

methodological disagreements that outcome is unavoidable. However, I hope that my brief observations in Section 4 have at least helped the reader to map out the different 'discursive fields' (to use that recently-fashionable jargon) within which we are working and to find some sort of an answer to the question of which of the two approaches will in the end turn out to be more fruitful for political theorizing.

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ABSTRACT JUDICIAL REVIEW, LEGISLATIVE BARGAINING, AND POLICY COMPROMISE

Georg Vanberg

ABSTRACT

The constitutions of many parliamentary democracies provide for abstract judicial review, a proceeding that allows a specified parliamentary minority to initiate judicial review against legislation in the absence of a concrete case. The paper analyzes the impact that this proceeding has on legislative bargaining, using a simple game-theoretic model. The main conclusion is that the most important effects of abstract review are indirect and anticipatory. Furthermore, abstract review results in more moderate legislative proposals than would be expected in its absence. In this sense, it promotes what Lijphart has called 'consensus democracy'. Finally, the model reveals that such moderation depends on the degree of judicial deference towards the legislature. Surprisingly, a court that is not deferential will be appealed to less than a deferential court, even though its influence on policy is larger.

KEY WORDS • judicial review • legislative bargaining • opposition influence

Introduction

Over the course of the last 20 years, institutions have once again acquired a central place in the political science literature. In particular, considerable progress has been made in investigating the impact of formal institutions on the legislative process using the tools of rational-choice theory, especially in the study of Congress (see Baron and Ferejohn, 1989; Krehbiel, 1988; Shepsle, 1979; Weingast and Marshall, 1988). In comparative politics as well, scholars have paid increasing attention to institutional constraints on legislative politics and government formation (Laver and Schofield, 1990; Laver and Shepsle, 1996; Huber, 1992, 1996). A second development has been a renewed interest in the impact of courts, and particularly constitutional courts, on legislative politics (Landfried, 1984, 1992; Shapiro, 1981; Shapiro and Stone, 1994; Stone, 1992, 1996; Volcansek, 1992, 1994).

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This paper connects these developments by formally modeling the impacts of a particular form of constitutional review on legislative bargaining.

Abstract judicial review is found in many parliamentary democracies. It allows certain constitutionally identified actors to initiate judicial review against legislation in the absence of any concrete case, usually after passage of a bill, but before its promulgation, or within a specified period following promulgation.¹ Typically, the constitutional court cannot refuse to hear a case brought under abstract review.² Significantly, a *minority* of parliamentary deputies possesses the power to initiate review under most constitutions. Therefore, abstract review can constitute a powerful weapon for opposition parties.

This paper investigates the influence that the possibility of abstract review exercises over legislative bargaining, using a simple game-theoretic model. The main conclusion that emerges is that the importance of abstract review lies in its indirect, anticipatory effects. Abstract review encourages majorities to consider opposition interests in drafting legislation, and thus fosters policy compromise.³ Furthermore, such policy compromise comes in two forms, depending on the degree of judicial deference towards the legislature and the shadow that future elections cast in the current legislative period. When the court exhibits little deference towards the legislature, or when future elections loom large in the parties' calculations, parties strike political compromises in an attempt to bypass the court. When the court is fairly deferent, or when future elections are less significant, parties are not willing to make such compromises. Yet, they still moderate their proposals in an attempt to have them upheld by the court. The exact meaning of these conclusions may be somewhat nebulous at the moment, but they will become clear in the course of the paper. Finally, the model demonstrates the impact of the re-election probabilities of the parties, the significance of future elections, the location of the status quo, and the degree of judicial deference towards the legislature on the effects of abstract review. The next section reviews previous work on abstract review and on the use of formal models to investigate the impact of judicial institutions. In the third section, I present a formal model of abstract review. The final section consists of a summary and interpretation of the model's results.

1. Abstract review that takes place prior to promulgation is known as 'a priori review', whereas abstract review that is restricted to take place after promulgation is known as 'a posteriori review'.

2. In all these respects, abstract review is radically different from the kind of concrete review which courts can exercise in the USA.

3. Whether such compromise is desirable or not is a normative issue with which I am not concerned.

Abstract Judicial Review and Legislative Bargaining

Precedents for using formal models to study judicial institutions in the literature are mostly confined to the experience of the United States judiciary. Examples include papers by Clinton (1994) and Knight and Epstein (1996), who have made use of game-theoretic models to study the decision of the US Supreme Court in *Marbury v. Madison* as a strategic interaction between President Jefferson and Chief Justice Marshall. Ferejohn and Shipan (1990) analyse the effect of judicial review on Congressional control over bureaucracy in a one-dimensional spatial model. They conclude that such review can actually work to increase the responsiveness of the bureaucratic agent to the Congress. Ferejohn and Weingast (1992) use a similar model to investigate the logic of statutory interpretation by the courts. They show that the potential for Congressional overturn has important implications for the manner in which courts can make decisions, and that anticipation of legislative reactions can shape the manner in which courts interpret statutes they are asked to review. The present paper seeks to extend the use of formal models beyond the US case to the politics of constitutional review in Europe.

Several Western European constitutions and most of the new constitutions of Eastern Europe provide for abstract judicial review. Table 1 furnishes an overview of European courts that feature this proceeding. As the table shows, all of these courts accord standing to a minority of parliamentary deputies, as well as to a variety of other institutional actors. They differ, however, with respect to the size of the minority coalition that can bring a suit, as well as with respect to the other ways in which cases can be brought to the court. Some allow individual citizens to bring concrete review cases when they can claim a violation of their rights. Most make it possible for lower courts to refer a law to the constitutional court for review when doubts about its constitutionality arise during a proceeding in the lower court. Other courts are restricted to abstract proceedings. Finally, some courts (in Hungary, Poland, and Russia) can even initiate cases of their own accord.

In previous studies of the impact of abstract review on legislative bargaining, France and Germany have attracted most attention (Landfried, 1984, 1992; Stone, 1992, 1994; Kommers, 1989, 1994; Mendes, 1990). The most important theoretical contributions to the study of abstract review have also been made in connection with these two countries. In writing on the French experience, Alec Stone, in particular, has called attention to the effects of abstract review on the legislative process. By threatening the validity of majority legislation, abstract review provides an incentive for majorities to limit or modify their proposals in the anticipation of review. To use Stone's phrase, legislators may engage in 'auto-limitation' (Stone,

Table 1. Abstract Review Proceedings in Europe

Country	Can Initiate Abstract Review	Can Initiate Concrete Review
Austria	Federal government; state governments; 1/3 of federal or state parliament	Lower courts; individual complaints
Bulgaria	President; government; 1/5 of parliament	Lower courts
Czech Republic	President; 41 deputies; 10 senators	Lower courts; individual complaints
France	President; prime minister; president of the Assembly; president of the Senate; 60 deputies; 60 senators	No concrete review allowed
Germany	Federal government; state governments; 1/3 of federal parliament	Lower courts; individual complaints
Hungary	Anyone can initiate a case, even the court	Anyone can initiate a case
Poland (1997 Constitution)	President; prime minister; marshals of the Sejm and Senate; 50 deputies; 30 senators; local governments; trade unions; employers' organizations; occupational organizations; churches; religious organizations; certain lower courts	Lower courts; individual complaints
Portugal	President; prime minister; president of the assembly; 1/10 of national parliament; presidents of regional governments; presidents of regional assemblies; 1/10 of regional assembly	Individuals can appeal against lower court decisions if the constitutionality of an act is in question
Romania (Court can be overridden by a 2/3 vote in each chamber)	President; presidents of the assembly and the senate; 50 deputies; 25 senators	Lower courts
Russia	President; president of the Duma; 1/5 of federation council; 1/5 of Duma; the court (restricted)	Lower courts; individual complaints
Slovakia	President; government; 1/5 of deputies	Lower courts; individual complaints
Slovenia	Government; local governments; 1/3 of national parliament	Lower courts; individual complaints
Spain	President; president of parliament; 50 deputies; 50 senators; local governments; local assemblies; the defender of the people	Lower courts; individual complaints

Source: Constitutions of the countries, government web-sites, embassy staff.

