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Democratic backsliding and decision-making in the European Union: Eurosceptic contestation?

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Abstract

Do governments engaged in democratic backsliding adopt Eurosceptic positions in decision-making in the European Union (EU)? This study argues that policy context is crucial to answering this question. Backsliding governments do not necessarily oppose greater integration but are likely to resist decisions that could interfere with their domestic repression, co-optation, and legitimation strategies. Backsliding governments adopt Eurosceptic positions if and when the EU exercises or develops backsliding-inhibiting competences—that is, competences that could constrain their autocratic ambitions. I further show that backsliding does not affect EU legislative outcomes and that backsliding governments might even incur a backsliding penalty. These findings indicate that the main challenge of democratic backsliding for EU decision-making might lie in the long-term, corrosive effects that could result from the contestation of decisions and political norms. The results also enhance our understanding of the choice between incrementalism, aggression, and indulgence as the EU's response to backsliding.

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Introduction

On October 10, 2021, large protests, in which citizens proclaimed their support for European Union (EU) membership, took place in Poland.[1] The protests followed a decision by the Polish Constitutional Court, itself at the heart of the Polish government's conflict with the EU, restricting key principles of EU law. Opposition leaders including former European Council President Donald Tusk interpreted the Court's ruling as evidence of the government's ambition to weaken its European obligations, become an obstacle to decision-making, and eventually leave the EU.[2] Commentators raised the risk of a "Polexit."[3] Whether the pursuit of these Eurosceptic goals really is the government's ambition has remained unclear, however.

This study asks what backsliding governments aim to achieve in EU decision-making. However, instead of examining whether the exit of backsliding governments might be imminent, which seems an implausible proposition given the difficult experience of the United Kingdom's departure process, my focus is on the positions that backsliding governments adopt in EU decision-making. In the hundreds of negotiations, which keep the EU's legislative machinery running, do backsliding governments adopt Eurosceptic positions? Do they oppose decisions that strengthen EU rules and institutions instead of leaving freedom to the national level? In doing so, backsliders would increase contestation in EU decision-making.

Starting from the premise that the goal of backsliding governments is to consolidate domestic power, and that their behavior in EU decision-making reflects this goal rather than ideological and principled opposition to European integration, I suggest that *policy context* is key. Backsliding governments do not necessarily oppose greater integration. They might, in fact, be more pro-EU considering that the single market boosts their economic and co-optation strategies significantly (Kelemen, 2020). But they are likely to resist decisions that could interfere with their domestic repression, co-optation, and legitimation strategies. I specify the areas that trigger this contestation between backsliding and democratic EU member states and refer to them as *backsliding-inhibiting competences*.

1 https://www.euractiv.com/section/politics/short_news/poles-pin-hopes-on-tusk-to-prevent-eu-exit/.

2 https://www.euractiv.com/section/politics/short_news/poland-enters-minefield-over-eu-order/.

3 https://www.bbc.co.uk/news/world-europe-58840076. https://www.spiegel.de/ausland/polen-gegen-die-eu-der-schleichende-abgang-a-ed767d88-d09b-4a66-8b5b-9628b446d4b3.

My focus on the policy contours of backsliders' contestation of EU decisions helps reconcile different strands of literature. On one hand, considering the EU's commitment to democratic norms, its history of promoting democracy (Schimmelfennig & Sedelmeier, 2020), and efforts to strengthen the rule of law (Closa, 2019; Kelemen & Blauberger, 2017; Sedelmeier, 2017), contestation by backsliding governments seems inevitable. On the other, backsliders are said to gain from membership and seem to have little reason for Eurosceptic contestation (Kelemen, 2020). While these studies of course recognize that policy context matters, they rarely treat variation in the policies at stake as an explicit condition for backsliders' behavior. But doing so can help clarify why backsliders behave in certain ways at certain times in EU decision-making.

A similar point can be made about the broader literature on the contestation of regional norms and policies by autocracies and backsliding democracies. As in the EU context, this literature recognizes that the benefits that backsliding governments and autocracies seek from regional integration are policy-specific—material, economic support, and other select, "regime-boosting" gains (e.g., Debre, 2021a; Kneuer et al., 2019; von Soest, 2015). In a similar vein, we know that tensions between backsliders, autocrats, and regional organizations typically arise if domestic regime survival strategies come under threat (e.g., Pevehouse, 2002). For example, EU ambitions to incentivize democratization after the collapse of the Soviet Union typically faltered in the countries with the highest political adaptation costs and in the domains closest to domestic power (Schimmelfennig & Sedelmeier, 2020). Yet, in and beyond the EU context, less effort has been invested in examining the policy dimension of contestation systematically.

In the following, I discuss why backsliding governments are sometimes likely to support and sometimes likely to oppose EU decisions—and suggest that it is important whether backsliding-inhibiting competences are at stake. I then provide evidence from an analysis of government positions on hundreds of legislative issues at stake in EU decision-making between the 1990s and 2018, based on the Decision-Making in the European Union (DEU) dataset (Arregui & Perarnaud, 2022; Thomson et al., 2006, 2012) and newly-coded information on backsliding-inhibiting competences. Across a variety of tests, I find support for the view that backsliders adopt considerably more Eurosceptic positions than other member states, but only in backsliding-inhibiting competences. However, I also show that they are unlikely to gain legislative success from doing so.

Why democratic backsliders often support EU decisions

In recent years, scholars have examined the benefits that autocracies can reap from regional cooperation and integration (Debre, 2021b, 2021a; Kneuer et al., 2019; von Soest, 2015). For example, Debre (2021a) highlights numerous examples of how regional organizations help autocracies repress opponents, co-opt loyalists, and avert international interference (see also Cottiero & Haggard, 2021a). Of course, the backsliding countries in the EU are not consolidated autocracies (Cianetti & Hanley, 2021), and the EU is far from the authoritarian-majority organizations often considered in the literature (Cottiero & Haggard, 2021b; Kneuer et al., 2019). Yet, I argue that backsliders in Europe also carefully appraise the benefits of integration for their regime strategies and adjust their engagement with the EU accordingly.

