Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review

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This article develops an imperfect information model of the interactions between legislatures and constitutional courts. The model addresses legislative anticipation of judicial review, legislative reactions to judicial rulings, and the impact of anticipation of such reactions on judicial behavior. The most important finding is that the nature of legislative-judicial relations depends crucially on the political environment in which court and legislature must act, as well as on judicial preferences. Several results are tested in a logit analysis of decisions by the German Constitutional Court from 1983 to1995.

Courts with the power to exercise constitutional review—as constitutional courts or in a decentralized system of judicial review—constitute central institutions of governance in most Western-style democracies. I present a simple game-theoretic model that provides a unified account of the multi-faceted interactions between such courts and the legislatures they are, at least in part, intended to control. The model addresses legislative anticipation of judicial review, legislative reactions to judicial rulings, and investigates the implications for judicial behavior. It demonstrates that the political environment in which a court must act is crucially important to the manner in which it will use its powers. As a result, the analysis provides important insights into the extent and the limits of judicial influence, thereby addressing questions that have been a recurring topic of debate among judicial scholars in the last decade (e.g., Holland 1991; Stone 1992; Tate and Vallinder 1995). In addition, the model lends insight into the current debate concerning the extent of strategic behavior by justices, demonstrating under which circumstances justices are likely to be constrained by strategic considerations and when this will not be the case (e.g., Carrubba 2000; Ferejohn and Weingast 1992; Rogers 2001; Segal 1997).

The article is organized as follows. The next section introduces the substantive feature of legislative-judicial relations that is central to the analysis. The third section describes the model. In the fourth section, I present the equilibria of the game and interpret the results. The fifth section provides an empirical test of some of the model's conclusions using data on the decisions of the German Constitutional Court. The final section concludes.

Implementation, Public Support, and Transparency

According to conventional wisdom, the primary purpose of constitutional courts is to oversee and constrain the exercise of political power by legislative majorities or government agencies. One question that has received

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relatively sparse attention is how courts are able to achieve this purpose in practice. This question is interesting because a crucial (and curious) fact concerning constitutional review is that courts with the power to annul legislation or administrative acts must frequently rely on the willingness of other branches to implement their decisions because they may require a legislative or an administrative response. If a law is found to be in conflict with the constitution, it will generally be necessary for the legislature to address the deficiency by redrafting the offending sections (Carrubba 2000). Similarly, decisions on administrative procedures may require a change in an agency's policies (Spriggs 1996). This "implementation problem" has, of course, been long recognized.[1] Thus, Hamilton notes in *Federalist 78* that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements" (1961, 465).[2]

In light of the implementation problem, scholars have emphasized the importance of public support for constitutional "rules of the game" in general and for high courts in particular (e.g., Caldeira 1986; Murphy and Tanenhaus 1990; Weingast 1997). As Gibson, Caldeira, and Baird have expressed it, "with limited institutional resources, courts are therefore uncommonly dependent upon the goodwill of their constituents for both support and compliance" (1998, 343). In democracies where a high court enjoys a high degree of public support, a legislative decision not to comply with judicial rulings may result in a negative public backlash. The fear of such a backlash can be a powerful inducement for legislative majorities to respect judicial decisions as well as the institutional integrity of a court (Vanberg 2000; see also Leuchtenburg 1995, 92). In short, the "electoral connection" (Mayhew 1974) can also serve as an (indirect) enforcement mechanism for judicial decisions. Two conditions are critical to this mechanism's efficacy:

(1) There must exist sufficient public support for the court generally (or for its particular decision) to make an attempt at noncompliance unattractive.
(2) Voters must be able to monitor legislative responses to judicial rulings effectively and reliably.

[1]See Rosenberg (1991). A closely related issue, although one I am not directly concerned with, concerns explicit legislative overrides of judicial decisions within a constitutional framework (see Ferejohn and Weingast 1992; Segal 1997; Hettinger and Zorn 2000).

[2]Interestingly, for Hamilton, the implementation problem constitutes an important check on the powers of the judiciary. Its "total incapacity to support its usurpations by force" (*Federalist 81*, 1961, 485) would (according to Hamilton) make it nearly impossible for the judiciary to systematically undermine the intent of a legislative majority.

I am not directly concerned with the first condition. Empirically at least, high courts in most advanced democracies enjoy considerable public support, especially compared to other branches of government (see Gibson, Caldeira, and Baird 1998, 349 and following). Therefore, I assume that sufficient support for the court exists (in the fourth section, I also briefly discuss the implications of dropping this assumption). Instead, the analysis focuses on the second condition, which raises a more subtle point. The threat of public censure will only deter noncompliance if legislative majorities are sufficiently likely to be "caught" if they choose not to comply with a decision. In short, *monitoring* of legislative responses to judicial decisions is crucial.

Such monitoring is not a trivial task, particularly when legislative majorities do not challenge a court's decision openly but attempt to avoid compliance implicitly. Judicial rulings and legislative proposals often involve technical and abstract provisions, and deciding whether a particular judicial demand has been met may not be a straightforward problem. Consequently, a legislative majority that chooses to evade a decision may not be "punished" by a public backlash, even if the court does enjoy the public's support. There are numerous ways in which such implicit "evasion" can be accomplished. A legislative majority may acknowledge a decision but fail to address it. The German Bundestag's reaction to a decision of the German Constitutional Court that called for a change in the differential taxation of civil servant pensions and regular retirement benefits provides an example.[3] After the decision was issued in early 1980, a parliamentary commission to study possible revisions of the tax code was established. Since then, however, the tax code has not been altered. As a result, without openly challenging the court, legislative majorities have evaded a decision for more than twenty years. Similarly, the Bundestag has not acted on the court's 1975 order to pass a prohibition against "consulting" contracts between legislators and special interest groups (BVerfGE 40,296).

A second possibility is to revise a statute, but to do so in a way that avoids some (or all) of the consequences of the decision. That is, a legislative coalition may choose to comply procedurally (it does revise the statute) but not substantively (the particular revision chosen still maintains the essence of the offending provisions). Again, an example may help to illustrate. Under the German party

[3]Decisions of the German Constitutional Court are published in serial format and are referenced by the volume and page number on which the decision appears. The current decision is BVerfGE 54,11, implying that it can be found in volume 54, page 11 of the court's decisions. All references to decisions by the FCC follow this convention.

finance law in effect during the late 1980's and early 1990's, one important source of funding for political parties was the so-called "base-amount." The base-amount was a fixed amount of money to which each party was entitled, provided it received at least 2 percent of the vote in a given election. In a 1992 decision, the German court declared this provision unconstitutional (BVerfGE 85,264, 294). Under the revision that was passed by the Bundestag in response to this decision in 1994, a party receives DM 1 for every vote it captures in a federal, state, or European Union election. Each party then receives an additional DM 0.30 for every vote up to the first five million votes captured. Naturally, this "bonus payment" amounts, in practice, to little other than the base-amount that was declared unconstitutional by the court, as several prominent constitutional lawyers have pointed out (Arnim 1996, 107; Rudzio 1994).

These examples suggest that when legislative majorities choose not to comply with a decision, they may do so implicitly, and not in an open, explicit fashion. As a result, the second condition takes center stage. The effectiveness of the electoral connection in enforcing court decisions will depend on the ease with which voters can monitor legislative responses to judicial decisions. Obviously a number of factors, including the institutional structure of the political system, public awareness of a decision, and the complexity of the issue at hand influence how easy such monitoring will be. The fourth and fifth sections consider these factors in greater detail. For current purposes, I will simply say that the more *transparent* a political environment is, the easier it is for citizens to monitor legislative responses to judicial decisions.

In issuing a decision, justices are presumably hoping to have an impact on—or at least to set the framework for—policy. Therefore, it is plausible to assume that they are sensitive to the possibility of legislative evasion.[4] Consequently, they may attempt to anticipate how legislative majorities will respond to the court's ruling and these anticipations can shape judicial behavior. At the same time, legislative behavior may be conditioned by anticipation of constitutional review. The next section presents a simple game-theoretic model of this interaction.

