The Separation of Powers, Court Curbing, and Judicial Legitimacy in American States

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Abstract

We study the separation of powers between judicial and legislative institutions among the 50 American states. We consider the likelihood that legislatures attempt to curb their judicial counterparts in addition to how likely courts are to bow to such pressure. Building upon previous studies in this area, we consider how judicial accountability mechanisms affect this separation of powers. We specify a series of game theoretic models which consider these issues. Counterintuitively, our results show how accountable courts can be more independent than unelected courts when they use their retention opportunities to update their information over their popular legitimacy. We examine court-curbing and judicial independence in every state from 2007 to 2014 and find that elected courts are, consistent with this insight, often more likely to invalidate legislative acts and, inconsistent with prior research, do not condition their strategies upon legislative court-curbing efforts.

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1 Introduction

Judicial review gives courts the power to invalidate acts of other branches of government. Of course, the scope of a court's authority at any given time is constrained by interbranch relations, public opinion, institutional rules, and politics more broadly (Peltason, 1971; Rosenberg, 2008) In the American separation of powers system, one constraint on judicial power is the introduction of court-curbing legislation.[1] Court-curbing efforts can be traced back far in the historical record and consequently receives considerable attention from scholars.[2] This research finds that legislators are more likely to introduce court-curbing bills when the judiciary is unpopular and politically incongruent with legislative preferences (Bell and Scott, 2006; Clark, 2011; Mark and Zilis, 2018). Furthermore, scholars find that judges are more likely to uphold legislative policies in response to such court-curbing efforts (Clark, 2009, 2011).

Court-curbing is an important component of interbranch relations with potentially critical payoffs for judicial independence and the separation of powers. Most analysis of this phenomenon, however, is limited to the federal context with courts that are institutionally homogeneous.[3] All federal judges are selected via executive nomination, Senate confirmation, then privy to life tenure. This is an important distinction given that a similar level of institutional independence exists in only three American state high courts where most cases are heard.[4] Most states hold judges accountable either to citizens via election or to other lawmakers via reappointment. Up to now, what drives court-curbing behavior in institutionally heterogeneous systems and whether such efforts might constrain judicial independence is unclear.

The court-curbing phenomenon is not unique to the federal judiciary as state courts are not immune from such maneuvering by lawmakers. State legislative court-curbing efforts include routine proposals to cut judicial pay and budgets as well as other reprimands such as charging personal rent for courtroom space when judges make unpopular decisions. Most extreme are efforts to re-

[1] Such legislation might include plans to strip the judiciary of jurisdiction over a particular issue, pack the courts with partisan loyalists, defund the courts, and more (Clark, 2011).

[2] Famously, as an effort to constrain the only branch of government still controlled by the Federalists after the election of 1800, an Anti-Federalist Congress passed the Judiciary Act of 1802 and managed to "cancel" a year-long session of the Supreme Court. This legal savvy effectively delayed judicial action on (most notably) *Marbury v. Madison* (1803), as well as other cases.

[3] See, however, Leonard (2016).

[4] These states are Massachusetts, New Hampshire, and Rhode Island. Justices on these state high courts have an undefined tenure in office, though Massachusetts and New Hampshire each provide for mandatory retirement ages.

move judges entirely.[5] According to Wines (2018) seven state legislatures introduced impeachment measures in the 2011/2012 legislative session. This included an effort by Republicans in the New Hampshire State House to remove the entire New Hampshire Superior Court over its handling of custody and domestic relations cases. Similar efforts have occurred in states like Iowa, North Carolina, and West Virginia.

Given the diversity of institutional arrangements in high courts in American states, we focus on court curbing there. Specifically, we examine how institutional arrangements related to judicial independence affect legislative court-curbing behavior in state legislatures. We also examine the payoffs of court curbing legislation for the exercise of judicial review. Our analysis introduces game theoretic models that consider judicial independence and the separation of powers. These models indicate that accountability mechanisms can undermine judicial independence. However, if these mechanisms afford judges the opportunity to learn about the state of their legitimacy from extra-legislative sources, our models suggest that accountable judges can exhibit higher levels of judicial independence compared to those with tenure in office.

We test the empirical implications of our formal models using aggregate-level data from all 50 American states over time. We find that legislatures respond to judicial threats with court-curbing behavior, but courts, regardless of institutional design, do not respond to these signals. Moreover, we find that accountability mechanisms empower courts in the separation of powers game as high courts subject to accountability mechanisms invalidate significantly more legislative acts compared to those with life tenure. As a robustness check, we analyze individual, justice-level data and again find that justices working in accountable institutions are significantly more likely to vote to invalidate a legislative act compared to those with life tenure. Our findings suggest that the time may be ripe to reconsider the effect court-curbing has upon the exercise of judicial review.

2 Court-Curbing and the Separation of Powers

Our research builds upon scholarly work that examines the influence of separated powers upon judicial behavior. Scholars have assessed the likelihood that legislative efforts to limit or punish the judiciary have any measurable influence on the exercise of judicial review (Murphy, 1962; Eskridge,

[5]This happened recently in Iowa, according to William Rafferty from the National Center for State Courts.

1991; Gely and Spiller, 1992; Epstein and Knight, 1998; Rogers, 2001). Their research largely concludes that the threat of legislative hostility induces strategic judicial behavior, including a constrained use of judicial review. Research by Tom Clark (2009) is particularly significant. His work integrated legislative court curbing behavior into a separation of powers model. He argued that court curbing bills indicate public disapproval of the judiciary by giving legislators a means to provide some symbolic response to constituents or to position-take regarding judicial action (i.e., Mayhew, 1974). Accordingly, public opinion in his formal model was an indirect conditioning agent upon judicial decision-making.[6]

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

Beyond differences in independent behavior across elected and appointed courts, scholars have also recognized that differences may exist in the behavior of state legislatures as they relate to these courts. This research suggests that legislative attempts at court curbing are a function of ideological distance, as well as the degree of political insulation for the judiciary (Bell and Scott, 2006; Clark, 2009, 2011; Mark and Zilis, 2018). While Clark's (2009) analysis of federal courts equates political insulation with lifetime appointment, Leonard (2016) argues that political insulation may or may not be related to how the court is selected for state judiciaries. Her analysis of court curbing by

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

state legislators demonstrates that the political relationship between a state's legislative and judicial branch is more important than judicial selection methods in determining whether legislators will exhibit court curbing behavior.

The impact that court curbing efforts by state legislatures may have on a state judiciary is unknown and untested in Leonard's (2016) analysis. Accordingly, any conclusion about political insulation and political independence for these courts is preliminary. Here, we examine not only the conditions under which legislators are more likely to engage in court curbing in the states but also the impact that it has upon the judiciary as well.

3 Judicial Independence and the Separation of Powers

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

Politics may also empower judicial discretion. An effective judiciary usually needs at least one other branch of government to support its agenda. The U.S. Supreme Court's decades' long effort to further civil rights for African Americans illustrates this point (Rosenberg, 2008). An independent judiciary may also further policy goals for elected elites who lack sufficient political capital to advance unpopular public policies or who face entrenched political interests (Rodgers and Bullock, 1976; Whittington, 2005).[7] Judicial independence can also be useful to political parties who

[7]For example, during the John F. Kennedy administration, the Democratic Party was badly fractured by conservative and liberal factions, which made liberal policy-making difficult for Kennedy in Congress, especially given the many vetoes enjoyed by prominent southern Democrats. Kennedy therefore backed the U.S. Supreme Court's decision in *Baker v. Carr* (1962), which challenged racially malapportioned legislative districts in the South and paved the way for more liberal Democrats in the House of Representatives—effectively hurting his own party but

compete closely with others for power, especially when opposition parties have polarized preferences (Hanssen, 2004; Stephenson, 2003, 2004). When a majority party's agenda is at little risk of being threatened by a minority party, majorities have few incentives to share power with courts.[8]

One additional explanation for judicial independence centers upon public opinion. There is generally strong support for American judicial institutions, even when the public disagrees with specific case outcomes (e.g., Caldeira and Gibson, 1992; Gibson, 2007). Logically, elected officials risk voter backlash if they defy a popular court (Rogers, 2001; Vanberg, 2001, 2005). Given that courts have neither the power of the "purse nor sword," legitimacy is perhaps the most important political capital for the judicial branch.

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

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

In terms on judicial review, it is possible that accountability might constrain a judiciary's ability to engage in an unfettered review of legislative acts. After all, the existence of a mechanism for

furthering his ideological interests (see Whittington, 2005, 587-8). See Fox and Stephenson (2011), however, for a model that shows how such an arrangement can be welfare suboptimal.

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

institutional accountability is proof that judges can be punished for unpopular decisions. To this end, a lengthy literature demonstrates that electorally accountable judges may tailor their decision-making to win reelection (e.g. Hall, 1987)—especially for salient cases and when more proximate to retention elections (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014; Canes-Wrone, Clark and Semet, 2018; Cann and Wilhelm, 2011). This may be true in unelected courts as well as appointed judges who must win reappointment to serve additional terms in office exhibit similar behavior (Canes-Wrone, Clark and Kelly, 2014; Shepherd, 2009).[9]

Alternatively, accountability mechanisms might expand judicial authority to review the acts of co-equal branches. Public goodwill can empower courts in the separation of powers game (Baum, 2006; Carrubba, 2009; Clark, 2009; Rogers, 2001; Staton, 2006). And recent experimental and observational research indicates that accountability mechanisms like judicial elections influence democratic engagement with courts and help expand judicial legitimacy (Bonneau and Hall, 2009; Gibson, 2008, 2009, 2013; Hall, 2015).[10] In this way, accountability mechanisms might not only enhance judicial legitimacy but also independence. In the following sections, we formalize these expectations with respect to judicial independence, legitimacy, and the separation of powers.

4 Game Theoretic Models

In this section, we outline game theoretic models of judicial independence and the separation of powers. We build most directly upon Clark's (2009) model of legislative-judicial relations.[11] Clark (2009) examined legislative signals of waning judicial legitimacy and the likelihood that courts would constrain their review of legislative acts. He found that information asymmetries and a desire to protect institutional legitimacy led courts to moderate their exercise of judicial review in response to mounting signals of waning legitimacy. We use his model as a baseline for an unaccountable judiciary. We then refine this baseline to allow for accountability mechanisms, including the opportunity for courts to learn about the state of their legitimacy after having stood

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

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

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

for retention. These models allow us to understand how changing institutions and informational structures influence legislative hostility to courts and judicial discretion in the separation of powers game. In consideration of space, we present the results from the models below, and we rigorously prove these results in a supplemental appendix.

4.1 Unaccountable Courts

There are two players in this version of the game, $N = \{j, l\}$, which include a judicial branch, j, and a legislative branch, l.[12] Prior to play, Nature determines j's popular legitimacy probabilistically, $\Omega \in \{A, B\}$. When $\Omega = A$, the judiciary is said to be illegitimate such that unconstrained behavior fails to enjoy public support—vice versa when $\Omega = B$. The legislative branch observes this state perfectly and proceeds to send j a signal relating to its institutional legitimacy, $\omega \in \{a, b\}$, where $\omega = a$ is a signal of waning public support, and $\omega = b$ one of strong support. The judiciary is imperfectly informed regarding the state of its legitimacy. Its prior beliefs are such that $Pr(\Omega = A) = p$, where $p \in (0, 1)$. It updates its beliefs via Bayes' Rules whenever possible and proceeds to evaluate the constitutional validity of a pair of legislative acts, $d \in \{c, u\}$.[13] It can either make a "constrained" choice, upholding the act's validity, or an "unconstrained" choice, striking it down. Upon making its decision, the game ends, states are realized, and payoffs accrue.