Thus, instead of assuming that backsliders oppose the EU as a matter of principle, I begin from the fundamental domestic goal of these governments: to consolidate power. The consolidation of power is the foremost priority of backsliders since their pathway to (more) autocracy remains fraught with difficulty. It does not rely on an outright *coup d'état* but on a gradual process of "executive aggrandizement" (Bermeo, 2016) with a "legal façade" (Lührmann & Lindberg, 2019). It can stall suddenly when the opportunity structure changes—for example, when courts or local governments cannot be controlled or public opinion shifts (Bakke & Sitter, 2022). While backsliders work hard to (often severely) reduce the risk of losing power, this risk remains real, as in all competitive autocracies (Levitsky & Way, 2002), and as opposition successes in the 2019 Budapest mayoral election and the 2019 Polish Senate election show (Bakke & Sitter, 2022, pp. 30–31). If power is lost, the opposition can dismantle executive aggrandizement or adopt it for its own gain. Avoiding this must be any backslider's priority.

How backsliders approach the EU then depends on the costs and benefits that integration has to offer for their backsliding projects. Similar to autocracies, they rely on a mix of legitimation, co-optation, and repression strategies (Gerschewski, 2013), and they evaluate the EU in relation to these strategies. They ask whether the EU helps or hinders repressive actions against civil society and the media (Bakke & Sitter, 2022), the distribution of economic advantages to government supporters (Kelemen, 2020, pp. 490–491), or the embrace of a legitimating "ethnopopulist" ideology (Vachudova, 2020). If the EU is deemed to facilitate these or related goals, it can count on backsliders' support.

Against this background, backsliders are unlikely to oppose European integration in general or to adopt Eurosceptic positions in decision-making frequently. On the contrary, the EU bolsters backsliding strategies in several ways. Kelemen (2020, pp. 490–494) makes this point most explicitly by arguing that EU funding has become a key source of GDP in Hungary and Poland and a contributor to these governments' efforts to enhance legitimacy through growth. Moreover, the EU helps attract international investors and, by allowing sceptical citizens to work elsewhere, weakens domestic opposition and generates remittances. Finally, Kelemen highlights, EU funding appears to benefit government supporters disproportionately, suggesting that the EU unwillingly funds domestic co-optation. It would be surprising if backsliders chose to forego these benefits. Plausibly, the Polish Prime Minister argued in a speech before the European Parliament that the constitutional court's controversial judgment was limited to "one very specific interpretation of certain provisions of the Treaty, resulting from recent case law of the Court of Justice" rather than expressing opposition to the EU.[4]

Furthermore, EU membership supports the legitimation and co-optation strategies of backsliding governments by protecting them from sanctions against their economies and loyalists. When the EU and other actors seek to put pressure on undemocratic regimes, they often start with sanctions on the trade in goods and services and in capital mobility alongside travel and financial restrictions (Hellquist & Palestini, 2021; Marinov & Nili, 2015; von Soest & Wahman, 2015). However, the EU market guarantees the free movement of goods, services, and capital to member states and citizens, and the Schengen Area provides for visa-free travel. Remarkably, while the EU Court of Justice has been the target of criticism by backsliders, it provides strong assurances of economic and travel freedoms and thus serves the interests of these governments in an important, albeit often unacknowledged, way.

Overall, apart from Eurosceptic rhetoric—which itself forms part of domestic legitimation efforts (Schlipphak & Treib, 2017)—backsliders should thus be expected to support the EU in general and its legislative decisions in particular in many situations. Specifically, if we examine the competences of the EU, the deep level of integration, advanced body of legislation, and strong institutional protections in the single market serve backsliding governments well (see also Kelemen, 2020). In these domains, backsliders might of course oppose or support decisions for various country-specific or even idiosyncratic reasons, as might any other member state (e.g., Kleine et al., 2022; Pircher & Farjam, 2021; Roos, 2019). Yet, it seems unlikely that they would adopt Eurosceptic positions systematically more than other governments.

[4] See https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament (accessed October 30, 2021).

The limits of backsliders' support

If the EU was only a market project, backsliding would be unlikely to affect national position-taking and voting. However, the EU's policy scope extends far beyond the market domain as a result of the rapid expansion of its substantive agenda since the 1992 Treaty of Maastricht (Börzel, 2005; Hooghe & Marks, 2015). The EU has come to be active in "core state powers" (Genschel & Jachtenfuchs, 2014), which used to be monopolies of the state, such as matters of justice and home affairs (Herschinger et al., 2011; Lavenex & Wagner, 2007). It has sought not simply to distribute funds but to monitor spending practices in the member states, especially in light of concerns about corruption (e.g., Vachudova, 2009). The EU's border and migration policies have also become a persistent matter of legislative and policy debate (Lavenex, 2006; Schimmelfennig, 2021). In many of the issues arising in these domains, but not in all, backsliding governments might deem EU authority more problematic than in the market.

I argue that backsliding governments adopt Eurosceptic positions if the EU exercises or develops backsliding-inhibiting competences—that is, competences that could constrain their autocratic ambitions. Given the fragility of their domestic projects, backsliding governments are likely to monitor carefully and oppose EU activity in areas that could interfere with backsliding. Even if an EU decision does not directly affect a backsliding government—e.g., if the EU strengthens monitoring of EU funds without reference to any specific country—backsliders are likely to resist to avoid a precedent and prevent the incremental growth of backsliding-inhibiting authority.

Table 1. Backsliding-inhibiting competences.

Strategies	Backsliding-inhibiting competences
Repression	Organization of the bureaucracy, police, and judicial system.
	Protection of basic and political rights.
Co-optation	Rules and conditions for the distribution of EU funds.
	Monitoring and enforcement regarding domestic s pending policies.
Legitimation	Immigration, borders, minority rights.
	Education and equality policies.

