Judicial Guardians: Court Curbing Bills, the Supreme Court, and Judicial Review

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Abstract

Previous studies examining the relationship between the introduction of court curbing bills and the instances of judicial review on the Supreme Court have two potential oversights. First, they rely solely on instances of judicial review and not the potential for such action. There are two reasons judicial review might decrease following the introduction of court-curbing bills: the Court considers fewer constitutional cases or the Court upholds more Acts of Congress after introductions of court-curbing bills. Second, these studies have assumed that the Court acts as a guardian of the judiciary, but have not tested this. Since many court-curbing bills are directed at lower courts, if the Court fills this “guardian” role, then we should see them correcting instances of judicial review on the lower courts. Moreover, previous studies have not considered the behavior of circuit courts following these introductions. We test these two inherent assumptions, and incorporate information about circuit court decisions, in this paper. First, we use a yearly measure of the number of positive and negative treatments of Acts of Congress both at the Supreme Court and at circuit courts. Next, we create a measure of “guardian” behavior. We test at both a case-level and a year-level the likelihood that the Court engages in guardian behavior following the introduction of court-curbing bills.
United States Supreme Court decisions regarding controversial federal statutes or other hot-button political issues are often criticized by those who oppose the ruling, such as the media, political pundits, members of Congress, or the public. For example, Senator Ted Cruz (R-TX) said he would introduce a constitutional amendment to establish retention elections for Supreme Court Justices after the tax credit provisions of the Affordable Care Act were upheld in *King v. Burwell* (2015) and same-sex marriage was legalized in *Obergefell v. Hodges* (2015) (e.g., Zezima 2015). Cruz’s attempt to institute electoral accountability in the Supreme Court is a standard example of court-curbing legislation. Other proposals to alter the composition of the bench usually entail instituting a mandatory retirement age for justices and/or federal judges. Court-curbing legislation can have other objectives such as stripping the judiciary of jurisdiction over certain statutes or policy areas (e.g., cases involving gay marriage or school prayer), or placing restrictions or limitations on the exercise of judicial review (e.g., congressional override procedures). Although there are differences among the purpose of court-curbing bills, each initiative is similar in that it attempts to influence judicial decision making and restrict judicial power and authority.

The interaction between the U.S. Congress and the Supreme Court that results from the introduction of court-curbing legislation is included in the separation of powers literature that examines how the branches of the federal government create and implement public policy. Most studies focus on how Congress constrains judicial decision making (e.g., Bergara, Richman, and Spiller 2003; Epstein, Knight, and Martin 2001; Hansford and Damore 2000; Sala and Spriggs 2004; Segal 1997; Segal, Westerland, and Lindquist 2011) and/or the conditions under which Congress can override Supreme Court decisions (e.g., Blackstone 2013; Eskridge 1991; Ignagni and Meernik 1994; Uribe, Spriggs, and Hansford 2014). As a result, the ability of Congress to
influence judicial decision making with court-curbing legislation is an important but underexplored issue in the Court-Congress relations literature. Thus, a crucial research question is: how does the introduction of court-curbing bills constrain judicial independence?

Sponsoring court-curbing legislation is largely considered a position-taking endeavor that members of Congress use to express personal and constituent disagreement with Supreme Court decisions (Clark 2009, 2011). Since members of Congress introduce court-curbing bills to help them in their pursuit of reelection, the bills are rarely passed into law (e.g., Bell and Scott 2006; Clark 2011; Nagel 1965). Regardless, court-curbing bills are deemed successful mechanisms for attempting to influence judicial decision making because the legislation attacks the judiciary’s legitimacy or its role as the branch of government best suited for resolving disputes relating to the interpretation of federal law or the Constitution (e.g., Clark 2009, 2011; Rosenberg 1992). The Court strives to protect its institutional legitimacy at all costs, so multiple studies have found that court-curbing legislation results in the Court actively deferring to congressional preferences and striking down fewer federal statutes (e.g., Clark 2009, 2011; Epstein, Knight, and Martin 2001; Handberg and Hill 1980; Marshall, Curry, and Pacelle 2014; Nagel 1965; Rosenberg 1992).

