2022

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Meghan Leonard
Illinois State University, mleonar@ilstu.edu

This is the accepted manuscript of an article published in *Justice System Journal* 43, no. 4 (2022): 486-502. https://doi.org/10.1080/0098261X.2022.2131485.

State Supreme Court Responsiveness to Court Curbing: Examining the use of Judicial Review

Meghan E. Leonard
Associate Professor
Department of Politics and Government
Illinois State University
mleonar@ilstu.edu

Abstract: State legislatures introduce court-curbing legislation as they threaten to restrict the independence of state high courts. While scholars have examined when this legislation is introduced and what drives the introduction, we know little about how state supreme courts react to this legislation. In this paper I begin the examination into how state courts react to court-curbing legislation by looking to the court's exercise of its judicial review power. I theorize that state supreme courts are less likely to invoke their power of judicial review when facing increased court-curbing legislation because judicial review is the most direct form of communication between the branches. I also argue communication is necessarily conditioned by the methods of selection and retention in the states. Examining narrow and broad court curbing, I find that neither type of introduction affects the use of judicial review by the state supreme courts and that, in line with previous scholarship, courts are using legislative ideology as an informational signal in this interbranch interaction.

Keywords: state supreme courts; state legislatures; institutional interactions; judicial decision-making

In March 2014, the Kansas Supreme Court ruled that the state legislature's funding scheme for public schools was inadequate and unconstitutional.[1] That same year the high court struck down death sentences for two defendants in a very high-profile case in *State v Carr* (331 P.3d 544 (Kan. 2014)), and for a third defendant in *State v. Gleason* (299 Kan. 1127 (Kan. 2014)). These decisions, among others before and after (including a Kansas Court of Appeals decision striking a law restricting abortion access), received significant attention from the media, the public, and the state legislature. In response between 2013 and 2016 more than thirty court-curbing bills were introduced in the Republican-controlled Kansas state legislature. Though most did not pass, one bill would have lowered the mandatory judicial retirement age from 75 to 65. Another threatened to change the current retention elections, so judges would have to be reelected with 67% of the "yes" vote instead of just 50%. A third would restrict the court's ability to make any decision that would affect how the legislature distributes the budget – a direct response to the previous decisions on school funding. Finally, the Kansas legislature did pass a bill that would cut all funding for the judicial branch if the state supreme court overturned a law that took away the power of the state supreme court to choose chief judges in the lower courts.[2] In *Solomon v. Kansas* (2015) the Kansas Supreme Court struck that section of the law as unconstitutional, directly challenging the threat of the state legislature.[3]

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[1] Hanna, John. "Kansas Supreme Court says state is inadequately funding public schools, violating constitution." Star Tribune 7 March 2014. Accessed 17 June 2021. https://www.startribune.com/kansas-high-court-school-funding-unconstitutional/248952891/

[2] Cassens Weiss, Debra. "Kansas governor signs law cutting off court funding if courts strike down 2014 law" ABA Journal 8 June 2015. Accessed 3 January 2020. http://www.abajournal.com/news/article/kansas_governor_signs_law_cutting_off_court_funding_if_courts_strike_down_2

[3] See "*Solomon v. Kansas*" https://www.brennancenter.org/our-work/court-cases/solomon-v-kansas

Though the funding for the judiciary was never cut, the battle between the institutions continued. The legislature introduced a constitutional amendment to take away the power of the court to make decisions in school funding cases. They introduced other legislation to allow for the recall of judges and to change the method of selection to either partisan elections or gubernatorial appointment, away from merit selection. If this were the U.S. Supreme Court, the literature suggests the Court would adjust their decision-making in the face of these increasing court-curbing introductions by limiting their use of judicial review as they seek to protect their legitimacy (e.g. Clark 2009; 2011). Yet, the justices on the Kansas Supreme Court seemingly ignored the legislature's threat and did not change how they decided future school funding cases.[4] In 2018 the court again struck down the school funding scheme as unconstitutional. The next year, the Kansas Supreme Court handed down a sweeping abortion decision, striking another law and ruling that the state constitution protects abortion rights.[5] Tensions were somewhat eased by the election of a Democratic governor in 2018 ending a period of unified Republican control. If this was an effort by the legislature and then-Governor (Brownback) in Kansas to use court-curbing threats to change the court's behavior, it failed. But does it ever succeed? In this paper, I examine how state supreme courts respond to this court-curbing legislation. I ask if court-curbing legislation can change the behavior of state supreme court justices by examining their use of judicial review. If these signals of

[4] See Lefler, Dion, Suzanne Perez Tobias, Hunter Woodall, and Katy Bergen. "Kansas school funding still inadequate, Supreme Court says" *The Wichita Eagle*. 25 June 2018. https://bit.ly/2OZKHW0 and Shorman, Jonathan. "Kansas conservatives renew push for a constitutional amendment on schools after ruling" *The Wichita Eagle*. 26 June 2018. https://bit.ly/2PyUJyj

[5] Hanna, John. "Kansas Court bolsters abortion rights, blocks ban" Associated Press. 26 April 2019. Accessed 17 June 2021. https://apnews.com/article/3f479b218a6140719e1694fcfcdb8036

court-curbing affect the decision-making of the court, then even without becoming law, the power of court curbing is clear.

While scholars have examined the introduction of court-curbing legislation, no research to date has studied the state high courts' reaction to this legislation. In this paper I ask if the court responds to this legislation by giving in to the legislature. I examine judicial review not because it is the only way we might observe state court reactions to court curbing (in fact there are numerous ways courts and individual justices might react); but I argue we should start with an examination of judicial review because we know from previous work it is the most direct, clear manner of communication between the branches as the court decides the fate of legislation (see Langer 2002). It is also where evidence was found of judicial responsiveness to court curbing at the federal level (e.g. Clark 2009). Considering the unique institutional rules and political conditions that are the hallmark of state supreme courts I use an original dataset of all court-curbing bills introduced by state legislatures from 2008 through 2015 as well as all constitutional decisions made a by all state supreme courts during this same time period to determine if, when, and how state courts react to court curbing.