We can specify backsliding-inhibiting competences by identifying areas in which the EU could interfere with backsliders' repression, co-optation, and legitimation strategies. **Error! Reference source not found.** provides an overview. Repression relies on the government's discretionary control of the bureaucracy, police, and judicial system to undermine political opponents (Bermeo, 2016; Gerschewski, 2013). EU competences over these institutional arenas or related citizen rights are thus sensitive from the perspective of backsliding governments, as evident in controversial attempts of the EU to prevent the restructuring of the Hungarian and Polish judiciary (e.g., Kelemen & Blauberger, 2017).

As co-optation entails financial advantages for loyalists (Kelemen, 2020), the EU can interfere by regulating, monitoring, and enforcing rules regarding the distribution of funds and domestic spending policies. For instance, the European Union has put pressure on Hungary and Poland by tying budget allocations to the rule of law, monitoring the disbursement of funds, and examining compliance with state aid and competition rules (Blauberger & Kelemen, 2017; Blauberger & van Hüllen, 2021).

Anecdotal evidence suggests that the EU and backsliding governments have indeed clashed in areas of relevance for repression and co-optation strategies. Hungary and Poland refused to participate in the European Public Prosecutor's Office, which strengthens the EU's ability to investigate crimes against the EU budget and which could compromise the Hungarian and Polish governments' co-optation strategies (Kelemen, 2020, p. 490).[5] The two governments have also opposed EU efforts to reign in executive aggrandizement and safeguard domestic opposition—in particular, the weakening of judicial checks and balances and media scrutiny (Closa, 2019, 2021; Holesch & Kyriazi, 2021; Kelemen & Blauberger, 2017; Sedelmeier, 2014, 2017). They only allowed the adoption of the EU's new rule of law regulation under significant pressure, with the help of financial incentives, after it had been watered down to focus specifically on the link between the judiciary and the implementation of the EU budget, and after it had been made conditional on future judicial review (e.g., Priebus, 2022).

The EU could also inhibit backsliding by constraining or countering backsliders' legitimation strategies. These strategies, which have a strongly conservative, nationalist, and populist orientation (Bogaards, 2018; Buzogány, 2017; Vachudova, 2020), have included policies such as restricting material related to certain gender and sexual orientations in schools,[6] prohibiting recognition and change of gender identity, and

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[5] See also https://www.economist.com/europe/2021/08/19/the-eu-gets-a-prosecutors-office-of-its-own (accessed November 1, 2021).

[6] https://www.economist.com/europe/2021/07/24/minority-rights-and-minorities-wronged (accessed October 30, 2021); https://www.theparliamentmagazine.eu/news/article/eu-member-states-express-grave-concern-over-hungarys-lgbtiq-discrimination (accessed October 30, 2021).

restricting adoption.[7] The Hungarian and Polish governments have also adopted restrictive policies on refugees.[8] EU policies that foster (the redistribution of) immigration, loosen border controls, protect minority rights, strengthen equality more broadly, or prevent the politicization of education are thus likely to raise opposition by backsliding governments.

In terms of anecdotal evidence, the picture on backsliding-inhibiting competences around legitimation is more mixed. Hungary and Poland have, unsurprisingly, strongly opposed EU refugee and immigration policies. However, limited signs of conflict outside of the area of immigration can be found other than, for example, short-lived conflict over a reference to gender equality in EU summit conclusions.[9] The absence of anecdotal evidence should not be taken to invalidate the point that backsliders oppose potential interference in their legitimation strategies. More plausibly, it reflects the limited levers that the EU has with respect to the legitimating discourse, societal values, or policies at stake.

It should be noted that any specification of backsliding-inhibiting competences is imperfect as the EU is creative in the interpretation of its authority. For example, beyond the areas noted here, the EU has referenced anti-discrimination in the workplace[10] and various other directives and treaty articles (e.g., audiovisual services, e-commerce, the freedom to provide services)[11] to target backsliding. However, when it comes to formulating expectations, EU decisions in these less conspicuous areas are unlikely to trigger opposition systematically. The implications for ongoing backsliding projects are too indirect. In contrast, I expect that backsliders adopt strongly Eurosceptic positions in EU decision-making on the unambiguously backsliding-inhibiting competences discussed here.

One might also wonder whether backsliders' opposition could spill-over into other issues through issue-linkage. For example, the Hungarian and Polish governments recently threatened to veto the implementation by the EU of a OECD agreement on minimum corporate taxation – a move widely perceived as a strategy of these governments to create leverage against ostensibly unrelated EU efforts to strengthen

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7 https://www.amnesty.org/en/location/europe-and-central-asia/hungary/report-hungary/ (accessed October 30, 2021).

8 https://www.euronews.com/2020/09/24/hungary-poland-and-czech-republic-oppose-eu-s-new-migration-pact (accessed October 30, 2021).

9 https://www.reuters.com/world/europe/poland-hungary-push-against-gender-equality-eu-social-summit-2021-05-07/ (accessed October 30, 2021).

10 https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190134en.pdf (accessed 8 November 2021); https://www.bbc.co.uk/news/world-europe-50302102 (accessed November 8, 2021).

11 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668 (accessed November 8, 2021).

backsliding-inhibiting competences.[12] This example is compatible with the general logic of my argument but indicates a generalized effect of backsliding beyond backsliding-inhibiting competences. However, following the near-comprehensive adoption of legislative majority voting in the Lisbon Treaty of 2009, this strategy is only possible in rare issues that still require unanimity. It is unlikely to be visible in a systematic analysis of legislative decision-making across many issues and areas.

Data and operationalization

The dependent variable is whether governments adopt Eurosceptic positions in EU decision-making. I employ the Decision-making in the European Union (DEU) dataset (Arregui & Perarnaud, 2022; Thomson et al., 2006, 2012).[13] Based on 494 interviews with EU policymakers, the DEU dataset records initial government positions on 363 controversial issues arising in 141 legislative proposals introduced between 1996 and 2018.[14] For each issue, each government's stance is recorded on a 0-100 scale, with the most extreme positions providing the ends of the scale. The DEU dataset has been very widely used for the analysis of member state preferences and bargaining in the EU (Kleine et al., 2022). It is particularly suitable here because it allows measuring the positions of backsliders directly rather than, as is often the only option, indirectly (e.g., via regime type, party ideology, or UN General Assembly voting).