1992: 122). Using previous decisions of the Constitutional Council (the French constitutional court) as a guide to the Council's decision-making procedure, majority parties can attempt to write bills in a fashion that takes account of possible constitutional objections. In this manner, they can try to insulate their legislation from censure (Stone, 1992: 122).⁴ Stone has documented this phenomenon with respect to a variety of policy areas, including nationalization and media policy (Stone, 1992, 1994).

The present paper demonstrates these autolimitation effects in an analytical fashion. One advantage of modeling this process formally is that the model demonstrates that a second kind of 'autolimitation' can exist in addition to the phenomenon described by Stone. Under certain conditions, parties do not only anticipate court censure and respond by trying to make their bills 'constitutionally sound'. Rather, parties may strike a political compromise with the opposition in order to induce it not to refer a bill in the first place. The court can be bypassed completely.

A Formal Model of Abstract Review and Legislative Bargaining

Consider the following (complete and perfect information) model of abstract review and legislative bargaining. There are two parties and two legislative periods. At the beginning of period 1, the Incumbent party (party *I*) can make a policy proposal. The opposition party, or Challenging party (party *C*) can then choose whether to acquiesce in the proposal, or whether to initiate a proceeding of abstract review by referring the proposal to the constitutional court.⁵ If a proposal is referred, the court determines its constitutionality. If it is constitutional, the proposal is implemented. Otherwise, the status quo remains in force.⁶

The second period begins with a new election. The election probabilities in this election depend on the outcome of the first period. That is, parties can be punished electorally for making unconstitutional proposals, or for making unwarranted claims of unconstitutionality. The payoffs to the

4. It should be noted that Christine Landfried has made very similar observations with respect to the German Constitutional Court (see especially Landfried, 1984, 1988).

5. Parties are treated as unitary actors in this model. While this is clearly a simplifying assumption which neglects the internal divisions and decision-making procedures of parties, it is justified in so far as, no matter what internal disputes may exist, parties (especially in parliamentary systems) typically need to present a unified front when policy proposals are made and voted on in the legislature. For a further discussion of the 'unitary actor' assumption, see Laver and Schofield (1990).

6. Deference to the court's decisions is assumed in this model, not internally generated. A more general model should endogenize such obedience. However, since the main interest of the present model lies in the impact of abstract review on legislative bargaining, the limitation is not too severe. On the general problem of endogenizing institutions, see Riker (1982) and Calvert (1996).

parties are simply the sum of the payoffs in each of the two periods. The details are spelt out in the next paragraph.

Let the policy space be the real line, R , with party I 's ideal point located at 0 and party C 's at 1, respectively.⁷ (The restriction to one dimension turns out to be a fairly mild one; using a multidimensional policy space increases the complexity of the model without significantly changing the substantive results, although the multidimensional model does have the advantage of easing the exposition at a crucial step in the argument, and I will sketch the intuition at that point.) In the first period, the parties' payoffs depend on the policy that is implemented. The parties' utility functions correspond to Euclidean distance, i.e. for any proposal y , $U_i(y) = -\|x_i - y\|$, where $x_I = 0$ and $x_C = 1$. Thus, the further a policy is located from a party's ideal point, the worse off the party is. Let party I 's proposal in the first period be denoted by p .

In the second period, parties are assigned continuation values, which capture all future payoffs which will accrue to a party as a result of the second-period election. These continuation values are denoted by v_{ij} , where v_{ij} is the continuation value to party i if party j wins the election. Substantively, one could think about these continuation values in a number of ways. One natural interpretation is to think of them as a discounted sum of payoffs from policies implemented in an unknown number of future legislative periods. I assume that for both parties, $v_{ii} > v_{ij}$, $i \neq j$. In words, parties want to win the election.⁸ Furthermore, I assume that $v_{II} - v_{IC} = v_{CC} - v_{CI} = \Delta$. That is, both parties have equally much at stake in the election. Δ captures this potential gain from winning office. If Δ becomes small, the value to winning office is marginal, and therefore, the next election does not weigh heavily in parties' calculations. Let $g \in (0,1)$ denote the prior election probability for party I in the second period. Let $s \in (0,1)$ denote the status quo.⁹

The court is modeled as a stochastic process that invalidates proposals according to their distance from the status quo: the further a proposal is from the status quo, the more likely it is to be declared unconstitutional. In

7. Although the model is not framed in these terms, the restriction to the unit interval makes it possible to interpret it as another version of the 'divide-the-dollar game' which is often used to model legislative bargaining (see Baron and Ferejohn, 1989). Essentially, party I proposes a split of a dollar between itself and party C .

8. To continue with the interpretation of the continuation values hinted at above, the gain from winning might lie in the possibility of implementing more favorable policies in the next legislative period, and it may also capture any incumbency advantages which might accrue to the winner in the future.

9. Restricting s to be between 0 and 1 is a weak assumption that insures that the bargaining process begins from a Pareto-optimal position. It makes intuitive sense in the current setting because we normally think of one party wanting to move policy to 'the left' and the other party of wanting to move policy to 'the right' if elected.

particular, the probability that a proposal p is constitutional is given by $f(\text{'constitutional'} | p) = \max[1 - b(\|s - p\|); 0]$, where $b > 0$ is a parameter indicating the degree of judicial deference towards the legislature. The larger b becomes, the less likely a given proposal is to be constitutional; in other words, higher b -values make the court 'more restrictive'. In the language of the literature on courts, higher b -values signify a 'less deferent' court. This probability function assumes the value 1 at $p = s$, capturing the intuitive notion that the status quo is always constitutional. The probability of constitutionality then falls monotonically with distance until it reaches 0. This functional form captures the most important, and intuitively plausible, characteristic of court decisions: the more radical a proposal is, the less likely it is to be upheld.¹⁰

Finally, let $c > 1$ represent a punishment factor by which election probabilities are adjusted in the second period. Specifically, let the election probability of party I fall to g/c if I makes a proposal which is held to be unconstitutional by the court, while the election probability of C falls to $(1 - g)/c$ if C makes an unwarranted complaint of unconstitutionality in period 1. The parameter c captures the notion that it is electorally costly to be perceived to be in conflict with the court. The justification for this assumption is that in democratic systems, citizens are likely to care not only about *policy*, but also about *process*, that is, they expect politicians and parties to 'play by the rules'. At the margin, a party that is perceived to violate the constraints imposed by the constitution can therefore expect to experience some defection by voters. The degree of this electoral punishment is captured by the size of c .¹¹ Together, the parameters c and Δ indicate the shadow that future elections cast in the present. On occasion, I will therefore refer to them jointly, and say that the 'the electoral consequences of a confrontation with the court' rise when c and Δ increase, and vice versa. The parameters are summarized in Table 2.

Since proposals are continuous, it is impossible to depict the entire

10. Modeling the court in this way provides a rough first cut because the court is not treated as a strategic actor in this model. In particular, its internal decision-making process, which certainly depends on factors other than mere distance from the status quo, is not considered. Moreover, this linear probability function does not take into account the fact that the court's tolerance is not likely to decline at a steady rate across the policy space – rather, the probability of having a proposal invalidated is likely to rise faster, the more radical a proposal becomes. Nevertheless, this functional form captures one of the most important characteristics of court decisions: the further a proposal is from the status quo, i.e. the more radical it is, the more likely it is to be declared unconstitutional.

