Tending the bar: Case allocations in the Court of Justice of the European Union

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Abstract

To what extent does the president of the Court of Justice of the European Union (CJEU) make strategic use of his members? Despite its status as the world's most powerful court, recent scholarship has identified substantial self-restraint when the Court receives signals from member states. To date, studies in the separation-of-powers tradition have considered court behavior at the organizational level. In contrast, this paper focuses on the effect of external strategic considerations on allocation of influence within the Court.

Contrary to many other international courts, influence in the CJEU is individualized and distributed at the discretion of its leadership. This paper argues that the president seeks to enhance the Court's position by strategic use of experienced members and emphasis of individual independence. Yet, case allocations remain sensitive to the broader (political) context.

To support its arguments, the paper draws on original data including allocations in 11210 cases brought before the CJEU (1958-2015). The results speak to the key role of internal organization for judicial independence as well as the interdependence between state-signatories and the court's leadership.

Introduction

Since his appointment by the Bush administration, Chief Justice John Roberts has established a solid voting record among the conservatives on the US Supreme Court. However, in some of the Court's most politicized cases – touching questions such as the Affordable Care Act (National Federation of Independent Business v. Sebelius, 2012) and the right to abortion (Whole Woman's Health v. Hellerstedt, 2016; June Medical Services v. Louisiana Department of Health and Hospitals, 2019) – he swung the Court towards more judicial restraint than what his and the majority of judges' preferences would indicate.

The moves were generally interpreted as strategic retreats, yet there were no credible threat of either legislative override or non-implementation (Glick, 2009). Rather, commentators have suggested that, as Chief Justice, Roberts relinquished short-term political gains to maintain the Court's reputation as an institution above politics (e.g.: Crawford, 2012; Liptak, 2019; Leonhardt, 2019). For a politically motivated actor this makes sense. A Court has more ideological leeway when it is seen as being above politics.

These are exceptional examples of polarized cases with a media coverage that allows the public to update their assessment of the Court's legitimacy (Christenson and Glick, 2015). But how does the situation look like for international courts? International courts may appeal to the domestic public to pressure recalcitrant governments into compliance (Simmons and Danner, 2010). However, when that strategy fails, they are reliant on member states to push for implementation. International courts' reputation with governments is therefore as important for their effectiveness as public support is for their domestic counterparts. While independent courts may occasionally go against the expressed wishes of elected leaders, these are moments when they cash in capital built up through a cohesive case law and a reputation for even-handed problem solving. Courts' internal case management is a first step in such a venture.

We may think of courts as agents designed to reveal attempts to shirk and propose outcomes that are acceptable to all parties. Courts thereby promote international cooperation; and particularly so in instances where the cost of compliance is high (Carrubba, 2005). They are tasked with upholding agreements in which the distribution of power has been carefully negotiated. The balance is often reflected in the courts' institutional set-up itself, with national quotas ensuring states' representation among the adjudicators and regular political bargaining over judges' appointments (Elsig and Pollack, 2014). However, the balance sought in these these negotiations may be thwarted if individual influence is reshuffled after the appointment.

International courts enjoy varying autonomy in how members' influence is allocated. As such, courts can be classified according to the degree to which decision making is individualized and to what extent case assignment is left to the leader's discretion. This paper argues that while delegating authority to allocate cases to the judiciary itself may expose state signatories to agency drift, the flexibility of the system allows for gains in perceived impartiality and efficiency. Courts endowed with such autnonomy may identify the staff most suited to broker solutions between states on a case-to-case basis, while a restriction of courts' autonomy would trap governments in unnecessary conflicts.

I focus on a type of courts in which individual decision makers play a central role and the leadership enjoys a large discretion in assigning it. Specifically, I ask *to what extent case assignment in the Court of Justice of the European Union (CJEU) is sensitive to the political context provided by the EU member states?*

The CJEU is often cited as the world's most powerful international court. Studying it allows for generalizable conclusions. First, even a highly independent court as the CJEU is observed to moderate its rulings in response to member states' signals (Carrubba et al., 2008; Larsson and Naurin, 2016). We may thus expect to see such political sensitivity elsewhere. Second, its

success has inspired the design of many of the new international courts established in the wake of the Cold War (Alter, 2008b, 2014). Yet, the internal workings of such courts have remained largely unexplored (Dunoff and Pollack, 2018, p. 86-87). If who makes decisions within courts matter for the outcome of cases and their implementation, then studying how cases and judges are matched is an essential step to understanding judicial independence.

To answer the research question, I have collected information on 11982 cases brought before the CJEU in the period 1958-2015. The data includes information on the parties in government at the time of the allocation, each judge's experience adjudicating on similar topics, as well at the salience and politicization of the case in question.

Literature

Courts' policy making is constrained by other branches of government. On the one hand, judges may see the potential effects of their judgments cut short by new legislation (Marks, 2015; Gely and Spiller, 1990; Ferejohn and Weingast, 1992; Epstein and Knight, 1997). On the other hand, courts are also reliant on political actors to implement their decisions (Vanberg, 2005; Staton and Vanberg, 2008; Carrubba and Zorn, 2010; Staton and Moore, 2011). While legislative override requires a coordinated action to successfully constrain the court, the second mechanism often requires an equally coordinated action to render its judgments effective. This has a profound effect on how the court assesses its strategic environment.

Independence often encompasses concerns about both a court's effectiveness – defined as its policy impact – and the autonomy with which judges form their opinion (Staton and Moore, 2011, p. 559). A court concerned with its effectiveness will be sensitive to its political context. However, its perceived autonomy – and in particular its impartiality – also bolsters its

legitimacy, which in turn feeds into its effectiveness. The perception of the court as a non-political institution is ultimately an argument for compliance. In this study, I argue that judges are particularly sensitive to their environment when faced with the joined risk that a decision may be perceived as political and possibly ignored.

Political constraints

Courts and legislators are involved in a continuous game of policy making where no actor has the last move (Ferejohn and Weingast, 1992).

A first wave of contributions to the separation-of-powers literature focused on the possibility for legislators to enact new laws to counter court decisions. Legislative override implies that the set of politically feasible court outcomes narrows down in parallel with the legislator's ability to coordinate on new policies (e.g.: Marks, 2015; Gely and Spiller, 1990; Ferejohn and Weingast, 1992). A divided legislator would therefore nurture a proactive court.

A similar argument is made in the literature on European integration, where authors have claimed that member state governments find themselves in a "joint-decision trap" (Scharpf, 1988). The difficulty of treaty making – but also the majority thresholds for passing EU secondary legislation – have left the CJEU unchecked in its pursuit of market and political integration (e.g.: Alter, 2008a; Stone Sweet and Brunell, 2012). This claim has later been challenged on two grounds. Empirically, studies have demonstrated the sensitivity of Court outcomes to member state signals (Carrubba et al., 2008; Larsson and Naurin, 2016). Theoretically, the debate in recent years has focused on the effect of non-compliance.

Early studies of international courts emphasized states' respect for legal norms as a mechanism ensuring effectiveness. The preliminary reference procedure allows courts like the CJEU to short-circuit the political level by relying on domestic judiciaries for implementation (Stone Sweet and Brunell, 1998). In contrast, other authors have observed that many higher-court cases

– even at the domestic level – require a change in government policies (e.g.: Vanberg, 2005; Staton and Vanberg, 2008; Clark, 2009; Carrubba and Zorn, 2010). The threat of non-compliance may therefore exert a more effective influence over Courts' decision making than legislative override (Carrubba et al., 2012) because non-implementation can flow from political *in*action.