A Bayesian Model of Constitutional Review

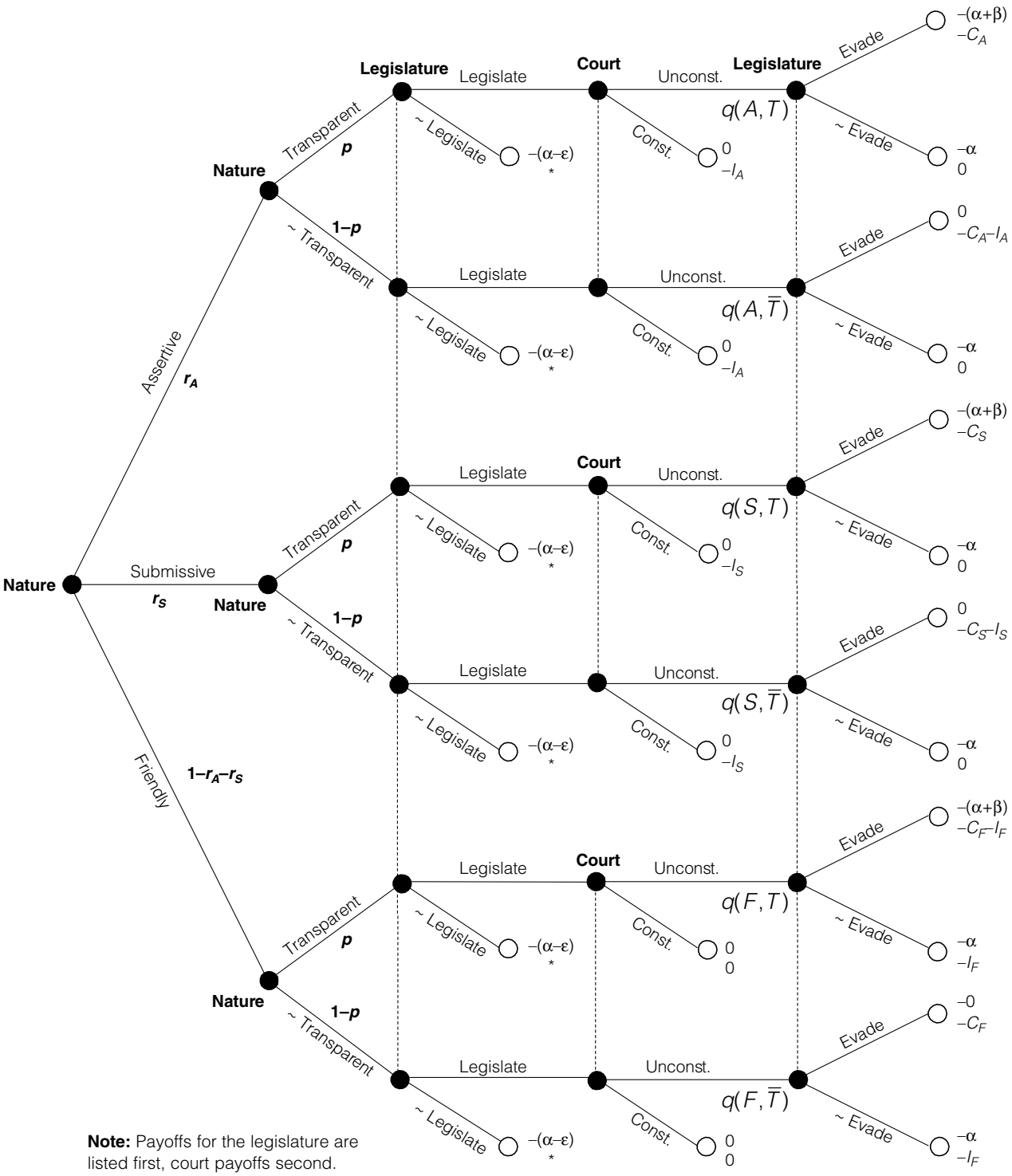
To date, judicial behavior has largely been analyzed using games of complete information (see Ferejohn and Weingast 1992; Clinton 1994; Epstein and Knight 1996; Barzilai and Sened 1997). More recently, games of incomplete information have also been considered (Rogers 2001). To capture the impact of transparency, I also employ a game of incomplete and imperfect information, depicted by the game tree in Figure 1. I refer to this game as the "constitutional review game" (CRG). There are three players: Nature, a constitutional court, and a legislature. At the outset of the game, nature makes two (independent) moves. First, it chooses a court type (more on these types below). Next, it picks a "policy environment" (more on these environments below). After nature has moved, the legislature decides whether to pass a bill (L) or not to pass a bill ($\overline{L}$). It must make this choice without certain knowledge of the court's type or the policy environment in which it is acting. If the legislature chooses not to pass a bill, the game ends. If it chooses to legislate, the court reviews the constitutionality of the bill. The court can declare the bill unconstitutional ($\overline{c}$) or uphold it as constitutional (c). The court must make its decision knowing its own type, but being uncertain about the policy environment. If the court declares the bill constitutional, the game ends. If it finds a constitutional violation, the legislature once again makes a choice. It can attempt to evade the decision (E) or it can comply with the court's ruling ($\overline{E}$).

The two parameters of this game that are incomplete information are the court's type and the nature of the policy environment. A "transparent" environment (T) is one in which an evasion attempt by the legislature will become public knowledge and will result in a public backlash against the legislature. A "nontransparent" environment ($\overline{T}$) is an environment in which the legislature's evasive maneuver remains undetected and is therefore not punished by a public backlash. Since legislature and court generally cannot tell with certainty whether an attempt at evasion will be successful *ex ante*, the nature of the policy environment is not known to either player. The (common) prior belief that the environment is transparent is captured by the parameter $p \in (0,1)$.

The second kind of incomplete information concerns the court's preferences. There are three court types: a *friendly* court, an *assertive* court, and a *submissive* court. Thus, the type space is given by $T_C = \{Friendly, Assertive, Submissive\} \equiv \{F, A, S\}$. The court's payoffs are a function of two components. First, the court has a preference over the issue under review, captured by an issue payoff $I_i > 0$ (where $i \in \{F, A, S\}$). The court must pay this cost I_i whenever the outcome of the game with respect to the statute under review (whether the statute is implemented or not) does not comport with its preference for or against the bill. These issue

[4] The fact that some constitutional courts explicitly provide deadlines for legislative revision of unconstitutional statutes (Kommers 1997, 53) provides at least indirect evidence that justices are concerned about evasion in the form of inaction.

FIGURE 1 The Constitutional Review Game



Note: Payoffs for the legislature are listed first, court payoffs second.
For the court: C_F, $l_F>0$; $C_S>l_S>0$; $l_A>C_A>0$.
For the legislature: $\alpha>\varepsilon>0$; $\beta>0$.

preferences can be interpreted as motivated by pure policy preferences or by legal and constitutional aspects of the statute. In addition to caring about the issue under review, the court also cares about its institutional status. Specifically, an attempt at evasion, whether successful or not, is costly to the court because its position in the political system is challenged. Thus, the court pays a cost of $C_i > 0$ (where $i \in \{F, A, S\}$) if the legislature attempts to

evade the court.[5] The three court types are differentiated by the interplay of these payoff parameters.

A "friendly" court shares the coalition's preferences for the bill or, in a more general interpretation, has no constitutional objections to the statute. For this type of court, upholding the law is thus more preferred than any outcome that results if the court tries to annul the statute. These considerations are captured in the payoffs listed in Figure 1. The court's highest payoff (0) occurs when it upholds the bill as constitutional. If the court annuls the statute and the legislature complies with the decision, the court's payoff reduces to $-I_F$, reflecting the fact that the court prefers to see the policy implemented. If the legislature evades the court's decision, the court must pay the institutional cost C_F. In addition, it must pay the issue cost $-I_F$ if the legislature's attempt at evasion is unsuccessful and the policy is scrapped in response to a public backlash.[6] It is immediate that given these payoffs, the friendly court's dominant strategy is to uphold the statute at the review stage.

