

Veto players, veto bargaining and constitutional courts: Theoretical considerations and empirical lessons

Christoph Hönnige University of Hannover Institute for Political Science Schneiderberg 50 30167 Hannover (Germany) c.hoennige@ipw.uni-hannover.de	Thomas Gschwend University of Mannheim Department of Political Science A5, 6, Room C219 68131 Mannheim (Germany) gschwend@uni-mannheim.de
Benjamin G. Engst University of Hannover University of Mannheim - CDSS Institute for Political Science Schneiderberg 50 30167 Hannover (Germany) b.engst@ipw.uni-hannover.de	Caroline E. Wittig University of Mannheim Mannheim Center for European Social Research Center for Doctoral Studies in Social & Behavioral Sciences A5, 6, Room C221 68131 Mannheim (Germany) cwittig@mail.uni-mannheim.de

presented at

First Conference on Empirical Legal Studies in Europe (CELSE)

21-22 June 2016, University of Amsterdam, Netherlands

Veto players, veto bargaining and constitutional courts: Theoretical considerations and empirical lessons

Constitutional courts can veto changes of the status quo initiated by executive and legislature by their right to constitutional review. Therefore, in many macro-comparative concepts they are perceived as important institution, even though little is known about the mechanisms explaining when they actually use their veto. This paper compares the predictions of veto player theory widely used in comparative politics and expectations by veto bargaining models. We empirically test the expectations for Germany with data of constitutional complaints, concrete and abstract review procedures for the years 1974 to 2010. The German case allows testing the robustness of the theory because it maximizes experimental variance within a single case study: the German court constitutes of two independent Senates and there are two distinct legislative procedures with different numbers of veto players Overall we analyze 1664 proceedings of the two Senates of the court. We find that if the court is absorbed, it vetoes legislation less often than in a non-absorption situation.

1. Introduction

When do justices at constitutional courts use their veto power and stop a change of the status quo after the end of the legislative process? In this article we investigate the relationship between a constitutional court and governmental and legislative actors in the legislative process. In any democratic system, may it be presidential, semi-presidential or parliamentary, governments and parliaments are responsible for enacting new policies and the change of existing policies. After new legislation has been passed a law might face institutional obstacles and policy change might be stopped even after executive and legislative decision-making. In some political systems this is possible through direct democratic procedures, like the Italian “abrogative” referendum or the Swiss facultative referendum (Hug & Tsebelis, 2002; Immergut, 1992). In many more countries constitutional courts or supreme courts with judicial review rights might stop legislation by declaring them null and void and thus terminate policy change (Ginsburg, 2003).

In this article we employ the two most common sets of theories to predict vetoes by constitutional courts in the legislative and post-legislative process. On the one hand, veto player theory (König, Tsebelis, & Debus, 2011; Tsebelis, 2002), which is widely used in the field of comparative politics. On the other hand veto bargaining theories (Cameron, 2000), most often used in American politics to predict behavior of President and Congress but rarely applied in comparative politics. Both sets of theories use the spatial location of actors and the decision-making rules to predict their behavior but come to different conclusions under which conditions vetoes should occur. We develop a model under incomplete information, which allows comparing the predictions of both sets of theories directly with each other. Overall we derive two complementary and one discriminating hypotheses. While veto player theory predicts lower veto rates if the court is located in the pareto-set of executive and legislature than if not, the veto bargaining model makes more fine-grained predictions in overall 6 scenarios as it includes also the status quo in the model. The predictions are independent of the type of democratic system: it applies to presidential, parliamentary or semi-presidential systems. The results with regard to the expected behavior and the outcome will be the same.

We conduct an empirical test with data on the German Federal Constitutional Court for the years 1974 to 2010 using 1664 proceedings brought before the court. The German case is an excellent case to test the different predictions because of four sources of intra-case variation: Firstly, the number of actors varies across our set of legislation because of two distinct legislative standard procedures, one where the second chamber is symmetric, one where it is asymmetric. Secondly, because the court consists of the senates which are composed

independent of each other. Thirdly, the caseload is high and a multiplicity of actors can refer cases to the court and fourthly, since the court is considered to be an influential court, the incentives for justices to take motives beyond policy into account might be comparatively limited.

To empirically test the predictions, the paper proceeds in the following steps. In the second section we give an overview about the state of the art, introduce our theoretical model and derive hypotheses. In the third section we justify the case selection and introduce the necessary institutional peculiarities of the German court and system, in the fourth section we present the data that we use for the analyses in section five. We conclude in section six.

The main finding is with regard to veto player theory, that the absorption status of a court explains the veto behavior of the court. If the court is located in the pareto-set of executive and legislature, it vetoes legislation less often. This finding holds across different subsamples of actors. There is also support for veto bargaining theory in the area where expectations overlap with veto player theory.

The study has therefore several general implications. Firstly, it seems important to link the literature on comparative politics with the study of judicial politics. Next to institutional features of constitutional courts, the preferences of the justices should be taken into account like the preferences of any other governmental or legislative actor. Secondly, measuring the status quo is a major empirical problem in many empirical studies. We make a suggestion by assigning the position of the government conducting the preceding change of the particular piece of legislation. Thirdly, veto bargaining models including the status quo have a higher explanatory power than veto player models focusing on pareto-efficient areas only. Fourthly, veto player theory is a helpful tool for analyzing the influence of courts when focusing on the macro-level comparison of many political systems as our empirical test also supports the effect of absorption on judicial vetoes.

2. Veto player and veto bargaining theories

2.1. The setting: Three players under incomplete information

We therefore analyze the legislative decision-making of three players in parliamentary, semi-presidential and presidential systems. The following scenarios include the following actors with their ideal points: executive (e), the legislature (l) and a court (c). Additionally we mark the status quo (sq). The sequence of moves in our one shot-game may vary according to the type of system: in presidential systems the legislature moves first and the president second, in parliamentary and semi-presidential system the executive is typically the first mover and the

legislature the second mover. However, in any case, the court always moves last. Five types of outcomes are possible. Either there is legislative gridlock during the first two stages of the game. Even if the executive and the legislature could agree on change, they might abstain from legislating, as they fear to lose at the court because of judicial gridlock. Executive and legislature can also make a compromise proposal (autolimitation) to appease the court. The court as last mover can accept any proposal or veto it.

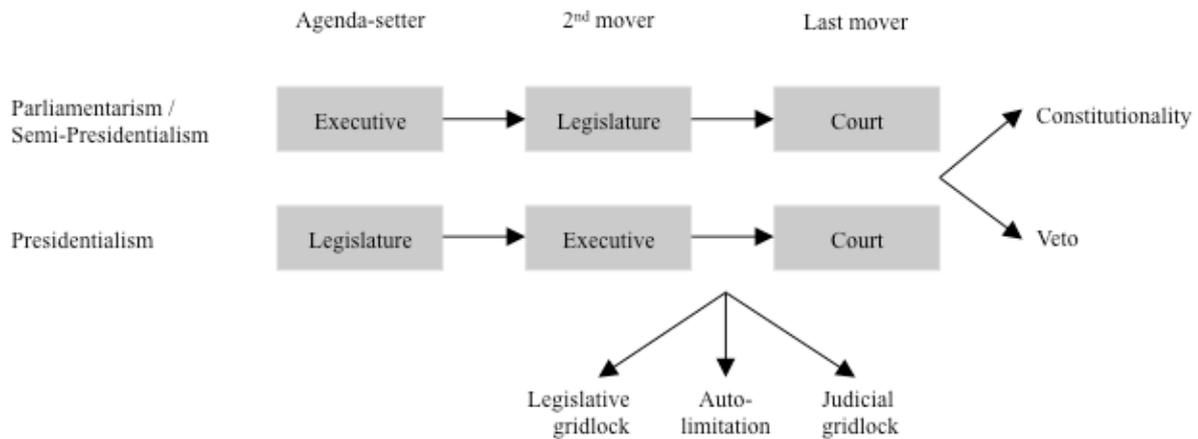


Figure 1: Sequence of moves in three system types

All actors are located on a single dimension. For the sake of simplicity we assume that the executive is located to the left of the legislature and we will then discuss different outcomes for the variation of the position of the court and the status quo.

2.2. Veto player theory and the role of courts: Absorption and non-absorption

In comparative politics spatial models have long been neglected and the main focus lied on the analysis of effects of institutional characteristics (Lijphart, 1999), while the preferences of actors have been widely ignored. They have become increasingly popular with the introduction of the veto player theory by Tsebelis (Tsebelis, 2002) which has the potential of being a paradigm in comparative politics (Diermeier, 2014). Tsebelis goes beyond institutional veto concepts (Crepaz, 1996; Crepaz & Moser, 2004; Ganghof, 2010; Henisz, 2000; Huber, Ragin, & Stephens, 1993; Kaiser, 1997; Schmidt, 1996b) linking institutions and preferences on the macro-level. Its aim is to explain policy stability within and across political systems. The number of veto players and their ideological distance explain the degree of policy stability. Veto players are actors, which can formally stop a change of the status quo in the legislative process. They might be partisan like coalition partners, or institutional, like courts or second

chambers. Change occurs when all veto players have a joint winset which is calculated based on the preferred-to-sets of all players in relation to the status quo. In principle policy stability increases the more veto players are in a system and the larger their ideological distances. This reduces the winset and increases the set of pareto-efficient policies. This set is called the core. The only exception is if an additional veto player is absorbed.

Absorption occurs in games with at least three players making decisions with unanimity, if one actor is located in the pareto-set of the other actors, which make a decision in a preceding stage. If these actors are able to agree on change – and thus have a non-empty winset – the additional actor does (1) not change the size of the winset and (2) does not change the size of the pareto-set. This set of pareto-efficient policies is called a core (K. Krehbiel, 1988; Schofield, 2008; Tsebelis, 2002). In other words, the inclusion of the additional actor in the decision-making process has no impact on the outcome at all with regard to the set of feasible policies.

This idea might be transferred to the relationship of courts, executive and legislative actors. Justices' preferences are seen as the lowest common denominator to explain the decision-making in the US Supreme Court (Epstein & Knight, 1997; Segal & Spaeth, 2002). Recent research on European courts has found that – using dissenting opinions, which are the main source of individual votes in Europe – justices at European courts can be placed along liberal-conservative dimensions like in the United States (Hanretty, 2013, 2014). Additionally, authors have found that the preferences of the justices are also helpful to explain court decisions at European courts (Grendstad, Waltenburg, & Shaffer, 2015; Hönnige, 2009).

Tsebelis argues with regard to courts as veto players that formally courts are veto players because of their right to constitutional review: they are able to stop legislation, however, he argues that justices are entirely selected by other veto players. Thus, they share their preferences and they are typically located centrally in policy space. Therefore, he argues they are absorbed. In our game, the court is therefore absorbed if it is located in-between executive and legislature as it is the last mover in all three types of democratic systems. The following figure illustrates the logic of absorption for a complete information model.