Previous work examining how court-curbing legislation constrains judicial decision making has two potential oversights. First, studies rely on instances of judicial review rather than the potential for such action. In other words, the research cannot capture whether court-curbing legislation leads the Court to utilize the “constitutional avoidance” doctrine in which the justices choose to interpret statutes in a manner that would not render them unconstitutional or produce constitutional concerns (see Justice Louis Brandeis’ concurring opinion in Ashwander v. Tennessee Valley Authority [1936]). It is possible that the Court strikes down fewer Acts of
Congress because it considers fewer constitutional cases after the introduction of court-curbing bills. Second, the existing literature assumes that the Court acts as a guardian of the federal courts by adjusting its decision making after court-curbing bills are introduced that attack the judiciary’s institutional legitimacy. However, many of these bills are targeted at lower courts, meaning that the Supreme Court acts as protector not only of itself, but the entire federal judiciary. This assumption has never been explicitly tested.

In order to address these oversights and gaps in the literature, this study first tests whether the Supreme Court and the circuit courts respond to court-curbing legislation by invalidating fewer federal laws by deciding fewer constitutional cases, or instead, upholds more Acts of Congress following the introduction of court-curbing bills. Second, the research examines whether the Court fulfills this “guardian” role of protecting the federal judiciary from attacks on its institutional legitimacy—via court-curbing legislation—by the justices correcting instances of judicial review from the lower courts. Overall, the analyses contribute to the existing literature by providing a better understanding of judicial behavior in relation to congressional attempts to constrain the Supreme Court with court-curbing proposals.

**Constraining Judicial Decision Making with Court-Curbing Legislation**

Court-curbing bills seek to limit judicial power and influence judicial decision making by proposing changes to the federal judiciary’s composition, jurisdiction, or procedures. Some initiatives would only impact the Supreme Court whereas others target the entire federal judiciary. Initial descriptive studies on the effect of court-curbing legislation on judicial behavior sought to determine whether the Supreme Court deferred to congressional preferences—or engaged in sophisticated decision making—after the bills were introduced to avoid the proposed changes to the structure and function of the federal judiciary (Handberg and Hill 1980; Nagel
Findings indicated that periods of increased court-curbing bill sponsorship coincided with more judicial decisions that reflected congressional preferences as evidenced by fewer laws deemed unconstitutional, more cases decided in favor of the federal government, and changes in the voting behavior of the justices (Handberg and Hill 1980; Nagel 1965; Rosenberg 1992). Interestingly, this change in judicial behavior persisted although court-curbing bills are rarely considered by committees, let alone enacted into law (Handberg and Hill 1980; Nagel 1965; Rosenberg 1992).

Building on these studies, additional research sought to determine why the Court would respond to court-curbing legislation if it was unlikely that the proposed changes would come to fruition. Most scholars concluded that court-curbing bills are signals of congressional or public disagreement with the judiciary, not serious policy proposals seeking to change the structure and function of federal courts (Handberg and Hill 1980; Nagel 1965; Rosenberg 1992). Furthermore, court-curbing legislation damages the federal judiciary’s institutional legitimacy because it questions whether the federal courts are resolving disputes effectively that relate to the interpretation of federal law or the Constitution. After the sponsorship of court-curbing bills, the justices will work to regain the judiciary’s reputation by strategically handing down decisions that reflect congressional preferences and (presumably) public opinion (Epstein, Knight, and Martin 2001; Rosenberg 1992).

Clark’s (2009, 2011) conditional self-restraint model formalizes the idea that the Court responds to court-curbing legislation because the bills question the judiciary’s institutional legitimacy, not for seriously threatening the organization or operations of the federal courts. Additionally, these proposals are considered signals of waning public support for the Supreme Court. While building this theory of Court-Congress relations regarding court-curbing
legislation, Clark makes assumptions about both legislative and judicial behavior. Members of Congress are said to use court-curbing legislation as a position taking endeavor that responds to constituent disagreement with judicial decision making. In accordance with existing literature, the justices respond to these bills because congressional criticism and waning public support diminishes the judiciary’s institutional legitimacy, which can also encourage the executive branch and other government officials not to implement decisions.

Empirical results support the conditional self-restraint model in which the justices are most responsive to court-curbing legislation under conditions when the bills are reliable signals of waning institutional legitimacy: sponsored by ideological allies in Congress and introduced when the public disagrees with judicial behavior (Clark 2009, 2011). During periods when there is little public support for the Court, the justices respond to court-curbing legislation by striking down fewer federal statutes in order to regain its good standing with the public and repair its institutional legitimacy as both are essential in ensuring decisions are implemented in a timely manner. The Court elicits similar behavior for the same reasons when court-curbing bills are proposed by its ideological allies in Congress. Since these legislators generally agree with the justices, their court-curbing bills are a credible indication that the judiciary’s institutional legitimacy has diminished (via public and congressional disagreement with judicial behavior), not an effort to criticize the Court and manipulate the ideological content of decisions.