11. There is no a priori reason to assume that parties are punished equally for making unconstitutional proposals and for making unwarranted complaints of unconstitutionality. While it would therefore be desirable to employ separate punishment factors, doing so adds significantly to the complexity of the model, and in the interest of tractability, I have combined these punishment factors.

Table 2. Model Parameters

Utility for party <i>I</i> in period 1	$U_i(p) = -\ p\ $
Utility for party <i>C</i> in period 1	$U_c(p) = -\ 1 - p\ $
Prior election probability for party <i>I</i>	$g \in (0,1)$
Proposal by <i>I</i> in period 1	p
Continuation value to party <i>i</i> if party <i>j</i> wins the election	v_{ij}
Status quo	$s \in (0,1)$
Probability that p is constitutional	$\max[1 - b(\ s - p\ ; 0]$, where $b > 0$
Punishment factor	$c > 1$

extensive form of the game. Figure 1 presents a partial game-tree in which only one proposal is shown at the appropriate node.

The solution concept used to identify the equilibrium of this game is subgame-perfection. Loosely speaking, in the current game, this means that party *C* can only ‘threaten’ a proposal p with a proceeding of abstract review if it is really in its interest to initiate such a proceeding against p .

Before deriving the equilibrium of this game, consider the same model in the absence of abstract review, i.e. suppose that in the first period, party *I* can simply implement a proposal without fear of judicial review. Clearly, the only subgame-perfect equilibrium in this game is for party *I* to implement its ideal point.¹² Without abstract review, there is no policy compromise or autolimitation. The party in power makes no concessions to the opposition: it always implements its most preferred alternative.

The Initiation of Abstract Review

What will happen when party *C* can initiate a proceeding of abstract review in period 1? Now, first-period proposals by *I* can have implications for the second period. First, party *I* will never make a proposal that will leave it worse off than the status quo, nor will *I* make a Pareto-dominated proposal. In other words, party *I* will restrict its proposal to the interval between its ideal point and the status quo.¹³ This immediately leads to the expression for the probability of constitutionality for challenged first-period proposals:

$$f(\text{“const”} | p_1^1) = \max[1 - b(s - p); 0]$$

which assumes the value 0 for $p \leq s - \frac{1}{b}$

12. Given that abstract review is not possible, the first period can have no impact on the second period in this model. Given that the outcome of the second period is not affected by the first period proposal, proposing $p = 0$ is the only optimal action for party *I* in the first period.

13. For a proof of this statement, and of all subsequent results and propositions, see the Appendix.

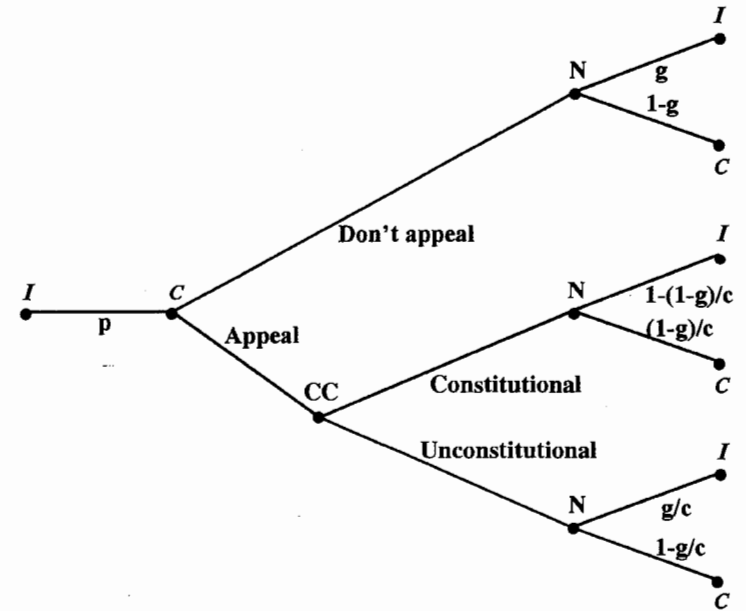


Figure 1. A Partial Extensive Form of the Abstract Review Game
I = Party *I*; *C* = Party *C*; CC = Constitutional Court; N = Nature (election);
 p = proposal

Next, it is necessary to establish under what circumstances party *C* will initiate a proceeding of abstract review. Intuitively, the question is what proposals by party *I* will be so detrimental to party *C* that it is better off appealing (which could result in the preservation of the status quo and a rebuke for *I*, but entails the risk of a confrontation with the court), rather than acquiescing in *I*'s proposal (which leads to an implementation of p and an avoidance of the court). Solving this problem yields a threshold value T_C that identifies the nearest proposal *I* can make to its ideal point without inducing *C* to appeal. Below T_C , proposals by *I* are so far removed from *C*'s ideal point that *C* is better off appealing, even if doing so risks a confrontation with the court. On the other hand, proposals at or above T_C are sufficiently acceptable to party *C* that it is better off accepting the proposal than risking a confrontation with the court. In short, party *C* appeals if $p < T_C$. The threshold T_C is given by:

$$T_C = s + \Delta \left(\frac{1}{2} - \frac{1}{2c} \right) - \frac{\sqrt{b(c-1)\Delta(4c(1-g) + \Delta(bc-b))}}{2bc} \quad (1)$$

This threshold is always strictly less than the status quo s , and always greater than $s - 1/b$, the point at which the probability of constitutionality falls to 0. Intuitively, this implies that party C allows party I some room to shift policy in favor of I without appealing. However, this willingness to grant the majority some leeway depends crucially on the possibility of being punished electorally for coming into conflict with the court. As c goes to 1, i.e. the less severely parties are punished by voters for coming into conflict with the court, T_c goes to s . Similarly, T_c goes to s as Δ goes to 0, i.e. the less there is at stake in the election. As one would expect, if there are no potential costs to appealing, parties will appeal against any proposal that leaves them worse off than the status quo. The second condition implies that C begins to take proposals to the court even before it is certain that it will win: in other words, C is willing to bear some risk of coming into conflict with the court to protect its interests.

The threshold T_c also demonstrates that the court can only be a significant force if it is sufficiently restrictive in its rulings. If b (the parameter indicating the degree of judicial deference towards the legislature) falls below the following threshold α , where

$$\alpha = \frac{\Delta(c-1)(1-g)}{s[\Delta(c-1) + cs]}, \quad (2)$$

party C will not appeal to the court even if party I attempts to implement its ideal point. Intuitively, this condition shows that the court must be minimally restrictive if abstract review proceedings are ever to affect the legislative process. A court that is extremely deferent to the legislature is not worth appealing to, and therefore, the majority will not be constrained by it in drafting legislation. A highly deferent court is irrelevant.

Optimal Proposals

Having established the circumstances under which party C will appeal, the next question is what kinds of proposals will be made by party I in period 1. At this stage, the effects of autolimitation should become apparent. Will I moderate its proposals in response to potential appeals by the opposition? And if so, how is such moderation influenced by the degree of judicial deference and the election probabilities of the parties? In answering these questions, I will only treat the most plausible case, in which party I cannot hope that the court will tolerate an implementation of its ideal point, i.e. I cannot expect to 'completely have its way' in office.¹⁴ The situation is depicted graphically in Figure 2.

14. Technically, this amounts to assuming that $b > (1/s)$. It is readily verified that this also implies that $b > \alpha$. The case in which $b \leq (1/s)$ is omitted here because it adds nothing new to the analysis.

