The Political Constraints on Constitutional Review

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To Edith Pflaum and Yesmean Luk, whatever comes out of this, without them I would have never made it this far.

I am also thankful for support from my supervisors Christine Reh, Lucas Leemann and Tim Hicks, who had the right advice whenever this project was about to go off the rails.

I, Philipp Alexander Schroeder, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

Scholars of judicial politics have long recognised that courts reviewing the constitutionality of legislative and executive acts lack the power of the purse and sword and cannot coerce lawmakers into compliance with their jurisprudence. In this thesis, I offer a novel perspective on how courts solve the tension that comes with their reliance on the executive and legislative branches for the efficacy of their judgements. The thesis is motivated by an empirical puzzle: Existing scholarship suggests that censure though a court is electorally costly for lawmakers, yet at time we can observe lawmakers' pursuit of policies provoking confrontation with courts. I present a formal model demonstrating that lawmakers dismissing advice that their policies are at odds with constitutional jurisprudence and hence risking the political fallout from a court's veto signal a credible non-compliance threat. Upon observing such signals, courts face incentives to show self-restraint in their judgements and ease the constitutional limits to lawmakers' policy-making. I bring both quantitative and qualitative evidence from the German Federal Constitutional Court's (GFCC) review of federal law to bear on the theoretical model's claims. A statistical analysis of original data on the GFCC's review of federal law between 1983 and 2017 shows that the court is more likely to exercise self-restraint when lawmakers in government had previously dismissed constitutional concerns voiced by members of the governing coalition caucus. Complementing the statistical analysis, I evaluate the assumptions underlying the formal model drawing on evidence from interviews with justices at the GFCC, the German federal government and the Bundestag, while a case study on the GFCC's review of the 2008 Federal Criminal Police Office Act offers an analytic narrative of the model's main argument. The thesis shows that lawmakers' risk-taking in the shadow of courts' constitutional review provides an impetus for the evolution of constitutional jurisprudence.

Impact statement

The academic impact of this doctoral thesis comes through (1) a scholarly article targeted at a top-ranked political science journal, introducing the thesis's main theoretical argument and evidence from its statistical analysis to a wider audience of scholars, and (2) an original dataset of federal laws reviewed by the German Federal Constitutional Court (GFCC) for their constitutional compatibility over more than three decades (1983–2017) made available for replication analysis and future research. At the time of subsmission of the thesis, the scholarly article "Signaling political constraints on constitutional review" was under review at the *American Political Science Review*. The article presents the formal analysis of the theoretical model, which provides a novel insight into how courts lacking the power to enforce their rulings foster compliance with their jurisprudence and how the external constraints on courts' exercise of constitutional review reflect in the behaviour of lawmakers. The scholarly article and thesis offer evidence consistent with the theoretical model's expectations from the GFCC's exercise of constitutional review of federal law. In a recent contribution published in the German scholarly journal *Politische Vierteljahresschrift*, leading German judicial politics scholars acknowledged that while the GFCC is often regarded as one of the most consequential constitutional courts in Europe, shaping the decision-making of lawmakers in the German legislature and federal government, scholars have provided little empirical evidence supporting these claims. The thesis's empirical analysis addresses this gap. The data collected for the empirical analysis will be made publicly available, facilitating replication studies and future research on the GFCC's review of federal law and lawmakers' choices in Germany's system of limited government.

Beyond academia, questions surrounding the optimal design of systems of limited government have long occupied delegates of constitutional conventions and committees tasked with reforming political institutions. Challenges facing members of these fora involve identifying institutional designs ensuring that public officials in the legislative and executive branches respect constitutional norms, while avoiding the delegation of policy-making to courts lacking direct accountability to the electorate. The theoretical analysis presented in this thesis allows officials to understand how variation in features of courts' institutional design (i.e. the presence/lack of certain formal institutions ensuring courts' independence from the elected branches, or provisions allowing the elected branches to overrule courts' decisions) and varying scope conditions in political environments translate into courts' constitutional jurisprudence and the constraints they can place on lawmakers in the elected branches.

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Chapter 1

Constrained constitutional review

Courts reviewing the constitutionality of the actions of the elected branches of government have become a near universal feature of democratic polities. Ginsburg and Versteeg (2014, 587) observe that "what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state." Courts are at the heart of systems of limited government, where constitutional limits are imposed on the actions of the legislative and executive branches.

Albeit differing in their composition, the type of cases they hear, the legal system they operate in and so forth, courts exercising constitutional review of legislative and executive acts fulfil the same fundamental functions in systems of limited government: They serve as a check on those controlling the levers of political power to protect constitutional norms against the transgressions of the elected branches. In the process, courts breathe life into constitutions. Constitutions are incomplete contracts harbouring the fundamental principles of politics, but lack specific instructions for every eventuality. Interpreting the constitution, courts' jurisprudence establishes the constitutional guardrails for the actions of the elected branches.

We may expect that the authority transferred to courts to set aside legislative and executive acts for their constitutional incompatibility serves as a deterrent for lawmakers intent on pursuing actions that would infringe on their constituents' constitutional rights. In the *The Federalist 78*, Alexander Hamilton asserts that lawmakers "perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts" (Hamilton, 1961, 495). In other words, knowing that courts stand ready to censor acts transgressing the boundaries of the constitution, prudent lawmakers would be well-advised to draft their policies carefully and avoid conflict with the judiciary (see Stone, 1992).

In this thesis, I will show that the reality of lawmakers' decision-making in the face of constitutional review looks different, however. Despite the shadow of constitutional review looming, lawmakers do not always shy away from provoking confrontation with the judiciary over the constitutionality of their policies. More so, I will show that lawmakers' choice to pursue acts that conflict with courts' jurisprudence has a profound effect on the constitutional limits courts subsequently impose on the actions of the elected branches. Before I define the fundamental questions regarding the relationship between the judiciary and the elected branches as well as the functioning of systems of limited government this thesis seeks to answer, I briefly sketch two examples of the empirical phenomenon at the centre of my work: Lawmakers' choice to provoke confrontation with the courts.

1.1 Risking confrontation with courts

This thesis is motivated by a puzzle: Existing scholarship suggests that lawmakers in the elected branches anticipate that the constitutional compatibility of their policies may be scrutinised by courts (see for example Stone Sweet, 2000; Vanberg, 1998; Wasserfallen, 2010). Yet, once in a while lawmakers appear undeterred in their pursuit of policies that set the stage for confrontations with courts capable of striking these policies. In the following, I introduce two illustrative examples of lawmakers ignoring warning signs that their plans would fail to respect constitutional boundaries to policy: the German federal parliament's adoption of the 2008 Federal Criminal Police Office Act and the Trump administration's implementation of a travel ban targeting individuals from predominantly Muslim states in 2017.

On December 25 of 2008, a governing majority in the German Bundestag comprising the Christian-conservative CDU/CSU and the centre-left SPD adopted the Federal Criminal Police Office Act (in German, the Bundeskriminalamtgesetz, in the following BKAG). The act extended the law enforcement duties of the Federal Criminal Police Office (in the following, BKA) to include the domain of the protection against threats from international terrorism and allowed the BKA to conduct surveillance in private residences, allowed remote searches of information technology systems, and regulated how the BKA would share information with other law enforcement agencies.

During the legislative process, concerns were raised that the BKAG mandated an impermissible encroachment upon the core area of an individual's private life. Gisela Piltz of the liberal-conservative FDP labelled the act as "poorly thought out and constitutionally dubious", claiming that it failed to live up to restrictions on

state surveillance defined in the German Federal Constitutional Court's recent jurisprudence.[1] Announcing that his party would immediately refer the act to the German Federal Constitutional Court, Wolfgang Wieland of the left-wing Green party predicted that the BKAG would not survive the court's review. In a rare turn of events, several members of the coalition caucus joined the parliamentary opposition parties in their criticism of the BKAG. Ten members of the SPD, including former Justice Minister Herta Däubler-Gmelin, signed a statement denouncing the BKAG for infringing on citizens' constitutional rights. Despite a number of lawmakers of the SPD breaking party ranks and voting against the government, the act eventually passed parliament and entered into force on January 1 of 2009.

Arguably to no surprise, the BKAG indeed ended up at the German Federal Constitutional Court. Plaintiffs including a former federal minister, lawyers and journalists alleged that the act's provisions infringed upon several constitutional norms enshrined in the German Basic Law. The German Federal Constitutional Court issued its decision in *1 BvR 966/09* on April 20 of 2016, stating that "[t]he authorisation of the Federal Criminal Police Office to carry out covert surveillance measures (surveillance of private homes, remote searches of information technology systems, telecommunications surveillance, collection of telecommunications traffic data and surveillance outside of private homes using special means of data collection) is, for the purpose of protecting against threats from international terrorism, in principle compatible with the fundamental rights enshrined in the Basic Law" (see preamble of *1 BvR 966/09*).[2] While the court's judgement addressed the legal prerequirements of carrying out covert surveillance measures and data transfers, reining in a number of provisions of the BKAG it perceived as too broad and unspecific, it also consolidated existing case law. In doing so, the court's judgement delimited the restrictions its jurisprudence had previously placed on law enforcement.

In an unusual show of dissent on the bench of the German Federal Constitutional Court, Justice Eichberger and Justice Schluckebier nonetheless penned separate opinions, criticising the court for placing excessive constraints on lawmakers' scope for effective action to combat a tangible security threat. Justice Eichberger wrote that "[t]he judgment, despite its welcome steps toward consolidation, nevertheless leads to a problematic entrenchment of the excessive constitutional requirements in this field." In a similar vein, Justice Schluckebier noted that "[u]ltimately, by means of numerous detailed requirements of a technical legislative nature the

[1] Translated from German, excerpt from the second reading of the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, November 12, 2008, 2. Beratung : BT-PlPr 16/186, `http://dipbt.bundestag.de/dip21/btp/16/16186.pdf`.

[2] The full text of the GFCC's ruling in *1 BvR 966/09* including dissenting opinions (in English) is available at `http://www.bverfg.de/e/rs20160420_1bvr096609en.html`

Senate [of the German Federal Constitutional Court] puts its own notions of a regulatory framework before those of the democratically legitimised legislature."

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On January 27 of 2017, U.S. President Trump signed an executive order titled "Protection Of The Nation From Foreign Terrorist Entry Into The United States" into effect. The order barred citizens of seven predominantly Muslim states—Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen—from entering the United States for a 90-day period and suspended Syrian refugees' entry into the United States indefinitely. The immediate implementation of the order caught travellers on incoming flights from these countries by surprise. Upon arrival, citizens of Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen holding previously valid visas to enter and remain in the U.S. faced detention by U.S. law enforcement officials and subsequent deportation. Democratic lawmakers were quick to rush to the defense of those affected by the policy. House Representative Nydia Velazquez and New York Mayor Bill de Blasio labelled the Trump administration's actions "shameful" and it did not take long before those opposing the executive order pointed out that the White House had delivered on an infamous campaign pledge.[3]

On the campaign trail in late 2015, citing polling data allegedly showing that a sizeable proportion of the Muslim population in the United States harboured hatred towards Americans, then-Presidential candidate Trump had called "for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."[4] At the time, the constitutionality of an immigration policy discriminating along the lines of religion had been widely questioned, including criticism from senior Republicans, with House speaker Paul Ryan distancing himself from the Trump campaign for its anti-Muslim rhetoric.[5] Unsurprisingly, given the 90-day entry ban applied only to citizens from predominantly Muslim states, the executive order was quickly linked to Trump's campaign pledge and coined as the 'Muslim ban'. Civil rights groups and several state governments controlled by Democrats challenged the order in the lower courts, arguing that the policy amounted to religious discrimination under the pretext of

[3]CNN, January 29, 2017. *Protesters mass at airports to decry Trump's immigration policies*, accessed February 13, 2019. https://edition.cnn.com/2017/01/28/politics/us-immigration-protests/index.html

[4]Washington Post, December 7, 2015. *Trump calls for 'total and complete shutdown of Muslims entering the United States'*, accessed February 13, 2019. https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims/

[5]Politico, June 14, 2016. *Ryan breaks with Trump on Muslim immigrant ban*, accessed February 19, 2019. https://www.politico.com/story/2016/06/ryan-trump-muslim-ban-224312

national security and was thus unconstitutional. On February 3, 2017, a U.S. District Court in Seattle, Washington, issued a restraining order in *State of Washington v. Trump*, temporarily blocking the nationwide application of the executive order.

The District Court's judgement was among the first of a series of judicial decisions challenging the Trump administration's immigration policy. Responding to the flurry of legal challenges, the White House replaced the original order with executive order 13780, which itself was superseded by Presidential Proclamation 9645, to include travel restrictions to the U.S. for individuals from North Korea and Venezuela, while removing Iraq from the list. However, constitutional objections to the Trump administration's immigration policy persisted and the U.S. Supreme Court agreed in early 2018 to hear a case brought by the State of Hawaii, which argued that the policy's latest iteration remained motivated by an anti-Muslim animus.

Arguably, in light of the five-to-four majority of Republican-nominated justices at the U.S. Supreme Court, the Trump administration now faced a more 'friendly' bench than in the lower courts that had previously censored its immigration policy. However, given the Republican party's initial objection of then-Presidential candidate Trump's planned 'Muslim ban' and conservative Justice Anthony Kennedy's previous decisions to side with his liberal colleagues on core issues of conservative ideology,[6] a judgement in favour of the Trump administration's Presidential Proclamation did not seem certain. Further, Justice Sonia Sotomayor warned that allowing the Trump administration's travel ban to go ahead would bear the hallmarks of the U.S. Supreme Court's infamous judgement in *Korematsu v. United States*, which had legitimised the internment of Japanese Americans during World War II.[7] Nonetheless, eventually a five-to-four majority on the bench disagreed with the plaintiff's argument and upheld the Presidential Proclamation. Writing for the majority in *Trump v. Hawaii*, Chief Justice Roberts noted that the proclamation "is expressly premised on legitimate purposes and says nothing about religion."[8]

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These examples illustrate several features of the relationship between courts exercising constitutional review and the elected branches of government that define

[6]Washington Post, June 27, 2018. *Justice Kennedy ideology: Judge swung more conservative before retiring*, accessed April 30, 2019. `https://www.washingtonpost.com/graphics/2018/politics/supreme-court-2017-term/`.

[7]New York Times, June 26, 2018. *Sonia Sotomayor Delivers Sharp Dissent in Travel Ban Case*, accessed April 30, 2019. `https://www.nytimes.com/2018/06/26/us/sonia-sotomayor-dissent-travel-ban.html`.

[8]The full text of the U.S. Supreme Court's ruling in *Trump v. Hawaii* is available at `https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf`.

the focus of this thesis. First, they show that constitutional questions surrounding a legislative or executive act arise well in advance of courts actually hearing a related case. The shadow of courts' exercise of constitutional review is long, and it reaches into the chambers of legislatures and the offices of lawmakers in the executive branch. Scholars have pointed out that lawmakers anticipate that their acts will be scrutinised by courts commanding the authority to strike them as unconstitutional (see Stone, 1992; Vanberg, 1998). 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 Blauberger, 2012; Wasserfallen, 2010). They do so because a judicial veto comes with costs for lawmakers. When courts censor legislative or executive acts as unconstitutional, they instruct lawmakers to return to the drawing board and come up with new solutions that respect the boundaries of courts' interpretation of the constitution. At the very least, lawmakers then have to allocate often scarce resources and floor time in legislatures to amend the acts objected by courts (Vanberg, 2005).

However, the examples discussed above suggest that the prospects of being at the receiving end of a judicial veto and the costs that come with it do not always deter lawmakers from pushing ahead with acts high at risk of courts' censure. In this regard, the example of the German Bundestag's passage of the BKAG appears even more puzzling than the Trump administration's pursuit of an immigration policy ostensibly discriminating along the lines of religion. Not only did German lawmakers of the CDU/CSU and factions of the SPD ignore the constitutional warnings voiced by lawmakers on the opposition benches, they also dismissed advice from members of their own caucus. Negotiations on the BKAG were a particularly troublesome episode for the SPD, as its proponents in the party had to defend the act's constitutionality against the objections from their party's designated legal specialists. Amid clear warning signs that the BKAG would infringe on the constitutional limits to state surveillance, lawmakers in government persevered in their attempt to expand the competences of federal law enforcement agencies.

Finally, the examples illustrate a feature of courts' decision-making that has long garnered the attention of scholars of judicial politics: Courts' decision to defer to the elected branches of government and the exercise of self-restraint in their jurisprudence. A long-standing debate among scholars of judicial politics has revolved around courts' role as countermajoritarian institutions, capable of frustrating the political agenda of democratically elected lawmakers. In the words of Alexander Bickel, when a court declares "unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people

of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel, 1986, 16). Some scholars have gone so far to argue that courts' unconstrained exercise of constitutional review has paved the way for a juristocracy—government through courts instead of those mandated to rule by the electorate (Tate and Vallinder, 1995; Hirschl, 2009; Stone Sweet, 2000). Yet, the more recent literature has pushed back on the perception of judges as unconstrained and unaccountable lawmakers in robes. This work has shown that courts themselves are acting under a series of constraints and carefully avoid jurisprudence that precipitates conflict with the elected branches (see for example Clark, 2010; Bailey and Maltzman, 2011, see also Dahl 1957). Lacking the 'power of the purse or sword' and relying on the executive and legislative branches for their institutional efficacy (Hamilton, 1961; Shapiro, 2013), courts may feel inclined to defer to the elected branches when resistance to their jurisprudence is on the horizon.

The examples discussed above and the highlighted features in the choices of the elected branches and courts underscore that there is more to inter-branch relations than judges exercising constitutional review and lawmakers complying with their judgements. Lawmakers pushing for policy conflicting with constitutional jurisprudence set the stage for confrontations with the judiciary. Courts, on the other hand, seem to carefully navigate their exercise of constitutional review and avoid placing excessive demands on the elected branches of government. These points give rise to fundamental questions about the functioning of systems of limited government:

- Why do lawmakers provoke confrontation with courts capable of striking their acts as unconstitutional?
- How do courts respond when lawmakers embrace policies conflicting with their constitutional jurisprudence?
- How do courts resolve the tension in their role as effective checks on the elected branches and their reliance on the latter for the efficacy of their judgements?
- Who eventually defines the constitutional limits to policy in systems of limited government?

In this thesis, I offer an answer to these questions that is disarmingly simple. The choices of lawmakers anticipating constitutional review allow courts to predict how members of the elected branches would respond to their judgements. I argue that lawmakers risking politically costly confrontations with courts signal their willingness to evade compliance with jurisprudence limiting their policy options. These signals then allow courts to avoid issuing decisions that are ultimately not enforced

by the elected branches. Before I sketch the rationale of this argument in more detail and discuss the general approach of this thesis, I briefly review the scholarly literature that provides the building blocks of my theory.

1.2 The foundations of judicial authority

Courts exercising constitutional review of the acts of the elected branches occupy a peculiar role in democratic polities. Alexander Hamilton famously described the judiciary as 'the least dangerous branch of government'. The judiciary commands "neither force nor will, but merely judgement; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgements" (Hamilton, 1961, 490). And yet, courts have proven themselves as remarkably consequential institutions in constitutional democracies (see Kapiszewski et al., 2013). Hirschl (2008) provides an impressive list exemplifying the influence courts around the world have had on the most fundamental questions of political life in their jurisdictions. Courts have left their mark on questions such as Germany's role in the European Union, decided on the fate of the U.S. presidency, addressed the status of indigenous people in Australia and New Zealand, and considered Israel's definition as a Jewish state (see Hirschl, 2008, 94). Where does courts' authority stem from? How do courts get other actors to enforce and comply with their judgements? And why do the elected branches seem to tolerate courts capable of frustrating their political agenda? The existing literature addressing these questions fills library shelves and it is useful to review some of it here to establish the basic premises of the argument I present in this thesis.

Vanberg (2008) distinguishes between two types of mechanisms—endogenous and exogenous—that explain why courts play a consequential role in systems of limited government. Endogenous accounts claim that independent courts help the other branches of government to secure benefits they could otherwise not obtain. Douglass North and Barry Weingast trace the origins of independent judiciaries capable of placing constraints on other branches of government back to 17th century Great Britain. The British crown was accustomed to raising money through forced loans from its wealthy constituents, unilaterally renewing loans and paying less interest than originally agreed (North and Weingast, 1989, 820). Faced with a crown that controlled both policy and the courts at its pleasure, lenders had little choice but to grudgingly agree to the monarchy's terms.

However, affluent strata of society eventually demanded institutional change to limit the monarchy's arbitrary power and posed a credible threat of overthrowing

the crown. In the course of the Glorious Revolution and with parliament's passage of the Act of Settlement in 1701, judges' tenure ceased to be subject to the monarch's pleasure but rested on good behaviour, establishing a fundamental prerequisite for courts' independence from the crown (see Ervin, 1970). Relinquishing control over the judiciary, the British crown was able to make a credible commitment to respect the property rights of its constituents and ensure it could continue borrowing to serve its fiscal needs.

Similar arguments have been made by economists, who highlight that government faces credibility problems when committing to property rights, which they see as a prerequisite to spur private investment into the economy (see Feld and Voigt, 2003; Hayo and Voigt, 2007; Laffont and Meleu, 2001, see also Moustafa 2007). Hayo and Voigt (2007) argue that governments have time-inconsistent preferences and face short-term incentives to renege on prior promises to property rights. Since potential investors are aware of governments' incentives, the latter instituted independent judiciaries with jurisdiction to referee disputes over these rights to signal credible commitment to their promises. Illustrating this argument empirically, Voigt et al. (2007) show that upon gaining independence, some former British commonwealth colonies decided to retain the authority of the Privy Council's judicial committee as an internationally guaranteed independent judiciary to increase the credibility of their policy commitments.

The argument that independent courts allow the elected branches of government to 'lock-in' policies has been taken up by political scientists as well. Landes and Posner (1975) argue that by tying their hands and supporting an independent judiciary, political actors can increase the shelf-life of their policies. Given lawmakers in electoral democracies expect to rotate in and out of government office, delegating the enforcement of their policies to an independent judiciary decreases the influence incoming political majorities wield over past policies (for a similar argument, see Stephenson, 2003).

This argument only bites where lawmakers actually have reasonable expectations that they will lose political power in the foreseeable future (see Ferejohn and Weingast, 1992; Ramseyer, 1994; Helmke, 2002). Analysing patterns in the decision-making within the judicial hierarchy of post-war Japan, Ramseyer and Rasmusen (2001) show that given the Liberal Democratic Party's firm grip on political power, consistently controlling government office in the decades following World War II, both the Japanese Supreme Court and lower courts routinely deferred to the long-time political incumbent.

Exogenous explanations, on the other hand, hold that even if the elected branches wanted to challenge the judiciary over unfavourable judgements, the costs lawmakers

would have to bear for defying the courts render this option unattractive. Decades of scholarship have shown that most courts sitting at the top of the judicial hierarchy, such as the U.S. Supreme Court or the German Federal Constitutional Court, typically enjoy comfortable reservoirs of public support (see for example Gibson et al., 1998; Gibson and Caldeira, 1995; Caldeira and Gibson, 1992; Gibson and Caldeira, 2003; Gibson and Nelson, 2016; Mondak, 1992; Vanberg, 2005).

Scholars of judicial politics distinguish between the public's 'specific' support for individual judgements of courts and 'diffuse' (or institutional) support. The concept of diffuse support is based on work by David Easton and captures a "reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants" (Easton, 1965, 273). Members of the public may occasionally disagree with the direction of courts' judgements. However, as long as courts avoid consistently issuing decisions out of touch with dominant public opinion, the public's faith in courts' institutional legitimacy is unlikely to waver (see for example Gibson et al., 2005; Durr et al., 2000; Ura, 2014).

The public's diffuse support for courts has consequences for the relationship among courts and the elected branches. Vanberg (2001) highlights that lawmakers frustrated by the constraints courts place on their actions risk the public's ire at the ballot box and spoil their electoral prospects should they decide to move against the courts (see also Mayhew, 1974). Courts' diffuse public support and institutional legitimacy thus plays a critical role in ensuring that the elected branches respect the constraints courts place on their actions (see Clark, 2010; Carrubba and Zorn, 2010; Vanberg, 2005). The public's role in reinforcing courts' authority vis-à-vis the elected branches leaves its mark on the decision-making of courts as well, however. Analysing the decision-making of the U.S. Supreme Court, Casillas et al. (2011, 86) note that "not only do justices have reason to believe that ignoring the public may compromise public confidence in the Court, but also the Court's decisions—at least for nonsalient cases—consistently respond to changes in public opinion." The public's support is a foundation of courts' authority but it simultaneously constrains their decision-making. Existing literature holds that courts need to carefully pay attention to the public's mood in their judgements in order to avoid jeopardizing a key source of their authority (see for example Hall, 2014; McGuire and Stimson, 2004; Sternberg et al., 2015, see also Bartels and Johnston 2013).

Endogenous and exogenous explanations of judicial authority in systems of limited government suggest that courts need to be foresighted in their decision-making in order to mature in their role as constraints on the political power of the elected branches. Clifford Carrubba neatly summarizes this point:

> Once created, an institutionally 'immature' court—one without public backing—will fulfill the role set out by the governments admirably; the court can facilitate compliance with the regulatory regime's rules, but it cannot impose its own preferences over those of the governments. [...] If the same court 'matures' and gains public backing the story changes dramatically. While the court is not totally free to rule as it wishes, up to certain limits it is capable of getting government compliance with the regulatory regime's rules even when both governments and publics would prefer otherwise. That is, the court develops truly independent influence, or, put differently, the court's decisions become institutionally based exogenous constraints (Carrubba, 2009, 68).

Carrubba's theory of the development of independent courts capable of placing constraints on the elected branches suggests that courts need to nurture and subsequently maintain their authority. A prominent strand of scholarship in judicial politics has shown that courts engage in strategic decision-making to try to ward off attempts by the other branches of government to undermine their authority and institutional integrity. In the following section, I take a closer look at two specific, separate threats to courts' authority that are central to this scholarship: elected branches' backlash against courts in the form of court-curbing and lawmakers' failure to comply with courts' judgements.

1.3 Threats to judicial authority

To exercise constitutional review free from external influences is critical for courts to serve as an effective check on the elected branches in systems of limited government. Hence, unsurprisingly the establishment of courts tasked with controlling the acts of the elected branches usually comes with a set of formal institutions designed to insulate courts from external pressures on their decision-making. Carrubba et al. (2015, 4) note that formal institutions such as "life tenure, strict rules against removal for political reasons, protected budgets and so on are the types of institutional protections that are designed to ensure that judges do not simply defer to governments for reasons unconnected to the legal merits of the cases they review."

However, scholars of judicial politics have questioned whether these institutional protections in fact translate into courts' independent exercise of authority. This strand of scholarship distinguishes between *de jure* independence, i.e. the formal rules designed to insulate judges from external pressure, and *de facto* independence, i.e. the expectation that outcomes of courts' decisions not only reflect the sincere

beliefs of judges but are also effectively implemented (see for example Ríos-Figueroa and Staton, 2014; Linzer and Staton, 2015). So far, empirical evidence suggesting a systematic link between the two concepts remains mixed at best (see Melton and Ginsburg, 2014; Herron and Randazzo, 2003; Helmke and Rosenbluth, 2009).

Institutional protections of courts' independence may not serve as a guarantee of courts' exercise of constitutional review free from external influences partly because lawmakers nonetheless find ways to circumvent or undermine these institutions. When courts frustrate the political agenda of those controlling political power, the latter face incentives to curb the courts. Court-curbing encompasses action "that threatens to restrict, remove, or otherwise limit the Court's power" (Clark, 2010, 19). Court-curbing thus includes lawmakers' attempts to undermine a court's institutional legitimacy in public speeches in legislatures or press interviews (Carrubba et al., 2015). But it may also involve more serious attacks on the judiciary, involving the slashing of courts' budgets, restrictions on their jurisdiction, or 'packing' the court with loyal judges (see Handberg and Hill Jr., 1980; Rosenberg, 1992; Whittington, 2003). These attacks may leave courts dysfunctional and put their role as effective checks on the elected branches in jeopardy.

For instance, documenting the evolution of the Russian Constitutional Court during the early years of the post-Soviet Russian Federation, Epstein et al. (2001) note that the court's assertive use of its powers to challenge the executive branch in the early 1990s provoked President Yeltsin to sign a decree in October 1993, suspending the Constitutional Court until the adoption of a new constitution. Following the subsequent constitutional reform, judges on the Russian Constitutional Court had inter alia lost their lifetime appointment, could no longer decide cases on their own initiative or pass judgements on the constitutionality of political parties (Epstein et al., 2001, 137).

The existing literature shows that episodes of court-curbing are not limited to states with fragile political institutions (see Llanos et al., 2015), but remain a credible threat in democratic polities with established institutions as well. Clark (2010) documents several periods of court-curbing the U.S. Supreme Court had endured between the pre-Civil War era and 2008 (see also Nagel, 1965; Rosenberg, 1992). According to Clark, the latest period of 'high' court-curbing in the United States began in 2002, noting that "Congress has been very proactive during recent years, using new legislative techniques that have been designed to publicly condemn the Court and side-step the possibility of judicial review" (Clark, 2010, 59).

Arguably to no surprise, lawmakers' attempts to curb the judiciary eventually leave their mark on the decision-making of courts. Clark (2009) shows that the U.S. Supreme Court responds to lawmakers' tabling of court-curbing legislation with

subsequent self-restraint in its exercise of constitutional review. He argues that justices on the U.S. Supreme Court interpret lawmakers' choice to introduce and debate court-curbing legislation in Congress as an indication that the court has lost support among the public. Knowing that it may no longer be able to rely on the public's support pressuring lawmakers to duly enforce its decisions, the court then becomes more deferential to Congress in its judgements.

Lawmakers' attempts to undermine the institutional safeguards of courts' formal independence are not the only instrument available to the elected branches threatening to undermine courts' authority. 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' judgements censoring the actions of the elected branches for constitutional incompatibility typically require a response from lawmakers. The elements of legislative and executive acts a court had invalidated and taken off the books need to be redrafted in light of the court's jurisprudence. Scholars of judicial politics have highlighted that lawmakers enjoy a degree of discretion in their response to courts' judgements and may attempt to evade faithful compliance with the spirit of courts' jurisprudence (Carrubba and Zorn, 2010; Staton and Vanberg, 2008; Larsson and Naurin, 2016; Carrubba et al., 2008; Hall, 2011).

Evasion of compliance can take a variety of forms. Krehbiel (2016) references German lawmakers' response to the German Federal Constitutional Court's 1992 objection to provisions in party finance laws affording financial advantages to established political parties. Filling the gaps the court's ruling had left in the legislative text, German lawmakers simply added "a new clause that created a substantively equivalent policy to the one ruled unconstitutional" (Krehbiel, 2016, 996). Other avenues for lawmakers to evade faithful compliance include informal and non-statutory arrangements, which continue to apply practices objected by the court (see for example the U.S. Congress's continued use of the so-called 'legislative veto' in its bills despite the U.S. Supreme Court's objection of the practice in *INS v. Chadha*, see Fisher, 1993), or the—possibly indefinite—delay of implementation of court rulings (see Kapiszewski and Taylor, 2013).

The existing literature has shown that courts' implementation dilemma, lacking the power to coerce the elected branches into compliance with its jurisprudence, is a concern for courts keen on maintaining their institutional integrity. Hall (2014, 354) notes that "justices' concern for institutional maintenance may be partially rooted in a fear of nonimplementation", adding that "[f]requent nonimplementation of the Court's rulings might reduce its power and degrade its legitimacy over time." Excerpts from Vanberg's interviews with former justices at the German Federal

Constitutional Court corroborate this expectation:

> You know, the court has issued many decisions that were never complied with, for example about the treatment of civil servant pensions. And there really isn't anything the court can do about that. If no one else takes an interest in it, that's just the way it is going to be. And of course the court has to be worried about that, that a tradition of ignoring the court isn't established (Justice of the German Federal Constitutional Court, quoted in Vanberg, 2005, 122).

Courts' reliance on the elected branches of government for the effective implementation of their judgements and the prospects of tarnishing their institutional integrity should the elected branches repeatedly fail to comply with their jurisprudence has spawned a literature analysing how courts' implementation dilemma reflects in their decision-making. This literature expects courts to exercise constitutional review of the actions of the elected branches strategically. Epstein and Knight (1998, 10) argue that "justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."

The main argument of this literature claims that courts' implementation dilemma constrains courts' decision-making. Given implementation of their judgements often lies in the hands of lawmakers, courts anticipate how the latter would react to their judgements—and strategically avoid judgements at risk of non-compliance (see Gely and Spiller, 1990; Bergara et al., 2003). 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).

Accordingly, the preferences of the elected branches can act as a constraint on the decisions of courts tasked with controlling them. However, a series of recent studies have shown that courts can employ a variety of strategies to attenuate these constraints. Owens et al. (2013) find that justices at the U.S. Supreme Court obfuscate the language they use in majority opinions in order to make it more costly for a politically hostile Congress to review their judgements and potentially pursue retaliatory measures for unfavourable judgements (for similar arguments, see also Owens and Wedeking, 2011; Staton and Vanberg, 2008). Larsson et al. (2017, 881) analyse the use of references to precedent in the judgements of the Court of Justice of the European Union and find that "the Court argues more carefully, by means of reference to precedent, when it takes decisions that conflict with the positions of EU governments." Finally, knowing that lawmakers risk backlash from an

electorate supportive of the court should they get caught evading compliance with courts' jurisprudence, courts attempt to increase the transparency of the political environment in which implementation would take place, for instance by accompanying their judgements with press releases or by scheduling oral arguments that garner the attention of the media (Vanberg, 2005; Staton, 2006, 2010; Krehbiel, 2016).

1.4 Approach of the thesis

The literature reviewed in the preceding sections shows that the actions of the elected branches and courts tasked with controlling them are highly interdependent. This seems hardly surprising. After all, mutual interdependencies across the legislative, executive and judicial branches are the intended product of systems of checks and balances. In *The Federalist 51*, James Madison argues that to effectively constrain the power of individual branches of government "[a]mbition must be made to counteract ambition" (Madison, 1961, 356). In light of these mutual interdependencies, it is equally unsurprising that scholars studying systems of limited government have embraced a strategic outlook to explain the behaviour of courts, legislatures and executive officials (see for example Vanberg, 2005; Rogers, 2001; Harvey and Friedman, 2006; Epstein and Knight, 1998; Segal et al., 2011; Bailey and Maltzman, 2011; Iaryczower et al., 2002).

My approach in this thesis follows in the footsteps of scholarship perceiving courts and the elected branches as strategic actors. In line with these accounts, I expect courts to be aware that challenging the actions of the elected branches may result in backlash against the courts, threatening their institutional integrity. At the same time, courts know that should they decide to challenge the constitutionality of policy, political majorities in legislatures and executive officials may attempt to evade compliance with the spirit of courts' jurisprudence. Consequently, I expect courts to be uncertain whether or not it is worthwhile to pick a fight with the elected branches over the constitutionality of policy and suffer backlash, given that lawmakers may eventually come out on top and evade compliance.

In this thesis, I present a theoretical argument showing how courts solve this dilemma and offer a new perspective on the strategic inter-branch relations in systems of limited government. Much of the existing literature has focused on the constraints that courts enjoying comfortable public support place on the elected branches. Departing from these accounts, this thesis is concerned with scenarios in which courts' authority to exercise constitutional review of executive and legislative acts *fails* to counteract the ambition of the elected branches. The motivating em-

pirical examples sketched at the outset of this chapter illustrate that lawmakers do not always respond to incentives to avoid confrontation with courts. One possible explanation for this phenomenon could be that lawmakers choose to pursue controversial and ostensibly unconstitutional policies to appease the demands of fringe groups among their electoral constituencies, knowing that courts will eventually censor these policies and relieve lawmakers from actually applying them (for similar arguments, see Salzberger, 1993; Graber, 1993; Whittington, 2005). While this argument seems plausible for fringe policies, it seems less applicable to policies at the heart of governing majorities' political agenda, such as the German government's counter-terrorism strategy in the BKAG in 2008 illustrated above.

In this thesis, I argue that lawmakers' choice to pursue policies that provoke confrontation with the judiciary helps courts to anticipate how lawmakers would respond to judgements invalidating such policies—and when it is in courts' best interest to defer to the elected branches rather than to restrict their scope of action for future policies. Given that systems of limited government induce both courts and lawmakers to act strategically, lawmakers' pursuit of controversial policies allows courts to update their beliefs of whether or not they are facing lawmakers who would resist faithfully implementing judicial vetoes of their policies. Put simply, lawmakers' provocation of confrontation with courts signals a threat of non-compliance should courts opt to challenge their policies. Crucially, I show that the credibility of such signals is conditional on the costs associated with lawmakers' pursuit of controversial policies.

Existing studies have shown that political actors interacting in a strategic environment can credibly signal their true preferences or intentions when their actions are tied to costs (for an application of this logic to the signalling of foreign policy interests among states at the brink of violent conflict, see Fearon 1997). I do not expect courts to respond to every instance of lawmakers' provocation with self-restraint in their jurisprudence. However, when it is politically costly for lawmakers to pursue policies flouting the constitutional limits defined in courts' jurisprudence, courts have reason to believe that they are dealing with lawmakers prepared to evade compliance with a judicial veto, should lawmakers nonetheless persist in their pursuit of such policies.

The logic underlying this expectation is straightforward: When the political fallout from being censored by a court is particularly costly, then lawmakers willing to eventually comply with a judicial veto should not opt for policies that are at risk of being opposed by the courts in the first place. The type of lawmakers that provoke confrontation, nonetheless, are then more likely to be the ones prepared to evade compliance with the spirit of courts' jurisprudence. In these scenarios, I expect

strategic courts to be more likely to answer lawmakers' pursuit of constitutionally controversial policies with self-restraint. In other words, under these conditions, lawmakers' provocation of confrontation places a political constraint on courts' exercise of constitutional review.

My theoretical argument, to be fleshed out in the next chapter, rests on a game-theoretic analysis of the decision-making of courts and lawmakers in systems of limited government. Game theory has been the preferred analytical tool for scholars of judicial politics, who argue that courts and the elected branches act strategically in light of their mutual interdependence (see for example Vanberg, 2005; Rogers, 2001; Clark, 2010; Stephenson, 2003; Ferejohn and Weingast, 1992; Staton, 2010). Game-theoretic analyses discipline scholars to make their assumptions that enter a theoretical model, the relevant actors, their possible courses of action, and their motivations explicit (Kreps, 1990). This formalization of a theoretical model is often useful as it "may lead to new insights by forcing us to think through the implications of our assumptions" (Vanberg, 2005, 16). The class of game-theoretic models I employ in this thesis is known as signalling games (see Cho and Kreps, 1987). These games involve an interaction between a more informed agent, here the lawmaker, and a less informed agent, here the court, and "take their name from the possibility that the sender's action conveys information about her type to the receiver" (McCarty and Meirowitz, 2007, 214).

Like most game-theoretic models, the model of the strategic interactions between courts and the elected branches I present in this thesis abstracts heavily from reality and may seem overly simplistic. In reality, courts' exercise of constitutional review in a particular case is likely to be subject to a wide variety of factors, first and foremost a case's facts, the ideology and personal history of judges hearing the case, differences among the judges on the bench, the plaintiff's reasoning, interventions from third parties to the case, and so forth (see for example Segal, 1984; Segal and Spaeth, 2002; Glynn and Sen, 2015; Johnson et al., 2006; Clark and Lauderdale, 2010). My game-theoretic model strips away most of these factors and leaves only a handful of elements characterising the strategic interaction between courts and the elected branches. Despite this abstraction from reality (or as some may argue *because* of it), game-theoretic models are still useful as they allow us to focus on the effect of a particular aspect characterising the relationship among relevant actors on their behaviour—here, the costs lawmakers expect to pay from provoking confrontation with the courts (see Clarke and Primo, 2012).

My theoretical model produces empirically testable expectations. The empirical analysis in this thesis testing these expectations focuses on the decision-making of the German Federal Constitutional Court (GFCC). The reasons for choosing the GFCC

as the focus of my analysis are discussed further in the third chapter of this thesis. However, it is worth mentioning here that while the model turns out to be useful in explaining a puzzling feature of the GFCC's decision-making, I believe that the key insight of my theoretical model—courts respond with self-restraint to lawmakers' costly signals of a non-compliance threat—is applicable to other courts as well. As long as it is actually politically costly for lawmakers to provoke confrontation with the judiciary, the strategic incentives for courts required to respond to such confrontation described in the theoretical model should be at work. This makes the theoretical model useful for explaining the decision-making of courts occupying an equally powerful position in their respective political system as the GFCC, which would include courts such as the U.S. Supreme Court or the Court of Justice of the European Union.

