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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.

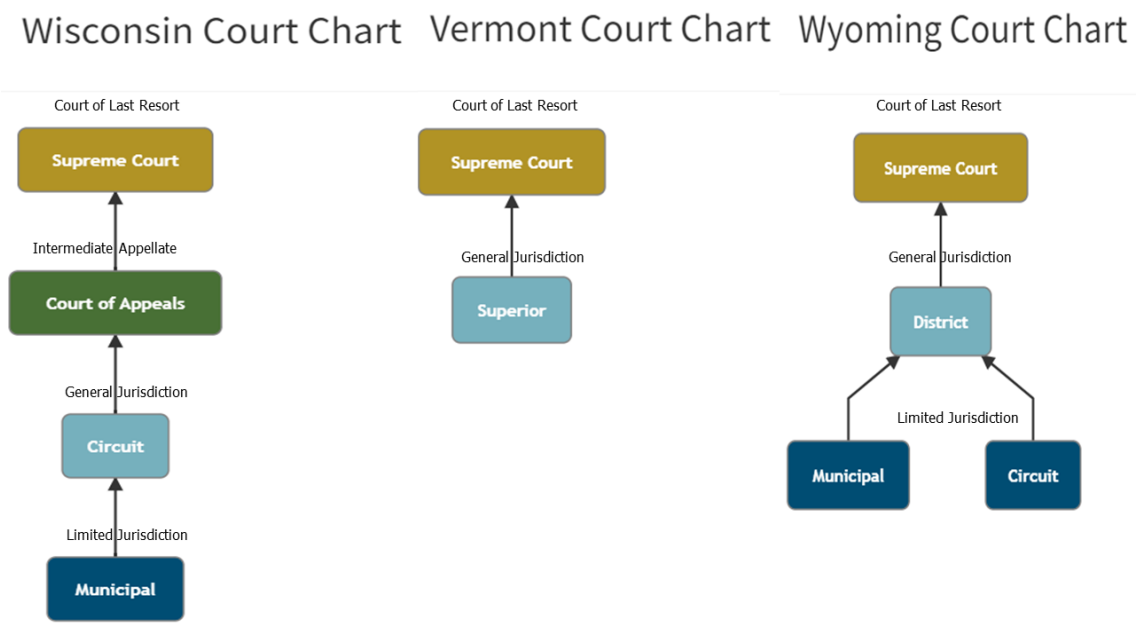

Figure 1. Types of Courts Constituting State Judiciaries

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.

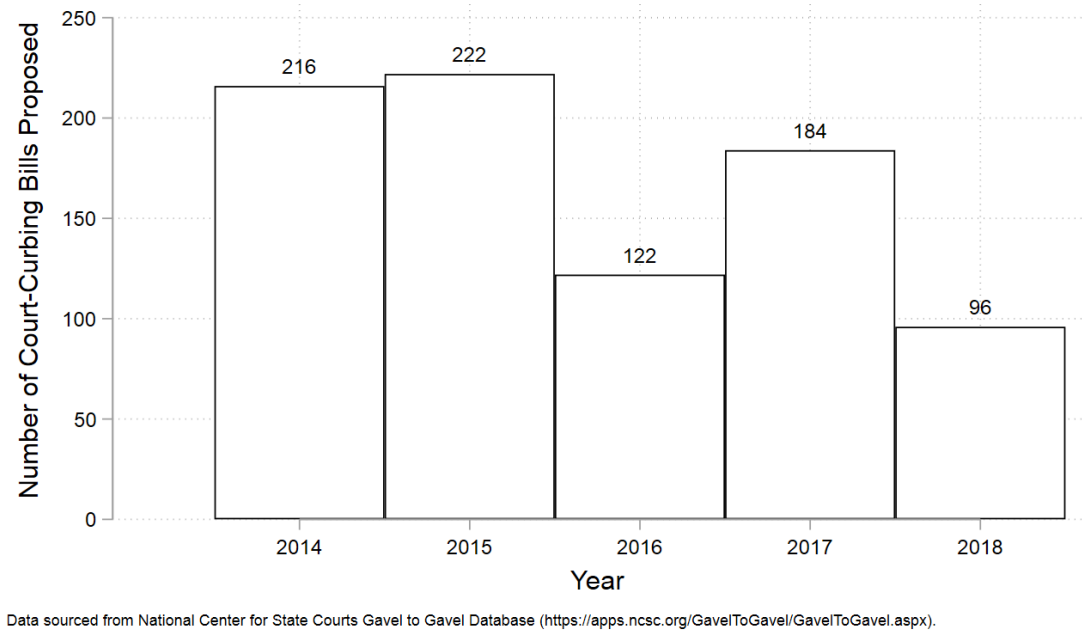

Figure 2. Number of Court-Curbing Bills Proposed by Year

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.

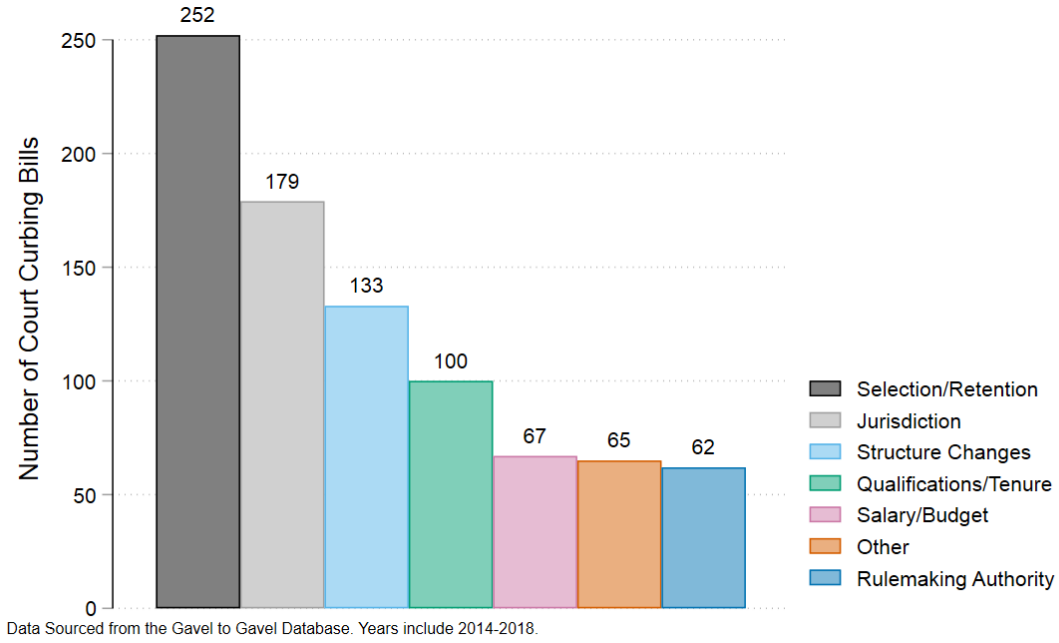

Figure 3. Number of Bills by Type of Court-Curbing Legislation, 2014-2018

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).

