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## - Courts as Veto Players - A Game-Theoretic Model

Benjamin G. Engst

University of Göttingen

University of Mannheim - CDSS

Institute for Political Science

Platz der Göttinger Sieben 3

37073 Göttingen (Germany)

[benjamin.engst@sowi.uni-goettingen.de](mailto:benjamin.engst@sowi.uni-goettingen.de)

Caroline E. Wittig

University of Mannheim

Mannheim Center for European Social Research

Center for Doctoral Studies in Social & Behavioral Sciences

D7, 27, Room 303

68131 Mannheim (Germany)

[cwittig@mail.uni-mannheim.de](mailto:cwittig@mail.uni-mannheim.de)

Christoph Hönnige

University of Göttingen

Institute for Political Science

Platz der Göttinger Sieben 3

37073 Göttingen (Germany)

[christoph.hoennige@sowi.uni-goettingen.de](mailto:christoph.hoennige@sowi.uni-goettingen.de)

Thomas Gschwend

University of Mannheim

Center for Doctoral Studies in Social & Behavioral Sciences

D7, 27, Room 303

68131 Mannheim (Germany)

[gschwend@uni-mannheim.de](mailto:gschwend@uni-mannheim.de)

# Contents

- 1 Introduction** **1**
  
- 2 Constitutional Court: An understudied Black-Box** **2**
  - 2.1 Literature Review: Two Research Traditions . . . . . 2
  - 2.2 European Constitutional Courts . . . . . 2
  - 2.3 The US Supreme Court . . . . . 4
  - 2.4 The Research Gap . . . . . 5
  - 2.5 Specifics of the Kelsenian Court: Admissibility and Justification . . . . . 6
    - 2.5.1 Admissibility . . . . . 7
    - 2.5.2 Justification . . . . . 7
    - 2.5.3 Directives . . . . . 8
  
- 3 Opening the Black-Box** **9**
  - 3.1 The Logic of the Judicial Policy Game . . . . . 10
  - 3.2 Actors Behavior to accommodate their Interests . . . . . 11
  - 3.3 Varying Strategies for varying Laws . . . . . 15
  - 3.4 Varying Strategies for Varying Actors' Placement . . . . . 18
  
- 4 General Implications of the Judicial Policy Game** **20**
  
- 5 What is next** **22**
  
- 6 Conclusion** **23**
  
- References** **24**

## Abstract

Moving research on judicial politics beyond mere case studies stemming from the US judicial system, we develop a *judicial policy game* to make transparent the policy influence of the Kelsenian court, the predominant court type in Europe, within the constitutional policy-making process. This court type focuses exclusively on the constitutionality of a law and has particular features at its disposal (*admissibility, justification, directives*) that can be employed strategically. It is therefore a strong assumption to model constitutional courts as probabilistic black-boxes (Vanberg 1998). Instead, one contribution of our *judicial policy game* is to relax this rather restrictive assumption and to model constitutional courts within the *judicial policy game* as strategic utility-maximizer. Based on our model we derive predictions that stay in stark contrast to the current literature. One implication of our model is, contrary to Stone Sweet's (1998), that the parliamentary opposition should not always refer legislation to the court. Another implication of our model is, contrary to Tsebelis's (2002, Chapter 10), that constitutional courts are not absorbed but rather become a *veto player* if activated by a plaintiff referring legislation to the court. While in most spatial settings the plaintiff is disadvantaged compared to the government's and the constitutional court's influence on policy, the influence of the court on policy is larger than previously thought. As long as there is an active plaintiff – and empirically constitutional courts are overwhelmed by constitutional complaints – the court is influential by moving policy closer to its ideal point.

# 1 Introduction

Constitutional courts possess a specific position in their respective political systems due to exclusively dealing with constitutional review. Unlike highest courts in other judicial systems they do not serve as appellate courts. Instead, they are courts *sui generis* outside the regular appeal stages. Unfortunately, most models of judicial decision making are designed for the American case or similar judicial systems. Therefore, those models do neither account for the courts' differing positions in the respective political systems nor for the institutional peculiarities of a constitutional court. This poses the question: How can we establish models of judicial decision making that suit the specifics of constitutional courts?

We develop a new general model, the *judicial policy game*, which is tailored to courts of the German-Austrian type. Whereas Tsebelis (2002) claims that constitutional courts are conditional veto players, we argue that they have institutional features at their disposal that allow them to become strong, strategic veto player. As such every actor in a political system has to continuously account for the judicial influence.

We approach the model here from the plaintiff's perspective, assessing when he should choose to go to court or forego it after a government has presented a policy. It reveals that the plaintiff should consider carefully if he wants to refer a law to the court because only under a certain constellation he will surely benefit from it. Even more, we suggest that a strategically acting court can use the plaintiff as a servant for establishing its favored policies.

To draw these conclusions and to build the argument, the paper is structured as follows. We start with providing an overview on the current status of research on judicial politics in order to point out the gap in the literature addressed here. The subsequent section introduces jurisprudential concepts that are essential for our model. We continue with developing the *judicial policy game* by providing a general overview of the sequences that constitute this game. Afterwards, we introduce spatial models to present the interaction and strategies played by the actors involved. Finally we offer solutions to the game to

derive general implications. Prior to a summary in the conclusion we highlight further steps to be taken.

## **2 Constitutional Court: An understudied Black-Box**

### **2.1 Literature Review: Two Research Traditions**

The literature on constitutional courts in established and well-functioning democracies is determined by two strands of research. First, the literature on European courts that had - and still has - a focus on the impact of constitutional courts within political systems. Here, the court is usually treated as a judicial black box, and the outside actors like government and litigants are perceived as strategic actors. Second, the literature on the US Supreme Court, which is focusing either on intra-court decision-making or on the independence of the Supreme Court. The US literature has a long tradition of opening the court as black box and of arguing that it is a mainly policy driven actor, either sincere (Segal & Spaeth 2002) or strategic (Epstein & Knight 1998). This literature is less concerned with the impact of the Supreme Court on the actors within the political system.

