

# Mobilizing the Public

## The Importance of Mediators for Judicial Decision-Making

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**Abstract.** Highest courts need to rely on external actors to enforce compliance with decision-making. Therefore, courts seek to mobilize the public to hold governments accountable. In doing so, courts become constrained in their action by the environment. This raises the question: How do external actors moderate judicial decision-making? To answer this question I design a formal model of judicial decision-making and political compliance, including the court and the governing majority as actors. The interaction between both actors is moderated by mediators who mobilize the public to impose costs. On the one hand, mobilized audiences can punish the government for non-compliance with decisions. On the other hand, non-compliance reveals the weakness of courts, which may damage their diffuse support by the public. At the same time, the mobilized public evaluates the policy preferences of the court and the governing majority. This dynamic influences the strategic behavior of the court: Depending on the strength of reputational concerns to the court, the justices make more or less sincere decisions. This has major implications for our understanding of how different courts use transparency surrounding decisions against political actors. Moreover, the model provides an explanation for why non-governmental actors pay the costs to approach the court; namely, to pursue their own agenda.

# 1 Introduction

The interaction of highest courts and governments is a defining feature of political systems, and an important focus of judicial politics research. The guiding question of this strand of research is: How do courts and governments constrain each others power (cf. Engst, 2021; Schröder, 2020; Vanberg, 2005)? Governments, as office and policy seekers (cf. Strøm and Müller, 1999), try to pursue their agenda, but they may face an opposing highest court, ruling their law unconstitutional. Herein I refer to ruling a law unconstitutional as a decision by a court to *Justify* against a government. In contrast, courts can uphold a law and *not Justify*. Formally, courts lack the means to enforce their decisions (Hamilton 1788, Federalist No. 78). In consequence, someone else has to enforce decisions of highest courts. This article addresses the lack of attention external actors receive as an influence on decision-making and enforcement. I argue that external actors moderate the costs imposed on government and court when law is under judicial review, but only to the extent that observing external actors are able to *mobilize* the public. Mobilizing public audiences to impose costs can help achieve policy goals and benefit the external actor, but requires resources (Caldeira and Wright, 1990; Hansford, 2004; Wofford, 2020). If there is no mobilizing monitoring agent, no one will learn about the content and consequences of judicial review. This contributes to addressing the question of how court and governments enforce their preferences, and acknowledges the impact non-governmental institutions and other public actors have on compliance. I derive the following research question to guide this work:

*How do external actors moderate judicial decision-making?*

The concept of public backlash often used to describe the costs public audiences can impose on governments and courts is hard to capture empirically, as such vast and court-specific data on public opinion is rarely available. There is nevertheless strong theoretical and empirical evidence that transparency, accountability and accessibility

play a strong role in the formation of non-compliance risks to courts and governments (Krehbiel, 2016; Owens et al., 2013; Staton and Vanberg, 2008; Vanberg, 2005). While I do not attempt to provide a new strategy to operationalize public backlash directly, I do follow research in formally modeling its theoretical impact. In contrast, I seek to operationalize a signal of public backlash, not public backlash itself. For example, external actors who bear the costs of writing briefs attempt to signal opposition or support to judicial decisions, and further signal their attention to the proceeding. The selection of actors who decide to send a signal also reveals the strength and willingness of the set of mobilizing actors in monitoring non-compliance and imposing costs. The court can account for these signals in their decision-making. In some systems, these briefs are publicly available, so that other actors, i.e. government and opposition, can observe them before deciding to comply with a judicial decision or not. This way, I propose to account for signals of public backlash from information derived directly from the judicial proceeding, which constitutes a more accessible (more efficient) research approach compared to public opinion data, and is applicable retrospectively.

However, some uncertainty remains whether mobilization efforts of external actors are actually successful, i.e. whether external actors are representative of public opinion. To what degree the public majorities support a given policy, and to what degree they inflict costs based on their policy evaluation, is covert to the Court and governing majorities; but these reputational concerns only come into play when mobilization of public audiences is successful. In recent research, scholars have outlined how the Court can shape transparency to mobilize the public (Staton, 2006, 2010; Vanberg, 2005).

I argue that external actors can mobilize the public as well, and propose to study their impact on judicial decision-making. This approach contributes to existing research in three ways. First, it formally models that the court is moderated not only by political, but also by public actors. Second, it acknowledges the fact that public audiences are not always in favor of the court; and there are situations where courts fear publicity

(cf. Staton and Vanberg, 2008). Third, by differentiating between mobilization and public opinion, I can explicitly model assumptions on how publicity influences courts, and explicitly model assumptions on how external actors can actually impact judicial decisions.

Throughout this article, I will introduce the Judicial Implementation Game, illustrating how external actors moderate a highest court's decision to justify, and subsequently, a government's decision to comply with the judicial outcome. The model provides a better understanding for variance in observed judicial outcomes, and how they depend on publicity, as well as specific and diffuse support. Second, the model is highly adaptive to varying systems of separated powers and therefore we can explicitly model differences in institutional rules. First, I will outline the relevant literature that builds a strong foundation for this paper. Second, I will illustrate the formal model to explain judicial decisions and political compliance. Herein, I will present separate game trees for decisions where mobilization occurs and decisions that receive no public attention, because mobilization did not occur. For each scenario, I present the equilibrium strategies for *Court* and *Governing Majority* for varying costs. Subsequently, I present comparative statics to describe the behaviour of courts with different cost considerations; illustrating when and how they are prone to external influence. A discussion of the work concludes this paper, where I summarize the main implications and outline preliminary approaches for empirical analysis.

## 2 External actors as moderators of judicial-decision making

In this section, I show that existing literature emphasizes the importance of external actors for judicial decision-making, and subsequently, compliance to their decisions. However, while external actors are – in various ways – accounted for in existing formal

models of judicial action, they are not explicitly modelled. I argue that we do have to account for the preferences and action of external actors, to explain judicial behaviour. There are various schools of thought as to why justices behave the way they do (see e.g. Parceller Jr. et al., 2011). I build on the strategic model of judicial action, assuming that judges are constrained by the institutional settings as well as other actors (Epstein and Knight, 1998; Murphy, 1964).

A common approach to explain strategic action is to formally model it. This strategy is particularly useful for judicial decision-making, as essentially, judicial proceedings are turn-based interactions over distinctive outcomes between competitive players (cf. Schubert, 1958). Prominently, formal models have been used to outline the interaction between a court and a governing majority; and in some cases also opposition actors. These models rest on the assumption that courts are powerless to implement their rulings. Instead, they rely on the public to pressure political actors to comply with decisions. To mobilize this public courts seek to enhance the transparency surrounding their decision-making (Kranenpohl, 2010: 428-431; Krehbiel, 2016; Staton, 2010; Vanberg, 2005).

However, while transparency is introduced as an abstract concept its features are not explicitly modeled. For example, Vanberg (2001; 2005) argues that oral hearings, by inducing transparency, empower the Court to rule against the government. However, the extent to which oral hearings induce transparency in a given case remains unclear. In his model of case promotion, Staton (2006) argues that courts can promote their cases to increase media coverage. Herein, publicity can also carry costs to the court, namely through misreporting by the media. Both approaches acknowledge the importance of external actors to the decision-making calculus of courts and governments. However, what lacks in existing formal models is an explicit inclusion of external actors' preferences. This is why I present a model including external actors' diffuse support towards the court, but also their policy-specific support. This way, one can explicitly model how

external actors perceive judicial and legislative action. Further, by accounting for their policy-specific preference, we can assess when an actor benefits from transparency, and when it does not.