The actors' positions are located in the order $e < c < l < sq$. The core of e and l is marked in dark grey. The core of e , l and c is shown in light grey. As sq is not located inside the core of e and l , sq is not located in their set of pareto-efficient policies and thus change is possible in their winset $W(E, L)$. The actual outcome of the legislative phase might vary dependent on which player is agenda-setter. If e has agenda-setting power it will suggest sq' , if l is agenda setter it will propose its ideal point l . The court is the third mover is located inside the core of e and l .

The core of e and l is identical to the core of e , l and c and the winset $W(E, L)$ is identical to the winset $W(E, L, C)$. Thus, the existence of the court has no effect on the legislative outcome in any case. No matter which institution has agenda setting power, c will accept any proposal in the winset as outcome and not veto. This is the typical absorption scenario as described by Tsebelis (2002).



Figure 2: Example of absorption of the court in a full information model

The expectation derived from this is that absorption and non-absorption of the court by other legislative actors causes judicial vetoes as effect. If the court is absorbed we will not expect vetoes, if it is not absorbed vetoes may occur.

2.3. Veto bargaining theory and the role of courts: legislative gridlock, legislative change, judicial gridlock and autolimitation

The latest major development in the area of spatial models has been the introduction of a class of veto bargaining models (Cameron, 2000). They were mainly used to predict the results of legislative decision-making, especially in the US. These models analyze various steps of legislative decision-making by not looking only into the majorities in different institutions, but also into agenda-setting and veto power of these involved actors. The veto player model by Tsebelis is mainly interested in general outcomes and thus rather resembles social choice models. However, unlike social choice related models veto bargaining models aim to predict behavior instead of a general outcome. They are characterized by not relying on the core mainly but rather on the institutions if the decision-making processes, majority approval and an exogenous status quo (Diermeier, 2014).

In their earliest form they were used as full information games (Romer & Rosenthal, 1978), however, this assumption was relaxed soon for theoretical reasons. If all players have full information about the preferences of other players they will anticipate their moves. This process of anticipation is a well-known mechanism in the study of judicial and legislative

politics (Fortunato, Konig, & Proksch, 2013; Manow & Burkhart, 2007; Stone Sweet, 1999; Vanberg, 1998a) and is called autolimitation. If executive and legislative have full information about the preferences of the court and are able to act strategically, they will choose a point in the policy space for new legislation which is not only in their own winset but also in the preferred to set of the court and thus in the joint winset of all actors with veto power. As a consequence we should not observe vetoes because of the preferences location of the actors as well, even though the outcome of the new legislation is a different one. This problem is known as the Hicks paradox (Cameron, 2000; Hicks, 1932). If the assumption of complete information is relaxed and incomplete information about the preferences are assumed, we find more meaningful results (Fortunato et al., 2013; J. Krehbiel, 2015; Vanberg, 2001). If incomplete information about the courts preferences are assumed, executive and legislative are not able to restrict themselves adequately: in the area where under full information autolimitation occurred, now autolimitation and vetoes occur.

Incomplete information is a plausible assumption in a game including executive, legislators and a constitutional court for various reasons: (1) Typically, legislators do not have full information about the actual preferences of the justices, even though they most of the time have chosen themselves. (2) Even if they have information about preceding cases, a new topic might come up on the agenda where little information about justice's preferences are available. (3) even if there was a preceding court decision on the same topic, the court was vague in the decision and (4) legal experts in the legislative process might have given the wrong advice about the justices or the case. The most important reason from our perspective is – however – that it takes quite a long time for a piece of legislation to proceed from the legislative stage to the court. Within the legislative stage, most countries pass their bills through the legislative process within one legislative period. With a few exceptions, bills die at the end of the legislative period. Executive and legislative thus have full information about each other's preferences, especially since deliberation at committees and the plenary take place. However, executive and legislative can only guess about the court position by various mechanisms like expert hearings. Even if they do so, they do not know at what time and under which composition a court will decide.

2.4. Six scenarios: Expectations of veto player theory and veto bargaining theory

We now discuss six logically possible scenarios with regard to the location of e , l , c and sq , their winset, the absorption situation and the expected outcome in a one-dimensional spatial model of incomplete information. Instead of an exact position for c we find an interval

between c^- and c^+ which indicate the lower and upper boundaries for the possible locations of c . The core of e and l is marked with the dark grey shaded area below the line, the core of e , l and c is marked with the light grey shaded area above the line. The black area indicates the extended core of e , l and c taking into account the unknown position of c by its boundaries c^- and c^+ .

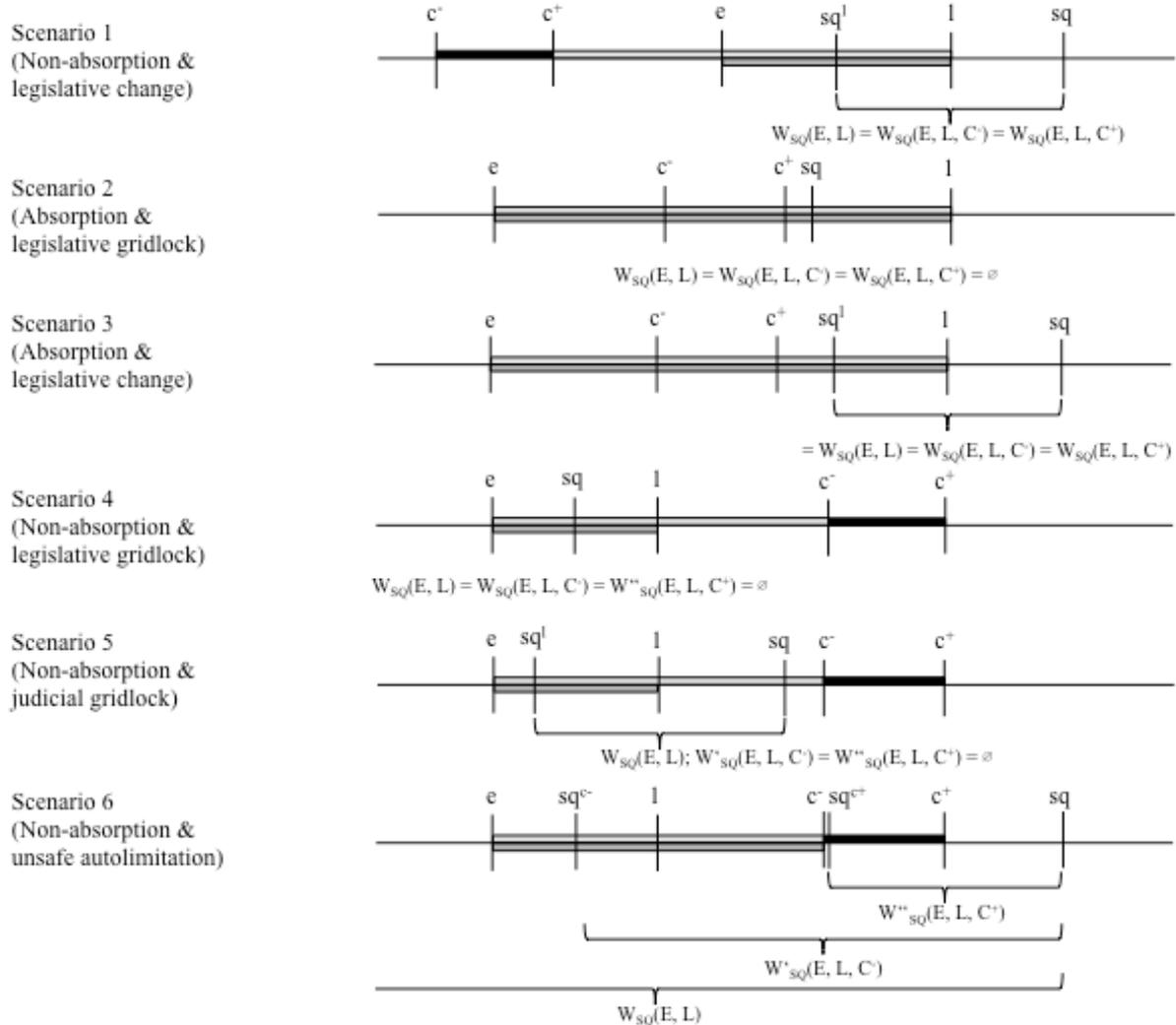


Figure 3: Six different scenarios for the location of e , l , c and sq under incomplete information

In scenario 1 (non-absorption & legislative change) the entire interval of c is located to the left of e and l , while the sq is located to the right of e and l . The behavior we should observe is that e and l legislate in their joint winset. C will accept the proposals as any proposal lies in its preferred-to-set. The outcome is legislative change and the court is not absorbed.

In scenario 2 (absorption & legislative gridlock) the entire interval of c is located between e and l , sq is also located in between e and l . The court is absorbed as it lies in the core of e and

1. The outcome is that there is no legislative change as e and l cannot agree on a new policy. Scenario 2 is the classic legislative gridlock situation of veto bargaining games (Cameron, 2000; König & Bräuninger, 1996; K. Krehbiel, 1998).

In scenario 3 (absorption & legislative change) the position of e , l and c remain as in scenario 2 but the sq is moved outside the core. In this scenario we expect legislative change in the winset of e and l . The court is located in the core and is absorbed. It has no effect on the legislative outcome in any case. This is the typical absorption scenario as introduced by Tsebelis (2002) as the standard scenario for constitutional courts. The court will be fully absorbed and the scenario does not predict any court vetoes.

Scenario 4 (non-absorption & legislative gridlock) locates sq inside the core of e and l . In this scenario the legislative winset of e and l is empty as sq is located in the legislative core. The outcome of this scenario is that there is no new legislation. The court is not absorbed but this has no effect because of the legislative gridlock.

In scenario 5 (non-absorption & judicial gridlock) is the non-absorption scenario with the sq located between e and l on the one hand and c on the other hand. The court is located outside the legislative core. The outcome is that e and l will refrain from introducing new legislation, as the court would veto any proposal acceptable to them. This is a case of judicial gridlock (Vanberg, 2001).

In scenario 6 (non-absorption & autolimitation) both the court and the status quo are located outside the legislative core while the status quo is also located to the right of c . The existence of the court increases the winset and thus forces e and l to anticipate the preferred-to-set of c to make a successful proposal. The outcome is legislative change under the restriction of the wishes of c : the court is not absorbed. This phenomenon is widely discussed in the judicial politics literature as autolimitation (Stone, 1992; Vanberg, 1998a, 1998b) but it is also clear that it is only one of six possible outcomes. However, under incomplete information autolimitation is not successful, if the true position of c is at c^+ , neither l nor sq^c are an element of the preferred-to-set of the court. The court will thus veto any new legislation despite autolimitation attempts of the legislature and the executive. Overall, in this situation autolimitation is to be expected, but the outcome is unsure. Overall, the likelihood of veto in this scenario is 0.5.