### **2.2 European Constitutional Courts**

The judicialization hypothesis is the central research paradigm regarding constitutional courts in stable democracies outside the United States (Hirschl 2004, Stone 1992, Stone Sweet 2002, Tate & Vallinder 1995). It claims that the courts' activity increasingly limits the ability of political actors to take political decisions: Government and parliament are less able to make laws without taking the constitutional court into account. This view turns constitutional courts into a negative legislator. They are not able to make laws but can abrogate them and thus strongly influence political decision-making by nullifying laws passed and promulgated by the executive and the legislative. Judicialization occurs in various ways: Politicians can take legal arguments into account when drafting and debating proposals (Kommers 1994, Landfried 1988, Stone 1992), they can avoid some

difficult decisions and thus move competencies from parliament to the court, or courts themselves can act as positive legislators by outlining feasible options in their rulings (Tate & Vallinder 1995). As a result, some authors claim that due to the institutionalisation of constitutional courts, in many countries parliamentary sovereignty is on its deathbed, while the new sovereigns are the courts. After all, they can overturn the parliament's decisions, while their decisions cannot be overturned (Stone Sweet 2000). Stone's position is that especially the right of parliamentary minorities to initiate abstract review against new governmental legislation leads to an increase in judicialization. A request for abstract review is basically cost-free, which is the reason why opposition parties initiate reviews rather often and courts will strike down laws with a certain probability. This is called the direct effect of judicial review: courts nullify laws. As a reaction to the review threat, the government starts to restrain itself when drafting new laws. It employs legal specialists to analyze whether proposals are in line with the constitution and likely to be accepted by the court. This is the so-called indirect effect, also named autolimitation. A lot of case studies on various courts in Europe consider the indirect effect (Landfried 1988, Landfried 1992, Llorente 1988, Pizzorusso 1988, Stone 1992, Stone Sweet 2000, Volcansek 1994). However, the government's autolimitation measures are not always successful, and the court will still declare laws void. This further reduces the government's options. Thus, Stone comes to the conclusion that constitutional courts are basically third chambers in the legislative process, interacting with the other two chambers (Stone Sweet 2000).

Newer research changes this focus and is interested in the limitations of the process of judicialization. These limitations might either come from the judges themselves or from the plaintiffs. The likelihood of striking down a law might depend - as observed for the US Supreme Court - on the judges' preferences as measured by Hönnige and Magalhaes for Germany, Portugal, Spain and France (Hönnige 2009, Magalhães 2003). Therefore, more effort is being made to gauge the preferences more exactly (Hanretty 2012) or to understand the intra-court discussions anecdotally (Kranenpohl 2009). Apart from policy considerations, the judges' behavior in European courts might also be influenced by strategic self-restraint of the courts (Brouard 2009, Santoni & Zucchini 2004, Vanberg

2001) as can be observed for Italy, France and Germany. Additionally, the propensity to use the court might also depend on the electoral considerations of a plaintiff (Dotan & Hofnung 2005, Vanberg 1998). Thus plaintiffs should also be self-restraining.

## **2.3 The US Supreme Court**

The central focus on the judicialization hypothesis separates the research agenda on constitutional courts outside the US from that on the Supreme Court. Research on the Supreme Court is divided into various schools. These loosely follow the division between neo-institutionalist schools: Attitudinalists, strategic approaches, and interpretative approaches (Maveety 2003). Attitudinalists focus exclusively on judges' political preferences and intra-institutional rules in explaining Supreme Court behavior (e.g. Segal & Spaeth 2002, ). Strategic approaches vary a lot more in the judges' possible motives, since they also take legal and procedural preferences into account. Moreover, they undertake research about the inter-institutional connections between Supreme Court and other actors (Epstein & Knight 1998). Researchers using interpretative approaches explain court behavior by historical and sociological variables (e.g. Clayton & Gillman 1999, ). Judicial preferences are the cornerstone of any analysis of the Supreme Court, and the justices' preferences have been intensely debated (Baum 1994, Epstein & Knight 1998, Macey 1994, Posner 1993, Segal & Spaeth 2002). All three schools (Attitudinalists, Strategists, and Interpretativists) argue that policy preferences are the main driving forces behind the behavior of judges of the US Supreme Court. At the same time, research paradigms vary with regard to whether there are other types of preferences such as procedural preferences or legal preferences, whether preferences are stable and where they are formed. With regard to intra-institutional rules, basically everything has been tested for the US Supreme Court exclusively. The focus of research has been the assignment of opinions to judges and majority rules within the court, e.g. case selection, decision-making (Epstein & Knight 1998, Maltzman & Wahlbeck 1996, Spriggs, Maltzman & Wahlbeck 1999), and dissenting opinions (Brace & Hall 1997, Epstein, Knight & Shvetsova 2001, Hettinger, Lindquist & Martinek 2004). Judicial independence and the

separation of powers is another interesting issue. While the judicialization hypothesis assumes that courts are unrestrained actors, a lot of institutional rules give political actors the opportunity to put pressure on the court or on individual judges with regard to policy-, vote-, or office-motives. This issue is also discussed for the US Supreme Court as separation of powers game (Caldeira 1987, Durr, Martin & Wolbrecht 2000, Flemming & Wood 1997, Gibson, Caldeira & Spence 2003, Mondak & Smithey 1997).

Unlike for European courts, where litigation routes and access to the court is intensely debated, this topic does only play a minor role for the Supreme Court. This is due to the fact that the US Supreme court has full control over its own docket and needs a minority of 4 out of 9 votes to accept cases. Therefore, the effect of this rule is discussed (Baum 1993) but less the way of a case into the docket.

## **2.4 The Research Gap**

This paper aims to provide a theoretical link between the two research traditions. It connects the European research focus on the strategic actors outside parliament - which mainly ignores the court's behavior - with the US research focus on policy driven strategic behavior of the court - which mainly ignores outside behavior. We therefore assess the intra-institutional features of European courts that set incentives for the courts to behave strategically in interaction with the strategically behaving political actors outside the court, like plaintiffs and governments.

This more encompassing perspective also helps us to make a connection between research about constitutional courts on the micro-level with the perception of courts on the macro-level in our concepts of comparative politics. While constitutional courts often play an important role on the level of political systems, where they are understood as veto players or elements of consensus democracy (Alivizatos 1995, Brouard 2009, Cooter & Ginsburg 1996, Kaiser 1998, Lijphart 1999, Smithey & Ishiyama 2000, Tsebelis 2002, Volcansek 2000, Wagschal 2009), the theoretical and empirical foundations of these claims are relatively weak. Only few attempts have been made to measure the influence of courts comparatively on the aggregate level (Alivizatos 1995, Brouard 2009, Cooter & Ginsburg

1996, Lijphart 1999, Smithey & Ishiyama 2000), and all these attempts suffer from the same problem: the evaluation is mainly based on the idiosyncratic judgment of case studies or - even worse - institutional features but not on a stringent theoretical concept that is measured empirically. To develop a measurement concept for court activity in a comparative manner in the long run, it thus seems important to understand the interaction between constitutional courts and other actors such as government, plaintiff, and second chambers more systematically.