Court-Legislative Relations in the States and Judicial Review

Recent research has increased our understanding of court-curbing legislation in the states, though this work focuses on the introduction of such legislation. A series of articles shows that state legislatures introduce court curbing when they are ideologically distant from the court (Leonard 2016); when judges strike down more legislation (Hack 2021); and when the members are electorally safe (Blackley 2019). Trends in who introduces court-curbing legislation are similar across the literature, this legislation is introduced by Republican legislators, who generally are not in leadership positions and are less likely to be on the judiciary committee (see Author Identified 2022). When

court-curbing legislation is introduced by members of the judiciary committee or leadership it moves further through the legislative process (Author Identified 2022). How state courts react to this legislation is yet to be examined systematically. There are multiple audiences for this legislation; constituents as a position-taking manner (as legislators are less poised to see the legislation become law) and the court as a communication mechanism about the state legislature's views toward the court.

Judicial review is the state high court's most clear and direct communication to the other branches of state government in the separation of powers game (Langer 2002; Leonard 2014; Bosworth 2017).[6] State supreme courts alter their use of judicial review in response to increased political pressure from the other branches, as well as decreased institutional power of the court (Langer 2002). The engagement in judicial review decisions is part of an interactive game between the branches, that includes both reaction and anticipation (Langer and Brace 2005). As Bosworth (2017) shows state legislatures respond to the use of judicial review in systematic ways, as they are willing to change or repeal statutes after a ruling of unconstitutionality. Indeed, they also respond by increasing the introduction of court curbing legislation (Hack 2021). The methods of selection have not been found to condition this relationship, however, as Leonard (2014) finds no difference in the use of judicial review by state courts based on the way the justices are selected and retained.

[6] Judicial review and court curbing are not the only forms of communication between the court and legislature. In a series of work, Douglas and Hartley (2001a, 2001b, 2003; Hartley and Douglas 2003) examine the independence of the judiciary via the budgetary process in the states. They find that judicial independence is threatened by this budgetary process as courts compete against the executive branch for funding and may be expected to raise revenues from the court system (Douglas and Hartley 2003).

Inherent in the examination of the state supreme court reacting to the state legislature is that this takes place within an iterative interaction between the institutions (Langer 2002; Langer and Brace 2005). State supreme courts are reacting to state legislatures who are reacting to state supreme courts. Both are also concurrently reacting to other forces (for example, several state-level court-curbing bills were reactions to federal court decisions such as those protecting same-sex marriage or the upholding of the Affordable Care Act) but doing so with direct communication between each branch. There may be no formal start point for the interaction. This presents both theoretical and methodological challenges as I try to parse out whether court curbing is causing the court to limit their use of judicial review. While court-curbing introductions may be a reaction to a decision by a state supreme court, the direction of the reaction is clear. Court-curbing bills are a distinct statement of legislative preferences against court. As such, reactions by the court in the future should be expected as a direct result of these introductions, even within the broader context of legislative-judicial interactions.[7]

If court curbing is influencing the decisions of state supreme courts, we should expect to see a reaction via the court's use of the judicial review power because this power is the most direct communication with the state legislature. Langer (2002) refers to judicial review as "intrusive and salient" (8) as she argues for the centrality of judicial review in the separation of powers game at the state level. I expect that court-curbing introductions will lead the state supreme court to limit the number of cases in which they review statutes and the likelihood they strike any laws in response to increased court curbing. But there are two factors that condition this interaction: the type of court-curbing bill and the methods of retention for the justices.

[7] Methodologically, this is dealt with by using time lags, where the court is reacting to court-curbing in the previous year as well as using an indicator of the change in the number of court curbing bills from the previous year.

Judicial Independence and Court Curbing

Court curbing at the federal level is directed at both the Supreme Court (see e.g. Nagel 1965; Rosenberg 1992; Clark 2011) and at lower federal courts (Moyer and Key 2018) and is used as communication, or a signal, from the legislature to the Court and constituents indicating disapproval and threatening the legitimacy of the institution. Mark and Zilis (2018a) find that federal judges are aware of these threats and consider the nature of the threat from court curbing and its ability to affect their institutional power. Though federal judges maintain a step of removal from the public opinion, the public plays an important role in this court-curbing process. Scholars have found that the public generally supports court curbing that serves their partisan beliefs (Bartels and Johnston 2020). The public are not "guardians of judicial independence" as previous research has suggested but are at least tolerant of attacks on the Supreme Court by political elites (see Bartels and Johnston 2020 and Clark 2011). In response to court curbing federal judges alter their behavior in some ways. Clark (2009; 2011) finds that the U. S. Supreme Court limits their use of judicial review in response to increased numbers of court-curbing introductions by Congress. In interviews, some federal court judges discuss altering how they write their opinions in response to these threats (Mark and Zilis 2018a).

Theories from the federal level may be helpful in starting to understand state-level court curbing, for example there would be significant reason to believe like their federal counterparts, state supreme courts are aware of the court-curbing legislation being introduced in their states as significant evidence shows the branches communicate through formal ways like state of the state judiciary addresses and informal ways such as via the media (Wilhelm et al 2020). The federal and state courts have a significantly different set of rules that determine their level of independence. The highly independent federal courts have far more power to lose from this type of legislation whereas state supreme courts already operate in a complex system of constrains from institutional rules and

political contexts (see e.g. Langer 2002). One issue with the study of court-curbing legislation is that not all these bills are the same or would have similar effects on the decision-making or independence of the justices on the state high court. Federal court justices themselves "indicated that institutional threats compelled them to adjust their behavior in a variety of ways" (Mark and Zilis 2018a). These judges were also clear about the difference in these independence-threating bills as opposed to those narrower bills that might change a single policy outcome. The nature of the legislation introduced is likely to effect if and how the court reacts to it. Court curbing should be separated into those bills that would have substantial independence-limiting effects on the court, and those bills that would be more narrowly-targeted. If judicial review is ultimately about the independence of the court, then it is likely the court would alter their use of judicial review in the face of court-curbing measures that would limit this independence. Given this, any examination of court curbing cannot treat all bills as equal.

Broad Court-Curbing and Responsiveness

To address this, I follow the Bartels and Johnston (2020) categorization of court curbing as broadly or narrowly targeted. Broadly targeted, or broad court-curbing bills, are "actions that reduce the Court's power and independence in a more general and enduring way, across all issue areas" (Bartels and Johnston 2020; 53). Examples from the states of broad court curbing include wholly changing the methods of selection and retention of the justices, removing the power of judicial review, impeaching a justice for an unpopular decision they made (rather than for impeachable offenses like being indicted), or decreasing the term of the justices. These broad-based attacks on the court are rare, making up only 23% of all court-curbing legislation introduced in this period.

