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Institutions and the Performance of Liberal Democracy: Judicial Procedures and the
Efficacy of Constitutional Review
by
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To Rebecca

ABSTRACT OF THE DISSERTATION

Institutions and the Performance of Liberal Democracy: Judicial Procedures and the

Efficacy of Constitutional Review

by

Jay N. Krehbiel

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Professor Matthew Gabel, Chair

Modern liberal democracies typically depend on courts with the power of constitutional review to ensure that elected officials do not breach their constitutional obligations. With neither the power of the purse nor the sword, the potency of this review is not guaranteed. Courts must rely on government officials for the implementation of judicial rulings. The ability of a court to ensure that elected officials faithfully implement decisions can depend critically on the public's ability to observe elected officials' responses to judicial decisions. In this dissertation, I argue that courts strategically use key judicial procedures to increase the likelihood of public awareness of rulings. Drawing from the comparative judicial politics literature on separation of powers, public awareness, and noncompliance, I develop a formal model of one such procedure available to many of the world's constitutional courts, public oral hearings. The model provides empirical implications for when a court will hold public hearings and how hearings affect case disposition. I then test these implications using data on cases and the use of hearings at the German Federal Constitutional Court. The results of this analysis support my argument that courts use hearings as an institutional tool to address potential noncompliance. An empirical extension of the theory to the timing of judicial decisions at the German court provides further support for my argument.

Chapter 1

Introduction

The institution of constitutional review has increasingly become a hallmark of modern liberal democracy. Since the end of World War Two, constitutional review has been adopted by most of the democratized and democratizing world (Schwartz 2000). From Western European nations like Germany and Italy to more recently established democracies like Montenegro and South Korea, constitutional review has become a standard part of democratic political systems. By the year 2011, 83% of the world's constitutions included a provision for giving the judicial branch the authority to review the compatibility of state actions, including legislation, with elected officials' constitutional obligations (Ginsburg and Versteeg 2014).

These constitutional courts play a pivotal role in democratic politics. Modern liberal democracies typically depend on courts with the power of constitutional review to consider alleged breaches of constitutional obligations by government officials. By granting a court the ability to invalidate legislation, constitution writers hoped to create an institutional structure that would credibly commit elected governments to things like the rule of law and the protection of citizens' rights from the state (North and Weingast 1989). Perhaps most importantly, courts can serve to constrain governing majorities. For example, the Kosovo Constitutional Court, created in 2009, was granted the "authority to review legislation and individual complaints of rights violations" in order to make the court "the ultimate

check on legislative and executive power in Kosovo and the final arbiter of the meaning of constitutional provisions enshrining human rights and freedoms" (Constitutional Court of Kosovo 2016). Similarly, the German Federal Constitutional Court's core duties are to "ensure that the constitution...is obeyed" and to secure individuals' "fundamental rights" (Bundesverfassungsgericht 2016). The quality of democratic governance has come to depend on the ability of judiciaries to effectively carry out these duties.

The Fundamental Challenge of Noncompliance

Although constitutional review has become a prominent feature of modern liberal democratic politics, the potency of review is fundamentally limited. Courts are inherently weak institutions. With neither the power of the sword nor the purse, courts cannot directly enforce their own decisions. Unlike the executives with their "swords" or legislatures with their "purses", courts have few formal powers to ensure court orders are carried out. Constitutional review provisions typically grant courts the authority to issue rulings on the constitutionality of government actions and legislation, but rarely provide judges with the institutional tools needed to implement and enforce those decisions. As a consequence, compliance with the rulings of constitutional courts relies on the willingness of elected officials to faithfully implement a court's decision.

This institutional arrangement leaves courts in a potentially precarious situation. Judiciaries are tasked with constraining governing majorities, and yet at the same time they are reliant on these very same elected officials for the implementation of their decisions. Of course, obtaining such cooperation from elected officials poses no challenge to judicial authority when a court's decision conforms with their interests. Even in striking down legislation, courts can anticipate compliance when the governing majority prefers the discontinuation of the policy under review (Whittington 2005). Similarly, courts may enjoy substantial latitude in their decision making when governing majorities view courts as a form of political insurance protecting their interests in the event of future electoral defeat (Ginsburg 2003). Governments might also view courts as beneficial actors providing

elected officials information on the efficacy of current policies (Rogers 2001). In circumstances such as these, the court's reliance on the other branches of government poses may pose little threat to the efficacy of constitutional review.

A court's institutional weakness becomes problematic for the efficacy of review, however, when the preferences of those other branches diverge from those of the court. In such cases, courts must rely on the government for implementation, even when doing so is counter to the interests of the actor directed to implement the decision. Faced with a decision constraining their own power and striking down their preferred policies, elected officials have an incentive to not comply with the court's ruling by ignoring or even outright defying the court. Scholars have noted the occasional use of noncompliance in a number of contexts (Rosenberg 2008; Spriggs 1996; Vanberg 2001, 2005; Staton 2006, 2010; Carrubba, Gabel and Hankla 2008; Carrubba and Zorn 2010; Carrubba and Gabel 2015).

Courts are not blind to this threat of government noncompliance. With few or no formal powers to prevent officials from engaging in noncompliance or to punish them when they do, courts face a choice when confronted with potential noncompliance. On the one hand, a court can resolve the conflict by refraining from ruling against the government's preferences. By deferring in this way to the government, the court essentially avoids the issue of noncompliance entirely by aligning its ruling with the preferences of the government. On the other hand, a court can face the threat of noncompliance head on by ruling against the government and striking down the challenged legislation. But in doing so, the court runs the risk of having its decision ignored or defied.

A recent case from the German Federal Constitutional Court helps illustrate the nature of this potentially difficult situation. In 2010, the court received a case challenging the constitutionality of the state law governing university professors' salaries in the state of Hesse. The plaintiff in the case was asking the court to strike down the statute on the grounds that it set salaries unconstitutionally low. To declare the law unconstitutional, however, would require the court to rule against the preferences and explicit wishes of both

the state government of Hesse and the federal government, the two government entities who would be called upon to implement the court's decision. The court faced something of a dilemma - if it struck down the challenged statute, obtaining compliance would depend on the choices of elected officials with a vested interest in the continued implementation of the overturned policy. How, then, could the court ensure the implementation of its decision if it chose to strike down the challenged statute?[1]

Cases such as this highlight the potential for tension between courts and governments and bring into focus the fundamental puzzle this project seeks to help answer. How can a constitutional court effectively constrain a government and obtain compliance with its decisions? In particular, how can a constitutional court do so when the governing majority has an incentive to engage in noncompliance? In what follows, I briefly review the existing literature on this question and then present my argument. I then proceed to discuss the theoretical and empirical approach I employ in the project. I conclude with an outline of the remaining chapters.

Theoretical Solutions to the Noncompliance Problem

That courts regularly are able to successfully constrain governments indicates the existence of some mechanism compelling elected officials to comply with judicial decisions striking down legislation. Several theories seek to identify this mechanism. Institutions feature prominently in many of these theories. For one, governing majorities may feel it is in their best interest to have an effective judiciary capable of constraining the government. As discussed earlier, uncertainty over future electoral or policy outcomes can incentivize officials to create, empower, and maintain a constitutional court as a form of insurance (Ginsburg 2003; Ramseyer 1994). By complying with the court today, officials aim to create a reciprocal arrangement with their competitors that will ensure they similarly

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[1]In the conclusion, I return to this case in a more in-depth discussion of its circumstances and the court's actions through the adjudication process. In particular, I consider how my argument helps understand this case.

comply with the court if the current governing majority falls out of power.

For another, the efficacy of courts may be determined by the arrangement of preferences held by the other branches of government. In such an account, the ability of courts to obtain compliance is reliant on one or more political institutions bringing pressure on the complying actors. Judicial authority results from either having the aid of another institution capable of compelling compliance or sufficient discord amongst the other branches of government that they cannot coordinate on a response to judicial decisions. If, however, one of these conditions is not met, courts are constrained by the threat of noncompliance and thus have an incentive to avoid the conflict with governments that can arise from striking down legislation, even if the constitutionality of the statute is highly suspect (Epstein and Knight 1998; Epstein, Knight and Shvetsova 2001; Ramseyer and Rasmusen 2001; Herron and Randazzo 2003; Helmke 2005).

While these accounts provide powerful insights into the politics of constitutional review, they cannot fully answer the question of why the same court might be able to obtain compliance in one case but then be unable to do so in another case despite no changes in the arrangement of the other political institutions' preferences. These accounts are well suited for explaining the creation of constitutional courts and providing a sense of the limits of judicial power, but they do not provide an explanation for the cases when a court strikes down a statute and obtains compliance against the wishes of a governing majority. If reciprocity were the motivation for compliance, then it is unclear why some decisions are met with compliance and others are met with noncompliance. And if courts are wholly limited by the preferences of other institutions, then it is similarly unclear why governments sometimes comply despite simultaneously protesting the court's decision.

If institutions alone cannot fully explain how courts obtain compliance and when they are able to do so, then some additional mechanism must be involved. Public support for a court can serve as this force compelling government compliance. If a court enjoys considerable public support, elected officials may opt to comply with the court's rulings in order to avoid upsetting voters. The public support needed to engender this response

from governments can take one of two forms: diffuse support or specific support (Gibson, Caldeira and Baird 1998). Outlined by Easton (1975), citizens might support an institution due to the particular content of its actions (specific support) or they might do so because they view an institution as legitimate (diffuse support). In the context of courts, specific support corresponds to the public's support for the policy choices made by judges and diffuse support is the public's support for the judiciary as a legitimate institution and important feature of democratic governance *even* when the court makes unpopular decisions. In other words, diffuse support is public support enjoyed by a court when it makes a decision the public does not like. While specific support and diffuse support are largely viewed as linked (Mondak 1991, 1992; Caldeira and Gibson 1992; Gibson, Caldeira and Baird 1998; Gibson et al. 2003), there is a key distinction between the two. A court tasked with effectively constraining a governing majority is likely to be called upon to strike down statutes popular with the public. In order for public support to compel government compliance, citizens must back the legitimacy of the court and its decision even when they dislike the specific content of the ruling.

Although diffuse public support can account for how courts can obtain compliance even in the face of government resistance, it does not explain why the same court can obtain compliance in some cases and not in others. If a high level of public support were sufficient for compliance, then a court with such support would never be ignored or defied by elected officials. Yet this is not the empirical reality facing even the most highly esteemed courts (e.g. Carrubba and Zorn 2010; Vanberg 2005). Examining the German Federal Constitutional Court, Vanberg (2001, 2005) argues that the impact of public support on the efficacy of constitutional review is conditioned by the likelihood the public will become aware of government noncompliance. When the public is aware of a case and the court enjoys a high level of support, the court is free to rule against the government with the knowledge that voters will hold their elected officials accountable for noncompliance. If, however, the public is unaware of a case and the government's noncompliance, then voters cannot punish officials, even if they staunchly support the

court's legitimacy.

A key feature of Vanberg's argument is that courts cannot assume their rulings will always attract the necessary public attention to assure compliance. As Staton (2006, 2010) shows, however, courts are not entirely helpless. Studying the Mexican Supreme Court, Staton demonstrates that public attention is endogenous to judicial behavior. While Staton focuses on the use of public relations efforts, his theory draws attention to the ability of courts to use their resources strategically to enhance the chances of gaining compliance. If Staton's argument holds in general, we would expect to see courts using other institutional tools at their disposal to raise public awareness about their rulings when faced with potential noncompliance.

The central argument of this project is that judicial procedures can serve as such institutional tools for courts to increase public awareness when faced with potential non-compliance. The judicial process typically offers courts mechanisms for raising the profile of a case. Some procedures can expand the media exposure of a case and create opportunities for media access to the court. Other facets of the process can influence the salience of a case and the likelihood of the public becoming aware of a decision. This project focuses on one of the most prominent judicial procedures, the public oral hearing.

Building on the theoretical and empirical work of Vanberg (2001, 2005) and Staton (2006, 2010), I argue that courts call public oral hearings to promote compliance. Perhaps more than any other judicial procedure, public oral hearings tend to increase public awareness of cases. Unlike most aspects of judicial deliberation, hearings are typically both open to the public and, importantly, the media. Focusing on this aspect of hearings, I contend that courts' use of hearings is strategically linked to the potential for noncompliance in a case.

To illustrate my argument, I develop a formal model of the interaction between a government and a court empowered to hold a public oral hearing. I demonstrate that courts can use hearings to improve the likelihood of compliance, but that there are also limits to what the procedure can accomplish. There are some cases that hearings cannot

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bring into the public consciousness. There are others that governments will fight regardless of a court's strategic use of procedures. But for some, the increase in public awareness brought on by a public oral hearing can empower a court and bring a government to comply. The theoretical argument and empirical analysis presented in the coming chapters clarify how and when hearings can successfully fulfill this role of enhancing the efficacy of constitutional review.

Theoretical and Empirical Approach

The theoretical approach I employ in this project centers on a formal model. There are several advantages to using a formal model when analyzing complex research questions such as the one posed here. First, models promote parsimony. Constitutional review is a complex process. A model allows me to narrow my focus onto the specific actions of interest, like the use of a public oral hearing. To do this, I must make a number of assumptions about how courts and governments operate. For example, I am interested here in how courts relate to external institutional pressures, and so I do not model the internal politics of bargaining within a court (Maltzman, Spriggs II and Wahlbeck 2000). Similarly, I am focused on how a governing majority responds to a judicial ruling rather than the negotiating that takes place in coalition governments (Martin and Vanberg 2004, 2011). It is not that these aspects of politics are unimportant, but rather that they are not central to the problem of interest.

Second, models force scholars to be explicit about the assumptions and choices made in modeling this simplified world. The players, what they care about, and the actions they can take are all defined and transparently presented. Models require us to assume away aspects of the real world, but the manner in which we must make such assumptions eliminates any ambiguity over what is included and what is excluded from the model. And while the plausibility of the assumptions made in a model can be debated, the transparent nature of models specifies the precise assumption or claim under scrutiny.

Third, models can motivate rich empirical analysis by yielding empirically-testable

implications. The findings of a game theoretic model, just like those of any deductive theory, follow logically from the assumptions made. By developing an argument in this manner, we can identify implications for how the players in the game should behave. Some of these implications may be straightforward and fairly obvious. Others, however, may be counterintuitive or nuanced relationships that would be difficult to discern without the aid of a model. Such results can often inform empirical analyses, which, importantly, can empirically distinguish the argument promoted in the model from alternative accounts and explanations.

The empirical approach I employ complements this theoretical approach. I use the German Federal Constitutional Court as my case study. Centering the analysis on a single country allows me to appropriately match the model's propositions and assumptions to an empirical setting. Aspects of judicial politics and institutional design, for example, can be best accounted for by eliminating cross-national variation. Put another way, a single-country analysis is best suited for the task of mapping the assumptions made in the model to the real world. Furthermore, focusing on one court allows me to more effectively collect the detailed information needed to test the model's empirical implications. Of course, this approach does not come without costs. Designing empirical research around one country necessarily limits the scope and generalizability of the findings. However, the abstract nature of the model ensures that the empirical hypotheses are not dependent on the specific context of Germany. As I discuss later in the project, the German court provides a useful case for testing my theory, but it is not the only potential case.

Plan of the Project

The remainder of the project is organized as follows. In Chapter 2, I present the theoretical argument. I begin the chapter by providing an extensive discussion of public oral hearings that shows the procedure's prominence and widespread use in the world's judiciaries. The chapter then goes on to consider how hearings might address noncompliance and present potential alternative explanations for the use of hearings. In order to specify

empirical hypotheses distinguishing my argument from these alternatives, I construct a game theoretic model of an interaction between a court and government. The model identifies conditions under which courts can use hearings to address potential noncompliance and when hearings are most likely to have a substantive impact on case disposition. These results suggest that courts use hearings improve the likelihood of government compliance and enhance the ability of constitutional courts to effectively exercise constitutional review. In doing so, the model provides a series of testable empirical implications.

Chapter 3 transitions the analysis from the abstract nature of the theoretical argument to the case study that forms the basis for testing the theory's empirical implications, the German Federal Constitutional Court (FCC). The chapter begins with a brief history of the FCC focused on the court's creation and early attempts to establish itself in the German political system. I then describe the institutional structure of the FCC, including the court's appointment process, jurisdiction, organization, and process. I then turn to assessing the compatibility of the FCC with the key assumptions and features of the theoretical model. In particular, the chapter focuses on the connection between hearings and media coverage, the risk of noncompliance facing the FCC, and the degree of public support for the FCC.

In Chapter 4, I test the model's implications for the court's use of public oral hearings and the relationship between hearings and case disposition. To carry out this analysis I use an original dataset on constitutional review cases at the German court. This dataset, covering all instances of constitutional review from 1995 to 2013 for which the court had discretion over hearings, includes a series of variables on case characteristics as well as variables capturing aspects of the political circumstances surrounding each case. I then extend the data back to 1983 by merging this dataset with Vanberg's (2005) dataset on FCC decisions. I find that the FCC is more likely to hold a public oral hearing when noncompliance is potentially at issue in a case. This relationship, however, is conditioned by the expected effectiveness of the proceeding at increasing public awareness of the case. I further find that the court is more likely to rule against the government by striking down

a statute as unconstitutional in cases granted a hearing. These findings provide nuanced insights into the strategic behavior of courts and, critically, remain robust to controlling for a series of alternative explanations for the use of hearings and their impact on case disposition.

In Chapter 5, I extend the theoretical and empirical analysis to a second potential institutional tool available to courts, the timing of decisions. Building off the model in Chapter 2, I develop a theoretical account of constitutional review that explores how a court can address the noncompliance problem by strategically timing its decisions. I argue that the likelihood of public awareness is affected by the electoral calendar in such a manner that cases decided in the period immediately preceding an election are, all else equal, more likely to garner the public's attention. The ability of courts to effectively take advantage of this feature of electoral campaigns, however, is limited by uncertainty in the length of each electoral term. Using data on media coverage of German politics generally and FCC decisions specifically, I find evidence suggestive of a media coverage "bump" for cases decided in the months immediately prior to a national election. An empirical analysis of the timing of FCC decisions provides further evidence that the court is more likely to strike down legislation as unconstitutional in this pre-election period, but only when faced with potential noncompliance and when the upcoming election is at the end of a standard electoral term.

I conclude in Chapter 6. The chapter begins by offering a summary of the theoretical and empirical results. Next, I consider the implications of my project for understanding cases by returning to the illustrative example briefly introduced earlier in this chapter. I then discuss the implications of my research for a range of topics in German politics, judicial politics, and, more broadly, comparative politics and the study of democratic systems. The chapter then raises a number of questions for future research and analysis. I conclude with a discussion on what the project tells us about the role of judicial procedures in modern liberal democracies and their impact on the quality of democratic governance.

Chapter 2

A Strategic Theory of Public Oral Hearings

How can constitutional courts use public oral hearings to address potential noncompliance? When might we expect to observe a court holding hearings to such an end? And what are the consequences of such a strategy for case disposition and ultimately the efficacy of constitutional review? In this chapter, I address these questions by developing a strategic theory of public oral hearings in which I describe how a court might use hearings as an institutional tool for overcoming noncompliance. The model formalizes the interaction between a government and a court with discretion over which cases receive a public oral hearing. In doing so, the model yields several insights into the influence potential noncompliance has on a court's procedural choices and the downstream consequences of those choices for the ability of a court to obtain compliance from government officials.

The chapter is divided into two parts. In the first part, I begin by describing public oral hearings from a comparative perspective. I will show the widespread discretionary use of hearings in constitutional courts and further provide an intuition for why public oral hearings might serve as an especially useful institutional tool for increasing the likelihood of compliance by raising public awareness of judicial decisions. In the second section, I develop a game theoretic model of judicial-government relations in which the court

has discretion over holding a hearing. I then provide a discussion of the model's results and implications. The chapter concludes by considering the extent to which public oral hearings can help courts overcome the noncompliance problem.

Public Oral Hearings as an Institutional Tool

Public oral hearings are one of the most prominent judicial procedures in many of the world's constitutional courts. Hearings provide litigants the opportunity to state their arguments directly to the court and to answer justices' questions. Moreover, the public nature of hearings means that members of the media can observe the proceedings and the public can consequently become increasingly aware of the court, cases, and legal issues. Together, these features of hearings create a unique environment that intersects the interests of judges, litigants, the media, and the broader public.

The typical public oral hearing at the Austrian Constitutional Court illustrates this well. Hearings begin with a presentation by the Permanent Reporter assigned to the case.[1] This presentation includes an overview of the case facts, the legal issues at question and the litigants' positions on those questions. Once this background information has been presented, the justices' questioning of the litigants begins. This predominantly involves the judges asking the parties present to clarify certain aspects of their arguments, although the justices can additionally delve into issues such as the legal or policy implications of the case. At the conclusion of the hearing, the President of the court closes the session by informing the parties of whether the court's decision will be issued orally or in writing. The proceedings are open to the public and, to a limited extent, the media.

The public nature of hearings is particularly noteworthy in the context of judicial decision making. While much of the judicial process, such as deliberations, takes place behind closed doors, public oral hearings provide an opportunity for litigants, citizens, and the media to watch the court conduct its business. As Johnson, Wahlbeck and Spriggs II

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[1]The Permanent Reporters are elected by the plenum of the Constitutional Court from among its members for a three year term of office.

(2006) described it in the context of oral arguments at the Supreme Court, hearings serve as "the most visible element" of the decision making process. This visibility, and the insight it provides citizens on both what their courts do and how they go about doing it, has led the public oral hearing to occupy an influential role in many judiciaries' relationships with their respective publics.

Recognizing the ability of hearings to engage the public, the rules governing public oral hearings at many of the world's constitutional courts include specific provisions regarding media coverage of proceedings. These provisions typically outline the degree of media access to hearings and specify what can and cannot be broadcasted or recorded. For example, paragraph 1 of Article 28 in the Slovenian Constitutional Court Rules of Procedure states that "filming and photographing during public hearings is not allowed, however, it is allowed prior to a public hearing and at the oral pronouncement of Constitutional Court decisions," while the Constitutional Act on the Constitutional Court of the Republic of Croatia similarly affirms the ability of journalists and media reporters to "be present at the...public hearing."[2] The Supreme Court of the United Kingdom takes media access a step further by providing live online streaming of all proceedings before the court. And even in courts that do not have formal rules specifying media access, norms of transparency have led many courts to allow recordings of portions of hearings.[3] However these courts define media access, the key takeaway from these examples is that courts structure the relationship between hearings and the media.

The second distinguishing feature of public oral hearings is their infrequent use by many constitutional courts. In contemporary liberal democracies, constitutional courts typically have discretion over which cases are granted a public oral hearing. While courts are often required to hold hearings for certain types of cases, such as impeachments and

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[2]Article 47, Para 3 of the Act. The full text reads "Journalists and the media reporters may be present at the Session and the public hearing as well as the other gatherings in the Constitutional Court."

[3]As we will see in the next chapter, this is the case at the German Constitutional Court.

political party prohibitions, the decision to hold a hearing is often left to the court for more common proceedings like concrete judicial review cases. In such cases, a court's internal rules govern the decsionmaking process on the use of hearings. Although the specifics of these rules vary across country, they commonly grant the power to determine the use of a hearing to the court's president (e.g. South Africa, Austria).

This ability of courts to rule with or without public oral hearings and, in so doing, control the media's access to the courtroom without limiting the judges' capacity to adjudicate cases, is found in a diverse set of courts. Table 2.1 provides a breakdown of this discretion across a sample of 40 high courts from around the world. The geographically varied sample includes many of the most prominent and power constitutional courts, such as the German Constitutional Court and the U.S. Supreme Court, as well as several less established or newer constitutional courts such as those recently created in Kosovo and Albania. Of the 40 courts in the sample, 27 have wide discretion over the use of hearings in constitutional review cases. These 27 include courts at varying stages of development and from disparate political contexts. Notably, discretion over hearings is not clearly related to the influence or power of a constitutional court. Courts that have struggled to assert their authority over other political institutions, such as the Russian Constitutional Court (Trochev 2008), have such discretion, as do the highly influential German and Austrian constitutional courts. Similarly, discretion is limited in both powerful courts (e.g. U.S. Supreme Court) and courts struggling to assert themselves in their domestic political arenas (e.g. Hungary, Romania). One trend worth noting is the increasing prevalence of discretionary hearings in newer constitutional courts, which may be suggestive of a growing acceptance of such an arrangement in the design of courts.

Despite the prominence of public oral hearings in modern constitutional courts and the ability of many courts to harness the use of this key procedure, scholarly attention to hearings has been limited and predominantly focused on the U.S. Supreme Court (e.g. Johnson 2001, 2004; Johnson, Wahlbeck and Spriggs II 2006). One result of this focus on the U.S. Supreme Court, which holds hearings for most constitutional review cases, is

Table 2.1: High Court Discretion over Public Oral Hearings

Wide Judicial Discretion	Little or No Discretion
Albania	Australia
Austria	Bosnia and Herzegovina
Azerbaijan	Denmark
Belgium	Greece
Bulgaria	Hungary[1]
Croatia	Iceland
Czech Republic	Italy
Estonia	Norway
Georgia	Poland
Germany	Portugal[1]
Israel	Romania
Latvia	UK Supreme Court
Liechtenstein	US Supreme Court[2]
Kosovo	
Macedonia	
Moldova	
Russia	
Slovakia	
Slovenia	
South Africa	
South Korea	
Spain	
Sweden	
Switzerland	
Taiwan	
Turkey	
Ukraine	

[1]Only written proceedings used.

[2]While not required, the court typically holds oral arguments in cases involving the constitutional review of statutes.

Sources: Official court websites, European Commission for Democracy through Law's 2010 "Study on Individual Access to Constitutional Justice".

that scholars have not given attention to why a court holds a hearing. As a consequence, the extant literature has sought to answer the impact of hearings independently of the rationale for the hearing in the first place. The theory presented here addresses these two questions as inextricably linked in the context of the many courts that have discretion over hearings. Before developing the formal model, however, it is useful to consider how extant accounts of the role hearings play in decision making, particularly at the U.S Supreme Court, could be applicable in a comparative context or, at a minimum, informative with respect to potential alternative accounts to the theoretical argument presented here.

One potential use of hearings is to address a court's normative or functional goals, such as increasing the transparency of salient cases and promoting the legitimacy of decisions. By allowing litigants to have their day in court, hearings can enhance the perceived fairness and legitimacy of the court's ultimate decision. This "procedural fairness" can ensure that litigants accept the court's decision and, ultimately, the institution's legitimacy (Tyler 1994, 2003). Moreover, the public nature of hearings provides a degree of transparency in the judicial process that is otherwise conducted out of the public eye. Transparency can similarly enhance the legitimacy of the court's ultimate decision by promoting the appearance of a fair process. In both instances, hearings serve a functional purpose as a means to achieving a normative goal.

A second account of hearings addresses the informational aspect of the procedure. Examining the U.S. Supreme Court, Johnson (2001, 2004) argues that the court uses hearings as a means for obtaining information that in turn enhances the court's ability to ensure its decisions result in the justices' preferred policy outcome. Hearings reduce uncertainty over policy conditions, which allows the court to make more precise decisions than it otherwise would. The function of hearings by this account, then, is to help judges craft their opinions to ensure the implementation of the decision results in the desired policy outcome.

The potential influence of hearings on case disposition has similarly been studied in the context of the U.S. Supreme Court. In particular, empirical research on the U.S.

Supreme Court shows that oral arguments advantage the government's position because the government typically has superior representation in the form of the Solicitor General (Johnson, Wahlbeck and Spriggs II 2006). The government's resources, coupled with the reputation and experience gained from repeated arguments at the court, give the Solicitor General an edge in oral arguments at potentially persuading justices to adopt the government's viewpoint. As a result, oral arguments more often than not ultimately serve to improve the federal government's probability of success at the court.

Below, I develop a formal argument of how a court can use public oral hearings to promote compliance. In short, I argue that hearings provide courts an opportunity to influence public awareness of judicial decisions, which in turn enhances the capacity of a constitutional court to ensure that government officials comply with that decision. The formalization of this argument is valuable because it distinguishes my argument from these extant theoretical and empirical claims about the relationships between oral hearings, the likelihood of government noncompliance, and case disposition. For one, if courts use hearings to pursue the normative goals like transparency and legitimacy, then they should be more likely to use hearings in publicly salient cases. Salient cases are more likely to involve government actions where compliance is at issue. For another, if it is the case that hearings benefit the government, then the court's likelihood of ruling against the government should be lower in cases granted a hearing. The formal model will help to clarify the strategic argument advanced here and identify empirical implications that distinguish my argument from extant ones like those described above.

A Formal Model of Public Oral Hearings

Following the example of Vanberg (2001, 2005) and Staton (2006, 2010), I use a single period game of incomplete information. The game has two players: a government[4], G,

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[4]I treat the government as a unitary actor since many of the courts with discretion over hearings are in countries with a fused executive. Indeed, most of the courts in my sample that have discretion operate in such a system.

and a court, C. I assume the government prefers its policy upheld and the court prefers to strike down the challenged law as unconstitutional. I further assume that the court enjoys a high level of public support such that the government is always punished when the public observes noncompliance. Upon receiving a case, the court chooses whether to hold a public oral hearing ($H = 1$) or forego doing so ($H = 0$). The court then issues its decision and either upholds ($V = 0$) or vetoes ($V = 1$) the challenged government action. If the court upholds, the game ends as the government automatically complies. If the court vetoes, the government responds by either evading ($E = 1$) or complying ($E = 0$) with the ruling. The game then ends and payoffs are realized. The timing of the game is summarized as follows:

1. Court receives a case

2. Court chooses to hold a hearing ($H = 1$) or not hold a hearing ($H = 0$).

3. Court chooses to uphold ($V = 0$) or veto ($V = 1$) the challenged law. If the court chooses $V = 0$, the game ends.

4. If the court vetoes, the government chooses to evade ($E = 1$) or comply ($E = 0$).

5. Game ends, payoffs are realized.

I now turn to the utility functions of the players. I specify three components of the court's utility function. First, a policy component captures the importance of the policy at issue in a case to the court. This component accounts for the long-standing finding in the judicial politics literature that judges have preferences regarding the outcome of cases (e.g George and Epstein 1992; Baum 2009). It is important to note, however, that I am agnostic here as to the source of the court's preferences. That is, the model makes no claims about, for example, whether the court is motivated by ideology (i.e. the attitudinal model (Segal and Cover 1989; Segal and Spaeth 1993, 2002) or legal principles (i.e. the legal model). Rather, this component of the court's utility distills these distinct accounts

into a single parameter in the model. I label this parameter A, where $A > 0$.[5] Since I assume the court has preferences divergent from the government, the court only receives A when it vetoes and the government complies.

The second component represents the institutional costs of noncompliance. Successful noncompliance can undermine public confidence in the court's ability to effectively constrain other institutions and ultimately harm the court's institutional legitimacy. Moreover, successful noncompliance can harm how the court is perceived by other political institutions, which can encourage further noncompliance. That courts concern themselves with these negative institutional consequences of noncompliance has been well established in the literature (Clark 2009; Staton 2010; Vanberg 2005; Stephenson 2004; Carrubba 2009; Caldeira 1987; Caldeira and Gibson 1992, 1995; Rogers 2001). In the model, I capture the potential institutional cost attached to a case with the parameter I, where $I > 0$. The court incurs this cost when the government successfully evades; otherwise I equals 0.

The third component of the court's utility function is the cost of holding a hearing. Judges have limited time, especially in courts with mandatory dockets. Frequently faced with overwhelming caseloads, dedicating at least a full day to a hearing for a single case comes at considerable cost. In addition to the opportunity cost of holding a hearing, the proceedings require courts to use their limited budgetary resources. The model captures these costs with the parameter κ, where $\kappa > 0$. To summarize, the utility function of the court is:

$$
\begin{aligned}
EU_C(H = 0) &= A(V)(\pi) - I(V)(1 - \pi) \\
EU_C(H = 1) &= A(V)(\phi) - I(V)(1 - \phi) - \kappa
\end{aligned}
$$

___
[5]This conditions simply represents the assumption that the court always has some policy interest in a case. This condition is particularly justifiable since constitutional law cases typically have particularly serious policy implications.

The government's utility has two components. The first component is the importance of the challenged policy to the government. I assume that the government always attaches some value to the policy under review. This is, of course, not to say that courts and elected officials never agree on policy. Rather, I make this assumption for a clear theoretical reason. The model is intended to provide intuition into a court's response to the implementation problem. If, however, the government places no value on the challenged policy, then there is no implementation problem and, as a result, the model is no longer useful. By assuming that at least some policy divergence exists between the court and the government, I am ensuring that the model captures the political environment of theoretical interest here. The value the government places on the challenged policy is represented by α, where $\alpha > 0$. The government gains α if either the court upholds or the government successfully evades a judicial veto. The second component of the government's utility function is the potential electoral backlash from the public for noncompliance. This component captures the theoretical claim that voters punish elected officials when the voters observe those officials failing or refusing to comply with the decision of a legitimate court. In the model, this electoral punishment is captured by the parameter β, where $\beta > 0$. To summarize, the utility function of the government is:

$$EU_G(H = 0) = \alpha(E)(1 - \pi) - \beta(E)(\pi)$$
$$EU_G(H = 1) = \alpha(E)(1 - \phi) - \beta(E)(\phi)$$

Both players have a common prior belief, π, about the probability of the public becoming aware of evasion by the government when the court does not hold a hearing. The model's innovation is the addition of a second belief, ϕ, the public becoming aware when a hearing is held. I assume the likelihood of public awareness is strictly greater for cases granted a hearing ($\phi > \pi$). As with the probability π, both the government and court share the same belief about ϕ. Table 2.2 provides a summary of the model's parameters.

Table 2.2: Model Parameters

Probabilities	Explanation	Restriction
π	Baseline Probability of Public Awareness	$0 < \pi < 1$
ϕ	Probability of Public Awareness After a Hearing	$0 < \pi < \phi < 1$
Utility Components		
A	Court's policy payoff	$A > 0$
I	Court's institutional cost	$I > 0$
κ	Court's cost of holding a hearing	$\kappa > 0$
α	Government's policy payoff	$\alpha > 0$
β	Government's electoral cost	$\beta > 0$

Results

The solution concept for the game is subgame perfection. I limit the analysis to pure strategies. To aid the analysis, I state the definitions that structure the equilibria conditions. Each definition identifies a threshold governs each actor's choice. This allows me to structure the equilibria in a straightforward manner and provide a clearer exposition of the results. The relevant actor's strategy is determined by whether π, or ϕ when the court holds a hearing, is greater or less than the threshold.

Definition 1.1: Define the "Government Compliance Threshold" as:
$$T_G^{Comp} \equiv \frac{\alpha}{\alpha+\beta}$$

The first definition delineates the threshold by which the government determines whether or not to evade a judicial veto. I refer to this threshold as the "Government Compliance Threshold." If π, or ϕ when the court holds a hearing, is less than this value, then the government chooses to evade the ruling. This threshold is determined by the two components of the government's utility function. As the importance of the challenged policy to the government increases, or the political backlash for noncompliance decreases, the government is more willing to engage in noncompliance. In other words, the threshold indicates that the value of π, or ϕ, must be higher to incentivize the government to comply when the government either values the policy highly or the potential electoral cost of

noncompliance is low.

Definition 1.2: Define the "Judicial Veto Threshold" as:

$$T_C^{Veto} \equiv \frac{I}{A+I}$$

The second definition concerns the court's decision of whether or not to veto the challenged government action. I label this inequality the "Judicial Veto Threshold." The court vetoes only if π, or ϕ when the court holds a hearing, is greater than the threshold value. As the court becomes increasingly confident in the likelihood of public awareness of its decision, the court's willingness to strike down legislation as unconstitutional correspondingly rises. This relationship, however, is conditioned by the policy and institutional implications of the case. When the institutional costs associated with noncompliance are high, the court becomes increasingly cautious about striking down laws by only striking down laws when the probability of public awareness is similarly high. In contrast, the court's willingness to challenge the government increases when the court places significant importance on the policy under review. In such instances, the court will strike down a law even under less transparent conditions.

