

# The political dynamics of constitutional review

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20 August 2018

## Abstract

A prominent argument in the judicial politics literature expects courts to project their authority and induce governments to ‘auto-limit’ their policy choices. Still, the regularity with which disputes over policy are ultimately resolved in the courts suggests that the latter aren’t universally successful in deterring governments from choosing constitutionally controversial policies. How do courts respond when policy-makers’ choices openly provoke confrontation with the courts? This paper introduces a formal theoretical model, which shows that external constraints on courts’ exercise of constitutional review can account for the empirical puzzle that policy-makers tend not to shy away from confrontation with courts enjoying comfortable levels of public support. The paper contributes to a judicial politics literature divided over the nature of courts’ political authority. The formal model highlights that courts are generally unconstrained in their exercise of constitutional review when rulings are issued years after a reviewed policy had been adopted, a condition typically satisfied in light of lengthy constitutional review processes. Yet, lacking immediate control over the implementation of their decisions, courts are often unable to shape high-profile policy questions dominating current political affairs. Further, losses of public support for courts won’t directly translate into deference to policy-makers, but materialise in fewer judicial constraints felt by the latter.

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*The call on us eight justices was to stop the EU, or at least stop Germany in the EU.*

*How should a court react to that situation? Should it stick to the text, an always constructed original idea of the drafters of a constitutional clause? Should consequences matter, on the stock market, for the budget, for life in Greece or the political state of the European Union? Should justices bow to that reality or should they be solid as a rock?*<sup>1</sup>

Justice Susanne Baer, German Federal Constitutional Court

## 1 Introduction

Constitutional review is a common feature of modern democracies. The influence over policy-making attributed to courts through constitutional review, however, has been the subject of a contentious debate. Citing the effects of constitutional review, a group of prominent scholars cautions against a judicialization of political life, judicial activism and government through judges unaccountable to the electorate (Tate and Vallinder, 1995; Stone Sweet, 1999, 2000; Hirschl, 2008). Still, a subtle irony lies at the heart of the judicial activism reproach often levelled against constitutional courts: Unless governments issue policies courts would object as unconstitutional, the latter won't assume an active role in the policy-making process. Courts may project their power and induce governments to adapt or 'auto-limit' their policies in anticipation of an adverse ruling (see Stone Sweet, 2007; Stone, 1992). Yet, the regularity with which disputes over policy are ultimately resolved in the courts suggests that the latter aren't universally successful in deterring governments from choosing policies conflicting with their interpretation of the constitution. If we are to take the phenomenon of 'auto-limitation' seriously, then it appears that governments are often willing to ignore the writings on the wall and risk confrontation with the courts.

How do courts respond when policy-makers openly provoke a confrontation? To address this question I provide a formal analysis of the political dynamics of constitutional review. The analysis draws on two observations prominent in the literature on courts' exercise of constitutional review: the price courts risk to pay for challenging government policy, coming in the form of attacks on their institutional integrity (Clark, 2010; Hand-

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<sup>1</sup>Quoted from public lecture titled "Rights Under Pressure: practising constitutional law in turbulent times", delivered at the London School of Economics and Political Science on 10 May 2016; podcast and video recording are available at <http://www.lse.ac.uk/Events/2016/05/20160510t1830vSZT/rights-under-pressure>

berg and Hill Jr., 1980), and courts' lack of immediate control over the implementation of their decisions in constitutional review cases (Baum, 2003; Carrubba and Zorn, 2010; Epstein and Knight, 1998).

The formal model predicts that courts enjoying comfortable levels of public support will rarely self-censor their exercise of constitutional review. However, despite the prospects of having policy struck at the hands of justices, courts' implementation dilemma often provides policy-makers with incentives to ignore judicial constraints on their policy-making and opt for policies contesting constitutional rights over less preferable options.

Second, the model expects courts to defer to government when an adverse ruling would require an immediate reaction from policy-makers on highly salient policy issues. This prediction qualifies our perspective on courts' type of authority in the policy-making process. In light of the lengthy nature of constitutional review, with years typically separating the adoption of a policy from a corresponding court ruling, courts are generally well-positioned to shape policies through their jurisprudence in the long run. Yet, when courts are called in to serve as arbiters on salient issues dominating current political affairs, external constraints on courts' exercise of constitutional review feature prominently and governments are more likely to successfully push policies contesting constitutional rights past the courts.

Finally, the formal analysis shows that courts lacking comfortable levels of public support won't always shy away from striking government policy as long as electoral competition for government is high. However, courts lacking institutional legitimacy generally fail to project their authority and prevent government from implementing policies contesting constitutional rights. Hence, albeit appearing to play an active role in the policy-making process, courts' exercise of constitutional review often remains 'non-consequential' (for a similar discussion, see Kapiszewski et al., 2013).

The formal model's perspectives on the nature of courts' authority in the policy-making domain contribute to the literature on constitutional review, divided between scholarship arguing courts chip away at the prerogatives of legislative and executive branches (Stone Sweet, 2000; Hirschl, 2008), and scholarship highlighting a web of constraints on courts' exercise of constitutional review (Hall and Ura, 2015; Vanberg, 2005; Clark, 2009; Carrubba et al., 2008). I argue that courts are generally unconstrained in their exercise of constitutional review and can demand corrections to policy when rulings are issued long after a reviewed policy had been adopted, a condition typically satisfied given the often lengthy and time-consuming process of constitutional review. Yet, lacking immediate

control over the implementation of their decisions, courts are unable to shape high-profile policy questions, dominating current political affairs. Further, the analysis shows that sheer observation of courts' active exercise of constitutional review should not drive conclusions about courts' authority vis-à-vis legislative and executive branches—nor should it serve as empirical proof of an effective system of checks and balances on government.

The paper proceeds as follows. The following section discusses governments' and courts' strategic incentives in the context of constitutional review and introduces the primitives of the formal model. Thereupon, a formal analysis of the model identifies equilibrium behaviour for both government and the court. The model's equilibria are then translated into specific predictions for government's and the court's behaviour for several scenarios with varying values of the model's parameters. The final section discusses the results of the model's comparative statics and offers concluding remarks.

## 2 A formal model of constitutional review

I approach the analysis of the political dynamics of constitutional review with a formal theoretical model, which captures strategic interactions between a court and policy-makers controlling government. The model draws on two features of courts' exercise of constitutional review highlighted in existing formal analyses: the incentive for policy-makers to discipline courts in response to adverse rulings (Clark, 2009; Rogers, 2001), and courts' inability to coerce policy-makers into faithfully implementing their rulings (Vanberg, 2001; Staton and Vanberg, 2008). Departing from existing formal analyses, the model places a time-dynamic typical for constitutional review front and centre: Given the lengthy nature of constitutional review processes, often spanning across electoral cycles, policy makers currently in government may or may not take charge of the implementation of a future court ruling. Both government and the court know that confrontation over policy may prove costly, yet both actors are uncertain of how a future government would respond to an adverse court ruling.

