Constitutional Courts as Veto Players: Composition, Absorption and Decisions at the German Court

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Being an exception in the political systems of most countries before the 70s, constitutional courts have become a common feature in Europe since the 3rd wave of democratization. Usually, they are considered counter-majoritarian institutions, veto points, or veto players because they can use abstract and concrete review procedures to stop governmental legislation. However, little is known when they use their veto actually. This paper analyses the preferences of the court vis-a-vis the other actors involved in the legislative process by using the veto player theory. We test if the court regularly exerts a veto or if it is absorbed within the core of the other veto players. We empirically test this for Germany with data of constitutional complaints, concrete and abstract review procedures for the years 1974 to 2010. Overall we analyze 1664 proceedings of the two Senates of the court. We find that constant absorption is not the case but that there is a varying pattern depending on the preferences of actors. If the court is absorbed, it vetoes legislation less often than in a non-absorption situation.
1. Introduction

Is a constitutional court an effective veto player or do other veto players in the legislative process absorb the court? Constitutional courts play an important role in our concepts of comparative politics and during the third wave of democratization, almost all new democracies have installed a court being able to stop parliamentary legislation (Ginsburg, 2003). On the level of the political system, courts can be understood as elements of consensus democracy (Lijphart, 1999), or more commonly veto players (Alivizatos, 1995; Jahn, 2011). However, this perceived role stands in stark contrast to our knowledge about the mechanisms determining the influence of courts in political systems (Hönnige, 2011). Compared with the US Supreme Court, we have insufficient knowledge about the effects of composition rules determining the position of courts in the policy space, access routes of political actors to the courts controlling the amount of laws courts are involved with, and isolation of the court from political pressure. This is also true for the perception that courts are veto players. On the one hand, individual studies convincingly show that courts can be veto players (Brouard, 2009; Santoni & Zucchini, 2006; Volcansek, 2001). On the other hand, Tsebelis (2002) argues that courts are not veto players due to usually being absorbed because of the exclusive composition by other veto players. He chose not to include courts in the measures for veto player theory. And while some comparative veto scales count courts as veto institutions or players (Ganghof, 2005; Jahn, 2011; Kaiser, 1998; Lijphart, 1999) others do not (Huber, 1993; Tsebelis, 2002). Regarding the fact that the number of veto players or veto institutions typically varies between one and four on most scales, one additional veto player might make a huge difference in cross-country and time-series analysis.

This paper aims to understand the pattern under which a court uses its veto power and when it is absorbed by other legislative decision-makers. It focuses on the policy preferences of political and judicial actors as explanatory mechanism and conceptualizes them as sincere policy-seekers. While policy preferences are long established for the analysis of parliamentary and governmental actors in general as well as Supreme Court justices in the United States, only a few authors used them to explain court decisions in Europe or improved measurement theory (Hanretty, 2012; Hönnige, 2009; Magalhães, 2003).

The argument is tested empirically with data on the German Federal Constitutional Court for the years 1974 to 2010 using 1664 proceedings brought before the court. We find that the German court is not always absorbed despite the fact that it is located at the centre of the policy space. We find variation due to preferences constellations, the type of legislation and
the two senates of the court. More importantly, if the court is absorbed, that likelihood that the
court nullifies a piece of legislation is considerably lower than if not.

The paper proceeds in the following steps. In the second section we give an overview of the
state of the art before we make our theoretical point in the third section. In the fourth section
we introduce the institutional peculiarities of the German court and justify the case selection,
in the fifth section we present the data that we use for the analyses in section six. We conclude
in section seven.

2. State of the Art: Courts and veto player theory

The first step is to outline the role of constitutional courts in the analytical concepts of
comparative politics in general and in particular as institutions that can either block a change
of the status quo or can revert to the status quo after a law has been enacted. The most
prominent macro-comparative approaches use the idea of a veto by an institution involved in
policy-making to understand the political system. These approaches vary to some extent.
While some scholars employ additive institutional veto point scales (Ganghof, 2005; Jahn,
2011; Kaiser, 1998; Lijphart, 1999), others use actor-centered veto player analytic narratives
or spatial approaches including the preferences of the actors involved (Birchfield, 1998;
Immergut, 1992; Tsebelis, 1995). Most research dealing directly with the influence of courts
has also applied the veto player approach and comes to the conclusion that courts have – of
course with a cross-country variation – a strong impact on political decision-making (Brouard,
2009; Santoni & Zucchini, 2006; Volcansek, 2001). To answer the questions if and how to
integrate courts in the macro-concepts of comparative politics we apply the approach by
Tsebelis (Tsebelis, 2002). This has been the theoretically most detailed and influential one.
The second important question is if courts can actually be perceived in the same - mainly
policy-driven - logic we deal with other institutions like the government and the parliament.
Scholars studying the United States Supreme Court have reached consensus on
conceptualizing courts in four major theoretical models: the legal, the attitudinal, and the
strategic model, as well as the sociological school (Epstein & Knight, 1998; Maveety, 2003;
Segal & Spaeth, 2002).

