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Restraining the Court: Assessing Accounts of Congressional Attempts to Limit Supreme Court Authority

We propose a multilevel account of legislative Court curbing in order to assess existing explanations as to why such proposals come about. We argue that although Court curbing is commonly seen as the result of institutional conflict between Congress and the Supreme Court, it is best understood as a product of three interrelated factors: the individual motivations on the part of lawmakers, the partisan context in which they operate, and institutional disagreements between Court and legislature. We find evidence that micro-level factors offer an important insight into Court curbing that institution-focused explanations alone cannot.

Although numerous studies investigate power struggles between Congress and the federal judiciary, scholars often take a compartmentalized approach to the study of this interinstitutional relationship. Because of this, we know a great deal about specific legislative threats toward the courts and judicial responses to those threats. However, we know significantly less about the factors that drive this complex separation-of-powers dynamic. When do individual legislators decide to utilize Court-curbing threats against the Supreme Court, and what are the consequences for the study of the separation of powers? Some research conceptualizes Court curbing as rooted in institutional concerns, like differences in policy preferences between the branches (e.g., Whittington 2005). Other research points to individual-level factors or partisan considerations as determinative (e.g., Clark 2011). As a result, the conditions under which aggregate dynamics (such as institutional or coalitional considerations) and individual-level differences interact to reshape the balance of institutional power are not well understood. We consider the divergent explanations that scholars have proposed to explain interinstitutional power

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encroachments. While no single explanation can account for all of these attacks, we argue that micro-level factors offer an important insight into Court curbing that institution-focused explanations alone cannot.

We test this innovation through an analysis of the introduction of Court-curbing proposals in Congress with specific attention paid to the micro-level underpinnings of these proposals. Previous studies of Court curbing have focused on institutional factors, such as Congress's ideological distance from the Court (Eskridge 1991a, 1991b; Hettinger and Zorn 2005; Ignagni, Meernik, and King 1998), or individual factors, like the re-election goals of members of Congress (Clark 2011; Curry 2007; Gely and Spiller 1990; Segal 1997). Our work advances the literature by suggesting that it is important to consider how individual and contextual dynamics work together to shape Court-curbing behavior.

Our account of the importance of micro-level factors is based on the insight that Court curbing largely serves as a messaging, or position-taking, tactic for individual legislators (Mayhew 1974). As proposals to sanction the Court rarely become law (Farganis 2009), members likely utilize these threats publicly to convey "symbolic messages" to a variety of audiences—including their constituents, parties, and the Court itself—in order to shore up support, display expertise, and influence behavior (Devins 2006, 1339). As such, we contend that Court-curbing behavior is best understood as a product of an individual member's incentives to propose threats to the Court given her goals and the context in which she operates. The importance of this approach stems from the fact that focusing on a limited set of indicators, such as those measuring institutional conflict, obscures others that may drive the decision to reshape institutional authority. In other words, Court curbing is an action that is undertaken by individual lawmakers, not the institution as a whole. We contribute to the Court-curbing literature by explaining its roots in the behavior of individual lawmakers and the context in which they work, rather than solely as a result of Congress's goals as an institution.

Understanding the process through which attempts to redistribute interinstitutional power are made possesses important implications for our understanding of the separation of powers. We argue that the bulk of the current literature, which views attempts to reshape this balance as a product of institutional conflict between courts and the legislature, is underspecified. At its root, the proposal of Court-curbing legislation is an individual-level behavior, and we contend that this behavior can be constrained or enhanced by the institutional and partisan context. For instance, we show that because lawmakers use Court curbing as a position-taking strategy, their behavior can be better understood by

considering carefully how context shapes the value of Court curbing to a lawmaker.

Furthermore, our article provides the first account to assess models of Court-curbing behavior from the perspective of both individual lawmakers and Congress as an institution. It suggests that a variety of cross-cutting goals may operate simultaneously in the separation-of-powers game. One of the central contributions of our assessment is to demonstrate that what existing scholarship commonly conceives of as institutional conflict—the legislature's goal of limiting the judiciary's aggressive use of power—has little effect on Court curbing. Most attempts to limit judicial authority are instead the result of incentives that operate on *individual* political actors and the *coalitional* context in which they operate. In other words, proposals to reshape interinstitutional power occasionally come about in response to institutional goals, but many more are introduced with the goals of individual political actors and dominant political coalitions in mind. Our findings offer nuance to existing accounts that seek to understand whether, and for what reasons, the Court may respond to congressional threats by laying bare the variegated sources of such threat. They ultimately enrich our understanding of separation-of-powers struggles in the political system more broadly.

A Primer on Court Curbing

A significant concern for courts is the extent to which they are vulnerable to attacks from the elected branches and, arguably, the most significant of these threats are those that formally alter a court's power. These institutional encroachments can take a variety of forms. Historical examples include: attempts to pack the benches with political allies, attempts to limit the judiciary's budget and freeze judicial salaries, the override of judicial decisions, and refusals to implement controversial rulings. Even though Court-curbing proposals pass only on occasion, judges see them as worrisome since even their proposal may "undermine the separation of powers and impair the judiciary's ability to resolve contentious political and legal disputes" (Moyer and Key 2016, 1).[1] Indeed, evidence suggests that the proposal of such legislation can, under specific conditions, dissuade the judiciary from striking down legislation (Clark 2009; Segal, Westerland, and Lindquist 2011). For these reasons, Court-curbing legislation has attracted renewed scholarly attention (e.g., Clark 2009, 2011; Farganis 2009; Marshall, Curry, and Pacelle 2014).

What drives Court-curbing behavior? Though the literature has reached divergent conclusions, most existing accounts focus on the behavior's institutional roots. In other words, the legislature's perception

of interinstitutional conflict is perceived to be the central determinant of attempts to limit judicial authority. Clark provides the most comprehensive account of Court curbing to date. His work sees the behavior, which has roots in Congress's desire to provide to the justices information regarding their standing vis-à-vis the legislature and public, as "what might be characterized as an institutional assault on the Court" (2009, 979). One basis for this assault is the judiciary overstepping the bounds of its authority and infringing upon the province of the legislature.