Additional empirical findings reported by Marshall, Curry, and Pacelle (2014) support the conclusion that the justices respond to court-curbing legislation to protect the judiciary’s institutional legitimacy. From 1953-2000, these authors find that the Supreme Court is more likely to change the ideological content of constitutional decisions after the introduction of jurisdiction stripping court-curbing bills than in statutory decisions in which maintaining
institutional legitimacy is less of a concern. In contrast to these findings and those of Clark (2009, 2011), Segal, Westerland, and Lindquist (2011) do not find that court-curbing legislation consistently discourages the Court from striking down federal legislation. Regardless of these findings, the existing literature only addresses how court-curbing legislation influences the ideological content of decisions and whether the Court strikes down an Act of Congress, not if the justices also avoid rendering constitutional decisions after Congress introduces these bills. Furthermore, the research discusses how the justices respond to court-curbing legislation to protect the judiciary’s institutional legitimacy more within the context of the Supreme Court than the entire federal judiciary despite the bills often targeting all federal courts.

**Judicial Review Following the Introduction of Court-Curbing Legislation**

**Describing Court-Congress Relations**

Theories of Court-Congress relations address whether Congress can constrain judicial behavior, and if so, the conditions under which the Court engages in strategic decision-making and defers to legislative preferences (see Devins 1996; Fisher 1985; Ferejohn and Shipan 1990; Gely and Spiller 1990; Marks 1989; Segal and Spaeth 1993, 2002). Many theories fail to find evidence that Congress can influence judicial decision making in general, or through threats to overturn rulings. This is because Congress rarely overrides judicial decisions (Segal and Spaeth 1993, 2002). Similarly, the coordinate construction approach states that the Court expects policy-based responses to its decisions because rulings encourage a constitutional dialogue in Congress (Blackstone 2013; Devins 1996; Fisher 1985; Pickerill 2004). Consequently, the justices can hand down decisions reflecting the Court’s preferred policy preferences.

Clark’s (2009, 2011) conditional self-restraint model pertains specifically to court-curbing legislation, but these bills are not considered signals of congressional preferences.
Instead, court-curbing bills indicate declining public support for the judiciary and waning institutional legitimacy. As such, Congress cannot directly constrain judicial behavior with court-curbing bills. The one exception being when Congress and the public disagree with decisions that have been handed down by the Court. Although Congress represents the will of the people, studies have documented that the public is relatively supportive of the judiciary and unknowledgeable about most cases before the Supreme Court (e.g., Caldeira 1986; Caldeira and Gibson 1992; Durr, Martin, and Wolbrecht; Gibson, Caldeira, and Baird 1998). Thus, it is possible that: (1) Congressional preferences and public opinion regarding the judiciary will often not align; and, (2) Congress will legitimately attack the Court’s institutional legitimacy using court-curbing bills at times when the public is relatively supportive of the judiciary.

The separation of powers (SOP) model is the primary theoretical framework that views Congress as directly able to influence judicial decision making, but not with court-curbing legislation. According to the SOP model, the Court defers to legislative preferences to avoid reversals that would eliminate any influence the ruling had on policy (e.g., Ferejohn and Shiman 1990; Gely and Spiller 1990; Marks 1989). Empirical research has not found consistent support for the SOP model (e.g., Bergara, Richman, and Spiller 2003; Eskridge 1991; Hansford and Damore 2000; Segal 1997) in constitutional or statutory decision making. Regardless, legislative preferences are expressed via overrides, not court-curbing legislation; and, judicial responses are to avoid reversals, not diminished institutional legitimacy.

The institutional maintenance framework combines the conditional self-restraint model with the SOP model. This model suggests that overrides are not the only way that Congress can directly influence the Court and encourage strategic decision making (Segal, Westerland, and Lindquist 2011). Instead, mechanisms, such as court-curbing bills, also directly threaten judicial
authority. The justices will often intentionally defer to legislative preferences in order to repair its reputation and restore its institutional legitimacy after the sponsorship of override and court-curbing legislation. The key difference between the institutional maintenance framework and the SOP model is that the Court engages in strategic decision making more so to repair its institutional legitimacy and regain its reputation in the former than protect the policy outcome of a case in light of a possible Congressional override in the latter (Segal, Westerland, and Lindquist 2011). As a result, the institutional maintenance framework is ideal for examining if and how the Court responds to court-curbing legislation in constitutional decisions to protect the judiciary’s institutional legitimacy because the bills are considered a direct expression—as opposed to an indirect signal in the conditional self-restraint model—of congressional preferences.