## 2.5 Specifics of the Kelsenian Court: Admissibility and Justification

Judicial politics research has been conducted mostly in judicial systems similar to the one of the United States, where highest courts serve as appellate courts. However, the German-Austrian type of court, a court that focuses exclusively on the constitutionality of laws, is the predominant model all over and even beyond Europe. After the fall of the iron curtain most of the new democracies in eastern Europe adopted the concept of a purely constitutional court. Examples are Bulgaria, Poland, or Romania. But even South Africa decided to rely on this model.

What distinguishes most courts of the Kelsenian type from highest courts in other legal systems is a rather strict two-tiered test when examining the constitutionality of a law. The procedure consist of *admissibility*, the question of access to the court, and *justification*, the inquest if the respective law does indeed violate the constitution, as claimed by the plaintiff. Those two tests are in large parts disconnected, meaning the judges can decide on one question without taking into consideration the outcome of the other part. Logically, it makes only little sense to invest further work in a case that cannot be decided at the court anyway due to inadmissibility. Empirically, however, we do observe such situations.

In the next paragraphs we explain the term *admissibility*, followed by *justification*. The section concludes with introducing the new concept of "*directives*," which are instructions, the means by which a court specifies its ideas and tries to broaden its influence.

### 2.5.1 Admissibility

While several highest courts employ a system of mainly free docketing, most constitutional courts are compelled to take up a case and decide on it if certain formal requirements are fulfilled. At most courts, different proceedings need to be initiated by different plaintiffs. While, for example, sometimes a regular citizen can file a complaint, other cases can only be handed in by political actors or lower courts. Also, a case that obviously does not have any chance at all to be successful will be denied access to further examination. A further reason for inadmissibility is not complying with other formal rules such as deadlines. But as soon as the formal prerequisites are fully met, the court has to decide on the case.

Although these rules constrain judges in terms of deciding which case to rule on, they continue to be subject to interpretation. Therefore, judges can still use them strategically - to a smaller extent than judges at courts with free docketing, though. The model will not specifically include the question of admissibility. Our game starts in the second part of a court's examination. It should be kept in mind, however, that admissibility is an instrument for strategic actions prior to the steps this paper covers. In this paper we focus on cases initiated by political actors. But the model contains explanatory power independent of the type of plaintiff.

### 2.5.2 Justification

One of the concepts that are center of our model is *justification*, the decision on the merits. It is examined after a court has granted admissibility and can be said to be one of the jurisprudential cornerstones of constitutional review. In this stage, the judges have to decide whether the plaintiff's claim is justified. A statute can be unconstitutional due to formal deficiencies, i.e. if the procedure of passing the law was incorrect. Or the law's content violates constitutional provisions such as the freedom of speech. If the judges find irregularities in at least one of these aspects, they will approve of the justification and repeal the law.

### 2.5.3 Directives

We now turn to introducing a third concept. It cannot be found in the jurisprudential or political science literature. But analyzing the text of court decisions reveals that several constitutional courts, for example the Constitutional Court of Austria, the French Conseil Constitutionnel, or the German Federal Constitutional Court elaborate besides admissibility and justification also on the aftermath of the decision. In doing so, the courts empower themselves with active influence on the legislative process. Not only do the judges annul statutes, in some cases they even specify in which way they expect the government to change the law. We will call these instructions *directives*. Their occurrence is contingent on the result of the justification and comes into play when the judges hold a law unconstitutional. Only if a court has overturned a statute it makes sense to give instructions on what the new law has to contain.

However, if a court chooses to give directives, those specifications only rarely appear clear-cut in a separate section of the decision. The judges rather tend to delineate their ideas within the justification. Being aware that such instructions can cause a conflict with the legislator and violate the jurisprudential standard of judicial self-restraint, a court is keen to formulate the directives rather vaguely.

One should note, however, that a court does not always make use of this option. Moreover, even directives precisely written do not ensure that a court's ideas are eventually implemented by the legislator, i.e. primarily the government, since a constitutional court has no means to pursue the implementation. Thus, a government can evade a court's provisions.

Only in very specific situations a government will not be able to circumvent directives of the court. Those are cases, in which the substantial question does not permit to refrain from passing a new law. A vivid example is the decision of the German Federal Constitutional Court on voting regulations for federal elections. The court repealed the law, which resulted in a situation without an election law. Given that elections have to be conducted, the legislator did not have the opportunity to evade the decision of the court. In fact, it did not implement the directives on time but it did pass a new law

later on. Those cases, however, remain an exception. Therefore, in the vast majority of decisions a government will be able to evade the intentions of a court.

Having outlined these “tools” available to judges at constitutional courts the question remains how they can be used effectively to maximize judicial influence. In this paper we will only include those situations when cases are granted admissibility. Hence, we will focus on the strategic power judges have when they decide on the justification of a referral or even present a directive.

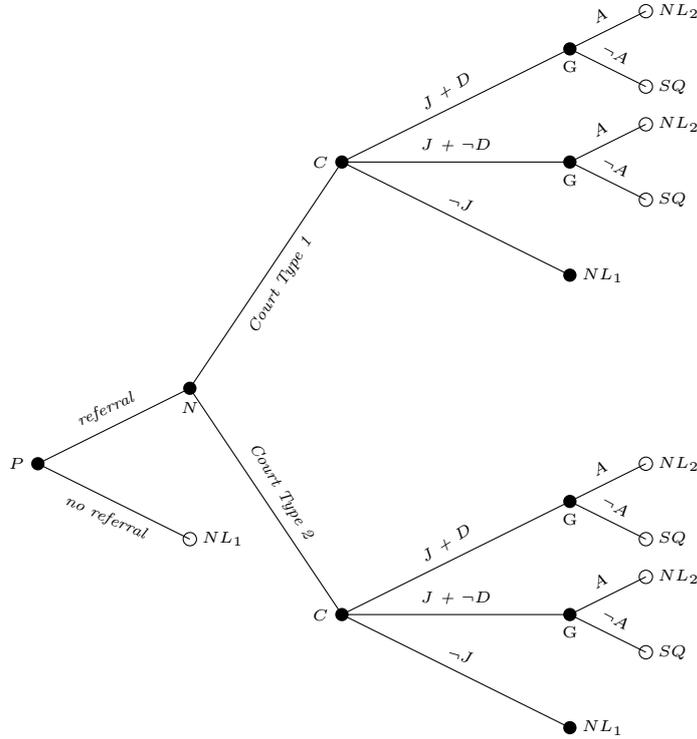
### 3 Opening the Black-Box

The prior section has shown that one can argue that the judicial black-box contains three features: Through *admissibility*, judges can control whether a referral has general access to the court, and through *justification* they can decide whether referred legislation is constitutional or not. Finally, judges can even present ideas how an unconstitutional law should be changed. Constitutional courts can spin a statute in their preferred direction by giving a *directive*. It is therefore a strong assumption to model constitutional courts as probabilistic black-boxes (like for example Vanberg (1998) does). Instead, we relax this rather restrictive assumption and model constitutional courts as strategic utility-maximizers.