Out of the six scenarios, only two are absorption scenarios: scenario 2 will lead to the outcome that there is no new legislation because of legislative gridlock or the new legislation will be accepted by the court in scenario 3. In neither case we would expect a veto of the court. The outcomes of the non-absorption scenarios under incomplete information are that

either there is new legislation, which is accepted by the court (scenario 1), no new legislation because of legislative gridlock (scenario 4) or judicial gridlock (scenario 5). In the last scenario legislative actors limit themselves (scenario 6), which might lead to successful autolimitation and legislative change or to unsuccessful autolimitation and thus a veto by the court. This means that vetoes are only to be expected under non-absorption.

2.5. Boundaries between scenarios under incomplete information

As the position of the court c is not a point, but an interval between c^- and c^+ , there are boundary situations, which violate the assumptions about the order of actors made for each scenario. These boundaries are relevant as the outcome changes from one scenario to another made for scenarios 3, 5 and 6. At the borders of the other scenarios, the switch leads to the same outcome, even though for different reasons (Scenarios 1 to 3 and 2 to 4). Thus these boundaries are not discussed.

All scenarios assume that the entire range c is located in between two other actors. However, boundary distributions are also possible where c^- is located to the left of one actor and c^+ to the right of the same actor. We therefore find a left and a right boundary per scenario. We discuss the effects of the boundaries only for the situation where $L < SQ$ in the right-hand absorption zone. The same logic applies to the left-hand absorption zone where $SQ < E$.

Two particular boundary situations need to be discussed for scenario 3: (1) $c^- < e < c^+ < l < sq$ on the left boundary and (2) $e < c^- < l < c^+ < sq$ on the right boundary. The change on the left boundary (undershooting) has no effect on the outcome. However, if $l < c^+$ (overshooting), the situation is identical with scenario 5. If e and l make a misjudgment about the true position of the court, a veto will occur on the right boundary. The propensity for the veto is thus 0.5 for the entire boundary situation.

For scenario 5, there is only a left boundary situation change, as c^+ is already the most extreme actor on the right hand side (overshooting). The left boundary (undershooting) change would be $e < l < c^- < sq < c^+$. In this situation, e and l refrain from making a policy proposal even though change would be possible. The outcome remains: judicial gridlock, no matter if the assumption about the location of c is right or wrong.

In scenario 6, the left and right hand side boundaries are relevant. The actor distribution of the left boundary is $e < c^- < l < c^+ < sq$. In this situation, the court is absorbed if its true position is located inside the interval c^- to l . However, as the true position is not revealed to e and l , they would make a proposal to the right of sq^{c^-} (undershooting). This proposal would be acceptable to the court as it is located in its winset. Thus, we would observe successful autolimitation.

The veto propensity for this boundary is 0. On the right boundary, the actor distribution is $e < l < c^- < sq < c^+$. While the e and l presume autolimitation at c^- to be the right strategy, the actual situation is judicial gridlock as sq is located inside the core of e , l and c^+ . The outcome here is a veto, which is unexpected for e and l . The propensity for veto on the right boundary is 1.

2.6. *Contrasting the two theories and hypotheses*

The following figure presents the equilibrium predictions of the six scenarios in the absorption situation in one figure with nine fields (the lower three fields are symmetric to the upper three). On the y-axis we show the variation of the status quo (sq) on the x-axis the variation of the court (c) in the one-dimensional policy-space. E and l are given, but their position is interchangeable for the sake of the argument. The dark grey shaded area is the core of e and l , the light grey shaded area is the additional core of e , l and c .

We can identify three zones which are relevant for veto player theory: A zone of absorption (A) in the middle and two zones of non-absorption (\tilde{A}) at the outer margins. When the court is absorbed in zone A , it has no influence on the policy outcome as its entire preferred set is included in the winset of E and L . Either (1) E and L abstain from legislating because of legislative gridlock ($S2$), or (2) any proposal in their winset is accepted by the court and declared constitutional ($S3$). However, the right boundary predicts a veto with $p=0.5$. As the legislative and executive presume to be safe they do not limit themselves and therefore receive an unexpected veto. This situation is likely, when the position of one of the legislative actors is very close to the position of the court but still inside the core.

In the non-absorption situation (\tilde{A}) we find four possible outcomes. There are also situations of legislative change ($S1$) and legislative gridlock ($S4$) like in the absorption scenario where we should not be able to observe court vetoes. The model also predicts no court vetoes for the judicial gridlock scenario ($S5$) at all. Scenario 6 is the most interesting one. It is difficult to make a successful autolimitation proposal under incomplete information. Therefore it is named unsafe autolimitation where a veto might occur with a likelihood of $p=0.5$. Also, the right hand boundary of this scenario leads to a certain veto with $p=1$. Only the left-hand boundary is an unexpected successful autolimitation zone where no vetoes occur.

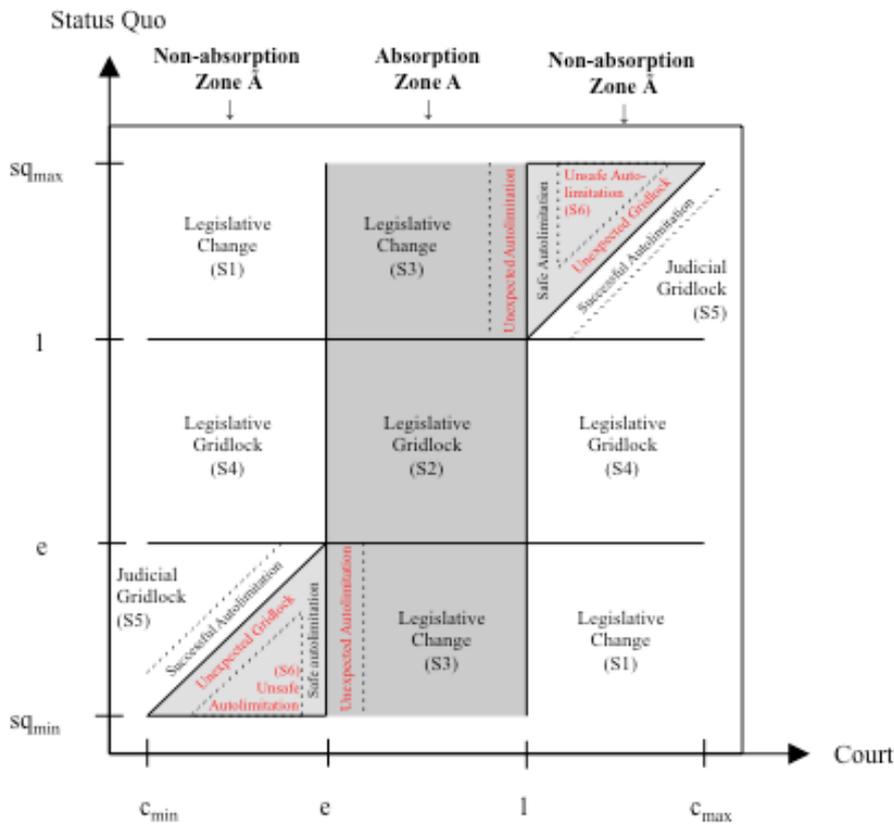


Figure 4: Equilibrium outcomes under incomplete information

This also means that veto player theory as it is used in comparative politics (Tsebelis 2002) in its purest form reduced to the social choice component focusing on outcomes rather than behavior comes to different propositions than veto bargaining models (Cameron 2000) focusing on behavior and deriving outcomes from that behavior. A focus on the veto player mechanism ignores the role of the status quo and focuses on the difference of situations of absorptions and non-absorptions instead.

The absorption situation is supposed to have effects on the court's behavior when a case arrives at the court. If the court is absorbed (A) we should observe very few full or partial nullification of a piece of legislation, even under under incomplete information. Rather, the court should argue that the law is in line with the constitution. If the court is not absorbed (\tilde{A}), we should expect regular vetoes by the court and thus find a partial or full nullification of a law. We can therefore derive the following hypothesis:

H1 (Veto Player: Absorption vs. non-absorption): We should observe less vetoes if the court is absorbed than when it is not absorbed.

If we take into account the status quo in a veto bargaining model, we come to modified conclusions. While we should still be able to observe the implications of H1 as well, we can distinguish different scenarios within the situation of non-absorption more precisely. In these scenarios, the expected court behavior and the outcome vary. We should not observe any new legislation and thus no court decisions in scenario S4 because of legislative gridlock. Executive and legislature cannot agree on a change of the status quo in the first place. However, there is a big difference between scenario S1 on the one hand and scenarios S5 and S6 on the other hand. S1 expects legislative change induced by E and L and because all solutions are acceptable to the court in this scenario, the court will not veto and change is the outcome. S6 expects autolimitation attempts by executive and legislature. Since they exact position of the court is unclear to them because of incomplete information, these attempts fail partially. The court behavior is mixed: both vetoes and no vetoes depending if E and L guess the preferred to set of the court correctly. The outcome is thus either change or no change. S5 predicts judicial gridlock. While E and L can agree on change, the court is at unease with any change and would thus veto. E and L should thus refrain from legislating, however, the court will veto every actual piece of legislation in this scenario.

H2: (Veto Bargaining: Change vs. Veto): We should observe less vetoes in scenario S1 than in scenario S5 and S6 for situations of non-absorption.

H1 and H2 are compatible with each other. Neither excludes H1 the expectations of H2, nor vice versa. Rather veto bargaining models appear as a more fine-grained approach than absorption arguments within veto player theory. However, the comparison of the two models allows deriving a third hypothesis, which is able to discriminate between those two theories for scenarios S1 and S3 under incomplete information. If the logic of absorption in veto player theory is correct, we should observe fewer vetoes in S3 than in S1. In scenario S3 the court is entirely absorbed and therefore the court should not veto. The court is not absorbed in S1 and thus we should expect vetoes. Following the logic of veto bargaining models, we expect the opposite: In both scenarios we expect legislative change in general and no court vetoes. However, because of incomplete information, we expect some vetoes at the boundary of S3 and S6.

H3a: (Veto player discrimination): We should observe fewer vetoes in scenario S3 than in in scenario S1, because the court is absorbed in S3 but not in S1.

H3b: (Veto bargaining discrimination) We should observe more vetoes in scenario S3 than in in scenario S1, because of unexpected vetoes in scenario S3 under incomplete information.