No court – national or international – can enforce its own judgments (Staton and Moore, 2011). In situations of direct conflict with an unwilling policy maker, courts are therefore reliant on third-party pressure for compliance. Higher domestic courts thus engage in a battle for public perception where its legitimacy is the main tool for trade (e.g.: Vanberg, 2005; Staton and Vanberg, 2008; Clark, 2009; Carrubba and Zorn, 2010; **?**). The situation is not inherently different for international courts, where a well-argued judgment may impose a domestic audience cost on the current government (Simmons and Danner, 2010).

International courts may furthermore rely on inter-state enforcement. Although the decision not to comply is unilateral, exerting pressure on the non-complier requires coordinated action among the remaining state signatories. This is particularly true in the case of the EU, where unilateral retaliation is prohibited (Phelan).

The EU judicial system is geared towards identifying situations where such enforcement is politically feasible and effective. The EU infringement procedure is a case in point, where both the Commission and the affected states have several occasions to back down from further conflict (Fjelstul and Carrubba, 2018). Beyond willed shirking, non-compliance can also be caused by states' inadvertence or inability to implement policies. European integration can therefore in parts be explained by the European Union's combination of cooperative and coercive instruments (Tallberg, 2002). If litigation occurs, Carrubba (2005) shows that – while international courts may be useful "fire alarms" alerting states to breeches of the contract – their added-value is the highest in situations where the domestic context renders

non-compliance inevitable. Courts can identify these situations and render narrow judgments that in effect constitute permissible derogations. This allows states to remain in cooperation despite the occasional non-compliance. However, an effective execution of that task also requires some strategic skills on the part of the Court.

Strategic replies

Writing a judgment requires a combination of policy skills and political flair. We can understand case allocation through an informational framework. While decision makers may have a particular policy outcome in mind, they are also uncertain about which policy measure would best achieve it. The court can resolve the problem in two ways. On the one hand, it can fill the information deficit internally by building up expertise through specialization among judges. Overall, we may say that the valence of a judgment reduces the uncertainty of its policy impact (Lax and Cameron, 2007). On the other hand, it can leave the details to the authority in charge of implementation (Staton and Vanberg, 2008). The gains from such a delegation may be high, as other branches of government have a large state administration at their disposal. However, it also leaves room for policy drift; allowing political actors to hollow out the court's original intent.

In each case brought before the judges, the court is faced with a decision tree. When available, it can choose to rely on its own expertise to produce precise recommendations. This may improve the chances of a timely implementation (Stiansen, 2018). However, non-compliance is also easily identifiable. If the bargain fails, the court not only sustains the cost of an ineffective judgment, it also risks losing reputation in a stand-off with elected politicians (Staton and Vanberg, 2008). An effective court is therefore a court that keeps both options open and chooses its battles wisely.

The Court's president has a special responsibility in preserving the Court's independence through his case allocation. This involves nurturing the ac-

quisition of expertise among judges through specialization. It also involves identifying situations where the Court finds itself in a political minefield. Resolving political questions in the court room exposes the Court to the suspicion that it is itself a political actor. In particular because the CJEU enjoys such a large discretion – especially in matters of economic integration – the judiciary ought to take particular care when politicized questions are brought before it (Ferejohn, 2002). When member states disagree about the contents of a policy, then a strong stand in one direction exposes the Court to a dual risk that its its reputation as an impartial adjudicator is tarnished and that its decision will be ignored.

In the following, I will argue that the president is sensitive to these considerations when allocating cases. I will also argue that the Court's internal procedures provide him with the information he needs to identify such situations. However, first, I will place the CJEU's case allocation in a comparative context. The purpose is to show that not all courts have the internal organization that allows for such dynamics. It means that inducing such a strategic sensitivity is a matter of institutional design.

Matching judges with cases

It is reasonable to believe that the success of a judgment is related to the attributes of its author(s). Quality – and therefore effectiveness – is linked to judges' skill set. Similarly, content and/or the perception of the court as impartial is linked to the pressures that judges face. Justices vary in both of these respects. The way judges and cases are matched is therefore key to a court's independence.

In contrast to arbitration – a common international-level alternative to litigation – matching in a court is a two-step procedure. The purpose is to ensure judges' impartiality, as the parties cannot choose their adjudicator. However, this creates a trade-off in terms of expertise.

At the first stage, an external appointer – often the member states them-

selves – sends judges to the court without knowing the cases he or she will adjudicate. In a full-representation court – where member states can appoint their own judge(s) – this implies that members respond to different principals. The resulting heterogeneity in incentive structures can be attenuated through the appointment procedures; in particular with respect to the career incentives created by renewable terms (Dunoff and Pollack, 2017). In contrast, the growing reliance on judicial selection committees at the international level can be read as an attempt to reduce heterogeneity in terms of legal competence (Bobek, 2015). However, an exact match between judges' skill set and individual cases at this stage would defeat the purpose of a permanent court.

Once a case is filed, a second round of matching is done internally. Courts vary along two dimensions. Deliberations may be more or less inclusive, and matching may be more or less left to the membership's discretion. Figure 1 is an attempt to illustrate such a classification.

Both elements are relevant to the court's autonomy and ability to pursue effectiveness on a case-to-case basis. On the one hand, collective deliberations provide the court with the diverse skill set required for effective decision making but its activism may be limited by checks and balances provided by the group of judges themselves. On the other hand, discrete case allocation provides the court with the possibility of strategic use of resources. While this may allow autonomous – and possibly activist – decision making, it also allows the court to staff cases as a function of its political environment.

Inclusive or exclusive participation The extent to which all judges are involved in decision making varies across courts, ranging from a very collective process in the International Court of Justice (ICJ) and the WTO Appellate Body (WTO AB) to more secluded chamber deliberations in the European Court of Human Rights and the CJEU (Dunoff and Pollack, 2018, p. 101-102). Although the treaty text only foresees a three-member panel,

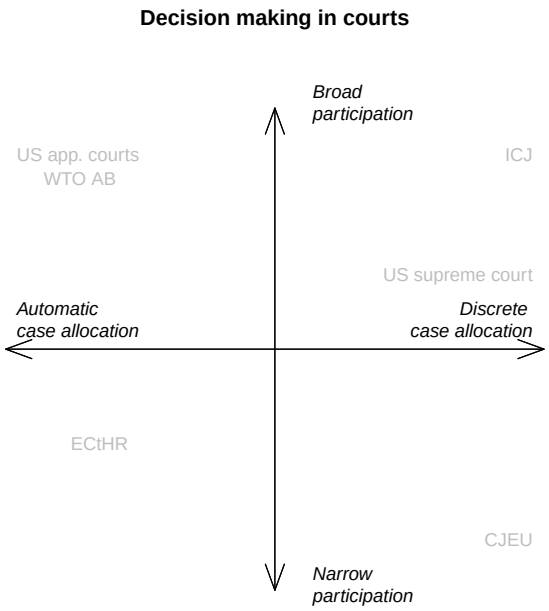

Figure 1: Courts vary along two dimensions in how deliberations are organized.

the WTO AB organizes an exchange of views with all members prior to the deliberations (WTO, 2017, p. 118-119). Similarly, cases in the ICJ are generally heard and discussed in plenary before a general consensus is met and three members are elected to draft the judgment.