To understand the action of external actors we first need to understand who these actors are and which goals they pursue. These questions have been comprehensively addressed for the Supreme Court of the United States (SCOTUS): Foremost, a substantial set of different – dominantly organized – interests file briefs with the Court and do so increasingly in recent decades (Epstein, 1993; Collins and McCarthy, 2017; Hansford, 2004). External actors who file briefs with the court repeatedly build expertise, which can positively impact their influence on the Court (Epstein, 1993; Hansford, 2004; Johnson et al., 2006). Organized interest can be broadly categorized into three distinct group. Governments, opposition and public interest groups (cf. Caldeira and Wright, 1990; Hansford, 2004). Governments often participate as an involved party, and in consequence actually file *amici curiae* less often by definition. In many constitutional court systems like the German or French case, involved parties can still file briefs, because this is one institutionalized venue through which they can take position on the case, but also provide information to the court. For the SCOTUS, involved actors take similar action, but *amici curiae* briefs are solely filed by third parties. For all three courts, involved and external parties can in many ways file briefs to take position or provide information. From hereon I will refer to briefs as all written statement filed to a given case by any external actor, involved directly, joining any party, or those filing *amici curiae*.

The loose definition of external actors herein is any actor other than the governing majority. In detail, external actors vary by their level of organization and access to resources (Caldeira and Wright, 1990; Collins, 2018; Hansford, 2004; Solberg and Waltenburg, 2006). Who has access varies across systems as well, e.g., ordinary citizens

can file a claim with the constitutional court in the German case (but not file a brief without being involved or asked by the court).

Filing briefs is actually costly and requires expertise. For governments as frequent actors at the Court and with access to a large pool of expertise and resources, the tangible costs of filing briefs is negligible (Caldeira and Wright, 1990). In contrast, smaller NGOs and loosely organized interests may be more selective when to file briefs (Caldeira and Wright, 1990). They seek to maximize their goals of policy influence, organizational maintenance and mobilization (Caldeira and Wright, 1990; Hansford, 2004; Hollis-Brusky and Wilson, 2017: 132; Solberg and Waltenburg, 2006). Constrained by costs, they file briefs when they deem it most efficient, and decide to file them alone, or join briefs of other actors (Caldeira and Wright, 1990; Solberg and Waltenburg, 2006). Furthermore, media coverage can be understood as a signal of an external actor being invested in and observing the judicial proceeding. Oral hearings (Krehbiel, 2016; Vanberg, 2001, 2005), press releases (Meyer, 2020; Staton, 2006) and other institutional venues can be instruments to build transparency and salience; but external actors do not only build transparency and salience, but also signal the strength of numbers, as well as the degree of transparency and salience surrounding the decision, through their participation and communication.

Briefs by itself constitute a source of information. They signal to the court which actors are invested and how strong they are. Briefs further provide information on the case, venues of legal argumentation and the reach of – potentially disregarded – implications on different societal audiences (Caldeira and Wright, 1990; Epstein and Knight, 1999; Hansford, 2004). There is evidence that briefs impact judicial-decision making at various courts, especially if briefs run against the expectations of the court, i.e. an ideologically close party opposes the court unexpectedly. To what extent ideological congruence to filing actors matters itself is debated (cf. Caldeira and Wright, 1990; Collins, 2018; Johnson et al., 2006), but expertise seems to positively impact the chance

of successful influence on justices (Hansford, 2004; Johnson et al., 2006). However, the impact of briefs on judicial decision-making has not been formalized and empirical evidence outside the US literature is scarce. Additionally, little attention has been given to the impact of briefs by external actors on political compliance to judicial decisions.

### 3 Judicial Implementation Game

I present a formal model, the Judicial implementation game (JIG) to illustrate how the presence and preferences of an external actor impact the strategic interaction of courts and governments. Namely, I demonstrate how external actors moderate a court's decision to justify and a government's decision to comply by accounting for the reputational concerns that arise over policy and non-compliance when public audiences are mobilized. To show that external actors can lead both courts and governments to make decisions that are insincere to their policy preference, I introduce an extensive form game of incomplete information between two players, a highest court  $C$  and a governing majority  $G$ . The notion of a governing majority is made to keep the model generalizable to any democratic system (cf. Staton, 2006; Engst, 2021). In many cases, the government embodies the governing majority. There are however exceptions such as minority governments. Different legislative majorities may be build for each piece of legislation. In other cases, executive powers allow legislation to be made without legislative majorities. Governing majority entails any political actor or group of actors empowered to legislate, either by legislative majority requirements or by executive powers. The model applies to any of these cases, as long as the governing majority can be held accountable.

At the start of the game, a governing majority has legislated. The status quo represents the legislation implemented by the governing majority. If it does not change, there is no cost or benefit to the policy preferences of any actor. Thus, I fix the value