Not surprisingly from the institutional-conflict perspective, certain Congresses have been considerably more willing to propose limitations on the Supreme Court authority. Devins and Fisher explain that these periodic shifts in Court-curbing behavior, also observed by Nagel (1964), "often emerge when the judiciary acts by nullifying statues" (2015, 24). Put differently, electoral and partisan realignments occasionally place the judiciary out of step with majoritarian institutions like the elected branches, precipitating an increase in Court curbing (see also Dahl 1957).

This view squares with the conception that Congress and the judiciary (and the president) engage in what can be called a "constitutional dialogue" over the scope of legislative authority as well as the judiciary's proper role in a separation-of-powers system (Fisher 1988, 2014; Pickerill 2004).[2] The judiciary's response in this dialogue also highlights the role of interinstitutional conflict. Clark (2009) finds that when the Court is pessimistic about its public support, threats from Congress become more credible, leading the Court to minimize the degree to which it engages in countermajoritarian behavior. Consistent with this perspective, Segal, Westerland, and Lindquist find that the Court is sensitive to the relative ideological configuration of the elected branches primarily because it is concerned with "institutional maintenance," as opposed to overrides of specific decisions. They argue that the justices are "savvy strategic actors who are more willing to assert their collective policy preferences when their institution is insulated politically from potential institutional retaliation by the elected branches" (2011, 102). The Court assesses these signals in a sophisticated fashion, becoming more responsive when presented with credible signals that its popular legitimacy is waning. For the Court, "institutional power is of paramount strategic concern in the disposition of constitutional cases and policy preferences move to the fore as the Court engages in statutory interpretation" (Marshall, Curry, and Pacelle 2014, 41).

As a result, the extant literature is fairly emphatic in highlighting institutional conflict as a determinant of Court-curbing behavior. This research suggests that Congress attempts to rein in the Court for intruding on what it views as the authority of the legislative branch when, for

instance, it aggressively reviews congressional statutes.[3] However, whereas approaches that focus largely on interinstitutional dynamics provide valuable insights regarding judicial responsiveness, they leave much unexplained about the factors that actually motivate Court curbing in Congress. The problem is made more acute because individual lawmakers are responsible for the introduction of Court-curbing proposals. As Whittington argues, "[b]efore legislators are willing to sanction the Court, they must be willing to bear the risks of a public backlash for such sanctioning activity" (2003, 460). This is not to suggest that lawmakers will not bear such a risk (certainly they will, under a variety of conditions), but rather that our understanding of the decision to Court curb must take into account factors at the individual level. A focus on institutional considerations alone may obscure variance in the propensity of individual lawmakers to engage in Court-curbing behavior. Indeed, some lawmakers regularly introduce Court-curbing legislation whereas others will never introduce this type of bill (Clark 2011). In other words, the differences between lawmakers cannot be explained by institutional concerns alone—their behavior may also be motivated by partisan or ideological considerations (Whittington 2005).

Support for these contentions can further be seen in work that emphasizes strategic behavior on the part of lawmakers. As Miller (2009) documents, the rise of religious conservatives and their attendant focus on reining in judicial power in the wake of *Roe v. Wade* and other decisions provided conservative lawmakers with strong incentives to attack the judiciary. As a result, the House Judiciary Committee in particular evolved into an "anticourt" body when under Republican control (Miller 2009, 36). This finding is consistent with Clark's (2009) argument that congresspersons may use attacks on the Court in order to position take and credit claim in front of key audiences. Position taking against the judiciary may have additional value in certain contexts, such as when control of government is divided and the likelihood of actually advancing a Court-curbing bill through the legislative process diminishes.

It is therefore our understanding from the literature that the risks (and value) associated with Court-curbing behavior will vary across individuals and lawmaking contexts as well as across institutional contexts. But because the balance of existing scholarship focuses primarily on the latter, we believe that the literature on separation-of-powers encroachments like Court curbing leaves much to be explained. Most existing accounts focus on a circumscribed set of factors, like institutional conflict or political ideology, and explore their effects on Court curbing in isolation. Few have attempted to disentangle the relative weight of these factors and the ways in which they interact with one

another, in spite of the fact that their interactions may offer important insight into interinstitutional politics. Still, the existing literature offers a strong starting point from which we can trace how individual motivations, as well as coalitional and institutional context, shape Court curbing. In the following section, we distill expectations about how each of these factors may shape such behavior in Congress. As we demonstrate, this approach has important consequences for the scholarly understanding of the factors that systematically underpin attempts to reshape institutional authority in a separation-of-powers system.

Theoretical Expectations

To broaden and enrich the understanding of Court curbing, distilling insights from previous scholarship, we propose that the factors that motivate the behavior are best conceptualized along three lines. We first point to *individual*-level considerations, such as the motivations, goals, and constraints upon lawmakers, and how they influence the likelihood that members engage in Court curbing. Additionally, because we follow prior work in seeing Court curbing as a messaging endeavor for the individual lawmaker, we argue that the propensity to engage in such behavior is also shaped by context. Therefore, we propose that *coalitional* considerations, which involve the struggle over policy outcomes between partisan coalitions in the legislature and the Court, are important because they interact with individual-level factors when Court-curbing behavior is in question. Finally, we draw on previous work that suggests that *institutional conflict* will increase Court-curbing efforts, which allow Congress to rein in a judiciary that it views as overstepping the boundaries of its institutional authority. We lay out these expectations more formally in the coming sections.

Individual and Coalitional

The micro-level dynamics governing institutional conflict between Congress and the Court are poorly understood. We see this as particularly problematic since individual lawmakers are responsible for the introduction of Court-curbing legislation, even as lawmakers operate within specific institutional and coalitional contexts. In this section, we seek to understand how these considerations shape Court-curbing behavior.

Our starting point is that the proposal of Court-curbing legislation is largely a messaging endeavor, through which legislators convey their preferences to a variety of relevant audiences (Clark 2009, 2011; Devins 2006; Lipinski 2001). Though lawmakers have preferences over policy

outcomes, there is a small likelihood of passing substantive Court-curbing legislation. Instead, lawmakers rely on the messaging value of Court-curbing legislation to achieve outcomes they desire, using proposals to maintain political support and shape other actors' behavior, like the Court's, within the separation-of-powers system (see generally Devins 2006; Mayhew 1974, 61–73). Because lawmakers' use of messaging is shaped by the incentives and constraints operating on their behavior, this implies that lawmakers will be more likely to position take with Court-curbing legislation in contexts where they perceive it to be most valuable in actualizing their goals.[4] Although we acknowledge that any individual lawmaker may have a range of audiences in mind when introducing Court-curbing legislation, three of the most important audience-focused goals draw our attention: shoring up political support from constituents, sending credible signals to the Court, and demonstrating vigilance to fellow party members.