The second type of court is the "submissive" court. Unlike the friendly court, the submissive court is hostile to the legislature's bill. As a result, its most preferred outcome is to declare the statute unconstitutional and to have the legislature comply with that ruling (payoff 0). The worst outcome is to declare the bill unconstitutional and to have that ruling successfully evaded by the legislature. This outcome is worst because the court fails to achieve its purpose of scrapping the bill (captured by $-I_S$) and its institutional standing is challenged successfully (captured by $-C_S$). If the legislature unsuccessfully evades an annulment, the court's payoff is $-C_S$, reflecting the fact that it must pay the price of an institutional struggle with the legislature, but prevails on the issue. If the court simply upholds the bill at the review stage it must pay the issue cost of not eliminating the policy (captured by $-I_S$), but it forecloses any possibility of an evasion attempt. Finally, for the submissive court, it is assumed that $C_S > I_S$. In words, the submissive court prefers to uphold a bill (payoff of $-I_S$) rather than to invite a confrontation with the legislature, even if that confrontation would eventually result in the scrapping of the bill (payoff of $-C_S$). The submissive court is particularly concerned about preventing challenges to its institutional integrity.

An "assertive" court differs from a submissive court in only one, albeit crucial, aspect. Like the submissive court, it is opposed to the legislature's bill. But the cost born by the assertive court for an evasion attempt (C_A) does not weigh as heavily. Specifically, $I_A > C_A$. In other words, the assertive court is willing to engage in a public confrontation with the legislature provided that the court prevails on the issue under review. Putting it slightly differently, this type of court is less concerned about challenges to its institutional status. It is worth noting explicitly that these assumptions regarding judicial preferences are very modest and general. No inherent conflict between court and legislature is assumed. If the court prefers to annul the bill, it is immaterial whether it prefers to do so for jurisprudential reasons or because of its own policy preferences. The only assumption asserts that justices who overturn a statute prefer not to be evaded by the legislature.

The (common) prior beliefs over the court's types are given by $P(A) = r_A$, $P(S) = r_S$, and $P(F) = 1 - r_A - r_S$, where $r_A \in (0,1)$, $r_S \in (0,1)$ and $r_A + r_S < 1$. The court's action set is given by:

$$A_C = \begin{cases} \{c, \bar{c}\} & \text{if } A_L^1 = L \\ \varnothing & \text{otherwise} \end{cases}$$

The court's strategy is a mapping from its type space into its action set. Thus, $S_C: T_C \rightarrow A_C$. Given that upholding the bill dominates an annulment for the friendly court, there are four pure strategies to consider:

$$S_C = \{(c\,|F;\, c\,|A;\, c\,|S);\, (c\,|F;\, c\,|A;\, \bar{c}\,|S);\; (c\,|F;\, \bar{c}\,|A;\, c|S);\, (c\,|F;\, \bar{c}\,|A;\, \bar{c}\,|S)\}$$

The initial assumption regarding the legislature's preferences posits that the legislature prefers to have its bill implemented. Therefore, its two most preferred outcomes are to have the bill upheld by the court or to evade the court successfully in response to an annulment.[7] Compliance with a ruling (which entails giving up its policy) imposes a cost of $\alpha > 0$ on the legislature. In a sense, one can thus think of *a* as the importance of the

[5] The assumption that the cost C_i is symmetric across successful and unsuccessful evasion attempts has no substantive implications. The model can easily be reworked with asymmetric cost parameters. It is also worth noting that, under certain circumstances, a court may actually *invite* legislative challenges to its rulings (see Hausegger and Baum 1999).

[6] It is not necessary to specify the court's payoff if the coalition chooses not to pass a bill. In the interest of generality, no assumptions are therefore imposed.

[7] Another possible modeling choice would be to assume that the government prefers having its policy upheld to a successful evasion, i.e., that the government bears some cost for evading the court. The model could be reworked with this assumption and generate essentially the same conclusions.

"purpose" to be addressed by the statute. If the legislature attempts to evade a decision and that attempt fails, it must give up its policy (captured by *a*) and, in addition, bear the costs of a public backlash (captured by $\beta > 0$). The payoff parameter β can therefore be interpreted as a measure of the severity of a public backlash for noncompliance.[8] The more severe a public backlash for disregarding the court, the more costly an unsuccessful attempt at evasion for the legislature. As the game tree makes clear, evasion is successful if the policy environment is nontransparent and fails otherwise. Finally, if the legislative majority decides to forego passing a bill, it must bear the cost α (since it fails to achieve the purpose of the bill), but it does not have to expend any legislative resources (captured by the fact that it "saves" ε). If the legislature can anticipate that it will comply with an unfavorable ruling, it would therefore prefer not to pass the bill in the first place. Thus, for the coalition the payoffs satisfy $\alpha > \varepsilon > 0$ and $\beta > 0$.[9]

The legislature must (potentially) make a choice at two stages in the game. Initially, it must choose whether to pass a bill. Should it pass a bill, and the bill is challenged, it must decide whether to evade the court or to comply. The legislature thus has two action sets, given by:

$$A_L^1 = \{L, \overline{L}\}$$
$$A_L^2 = \begin{cases} \{E, \overline{E}\} & \text{if } A_L^1 = L \text{ and } A_C = \overline{c} \\ \varnothing & \text{otherwise} \end{cases}$$

Given these two action sets, the legislature has four pure strategies available:

$$S_L = A_L^1 \times A_L^2 = \{(L; E); (L; \overline{E}); (\overline{L}; E); (\overline{L}; \overline{E})\}$$

The appropriate solution concept for this game is Perfect Bayesian Equilibrium (PBE). Loosely speaking, PBE requires that the players' strategies be sequentially rational given their beliefs at each information set, and that these beliefs be determined (where possible) by Bayes' rule and the players' strategies at information sets on and off the equilibrium path of play (see Gibbons 1992, 177 and following). In short, in a PBE each player's strategy *and* beliefs must constitute an optimal response to the strategy of the other player.

[8]Naturally, it is not necessary to assume that the legislature will be punished for noncompliance. It is also possible that in some circumstances, a legislature can actually derive positive benefits from opposing a highly unpopular court decision. Such a situation would correspond to a case in which $\beta < 0$. I will sketch how such a situation affects the results below.

[9]For simplification purposes, it is assumed that $\varepsilon \leq \alpha(1 - r_A)$. This assumption rules out an implausible knife-edge equilibrium and eases statement of other equilibrium conditions. Imposing this assumption does not change the results in any substantive way. The appendix specifies the additional equilibrium that is possible if the assumption is dropped.

Results and Interpretation

Before stating the equilibira, several definitions are useful. The first definition concerns the beliefs of the legislature about its political environment when it must decide how to respond to a judicial ruling.

Definition: Let the legislature's updated beliefs at the last information set of the game be denoted by $q(x, y)$, where $(x, y) \in \{F, A, S\} \times \{T, \overline{T}\}$.

Thus, $q(A, \overline{T})$ denotes the legislature's subjective belief at the last stage of the game that it is facing an assertive court and that the political environment in which it is acting is not transparent.

Definition: Let $p^* \equiv \dfrac{\alpha}{\alpha + \beta}$ and $\tilde{p} \equiv \dfrac{C_A}{I_A}$.

The significance of these thresholds will become apparent shortly. I will refer to the first threshold as the "legislative transparency threshold" (note that it depends only on the legislature's preference parameters) and to the second as the "judicial transparency threshold" (it depends only on the assertive court's preference parameters). There are four pure-strategy PBE in the CRG, summarized in the following propositions. A substantive interpretation of the equilibria and a discussion of their significance follows. The proof is reserved to the appendix.