The model includes two players, a government ( $G$ ) and a court ( $C$ ). Government needs to solve a policy issue and has several options at hand, some of which she prefers over others. For simplicity, let government choose from two policy options,  $\rho \in \{a, b\}$ . Government prefers policy  $a$  over  $b$ : If policy  $a$  is on the books it yields her a payoff of 1, while policy  $b$  yields a payoff of 0.

As we shall see below, the court plays a critical role in government's choice whenever

government’s preferred policy conflicts with the court’s interpretation of the constitution. By resolving constitutional review cases courts create legal rules, which define the type of policies that qualify as compatible with the constitution and guide the resolution of future cases (Callander and Clark, 2017, see also Lax 2007; Carrubba and Clark 2012; Clark and Lauderdale 2012). We can assume that policy-makers learn of courts’ prior jurisprudence through legal counsel and expert hearings during committee stages of the policy-making process, and can anticipate whether or not a policy would conflict with a court’s interpretation of the constitution (for similar arguments, see for example Vanberg, 1998; Wasserfallen, 2010). To illustrate, in an interview conducted in November 2017, a high-ranking official of the German federal government noted that policy-makers pay close attention to the German Federal Constitutional Court’s jurisprudence, particularly with regard to the court’s landmark decisions, adding that each new piece of legislation is carefully vetted by both the Ministry of Justice and the Ministry of the Interior. Notably, the official also noted that where a clear jurisprudence of the court is lacking, policy-makers “are willing to take the risk that a legislative text will not stand in court.”<sup>2</sup>

To motivate the strategic interaction between government and the court, let the court indeed prefer policy  $b$  over  $a$ : policy  $b$  yields a payoff of 0 to the court, while policy  $a$  yields a negative payoff of  $-1$ .<sup>3</sup> In other words, government knows that her preferred policy  $a$  conflicts with the court’s interpretation of the constitution, while policy  $b$  is a ‘constitutionally safe’ albeit less preferable option for government. When government chooses policy  $a$  the court is called upon to exercise constitutional review and decides whether to uphold or strike policy  $a$ ,  $d \in \{u, s\}$ .

Losing a constitutional review case in court is costly for government as her political opponents can use the court’s ruling to discredit the latter’s reputation and policy-making record among the electorate. Accordingly, let government pay a cost  $c$  when the court decides to strike policy  $a$ . Likewise, striking a policy can be costly for the court. Existing literature on the politics of separation of powers highlights that courts intervening in the policy-making process risk being disciplined by legislative and executive branches (see for example Handberg and Hill Jr., 1980; Rogers, 2001; Segal et al., 2011; Clark, 2009).<sup>4</sup>

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<sup>2</sup>As a condition of the interview, I guaranteed anonymity. Details are available upon request.

<sup>3</sup>Payoffs for both government and the court are normalized. However, the strategic environment captured by the model requires that the court strictly prefers policy  $b$  over  $a$ , while the court’s preference for realized outcomes after its choice to uphold or strike a policy need to be contingent on the model’s parameter values. As shown below this condition is satisfied by the described choice of payoffs for the court.

<sup>4</sup>Instruments applied to discipline courts include for instance tampering with a court’s jurisdiction,

Epstein et al. (2001) note that attempts to discipline a court do not necessarily have to take effect to tarnish the latter’s institutional integrity, but that the attempt itself can do the damage. Hence, even political elites not currently sitting at the levers of executive or legislative power can attempt to undermine a court’s institutional integrity. Accordingly, let the court pay a cost  $k$  when it strikes policy  $a$ .

The analysis below shows that the court’s decision to bear these costs and strike an ‘unconstitutional’ policy is closely tied to its expectation of whether government will faithfully implement its ruling. Ferejohn and Weingast (1992, 276) note that “[w]hereas much analysis of interpretation in the legal literature assumes that courts have the last word, in reality there is no last move.” Courts lack direct control over the implementation of constitutional review decisions and count on policy-makers’ cooperation to see policies remain within the constitutional boundaries defined by their rulings (Hall, 2014; Cross and Nelson, 2001; Bergara et al., 2003). As courts lack the authority to directly enforce their rulings, policy-makers can evade implementation of judicial decisions, either by passing policies to the same effect as the ones previously objected by a court, or by maintaining the application of objected policies through informal agreements (see for example Vanberg, 2005; Kapiszewski and Taylor, 2013; Fisher, 1993). The model accounts for the possibility of non-implementation: If the court decides to strike, policy  $a$  is taken off the books and a future government tasked with implementation may either choose to respect the court’s ruling and apply policy  $b$  or choose to defy the court, evade implementation of the ruling and re-instate policy  $a$ .

Vanberg (2001) notes that elected office-holders caught evading implementation of a court ruling risk paying the price at the ballot box for breaching their constitutional obligations (for similar arguments, see Krehbiel, 2016; Staton, 2006, 2010). Accordingly, the model assumes that government won’t attempt to evade implementation of a court ruling and shoulder these risks unless policy-makers in office consider the issue in question as particularly salient. Salience is conceptualized as the importance an actor, here policy-makers in government, attach to a specific political issue (Thomson, 2011). Beyers et al. (2017) note that the salience policy-makers attach to an issue may or may not reflect the salience other relevant actors, such as the public or interest groups, attribute to a matter. Where an issue dominates public discourse and the headlines of the day, it is also likely to rank highly on policy-makers agenda. However, in response to the interests 

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budget cuts, or the withholding of pay (Rosenberg, 1992).

of specific constituencies policy-makers may also attribute high salience to issues, which don't concern the average citizen or feature prominently in the news.

In addition to the salience of a policy issue, the timing of constitutional review is of essence for the prospects of evasion. Constitutional review rulings generally instruct policy-makers to replace the objected policy by a specified date, with rulings typically issued years after the adoption of the reviewed policy. Hence, in between the policy's date of adoption and the implementation date for a corresponding constitutional review ruling the composition of government may change.

To account for the timing of constitutional review decisions and policy-makers' risks associated with evasion, the probability that a future government will evade implementation is modelled as a product of two parameters: (1) the probability that government will still be in office to implement the court's decision,  $\pi \in (0, 1)$ , either because the adoption of the policy in question and the implementation date fall within the same legislative period, or because government won subsequent elections,<sup>5</sup> and (2) the salience policy-makers in government attribute to the policy issue,  $\omega \in \{0, 1\}$ , with  $\omega = 1$  indicating salient issues and  $\omega = 0$  indicating non-salient issues.