**The Influence of Court-Curbing Bills on Constitutional Decision Making**

The prevailing literature suggests that the Supreme Court responds to court-curbing bills to protect the judiciary’s institutional legitimacy (e.g., Clark 2009, 2011; Marshall, Pacelle, and Curry 2014; Rosenberg 1992). The Court does so by deferring to legislative preferences, whether that is by striking down fewer federal statutes or adjusting the ideological content of decisions (Clark 2009, 2011; Marshall, Curry, and Pacelle 2014). However, existing research has not considered the mechanism through which fewer federal statutes are struck down. One possibility is that the justices engage in constitutional avoidance by issuing fewer constitutional decisions. Alternatively, the justices may consider the same number of constitutional decisions, in which case, striking down fewer laws would mean that they uphold more Acts of Congress after the introduction of court-curbing bills. The latter approach is a stronger statement of the conditional self-restraint model because court-curbing bills represent waning institutional legitimacy due to
declining public support for the Court, not congressional preferences, which would not influence case selection. Rather than avoiding the constitutional questions, as would be the case if the court-curbing bills represented congressional preferences, the Court actually approves more congressional actions. If instead, the Court engages in constitutional avoidance, they can choose to defer the timing in which they bring up a case challenging an Act of Congress, waiting until their interactions with Congress have settled down.

Striking down fewer statutes and considering fewer constitutional cases in response to court-curbing legislation follows the institutional maintenance model of Court-Congress relations. There, court-curbing bills represent congressional disagreement with judicial behavior and threaten the judiciary’s institutional legitimacy. Since judicial decisions are expected to be made using sound legal rationales grounded in the text of the Constitution, criticism expressed via court-curbing legislation signals that the court’s decisions are activist and based on personal policy preferences. Federal judges and Supreme Court Justices respond by invalidating fewer federal laws in order to regain the judiciary’s reputation because criticism following a constitutional case is especially damaging as the judiciary, not Congress, is the only branch with the power of constitutional interpretation (e.g., Dickerson v. U.S. [2009]). Additionally, the justices respond by delaying the consideration of cases involving constitutional questions. If the Court knows they want to declare an Act of Congress unconstitutional, they can simply wait for Congressional animosity to die down before making that decision.

In statutory decisions, criticism or an override poses very little threat to the Court’s institutional legitimacy because policymaking power is vested primarily in Congress, not the Supreme Court (Cross and Nelson 2001; Segal, Westerland, and Lindquist 2011). Thus, it is plausible that court-curbing legislation actually causes the Court to utilize the “avoidance
doctrine” in which the justices approach cases in a manner so as not to address constitutional concerns or declare federal statutes unconstitutional (see Justice Louis Brandeis’ concurring opinion in Ashwander v. Tennessee Valley Authority [1936]). We expect the following:

**H1:** An increase in the number of court-curbing bills introduced decreases the percentage of cases where the Supreme Court reviews an Act of Congress and declares it unconstitutional.

**H2:** An increase in the number of court-curbing bills introduced decreases the percentage of cases where the circuit courts review an Act of Congress and declare it unconstitutional.

**H3:** An increase in the number of court-curbing bills introduced decreases the percentage of petitions the Supreme Court grants in which the lower court decided the constitutionality of an Act of Congress.

Another oversight of the existing literature on the impact of court-curbing legislation on judicial decision making is the assumption that the Supreme Court intentionally responds to the bills to protect the entire federal judiciary’s institutional legitimacy (e.g., Clark 2009, 2011; Marshall, Curry, and Pacelle 2014; Rosenberg 1992). Court-curbing bills target the entire federal judiciary, not just the Supreme Court; however, empirical work only tests whether the justices actively seek to restore the Supreme Court’s institutional legitimacy by deferring to legislative preferences through the act of declaring fewer federal laws unconstitutional or adjusting the ideological content of decisions (e.g., Clark 2009, 2011; Marshall, Curry, and Pacelle 2014).

The distribution of judicial power within the federal judiciary is often thought of in terms of a hierarchy with the Supreme Court at the top as the final arbiter of issues pertaining to federal law and the Constitution. It is the Supreme Court that establishes doctrines for deciding cases that the lower federal courts should follow when confronting similar issues. A substantial body of work finds that the circuit and district courts do in fact follow Supreme Court precedent (e.g.,
Benesh 2002; Johnson 1987; Reddick and Benesh 2000; Songer, Segal, and Cameron 1994; Songer and Sheehan 1990). Thus, the justices are likely able to shield the federal judiciary from additional attacks on its institutional legitimacy by deferring to congressional preferences after the introduction of court-curbing legislation. This response to court-curbing legislation simultaneously helps the justices restore the federal judiciary’s reputation and signals to the lower federal courts to do so as well by also deferring to Congress.

