Putting Courts Under Pressure: When Lawmakers Push Constitutional Boundaries

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Argument and Motivation

Our knowledge of how courts and the political branches interact in modern democracies is incomplete. We expect courts reviewing the constitutionality of policy to be a passive yet moderating force in politics. Lawmakers in parliament and government anticipate constitutional review and are supposed to shelve policies that are unlikely to survive judicial scrutiny. However, this account of courts' passive political clout misses that lawmakers cannot be counted on to play along.

This book shows how lawmakers consciously take constitutional risks in their policy choices and thereby lays bare the limits to courts' control over the boundaries of the constitution. Courts cannot coerce the political branches into faithful compliance with their jurisprudence. Acknowledging this enforcement dilemma, scholars of judicial politics have highlighted that courts accommodate lawmakers to pre-empt non-compliance and protect their institutional integrity. This book demonstrates that courts' dilemma is not lost on lawmakers. It uncovers a facet of politics in modern democracies overlooked in existing scholarship: *Lawmakers whose policies push the envelope on constitutional boundaries signal credible non-compliance threats to courts and pressure them to ease legal restrictions on their policymaking*.

This argument and the original supporting empirical evidence presented in this book expand on what we know about the politics of separation of powers in modern democracies. Where earlier work suggested that lawmakers expect constitutional review and avoid judicial censure of their policies, this book offers plenty of evidence that lawmakers are not always shying away from confrontations with courts. Drawing on the insights of a sophisticated formal theoretical model, the book makes counterintuitive yet precise statements about when lawmakers' pushing of constitutional boundaries is met with courts' easing of restrictions on their policymaking.

In a nutshell, this book shows that lawmakers successfully signal non-compliance threats to courts by ignoring widespread constitutional concerns over their policies. Judicial vetoes are politically costly for lawmakers, especially when courts enjoy strong support among the electorate and when lawmakers had been warned that their policies would fall foul of constitutional norms. Existing literature thus leads us to expect that lawmakers should always self-censor their policymaking when they receive sound advice that their policy choices would violate the constitution.

The argument and empirical evidence presented in this book correct this expectation. Because confrontations with courts are costly for lawmakers, those who provoke them nonetheless send a clear message to courts. *Lawmakers who ignore widespread constitutional concerns credibly signal to*

courts that they value their policies enough to evade compliance with the judgments that try to stop them. Courts, in turn, have strong incentives to respond with deference to lawmakers who push constitutional boundaries – and thus cease to be a check on lawmakers when it matters the most.

This dynamic highlighted by the book confronts readers with a normative quandary that plagues almost every modern democracy. Courts are counted on to protect constitutional rights from the transgressions of the political branches. At the same time, courts are criticised for their 'countermajoritarian' role, placing constraints on elected lawmakers. The book eases concern that courts straitjacket lawmakers and offers comprehensive evidence that lawmakers cannot be prevented from probing the boundaries of the constitution. However, readers also learn that courts cannot stop lawmakers from crossing these boundaries on high stakes, salient issues – the kinds of issues that are central to the political agenda of lawmakers and their core constituencies.

The book offers readers new important insights into legislative just as much as judicial behaviour, highlighting that we cannot study either in isolation. Its distinguishing features are a new theoretical and empirical perspective on politics in systems of separation of power based on a Bayesian formal model, coupled with a rigorous empirical analysis of both original quantitative and qualitative evidence that is accessible to a wide audience. The book is of interest for readers who want to learn how courts shape and are shaped by politics in modern democracies. Beyond the discipline of judicial politics, the book's main argument applies to any institution, judicial or not, that cannot enforce its own decisions and instead relies on the cooperation of the same actors it is tasked to control.

The book's original empirical material – both quantitative and qualitative – centres on the German Federal Constitutional Court (GFCC), counted among the most influential constitutional courts in modern democracies. Considering the GFCC's political clout and prestige among the German public, Germany presents a hard case for the book's argument. If the GFCC cannot deter lawmakers from pushing constitutional boundaries and eases constraints on policymaking in response, we cannot expect less influential courts elsewhere to be in a better position to protect constitutional norms against transgressions of the political branches.