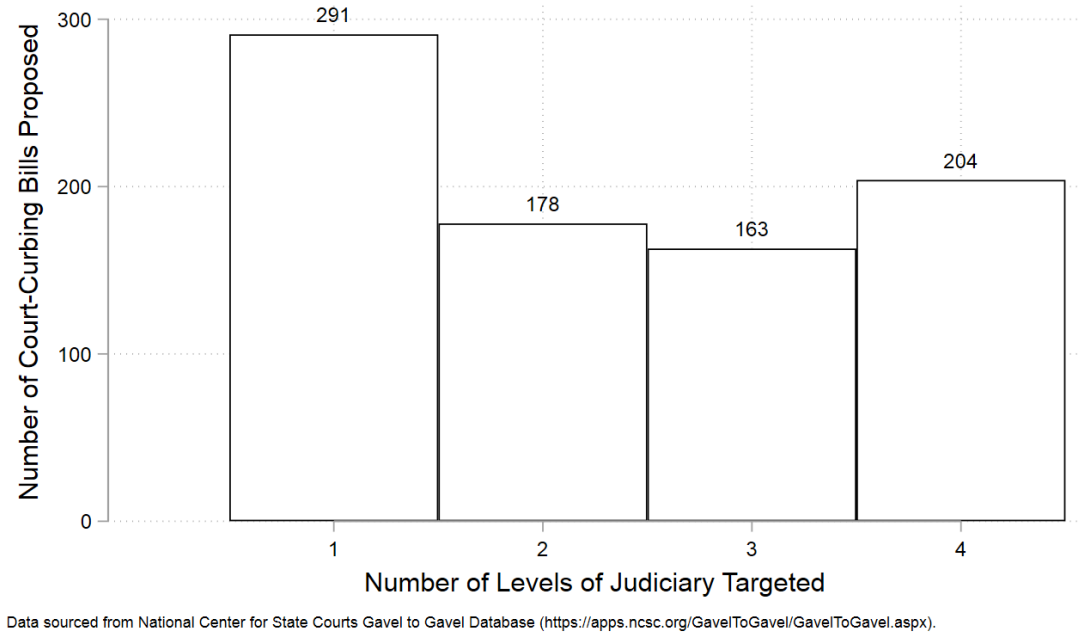

Figure 4. Number of Proposed Court-Curbing Bills based on Number of Levels of Judiciary Targeted, 2014-2018

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.

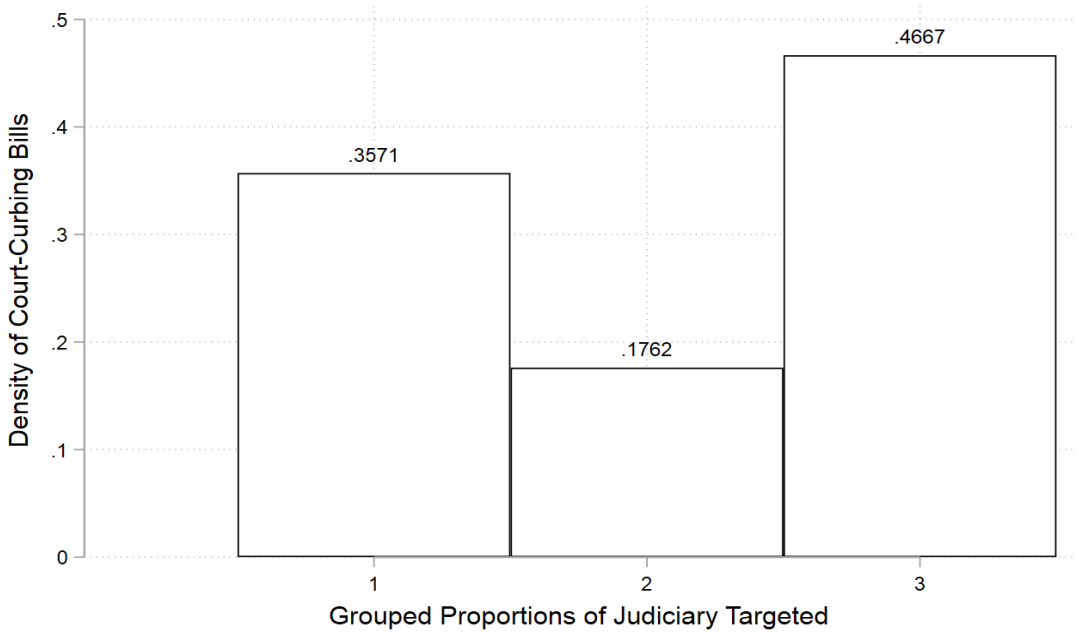

Figure 5. Grouped Proportions of Judiciary Targeted by Court-Curbing Bills, 2014-2018

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.

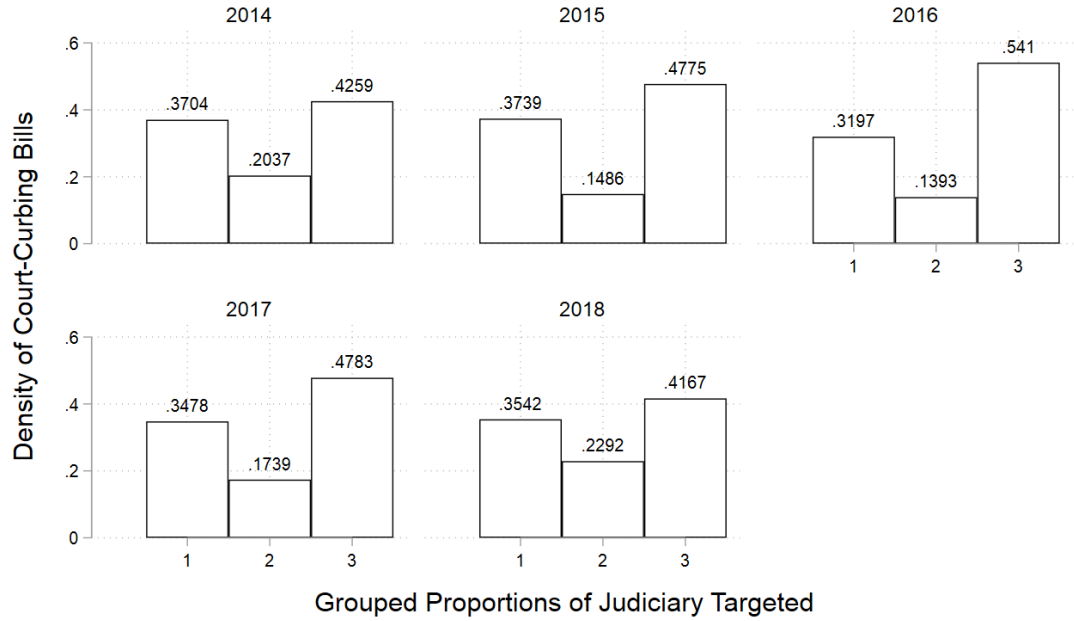

Figure 7. Grouped Proportions of Judiciary Targeted by Court-Curbing Bills by Year, 2014-2018

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.

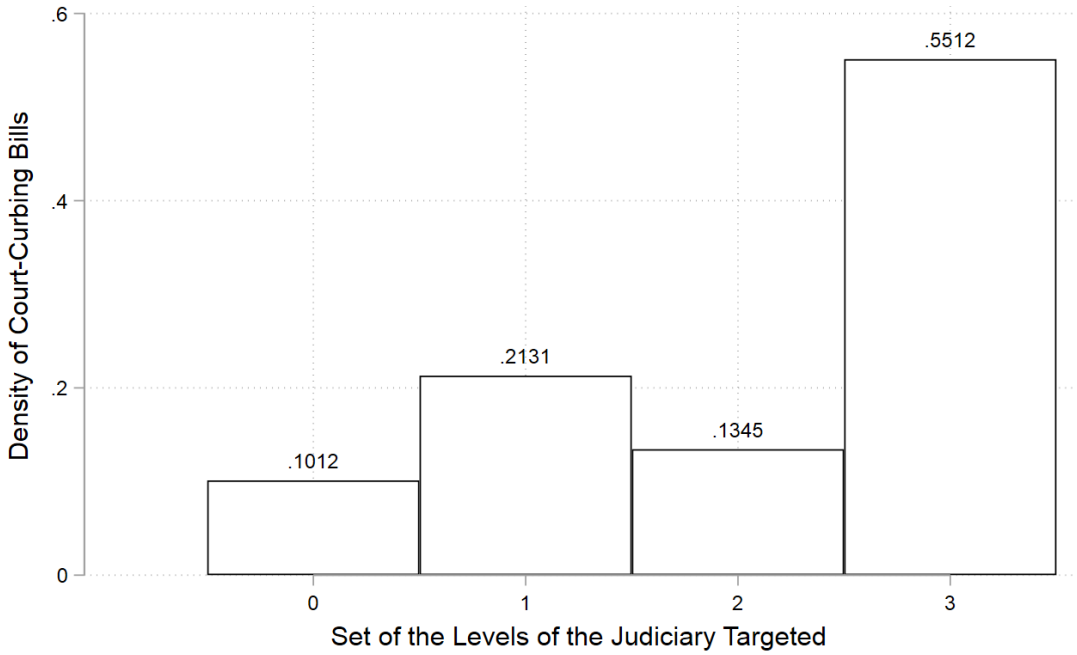

Figure 8. Set of the Levels of the Judiciary Targeted by Court-Curbing Bills, 2014-2018

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).