While infrequent, the broad court-curbing bills are clear threats to judicial independence. Given this, I expect courts with all types of selection mechanisms to respond to these threats as they seek to maintain their position within the separation of powers. When the court's independence and

decision-making power is threatened, I expect the court to respond to this legislation by limiting their invocation of the judicial review power. Judicial review is the clearest signal from the court to the legislature and limiting the number of laws the court strikes will serve as the clearest response to this broadly targeted court-curbing. Therefore, I expect:

> H_1: *As the number of broad court-curbing bills in the previous year increases, the number of cases in which the court reviews a statute and the likelihood the court invalidates a statute should decrease*

Of course, it is not just the raw number of broadly targeted bills that might affect the court's decisions. There is a limit to what the static number of bills can signal to the court. Changes in the introduction of broadly targeted court-curbing legislation may serve as a stronger or clearer signal to the court. When justices observe an increase in the number of broadly targeted bills from the previous year, that would be a strong signal to the court that there has been a change in the legislatures' preferences. Therefore, I also expect:

> H_2: *As the change in the number of broad court-curbing bills (from the previous year) increases, the number of cases in which the court reviews a statute and the likelihood the court invalidates a statute should decrease*

Methods of Selection and State Supreme Court Responsiveness to Narrow Court-Curbing

The second type of court-curbing legislation as characterized by Bartels and Johnston (2020) is narrowly targeted. If broad court-curbing bills would fundamentally change the court as an institution, these narrow bills would make far smaller changes. As they describe it, narrowly targeted court curbing "involves actions designed to minimize the consequences of a small number of decisions… the goal is not to alter the Court in a fundamental way but to mitigate the negative implications of the Court's jurisprudence in an issue area" (2020; 53). Examples of this in the states include limiting the court's jurisdiction on school funding cases or punishing justices who would affirm federal same-sex marriage decisions. Other legislation might punish the justices for citing

foreign law in their opinion—there were 99 bills introduced during this time that would do just that. Most court-curbing introductions in the states (77%) fall into this category.[8]

When it comes to more narrow types of court-curbing bills I expect the reaction of the justices to be conditioned on the methods by which the justices are retained as these bills are more directly political and easier for the public to understand and respond to. While it is not only narrow bills that are easy to understand and respond to, by their nature they are limited to a single-issue area and simplified with a punishment in reaction to an unwanted decision by the court. They speak to the public about these salient issue areas (such as the Affordable Care Act, gun rights, LGBTQ rights, and foreign law). As an example, a flurry of same-sex marriage court-curbing bills were introduced in the states in response to the expansion of same-sex marriage rights via the federal courts. This legislation was set to punish judges for enforcing same-sex marriage, but they were also communicating clearly to the public the legislators' policy position. Justices who must face the public for some type of election mechanism have been shown to be responsive to the public in their decision-making (see e.g. Brace and Boyea 2008; Canes-Wrone, Clark, and Kelly 2014). Legislators use this court-curbing to position-take with the public about their displeasure with the court in a policy-specific way. I expect that the responsiveness of justices who face elections is conditioned by public opinion. I hypothesize that when the legislature and public are ideologically similar the court will take the threat of court-curbing introductions more seriously. In this case, legislators have more

[8] Interestingly, narrow court curbing may be a response to actions taken by the state courts or federal courts, as is the case with foreign law bans, or reactions to same-sex marriage or the Affordable Care Act decisions. I treat these bills the same as reactions to state court actions because they are written in a way to punish the state courts. For example, a law may say a state court justice can be impeached or lose their salary for upholding one of these federal court decisions. Given this, I believe the curbing (rather than the impetus for the legislation) will be more determinative of the state high court's actions.

to gain from the public when attacking the court, as they can rely on public opinion to reinforce the level of threat to the court. However, when the legislature and the public are ideologically distant, the court will be less responsive, because there is less for the legislature to gain from attacking the court and the court is protected by this ideological disagreement.

> H3: *In states where justices face contestable elections, as the number of narrow court curbing bills increases and the change in the number of narrow court-curbing bills (from the previous year) increases, the number of cases in which the court reviews a statute and likelihood the court invalidates a statute should decrease as the ideological distance between the legislature and public decreases*

Additionally, there are those state high courts where the justices retain their seats via retention elections. These elections pose an interesting theoretical test because while the justices do face the public, they rarely lose (Hall 2001). In 2010 three Iowa Supreme Court justices lost their bid for retention after participating in the court's decision in favor of same sex marriage. It is possible that the Iowa example was just a response to a well-advertised campaign against the justices; though it is also likely that campaigns such as that could be the new normal in some states. Similarly, the justices up for retention in Kansas faced increased scrutiny during the fight between the court and legislature. In 2016, five of the seven justices on the court faced a retention election, yet in this case all justices retained their seats, though four of the five received less than 56% of the vote.[9] [10] These kind of electoral attacks on the retention of judges tend to be rare and a result of significant political events, but they are led by political elites. While loses in retention elections are rare, court curbing does signify this hostility by the political elites. In the years surrounding these elections in Iowa and Kansas, both courts faced very high numbers of court-curbing legislation. Further, Canes-

[9] See, Cleek, Ashley. "State Judicial Elections Become Political Battlegrounds" National Public Radio. Accessed 1 January 2020. https://www.npr.org/2016/11/02/500351735/state-judicial-elections-become-political-battlegrounds

[10] In the 2010 retention election, all justices were retained with more than 60% of the vote. In the 2016 election, the retention support was down between 6 and 10 points.

Wrone, Clark, and Park (2012) find that judges in these states with retention elections are not insulated from public opinion any more than those justices in states with nonpartisan elections. As a result, I expect those justices on courts where they face retention elections to react as elected courts do and limit their use of judicial review conditioned on the ideological closeness of the public and the legislature.

> H4: *In states where justices face retention elections, as the number of narrow court curbing bills increases and the change in the number of narrow court-curbing bills (from the previous year) increases, the number of cases in which the court reviews a statute and likelihood the court invalidates a statute should decrease as the ideological distance between the legislature and public decreases*

Narrow court curbing is far more likely to be about position-taking for a constituent audience. Therefore, I expect courts where the justices who face reelection will be far more responsive to this type of curbing than those courts whose members are appointed and not reelected. For those justices who are appointed, I expect their reaction to court-curbing legislation will be based on their method of retention. I argue that appointed justices who serve for life will operate more like the federal courts – in focusing on the serious threats to their independence through broad court-curbing bills and tune out the 'noisy' narrowly tailored bills that have more of a position-taking for the public goal. These bills communicate information to the appointed courts, and many of these justices face the legislature for reappointment. If appointed courts were to react to narrow court curbing at all, it would be those justices who face reappointments as they seek to appease a legislature that may have the power to remove them from the bench.[11] Therefore, in states with reappointment methods:

> H5: *In states where justices face reappointment, as the change in the number of narrow court-curbing bills (from the previous year) increases, then number of cases in which the court reviews a statute and likelihood the court invalidates a statute should decrease*

[11] There may be interactive effects of reappointment and ideological distance between the court and legislature, but there are not enough observations in the data from the few states with appointment/reappointments to test this.