Definition 1.3: Define the "Judicial Public Hearing Threshold" as:

$$T_C^{Hearing} \equiv \frac{K}{A+I}$$

The third threshold, which I refer to as the "Judicial Public Hearing Threshold." defines the court's decision to hold a public hearing. The court will only hold a public oral hearing if this condition is met. The parameter values necessary for this condition to obtain, however, vary with the values taken by π and ϕ. Specifically, whether or not the court holds a hearing is a function of the court's willingness to strike down the legislation as unconstitutional and the likelihood of the government complying with the court's decision. Of course, these conditions are endogenous to the game and themselves functions of the players' utility functions. Below I address these equilibria condition, along with discussions of their substantive significance.

In total, there are eight subgame perfect equilibria (SPE) in the game.[6] In discussing these equilibria, I group them into categories. The following propositions summarize the equilibria. The proofs of the equilibria are left to the appendix.

Confrontational Hearing Equilibrium: For $\pi < \phi < T_G^{Comp}$, $\phi > \pi > T_C^{Veto}$, and $\phi - \pi > T_C^{Hearing}$ the following strategy profile constitutes a SPE:

$$S_G = \{Evade, ..., Evade\}$$
$$S_C = \{Hearing, Veto\}$$

This equilibrium, as its name implies, captures a combative interaction between the court and government. Under these conditions, the government opts to engage in noncompliance irrespective of the court's use of a public oral hearings. Interestingly, though, the court similarly will strike down the challenged statute as unconstitutional with or without a hearing. The key determination for the court, then, is whether the marginal increase in the probability of the public observing the court's decision after a hearing, formally $\phi - \pi$, outweighs the cost (κ) of holding the hearing. If either the case or the broader political environment is not conducive for a hearing to be effective enough to offset the cost of the hearing, then the court will simply strike down the law without holding a hearing. If, however, a case lends itself to having a hearing, then the court will still strike down the law but do so after bearing the cost of holding a hearing. In short, in this setting both the court and government aggressively pursue their most preferred course of action (strike and evade, respectively), with the court determining its willingness to hold a hearing on the effectiveness of the procedure at increasing public awareness.

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[6]The government's strategy profile is listed in the following order: 1.) nature selects an environment in which evasion will be observed and the court holds a hearing; 2.) nature chooses such an environment but the court does not hold a hearing; 3.) nature selects an environment in which evasion will not be observed and the court holds a hearing; 4.) nature selects such an environment and the court does not hold a hearing.

Mobilizing Hearing Equilibrium: For $\phi > T_G^{Comp} > \pi$, $\phi > T_C^{Veto}$, and $1 - \pi > T_C^{Hearing}$, the following strategy profile constitutes a SPE:

$$S_G = \{Comply, Evade, Comply, Evade\}$$

$$S_C = \{Hearing, Veto\}$$

This equilibrium characterizes an environment in which the court's use of a hearing switches the government's behavior from evasion to compliance. This equilibrium obtains if the court's veto and hearing thresholds are met and the government's threshold for compliance is met only when the court holds a hearing. In this setting, the government will only comply when a hearing is held; otherwise, it will evade the decision. The court will hold a hearing when the cost of doing so justifies the increase in the likelihood of public awareness. As with the Confrontational Hearing Equilibrium, the court's veto threshold is met without a hearing, and thus the court will veto regardless of whether or not it holds a hearing. The decision to hold a hearing, then, similarly turns on the procedure's effectiveness. When a hearing is either a low cost endeavor or expected by the court to considerably increase the likelihood of public awareness, the court will strikes down the law after a hearing and the government will comply. Otherwise, the court still strikes down the law without a hearing but faces a noncompliant government.

This equilibrium additionally highlights the potential impact of hearings on the regular interactions between legislations and the judiciary. The ability of a hearing to increase the likelihood of public awareness for judicial decisions creates the classic "separation of powers" relationship between courts and legislatures. That is, the court holding a hearing leads to a political environment in which each branch carries out its constitutional duty: the court to strike down unconstitutional legislation and the legislature to faithfully implement that decision. But the government's equilibrium behavior in the absence of a hearing is telling. Without a hearing, the government evades the court's decision and the quality of democratic governance is brought into question. One important implication of this result is that a successful separation of powers system, one in which courts strike

down legislation that does not conform to the constitution and legislatures comply, can be the result of choices made by courts during the adjudication process.

Judicial Emboldening Hearing: For $\phi > T_G^{Comp} > \pi$, $\pi < T_C^{Veto} < \phi$, and $\frac{A}{A+I} > T_C^{Hearing}$, the following strategy profile constitutes a SPE:

$$S_G = \{Comply, Evade, Comply, Evade\}$$
$$S_C = \{Hearing, Veto\}$$

Limited Judicial Emboldening Hearing: For $\phi < T_G^{Comp}$, $\pi < T_C^{Veto}$, and $\frac{\kappa\phi}{K+I} > T_C^{Hearing}$, the following strategy profile constitutes a SPE:

$$S_G = \{Evade, ..., Evade\}$$
$$S_C = \{Hearing, Veto\}$$

These two equilibria characterize environments in which a hearing alters the court's behavior. These equilibria obtain when the court's veto threshold lies between the probability of awareness without a hearing and the probability of awareness after the court holds a hearing. In these equilibria, the increased level of public awareness emboldens the court to veto the challenged government action when it otherwise would uphold. In the judicial emboldening equilibrium, hearings have the additional effect of making the government switch its strategy from evasion to compliance. Once again, these equilibria are bounded by the costs associated with holding a hearing; if the costs to doing so become too high, the court will forgo the procedure. In addition to the direct cost of the hearing (κ), these thresholds are a function of the policy component of the court's utility function. The more the court values the specific policy at stake, the greater the cost it is willing to bear to hold a hearing.

These equilibria speak further to the role hearings can have in ensuring the proper functioning of democratic governance and separation of powers arrangements. First consider the limited judicial emboldening hearing equilibrium. In this environment, the ability of

the court to hold a hearing provides an opportunity to create the political environment necessary for the court to challenge the government by striking down legislation. This point is critical - without the hearing, the court would lack the necessary public attention to strike down an unconstitutional law and, as a result, uphold such a statute rather than strike it down but be met with successful noncompliance from government officials. This dynamic is even clearer in the judicial emboldening equilibrium. In this equilibrium the ability of the court to hold a hearing has its most striking impact on the efficacy of constitutional review. Without a hearing, the court would uphold the challenged law because it expects the legislature to successfully evade the decision. As a result, the lack of a hearing leaves the court unable to fulfill its role as a constraint on legislative behavior. The ability to hold a hearing, however, creates an environment that both allows the court to strike down the challenged statute and incentivizes the government to comply with the decision. That is, the court's use of a hearings leads both players to change their actions from damaging the quality of democratic governance to behavior that falls directly in line with the expectations of a separation of powers system.

Fully Deferential Government: If $\pi > T_G^{Comp}$ and $\pi > T_C^{Veto}$, the following strategy profile constitutes a SPE:

$$S_G = \{Comply, ..., Comply\}$$
$$S_C = \{No\ Hearing,\ Veto\}$$

The fully deferential government equilibrium captures cases involving a government that will comply with the court's decision regardless of whether or not the court holds a hearing. Such cases may follow from one of two situations. In the first scenario, the government may view the challenged statute as insignificant or not worth risking the potential backlash for engaging in noncompliance. For example, a government might find itself defending a law in court that was passed by a previous government. In such a case, the cost incurred by the current government when the court strikes down the

previous government's law is minimal. As a result, the government in such a case has little incentive to engage in noncompliance. In the second situation, the government might value the law under review, but recognize that the likelihood of public awareness for the case is too high to make noncompliance an electorally viable strategy, even in the absence of a hearing. In cases where the public is likely to observe the court's decision and the government's subsequent response, the government is bound by the court's decision despite its preference to ignore or defy the court. Put another way, this equilibrium represents the ideal separation of powers environment; the court effectively constrains the government without the need for procedural or other tools. The court ensures that officials do not breach their constitutional obligations thanks to the credible threat of an electoral backlash from an informed and aware public.

Fully Deferential Court: For $\phi < T_C^{Veto}$, the following strategy profile constitutes a SPE:

$$S_G = \{Evade, ..., Evade\}$$
$$S_C = \{No\ Hearing,\ Uphold\}$$

The defining feature of the fully deferential court equilibrium is, as the name implies, the court's weakness vis-a-vis the government. In this equilibrium, the likelihood of public awareness for a case is so low that the court upholds the challenged statute even after holding a public hearing. That is, the ability of the court to obtain compliance from government officials is limited regardless of the court's use of procedural or institutional tools like oral hearings and, as a result, the court is effectively eliminated as a check against the government. Just as the fully deferential government equilibrium characterized a separation of powers arrangement functioning as intended, this equilibrium characterizes a failed separation of powers arrangement in which one branch, the court, is unable to constrain another branch of government.

The relationship described in the fully deferential court equilibrium further highlights

the limited efficacy of public oral hearings at ensuring the effective exercise of constitutional review. In some previous equilibria the court can sufficiently increase the likelihood of public awareness to strike down unconstitutional legislation and, under certain circumstances, ensure compliance from government officials without the need of the public. Here, however, public oral hearings cannot aid the court in this endeavor. The intuition behind this result is that some cases are simply unlikely to garner public awareness regardless of a court's procedural choices. Some issue areas fail to engender significant media or public interest and, as a result, are unlikely to receive attention even if the court tries to highlight the case. When this is the case, the court cannot expect voters to credibly hold their elected officials accountable for breaching constitutional obligations. Consequently, in such instances the court must defer to the government even when a case involves unconstitutional state actions.

Excessively Costly Hearings: For anytime $T_C^{Hearing}$ is not met, the following strategy profiles constitute SPE:

$$S_G = \begin{cases} Evade, ..., Evade & \text{if } \pi < T_G^{Comp} \\ Comply, ..., Comply & \text{if } \pi > T_G^{Comp} \end{cases}$$

$$S_C = \begin{cases} No\ Hearing,\ Veto & \text{if } \pi > T_C^{Veto} \\ No\ Hearing,\ Uphold & \text{if } \pi < T_C^{Veto} \end{cases}$$

The final equilibrium, the excessively costly hearings equilibrium, captures the players' strategies when the costs associated with holding a public oral hearing outweigh the policy and institutional concerns of the court. In this equilibrium, the court explicitly compares the expected benefit of holding a hearing to costs of doing so. Importantly, this decision is made independently from the government's strategic calculation. That is, the cost of holding a hearing can simply be too both in cases where the government will comply with court's decision and in cases where the government will engage in noncompliance.

Rather, the court in this equilibrium determines that the low level of importance of the policy under review makes holding a hearing an unattractive option. Similarly, the court is increasingly unwilling to incur the cost of holding a hearing as the expected institutional costs of noncompliance decrease.

Substantively, in this equilibrium, the court and government behave as though the court does not have the ability to hold a hearing. That is, the court's choice regarding case disposition and the government's choice regarding compliance are determined by the likelihood of public awareness only insofar that a case is inherently likely to garner attention without the aid of judicial procedures. The result is an environment in which the court is considerably less capable of effectively constraining the government, particularly in cases unlikely to garner the public's attention. What sets this equilibrium apart from others in which the court's authority is limited, however, is the nature of the condition hindering the court. While the policy and institutional costs associated with a case are determined by the topic of the case and the policy preferences of the court, the cost of holding a hearing is in many ways a function of factors beyond the court's control. Legislative acts, for example, often place requirements on the court when hearings are held and specify how hearings are to be conducted. Moreover, the budgetary costs for holding hearings come from court budgets that are often set by legislatures. As a result, the likelihood of a court finding itself in the excessively costly hearings equilibrium and thus unable to use the procedure to engender compliance can be the result of actions taken by the very actors the court is attempting to constrain. This raises a question about the political incentive for legislatures to grant courts the discretion and resources to hold hearings that can be used against them. Legislatures could, after all, place severe restrictions on the use of hearings in order to render them ineffective. Such actions would increase κ and thereby expand the range of cases falling into this equilibrium. Although beyond the scope of the model, I return to this question of the ability of legislatures to manipulate the cost of hearings later in the conclusion.

Taken together, the equilibria demonstrate the range of influence public oral hearings

can have on judicial-legislative relations. On one end of the spectrum, hearings play no role in affecting the strategic behavior of the court or government. Characterized by the fully deferential court and government equilibria, the court does not use hearings in these cases to address to potential noncompliance.[7] On the other end of the spectrum, hearings have a profound affect on the behavior of both courts and governments. This is most clearly demonstrated by the impact of hearings on behavior in the judicial emboldening equilibrium. In this equilibrium the court's use of a hearing simultaneously allows the court to rule against the government when it otherwise would have upheld the challenged statute *and* the government complies with the court's decision when it would have evaded such a decision in the absence of a hearing. In such cases, the consequence of hearings for the quality of democratic governance is most prominent. But even in less extreme cases, such as those characterized by the mobilizing hearing and limited judicial emboldening equilibria, hearings continue to provide a court with an expected level of public awareness sufficient to engender compliance from an otherwise recalcitrant government.

Interpretation and Empirical Implications

One of the particularly useful values of a theoretical model such as the one constructed above is that we can interpret the model's results in ways that provide insights into the relationship between two actors that otherwise may not be immediately obvious. Figures 2.1 and 2.2 help to facilitate such an interpretation of my model. The shaded regions in the figures indicate the sections of the parameter space in which the court holds a hearing, while the unshaded regions represent regions in which the court does not do

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[7]It is important to note, however, that this does not imply that courts in reality would *never* hold hearings. Courts may use hearings for other purposes, such as gathering information or to legitimize the judicial process by giving litigants their "day in court." The model does not preclude such uses of hearings, but rather simply does not speak to when we should expect to observe hearings used for such purposes.

so.[8] The x-axes represent the government's willingness to engage in noncompliance (the government's compliance threshold T_G^{Comp}). That is, higher values along the x-axis in both figures indicates that the government is more likely to evade or ignore a judicial decision to strike down the challenged statute.[9] The court's "Judicial Public Hearing Threshold" is captured by the y-axis, with increasing values along that axis indicating that the likelihood of public awareness must increase in order for the court to hold a hearing. Along both axes I specify the values of the model's parameters that form the boundaries between the equilibria. In order to ease the interpretation of the figures, I focus my discussion on the relationship between two cut points on the x-axis, π and ϕ, and the court's veto threshold (T_C^{Veto}).

Consider Figure 2.1 first. This figures shows the model's predictions when the likelihood of public awareness for the court's decision is sufficient for the court to strike down the challenged legislation even without holding a hearing ($\pi > T_C^{Veto}$). In this scenario, the court holds a hearing when a case falls in one of two equilibria: the "Mobilizing Hearing" and "Confrontational Hearing" equilibria. These equilibria obtain when T_G^{Comp} surpasses π and ϕ, respectively, and the court's cost of holding a hearing does not become too high. When the conditions regarding the government's compliance threshold are met, as is the case in the far left region of the figure, the court is in its strongest position, the "Fully Deferential Government" equilibrium. The final equilibrium represented in Figure 2.1 is the "Excessively Costly Hearing" equilibrium located in the upper region of the figure. With the costs of holding a hearing exceeding their expected value, the court here is in a weak position vis-a-vis the government. Note that the government's compliance thresh-

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[8]The relative size of the regions in the figures are purely illustrative. While the general shape of the figures remains consistent across different values of the model's parameters, the values chosen here and the subsequent depiction of the equilibria regions were selected in order to aid in the exposition of the results.

[9]Recall from the model results described above that this can be either due to the government placing considerable importance on the challenged statute or a low electoral cost for engaging in noncompliance.

old influences this equilibrium only insofar that the government cares sufficiently about the policy to consider noncompliance (i.e. the fully deferential government equilibrium does not obtain). If this condition is met, we see from the figure that the court may be constrained by the cost of a hearing regardless of the intensity of both the court's and government's policy preference.

Figure 2.1: Equilibrium Predictions when $\pi > T_C^{Veto}$
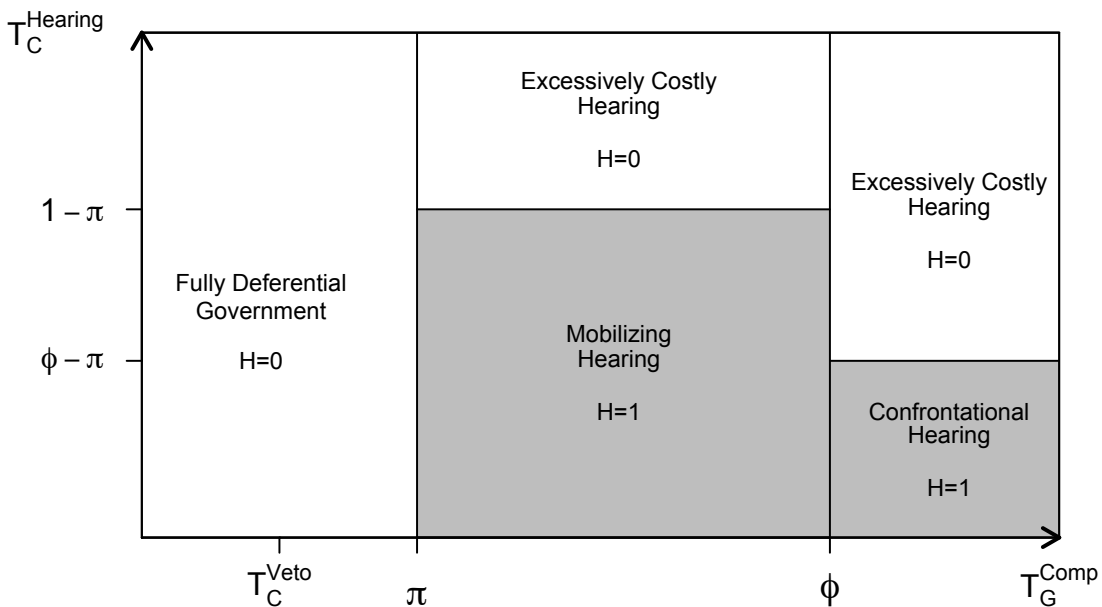
The second figure displays the model's predictions for intermediate values of the court's veto threshold ($\pi < T_C^{Veto} < \phi$). The results presented in this figure are analogous to those in Figure 2.1, with the primary difference being that the court's veto threshold has increased to surpass π but remain less than ϕ.[10] Under this condition, the court's strongest position is once again in the far left portion of the figure. Just as in Figure

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[10]If the court's veto threshold is beyond ϕ, then the "Fully Deferential Court" equilibrium obtains for all combinations of parameter values. The logic for this result follows from the relationship between the court's veto threshold and ϕ. If the threshold is beyond ϕ, then the court will not feel it has sufficient public awareness to strike down the challenged legislation, *even* if it holds a hearing. As a result, the court always upholds without holding a hearing.

2.1, the Fully Deferential Government equilibrium that obtains here is the result of π surpassing the government's compliance threshold, which indicates that the government will comply without the court holding a hearing due to the latent likelihood of public awareness. As the government's compliance threshold value shifts rightward along the x-axis, the relative strength of the court vis-a-vis the government becomes increasingly dependent on the court's use of a hearing. When the government's compliance threshold takes an intermediate value ($\pi < T_G^{Comp} < \phi$), the court's use of a hearing empowers the court to challenge the government when it otherwise would not have ("Limited Judicial Emboldening Hearing"). Similarly, hearings allow the court to challenge the government even when the government places a high level of importance on the policy under review ($T_G^{Comp} > \phi$). This strengthened position for the court is constrained, however, by the relative cost of holding the hearing. This constraining effect, logically, increases with the likelihood that the government will engage in noncompliance (T_G^{Comp} increases). To summarize both figures with regard to the court's strength relative to the government, the court is strongest in the left regions of the figure and decreases in strength as we move to the right and upward in the figure. The court is able to retain this strength in the lower portions of the center and right regions of the figure by holding a public oral hearing, but in turn pays a cost to do so.

A series of observations based on these figures help to structure the empirical implications that follow from the model's results. First, consider environments in which the government places little to no importance on the policy under review. In such cases, the government has little incentive to risk an electoral backlash by engaging in noncompliance and so accordingly faithfully carries out the court's decision. The court, recognizing that the government will not challenge the court's authority to strike down legislation as unconstitutional, does not need to pay the cost of holding a hearing in order to effectively exercise its judicial review power. Put another way, the court has no incentive to hold a hearing when the environment is such that the government will comply with the court's decision due to a lack of interest in defending the continued implementation of the

Figure 2.2: Equilibrium Predictions when $\pi < T_C^{Veto} < \phi$
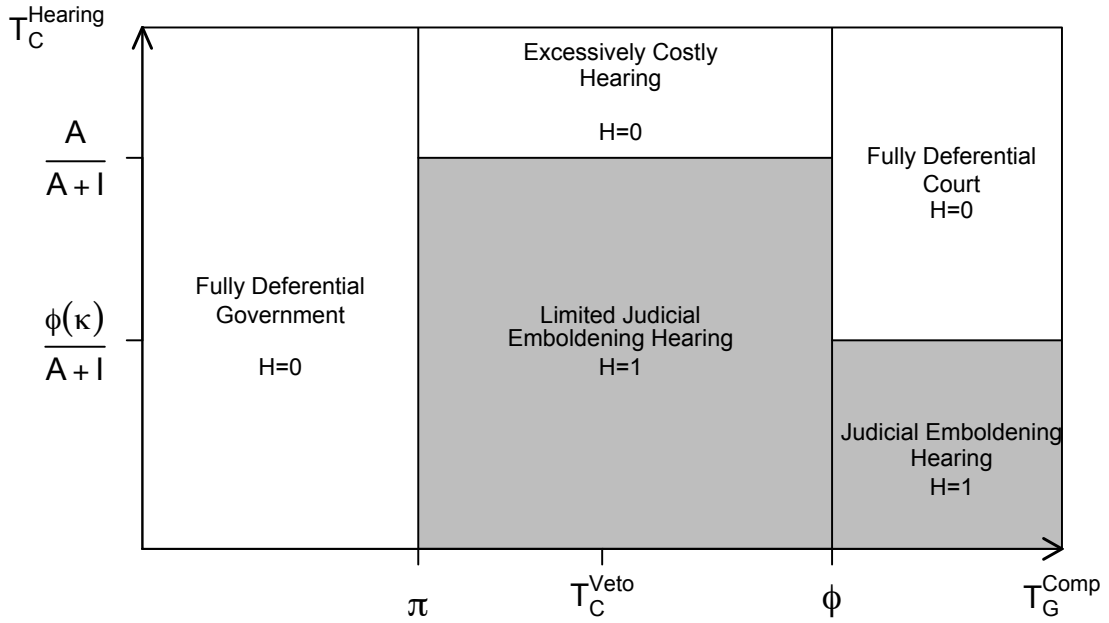
challenged policy.

The converse of this dynamic is further instructive for understanding the model's implications for when a court *will* hold a hearing. The court's ability to rely on the public to compel compliance from government officials is decreasing as the importance of the policy to the government increases.[11] As the figures show, when our attention shifts from the left section of the figure towards the shaded lower center and right sections, the court's response in such cases is to use public oral hearings to increase the likelihood of public awareness. The possibility of noncompliance, a strategy driven by the government's policy interest in a case, leads the court to effectively strengthen its position by incurring the cost of a hearing to increase the likelihood of public awareness. Only when confronted with this threat does the court hold a hearing. The figure illustrates this aspect of the game, as the court holds a hearing only when the challenged policy is at least moderately salient to the government. This leads to the first observation.

Observation 1: If a court uses hearings to increase the likelihood of public

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[11]Formally, T_G^{Comp} increases.

awareness in response to potential noncompliance, then a court should only use hearings when the government cares about the constitutionality of the policy under review. If the government views the policy under review as being of little or no importance, then a court should never hold a hearing.

A similar dynamic exists between the court and government with regard to the magnitude of the potential electoral backlash against elected officials for failing to comply with the court's decision. Recall that the government's compliance threshold is determined not only by the government's policy concerns, but also the electoral cost (β) associated with the public observing the government engage in noncompliance. The relationship between this cost and the court's need to use hearings, however, is the inverse of that described above regarding the government's policy considerations. When the electoral cost is high, the government is less likely to take the risk of being "caught" defying the court by the public. As a result, the government will comply independent of the court's strategy with regard to hearings. In such instances, the court's effectiveness at constraining the government is sufficiently supported by the threat of the public's backlash against the government that the court does not need a hearing. When this is not the case, however, and the magnitude of the public backlash is insufficient to compel compliance alone, then the court can use a hearing to make the most of that threat by increasing the likelihood of public awareness. This counterintuitive result suggests courts use hearings simply when the potential magnitude of the public backlash is greatest, but rather when the threat of backlash is coupled with a strong likelihood of the public becoming aware of the government's noncompliance.

Observation 2: If a court uses hearings to increase the likelihood of public awareness in response to potential noncompliance, then a court should be less likely to hold a hearing as the magnitude of the electoral backlash suffered by the government for observed noncompliance increases.

Taken together, these first two observations identify a critical insight of the model.

Both the policy salience and magnitude of an electoral backlash are central to the credibility of a government's threat of noncompliance. When the government cares significantly about the challenged policy (Observation 1) or the electoral punishment for noncompliance is not exceptionally high, then a strategy of noncompliance is credible. That is, in such situations the court must take seriously the possibility that the government will respond to a decision to strike down a statute by ignoring the court or otherwise refusing to implement the court's decision. The credibility of noncompliance threats is enhanced even further when both conditions obtain. When neither do, however, the court recognizes the government's weakened position and, consequently, can exert its authority over the government without a need to hold a public oral hearing. To summarize, the first two observations highlight the centrality of the *degree* of risk for noncompliance in determining the court's strategy. When the degree is low, the court is empowered and does not a hearing. When the opposite is true, however, the court must evaluate how a hearing might influence its political environment. The remaining observations from the model speak to such evaluations.

The third observation addresses the court's use of hearings when confronted with a government sufficiently invested in the challenged policy to make noncompliance a credible threat to the court's authority, or, to put it in the context of the figures, a case falls outside of the "Fully Deferential Government" equilibrium. In such situations, the court can use its ability to hold a hearing to increase the likelihood of public attention and thereby incentivize government officials to comply. To do so, however, is not costless. The cost of holding a hearing forces a court to be selective about which cases receive a hearing. The model suggests a criterion upon which a court can balance the expected benefit of holding a hearing with the costs of doing so. The expected effectiveness of a hearing at increasing the likelihood of public awareness can inform a court as to whether or not a hearing is worthwhile. Put simply, hearings that are more likely to significantly increase the likelihood of awareness are more likely to provide a benefit to the court that outweighs the cost of holding the hearing. All else being equal, courts should use hearings when a

hearing is likely to have its greatest impact. Formally, this concept of effectiveness is the difference in the likelihood of public awareness for a case including a hearing and that same case without a hearing. This is captured in the model by the quantity $\phi - \pi$. In the model, as $\phi - \pi$ increases, the range of values that satisfy $T_C^{Hearing}$ increases and the more likely the court will hold a hearing. This dynamic is best illustrated in Figure 2.1. In Figure 2.1, the court will hold a hearing even when doing so does not change the government's strategy. However, the court will only do so if the increase in the likelihood of public awareness is sufficiently large. The share of the parameter space in which the court will hold a hearing increases with the distance between π and ϕ; as the distance between these values grows, so does the range of possible values the model's other parameters can take and still have a hearing be an equilibrium strategy for the court. The third observation follows from this discussion.

> **Observation 3:** Given a sufficient risk of noncompliance and that courts
> use hearings to address that noncompliance, the court is more likely to hold
> hearings when they will be most effective at increasing public awareness.

The fourth observation considers how the court's use of hearings is influenced by the interaction between the cost of holding a hearing and the government's incentive to engage in noncompliance. Naturally, the cost of holding a hearing constrains the court's use of the procedure. The unique insight of the model, however, is that this constraint is conditioned by the value of the government's compliance threshold (T_G^{Comp}). When this threshold is high, such as in cases involving policies the government views as important, the maximum cost the court is willing to incur to hold a hearing decreases. The logic here is that the court is averse to paying the cost of a hearing only for the government to successfully ignore its ruling. Accordingly, the cost the court is willing to incur for a hearing decreases when the court faces a government with a strong incentive to engage in noncompliance. It is in such cases that the court is least likely, if it holds a hearing, to reap the benefits of doing so. To see this relationship graphically, consider again Figures

1 and 2. Recall that the government's compliance threshold (T_G^{Comp}) is captured by the x-axis, while the cost of holding a hearing is represented along the y-axis by the court's public hearing threshold $(T_C^{Hearing})$. As the government's compliance threshold increases, due, for example, to the importance of the policy to government officials, the range of parameter values that satisfies the court's public hearing threshold decreases. That is, as we move from the "Mobilizing Hearing" equilibrium to the "Confrontational Hearing" equilibrium in Figure 2.1, the court's threshold exerts a greater constraining effect on the court's use of hearings. Similarly in Figure 2.2, the transition from the "Limited Judicial Emboldening Hearing" equilibrium to the "Judicial Emboldening Equilibrium" that occurs when T_G^{Comp} increases is accompanied by the enhanced constraining effect of $T_C^{Hearing}$ and κ on the court's willingness to hold a hearing. It is important to note, however, that the relationship between the cost of hearings and the government's willingness to engage in noncompliance is itself conditional. When the challenged policy is of minimal importance to the government and the "Fully Deferential Government" equilibrium obtains, this dynamic does not exist. This insight informs the fourth observation.

> **Observation 4:** Given a sufficient risk of noncompliance and that courts use hearings to address that noncompliance, the constraint imposed on the court by the cost of holding a hearing increases with the importance of the policy to the government.

In addition to identifying the conditions under which a court holds hearings to address noncompliance, the model provides insights into the relationship between such a use of hearings and a court's ability and willingness to effectively constrain government officials by striking down unconstitutional statutes. Specifically, an implication of the model is that hearings should correspond to case disposition in constitutional review cases. If courts are using hearings to address potential noncompliance, then they should use the procedure in precisely the cases involving statutes the court wants to strike down. The result is that a court should be more likely to strike down legislation in cases granted a

hearing. This result follows from the theory's central argument that hearings improve the level of public awareness and ultimately increase the likelihood of compliance. Put simply, a court will only incur the cost of holding a hearing if it then expects to reap the benefits of striking down the challenged statute and obtaining compliance from government officials. To see this graphically, consider again Figure 2.1. In Figure 2.1, there are two equilibria in which the court holds a hearing: the "Mobilizing Hearing" and "Confrontational Hearing" equilibria. In both of these equilibria, the court rules against the government by striking down the challenged legislation. In other words, the model produces no equilibrium in which the court holds a hearing but does not strike down the challenged statute. Moreover, if we examine Figure 2.2, we see that the court holds a hearing in the "Limited Judicial Emboldening" and "Judicial Emboldening" equilibria, indicating that holding a hearing switches the court's strategy from uphold (V=0) to veto (V=1). The equilibrium strategy predicted by the model in every case granted a hearing, then, is for the court to strike down the statute. This prediction motivates the fifth and final observation.

> **Observation 5:** Given a sufficient risk of noncompliance and that courts use hearings to address that noncompliance, the court is more likely to rule against the government in cases granted a hearing.

Conclusion

Constitutional courts face a fundamental challenge when exercising their authority to subject legislation to constitutional review. Without the ability to directly enforce their decisions, courts must rely on government officials to implement judicial rulings. And while this reliance on the other branches of government poses no problem for judicial authority when the court's decision conforms with the interests of those other branches, courts encounter a real difficulty when the interests of government officials incentivize them to ignore rather than implement the court's decision. Explaining how courts can ensure compliance with decisions in these difficult situations, then, is central to under- standing the limits of judicial authority and ultimately the role of constitutional courts

in modern liberal democracies.

In this chapter I examined how one of the most prominent judicial procedures, public oral hearings, can influence the ability of a court to effectively exercise constitutional review. Public oral hearings in modern liberal democracies are characterized by two key features. First, hearings typically generate media coverage of cases brought before constitutional tribunals by providing media access otherwise lacking in the judicial process. Second, typically the decision to hold hearings is largely left to the discretion of the presiding court. Combined, I argue these two features make public oral hearings a institutional tool courts can use to address potential noncompliance. Using a formal model to develop my argument, the argument presented in this chapter provides insights into how hearings might serve to empower constitutional courts, when a court might use a hearing to this end, and the consequences of such a use of hearings for judicial decision making and the efficacy of constitutional review.

Specifically, the model allowed me to derive a series of relatively nuanced implications about the relationship between hearings and the efficacy of constitutional review. The theory implied that a court's use of hearings is tied to the need for public awareness of judicial decisions. Unlike extant accounts of hearings that attribute the use of hearings to information gathering or the pursuit of normative goals such as legitimacy or transparency, the account presented here links hearings to the credibility of the noncompliance threat posed by the government. Moreover, the theory identified two constraining conditions, the likely effectiveness of a hearing at increasing public awareness and the cost of the procedure, on the use of hearings for combating potential noncompliance. In contrast to existing accounts of public oral hearings, the theory highlights how the effect of hearings on case disposition can be a function of the decision to hold the hearing in the first place. Taken together, these implications present a novel account of the role hearings can play in the interbranch relationship of constitutional review.

What do these implications mean for the quality of democratic governance in modern liberal democracies? Perhaps most clearly, the theoretical model points to how discretion

over public oral hearings can empower constitutional courts. If public awareness of judicial decisions is indeed a solution to the issue of potential noncompliance, then courts can use hearings to increase the likelihood of such public attention. That is, the discretion available to courts with regard to hearings provides an opportunity for courts to affect their political environment and, ultimately, affect the response from government officials to a court's decision. In showing these relationships, the model suggests that granting courts discretion over the use of hearings can promote compliance with judicial decisions and serves to enhance the quality of democratic governance.

It is important to note, however, that discretion over hearings does not necessarily *aid* constitutional courts in ensuring the faithful implementation of all decisions. Hearings are only useful for promoting compliance insofar as they are effective at garnering public attention for a case and the court's decision. When a hearing is unlikely to improve the likelihood of public awareness, the procedure has minimal impact on judicial authority. This limitation is most pronounced in cases that are either too technical or banal to inspire the public's attention. Such cases, however, are those for which the court is most constrained. That is, hearings do not help courts when they are at their weakest.

Ultimately, the theoretical model shows that public oral hearings can serve as a useful, albeit limited, institutional tool for courts. The ability of hearings to increase the likelihood of public awareness allows judges to have a measure of control over their political environment. In the subsequent chapters, I test a set of the model's empirical implications in order to find evidence of court's using hearings as tools for addressing noncompliance. Although the model is intentionally devoid of much institutional details in order to maximize its generalizability, I conduct this analysis in the context of the German Federal Constitutional Court. The subsequent chapters provide a justification for this choice of setting and then a rigorous empirical examination of the court's use of hearings and the consequences of the procedure's use for the court's decision making.

Chapter 3

An Empirical Application: The German Federal Constitutional Court

In Chapter 2, I presented a theoretical model that explains how a court can use a procedure such as public oral hearings to facilitate government compliance with judicial decisions. The model demonstrates how the ability of hearings to raise public awareness can incentivize a court to strategically hold hearings and ultimately constrain governments through the effective exercise of judicial review. In so doing, the model generates a series of empirical implications regarding when a court will hold a hearing and how the use of hearings corresponds to the likelihood of a court striking down legislation as unconstitutional. I now turn to the empirical tests of these hypotheses. In this chapter, I present the case I use for the empirical analysis, the German Federal Constitutional Court (German: *Bundesverfassungsgericht*).

The Federal Constitutional Court, which I will from here on refer to as the FCC, serves as the arbiter of constitutional disputes raised in the German judiciary. As the "supreme guardian of the constitution", the FCC is widely viewed as the most influential court in the German judiciary (Kommers 19994; Kommers and Miller 2012). Indeed, the

court's position as a constitutional organ makes the president of the FCC the fifth highest ranking position in the German political system. More practically, the FCC's ability to effectively exercise judicial review over state and federal legislation has made it one of "the most active and powerful constitutional court in Europe" (Kommers 1994: 470). This success has made the FCC a model for new constitutional courts in recently democratized nations in Eastern Europe (Schwartz 2000) and East Asia (Ginsburg 2003). In sum, the FCC operates as one of the most significant legal institutions in the world.