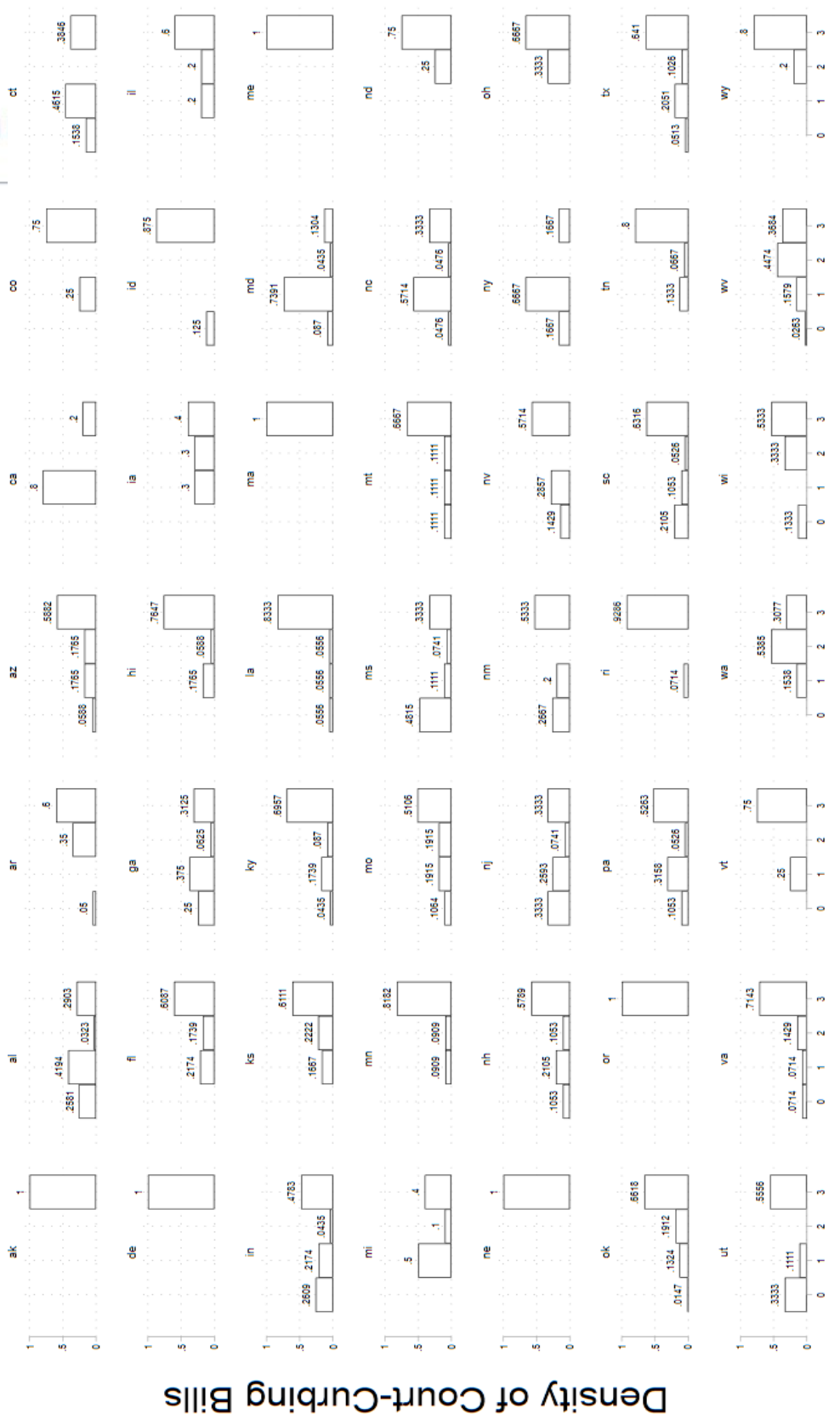

Figure 9. Set of the Levels of the Judiciary Targeted by Court-Curbing Bills by State, 2014-2018

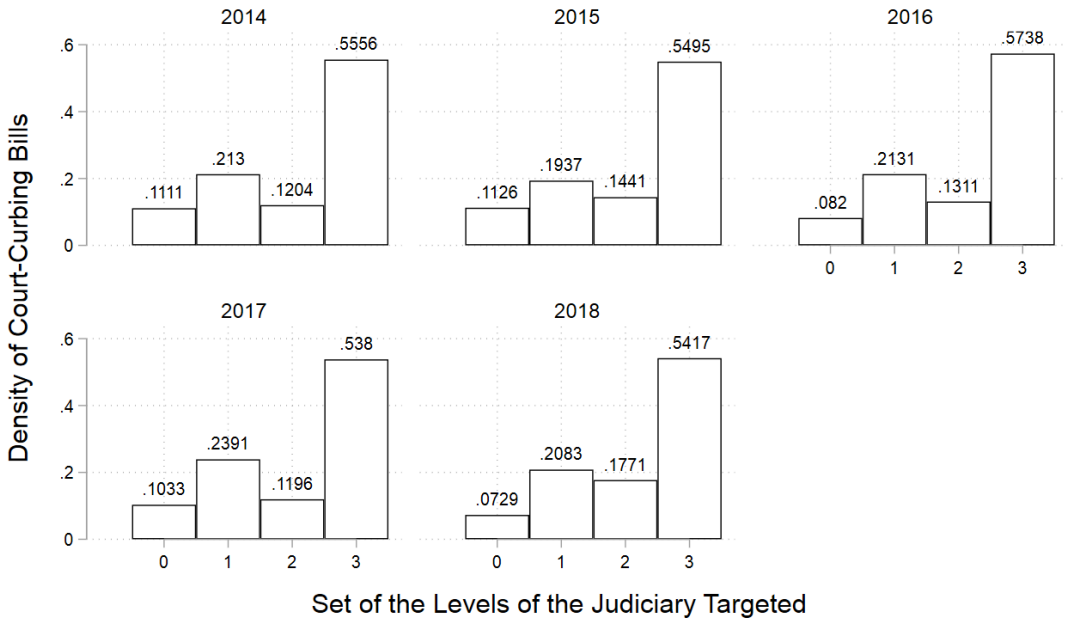

Figure 10. Set of the Levels of the Judiciary Targeted by Court-Curbing Bills by Year, 2014-2018