The practice of holding discussions with members who are not explicitly assigned to cases is unique to international dispute settlements (Dunoff and Pollack, 2018, p. 101-102). However, decision making may move from a collective to a more secluded phase also at the domestic level. Deliberations in the US Supreme Court follow a setup where cases are assessed in plenary before a preliminary vote is cast. The final judgment is drafted by a member of the majority. All members are free to join this opinion or author their own text, dissenting or concurring.

In contrast, – even though both the ECtHR and CJEU are formally full-representation courts – most decisions are taken by a sub-set of judges without substantive involvement of the plenary (Mackenzie et al., 2010, p. 7-8; Dunoff and Pollack 2018, p. 101-102). The CJEU provides an example of extremely individualized decision-making. While cases are assigned directly to chambers in the ECtHR, in the higher formation of the CJEU (the Court of Justice) a "judge-rapporteur" is appointed already at the out-set. The assignment of other panelists follow from that choice.

The judge-rapporteur is in charge of preparing the case and act thereby as an agenda-setter. Early in the process, the appointed judge communicates a preliminary report to all the members of the Court (RoP, 2012, Article 59). He suggests how to deal with the case, the key questions involved and may go far in outlining the outcome. Only after his preliminary report, the panel size is decided. Overall, the workload at the Court is such that the reporting judge is entrusted with the information gathering and drafting of the judgment. During the final deliberations, all judges are requested to present their views, and if no consensus is reached, the final outcome is decided by a majority vote (RoP, 2012, Article 32). In contrast to the American majority opinion writer,

the judge-rapporteur is tasked with writing the final decision on behalf of the entire panel regardless of whether he is in the majority.

Given the central role played by the rapporteur, we may assume that the allocation of that task is central to the institution's policy making. This is also why a growing literature has relied on the internal strategic approach to study individual influence in the US Supreme Court. In particular, authors have focused on the impact of the majority opinion writer (Bonneau et al., 2007; Lax and Rader, 2015) and the process leading up to his appointment (Carrubba et al., 2012; Lax and Rader, 2015).

Early contributions emphasized the presidents' concern for organizational needs either as a institutional constraint to policy making (Maltzman and Wahlbeck, 1996, 2004; Wahlbeck, 2006), or as an inherent part of efficient policy seeking. Specifically, repeated allocations of cases within the same policy domain can be explained by a system of specialization that provides courts with the expertise needed to render high-valence judgments (Lax and Cameron, 2007).

However, in recent years, authors have mainly considered the court's decision making in isolation from its environment, explaining output in terms of judges' attitudes and bargaining leverage (e.g.: Lax, 2007; Carrubba et al., 2012). While this provides us with insights into how autonomous courts reach their decisions, it fails to explain how considerations of the external environment translates to the individual level. In courts where case assignment is discrete, we may expect that choice to be strategic.

Random or discrete case assignment Courts also vary in how much discretion they enjoy in assigning cases to specific judges. This, in turn, determines the extent to which courts can seek to increase their effectiveness through strategic allocations.

On one end of the scale are courts that follow a *completely random* case assignment. In US appellate courts, all three judges on a panel are assigned

by a random draw. The court thereby controls neither the composition of judges nor the match between judges and cases.

Other courts follow a system of *administrative* case assignments designed to approximate a random draw. Thus, cases are assigned following a rotation but panel compositions are predetermined. This solution is used in several international courts. One reason may be that the system ensures some degree of representation/diversity among the decision makers. For example, all seven members of the WTO AB serve on three-member panels on the basis of a rotating list (WTO, 2017, p. 110-111). While assignments are done regardless of their nationality, regional quotas apply during member states' appointment of judges so that all regions have an equal chance of representation. Similarly, chambers in the ECtHR are set up for a three year period to reflect the different legal systems among the member states as well as ensuring geographical and gender balance (ECtHR, 2018, Rule 25-1 and 2). Similar informal considerations apply in the CJEU.

As an addition to the principle of rotation, some courts also include specific rules pertaining to the match between judges' and parties' nationality. Unlike governments brought before the WTO AB, all signatories of the ECHR are therefore guaranteed representation by their own appointed judge (ECtHR, 2018, Rule 26). In contrast, the CJEU has a formalized rule that prohibits judges from sitting on infringement cases brought against their own member state. These rules can be seen as attempts by treaty makers to constrain or enhance judges' autonomy.

On the other end of the scale are courts that allow for *discretionary case allocations*. This discretion can be exercised collectively and/or by the court's leadership. As we have seen, in the ICJ, the final draft is drawn up by members selected *collectively* by their peers. The US Supreme Court applies a *hybrid* system in which members are free to join a coalition but where the final judgment is written by a member appointed by either the president or the most senior judge in the majority.

Once again, the higher formation of the CJEU constitutes an example of extreme *leadership discretion*. The internal rules read "As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur in the case" (RoP, 2012, Article 15.1). However, this is only done upon the reception of additional information provided by the Court's administration (Guide Pratique, 2017, Section I(9-11)).

Following the lodging of any case, the registry prepares a preliminary memo. The document briefly describes the case and identifies similar cases and their authors – past or present – in order to facilitate the President's allocation decision (Guide Pratique, 2017, Section I(1 and 11)). Under the preliminary reference procedure, the Research and Documentation Directorate also proceeds to a more thorough "pre-exmination" of the case at hand. The document is authored by one of the Court's civil servants with local expertise[1] and is intended to provide the President with all relevant contextual information. Thus, it identifies the national and European laws affected by the case as well as related case law. It may furthermore include information on such elements as dissenting opinions, observations filed by the public prosecutor or debates around jurisprudential or doctrinal questions at the domestic level. The list is not exhaustive (Guide Pratique, 2017, Section I(4-5)).

Theory

An autonomous court may pursue its own agenda. However, its effectiveness hinges on the reception that judgments receive by external actors. Thus, policy-seeking, rational leaders will also make allocations in view of that reception.

[1]The internal guidlines suggest relying on nationals from the member state in which the case originated.

Case allocations can be considered in an informational framework. The president, acting as a principal, delegates decisions to members of the court who are better able to shape effective solutions on his behalf. A part of the solution is to allow for specialization. However, the Court has consistently rejected the institutionalization of specialized chambers. This can be understood in light of the occasional need for judges with other attributes when cases are complex. In the words of justice Prechal (2015, p. 1286-1287), even sector-specific cases may touch upon horizontal issues or foundational principles of EU law. This should not be left to a subset of policy experts. A de facto specialization has nevertheless developed at the individual level:

> When designating the Judge-Rapporteur, the President will usually take into account whether a certain judge has been already dealing with a certain matter and has profoundly familiarized him or herself with the area of European Union law concerned. For reasons of efficiency, this judge will receive, during a certain period of time, cases that are similar. (Prechal, 2015, p. 1286-1287)

As a consequence, I formulate a first expectation that the president favors specialization as a means of obtaining low-cost expertise.

Hypothesis 1a *The president is more likely to appoint a rapporteur who has acted in the same role in previous cases related to the same topic.*

To encourage the accumulation of expertise, judges may therefore obtain a disproportional influence over certain EU policies. Yet, since allocations are made on a case-to-case basis, the President nevertheless retains the possibility to allocate differently if the circumstances so require.

By allowing for specialization, the President also ensures a certain degree of consistency between cases. A coherent case law can be seen as a strategy of self-binding. Previous studies have demonstrated that in instances where the Court rules against the majority of member state governments that have

submitted observations in preliminary reference cases, the Court refers to a larger body of earlier decisions than when the political environment is less hostile (Larsson et al., 2017). When a legislation has not yet been interpreted by the Court, I therefore expect that the rapporteur's knowledge of the fields matters relatiely more.