Although there is evidence that the federal courts hand down decisions that follow Supreme Court precedent and conform to the preferences of the current justices, some studies do not find this to be the case (e.g., Cross 2003; Klein 2002; Klein and Hume 2003). Furthermore, federal judges are often influenced by the preferences of a variety of actors, such as the appointing president, home state senators, and/or the current presidential administration (e.g., Giles, Hettinger, and Peppers 2001; Songer, Sheehan, and Haire 1999). As a result, it is possible that strategic adjustments in Supreme Court decision making after the introduction of court-curbing legislation intended to preserve the federal judiciary’s institutional legitimacy will not produce similar changes in lower federal court decision making. Without seeing a change in judicial decision making across all federal courts, members of Congress may continue to introduce court-curbing legislation that attacks the judiciary’s institutional legitimacy. In order to avoid this scenario, it is likely that the Supreme Court takes additional steps to restore the entire federal judiciary’s institutional legitimacy and protect the lower courts. In other words, the Supreme Court acts as a guardian for the lower federal courts.

The institutional maintenance model of Court-Congress relations best explains how the justices will respond to court-curbing legislation to restore its institutional legitimacy (and the entire federal judiciary’s in the process); however, specific strategic efforts on behalf of the
Supreme Court to protect the lower federal courts is best characterized by the principal-agent framework. The hierarchical nature of the federal judiciary lends itself well to the main idea behind the principal-agent framework: that the Supreme Court (principal) supervises the lower federal courts (agents) to encourage decisions that match the preferences of the justices on the bench. Although principals often lack an enforcement mechanism to ensure compliance, at least within the context of the relationship amongst the federal courts, the Supreme Court can reward compliant lower courts with complimentary citations in opinions and reprimand judges by overturning their decisions (e.g., Fiss 1983; Brent 1999; Cameron, Segal, and Songer 2000; Cross 2003; Haire, Lindquist, and Songer 2003; Schanzenbach and Tiller 2007). Thus, in order to act as a guardian of the lower federal judiciary and encourage the courts to protect their own institutional legitimacy after the introduction of court-curbing legislation by engaging in strategic decision-making, the Supreme Court likely “corrects” instances of judicial review on the lower courts. In other words, following the sponsorship of court-curbing legislation, the Supreme Court reverses more lower court decisions declaring an Act of Congress unconstitutional to encourage the lower federal courts to hand down decisions deferring to congressional preferences. This expectation is summarized in the following hypotheses:

\textit{H4: An increase in the number of court-curbing bills introduced increases the likelihood that the Supreme Court reverses a lower federal court’s decision to declare an Act of Congress unconstitutional.}

\textit{H5: An increase in the number of court-curbing bills introduced increases the percentage of cases in which the Supreme Court corrects lower court decisions that declare an Act of Congress unconstitutional.}
Data and Methods

To test our hypotheses, we need measures of when the Supreme Court reviews an Act of Congress, if they uphold or strike down the Act of Congress, and how the lower court treated the Act of Congress. We rely on two sources of data for our tests. For our yearly tests, we use information from the Shepard’s reports of sections of the United States Code. These identify instances in which circuit courts or the Supreme Court consider the constitutionality of each sections of the U.S. Code. We have currently collected and coded the reports from 22,425 sections. From each Shepard’s report we identify every circuit and Supreme Court decision that reviewed that section of the U.S. Code. We conduct this data collection at a statute level, which means some cases appear in our data multiple times because the court determined the constitutionality of multiple sections of U.S. Code. From these reports, we code whether the decision found the statute constitutional or unconstitutional. For each case, we include the lower court decision and (if applicable) the Supreme Court decision. We match all cases for which both the circuit and Supreme Court decisions are on the Shepard’s report. For all other Supreme Court cases, we identify the lower court decision that was appealed to the Court. In doing so, we identify some district court decisions that were appealed directly to the Supreme Court. We also identify some lower court decisions that did not address the constitutionality of the statute, in which case we code this as the court ignoring the constitutionality of the statute. For all circuit court cases, we review the subsequent appellate history for the case. For each case, we identify if the case was appealed the Supreme Court, and if so, if it was granted certiorari. We identify some cases in which the Supreme Court reviewed the decision, but did not review the declaration of constitutionality, which again we code this as ignoring the constitutionality. For cases where subsequent circuit court activity, such as en banc review, changed the circuit court opinion, we
do not code information about the Supreme Court as the case is no longer addressing that decision.