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

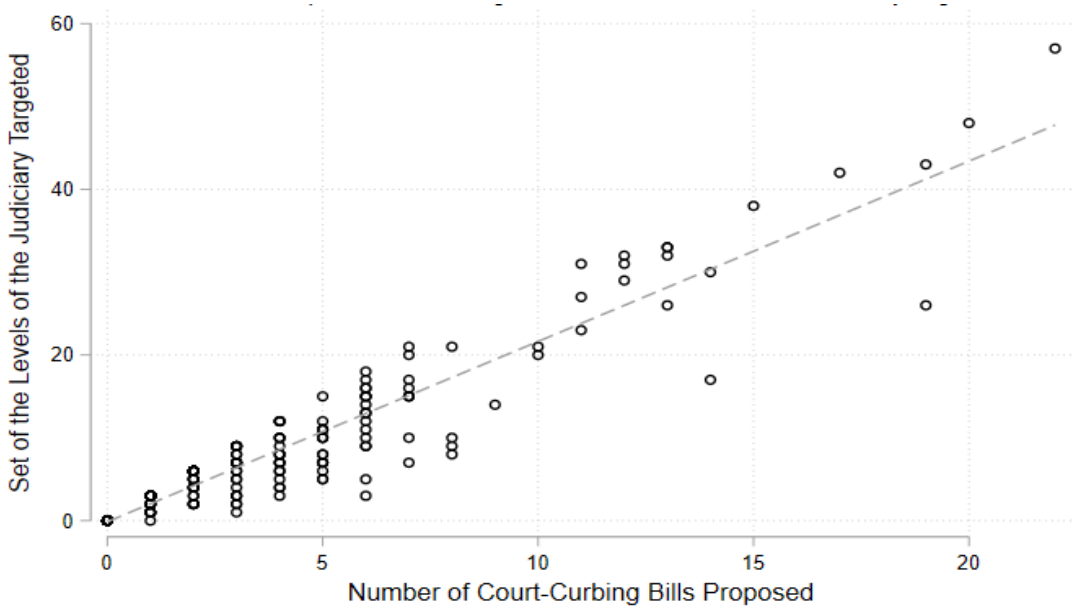

Figure 11. Number of Proposed Court-Curbing Bills and Set of the Levels of the Judiciary Targeted, 2014-2018

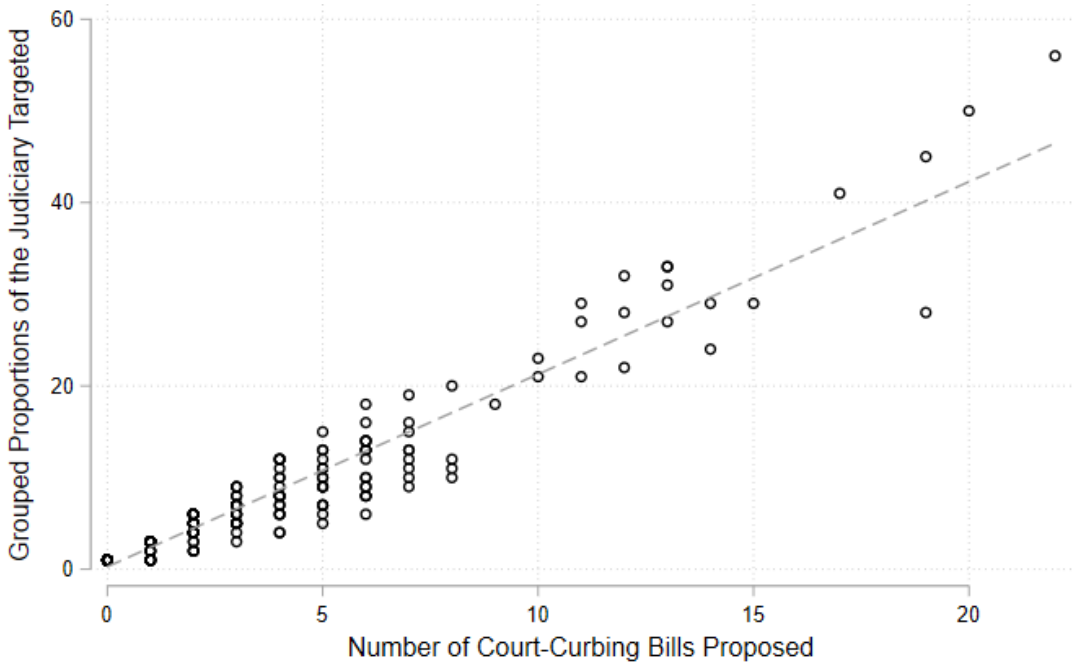

Figure 12. Number of Court-Curbing Bills Proposed and Grouped Proportions of the Judiciary Targeted, 2014-2018

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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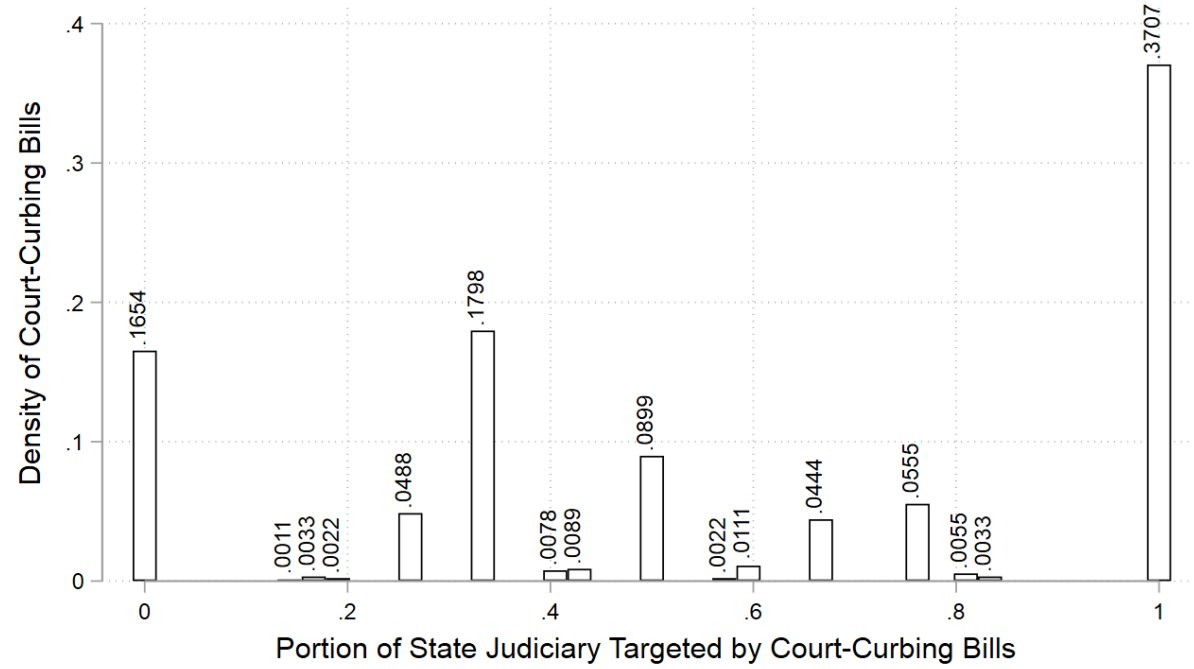
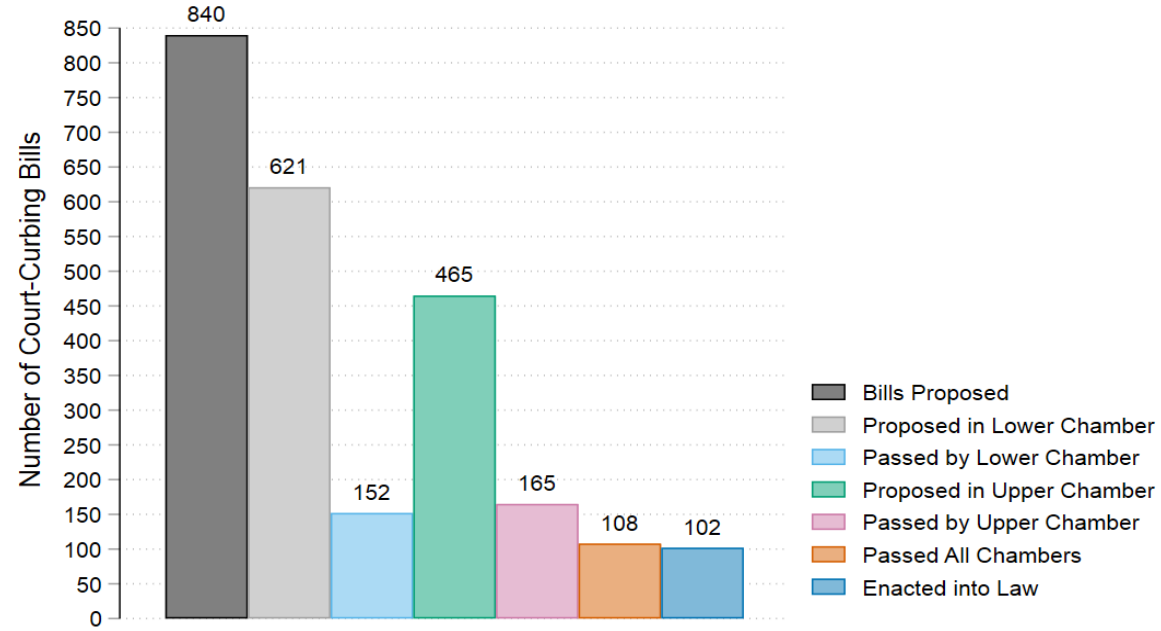
Appendix for Measuring Court Curbing