Hypothesis 1b *The president is more likely to emphasize expertise (acquired through specialization) in cases where the Court has not yet provided an interpretation of a piece of legislation.*

Courts derive much of their authority from the perception that their decisions are not political. As politicization increases, the Court may see it beneficial to bolster the impression of a neutral decision maker or a moderate broker.

On the one hand, the classical separation-of-powers approach would imply that the Court rules expansively when political division among legislators render the threat of override minimal. On the other hand, states' non-compliance also involve few risks, as the possibility of a concerted reaction among other signatories is equally reduced. That is, in line with the view that courts are set up to broker viable solutions between state parties, we may expect that the President opts for a judge whose government is likely to see both sides of an argument.

Hypothesis 2 *In cases where member states have expressed conflicting positions, the president is more likely to appoint a judge whose current government hold preferences close to the median.*

In contrast, in uncontroversial cases, the President runs only a limited reputational risk in appointing rapporteurs from preference outliers.

Empirical strategy

In the following I describe the basic data structure and justify my choice of model before giving an account of my operationalizations.

Data structure and choice of model

To better understand the president's allocation criteria, I have collected a data set including 11210 court cases, 6265 of which were initiated by a preliminary reference (1958-2015). Unless otherwise stated, information is gathered from the official website for EU legislation (EUR-Lex) or the Court's own web pages (Curia).

The data structure provides a realistic description of the alternatives faced by the president. For each case, I list the judges who were members of the Court and flag the rapporteur. This constitutes the president's "choice set". The baseline data frame thus includes 238341 observations of a total of 101 judges nested in cases. Several models will nevertheless focus on a subset of judgments, determined either by availability of relevant data or by substantive concerns pertaining to the context in which the president makes his allocation.

The dependent variable, *Rapporteur*, is a binary measure indicating the president's choice. While the president has an obligation to allocate all cases and employ all judges, their exact match remains at his discretion. All predictors are therefore designed to describe that match. Unless otherwise stated, predictors consequently vary between judges within each case as well as across cases within individuals.

Statistical model choice The statistical model is guided by the same realism. All results are obtained from mixed conditional logistic regression. The probability that a case is allocated to justice i in case j can be written as follows:

$$\mu_{j(i)} = \beta X_{j(i)} + \beta X_{j(i)} \times Z_j$$

The choice calls for some clarifications. First, the Court's membership has evolved continuously, presenting the president with an ever-changing menu. The varying choices make comparisons over time challenging, as the level of the predictors is substantially different over the Court's history. For example, the overall experience among members was limited in the early period compared to later. Yet, the president could not allocate cases to more experienced judges, since they were not yet members of the Court. Other logistic regressions would allow for such choices, thus reporting that the president regularly makes allocations to inexperienced members. The conditional logit model specifically makes comparisons within each choice set so that irrelevant alternatives are excluded (McFadden, 1973). The values of variables may well vary across cases. However, their effect is aggregated and correctly estimated (Long, 1997, p. 178).

Second, while most predictors describe differences between judges nested within choice sets, I expect that the president's assessment also depends on contextual features that vary at the case-level (Z_j). Specifically, I expect the president's selection criteria to change in salient and politicized cases. These predictors are included in the model as cross-level interactions in order to reflect the contextual change in the president's relative emphasis on individual features. The model hence qualifies as a mixed conditional logit.

Estimation strategy All results are obtained using MCMC simulation within a Bayesian framework.

In order to retain a valid data sample that includes all judges in the choice set, values for some units are simulated rather than observed. Most predictors to not contain missing observations. A notable exception is the measure of governmental preferences. A listwise exclusion would effectively remove

judges from the president's choice set, thereby counteracting the realism implied in the conditional logit. Instead, I impute the missing observations through a linear regression estimated in parallel to the main model. While government preferences are measured using party manifesto data (Volkens et al., 2017), the imputations rely on information on the prime minister's party family (Döring and Manow, 2018). The Bayesian framework incorporates the additional information to the model while also inserting the uncertainty implied in the imputation (Jackman, 2009, p. 237-244). In total, depending on the model, some 7% to 8% of the observations rely on preferences imputed in this way.

All models are run with 2 000 iterations burn-in to ensure convergence. I then sample every tenth iteration for the following 5 000. Details are provided in the appendix.

Variables

A high-quality judgment increases the precision of its policy impact (Lax and Cameron, 2007). However, well-crafted judgments also require additional resources; such as time, talent and experience. I have argued that these resources are managed strategically at the president's discretion. This would require the president to anticipate the course of action of a diverse set of stakeholders before making a choice based on his belief about how each judge would handle the task.

Regardless of the type of case filed, I expect the president will seek to increase the institution's effectiveness by rewarding specialization (H_1a). In addition, I expect that the governmental preferences of a judge's member state have a bearing on allocations in potentially politicized cases (H_2).

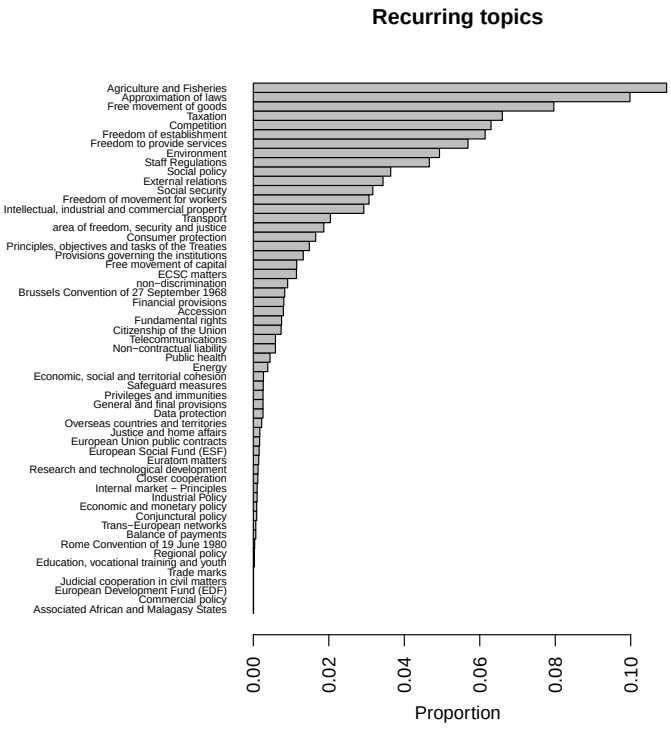
Recurring topics
Agriculture and Fisheries
Approximation of laws
Free movement of goods
Taxation
Competition
Freedom of establishment
Freedom to provide services
Environment
Staff Regulations
Social policy
External relations
Social security
Freedom of movement for workers
Intellectual, industrial and commercial property
Transport
area of freedom, security and justice
Consumer protection
Principles, objectives and tasks of the Treaties
Provisions governing the institutions
Free movement of capital
ECSC matters
non−discrimination
Brussels Convention of 27 September 1968
Financial provisions
Accession
Fundamental rights
Citizenship of the Union
Telecommunications
Non−contractual liability
Public health
Energy
Economic, social and territorial cohesion
Safeguard measures
Privileges and immunities
General and final provisions
Data protection
Overseas countries and territories
Justice and home affairs
European Union public contracts
European Social Fund (ESF)
Euratom matters
Research and technological development
Closer cooperation
Internal market − Principles
Industrial Policy
Economic and monetary policy
Conjunctural policy
Trans−European networks
Balance of payments
Rome Convention of 19 June 1980
Regional policy
Education, vocational training and youth
Trade marks
Judicial cooperation in civil matters
European Development Fund (EDF)
Commercial policy
Associated African and Malagasy States
0.00
0.02
0.04
0.06
0.08
0.10
Proportion

Figure 2:

Expertise through specialization

A judge may signal to the president the type of cases he finds particularly interesting. From the court's perspective, such specialization allows for efficiency gains, as an expert may write higher-quality judgments spending less resources.