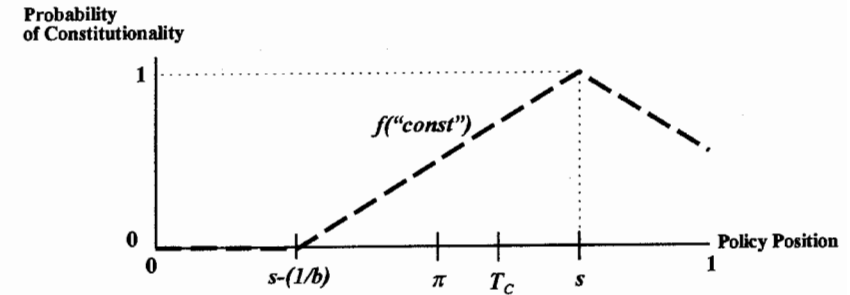


Figure 2. Autolimitation if $b > 1/s$

For any given value of b , there exists only one optimal proposal for party I . If b exceeds the following threshold λ , i.e. if the court is fairly restrictive, the best proposal I can make is to set $p = T_c$, inducing C not to appeal. This threshold λ is given by:

$$\lambda = \frac{c}{\Delta(c-1)} \left[\sqrt{4(1-g)^2 + 1} - 2(1-g) \right] \quad (3)$$

Thus, if party I faces a sufficiently restrictive court ($b \geq \lambda$), it is better off avoiding a possible confrontation with the court by compromising with the opposition to convince it not to initiate a proceeding of abstract review. A strict court is so likely to invalidate a given proposal that the majority benefits by insulating itself from the possibility of court censure through political compromise. Autolimitation is taken so far as to bypass the court completely.

However, such political compromise between majority and opposition depends crucially on the potential for punishment. The threshold λ relies in an important manner on the electoral consequences of coming into conflict with the court: what a deferent court is only has meaning with reference to a particular cost structure of coming into conflict with it. If c goes to 1, or if Δ goes to 0, the threshold λ goes to infinity, and the condition cannot be met. In other words, when parties do not expect to be punished electorally for coming into conflict with the court, or if future elections do not matter much, the incumbent will not compromise with the opposition to bypass the court.

If $b < \lambda$, either because the court is relatively deferent towards the legislature, or because the potential for punishment is low, the optimal proposal for I lies in the interval $(s - \frac{1}{b}; T_c)$ and is given by:

$$\pi = s - \frac{1}{2b} + \Delta \left(\frac{1}{2} - \frac{1}{2c} \right) \quad (4)$$

In words, if the court provides sufficient leeway for majority parties, or if the majority need not worry about future electoral consequences, the majority party is better off drafting legislation that invites judicial review rather than bypassing the court by compromising with the opposition. The 'cost' of appeasing the opposition is higher than the expected cost of a confrontation with the court. Nevertheless, even in this case, the proposal π is always greater than 0, the proposal made in the absence of judicial review. Party *I* still trades off closeness to its ideal point against the probability of constitutionality – one might say that instead of making a *political* compromise with the opposition, the incumbent makes a *constitutional* compromise with the court. Autolimitation, while not as extreme as with a restrictive court, still persists.¹⁵ It is this kind of autolimitation that Stone is primarily concerned with. These results are summarized in the following proposition (for proof, see Appendix).

PROPOSITION 1. *A set of strategies for parties I and C, denoted by a strategy profile $\sigma = (\sigma_I, \sigma_C)$ constitutes a subgame-perfect equilibrium if and only if it has the following form:*

σ_I : if $b \geq \lambda$, propose $p = T_C$; if $b < \lambda$, propose $p = \pi$.
 σ_C : if $p \geq T_C$, acquiesce in the proposal; if $p < T_C$, appeal.

While this equilibrium is unique, it exhibits different characteristics, depending on the model parameters. If the court is very restrictive, or if parties expect that coming into conflict with the court is extremely costly ($b \geq \lambda$), party *I* will strike a political compromise with the opposition in equilibrium, and the court is never appealed to. If the court is sufficiently deferent, or if the consequences of conflict with the court are negligible ($b < \lambda$), party *I* makes a proposal which invites review, and then takes its chances with the court.

In deriving Proposition 1, three important results have been established. The first is that abstract review cannot influence legislative bargaining unless the court displays a certain minimum restrictiveness in its rulings. A court that is extremely deferent towards the legislature, i.e., refuses to censor all but highly radical proposals, is not worth appealing to, and the opposition will not make use of it. If, however, the court meets this 'minimum restrictiveness condition', the effects of abstract review become apparent. Instead of proposing its ideal point (the solution in the absence of abstract review), party *I* proposes compromise solutions which, at least to some extent, accommodate the opposition. Moreover, such autolimita-

15. If majority parties do not expect to suffer electoral punishment for making an unconstitutional proposal, or if the value of winning the next election is low (i.e. as c goes to 1 or as Δ goes to 0), the proposal π goes to $(s - 1/2b)$.

tion comes in two forms. When the court is sufficiently restrictive, and poses a substantial threat to legislation, or if conflict with the court is highly costly, the majority will moderate its proposals so much that the opposition will not even initiate an abstract proceeding. Political compromise is used to bypass the court. A second kind of autolimitation occurs with a more deferent court, or when the future consequences of conflict with the court are negligible. When it has less to fear from the court, the majority does not compromise with the opposition to bypass the court, but makes a sufficiently partisan proposal to invite review. Nevertheless, the proposal that is made is still closer to the status quo than the majority's ideal point. With abstract review in place, legislative bargaining results in compromise – this institution provides the opposition with some influence over policy.

Since the target of autolimitation is different in these two cases, there may be reason to think that the *kinds* of concessions made will also be different. Because it is one-dimensional, the current model does not allow drawing such a conclusion. However, in a multidimensional model, it is possible to show that such a difference does indeed exist. In fact, in such a model, it can be shown that under certain circumstances, the proposal T_C need not be constitutional. It is possible for parties to agree on a political compromise that would not pass constitutional review but that both parties prefer to the status quo, and which neither wants the court to scrutinize. Because the court cannot initiate proceedings on its own, abstract review does not guarantee that such unconstitutional laws will be reviewed or struck down.¹⁶

Comparative Statics

The remaining task is to determine how autolimitation, in its two forms, is affected by the election probabilities of the parties, the location of the status quo, the importance of future elections (as measured by c and Δ), and the degree of judicial deference. The signs of the derivatives of π and T_C with respect to b , g , c , Δ , and s are given in Table 3.

The table shows that as the court becomes less deferent, π shifts toward the opposition's ideal point. As one would expect, a stricter court induces the majority to be more moderate in making a proposal that it expects to come under judicial scrutiny. Because any given proposal is more likely to

16. Important exceptions to this conclusion are courts which are able to initiate proceedings of their own accord, as in Poland or Russia, or courts that have such open rules of access (through concrete review) that such a compromise might reach the court via another proceeding.

