

The Conditional Effectiveness of Legislative Threats: How Court Curbing Alters the Behavior of (Some) Supreme Court Justices

Political Research Quarterly

1–14

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DOI: 10.1177/1065912918798501

journals.sagepub.com/home/prq

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Abstract

The separation-of-powers literature focuses on how the preferences of one branch constrain the behavior of its counterparts. Yet, in much of this work, scholars do not address how responsive behavior varies across particular members. Focusing on Court curbing legislation in Congress, we develop a model of heterogeneous responsiveness. Our theory identifies two distinct mechanisms that underpin responsiveness in judicial behavior, implying that the chief justice and the most moderate (swing) justice are more likely than their colleagues to adjust their behavior in response to external threats from Congress. We find that these two justices are significantly less likely to vote to invalidate legislation than their colleagues during periods of heightened Court curbing and provide evidence that distinct mechanisms shape their behaviors. In addition, we offer justice-specific evidence using a pre–post promotion analysis, demonstrating that Justice Rehnquist became responsive to Court curbing only after becoming chief justice. Our model highlights the micro-level underpinnings of judicial responsiveness to inter-institutional politics and, most broadly, speaks to the need for separation-of-powers models to differentiate the preferences of individual political actors when seeking to understand inter-institutional responsiveness.

Keywords

Supreme Court, separation of powers, court curbing, inter-branch politics

Studies of the American separation-of-powers system tend to focus on political institutions as the unit of analysis. In these works, individual actors are conceived of as uniformly interested in making policy gains for their branch, while avoiding rebuke from other institutions. Yet, there are reasons to expect that individual political actors might vary in the motivations for their behavior. As such, some may display more sensitivity to inter-branch conflict than others for reasons that are not well understood by the current literature. If we can identify explanations for heterogeneity in decision-making at the individual level, we may also be able to better understand the conditions under which inter-branch threats can be effective within the separation-of-powers system.

In this paper, we exploit the Supreme Court–Congress relationship to analyze the causes and consequences of decisional heterogeneity for inter-branch politics. We argue that individual justices do not equally consider separation-of-powers concerns in their decision-making, and some justices may be more attentive to Congressional threats than others. As a consequence, the Supreme Court may only appear responsive at the institutional level when

justices who are externally attentive are in pivotal positions on the Court. Prior studies (e.g., Bailey and Maltzman 2011; Hall 2014; Hall and Ura 2015; Harvey and Friedman 2006; Marshall, Curry, and Pacelle 2014; Segal, Westerland, and Lindquist 2011; but see Baum 2003) have treated justices as implicitly homogeneous in their decision-making inputs, and we argue this assumption obscures the individual roots of behavior (Enns and Wohlfarth 2013, 1090; see also Baum 2015). Although it is likely that Supreme Court justices share similar concerns over institutional maintenance, we contend that the chief justice, due to his unique positional responsibilities (Maltzman and Wahlbeck 1996), and the swing justice, due to her more moderate ideological position (Collins 2008), place a premium on preferences for institutional

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maintenance, even after accounting for policy preferences, during times of heightened inter-branch conflict.

We focus on one important external constraint faced by courts, the introduction of Court curbing legislation in Congress, and use a multilevel modeling strategy that allows us to exploit individual-level variance in judicial decision-making. Finding evidence consistent with our expectations, we also draw out a series of other testable implications, including the effects of ideological moderation under various conditions. To further examine evidence surrounding our chief justice hypothesis, we conduct an analysis of the responsive behavior of Justice Rehnquist both before and after he was elevated to the role of chief justice.

We show that Court curbing alters the willingness of some justices to defer to Congress, a fact that has important substantive implications. Only a few justices derive significant utility from deferring to Congress, and they are in a position to pivot outcomes in 18 percent of the cases in our dataset. This demonstrates that in the majority of judicial review cases, congressional Court curbing may not matter—a result distinct from the current literature. This finding underscores the importance of understanding variation at the justice level in judicial review cases. We conclude with implications for future work on how members of Congress develop and target proposals as a result of our model, which links micro-level dynamics in judicial behavior and institutional response in the Court curbing game.

Understanding Responsive Behavior

To understand why Supreme Court justices alter their behavior in response to Court curbing threats, it is important to recognize why Congress forwards these proposals in the first place. Contemporary scholarship attributes this behavior to both institutional- and individual-level forces. At the institutional level, Court curbing is thought of as a way for Congress to provide the Court with information about its reputation with both the public and Congress (Clark 2009; see also Caldeira 1987). Congress may lodge Court curbing threats because it perceives the judiciary as overstepping its authority and infringing upon the purview of the legislature. Alternatively, it may refrain from limiting judicial authority when there are reputational costs or when it believes that this power can be harnessed to its benefit (Baum 2003; Whittington 2005). These perspectives align well with other work on inter-institutional relations, which suggests the legislature and the judiciary are often engaged in a dialogue about the appropriate jurisdiction of the branches (Fisher 2014; Pickerill 2004). According to this approach, when Court curbing behavior is ramped up, the Court understands this to be a signal of its diminishing standing with

these external audiences and responds by striking down fewer pieces of federal legislation as unconstitutional (Clark 2011).

At the individual level, scholarship shows that there is variance among members of Congress in their propensity to propose Court curbing legislation (Mark and Zilis 2018), yet very few works conceptualize the individual-level motivations for these proposals within an explicitly inter-institutional framework (but see Whittington 2005). Some work suggests that ideological discord between the Court and a lawmaker drives the decision to propose Court curbing bills (e.g., Miller 2009), but other work suggests that a member's strong interests might activate Court curbing tendencies if the Court decides unfavorably in cases that are of particular importance, such as those that activate the religious preferences of some lawmakers (Miller 2009). Taken together, recent approaches to congressional Court curbing provide an account of individual behavior that is nested within an institutional and coalitional context.

Why the Supreme Court Responds

Although research on proposal behavior considers individual members of Congress, work that focuses on the Court's responses largely overlooks justice-level variations in attention and reaction. Judicial responsiveness has gained renewed interest by scholars, and there is a general agreement that the Court as a whole recognizes threats to its authority and responds accordingly (Hall 2014; Harvey and Friedman 2006; Owens, Wedeking, and Wohlfarth 2013; Segal, Westerland, and Lindquist 2011). In other words, the majority of scholarship on the Supreme Court's responsiveness to Court curbing threats treats the preferences of all justices as monolithic—either from the perspective of the majority coalition or the institution itself. As a result, scholarship is limited in its ability to adjudicate between the different types of factors that influence the decision-making of individual justices, especially as it pertains to external threats.