The model assumes that the court is uncertain about the salience government attaches to the policy issue in question. Technically, Nature ( $N$ ) selects a state of the world,  $\omega \in \{0, 1\}$ , which is only observed by government. The court's uncertainty about the state of the world is characterized by its prior beliefs,  $p \in (0, 1)$ , with

$$\omega = \begin{cases} 1 & \text{with probability } p \\ 0 & \text{with probability } 1 - p \end{cases}$$

Summarizing the model's primitives yields the following Bernoulli utility functions for

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<sup>5</sup>Given the court issues its ruling after government makes her policy choice, we can assume that the court is better informed than government about the probability that government will remain in office for implementation of its decision. Technically, while the court knows  $\pi$ , government receives a noisy signal  $\hat{\pi} = \pi + \epsilon$ . However, as long as we are willing to assume that government neither systematically overestimates nor systematically underestimates her chances of retaining office for implementation (i.e.  $\hat{\pi}$  is an unbiased estimate of  $\pi$ ), the court's information advantage over government is irrelevant and is therefore not considered further here.

government and the court:

$$U_G = I_G(I_C(\omega\pi - c) + (1 - I_C))$$

$$U_C = I_G(I_C(-\omega\pi - k) - (1 - I_C))$$

where  $I_G$  denotes government's choice of policy ( $I_G = 1$  if government chooses policy  $a$ ;  $I_G = 0$  if government chooses policy  $b$ ), and  $I_C$  denotes the direction of the court's constitutional review ruling ( $I_C = 1$  if the court chooses to strike policy  $a$ ;  $I_C = 0$  if the court chooses to uphold policy  $a$ ).

Figure 1 shows the sequence of play. The game starts with Nature selecting a state of the world,  $\omega \in \{0, 1\}$ . Government then chooses from its policy choices,  $\rho \in \{a, b\}$ . Whenever government chooses policy  $b$ , both the court and government receive a payoff of 0, regardless of the state of the world. When the issue at hand is not salient,  $\omega = 0$ , but government chooses policy  $a$  nonetheless, the court does not have to fear—while government cannot count on—non-implementation of a decision to strike. Hence, both the court and government would simply pay their respective costs,  $k$  and  $c$ . When the issue is salient,  $\omega = 1$ , and government chooses policy  $a$ , the court risks non-implementation when striking, contingent on the likelihood  $\pi$  that government will be tasked with implementing its decision. Should government choose policy  $a$  and the court upholds the policy, then regardless of the state of the world government receives a payoff of 1 and the court a payoff of -1, reflecting government's benefits of applying its preferred policy and the court's costs of waving through a policy it considers unconstitutional.

## 2.1 Analysis

A strategy for government is a mapping from the state space  $\omega$  into a policy choice,  $\rho : \omega \rightarrow \{a, b\}$ . Given the court only acts when government chooses policy  $a$ , a strategy for the court is a mapping from its prior beliefs about the state of the world into a constitutional review decision,  $d : (0, 1) \rightarrow \{u, s\}$ .

The Constitutional Review Game of Figure 1 represents a simple signalling game. Three types of perfect Bayesian equilibria characterise signalling games:

- (1) *Separating*: Government chooses different strategies contingent on the state space and the court can perfectly update its prior beliefs.
- (2) *Pooling*: Government chooses the same strategy for each state and the court is



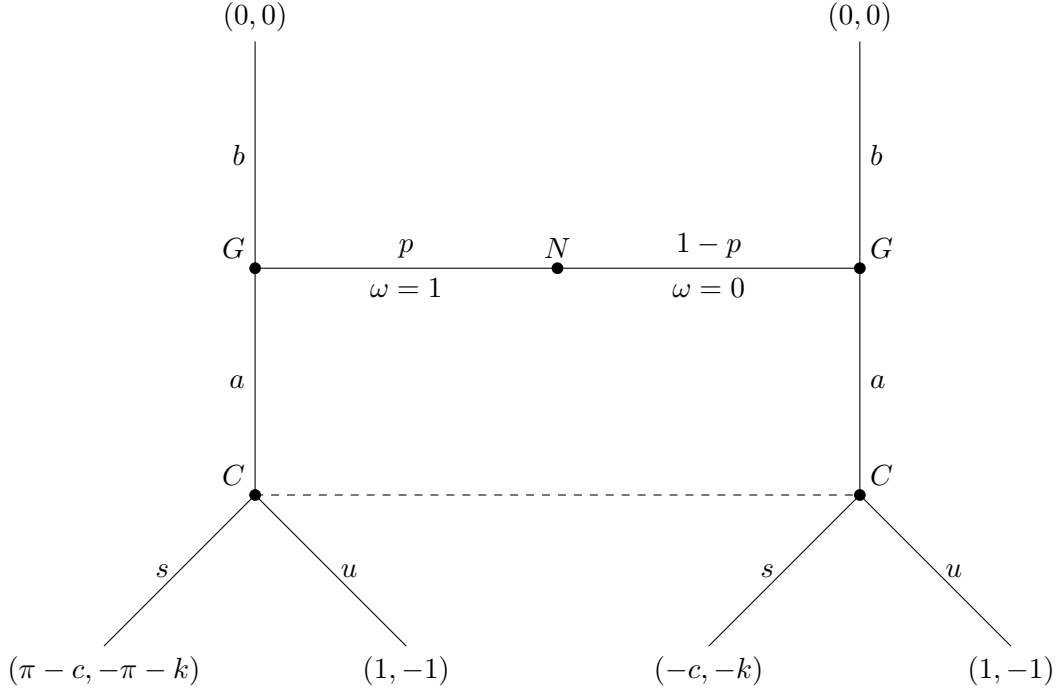


Figure 1: Constitutional Review Game

unable to update its prior beliefs.

- (3) *Partial pooling*: Government chooses different mixed strategies contingent on the state space.<sup>6</sup>

In the following I consider equilibrium behaviour for the full space of the model's parameters.<sup>7</sup> Proofs of all formal results are gathered in the appendix.

I start with a separating equilibrium in which government chooses policy  $a$  if the policy issue is considered salient and policy  $b$  otherwise. When called upon, the court will then

<sup>6</sup>Formal proofs in the appendix show that given the court only acts after government chooses policy  $a$ , the court can perfectly update its prior beliefs about the state of the world in the model's partial pooling equilibrium as well.

<sup>7</sup>The trained eye will quickly see that the game has a unique pooling equilibrium, which in fact would be the only equilibrium, when the court's cost parameter exceeds the threshold  $k \geq 1$ . Given  $\pi \in (0, 1)$  and  $p \in (0, 1)$ , the court would always prefer to uphold, regardless of the state of the world. Knowing this, government would always choose policy  $a$ . As discussed further below, empirically this equilibrium reflects political systems in which a court lacks institutional legitimacy and thus has to fear particularly damaging attacks on its institutional integrity, common for authoritarian polities. Hence, the analysis below is restricted to the court's cost parameter values of  $k < 1$ .

choose to strike policy  $a$  as long as its costs  $k$  for striking the policy fall below the threshold  $k^* \equiv 1 - c$ .