The FCC provides an excellent setting for the empirical implications of my theoretical model. This is because of the court's position in German politics, its institutional structure, and the its decision making process. This chapter describes these aspects of the FCC and focuses particularly on how adjudication at the FCC satisfies the assumptions of the model. To this end, the chapter is organized as follows. The first section gives a brief history of the FCC. In the second section, I provide a description of the court's institutional structure, jurisdiction, and process. The third section consider the compatibility of the FCC with the key assumptions and features of the theoretical model.

A Brief History of the FCC

The origins of the FCC lie in the political environment of post-World War Two Germany. As the Allied powers worked to shape a new West German political system based on the tenets of liberal democracy, they promoted the inclusion of judicial review in the form of an independent judiciary capable of ruling on the constitutionality of laws and other official acts. Although there existed some limited precedent for judicial review in Germany's legal system, neither the Nazi regime nor its predecessor, the Weimar Republic, had provided an environment conducive to the development and maintenance of a judiciary willing and capable of effectively constraining the state through the abrogation of legislation. With the experience with Nazism still fresh in their minds, the constitutional scholars, lawyers, and politicians that set to work on crafting the a new German constitution considered it critical to rectify this shortcoming of the previous regimes. To

this end, the delegates to the constitutional assembly, officially known as the Parliamentary Council, agreed to create an independent tribunal vested with the ability to engage in constitutional review.[1] This tribunal became known as the *Bundesverfassungsgericht*, the Federal Constitutional Court.

Promulagted on May 23, 1949, the new German constitution, officially called the *Grundgesetz* or Basic Law, laid out the basic authority and primary responsibilities of the FCC. But while the Basic Law specified the court's compulsory jurisdiction and the selection process for judges, it otherwise left to the newly elected legislature the task of enacting an enabling law to define the court's procedure and organization. What followed was two years of extensive debate between the Christian Democratic-led government, the Social Democratic-led opposition, and the state governments. Ultimately, the lower house of parliament, the Bundestag, and the upper house, the Bundesrat, passed the Federal Constitutional Court Act (FCCA). Consisting of over 100 operative sections, the FCCA structured the court's organization, composition, procedure, and jurisdiction. With the passage of the FCCA, the court had both a constitutional and statutory basis. All that was left for the legislature to do was to appoint judges to serve on the court.

Although the Bundestag and Bundesrat had passed the FCCA with the support of the major parties and state governments, the process of appointing judges to the court proved difficult. The Basic Law stipulated that half of the court's judges be appointed by the Bundestag, while responsibility for appointing the other half was given to the Bundesrat, the upper house of the German parliament consisting of representatives of the state governments. Moreover, the rules for appointing judges, which had just been passed as part of the FCCA, required a three-fourths majority vote of the Bundestag for its half

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[1]The proposal for such a court came from Professor Hans Nawiasky, a colleague of the famous Austrian jurist Hans Kelsen. Nawiasky played a prominent role in writing the Bavarian state constitution, which included provisions for a constitutional court. His background in the design of the Bavarian court and work with Kelsen, who had founded the Austrian Constitutional Court after the First World War, proved influential for the FCC's inclusion in the constitution.

of the court appointments and a two-thirds majority for the half of the court appointed by the Bundesrat. As a result, any appointment to the FCC would require a compromise between the governing party, the CDU led by Chancellor Konrad Adenauer, and the main opposition party, the SPD. While the two parties had agreed on the importance of creating the FCC, they now starkly disagreed over who would serve as the justices on the newly formed court. Six months after the passage of the FCCA, the deadlock continued unresolved and the FCC remained unable to perform its duty.

It was only after that constitutional crisis over the territorial organization of the states in southwestern Germany did the government and the opposition parties reach a compromise over judicial candidates and appoint judges to the FCC. In what became the FCC's *Marbury vs. Madison* (Kommers and Miller 2012), the court was needed to adjudicate a dispute over what statehood would look like for the three southwestern states of Baden, Württemburg-Hohenzollern, and Württemburg-Baden. While the leader of the Baden government argued for the restoration of the pre-war state boundaries of Baden, the leaders of the other two states favored a large, single state. Since the Basic Law requires a referendum be held for any territorial reorganization, both sides promoted plans for the referendum that advantaged their preferred outcome. And with neither side willing to compromise, the Bundestag stepped in and passed legislation organizing the referendum in a way that favored the creation of a unified Southwest state. Specifically, the statute set the date and process for the referendum and extended the state legislative sessions to avoid holding both the scheduled election immediately preceding the referendum and a new election afterwards.

Recognizing the implications of the Bundestag's actions for the likely outcome of the referendum, the minister-president of Baden, Leo Wohlleb, initiated a challenge of the statute's constitutionality at the FCC. By doing so, Wohlleb put the federal government in a doubly difficult position. First, there were legitimate doubts about the law's constitutional basis, particularly regarding whether or not the federal government has the authority to extend the terms of state legislatures. The second problem was of a more

pressing political nature. No ruling could be made on the case because neither the Bundestag nor the Bundesrat had made any appointments to the court. The prospect of an unresolved constitutional challenge of the referendum posed a serious problem for the government, especially after Wohlleb declared that Baden would boycott the referendum unless the FCC ruled on the case. Faced with the choice of either finally establishing the court or risking the possibility of a state government defying the national government, the Adenauer government brokered a compromise with the SPD-led opposition that appointed a slate of moderate judges to the court with broad partisan support.[2] With these appointments, the FCC was finally operational and ready to address the constitutional questions facing the young West German republic.

The FCC's decision in *Southwest* has become a cornerstone of German constitutional jurisprudence. The court struck down the Bundestag's extension of the state legislative terms as unconstitutional, stating that "a state cannot dispose of its legislative authority". As for the referendum itself, the court upheld the part of the statute governing the procedures of the vote. As Kommers and Miller (2012) and Vanberg (2005) both note, however, the more important aspect of the decision was the scope of its effect. The court asserted its authority to strike down unconstitutional legislation. Even though this power is explicitly granted to the court in the Basic Law, the case provided a critical opportunity for the FCC to define the scope of that authority. In its decision, the FCC stated that "legislative bodies may not again deliberate upon and enact a federal law with the same content" as a law struck down as unconstitutional. That is, the court asserted that its judgement both prevented the execution of the current law under review and proscribed

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[2]See Vanberg 2005 for an excellent discussion of the political environment surrounding the case. The court's decision, 1 BVerfGE 14 (1951) also provides a valuable depiction of the events leading up to the case.

the government from passing laws in the future with the same content.[3]

The first major tests for the FCC's authority came shortly after the *Southwest* case. In late 1952, the Adenauer government was shepherding two treaties through the Bundestag and Bundesrat. One, the General Treaty, ended the Allied occupation of West Germany and restored the nation's sovereignty. The second, the European Defense Community Treaty, committed Germany and German forces to a pan-European defense system. The passage of both treaties was a high priority for the government, as Adenauer saw them as vehicles for promoting West Germany's ties with the Western powers. The SPD-opposition to the treaties, however, saw them as too demanding on West Germany and as running counter to the goal of reunification with East Germany (Vanberg 2005). Lacking the necessary votes in the Bundestag to stop ratification, the SPD decided to pursue the alternative strategy of challenging the constitutionality of the treaties at the FCC. With the support of 144 members of the Bundestag, the SPD sent the case to the FCC and put the court on a direct collision course with the Adenauer government.

The ratification of the treaties was a central part of the Adenauer government's foreign policy, and as such the government took a keen interest in the proceedings at the court. The government's interest turned to concern, however, when word began to reach the chancellory that the First Senate of the FCC, which had been assigned the case, was likely to rule against the treaties.[4] Faced with the possibility of a damaging FCC ruling, the government sought to initiate a proceeding that incorporated the more pro-

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[3]The FCC also established two fundamental tenets for interpreting the Basic Law. First, the court declared that the Basic Law must be considered as a whole rather than as a collection of individual clauses. Second, the FCC stated that the Basic Law contains the "fundamental principles" of democracy and federalism that supersede any other constitutional provision or amendment. See Kommers and Miller (2012: 80-87) for an in-depth discussion on the jurisprudential consequences of the case.

[4]The FCC is divided into two senates of equal size. Each senate has unique and exclusive jurisdiction over certain issue areas. I give more detail on this structure later in the chapter.

government leaning Second Senate. If the government could move the question of the treaties' constitutionality to a friendlier venue, such as the entire court rather than only the half of the judges that made up the First Senate, then the government could obtain a positive FCC decision that would preempt the First Senate's ruling on the original SPD-initated proceeding. The government found the proceeding it needed by convincing the Federal President, Theodor Heuss, to request an advisory opinion from the court regarding the constitutionality of the treaties. Since such proceedings required the entire Court instead of only one senate, the government was assured that the case would go to its preferred venue.

At this point, however, the case took an unexpected turn. The court recognized that the government was attempting to manipulate the outcome by engaging in forum shopping. Accordingly, the court sought to avoid the damage to its authority that would result from falling victim to the government's maneuvering. The First Senate recommended that the decision on the president's request for an advisory opinion be made binding, which would supersede all other proceedings, including the SPD's original case. The Adenauer government signed off on this move, viewing this as a positive development since the binding decision would come from the full court where they had an advantage. With the decision now in the hands of the full court, the First Senate dismissed the SPD's case.

Once the case reached the full court, the government's expectation of a positive disposition of the case came into serious doubt. When word reached the government that the court was likely to rule against the treaties in the advisory opinion, government officials quickly changed tactics. First, they sought to bring a case to the Second Senate, which they anticipated would uphold the treaties as constitutional. The government did so by claiming that the opposition had obstructed the majority's ability to legislate, a claim that only the Second Senate had the jurisdiction to resolve. This move, however, was met with derision from both the court and the media, all of whom viewed the move as an unabashed attempt to undermine the court by shifting venues. The court reiterated the binding nature of the pending advisory opinion for all other proceedings regarding the

topic, including the government's newly proposed proceeding.

With that path seemingly blocked, at least temporarily, the government turned to withdrawing the advisory opinion request from the court's docket. By doing so, the government could focus its efforts on the recently initiated proceeding at the Second Senate, which would then be the only proceeding remaining on the issue before the court. As Vanberg (2005) notes, however, the government did not leave it at that. Seeking to further influence the court's decision, government officials began openly criticizing the court and suggesting that possible changes to the court's institutional structure may be needed. While the Adenauer government had hoped that such talk would bring the FCC closer to the government's desired policy views, it had the opposite effect. The media immediately criticized the government for suggesting attacks on the court. The resulting turn of public support against the government and in favor of the court led the government to walk back its statement and reiterate its support for the court's independence and the importance of the rule of law. The court ultimately dismissed the government's suit as inadmissible and the withdraw of France from the treaty made further litigation moot before the court could rule on the treaty's constitutionality. While the jurisprudential fallout of the cases was relatively limited, the political ramifications were considerable. The court and government now knew that conflict between the institutions was a distinct possibility and that the court had considerable support from the media and the general public.[5]

These events early in the court's development highlight the institutional tension facing courts engaged in constitutional review. Recall that a fundamental assumption of the model in chapter 2 is that the government can ignore or otherwise defy the court's ruling. As we saw with the Adenauer government's plan to manipulate the FCC, this potential exists in the German context. A second key assumption is that public attention to such attempts by the government to engage in noncompliance brings pressure upon elected

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[5]See Vanberg (2000) for an excellent in-depth discussion of these cases and, more generally, the challenges faced by the FCC in its early years.

officials to accept the court's decision. The media attention and subsequent public backlash against the government in the European Defense Community Treaty highlights this point well. In the remainder of the chapter, I turn to the FCC's institutional structure and position in German politics to demonstrate the aptness of the German court as a test case for my theory.

The Institutional Structure of the FCC

The institutional structure of the FCC is defined by a combination of the Basic Law, the FCCA, and the court's own internal rules. The Basic Law includes unambiguous provisions for the court's jurisdiction and the election of judges by the Bundestag and Bundesrat. As is the case for many high courts, however, most aspects of the FCC's internal structure and process are unspecified in the constitution and instead left to legislation passed by the Bundestag and Bundesrat or the court's own procedures.[6] The Bundestag, through the FCCA, has given the court much of its structure, while the court has then organized itself and developed its own method for conducting business.

Appointment Process. Article 94 of the Basic Law delegates the appointment process for FCC judges to the two houses of the federal parliament, the Bundestag and Bundesrat.[7] This has come to mean that the Bundestag and Bundesrat each select half of each senate. The FCCA requires a two-thirds majority vote to approve a judicial selection. The process by which that vote comes to pass, however, is left to the internal processes of the institutions themselves. In the Bundesrat, the entire chamber debates and then votes on candidates. In contrast, the Bundestag employs a more complicated method. The Bundestag delegates the election of judges to a committee called the Ju-

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[6] Article 94 stipulates that "the organisation and procedure of the Federal Constitutional Court shall be regulated by a federal law."

[7] The exact text is: "Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat."

dicial Selection Committee (Wahmännerausschuss).[8] This twelve-person committee then selects the justices by a two-thirds majority vote. Since partisan representation on the committee is proportional to each party's size in the Bundestag, the two-thirds threshold effectively gives both the CDU and SPD, the two major parties, the ability to veto any appointment. As we saw with the *Southwest* case, the parties place considerable importance on the selection of FCC judges and therefore are willing to exercise this veto if necessary. To avoid such deadlocks, the parties have compromised by granting "property rights" to seats on the court, with half of the seats going to the SPD and half to the CDU. In addition, when the smaller liberal party (FDP) or the Greens are in a governing coalition, they may gain a seat on the court. The key to this compromise is the balance it creates on the FCC. Whenever a seat becomes open on the court, the party with "rights" to that seat selects the replacement even when that party is not the majority party in the Bundestag. This practice of "property rights" on seats has similarly been adopted by the Bundesrat, thus ensuring that neither party has an advantage in the number of judges appointed to the court.

The FCCA places additional structure on the selection of judges by specifying the qualification requirements and tenure conditions for judges. Judges must be 40 years old, eligible for election to the Bundestag, and be qualified to hold a judicial office in the German judiciary.[9] The law additionally prohibits judges from simultaneously holding any office in the legislative or executive branch of the federal or any state government.

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[8]In 2012, a private litigant brought a case to the FCC challenging the constitutionality of the Bundestag's use of the Judicial Selection Committee (2 BvC 2/10). Since the litigant was arguing that the sitting judges had been appointed unconstitutionally, the court not surprisingly rejected the case.

[9]This means that candidates must have passed certain bar exams and be certified in the legal profession (Kommers and Miller 2012). It is worth noting that this requirement stands in contrast to those imposed on candidates for seats on many other prominent high courts. For example, there are no qualification requirements for U.S. Supreme Court nominees.

Once on the court, judges serve twelve-year nonrenewable terms.[10] Judges are required to retire at the age of sixty-eight, even if they have yet to complete their twelve year term.[11]

Jurisdiction.   Like many European constitutional courts, the power to review the constitutionality of government actions in Germany is vested solely in a constitutional court. Based on the work of Austrian jurist Hans Kelsen, this centralized model of review grants the authority to interpret the constitution to a single constitutional tribunal. These "Kelsenian" courts, such as the FCC, stand in stark contrast to the decentralized model of review best exemplified by the American judicial system. In the American model, the authority to review the constitutionality of legislation is granted, in principle, to every court in the judiciary. For example, if any court in the American judiciary, such as a federal district court, is presented a case that raises a constitutional question, that court is empowered to rule on that question. Litigants can then appeal that decision up the judicial hierarchy, at the apex of which sits a high court like the U.S. Supreme Court. In contrast, the European model of judicial review gives a monopoly on the power of constitutional interpretation to a single tribunal. Under this system, whenever an ordinary court in the judiciary receives a case requiring an answer to a constitutional question, that court is obligated to refer the question to this tribunal. The tribunal, typically called a constitutional court, then can answer the constitutional question and refer the dispute back to the originating court. The result is a specialized court that only addresses constitutional questions and has exclusive jurisdiction over such questions.

The Basic Law enumerates the paths by which cases can reach the FCC. Table 3.1

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[10]The FCCA originally provided for a two-tiered tenure system in which judges selected from the federal judiciary were granted life tenure while other judges had eight year renewable terms (Kommers and Miller 2012). The Bundestag revised the FCCA in 1970 to its current state.

[11]There are no prohibitions on judges' post-FCC careers, although most either retire from professional life or work for a university either as a law professor or in administration (Vanberg 2005). A notable exception was FCC president Roman Herzog, who become Federal President after completing his term on the court.

provides a list of the types of actions that fall under the court's constitutionally authorized jurisdiction.[12] As is evident from this extensive list, the Basic Law allows cases to reach the FCC via a variety of means. That said, as Table 3.2 shows, the vast majority of cases brought to the FCC fall within just a few key proceeding categories. Concrete and abstract judicial review cases, along with constitutional complaints, dominate the court's docket and, of particular importance for the questions of interest here, represent the bulk of cases asking the FCC to issue an opinion on the constitutionality of federal and state laws.

Table 3.1: Proceeding Types at the FCC

Proceeding	Authorizing Constitutional Article
Forfeiture of Basic Rights	Article 18
Constitutionality of Political Parties	Article 21 (2)
Review of Election Results	Article 41 (2)
Impeachment of the federal president	Article 61
Disputes between high state organs	Article 93 (1) [1]
Abstract judicial review	Article 93 (1) [2]
Federal-state conflict	Articles 93 (1) [3], 84 (4)
Individual constitutional complaints	Article 93 (1) [4a]
Municipal constitutional complaint	Article 93 (1) [4b]
Other disputes specified by law	Article 93 (2)
Removal of judges	Article 98
Intrastate constitutional disputes	Article 99
Concrete judicial review	Article 100 (1)
Public international law actions	Article 100 (2)
State constitutional court references	Article 100 (3)
Applicability of federal law	Article 126

Source: Kommers and Miller (2012: 10)

The most common proceeding brought to the FCC is the individual constitutional complaint. Unlike the other proceedings brought to the court, constitutional complaints can be brought directly by ordinary citizens. When an individual believes that some government action has infringed on his or her constitutional rights, that person can lodge the complaint at the FCC at next to no cost. No filing fees or formal papers are required,

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[12]In addition, the FCCA grants the court the authority to issue temporary injunctions in certain circumstances.

Table 3.2: Number of FCC Decisions by Proceeding Type, 1951-2015

Proceeding	Number of Decisions
Constitutional Complaints	4,076
Concrete Judicial Review	1,074
Abstract Judicial Review	116
Disputes between Federal Organs	124
Federal-State Conflicts	27
Unconstitutional Parties	5

Source: *Bundesverfassungsgericht*

nor is the assistance of a lawyer. In addition, the FCC has taken an expansive view on standing requirements such that corporate entities, including foreign corporations, are entitled to file constitutional complaints (Kommers and Miller 2012). The only requirement applicants must meet is that they have exhausted all other remedies before bringing their case to the FCC. Given the low cost and wide access for filing, it is perhaps not surprising that the FCC receives thousands of constitutional complaints every year challenging a wide range of government actions.[13] As Table 3.3 shows, the FCC receives constitutional complaints against the decisions of both the judicial and legislative branches of government. While the bulk of constitutional complaints deal with claims against ordinary courts,[14] the court does receive a steady stream of cases addressing laws and regulations. Moreover, many of the highest profile constitutional complaints are challenges of state or federal legislation.

The second key proceeding at the FCC is concrete judicial review. These proceedings are brought to the FCC by ordinary courts in the German judiciary. The administrative, civil, and criminal courts regularly docket cases that include constitutional questions. As ordinary courts lack the authority to decide constitutional disputes, these courts must refer constitution questions to the FCC when resolving a case depends on constitutional

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[13]The court's caseload has grown over the course of its existence in large part as a result of the popularity of the constitutional complaint. To deter litigants from irresponsibly filing complaints, the court now has the authority to levy a fine for filing frivolous cases.

[14]Most such cases claim that a court improperly applied a citizen's constitutional rights in a case, such as due process.

interpretation. These conditions for concrete review cases most closely resemble the cases and controversies requirement of the U.S. Supreme Court insofar that they require a court in the judiciary to be adjudicating an ongoing case in order to refer the constitutional question to the FCC. A key difference between these proceedings and cases in the U.S. system is that the decision to refer a constitutional question is vested solely in the court hearing the case. While litigants can raise a constitutional question in the course of a case, the presiding court has the discretion over whether or not to refer the question. Moreover, the ordinary courts must provide a justification for referring a case, which the FCC can reject if it determines the referral is unfounded.

The third primary route for bringing constitutional challenges of legislation to the FCC is abstract judicial review. While constitutional complaints and concrete judicial review cases involve challenges against legislation already in effect, abstract review cases deal with questions regarding the constitutionality of legislation before it has taken effect. That is, abstract review allows specific litigants the right to challenge an action without the existence of a concrete dispute. Standing to bring abstract review cases is, however, limited to the federal government, state governments, and the Bundestag if 1/3 of that body's members agree to the request. These cases often are particularly politicized, as they effectively extend the legislating stage of lawmaking by involving challenges of recently debated and passed legislation (Vanberg 1998; Stone Sweet 1992). Abstract review cases, however, occur relatively infrequently compared to concrete review or constitutional complaints, as the political actors empowered to use abstract review can leverage the threat of initiating proceedings during the legislative bargaining stage of lawmaking (Vanberg 1998).

While constitutional complaints, concrete review and abstract review cases dominate the FCC's docket in terms of both the quantity and public profile of cases, the court does decide occasionally on other eligible proceedings. Disputes between federal organs, known as "Organstreit" proceedings, resolve conflicts between branches of the federal

government.[15] The FCC also resolves conflicts between the Federal government and state governments, which ordinarily involve disputes over the administration of federal law by state governments (Kommers and Miller 2012). Finally, the court resolves election disputes and cases regarding the prohibition of political parties.[16]

Table 3.3: Constitutional Complaints Filed at the FCC, 2011-2015

Filed Against	2011	2012	2013
Laws and Regulations	93	180	203
Ordinary Civil Courts	2425	2193	2352
Ordinary Criminal Courts	1471	1561	1711
Administrative Courts	791	691	755
Social Courts	517	525	593
Finance Courts	179	127	172
Labor Courts	102	128	122
Source: *Bundesverfassungsgericht*			

Organization. The court's internal organization is determined by the Bundestag through the FCCA. The FCC currently has sixteen judges, although in the past the court has had as many as twenty-four judges.[17] The most distinctive feature of the FCC's organization is its two senate structure. This structure splits the court into two distinct, independent bodies with eight judges. Each senate is given exclusive jurisdiction over specific proceedings and issue areas. The result of this structure is a court that effectively

[15]The federal president, Bundestag, Bundesrat, and the federal government are qualified to bring Organstreit cases to the FCC.

[16]The court has not banned a political party since the first decade of the West German Republic, when it banned the Communist and the right-wing Socialist Reich parties. A 2003 attempt by the federal government to ban the extreme right wing National Democratic Party of Germany (NPD) failed due to procedural concerns regarding the government's evidence gathering tactics. See Kommers and Miller (2012: 293-300) for more.

[17]The FCCA originally set the number of judges at twenty-four. This number was then reduced to twenty in 1956, and further reduced to its current number of sixteen in 1962.

consists of two courts, as the two senates rarely come together to decide cases as a single court.[18] The First Senate decides cases involving issues of substantive law, including concrete review cases and constitutional complaints dealing with the constitutionality of legislation. The Second Senate deals with "political" cases, such as abstract review cases, election disputes, and disputes between branches or levels of government. Since such cases are relatively uncommon, the Second Senate has added to its docket constitutional complaints and concrete review cases involving civil and criminal procedure.

In response to a seemingly ever-growing caseload, the FCC further organized its senates into three judge panels called chambers (*Kammern*). Revisions to the FCCA in 1956 allowed the court to create these committees in order to quickly dismiss constitutional complaints that are either unfounded or lack any chance of success. The Bundestag increased the power of these chambers in 1986 by giving the panels the authority to rule on the merits of a constitutional complaint if all three judges agree on the decision and the decision clearly lies within established constitutional jurisprudence (Kommers and Miller 2012). If, however, one judge votes to accept the complaint, it is referred to the full senate. Additionally, the chambers are prohibited from striking down legislation as unconstitutional. This arrangement allows the chambers to effectively dispose of cases quickly without undermining the authority of the senates or the court's ability to rule consistently.

Process. Once a case reaches the First or Second Senate, the FCCA and the court's Rules of Procedure govern the court's decision making process. While the adjudication process at the FCC varies in some degree on the specific proceeding type, the process is generally as follows. The first stage is the assignment of the case to a judge rapporteur. At the beginning of every business year, the court assigns each judge specific issue areas

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[18]The FCC refers to such decisions as being made *en Plenum*. The plenum does issue rules on the court's procedures and judicial administration. In addition, the plenum decides cases in the event that one senate decides a matter contradicting the jurisprudence of the other senate.

for which they are responsible. This specialization takes advantage of individual judges'
expertise and background in legal issues such as international and European law, envi-
ronmental law, and tax law. Once a case is assigned to the appropriate judge, that judge
is effectively in charge of the case. The rapporteur writes a report for the senate that
provides to the other judges the facts, background, legal arguments, and a recommended
holding for the case. This role gives the judge rapporteur considerable influence over the
final opinion, which in fact is often written by the judge rapporteur or at least draws
heavily from the rapporteur's initial report.

After the case has been assigned to the appropriate judge rapporteur and the rap-
porteur's report has been distributed to the senate, the court has the option to hold a
public oral hearing. Article 25 of the Federal Constitutional Court Act stipulates that
"the Federal Constitutional Court shall decide on the basis of oral proceedings." The FCC
developed its own interpretation of the law's provisions for oral arguments, determining
that only a small subset of proceeding types, such as abstract review and political party
prohibitions, are entitled to guaranteed oral hearings, while constitutional complaints and
concrete review cases, which comprise the bulk of the court's caseload, can be adjudicated
with or without a hearing. As a result, oral arguments have become the exception rather
than the norm (Kommers and Miller 2012). The hearings themselves allow the court to
bring litigants, experts, legal scholars, and public officials to the court. The court hears
arguments and evidence from both sides of a case, with the process typically taking a full
day or even longer in exceptional circumstances.[19] The media is not permitted to tape or
broadcast the proceedings, although the court does allow recording of opening remarks.
Despite this limitation on media access, hearings typically generate considerable media
coverage, including reports on the evening news and in the major print news outlets.[20]

After the court holds a hearing, or after the distribution of the rapporteur's report

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[19]Questioning is typically dominated by the judge rapporteur during hearings, although
all justices have the opportunity to ask questions.

[20]Below I provide an empirical analysis of these claims.

to the senate if no hearing is held, the court goes into conference to reach a decision. Here again the process is dominated by the judge rapporteur. Unlike the U.S. Supreme Court, where opinion assignment is at the discretion of the chief justice or the senior member of the majority, the judge rapporteur writes the opinion for the FCC even when the rapporteur is in the minority.[21] The court requires a majority vote to rule a law unconstitutional; a tie results in upholding the law.[22] The court typically writes with one voice, even though dissents have been allowed since 1970. An institutional norm of unanimity has limited the number of dissents, with only 146 having been published since 1971 (Kommers and Miller 2012). With more than 90 percent of reported cases are decided unanimously, the court generally presents a united front. When this is not the case, the court only reveals the vote split between the majority and minority; justices names are not identified as being in the minority or majority.

Broadly speaking, the FCC can either strike down a law as unconstitutional or uphold the law as being consistent with the constitution. If the court upholds, the challenged law remains in effect and the case ends. If the court strikes down a challenged law, it can do so in two ways. First, the court can declare a law null and void (*nichtig*). Such a ruling goes into force immediately, meaning the law is no longer in effect upon the issuance of the court's decision. The second option available to the court is declare a law incompatible with the constitution (*unvereinbar*). Declaring a law incompatible with the constitution allows the statute in question to remain in effect for a limited period time, at the end of which the legislature is required to have replaced it with a constitutionally acceptable statute. The court has wide discretion in defining the terms of this time frame. In some instances, the court has given a specific date on which the law will no longer be in effect. In other cases, the court has given the legislature an open-ended timeframe with which

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[21]This does not mean that the rapporteur's preference is adopted in the opinion. Rather, the rapporteur must write the majority opinion in a manner that passes with the majority's approval. This does leave some room for the rapporteur to influence the opinion, especially if the rapporteur is a particularly effective writer.

[22]A quorum for a senate is six judges.

to work.[23] Whether the court declares a law null and void or incompatible, the statute is officially unconstitutional and the legislature prohibited from passing the overturned legislation again.

This discussion of the court's organization and process describes a court with the basic features of the court in the model presented in chapter 2. Specifically, the model assumes a court that can both strike down legislation that violates the constitution and hold hearings at its discretion. As we see in the case of the German FCC, these two key abilities are present. I now turn to an examination of the FCC's relationship with the public and the effect of hearings on media coverage of the court in order to ascertain whether the FCC is an appropriate case for the model in light of the model's other assumptions.

The Compatibility of the FCC with the Theoretical Model

In the previous chapter I presented a theoretical model of public oral hearings as an institutional tool for addressing potential noncompliance. In constructing the model, I made a set of assumptions from which to work. Such assumptions are a necessary aspect of developing a deductive theory like the one presented here. Only once these first principles are laid out can we construct a theoretical account and ultimately derive empirical implications that we can take to data. The nature of this form of research design, however, naturally raises questions regarding the appropriateness of the assumptions made. These concerns are amplified when applying the theory to data. Are the assumptions incorporated into the model plausible? Do they make sense in the context of the data?

While at some level the plausibility and appropriateness of the assumptions made in the course of formally modeling are subjective, it is possible to provide evidence to support them. For example, the assumption that courts are concerned with policy outcomes is supported by a substantial literature in judicial politics (e.g. Segal and Spaeth 1993).

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[23]This would be akin to the U.S. Supreme Court's use of the phrase "with all deliberate speed."

Three assumptions in the model, however, merit specific empirical attention in the German context. The model makes empirical claims regarding the relationship between hearings and public awareness, public support for a court, and the potential for noncompliance. Below I provide evidence supporting the compatibility of these three assumptions in the context of the FCC.

Public Oral Hearings and Public Awareness of FCC Decisions

A central assumption of the theoretical model is that holding a public oral hearing increases the likelihood of public awareness of judicial decisions. Vanberg (2001, 2005) argues that hearings increase public awareness of judicial decisions by providing an opportunity for increased media coverage. Similarly, Kommers and Miller (2012) note that the hearings are typically accompanied by considerable media broadcasts. In both cases, however, the linkage between hearings and increased media coverage remains untested empirically. This makes it difficult to rule out alternative explanations for why hearings correspond to greater media coverage. For example, the relationship between hearings and coverage could be epiphenomenal because cases granted hearings would have received greater media attention even in the absence of the hearing. Given the critical nature of this assumption's validity for the theoretical model, it is a worthwhile endeavor to empirically investigate the claim that hearings do in fact correspond to increased media coverage. In what follows, I construct a measure of media coverage of FCC decisions. I then carry out an empirical analysis of the relationship between coverage and public oral hearings. This analysis provides insight into the impact of hearings on media coverage and addresses the alternative account described above.

Measuring Media Coverage of Hearings at the FCC.   I used the Foreign Language News Search on Lexis Nexis to collect media coverage of all 231 concrete review and constitutional complaint cases at the FCC from 2000 to 2013. I focus on these cases because the court has discretion over the use of hearings in these proceedings. I constrain

the data to these years due to data limitations. News sources are less consistently digitized prior to 2000, weakening any conclusions we can draw when making comparisons, for example, of coverage from 2013 to coverage from 1995. In addition to this concern, the Foreign News Search function does not cover the full range of years in the dataset. For each case, a search was conducted using the official case number. Each case is assigned a unique number that identifies the senate that heard the case, the proceeding type, and the year in which the case was initiated. So, for example, case 1 BvL 28/95 indicates a concrete review case submitted to the court in 1995 and heard by the first senate. An article is considered to cover a case if it provides a discussion, explanation, or depiction of the case. Updates of already counted articles and articles that do not provide any case facts or information on the decision are excluded. I exclude articles written more than a month after the issuance of the decision. Media sources included press agencies such as *Agence France-Presse* and newspapers such as *Die Tageszeitung*, *Die Welt*, and the *Berliner Abendsblatt*.

Articles were coded as covering a given case at one of three points in time. Articles written prior to both the decision and the announcement that a hearing, if one was held, are coded as *Pre-Hearing Coverage*. For cases that were not granted a hearing, this variable is the number of articles covering the case before the court issued its decision. The second variable, *Pre-Decision Coverage*, is the number of articles written after the announcement of a hearing, if one was held, but prior to the court's decision. This variable takes the same value as *Pre-Hearing Coverage* for cases not granted a hearing. The key distinction here is that the first variable captures the amount of coverage prior to the court's determination of whether or not to hold a hearing, while the second variable measures the coverage leading up to the decision. Finally, *Post-Decision Coverage* is the number of articles written once the court issued its decision. Descriptive statistics of the three measures are provided in Table 3.4.

If hearings increase public awareness of FCC decisions, then the decision in cases granted a hearing should receive more coverage than those not granted a hearing. One

Table 3.4: Descriptive Statistics of Media Coverage Variables

| Variable	Mean	Standard Deviation	Minimum	Maximum
Pre-Hearing Media Coverage	0.27	1.32	0	16
Pre-Decision Media Coverage	0.39	1.13	0	8
Post-Decision Coverage	5.00	4.56	0	29

Note: N = 232

potential concern with this coding scheme is that it may bias the results towards those cases that are granted an oral hearing. Specifically, the likelihood of a media outlet including the case number in its story may be positively correlated with the court's likelihood of holding a hearing. If this is the case, the measures of media coverage will overcount the coverage of cases granted hearings while underestimating the amount of coverage for those cases not granted a hearing. Such a bias would explain a positive correlation between hearings and coverage; the relationship would be the result of cases' latent characteristics rather than the media's response to hearings.

To check for such a bias, I compare the correlation between hearings and coverage at three points in time: (1) the period before the court announced its decision to hold a hearing, (2) the period between the hearing announcement and the issuance of the court's decision and (3) after the court issues its ruling. If using the case number biases the measure, we should see a positive correlation between hearings and pre-hearings coverage. If, however, hearings only correlate with coverage written after the announcement of the hearing and the issuance of the final ruling, then we can be more confident that the coding scheme is not biasing the empirical results. That is, media coverage is more likely brought on by the hearing if all cases garner approximately the same amount of coverage on average before the court makes a decision regarding the use of a hearing. The results of this analysis are presented in Figure 3.1.