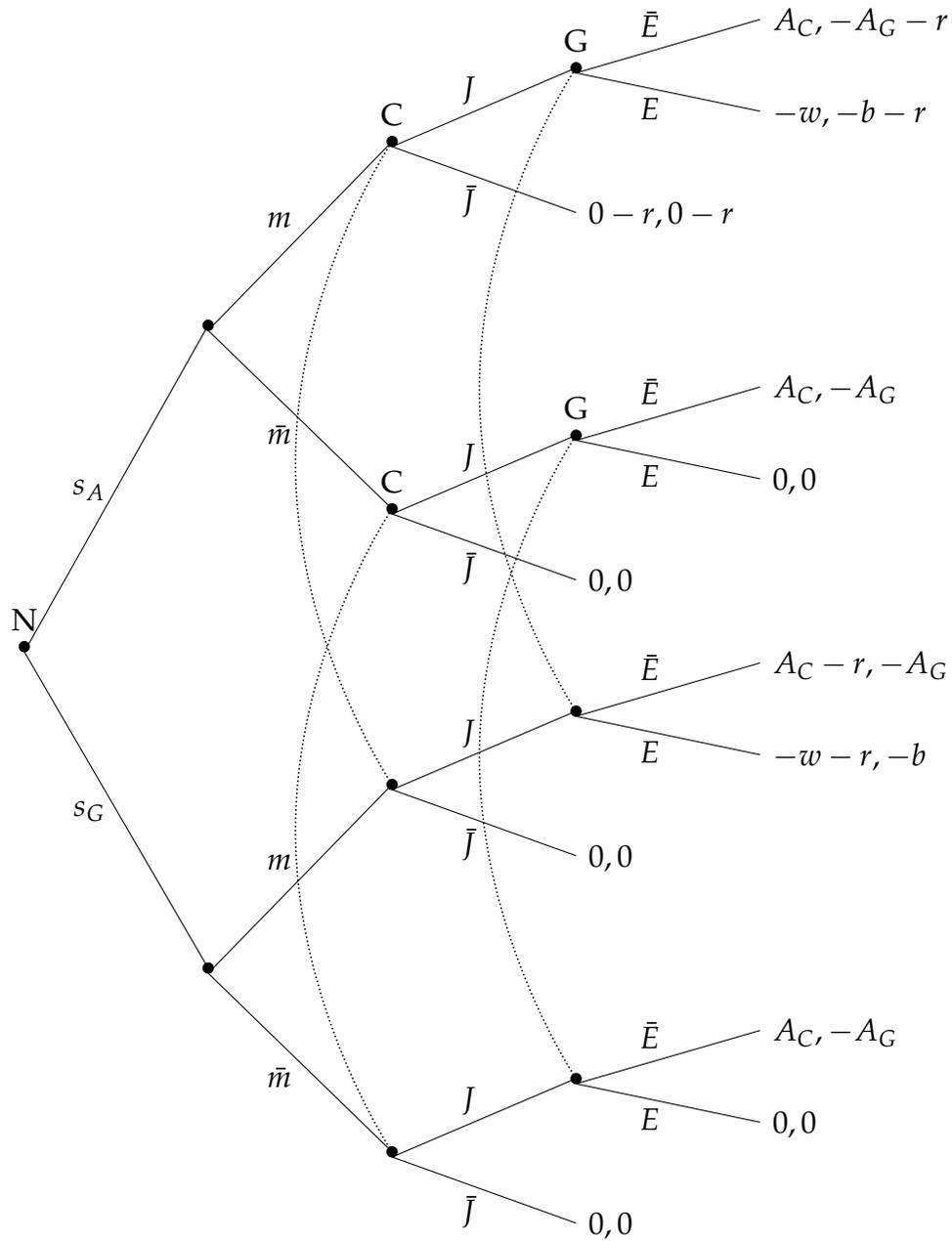


Figure 1: Judicial implementation game in extensive form

of the status quo at 0 for both players. The game starts with a highest court receiving a claim against the status quo. The court can uphold the reviewed status quo policy,  $\bar{J}$ , ending the game and preserving the status quo. Alternatively, the court can strike down the reviewed status quo policy with Justify,  $J$ , and have it substituted with an alternative policy. In the latter case, the government can decide to comply to the alternative (truthfully),  $\bar{E}$ , or evade the court's decision,  $E$ . If the government decides not to comply, the status quo policy is retained, but it can be punished given there is an observer willing and able to impose costs.

Before either player moves, there are two random draws by Nature  $N$  that determine the policy preference of the external actor and mobilization type. In the first draw, the external actor either supports the status quo policy,  $S_G$ , or the alternative policy,  $S_A$ . The probability that the external actor supports the an alternative policy over the status quo policy legislated by the governing majority is denoted by  $p$ . Neither the court nor the governing majority observe the outcome of Nature's first draw, but both share a belief on  $p$ , the probability that external actor is supportive of an alternative policy. In the second draw, Nature picks whether the external actor is *mobilizing* or not,  $\bar{m}$ . When the external actors monitor the proceeding and implementation, they can monitor policy output. When they also *mobilize* public audiences to impose costs, court and government behaviour is constrained by external actors. These can impose costs based on policy, depending on their preference type  $\in \{S_G, S_A\}$ , and on non-compliance, if  $G$  *evades*.

Court, government and external actors are modelled as unitary actors. Obviously, within a panel of judges, within a government or legislature, as well as across ordinary citizens, it is natural that preferences vary. However, for one, we cannot observe the deliberation of individual actors that form those actors modelled in the JIG. Further, these actors arrive at a unitary decision. As an external observer, the single outcome they produce is the only overt signal on their (aggregated) preferences. In other

words, while actors who are assumed to be unitary actually may simply aggregate individual preferences, their influence on judicial decision-making is unitary, based on the aggregated preference of all (influential) external actors. This unitary behaviour is modelled, even if within court, political and public actors, preferences may vary, which is unobserved and unmodelled herein.

For now, it is important to distinguish between two essentially different (sub)games: Where public audiences are mobilized,  $m$ , and where they are not,  $\bar{m}$ . I argue that, if there is no monitoring agent to observe and report on the action of courts and governments, and no audience mobilized, that is willing to impose costs on judicial and political actors, then reputational concerns over policy signals and non-compliance disappear. Thus we have one game where courts and governing majorities behave sincerely to their policy preference, and a second game where courts and governing majorities account for reputational concerns in their decision-making. For both games, a strategy for the court is a function  $f_C$  that assigns an action, *Justify*,  $J$ , or *Not Justify*,  $\bar{J}$ , to its information set. The court has a single information set in both games as it cannot observe policy preference type. Similarly, a strategy for the government is a function  $f_G$  that assigns an action, *Evade*,  $E$ , or *Not Evade*,  $\bar{E}$  to its single information set.

Table 1: Utility components of the Judicial Implementation Game

	description	type	term	actor	condition
	policy reputation	cost	$r$	$C, G$	$m$
	public backlash	cost	$b$	$G$	$m$
	non-compliance weakness	cost	$w$	$C$	$m$
	government policy	gain	$A_G$	$G$	-
	alternative policy	difference	$A_C$	$G$	-

### 3.1 Passive audience action

In the first game, the action by court and government is only passively observed by any audience that could impose costs on the court and government. This could be due to

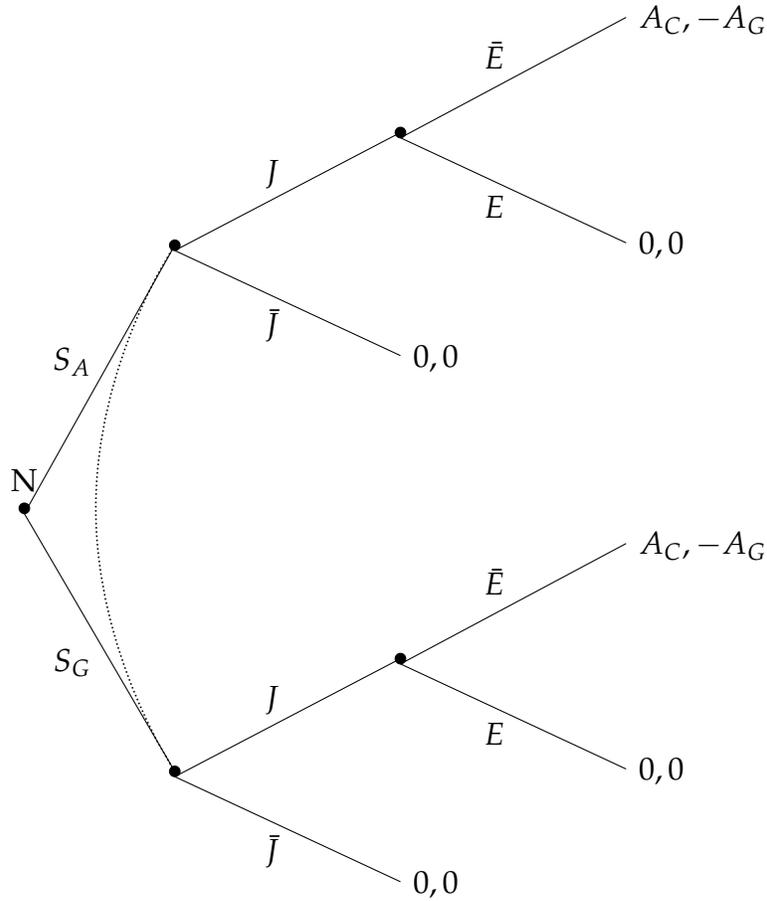


Figure 2: JIG without mobilized public audiences in extensive form

the absence of a monitoring agent or absence of an attentive audience. In consequence, I assume that decisions made by court and governments are solely driven by policy concerns. The governing majority prefers the status quo over any alternative. This implies that it has legislated its optimal policy. Any other policy alternative will have the governing majority pay a cost  $A_G > 0$ . The court makes the first moves, deciding to *Justify* against the status quo, or uphold it,  $\bar{J}$ . If the court decides to uphold, the game ends and each actor receives a payoff of 0. If the court decides to *Justify*, the governing majority can make a move. The governing majority can decide to comply with the court's decision,  $\bar{E}$ , or *Evade* it.