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

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

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

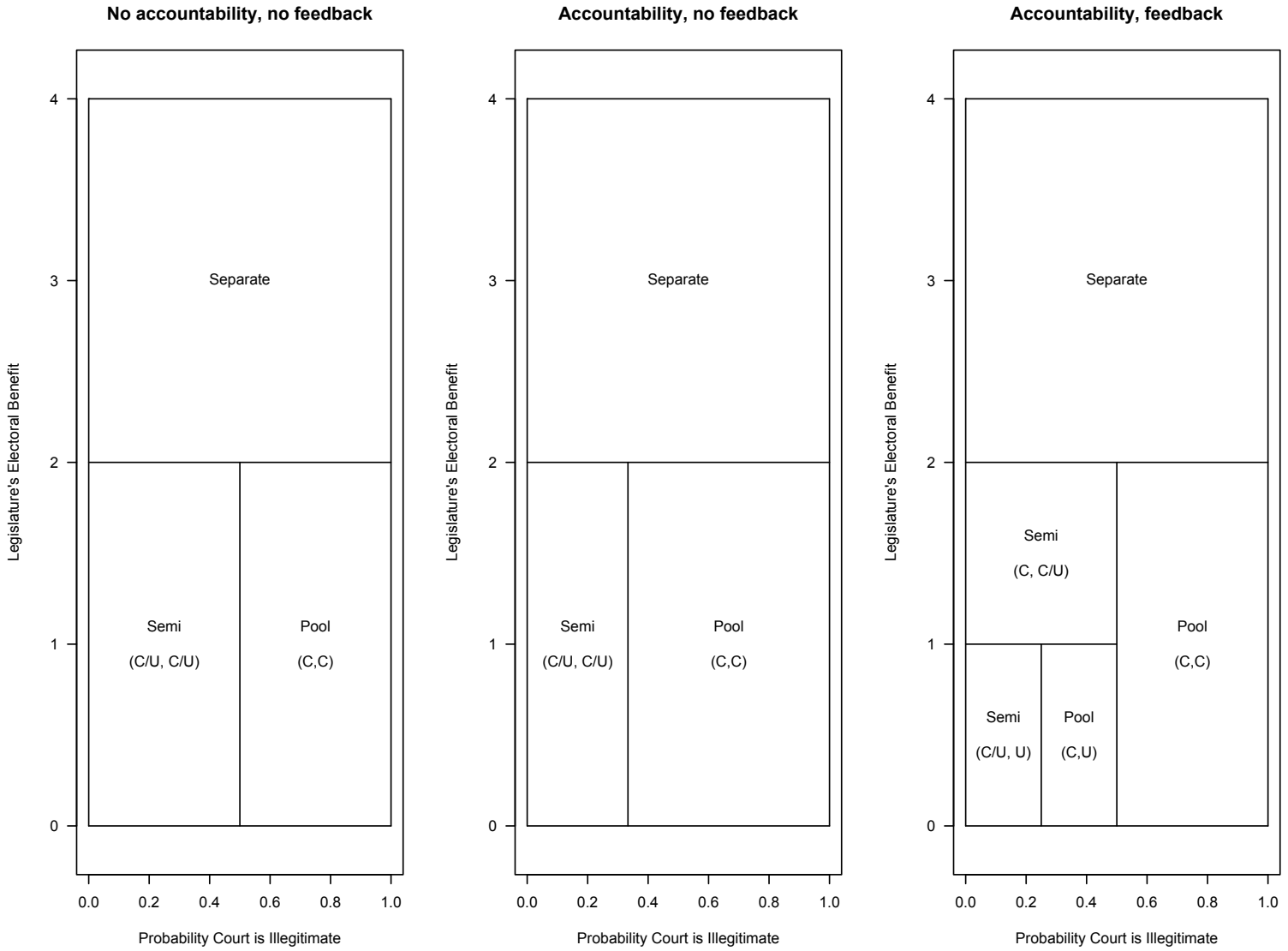

Figure 1: Perfect Bayesian equilibria across three models of legislative-judicial interactions. The x-axis represents the prior probability that j is illegitimate (p), and the y-axis is the legislature's preference for electoral benefits (ϵ). Parenthetical strategies represent the judiciary's choice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

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

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

4.2 Accountable Courts without Feedback

Absent accountability mechanisms, the likelihood l signals that the court is illegitimate is a function both of its desire to protect its legislative agenda along with the court's prior belief it lacks legitimacy. Because these courts are disconnected from public opinion, legislatures capitalize upon information asymmetries to win at the separation of powers game. In this section, we consider how accountability mechanisms affect the separation of powers game.[14] We now amend the game such that judges must face some type of retention vote after they have considered the constitutionality of some legislation, and they must now attend to not only their preference to maintain legitimacy but also their jobs.[15]

[14] By "accountability mechanisms," we refer to any institution that limits judicial terms in office such that individuals must seek permission (either from the public or other elites) to continue for subsequent terms of service.

[15] We note here that two American states, South Carolina and Virginia, subject judges to reappointment by the legislature. We do not model a scenario where the same institution that signals the court determines its retention

This version of the game has three players, $N = \{j, l, v\}$, which are a judiciary, legislature, and voter, respectively.[16] We assume that v derives utility from having a legitimate judiciary such that it earns a payoff of "1" if it retains j given $\Omega = B$ or if it removes j given $\Omega = A$. Otherwise v earns a payoff of "0." The voter has some prior belief that j is legitimate, $\rho > \frac{1}{2}$.[17] Therefore, v would prefer to retain j when $\Omega = B$, and it would prefer to remove j when $\Omega = A$. Suppose that an unconstrained judicial policy reveals j's type; whereas a constrained choice conceals it. Therefore, the best that v can do is to retain j anytime it makes a constrained choice or, provided $\Omega = B$, an unconstrained choice. The voter will remove j from office if it observes unconstrained behavior when $\Omega = A$. Additionally, j has preferences over voting outcomes. We assume that j earns a benefit, $\pi > 0$ anytime it is retained and $-\pi$ when it is removed from office.

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

- *Proposition 1*: For all $\epsilon < 2b_l$, the *ex ante* likelihood that l plays $\omega = a$ is at least as great among accountable courts without feedback as it is for unaccountable courts.

decision. Rather, we assume that the individuals who signal the court and who determine its retention are different entities.

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

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

Turning now to the accountable judiciary's response, we find that its independence is curtailed by its preference to win retention. Of course, so long as l enters into a separating equilibrium, j will make a constrained choice when $\omega = a$ and an unconstrained choice otherwise. But when l has a strong preference for policy-based benefits, j is less able to invalidate legislative acts. First, note that because $\frac{b_j}{2b_j+\pi} < \frac{1}{2}$, the judiciary upholds the constitutional validity of legislative acts for a strictly larger class of beliefs than when it is unaccountable. Without accountability mechanisms, j strikes down l's policies probabilistically for all $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$, but with the introduction of accountability, j upholds these policies with probability 1.0. And even when j is most certain it is legitimate ($p < \frac{b_j}{2b_j+\pi}$), it invalidates legislative acts with probability $m^* = \frac{2b_l-\epsilon}{2b_l}$. This likelihood is equal to the game without accountability mechanisms but covers a strictly smaller class of prior beliefs. That judicial accountability appears to cower courts in response to mounting legislative posturing leads to the following proposition:

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

4.3 Accountable Courts with Feedback

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

To suss out these confounding issues in the separation of powers game, we modify the previous model with accountable courts such that j now evaluates the constitutional validity of some leg-

islative act, stands for retention, and then evaluates the validity of some second legislative act.[18] If j makes a constrained choice in its first exercise of judicial review, v, being unable to update its beliefs, will reelect it, but unless l plays a separating strategy, j will remain unsure of its type. By contrast, if j makes an unconstrained choice in its first exercise of judicial review and is retained, it will have learned with certainty that it is a legitimate institution and will therefore make an unconstrained choice in its subsequent assessment of legislative policy. By allowing j to make policy, learn about its legitimacy, and then make additional policy, we are modeling a court's ability to obviate the legislature's monopoly on information and update its beliefs regarding its legitimacy.

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

- *Proposition 3*: For all $b_l < \epsilon < 2b_l$, the *ex ante* likelihood that l plays $\omega = a$ is at least as small for accountable courts with feedback as for all other courts.

Next, consider the case for when l strictly cares for its policy benefits more than for its electoral ones ($\epsilon < b_l$). Note immediately from the right-hand pane in Figure 1 that l is more likely to pool its signal that j lacks legitimacy than in either of the two previous models. So long as $p > \frac{b_j}{2b_j+2\pi}$, the legislature has no incentive to place any positive weight upon the signal $\omega = b$. As we explain below, this is due to the fact that, given the opportunity for feedback, j is more likely to make

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

unconstrained decisions after its reelection, which is especially detrimental to a legislature that highly evaluates its policy payoffs. Furthermore, note that even when j is nearly certain it is legitimate, $p < \frac{b_j}{2b_j+2\pi}$, the legislature enforces a semi-separating equilibrium but only by placing a very high probability on bluffing on j's legitimacy, $q^* = \frac{p(2\pi+b_j)}{(1-p)b_j}$. Note that the likelihood l bluffs in this semi-separating equilibrium is strictly greater than in any of the semi-separating equilibria discussed above. It is clear, then, that when $\epsilon < b_l$, and when courts enjoy access to extra-legislative feedback, legislatures become more likely to send signals of waning legitimacy compared to unaccountable courts or to accountable courts without feedback. That such feedback leads legislatures to more frequently bluff given its strong preference for policy payoffs leads to the following proposition:

- *Proposition 4*: For all $\epsilon < b_l$, the *ex ante* likelihood that l plays $\omega = a$ is at least as great for accountable courts with feedback as for all other courts.

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

Now consider the judiciary's optimal response when l is highly motivated by its desire to secure favorable policy outcomes ($\epsilon < b_l$). Recall that for this class of preferences, l is driven to bluff more than in any previous version of the game. But note how j's response to this bluffing is more sophisticated that in previous models. This is because of its ability to condition its future decisions upon v's response to its earlier ones. As before, when j is, on balance, more certain it is illegitimate

($p > \frac{1}{2}$), it will only make constrained decisions. When its prior beliefs are that it is legitimate ($p < \frac{1}{2}$), however, it enters into two types of equilibria. The first is a pooling equilibrium that attains when j is reasonably certain it is legitimate, $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{1}{2}\right)$. In it, the legislature always signals j that it is illegitimate, j makes a constrained choice prior to its election, and then it makes an unconstrained choice afterward. This behavior resembles the pandering phenomenon observed in much of the judicial elections literature. Courts are unsure about their legitimacy, and they value their positions; therefore, they pander for retention and then exhibit unconstrained behavior afterward.

When j has a very strong belief it is legitimate $\left(p < \frac{b_j}{2b_j+2\pi}\right)$, and when it has the opportunity to confirm its beliefs via election, it behaves in some of its most unconstrained ways yet. For all $\epsilon < b_l$ and $p < \frac{b_j}{2b_j+2\pi}$, a set of semi-separating equilibria attain such that j always makes an unconstrained choice when it observes a signal of $\omega = b$. And when l signals that j has lost public support, the courts make an unconstrained choice prior to its election with probability $m^* = \frac{b_l-\epsilon}{b_l}$. Note that this probability is strictly less than in any previous semi-separating equilibrium. Nevertheless, unlike the other set of semi-separating equilibria identified for accountable courts with feedback, j is willing to gamble on unconstrained decision-making prior to its retention decision, risking its security in office. If j makes an unconstrained choice prior to its retention decision, v will retain it so long as $\Omega = B$; the judiciary will learn that it is legitimate; and j will continue to make unconstrained choices afterwards. If j makes a constrained choice, v will be unable to update its beliefs and will therefore retain the judiciary. Consequently, j will proceed to make unconstrained decisions since its *ex ante* belief is that it is, in fact, legitimate. That such feedback leads accountable judges to make more constrained decisions prior to its elections and more unconstrained decisions afterward leads to the following proposition:

- *Proposition 5*: The *ex ante* likelihood accountable courts with feedback play $d = u$ is at least as small as all other courts prior to its retention decision and at least as great afterward.