For our case level approach, as we have not yet completed the analysis of Shepard’s reports, we have identified cases in the Supreme Court Database that review a federal court. To gather measures that will help us craft our outcome variables, we have coded 1830 cases.¹ For each case, we have reviewed the Supreme Court decision and the corresponding lower court decision.² With each case we determine whether each court reviewed an Act of Congress. We code six variables that describe the fate of a law in the course of the case. The first two variables, *Supreme Court Reviews Act* and *Lower Court Reviews Act* determine whether the Court chose to review an Act of Congress. The next four determine the direction of the treatment of the Act of Congress: *Supreme Court Upheld, Supreme Court Struck Down, Lower Court Upheld, Lower Court Struck Down*.

To test our hypotheses, we take both a year-level and a case-level approach. For the year-level approach, we test three outcome variables. The first is the percentage of cases in which an Act of Congress is declared unconstitutional. For both the circuit courts and the Supreme Court, we take the number of cases in which the Court declared an Act of Congress unconstitutional in a year and divide it by all cases in which an Act of Congress was reviewed in that year. Next, we consider the cases in which a petition for certiorari was submitted and look

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¹ We are utilizing data collected for older versions of this paper before we turned our data collection to Shepard’s reports of the U.S. Code.
² To help parse through the numerous cases, we used a heuristic to quickly dispose of cases that did not address the constitutionality of statute. We searched each Supreme Court and corresponding lower court decision for the phrase “constitution”. If neither case mentioned the Constitution, we coded both as not reviewing the constitutionality of a statute. If the phrase was in either the Supreme Court or lower court decisions, we read each case to determine whether the court reviewed the constitutionality of an Act of Congress and if so whether the court upheld the act or found it unconstitutional.
at the percentage of those cases where the Supreme Court granted certiorari. Lastly, we consider the percentage of cases in which the Supreme Court engages in “guardian” type behavior. We consider the Court to have engaged in guardian behavior if the lower court either found the act unconstitutional or did not consider the constitutionality and the Supreme Court found the act constitutional. The number of cases where the Court engaged in guardian behavior is then divided by all cases decided by the Supreme Court that year. Because each of these variables are percentages, we use logistic regression models for these outcomes.

At the case-level, our outcome variable measures the extent to which the Court acts as a guardian, correcting instances where the lower court strikes an Act of Congress. We model this as an ordinal measure, ranging from anti-guardian behavior, where the Supreme Court is at least as negative towards the Act of Congress than the lower court, to guardian behavior, where the Court is at least as positive towards the Act of Congress as the lower court. At each level, there are three possible outcomes: do not review the constitutionality of an act, uphold an act, and strike down an act. This leads to a 3x3 arrangement, with 9 possible outcomes. In Table 1, we have outlined the possible outcomes and corresponding value for our dependent variable. Since the outcome variable is ordinal, we estimate an ordinal logistic regression model.

<table>
<thead>
<tr>
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<th>Lower Court Struck Down</th>
<th>Lower Court Did Not Review</th>
<th>Lower Court Upheld</th>
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<tr>
<td>Supreme Court Upheld</td>
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<td>1</td>
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</table>

**Table 1:** Case-level outcome variable. The variable is positive when the Supreme Court is at least as positive as the lower court and negative when they are at least as negative as the lower court. The variable is zero when neither the lower court nor the Supreme Court reviews an Act of Congress.
Our primary variable of interest in all models is the number of court-curbing bills introduced in Congress in the year prior to the case, Court Curbing Bills$_{t-1}$. We use Clark’s (2009) count of court-curbing bills. This data is available through 2008.