I rely on four different measures that capture the degree of specialization in a judge's portfolio as rapporteur at the time of the allocation. The two first measures capture a very precise and a very broad definition of connected cases, respectively. The two remaining measurements only cover a fraction of the historical period, but in exchange they reflect the overlap in policy areas as defined by the legislators themselves.

Expertise – previous judgments relating to same laws is constructed in the same way, but captures the degree of overlap in terms of the legal texts directly affected by the litigation. As such, it taps directly into the idea that judges may successfully end up shaping policies deriving from specific pieces of legislation. In most instances (65% of the cases), the president has at least one judge at his disposal who has previously rendered a judgement at least partially affected by the same EU laws.

Expertise – previous judgments on the same topic relies on a broad concept of policy areas. EUR-Lex classifies all documents according to their subject matter. Figure 2 displays the distribution of the 57 topics identified by the institution itself. To construct the variable, I compare each case with all previous cases in a judge's portfolio. A court case may touch upon several topics simultaneously. For each pair of cases, I thus calculate the proportion of overlap, before summing over the judge's entire portfolio. The cumulative count captures how expertise grows over the course of a judge's career. Since judges more likely gain new expertise and/or establish themselves as experts in the first related cases than later, the variable is log transformed ($log(x+1)$).

The two remaining measures rely on information on the secondary EU law affected by a case. While the first measure captures the overlap in

terms of the Commission's Directorate General responsible for proposing the legislation, the second measure captures overlap in terms of the Council's formations involved.

Expertise has previously been identified as an important predictor of majority opinion assignments in the US Supreme Court (Maltzman and Wahlbeck, 1996, 2004). In contrast to previous studies, here, expertise is a continuous measure which I expect to be positively related to report assignments.

Perception of moderate judges in controversial cases

I have argued that the authority of the Court's judgments hinges on the perception that those adjudicating the case do not enter the political debate. Testing the expectation requires a measure of governments' political preferences as well as an indication of which cases the President anticipates as having potential for controversy. I rely on three measures where member state governments have potentially different preferences over the outcome. These measures seek to identify cases where the Court is in a typical situation for international courts where judges are called to resolve coordination problems between member states.

Potential politicization - debated legislation relies on all Court cases lodged affecting secondary legislation (directives and regulations) where information on the legislative decision making in the Council is electronically available. All EU legislation is not discussed at the ministerial level. If a policy proposal can be resolved by national civil servants, the dossier passes as an A-item on the Council's agenda without further discussion. In contrast, a B-item reflects cases with sufficient political disagreement to vouch for a discussion by the member states' ministers. B-items therefore reflects preference divergence among governments at the time when the legislation was passed (Häge, 2007). When such legislation is brought before the court for the first time for interpretation, I expect that the president has reasons to anticipate some

degree of politicization. Such cases are a relatively rare event. In total, I have identified 424 out of 2660 judgments (16%) affecting B-item legislation where the text has not yet been interpreted by the Court. The variable is tested in a model covering a total of 4580 direct and indirect actions lodged after 1990.

Potential politicization - several member states involved indicates preliminary reference cases where several member states are mentioned in the exposition of facts in the main proceedings and/or in the Court's discussion of the question. The indicator is designed to capture cases where the Court explicitly engages with issues that crosscut borders. Among the the top subjects matter are cases pertaining to the EUs Four Freedoms (45% against 33%). Court procedures are supranational in nature. Member states rarely resolve their disputes directly before the Court: Direct actions most often involve a European institution and and a member state or individual, while indirect actions are taken to the Court as a result of a preliminary question sent from a domestic court. However, preliminary references involve interpretation of European law that binds all member states. Their conclusions tend to be formulated as more general statements.

The variable is intentionally broader than other proxies for member state involvement such as the number of amicus curia briefs ("member state observations") filed by governments. The case with the most member state mentions (Case C-162/13, 21 member states) is an example in point. The question referred demanded a clarification of the European directive imposing compulsory insurance against civil liability for motor vehicles (Council Directive 72/166/EEC of 24 April 197). The case was referred by the Slovenian Supreme Court, but only Ireland and Germany filed observations. However, after the Advocate General's opinion, the UK and German governments requested a reopening of the oral procedure. It was brought to the Court's attention that the national translations of the directive differed. The judgment text proceeds to enmerate which community languages would imply

differing interpretations of the directive's scope.

Among the 3314 preliminary cases lodged since 1998, some 66% of them made mention of more than one member state.

Potential politicization - diverging member state observations indicates whether the Court received amicus curia briefs from at least two member state governments expressing different preferences over the outcome of a case. The data is obtained from two different sources. Information on member state positions in the period between 1959 and 1996 is derived from the European Court of Justice Data (Carrubba and Gabel, 2007), while positions in the period between 1996 and 2007 were coded for a different project (Larsson and Naurin, 2016).

In the models the indicators of politicization are interacted with the measure of preferences, and I expect a negative sign. Figure 3 reports the spread in governmental economic preferences over time. The distance between governments reached a high in the beginning of the 1980-ies following the election of conservative prime minister Margaret Thatcher and socialist president Francois Mitterrand. However, the median choice set faced by the Court's president had an inter quartile range in preferences of 0.18.

Distance from median judge reports the absolute preference distance on economic issues between a judge's current government and the median on the bench. Preferences are calculated as a weighted mean derived from the current governmental parties' electoral manifestos using the vanilla method (Döring and Manow, 2018; Volkens et al., 2017; Gabel and Huber, 2000). While the measure is stylized, it has the advantage that all governments are placed in the same policy space. In practice, most observations (99%) are registered with a distance ranging between 0 and 1.

Controls

Ties to member state – Case from judge's member state indicates whether the case was filed by a national court in the judge's member state. From the

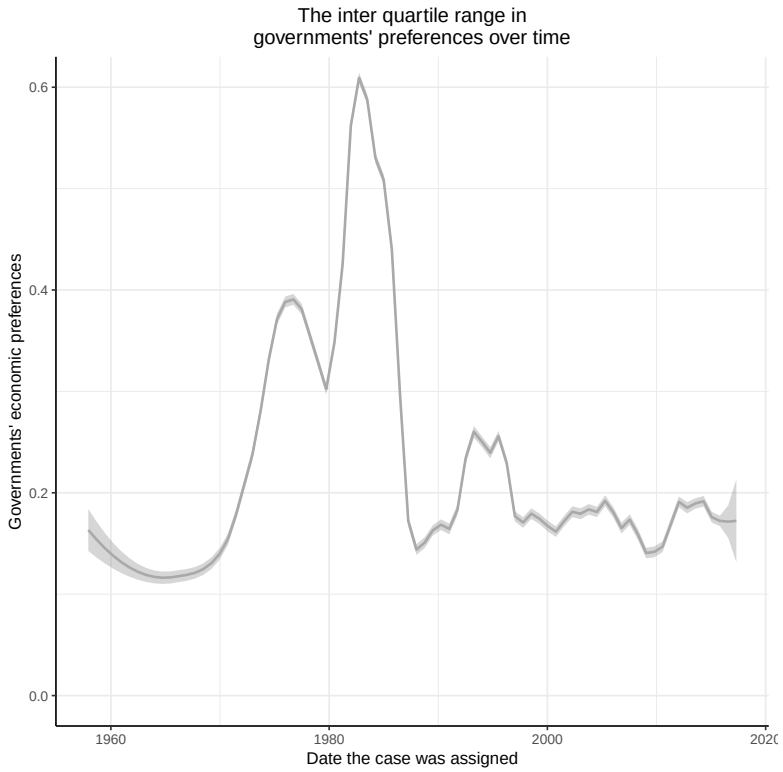

Figure 3: The spread in government preferences have varied over time. (Results from a loess estimation of the standard deviation of preferences in each choice set.)