**Proposition 1.** (*Separating*) Given  $k < k^*$  and  $c < \pi \leq 1 - k$ , a perfect Bayesian equilibrium exists in which government chooses policy  $a$  if  $\omega = 1$  and policy  $b$  if  $\omega = 0$ , and the court chooses to strike policy  $a$ .

The separating equilibrium shows that as long as the costs for having her preferred policy struck in court are sufficiently low relative to the probability of remaining in office for implementation, government will take her chances and opt for her preferred policy  $a$ , despite knowing that the court will strike it. The court then chooses to strike as long as the costs it endures for striking the policy are sufficiently low relative to the probability that the government responsible for policy  $a$  remains in office for implementation. The separating equilibrium is only supported if  $k$  falls below the threshold  $k^* \equiv 1 - c$  (i.e. requiring that  $1 - k > c$ ). There are several ways to interpret the substantive implications of the threshold  $k^*$ . A straightforward interpretation suggests that as the court's costs  $k$  increase above the threshold, striking a policy becomes so unattractive for the court that government can (at least in some instances) no longer be deterred from choosing her preferred policy  $a$ , even if she does not consider policy  $a$  as salient.

The two equilibria considered next capture this scenario. First, consider a pooling equilibrium in which government chooses identical strategies and picks policy  $a$  over policy  $b$ , regardless of whether the policy issue is considered salient or not. Given the court's costs for striking the policy is sufficiently high relative to the probability that government retains office for implementation, the court's equilibrium strategy then depends on its prior beliefs that government considers the policy issue as salient. If the court's prior beliefs are sufficiently high, a pooling equilibrium exists in which government always chooses policy  $a$  and the court self-censors its exercise of constitutional review to uphold policy  $a$ .

**Proposition 2.** (*Pooling 1*) Given  $\pi > 1 - k$  and  $p > (1 - k)/\pi$ , a perfect Bayesian equilibrium exists in which government always chooses policy  $a$  and the court always chooses to uphold policy  $a$ .

The court's prior beliefs are key to this equilibrium. When the court has reason to believe that government considers the policy issue at hand as salient then it has an incentive to constrain its exercise of constitutional review and uphold policy  $a$ . Hence,

as long as the court's prior beliefs are above the defined threshold, government gets away with pushing policy  $a$  past the court, even if she does not consider the issue as salient.<sup>8</sup>

If the court's prior beliefs fall below the threshold defined in Proposition 2, a partial pooling equilibrium exists in which government always chooses policy  $a$  if the issue is salient. Otherwise, government chooses policy  $a$  with probability  $q(\pi)^*$ . The probability  $q(\pi)^*$  is increasing in  $\pi$ . As government's chances of retaining office for implementation increase, government will be more likely to choose policy  $a$  over  $b$ . Upon observing that government chooses policy  $a$ , the court strikes the policy with probability  $r(c)^*$ . The probability  $r(c)^*$  is decreasing in  $c$ . Accordingly, as government's costs for seeing policy  $a$  struck in court increase, the court becomes less likely to strike the latter.

**Proposition 3.** (*Partial pooling*) Given  $\pi > 1 - k$  and  $p \leq (1 - k)/\pi$ , a perfect Bayesian equilibrium exists in which government always chooses policy  $a$  if  $\omega = 1$  and policy  $a$  with probability  $q(\pi)^* = \frac{p(\pi+k-1)}{(1-k)(1-p)}$  if  $\omega = 0$ , and the court chooses to strike policy  $a$  with probability  $r(c)^* = 1/(1 + c)$ .

In this partial pooling equilibrium, the costs government pays for seeing her preferred policy struck in court can work to her advantage. When the issue at hand is not considered salient, higher costs allow government to mimic a state of the world in which the issue is salient and induce the court to become less likely to strike the policy.

The pooling and partial pooling equilibria considered above indicate that the court would (at least in some instances) be willing to self-censor its exercise of constitutional review as long as the probability that the government responsible for passing policy  $a$  takes charge of implementing the court's decision is sufficiently high. But what if this probability is low? Another pooling equilibrium exists in which government chooses policy  $b$  regardless of the policy's salience. Given the probability that government will retain office and take charge of implementation is low, the court sees no reason to self-censor its exercise of constitutional review and would always strike policy  $a$ . Knowing that, government chooses not to provoke a confrontation with the court.

**Proposition 4.** (*Pooling 2*) Given  $k < k^*$  and  $\pi \leq c$ , a perfect Bayesian equilibrium exists in which government always chooses policy  $b$  and the court chooses to strike off the equilibrium path. Given  $k \geq k^*$  and  $\pi \leq 1 - k$ , a perfect Bayesian equilibrium

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<sup>8</sup>Given Proposition 2 makes no assumption about government's costs for having her preferred policy struck in court, the equilibrium is supported regardless of whether or not  $k$  falls below or above the threshold  $k^*$ .

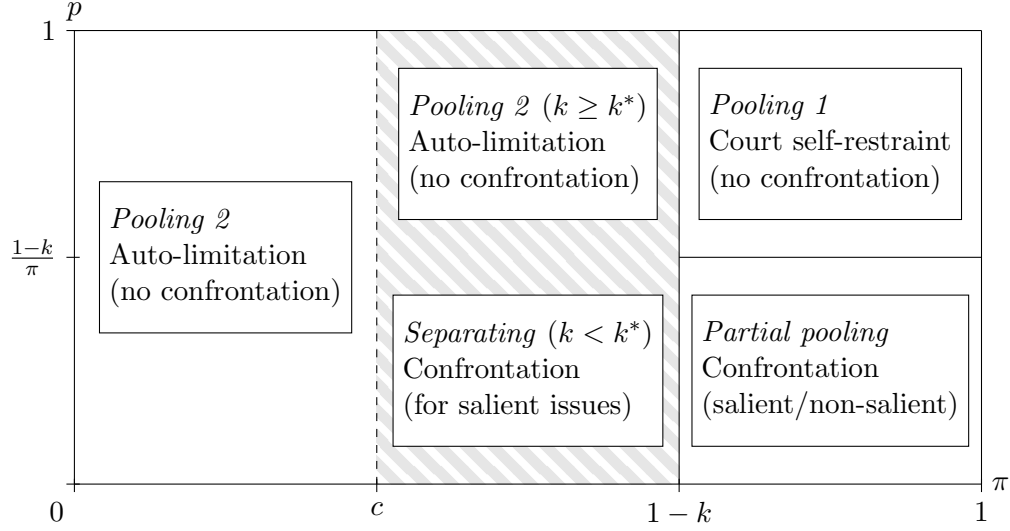


Figure 2: Equilibrium predictions ( $\pi$  represents the probability that government responsible for the policy reviewed by the court takes charge of the implementation of the court’s decision;  $p$  represents the court’s prior beliefs that the policy issue is salient to government;  $k$  represents court’s cost for striking a policy;  $c$  indicates the costs government pays when the court strikes a policy;  $k^* \equiv 1 - c$ )

exists in which government always chooses policy  $b$  and the court chooses to strike off the equilibrium path.

In this equilibrium, government adjusts or ‘auto-limits’ her policy-making, choosing a ‘constitutionally safe’ policy option in anticipation of the court’s decision. Hence, the court has a critical influence on government’s policy choices without actively intervening in the policy-making process. This finding resonates with Vanberg (1998, 300), who finds that the importance of court’s constitutional review often lies in “its indirect, anticipatory effects” (for similar arguments, see Blauburger, 2012; Stone Sweet, 2007).

The model’s predictions for equilibrium behaviour are illustrated in Figure 2, with the probability that government remains in office for implementation,  $\pi$ , located on the horizontal axis and the court’s prior beliefs about the salience government attributes to the issue,  $p$ , on the vertical axis.

## 2.2 Interpretation and comparative statics

The model's equilibria summarized in Figure 2 identify conditions under which we can expect courts to effectively constrain the choices of policy-makers in government and preempt confrontation, scenarios in which the court would fail to do so—and when we would expect the court to defer to government. Based on the model's equilibria, I now turn to consider how changes in the model's parameter values translate into changes in behaviour for both government and the court. Figure 2 shows that the probability a government responsible for a policy reviewed by the court will also take over the implementation of the court's ruling is relevant to both actors' choices. Empirically, this probability can be seen to reflect the level of electoral competition for office. As noted above, time plays a critical role for the political dynamics of constitutional review given it often takes years following the adoption of a policy before it may be reviewed by a court, followed by an implementation period again possibly spanning several years. Hence, as elections become more competitive, a government can be less certain that it will get a shot at—and possibly evade—implementation of an adverse court ruling in the future.

Most modern democracies are likely to experience at least moderate levels of political competition, thus typically incumbent governments cannot bank on controlling the levers of political power for years to come (although there may be notable exceptions to that expectation, see for example post-war Japan in Ramseyer, 1994; Ramseyer and Rasmusen, 2001). Bar polities in which government is generally dominated by the same political party (or a coalition of political parties), how should we then interpret the model's predictions for particularly high values of the probability that government will take charge of implementation? Here, a second empirical interpretation of this probability comes into play. Some constitutional review cases are fast-tracked to the court and an adverse court ruling would require an urgent response by the implementing government. It is these high-profile cases in which we can expect that the government adopting a policy subsequently reviewed by a court would also take charge of implementing the court's ruling.

A second parameter deserving closer attention before turning to the model's comparative statics is the court's cost for striking policy in a constitutional review ruling. As noted above, it is not uncommon that courts endure attacks on their institutional integrity when challenging government over policy (see Clark, 2010; Rosenberg, 1992; Whittington, 2003). Given the model's equilibrium predictions are contingent on these costs' size, what is it that makes courts' costs for striking government policy vary? A prominent strand of

scholarship in judicial politics notes that the authority of courts lacking the ‘power of the sword and the purse’ stems from their reservoirs of diffuse public support (Gibson et al., 1998; Caldeira and Gibson, 1995; Mondak and Ishiyama Smithey, 1997). This literature distinguishes diffuse support from the public’s support for specific decisions of the court, capturing the public’s judgements about the institutional legitimacy of courts themselves (for a comprehensive discussion see Gibson et al., 2003). Following this reasoning, the empirical interpretation given to the court’s cost parameter here is that lower levels of diffuse support, i.e. attributed institutional legitimacy, correspond to higher costs courts expect for striking government policy. When courts lack diffuse public support in the first place, governments accountable to the public will feel less constrained in inflicting particularly damaging losses on court’s institutional integrity in response to an adverse ruling (for a discussion of the endogenous development of courts’ authority this argument implies see Carrubba, 2009).

I begin my interpretation of the model’s comparative statics with a court enjoying comfortable levels of diffuse public support, hence satisfying the condition  $k < k^*$ . In the first scenario considered here, both the court’s and government’s cost following a court decision to strike are relatively low, fixed at  $k = 0.4$  and  $c = 0.4$ . In addition, in this scenario the court’s prior beliefs that it is dealing with an issue considered salient by government is also relatively low, with  $p = 0.3$  (predictions for higher levels of the court’s prior beliefs are considered below). Figure 3 illustrates behaviour predicted by the model for government and the court for these parameter values.<sup>9</sup> On the vertical axis, the top panel displays the probability that government chooses policy  $a$  (i.e. a policy provoking confrontation with the court), while the horizontal axis shows the probability that government will take charge of implementing the court’s ruling, the parameter  $\pi$ . On the vertical axis the bottom panel displays the probability that the court would strike such a policy, with the probability that government will take charge of implementing the court’s ruling again displayed on the horizontal axis. Shaded areas in the middle panel indicate the equilibria which drive government and court behaviour at different levels of the parameter  $\pi$ .

The bottom panel of Figure 3 shows that a court enjoying comfortable levels of institutional legitimacy will rarely defer to government when it is dealing with what it believes to be low-salience issues. The court will moderate its exercise of constitutional review

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<sup>9</sup>Visualization of the model’s comparative statics relies on the statistical programming software R. Code for replication of the illustrated comparative statics is available upon request.

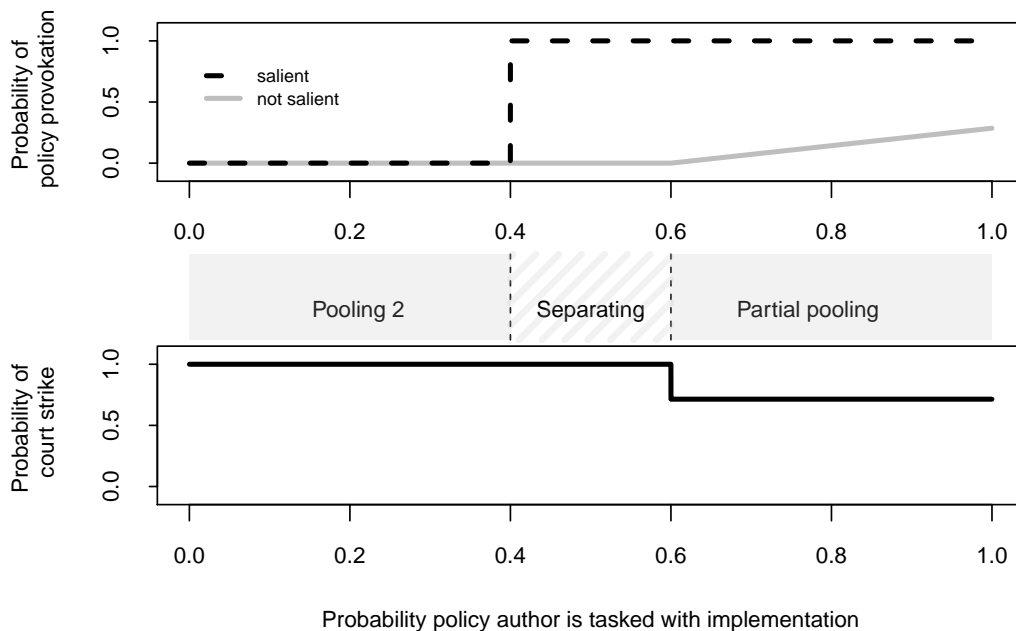


Figure 3: Government and court equilibrium behaviour for varying levels of  $\pi$  (other parameter values set at  $k = 0.4$ ,  $c = 0.4$  and  $p = 0.3$ )

