The determinants of judicial review: Judicial concessions and legitimacy concerns

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Abstract

When courts exercise judicial review, scrutinizing policies enacted by governing majorities for their compatibility with constitutional norms, they often depend on the cooperation of other branches of government to secure implementation of their decisions. I argue that in order to avoid non-implementation of decisions that are viewed unfavourably by other branches of government, courts can proof their decisions against non-implementation by offering policy concessions. However, I expect courts not to do so at all costs. I introduce a formal model showing that if concessions necessary to allay non-implementation fears would fall far from the court's preferred ruling, justices will fear for their image as a legally motivated arbiters central to their legitimacy and thus will assert their genuine positions, even if doing so increases the risks of non-implementation.

1 Introduction

By now an almost universal feature of modern democratic political systems, judicial review allows courts to censor the actions and behaviour of other branches of government. However, judicial control over the practice of other actors is limited by courts' lack of power to enforce their own decisions (Carrubba and Zorn, 2010). Where legislative chambers, the executive branch or bureaucracies defy implementation of a court ruling, the authority of the judiciary is tarnished (Vanberg, 2001, 2005). Given that the judiciary wields neither the power of the sword nor of the purse, extant scholarship argues that courts anticipate other actors' behaviour when exercising judicial review and avoid confronting those entrusted with implementing their rulings when threats of

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non-implementation are credible (Carrubba et al., 2008; Clark, 2010; Epstein and Knight, 1998; Epstein et al., 2001; Helmke, 2002; Iaryczower et al., 2002; Staton, 2006; Vanberg, 2005). However, research analysing bargaining among justices themselves suggests that their choices are not limited to challenging or deferring to other branches of government. Faced with multiple avenues of reasoning, justices can carefully craft the language of their opinions (Tiller and Cross, 2006; Clark and Lauderdale, 2010; Lax and Cameron, 2007; Epstein and Knight, 1998). Staton and Vanberg (2008) argue that justices concerned about the costs accruing from non-implementation of their decisions mitigate such costs by delivering vague opinions, which make subsequent non-implementation more difficult to spot (see Owens et al., 2013, for a similar argument).

Staton and Vanberg's model allows us to understand why justices frame their preferred opinions in more or less clear terms, but we lack a theory that explains when justices not only temper language but cede substance in policy to other branches of government. Consider the following two examples. In 1998's *2 BvL 42/93*, the German Federal Constitutional Court invalidated parts of the 1985 federal law on income taxes, finding that child benefits awarded to parents with a single child did not meet children's minimum subsistence levels. The court not only invalidated parts of federal legislation but determined the procedure through which child benefits had to be calculated.[1] However, four years earlier when ruling on a constitutional complaint that challenged cuts to child benefits, the German court had conceded that due to regionally varying minimum subsistence levels legislators had to enjoy a margin of assessment in setting the value of awarded child benefits, and had refrained from proscribing a procedure for calculating the value of child benefits (see *1 BvR 1022/88 [84]*). In both cases the court eventually ruled in favour of the complainants and against governing political majorities. Yet, the rulings differed markedly in the consequences for Germany's federal legislature. While the former conceded considerable discretion to legislators in designing policy on child benefits, the latter rescinded such discretion and prescribed in detail the procedures for determining the value of child benefits awarded to parents.

When do justices grant policy concessions to those tasked with implementing their rulings? I expect that in political environments in which policy preferences of courts and other branches of

[1] Specifically, the court's Second Senate determined that accruing costs of residential use by a child ought not to be calculated by a per-capita method but by additional residential demand per each child.

government diverge, justices face a choice between delivering judicial review decisions that stray from their own preference but are expected to be tolerated by other branches of government, and issuing rulings that concede little or no ground but risk non-implementation. I argue that this choice is a strategic one. The type of concessions justices need to make to proof judicial review decisions against non-implementation varies with the costs actors tasked with implementing these decisions would have to face for defying the court. Judiciaries in modern political democracies, and particularly courts at the apex of the judiciary, enjoy comfortable reservoirs of public support (Caldeira and Gibson, 1992, 1995; Gibson et al., 1998). Defying the implementation of a court decision thus can provoke a public backlash against those wielding legislative power and prove to be costly at the ballot box (Vanberg, 2001, 2005). Courts drawing on high levels of public support are more likely to see through implementation of concessions that fall closer to their ideal preferences. However, I argue that offering concessions to other branches of government to proof judicial review decisions against non-implementation not always represents courts' most promising strategy. Literature on public support for judicial decisions has shown that courts are more likely to elicit support for their decisions when they maintain an image as a neutral and fair arbiter that operates above the fray of politics and is guided by legal principles (Baird and Gangl, 2006; Zink et al., 2009; Christenson and Glick, 2015; Gibson and Nelson, 2016). Justices, who offer compromises that differ from rulings their legal assessments would demand, risk to tarnish their image as neutral arbiters that is central to their legitimacy in a political system of separation of powers, and the costs associated with such a loss in reputation may outweigh the costs associated with non-implementation of its decisions.

In this paper, I develop a simple formal model that identifies the conditions under which courts will offer concession in their rulings. The model predicts that in environments in which costs for evading implementation of court rulings are low, courts become less likely to offer concessions as policy preference gaps between courts and actors tasked with implementing their rulings increase. While counter-intuitive at first sight, this prediction captures a court that is not only concerned about the implementation of its decisions but also its perception as an arbiter motivated by legal

reasoning. The model I propose makes a contribution to theories on strategic judicial decision-making as it allows for equilibria that match neither the preference of the court issuing a judicial review decision nor the preferences of those tasked with implementing it. In addition, my formal analysis provides predictions that contrast established theories of strategic judicial decision-making (Vanberg, 2005; Hall, 2014; Carrubba et al., 2008; Staton, 2006), which expect courts to defer to government when they expect successful non-implementation of their decisions. My theory of strategic judicial decision-making expects courts to willingly risk non-implementation of their judicial review decisions if the concessions they would have to make to proof their rulings against non-implementation will tarnish their image as neutral, legally motivated arbiters.

The remainder of the article is structured as follows. The next section discusses the factors expected to shape the strategic decision-making of justices exercising judicial review. I then introduce the theoretical model and present the comparative statics derived from the formal analysis. Finally, I suggest a research design centring on the German Federal Constitutional Court's judicial review of federal legislation between 1998 and 2016, which allows me to empirically test the predictions of my theory.

2 Implementation, Scrutiny and Judicial Concessions

Extant scholarship has emphasised that courts exercising judicial review often rely on the cooperation of other actors to see their decisions implemented (Vanberg, 2001, 2005; Staton, 2006; Hall, 2014). A court may order changes to a legislative statute or instruct a public entity to cease a course of action, yet implementation thereof hinges on the cooperation of legislators in parliament and officials in public administrations. Courts' vulnerability to non-implementation of their judicial review decisions threatens the authority the judiciary commands in a system of separation of powers. Staton and Vanberg (2008, 507) argue that once "defying decisions becomes a 'normal' part of politics, judges lose influence as policy makers are no longer expected to heed rulings they dislike." While governing majorities have an interest in maintaining a functioning, independent judiciary (Ferejohn, 1998; Ferejohn and Weingast, 1992; Ramseyer, 1994; Ramseyer and Rasmusen,

2001; Stephenson, 2003; Hayo and Voigt, 2007), extant research suggests that legislators not always shy away from curbing the authority of courts to limit the latter's influence in policy-making (Handberg and Hill Jr., 1980; Clark, 2009, 2010). The fact that courts can nonetheless exercise considerable authority over policy-making (Tate and Vallinder, 1995; Tate, 1995; Stone Sweet, 2000) has been attributed to the generally high levels of support courts enjoy among the public (Caldeira and Gibson, 1995; Gibson et al., 1998; Gibson and Caldeira, 2003; Durr et al., 2000; Mondak and Ishiyama Smithey, 1997). Defying a popular court can prove costly for legislators, whose re-election prospects depend on the votes cast by the public.

Courts can draw on their public support to constrain other branches of government, but at the same time need to take the preferences and perceptions of the public into account when delivering their opinions in order to maintain such support (Mishler and Sheehan, 1993; McGuire and Stimson, 2004; Casillas et al., 2011; Hall, 2014; Ura, 2014). While we cannot expect the public to be informed about every step courts take, justices exercising judicial review face scrutiny from interest groups whose work will be affected by the decisions they reach in specific cases, the legal profession, the media and academics (Staton, 2006, 2010; Gillman, 2001). I expect the public to learn of justices' decision-making through these intermediaries, and thus the latter's scrutiny of judicial decision-making should play a crucial role in courts' strategic considerations. Those frequently working with and observing the day-to-day business of a court will formulate expectations about its rulings in specific cases, based on past decisions and their previous interactions with justices. Accordingly, I expect that such intermediaries will be able to gauge whether a ruling delivered by a court contains concessions to other branches of government and strays from its genuine preferences, with their ability to do so improving as the size of courts' concessions increases. The consequences of having concessions spotted are non-negligible for courts. Extant scholarship suggests that justices' decisions are viewed more favourably and considered legitimate by the public when they are perceived as being guided by legal principles (Gibson et al., 2005; Simon and Scurich, 2011; Gibson and Nelson, 2016; Zink et al., 2009; Baird and Gangl, 2006; Christenson and Glick, 2015). We may expect that in order to offer concessions to proof their decisions against non-implementation, justices need to depart from legal precedent or at the very least stretch their

interpretation thereof. Doing so under the close scrutiny of the legal profession, the media and others ultimately threatens to tarnish a court's image as a legalistic arbiter among the public.