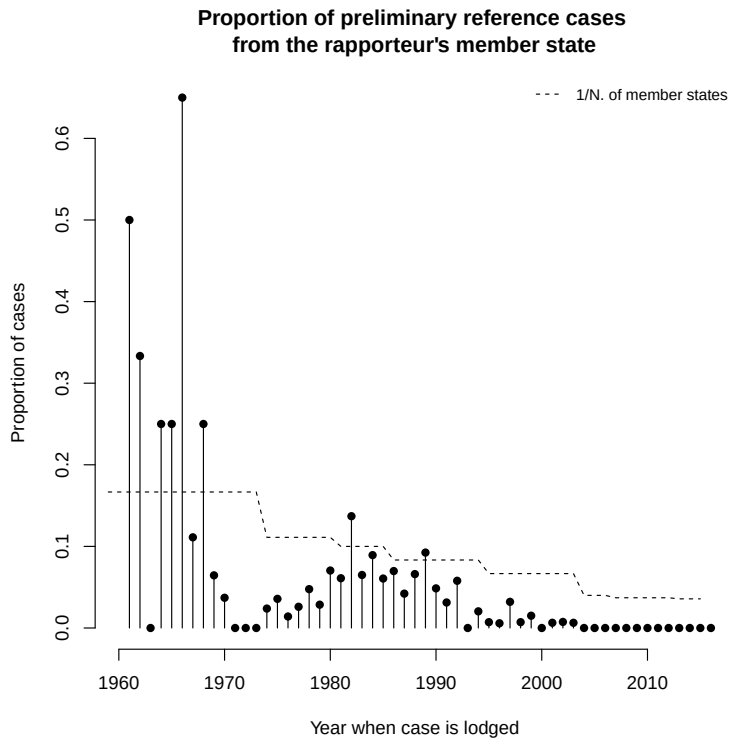

Figure 4: While it has never been common, following the Nice treaty, preliminary reference cases are never allocated to the judge hailing from the member state where the case has originated.

outset, no judge is called to act as rapporteur in an infringement case brought against his own member state[2]. In contrast, the rules governing preliminary reference cases have been less rigid. The member state government is not strictly speaking a party to the conflict. It may nevertheless have high stakes in the case, as it risks seeing its policies overruled and future policy-making constricted by the European Court.

As is apparent from figure 4, practice has changed over time. While the Court's first preliminary reference cases in the 1960-ies were also handled by the member state's appointed judge, it became less common throughout the 1970-ies and 80-ies. From the Nice treaty (2003), the president has consistently avoided assignments to the judge most affected by the case. In the multivariate analysis, I expect that when cases hail from a judge's member state, the probability of a report allocation decreases.

Participation counts the number of panel deliberations a judge has participated in in the last 90 days prior to the allocation. Judges' vary in how invested they are in their mandate and what career stage they are at. This is reflected in their participation rates. In the median choice set, the inter quartile range among members is 7.75 deliberations. In the analysis, I expect that the more assidious a member is in the Court's activities, the more likely he will be appointed rapporteur.

Similarly, all models control for the number of *Past cases* in which a judge has acted as rapporteur. The variable is a proxy for a judge's experience on the Court. Once again, the variation among judges is substantive, with the median choice set displaying an inter quartile range of no less than 80 cases. In the multivariate analysis, the variable captures a member's experience with unrelated cases, since it is introduced together with similar measures of specialization. If the president favors specialization, I therefore expect this variable to correlate negatively with the likelihood of an appointment.

Membership unclear indicates members whose membership at the Court

[2]The only 3 exceptions are the cases 61981CJ0149, 61985CJ0412 and 61990CJ0355.

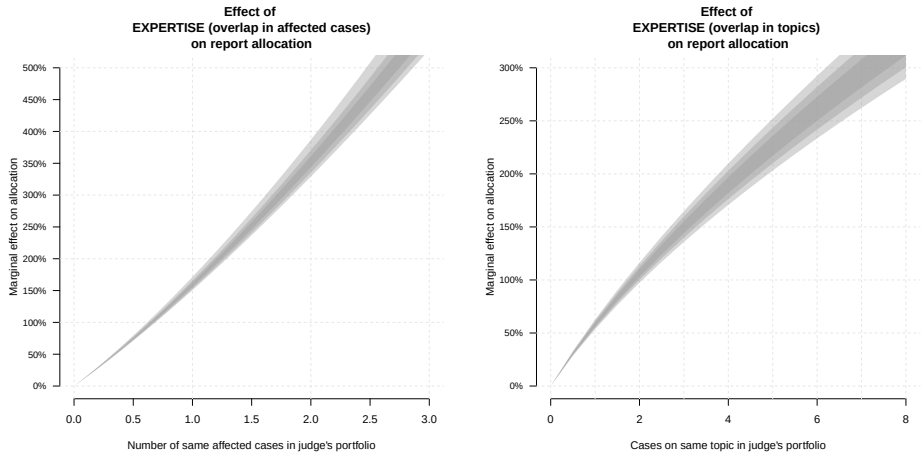

Figure 5: The effect of relative expertise acquired from previous cases on the same topic on case allocation.

is uncertain. The Court's official documents do not report the date of the rapporteur appointment. To construct the choice set, I therefore include all judges who were members of the Court at any point from the case was lodged to its' final decision. Since this is a fairly broad definition, I therefore control for situations in which the judge is unlikely to act as rapporteur. The indicator marks two situations: First, when the Council has announced the appointment of a new judge, but the judge is still a member of the Court, it is likely that the incumbent judge will not be able to see the case through. Second, the indicator marks judges who are presently members, but whose appointment was not yet made public when the allocation most likely took place.

Results

Building expertise through specialization (H_1a)

Results from a first series of regressions are displayed in table 1 and further illustrated in figure 5. The results indicate a strong and consistently positive effect of specialization across the different operationalizations.

Avoiding policy outliers when cases are politicized (H_2)

Results from a second series of regressions testing the effect of politicization on preferences are displayed in table 3 and figure 6. Once again, the results are in the expected direction. Both measures of politicization indicate a significant shift towards rapporteurs with a government holding a median position when a case is potentially contentious.

If we consider the most extreme outlier that the president could potentially choose (i.e. a median absolute distance of 0.64), the member would see his chances of allocation decrease by 45% when the affected legislation had been subject to intergovernmental negotiation at the political level. The similar figure is 26% when politicization is measured as disagreement expressed in the member state observations filed. These effects are substantial and within conventional boundaries of statistical significance. They are also consistent across the different measures of politicization.