First, from the perspective of political support, Court curbing can help lawmakers earn approval from constituents. Conservatives in particular perceive curbing the Court to be a valuable messaging strategy. This is because perceptions of the modern Court are heavily influenced by its more liberal decisions (Jessee and Malhotra 2013), a lasting remnant of the Warren Court era (Lewis 1999). In order to maintain popular support, a lawmaker will participate in activities that ensure the security of her seat (Mayhew 1974), and for conservative audiences, "liberal activist" judges have come under particular scrutiny.[5] This creates an incentive for conservative lawmakers, as compared to liberal lawmakers, to readily engage with their base by criticizing "the activist judge" and proposing reforms grounded in limiting the role of courts.

H1 (Conservative Ideology Hypothesis): The more conservative a lawmaker is, the more likely she will be to engage in Court curbing.

We also argue that our assessment of competing accounts should consider lawmakers' calculations about the likelihood their messaging behavior leads to change on the part of the Court. In other words, individual lawmakers may Court curb in order to send messages to the Court itself, attempting to affect its behavior. Our reasoning here is rooted in the calculations that members of the majority make about the value of sending a message to the Court. We argue that members of the majority have a stronger incentive to Court curb when their party is distant from the Court because their proposals, as opposed to ones from the minority party, are more likely to reach the floor (Anderson, Box-Steffensmeier, and Sinclair-Chapman 2003; Cox and McCubbins 2002).[6] Since the

Court is particularly concerned about attention-generating proposals, which spark widespread backlash against the institution (Clark 2011, 77), majority-initiated proposals represent more credible threats to the Court's support due to majority-party agenda control. In other words, members of the majority party have an additional incentive to ramp up their threats against a distant Court because the judiciary sees threats from the majority as more credible, making it more likely that it will adjust its behavior as a result. We posit that majority-party members are comparatively more likely to Court curb than minority members when their party is distant from the Court due to the fact that the institution perceives these majority threats as more credible.

For example, in 2006, Congress made a highly credible threat against the Court: it passed a piece of Court-curbing legislation that stripped the federal judiciary of jurisdiction over writs of habeas corpus for "enemy combatants" in the War on Terror. This effort was spearheaded by Senate Majority Whip Mitch McConnell, reached the floors of both chambers, and passed overwhelmingly by majority-party Republicans in the House and Senate. Because McConnell's party held preferences that were moderately distant (i.e., more conservative) from the Roberts Court, our logic suggests that McConnell would be more likely to forward Court-curbing legislation than if he were a member of the minority party, all else equal. This is because a member of the majority party is likely to see additional value in sending a message to the Court since he perceives the proposal as a viable signal to the Court of a potential institutional curtailment, rather than solely a signaling device to his constituents. Therefore, we anticipate that when the Court is distant, majority-party members see additional value in Court curbing and are thus more inclined to offer such proposals than their minority-party counterparts.[7]

> *H2* (*Majority-Member Messaging to the Court Hypothesis)*: In comparison to minority-party members, members of the majority party will be more likely to engage in Court curbing when the Court is distant from their party.

We also anticipate that lawmakers who have established expertise in the realm of judicial-branch policy will be particularly attuned to the Court's deviation from their party's preferred policy goals and are more likely to send anti-Court messages as a result. Here, we operationalize such expertise as membership on the Judiciary Committee. We expect that members of the Judiciary Committee have an interest in demonstrating their vigilance in overseeing the Court and making sure it shares their party's priorities. Not only does this committee "dominate constitutional

discussions" (Geyh 2006, 405), it has also been the epicenter of recent Court-curbing efforts (Miller 2009). Furthermore, attention to judicial-branch policy reveals a connection between a member and her party. Members are reliant on their parties for assignment to their desired committees (and especially so on party leadership in the House for leadership positions within committees). As a result, Judiciary Committee members will be more likely to engage in Court-curbing behavior as compared to the average member of their parties when the Court diverges from the party's desired policy in order to message to fellow members, a point that squares with Miller's (2009) historical insights.

> *H3 (Judiciary Committee Member Hypothesis)*: Judiciary Committee membership will interact with the degree to which the Court is ideologically distant from the member's party, with members of the Judiciary Committee more likely to introduce Court-curbing legislation when their party is ideologically distant from the Court.

To summarize our insights regarding the propensity of individual lawmakers to Court curb, we see this behavior as primarily a messaging or position-taking action. We argue, however, that the incentives to propose Court-curbing legislation should not be seen as consistent across all contexts, but rather understood to vary depending upon the coalitional context and the audiences involved. Although we do not doubt that lawmakers may have many such audiences in mind, we focus on three here—constituents, party members, and the Court itself—and demonstrate how these interact in context to shape Court-curbing behavior. One important insight from this exercise is that when lawmakers position take with Court-curbing legislation, their propensity to do so is governed by calculations about its value across different contexts.

Institutional

Although we place particular emphasis on the individual and coalitional components of Court curbing, a rich tradition of separation-of-powers scholarship assumes that the legislative and judicial branches engage in a dynamic struggle to consolidate institutional authority. As Handberg and Hill observe, "[t]he relationship between the United States Supreme Court and the United States Congress has been stormy. The Court has asserted and exercised the power to declare acts of Congress unconstitutional. Congress has long resisted such judicial exertions" (1980, 309). As this argument suggests, part of the tension between the judiciary and legislature is driven by the power of judicial review, which

supplies the Court with the authority to "veto" congressional legislation. More contentiously, the Court may also revise portions of congressional statutes by wielding the power to sever unconstitutional portions of legislation (Maltzman et al. 2014). These decisions clearly have policy ramifications, and they also serve to reshape the balance of power between the Court and Congress.

Indeed, Congress should view with displeasure judicial encroachments on what it perceives as its primacy in lawmaking authority. In other words, if all else were equal, Congress would prefer to wield the final word in the struggle over public policy rather than be subject to the exercise of judicial review. Furthermore, we suggest that Congress will be motivated to signal its displeasure by using Court-curbing legislation to draw the attention of the justices when it views the Court as encroaching upon legislative authority.