Data and Methods

To test these hypotheses, I need a measure of broad and narrow court curbing as well as a measure of the constitutional decisions by state supreme courts. I collected these data from all states for the years 2008-2015. Comparing the introduction of court-curbing bills to the decisions of the court poses a timing challenge as bills can be introduced at any time during the legislative session (which is different for each state within and across years) just as a state high court can release an opinion at any time during their term (which also varies across states and in comparison, to the legislative session). To account for this challenge, I measure each variable at the state-year level. I also lag the court curbing measure, so the model examines how the state court in Alabama in 2009 reacts to the introduction of court curbing legislation by the Alabama state legislature in 2008.[12]

Notably, scholars' examination of the interaction between state legislatures and state courts has often focused on the institutional-level and I continue that tradition here by examining court-level decisions rather than individual justice votes (see e.g. Langer 2002; Leonard 2014; Johnson 2014, 2015). In other words, I am surveying how the court as an institution reacts to the legislature as an institution – rather than the reactions of individual justices or state legislators. Although it is possible that individual justices react to court curbing legislation differently (see e.g. Mark and Zilis 2019) (and that this individual reaction is likely conditioned on their interest in keeping their seat on the bench), that is beyond the scope of this paper. Variables are measured at the state-year level unless otherwise noted.

Measuring Court-Curbing

To test this theory of the reactions to court-curbing legislation, one must access all court-related legislation introduced in the state legislatures (for additional information on this data and the

[12] Unfortunately, the exact dates that a bill was introduced, or that a judicial review case was decided are not readily available within the data.

collection process see Author Identifying 2022). This information is available on the Gavel-to-Gavel blog database (gaveltogavel.us) which is hosted by the National Center for State Courts. From this database, I selected all introductions from 2008 through 2015. These years include the aftermath of the Republican takeover of so many state legislatures in 2010, as well as reactions to federal and state same-sex marriage and ACA cases. With this list, each introduction was coded as court-curbing or not (see also Author Identifying citation). Following Rosenberg (1992) and Clark (2011) a court-curbing bill is a statute or constitutional amendment "introduced … having as its purpose or effect, either explicit or implicit, Court reversal of a decision or line of decisions, or Court abstention from future decision of a given kind, or alternation in the structure of functioning of the Court to produce a particular substantive outcome" (1992; 377). In total there were 1,253 court-curbing bills across all states during this time.[13]

In initial coding, the broadest definition of court-curbing was used. A bill was determined to be court-curbing if it limited the power of the court, weakened the independence of the court, or made the court more accountable to other institutions or the public. Additionally, significant changes to structure, or rules, or jurisdiction were also included. This measure of all court curbing ranges from 0 to 23 with a mean of 2.78.[14] From the initial coding of legislation as court curbing or

[13] Notably, I do not examine the passage of this legislation. Theoretically this is because the communication to the court from the legislature is via introduction of this legislation. Additionally, these bills rarely pass, with 3.7% (or 47) passing. Of those 47 bills that did become law, only three were broad curbing bills, including the changing the method of selection and retention in North Carolina to partisan elections in 2015.

[14] The state-year with 23 court-curbing introductions was Tennessee in 2010 and 2012. Many of these introductions were changes to the method of selection and retention of the justices as the state legislature vehemently fought to change what is known as the "Tennessee Plan" merit selection system. Given this battle, after three court-curbing bills were introduced in Tennessee in 2008, from

not, each court-curbing bill was recoded as narrowly or broadly tailored as discussed above. Following the definitions of Bartels and Johnston (2020) I read each bill's description from the Gavel-to-Gavel database and determined if it was narrowly or broadly targeted. Broadly targeted bills would limit the independence of the court and have significant effects on the institution. Examples include those that would fully alter the methods of selection and retention or cut the terms of the justices or subject their decisions to review by the legislature. Of the 1253 total court-curbing bills, 292 or 23% were broadly targeted while the great majority of the bills, 77% were narrowly targeted.[15] These counts of court-curbing introductions were lagged by one year to test how the court reacts to curbing in the previous year. To try to further parse the role of court-curbing, I also include a measure of change in the number of narrow and broad bills from the previous year to get at the changing communication about legislative preferences. For narrowly targeted legislation, this variable ranges from -18 to 18 with a mode of 0 and mean of -0.05. For broad court curbing, the change variable ranges from -8 to 9 with a mode of 0 and mean of 0.065.[16]

2009 through 2013 an average of 16.2 court-curbing bills were introduced in Tennessee each year. In 2014 the voters of Tennessee ratified a constitutional amendment that gave the governor and state legislature a larger role in the method of selection. Following those changes, the legislature has averaged 4 court-curbing introductions in a year.

[15] The broad and narrow court curbing measures were coded by the author. Broad court curbing fit into very specific categories: changing the methods of selection or retention (or the process followed); splitting the court (as Florida attempted to in 2011 and Oklahoma in 2016); term limits, or shortening the term of the justices including via lowering the mandatory retirement age; impeachments; threatens criminal punishment for judge decisions; removes judicial review or allows for legislative or citizen override of court decisions. For more on the details of this coding and other intercoder reliability scores, see (Author Identified 2022).

[16] There are four states where the legislature meets every other year: Montana, Nevada, North Dakota, and Texas. For these states, I only include the even years (the legislature meets in the odd

This change measure is complicated because a score of -1 can mean a state moved from 2 court-curbing bills in one year to 1 in the next year. That same -1 can also represent moving from 20 court-curbing bills to 19 court-curbing bills. To account for this, I standardized the change variables using z-score standardization so that the change measure is more comparable across state-years.

Measuring Judicial Review

The dependent variable in my analysis is the use of judicial review by the state supreme court. This is an indicator of the court's exercise of its power, and is expected to decrease in certain, predictable ways based on the use of court-curbing by the state legislature. To test this, I collected all constitutional decisions made by all state supreme courts from 2008-2015 using the Westlaw key cite system. Because there are so many non-constitutional cases marked as constitutional in the key cite system, each case had to be read individually to determine if the court made a decision that dealt with the constitutionality of a statute or law. If a constitutionality decision on a statute was made, each decision was coded in one of three categories: the court invalidated, invalidated in part, or upheld a statute in that decision.