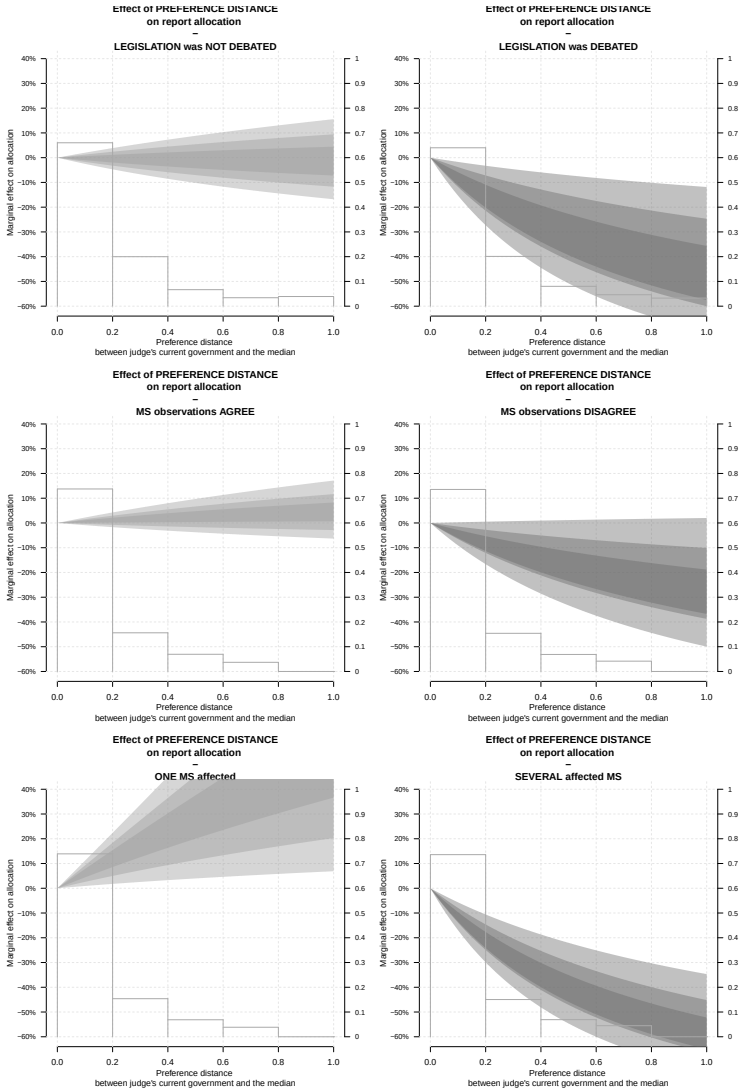

Figure 6: The conditional effect of politicization: The figures illustrate the effect of distance between a judge's current government and the median government currently in power on the probability of case allocations.

Dependent variable: 'Allocation of report'	Model 1	Model 2	Model 3	Model 4
Distance from median judge	-0.016	-0.056	-0.085	-0.059
	(-0.111,0.061)	(-0.14,0.034)	(-0.236,0.076)	(-0.422,0.275)
Expertise (overlap in affected case(s))	1.372			
	(1.329,1.426)			
Expertise (EUR-Lex)		0.66		
		(0.622,0.694)		
Expertise (Commission DG)			0.65	
			(0.59,0.709)	
Expertise (Council formation)				0.506
				(0.39,0.631)
Expertise (overlap in affected case(s)) * Preliminary reference	0.011			
	(-0.055,0.072)			
Expertise (EUR-Lex) * Preliminary reference		0.017		
		(-0.021,0.058)		
Expertise (Commission DG) * Preliminary reference			0.055	
			(-0.009,0.121)	
Expertise (Council formation) * Preliminary reference				0.133
				(0.003,0.252)
Ties to member state (case from MS)	-1.276	-1.269	-1.765	-5.421
	(-1.373,-1.172)	(-1.39,-1.154)	(-2.023,-1.513)	(-8.65,-3.492)
Cases as rapporteur	0.324	0.101	-0.09	-0.101
	(0.287,0.351)	(0.072,0.128)	(-0.146,-0.042)	(-0.202,-0.008)
Exit decision made	-1.406	-1.363	-1.448	-5.064
	(-1.543,-1.253)	(-1.516,-1.216)	(-1.711,-1.213)	(-8.245,-3.144)
Participation	-0.009	-0.009	-0.006	-0.004
	(-0.009,-0.008)	(-0.01,-0.009)	(-0.007,-0.005)	(-0.005,-0.002)
Leadership (Chamber/Vice president)	-0.301	-0.363	-0.493	-0.338
	(-0.38,-0.223)	(-0.442,-0.283)	(-0.6,-0.38)	(-0.46,-0.214)
Number of observations	227000	227000	107602	50135
Number of choice sets	11166	11166	4805	1838
Proportion of correct predictions	0.631	0.585	0.587	0.551
Prop. of correct positive pred.	0.604	0.608	0.623	0.624
Prop. of correct negative pred.	0.632	0.583	0.585	0.548

Median effects with 95% HDI in parenthesis.

Table 1: The effect of expertise and ties to the member state on allocation of court cases, regardless of the procedure in question. Results from a hierarchical conditional logit.

Dependent variable: 'Allocation of report'	Model 1	Model 2
Distance from median judge	0.042	0.01
	(-0.041,0.128)	(-0.084,0.109)
Expertise (overlap in affected case(s))	1.204	1.278
	(1.171,1.236)	(1.236,1.321)
Expertise (overlap in affected case(s)) * New legislation		-0.11
		(-0.185,-0.036)
Expertise (EUR-Lex)	0.323	0.293
	(0.297,0.348)	(0.253,0.334)
Expertise (EUR-Lex) * New legislation		0.101
		(0.041,0.166)
Cases as rapporteur	-0.406	-0.404
	(-0.428,-0.377)	(-0.434,-0.369)
Cases as rapporteur * New legislation		-0.054
		(-0.107,-0.018)
Ties to member state (case from MS)	-1.268	-1.366
	(-1.377,-1.13)	(-1.513,-1.251)
Membership unclear	-0.765	-0.847
	(-0.835,-0.691)	(-0.93,-0.763)
Participation	0.048	0.047
	(0.046,0.05)	(0.044,0.05)
Leadership (Chamber/Vice president)	-0.542	-0.553
	(-0.611,-0.479)	(-0.635,-0.482)
Number of observations	227180	205324
Number of choice sets	11178	9663
Proportion of correct predictions	0.655	0.663
Prop. of correct positive pred.	0.61	0.625
Prop. of correct negative pred.	0.658	0.665

Median effects with 95% HDI in parenthesis.

Table 2: The effect of expertise is even more important when the case-law is not yet set. Results from a hierarchical conditional logit.