As an institution, the Court is thought to respond to legislative threats because of its attention to inter-institutional context. The Court is interested in preserving both the policy it sets and its formal institutional powers, and recognizes that to accomplish these two goals, it must be attentive to the external forces that influence the Court's relative success in these areas. The Court's responsiveness to policy-based threats is consistent with a long line of literature that considers the justices to be policy-motivated actors who need to gauge the reactions of the legislature to avoid reversals (e.g., Ferejohn and Weingast 1992; Harvey and Friedman 2006; Sala and Spriggs 2004).

Studies of institutional threats are less plentiful than those of policy-based threats (but see Rosenberg 1992;

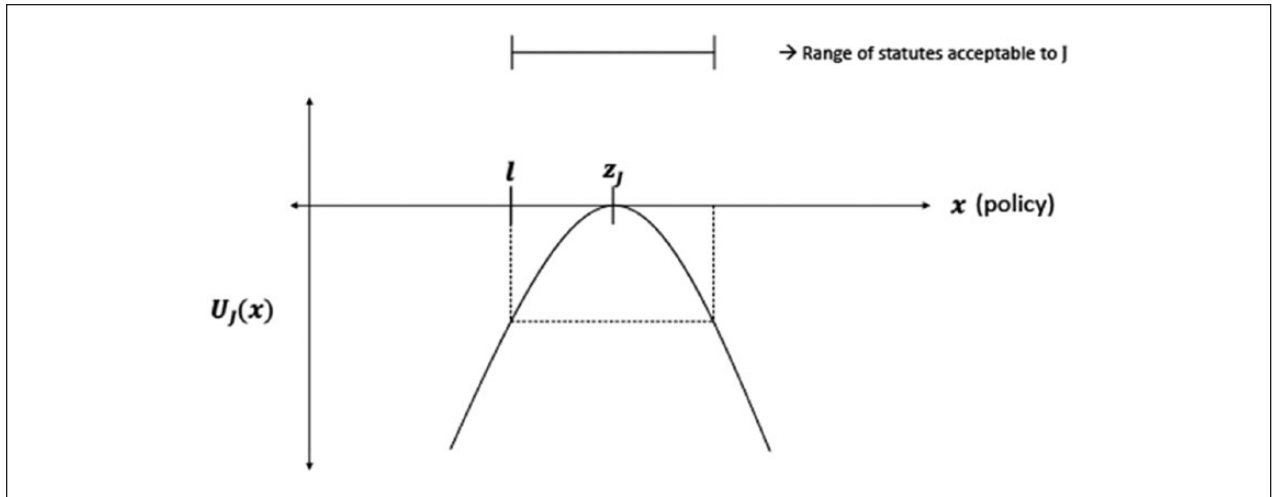


Figure 1. Policy-focused (homogeneous preferences) model of judicial decision-making.

Toma 1991), but the strategic underpinnings are similar. The justices may seek to moderate their behavior to avoid congressional attacks that directly challenge the Court's formal powers (Clark 2011). The Court may further evaluate the balance of these threats to determine which are most important to respond to, providing additional support to the strategic account of judicial behavior within an inter-institutional environment. Furthermore, while there is ample evidence that members of the Court vary in their decision-making at the justice level due to the institutional concerns articulated above (e.g., Maltzman and Wahlbeck 1996), this logic has yet to be extended to a study of Court curbing.

Identifying Micro-Level Variations in Judicial Response

Accounts of judicial response to congressional threats are limited because they do not consider how justices may vary in their individual tendencies to value institutional maintenance. Indeed, in many studies, the factors influencing judicial decision-making are modeled as having uniform effects across members of the Court—an assumption that presumes all justices approach decision-making in the same way (Baum 2015; Johnson, Wahlbeck, and Spriggs 2006; Tate and Handberg 1991; Yates 1999; but see Bailey and Maltzman 2008; McAttee and McGuire 2007; Segal 1986). For example, while a justice's liberal preferences may lead her to vote in a liberal direction in any given case, the effect of ideology on that justice is not considered to be different than the effect of ideology on any other justice (e.g., Segal and Cover 1989).

We can gain valuable insights about Court curbing and judicial behavior by considering how concerns over institutional maintenance alter the calculations of the justices.

Figures 1 and 2 spatially translate this theoretical innovation. Figure 1 presents a policy-focused model of judicial decision-making. Here, justice J has an ideal preference z_J on a policy dimension x . J's utility for any given policy is represented by the utility curve $U_J(x) = -(x - z_J)^2$. When the Court hears a case challenging the constitutionality of a congressional statute, J has a choice between upholding the statute and receiving the utility that corresponds with its location along dimension x , or striking down the statute, which allows Congress to set new policy at its ideal point, l .¹ As a result, J has a range of acceptable statutes that she will vote to uphold because the utility for doing so, $U_J(x)$, is weakly greater than the utility for striking these down and allowing Congress to set policy, $U_J(l)$.

But, in addition to policy considerations, preferences over institutional maintenance may also influence J's utility function. In this model, a justice's utility is derived from a combination of policy and inter-institutional factors. We translate this logic in Figure 2. Here, we allow for the possibility that a justice values institutional maintenance ($m = 1$, otherwise $m = 0$) and receives some utility bonus, b , when she takes steps to protect the institution. J's utility can, therefore, be represented as $U_J(x, m) = \begin{cases} -(x - z_J)^2 & \text{if } m = 0 \\ -(x - z_J)^2 + b & \text{if } m = 1 \end{cases}$. By intro-

ducing this dimension to J's utility function, Figure 2 makes clear how the range of acceptable statutes expands. In other words, when J takes into consideration her preferences for inter-institutional deference, she is willing to accept statutes that fall to the left of the congressional ideal point l , which is outside of the range of statutes that she is willing to vote to uphold based on policy preferences alone.