To measure whether governments oppose or support integration, I manually identified the most Eurosceptic of the observed positions for each issue in the DEU data.[15] I define Eurosceptic positions as those demanding weaker, vaguer, or more (nationally) discretionary rules, leaving more decision-making authority to national governments or to the Council (rather than the Commission), limiting the EU's budget and spending, reducing the authority of supranational institutions, and reducing the scope and actors bound by EU rules. In principle, governments' pro-EU or Eurosceptic positions can then be measured as the distance from the Eurosceptic position (higher values thus mean pro-EU). In practice, however, member state positions in the DEU data—and thus also Eurosceptic and pro-EU positions—follow a strongly bimodal distribution. Two-thirds of the observations are on either extreme (pro-EU or Eurosceptic). 80 percent are either

12 https://www.euractiv.com/section/economy-jobs/news/hungary-blocks-eu-clearance-of-minimum-corporate-tax/ (accessed June 25, 2022).

13 The DEU dataset is publicly available: https://doi.org/10.34810/data53 (accessed April 11, 2022).

14 There has been extensive debate about the selection of legislative dossiers (Arregui & Perarnaud, 2022). The DEU is limited to legislation that reached some degree of controversy among governments. It excludes a vast amount of technical and uncontested decisions adopted by the EU. While this selection could be a concern for certain purposes, it is appropriate here as it allows examining legislation in which opposition by backsliding governments is a reasonable possibility but by no means certain.

15 10 percent of the cases do not have any pro/anti-EU dimension. These cases are not relevant for my analysis.

on the 0-30 end or the 70-100 end of the 0-100 range. Given this distribution, I employ a binary measure that splits the data at 50 and indicates whether governments adopt a pro-EU (1) or Eurosceptic (0) position.

I measure democratic backsliding in a narrow and a broad way. For the broad approach, I start from Lührmann and Lindberg's (2019) recommended standard for backsliding in the Varieties of Democracy (V-DEM) dataset: a decline of 0.1 on the 0-1 polyarchy index in a connected period. Three EU members meet this standard: Hungary (since 2010), Poland (since 2016), and Slovenia (since 2012). I also include three more countries that come close: Croatia (2013–2019, 0.099 decline), Czech Republic (since 2009, 0.091), and Greece (since 2013, 0.086). All cases except Hungary and Poland can be contested and might be characterized better by other concepts (Cianetti & Hanley, 2021). For example, the Czech Republic and Slovenia held free and fair elections in 2021 and 2022, won by the opposition. Yet, all cases have been discussed in terms of backsliding by some studies (e.g., Bugarič, 2015; Haggard & Kaufman, 2021; Soteropulos, 2018; Vachudova, 2020). For the narrow approach, I only consider Hungary and Poland as cases of backsliding. Only the institutional and political changes seen in Hungary and Poland have been sufficiently clear to warrant a sustained EU response. Hungary has also been downgraded to "partly free" and "hybrid regime" by Freedom House.[16] Even sceptics of the backsliding concept regard both countries as cases of backsliding (Cianetti & Hanley, 2021). The narrow and broad conception can be employed to assess the robustness of the results.

To measure backsliding-inhibiting competences, I manually classified all issues in terms of whether the EU exercised or sought to acquire authority that could inhibit backsliding. Following the structure of **Error! Reference source not found.**, I included decisions in
the following areas:[17]

- **Rights/public administration/justice:** Decisions related to citizens' basic and political rights. Decisions related to the organization and transparency of the public administration. Decisions related to courts and the justice system.
- **Funds:** Decisions related to the spending of EU funds, especially the distribution of funds, transparency and monitoring of spending, and sanctions related to spending.
- **Borders:** Decisions related to border control and migration.

[16] https://freedomhouse.org/country/hungary/nations-transit/2021.

[17] Two issues related to education and inequality, and are thus backsliding-inhibiting, but date back to the 1990s, so they do not matter much for the analysis.

To give an example, I coded the first controversial issue in *Proposal for a Directive on fight against fraud to the Union´s financial interests by means of criminal law* (2012/0193/COD) as a backsliding-inhibiting competences. The issue, according to the DEU codebook (see issue 338), was: "What are the preferences of stakeholders regarding the inclusion of the VAT fraud into the scope of competencies of the European Public Prosecutor Office?" The positions were:

> **0:** No inclusion of the VAT fraud into the scope of competences of the EPPO (current status quo)
>
> **70:** Inclusion of VAT fraud with two conditions: cross-border fraud, and valued more than 10 million euros.
>
> **100:** Inclusion of VAT fraud without conditions