only for higher values of the probability that the government responsible for the policy under review will also take charge of implementing the court’s decision (indicated by the partial pooling equilibrium area at the right end of the bottom panel of Figure 3). Notice that notwithstanding a potential non-implementation threat, the court will still strike a significant share of policies contesting its interpretation of the constitution.

Figure 3 also shows that the court is often unable to deter government from passing policies contesting its interpretation of the constitution when the latter considers the policy issue as salient, setting government and the court up for confrontation. The dashed line in the top panel of Figure 3 shows that government won’t shy away from a confrontation with the court on salient issues, even when her chances of retaining office for implementation are moderate at best (indicated by the separating equilibrium area).<sup>10</sup> Hence, even when

<sup>10</sup>Unsurprisingly, this behaviour changes as government’s costs for losing a constitutional review case increase. In this case the area characterised by the pooling equilibrium at the left end of Figure 3, in which government ‘auto-limits’ her policy-making, would expand at the expense of the area defined by the separating equilibrium, while the likelihood that the court would strike a policy for high values of  $\pi$  would decrease (not shown here).

competition for office is high, confrontation between government and the court on salient issues is likely, given neither the court will be deterred from striking nor will government censor her policy choice in anticipation of the court’s ruling. This prediction qualifies expectations in the existing literature that political competition generally works in favour of courts’ authority vis-à-vis legislative and executive branches of government (see for example Ishiyama Smithey and Ishiyama, 2002; Stephenson, 2003; Aydin, 2013).

The grey line in the top panel of Figure 3 indicates that the court is generally successful in inducing government to ‘auto-limit’ her policy choice on non-salient issues. Only as it becomes increasingly likely that government will take charge of implementing the court’s ruling will government risk a confrontation on non-salient issues.

Finally, Figure 3 shows that the pooling equilibrium in which the court exercises judicial self-restraint and always defers to government (*Pooling 2*) does not come into play and define actors’ behaviour as long as the court’s costs and its prior beliefs it is dealing with a salient issue are low. Recall that the critical threshold for the court’s prior beliefs,  $(1 - k)/\pi$ , is decreasing in both  $k$  and  $\pi$ . As long as the court’s cost parameter  $k$  and its prior beliefs  $p$  are sufficiently low,  $p$  won’t surpass the critical threshold, even for high values of  $\pi$ , and the parameter space for the judicial self-restraint pooling equilibrium (*Pooling 2*) is never reached.

The model’s predictions for government and court behaviour change substantively as the latter’s prior beliefs it is dealing with an issue considered salient by government increase. Consider the following scenario in which the court’s and government’s costs are again fixed at  $k = 0.4$  and  $c = 0.4$ , while the court’s prior beliefs increase to  $p = 0.7$ . Figure 4 shows that if the court believes it is dealing with a salient issue it will exercise self-restraint and defer to government whenever the probability that government would take charge of implementing its ruling is particularly high (indicated by the pooling equilibrium area at the right end of Figure 4). This prediction has substantive implications for our expectations regarding the nature of courts’ political authority. The model predicts that when courts are called upon to intervene in current political affairs and resolve high-profile issues, with effects from a decision to strike a policy demanding an immediate response from policy-makers, courts will exercise judicial self-restraint and defer to government.

The paper’s opening quotation by Justice Susanne Baer of the German Federal Constitutional Court references such a case. In *2 BvR 987/10*, the German Federal Constitutional Court was called upon to consider the constitutional conformity of the Monetary Union Financial Stabilisation Act (*Währungsunion-Finanzstabilisierungsgesetz*), which



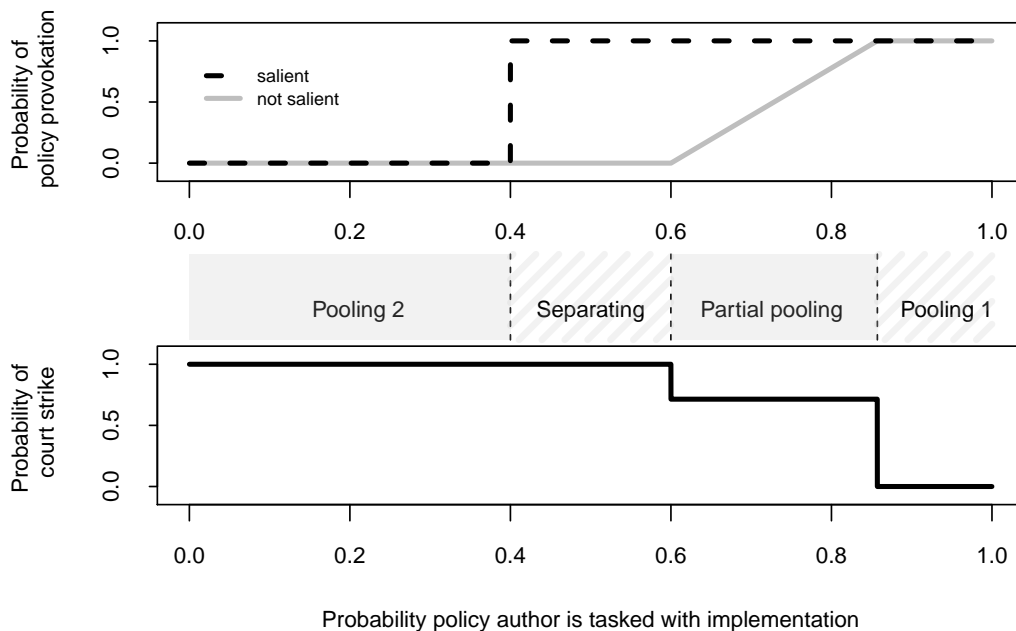


Figure 4: Government and court equilibrium behaviour for varying levels of  $\pi$  (other parameter values set at  $k = 0.4$ ,  $c = 0.4$  and  $p = 0.7$ )

granted the authorisation to provide aid to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*), both from May 2010. A group of renowned economists and constitutional lawyers as well as a prominent then-Member of Parliament filed the case, arguing that the referenced acts violated the federal parliament’s budget autonomy enshrined in the Basic Law, the German constitution. In the midst of the European sovereign debt crisis, the case naturally garnered significant attention and a decision to strike these acts as unconstitutional clearly would have had far-reaching, immediate consequences for pan-European efforts spearheaded by the German federal government to contain the crisis. However, the German Federal Constitutional Court eventually rejected the constitutional complaints as unfounded, noting that “the legislature has a margin of appreciation with regard to the probability of having to make payments in a guarantee event, which the Federal Constitutional Court has to respect.”<sup>11</sup> In essence, anticipating an immediate political response

<sup>11</sup>Referenced from the German Federal Constitutional Court’s official press release No. 55/2011 of

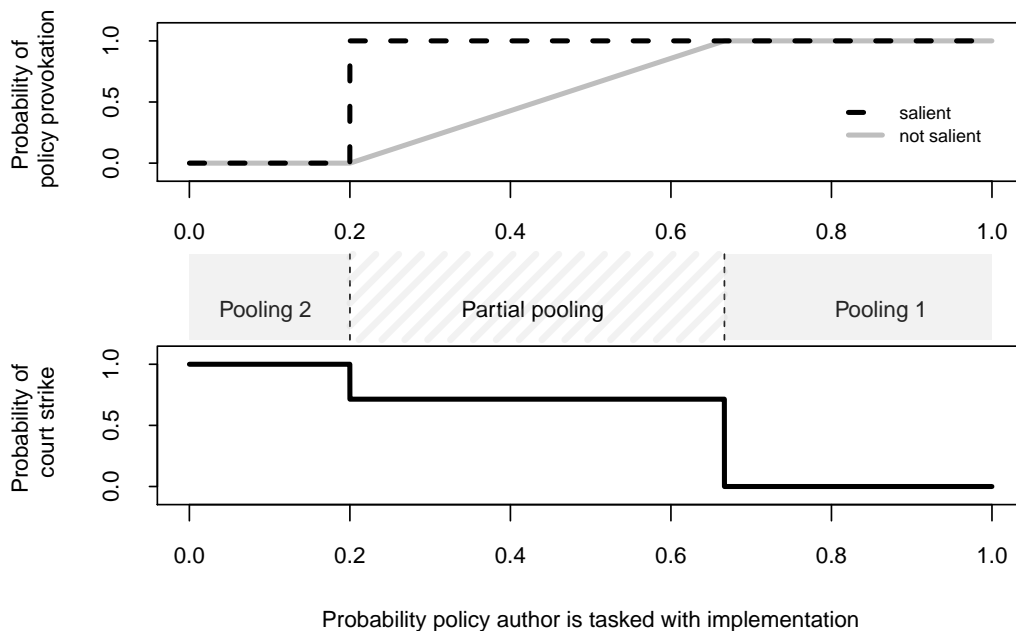


Figure 5: Government and court equilibrium behaviour for varying levels of  $\pi$  (other parameter values set at  $k = 0.8$ ,  $c = 0.4$  and  $p = 0.3$ )

on a highly salient issue, the court decided to exercise judicial self-restraint and defer.

Finally, consider a scenario in which the court lacks comfortable levels of diffuse public support. Similar to the scenario captured in Figure 3, government’s cost parameter is set at  $c = 0.4$ , while the court’s prior beliefs are again fixed at  $p = 0.3$ . However, now the court’s costs for striking a policy exceed the threshold  $k^* \equiv 1 - c$ , with the parameter fixed at  $k = 0.8$ . Figure 5 shows that anticipation of the court’s exercise of constitutional review still induces government to ‘auto-limit’ her policy choices, albeit only when it is particularly unlikely that government would remain in office to implement the ruling (indicated by the pooling equilibrium area at the left end of the top panel of Figure 5).

Similar to the previous two scenarios, as her chances of retaining office increase, government will no longer be deterred from passing policies contesting the court’s interpretation of the constitution when the issue at hand is salient (indicated by the dashed line in the top panel of Figure 5). However, notice that even on non-salient issues government will

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07 September 2011, see <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2011/bvg11-055.html>

take her chances and at times provoke confrontation with the court (indicated by the grey line in the top panel of Figure 5 within the area characterized by the partial pooling equilibrium). As her chances of retaining office for implementation increase, government considering a non-salient issue will gradually become more likely to mimic a state of the world in which the policy passes off as salient and provoke confrontation with the court (indicated by the slope of the grey line in the partial pooling equilibrium area).

In this scenario the court will begin to moderate its exercise of constitutional review even for moderate values of the parameter  $\pi$  and eventually fully defer to government when it is highly likely that government responsible for the reviewed policy would take charge of implementing its decision. The area characterized by the partial pooling equilibrium in Figure 5 reveals an interesting dynamic of courts' exercise of constitutional review when their diffuse public support is low. When electoral competition for office is high, the court appears to play an active role in the policy-making process, frequently striking government policy despite lacking comfortable levels of institutional legitimacy. Government's behaviour illustrated in the top panel of Figure 5, however, pre-empts conclusions that the court's apparent authority is consequential: Even for moderate levels of political competition and low-salience issues, government will tend to ignore the court's jurisprudence and hardly feel the judicial constraints on its policy choices. Figure 5 shows that a lack of diffuse public support and institutional legitimacy will not necessarily translate into deference to government, yet simply observing a court objecting government policy should not lead to conclusions that constitutional review is effective in preventing government from pursuing policies contesting constitutional rights.

### **3 Discussion and conclusion**

This paper set out to address seemingly contradicting perspectives on courts' influence over policy-making prominent in the literature on the judicialization of politics. On the one hand, courts are expected to project their authority and induce governments to 'auto-limit' their policy choices in anticipation of adverse court rulings. On the other hand, given we still frequently observe courts demand corrections to policies, citing violations of the constitution, courts exercising constitutional review appear to assume an activist role in the policy-making process. The paper introduced a formal theoretical model illustrating the political dynamics of constitutional review. The model shows that external constraints on courts' exercise of constitutional highlighted by the literature on strategic judicial

decision-making, namely the prospects of court curbing and a lack of immediate control over the implementation of their own decisions, can account for the ambiguous nature of courts' political authority.

Three lessons can be drawn from the paper's formal analysis. First, courts enjoying comfortable levels of institutional legitimacy and public support are generally unconstrained in their exercise of constitutional review. However, due to courts' implementation dilemma policy-makers won't be deterred from provoking confrontation with a court over salient policy issues, unless the formers' chances of remaining in office to take charge of implementing a constitutional review ruling are slim. Courts' lack of immediate control over the implementation of constitutional review rulings is the key to the empirical puzzle that policy-makers won't shy away from confrontation with the courts, even in politics in which courts are generally viewed as particularly powerful.