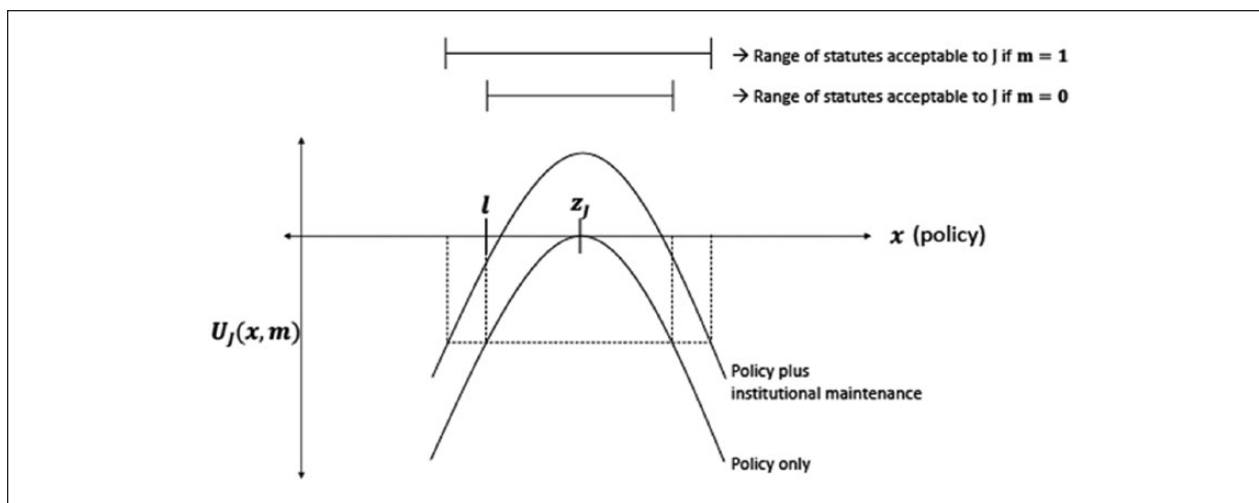


Figure 2. Policy and institutional maintenance (heterogeneous preferences) model of judicial decision-making.

As a consequence, it becomes critical to explain why some justices value institutional maintenance more than others. Such variation influences the range of statutes a justice may find acceptable. Theoretically speaking, a justice who places a very high value on institutional maintenance would choose to uphold almost any congressional action before the Court. Because we do not expect all justices to equally care about institutional maintenance, we contend that this variance has implications for voting behavior and case outcomes in judicial review cases. In the next section, we explore the factors that should lead particular justices to value institutional maintenance more highly than others.

The Mechanisms Underpinning Congressional Deference

We expect that justices vary in how they weigh the factors used in their decision-making processes, and we focus on two distinct mechanisms—positional responsibilities and ideological moderation—that directly affect how a justice behaves in response to external threats. Because these mechanisms most strongly influence the behavior of the chief and swing justices, we hypothesize that these justices, in particular, will exhibit the greatest degree of responsiveness to legislative threats.

Positional Responsibilities

When a justice possesses administrative duties that require him to interact more closely with the other branches, he is more attuned to the inter-institutional environment and more willing to weigh signals from it when deciding cases. On the Court, the chief justice is differentiated from his colleagues by his enhanced positional responsibilities.

While the chief's distinct duties are numerous (Johnson, Spriggs, and Wahlbeck 2005), many of them require him to interact with and regularly consider the preferences of Congress, something not required to the same degree of the associate justices. In particular, the chief justice presides over the Judicial Conference of the United States, for which he submits an annual report to Congress of proceedings and recommendations for legislation, and he is also required to submit year-end reports to Congress on the state of the federal judiciary. As a result of these responsibilities, chief justices are carefully attuned to the inter-institutional environment, as the behavior of many chief justices attests.²

The annual reports of the chief justice often defend the courts against efforts to decrease the judiciary's budget and from other politicized attacks (Resnik and Dilg 2006)—for example, Chief Justice Rehnquist devoted an entire section of his 2003 year-end report to "Relations between Congress and the Judiciary," chastising Congress for using the PROTECT Act to eliminate judicial discretion in sentencing. Chief Justice Roberts spent the early years of his tenure making continual pleas for federal judicial salaries to rise with inflation. By 2008, he said he was "tired" of asking Congress for these appropriations.³ Roberts also, in 2013, implored Congress to be respectful of the judiciary's needs and predicted "adverse consequences" if funding were reduced (a common Court curbing measure; Mears 2013). Chief Justice Charles Evans Hughes paid careful attention to the danger of FDR's plan to pack the Court, writing publicly against the plan and working behind the scenes to defeat it (Shesol 2010, 393–96).

Scholars have also demonstrated the chief's responsiveness to external threats through other behaviors relevant to his positional responsibilities, notably through

his opinion assignment and drafting behavior (Johnson, Spriggs, and Wahlbeck 2005; Maltzman, Spriggs, and Wahlbeck 2000; Maltzman and Wahlbeck 1996; Slotnick 1979). The chief justice may be more willing to depart from his preferences by allowing other factors to motivate these decisions as compared with the associate justices. The chief is particularly sensitive to intra-Court issues, such as securing a majority, ensuring equality in assignment, and encouraging issue specialization (Brenner 1984; Brenner and Spaeth 1986), and extra-Court dynamics, such as maintaining the relationship between the Court and other political actors (Maltzman and Wahlbeck 1996; Rohde 1972). Furthermore, Kobylka (1989) finds that Chief Justice Burger was more willing to vote in favor of redeveloping Establishment Clause policies in a way that would be supported by Reagan-era Republicans, while the associate justices were more leery of appearing to be influenced by the preferences of external actors. We theorize that such behavior modification should extend to responsive voting behavior in light of legislative threats. Therefore, we propose that the chief pays particular attention to maintaining the Court's formal powers and institutional structure, making him much more likely to modify his behavior in response to legislative threats. Building on our earlier insights, this implies that even after we have controlled for policy preferences, the chief justice should be more likely to find policies acceptable in a high threat environment.

Hypothesis 1 (H1): As legislative attempts to curb the Court increase, the chief justice becomes more deferential to Congress. Specifically, the chief justice should display a lower likelihood of voting to strike down legislation relative to his associate justice counterparts, as court curbing increases.