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



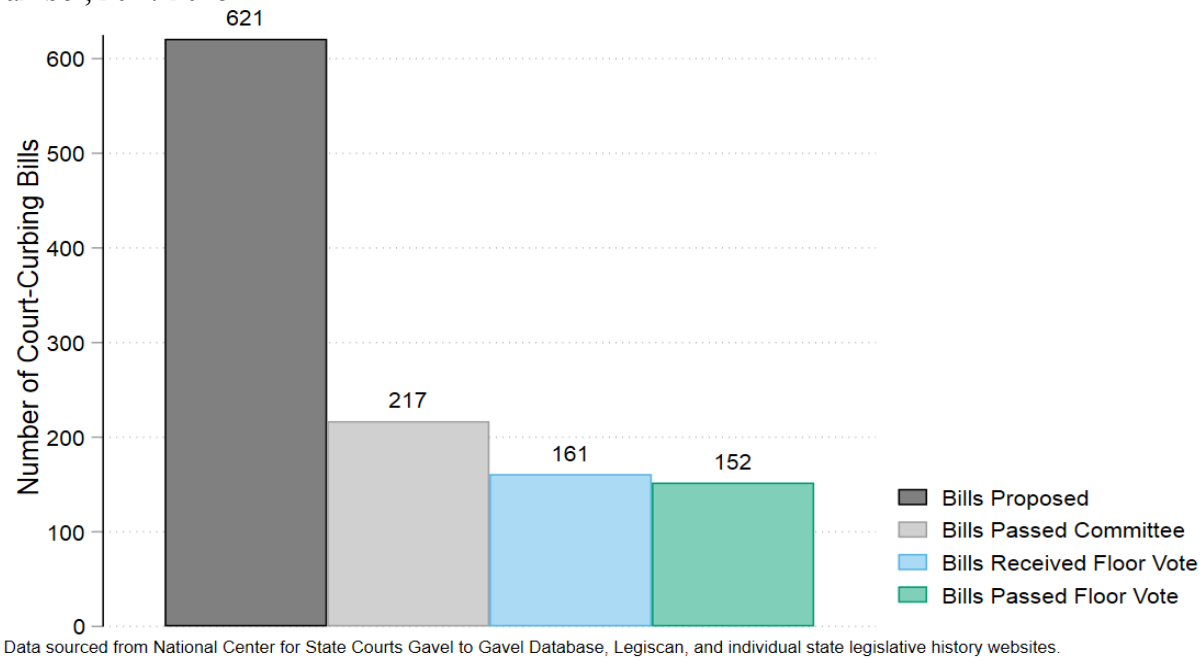
This measure is constructed based on the total number of courts of last resort + intermediate appellate courts + general jurisdiction trial courts. Data sourced from National Center for State Courts Gavel to Gavel Database.

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



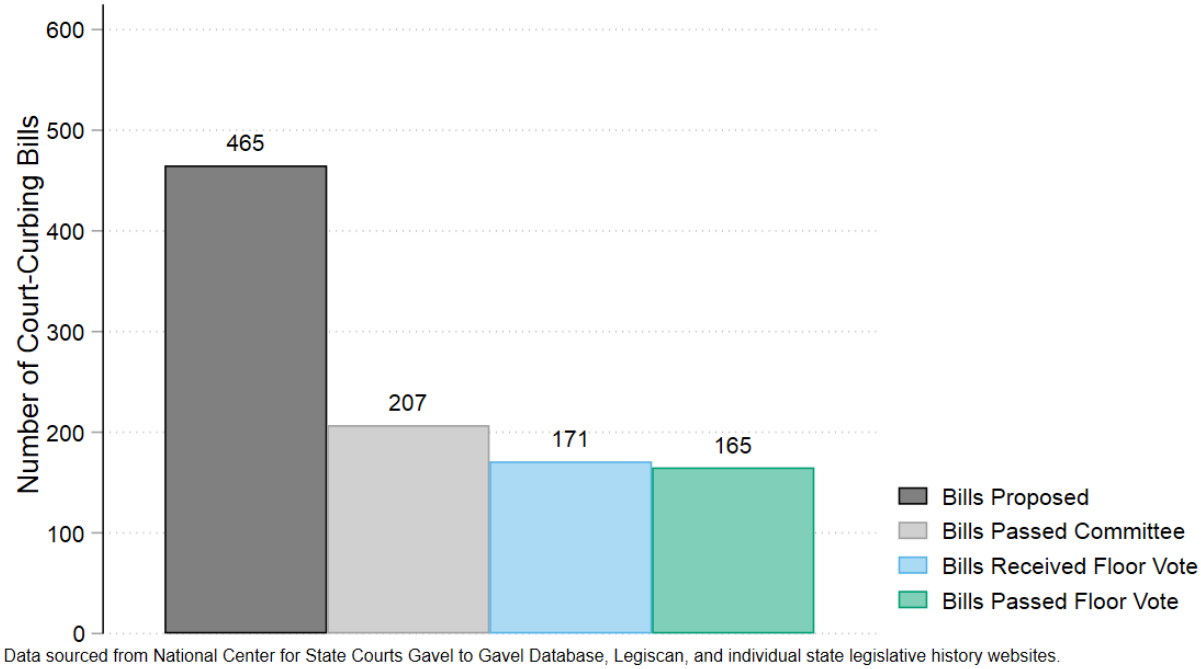
Data sourced from National Center for State Courts Gavel to Gavel Database, Legiscan, and individual state legislative history websites.