Thus, a court with preferences for policy diverging from those who are tasked with implementing its decisions faces a trade-off. It can choose to offer concessions to proof its decision against non-implementation, yet at the same time needs to consider that doing so can hurt its legitimacy and image as a legally motivated arbiter tasked with protecting the rights of its citizens. Empirical evidence suggests that courts are not always willing to offer concessions to other branches of government to allay non-implementation threats. Consider the U.S. Supreme Court's 1983 landmark decision in *INS v. Chadha*. In *Chadha*, the U.S. Supreme Court invalidated Congress's use of a so-called legislative veto, which previously had allowed Congress to delegate power to the executive branch on the condition that Congress could control executive decisions without having to pass another law. While Congress subsequently dropped the legislative veto from a number of statutes following the court's decision in *Chadha*, Fisher (1993) reports that between 1983 and 1993 more than two-hundred new statutes including a legislative veto had been passed. Interestingly, concurring in judgement, Justice Powell argued that instead of invalidating all legislative vetoes, the court could have invalidated the veto only in cases in which Congress assumed a judicial function in violation of the principle of separation of powers. In other words, the court could have offered concessions to Congress and the executive branch, however it chose not to and eventually saw constitutional law in this area defined by pragmatic agreements between Congress and the executive, instead of its own legal doctrine. In the following section I develop a model that formalizes the trade-offs justices face and provides predictions predictions of how justices will decide in particular cases.

3 A Formal Model of Judicial Concessions

The formal theoretical model introduced in this section captures a stylized interaction between a court exercising judicial review and another actor tasked with implementing the court's ruling, with diverging preferences for policy. For the sake of simplicity, I will denote this second actor as

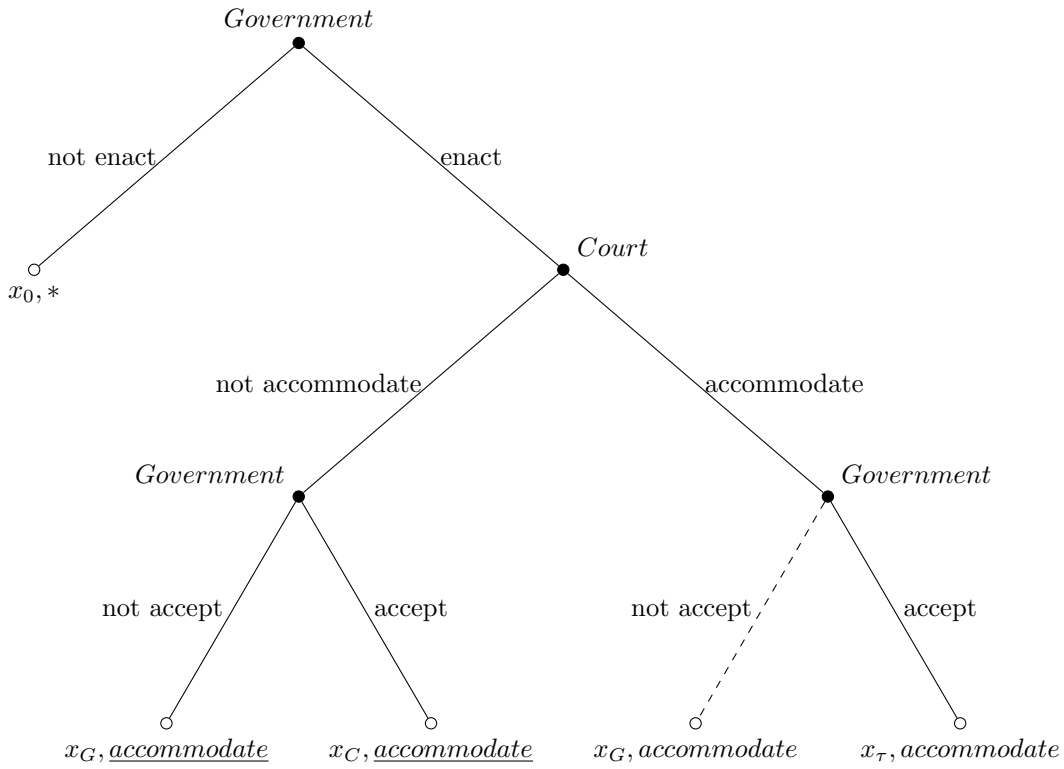

Figure 1: Extensive form game

government, however, I am aware that the type of actor tasked with implementing judicial review outcomes may vary with the political system and the case at hand.[2]

The formal model captures how the deviation in preferences between the court and government in connection with the costs associated with the actors' different strategies shapes the actions the government and court choose. Figure 1 depicts the extensive form game of complete information played between government, which tries to enact a policy matching its own ideal preference, and the court, which tries to issue a ruling matching its own preference but is concerned about

[2]For example, U.S. scholarship focuses on interactions between the U.S. Supreme Court and Congress (Handberg and Hill Jr., 1980; Clark, 2010; Segal et al., 2011; Hall and Ura, 2015; Owens et al., 2013), while scholarship on the German Federal Constitutional Court is concerned with the interaction between the court and the governing majority that controls both parliament and the executive branch (Vanberg, 2005; Hönnige and Gschwend, 2010; Sternberg et al., 2015). In addition, a policy reviewed by a court may originate in parliament, while faithful implementation of a judicial review outcome may depend on the cooperation of an agent of the executive branch. Here, I assume that the governing majority controls sufficient leverage to press such agents to implement a judicial review outcome–or can choose not do so.

implementation and its perception as a legally motivated arbiter.

The game starts with the government deciding whether to pass a policy x_G at its ideal preference (G) or remain idle and leave policy at its status quo, x_0. If government passes policy x_G, the court hears a challenge of this policy and can decide whether to offer a concession in its ruling and demand policy x_τ or demand a policy x_C that matches its own ideal preference (C). If the court decides to simply affirm the policy passed by government without demanding any changes, the game ends and policy x_G at government's ideal preference G remains in place. If the court does demand a change to policy, either through x_τ or x_C, government can decide whether it accepts, i.e. implements, whatever the court demanded in its judicial review decision, or not to accept the ruling and defy implementation thereof.

3.1 Utility functions

Central to my argument is the extent to which the court and government disagree on a policy. To capture such deviation in the formal analysis, I assume that the ideal preferences of government and the court can both be located on a one-dimensional policy space. This policy space is defined by two points, the status quo of policy x_0 prior to the first move of government, which I fix at 0, and government's ideal preference G, which I fix at 1. In other words, for the formal analysis I assume that government always prefers a move away from the status quo.[3] The court's preference for policy C is continuous and can fall anywhere along the one-dimensional policy space. C captures the preference of the median justice on the court, which

- can fall somewhere close to (or even below) the status quo (and thus starkly deviate from the preference of the government),
- can fall somewhere along a continuum between the status quo and government's preference (and thus moderately deviate from the preference of government),
- or can be close to (or even beyond) government's preference for policy.

[3]It is plausible to assume that if the government's ideal preference matches the status quo, it won't even consider to pass a new policy.

The second central tenet of my argument is that both actors need to anticipate costs associated with each action they can choose, which affect their utilities for different outcomes of the game. Let's start with the actions government can choose at either of the two final decision nodes in Figure 1. If government decides to accept whatever the court demands in its rulings, government's utility is determined by the distance between the policy demanded by the court and its own ideal preference, minus an additional cost parameter $\eta > 0$, which captures the time and resources government needs to expend during the policy-making process (including the costs for passing another policy after the court struck x_G). When policy-making costs are held constant, government's utility of accepting the court's demands decreases as the distance between its own ideal preference and the demand of the court increases. Extant research suggests that governments weigh their utility of accepting and faithfully implementing judicial review decisions, and—where this utility is outweighed by the expected payoffs from other courses of action—can decide to evade implementation of the court's demand (Vanberg, 2005; Staton and Vanberg, 2008; Fisher, 1993). In such cases, given the court invalidated its original policy, government would again have to expend time and resources in the policy-making process, but could simply choose to pass the same policy x_G for a second time.