Ideological Moderation

We further develop the logic regarding variant weights that justices place on decision-making considerations to emphasize the role of ideological moderation. Our argument is based on the fact that relative moderates weigh ideology less heavily in their decision-making (Collins 2008; Enns and Wohlfarth 2013). This depressed reliance on ideological considerations, combined with the unique ability to round out a majority coalition, also means that relative moderates are more aware of the other inputs when making decisions, including the preferences of external actors, as compared with more ideologically extreme justices. This insight leads us to theorize that if a moderate justice perceives the inter-institutional environment to be a hostile one, as determined by her attention to external factors such as congressional threats, she will

shift her behavior in cases that may further antagonize the hostile branch.⁴

Here, we build on prior work that suggests the swing justice is particularly attentive to and likely to be influenced by external constraints. However, whereas existing studies focus on the role that public opinion plays in shaping the behavior of the swing justice (e.g., Enns and Wohlfarth 2013), we believe that legislative threat is another important form of external constraint. Although proposals to sanction the Court rarely become law (Farganis 2009), Congressional threats convey “symbolic messages” to a variety of audiences—including the Court—to influence its behavior (Devins 2006, 1339). Simply put, relative moderates are particularly attentive to the “reception” that the Court's rulings will receive, including the likelihood that they will engender opposition from outside actors such as Congress. They are, therefore, concerned that decisions that displease the legislature may have negative institutional ramifications, making them more likely than their colleagues to heed signals of congressional displeasure and adjust their behavior accordingly.⁵

To capture our intuitions empirically, we focus on the swing justice, who is the pivotal justice by definition. To further refine this point, on any given Court, there could be multiple swing justices, because justices do not need to maintain the same ideological position across each issue area. It follows that justices may find themselves to be the swing, or pivotal majority member, in some issue areas and not in others due to these multiple ideological alignments on the Court. But being the swing does not mean that the justice in that position makes decisions in the same way that they do when they are not the swing justice. We expect that all else equal, swing justices will be less reliant on their ideological predispositions as compared with the more extreme members of the Court. Instead, these justices will be more likely to consider external threats against the Court as compared with their colleagues (Collins 2008). Therefore, we hypothesize,

Hypothesis 2 (H2): As legislative attempts to curb the Court increase, the pivotal swing justice becomes more deferential to Congress. Specifically, the swing justice should display a lower likelihood of voting to strike down legislation relative to her associate justice counterparts, as court curbing increases.

Empirical Approach

Our theory is one that explicitly models heterogeneity in judicial behavior, suggesting that some justices will be more likely than others to moderate their behavior in response to institutional threats. This theory is consistent with a conceptualization of voting outcomes (as an

indication of judicial autonomy) that vary in response to an external threat such as Court curbing (e.g., Clark 2009). In other words, in cases in which federal legislation has been challenged, justices have the ability to exhibit independence by voting to strike down the legislation. We anticipate that their behavior will vary as a function of Court curbing threats.

To test this model, we consider relevant all cases in which the justices were presented with the opportunity to vote to strike down a piece of federal legislation. Using the Supreme Court Database (Spaeth et al. 2017), we identified only those cases in which a piece of federal legislation was challenged (*authorityDecision1* = 1 or *authorityDecision2* = 1) between 1953 and 2005, all years for which our covariates are available. Our dependent variable is a dummy that takes on a value of 1 if a justice voted to strike down a piece of federal legislation—either she joined a majority opinion, judgment of the Court, or wrote a concurrence in a case where the Court declared a federal law unconstitutional, or she dissented when the Court voted to uphold the law. The variable takes on a value of 0 otherwise. Overall, justices voted to strike down federal legislation 25.7 percent of the time in cases in which they had the opportunity to do so. Our measure builds on the Segal, Westerland, and Lindquist (2011) method to identify judicial review. In addition, we focus on voting outcomes as a stringent test of our theory but do not forestall the possibility that responsiveness may also influence other forms of behavior, such as opinion content (Owens, Wedeking, and Wohlfarth 2013).

Our key independent variables aim to capture the combined effects of Court curbing and a justice's position on the Court. We create a variable to capture a justice's position on the Court, *Chief justice* or *Swing justice* (with other associate justices as the reference category). Because the Court median may vary across contexts, we rely on an issue-specific measure of the swing justice. We follow the approach developed by Enns and Wohlfarth (2013), who use issue-specific Martin-Quinn scores to identify the pivotal swing justice across eight substantive issue areas. The areas, corresponding to Supreme Court Database (SCDB) codes, are civil rights, criminal procedure, First Amendment, other civil liberties cases, economic cases, unions, federalism and taxation, and judicial power. Our variable *Swing justice* is a dummy that takes on a value of 1 if a justice occupies the median position and rounds out a majority coalition for a given issue area, as measured using Martin-Quinn scores.⁶

To measure the external threat of congressional legislation, we rely on Clark's (2009) exhaustive list of all congressional Court curbing proposals. Although there are other measures that capture Court curbing behavior, Clark extensively validated his list, demonstrating it to be

the most comprehensive one available. Adopting a similar approach to Clark's, we updated the Court curbing data so that our dataset runs through 2010, including 198 vote-level observations from the first three natural courts of Roberts's tenure as chief justice.⁷ Following Clark, we use the logged number of Court curbing proposals in a given year, as evidence shows that each additional sanction proposed in a given year is less impactful in causing deference. Furthermore, we used a one-year time lag on this variable, for a pair of theoretical reasons. We expect that justices are particularly concerned about contemporaneous institutional threats to their authority because Congress's attacks on the Court tend to wax and wane substantially over time (Nagel 1964). However, using a contemporaneous indicator invites questions about whether Congress is simply *responding* to unwanted rulings, a real possibility. We, therefore, believe that the common approach of using the shortest possible yearly lag receives the strongest theoretical (and empirical; see Clark 2009) support. The variable *Court curbing_{t-1}* is the logged number of Court curbing proposals in Congress from the year prior to a ruling. We use the logarithm to capture the logic that the importance of each additional Court curbing proposal diminishes as the number of these proposals becomes very large.

We also include a number of relevant control variables in our empirical models. Importantly, we want to account not only for a justice's ideological preferences but also her ideological distance from a challenged statute—our expectation being, even after controlling for this, some justices should prove more responsive than others. We control for a justice's ideology by using issue-specific Martin-Quinn scores for each of the eight issues mentioned above. *Issue-specific ideology* gives us a precise measure of preferences across issue areas. To measure specific preferences over challenged legislation, *Justice-statute inconsistency*, we adopt an approach developed by Lindquist and Solberg (2007, 77–78). The authors' measure was created specifically to explore how attitudinal considerations influence voting when a statute's constitutionality is challenged, making it particularly appropriate for our inquiry. Specifically, we use the SCDB's decision direction code to determine the direction of a challenged statute (e.g., when a conservative decision invalidates a statute, that statute is coded as liberal). Then, we multiply the statutory ideology by a justice's Judicial Common Space (JCS) score (Epstein et al. 2007). As Lindquist and Solberg (2007, 78) explain, "the resulting figure will be positive when there is ideological congruity and negative when there is not. Moreover, the value of the term will vary with the intensity of the justices' preferences." Simply put, this gives us a validated measure of a justice's preferences over a statute that varies in intensity and is specifically appropriate for constitutional cases.