3. Alternative explanations

There are a number of alternative reasons why the constitutional court might repeal a law or refrain from nullifying it. These alternative explanations are independent of the positions of the actors involved. Most importantly, while the court has the constitutional power to strike down a law, it has to rely on the legislative branch to redraft the law and the government and its administration to implement the new law. The constitutional court can include deadlines and directives into its decisions (Engst et al. 2014) in order to influence the redrafting process. Nevertheless, the government might not comply with the decision and simply evade it. This might backfire, when the court enjoys sufficient public support or the ‘policy environment’ (Vanberg 2001) of an issue under review is sufficiently transparent. An evasion of a court’s decision is similarly costly for the government if the institution of the constitutional court relative to the institution of the government enjoys higher levels of public trust. All those factors that make evasion costly should make the court more likely to nullify a law independent of the specific ideological position of the other legislative actors involved. Thus, we expect the more transparent such a policy environment is and the higher public support for (and the higher public trust in) the court is as compared to the government the more likely should the court strike down a law.

Moreover, governments are increasingly monitored during election times. Evasion is more likely during later times when governments do not have to fear immediate electoral costs. Hence, if an election is close, courts might be more likely to strike down a law.

Sternberg et al. (2015) show that in addition to a supporting public opinion, a strategic court might also consider the current ideological position of the government before striking down a law. If the court happens to be closely positioned to the current government (rather than a previous government that was responsible for enacting the referred law) then the court should not fear being evaded when nullifying a law. This consideration should be independent from any considerations of the court to leverage the transparency of the policy environment or the support of public opinion in order to make evasion of the government more costly.

4. Case selection: Germany as quasi-experimental case

To test our hypothesis we use data from the German constitutional court. Analysing this case has a number of advantages. Firstly, the German case has the major advantage that it exhibits intra-case variation with regard to the number of veto players and thus constitutes a controlled environment while enhancing variance at the same time.

Analyzing the legislative process one can identify veto players in Germany. The German political system is a parliamentary system with a bicameral parliament (Schmidt, 1996a). The German electoral system usually leads to coalition governments consisting of two parties. The second chamber represents the state governments. Two legislative procedures are being used for ordinary legislation: on the one hand consent bills where the second chamber has an absolute veto and thus constitutes a veto player and on the other hand objection bills where the second chamber has a suspensive veto but cannot block it. On average, 45% of the legislation is passed under the objection bill procedure and 55% under the consent bill procedure. The second chamber has a considerable high party cohesion and might either be controlled by the parties in government or the minority parties or by none of them. Therefore, we quite often find deadlock situations like in the US bicameral system (Bräuninger & König, 1999). There are no referendums, and the German president wields no power, so there are no further veto players.

Therefore we typically find two partisan veto players, and the second chamber as an institutional veto player for consent bills but not for objection bills. We therefore have intra-case variation and a testing ground with a quasi-experimental situation. The strategy we can employ is thus similar to Stratmann/Baur and Lancaster/Patterson (Lancaster & Patterson, 1990; Stratmann & Baur, 2002) who are comparing pork-barrel behaviour of legislators in Germany's mixed electoral system for legislators elected under relative majority vote and proportional representation. With this intra-case comparison we can keep all other factors constant like political culture explanations, peculiarities of the political system or particularities of individual legislators or parties.

Secondly, we are able to increase variance by the fact that the courts is divided in two senates which decide a different set of cases independently of each other and have a slightly deviating composition. In fact we therefore analyse not one but two cases.

The procedures governing the composition of the German Federal Constitutional Court (GFCC) are characterized by three rules. Firstly, it is an election. Secondly, we find institutional *proportional representation* and thirdly, the decision rules enforce consent between the major political parties. According to Article 94 of the German constitution, the

Court consists of 16 judges in 2 Senates elected for 12 years by either the *Bundesrat* or the *Bundestag*. Both Senates are composed to equal parts by both institutions. Each institution elects the President and the Vice-President of the GFCC alternately. Since 1971 a re-election has not been possible anymore. The empirical result of the electoral rules is a very complex inter-party agreement. The two major parties SPD and CDU/CSU need to cooperate with each other in order to achieve a 2/3-majority. For this purpose they alternately nominate judges for both senates. Either party usually nominates four judges per senate. Three of them are usually party members – the other ones are considered to be ideologically close to them. The smaller coalition partners FDP and Greens are typically allowed to nominate one candidate each in the 1st Senate in consent with the bigger parties.

The selection process violates Tsebelis basic assumption that constitutional courts are always absorbed because they are entirely composed by other veto players. The governmental parties in the *Bundestag* are of course partisan veto players. However, due to the supermajority requirement in the *Bundestag* the major opposition party is also required to consent. The *Bundesrat* is not always a veto player but only for consent bills accounting for half of the federal legislation. Like in the *Bundestag*, the supermajority requirement leads to an inclusion of the major opposition party. Thus, in the German case, the court is not entirely composed by other veto players but also by non veto players even though the supermajority requirement leads to a centrist position of the court.

Thirdly, the German court is generally perceived as a strong court (Lijphart 1999, Alivizatos 1995) in comparison. While weak courts might very easily bow to pressure, we can assume that strong courts might act mainly according to the policy preferences of the judges, even though strategic behaviour might be observable as well (Vanberg 2005, 2000).

Fourthly, the caseload is rather high and there is a multiplicity of actors which can activate the court. Therefore we can assume that the court is a permanent player in the veto player game.

The German court allows for a large number of access routes: abstract review, concrete review, constitutional complaints, and a number of horizontal and vertical competence conflicts (Vanberg, 2005). The overall caseload of the court is rather high: on average 2 to 3 abstract reviews, 20 concrete reviews and about 6000 constitutional complaints per year (cf. Website of the *Bundesverfassungsgericht*). A peculiarity of the German system is that unlike in the US system where the Supreme Court has full docket control, the German court has to take a formal decision on every case. The eight judges of the senates make 30 to 50 decisions per year. Of the remaining 6000 cases, five panels consisting of three judges decides a few hundred, the remainder is factually decided by law clerks,. Because the number of access

routes is high, the number of potential litigants is high as well and independent of the considerations of political decision-makers. Only the abstract review procedure and a few constitutional complaints are initiated by politicians, concrete reviews are submitted by lower courts and constitutional complaints by individual citizens who feel that their constitutional rights are violated by primary or secondary legislation, by an administrative act, or a lower court decision. Since constitutional complaints are only possible after the litigant has gone through the regular legal system, it might take several years before a law is challenged at the constitutional court.

5. Data, Operationalization and Identification Strategy

In the previous section we hypothesized that under certain conditions the constitutional court should be more likely to partially or fully nullify referred laws. These conditions are dependent on the spatial locations of the various other veto players in a common ideological space. If the court's senates are absorbed by other veto players we do not expect the senates to be more likely to partially or fully nullify a particular law because the senates' preferences are already reflected in the preceding legislative process that brought about the respective law. This situation changes completely once the other veto players of the legislative process do not absorb the respective senate. In this case the senate acts as a veto player. In order to test our absorption hypothesis we leverage an original data source, the *Constitutional Court Database* (CCDB), which includes all senate decisions of the German Federal Constitutional Court as well as several other statistics that characterize the political environment of those decisions.¹ In particular, we use all proceedings referred via constitutional complaints, concrete and abstract review procedures directed against federal laws and decided by either senate of the GFCC between 1974 and 2010. These are 1664 proceedings.

Dependent Variable: Nullification. One observable implication of the absorption hypothesis refers to decisions of the Court and specifies under which spatial actor constellations the Constitutional Court partially or fully nullifies a particular law referred to it. Consequently, our dependent variable is dichotomous scoring "1" when a decision partially or fully nullifies a law and "0" otherwise. In our data we observe that 47% of all the proceedings were partially or fully nullified.

¹ This database is part of the research project "The German Federal Constitutional Court as a Veto Player" funded by the German Research Foundation (DFG) and located at the University of Hannover and the University of Mannheim. The current version is Version 1 with 2006 decisions composed of 3284 proceedings prior to the final validation stage.

Independent Variable: Absorption. To operationalize the spatial absorption, which is our major independent variable, we face the institutional challenge particular to the German political system. This is “objection bills” (*Einspruchsgesetze*) are voted on by the lower house (the *Bundestag*) only while “consent bills” (*Zustimmungsgesetze*) are voted on by the lower house and the upper house (the *Bundesrat*). Coding the variable ABSORPTION we need to account for this. Hence, ABSORPTION, is a dummy variable scoring “1” if the respective Senate’s position is located between the two parties which are part of the coalition government in the *Bundestag* for a proceeding initiated against an objection bill. Furthermore, ABSORPTION, is coded “1” if the respective senate’s position is located between the *Bundestag* and the *Bundesrat* for a proceeding initiated against a consent bill. If neither of these conditions applies ABSORPTION is coded “0.” We expect a negative coefficient of ABSORPTION because the senate is less likely to strike down a law if the senate’s preferences are already reflected in the spatial scenario. In the analyzed data we observe that the Court is absorbed in 53 to 57 percent of the cases, depending on how actor positions are operationalized (see below). This is definitely less than one would expect given how the judges are elected.

A well-known challenge when conceptualizing spatial models is to provide a measurement strategy that maps actors’ positions into a common ideological space. Our general measurement strategy is to operationalize the positions of collective actors such as the Court’s Senates, the Government, and the *Bundesrat* based on the respective positions of the parties with which the individuals that make-up a collective actor are affiliated.

How do we operationalize the position of parties? Given our time frame we need comparable measures of several parties across several years. Therefore, we measure party positions on a left-right dimension using scores from the *Comparative Manifesto Project* (CMP). However, these so-called ‘Rile’ scores are increasingly criticized with regard to their spatial and temporal comparability (König, Marbach, & Osnabrügge, 2013; Lowe, Benoit, Mikhaylov, & Laver, 2011). Hence, we follow the approach by Lowe et al. (2011) using their scores based on log odds-ratios of the number of quasi-sentences that are categorized as ‘right’ and ‘left’, respectively, to derive meaningful positions. As a second alternative to ‘Rile’ scores, we use *Manifesto Common Space Scores* (MCSS) provided by König et al. (2013), which stem from a latent variable model based on CMP data to estimate positions of political parties across time.² Given these scores we know where the parties stand on a common ideological space. We assign the respective scores to each actor involved in the interaction outlined here in the following ways:

² Thanks to Moritz Marbach for providing the scores to us.

The position of the federal government is simply the score of the parties that are part of a coalition weighted by the members of these parties in the *Bundestag* on the day the Constitutional Court takes a decision (similar to Hönnige 2009). This will lead to one position of the federal government which is necessary to assess the absorption hypothesis for consent bills. As mentioned above this procedure is not the same for objection bills in which case the *Bundestag* passes a law only. Faced with objection bills the positions of the governmental parties are taken separately spanning an area in which the federal government accepts laws.