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



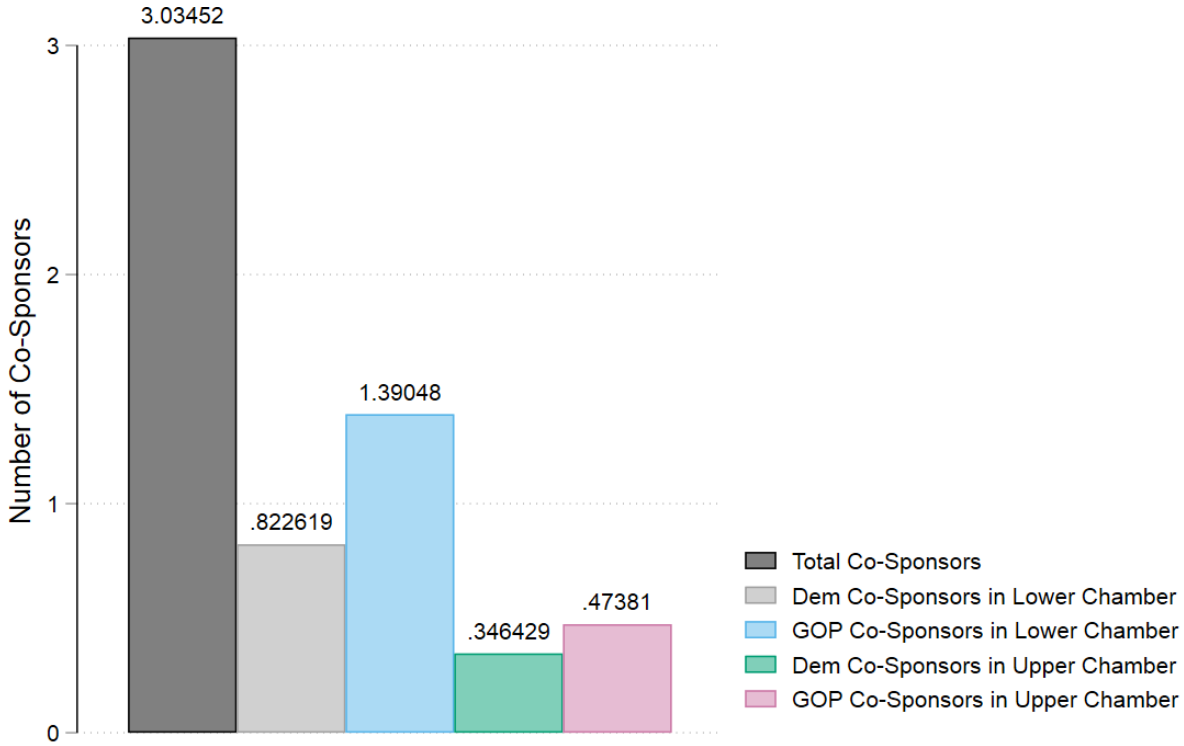
Data sourced from National Center for State Courts Gavel to Gavel Database, Legiscan, and individual state legislative history websites.

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

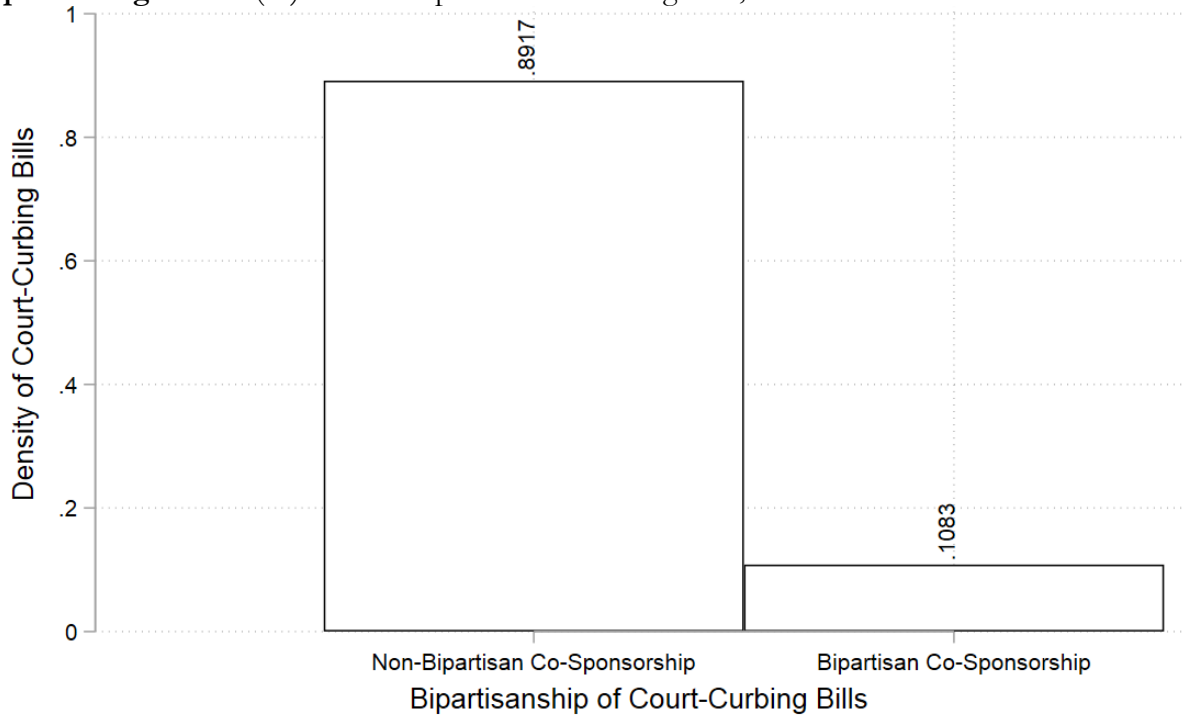


Data sourced from National Center for State Courts Gavel to Gavel Database, Legiscan, and individual state legislative history websites.

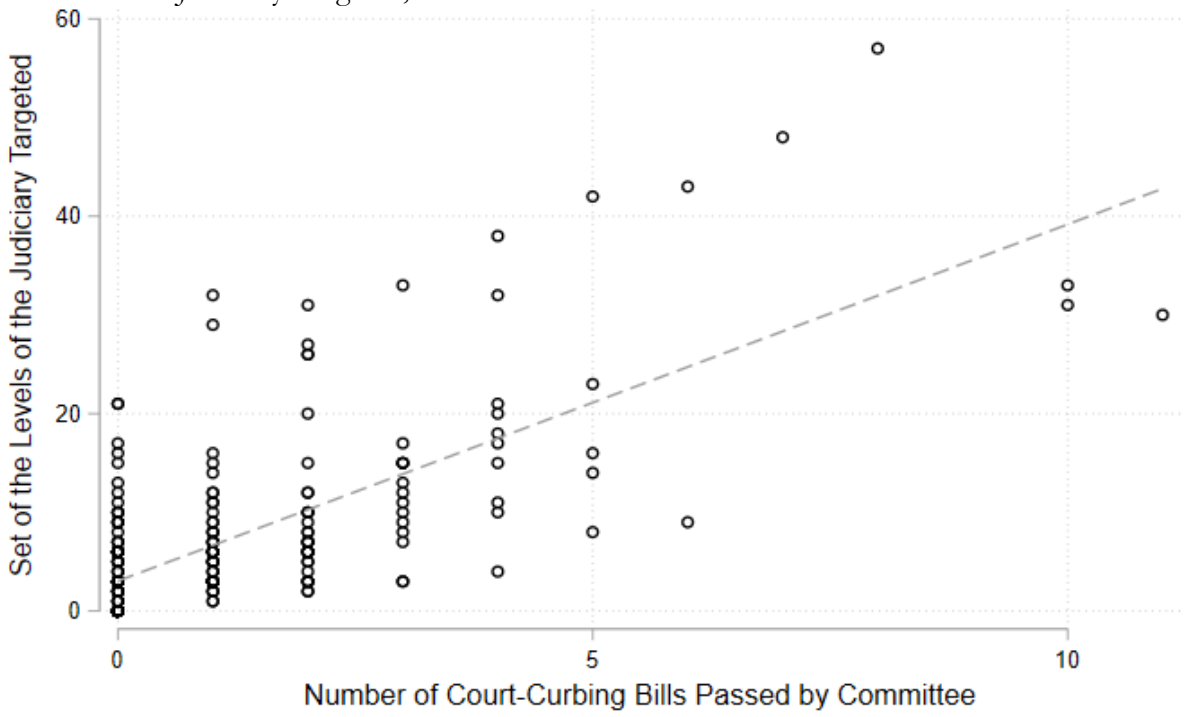
Appendix Figure A5. Mean Number of Co-Sponsors of Court-Curbing Bills, 2014-2018