5 Empirical Implications of the Formal Models

Our formal models provide us with a number of possible—and at times competing—expectations over the separation of powers between courts and legislatures given their institutional designs.

Specifically, our results show how accountability mechanisms and access to extra-legislative signals of judicial legitimacy might affect either legislative efforts to curb the courts or a court's likelihood of showing constraint in its review of legislative acts. In this section, we outline hypotheses related to legislative-judicial behavior in light of the separation of powers games presented above.

5.1 Unaccountable Courts

To begin, our baseline model predicted that courts and legislatures would behave as outlined by Clark (2009). When courts are unaccountable, and when they must rely largely upon legislative signals to assess their legitimacy, then we would expect legislatures to engage in greater court-curbing not only when a court's legitimacy is waning but also as legislatures increasingly value their policy benefits.

- *Hypothesis 1*: As judicial legitimacy decreases, legislatures will be more likely to signal waning public support for courts.
- *Hypothesis 2*: As legislative preferences over policy victories increase, legislatures will be more likely to signal waning public support for courts.

Turning now to the judiciary, our baseline model leads us to suspect that when courts are unaccountable, and when they do not have access to extra-legislative information regarding their legitimacy, they will be more likely to heed legislative signals and behave in a constrained manner. Nevertheless as the legislature increasingly values policy victories, courts should be more likely to behave in an unconstrained manner.

- *Hypothesis 3*: As legislative signals of waning public support are increasing, courts will be more likely make constrained decisions.
- *Hypothesis 4*: As legislative preferences over policy victories increase, courts will be more likely to make unconstrained decisions.

5.2 Accountable Courts without Feedback

Our formal models built upon the work set out in Clark (2009) by first introducing an accountability mechanism to the judiciary's utility function. When courts have preferences over their retentions, and when they do not have access to extra-legislative information regarding their legitimacy, we

found that not only were legislatures more likely to signal waning legitimacy but also that courts were more likely to heed such advice.

- *Hypothesis 5*: Legislatures will be more likely to signal waning judicial legitimacy, provided courts are accountable and have no extra-legislative information related to their legitimacy.
- *Hypothesis 6*: Accountable courts will be more likely to make constrained decisions compared to unaccountable courts, provided courts have no extra-legislative information related to their legitimacy.

5.3 Accountable Courts with Feedback

Finally, our third game-theoretic model showed how judicial accountability mechanisms can allow courts to learn about their popular legitimacy from sources independent of legislative signals. First, this version of the game demonstrated that, provided legislatures weigh electoral benefits more than policy benefits, their signaling behavior will be no different compared to the game with no accountability whatsoever. Nevertheless, we also found that as the legislature's preference to win policy victories is increasing, judicial accountability and access to extra-legislative information causes the legislature to send ever-increasing signals of waning legitimacy.

- *Hypothesis 7*: As legislative preferences over policy victories increase, legislatures will be more likely to signal waning public support for accountable courts compared to unaccountable courts.

Next, we found that accountability mechanisms, when they provide courts opportunities to learn about their legitimacy from reelection or reappointment itself, leads courts to behavior more cautiously prior to a retention decision but more aggressively following a successful retention. Put differently, prior to getting feedback from voters or elites, accountable courts are more likely to uphold some legislative act, but as these retention constraints are decreasing, courts are more likely to invalidate some legislative act.

- *Hypothesis 8*: As retention constraints are decreasing, accountable courts will be more likely to make unconstrained decisions.

6 Quantitative Analysis

To test the above-stated hypotheses, we require comparatively heterogeneous institutions including both those with and without judicial accountability mechanisms. We therefore examine legislative-judicial relations among all 50 American states between 2007 and 2014. Below, we test hypotheses using aggregate-level data related to the number of court-curbing bills each state legislature introduced in a given year and how state high courts responded when reviewing the constitutionality of legislative acts. To further assess the effect accountability mechanisms have upon judicial behavior, we conclude our analysis by gathering data related to individual justices' votes in cases challenging legislative acts.

6.1 Legislative Signaling Behavior

In this section, we assess legislative signals of waning judicial legitimacy. Consistent with received wisdom, we collect data related to state legislatures' attempts to curb their high courts. We also gather data related to other variables implicated by the formal models such as judicial legitimacy, legislative preferences over policy, and so forth. We then test our hypotheses using negative binomial regression techniques.

6.1.1 Court-Curbing

Our outcome variable of interest in this section is a legislature's signaling behavior regarding a judiciary's institutional legitimacy. We here follow Clark's (2009) lead and gather data relating to court-curbing behavior by state legislatures ("Court-Curbing"), operationalized as an event count of the number of bill introductions in a state legislature in a given year. To obtain this information, we follow Leonard (2016) and use data made available by the National Center for State Courts (NCSC) on the Gavel to Gavel blog. The blog includes all legislative bill introductions, enactments, and amendments related to state judiciaries in the 50 states from 2007 to the present. In order to identify whether legislative action was court curbing in nature, we follow Leonard (2016) and use coding rules that mirror those used by Rosenberg (1992) and Clark (2011).[19]

[19] A good summary of theses coding rules can be found in Leonard (2016). She also provides an excellent overview of the substance of state policy related to state judiciaries, and more information on Gavel to Gavel's categorical policy designations.

Descriptive statistics show that court-curbing efforts in the American states is relatively common. Between 2007 and 2014, the average state legislature introduced 3.5 court-curbing bills. While the modal outcome is that no court-curbing bills were filed, there are extreme cases in which court-curbing can run into the dozens. In Kansas, for example, the Republican-led state legislature passed sweeping tax cuts in 2012 that created insurmountable budget shortfalls for the state's public schools. Even before the Kansas Supreme Court ruled these funding disparities unconstitutional in 2014, Republican leaders had hinted they would not comply with an adverse opinion. In 2013, they filed 14 court-curbing bills, and after a lower court demanded nearly $400 million more in school funding, the legislature responded by filing another 20 court-curbing bills.[20]

6.1.2 Accountability Mechanisms

Consistent with Hypothesis 5, we suspect that legislatures might be more likely to send signals of waning judicial legitimacy when courts are accountable. Nevertheless, accountability mechanisms come in a variety of flavors. Below, we outline our operationalization strategy for concepts related to accountability mechanisms and offer expectations for each of our variables.

To begin, we control for institutions that do not limit justices' terms in office ("Tenure = 1" if yes, "0" otherwise). Individuals working in these types of systems are, like their federal counterparts, generally unaccountable for the decisions they render. Consistent with Hypotheses 5 and 7, then, we might anticipate legislatures to send these institutions comparably fewer signals of waning popular legitimacy.Unaccountability is relatively uncommon in state politics as only three American states grant justices tenure in office.[21]

The American states have designed a variety of mechanisms to hold judges accountable for their behavior. Some of these institutions make individuals more vulnerable to removal compared to others. First, some states require judges to win reappointment at the end of each term in office ("'Reappointment = 1" if yes, "0" otherwise). Which political body holds the keys to reappointment differs by state. Some require judges to win reappointment from the governor, others the state legislature, and others still nonpartisan nominating commissions. Elite reappointment methods of accountability can leave judges uniquely vulnerable to reprisal as the decision to remove an

[20]See *Gannon v. Kansas* (298 Kan. 1107 [2014]).
[21]These states are Massachusetts, New Hampshire, and Rhode Island.

incumbent juror is confined to a select number of well-informed individuals (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Kelly, 2014; Shepherd, 2009). Even still, most reappointments are pro forma, and few incumbents are actually removed from office. Nine American states use reappointment methods of accountability.[22]

Most American states use some form of popular election to hold their judges to account. These types of mechanisms themselves tend to fall into one of two categories. A total of nineteen states use uncompetitive popular elections.[23] Here, voters are asked whether a given jurist should be retained for another term in office ("Retention = 1" if yes, "0" otherwise). Voters can only choose to retain or remove a judge. There are no formal challengers seeking to replace the incumbent, and if an incumbent is removed, the position is vacated, and a new selection process must occur.[24] Historically, retention elections have not posed much risk to incumbents absent some popular outcry over controversial court rulings, but recent research shows that these elections became significantly more competitive with the rise of the Tea Party Movement of 2010 (Hughes, 2019).

Another nineteen states use competitive popular elections to hold judges accountable ("Competitive = 1" if yes, "0" otherwise). These types of elections are more akin to those for legislative or executive positions compared to uncompetitive judicial elections. Competitive accountability mechanisms themselves tend to come in three varieties. Partisan elections have judges seek their party's nomination for a judicial position, and that party label appears on the general election ballot.[25] Nonpartisan elections omit political parties from the nomination process, and candidates appear on the ballot with no partisan affiliation.[26] Finally, some states use elements of both partisan and nonpartisan elections to hold judges accountable. These hybrid methods require individuals to seek a political party's nomination for a judicial position, but on the general election ballot, partisan labels are omitted.[27]

[22]These states are Connecticut, Delaware, Hawaii, Maine, New Jersey, New York, South Carolina, Vermont, and Virginia.

[23]These states are Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming.

[24]Some states use elite appointment to fill such vacancies while others utilize popular elections.

[25]These four states are Alabama, Louisiana, Texas, and West Virginia. In 2018, North Carolina switched to partisan elections for state high court positions, but this change occurred outside the time span of our study. West Virginia ceased using partisan elections in 2016, but this change also occurred outside the span of our study.

[26]These thirteen states are Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin.

[27]Only two states use hybrid methods, and these are Ohio and Michigan.

6.1.3 Public Support for Courts

In light of Hypothesis 1, we anticipate that legislatures should be more likely to engage in court-curbing behavior when the judiciary is losing support among the electorate. At the federal level, a wealth of survey research measures public opinion regarding the state of Supreme Court legitimacy. For example, Clark (2009, 979-80) uses longitudinal research from the General Social Survey to gauge the percentage of Americans who have "hardly any" confidence in the Supreme Court to test his hypotheses.[28] Others measure the public's willingness to amend or outright eliminate certain institutional powers like judicial review (Caldeira and Gibson, 1992).

Unfortunately, there is little comparable survey-level research of judicial legitimacy available at the state-level. For example, the Cooperative Election Study is one of the most comprehensive surveys of public opinion at the state-level. But while this research assesses public support for state institutions like the governor, it fails to assess comparable levels of support for state high courts.[29] And while it is true that the occasional one-off research design assesses state court legitimacy, these studies tend to focus on individual courts or specific moments in time (e.g., Gibson, 2008; Gibson and Nelson, 2018).

Despite a scarcity of data, scholars recognize that certain factors are likely to contribute to a presence or lack of popular support for courts. In one of the most comprehensive studies on the subject, Gibson, Caldeira and Baird (1998) find that individuals are more likely to assess a court as legitimate when they agree with the content of its decisions. Consequently, we conclude that voters should have more support for judicial institutions when those bodies are ideologically more proximate to the electorate. To assess the congruity between courts and voters, we make use of longitudinal measures of public and judicial ideology at the state-level for the period under study.

To measure the ideology of the public for each state and year under analysis, we use data first presented in Berry et al. (1998).[30] These "Berry Citizen Scores" are measured on a scale from 0 to 100 with higher values indicating greater liberalness. Brace, Langer and Hall (2000) similarly

[28]Information regarding the General Social Survey is available at `https://gss.norc.org/` (last accessed on 27 December 2021).

[29]Information regarding the Cooperative Election Study is available at `https://cces.gov.harvard.edu/pages/welcome-cooperative-congressional-election-study` (last accessed on 27 December 2021). The annual survey, which includes tens of thousands of respondents in each wave, regularly investigates public opinion on topics of state and national import.