Research about European courts lags behind with regard to the analysis of preferences and
rules, but recent studies have investigated the impact of policy preferences of the judges on
judicial decisions in Spain, Portugal, Germany and France. They find empirical support
(Hanretty, 2012; Hönnige, 2009; Magalhães, 2003) for the proposition that judges are actors
who are driven by their policy preferences. We can therefore integrate constitutional courts into standard spatial models of political science like veto player theory.

To present our argument we apply the most widely used and analytically rigorous veto player approach introduced by Tsebelis (Tsebelis, 1995, 2002). A veto player is an actor being able to stop a change of the status quo. Veto players can be individual (US President) or collective (referendum), partisan (party in government) or institutional (second chambers). Tsebelis tries to explain political stability and system stability with three main variables: the number of veto players, their ideological distance, and internal homogeneity. The higher the number of veto players, the larger their ideological distances, and the smaller their internal homogeneity, the more difficult it is to change the status quo. The reason: The winset – all points preferred by the veto players to the status quo - shrinks, and the core – the area where no change at all is possible – grows.

Are constitutional courts able to stop a change of the status quo and do they have an incentive to do so? Constitutional courts have the right to review laws and decisions by national and subnational governments applying the constitution. They can declare a law fully or partially unconstitutional and thus stop a change of the status quo (Stone Sweet, 2000). Hence, theoretically they are veto players with two restrictions: (1) they are not automatically involved in every legislative process. Instead, there has to be a concrete or abstract case being brought to the court by a litigant. (2) Constitutional courts might exert their right to review rather late. Basically, three main procedures can be identified: a priori/a posteriori abstract review, concrete review, and constitutional complaint (Stone Sweet, 2000). A priori abstract review is a procedure that only a few courts like the French and the Romanian know for ordinary bills: a litigation against a bill can be initiated by a political actor who is not directly affected by the bill, and he does so before the bill is promulgated. In this case, the court is actually part of the legislative process. A posteriori abstract review can only be initiated after the promulgation. Regularly, this happens shortly after the law came into effect. Thus, the court is also involved more or less in the legislative process. Lower courts or individual political actors usually initiate concrete review cases and citizens negatively affected by legislation bring forward constitutional complaints. The caseload of most courts in Europe is considerably high. In both proceedings, concrete reviews and constitutional complaints, it might take years until a case comes before the court. Other veto players have to take into consideration the fact that theoretically every new law can come under scrutiny of the court. Therefore, they should account for the courts’ preferences beforehand. This has been described as autolimitation (Stone, 1992). Despite the two restrictions of access and timing,
the court’s preferences have to be taken into account similarly to the public in countries where
direct democratic procedures like popular initiatives or popular vetoes are possible (Hug &

3. Theory
3.1. The Absorption Hypothesis and three Counter Arguments

Tsebelis’ (Tsebelis, 2002) main point is that constitutional courts are always absorbed as they
are completely composed by other veto players and thus they are in the core of pareto-
efficient, unchangeable policies. This also means that constitutional courts should never
nullify laws for policy reasons but only for other considerations. The implicit assumption is
that we find a system with rather many than few veto players and that the other veto players
are symmetrically distributed over the policy space. If these institutions participate in the
selection process of judges, the court will be in the middle of the policy space – either because
judges are chosen as compromise candidates or because every institution can choose its own
candidate due to a system of proportional representation.
The situation is shown in figure 1. Here we find a constitutional court (CC) which located at
the center of the policy space between the other veto players (VP1 and VP2). Since CC is
positioned at the center between VP1 and VP2, the court neither has an effect on the size of
the core nor on the size of the win-set.

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VP1          CC          VP2
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Figure 1: Absorption in a one-dimensional model

This argument is not only counter-intuitive but also contradicted by preliminary empirical
considerations. The German Federal Constitutional Court nullifies about 5% of the German
laws (Landfried, 1992). This is a high number compared to the bills blocked by the German
second chamber which are 1.8%. Tsebelis tries to safe his – empirically untested – argument
by making the point that there might be incomplete information about the true preferences of
the judges in the policy space. Also, issues might change over time, and preferences of judges
on this new issue might have been unknown at the time they were elected.
However, three main arguments can be made why a constitutional court is not always absorbed (Brouard & Hönnige, 2010): Firstly, courts might not only composed by veto player actors but also non veto players like state presidents, asymmetric second chambers or judicial organisations. Additionally, not all veto players within a political system might be involved in the election process. Thus the assumption that courts are automatically centrally located between other veto players is untenable.

Secondly, absorption also depends on the pattern of governmental control and the election cycle. While a court might be located between all other veto players at $t_0$, e.g. two left wing governmental parties, this situation might change with an alternation of the government after an election at $t_a$. Whereas the court would be still located on the left, the new government (the partisan veto players) will be on the right side and thus the court will not be absorbed any more.