Although the costs associated with the introduction of such legislation, such as the time it requires to consider these bills, are relatively limited in some respects, they are quite substantial in others. For instance, the American people may look unfavorably on Court curbing given their generally robust support for judicial authority (e.g., Gibson and Nelson 2015). For this reason, Congress must consider carefully whether it is worth paying the costs associated with an attack on judicial independence (Whittington 2003). Overall, our perspective on institutional concerns suggests that all else equal, Congress is motivated to retain its legislative authority and will engage in Court curbing with a greater degree of frequency when the justices take actions that call into question legislative primacy.

These encroachments can take a variety of forms. First, the Court may invite congressional sanction when it utilizes its power of judicial review. In doing so, the Court clearly signals that it wields veto power, or the ability to make determinations as to whether Congress acted beyond the parameters of its delegated powers, resulting in the invalidation of legislation. To the extent that Congress cares about retaining primary lawmaking authority, it may aim to first warn the judiciary that it is encroaching on legislative authority and, second, formally limit the authority of the Court. This increased likelihood of congressional response leads to our first institutional hypothesis:

> *H4 (Activist Judiciary Hypothesis)*: As the number of congressional statutes struck down in a given year increases, the likelihood that members of Congress introduce Court-curbing legislation increases.

Of course, the Court does not need to strike down legislation in order to capture the attention of Congress. Congress may also view the Court as

overstepping its institutional authority when it grants certiorari to cases involving federal legislation. In other words, by allocating a portion of its limited discretionary docket to consider cases that raise questions about congressional legislation, the Court may be viewed as crossing the line into the province of legislative authority. It is not our argument that the Court necessarily does cross such a line (after all, the justices may look favorably upon the federal legislation at issue, or Congress may in fact *prefer* that the Court reviews its statutes; see Bamberger 2000 and Whittington 2005), but rather that its actions may be perceived as such and in turn draw the condemnation of Congress. Therefore, we offer our next hypothesis:

> *H5 (Legislative Encroachment Hypothesis)*: As the number of federal statutes considered by the Court in a given year increases, the likelihood that members of Congress introduce Court-curbing legislation increases.

Finally, we anticipate that members of Congress will have preferences over the types of issues the Court puts on its docket. In other words, we believe that Congress will see certain issues as primarily within the bounds of legislative authority and look unfavorably upon the Supreme Court's decision to hear cases involving these issues.

For example, the justiciability doctrine indicates that courts will not involve themselves in "political questions," which they leave to elected officials. Although this may be true in theory, in practice courts often resolve contentious political issues even after lawmakers have spoken on them. Scholars (Hendershot et al. 2012; Unah 2010, xii) have noted a corresponding shift in the Supreme Court's docket as a result of its famous footnote in *U.S. v. Carolene Products*. Afterwards, contentious political disputes, including those involving questions about civil rights and liberties questions, have come to make up a comparatively larger portion of the Court's docket. We anticipate that Congress is likely to view the resolution of such issues at the Supreme Court as an encroachment on legislative authority. In other words, our argument is consonant with Miller's finding that the Court's foray into issues like abortion reshaped the relationship between legislature and judiciary, with Congress becoming more likely to "rein in what it sees as the hopelessly liberal activist federal judges currently on the bench" (2009, 36). To capture this institutional logic, we offer the following hypothesis:

> *H6 (Political Issues Hypothesis)*: As the percentage of cases that involve civil rights and liberties issues on the Court's docket in a given year increases, the likelihood that members of Congress introduce Court-curbing legislation increases.

In sum, our comparative account of the roots of Court curbing sees three factors as dispositive: the messaging strategies of individual lawmakers, the coalitional context in which they operate, and concerns on the part of Congress about the proper balance of powers between institutions. Whereas previous scholarship places an emphasis on the institutional-conflict factor, we theorize that it has missed components of the Court-curbing game. We believe the above account is the first to take seriously how the micro-level underpinnings of Court curbing interact with coalitional and institutional context to shape member behavior.

Empirical Tests

We estimate a multilevel logistic regression with fixed and random effects for Congress and chamber to predict the introduction of Court-curbing bills between 1951 and 2008. This modeling structure allows us to account for the nested structure of our data, since we anticipate that error terms are correlated across both legislative houses and Congresses. Our model enables us to take this anticipated variance into account. Additionally, in the appendix, we present results from a model in which errors are clustered on congressperson, which are consistent with our main findings.

Dependent Variable

The dependent variable is a dummy variable that takes on a value of 1 if a lawmaker introduces a piece of Court-curbing legislation in a given year, and 0 on all other occasions. To construct this, we draw on Clark's (2009, 2011) catalogue of all Court-curbing measures introduced in Congress, the product of an exhaustive search process whose validity has been extensively tested.[8] Clark defines such a bill as a "legislative proposal to restrict, remove, or otherwise limit judicial power" (2009, 978). We focus on sponsorship since it is the key way in which lawmakers send signals to the judiciary (976). The data show that Court-curbing activity is a relatively rare phenomenon. The likelihood that a lawmaker will sponsor such legislation is approximately 1% on average in a given year.

Individual- and Coalitional-Level Variables

We utilize a dummy variable that captures whether a lawmaker is a *Majority-party member*. We also utilize a dummy variable that captures whether a lawmaker served in a given year as a *Judiciary Committee*

member. At the individual level, ideological-preference variables are also relevant. We capture *Conservative ideology* by drawing on ideal point estimates for individual lawmakers from Bailey (2007).[9] Because some evidence suggests that lawmakers may be more inclined to Court curb when the institution is ideologically distant (Nagel 1964), we also control for a lawmaker's *Ideological distance from Court*, which we measure by taking the absolute value of the distance between a lawmaker's ideal point and that of the median member of the Court.

We use Bailey (2007) ideal point estimates to measure the Court and the dominant parties in Congress based upon the estimates of their median member. Our *Party distance from Court* measure is constructed by taking the absolute value of the distance between the Court median and the median of each party in a given Congress. We control for the presence of *Divided government* in a given year due to the debate about its effect on legislative output (Binder 2003; Howell et al. 2000; Mayhew 1991).