Contributions

The book offers three contributions to the existing literature on the politics of systems of separation of powers. First, it offers a novel theoretical argument that challenges prominent expectations of courts' influence in the political domain, arguing that lawmakers who ignore widespread constitutional concerns over their policies can pressure courts into easing legal constraints on lawmakers' policymaking. Second, it combines statistical analyses of four decades worth of original data on almost 500 federal legislative acts reviewed by the GFCC with rich qualitative case study evidence to provide the most comprehensive account to date of German constitutional politics that is accessible to

an audience with diverse methodological interests. Finally, the book offers a new angle to a long-running normative debate surrounding the role of courts in modern democracies, reflecting on courts' ability to draw and enforce constitutional boundaries to policy.

The first contribution is tied to the insights from a formal model that highlights how courts' inability to enforce their own rulings reflects in the decisions of both lawmakers and courts. A prominent strand of literature, represented by the works of Alec Stone Sweet and Ran Hirschl, has offered compelling arguments that courts threaten the policymaking prerogatives of elected officials. Constitutional jurisprudence spins an ever-denser web of legal constraints, and policy decisions are thus no longer made in parliaments and government cabinets but courtrooms. The book pushes back against this statement and highlights that courts' clout to direct the choices of lawmakers has its limits. Because courts cannot claim 'the last word' on policy, they cannot prevent determined lawmakers from untangling the web of legal constraints and pushing constitutional boundaries.

The book's formal model represents the state of the art in scholarship on politics in systems of separation of powers. It clearly communicates insights to readers by explicitly defining assumptions, actors' motivations and the costs and benefits of their choices. The model allows readers to trace how a lawmaker's policy choice provides a court with clues about their motivations. Where policy is adopted amid widespread constitutional concerns, a court can update its belief that it is dealing with a lawmaker determined to evade compliance with an unfavourable judgment. Only lawmakers prepared to evade compliance should provoke otherwise pointless confrontations with courts.

Second, the books' central arguments are examined through a mixed-methods design. The book offers original data that I collected on every one of the nearly 500 federal legislative acts reviewed by the GFCC between 1977 and 2020, which is made publicly available for the readers. A text analysis of parliamentary debate transcripts linked to the reviewed legislative acts provides a comprehensive history of constitutionally controversial legislation in Germany over the past four decades. The book combines state of the art Bayesian regression analyses of this original data with an in-depth case study of the GFCC and the German Bundestag's 'tug of war' over expanding law enforcement's powers to surveil terror suspects since the late 1990s.

The statistical analyses provide evidence that the GFCC is likely to respond with deference when reviewing policies that had been adopted amid widespread constitutional concerns, a counterintuitive pattern that is explained by the book's theoretical argument. The case study then allows the reader to dive much deeper into the evidence and uncover the dynamics behind this pattern. German lawmakers' repeated confrontations with the GFCC over privacy violations in the name of fighting terrorism provide excellent, nuanced illustrations of the mechanism predicted by the theoretical model. Since the late 1990s, German lawmakers have time and again thrown caution into the wind and pushed constitutional boundaries. Ignoring widespread constitutional concerns lent credibility to lawmakers'

determination to shift the balance between privacy and security in favour of the latter and ultimately led the GFCC to reverse existing legal constraints on security policy in a landmark judgment in 2016.

Third, the book's arguments have significant normative repercussions. It contributes to an ongoing debate on the 'countermajoritarian' nature of courts and the impact of their constitutional jurisprudence in modern democracies. The book offers a nuanced yet hardly upbeat account of judicial constraints on lawmakers that have caused concerns among lawyers and political scientists. Scholars including Dieter Grimm and Susanne K. Schmidt caution that courts remove policy options from the agenda of elected officials. The book shows that jurisprudence certainly leaves its mark on policy choices of parliaments and governments. But it cannot subjugate lawmakers.