Table 1. Descriptive Statistics.

	M	SD	Minimum	Maximum
Vote to strike down legislation	0.24	0.44	0	1
Court curbing _{t-1}	2.10	0.88	0	3.99
Chief justice	0.11	0.31	0	1
Swing justice	0.07	0.26	0	1
Issue-specific ideology	0.002	2.35	-6.81	5.14
Justice-statute inconsistency	-0.04	0.54	-0.86	0.86
Justice-House constraint	0.48	0.23	0.01	1.01
Justice-Senate constraint	0.47	0.23	0.01	1.00
Court-House constraint	0.36	0.15	0.01	0.57
Court-Senate constraint	0.34	0.15	0.02	0.61
Public opposition	-8.09	7.64	-20.19	18.56

We believe it is important to account for constraint from the current Congress, which may factor into the decision to strike down legislation. Harvey (2013) demonstrates that the invalidation of legislation is strongly conditioned by the preferences of the contemporaneous Congress (see also Harvey and Friedman 2006). Coupled with the fact that the majority of legislation invalidated by the Supreme Court is struck within two years of enactment (Dahl 1957; see also Maltzman et al. 2014 for an examination of statutory and constitutional nullifications), we believe that the most sensible way to account for how ideological distance shapes the decision to invalidate legislation is to control for the constraint imposed by the preferences of the contemporaneous Congress. Using the most recent version of JCS scores (Epstein et al. 2007), which were designed to make these types of inter-institutional comparisons, we controlled for whether the presence of constraint at the justice level was driving voting behavior by incorporating into the model the distance between an individual justice's preference and those of the Congressional medians (*Justice-House constraint* and *Justice-Senate constraint*). Also, we considered the possibility that the justices may pay attention to other pivotal actors in Congress, most notably the median of the majority party (see Mark and Zilis 2018). We ran models using these control variables in place of the chamber medians, and the results, presented in the online supplemental appendix, are unchanged.

We, furthermore, wanted to account for whether the Court as an institution was constrained by the current Congress. We create this measure of Congressional constraint by taking the distance from the Court's median justice to the median member of the nearest legislative body. Greater values of the *Court-House constraint* and *Court-Senate constraint* variables indicate greater constraint, meaning that the Court's preferences differ from those of the relevant house and, thus, that the justices

may be more reticent about striking down federal legislation. Again, we also looked at controlling for the distance from the Court to the majority party medians in Congress and present these results in the online supplemental appendix.

Finally, we acknowledge the role that public opinion plays in some models of Court curbing and want to account for this in our model. A common approach to doing so involves extracting the public's policy mood from a series of survey questions and then comparing this with the Court's output (e.g., Durr, Martin, and Wolbrecht 2000). Stimson's policy mood indicator is among the best available, continually updated into the modern era and supplying the overall liberal/conservative mood of the public (Stimson 2018). We made a simple linear transformation by subtracting the long-term median from the yearly mood, with the result being that higher (positive) values indicate a more liberal public, while lower (negative) values indicate a more conservative public. We then multiply this by our aggregate indicator of Court direction, the median justice's JCS score. This supplies our indicator of *Public opposition*, with higher values indicating a greater divergence between the preferences of the Court median and the public's mood. These variables in hand, Table 1 presents descriptive statistics.

Even with a variety of control variables included, we acknowledge that other contextual factors may influence voting behavior. Our modeling structure enables us to take into account a large range of such variation. We use a multilevel mixed effects logistic regression with random effects by case. By accounting for differences in outcome at the case level, this allows us to focus on the fixed effects about which we care: the *differences* in the propensity of the chief and swing to display responsive behavior relative to their colleagues. In addition, our model includes natural Court level-fixed effects and issue area-fixed effects. We cluster our standard errors by year.

Table 2. The Likelihood of Voting to Strike Down Legislation.

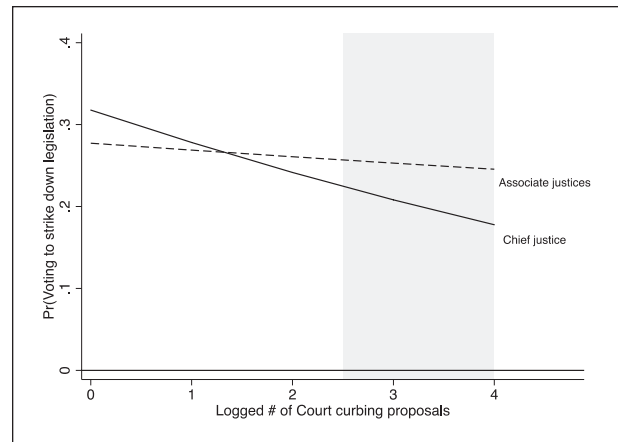
	Main model
Responsiveness variables	
Court curbing _{t-1}	-0.06 (0.11)
Chief Justice	0.35 (0.36)
Swing justice	-0.81 (0.56)
Court curbing _{t-1} × Chief Justice	-0.27 (0.17)
Court curbing _{t-1} × Swing justice	-0.28 (0.27)
Control variables	
Issue-specific ideology	-0.12 (0.04)
Justice-statute inconsistency	2.96 (0.19)
Justice-House constraint	-0.21 (0.80)
Justice-Senate constraint	-0.23 (0.85)
Court-House constraint	0.06 (1.94)
Court-Senate constraint	1.63 (1.87)
Public opposition	0.02 (0.02)
Issue area-fixed effects?	Yes
Natural Court-fixed effects?	Yes
Log pseudolikelihood	-2,326.72
N	5,769

Results are estimated coefficients from a multilevel logistic regression with random effects by case and standard errors clustered by year. See Figures 3 and 4 for substantive and statistical interpretations.

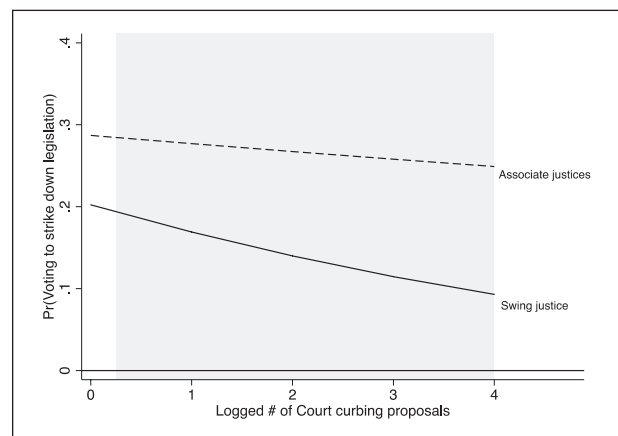
Study 1: Examining Six Decades of Justice-Votes for Responsive Behavior

Our heterogeneous responsiveness model anticipates that the chief justice and pivotal swing justice are responsive to inter-institutional threats forwarded by Congress, altering their voting behavior accordingly. To evaluate these expectations, we want to compare how the likelihood of voting to invalidate legislation differs between these justices and all of their colleagues as the volume of Court curbing legislation varies. This calls for an interactive specification between the justice's position and the Congressional Court curbing environment. Our main results are presented in Table 2. However, we emphasize that the interpretation of these results must be evaluated graphically as we have a logistic specification with interaction terms (Brambor, Clark, and Golder 2006). We focus on the graphical interpretations of marginal effects in Figures 3 and 4.

The basic insight of our heterogeneous responsiveness model is that the chief and swing justice should be less willing than their colleagues to invalidate legislation when under the threat of Court curbing. To see whether this is the case, we begin with the chief justice hypothesis (H1). Figure 3 plots the predicted marginal effects of chief justice status as Court curbing varies, and it shows support for our theory. At low levels of Court curbing, the chief is similarly likely to invalidate legislation as his colleagues

**Figure 3.** Chief justice average marginal effect of court curbing on voting to strike down legislation.

The figure displays the likelihood of voting to strike down legislation at various levels of Court curbing for the chief justice and associate justices, based on the model from Table 2. The shaded region represents a significant difference between the chief and associate justices' propensities to strike down legislation. Substantively, this demonstrates that the chief justice is less likely than his colleagues to vote to strike down legislation as Court curbing increases.

**Figure 4.** Swing justice average marginal effect of court curbing on voting to strike down legislation.

The figure displays the likelihood of voting to strike down legislation at various levels of Court curbing for the swing justice and associate justices, based on the model from Table 2. The shaded region represents a significant difference between the swing and associate justices' propensities to strike down legislation. Substantively, this demonstrates that the swing justice is less likely than her colleagues to vote to strike down legislation as Court curbing increases.

(32% of the time vs. 28% of the time, $p > .05$). However, this likelihood reverses when Congress proposes multiple sanctions in a given year. Once Court curbing is 1 *SD* above its mean, the chief is significantly less likely than his colleagues to strike down legislation. The gray-shaded regions represent a significant difference between the chief and his colleagues. At the high levels of Court

curbing, the chief justice votes to invalidate legislation about 18 percent of the time, his colleagues about 25 percent of the time. This is about a 28-percentage point difference in likelihood, indicating substantive support for H1: the chief justice is less likely to strike down legislation than his colleagues as Court curbing increases.

Figure 4 presents the results specific to the swing justice, comparing her likelihood of striking down legislation with her associate justice colleagues across different levels of Court curbing. As can be seen, the behavior of the moderate swing justice is statistically indistinguishable from her colleagues when Court curbing is rare (when no such legislation has been proposed in Congress). The swing justice votes to strike down legislation in this instance approximately 20 percent of the time, whereas other justices do so approximately 29 percent, a difference that is not significant at $p < .05$. However, as Court curbing increases, we can see the behavior of the justices diverge, as expected. At even low-to-moderate as well as high levels of Court curbing, when Congress has proposed multiple sanctions in a given year, the swing justice is considerably more responsive to the threat. This is represented by the gray-shaded region. At the very highest levels, associate justices vote to invalidate legislation approximately 25 percent of the time, whereas she does so only 9 percent of the time, or about 63 percent less often. This provides evidence of the swing justice's responsive behavior, supporting H2. Taken together, the evidence presented in Figures 3 and 4 provides support that Court curbing threats are effective in changing the behavior of two justices, in particular, as they make the chief justice and the swing justice less likely to vote to invalidate legislation than their colleagues.⁸

Turning to our control variables, we observe a few other noteworthy results. We call attention first to the significant coefficients estimated for two of our justice-specific variables, ideology and statute inconsistency. These indicate that a justice's specific policy considerations appear to play an important role in even constitutional cases. This is particularly clear given the substantively large coefficient on statutory inconsistency: justices are much more likely to vote to invalidate laws with which they disagree from the standpoint of policy preferences. Yet, while this replicates a common result in the separation-of-powers literature, we should note that it buttresses our novel insights when it comes to Court curbing. Namely, coupled with our earlier findings, we show that legislative threats condition the use of judicial review—but only among some justices—even after we have taken into account policy preferences. We also note that, outside of Court curbing threats, the contemporaneous institutional environment appears to have little effect on voting behavior. None of our constraint variables achieves statistical significance. One way to read this result is that ideological distance between the branches is not, by

itself, enough to alter voting behavior on the Supreme Court. Rather, Congress must actively forward some type of institutional threat to induce deference.

How often does heterogeneous responsiveness matter to case outcomes? To gain insight on this, we considered instances of “high Court curbing,” where the volume of legislation forwarded by Congress was above its median. Then, we looked at cases in which the chief or swing justice was in a position to control the outcome—either one joined a five-member majority or both joined a six-member majority. This represents 116 of 644 total cases, or about 18 percent of judicial review cases, in which the combination of high Court curbing and a responsive justice shapes the outcome. While the chief and swing, then, play a key role, the result also warns of the perils of a homogeneous responsiveness model, because in a large number of cases, these justices are not in a position to shape the outcome.

Finding support for our theoretical argument, we explore its robustness in a series of additional models, presented in the online supplemental appendix (Sections A–C). While continuing to control for justice-specific preferences over policy, we also explore whether the findings are sensitive to another way to identify the swing justice (Section A) as well as the use of different pivotal actors in Congress matters (Section B). In Section C, we unpack whether public opposition conditions responsive behavior. Across all of these specifications, our main results concerning the key justices are similar. In addition, in the following section, we leverage a unique event—Justice William Rehnquist's elevation to chief justice—to further explore our theory.