The Position of the upper house (the *Bundesrat*) is calculated in three steps. First, we calculate for every election in every state of the 16 German states a score for the respective state government. Taking the position of every party being part of the state government weighted by their members in the respective state parliament does this. Second, we take the state scores and repeat them by the number of votes a respective state has in the *Bundesrat*.³ Third, we identify the median position of the *Bundesrat* for every change that occurred to the composition of the *Bundesrat* or the votes in the *Bundesrat*. These are 112 changes in the time frame assessed here. Eventually, we assign each referral to the court directed against an consent bill the position of the *Bundesrat* on the day the court makes the respective decision.

Finally, we calculate the position of each senate of the German Federal Constitutional Court. We assign each judge the position of the political party that nominated him or her. To do so we use the party position at that day a respective judge entered the court. In order to derive one measure for the position of the entire senate in our common space we simply take the position of the median judges that participated in a particular decision.

With all these position measures we are able to operationalize the absorption as our major independent variable.

Independent Variable: Ideological Distance. We pointed out alternative determinants that might facilitate the constitutional court to be more likely to partially or fully nullify laws, which are referred to it, but which are unrelated to the absorption hypothesis. Courts cannot enforce their rulings and therefore fear evasion. It seems plausible that if the ideological distance of the court to the relevant implementation agent (either the government in the case of objection bills or the *Bundesrat* as well as the government in the case of consent bills) is wide, the court's fear of non-implementation increases. If this is true, the court should be less likely to partially or fully nullify laws no matter whether the court is absorbed or not. Depending on the type of legislation, we take the distance between the court's position and

³ The number of votes a state has in the German *Bundesrat* is based on the number of citizens in the respective state. The interested reader might turn to Articles 50 to 53 of the German Basic Law for further information.

the position of the respective implementation agent (or if there are two, as for consent bills, we take the maximum of both distances) as our measure of IDEOLOGICALDISTANCE.⁴

Control Variable: Senate I. Moreover, when pooling all decisions to calculate an average (treatment) effect of absorption, i.e. a first difference between a situation in which the court absorbed to a situation in which the court is not absorbed, we control additionally for the respective Senate of the Court and the type of legislation (objection bill and consent bill). We code a dummy variable, SENATE1, scoring ‘1’ if the decision is taken by the 1st Senate of the Court and not by the 2nd Senate. In our data the 1st Senate assessed 59 percent of the federal laws referred to the court.

Control Variable: Type of Legislation. In order to distinguish the type of legislation we include a dummy variable, TYPEOFLEGISLATION, scoring ‘1’ if the type of legislation is a consent bill but not an objection bill. 73 percent of the federal laws in our data are consent bills.

Control Variable: Public Opinion. We rely on measures derived from public opinion polls asking voters for which party they would vote if there were a general election to be held in the respective week. The popularity of the government is then measured in percent by combining the vote choices for the governmental parties currently in place. In our data this variable’s range is between 28.8 percent to 78.8 percent with a mean of 49.7 percent.

Control Variable: Oral. Following Vanberg (2001, 2005) we measure transparency by a variable ORAL scoring ‘1’ if oral arguments that provide maximally press coverage of a given case were held and ‘0’ otherwise. Cases in which oral arguments are held should be a priori more likely to get nullified. Hence, we expect a respective positive coefficient. In the analysis sample we observe that in 39 percent of all the cases oral arguments were held.

The data structure requires an identification strategy that demands particular attention. Each decision of the German Federal Constitutional Courts combines multiple referrals which are potentially directed against several federal laws that are subject of scrutiny. Thus, the federal laws are clustered in referrals. In our data we have 621 different referrals and 1365 federal laws under scrutiny. This makes an average of 2.2 federal laws per referral, while we have 424 referrals that include only one federal law under scrutiny. Therefore, we cannot identify a multi-level model (although we would have paid the cost of having to make additional

⁴ No matter which strategy we use to operationalize those distances, there seems to be meaningful variation. The IDEOLOGICALDISTANCE based on Rile scores ranges from 1.3 to 35.2 with a mean of 15.5 in the analysis sample. The respective values based on log odds-ratios scores ranges from .4 to 1.4 with a mean of .7, while we obtain distances based on MCSS-scores that range from .1 to 18.1 with a mean of 3.8.

assumptions) because there is not enough variance in order to identify the model (including random effects for referrals). An alternative strategy is to estimate an ordinary logistic regression model and to adjust the estimated standard errors for the fact that the federal laws are correlated within referrals but not across referrals of court decisions. This can be efficiently done through cluster bootstrapping the referrals.⁵ Resampling from referrals rather than from federal laws allows us to account for interdependence of the observations (legal norms) within each referral of a court decision.⁶

Table 1: Logistic Regression Analysis predicting the conditions under which a law gets partially or fully nullified.

	(1) (MCSS)	(2) (MCSS)	(3) (Lowe et al.)	(4) (Lowe et al.)	(5) (Rile)	(6) (Rile)
Absorption (=1)		-0.54* (0.27)		-0.52* (0.26)		-0.58* (0.25)
Oral Arguments	-0.90** (0.25)	-0.80** (0.25)	-0.83** (0.24)	-0.75** (0.24)	-0.91** (0.24)	-0.82** (0.24)
Senate 1 (=1)	-0.96** (0.25)	-0.89** (0.25)	-0.97** (0.25)	-0.82** (0.25)	-1.01** (0.25)	-0.84** (0.25)
Type of legislation	1.21** (0.28)	1.23** (0.28)	1.10** (0.29)	1.23** (0.28)	1.18** (0.28)	1.33** (0.28)
Popularity Govt.	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)
Ideological Distance	-0.04* (0.02)	-0.03 (0.02)	0.38 (0.36)	0.24 (0.35)	0.00 (0.01)	-0.00 (0.01)
Constant	-0.45 (0.76)	-0.41 (0.75)	-0.82 (0.79)	-0.90 (0.79)	-0.55 (0.79)	-0.64 (0.79)
LL	-808	-799	-812	-806	-815	-806
PCP	65	65	66	64	67	67

N = 1365; * p < 0.05; ** p < 0.01. Bootstrapped standard errors (at the referral level) are presented in parentheses.

6. Analysis

Our key variable of interest is the effect of to what degree the court systematically decides differently in cases where other relevant actors absorb it. In other words, we want to identify how a Senate takes a decision not accounting for absorption at all and how this process changes once accounting for absorption. As outlined above, we operationalize the scenario of absorption using three different measures for party positions. Table 1 summarizes six models estimated using these different measures: Models 1 & 2 are based on the MCS Scores by

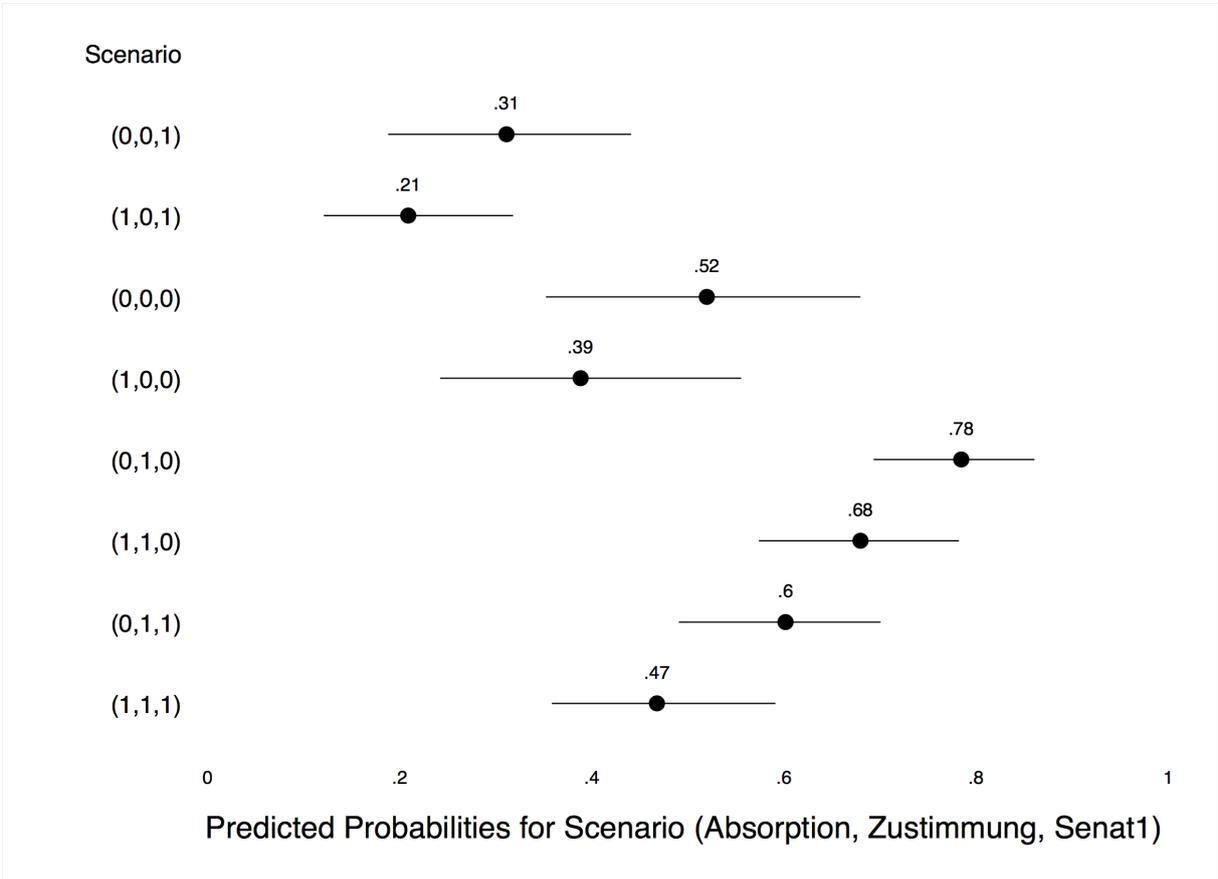
⁵ Thanks to Daniel Stegmüller for suggesting this strategy.

⁶ Evidence in support of this strategy is that the mean of the bootstrap sample for each coefficient is fairly close (up to the first decimal) to the estimated coefficient without considering the clustering.

König et al. (2013), Models 3 & 4 are based on Lowe et al.'s (2011) log odds-ratio scores, and Models 5 & 6 are based on the traditional CMP Rile scores. Within each pair of models the first model (1,3,5) is estimated without the variable measuring absorption while this variable is included in the respective second run of the model (2,4,6).

We can draw the following five conclusions from Table 1: First, the estimated coefficients do not change much whether ABSORPTION is included or not. Second, the estimated size of the absorption coefficient is very stable, no matter which measurement strategy we use to operationalize the position of the relevant actors. Third, even the estimated size of the remaining coefficients - relative to their standard errors - are fairly stable across model

Figure 1: Predicted probabilities to partially or fully nullify a law in eight different scenarios.



specifications (comparing Model 1, 3 & 5 as well as Model 2, 4 & 6). Forth, we consistently find across models that a particular type of legislation is more likely to get partially or fully nullified, namely consent bills. Moreover, the 1st Senate of the court is less likely to nullify laws than the 2nd Senate. In contrast to our expectation, though, holding oral arguments does not increase but decrease the likelihood that a law will get partially or fully nullified. Fifth, none of the alternative explanations to absorption is consistently supported.