Thirdly, the number of veto players might change depending on the legislative process and in particular on the rights institutions have in the legislative process. A nice example is a comparison of the consultation and ordinary (ex-co-decision) legislative procedure in the European Union. While the European Parliament (EP) is equal to the Council of Ministers under the ordinary procedure, it can be overridden under consultation. While the EP is a veto player in the first case, it is not in the second case. Therefore, it is necessary to analyze the veto player configuration empirically to understand the possible effects of a constitutional court in terms of the veto player theory.

3.2. Hypothesis

What are the effects of the integration of a constitutional court in the veto player theory? Firstly, the veto player situation should become more complex and we should observe periods in which the court is absorbed and situations in which the court is not absorbed. Secondly, 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 we should observe no full or partial nullification of the law. Rather, the court should argue that the law is in line with the constitution. If the court is not absorbed, we should expect a veto by the court and thus find a partial or full nullification of a law. We will therefore treat the veto player configuration, more precisely the absorption situation, as independent variable and the propensity to nullify a law as dependent variable.

Our main hypotheses are
**H1:** If the constitutional court is absorbed by the other veto players, the court will not partially or fully nullify laws that are referred to it, as the preferences of the court are already integrated in the preceding legislative process.

**H2:** If other veto players do not absorb the court, the court will partially or fully nullify laws that are referred to it as its preferences were not integrated in the preceding legislative process.

These hypotheses are based on the assumption that all actors are sincere policy seekers. From a probabilistic point of view this is also the case if the other veto players have the ability to act strategically and exert autolimitation, as they will never have full information about the judges’ true preferences.

3.3. 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 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 at 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, 1996). 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 suspense 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 elected 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.

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.
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.

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. 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:

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*. 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,

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

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.
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
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 1.* 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.

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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.
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 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.\(^6\)

\(^5\) 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.

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

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<td>-0.80(^**)</td>
<td>-0.83(^**)</td>
<td>-0.75(^**)</td>
<td>-0.91(^**)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.25)</td>
<td>(0.25)</td>
<td>(0.24)</td>
<td>(0.24)</td>
<td>(0.24)</td>
</tr>
<tr>
<td>Senate 1 (=1)</td>
<td></td>
<td>-0.96(^**)</td>
<td>-0.89(^**)</td>
<td>-0.97(^**)</td>
<td>-0.82(^**)</td>
<td>-1.01(^**)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.25)</td>
<td>(0.25)</td>
<td>(0.25)</td>
<td>(0.25)</td>
<td>(0.25)</td>
</tr>
<tr>
<td>Type of legislation</td>
<td>1.21(^**)</td>
<td>1.23(^**)</td>
<td>1.10(^**)</td>
<td>1.23(^**)</td>
<td>1.18(^**)</td>
<td>1.33(^**)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.28)</td>
<td>(0.28)</td>
<td>(0.29)</td>
<td>(0.28)</td>
<td>(0.28)</td>
</tr>
<tr>
<td>Popularity Govt.</td>
<td></td>
<td>0.01</td>
<td>0.01</td>
<td>0.01</td>
<td>0.01</td>
<td>0.01</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
</tr>
<tr>
<td>Ideological Distance</td>
<td>-0.04(^*)</td>
<td>-0.03</td>
<td>0.38</td>
<td>0.24</td>
<td>0.00</td>
<td>-0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.02)</td>
<td>(0.36)</td>
<td>(0.35)</td>
<td>(0.01)</td>
<td>(0.01)</td>
</tr>
<tr>
<td>Constant</td>
<td></td>
<td>-0.45</td>
<td>-0.41</td>
<td>-0.82</td>
<td>-0.90</td>
<td>-0.55</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.76)</td>
<td>(0.75)</td>
<td>(0.79)</td>
<td>(0.79)</td>
<td>(0.79)</td>
</tr>
<tr>
<td>LL</td>
<td></td>
<td>-808</td>
<td>-799</td>
<td>-812</td>
<td>-806</td>
<td>-815</td>
</tr>
<tr>
<td>PCP</td>
<td></td>
<td>65</td>
<td>65</td>
<td>66</td>
<td>64</td>
<td>67</td>
</tr>
</tbody>
</table>

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 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)

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Senate 1</th>
<th>Senate 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consent bills</td>
<td>E(1,1,1)-E(0,1,1) = -.13</td>
<td>E(1,1,0)-E(0,1,0) = -.10</td>
</tr>
<tr>
<td></td>
<td>[-.20; -.002]</td>
<td>[.26; -.002]</td>
</tr>
<tr>
<td>Objection bills</td>
<td>E(1,0,1)-E(0,0,1) = -.10</td>
<td>E(1,0,0)-E(0,0,0) = -.13</td>
</tr>
<tr>
<td></td>
<td>[-.26; -.002]</td>
<td>[.21; -.002]</td>
</tr>
</tbody>
</table>

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 Senate 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