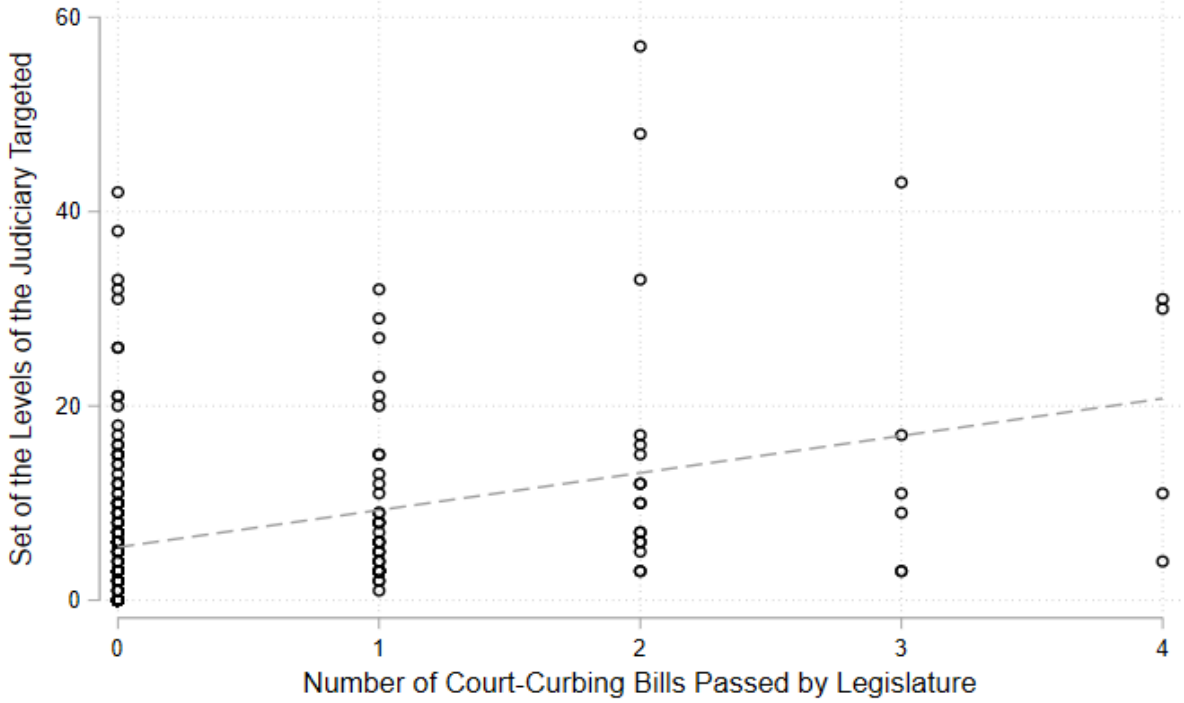
Appendix Figure A6. (Bi)Partisanship of Court-Curbing Bills, 2014-2018



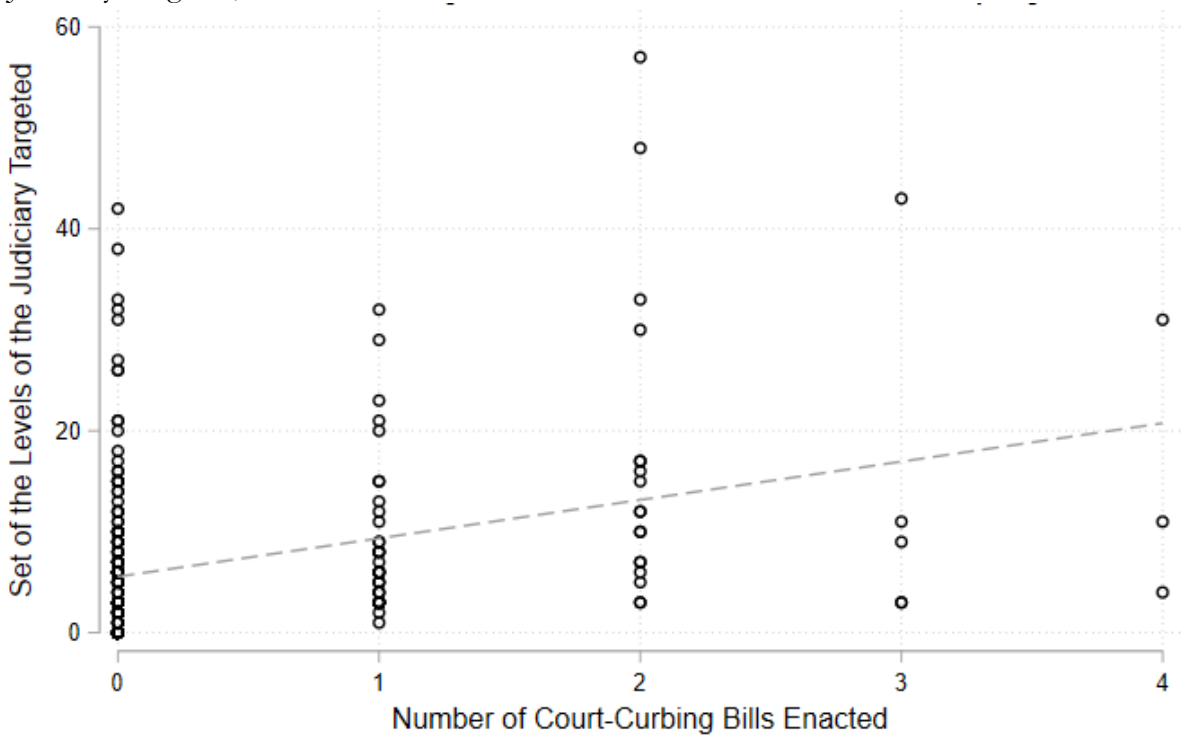
Appendix Figure A7. Number of Court-Curbing Bills Passed by Committee and Set of the Levels of the Judiciary Targeted, 2014-2018