Table 3. Signs of Derivatives

	π	T_C
Sign of $\frac{\partial^*}{\partial \Delta}$	+	-
Sign of $\frac{\partial^*}{\partial b}$	+	+
Sign of $\frac{\partial^*}{\partial c}$	+	-
Sign of $\frac{\partial^*}{\partial g}$	0	+
Sign of $\frac{\partial^*}{\partial s}$	+	+

be invalidated, π moves towards the status quo, thereby enhancing the probability that it will stand. A less deferent court induces larger constitutional compromises. As the court becomes less deferent, the threshold T_C shifts towards party C 's ideal point. Since the opposition is more likely to win before the court when the court is more restrictive, the court has become a more powerful weapon for C , and the majority must make larger concessions to induce C not to appeal. The cost of a political compromise has increased. Furthermore, if b is below the threshold λ , an increase in b may push it 'over the edge', that is, as the court becomes less deferent, the majority may begin to compromise with the opposition to bypass the court. Hence, a more restrictive court may be appealed to less frequently than a deferent one. Combining the results on π and T_C yields the following proposition:

PROPOSITION 2. *As the court becomes less deferent (b increases),*

- *the incumbent becomes more moderate in proposals it expects to be reviewed (π increases)*
- *the opposition becomes more demanding in terms of the compromise solution that will induce it not to appeal (T_C increases)*
- *an incumbent who originally did not compromise with the opposition to bypass the court may begin to do so. In other words, the number of appeals weakly decreases in b.*

As the electoral costs of a confrontation with the court increase (c and Δ increase), π increases and the opposition reduces its threshold T_C . As one would expect, both majority and opposition attempt to diminish the potential for conflict with the court when such a confrontation is more costly. Moreover, if π is originally to the left of T_C , an increase in c or Δ may move π to the right of T_C , inducing I to strike a political compromise

with C to bypass the court.¹⁷ In other words, as the electoral costs of conflict with the court rise, the majority may begin to compromise with the opposition to avoid the possibility of review. These results yield the following proposition:

PROPOSITION 3. *As the electoral cost of a confrontation with the court increases (c and Δ increase),*

- *the incumbent is more moderate on proposals it expects to be reviewed (π increases)*
- *the opposition becomes less demanding in the compromise solution needed to bypass the court (T_C decreases)*
- *an incumbent who originally did not compromise with the opposition to bypass the court may begin to do so. In other words, the number of appeals weakly decreases in c and Δ .*

Changes in the election probabilities yield the most interesting results. As the incumbent is more likely to be re-elected (g increases), π does not change. However, the opposition becomes *more* demanding in its threshold T_C . Contrary to the intuitive notion that greater electoral prospects provide the incumbent with a 'mandate' that the opposition will respect, the model thus predicts that the opposition will actually become more obstructionist as it becomes electorally weaker. The logic underlying this result is that as the opposition is less likely to win office in this model, it has less to lose by coming into conflict with the court (the proportionate reduction in $(1-g)/c$ is less). Consequently, C is quicker to appeal to the court. Therefore, if the majority changes its proposal as a result of an increase in g , it will only become *more* accommodating towards the opposition, a rather surprising result (π does not change, and T_C increases). At the same time, an incumbent who originally compromised with the opposition to bypass the court may stop doing so as g increases – because the opposition is more demanding, compromising with it may become too costly. These results yield the next proposition:

PROPOSITION 4. *As the election probability of the incumbent increases (g increases),*

- *party C becomes more demanding in the compromise solution it takes to bypass the court (T_C increases)*
- *an incumbent who originally compromised with the opposition to bypass the court may stop doing so. In other words, the number of appeals weakly increases in g.*

Finally, shifts in the status quo which favor the opposition lead to an equivalent upwards shift in π and T_C (both derivatives are equal to 1).

17. The requirement that $\pi < T_C$ is formally equivalent to the requirement that $b < \lambda$. See the Appendix.

Hence, changes in the status quo always benefit the party in whose favor the status quo has moved, but they cannot lead to a change in court activity.

Summary and Interpretation

The foregoing analysis demonstrates that the institution of abstract judicial review provides an effective tool in fostering legislative compromise. In a setting in which parties ordinarily would not accommodate opposition interests, the availability of abstract review can move majorities to consider opposition interests in drafting legislation, and to moderate proposals in the anticipation of judicial scrutiny. In this sense, abstract review is another institutional feature that encourages what Lijphart (1984) has termed 'consensus democracy'.¹⁸ However, abstract review can only have this effect if the court is not too deferent towards the legislature ($b > \alpha$). A court that refuses to censor all but highly radical proposals can have no impact on legislative bargaining.

Moreover, the model demonstrates that the autolimitation effects which abstract review has on legislative bargaining are of two different kinds. First, when facing a fairly deferent court, or when the electoral consequences of a confrontation with the court are small, the majority moderates its proposals in order to raise the probability that the court will uphold them. But the proposals that are made are still so partisan that the opposition initiates judicial review. In such cases, autolimitation is directed at the *court* in anticipation of constitutional muster. Majority parties make concessions to the court in an attempt to pass its scrutiny.

Second, when the court is very restrictive, or when the electoral consequences of a confrontation with the court loom large, the court poses such a threat to majority proposals that the majority will compromise with the opposition by making a sufficiently large policy concession to induce *C* not to initiate abstract review. In such cases, autolimitation is directed at the *opposition* and serves to bypass the court. Thus, we have demonstrated that it is necessary to be more discriminating in identifying the indirect effects of abstract review. Autolimitation can be aimed at either the opposition or the court, and the concessions made in these two cases may be different.

Another important implication of the model is that the ability of abstract review to create compromise is greatest when the court is so restrictive, or the consequences of a confrontation with the court are so detrimental, that

18. By 'consensual', I simply mean that parliamentary minorities gain influence over policy, not that politics becomes less partisan or confrontational. 'Constitutional' politics can be just as nasty as politics without abstract review. I would like to thank Alec Stone for alerting me to this point.

parties avoid the court completely. *Ceteris paribus*, the proposal made by party *I* is closer to *C*'s ideal point when *I* compromises with the opposition at T_C rather than proposing π . A court that is seldom used may therefore be more powerful in the sense of influencing legislation than a court that is very active. This highlights the potential causal error made in some discussions of 'consensual politics' and the frequency of abstract review. Consider, for example, Stone's comments on Austria:

Whether due to the consensual nature of Austrian politics, a belief that referrals are not altogether legitimate, or both, the court has received only five referrals to date, resulting in only one ruling of unconstitutionality. In consequence, the legislative process has not been significantly altered by the existence of such review (Stone, 1992: 233).

While Stone may be correct about the importance of abstract review in Austria, the reasoning behind this conclusion is not as straightforward as the quotation suggests. The court may be rarely called on *not* because politics is consensual, but rather, politics may be consensual because of the presence of a strong court, which leads parties to compromise in an attempt to bypass it. The *rarity* of abstract review does not necessarily imply that it has an insignificant impact on legislation. Other information is necessary to reach that conclusion.¹⁹

In closing, let me briefly outline some of the limitations of the model, and suggest areas for future research. One particularly strong assumption of the current model is that the re-election probabilities of parties are exogenously given, and are only modified in response to a conflict with the court. Essentially, this amounts to assuming that voters do not care about the final policy outcome, but only about conflict with the court. Making compromises is therefore electorally costless for parties.²⁰ This is unlikely to be the case. Rather, voters are also likely to punish a party at the polls if that party moves too far away from its promised policies in order to compromise with the opposition or the court. Reworking the model with an alternative assumption under which voters also care about the final policy

19. A fair objection at this point might be that if the court rarely reviews legislation, it will be hard to judge the degree of deference that the court will exhibit toward the legislature. In other words, if the court were rarely called on, uncertainty about its behavior would increase (or, rather, uncertainty about its behavior would not decrease). That is certainly true. However, there are other sources of information that parties can use to estimate the degree of judicial deference. Many judges on constitutional courts are senior politicians with established records. Others are law professors with a considerable publication record. In short, actual decisions are not the only source of information on the court's attitude. Nevertheless, the development of case law through actual decisions is a crucial and primary source of information about the court's behavior. A more complete model should attempt to account for the impact of precedent.

20. Note that compromise does carry a utility cost in the current model because a party is sacrificing closeness to its ideal point.

is a possibility for future work. Intuitively, I suspect that the impact of such a change would be to attenuate, rather than to change, the substantive results of the model. Compromise would become more costly, and therefore the party in power would be less willing to be accommodating. However, the distinction between the two types of autolimitation would remain.

A more serious shortcoming of the model is that the court itself is not treated as a strategic actor, but portrayed as a black box that mechanically determines a proposal's constitutionality. The general functional form of this 'review process' seems to correspond roughly to what is observed empirically about court decisions (more radical proposals are more likely to be turned down). Since the focus of the current paper is not on judicial decision-making per se, but on the impact of the potential for review on legislative bargaining, the limitation of using such a crude approximation may not be too severe. However, it would be desirable to have a model that recognizes justices as strategic actors and endogenizes the court's behavior. A full model of constitutional politics must explicitly account for the nature of, and the constraints facing, judicial decision-making. In short, the model presented here constitutes a modest step in the process of trying to understand the relationship between European constitutional courts and legislatures. More work will be necessary.

Finally, the discussion in this paper has been very abstract, and concerned with a highly simplified model of the abstract review process. However, it is possible to draw a closer connection between this model and constitutional politics in the 'real world'. Making this connection depends on the realization that the parameters of the model are not independent of each other, or of other factors present in the richer environment of actual legislative bargaining. For example, the degree of deference that the court exhibits towards the legislature may depend on the judicial appointment process. The more opportunity the majority has to appoint justices favorably disposed towards its own policies, the smaller b will become. In accordance with Proposition 2, one would therefore expect that the more judicial appointments a given government has made, the more frequent appeals to the court would become. Similarly, the deference of the court towards the legislature may also depend on the degree of popular support enjoyed by a government. If constitutional courts are more likely to respect the policies of governments with significant popular support than of governments which are unpopular, increases in g lead to corresponding decreases in b . Hence, Propositions 2 and 4 imply that as a government's re-election prospects improve, the number of appeals weakly increases. A highly popular government may be taken to court more often than an unpopular one. Testing these hypotheses by using cross-national data on the number of appeals, the popularity of a government, and the number of

judicial appointments it has made, provide an obvious opportunity for future work.

APPENDIX

Proof of Proposition

PROPOSITION 1. A strategy profile $\sigma = (\sigma_b, \sigma_c)$ constitutes a subgame-perfect equilibrium if, and only if, it has the following form:

σ_I : if $b \geq \lambda$, propose $p = T_C$; if $b < \lambda$, propose $p = \pi$.

σ_C : if $p \geq T_C$, acquiesce in the proposal; if $p < T_C$, appeal.

Proof

LEMMA 1. Any first-period proposal by party I must lie between party I's ideal point and the status quo, i.e. $p \in [0, s]$.

Proof. Suppose I proposes $p = s + \epsilon$, $\epsilon > 0$. If C does not appeal p , I would have been better off proposing $p' = s$ which is closer to party I's ideal point and (by definition) constitutional. If C does appeal p , proposing $p' = s - \epsilon$ would have yielded a higher utility for I because it induces the same probability distribution in the court's decision as p , but is closer to I's ideal point. Hence, we must have $p \leq s$.

Suppose I proposes $p = 0 - \epsilon$, $\epsilon > 0$. If C does not appeal p , subgame perfection demands that C does not appeal $p' = 0$ either. At the same time, p' yields a higher utility for I than p . If C does appeal p , then $p' = 0$ again yields a higher utility for party I. If C does not appeal p' , this is immediate. If C does appeal p' , proposing p' must yield a higher utility for I than p because p' induces a more favorable probability distribution for I in the court's decision. Hence we must have $p \geq 0$.

QED

It follows immediately that the probability of constitutionality in the first period is given by $f = \max[-b(s - p) + 1; 0]$.

LEMMA 2. Party C will appeal any first-period proposal which falls below the following threshold T_C , and acquiesce in any first-period proposal which is equal to, or greater than, T_C , where

$$T_C = s + \left(\frac{1}{2} - \frac{1}{2c}\right) \Delta - \frac{\sqrt{b(c-1)\Delta(4c(1-g) + \Delta(bc-b))}}{2bc},$$

$$\text{where } \Delta = (v_{CC} - v_{CI})$$

Proof. Take an arbitrary proposal p by party I. The expected utilities to C from appealing and not appealing are given by:

$$EU(\text{no appeal}) = -(1-p) + gv_{CI} + (1-g)v_{CC}$$

$$EU(\text{appeal}) = [1-b(s-p)] \left[-(1-p) + \left(1 - \frac{1-g}{c}\right)v_{CI} + \left(\frac{1-g}{c}\right)v_{CC} \right]$$

$$+ [b(s-p)] \left[-(1-s) + \left(\frac{g}{c}\right)v_{CI} + \left(1 - \frac{g}{c}\right)v_{CC} \right]$$

Assuming that C will appeal if, and only if, the utility from appealing exceeds the utility from acquiescing, then C will appeal if:

$$EU(\text{appeal}) > EU(\text{no appeal})$$

\Leftrightarrow

$$bcp^2 + p[-2bcs + (bc-b)\Delta] + [bcs^2 + \Delta(1-c-g+cg-bs+bcs)] > 0$$

$$\frac{\partial[lhs]}{\partial p} = 2bcp - 2bcs + (b-bc)$$

Since $p \leq s$, $b > 0$, and $c > 1$, this derivative must always be negative. Therefore, setting the *lhs* equal to 0 will provide us with a threshold p^* such that the inequality holds for all $p < p^*$. To find this solution, we can apply the quadratic formula and use the lower solution, since the negative derivative indicates that we are on the downward-sloping part of a parabola with a minimum:

$$p^* = T_c = s + \left(\frac{1}{2} - \frac{1}{2c}\right)\Delta - \frac{\sqrt{b(c-1)\Delta(4c(1-g) + \Delta(bc-b))}}{2bc}$$

C will appeal any proposal by I which falls below the threshold T_c , and acquiesce otherwise.

QED

LEMMA 3. The threshold T_c is always less than the status quos, and greater than $s - \frac{1}{b}$ (the point at which the probability of constitutionality falls to 0).

When $b \leq \frac{\Delta(c-1)(1-g)}{s[\Delta(c-1) + cs]}$, T_c falls below 0.

Proof. To see that T_c is less than s , note that:

$$T_c < s$$

\Leftrightarrow

$$\left(\frac{1}{2} - \frac{1}{2c}\right)\Delta - \frac{\sqrt{b(c-1)\Delta(4c - 4cg + \Delta(bc-b))}}{2bc} < 0$$

\Leftrightarrow

$$(bc^2 - 2bc + b)\Delta < (c-1)(4c - 4cg + \Delta bc - \Delta b)$$

\Leftrightarrow

$$c > \frac{1-g}{1-g}$$

This always holds since $g < 1$, $c > 1$.

To see that T_c is greater than $s - \frac{1}{b}$, note that:

$$T_c > s - \frac{1}{b}$$

\Leftrightarrow

$$(bc-b)\Delta + 2c > \sqrt{b(c-1)\Delta(4c - 4cg + \Delta(bc-b))}$$

\Leftrightarrow

$$c + c\Delta g - \Delta g > 0$$

\Leftrightarrow

$$c > \frac{\Delta g}{1 + \Delta g}$$

This always holds since $c > 1$.

When $T_c \leq 0$, party C will not appeal even if I attempts to implement its ideal point.