[30]Data are available from `https://rcfording.com/state-ideology-data/` (last accessed on 27 December 2021).

measure the preferences of state supreme court justices using the partisanship of each justice, whether they were chosen via elite appointment or popular election, and the "Berry" score of those who chose them. These scores therefore represent the party-adjusted ideology (PAJID scores) of each high court justice on the same scale as the Berry scores.[31] To measure the ideological congruity between courts and voters in each state and year under analysis, we therefore calculate the absolute distance between the Berry Citizen Score for each state's electorate in a given year and the median PAJID score for each state high court in a given year ("Citizen Distance"). We expect that signals of waning support will be increasing with the distance between courts and the public.

6.1.4 Threats to Legislative Policy Preferences

According to Hypothesis 2, legislatures should be more likely to engage in court-curbing behavior as they increasingly value their policy payoffs. While it might be difficult to conceptualize a measure for a legislature's preference to protect policy outputs, we argue that it is easier to assess threats to those legislative priorities. We do so below with four additional control variables.

First, we examine the effect judicial review has upon the perceived threat legislatures have regarding judicial review. Arguably one of the clearest threats a legislature has over its policy agenda is the historical frequency with which courts invalidate their acts. Consequently, we operationalize this threat as the number of legislative acts a state high court invalidated in the previous year ("Judicial Review$_{t-1}$").[32] As the number of invalidations increase, we expect that legislatures will file increasing numbers of court-curbing bills.

Next, we measure the ideological distance between courts and other policy-makers. Similar to the measure of court-voter congruity above, we here rely upon data from Berry et al. (1998). As with voters, "Berry Elite Scores" measure the ideological preferences of state policy-makers on the same 0 to 100 scale of liberalness. Consequently, to capture the ideological congruence of state courts and their co-equal policy-makers, we measure the absolute distance between the median member of a state high court in a given year and other policy elites ("Elite Distance"). We anticipate that as this distance is increasing, legislatures will file increasing numbers of court-curbing bills.

[31] Because the original PAJID scores are not available for all of the justices in our sample, we replicate the original methodology of Brace, Langer and Hall (2000) by gathering the partisanship, method of selection, and ideology of selecting individuals to attain these measures.

[32] In the succeeding section, we use a version of this measure as the outcome variable of interest. In the interest of space, we therefore save a detailed discussion of this variable for that section of the paper.

We furthermore control for the presence of divided government. Here, we account for whether state legislative chambers and governorships are controlled by more than one political party in a given year ("Divided Government =1" if yes, "0" otherwise). The rationale here is that in the presence of divided government, it will be more difficult for legislatures to overturn a court's invalidation of some statute. Put differently, when government is divided, courts are more likely to have allies in some coequal branch of government that can veto changes to judicial policy-making. Consequently, we suspect that amidst divided government, legislatures will exhibit increasing numbers of court-curbing bills compared to unified governments.

Our last control variable for judicial threats to legislative priorities is the length of high court justices' terms in office ("Term Length"). State high courts have terms in office that span from a minimum of six to a maximum of fourteen years. On the one hand, it stands to reason that the more time that can pass between an offensive decision and an evaluation for retention, the less likely judges are to be removed from office. Therefore, we might expect courts with longer terms in office to pose greater risks to legislative policy preferences. On the other hand, if accountability mechanisms empower courts as implied by Hypothesis 8, then shorter terms in office could represent a greater threat to legislative policy preferences. Thus, it could also be the case that as judicial terms in office are increasing, legislative signals of waning legitimacy are decreasing.

Finally, consistent with Hypothesis 7, we anticipate that as legislatures increasingly value policy benefits, they will be more likely to signal waning legitimacy to accountable compared to unaccountable courts. We therefore estimate interaction effects between state supreme court methods of accountability and perceived threats to legislative priorities.[33]

6.1.5 Statistical Methodology

We estimate models relating to the number of court-curbing bills a legislature files in a given year. The dependent variable in this section is an event court, and statistical tests indicate it is overdispersed. Therefore, we use a negative binomial regression technique. To account for state-level heterogeneity, we estimate standard errors clustered by state. Finally, we include an exposure term for each of our regressions. An exposure term in an event count model reflects the number of

[33]Note, however, that justices with tenure do not have a defined term in office; therefore, these individuals are dropped from any regression including the variable, "Term Length."

opportunities an event could possibly have arisen. For our models of court-curbing legislation, the exposure term is the total number of bills filed in a given state and year. We summarize the general form of our statistical models in Equation 1:

$$Y_{i,t} \sim \text{NB}\big(u_{i,t} e^{\mathbf{X_{i,t}}\boldsymbol{\beta}+\alpha}\big), \tag{1}$$

where $u_{i,t}$ represents the exposure term and α represents the overdispersion term.

6.1.6 Results: Legislative Court-Curbing

In Table 1, we first present results from our negative binomial regressions relating to the likelihood legislatures engage in court-curbing behavior. The first column includes results from every state while the second includes only those that are accountable. Note that when it comes to the separation of powers game, our first set of results indicates that legislatures primarily respond to policy threats from the judiciary—results that are consistent with Hypothesis 2. Among all courts, a change from one standard deviation less than the mean number of legislative acts invalidated the previous year to one standard deviation greater than the mean results in an increase in predicted court-curbing bills filed in the legislature from 4.42 to 6.50 (a 47 percent increase in legislative hostility).

Similarly, accountable courts are the only types that have defined terms of office. Above, we argued that justices' term lengths could be associated with either greater or less hostility, depending upon how accountability methods informed courts about their popular legitimacy. According to results in the second column of Table 1, among accountable courts, as justices' terms in office are increasing, legislatures are less prone to file court curbing bills. A change in one standard deviation from below to above the mean term length results in a decline in project court-curbing bills from 6.59 to 3.36, all things being equal (a 49 percent decrease in legislative hostility). These results indicate that legislatures are more threatened by courts with shorter terms in office. Even still, we do not find support for they idea that legislatures are more likely to curb the courts when the two institutions are ideologically distant or when partisan control of government is divided.

Unlike Hypothesis 2, we find little support for Hypotheses 1 or 5. Hypothesis 1 posited that as popular support for the courts decreased, legislative court-curbing would increase. Nevertheless, the variable, "Citizen Distance" fails to reject the null hypothesis. Similarly, Hypothesis 5 held

Table 1: Court curbing among American state legislatures (2007 - 2014)

	All Courts		Accountable Courts	
	Estimate	$\Delta E(Y_{i,t})$	Estimate	$\Delta E(Y_{i,t})$
Accountability Mechanism				
Contested	-0.63	–	-0.07	–
	(0.11)		(0.40)	
Retention	-0.10	–	0.59	–
	(0.65)		(0.43)	
Reappointment	-0.80	–	–	–
	(0.75)			
Public Support				
Citizen Distance	-0.01	–	-0.01	–
	(0.01)		(0.01)	
Judicial Threats				
Judicial Review$_{i,t-1}$	0.34*	4.42→6.50	0.35*	3.77→5.55
	(0.11)		(0.11)	
Elite Distance	0.01	–	0.00	–
	(0.01)		(0.01)	
Divided Government	0.02	–	-0.04	–
	(0.19)		(0.18)	
Term Length	–	–	-0.16*	6.59→3.36
			(0.07)	
Statistical Estimates				
α	1.06*		0.94*	
	(0.14)		(0.14)	
Constant	-5.74*		-5.01*	
	(0.71)		(0.82)	
Log-Likelihood	-671.68		-611.67	
AIC	1361.36		1241.34	
N	281		264	

Notes: The dependent variable is the number of court-curbing bills in a given state and year. Estimates are negative binomial regression coefficients. Standard errors are clustered upon states. $\Delta E(Y_{i,t})$ denotes the change in the predicted number of court-curbing bills given a change in the independent variable from one standard deviation less than its mean to one standard deviation greater than its mean. Statistical significance denoted by an asterisk ($p < 0.05$, one-tailed).

that legislatures would be more likely to signal waning support to accountable courts compared to those with tenure. But as can be seen from Table 1, legislatures are no more or less likely to signal courts held to account via contested elections, retention elections or reappointment methods compared to courts with tenure in office.

Even still, Hypothesis 7 posited an interactive effect between a court's institutional design and the legislature's desire to defend its policy benefits. In Table 2, we present results from four additional negative binomial regressions. Each column represents a different interaction effect

Table 2: Court curbing amidst judicial threats to policy benefits (2007 - 2014)

	Judicial Review$_{t-1}$		Elite Distance		Divided Government		Term Length	
	Estimate	$\Delta E(Y_{i,t})$	Estimate	$\Delta E(Y_{i,t})$	Estimate	$\Delta E(Y_{i,t})$	Estimate	$\Delta E(Y_{i,t})$
Judicial Threats								
Main Effect	0.58	–	-0.03*	15.47→4.77	1.36*	2.88→11.22	-0.17	–
	(0.69)		(0.01)		(0.64)		(0.18)	
Accountability Mechanism								
Contested	-0.52	–	-1.65*	16.62→3.18	0.48	–	-0.73	–
	(0.69)		(0.79)		(0.76)		(1.90)	
Retention	-0.07	–	-1.23	–	0.84	–	1.11	–
	(0.69)		(0.80)		(0.76)		(2.07)	
Reappointment	-0.93	–	-0.93	–	0.46	–	–	–
	(0.79)		(0.88)		(0.84)			
Interaction Effects								
Contested × Threat	-0.34	–	0.04*	3.30→6.05	-1.52*	4.66→3.95	0.09	–
	(0.72)		(0.02)		(0.72)		(0.20)	
Retention × Threat	-0.24	–	0.04*	5.06→9.23	-1.16*	6.70→8.15	-0.05	–
	(0.72)		(0.01)		(0.70)		(0.22)	
Reappointment × Threat	0.26	–	-0.01	–	-2.23*	4.56→1.90	—	–
	(0.74)		(0.01)		(0.87)			
Public Support								
Citizen Distance	-0.00	–	-0.00	–	-0.00	–	-0.01	–
	(0.01)		(0.01)		(0.01)		(0.01)	
Statistical Estimates								
α	1.05*	–	0.97*	–	1.10*	–	1.06*	–
	(0.15)		(0.14)		(0.16)		(0.16)	
Constant	-5.77*	–	-4.86*	–	-6.59*	–	-4.72*	–
	(0.75)		(0.75)		(0.77)		(1.76)	
Log-Likelihood	-671.21		-666.71		-678.82		-623.94	
AIC	1360.43		1353.42		1379.63		1263.88	
N	281		285		285		268	

Notes: The dependent variable is the number of court-curbing bills in a given state and year. Estimates are negative binomial regression coefficients. Standard errors are clustered upon states. $\Delta E(Y_{i,t})$ denotes the change in the predicted number of court-curbing bills given a change in the independent variable from one standard deviation less than its mean to one standard deviation greater than its mean (continuous variables) or from its minimum to maximum (dichotomous variables). Statistical significance denoted by an asterisk ($p < 0.05$, one-tailed).

between accountability mechanisms and judicial threats to legislative policy benefits. First, from the table, note that interaction effects between declarations of unconstitutionality and term lengths with accountability methods are unrelated to legislative efforts to curb the judiciary. We do find, however, that the ideological distance between state high courts and legislatures, when interacted with methods of accountability, help to explain court-curbing behavior consistent with Hypothesis 7. We plot these effects graphically in Figure 2.

From Figure 2, note that as electorally accountable courts become more ideologically distant to the legislature, the legislature engages in ever-more-hostile court-curbing behavior, but the opposite type of behavior occurs for appointed courts. For example, among courts that face contested accountability methods, a change from one standard deviation below to above the mean distance from a legislature leads to a predicted increase in court-curbing behavior from 3.30 to 6.05, all things equal (an 83 percent increase in legislative hostility). Compare this effect to courts that are granted tenure in office. A change from one standard deviation below to above mean distance to the legislature leads to a predicted decrease in court-curbing behavior from 15.47 to 4.77, all things equal (a 224 percent decrease in legislative hostility).