However, constitutional courts have a special position in the legal system, and judges decide exclusively on questions with regard to the constitution (see Kelsen 1931). Moreover, it is necessary that a plaintiff refers an issue to the court because the judges are not empowered to become involved by themselves (i.e. no judicial activism). Nevertheless, a plaintiff should consider the institutional features that provide opportunities for strategic behavior by the court. Otherwise it might very well be possible that strategic judges take a plaintiff’s referral to spin a policy in their direction - and against the interests of the plaintiff.

Hence, a strategic plaintiff should anticipate strategic action by the constitutional court prior to a referral. This leads to a complex *judicial policy game* with multifarious interactions between all three actors involved, the government, a plaintiff, and the constitutional

Figure 1: Sequential logic of the Judicial Policy Game



$P$  = Plaintiff;  $N$  = Nature;  $C$  = Constitutional Court;  $G$  = Government;  $NL_t$  = New Legislation at time  $t$   
 $SQ$  = Status Quo;  $J$  = Justification;  $D$  = Directive;  $A$  = Action taken by the government.

court. We will outline this game in the next section and then present strategies actors play when facing this game.

### 3.1 The Logic of the Judicial Policy Game

The tree in *Figure 1* outlines sequences of the *Judicial Policy Game*. There are three actors: government ( $G$ ), constitutional court ( $C$ ), and a plaintiff ( $P$ ). It begins after the parliamentary majority - which we assume to be the government - presented a new legislation ( $NL_1$ ) to change the prior existing status quo ( $SQ$ ). In the first step, a plaintiff can decide to refer the legislation to the constitutional court or to accept  $NL_1$ . An advantage of our model is that we can consider any plaintiff, be it the parliamentary minority or an individual initiating a constitutional complaint. This makes our model more general than comparable ones (see e.g. Vanberg 1998, Vanberg 2001). If the plaintiff initiates a

referral, nature moves choosing a court type she faces. She can face a supportive court (court type 1) with probability  $q$  or an opposing court (court type 2) with probability  $1 - q$ .<sup>1</sup> After the move by nature the constitutional court ( $C$ ) can choose one of three responses to the plaintiff's referral. It can justify ( $J$ ) the referral and present a directive ( $D$ ) or it can justify the referral and not present a directive ( $\neg D$ ). Finally, it can regard the referral unjustified ( $\neg J$ ). In this case the game would end as the court's decision would directly imply that the government's legislation  $NL_1$  is constitutional. However, after a justification by the court our third actor in the game, the government, can move. It can accept the courts decision without acting ( $\neg A$ ) again what will lead to the  $SQ$  existing prior to the government's bill  $NL_1$ . The other option is that the government acts and presents a new bill ( $NL_2$ ) compared to its original legislation ( $NL_1$ ).

In sum, the advantage of the game in *Figure 1* is that it *explicitly* includes a bundle of actions the court can choose from. Thus, it allows for understanding the court as a multifarious actor and not as a probabilistic black-box. Instead, the judges have tools available to act strategically. Furthermore, by including a step prior to the court's involvement *and* after the court's decision allows for assessing strategic involvement of the court *and* strategic action by the court. This leads to multiple strategies that can be played in this game. These strategies are chosen by the actors depending on their interests. Hence, in the next section we outline potential interests the plaintiff, the court, and the government might have before solving the game for equilibrium.

### 3.2 Actors Behavior to accommodate their Interests

Throughout the game, rational acting players will pursue an outcome that maximizes their utility. This is achieved, in a one-dimensional policy space, if they can draw policy close to their own ideal point. This means, they prefer to have a particular policy enacted. For example, if they are interested in a particular amount of unemployment assistance everything below or above this amount is of less use to them. Hence, prior to any move either actor has to consider whether that move will make him or her better off compared to the currently enacted policy.

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<sup>1</sup> This step adds dynamics to the game, which we are not considering yet. We plan to include this in further iterations of this paper.

The plaintiff can choose among two options to maximize her utility. She can either refer the legislation ( $NL_1$ ) or accept it. Hence, aware of her own ideal point the plaintiff will refer  $NL_1$  to the court if it is worse than the original status quo  $SQ$ . However, she is aware of the fact that she does not know the court's decision beforehand. Hence, to avoid being blamed for losing at the court and receiving an unpleasant outcome the plaintiff has to anticipate the court's options and interests prior to a referral.

Similarly to the plaintiff, the court has complete and perfect information about its own interests, the location of the original  $SQ$ , and the legislation  $NL_1$ . Having three options the court can preserve  $NL_1$  when deciding that a referral is unjustified. However, using one of the other two options, the court can only signal its interest. If the court prefers the prior existing  $SQ$  over the new  $NL_1$ , it can simply justify a referral. This will lead to a return to the  $SQ$ . In addition the court may not prefer  $NL_1$  or the  $SQ$  but presents a directive favoring a completely new policy. The later two options are risky ones. Returning to the status quo or suggesting a new policy requires the court to anticipate the government's reaction. This is because the judges can neither enforce their decisions nor can they prevent the government from presenting new policy not in the court's interest.

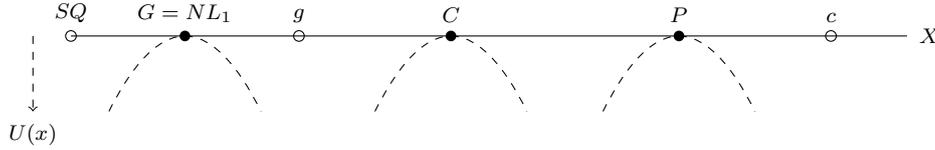
The government is in the situation that it knows its own position, is aware of the court's decision, and can freely choose to present policy or not.<sup>2</sup> Hence, the government can not act after the court justified a referral and declared  $NL_1$  unconstitutional. This would lead to a return to the  $SQ$ . Moreover, the government can always present new legislation ( $NL_2$ ) at the end of the game. It is not necessary that it includes a directive presented by the court but instead adapts it only partially to "rescue" parts of its originally preferred legislation. However, even though the game in *Figure 1* is designed as one-shot game it will be played repeatedly. Hence, after a decision that  $NL_1$  was unconstitutional the government can not present the same bill again as a new plaintiff observing this would refer this bill to the court. Therefore, even if the government moves last it has to anticipate the probability that the game starts over.