Proposition 1 ("Judicial Supremacy"): For $p \geq p^*$ and $r_A + r_S < \dfrac{\alpha - \varepsilon}{\alpha}$, the following strategy profile constitutes a PBE of the CRG game:

Legislature: $S_L = \{L; \overline{E}\}$

Court: $S_C = \{c \,|F; \overline{c}\,|A; \overline{c}|S\}$

The legislature's beliefs at the last information set are given by $q(A, T) = \dfrac{r_A p}{r_A + r_S}$, $q(A, \overline{T}) = \dfrac{r_A(1-p)}{r_A + r_S}$, $q(S, T) = \dfrac{r_S p}{r_A + r_S}$, $q(S, \overline{T}) = \dfrac{r_S(1-p)}{r_A + r_S}$, $q(F, T) = 0$, and $q(F, \overline{T}) = 0$.

Proposition 2 ("Autolimitation"): For $p \geq p^*$ and $r_A + r_S \geq \dfrac{\alpha - \varepsilon}{\alpha}$, the following strategy profile constitutes a PBE of the CRG game:

Legislature: $S_L = \{\overline{L}; \overline{E}\}$

Court: $S_C = \{c \,|F; \bar{c}\, |A; \bar{c}\, |S\}$

The legislature's beliefs at the last information set are given by $q(A,T) = \frac{r_A p}{r_A + r_S}$, $q(A,\overline{T}) = \frac{r_A(1-p)}{r_A + r_S}$, $q(S,T) = \frac{r_S p}{r_A + r_S}$, $q(S,\overline{T}) = \frac{r_S(1-p)}{r_A + r_S}$, $q(F,T) = 0$, and $q(F,\overline{T}) = 0$.

Proposition 3 ("Legislative Supremacy"): For $p < Min[p^*; \tilde{p}]$, the following strategy profile constitutes a PBE of the CRG game:

Legislature: $S_L = \{L; E\}$

Court: $S_C = \{c \,|F; c\, |A; c\, |S\}$

The legislature's beliefs at the last information set are given by
$q(A,T) = r_A p$, $q(A,\overline{T}) = r_A(1-p)$, $q(S,T) = r_S p$,
$q(S,\overline{T}) = r_S(1-p)$, $q(F,T) = (1 - r_A - r_S)p$, and
$q(F,\overline{T}) = (1 - r_A - r_S)(1-p)$.

Proposition 4 ("Jousting"): For $\tilde{p} \le p < p^*$, the following strategy profile constitutes a PBE of the CRG game:
Legislature: $S_L = \{L; E\}$

Court: $S_C = \{c \,|F; \bar{c}\, |A; c\, |S\}$

The legislature's beliefs at the last information set are given by $q(A,T) = p$, $q(A,\overline{T}) = (1-p)$, and $q(S,T) = q(S,\overline{T}) = q(F,T) = q(F,\overline{T}) = 0$.

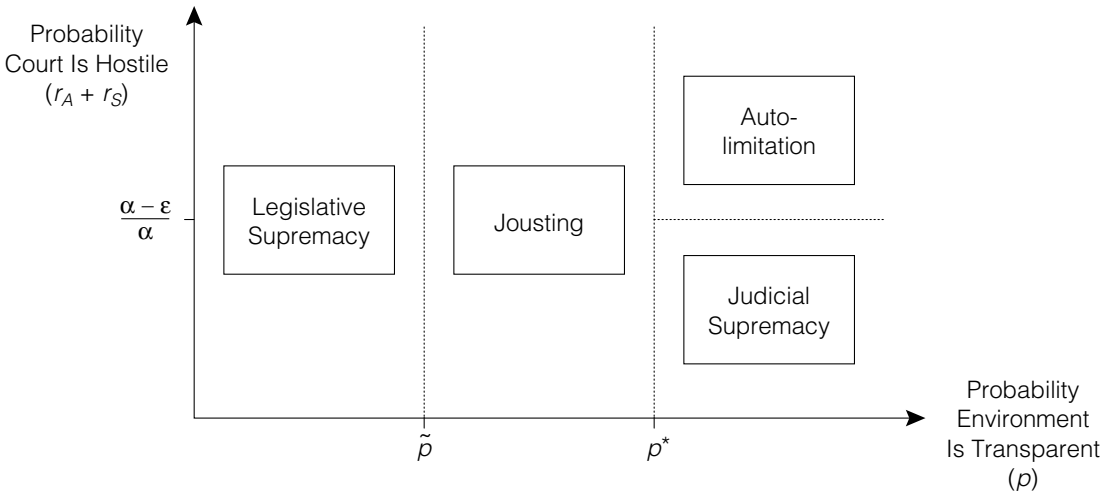
Proposition 1 characterizes a "judicial supremacy" equilibrium. Along the path of play, the legislature passes a bill, which is annulled by the assertive court and the submissive court, and the legislature complies with that decision. The sense in which this equilibrium represents a judicial supremacy regime is immediate: the two hostile courts are able successfully to annul the statute. Two conditions must hold for this equilibrium to obtain. First, the legislative transparency threshold must be met. If this is the case, the environment is so likely to be transparent that the legislature will not choose to evade the decision. As a result, the hostile courts, expecting compliance with their decision, declare the statute unconstitutional. The second requirement states that the probability of encountering a hostile court must be sufficiently low. If this is the case, the legislature will pass a bill despite the fact that it will respect an annulment because it is sufficiently optimistic that the court will uphold the statute.

Proposition 2 characterizes an "autolimitation" equilibrium. This equilibrium results if the legislative transparency threshold is met, but the probability of encountering a hostile court rises above the threshold imposed in Proposition 1. Once again, the legislature will comply with the court's ruling. But because the probability of meeting a hostile court is high, the legislature chooses not to pass the statute instead of exposing itself to the possibility of an annulment. In other words, the legislature censors its own behavior preemptively in anticipation of judicial review. This equilibrium captures an important phenomenon that has recently received attention by judicial scholars. Stone has argued that French legislatures routinely limit their legislative proposals in order to guard against a negative decision of the Constitutional Council (Stone 1992). Other studies suggest that such "autolimitation" may be a more general phenomenon in Europe (see Stone Sweet 1998, 2000; Vanberg 1998). Proposition 2 highlights the fact that autolimitation is conditional on the threat of a public backlash for noncompliance and the legislature's expectation that the court will be hostile to the statute. Autolimitation characterizes only one kind of judicial-executive "regime" that occurs in a specific political environment.

Proposition 3 characterizes a "legislative supremacy" equilibrium. Along the path of play, the legislature passes a statute, which is upheld by all types of court. This equilibrium characterizes a situation of legislative supremacy in the sense that the legislature is able to implement its policy without regard for the court's preferences. This equilibrium obtains if the probability that the policy environment is transparent falls below the legislative and the judicial transparency thresholds. Under such conditions, the legislature is likely to succeed in evading a negative court decision. As a result, it chooses to pass a bill and to evade any annulment. Faced with evasion and little prospect of winning in a confrontation with the legislature, the assertive court and the submissive court choose to uphold the statute.

Finally, proposition 4 characterizes an interesting intermediate case. In this "jousting" equilibrium, the legislature evades any annulment. Faced with the prospect of evasion, the submissive court upholds the statute. But the assertive court, despite the expectation that the legislature will evade its decision, annuls the statute, hoping that the legislature will be forced to rescind the policy in a public confrontation. This equilibrium can only obtain if the parameter p falls in between the legislative and the judicial transparency thresholds. The likelihood that the environment is transparent must be low enough to induce the legislature to risk an evasion attempt but high enough for the assertive court to risk annulling the stat-

FIGURE 2 Equilibrium Predictions



ute. Observationally in this equilibrium, the court may rule in favor of a statute or annul it. Sometimes, a public confrontation between court and legislature may develop as legislative evasion of a decision is discovered. At other times, the legislature will successfully ignore a decision by the court.

Although there are four pure-strategy PBE of this game, the model makes a unique equilibrium prediction depending on the parameters p, r_A, and r_S. As a result, no multiple-equilibrium problem exists. Figure 2 illustrates this. There are two cases to consider. Either $p^* > \tilde{p}$ or $\tilde{p} \geq p^*$. The former case is depicted in Figure 2. If p meets the legislative transparency threshold (p^*) and the probability of meeting a hostile court is sufficiently high, the model predicts the autolimitation equilibrium. If the legislative transparency threshold is met but the probability of meeting a hostile court is low, the judicial supremacy equilibrium results. When p is in between the legislative transparency threshold and the judicial transparency threshold ($\tilde{p}$), the jousting equilibrium prevails. If the judicial transparency threshold is not met, legislative supremacy is expected.[10]

The model has several important implications for the interactions between high courts and legislatures. It will be useful to structure the discussion of these implications around several observations.