The results are consistent with the assumption of the model and do not provide evidence of bias. If the measures are biased, we would expect cases granted a hearing to

Figure 3.1: Media Coverage Before and After the FCC Announces a Hearing
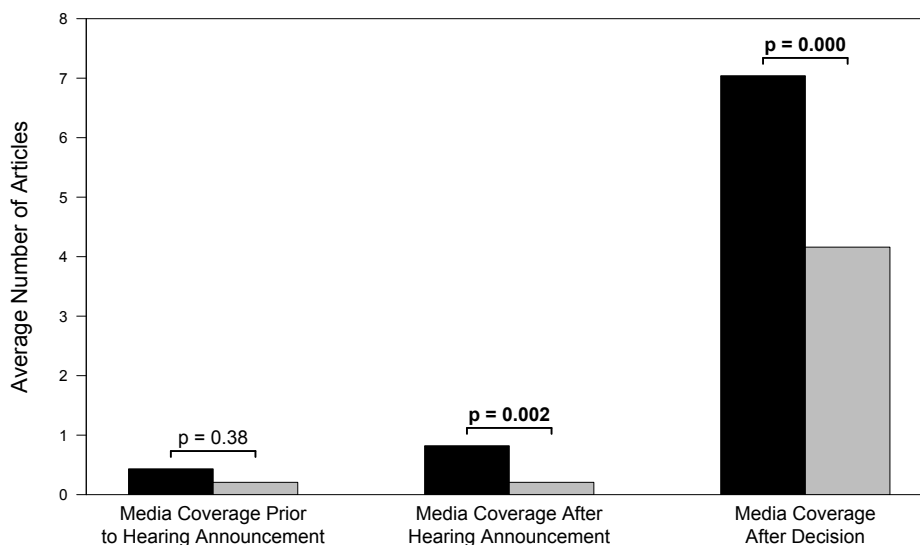
Note: Black bars are the mean number of articles for cases ultimately granted a hearing, while gray bars are the mean number of articles for cases not granted a hearing. P-values for difference in means tests are provided at each point in time; bolded values indicate a statistically significant difference at the $p < 0.01$ level.

systematically have higher levels of coverage both before and after the court announces it will hold hearing. This is not the case; the mean number of articles covering cases prior to any hearing announcement is not statistically different for cases granted a hearing than those not granted a hearing. There is, however, a statistically significant difference between the mean number of articles covering cases granted a hearing than those not granted a hearing. Cases granted a hearing enjoy more coverage than other cases in both the intermediate period between the announcement of the hearing and the court's ruling and in the period following the issuance of the court's decision.

Empirical Analysis of Hearings' Impact on Media Coverage.   In order to get a sense of the relationship between hearings and media coverage of cases at the German Constitutional Court, I estimate the relationship between hearings and media coverage both before and after the court's decision to hold a hearing. Accordingly, I use two outcome variables. For the first model, I use the variable *Pre-Hearing Coverage*, while for the second model I use the variable *Post-Decision Coverage*.

The key explanatory variable is whether or not the court decided to hold a hearing. This variable, *Hearing*, is coded the same as in the article's primary analysis. In addition, I include two control variables. First, I control for the proceeding type. Certain types of cases may systematically be of more interest to the media and more likely to be granted a hearing. In the article's main analysis, I find that the court is more like to grant a hearing for constitutional complaints than other proceeding types. If such cases are also more likely to generate media coverage, then failing to account for this in the analysis could lead to biased results. Therefore, I include the variable *Constitutional Complaint*, which takes a value of 1 if a case is a constitutional complaint and 0 otherwise. Second, I control for the year a decision was issued. Media coverage of court decisions has broadly increased in the last decade, a trend that is borne out in the data. If the court was more likely to hold a hearing for cases in the later years of the sample, failing to include a control for the year could result in biased estimates.

Since both outcome variables are counts, I use negative binomial regressions to estimate the statistical and substantive significance of the relationship between hearings and media coverage. Negative binomial models have become standard in political science when a count variable is the outcome of interest because they address the problem of overdispersion found in alternatives such as Poisson models. I expect the variable *Hearing* to have no statistically significant relationship in the first model and a positive coefficient in the second model, which would indicate that cases granted a hearing systematically receive higher levels of media coverage.

The results of the regressions are presented in Table 3.5. Model 1 estimates the relationship between hearings and *Pre-Hearing Coverage*, while model 2 estimates the relationship between hearings and *Post-Decision Coverage*. There is no statistical evidence of greater coverage for cases ultimately granted a hearing. As expected, cases granted a hearing receive significantly more media coverage of the decision. To determine the substantive magnitude of these relationships, I follow the example of Martin and Vanberg (2005) and calculate the percentage change in the expected number of articles. This

quantity, which is calculated as $[100(e^{\beta(x+\delta)} + e^{\beta x})]/e^{\beta x}$, estimates how much the outcome of interest, media coverage, changes between a case not granted a hearing to one granted a hearing. The results make the substantive impact of hearings apparent: media coverage increases an average of 90% for cases granted a hearing. These results provide strong empirical evidence supporting the model's assumption that public oral hearings increase media coverage of the FCC, particularly the court's decisions.

Table 3.5: Negative Binomial Analysis of Media Coverage of FCC Cases

Variable	Model 1	Percentage Change in Expected Number of Pre-Hearing Articles	Model 2	Percentage Change in Expected Number of Post-Decision Articles
Hearing	0.88		0.64	90%
	(0.61)		(0.13)	
Constitutional Complaint	-0.43		-0.07	
	(0.56)		(0.12)	

Note: Cell entries are coefficient estimates; numbers in parentheses are standard errors. N = 231
Both models include a control variable for year. Only percentage changes statistically significant
at the $p < 0.05$ level are presented.

Public Support for the FCC

A second key assumption of the theoretical model regards diffuse public support for the court. Recall that in Vanberg's account of judicial review, a court can effectively constrain a government when two conditions obtain: the public supports the legitimacy of the court (diffuse public support) and the public is aware of the court's decisions. Since the focus of this project is on a court's ability to influence the latter, I have explicitly assumed in the model that the court enjoys a high level of diffuse public support such that voters will punish government officials for noncompliance when they observe the government's behavior. Of course, this assumption does not hold for every constitutional court. Courts like the Russian Constitutional Court (Trochev 2008) or the European Court of Justice (Caldeira and Gibson 1995) have struggled to successfully promote public faith in the judiciary. If this were the case in Germany, then, we would be concerned about the

applicability of the model to the FCC.

Considerable scholarly evidence supports the assumption that the FCC enjoys a high level of diffuse public support. Vanberg (2005) comments that levels of diffuse public support are both "high and stable over time" (pg. 99). Public opinion research on support and trust in political institutions supports this conclusion. Tables 3.6 and 3.7 provide insight into trends of citizens' attitudes towards key political institutions both historically and, critically, during the time period under study here. As is evident from these tables, the German public holds the FCC in high regard and has done so for decades. The court's strong position in the German political system was well summarized by a member of the Bundestag in response to a question about the importance of public opinion for the FCC:

> The court...enjoys tremendous trust among the general public. In a confrontation, the broad public would stand behind the court (Vanberg 2005: 121)

In short, there is strong evidence, both quantitative and qualitative, that the FCC enjoys a high level of public support and is considered by the public to be a legitimate institution in the German political system.

Table 3.6: Trust in German Political Institutions, 1982-1993

Institution	1982	1986	1990	1993
FCC	82%	85%	84%	73%
Bundestag	61%	74%	65%	44%
Federal Government	59%	66%	61%	43%
Judiciary	74%	76%	69%	62%
Police	-	78%	83%	76%
Churches	67%	64%	62%	52%
Trade Unions	53%	42%	44%	44%
Political Parties	39%	45%	37%	23%
Newspapers	57%	51%	36%	42%

Source: Vanberg (2005)

Table 3.7: Trust in German Public Institutions, 2011

Institution	2011
Police	89%
FCC	**80**%
Educational System	78%
Military	70%
Municipal Authorities	67%
Public Broadcasting	61%
Trade Unions	55%
Churches	43%
Press	37%
Political Parties	16%

Source: TNS Emnid (2011)

The Risk of Noncompliance in German Constitutional Politics

An underlying claim in the theory is that the government can credibly threaten non-compliance. My argument is that the basis for a court's use of hearings is predicated upon the real possibility that the government will ignore or otherwise evade a judicial decision that strikes down one of the government's policies. It is not sufficient that there is an abstract possibility that the government can engage in noncompliance; the critical question is whether or not a government seriously considers noncompliance an option and has the means to do so. In the context of Germany and the FCC, then, the relevant question is whether the court has reason to be concerned about federal or state governments engaging in noncompliance.

The support of the German public has not fully insulated the court from the possibility of noncompliance. As Vanberg (2005) notes, the possibility of noncompliance is quite real for the FCC. Noncompliance generally takes one of three forms. First, on rare occasion government actors can publicly defy an FCC decision. Second, a government can fail to pass the legislation necessary for the implementation of the court's decision. Third, the government can pass legislation creating a policy that, on its face, conforms to the court's

decision but, when implemented, is substantively identical to the policy struck down by the ourt. Below I address each of these modes of noncompliance and provide an example of their use in response to an FCC decision.

The first form of noncompliance, outright defiance, is the most seldomly employed by German elected officials. As we saw in the previous section, the FCC enjoys a high level of public support that makes challenging the legitimacy of the court a particularly risky political strategy.[24] There have, however, been examples of government officials defying FCC decisions. One of the most prominent such cases involved Bavarian law requiring the display of a crucifix in public elementary school classrooms. The constitutionality of the law was challenged at the FCC, where the court struck the statute down as violating the constitutional right to religious freedom. The response from the Bavarian government was to publicly denounce the court's decision and declare the government's intent to defy the court's demand that the crucifixes be removed from Bavarian classrooms.

The conclusion of the *Crucifix* case speaks, however, to the limited extent of such responses to FCC decisions. The Bavarian government, rather than unabashedly refuse to implement the court's decision, ultimately passed new legislation to implement the court's decision. The government did so, however, by writing legislation that had no substantive effect on policy. This second strategy available to governments for engaging in noncompliance allows officials to claim they are complying with FCC decisions without paying the policy costs of faithfully doing so. In the *Crucific* case, the Bavarian government passed legislation that made the placement of a crucifix in Bavarian classrooms the "default" setting. The crucifix may only be removed if a student or parent raises an objection, and even then the revised legislation left considerable discretion to local school officials to find a "compromise solution" or "individual solution" (Vanberg 2005: 3). The effect of the government's new law was clear: the status quo prior to the court's decision was

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[24]An excellent quote from Vanberg (2005: 121) of a member of the Bundestag relays this point quite nicely: "A serious confrontation [with the FCC] would just create a public discussion in which one could easily get a bloody nose."

maintained, even though the government had passed legislation superficially complying with the court's ruling. This strategy has been used by the federal government as well in response to adverse FCC decisions, as it allows the government to avoid outright confrontation with the court without incurring the full costs of ending the unconstitutional policy.[25]

The third general strategy available for government officials to engage in noncompliance is to simply not pass the legislation necessary to implement the court's decision. An example of this tactic in Germany is the Federal government's response to a 1980 ruling on civil servant pensions.[26] The case involved several civil servants challenging the constitutionality of the civil servant pension system, specifically the tax status of their pension benefits. The FCC ruled in favor of the civil servants, stating that the pension system violated the constitution's equal protection clause. The government, faced with a decision that would have direct budgetary costs, effectively delayed the passage of legislation that would bring the policy into conformity with the constitution. The government created a committee to develop a revised policy and, in the meantime, cited the complex nature of the policy as justification for delay. After some twelve years had passed without new legislation, civil servants filed a new constitutional complaint at the court. The court cited the delay as not unreasonable and dismissed the claim. The government had been able to avoid complying with the court's decision by effectively delaying the legislative process until the court lacked the will or political capital to push the issue.

To be sure, these examples should not be taken to suggest that noncompliance of FCC is anything but a rare occurrence. The rarity of these events, in fact, is entirely consistent with the theoretical model. If German governments and the FCC are forward looking

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[25]The Federal government adopted this strategy when faced with an adverse ruling in 1992 regarding political party finance laws. The government did so by passing a revised law that made the changes requested by the court but added a new clause that in effect replaced the unconstitutional features of the original statute. See Vanberg (2005) for an in-depth discussion of these cases.

[26]An excellent account of the case can also be found in Vanberg (2005).

players, then we would expect them to avoid noncompliance much of the time. The court, for instance, should be less likely to strike down legislation when it does anticipate being able to compel government officials to comply. From the perspective of elected officials, they have an incentive to avoid conflict with the court when voters are likely to observe noncompliance. The result is, as the equilibria from the game suggest, a relationship between judicial and legislative institutions based often on deference to the other branch. It is important to point out this dynamic, as it highlights the influence potential noncompliance can have on judicial behavior *even* in the absence of many observed cases of noncompliance.

Conclusion

This chapter has presented the case study I use for testing the empirical hypotheses derived from the theoretical model developed in Chapter 2. The German Federal Constitutional Court provides a uniquely excellent case for testing the theory because of its history, institutional structure, and role in the German political system. The FCC has developed into one of the most successful and influential German political institutions and constitutional courts in the world. For the purposes of testing the theoretical model, the FCC is an especially useful case because it at once corresponds well to the assumptions and structure of the theoretical model. The court faces, as we saw in the early cases on the EDC and General treaties, potential noncompliance from government officials. The ability of governments to successfully ignore FCC decisions, however, is limited by the high level of public support enjoyed by the court. Perhaps most critically for the theory proposed in Chapter 2, this chapter has shown that public oral hearings increase media coverage of FCC decisions. With the appropriateness of the German case established, I turn to the next chapter, in which I conduct a systematic empirical analysis of the empirical hypotheses derived from the theoretical model.

Chapter 4

An Empirical Analysis of Public Oral Hearings at the FCC

In Chapter 2, I presented a theoretical model that explains how a court can use its discretion over public oral hearings to facilitate compliance with its decisions from an otherwise resistant government. The principal argument forwarded in that chapter focuses on the ability of hearings to increase public awareness of judicial decisions and thereby create an electoral incentive for elected officials to comply with a court's ruling. The model yielded a series of empirically-testable implications of such an argument. In the preceding chapter, I considered the applicability of the model to one of the most prominent constitutional courts, the German Constitutional Court (FCC). I now turn to specifying a series of empirical hypotheses from the model's implications and testing those hypotheses using data from the FCC.

Hypotheses

The theoretical model's central claim is that a court's use of public oral hearings corresponds to the credibility and severity of a government's threat of noncompliance.[1] When the court is faced with the possibility of noncompliance, hearings can bolster the court's ability to obtain compliance by increasing public awareness of the court's ruling. If, however, the potential for noncompliance is minimal or nonexistent, for example in cases involving statutes the government prefers the court strike down (Whittington 2005), then there is no incentive for a court to use hearings as a response to noncompliance. In other words, courts hold hearings for the purpose of confronting potential noncompliance. As such, courts should be more likely to use the proceeding when this threat exists. This observation, which motivated the first observation in chapter 2, leads to the first empirical hypothesis, the Noncompliance Risk Hypothesis.

> **Noncompliance Risk Hypothesis (H1):** *The German Constitutional Court is more likely to hold a hearing when the government poses a credible threat of noncompliance.*

When faced with a credible threat of noncompliance, courts then consider whether a hearing would be sufficiently effective at increasing public awareness to offset the cost of holding the proceeding. This observation (Observation 3 in Chapter 2) from the model highlights the limitations of hearings as a tool for addressing potential noncompliance. One potentially significant limiting factor is the complexity of the policy under review. Cases involving complex or otherwise arcane policies place a greater burden on citizens' ability to comprehend what precisely is at stake in a given case. This in turn makes it more difficult for the public to understand the content of a judicial decision and, impor-

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[1]Of course, there are other uses of hearings not addressed by my theoretical argument. As I discussed in Chapter 2, these alternative explanations do not account for the key results of the model. As we will see in this chapter, the evidence supporting my argument is robust to the inclusion these alternatives in the empirical analysis.

tantly, what precisely constitutes compliance with such a decision. Moreover, complex policies may be less likely to receive substantial media coverage due to the incentives for media outlets to tailor their coverage to issues and topics of likely interest to the public. Cases involving complex issues do not lend themselves to the short reports typical in television media or the limited page space in print media. In contrast, media outlets can more straightforwardly convey the import and implications of cases addressing relatively noncomplex issues. As the ability of hearings to increase public awareness relies on the media covering the proceeding and the public consuming and understanding that coverage, one would expect the court to more aggressively use its discretion over hearings in cases addressing less complex policy areas.

> **Complexity Hypothesis (H2):** *When faced with the risk of noncompliance, the German Constitutional Court is more likely to hold public oral hearings in cases involving less complex policies.*

A second factor that influences the effectiveness of hearings at increasing public awareness is the type and source of the case before the court. Citizens should be more likely to relate to the issue at stake in a case if they can relate to the circumstances of the dispute. That is, citizens should better understand the questions in a case when they can relate to the case itself. Accordingly, cases brought directly to the court by individuals should on average better capture the public's attention than cases sent to the court by other political institutions requesting technical legal clarifications. Recall from the previous chapter that constitutional complaints allow citizens to make claims of unconstitutional actions directly to the court. Although most constitutional complaints are directed against the decisions of other courts, this procedure provides citizens the opportunity to directly challenge the legality of legislation. As a result, the constitutional complaint has become the primary method for the general public to challenge the constitutionality of government policies and legislation. This direct connection between ordinary citizens and the court stands in stark contrast to the other primary proceeding types like concrete and abstract

review cases, which rely on another branch of the German political or judicial system to refer constitutional questions, often of a highly technical nature, to the court. As a consequence, I would expect hearings to be less effective in these other proceedings than in constitutional complaints.

> **Proceeding Type Hypothesis (H3):** *When faced with the risk of noncompliance, the German Constitutional Court is more likely to hold public oral hearings in constitutional complaints.*

In addition to predictions regarding when a court should hold a hearing, the model had implications for the consequences of hearings for case disposition. The fifth observation from Chapter 2 noted that courts should be more likely to rule against the government and strike down the challenged legislation in cases granted a hearing. After all, if courts use hearings to overcome noncompliance then they can only fulfill that purpose when noncompliance is at issue, i.e. when the court has struck down a policy against the government's wishes. To hold a hearing and then uphold the challenged statute leaves the court with the undesired policy intact and bearing the cost of the hearing. One would expect empirically, then, for the German court to coordinate its use of hearings with case disposition, with cases granted a hearing being more likely to result in the court striking down the challenged statute. This leads to the fourth hypothesis.

> **Strategic Case Disposition Hypothesis (H4):** *When faced with the risk of noncompliance, the German Constitutional Court is more likely to rule against a government action in cases granted a public oral hearing.*

Before turning to the empirical analysis, it is worth noting that the above four hypotheses are not the entirety of the empirically testable implications produced by the model. As we saw in Chapter 2, the model generates predictions regarding the relationship between the use of hearings and the cost of holding a hearing. While ideally the analysis would incorporate these predictions into the analysis, the research design I

use here - focusing on the German Constitutional Court - makes this unfeasible. The costs associated with hearings, such as the opportunity costs and time constraints facing courts, are difficult at best to quantify. And those cost aspects that are measurable, such as budgetary constraints, vary cross-nationally rather than within a single court. Beyond these measurement challenges, these predictions, while interesting, are not as central as the above hypotheses to the purpose of the theoretical argument made here. Recall that one primary goal of the formal model was to distinguish my theoretical argument from alternative explanations and extant theoretical accounts for hearings. Focusing on the effectiveness of hearings at increasing public awareness and the consequences of hearings for case disposition most efficiently accomplishes this task. I return to the role of cost and potential further empirical work in the final chapter.

Data and Measures

I use data collected on published FCC decisions reviewing federal and state laws made between 1995 and 2014, which I then supplement with Vanberg's (2005) dataset of such cases from 1983 to 1995. The dataset consists of 613 cases for which the court had discretion over holding a hearing, including constitutional complaints, concrete review, public law disputes, election disputes involving the constitutionality of an electoral law, constitutional disputes between the national and states governments, and constitutional disputes within a state. It excludes cases in which the court does not have discretion over hearings, such as abstract review cases and disputes between federal institutions. Figure 2.1 shows the distribution of the two primary proceeding types, concrete review and constitutional complaints, over the time period covered in the data set.

The outcome variable for the first and second hypotheses is the court's decision to hold a hearing. The variable *Hearing* is coded 1 if the court held a hearing and 0 otherwise. The outcome variable for the third hypothesis, *Strike*, is the decision of the court. The variable is coded 1 if the court rules the statute unconstitutional and 0 if it upholds the statute.

Figure 4.1: Number of Cases in Dataset by Proceeding Type and Year, 1983-2013
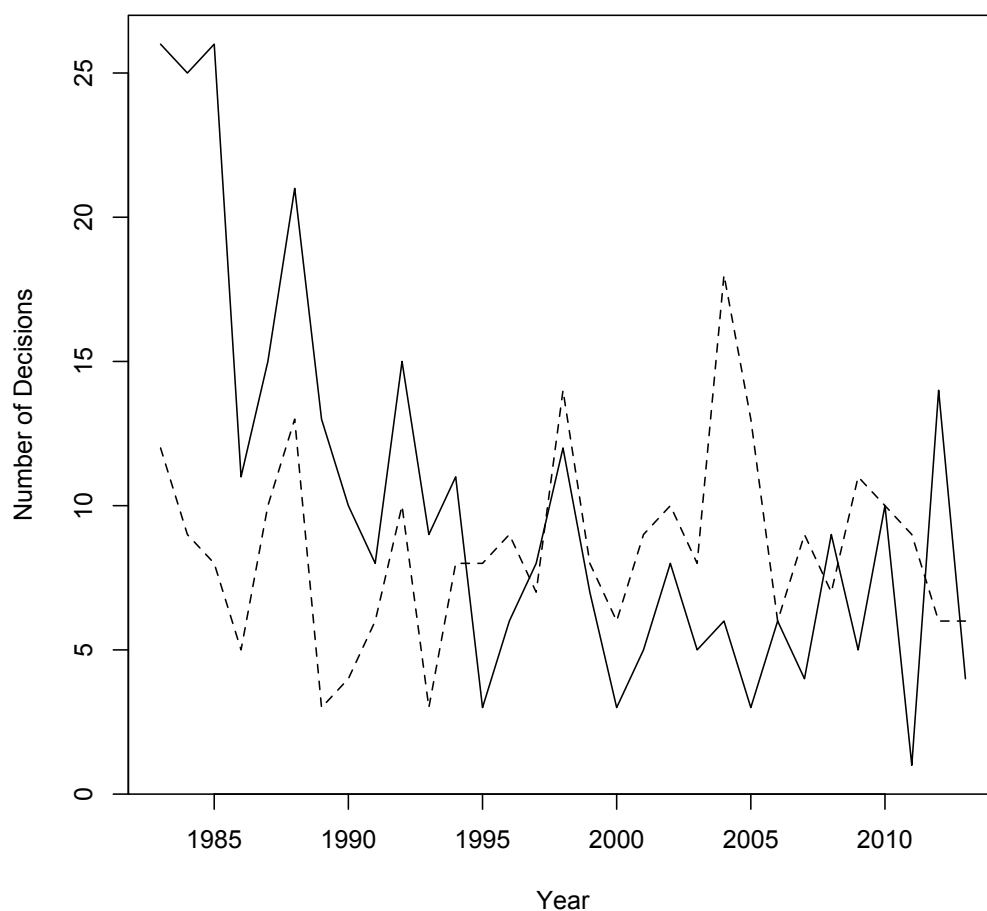
Note: Solid line denotes number of concrete review decisions present in the dataset in a given year. Dashed line represents the number of constitutional complaint cases in the dataset in a given year.

For the first hypothesis, which predicts the likelihood of a hearing to be greater for cases involving potential noncompliance, I measure the risk of noncompliance by examining whether or not the government whose statute is being challenged filed an amicus brief in defense of the statute. Filing a brief requires a government to invest resources, which can indicate the level of importance politicians place on the law. Furthermore, filing a brief requires a government to take a public stance and risk its reputation on the issue. While such briefs are rarely direct threats of noncompliance, they signal to the court the government's investment in the law and potential willingness to engage in noncompliance. That is, the government's decision to file a brief defending the constitutional of a statute indicates that the policy under review is of nontrivial amount of importance to the government. Conversely, failure to file a brief on the part of the government highlights the government's disinterest in the case's outcome and suggests that the policy under review is of little to no importance to the government. This variable, *No Government Brief*, is coded 0 when the challenged government files a brief defending the constitutionality of the statute under review and 1 otherwise.[2]

For the second hypothesis, which predicts the likelihood of a hearing to increase with the complexity of the issue under review, I focus on the policy addressed in each case. To measure complexity, I use Vanberg's (2005) dichotomous coding scheme to construct the variable *Case Complexity*. Cases involving taxation, budgets, economic regulation, social insurance, civil servant compensation, and party finance are coded as "complex" with a value of 0, while those involving institutional disputes, family law, judicial process, individual rights, asylum rights, and military conscription are coded as "simple" with a value of 1. The logic behind this coding scheme is that "complex" policy topics often involve technical issues and have far reaching, complicated implications for public policy. A case involving the federal tax structure for civil servants would be an example of a

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[2]This variable does not distinguish between the Federal and state governments. Thus, if a state law is challenged, the variable is coded as 1 only if the state government files a brief defending the law; the Federal government's position is not taken into account.

"complex" case, as it involves a highly technical area, the tax code, and has broader implications for government budgets. This contrasts to the "simple" cases that tend to address policies more limited in scope and easily recognizable by citizens. For example, a "simple" policy might involve the regulation of abortion because the court is asked to identify the specific instances in which the procedure is legal or prohibited. Note that here the notion of complexity is not one based on the legal complexity of the issue before the court, but rather one focused on the difficulty a case poses for the public's understanding of the issue at stake and the court's decision.

The key explanatory measure for the third hypothesis is proceeding type. Constitutional complaints allow citizens to make claims of unconstitutional actions directly to the court. Although most constitutional complaints are directed against the decisions of other courts, this procedure critically provides citizens the opportunity to directly challenge the legality of legislation. Constitutional complaints are more easily relatable for the public, as the cases involve instances of individual harm rather than issues of constitutional jurisprudence raised by lower courts. As a result, news coverage of a citizen's complaint against the government should be more effective at increasing public awareness. Thus, I expect the FCC to be more likely to hold a hearing for constitutional complaints than other proceedings. The variable *Constitutional Complaint* is coded 1 for constitutional complaints and 0 for all other proceedings.[3]

Since the fourth hypothesis predicts the court to be more likely to rule against the government in cases granted a hearing, the independent variable for this hypothesis is whether or not the court held a public oral hearing. This variable, *Hearing*, is the same as the outcome variable for the first and second hypotheses.

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[3]The dataset excludes constitutional complaints that do not directly challenge the constitutionality of legislation, as such cases do not involve the inter-institutional dynamic of interest here.

Table 4.1: Fisher's Exact Test Results

Relevant Hypothesis	First Variable	Second Variable	Government Brief Filed?	Odds Ratio
H1	Hearing	No Government Brief	-	0.30*
H2	Hearing	Case Complexity	Yes	2.13*
H2	Hearing	Case Complexity	No	5.82
H3	Hearing	Const. Complaint	Yes	2.61*
H3	Hearing	Const. Complaint	No	3.21
H4	Strike	Hearing	Yes	2.29*
H4	Strike	Hearing	No	3.86

* = Significant at 0.05 level.

Total of 613 Cases. Government brief filed in 486 cases.

Empirical Analysis

The theoretical model identified the conditions under which the decision to hold a hearing coincides with the risk of noncompliance, the expected effectiveness of hearings at increasing public awareness, and case disposition. Fisher's exact test provides a straightforward method for determining the relationship between two dichotomous variables such as those used here. Based on the first hypothesis, I expect an odds ratios of less than one for the relationship between *Hearing* and *No Government Brief*. For the second and third hypotheses, I expect the odds ratio between *Hearing* and *Case Complexity* and *Constitutional Compliant*, respectively, to be greater than one when *No Government Brief* equals zero. Similarly, for the fourth hypothesis I expect an odds ratio greater than one for *Hearing* and *Strike* when *No Government Brief* equals zero. The results of this preliminary analysis, presented in Table 4.1, conform to the theoretical model's predictions.[4]

Although this preliminary analysis supports the theoretical account, the conclusions we can draw from the results are limited in two critical ways. First, it is difficult to discern the substantive significance of the relationships from these results. Second, these results do not take potential confounding factors into account. To address these issues I estimate logistic regressions, as this approach provides estimates of both the statistical and

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[4]Results are robust to variety of alternative measures of association for contingency tables, such as standard χ^2 tests.

substantive significance of the hypothesized relationships while controlling for potential confounders.

The Noncompliance Risk Hypothesis (H1) predicts a negative relationship between No Government Brief and *Hearing*. For the Complexity Hypothesis (H2), Proceeding Type Hypothesis (H3), and the Strategic Case Disposition Hypothesis (H4), I follow Kam and Franzese's (2007) recommendation to estimate a model including an interaction term between the independent variables and the conditioning variable *No Government Brief*.[5] The coefficients of the interaction's constituent terms are estimates of the independent variables when there is a risk of noncompliance (*No Government Brief = 0*). For the Complexity Hypothesis I estimate a model interacting the measures of effectiveness (*Case Complexity* and *No Government Brief*, with the expectation that the variable *Case Complexity* will be positive and statistically significant. I further expect the interaction term between the two variables to not reach statistical significance. I conduct a similar analysis for the third hypothesis, the Proceeding Type Hypothesis. I interact *Constitutional Complaint*) with *No Government Brief* with an expectation that the coefficient for *Constitutional Complaint* will be positive statistically significant while that of the interaction should not be statistically significant. For the Strategic Case Disposition Hypothesis (H4), I estimate a model interacting *Hearing* with *No Government Brief*.[6] The coefficient of *Hearing* should be positive and statistically significant, while the interaction term between *Hearing* and *No Government Brief* should not be statistically significant.

I include a series of control variables to address potential omitted variable bias. The court's decision to hold a hearing may be a function of existing salience rather than the

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[5]See Kam and Franzese (2007), pgs. 103-111, for benefits of this approach over alternatives such as subsetting the data. Also see (Brambor, Clark and Golder 2005) for a discussion when interaction models are appropriate and their relative advantages and disadvantages to other empirical modeling strategies.

[6]As the model predicts the decision to hold a hearing and case disposition to effectively be joint choices, the decision to specify *Strike* as the outcome variable is based on the temporal ordering of the judicial process.

risk of noncompliance. As salience may correlate with the government's decision to file a brief, failing to control for existing public awareness could lead to biased results. To measure existing salience, I create the variable *Total Briefs* using the number of amicus briefs filed for a case, as greater interest group participation can be indicative of a case's salience (Spriggs and Wahlbeck 1997; Vanberg 2005).[7] As an additional measure of pre-hearing awareness, I account for whether the challenged statute was passed by the Federal government or a state government. Federal laws are likely to have a broader societal impact than subnational laws, which may lead the public to be more aware of a case if it involves a national rather than subnational law.[8] *Federal Law* takes a value of 1 for cases involving a Federal statute and 0 for state and local statutes.

I further control for two potential alternative goals judges may pursue through the use of hearings. Scholars have argued that the U.S. Supreme Court uses oral arguments as an information-gathering tool to improve the quality of decisions (e.g Johnson 2001). To control for this possibility in the context of the FCC, I include the variable *Court Brief*, which captures whether or not a lower court filed a brief. Lower courts regularly file briefs for cases, providing the FCC with more reliable information than interest groups. Second, the FCC may use hearings to legitimate decision by reassuring litigants of the proceeding's fairness. If the court is concerned about highlighting the legitimacy of the process, I would expect it to hold hearings more frequently when faced with a plaintiff with third party support. Therefore, I include the variable *Complainant Support*, which is coded 1 if a brief was filed supporting the plaintiff's position and 0 otherwise.

Additionally, I control for the institutional structure of the FCC. Recall from the previous chapter that the court conducts the majority of its business, including oral hearings,

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[7]Figures presenting the distribution of the *Total Briefs* variable is included in the appendix.

[8]Including this variable also addresses the possibility that the court's potential costs are greater when facing the Federal government than when facing a state government. As such, we might expect the court to be more likely to grant a hearing for cases involving Federal laws than state laws.

in one of two senates consisting of eight judges (Kommers and Miller 2012). There are two key defining characteristics of these senates. First, each judge is assigned to one and only one senate, meaning that the two senates have entirely separate memberships. The resulting personnel differences can, in turn, have consequences for the court's behavior, including potentially the decision to hold public oral hearings. Moreover, as the story of the treaties cases in the previous chapter made apparent, government officials are not oblivious to the court's composition. This knowledge could alter the government's strategy regarding the defense of challenged statutes accordingly, just as it might for strategic litigants similarly concerned with the makeup of the Senate likely to hear a case. The second characteristic is that each senate is assigned jurisdiction over specific issue areas. It is possible that some issue areas are more likely to compel the court into holding a hearing, which would lead to one senate holding hearings more frequently than the other. A senate's jurisdiction may further corresponds to the either the complexity of cases or the government's likelihood of filing a brief defending the constitutionality of the challenged statute. If either of these accounts is accurate, then failing to include this control could result in biased coefficients. The variable *Second Senate* addresses these concerns, with cases adjudicated by the Second Senate assigned a value of 1 and those adjudicated by the First Senate coded as 0.

Similarly, I control for potential confounding factors in testing the fourth hypothesis. First, I control for the legal merits of each case. I follow the example of Vanberg (2005) and examine the opinion of lower courts to control for the legal merits. The lower courts of the German judiciary are staffed with judges who have the necessary legal expertise and familiarity with the FCC's jurisprudence to provide the court with a clear portrayal of a case's legal merits. Furthermore, while the information provided by interest groups is likely biased, the FCC can have greater confidence in the objectivity of the legal reasoning presented in lower court briefs. The variable *Lower Court Unconstitutional Brief* is coded 1 if any lower court filed a brief supporting the plaintiff and 0 otherwise. In addition, I include a variable considering only briefs filed by high courts, as they may provide higher

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quality information than lower courts. This variable, *High Court Unconstitutionality Brief*, is coded 1 if a high court in the German federal or state judiciaries files a brief in support of overturning the statute. A third control for legal merits, *Amicus Brief Balance*, is calculated by subtracting the number of pro-plaintiff briefs from the number of pro-government briefs. Thus, a negative number indicates more support for the plaintiff than the government, while more support for the government is indicated by a positive value.[9]

I additionally include the variable *Second Senate* to account for the possibility hearings vary systematically across the two Senates in a manner that correlates with case disposition. *Case Complexity* is also included, as (Vanberg 2005) finds it is a significant predictor of FCC decisions. Finally, I control for the governing party. To account for possible partisan bias on the court, the variable *CDU* captures the partisan identity of the defendant government. This variable is intended to ensure that my results are not driven by a predisposition of the court to rule for or against a specific political party. This variable takes a value of 1 when the head of the defendant government is a member of the Christian Democratic Union (or Christian Social Union in Bavaria) and 0 otherwise. Table 4.2 provides descriptive statistics for each of these variables.

Results

Table 4.3 displays the results of the logistic regressions for the Noncompliance Risk (H1), Complexity Hypothesis (H2), and Proceeding Type Hypothesis (H3). Model 1 analyzes the Noncompliance Risk Hypothesis. The results support the theoretical model; the FCC is more likely to hold a hearing when the government files a brief defending the constitutionality of its statute. Importantly, this relationship remains statistically significant after controlling for potential confounding factors.[10] Moreover, the substantive

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[9]A figure presenting the distribution of the *Amicus Briefs Balance* variable is included in the appendix.

[10]The results for both H1 and H2 are robust to the use of an alternative measure of public awareness using media coverage collected from Lexis Nexis. Data limitations, however, constrain this robustness analysis to cases from 2000 to 2013.

Table 4.2: Descriptive Statistics

| Variable	Mean	Standard Deviation	Minimum	Maximum
Public Oral Hearing	0.18	0.38	0	1
Strike	0.39	0.49	0	1
No Government Brief	0.21	0.41	0	1
Case Complexity	0.42	0.49	0	1
Constitutional Complaint	0.44	0.50	0	1
Court Brief	0.55	0.50	0	1
Total Briefs	3.25	3.38	0	23
Federal Law	0.79	0.41	0	1
Complainant Support	0.39	0.49	0	1
Amicus Brief Balance	0.92	2.33	-10	17
Second Senate	0.39	0.49	0	1
Lower Court Unconstitutionality Brief	0.50	0.50	0	1
High Court Unconstitutionality Brief	0.17	0.37	0	1
CDU	0.73	0.45	0	1

Note: N = 613

significance of noncompliance rivals that of saliency.[11] Figure 4.2 presents the substantive significance of the relationship graphically. The figure provides the predicted probability of the FCC holding a hearing based on the presence or absence of a government brief. The predicted probability of the FCC holding a hearing when the government files a brief is 17%, while the probability of a hearing when the government does not file a brief is 6%.[12]

Models 2 and 3 analyze the the Complexity Hypothesis (H2), and Proceeding Type Hypothesis (H3), with the former model using *Case Complexity* as the key explanatory variable while the latter model uses *Constitutional Complaint*. These hypothesis both focus on the model's prediction that when faced with a risk of noncompliance, the FCC is more likely to hold a hearing when doing so will have the largest effect on public awareness.