Dependent variable: 'Allocation of report'	1990-2015	1958-2007	1998-2015
Distance from median judge	-0.023	0.06	0.621
	(-0.226,0.174)	(-0.071,0.193)	(0.155,1.023)
Distance from median judge * Debated legislation	-0.928		
	(-1.618,-0.287)		
Distance from median judge * Disagreement MS observations		-0.48	
		(-0.912,-0.054)	
Distance from median judge * Several affected MS			-1.267
			(-1.853,-0.719)
Expertise (overlap in affected cases)	1.489	1.06	1.313
	(1.443,1.536)	(1.004,1.117)	(1.26,1.369)
Expertise (overlap in topics)	0.33	0.158	0.398
	(0.284,0.378)	(0.101,0.214)	(0.345,0.451)
Ties to member state (Case from MS)	-2.65	-0.95	-3.523
	(-3.113,-2.244)	(-1.1,-0.798)	(-4.298,-2.909)
Past cases	-0.511	-0.303	-0.466
	(-0.549,-0.473)	(-0.35,-0.26)	(-0.512,-0.424)
Membership unclear	-1.123	-0.635	-1.644
	(-1.257,-0.981)	(-0.775,-0.513)	(-1.846,-1.464)
Participation	0.047	0.053	0.043
	(0.043,0.05)	(0.049,0.056)	(0.039,0.047)
Leadership (Chamber/vice president)	-0.593	-0.658	-0.434
	(-0.693,-0.495)	(-0.844,-0.467)	(-0.53,-0.343)
Number of observations	112525	64999	96721
Number of choice sets	4580	3896	3630
Proportion of correct predictions	0.699	0.66	0.685
Prop. of correct positive pred.	0.648	0.597	0.665
Prop. of correct negative pred.	0.701	0.664	0.686

Median effects with 95% HDI in parenthesis.

Table 3: The effect of the current government's preferences on allocation of preliminary reference cases. Results from a hierarchical conditional logit.

References

June Medical Services, L.L.C., et al., Applicants v. Rebekah Gee, Secretary, Louisiana Department of Health and Hospitals.

Alter, K. J. (2008a, March). Agents or Trustees? International Courts in their Political Context. *European Journal of International Relations 14*(1), 33–63.

Alter, K. J. (2008b, August). The European Court and Legal Integration: An Exceptional Story or Harbinger of the Future? *The Oxford Handbook of Law and Politics*.

Alter, K. J. (2014, January). *The New Terrain of International Law: Courts, Politics, Rights*. Princeton University Press.

Bobek, M. (Ed.) (2015, March). *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*.

Bonneau, C. W., T. H. Hammond, F. Maltzman, and P. J. Wahlbeck (2007, October). Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court. *American Journal of Political Science 51*(4), 890–905.

Carrubba, C., B. Friedman, A. D. Martin, and G. Vanberg (2012, April). Who Controls the Content of Supreme Court Opinions? *American Journal of Political Science 56*(2), 400–412.

Carrubba, C. J. (2005, August). Courts and Compliance in International Regulatory Regimes. *The Journal of Politics 67*(3), 669–689.

Carrubba, C. J., M. Gabel, and C. Hankla (2008, November). Judicial Behavior under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review 102*(4), 435–452.

Carrubba, C. J., M. Gabel, and C. Hankla (2012, February). Understanding the Role of the European Court of Justice in European Integration. *American Political Science Review 106*(1), 214–223.

Carrubba, C. J. and C. Zorn (2010, July). Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States. *The Journal of Politics 72*(3), 812–824.

Christenson, D. P. and D. M. Glick (2015). Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy. *American Journal of Political Science 59*(2), 403–418.

Clark, T. S. (2009, October). The Separation of Powers, Court Curbing, and Judicial Legitimacy. *American Journal of Political Science 53*(4), 971–989.

Court, U. S. (2012, July). National Federation of Independent Business v. Sebelius.

Court, U. S. (2016, June). Whole Woman's Health v. Hellerstedt.

Court of Justice of the European Union (2012, September). Rules of Procedure.

Court of Justice of the European Union (2017, October). Guide Pratique Relatif au Traitement des Affaires Portées devant la Cour de Justice.

Crawford, J. (2012, July). Roberts switched views to uphold health care law. *CBS News*.

Döring, H. and P. Manow (2018). *Parliaments and Governments Database (ParlGov): Information on Parties, Elections and Cabinets in Modern Democracies*.

Dunoff, J. L. and M. A. Pollack (2017, April). The Judicial Trilemma. *American Journal of International Law 111*(2), 225–276.

Dunoff, J. L. and M. A. Pollack (2018). A Typology of International Judicial Practices. In A. Follesdal and G. Ulfstein (Eds.), *The Judicialization of International Law - A Mixed Blessing?* (1 ed.)., European Society of International Law Series, pp. 86–106. Oxford: Oxford University Press.

Elsig, M. and M. A. Pollack (2014, June). Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization. *European Journal of International Relations 20*(2), 391–415.

Epstein, L. and J. Knight (1997, January). *The Choices Justices Make*. Washington: SAGE.

European Court of Human Rights (2018, April). Rules of Court.

Ferejohn, J. (2002, July). Judicializing Politics, Politicizing Law. *Law and Contemporary Problems 65*(3), 41–68.

Ferejohn, J. A. and B. R. Weingast (1992, June). A positive theory of statutory interpretation. *International Review of Law and Economics 12*(2), 263–279.

Fjelstul, J. C. and C. J. Carrubba (2018, August). The Politics of International Oversight: Strategic Monitoring and Legal Compliance in the European Union. *American Political Science Review 112*(3), 429–445.

Gabel, M. J. and J. D. Huber (2000, January). Putting Parties in Their Place: Inferring Party Left-Right Ideological Positions from Party Manifestos Data. *American Journal of Political Science 44*(1), 94.

Gely, R. and P. T. Spiller (1990). A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the "State Farm" and "Grove City Cases". *Journal of Law, Economics, & Organization 6*(2), 263–300.

Glick, D. (2009, July). Conditional Strategic Retreat: The Court's Concession in the 1935 Gold Clause Cases. *The Journal of Politics 71*(3), 800–816.

Häge, F. M. (2007, September). Committee Decision-making in the Council of the European Union. *European Union Politics 8*(3), 299–328.

Jackman, S. (2009). *Bayesian Analysis for the Social Sciences*. Wiley Series in Probability and Statistics. John Wiley & Sons.

Larsson, O. and D. Naurin (2016). Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU. *International Organization 70*(2), 377–408.

Larsson, O., D. Naurin, M. Derlén, and J. Lindholm (2017, June). Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union. *Comparative Political Studies 50*(7), 879–907.

Lax, J. R. (2007, August). Constructing Legal Rules on Appellate Courts. *American Political Science Review 101*(03), 591–604.

Lax, J. R. and C. M. Cameron (2007, June). Bargaining and Opinion Assignment on the US Supreme Court. *Journal of Law, Economics, and Organization 23*(2), 276–302.

Lax, J. R. and K. Rader (2015, July). Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching. *The Journal of Politics 77*(3), 648–663.

Leonhardt, D. (2019, March). Opinion — John Roberts, Legislator. *The New York Times*.

Liptak, A. (2019, February). In Surprise Abortion Vote, John Roberts Avoids 'Jolt to the Legal System' - The New York Times. *The New York Times*.

Long, J. S. (1997, January). *Regression Models for Categorical and Limited Dependent Variables* (1 edition ed.). Thousand Oaks: SAGE Publications, Inc.

Mackenzie, R., K. Malleson, P. Martin, and P. Sands (2010). *Selecting International Judges - Principle, Process, and Politics* (1 ed.). International Courts and Tribunals Series. Oxford: Oxford University Press.

Maltzman, F. and P. J. Wahlbeck (1996, May). May It Please the Chief? Opinion Assignments in the Rehnquist Court. *American Journal of Political Science 40*(2), 421.

Maltzman, F. and P. J. