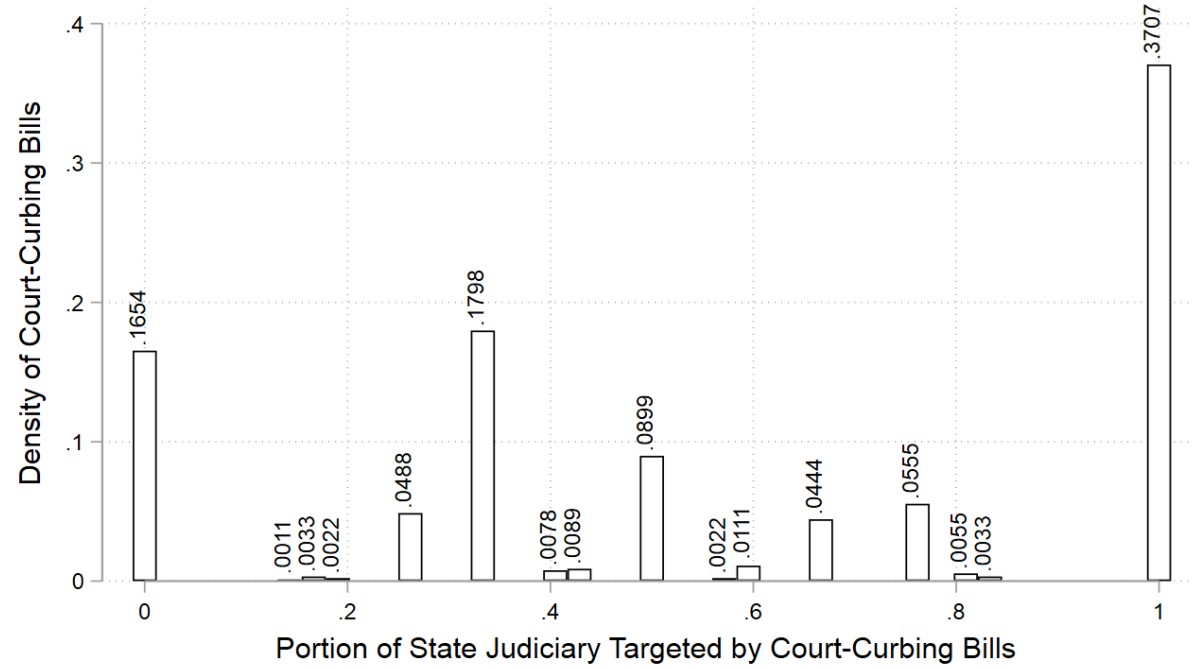
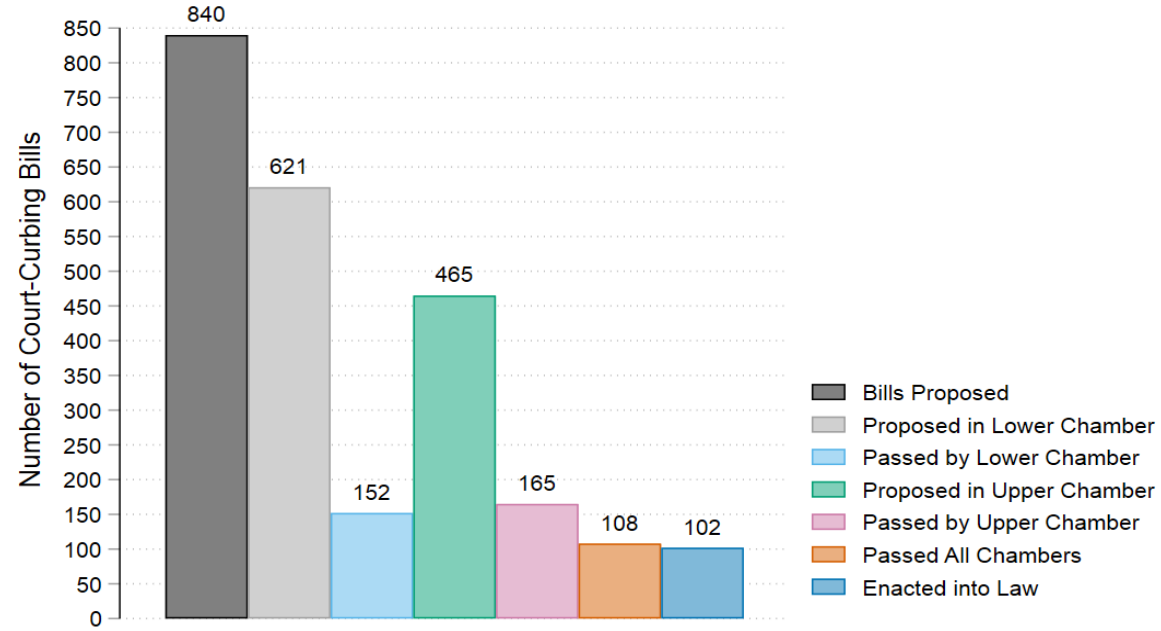
Appendix for Measuring Court Curbing

Appendix Figure A1. Proportion of State Judiciary Targeted by Court-Curbing Bills, 2014-2018



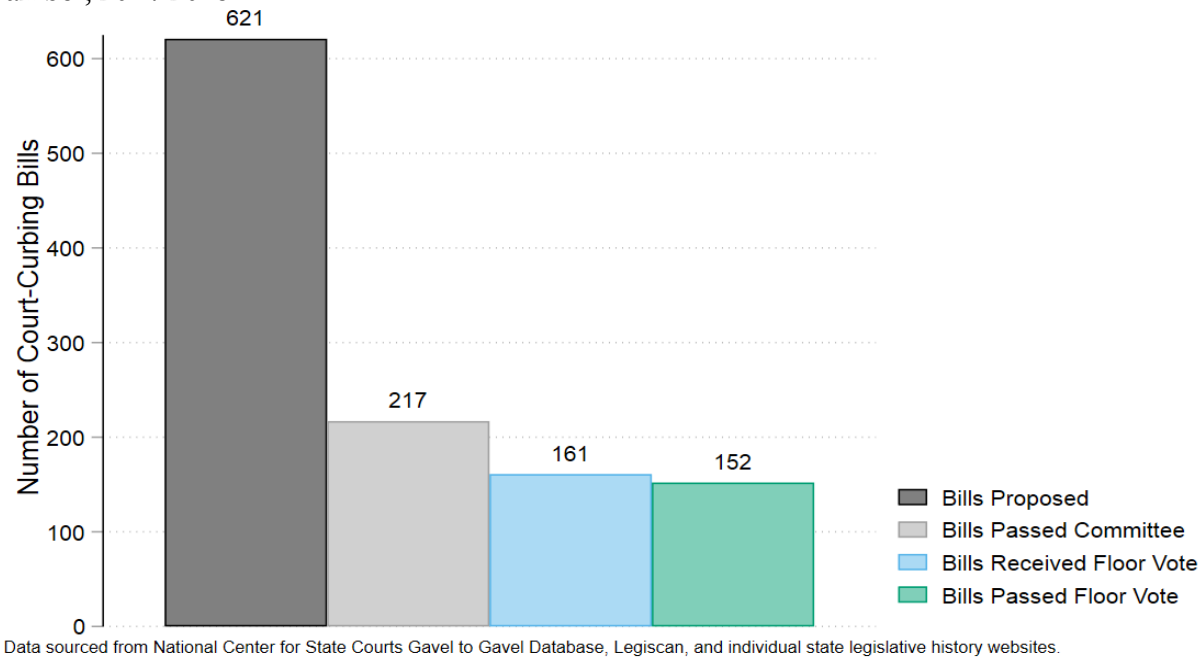
This measure is constructed based on the total number of courts of last resort + intermediate appellate courts + general jurisdiction trial courts. Data sourced from National Center for State Courts Gavel to Gavel Database.

Appendix Figure A2. Progress of Court-Curbing Bills through the Legislature, 2014-2018



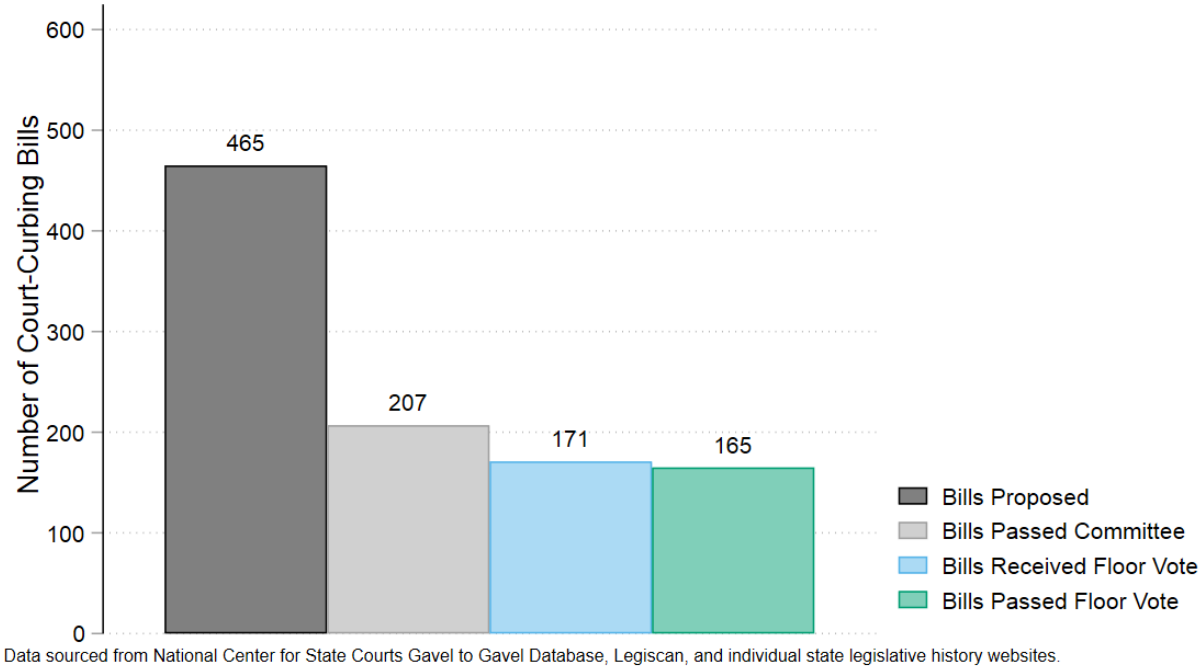
Data sourced from National Center for State Courts Gavel to Gavel Database, Legiscan, and individual state legislative history websites.

Appendix Figure A3. Progress of Court-Curbing Bills through Lower Legislative Chamber, 2014-2018



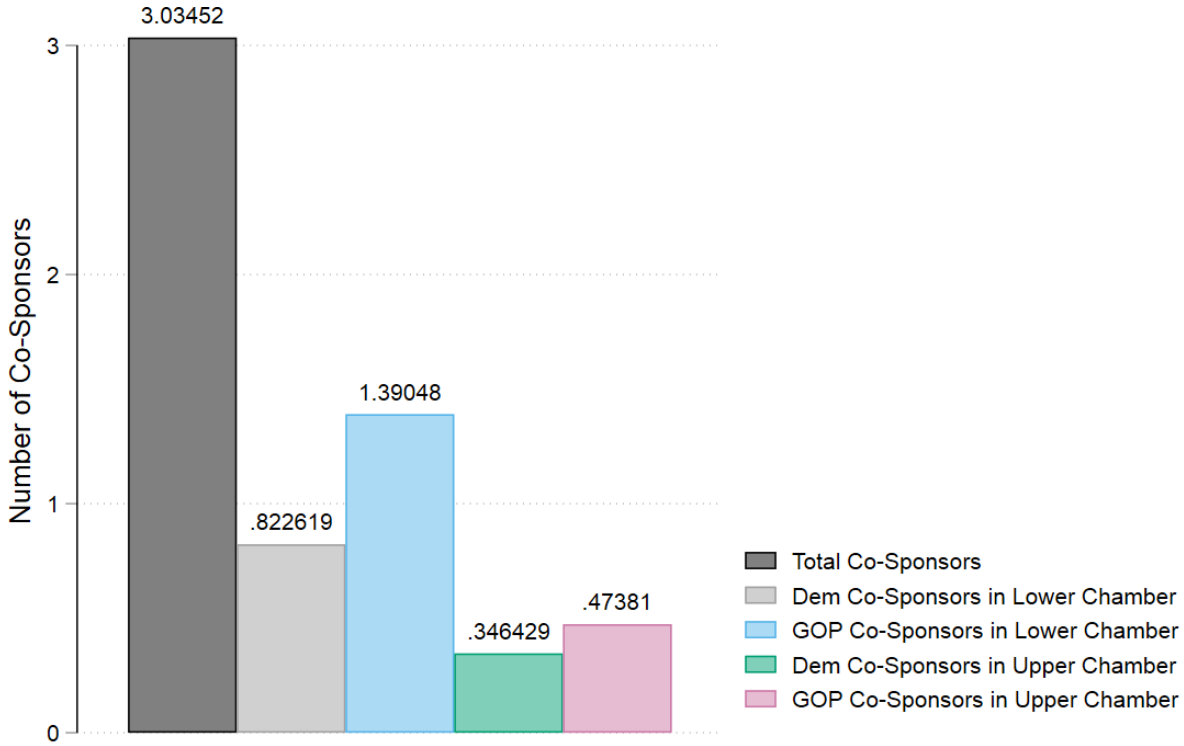
Data sourced from National Center for State Courts Gavel to Gavel Database, Legiscan, and individual state legislative history websites.

Appendix Figure A4. Progress of Court-Curbing Bills through Upper Legislative Chamber, 2014-2018

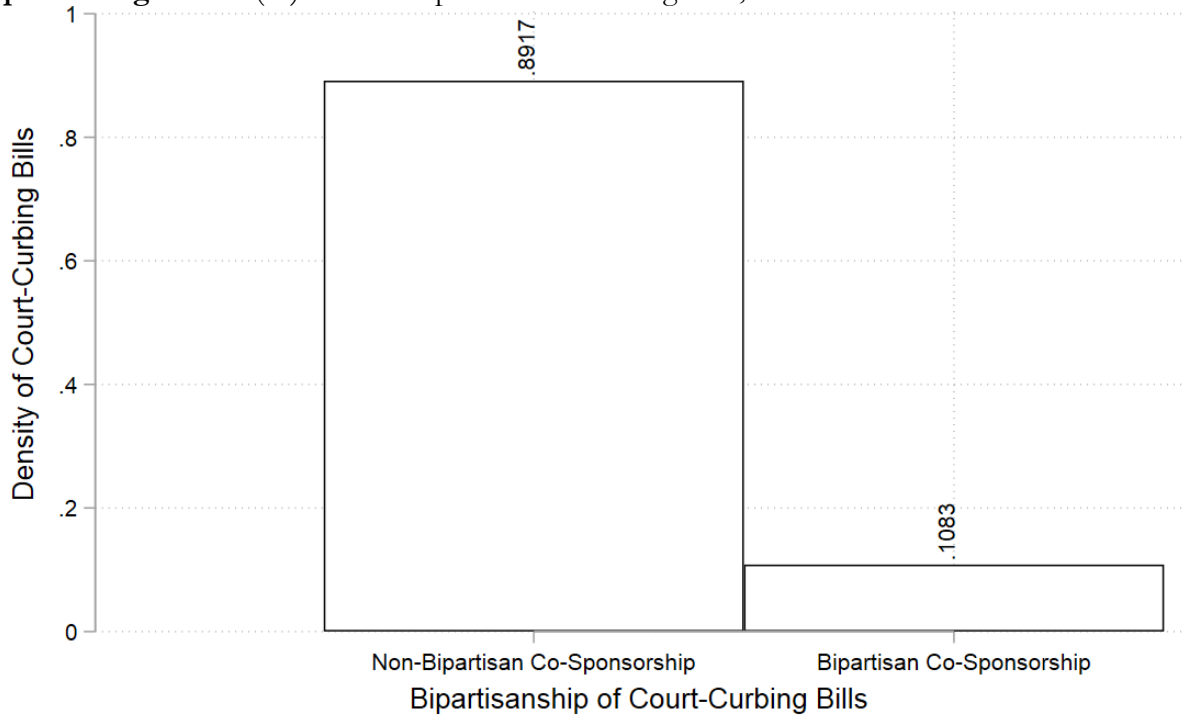


Data sourced from National Center for State Courts Gavel to Gavel Database, Legiscan, and individual state legislative history websites.

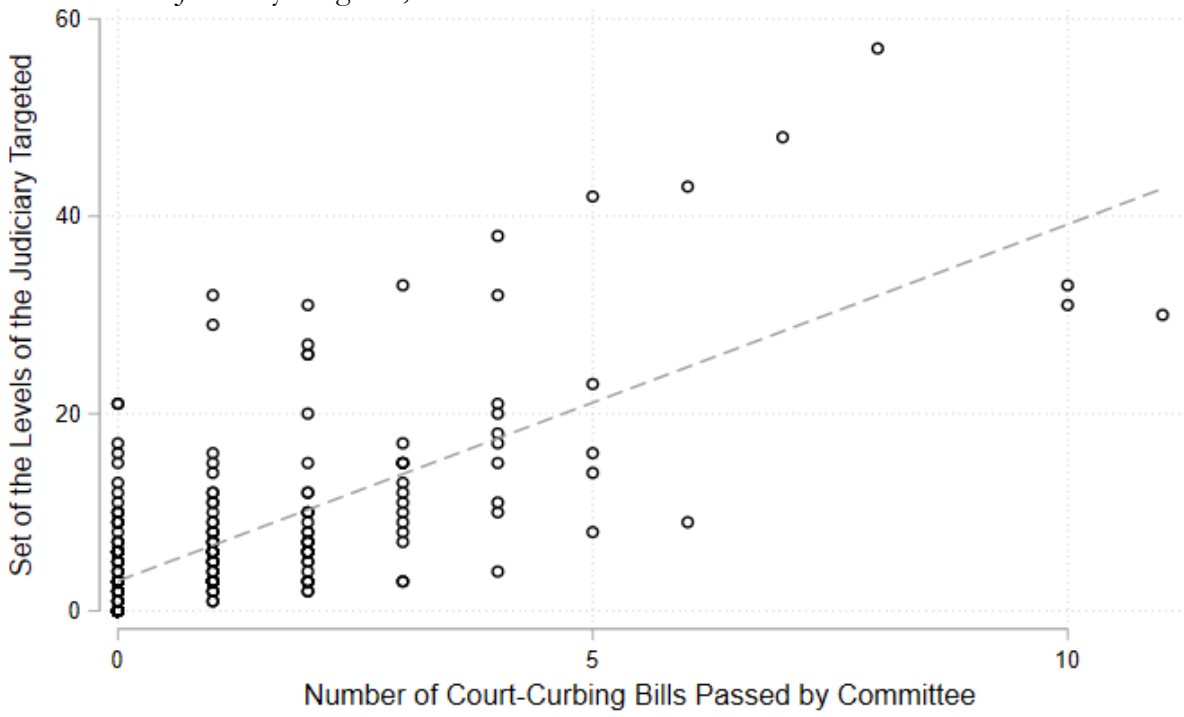
Appendix Figure A5. Mean Number of Co-Sponsors of Court-Curbing Bills, 2014-2018



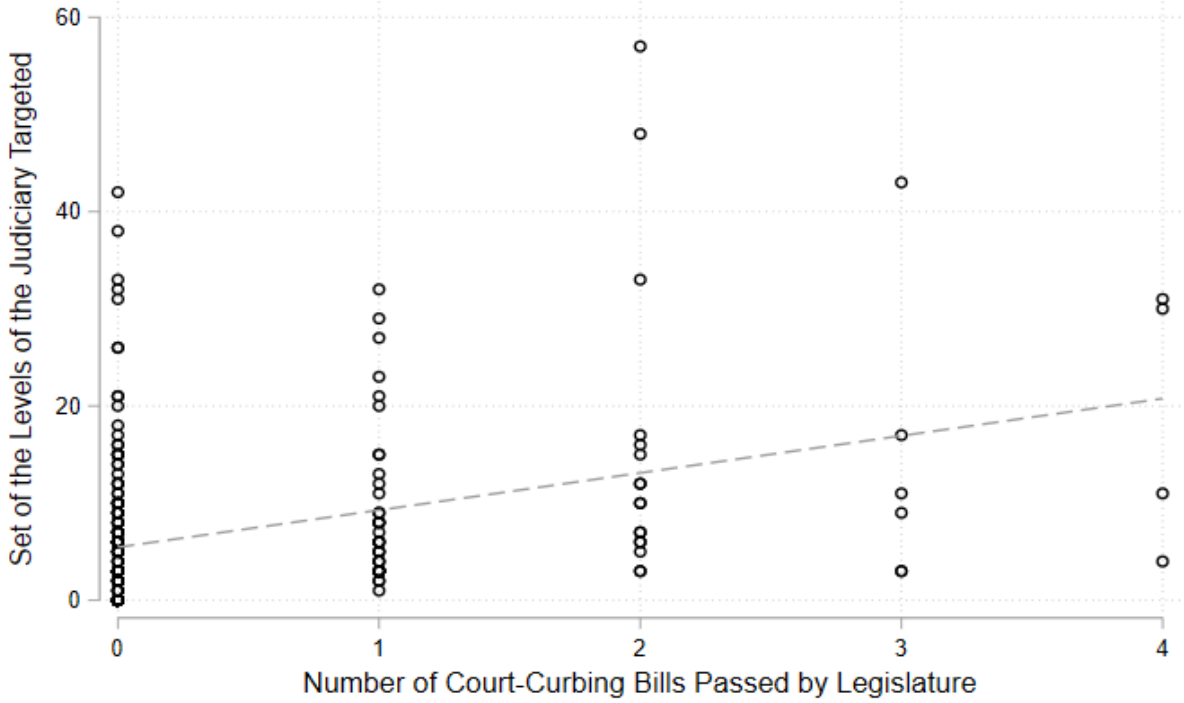
Appendix Figure A6. (Bi)Partisanship of Court-Curbing Bills, 2014-2018



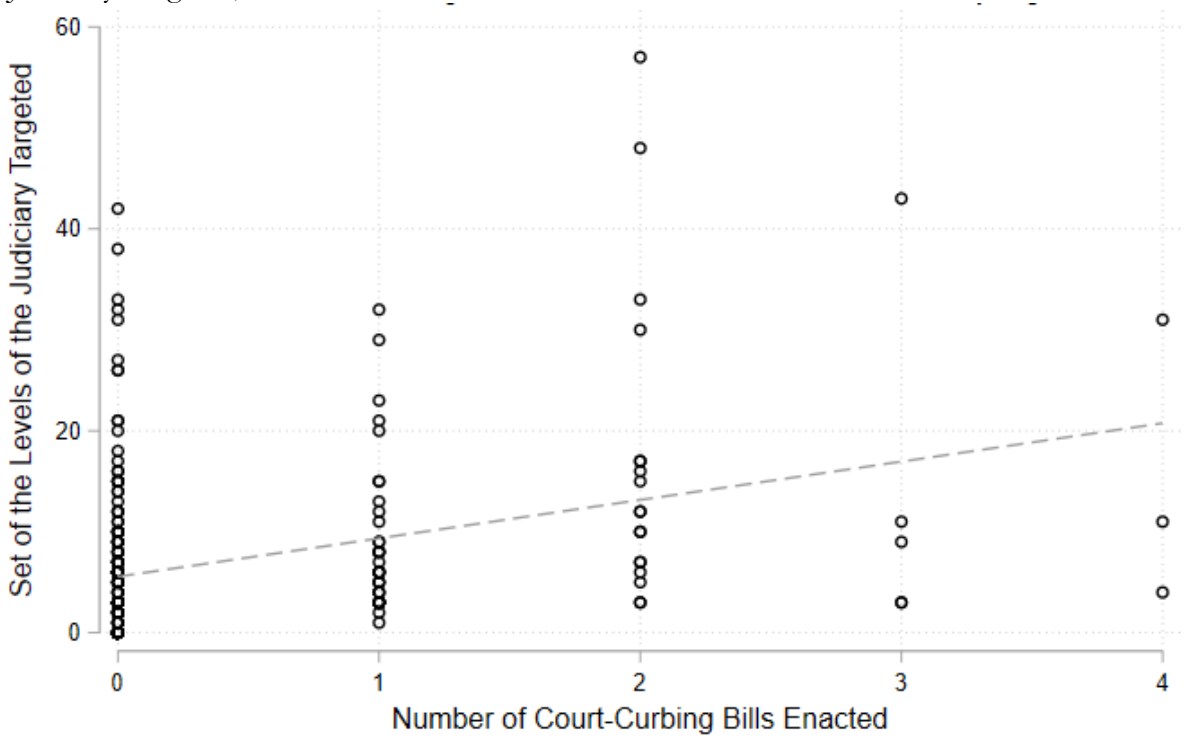
Appendix Figure A7. Number of Court-Curbing Bills Passed by Committee and Set of the Levels of the Judiciary Targeted, 2014-2018



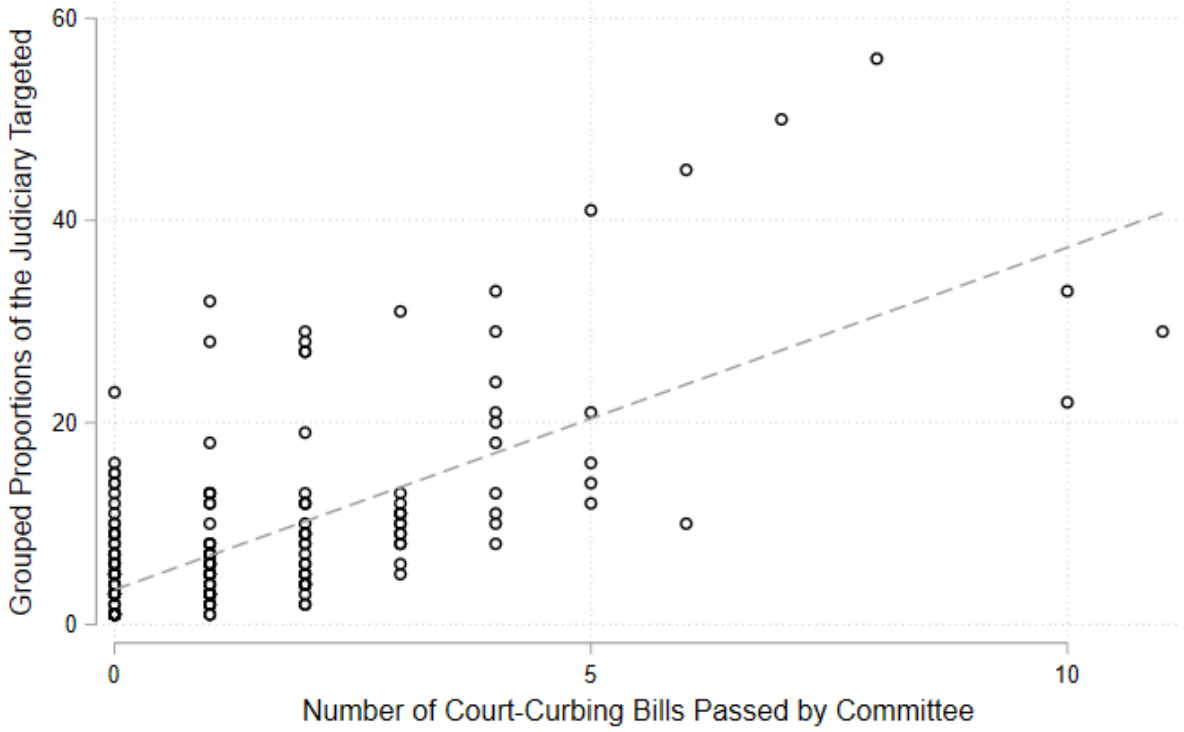
Appendix Figure A8. Number of Court-Curbing Bills Passed by Legislature and Set of the Levels of the Judiciary Targeted, 2014-2018