Study 2: A Pre-Post Promotion Analysis of Rehnquist's Elevation from Associate to Chief Justice

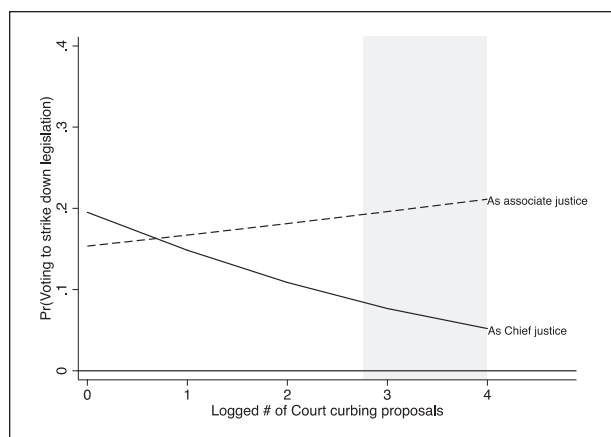
After fourteen years as an associate justice, William Rehnquist was elevated to chief justice in 1986, a position in which he served for the next twenty years. This split in Rehnquist's tenure on the Supreme Court offers a unique opportunity to further test our heterogeneous responsiveness theory using the behavior of a single justice. Put differently, by focusing on Rehnquist's two unique roles on the Court, we can isolate the effect of these roles on responsiveness. Our theory implies that Rehnquist should prove unresponsive to Congressional threats in his associate justice position, but more willing to moderate his behavior when serving as the chief justice.

To test this implication, we apply our statistical model to explain the voting behavior of Justice Rehnquist alone. Because we include Rehnquist observations only, we do not include the justice-specific ideological control variable or the institutional constraint measures, although

Table 3. Rehnquist Responsiveness.

	Rehnquist-only model
Responsiveness variables	
Court curbing _{t-1}	0.16 (0.29)
Chief Justice	0.46 (0.75)
Court curbing _{t-1} × Chief Justice	-0.68 (0.47)
Control variables	
Justice-statute inconsistency	-2.57 (0.31)
Justice-House constraint	-2.49 (1.69)
Justice-Senate constraint	-0.56 (1.56)
Public opposition	-0.002 (0.04)
Issue area-fixed effects?	Yes
Log pseudolikelihood	-134.76
N	489

Results are estimated coefficients from a logistic regression with standard errors clustered by year. See Figure 5 for substantive and statistical interpretations.

**Figure 5.** The conditionally responsive behavior of Justice Rehnquist, a pre-post promotion analysis.

The figure displays the likelihood of voting to strike down legislation for periods in which Rehnquist was an associate justice (dashed line) and chief justice (solid line), based on the model from Table 3. The shaded region represents a significant difference between propensities to strike down legislation (one-tailed). Substantively, this demonstrates that Rehnquist was less likely to vote to strike down legislation as Court curbing increases, but only during his tenure as chief justice.

we continue to control for Rehnquist's preferences regarding the challenged statute. We present our estimates in Table 3 using a model that includes a dummy variable to capture Rehnquist's position on the Court. The *Chief justice* dummy takes on a value of 1 for the years in which Rehnquist served in the position of chief justice, and a value of 0 in all other years. Once again, given that we are interested in the interaction between Rehnquist's position on the Court and the threat of Court curbing legislation, we evaluate our interactive hypoth-

esis through inspection of a marginal effects plot, presented in Figure 5.

In spite of the fact our model spans only 489 vote-observations for Justice Rehnquist, we find statistical support for our theory. Put simply, Rehnquist was completely unresponsive to Congressional threats during the terms in which he served as an associate justice. In fact, he was slightly (though not significantly) *more likely* to vote to strike down legislation during periods of high Court curbing as opposed to low. Upon elevation to the position of chief justice, however, Rehnquist became much more concerned with Congress. As chief justice, Rehnquist was strongly responsive to legislative threats, becoming significantly less likely to strike down legislation during periods of high Court curbing. Specifically, when faced with the highest levels of Court curbing, our model predicts that Associate Justice Rehnquist would vote to strike down about 21 percent of the time, while Chief Justice Rehnquist would do so only about 5 percent of the time, even holding his preferences over the challenged statute constant. This evidence provides further confirmation that a justice's position on the Court influences whether he or she will respond to Congressional threats, with the legislature equipped to alter the decision-making calculus for the chief and swing justices.

Discussion

Existing evidence suggests that Court curbing is an effective tool for Congress: the judiciary is much more willing to eschew judicial review when faced with formal threats from the legislature. However, until this point, no evidence speaks to the micro-level mechanics that underpin judicial responsiveness. Here, we detail two alternative models that can account for responsiveness. In a homogeneous responsiveness account, implicit in much of the literature, Court curbing leads to a uniform change in behavior, with each justice aware of threats from Congress and willing to moderate her behavior accordingly. In another, Court curbing leads to a conditional change that depends on the weight various justices place on other decision-making inputs.

The heterogeneous responsiveness insight leads us to posit that Court curbing is particularly impactful in shaping the behavior of the chief justice, whose administrative duties require regular interactions with Congress, and the swing justice, who as an ideological moderate is attentive to a variety of external signals, including threats from the legislature and opposition from the public. Our evidence shows support for our theory. We find that Court curbing influences these two justices, in particular, making both the chief justice and the swing justice much less likely than their colleagues to vote to strike down federal legislation. We also note that given the

swing justice's willingness to weigh a variety of factors in decision-making, the effect of Court curbing is made more powerful for this justice when underscored by concerns about the Court's popular support. These effects are substantively meaningful; in some instances, they lead to nearly a two-thirds reduction in the likelihood of voting to strike legislation. Therefore, while Congress may be able to guarantee a deferential Court by shaping the behavior of the two justices that are most inclined to react to its threats, our findings also suggest a novel limit on inter-institutional responsiveness.

Our findings speak to multiple literatures. First, some scholarship considers the degree to which a justice's position on the Court shapes her propensity to behave in a strategic fashion (e.g., Enns and Wohlfarth 2013). The general takeaway from this work is that the swing justice, in particular, is inclined to behave strategically. However, this largely overlooks the important role played by the chief justice, whose administrative responsibilities have an influence when the Court is faced with legislative threats to its institutional authority. Our findings add to this literature by showing that, under certain conditions, the chief justice is similar to the swing justice—inclined to evince a higher degree of strategic responsiveness than his colleagues. More broadly, however, they show that *different* considerations govern the behavior of individual justices, including the chief and swing justices, when the Court faces external constraint. Second, scholarship on Court curbing and separation-of-powers struggles has made tremendous advances in recent years. A considerable literature now verifies that the judiciary is inclined to take prospective action when it faces threats from the legislature (e.g., Clark 2009; Harvey and Friedman 2006; Sala and Spriggs 2004; Segal, Westerland, and Lindquist 2011). These models have reshaped our understanding of Congress's power to change judicial behavior. But with few exceptions, this work focuses its attention on either institutional response or homogeneity in behavior across justices. This means that scholars have very little sense of which justices are most likely to react to congressional threats.