**Proposition 1.1** *For any p, the government will always evade.*

Given there is no risk of reputation loss for neither policy signals nor non-compliance,

the government will always prefer to uphold the status quo, because for any  $p \in [0, 1]$  it is always true that  $0 > -A_G$  for any  $A_G > 0$ . Irrespective of the preference type of the external actor, the governing majority will choose to *Evade* the alternative policy,  $f_G = (E)$ , because they pay no cost for doing so, but evade the cost of alternative policy.

**Proposition 1.2** *For any  $p$ , the court is indifferent between its available strategies.*

The court's decision does not impact the policy outcome. Given that the court cannot achieve the benefit of the alternative policy,  $A_E$ , the court is indifferent between a decision to justify,  $J$ , or not to justify,  $\bar{J}$ . I assume that the court always prefers its sincere choice when it is indifferent, or in other words, that it will behave as if the government will comply. Given the government complies,  $\bar{E}$ , then the court decides to *Justify* if the court prefers the alternative policy to the status quo,  $A_C > 0$ . If the court does not prefer the alternative policy to the status quo,  $A_C \leq 0$ , the court decides not to justify,  $\bar{J}$ . I make this assumption to explain the unmodeled variation in the ruling on passively observed scenarios, where the model builds on an arbitrary choice on whether the Court decides to *Justify* or not when it is indifferent. Instead, I provide a theoretically guided assumption. Namely, I assume courts to rule consistent with their policy preference for two reasons: First, it gives them a decision to refer to in future opinions, where public audiences may be mobilized to impose costs. Second, there appears to be no convincing reason to assume that courts would solely Justify [or not Justify] given they cannot impact the actual policy output. Instead, courts can voice their true preferences without any risk. In contrast, being insincere should be less preferred to judges, at least for moral reasons, and because there is no tangible benefit for insincerity that would incentivize judges to deviate from their sincere preference.

In sum, the preference type of an external actor does not matter, hence the beliefs over  $p$  are irrelevant. The governing majority evades irrelevant of preference type. The court is indifferent as it cannot impact the policy output, so I assume it will decide sincerely based on its own preference.

Table 2: Passive audience action equilibrium predictions

<b>Court Preferences</b>	
Court prefers sq ( $A_C \leq 0$ )	For all p $f_C = (\bar{J})$ $f_G = (E)$
Court prefers alternative ( $A_C > 0$ )	For all p $f_C = (J)$ $f_G = (E)$

Table 2 shows subgame perfect equilibrium strategies erived from the passive audience action model.  $p$  is the probability of external actor to not support  $G$ 's status quo policy.

### 3.2 Mobilized audience action

In the second game, the action by court and government is observed by some audience and monitored by some monitoring agent, and a public audience able to impose costs is being mobilized. Thus, the external actor can impose cost on the court and government. For the court, it can lose acceptance over policy disagreement with an external actor, or lose acceptance over non-compliance exposing the court as a weak actor, that is unable to enforce decisions against the government. The degree of reputation costs impacts the courts decision to *Justify* or not justify,  $\bar{J}$ . For the government, external actors can hold the government accountable by threatening its office. Losing a vital share of voters over a policy decision can be more costly to the governing majority than the potential policy gains. Essentially, reputational costs either outweigh policy costs of alternatives, or they do not.

As in the previous game, assume the government has to pay some cost  $A_G > 0$  for complying with any alternative policy. Without any mobilized public audiences, the government has no incentive to comply, because it prefers to pay no cost. With mobilized public audiences, the government now has to account for the cost of non-compliance the audience can impose. I assume that the non-compliance cost is imposed irrespective of the specific policy support. Where citizen support the court as a decision-making body with authority, they should be more acceptant of decisions even if they

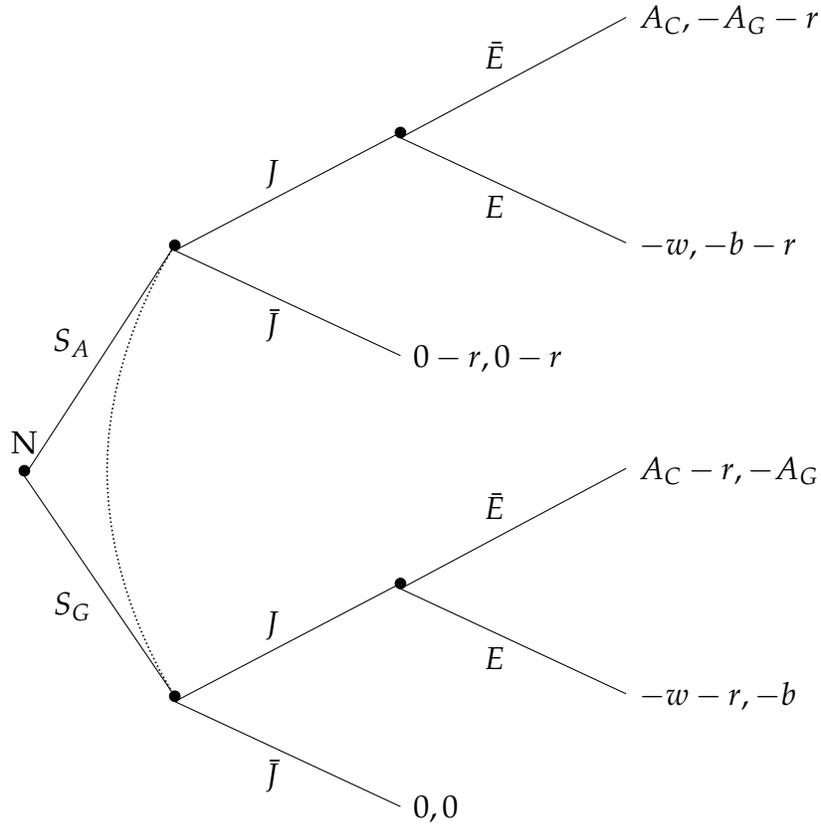


Figure 3: JIG with mobilized public audiences in extensive form

do not prefer the specific policy. I assume that as diffuse support for the court increases, so should the expectation that a governing majority complies with its decisions. In consequence, the non-compliance cost depends on the diffuse support for the court.

Additionally, an external actor can punish the governing majority based on its policy signal. In other words, if the observer does not support the legislation by the governing majority, she will be less supportive of the governing majority itself, because they do not represent their policy preference (on this issue). However, the government already gives its policy signal by legislating. Thus, the reputational concerns on the policy itself do not impact the decision on whether to comply or not, as in both cases, the policy signal has already been observed through the legislation itself. I assume that at the very latest, the observer of the judicial proceeding can also observe the legislation passed by the governing majority, and in consequence, make a judgement on this policy.