*Figure 2* summarizes considerations made so far in a one-dimensional spatial model. The

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<sup>2</sup> In line with the definition given above we assume that the directive presented by the court can be evaded by the government.

Figure 2: The Judicial Policy Game under complete and perfect information



$G$  = ideal point of the government;  $C$  = ideal point of the constitutional court;  $P$  = ideal point of the plaintiff  
 $g$  = utility equivalent point of  $G$ ;  $c$  = utility equivalent point of  $C$ ;  $SQ$  = Status Quo;  $NL_1$  = policy present at the beginning of the game

solid line is the policy space  $X$ .  $G$ ,  $C$ , and  $P$  are the preferred policy positions (ideal points) of the government, the court, and the plaintiff, respectively.  $SQ$  is the original status quo prior to the law presented by the government  $NL_1$ . Hence,  $SQ$  is the point that will be restored if  $NL_1$  is unconstitutional and no new legislation will be presented. The dashed parabolas below the ideal points depict the actors' utility functions. Following standard game theory (see e.g. McCarty & Meirowitz 2006, 22p) we assume single peaked, symmetric preferences illustrated by quadratic utility functions of the general form

$$U(x) = -(x - z)^2$$

where  $x$  is the position of a policy in the space  $X$  and  $z$  is an agent's ideal point with  $z \in \{P, C, G\}$ . Assuming symmetric functions leads to the elegant implication that on these parabolas there are utility equivalent points left and right of the actors' ideal points. For example, the government can maximize its utility with every point to the left of its ideal point  $G$  that is closer than  $SQ$ . Symmetry implies that there is a utility equivalent point to  $SQ$  to the right of  $G$ . We denote this equivalent point as  $g$  (or  $c$  and  $p$  respectively). Every point to the right of  $G$  closer than  $g$  maximizes the government's utility in the same way as the same distant point to the left of  $G$  that is closer than  $SQ$ . The placement of the actors shown in *Figure 2* illustrates a *theoretically* interesting scenario. As our plaintiff is modeled in general terms we can assume for a moment that the plaintiff is the opposition. The court's placement between the government and the opposition is in line with theoretical arguments presented by Tsebelis (2002, Chapter 10). He argues that judges at constitutional courts are chosen equally by the

opposition and the government. Hence, the court is situated between these political actors.<sup>3</sup> Furthermore, throughout the paper, we fix  $NL_1$  to the governments ideal point. This is reasonable because the government always has the interest to have policy at its ideal point. Every actor is well aware of the  $SQ$  prior to the also publicly known  $NL_1$ . The sequences of our game require, first, that the plaintiff considers whether she can maximize her utility by referring  $NL_1$  to the court.<sup>4</sup> Assuming perfect and complete information for now the question remains, what is the best *strategy* the plaintiff, the court, and the government will follow in the scenario in *Figure 2*.<sup>5</sup> In general, the plaintiff's decision to refer is based on two steps: First, she will compare her own ideal point  $P$  to  $NL_1$  and to  $SQ$ . If  $SQ < NL_1 < P$  like in *Figure 2* the plaintiff is better off by  $NL_1$  than  $SQ$ . Hence, she will only refer if a decision by the court makes her better off than  $NL_1$ . Thus, second, she anticipates the court's action. The court will compare the distance of its ideal point  $C$  to the original  $SQ$  and to  $NL_1$  like the plaintiff. In our scenario,  $NL_1$  is already an improvement over the  $SQ$ . Hence, the court will not only justify a referral by the plaintiff. If the judges would decide to only justify their decision they would restore the  $SQ$ . Therefore, it comes down to two options. The court can either hold the referral unjustified or justify it *and* present a directive. Thereby, the judges will choose the way that ensures that the court's decision will not be evaded. Holding a referral unjustified is the safest option. However, having observed the government's movement of the status quo to  $NL_1$ , symmetric utility functions imply that there is a point  $g$  to the right of  $G$  that is utility equivalent to  $SQ$ . Hence, the court can demand concessions by justifying the plaintiff's referral and giving a directive that draws policy in the court's direction. However, this concession ends at the utility equivalent point  $g$ . This is because if the court justifies, it restores the  $SQ$ . Hence, if in the last sequence the government would not act,  $SQ$  is the outcome. If the court presents a directive with justification, it needs the government to implement it. However, if the directive is further away from  $G$  than  $SQ$  or its equivalent point  $g$ , the government will

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<sup>3</sup> This is a theoretical paper but the authors recognize that Hönninge (2007, 104pp) finds varying empirical proof for this.

<sup>4</sup> One could also solve the game by backward induction but we intent to outline it in temporal order of the moves.

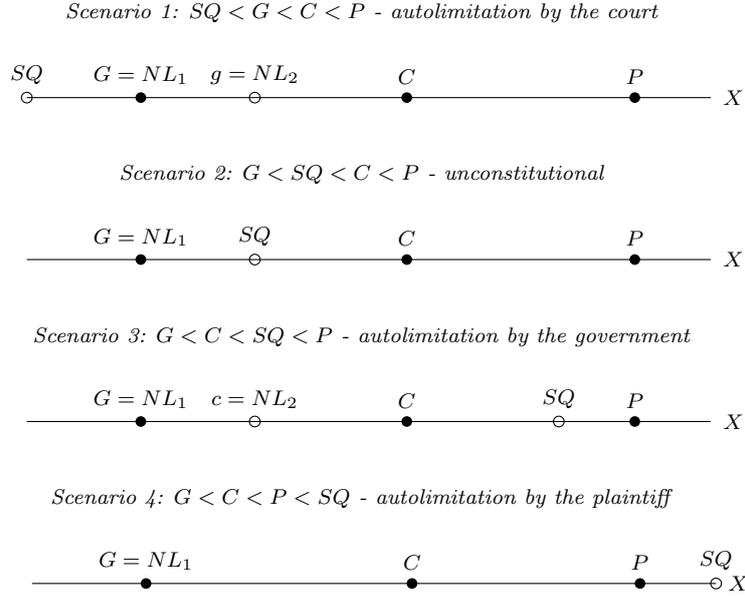
<sup>5</sup> A strategy is an "action to be taken [by a player, B.E.] in each interaction as a function of what happened in previous stages" (McCarty & Meirowitz 2006, 90).

evade the directive. Hence, the directive the court will present suggests policy close to its ideal point  $C$  but giving leeway to the government so that it will present policy at  $g$ . In sum, in the scenario in *Figure 2* a plaintiff having complete and perfect information should refer  $NL_1$  to the court. The court will engage in *strategic autolimitation* by justifying the referral but constraining a directive to the equivalent point  $g$ . Eventually, the government will present  $NL_2$  at  $g$ , which is utility equivalent to  $SQ$  and an improvement for  $C$  and  $P$  over  $SQ$  and  $NL_1$ .