Institutional-Conflict Variables

Finally, to understand institutional tension between the Court and Congress, we observe whether, in any given year, judicial behavior encroaches in domains over which Congress believes it exerts rightful authority. In particular, we are interested in whether the Court exercises judicial review, takes on cases involving federal legislative provisions, or fills its docket with civil rights and liberties issues. Our measure of *Laws invalidated* is a count variable developed by Whittington (2005) for the number of federal statutes invalidated by the Court in a given year (see also Clark and Whittington 2009). This measure is strongly correlated with one compiled by the Congressional Research Service, although it is more inclusive and thus, we believe, a more valid indicator of judicial encroachment on Congress. Our measure of *Federal provisions reviewed* is a count measure taken from the Supreme Court Database for cases that involved a federal statute (coded as lawType = 3; Spaeth 2016). We also explore the percentage of the Court's docket in a given year that is devoted to cases involving *Civil rights/liberties decisions*, which the SCDB codes as issue areas 1–6. Table 1 presents summary statistics for each of our variables.

Results

Our multilevel logistic regression enables us to predict the likelihood of a lawmaker proposing a piece of Court-curbing legislation by

TABLE 1
Summary Statistics

Variable	Mean	*SD*	Min	Max	Obs.
Bill introduction	0.02	0.12	0	1	30242
Divided government	0.58	0.49	0	1	30242
Majority-party member	0.57	0.49	0	1	30242
Judiciary Committee member	0.10	0.30	0	1	30242
Lawmaker conservative ideology	0	1	−2.62	2.71	30242
Lawmaker ideological distance from Court	0	1	−1.44	4.15	30242
Party distance from Court	0	1	−1.72	3.34	30242
Laws invalidated	0	1	−1.71	2.84	30242
Federal provisions considered	0	1	−1.86	1.88	30242
Civil rights/liberties decisions	0	1	−2.32	1.46	30242

Note: The unit of analysis is lawmaker-year. Therefore, the *Bill introduction* variable represents an individual lawmaker's decision to propose Court-curbing legislation in a given year.

taking into account the coalitional and institutional contexts within which these lawmakers operate. We test our expectations by exploring the estimated coefficients and presenting graphical interpretations where appropriate. Table 2 presents our results.[10]

We begin with our Conservative Messaging Hypothesis (H1). The estimated coefficient on ideology is in the direction as expected. Because the results generated from a multi-level logistic regression are best demonstrated graphically, Figure 1 presents the predicted margins of the likelihood of Court curbing across different ideological preferences. The figure demonstrates that conservatism on the part of lawmakers increases their likelihood of Court curbing. This is a particularly meaningful effect from a substantive perspective: The predicted probability of Court curbing for lawmakers who are two standard deviations more conservative than average is roughly 8%, a more than 700% increase when compared with the likelihood for a lawmaker with an "average" (moderate) ideological preference, who Court curbs at a 1% rate. Because our model includes other variables to account for various ideological considerations, such as a member's distance from the Court, one way to interpret this result is to consider the effect of ideological preferences for two members who are equidistant from the Court, one liberal and one conservative. Our finding implies that the conservative member is significantly more likely to sanction the Court.

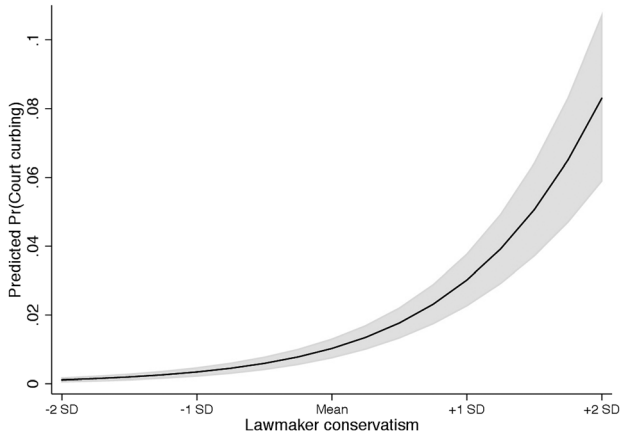
TABLE 2
Multilevel Logistic Regression Predicting the Propensity to Court Curb

Individual and Coalitional Factors		
H1	Lawmaker conservative ideology	1.13***
		(0.08)
H2	Lawmaker majority-party member	0.43***
		(0.12)
	Party distance from Court	0.25***
		(0.08)
	Lawmaker majority-party member	−0.05
	*Party distance from Court	(0.13)
H3	Lawmaker Judiciary Committee member	0.74***
		(0.13)
	Lawmaker Judiciary Committee member	−0.05
	*Party distance from Court	(0.13)
	Lawmaker ideological distance from Court	0.18**
		(0.07)
	Divided government	0.32
		(0.25)
Institutional Conflict		
H4	Laws invalidated$_{t-1}$	−0.43***
		(0.09)
H5	Federal provisions considered$_{t-1}$	−0.09
		(0.10)
H6	Civil rights/liberties decisions$_{t-1}$	0.58***
		(0.11)
N		30242
Log-likelihood		−2106.72

Note: Results are estimated coefficients from a multi-level logistic regression predicting the introduction of Court-curbing legislation, with random intercepts for chamber and Congress and standard errors in parentheses. *$p < 0.1$, **$p < 0.05$, ***$p < 0.01$.

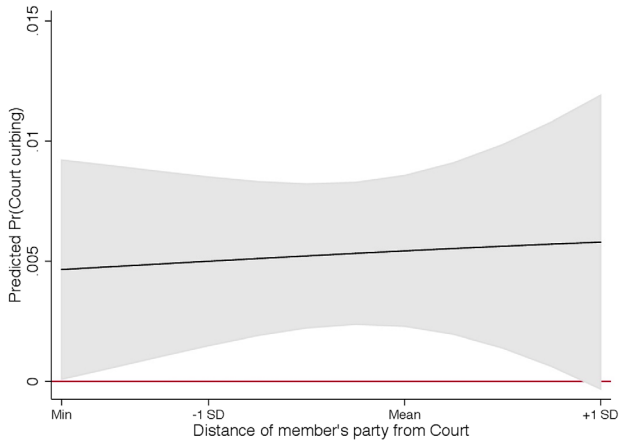
Next, we consider how majority-party status influences the propensity to engage in judicial sanction. We begin with a look at the way in which the ideological distance between the Court (median member of the Court) and a party's median member impacts lawmakers' willingness to engage in Court curbing. Our expectation is that majority-party members are more willing to sanction a Court whose preferences differ from their party's, given the likelihood that the Court will perceive threats as more credible when they come from the majority (H2). We plot the marginal effects and confidence intervals of this interactive term in Figure 2 (Brambor, Clark, and Golder 2006). This demonstrates a relationship between party membership and Court curbing. It shows that