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[11]This is based on Model 1. The inclusion of a government brief increases the probability of a hearing from 6% to 17%, while increasing the number of amicus briefs from the mean (3.25) by one standard deviation (3.38) raises the probability from 14% to 25%.

[12]Presented differences in predicted probability are all statistically significant at the $p < 0.05$ level.

Figure 4.2: Government Briefs and the Decision to Hold a Public Oral Hearing
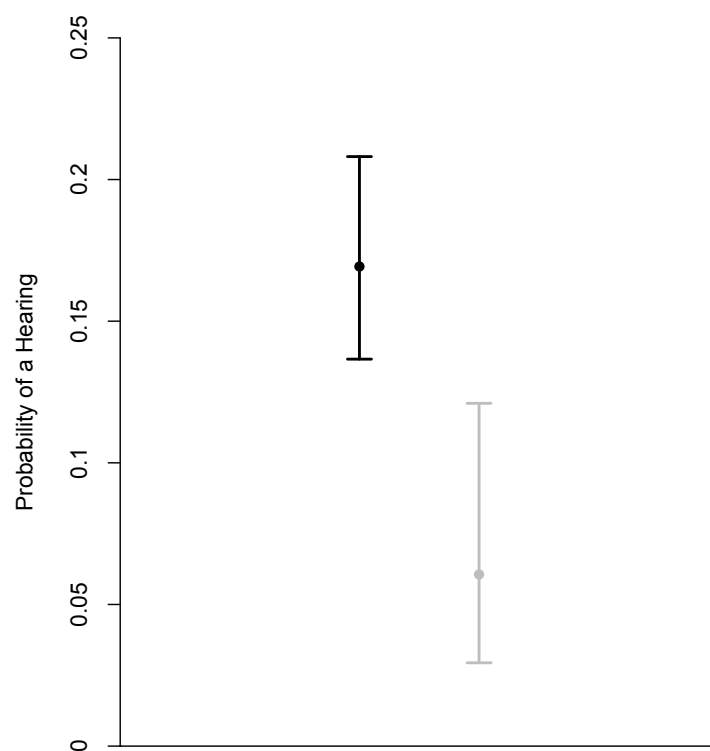
Note: The black point is the predicted probability of a hearing when the government files a brief. The gray point is the predicted probability of a hearing when the government does not file a brief. Lines represent 95% confidence intervals. Estimates based on Model 1.

Table 4.3: Logit Analysis of H1-H3

Variable	Model 1	Model 2	Model 3
No Government Brief	-1.15	-1.84	-1.13
	(0.40)	(1.03)	(0.64)
Case Complexity	-	0.92	-
		(0.25)	
Constitutional Complaint	-	-	0.87
			(0.25)
No Gov't Brief * Case Complexity	-	0.51	-
		(1.14)	
No Gov't Brief * Const. Complaint	-	-	-0.05
			(0.82)
Second Senate	0.48	0.42	0.53
	(0.25)	(0.26)	(0.26)
Total Briefs	0.21	0.19	0.19
	(0.04)	(0.04)	(0.04)
Court Brief	0.12	0.13	0.25
	(0.23)	(0.24)	(0.24)
Federal Law	0.81	1.02	0.79
	(0.32)	(0.33)	(0.32)
Complainant Support	0.36	0.48	0.45
	(0.29)	(0.29)	(0.29)
Constant	-3.31	-3.85	-3.80
	(0.40)	(0.45)	(0.44)
N	613	613	613

Note: Cell entries are coefficient estimates; numbers in parentheses are standard errors.

The empirical results support this prediction. Based on the results of model 2, the FCC is more likely to hold a hearing for cases involving "simple" issue areas, but only when there is a risk of noncompliance. This relationship, presented in Figure 4.3, is substantively significant. In cases including a brief filed by the government, the probability of a hearing increases from 12% for "complex" cases to 25% for "simple" cases. When the government does not file a brief, case complexity does not have a statistically significant relationship with the court's decision to hold a hearing.

Model 3 yields a similar relationship between proceeding type and hearings. The FCC

Figure 4.3: Case Complexity and the Decision to Hold a Public Oral Hearing
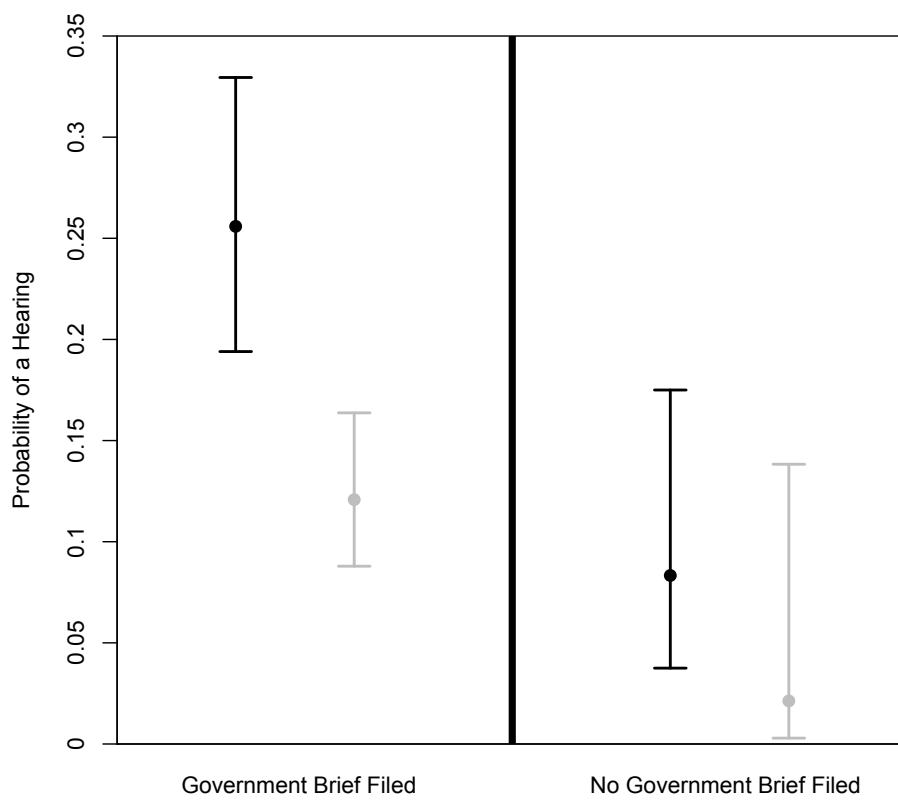
Note: Black points are predicted probabilities for "simple" cases. Gray points are predicted probabilities for "complex" cases. Lines represent 95% confidence intervals. Estimates based on the interaction term *Case Complexity ∗ No Government Brief* in Model 2.

Figure 4.4: Proceeding Type and the Decision to Hold a Public Oral Hearing
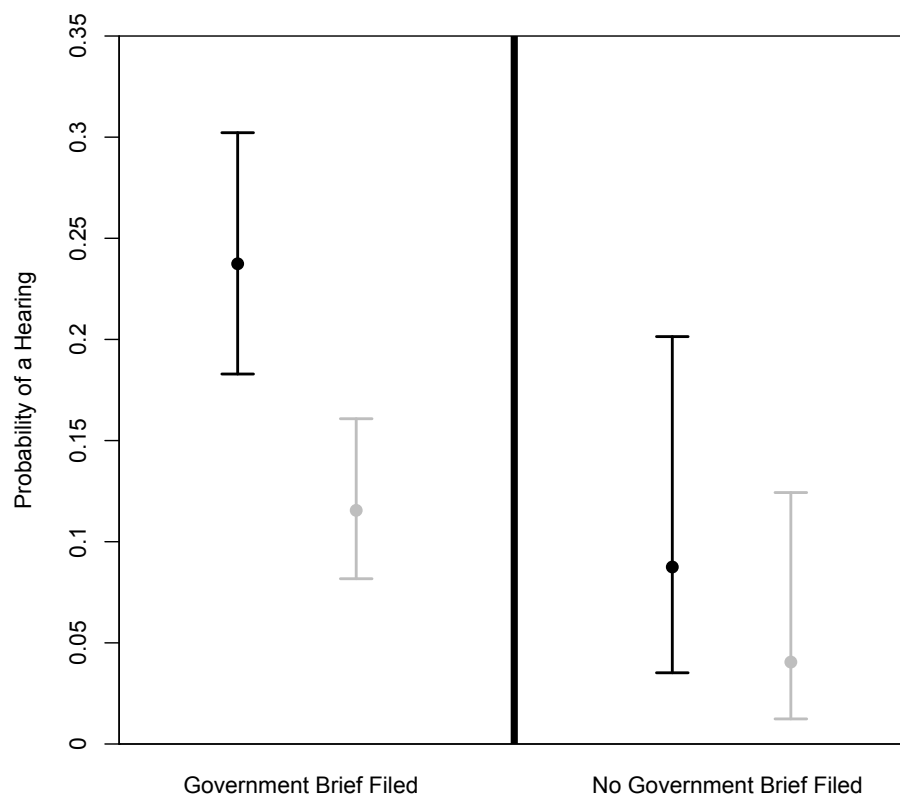
Note: Black points are predicted probabilities for constitutional complaints. Gray points are predicted probabilities for all other proceeding types. Lines represent 95% confidence intervals. Estimates based on the interaction term *Constitutional Complaint ∗ No Government Brief* in Model 3.

is more likely to hold a hearing for constitutional complaints than other proceeding types, such as concrete review cases. The probability of a hearing for a constitutional complaint is 24% but only 11% for other proceeding types (see Figure 4.4). This relationship holds, however, only when the government files a brief. Otherwise, the proceeding type does not have a statistically significant relationship with the court's decision to hold a hearing.

Table 4.4: Logit Analysis of the Strategic Case Disposition Hypothesis (H4)

Variable	Model 4	Model 5
Hearing	0.93	0.92
	(0.25)	(0.25)
No Government Brief	-0.15	-0.10
	(0.23)	(0.23)
No Gov't Brief * Hearing	0.78	0.67
	(0.87)	(0.87)
Lower Court Unconst. Brief	0.10	-
	(0.18)	
High Court Unconst. Brief	-	0.68
		(0.24)
Second Senate	-0.46	-0.49
	(0.18)	(0.18)
Amicus Brief Balance	-0.15	-0.13
	(0.04)	(0.04)
Federal Law	-0.75	-0.76
	(0.23)	(0.23)
Case Complexity	-0.01	0.06
	(0.19)	(0.19)
CDU	-0.19	-0.19
	(0.20)	(0.20)
Constant	0.41	0.31
	(0.27)	(0.26)
N	612	612

Note: Cell entries are coefficient estimates; numbers in parentheses arestandard errors.

Table 4.4 presents the analysis of the Case Disposition Hypothesis (H4).[13] This hypothesis states that, given a sufficient risk of noncompliance, the likelihood of an unconstitutionality ruling should be greater for cases granted a hearing. The results of models 4 and 5 provide support for this hypothesis. German federal and state governments tend to lose cases more often when the court holds a public oral hearing. This tendency, however, only holds in those cases for which the government filed a brief. When there is a low risk of noncompliance, there is no statistically significant relationship between hearings and the court's willingness to rule against the government.

To ascertain the substantive significance of the relationship between hearings and case disposition, Figure 4.5 provides predicted probabilities of the court ruling against the government according to whether or not a hearing was held and whether or not the government filed a brief defending the statute's constitutionality. In cases including a brief filed by the government, the probability of the court ruling against the government after holding a public oral hearing is 58%. In contrast, when the court does not hold a hearing in cases including a brief from the government, the probability of an unconstitutionality ruling is 35%.[14] This relationship between hearings and case disposition fails to reach statistical significance, however, in cases that do not include a brief from the government defending the statute's constitutionality.

Conclusion

The central insight from the theoretical model in Chapter 2 was that a court can use public oral hearings to address potential government noncompliance. The empirical implications that followed from this argument identified a series of hypotheses regarding relationships between the use of hearings, the political conditions surrounding a case,

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[13]The results are robust to analysis using only cases including a brief from the government. See appendix for full results.

[14]Probabilities are based on model 4. Using model 5, which controls for the legal merits using *High Court Unconstitutional Brief*, does not effect the statistical or substantive interpretation.

Figure 4.5: Public Oral Hearings and Case Disposition
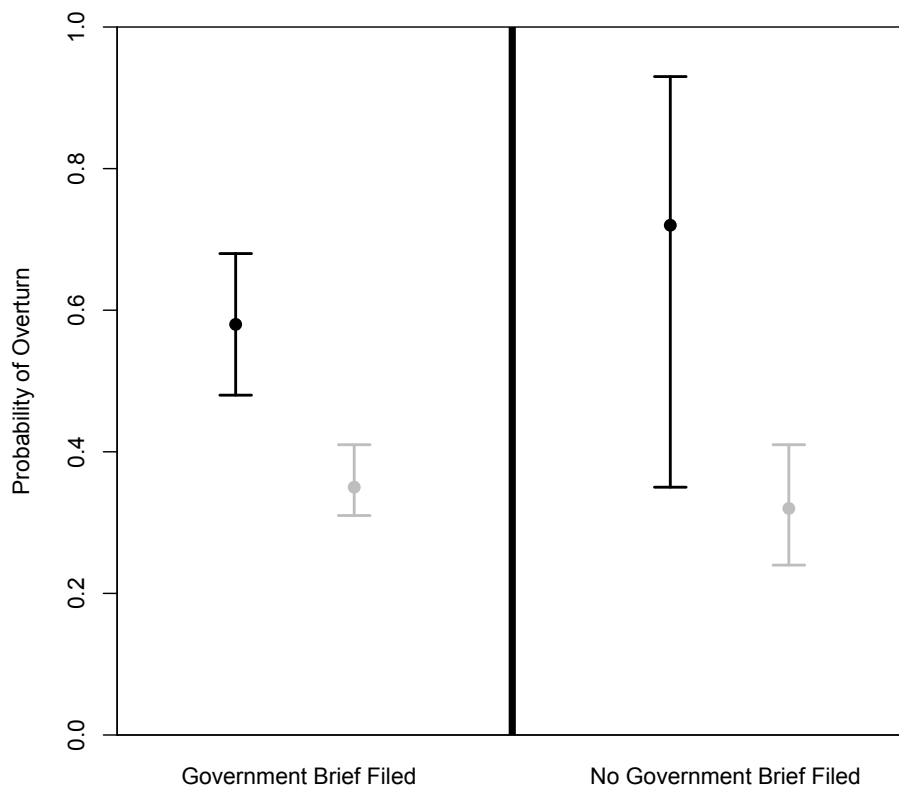
Note: Black points are predicted probabilities for cases granted a public oral hearing. Gray points are predicted probabilities for cases not granted a hearing. Lines represent 95% confidence intervals. Estimates based on the interaction term *Hearing ∗ No Government Brief* in Model 4.

and case characteristics. In this chapter, I tested these implications. Using a dataset of over 600 constitutional review cases brought to the German Constitutional Court between 1983 and 2013, I found evidence consistent with the model's predictions. Further analysis accounting for potential confounding factors and alternative accounts similarly yielded empirical support for each of my hypotheses.

The analysis presented in this chapter has yielded unambiguous support for my theoretical account of public oral hearings. Simultaneously, however, it raises a fundamental question about the generalizability of my theory to judicial procedures more broadly. If it is the case, as the evidence about suggests, that courts such as the German Constitutional Court use hearings to address potential noncompliance, then we might expect other facets of the judicial process to be similarly used. I take this question up in the next chapter by extending the theory to consider another institutional tool potentially available to courts, the timing of decisions.

Chapter 5

Extending the Theory: Elections and the Timing of Decisions

In the previous chapters, I developed a theoretical model that explains how a court can facilitate compliance from government officials by strategically using discretion over one of the most prominent judicial procedures, public oral hearings. Focusing on the consequences of public oral hearings for public attention to the judiciary, the model demonstrated how courts can overcome the fundamental challenge of noncompliance. In so doing, the model generated a series of predictions regarding when a court will use hearings and, moreover, how the use of hearings corresponds to the exercise and ultimate efficacy of constitutional review.

Although the model and empirical analyses in the previous chapters focused on public oral hearings, the central logic behind the theoretical model - the ability and incentive for courts to leverage their discretion over key features of the judicial process to confront potential threats of noncompliance - is not limited to hearings. Courts may possess a variety of means to use procedural features to affect public awareness of their decisions. In this chapter, I test this additional implication by extending the empirical analysis to one such institutional tool, the timing of judicial decisions. Specifically, I contend that the ability of a court to strategically time its decisions provides an opportunity to strike down

legislation when voters are especially attentive to political issues, election campaigns and the period immediately preceding an election.

The remainder of the chapter considers this empirical extension. I first motivate the chapter by discussing the role of timing in politics. The following section develops the theoretical argument and empirical hypotheses. I then discuss the data, measures, and empirical approach employed to test these hypotheses. The fourth section presents the results. In the fifth section I extend the analysis to consider whether the court modifies its decisions based on timing or, instead, the court delays its decisions to issue rulings in the advantageous context of election campaigns. I then conclude with a discussion of the implications of these findings for constitutional review and the quality of democratic governance, specifically in regard to the relationship of these findings with the empirical results presented in Chapter 4.

The (Judicial) Politics of Timing

Scholars have long recognized the central role of timing in the calculus of political decision making. Party leaders in parliamentary systems act strategically when timing national elections (Lupia and Strøm 1995). Legislators strategically time their position-taking on prominent issues (Box-Steffensmeier and Zorn 1997; Caldeira and Zorn 2004). Presidents use the timing of speeches and trips in order to improve their chance of reelection (Brace and Hinckley 1993). Political conditions similarly can influence when United States Supreme Court justices (Hagle 1993) and U.S. Courts of Appeals judges (Spriggs and Wahlbeck 1995) choose to retire from the bench.

Key to these arguments is the relationship between the timing of decisions and political actors' pursuit of specific goals. Specifically, the timing of the action is meant to maximize the likelihood of the desired outcome, such as reelection. That is, political actors may base the timing of major decisions in part on their political impact, as the conditions affecting a decision's political consequences may vary across time. The logic here is straightforward: make decisions under as advantageous of conditions as possible and attempt to delay or

avoid decisions under less conducive conditions.

Of course, what conditions political actors focus on and what constitutes advantageous timing for issuing a decision versus a disadvantageous one is dependent on the actors' goals and political environment. In modern liberal democracies, the ability of the public to observe and evaluate an official's decision or action figures prominently as one such condition. When voters are aware of an elected official's action, they can effectively reward or punish that official at the ballot box. Accordingly, officials have an incentive to issue decisions that will be popular with voters when the likelihood of public awareness is highest. Conversely, officials have reason to minimize attention for unpopular actions.

Most constitutional courts enjoy discretion regarding when to issue decisions. But while the above logic of strategic timing is straightforward in the case of reelection-focused public officials, it is not as immediately clear how a court composed of unelected judges would benefit from strategically timings its decisions. Since constitutional court judges are not elected, they do not face the electoral pressures that can motivate the timing of elected officials' decisions.[1] Moreover, the legitimacy of the courts on which judges serve is derived in part from the presence and preservation of the appearance that the judiciary does not engage in politicking or other separation between the judiciary and the public (Staton 2010; Gibson, Caldeira and Baird 1998). With these points in mind, any explanation for why a court might strategically time its decisions must first identify the court's goal.

The theory presented in the previous chapters provides such an explanation by focusing on the correspondence between the timing of a court decision, the likelihood of public attention for the decision, and the court's goal of obtaining compliance with its decision from government officials. Specifically, discretion over when a decision is issued provides courts an opportunity to manipulate public awareness in a manner that can aid in the pursuit of compliance. Courts can time their decisions to roughly coincide with events

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[1]Bolivia is an exception to this electoral connection in the context of constitutional courts; see Driscoll and Nelson (2014).

likely to raise public attention to political issues. Indeed, if courts are concerned with obtaining compliance with their decisions and consider the attention of a supportive public to be a means to that end, then courts have an incentive to consider their discretion over the timing of decisions as a resource for affecting public awareness.

If it is the case that courts time their decisions with noncompliance in mind, then they likely seek to issue their decisions when citizens are most likely to become aware of the ruling. In modern liberal democracies, elections can serve as this basis. Election campaigns typically increase press and public attention to all political matters, including constitutional review. Consequently, rulings issued in that period may be more likely to garner greater public awareness than those issued far from the spotlight of election campaigns.[2] Moreover, the proximity of the decision to an election allows rulings to figure more prominently in voters' calculus than they otherwise might if the decision were issued two or three years before the election. A strategic court concerned with garnering sufficient public awareness of its decisions to compel government officials to comply with its decisions should, then, take advantage of the electoral cycle by ruling against the government in the period immediately preceding an election. This expectation leads to the first hypothesis.

> **Timing Hypothesis (H1):** *A court is more likely to rule against the government in the period immediately preceding an election.*

One of the key implications of the theoretical model presented in Chapter 2 is that a court will use its discretion over institutional tools to increase public awareness only when faced with a credible threat of noncompliance. When the government does not value the policy under review, whether because the policy is of little importance or because the government prefers the law struck down, noncompliance is not at issue and the court need not strategically time its decision. Accordingly, a court that values compliance with its rulings should be more likely to strike down statutes as unconstitutional in the period

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[2]Later in this chapter I provide evidence to this effect in the context of the FCC.

leading up to an election only when the defendant government's investment in the policy signals the potential for noncompliance. That is, a court need not be strategic in this manner when noncompliance is not a threat, and as a result one would not expect in those cases to find evidence of the strategic relationship proposed in the first hypothesis.

Noncompliance Risk Condition Hypothesis (H2): *The relationship defined in Hypothesis 1 is limited to cases involving a threat of noncompliance.*

A challenge facing a court attempting to strategically time its decisions is uncertainty over the length of the electoral cycle. Constitutional courts often operate in political systems where electoral cycles are not always fixed. Successful motions of no confidence in national parliaments, for example, can result in the holding of early elections. Similarly, in some parliamentary democracies the prime minister can choose to call an election before the end of the current term (see Schleiter and Tavits 2016; Goplerud and Schleiter 2016). Table 5.1 shows the widespread nature of such features in European democracies.

As a result of these powers, predicting when the next election will take place is not straightforward for a court attempting to strategically time its decisions. Such a court cannot be assured that an attempt to time a decision to coincide with the next election will in fact do so, as the court may miss its opportunity as a result of an unexpected early election. Thus, courts may be less successful at strategically timing their decisions when a government terminates its term in office with an early election. If this is the case, then one might expect the relationship between a court's likelihood of striking down legislation as unconstitutional and issuing the decision in the period immediately preceding an election to be limited only to cases decided in electoral terms that are not ended in an early election. Conversely, the court cannot effectively time its decisions and as a result we should not observe the relationship between timing and case disposition when there is an early election.

Early Election Hypothesis (H3): *The relationship defined in Hypothesis 1 is limited to cases decided during to a standard election period.*

Table 5.1: Dissolution Powers in Europe

Country	PM Dissolution Power	Government Dissolution Power
Austria	No	Yes
Belgium	No	Yes
Bulgaria	No	Yes
Czech Republic	No	Yes
Denmark	Yes	Yes
Estonia	No	Yes
Finland	Yes	Yes
France	No	Yes
Germany	Yes	Yes
Greece	No	Yes
Hungary	No	Yes
Iceland	No	No
Ireland	Yes	Yes
Italy	No	No
Latvia	No	No
Lithuania	No	Yes
Luxemburg	No	Yes
Netherlands	No	Yes
Norway	No	No
Poland	No	Yes
Portugal	No	No
Romania	No	Yes
Slovakia	No	Yes
Slovenia	Yes	Yes
Spain	Yes	Yes
Sweden	No	Yes
United Kingdom	No	Yes

Source: Schleiter and Tavits (2016). Based on powers as of 2011.

Returning the the German Constitutional Court

Before turning to the empirical tests of these hypotheses, I consider their applicability in the case of the German Constitutional Court. Specifically, I address three questions critical to determining whether or not the FCC is an appropriate setting. First, I show variation in the timing of the court's decisions, with particular attention paid to how this variation corresponds to the German electoral cycle. Second, I look for evidence consistent with the claim that decisions issued in the period preceding an election garner attention. Third, I review the instances of early federal elections in Germany to show that it was unlikely that the court would have foreseen their use and thus been unable to successfully time its decisions.

The Timing of Federal Elections and Campaigns in Germany. The German constitution lays out guidelines for the timing of federal elections, including Bundestag elections. The first section of Article 39 stipulates that "the Bundestag shall be elected for four years. Its term shall end when a new Bundestag convenes. New elections shall be held no sooner than forty-six months and no later than forty-eight months after the electoral term begins." A result of this requirement is a largely stable and consistent electoral calendar. In fact, every Bundestag election since 1998 has been held in September. If the Bundestag is dissolved, then the constitution requires a new election to be held within sixty days.

The length of Bundestag election campaigns is regulated neither by the constitution nor federal law. Rather, state and local laws govern certain aspects of campaigning. For example, the use of billboards is often limited to a few weeks immediately preceding the election. Similarly, advertising on radio and television is limited by state laws to a four week period before the election. Otherwise, the timing of formal campaigns is left to convention, with the norm being that parties begin campaigning in earnest five or six weeks prior to the election (Birnbaum 2013; Khazan 2013).

The Media and German Elections. While formal campaigning may not begin until a few months before election day, media interest in Bundestag elections typically begins much sooner and crescendoes as the election nears. Since the timing of the next election is constrained by the constitution (barring an early election), media outlets can begin reporting on the dynamics of an upcoming election well in advance of the parties' campaigning. And as the election nears, the media coverage grows in its intensity. Peak coverage comes in the months immediately preceding the election known as the "hot phase" of the campaign (Schoenbach 1987; Schoenbach and Lauf 2001; Bachl and Brettschneider 2011). During this period, voters are inundated with campaign-related coverage as "television channels can hardly avoid political information" (Schoenbach 1987: 383).

To see how media coverage grows in the months preceding an election, I collected data on newspaper coverage of Bundestag elections between 2000 and 2013. This timespan covers four national elections: the 2002, 2005, 2009, and 2013 Bundestag elections. Using the Lexis-Nexis Foreign Language News Search function, I counted the number of newspaper articles focused on Bundestag elections each month. Articles were counted if their title included the word *Bundestagswahl* (Bundestag Election). The average number of headlines per month was 42, with a median number of articles of 7.

The results are presented in Figure 5.1. A few observations stand out from the figure. First, the media unsurprisingly covers the elections most vigorously in the month including election day. Indeed, the coverage in these months far surpasses the amount of coverage in any other month, a finding that conforms with the narrative in the German politics literature regarding a "hot phase" of the campaign. Second, the figure highlights the media buildup as an election approaches. While coverage is greatest during the month of the election, this peak is the culmination of several months of increasing media coverage. With the exception of the 2005 early election[3], media attention for the upcoming election

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[3]Since an election was not anticipated by the media, there was no buildup of coverage six months out from the election. I discuss the circumstances surround this election in greater detail later in the chapter.

began in earnest six to nine months before election day. That is, upcoming elections were coming into the public eye well before the politicians began their formal campaigning.

The data also suggest that media coverage of elections has increased over time. I am hesitant, however, to draw such a conclusion because the data rely on newspapers having digitized their archives. Simply put, the greater amount of coverage in September 2009 than September 2005 may be the result of more newspapers being included in the Lexis-Nexis catalogue of online newspaper records in 2009 than there were in 2005. Such a dynamic, however, would not account for the relative trend of coverage increasing in the months leading up to election day.

Recall, however, that my argument here is that media coverage of government actions, not just elections, increases as an election nears. While election coverage naturally entails discussion of politics and the issues facing voters, it may not fully encompass the degree of interest in the actions of the government itself. To address this, I collect data on headline coverage of the German federal government. The data counts the number of headlines per month including the word *Bundesregierung*, or federal government. In Figure 5.2, I plot the media's coverage of the government alongside the election coverage shown above in Figure 5.1. While attention to the government is not quite as systematically related to election day as that of elections, a trend nonetheless is evident from the figure. Coverage of the government creeps upward in the months immediately preceding an election, with the spike occurring typically in the month or two following election day. This is likely the result of coalition negotiations that occur after each election and, consequently, typically delay the installation of a new government for a month or two. Without accounting of this lag, the partial correlation between the two variables is both positive and statistically significant after controlling for the spike in coverage of the government when the financial crisis and subsequent recession hit in the fourth quarter of 2008.[4] If, however, a one month lag in coverage is taken into account, the relationship becomes even stronger with
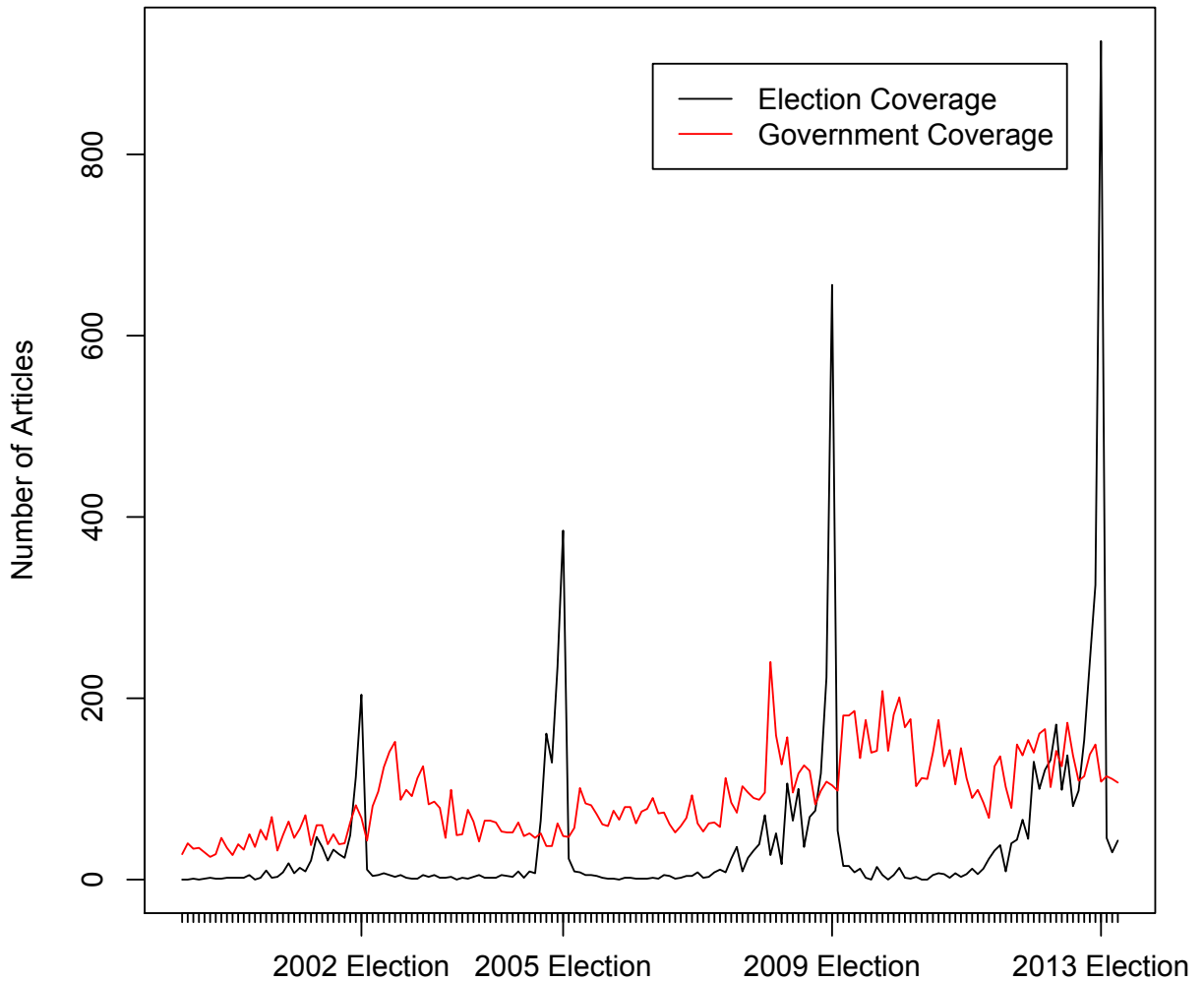
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[4]Partial correlation estimate is 0.13 with a p-value of 0.09. The months controlled for are October through December of 2008.

Figure 5.1: Media Coverage of Bundestag Elections, 2000-2013
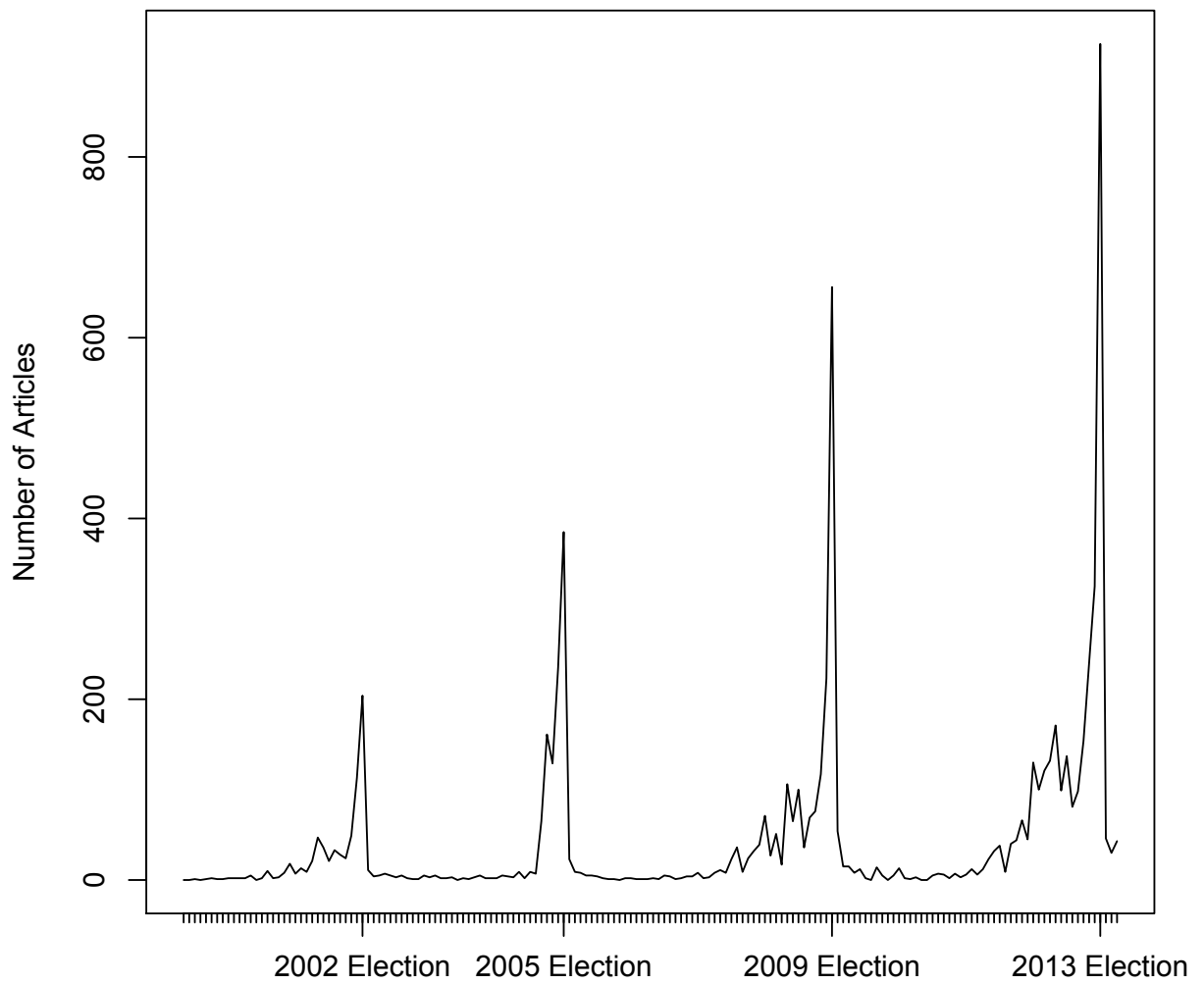
Note: Monthly tick marks shown along the x-axis.