Defying implementation of a judicial review decision however comes with a cost $\beta > 0$. As discussed earlier, those who defy implementation of a court ruling risk suffering a public backlash, and I expect the costs of such a backlash to increase with the support the court enjoys among the public. In addition, I expect the costs of a public backlash a government expects for defying the court to be mitigated by the salience it attaches to a particular policy. I assume that governments are more likely to devalue the costs of a public backlash if defying the court means they can maintain a policy they perceive as particularly salient.[4] In other words, the costs of evading implementation increase with the public support the court enjoys and decrease with the salience the government attaches to the policy reviewed by the court.

After considering how government values different outcomes on the one-dimensional policy space and the costs it faces for certain actions, I can specify the following linear and symmetric

[4]Salience here can for example capture a policy that is particularly important to a key constituency of the government, or touch an issue that features particularly prominent in a party's political manifesto.

utility function for the government

$$U_{Government} = -|x_{outcome} - G| - A_{demand} \cdot \eta - A_{defy} \cdot \beta$$

where $x_{outcome}$ denotes whatever policy is eventually enacted,[5] A_{demand} denotes whether or not the court demands a change in policy ($A_{demand} = 1$ if the court demands a change in policy and $A_{demand} = 0$ if it doesn't), while A_{defy} denotes whether or not government chooses to implement the court's demand ($A_{defy} = 1$ if government does not implement the court's decision; $A_{defy} = 0$ if it does).

Turning to the court at the review stage, if the court decides not to offer any concessions and demands that policy is set at the median justice's preference C, the court receives its maximum utility if the government implements its demand faithfully and subsequently passes policy x_C. However, if the government chooses not to implement the judicial review decision and instead passes its preferred policy x_G again, the court's utility is determined by the distance between x_G and its own preference, minus an additional institutional cost $I > 0$, which captures the loss in authority the court suffers if its role in the policy-making process is successfully challenged. The court can avoid non-implementation of its judicial review decisions by offering substantive concessions in its rulings. In other words, the court can demand policy x_τ, which deviates from its own preference but falls closer to the preference of the government. While such a concession increases the chances that government will respect the court's decision, I argue that government will not faithfully implement every concession the court offers (which types of concessions government will accept is discussed further below). Again, I expect the court to pay an institutional cost I if its judicial review decision, despite containing concessions, is not implemented.

In addition, whenever the court decides to offer a concession in its ruling it risks tarnishing its image as a neutral, legalistic arbiter. Where concessions offered by the court are spotted, the court pays a cost $D > 0$, which captures a loss in public reputation for the court. As discussed above, those scrutinizing the decision-making of courts cannot easily discern whether a court is offering

[5]Recall from Figure 1 that the four different possible outcomes are the status quo x_0, a policy preferred by government x_G, a policy preferred by the court x_C, and a judicial concession x_τ.

concessions in its rulings. To capture the uncertainty about whether the offer of concessions will be observed or not, I argue that the court pays the cost D with probability q. The probability q is defined by

$$q = \frac{C - x_\tau}{C - G}$$

If the court were to offer concessions that are very close to government's ideal preference G, the probability q approaches 1, whereas q decreases towards 0 the further x_τ falls from G and the closer it is to C. In other words, the further away the concession x_τ is from the median justice's preference C, the higher the probability concessions offered by a court will be identified as such.

Now that I conceptualized how the court values different outcomes on the one-dimensional policy space and the costs it faces for certain actions, I can specify the following linear and symmetric utility function for the court

$$U_{Court} = -|x_{outcome} - C| - A_{defy} \cdot I - q \cdot D$$

where again A_{defy} denotes whether or not government chooses to implement the court's demand ($A_{defy} = 1$ if government does not implement the court's decision; $A_{defy} = 0$ if it does).

3.2 Equilibrium conditions

The technical aspects and proofs of the formal analysis presented in this section are provided in Appendix A. A glance at the court's utility function indicates that the least promising strategy for the court is offering a concession that it doesn't expect to be implemented by the government. The court would pay the institutional cost I and have to live with policy at x_G, while it also exposes itself to the risk of a loss in reputation D. Thus, the court's strategy to offer a concession that government won't implement is strictly dominated by any other strategy available to the court, indicated by the dashed branch in Figure 1. Given that I assume perfect information, the court knows which type of concession will be implemented by the government and I expect that the court will never play such a strategy. Assuming the court's preference C falls closer to the status quo than the government's preference G (i.e. $C < G$), I can formally show that government will

implement any concession x_τ, which satisfies the following condition 1 (proofs are in appendix A.2)[6]:

$$x_\tau \geq G - \beta \tag{1}$$

Condition 1 shows that as the government's costs for evading implementation of a judicial review decision increase, the court can offer concessions further away from G (and thus closer to its own preference) and still see its decision implemented. In the following I limit the analysis to the case where the court's preference falls closer to the status quo than government's preference (including below the status quo). All proofs for the following analysis can be found in Appendix A.3, while proofs and equilibrium conditions for the case $C > G$ (i.e. the court's preference falls further from the status quo than government's preference) can be found in Appendix A.4.

After eliminating strictly dominated strategies, the choice of a court, whose preferences diverge from those of government, simplifies to choosing between a concession x_τ, which satisfies condition 1 and which government will thus accept, and demanding a policy x_C, which matches its own preference C. Formally, I can show that government will choose to accept implementation of a policy x_C if the following condition 2 is satisfied:

$$\beta \geq |G - C| \tag{2}$$

Condition 2 indicates that as the divergence between the preferences of the court and government increase, a court will only be able to see through its demand for a policy matching its own preference if the costs for evading implementation are sufficiently high. For simplicity, I will denote the right hand side of the inequality in condition 2 as $Threshold_{acceptance}$.

I argue that the court makes its choice whether to offer any concessions or not strategically and in anticipation of the government's reaction should it offer no concessions. Thus, one may expect that the court is inclined to offer concessions when it expects government not to implement demands for the court's preferred policy x_C. However, recall that offering concessions to avoid

[6]The condition indicating which concession government would accept if $C > G$ is given by $x_\tau \geq G + \beta$ and proofs for this condition can also be found in Appendix A.2.

non-implementation of a judicial review decision can result in reputation losses for the court, which may outweigh the court's institutional costs associated with non-implementation. Formally, I can show that a court anticipating non-implementation of policy x_C will only choose to offer a concession x_τ if the following condition 3 is satisfied:

$$x_\tau \leq \frac{G(-|C-G|-I)+C(I-D)}{-|C-G|-D} \tag{3}$$

For the sake of simplicity, I will denote the right hand side of the inequality in condition 3 as $Threshold_{accommodate}$. While the term for this threshold appears somewhat complicated, some simple conclusions can be drawn from it. First, a court expecting non-implementation of its preferred demand for policy x_C will always offer concessions in its rulings if its expected institutional costs associated with non-implementation outweigh expected losses in reputation for compromising in its ruling (or expressed formally, if $I > D$ then $Threshold_{accommodate} > x_G$). If the opposite is the case, the court's willingness to offer concessions decreases as expected losses in reputation and/or the divergence in preferences between the court and government increase.

After specifying conditions 1 through 3, I can consider the choice the government faces at the initial policy-making stage, taking into account the costs government needs to expend in the policy-making process. For any given value of the parameters considered in this game I can identify a subgame perfect equilibrium (SPE) strategy for both government and the court. Table 1 lists the SPE strategies for the court and government, and the associated outcomes.

Conditional on the two threshold values and the costs government needs to expend in the policy-making process, Table 1 discriminates between four different outcomes:

> *Government self-censoring*: Here, the government anticipates the court's judicial review decisions and concludes that the costs it needs to expend in the policy-making process do not justify passing a policy at its ideal preference in the first place. The government thus remains idle. A special case is the condition for government self-censoring in the bottom right cell. Here, the government would be prepared to evade implementation of the court's demand and simply pass its ideal policy x_G again. However, it will choose not to pass a

Table 1: SPE strategy profiles and equilibrium predictions

	Court strategy	
Government strategy	accommodate $x_\tau \leq Threshold_{accommodate}$	not accommodate $x_\tau > Threshold_{accommodate}$
accepts x_C $\beta \geq Threshold_{accept}$	If government accepts x_C court will never accommodate	Outcome is x_0 if $\eta > x_C$ No policy passed (government self-censoring) Outcome is x_C if $\eta \leq x_C$ Policy passed and court asserts (judicial assertion)
not accepts x_C $\beta < Threshold_{accept}$	Outcome is x_0 if $\eta > x_\tau$ No policy passed (government self-censoring) Outcome is x_τ if $\eta \leq x_\tau$ Policy passed and court concedes (judicial concessions)	Outcome is x_0 if $\beta + \eta > x_G$ No policy passed (government self-censoring) Outcome is x_G if $\beta + \eta \leq x_G$ Policy passed and government evades (government evasion)

Note: Table 1 shows subgame perfect equilibrium strategies for court and government for given parameter values and the corresponding equilibrium predictions of the model.

policy in the first place if it expects that the joint costs of evading implementation and policy-making outweigh the benefits government reaps from its ideal policy x_G. This may be the case in environments in which the court enjoys high public support and/or the policy area is not particularly important to government, and environments in which policy-making is especially cumbersome.