Results from Table 2 also indicate that the interaction effect between divided government and institutional design is also statistically significant. Nevertheless, these results go in the opposite direction as what we had predicted in Hypothesis 7. In the presence of divided government, court-curbing is increasing among states with retention elections and tenure in office but decreasing in states with contested elections and reappointment methods of accountability.

6.2 Judicial Review of Legislative Acts

The previous section found support for Hypothesis 2 and qualified support for Hypothesis 7. That is, legislatures are primarily motivated to signal waning judicial legitimacy as their preference to obtain policy benefits are increasing, and this effect is exacerbated among courts that are accountable and ideologically incongruent with the legislature. In this section, we turn to the behavior of the judiciary in our separation of powers game. Specifically, we examine state high courts' use of judicial review when evaluating the constitutionality of some act of the state legislature. Below, we outline the data we use to test our hypotheses and discuss results in light of the predictions generated by the formal models above.

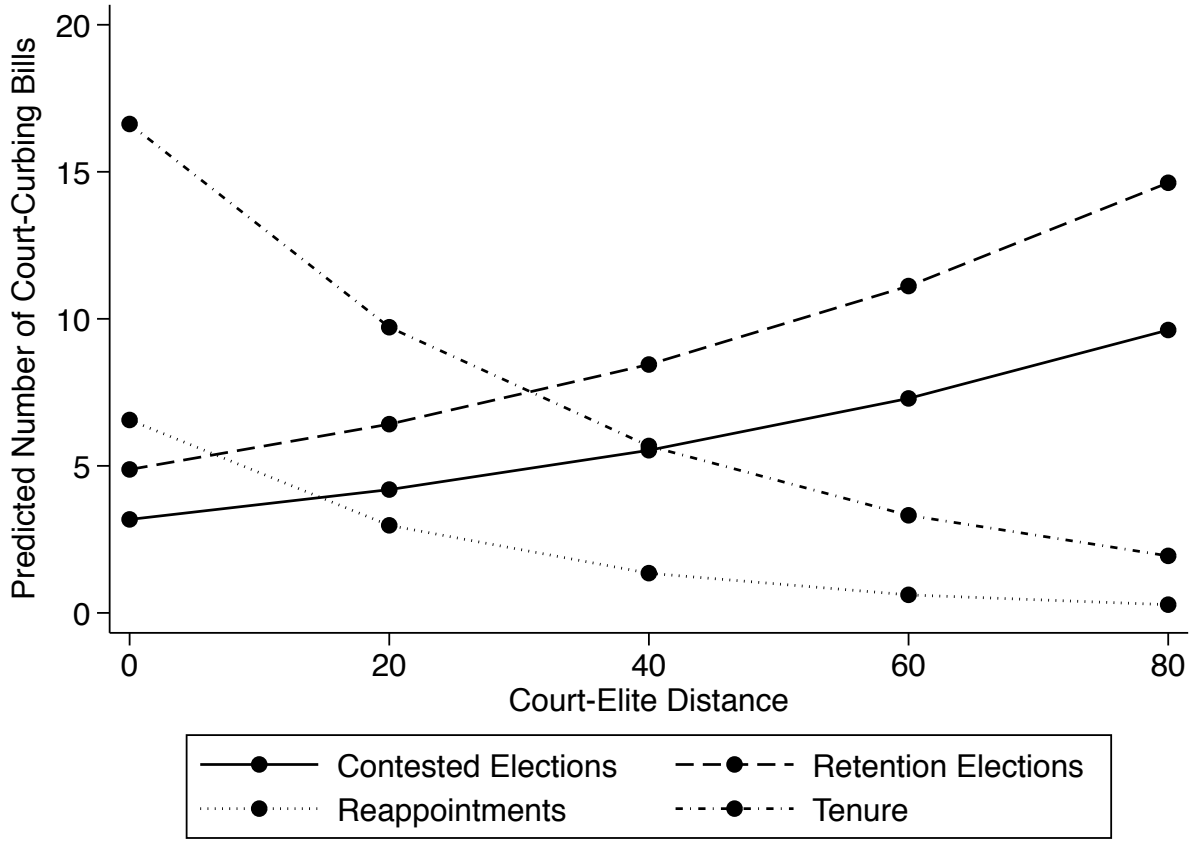

Figure 2: Legislative court-curbing efforts given judiciary's ideological distance from state elites and method of accountability (2007-2014)

6.2.1 Judicial Review

Our second outcome variable of interest relates to how courts respond to court-curbing signals received from the legislature. Specifically, we examine whether a state supreme court either upheld or invalidated some legislative act before it. To do so, we gather data that is an event count of the number of legislative acts a state supreme court invalidated in a given year ("Judicial Review"). To identify cases in state supreme courts that considered a constitutional challenge to state law, we conducted searches in Westlaw. We followed the search language and methodology used in Langer's (2002) analysis of judicial review in the state supreme courts. From this group of cases, we identified those decisions that issued a formal opinion invalidating a state law, excluding *per curium* opinions and challenges to county or municipal ordinances.

Compared to court-curbing, declarations of unconstitutionality are relatively less common. Between 2007 and 2014, the average state supreme court invalidated 0.4 legislative acts in a given year. No declarations of unconstitutionality occurred in 70 percent of all court-years. In 22.4 percent of all court-years, only one such declaration occurred, two declarations in 5.0 percent of court-years, three declarations in 2.6 percent of court-years, and only once in our data (Nebraska in 2014) did a court invalidate a total of four legislative acts. Below, we turn to predictor variables for a court's propensity to invalidate acts of the legislature.

6.2.2 Legislative Signals of Legitimacy

One of our primary relationships of interest relates to how courts respond to legislative signals that their legitimacy has waned among the public. According to expectations outlined in Hypothesis 3, in addition to received wisdom (Clark, 2009), we anticipate that as legislatures increasingly send court-curbing signals that courts will be more likely to believe they have lost popular legitimacy and therefore less likely to invalidate legislative acts. Consequently, we use court-curbing data introduced in the previous section to assess how courts respond to signals of waning legitimacy. Specifically, we assess how the number of court-curbing bills filed in the previous year ("Court-Curbing$_{t-1}$") affects the number of legislative acts a state high court invalidates in the present year.

6.2.3 Threats to Legislative Policy Preferences

According to Hypothesis 4, courts could be able to learn something from legislative signals of waning legitimacy when the legislature's policy-based preferences are comparatively high. Specifically, the court should be aware that the legislature is incentivized to bluff in these cases. Accordingly, we found that courts should be more willing to invalidate legislative acts as the legislature's policy priorities are increasing. To assess this relationship, we again turn to measures of judicial threats to the legislature's policy preferences. These include the variables,"Elite Distance," and "Divided Government." We anticipate that as the court becomes more ideologically distant to state elites, and that under conditions of divided government, courts will invalidate greater numbers of legislative acts.

6.2.4 Accountability Mechanisms

As with the previous section, we control for state high courts' accountability mechanisms. That is, we include as covariates the dichotomous indicators, "Contested," "Retention," and "Reappointment." Nevertheless, as we found with our formal models, the role accountability plays in conditioning judicial behavior in the separation of powers game depends upon whether a court can learn about the state of its popular legitimacy via the retention process itself. Specifically, according to Hypothesis 6, when accountable courts are unable to learn about their legitimacy through accountability mechanisms, we expect them to make fewer declarations of unconstitutionality compared to unaccountable courts.

6.2.5 Retention Constraints

Finally, we control for retention constraints among accountable courts. Our formal models demonstrated that when such constraints were increasing, courts should invalidate fewer legislative acts. Such constraints might include a difficult reelection effort, for example. Nevertheless, our models also showed that when these types of restraints are decreasing, accountable courts should behave in a more unconstrained manner. For example, a term-limited justice might be expected to behave in a more unconstrained manner than one who is nearing a reelection date. To test for the effects of retention constraints, we include the covariates, "Term Length" and "Citizen Distance" in the below models. As term lengths increase, and as citizen distance decreases, we might expect to see less constraint among state high courts. Nevertheless, we suspect that the effect of voters should be conditioned upon electoral accountability mechanisms, which is why we subdivide results below by these types of institutions.

6.2.6 Statistical Methodology

In this section, we estimate models relating to the number of legislative acts state high courts invalidate in a given year. The dependent variable is, therefore, an event count, and as with the previous section, we use a negative binomial regression technique to test our hypotheses. To account for state-level heterogeneity, we estimate standard errors that are clustered by state.

Table 3: Judicial review among American state supreme courts (2007 - 2014)

	All Courts		Elected Courts		Unelected Courts	
	Estimate	$\Delta E(Y_{i,t})$	Estimate	$\Delta E(Y_{i,t})$	Estimate	$\Delta E(Y_{i,t})$
Legislative Signals						
Court-Curbing$_{t-1}$	0.02	–	0.01	–	0.10	–
	(0.02)		(0.02)		(0.08)	
Judicial Threats						
Elite Distance	-0.01	–	-0.00	–	-0.12*	4.92→0.03
	(0.01)		(0.01)		(0.05)	
Divided Government	0.15	–	0.18	–	0.95*	0.08→0.21
	(0.23)		(0.24)		(0.57)	
Accountability Mechanism						
Contested	14.93*	0.00→0.55	0.21	–	–	–
	(0.64)		(0.31)			
Retention	14.68*	0.00→0.43	–	–	–	–
	(0.65)					
Reappointment	13.52*	0.00→0.14	–	–	16.57*	0.00→0.18
	(0.80)				(0.93)	
Retention Constraints						
Term Length	–	–	-0.02	–	–	–
			(0.09)			
Citizen Distance	0.02*	0.30→0.50	0.01	–	0.16*	0.02→2.23
	(0.01)		(0.01)		(0.06)	
Statistical Estimates						
α	0.22	–	0.19	–	–	
	(0.24)		(0.23)			
Constant	-15.99*	–	-1.08	–	-21.72*	–
	(0.69)		(0.89)		(2.30)	
Log-Likelihood	-182.09		-163.81		-15.14	
AIC	382.19		343.62		42.29	
N	241		181		60	

Notes: The dependent variable is the number of legislative acts a high court invalidates in a given state and year. Estimates are negative binomial regression coefficients. Standard errors are clustered upon states. $\Delta E(Y_{i,t})$ denotes the change in the predicted number of court-curbing bills given a change in the independent variable from one standard deviation less than its mean to one standard deviation greater than its mean. Statistical significance denoted by an asterisk ($p < 0.05$, one-tailed).

6.2.7 Results: Declarations of Unconstitutionality

We provide regression results for this section in Table 3. Negative binomial results are presented across three models. The left-hand column includes court decisions from all types of institutions. The central column includes results just from among elected courts (contested and retention). And the right-hand column includes results just from among unelected courts (reappointment and tenure).

First, not that across all three models in Table 3, courts are simply not responsive to signals of waning legitimacy from the legislature. In no model do we find evidence that, given increasing numbers of court-curbing bills filed in the legislature, the judiciary is any less likely to invalidate one of its acts. Thus, we find no support for Hypothesis 3, which posited that information asymmetries between the court and legislature would lead courts to heed legislative signals of waning public legitimacy. These results are at odds with previous research conducted at the federal level (e.g., Clark, 2009) and bears greater scrutiny—something to which we will turn in the next section.

Regarding Hypothesis 4, we find only mixed evidence that state high courts condition their evaluation of some legislative act upon the legislature's desire to win policy victories. Among all courts, we find no significant evidence that state judiciaries tailor their decisions based upon either their ideological distance to state elites or upon the existence of divided government. This null finding indicates that, regarding our operationalization of legislative policy preferences, at least, American state courts do not consider the likelihood legislatures bluff when they signal waning judicial legitimacy.