Figure 5.2: Media Coverage of the Federal Government and Bundestag Elections, 2000-2013

Note: Monthly tick marks shown along the x-axis.

a correlation estimate of 0.17 and p-value of 0.03. In short, there appears to be evidence of elections' influence on the coverage of politics in Germany, both in the context of the elections themselves and the behavior of the governments seeking votes.

The Timing of FCC Decisions. The German Constitutional Court has considerable discretion over the timing of its decisions. There is no specified timeline by which the

court must make its decisions. That is, while the U.S. Supreme Court, for example, typically issues its decisions on cases within a year of receiving the case, the German Constitutional Court may take years to dispose. Figure 5.3 highlights this discretion by showing the variation in the number of years the German court took to decide cases involving Federal laws from 1983 to 2012. While the plurality of cases are decided within a year of being filed, the median amount of time between application and decision is three years. The variation shown in the figure is particularly striking, with the court having taken as long as twelve years to provide a ruling in some cases and regularly taking five years in others.

There is similarly variation in the timing of FCC decisions with respect to the German electoral cycle. Figure 5.4 shows the frequency of FCC decisions by the number of years between the decision and the most recent national election. Two specific observations from the figure warrant particular attention. First, the court issued decisions throughout the electoral cycle. Interestingly, the frequency of decisions decreases as the number of years since the last election increases. Second, the court issued the most decisions after the first and second years following an election. The number of decisions then tapers as the electoral cycle moves forward, with the fewest decisions issued after four years have passed since the last election. This observation makes sense, as the German constitution requires that a national election be held at least roughly every four years. More generally, taken together these figures illustrate the FCC's use of discretion over the timing of decisions and, moreover, highlight potential trends in the court's use of this discretion. My argument here is that this variation is, at least partially, due to strategic considerations regarding noncompliance.

Media Coverage and the Timing of FCC Decisions. A second concern regards whether decisions issued near elections do in fact garner more media, and thereby public, attention. Although on its face an uncomplicated claim, answering this question empirically is not entirely straightforward because of the strategic nature of the timing of

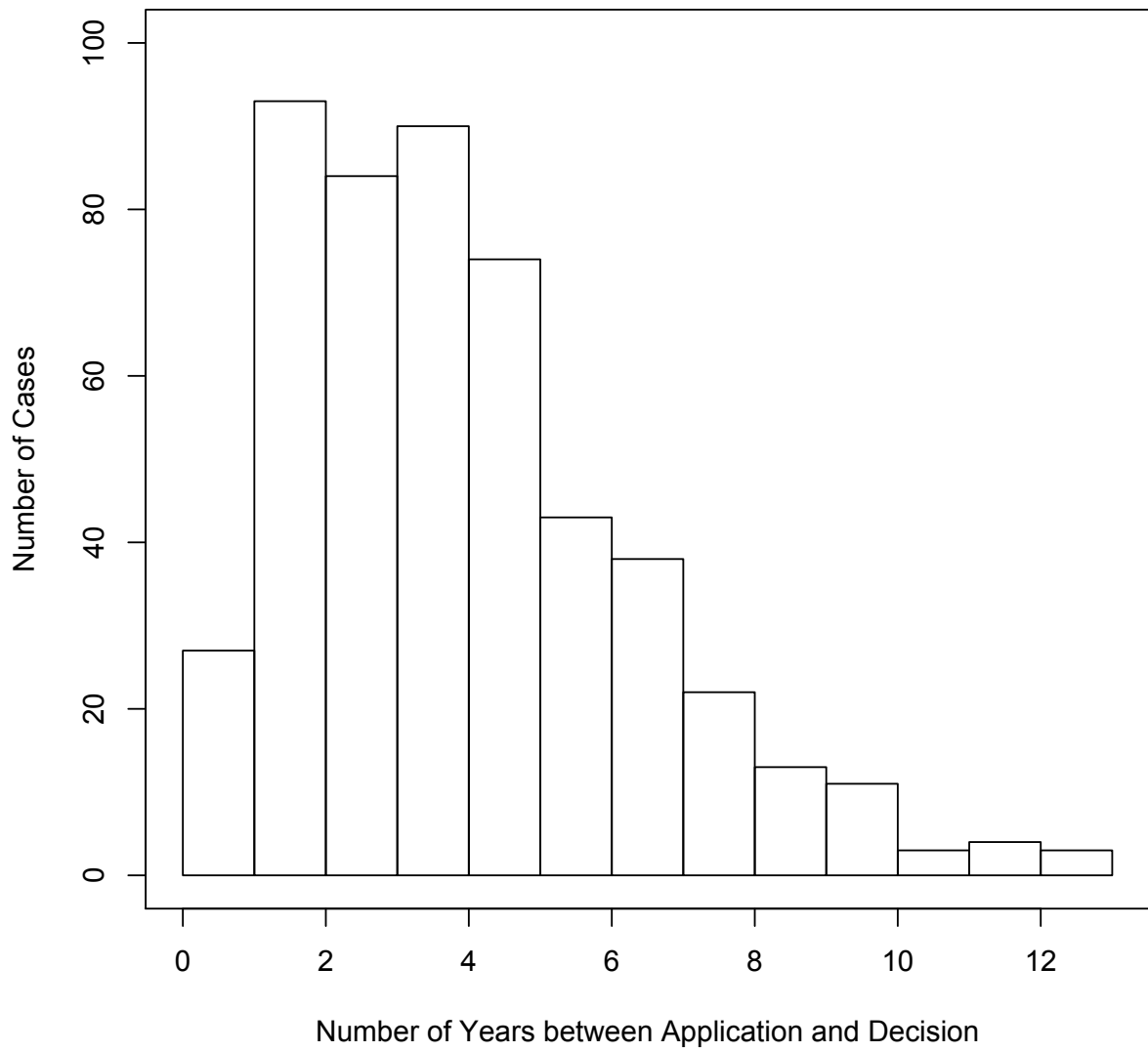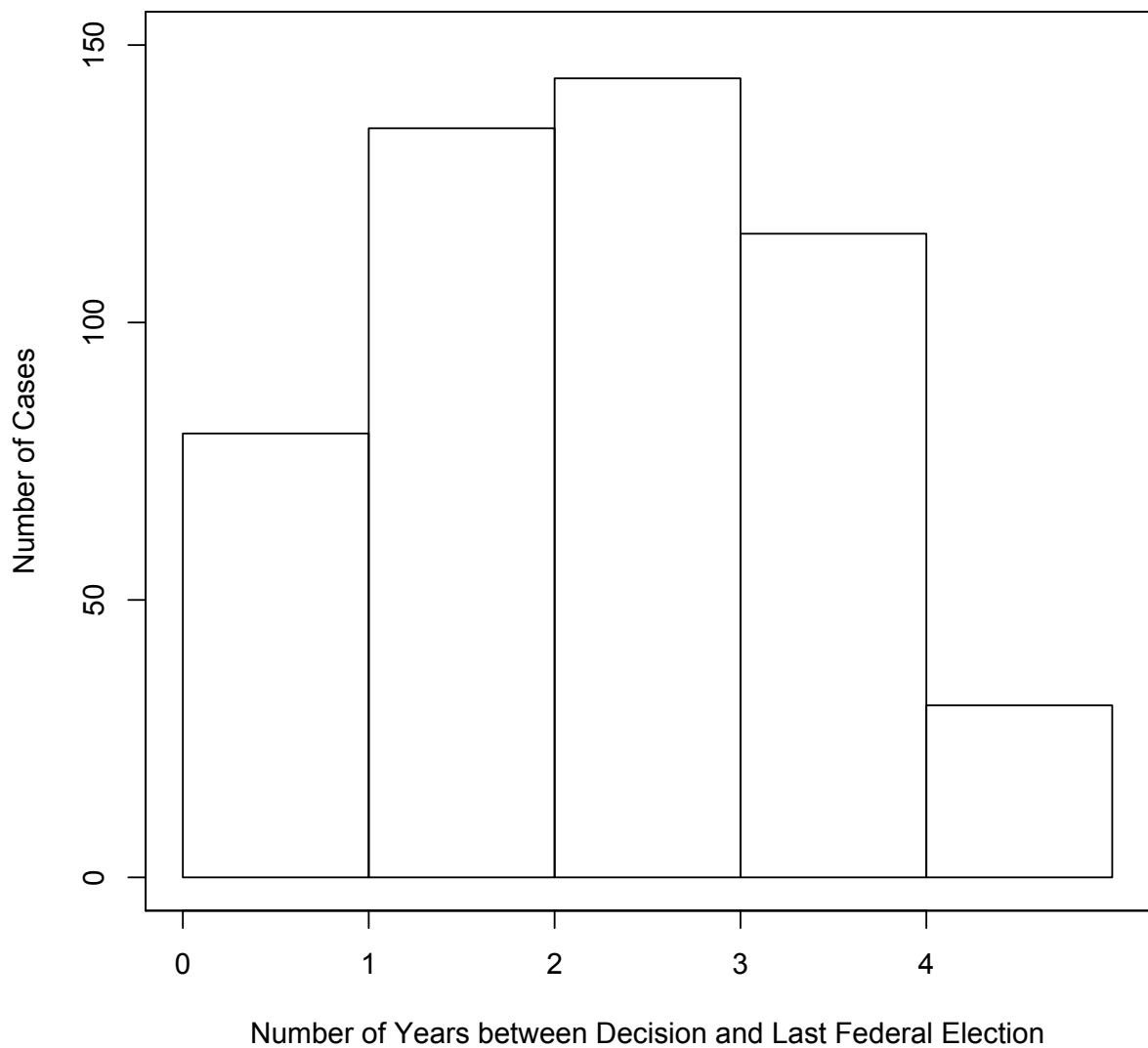Figure 5.3: Time Between Application and Decision of Cases at the FCC

Figure 5.4: Timing of FCC Decisions in the Electoral Cycle

Note: The column to the left of each number on the x-axis indicates the number of cases decided after that number of years had passed since the last national election. So, for example, the left-most column counts the number of cases decided less than a full year after a national election.

Table 5.2: Timing and Media Coverage of FCC Decisions

	Model 1
Next Election within Six Months	0.19
	(0.24)
Strike	0.44*
	(0.13)
Constant	1.40*
	(0.10)
N	176

Standard errors in parentheses
* indicates significance at $p < 0.05$

decisions. The most obvious empirical test is to examine whether cases decided in the period immediately preceding an election garner more media coverage than other cases. Table 5.2 presents the results of such an analysis using data on media coverage of cases involving Federal laws between 2000 and 2013. The outcome of interest here is the number of articles covering a decision and the explanatory variable of interest is whether a decision was issued in the six-month period immediately preceding a federal election. I also control for whether or not the court struck down the challenged law as unconstitutional. I do so to account for possible omitted variable bias. Case disposition may be correlated with both the timing of the decision, a relationship predicted by hypothesis 1, and the amount of media coverage given to a case. While decisions striking down legislation as unconstitutional garnered greater media coverage than those upholding challenged statutes, this empirical approach provides no statistical evidence of such a relationship between coverage and the timing of decisions immediately preceding an election.

This result is not, however, dispositive regarding the potential for increased media coverage of rulings issued in this period. If my strategic timing argument is correct, then the court may be selectively choosing which decisions to issue in the pre-election period and which to issue earlier in the electoral cycle. Critically, one criterion upon which the court may be making this selection could be the expected amount of coverage a decision will receive if it is not issued in the higher-coverage time period preceding the national election. Timing the issuance of decisions for cases that are unlikely to otherwise garner

the coverage necessary to engender compliance maximizes the court's benefit of using its discretion. This is because such a strategy allows the court to strike down legislation that it would likely uphold without the additional media attention. In contrast, the marginal impact of timing decisions is more limited for decisions that are likely to generate media coverage. This approach by the court would conform with the predictions of the theoretical model in Chapter 2. Timing decisions in this manner results in the "Judicial Emboldening" and "Limited Judicial Emboldening" equilibria. Moreover, such a selection process would suggest that the court is using its discretion over timing when it is likely to be most effective at promoting public awareness and ultimately compliance. Empirically, then, the reason we find no statistically significant relationship between coverage and timing is not because timing does not affect coverage, but rather because strategically timing a decision brings coverage of those cases up to the level of more salient cases.

Two empirical hypotheses follow from this discussion that shed light on the question of the relationship between timing and media coverage. First, if the court is using the immediate pre-election period to increase media coverage of decisions that would otherwise not garner significant attention, then cases decided in that period should, on average, exhibit characteristics that suggest the media will not provide much coverage of the court's decision. In other words, there should be a correlation between cases decided in the period leading up to an election and the amount of coverage the court might expect its decision to receive if the decision is issued further away from the next election. Second, this relationship should be conditioned by the risk of noncompliance in a case. Only when there is a credible possibility that the government will fail to comply with the case does the court have an incentive to behave in the strategic manner described here. When this isn't the case and the government does not value the statute under review, then we should not observe the court linking the timing of its decision to the likelihood of media coverage. To summarize, I expect cases decided in the period immediately preceding an election to, on average, be less salient than other cases, but only when the court faces the possibility of noncompliance with a decision to strike the challenged legislation down as

unconstitutional.

To test these expectations, I once again use data on FCC decisions involving federal legislation from 2000 to 2013. The outcome of interest here is whether or not a case was decided in the six months immediately preceding the next national election. To measure interest in a case before the court issues its decision, I rely on previous studies (e.g. Vanberg 2005; Caldeira and Wright 1990; Spriggs and Wahlbeck 1997) and use the total number of amicus briefs filed in a case (*Total Briefs*). Importantly, interested parties (i.e. interest groups, governments, lower courts) must decide to file such briefs uncertain about when the court will issue its decision. That is, the measure is exogenous to the outcome of interest, the timing of Court's decision. As in the empirical analysis in the previous chapter, I use the variable *No Government Brief* as a measure of the risk of noncompliance. As the relationship between the number of briefs and the timing of the court's decisions should be conditioned by *No Government Brief*, I once again follow the advice of Kam and Franzese (2007) and interact the variables *No Government Brief* and *Total Briefs*. The coefficient of most interest, then, is *Total Briefs*, as that coefficient estimates the relationship between the number of briefs filed in a case and when the court issues its decision.

The results, presented in Table 5.3, support the empirical expectations derived from my strategic account of timing. Specifically, the likelihood of the court issuing a decision in the six months prior to a federal election decreases as the number of amicus briefs increases. That is, the more inherently salient a case is, the less likely the court is to release that decision in the immediate buildup to an election. Moreover, this negative relationship is limited to cases where noncompliance is at issue. When the government does not file a brief defending the constitutionality of the challenged statute, the court's timing does not appear to be based significantly on a case's salience. Figure 5.5 plots the predicted probabilities based on these results to demonstrate the substantive significance of this relationship. When the government files a brief defending the constitutionality of the challenged statute and the case includes four amicus briefs, the probability of the

court issuing its decisions within six months of the next election is 7%.[5] This probability rises to 33% when no third party amicus briefs are filed in a case. When the court is not confronted with the potential for noncompliance, the number of amicus briefs has no statistically significant relationship with the timing of the court's decision. These results, while not definitive, provide empirical support to the claim that the court strategically times its decisions based, at least in part, on the risk of noncompliance and the need for media coverage of decisions in order to overcome that risk.

Table 5.3: Case Salience and the Timing of FCC Decisions

	Model 1
No Gov't Brief	−1.95
	(1.08)
Total Briefs	−0.49*
	(0.20)
No Gov't Brief * Total Briefs	0.50*
	(0.26)
Constant	−0.68
	(0.65)
N	176

Standard errors in parentheses
* indicates significance at $p < 0.05$

Early Elections in Germany. The third empirical hypothesis contends that courts cannot time their decisions as effectively when the electoral cycle is unexpectedly shortened by early elections. This predicted relationship assumes that courts are unable to accurately predict early elections, a claim that implicitly requires the decision to hold an early election to be exogenous to the behavior of courts. That is, it is critical for the theory that the decision of government officials to hold an early election is not the result of judicial action. If this were the case, a court could strategically time its decisions more effectively since it would be informed of the likelihood of an early election. While this is of less concern with the early election of 1990 that was called after the reunification of East

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[5]This is the median number of briefs in this data set.

Figure 5.5: Predicted Probability of Pre-Election Decision
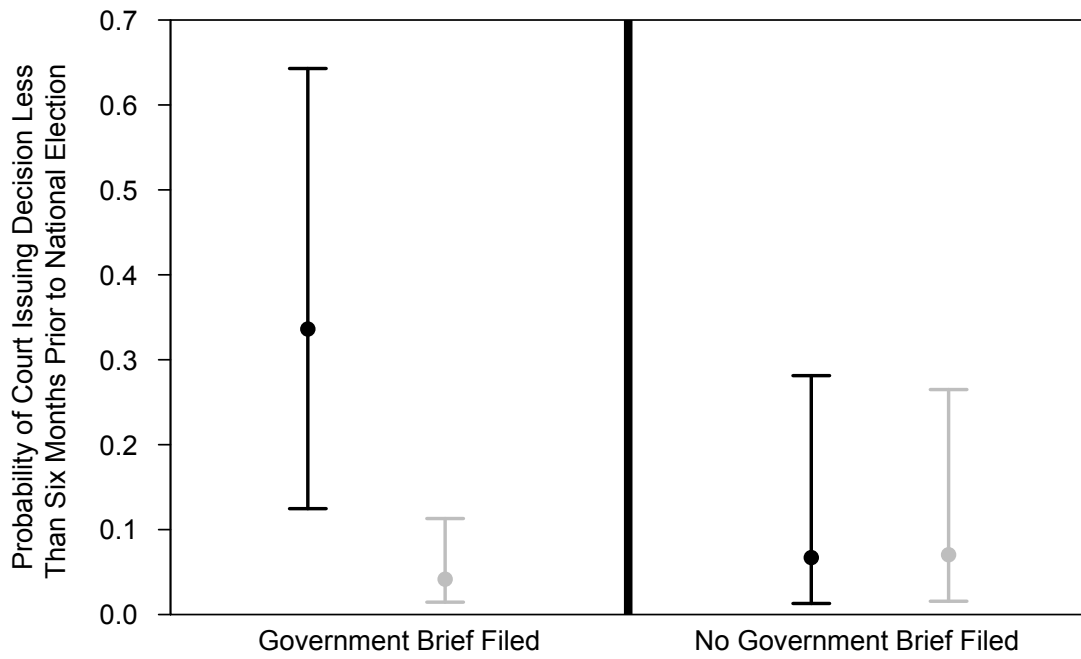
Note: Black lines indicate cases for which zero third party briefs were filed. Gray lines indicate cases for which four amicus briefs were filed.

and West Germany, it is worth discussing the highly politicized circumstances behind the contentious use of early elections in 1983 and 2005.

In the case of Germany, early elections are generally the result of failed votes of confidence. Specified by Article 68 of the Basic Law, this procedure allows the chancellor to bring forth a motion to the parliament that, if successful, allows for the governing coalition to continue in power.[6] If, however, a majority of parliament does not vote in support of the government, then the chancellor can either attempt to govern as a minority government or ask the Federal President to dissolve the Bundestag and hold an election.[7] Since the founding of the Federal Republic after World War Two, this procedure has been used five times, three of which resulted in the dissolution of the *Bundestag* and the holding of early elections (Reutter 2006). Two of these early elections, those of 1983 and 2005, are included in my dataset.

Interestingly, in both cases the chancellor motioned for a vote of confidence with the explicit goal of the vote failing and thereby dissolving the Bundestag and bringing about an election. In December 1982, Chancellor Helmut Kohl requested a vote of confidence

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[6]The text of Article 68: "If a motion of the Federal Chancellor for a vote of confidence is not assented to by the majority of the members of the Bundestag, the Federal President may, upon the proposal of the Federal Chancellor, dissolve the Bundestag within twenty-one days."

[7]There is a second related parliamentary procedure, and the only one initiated by the parliament for removing the chancellor, known as the "constructive vote of no confidence." Specified by Article 67 of the Basic Law, this procedure allows the lower house of the German parliament, the Bundestag, to remove the chancellor from office only if a majority of its members simultaneously elect a successor. It was through this procedure that Helmut Kohl replaced Helmut Schmidt as chancellor in 1982. The Social Democrats (SPD) and liberals (FDP) had been the ruling coalition since 1969, but in 1982 the FDP decided to leave that coalition and instead join a coalition with the conservative CDU/CSU. Since a majority of the *Bundestag* now preferred an alternative chancellor to the sitting chancellor, a constructive vote of no confidence was successful at removing Schmidt and replacing him with the leader of the CDU/CSU, Kohl. For more, see Winkler (2007).

from the Bundestag and instructed his parliamentary majority to abstain from the vote and thus ensure that the motion failed. Kohl had only become chancellor in October of that year as the result of the only successful constructive vote of no confidence in the history of the Bundestag.[8] The issue for Kohl, then, was not that he lacked the support of a majority of the chamber's members, but that he wanted an election to legitimize the new governing coalition and allow him to govern with a fresh electoral mandate.[9] The problem, however, was that the Bundestag cannot dissolve itself and hold a new election; that power is reserved for the Federal President. The president at the time, Karl Carstens, was concerned that the motion for a vote of confidence was constitutionally suspect since there was no question that the government had the support of a majority of the Bundestag; the government had successfully passed a budget the day before the vote of no confidence was scheduled to take place. Nonetheless, President Carstens accepted Kohl's proposal to dissolve the Bundestag and hold new elections in March 1983.[10] Four Bundestag delegates then challenged the President's decision by bringing a case to the . The court concluded that the action did not violate constitutional norms, allowing the election to take place. The result of the election was a resounding victory for Kohl and the CDU, with the party winning 48.8% of the vote and Kohl retaining the chancellorship, a post he occupied until 1998.

The other instance of a vote of confidence resulting in an early election occurred in 2005

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[8]The only other attempted constructive vote of no confidence occurred in 1972, when CDU leader Rainer Barzel came two votes short of replacing SPD chancellor Willy Brandt.

[9]Kohl stated that the coalition needed "the decision of the people as a basis for the necessary, long-term and broadly conceived policy of renewal" (Winkler 2007).

[10]Carstens justified this decision on the basis of three points. First, both the governing and opposition parties favored an early election. Second, there was no parliamentary majority that stood to benefit from an election at the expense of a minority. Third, leaders of within the government indicated that their support for the government was contingent on new elections, thus calling into direct question the ability of the governing coalition to maintain a parliamentary majority without new elections. See Winkler (2007) for a detailed account.

during the chancellorship of the SPD leader Gerhard Schröder.[11] After electoral defeat in a series of state elections culminating with a critical defeat in Nordrhein-Westfalen, the governing parties, the SPD and Greens, did not control any state governments. As a result, opposition parties controlled 43 of 69 seats in the Bundesrat, the upper house of the German parliament consisting of delegates appointed by state governments. Schröder claimed that the opposition's control of the upper house left his government unable to effectively legislate, a situation that could only be resolved by new elections (Reutter 2006). In July 2005, Schröder put forth the motion for a vote of confidence with the instructions that members of the coalition parties abstain and thus ensure the motion's failure. The Federal President, at the time Horst Köhler, assented to Schröder's request for the dissolution of the *Bundestag* and the holding of early elections. After an unsuccessful challenge of the constitutionality of the use of the vote of confidence motion at the FCC, national elections took place in September. The results were a setback for Schröder's SPD party, but not a total defeat. The SPD entered into a "Grand Coalition" with the CDU, with Schröder stepping down from the chancellorship and Angela Merkel of the CDU taking over as chancellor.

To summarize, the three early elections included in my data set were not the direct result of FCC actions. In the case of the 1990 election, few politicians, much less the FCC, had seen reunification coming as swiftly as it did (Winkler 2007). As for the elections following confidence votes in the *Bundestag*, in both instances it was the desire of the chancellor that new elections be called because of shifts in the partisan makeup of key veto players in the German political system. The resulting elections, which the constitution required be held within 60 days of the Bundestag's dissolution, left the court little time to attempt to strategically time its decisions without appearing to behave politically. As such, I expect the court's ability to strategically time its decisions to have been hampered in the electoral cycles ended by these elections.

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[11]For a more extensive treatment, see Reutter (2006).

Empirical Analysis

To test my hypotheses, I consider all rulings involving the Federal government in my data set. I restrict the analysis to cases of national law due to data limitations regarding cases addressing questions of state law. The mechanism proposed here argues that impending elections increase media coverage. This trait of elections, however, is generally less prominent in state elections than national elections. Moreover, attention to elections likely varies across states; elections in some states, such as the highly populated *Nordrhein-Westfalen* and *Niedersachsen*, are likely to garner significantly more attention than others, such as the less populated *Saarland* or *Mecklenburg-Vorpommern* states. To appropriately model this requires estimating state-level relationships between timing and case disposition, a task that requires more observations per state than the data provide.[12] By limiting the analysis to disputes over the constitutionality of national laws, I can avoid these issues and ensure I employ the appropriate empirical model.

Since Hypothesis 1 predicts a relationship between timing and case disposition, the outcome variable of interest is whether the FCC struck down or upheld the challenged statute. Recall that this variable, *Strike*, is coded 1 if the FCC strikes down a law as unconstitutional and 0 if the court upholds the law. I take an expansive view of what it means for the court to strike down a law by assigning cases a value of 1 when the court at least partially invalidates the law. I also code a case as 1 when the court declares a law incompatible with the Basic Law, which requires the legislature to revise the law but in the meantime allows for its continued implementation for a limited period of time.

The key explanatory variable for the analysis is whether or not the FCC issued its decision on a case in the period immediately preceding a national election. The variable, *Near Election Decision*, codes cases as being close to the next election if the court issued the decision within six months of election day. I chose six months as the cutoff for two

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[12]An interesting task for future research would be to consider state-level cases when sufficient data is available. Or, alternatively, to examine cases at state constitutional courts and then compare results across states.

reasons. First, it accounts for the FCC's desire to avoid appearing overtly political (Vanberg 2005: 125). Decisions issued days before an election may appear too conspicuously strategic in the eyes of both politicians and, more importantly, the public. To avoid this pitfall, the court can take advantage of the media buildup to an election, like that shown in Figure 3.3 and described by scholars of German politics (Schoenbach 1987; Schoenbach and Lauf 2001; Bachl and Brettschneider 2011), without directly inserting itself into the politicized environment of the relatively short period of formal campaigning. This is not to say that the court never makes decisions during this period, but rather that the mechanism described here can be at work before the official start of campaigns and, moreover, there may be an incentive for the FCC to balance its image as a neutral institution with strategic need related to obtaining compliance. Second, this measure accounts for the uncertainty over the exact date of national elections. The constitution dictates that an election must be held between 45 and 47 months after the start of a legislative session. As a result, there is some variability in the precise date of national elections. Using six months as the cutoff allows for the possibility that the FCC's ability to strategically time its decisions is related to this constitutional feature of German elections.

For the noncompliance risk condition hypothesis (H2), which states that the relationship between the timing of FCC decisions and case disposition is conditional on the potential for noncompliance, I use the variable *No Government Brief*. Recall that this variable is coded 1 if the government does not file a brief defending the constitutionality of the challenged statute and 0 if it does file such a brief. Since the analysis is limited to cases involving national laws, this variable is based solely on whether the federal government filed such a brief. To measure the key concept of the early election hypothesis (H3), which predicts the relationship between timing of decisions and case disposition to be conditioned by the timing of national elections, I consider whether or not a case was decided during a term of the *Bundestag* ended by an early election. That is, if the FCC decided a case during the electoral cycles ended by the early elections of 1983, 1990, or 2005, then the variable *Early Election* takes a value of 1. If the FCC issued its decision

Table 5.4: Fisher's Exact Test Results

Relevant Hypothesis	First Variable	Second Variable	Government Brief Filed?	Early Election?	Odds Ratio	p-value
H1	Strike	Near Election Decision	-	-	1.49	0.25
H2	Strike	Near Election Decision	Yes	-	1.80	0.13
H2	Strike	Near Election Decision	No	-	0.83	1
H3	Strike	Near Election Decision	No	Yes	2.4	0.57
H3	Strike	Near Election Decision	No	No	0.35	0.43
H3	Strike	Near Election Decision	Yes	Yes	1.52	0.56
H3	**Strike**	**Near Election Decision**	**Yes**	**No**	2.31	**0.12**

during any other electoral cycle, then this variable takes a value of 0.

Since the predicted relationship is between two dichotomous variables, I again conduct a preliminary empirical analysis using Fisher's Exact Test. For each test, I examine the relationship between *Strike* and *Early Election Decision*. For the second hypothesis, I divide the data according to whether or not the government filed a brief defending the constitutionality of the challenged statute. Similarly, for the third hypotheses I divide the data between the presence of such a brief and whether or not the case was decided before an early election. The results of the tests are presented in Table 5.4.

The results of this preliminary analysis do not provide conclusive evidence supporting my hypotheses. None of the odds rations resulting from the Fisher's Exact tests reach standard levels of statistical significance. Despite these inconclusive findings, the results are suggestive of a conditional relationship between case disposition and timing. The bottom row of Table 5.4 shows this relationship when only considering cases including a brief filed by the government and decided during a standard electoral period. Recall that the third hypothesis predicts the relationship between *Strike* and *Near Election Decision* to be present specifically under these conditions. As the table shows, this relationship is strongest when looking at cases that meet those two criteria. This finding suggests that a more thorough empirical analysis using the entire dataset and key control variables may better reveal any strategic timing of FCC decisions.

As Hypotheses 2 and 3 predict a relationship between case disposition and timing that is conditioned by the risk of noncompliance and nature of the electoral term, respectively, I employ a logistic model with a triple interaction term (Kam and Franzese 2007). The

constituent terms of this interaction are the three variables *Near Election Decision*, *No Government Brief*, and *Early Election*. Since these three variables are all dichotomous, the coefficients for each of the constituent terms correspond to the relationship between the outcome variable and the individual explanatory variables when they take a value of 1 and the other two components of the interaction equal 0. Recall that the key explanatory variable is the timing of the FCC's decision, the variable *Near Election Decision*, which I expect to have a positive correlation with case disposition when the government files a brief (*No Government Brief* = 0) and the decision is not issued in an electoral cycle ended by an early election (*Early Election* = 0). Therefore, the coefficient of interest here is *Near Election Decision*, as it will indicate the relationship between case disposition and timing when the two conditioning variables equal 0.

I include a series of control variables in the analysis to deal with potential omitted variable bias and account for factors previous research identifies as influencing judicial decision making in general and at the FCC in particular. First, I control for the legal merits of the case using the variables *Lower Court Unconstitutionality Brief* and *Amicus Briefs Balance*. Including these variables accounts for potential bias resulting from a correlation between legal merits and both case disposition and the timing of the court's decisions. While I discuss the potential for correlation between legal merits and case disposition in Chapter 4, it is worth briefly considering how the legal merits might correlate with the timing of FCC decisions. If it is the case that the FCC is not strategic about the timing of its decisions, then strategic litigants could be influencing the timing of decisions and a case's outcome. Strategic litigants might have an incentive to time their applications to the court in order to maximize the likelihood of the FCC issuing its decision near an election. In such a story, politically motivated litigants might try to time cases with particularly strong legal arguments to come out near the election in order to embarrass or otherwise electorally harm the government. A critical implication of this account is that litigants, not the court, are acting strategically, which suggests that failing to account for this possibility could lead to an incorrect interpretation of the empirical analysis.

Second, I control for procedural aspects and the issue area of each case that might both influence case disposition and timing. The variable *Second Senate* is included in order to ensure that characteristics unique to one of the Senates is not driving the results. The variable *Hearing* addresses the possibility that the focus of the court is on the strategic use of hearings discussed in the previous chapter and, as a result, any relationship between timing and case disposition is an artifact of the court's use of this procedure. I include the variable *Case Complexity*, as litigants may strategically select cases that will be readily understood by voters during an election campaign and time their applications to increase the likelihood of the FCC issuing its decision in the lead up to an election.

Results

Table 5.5 presents the results of the logistic regression designed to test my three hypotheses. The results are consistent with the expectations of each hypothesis. The FCC is more likely to strike down a statute as unconstitutional in decisions issued within the six month period immediately preceding a national election. This relationship, however, is only statistically significant for cases involving potential noncompliance that the FCC decided in an electoral cycle that did not end with an early election. When the government did not file a brief defending the constitutionality of the challenged statute, the timing of the FCC's decision does not have a statistically significant relationship with case disposition. Similarly, this relationship is not statistically significant for cases decided during electoral terms that are shortened by early elections.

Since the coefficients of the logistic regression do not lend themselves to straightforward interpretation, I turn to the predicted probabilities presented in Figure 5.6 for a substantive interpretation of the empirical results. The left panel of the figure provides the predicted probability of the FCC striking down legislation as unconstitutional when the court issues its decision in regular electoral cycles. In these instances, the figure then distinguishes between cases involving potential noncompliance and the timing of the

Table 5.5: Case Disposition and the Timing of FCC Decisions

	Model 1
Near Election Decision	1.08*
	(0.53)
No Government Brief	−0.22
	(0.30)
Early Election	−0.14
	(0.27)
Lower Court Unconstitutionality Brief	0.13
	(0.20)
Amicus Brief Balance	−0.17*
	(0.05)
Hearing	0.90*
	(0.24)
Second Senate	−0.28
	(0.20)
Case Complexity	−0.01
	(0.21)
Near Election Decision × No Gov't Brief	−2.13
	(1.24)
Near Election Decision × Early Election	−0.75
	(0.78)
No Gov't Brief × Early Election	0.01
	(0.56)
Near Election Decision × No Gov't Brief × Early Election	2.85
	(1.76)
Constant	−0.53*
	(0.22)
N	498

Standard errors in parentheses.
* indicates significance at $p < 0.05$

FCC's decision. The results are striking: when the government files a brief defending the constitutionality of the challenged statute, the probability of the FCC striking down legislation is 64% for cases decided in the six months immediately preceding the next election. In contrast, the probability of such a ruling when faced with the risk of noncompliance decreases to 36% when the FCC decides cases at any other point in the electoral cycle.[13]

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[13]The difference between these two predicted probabilities is statistically significant at $p < 0.1$ level.

Figure 5.6: Analysis of Timing of FCC Decisions
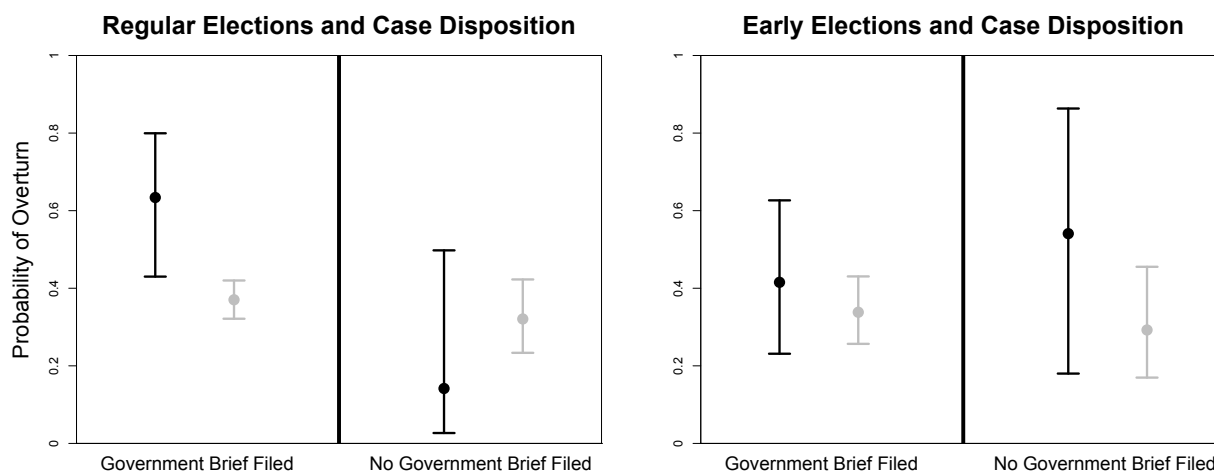
Note: Black points indicate predicted probability of the FCC striking down legislation as unconstitutional when the case is decided in the six months prior to the next national election. Gray points indicate the probability of such a ruling for cases decided more than six months prior to the next national election. Lines indicate 90% confidence intervals.