Judicial concessions: Here, the government is prepared to evade implementation of x_C, but the expected costs for offering a concession are sufficiently small for the court, which thus offers—and secures implementation of—x_τ. As discussed earlier, in this scenario the court's concerns about maintaining an image as legalistic arbiter may by sufficiently small relative to its concern about non-implementation of judicial review decisions, or the divergence between the court's and government's preference is sufficiently small (or both). In other words, the compromise of policy x_τ is acceptable to both the government and the court.

Judicial assertion: Here, the costs for defying a court asserting its own position in a judicial review decision would be too high for government, which thus would accept a policy x_C demanded by the court. This reflects a political environment in which the public support for the court is sufficiently high, or an environment in which the government does not consider a policy as particularly important (or both). However, this also captures environments in which the divergence in preferences between the court and government is sufficiently small, and thus implementation of the court's demand for policy x_C would entail fewer losses in utility for government.

Government evasion: Finally, government can be prepared to evade implementation of a court's demand for policy x_C, however now the court is not willing to offer any concessions in its judicial review rulings. Accordingly, the court's judicial review decision has eventually no effect on the actual policy that is enacted, albeit it asserted its own position during judicial proceedings. This outcome reflects environments where the deviation of preferences between government and court is sufficiently large—and costs for evading implementation of a court decision sufficiently small—so that the court decides to choose between the lesser of

two evils. In other words, the court would have to concede so much ground to government to proof its judicial review decision against non-implementation that the expected costs for tarnishing its image as a legalistic arbiter outweigh the costs the court associates with the non-implementation of its decision.

Based on the equilibrium predictions identified in Table 1, I now turn to the comparative statics of my model.

3.3 Comparative statics

Figure 2 plots the comparative statics for environments in which the costs the government has to expend in the policy-making process are low.[7] Furthermore, in Figure 2 I assume that the costs the court associates with tarnishing its image as a legalistic arbiter outweigh the costs it associates with the non-implementation of one of its decisions. I argue that this assumption is reasonable for courts that have established their authority in a political system's policy-making process and are more willing to stomach incidental non-implementation of their decisions than courts in unstable environments, which are likely to be more concerned about developing a track record of seeing through implementation of their decisions (see for example Carrubba, 2009, for a similar argument on the endogenous development of judicial institutions). The x-axes in both panels indicate where the median justice's preference C is located on the one-dimensional policy space, relative to the status quo x_0 and the government's preference G. The darker shaded area indicates environments in which the preferences of the median justice and the government starkly diverge, the lighter shaded area indicates moderate divergences of preferences, and the lightly shaded area illustrates environments in which the court's and government's preferences nearly align. The y-axes capture the location of the eventual policy outcome enacted after the court issues its judicial review decision, which is indicated in the panels by the solid black line. The red line marks what the court demands in its judicial review rulings, whereas the blue line marks the actual preference of the court. The latter two lines thus indicate where the court is willing to offer concession (i.e. where the blue and red lines diverge). Panel A and B show comparative statics for

[7] For the comparative statics illustrated in Figure 2, $\eta = 0.1$, $\beta = 0.3/0.7$, $D = 0.6$ and $I = 0.1$.

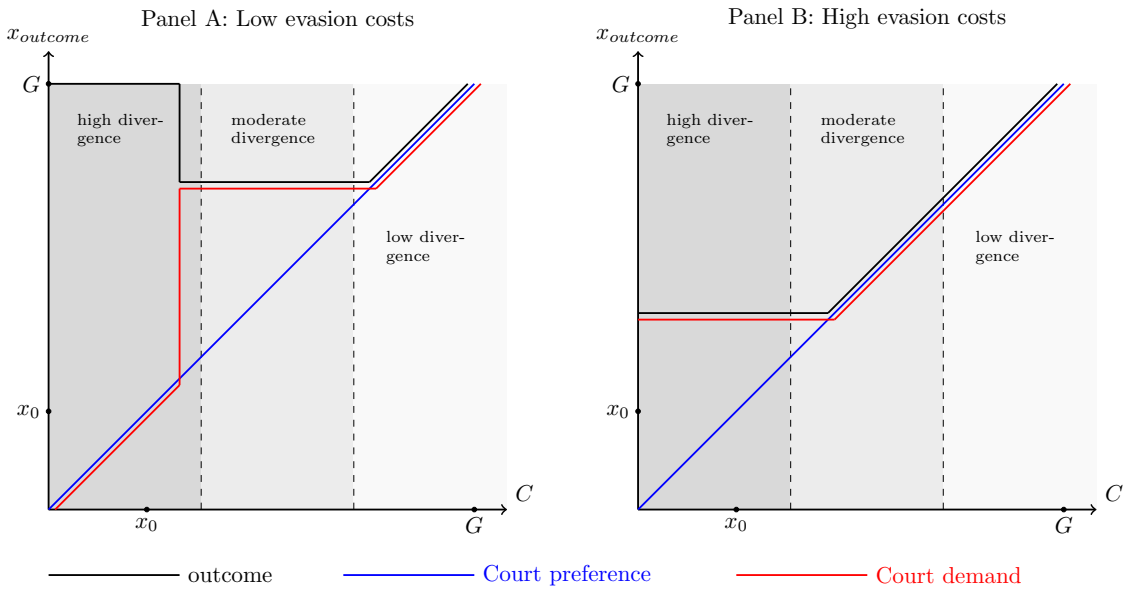

Figure 2: Comparative statics when policy-making costs are low

two different values for government's cost of evading implementation of a court decision (in Panel A $\beta = 0.3$ i.e. low evasion costs, and in Panel B $\beta = 0.7$ i.e. high evasion costs).

A comparison of the two panels in Figure 2 shows that if courts enjoy comfortable public support and/or government attaches little salience to a policy, courts exercising judicial review will be able to elicit policies that are generally closer to their own preferences. Panel B shows that courts with clearly diverging preferences from government can proof their judicial review decisions against non-implementation by offering concessions that fall relatively far from government's ideal preference (and thus closer to their own preferences). Once the preferences converge, high evasion costs then allow the court to see through implementation of its preferred policy x_C. In comparison, Panel A shows that when evasion costs are low, courts with moderately diverging preferences will still seek to proof their judicial review decisions by offering concessions closer to governments. Most interesting, however, is that when courts enjoy little public support and/or a policy is particularly salient for government, courts with preferences clearly diverging from government are expected not to offer any concessions, but to assert their own preference in judicial review decisions and subsequently see government evade implementation thereof. This finding is illustrated by the

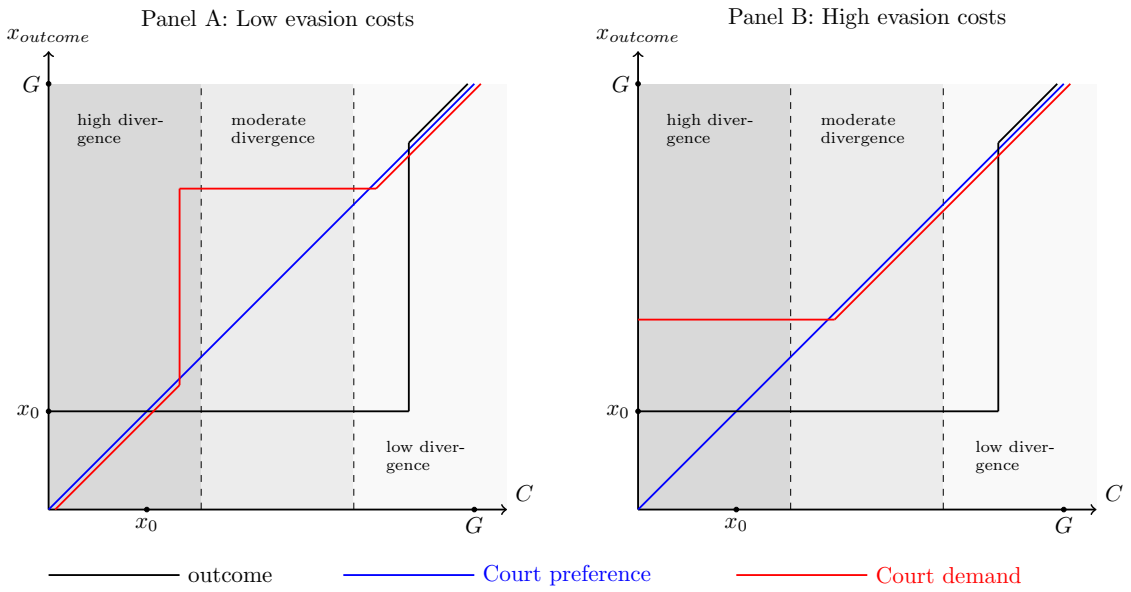

Figure 3: Comparative statics when policy-making costs are high

court's behaviour on the left edge of the plot and the subsequent outcome indicated by the solid line. This stands in marked contrast to established theories of strategic judicial decision-making (Vanberg, 2005; Hall, 2014; Carrubba et al., 2008; Staton, 2006), which expect courts to defer to government when they expect successful non-implementation of their decisions. My theory of strategic judicial decision-making expects courts to willingly risk non-implementation of their judicial review decisions if the concessions they would have to make to proof their rulings against non-implementation will tarnish their image as neutral, legally motivated arbiters.