Both in its theoretical analysis and empirical findings, the book shows that lawmakers find ways to disentangle the web of constraints spun through courts' constitutional jurisprudence. What sounds like an assurance against Grimm and Schmidt's concerns, however, has a normatively charged flipside. The limits of courts' influence in the political domain shine through on highly salient, high stakes issues. In Germany these include the constitutional architecture on asylum rights, law enforcement's deep reach into citizens' private life, or the erosion of parliament's competences as its powers are transferred to the supranational level. For these types of issues, it matters most that courts ensure that constitutional rights and norms are respected. Yet, precisely on these issues courts' influence over the choices of lawmakers is hamstrung. *Courts may be a countermajoritarian force in everyday politics – but they cede a sizeable part of their political clout on the policy issues that spark constitutional controversy but are ultimately pushed through by lawmakers*.

Chapter Overview

Chapter 1: The Sources and Implications of Constrained Constitutional Review

Chapter 1 provides the reader with several illustrative examples of lawmakers proactively opting for policies of questionable constitutionality and getting away with it – the puzzle that motivates the theoretical and empirical analyses at the heart of the book. The chapter then defines the book's contributions and links these to ongoing debates across several literatures. Scholars of judicial politics, legislative politics, the legal academy, and political theory have long debated how the political and judicial branches constrain each other, and the impact of constitutional constraints on decision making in democracies. Chapter 1 highlights how the book enriches these conversations: *Lawmakers have a hand in drawing constitutional boundaries to policy by crossing these boundaries*. This finding shifts our attention from discussing the constraints courts impose on lawmakers to studying how the latter circumvent these constraints and the effects of lawmakers pushing constitutional boundaries. Chapter 1 concludes with the plan of the book, providing an overview of individual chapters and briefly justifies Germany as the case for its empirical analysis.

Chapter 2: When Lawmakers Push Constitutional Limits and Courts Back Down

Chapter 2 introduces the reader to the formal model, which generates the theoretical argument at the heart of the book. The chapter first discusses and illustrates key assumptions of the model, then walks the reader through its sequence of play, and concludes by spelling out and visualizing the model's empirical implications. Chapter 2 avoids technical jargon throughout and makes the description of the formal model accessible to both readers who are familiar with formal theory and those who are not.

The model covers an interaction between a lawmaker deciding whether to adopt a policy and a court then deciding whether to uphold or invalidate the adopted policy. The model assumes that there are two 'types' of lawmakers, who differ in the way they respond to a judgment that invalidates their policy. A 'compliant' lawmaker would not challenge a court over an unfavourable judgment given that the risk of electoral backlash following non-compliance outweighs the benefits they receive from the policy. The 'non-compliant' lawmaker, on the other hand, values the policy highly enough to shoulder the costs of evading compliance with an unfavourable judgment.

Drawing on well-established literature on judicial politics, the model assumes that the court prefers not to strike down policies of the non-compliant lawmaker. Work by Georg Vanberg, Clifford Carrubba and others shows that courts are keen to nurture a perception that lawmakers consistently comply with their judgments. After all, courts risk a diminution of their institutional integrity when judgments are routinely ignored by lawmakers. Not being able to enforce their own judgments obviously complicates the work of courts. Courts thus anticipate which lawmakers would comply with unfavourable judgments and which ones would not – and challenge the former while accommodating the latter.

The model assumes that the lawmaker receives legal advice during the legislative process assessing whether their preferred policy would violate the constitution. While the risk of constitutional infringement may be low for some policies, it may be high for others. The lawmaker's policy choice in light of this advice *signals* information about their type to the court. Upon receiving advice that a policy is very likely to violate the constitution, pushing ahead with it nonetheless is hardly a viable option for the compliant lawmaker. A non-compliant lawmaker, however, is never deterred in their pursuit of policy by concerns about the latter's constitutionality. *By ignoring advice that their policy choice falls foul of constitutional norms, the lawmaker can credibly signal a non-compliant type to the court and pressure judges to back off from invalidating a policy that pushes constitutional boundaries.*

Chapter 3: Methodology

Chapter 3 discusses the rationale of a mixed methods research design to study the interactions between lawmakers and courts through the lens of the book's theoretical argument. Original quantitative data that captures the advice German lawmakers had received during legislative proceedings on the constitutionality of their policy drafts and data on the cases subsequently heard at the GFCC allows for a statistical analysis testing the model's predictions across a large set of

observations. A qualitative analysis of case study evidence that inter alia draws on archival records of committee hearings at the German Bundestag, media coverage, expert legal analyses of the GFCC's judgments and conversations with both judges and lawmakers then uncovers the motivations of lawmakers and courts that drive the patterns pinned down by the statistical analyses.