Observation 1: The bargaining powers of a constitutional court and a legislature relative to one another depend on the transparency of the environment in which they act.

In an environment in which a legislative evasion attempt is likely to become public (exposing the legislature to censure), the court is in a strong position. In particular, in the autolimitation and the judicial supremacy equilibria, both hostile court types can successfully prevent implementation of the statute despite the legislature's preferences. On the other hand, when an evasion attempt is unlikely to be discovered, the legislature is in a strong position. In the legislative supremacy equilibrium, the court realizes that it has few prospects of successfully annulling a statute since its decisions will be ignored. The assertive and the submissive court censor their own behavior by upholding the statute. In an "intermediate" environment, an assertive court and a legislature may spar over policy as the legislature passes a bill that is annulled by the assertive court.

A second set of conclusions concerns judicial deference and power more specifically. An intuitive definition of deference in the current context is the probability p—the prior belief that the environment is transparent—necessary to induce a court to overturn a statute. The lower the critical value of p that will induce an annulment, the more aggressive the court.

Observation 2: The court becomes less deferential and more powerful as the support it can expect from the public in a confrontation with the legislature increases.

Formally, as β increases, the legislative transparency threshold decreases, making it more likely that the assertive and the submissive court will annul the statute because they expect compliance (see Figure 2).[11] That is, the

[10]If $\tilde{p} \geq p^*$, the condition for the jousting equilibrium cannot be met and the equilibrium disappears.

[11]Formally, $\frac{\partial p^*}{\partial \beta} = \frac{-\alpha}{(\alpha+\beta)^2} < 0$

autolimitation and judicial supremacy equilibria are predicted even in less transparent environments. Putting it differently, the court becomes less deferential as its public support grows. This makes intuitive sense since greater public opposition to an evasion attempt strengthens the court's bargaining position vis-à-vis the legislature.

So far, I have assumed that the court enjoys public support. As a brief aside, it is also worth considering the implications of nonexistent public support for the court. Sometimes, a court may find itself in a position in which legislative failure to comply with a judicial decision, even if it becomes public, does not result in a backlash against the legislature and may even be supported by citizens. The reaction of southern state and local governments in the United States to the *Brown* decision and the Bavarian reaction to the German court's *Crucifix* decision provide examples.[12] In terms of the model presented here, such a situation corresponds to a case in which $\beta < 0$. As one would expect intuitively, such a situation considerably weakens the court. Reworking the model with this assumption reveals that in all but the most extraordinary circumstances, only the legislative supremacy equilibrium and the jousting equilibrium survive, demonstrating even further the degree to which the power of constitutional courts is shaped by the political environment.

Observation 3: As the political importance of the issue under review to the legislature increases, courts that are hostile to the statute become more deferential and less powerful in using their powers of review.

Formally, as α increases, the legislative transparency threshold increases; that is, the conditions that must be met for the autolimitation and judicial supremacy equilibria become more stringent.[13] Substantively, this means that as the political stakes of the issue under review increase for the legislature, a submissive court is more likely to uphold a statute and an assertive court is more likely to be evaded. In other words, the court's power and its use of that power are sensitive to the intensity of legislative preferences.

All three observations call attention to the fact that legal and constitutional considerations are not the only variables determining how a constitutional court makes use of its powers. The *political* environment in which a court must act matters as well. By demonstrating the impact of the political environment on legislative-judicial relations, the model integrates and lends insight into an important recent debate in the judicial politics literature: To what degree are courts constrained by strategic considerations in issuing their decisions? While some scholars have insisted that such constraints exist (Barzilai and Sened 1997; Carrubba 2000; Ferejohn and Weingast 1992), others have argued that courts are largely unconstrained by strategic considerations (e.g., Segal 1997; Stone Sweet and Brunnell 1998). The model suggests that the answer may be "both." Certain environments are so favorable for the court that it need not worry about noncompliance (Propositions 1 and 2). This will be the case if the court enjoys considerable public backing (β is large), and the threat of public censure is credible because citizens can easily monitor legislative reactions to a court decision (p is large). When these conditions are not met, strategic concerns about noncompliance may be central and lead the court to defer to the legislature on legislation it would prefer to overturn (Propositions 3 and 4).

All three observations raise the centrality of transparency. It is therefore worthwhile to "unpack" the substantive meaning of the parameter p explicitly. This parameter acts as shorthand for factors that determine how easy it is for citizens to monitor legislative responses to judicial decisions. Transparency in this sense is affected by several conditions, including the institutional structure of the political environment, the exogenous context of a decision, and specific features of the issue under review. The institutional structure of the political environment matters in the sense that different institutional set-ups may create more or less favorable conditions for monitoring legislative responses. For example, parliamentary systems are likely to be less favorable for transparency than presidential systems, because presidentialism requires two independent branches to work together, each of which may have an interest in calling attention to evasion attempts. Similarly, institutional arrangements that strengthen legislative majorities by denying opposition parties access to resources that can be employed to monitor legislative responses (e.g., committee chairs, investigative committees) or that allow majorities to curtail open parliamentary debate make it easier to avoid public scrutiny. The institutional structure of the judiciary matters as well. Open access to the constitutional court is likely to be more favorable for transparency than more restricted access since greater access implies that evasive maneuvers can be challenged more easily.[14]

[12]In 1995, the German court declared a Bavarian statute requiring the display of a crucifix in elementary schoolrooms unconstitutional. The decision was met by large-scale public protests, and the Bavarian government for months openly refused to implement the decision. Finally, a new statute was passed that (for practical purposes) keeps the crucifix in schoolrooms (see Kommers 1997, 482 and following).

[13]Formally, $\frac{\partial p^*}{\partial \alpha} = \frac{\beta}{(\alpha+\beta)^2} > 0$

[14]In addition to affecting transparency, the institutional environment may of course also be important in creating internal veto points that can block attempts at evasion without a recourse to a public backlash (see Vanberg 2000).

The exogenous context of a specific decision also affects transparency. Some courts are highly visible institutions in their political systems (e.g., the US Supreme Court or the German Federal Constitutional Court). Decisions are disseminated through the mass media and generally receive some public attention. As a result, resisting such courts is more difficult than evading the ruling of a court that lingers in obscurity. Beyond this general level of attention, the degree of actual or potential public attention in a specific case matters. Highly salient decisions with greater public awareness create a more transparent environment. In this respect, the structure of interest groups may also constitute a crucial dimension of the political context. Organized groups that have a stake in a particular court decision may act as "watchdogs" that increase the transparency of the political environment. Such groups can provide financing and legal expertise in mounting renewed challenges. They can generally raise publicity and call attention to evasive maneuvers. As Epp has argued with respect to the rise of judicial enforcement of rights provisions, interest groups can provide "the judiciary with active partners in the fight against opponents of implementation" (1998, 22).

Finally, aspects of the specific issue under review also affect transparency. The more complex an issue, the harder it will be to monitor a legislative response. For example, it is easier to determine whether a legislature has failed to comply with a ruling that declares the death penalty unconstitutional than a ruling that involves highly technical tax provisions. In short, complexity tends to decrease transparency. Taken together, all these factors suggest that the transparency of the political environment in which a court must act is affected by a large number of conditions. Variation in these conditions not only implies a basis for cross-national and cross-temporal variation in the power of constitutional courts, but also suggests that judicial power will vary for the same court at the same time across different issue areas.