Figure 2 plots the comparative statics for environments in which the costs the government has to expend in the policy-making process are high.[8] Again, Panel A and B show comparative statics for two different values for government's cost of evading implementation of a court decision (in Panel A $\beta = 0.3$, in Panel B $\beta = 0.7$).

Figure 3 captures an environment in which policy-making is particularly cumbersome for government. A glance at the blue and red lines indicate that the behaviour of the court did not change. Where evasion costs are high, courts with clearly diverging preferences would be willing

[8]For the comparative statics illustrated in Figure 3, $\eta = 0.8$, $\beta = 0.3/0.7$, $D = 0.6$ and $I = 0.1$.

to offer concessions in their judicial review rulings, yet this willingness vanishes as preferences of the court and government start to converge. On the other hand, where evasion costs are low, clearly diverging courts would assert their own preference when exercising judicial review, while moderately diverging courts would be willing to offer relatively large concessions to government. What in fact radically changed is the actual policy outcome. The solid line shows that in environments where policy-making is especially cumbersome, governments will choose not to pass policies whenever their preferences for policy start to moderately diverge from those of the court. Accordingly, observing empirical patterns where courts exercising judicial review tend to demand little to no changes to government policies does not necessarily indicate that the preferences of the judiciary and other branches of government always align. Instead, policy-making costs may just simply be so high that government censors its own policy-making and we never get to see policies in court on which preferences diverge.

In summary, based on the findings presented above I can formulate the following hypotheses of my theoretical model that offer new perspectives on the strategic behaviour of courts exercising judicial review:

> *Hypothesis 1*: Where the preferences of courts and other branches of government clearly diverge, while the latter's costs for evading implementation are simultaneously low, courts are *less likely* to offer concessions in judicial review decisions, even if this means increasing the risks of non-implementation of their rulings.
>
> *Hypothesis 2*: As costs for evading implementation of judicial review decisions increase, courts with preferences diverging from those of other branches of government become *more likely* to offer concessions to other branches of government.
>
> *Hypothesis 3*: As the preferences of courts and other branches of government converge, courts become *less likely* to offer concessions in their judicial review decisions.

The following sections discuss the research design I intend to employ and the data required to test the predictions of my theory.

4 Research design

I suggest a research design that centres on judicial review rulings on federal legislation delivered by the German Federal Constitutional Court between 1998 and 2016, which allows me to vary the preference gap between the court and governing majorities on policy by design. The German Federal Constitutional Court hears judicial review cases in two senates comprising eight justices each. The justices are appointed for (maximum) 12-year non-renewable terms, with half of the justices appointed by a two-thirds majority in the lower legislative chamber, the Bundestag, and the other half by a two-thirds majority in the upper chamber, the Bundesrat. The two major political parties, the centre-left Social Democratic Party (SPD) and the Christian Democratic Union (CDU/CSU) have maintained a compromise, alternating in the appointment of justices to the court. This compromise has preserved a careful balance of four SPD-appointed justices and four CDU/CSU-appointed justices in each senate for most of the time since 1998.

However, there are a few exceptions to this balance since 1998. Both SPD and CDU/CSU incidentally delegated the appointment of justices to the court to two smaller parties, the Free Liberal Democratic Party (FDP) and the Green Party (Greens). The FDP appointed Dieter Hoemig to the first senate, who served on the bench until April 2006 before being replaced by Michael Eichberger, appointed by the CDU/CSU. The second appointment by the FDP since 1998 was Andreas Paulus, who has served on the first senate since March 2010. The Greens appointed Brun-Otto Bryde to the first senate in January 2001, who has served on the bench until February 2011 and was replaced by Susanne Baer, also appointed by the Green Party. In addition, two justices, Helga Seibert (first senate, SPD-appointed) and Klaus Winter (second senate, CDU/CSU-appointed), died in office in 1998 and 2000, each leaving five-month vacancies, which shifted the majorities in favour of the CDU/CSU in the first senate and in favour of the SPD in the second senate during these times.

In order to measure the gap in preferences between the court's two senates and governing majorities I employ a strategy analogous to Hönnige (2009) and Sternberg et al. (2015). First, the policy preferences of individual justices are captured via the ideological left-right position of

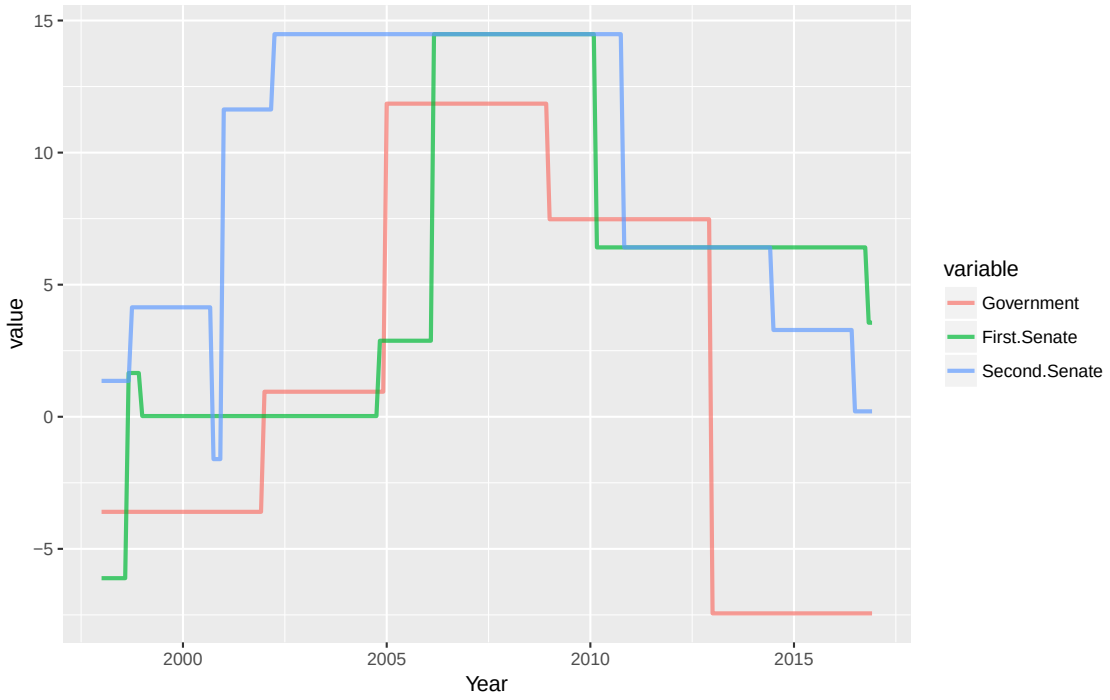

Figure 4: Left-Right positions of German Federal Government and German Federal Constitutional Court senates 1998-2016 (negative values = *left*, positive values = *right*)

the party that appointed them, which draws on party positions available through the Manifestos Project administered by the WZB Social Science Research Center in Berlin. The size of the preference gap is then determined via the difference between the median justices' positions in each senate respectively and the left-right position of the governing majority for each year between 1998 and 2016.[9] Changes to the composition of the German court's two senates coupled with variation in the ideological positions of Germany's main political parties between 1998 and 2016 allow me to vary the gap in preferences for policy between the court and governing majorities by design. Figure 4 illustrates the variation in preference gaps between governing majorities and the court's first and second senates between 1998 and 2016.

After controlling for variation in preference gaps, the second key component of my theoretical

[9]The position of the governing majority is calculated via the average left-right position of the two governing coalition parties, using the Manifestos Project's *rile* variable. Individual parties' positions are weighted by their share of the total number of seats held by the governing coalition.

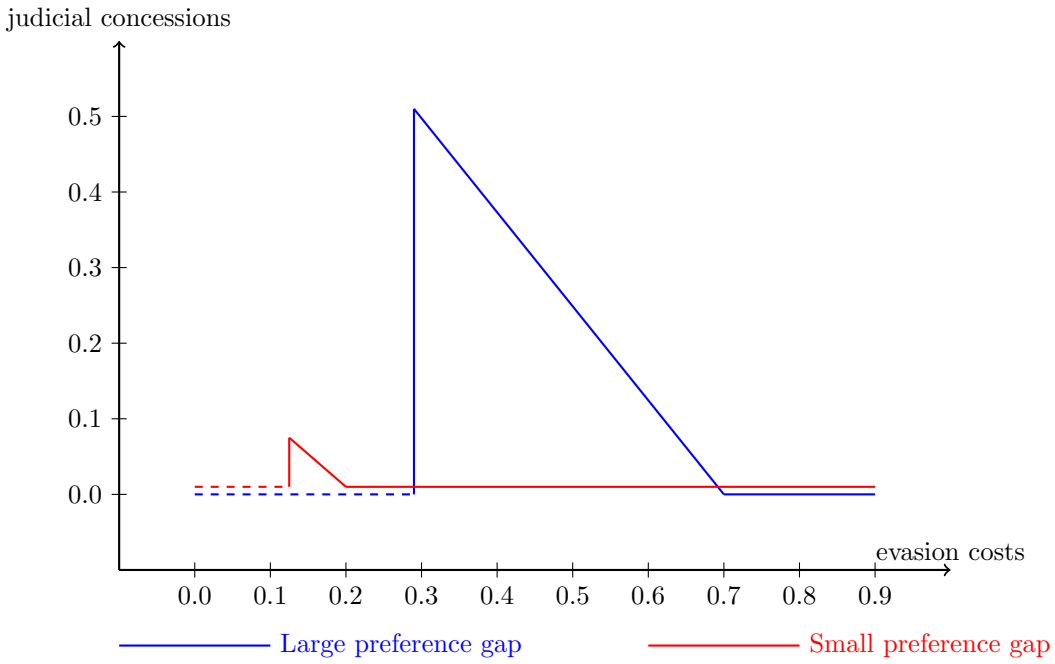

Figure 5: Comparative statics illustrating how evasion costs affect the size of judicial concessions

model takes centre stage: the costs governing majorities expect for defying implementation of a judicial review decision. Figure 5 illustrates the predictions of the theoretical model regarding the size of the concessions two different courts are willing to make in their judicial review decisions, conditional on the size of the expected costs for government when evading implementation of the court's ruling. The blue line indicates the size of concessions offered by a court, whose preferences for policy clearly diverge from government, while the red line indicates the concessions of a court, whose preferences fall close to government.[10] Note that the dashed parts of the lines indicate scenarios where we should expect government not to implement a court's judicial review decision.

Figure 5 shows that courts, whose preferences for policy are close to those of government, are generally more likely to assert their own preference in judicial review decisions, yet will offer small concessions when government's costs for evading implementation of court rulings are low. On the

[10]Recall that for the formal analysis, the government's preference was fixed at 1. In Figure 5 (and Figure 6), the court with diverging preferences is located at 0.2 on the unidimensional policy space, while the court with preferences closer to government is located at 0.8.

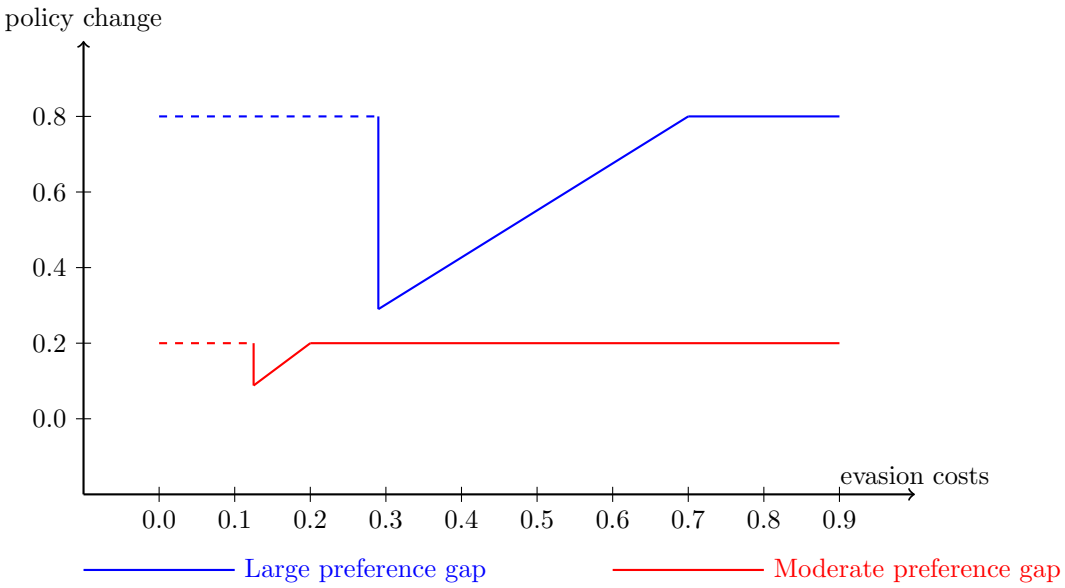

Figure 6: Comparative statics illustrating how evasion costs affect the size of judicial demands for policy change

other hand, courts with preferences clearly diverging from government are expected to—in vein—assert their own position in judicial review decisions when evasion costs are low, yet will start to offer considerable concessions once these costs increase. Once evasion costs are high, the court will—now successfully—return to asserting its own preference in judicial review decisions.

Given that my research design does not allow me to identify either the court's or ruling majorities' preferences for individual pieces of legislation reviewed by the court, but relies on a more general distinction between preference gaps between the court and governing majorities, the question remains how I am able to empirically capture the extent of judicial concessions. A possible strategy is to translate the expected concessions into expectations regarding the change in policies demanded by the court in its rulings. Figure 6 shows how the predicted judicial concessions translate into demanded policy changes. Again, the dashed parts of the lines indicate scenarios where we should expect government not to implement judicial review rulings.

The blue line in Figure 6 shows that in environments in which the preferences of the court and government diverge, we should see that the size of changes to policy demanded by the court

decreases as the costs for evading implementation thereof fall, yet will sharply return to previous high levels when evasion costs are low. On the other hand, the red line shows that where the gap in preferences for policy between the court and government is small, we should expect that changes to policy demanded by the court should be relatively small as well. The following section briefly discusses possible operationalisations of the key variables employed in my theoretical model: the extent of judicial concessions, the public support the German court enjoys and the salience governing majorities attach to individual pieces of legislation reviewed by the court.

5 Data

The outcome variable of my research is the extent of concessions courts exercising judicial review are granting to governing majorities, which—as discussed above—can be expressed in the extent of changes the court demands to the original policy it reviewed. The German Federal Constitutional Court maintains an online database comprising the texts of all of its rulings issued since 1 January 1998. The courts' rulings also include a detailed description of the original challenges heard by the court in each case. Given that these challenges typically comprise multiple aspects of the reviewed legislation, a possible way to capture the extent of changes demanded by the court in its rulings is to assess whether the court ruled in favour of the complainant(s) across the range of challenged sections of the reviewed legislation. One may expect that increasing numbers of invalidated sections of a challenged piece of legislation exemplify increasing demands of change to the original policy (and thus decreasing levels of judicial concessions).

As discussed earlier, the costs for governing majorities associated with evading implementation of a court decision are a function of the public support the court enjoys and the salience a governing majority attaches to a specific policy. Extant research suggests that the German Federal Constitutional Court has enjoyed high public approval ratings (Vanberg, 2005; Hönnige and Gschwend, 2010; Sternberg et al., 2015; Vanberg, 2015), while diffuse support is not expected to fluctuate rapidly over time (Gibson et al., 1998; Durr et al., 2000; Caldeira and Gibson, 1992). To capture the support of the court among the German public I can draw on survey data on the

German public's trust in political institution, including the German Federal Constitutional Court, collected every two years in the ALLBUS public opinion survey, which is available online via the Gesis database.[11]

In order to measure the salience a governing majority attaches to a particular policy item, I can draw on a variety of data sources. First, the Eurobarometer survey periodically asks respondents to identify policy issues that are particularly salient to them, while also asking respondents to place themselves on a left-right political spectrum. Accordingly, I can identify likely key constituencies for different political majorities in government and identify the policy areas that are particularly salient to them. Here, I assume that governing majorities are more likely to devalue the costs they expect to pay for defying implementation of a judicial review decisions if a key constituency considers the corresponding policy issue as particularly important. Second, I can identify key policy issues listed in the political manifestos of governing political parties. Political manifestos for all major German political parties are available via the Manifesto Project. Third, given that German governments are generally coalition governments, I can analyse whether governing parties mention specific policy areas in their coalition contracts adopted at the outset of each legislative period. Here, policy issues that occupy a prominent spot in coalition contracts and/or are discussed in detail may indicate that governing majorities attach particular importance to these issues.[12]

6 Conclusion

When courts exercise judicial review, scrutinizing policies enacted by governing majorities for their compatibility with constitutional norms, they often depend on the cooperation of other branches of government to secure implementation of their decisions. In this paper, I introduced a formal model that seeks to explain when justices are willing to offer policy concessions to those tasked with implementing their decisions. I argue that courts with diverging preferences for policy from other branches of government will not proof their decisions against non-implementation through

[11] See http://www.gesis.org/allbus/allbus-home/.

[12] Note however that possibly some salient policy issue may not make it into coalition contracts or are only discussed briefly, as governing majorities cannot agree on substance with regard to these issues.

concessions when doing so would tarnish their perception as legalistic arbiters. Accordingly, if a court would have to cede considerable ground to other branches of government to proof its rulings against non-implementation, I expect it to assert its genuine positions, even if doing so increases the risks of non-implementation.

Albeit pending an empirical test, the model I propose seeks to make a contribution to theories on strategic judicial decision-making, allowing for predicted judicial review decisions that match neither the preference of the court nor the preferences of those tasked with implementing them. My formal analysis provides predictions that challenge established theories of strategic judicial decision-making, expecting courts to defer to government when they expect successful non-implementation of their decisions. My theory of strategic judicial decision-making expects courts to willingly risk non-implementation of their judicial review decisions if the concessions they would have to make to proof their rulings against non-implementation will tarnish their image as neutral, legally motivated arbiters, which lies at the heart of their institutional legitimacy.

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A Formal analysis

This section supplements the theoretical analysis discussed in section 4 above, and provides the proofs for the equilibrium conditions. Let's first introduce notations for the strategies of the two players and the utilities for both players associated with the different outcomes at the terminal nodes of the full extensive form of the game illustrated in Figure 1.

The status quo is fixed at $x_0 = 0$ and the *Government*'s preference for policy, G, is fixed at $G = 1$. *Government*'s preference G is the preference of the median voter in the governing majority. The *Court*'s preference for policy, C, is continuous and given by the preference of the median justice, which can fall either below or above *Government*'s preference G. The game starts with *Government* choosing whether to pass a policy x_G at its ideal preference G (*enact*) or not (*enact*). If *Government* decides not to enact a policy, policy remains at x_0, the status quo.

If *Government* passes a policy, the non-convergent *Court* reviewing policy x_G can choose to offer a concession x_τ (*accommodate*) or to demand that policy be set at its ideal preference C. x_τ is a concession by the court to *Government*, which will always fall between C and G ($x_\tau \in]C, G[$). If the court decides to offer a concession x_τ, there is a probability q that the *Court* pays a reputation cost D. q is given by the function:

$$q = \frac{C - x_\tau}{C - G}$$

$q \in]0, 1[$ and is linear in the difference between C and x_τ. In other words, the further away the concession x_τ is from the median justice's preference C, the higher the value of q.

Finally, *Government* moves in the final stage of the game (either after the *Court* accommodated or not accommodated) and can decide whether to implement (*accept*) whatever the court demands or pass policy again at its own preference G (*accept*). If *Government* decides not to accept whatever the court demands, the *Court* pays an institutional cost I, capturing a loss in institutional authority following non-implementation of its decision. Similarly, if *Government* de-

cides not to accept whatever the court demands it pays the cost β for defying implementation of a court decision.

The full set of possible strategies for *Government* comprises:

$$S_{Government} = \left\{ \begin{array}{l} enact, accept, accept \\ enact, \underline{accept}, accept \\ enact, accept, \underline{accept} \\ enact, \underline{accept}, \underline{accept} \\ \underline{enact}, accept, accept \\ \underline{enact}, \underline{accept}, accept \\ \underline{enact}, accept, \underline{accept} \\ \underline{enact}, \underline{accept}, \underline{accept} \end{array} \right\}$$

The *Court*'s full set of strategies comprises:

$$S_{Court} = \left\{ \begin{array}{l} accommodate \\ \underline{accommodate} \end{array} \right\}$$

A.1 Actor utilities over outcomes

The utility function for *Government* for the outcome $x_0, *$ is given by

$$x_0, *\colon U_{Government}(x_0, *) = -\left|x_0 - G\right|$$

The utilities for *Government* and the *Court* for the four different outcomes after the final stages of the game are given below.

$$U_{Government}(x_G, \underline{accommodate}) = -\beta - \eta$$

$$U_{Court}(x_G, \underline{accommodate}) = -|x_G - C| - I$$

$$U_{Government}(x_C, \underline{accommodate}) = -|x_C - G| - \eta$$

$$U_{Court}(x_C, \underline{accommodate}) = 0$$

$$U_{Government}(x_G, accommodate) = -\beta - \eta$$

$$U_{Court}(x_G, accommodate) = q(-|x_G - C| - I - D) + (1 - q)(-|x_G - C| - I)$$

$$U_{Government}(x_\tau, accommodate) = -|x_\tau - G| - \eta$$

$$U_{Court}(x_\tau, accommodate) = q(-|x_\tau - C| - D) + (1 - q)(-|x_\tau - C|)$$

These utility functions are linear and correspond to symmetric tent-shaped preferences regarding the different final policy outcomes, x_0, x_G, x_C and x_τ.

A.2 Elimination of weakly dominated strategies

Given that $x_\tau \in]C, G[$, *Court*'s strategy to offer a concession, which it expects *Government* not to accept is strictly dominated by any other possible strategy of the *Court*. Therefore, I assume that the *Court* will never offer a concession x_τ that it expects not to be accepted. The simplified extensive form game after elimination of weakly dominated strategies is illustrated in Figure 1 through the solid branches. In this form of the model the set of strategies for *Government* simplifies to

$$S_{Government} = \left\{ \begin{matrix} enact, accept \\ enact, \underline{accept} \\ \underline{enact}, accept \\ \underline{enact}, \underline{accept} \end{matrix} \right\}$$

To identify the value of the concession x_τ the court needs to offer, I consider *Government*'s decision after the *Court* plays *accommodate* and distinguish between the following two cases:

Case I: $C < x_\tau \leq G$, $S_{Government} = \{enact, *\}$ and $S_{Court} = \{accommodate\}$

Government chooses to accept the offer x_τ of the *Court* if

$$U_{Government}(x_\tau, accommodate) \geq U_{Government}(x_G, accommodate)$$

$$-|x_\tau - G| - \eta \geq -\beta - \eta$$

$$x_\tau - G \geq -\beta$$

$$x_\tau \geq G - \beta$$

$$\tau_{required} = G - \beta \tag{4}$$

I expect the *Court* not to concede further than it expects it needs to in order ensure that *Government* accepts its offer, thus I express condition 4 as $\tau_{required} = G - \beta$. If the cost of defying implementation of a court decision is 0 (i.e. $\beta = 0$), $\tau_{required}$ simply marks *Government*'s ideal preference and *Government* can pass policy without concern for the *Court*. Any positive value for *Government*'s cost parameter β however allows the *Court* to offer a $\tau_{required}$ closer to its own preference C.

Case II: $G \leq x_\tau < C$, $S_{Government} = \{enact, *\}$ and $S_{Court} = \{accommodate\}$

Government chooses to accept the offer x_τ of the *Court* if

$$-|x_\tau - G| - \eta \geq -\beta - \eta$$

$$-x_\tau + G \geq -\beta$$

$$x_\tau \leq G + \beta$$

$$\tau_{required} = G + \beta \tag{5}$$

Again, given that in Case II C is larger than G, any positive value of β allows the *Court* to offer a $\tau_{required}$ closer to its own preference C.

A.3 Equilibrium conditions: Case I

In the following section I will identify the conditions for equilibria of the model for Case I. The solution concept is subgame perfect equilibrium. I start at the last decision node in the (now simplified) game tree (i.e. *Government*'s decision after $S_{Court} = \{\underline{accommodate}\}$).

Case I: $C < x_\tau \leq G$ and $S_{Court} = \{\underline{accommodate}\}$

Government chooses to accept the offer C of the *Court* if

$$U_{Government}(x_C, \underline{accommodate}) \geq U_{Government}(x_G, \underline{accommodate})$$

$$-|C - G| - \eta \geq -\beta - \eta$$

$$C - G \geq -\beta$$

$$\beta \geq |G - C| \tag{6}$$

It follows that

$S_{Government} = \{*, accept\}$ if $\beta \geq |G - C|$ and

$S_{Government} = \{*, \underline{accept}\}$ if $\beta < |G - C|$

Condition 6 indicates that as the distance between G and C increases, the higher β needs to be to allow the *Court* to offer C and still see its offer accepted.

In the next step I consider the *Court*'s choice whether to offer a concession at $\tau_{required}$ or demand C when reviewing *Government*'s policy x_i.

Case I.a: $C < x_\tau \leq G$ and $S_{Government} = \{*, accept\}$

If $S_{Government} = \{*, accept\}$ then $S_{Court} = \{\underline{accommodate}\}$.

