Signalling non-compliance threats: Political constraints on constitutional review

Existing literature has argued that courts reviewing acts of the elected branches are hamstrung by an enforcement problem. I offer a new perspective on how courts solve the tension that comes with their reliance on the elected branches for the efficacy of their judgements. I develop a formal model showing that lawmakers' pursuit of constitutionally controversial policies signals a credible non-compliance threat and helps courts to know when (not) to pick a fight with the elected branches. Original data from the German Federal Constitutional Court's review of federal laws adopted between 1977 and 2015 shows that the Court is less likely to strike a policy when lawmakers had ignored advice that the policy is unconstitutional. The article's findings have implications for debates on courts' strategic exercise of constitutional review and the judicialisation of policy-making.

Word count: 9,925

1. Introduction

Scholars of judicial politics have long recognised that courts reviewing the actions of the legislative and executive branches passively constrain governing majorities. Prudent lawmakers anticipate that their acts will be scrutinised by courts and amend (or auto-limit)

their policy choices when a judicial veto is likely (see Stone 1989; Stone Sweet 2000; Vanberg 1998; Brouard and Hönnige 2017).

But not all lawmakers sacrifice policy to preempt censure from courts. For instance, in December 2008, German lawmakers adopted an act allowing federal law enforcement agents to covertly monitor suspects' online activities. Lawmakers flouted advice from constitutional lawyers pointing out that the German Federal Constitutional Court had struck a state law containing virtually the same provisions only a few months before.[1] Several of the act's provisions were then challenged at the Court, which found them to be incompatible with the constitution and instructed lawmakers to re-legislate.[2] Nonetheless, constitutional law scholars soon after raised concerns that parliament's subsequent overhaul of the act merely paid lip service to the Court's decision and once again conflicted with the constitution.[3]

Why do lawmakers provoke confrontations with courts capable of striking their acts? How do courts respond when lawmakers pursue ostensibly unconstitutional acts? I offer a novel argument addressing these questions. In the *Federalist 78*, Hamilton (1961, 490) observes that courts are hamstrung by an enforcement problem and "must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgements." Despite lacking immediate control over the implementation of their rulings, courts are unlikely to shy away from every confrontation with legislatures and executives. However, existing literature claims that courts are attentive to signals of future non-compliance and avoid all too frequent tensions with the elected branches (see Clark 2010; Vanberg 2005; Whittington 2003; Bailey and Maltzman 2011). I develop a formal model, which shows that lawmakers' policy choices allow courts to update their prior beliefs of whether or not their decisions are at risk of non-compliance. I argue that lawmakers expecting their policies to

[1] See statement delivered by Prof Dr Hansjörg Geiger on the draft Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism at the German Bundestag's Committee for Internal Affairs, September 15, 2008, Innenausschuss: A-Drs 16(4)460 H, `http://webarchiv.bundestag.de/archive/2009/0626/ausschuesse/a04/anhoerungen/Anhoerung15/Stellungnahmen_SV/Stellungnahme_08.pdf`.

[2] See BVerfG, Judgment of the First Senate of 20 April 2016 - 1 BvR 966/09 -, paras. 1-360.

[3] See commentary in Verfassungsblog, a leading debate forum on German constitutional law and politics supported by the WZB Berlin Social Science Center (original in German), June 8, 2017. Der Umsturz kommt zu früh: Anmerkungen zur polizeilichen Informationsordnung nach dem neuen BKA-Gesetz, accessed May 9, 2019. `https://verfassungsblog.de/der-umsturz-kommt-zu-frueh-anmerkungen-zur-polizeilichen-informationsordnung`.

be unconstitutional but pursuing them nonetheless signal a credible non-compliance threat to courts. Lawmakers' choice to provoke confrontation then helps courts to know when to avoid bruising clashes with the elected branches.

I present evidence consistent with these theoretical expectations, drawing on original data from legislative proceedings in the German Bundestag and the German Federal Constitutional Court's review of federal laws adopted between 1977 and 2015. The theoretical argument and empirical evidence presented in this article offer a new perspective on how courts strategically choose when to pick a fight with the legislative and executive branches (Epstein and Knight 1998; Epstein and Jacobi 2010), and tap into a long-standing normative debate revolving around the role of courts in democratic polities and their ability to judicialise the policy-making process (Tate 1995; Stone Sweet 2000; Hirschl 2009).

The article proceeds as follows. The next section briefly reviews the existing literature on legislative-judicial relations and presents evidence from interviews with German lawmakers on the elected branches' anticipation of constitutional review. The third section introduces the formal model and discusses its comparative statics. The fourth section fields observational data from the German Federal Constitutional Court's exercise of constitutional review to evaluate support for the theoretical model's empirical implications. The article concludes with a discussion of the empirical findings and considers their normative implications.

2. Strategic anticipation in legislative-judicial relations

The existing literature on the separation of powers has highlighted an enforcement dilemma for courts lacking immediate control over the implementation of their own rulings. Vanberg (2001, 347) notes that "courts with the power to annul legislation or administrative acts must frequently rely on the willingness of other branches to implement their decisions because they may require a legislative or administrative response." Courts are uncertain about future compliance with their decisions as lawmakers enjoy some discretion when it comes to implementing judicial decisions (see Carrubba and Zorn 2010; Carrubba 2009; Staton and Vanberg 2008). Following a judicial veto, lawmakers may adopt "a substan-

tively equivalent policy to the one ruled unconstitutional" (Krehbiel 2016, 996). Further, lawmakers may evade compliance through informal and non-statutory arrangements, which continue to apply practices objected by a court (see Fisher 1993), or the (possibly indefinite) delay of implementation (Kapiszewski and Taylor 2013).

Recurring non-compliance with their decisions is a concern for courts intent on maintaining their institutional integrity. Hall (2014, 354) notes that "[f]requent nonimplementation of the Court's rulings might reduce its power and degrade its legitimacy over time." Courts' enforcement dilemma and motivation to protect their institutional integrity spawned a literature expecting courts to anticipate lawmakers' non-compliance and exercise constitutional review strategically (see Epstein and Knight 1998; Bergara et al. 2003; Gely and Spiller 1990).

This literature offers evidence of courts seeking out information to mitigate their uncertainty about the likelihood of non-compliance. Work by Vanberg (2001, 2005) suggests that the German Federal Constitutional Court evaluates the transparency of the political environment and self-restrains its exercise of constitutional review when it is unlikely that the public would observe (and hence, punish) lawmakers' non-compliance. Hall and Ura (2015, 819) find evidence that the U.S. Supreme Court "is less likely to invalidate important statutes that enjoy greater support among current lawmakers" (for similar findings, see Whittington 2007; Segal et al. 2011; Harvey and Friedman 2009; Bailey and Maltzman 2011). Clark (2009) argues that the U.S. Supreme Court mitigates its uncertainty about lawmakers' future compliance by taking cues from court-curbing bills introduced in Congress to gauge the state of public support for the Court.

Uncertainty about the future and strategic behaviour is not limited to courts, however. Rogers and Vanberg (2007, 443) argue that "under the probabilistic threat of litigation (with the possibility of a judicial veto), legislative majorities draft statutory provisions to be immune to the judicial veto" (for similar arguments, see Stone Sweet 2000; Blauberger 2012; Wasserfallen 2010). Lawmakers are advised to do so as a judicial veto comes with costs. Notwithstanding the public humiliation of being censored by a court, lawmakers have to allocate typically scarce resources and floor time in legislatures to amend the acts objected by courts (see Vanberg 1998).

Evidence from interviews with former members of the German Bundestag and federal government I conducted between May 2017 and April 2019 is consistent with this expectation and suggests that lawmakers anticipate the German Federal Constitutional Court's review of their policy choices, relying on evaluations of the Court's existing jurisprudence and independent expert testimonies heard during legislative proceedings.[4] However, anticipation of the Court's review does not necessarily translate into the sacrifice of important policy objectives, with one lawmaker commenting:

> "In the end, I need to ask myself, how great is the risk that I am willing to take? And if I am not prepared to take any risks, then I am limited in my leeway to create policy. In the end, it is us who are in charge of politics, it is us who are tasked with designing policy. I have always maintained that if the justices want to get into politics, then they will have to get themselves elected to parliament."

The statement emphasises a tension inherent to lawmakers' auto-limitation in the shadow of constitutional review. The choices of lawmakers anticipating review by a court reflect the extent to which lawmakers are willing to let courts constrain their policy-making. Some lawmakers may flinch at the prospects of being censored by a court and amend policies to minimise the risks of confrontation with the judiciary. However, others may be less willing to accept judicial constraints on their pursuit of policy and are prepared to contest a court's authority if necessary. It is this tension—and lawmakers' choices in light thereof—which is at the core of the formal theoretical model introduced in the next section.

3. A signalling game of constitutional review

I develop a formal model of incomplete and imperfect information that demonstrates how lawmakers' choice to pursue an ostensibly unconstitutional policy affects the decision-making of a court concerned about non-compliance. Prominent models of legislative-

[4] I assured my interviewees that I would reference evidence from our conversations in ways that would guarantee their anonymity. All statements are translated from German. Further details are discussed in Section A.1 of the supplementary material.

judicial relations capture lawmakers' uncertainty about future judicial decisions and incentives to comply with courts' orders. They show that lawmakers face incentives to auto-limit when a judicial veto of their policies is likely, as subsequent non-compliance is an unattractive option when lawmakers fear the public's backlash for flouting courts' decisions (Vanberg 1998, 2005; Clark 2010).

In the following, I make a simple yet consequential tweak to familiar models of legislative-judicial relations. I relax an implicit assumption that all lawmakers perceive the costs of non-compliance to be equally burdensome and let the valuation of a policy reviewed by a court vary across different 'types' of lawmakers. I distinguish between *non-compliant* lawmakers who value a policy enough to risk evading compliance should a court strike it, and *compliant* lawmakers who believe that the costs of non-compliance outweigh the benefits of keeping a policy on the books against the court's orders. Both types of lawmakers anticipate the court's review but respond differently to information suggesting that the court will strike their policy. As we will see, lawmakers' choices allow the court (albeit imperfectly) to update its prior beliefs about their types and whether or not a decision to strike policy would be at risk of non-compliance.

3.1. Model primitives

The game involves three players, Nature (N), a lawmaker (L) deciding whether or not to adopt a new policy, and a court (C) reviewing the policy. The sequence of play is shown in Figure 1.