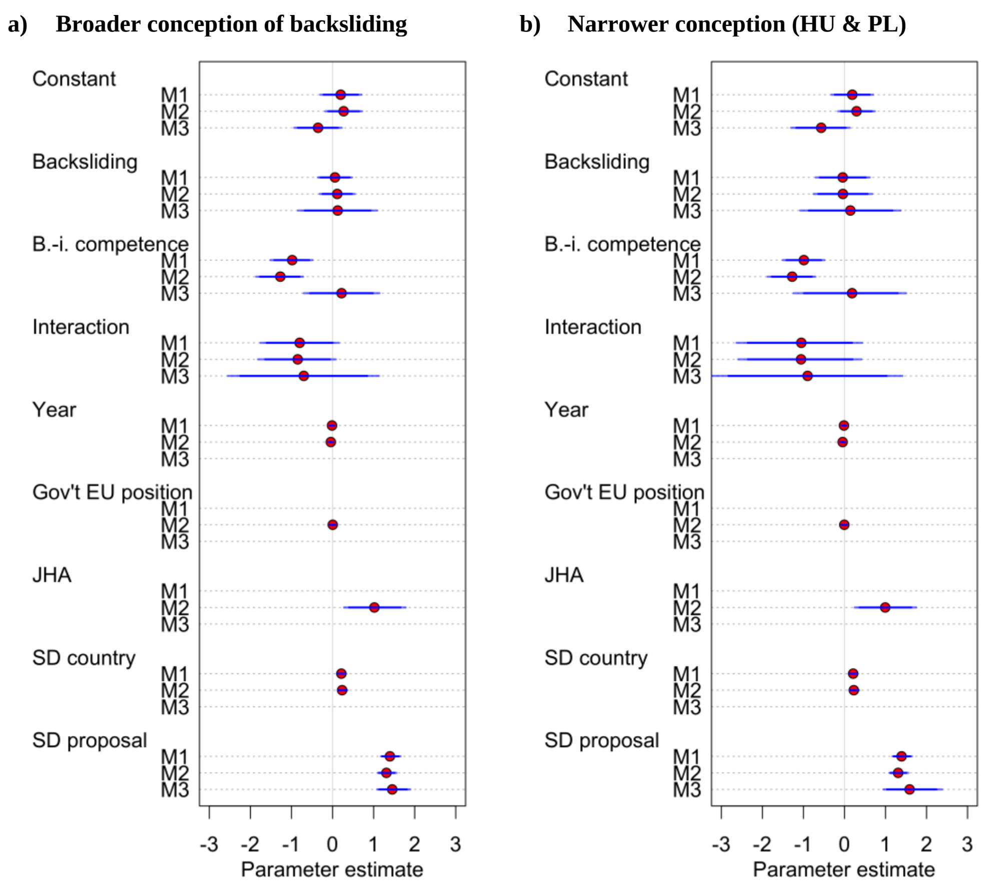
This issue is backsliding-inhibiting because backsliders seek to avert the development of EU investigative and fraud-prevention capacity. Their co-optation strategies could come under threat directly or over time as the EU's capacity grows. Appendix 1 shows all legislative proposals in which at least one issue was coded as backsliding-inhibiting.

The DEU dataset is the only available source enabling us to analyze the effect of backsliding on substantive negotiation positions across numerous legislative issues. It should be acknowledged, however, that this advantage in turn means that the number of distinct legislative proposals that can be analyzed has some limits. The dataset was collected in three waves covering legislation proposed in three time periods (1996–2000, 2003–2008, 2012–2018). For the present analysis, the first wave provides 145 legislative issues, the second 134, and the third, which was smaller, 32. However, due to the fine-grained quality of the data, we have positions of all governments for these issues yielding many issue-government observations. Moreover, unlike for example in the analysis of Council voting where only very few governments ever vote "no" (Pircher & Farjam, 2021; Roos, 2019), there is ample variation in Eurosceptic and pro-EU positions.

Results

Error! Reference source not found. shows results of regressing the binary measure of Eurosceptic (0) or pro-EU (1) positions on backsliding, backsliding-inhibiting competences, the interaction between the two, and additional variables. The first two models include random intercepts for the country and the proposal under negotiations. The third model includes *only* observations from countries that experience backsliding at some point in the analysis period (i.e., they have far fewer observations) and fixed effects for these countries (thus controlling for time-invariant country effects). The models in panels a) and b) are identical except that panel b) relies on the narrow conception in which backsliding only occurs in Hungary and Poland. All models were estimated in a Bayesian framework, albeit with loose priors given the absence of much previous research.

Figure 1. Backsliding and Eurosceptic positions in EU decision-making.



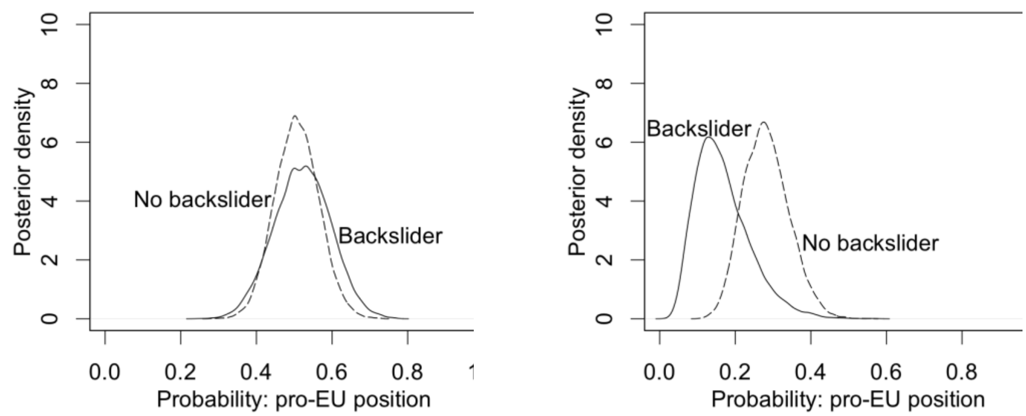
Note: Observations for the models in both panels (cases/countries/proposals): M1: 5547/28/127. M2: 4827/28/118. M3: 780/6/114. The bars are 90% (dark blue) and 95% (light blue) Highest Posterior Density Intervals (HPDI or credible intervals).

The results show that backsliding alone, outside of backsliding-inhibiting competences, does not relate strongly to Eurosceptic or pro-EU positions. While the effect is not clearly positive either, this finding suggests no general opposition of backsliding governments to pro-EU decisions. In this sense, it is in line with views highlighting the benefits backsliders obtain from the EU and lack of incentives to contest this situation (Kelemen, 2020). Regarding backsliding-inhibiting competences, all governments tend to adopt more cautious positions. This is plausible given the sensitivity of these areas for any national government. Notably, however, in model 3 with only countries that backslide at some point in the data, there is no negative relationship. This means that these countries, *before the onset of backsliding*, did not adopt Eurosceptic positions when backsliding-inhibiting competences were at stake in decision-making.

I also find a negative interaction effect. The 90 percent credible interval in the random effects models excludes any positive parameter estimates. Uncertainty is larger in the third, fixed-effects model. This is not a surprise because these models include far fewer observations (only from countries that experience backsliding). The median parameter estimate is very similar, however. These results mean that the near-zero main effect for backsliding turns strongly negative if backsliding-inhibiting competences are at stake in decision-making. Figure 1 illustrates that backsliding in combination with backsliding-inhibiting competences reduces the median probability of a government adopting a pro-EU position by over 10 percentage points. There is no noteworthy difference in the probability of pro-EU positions outside of backsliding-inhibiting competences. In the Council of the EU, in which few governments consistently find themselves on one side or the other of the typical political divides characterizing European politics (Cross, 2013; Kleine et al., 2022; Thomson et al., 2006, 2012), this is a substantively important relationship. It is compatible with the observation that backsliders and democratic member governments have clashed in decision-making (Closa, 2019; Kelemen & Blauberger, 2017; Sedelmeier, 2017), but specifies the policy context of these conflicts.