### 3.3 Varying Strategies for varying Laws

The prior section has introduced the basic logic in spatially modeling the interaction between the plaintiff, the court, and the government. While the steps the individual actor takes when finding an optimal strategy remain always the same, varying spatial location of the actors and the  $SQ$  will influence each actor's reasoning. Hence, we should not always find that the outcome is *autolimitation by the court* like in *Figure 2*. Therefore, we will first present a closer look at varying positions of  $SQ$  and, second, at different constellations of actors.

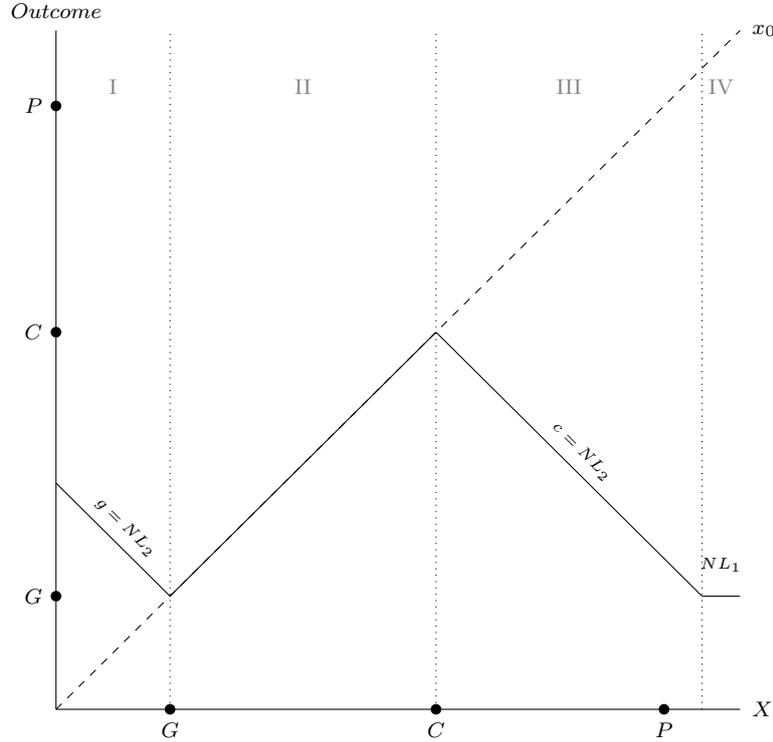
In *Figure 3* the placement of the actors is fixed to  $G < C < P$  but the  $SQ$  varies over the policy space. This leads to four different scenarios in the interaction between the plaintiff, the court, and the government. *Scenario 1* is already outlined above and leads to *autolimitation by the court* when giving a directive. *Scenario 2* begins after the government's law  $NL_1$  has moved the original  $SQ$  to the left, away from  $P$  and  $C$ . Hence,  $P$  has an interest in a restored  $SQ$ . The same holds true for the court located to the right of  $SQ$ . Thus, the court should at least justify the referral by  $P$ . Moreover, in this scenario the judges will not present a directive drawing policy closer to  $C$ . This is because  $G$  would evade a directive that is further away than the original  $SQ$ . Therefore, when  $G < SQ < C < P$  the plaintiff should refer  $NL_1$  and the court should justify this referral restoring  $SQ$ . The government's move is *unconstitutional*. In *Scenario 3*,  $NL_1$  is further away from  $P$  than the prior existing  $SQ$ . Thus, the plaintiff is motivated to refer the legislation  $NL_1$ . In fact, the court will justify this referral as the distance of

Figure 3: The Judicial Policy Game when  $G < C < P$ 

$G$  = ideal point of the government;  $C$  = ideal point of the constitutional court;  $P$  = ideal point of the plaintiff  
 $g$  = utility equivalent point of  $G$ ;  $c$  = utility equivalent point of  $C$ ;  $SQ$  = Status Quo;  $NL_1$  = policy present at the beginning of the game;  
 $NL_2$  = if changed, policy present after the game

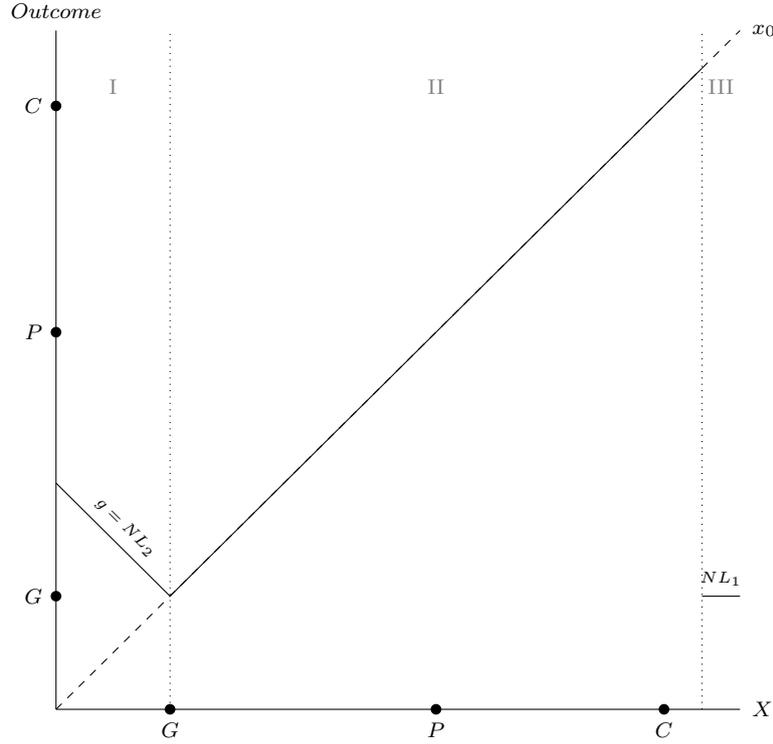
$C$  to  $NL_1$  is larger than  $C$  to  $SQ$ . Moreover, in this scenario the court can present a directive around its ideal point. This leaves the government the option to present  $NL_2$  at  $C$ 's equivalent point  $c$ . Locating a new policy  $NL_2$  at  $c$  ensures that the court will uphold it in case a new plaintiff would refer  $NL_2$  and start the game again. Therefore, when  $G < C < SQ < P$ , the plaintiff will refer, and the court will justify the referral but presenting a directive. This will allow the government to anticipate a law  $NL_2$  that the court would uphold. The government will *autolimit* itself to  $c$ . Finally, in *Scenario 4*  $NL_1$  is worse for the plaintiff than the original  $SQ$ . In the depicted situation,  $P$  could refer  $NL_1$  favoring  $SQ$  and hoping for a justification of the referral. However, under complete and perfect information the plaintiff knows that the government's move has drawn policy closer to  $C$ . Therefore, the court would uphold  $NL_1$ . Hence, when  $G < C < P < SQ$ , the plaintiff will *autolimit* itself to not lose at the court and accept  $NL_1$ .