An Application: Constitutional Politics in Germany

In this section, I provide some evidence for one of the main implications of the analysis. Observationally, as Figure 2 indicates, a constitutional court should be more likely to annul a statute as transparency increases. For $p < Min[p^*; \tilde{p}]$, all three types of court uphold any statute they review. For $\tilde{p} \leq p < p^*$, the assertive court will overturn. If p meets the legislative threshold, the submissive and the assertive court will annul the statute. This leads to the following hypothesis:

Hypothesis: *A constitutional court is more likely to annul a statute the greater the likelihood that the policy environment in which it is acting is transparent.*

To test this hypothesis, I coded all decisions issued by the German Federal Constitutional Court (FCC) on the constitutionality of a federal statute between January 1983 and May 1995 (N=253). The dependent variable for the analysis is the decision of the court, coded 1 if the court finds a constitutional violation (either in whole or in part) and coded 0 if the court upholds the statute.

The main independent variables are four indicators of the likelihood that the policy environment is transparent. As indicated above, the level of public attention in a case affects transparency. The first measure indicates whether oral arguments were held in a case. The German court holds oral arguments rarely. Out of the 253 decisions in the data set, oral arguments were held in only thirty-six. Cases involving oral arguments are usually cases of great significance, and the level of public interest is considerably higher than in ordinary cases. The proceedings are videotaped and excerpts are generally shown during the nationwide evening-newscasts. As a consequence, oral arguments can serve as a proxy for the level of public attention a case receives. ORAL is coded 1 if oral arguments were held and 0 otherwise.

As argued at the end of the previous section, organized groups that take an interest in a decision raise the likelihood that the environment is transparent because such groups can act as "watchdogs" that call attention to evasion attempts. The briefs filed in a case constitute one convenient proxy that indicates such outside interest (Caldeira and Wright 1988, 1111). BRIEFS codes the absolute number of briefs filed by outside groups or institutions, including briefs filed by state governments, lower courts, or interest groups. To get at the presence of potential "watchdogs" more directly, a second variable (CONFLICT) codes whether at least one brief alleges that the statute under review is unconstitutional. If an outside institution or group contends that the statute is unconstitutional, the court has a natural "ally" who may call attention to evasion attempts. CONFLICT is coded 1 if such an allegation is made and 0 otherwise.

Finally, as suggested above, the likelihood that the environment is transparent depends on the issue under review. Some policy areas involve complex, technical issues while others are relatively straightforward and noncomplex. Presumably, it will be easier for a government to evade a decision in a complex policy environment because it is more difficult to monitor a governmental response. To capture this complexity, the primary policy area involved in each case was classified as being "complex" or "noncomplex." The following policy areas were

classified as complex: Economic regulation, state-mandated social insurance (unemployment, health, and retirement insurance), civil servant compensation, taxation, federal budget issues, and party finance. These policy areas are complex in several ways. First, they generally involve questions that concern several policy areas at once. For example, a certain purpose (say, raising the standard of living for low-income families) could be accomplished through changes in economic regulation or through a change in social insurance provisions. They are also complex in that they tend to involve technical regulatory questions. Finally, they all tend to raise questions of revenue and resource allocation. The following policy areas were coded as noncomplex: Institutional disputes, family law, judicial process, individual rights, asylum rights, and military conscription. All of these policy areas are less complex in that they typically involve questions that do not have direct or immediate connections to other policy areas. They also tend not to involve revenue questions directly. Finally, they often involve procedural questions, which are easier to monitor. The variable COMPLEX is coded 1 if a decision involves a complex policy area and 0 otherwise. In addition to these substantive variables, the models contain two control variables that capture the federal government's position on a case (since Germany is a parliamentary system, the government's position is, for most purposes, equivalent to the position of the legislative majority). GOVCON is coded 1 if the federal government has filed a brief contending that the challenged statute is constitutional. GOVUNCON is coded 1 if the government has filed a brief alleging that the statute is unconstitutional. If both GOVUNCON and GOVCON are 0, the government has not filed a brief.

I use a logit model to analyze the effects of these variables on the court's decision (see Maddala 1992, 327 and following). A positive coefficient for an independent variable implies that increasing the value of the independent variable raises the probability of an unconstitutionality ruling (vice versa for a negative coefficient). The hypothesis outlined above provides some expectations about the signs of the estimated coefficients. The coefficient of ORAL should be positive since higher public attention raises the likelihood that the environment is transparent (that is, these cases should be more likely to result in an annulment). Likewise, the coefficients of BRIEFS and CONFLICT should be positive. The coefficient of COMPLEX should be negative: the court is hypothesized to be less aggressive in complex policy areas. GOVCON should have a negative coefficient while GOVUNCON is expected to have a positive sign.

Table 1 presents the results, using robust standard errors and one-tailed tests of significance. The first column displays the full model. Since BRIEFS and CONFLICT are moderately correlated ($\rho = .55$), columns 2 and 3 present reduced models, leaving each of these variables out in turn. The results are largely supportive of the hypothesis and robust over the alternative specifications.[15] Cases that are salient in the sense that oral arguments are held result in a higher likelihood of annulment than cases that do not involve oral arguments. Moreover, the coefficient is statistically highly significant. Similarly, the coefficients on BRIEFS and CONFLICT are positive and significant. The results also reveal that an allegation of unconstitutionality by the federal government increases the likelihood of an unconstitutionality ruling, and the variable is statistically highly significant. Finally, the expectation that the court will be more deferential in highly complex policy areas is also borne out. The coefficient on COMPLEX is negative and statistically significant.

The only coefficient that does not correspond to expectations is the coefficient of GOVCON. When the federal government files a brief to defend the constitutionality of a statute, the court is more likely to declare the statute unconstitutional. Several hypotheses, which deserve additional research, could explain this finding. One possibility is that a government brief in favor of a statute may have two countervailing tendencies. On the one hand, it indicates that the government has a special interest in a statute. On the other hand, it may also call more public attention to a case, thereby increasing transparency. Another possibility is that the government's decision to file a brief may be endogenous to its expectations about the outcome of the case. Unfortunately, these hypotheses cannot be investigated given the current data. However, to test the possibility that the influence of GOVCON impacts the other variables, I reestimated the model by splitting the data set along the two values of GOVCON. Doing so does not change the substance of the results.

Because it is difficult to judge the substantive significance of logit coefficients by inspection, Figure 3 presents the impact of several variables graphically. Each bar shows the estimated probability that a statute will be annulled for a particular configuration of the variables. The estimates are derived using the full model, holding all other variables at their median. As the figure shows, a noncomplex issue is, on average, more than 50 percent more likely to result in an annulment than a complex issue, holding all else equal. Similarly, oral arguments raise the average likelihood of an annulment by approximately

[15] The FCC is composed of two courts, called "senates," with separate personnel and jurisdiction. Introducing an additional control variable to distinguish between the two senates has no impact on the results.

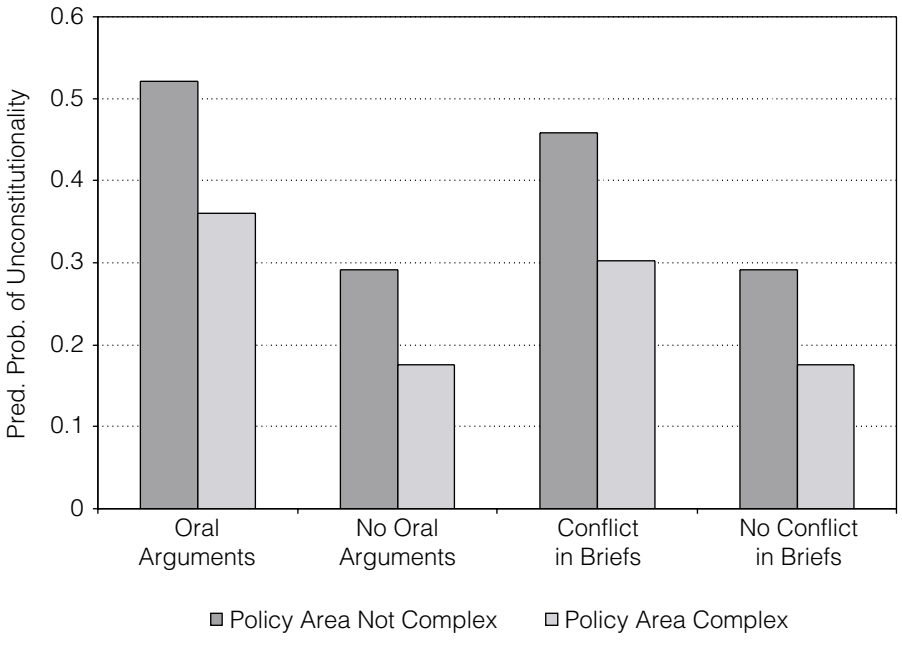
TABLE 1 Results of Logit Regressions

Dependent variable is the decision of the court (0 if constitutional, 1 if unconstitutional)