**Proposition 2.1** *The governing majority's decision to evade or not is solely driven by non-compliance costs, so that for any  $p$  it is true that the governing majority's plays  $f_G = (E)$  if  $A_G > b$  and  $F_G = (\bar{E})$  if  $A_G \leq b$ .*

Recall that the governing majority does not know whether the external actor supports its legislation, or prefers an alternative policy. The governing majority has to pay some reputational cost for its policy if the external actor does not support its legislation, and has to pay that cost regardless of the choices the governing majority or the court makes. The governing majority has to pay no reputational cost for its policy if the external actor does support its legislation. Herein, the choice to legislate or not legislate is not modelled, but the game could simply be extended to incorporate the decision. The choice to legislate is uninformed about the preference type and the mobilization of external actors. I assume that the governing majority cannot with certainty say whether they will have to pay the costs of a bad policy signal, i.e. one that opposes the external actor, or not. In contrast, the decision to comply is made with uncertainty about the preference type, but knowing the mobilization capacity of external actor. Thus, one can plausibly assume the governing majority to legislate, but comply with a court's decision later on as it updates its belief on  $q$ , the probability that the external actor supports to status quo, after observing it.

Assume that when indifferent about evading or not evading, the governing majority will choose not to evade. The governing majority complies,  $\bar{E}$ , when:

$$\begin{aligned}
 p(-A_G - r) + (1 - p)(-A_G) &\geq p(-b - r) + (1 - p)(-b) \\
 -A_G &\geq -b \\
 A_G &\leq b
 \end{aligned}$$

The governing majority evades,  $E$ , when:

$$\begin{aligned}
 p(-A_G - r) + (1 - p)(-A_G) &> p(-b - r) + (1 - p)(-b) \\
 -A_G &> -b \\
 A_G &> b
 \end{aligned}$$

The court's power in judicial review is in mobilizing actors to impose costs against non-compliance. Further, the decision to justify gives monitoring agents some reference for accountability for monitoring agents to identify non-compliance. Given high enough diffuse support, the court can impose costs on non-complying governments that can be larger than the policy benefits of legislation. A high diffuse support means the court's decision is regarded as binding irrespective of policy preferences. However, if the government values its policy benefits higher than the costs of non-compliance, the court cannot induce a change in action.

I assume that the court's decision to *Justify* or not justify,  $\bar{J}$ , depends on their policy preference, as in the game without mobilized public audiences, and additionally on reputational concerns. There are two types of reputational concerns for the court. The first type of reputational concerns is over the policy signal. If the external actor supports the governing majority's legislation,  $S_G$ , then the court pays a cost for its opposing policy signal,  $r > 0$ , if it chooses  $J$ . If the external actor does not support the government policy,  $S_A$ , then the court pays a cost for its opposing signal,  $r > 0$ , if it chooses  $\bar{J}$ . These are the same reputational costs the governing majority pays when opposing the external actor's preference type. I assume that if actors support an opposed policy, they pay a reputation cost depending on the specific preference of the external actor. However, if  $A_G > b$ , the governing majority always chooses  $E$ . In this case, the court faces an additional cost,  $w > 0$ , for its inability to enforce compliance. The literature commonly acknowledges the harm a deviating actor has on the court's

reputation. Specifically, I argue that by highlighting a courts lack of enforcement powers, it decreases the authority ascribed to it, and thus its diffuse support levels. In what follows I describe two sets of equilibrium strategies, depending on  $A_G$  and  $b$ .

**Proposition 2.2** *Given a governing majority will not comply to a decision, courts should be more likely to justify as reputation concerns over policy increase in comparison to reputation concerns over non-compliance. The decision to justify is unaffected by policy (outcome) concerns, as courts cannot influence the policy outcome when governing majorities evade.*

In contrast to the governing majority, reputational concerns over policy signals always impact the decision of a court to justify or not. However, given  $A_G > b$ , then  $f_G = (E)$ . In that case, the court cannot impact the policy outcome with an alternative policy. The decision to justify or not thus depends on policy reputation and non-compliance costs. For simplicity, assume that when indifferent about  $J$  and  $\bar{J}$ , the court chooses to  $J$  (cf. Staton, 2006; Vanberg, 2001). The court justifies,  $J$ , when:

$$p(-w) + (1 - p)(-w - r) > p(0 - r) + (1 - p)0$$

$$p > \frac{w + r}{2r}$$

The court does not justify,  $\bar{J}$ , when:

$$p(-w) + (1 - p)(-w - r) \leq p(0 - r) + (1 - p)0$$

$$p \leq \frac{w + r}{2r}$$

First note the absence of any policy output related benefit. As the court cannot achieve  $A_C$  if  $G$  chooses  $f_G = (E)$ , policy preference does not influence a court decision. Second, for any  $w \geq r > 0$ ,  $C$  always chooses  $f_C = (\bar{J})$ . If non-compliance concerns weakly outweigh reputation concerns, than the Court never justifies in first place. However, there is no  $w < -r$ , because by definition  $r > 0$  and  $w > 0$ , so that there is no situation where  $C$  always chooses  $f_C = (J)$  regardless of  $p$ . So for any  $w < r$ : If

$p^* > \frac{w+r}{2r}$ , the court chooses  $f_C = (J)$ . Else, if  $p^* \leq \frac{w+r}{2r}$ , the court chooses  $f_C = (\bar{J})$ . The lower  $w$ , the more likely the court chooses  $J$ . The higher  $w$ , the less likely the court chooses  $J$ . The higher the value of  $r$ , the less important is  $w$ . The lower the value of  $r$ , the more important is  $w$  for court's decision-making.

**Proposition 2.3** *Given a governing majority will comply to a decision, courts decision to justify depend purely on the courts' policy preference when the benefits of alternative policy outweigh reputational concerns.*

For simplicity, assume that when indifferent about  $J$  and  $\bar{J}$ , the court chooses to  $J$  (cf. Staton, 2006; Vanberg, 2001). The court justifies,  $J$ , when:

$$pA_C + (1 - p)(A_c - r) > p(0 - r) + (1 - p)0$$

$$p > \frac{-A_c + r}{2r}$$

The court does not justify,  $\bar{J}$ , when:

$$pA_C + (1 - p)(A_c - r) \leq p(0 - r) + (1 - p)0$$

$$p \leq \frac{-A_c + r}{2r}$$

The court chooses  $J$  whenever its beliefs suggest  $p^* > \frac{-A_c+r}{2r}$ . This implies that for any  $\frac{-A_c+r}{2r} \geq 1$ , the court will never choose to  $J$ . It can be shown that for any  $r > 0$ , it is true that  $\frac{-A_c+r}{2r} > 1$  when  $-a \geq r$ . This is true whenever the court prefers the status quo to any alternative policy, and if the preference over policy output weakly dominates reputational concerns.  $C$  always chooses  $f_C = (\bar{J})$  if  $A_C < 0$  and  $|A_C| \geq r$ , so that  $-A_C \geq r$ . In that case, there cannot exist any  $p^* \in [0, 1]$  so that  $p^* > \frac{-A_c+r}{2r}$ , because  $\frac{-A_c+r}{2r} \geq 1$ . For any  $|A_C| \geq r, A_C < 0$ , court chooses  $f_C = (\bar{J})$  regardless of  $p$ .

A very interesting implication of this cost rationale is that a governing majority may, depending on its prior beliefs, choose to initially legislate to receive reputation benefits, whenever it assumes that the court has strong enough preferences against the presented

legislation, so that it will *Justify* against the status quo legislation presented by G. This way, a governing majority can reap reputational benefits even if the legislation will not be upheld. If we relax the assumption that governments implement optimal legislation, the governing majority could even legislate in favor of reputational benefits, if they assume that they will not actually have to sustain the policy. This way, governments could shift the blame over (lack of) policy to the court.