Langer (2003) described judicial review as a multi-step process. A court is asked to review the constitutionality of a statute, and then if they take the case they decide if they will review the statute, and then if the statute is constitutional or not. Unfortunately, certiorari data is not available for all cases appealed to state high courts. But, in states with docket discretion we can still test two parts of judicial review to determine if court curbing changes the court's behavior in judicial review

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year in each state) for the measure of court-curbing that is lagged. I do not include these states in the models of the change in the number of bills, as this change is not possible to calculate clearly. As for Texas and Oklahoma, I am referring to decisions by their highest courts of civil appeals, not their high courts of criminal appeals.

cases. Given this, I first examine the number of cases in a state year where the justices answered a question of constitutionality and second, I look to the cases in which the court struck a statute.

The use of judicial review in a state is a relatively rare event. In the years included in this study, state high courts had anywhere from 0-6 judicial review cases in a year with a mean of 0.618 reviewed. I operationalize this as a count of the number of cases where the court reviewed a statue, using negative binomial regression models that account for the interrelatedness of the state-year data. The courts invalidated statutes in 0-3 cases in a year with a mean of just 0.19 cases with statutes invalidated in a state-year. As such, I operationalize the engagement in this judicial review process by considering if the court had any decision where they invalidated a statute in a state year as a dichotomous indicator.[17][18]

Ideology

Ideology conditions many of the interactions between state courts and state legislatures. Unfortunately, consistent, and comparable measures of state court and state legislative ideology are not available for the entire 8-year period included in this study.[19] But, the CF scores for the court

[17] I do consider a second measure of the dependent variable, the proportion of cases with statutes overturned to constitutional cases considered. This variable ranges from 0-1 with a mean of 0.05. The results of the models predicting this are in the appendix.

[18] While there are some limitations to the state-year variable measurements I address this by examining the case level as well. At the case level I measure the invocation judicial review as if the court voted to overturn or overturn in part a statute as 1, and 0 otherwise. This gives 503 observations with 85% as 0s. Case level models can be found in the Appendix.

[19] The PAJID scores of state court ideology are comparable to the Berry et al state citizen and elite ideology scores, used here. But, the PAJID scores are not available at the state-court level after 2010. The Windett, Harden, and Hall (2015) ideal point measures of court ideology are not available for the time period and do not have a comparable measure of legislative ideology to calculate ideological distance.

and the legislature are available for 2008-2012 (Bonica 2015; Bonica and Woodruff 2015). Given this, I examine the role that the ideological distance between the branches plays in this interaction. Including all courts, I expect that as this ideological distance between the institutions increases, the court will take on more judicial review cases, but will be less likely invalidate a statute in a case will decrease.[20] This is because the court will operate to check the power of a legislature it disagrees with through their judicial review process, but may be less likely to overturn the legislature if that distance increases too much for fear of retaliation. The ideological distance of the legislature and public are measured with the Berry et al (2010) scores.

Court Curbing and Responsiveness

I begin with an examination of the relationship between all court curbing and judicial review. Because judicial review is a two-part process, I first examine the number of cases in which the court reviewed a statute in a state-year. To do this I use a fixed effects negative binomial regression model. To consider the non-independence of the observations I compare a fixed effects and random effects model using a Hausmann test (Prob > chi2 = 0.0016) and reject the null that the random effects model is the appropriate model. I repeat the Hausmann test for each model, testing the appropriateness of random and fixed effects. I report the most appropriate model in the text of the paper.[21] In no case were the substantive results of a fixed or random effects model different. Table 1 includes the results of two fixed effects negative binomial regression models, with the second

[20] In the Appendix I include additional models that include variables that previous literature has demonstrated alters the decision to engage in judicial review in the states focusing on ideology (see Langer 2002; Leonard 2014). Because none of these variables reach a level of statistical significance, I leave them out of the models presented to avoid overfitting and for parsimony.

[21] I also ran all models as multi-level mixed effects regressions. The results confirmed the results reported here.

including a measure of ideology. For the negative binomial regressions, I control for the number of cases in which a court reviewed a statute in the previous year. The models only include states that have control of their docket using the presence of an intermediate appellate court as the indicator.[22]

Additionally, I estimate a series of logistic regression models that consider the non-independence of the observations from the states. The dependent variable in this model is 1 if the court struck down at least one statute in a state-year and 0 otherwise. I only include state-years where the court reviewed at least one statute. Comparing the random and fixed effects logit models using a Hausmann test, I cannot reject the null that random effects is the more appropriate model (Prob > chi2 = 0.1537). The first set of results are presented in Table 1, columns 3 and 4. I also control for the total number of judicial review cases that year in these models.

The independent variables of interest are the measure of the number of broad and narrow court curbing bills in the previous year and the change in the number of court curbing bills from the previous year (standardized using z-score standardization). The results in Table 1 demonstrate that the use of broad and narrow court-curbing are not significant predictors of the court's decision to engage in either step of the judicial review process.

However, as the fourth column demonstrates, ideology does affect this decision. As the distance between the court and the legislature increases, the court is less likely to strike a law as unconstitutional in that state year. Moving from the lowest to highest ideological distance decreases the probability that a court will strike down a statute by 75% holding all other variables at their

[22] There are multiple ways that docket control could be measured. I use the presence of an intermediate appellate court because it is the simplest indicator of at least some docket control of a state supreme court. Docket control can be a complex measure, and the intention here is to include as many states as possible while not testing the model for those states that must take all cases on appeal.

means. The change in the likelihood the court will strike a statute is graphed over the ideological distance in Figure 1 (calculated from the model results in Table 1, Model 4, holding all other variables at their means). This figure shows that for lower levels of ideological distance, the probability of striking a statute is higher, as courts are less likely to fear retaliation from ideologically similar legislatures. But, as this distance increases that probability decreases. At the higher end of the ideological distance, this distance is no longer a significant predictor of the likelihood that a statute will be struck.