FIGURE 1
The Effect of Ideology on Court Curbing



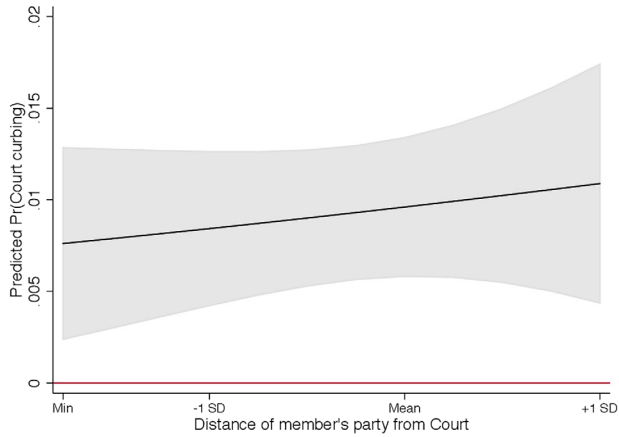
Note: Marginal fixed effects and 95% confidence intervals calculated from the model in Table 2.

FIGURE 2
The Conditional Effect of Majority-Party Membership on Court Curbing



Note: Discrete marginal fixed effects and 95% confidence intervals calculated from the model in Table 2. Coefficient differs significantly from 0 at $p<0.05$ where red line is visible. [Color figure can be viewed at wileyonlinelibrary.com.]

FIGURE 3
The Conditional Effect of Judiciary Committee Membership on Court Curbing

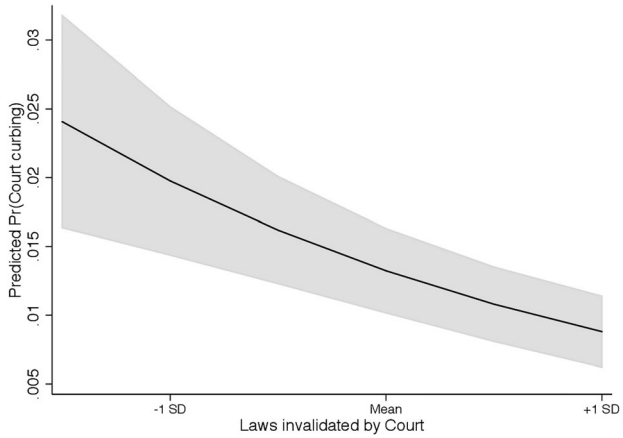


Note: Discrete marginal fixed effects and 95% confidence intervals calculated from the model in Table 2. [Color figure can be viewed at wileyonlinelibrary.com.]

majority-party members are significantly more likely than minority-party members to Court curb when the Court differs in terms of ideology from their party. This finding, which comports with our theoretical expectations, suggests to us that majority-party members believe that the value of Court curbing varies. Holding other factors constant, if two members are otherwise identical, majority-party membership will make them more likely to Court curb in a specific set of scenarios, a result that may suggest that they believe they will have more success in altering judicial behavior through threats that the Court interprets to be more credible.[11]

Our expectation is that the desire to message to party members will also govern the behavior of Judiciary Committee members (H3). Specifically, the model shows that Judiciary Committee membership increases the likelihood of Court curbing, although this effect is consistent irrespective of the distance of a member's party from the Court. This demonstrates that Judiciary Committee members are concerned with maintaining their reputation as vigilant overseers of the federal bench. Figure 3 interprets this result graphically. Again holding other factors constant, if two members are otherwise identical, Judiciary Committee membership will make them more likely to Court curb.

FIGURE 4
The Effect of Laws Invalidated on Court Curbing



Note: Marginal fixed effects and 95% confidence intervals calculated from the model in Table 2.

Additionally, looking to our individual and coalitional control variables, we note that lawmakers become significantly more likely to Court curb when ideologically distant from the median justice. On the other hand, we find no evidence that divided government conditions the behavior. In summary, our results from this portion of the analysis demonstrate that individual-level considerations clearly impact the propensity of lawmakers to Court curb. We find support that attacks on the Court are more likely (1) among conservative lawmakers, (2) for members of the majority party, and (3) for members of the Judiciary Committee.

We next turn our attention to our institutional hypotheses, which give voice to the conventional view that Court curbing is rooted in disagreements between the legislature and the judiciary. We find uneven results. For instance, we find evidence *against* our Activist Judiciary Hypothesis (H4). As the number of laws invalidated by judicial review increases, legislators become *less likely* to introduce Court-curbing bills in the subsequent year. Figure 4 presents the predicted likelihood of Court curbing across different levels of judicial review. This demonstrates the diminishing frequency of Court curbing as more laws are struck down. The likelihood that a lawmaker introduces a sanctioning bill is predicted to be around 2% in years after which the Court has not struck down any legislation, but less than 1% after a year in which it

strikes more than four laws. We are not entirely sure what to make of this result. One interpretation, consistent with Whittington (2005), would suggest that Congress would welcome judicial review as a means to break gridlock, provided the Court was an ideological ally. However, we have accounted in our model for ideological agreement of both legislative coalitions and individual lawmakers with the Court, rendering this alternative account unlikely. A second interpretation is that the Court may strike down more legislation when it believes Congress will approve of this behavior (e.g., Harvey and Friedman 2006), perhaps for reasons not captured by our account. If accurate, Congress would have a weaker motivation to sanction the Court in this scenario. Not inconsistent with this perspective is the explanation that Congress may *desire* the Court to strike down poorly crafted legislation, since doing so provides valuable information to the legislature. As such, Congress may reward, or at the least refrain from sanctioning, the Court when it uses judicial review. On the other hand, we find no evidence in favor of our Legislative Encroachment Hypothesis (H5) but we find results in favor of our Political Issues Hypotheses (H6). As the Court increases the portion of its docket devoted to civil rights and liberties issues, Court curbing in Congress becomes more likely.