In the following we are interested in simulating relevant scenarios in order to see how important our estimated results actually are. We have simulated $2^3 (= 8)$ different hypothetical scenarios, depending on whether or not the court is absorbed, whether or not the type of legislation is a consent bill (*Zustimmung*), and whether or not the 1st Senate of the court has the jurisdiction to make a decision. Throughout our simulations we assume that no oral arguments were held (the modal category of this variable). All other variables were held at their analysis sample mean. The simulations were done using the specifications from Model 2 in Table 1.

Table 2: Estimated Effect of Absorption across various Scenarios as first-differences (a difference of two expected values)

	Senate 1	Senate 2
Consent bills	$E(1,1,1)-E(0,1,1) = -.13$ [-.20; -.002]	$E(1,1,0)-E(0,1,0) = -.10$ [-.26; -.002]
Objection bills	$E(1,0,1)-E(0,0,1) = -.10$ [-.26; -.002]	$E(1,0,0)-E(0,0,0) = -.13$ [-.21; -.002]

95% Confidence Intervals in squared brackets

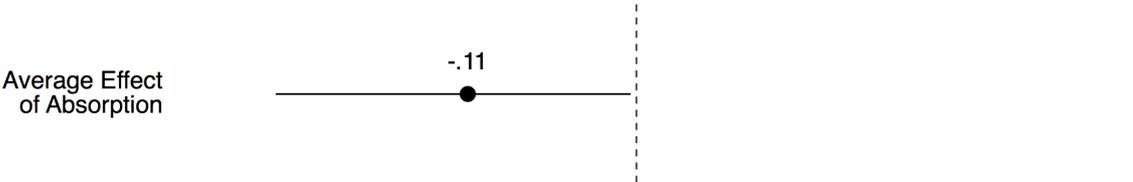
Figure 1 plots the predicted probability of nullifying a federal law for the 8 scenarios. It is easy to always compare two scenarios and interpret them as one situation. For example, the first two upper scenarios are one situation: Namely, the situation that Senate 1 faces an objection bill, once under the influence of absorption and once in the absence of absorption. The upper scenario (0,0,1) is a typical one in which Senate 1 is *not* absorbed and is *not* dealing with a consent bill (hence, it is dealing with an objection bill). The immediately following scenario (1,0,1) is similar to the first one but assuming absorption now. Accordingly, the mean predicted probability that the 1st Senate will nullify an objection bill while being not absorbed is about 31 percent but only about 21 percent when being absorbed. The comparison between both scenarios allows for identifying the effect of absorption when Senate 1 is dealing with an objection bill. In that case, the first difference becomes the quantity of interest. Table 2 summarizes estimated first differences for each comparison of the meaningful situations from Figure 1 including 95% confidence intervals (in squared brackets). Hence, for Senate 1 dealing with objection bills the first difference is significant and about 10

percentage points. Thus, the probability of nullifying a law is 10 percentage points lower once the Senate is absorbed.

Situation two, which is scenario three (0,0,0) and scenario four (1,0,0) from the top of Figure 1, allows for a comparison of the effect of absorption in Senate 2 when facing objection bill. The mean probability of nullifying a law is about 52 percent when not being absorbed but only about 39 percent once being absorbed. Moreover, the first difference is significant. The probability of nullifying an objection bill in Senate 2 is about 13 percentage points lower when being absorbed.

The lower four scenarios in Figure 1 summarize two situations. First, the effect of absorption on consent bills in Senate 2 (0,1,0 & 1,1,0) and second the effect of absorption on consent bills in Senat 1 (0,1,1 & 1,1,1). Consistent with the other findings, the probability of

Figure 2: Average Effect of Absorption (including 95% Confidence Interval)



not nullifying a consent bill is significantly lower (about 10 to 13 percentage points) when either Senate is absorbed (see also Table 2). However, the mean probability of not nullifying a law is nearly always higher in every scenario among consent bills (47 percent to 78 percent) than among objection bills (21 percent to 52 percent). Finally, the 2nd Senate is always more likely to invalidate a respective type of law compared to the 1st Senate.

In sum, no matter whether we are interested in the effect of a particular type of legislation and whether or not the jurisdiction of this case is in the 1st Senate of the court, the predicted effect of absorption (based on Model 2) is relatively stable across a variety of very different scenarios. If the court is absorbed, the likelihood to partially or fully nullify a law decreases by about 10-13 per cent. We can also calculate the average effect of absorption (similar to an average treatment effect if absorption would be a random treatment) for all the laws in our analysis sample. In order to do this we calculate the marginal effect of absorption for each observation, using the values actually taken on by each observation, and then we average them across all observations in the analysis sample. In order to estimate this we again set all independent variables in Model 2 to the values that are observed for that law except for our ABSORPTION dummy which we change from ‘0’ to ‘1’ to compute the respective first difference for each observation. Figure 2 highlights that the average effect of being absorbed

is systematically different from zero because the dashed vertical zero-line does not overlap with the estimated confidence interval of the average absorption effect. We find that, on average, the court is 11 percentage points less likely to partially or fully nullify a given law, when it is absorbed.

Therefore, the analysis confirms our hypothesis. The negative effect of absorption on the nullification of federal laws is robust using different estimation strategies and different measures.

7. Conclusions

The focus of this paper lays on the hitherto unresolved question when a constitutional court is a veto player and when the other players involved in the formal legislative process absorb it. Previous approaches to understand the role of courts in a comparative perspective have remained on a very general level. In veto player theory (Tsebelis, 2002) there are competing opinions if courts are veto players but the mechanisms are not specified properly. In consensus and majoritarian concepts (Lijphart, 1999; Vatter & Bernauer, 2009) they are classified either on general access routes to the court or in a qualitative manner based on the wider courts literature.

This paper focuses on the effects preferences of the court and the other veto players have as main explanatory mechanism. In our model we also employ actors, which are sincere voters. This allows us to make our theoretical model match newer approaches in comparative politics which shift away from the sole analysis of institutions towards the inclusion of preferences.

To empirically analyze this question we have focused on the German court with data from 1972 to 2010 for various reasons: (1) the German legislative process entails two different legislative procedures which vary the number of veto players in a controlled situation where all other factors are held constant, (2) it allows to increase variance as well since the court consists of two decision-making senates which are independent of each other, (3) the court has a high case load and there is a real threat that a piece of legislation is referred to it and (4) it is generally perceived as powerful what reduces the necessity to act strategically to improve the standing of the court. Justices are more inclined to focus on their policy preferences even if newer research shows that justices at the German court also take their environment into account (Vanberg, 2000, 2001)

We find our main hypotheses confirmed: If the court is in the core of the other veto players and thus absorbed it is less inclined to veto legislation. Overall the likelihood is lowered by 11 per cent. If the court is not in the core and thus not absorbed, the likelihood of vetoes

increases. However, we also find that variables like oral arguments, which focus on the strategic behavior of justices have explanatory power as well. However, they do not impact the analysis of the preferences from a statistical point of view.

This finding has several implications: Firstly, courts are veto players and should be treated as such in comparative concepts and scales. Leaving them away might seriously misrepresent the actor constellation in a comparative perspective as veto scales typically only vary between 1 and 4.

Secondly, the empirical analysis shows that the analysis of preferences is next to strategic behavior an important task. The analysis shows that the pattern of preference constellations explains to a good degree the behavior of the court. We should therefore intensify approaches to measure preferences more exactly but should avoid measuring them entirely independent of measures for political parties. It also means that the key for the comparative understanding of courts lies in the electoral rules.

Thirdly, apart from the focus on veto concepts in comparative politics, this has also impact for the understanding of how courts might be treated in other comparative concepts like consensus and majoritarian democracy. Authors dealing with this concept either use impressionistic measures (Lijphart, 1999) or very general institutional measures of court access (Vatter & Bernauer, 2009). Taking the lesson seriously that justices preferences matter for decision outcomes, it would seem rather helpful to analyze the role of courts with regard to symmetry and congruence of preferences – like second chambers are treated in these concepts.

Fourthly, our findings with regard to absorption are likely to be generalizable: By using the German case we varied the number of veto players and the number of courts within one country. Our findings are consistent for all situations. Nevertheless, more comparative research seems necessary to control for other variables as well, especially the potential impact of a weak court and different caseloads.

8. Literature

- Bräuninger, T., & König, T. (1999). The checks and balances of party federalism: German federal government in a divided legislature. *European Journal of Political Research*, 36(2), 207-234.
- Cameron, C. M. (2000). *Veto Bargaining. Presidents and the Politics of Negative Power*. Cambridge: Cambridge University Press.
- Crepaz, M. (1996). Consensus Versus Majoritarian Democracy: Political Institutions and Their Impact on Macroeconomic Performance and Industrial Disputes. *Comparative Political Studies*, 29(1), 4-26.
- Crepaz, M., & Moser, A. (2004). The impact of collective and competitive veto points on public expenditures in the global age. *Comparative Political Studies*, 37(3), 259-285.
- Diermeier, D. (2014). Formal Models of Legislatures. In S. Martin, T. Saalfeld, & K. W. Strom (Eds.), *The Oxford Handbook of Legislative Studies* (pp. 29-58). Oxford: Oxford University Press.
- Epstein, L., & Knight, J. (1997). *The Choice judges make*. Washington, D.C: CQ Press.
- Fortunato, D., König, T., & Proksch, S. O. (2013). Government Agenda-Setting and Bicameral Conflict Resolution. *Political Research Quarterly*, 66(4), 938-951.
- Ganghof, S. (2010). Understanding Democratic Inclusiveness. A Reinterpretation of Lijphart's Patterns of Democracy. *British Journal of Political Science*, forthcoming.
- Ginsburg, T. (2003). *Judicial review in new democracies. Constitutional courts in Asian cases*. Cambridge: Cambridge UP.
- Grendstad, G., Waltenburg, E. N., & Shaffer, W. R. (2015). *Policy Making in an Independent Judiciary. The Norwegian Supreme Court*. Colchester: ECPR Press.
- Hanretty, C. (2013). The Decisions and Ideal Points of British Law Lords. *British Journal of Political Science*, 43, 703-716.
- Hanretty, C. (2014). The Bulgarian Constitutional Court as an Additional Legislative Chamber. *East European Politics and Societies*, 28(3), 540-558.
- Henisz, W. J. (2000). The institutional environment for multinational investment. *Journal of Law Economics & Organization*, 16(2), 334-364.
- Hicks, J. (1932). *The Theory of Wages*. New York: Macmillan.
- Hönnige, C. (2009). The Electoral Connection: How the Pivotal Judge affects Oppositional Success at European Constitutional Courts. *West European Politics*, 35(2), 963-984.
- Huber, E., Ragin, C., & Stephens, J. D. (1993). Social Democracy, Christian Democracy, Constitutional Structure and the Welfare State. *American Journal of Sociology*, 99(3), 711-749.
- Hug, S., & Tsebelis, G. (2002). Veto players and referendums around the world. *Journal of Theoretical Politics*, 14(4), 465-515.
- Immergut, E. M. (1992). The rules of the game: The logic of health policy-making in France, Switzerland, and Sweden. In S. Steinmo, K. A. Thelen, & F. Longstreth (Eds.), *Structuring politics: historical institutionalism in comparative analysis. Cambridge studies in comparative politics* (pp. 57-89). Cambridge: Cambridge UP.
- Kaiser, A. (1997). Types of democracy - From classical to new institutionalism. *Journal of Theoretical Politics*, 9(4), 419-444.
- König, T., & Bräuninger, T. (1996). Power and Political Coordination in American and German Multi-chamber Legislation. *Journal of Theoretical Politics*, 8(3), 331-360.
- König, T., Marbach, M., & Osnabrügge, M. (2013). Estimating Party Positions across Countries and Time—A Dynamic Latent Variable Model for Manifesto Data. *Political Analysis*, 21(4), 468-491.
- König, T., Tsebelis, G., & Debus, M. (Eds.). (2011). *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies*. Berlin: Springer Publisher.