The empirical test of my model combines both a statistical analysis of the GFCC's decision-making, qualitative evidence from interviews with former members of the GFCC as well as the legislative and executive branches in Germany, and a case study. It is worth stressing here that my qualitative evidence provides more than just an illustrative narrative of the findings from my statistical analysis. Qualitative evidence, particularly from interviews with actors at the heart of my theory, is an essential element of evaluating game-theoretic models. Vanberg (2005, 16) notes that given game-theoretic models often involve actors' beliefs about counterfactual situations that never occur, "[a] crucial concern in assessing the power of a formal model must therefore consist in determining whether the beliefs and perceptions of real-world actors about the interactions they are engaged in and about the strategies of other players correspond closely to the beliefs imputed to players in the model."

1.5 Plan of the thesis

The remainder of this thesis is organized as follows. The second chapter introduces the game-theoretic model and derives a set of empirically testable expectations of how courts respond to lawmakers' provocation of confrontation. The first part of the third chapter discusses my case selection and the assembly of the dataset that I use for my statistical analysis of the GFCC's decision-making. I identified every federal law reviewed by the GFCC between 1983 and 2017, and read the parliamentary plenary debates on these laws to capture the political costs lawmakers in government risked paying for provoking confrontation with the GFCC. The third chapter's second part then presents the result of the statistical test of the theoretical model's expectations.

The fourth chapter presents evidence from my interviews with German lawmakers and former members of the GFCC to evaluate whether my assumptions about the beliefs of the actors in my theoretical model match up to the beliefs the corresponding actors in the real world hold about the strategic environment they find themselves in. The fifth chapter offers a case study of the GFCC's constitutional review of the 2008 Federal Criminal Police Office Act, providing an analytic narrative of the theoretical model's main argument. While my approach in this thesis remains by and large positive, in other words I do not evaluate whether the model's expected behaviour of courts and lawmakers is normatively desirable, the final chapter considers the broader normative implications of my findings in this thesis.

Chapter 2

Signalling political constraints

In most modern constitutional democracies, courts can invalidate executive and legislative acts for their constitutional incompatibility and play a critical role in ensuring that the elected branches respect constitutional norms (Ginsburg and Versteeg, 2014). Several scholars have provided evidence of how courts exercising constitutional review *passively* shape and constrain the actions of lawmakers.

Stone (1989) argues that the legislative process in the French parliament cannot be assessed without considering both the direct and indirect influence of the French Constitutional Council. The French parliament operates in the shadow of the Constitutional Council and "there is some basis for the view that the institution does function as a kind of third legislative chamber within parliamentary space, and an umpire in the political 'game'" (Stone, 1989, 30). Similar arguments have been made for the indirect influence the German Federal Constitutional Court exerts on the legislative process in the German parliament, urging lawmakers to 'self-censor' their policy-making (see for example Landfried, 1992; Vanberg, 2005; Hönnige and Gschwend, 2010), and the Court of Justice of the European Union, which induces lawmakers in EU member states to draft their policies 'with Luxembourg in mind' (Blauberger, 2012, see also Wasserfallen 2010).[1]

However, in the previous chapter I argued that the prospects of courts' exercise of constitutional review do not always deter lawmakers from testing the constitutional limits to their policies. Not every case of constitutional review a court considers merits a judicial veto, and not every act that is eventually invalidated by a court represents an instance of lawmakers willingly flouting constitutional limits on their policy-making. The actual effects of their policies are often difficult to foresee for lawmakers, and courts can serve as "an agency of sober second thought" (Note,

[1] Luxembourg is the seat of the Court of Justice of the European Union.

1956, 1311), allowing lawmakers to correct any unintended consequences of their policies (see Rogers, 2001).

But there is evidence that lawmakers in government at times persist in their pursuit of controversial policy even if a risk of breaching constitutional limits is tangible at the policy-making stage. Hönnige and Gschwend (2010, 510) show that between 1997 and 2007, members of the German Bundestag or state governments referred roughly five federal laws for review to the German Federal Constitutional Court each year—with about half of them eventually struck as unconstitutional by the court. The third chapter in this thesis provides ample evidence from debates in the German Bundestag, which shows that its members rarely wait for policy to be passed to voice their constitutional concerns, but instead make themselves heard during the legislative process. The following excerpt from a Member of Parliament's statement during the German Bundestag's debate on the 2008 Act Reforming Inheritance and Valuation Taxation is illustrative of this phenomenon:

> Christine Scheel (Greens): For today's vote, you submitted a highly complex body 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—this legislation will end up in Karlsruhe.[2] It doesn't bode well for parliamentary democracy if legislation is passed, despite knowing it fails to conform with our constitutional guidelines.[3]

Put simply, lawmakers who see their favoured policies end up reviewed and invalidated by a court often had been warned about the constitutional risks inherent in their choices. What seems puzzling is that the evidence laid out in subsequent chapters of this thesis shows that lawmakers in government not only disregard constitutional concerns coming from the opposition benches, which may be motivated by political opportunism rather than genuine constitutional concerns, but also warnings from independent experts heard during the committee stages and their own political allies in parliament. Why would lawmakers pursue policies that provoke confrontation with a court capable of censoring them?

This chapter's focus is to present a theoretical model that can explain this type of lawmakers' behaviour and identify its implications for the decision-making of courts in systems of limited government. The model I present in this chapter is formal and applies game theory. In the following, I address the more intricate elements of

[2]Karlsruhe is the seat of the German Federal Constitutional Court.

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

the formal analysis in detail, while leaving the formal proofs of my argument to a technical appendix at the end of this chapter.

2.1 Confrontation and judicial self-restraint

At the heart of the theoretical model is a dilemma for courts tasked with reviewing the acts of the legislative and executive branches. The literature reviewed in the preceding chapter suggests that courts know that their judgements censoring the policies of political majorities are unlikely to be viewed favourably by the latter and increase the chance of backlash. Not every instance of court-curbing will threaten to deplete courts' institutional integrity, but it is unlikely that a court challenging the elected branches will ever escape some form of criticism of interfering with the will of the democratically elected institutions (see Carrubba et al., 2015).

At the same time, even if courts decide to bear the risks of court-curbing and challenge policies favoured by a political majority, courts know that lawmakers may attempt to evade compliance with their judgements and find ways to continue to apply the policies objected by the court (see Vanberg, 2005; Staton and Vanberg, 2008; Carrubba and Zorn, 2010). Hence, courts challenging the constitutionality of policy expose themselves to the risk of court-curbing knowing that they may walk away from confrontation with the elected branches without achieving their preferred outcome, the correction of policy in line with their constitutional jurisprudence.

The dilemma for courts is then to assess whether challenging lawmakers over policy is worth the risk. In the following, I model this dilemma as courts' uncertainty about the type of lawmakers they are facing. Given that lawmakers themselves risk to spoil their electoral prospects if they choose to evade compliance with the demands of courts (see Clark, 2010; Vanberg, 2001), some lawmakers may be prepared to defend their policy choices against a judicial veto and bear these electoral risks—but others are not. At the end of the previous chapter I mentioned that the theoretical model simplifies a political process that is complex in reality and my approach towards modelling courts' uncertainty is an example of such simplification. I do not explicitly model why there are different types of lawmakers, compliant and non-compliant ones.

The existing literature offers several plausible reasons of why some lawmakers may be more inclined to risk evading compliance than others. Clark (2010) argues that due to their direct accountability to the electorate, lawmakers are better informed than courts about how the public would react to them challenging judicial authority. Following shifts in the public's attitudes towards the court, the risk of

electoral backlash for lawmakers defying courts' demands varies over time and lawmakers are in a better position than courts to identify periods of low-risk. Similarly, scholarship suggests that transparency of the political environment increases the costs of non-compliance (Staton, 2006; Krehbiel, 2016; Vanberg, 2005), and it may be easier for lawmakers than judges to assess whether a political issue is likely to gain traction in the media and create the necessary transparency to make compliance evasion too risky (but see Blauberger et al., 2018). Finally, lawmakers may simply value some policies more than others and be more willing to evade compliance with judicial vetoes on policies they consider as highly salient (Dahl, 1957, 286).

Regardless of which of these expectations is at work in reality, the key assumption at the heart of my theoretical model is that courts lack perfect information of whether or not lawmakers would evade compliance with their judgements. Note that a lack of perfect information does not imply that courts are clueless about the type of lawmakers they are facing, however. The model developed below incorporates courts' prior beliefs about lawmakers' types—the key is simply the absence of courts' certainty about the latter.

I expect courts to prefer challenging the actions of lawmakers who will eventually comply with their judgements over walking away empty-handed from confrontation with lawmakers. I argue that the solution to courts' dilemma lies in the costs that lawmakers risk from confrontation with the courts. Being censored by a court comes with political costs for those who had openly supported the objected policies. I expect these costs to bite in scenarios in which the subject of a judicial veto is not the correction of an unintended consequence of policy (see Rogers, 2001), but when lawmakers had received clear advice during the policy-making stages that their choices infringe on constitutional norms.

When lawmakers ignore credible warning signs that their favoured policies are unconstitutional and choose to push these policies through parliament regardless, censure by a court offers ammunition to lawmakers' political opponents—including critics within their own party—to discredit their political acumen among the electorate. Upon taking up their mandate in the legislature or executive office, lawmakers are sworn to respect and protect the constitution. Ignoring concerns of breaching constitutional norms voiced by representatives of all political colours, followed by censorship through a court, allows members of the opposition parties and critics to publicly question lawmakers' commitment to 'play by the rules' (see Vanberg, 1998).

These costs described above are distinct from the costs lawmakers risk paying should they evade compliance and get caught (Vanberg, 2001; Mayhew, 1974). Should a court strike constitutionally controversial policies, lawmakers who had pushed these policies through the legislature pay the price for provoking confronta-

tion regardless of whether or not they actually choose to evade compliance with the court's judgement. In other words, lawmakers willingly risking confrontation with a court create political costs they suffer *ex post* should the court veto their policies.

I argue that lawmakers' demonstrated willingness to pay these costs allows courts to update their prior beliefs of whether or not they are facing lawmakers prepared to evade compliance with an unfavourable judgement. I expect lawmakers to be aware that they risk paying a political price for provoking confrontation with courts over the constitutionality of their policies. Accordingly, compliant lawmakers, who are ultimately willing to faithfully implement a judicial veto of their policies should be less likely to risk exposing themselves to these costs. Compliant lawmakers would have to pedal back and re-draft their policies to respect the constitutional boundaries the court established in its jurisprudence, while still suffering the political fallout from the judicial veto. For these types of lawmakers, 'auto-limiting' their policy choices and taking constitutional concerns on board to avoid a court's scrutiny in the first place generally appears to be the more attractive option. This implies that the lawmakers who do not avoid confrontation with the court and are undeterred in their pursuit of constitutionally controversial policy are more likely to be the types of lawmakers prepared to evade compliance. Before I formalize the argument in the next section and show how lawmakers' choices at the policy-making stage affect courts' decision-making, I briefly discuss the final building block of my theory.

The model rests on an assumption that lawmakers can actually identify the constitutional limits to their policies at the policy-making stage and are thus able to evaluate whether a court is likely to strike their policy choices. This assumption requires that lawmakers can form reasonable expectations about the direction of future constitutional review judgements. I argue that the legal reasoning courts provide in existing case law and the legal precedent they set in their judgements help lawmakers with this task.

Existing scholarship shows that by resolving constitutional review cases, courts create legal rules, which define what kind of policies would qualify as compatible with the constitution and guide the resolution of future cases (Callander and Clark, 2017, see also Lax and Cameron 2007; Carrubba and Clark 2012; Clark and Lauderdale 2012). These studies draw on a doctrinal-politics approach and the 'case-space model', which seeks to bring the theoretical arguments of judicial politics scholars closer to what judges are actually doing in their work. Making the case for the usefulness of a doctrinal-politics approach, Jeffrey Lax writes:

> This model highlights legal cases as the vehicles for policy making, but of course judicial policy making is more than simply case disposition after case disposition. When appellate courts address judicial policy

> more generally, they typically do so in opinions that establish (new or modified) legal rules for deciding current and future cases. The possible set of cases is the 'case space.' A rule is a partition of the case space into winners and losers (Lax, 2011, 133).

In the context of this thesis, it is these legal rules contained in courts' jurisprudence, which separate constitutional from unconstitutional policies and serve as the constitutional guardrails for lawmakers' policy-making. In reality, these legal rules are unlikely to always provide lawmakers a definite answer of whether or not a particular policy is unconstitutional or not, not least because some of the rules courts create in their judgements closely stick to the facts of a particular case and are unsuitable to be applied beyond the latter (see Fox and Vanberg, 2014). Here, the model presented in this chapter again abstracts from reality and assumes that lawmakers can perfectly distinguish between policies in line and at odds with a court's jurisprudence. While this assumption benefits theoretical parsimony at the costs of simplifying reality, the model still provides a useful insight into how lawmakers' choice to adopt a policy despite expecting (and in the theoretical model, knowing) that it conflicts with existing jurisprudence affects a court's decision-making.

2.2 A formal model of constitutional review

In the following, I develop an extensive form game of incomplete information involving three players, Nature (N), a lawmaker (L) and a court (C). Adding a third player, Nature, is a tool commonly used in formal models to allow one player, here the lawmaker, to be better informed about a certain aspect of the game than the other player, here the court. The model's sequence of play is shown in Figure 2.1.

At the start of the game, Nature randomly selects the lawmaker's type, $\theta \in \{0, 1\}$. If $\theta = 1$, the lawmaker is non-compliant and evades compliance with a judicial veto that censors her policy choice. If $\theta = 0$, the lawmaker is compliant and corrects any policy struck by the court in line with the spirit of the latter's decision. Nature's draw is only revealed to the lawmaker, hence the court is uncertain about the lawmaker's type. The court's prior beliefs that it is facing a non-compliant lawmaker are characterized by the probability $Pr(\theta = 1) = p$. Following Nature's draw, the lawmaker then chooses from two policy options, $\rho \in \{a, b\}$. Policy a conflicts with the court's existing constitutional jurisprudence, while policy b does not. If the lawmaker chooses option a, the court is called upon to exercise constitutional review and decides whether to strike or uphold policy a, $d \in \{strike, uphold\}$. After the court's choice, the lawmaker's type is revealed and payoffs are allocated.

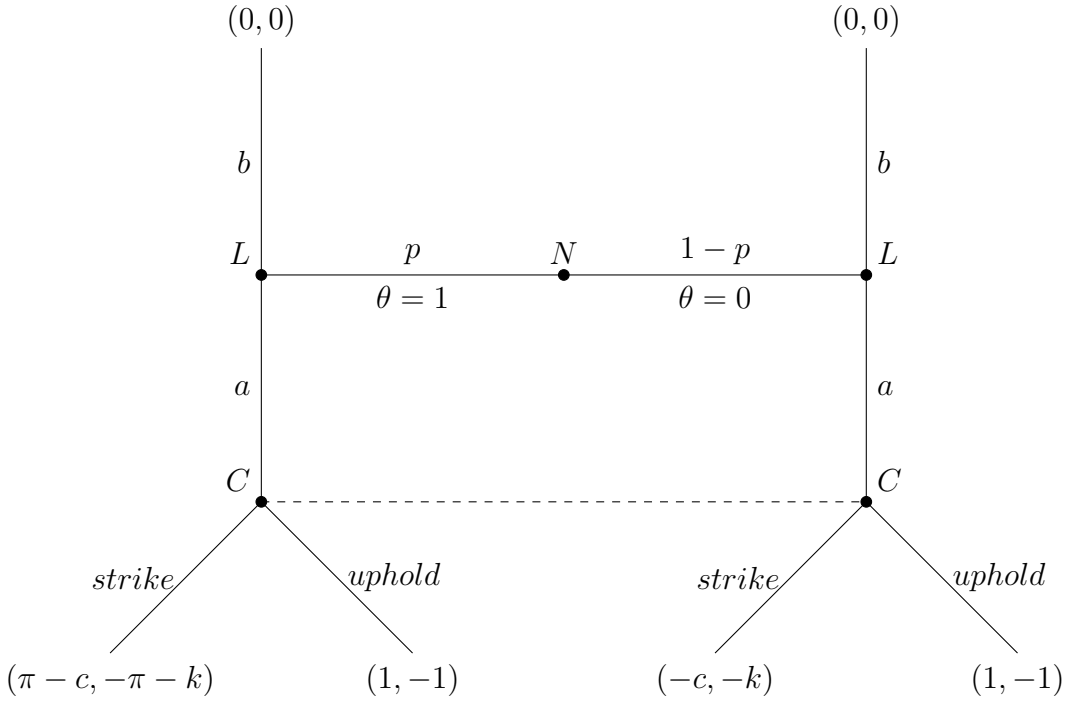

Figure 2.1: Sequence of play and realized outcomes

To motivate the strategic interaction between the court and lawmaker I am interested in, let the lawmaker prefer policy a over b. In other words, the lawmaker prefers to pass policy unconstrained by the court's jurisprudence. To illustrate, consider the following example: A lawmaker interested in reducing social welfare spending may pursue policy reforms that for some of her constituents result in welfare payments that fall below a minimum guaranteed by the court's constitutional jurisprudence. The lawmaker knows that she would not be able to reduce spending to her preferred level if she took the court's constitutional jurisprudence into account (i.e. through policy b), but could achieve her intended target through a policy that does not pay respect to the court's jurisprudence (i.e. through policy a).

On the other hand, let the court suffer a cost whenever the policy conflicting with its constitutional jurisprudence (i.e. policy a) continues to be applied at the end of the game, either because the court decided to uphold the policy or because the lawmaker evaded compliance with a ruling striking policy a. When policy a remains on the books after the court's decision, the lawmaker receives a payoff of 1, while the court suffers costs of -1. To simplify the algebra that goes into identifying the game's equilibria, let both the lawmaker and the court receive a payoff of 0 when policy b is on the books. Note that the payoffs' values are essentially arbitrary, yet not their relation. What is important is that the lawmaker strictly prefers policy a over b, while the opposite is the case for the court. Provided this is the case, the payoffs' actual values do not affect the game's number or type of equilibria.

The lawmaker and the court both anticipate costs should the court decide to strike policy a as unconstitutional. The court knows that the lawmaker may discipline it for striking her preferred policy. Hence, let the court anticipate costs $k \in \mathbb{R}_+$ (i.e. any positive, real number) for striking policy a. As discussed in the previous chapter, court-curbing in response to an unfavourable judgement can come in many forms, such as lawmakers' statements seeking to undermine the public's faith in courts' institutional legitimacy, cuts to courts' budgets or amendments to their jurisdiction. Given the severity of threats to courts' authority varies across these measures, the model allows the court's anticipated costs k to vary as well.

The lawmaker, on the other hand, knows a judicial veto of policy a comes with costs $c \in \mathbb{R}_+$, the political fallout from being censored by the court. The model allows the lawmaker's costs to vary as not every judicial veto of a policy will throw the political future of those who authored the policy in jeopardy. Yet, as discussed in the previous section, in some instances a court's veto can provide lawmakers' political opponents the necessary tailwind to successfully undermine the electorate's belief in lawmakers' commitment to 'play by the rules' (see Vanberg, 1998).

Finally, the court knows that it may rely on the lawmaker responsible for passing policy a to give effect to its decision to strike policy a. Typically, lawmakers' response to a court's constitutional veto of their policy does not immediately follow the court's decision: Floor time in the legislature has to be re-allocated and the policy addressing (or at least pretending to address) the court's demands needs to be shuttled through the legislative process, which requires time. Accordingly, the lawmaker's ability to evade compliance with a judicial veto is conditional on her retaining office long enough to actually be in charge of implementing the court's decision. Let $\pi \in (0, 1)$ denote the probability that the same lawmaker responsible for policy a will still be in office to take charge of implementing the court's decision.

Summarizing the model's primitives yields the following Bernoulli utility functions for the lawmaker and the court:

$$U_L = I_L(I_C(\theta\pi - c) + (1 - I_C))$$
$$U_C = I_L(I_C(-\theta\pi - k) - (1 - I_C))$$

Here, I_L identifies the lawmaker's choice of policy ($I_L = 1$ if the lawmaker chooses policy a; $I_L = 0$ if she chooses policy b) and I_C identifies the direction of the court's decision ($I_C = 1$ if the court chooses to strike policy a; $I_C = 0$ if the court chooses to uphold policy a). To illustrate, assume the lawmaker's type is non-compliant, $\theta = 1$. If she chooses policy a ($I_L = 1$) and the court chooses to uphold ($I_C = 0$), the lawmaker's utility is simply $U_L = 1$, whereas the court's utility is $U_C = -1$.

However, should the court instead decide to strike ($I_C = 1$), the lawmaker's utility is determined by $U_L = \pi - c$, while the court's utility is determined by $U_C = -\pi - k$. In this signalling game, a strategy for the lawmaker is a mapping from her type into a policy choice, $\rho : \theta \rightarrow \{a, b\}$. A strategy for the court is a mapping from its prior beliefs about the lawmaker's type into a constitutional review decision, $d : p \in (0, 1) \rightarrow \{strike, uphold\}$.

2.2.1 Analysis

In the following, I derive predictions about both the lawmaker's policy choice and the court's response should the lawmaker choose policy a. Equilibrium solutions to signalling games such as the one presented in this chapter require "that agents form beliefs about the history reached at each information set and select best responses given these beliefs" (McCarty and Meirowitz, 2007, 209). These kinds of equilibria are known as perfect Bayesian equilibria (PBE).

Three types of PBE can be supported in this signalling game: (1) *Separating*: The lawmaker chooses different strategies contingent on her own type and based on the lawmaker's choice the court can perfectly update its prior beliefs about the lawmaker's type; (2) *Pooling*: The lawmaker chooses the same strategy regardless of her type and the court is unable to update its prior beliefs; and (3) *Partial pooling*: The lawmaker chooses different (mixed) strategies contingent on her type and the court is unable to perfectly update its prior beliefs about the lawmaker's type.[4] All formal proofs are gathered in the technical appendix to this chapter.

I begin the formal analysis with scenarios in which the court never defers to the lawmaker should the latter opt for policy a. Whenever the probability that the lawmaker responsible for policy a would also take control of the implementation of the court's judgement is low enough relative to the court's costs of striking policy a, the court has no incentive to defer to the lawmaker. Specifically, when $\pi \leq 1 - k$, two types of PBE can be supported. A separating equilibrium exists, in which the non-compliant lawmaker ($\theta = 1$) opts for policy a and the compliant lawmaker ($\theta = 0$) for policy b. As long as the lawmaker's costs satisfy the condition $c < \pi$, the non-compliant lawmaker's preferred choice is to opt for policy a, despite knowing that the court would strike it. In addition, given $\pi \leq 1 - k$, two (similar) pooling equilibria exist, in which both types of lawmakers self-censor their policy-making in anticipation of the court's veto and never opt for policy a.

[4]Note that the formal proofs in the technical appendix to this chapter show that the court remains uncertain whether or not it faces a non-compliant lawmaker should the lawmaker choose policy a, yet knows that it faces a compliant lawmaker should the latter choose policy b.

Proposition 1. Provided $\pi \leq 1 - k$, the court strikes whenever the lawmaker chooses policy a. Given $c < \pi \leq 1 - k$, a PBE exists in which the lawmaker chooses policy a if $\theta = 1$ and policy b if $\theta = 0$, and the court chooses to strike policy a. Given $\pi \leq 1 - k \leq c$, a PBE exists in which the lawmaker always chooses policy b and the court chooses to strike off the equilibrium path. Given $\pi \leq c < 1 - k$, a PBE exists in which the lawmaker always chooses policy b and the court chooses to strike off the equilibrium path.[5]

The separating equilibrium exemplifies an interesting dynamic. It shows that despite the court's best response to strike any policy conflicting with its jurisprudence, the non-compliant lawmaker will still opt for policy a whenever the probability π that she gets a shot at evading implementation of the court's ruling is sufficiently high relative to the costs c she suffers from a veto. This finding suggests that as long as the lawmaker's anticipated political fallout from a judicial veto is negligible, the mere chance of getting another shot at redrafting the policy in the future is enough to compromise the efficacy of the deterrent the shadow of constitutional review is thought to impose on lawmakers. I further discuss this finding in my interpretation of the formal results below and return to it in my analysis of evidence from interviews with members of the German Bundestag in Chapter 4. At the same time, the two pooling equilibria identified in the proof for Proposition 1 in the technical appendix show that otherwise, the lawmaker's expected costs from suffering a judicial veto induce her to pass policies respecting the court's jurisprudence and pre-empt the court's exercise of constitutional review altogether.

I now analyse equilibrium behaviour for the remaining parameter space of π, i.e. $\pi > 1 - k$. In these scenarios, two types of PBE can be supported. I first consider a pooling equilibrium, in which the lawmaker always picks policy a over policy b, irrespective of her type. If the court's prior beliefs of facing a non-compliant lawmaker are sufficiently high relative to its own costs k and the probability of relying on the lawmaker for faithful implementation π, the court' best response is to self-censor its exercise of constitutional review and uphold policy a.

Proposition 2. Provided $\pi > 1 - k$ and $p > (1 - k)/\pi$, a PBE exists in which the lawmaker always chooses policy a and the court always chooses to uphold a.

The pooling equilibrium defined in Proposition 2 shows that the court defers to the lawmaker when it expects to suffer high costs from striking the lawmaker's preferred policy, i.e. high values on k, and faces a lawmaker with a lasting grip

[5] Referring to the choice(s) of the court 'off the equilibrium path' here simply says how the court would react if the lawmaker chose policy a. Given that in equilibrium the lawmaker never chooses policy a in these scenarios, the node where the court can actually make a decision in the game-tree in Figure 2.1 is never actually reached.

on political power, i.e. high values on π.[6] This finding resonates with existing scholarship showing that the prospects of turnover in government office—or lack thereof—are systematically related to the deference courts show towards the elected branches in their jurisprudence (see Ramseyer and Rasmusen, 2001; Stephenson, 2003; Ishiyama Smithey and Ishiyama, 2002). For instance, analysing more than 7,500 decisions issued by justices on the Argentine Supreme Court between 1976 and 1995, Helmke (2002) provides evidence that justices increasingly issue judgements challenging government towards the end of both weak dictatorships and weak democratic governments, yet act more deferentially as long as the incumbent demonstrates a firm grip on political power.

The model's final equilibrium shows that under certain conditions, the court has an incentive to self-restrain even when it occupies a generally powerful position, that is when the prospects of being disciplined by lawmakers for striking policy are low (i.e. low values on k) and when the court can generally expect that its rulings are subsequently implemented (i.e. low values on p). Provided the probability that the lawmaker responsible for policy a would also take charge of implementing the court's decision is sufficiently high, the court then draws on the costs the lawmaker risks suffering from a judicial veto to update its prior beliefs about the lawmaker's type. Specifically, in these scenarios the court makes a probabilistic decision of whether or not to strike policy a, which is conditional on the lawmaker's costs c.

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

This partial-pooling equilibrium indicates that the probability $r(c)^*$, the probability that the court strikes policy a, decreases in c, the costs the lawmaker would suffer from a judicial veto. The intuition behind this finding is straightforward: We should expect that a compliant lawmaker should not risk bearing the costs of a judicial veto, given she would eventually apply a policy that conforms with the court's ruling. Hence, when the lawmaker has much to lose in case a court censors her actions, yet chooses to pass a policy conflicting with the court's constitutional jurisprudence nonetheless, she credibly signals a non-compliant type (although the equilibrium shows that given the court plays a mixed strategy, the compliant lawmaker is not always deterred from choosing policy a and plays a mixed strategy herself). The higher the costs the lawmaker risks paying, the more credible the

[6]Note, the threshold $(1 - k)/\pi$ decreases in both k and π, hence an increase in both k and π means that the parameter space for the court's prior beliefs p supporting the pooling equilibrium of Proposition 2 increases as well.

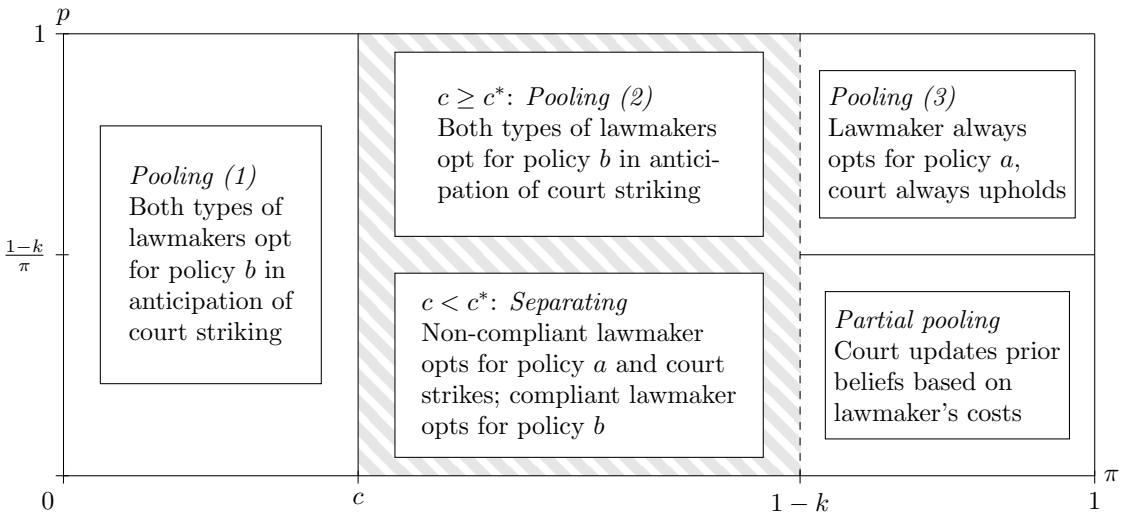

Figure 2.2: Equilibrium predictions (π denotes the probability that the lawmaker controls implementation; p denotes the court's prior beliefs about the lawmaker's type; k denotes court's cost for striking a policy; c denotes the costs the lawmaker pays when the court strikes policy a; $c^* \equiv 1 - k$)

signal. Given the court anticipates (at least some) costs from striking policy itself, the court then becomes more cautious in its response to the lawmaker's choice and more likely to defer as the lawmaker's anticipated costs increase.

2.2.2 Interpretation and comparative statics

The equilibrium behaviour of the court and lawmaker for the full space of the parameter π (i.e. the probability that the same lawmaker who passed policy a would also control the implementation of a judicial veto of policy a), and the parameter p (i.e. the court's prior belief that it is facing a non-compliant lawmaker) is illustrated in Figure 2.2. One of the questions I seek to answer in this thesis is which of the two actors effectively defines the constitutional boundaries to policy. The five equilibria displayed in Figure 2.2 can be ranked according to the court's ability to ensure that only policies respecting the boundaries it defines in its constitutional jurisprudence are applied. I discuss them in the order of this ranking in the following.

The two pooling equilibria *Pooling (1)* and *Pooling (2)* in Figure 2.2 suggest that the court is most successful in preventing the application of policies conflicting with its constitutional jurisprudence when lawmakers' expected costs from being censored by a court are sufficiently high and when it is unlikely that lawmakers can hold on to political power long enough to be in a position to evade compliance

with the court's judgement.[7] This observation fits neatly with the expectations of scholars arguing that courts do not necessarily have to play an active role in order to ensure that policies stay within the boundaries of the constitution (see Stone, 1992; Landfried, 1992; Rogers and Vanberg, 2007).

As long as both the lawmaker and the court know that it is costly for the former to be at the receiving end of a court's constitutional veto, a provocation of confrontation is simply not worth it for any lawmaker lacking the prospects of having a shot at evading compliance with the court's judgement. Since the court knows that it has little to fear in the way of both court-curbing and non-compliance (captured by the condition $\pi \leq 1 - k$), it can essentially act unconstrained and would censor any policy that conflicts with its interpretation of the constitution. Knowing that, the lawmaker 'auto-limits' her policy-making and addresses any constitutional concerns that come up during the policy-making stages to ensure that the policies she adopts align with the court's constitutional jurisprudence (see Stone Sweet, 2007).

The drivers of such 'auto-limitation' are the costs the lawmaker expects to pay should the court censor her policies. Unless there are costs to ignoring constitutional boundaries, the lawmaker has no incentive not to opt for its preferred policy, even if an application of such policy would violate constitutional norms. This dynamic is evident again in the model's separating equilibrium. In this equilibrium, the court still chooses to strike any policy that conflicts with its interpretation of the constitution. If we think of the court's judgements in constitutional review cases in terms of legal rules separating constitutional from unconstitutional policies (see Lax, 2007; Landa and Lax, 2009), then the legal rules the court establishes in scenarios captured by the separating equilibrium reflect its sincere interpretation of the constitution.

However, the separating equilibrium also shows that the non-compliant lawmaker will still opt for its preferred policy, despite knowing that the court will strike it. While this behaviour may initially seem counter-intuitive, the separating equilibrium provides the first indication that a lawmaker's choice to provoke confrontation with a court capable of striking her policies can be entirely rational. When the stakes are low for a lawmaker prepared to evade compliance with a court's judgement (i.e. low values on her cost parameter c), passing her preferred yet 'bound-to-fail' policy is preferable over working out an alternative policy that respects the court's constitutional jurisprudence. This equilibrium hence indicates that the court's ability to ensure that applied policies fall within the limits of its constitutional jurisprudence can be compromised without the court ever deferring to the elected branches. Under

[7] This latter expectation is captured by the threshold $1 - k$ for the parameter π. In every equilibrium that falls to the left of the threshold $1 - k$ in Figure 2.2, the court censors any policy conflicting with its jurisprudence (but note that this does not necessarily prevent that such policies are eventually applied, which is further illustrated in the discussion of the separating equilibrium).

certain conditions, the prospects of the court's exercise of constitutional review fail to be an effective deterrent for some lawmakers. While the court *formally* defines legal rules that match its sincere interpretation of the constitution, it cannot prevent at least some lawmakers from (at least temporarily) implementing policies with effects that stray beyond constitutional boundaries *in practice*.

Lawmakers' costs from confrontation with the court operate in an intuitive way in scenarios captured by the separating equilibrium—lower costs correspond to fewer inhibitions among lawmakers against pursuing policies that conflict with courts' constitutional jurisprudence. Moving on to the partial-pooling equilibrium illustrated in the bottom-right corner of Figure 2.2, the formal model shows that lawmakers' costs from confrontation with a court can play another, distinct role in the strategic interactions among courts and lawmakers in systems of limited government.

Compared to the conditions captured by the equilibria discussed in the previous paragraphs, the political environment captured by the partial-pooling equilibrium differs in one respect. While the court still has little to fear from court-curbing (i.e. low values on the parameter k), lawmakers now stand a good chance of staying in office long enough to be in charge of implementing (and possibly evading) a court's judgement that challenges their policies (i.e. high values on the parameter π).[8] Technically, for the partial-pooling equilibrium to take centre-stage, the relationship between these two parameters could also be inverted (i.e. high values on k and low values on π). However, I believe that in reality we are more likely to encounter the former kind of political environment, where courts enjoying comfortable levels of diffuse public support that shield them from serious assaults on their institutional integrity face lawmakers able to count on getting a shot at responding to the court's decision during their time in government office.

The model's partial-pooling equilibrium shows that under these conditions, both the non-compliant and compliant lawmaker pursue policies that conflict with the court's constitutional jurisprudence. Notably, the latter type of lawmaker makes a probabilistic choice of whether or not pursue such policy. The probability with which the compliant lawmaker opts for a policy that provokes conflict with the court increases with the likelihood that she stays in office to take charge of implementation (i.e. the parameter π), the costs the court expects to pay should it strike the policy (i.e. the parameter k), and the court's prior beliefs of facing a non-compliant lawmaker (i.e. the parameter p).[9] This seems intuitive: As higher values on these

[8]Note that high values on π and low values on k (or vice versa) also mean that the court's prior beliefs are more likely to satisfy the partial-pooling equilibrium's condition $p \leq (1-k)/\pi$ than if both π and k have high values.

[9]Recall that the partial-pooling equilibrium shows that the compliant lawmaker chooses policy a with probability $q(\pi)^* = \frac{p(\pi+k-1)}{(1-k)(1-p)}$.

parameters make striking policy more risky and costly for a court hoping to avoid non-compliance with its judgements, the tide turns in favour of the (compliant) lawmaker, who in turn becomes less inhibited in her pursuit of policy conflicting with the court's jurisprudence.

The fact that both types of lawmakers now (at least potentially) pursue policies at odds with the court's existing jurisprudence pushes the court to find a way to distinguish among the two types. The court still prefers to strike an 'unconstitutional' policy if it faces a compliant lawmaker, but how can it determine the lawmaker's type? The model suggests that the court pays close attention to the costs the lawmaker risks paying in confrontation with the court in order to distinguish between the lawmaker's types. When two interdependent actors with diverging preferences compete over an outcome (such as a policy), an actor can credibly signal her intentions or type to her counterpart if her own actions are tied to costs. 'Listening to the pain' others are bearing (or at least appear willing to bear) to pursue a certain course of action allows actors to update their prior beliefs about the type of their counterparts (Humphreys, 2016, 60, see also Fearon 1997).

In the theoretical model, the court 'listens to the pain' of the lawmaker to update its prior beliefs of whether or not it is facing a non-compliant lawmaker. The court has reason to believe that the costs lawmakers expect to pay should it strike their policy are more likely to deter compliant lawmakers from provoking confrontation with the court. Hence, if the prospects of a particularly detrimental political fallout from being censored by the court fail to deter the lawmaker from provoking confrontation, the court concludes that it is likely that it is facing a non-compliant lawmaker. Figure 2.3 provides a simple illustration of how variation in the lawmaker's costs translates into the decision-making of the court.

The horizontal axis displays the lawmaker's (increasing) costs, while the vertical axis displays the probability of the court striking a policy that conflicts with its constitutional jurisprudence. It is easy to see that the probability of the court striking policy decreases as the lawmaker's expected costs from being censored by the court increase (including scenarios where the lawmaker's costs c actually exceed the payoff she receives from implementing her preferred policy). The court becomes more likely to defer to the lawmaker as the costs the lawmaker appears willing to bear from confrontation with the court increase. Figure 2.3 also shows that provided the lawmaker's costs are close to zero, it is still likely that the court strikes a policy conflicting with its jurisprudence. Unless the lawmaker's costs are 'painful', they cannot credibly signal her type.

Note that in scenarios captured by the partial-pooling equilibrium the court never becomes entirely deferential to the lawmaker. The negative marginal effect of

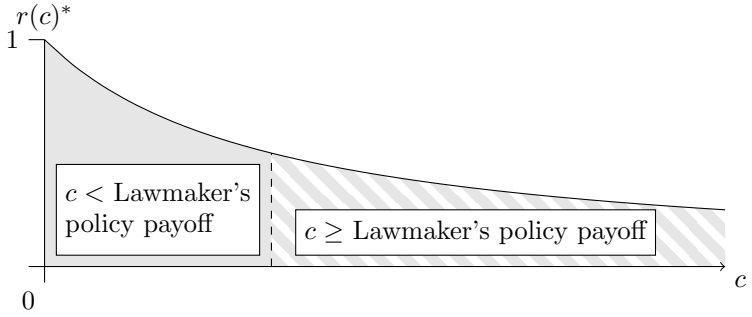

Figure 2.3: Probability $r(c)^*$ of court striking policy a conditional on lawmaker's cost c in a partial-pooling equilibrium with $\pi > 1 - k$ and $p \leq (1 - k)/\pi$

the lawmaker's costs shown in Figure 2.3 gradually decreases as these costs increase and the court always strikes policy with some positive probability.[10] Consequently, it is these environments, with a powerful lawmaker facing a powerful court, in which we should be able to observe lawmakers and courts repeatedly clashing over the constitutionality of policy, as neither faces sufficient incentives to consistently shy away from confrontation. Yet, it is also these kinds of environments in which we should expect courts to defer to lawmakers over the constitutionality of policy from time to time. The model predicts that courts will grant lawmakers greater leeway in their constitutional jurisprudence than they would ideally prefer—and that the likelihood of courts deferring increases with the costs lawmakers risk from confrontation.

The model's final equilibrium, *Pooling (3)* in Figure 2.2, captures scenarios in which the cards are stacked against the court. In these political environments it is highly likely that lawmakers will stay in office long enough to be in a position to evade compliance with a judicial veto (i.e. high values on the parameter π) while the court also expects to pay high costs for striking lawmakers' policies (i.e. high values on the parameter k).[11] Put simply, it is these scenarios in which a court is most likely to walk away empty-handed from a bruising confrontation with lawmakers.

The model then predicts that the court will choose to defer to lawmakers whenever the latter pursue policies that conflict with the court's jurisprudence. Knowing that, neither type of lawmaker is deterred from pursuing such policies. In other words, in these scenarios courts are in the least favourable position to ensure that policies stay within the limits of its constitutional jurisprudence: The court deliberately crafts legal rules to classify lawmakers' policies as constitutional.

[10] Technically, the probability $r(c)^* = 1/(1 + c)$ can take on the value zero in its limit as $c \to \infty$.

[11] Note that high values on the parameters π and k also lower the threshold $(1 - k)/\pi$ for the parameter p, which means that the court finds itself subject to the incentives characterised by the pooling equilibrium *Pooling (3)* even if its prior beliefs of facing a non-compliant lawmaker are relatively low.

In reality, we may find such environments in (semi-)authoritarian polities, which at least formally grant courts the power of constitutional review (see for example Moustafa and Ginsburg, 2008; Gandhi, 2008). In these environments, the electoral connection between those controlling the levers of political power and their constituents may be compromised, which allows the former to stay in office long enough to respond to any court judgement concerning their policies. An underdeveloped electoral connection also diminishes the potential inhibitions lawmakers may have against curbing courts.

This does not necessarily mean, however, that courts facing such an environment are indefinitely trapped in the pooling equilibrium. While the model developed in this chapter stays silent on this issue, others have shown that even courts facing initially adverse political environments can gradually develop their institutional authority and become an effective constraint on political power (see Carrubba, 2009; Ginsburg, 2003). Moustafa (2003), for instance, shows how the Egyptian constitutional court developed from an institutional guarantee signalling the Egyptian regime's commitment to property rights into an authority capable of providing activists and human rights groups an avenue to challenge the state (see also Moustafa, 2007; Ginsburg, 2003).

Before I summarize the observations I have made based on my formal analysis of the model and translate them into empirically testable hypotheses in the final section of this chapter, I briefly discuss what I believe should not be concluded from my formal analysis.

Arguably the two most interesting and novel findings of my analysis are that under certain conditions, pursuing policies that will be struck by a court is a rational choice for lawmakers, while at times courts will choose to defer to lawmakers when the latter provoke a for themselves potentially very costly confrontation. One may gain the impression upon reading this chapter that we should expect lawmakers to frequently and willingly pursue policies that conflict with courts' existing constitutional jurisprudence. However, it is worth recalling that the model is built on the premise that a lawmaker prefers a policy that conflicts with a court's jurisprudence over any other possible alternative.

In reality, this may actually be the case from time to time, and the evidence laid out in the next chapter in fact shows that incidentally German lawmakers pursue evidently unconstitutional policies. At the same time, there appears to be little reason to believe that lawmakers *generally* favour policies a court would object to. In other words, lawmakers' choice to provoke confrontation with courts over policy is a rare yet nonetheless important event for understanding and explaining courts' decision-making in systems of limited government.

2.2.3 Empirical implications

The formal model developed in this chapter has several implications, which can be empirically evaluated. In the remainder of this thesis, I will provide empirical tests for some of these implications, and where this is not possible I will nonetheless make an effort to provide quantitative and qualitative evidence to illustrate the plausibility of these claims. While formulating empirically testable hypotheses in this section, I will also indicate which of the remaining chapter(s) of this book will provide empirical evidence addressing these claims.

The first empirical implication I consider draws on the observation derived from the formal model's separating equilibrium. The model predicts that some lawmakers pursue policies despite knowing that the court will strike them. Provided the political costs from being at the receiving end of the court's veto are negligible, these lawmakers also know that they may get a chance at evading compliance with the court's decision in the future, making confrontation with the court worth the risk. Hence, under these conditions, lawmakers opt for their preferred albeit 'unconstitutional' policies instead of settling for any less attractive alternatives that would be in line with the court's constitutional jurisprudence:

Hypothesis 1. Ceteris paribus, lawmakers should be more likely to risk confrontation with a court when the costs from such confrontation are low (Chapter 4).

The second empirical implication I consider in the remainder of the thesis concerns the probability that the authors of a policy reviewed by a court would also be in charge of implementing the latter's decision on that policy. As we move through the theoretical model's equilibria, the formal analysis suggests that, ceteris paribus, as it becomes more likely that lawmakers will cling onto power long enough to take charge of implementing a judgement on their policy choices, the risks of non-compliance increase for a court. Assuming courts lacking the 'power of the purse or sword' face incentives to avoid issuing decisions that are ultimately not enforced by the legislative and executive branches then leads to the following hypothesis:

Hypothesis 2. Ceteris paribus, a court should be less likely to strike a policy when the probability that the policy's author controls implementation of the court's decision is high (Chapter 3).

The probability that a policy's authors would take charge of implementing the court's corresponding constitutional review decision also plays an implicit role in the model's final empirical implication I consider here. The model predicts that a court should be more likely to deal with constitutionally controversial policies when lawmakers can expect to hang onto power long enough to respond to the court's

decisions. In these scenarios, the shadow of constitutional review fails to deter non-compliant *and* compliant lawmakers in government from pursuing policies at odds with a court's jurisprudence.

A key implication of the model is that courts should be more likely to show self-restraint in their decision-making when lawmakers had ignored advice on the constitutionality of their policies and thus face prospects of suffering high political costs *ex post* a judicial veto. Ignoring warning signs of constitutional violations during the policy-making stages can come back to bite lawmakers should a court actually censor their policies. It lends the political opposition and critics (including those in lawmakers' own party), who had identified constitutional issues later addressed by the court, an opportunity to score political points by publicly questioning their political acumen and commitment to upholding the constitution. The model suggests that lawmakers showing their willingness to bear these costs are signalling a credible non-compliance threat to the court, leading to the following hypothesis:

Hypothesis 3. Ceteris paribus, a court should be less likely to strike a policy when lawmakers had risked suffering high political costs for provoking confrontation with a court (Chapters 3 and 5).

2.3 Conclusion

In this chapter, I presented a formal theoretical model, which explains why lawmakers at times adopt policies that conflict with courts' constitutional jurisprudence and predicts how courts respond when lawmakers provoke confrontation with them by pursuing such policies. The model explicitly addresses a dilemma for courts lacking immediate control over the implementation of their constitutional review rulings: How can courts avoid issuing judgements that are subsequently not implemented by lawmakers? The model provides a simple answer to this question. Lawmakers credibly signal a non-compliance threat if their actions provoking confrontation with courts are tied to high political costs.

The theoretical model predicts that when facing a credible non-compliance threat, courts become less likely to strike policy as unconstitutional and establish legal rules in their jurisprudence that grant lawmakers more leeway for their policy-making. Accordingly, by provoking confrontation with courts over the constitutionality of their policies, lawmakers can indirectly shift the constitutional limits to policy in their favour. In the remainder of this thesis, I bring original evidence from the German Federal Constitutional Court's exercise of constitutional review and the German Bundestag's policy-making to bear on this and other claims made in this chapter.

2.4 Technical appendix

This appendix provides formal proofs of the propositions defined in this chapter. Without loss of generality, consider the following tie-breaking assumptions:

- If indifferent between policy a and b, the lawmaker will choose policy b.
- If indifferent between striking and upholding policy a, the court will choose to strike.

Proof of Proposition 1 (Separating equilibrium): Suppose the lawmaker chooses policy a if $\theta = 1$ and policy b if $\theta = 0$. The court's posterior beliefs are given by $Pr(\theta = 1 \mid a) = 1$ and $Pr(\theta = 0 \mid a) = 0$. The court chooses to strike policy a if $-\pi - k \geq -1$. Solving for π yields $\pi \leq 1 - k$. Given $\pi \leq 1 - k$ and $\theta = 1$, the lawmaker has no incentive to deviate from choosing policy a if $\pi - c > 0$. Solving for π yields $\pi > c$. Given $\pi \leq 1 - k$ and $\theta = 0$, the lawmaker has no incentive to deviate from choosing policy b if $-c \leq 0$ or $c \geq 0$. A separating equilibrium exists if $c < \pi \leq 1 - k$.

Proof of Proposition 1 (Pooling equilibria): Suppose the lawmaker chooses policy b if $\theta = 1$ and policy b if $\theta = 0$. Off the equilibrium path, arbitrary values can be assigned to the court's posterior beliefs, i.e. $Pr(\theta = 1 \mid a) = \lambda$ and $Pr(\theta = 0 \mid a) = 1 - \lambda$. Off the equilibrium path, the court chooses to strike policy a if $\lambda(-\pi - k) + (1 - \lambda)(-k) \geq -1$. Solving for λ yields $\lambda \leq (1 - k)/\pi$. Given $\lambda \leq (1 - k)/\pi$ and $\theta = 1$, the lawmaker has no incentive to deviate from its prescribed strategy if $0 \geq \pi - c$. Solving for π yields $\pi \leq c$. Given $\lambda \leq (1 - k)/\pi$ and $\theta = 0$, the lawmaker has no incentive to deviate from its prescribed strategy if $0 \geq -c$ or $c \geq 0$. If if $c < 1 - k$ and $\pi \leq c$, then the condition $\lambda \leq (1 - k)/\pi$ is always satisfied and a pooling equilibrium exists if $\pi \leq c < 1 - k$. If $c \geq 1 - k$ then the condition $\lambda \leq (1 - k)/\pi$ is always satisfied if $\pi \leq 1 - k$ and a pooling equilibrium exists if $\pi \leq 1 - k \leq c$.

Proof of Proposition 2: Suppose the lawmaker chooses policy a if $\theta = 1$ and policy a if $\theta = 0$. The court's posterior beliefs are given by $Pr(\theta = 1 \mid a) = p$ and $Pr(\theta = 0 \mid a) = 1 - p$. If the lawmaker 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, the lawmaker has no incentive to deviate from its prescribed strategy. A pooling equilibrium exists if $\pi > 1 - k$ and $p > (1 - k)/\pi$.

Proof of Proposition 3: Suppose the lawmaker chooses policy a if $\theta = 1$ and policy a with probability $q(\pi)^*$ if $\theta = 0$. Suppose the court strikes policy a with probability $r(c)^*$. The court's posterior beliefs are given by $Pr(\theta = 1 \mid a) = \frac{p}{p+q(1-p)}$ and $Pr(\theta = 0 \mid a) = \frac{q(1-p)}{p+q(1-p)}$. 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 $\theta = 0$, the lawmaker 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 $\theta = 1$, the lawmaker 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 π yields $\pi > 0$, which is always satisfied given $\pi \in (0,1)$. A partial pooling equilibrium exists if $\pi > 1-k$ and $p \leq (1-k)/\pi$. ■QED

Chapter 3

Constitutional confrontation and judicial deference in Germany

The theoretical model developed in the previous chapter makes a novel claim on how courts identify whether their constitutional review judgements are at risk of non-compliance: Courts conclude that lawmakers who risk paying a high political price for pursuing constitutionally controversial policies are more likely to be the ones prepared to evade compliance with courts' judgements. Put simply, lawmakers' political costs from confrontation signal a non-compliance threat to courts. Assuming courts face incentives to avoid conflict with the elected branches when non-compliance with their jurisprudence is on the horizon, we should be more likely to see courts display self-restraint in their judgements when lawmakers had provoked a potentially costly confrontation with them.

In this chapter, I offer an empirical test of this claim, employing a statistical analysis of original data on the German Federal Constitutional Court's constitutional review of federal laws between 1983 and 2017. The theoretical model identifies two conditions for political environments in which we should expect lawmakers' costs from confrontation to serve as a (credible) signal of a non-compliance threat:

1. A court challenging the actions of the elected branches is not at risk of suffering high costs from court-curbing, and

2. Lawmakers anticipating constitutional review can reasonably expect to control government office in the future, allowing them to respond to (and possibly evade compliance with) the court's judgements on their policy choices.

When these conditions apply, both courts and lawmakers occupy powerful positions in systems of limited government, with neither of them facing sufficient in-

centives to consistently shy away from confrontation. A court knows that it is at risk of non-compliance, yet given the costs from challenging lawmakers over their policies are low, it will not always choose to defer to the elected branches. Lawmakers on the other hand know that their constitutionally controversial policies are at risk of a constitutional veto. Yet, given it is likely enough that lawmakers get an opportunity to respond to the court's jurisprudence, with the latter thus facing incentives to occasionally show self-restraint, even otherwise 'compliant' lawmakers are not always deterred from provoking confrontation.

In the next section, I reflect on these conditions and discuss why Germany's constitutional politics since 1983 present a promising environment to evaluate the core claim of my theoretical model. I then describe how I operationalized the relevant parameters of my theoretical model to test (some of) the hypotheses developed in the previous chapter, detail my data collection process and briefly describe relevant patterns in my data. The third part of this chapter defines the statistical models I estimate and presents the findings of my analysis, followed by a series of robustness checks. The chapter concludes with a discussion of my findings.

3.1 Constitutional review in Germany

The empirical evaluation of the theoretical model's claims centres on the case of constitutional review by the German Federal Constitutional Court (in the following, GFCC) for several reasons. First, in practice the GFCC's exercise of constitutional review of the legislative and executive branches' acts closely reflects the interactions among lawmakers and courts in systems of limited government that the theoretical model tries to capture. Second, over the past three decades, the GFCC has operated in a political environment that matches the theoretical model's two conditions for lawmakers' costly signalling to take centre stage: The GFCC has enjoyed high diffuse public support that makes serious assaults on its institutional integrity practically unthinkable, while lawmakers in government (at least during some legislative periods) had sufficient reason to believe that they would get a shot at responding to the GFCC's judgements on their policies.

I discuss these reasons for my case selection in more detail in the following paragraphs and provide background information on the institutional features and decision-making procedures of the GFCC relevant for my analysis in this chapter along the way (for excellent, more comprehensive overviews over the institutional history and practice of the GFCC, see work by Vanberg, 2005; Kommers, 1994; Stone Sweet, 2000; Landfried, 1995).

The GFCC is one of the busiest constitutional courts in the world and is regularly called upon to review whether an act pursued by a German public authority conflicts with the rights and norms that can be derived from the German constitution, the Basic Law.[1] A small fraction of the GFCC's decisions concerns the compatibility of German federal and state laws with the Basic Law (e.g. in 2018 the GFCC issued decisions on the constitutionality of twelve federal or state laws).

A law's constitutional compatibility can be challenged at the GFCC via three different routes: (1) concrete norm control, i.e. lower courts can refer a law for review to the GFCC should they believe that its application would result in a breach of the constitutional rights of a party to a case they need to adjudicate;[2] (2) abstract norm control, i.e. the federal government, state governments or one quarter of the members of the German Bundestag can refer a law for review to the GFCC; and (3) constitutional complaints, i.e. individuals can challenge the constitutionality of a law themselves once they have exhausted all other legal remedies (usually through challenges of an act pursuant to a law in the lower courts), provided the challenged law affects them personally, presently and directly.

The GFCC hears its cases in different institutional compositions. The court comprises two Senates, with eight justices sitting on the bench of each Senate. The Federal Constitutional Court Act states that the First Senate enjoys jurisdiction over cases involving the possible violation of fundamental rights, while the Second Senate primarily deals with 'state matters', such as disputes between the federal government and Germany's federal states or electoral complaints (although evidence from my interviews with former clerks at the GFCC suggests that this distinction in competences has been somewhat blurred due to the court's immense workload).

Not every application challenging the constitutionality of a public authority's act is eventually heard in one of the GFCC's Senates. Overall, the vast majority of applications that reach the GFCC are decided in Chambers, which comprise three justices each. The GFCC's Chambers can refuse to admit an application for decision, which means that the court does not substantively consider the constitutionality of the challenged act (i.e. the challenged acts remain in effect).

[1] In 2018 alone, the GFCC issued decisions in more than 5,600 proceedings, with the vast majority of these (roughly 5,400) originating from constitutional complaints filed by individuals alleging that their rights were violated by a German public authority. A detailed overview over the workload of the GFCC since 1951 is published in English in its annual statistics summary from 2018, see `https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2018.pdf`.

[2] Lower federal and state courts often hear cases involving disputes between individuals and public authorities, e.g. recipients of welfare payments and public authorities issuing these payments. Generally, authorities' decisions are made pursuant to federal or state laws, and in deciding their cases lower courts may find that the application of a particular law results in infringements of individuals' constitutional rights. Given that lower courts in Germany cannot invalidate laws for their constitutional incompatibility themselves, they then refer these cases to the GFCC.

In the context of constitutional review of a law, a Chamber may refuse an application admission for decision for instance because a challenged law does not affect the individual lodging the application personally, presently and directly, or if the Chamber finds that a lower court referring a law for review to the GFCC did not adequately justify its reasons for referral. Decisions issued by Chambers require unanimity. If justices in a Chamber cannot agree on whether an application challenging a law's constitutionality is inadmissible, the case needs to be heard by one of the Senates. Only a Senate of the GFCC can declare a law as unconstitutional.

Half of the justices on the GFCC are elected by the Bundestag, Germany's lower parliamentary chamber, and half of them are elected by the Bundesrat, parliament's upper chamber comprising government representatives of Germany's sixteen federal states. Justices serve twelve-year, non-renewable terms on the bench of the GFCC. To be appointed, a justice requires the support of at least two-thirds of the respective chamber's members. The two-thirds requirement essentially demands that governing majorities and the opposition in the parliamentary chambers cooperate when appointing justices to the GFCC (Hönnige and Gschwend, 2010, 513).

Hönnige and Gschwend (2010) note that relative to the politics surrounding the appointment procedures at the U.S. Supreme Court (see Moraski and Shipan, 1999; Szmer and Songer, 2005), we know remarkably little about how lawmakers in the German parliament choose justices for the GFCC (see also van Ooyen, 2008). Nonetheless, Vanberg (2005, 83) identifies a pattern in the selection process that is closely related to the two-thirds requirement for appointments: In order to avoid deadlock in the appointment process, "an informal division of seats on the court has developed." Throughout the timeframe for my analysis (1983 to 2017), the GFCC has traditionally maintained an ideological parity within its two Senates, with four justices in each Senate appointed by centre-right coalitions and the other four appointed by centre-left coalitions. Accordingly, even if a coalition of political parties enjoys a majority of seats in either the Bundestag or Bundesrat for several consecutive terms, their political dominance does not translate into an ideological shift on the bench of the GFCC in their favour.

To declare a federal or state law as incompatible with the constitution, a majority of justices in the Senate hearing the case needs to agree with this decision. The votes individual justices cast in a case are not made public, unless a justice takes the rare step of writing a dissenting opinion. If the vote in the Senate is tied, the reviewed law is considered constitutional (i.e. the presiding justice in the Senate, usually the GFCC's president or vice-president, does not cast a deciding vote). Applications challenging the constitutionality of federal or state laws heard by the GFCC generally concern specific paragraphs, rather than laws in their entirety. The

decisions of the GFCC themselves carry the force of law, which means should the court rule that specific paragraphs contained in a law are unconstitutional, they are struck from the rest of the law's text and lawmakers in the elected branches are instructed to replace the objected paragraphs with provisions in line with constitutional norms.[3] Notably, given its decisions carry the force of law, the GFCC does not rely on action by the elected branches for its decision to strike sections from a law to take effect. This characteristic of the GFCC's decisions makes it seem that evading compliance with a ruling is effectively impossible for the elected branches.

However, Vanberg (2005, 7) argues that, in practice, the possibility of non-compliance with the GFCC's decisions is not simply academic, noting that "[e]vasion of constitutional decisions in Germany, for example, is sufficiently frequent that an article published in one of the nation's preeminent newspapers, the Süddeutsche Zeitung, recently concluded that legislative majorities in Germany routinely evade or circumvent FCC decisions that are politically costly or have significant budgetary implications" (translated from German the article's title from January 10 of 1998 reads 'If it does not sit well, it is ignored').

Vanberg (2005) provides examples of non-compliance with the GFCC's decisions, including the court's so-called 'Crucifix decision',[4] and its 1992 ruling on federal law regulating the financing of political parties. In the latter case, the GFCC had ruled that the provision of a fixed amount of money to each political party that had received at least two percent of the vote in the previous federal election violated the constitutionally guaranteed independence of political parties from the state. The Bundestag subsequently passed a new law, which afforded every party one Deutsche Mark for every vote it received in a federal election, while adding an additional small bonus payment for each of the first five million votes a party captured. Vanberg (2005, 4) notes that "this 'bonus payment' constitutes, in practice, little more than the base amount that was declared unconstitutional by the court, as several prominent constitutional lawyers have pointed out" (see also von Arnim, 1996).

To summarize, once the GFCC has been called upon to exercise constitutional review of a federal or state law, the court can declare paragraphs contained in these laws unconstitutional, striking them off the books. Yet, in practice, the GFCC

[3]Generally, the GFCC can choose one of two formulations when declaring paragraphs of federal or state law unconstitutional: The court can declare paragraphs as (1) incompatible with the Basic Law and consequently 'null and void', which effectively means that the paragraphs are struck from the rest of the law's text with immediate effect; otherwise, (2) the GFCC typically chooses to declare paragraphs as incompatible with the Basic Law and instructs lawmakers to replace the objected provisions by a certain date.

[4]After the GFCC had ruled a Bavarian school ordinance requiring the display of a crucifix in public elementary school classrooms as unconstitutional in August 1995, the Bavarian parliament responded with new legislation stating that "[i]n light of Bavaria's historical and cultural traditions, a cross is displayed in every classroom" (cited in Vanberg, 2005, 3).

cannot prevent the elected branches from pursuing legislative or administrative responses to the GFCC's decisions, which would allow them to evade compliance with the spirit of the court's jurisprudence. Existing literature has shown that the GFCC is not alone with this dilemma. For instance, Carrubba and Zorn (2010) show that the U.S. Supreme Court's decision-making is shaped by a concern for compliance with its jurisprudence (see also Clark, 2010; Hall, 2014), while Larsson and Naurin (2016, 403) provide evidence from the European Court of Justice's decisions in preliminary reference procedures implying that "judges are both concerned with—and uncertain of—what the political reactions to their decisions will be." In other words, like other courts exercising constitutional review, the GFCC faces the kind of compliance dilemma captured by the theoretical model presented in Chapter 2.

One of the reasons why the GFCC's constitutional review of federal law appears to be a fertile ground to test the theoretical model's core claims is that the GFCC has enjoyed consistently high levels of diffuse public support over the past three decades. Evidence from public opinion surveys presented by Gibson et al. (1998, 351) suggest that not only are Germans very aware of the GFCC's existence, but also express remarkably high levels of trust in the GFCC "to make decisions that are right for the country as a whole."

Data covering the mid-1980s up until the early 1990s collected by the Emnid Institute and reported by Vanberg (2005, 98) provide evidence of the German public's high diffuse support for the GFCC. Table 3.1 shows that the public's trust in the GFCC as an institution not only seems to be high, consistently outranking trust in the Bundestag or the federal government, it also appears to be fairly stable over the years (the general drop in trust in institutions shown for 1993 in Table 3.1 captures the inclusion of respondents from East Germany, a pattern also reflected in the data provided by Gibson et al. 1998). Further, there is no indication that the German public's high trust in the GFCC abated in more recent years. Table 3.2 reports data from the German General Social Survey, again capturing the German public's trust in the GFCC, the Bundestag and federal government between 2008 and 2018, which reinforces the impression that the GFCC's standing amongst the German public by far outweighs that of the executive and legislative branches.

High levels of public trust in the GFCC are a critical factor in my case selection. First, recall that the main focus of this chapter is to empirically evaluate the theoretical model's claim that courts tend to respond with deference to lawmakers who had provoked a for them potentially costly confrontation. The literature reviewed in the first chapter of this dissertation highlights that the public's diffuse support is a critical source of courts' authority in systems of limited government. Vanberg (1998, 305) argues that "it is electorally costly to be perceived to be in

Institution	1982	1986	1990	1993
GFCC	82%	85%	84%	73%
Bundestag	61%	74%	65%	44%
Federal government	59%	66%	61%	43%

Table 3.1: Proportion of respondents stating that they trust an institution in response to the question "I am now going to read you a list of public institutions and organizations. Please tell me for each institution or organization whether you trust it, or whether that is not the case. How about ... ?" Table is based on representation by Vanberg (2005, 98) and reports data from Emnid Institute (1995)

Institution	2008	2012	2018
GFCC	62%	67%	70%
Bundestag	27%	36%	42%
Federal government	29%	37%	40%

Table 3.2: Proportion of respondents reporting values of 5 and above on a 7-point Likert scale in response to the survey item "I am now going to read out a number of public institutions and organisations. Please tell me for each institution or organisation how much trust you place in it. Please use this scale: 1 means you have absolutely no trust at all – 7 means you have a great deal of trust." Table reports data from Leibniz Institute for the Social Sciences (2018)

conflict with the court", yet this argument rests on the assumption that the electorate is actually supportive of the court's role. Unless the public considers a court as a legitimate authority, lawmakers are unlikely to face costs for ignoring a court's jurisprudence. Qualitative evidence from German media coverage and interviews presented in subsequent chapters illustrates that lawmakers in the Bundestag and federal government indeed risk public shaming for flouting the court's jurisprudence.

Given the GFCC's public support outweighs the support enjoyed by the legislature and the federal government, the costs lawmakers risk paying may in fact be too high for them to ever provoke confrontation with the GFCC. This would render the German case unsuitable to test the empirical implications of the formal model's partial-pooling equilibrium and the dissertation's core argument derived from it. However, evidence collected for the statistical analysis presented below (as well as the qualitative evidence considered in subsequent chapters) shows that despite the risks associated with provoking confrontation with the GFCC, lawmakers nonetheless occasionally pursue policies disregarding widespread constitutional concerns.

The German court's high public support plays another, albeit related role for my case selection. At times the GFCC has to weather vociferous criticism from lawmakers questioning the court's 'undue' influence in the legislative process. To

illustrate, in response to a series of GFCC decisions invalidating federal law, one of the most senior members of the Christian-conservative CDU and then-President of the Bundestag, Norbert Lammert, penned a rather thinly veiled threat in one of Germany's most prominent newspapers, the Frankfurter Allgemeine Zeitung. Lammert wrote that a parliament left overly restricted by the GFCC's jurisprudence may "choose to defend itself" and amend the constitution "in order to avoid unwelcome jurisprudence in the future."[5]

The German public's high diffuse support for the GFCC effectively shields the court from lawmakers' efforts that would threaten the court's institutional integrity actually being implemented. Whittington (2003, 460) notes that "[a]n attack on the courts may provoke a public backlash against those who seek to subvert a cherished national institution, independent of any calculation about the particular actions that the court has taken or may take in the future." This sentiment is reflected in the evidence I gathered from interviews with former members of the Bundestag and the German federal government. In a telephone interview conducted on March 23, 2019, I asked a former member of the Bundestag how lawmakers can respond to the GFCC's—in their opinion—activist jurisprudence, who then replied:[6]

> *Lawmaker 1:* Once in a while, you hear calls to change the personnel at the constitutional court or to amend the court's jurisdiction. Theoretically, that is possible and when the emotions are running high, these options may seem feasible. But in the end, people shy away from actually doing it. You know, there is a general consensus in Germany that the Federal Constitutional Court is a necessary institution, and the public definitely holds the court in high regard.

The first of my theoretical model's conditions for courts to draw on lawmakers' costs to assess the credibility of a non-compliance threat states that courts should not be at risk of suffering high costs themselves due to court-curbing. Overall, in light of the GFCC's high diffuse public support over the past decades, protecting the court from the more serious attacks on its institutional integrity, I believe that the environment in which the GFCC has operated since 1983 matches this condition. My model's second condition states that lawmakers need to have sufficient reason to believe that they will get an opportunity to evade compliance with the court's

[5]Original in German, Frankfurter Allgemeine Zeitung, May 10, 2017. *Lammert fordert Zurückhaltung*, accessed April 2, 2019. `https://www.faz.net/aktuell/politik/inland/bundesverfassungsgericht-lammert-fordert-zurueckhaltung-15009324.html`

[6]While some of my interviewees I spoke to in the course of my research agreed to be quoted by name, some asked for anonymity. To ensure consistency in the following, statements made by interviewees are anonymised and names are replaced with indicative placeholders, e.g. *Lawmaker 1*, *Justice 3* or *Clerk 3* throughout the rest of this thesis.

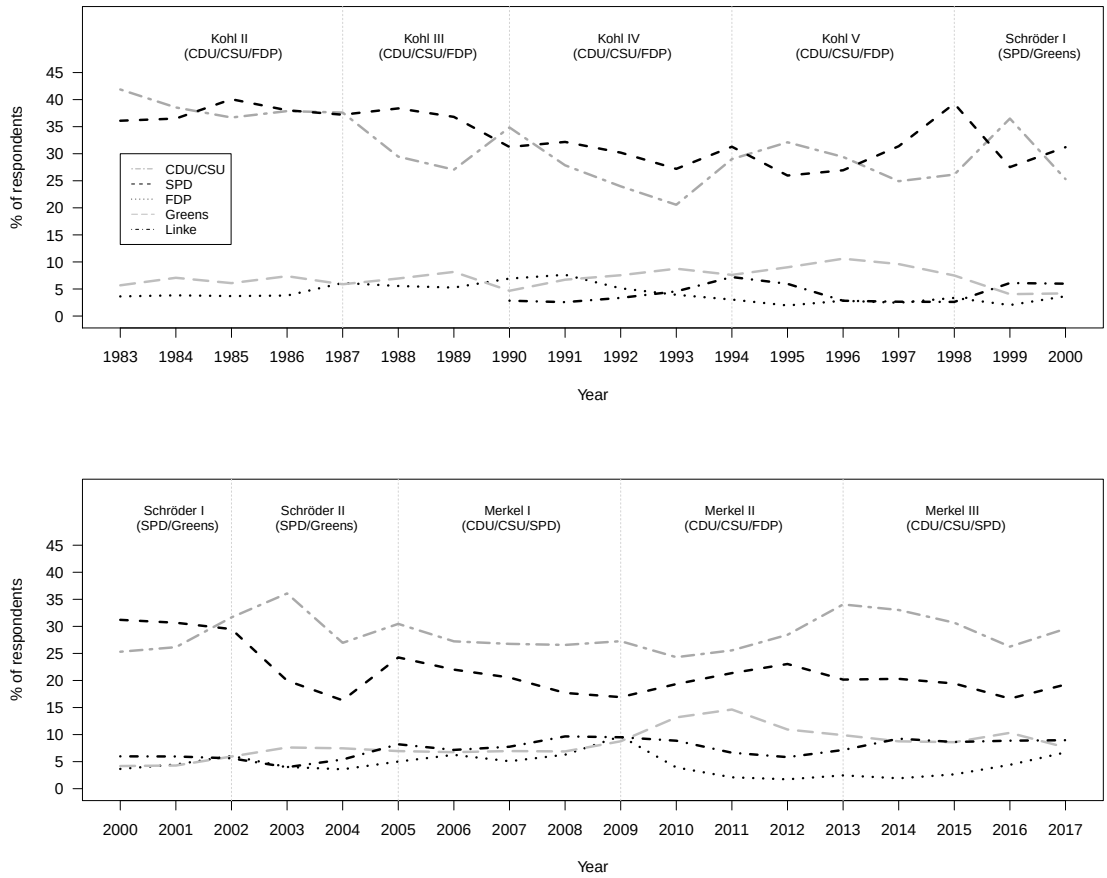

Figure 3.1: Annually cumulated proportion of respondents (in %) reporting their vote intention in response to the question "Which party would you vote for if federal elections were held this Sunday?" Figure reports Politbarometer survey data provided by Forschungsruppe Wahlen (2019)

jurisprudence in the future. Only then is it likely enough that *both* 'compliant' and 'non-compliant' lawmakers take their chances and risk pursuing policies that provoke confrontation with the court, pushing the court to look for ways to distinguish among the two types of lawmakers (i.e. the scenario captured by the model's partial-pooling equilibrium). In the remainder of this section, I will consider evidence suggesting that during some periods within the timeframe for my analysis (1983 to 2017), both types of lawmakers in the German Bundestag faced sufficiently positive electoral outlooks to risk confrontation with the GFCC.

Figure 3.1 provides an overview over every German government cabinet in office between 1983 and 2017, along with survey data from the German Politbarometer (Forschungsruppe Wahlen, 2019), which has documented political parties' popularity among the German electorate since 1977. Figure 3.1 shows that a conservative-liberal coalition under Chancellor Helmut Kohl consistently controlled government

office between 1983 and 1998. For Chancellor Kohl's first three full terms in office, Politbarometer data suggests that the governing coalition's electoral popularity dipped each mid-term, yet recovered in time for federal elections to the Bundestag in 1987, 1990 and 1994.[7]

Towards the end of Kohl's last term in office, the governing coalition of the CDU, CSU and FDP saw its electoral support waver and lost its parliamentary majority in the 1998 elections to the SPD and the Green party. During its two terms in office, Chancellor Gerhard Schröder's cabinet pursued a sweeping reform of social welfare policy, which effectively alienated the SPD's traditional electoral constituencies.[8] The loss of electoral support for the SPD and Green party's governing coalition was exemplified by the SPD's performance in state parliamentary elections. Most notably, the SPD experienced dramatic losses in elections to the state parliament of North Rhine-Westphalia, one of the party's traditional strongholds, in May 2005, which prompted the Chancellor to seek early federal elections to "find clarity whether the German public will continue to support the government's agenda."[9] The SPD and Green party subsequently lost their governing mandate in the 2005 federal elections, and government office has since been controlled by the CDU/CSU and Chancellor Angela Merkel, albeit with different junior coalition partners (including so-called 'grand-coalitions' with the SPD).

The discussion in the previous paragraphs falls short of an in-depth analysis of public opinion and electoral shifts in Germany since the early 1980s. Nonetheless, this brief overview serves an illustrative purpose to support my case selection: During some periods between 1983 and 2017, lawmakers in government enjoyed the kind of electoral fortunes that—according to the model—would provide lawmakers with enough incentives to pursue policies provoking confrontation with the GFCC even if they were willing to eventually comply with a constitutional veto. From the early 1980s until the mid-1990s, the GFCC faced a relatively popular conservative-liberal coalition that managed to hold on to government office for sixteen consecutive

[7]Helmut Kohl was first elected chancellor in October 1982 when his predecessor Helmut Schmidt of the SPD lost a so-called 'constructive vote of no-confidence' in the Bundestag. Following the change in government office from a SPD/FDP-led cabinet to a CDU/CSU/FDP governing coalition, early elections were then called for March 1983.

[8]Coined as the 'Agenda 2010', Chancellor Schröder's cabinet responded to a trend of stagnating economic growth with policies reforming the labour market, social security, taxation and public budgets. Particularly the so-called 'Hartz' legislative reform package caused controversy, as it inter alia provided incentives to individuals experiencing long-term unemployment to take up work by cutting welfare payments by up to 30% should they refuse to take a 'reasonable' job (effectively any form of legal employment), see Bundeszentrale für politische Bildung, June 31, 2007, *Die Agenda 2010*, accessed April 4, 2019, `https://www.bpb.de/apuz/28920/die-agenda-2010-eine-wirtschaftspolitische-bilanz?p=all`.

[9]Original in German, Spiegel Online, May 22, 2005. *Schröder will Neuwahlen*, accessed April 4, 2019. `http://www.spiegel.de/politik/deutschland/politisches-beben-schroeder-will-neuwahlen-a-357076.html`

years,[10] while the same political (sister) parties, the Christian-conservative CDU and CSU, consistently defined the government's agenda since the mid-2000s under the leadership of Chancellor Merkel.

Provided the theoretical model adequately reflects the behaviour of lawmakers and courts in systems of limited government, periods of consistency in government office should coincide with lawmakers being prepared to take high political risks when pursuing policies that provoke confrontation with the GFCC (e.g. the Conservative-led coalitions between 1983 and 1998 as well as 2005 and 2017). Yet, we should be less likely to observe lawmakers' high-risk taking when governing coalitions struggle for electoral support (e.g. the SPD-led coalitions between 1998 and 2005). Descriptive evidence presented in the next section suggests that this is in fact the case.

The next section revisits the hypotheses developed in the previous chapter based on the formal analysis of the theoretical model and translates them into empirically testable expectations for the GFCC's exercise of constitutional review of federal law. I then identify and operationalize the variables that make up these hypotheses for the German context and provide descriptive statistics for my data.

3.2 Hypotheses and data

The theoretical model's empirical implication at the centre of the statistical analysis in this chapter states that courts are more likely to respond with deference in their judgements to lawmakers who had provoked a for them potentially costly confrontation (see hypothesis 3 in Chapter 2). This implication can be translated into a hypothesis tailored at the GFCC's review of the Bundestag's federal laws: *Ceteris paribus, the GFCC should be less likely to strike a law when lawmakers had risked suffering high political costs for provoking confrontation with the GFCC.*

The second implication of the model considered here concerns the relationship between a court's decision-making and the likelihood that lawmakers who had authored the reviewed act would also control the implementation of a court's corresponding judgement. Hypothesis 2 discussed in Chapter 2 suggests that as we move across the theoretical model's equilibria, a higher likelihood of lawmakers controlling the implementation of judgements concerning their own policies comes with a higher likelihood of courts showing self-restraint in their exercise of constitutional review. Tailored to the GFCC's review of federal laws, this hypothesis reads: *Ceteris paribus, the GFCC should be less likely to strike a law when the probability that the law's author controls implementation of the GFCC's decision is high.*

[10] Effectively, Chancellor Kohl's first term in office began in October 1982 with then-Chancellor Schmidt's defeat in the Bundstag's 'constructive vote of no confidence'.

These hypotheses refer to the same outcome variable, the GFCC's decision to declare a federal law unconstitutional. The operationalization of this variable for my analysis is (fairly) straightforward: For each case of constitutional review involving federal laws the GFCC's Senates decided between 1983 and 2017, I identified whether the court declared the challenged paragraphs (or parts thereof) unconstitutional. Here, I was able to draw on replication data provided by Krehbiel (2016), who extended Vanberg's (2005) data on the German court's constitutional review of federal laws to the time period from 1983 to 2014. I then further extended the data to 2017 myself. The variable *Strike* is binary and coded 1 if the GFCC declared the challenged paragraphs (or parts thereof) unconstitutional, and coded 0 otherwise. Between 1983 and 2017, the GFCC's Senates issued decisions in 363 cases involving constitutional challenges of federal law paragraphs. Each year the GFCC's Senates collectively heard roughly 10.4 of these cases and struck the challenged paragraphs in about 5.3 cases.[11]

3.2.1 Explanatory variables

The explanatory variable at the centre of my attention in this chapter captures lawmakers' expected costs for pursuing policies that provoke confrontation with a court. When presenting the theoretical model in the previous chapter, I linked these costs to lawmakers' choice to ignore advice received at the policy-making stages, highlighting that their plans would violate constitutional norms.

When a court strikes a policy lawmakers had pursued despite warning signs that it would fail to match the requirements of constitutional jurisprudence, lawmakers' critics and political opponents get an opportunity to discredit their political acumen among the electorate and question their commitment to respect constitutional norms (see Vanberg, 1998). Hence, flouting their colleagues' constitutional concerns can turn out to be politically costly for lawmakers. Crucially, lawmakers' choice to ignore constitutional objections raised publicly in parliament is also a signal easily observed by courts, given that justices supported by a team of law clerks are typically well-informed about the legislative proceedings which produced the policies they review (see McCubbins et al., 1992, and qualitative evidence presented in Chapter 4).

In order to measure the political costs lawmakers pushing for constitutionally controversial policies risk paying, I studied the parliamentary debates of all federal

[11] It is worth mentioning here that, unlike Vanberg (2005) and Krehbiel (2016), I exclude decisions issued by any of the GFCC's Chambers on the admissibility of a challenge in my main analysis, as these types of decisions are substantially different from Senate decisions (i.e. they generally do not consider the constitutionality of a law). However, I include the decisions of the GFCC's Chambers in one of my robustness checks discussed in section 3.3.3 with results provided in Table 3.10.

laws that eventually ended up at the GFCC between 1983 and 2017 and identified whether lawmakers in the Bundestag had considered (parts of) a federal law unconstitutional prior to its adoption. In a first step, I referred to the preamble of each GFCC decision to identify the federal laws containing the challenged paragraphs.

Different paragraphs of the same law can be challenged in different cases heard by the court. For instance, different parts of the 2007 Act Implementing the Residency and Asylum Directives of the European Union were challenged in two different cases heard by the GFCC, *2 BvL 16/09* and *1 BvL 4/12*.[12] In the former, the Higher Administrative Court of Baden-Wuerttemberg referred a case to the GFCC to consider the constitutionality of legislation allowing government to refuse residence permits for immigrants, whose next of kin had been convicted of particular crimes. The latter case involved a challenge of the constitutionality of legislation excluding immigrants with particular types of residence permits from access to public parental allowances. In total, paragraphs of 241 different federal laws were challenged in the 363 cases heard by the GFCC's Senates between 1983 and 2017. The fact that different parts of federal laws can be challenged in different cases complicates the statistical models I estimate slightly and I return to this point further below.

Once I identified the challenged federal laws for each GFCC case, I referred to the Bundestag's Parliamentary Material Information System to access the texts of the final parliamentary debates for each challenged law. Specifically, in order to avoid including lawmakers' constitutional concerns which had been addressed through a subsequent amendment, I only considered statements delivered by members of the Bundestag at debates which took place right before final votes on the law were cast.[13] I then read each of these debates and identified whether members of the Bundestag had considered parts of the considered draft law as unconstitutional. To illustrate the types of statements I identified as constitutional objections, consider the following examples from several different parliamentary debates:

> Horst Gobrecht (SPD): After hearing from so many experts, I find it difficult to understand how a majority here can, I may say with open eyes,

[12]The GFCC uses a simple system to label its cases. The first number identifies the Senate hearing the case. The following code then identifies the type of proceeding: *BvL* marks concrete norm control proceedings, *BvR* marks constitutional complaints and *BvF* marks abstract norm control proceedings. Finally, the first number of the last block identifies the annual running case file, while the second number identifies the year the respective application was filed with the court.

[13]For ordinary legislative procedures, the Bundestag schedules three readings. The third reading generally does not include a substantive debate of the law, concludes with Members of Parliaments voting on the law and usually follows straight after the second reading. Unless the Bundestag substantively debated the law at the third and final reading, I accessed the text of lawmakers' statements delivered during substantive debates at the second reading. When a federal law was passed following the meeting of a conciliation committee comprising selected representatives of the Bundestag and the Bundesrat, I considered statements delivered by members of the Bundestag after the conciliation had met.

> adopt a provision that goes against the constitution and thus must end negatively, quite frankly negatively for everyone who sat here today.[14]
>
> Rainer Funke (FDP): Federal officials employed at the Federal Post Office should not be treated differently than federal officials, for instance, working for the Federal Ministry of Finances. The FDP and myself remain committed to this principle. And that is why we will not consent to this unconstitutional law.[15]
>
> Horst Seehofer (CSU): You simply pretend that the entire population invests four percent of its income into a private pension provision. I predict: Your approach will eventually fail at the Federal Constitutional Court. It amounts to a socio-political injustice to ask pensioners to make additional sacrifices based on an unfounded assumption that everyone in Germany invests into some form of private provision.[16]

When reading the statements delivered by Members of Parliament at the final debates in the Bundestag, I coded whether a law was considered unconstitutional by members of the parliamentary opposition and whether members of the governing coalition caucus voiced constitutional objections. We may generally expect that members of the parliamentary opposition feel few inhibitions to attack government's legislative plans for their supposed constitutional incompatibility. Hence, we should not conclude that every instance of governing majorities ignoring constitutional concerns voiced from the opposition benches is an example of government willingly disregarding constitutional constraints on their policy choices. Raising constitutional issues may be an attempt by the opposition to score political points and reflect political opportunism rather than genuine legal concerns.

On the other hand, taking the step to publicly discredit their political allies' policy choices is likely to be far more consequential for members of the governing coalition caucus. While we cannot confidently rule out that these statements are also instances of political point-scoring (and I return to this argument in my discussion of robustness checks further below), defying party discipline and publicly accusing their

[14]Translated from German, excerpt from the second reading of the Act on the Recovery of the Economy and Employment and Unburdening of the Federal Budget in the German Bundestag, December 15, 1982, 2. Beratung: BT-PlPr 09/139, `http://dipbt.bundestag.de/extrakt/ba/WP9/2058/205893.html`.

[15]Translated from German, excerpt from the second reading of the First Act on the Amendment of the Federal Post Office Employee Act in the German Bundestag, September 24, 2004, 2. Beratung: BT-PlPr 15/127, `http://dipbt.bundestag.de/extrakt/ba/WP15/952/95286.html`.

[16]Translated from German, excerpt from the second reading of the Act to Secure the Sustainable Financing of Public Pensions in the German Bundestag, March 11, 2004, 2. Beratung: BT-PlPr 15/97, `http://dipbt.bundestag.de/extrakt/ba/WP15/968/96835.html`.

colleagues of failing to uphold constitutional norms comes with at least some political costs for members of the coalition caucus who do so. Accordingly, we may expect that members of the governing coalition caucus should generally be more likely to voice constitutional concerns only if they genuinely believe that government's plans infringe on constitutional norms.[17] In light of this, I expect that flouting the concerns voiced by members of their own caucus comes with higher political risks for lawmakers in government, relative to ignoring constitutional concerns voiced by the parliamentary opposition.

The variable *Constitutional objections by opposition MP(s)* is binary and coded 1 if at least one member of the parliamentary opposition objected to the law citing their constitutional concerns, and 0 otherwise. Similarly, the variable *Constitutional objections by governing MP(s)* is binary and coded 1 if at least one member of the governing coalition caucus objected to the law citing their constitutional concerns, and 0 otherwise.

To no surprise, the data suggests that members of the opposition are far more likely to argue that a federal law fails to conform with constitutional principles than their colleagues from the majority caucus. Out of the 363 cases heard by the GFCC's Senates between 1983 and 2017, 175 (48%) involved federal laws, which had been considered unconstitutional by the opposition in the Bundestag prior to their adoption. At the same time, only 29 cases (8%) involved federal laws which had been considered unconstitutional by members of the governing coalition caucus. Again to no surprise, the two variables are not independent of each other and objections voiced by members of the governing caucus usually come hand in hand with objections voiced by the parliamentary opposition (the p-value of the corresponding χ^2-test statistic is roughly 0.01, and only eight out of 363 cases heard by the GFCC's Senates dealt with federal laws considered unconstitutional 'only' by members of the governing coalition caucus).[18]

Since the variable *Constitutional objections by governing MP(s)* will play a key role in the analysis as it serves as a proxy for lawmakers risking high costs from provoking confrontation with the GFCC it is worthwhile to take a closer look at the laws considered unconstitutional by members of the governing coalition caucus. Table 3.3 provides a chronological overview over every federal law identified as unconstitutional by a member of the Bundestag serving in the governing coalition caucus, along with the coalition that adopted the law, the corresponding cases

[17]Consider for example the decision of Justice Minister Sabine Leutheusser-Schnarrenberger to resign from office in protest against government's plans for a so-called 'big eavesdropping operation' eventually implemented through the 1998 Act on Improving Measures to Combat Organised Crime.

[18]Cases involving concerns raised 'only' by members of the governing coalition caucus involve objections by Christian-conservatives of the CDU/CSU to the regulation of abortion in federal law concerning the 1990 Treaty on the Reunification of Germany.

Federal law and adopting coalition	GFCC case(s)
Act amending the Law on Restrictions to the Privacy of Correspondence, Post and Telecommunications of 13 September 1978 (BGBl. I S. 1546); SPD/FDP	1 BvR 1494/78 (1984)
Act on Tax Adjustments of 19 December 1985 (BGBl. I S. 2436); CDU/CSU/FDP	1 BvL 2/04 (2008)
Act of 23 September 1990 on the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Reunification of Germany and the Agreement of 18 September 1990 (BGBl. II S. 885); CDU/CSU/FDP	1 BvR 1341/90 (1991), 1 BvR 454/91 (1992), 1 BvR 1467/91 (1992), 1 BvR 1452/90 (1996), 2 BvL 6/95 (1997)
Act on the Regulation of Outstanding Property Issues as amended by the Second Law on Outstanding Property Issues of 14 July 1992 (BGBl I S. 1257); CDU/CSU/FDP	1 BvR 1452/90 (1996), 1 BvF 1/94 (1999), 2 BvR 955/00 (2004)
Act on the Safeguarding and Structural Improvements of Social Health Insurance of 21 December 1992 (BGBl. I S. 2266); CDU/CSU/FDP	1 BvR 2167/93 (1998), 1 BvR 264/95 (1999), 1 BvL 16/96 (2000), 1 BvR 422/00 (2000), 1 BvR 630/93 (2000), 1 BvL 4/96 (2001), 2 BvF 2/01 (2005)
Act on Amendments to the Basic Law (Article 16 and Article 18) of 28 June 1993 (BGBl. I S. 1002); CDU/CSU/FDP	2 BvR 1938/93 (1996)
Act amending Procedural Law concerning Asylum, Foreign Nationals and Citizenship of 30 June 1993 (BGBl. I S. 1062); CDU/CSU/FDP	2 BvR 1938/93 (1996), 2 BvR 1507/93 (1996), 2 BvR 1516/93 (1996), 2 BvL 2/98 (1999)

Continued on next page

Table 3.3 – *Continued from previous page*

Federal law and governing coalition	GFCC case(s)
Act on the Re-regulation of the Provision of Services to Asylum Seekers of 30 June 1993 (BGBl. I 1993 S. 1074); CDU/CSU/FDP	1 BvR 293/05 (2006)
Act on Adjusting Contractual Law with regard to the Use of Property in Acceding Territories of 21 September 1994 (BGBl. I S. 2538); CDU/CSU/FDP	1 BvR 995/95 (1999)
Act on Compensations based on the Law on Outstanding Property Issues and on State Compensation for Expropriation under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers of 27 September 1994 (BGBl I S. 2624); CDU/CSU/FDP	1 BvR 1408/95 (1996), 1 BvR 2307/94 (2000), 1 BvL 17/00 (2001)
1996 Annual Tax Act of 11 October 1995 (BGBl I S. 1250); CDU/CSU/FDP	2 BvR 301/98 (1999), 2 BvR 400/98 (2002), 2 BvL 5/00 (2004)
Act on Amendments to the Basic Law (Article 13) of 26 March 1998 (BGBl I S. 610); CDU/CSU/FDP	1 BvR 1104/92 (2001), 1 BvR 2378/98 (2004)
Act on Improving Measures to Combat Organised Crime of 4 May 1998 (BGBl I S. 845); CDU/CSU/FDP	1 BvR 1104/92 (2001), 1 BvR 2378/98 (2004)
Act Implementing the Residency and Asylum Directives of the European Union of 19 August 2007 (BGBl I S. 1970); CDU/CSU/SPD	2 BvL 16/09 (2010), 1 BvL 4/12 (2012)
Act on the Lisbon Treaty of 13 December 2007 of 8 October 2010 (BGBl II S. 1038); CDU/CSU/SPD	2 BvR 2136/09 (2009), 2 BvE 2/08 (2009)
Act on Amendments to the Basic Law (Articles 23, 45 and 93) of 8 October 2010 (BGBl I S. 1926); CDU/CSU/SPD	2 BvE 2/08 (2009)

Continued on next page

Table 3.3 – *Continued from previous page*

Federal law and governing coalition	GFCC case(s)
Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism of 25 December 2008 (BGBl I S. 3083); CDU/CSU/SPD	1 BvR 966/09 (2016)
Act on Combating Child Pornography in Communication Networks of 17 February 2010 (BGBl I S.78); CDU/CSU/SPD	1 BvR 508/11 (2011)

Table 3.3: Federal laws (with adopting governing coalition) objected as unconstitutional by members of the governing coalition caucus and corresponding cases heard by the German Federal Constitutional Court (with year of decision)

heard by the GFCC and the year the court eventually issued its decision (note that Table 3.3 also includes GFCC cases in which a Chamber ruled an application as inadmissible). Several interesting patterns can be derived from Table 3.3.

First, half of the laws objected by members of the governing coalition caucus were passed by the CDU/CSU and FDP's governing coalition between 1983 and 1994 (with an additional three adopted by the same coalition between 1994 and 1998), while none were adopted by the governing coalition of the SPD and Green party between 1998 and 2005. The theoretical model developed in the previous chapter provides one possible explanation for this pattern. The SPD and Green party struggled for electoral support and arguably lacked clear prospects of retaining government office in the future to respond to the GFCC's rulings on their policies. Governing coalitions of the CDU/CSU and FDP, one the other hand, faced an electorally more favourable environment between 1983 and 1994. The pattern we can observe in Table 3.3 appears consistent with the assumption that lawmakers are forward-looking and take into account how likely it is that they would still control government office to respond to the court's decisions invalidating their policies.

Second, the laws listed in Table 3.3 cover a variety of issue areas, ranging from taxation, immigration law and public health insurance to internal security policy, property rights of individuals and businesses in the former German Democratic Republic and abortion.[19] Hence, while at face value most of these issue share some propensity to be at the centre of controversial political debates, there is no indication

[19]Prior to reunification, the German Democratic Republic and the Federal German Republic had different approaches towards women's rights to terminate pregnancies. Plans to incorporate Eastern Germany's more liberal regulations on abortion into the 1990 Treaty on Reunification faced opposition from several conservative politicians among the CDU and the Bavarian CSU.

that German lawmakers' willingness to criticise their colleagues in the governing coalition caucus for failing to respect constitutional constraints on their actions is limited to a particular issue area.

Finally, Table 3.3 shows that some of the challenged laws involved amendments of the constitution, while others were adopted by a grand-coalition of the two electorally strongest parties in Germany between 1983 and 2017, the CDU/CSU and SPD. Given that amendments to the German Basic Law require the support of a two-thirds majority in the Bundestag it seems plausible that the GFCC may be more reluctant to challenge a law that secured widespread backing among Members of Parliament. Therefore, I control for the variable *Constitutional amendment* in my analysis, which is coded 1 if the law involves a change of the Basic Law, and 0 otherwise. Similarly, to avoid confounding effects of laws passed by electorally stronger governing coalitions, my analysis includes an additional control variable, *Law by grand-coalition*, which is coded 1 if the reviewed law was adopted by a coalition of the CDU/CSU and SPD, and 0 otherwise.

It is worth adding here that it is generally difficult to measure the extent of support among members of the Bundestag for a particular law, as votes are only recorded when a roll-call vote is specifically requested, which was the case for only 31% of the laws reviewed by the GFCC's Senates between 1983 and 2017. In all other instances, members of the Bundestag voted by show of hand, and in the majority of cases in my data there is no clear indication how lawmakers (and often even their party factions) voted on a particular draft.

Another critical factor concerning the variable *Constitutional objections by governing MP(s)* relates to the individuals voicing their constitutional concerns. It is possible that these lawmakers are typically backbenchers at the fringes of their political parties, criticising their colleagues in the coalition caucus to pander to a particular electoral constituency. A pattern of the GFCC upholding laws, which had been objected by these backbenchers for their supposed unconstitutionality, may thus not reflect the GFCC's response to a signalled non-compliance threat but may simply be due to a lack of substance in backbenchers' claims.

To account for this possibility in my robustness checks, I re-run my analysis while distinguishing lawmakers of the governing coalition caucus voicing constitutional concerns according to their seniority. The variable *Seniority of objecting governing MP(s)* comprises three categories: *No objections* if no member of the governing coalition voiced constitutional concerns; *Senior governing MP(s)* if constitutional concerns are voiced by a cabinet member, a governing party's designated spokesperson for a policy area, a member of a governing party's executive board or a governing party member serving as parliamentary committee chair; and *Junior*

Category	Frequency	% of observations
No objections	334	92%
Junior governing MP(s)	12	3%
Senior governing MP(s)	17	5%

Table 3.4: Distribution of the variable *Seniority of objecting governing MP(s)*

governing MP(s) if constitutional concerns are voiced by any other member of the governing coalition caucus. This operationalization follows from the assumption that lawmakers considered as senior require the support of their party colleagues to attain these positions and hence should not be considered backbenchers. Table 3.4 provides the distribution of the variable *Seniority of objecting governing MP(s)*.

Moving on to the second explanatory variable of interest for the analysis in this chapter, I require a measure that captures the likelihood that lawmakers who had authored the reviewed law would also take control of crafting the response to the GFCC's corresponding judgement. To capture this likelihood, I first identified whether the legislative paragraphs challenged at the GFCC were passed by the governing coalition in office at the time of the court's decision. The variable *Current government* is binary and coded 1 either if the law containing the challenged paragraphs was passed during the current legislative period at the time of the court's decision, or if the law was passed during the previous legislative period, provided the then-governing coalition had won subsequent elections and was still in office at the time of the court's decision. Otherwise, the variable was coded 0. In 74 (20%) out of the 363 cases heard by the GFCC's Senates, the court reviewed laws authored by the then-governing coalition.

In a second step, I then specified an interaction term in my statistical model(s), involving the measure *Current government* and a measure capturing the time left until the next federal parliamentary elections at the date of the court's decision, the variable *Years until election*. For the latter variable, I counted the exact number of days between the date of the GFCC's decision and the date of the next scheduled election, and then expressed this time period in years.[20] On average, the GFCC's Senates issued their decisions roughly 2.2 years prior to the next federal elections to the Bundestag (the variable's standard deviation is roughly 1.2 years).

The rationale underlying the interaction effect is as follows: When the GFCC issues a decision early on during a legislative period it can expect that the legislative

[20]To account for the early elections in September 2005, which were announced by Federal President Horst Köhler on July 21, 2005, I considered the GFCC's anticipated date of the next federal elections to be October 1, 2006, for decisions issued prior to President Köhler's announcement, and September 18, 2005 (the actual date of the elections) after the announcement.

response to a judicial veto (potentially evading compliance) would be authored by the current government. As elections draw closer, however, the probability that a different governing coalition would take charge of responding to the court's decision increases. I expect the court to be less likely to strike the challenged paragraphs when the time until the next elections is longer, provided the law was passed by the current governing coalition (i.e. in line with this expectation, the sign of the interaction term's regression coefficient should be negative).

One concern about this operationalization is that a court conscious of a non-compliance threat may simply choose to postpone a decision sufficiently long enough in the hope of finding a politically more favourable climate in the future. It seems difficult to generally rule this possibility out, however, there are also indications that the GFCC's discretion over the timing of its decisions is somewhat limited. In my interviews with members of the GFCC I asked how much control justices enjoy over the timing of their decisions. In a telephone interview conducted on April 14, 2019, one former justice noted:

> *Justice 1:* When applications land on our desks then of course we have to decide them. As mentioned earlier, there is some degree of discretion and the publication of a decision can be pushed back by a couple of months. For example, the Federal Constitutional Court will not drop a political bombshell, so to speak, during an election season. But you have to understand, a lot of the scheduling at the court is done by the administration, of course we need to prioritise some things over others once in a while, but the decisions at the Federal Constitutional Court are subject to a preliminary planning cycle by the administration.

Another factor likely to limit the GFCC's discretion in scheduling decisions according to political considerations is that in doing so the court may tarnish its institutional legitimacy among actors in Germany's political system that frequently interact with it. In cases involving the constitutional review of federal (or state) laws, the GFCC generally seeks the opinion of interested parties to a case, comprising relevant interest groups (e.g. the Federation of German Industries and trade-unions) and non-governmental organizations. These interested parties are aware that the GFCC currently considers a constitutional question that is relevant to their operations and often require constitutional clarity over a law under review at the GFCC. Thus, deliberately delaying constitutional review decisions may come with costs for the court's reputation that may outweigh the costs of deferring to the elected branches in an individual case.

3.2.2 Control variables

Given that my empirical tests in this chapter rely on observational data, i.e. values on my independent variables of interest are not randomly assigned to individual observations, it is critical for my analysis to carefully avoid omitted variable bias. In addition to the variables *Constitutional amendment* and *Law by grand-coalition* discussed above, I therefore include a battery of control variables in my statistical models, which—if omitted from my analysis—may confound any observed effect of my independent variables. First, as federal laws on some policy issues may be more likely to touch upon constitutional rights, and hence may be correlated with both instances of lawmakers objecting a law as unconstitutional and the court's decision-making, I control for the issue area of the challenged legislative paragraphs. The variable *Policy area* is categorical and draws on the existing operationalization employed by Krehbiel (2016) and Vanberg (2005). The variable distinguishes between eight policy areas, namely economic regulation (serving as the reference category in my analysis), social insurance, education policy, family law, individual rights, institutional disputes, judicial process, as well as budgets and fiscal policy.

Second, any observed effect of the variables *Constitutional objections by opposition MP(s)* and *Constitutional objections by governing MP(s)* may be linked to the type of constitutional review procedure at the GFCC (concrete norm control, abstract norm control or constitutional complaints). For instance, members of the Bundestag may be more likely to refer a law for review through abstract norm control if the law had attracted constitutional controversy during the legislative process. At the same time, relative to abstract and concrete norm control proceedings, the GFCC may be less likely to strike laws as unconstitutional in proceedings involving constitutional complaints, as individual citizens (and their legal representation) may be in a less favourable position than judges serving in the lower courts and members of the Bundestag or state governments to evaluate the constitutionality of a law prior to lodging their application with the court. Hence, I control for the categorical variable *Court proceeding*, distinguishing between abstract norm control (the reference category), concrete norm control and constitutional complaints.

Finally, the court may be less concerned about a non-compliance threat when a considerable amount of time lies between the reviewed law's adoption and the court's corresponding ruling, either because it took several years before an application challenging the law reached the court or because a case lingered on at the court for years. Therefore, I control for the time that has passed between the date the challenged law had been adopted and the date the court issued its corresponding ruling, *Years since adoption*, as well as the time it took the GFCC to issue its ruling since the corresponding application had been filed with the court's registrar,

Length of proceeding.[21] On average, between 1983 and 2017 the GFCC's Senates issued their rulings roughly 6.8 years after the reviewed law had been adopted by the Bundestag (the standard deviation of the variable *Years since adoption* is 4.6 years), while their proceedings lasted on average 3.7 years (the standard deviation of the variable *Length of proceeding* is roughly 2.3).

3.3 Estimation and analysis

In the following, I consider each hypothesis in turn and first specify the statistical model I employ to test the hypothesis, followed by a brief discussion of how I estimated the models' coefficients. I then discuss the sign and uncertainty of the relevant regression coefficients, and finally provide an intuition of what these coefficients mean in substantive terms. Throughout this section, I will make an effort to visualize the relevant results of my analysis rather than providing lengthy tables displaying a myriad of regression coefficients (although the latter will make an appearance in the appendix to this chapter). The specification of my statistical models requires a fair bit of notation and I will stick to the type of notation seen in Gelman and Hill (2007), while resorting to matrix notation where useful. To save on notation for nominal variables with more than two categories, I express regression coefficients for these variables through a single coefficient.[22]

3.3.1 Costly signalling and judicial deference

I first consider my theoretical model's core claim: The GFCC is more likely to respond with deference to lawmakers who had provoked a for them potentially costly confrontation. The dependent variable *Strike* is binary, accordingly I estimate a logistic regression model. Since paragraphs challenged in different court cases are nested in federal laws, I allow intercepts to vary across federal laws. Throughout this section, let i indicate the individual challenged paragraphs and j indicate federal laws. Model 1 to test this claim is then defined as follows:

[21] While I can pin down the time that had passed between a law's adoption and the court's corresponding decision to the exact number of days (then expressed in years), I can only identify the year an application was lodged with the GFCC, yet not its exact date. Hence, the variable *Length of proceeding* reports only an approximate time the GFCC spent on a particular proceeding. However, lacking access to the files submitted by individual applicants (e.g. lower courts or individuals filing a constitutional complaint) that would allow me to identify the exact date the GFCC received an application, referring to the year seems to be the best option.

[22] For instance, the nominal variable *Policy area* comprises eight categories and would require coefficients for seven dummy variables, one for each category save the reference category. For convenience, I write down only one regression coefficient for the variable *Policy area*.

$$\begin{aligned}\Pr(\text{Strike}_i = 1) = \text{logit}^{-1}(&\beta_0 + \beta_1 \cdot \text{Obj. opposition MP(s)}_i + \\ &\beta_2 \cdot \text{Obj. governing MP(s)}_i + \beta_3 \cdot \text{Const. amendment}_i + \\ &\beta_4 \cdot \text{Law by grand-coalition}_i + \beta_5 \cdot \text{Policy area}_i + \\ &\beta_6 \cdot \text{Court proceeding}_i + \beta_7 \cdot \text{Years since adoption}_i + \\ &\beta_8 \cdot \text{Length of proceeding}_i + \alpha_{j[i]}^{\text{Law ID}})\end{aligned}$$

$$\alpha_j^{\text{Law ID}} \sim N(0, \sigma^2_{\text{Law ID}}), \quad \text{for} \quad j = 1, \ldots, J \quad \text{(number of laws)}$$

All statistical models in this chapter are estimated using the statistical computing environment R. Maximum likelihood estimation of the model's parameters fails to converge when relying on the R package **arm** (Gelman et al., 2018). I therefore follow advice by Gelman and Hill (2007) and employ a Bayesian approach to estimate the model parameters. Throughout this chapter, the Bayesian estimation of the models' parameters relies on the **rstanarm** package (Stan Development Team, 2016). For each model, I specify **rstanarm's** weakly informative default (normal) prior distributions (i.e. normal priors of regression coefficients for explanatory variables are centred at 0 with a standard deviation of 2.5, the default prior for the intercept has a mean of 0 and a standard deviation of 10). For each model estimated in this chapter, I 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. Across all models estimated in this chapter, none of the parameters' $\hat{R}$ values exceed 1.01, well below the critical threshold of 1.2 defined by Gelman and Rubin (1992).

My interpretation focuses on the regression coefficients for the main explanatory variables of interest, *Constitutional objections by opposition MP(s)* and *Constitutional objections by governing MP(s)*. Results for the remaining coefficients of Model 1 are displayed in Table 3.5 in the chapter's appendix. Figure 3.2 reports posterior distributions and their respective means of the coefficients for the two explanatory variables of interest. We can quickly spot an interesting pattern in the relationship between lawmakers' constitutional objections and the GFCC's decision-making. The posterior mean of the coefficient for *Constitutional objections by opposition MP(s)* is positive and its highest posterior density (HPD) effectively allows us to be confident that the coefficient is not negative (note that the coefficient's 95% HPD interval just overlaps zero). The coefficient suggests that the GFCC was more likely to invalidate a federal law (or parts thereof) if members of the opposition in the Bundestag had objected the law as unconstitutional just prior to its adoption.

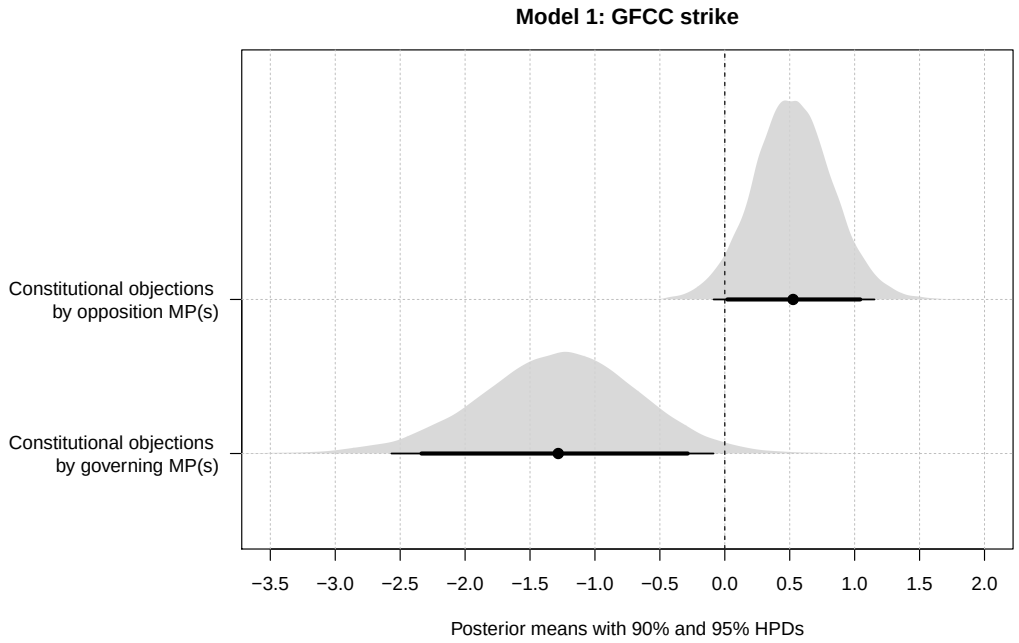

Figure 3.2: Posterior means, 90% and 95% highest probability densities for main fixed-effects coefficients of Model 1; posterior distributions are illustrated in grey

This result seems hardly surprising. While controlling for objections voiced by members of the governing coalition caucus, the reference category for the variable *Constitutional objections by opposition MP(s)* by and large captures laws, which did not attract any constitutional concerns at the final stage of the legislative process. Notwithstanding the possibility that members of the opposition declare government policy as unconstitutional to score political points, the measure may still come somewhat close to an 'objective' evaluation of the constitutionality of a law. Laws which did not attract constitutional objections in the Bundestag may simply be more likely the ones which actually do not infringe on any constitutional norms. At the same time, it seems plausible to assume that at least some of the laws, which were objected by members of the parliamentary opposition, indeed conflict with the constitution. Accordingly, we should expect the GFCC to be more likely to strike (parts of) these types of laws.

Interestingly, the opposite appears to be the case if members of the governing coalition caucus had objected a federal law as unconstitutional. The coefficient's posterior mean for the variable *Constitutional objections by governing MP(s)* is negative (as well as every point within the coefficient's 95% HPD), suggesting that the court was less likely to strike federal law as unconstitutional when lawmakers in government had ignored constitutional concerns from their own political allies. The theoretical model presented in Chapter 2 provides an explanation for this otherwise counter-intuitive finding. Insisting on the pursuit of constitutionally controversial

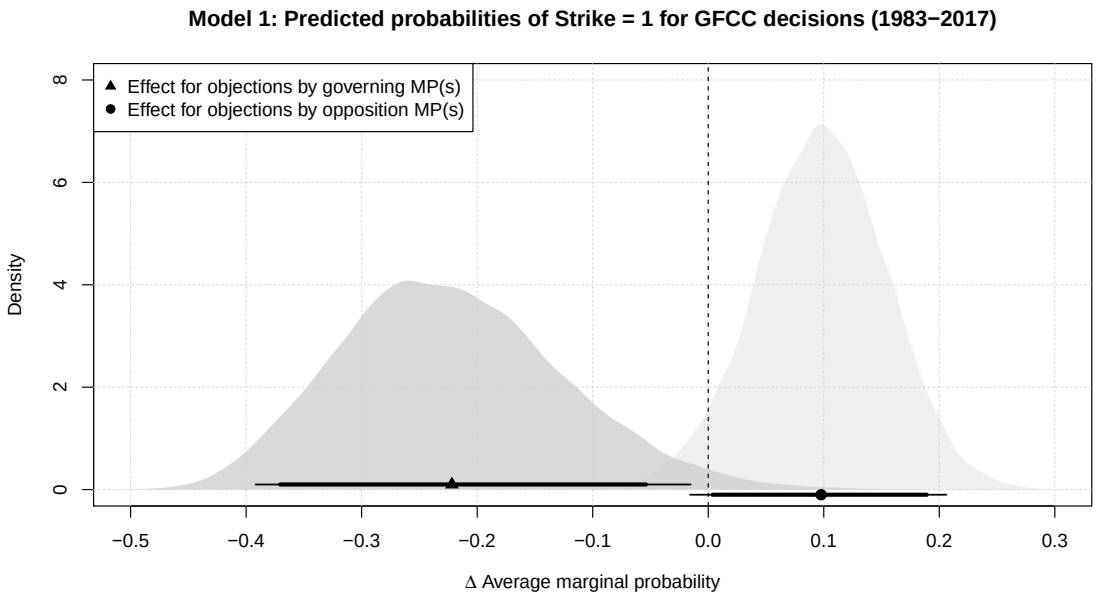

Figure 3.3: First difference in predicted average marginal probabilities for *Constitutional objections by opposition MP(s)* and *Constitutional objections by governing MP(s)* with 5.0th–90th and 2.5th–97.5th percentiles of predictions

policy while dismissing the concerns of their political allies can prove costly for lawmakers in government if a constitutional court indeed strikes their policy as unconstitutional. Yet, given this choice is associated with political risks, lawmakers signal their willingness to defend their policy against a judicial veto and evade compliance with the court's judgement if necessary. Observing such signals, a court concerned about non-compliance with its jurisprudence has then reason to become more deferential in its decision-making.

I now illustrate the substantive effects for variation on the variables *Constitutional objections by opposition MP(s)* and *Constitutional objections by governing MP(s)*. Given the random effects bear on the results, I predict average marginal probabilities, indicating the average change in the probability of *Strike* = 1 across all groups (i.e. laws) in my data while manipulating values on the main independent variables of interest.[23] I predict the difference in average marginal probabilities between the two variables' levels (i.e. 0 and 1), respectively. Figure 3.3 shows that the model predicts that the GFCC was on average about 10.0 percentage-points

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

more likely to strike federal law paragraphs if the federal law had been objected by members of the parliamentary opposition as unconstitutional than if no opposition members had raised concerns. On the other hand, when constitutional concerns had been raised by members of the governing majority, the model predicts that the GFCC was on average about 22.2 percentage-points less likely to strike the challenged paragraphs, a substantial decrease in the court's use of its constitutional veto. The GFCC is more likely to back-off from challenging lawmakers if the latter had signalled determination in their pursuit of controversial policy by taking the risk of ignoring constitutional objections from their own political allies. This evidence appears consistent with the theoretical model's claim that courts are more likely to respond with deference to lawmakers, who had provoked a for them potentially costly confrontation.

3.3.2 Anticipation of elections

Next, I provide an empirical test of the claim that the GFCC should be less likely to strike a federal law when it is likely that the lawmakers responsible for the reviewed act would also be in charge of crafting the response to the GFCC's judgement (see hypothesis 2 in Chapter 2). At the heart of my empirical test is an interaction effect involving the variables *Current government* and *Years until election*. Again, given the dependent variable *Strike* is binary, while challenged paragraphs are nested in federal laws, I estimate a multi-level logistic regression model, allowing intercepts to vary across federal laws. Model 2 is then defined as:

$$\begin{aligned}\Pr(\text{Strike}_i = 1) = \text{logit}^{-1}(&\beta_0 + \beta_1 \cdot \text{Years until election}_i + \beta_2 \cdot \text{Current government}_i + \\ &\beta_3 \cdot \text{Years until election}_i \cdot \text{Current government}_i + \\ &\beta_4 \cdot \text{Policy area}_i + \beta_5 \cdot \text{Court proceeding}_i + \\ &\beta_6 \cdot \text{Years since adoption}_i + \beta_7 \cdot \text{Length of proceeding}_i + \\ &\alpha_{j[i]}^{\text{Law ID}})\end{aligned}$$

$$\alpha_j^{\text{Law ID}} \sim N(0, \sigma^2_{\text{Law ID}}), \quad \text{for} \quad j = 1, \ldots, J \quad \text{(number of laws)}$$

Figure 3.4 illustrates the posterior means, 90% and 95% HPDs for the coefficients of the variables *Years until election* and *Current government*, as well as their interaction term. Results for all coefficients of Model 2 are displayed in Table 3.6 in the appendix to this chapter. The posterior mean, 90% and 95% HPDs of the coefficient for the variable *Years until election* suggest that the GFCC appears more

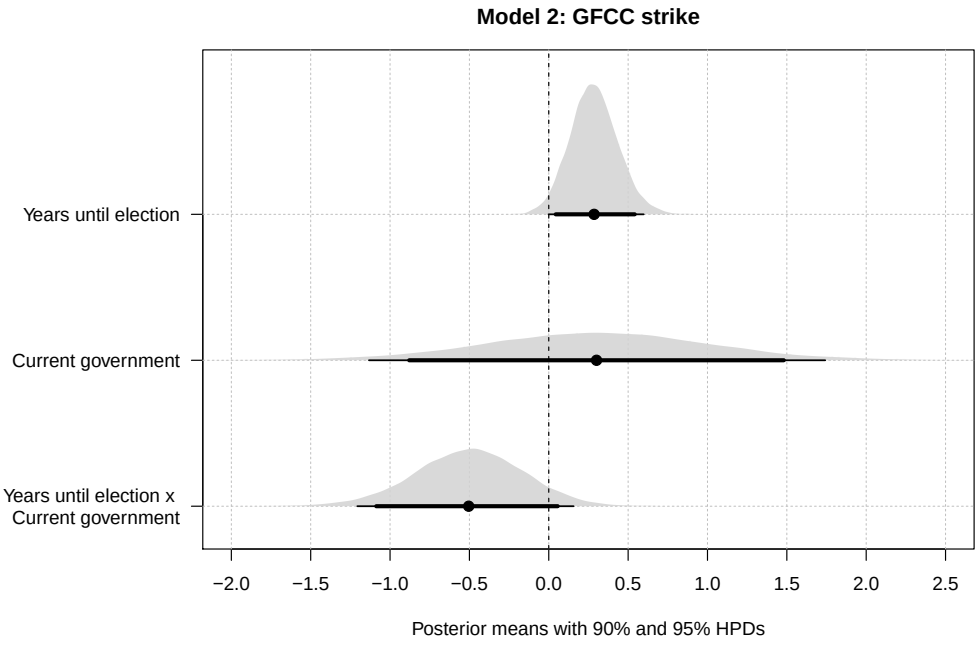

Figure 3.4: Posterior means, 90% and 95% highest probability densities for main fixed-effects coefficients of Model 2; posterior distributions are illustrated in grey

likely to strike federal law as the time left until the next election to the Bundestag increases—provided the reviewed law was *not* authored by the current governing coalition. In other words, when considering laws that were not adopted by the current incumbent, the GFCC tends to avoid striking federal laws when elections are around the corner. Evidence from interviews with former justices and law clerks at the GFCC provides an explanation for this pattern. In a telephone interview conducted on April 18, 2019, one of the justices noted:

> *Justice 1:* Something that is rarely mentioned when people cover the Federal Constitutional Court is that we do pay attention to the timing of our decisions. For instance, the court will not issue a politically sensitive decision during an election season, we don't do that.

Accordingly, the GFCC may generally be less likely to strike a law as the next elections are drawing closer simply because the court carefully avoids playing a proactive role in the electorates' decision-making at the ballot box. At the same time, the interaction term's coefficient provides some indication that this relationship may not hold when the GFCC reviews laws that were passed by the incumbent governing coalition. The posterior mean for the interaction term's coefficient is negative and its absolute size (-0.51) is larger than the size of the coefficient for the variable *Years until election* (0.29). This suggests that the GFCC on average appears less likely to strike a law as the time until the next election increases, provided the court reviews

a law adopted by the incumbent governing coalition. Nonetheless, Figure 3.4 also shows that the coefficient's 90% and 95% HPDs (including positive values) do not allow us to confidently rule out that the coefficient is in fact positive (or zero).

However, it seems worthwhile to push the data a little harder. It is possible that the effect of the timing of upcoming elections not only depends on whether the GFCC reviews a law by the incumbent governing coalition, but also whether or not the governing coalition at the time of the court's decision comprised Germany's two main political parties, the CDU/CSU and the SPD. During the timeframe of my analysis, grand-coalitions of the CDU/CSU and the SPD controlled government office between 2005 and 2009 as well as between 2013 and 2017. At least up until the most recent federal elections in September 2017, it seemed highly likely that either the CDU/CSU or the SPD would lead the next governing coalition following an election. Accordingly, whether or not the GFCC reviews a law authored by the current incumbent in these scenarios should not bear on any effect the timing of the next federal election may have on the court's decision. In other words, in these cases the coefficient for the interaction effect should be effectively zero. In order to account for this pattern, I estimate the statistical model again after sub-setting my data. Model 3 excludes observations in which the GFCC issued its decisions while a grand-coalition of the CDU/CSU and SPD was in office (i.e. *Grand-coalition* = 0), while Model 4 is estimated relying on data including only GFCC decisions issued during the legislative terms from September 2005 until September 2009 and from September 2013 to September 2017 (i.e. *Grand-coalition* = 1).

Results for Model 4 provided in Table 3.8 in the appendix show that none of the coefficients for the explanatory variables of interest, *Years until election* and *Current government* as well as their interaction effect, are distinguishable from zero (although it needs to be acknowledged that the estimation of Model 4 relies on only 76 observations). The posterior mean of the interaction term's coefficient in Model 4 falls close to zero, suggesting that the effect of the variable *Years until election* is not conditional on the variable *Current government* when considering only GFCC decisions issued during a grand-coalition term.