The results in the right panel of the figure, which provides predicted probabilities of case disposition for cases decided during electoral cycles ended with an early election, are noteworthy as well. In these cases, the relationship between the timing of the FCC's decision and case disposition fails to reach statistical significance. Moreover, this is the case irrespective of the government's decision to file a brief defending the constitutionality of the challenged statute. In short, the linkage between the FCC's strategic timing of decisions and the political conditions of constitutional review cases is considerably hampered by the use of early elections.

Extending the Analysis: Convenient Timing or Strategic Delay?

While the above analysis provides empirical evidence for a strategic component to the timing of FCC decisions, it leaves one central question unanswered: is the timing of FCC decisions the result of strategic action by the court in choice of timing, or is it instead the result of exogenous forces that the FCC reacts to by being strategic in its choice of disposition. Put another way, there are two potential mechanisms for how a court

such as the FCC can take strategic advantage of timing its decisions. Discerning which mechanism is at work here will provide a fuller picture of strategic judicial behavior and the extent to which the timing of decisions serves as an institutional tool for courts to overcome potential noncompliance.

First, a court could proactively time its decisions by selectively delaying or expediting its decisions based on when doing so is most advantageous. In this account, the court prefers to strike down the challenged legislation and seeks to find the most opportune time to do so. Specifically, the court receives challenges of statutes it wishes to strike down and so, in order to maximize the likelihood of compliance, it can withhold those decisions until an impending election creates greater public and media attention to political events like constitutional review. This "proactive" account of judicial behavior focuses on how courts can use the complicated and time-intensive nature of decision making as an institutional tool for addressing potential noncompliance.

A second account is that a court changes the content rather than the timing of its rulings. By this account, the strategic component of the relationship between timing and decision making is the latter. This would be the case, for example, when a court has minimal discretion over the timing of its decisions. In such an instance, the court is not strategic about when it issues its decision, but instead strategically adjusts the decision to meet the political conditions. This "reactive" court account depicts judiciaries as constrained by their environment and by their inability or unwillingness to change that environment through the timing of their decisions.

Distinguishing between these two accounts empirically requires moving beyond the preceding analysis, since an implication of both accounts is that a court should be more likely to strike down legislation near an election. To do so, I focus on the implications of the two accounts for observable aspects of decisions. In particular, the empirical implications of the "proactive" and "reactive" mechanisms for judicial behavior diverge depending on the length of time between when a court receives a case and when it issues a decision as well as the characteristics of cases decided in the period preceding a national election.

Only the first account, that is the "proactive" court mechanism, generates predictions about the strategic use of delay by courts faced with potential noncompliance. In this account, courts respond to the risk of noncompliance by selecting when they will issue their decisions. If this is the case, then the political conditions of a case should correspond to the amount of time a court takes to issue its decision. Moreover, the time taken to make a decision should further relate to the conditions facing the court when it receives the case. That is, this account directs our attention to examine the influence of two factors: the timing of litigation, specifically as it pertains to the likelihood of public attention to the case, and the potential for noncompliance attached to that case.

When the court receives a case in the electoral cycle directly influences whether and for how long the court has an incentive to delay its decision. As Figure 5.7 shows, the FCC receives cases throughout the electoral cycle. Cases the court receives early in an electoral cycle are less likely to require significant delay because the court can reasonably expect to issue its decision before the next election. This may not, however, be true for cases received later in the electoral cycle. The FCC is rarely able to reach its decisions in a short period of time, making it more difficult to time decisions in the "sweetspot" prior to an election when the court receives the case later in the electoral cycle. Moreover, a court can justify delaying its decision relatively easily by citing the complex and demanding nature of judicial decision making. By delaying these decisions, the court can effectively wait out the current electoral cycle by delaying and then issue its decision at a more opportune time in the next electoral cycle. Empirically, then, the FCC should take longer to make decisions in cases received later in an electoral cycle. Moreover, this relationship should be limited to cases where noncompliance is at issue; when this is not the case, there is no incentive for the court to strategically delay its decision in response to the political environment. My fourth hypothesis follows from this discussion.

> **Time to Decision Hypothesis (H4):** *The closer to an election the FCC receives a case, the longer the FCC takes to issue its decision in that case. This relationship only holds in cases for which noncompliance is at issue.*

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Figure 5.7: Time Between Application to FCC and Last National Election
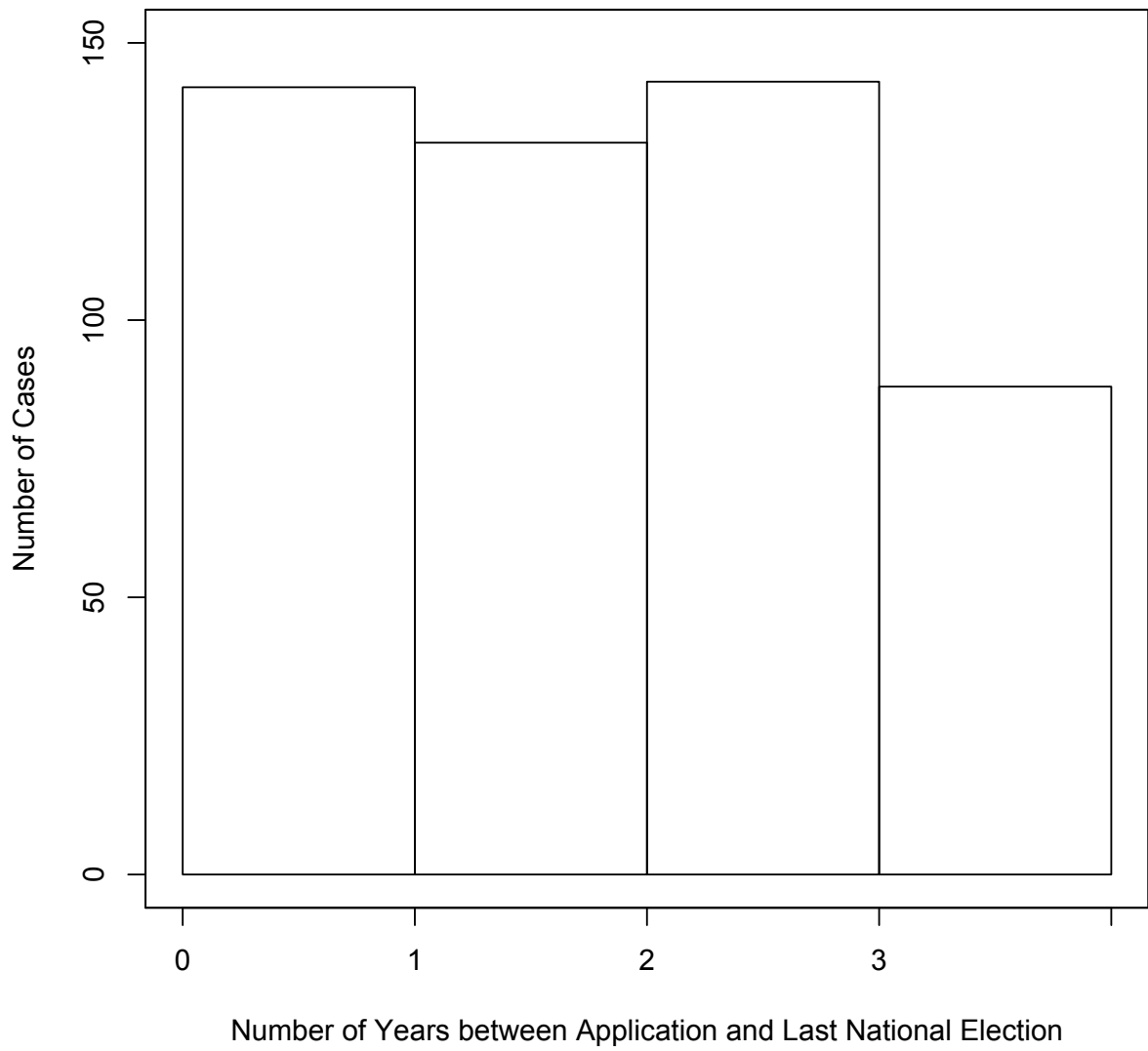
A second implication of the strategic timing account regards the relationship between the delay of decisions and the specific timing of those decisions. If it is the case that a court such as the FCC is delaying some decisions to maximize the likelihood of public attention, then we should observe a relationship between delayed decisions and the electoral cycle and, critically, the threat of noncompliance. This logic corresponds directly to the second empirical implication of the theoretical model presented in Chapter 2, in that we should observe a strategic court using its institutional tools, in this case the timing of decisions, when doing so is most beneficial. As such, I expect the delay of decisions to correlate with the timing of those decisions under two conditions. First, I expect such a relationship when the FCC strikes down legislation as unconstitutional. When the court upholds, noncompliance is not at issue and, as a result, there is no incentive for strategic timing. Second, I expect this relationship when the government defends the constitutionality of the challenged statute. Similar to the court's disposition, when the government does not defend the statute, noncompliance is not at issue and we should not observe the timing of decisions vary systematically with the length of time the court takes to issue its decision. When, however, these two conditions hold and the court strikes down the challenged legislation against the explicit preferences of the government, I expect longer delays in the issuance of the court's decision to correlate positively with the likelihood that the decision is issued in the period immediately preceding an election. I present this expectation below as my fifth hypothesis.

Strategic Delay Hypothesis (H5): *The longer the FCC takes to issue a decision, the more likely it is to issue that decision in the period immediately preceding an election. This relationship only holds in cases for which noncompliance is at issue.*

Note that these implications contrast directly with that of the "reactive" court account, according to which courts respond rather than affect the timing of cases. In this account, courts change their decisions based on the timing of a decision rather than, as predicted

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in hypotheses 4 and 5, changing the timing of the decision to fit the court's preferences. If this alternative "reactive" account is correct, then we should not observe evidence of the court delaying its decisions or, more generally, a correspondence between political nature of a case and the length of time the court takes to dispose of a case. In the context of the hypotheses presented here, such an account would predict a null result, making the tests below provide a way to empirically adjudicate between this account and the "proactive" court account. To test the fourth and fifth hypotheses, I again use data on all FCC cases involving federal law in my dataset.

Testing the Time to Decision Hypothesis (H4)

The key outcome variable for the fourth hypothesis is the number of years between when the FCC received a case and when the FCC issued its decision. Since FCC decisions do not list the specific date a case was filed, I rely on the year indicator included in every case number, which provides the year in which the FCC received each case. This variable, *Decision Years*, is the number of years between this application year and the year in which the FCC issues its decision.[14] Since this variable is a count measure, I estimate a negative binomial regression.[15]

There are two primary explanatory variables for the fourth hypothesis. The first is

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[14]Cases decided in the same year they are received by the FCC take a value of 0, cases decided in the year following the application to the court take a value of 1, and so on.

[15]An alternative specification is to use a survival model since the outcome is effectively the likelihood of a case "surviving", that is not being decided by the FCC, in a given year as explained by the timing of the case's application. I include in the appendix an estimation of the model using a Cox Proportional Hazard model, as another common approach in political science (Box-Steffensmeier and Jones 1997; Box-Steffensmeier and Zorn 2001). The results of this Cox Proportional Hazard model are statistically and substantively similar to those of the negative binomial model used here. The results of this robustness check are provided in the appendix. I use the negative binomial here for its more straightforward interpretation and presentation of predicted probabilities and interaction effects.

Table 5.6: Time to Decision Hypothesis Preliminary Analysis

First Variable	Second Variable	Government Brief?	Correlation	p-value
Election to Filing Time	Decision Years	Yes	0.10	0.04
Election to Filing Time	Decision Years	No	0.06	0.52

when a case reaches the FCC with respect to the national electoral calendar. This variable, *Election to Filing Time*, is the number of years between the case's arrival at the FCC and the preceding national election. Note that, as with the variable *Decision Years*, the year of a case's arrival at the FCC is determined by the case number, which does not provide a specific date. Thus, a case that arrived at the FCC in an election year is coded 0. The second explanatory variable is *No Government Brief*, as the hypothesis predicts the relationship between *Election to Filing Time* and *Decision Years* to be conditioned by the threat of noncompliance.

A simple correlation test, presented in Table 5.6, supports the hypothesis's expectation. A positive relationship exists between the two variables, suggesting that the nearer to an election the FCC receives a case, the longer the court takes to issue its decision. Critically, this relationship only is found in cases including a brief from the government defending the constitutionality of the challenged statute. To test the robustness of this preliminary result, I extend the analysis. Because of this conditional relationship, I interact *Election to Filing Time* with *No Government Brief*, with the expectation that the coefficient for *Election to Filing Time* will be positive. I further include a series of control variables to address potential omitted variable bias. The variable *Case Complexity* addresses the possibility that it takes the FCC longer to decide more complex cases. Moreover, it may take litigants more time after an election to bring forward a case involving complex statutes, either because it took the government longer to pass the statute in question or because the complex nature of the legislation limited the number of litigants

capable of bringing a plausible suit to the court. The variable *Lower Court Unconstitu-tionality Brief* controls for the legal merits of each case, as the quality of legal arguments could influence the time needed to decide a case as well as the timing of litigation. Failing to include these characteristics of each case could lead to biased results and ultimately hamper the ability of the empirical models to distinguish between the two competing accounts of judicial behavior.

In addition to these case-focused controls, I include a control variable to address the possible impact of election results on the relationship between *Decision Years* and *Election to Filing Time.* If an election results in a change in the partisan control of government, litigants may have an incentive to challenge the previous government's policies shortly after the election. Without the enacting government in power to defend against these challenges, the threat of noncompliance may be less immediate. As a result, the FCC can strike down legislation challenged in such suits more quickly. To account for this potential dynamic, I include the variable *Government Change.* This variable takes a value of 1 if the election immediately preceding an application to the FCC results in a partisan change of government and 0 if the incumbent party retains control of government.

The results of this analysis are presented in Table 5.7. The coefficient of interest here, *Election to Filing Time,* is positive and statistically significant. This indicates that when the federal government files a brief defending the constitutionality of a challenged statute, the FCC takes longer to decide the case the later in the electoral cycle the court receives it. That is, the more time that passes between a case's arrival at the FCC and the preceding national election, the longer the FCC takes to issue its decision in the case. This relationship, however, only holds in cases where noncompliance is at issue. When the government does not file a brief in defense of the law under review, the number of years taken by the FCC to decide a case is unrelated to when the FCC received the case. Importantly, this conditional relationship holds after the inclusion of key control variables such as the legal merits of each case and the results of the previous election.

Table 5.7: Time To Decision Hypothesis Analysis

	Model 1
Election to Filing Time	0.06*
	(0.03)
No Government Brief	−0.17
	(0.13)
Case Complexity	−0.39*
	(0.07)
Constitutional Complaint	0.34*
	(0.09)
Lower Court Unconstitutionality Brief	0.20*
	(0.09)
Government Change	−0.18*
	(0.06)
Election to Filing Time × No Government Brief	−0.10
	(0.07)
Constant	1.16*
	(0.10)
N	497

Standard errors in parentheses
* indicates significance at $p < 0.05$

Figure 5.8 provides a graphical representation of these relationships for a substantive interpretation of the results. The most interesting result is presented in the left panel of the figure. Cases filed in the same year as a national election take the FCC on average 3.24 years to decide when the government files a brief defending the constitutionality of the challenged statute. This contrasts to the 3.89 years the FCC takes to issue a decision in cases received the maximum number of years after the last national election (3 years). That is, the FCC takes 237 days longer to decide cases that reach the court at the end of the electoral cycle than those that reach the FCC in the same year as an election. Given that cases in the dataset took the FCC an average of 3.44 years to decide, this difference is far from trivial. Indeed, it can be the difference between issuing a decision in a media-rich electoral environment and issuing the same decision in the middle of the electoral cycle. In short, this evidence is consistent with the "proactive" account in that the FCC delays decisions to some degree based on timing.

Figure 5.8: Predicted Number of Years Between Application and FCC Decision
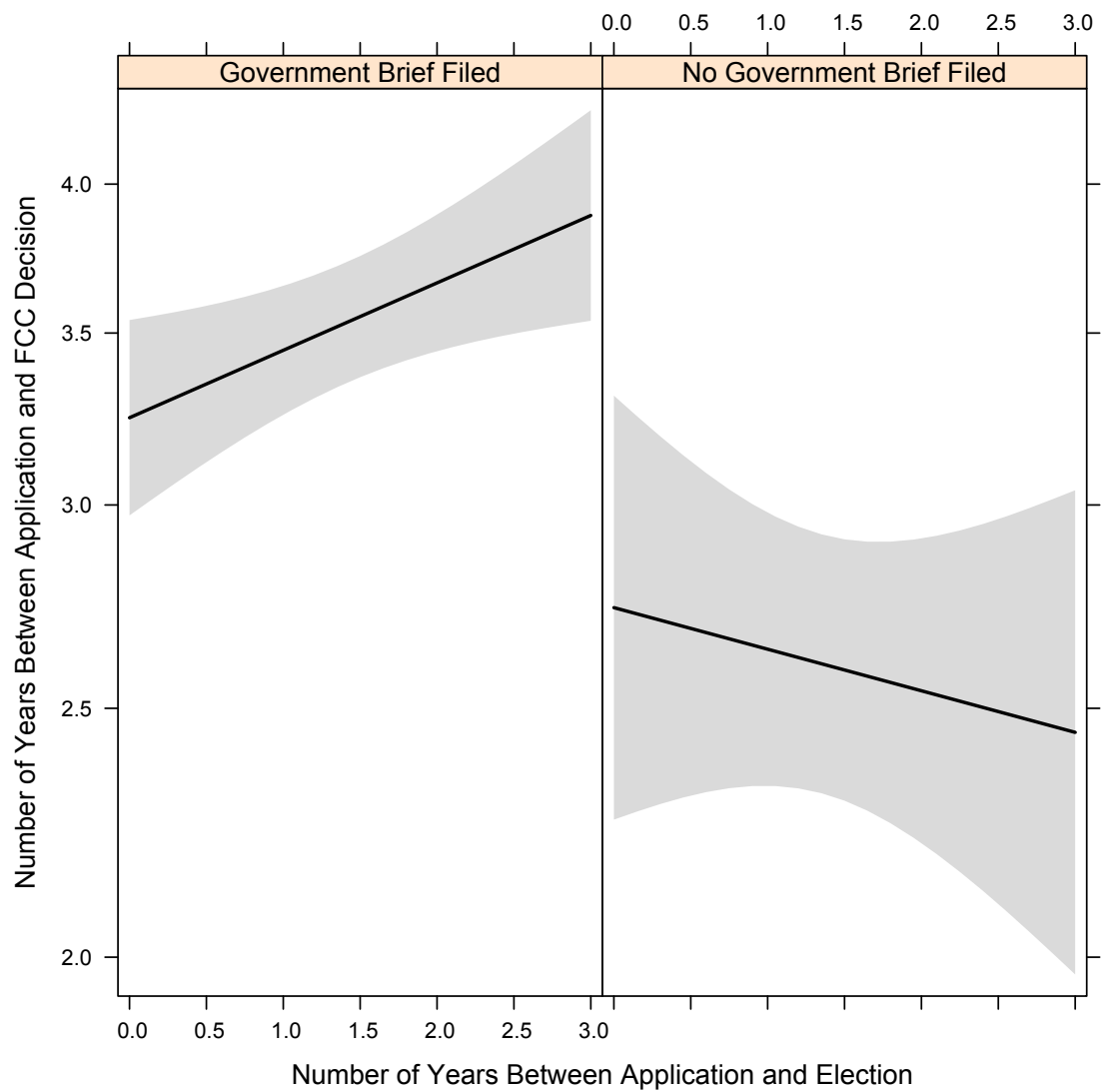
Note: Based on model 1 from Table 5.7. Shaded bands indicate 90% confidence intervals.

Testing the Strategic Delay Hypothesis (H5)

The outcome variable for my analysis of the fifth hypothesis is the dichotomous variable *Near Election Decision*. There are three key explanatory variables for this hypothesis. The first is *Decision Years*, as the hypothesis predicts the likelihood of the FCC issuing decisions in the period immediately preceding the next election to be higher for cases that took the court longer to decide. The second and third variables of interest address the conditional nature of this relationship. I include *No Government Brief* because the relationship between *Decision Years* and *Near Election Decision* should be limited to cases involving potential noncompliance. The final explanatory variable is *Strike*. Strategically timing its decisions only benefits if the court strikes down the challenged statute. As these last two variables are conditioning variables, I interact them with *Decision Years* to create a triple interaction term. Since the hypothesis predicts the relationship between *Decision Years* and *Near Election Decision* to occur when *No Government Brief* equals 0 and *Strike* equals 1, the coefficient estimate that represents this conditional relationship is the interaction term *Decision Years* × *Strike*. I expect this coefficient to be positive and statistically significant.

The results, presented in Table 5.8, support the expectation of the Strategic Delay Hypothesis (H5). Specifically, the likelihood of the FCC issuing a decision in the period immediately preceding an election increases with the length of the court's delay in issuing the decision. That is, the longer it takes the FCC to issue its decision, the more likely it is that the FCC issues that decision within six months of the next national election. This relationship only reaches a traditional level of statistical reliability, however, when the government files a brief defending the constitutionality of the challenged statute and the FCC decides to strike the statute down as unconstitutional. When this conflict is not present, there is no statistical evidence of the FCC strategically delaying decisions in order to issue them at a more advantageous point. This result is further evidence of the strong conditioning influence of potential noncompliance on judicial behavior.

Table 5.8: Results of Logistic Regression for Strategic Delay Hypothesis (H5)

	Model 1
Decision Years	−0.12
	(0.12)
No Government Brief	−0.13
	(0.72)
Strike	−0.86
	(0.76)
Decision Years × No Government Brief	0.19
	(0.21)
Decision Years × Strike	0.35*
	(0.17)
No Government Brief × Strike	0.39
	(1.41)
Decision Years × No Government Brief × Strike	−0.31
	(0.32)
Constant	−2.23*
	(0.46)
N	505

Standard errors in parentheses
* indicates significance at $p < 0.05$

Figure 5.9 provides predicted probabilities of the FCC issuing a decision in the six month period immediately preceding the next election based on the three explanatory variables. Each panel in the figure corresponds to a specific combination of the two conditioning variables *Strike* and *No Government Brief*, while the variable on the x-axis is *Decision Years*. The upper left panel presents the result of particular interest here, as it provides the predicted probability of a near-election decision striking down a statute despite a brief from the government defending the law. The results are striking. The probability of the FCC issuing its decision in the period immediately preceding the next election is 4% in cases decided in less than one year. This probability doubles to 8% for cases decided in three years, which is the median number of years the FCC took to decide cases in the data set. At five years, which is third quartile in the data set, the probability of the FCC issuing its decision in the period immediately preceding an election increases to 12%. The decisions involving the longest delays by the FCC reveal a considerably

greater probability of the FCC strategically timing their issuance; when the FCC takes 8 years to issue a decision, it does so in that pre-election period with 23% probability, while this probability increases to 42% for cases taking the FCC 12 years to decide. In short, it appears that when the FCC delays issuing decisions, it does so at least in part to allow itself an opportunity to time the issuance of the decision for the end of the electoral cycle.

Figure 5.9: Predicted Probabilities for Strategic Delay Hypothesis (H5)
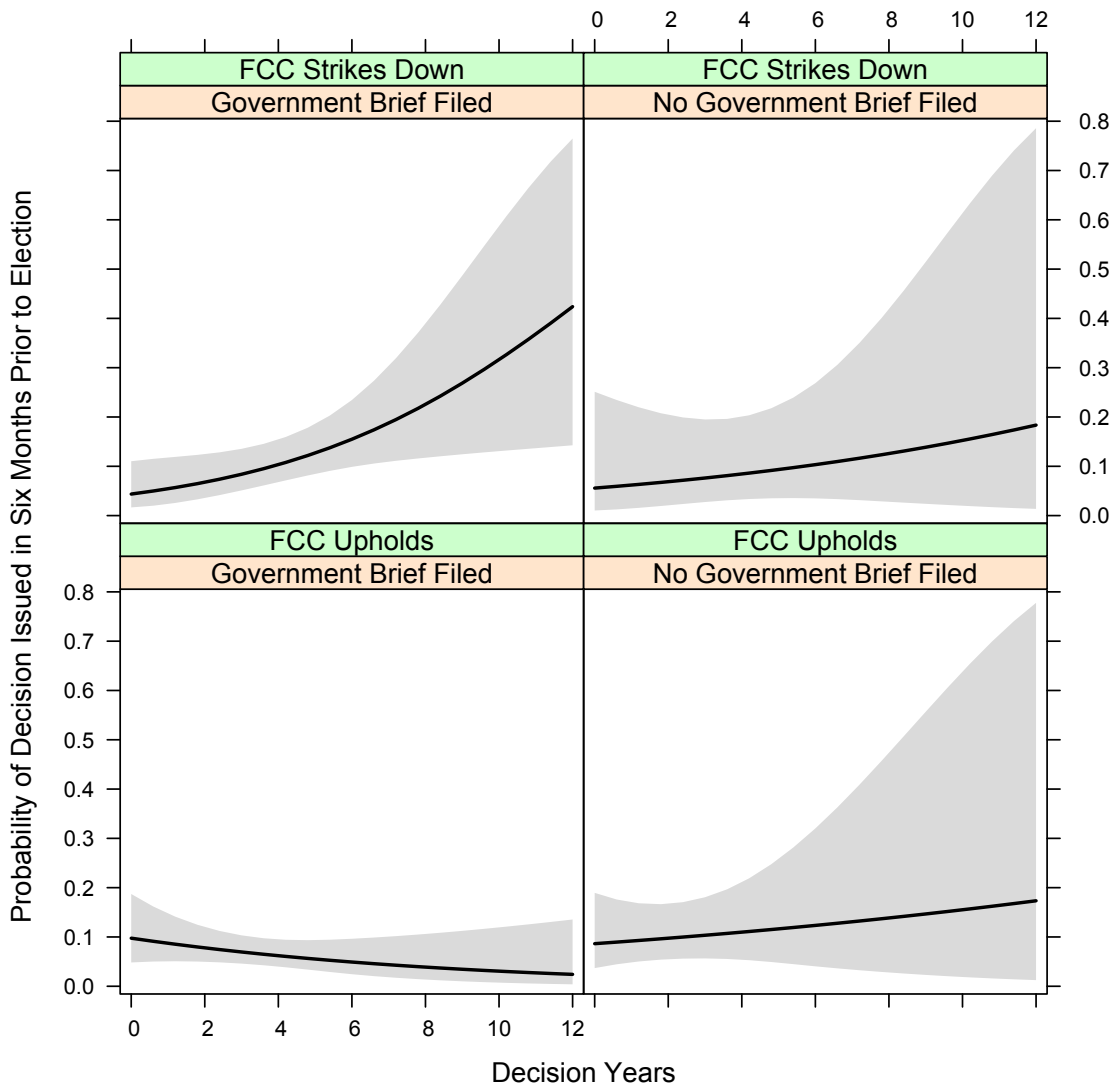
Note: Based on model 1 from Table 5.8. Shaded bands indicate 90% confidence intervals.

Conclusion

This chapter provides an empirical extension of the theoretical argument presented in Chapter 2 by considering how the ability of a court to select the timing of its decision can serve as an institutional tool for affecting public awareness of judicial decisions. Timing matters in politics, in particular with respect to the ability of citizens to observe the behavior of their elected officials. I argue that courts can strategically time their decisions to coincide with period of heightened public interest in politics, specifically the months leading up to a national election. Building on the insights of the formal model in Chapter 2, I develop a series of discriminating hypotheses regarding the relationship between case disposition, the threat of noncompliance, and the dynamics of electoral politics in many of the world's modern liberal democracies.

I return to the context of the German Constitutional Court to test these hypotheses. As shown in Figures 5.3 and 5.4, the timing of the court's decisions varies considerably. Using data on the German Constitutional Court to test the empirical implications of this argument, I find several systematic trends in the timing of the court's decisions. When the court is faced with potential noncompliance and electoral politics do not prevent the court from anticipating the timing of the next election, the FCC is more likely to issue rulings against the government in the period immediately preceding an election. When either of these conditions do not hold, however, this relationship does not hold. Further analysis of the court's decision provides evidence that the court is strategic in its choice of timing rather than choice of disposition. That is, my results suggest that the court selectively delays issuing rulings until the period immediately preceding an election instead of selectively changing its disposition of a case in response to the timing of the decision.

These results help to paint a fuller picture of the strategic interactions that occur between courts and elected officials. It highlights the potential variation in procedural discretion available to courts and, moreover, the strategic potential of such features of the

judicial process. In the next and final chapter, I consider how the results shown in this chapter might interact with those of the preceding chapter. By taking a step back, I can evaluate the broader implications of the empirical results in their entirety for the quality of democratic governance.

Chapter 6

Conclusion

In this project, I proposed and tested a theory of strategic judicial procedures focused on understanding how key aspects of the judicial process, specifically public oral hearings and the timing of judicial rulings, influence judicial authority and ultimately the quality of democratic governance in modern liberal democracies. To conclude, I consider how my theoretical and empirical results fit into the broader context of judicial politics and the study of courts. To this end, the chapter proceeds as follows. In the first section, I summarize my argument and findings. In the second section, I consider the implications of my argument for understanding cases at the German Court by examining a recent FCC ruling as an illustrative example. The third section describes the implications of the results presented here for several streams of scholarship. Then, in the fourth section, I examine potential avenues for future research. Finally, I conclude by returning to the motivating question of the role of judicial procedures in modern liberal democracies.

Summary of Argument and Findings

My theory of strategic judicial procedures is predicated on the first principle that courts cannot be assured of government compliance with judicial decisions. With neither the power of the purse nor the sword, courts must instead rely on elected officials for the implementation of decisions. Critically, this reliance poses a threat to judicial authority when those officials tasked with implementing the decision prefer not to do so. To over-

come this challenge, courts may be able to rely on public support for the legitimacy of the judiciary to compel government compliance (Vanberg 2001, 2005). If voters view judicial decisions as a legitimate and necessary component of democratic governance, then they may punish elected officials for failing to implement a ruling. The focal point of the theory and this project is how courts can use their control over the judicial process to ensure citizens are aware of judicial decisions such that governments are incentivized to faithfully carry out judicial orders.

To answer this question, I focused my theoretical account on one of the most prominent judicial procedures, public oral hearings. By providing for media access to an otherwise typically closed judicial process, public oral hearings have the capacity to increase public attention to constitutional review cases. In addition, the relative rarity of hearings in many constitutional courts contributes to the increased media attention hearings garner. Hearings are typically not required in most cases. Rather, constitutional courts in modern liberal democracies typically have considerable discretion over the use of hearings. This discretion allows such a court to decide whether or not to hold a hearing before issuing its ruling on the constitutionality of a challenged statute. I contend that these two decisions in the judicial process are linked by a court's interest in overcoming potential threats of noncompliance. That is, I argue that courts can use hearings to strategically increase public awareness of cases to create electoral pressure that incentivizes elected officials to comply.

To develop my argument, I constructed a formal model of an interaction between a court with discretion over the use of a public oral hearing and a government with policy interests opposed to those of the court. The model allows the court to chose between issuing its decision with or without a public hearing. When the court opts to incur the cost of holding a hearing, the procedure increases the likelihood that the public will be aware of the court's final decision. The government, having observed the court's actions, then determines whether to comply with the court's decision or, instead, engage in noncompliance.

The model generates a series of empirically testable predictions providing insight into both a court's use of hearings and the procedure's impact on case disposition. The model predicted the court to be more likely to hold a hearing for cases that involve a potential noncompliance risk. This observation stated that when the government is likely to comply with the court's decision regardless of a hearing, then the court does not need the procedure. Only when faced with potential noncompliance does the court have reason to use its procedural discretion. The model then highlighted the conditions constraining a court's use of hearings when faced with potential government noncompliance. A court is most likely to use a hearing in a case when the proceeding is most likely to generate public awareness. The model further identified a linkage between the use of hearings and case disposition. In the theory, courts use hearings to address noncompliance and therefore should follow up a hearing by striking down the challenged legislation as unconstitutional.

To test these predictions, I collected and coded data on cases at the German Constitutional Court (FCC) from 1995 to 2013 and then added Vanberg's data on cases from 1983 to 1995 to the dataset. The first hypothesis, the Noncompliance Risk hypothesis, followed from the first observation of the theoretical model. Consistent with theoretical expectations, the FCC is more likely to hold a hearing when noncompliance is at issue, which I measure by examining whether the government filed an amicus brief defending the constitutionality of the statute. I then tested the Case Complexity and Proceeding Type hypotheses, which followed from the observation that hearings are more likely to be effective at increasing public awareness in some cases than others. As anticipated, the FCC was more likely to hold a hearing in noncomplex and constitutional complaint cases, as these characteristics lend themselves to increased media coverage and make a case more easily relatable to the public. Finally, consistent with the Case Disposition hypothesis based on the final observation from the model, the court was more likely to strike down a statute after holding a hearing. Critically, this relationship only held when noncompliance was at issue; otherwise the data yielded no statistically significant relationship between hearings and case disposition.

To examine the generalizability of the theory to aspects of the judicial process beyond hearings, I extended the empirical analysis to the timing of judicial decisions. Again using data on German Constitutional Court decisions from 1983 to 2013, I test a series of hypotheses regarding the strategic timing of judicial decisions. The primary hypothesis, the Timing hypothesis, predicts the court to rule against the government with a higher frequency in the months immediately preceding a national election due to the increased media coverage of political news that occurs in the build up to an election. Two further hypotheses, the Noncompliance Risk Condition and Early Election hypotheses, predict the relationship between timing and case disposition to be limited to cases for which noncompliance is at issue and for cases decided near the conclusion of a standard electoral term. The results of this analysis produced evidence of strategic timing on the part of the German Court. Decisions issued within the six-month period were more likely to strike down legislation, but only when a threat of government noncompliance existed and the upcoming election was not an early election.

Together, the theoretical and empirical results provide strong, nuanced support for a strategic account of judicial procedures. Notably, the empirical support for the model's predictions hold up to the inclusion of alternative accounts in the analysis, such as informational and procedural legitimacy arguments. It suggests that a fuller understanding of judicial behavior, particularly in the politicized realm of constitutional review, requires considering the strategic potential of the judicial process itself and the strategies available for courts to use procedures to address potential noncompliance.

Understanding FCC Rulings: An Illustrative Example

In addition to providing evidence of the strategic potential of judicial procedures, my argument and accompanying empirical results have the potential to inform our understanding of individual cases adjudicated by the German court. Although the focus of the empirical aspects of the project has been on the use of large-N statistical analyses, the theory should nonetheless be a useful guide to interpreting the behavior of constitutional

courts in specific instances. An illustrative example of the theory's application to a recent major case demonstrates this contribution of the project. To this end, I return to the example discussed in the introduction of the project to consider how my argument might help inform our understanding of how the FCC handled the case.

In 2010, a chemistry professor at the Philipp University of Marburg in the state of Hesse brought suit against the state of Hesse regarding his salary.[1] In the early 2000's, state and federal legislators reformed the pay scale for university professors with the goal of introducing increased competition. Federal rules introduced in 2005 allowed for professors' salaries to be set low and then provide for performance-based bonuses. The professor challenged the constitutionality of state law specifying the pay of professors, claiming that his low salary was not commensurate with the degree of training and expertise necessary to obtain employment in his post. The administrative court adjudicating his claim referred the case to the constitutional court seeking clarification on the statute's conformity with the constitution.

Initial interest in the case was predominantly limited to higher education interest groups, who supported the litigant's claim, and the government of Hesse, which defended the constitutionality of the challenged statute. In addition, the Federal government took an interest in the case since it involved the state level implementation of its reform legislation passed in 2005. In addition to these directly involved parties, five interest groups filed amicus briefs with the court. Beyond the demonstrated interest of these parties, however, attention for the case was sparse. In fact, the case received no initial media attention based on the Lexis Nexis data on media coverage of cases used in Chapter 3.

On October 11, 2011, the court held a public oral hearing for the case. The plaintiff and the Hessian government presented their arguments, as did the Federal government. The court further heard expert testimony from a representative of the Federal Statistical Office (*Statistischen Bundesamt*) In addition, representatives from the several interest groups that had filed briefs participated in the hearing. Notably, the hearings garnered

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[1]The case number is 2 BvL 4/10.

coverage from some major German news outlets. This included the Süddeutsche Zeitung, Germany's highest circulating daily newspaper according to the German Advertising Federation.

In a decision issued on February 12, 2012, the court ruled 6 to 1 in favor of the plaintiff.[2] The court declared the law contradictory to the "maintenance principle", which is a constitutional mandate for the state to take care of civil servants' welfare. In the opinion, the justices stated that basic salaries are "not enough to ensure a professor an appropriate living in accordance with his rank, the responsibilities his office entails and the significance of civil service with tenure for the public at large." The ruling ordered the Hessian government to pass new legislation raising pay for university professors by no later than the end of that year (January 1, 2013).

The court's decision created a media frenzy. The major media outlets dedicated considerable coverage to the ruling. Der Spiegel, Germany's most widely circulated weekly news magazine, carried court articles on the case, including an English language article. The most widely circulated weekly newspaper, Die Zeit, similarly included coverage of the decision. In addition to the widespread reporting of the decision, the editorial pages of German newspapers were filled with commentary on the case. Editorials appeared in, among others, the Frankfurter Allgemeine Zeitung, Die Zeit, the Süddeutsche Zeitung, Handelsblatt, the Financial Times Deutschland, and Die Tageszeitung. Beyond the traditional news media, higher education interest groups and unions issued press releases and statements on the decision.

The government responded to the court's decision by passing revised legislation as ordered. As the court's ruling gave the government until January 1, 2013 to comply, the change was not made immediately. Nonetheless, on October 1, 2012, a revised pay scale took effect. With the passage of the new law, the state government had complied with the FCC's ruling.

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[2]A rarity in FCC decisions, one justice wrote a dissent in the case. Decisions are typically issued unanimously.

This case is an excellent example of a constitutional court successfully constraining a government against its will. The argument in this study highlights how the German court was able to use procedures as tools for accomplishing this end. At the outset, it was not clear whether or not public awareness would be sufficient to compel the Hessian government to comply if the court struck the law down. Although there was attention from interest groups, the media appeared largely uninterested. Moreover, the federal government had sided with the state government, meaning that the court could not rely on the national government to pressure Hesse to comply. This case posed what might be considered a moderate threat of noncompliance - the government in the case had a vested interest in the continued implementation of the challenged statute and the likelihood of public awareness in the case was small but not trivial.

The court's use of a public oral hearing changed things dramatically. In the context of my theory, it made sense for the court to hold a hearing in this case. The issue at stake, low pay for university professors, was relatively straightforward and could be effectively covered by the media and easily understood by the public. Moreover, the potential for noncompliance, while present, was not so overwhelming as to make a hearing a waste of the court's resources. If confronted with an alert electorate, the government was unlikely to make a defiant stand on the issue. In short, the case was ideally suited for the use a procedure that could raise its public profile. The hearing did just that, leaving the government in the position of accepting the court's decision and passing new legislation.

The timing of the court's decision similarly conforms with my theory's expectations. The FCC received the case in 2010, only one year after a state election had been held. With elections typically held in the January or February of every fourth year, one could have reasonable anticipated the next election to take place in the early months of 2013. While the court's decision was issued in February 2012, recall that it specified that the government had until January 1, 2013 to comply. As a result, a failure to comply with

the court's decision by this date would likely coincide with the next electoral campaign.[3] While it is difficult to discern with any precision the link between the timing of the court's decision and the electoral calendar in this singular instance, the argument and empirical evidence in Chapter 5 suggest a nuanced account for the court's choice of timing.

Implications for Extant Research

This project has implications for the study of the German Federal Constitutional Court. The conventional wisdom has been that a case's saliency is the primary determinant for whether or not the court holds a hearing (Vanberg 2001: 355, 2005: 103; Kommers and Miller 2012: 27). While my analysis shows empirical support for the previously untested claim of salience's effect, it also provides compelling evidence for the project's novel claim that the threat of noncompliance motivates the FCC's use of hearings. Moreover, the results reveal the substantively significant influence of noncompliance, most notably in comparison to the influence of salience. Together with Vanberg's empirical evidence, these results provide further evidence of how noncompliance influences the FCC's behavior.

The results of this study are also interesting when considered in light of recent evidence of the ideological basis of decision making by European constitutional courts (e.g. Hanretty 2012; Hönnige 2011). This line of research has demonstrated that courts strike government actions more often when the court consists of judges with conflicting ideological preferences to that of the government (Hönnige 2009). Such ideological considerations cannot account for the results presented here. By typical measures of ideology, the FCC had no variation in ideological divergence from the government during the period of this study (Hönnige 2009). As a result, the patterns of FCC decision making, and their sys-

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[3]Only several months after the court's decision did the state government institute a complete shift in the state's electoral calendar by synchronizing the date of state elections with the federal elections in September 2013. Although a rather extreme measure, the possibility of such drastic changes to the electoral calendar pose a challenge the strategic timing of decisions similar to that posed by early elections.

tematic connection to procedural choice, complement these past studies and provide a richer depiction of adjudication in these courts. This study also suggests that previous evidence of ideological voting on constitutional courts likely understates the actual prevalence of ideological considerations in judges' sincere preferences over rulings. Based on the model and findings presented here, noncompliance concerns should cause judges, at least some of the time, to vote strategically and uphold government actions that they ideologically oppose. This finding directs the attention of future research on Europe's constitutional courts toward incorporating the procedures and processes that shape the judicial process, such as the constitutional complaint, into theories of judicial behavior and empirical studies of ideological voting on constitutional courts.

The study additionally offers insights into the role and influence of public oral hearings on judicial review. The most developed empirical literature addresses the U.S. Supreme Court's oral arguments and the impact of the content of hearings. In these works, hearings affect judicial review by serving as an information-gathering tool for judges (Johnson 2001) and an opportunity for the Federal government to convert the Solicitor General's superior resources and expertise into a higher likelihood of winning (Johnson, Wahlbeck and Spriggs II 2006). While addressing important questions, this line of research is limited to considering behavior after the court has decided to hold oral arguments. In contrast, this article poses the question of why courts opt to hold hearings when they do. A more complete appreciation of hearings might consider how the answers to these two distinct questions complement or contradict each other.

The results further highlight the influence of institutional rules on the quality of liberal democratic governance. Liberal democratic governance requires elected officials to adhere to constitutional obligations and constitutional courts to hold officials accountable when they breach those obligations. To effectively do so, constitutional courts must be willing to rule against the wishes of the government and then maximize the chance such rulings will be accompanied by electoral or other pressures on the government to comply. The theoretical account presented here suggests that courts use procedures such as public oral

hearings to bring such pressures upon officials by increasing public attention to cases of unconstitutional behavior. The discretion available to courts allows them to use hearings when they are both most needed to confront threats of noncompliance and when they will be most effective at garnering public attention. Ultimately, as evidenced by the empirical results from the German Constitutional Court, hearings provide courts with a route through which they can more readily exercise their authority and hold government officials accountable for breaches of constitutional obligations.

Finally, my findings have implications for the study of compliance. Scholars of the politics of judicial review are increasingly considering how threats of noncompliance constrain constitutional courts (e.g. Vanberg 2001, 2005; Staton 2006, 2010; Carrubba and Zorn 2010; Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015). The work presented here provides further theoretical and empirical support for this literature's key conclusion that noncompliance shapes judicial behavior and substantiates the conclusion of previous studies (Staton 2006, 2010) that courts use the institutional tools at their disposal to address potential noncompliance. This contribution, however, goes beyond reinforcing existing conclusions in the literature. This project extends the literature's understanding of compliance's influence on judicial behavior in a novel manner by showing the influence of political conditions on judicial behavior *before* any ruling has been issued. In so doing, the argument and accompanying evidence shown in the preceding chapters promote a more complete and thorough account of courts' strategic responses to the fundamental challenge noncompliance poses for judicial authority. As I discuss in the next section, future work building on this project would further this progression towards a general understanding of noncompliance's impact on judicial politics.

Future Research

Future research might address a number of theoretical and empirical questions raised by the argument presented here. The theoretical model, although simple in its construction, yielded a number of empirical implications and insights into the relationship

between courts and elected governments. While I tested the implications most central to the question of judicial procedures' influence on judicial authority, there remain additional implications of the model yet to be empirically tested. The results of the model point to the constraining effect the cost of hearings has on the court's ability to use the procedure to overcome potential noncompliance. On the one hand, some cases, such as those addressing highly complex policies, may require a court to bring in experts and other qualified parties to provide testimony. For some courts, such costs may be negligible thanks to substantial budgets, docket control (thus limiting the number of potential hearings), or an ability to efficiently distribute cases within the court (thus spreading the opportunity cost among the judges). For others, however, hearings may constitute a drain on time and financial resources that makes the procedure's use considerably more onerous. On the other hand, other disputes may leave the court requiring little more information than the briefs submitted by interested parties and the litigants' statements. Further empirical analysis of the strategic potential of judicial procedures might look to examine if there is empirical support for the model's predictions linking variation in the cost of holding a public hearing to the procedure's use by constitutional courts.

The potential for such future work points to implications of the theory's generalizability. While the focus here has been on Germany and its Federal Constitutional Court, the argument applies to many constitutional courts from a variety of backgrounds. As we saw in Chapter 2, a wide range of courts enjoy discretion over the public oral hearings. And similarly many courts have discretion over when they dispose of a case. The theory proposed here has the potential to provide a new perspective and understanding of how these courts operate, much like this project did in the case of the German Constitutional Court. Moreover, variation across countries on key aspects of the model suggests a potential for cross-national analyses that can leverage additional insights from the model, such as the role of hearings' cost. This point regarding comparative analysis is particularly poignant, as it highlights how the model's results have implications for behavior *across* courts in addition to the implications tested here on the actions of a single court.

One of the lessons from the analysis of the timing of FCC decisions was the potential extent of strategic behavior beyond hearings. The project extends Staton's conclusions regarding media relations by demonstrating that the list of institutional tools includes key features of the judicial process. A key implication of this conclusion is that similar strategic judicial behavior may extend to a multitude of facets of the judicial process; courts have a list of potential tools that goes far beyond public oral hearings and press releases. For example, many courts, including the FCC, can reduce the ambiguity of rulings by specifying the date upon which the government must implement new legislation. The theoretical account presented here suggests that the relationship between public awareness and noncompliance may be one possible explanation for why and when courts use such features.[4] Insofar that such tools can be manipulated to effectively influence public awareness, this article directs the attention of future research to the influence of threats of noncompliance on the judicial process.

The implications of the project, and by extension the potential for future work, may not be limited to the context of domestic constitutional courts. International courts, much like their domestic counterparts, face a fundamental challenge of ensuring the faithful implementation of their decisions (Staton and Moore 2011; Carrubba and Gabel 2015). Indeed, much of the international law is often characterized as anarchic, i.e. a system lacking an enforcement mechanism (e.g. Waltz 1979). In short, the first principles that motivate my argument here are largely applicable to international courts that enforce international legal regimes, such as the European Court of Justice (ECJ). While the solutions to noncompliance threats available to international courts differ from those available to domestic courts, judicial procedures at international courts may nonetheless have strategic potential. Indeed, it is entirely possible that international courts use procedures to affect public attention much like evidence presented here shows domestic courts do. Understanding the role of procedures in international courts can provide some insights into the behavior of

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[4]The political potential of this feature in the German context has not been lost on scholars of the FCC (Kommers and Miller 2012, Vanberg 2005).

this growing set of courts and, additionally, yield theoretical and empirical leverage to the ongoing debate regarding the differences and similarities between international and domestic courts.

In addition to such empirical extensions, avenues for future research include extensions of the theoretical model. The empirical and theoretical analyses in this project focused on the strategic use of individual procedures. It is unlikely, however, that courts make procedural decisions without consideration for past and future procedural choices. Indeed, the model and analysis presented here demonstrate the interconnectedness between such choices (i.e. hearings and case disposition). Courts, then, may have a broader strategy with regard to procedures, one in which the variety of institutional tools available to courts serve as a form of menu from which the court can choose. This would suggest more extensively strategic judicial behavior that links procedural decisions throughout the process. For example, the use of hearings may be tied to the timing of when a case reaches a court. A more complete theory of the judicial process, one that accounts for the various steps involved and procedural options available to courts, would help to improve our overall understanding of judicial behavior in the broader sense and the influence of political threats like noncompliance in a more specific sense.

A second theoretical extension would be to relax the assumption that the court enjoys a high level of diffuse support. Recall that the court in the model is assumed to have a high level of public support that creates the electoral incentive for elected officials to comply with the court. But what of courts that do not enjoy such support? Courts like the Russian Constitutional Court (Trochev 2008) cannot rely on voters to punish elected officials when they observe noncompliance. In such cases, does a court use hearings, the timing of decisions, or similar procedural tools to affect public awareness? A useful extension of the argument here would be to examine the implications of increasing public awareness in those contexts where courts lack public support or are even actively disliked by the public.

Final Thoughts: Judicial Procedures and Democratic Governance

This project began by noting the increasingly central role of constitutional courts and judicial review in modern liberal democracies. Both established and new democracies are adopting some form of constitutional review as the institution becomes a hallmark of democratic governance. But the mere presence of a court does not ensure it can effectively exercise its authority and constrain the other branches of government. The central conclusion following from the analysis presented here is that procedures can help courts hold officials accountable for breaching their constitutional obligations. What, then, does this mean for the influence of institutional procedures on the quality of liberal democratic governance?

The argument and evidence suggest that the clear answer to this question is that procedures like public oral hearings can serve to improve the quality of governance. Modern liberal democracies rely broadly on the threat of electoral punishment to ensure elected officials act in accordance with both the policy objectives of voters and constitutional obligations. For voters to effectively hold politicians accountable in this manner, however, citizens must be aware of their elected officials' behavior. Procedures like hearings serve to establish and reinforce this critical link in the democratic process by improving the public's access to information about the actions of their elected representatives. An informed public can empower a court, which in turn can promote the rule of law and protect that public from illegal state actions.

The extent to which public oral hearings or the timing of judicial rulings can accomplish this, however, is limited in a critical way. As the model predicted and the empirical analysis demonstrated, judicial procedures are by no means a comprehensive solution to the noncompliance problem facing courts. Hearings, for example, are most effective when the media is likely to cover the proceeding and the public is likely to understand that coverage. But such cases are ex ante more likely to garner public attention even without

a hearing - the court's use of the procedure activates the public's awareness to a case. Where hearings lose their effectiveness is in the cases that are most likely to result in government noncompliance. Courts are weakest when the threat of electoral punishment for noncompliance lacks credibility because the public is highly unlikely to become aware of the government's actions. When the public's inattentiveness is entrenched, holding a hearing is unlikely to generate much public interest. This leaves the court unable to effectively exercise its authority and further still unable to rely on procedural tools to rectify the situation. When the court is at its weakest and most needs an effective tool for addressing potential noncompliance, these procedural options fall short.

This leaves something of a mixed message regarding the desirability of discretionary procedures. Policymakers see the structure of procedures as a critical component of designing and maintaining effective judiciaries. In a 2004 report on hearings at the Russian Constitutional Court, the Council of Europe's European Commission for Democracy through Law, known as the Venice Commission, endorsed revising the Russian Constitutional Court Act to allow the court broader discretion over the use of hearings. Citing the value of the procedure for ensuring judicial legitimacy and authority, the commission recommended granting the court more control over the judicial process. The argument and evidence here only offers tentative support for such a recommendation. Without the necessary public support, it is unclear the extent to which hearings can engender the sort of electoral threat that can help a judiciary effectively exercise constitutional review.

Despite their limitations, discretionary procedures may in some respects better serve the goal of promoting judicial authority than other options typically available to courts. Compare, for example, public oral hearings with the focus of Staton's work, press releases and other media relations. Both can serve the similar purpose of bringing judicial rulings into the public eye. But whereas media relations offices are not part of the judicial process itself, hearings are. This distinction is not trivial, as it may make a court's discretion over hearings more durable to potential political maneuvering. Court curbing, that is actions taken by politicians to limit the authority or capacity of the judiciary, can be a threat

to courts, including otherwise established judiciaries like the U.S. Supreme Court (Clark 2009, 2011). In such instances, politicians may find it difficult to justify hampering a court's ability to use normatively desirable procedures like public oral hearings. In contrast, cutting a court's budget to render a press office ineffective may be considerably more politically plausible. In this sense, providing a court with discretion over hearings may be a particularly durable method for enhancing judicial authority.

In sum, this study suggests that interactions between courts and governments involve complex dynamics than span throughout the judicial process. Judicial procedures like public oral hearings can serve as effective institutional tools for courts confronted with potential noncompliance, but only when they effectively communicate issues to the public and voters are dedicated to the institutional integrity of a court. Ultimately, though, the results presented here are positive for the efficacy of constitutional review. With judicial procedures in a court's toolbox, the least dangerous branch has at least a few more ways to assert its authority.

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Appendix: Formal Model Proof

Proofs for Model Equilibria.   The solution concept for the game is subgame perfect equilibrium (SPE) and I limit the analysis to pure strategies. I first prove the three thresholds used to structure the model's equilibria.

Consider the final stage of the game. At this node the government decides whether to evade ($E = 1$) or comply ($E = 0$) with the court's veto. Note that since I assume the government complies trivially any time the court upholds, I will not consider government strategies after the court issues a ruling upholding the challenged action. As the government observes the court's decision regarding a hearing for the case, there are two possible environments in which the government can find itself. First, consider when the court has chosen not to hold a hearing ($H = 0$). In this case, the government's utility functions are:

$$
\begin{aligned}
EU_G(E = 1 | H = 0, V = 1) &= \alpha(1 - \pi) - \beta(\pi) \\
EU_G(E = 0 | H = 0, V = 1) &= 0
\end{aligned}
$$

This yields the following threshold:

$$
\textit{Evade (E=1) iff: } \pi \; < \; \frac{\alpha}{\alpha + \beta}
$$

Now consider when the court has chosen to hold a hearing ($H = 1$). In this case, the government's utility functions are:

$$
\begin{aligned}
EU_G(E = 1 | H = 1, V = 1) &= \alpha(1 - \phi) - \beta(\phi) \\
EU_G(E = 0 | H = 1, V = 1) &= 0
\end{aligned}
$$

This yields the following threshold:

$$
\textit{Evade (E=1) iff: } \phi \; < \; \frac{\alpha}{\alpha + \beta}
$$

Definition 1.1: Define the "Government Compliance Threshold" as:
$$
T_G^{Comp} \equiv \frac{\alpha}{\alpha + \beta}
$$

Now consider the court's decision stage. At this point in the game, the court must decide to either uphold ($V = 0$) or veto ($V = 1$) the challenged government action. Since the court must base its decision off its previous move (whether or not to hold a hearing)

and in anticipation of the government's choice (whether or not to evade a veto), there are four possible cases.

Case 1: $H = 1$ and $\phi < T_G^{Comp}$

$$
\begin{aligned}
EU_C(V = 0 | H = 1; E = 1) &= -\kappa \\
EU_C(V = 1 | H = 1; E = 1) &= A(\phi) - I(1 - \phi) - \kappa
\end{aligned}
$$

This yields the following threshold:

$$
\textit{Veto (V=1) iff: } \phi > \frac{I}{A + I}
$$

Case 2: $H = 1$ and $\phi > T_G^{Comp}$

$$
\begin{aligned}
EU_C(V = 0 | H = 1; E = 0) &= -\kappa \\
EU_C(V = 1 | H = 1; E = 0) &= A - \kappa
\end{aligned}
$$

This yields the following threshold:

$$
\textit{Veto (V=1) iff: } A > 0
$$

Case 3: $H = 0$ and $\phi < T_G^{Comp}$

$$
\begin{aligned}
EU_C(V = 0 | H = 0; E = 1) &= 0 \\
EU_C(V = 1 | H = 0; E = 1) &= A(\pi) - I(1 - \pi) - \kappa
\end{aligned}
$$

This yields the following threshold:

$$
\textit{Veto (V=1) iff: } \pi > \frac{I}{A + I}
$$

Case 4: $H = 0$ and $\phi > T_G^{Comp}$

$$
\begin{aligned}
EU_C(V = 0 | H = 0; E = 0) &= 0 \\
EU_C(V = 1 | H = 0; E = 0) &= A
\end{aligned}
$$

This yields the following threshold:

$$Veto \ (V=1) \ iff: \ A \ > \ 0$$

Definition 1.2: Define the "Judicial Veto Threshold" as:
$$T_C^{Veto} \equiv \tfrac{I}{A+I}$$

Finally, consider the first move of the game, the court's decision regarding the holding of a public oral hearing. The threshold that must be met in order for the court to hold a hearing is the following:

Definition 1.3: Define the "Judicial Public Hearing Threshold" as:
$$T_C^{Hearing} \equiv \tfrac{K}{A+I}$$

When this condition is met, there are six unique pure strategy subgame perfect equilibria to the game. I will present each one in turn.

Confrontational Hearings. In this equilibrium, the court and government are at conflict regardless of the court's decision to hold a hearing. However, holding a hearing has the possibility to sufficiently improve the likelihood of public mobilization such that doing so offsets the accompanying cost.

Equilibrium A: Confrontational Hearing. For $\pi < \phi < T_G^{Comp}$, $\phi > \pi > T_C^{Veto}$, and $\phi - \pi > T_C^{Hearing}$ the following strategy profile constitutes a SPE:
  Government: $S_G = \{Evade, ..., Evade\}$
  Court: $S_C = \{Hearing, Veto\}$

Proof: If $\pi < \phi < \tfrac{\alpha}{\alpha+\beta}$ and $\phi > \pi > \tfrac{I}{A+I}$, then

$$
\begin{aligned}
EU_C(H=0) &= A(\pi) - (I)(1-\pi) \\
EU_C(H=1) &= A(\phi) - (I)(1-\phi) - \kappa
\end{aligned}
$$

Hold a hearing iff:

$$
\begin{aligned}
A(\phi) - (I)(1-\phi) - \kappa &> A(\pi) - (I)(1-\pi) \\
\phi(A+I) - \kappa &> \pi(A+I) \\
\phi - \pi &> \frac{K}{A+I}
\end{aligned}
$$

Mobilizing Hearing. In this equilibrium, the government's behavior is altered by the holding of a hearing. Specifically, the hearing effects the government's utility function such that the government complies with a judicial veto when it would not do so otherwise.

Equilibrium B: For $\phi > T_G^{Comp} > \pi$, $\phi > T_C^{Veto}$, and $1 - \pi > T_C^{Hearing}$, the following strategy profile constitutes a SPE:
  Government: $S_G = \{Comply, Evade, Comply, Evade\}$
  Court: $S_C = \{H = 1, V = 1\}$

Proof: If $\phi > \frac{\alpha}{\alpha+\beta} > \pi$ and $\phi > \frac{I}{A+I}$, then

$$EU_C(H = 0) = A(\pi) - (I)(1 - \pi)$$
$$EU_C(H = 1) = A - \kappa$$

Hold a hearing iff:

$$A - \kappa > A\pi + I\pi - I$$
$$(A + I)(1 - \pi) > \kappa$$
$$1 - \pi > \frac{\kappa}{A + I}$$

Judicial Emboldening Hearing. In this equilibrium, hearings shift a case from one in which the court upholds in order to avoid government evasion to one in which the court vetoes and the government acquiesces.

Equilibrium C: For $\phi > T_G^{Comp} > \pi$, $\pi < T_C^{Veto} < \phi$, and $\frac{A}{A+I} > T_C^{Hearing}$, the following strategy profile constitutes a SPE:
  Government: $S_G = \{Comply, Evade, Comply, Evade\}$
  Court: $S_C = \{Hearing, Veto\}$

Proof: If $\phi > \frac{\alpha}{\alpha+\beta}$ and $\phi > \frac{I}{A+I} > \pi$, then

$$EU_C(H = 0) = 0$$
$$EU_C(H = 1) = A - \kappa$$

Hold a hearing iff[5]:

$$0 > A - \kappa$$
$$\frac{A}{A + I} > \frac{K}{A + I}$$

Limited Judicial Emboldening Hearing. In this equilibrium, a hearing increases the likelihood of public mobilization a sufficient level to incentivize the court to veto. It does not, however, increase it enough to influence the government's strategy. As a result, a hearing in this equilibrium takes a case from a nonconfrontational setting to one in which the court is willing to challenge the government.

Equilibrium D: For $\phi < T_G^{Comp}$, $\pi < T_C^{Veto}$, and $\frac{\kappa\phi}{K+I} > T_C^{Hearing}$, the following strategy profile constitutes a SPE:
  Government: $S_G = \{Evade, ..., Evade\}$

---

[5]The final step in the proof is added to make the threshold for this equilibrium consistent with those of Equilibria C, D, and E.

Court: $S_C = \{Hearing, Veto\}$

Proof: If $\phi < \frac{\alpha}{\alpha+\beta}$ and $\pi < \frac{I}{A+I}$, then

$$
\begin{aligned}
EU_C(H = 0) &= 0 \\
EU_C(H = 1) &= A\phi - (1 - \phi)(I) - \kappa
\end{aligned}
$$

Hold a hearing iff:

$$
\begin{aligned}
A\phi - (1 - \phi)(I) - \kappa &> 0 \\
\frac{\kappa\phi}{\kappa + I} &> \frac{\kappa}{A + I}
\end{aligned}
$$

Inconsequential Hearings. There are two equilibria in which hearings have no effect on the players' strategies due to their beliefs. As a result, in these equilibria the court never holds a hearing in these equilibria.

Equilibria E: Fully Deferential Government. If $\pi > T_G^{Comp}$ and $\pi > T_C^{Veto}$, the following strategy profile constitutes a SPE:
    Government: $S_G = \{Comply, ..., Comply\}$
    Court: $S_C = \{No\ Hearing, Veto\}$

Proof: For $\phi > \pi > \frac{\alpha}{\alpha+\beta}$ and $\phi > \pi > \frac{I}{A+I}$, then

$$
\begin{aligned}
EU_C(H = 0) &= A \\
EU_C(H = 1) &= A - \kappa
\end{aligned}
$$

Hold a hearing iff: $A - \kappa > A$
Hold a hearing iff: $\kappa < 0$
Since $\kappa > 0$, the court never holds a hearing.

Equilibria F: Fully Deferential Court. For $\phi < T_C^{Veto}$, the following strategy profile constitutes a SPE:
    Government: $S_G = \{Evade, ..., Evade\}$
    Court: $S_C = \{No\ Hearing, Veto\}$

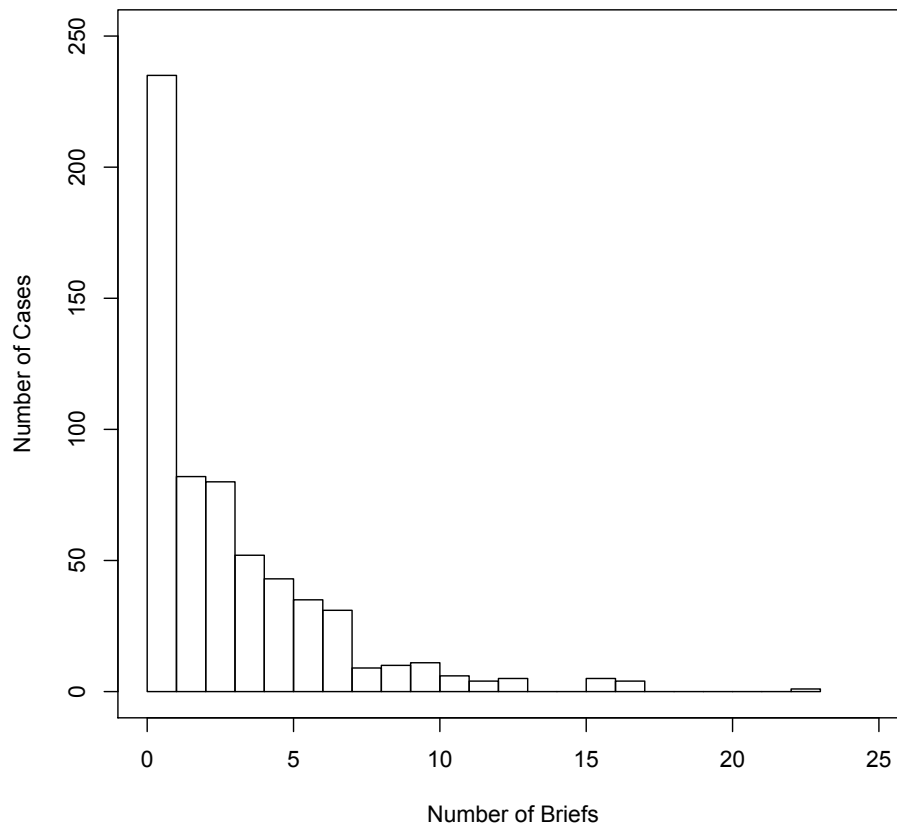**Proof:** If $\pi < \phi < \frac{I}{A+I}$, then

$$
\begin{aligned}
EU_C(H = 0) &= 0 \\
EU_C(H = 1) &= -\kappa
\end{aligned}
$$

Hold a hearing iff: $\kappa < 0$
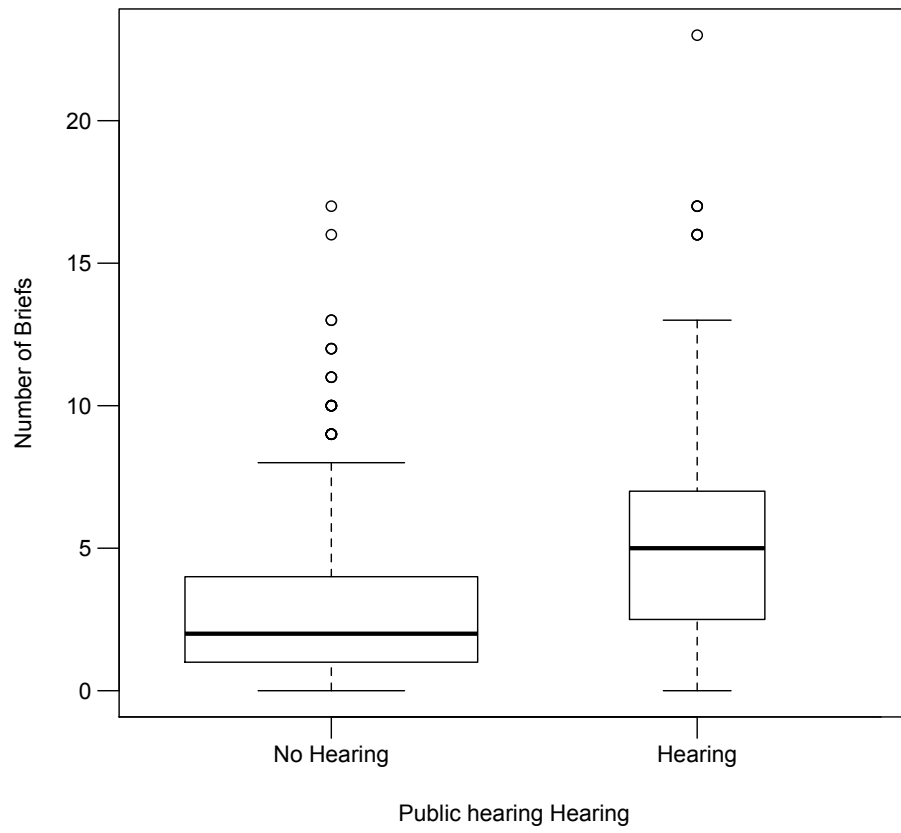Since $\kappa > 0$, the court never holds a hearing.

Appendix: Descriptive Statistics of FCC Dataset

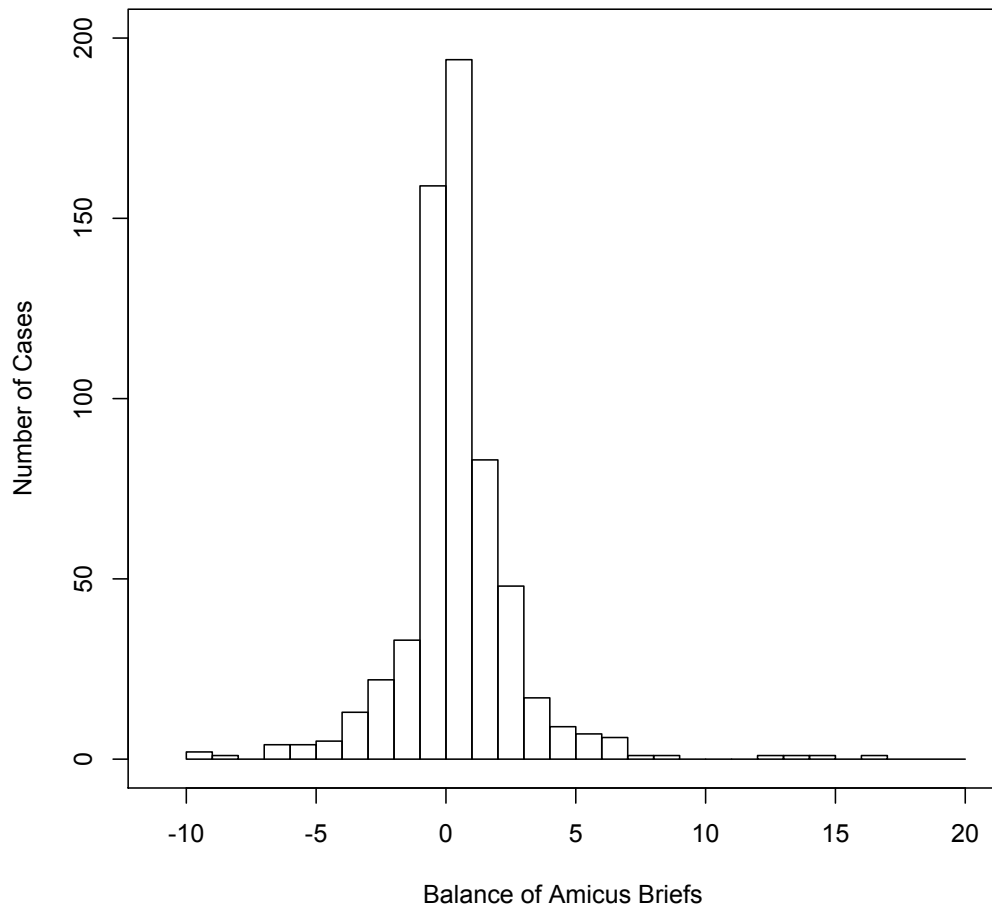Figure A1: Histogram of *Total Briefs* Variable

A2: Histogram of *Total Briefs* Variable

Note: Boxplot widths are proportional to the square root of the sample sizes.

Histogram of *Amicus Briefs Balance* Variable

Appendix: Alternative Analysis of Time to Decision Hypothesis (H4)

Table A1: Cox Proportional Hazard Model Analysis of H4

	Model 1
Near Election Decision	$-0.09^{\dagger}$
	(0.05)
No Government Brief	0.20
	(0.18)
Case Complexity	0.61***
	(0.10)
Constitutional Complaint	-0.53***
	(0.14)
Lower Court Unconstitutionality Brief	$-0.25^{\dagger}$
	(0.13)
Government Change	0.28**
	(0.09)
Near Election Decision ×No Government Brief	0.17
	(0.10)
N	497

Standard errors in parentheses

† significant at $p < .10$; $^{*}p < .05$; $^{**}p < .01$; $^{***}p < .001$