Second, even courts boasting high levels of institutional legitimacy are constrained in their exercise of constitutional review when called in to resolve high-profile policy issues featuring prominently in current political affairs. Courts' authority in the policy-domain works in the long run, when judicial decisions over policy are made years after the latter was adopted. However, the external constraints on courts often highlighted in the judicial politics literature will make their mark on constitutional review when courts are expected to resolve policy issue at the forefront of the current political agenda.

Finally, the model shows that courts' lack of institutional legitimacy will not directly translate into outright deference to government. Instead, courts' lack of institutional legitimacy materialises in fewer judicial constraints felt by policy-makers, with courts unable to deter government from pursuing policies contesting constitutional rights, even when electoral competition for office is high and policy issues are low in salience. These findings illustrate that courts' mere exercise of constitutional review, challenging government over policy, should not necessarily serve as an observable implication of courts' political authority. The finding also has implications for scholarship on measuring judicial authority and independence (see for example Linzer and Staton, 2015; Ríos-Figueroa and Staton, 2014). This literature generally distinguishes between courts' *de jure* and *de facto* independence, with the latter highlighting that "independence requires not only that judges resolve cases in ways that reflect their sincere preferences, but also that these decisions are enforced in practice even when political actors would rather not comply" (Ríos-Figueroa and Staton, 2014, 107). To estimate courts' authority vis-à-vis other branches of government, it may not be enough to consider how the latter respond to courts' rulings but how also courts

shape policy-makers behaviour prior to taking an active role in the policy-making process.

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## A Formal proofs

### A.1 Proof of Proposition 1

Suppose government chooses policy  $a$  if  $\omega = 1$  and policy  $b$  if  $\omega = 0$ . The court's posterior beliefs are given by  $Pr(\omega = 1 | a) = 1$  and  $Pr(\omega = 0 | a) = 0$ . The court chooses to strike policy  $a$  if  $-\pi - k \geq -1$ . Solving for  $\pi$  yields  $\pi \leq 1 - k$ . Given  $\pi \leq 1 - k$  and  $\omega = 1$ , government has no incentive to deviate from choosing policy  $a$  if  $\pi - c > 0$ . Solving for  $\pi$  yields  $\pi > c$ . Given  $\pi \leq 1 - k$  and  $\omega = 0$ , government has no incentive to deviate from choosing policy  $b$  if  $-c \leq 0$  or  $c \geq 0$ . A separating equilibrium exists if  $c < \pi \leq 1 - k$  and  $k < k^*$ , with  $k^* \equiv 1 - c$ .

### A.2 Proof of Proposition 2

Suppose government chooses policy  $a$  if  $\omega = 1$  and policy  $a$  if  $\omega = 0$ . The court's posterior beliefs are given by  $Pr(\omega = 1 | a) = p$  and  $Pr(\omega = 0 | a) = 1 - p$ . If government chooses policy  $a$ , the court chooses to uphold policy  $a$  if  $p(-\pi - k) + (1 - p)(-k) < -1$ . Solving for  $p$  yields  $p > (1 - k)/\pi$ . Given  $p \in (0, 1)$ , this condition is satisfied if  $\pi > 1 - k$ . Given the court always chooses to uphold policy  $a$ , government has no incentive to deviate from its prescribed strategy. A pooling equilibrium exists if  $\pi > 1 - k$  and  $p > (1 - k)/\pi$ .

### A.3 Proof of Proposition 3

Suppose government chooses policy  $a$  if  $\omega = 1$  and policy  $a$  with probability  $q(\pi)^*$  if  $\omega = 0$ . Suppose the court strikes policy  $a$  with probability  $r(c)^*$ . The court's posterior beliefs are given by  $Pr(\omega = 1 | a) = \frac{p}{p+q(1-p)}$  and  $Pr(\omega = 0 | a) = \frac{q(1-p)}{p+q(1-p)}$ . Playing a mixed strategy, the court is indifferent between striking and upholding if  $\frac{p}{p+q(1-p)}(-\pi - k) + \frac{q(1-p)}{p+q(1-p)}(-k) = -1$ . Solving for  $q$  yields  $q(\pi)^* = \frac{p(\pi+k-1)}{(1-k)(1-p)}$ .  $q \in [0, 1]$  requires that

$\frac{p(\pi+k-1)}{(1-k)(1-p)} \leq 1$ . Solving for  $p$  yields  $p \leq (1-k)/\pi$ . Given  $p \in (0,1)$ , this condition is satisfied if  $\pi > 1-k$ . If  $\omega = 0$ , government has no incentive to deviate from her mixed strategy if  $r(-c) + 1 - r = 0$ . Solving for  $r$  yields  $r(c)^* = 1/(1+c)$ . If  $\omega = 1$ , government has no incentive to deviate from choosing policy  $a$  if  $r(\pi - c) + 1 - r > 0$ . Solving for  $r$  yields  $r < 1/(1+c-\pi)$ . Plugging in  $r(c)^*$  and solving for  $\pi$  yields  $\pi > 0$ , which is always satisfied given  $\pi \in (0,1)$ . A partial pooling equilibrium exists if  $\pi > 1-k$  and  $p \leq (1-k)/\pi$ .

#### A.4 Proof of Proposition 4

Suppose government chooses policy  $b$  if  $\omega = 1$  and policy  $a$  if  $\omega = 0$ . Off the equilibrium path, arbitrary values can be assigned to the court's posterior beliefs, i.e.  $Pr(\omega = 1 | a) = \lambda$  and  $Pr(\omega = 0 | a) = 1 - \lambda$ . Off the equilibrium path, the court chooses to strike policy  $a$  if  $\lambda(-\pi - k) + (1 - \lambda)(-k) \geq -1$ . Solving for  $\lambda$  yields  $\lambda \leq (1-k)/\pi$ . Given  $\lambda \leq (1-k)/\pi$  and  $\omega = 1$ , government has no incentive to deviate from its prescribed strategy if  $0 \geq \pi - c$ . Solving for  $\pi$  yields  $\pi \leq c$ . Given  $\lambda \leq (1-k)/\pi$  and  $\omega = 0$ , government has no incentive to deviate from its prescribed strategy if  $0 \geq -c$  or  $c \geq 0$ . If  $k < k^*$ , i.e. if  $1 - k > c$  and  $\pi \leq c$ , then the condition  $\lambda \leq (1-k)/\pi$  is always satisfied and a pooling equilibrium exists if  $k < k^*$  and  $\pi \leq c$ . If  $k \geq k^*$  then the condition  $\lambda \leq (1-k)/\pi$  is always satisfied if  $\pi \leq 1 - k$  and a pooling equilibrium exists if  $k \geq k^*$  and  $\pi \leq 1 - k$ . ■QED