*Figure 4* summarizes all outcomes (y-axis) when the  $SQ$  varies over the policy space

Figure 4: Scenario of varying Status Quo by a constellation of  $G < C < P$ 

(x-axis) with an constellation of actors of  $G < P < C$ . The prior assessment and this figure allow for some implications from the *Judicial Policy Game*.

First, the model does not require precise specifications of the plaintiff but only an assumption about its policy interest. Second, when the plaintiff is the parliamentary opposition the model predicts that it should not always refer legislation when defeated at the floor. The reason for this is related to the third implication of the model. When the court has multiple options to decide on a case, every actor facing the court has to anticipate its strategic behavior. Hence, there are situations when the court limits itself to the government (*Area I* in *Figure 4*) as well as situations when the government anticipates the court's equivalent point (*Area III*) and situations when the plaintiff accepts the will of the government and the court (*Area IV*) in order to not being defeated. Finally, the fourth implication is that the court will present directives only in situations when the government and the judges favor a change of the status quo in the same direction. When the original policy was located between the interests of the government and the court, one will not observe directives (*Area II* in *Figure 4*).

Figure 5: Scenario of varying Status Quo with a constellation of  $G < P < C$ 

The question is whether the implications from the solution shown in *Figure 4* remain the same when the preferences of the plaintiff, the court, and the government change.

### 3.4 Varying Strategies for Varying Actors' Placement

To assess all possible spatial combinations of  $P$ ,  $C$ , and  $G$  it is not necessary to draw six (three factorial) figures but only three, as the symmetry of the policy space makes one combination the mirror image of another. Thus, for example  $G < C < P$  (*Figure 4*) is the mirror image of  $P < C < G$ . Moreover, under any spatial placement the considerations made by the actors follow the same pattern. First, the plaintiff considers whether a referral leads to policy in her interest. She also anticipates the court's behavior. Second, the court compares its ideal point to the referred policy and chooses among three options: unjustified, justified, and justified with directive. Finally, the government can consider to present new policy or to refrain from acting.

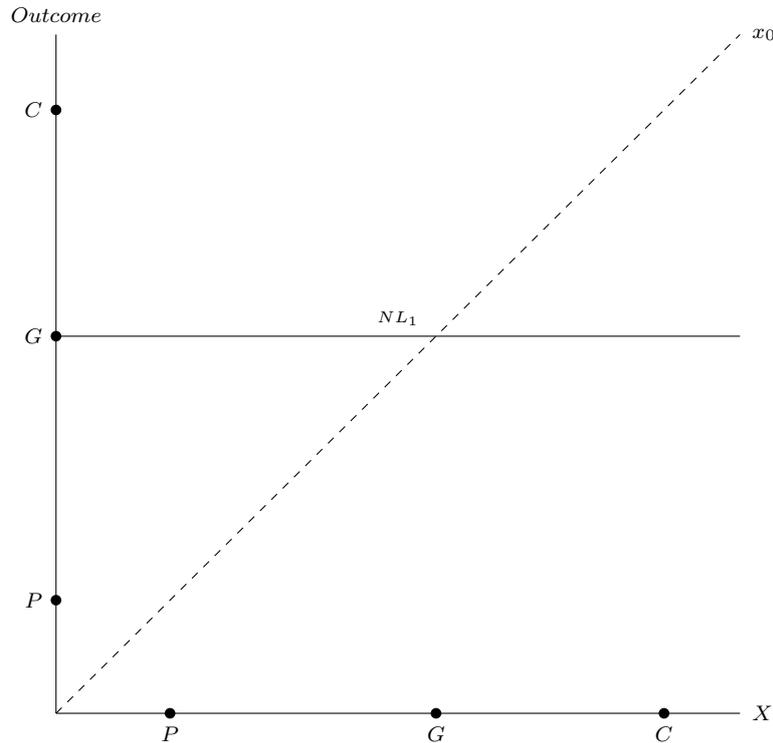
*Figure 5* is constructed in the same way like the illustration above but for  $G < P < C$ .

This constellation produces only three different outcome areas. *Area I* is similar to *Area I* in *Figure 4*, and the strategic considerations are the same. If the status quo is to the left of  $G$  but  $G$  presents  $NL_1$  at its ideal point, then  $P$  will refer this legislation.  $P$  knows that the court, to the right, will demand more concessions from the government but will restrict itself to  $g$ . The final policy  $NL_2$  at  $g$  will be closer to  $P$  and  $C$  than  $NL_1$ . Thus, both actors unite against the government. The second area in *Figure 5* results from a similar “cooperation” between the court and the plaintiff. Every try by the government to move an  $SQ$  outside the interval of  $[G, P]$  leads the plaintiff to refer  $NL_1$  to the court, which will restore  $SQ$ . Finally, in *Area III* of *Figure 5* the mutual interest between court and plaintiff ends as the government’s proposal  $NL_1$  will make the plaintiff always better off than the outcome from a referral.

These findings imply that facing a constellation like the one in *Figure 5*, the outcome from interaction makes the plaintiff mostly better off compared to *Figure 4*. Thus, he can draw policy closer to his ideal point  $P$  than in constellation  $G < C < P$ . Moreover, empirically one should observe that the plaintiff can frequently blame the government publicly. This is because if the government repeatedly presents a law to change the  $SQ$  in the interval  $[G, P]$ , the plaintiff will restore this status quo via a referral to the court. The government will lose its law completely without being able to present a satisfying alternative. Therefore, the constellation in *Figure 5* provides a double-win for the plaintiff: most often, a referral leads to policy closer at  $P$  and most of the time to a complete blame of the government.