Further, the chapter discusses the case selection of Germany as a hard case for the theoretical model. The GFCC has consistently enjoyed high levels of support from the German public and sports far higher institutional approval rates than Germany's federal parliament and government. Hence, the GFCC is the type of court least likely to back down from challenging constitutionally dubious policies of lawmakers and Germany is among the last places where we would expect to find evidence in support of the book's theoretical argument. The German system of constitutional review is a textbook example of the Kelsen model of centralized constitutional review that characterises Western, Central and Eastern European democracies since World War II. It is also reflected in the Court of Justice of the European Union's authority to review the conformity of Member State policies with European Union law. Thus, finding support for the book's argument in Germany of all places strongly implies that it is even more likely that we find the same patterns of lawmakers pressuring courts to ease legal constraints by pursuing constitutionally dubious policies in other democracies with weaker courts.

Chapter 4: When Lawmakers Push Constitutional Boundaries

Chapter 4 provides the reader with a comprehensive overview over the original data that I collected for the project. The chapter discusses the various episodes of constitutional controversy Germany witnessed since the late 1970s, illustrated with excerpts from parliamentary debates and the cases heard at the GFCC. Chapter 4 allows the reader to familiarise themselves with the empirical material at the heart of the following chapter, understand and retrace coding decisions, and link the effects observed in the subsequent statistical analyses to real-world events.

Chapter 5: Judicial Responses: When Constitutional Courts Back Down

Chapter 5 puts the hypothesis derived from the theoretical model to the test. Relying on state-of-the-art Bayesian regression analyses, the chapter studies the effects of lawmakers ignoring constitutional concerns that arose during legislative proceedings on subsequent decisions of the GFCC. The statistical analyses establish that policies which sparked constitutional concerns among lawmakers of various political colours – including members of the political opposition and members of the governing coalition in power – are less (not more) likely to be struck by the GFCC relative to less controversial policies. The theoretical model introduced in Chapter 2 explains this otherwise counterintuitive pattern: When governing majorities ignore well-founded constitutional concerns, they send a credible signal to the GFCC that they are unprepared to let constitutional jurisprudence constrain their policy choices and thus pressure the court to back down.

The chapter offers easily accessible illustrations of this finding and provides several robustness checks. The chapter concludes by discussing the limitations to the inferences we can draw from the statistical analyses and explains how a qualitative analysis can overcome them.

Chapter 6: Pushing Boundaries: The Case of Anti-Terrorism Surveillance in Germany

Chapter 6 offers an analytic narrative of the game-theoretic model's argument. The statistical analyses of the previous chapter establish a robust link between lawmakers ignoring constitutional concerns and the GFCC's show of deference. However, the statistical analyses necessarily cannot capture every facet of the court's justification and reasoning behind its judgments. Judicial reasoning explaining how the court arrived at a particular judgment is equally if not more important for lawmakers' future decisions than the court's conclusions whether a particular policy is constitutional or not. This nuance, which is often lost in purely quantitative analyses, is captured in the book's qualitative case study.

The case study of Chapter 6 analyses several episodes of confrontation between German lawmakers and the GFCC over policies linked to law enforcement's use of intrusive surveillance measures to obtain evidence to prosecute terrorism suspects. The episodes of confrontation over the constitutionality of law enforcement's surveillance powers between the late 1990s and 2020 allow me to investigate whether the formal theoretical model can explain the choices of German lawmakers in the face of stringent rules on privacy rights and the GFCC's responses, when lawmakers had ostensibly dismissed these rules. Chapter 6 relies on detailed analyses of the parliamentary documentation of relevant legislative processes, the GFCC's judgments in various cases surrounding questions on the compatibility of state surveillance and privacy rights, media coverage and existing scholarly literature.