In both analyses, we, following Clark (2009), include as controls, measures of the political alignment between Congress and the Court, Court-Congress Distance, the Court’s support, GSS Support, the divergence between the public and the Court, Court Divergence, and whether it is an election year, Election Year. For Court-Congress Distance, we take the absolute value of both houses from the Supreme Court, and use the smaller of the two distances. This differs from the opposite party measure that Clark (2009) uses. We use this approach as it allows more nuance in the role that ideology plays in the decisions of the Court. We also include a measure of the Court’s support measured using the General Social Survey (GSS), GSS Support. Following Clark, we use the percentage of people responding they have “hardly any” confidence in the Court in that year. For the years where the question was not asked, we use the average of the year before and after the missing observation. Since the question about confidence in the Court has only been regularly asked since 1973, we also utilize the measure of Court Divergence that Clark (2009) uses. This measure was first created in Durr, Martin, and Wolbrecht (2000), and utilizes the divergence of both Stimson’s public mood measure and the percentage of liberal decisions in salient cases on the U.S. Supreme Court from their means. Clark utilized this measure because, as Durr, Martin, and Wolbrecht show, public support for the Court decreases when the distance between the public and the Court increases. By utilizing this measure, we are able to extend our analysis to 1953. The measure is negative when both the Court and the public are either more conservative or liberal than average and positive when one is more liberal and the other more conservative. Thus, as the measure increases the public and the Court move farther
apart. Finally, since the introduction of court-curbing bills is largely a position-taking endeavor, we include a variable indicating whether or not it is an election year, *Election Year*. The variable is equal to 1 in a congressional election year, and 0 in non-election years.

In addition, we include a measure indicating who the chief justice is to our case-level analysis, *Chief Justice*. Because we might expect different behavior in different eras on the Court, we control for different leadership styles, and thus different eras, of the Court’s history. There are five chief justices included in our time period: Vinson, Warren, Burger, Rehnquist, and Roberts.

Lastly, following Clark, we also include interactions between our court-curbing measure and both *Court-Congress Distance* and the support or support proxy measure, *GSS* and *Court Divergence*.

For the case-level analysis, we also include a categorical measure of the lower court’s treatment of the act, *Lower Court Treatment*. The variable takes on three values, *Lower Court Upheld*, *Lower Court Struck Down*, and *Lower Court Did Not Review*. This variable allows us to test whether the lower Court’s behavior changes the likelihood of the Court engaging in guardian behavior.

**Results**

We find little evidence in support of the institutional maintenance hypotheses. Table 2 shows the results of the percentage of cases that review the constitutionality of a federal statute and found the statute unconstitutional for both circuit courts and the Supreme Court.

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3 We do not include this variable in our year-level analyses because we do not want to overfit the models.
Table 2: Results of year-level analyses for both the circuit court and Supreme Court. Column one and two display the results of the model estimating the percentage of cases in which the circuit courts review a statute and find that statute unconstitutional. Columns three and four display the results of the model for the Supreme Court.

We do not find evidence that the number of court-curbing bills influences the percentage of laws found unconstitutional for either the circuit courts or the Supreme Court. In fact, none of our variables in this model reach statistical significance. We are cautious to take too much from these results as many of the coefficients are large suggesting that there is separation in the model. We are optimistic that as we gather more data our results will be more illustrative.

In Table 3, we present the results of our models testing Hypotheses 3 and 5. The first two columns present the results for the percentage of appealed cases reviewing the constitutionality of a statute that the Supreme Court grants. The second two columns present the results for the percentage of cases in which the Supreme Court is correcting negative instances of judicial review at lower courts.
Table 3: Results of year-level analyses. Column one and two display the results of the model estimating the percentage of cases where the Supreme Court grants certiorari to cases that review the constitutionality of an Act of Congress. Columns three and four display the results of the model estimating the percentage of cases in which the Supreme Court corrects negative instances of judicial review at lower courts.

As with our other year-level analyses, we find no evidence that the Court either grants more petitions or engages in more guardian behavior following the introduction of court-curbing bills. Again, none of the variables in these models are statistically significant, but we are still cautious to read too much into these results at this time as some of the variables suggest separation.

In Table 4, we present the results of our case-level analysis. Again, we find little evidence in support of the institutional maintenance hypothesis. The Court Curbing Bills variable does not reach conventional levels of significance. The two lower court variables, however, are both statistically significant. This suggests that when a lower court reviews an Act