To further parse out the effect of court curbing on judicial review, I examine different operationalizations of court curbing. In Table 2, I consider the total number of court-curbing bills as well as the change in the number of total bills year over year (again using a standardized measure). In addition, I categorize some of the most important court-curbing bills and look at those bills that would change the methods of selection and retention; impeach any judges or justices in the state; change the court's jurisdiction; or alter the court's decision-making rules.[23] The first two columns are fixed effects negative binomial regressions predicting the number of statutes reviewed in a year (controlling for the number reviewed in the previous year), and the second two columns are random effects logistic regression models predicting if the court struck down at least one law controlling for the number of statutes reviewed and only including those state-years in which a law was reviewed.

The results in Table 2 are consistent with the results presented in Table 1: court curbing has no effect on the number of statutes reviewed by the court in a state year and no effect on the likelihood that the court will strike down a statute. What is found is more evidence that the court is using ideology, rather than court curbing as an indicator of the legislature's position. As the

[23] These categories are coded by the gavel-to-gavel project except for impeachment. Those were coded as any bill that would impeach or begin an impeachment investigation against any judge or justice in the state. They are mutually exclusive categories and are not co-linear.

ideological distance between the branches increases, the court increases the number of statutes they review. The court is more likely to check the work of the legislature when they disagree, but as we see in Figure 1, that disagreement may stop the court from striking down a statute.

Figure 2 (calculated from the model results in Table 2, Model 2, holding all other variables at their means) demonstrates this complex relationship between ideology and judicial review. As the ideological distance between the branches increases, the court is likely to take up more decisions that review statutes. That is until a point when the distance becomes too far and ideology no longer predicts the number of judicial review cases the court hears. But, as Figure 1 shows, they are less likely to strike those statutes when that disagreement increases as well.

Court Curbing, Methods of Retention, and Responsiveness

Theoretically I expect all courts to react to broad, independence-threatening court-curbing proposals and the change in the number of these proposals irrespective of how the justices are selected and retained. Grave threats to a court's independence should affect how all courts interpret the preferences of the legislature at that time and react to those threats. But a full accounting of any type of decision-making on state supreme courts should address these institutional differences. Given this, I separated the courts into three categories based on how they are retained: (1) courts where the justices are retained via contestable partisan or nonpartisan elections, and (2) courts where the justices are retained via retention election, and (3) those that face elite retention by the governor or legislature or serve for life. I focus on retention rather than selection because these justices are already on the court and in all but the three states where they serve for life, they should be considering how their decisions affect their ability to retain their seat. I expect that courts where justices face elections – either contestable or retention only – should react to increased narrow court curbing.

Table 3 includes the results from the models that consider the effect of court-curbing on the judicial review decisions of courts in states with elections. The first two columns include those states with contestable elections (partisan and non-partisan) and the third and fourth column, those states with retention elections only. All models include an interaction of the number of narrow court-curbing introductions and the ideological distance between the public and the state legislature.[24] The results in Table 3 indicate that there are no significant effects on the decision to strike down statutes on courts where the justices face contestable elections. The measures of court curbing and ideology, including an interaction between narrow court curbing and the ideological distance between the public and the legislature do not reach a level of statistical significance. What we might conclude from the results of Table 3 is that courts that face some type of election are unlikely to react to the use of court curbing by limiting their use of the power of judicial review to strike a statute.

Finally, I examine the effect of court-curbing bills, controlling for states with appointed courts. These states are interesting because some of them are particularly vulnerable to the state legislature as they face retention by the legislature while in the other appointment states the justices on the court serve for life.[25] Yet, I find no effects of those justices that face reappointment on the

[24] Models without the interaction still demonstrated no evidence of a relationship between court curbing and judicial review.

[25] All appointment states fall into one or the other of these categories except New Jersey. In New Jersey justices have to be reappointed once then they serve for life. For this context, I included New Jersey in the reappointment states. This is because during the time of this study there was significant disagreement between the Republican governor and Democratic controlled state legislature on retention. Prior to that retention was generally a certainty but given the politicization of the process during the time studied I refer to New Jersey as a retention state. I also ran the appointed/reappointed and appointed/life states as separate models. While the results were the same as presented here, the sample size of the models were too small to be confident in the results.

use of judicial review. Even when only considering those courts where the justices need to be reappointed with the different types of court curbing, as shown in Model 3.[26] The results in Table 4 confirm the previous results. Courts are using information about the ideology of the legislature in their decision-making, but not using court-curbing as an information cue. This relationship is like that of Figure 2, again showing the complex relationship between ideological distance and the use of judicial review. At the lower and higher measures of ideological distance, the court does not significantly change the number of cases they hear regarding the constitutionality of statues, but around the median distance, when that distance increases, the court increases the number of statutes they review in cases (though this has no effect on the decision to later strike a statute.) At a distance of 0.2, the incidence rate of laws reviewed is 0.245 (or one quarter of a statute), but when that distance increases to 0.75, the incidence rate increases to more than one statute (1.49).

Discussion and Conclusion

Do state supreme courts react to court-curbing legislation by limiting their use of the judicial review power? The evidence presented here suggests that answer is no. The actions of the Kansas Supreme Court outlined at the beginning of this paper is not the story of an outlier court deifying the state legislature, but one that acted in line with how other state high courts react to this legislation. While these results are informative about the court-legislative interaction in the states, they are the beginning of the story rather than the end. The results presented are a first examination of how state supreme courts react to court-curbing introductions by their legislative counterparts.

[26] I also interacted government reappointment and the measures of court curbing, results of these interaction models can be found in the Appendix.

I theorized that court curbing legislation would be a signal of legislative displeasure with state supreme courts, but the courts are relying on other information in determining when and how they will engage their power of judicial review. Courts rely on the ideology of the legislature as information in the separation of powers game (e.g. Langer 2002; Johnson 2014; 2015) in line with previous research on state and courts. That state supreme courts are not affected by the introduction of court-curbing legislation in their use of judicial review is an important, but first part of the story about court curbing in the separation of powers game.

This result is also interesting because of its contrast with what we know about court curbing on the federal level. We know that federal judges and justices are aware of court curbing, distinguish between types of court curbing bills, and at least the Supreme Court is responsive to court-curbing introductions by limiting its use of judicial review (Mark and Zilis 2018a; Clark 2011). Most surprising about this difference is the fact that these highly independent, life-tenured federal judges are far more responsive to court curbing than the less independent, shorter termed state supreme court justices. These state supreme court justices seem to be relying on the more traditional cue of ideology, rather than the immediate information provided by the court-curbing introductions.