Even still, Hypothesis 6 posited that, in the absence of extra-legislative feedback regarding the state of the judiciary's popular legitimacy, accountable courts would be less likely to invalidate legislative acts. However, if accountability mechanisms do provide courts with a source of information regarding their legitimacy that is independent of the judiciary, we should expect to see accountable state courts invalidating even greater numbers of legislative acts. Examining the results from the middle and right-hand columns in Table 3 allows us to consider these claims. Note that among elected state high courts, we find no significant evidence that courts tailor their decision-making to either their distance to other policy elites or the existence of divided government.

Among unelected courts, however, we see a strong influence for court-elite distance. Given a change from one standard deviation less than the mean distance between courts and elites to one standard deviation greater than this mean, unelected courts are predicted to go from invalidating 4.92 legislative acts to 0.03, all things equal (a 99 percent reduction in judicial hostility). These results could indicate that, compared to elected courts, unelected courts, in the face of legislative hostility, tamper their use of judicial review in light of information asymmetries about the state of their popular legitimacy. We must be cautious in this interpretation, however, as our other measure of judicial threat to legislative preferences, is also statistically significant for unelected courts, but

it is signed in the wrong direction. These results indicate that unelected courts take advantage of the presence of divided government to invalidate legislative acts. Nevertheless, this predicted effect is quite small.

Turning back to all courts in Table 3, we see strong support for the proposition that accountability mechanisms might empower courts in the separation of powers game. Courts held accountable via contested elections, retention elections, and reappointment methods are all predicted to invalidate greater numbers of legislative acts compared to courts whose justices have tenure in office. Hypothesis 6 posited that accountability mechanisms, absent extra-legislative signals, would lead courts to invalidate fewer acts of the legislature. But that's not what we observe in these results. That accountable courts are more aggressive in the separation of powers game compared to those with tenure is good evidence that these institutions needn't rely upon the legislature to indirectly learn about the state of their popular legitimacy. That is, they may be able to learn about their legitimacy from accountability itself to therefore play on a more even footing with the legislature.

To this end, Hypothesis 8 held that as retention constraints are decreasing among accountable courts, these institutions may be able to engage in a more aggressive brand of judicial review. The results from Table 3 again lend mixed evidence in favor of this hypothesis. To begin, among no court is the length of an average justice's term associated with the institution's likelihood of invalidating legislative acts. And while we find no evidence among elected courts that retention constraints affect decision-making, we do find some evidence that retention constraints influence unelected courts. Unelected courts are not accountable to voters, and so it is no surprise to see that they do not constrain their use of judicial review as they become more ideologically incongruent with the electorate. And as before, we find that as unelected courts become more ideologically distant to other elites, they constrain their use of judicial review, which may be evidence in favor of Hypothesis 8.

Finally, it could be that our tests of Hypothesis 8 are too blunt an instrument to assess the phenomenon about which we are interested. After all, retention constraints are more likely to vary considerably by individual justices among state high courts as some will be more popular with voters or elites; some may be term limited; or others may be inexperienced campaigners. As such, in the following section, we readjust the focus of our analysis to examine individual, justice-level

votes over the constitutional validity of legislative acts in state supreme court cases and account for each justice's individual retention constraints to better test Hypothesis 8.

6.3 Justice-Level Votes in Judicial Review

In the previous section, we considered some court-level factors that might influence judicial review amidst the separation of powers. This level of analysis, however, could make it difficult to assess the effects of retention constraints in this dynamic. After all, our formal models indicated that as these constraints recede, accountable justices should behave more aggressively toward the legislature. Thus, in this section, we refine our analysis of judicial behavior and examine justice-level voting behavior in the review of legislative acts and examine whether individual-level factors likely to make specific judges more or less accountable for their behavior affects their votes on the merits.

6.3.1 Votes of Unconstitutionality

To test our hypotheses, we gathered a new dataset of state high court justices' voting behavior in cases challenging the validity of acts of the state legislature. Our search results provided us with 384 cases decided between 2007 and 2014, spanning 1,680 total votes across all 50 states. Our outcome variable of interest in this section was an individual justice's vote over the outcome of the case. For each case-justice observation, we coded whether the individual voted to invalidate the legislative act under consideration ("Unconstitutional Vote = 1" if yes, "0" otherwise). Generally, most justices deferred to the legislature. A total of 59.7 percent of votes were in favor of the challenged legislation compared to 40.3 percent against.

6.3.2 Retention Constraints

In the previous section, we tested the effects of retention constraints using the aggregate length of a justice's term on a state court of last resort. Nevertheless, this is likely too broad a brush to get at the phenomenon we are interested in. In this section, therefore, we introduce three additional variables to the analysis. First, we control for whether a justice is in their first term of office ("First Term = 1" if yes, "0" otherwise). Freshmen justices may be pressured to rule in more majoritarian ways as they have yet to become seasoned politicians who know the various ways the political winds blow. We therefore suspect that first-term justices will be more likely to vote in favor of a

legislative act's constitutionality. In our data, approximately 31.9 percent of all observations are among justices serving in their first term.

Similarly, justices who are term-limited needn't necessarily worry about majoritarian preferences. Whether they would traditionally be accountable to voters or other elites, justices who are legally barred from seeking another term of office might well behave in a more unconstrained manner, all things being equal ("Term Limited = 1 " if yes, "0" otherwise). Thus, we suspect that term-limited justices will be more likely to vote against the constitutionality of some challenged legislative act. Among the justices voting in our data, only about 9.1 percent are term-limited.

Finally, justices who have demonstrated their popularity in previous retention decisions could be likely to behave in a more unconstrained manner compared to those whose retention decision was comparatively closer to defeat. Consequently, among electorally accountable judges, we record the percentage of the vote incumbents won the last time they ran for reelection ("Incumbent Vote"). We anticipate that as the margin of victory for justices is increasing, the likelihood they invalidate some legislative act is also increasing.[34] Most state supreme court incumbents perform well—especially those running in uncompetitive elections. Among those justices in our data who had previously stood for election, the average individual won 70.9 percent of the vote.

6.3.3 Case Issue Area

A wealth of judicial politics research indicates that the issue under consideration in a given case affects judges' attitude evaluation in that case (e.g., Segal and Spaeth, 2002). For example, cases related to criminal law are typically difficult for criminal defendants to win. To code the issue area of each case under review, we rely upon the codebook provided by the Supreme Court Database.[35] We include dichotomous indicators for each of the Supreme Court Database's 14 issue areas. These include issues such as the First Amendment, due process, unions, judicial power, and more.

6.3.4 Other Controls

As before, we include other controls likely relevant to justices' votes over the constitutionality of state legislative acts. To begin, we control for the number of court-curbing bills filed in the previous

[34] At this time, we restrict our analysis to the margin of victory for justices who electorally accountable.

[35] The codebook is available at: `http://scdb.wustl.edu/documentation.php` (last accessed 3 January 2022).

year as Hypothesis 3 posited that increasing legislative signals of waning judicial legitimacy would tamper the use of judicial review.

Secondly, we control for the accountability mechanisms discussed earlier. Specifically, we include dichotomous indicators for accountable courts using contested elections, retention elections, and reappointment mechanisms. Hypothesis 6 held that accountable courts would uphold greater legislative acts provided that accountability mechanisms did not provide courts with extra-legislative signals of judicial legitimacy. But if these institutions help to inform courts regarding their popular legitimacy, then we should expect to see accountable justices voting increasingly to invalidate legislative acts.

Finally, we control for other relevant political factors discussed above. Hypothesis 4 posited that judicial threats to the legislature's policy agenda would lead courts to more frequently invalidate legislative acts. Thus, we control for the ideological distance between each high court justice and both voters and other policy elites. To do so, we now take the absolute distance between each individual justice's PAJID score and the Berry score for both voters and elites. We would expect justices to defer more to voter ideology among elected states and elite ideology in appointed states. Therefore, below, we subdivide our regression results by the type of institution an individual justice works—elected or otherwise. As before, we also control for the presence of divided government. We suspect that as these threats to legislative policy benefits are increasing, justices will be more likely to vote to invalidate legislative acts.

6.3.5 Statistical Methodology

Because our dependent variable is dichotomous, a logistic regression technique is an appropriate estimator. To account for heterogeneity, we calculate robust standard errors estimated at the level of each individual judge in the dataset.

6.3.6 Results: Votes of Unconstitutionality

The results from our individual-level model of justice votes appear in Table 4. We present results across five total models in the table. The first column contains results from justices' voting behavior across all types of courts. The second and third columns examine only electorally accountable

Table 4: Justices' votes of unconstitutionality in state legislative challenges (2007 - 2014)

	All Courts		Elected Courts (1)		Elected Courts (2)		Appointed Courts (1)		Appointed Courts (2)	
	Estimate	$\Delta Pr(Y=1)$	Estimate	$\Delta Pr(Y=1)$	Estimate	$\Delta Pr(Y=1)$	Estimate	$\Delta Pr(Y=1)$	Estimate	$\Delta Pr(Y=1)$
Legislative Signals										
Court-Curbing$_{t-1}$	0.03*	0.37→0.45	0.02	–	0.01	–	0.11*	0.24→0.44	0.19*	0.17→0.49
	(0.02)		(0.02)		(0.02)		(0.05)		(0.07)	
Retention Constraints										
First Term	–	–	-0.16	–	-0.12	–	–	–	0.14	–
			(0.15)		(0.16)				(0.53)	
Term Limited	0.65*	0.40→0.55	0.35	–	0.36	–	2.17*	0.24→0.68	1.77*	0.19→0.49
	(0.29)		(0.32)		(0.30)		(0.66)		(0.56)	
Incumbent Vote	–	–	–	–	-0.00	–	–	–	–	–
					(0.00)					
Accountability Mechanism										
Contested	-0.01	–	-0.18	–	-0.23	–	–	–	–	–
	(0.43)		(0.17)		(0.17)					
Retention	0.15	–	–	–	–	–	–	–	–	–
	(0.43)									
Reappointment	-0.87*	0.42→0.25	–	–	–	–	-1.26*	0.45→0.22	–	–
	(0.47)						(0.48)			
Political Controls										
Citizen Distance	0.00	–	0.00	–	0.01	–	0.00	–	-0.00	–
	(0.01)		(0.01)		(0.01)		(0.00)		(0.02)	
Elite Distance	0.00	–	0.00	–	0.00	–	-0.00	–	-0.00	–
	(0.00)		(0.00)		(0.00)		(0.00)		(0.01)	
Divided Government	-0.21	–	-0.08	–	-0.09	–	-0.81	–	0.64	–
	(0.17)		(0.19)		(0.20)		(0.51)		(0.65)	
Issue Controls										
					Included in every model					
Statistical Estimates										
Constant	-0.87*	–	-0.71*	–	-0.57	–	-0.30	–	-2.61*	–
	(0.49)		(0.25)		(0.43)		(0.70)		(0.75)	
Log-Likelihood	-639.92		-537.97		-509.34		-86.43		-50.59	
AIC	1315.84		1109.94		1054.68		192.86		121.18	
N	1,018		832		785		164		116	

Notes: The dependent variable is whether a state supreme court justice voted to invalidate an act of the legislature in a given case. Estimates are logistic regression coefficients. Standard errors are clustered on each justice. $\Delta Pr(Y=1)$ denotes the change in the predicted probability a justice votes to invalidate some legislative act given a change in the independent variable from one standard deviation less than its mean to one standard deviation greater than its mean (continuous variables) or from its minimum to maximum (dichotomous variables). Statistical significance denoted by an asterisk ($p < 0.05$, one-tailed).

courts, and the fourth and fifth columns examine only electorally unaccountable courts. For the sake of space, we do not include estimates for each of the 14 issue area dichotomous variables.