Hence, the court is irrelevant if this holds. To see that $T_c \leq 0$ if $b \leq$

$\frac{\Delta(c-1)(1-g)}{s[\Delta(c-1) + cs]}$, note that:

$$T_c \leq 0$$

\Leftrightarrow

$$2bcs + 2bc\Delta \left(\frac{1}{2} - \frac{1}{2c}\right) \leq \sqrt{b(c-1)\Delta(4c - 4cg + \Delta(bc-b))}$$

\Leftrightarrow

$$b(cs^2 + cs\Delta - s\Delta) \leq c\Delta(1-g) - \Delta(1-g)$$

\Leftrightarrow

$$b \leq \frac{\Delta(c-1)(1-g)}{s[\Delta(c-1) + cs]}$$

Denote this threshold by α . Hence, if $b \leq \alpha$, the court cannot influence legislative bargaining.

QED

LEMMA 4. Given C 's threshold T_c , I 's optimal first period proposal is given by T_c for

$b \geq \lambda$, and by $\pi = s - \frac{1}{2b} + \Delta\left(\frac{1}{2} - \frac{1}{2c}\right)$ for $b < \lambda$ where

$$\lambda = \frac{c}{\Delta(c-1)} \left[\sqrt{4(1-g)^2 + 1} - 2(1-g) \right].$$

Proof. I can propose on the following intervals, with the associated expected utilities (see Figure 2):

$$(A) p \in \left[0; s - \frac{1}{b} \right]$$

Any proposal on this interval will be appealed by C , and declared unconstitutional by the court. Hence, the expected utility is:

$$EU_I\left(p \in \left[0; s - \frac{1}{b}\right]\right) = -s + \left(\frac{g}{c}\right)v_{II} + \left(1 - \frac{g}{c}\right)v_{IC} \quad (1)$$

$$(B) p \in \left(s - \frac{1}{b}; T_C\right)$$

Any proposal on this interval will be appealed by C , but is constitutional with positive probability. Hence, the expected utility is:

$$EU_I\left(p \in \left(s - \frac{1}{b}; T_C\right)\right) = \left[-b\left(s - p\right) + 1\right] \quad (2)$$

$$\left[-p + \left(1 - \frac{1-g}{c}\right)v_{II} + \left(\frac{1-g}{c}\right)v_{IC}\right] + \left[b\left(s - p\right)\right] \left[-s + \left(\frac{g}{c}\right)v_{II} + \left(1 - \frac{g}{c}\right)v_{IC}\right]$$

To find the optimal proposal on this interval:

$$\frac{\partial[(2)]}{\partial p} = -1 - 2bp + 2bs + \Delta\left(b - \frac{b}{c}\right)$$

$$\frac{\partial^2[(2)]}{\partial p^2} = -2b < 0$$

Setting the first-order condition equal to 0 yields the optimal proposal π :

$$\pi = s - \frac{1}{2b} + \Delta\left(\frac{1}{2} - \frac{1}{2c}\right)$$

The expected utility of this proposal is given by:

$$EU(\pi) = -s + \frac{1}{4b} + \Delta^2\left(\frac{b}{4} + \frac{b}{4c^2} - \frac{b}{2c}\right) + \Delta\left(-\frac{1}{2} - \frac{1}{2c} + \frac{g}{c}\right) + v_{II} \quad (2')$$

It is necessary to verify when π will lie in the interval $(s - \frac{1}{b}; T_C)$.

(i) π is always greater than $s - \frac{1}{b}$. To see this, note that:

$$\pi > s - \frac{1}{b}$$

\Leftrightarrow

$$\Delta\left(\frac{1}{2} - \frac{1}{2c}\right) + \frac{1}{2b} > 0.$$

This always holds since $\Delta > 0$, $c > 1$, and $b > 0$.

(ii) π is less than T_C if:

$$T_C - \pi > 0$$

\Leftrightarrow

$$\sqrt{b(c-1)\Delta(4c-4cg+\Delta(bc-b))} < c + 2bc\left(\frac{1}{2} - \frac{1}{2c}\right) \times$$

$$((vc_{CC} - v_{CI}) - (v_{II} - v_{IC}))$$

\Leftrightarrow

$$b^2(\Delta^2(1-2c+c^2)) + b(\Delta(4c^2-4c+4cg-4c^2g)) - c^2 < 0$$

Since $(1-2c+c^2) > 0$ for $c > 1$, the left-hand side describes a parabola with a minimum in b . Solving for b using the quadratic formula yields:

$$b_{1/2} = \frac{-2c(1-g)}{\Delta(c-1)} \pm \frac{\sqrt{4c\Delta(c-1)(1-g)^2 + 4c^2\Delta^2(c-1)^2}}{2\Delta^2(c-1)^2},$$

$$= \frac{-2c(1-g)}{\Delta(c-1)} \pm \frac{\sqrt{4(1-g)^2 + 1}}{\Delta(c-1)}$$

Since the first term is negative and the second term is positive, but $b > 0$, only the larger solution is relevant. The inequality will hold for all $b < b_2$. Rearranging terms therefore yields that π is less than T_C if

$$b < \frac{c}{\Delta(c-1)} [\sqrt{4(1-g)^2 + 1} - 2(1-g)]$$

Denote this threshold by λ .

(C) $p \in [T_C; s]$

Any proposal on this interval will not be appealed by C . Clearly, the only optimal proposal on this interval is the proposal closest to I 's ideal point, i.e., T_C . Hence, the expected utility is:

$$EU(T_C) = -T_C + gv_{II} + (1-g)v_{IC} = -T_C + \Delta g + v_{IC} \quad (3)$$

The next question is which of the three possible proposals (A), (B), and (C) will be made by party I .

No proposal in the interval (A) will ever be made because both (2') and (3) are larger than (1).

To see that (2') is larger than (1), note that:

$$EU(\pi) > -s + \left(\frac{g}{c}\right)v_{II} + \left(1 - \frac{g}{c}\right)v_{IC}$$

⇔

$$\frac{1}{4b} + \Delta^2 \left(\frac{b}{4} + \frac{b}{4c^2} - \frac{b}{2c} \right) + \Delta \left(-\frac{1}{2} - \frac{1}{2c} + \frac{g}{c} \right) + \left(1 - \frac{g}{c} \right) (v_{II} - v_{IC}) > 0$$

⇔

$$\frac{1}{4b} + \Delta^2 \left(\frac{b}{4} + \frac{b}{4c^2} - \frac{b}{2c} \right) + \Delta \left(\frac{1}{2} - \frac{1}{2c} \right) > 0$$

This always holds for $b > 0$, $\Delta > 0$, $c > 1$.

To see that (3) is larger than (1), note that we need:

$$EU(T_C) > -s + \left(\frac{g}{c}\right)v_{II} + \left(1 - \frac{g}{c}\right)v_{IC}$$

⇔

$$-T_C + g(v_{II} - v_{IC}) + s - \frac{g}{c}(v_{II} - v_{IC}) > 0$$

⇔

$$s - T_C + \Delta \left(g - \frac{g}{c} \right) > 0$$

This always holds because $s > T_C$ and $c > 1$.

Hence, no proposal $p \in [0; s - \frac{1}{b}]$ will ever be made. The only remaining question is whether I will propose π or T_C .

First, suppose $b \geq \lambda$, in which case $\pi \geq T_C$. In this case, the expected utility from a proposal p rises over the entire interval $(s - \frac{1}{b}; T_C)$ (this follows because the expected utility is a parabola with a maximum at π). As p approaches T_C , the expected utility from p goes to $EU_I(T_C)$. To see this note that:

$$\lim_{p \rightarrow T_C} EU(p) - EU(T_C) =$$

$$\frac{1}{2c^2} [(2c(-1 + c + g) + b\Delta(1 - 2c + c^2) - (c - 1) \sqrt{b(c - 1)\Delta(4c - 4cg + \Delta(bc - b))}] (v_{II} - v_{IC} - \Delta)$$

Since $v_{II} - v_{IC} = \Delta$, this quantity is equal to 0.