The court chooses  $\bar{J}$  whenever its beliefs suggest  $p \leq \frac{-A_c+r}{2r}$ . This implies that for any  $\frac{-A_c+r}{2r} < 0$ , the court will never choose  $\bar{J}$ . It can be shown that for any  $r > 0$ , it is true that  $\frac{-A_c+r}{2r} < 0$  when  $a > r$ . This is true whenever the court prefers the alternative policy to the status quo, and if the preference over policy output strictly outweighs reputational concerns. C always chooses  $f_C = (J)$  if  $A_C > r > 0$ . In that case, any  $p^* \in [0, 1]$  fulfill the requirement  $p^* > \frac{-A_c+r}{2r}$ , so that the court always chooses  $f_C = (J)$  regardless of  $p$ .

Assuming that the court prefers  $\bar{J}$  when indifferent, it follows that the court always chooses  $\bar{J}$  if  $\frac{-A_c+r}{2r} \leq 0$ , so that there is no  $p^* \in (0, 1]$  which satisfies  $p^* < \frac{-A_c+r}{2r}$ . This is true for any  $A_C > r > 0$ , regardless of  $p$ .

**Proposition 2.4** *Given a governing majority will comply to a decision, courts decision to justify depends on both, policy preference and reputational concerns over policy signals, when policy benefits are not higher than the maximum expected reputation cost.*

As before, the court chooses  $J$  whenever its beliefs suggest  $p^* > \frac{-A_c+r}{2r}$ . Given that  $|A_C| < r$ , the court chooses  $f_C = (J)$  if  $p^* > \frac{-A_c+r}{2r}$ . Else, the court chooses  $f_C = (\bar{J})$  if  $p^* \leq \frac{-A_c+r}{2r}$ . The lower the difference between  $A_c$  and  $r$ , the more impactful the beliefs over external actor's preference type on decision-making. The higher the difference between  $A_c$  and  $r$ , the less important is the preference type for court's decision-making.

**Proposition 2.5** *Given a governing majority will comply to a decision and a court has no preference between status quo and alternative policy, reputational concerns guide the court's decision.*

As  $r > 0$ , it must be true that if  $A_C = 0$ , then  $r > A_C$ . In this case, beliefs over preference type of external actors dominate the decision-making of the court. If  $p^* > 0.5$ , the court chooses  $f_C = (J)$ . Else, if  $p^* \leq 0.5$ , the court chooses  $f_C = (\bar{J})$ .

Table 2: Equilibrium predictions for mobilized audiences  
Governing majority preferences:  
Value of Policy vs. Reputation

Court Preferences: Policy vs. Rep.	Court Preferences: Value of $p_A$	Large ( $A_G > b$ )	Small ( $A_G \leq b$ )
Policy over rep. ( $ A_C  > r$ )	Court prefers $p_{sq}$ ( $A_C \leq 0$ )	For all $p$ $f_C = (\bar{J})$ $f_G = (E)$	For all $p$ $f_C = (\bar{J})$ $f_G = (\bar{E})$
	Court prefers $p_A$ ( $A_C > 0$ )	For all $p$ $f_C = (J)$ $f_G = (E)$	For all $p$ $f_C = (J)$ $f_G = (\bar{E})$
Rep. over policy ( $ A_C  \leq r$ )		For $p \leq \frac{w+r}{2r}$ $f_C = (\bar{J})$ $f_G = (\bar{E})$	For $p \leq \frac{-A_C+r}{2r}$ $f_C = (\bar{J})$ $f_G = (E)$
		For $p > \frac{w+r}{2r}$ $f_C = (J)$ $f_G = (\bar{E})$	For $p > \frac{-A_C+r}{2r}$ $f_C = (J)$ $f_G = (E)$

Table 3 shows subgame perfect equilibrium strategies erived from the mobilized audience action model.  $p$  is the probability of external actor to not support  $G$ 's status quo policy.

From the JIG, one can derive many hypotheses, but for now I will focus on two of them. Consider first *Proposition 2.1*: Governing majority's decision to evade is driven by non-compliance costs. I argue that for seperated power systems with strong courts that receive high diffuse support, non-compliance costs are on average higher. In consequence, I derive the following hypothesis:

*Hypothesis 1:* If a government faces a strong court, then it is less likely to defy a judicial decision.

This hypothesis can be tested in two ways. First, one can compare different courts of varying type and analyze the differences in government compliance to judicial decisions, as well as threats towards the court. Second, one can compare a given court over time. Both approaches have some shortcomings. A comparative approach has to account for systematic difference in the systems. A case-study approach has to control whether the same causes that drive diffuse support also impact judicial behaviour. I will attempt to implement both approaches to arrive at robust and generalizable results. If strong courts are less likely to face non-compliance, and less likely to face threats, the hypothesis is supported.

Now consider *Proposition 2.2:* Court's decision to justify is influenced by non-compliance costs as well. I argue that for separated power systems with weak courts that receive low diffuse support, non-compliance costs are on average higher.

I assume that weak courts have lower levels of acceptance and lower levels of reputation compared to strong courts. In consequence, their concerns towards non-compliance are considered more strongly, because unlike strong courts, they cannot build on a strong diffuse support that leads to acceptance of decisions which are potentially not supported, but where a strong court would otherwise build on their high reputation to generate acceptance and compliance. I derive the following hypothesis:

*Hypothesis 2:* Weak courts are, on average, less likely to justify against governments in comparison to strong courts.

The higher the potential costs of non-compliance to the court, the less likely the court will Justify given it is uncertain about whether the government will comply or not. If it is certain, the court will, on average, Justify less given it believes the government will evade. To assess the second hypothesis, a comparative analysis of weak and strong

courts appears most promising, e.g., a comparison between the GFCC and the FCC (see e.g. Sternberg, 2019).

A key contribution of the JIG is in dividing external actor by their capacity to mobilize, that is, whether some (meaningful) external actor is monitoring judicial action and legislative compliance, as well as whether they can mobilize public audiences to impose costs. Unlike many previous model, the JIG does not by definition assume that the public is always in favor of one actor or another. For example, a prominent strand of scholarship has argued that transparency helps the Court in ruling against the government (Vanberg, 2005; Krehbiel, 2016). The JIG accounts not only for the publicity of action, but also for the (policy-)specific support of any external actors. Recent research has already provided evidence that support for decisions depends on diffuse support for the court (and government), as well as preferences over a specific policy (cf. Gibson and Nelson, 2015; Engst and Gschwend, 2020).

The framework provided by the JIG also provides plausible explanations as to why external actors pay the cost to voice their opinion and participate in judicial proceedings, namely, that they are able to influence policy outcomes and punish actors who oppose their preferences.

## **Comparative Statics: Judicial Decision-Making**

The previous section presented a formal model to account for external influences on judicial decision-making and political compliance, and outlined the propositions that can be derived from the formal theory. We will now focus on how to assess the two hypotheses by comparative analysis. Commonly, we do not have precise knowledge on public opinion and the risks of public backlash. Collecting this data directly for large sets of judicial decisions across countries is expensive and takes a long time. It is also something we cannot do retrospectively for proceedings in the past.

We can however simplify the predictions over two distinct environments in which

the Court makes decisions, depending on (what they think) the government will do. If  $C$  is uncertain about what action  $G$  will take, we can think of it as a mixed strategy over both scenarios; based on their policy preferences and held beliefs on reputational and non-compliance concerns. If  $C$  is certain that external actors do not *mobilize*, they simply dismiss any concerns towards costs imposed by outside actors.