First, note that, as in the previous section, we find no support for Hypothesis 3—the idea that legislative court-curbing behavior constrains the judiciary. In fact, we find quite the opposite. Among all courts, but appointed courts in particular, increased legislative signals of waning legitimacy is associated with a greater likelihood, all things being equal, a high court justice votes to invalidate some legislative act. While legislatures appear to condition their signal upon judicial hostility to legislative policy agendas, these signals do not appear to accomplish any policy-related goal. Given the results in this in the previous section, we are left to wonder why legislatures engage in court-curbing behavior at all. It may be, as Clark (2011) argues, that court-curbing affords legislators an opportunity to position-take for their constituents. If so, this motivation bears further analysis. But we are unable to find any support whatsoever with others' findings that court-curbing also helps legislatures to achieve policy victories by constraining courts' use of judicial review (e.g., Clark, 2009). Put simply, our results indicate that courts are either indifferent to, or antagonized by, these types of signals.

Maybe, then, it is the case that state high courts justices observe the state of their popular legitimacy from extra-legislative sources. Hypothesis 6 posited that, provided courts observe extra-legislative signals of legitimacy, accountable courts should not be penalized in the separation of powers game. We see some evidence for this in Table 4. Among all types of courts, we see from the first column in Table 4 that justices on all but reappointment courts have a similar probability of voting to invalidate some legislative act. All things equal, justices on contested courts have a 0.42 probability of casting a vote of unconstitutionality; justices on retention courts have a 0.45 probability of casting such a vote; and justices on courts with tenure have a 0.42 probability of such a vote. Compare these institutions to justices facing reappointment. These individuals have only a 0.25 probability of casting a vote of unconstitutionality, all things being equal. Therefore, our results are highly consistent with recent published work suggesting that justices on reappointment courts are among the least independent in American states (e.g., Canes-Wrone, Clark and Kelly, 2014).

Hypothesis 8 posited that retention constraints could limit a justice's ability to cast a vote of unconstitutionality. The results from Table 4 indicate that among the three factors we considered, only one allows us to reject the null hypothesis. Justices who are term limited are strictly more likely to cast votes of unconstitutionality compared to those who are not, and this effect is particularly noticeable among justices who face reappointment. This result dovetails nicely with the previous one. We've found in this section that reappointment mechanisms can leave justices uniquely vulnerable to reprisals, so it should make good sense that when those constraints are lifted through term limits, these individuals behave in an unconstrained manner. Examining the right-most column in Table 4, we can see this effect clearly. When reappointment justices are not term limited, they have a 0.19 probability of casting a vote of unconstitutionality, all things being equal. Upon being term limited, that probability increases to 0.49 (a 158 percent increase).

Finally, none of our other political controls are able to reject the null hypothesis. According to results from Table 4, no type of high court justice is predicted to condition their vote over the constitutionality of some legislative act over their distance to the electorate, their distance to other policy elites, or due to the presence or absence of divided government. These null findings are inconsistent with Hypothesis 4, which posited that as judicial threats to the legislature's policy agenda increased, declarations of unconstitutionality would also increase. Rather, the findings of this section overwhelmingly indicate that reappointment mechanisms limit judicial independence compared to judicial elections and tenure and that term limits can remove some of these constraints to further judicial independence in the separation of powers game.

7 Conclusion

In this paper, we have considered the role accountability mechanisms play in the separation of powers game with particular emphasis upon their payoffs for judicial legitimacy and independence from legislative interference. To these ends, we developed a series of game theoretic models that helped us to understand the conditions under which legislatures were likely to signal courts of waning popular legitimacy along with the conditions under which courts were likely to heed these signals or constrain their use of judicial review of the legislature. We then tested our models' predictions using data on court-curbing legislation introduced among American state legislatures,

use of judicial review of legislative acts among state high courts, and individual justices' votes over the constitutionality of state legislative acts.

Building upon work by Clark (2009), our formal models led us to propose several hypotheses novel to the literature on institutions and the separation of powers. Our baseline model established that a judiciary's informational shortfalls over its popular legitimacy incentivizes a better-informed legislature to signal the courts their support has waned, which in turn leads courts to constrain their use of judicial review. We next added an accountability component and found that a judiciary's desire to win another term in office not only led legislatures to increasingly signal the courts they had lost popular legitimacy but also led the courts to increasingly constrain their use of judicial review. Put differently, holding judges accountable makes them less independent. Nevertheless, we then added one final component to our game. We allowed courts to learn about their popular legitimacy from the act of being held accountable as a direct signal in addition to their legislative one. We found that if courts are able to learn about the state of their popular legitimacy through the act of being held accountable, then accountability mechanisms can empower courts in the separation of powers game, furthering their independence, and leading them to invalidate greater numbers of legislative acts.

We then tested these competing theoretical perspectives with data from the American states. We began with an analysis of legislative efforts to curb state high courts. We found that legislatures primarily respond to judicial threats to their policy agenda when they attempt to curb the power of judicial review among state supreme courts. For example, we found that legislatures were more likely to file court-curbing legislation in response to previous instances of judicial invalidation of legislative acts. We also found support for one of our formal model's more interesting predictions, which held that legislatures would more aggressively seek to curb the courts when courts not only posed threats to their policy agenda but also when they were electorally accountable.

We next turned to an analysis of the number of legislative acts a state supreme court invalidated in a given year. Of key interest to us, we found no evidence whatsoever that state high courts respond to legislative efforts to curb their authority, and in subsequent analyses, we even found significant results indicating that court-curbing efforts antagonized courts to invalidate even greater numbers of legislative acts. Examining rates of court invalidations of legislative acts, we found, consistent with the predictions from our formal models, that accountable courts were more likely to

invalidate legislative acts compared to those with tenure. This, we concluded, was good evidence that accountability mechanisms allow courts to learn about the state of their popular legitimacy through the act of retention itself. This may help to explain why legislative court-curbing efforts were, on the whole, unassociated with courts' use of judicial review.

Finally, we narrowed our focus to examine the voting behavior of individual state supreme court justices over the constitutionality of legislative acts under consideration. Our formal models anticipated that as constraints associated with the act of winning additional terms of office decrease, judicial independence would increase. Here we found qualified support for our hypothesis. We found that state high court justices facing electoral accountability did not condition their decision-making upon any of the factors we considered such as their previous margin of victor or whether they were term limited. Rather, we found that among courts using appointment methods, and particularly among those requiring justices to win reappointment from state elites, justices were less likely to cast votes of unconstitutionality compared to other types of justices, but that these votes were far more common when justices could no longer seek reappointment due to term limits.

Our research leads us to make several observations about the discipline's understanding of judicial institutions, legitimacy, and the separation of powers. First, our formal models, in addition to some of our quantitative models, lead us to believe that scholars may need to readjust their understanding of accountability mechanisms such as judicial elections. The conventional wisdom holds that such accountability mechanisms limit the judiciary's independence. We find compelling evidence to the contrary, however. To the extent that judges can use accountability mechanism like elections to learn about the state of their popular legitimacy, these individuals are empowered, particularly in the separation of powers game, to overcome information asymmetries with other policymakers and hold them to account via judicial review.

Next, our research suggests that we may need to reconsider the role of legislative court-curbing efforts in the separation of powers game. While our results confirm suspicions that legislatures use court-curbing bills to strike back at judicial threats to policy agendas, we find no evidence whatsoever that such efforts actually influence judicial behavior. Indeed, vote-level models indicate that court-curbing behavior may actually antagonize state courts to strike down even more legislative acts. These results stand in stark contrast with previous research on the phenomenon (i.e., Clark, 2009, 2011). What, then, are we to make of these diverging analyses? On the one hand, it

may be the case that legislative-judicial interactions at the state and federal level are simply not comparable to one another.

Furthermore, our data derive from relatively recent periods in American political history, and this era may simply exhibit different types of behavior among judicial institutions compared to those historical eras under consideration in previous works. And finally, it could be the case that scholars simply don't fully understand the role court-curbing plays in the separation of powers system. While previous works assumed that such legislation sought to influence courts amidst an asymmetry of information related to judicial legitimacy, it may be that courts are better informed that we previously gave them credit. Such issues will require greater focus moving forward.

Appendix

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

Unaccountable Courts

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

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

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

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

Proof. Suppose that j forms the belief that l plays $\omega = a$ with probability 1.0 for all Ω. Hence, j is unable to update its beliefs that it is legitimate. In response to a pooling strategy, j's expected utility from an unconstrained choice is $b_j(1-2p)$, while its expected utility from a constrained decision is 0. Therefore, j will strictly prefer to make a constrained choice for all $p > \frac{1}{2}$. Assume that $p < \frac{1}{2}$. Then l's expected payoff from the pooling strategy is $-2b_l - \epsilon$ when $\Omega = B$, which means it may profitably deviate from the pooling strategy. Now suppose that $p > \frac{1}{2}$. Then l's expected utility when $\Omega = A$ is $2b_l + \epsilon$, so it cannot profitably deviate from the pooling strategy. And when $\Omega = B$, it earns $2b_l - \epsilon$. If it deviates from its strategy, it expects to earn $-2b_l + \epsilon$.[36] Therefore, l has no unilateral incentive to deviate from its pooling strategy for all $\epsilon < 2b_l$. □

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

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

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

Accountable Courts without Voter Feedback

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

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

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

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

Proof. Suppose that j forms the belief that l plays $\omega = a$ with probability 1.0 for all Ω. Therefore, j is unable to update its beliefs upon observing its signal. In response to l's pooling strategy, j's expected utility from unconstrained behavior is $(2b_j + \pi)(1 - 2p)$, while its expected utility from constrained behavior is simply π. Therefore, j will strictly prefer to make a constrained choice for all $p > \frac{b_j}{2b_j+\pi}$. Assume that $p < \frac{b_j}{2b_j+\pi}$. Then l's expected payoff from its pooling strategy when $\Omega = B$ is $-2b_l - \epsilon$, which means it can profitably deviate from the pooling strategy. Now suppose $p > \frac{b_j}{2b_j+\pi}$. Here, l's expected utility when $\Omega = A$ is $2b_l + \epsilon$, which means it cannot profitably deviate. And when $\Omega = B$, it earns $2b_l - \epsilon$. If it instead plays $\omega = b$, it expects to earn $-2b_l + \epsilon$.

Therefore, the legislature has no unilateral incentive to abandon its pooling strategy for all $\epsilon < 2b_l$. Finally, because v is unable to update its beliefs, it rationally can do no better than to retain j. □

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

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

- *Proposition 1*: For all $\epsilon < 2b_l$, the *ex ante* likelihood that l plays $\omega = a$ is at least as great among accountable courts without feedback as it is for unaccountable courts.

Proof. To prove the proposition, it is sufficient to note that for no set of equilibria are legislatures with accountable courts without feedback less likely to play $\omega = a$ or that for some class of equilibria, legislatures are strictly more likely to play $\omega = a$ compared to unaccountable courts. According to Remarks 1 and 4, l's optimal response is identical for all $\epsilon > 2b_l$. Therefore, we proceed to analyze equilibria for all $\epsilon < 2b_l$. First, note that $\frac{b_j}{2b_j+\pi} < \frac{1}{2}$ if $\pi > 0$, which is true by definition.

According to Remarks 2 and 5, l plays $\omega = a$ for all $p > \frac{1}{2}$ for both types of courts. According to Remarks 3 and 6, l plays $\omega = a$ with probability 1.0 for all $p < \frac{b_j}{2b_j+\pi}$ and $\Omega = A$. If $p < \frac{b_j}{2b_j+\pi}$ and $\Omega = B$, l plays $\omega = a$ with probability $\frac{p}{1-p}$ for unaccountable courts and $\frac{p(\pi+b_j)}{(1-p)b_j}$ for accountable ones. The legislature is at least as likely to bluff among accountable courts if $\pi \geq 0$, which is true by definition. Finally, for all $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$, l is equally likely to play $a \mid A$, but if $\Omega = B$, l is at least as likely to play $\omega = a$ with elected courts if $p \leq \frac{1}{2}$, which is true by assumption. □

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

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

Accountable Courts with Feedback

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

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

Proof. Suppose j forms the belief that l plays a separating strategy such that $\omega = \Omega$. When j observes $\omega = a$, its best response is to make constrained choices in every period; and if it observes $\omega = b$, its best response is to make unconstrained choices in every period. When $\Omega = A$, l's expected utility from the separating strategy is equal to $2b_l + \epsilon$, which means it cannot profitably deviate from the separating strategy. When $\Omega = B$, l's expected utility is $-2b_l + \epsilon$. If it deviates, it earns $2b_l - \epsilon$. Therefore, l will maintain the separating strategy for all $\epsilon > 2b_l$. Finally, when $\Omega = A$, j makes a constrained decision; therefore, v cannot update its beliefs, and a vote to retain is a rational choice. And when $\Omega = B$, v observes an unconstrained decision that reveals j to be legitimate, making a vote to retain j a rational choice. □

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

Proof. Suppose that j forms the belief that l plays $\omega = a$ for all Ω. Then j is unable to update its beliefs over the state of Ω. If $p < \frac{1}{2}$, then j's best response is to make an unconstrained choice after its election. Assume that $p > \frac{1}{2}$. Then j will make an unconstrained choice prior to its election if $p < \frac{b_j}{2b_j+2\pi}$, which is less than $\frac{1}{2}$ if $\pi > 0$, which is true by definition. Therefore, for all $p < \frac{b_j}{2b_j+2\pi}$, a best response to l's pooling strategy is to make an unconstrained choice both before and after its election. For all $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{1}{2}\right)$, j's best response is to play a strategy in which it makes a constrained choice prior to its election and an unconstrained choice afterward. And for all $p > \frac{1}{2}$, j's best response is to make a constrained choice at all times. Now assume that $p > \frac{1}{2}$. If l maintains its pooling strategy, its expected utility is equal to $2b_l + \epsilon$ when $\Omega = A$; therefore, it cannot profitably deviate. And when $\Omega = B$, its expected payoff is $2b_l - \epsilon$. Therefore, l will maintain its pooling strategy for all $p > \frac{1}{2}$ and for all $\epsilon < 2b_l$. Now suppose that $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{1}{2}\right)$. Here, l's expected utility from the pooling strategy when $\Omega = A$ is equal to ϵ, a payoff upon which it cannot improve it defects. When $\Omega = B$, then l's expected utility is equal to $-\epsilon$. If it were to defect from the pooling strategy, it expects to earn $-2b_l + \epsilon$. Now suppose that $p < \frac{b_j}{2b_j+2\pi}$. The legislature's expected payoff is equal to $-2b_l - \epsilon$ when $\Omega = B$, which means it can profitably deviate

from the pooling strategy. Finally, note that in none of these equilibria can v update its beliefs; therefore, it can do no better to retain every type of j. □

- *Remark 9*: For all $b_l < \epsilon < 2b_l$, and for all $p < \frac{1}{2}$, a set of semi-separating equilibria exists such that l plays $\omega = a$ with probability 1.0 when $\Omega = A$; l plays $\omega = a$ with probability $q^* = \frac{p}{1-p}$ when $\Omega = B$; j makes an unconstrained choice for all periods with probability 1.0 when it observes $\omega = b$; when $\omega = a$, j makes a constrained choice with probability 1.0 prior to its election and an unconstrained choice with probability $m^* = \frac{2b_l - \epsilon}{b_l}$ afterward; and v retains every j regardless of Ω.

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

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

Proof. Suppose j forms the belief that l plays $a \mid A$ with probability 1.0 and $a \mid B$ with probability q. If j observes $\omega = b$, it updates its beliefs, concludes $\Omega = B$, and makes an unconstrained choice with probability 1.0. If, however, it observes $\omega = a$, it updates its beliefs such that $Pr(A \mid a) = \frac{p}{p+(1-p)q}$.

If j had made an unconstrained choice prior to its election and finds itself called upon to evaluate the validity of some new legislative act, it updates its beliefs such that the probability $\Omega = B$ is equal to 1.0, and it makes an unconstrained choice once again. Now suppose that j made a constrained decision prior to its election. Not being able to update its beliefs, v would retain it. After its reelection, an unconstrained decision for j is a rational choice if $q > \frac{p}{(1-p)}$. Assume that $q > \frac{p}{1-p}$. Then l mixes such that it makes j indifferent between making a constrained and an unconstrained choice prior to its election where: $-p(\pi + 2b_j) + (1-p)q^*(\pi + 2b_j) = p(\pi - b_j) + (1-p)q^*(\pi + 2b_j)$. Rearranging, $q^* = \frac{p(2\pi + b_j)}{(1-p)b_j}$. The legislature will abandon its semi-separating strategy if $\frac{p(2\pi+b_j)}{(1-p)b_j} = 1$. Rearranging, l will maintain its semi-separating strategy for all $p < \frac{b_j}{2b_j+2\pi}$. The judiciary's best response is to choose some probability of making an unconstrained decision that makes l indifferent between its signals: $-m^*(2b_l + \epsilon) - (1-m^*)(\epsilon) = -2b_l + \epsilon$. Rearranging, $m^* = \frac{b_l - \epsilon}{b_l}$, which exists if $\epsilon < b_l$ (true by assumption). Finally, note that v will be unable to update its beliefs whenever j makes a constrained decision; therefore, a rational choice is to reelect it. Voters will learn j's type with probability 1.0 whenever j makes an unconstrained decision; therefore it will fail to reelect j *iff* $u \mid A$. □

- *Proposition 3*: For all $b_l < \epsilon < 2b_l$, the *ex ante* likelihood that l plays $\omega = a$ is at least as small for accountable courts with feedback as for all other courts.

Proof. Assume that $b_l < \epsilon < 2b_l$. To prove the proposition, it is sufficient to show that for no specification is l more likely to send a signal of $\omega = a$ when j is accountable and has feedback, or for some specifications, l is strictly less likely to send such a signal. Begin with the case of $p > \frac{1}{2}$. According to Remarks 2, 5, and 8, every l plays $\omega = a$ with probability 1.0. Now suppose $p < \frac{b_j}{2b_j+\pi}$. According to Remarks 3, 6, and 9, every l plays $a \mid A$. Furthermore, l is equally likely to play $a \mid B$ for unaccountable and accountable courts with feedback, but l is less likely to bluff compared to other accountable courts with feedback if $\pi > 0$, which is true by definition. Finally, suppose $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$. As before, l makes identical decisions between unaccountable and accountable courts with voter feedback. Comparing l's behavior across the two types of accountable courts, we see from Remarks 6 and 9 that each make identical decisions given $\Omega = A$, but l is no more likely to choose $a \mid B$ without feedback if $p \leq \frac{1}{2}$, which is true by assumption. □

- *Proposition 4*: For all $\epsilon < b_l$, the *ex ante* likelihood that l plays $\omega = a$ is at least as great for accountable courts with feedback as for all other courts.

Proof. Assume that $\epsilon < b_l$. To prove the proposition, it is sufficient to show that for no specification is the probability l plays $\omega = a$ is any less for accountable courts with voter feedback compared to other courts, or for some specifications the probability $\omega = a$ is strictly greater for accountable courts with feedback compared to others. Begin with the case of $p > \frac{1}{2}$. According to Remarks 2, 5, and 8, every type of l is equally likely to play $\omega = a$. Now suppose $p < \frac{b_j}{2b_j+2\pi}$. According to Remarks 3, 6, and 10, all types of l are equally likely to play $a \mid A$. If $\Omega = B$, however, l is at least as likely to bluff given j is accountable with feedback compared to all other courts if $\pi \geq 0$, which is true by definition. Now suppose $p \in \left(\frac{b_j}{2b_j+2\pi}, \frac{b_j}{2b_j+\pi}\right)$. Every type of l is equally likely to play $a \mid A$. When $\Omega = B$, however, l plays $\omega = a$ with probability 1.0 when j is accountable with feedback, which is at least as great as for other courts if $p \leq \frac{1}{2}$ (true by assumption) and $p \leq \frac{b_j}{2b_j+\pi}$ (true by assumption). Finally suppose that $p \in \left(\frac{b_j}{2b_j+\pi}, \frac{1}{2}\right)$. Every type of l chooses $a \mid A$. Now suppose $\Omega = B$. For accountable courts with feedback, l is just as likely to play $a \mid B$ when j is accountable, regardless of feedback type, and is at least as likely to play $\omega = a$ compared to unaccountable courts if $p \leq \frac{1}{2}$, which is true by assumption. □

- *Proposition 5*: The *ex ante* likelihood accountable courts with feedback play $d = u$ is at least as small as all other courts prior to its retention decision and at least as great afterward.

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

Now suppose that $b_l < \epsilon < 2b_l$. We begin with a comparison of unaccountable courts and accountable courts with feedback. If $p > \frac{1}{2}$, Then j makes a constrained decision at all times, regardless of its institutional type. Therefore, we proceed to the case in which $p < \frac{1}{2}$. According

to Remark 9, j makes a constrained choice with probability 0.0 when $\omega = b$, probability 1.0 when $\omega = a$ and j has yet to stand for retention and probability $\frac{2b_l - \epsilon}{b_l}$ afterward. According to Remark 3, an unaccountable j will make an unconstrained decision with probability 1.0 if it observes $\omega = b$ and an unconstrained decision with probability $\frac{2b_l - \epsilon}{2b_l}$ if it observes $\omega = a$. Therefore, unaccountable courts and accountable courts with feedback are equally likely to make an unconstrained choice when $\omega = b$, but when $\omega = a$, an accountable court with voter feedback is no more likely to make an unconstrained decision compared to unaccountable courts prior to its election if $\epsilon \leq 2b_l$ (which is true by assumption), and an accountable court with voter feedback is at least as likely to make an unconstrained decision after its retention compared to an unaccountable court if $\epsilon \leq 2b_l$, which is true by assumption.

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

Now assume that $\epsilon < b_l$. As before, for all $p > \frac{1}{2}$, every type of j is equally likely to make an unconstrained decision. Therefore, we turn to the case for which $p < \frac{1}{2}$ and begin with a comparison of unaccountable courts and accountable courts with feedback. According to Remark 3, j makes an unconstrained choice with probability 1.0 following $\omega = a$ and probability $\frac{2b_l - \epsilon}{2b_l}$ if $\omega = a$ for all $p < \frac{1}{2}$. According to Remark 8, for all $p \in \left(\frac{b_j}{2b_j + 2\pi}, \frac{1}{2}\right)$, j makes an unconstrained choice

prior to its retention with probability 0.0, and after its retention it makes an unconstrained choice with probability 1.0. Therefore, an accountable court with feedback is no more likely to make an unconstrained choice prior to its retention compared to an unaccountable court if $\epsilon \leq 2b_l$, which is true by assumption, and it is at least as likely to make an unconstrained choice after its retention if $\epsilon \geq 0$, which is true by definition. Now when $p < \frac{b_j}{2b_j+2\pi}$, an accountable court with feedback makes an unconstrained choice with probability 1.0 if it observes $\omega = b$. If it sees $\omega = a$, then according to Remark 10, it makes an unconstrained choice prior to its retention with probability $\frac{b_l-\epsilon}{b_l}$ and with probability 1.0 after its retention. Therefore, an accountable court with feedback is equally likely as an unaccountable court to make an unconstrained decision when $\omega = b$. And when $\omega = a$, an accountable court with feedback is no more likely than an unaccountable court to make an unconstrained decision if $\epsilon \geq 0$, which is true by definition, and an accountable court with feedback is at least as likely to make an unconstrained decision after its election if $\epsilon \geq 0$, which is true by definition.

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

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