Overall, the weight of the evidence regarding institutional conflict as a determinant of Court curbing is not particularly strong. To further interrogate these uneven results, we considered whether our three indicators might generally be a signal of an underlying latent construct of institutional conflict. We find some evidence to this effect and thus consider the matter further in the appendix. The results we present in the appendix show a stronger degree of support for the idea that institutional conflict increases the propensity to Court curb, but not at the expense of the other factors we have identified. This suggests to us that what is sometimes taken to be only an institutional struggle over the authority of the Supreme Court is one that is also shaped by other, noninstitutional factors.

Discussion

Our results help to enrich the literature's understanding of movements to reshape the balance of power in a separation-of-powers system. Specifically, we conceptualize the dynamic struggle over institutional authority as one rooted not only in institutional conflict but driven by the goals and motivations of individual actors and political coalitions. Our look at Court-curbing proposals, in fact, suggests that a focus on institutional context is misplaced. We

find uneven evidence that institutional disagreement drives attempted sanctions of the judiciary by Congress but strong evidence that individual- and coalitional-level factors do so. These findings give us reason to reassess the long-standing conventional wisdom about judicial-legislative interactions. Much of this work sees Court curbing as rooted in institutional struggle, an account that has some logical appeal. After all, the assaults on the Court may well, it has been theorized, come about when the judiciary steps on Congress's toes, so to speak. But our work suggests that is an incomplete theoretical framework. Although we do not dispute that Congress may prefer, as a general rule, to make policy itself rather than leave it in the hands of the other branches, the decision to propose Court-curbing legislation is not one made at the institutional level. Instead, our findings emphasize that individual lawmakers, who have discrete goals and are situated within an institutional context that shapes their behavior, make these decisions. In other words, if an individual lawmaker—who may already have a high propensity to Court curb—is not incentivized by her environment to do so, she may opt against proposing such legislation. Without an understanding of how these multiple factors influence Court-curbing behavior, existing accounts fail to disentangle the role of institutional conflict from individual- and coalitional-level factors that have an important influence on Court curbing. As such, examining these micro-level dynamics is crucial to future investigation of the consequences of this interinstitutional signal, as the proposal of even a handful of Court-curbing bills can dramatically affect Supreme Court behavior (Clark 2009).

Put differently, the major contribution of this work is to offer additional analytic leverage with which to understand Court-curbing efforts and separation-of-powers relationships more generally. In the Court-curbing literature, attacks on the judiciary have traditionally been explained as periodic in nature, driven by occasions during which congressional and Court preferences diverge. This could be used to explain, for instance, an increase in Court curbing since 2000. However, the institutional-conflict explanation only provides a limited degree of insight. By the start of the 21st century, most ideological measures suggest that the Court was relatively moderate. In spite of its increased use of judicial review, our findings suggest that more aggressive attacks on the institution can be traced to factors other than institutional conflict, such as attempts by conservative lawmakers to message to relevant audiences about their plans to strip authority from the Court. In other words, our work

reorients the literature on separation-of-powers struggles by pointing to their noninstitutional roots.

Our analysis, of course, leaves a number of questions unanswered. Perhaps most notably, we are unable to disentangle the precise reasons as to why institutional conflict, which has long been asserted to drive Court-curbing behavior, has uneven effects. Our finding that the use of judicial review lowers the degree of Court curbing suggests to us that previous accounts have not distinguished this behavior from coalitional and individual considerations, which our model is able to do. We find evidence, therefore, that lawmakers more readily aim to sanction the Court that they see as an ideological adversary. However, our findings with respect to judicial review, and our institutional results more generally, suggest the need for additional, focused attention on the shortcomings of institutional conflict as a determinant of Court curbing.

Additionally, our findings open questions with respect to the dynamic process of Court-Congress interaction. Previous conceptualizations of judicial decision making suggest that the Court may, under certain conditions, moderate its behavior to avoid displeasing Congress (e.g., Segal, Westerland, and Lindquist 2011). However, a strategic Court may have reason to differentiate in a sophisticated fashion between the varying types of Court-curbing proposals and the degree to which their sponsors represent credible dangers to the judiciary. One implication of this insight is that a Court concerned with Court-curbing legislation may have a more pressing need to avoid dissatisfying particularly influential lawmakers and important members of the dominant political coalitions in Congress. For instance, since we uncover certain factors that systematically increase the prevalence of Court-curbing behavior, such as membership on the Judiciary Committee for certain lawmakers, a careful Court may well aim to avoid severely displeasing only these individuals. It remains an open question as to whether the Court actually behaves in such a manner. Our work, in sum, points to a diverse array of considerations ranging from institutional to individual level and raises a variety of significant questions for future studies of institutional struggle in a separation-of-powers system.

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APPENDIX

Here we consider the robustness of our results to alternative modeling specifications, differing operationalizations of independent variables, and when controlling for other factors. Table A1 presents results from these various models. Model 1 provides an alternative specification of our main model clustered by congressperson. Model 2 includes a control for public opposition to the Court, using the divergence indicator from Durr, Martin, and Wohlbrecht (2000) as updated by Clark (2009). Results across these models are consistent with the findings from our main model.

Additionally, we give further attention to our uneven results with respect to institutional conflict presented in the article. To do so, we considered the possibility that each of the three institutional indicators was, on its own, a somewhat noisy signal of the underlying latent construct of institutional conflict. To reduce this noise, we used five-year rolling averages and factor analyzed these three indicators together as a means of extracting their common variance, which we assume to be institutional conflict. Factor analysis, extracting a single significant underlying factor, confirms that a latent dimension is indeed common to these three indicators. Therefore, in Model 3, we present an alternative specification that employs the factor score in place of our three original institutional indicators. This model provides evidence that Court curbing becomes more likely as institutional conflict increases. Even so, we see continued support for each of our individual and coalitional hypotheses, further attesting to their importance in the decision to Court curb.