Very few decisions by state supreme courts in any given year are in judicial review cases. Given the limited use of judicial review by state supreme courts, it is quite possible that the limited reactions found here demonstrate that state high court justices do not use the rare event of reviewing a statute to react to the hostility of the state legislature but do so through other means of decision-making. There are certainly other ways in which state high courts – or the justices individually – react to court-curbing legislation. Indeed, federal judges discuss how court-curbing threats lead them to alter how they write opinions (Mark and Zilis 2018a). More research on the role of court curbing in the separation of powers interactions would be a welcome addition to what we know about state institutional interactions. It is possible courts are reactive to this legislation by, for

example, voting in line with a government that introduces more court-curbing legislation such as in cases when the Attorney General or Solicitor General participates, or that reactions to court curbing are at an individual level, where the justices themselves react based on their desire to maintain their seat on the bench.

To truly understand the balance of power within a state, we must know the extent to which courts are able to act independently of the other branches of government Court-curbing legislation is introduced by state legislatures to threaten to limit the power of the state high courts. This legislation has long been understood to be a common part of the battle for policy control between and among the branches of government in the states. That state high courts do not react to court curbing with their judicial review decisions is an important and notable result even as there is still more to learn about the 'effectiveness' of court-curbing legislation in the states. The interaction between and among the branches at the state level is a central part of our democratic system. Understanding when and how each branch can implement its policy preferences is essential to explaining policy outcomes in the states.

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Table 1: Regression models for court overturns a law and case level law is overturned

	Model 1: Fixed effects negative binomial	Model 2: Fixed effects negative binomial w/ideology	Model 3: Random Effects logistic regression	Model 4: Random Effects logistic regression w/ ideology
Court Curbing				
Broad curbing lagged	0.007 (0.101)	-0.297 (0.209)	-0.035 (0.334)	-0.133 (0.478)
Change in broad introductions (standardized)	-0.119 (0.131)	-0.327 (0.226)	-0.667 (0.497)	-0.842 (0.651)
Narrow curbing lagged	0.027 (0.059)	0.131 (0.09)	-0.011 (0.182)	0.05 (0.205)
Change in narrow introductions (standardized)	0.107 (0.121)	0.149 (0.17)	-0.444 (0.428)	0.113 (0.443)
Legislative and Court Context				
Number of cases reviewed statute in the previous year	-0.061 (0.069)	-0.116 (0.082)	--	--
Number of judicial review cases	--	--	1.070* (0.439)	0.904* (0.426)
Ideological distance court and legislature	--	2.075 (1.129)	--	-3.694* (1.92)
Constant	1.675* (0.787)	14.62 (1045.398)	-1.979* (0.929)	-0.209 (0.827)
** p< 0.00; * p <0.05	n=245 State fixed effects (35) Prob > chi2=0.728	n=112 State fixed effects (28) Prob > chi2=0.284	n=114 State Random Effects (38) Rho=0.610 LR Test Prob chi2>0.00	n=184 State Random Effects (46) Rho=0.426 LR Test: Prob chi2>0.00

Figure 1: Change in probability of striking a statute given the ideological distance between the court and legislature

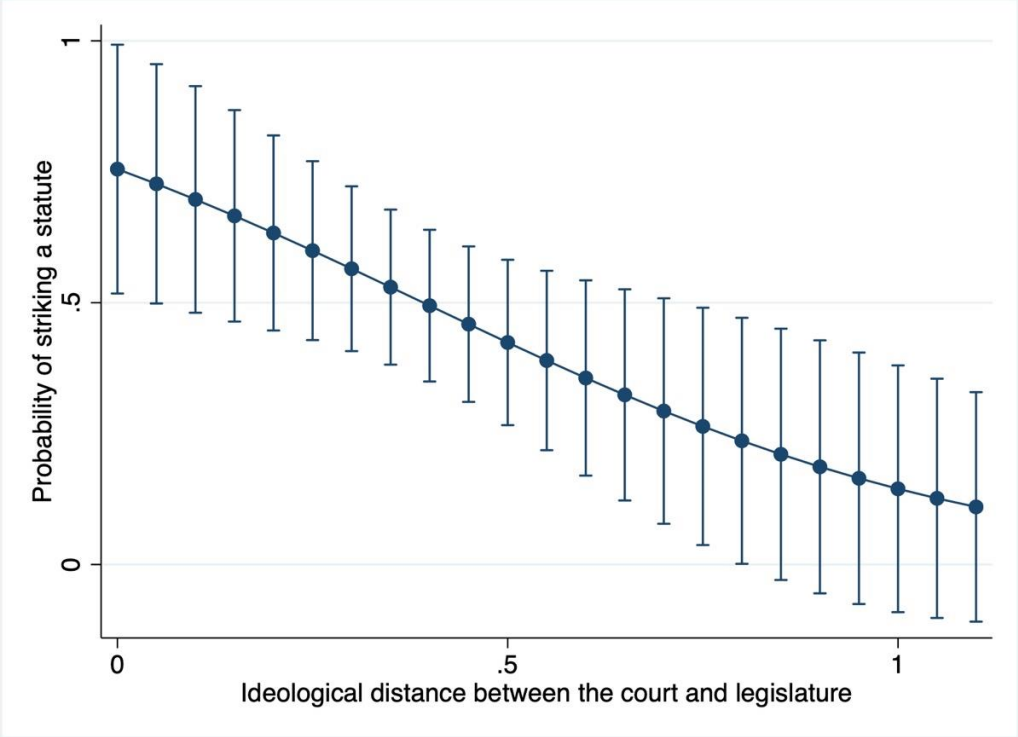

Table 2: Regression models for the number of judicial review cases heard and if a law was struck down

	Model 1: Random effects negative binomial	Model 2: Random effects negative binomial w/ideology	Model 3: Random Effects logistic regression	Model 4: Random Effects logistic regression w/ ideology
Court Curbing				
Court curbing lagged	-0.065 (0.068)	-0.024 (0.079)	0.025 (0.246)	0.063 (0.286)
Change in total introductions (standardized)	-0.021 (0.114)	-0.131 (0.161)	-1.344 (0.695)	-0.679 (0.812)
Selection curbing lagged	0.06 (0.091)	-0.102 (0.105)	-0.395 (0.423)	-0.145 (0.485)
Impeachment curbing lagged	0.274 (0.199)	0.239 (0.283)	0.796 (0.88)	-0.265 (1.239)
Jurisdiction curbing lagged	0.081 (0.13)	0.103 (0.16)	-0.005 (0.438)	0.123 (0.507)
Decision-making curbing lagged	-0.083 (0.265)	-0.190 (0.359)	-0.961 (1.036)	-1.424 (1.692)
Legislative and Court Context				
Number of cases reviewed in the previous year	0.110 (0.079)	0.043 (0.093)	--	--
Number of judicial review cases	--	--	1.147* (0.449)	1.021 (0.521)
Ideological distance court and legislature	--	1.454* (0.632)	--	-2.422 (1.714)
Constant	1.133* (0.634)	13.459 (569.934)	-1.862* (0.933)	-0.812 (0.946)
** p< 0.00; * p <0.05	n=293 State Random Effects (43) LR Test Prob chi2>0.001	n=168 State Random Effects (42) LR Test: Prob chi2>0.003	n=124 State Random Effects (41) Rho=0.682 LR Test Prob chi2>0.00	n=77 State Random Effects (34) Rho=0.469 LR Test: Prob chi2>0.048