At the beginning of the game, Nature makes two independent moves. First, Nature picks the lawmaker's type, $\theta \in \{E, \overline{E}\}$, choosing a non-compliant lawmaker who would evade the court's decision to strike her policy, $\theta = E$, with probability p, and a lawmaker who would comply with the court's decision, $\theta = \overline{E}$, with probability $1 - p$. Nature's choice of the lawmaker's type is only observed by the lawmaker herself. Second, Nature picks a state of the world, $\omega \in \{C, \overline{C}\}$, choosing the state in which the lawmaker's policy is unconstitutional, $\omega = \overline{C}$, with probability q, and the state in which the policy is constitutional, $\omega = C$, with probability $1 - q$. While the court is uncertain whether or not it is facing a non-compliant lawmaker, Nature's choice of the state of the world is only observed by

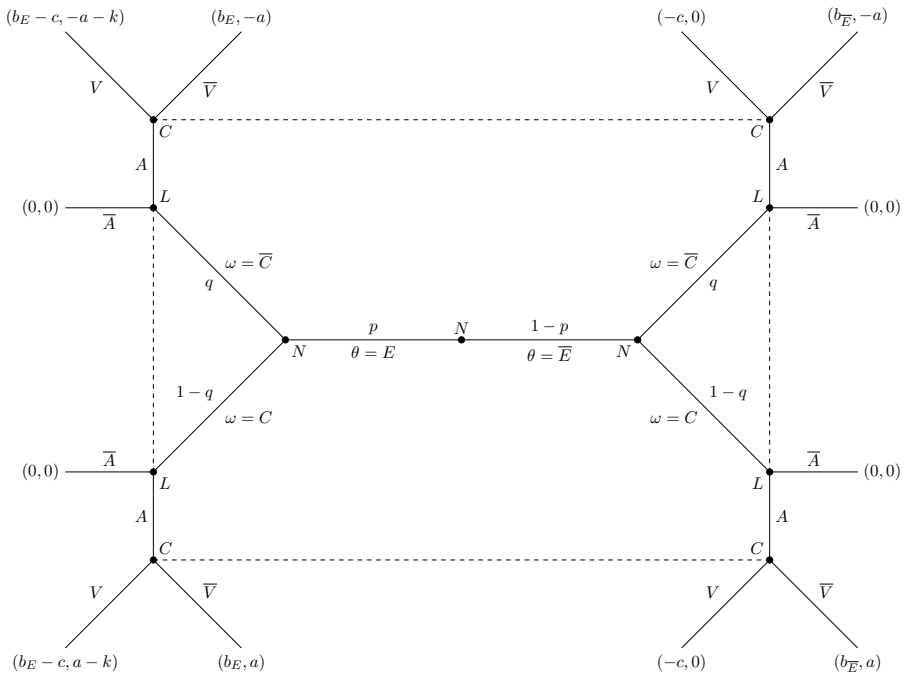

Figure 1: Payoffs for the lawmaker (L) are listed first, payoffs for the court (C) are listed second. Payoffs for L are subject to the condition $b_E \geq c > b_{\overline{E}} > 0$. Costs for legislators and the court are subject to the condition $c > 0$ and $k > 0$.

the court and the lawmaker is uncertain whether or not the policy is constitutional and therefore whether the court would prefer to strike it. The court's prior beliefs about the lawmaker's type are characterized by $Pr(\theta = E) = p$. The lawmaker's prior beliefs about the state of the world are characterized by $Pr(\omega = \overline{C}) = q$.

The lawmaker's uncertainty about whether or not her policy would conflict with the constitution does not imply that she is uninformed. Lawmakers have access to testimonies from independent experts and constitutional lawyers heard during committee proceedings as well as assessments from their own research staff, which inform their prior beliefs about the constitutionality of their policy choices. In light of such information, the lawmaker then needs to make a decision of whether or not to adopt a new policy, $d \in \{A, \overline{A}\}$, with A indicating that she decides to adopt the policy and $\overline{A}$ indicating that she chooses not to legislate. The game ends should the lawmaker choose not to adopt the policy. Otherwise, the court reviews the newly adopted policy and issues a judgment, $f \in \{V, \overline{V}\}$, deciding whether to strike, V, or uphold it, $\overline{V}$. After the court's move, the game ends and payoffs are revealed.

Regardless of her type, the lawmaker anticipates a cost c should the court strike her policy. The parameter c captures lawmakers' costs of re-legislating after the court struck their policy and the political fallout of being perceived to be in conflict with the court (see Vanberg 1998, 305). The court, on the other hand, expects to pay a cost k whenever the lawmaker evades compliance with its decision. The parameter k captures the assumption that political actors' non-compliance with judicial decisions undermines the institutional integrity of the court (see Hall 2014; Vanberg 2005).

Compliant and non-compliant lawmakers differ in their valuation of the policy. Whenever the adopted policy remains on the books after the game ends, either because the court chose not to strike it or because the lawmaker evaded compliance with the court's decision, the compliant lawmaker receives a payoff of $b_{\overline{E}}$, while the non-compliant lawmaker receives b_E. Let $b_E \geq c > b_{\overline{E}}$, and let only b_E be high enough such that the non-compliant lawmaker prefers to evade compliance with the court's decision to strike the policy.[5] Whenever $\omega = \overline{C}$, the court pays a cost a should the (thus unconstitutional) policy remain on the books after the game ends. Otherwise, whenever $\omega = C$, the court receives a payoff of a when the (thus constitutional) policy remains on the books. The parameter a captures the court's valuation of the policy, ceteris paribus preferring to strike the policy if it is unconstitutional, and preferring to uphold it when the policy is compatible with the constitution. Finally, for simplicity, let both types of lawmakers and the court receive a payoff of 0 should there be no change to the status quo, either because the lawmaker chose not to adopt the policy or because the court struck the new policy and the lawmaker complied with the decision.

A strategy for the lawmaker is a mapping from her type and prior beliefs about the constitutionality of the policy into a decision, $d : \theta \times (0,1) \rightarrow \{A, \overline{A}\}$. A strategy for the court is a mapping from the state of the world and its prior beliefs about the lawmaker's type into a judgment, $f : \omega \times (0,1) \rightarrow \{V, \overline{V}\}$.

[5] The distinction between the payoffs for the two types of lawmakers captures the costs of non-compliance, which are not explicitly modelled here. The model's assumption is that if faced with the choice of complying with a court order or not, unlike a compliant lawmaker, the non-compliant lawmaker strictly prefers not to comply.

3.2. Analysis

I seek perfect Bayesian equilibria (PBE) and describe equilibrium behaviour for the lawmaker and the court across all values of the model's parameters. All formal proofs are gathered in Section A.2 of the supplementary material. For simplicity, let the following critical thresholds for the lawmaker and court's prior beliefs be defined as $q^* \equiv \frac{b_{\overline{E}}}{b_{\overline{E}}+c}$ and $p^* \equiv \frac{a}{a+k}$. I begin the formal analysis with scenarios in which the lawmaker's prior beliefs that the policy is unconstitutional and the court's prior beliefs that it is facing a non-compliant lawmaker are sufficiently low, $q < q^*$ and $p \leq p^*$. In these scenarios, both types of lawmakers adopt the policy, while the court chooses to strike the policy whenever it finds that it is incompatible with the constitution.

Proposition 1. Given $q < q^*$ and $p \leq p^*$, a PBE exists in which the lawmaker plays $d = A$ regardless of her type, and the court plays $f = V$ if $\omega = \overline{C}$ and $f = \overline{V}$ if $\omega = C$.

In these scenarios, the court is unable to update its prior beliefs about the lawmaker's type, given both types play the same strategy. However, since it is sufficiently unlikely that the court is facing a non-compliant lawmaker, the court sees no reason not to strike a policy it considers unconstitutional. Lawmakers are undeterred in their pursuit of policy, given the risk of unconstitutionality is low, while the court is unconstrained by concerns about non-compliance in its decision-making.

This picture changes once the court's prior beliefs p surpass the threshold p^*. In these scenarios, both types of lawmaker again adopt the policy. However, given that it is now sufficiently likely that the court is facing a non-compliant lawmaker, the court is constrained in its decision-making and chooses to uphold policies it would otherwise prefer to strike.

Proposition 2. Given $p > p^*$, a PBE exists in which the lawmaker plays $d = A$ regardless of her type, and the court plays $f = \overline{V}$ regardless of the state of the world.

This pooling equilibrium provides a formal representation of the non-compliance trap that motivates courts to avoid all too frequent instances of non-compliance with their decisions (see Vanberg 2005; Carrubba et al. 2008; Staton and Vanberg 2008). Once the norm of lawmakers' compliance with the court's decisions has lost its force, the court

generally expects to face non-compliant lawmakers. Knowing that its decisions are at a high risk of non-compliance, the court then has an incentive to shy away from challenging lawmakers over their policies to avoid a further erosion of its institutional integrity, but simultaneously ceases to be an effective check on lawmakers' actions.

The model's final equilibrium captures scenarios in which the court generally expects the lawmaker to comply with its decisions, $p \leq p^*$, while the lawmaker now has sufficient reason to believe that the policy is unconstitutional, $q \geq q^*$.

Proposition 3. Given $p \leq p^*$ and $q \geq q^*$, a PBE exists in which the lawmaker plays $d = A$ if $\theta = E$. If $\theta = \overline{E}$, the lawmaker plays $d = A$ with probability $r = \frac{pk}{a(1-p)}$. The court plays $f = \overline{V}$ if $\omega = C$ and $f = V$ with probability $s = \frac{b_{\overline{E}}}{q(b_{\overline{E}}+c)}$ if $\omega = \overline{C}$.

In this partial-pooling equilibrium, the compliant lawmaker anticipates the court's review and makes a probabilistic choice to auto-limit its policy-making as there is a relatively high likelihood that the policy is unconstitutional. Given the compliant lawmaker nonetheless occasionally chooses to adopt the policy, the court is unable to perfectly update its prior beliefs about the lawmaker's type. The court itself therefore makes a probabilistic choice of whether or not to strike the policy.

3.3. Comparative statics

The formal model yields a variety of predictions characterising the behaviour of both lawmakers and courts. In the following, I centre my analysis of the model's comparative statics on the behaviour of the court. Figure 2 summarizes the model's predictions for equilibrium behaviour for the full space of both players' prior beliefs, p and q. The hatched space marks the equilibrium space in which the court is paralyzed by its concerns about non-compliance. The threshold $p^* \equiv \frac{a}{a+k}$ indicating when this space is reached is intuitive. The more the court cares about the policy it reviews, a, the less likely the court finds itself in a scenario where it always prefers to defer to the lawmaker. However, the space marking the equilibrium in which the court is fully constrained increases with the costs of lawmakers' non-compliance for the court, k.

Moving to the bottom quadrants in Figure 2, the model offers a new insight into how the

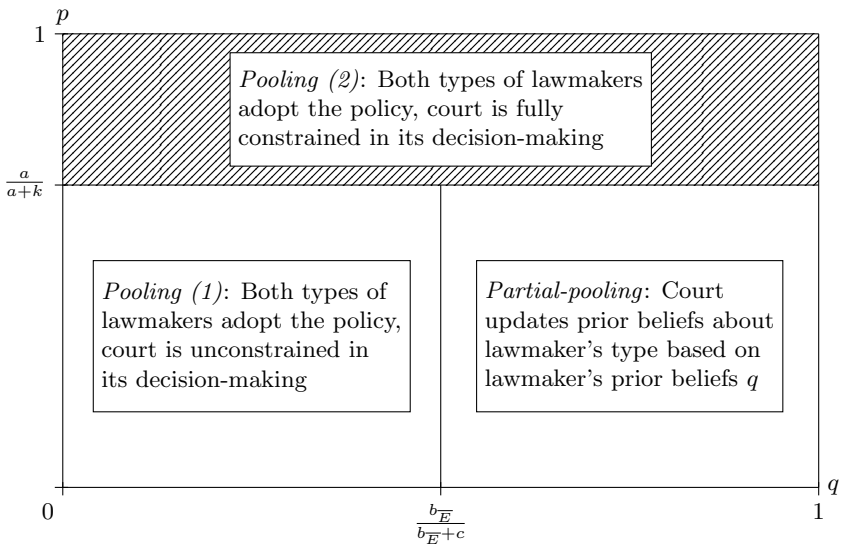

Figure 2: Equilibrium predictions. On the vertical axis, p denotes the court's prior beliefs of facing a non-compliant lawmaker. On the horizontal axis, q denotes the lawmaker's prior beliefs that the policy is unconstitutional. The parameter c denotes the lawmaker's cost of having policy struck by the court. The parameter k denotes the costs of non-compliance to the court's institutional integrity. $b_{\overline{E}}$ denotes the non-compliant lawmaker's valuation of the policy.

lawmaker's choice in light of her prior beliefs about the constitutionality of policy reflects in the court's decision-making. In the bottom-left quadrant, the court is unconstrained by concerns about non-compliance and chooses to strike the policy whenever Nature's draw reveals that it is unconstitutional. However, this equilibrium only holds as long as lawmakers have few reasons to expect that the court would strike their chosen policy.[6]

The formal model's main result, which motivates the empirical analysis in the following section, is captured by the bottom-right quadrant. Here, the lawmaker has reason to expect that the court would prefer to strike her chosen policy. The model shows that should the lawmaker choose to legislate nonetheless, the court strikes the chosen policy with probability $s = \frac{b_{\overline{E}}}{q(b_{\overline{E}}+c)}$. Note that this probability decreases in q, the lawmaker's prior beliefs about the constitutionality of her chosen policy. In other words, the model predicts that the court is less likely to strike a policy adopted by lawmakers who had reason to expect that it would conflict with the constitution. The intuition behind this

[6]Note that the threshold $\frac{b_{\overline{E}}}{b_{\overline{E}}+c}$ increases with the costs the lawmaker expects to pay should the court strike her policy, c, but decreases with the non-compliant lawmaker's valuation of the policy $b_{\overline{E}}$. Put simply, the space in which the court makes an unconstrained decision decreases as the (non-compliant) lawmaker's valuation of the policy increases.

finding is the following. A compliant lawmaker who has reason to believe that a policy is unconstitutional should not risk bearing the costs of having her policy struck by the court, given she would ultimately comply with the court's decision. Consequently, a lawmaker dismissing information that her proposed policy is unconstitutional credibly signals a non-compliant type to the court.[7]

To summarise, just as courts anticipate lawmakers' responses to their rulings, lawmakers anticipate that courts review their policies. Lawmakers are ultimately uncertain about the direction of future court decisions, but legislate with access to information about a proposed policy's constitutionality. Whenever lawmakers legislate despite information suggesting that their policies conflict with the constitution, the model expects courts to interpret such choices as credible signals of non-compliance threats and strategically self-restrain their review of policy.

4. Application: Constitutional review in Germany

In the following, I field observational data from the German Federal Constitutional Court's reviews of the constitutionality of federal laws to evaluate empirical support for the theoretical model's main comparative statics. The GFCC has frequently been described as one of the most powerful constitutional courts, enjoying comfortable reservoirs of institutional support among the German public (see for example Kommers 1994; Stone Sweet 2000; Landfried 1995; Gibson et al. 1998). Based on the Court's popularity, we have reason to expect that non-compliance with the GFCC's orders is costly, and that elected officials typically face incentives to avoid confrontations with the Court (see Brouard and Hönnige 2017).

However, quantitative and qualitative evidence presented in existing literature on the GFCC's exercise of constitutional review of federal and state laws is consistent with claims that the Court is nonetheless concerned about non-compliance (Vanberg 2001, 2005; Krehbiel 2016). German lawmakers' evasion of compliance with the GFCC's jurisprudence—while overall uncommon—is frequent enough for the GFCC to be attentive to signals of

[7] But note that the equilibrium shows that given the court plays a mixed strategy, the compliant lawmaker is not always deterred from adopting the policy and plays a mixed strategy herself.

credible non-compliance threats. Accordingly, the German case reflects an environment in which the theoretical model would expect the GFCC to draw on lawmakers' choices in light of information about the constitutionality of their policies to anticipate risks of non-compliance.

4.1. Data and research design

Cases heard by the GFCC involving the constitutionality of federal laws are almost always concerned with specific legislative provisions. The constitutional compatibility of a legislative provision can be challenged via three different routes. Lower courts may refer legislative provisions for review to the GFCC should they believe that their application in a dispute in court would be incompatible with the constitution. Further, the federal government, state governments or one quarter of the German Bundestag's members can refer legislation for review to the GFCC even in the absence of a concrete dispute in court. Finally, individuals may challenge the constitutionality of legislation through constitutional complaints once they have exhausted all other legal remedies, provided the challenged law affects them personally, presently and directly.

To illustrate, in 2009 a group of prisoners filed constitutional complaints concerning a provision of the 1998 Act to Combat Sexual Offences and Other Dangerous Criminal Offences, which authorised the continuance of preventive detention even in the case of detainees whose originating criminal offences were committed before the act had entered into force. The Court then considered whether the challenged provision was compatible with the German constitution, the Basic Law, and eventually struck (and thereby effectively nullified) the provision in question.[8]

The units of analysis in my data are the legislative provisions challenged at the GFCC. These provisions are nested in federal laws, and different provisions from the same law may be challenged in different cases heard by the Court. Drawing on data provided by the Constitutional Court Database (CCDB, Engst et al. 2019), I identified the 417 legislative provisions contained in 275 federal laws adopted by the German Bundestag between 1977 and 2015, which were subsequently challenged at the GFCC.

[8]See BVerfG, Judgment of the Second Senate of 04 May 2011 - 2 BvR 2365/09 -, paras. 1-178.

4.1.1. Outcome variable

For each legislative provision, I then followed operationalizations employed by Vanberg (2001) and recorded whether or not the GFCC struck the provision in question. The outcome variable in my analysis is binary, with $Strike = 0$ indicating that the Court chose to uphold a provision, and $Strike = 1$ indicating otherwise. There is little indication that the GFCC generally exercises self-restraint when reviewing the acts of the elected branches. Of the 417 provisions adopted between 1977 and 2015 which were later referred for review to the GFCC, 213 provisions (51%) were eventually struck by the Court.

4.1.2. Explanatory variable: Signalling non-compliance threats

To evaluate empirical support for the theoretical model's main comparative statics, I require a measure capturing whether lawmakers had received but ultimately ignored credible advice that a proposed policy is incompatible with the constitution. The model expects that such behaviour serves as a signal, allowing courts to distinguish non-compliant from compliant lawmakers, and hence reflects in their choice to strike the policy in question.

Here, I turned to statements lawmakers issued during final parliamentary debates and in voting declarations, expressing concerns that a proposed policy would conflict with the constitution. Lawmakers often reference testimonies from constitutional law scholars heard during committee hearings and refer to unresolved constitutional issues with legislative provisions to justify their opposition to the latter. Consider the following example of a lawmaker voicing constitutional concerns about a federal government's planned reform of inheritance tax law:

> Christine Scheel (Greens): For today's vote, you submitted a highly complex piece of legislation, envisioning preferential treatment for some citizens and disadvantages for others. I'm predicting that owing to its unconstitutionality—this has been widely discussed in this chamber—this legislation will end up in Karlsruhe [*the GFCC's seat*]. It doesn't bode well for parliamentary democracy if legislation is passed, despite knowing it fails to conform with our constitutional

guidelines.[9]

To identify such concerns, I accessed the transcripts of the final parliamentary debates of all 275 federal laws containing the challenged provisions in my data, available through the Bundestag's documentation system. I restricted my attention to final plenary debates and voting declarations as lawmakers no longer had an opportunity to alter a provision's text at this stage of the legislative proceeding.[10] I then defined a set of keywords to search these documents for lawmakers' assessments of the constitutionality of legislative provisions.[11] Where lawmakers' had voiced constitutional concerns, I assessed whether the provision in question matched the provision later reviewed by the Court and excluded concerns referring to provisions that were not part of the case at the GFCC. Lawmakers' concerns recorded in my data are therefore tailored to specific provisions.[12]

I then identified party affiliations of those lawmakers who had voiced constitutional concerns and determined whether they served as members of the current governing coalition or the parliamentary opposition. Figure 3 plots distributions of the numbers of legislative provisions which had been contested as unconstitutional by lawmakers of the parliamentary opposition and governing majority, respectively. Further, Table 1 provides descriptive statistics for the counts of lawmakers voicing constitutional concerns, again distinguishing between lawmakers of the governing coalition and lawmakers of the opposition, as well as concerns voiced in debate statements and voting declarations. Unsurprisingly, Figure 3 and Table 1 show that lawmakers on the opposition benches tend to (at least publicly) voice their constitutional concerns more frequently than their colleagues of the governing

[9] Translated from German, excerpt from the second reading of the 2008 Act Reforming Inheritance and Valuation Tax in the German Bundestag, 27 November 2008, 2. Beratung: BT-PlPr 16/190, http://dipbt.bundestag.de/dip21/btp/16/16190.pdf.

[10] The Bundestag typically holds three readings on federal legislation, with final plenary debates taking place at the second reading immediately followed by voting procedures in the third reading without debate. To count lawmakers' constitutional concerns, I generally referred to transcripts of plenary debates (including voting declarations) in the second reading. However, where lawmakers continued the debate into the third reading, transcripts from the third reading were included. Further, where federal legislation was adopted after a conciliation committee had submitted a revised draft after the upper chamber's rejection of the original draft, I only considered the Bundestag's debate transcripts concerning the revised draft.

[11] The list of keywords included the stemmed German terms for constitutionality (`verfass`), constitutional (or fundamental) rights (`grundrech`) and the German constitution, the Basic Law (`grundge`).

[12] Section A.3 in the supplementary material discusses the coding procedure in detail, along with several illustrative examples.

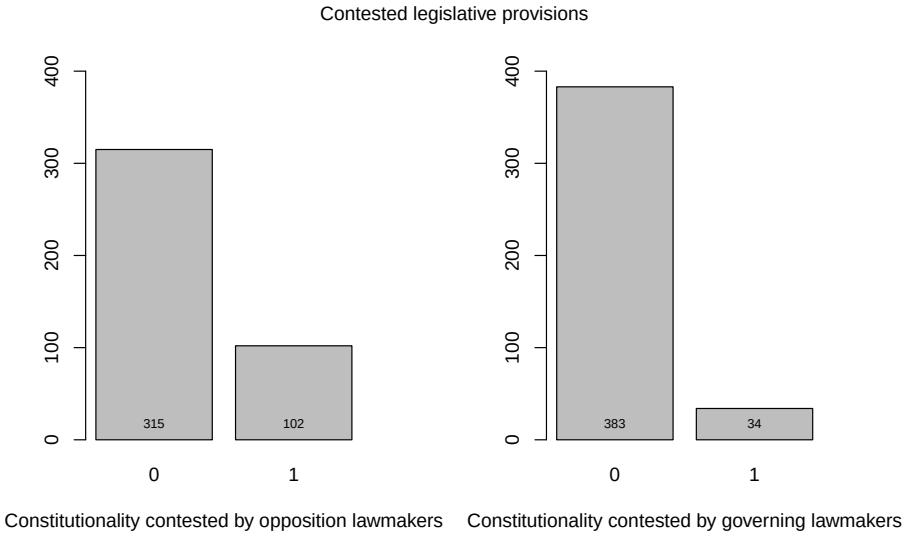

Figure 3: Numbers of legislative provisions contested as unconstitutional by lawmakers of the parliamentary opposition and governing majority, 1977-2015 (N417).

	Mean	SD	Min.	Max.
Debate statements (governing)	0.08	0.87	0	18
Voting declarations (governing	0.87	7.98	0	112
Debate statements (opposition)	0.54	1.33	0	9
Voting declarations (opposition)	1.77	13.10	0	110

Note: Descriptive statistics for the number of lawmakers' debate statements and voting declarations referencing constitutional concerns about legislative provisions contained in subsequently challenged federal laws, 1977-2015 (N417).

Table 1: Descriptive statistics

majority.

In the following, I leverage information on lawmakers' political affiliations to construct a measure for lawmakers' signals of credible non-compliance threats. Out of the 417 legislative provisions challenged at the GFCC, 102 had been considered unconstitutional by at least one lawmaker of the parliamentary opposition. In contrast, only 34 of these provisions had evoked constitutional concerns from members of the governing coalition. In other words, members of the governing coalition voicing constitutional concerns to contest provisions of federal law are rather exceptional events, arguably with implications that reach beyond the chambers of parliament.

Lawmakers of the governing coalition likely take decisions to break with party discipline and publicly accuse their political allies of violating the constitution carefully. Public disagreement within governing coalitions over the constitutionality of policy provides the political opposition with opportunities to discredit the government in the eyes of the electorate, as voters "are likely to care not only about *policy* but, also about *process*, that is, they expect politicians and parties to play by the rules" (Vanberg 1998, 305). Accordingly, I expect that governing lawmakers—unlike members of the parliamentary opposition—are less likely to employ claims of unconstitutionality as instruments of political opportunism and voice concerns when they have sufficient reason to believe that a proposed policy is in fact incompatible with the constitution.[13]

Given that constitutional concerns recorded in my data did not result in changes to the legislative provision in question, I interpret concerns voiced by members of the governing coalition as evidence of lawmakers ignoring credible advice that a policy is incompatible with the constitution. Following this logic, the main explanatory variable of interest, *Contested by governing lawmaker*, is binary and takes on the value 1 whenever at least one lawmaker of the current governing coalition contested a provision's constitutionality, and takes on the value 0 otherwise.

Note that the main explanatory variable captures governing lawmakers' *public* contestation of legislative provisions' constitutionality.[14] As such, lawmakers' choice to ignore credible advice can serve as a signal to other actors, including the GFCC. Justices at the GFCC are supported by a team of law clerks and are typically well-informed about the legislative proceedings that produced the provisions they review (see also McCubbins et al. 1992). Interviews conducted with former justices and law clerks of the GFCC between May 2017 and April 2019 highlighted that the Court carefully considers the parliamen-

[13] Evaluating the sincerity of constitutional concerns voiced by lawmakers of either the parliamentary opposition or the governing coalition is inherently difficult. Even governing lawmakers may instrumentalize public displays of constitutional concerns for political gains when constituent interests provide incentives for lawmakers to take a stand against government policy. Section A.3 in the supplementary material offers a closer look at the affiliations of the lawmakers who had contested government policies' constitutionality.

[14] Observations were the variable *Contested by governing lawmaker* takes on the value 0 capture one of two scenarios. One the one hand, no governing lawmaker may have had constitutional concerns about the provision in question. On the other hand, governing lawmakers may have had constitutional qualms but chose not to make their concerns public, and the variable is therefore likely to miss actual instances of disagreement over the constitutionality of policy within governing coalitions.

tary documentation of legislative proceedings for reviewed federal laws, as comprehending parliament's motives for legislating forms part of the GFCC's methods of interpretation.[15]

To summarise, members of the governing coalition voicing—albeit in vein—constitutional concerns about government legislation signal their colleagues' (un)willingness to let constitutional norms constrain their policy-making, in turn allowing the GFCC to gauge the risks of future non-compliance when reviewing these policies. In the following, I employ standard econometric tools to evaluate whether signals of lawmakers' non-compliant types induce the GFCC to exercise strategic self-restraint in its reviews of federal law.

4.1.3. Empirical strategy

I estimate logistic regression models including the variable *Strike* as the outcome variable and the variable *Contested by governing lawmaker* as the main explanatory variable of interest. To account for the hierarchical structure of the data, with challenged provisions nested in federal laws, all regression models include random effects, allowing intercepts to vary across federal laws.[16]

Let N denote the number of observations (i.e. challenged provisions, $N = 417$), J denote the number of federal laws ($J = 275$) and K denote the number of explanatory and control variables included in the model, with the latter further discussed below. Let $\boldsymbol{X}$ denote the $N \times K$ data matrix and $\boldsymbol{\beta}$ denote the $K \times 1$ vector containing the regression coefficients for the explanatory and control variables. The $N \times J$ matrix $\boldsymbol{Z}$ then identifies the corresponding federal law for each observation.[17] The $J \times 1$ vector $\boldsymbol{\gamma}$ contains the random variation on the intercept α across federal laws (i.e. the random effects). Accordingly, the $N \times 1$ vector

$$\boldsymbol{\eta} = \alpha + \boldsymbol{X}\boldsymbol{\beta} + \boldsymbol{Z}\boldsymbol{\gamma}$$

[15] Further details on the interviews conducted with justices and law clerks at the GFCC are provided in Section A.1 of the supplementary material.

[16] An alternative to the partial-pooling approach of a multilevel analysis involving random variation on the intercept across federal laws would be a complete pooling approach, ignoring differences between federal laws. Section A.4 in the supplementary material provides complete-pooling estimates for the main regression models discussed here for reference.

[17] Each column of the matrix $\boldsymbol{Z}$ is a binary variable indicating whether the federal law contained the challenged provision or not.

$$\gamma_j \sim N(\mu_\gamma, \sigma^2_\gamma) \quad \text{for} \quad j = 1, \ldots, J$$

contains the log-odds of a court strike for each challenged provision. The probability of provision i being struck by the court is then defined as

$$\Pr(Strike_i = 1) = \frac{exp(\eta_i)}{1 + exp(\eta_i)}$$

The regression analyses allow for comparisons of the probabilities of observing GFCC strikes across provisions with and without lawmakers signalling a credible non-compliance threat, conditional on a variety of other observed characteristics (i.e. the control variables). The GFCC may choose to strike a provision either because it simply finds no violations of the constitution or because it exercises strategic self-restraint. While it is difficult to disentangle these motivations, the theoretical model's comparative statics imply that the probability of observing strikes should be lower when lawmakers had signalled a credible non-compliance threat, relative to reviews of provisions in the absence of such signals.

Provisions contested by governing lawmakers are exceptional in several respects and potential outcomes are likely to differ for provisions with and without such signals. Most importantly, individual governing lawmakers may be more likely to contest government policy drafted by an ideologically heterogeneous coalition of political parties. At the same time, the Court is likely to tread more carefully when reviewing policy enjoying support from lawmakers of a variety of political colours. In such scenarios, evidence of the Court's strategic self-restraint may as well be attributed to the Court refraining from challenging acts of a broad coalition of interests in parliament (see for example Hall and Ura 2015), rather than government signalling its unwillingness to sacrifice important policy objectives. To mitigate selection bias on the regression coefficient for the main explanatory variable *Contested by governing lawmaker*, I therefore control for whether the federal law containing the challenged provisions had been proposed by a coalition of parties including both the main centre-right CDU/CSU as well as the centre-left SPD (*Cross-party proposal* = 1) or not (*Cross-party proposal* = 0).[18]

[18]The CDU/CSU and SPD either legislated together as part of a so-called grand coalition (accounting for 38 provisions in my data), or as one of them jointly drafted a policy proposal with the governing coalition while serving in the opposition (accounting for 22 provisions in my data).

To further address the concern that the actual mechanism underlying any evidence of the Court's self-restraint is the broad support among lawmakers for a legislative provision, an additional control variable would ideally consider the share of lawmakers eventually voting in favour of the law containing the challenged provision. Measuring lawmakers' support for a provision based on voting records is difficult, as the Bundestag adopts the majority of its laws by a show of hands without an official tally of votes. Note however, that even if such a measure existed, it would not come without its own problems. Legislative provisions harbouring constitutional violations are simply less likely to garner broad support from lawmakers. Evidence of the Court generally upholding provisions that enjoy broad support in parliament may well be traced to the fact that these provisions are—at least constitutionally—uncontroversial. By relying on a measure of lawmakers dismissing their political allies' constitutional concerns, my analysis sidesteps this source of selection bias.

An additional concern is that governing lawmakers tend to contest legislation in particular policy areas, while the GFCC's decision-making likewise varies systematically across these areas. Lawmakers may be more likely to identify ostensible constitutional violations in policy areas where an extensive body of GFCC jurisprudence already exists, while the GFCC may be less likely to add further constitutional constraints on lawmakers' leeway to create policy when it had detailed these constraints in numerous previous cases. I therefore control for the *Policy area* the challenged provision concerned, by recording which parliamentary committee drafted the provision in question.[19]

Finally, to further evaluate whether observable implications of the Court's self-restraint can be attributed to lawmakers' flouting of *credible* advice that a provision is incompatible with the constitution, I also consider the effect of a binary indicator capturing whether lawmakers of the parliamentary opposition had contested the provision's constitutionality (*Contested by opposition lawmaker* = 1) or not (*Contested by opposition lawmaker* = 0) in my analyses.

[19]Based on the policy assignments of parliamentary committees I identify eleven policy areas: *economy/business*, *education/research*, *environment*, *family*, *healthcare*, *interior*, *labour/social insurance*, *public finances*, *rights*, *transport/public infrastructure* and a residual category *other*.

	Model 1			Model 2			Model 3		
	Mean	95% HPD		Mean	95% HPD		Mean	95% HPD	
Contested by governing lawmaker	−0.74	[−1.65;	0.12]	−0.98	[−1.95;	−0.07]	−1.19	[−2.37;	−0.10]
Contested by opposition lawmaker				0.58	[−0.00;	1.18]	0.53	[−0.11;	1.22]
Cross-party proposal							0.61	[−0.23;	1.52]
Observations	417			417			417		
Number of groups (Federal laws)	275			275			275		
Var: Intercept (Federal laws)	0.09			0.09			0.22		

Note: Outcome variable is the Court's decision to strike the challenged provision. Coefficient estimates are posterior means along with 95% highest probability densities. Model 3 includes fixed-effect controls for policy areas (not shown). All models include random effects allowing intercepts to vary across across federal laws ($J = 275$).

Table 2: Regression coefficients

4.2. Results

I follow advice by Gelman and Hill (2007) on estimating multi-level regression models with relatively small datasets and employ a Bayesian approach to estimate the models' parameters via Markov Chain Monte Carlo sampling. I rely on the **rstanarm** package for the statistical software R (Stan Development Team 2016). I specify **rstanarm's** weakly informative default (normal) prior distributions and run four chains with 1000 warm-up iterations and 5000 sampling iterations, yielding a total of 20,000 draws describing the model parameters' posterior distributions. Upon inspection, none of the parameters' $\hat{\text{R}}$ values exceed 1.004, well below critical thresholds defined by Gelman and Rubin (1992).

Table 2 reports the means of the estimated coefficients' posterior distributions, along with 95% highest probability densities (HPD). Model 1 considers the bivariate relationship between the outcome variable *Strike* and the explanatory variable *Contested by governing lawmaker*. The coefficient's posterior mean is negative, with the upper boundary of the 95% HPD just overlapping zero. The main explanatory variable's coefficient remains negative and is now clearly distinguishable from zero once the control variable for constitutional concerns voiced by lawmakers of the opposition is added in Model 2. This evidence implies that while the GFCC responds with self-restraint when reviewing provisions which had been contested by governing lawmakers, the Court ceteris paribus appears more likely to strike provisions which had been contested as unconstitutional by the parliamentary opposition.

How can we interpret this pattern? First, the variable *Contested by opposition lawmaker* arguably allows us to identify constitutionally uncontroversial legislative provisions. Provisions which were not contested by opposition lawmakers—at least with regard to their constitutionality—are less likely to harbour constitutional violations than any other provisions, explaining the positive coefficient for *Contested by opposition lawmaker*. Second, because constitutional concerns voiced by members of the parliamentary opposition are more common and certainly more expected than concerns coming from within the governing coalition, governing lawmakers' dismissals of the opposition's concerns are less likely to serve as evidence of lawmakers ignoring *credible* advice on a policy's constitutionality. In other words, because governing lawmakers have fewer incentives to publicly voice constitutional concerns about government policy out of political opportunism than their colleagues of the parliamentary opposition, dismissals of such concerns are more likely to project a signal that lawmakers are undeterred by questions concerning constitutionality in their pursuit of policy objectives. The analyses' results suggest that such a signal is not lost on the Court, which subsequently strategically self-restrains its exercise of constitutional review. This evidence is consistent with the formal model's empirical implications.

Results for Model 3 show that the coefficient for the variable *Contested by governing lawmaker* remains robust and negative while clearly distinguishable from zero once the additional control variables *Cross-party proposal* and *Policy area* are introduced to mitigate selection bias. The posterior mean of the coefficient for *Contested by opposition lawmaker* remains positive, yet the lower boundary of its 95% HPD now just overlaps zero.

To provide a substantive interpretation of the results presented here, I compare the predicted probabilities of observing a GFCC strike for provisions which had been contested by a governing lawmaker and provisions which had not been contested by a governing lawmaker. Given the random effects bear on the results, I calculate average marginal probabilities indicating the average change in the probability of observing $Strike = 1$ across all groups (i.e. federal laws) while manipulating values on the main explanatory variables of interest.[20] Figure 4 plots average marginal probabilities along with the 2.5th and 95th

[20] Specifically, I hold an independent variable of interest k in the data-matrix $\boldsymbol{X}$ constant at a specific value x to create the matrix $\boldsymbol{X_i}$. Let $\boldsymbol{B}$ denote a matrix containing fixed-effect coefficient estimates and $\boldsymbol{\Gamma}$ denote a matrix containing random-effect coefficient estimates from the Bayesian model's sampling

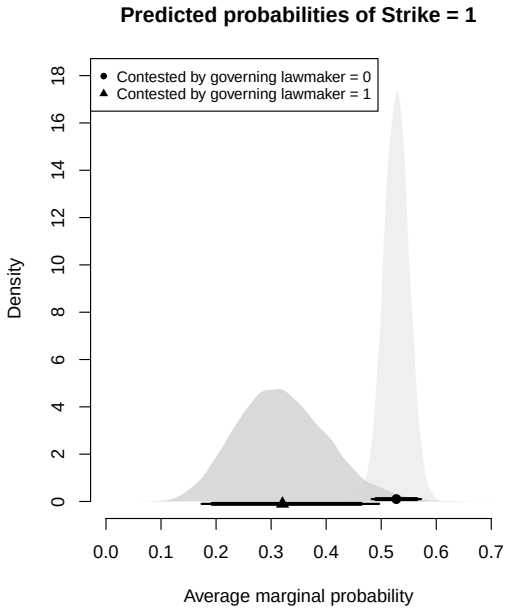

Figure 4: Distributions of average marginal predicted probabilities of *Strike* = 1. Predicted probabilities were calculated with coefficients from Model 3 (N417).

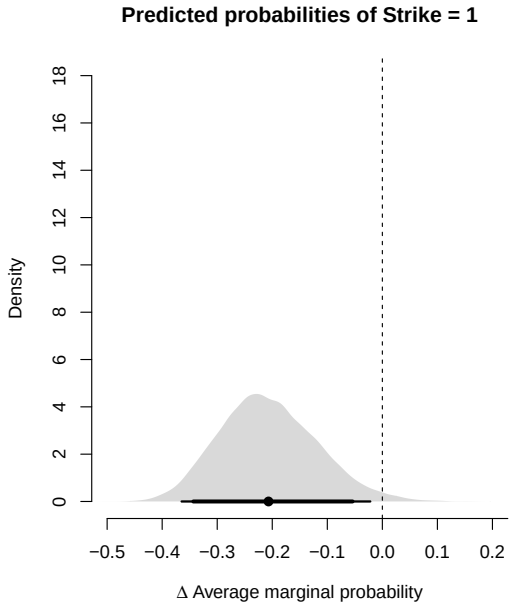

Figure 5: Distribution of difference in average marginal predicted probabilities between *Contested by governing lawmaker* = 0 and *Contested by governing lawmaker* = 1.

percentiles of their distributions (indicated by thinner lines, 5th and 90th percentiles are indicated by thicker lines) for *Contested by governing lawmaker* = 0 and *Contested by governing lawmaker* = 1. The distribution of the average difference in predicted probabilities for these two scenarios is plotted in Figure 5. The probability of observing a GFCC strike is on average about 53% when *Contested by governing lawmaker* = 0. This probability drops to roughly 32% when *Contested by governing lawmaker* = 1. In other words, while the GFCC finds about half of the provisions which had not been contested by the governing coalition's own members to be unconstitutional, the Court strikes only a third of the provisions it reviews when governing lawmakers' constitutional concerns had been ignored.

The results of the empirical analyses reported here are as substantively interesting as they are counter-intuitive. Assuming that governing lawmakers had expressed genuine, well-founded concerns about a provision's constitutionality, we would expect the Court to

iterations. I then calculate $\boldsymbol{H_i} = \alpha + \boldsymbol{X_i}\boldsymbol{B} + \boldsymbol{Z}\boldsymbol{\Gamma}$. The matrix $\boldsymbol{H_i}$ contains the predicted log-odds for each sampling iteration across the observations in $\boldsymbol{X_i}$. I transform these into predicted probabilities through $\boldsymbol{M_i} = \frac{exp(\boldsymbol{H_i})}{1+exp(\boldsymbol{H_i})}$. I then calculate the expectation of average marginal probabilities across the sampling iterations and their 2.5th and 97.5th percentiles.

be more (not less) likely to strike it as unconstitutional. The formal theoretical model introduced above provides an explanation for this counter-intuitive pattern: Lawmakers dismissing advice that their policies are unconstitutional signal a credible non-compliance threat to the Court. Knowing that confrontations with the judiciary may turn out costly for themselves as well, lawmakers' choice signals that they are prepared to bear these costs and unwilling to sacrifice their policy objectives despite anticipating the Court's constitutional review. Consistent with expectations that courts seek to avoid frequent non-compliance with their rulings (Carrubba et al. 2008; Carrubba and Zorn 2010; Clark 2009; Larsson and Naurin 2016), the empirical evidence presented here suggests that the GFCC then strategically self-restrains its exercise of constitutional review.

5. Discussion and conclusion

Courts reviewing the acts of the legislative and executive branches are hamstrung by an enforcement problem and frequent non-compliance with their decisions threatens their institutional integrity. In this article, I present a new perspective on how courts strategically choose when to challenge lawmakers, linking claims of courts' compliance dilemma and lawmakers' anticipation of constitutional review (see Stone 1989; Stone Sweet 2000; Vanberg 1998, 2005; Clark 2010).

Existing literature has highlighted that courts care about how lawmakers respond to their decisions (Whittington 2003; Carrubba et al. 2008; Carrubba and Zorn 2010; Staton 2010). In this article, I show that courts anticipate lawmakers' responses by turning to the past. Not all lawmakers are risk-averse and prepared to sacrifice important policy objectives out of concerns that their policies will be struck by a court. The formal model shows that lawmakers who are undeterred in their pursuit of policy despite high risks of a judicial veto, signal a credible non-compliance threat to courts. Given a judicial veto comes with costs, lawmakers willing to respect the court's decision should be less likely to risk a confrontation in the first place. In turn, lawmakers' choice *not* to auto-limit their policy-making thus allows courts to anticipate non-compliance and to know when to self-restrain their exercise of constitutional review.

Evidence from the statistical analyses of the German Federal Constitutional Court's review of federal law is consistent with the formal model's comparative statics. However, despite covering more than three decades of the German Federal Constitutional Court's jurisprudence on the constitutionality of federal law, the dataset used for my analyses is relatively small and there is relatively little variation on the main explanatory variable of interest, namely governing lawmakers contesting the constitutionality of their political allies' policy proposals. While this lack of variation raises legitimate concerns about the robustness of my findings and calls for replications of my analyses with additional data, possibly beyond the German case, the relatively small number of legislative provisions contested by governing lawmakers in itself is neither unexpected nor is it inconsistent with the empirical implications of the theoretical model.

We have reason to expect that lawmakers are prepared to flout constitutional constraints on their actions only when the value of their pursued policies outweighs the costs of evading compliance with court decisions. In the German case, where the Court enjoys widespread support among the public (and hence, the electorate), it is reasonable to expect that these instances are limited to a smaller number of key policy objectives. For instance, German governing lawmakers unsuccessfully contested the constitutionality of reforms of asylum regulations in the early 1990s in the wake of the conflict in former Yugoslavia, the strengthening of law enforcement's competences to combat modern international terrorism after the bombings in Madrid and London in 2004 and 2005, and authorisations to grant financial aid to ailing EU member states to preserve the stability of the EU's currency union during the euro-crisis.

Neither the theoretical model nor the empirical evidence presented here imply that courts will *always* shy away from challenging lawmakers over such significant yet constitutionally controversial policy reforms. However, just as prudent lawmakers anticipate constitutional review, courts are well-aware that the faithful implementation of their decisions relies on the cooperation of the elected branches and that frequent intervention on key policies increases the likelihood of non-compliance, which undermines their institutional integrity. The article's central tenet is that lawmakers' dismissal of advice on the unconstitutionality of their policies helps courts to solve their dilemma of knowing which of their decisions

are at risk of non-compliance and thus to effectively manage their reliance on the elected branches for the efficacy of their judgments (Hamilton 1961).

This claim has implications for a normative debate on the judicialisation of policy-making. Some scholars have cautioned against a government through all-powerful courts, 'thwarting the will' of the representatives of the people (Bickel 1986; Friedman 2002; Stone Sweet 2000). In this article, I show that courts' compliance dilemma allows lawmakers to pursue—and implement—policies courts would prefer to strike. This dynamic is born out of the institutional design of systems of checks and balances. Madison (1961) observed that to ensure the functioning of such systems, 'ambition must be made to counteract ambition', and this logic applies to courts as well. In other words, what may appear as lawmakers' provocation of confrontation with courts is ultimately an observable implication of a system of separation of powers at work, albeit one that raises questions to what extent courts can stop lawmakers determined to prioritise policy over constitutional concerns in their tracks.

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A. Supplementary Material

A.1. Interviews

Between May 2017 and April 2019, I interviewed three former justices and five former law clerks of the GFCC, five former members of the Bundestag and the German federal government (two former Federal Ministers of Justice, a senior official at the Federal Chancellery and members of the executive boards of two of Germany's main political parties), as well as two journalists of Germany's most prominent media networks. All interviews except for one were conducted in German via telephone (one justice provided brief written answers to my questions), lasting between thirty minutes and two hours.

Overall, I contacted more than forty potential interviewees, with the majority of them declining to be interviewed or not responding to my inquiries. The majority of lawmakers I contacted did not reply to my inquiries or follow-up messages, while most (former) justices of the GFCC replied, yet noted that they categorically refrain from giving interviews about the court. Acknowledging that lawmakers as well as justices and law clerks who agreed to be interviewed would possibly be hesitant to speak frankly about some of the phenomena I am most interested in (e.g. lawmakers' willingness to provoke confrontation with a constitutional court, and the court's exercise of self-restraint when facing the prospects of non-compliance), I offered my interviewees the opportunity to decline the recording of our conversations. Some interviewees made use of this option and in these cases I relied on hand-written notes I had made during the conversations. I also assured my interviewees that I would reference evidence from our conversation in ways that would guarantee their anonymity. The fact that my interests touch upon potentially sensitive information also had implications for (and somewhat limited) the type of questions I was able to ask. All interviews were semi-structured and in the following I provide an overview over the set of questions I posed to my interviewees.

Lawmaker questionnaire

1. Some of the existing literature in political science assumes that legislatures anticipate future decisions of constitutional courts and amend legislative drafts to avoid conflict

with these courts. What do you think, to what extent can legislatures anticipate the direction of future constitutional jurisprudence?

2. It does not always seem to be the case that the legislature shies away from risking the violation of constitutional norms, the 2008 Federal Criminal Police Office Act is a relatively recent example. Here, not only members of the parliamentary opposition argued that the act is incompatible with the constitution, several members of the governing factions thought the same. Why is it that once in a while majorities in the Bundestag vote in favour of laws despite widespread constitutional concerns?

3. What role does the public's opinion on the Federal Constitutional Court as well as the federal government and the party factions in the legislature play, when lawmakers take constitutional risks?

4. The 2008 Federal Criminal Police Office Act was a difficult episode for the SPD. Proponents of the act had to defend it against the objections of members of their own party. What are the risks lawmakers take when they champion laws that are considered unconstitutional by members of their own party?

5. Do you think the justices at the Federal Constitutional Court follow the legislative process, particularly for laws that are constitutionally controversial?

6. The Federal Constitutional Court is often accused of placing constraints on the legislature's leeway that are too restrictive. What are the options for lawmakers to respond to overly restrictive jurisprudence?

7. Some of the Federal Constitutional Court's decisions invalidating laws come with dissenting opinions by some of the justices. What role do these dissenting opinions play for lawmakers?

Court questionnaire

1. In the context of my research, I read the transcripts of debates in the Bundestag on laws that were eventually reviewed by the Federal Constitutional Court. Here, I found that members of the Bundestag often highlight that legislative drafts conflict

with the court's jurisprudence, and once in a while it is members of the governing factions in the Bundestag, who voice these concerns. What do you think, why are governing factions sometimes prepared to dismiss widespread constitutional concerns when adopting legislation?

2. The kind of laws that attracted constitutional concerns by members of the Bundestag often actually end up at the Federal Constitutional Court. To what extent are justices familiar with the political debate that happened in the Bundestag on a law the court then has to review?

3. The Federal Constitutional Court's review of federal law is characterized by a certain tension. On the hand, the court needs to ensure that constitutional rights are protected, on the other hand it needs to leave enough space for the legislature to create effective policy. What role—if any—does the political debate on a law play for justices to determine how far the court can go when placing constraints on lawmakers' leeway?

4. The Federal Constitutional Court is often criticised for being overly restrictive in its jurisprudence and placing too many constraints on lawmakers. I remember a guest editorial written by Norbert Lammert for the Frankfurter Allgemeine Zeitung, where he called on the Federal Constitutional Court to exercise more self-restraint. To what extent are justices able to anticipate whether a decision would be met with backlash from lawmakers?

5. Recent scholarship in political science suggests that constitutional courts anticipate backlash against their decisions and at times postpone unpopular decisions in the hope of facing a politically more friendly environment in the future. To what can justices at the Federal Constitutional Court delay their decisions, particularly when reviewing federal laws?

6. The Federal Constitutional Court enjoys a very high standing among the German public. Political scientists generally assume that courts' high public support allows them to issue decisions unpopular among governing majorities without having to fear

serious consequences, for instance restrictions on their own jurisdiction. Did you get the impression that this is actually the case for the Federal Constitutional Court?

7. The Federal Constitutional Court's decisions carry the force of law. Nonetheless, about twenty years ago an article was published in the Süddeutsche Zeitung titled 'If it does not sit well, it is ignored'. The article claimed that majorities in the Bundestag fail to faithfully implement politically unwanted or simply fiscally expensive court decisions. What do you think, are lawmakers in the Bundestag and the federal government always implementing the court's jurisprudence?

8. The majority of the Federal Constitutional Court's decisions are passed unanimously. However, once in a while justices decide to write a dissenting opinion. Based on your experience, what role do these dissenting opinions play for lawmakers?

A.2. Formal proofs

Below I provide the formal proofs for the propositions discussed in Section 3.2 of the manuscript. Without loss of generality, consider the following tie-breaking assumptions: 1) If indifferent between upholding, $f = \overline{V}$, and striking the policy, $f = V$, the court chooses to strike the policy; 2) If indifferent between adopting the policy, $d = A$, and not adopting the policy, $d = \overline{A}$, the lawmaker chooses not to adopt the policy.

A.2.1. Proof of Proposition 1 and 2

Suppose the lawmaker plays $d = A$ regardless of her type. The court's posterior beliefs about the lawmaker's type are given by its prior beliefs, $Pr(\theta = E \mid A) = p$. Given $\omega = C$, the court always chooses to uphold the policy, $f = \overline{V}$. Given $\omega = \overline{C}$, the court chooses V if $p(-a - k) \geq -a$. Solving for p yields $p \leq \frac{a}{a+k}$. Consider the following cases.

Case 1: Given $p \leq \frac{a}{a+k}$, the court plays $f = V$ whenever $\omega = \overline{C}$. The non-compliant lawmaker has no incentive to deviate from $d = A$ if $q(b_E - c) + (1 - q)(b_E) > 0$. Solving for q yields $q < \frac{b_E}{c}$, which is always true given $b_E \geq c$. The compliant lawmaker has no incentive to deviate from $d = A$ if $q(-c) + (1 - q)b_{\overline{E}} > 0$. Solving for q yields $q < \frac{b_{\overline{E}}}{b_{\overline{E}}+c}$.

Given $p \leq \frac{a}{a+k}$ and $q < \frac{b_{\overline{E}}}{b_{\overline{E}}+c}$, a pooling equilibrium exists in which the lawmaker plays $d = A$ regardless of her type and the court strikes the policy, $f = V$, whenever $\omega = \overline{C}$, and always upholds the policy, $f = \overline{V}$, when $\omega = C$ (Proposition 1).

Case 2: Given $p > \frac{a}{a+k}$, the court plays $f = \overline{V}$ regardless of the state of the world. The non-compliant lawmaker has no incentive to deviate from $d = A$ if $b_E > 0$, which is always true. Similarly, the compliant lawmaker has no incentive to deviate from $d = A$ if $b_{\overline{E}} > 0$, which is always true. Given $p > \frac{a}{a+k}$, a pooling equilibrium exists in which the lawmaker plays $d = A$ regardless of her type and the court upholds the policy, $f = \overline{V}$, regardless of the state of the world (Proposition 2).

A.2.2. Proof of Proposition 3

Suppose the non-compliant lawmaker plays $d = A$, while the compliant lawmaker plays a mixed strategy, playing $d = A$ with probability r, with $r \in [0, 1]$. The court's posterior beliefs about the lawmaker's type are given by Bayes rule, $Pr(\theta = E \mid A) = \frac{p}{p+r(1-p)}$ and $Pr(\theta = \overline{E} \mid A) = \frac{r(1-p)}{p+r(1-p)}$. Given $\omega = C$, the court always chooses to uphold the policy, $f = \overline{V}$. Suppose the court plays a mixed strategy, striking the policy, $f = V$ with probability s, with $s \in [0, 1]$.

The court is indifferent between $f = \overline{V}$ and $f = V$ if $\frac{p}{p+r(1-p)}(-a-k) = -a$. Solving for r yields $r = \frac{pk}{a(1-p)}$. $r \in [0, 1]$ requires that $\frac{pk}{a(1-p)} \leq 1$, which is true if $p \leq \frac{a}{a+k}$. Given the court plays $f = V$ with probability s when $\omega = \overline{C}$, the non-compliant lawmaker has no incentive to deviate from playing $d = A$ if $q(s(b_E - c) + (1-s)b_E) + (1-q)b_E > 0$. Solving for s yields $s < \frac{b_E}{qc}$, which is always true given $c \leq b_E$ and $q \in (0, 1)$. The compliant lawmaker has no incentive to deviate from playing a mixed strategy if $q(s(-c) + (1-s)b_{\overline{E}}) + (1-q)b_{\overline{E}} = 0$. Solving for s yields $s = \frac{b_{\overline{E}}}{q(b_{\overline{E}}+c)}$. $s \in [0, 1]$ requires that $\frac{b_{\overline{E}}}{q(b_{\overline{E}}+c)} \leq 1$, which is always true if $q \geq \frac{b_{\overline{E}}}{b_{\overline{E}}+c}$.

Given $p \leq \frac{a}{a+k}$ and $q \geq \frac{b_{\overline{E}}}{b_{\overline{E}}+c}$, a partial pooling equilibrium exists in which the non-compliant lawmaker plays $d = A$, and the compliant lawmakers plays $d = A$ with proba-

bility $r = \frac{pk}{a(1-p)}$. The court plays $f = \overline{V}$ if $\omega = C$. If $\omega = \overline{C}$, the court plays $f = V$ with probability $s = \frac{b_{\overline{E}}}{q(b_{\overline{E}}+c)}$. ■QED

A.3. Data collection

The empirical analyses presented in Section 3.2 draw on the collection of original data from the German Bundestag's legislative proceedings. I hand-coded whether lawmakers had voiced constitutional concerns about legislative provisions, which were later challenged at the German Federal Constitutional Court (GFCC). The coding followed four steps. I first identified all cases heard by the GFCC involving challenges of the constitutionality of federal laws, drawing on data from the Constitutional Court Database (CCDB), an extensive collection of information on proceedings at the GFCC collated by Engst et al. (2019) at the University of Mannheim. In the second step, I identified the federal law and specific legislative provisions which were challenged, by reading the GFCC's judgment summary as well as the summary of the case's facts. Equipped with information about a challenged federal law, I then made use of a German online law database, `https://dejure.org/`, to identify documents from the respective legislative proceeding (and in particular, transcripts of debates), provided by the German Bundestag's documentation system.

The Bundestag typically holds three readings on federal legislation, with final plenary debates taking place at the second reading immediately followed by voting procedures in the third reading without debate. I generally referred to transcripts of plenary debates (including lawmakers' voting declarations) in the second reading. However, where lawmakers continued the debate into the third reading, transcripts from the third reading were included. Further, where federal legislation was adopted after a conciliation committee had submitted a revised draft after the upper chamber's rejection of the original draft, I only considered the Bundestag's debate transcripts concerning the revised draft.

The Bundestag's documentation system provides transcripts of parliamentary debates by session rather then federal laws. For each document containing containing debate transcripts, I manually extracted the relevant text and searched the extracted text for a list of key words, namely the stemmed German terms for constitutionality (`verfass`), constitutional (or fun-damental) rights (`grundrech`) and the German constitution, the

Basic Law (`grundge`). For every hit, I then read the relevant section of the debate to identify whether (and if yes which) lawmaker had voiced constitutional concerns about the legislative provisions named in the GFCC's judgment summaries.

To illustrate this process, in Case *2 BvL 1/07* the GFCC considered a question whether a legislative provision of a 2006 federal law amending the German tax code was incompatible with the constitution, given the provision provided that workers could not deduct expenses for travel of less then 20 kilometres between their regular place of work and homes as professional expenses (the so-called "Pendlerpauschale") in their tax declarations. Searching for the aforementioned keywords in the final debate transcript showed that lawmakers of both the opposition and the then-governing coalition of the CDU/CSU/SPD had previously voiced constitutional concerns about this reform. Consider the following illustrative examples of these concerns:

> Dr Volker Wissing (FDP): The cuts you are making to the Pendlerpauschale are arbitrary. The experts unanimously confirmed that during the finance committee hearings. I had colleagues in the finance committee explain to me that the solution you found 'is a little less unconstitutional' than alternative options. But what does that even mean, how did we get to the point that we are even considering such trade-offs? I thought you were aware that 'unconstitutional means unconstitutional'.

> Gregor Gysi (LINKE): You are saying: No tax deductions for trips of up to 20 kilometres. I believe this is incompatible with the constitution, the German Federal Constitutional Court already told us that any expenses that are necessary to earn a wage have to be deductible. You are the saying the opposite. I expect that one day we will see a decision by the Court that you won't like.

> Fritz Kuhn (Greens): The Bundesrat had cautioned that your proposal is unconstitutional. To get rid of the Pendlerpauschale for distances below 20 kilometres is entirely arbitrary. How do you explain that to someone who lives 19 kilometres from their place of work?

> Klaus Hofbauer (CDU/CSU): There are plans to allow deductions only for long-distance commuters, the threshold being 20 kilometres. The Bundesrat had asked for a comprehensive evaluation of whether this is compatible with the constitution. We are unconvinced by the assertions the finance minister had made. We were told that the planned provisions are appropriate with consideration to the proportionality principle and possible under constitutional law. This assertion is very vague. We fear that parliament's decision is not going to survive the Court's scrutiny.
>
> Lothar Bindig (SPD): The mere formal possibility of distinguishing between tax and insurance law does not solve the contradiction of the proposal. We have considerable constitutional concerns regarding the deduction of professional expenses, as the point of discontinuity for the Pendlerpauschale at 20 kilometres and above is at risk of unconstitutionality.

This data collection process allowed me to identify which legislative provisions had been contested by lawmakers of either the parliamentary opposition or the current governing coalition (or both). Figure 6 plots the total numbers of constitutional concerns voiced by lawmakers, distinguishing lawmakers by their party affiliations and whether they were members of the governing coalition or parliamentary opposition at the time they had voiced their concerns. Figure 6 clearly shows that far more lawmakers of the centre-left SPD than any other party voiced constitutional concerns about government policy during their time in opposition. While the SPD is the party that spent the most time in an opposition role during the time frame of my analysis, 1977-2015, this pattern underlines assumptions that lawmakers may make use of constitutional concerns to discredit government policy, regardless of whether their concerns are well-founded or not.

A different picture emerges once we consider only constitutional concerns lawmakers voiced while they were part of a governing coalition. The centre-left CDU/CSU served in government for the majority of parliamentary terms covered by my data (eight out of eleven terms) and hence it does not appear too surprising that most constitutional concerns were voiced from within their ranks. Overall, there is no indication that constitutional concerns

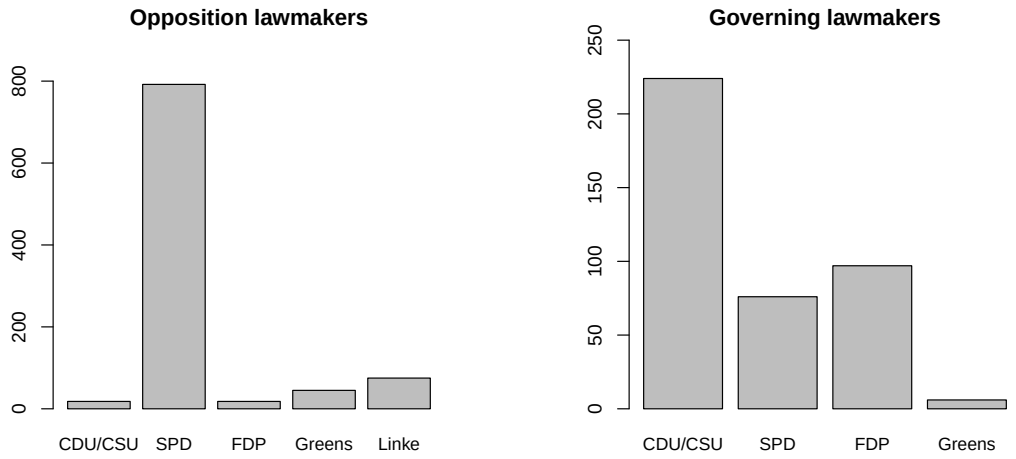

Figure 6: Total number of lawmakers contesting constitutionality of legislative provisions (by party affiliation and opposition vs. government role).

are predominantly voiced by members of a particular party or by junior coalition partners (e.g. the FDP or the Green party).

A.4. Additional results and robustness checks

In this section, I provide an overview over additional results and include an additional robustness test to address concerns that (at least some of) governing lawmakers' doubts over the constitutionality of policy proposals are motivated by political opportunism rather than genuine constitutional concerns. Figure 7 shows that only a small fraction of legislative provisions considered by the GFCC had been drafted by coalitions including both main centre-right and centre-left parties, while provisions reviewed by the Court mainly concerned questions surrounding individual rights, disputes over federal and state budget allocations, as well as regulations on the labour market.

Table 3 provides an overview over the full results of the analyses of the main manuscript, including coefficient estimates for all categories of the variable *Policy area*. The reference category for the variable *Policy area* is *economy/business*. Results for Model 3 show that, ceteris paribus, there is no clear evidence that the GFCC's decision-making differs systematically across policy areas (none of the coefficients for *Policy area* are clearly distinguish-

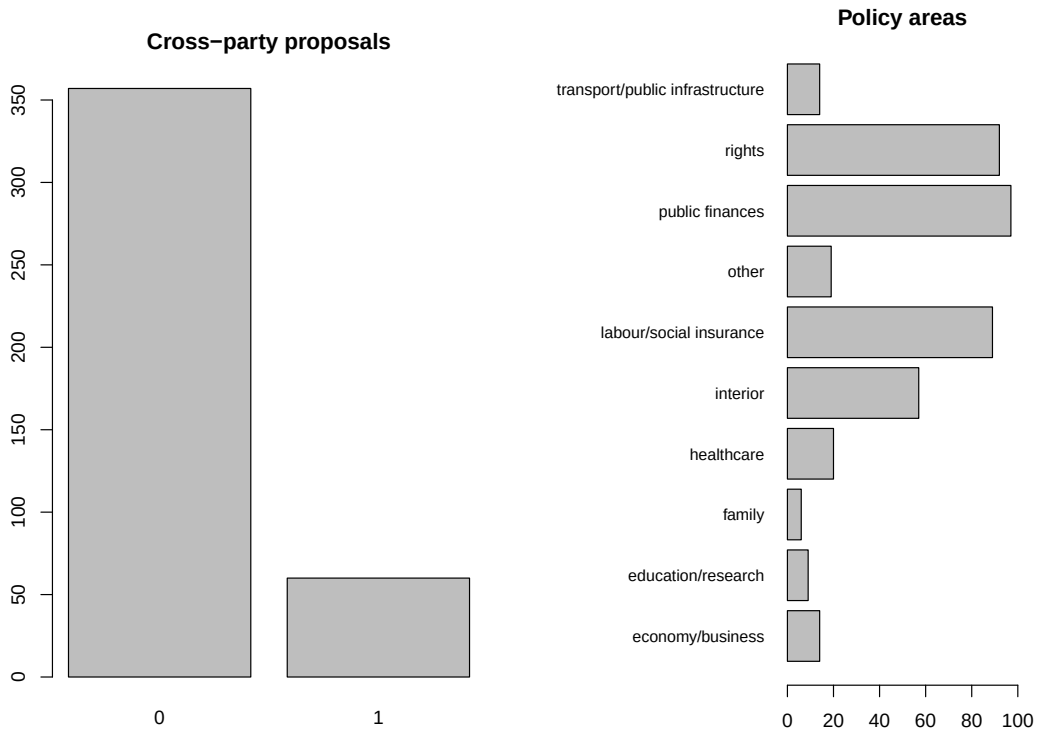

Figure 7: Distribution of control variables indicating (1) whether a legislative proposal was proposed by a coalition of parties including both the CDU/CSU and SPD and (2) the policy area covered by legislative provisions.

able from zero).

Table 4 shows coefficient estimates from regression models, without including random effects for federal laws (i.e. pooling estimates for legislative provisions without varying intercepts across federal laws). Table 4 shows that the results remain robust for the main explanatory variable of interest. Overall, results across the analyses indicate that the coefficient for the main explanatory variable of interest, *Contested by governing lawmaker*, is negative and distinguishable from zero. The narrative of the theoretical model offers an explanation for this finding. The Court self-restrains its exercise of constitutional review when lawmakers had signalled a credible non-compliance threat by dismissing their political allies' constitutional concerns at the final stage of the policy-making process. However, it is difficult to establish just how sound the advice from governing lawmakers was. An alternative explanation for the observed empirical pattern is that governing lawmakers who voice legitimate concerns about the constitutionality of government policy during the

	Model 1			Model 2			Model 3		
	Mean	95% HPD		Mean	95% HPD		Mean	95% HPD	
Contested by governing lawmaker	−0.74	[−1.65;	0.12]	−0.98	[−1.95;	−0.07]	−1.19	[−2.37;	−0.10]
Contested by opposition lawmaker				0.58	[−0.00;	1.18]	0.53	[−0.11;	1.22]
Education/Research							2.63	[−0.17;	6.24]
Family							1.91	[−1.13;	5.71]
Healthcare							−1.41	[−3.38;	0.46]
Interior							−0.35	[−1.99;	1.25]
Labour/Social insurance							−0.32	[−1.89;	1.22]
Other							−0.37	[−2.35;	1.61]
Public finances							0.13	[−1.44;	1.69]
Rights							−0.46	[−2.03;	1.06]
Transport/Public infrastructure							−1.50	[−3.75;	0.59]
Observations	417			417			417		
Number of groups (Federal laws)	275			275			275		
Var: Intercept (Federal laws)	0.09			0.09			0.22		

Note: Outcome variable is the Court's decision to strike the challenged provision. Coefficient estimates are posterior means along with 95% highest probability densities. All models include random effects allowing intercepts to vary across across federal laws ($J = 275$).

Table 3: Regression coefficients (additional results)

legislative process—possibly behind closed doors—are hardly ever ignored (and thus do not show up in my data), while concerns that linger on and are dismissed by a sufficient majority of lawmakers are simply unfounded in constitutional law.

It is inherently difficult to distinguish constitutional concerns that are well-founded from those that are not (to some extent, this part of why we have constitutional courts). To address the potential source of selection bias outlined above, nonetheless, I consider a proxy-variable intended to capture the a priori expected success of a claim of unconstitutionality at the GFCC. Recall that legislative provisions can be challenged via three different routes. Concrete review allows lower courts to refer provisions they deem unconstitutional to the GFCC, abstract review allows members of the Bundestag themselves to refer provisions, while individuals can make use of constitutional complaints to challenge the constitutionality of provisions that affect them personally, presently and directly. I expect that lower courts are in a better position than individuals (and possibly, lawmakers of the Bundestag) to assess whether a legislative provision is truly unconstitutional and whether a reference to the GFCC has a probable chance of success.

I therefore include a control variable *Court proceeding* in my analysis, indicating whether

	Model 4	Model 5	Model 6
Contested by governing lawmaker	−0.71	−0.91	−1.03
	(0.37)	(0.39)	(0.42)
Contested by opposition lawmaker		0.51	0.45
		(0.24)	(0.26)
Cross-party proposal			0.46
			(0.32)
Education/Research			1.80
			(1.19)
Family			1.15
			(1.26)
Healthcare			−1.15
			(0.74)
Interior			−0.24
			(0.61)
Labour/Social insurance			−0.34
			(0.59)
Other			−0.36
			(0.72)
Public finances			0.07
			(0.58)
Individual rights			−0.38
			(0.58)
Transport/Public infrastructure			−1.25
			(0.81)
AIC	578.16	575.69	576.23
BIC	586.22	587.79	628.66
Log Likelihood	−287.08	−284.85	−275.12
Deviance	574.16	569.69	550.23
Num. obs.	417	417	417

Note: Outcome variable is the Court's decision to strike the challenged provision. Standard errors for coefficient estimates are in parentheses. All coefficient estimates are pooled, without controls for federal laws.

Table 4: Regression coefficients (pooled estimates)

a legislative provision was review as part of a concrete review (i.e. following a referral by a lower court), abstract review or a constitutional complaint. Of the 417 challenged provisions, 197 were challenged through a constitutional complaint, 46 through abstract review, and 174 through concrete review. Note that the variable *Court proceeding* is not a particularly sound choice for a control variable as it is effectively a post-treatment control, yet it may still be a better choice than considering no control for the expected success of a challenge at all.

Figure 8 plots the posterior distributions along with their means and 95% HPDs for coefficients from a multi-level logistic regression model including the variables *Contested by governing lawmaker*, *Contested by opposition lawmaker* and *Court proceeding*. Figure 8 shows that the results for the coefficient for the main explanatory variable remain robust:

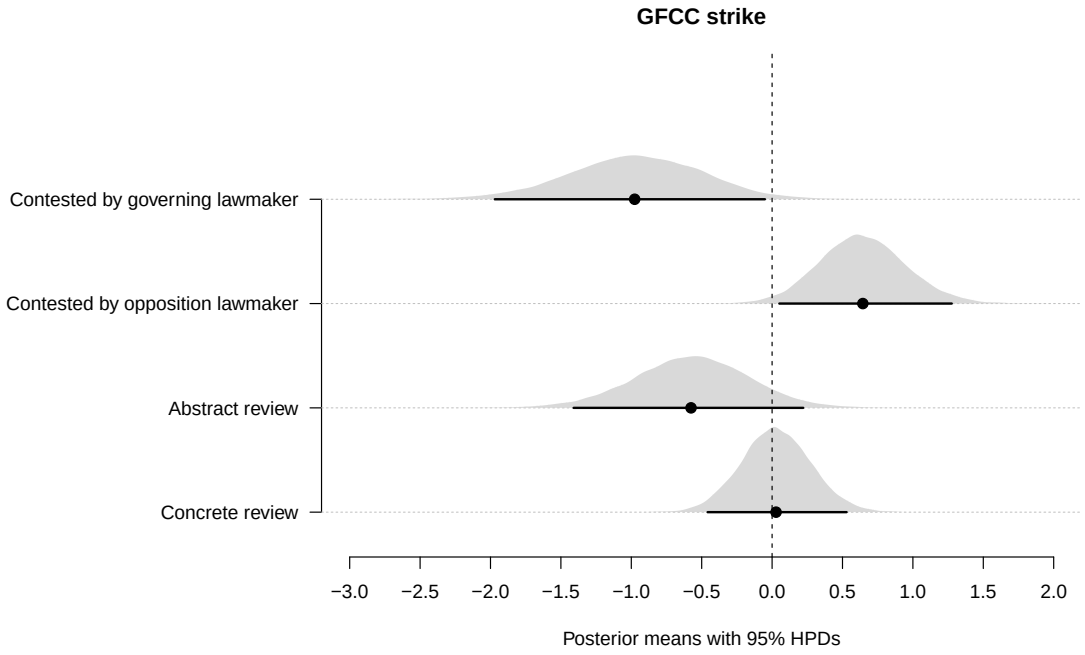

Figure 8: Coefficient estimates (robustness checks)

The posterior mean for the variable *Contested by governing lawmaker* is clearly negative and the coefficient remains distinguishable from zero.