Figure 1. The probability that backsliding governments adopt pro-EU positions.

a) No backsliding-inhibiting competences **b) Backsliding-inhibiting competences**



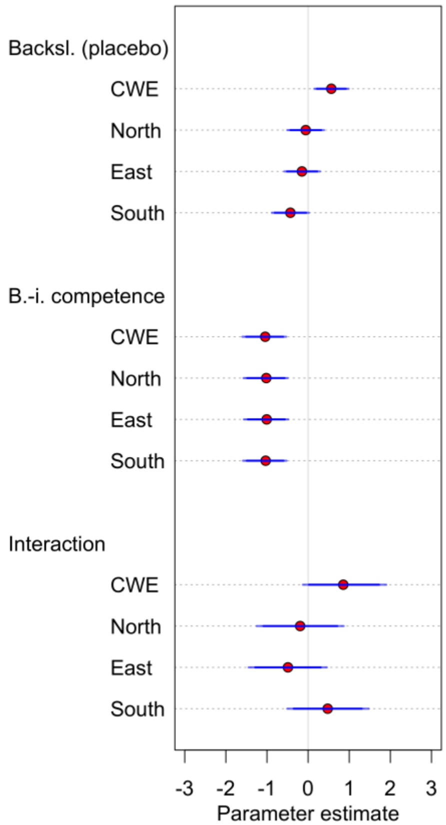
Note: The predicted probabilities were generated based on 1,000 draws from the posterior distribution of Model 1.

Could the positions of backsliding (and other) governments reflect Eurosceptic ideology? Model 2 in **Error! Reference source not found.** includes a measure of government Euroscepticism, based on the seat-weighted average position of the government parties according to Chapel Hill expert surveys (Bakker, de Vries, et al., 2015; Bakker, Edwards, et al., 2015; Bakker et al., 2020). This measure does not have a relationship with government positions or change the other findings. Furthermore, Models 1 and 2 also include a time trend, which suggests that pro-EU positions become less likely the later the date of introduction of a legislative proposal. This is in line with observations that Council decision-making has become (slightly) more contested (Pircher & Farjam, 2021), but does not change the other results. Finally, might backsliding-inhibiting competences simply capture a "justice and home affairs" effect? Including a dummy variable for all legislation negotiated by the justice and home affairs council does not change the results, however. Controlling for backsliding-inhibiting competences, governments would rather adopt more than less pro-EU positions in justice and home affairs.

Furthermore, I conducted a placebo test to examine whether the findings reflect some accidental interaction of a time trend with backsliding-inhibiting competences. If so, then coding any other member state as backsliding should yield similar results. Figure 2 shows results of four models that, respectively, assign backsliding to another grouping of countries and exclude the actual backsliders. The onset of backsliding is coded for 2010, which is when the current Hungarian government entered office (see **Error! Reference source not found.** for a 2015 onset, the start of the current government in Poland). Irrespective of which grouping is "given" the placebo coding, however, the interaction between backsliding and backsliding-inhibiting competences is weaker or even positive than for the actual

backsliders. The group of countries that generates relatively similar results are the other Central and East European countries. However, the relationship is weaker, and the credible interval includes many more positive values.

Figure 2. A placebo test treating other countries as backsliders as of 2010.



Note: Observations for all models (cases/countries/proposals): 4747/22/127. The bars are 90% (dark blue) and 95% (light blue) Highest Posterior Density Intervals (HPDI or credible intervals). See **Error! Reference source not found.** for the same models but treating countries as backsliders as of 2015. The same variables as in Model 1, Figure 1, were included but not all are shown.

Overall, the evidence suggests that backsliding governments contest EU decisions by adopting a Eurosceptic position, but only in backsliding-inhibiting competences. In the market and other domains that are not directly related to backsliders' strategies to consolidate domestic power, backsliders' positions do not differ systematically from other member states.

Do backsliders succeed in legislative negotiations?

Finally, I conduct a first test of whether democratic backsliding might result in more Eurosceptic legislative *outcomes* in the EU. This depends on whether backsliding governments succeed in legislative negotiations. Existing research provides strong indications that this is unlikely. In the highly consensus-oriented Council (Heisenberg, 2005; Lewis, 2005; Novak, 2013), negotiation outcomes regularly lie close to the center of the distribution of member state preferences. This pattern has been found repeatedly for different time periods and policy domains (e.g., Kleine et al., 2022; Târlea et al., 2019; Thomson, 2011; Thomson et al., 2006). If backsliders adopt more Eurosceptic views and thus deviate from the center, they are likely to lose. There could even be a backsliding penalty—as violators of foundational, treaty-based EU norms of representative democracy, backsliders might not enjoy the benefits of the compromise orientation of the Council (see also Adler-Nissen, 2014). In other words, backsliders are likely to contest but unlikely to change legislative outcomes.

The DEU dataset, introduced earlier, contains information on legislative outcomes (Arregui & Perarnaud, 2022). In keeping with the approach so far, I categorize outcomes as pro-EU or Eurosceptic. I then follow the approach of recent studies of Council decision-making (Mariano & Schneider, 2022; Târlea et al., 2019), and code bargaining success if a government adopted a Eurosceptic or pro-EU position and the outcome turned out accordingly.[18]

[18] I use a binary measure of the outcome for the same reasons noted earlier. The distribution of the continuous measure is highly bimodal with very few observations far away from the pro-EU or Eurosceptic extremes.