Hence, if $b \geq \lambda$, the utility over the interval $(s - \frac{1}{b}; T_C)$ approaches the utility at T_C .

Moreover, since it approaches this utility from *below*, the optimal proposal is to set

$p = T_C$. Therefore, whenever $b \geq \lambda$, party I will bribe party C to not initiate review by proposing C 's threshold.

Second, suppose $b < \lambda$. In this case $\pi < T_C$. If this is the case, the utility from proposing π weakly exceeds the utility from proposing T_C . To see this, note that:

$$EU(\pi) \geq EU(T_C)$$

⇔

$$\frac{1}{4b} + \Delta \left(\left(1 - g \right) \left(1 - \frac{1}{c} \right) \right) + \Delta^2 \left(\frac{b}{4} + \frac{b}{4c^2} - \frac{b}{2c} \right) - \frac{\sqrt{b(c - 1)\Delta(4c - 4cg + \Delta(bc - b))}}{2bc} > 0$$

⇔

$$(c^2 + 4bc\Delta - 4bc^2\Delta - b^2\Delta^2 + 2b^2c\Delta^2 - b^2c^2\Delta^2 - 4bc\Delta g + 4bc^2\Delta g)^2 \geq 0$$

Since this always holds, we have that when $b < \lambda$, $EU(\pi) \geq EU(T_C)$, and hence, proposing π is optimal for party I .

QED

The proof of Proposition 1 follows immediately by applying Lemmas 1–4.

Proof of Propositions 2–4

To prove these propositions, only two things are necessary: (A) to establish the signs of the derivatives of π and T_C with respect to b , c , Δ , and s , and (B) the fact that when π is to the left of T_C , i.e., when $b < \lambda$, proposing π is optimal, while when π is to the right of T_C , proposing T_C is optimal.

$$\frac{\partial T_C}{\partial b} = \frac{\sqrt{b(c - 1)\Delta(4c(1 - g) + \Delta(bc - b))}}{2b^2c} - \frac{(c - 1)\Delta(2c(1 - g) + \Delta(bc - b))}{2bc\sqrt{b(1 - c)\Delta(4c(1 - g) + \Delta(bc - b))}} > 0 \quad (1)$$

To see that this derivative is always positive, note that some algebraic manipulation shows that

$$\frac{\partial T_C}{\partial b} > 0$$

⇔

$$b(c - 1)\Delta(4c(1 - g) + \Delta(bc - b)) - b(c - 1)\Delta(2c(1 - g) + \Delta(bc - b)) > 0$$

⇔

$$2c(1 - g) > 0$$

Since $c > 1$, and $g < 1$, this always holds.

$$\frac{\partial T_c}{\partial g} = \frac{(c-1)\Delta}{\sqrt{b(c-1)\Delta(4c-4cg+\Delta(bc-b))}} > 0 \quad (2)$$

Since $c > 1$, $\Delta > 0$, this derivative must be positive.

$$\begin{aligned} \frac{\partial T_c}{\partial c} &= \frac{\Delta}{2c^2} + \frac{\sqrt{b(c-1)\Delta(4c(1-g)+\Delta(bc-b))}}{2bc^2} \\ &+ \frac{\Delta((2-4c)(1-g)-\Delta(bc-b))}{2c\sqrt{b(c-1)\Delta(4c(1-g)+\Delta(bc-b))}} < 0 \end{aligned} \quad (3)$$

To see that this derivative is always negative, note that some algebraic manipulation shows that

$$\frac{\partial T_c}{\partial c} < 0$$

\Leftrightarrow

$$\begin{aligned} &\Delta\sqrt{b(c-1)\Delta(4c(1-g)+\Delta(bc-b))} \\ &+ \frac{b(c-1)\Delta(4c(1-g)+\Delta(bc-b))}{b} \\ &+ c\Delta(2-4c)(1-g)-\Delta(bc-b) < 0 \end{aligned}$$

\Leftrightarrow

$$\sqrt{b(c-1)\Delta(4c(1-g)+\Delta(bc-b))} < \Delta(bc-b) + 2c(1-g)$$

\Leftrightarrow

$$0 < (g-1)^2$$

This must always hold.

$$\frac{\partial T_c}{\partial s} = 1 \quad (4)$$

$$\frac{\partial T_c}{\partial \Delta} = \left(\frac{1}{2} - \frac{1}{2c}\right) - \frac{(c-1)(2c(1-g)+\Delta(bc-b))}{2c\sqrt{b(c-1)\Delta(4c(1-g)+\Delta(bc-b))}} < 0 \quad (5)$$

To see that this derivative is always negative, note that some algebraic manipulation shows that

$$\frac{\partial T_c}{\partial \Delta} < 0$$

\Leftrightarrow

$$\frac{(c-1)(g-1)^2}{b\Delta(4c(g-1)+\Delta(b-bc))} < 0$$

This must always hold since $g < 1$ and $c > 1$.

$$\frac{\partial \pi}{\partial b} = \frac{1}{2b^2} > 0 \quad (6)$$

This derivative is always positive.

$$\frac{\partial \pi}{\partial g} = 0 \quad (7)$$

$$\frac{\partial \pi}{\partial c} = \frac{\Delta}{2c^2} > 0 \quad (8)$$

Since $\Delta > 0$ this derivative is always positive.

$$\frac{\partial \pi}{\partial s} = 1 \quad (9)$$

$$\frac{\partial \pi}{\partial \Delta} = \frac{1}{2} - \frac{1}{2c} > 0 \quad (10)$$

Since $c > 1$, this derivative is always positive.

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A COMMENT ON VANBERG

RULES, DISPUTE RESOLUTION, AND STRATEGIC BEHAVIOR

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Until very recently, *autolimitation*, both a symptom and cause of a profoundly important *judicialization* of European politics, was all but unknown. Comparative political scientists did not study law and courts, and public law-political scientists were not much interested in comparative law (Kommers (1976) is a notable exception). To my knowledge, the first works germane to the topic of this comment were produced by Landfried (1984, 1985) on West Germany, and by Keeler and Stone (1987) and Stone (1989a, 1989b) on France. The appearance of special issues of *West European Politics* (Volcansek, 1992) and of *Comparative Political Studies* (Shapiro and Stone, 1994) devoted to European judicial politics, combined with the spread of constitutional rights and courts to the democratizing states of the former Soviet bloc, pushed this agenda forward. If the study of pan-European and global constitutionalism is today a growth industry (e.g. Tate and Vallinder, 1995), rigorous theorizing on the political impact of constitutional law and constitutional courts remain a scarce commodity.

Georg Vanberg is the first to elaborate a formal model of legislation in the shadow of constitutional adjudication. Vanberg's contribution to the study of constitutional politics – by which I mean the relationship between legislators (governments and members of parliaments) and constitutional judges (members of constitutional courts) in the making of public policy and the construction of constitutional law – is potentially seminal of a new wave of research. Vanberg's piece can also be profitably read by many who do not work primarily in the rational choice-institutionalist, or game-theoretic, tradition. He focuses not only on the crucial, policymaking core of constitutional politics, but has largely (if not quite enough) resisted temptations to narrow the domain of inquiry to facilitate the task of model-building.

In the first two sections, I shall discuss constitutional politics as legislative bargaining, and argue that Vanberg's model of these politics is misspecified at key points. Although I reference the results of prior research in this area, and bring to bear certain empirical findings, I do so within the confines of Vanberg's own preferred epistemology. Thus, I accept that: (1) all actors behave rationally, in the sense that they select strategies