TABLE A1
Robustness Checks of Main Model

		(1)	(2)	(3)
Individual and Coalitional Factors				
H1	Lawmaker conservative ideology	1.17***	1.20***	1.14***
		(0.12)	(0.09)	(0.08)
H2	Lawmaker majority-party member	0.45***	0.53***	0.47***
		(0.15)	(0.13)	(0.12)
	Party distance from Court	0.26***	0.28***	0.30***
		(0.09)	(0.08)	(0.08)
	Lawmaker majority-party member	−0.18	−0.02	0.02
	*Party distance from Court	(0.12)	(0.14)	(0.13)
H3	Lawmaker Judiciary Committee member	1.08***	0.63***	0.72***
		(0.22)	(0.14)	(0.13)
	Lawmaker Judiciary Committee member	0.05	−0.01	−0.04
	*Party distance from Court	(0.16)	(0.14)	(0.13)
	Lawmaker ideological distance from Court	0.12	0.15**	0.20***
		(0.08)	(0.08)	(0.07)
	Divided government	0.03	0.24	0.31
		(0.12)	(0.28)	(0.29)
Institutional Conflict				
H4	Laws invalidated$_{t-1}$	−0.39***	−0.37***	∼
		(0.07)	(0.10)	
H5	Federal provisions considered$_{t-1}$	0.04	−0.09	∼
		(0.07)	(0.11)	
H6	Civil rights/liberties decisions$_{t-1}$	0.82***	0.52***	∼
		(0.08)	(0.12)	
	Long-term institutional conflict	∼	∼	0.29**
				(0.15)
Public Opinion				
	Public opposition to Court	∼	0.10	∼
			(0.09)	
N		30242	27602	29718
Log-likelihood		−1892.35	−1883.57	−2109.98

Note: Results are estimated coefficients from a multi-level logistic regression predicting the introduction of Court-curbing legislation. Model 1 provides an alternative specification of our main model with effects nested by congressperson. Model 2 includes a control for public opposition to the Court, as measured by Durr, Martin, and Wohlbrecht (2000) and updated by Clark (2009). Model 3 includes a measure for long-term institutional conflict using the factor-score method over a five-year period. *$p < 0.1$, **$p < 0.05$, ***$p < 0.01$.

TABLE A2
Correlation Matrix

	Lawmaker Conservative Ideology	*Lawmaker Ideological Distance*	*Divided Government*	*Majority-Party Member*	*Judiciary Committee Member*	*Party Distance*	*Laws Invalidated*	*# Federal Provisions Considered*
Lawmaker Conservative Ideology								
Lawmaker Ideological Distance	0.10							
Divided Government	−0.04	−0.11						
Majority-Party Member	−0.11	0.01	−0.01					
Judiciary Committee Member	−0.04	0.06	−0.005	0.01				
Party Distance	−0.23	0.31	−0.11	−0.30	0.01			
Laws Invalidated	−0.05	−0.07	0.18	−0.01	0.004	0.01		
# Federal Provisions Considered	0.03	0.03	0.14	0.06	−0.01	−0.20	−0.22	
Civil Rights/Liberties Decisions	−0.17	−0.13	0.18	0.01	0.01	0.14	0.34	−0.11

NOTES

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1. One study finds that the Court enjoys "relative immunity from attack" by Congress: though "there have been repeated attempts to curb the Court's powers . . . the vast majority of these attempts have failed" (Adamany and Grossman 1983, 406). Still, as recently as 2006, Congress was able to sanction the judiciary, using the Military Commissions Act to strip federal courts of jurisdiction to hear the appeals of enemy combatants held during the War on Terror.

2. We also note that this dialogue may be fairly one-sided, since some suggest that recent Congresses have "paid little notice to the Court's decision making" (Devins 2001, 436) and that "today's lawmakers seem quite approving of the Court's power to invalidate federal statutes" (Devins 2004, 140; see also Katzmann 1991). Further, Geyh (2006) argues that Court-curbing periods are the exception to the rule, since judicial independence has come to be protected by the rise of strong behavioral norms that shield courts from politicized interference.

3. To be clear, it is not always the case that Congress will sanction the Court for using the power of judicial review. As Whittington (2005) ably demonstrates, lawmakers may at times prefer the judiciary to strike down unwanted status quo policies, in turn ending gridlock. Lawmakers may even invite this response (see Bamberger 2000).

4. Lawmakers have multiple goals that are often difficult to disentangle within the context of policymaking (see generally Binder and Lee 2015). In this article, we argue that a messaging strategy with multiple target audiences is the best way to articulate the way legislators attempt to accomplish their goals through Court-curbing proposals

5. Although the use of the term "activist judge" is not always constrained to one ideological position, that term is more likely to be attributed to judicial nominees who are unfavorable to a conservative lawmaker and signals to a member's constituency that the nominee would not accomplish the policy goals of the lawmaker (Scherer 2003).

6. Although the majority party's agenda power may not be quite as strong in the Senate as compared with the House, the majority nonetheless exercises significant agenda-setting authority in the upper chamber as well (Den Hartog and Monroe 2011; Gailmard and Jenkins 2007).

7. Whereas members of a very distant majority have an incentive to Court curb (Nagel 1964), Clark's (2011, 185–86) research also suggests that the Court may find threats from members with moderately different priorities to be particularly credible. We investigate this possibility later in the article.

8. Though Clark's data extend back through 1887, we focus our analysis on a 58-year time period for which all of our key covariates are available.

9. Although we considered alternative measures of ideological preferences, Bailey estimates are particularly appropriate for testing our theoretical predictions. Unlike Judicial Common Space estimates, for instance, Bailey measures do not impose assumptions regarding temporal stability (see Binder 2008; Bonica et al. 2016; Enns and Wohlfarth 2013). This is critical for our theory, in which lawmakers are attentive to

dynamic changes in Court behavior (see also Clark 2009) and use Court curbing as a tool to bring the institution back into line when it strays ideologically.

10. It is useful to assess the performance of our model before delving into empirical results. In the appendix, we present a correlation matrix demonstrating the association between covariates, most of which are weakly related ($r < 0.1$). Additionally, we show in the appendix that the results we discuss here are generally robust to alternative modeling specifications, differing operationalizations of independent variables, and when controlling for other factors. Table A1 presents results from these various models, which are consistent with the findings from our main model that we present here.

11. Note that, at the highest levels of party distance, the effect of majority-party membership is not significantly different from 0. Although there may not be enough observations to observe a significant effect at these highest levels, another explanation is that majority-party members believe their threats are more credible only when they are moderately distant from the Court (see Clark 2011, 185–86).

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