More generally, our study has implications for work on the theoretical and empirical applications of the strategic model, in two main ways. First, we take on a criticized assumption of models of judicial decision-making in general—that the justices are equally likely to be affected by the factors that influence their decision-making (Baum 2015). Like Baum, we agree that the justices, while perhaps influenced by the same basket of indicators when making decisions, do not weigh them equally. As such, we provide a theoretical perspective and empirical test of the effect of a justice's institutional position, one source of intra-Court variance in responsiveness. This provides empirical insight related to the idea that judges balance a variety of factors in their reasoning, with the

importance they assign to certain considerations varying across individuals and contexts (Epstein and Knight 2013). Second, while the likelihood of behavior modification on the Court is typically associated with ideological distance from Congress (Segal, Westerland, and Lindquist 2011), we suggest a more nuanced picture of the branches' inter-institutional relationship based on heterogeneous responsiveness to Court curbing proposals.

Our understanding of judicial responsiveness is significantly enriched when a micro-level model underpins it. Our model implies that the power of the chief justice and the swing justice to shift case outcomes—and, thus, the ability of Congress to make *effective* threats that lead the judiciary to change its behavior—depends on the alignment of the Court's other justices. To illustrate: suppose that the seven other justices intend to vote to strike down a law, regardless of the Court curbing regime in which the judiciary operates. This may happen when, for instance, these justices see such severe problems with a piece of legislation that little will change their basic views of the law's constitutional invalidity. Then, even responsive behavior from the chief justice and the swing justice will fail to cause institutional responsiveness—as five votes are (usually) necessary to determine a case outcome. But suppose, instead, that the bench is equally divided—three justices are inclined to strike down a piece of legislation, three to uphold it. In this scenario, the ability of Court curbing threats to induce behavior change on the part of the chief justice and the swing justice is enough to alter a case outcome. Of course, there are other ways in which justices may demonstrate their responsiveness beyond altering their voting behavior, and we consider this a fruitful extension of this study.

In other words, on an evenly divided Court, Congress's ability to change the votes of up to two justices is a powerful tool. Indeed, swinging the behavior of even one justice on an evenly divided bench can shift an outcome. This heterogeneous responsiveness mechanism provides the link between the micro-level and the institutional. Congressional threats *do not* lead to a uniform change in judicial behavior. In many cases, and, indeed, at many points in history, the alignment of the justices may diminish or even nullify the effectiveness of Court curbing. We, ultimately, suggest that a micro-level model of responsiveness highlights the conditional effectiveness of legislative threats.

Acknowledgments

The authors would like to thank the anonymous reviewers and the editors of *Political Research Quarterly* for their thoughtful comments and helpful critiques. We would also like to thank Keith Schnakenberg, Paul Wahlbeck, Justin Wedeking, and our panel at the 2017 meeting of the Midwest Political Science Association for their comments on earlier drafts of this article.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. This assumption builds on the idea that judicial review, by disrupting the status quo, may allow Congress to enact new policy that it otherwise could not pass (Whittington 2005).
2. For a more detailed treatment of the chief justice's powers and responsibilities, see Dannelski (2006) and Dannelski and Ward (2016).
3. These reports are accessible at supremecourt.gov.
4. To note, our logic raises interesting questions regarding the psychology of decision-making. Do justices weigh external considerations only after they have determined they do not possess strong ideological preferences on an issue? Or do they first decide to take into account external constraints when deciding, which has the effect of weakening ideological decision-making? This is a complex question that we cannot resolve here.
5. To illustrate, consider the behavior of Justice Kennedy, the pivotal member of the Roberts Court on a number of issues, whom Fuentes-Rowher (2015) considers a "super median" (see Epstein and Jacoby 2015 for discussion of this concept). Due to his diverse set of preferences, Kennedy exhibits less ideological consistency than other justices and looks more readily to other considerations, such as public opinion, to guide his decision-making (Fuentes-Rowher 2015, 1502). Of course, it is possible that the swing justice is not particularly moderate in an absolute sense. Our argument presumes only that she is moderate relative to her colleagues, a condition that is satisfied by definition.
6. Another approach for doing so is to use the overall Court median, measured by the justice with the least extreme ideological preference in a given term, as indicated by Martin-Quinn scores (Martin and Quinn 2002). However, we believe that a more nuanced test of our expectations recognizes the fact that the justice who is the most "moderate" can vary across issue areas. We also explore the robustness of our results by using an alternative, targeted swing justice measurement strategy in the online supplemental appendix, Section A.
7. To supply more detail about our approach to updating the Court curbing dataset, we had two research assistants search for bills indexed under the following subject terms on congress.gov: *constitutional and constitutional amendments*, *judges*, *judicial review* and *appeals*, *jurisdiction* and *venue*, and *Supreme Court*. This list differs slightly from the one Clark (2009) used because congress.gov updated its search term vocabulary since he conducted his study. We were able to gather 421 legislative hits (111th

Congress) using this approach. Our research assistants read summaries of each of these bills and identified those that potentially related to an institutional attack on the Supreme Court. For each identified provision, the research assistants and the authors checked using the Clark (2009) definition.

8. Our data include only four observations in which federal legislation was challenged and the issue-specific swing justice was also the chief justice. We, therefore, remain agnostic about the scope of interactive effects—that is, whether a justice who occupies this unique role (when an issue-specific swing justice *is* the chief justice) is any more likely to display responsiveness than a typical swing or chief justice. However, we note that justices in both of these roles are already very unlikely to strike down legislation when faced with Court curbing in our models—they vote to do so quite infrequently, on average—which implies that occupying the positions of chief justice and swing justice concurrently may not intensify this effect much further.

Supplemental Material

Replication materials are available at www.alyxmark.com and by request. Supplemental materials for this article are available with the manuscript on the *Political Research Quarterly* (PRQ) website.

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