*Figure 6* depicts the final possible arrangement between the plaintiff, the court, and the government. There is one outcome over the policy space and this is the government’s policy  $NL_1$ . No matter where the original  $SQ$  is located, the plaintiff has no incentive to refer  $NL_1$  to the court. If  $SQ$  is in the interval  $[-\infty, G]$ , the plaintiff would lose at the court when referring  $NL_1$ . If  $SQ$  is in the interval  $[G, \infty]$ , the plaintiff has no interest in referring  $NL_1$ .

This implies that under the constellation in *Figure 6* the court should never get involved. Up to a certain point, the modification of  $SQ$  to  $NL_1$  is a burden to the plaintiff but in the opposite interval it is a pleasure. This holds true for the court as well but facing

Figure 6: Scenario of varying Status Quo with a constellation of  $P < G < C$ 

the burden and the pleasure in the opposite interval compared to the plaintiff. These conflicting interest lead to gridlock allowing the government to act without restrictions.

## 4 General Implications of the Judicial Policy Game

Comparing across the *Figures 4* to *6* yields some general insights about the interaction between the plaintiff, the court, and the government. Surprisingly, playing the *judicial policy game* is of different advantage to the players involved.

The plaintiff will prefer a spatial setting like the one in *Figure 5*. Only in this situation she has frequently the opportunity to draw policy close to her ideal point and blame the government completely by referring legislation to the court. Faced with an placement of actors like the one in *Figure 6*, the plaintiff has no influence on the government's policy-making at all. Finally, the configuration in *Figure 4* is only partially helpful for the plaintiff. While a referral leads often to a success, the outcome is most of the time a compromise between the government and the court. Hence, the former is able to partly

“rescue” its policy and can rarely be blamed completely. In sum, the plaintiff can gain the most in *Figure 5*, win a Pyrrhic victory in *Figure 4*, and lose in *Figure 6*.

This has implications for those arguments stating that it is always rational for the defeated parliamentary minority to refer legislation to the court (see e.g. Stone Sweet 1998, Stone Sweet 2000). Our model shows that this is not the case *per se*. In fact, only under certain constellations it is rational *but* will not necessary lead to the most preferred outcome in the eyes of the plaintiff. Hence, a plaintiff defeated in parliament can gain advantages from the concessions the court negotiates with the government. However, these concessions will in the first place please the judges.

The constitutional court is in a comfortable situation in two out of the three scenarios. If the spatial setting is similar to that in *Figure 4*, the judges can mutually compromise with the government or simply restore policy close at their ideal point. The actors’ placement in *Figure 5* is also of interest for the court. In this composition the court will frequently become involved being able to draw policy closer to its ideal point. Similar to the plaintiff the arrangement in *Figure 6* leaves the court with no power on policy.

These findings lead us to reconsider arguments stating that constitutional courts are absorbed players in the political system (see e.g. Tsebelis 2002, Chapter 10). If they are not getting involved, this is less due to sharing interests with political actors but more because political actors are aware that they have to (mutually) compromise with the court. In addition, the court needs the plaintiff to refer legislation, but once activated the judges are not concerned with the plaintiff anymore. Instead, they pursue the outcome that maximizes the court’s interests. Finally, the judges decide on the change of the status quo. Therefore, the court becomes a *veto player* - an actor “whose agreement is necessary for a change of the status quo” (Tsebelis 2002, 19).

Like the court, the government has advantages in two out of three spatial settings. Even though a defeat at the court might produce public disgrace, most of the time the government is able to safeguard parts of its policy interest. Thus, in *Figure 4* policy might move away from the government’s ideal point but never beyond a threshold secured by the ideal point of the court. In addition, the moment the court and the plaintiff have diverging interests like in *Figure 6*, the government is free to chose its policy in the area

between the court and the plaintiff. *Figure 5* is the configuration less preferred by the government as under certain conditions it will lose its political agenda completely.

In sum, the general implications of the *judicial policy game* show that the influence of a strategic court on policy is by far larger than that of a conditional veto player. An active plaintiff allows the judges to influence policy in their interest. In our model every actor can become a plaintiff. Even though in most spatial settings the plaintiff has a disadvantage compared to the government's and the court's influence, one observes empirically that constitutional courts are overwhelmed by complaints. This highlights that these courts can always exert their power to shape policy.

## 5 What is next

We will extend our theoretical considerations in the following three directions. First, currently our model assumes complete and perfect information. The next step is to add *private information* making the game more realistic as “agents do not know the payoffs of the other players” (McCarty & Meirowitz 2006, 151). An approach used by game theorists to model these scenarios is the “*Hasanyi maneuver*” (McCarty & Meirowitz 2006, 151). We can adapt this approach, which is based on the idea that nature is added as a player (see also Cameron 2000, 99). This player moves first drawing the utility functions of the actors from a probability distribution. Every actor knows this distribution and can include it in its strategic considerations (McCarty & Meirowitz 2006, 151). Second, the current model assumes that all players are policy driven having symmetric utility functions. However, that the court, the plaintiff, and the government are motivated by policy only seems to fall short. This can be addressed by modifying the utility functions of the actors including cost and benefits from the outcome. For example, losing policy only partially to the court might have lower electoral cost for the government than losing it completely, or being evaded after presenting a directive leads to publicity costs for the court. Finally, the plaintiff, the court, and the government interact frequently in the political system. Thus, the third extension is to see the effects

of repeated plays of the game. This will reveal whether there are learning effects in the *judicial policy game*.

## 6 Conclusion

Constitutional courts are special legal institutions originally empowered to guard the constitution. They should base their judgments solely on these legal texts (see Kelsen 1931). However, constitutional norms are special higher order rules, and as such they constitute the political community (Stone Sweet 2000, 20). Hence, these laws allow judges at the courts to enter the political sphere. Furthermore, we have shown that judges have institutional features at their disposal that finally allow them to become strategic actors.

The result is the *Judicial Policy Game* presented here. The advantage of our game is that it is designed rather abstract for the Kelsen type of court, which is the dominating paradigm in Europe. Furthermore, we make no limiting assumptions about the plaintiff's characteristics but instead allow every possible actor, like a parliamentary minority, a second chamber, or an individual to refer legislation to the court. This is particularly elegant as there is a variety of actors in the different European countries that can refer legislation to their constitutional court (see e.g. Hönnige 2007, 125p). Moreover, current comparable models are only designed for the intra-parliamentary confrontation between the opposition and the government regarding the court as judicial balck-box (see e.g. Vanberg 1998, Vanberg 2001). Our game goes beyond these models and outlines the features that allow for strategic behavior by the court.

These features make courts strong *veto players* in the multifaceted interaction between the plaintiff, the government, and the judiciary. And it appears that plaintiffs are servants to the constitutional court allowing the judges to enhance policy in their interest.

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