Turning to the results from Model 3 and evidence from GFCC decisions issued while no grand-coalition controlled government office, we can now be relatively confident that the interaction term's coefficient is indeed negative. Figure 3.5 shows that the 95% HPD of the interaction term's coefficient just overlaps zero while its 90% HPD includes only negative values. This evidence suggests that the likelihood of the court striking federal law decreases as the time until the next federal election increases, provided the GFCC reviews a law authored by the incumbent governing coalition (and given that the decision is not issued during a grand-coalition term).

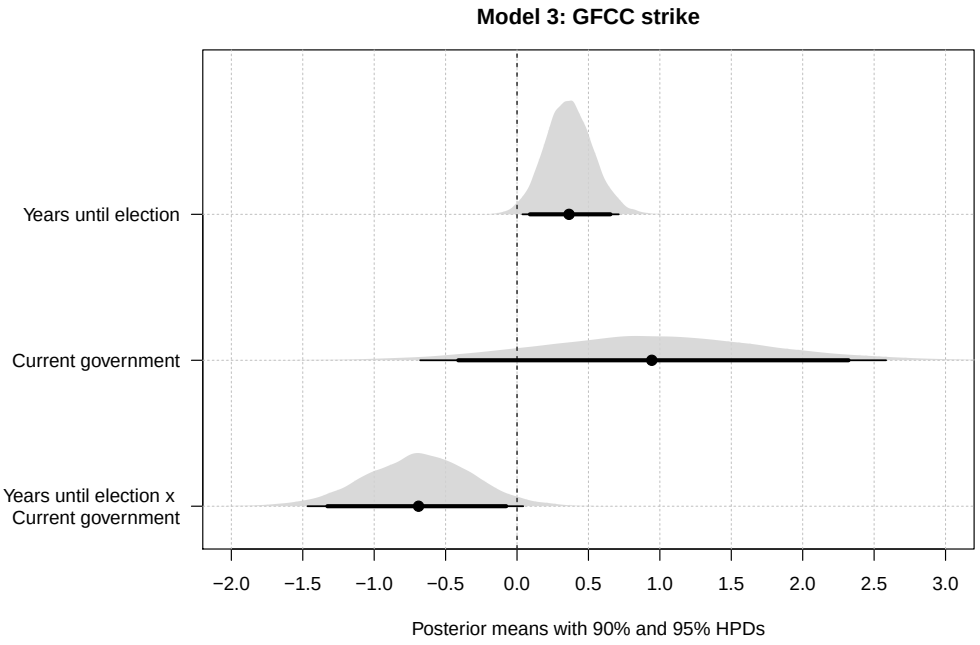

Figure 3.5: Posterior means, 90% and 95% highest probability densities for main fixed-effects coefficients of Model 3; posterior distributions are illustrated in grey

In the following, I consider whether these coefficients translate into a substantially discernible effect. Again, I predict average marginal probabilities, indicating the average change in the probability of *Strike* = 1 across all groups (i.e. laws) in my data while manipulating values on the main explanatory variables of interest, *Years until election* and *Current government*.[24] Figure 3.6 illustrates average marginal predicted probabilities across the range of *Years until election* for *Current government* = 0 (dark grey) and *Current government* = 1 (light grey). The predictions' 2.5th and 97.5th percentiles show that the probabilities for each scenario are at no point clearly distinguishable from each other across the range of the variable *Years until election*. In other words, there is not sufficient evidence to support the claim that the GFCC is less likely to strike a federal law when it is likely that the lawmakers responsible for the law would also be in charge of implementing the court's decision (see hypothesis 2 in Chapter 2).

What does this mean for the empirical evaluation of the theoretical model presented in Chapter 2 in a more general sense? Hypothesis 2 draws on the observation from the formal analysis that—holding everything else constant—increasing the likelihood of the policy's authors controlling implementation of the court's judgement corresponds to movement across the model's equilibria. This movement starts at the

[24]Specifically, I allow the variable *Years until election* to vary from its minimum value 0.01 to its maximum value 3.98 in the data, and consider its effect for both cases of *Current government* = 0 and *Current government* = 1.

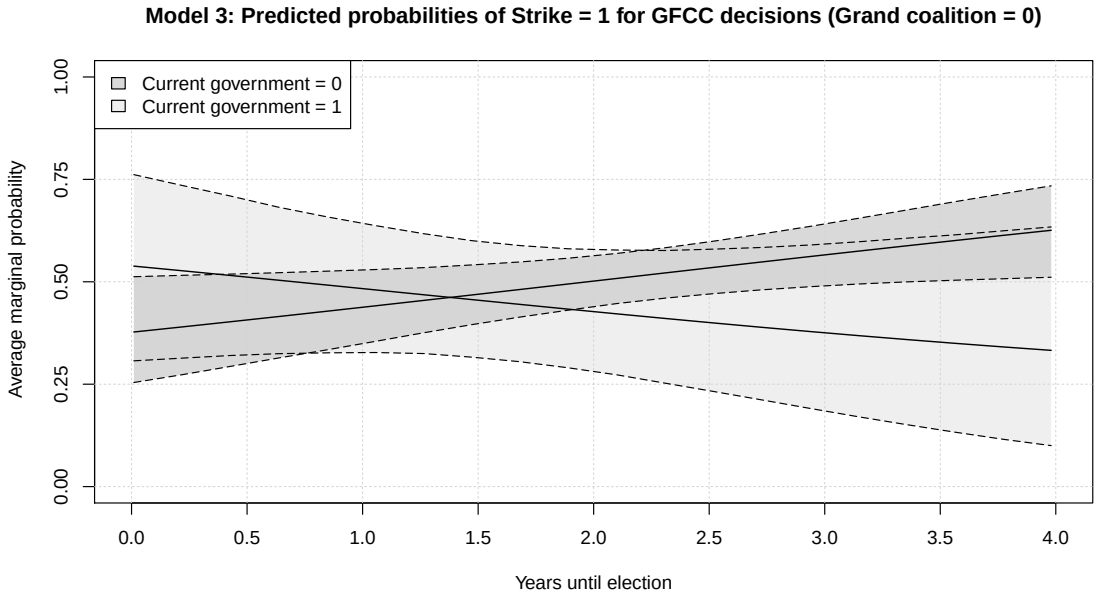

Figure 3.6: Predicted average marginal probabilities for *Current government* across range of *Years until election* (solid lines indicates mean values of predicted probabilities, shaded areas indicate 2.5–97.5th percentiles of predictions)

model's pooling equilibrium showing that all types of lawmakers 'auto-limit' their policy choices knowing the court would strike every policy it considers unconstitutional, and it eventually ends at a pooling equilibrium where all types of lawmakers ignore constitutional jurisprudence knowing that the court will never challenge them.

The justification for selecting Germany as the case for the model's empirical evaluation in this thesis centred on the assumption that the GFCC exercises constitutional review in an environment matching the conditions of the model's partial-pooling equilibrium: a court enjoying high levels of public support reviewing the acts of lawmakers controlling (at least for long periods within the timeframe of the analysis) government office for several consecutive terms. It is these kinds of environments in which the costs lawmakers appear willing to pay from confrontation with the court signal a non-compliance threat and the evidence presented in Section 3.3.1 appears consistent with this claim.

However, it is also these kinds of environments in which the likelihood that lawmakers responsible for the reviewed law would also control the implementation of the courts' judgement does not directly reflect in the court's decision-making but in the choices of lawmakers (i.e. otherwise 'compliant' lawmakers are more likely to risk confrontation with the court as their chance at getting a shot at controlling implementation increases). While it seemed worthwhile to test hypothesis 2 in the German context, it is possible that—particularly in light of the GFCC's high public

support—German lawmakers' chances of controlling implementation of the GFCC's judgements on their own policies are never high enough to move from an environment characterised by the model's partial-pooling equilibrium to a scenario in which the GFCC consistently exercises self-restraint (the model's final pooling equilibrium).

3.3.3 Robustness checks

In addition to the statistical models estimated for the main analyses discussed in Sections 3.3.1 and 3.3.2, I implement a series of robustness checks. First, I estimate a multi-level logistic regression model, including the full set of both explanatory and control variables discussed in this chapter in a single model, Model 5.

Results for Model 5 are displayed in Table 3.9 in the appendix to this chapter. Table 3.9 shows that when considering the full set of explanatory and control variables, the results remain virtually the same as for the main analyses discussed in Sections 3.3.1 and 3.3.2. The posterior mean of the coefficient for the variable *Constitutional objections by governing MP(s)* is negative with the coefficient's 95% HPD comprising only negative values. This evidence is consistent with the theoretical model's core claim that courts are more likely to respond with self-restraint to lawmakers provoking a for them potentially costly confrontation. At the same time, as in Section 3.3.2, results from Model 5 for the coefficients of the variables *Years until election* and *Current government* as well as their interaction term show that there is not enough evidence to support the claim that the GFCC is more likely to show self-restraint in its decision when the likelihood that lawmakers responsible for the laws the court reviews would control implementation of the judgements is high.

The second set of robustness checks digs a little deeper regarding the evidence from Model 1, supporting the theoretical model's core claim. Evidence presented in Section 3.3.1 shows that the GFCC is less likely to strike a federal law if it had been objected as unconstitutional by members of the governing coalition caucus prior to its adoption. While the theoretical model of Chapter 2 provides one possible explanation for this counter-intuitive pattern, another explanation appears consistent with this evidence. Some lawmakers in the governing coalition caucus may use constitutional objections in the Bundestag to send a highly visible signal of their position on a policy issue to pander to a particular constituency. Several former members of the German government highlighted in my interviews that every new legislative initiative is carefully screened by constitutional lawyers working for two of the federal government's ministries, the Justice Ministry and the Ministry for Internal Affairs (the so-called 'constitutional ministries'). One lawmaker noted in a telephone interview conducted on November 11, 2017:

> *Lawmaker 5:* Generally, it seems to me that the Ministry for Internal Affairs tries to make as much use as possible of the scope of action the constitution leaves us, while my feeling always was that the Justice Ministry tends to make the case that some initiatives go too far. What then follows is a close exchange among these ministries and every initiative is subject to their joint scrutiny.

Following the ministries' screenings of federal laws' constitutional compatibility, any subsequent objections voiced by members of the governing coalition at the end of the legislative process may reflect opportunistic political motivations rather than genuine constitutional concerns. We should then expect the court to be less likely to strike these types of laws, an expectation that appears consistent with the evidence discussed in Section 3.3.1.

To evaluate this alternative explanation for the empirical pattern shown by Model 1, I first turn to the decisions the GFCC makes about the admissibility of constitutional review cases. The GFCC can refuse to admit constitutional complaints directed against laws for decision in its Senates if applicants fail to show that the challenged law affects them personally, presently and directly. In addition, when considering laws referred for review by lower courts, the GFCC can rule a case as inadmissible if the lower court fails to demonstrate which constitutional norm the challenged act appears to violate and how it arrived at this conclusion. In other words, a lower court has to show that the law referred for review harbours a violation of constitutional norms that merits the GFCC's scrutiny.

A closer look at the data shows that between 1983 and 2017, the GFCC dismissed twelve cases involving laws objected as unconstitutional by members of the governing caucus as inadmissible. These cases include constitutional complaints concerning the 2010 Act on the Lisbon Treaty of 13 December 2007 in *2 BvR 2136/09*, which had been objected by some members of the Bavarian CSU, and a lower court referral of the 2007 Act Implementing the Residency and Asylum Directives of the European Union in *1 BvL 4/12*, parts of which had been considered unconstitutional by the governing SPD's Chair of the Bundestag's Committee for Internal Affairs.

The GFCC's rules concerning the admissibility of cases allow the court to avoid overburdening its Senates with cases which do not require scrutiny of the challenged act's constitutional compatibility on the merits, and dismiss these cases through Chamber decisions instead. Given the GFCC enjoys some discretion over the cases it hears in its Senates and dismiss the kinds of cases that do not involve a substantive constitutional question mitigates concerns that—rather than providing evidence in support of the theoretical model's core claim—the empirical pattern shown by Model 1 reflects governing lawmakers voicing constitutional for purely political motivations.

All of the GFCC's cases included in the analysis of Model 1 made it past the court's admissibility test, suggesting that they involve substantial constitutional questions that merit the GFCC's scrutiny.

Nonetheless, it is still worthwhile to evaluate whether governing lawmakers' constitutional objections of laws play a discernible role in the GFCC's choice to admit constitutional review cases for decision. If members of the governing coalition caucus voice constitutional concerns about federal laws for purely political reasons rather than legal motivations, applications challenging these laws should not be more likely to be admitted for decision at the GFCC than any other applications. Vice versa, if all constitutional concerns voiced by governing lawmakers indeed speak to constitutional issues meriting the GFCC's scrutiny, the court should also be more likely to admit hearing cases involving laws subject to these concerns.

To test these arguments, I consider the effect of the variable *Constitutional objections by governing MP(s)* on an outcome variable capturing whether the GFCC admitted a case for decision ($Admission = 1$) or not ($Admission = 0$). The multilevel logistic regression model, Model 6, includes the same control variables as Model 1 in Section 3.3.1 and is defined as follows:

$$\begin{aligned}\Pr(\text{Admission}_i = 1) = \text{logit}^{-1}(&\beta_0 + \beta_1 \cdot \text{Obj. opposition MP(s)}_i + \\ &\beta_2 \cdot \text{Obj. governing MP(s)}_i + \beta_3 \cdot \text{Const. amendment}_i + \\ &\beta_4 \cdot \text{Law by grand-coalition}_i + \beta_5 \cdot \text{Policy area}_i + \\ &\beta_6 \cdot \text{Court proceeding}_i + \beta_7 \cdot \text{Years since adoption}_i + \\ &\beta_8 \cdot \text{Length of proceeding}_i + \alpha_{j[i]}^{\text{Law ID}})\end{aligned}$$

$$\alpha_j^{\text{Law ID}} \sim N(0, \sigma^2_{\text{Law ID}}), \quad \text{for} \quad j = 1, \ldots, J \quad \text{(number of laws)}$$

Figure 3.7 reports posterior means, 90% and 95% HPDs for the regression coefficients of the variables *Constitutional objections by opposition MP(s)* and *Constitutional objections by governing MP(s)*. Results for the remaining coefficients of Model 6 are provided in Table 3.10 in the chapter's appendix. The posterior mean of the coefficient for the variable *Constitutional objections by opposition MP(s)* and its 95% HPD show that we can be confident that the coefficient's true value is indeed positive. This does not seem surprising. Model 1 in Section 3.3.1 already showed that the GFCC is more likely to strike federal laws, which lawmakers of the parliamentary opposition had previously objected as unconstitutional. Hence, it is plausible to expect the court to be more likely to admit challenges of these kinds of laws for decision in the first place.

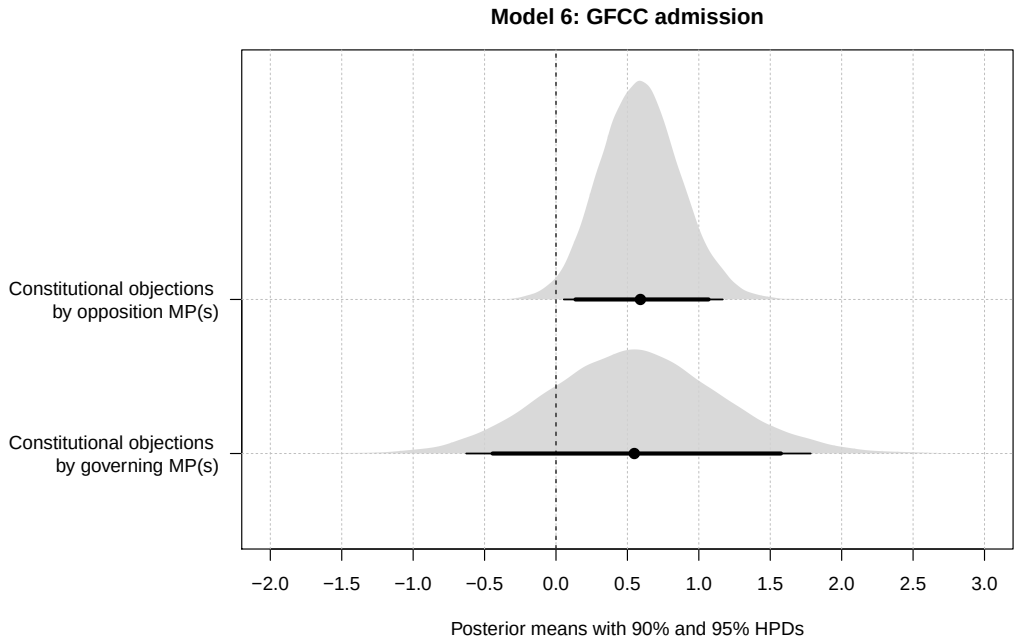

Figure 3.7: Posterior means, 90% and 95% HPDs for coefficients for main fixed-effects coefficients of Model 6; posterior distributions are illustrated in grey

Turning to the coefficient for the variable *Constitutional objections by governing MP(s)*, the evidence is less clear cut. The coefficient's posterior mean is positive, however its 90% and 95% HPDs (both overlapping zero) show that we cannot be confident in ruling out that its true value is zero. Evidence from Model 6 does not allow us to confidently rule out that, ceteris paribus, applications challenging laws objected as unconstitutional by lawmakers of the governing coalition caucus are just as likely to be admitted for decision at the GFCC as any other applications.

Accordingly, Model 6 does not provide further conclusive evidence to push back on claims that governing lawmakers' objections reflect political motivations rather than constitutional concerns, thus explaining the empirical pattern shown by Model 1 in Section 3.3.1. Nonetheless, given that cases that made it past the GFCC's admissibility test concern a substantive constitutional question, the core argument of the theoretical model presented in Chapter 2 provides an (at least equally) plausible explanation for the empirical pattern shown by Model 1: Lawmakers dismissing constitutional concerns voiced by their political allies signal a credible non-compliance threat to courts and induce the latter to exercise self-restraint.

A second robustness check for the results obtained from Model 1 involves substituting the dichotomous variable *Constitutional objections by governing MP(s)* with the variable *Seniority of objecting governing MP(s)*. As discussed in Section 3.2.1 above, it is possible that lawmakers of the governing coalition caucus voicing constitutional concerns are backbenchers at the fringes of their political parties, criticising

government to pander to a particular electoral constituency. Similar to the motivation underlying the previous robustness check, a pattern of the GFCC upholding laws which had been objected by government backbenchers may thus not reflect the GFCC's response to a credible non-compliance threat but may simply be due to a lack of substance in backbenchers' claims of unconstitutionality.

Recall that the variable *Seniority of objecting governing MP(s)* comprises three categories: *No objections* if no member of the governing coalition voiced constitutional concerns; *Senior governing MP(s)* if constitutional concerns are voiced by a cabinet member, a governing party's designated spokesperson for a policy area, a member of a governing party's executive board or a governing party member serving as parliamentary committee chair; and *Junior governing MP(s)* if constitutional concerns are voiced by any other member of the governing coalition caucus. In the following, I estimate a multi-level logistic regression model, Model 7, including the same set of control variables as Model 1, yet replacing the explanatory variable *Constitutional objections by governing MP(s)* with the variable *Seniority of objecting governing MP(s)*. Model 7 is then defined as:

$$
\begin{aligned}
\Pr(\text{Strike}_i = 1) = \text{logit}^{-1}(&\beta_0 + \beta_1 \cdot \text{Obj. opposition MP(s)}_i + \\
&\beta_2 \cdot \text{Senior gov. MP(s)}_i + \beta_2 \cdot \text{Junior gov. MP(s)}_i + \\
&\beta_3 \cdot \text{Const. amendment}_i + \\
&\beta_4 \cdot \text{Law by grand-coalition}_i + \beta_5 \cdot \text{Policy area}_i + \\
&\beta_6 \cdot \text{Court proceeding}_i + \beta_7 \cdot \text{Years since adoption}_i + \\
&\beta_8 \cdot \text{Length of proceeding}_i + \alpha_{j[i]}^{\text{Law ID}})
\end{aligned}
$$

$$
\alpha_j^{\text{Law ID}} \sim N(0, \sigma^2_{\text{Law ID}}), \quad \text{for} \quad j = 1, \ldots, J \quad \text{(number of laws)}
$$

The category *No objections by governing MP(s)* serves as the reference category for the variable *Seniority of objecting governing MP(s)* in Model 7. If the empirical pattern uncovered by Model 1 was driven by backbenchers' constitutional concerns lacking legal substance, the coefficient for the category *Junior governing MP(s)* should be negative and clearly distinguishable from zero, while the same should not be the case for the coefficient for the category *Senior governing MP(s)*.

Figure 3.8 reports the posterior distributions, their means as well as 90% and 95% HPDs for the coefficients of the categories *Senior governing MP(s)* and *Junior governing MP(s)* of the variable *Seniority of objecting governing MP(s)*. Results for the remaining coefficients of Model 7 are displayed in Table 3.11 in the appendix. With the caveat in mind that the inference from Model 7 is driven by a very small

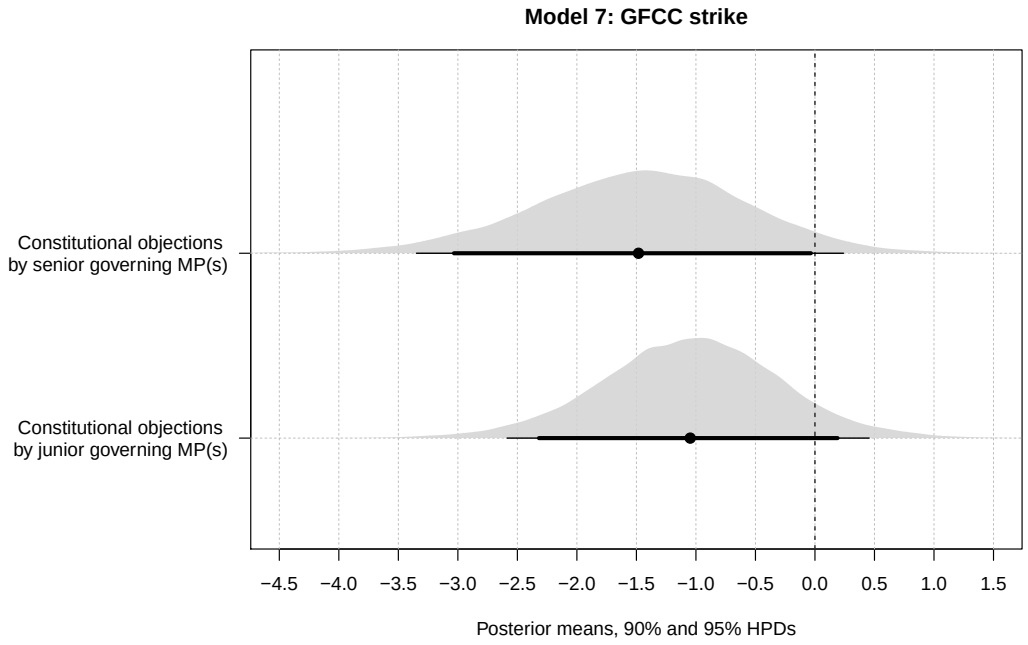

Figure 3.8: Posterior means, 90% and 95% HPDs for coefficients for main fixed-effects coefficients of Model 7; posterior distributions are illustrated in grey

number of observations in the categories *Senior governing MP(s)* and *Junior governing MP(s)* (17 and 12 observations, respectively), there is no conclusive evidence suggesting that the seniority of the governing lawmakers voicing constitutional concerns about a law makes a difference in the GFCC's decision-making. The coefficients' posterior means reported in Figure 3.8 are both clearly negative, and while their 95% HPDs indicate that the coefficient estimates are not distinguishable from zero at conventional levels of confidence, wide uncertainty intervals surrounding the estimates seem not surprising given the few number of observations the inference relies on. Overall, the results obtained from Model 7 show the same general pattern as Model 1 in my main analysis. The GFCC appears less likely to strike federal laws as unconstitutional if lawmakers of the governing coalition caucus (irrespective of their seniority) had objected the reviewed laws as unconstitutional prior to their adoption in the Bundestag.

3.4 Discussion

In this chapter, I set out to test the core empirical implication derived from the theoretical model presented in Chapter 2: I expect courts to be more likely to show self-restraint in their jurisprudence when lawmakers send costly and thus credible signals of a non-compliance threat. I identified Germany's constitutional politics

between 1983 and 2017 and the GFCC's constitutional review of federal law as a suitable case to empirically test this claim. Within this timeframe, both the GFCC and lawmakers in the elected branches occupied (at least during certain legislative terms) powerful positions in Germany's political system, setting the stage for constitutional confrontations over policy.

The empirical analysis presented in this chapter suggests that the GFCC was indeed less likely to strike parts of federal laws when members of the governing coalition had previously objected these laws as unconstitutional. Ignoring their colleagues' constitutional concerns may backfire for lawmakers in government once a constitutional court actually invalidates their policies. However, because this choice is politically risky, it also signals lawmakers' determination to courts, which according to my theoretical model explains the GFCC's propensity to exercise self-restraint when considering these types of cases.

While this empirical pattern may raise normative concerns, which will be further discussed in the concluding chapter of this thesis, it is worth mentioning here what the empirical evidence presented in this chapter does not suggest. First, the data that I have collected provides an indication that—at least in Germany—it is very rare that constitutional concerns coming from the benches of the governing coalition are ignored (it happens in less than 10% of the GFCC's constitutional review cases involving federal laws). In other words, there is little evidence that governing majorities frequently disregard credible warning signs that their actions would conflict with constitutional norms, pushing constitutional boundaries and constantly provoking clashes with the GFCC. Unsurprisingly, it happens far more often that government disregards claims of constitutional incompatibility voiced by the parliamentary opposition, although it is difficult to assess the credibility of each of these claims. In addition, if anything, the results of my analysis show that the GFCC is indeed more likely to strike federal laws when members of the opposition had rang the constitutional alarm bells.

Even when lawmakers in government occasionally do flout their political allies' concerns, the evidence considered in this chapter does not suggest that the GFCC will *always* back off from challenging them. The interpretation I give to the main empirical finding presented in this chapter suggests that lawmakers costly signalling of a non-compliance threat effectively allows the GFCC to avoid the kinds of confrontations that would visibly rattle at the pillars of systems of limited government, with courts invalidating the elected branches' act and the latter failing to comply. In systems of limited government, the competences that can shape policy are distributed across the elected and judicial branches, with the branches' 'ambition counteracting ambition' (Madison, 1961). After all, lawmakers' costly signalling may help courts

to navigate the tension in their role as effective checks on the elected branches and their reliance on the latter for the efficacy of their jurisprudence.

3.5 Appendix

In the following, I tabulate results for fixed-effect coefficient estimates of each model estimated in Chapter 3. Each table reports the coefficient estimates' posterior means, posterior distributions' standard deviation as well as 95% highest posterior density (HPD) intervals. Further, the tables report the number of laws (i.e. groups in the multi-level models), the total number of observations and the variance of their random-effect, $\sigma^2_{\text{Law ID}}$. Replication files for all analyses presented in this chapter are available upon request.

Main analyses

Table 3.5: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 1 – GFCC strike of federal laws, 1983 to 2017

Variable	Mean	SD	2.5%	97.5%
Constitutional objections by opposition MP(s)	0.53	0.31	-0.09	1.15
Constitutional objections by governing MP(s)	-1.28	0.63	-2.57	-0.09
Constitutional amendment	-2.40	1.76	-6.15	0.80
Law by grand-coalition	0.86	0.51	-0.10	1.93
Policy area: Education	1.47	1.02	-0.46	3.55
Policy area: Family law	0.71	0.74	-0.69	2.24
Policy area: Individual rights	1.00	0.53	-0.02	2.09
Policy area: Institutional disputes	1.98	0.86	0.34	3.72
Policy area: Judicial process	0.57	0.64	-0.69	1.81
Policy area: Social insurance	0.49	0.44	-0.35	1.40
Policy area: Budgets/Fiscal policy	0.77	0.49	-0.17	1.76
Court proceeding: Concrete norm control	0.79	0.58	-0.31	1.98
Court proceeding: Constitutional complaints	0.96	0.57	-0.11	2.14
Years since adoption	0.04	0.04	-0.03	0.11
Length of proceeding	-0.02	0.06	-0.15	0.11
$\sigma^2_{\text{Law ID}}$: 0.18				
Number of groups (Law ID): 241				
Number of observations: 363				

Table 3.6: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 2 – GFCC strike of federal laws, 1983 to 2017

Variable	Mean	SD	2.5%	97.5%
Years until election	0.29	0.15	-0.00	0.60
Current government	0.30	0.72	-1.13	1.74
Years until election × Current government	-0.51	0.35	-0.97	0.16
Policy area: Education	1.35	1.09	-0.74	3.53
Policy area: Family law	0.93	0.78	-0.56	2.56
Policy area: Individual rights	0.89	0.56	-0.19	2.01
Policy area: Institutional disputes	2.02	0.91	0.34	3.90
Policy area: Judicial process	0.50	0.66	-0.80	1.80
Policy area: Social insurance	0.52	0.47	-0.38	1.49
Policy area: Budgets/Fiscal policy	0.81	0.52	-0.20	1.86
Court proceeding: Concrete norm control	0.75	0.61	-0.42	1.99
Court proceeding: Constitutional complaints	0.90	0.60	-0.24	2.14
Years since adoption	0.01	0.04	-0.07	0.10
Length of proceeding	-0.02	0.07	-0.16	0.12
$\sigma^2_{\text{Law ID}}$: 0.44				
Number of groups (Law ID): 241				
Number of observations: 363				

Table 3.7: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 3 – GFCC strike of federal laws given *Grand-coalition* = 0

Variable	Mean	SD	2.5%	97.5%
Years until election	0.36	0.17	0.04	0.71
Current government	0.94	0.83	-0.68	2.58
Years until election × Current government	-0.69	0.38	-1.47	0.04
Policy area: Education	1.17	1.13	-1.05	3.43
Policy area: Family law	1.54	0.92	-0.24	3.38
Policy area: Individual rights	0.96	0.64	-0.25	2.27
Policy area: Institutional disputes	2.57	1.03	0.66	4.70
Policy area: Judicial process	1.29	0.73	-0.15	2.75
Policy area: Social insurance	0.98	0.54	-0.05	2.07
Policy area: Budgets/Fiscal policy	1.32	0.61	0.16	2.56

Continued on next page

Table 3.7 – *Continued from previous page*

Variable	Mean	SD	2.5%	97.5%
Court proceeding: Concrete norm control	-0.35	0.68	-1.71	0.98
Court proceeding: Constitutional complaints	-0.21	0.67	-1.54	1.12
Years since adoption	0.08	0.06	-0.02	0.20
Length of proceeding	-0.02	0.08	-0.18	0.12
$\sigma^2_{\text{Law ID}}$: 0.31				
Number of groups (Law ID): 191				
Number of observations: 287				

Table 3.8: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 4 – GFCC strike of federal laws given *Grand-coalition* = 1

Variable	Mean	SD	2.5%	97.5%
Years until election	0.12	0.48	-0.75	1.16
Current government	-1.26	1.66	-4.49	2.07
Years until election × Current government	0.21	1.51	-2.92	3.09
Policy area: Education	1.14	2.18	-3.12	5.44
Policy area: Family law	-0.87	1.49	-3.63	2.30
Policy area: Individual rights	3.18	1.78	-0.09	6.81
Policy area: Institutional disputes	-0.30	1.89	-4.06	3.35
Policy area: Judicial process	-2.97	1.96	-6.97	0.80
Policy area: Social insurance	-0.74	1.14	-2.94	1.60
Policy area: Budgets/Fiscal policy	-0.15	1.17	-2.60	2.13
Court proceeding: Concrete norm control	3.21	1.33	0.61	5.86
Court proceeding: Constitutional complaints	3.08	1.29	0.65	5.74
Years since adoption	-0.13	0.10	-0.35	0.07
Length of proceeding	-0.01	0.29	-0.58	0.57
$\sigma^2_{\text{Law ID}}$: 0.92				
Number of groups (Law ID): 64				
Number of observations: 76				

Robustness checks

Table 3.9: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 5 – GFCC strike of federal laws, 1983 to 2017

Variable	Mean	SD	2.5%	97.5%
Constitutional objections by opposition MP(s)	0.59	0.34	-0.06	1.28
Constitutional objections by governing MP(s)	-1.29	0.67	-2.66	-0.01
Years until election	0.32	0.16	0.03	0.64
Current government	0.15	0.73	-1.28	1.61
Years until election × Current government	-0.36	0.36	-1.08	0.32
Constitutional amendment	-2.37	1.79	-6.09	0.91
Law by grand-coalition	1.02	0.57	-0.03	2.21
Policy area: Education	1.31	1.06	-0.70	3.45
Policy area: Family law	0.70	0.78	-0.76	2.32
Policy area: Individual rights	1.10	0.57	0.04	2.28
Policy area: Institutional disputes	2.26	0.93	0.53	4.13
Policy area: Judicial process	0.53	0.66	-0.78	1.83
Policy area: Social insurance	0.50	0.47	-0.38	1.47
Policy area: Budgets/Fiscal policy	0.83	0.53	-0.17	1.89
Court proceeding: Concrete norm control	0.74	0.61	-0.44	1.98
Court proceeding: Constitutional complaints	0.90	0.60	-0.23	2.12
Years since adoption	0.03	0.04	-0.05	0.12
Length of proceeding	-0.01	0.07	-0.16	0.12
$\sigma^2_{\text{Law ID}}$: 0.51				
Number of groups (Law ID): 241				
Number of observations: 363				

Table 3.10: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 6 – GFCC admission of applications challenging federal law, 1983 to 2017

Variable	Mean	SD	2.5%	97.5%
Constitutional objections by opposition MP(s)	0.59	0.28	0.05	1.17
Constitutional objections by governing MP(s)	0.55	0.61	-0.63	1.78
Constitutional amendment	-0.56	1.47	-3.36	2.45

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Table 3.10 – *Continued from previous page*

Variable	Mean	SD	2.5%	97.5%
Law by grand-coalition	-0.60	0.36	-1.34	0.09
Policy area: Education	0.33	1.00	-1.57	2.34
Policy area: Family law	0.60	0.66	-0.69	1.90
Policy area: Individual rights	-0.05	-0.87	-0.09	0.75
Policy area: Institutional disputes	0.44	0.69	-0.91	1.79
Policy area: Judicial process	0.27	0.52	-0.75	1.28
Policy area: Social insurance	0.12	0.37	-0.60	0.85
Policy area: Budgets/Fiscal policy	0.64	0.44	-0.24	1.50
Court proceeding: Concrete norm control	-3.85	0.98	-5.92	-2.10
Court proceeding: Constitutional complaints	-4.17	0.96	-6.20	-2.46
Years since adoption	0.06	0.03	0.00	0.13
Length of proceeding	0.47	0.07	0.34	0.61
$\sigma^2_{\text{Law ID}}$: 0.37				
Number of groups (Law ID): 371				
Number of observations: 662				

Table 3.11: Posterior means, standard deviations and 95% HPDs of fixed-effects coefficients of Model 7 – GFCC strike of federal laws, 1983 to 2017

Variable	Mean	SD	2.5%	97.5%
Constitutional objections by opposition MP(s)	0.52	0.31	-0.09	1.14
Junior governing MP(s)	-1.48	0.91	-3.35	0.24
Senior governing MP(s)	-1.05	0.76	-2.59	0.46
Constitutional amendment	-2.48	1.75	-6.16	0.72
Law by grand-coalition	0.88	0.51	-0.08	1.93
Policy area: Education	1.48	1.02	-0.48	3.56
Policy area: Family law	0.71	0.74	-0.70	2.20
Policy area: Individual rights	0.98	0.53	-0.04	2.07
Policy area: Institutional disputes	1.97	0.86	0.35	3.74
Policy area: Judicial process	0.55	0.64	-0.71	1.79
Policy area: Social insurance	0.49	0.44	-0.36	1.39
Policy area: Budgets/Fiscal policy	0.78	0.49	-0.18	1.78
Court proceeding: Concrete norm control	0.78	0.58	-0.33	1.98

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Table 3.11 – *Continued from previous page*

Variable	Mean	SD	2.5%	97.5%
Court proceeding: Constitutional complaints	0.95	0.58	-0.14	2.12
Years since adoption	0.04	0.04	-0.03	0.11
Length of proceeding	-0.02	0.07	-0.15	0.11
$\sigma^2_{\text{Law ID}}$: 0.20				
Number of groups (Law ID): 241				
Number of observations: 363				

Chapter 4

Perspectives on constitutional confrontation

The previous chapter provided a statistical analysis of the German Federal Constitutional Court's (GFCC) review of federal laws between 1983 and 2017. The empirical evidence is consistent with a central implication of the theoretical model presented in this thesis: The GFCC appears less likely to strike federal laws when lawmakers had previously dismissed their political allies' concerns that their policies were at odds with the court's jurisprudence. The theoretical model claims that lawmakers' choice to flout their colleagues' constitutional concerns and provoke a costly confrontation with the GFCC signals a credible non-compliance threat. Courts lacking immediate control over the implementation of their decisions then face incentives to show deference to lawmakers in the elected branches.

In the following, I depart from the approach of the previous chapter and employ a different kind of data source to evaluate the empirical implications of the theoretical model and its underlying assumptions. In this chapter, I present and discuss evidence from interviews with justices and law clerks at the GFCC, lawmakers in Germany's executive and legislative branches, as well as journalists familiar with the GFCC's exercise of constitutional review. The evidence presented in this chapter provides something the previous chapter's statistical analysis of constitutional review cases decided by the GFCC could not offer: It allows for a glimpse into the perceptions of the actors at the centre of this thesis's theoretical model.

The evidence presented in this chapter stems from a total of fifteen interviews. It is not the goal of this chapter to provide an overview of perceptions representative of the views of every lawmaker in the Bundestag and the German federal government or justices and law clerks at the GFCC. Instead, the main objective is to provide thicker,

more detailed evidence from conversations with individuals who have been closely involved in the interactions between the GFCC and the legislative and executive branches, which speaks to the various causal mechanisms implied by the theoretical model of Chapter 2. Hearing from the actors whose behaviour the model seeks to explain is particularly relevant for the evaluation of a formal model. Vanberg (2005, 116) notes that "the *subjective perceptions* of the actors whose behavior is being explained constitute a crucial ingredient in rational choice approaches", adding that "assessing how well a model maps up to the 'players' actual perceptions' is one way to evaluate the adequacy of a rational choice explanation."

The theoretical model presented in Chapter 2 implies that both lawmakers and courts anticipate each others' reactions to their own behaviour and under certain conditions therefore refrain from pursuing certain courses of action. For instance, if being at the receiving end of a court's veto is very costly, some lawmakers may choose not to pursue a constitutionally controversial policy because they know a court would strike it, yet others may not. It is often difficult to evaluate whether actors' anticipated 'off-the-equilibrium path' behaviour implied by the model is indeed the driving force behind the patterns we can observe in reality when resorting to the type of observational data we have seen in the previous chapter. Accordingly, getting a glimpse of the relevant actors' subjective perceptions of the complex situations they are finding themselves in becomes all the more relevant.

The discussion of the qualitative evidence from interviews in this chapter serves two primary purposes. First, it allows me to evaluate some of the key assumptions that went in to the development of the formal model presented in Chapter 2. Second, it allows me to illustrate some of the empirical implications derived from the formal model. Specifically, this chapter's qualitative evidence speaks to the following points:

1. The theoretical model assumes that lawmakers anticipate courts' constitutional review and can assess whether or not their policies conflict with constitutional jurisprudence. How—if at all—can lawmakers evaluate whether a court would object to their policy choices?

2. Some of the formal model's equilibria predict that under certain conditions lawmakers 'auto-limit' their policy-making because of the costs that come with a court's veto, while another shows that lawmakers' willingness to provoke costly confrontation signals a credible non-compliance threat. Do lawmakers actually worry about being censored by a court? If yes, are there circumstances under which lawmakers risk confrontation with a court nonetheless? Under which conditions is the political fallout from a court's veto particularly costly?

3. The model assumes that courts know that their decisions are at risk of non-

compliance and are therefore sensitive to information signalling a credible non-compliance threat. Are members of the court paying attention to the political processes that produced the acts they review? Do courts consider the potential for backlash in their decision-making? How—if at all—do they respond to a possibility of lawmakers' non-compliance with their jurisprudence?

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 actually 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. In the following, I therefore attribute quotes in a way that prevents others from identifying them (e.g. referring to 'Justice 1' or 'Lawmaker 3').

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. An overview over the set of questions I posed to my interviewees is provided in the chapter's appendix.