The following two environments therefore apply when reputational concerns regarding policy ( $r$ ) or non-compliance ( $w$ ) are present, that is, when *mobilization* occurs. Depending on which Governing Majority ( $G$ ) they face, i.e., whether  $G$  decides to evade ( $E$ ) or not evade ( $\bar{E}$ ), the court  $C$  accounts for policy concerns or not.

In Figure 4 we can see  $C$ 's equilibrium strategies depending on their belief on whether external actor supports  $S_A$  over  $S_G$ . In this case, the government cares more about their policy than they do about public backlash for evading the court, so  $A_G > b$ .<sup>1</sup> This represents a typical scenario for weak courts, who struggle to enforce decisions because public backlash for evasion by  $G$  is less likely on average.

Weak courts are characterized by an environment where, on average,  $b$  is lower, therefore making  $A_G > b$  more likely, and where  $w$  is higher, therefore making  $w \geq r$  more likely.  $G$  does not fear public backlash, which leads to non-compliance. At the same time, non-compliance is more costly to the court. As the costs of non-compliance to the court,  $w$ , increase, the court is less likely to Justify, because they anticipate and fear evasion. However, even weak courts can be empowered by mobilizing external actors. Even as  $C$  is uncertain about the type of public opinion, or in the terms of the model, whether the external actor supports  $S_G$  ( $p = 0$ ) or  $S_A$  ( $p = 1$ ), as reputational concerns towards policy increase, the influence of  $w$  decreases. Thus, holding  $w$  constant, as  $r$  increases, the court is more likely to justify. This relationship is only true when policy reputation costs  $r$  are larger than non-compliance concerns  $w$ . Then, reputational concerns weight into the decision to *Justify* or *not Justify*.

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<sup>1</sup>The government is not concerned about policy reputation  $r$ , because they have already sent a signal of their preferred policy by legislating  $S_G$ .

For strong courts, the decision to *Justify*, in the absence of any policy gains, becomes a signal of policy preference, which the public can consider when they evaluate with the court. The assumption derived from the model is that a strong court chooses to *Justify* in close to 50% of cases. As courts get weaker, due to their non-compliance concerns increasing, they are less likely to *Justify*, as they require stronger beliefs on public opinion supporting their decision to counter non-compliance costs.

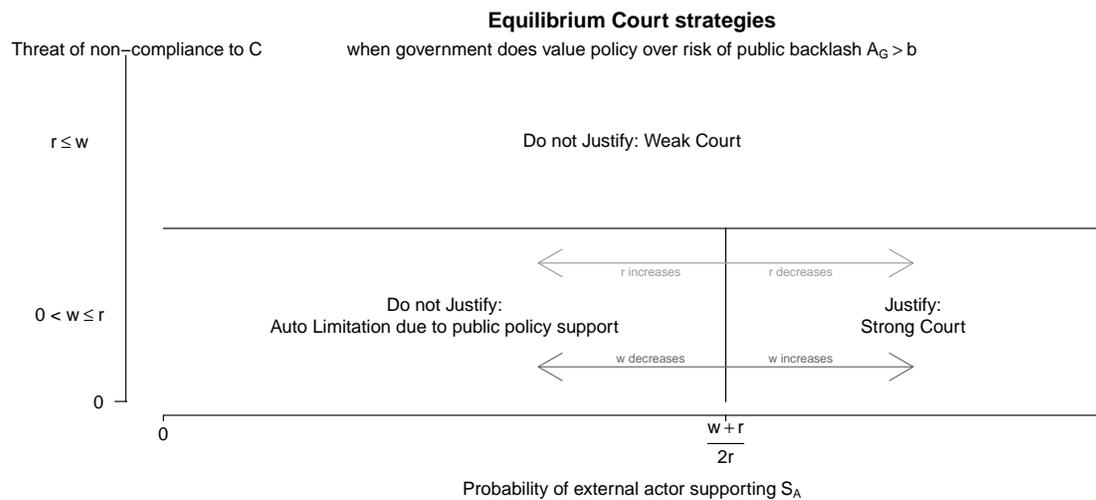


Figure 4: Equilibrium strategies for courts anticipating evasion

I have previously discussed the issues of collecting data on public opinion for large sets of judicial decisions across countries. However, we can account for the diffuse support of courts and governments to get some idea of a certain court's value of  $w$ . Further, their opinion-writing strategies like vagueness may reveal their beliefs. Namely, if they seek to hide non-compliance through vagueness (Staton and Vanberg, 2008), they may assume that policy reputation is less rewarding than visible evasion is costly to  $C$ . First evidence supports the assumption that weak courts, that sustain lower levels of diffuse support by the public, use vague language more often than strong courts (Sternberg, 2019). I assume that, on average, weak courts are less likely to *Justify* the

more  $C$  fears evasion by  $G$ , imposing cost  $w$  on  $C$ . I derive the following observable implication:

$O_{I_1}$ : If the court anticipates evasion, the lower the diffuse support of a court compared to the governing majority, the less likely it is, on average – or holding  $r$  constant –, to justify against a government policy.

In contrast, a strong court operates in an environment where  $b$  is higher, therefore making  $A_G < b$  more likely. The government will *not Evade* and the court has no concerns about non-compliance. As the court can influence policy, they evaluate their policy benefit to reputational concerns. Reputational concerns may to some extent depend on a court's strength, but will certainly vary over issues. When policy concerns are larger than reputational concerns,  $C$  will make a sincere decision to *Justify* or *not Justify* depending on their sincere preference. These are the Judicial Supremacy equilibrium strategies illustrated in Figure 5. As reputational concerns increase, once they outweigh policy concerns, the court's sincere decision will be influenced by  $r$ . If the court prefers  $A_G$  to  $A_C$ , so  $A_C < 0$ , then their sincere decision is *not Justify*. However, as reputational (issue-related) concerns increase in comparison to policy concerns,  $C$  becomes increasingly more likely to *Justify* as a consequence of auto-limitation accounting for beliefs on public opinion. For high values of  $r$  and low values of  $|A_C|$ ,  $p^*$  approaches (.5, ; in contrast, if  $C$  prefers  $A_C$ , so  $A_C > 0$ , the sincere decision is to justify, but as reputational concerns increase,  $C$  is less likely to justify. For high values of  $r$  and low values of  $|A_C|$ ,  $p^*$  approaches ,.5)

$O_{I_2}$ : If the court anticipates compliance, the higher the diffuse support of a court compared to the governing majority, the more likely it is, on average – or holding  $r$  constant –, to make a sincere decision.