Figure 2: Predicted incidence rate of the number of judicial review cases heard by the ideological distance between the court and legislature

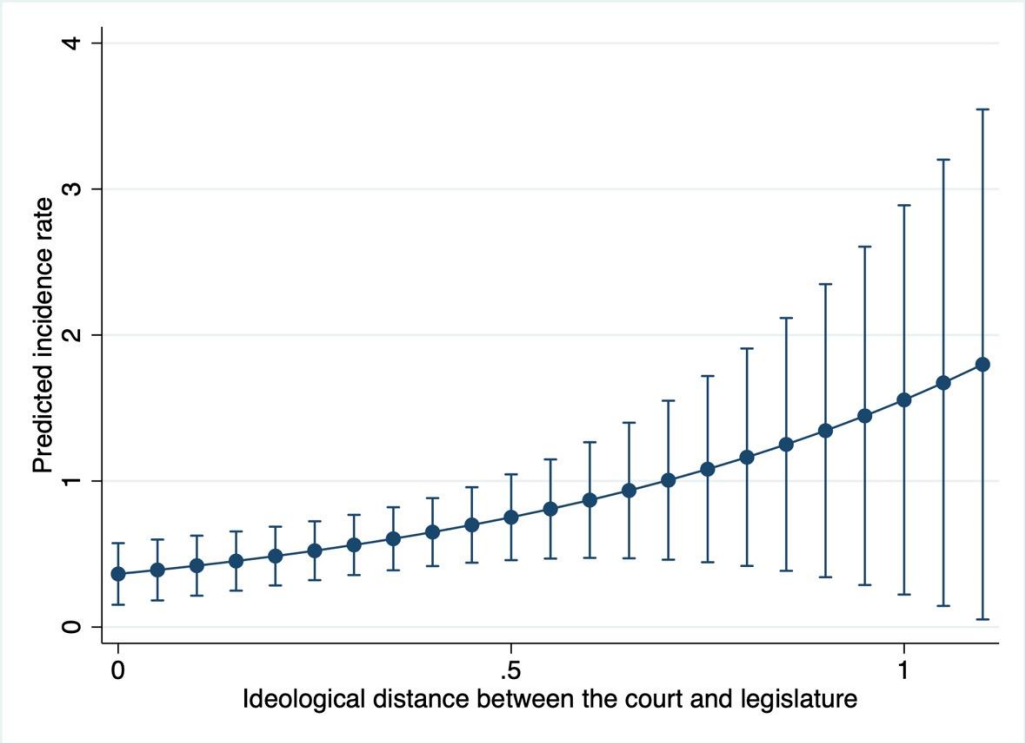

Table 3: Court curbing and contestable & retention elections

	Model 1: Random effects negative binomial	Model 2: Random Effects logistic regression	Model 3: Random effects negative binomial	Model 4: Random Effects logistic regression
Court Curbing				
Broad curbing lagged	0.242 (0.171)	0.087 (0.519)	-0.146 (0.135)	-0.12 (0.969)
Change in broad introductions (standardized)	-0.039 (0.21)	-1.012 (0.701)	-0.26 (0.175)	-0.173 (1.172)
Narrow curbing lagged	-0.434 (0.243)	-0.872 (0.774)	0.15 (0.091)	-0.032 (0.536)
Change in narrow introductions (standardized)	0.344 (0.219)	-1.339 (0.855)	0.141 (0.151)	-0.891 (0.923)
Legislative and Court Context				
Number of cases reviewed in the previous year	0.101 (0.129)	--	0.357** (0.078)	
Number of judicial review cases	--	1.479* (0.653)	--	3.599 (1.944)
Ideological distance public and legislature	0.008 (0.032)	-0.053 (0.09)	0.007 (0.028)	0.231 (0.208)
Narrow curbing lagged * Ideological distance public and legislature	0.021 (0.013)	0.026 (0.041)	-0.011 (0.007)	0.01 (0.035)
Constant	14.177 (895.508)	-0.849 (1.429)	1.26 (1.706)	-7.866 (4.479)
** p< 0.00; * p <0.05	n=112 State Random Effects (16) LR Test Prob chi2>0.002	n=47 State Random Effects (14) Rho=0.292 LR Test Prob chi2>0.043	n=112 State Random Effects (16) Rho=0.000 LR Test: Prob chi2>1.00	n=46 State Random Effects (16) Rho=0.743 LR Test: Prob chi2>0.011

Table 4: Appointed courts reaction to court curbing

	Model 1: Random Effects negative binomial regression	Model 2: Random Effects logistic regression	Model 3: Random effects negative binomial regression only states where reappointment
Court Curbing			
Broad curbing lagged	-0.137 (0.428)	-0.590 (1.589)	-0.789 (0.627)
Change in broad introductions (standardized)	0.269 (0.483)	-0.800 (2.313)	-0.477 (0.714)
Narrow curbing lagged	0.134 (0.166)	0.673 (0.925)	0.081 (0.172)
Change in narrow introductions (standardized)	0.008 (0.305)	0.513 (1.652)	-0.277 (0.378)
Legislative and Court Context			
Reappointment	--	-4.354 (6.549)	--
Ideological distance court and legislature	3.607* (1.445)	--	--
Number of cases reviewed in the previous year	0.073 (0.193)	--	-0.034 (0.167)
Number of judicial review cases	--	-0.079 (1.106)	--
Constant	-1.531 (1.322)	0.281 (2.228)	0.145 (0.975)
** p< 0.00; * p <0.05	n=32 State Random Effects (8) LR Test Prob chi2>0.006	n=21 State Random Effects (8) Rho=0.580 LR Test: Prob chi2>0.268	n=42 State Random Effects (6) LR Test Prob chi2>0.467