4.1 Anticipating constitutional review

The first implication of the theoretical model I consider in this chapter concerns lawmakers' anticipation of courts' exercise of constitutional review. The model

assumes that lawmakers are able to draw on a court's existing jurisprudence to evaluate whether the court would generally prefer to strike their current plans for a specific policy. This assumption is central to the core argument derived from the model: Lawmakers need to anticipate that their policies are at odds with a court's jurisprudence but pursue these policies nonetheless (and risk paying the costs for this choice) in order to signal a credible non-compliance threat.

Do lawmakers in Germany's legislative and executive branches actually anticipate constitutional review and evaluate whether their policy choices are in line with the GFCC's jurisprudence? Evidence from my interviews with lawmakers strongly suggests that they do. However, as briefly discussed in Chapter 2, several lawmakers also stressed that there is no certainty in their evaluations. In an interview conducted on April 4, 2019, one lawmaker noted:

> *Lawmaker 3:* I don't think you can predict the court's future decisions, but we definitely know their general direction. The decisions of the Federal Constitutional Court are based on decades of jurisprudence. This started in the 1950s and the court's interpretation of constitutional rights, particularly their core areas, has certainly become more and more concrete over the years.

In an interview conducted on March 19, 2019, another lawmaker offered a similar answer to the question whether the legislative and executive branches anticipate the GFCC's future decisions on their policies:

> *Lawmaker 4:* You know there is an old saying, at sea and in court, you are in god's hand. What I am trying to say is, you basically never know exactly how a case is going to turn out in court. I am a lawyer myself and we also don't know these things for sure, after all there are plenty of cases you lose. But at the very least, you usually have an idea how things would play out at the court.

Other lawmakers highlighted *how* the legislative and executive branches in Germany assess whether a planned policy lives up to the GFCC's constitutional jurisprudence. These responses show that both branches rely on specialised experts familiar with the GFCC's jurisprudence during the policy-making stages. One lawmaker interviewed on November 11, 2017, noted that employees of two federal ministries are typically involved in assessing the constitutionality of a new policy:

> *Lawmaker 5:* Two ministries, which we call 'constitutional ministries', play a role here. First, there's the Ministry for Internal Affairs

> with a designated department for constitutional law. And then there is also the staff at the Ministry of Justice, who usually say 'you need to consider our input as well'.

As another lawmaker pointed out in an interview conducted on February 22, 2019, legal experts in these ministries are qualified to assess new policy proposals in light of the GFCC's jurisprudence, with their assessments complemented by the expertise from academics and practitioners heard in the Bundestag's committees:

> *Lawmaker 2:* We have experts in the committees and specialised lawyers working for the ministries who are certainly capable of understanding these judgements. I think the judgements usually make it quite clear what the Federal Constitutional Court wants, if not in their operative part then in their reasoning.

The impression that lawmakers have access to expertise allowing them to assess whether their policies are at risk of the GFCC's censure, albeit not with certainty, is summarized in the following reply offered in an interview from March 23, 2019:

> *Lawmaker 1:* There are eight justices in each Senate and you never quite know how they will decide. But sure, there is plenty of existing jurisprudence in which the Federal Constitutional Court interprets the Basic Law. And then you can check, well, what did the court previously tell us on this specific point, and that can serve as a guidance. The court's settled case law plays a particularly relevant role here. You also need to remember, every new law goes through the legal departments of the ministries and there are plenty of talented lawyers who use this case law to make a judgement call about the constitutionality of the law. And we also have the hearings in the committees, with academic, legal expertise feeding into the legislative process.

Lawmakers' responses suggest that legal experts in the federal ministries and experts invited to hearings of the Bundestag's committees are familiar with the GFCC's case law and provide assessments of the constitutionality of new policy proposals. The evidence presented in this section shows that it is plausible to assume that lawmakers in Germany's executive and legislative branches can rely on these expert assessments to mitigate their uncertainty about the GFCC's views on their policies. In other words, lawmakers can evaluate whether their policies are at odds with the court's constitutional jurisprudence and thus at risk of the GFCC's censure. The next section considers evidence shedding light on how lawmakers use this kind of information in their decision-making.

4.2 Auto-limitation and confrontation

The previous section provided evidence suggesting that lawmakers have a relatively good sense of whether or not their policy proposals match up with the court's constitutional jurisprudence. A key theme of this thesis is lawmakers' behaviour in light of this information. Do lawmakers draft their policies in a way that allows them to avoid confrontation with the court? If yes, what are the drivers behind such decisions? Is the GFCC's jurisprudence sometimes ignored, and if so, why?

4.2.1 Respecting jurisprudence

Existing scholarship expects lawmakers to shy away from provoking confrontation with courts over their policies because of the costs that come with it (see Stone, 1992; Vanberg, 2005; Rogers and Vanberg, 2007). The shadow of constitutional review shapes lawmakers' decisions at the policy-making stages and leads them to 'auto-limit' themselves to policies a court would approve (see Landfried, 1992; Stone Sweet, 2000). This expectation is also reflected in some of the pooling equilibria of the theoretical model and hypothesis 1 discussed in Chapter 2. I asked lawmakers about the role the GFCC's jurisprudence plays in the legislative process. Some lawmakers pointed out that they make a conscious effort to only pass laws which respect the court's jurisprudence. One lawmaker noted:

> *Lawmaker 5:* The Federal Constitutional Court's jurisprudence plays a very significant role. When you are working on a draft, you always try to meet the requirements of the jurisprudence. And the core principles of constitutional rights, you know the ones the court repeats in its decisions over and over, play an especially important role. Every law that we pass protects these core rights, we take this very seriously.

In a subsequent statement about the legislative and executive branches' respect for the GFCC's jurisprudence in their actions, the same lawmaker highlighted the likely consequences of government's decision to flout constitutional jurisprudence in the legislative process:

> *Lawmaker 5:* You know, we also face the scrutiny of the legislature and the opposition. Even if a majority in the legislature would say, 'oh well, let's turn a blind eye to this particular decision' you can imagine that the opposition would respond 'how dare you treat the court's jurisprudence that way' and that's why we stick closely to the Federal

> Constitutional Court's jurisprudence. We don't take risks, we respect the jurisprudence.

These statements imply that lawmakers may simply recognize a court's interpretation of the constitution and the constraints on lawmakers' actions that follow from it as legitimate, and therefore respect it in their policy-making. Yet, especially the latter statement suggests that even if lawmakers would prefer to ignore a court's constitutional jurisprudence, lawmakers know that doing so would herald consequences. The lawmaker's reference of the opposition's expected response to government's choice to flout constitutional jurisprudence illustrates that such choices come with costs. Vanberg (1998, 305) argues "that it is electorally costly to be perceived to be in conflict with the court". The lawmaker's latter statement suggests that the political opposition in the legislature plays a critical role in uncovering and publicising governing majorities' incongruence with the court's jurisprudence, which can turn out to be a disadvantage for lawmakers in government when vying for the electorate's support (for a similar argument, see Mayhew, 1974).

Other lawmakers offered a reason for *why* it may be electorally costly to be perceived to be in conflict with the GFCC's jurisprudence: the comfortable support the court enjoys among the German public. One lawmaker initiated our conversation (even before I asked my first question) by referencing the prestige the GFCC enjoys in Germany:

> *Lawmaker 1:* Before we begin, let me just say that I believe that the Federal Constitutional Court is the most eminent court in the world. You don't find a court enjoying such prestige anywhere else.

Asked about how lawmakers respond when the GFCC's jurisprudence censors the governing majorities' actions and places constraints on the legislature's future policy-making, the same lawmaker later added:

> *Lawmaker 1:* I think a general tension between the court and the legislature is unavoidable. But don't get me wrong, I don't think there is actually a conflict between the court and the legislature. Of course we sometimes wish that the court had decided a case differently, but in the end there is no doubt that you have to accept it. You also need to consider that the court's prestige among the public is much higher than that of the legislature.

These statements indicate why the legislative and executive branches in Germany generally face incentives to respect the GFCC's jurisprudence in their actions,

regardless of whether they respond to a particular decision or whether they draft a new policy that touches upon existing jurisprudence.[1]

As shown in Chapter 3, the GFCC enjoys a comfortable reservoir of support among the German public, far beyond the support the legislative and executive branches can rely on (see also Gibson et al., 1998; Sternberg et al., 2015; Vanberg, 2005). The evidence presented here illustrates that lawmakers are aware of the GFCC's popularity among the public and know that ignoring the court's jurisprudence has consequences. Pursuant to Article 93 of the German constitution, all government institutions are bound by the GFCC's jurisprudence, and lawmakers have reason to expect that their own reputation would suffer if they were found to ignore the court's jurisprudence. The statements suggest that some lawmakers therefore (at least sincerely believe they) limit themselves to policies that are in line with the court's jurisprudence, reflecting expectations of two of the theoretical model's pooling equilibria and existing scholarship (see Vanberg, 1998; Stone, 1992; Rogers and Vanberg, 2007).

4.2.2 Flouting jurisprudence

The motivating theme of this thesis and the theoretical model is the impression that despite the costs this choice may entail, lawmakers at times disregard jurisprudence and provoke confrontation with courts, an impression that is antithetical to lawmakers' reported assertions that every effort is made to respect the GFCC's decisions. When lawmakers mentioned in our conversations that the GFCC's decisions are respected by the other branches, I followed up by providing them with examples of laws (e.g. the Federal Criminal Police Office Act in 2008), which had been adopted by the Bundestag despite widespread constitutional concerns voiced by members of both the opposition and governing factions in parliament.

I asked lawmakers, why majorities in the Bundestag occasionally vote in favour of laws despite such widespread constitutional concerns. Their responses to this question were fairly mixed. One lawmaker listed several reasons for this phenomenon.

[1]Recall that the theoretical model presented in Chapter 2 considers lawmakers' behaviour at two stages of their interaction with courts: first, their choice of whether or not to pass a policy at odds with a court's existing jurisprudence (i.e. prior to the court's decision in the model); and second, their response to a court's decision to strike such a policy (i.e. after the court's decision in the model). For the sake of theoretical parsimony, the model considers only a single interaction between lawmakers and a court. However, even this simplified snapshot of the complex dynamics between lawmakers and courts implies that the two actors face each other repeatedly (possibly over the same issue) and that lawmakers' choice at both stages in the model (prior and after the court's decision) boils down to the same question: whether or not lawmakers opt to comply with the court's jurisprudence. In other words, lawmakers' choice to flout existing jurisprudence prior to the court's decision in the model is essentially an instance of non-compliance.

The lawmaker's response implies that disagreement over the constitutionality of policy is a result of the legal education (and lack thereof) the members of the Bundestag have enjoyed. However, the lawmaker also alludes to some members of the Bundestag simply considering it worth the risk to pursue ostensibly unconstitutional policies as the court may show self-restraint in its jurisprudence:

> *Lawmaker 4:* I think there are a lot of things that play into this. First of all, not everyone sitting in the Bundestag is a lawyer, and those who are not see things quite differently than those who have studied law. Do you remember the Aviation Security Act? The crux here was whether you can shoot down a plane and sacrifice hundreds of lives to save thousands of lives in the event of a terrorist attack. Personally, I always knew that's out of question, you learn that during your undergraduate law studies, but here emotions are pitted against a legal principle. Second, even among the lawyers you will always find diverging opinions, ask three lawyers and you're lucky if you get two opinions. We often see that in the committee hearings. I also always had the impression that people were hoping, well, maybe we will get away with it. You need to consider, when we talk about things like the prevention of terrorist attacks, what we are really talking about is making sure that no one is getting hurt, and we are facing an immense responsibility here.

The theme of the legislature's risk-taking in the shadow of constitutional review also featured in other lawmakers' responses. Interestingly, one of the lawmakers who had previously insisted that the GFCC's jurisprudence always needs to be observed, offered a reply that points to the legislature's constitutional mandate and leeway to design policy:

> *Lawmaker 1:* Like I said before, you never quite know how the Federal Constitutional Court will decide. In the end, I need to ask myself, how great is the risk that I am willing to take? And if I'm not prepared to take any risks, then I'm limited in my leeway to create policy. In the end, it's us who are in charge of politics, it's us who are tasked with designing policy. I've always maintained that if the justices want to get into politics, then they'll have to get themselves elected to parliament.

This statement is an indication that lawmakers are willing to assert that it is the legislature and not the court which eventually writes the laws. The statement also suggests that lawmakers are willing to take risks in the shadow of constitutional review to see their preferred policies on the books, a central implication of the

theoretical model. The model's separating and partial-pooling equilibria imply that 'non-compliant' lawmakers are prepared to pursue policies that are at high risk of a court's censure simply because they know that they may get a chance to evade compliance with the court's decision in the future. This expectation is reflected in a statement one of the lawmakers offered in reply to examples of majorities in the Bundestag dismissing widespread constitutional concerns:

> *Lawmaker 3:* You mentioned the Federal Criminal Police Office Act. Here, I think political preferences played a role, some people are just convinced that everything needs to be done for security. Politically, that may be understandable, but in the end it's not faultless in legal terms. And sometimes it's the ones who believe that eventually you can still try to construe a decision of the Federal Constitutional Court in a certain way, who assert themselves. That's also where you tend to see the tension between the Ministry of Justice and the Ministry for Internal Affairs, both of them have constitutional departments, but possibly different opinions on a law. And of course there are representatives of the law enforcement authorities, who push for more security and say, well, in the end let the court decide if necessary. Personally, I don't think that's the way we should go, it's a matter of respect for constitutional rights and the Basic Law. I find it very problematic when the constitution's limits are tested time and again.

There is at least some evidence that lawmakers at times put their political preferences before legal considerations, and evidence that they do so because they know that a court's decision to strike their policy is not the last act. An even more explicit reference to lawmakers' option to evade compliance with unwelcome jurisprudence is evident in the following response one of the lawmakers offered after highlighting that lawmakers are capable of anticipating the GFCC's future decisions:

> *Lawmaker 2:* I think the real issue is not whether we can anticipate how the court will decide. Let me point you to some nasty statements former members of the federal government have made in the past, who said, please pardon my language, 'Up yours to those justices in Karlsruhe'. These sentiments are extremely disappointing, and especially with some of the more ideologically charged issues it happens that the government tries to do the absolute bare minimum to implement the court's jurisprudence, or even straight up says 'we're not going to implement this at all'.

Lawmakers' perceptions that we have seen so far in this section suggest that lawmakers are well aware that flouting the GFCC's jurisprudence has consequences. The electorate is highly supportive of the GFCC's role in Germany's political system and lawmakers know that ignoring its decisions may come back to bite them at the ballot box, much in line with the expectations of existing scholarship (see for example Carrubba and Zorn, 2010; Clark, 2010; Vanberg, 2005). However, when presented with examples of lawmakers dismissing constitutional concerns coming from both sides of the legislature's aisle, my interviewees were at least ready to admit that lawmakers are at times prepared to take risks in their pursuit of policies touching upon constitutional rights. Some of the statements reported above linked lawmakers' willingness to take risks to the legislature's interest to defend its leeway to create policy and lawmakers' option to evade compliance with a judicial veto, an assumption at the heart of the theoretical model presented in Chapter 2.

4.2.3 The costs of ignoring advice

The core argument derived from the theoretical model states that lawmakers signal a credible non-compliance threat when they provoke confrontation despite knowing that a court's censure of their policies would come with high costs. In Chapter 3, I operationalized these costs by identifying whether lawmakers in government had disregarded concerns by members of the governing coalition's own caucus that their policies would fail to meet the requirements of the court's jurisprudence.

Existing scholarship has highlighted that non-compliance with courts' jurisprudence is potentially costly for lawmakers when electorates' diffuse support for courts is high (see Carrubba, 2009; Vanberg, 2005, see also Whittington 2003). However, the existing literature has also shown that it is generally difficult for the electorate to determine whether lawmakers in government actually evade compliance (see Staton, 2006; Krehbiel, 2016, see also Staton and Vanberg 2008). I assume that scenarios in which lawmakers disregard credible advice that their policies fail to meet the requirements of constitutional jurisprudence and are subsequently censored by the court, are instances of non-compliance easily observed by the public: It is the court itself, which highlights lawmakers' non-compliance.

Do lawmakers believe that dismissing their colleagues' constitutional concerns and subsequently being censored by the GFCC entails risks? Some of the lawmakers' statements suggest that the GFCC's decisions invalidating government policy benefit the opposition and tarnish the governing factions' reputation among the electorate:

> *Lawmaker 1:* Think of politics a bit like tennis, you try to score points, and once you have enough points then you win the set. And

> sure, the opposition scores points when the government loses in court, but that doesn't mean that they win the whole match or will win the next elections. [...] But yeah, it's not irrelevant what happens at the court, and it could be that a party or politician's performance at the court plays a role for their reputation.
>
> *Lawmaker 3:* You asked about the risks. Yes, I do believe the Federal Constitutional Court's choice to strike a law comes with a loss in reputation among the public, especially when those who made these laws are legal experts themselves.
>
> *Lawmaker 4:* That certainly helps, if the judgement comes in and you're in the opposition you can then react to it and say 'look, you can't even agree among yourselves'. [...] Generally, it's never nice to lose at the Federal Constitutional Court, especially if you're still in office. But you know, it still happens that the governing factions fall flat on their faces at the court, once, twice, but then still don't seem to learn.

These statements illustrate that lawmakers are aware that their political opponents may exploit GFCC decisions striking policy as opportunities to discredit their political acumen among the electorate. Further, the latter statement indicates that some lawmakers nonetheless appear unwilling to correct course in line with constitutional jurisprudence even after suffering the costs of a loss in court. This behaviour appears consistent with the theoretical model's assumption that 'non-compliant' lawmakers will evade compliance with a court's decision even after suffering the political fallout following censorship by the court.

In previous chapters, I briefly discussed another possible consequence of lawmakers dismissing constitutional concerns voiced by members of the governing coalition caucus. Doing so may provide tailwind to intra-party critics once the GFCC had struck the law in question. Evidence from my interviews speaking to this assumption appears mixed at best. In one of the interviews, a lawmaker seized on the example of the 2008 Federal Criminal Police Office Act to highlight that members of the SPD, who had supported the act, faced continued opposition from within the party once the GFCC had struck it:

> *Lawmaker 2:* You know, there are some in the SPD who subscribe to more conservative beliefs than others, particularly on questions of internal affairs and security. And if you look at the Federal Criminal Police Office Act, you'll realize that the CDU/CSU managed to get these people on their side. I can tell you that these people certainly didn't

> make new friends in the party. [...] After the Federal Constitutional Court's ruling, the CDU/CSU didn't care at all how we would move on with the act at the federal level, and delegated much of the mess to the states. And of course we continue to bang the drums against those who had supported the act, even when they are from our own party.

However, another lawmaker questioned the assumption that those who had dismissed their political allies' constitutional concerns would face tangible consequences within their own party once the GFCC had struck the act in question:

> *Lawmaker 1:* I can't think of an example of someone being held politically accountable or resigning after losing a case in court. [...] Let me give you an example, just think of the law governing the European elections. We first had a five-percent electoral threshold but that was struck by the court. And then the German delegates from Brussel asked us, 'well, can't you just do at least one with a three-percent threshold?' Personally, I warned my colleagues that the court wouldn't change its mind on this issue within a matter of years and would also strike the three-percent threshold. And that's what happened. But I remember, that time the party whip had said 'we're doing it and I take the responsibility.' That was a rare case where we said, we see the risk but we go for it anyway. And do you know who the party whip was at that time? Frank-Walter Steinmeier, he's the Federal President now.

Overall, while lawmakers' perceptions do not suggest that flouting constitutional concerns and subsequently losing in court derails the political careers of the individuals who had assumed responsibility for the act in question, lawmakers' statements nonetheless suggest that doing so tarnishes political parties' reputation among the electorate and hence involves costs, a key assumption of the theoretical model.

Chapter 3 provided a key reason for distinguishing constitutional concerns voiced by members of the governing coalition caucus from concerns voiced by the political opposition when measuring these costs: We can assume that members of the opposition feel few inhibitions to attack government's plans for their supposed unconstitutionality, thus these attacks are more likely to reflect political opportunism rather than genuine legal concerns. Constitutional concerns voiced from within the governing coalition caucus, on the other hand, should be rather rare occasions as defying party discipline and accusing their colleagues of failing to uphold constitutional norms may have ramifications for those making these claims. Hence, constitutional objections voiced by members of the governing coalition caucus should be more likely

to reflect genuine legal concerns and ignoring them should be particularly damaging to lawmakers' reputation should a court indeed strike the act in question.

Descriptive evidence presented in Chapter 3 appears consistent with this assumption. The opposition frequently accuses government of failing to respect the GFCC's jurisprudence (e.g. about half of the laws reviewed by the GFCC's Senates between 1983 and 2017 had been considered unconstitutional by members of the opposition), while constitutional objections coming from within the governing coalition caucus are rare. The pattern of lawmakers routinely employing constitutional concerns to discredit government policy also featured in my interviews. One lawmaker noted that constitutional arguments are a common feature of debates in the Bundestag:

> *Lawmaker 1:* Basically, in Germany it happens quite often that people make use of references to constitutional law when we debate the more contested legislative proposals in the Bundestag. That's sort of a German peculiarity and happens all the time. Think of it as political sparring with legal arguments.

Interestingly, in an interview from March 3, 2019, a former justice of the GFCC also referred to the frequent nature of constitutional objections heard in the Bundestag and highlighted the negative effects of this characteristic on the political discourse in the legislature:

> *Justice 3:* I have repeatedly criticised that members of the Bundestag use constitutional arguments to contest legislative proposals. It would be catastrophic for the political life in Germany if all of these concerns would be taken seriously, and if—and that happens rather too often than too seldom—every legislative project would be abandoned because there is a potential 'constitutional risk'.

This statement has two implications: First, it shows that justices at the GFCC know about the political discourse happening in the Bundestag (and the subsequent sections in this chapter focus on this aspect in more detail); second, lawmakers in the Bundestag may in fact be well-advised not to change course on every legislative proposal once constitutional concerns are voiced, as most of these concerns are likely to lack substance. This latter sentiment may seem surprising, coming from a justice at a constitutional court. But it illustrates that contesting an unwanted law by claiming that it fails to live up to the GFCC's constitutional jurisprudence has become 'normalized' and common for debates in the Bundestag.

In light of this impression and the relative infrequency of constitutional concerns coming from the benches of the governing coalition caucus, it nonetheless seems plausible to assume that these latter kinds of constitutional objections stand out from

the rest of similar concerns. As discussed above, constitutional concerns voiced by members of the governing coalition caucus are more likely to reflect genuine legal concerns, while they may also be the more visible ones among the accusations of government failing to uphold constitutional norms commonly hurled against government's policy proposals. Hence, ignoring these kinds of constitutional concerns may be particularly costly for lawmakers in the governing coalition.

Most of lawmakers' perceptions reported in this chapter appear consistent with the assumptions and implications of the theoretical model presented in Chapter 2. Lawmakers are capable of assessing how the court would respond to their policies and generally face incentives to respect the GFCC's jurisprudence in light of the electoral risks that come with non-compliance. However, several lawmakers also indicated that lawmakers may not always shy away from risking confrontation, knowing that they may get a shot at construing the court's judgement in a way that would nonetheless allow them to pursue their preferred policies. In the following sections, I present evidence from my interviews with justices and law clerks at the GFCC, outlining how the court perceives lawmakers' choices to provoke confrontation.

4.3 Perspectives from the court

So far we have heard from lawmakers and had a chance to get glimpse of their perceptions of the complex inter-branch dynamics in systems of limited government. I now turn my attention to the perceptions of the justices and law clerks at the GFCC.[2] The formal model presented in Chapter 2 assumes that courts' decision-making in constitutional review cases is affected by two features of their relationship with the legislative and executive branches. First, courts are aware that decisions challenging government policy can result in backlash against them in the form of court-curbing, with varying implications for courts' institutional integrity. Second, courts know that they cannot coerce the elected branches into compliance with their jurisprudence and are aware that lawmakers may seek to evade faithful implementation of their decisions. In light of these features defining courts' compliance dilemma, the formal model predicts that (under certain circumstances) courts draw on the political costs lawmakers risk paying for provoking confrontation with the judiciary to assess the likelihood of lawmakers' non-compliance.

[2]The law clerks, or rather academic assistants, (in German, 'wissenschaftliche Mitarbeiter'), at the GFCC assist justices with research tasks related to their case files and often draft the court's decisions. Each justice is assisted by four law clerks, and while they are not involved in the deliberations among justices over individual cases, which are held behind closed doors, hearing from them is nonetheless useful as they are highly familiar with the factors that shape the court's decision-making in light of their task.

4.3.1 The prospects of backlash against the GFCC

The model's first assumption I consider here concerns courts' awareness that lawmakers in the legislative and executive branches may opt to discipline courts for striking their policies. The assumption that there are (at least some) costs for courts for striking policy is central to the formal model: Unless striking policy entails some form of costs, a court would face no incentive to show self-restraint in its decision-making—striking policy the court considers unconstitutional would then always be its best option, even if lawmakers' non-compliance is likely.

I asked former justices and law clerks at the GFCC whether they recognize that some of the court's decisions may cause frustration among lawmakers in the legislative and executive branches, ultimately leading the latter to clip the GFCC's authority. Overall, both justices and law clerks highlighted in their answers that the court certainly risks drawing lawmakers' ire when challenging their policies, while there is nonetheless evidence that backlash against the court falls short of having serious consequences for the GFCC's institutional integrity. One former justice of the GFCC interviewed on November 8, 2017, noted:

> *Justice 2:* I definitely remember more and less difficult times for the court, by difficult meaning that the politicians were, well, pretty annoyed by the court. You asked whether there were any differences between the governing coalitions, no, I never thought that this was a question of who was currently in charge. That's rather a consequence of particular decisions. Sure, the decision on equal status for same-sex partnerships definitely caused more anger among some parties than others. But not all of the decisions that caused outrage, so to speak, had such a clear ideological touch, just think of one of the more general decisions like the one on the thresholds for the elections to the European Parliament.

Asked about how justices at the GFCC respond to anticipations of backlash against the court, the same justice added:

> *Justice 2:* You know, that's just part of our job, to sometimes cause displeasure. We make sure that we stick to our duties as justices, but of course we all know about the political consequences of our decisions. I don't want to rule out that in times when the court gets the impression that the politicians' patience is particularly overstretched, that you need to make sure not to overstep, to take extra care when you know that you are treading in mined terrain.

Another justice interviewed on April 18, 2019, noted that members of the court can anticipate whether their decisions to strike laws will prompt criticism of the court based on their interactions with lawmakers during the proceedings of a case:

> *Justice 1:* You usually know pretty well, which of the decisions will spark anger. That's usually quite obvious from the proceedings at the court and the oral arguments, we obviously know what the concerned parties said about the law and the case.

One of the GFCC's former law clerks noted in an interview conducted on June 5, 2017, that the GFCC avoids becoming embroiled in disputes with the legislative and executive branch by showing self-restraint in its decision-making:

> *Clerk 4:* I would say the Federal Constitutional Court is also a political court, and you can't decide every case in a dogmatic fashion without considering the consequences in practice. And the court finds ways not to become part of political disputes. [...] I think it's fair to say, when you look at the progression of some cases, that the court finds compromises in its decisions. One example I can think of is the norm control proceeding concerning the film promotion fund, you know, where larger cinema operators have to pay fees into the film promotion fund. Here you tap into fiscal constitutional law and that's a pretty delicate chapter, what are taxes, what are fees, all of that is pretty complex. In terms of fiscal constitutional law, there were a lot of reasons to consider this fund as unconstitutional but in the end that's not what happened, the fund was considered constitutional. That's actually more than just a compromise.

Asked how the GFCC negotiates the tension between the court and the legislative and executive branches, another former law clerk mentioned in an interview conducted on May 18, 2017, that the court jeopardizes its role in Germany's political system should it continuously decide to place onerous constraints on lawmakers:

> *Clerk 1:* I think there's quite a sensitivity for this tension among the justices. They have to know whether they are asking too much from the legislature. The court certainly knows that if you constantly intervene and if there is a strong political group, they may get rid of the court in the long run. In my time at the court, one thing was always clear, the legislature needs room to breathe.

The impression that lawmakers in the legislative and executive branches may ultimately opt to disband the GFCC to avoid further constraints on their actions

was not shared by other clerks and lawmakers themselves. While highlighting that the GFCC in principle exercises self-restraint, one former law clerk interviewed on May 26, 2017, referenced the court's standing among the public and the GFCC's geographical distance from the capital, which alleviate any ire against the court:

> *Clerk 3:* We hear complaints that the Federal Constitutional Court acts as if it were a substitute for the legislature quite often, but I think that's pretty much cheap talk. First of all, the court doesn't initiate the proceedings itself, someone needs to bring the cases to us. And when a case comes we can't say, well, that's an issue we don't want to talk about. I can't tell you how often justices mention that the legislature's leeway needs to be respected when they deliberate, I was never part of that, but my impression is that the court exercises restraint wherever it can. A lot of the laws we review are junk, but that doesn't make them unconstitutional. Second, the Federal Constitutional Court has a standing among the public, it's simply a well-established institution. There have been certainly controversial decisions, but the media's treatment of the court is quite friendly and there's never widespread anger directed at the court from the public. In Karlsruhe we're also quite far away from the action and any critique of the court is attenuated.

When discussing the case selection of Germany for the statistical analysis (i.e. the focus on a constitutional court not at risk of suffering serious consequences for challenging lawmakers), Chapter 3 already offered evidence from one of my interviews, suggesting that lawmakers are well aware that the GFCC's comfortable reservoir of public support prevents them from implementing measures that would seriously undermine the court's institutional integrity. This sentiment was echoed by several other lawmakers:

> *Lawmaker 4:* Formally, it's pretty difficult for the legislature to change anything at the court. In practice, I do think that some people are sometimes considering to do something different about the appointment process to make it easier to get their own laws through. But everyone knows that you step on very thin ice with these ideas.

> *Lawmaker 3:* Well, the worst thing that could happen is that a two-thirds majority starts changing the Basic Law to limit the Federal Constitutional Court's jurisdiction. That would be kind of unconstitutional constitutional law. But that's very far off and has so far never happened. Although, I do think that the court operates in a tense environment and

> they do recognize the criticism. You know, the justices come from a certain social milieu and they know very well how the delegates in the Bundestag think about the jurisprudence. But I think that those who don't spare with their criticism tend to underestimate the justices. Some of the delegates may try to give a certain impression and in one way or another get the court to decide differently next time, but I don't think that's actually very effective.

To summarize, the perceptions reported in this section suggest that justices know that decisions challenging the acts of lawmakers come with risks of backlash against the court. One of the justice's statements implies that the GFCC takes care not to place onerous constraints on lawmakers when the latter's 'patience' with the court has depleted. While the court is not immune to criticism and aware that lawmakers can theoretically curb its jurisdiction, both lawmakers and justices of the GFCC nonetheless know that court-curbing measures that would ultimately threaten the effective functioning of the court are essentially off the table in light of the diffuse public support the court has acquired since it took up its work in 1951.

4.3.2 Perceptions of non-compliance

The second feature highlighted by the theoretical model shaping courts' decision-making in systems of limited government concerns lawmakers' treatment of constitutional jurisprudence. Existing scholarship has argued that courts know that (at least some of) their decisions are at risk of non-compliance by lawmakers in the legislative and executive branches, constituting a driving force behind courts' exercise of self-restraint (see Carrubba and Zorn, 2010; Hall, 2014; Vanberg, 2005, see also Larsson and Naurin, 2016, for a similar argument regarding the decision-making of international courts). Are justices at the GFCC aware that lawmakers may evade compliance with their decisions? How much of a role does it play in their decision-making? While admitting that lawmakers occasionally delay the implementation of decisions, one justice noted that non-compliance is not a pressing issue for the court:

> *Justice 1:* I think implementation usually works pretty well, I would definitely say so. Once in a while there are problems with the deadlines the court gives the legislature regarding the implementation of a judgement when a law is considered incompatible with the constitution but not void. It happens that the legislature misses these deadlines by several months, especially on politically sensitive issues. But generally that all runs smoothly, the state authorities definitely respect each other.

Another justice rebuffed expectations commonly held in existing scholarship (and the thesis's theoretical model) that the prospects of non-compliance play a part in the court's decision-making:

> *Justice 2:* I don't think that speculations on whether or not the legislature would suspend something play a role. Of course you know in an abstract sense whether something would be controversial, and there are things you can do about the consequences of a judgement. You know, the court can declare something as unconstitutional with immediate effect and strike it without replacement until the legislature passes a new law. Or you say something is unconstitutional and then give the legislature some time to fix it. But whether you pick one of these options over the other has nothing to do with whether the legislature would want to implement a decision or not. It's simply a question of what would be worse from a standpoint of constitutional law. Just think of the inheritance tax law. That law entailed preferential treatment for certain beneficiaries. Sure, the court could have struck it with immediate effect and without replacement. But then no one would pay any inheritance tax at all and that's definitely the more problematic result.

Whilst these statements do not suggest that the possibility of lawmakers' non-compliance play a prominent role in the decision-making at the GFCC, it is worth pointing out that these views do not necessarily align with perceptions of justices at the GFCC reported in existing scholarship. Vanberg (2005) interviewed a number of justices at the GFCC, asking them whether the potential for defiance by the executive branch is something that enters into the deliberations of the court. In these interviews, several justices highlighted that the court lacks the power to enforce its rulings and provided examples of non-compliance:

> I don't think there is much of a threat to the institutional framework. That's been settled in a manner that is satisfactory for everyone. Another question is how the court can maintain its position and get respect from the legislature and the other courts. That is something that is tricky. ... Sometimes the legislature just doesn't act on the decisions, and the court has no troops to enforce them (Justice of the GFCC, quoted in Vanberg, 2005, 120).

> You know, the court has issued many decisions that were never complied with, for example about the treatment of civil servant pensions. And there really isn't anything the court can do about that. If no one

> else takes an interest in it, that's just the way it is going to be. And of course the court has to be worried about that, that a tradition of ignoring the court isn't established. ... The civil servant [taxation] decision is now more than fifteen years old and clearly should have been complied with by now (Justice of the GFCC quoted in Vanberg, 2005, 122).

Interestingly, in the course of my own interviews, a former law clerk also picked up on the example of the GFCC's review of inheritance tax legislation to illustrate that the court avoids issuing specific constraints when lawmakers appear ready to evade faithful compliance:

> *Clerk 1:* I mean, the legislature is never really enthusiastic about implementing the decisions. And when you know that there is a strong political group in government you find ways to work around this. Let's take the inheritance tax reform as an example, it was always clear that the wealth of a significant share of German citizens is dependent on inheritance. And the Federal Constitutional Court was quite generous in this case, we knew that very strict provisions on who could get what weren't in the interest of the CDU/CSU. Then it's better to give some leeway to the legislature, you don't want to go for a very detailed ruling.

Justices' interest in finding out how the legislative and executive branches would think of certain decisions also came up in one of my interviews with a journalist, who regularly covers proceedings at the GFCC. Asked in an interview conducted on July 12, 2017, whether justices at the GFCC care about lawmakers' responses to their jurisprudence, the journalist noted:

> *Journalist 1:* Once in a while during the oral arguments, you can see that justices ask the government representative very specific questions about possible solutions to an issue, a bit like 'well, I could think of these kinds of solutions, one, two, three, what would you think of that?' [...] I do think the justices are specifically looking for objections to their own opinions, you know, I think to keep their own opinions in check.

Related to justices' interest in gauging lawmakers' opinions of their decisions, a former law clerk noted that justices are generally uncertain about whether or not lawmakers would comply with their jurisprudence. Yet, the law clerk also noted that the formal communications issued by the executive branch in the course of the court's review of a federal law, usually through representatives of the relevant federal ministry, in rare cases provide an insight into whether governing majorities would actually welcome a decision striking a federal law:

> *Clerk 3:* The justices certainly think about the consequences of their decisions, but in the end you don't really know what the legislature will do with them. I mean, the official statements government provides during the proceedings at the court contain some information. Also, well not very often, but sometimes it happens that the government doesn't really defend a law in court, just think of the successive right of adoption. [...] So yeah, what the legislature would do with the decisions matters, but I also wouldn't say that the justices always think about 'well, how can we write this judgement in a way that the legislature will actually implement it'.

While illustrating justices' uncertainty about lawmakers' willingness to faithfully implement their decisions, this statement also implies that a prospect of non-compliance is not always a decisive factor in the court's decision-making. Overall, the statements reported above suggest that the GFCC generally issues its decisions against the backdrop of non-compliance, yet also imply that concerns about lawmakers' unfaithful implementation of their jurisprudence are rarely a driving factor in justices' decision-making. The theoretical model presented in Chapter 2 makes no claim about the frequency of lawmakers' non-compliance with courts' jurisprudence but shows how courts—out of all the cases they need to decide—identify which of their decision are at high risk of lawmakers' non-compliance. The qualitative evidence presented in the following section speaks to this point.

4.3.3 The echoes of politics at the court

The promise (and usefulness) of the theoretical model in Chapter 2 is that it provides an insight into when courts take the prospects of non-compliance seriously: Courts pay attention to the risks lawmakers take when adopting policies to evaluate whether there is a credible risk of lawmakers evading compliance with jurisprudence censoring their actions. This argument rests on two closely related assumptions. First, justices know what happened in the legislature when lawmakers decided on the acts the court eventually reviews. Second, justices recognize that lawmakers risk paying the costs for pursuing policies at odds with the court's constitutional jurisprudence. In this chapter's final section, I consider perceptions of justices and law clerks at the GFCC that speak to these assumptions.

I asked justices and law clerks whether they are generally aware of the parliamentary debates—and possible controversies—related to the federal laws the GFCC reviews. Two of the justices I interviewed noted that the materials from the leg-

islative process that produced the laws they review play a prominent role in their interpretation of the constitutionality of an act:

> *Justice 2:* Understanding the motives of the legislature is one of the methods of interpretation we can employ when we interpret the constitutional compatibility of a law. That's in a way a historic method of interpretation, where you want to find out, what did the legislature actually want to achieve with a law? If there is a clear cut case that a legislature actually didn't want a specific interpretation of a law, then you can make that part of your decision and try to save the law. Basically, we find an interpretation that is conforming to the constitution by assuming that the legislature actually wanted to create something that is constitutional. And that's why engaging with the material from the legislature is a standard task in our work.

> *Justice 1:* First, you need to know that when you become a justice, you stay a politically interested human being, right? We also have contacts to Berlin, of course not in conversations about specific cases, that would be unprofessional, but we know the general mood in Berlin. We also get the statements in the course of the proceedings at the court, when a case concerns a federal law then—by law—we have to get statements from the Ministry for Internal Affairs and the Justice Ministry, the Chancellery and sometimes also the ministries for social affairs. [...] And in the end, we also have our own research, we always have a close look at all the documentation from the legislature.

One of the justices added that it is the documents detailing the legislative process in the Bundestag that allow justices to identify whether a law attracted controversy in the legislature:

> *Justice 2:* I guess your question was targeted at the adoption of a law, whether it was controversial or not. I wouldn't rule out that, in the back of your head, you sometimes remember that it was a contentious episode, maybe from the press coverage. But even if there is a, well, back-of-the-head awareness, that doesn't really play a role. What matters are the statements the parties provide at the court and our research. We do have a close look at the parliamentary documentation, we are always researching them, regardless of whether they are being cited in the text of the judgement or not. Like the reasoning for the law, committee sessions, any public hearings, all of that. And we evaluate this documentation with a view to the legal questions that play a role in our cases.

I also asked lawmakers in my interviews whether they believe that justices have an eye on the legislative proceedings, particularly when the Bundestag debates constitutionally controversial acts. Several lawmakers asserted that justices have a very clear sense of what happens in the legislature:

> *Lawmaker 3:* Yes, I think they are definitely informed. You see, in a lot of these cases the court holds oral arguments and if you follow these, you can see that the justices cite from the debates, interventions that were made, sometimes they also reference the press coverage, and so on. And I mean, these discourses not only reflect political opinions, occasionally these revolve around facts. I had the impression that the Federal Constitutional Court takes a very close look at how people argued in favour and against something.

> *Lawmaker 1:* The Federal Constitutional Court is a highly, highly qualified court with very high expectations and justices from different walks of life. You need to remember, some of the justices had a career in politics, so they know what's going on outside of the court. Also, the Federal Constitutional Court regularly invites statements from the politicians and then they need to report and explain, what did we try do with this particular law. That actually happens quite often. [...] I'm sure the way the justices see things is different from the way we see these, but they are definitely not living under a rock.