Variable	Full Model	Reduced Model 1	Reduced Model 2
Oral arguments	0.970 ***	1.000 ***	1.081 ***
	(0.408)	(0.402)	(0.401)
Briefs	0.081 *		0.144 ***
	(0.055)		(0.051)
Allegation of unconstitutionality in a brief	0.715 **	0.979 ***	
	(0.389)	(0.338)	
Federal government contends that the statute is constitutional	0.760 *	0.783 *	0.828 *
	(0.427)	(0.422)	(0.425)
Federal government contends that the statute is unconstitutional	2.456 ***	2.435 ***	2.889 ***
	(0.912)	(0.908)	(0.887)
Complex policy area	–0.662 **	–0.702 **	–0.565 **
	(0.318)	(0.315)	(0.307)
Constant	–1.724 ***	–1.663 ***	–1.724 ***
	(0.381)	(0.369)	(0.388)
Number of Cases	253	253	253
Percent Correct	75.1	75.9	73.9
–2 log Likelihood	268.2	270.1	271.7

Note: ***Significant at p<.01, **significant at p<.05, * significant at p<.10 (One-tailed test). Robust standard errors in parentheses.

FIGURE 3 Predicted Probability of an Unconstitutional Ruling



90 percent. Finally, an allegation of unconstitutionality increases the probability that the court will rule against the statute by more than 60 percent on average. Clearly, the impact of these variables is not trivial. Transparency has a significant effect on the level of judicial deference.

These data provide some evidence that is consistent with the model's predictions. The German court appears to be systematically more likely to annul a statute when the likelihood that it is acting in a transparent environment is higher. An important avenue for future research will be to gather additional data that will make it possible to improve on the measures and to extend the analysis to longer time periods and other courts.

Conclusion

I have presented a simple yet rich model of the interactions between constitutional courts and legislative majorities. Most importantly, the model highlights the importance of the political environment, specifically of transparency, public support, and the interests of legislative majorities, for legislative-judicial relations. In focusing on these aspects of constitutional review, the article has several implications that invite further study.

On one level, the analysis provides a departure point for an account of judicial power across time and place. The extent to which an explanation of the relative power of constitutional courts in terms of the public support they enjoy and the transparency of the environment in which they must act is an open question. But it may be no accident that one of the most powerful new constitutional courts in Eastern Europe has emerged in Hungary, where, as Orkeny and Scheppele have observed,

> The rule of law as a matter of state obligation is supported strongly not just within the institutions of the state but also among the general public. . . . And this support for constitutionalism carries over to support for the Constitutional Court, which presents itself as the guardian of the Constitution against the political branches of government. In repeated surveys conducted since the early days of political transition, the Constitutional Court is the most popular institution of government, with the exception of the president of the republic. (1996, 83)

The degree of public support represents one foundation of judicial power. Transparency constitutes another. To the extent that the electoral connection is crucial in lending force to judicial rulings, the ease with which citizens can monitor legislative reactions to decisions takes on special significance. For any given level of public support or degree of interest in a policy by legislative majorities, the court is able to garner respect for its decision only if the environment is sufficiently transparent. At the close of the fourth section, I outlined some considerations that affect transparency. But a fuller exploration is warranted. What are the institutional conditions for transparency? Do some governing systems reduce transparency and make it easier to evade judicial decisions? An additional consideration that might fruitfully be pursued is to consider the influence that judges can exercise over transparency. The more clearly an opinion enunciates the constitutional principles that sustain the decision and its implications for policy, the easier it is to verify whether a legislative response complies with the ruling. This line of argument may provide one reason for the (sometimes lamented) judicial tendency to write specific policy prescriptions into opinions. Specificity of judicial language may be one response to the problem of transparency.

Finally, the analysis also has implications for the power of supranational courts such as the European Court of Justice. In general, the ECJ must act in an environment that is less transparent than the environment faced by national high courts. Its decisions tend not to receive the same degree of public attention. Moreover, it must often confront complex economic issues. Finally, it does not enjoy the same degree of public support as national high courts. The analysis therefore suggests that the electoral connection may not be very effective in lending force to the decisions of the ECJ, which may lead to difficulties in garnering respect for its rulings. The most recent dispute between the court and Greece over failure to comply with a 1992 ECJ decision ordering Greece to implement EU directives on waste disposal is only an example. More systematic studies also suggest that member governments of the European Union evade ECJ rulings (Gallagher, Laver, and Mair 1995, 104). To the extent that courts situated in such unfavorable conditions do constitute effective institutions, the analysis therefore directs our attention to alternative enforcement mechanisms that can substitute for the electoral connection (e.g., Carrubba 2000).

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Appendix

I restrict attention to pure-strategy perfect Bayesian equilibria. Without loss of generality, I also impose the following "tie-breaking" assumptions on the players' strategies for

knife-edge conditions in which they are indifferent between two actions:

Assumption 1: If indifferent between complying with a court decision and not complying, the legislature will choose to comply.

Assumption 2: If indifferent between legislating and not legislating, the legislature will choose not to pass a bill.

Assumption 3: If indifferent between annulling a statute and upholding it, the court will choose to annul.

The proof proceeds by considering the four possible pure strategies for the court in turn (recall that for the friendly court, upholding the statute dominates an annulment), deriving conditions under which each can be part of a PBE.

Case 1: Suppose the court plays the strategy $(c\,|F;\bar{c}\,|A;\bar{c}\,|S)$. Using Bayes' Rule, the legislature's updated beliefs at the last information set are given by $q(A,T)=\frac{r_A p}{r_A+r_S}$, $q(A,\overline{T})=\frac{r_A(1-p)}{r_A+r_S}$, $q(S,T)=\frac{r_S p}{r_A+r_S}$, $q(S,\overline{T})=\frac{r_S(1-p)}{r_A+r_S}$, and $q(F,T)=0$.

The expected utility of evasion and compliance are given by $EU_L(E)=-p(\alpha+\beta)$ and $EU_L(\overline{E})=-\alpha$. Given Assumption 1, the legislature will therefore evade the ruling if

$$p<\frac{\alpha}{\alpha+\beta}\equiv p^*$$

Subcase 1a: $p<p^*$
Consider a submissive court. The expected utilities of annulling the statute and upholding it are given by $EU_S(\bar{c})=-C_S-(1-p)I_S$ and $EU_S(c)=-I_S$. Given $C_S>I_S$, the expected utility of upholding the statute exceeds the expected utility of an annulment. Thus, the court's strategy cannot be part of a PBE when $p<p^*$.

Subcase 1b: $p\geq p^*$
Consider a submissive court. The expected utilities of annulling the statute and upholding it are given by $EU_S(\bar{c})=0$ and $EU_S(c)=-I_S$. Clearly, the submissive court will annul the statute. Consider the assertive court. The expected utilities of annulling the statute and upholding it are given by $EU_A(\bar{c})=0$ and $EU_A(c)=-I_A$. Thus, the assertive court will annul the statute. The only thing left to consider is the legislature's choice of action at its initial information set. The expected utilities of passing a statute and not passing a statute are given by $EU_L(L)=-(r_A+r_S)\alpha$ and $EU_L(\overline{L})=-(\alpha-\varepsilon)$. Given Assumption 2, this implies that the legislature will legislate if

$$r_A+r_S<\frac{\alpha-\varepsilon}{\alpha}$$

If this threshold is met, the legislature passes a statute. If not, it does not legislate and the game ends.