Case I.b: $C < x_\tau \leq G$ and $S_{Government} = \{*, \underline{accept}\}$

Court will offer $\tau_{required}$ if

$$U_{Court}(\tau_{required}, accommodate) \geq U_{Court}(G, \underline{accommodate})$$

$$q(-|\tau_{required} - C| - D) + (1 - q)(-|\tau_{required} - C|) \geq -|G - C| - I$$

$$q(-\tau_{required} + C - D) + (1 - q)(\tau_{required} + C) \geq C - G - I$$

$$G + I \geq \tau_{required} + qD$$

$$I + 1 \geq \tau_{required} + \frac{D(C - \tau_{required})}{C - G}$$

$$G(C - G) + I(C - G) \geq \tau_{required}(C - G) + D(C - \tau_{required})$$

$$G(C - G - I) + C(I - D) \geq \tau_{required}(C - G - D)$$

$$\tau_{required} \leq \frac{G(-|C-G|-I)+C(I-D)}{-|C-G|-D} \tag{7}$$

It follows that

$S_{Court} = \{accommodate\}$ if $\tau_{required} \leq \frac{G(-|C-G|-I)+C(I-D)}{-|C-G|-D}$ and

$S_{Court} = \{\underline{accommodate}\}$ if $\tau_{required} > \frac{G(-|C-G|-I)+C(I-D)}{-|C-G|-D}$

The term on the right side of the inequalities will always be larger than G if $I > D$. On the other hand, if $I < D$ then the term decreases towards 0 as D increases. Secondly, the term decreases as the distance between C and G increases.

Finally, I consider *Government*'s choice at the initial policy-making stage.

Case I.a: $C < x_\tau \leq G$, $S_{Court} = \{\underline{accommodate}\}$ and $S_{Government} = \{*, accept\}$

Government chooses not to pass policy and leave policy at x_0 if

$$U_{Government}(x_0, *) > U_{Government}(x_C, \underline{accommodate})$$

$$-|x_0 - G| > -|C - G| - \eta$$

$$-G > C - G - \eta$$

$$\eta > C \tag{8}$$

It follows that

$S_{Government} = \{\underline{enact}, accept\}$ if $\eta > C$ and the outcome is $x_0, *$, while

$S_{Government} = \{enact, accept\}$ if $\eta \leq C$ and the outcome is $x_C, \underline{accommodate}$.

Case I.b.1: $C < x_\tau \leq G$, $S_{Court} = \{\underline{accommodate}\}$ and $S_{Government} = \{*, \underline{accept}\}$

Government chooses not to pass policy and leave policy at x_0 if

$$U_{Government}(x_0, *) > U_{Government}(x_G, \underline{accommodate})$$

$$-|x_0 - G| > -\beta - \eta$$

$$-G > -\beta - \eta$$

$$\beta + \eta > G \tag{9}$$

It follows that

$S_{Government} = \{\underline{enact}, \underline{accept}\}$ if $\beta + \eta > G$ and the outcome is $x_0, *$, while

$S_{Government} = \{enact, \underline{accept}\}$ if $\beta + \eta \leq G$ and the outcome is $x_G, \underline{accommodate}$.

Case I.b.2: $C < x_\tau \leq G$, $S_{Court} = \{accommodate\}$ and $S_{Government} = \{*, \underline{accept}\}$

Government chooses not to legislate and leave policy at x_0 if

$$U_{Government}(x_0, *) > U_{Government}(x_G, \underline{accommodate})$$

$$-|x_0 - G| > -|\tau_{required} - G| - \eta$$

$$-G > \tau_{required} - G - \eta$$

$$\eta > \tau_{required} \tag{10}$$

It follows that

$S_{Government} = \{\underline{enact}, \underline{accept}\}$ if $\eta > \tau_{required}$ and the outcome is $x_0, *$, while

$S_{Government} = \{enact, \underline{accept}\}$ if $\eta \leq \tau_{required}$ and the outcome is $\tau_{required}, accommodate$.

A.4 Equilibrium conditions: Case II

Similar to the previous section, this section will identify the conditions for equilibria for Case II. The solution concept is subgame perfect equilibrium. Again, I start at the last decision node in the simplified game tree, *Government*'s decision after $S_{Court} = \{\underline{accommodate}\}$.

Case II: $G \leq x_\tau < C$ and $S_{Court} = \{\underline{accommodate}\}$

Government chooses to accept the offer C of the *Court* if

$$U_{Government}(x_C, \underline{accommodate}) \geq U_{Government}(x_G, \underline{accommodate})$$

$$-|C - G| - \eta \geq -\beta - \eta$$

$$-C + G \geq -\beta$$

$$\beta \geq |C - G| \tag{11}$$

It follows that

$S_{Government} = \{*, accept\}$ if $\beta \geq |C - G|$ and

$S_{Government} = \{*, \underline{accept}\}$ if $\beta < |C - G|$

Again, as the distance between C and G increases, the higher β needs to be to allow the *Court* to offer C and still see its offer accepted.

In the next step I consider the *Court*'s choice whether to offer a concession at $\tau_{required}$ or demand C when reviewing *Government*'s policy x_G.

Case II.a: $G \leq \tau < C$ and $S_{Government} = \{*, accept\}$

If $S_{Government} = \{*, accept\}$ then $S_{Court} = \{\underline{accommodate}\}$.

Case II.b: $G \leq x_\tau < C$ and $S_{Government} = \{*, \underline{accept}\}$

Court will offer $\tau_{required}$ if

$$U_{Court}(\tau_{required}, accommodate) \geq U_{Court}(x_G, \underline{accommodate})$$

$$q(-|\tau_{required} - C| - D) + (1-q)(-|\tau_{required} - C|) \geq -|G - C| - I$$

$$q(\tau_{required} - C - D) + (1-q)(\tau_{required} - C) \geq G - C - I$$

$$I - G \geq qD - \tau_{required}$$

$$I - G \geq \frac{D(C - \tau_{required})}{C - G} - \tau_{required}$$

$$I(C-G) - G(C-G) \geq D(C - \tau_{required}) - \tau_{required}(C-G)$$

$$G(G - C - I) + C(I - D) \geq \tau_{required}(G - C - D)$$

$$\tau_{required} \leq \frac{G(-|G-C| - I) + C(I-D)}{-|G-C| - D} \tag{12}$$

It follows that

$S_{Court} = \{accommodate\}$ if $\tau_{required} \leq \frac{G(-|G-C|-I)+C(I-D)}{-|G-C|-D}$ and

$S_{Court} = \{\underline{accommodate}\}$ if $\tau_{required} > \frac{G(-|G-C|-I)+C(I-D)}{-|G-C|-D}$

Finally, I consider *Government*'s choice at the initial policy-making stage.

Case II.a: $G \leq x_\tau < C$, $S_{Court} = \{\underline{accommodate}\}$ and $S_{Government} = \{*, accept\}$

Government chooses not to pass policy and leave policy at x_0 if

$$U_{Government}(x_0, *) > U_{Government}(x_C, \underline{accommodate})$$

$$-|x_0 - G| > -|C - G| - \eta$$

$$-G > G - C - \eta$$

$$\eta > 2G - C \tag{13}$$

It follows that

$S_{Government} = \{\underline{enact}, accept\}$ if $\eta > 2G - C$ and the outcome is $x_0, *$, while

$S_{Government} = \{enact, accept\}$ if $\eta \leq 2G - C$ and the outcome is $x_C, \underline{accommodat}$.

Case II.b.1: $G \leq \tau < C$, $S_{Court} = \{\underline{accommodate}\}$ and $S_{Government} = \{*, \underline{accept}\}$

Government chooses not to pass policy and leave policy at x_0 if

$$U_{Government}(x_0, *) > U_{Government}(x_G, \underline{accommodate})$$

$$-|G| > -\beta - \eta$$

$$-G > -\beta - \eta$$

$$\beta + \eta > G \tag{14}$$

It follows that

$S_{Government} = \{\underline{enact}, \underline{accept}\}$ if $\beta + \eta > G$ and the outcome is $x_0, *$, while

$S_{Government} = \{enact, \underline{accept}\}$ if $\beta + \eta \leq G$ and the outcome is $x_G, \underline{accommodate}$.

Case II.b.2: $G \leq \tau < C$, $S_{Court} = \{accommodate\}$ and $S_{Government} = \{*, \underline{accept}\}$

Government chooses not to pass policy and leave policy at x_0 if

$$U_{Government}(x_0, *) > U_{Government}(x_G, \underline{accommodate})$$

$$-|G| > -|\tau_{required} - G| - \eta$$

$$-G > G - \tau_{required} - \eta$$

$$\eta > 2G - \tau_{required} \tag{15}$$

It follows that

$S_{Government} = \{\underline{enact}, \underline{accept}\}$ if $\eta > 2G - \tau_{required}$ and the outcome is $x_0, *$, while

$S_{Government} = \{enact, \underline{accept}\}$ if $\eta \leq 2G - \tau_{required}$ and the outcome is $\tau_{required}, accommodate$.