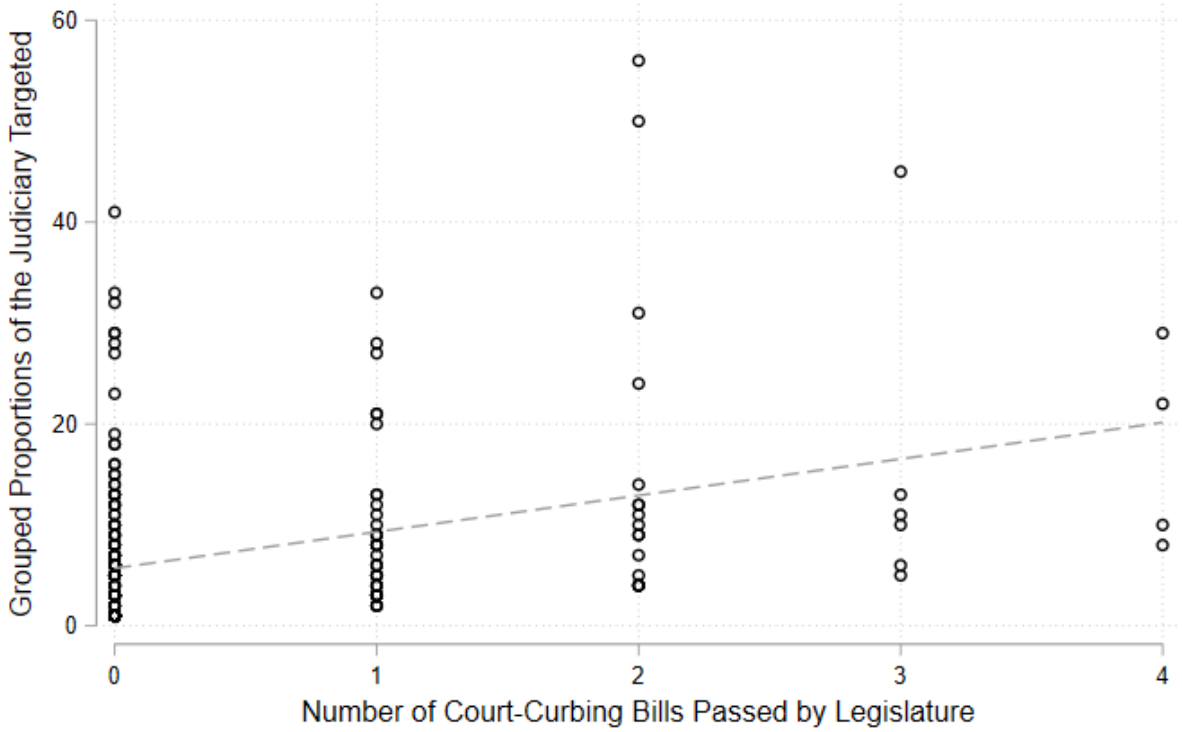
Appendix Figure A9. Number of Court-Curbing Bills Enacted and Set of the Levels of the Judiciary Targeted, 2014-2018



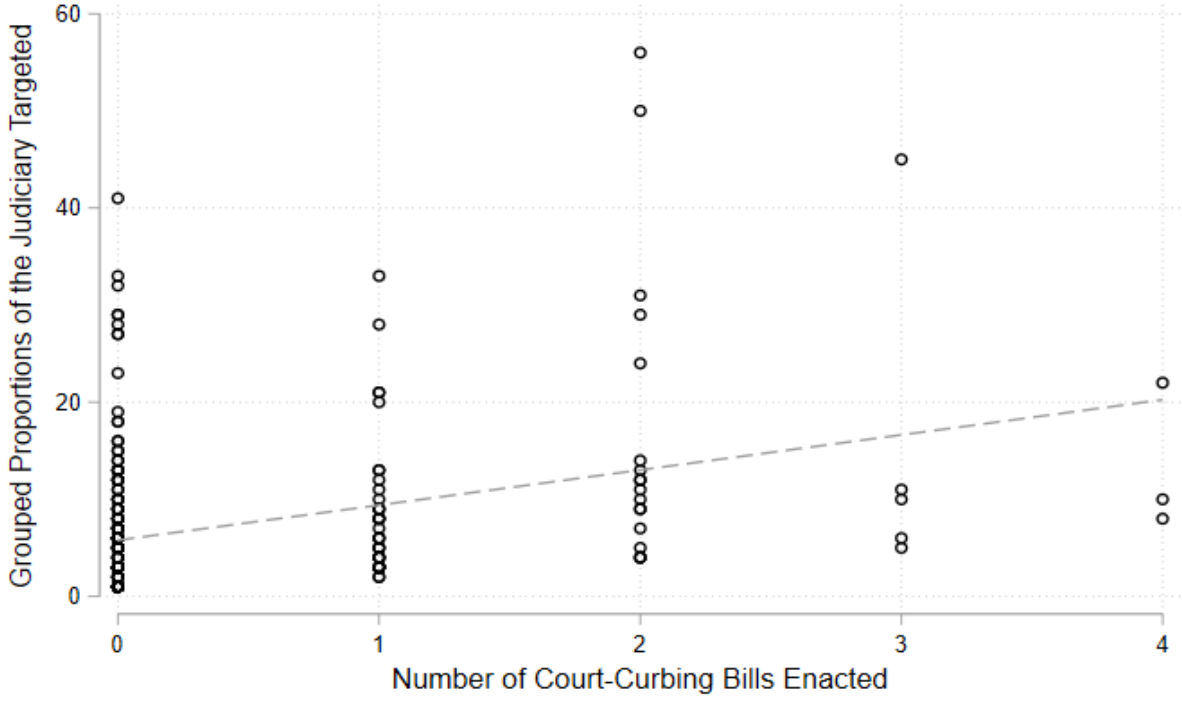
Appendix Figure A10. Number of Court-Curbing Bills Passed by Committee and Grouped Proportions of the Judiciary Targeted, 2014-2018



Appendix Figure A11. Number of Court-Curbing Bills Passed by Legislature and Grouped Proportions of the Judiciary Targeted, 2014-2018



Appendix Figure A12. Number of Court-Curbing Bills Enacted and Grouped Proportions of the Judiciary Targeted, 2014-2018