Thus, for $p\geq p^*$ and $r_A+r_S<\frac{\alpha-\varepsilon}{\alpha}$, the following strategy profile constitutes a PBE: $S_L=\{L;\overline{E}\}$, $S_C=\{c\,|F;\bar{c}\,|A;\bar{c}\,|S\}$. This equilibrium is stated in Proposition 1.

For $p\geq p^*$ and $r_A+r_S\geq\frac{\alpha-\varepsilon}{\alpha}$, the following strategy profile constitutes a PBE: $S_L=\{\overline{L};\overline{E}\}$, $S_C=\{c\,|F;\bar{c}\,|A;\bar{c}\,|S\}$. This equilibrium is stated in Proposition 2.

Case 2: Suppose the court plays the strategy $(c\,|F;\bar{c}\,|A;c\,|S)$. Using Bayes' Rule, the legislature's updated beliefs at the last information set are given by $q(A,T)=p$, $q(A,\overline{T})=(1-p)$, and $q(S,T)=q(S,\overline{T})=q(F,T)=0$.

The expected utility of evasion and compliance are given by $EU_L(E)=-p(\alpha+\beta)$ and $EU_L(\overline{E})=-\alpha$. Given Assumption 1, the legislature will therefore evade the ruling if

$$p<\frac{\alpha}{\alpha+\beta}\equiv p^*$$

Subcase 2a: $p\geq p^*$
Consider a submissive court. The expected utilities of annulling the statute and upholding it are given by $EU_S(\bar{c})=0$ and $EU_S(c)=-I_S$. Clearly, the submissive court will play $\bar{c}$. In consequence, the court's strategy cannot be part of a PBE when $p\geq p^*$.

Subcase 2b: $p<p^*$
Consider a submissive court. The expected utilities of annulling the statute and upholding it are given by $EU_S(\bar{c})=-C_S-(1-p)I_S$ and $EU_S(c)=-I_S$. Given $C_S>I_S$, the expected utility of upholding the statute exceeds the expected utility of an annulment. Now consider the assertive court. The expected utilities of annulling the statute and upholding it are given by $EU_A(\bar{c})=-C_A-(1-p)I_A$ and $EU_A(c)=-I_A$. Given Assumption 3, the assertive court plays $\bar{c}$ if

$$p\geq\frac{C_A}{I_A}\equiv\tilde{p}$$

In order for the proposed strategy to be part of a PBE profile, it must therefore be the case that $\tilde{p}\leq p<p^*$. Suppose this is the case. The only thing left to consider is the legislature's choice of action at its initial information set. The expected utilities of passing a statute and not passing a statute are given by $EU_L(L)=-r_A p(\alpha+\beta)$ and $EU_L(\overline{L})=-(\alpha-\varepsilon)$. Given Assumption 3, the legislature passes the bill if

$$r_A p<\frac{\alpha-\varepsilon}{\alpha+\beta}$$

If this threshold is met, the legislature passes a statute. If not, it does not legislate and the game ends.

Thus, for $\tilde{p} \le p < p^*$ and $r_A p < \frac{\alpha - \varepsilon}{\alpha + \beta}$, the following strategy profile constitutes a PBE: $S_L = \{L; E\}$ and $S_C = \{c \,|\, F; \bar{c} \,|\, A; c \,|\, S\}$. For $\tilde{p} \le p < p^*$ and $r_A p \ge \frac{\alpha - \varepsilon}{\alpha + \beta}$, the following strategy profile constitutes a PBE: $S_L = \{\bar{L}; E\}$ and $S_C = \{c \,|\, F; \bar{c} \,|\, A; c \,|\, S\}$.

Given the constraint that $p < p^*$ and $r_A p \ge \frac{\alpha - \varepsilon}{\alpha + \beta}$, the last equilibrium is not possible if $\frac{\alpha - \varepsilon}{(\alpha + \beta) r_A} \ge \frac{\alpha}{\alpha + \beta}$ $\Leftrightarrow \varepsilon \le \alpha(1 - r_A)$. Imposing the assumption that $\varepsilon \le \alpha(1 - r_A)$ thus rules out this knife-edge equilibrium. The other equilibrium is summarized in Proposition 4.

Case 3: Suppose the court plays the strategy $(c \,|\, F; c \,|\, A; \bar{c} \,|\, S)$. Using Bayes' Rule, the legislature's updated beliefs at the last information set are given by $q(A,T) = q(A,\overline{T}) = q(F,T) = 0$, $q(S,T) = p$, and $q(S,\overline{T}) = (1-p)$.

The expected utility of evasion and compliance are given by $EU_L(E) = -p(\alpha + \beta)$ and $EU_L(\bar{E}) = -\alpha$. Given Assumption 3, the legislature will evade the decision if

$$p < \frac{\alpha}{\alpha + \beta} \equiv p^*$$

Subcase 3a: $p \ge p^*$
Consider an assertive court. The expected utilities of annulling the statute and upholding it are given by $EU_A(\bar{c}) = 0$ and $EU_A(c) = -I_A$. Clearly, the assertive court will play $\bar{c}$. In consequence, the court's strategy cannot be part of a PBE when $p \ge p^*$.

Subcase 3b: $p < p^*$
Consider a submissive court. The expected utilities of annulling the statute and upholding it are given by $EU_S(\bar{c}) = -C_S - (1-p)I_S$ and $EU_S(c) = -I_S$. Given $C_S > I_S$, the expected utility of upholding the statute exceeds the expected utility of an annulment. In consequence, the court's strategy cannot be part of a PBE when $p < p^*$.

Case 4: Suppose the court plays the strategy $(c \,|\, F; c \,|\, A; c \,|\, S)$. Given this strategy, the legislature's last information set is reached with probability zero along the equilibrium path of play. The legislature's beliefs at this information set are therefore simply the priors $q(A,T) = r_A p$, $q(A,\overline{T}) = r_A(1-p)$, $q(S,T) = r_S p$, $q(S,\overline{T}) = r_S(1-p)$, and $q(F,T) = (1 - r_A - r_S)p$.

The expected utility of evasion and compliance are given by $EU_L(E) = -p(\alpha + \beta)$ and $EU_L(\bar{E}) = -\alpha$. Given Assumption 1, the legislature evades the decision if

$$p < \frac{\alpha}{\alpha + \beta} \equiv p^*$$

Subcase 4a: $p \ge p^*$
Consider an assertive court. The expected utilities of annulling the statute and upholding it are given by $EU_A(\bar{c}) = 0$ and $EU_A(c) = -I_A$. Since the expected utility of annulling the statute exceeds the expected utility of upholding it, the court's strategy cannot be part of a PBE when $p \ge p^*$.

Subcase 4b: $p < p^*$
Consider a submissive court. The expected utilities of annulling the statute and upholding it are given by $EU_S(\bar{c}) = -C_S - (1-p)I_S$ and $EU_S(c) = -I_S$. Given $C_S > I_S$, the expected utility of upholding the statute exceeds the expected utility of an annulment, and the submissive court will play c. Now consider the assertive court. The expected utilities of annulling the statute and upholding it are given by $EU_A(\bar{c}) = -C_A - (1-p)I_A$ and $EU_A(c) = -I_A$. Given Assumption 3, the assertive court plays $\bar{c}$ if

$$p \ge \frac{C_A}{I_A} \equiv \tilde{p}$$

In order for the proposed strategy to be part of a PBE profile, it must therefore be the case that $p < Min[p^*; \tilde{p}]$. Suppose this is the case. The only thing left to consider is the legislature's choice at its initial information set. The expected utilities of passing a statute and not passing a statute are given by $EU_L(L) = 0$ and $EU_L(\bar{L}) = -(\alpha - \varepsilon)$. Since the expected utility of passing the statute strictly exceeds the expected utility of not legislating, the government passes the bill. Thus, for $p < Min[p^*; \tilde{p}]$, the following strategy profile constitutes a PBE : $S_L = \{L; E\}$ and $S_C = \{c \,|\, F; c \,|\, A; c \,|\, S\}$.

Proposition 3 summarizes this strategy profile.
QED.

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