<table>
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<th>(2) Guardian Behavior</th>
<th>(3) Petitions Granted</th>
<th>(4) Guardian Behavior</th>
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<td><strong>Court-Congress Distance</strong></td>
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<td>1.41 (1.28)</td>
<td>0.67 (1.30)</td>
<td>-0.48 (1.00)</td>
<td>-1.63 (1.57)</td>
</tr>
<tr>
<td><strong>GSS Support</strong></td>
<td>8.93 (29.55)</td>
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<tr>
<td><strong>Court Divergence</strong></td>
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<td></td>
<td>0.01 (0.01)</td>
<td>-39.89 (47.46)</td>
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<tr>
<td><strong>GSS Support x</strong></td>
<td></td>
<td>-2.33 (2.76)</td>
<td></td>
<td>-0.96 (3.78)</td>
</tr>
<tr>
<td><strong>Court-Curbing Bills</strong></td>
<td></td>
<td></td>
<td>0.00 (0.00)</td>
<td>-0.00 (0.00)</td>
</tr>
<tr>
<td><strong>Court Divergence x</strong></td>
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<td><strong>Court-Curbing Bills</strong></td>
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</tr>
<tr>
<td><strong>Court-Congress Distance x</strong></td>
<td>1.61 (1.21)</td>
<td>1.76 (1.20)</td>
<td>-0.24 (0.37)</td>
<td>-1.61 (1.32)</td>
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<td><strong>Court-Curbing Bills</strong></td>
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<td></td>
<td></td>
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<tr>
<td><strong>Constant</strong></td>
<td>0.91 (1.15)</td>
<td>0.78 (4.73)</td>
<td>1.09 (0.91)</td>
<td>6.16 (7.64)</td>
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</table>

standard errors in parentheses
* p<0.05

As with our other year-level analyses, we find no evidence that the Court either grants more petitions or engages in more guardian behavior following the introduction of court-curbing bills. Again, none of the variables in these models are statistically significant, but we are still cautious to read too much into these results at this time as some of the variables suggest separation.

In Table 4, we present the results of our case-level analysis. Again, we find little evidence in support of the institutional maintenance hypothesis. The Court Curbing Bills variable does not reach conventional levels of significance. The two lower court variables, however, are both statistically significant. This suggests that when a lower court reviews an Act
of Congress, regardless of the outcome they reach, the Supreme Court is more likely to engage in guardian behavior, either upholding positive treatments of these laws by the lower court, or reversing the lower court’s negative treatment. This guardian behavior, however, is not tied to Congress’s attempts to curb the judiciary. Instead, the Supreme Court engages in this kind of behavior regardless of whether Congress is attempting to induce such behavior through introducing court-curbing bills. While there is not evidence to support the role of court-curbing

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<tr>
<td>Court-Congress Distance</td>
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<td>Court Curbing Bills</td>
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<td>Lower Court Upheld</td>
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<td>Lower Court Struck Down</td>
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<td>Court-Congress Distance x</td>
<td>-0.02 (0.12)</td>
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<td>Court Curbing Bills</td>
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<tr>
<td>GSS Support x Court Curbing Bills</td>
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<td>Court Divergence x Courting Bills</td>
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<td>Burger Court Curbing Bills</td>
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<td>Cut Neutral</td>
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<td>Cut Guardian</td>
<td>4.14* (0.37)</td>
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</table>

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standard errors in parentheses
* p<0.05

Table 3: Results of case-level analysis. The outcome variable is the Guardian variable that measures whether the Supreme Court attempts to correct negative treatment of laws by the lower courts.
bills factoring into the Court’s decision making calculus, the distance from Congress does exert a positive effect on guardian behavior, with the Court more likely to engage in this type of behavior when farther from Congress. We also see the Rehnquist Court engaging in a more activist role, and in doing so engaging in less guardian behavior.

**Discussion and Conclusion**

We do not find any evidence directly supporting our institutional maintenance hypotheses. At the yearly level, we fail to find evidence of a relationship between court-curbing bills and any of our dependent variables. At the case-level, while we find evidence of guardian behavior by the Supreme Court whenever the lower courts review Acts of Congress, this behavior is not connected to the number of court-curbing bills introduced in line with the institutional maintenance hypotheses.

We are hesitant to draw too many conclusions from our findings at this time until we have finished collecting the data for our analysis. When we have completed the collection of instances of judicial review from the Shepard’s reports, we will have stronger aggregate level data and more comprehensive case-level data. We also plan to further extend our analysis. We would like to incorporate information about the Acts that are being reviewed. While the institutional maintenance model makes sense when the Court reviews recent statutes, where the Court reviews an act that Congress also dislikes, we might expect the Court to be more likely to strike the law under the institutional maintenance framework, rather than uphold the law. Thus, we plan to incorporate information about the act being challenged, including the ideal points of the enacting coalition. This will allow us to better determine the grounds on which the Court is making their decisions about when to review a statute as well as its ultimate decision about constitutionality and whether to uphold or reverse the lower court. In the future, we also plan to
incorporate information about the targets of each court-curbing bill. It is possible that rather than engaging in guardian behavior across the board, the Court targets their review to those courts that have been most recently targeted by Congress.
References


Obergefell v. Hodges. 2015. 576 U.S. ____.


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