This evidence from my interviews suggests that justices at the GFCC are well informed about the legislative proceedings that produced the acts they eventually review. The more critical aspect for the evaluation of my theoretical model, however, is to get an impression of what justices make of it when the documentation of such legislative proceedings shows that lawmakers had dismissed widespread constitutional concerns about their policy choices. I did not ask justices about whether they interpret lawmakers' willingness to provoke confrontation with the GFCC as a credible non-compliance threat. Instead, I asked justices (and law clerks) about the reasons of why lawmakers at times seem to be prepared to risk confrontation with the court, ignoring widespread concerns about the constitutionality of their policies. One of the justices offered a reply similar to the one of the lawmaker's views heard earlier, noting that lawmakers in the legislature are generally interested in pushing the limits of their legislative powers:

> *Justice 1:* I think first and foremost, the delegates in the Bundestag are interested in claiming competences, the prerogative to create legislation, you know whether they have the competence to become active in

> a particular field. Just think of the act on the care allowance. That act was pushed by Bavaria and they are not usually known for an interest in federalising legislative powers. And then I think politicians are interested in putting these competences to use to support their policy goals. I guess it happens that they sometimes say, well let's just try this. But I find it hard to make a statement about their motives, why they take these risks.

In another interview, a justice spoke more directly to the role of lawmakers' risk-taking in the face of the GFCC's exercise of constitutional review and its implications for policy-making in systems of limited government. In the course of the interview, I referenced a statement one of the law clerks had made in a previous conversation, voicing frustration about the frequent criticism that the court acts as a substitute for the legislature:

> *Clerk 2:* I think the accusation that the Federal Constitutional Court interferes too frequently with the business of the legislature comes too quickly. [...] You know, if the delegates in the Bundestag would read the court's decision a bit more carefully then they'd know what's possible and what's not.

I mentioned this sentiment to the justice and asked whether the legislature could avoid provoking confrontation with the court if lawmakers simply read the jurisprudence more carefully. The justice rebuffed this sentiment:

> *Justice 2:* No, I don't see it that way. I mean, the ministries carefully assess the laws with a view to constitutional jurisprudence. Of course there are laws where someone says 'wait, I have concerns that this is incompatible with the jurisprudence of the constitutional court', but in the end it's the ones who say, well, let's see if that's actually the case, where the politicians say 'we think there are plausible reasons to interpret the jurisprudence in this or that way', or maybe the relevant circumstances have changed in a certain way, so that the court's jurisprudence is not applicable to this specific case. And I think that is very important. A court can make mistakes, for example by issuing jurisprudence that is too broad in its scope, applying to cases it didn't even think of when it developed the jurisprudence. I would find nothing worse than if decisions by the Federal Constitutional Court would be interpreted in an even more rigid fashion than the text of the constitution, and if there would be no opportunities for the court to differentiate its own jurisprudence, to row back. I think that's pretty important.

Similar to a sentiment voiced by another justice above, the justice then referred to the detrimental consequences of lawmakers' (hypothetical) strict 'auto-limitation' in the face of the court's constitutional review:

> *Justice 2:* There are certainly issues, where it's reasonable to bring them up and discuss them again at the Federal Constitutional Court. And I don't think that's some kind of disobedience by the legislature. It's certainly better than if lawmakers would treat indications that the court would decide in a certain way as absolute and then say, well, we're not going to change anything here. My point is, the court's jurisprudence must not petrify, but it does if no one ever takes a risk of getting a bloody nose at the court. I think it's important that the legislature has the courage—based on sound reasoning and an in principle loyal standpoint vis-à-vis the court, its jurisprudence and the constitution—to bring up certain issues again at the court.

Much of the language used while presenting the theoretical model in Chapter 2 implies that the relationship between the legislative and executive branches on the one hand and the court on the other is characterized by conflict. Both sides risk costs (directly or indirectly) at the hands of each other when their interests on policy diverge. However, after all the model's core argument shows how lawmakers and courts in fact *avoid* bruising conflict, by highlighting the signalling role of lawmakers' risk-taking for the development of policy in systems of limited government. The justice's statement speaks to this point. While risking 'a bloody nose', lawmakers' choice to pursue policies at odds with existing jurisprudence provides the court with an opportunity to correct existing case law that places constraints on the legislative and executive branches the latter (no longer) appear willing to accept.

The justice's statement does not mention or allow for any conclusions on whether lawmakers' risk-taking at times induces the GFCC to amend its jurisprudence against its own will, a key implication of the theoretical model. Nonetheless, the statement highlights that lawmakers' 'courage' to risk the fallout from confrontation with the court is an important element in ensuring that constitutional jurisprudence evolves and does not disengage with contemporary convictions in society. Hence, it offers an alternative normative perspective on lawmakers' choice to flout constitutional jurisprudence, contrasting normative concerns that lawmakers' disregard for the court's jurisprudence ultimately undermines the protection of constitutional rights. I revisit this discussion in the concluding chapter to this thesis.

4.4 Conclusion

In this chapter, I provided qualitative evidence from interviews with lawmakers in Germany's legislative and executive branches as well as justices and law clerks at the GFCC. Not all of these actors' reported perceptions fit seamlessly with the assumptions underlying the theoretical model presented in Chapter 2 and the empirical implications I derived from the model (e.g. evidence concerning the assumption that lawmakers risk paying a particularly high price for dismissing their allies constitutional concerns appears mixed, while the interviewed justices downplayed the role the prospects of lawmakers' non-compliance play in the court's decision-making). However, overall the evidence discussed in this chapter suggests that the relevant actors' perspectives on the inter-branch dynamics in Germany's system of limited government closely map up to the fundamental assumptions of the theoretical model.

Lawmakers anticipate the GFCC's constitutional review and—in light of the costs that come with confrontation with the court—face incentives to 'auto-limit' their policy choices. Nonetheless, several lawmakers were ready to admit that the shadow of constitutional review does not always deter the legislature from flouting constitutional jurisprudence, alluding to the option of non-compliance with the constraints the court's decisions place on lawmakers. Justices, on the other hand, recognize the potential for (albeit subdued) backlash against the GFCC when challenging governing majorities over their policies, and at least acknowledge the risk of lawmakers evading faithful implementation with their jurisprudence.

The qualitative evidence presented in this chapter does not provide a 'smoking gun' that would support the theoretical model's core argument that courts respond with deference to lawmakers' costly signalling of a non-compliance threat. However, it nonetheless provides some evidence suggesting that justices are aware of the risks lawmakers take when they pursue policies at odds with the GFCC's jurisprudence and recognize the role these choices play in the evolution of constitutional jurisprudence in Germany.

4.5 Appendix

In the following, I list the questions I asked in my interviews with lawmakers as well as law clerks and justices at the GFCC. All interviews were held in German. The original questionnaires in German are available on request.

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 constraint 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?

8. Did you get the impression that the federal government and the Bundestag faithfully complied with the Federal Constitutional Court's decision on the 2008 Federal Criminal Police Office Act?

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?

Chapter 5

The 2008 Federal Criminal Police Office Act

The theoretical model presented in this thesis implies that the shadow of constitutional review does not always deter lawmakers from pursuing policies evidently conflicting with constitutional jurisprudence and thus at a high risk of being censored by a court. When it seems politically costly to be at the receiving end of a court's veto, lawmakers' choice to push for policy at odds with the constitution regardless sends a credible signal that lawmakers are prepared to evade compliance with unwelcome jurisprudence. Ultimately, courts lack the 'power of the purse and sword' and cannot coerce legislatures and government officials into compliance with their jurisprudence (Hamilton, 1961; Carrubba and Zorn, 2010; Vanberg, 2005). The model predicts that courts facing incentives to avoid judgements that are eventually not enforced are more likely to show deference to lawmakers in the elected branches when the latter had sent costly signals of a non-compliance threat.

The theoretical model presented in Chapter 2 shows how courts and lawmakers respond to the conditions of their political environment, and predicts how these actors behave at the various stages of their interaction in systems of limited government. In this thesis, I have so far presented empirical evidence from a statistical analysis of the German Federal Constitutional Court's (GFCC) review of federal laws between 1983 and 2017 as well as interviews with former members of the court and the elected branches in Germany, which appears consistent with the expectations and predictions of the theoretical model. The statistical analysis of Chapter 3 centred on the court's decisions in constitutional review cases over the past decades, while the qualitative evidence in Chapter 4 provided a glimpse into the subjective perceptions of the actors whose behaviour the theoretical model seeks to capture.

Complementing the analysis of the GFCC's decisions on the constitutionality of federal laws over more than three decades and relevant actors' perceptions, this chapter zeroes in on the choices lawmakers and the GFCC made concerning an individual law, the 2008 Federal Criminal Police Office Act (in German, the Bundeskriminalamtgesetz, in the following BKAG). In this chapter, I show that the model can explain the choices lawmakers and the court made at the various stages of their interaction concerning the BKAG. The case of the BKAG and the GFCC's corresponding decision on the act's constitutional (in-)compatibility in *1 BvR 966/09* of April 20, 2016, are particularly interesting, as the choices lawmakers and the court made on the BKAG appear puzzling in light of existing scholarship.[1]

Evidence presented below shows that experts heard in the Bundestag's committee hearings as well as lawmakers from both opposition and governing factions highlighted that the act would fail to meet the requirements of recent constitutional jurisprudence the GFCC had re-asserted in its case law just months prior to the BKAG's adoption. Existing scholarship expects lawmakers to 'auto-limit' their policy choices when a court's constitutional veto looms (see Stone, 1992; Rogers and Vanberg, 2007; Landfried, 1992), yet lawmakers instead pushed ahead with the BKAG. The GFCC, on the other hand, issued a rather unusual decision in *1 BvR 966/09*. The BKAG had authorised the Federal Criminal Police Office to covertly collect personal data in the context of the protection of the state and public against threats from international terrorism. The act allowed law enforcement to interfere with individuals' fundamental rights of the inviolability of their home, secrecy of telecommunication, as well as the fundamental right to the confidentiality and integrity of information technology systems (see preamble in *1 BvR 966/09*).

While the GFCC declared several provisions of the act as unconstitutional, it also consolidated existing jurisprudence regarding law enforcement's use of surveillance data for purposes other than those determining the original data collection. Specifically, the court chose to "revoke former requirements" for law enforcement's use of data for new purposes, which had been developed by the court's jurisprudence in *1 BvR 2226/94* of July 14, 1999, and in *1 BvR 2378/98* of March 3, 2004 (see paragraph 292 of *1 BvR 966/09*). In other words, the GFCC chose to—at least partially—overrule its previous, relatively recent, jurisprudence on this issue. Existing scholarship highlights that courts tend to avoid overruling legal precedents they had specified in their recent case law. Zink et al. (2009, 911) argue that "[r]ather than adjudicating disputes on a case-by-case basis, the Court invokes precedent in part to demonstrate its use of fair and neutral decision-making procedures, whereby

[1] A full list of all decisions mentioned in this chapter along with the links to the full text of these decisions (where available in English) is provided in the appendix to this chapter.

similar cases are consistently treated according to similar legal principles, thus bolstering the public's acceptance of judicial outcomes and its confidence in the Court itself" (see also Hansford and Spriggs, 2006).

The chapter demonstrates the usefulness of the theoretical model by offering an explanation for the otherwise puzzling decision the GFCC issued in *1 BvR 966/09*, highlighting a factor contributing to the GFCC's choice to overrule its recent jurisprudence. The grand-coalition government of the CDU/CSU and SPD pushed the BKAG through parliament despite constitutional objections voiced by several members of the SPD, who referenced constitutional limits to state surveillance the GFCC had reasserted in its case-law just months before the BKAG's adoption. According to the model, this choice signalled government's willingness to evade compliance with a judgement that would censor their policy-making. Again facing a grand-coalition when issuing their decision on the BKAG in April 2016, justices at the GFCC had an incentive to show self-restraint in their jurisprudence and ease some of the constitutional constraints on lawmakers.

To illustrate this argument, I draw on documentation provided by the GFCC on its case law (i.e. the text of the court's judgements and accompanying press releases), media coverage of the 2008 BKAG (during legislative proceedings in the Bundestag and following the GFCC's ruling), evidence from my interviews with former members of the GFCC and German lawmakers, as well as documentation provided by the Bundestag on legislative proceedings involving the BKAG.

The chapter begins with a closer look at the GFCC's decision in *1 BvR 966/09* and discusses in more detail why this judgement can be considered as unusual for the court. The chapter's second part then traces the political debate surrounding the adoption of the BKAG, paying close attention to the constitutional controversy that unfolded in the Bundestag, and links it to the GFCC's judgement concerning the BKAG. Another reason that makes the GFCC's decision in *1 BvR 966/09* interesting for the illustration of the theoretical model's main argument is that the court—despite showing signs of self-restraint—still struck several parts of the BKAG. According to the theoretical model we should then see two things happening. First, the reputation of proponents of the act should come under fire for championing a law despite having been told that it would conflict with constitutional norms. Second, given the court decided to strike parts of the act despite an (at least according to the theoretical model) credible non-compliance threat, we have reason to expect that lawmakers actually evaded compliance with the court's decision in *1 BvR 966/09*. The third and fourth part of this chapter consider these two empirical implications of the theoretical model before the chapter's final part offers concluding remarks.

5.1 Balancing protection by and against the state

The BKAG formally passed parliament on December 25, 2008, and entered into force on January 1, 2009. Weeks later, a group of plaintiffs including the editor of the German newspaper ZEIT, a former Federal Minister for Internal Affairs as well as the director of the Berlin Regional Association of German Lawyers had filed constitutional complaints directed against two sets of provisions of the act. The first set of complaints concerned provisions granting various investigative powers to the Federal Criminal Police Office (in German, the Bundeskriminalamt, in the following BKA). These included (1) the covert recording of non-public speech and images, the application of tracking devices, and the use of police informants pursuant to paragraph 20g sec. 1 to 3 BKAG, (2) the power to carry out visual and acoustic surveillance of private homes pursuant to paragraph 20h BKAG, (3) the power to access information technology systems (so-called 'online searches') pursuant to paragraph 20k BKAG, and (4) the power to monitor and collect on-going telecommunications data pursuant to paragraph 20l and 20m BKAG (see preamble in *1 BvR 966/09*).

The second set of challenged provisions related to the BKA's further use of the data obtained in the course of its investigations. These provisions comprised (1) the use of data by the BKA itself, specifically concerning the use of data beyond the original incident and beyond the reason justifying the original data collection pursuant to paragraph 20v sec. 4 BKAG, (2) the transfer of surveillance data to other domestic public authorities pursuant to paragraph 20v sec. 5 BKAG, and (3) the transfer of surveillance data to authorities in third countries pursuant to paragraph 14 sec. 1 and sec. 7 BKAG (see preamble in *1 BvR 966/09*). When considering the constitutional compatibility of an act pursued by a public authority, the GFCC first establishes the constitutional principles the challenged act needs to meet. These principles are derived from Germany's constitution and substantiated in the court's case law. The court then considers whether or not the challenged act meets the principles applicable in a specific case (see for example Landfried, 1995; Kommers, 1994). In the following, I briefly discuss the benchmarks the GFCC considered in *1 BvR 966/09* and its evaluation of the constitutionality of both sets of the BKAG's challenged provisions in light of these (for more comprehensive evaluations of the GFCC's decision in *1 BvR 966/09*, see Rusteberg, 2017; Darnstädt, 2017).

5.1.1 The BKA's investigative powers

The GFCC centred its evaluation of the constitutional compatibility of investigative powers granted to law enforcement through the BKAG on two separate principles:

(1) the principle of proportionality, noting that "the granting of these powers must always pursue a legitimate aim and must be suitable, necessary and, in the strict sense, proportionate to achieving this aim" (see paragraph 93 of *1 BvR 966/09*), and (2) the principle of legal clarity and specificity, which aim "to increase the predictability of interferences for citizens, constitute an effective limit to administrative powers and enable effective judicial review" (see paragraph 94 of *1 BvR 966/09*).

The application of the principle of proportionality, in particular, reflects the fundamental constitutional tension accompanying lawmakers' attempts to bestow the BKA with effective powers to protect the public from threats of international terrorism. The investigative powers granted to law enforcement officials at the BKA allowed for serious interferences with the privacy of suspects as well as the individuals who interacted with these suspects. At the same time, the GFCC reiterated in its decision that the security of the state as well as the safety of the population it is bound to guarantee "rank equally with other highly valued constitutional rights" (see paragraph 100 of *1 BvR 966/09*). In other words, given the BKAG sought to offer protections against acts of terrorism, lawmakers and the court were tasked to strike the right balance in protecting the public by and from the state.

Defining the principle of proportionality as well as the principle of legal clarity and specificity, the GFCC drew closely on its existing jurisprudence (for example the GFCC's decision on the sharing of telecommunications data with law enforcement agencies in *1 BvR 330/96* of March 12, 2003, and its decision on the acoustic surveillance of private homes in *1 BvR 2378/98* of March 3, 2004). It is beyond the scope of this chapter to consider every detail of the requirements the challenged provisions of the BKAG had to meet (note that the court substantiated the principles in 54 paragraphs in *1 BvR 966/09*). Yet, overall, the GFCC's reasoning on proportionality as well as legal clarity and specificity can be summarized by its assertion that "[t]he more seriously the surveillance measures interfere with privacy and thwart legitimate expectations of confidentiality, the stricter the requirements must be" (see paragraph 105 of *1 BvR 966/09*).

The GFCC found that several aspects of the investigative powers granted to the BKA did not meet the constitutional requirements it had defined. The court found that (1) provisions on the use of special means of surveillance outside of homes, including the application of tracking devices or the use of police informants, were not sufficiently limited, (2) provisions on the surveillance of private homes, including data collection via acoustic surveillance, only partially satisfied the requirement of proportionality, (3) powers granting access to information technology systems did not come with adequate measures to protect the core area of individuals' private life, while (4) the powers allowing surveillance of on-going telecommunications were too

unspecific and broad (see preamble in *1 BvR 966/09*). Overall, the GFCC found that aspects of every challenged investigative power conflicted with the constitution and ruled them unconstitutional, much in line with its existing jurisprudence.

5.1.2 The BKA's use of surveillance data

While the GFCC showed little self-restraint and stuck to its existing jurisprudence when considering the constitutional (in-)compatibility of law enforcement's investigative powers granted by the BKAG, the picture changes somewhat when turning to the BKA's use of surveillance data. The two principles at the centre of the GFCC's evaluation of the constitutionality of the BKA's further uses of data were (1) purpose limitation, i.e. the use of data in the same context as the original purpose of the data, and (2) changes in purpose, i.e. the use of data for new purposes (see paragraph 277 of *1 BvR 966/09*).

With regard to purpose limitation, the GFCC noted that "[t]he legislature may permit the use of data extending beyond the original investigation procedure in the context of the original purpose of this data (further use), provided that the authority empowered to collect that data uses it within the same field of activity, for the protection of the same legally protected interests, and the enforcement or prevention of the same criminal offences, as authorised by the relevant data collection provision" (see the GFCC's press release No. 19/2016 of April 20, 2016).

On requirements for changes in the purpose of data, the GFCC wrote that "as far as data that results from particularly intrusive surveillance and investigative measures is concerned, such as the data at issue in these proceedings, it is necessary to determine whether it would be permissible, by constitutional standards, to also collect the relevant data for the changed purpose with comparably weighty means" (see paragraph 287 of *1 BvR 966/09*). Crucially, the court added that while a use of data for new purposes must serve the protection of legally protected rights or aim to investigate criminal offences of such a weight that hypothetically re-collecting them would be justified, it is " necessary but generally also sufficient that the data—either as such or in combination with the authority's additionally available information—results in a specific evidentiary basis for further investigations" (see paragraph 289 of *1 BvR 966/09*).

The GFCC explicitly revoked a requirement for changes in the purpose of data contained in its existing jurisprudence with this statement (see paragraph 292 in *1 BvR 966/09*): In *1 BvR 2378/98* of March 3, 2004, and *1 BvR 2226/94* of July 14, 1999, the GFCC had established that a change of purpose of data is permissible only if a temporal proximity threshold regarding the risk situation is met. The GFCC

kept this requirement in place for data obtained through the surveillance of private homes or remote searches of information technology systems. However, for data obtained through less intrusive means, the GFCC eased constraints on lawmakers willing to allow law enforcement officials to use surveillance data for purposes other than the one justifying their original collection.

The GFCC still found that several of the BKAG's provisions did not meet its requirements for purpose limitation and changes in purpose. To summarize, the court found that (1) provisions relating to the use of data obtained from the surveillance of private homes and remote searches were disproportionate, (2) provisions on the use of data for the protection of witnesses or other persons were too unspecific, and (3) provisions allowing the transfer of data were unconstitutional insofar as they covered transfers for the general prevention of terrorist offences, irrespective of a specific evidentiary basis for further investigations (see preamble in *1 BvR 966/09*). Nonetheless, lawmakers keen on providing law enforcement with more flexibility in their use of surveillance data walked away with a significant achievement. The court may have sent lawmakers back to the drawing board for several provisions originally contained in the 2008 BKAG, but the constitutional requirements lawmakers then had to respect for changes in purposes of data had been eased.

Revoking constitutional requirements the court had further substantiated only four years prior to the Bundestag's adoption of the 2008 BKAG is unusual for the GFCC. Existing scholarship suggests that courts make a conscious effort not to break with precedent all too frequently (see Knight and Epstein, 1996; Rasmusen, 1994). Spriggs and Hansford (2001, 1092) note that "[t]he overruling of a precedent, despite its infrequency, is a significant political and legal event, most notably because it represents a dramatic form of legal change." Similarly, evidence from my interviews with former members of the GFCC implies that it is critical for the court to stay consistent in its case law. In a telephone interview conducted on May 18, 2017, a former clerk of the GFCC noted:

> *Clerk 1:* To look back at how cases have been decided in the past is really important, it provides continuity and the court decides its cases in a consistent fashion. Whenever consistency is lacking, you quickly see the lower specialised courts issue strange opinions. You know, you can think of the Federal Constitutional Court as a tank ship, it does not take a zigzag route, instead things are steered very carefully and slowly. When something needs correcting, you take a long, slow turn, this does not happen abruptly.

What makes the GFCC's decision to revoke previous requirements on law enforcement's use of surveillance data for new purposes even more surprising is that

two of the court's Justices published dissenting opinions, in large parts referring to the GFCC's approach to changes in purpose of surveillance data. Yet, neither of these two Justices objected to the decision to revoke existing jurisprudence—instead, both of them argued that the court should have eased constraints on lawmakers even further. Regarding the court's decision to keep the requirement of a temporal proximity threshold in place for data obtained through the surveillance of private homes and searches of information technology systems, Justice Eichberger wrote:

> I cannot back the exception called for by this concept, whereby every further use and change in purpose with regard to data from the surveillance of private homes or remote searches must be justified by an imminent or a sufficiently specific danger, just as for the initial collection of the data. Even in the context of the surveillance of private homes, the actual massive interference with privacy takes place when the investigation accesses the protected area. A further use—even one with a change in purpose—does indeed perpetuate this interference, but, even with regard to the surveillance of private homes (and similarly with remote searches), it does not reach the level of severity of the initial interference. The further use and change in purpose of intelligence obtained from surveillance measures must thus be subject to the general rules. The Senate should have corrected its existing case law accordingly.[2]

Justice Schluckebier's dissenting opinion goes a step further and suggests that for data obtained through the use of certain, less intrusive surveillance methods, the requirement of a protection of comparably weighty legal interests when hypothetically re-collecting this data should have been revoked as well. In his dissenting opinion, Justice Schluckebier wrote:

> The judgement predicates the transfer and use of the data for other purposes on whether, even after a change in purpose, this data serves to protect legally protected interests or to uncover criminal offences of such a weight that this could, by constitutional standards, justify collecting them again with comparably weighty means (criterion of a hypothetical re-collection of data). This perspective may be justified with regard to findings that were obtained through highly intrusive, particularly significant interferences, which is the case, for example, when measures such as the surveillance of private homes and remote searches were employed.

[2] An excerpt (in English) of Justice Eichberger's dissenting opinion on *1 BvR 966/09* is available at `https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/04/rs20160420_1bvr096609en.html`.

> However, with regard to other interferences, which result in so-called coincidental findings, this can, in my opinion, lead to hardly tolerable results since it requires the rule-of-law order to accept the occurrence of crimes and damage to legally protected interests. On condition that such coincidental findings were obtained through a lawful and constitutional interference, my view is that it is an unacceptable consequence that a state under the rule of law is forced to deliberately 'look away'.[3]

Justice Eichberger and Justice Schluckebier's dissenting opinions indicate that the court was under pressure to ease the constitutional constraints on lawmakers trying to provide law enforcement with effective tools to respond to tangible security threats. For most of its judgement in *1 BvR 966/09*, the GFCC stuck to its existing jurisprudence and it invalidated a series of provisions contained in the BKAG for their constitution incompatibility. However, the GFCC's decision to revoke requirements for changes in purpose of surveillance data suggests that the court—at least to some extent—gave in to this pressure. Why did the GFCC feel the need to self-restrain and revoke parts of its own, relatively recent, jurisprudence? Why did two justices feel the need to go on record and state that they would have liked to see the GFCC provide lawmakers with even more room to breathe?

In the next section, I will take a closer look at the political debate surrounding the adoption of the BKAG in December 2008. I show that prior to the act's adoption several members of the Bundestag, including members of the governing coalition caucus, had voiced their concerns that government's plans for the BKAG would conflict with constitutional norms. The theoretical model that I presented in this thesis states that lawmakers' choice to ignore the constitutional objections voiced by their own political allies signalled a credible non-compliance threat to the GFCC. Hence, the model highlights a factor contributing to the GFCC's decision to show self-restraint in its judgement on the 2008 BKAG.

5.2 The BKAG in the Bundestag

In light of the terrorist attacks of September 11, 2001 on the World Trade Center in New York and the U.S. Department of Defense headquarters in Virginia, the bombings of commuter trains in Madrid on March 11, 2004, as well as coordinated bombings of London's public transport system on July 7, 2005, lawmakers in many

[3] An excerpt (in English) of Justice Schluckebier's dissenting opinion on *1 BvR 966/09* is available at `https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/04/rs20160420_1bvr096609en.html`.

Western democracies, including Germany, sought to equip law enforcement agencies with (further) means to combat the security threat from international terrorism.

In June 2008, Chancellor Angela Merkel's coalition cabinet of the CDU/CSU and SPD submitted a draft version of the BKAG to parliament. Survey data from the German Politbarometer suggests that, at least at the time, the German public did not consider terrorist security threats to rank among the most pressing issues in Germany: Less than 1% of the nearly 30,000 surveyed respondents listed terrorism or terrorist attacks as the most important issue facing Germany in 2008, far behind concerns about unemployment (40.7% in East Germany, 27.4% in West Germany), living expenses (10.4% in East Germany, 12.2% in West Germany), and the state of the economy (4.3% in East Germany, 5.5% in West Germany, see Forschungsruppe Wahlen, 2008a, and Forschungsgruppe Wahlen, 2008b). Nonetheless, the following sections show that the government's plans to mandate a federal law enforcement agency, the BKA, not only with the prosecution but also the prevention of acts of terrorism eventually caught the public eye.

5.2.1 Committee proceedings

The contents of the BKAG's draft were first debated in the Bundestag's designated leading Committee for Internal Affairs. The committee scheduled a hearing on the draft act in September 2008, inviting statements from representatives of the BKA and state law enforcement agencies as well as academic experts on constitutional law, the Federal Data Protection Commissioner and civil rights campaigners. The hearing was covered by several media outlets, reporting that opinions on the constitutionality of several provisions of the planned BKAG were divided.[4] The newspaper ZEIT reported from the hearing that law enforcement officials considered the envisioned competences for the BKA as "absolutely necessary" in light of a growing threat of terrorist attacks, while a majority of academic experts argued that the plans failed to respect the constitutionally protected core area of private life.[5]

Much of the criticism was directed at the BKAG's provisions allowing law enforcement officials at the BKA to remotely access information technology systems,

[4]See Heise Online (original in German), September 15, 2008. *Für und Wider im Bundestag zur geplanten Novelle des BKA-Gesetzes*, accessed April 30, 2019. `https://www.heise.de/newsticker/meldung/Fuer-und-Wider-im-Bundestag-zur-geplanten-Novelle-des-BKA-Gesetzes-205693.html`; netzpolitik.org (original in German), September 15, 2008. *BKA-Gesetz mit Online-Durchsuchung soll noch in diesem Jahr verabschiedet werden*, accessed April 30, 2019. `https://netzpolitik.org/2008/bka-gesetz-mit-online-durchsuchung-soll-noch-in-diesem-jahr-verabschiedet-werden/`.

[5]ZEIT (original in German), September 15, 2008. *Teilweise verfassungswidrig*, accessed April 30, 2019. `https://www.zeit.de/online/2008/38/bka-gesetz-anhoerung`.

a measure coined as 'online searches'. In his statement, Hansjörg Geiger, law professor at the Goethe University Frankfurt and former director of Germany's foreign intelligence service, noted that "[t]he draft act does not respect the balance between freedom and security, which had been repeatedly demanded by the Federal Constitutional Court, and which needs to observed even in the face of the most heinous attacks on the liberal, democratic and constitutional state order as well as human life."[6] Geiger added that "[e]ven though parts of the draft act's text are clearly leaning on the wording of recent Federal Constitutional Court decisions, this does not necessarily mean that the act respects the 'spirit of the constitution' that can be deduced from these decisions."[7]

Geiger referred to the GFCC's ruling in *1 BvR 370/07* concerning a state law of North-Rhine Westphalia, the Act on the Protection of the Constitution in North Rhine-Westphalia of December 20, 2006. The act originally allowed certain law enforcement agents of North-Rhine Westphalia to carry out investigative measures involving the secret monitoring of suspects' online activities and to secretly access information technology systems. On February 27, 2008, less than four months before the federal government submitted its draft of the BKAG, the GFCC had ruled that the act's provision allowing law enforcement "access to information technology systems ('online searches') violates the general right of personality in its particular manifestation as a fundamental right to the guarantee of the confidentiality and integrity of information technology systems", adding that "[t]he provision in particular does not meet the requirements of the principle of proportionality" (see the GFCC's press release No. 22/2008 of February 27, 2008).

Following weeks of deliberations, several committee members echoed the sentiment that the federal government's plans for the BKAG paid lip service to constitutional constraints on law enforcement's use of intrusive investigative powers in the fight against terrorism, yet in practice ignored the spirit of the court's recent jurisprudence. In the committee's recommended resolution submitted to the Bundestag's plenary session in November 2008, representatives of the opposition parties, the FDP, the Green party and Die Linke, announced that their factions would vote against the BKAG in the Bundestag, with committee members of the FDP arguing

[6]Translated from German, excerpt from 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.

[7]Translated from German, excerpt from 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.

that "it is not enough to quote the Federal Constitutional Court verbatim, when the semantic content of its decisions is not actually taken into account."[8]

To see representatives of opposition parties voicing concerns that the BKAG's draft proposed by the governing factions failed to respect constitutional constraints seems hardly surprising. After all, evidence presented in Chapter 3 and Chapter 4 suggests that this is a fairly common phenomenon characteristic of legislative proceedings in the Bundestag. Even government's dismissal of constitutional concerns raised by some academic experts at committee hearings does not seem too unusual. Notably, not all academic experts invited to the Committee on Internal Affairs' hearing considered the BKAG's provisions as unconstitutional.[9] Diverging opinions among experts were to be expected given that the core issue governing lawmakers sought to address with the BKAG (i.e. law enforcement's prevention of terrorist attacks) pitted two constitutionally protected norms—the state's responsibility to protect life and limb of its citizens and the individual's freedom from state interference with the core area of private life—against each other.

5.2.2 Constitutional controversy at plenary debates

What makes the Bundestag's legislative proceedings on the BKAG and government's persistence in its pursuit of the act unusual is the fact that several members of the governing coalition caucus echoed lawmakers of the opposition and shared their constitutional concerns.

In the course of the Bundestag's final ordinary plenary debate on the BKAG, ten members of the SPD's parliamentary faction, including former Federal Minister of Justice Herta Däubler-Gmelin and Jörg Tauss, then-member of the parliamentary faction's executive board, issued a statement explaining that they would vote against the BKAG. Drawing on the GFCC's decision of February 27, 2008, on North-Rhine Westphalia's Constitution Protection Act, they argued that law enforcement's "secret access to computers and other information technology systems not only produces data related to a specific threat, but also provides deep insights into individuals' 'digital personal privacy' and their communications", adding that "it is practically unavoidable that investigations would routinely violate individuals'

[8]Translated from German, excerpt from the recommended resolution and report of the Committee for the Interior on the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, German Bundestag, 10 November 2008, BT-16/10822, http://dipbt.bundestag.de/dip21/btd/16/108/1610822.pdf.

[9]See Stern (original in German), September 15, 2008. *Staatsrechtler geben Okay für BKA-Gesetz*, accessed April 30, 2019. https://www.stern.de/politik/deutschland/expertenanhoerung-im-bundestag-staatsrechtler-geben-okay-fuer-bka-gesetz-3760034.html

constitutionally protected core area of private life."[10]

While the group claimed that the empowerment of law enforcement to remotely access information technology systems "should be questioned in principle alone", they also lamented that the BKAG's provisions to protect individuals' core area of private life through a data protection officer employed by the BKA were insufficient, that the BKAG did not specify whether or how law enforcement agents would ensure that the 'correct' computer was targeted by a remote search, and that the government's plans failed to show that such intrusive measures were indispensable in light of the existing means available to law enforcement.[11] Despite twenty members of the SPD's parliamentary faction joining the FDP, the Green party and Die Linke in voting against the act, with a further six SPD members abstaining, a sufficient number of CDU/CSU and SPD lawmakers supported the BKAG's draft, and the Bundestag adopted the act at its third reading on November 12, 2008.[12]

Nonetheless, the constitutional controversy surrounding the BKAG did not end with the vote in the Bundestag. Since the act's provisions touched upon state competences, the BKAG required the consent of parliament's upper chamber, the Bundesrat, comprising representatives of Germany's sixteen federal states. Several SPD-controlled state governments decided to withdraw their support for the BKAG. Karl Peter Bruch, the SPD's State Minister for Internal Affairs of Rhineland-Palatine, voiced concerns "that it would be the Federal Criminal Police Office itself, which would assess what constitutes an individual's core area of private life", while Gisela Aue of the SPD and Senator of Berlin noted that "the covert access to information technology systems envisioned by the act implies further severe interferences with fundamental rights."[13] The decision of several SPD-led state governments to withhold their support for the BKAG meant that the act failed to garner enough votes to pass the Bundesrat.

Following state governments' rejection of the BKAG, the federal government called for a conciliation committee comprising a selection of representatives from

[10]Translated from German, excerpt from the second reading of the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, German Bundestag, November 12, 2008, 2. Beratung: BT-PlPr 16/186, `http://dipbt.bundestag.de/dip21/btp/16/16186.pdf`.

[11]Translated from German, excerpt from the second reading of the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, German Bundestag, November 12, 2008, 2. Beratung: BT-PlPr 16/186, `http://dipbt.bundestag.de/dip21/btp/16/16186.pdf`.

[12]See roll call vote count at the third reading of the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, German Bundestag, November 12, 2008, 3. Beratung: BT-PlPr 16/186, `http://dipbt.bundestag.de/dip21/btp/16/16186.pdf`.

[13]Translated from German, excerpt from the Bundesrat's second reading of the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, November 28, 2008, 2. Durchgang: BR-PlPr 851, `http://dipbt.bundestag.de/dip21/brp/851.pdf`.

both the Bundestag and the Bundesrat to hammer out a compromise that would see the BKAG across the finish line. The conciliation committee made several substantial amendments to the BKAG's draft version. First, law enforcement's remote access to telecommunications systems now generally required a judge's authorisation. Second, whether investigations would violate an individual's core area of private life would be assessed by a data protection officer employed by the BKA at the 'direction' of a judge.[14]

While these compromises were enough to get a sufficient number of state governments on board to shuttle the BKAG through the Bundesrat, some SPD lawmakers in the Bundestag reiterated concerns that the act failed to respect constitutional norms. At the Bundestag's hearing of the conciliation committee's compromise on December 18, 2008, SPD members Jörg Tauss and Monika Griefahn issued a statement, arguing:

> The BKA's new powers include the secret access to information technology systems, or so-called online searches. The Federal Constitutional Court established strict requirements for intrusions into individuals' digital privacy in its decision on the Constitution Protection Act of North-Rhine Westphalia, requirements that this draft act—even after the agreement found in the conciliation committee—fails to consider.[15]

Despite these persisting constitutional objections, the Bundestag adopted the BKAG on December 25, 2008 and the act entered into force on January 1, 2009. The previous sections have shown that at every stage of the Bundestag's legislative proceedings, concerns about the act's constitutional compatibility had been voiced. The federal government addressed some of these concerns and amended the BKAG's draft in the course of legislative proceedings, inter alia adding measures allowing some degree of judicial oversight over law enforcement's use of highly intrusive investigation measures. However, some of the fundamental constitutional objections rooted in the GFCC's recent case law against law enforcement's use of covert searches of information technology systems, which had been voiced by members of the governing coalition caucus, were ultimately ignored.

[14]Spiegel ONLINE, December 17, 2008. *Vermittlungsausschuss: Einigung bei BKA-Gesetz*, accessed May 2, 2019. `https://www.spiegel.de/politik/deutschland/vermittlungsausschuss-einigung-bei-bka-gesetz-a-597062.html`.

[15]Translated from German, excerpt from the reading on the conciliation committee's recommended resolution of the Act on Prevention by the Federal Criminal Police Office of Threats from International Terrorism, German Bundestag, December 18, 2008, Abstimmung über Vermittlungsvorschlag: BT-PlPr 16/196, `http://dipbt.bundestag.de/dip21/btp/16/16196.pdf`.

5.2.3 Linking objections to the court's demands

The earlier sections' discussion of the GFCC's decision in *1 BvR 966/09* on the BKAG suggests that the constitutional concerns voiced by some members of the SPD were well-founded. Recall that the GFCC eventually ruled that several of the act's provisions conflicted with constitutional norms, including provisions concerning the use of remote, covert searches of information technology systems. Specifically, in its press release accompanying its decision in *1 BvR 966/09*, the court singled out the BKAG's provision aimed at ensuring that those searches would not violate the protection of individuals' core area of private life (see the GFCC's press release No. 19/2016 of April 20, 2016):

> Sufficient protection of the core area of private life is lacking with regard to access to information technology systems (paragraph 20k BKAG). In this case, the body tasked with viewing the collected data is not sufficiently independent. It is necessary that the control essentially be carried out by external persons not charged with security tasks. While the recourse to personnel from the Federal Criminal Police Office for the purpose of involving staff with investigation-specific or technical expertise is not ruled out, the actual carrying out and decision-making responsibility must lie in the hands of persons independent from the Federal Criminal Police Office. By attributing the task of screening mainly to employees of the Federal Criminal Police Office, however, paragraph 20k sec. 7 sentences 3 and 4 BKAG falls short of these requirements.

The GFCC's demand that external persons had to effectively control decisions over law enforcement's use of online searches means the court hardly showed self-restraint when considering the issue at the centre of persistent constitutional objections voiced by members of the governing coalition caucus.

A strict reading of the empirical implications of the theoretical model presented in Chapter 2 would lead us to expect that the court faced incentives to show deference to lawmakers on this issue, instead. After all, the federal government's dismissal of their political allies' constitutional concerns would suggest that lawmakers in government were prepared to take high political risks in their pursuit of constitutionally controversial policies, signalling a credible non-compliance threat to the court.

While the GFCC did not seem to respond with deference on issues at the heart of the constitutional controversy in the Bundestag, the discussion of the GFCC's decision in *1 BvR 966/09* above shows that the court was indeed more lenient in its constitutional requirements concerning law enforcement's further uses of surveillance data. The empirical evidence presented in this chapter does not allow for a definitive

conclusion that the GFCC chose to revoke its existing jurisprudence concerning requirements on the further use of surveillance data in response to a credible non-compliance threat. However, evidence from a telephone interview with a former law clerk at the GFCC conducted on May 20, 2017, suggests that lawmakers' choice to disregard the GFCC's jurisprudence was not lost on the court. Asked how the GFCC can assess how lawmakers would respond to its jurisprudence, the clerk noted:

> *Clerk 2:* We also take a look at the laws the federal and state legislatures recently passed. For example, on issues like data protection or covert surveillance through law enforcement, it became quite clear that the concept of protecting the core area of private life simply hadn't been properly applied by the legislature. So what do you in these situations? One option is to simplify the jurisprudence and to work with simple statements. The simpler the language, the easier it is for others to follow it. A second option is to openly address it. There is jurisprudence that hasn't been properly implemented by the legislature, you acknowledge that, consolidate and scale back. It's sign of goodwill and then you hope that the legislature complies with the new jurisprudence.