- Krehbiel, J. (2015). The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court. *American Journal of Political Science*, forthcoming.
- Krehbiel, K. (1988). Spatial Models of Legislative Choice. *Legislative Studies Quarterly*, 13(3), 259-319.
- Krehbiel, K. (1998). *Pivotal Politics. A Theory of U.S. Lawmaking*. Chicago, London: University of Chicago Press.
- Lancaster, T. D., & Patterson, W. D. (1990). Comparative Pork Barrel Politics Perceptions from the West-German-Bundestag. *Comparative Political Studies*, 22(4), 458-477.
- Lijphart, A. (1999). *Patterns of democracy. Government forms and performance in thirty-six countries*. New Haven: Yale UP.
- Lowe, W., Benoit, K., Mikhaylov, S., & Laver, M. (2011). Scaling policy positions from coded units of political texts. *Legislative Studies Quarterly*, 36(1), 123-155.
- Manow, P., & Burkhardt, S. (2007). Legislative self-restraint under divided government in Germany, 1976-2002. *Legislative Studies Quarterly*, 32(2), 167-191.
- Romer, T., & Rosenthal, H. (1978). Political resource allocation, controlled agendas, and the status quo. *Public Choice*, 33(4), 27-43.
- Schmidt, M. G. (1996a). The Grand Coalition State. In J. M. Colomer (Ed.), *Political institutions in Europe* (pp. 62-98). London: Routledge.
- Schmidt, M. G. (1996b). When parties matter: A review of the possibilities and limits of partisan influence on public policy. *European Journal of Political Research*, 30(2), 155-183.
- Schofield, N. (2008). *The Spatial Model of Politics*. Milton Park, Abingdon, Oxon: Routledge.
- Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the attitudinal model revisited*. Cambridge: Cambridge University Press.
- Stone, A. (1992). Where Judicial Politics are Legislative Politics: the French Constitutional Council. *West European Politics*, 15(2), 29-49.
- Stone Sweet, A. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies*, 32(2), 147-184.
- Stratmann, T., & Baur, M. (2002). *Plurality Rule, Proportional Representation, and the German Bundestag: How Incentives to Pork-Barrel Differ Across Electoral Systems*. Retrieved from http://papers.ssrn.com/sol3/cf_derAbsAuth.cfm?per_id=103632
- Tsebelis, G. (2002). *Veto players. How political institutions work*. Princeton: Princeton University Press.
- Vanberg, G. (1998a). Abstract judicial review, legislative bargaining, and policy compromise. *Journal of Theoretical Politics*, 10(3), 299-326.
- Vanberg, G. (1998b). Reply to Stone Sweet. *Journal of Theoretical Politics*, 10(3), 339-346.
- Vanberg, G. (2000). Establishing judicial independence in West Germany - The impact of opinion leadership and the separation of powers. *Comparative Politics*, 32(3), 333-356.
- Vanberg, G. (2001). Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review. *American Journal of Political Science*, 45(2), 346-361.
- Vanberg, G. (2005). *The politics of constitutional review in Germany*. Cambridge: Cambridge University Press.
- Vatter, A., & Bernauer, J. (2009). The Missing Dimension of Democracy. Institutional Patterns in 25 EU Member States between 1997 and 2006. *European Union Politics*, 10(3), 335-339.

8. Appendix

8.1. Definitions

Let $i \in \mathfrak{R}$ be one-dimensional ideal positions of political actors on a scale $s = [0 \dots 1]$. The actors i are court, executive, legislature and the status quo denoted by their ideal points: $i = \{c^-, c^+, e, l\}$. Note that as the court's position is not known, we denote it through an interval $[c^-, c^+]$. Each of the actors i has a utility function $u_i(x_i) = -(x_i)^2$, for $x \in \mathfrak{R}$. Let sq be the position of the status quo on the one-dimensional scale.

Let $sq^i(i) \in \mathfrak{R}$ define indifference point with regard to position $i \in \mathfrak{R}$ by mirroring the status quo on i as follows:

$$\begin{aligned} sq^i(i) &= i - \sqrt{((i-sq)^2)} && \text{if } i < sq \text{ and} \\ sq^i(i) &= i + \sqrt{((i-sq)^2)} && \text{if } i > sq \text{ and} \\ sq^i(i) &= i && \text{else.} \end{aligned}$$

Let K be a function defining the core of a set of positions with boundaries defined by the minimum and maximum of the included positions. Let W_{SQ} be a function calculating a winset by comparing a given set of positions to the status quo sq . Let $x^* \in \mathfrak{R}$ define the position of new legislation, and $V(c^-, c^+, x^*, sq)$ be a function describing the court's decision to veto new legislation as follows:

$$\begin{aligned} V(c, x^*, sq) &= 0 \text{ if the court does not veto and} \\ V(c, x^*, sq) &= 1 \text{ if the court does veto.} \end{aligned}$$

8.2. Scenarios

Scenario 1 (Non-absorption & legislative change)

In this scenario c^- and c^+ are located to the left of e and l , while the status quo is located to the right of e and l :

$$\text{Equation 1: } c^- < c^+ < e < l < sq$$

$$\text{Equation 2a: } K(e, l) = [e, l]$$

$$\text{Equation 2b: } K(c^-, e, l) = [c^-, l]$$

$$\text{Equation 2c: } K(c^+, e, l) = [c^+, l]$$

In this scenario, the court is not located in the pareto-efficient area of executive and legislature and thus the court is not absorbed

$$\text{Equation 3: } [c^-, c^+] \cap K(e, l) = \emptyset$$

As the status quo is outside this area, the winset of executive, legislature and the court $W(E, L, C^-)$ and $W(E, L, C^+)$ the winset of executive and legislature $W(E, L)$ are non empty and identical.

$$\text{Argument 1: } sq \notin K(e, l) \rightarrow W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) = W_{sq}(e, l) \neq \emptyset$$

The outcome we should observe is that executive and legislature legislate in their joint winset.

$$\text{Argument 2: } W_{sq}(e, l) \neq \emptyset \rightarrow x^* \in W_{sq}(e, l)$$

The court will accept the legislation x^* no matter where it is located in the winset of executive and legislature.

$$\begin{aligned} \text{Argument 3: } & W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) = W_{sq}(e, l) \\ & \rightarrow x^* \in W_{sq}(e, l, c^-) \wedge x^* \in W_{sq}(e, l, c^+) \\ & \rightarrow V(c, x^*, sq) = 0 \end{aligned}$$

Scenario 2 (Absorption & legislative gridlock)

In this scenario the court interval c^- to c^+ is located between executive and legislature, the status quo is also located in between executive and legislature.

$$\text{Equation 1: } e < c^- < c^+ < sq < l$$

The core of executive, legislature and court is identical to the core of executive and legislature. In this situation, the court is absorbed.

$$\text{Equation 2a: } K(e, l) = [e, l]$$

$$\text{Equation 2b: } K(c^-, e, l) = [e, l]$$

$$\text{Equation 2c: } K(c^+, e, l) = [e, l]$$

$$\text{Equation 3: } [c^-, c^+] \cap K(e, l) = [c^-, c^+]$$

In this situation, the SQ is located in their pareto-efficient core. Therefore, the winsets of executive and legislature, and executive, legislature and court are empty.

$$\text{Argument 1: } sq \in K(e, l) \rightarrow W_{sq}(e, l) = W_{sq}(e, l, c^-) = W_{sq}(e, l, c^+) = \emptyset$$

The outcome is that we should observe no change at all, as executive and legislature cannot agree on a new policy.

$$\text{Argument 2: } W_{sq}(e, l) = \emptyset \rightarrow \neg \exists x^*, x^* \in W_{sq}(e, l)$$

As there is no new legislation, there is no court decision.

Scenario 3 (Absorption & legislative change)

In this situation, the status quo is located outside the core, however, the court is still located inside the legislative core.

$$\text{Equation 1: } e < c^- < c^+ < l < sq$$

The court as the third mover is located inside the core of E and L.

$$\text{Equation 2a: } K(e, l) = [e, l]$$

$$\text{Equation 2b: } K(c^-, e, l) = [e, l]$$

$$\text{Equation 2c: } K(c^+, e, l) = [e, l]$$

Therefore, all three cores have identical sizes. The court is absorbed.

$$\text{Equation 3: } [c^-, c^+] \cap K(e, l) = [c^-, c^+]$$

As the status quo is not located inside the core of executive and legislature, there is a legislative winset.

$$\text{Argument 1: } sq \notin K(e, l) \rightarrow W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) = W_{sq}(e, l) = \emptyset$$

The winset $W(E, L)$ is identical to the winsets $W(E, L, C^-)$ and $W(E, L, C^+)$. Thus, the existence of the court has no effect on the legislative outcome in any case. C will accept any proposal in the winset as outcome and not veto.

$$\text{Argument 2: } W_{sq}(e, l) \neq \emptyset \rightarrow x^* \in W_{sq}(e, l)$$

$$\text{Argument 3: } W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) = W_{sq}(e, l)$$

$$\rightarrow x^* \in W_{sq}(e, l, c^-) \wedge x^* \in W_{sq}(e, l, c^+)$$

$$\rightarrow V(c, x^*, sq) = 0$$

Scenario 4 (Non-absorption & legislative gridlock)

This scenario locates the status quo inside the core of executive and legislature, but the court outside.