Figure **3** shows results of multi-level models of bargaining success with country and legislative proposal random intercepts. The first model includes a variable, *distance from the mean*, that captures how far a government's position is from the Council average (with all positions located on the 0-100 range from pro-EU to Eurosceptic positions). If this variable's relationship to legislative outcomes proves negative, backsliders would lose from adopting more distant, Eurosceptic positions, as would any other member state. I also include an indicator of ongoing backsliding to probe whether backsliders incur a direct penalty in addition. Finally, the model contains further variables deemed important in recent studies: the distance from the European Commission's position, the relative salience a government attributes to the issue at stake, and a time trend (e.g., Mariano & Schneider, 2022).

Figure 3. Backsliding, Eurosceptic positions, and bargaining success.

Note: Observations for all models (cases/countries/proposals): 5447/28/127. The bars are 90% (dark blue) and 95% (light blue) Highest Posterior Density Intervals (HPDI or credible intervals).

The results are clear and in line with existing research. Governments that adopt positions further away from the Council mean are likely to lose in legislative negotiations. Backsliders cannot expect legislative success by adopting Eurosceptic positions. Their impact will thus be limited to enhancing contestation. There even is some evidence for a backsliding penalty as the indicator of ongoing backsliding relates negatively to bargaining success. However, the credible interval is wide. To explore this possibility further, Model 2 includes an interaction effect between backsliding and distance from the Council mean to assess whether backsliding governments incur an extra penalty for deviating from the mean. The interaction is indeed clearly negative suggesting there might be a backsliding penalty. Some caution is warranted, however. In a placebo test (see Figure A1), I instead coded other groups of countries as backsliders as of 2010 and found a similar interaction effect for the other Central and Eastern European (CEE) countries but not any other grouping of member states. Hence, it is unclear whether the finding indicates a backsliding penalty, a wider penalty for the CEE region, or a combination of both.

Nevertheless, this first assessment of bargaining success and legislative outcomes confirms existing research on the Council. It runs counter to the idea that backsliders could shift outcomes by adopting more Eurosceptic positions. In the consensual environment of the Council, in which outcomes tend to converge on the mean position, Eurosceptic positions come at the cost of bargaining losses. There might even be a distinct backsliding penalty, but the evidence is less clear and demands further research.

Conclusion

I have analyzed whether backsliding governments adopt Eurosceptic positions in EU decision-making. The main contribution has been to specify the policy context of backsliders' contestation of EU decisions and the underlying political goals and norms. Backsliding governments are likely to adopt Eurosceptic positions only on legislative issues that could threaten their domestic repression, co-optation, and legitimation strategies. I have labeled these areas backsliding-inhibiting competences. In other domains, backsliders stand to gain significantly from the EU and are unlikely to contest decisions more than other member states.

These findings help explain some of the puzzles we find in the current EU literature. For example, they help reconcile the observation that backsliders and democratic member states have clashed intensely in the EU's legislative process (Closa, 2019; Kelemen & Blauberger, 2017; Sedelmeier, 2017) with the charge that the EU provides a highly hospitable environment for backsliding (Kelemen, 2020). Both views are convincing, but their respective relevance depends on policy context; contestation is not ubiquitous across policy domains but depends on the extent to which EU decisions threaten to reduce the backsliders' discretion.

An important implication is that democratic backsliding in Europe is not only a domestic problem, and one that the EU could try to fix (Blauberger & van Hüllen, 2021; Kelemen & Blauberger, 2017; Sedelmeier, 2017). It is a challenge for the EU. It induces contestation due to backsliders adopting Eurosceptic positions in backsliding-inhibiting competences. The affected domains are important for the EU's development, which has increasingly focused on "core state powers" such as border control, police, and justice cooperation, or taxation and spending policies (Genschel & Jachtenfuchs, 2014; Herschinger et al., 2011; Lavenex & Wagner, 2007; Schimmelfennig, 2021). The finding that backsliders appear unable to change legislative outcomes, is some reason for comfort for EU policymakers. However, contestation could have significant corrosive effects in the long term. It could create the popular perception that the EU is gridlocked in intergovernmental conflict and unable to deal with members that violate foundational norms. Contestation could also raise the salience of the pro/anti-EU question in electoral politics at the domestic level and play into the hands of Eurosceptic movements in the member states.

Finally, this analysis enhances our understanding of the response strategies available to democratic member states: incrementalism, aggression, and indulgence. The results here indicate that incrementalism is a viable approach, but not without costs. Member states can continue to adopt market legislation and use legislation or softer tools to strengthen backsliding-inhibiting competences (Blauberger & van Hüllen, 2021; Priebus, 2022). Backsliders benefit from the former and cannot easily prevent the latter. Over time, the EU's ability to reign in backsliding would grow. This strategy can be complemented with other routine tools such as enforcing compliance with EU law to constrain backsliding (Blauberger & Kelemen, 2017). Progress would be slow since this strategy must operate within the limits of the treaties (Priebus, 2022). Moreover, as the results showed, even democratic member states are hesitant regarding EU legislation in backsliding-inhibiting competences. The cost of legislative incrementalism would be persistent Eurosceptic contestation in the legislative process and dissatisfaction by actors such as the European Parliament that not enough is being done.

Alternatively, the EU could be more aggressive. It could use demanding tools such as the suspension of membership rights under Article 7 or even create new tools through treaty reform (Closa, 2021; Kröger & Patberg, 2021). I have not studied this strategy here, but the analysis tentatively suggests some concerns. As legislative incrementalism, the aggressive approach would trigger Eurosceptic contestation as it relies on backsliding-inhibiting competences. In turn, its benefits are uncertain. In contrast to legislation, which backsliders struggle to prevent, the aggressive strategy faces high voting hurdles and even stronger hesitance from the democratic governments (Closa, 2021). It gives backsliders ample opportunity to protect themselves (Holesch & Kyriazi, 2021). The aggressive strategy could also trigger backlash in the domestic politics of backsliding countries (Schlipphak & Treib, 2017). It seems that the aggressive strategy would yield few gains above legislative incrementalism and possibly higher costs—even more contestation, domestic backlash, and decision-making failures.