Appendix Part B. National-Level Focus of Court Curbing

The United States court-curbing literature is dominated by national level studies, which have measured court curbing across much of United States history (see Clark 2011, Nagel 1965). From these studies, we see that members of Congress (MOC) propose court-curbing bills with relatively low frequency. For example, Nagel (1965) identified 165 court-curbing bills introduced from 1789-1957, for an average of just under one court-curbing bill proposed per year (p. 926). Clark (2009, 2011) expands the definition of what constitutes a court-curbing proposal beyond Nagel (1965) by including proposed constitutional amendments and resolutions by members of Congress.[I] This expansion in the type of proposals included increases the average number of court-curbing bills per year but it still remains relatively uncommon, averaging less than 10 proposals in any given year with a few notable exceptions in 1910, 1937, and the mid-1960s (Clark 2009).

This infrequency in occurrence does not mean court curbing is an insignificant factor in United States politics, nor does it mean we should not study it. Court curbing at the national level does influence judicial decision-making and, therefore, the resulting case law and policy (Clark 2009, Clark 2011, Mark and Zilis 2019). For instance, Clark (2009, 2011) demonstrates that court curbing influences the use of judicial review in the United States. Judicial review is the ability of a court to declare a legislative or executive act in violation of the Constitution, rendering that act void. Judicial review is an essential power of appellate courts in the United States and around the world as a check on the other branches of government (Hamilton 1788). When legislatures (e.g., Congress) increase court-curbing activity, courts (e.g., the Supreme Court of the United States) are less likely to invalidate laws than they might have otherwise (Clark 2009, 2011).

Langer (2002) argues that judiciaries do respond to retaliation (or threats of retaliation) from the legislatures at the state level as well (for examples, see pp. 35-39). In addition to the use of judicial review, court curbing can influence the individual votes of justices in non-judicial review cases as well, specifically influencing the Chief Justice and the justice at the ideological median (Mark and Zilis 2019). All this demonstrates that court curbing can be influential in judicial decision-making and policy-making.

Focusing at the national level offers scholars of court curbing plenty of reliable, accessible data on bills, the characteristics of proposing legislators, and broader inter-branch dynamics.

Clark (2009) used congressional journals of bills, the *Digest of Public General Bills and Resolutions*,[II] and the online THOMAS search engine[III] – two comprehensive clearinghouses of congressional bills, including court-curbing bills (p. 978). Others, like Moyer and Key (2018), utilized the *Congressional Record*, which not only offers data on each bill but also the "chamber, sponsor, sponsor's state and party, committee, and co-sponsors" for court-curbing bills introduced in Congress from 1955-2011 (p. 163). Attempting to find this type of information at the state level on any systematic basis is possible. Unfortunately, it is subject to the peculiarities of each state in how they report and store such information, which can create challenges for the data-collection process.

There are a number of drawbacks to focusing on court curbing at the national level, which this project aims to address. First, national-level court-curbing studies have explored the relationship between Congress and the Supreme Court, two institutions that have changed relatively little over the past two and a quarter centuries. Meanwhile, state-level court-curbing studies (for example, see Blackley 2019, Catalano 2022, Hack 2022, Leonard 2016, and Leonard 2022) benefit from the institutional variation in state judiciaries and legislatures. State courts act as diverse laboratories in the American judicial system. The variation in institutional and contextual factors offers an analytical advantage, with plenty of variance offering opportunities to test many important hypotheses (Brace and Hall 2000, Brace, Hall, and Langer 2001). For instance, differences in judicial selection and retention processes alter the inter-branch relationships between the judiciary and legislature (or executive) in a state. Deep exploration of how judicial selection conditions these relationships is extremely difficult at the national level due to a lack of variation in selection and retention mechanisms.

Lower courts play a meaningful role in state judiciaries as well, even if they do not possess the same level of impact in the policy-making process as courts of last resort. Intermediate appellate courts review cases appealed to them by lower courts; however, cases decided by intermediate appellate courts can be appealed to higher appellate courts, like a court of last resort. Not all states have an intermediate appellate court. For those that do, the intermediate appellate court sets binding precedent that lower courts (typically general jurisdiction trial court and limited jurisdiction trial court) must follow. However, those same intermediate appellate courts are bound to precedent established by higher level state courts, like courts of last resort. In virtually every state with an intermediate appellate court, state courts of last resort have a discretionary docket with the ability to decide whether or not to consider a case being appealed This often makes intermediate appellate courts the de facto court of last resort for most appeal if they are not taken up by a higher court, as is the case in the federal judiciary (Martinek 2009).

[I] Resolutions are distinct from legislative bills in that resolutions are not enacted into laws. Instead, resolutions tend to be expressions of the "sentiments" of a legislative chamber (or both).
[II] The *Digest of Public General Bills and Resolutions* is a brief summary of public bills and resolutions proposed in the United States Congress and published by the Library of Congress and Congressional Research Service.
[III] The online THOMAS (The House [of Representatives] Open Multimedia Access System) was the first online database for legislative information from the United States Congress. It is no longer in operation, having been replaced by Congress.gov in 2016.

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