The qualitative case study highlights that the GFCC cannot not invariably deter lawmakers from adopting policies that transgress the boundaries of constitutional jurisprudence, as German lawmakers repeatedly pushed for expanding law enforcement's surveillance powers despite clear signs that doing so would violate citizens' constitutional rights. The insights from the case study provide further nuance to the findings from the statistical analyses. The case study backs up evidence in support of the book's theoretical argument, showing that lawmakers' pushing of constitutional boundaries led the GFCC in its own words to 'carefully consolidate and delimit' the existing legal constraints imposed on lawmakers. However, the qualitative case study complements the statistical analyses with much more detailed insights into the court's responses to lawmakers' controversial policy choices.

Chapter 7: Putting Courts under Pressure: Normative Repercussions

Chapter 7 summarizes the book's key message for the reader. Not all lawmakers self-censor their policy choices in anticipation of constitutional review. Those who consciously pursue constitutionally dubious policies despite widespread warnings credibly signal their willingness to evade compliance with unfavourable judgments to courts. The book offers compelling quantitative and qualitative evidence that this message is received by courts loud and clear. It shows that German lawmakers were

repeatedly able to pressure the GFCC, one of the most powerful constitutional courts, to ease legal constraints on their policy choices by consciously crossing constitutional boundaries.

The chapter concludes with a discussion of the normative importance of the book's finding. Constitutional courts are meant to be a bulwark against the constitutional transgressions of the political branches. The book shows that this bulwark has its cracks. When lawmakers are prepared to evade compliance with judgments and shoulder any electoral backlash that comes with it, courts ultimately cannot stop them in their tracks. The normative implications that follow from this insight are multifaceted and difficult. It cannot be good news for democracies that treasure the rule of law if determined lawmakers can push past constitutional boundaries. On the other hand, unaccountable judges piling on constitutional jurisprudence that constrains the decision making of elected lawmakers likewise undermines the principles of democratic decision making. The book makes a strong case against arguments that modern democracies are effectively governed by courts. Yet, this assurance against 'juristocracy' or a government by courts, comes with a price: Constitutional norms and rights are not always enforced on the issues that lawmakers and their core constituents care most about.

Target audience

The book engages with ongoing important debates across several disciplines. It offers novel theoretical, empirical, and normative insights that will enrich conversations among lawyers, political scientists interested in judicial and legislative politics, as well as scholars of democratic theory. Constitutional review has become a near universal feature of modern democracies and the book provides a new perspective on how courts and the political branches interact in systems of separation of powers. Further, the book's analytical approach makes it worth a read for anyone interested in the strategic interactions of political actors and the use of game theory to study politics more generally. Finally, with its focus on the German case and the rich empirical data provided, the book serves as a useful resource for readers interested in the politics of constitutional controversy in Germany since the late 1970s.

The book makes its strongest contribution in the field of law and politics, and I expect that students and scholars of judicial politics will find the contents of the book intriguing and useful for their work. Although the book centres on courts' exercise of constitutional review, the motivations and strategic calculations of lawmakers in parliaments and governments play a lead role in the book's story. The book offers insights into legislative just as much as judicial behaviour, highlighting that we cannot study either of these in isolation. Readers interested in legislative politics will thus find novel, thought-provoking observations that are relevant to their own work in the book. Further, the book has something to offer for readers who care about the normative tensions associated with the role of courts and their jurisprudence in democratic polities. With its focus on the normative implications of the

theoretical argument and supporting empirical evidence, the book will resonate with readers interested in the political effects of constitutional law, how the law shapes politics and vice versa.

Aside from its substantive contents, the book is likely to appeal to readers who are interested in employing game-theoretic logic to explain the behaviour of political actors. Without compromising on mathematical rigour and precision, the book makes the set of assumptions that feed into the formal model and its equilibrium solutions accessible to readers with no prior training in game theory and visualizes the model's implications with plots and figures wherever possible. For the more experienced readers, including graduate students taking a more advanced class in game theory, the book provides comprehensive technical statements of the model's various equilibria in an appendix separated from the main manuscript, allowing the reader to retrace the model's solutions. Adding to this more pedagogical approach of the book, the game-theoretic model presented here may also present food for thought for scholars studying principal-agent relationships beyond judicial politics. Offering a variant of a signalling game with incomplete and imperfect information, the book's theoretical model highlights that whenever a principal cannot coerce an agent to comply with certain rules or instructions, an agent can exploit this enforcement dilemma to achieve more favourable outcomes by signalling a credible intent to shirk compliance.