$$\text{Equation 1: } e < sq < l < c^- < c^+$$

The core of executive and legislature and are not identical with the core of executive, legislature and court any more.

$$\text{Equation 2a: } K(e, l) = [e, l]$$

$$\text{Equation 2b: } K(c^-, e, l) = [e, c^-]$$

$$\text{Equation 2c: } K(c^+, e, l) = [e, c^+]$$

As the court is not element of the core of executive and legislature, the court is not absorbed. The existence of the court strongly increases the core.

$$\text{Equation 3: } [c^-, c^+] \cap K(e, l) = [c^-, c^+]$$

However, in this scenario the legislative winset is empty as the status quo is located in the legislative core. Therefore, the winset including the court is also empty.

$$\text{Argument 1: } sq \in K(e, l) \rightarrow W_{sq}(e, l) = W_{sq}(e, l, c^-) = W_{sq}(e, l, c^+) = \emptyset$$

The outcome of this scenario is that there is no new legislation. Again, legislative deadlock, the court does not play a role at all.

$$\text{Argument 2: } W_{sq}(e, l) = \emptyset \rightarrow \neg \exists x^*, x^* \in W_{sq}(e, l)$$

Scenario 5 (Non-absorption & judicial gridlock)

In this the non-absorption scenario with the status quo located between executive and legislative on the one hand and the court on the other hand

$$\text{Equation 1: } e < l < sq < c^- < c^+$$

The size of the core for executive and legislature is smaller than for executive, legislature and court.

$$\text{Equation 2a: } K(e, l) = [e, l]$$

$$\text{Equation 2b: } K(c^-, e, l) = [e, c^-]$$

$$\text{Equation 2c: } K(c^+, e, l) = [e, c^+]$$

The court is thus not absorbed.

$$\text{Equation 3: } [c^-, c^+] \cap K(e, l) = [c^-, c^+]$$

Executive and legislature have a joint winset $W(E, L)$ as the status quo is not located in their core.

$$\text{Argument 1: } sq \notin K(e, l) \rightarrow W_{sq}(e, l) \neq \emptyset$$

But there is no joint winset with the court for the entire interval $[c^-, c^+]$. The court will veto any legislation agreed on by executive and legislature, as the status quo is part of the core of

executive, legislature and court and thus pareto-efficient for the court. Executive and legislature will refrain from introducing new legislation.

$$\begin{aligned} \text{Argument 2: } & W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) = \emptyset \\ & \rightarrow \neg \exists x^*, x^* \in W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) \end{aligned}$$

Scenario 6 (Non-absorption & autolimitation)

In this scenario, both the court and the SQ are located outside the legislative core E and L:

$$\text{Equation 1: } e < l < c^- < c^+ < sq$$

The size of the core for executive and legislature is smaller than for executive, legislature and court.

$$\text{Equation 2a: } K(e, l) = [e, l]$$

$$\text{Equation 2b: } K(c^-, e, l) = [e, c^-]$$

$$\text{Equation 2c: } K(c^+, e, l) = [e, c^+]$$

The entire interval of the unknown court position is located outside the core of executive and legislature. Thus, the court is not absorbed.

$$\text{Equation 3: } [c^-, c^+] \cap K(e, l) = [c^-, c^+]$$

As a consequence:

$$\text{Argument 1a: } sq \notin K(e, l) \rightarrow W_{sq}(e, l) \neq \emptyset,$$

$$\text{Argument 1b: } sq \notin K(c^-, e, l) \rightarrow W_{sq}(c^-, e, l) \neq \emptyset,$$

$$\text{Argument 1c: } sq \notin K(c^+, e, l) \rightarrow W_{sq}(c^+, e, l) \neq \emptyset.$$

We can observe the size of the core executive, legislative and court is smaller for the lower boundary of the court than for the upper boundary of the court. But the opposite is true for the winset of executive, legislative and court. It is larger for the lower boundary than for the upper boundary.

Argument 2: $W_{sq}(e, l) \cap W_{sq}(e, l, c^-) = W_{sq}(e, l, c^-)$ and

$$W_{sq}(e, l) \cap W_{sq}(e, l, c^-) \cap W_{sq}(e, l, c^+) = W_{sq}(e, l, c^+) \\ \rightarrow W_{sq}(e, l, c^-) > W_{sq}(e, l, c^+)$$

Now, the uncertainty about the court's position plays a decisive role. If executive and legislative assume the position of the court at c^- , they will exert autolimitation and legislative in the presumed joint winset.

$$\text{Equation 4: } x^* \in W_{sq}(e, l, c^-)$$

If in this case, and the true position of C is at C^+ , this x^* is not an element of the preferred-to-set of the court. The court will thus veto the new legislation despite autolimitation attempts of the legislature and the executive:

$$\text{Argument 2: } x^* \in W_{sq}(e, l, c^-) \wedge x^* < sq^{c^+} \\ \rightarrow V(c, x^*, sq) = 1$$

On the other hand, if executive and legislature assume that the court is located at c^+ and the true position is at c^- , the suggested policy will at SQ' , even though the court would have been willing to accept anything between C' and SQ' .

$$\text{Equation 5: } x^* \in W_{sq}(e, l, c^+)$$

Autolimitation is successful here, but not efficient for the legislative actors. As outcome, we will not observe vetoes.

$$\text{Argument 3: } x^* \in W_{sq}(e, l, c^+) \rightarrow x^* \geq sq^{c^+} \\ \rightarrow V(c, x^*, sq) = 0$$

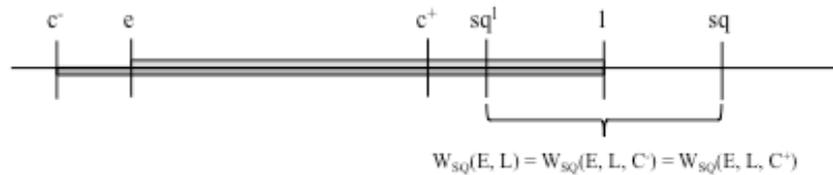
8.3. Scenario boundaries for the incomplete information model

Scenario 3 (Absorption & legislative change)

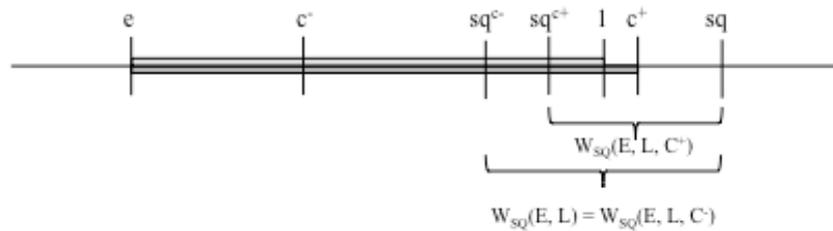
Two particular boundary situations need to be discussed for scenario 3. As the court location is an interval, there might be situations where the actor location is violating the spatial

location assumed in this scenario $e < c^- < c^+ < 1 < sq$. Within scenario 3, the following distribution of actors is possible: (1) $c^- < e < c^+ < 1 < sq$ on the left boundary and (2) $e < c^- < 1 < c^+ < sq$ on the right boundary. The change on the left boundary (undershooting) has no effect on the outcome. However, if $1 < c^+$ (overshooting) the situation is identical with scenario 5. If executive and legislative make a misjudgment about the true position of the court, a veto will occur on the right boundary. The propensity for the veto is 0.5.

Scenario 3 – LEFT (to S1)
(Absorption & legislative change)



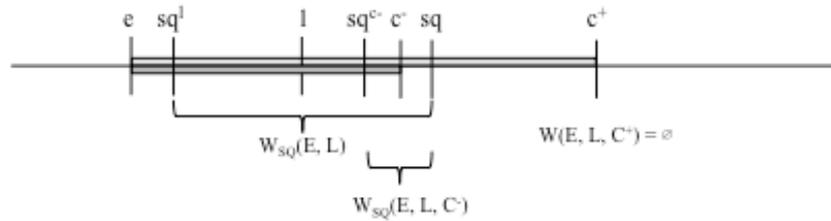
Scenario 3 – RIGHT (to S6)
(Absorption & legislative change)



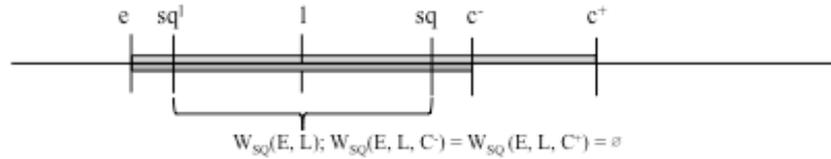
Scenario 5 (Non-absorption & judicial gridlock)

For scenario 5, there is only a left boundary situation change, as c^+ is already the most extreme actor on the right hand side (overshooting). The left boundary (undershooting) change would be $e < 1 < c^- < sq < c^+$. In this situation, change would be possible as $W(E, L, C^-)$ is non-empty. Because of incomplete information about the true position of the court, executive and legislature refrain nevertheless from making a policy proposal. The outcome remains: judicial gridlock, no matter of the assumption about the location of c is right or wrong.

Scenario 5 – LEFT (to S6)
(Non-absorption & judicial gridlock)



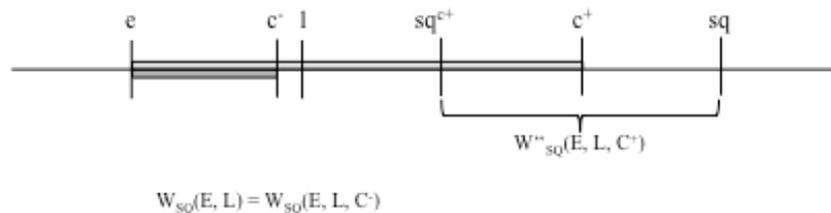
Scenario 5 – RIGHT (to nowhere)
(Non-absorption & judicial gridlock)



Scenario 6 (Non-absorption & autolimitation)

In scenario 6, the left and right hand side boundaries are relevant. The actor distribution of the left boundary would be $e < c^- < l < c^+ < sq$. In this situation, the court is absorbed if its true position is located inside the interval $[c^-, l]$. However, as the true position is not revealed to executive and legislature, they would make a proposal to the right of sq^{c^-} (undershooting). This proposal would be acceptable to the court as it is located in its winset. Thus, we would observe safe autolimitation. The veto propensity for this boundary is 0. On the right boundary, the actor distribution is $e < l < c^- < sq < c^+$. While the executive and legislature presume autolimitation at c^- to be the right strategy, the actual situation is judicial gridlock as the status quo is located inside the core of executive, legislature and court at c^+ . The outcome here is a veto, which is unexpected for executive and legislature. The propensity for veto in this boundary is 1.

Scenario 6 – LEFT (to S3)
(Non-absorption & unsafe autolimitation)



Scenario 6 – RIGHT (to S5)
(Non-absorption & unsafe autolimitation)