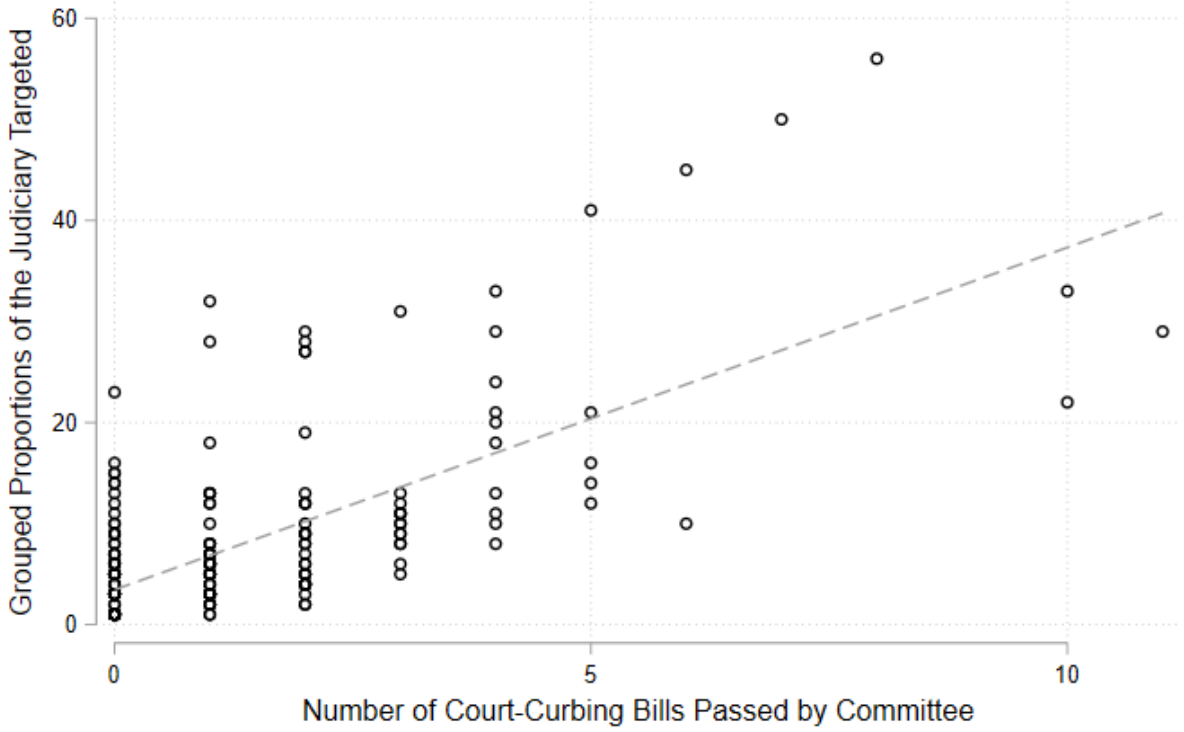
Appendix Figure A8. Number of Court-Curbing Bills Passed by Legislature and Set of the Levels of the Judiciary Targeted, 2014-2018



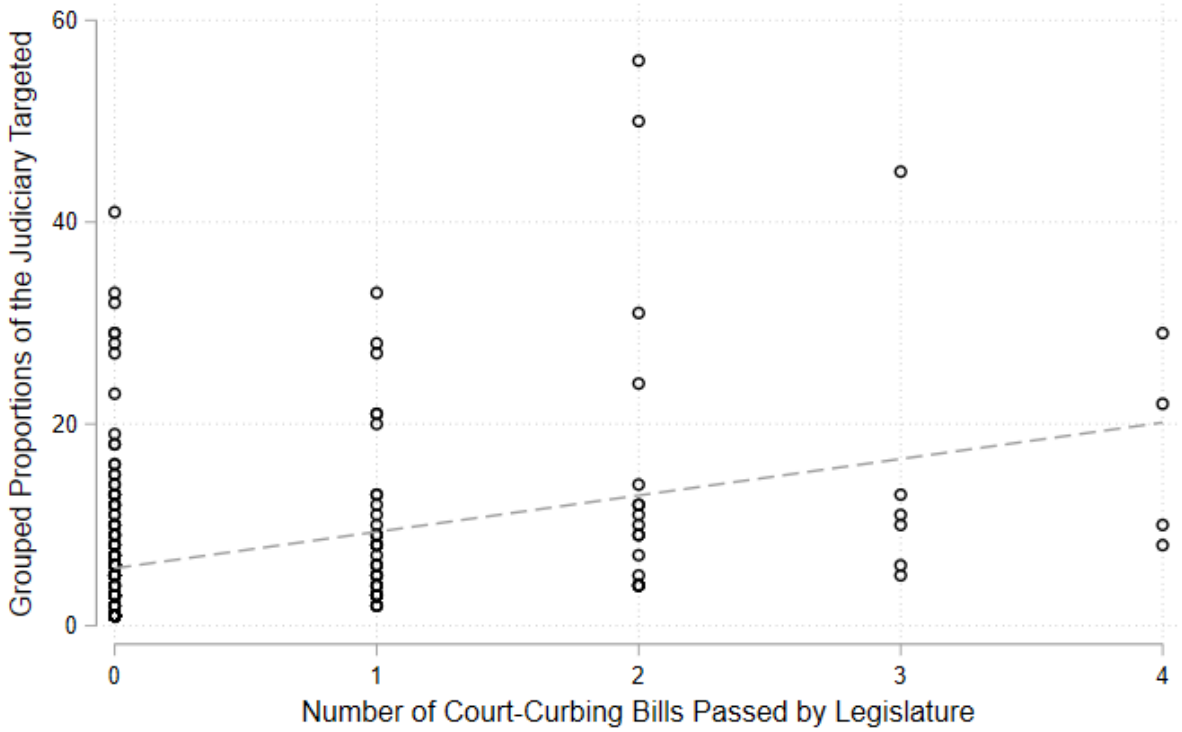
Appendix Figure A9. Number of Court-Curbing Bills Enacted and Set of the Levels of the Judiciary Targeted, 2014-2018



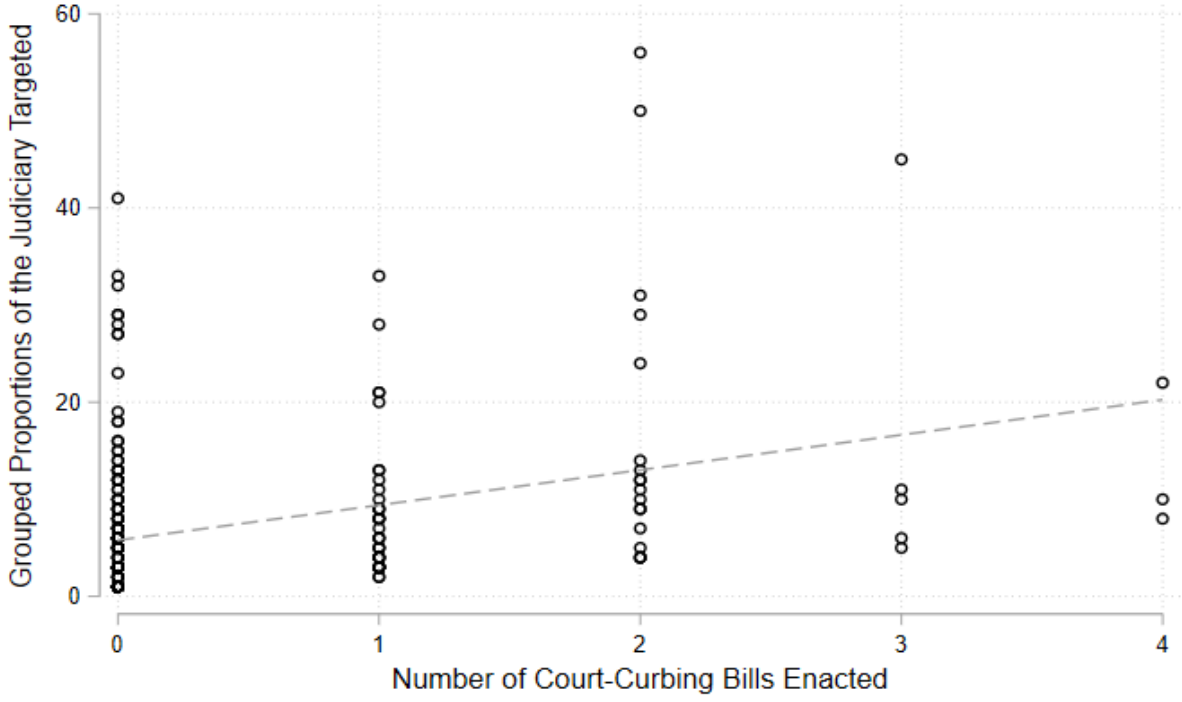
Appendix Figure A10. Number of Court-Curbing Bills Passed by Committee and Grouped Proportions of the Judiciary Targeted, 2014-2018



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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