To test this observable implication, I propose to jointly model constitutional court decision outcomes on influence of diffuse support levels of court and governing majority, issue salience, presence and participation of external actors, case characteristics, and

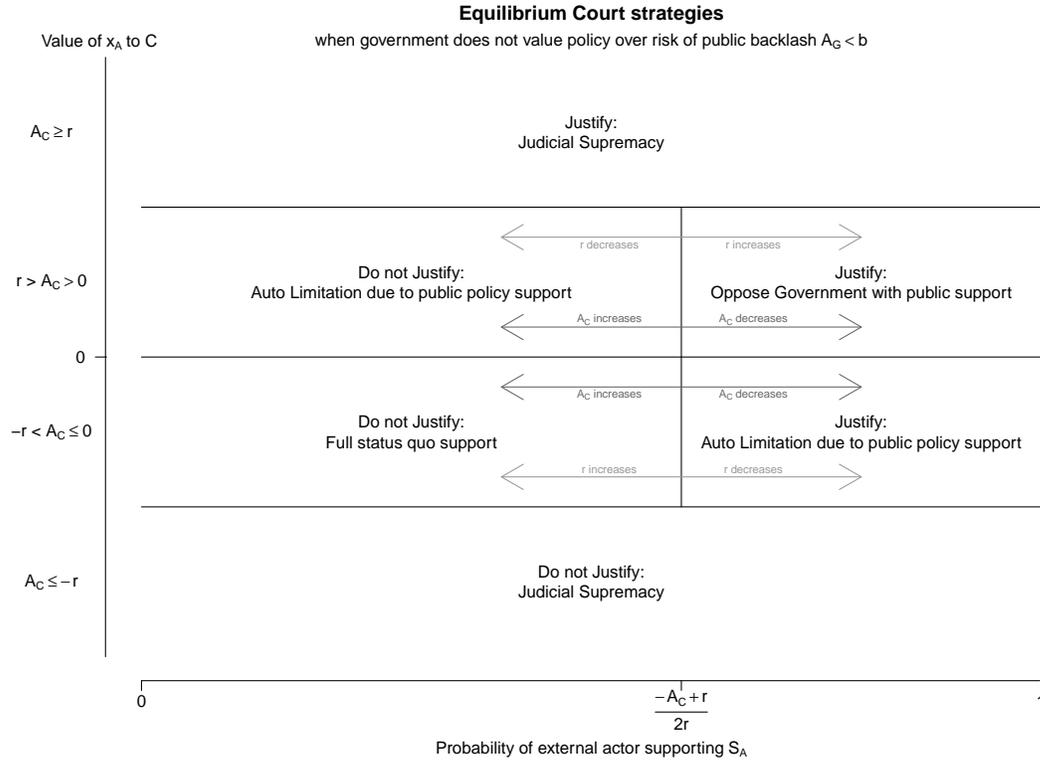


Figure 5: Equilibrium strategies for courts anticipating compliance

(use of) institutional rules. Many pieces of information can be derived directly through openly available court data, including the decision itself, e.g. which actors filed a brief, whether an oral hearing occurred, or whether the court has released a press release. Measures of diffuse support are commonly available measures. Comparing issue similarity of court decisions and media reporting, and identifying whether an issue has been previously reported on in the media, can constitute a proxy measure for issue salience. Arguably, issues that are already very transparent; with a strong potential of the public to impose cost (mobilized), should be more likely to raise reputation concerns among both, court and government.

I have previously argued that I assume sincere decisions to occur when reputation is not a concern; that is, when mobilization is not occurring and public actors do not impose costs. This implies, that when we can match judicial decisions based on

case-characteristics, but differ on whether mobilizing of public actors to impose costs occurs, we can compare the impact of external actors on courts across sincere and auto limited decisions. Systematic differences in the decision outcomes across these two sets of decisions should be more prevalent for weak courts than strong courts, because strong courts value reputational concerns less than weak courts.

The question arises how one can identify the sincere preference of the court; or at least its sincerely preferred outcome when ignoring reputational concerns. Whether weak courts are less sincere than strong courts can only be identified when we can identify the difference in sincere decisions as a share of all decisions between the two sets. This requires that we know for any decision, whether the court prefers to *Justify* or *not Justify*. One promising approach is to employ scaling approaches to identify the policy position of actors, and a prediction on an actor's decision based on a case-specific cutpoint on the one-dimensional latent policy space (e.g. for German courts Arnold et al., 2020; Engst and Gschwend, 2020). Does the prediction differ from the observed outcome? If yes, the decision may have been insincere by C. To avoid endogeneity, ideal points have to be estimated on previous cases, which limits research to long-standing courts, otherwise sufficient sample sizes cannot be achieved.

However, one could also argue that weak courts are always prone to insincere behaviour, because the influence of  $w$  increases and they are not certain of the governing majority's final move. So playing mixed strategies (uncertainty over  $G$ 's action), a weak court, with a higher  $w$  than a strong court, is more likely to *not Justify*, all else equal.

$OI_3$ : The higher the diffuse support for a court, all else constant, the more likely the court is to *Justify* against a governing majority, if non-compliance concerns exist.

On a macro level, to test this hypothesis, I propose first evidence could be crafted by simply estimating the share of decision outcome = *Justify* for a large set of courts, accounting mainly for diffuse support and polarization in policy preferences (cf. Engst and Gschwend, 2020)

## 4 Discussion

I argue that external actors moderate judicial decision-making. When the public is mobilized, courts have concerns towards loss of specific and diffuse support. Their best strategy depends on their value attached to the alternative policy outcome, and concerns towards loss of reputation due to policy preference disparity with public majorities and loss of diffuse support due to non-compliance revealing the court's inherent lack of powers to enforce their decision. This way, external actors, by mobilizing the public, can moderate judicial decision-making.

Actual court decisions in individual cases vary, as for every case, different external actors may attempt to mobilize, and public willingness to impose costs depends on strength of preferences, salience and transparency. Further, every policy comes with a cost or benefit to the court, and the willingness of a governing majority to evade a judicial decision varies over the benefit they anticipate, that is, whether the policy gains from evading are valued higher than the costs of public backlash or not.

The formal model presented herein enables me to derive testable implications on the macro level, suitable for comparative analysis. Namely, weaker courts, on average, should justify less against governing majorities, because their non-compliance concerns are higher compared to stronger courts. Therefore, an increase in diffuse support levels for the court, all else constant, should lead to an increase in the share of decisions to *Justify*, e.g., in a given year.

One may argue that if the court really wants to avoid transparency, they will simply not grant review for the decision. The set of referrals granted review is likely to be more salient; thus external actors are more likely to be present and able to mobilize. Courts may be incentivized to grant review either because they seek to send a strong policy signal, gaining support by supporting external actors; because they seek to achieve policy gains, as public backlash may be more likely; or both. It depends on the public policy preference, and the beliefs courts have about public preferences and capacity to

impose costs. Either way, the set of referrals granted review is likely more salient and the court at least believes that it may profit from discussing the referral over dismissing it right away, so non-compliance concerns are not forcing the court into hiding. Indeed, a court may have wrong beliefs, and the public may actually unanticipatedly backlash on the court (cf. e.g. on *Kruzifix* decisions, in: Kranenpohl, 2010).

On average, I argue that the stronger the diffuse support for a court, the more likely it is to *Justify* against the governing majority. If the assumption holds that for reviewed referrals, non-compliance concerns  $w$  are lower than for dismissed referrals, then the set of decision reviewed is a selection that courts can make to their benefit. Thus, weak courts should be most likely to *Justify* in this set of decision. If the difference between strong and weak courts across countries is robust for these cases, it is a conservative approach to test the impact of diffuse support on judicial decision-making. A next step could be to adapt the formal model to include decisions to legislate by the governing majority, and decisions to grant review by the court.

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# Appendix

## Formal proofs

Herein I will provide formal proofs for all derived propositions at a later stage of this project.

## Tie-breakers

Assume first that, if  $C$  is indifferent between reversing,  $f_C = (J)$ , or reversing a policy,  $f_C = (\bar{J})$ , the court chooses  $f_C = (\bar{J})$  in mobilized audience environment, and makes a sincere decision according to off-path utility in the passive audience environment, because there is no incentive to be insincere (but perhaps a moral expectation to be sincere instead). Assume also that, if indifferent between pulling through with unconstitutional policy,  $b = E$ , and complying to a judicial decisions,  $b = \bar{E}$ , the government chooses to comply to the reversal.