The theoretical model presented in Chapter 2 highlights a factor behind the GFCC's decision to ease some of the constitutional constraints lawmakers had to consider in their attempts to equip law enforcement with effective tools to combat a tangible terrorist threat. By ignoring several warning signs that provisions included in the BKAG were at odds with the GFCC's recent decisions, lawmakers in government made it clear that they were prepared to evade compliance with the requirements the court had established in its jurisprudence.

Arguably, the GFCC did not respond to this signal with outright deference but made concessions to lawmakers, striking several of the BKAG's provisions that would entail violations of individuals' core area of private life, while simultaneously easing constraints on law enforcement's further use of surveillance data.

In the remainder of this chapter, I consider two further empirical implications of the theoretical model. Since the GFCC struck the BKAG's provisions that had been at the centre of constitutional concerns voiced by members of the governing coalition caucus, we should expect lawmakers to bear the political costs for insisting on these provisions. In addition, given the court invalidated several of the BKAG's provisions despite a credible non-compliance threat, it appears worthwhile to assess how lawmakers actually responded to the GFCC's decision in *1 BvR 966/09*.

5.3 The costs of provoking confrontation

The theoretical model presented in Chapter 2 states that lawmakers who support a policy despite anticipating that it would transgress constitutional norms pay a price for their choice once a court actually strikes the policy as unconstitutional. In the following, I present evidence from news media coverage and debates in the Bundestag in the aftermath of the GFCC's ruling in *1 BvR 966/09* to illustrate that the reputation of those who had championed the BKAG indeed came under fire following the court's ruling.

The GFCC's decision on the BKAG's constitutional incompatibility was covered by every major German newspaper and media network.[16] While most reports centred on the text of the GFCC's ruling and its implications for law enforcement officials tasked with preventing terrorist attacks, some of the coverage took aim at the constitutional controversy that had accompanied the BKAG's adoption in the first place. The day after the GFCC's ruling, the nationwide network Deutschlandfunk broadcast an interview with the deputy chair of the SPD's parliamentary faction, Eva Högl.[17] The following exchange from the interview illustrates that journalists were well-aware that lawmakers of grand-coalition had missed opportunities to avoid confrontation with the GFCC over the BKAG:

> Interviewer: It is clear that the law needs correcting. The legislature now has two years to do so. And your party, the SPD, was also responsible for the law. Basically, you suffered a defeat yesterday as well.
>
> Eva Högl (SPD): Yes that is exactly right, and you need to handle these situations with self-confidence, it's the job of the Federal Constitutional Court to keep an eye on what the legislature is doing. And yes, the law was adopted with the votes of the SPD. We were part of the grand-coalition. Some of the criticism directed at parts of the law came from members of the SPD. So we feel that our concerns were validated by the Federal Constitutional Court. [...]

[16] See for example Spiegel ONLINE (original in German), April 20, 2018. *Polizisten murren über Verfassungsgericht*, accessed May 3, 2019. `https://www.spiegel.de/politik/deutschland/bundesverfassungsgericht-karlsruhe-bremst-bka-gesetz-a-1088298.html`; Frankfurter Allgemeine Zeitung (original in German), April 20, 2018. *BKA-Befugnisse zur Terrorabwehr zum Teil verfassungswidrig*, accessed May 3, 2019. `https://www.faz.net/aktuell/politik/inland/bundesverfassungsgericht-bka-befugnisse-zur-terrorabwehr.html`; tagesschau.de (original in German), April 20, 2018. *Verfassungsgericht urteilt über BKA-Gesetz*, accessed May 3, 2019. `https://www.tagesschau.de/inland/bka-gesetz-109.html`.

[17] Deutschlandfunk (original in German), April 21. *Bundesverfassungsgericht hat Grundrechte gestärkt*, accessed May 3, 2019. `https://www.deutschlandfunk.de/bka-gesetz-bundesverfassungsgericht-hat-grundrechte.694.de.html`.

> Interviewer: I'd like to come back to my previous point. Critics now ask, why is it that time and again the Federal Constitutional Court has to explain to government and legislature what's allowed and what's not?
>
> Eva Högl (SPD): Well, that is the normal balance between the different branches in our democracy. [...] I don't see a problem with the Federal Constitutional Court taking a look at one of our laws, giving us, the legislature, advice.
>
> Interviewer: But, Miss Högl, every law is reviewed by in-house legal counsel, at least in the Bundestag. It is remarkable that the legislature and court can arrive at so fundamentally different conclusions.
>
> Eva Högl (SPD): Look, lawyers have different opinions. You know how the saying goes, two lawyers, twenty-five different opinions. In the end it's always a question of interpretation.[18]

The lawmaker's latter statement offers an alternative perspective on the governing faction's decision to dismiss constitutional concerns regarding the BKAG in 2008 and push the act through the Bundestag: Even legal experts often disagree over the constitutional compatibility of policy and lawmakers of the governing coalition believed that their plans for the BKAG would live up to the requirements of the GFCC's jurisprudence yet simply misjudged. However, this sentiment was not shared by commentators in other media outlets. Wolfgang Janisch, correspondent of the Süddeutsche Zeitung (one of Germany's most prominent and widely read newspapers) at the GFCC, commented on the court's ruling in *1 BvR 966/09*:

> The play that we've seen in the Federal Constitutional Court's courtroom this Wednesday has been performed, with some exceptions, for more than a decade. The legislature picks up the pace in combating terrorism, civil rights activists litigate, justices at the constitutional court pick the law apart and call for 'privacy rights' and 'proportionality'. You could almost get used to this ritual if it wasn't actually a defiant strategy: Government and governing coalition factions create paragraphs, even though they anticipate that they are unconstitutional, and then

[18] Deutschlandfunk (original in German), April 21. *Bundesverfassungsgericht hat Grundrechte gestärkt*, accessed May 3, 2019. `https://www.deutschlandfunk.de/bka-gesetz-bundesverfassungsgericht-hat-grundrechte.694.de.html`.

> see what's left after the court reviewed them. This sarcastic conclusion was evident again this Wednesday in some of the responses of the federal government. In fact: The Federal Criminal Police Office Act of 2009, the centre-piece of the so-called fight against terror, is an act created clearly beyond the boundaries of the Basic Law. Everyone who had read the court's earlier decisions would have known that.[19]

These examples illustrate that even though the GFCC issued its decision on the BKAG more than seven years after the act's adoption, journalists recalled that lawmakers in the elected branches took an arguably calculated gamble and had passed an act they knew would transgress constitutional norms. Having their commitment to the principles of the constitution and the GFCC's jurisprudence openly questioned in the media is unlikely to help lawmakers' reputation among the electorate, particularly in light of the GFCC's comfortable public support (see Gibson et al., 1998; Vanberg, 2005). Vanberg (1998, 305) argues "that in democratic systems, citizens are likely to care not only about *policy*, but also *process*, that is, they expect politicians and parties to 'play by the rules'." Lawmakers of the CDU/CSU and SPD's grand-coalition had been warned that their plans for the BKAG would violate the constitution, but took their chances and were called out for it once the GFCC actually struck several provisions of the law.

Several members of the opposition factions in the Bundestag seized the opportunity of the GFCC striking parts of the BKAG and argued that the governing coalitions had wilfully passed a law at odds with the constitution in 2008. On February 17, 2017, the Bundestag held its first reading of the Act on the Amendment of the Federal Criminal Police Office Act, the CDU/CSU and SPD's response to the GFCC's ruling in *1 BvR 966/09*.[20] Members of the opposition rang the debate in with scathing attacks on the grand-coalition:

> Ulla Jelpke (Die Linke): Minister, I believe you should have mentioned that about a year ago you received a ruling by the Federal Constitutional Court, which confirmed that significant parts of the old BKAG were unconstitutional and instructed you to find remedies for these transgression in a new law. I believe that this was a humiliating defeat for the government, which in the name of 'combating terrorism' wilfully

[19] Süddeutsche Zeitung (original in German), April 20, 2018. *Wer durch das BKA-Urteil nun besser vor Überwachung geschützt ist*, accessed May 3, 2019. `https://www.sueddeutsche.de/politik/anti-terror-gesetze-wer-durch-das-bka-urteil-nun-besser-1.2957910`.

[20] See first reading of the Act on the Amendment of the Federal Criminal Police Office Act, German Bundestag, February 17, 2017, 1. Beratung: BT-PlPr 18/219, `http://dipbt.bundestag.de/dip21/btp/18/18219.pdf`.

accepted a breach of the constitution.[21]

> Konstantin von Notz (Greens): But in 2008, as well as today, the grand-coalition chose to downplay our law enforcement agencies, only to wildly reallocate their competences—against the widespread constitutional concerns from law enforcement experts, but also from the opposition, academia and civil society. As had been expected, the law was challenged in Karlsruhe, and Karlsruhe invalidated exactly those parts as incompatible with the constitution and void, which we had criticised. That was a proper hammering, Mr. de Maizière.[22]

Existing scholarship argues that lawmakers face electoral costs when their non-compliance with court's constitutional jurisprudence is uncovered, highlighting the role of the media and the political opposition for communicating lawmakers' failure to comply to the public (see Vanberg, 2005; Staton, 2010; Krehbiel, 2016, see also Whittington 2003). Admittedly, it is difficult to gauge to what extent the CDU/CSU and SPD's reputation among the electorate suffered following the GFCC's ruling in *1 BvR 966/09*. Nonetheless, this section provided evidence from news media coverage and debates in the Bundestag in the aftermath of the GFCC's ruling on the BKAG, showing that governing lawmakers' non-compliance with the court's jurisprudence was publicised in the media and the legislature. In other words, following the GFCC's ruling in *1 BvR 966/09*, the conditions for lawmakers' electoral reputation costs to take effect were in place.

5.4 The response in the Bundestag

Much of this chapter covered how lawmakers of the CDU/CSU and SPD's grand-coalition faced down constitutional objections voiced from within the governing coalition caucus and supported the BKAG despite clear warning signs that the law was at odds with the constitution. According to the theoretical model presented in this thesis, lawmakers' choice to pass a law despite anticipating that it would conflict with the GFCC's jurisprudence (and the risks this choice entailed) made it clear that lawmakers were unwilling to see their policy-making curtailed by the court. In other words, lawmakers had signalled a credible threat of non-compliance.

[21] Translated from German, excerpt from the first reading of the Act on the Amendment of the Federal Criminal Police Office Act, German Bundestag, February 17, 2017, 1. Beratung: BT-PlPr 18/219, `http://dipbt.bundestag.de/dip21/btp/18/18219.pdf`.

[22] Translated from German, excerpt from the first reading of the Act on the Amendment of the Federal Criminal Police Office Act, German Bundestag, February 17, 2017, 1. Beratung: BT-PlPr 18/219, `http://dipbt.bundestag.de/dip21/btp/18/18219.pdf`.

Reviewing the BKAG, the GFCC indeed eased constitutional constraints on lawmakers and revoked requirements it had established in its previous decisions. But the court did note fully cede the field to lawmakers and struck several provisions of the BKAG. Lawmakers of the grand-coalition again controlled government office at the time the GFCC issued its ruling on the BKAG in *1 BvR 966/09*. How did they respond to the court's ruling?

As briefly indicated above, about a year after the GFCC's ruling, the parliamentary factions of the CDU/CSU and SPD submitted a new draft of the BKAG to the Bundestag, the Act on the Amendment of the Federal Criminal Police Office Act. In their explanatory statement submitted along the new draft act, the governing coalitions referenced the GFCC's requirements for law enforcement's further use of surveillance data, stating:

> The Federal Constitutional Court delivered a judgement concerning law enforcement's data protection that consolidates existing jurisprudence concerning covert investigative measures, systematises this jurisprudence in overarching principles, further develops constitutional requirements regarding limitations in purpose and changes in purpose of data, and for the first time issues statements regarding the transfer of data to state agencies in third countries. In particular, the judgement states that the requirements for further uses and transfer of data are linked to the principles of purpose limitation and changes in purpose, and that the proportionality requirements concerning changes in purpose are to be assessed in light of the criterion of a hypothetical re-collection of data. The principles of purpose limitation and changes in purpose are also applicable to the transfer of data to state agencies in third countries. The Federal Criminal Police Office's existing IT-infrastructure, particularly its information network INPOL, is not suited to match the standards of the Federal Constitutional Court's judgement of April 20, 2016, and therefore requires a fundamental re-structuring.[23]

In other words, rather than amending the BKAG by addressing the GFCC's demands regarding law enforcement's further uses of surveillance data one-by-one, the governing coalition instead opted for a comprehensive overhaul of how German law enforcement agencies would administer their data inventories. In June 2017, Matthias Bäcker, law professor at Johannes-Gutenberg-University Mainz, wrote a commentary on the amended BKAG on Verfassungsblog, a journalistic and academic

[23] Translated from German, excerpt from the explanatory statement on the draft of the Act on the Amendment of the Federal Criminal Police Office Act, German Bundestag, February 14, 2018, BT-Drs 18/11163 (Gesetzentwurf), `http://dipbt.bundestag.de/dip21/btd/18/111/1811163.pdf`.

debate forum on German constitutional law and politics supported by the WZB Berlin Social Science Center. Bäcker noted that the amended BKAG was nothing short of a 'revolution' in the way law enforcement agencies at the federal and state level would administer, store and share their data, allowing the different agencies to link up their data inventories to facilitate the identification of patterns in criminal or terrorist activities.[24] Given that decisions about access rights to the now centralised data inventory would rest with the BKA, Bäcker added that "[t]he law therefore lacks clarity on fundamental issues: It is possible that the administration of law enforcement's information systems would be by and large at the discretion of the BKA; this would be incompatible with our constitutional rights."[25]

In my interviews with former members of the elected branches, I asked lawmakers about the options available to the government and legislature when responding to the GFCC's jurisprudence. In a telephone interview conducted on April 4, 2019, one lawmaker specifically referred to the governing coalition's decision to pursue an overhaul of law enforcement's administration of its databases:

> *Lawmaker 3:* Usually the court doesn't declare legislative texts as void but gives the legislatures instructions, which then have to be implemented by a certain date. And that creates work for the legislative branch. I can tell you, there is certainly little desire on behalf of the government to swiftly get to work on some of these decisions. Often, you then wait as long as you can and see just how little you can do to still match the court's requirements. With the Federal Criminal Police Office Act, you could see a different kind of strategy. Here, the legislature chose a fundamentally different legal construct in the act, and then people were able to say 'well, the Federal Constitutional Court didn't say anything on this new construct'.

Despite the governing coalition's change in course, restructuring how law enforcement officials would handle surveillance data rather than addressing the GFCC's requirements for further uses of such data head on, concerns emerged that the court's jurisprudence was once again acknowledged yet not faithfully implemented. In the Committee for Internal Affair's recommendation to the Bundestag's plenary session concerning the BKAG's new draft, representatives of Die Linke wrote:

[24] Verfassungsblog (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.

[25] Verfassungsblog (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.

> Almost all of the experts confirmed in the committee's hearing that the coalition factions simply copy-pasted passages from the Federal Constitutional Court's judgement of April 20, 2016, without making their own considerations or making an effort to tailor certain terms to police or regulatory law.[26]

These concerns were echoed in the Bundestag's plenary session at the final reading of the BKAG's draft. Irene Mihalic of the Green party noted:

> Irene Mihalic (Greens): The new linking up of data is essentially the same as a re-collection of data. That's why this is indeed important. To be honest, I don't understand why you are willing to take the constitutional risks that come with this approach. The only thing you will achieve with this is continued litigation in Karlsruhe. Instead, you should tackle the known issues in the context of the existing systems. [...] The Federal Constitutional Court objected to several competences in the previous BKAG and defined strict boundaries for our decision-making. Your draft act consistently scrapes these guardrails. What the Federal Constitutional Court considered as barely compatible with the constitution, you then copy-pasted into the act. But copy-and-paste is not only poor in style for a legislature, it also fails to recognise your mandate to ensure proportionality in a broader sense.[27]

Notably, this time members of the SPD's parliamentary faction did not share the constitutional concerns of their colleagues on the opposition benches. The amended BKAG shuttled through the Bundestag and Bundesrat without further constitutional controversy and entered into force on May 25, 2018. Nonetheless, once again concerns had been raised that lawmakers of the CDU/CSU and SPD had paid lip service to the GFCC's decision in *1 BvR 966/09* but effectively evaded compliance with the judgement by opting for an overhaul of law enforcement's data administration system, something the court's judgement did not call for. Matthias Bäcker concluded his commentary on the amended BKAG by stating:

> Perhaps, practitioners in law enforcement will find a way to organise the BKA's administration of data in an useful manner, in ways not

[26] Translated from German, excerpt from the recommended resolution and report of the Committee for Internal Affairs on the Act on the Amendment of the Federal Criminal Police Office Act, German Bundestag, April 25, 2017, BT-Drs 18/12141, `http://dipbt.bundestag.de/dip21/btd/18/121/1812141.pdf`.

[27] Translated from German, excerpt from the second reading of the Act on the Amendment of the Federal Criminal Police Office Act, German Bundestag, April 27, 2017, 2. Beratung: BT-PlPr 18/231, `http://dipbt.bundestag.de/dip21/btp/18/18231.pdf`.

envisioned by the act. Otherwise, we can expect that the new provisions will either lead to dysfunctional results or will be brought down with reference to constitutional rights.[28]

5.5 Conclusion

This chapter provided an analytic narrative of the theoretical model's main argument through a case study on the GFCC's decision on the Federal Criminal Police Office Act (BKAG). Citing from the GFCC's case law, the Bundestag's legislative proceedings, media coverage on the BKAG and interviews with former members of the GFCC and lawmakers, this chapter showed that the theoretical model provides a useful lens to analyse the interactions between courts and lawmakers, and can explain otherwise surprising patterns in judicial decision-making.

Shortly after submitting their draft of the BKAG, lawmakers of the CDU/CSU and SPD faced concerns that the act was at odds with the GFCC's jurisprudence concerning law enforcement's data protection duties and their respect for privacy rights. The grand-coalition's decision to push the BKAG through parliament despite these concerns signalled their willingness to evade compliance with a subsequent judgement that would constrain their decision-making on security policy, especially given that some of these concerns had been voiced by members of the governing coalition caucus. In line with the theoretical model's expectations, the GFCC offered concessions to lawmakers in its ruling on the BKAG by taking the rare step of revoking constitutional requirements contained in its existing jurisprudence. Since the GFCC simultaneously struck several provisions of the BKAG, the reputation of those who had supported the act despite widespread constitutional concerns nonetheless came under fire. Again in line with expectations of the theoretical model, there are also indications that lawmakers made good on their non-compliance threat and opted for a response to the GFCC's ruling that would allow them to evade faithful compliance with the court's jurisprudence.

This chapter's case study also highlighted two facets of the interactions between lawmakers and courts the statistical analysis of Chapter 3 could not capture. First, the discussion of the GFCC's ruling in *1 BvR 966/09* shows that it is useful to look beyond the dichotomous outcome of an individual case—for instance, did the court strike a provision or not—and to pay close attention to the reasoning in the text of

[28] Verfassungsblog (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`.

the court's decision. Clark and Lauderdale (2010, 871) note that "decisions are often most important because of the qualitative changes in law that they effect, rather than because of the decision they provide on the case facing the Court" (see also Tiller and Cross, 2006). The GFCC invalidated several provisions of the BKAG, yet to conclude that the court hence did not self-restrain its decision-making would miss the fact that the court simultaneously eased constitutional constraints on lawmakers.

Second, for the sake of parsimony, the theoretical model presented in Chapter 2 captures a single interaction between lawmakers and a court, yet its mechanism rests on the assumption that both lawmakers and the court are forward-looking actors, anticipating how the other would react to their own decisions. This chapter's case study highlights the dynamic nature of the interaction between lawmakers of the elected branches and the GFCC in Germany's system of limited government. The chapter shows that in order to explain how a court decided in a particular case, it is useful to evaluate how lawmakers had responded to the court's previous, similar decisions and what this information might tell the court about lawmakers' behaviour in the future.

5.6 Appendix

The following provides bibliographical information on the GFCC's case law and press releases (where available in English) cited in this chapter.

Case law

German Federal Constitutional Court, Order of the First Senate of 14 July 1999 – 1 BvR 2226/94, http://www.bverfg.de/e/rs19990714_1bvr222694en.html.

German Federal Constitutional Court, Urteil des Ersten Senats vom 12. März 2003 – 1 BvR 330/96, http://www.bverfg.de/e/rs20030312_1bvr033096.html.

German Federal Constitutional Court, Beschluss des Ersten Senats vom 20. April 2005 – 1 BvR 2378/98, http://www.bverfg.de/e/rs20050420_1bvr237898.html.

German Federal Constitutional Court, Judgement of the First Senate of 27 February 2008 – 1 BvR 370/07, http://www.bverfg.de/e/rs20080227_1bvr037007en.html.

German Federal Constitutional Court, Judgement of the First Senate of 20 April 2016 – 1 BvR 966/09, http://www.bverfg.de/e/rs20160420_1bvr096609en.html.

Press releases

German Federal Constitutional Court: Constitutional complaints against the investigative powers of the Federal Criminal Police Office for fighting international terrorism partially successful. Press Release No. 19/2016 of 20 April 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-019.html.

German Federal Constitutional Court: Provisions in the North-Rhine Westphalia Constitution Protection Act (Verfassungsschutzgesetz Nordrhein-Westfalen) on online searches and on the reconnaissance of the Internet null and void. Press Release No. 22/2008 of 27 February 2008, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2008/bvg08-022.html.

Chapter 6

Counteracting ambition

In most constitutional democracies, courts commanding the authority to deploy their constitutional veto and strike the acts of the legislative and executive branches play a significant part in politics. We expect courts to mark the constitutional limits to policy-making in their jurisprudence and call lawmakers back to the drawing board when their policies transgress the boundaries of the constitution. The importance of the role the judiciary fulfils in systems of limited government is reflected in the ever-growing volumes of scholarship seeking to uncover the drivers of courts' decision-making (see Bailey and Maltzman, 2011; Epstein and Knight, 1998; Epstein et al., 2013; Staton and Vanberg, 2008; Cross and Nelson, 2001; Rogers, 2001).

A little more than a decade ago, some lamented that "comparative political scientists have traditionally devoted surprisingly little attention to studying courts" (Vanberg, 2005, 168), a sentiment that would appear wholly unwarranted today. The judiciary occupies a prominent spot in the minds of scholars interested in identifying the factors that shape the laws that govern our societies (see Clark, 2010; Hall, 2011; Hirschl, 2009; Ginsburg, 2003; Kelemen, 2011). Whereas much of the early literature on courts' influence in politics and the determinants of their decision-making had focused on the U.S. Supreme Court (see for example Dahl, 1957; Caldeira and Gibson, 1992; Handberg and Hill Jr., 1980; Segal, 1984; Segal and Cover, 1989; Mondak, 1992), scholars' interests have since diversified beyond the American experience (see Stone Sweet, 2007; Brouard and Hönnige, 2017; Hanretty, 2012; Dyevre, 2011; Trochev, 2004; Volcansek, 2000).

Inter alia, scholars of judicial politics have shed light on the role courts play in Asia's emerging democracies (Ginsburg, 2003), the South African Constitutional Court's struggles to translate its legitimacy into acquiescence with unpopular rulings (Gibson and Caldeira, 2003), the Argentine Supreme Court's navigation of tense

relationships with autocratic and democratic rulers in the executive branch (Helmke, 2005), and the Mexican Supreme Court's interactions with the media to defuse the threats of non-compliance with its jurisprudence (Staton, 2010). Some scholars have turned their attention from the domestic arena to international courts, particularly the Court of Justice of the European Union, showing that many of the determinants shaping the decision-making of national courts are at work at the international level as well (see Naurin and Dederke, 2018; Alter, 2014; Carrubba et al., 2008; Carrubba, 2005; Larsson and Naurin, 2016)

Collectively, this literature has contributed to our understanding of how courts influence politics in systems of limited government. Existing scholarship suggests that once courts are able to rely on comfortable reservoirs of diffuse support among their constituents, courts can place exogenous constraints on the actions of lawmakers in the legislative and executive branches, often without actively intervening in the political process (see Carrubba, 2009; Rogers and Vanberg, 2007; Stone, 1992). However, even courts enjoying high levels of institutional legitimacy are themselves not free from constraints in their review of lawmakers' actions. Lawmakers frustrated by courts obstructing the pursuit of their preferred policies face an incentive to clip away at courts' jurisdiction and gradually undermine their institutional integrity, an incentive that is not lost on courts (Clark, 2010; Zilis and Mark, 2018). In addition, just as much as the shadow of constitutional review leaves its mark on lawmakers' choices during the legislative process, scholars have shown that the prospects of lawmakers' non-compliance with courts' jurisprudence affects the latter's decision-making (see Vanberg, 2005; Hall, 2014; Carrubba and Zorn, 2010).

In this thesis, I presented a theoretical model that highlights how courts' compliance dilemma and the external constraints on their exercise of constitutional review identified in the existing literature help us explain an otherwise puzzling phenomenon: Even courts boasting levels of public support that should induce the legislative and executive branches to shy away from confrontation with the judiciary cannot always prevent lawmakers from pursuing policies evidently at odds with courts' jurisprudence. Existing scholarship argues that lawmakers facing courts popular among the electorate also face incentives to spare themselves the costs of having their policies censored by courts and 'auto-limit' their choices to policies that match the requirements of courts' jurisprudence (see Vanberg, 1998; Stone, 1992; Landfried, 1992; Rogers and Vanberg, 2007). Why then would lawmakers risk paying the costs of confrontation with courts capable of striking their policies?

Offering an explanation for this puzzle, this thesis opened up a new perspective on how the constraints on courts' exercise of constitutional review reflect in the behaviour of lawmakers, and how the mutual interdependence among the judiciary

and the elected branches translates into jurisprudence establishing the constitutional guardrails for lawmakers' policy-making. This thesis makes a simple claim, that nonetheless has wider implications for the definition of the constitutional limits to policy in systems of limited government: Lawmakers' choices in the shadow of constitutional review signal to courts how lawmakers would respond to future jurisprudence limiting their leeway to create policy.

6.1 Looking forward, looking backward

Like many prominent contributions by scholars of judicial politics, the theoretical approach employed in this thesis perceives courts and lawmakers as strategic actors (see for example Epstein and Knight, 1998; Ferejohn and Weingast, 1992; Stephenson, 2003; Clark, 2009; Rogers, 2001; Vanberg, 2005, see also Tsebelis 2002). In systems of limited government, courts and lawmakers recognize that the realization of their preferences depends not only on their own choices but on the preferences of others and the actions they expect them to take (Epstein and Knight, 1998, 12).

This thesis follows in the footsteps of this strand of scholarship. The theoretical model presented in Chapter 2 assumes that courts and lawmakers are forward-looking, anticipating the actions of their counterparts, which are then reflected in their own choices. Some of the model's equilibria replicate existing scholarship's expectations about the inter-branch dynamics in systems of limited government, including lawmakers' 'auto-limitation' in the shadow of constitutional review (see Stone Sweet, 2007; Landfried, 1992; Rogers and Vanberg, 2007; Vanberg, 1998). However, beyond the phenomenon of 'auto-limitation', the thesis uncovers an additional effect of lawmakers' anticipated costs from constitutional review, which has so far received little attention in the existing literature.

The thesis highlights that both courts and lawmakers anticipate each others' responses to their own actions by turning to the past. Lawmakers draw on rules courts established in previous decisions to identify policy choices at risk of a judicial veto. Courts, on the other hand, consider the political risks lawmakers took when they adopted policies flouting jurisprudence to assess the likelihood of non-compliance with their decisions. By looking at lawmakers' past behaviour, courts update their beliefs about lawmakers' future choices: Lawmakers prepared to bear the costs of confrontation with courts are more likely to be the kinds of lawmakers prepared to evade compliance with courts' decisions censoring their policies. Courts keen to avoid issuing decisions that are ultimately not enforced then are more likely to respond with self-restraint when lawmakers had risked a costly confrontation.

The innovation of the theoretical model presented in this thesis lies within the link it establishes between lawmakers' willingness to bear the costs that come with a judicial veto and their willingness to evade compliance with courts' jurisprudence. For the sake of parsimony, the model abstracts from reality and captures only a snapshot of lawmakers and courts' repeated interactions. Nonetheless, despite limiting its attention to a single encounter, the model still shows that lawmakers and courts' choices are shaped by each other's past behaviour and the anticipation that their paths will cross again in the future. Some lawmakers avoid transgressing constitutional norms substantiated in existing jurisprudence to preempt courts' censure in the future. Yet, other lawmakers—as one of the interviewed justices put it—show the courage of risking a 'bloody nose' at the court and call existing constitutional rules into question in their policy choices. The model makes a simple claim: When tied to costs, lawmakers' past non-compliance with jurisprudence foreshadows lawmakers future non-compliance. *Courts' face incentives to avoid insisting on jurisprudence that is eventually not enforced, and it is lawmakers bearing the risks that come with adopting policies at odds with courts' previous judgements who thus provide an impetus for the evolution of constitutional jurisprudence.*

6.2 Empirical findings

In this thesis, I brought three different types of empirical evidence from the German Federal Constitutional Court's (GFCC) exercise of constitutional review to bear on the empirical implications of the theoretical model. In Chapter 3, a statistical analysis of the GFCC's review of federal law between 1983 and 2017 showed that the court is less likely to invalidate a challenged law when members of the governing coalition in the Bundestag had previously objected the law as unconstitutional just prior to its adoption.

The theoretical model provides an explanation for this otherwise counter-intuitive finding. Dismissing constitutional concerns voiced during the legislative process can come back to bite lawmakers. Existing scholarship suggests that lawmakers evading compliance with courts' jurisprudence risk paying a price at the ballot box, although non-compliance is generally difficult to observe for the electorate (Vanberg, 2001; Staton, 2006; Krehbiel, 2016). We can assume that lawmakers' flouting of advice that their policy choices conflict with jurisprudence—particularly advice from their own political allies—followed by a court's censure is an easily observable instance of non-compliance: It is the court itself, which highlights that lawmakers failed to respect the boundaries of the constitution.

The statistical analysis provides evidence consistent with the core claim of the theoretical model. Lawmakers risking a costly confrontation signal a credible non-compliance threat and induce courts to exercise self-restraint. To conduct this analysis, I identified every federal law reviewed by the GFCC between 1983 and 2017 (both by the court's Chambers and Senates) and read every corresponding final parliamentary debate to code whether members of the Bundestag had objected laws as unconstitutional. The data, including links to the documentation of each legislative proceeding on laws reviewed by the GFCC, will be made available for replication and future research.

The statistical analysis is complemented by qualitative evidence from interviews with lawmakers in the German federal government and the Bundestag, as well as former justices and law clerks of the GFCC. The subjective perceptions of these actors on the inter-branch dynamics in Germany reported in Chapter 4 are by-and-large consistent with assumption and empirical implications of the theoretical model. Lawmakers anticipate constitutional review of their policy choices—albeit lacking certainty about the court's future decisions—and reportedly avoid adopting policies at odds with the GFCC's jurisprudence.

However, when pressed on recent examples of governing majorities dismissing widespread constitutional concerns, some of the interviewed lawmakers acknowledged that the GFCC's judgements are not the last act, and asserted their prerogative to create policy. Justices at the GFCC, on the other hand, follow the political discourse surrounding the acts they review and know that some of their decisions may spark (albeit subdued) backlash and are at risk of non-compliance. Crucially, one of the interviewed justices highlighted the role lawmakers' risk-taking in the shadow of constitutional review plays in the evolution of the court's jurisprudence.

Finally, Chapter 5 provided evidence from a case study of the GFCC's review of the 2008 Federal Criminal Police Office Act (BKAG), demonstrating the usefulness of the theoretical model for explaining the GFCC's unusual decision in the case. The case study provides an analytic narrative of the theoretical model's core claim at work. Lawmakers of the CDU/CSU and SPD's governing coalition dismissed concerns voiced by members of their own caucus that the BKAG conflicted with the constitutional limits to state surveillance the GFCC re-asserted just months before the Bundestag's vote on the act. In its subsequent review of the BKAG, the GFCC struck several of the act's provisions, yet simultaneously revoked parts of its existing jurisprudence and eased constraints on law enforcement's use of surveillance data for the protection against terrorist threats. The case study shows that the theoretical model provides a useful lens to explain the choices of lawmakers and the court at the various stages of their interaction concerning the BKAG.

6.3 Links to existing scholarship

The lessons we can draw from the theoretical and empirical analysis presented in this thesis speak to some of the views held in the existing literature on inter-branch dynamics in systems of limited government. Existing scholarship suggests that lawmakers pursue certain policies despite knowing that courts will eventually censor them to delegate the resolution of contested political issues to courts and hence shift any blame for unpopular decisions on to the judiciary (see Salzberger, 1993; Graber, 1993; Whittington, 2005).

The implications of the theoretical model in this thesis further differentiate this argument. Lawmakers know that key decisions shaping the effects of their policies are eventually taken by courts. In reality, the decisions courts reach in constitutional review cases are far more complex than the dichotomous choice of striking and upholding policy accorded to courts in the formal model of Chapter 2, and the legal rules courts establish in their jurisprudence play a critical role for lawmakers' future policy-making (an observation highlighted by the case study in Chapter 5, see also Clark and Lauderdale, 2010).

By risking the political fallout from being censored by a court, lawmakers signal where their willingness to accept rules that impose strict limits on their leeway to create policy ends. In other words, lawmakers know that not every provision contained in their legislation will survive constitutional review and acknowledge that courts' jurisprudence marks the constitutional limits to their policies. Yet, lawmakers' provocation of for them costly confrontation with courts projects a credible risk of non-compliance and hence provides them with leverage over the legal rules courts establish in their jurisprudence.

Further, studies addressing the link between the support legislative acts enjoy in the legislature and courts' propensity to challenge governing majorities over the constitutionality of these acts have yielded mixed empirical results (see for example Bailey and Maltzman, 2011; Segal et al., 2011; Harvey and Friedman, 2009). These studies draw on scholarship showing that courts' decisions are driven by justices' ideological preferences (see Segal and Spaeth, 1993, 2002), and often rely on an estimation of the ideological distance between the median justice and median lawmaker as well as current lawmakers' estimated support for an act reviewed by the court (see Hall and Ura, 2015; Segal et al., 2011, see also Poole 1998).

A potential drawback of such approaches is that, beyond ideology, acts evidently at odds with constitutional norms may be less likely to garner support among lawmakers in the legislature, hence accounting for patterns of courts being more likely to strike acts enjoying little backing in the legislature and vice versa. The theoret-

ical and empirical approach employed in this thesis moves lawmakers' perceptions of the constitutional compatibility of the policies they debate to the centre of our attention. It shows that it is the political risks lawmakers at the levers of political power are prepared to take in their pursuit of policy that signal the quality of their support for an act eventually reviewed by a court and leave a mark on the latter's decision-making. When lawmakers in government push policy through the legislature amid widespread constitutional concerns and against the protest of their own political allies, lawmakers risk paying a high political cost should a court indeed strike their policy, yet therefore signal a credible non-compliance threat.

Finally, the theoretical model highlights the types of political environments in which we should expect lawmakers' costly signalling of a non-compliance threat to shape courts' decision-making: when courts enjoying comfortable reservoirs of institutional legitimacy face lawmakers with a grip on government office firm enough that would allow them to respond to courts' decisions on their own policies. At first sight, these conditions may lead us to expect frequent, bruising clashes between the elected branches and courts, with neither side facing sufficient incentives to back down from confrontation. Yet, the core argument put forward in this thesis shows that lawmakers signalling of a non-compliance threat helps courts to avert a tense stand-off with the elected branches and to know when to show self-restraint to avoid issuing decisions that are ultimately not enforced.

6.4 Beyond Germany

The evaluation of the theoretical model's empirical implications centred on the case of Germany, given that the GFCC has consistently enjoyed high levels of approval among the public yet has also faced governing majorities controlling government for several consecutive terms. While much of the quantitative and qualitative evidence from the German case presented in this thesis appears consistent with the expectations of the theoretical model, it appears worthwhile to study whether effects of lawmakers' costly signalling are discernible in environments with similarly influential courts, including the U.S. Supreme Court's review of Congressional acts and the Court of Justice of the European Union's (CJEU) decisions in preliminary reference procedures and infringement proceedings.

The U.S. Supreme Court has enjoyed similar levels of diffuse support as the GFCC, albeit experiencing more variation in levels of support over time (see Gibson and Nelson, 2016; Caldeira and Gibson, 1992; Durr et al., 2000). However, existing scholarship documents that the court's institutional legitimacy could not

stop officials in Congress and the executive branch from occasionally flouting its jurisprudence (see for example Fisher, 1993; Hall, 2011; Carrubba and Zorn, 2010). Future research may analyse whether politically costly instances of public officials' non-compliance on a particular issue (e.g. where non-compliance misaligns with dominant state or nationwide public opinion) reflects in the U.S. Supreme Court's subsequent jurisprudence.

Further, existing scholarship has highlighted that governments in the European Union's member states and the CJEU vie over the path of European integration, with member states often failing to comply with European law (see Alter, 1998; Zürn and Joerges, 2005; Börzel et al., 2010). In line with the theoretical insights discussed in this thesis, we may expect the CJEU to become more likely to avoid antagonising governments in member states in its interpretation of European law following periods of member states' governments opting for politically costly non-compliance with supranational rules.

6.5 Normative implications

In the final section of this thesis, I turn my attention to a normative question that has so far taken the backseat against the positive theoretical discussion and empirical evaluation: Should lawmakers' influence over the legal rules courts establish in their jurisprudence worry us?

Scholars' analysis of the drivers of courts' decision-making has been accompanied by a normative debate concerning the influence courts wield over politics and the constraints they place on lawmakers in the elected branches. Some see courts as fundamentally 'countermajoritarian' institutions, with justices acting as lawmakers in robes, who 'thwart the will' of the representatives of the people (Bickel, 1986; Friedman, 1998, 2002; Waldron, 2006). Scholars subscribing to these views of courts have cautioned against a judicialization of politics and government through courts (Tate, 1995; Stone Sweet, 2000; Hirschl, 2009).

At the other end of the debate, scholars have argued that influential courts capable of obstructing the actions of the elected branches are an essential feature of constitutional democracies. Courts ensure that the constitutional rights of minorities are protected against the 'tyranny' of political majorities (see Kaufman, 1980; Riker and Weingast, 1988), and should stand tall when their decisions precipitate outrage among dominant segments of society (Sunstein, 2007).

The findings of this thesis may cause concern among those considering courts as necessary institutions to keep the politically powerful in check. Here, the logic that

lawmakers in government are capable of pushing the constitutional limits defined in courts' jurisprudence after facing down widespread constitutional concerns would appear particularly alarming. Results of the formal analysis in Chapter 2 suggest that lawmakers consistently pushing the boundaries of the constitution ultimately succeed in undermining a court's protection of constitutional rights.

However, the empirical evidence presented in this thesis mitigates these concerns. The data I collected for the statistical analysis in Chapter 3 suggests that (at least in Germany) instances of lawmakers taking high political risks when pushing constitutional limits and hence inducing the court to show deference to the elected branches are relatively rare events. Further, the partial-pooling equilibrium harbouring the theoretical model's core claim shows that courts are more likely to respond with self-restraint to lawmakers costly signalling only under a certain set of circumstances: when courts are not at risk of suffering high costs from court-curbing and when lawmakers have a strong grip on government office. Provided the latter condition is not in place, courts face no incentive to show self-restraint in their decision-making. Hence, rather than highlighting how lawmakers can undermine constitutional rights, the thesis shows how electorally accountable lawmakers enjoying consecutive spells in office and powerful courts enjoying comfortable reservoirs of public support resolve their differences over policy, while avoiding frequent, bruising conflict.

The thesis shows that courts' jurisprudence defining the constitutional guardrails to lawmakers' policy-making is not rigid, with new judgements continually piling on further constraints on the actions of the elected branches. Instead, constitutional jurisprudence evolves over time, with legal rules varying the constraints lawmakers have to adhere to in their policy-making. Crucially, the thesis shows that it is not just justices serving on the highest benches who have a hand in writing these rules. By questioning the rules justices defined in their jurisprudence and provoking constitutional review, lawmakers set the premise for the evolution of jurisprudence and indirectly influence its direction.

This dynamic should not be viewed as an unwelcome, unintended anomaly in systems of limited government. Instead, it is born out of the institutional design of systems of checks and balances. To ensure the functioning of systems of checks and balances, 'ambition must be made to counteract ambition' (Madison, 1961), and this logic applies to courts as well. In other words, lawmakers' signalling of a political constraint on courts' exercise of constitutional review is an observable implication of a system of limited government at work.

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