Finally, complementing its theoretical contribution and game-theoretic approach to studying the choices of courts and lawmakers, the book provides a well-resourced overview over episodes of constitutional controversy witnessed in German politics since the late 1970s. Collating insights from relevant secondary literature and primary sources of evidence, including detailed studies of parliamentary debate transcripts, media reports and interviews with individuals involved in key decisions, the book offers a comprehensive and accessible resource for readers within and outside academia who want to learn more about the recent history of the German Federal Constitutional Court and constitutional controversies in German politics since the late 1970s.

Competitors

The book complements and challenges existing prominent work on judicial politics. While several earlier titles have offered compelling accounts of the passive effects of courts' constitutional review, none of them consider how lawmakers pushing constitutional boundaries in their policy choices affect judicial behaviour and the implications of this pattern for modern democracies. Monographs published by Stone Sweet (2000), Vanberg (2005) and Engst (2021) discuss lawmakers' anticipation of constitutional review with an empirical focus on Germany, while Clark's (2010) work on the U.S. Supreme Court highlights that judges pay close attention to signals sent by Congressional lawmakers.

Stone Sweet's highly influential work provides the backdrop for my book, as it makes a compelling argument that constitutional courts, including the GFCC, place stringent constraints on lawmakers in

the legislative and executive branches. My book challenges Stone Sweet's work by highlighting that jurisprudence does not prevent lawmakers from pushing constitutional boundaries. Where Stone Sweet argues that political decisions are made in courtrooms, my book shows that lawmakers can successfully break through constitutional jurisprudence and pressure courts to ease legal constraints on policy.

Vanberg's work highlights the consequences of constitutional courts' enforcement dilemma. Constitutional courts must keep in mind that lawmakers may evade compliance with their judgments and courts thus have incentives to accommodate lawmakers whenever non-compliance is likely. Vanberg argues that courts pay attention to the transparency of the political environment and that their decision to strike policy is linked to the likelihood of the electorate observing and punishing lawmakers for non-compliance. Extending Vanberg's work, my book shows that lawmakers send credible non-compliance threats to courts precisely because non-compliance is politically costly. Lawmakers' choices in the shadow of constitutional review shape constitutional courts' decision making.

The recently published monograph by Engst offers impressive and rare empirical evidence of legislative 'autolimitation' in Germany, showing that lawmakers indeed anticipate constitutional review and amend legislative proposals to avoid run-ins with the constitutional court. My book shows that this expectation does not always apply. My book provides comprehensive evidence that lawmakers ignore constitutional concerns on issues that are most important to them and their core constituencies. Legislative autolimitation is not universal and lawmakers can successfully push constitutional boundaries.

Finally, Clark's monograph argues that Congressional lawmakers, who introduce court-curbing bills on the floor of the Senate and House, signal to the U.S. Supreme Court that its support among the American public is waning, thus inducing the court to self-restrain its exercise of constitutional review. The formal theoretical model developed in my book further expands on the work of Clark. It shows that lawmakers do not have to resort to court-curbing instruments to shape the decision making of courts. According to Clark's work, court-curbing proposals are tabled by lawmakers with surprising regularity in the U.S. context, but such proposals are likely to be far less frequent in other well-established, less politically polarized democracies. Instead, my book's theoretical model shows that it is lawmakers' policy choices that let courts know whether lawmakers are prepared to challenge judicial authority.

Timetable

The complete manuscript will be ready for review by June 2023.

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Philipp Schroeder is an Assistant Professor at the Geschwister-Scholl-Institute of Political Science at Ludwig-Maximilians-University Munich. He completed his doctoral degree in July 2019 at the Department of Political Science at University College London, supervised by Christine Reh, Lucas Leemann and Tim Hicks. Prior to arriving in Munich, he was a postdoctoral researcher at the Department of Law at Umeå University, Sweden. His work is published and forthcoming in *Comparative Political Studies* and the *Journal of Law and Courts*.

Further details are provided in my attached CV.