The EU could also opt for indulgence. It could refrain from the Article 7 process and legislation in backsliding-inhibiting competences. If democratic governments wished to make progress, national opt-outs could exempt backsliders. This happened in the case of the European Public Prosecutor's Office (Kelemen, 2020, p. 490). This strategy could be complemented with social pressure and persuasion such as the EU's new rule of law scoreboards and review cycles (Priebus, 2022; Sedelmeier, 2017). The indulgence strategy would avoid Eurosceptic contestation and enable institutional and legislative development. The question is whether indulgence would change anything about democratic backsliding and the costs that the presence of backsliders might entail for the EU's reputation and organizational identity as a democratic organization. Since social pressure and persuasion depend on demanding conditions (Sedelmeier, 2017), scepticism might be warranted. Overall, given my findings and existing research, incrementalism, complemented with cost-free facets of indulgence, currently seems more viable an approach than aggression. Further research on the implications of these strategies is needed, however.

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Appendix 1: List of backsliding-inhibiting legislative proposals

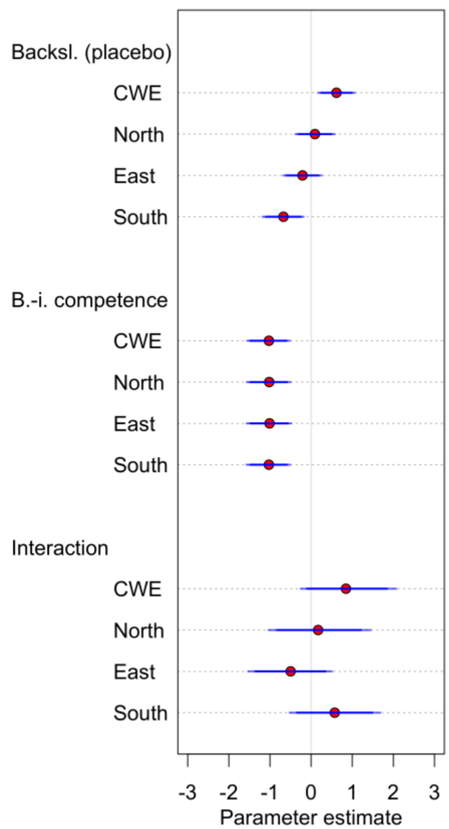
The following lists legislative proposals in which at least one issue was coded as backsliding-inhibiting. Note that legislative proposals often include several controversial issues.

1. Proposal for a regulation of the European Parliament and of the Council regarding public access to documents of the European Parliament, the Council and the Commission (COD/2000/032)
2. Proposal for a regulation regarding the implementation of measures to promote economic and social development in Turkey (COD/1998/300)
3. Proposal for a regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (CNS/2000/030)
4. Proposal for a directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (CNS/2000/127)
5. Proposal for a regulation regarding the implementation of measures to intensify the EC-Turkey customs union (CNS/1998/299)
6. Proposal for a regulation concerning the establishment of Eurodac for the comparison of the fingerprints of applicants for asylum and certain other third-country nationals to facilitate the implementation of the Dublin Convention (CNS/1999/116)
7. Proposal for a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (CNS/1999/154)
8. Proposal for a decision creating a European Refugee Fund (CNS/1999/274)
9. Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (COD/2005/127)
10. Proposal for a regulation on the financing of the common agricultural policy (CNS/2004/164)
11. Proposal for a regulation amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy (CNS/2007/045)
12. Proposal for a regulation establishing a European Union Agency for Fundamental Rights (CNS/2005/124)

13. Proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COD/2005/167)
14. Proposal for a regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism (COD/2006/140)
15. Proposal for a regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas (COD/2004/0287)
16. Proposal for a Directive on fight against fraud to the Union´s financial interests by means of criminal law – (2012/0193/COD)
17. Proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA (2017/0226/COD)
18. Proposal for a Regulation amending the Schengen border code as regards temporary reintroduction controls at internal borders (2017/0245/COD)
19. Proposal for a Regulation of the Council and the EP amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders – 2015/0307(COD)
20. Proposal for a Regulation on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement – 2018/0104(COD)

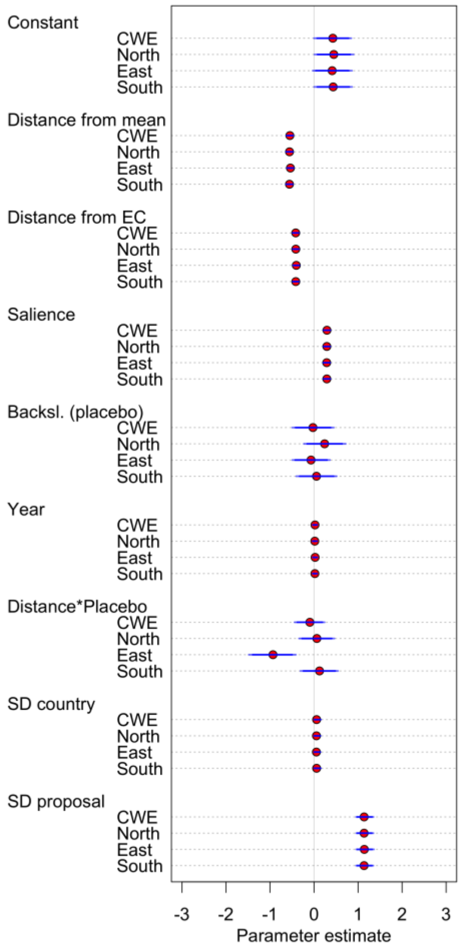
Appendix 2: Additional figures

Figure A1. A placebo test treating other countries as backsliders as of 2015.



Note: Observations for all models (cases/countries/proposals): 4747/22/127. The bars are 90% (dark blue) and 95% (light blue) Highest Posterior Density Intervals (HPDI or credible intervals). Only results for selected variables are shown. All variables from the main models were included but not all are shown.

Figure A1. Placebo test for the analysis of legislative outcomes



Note: Observations for all models (cases/countries/proposals): 4663/22/127. The bars are 90% (dark blue) and 95% (light blue) Highest Posterior Density Intervals (HPDI or credible intervals).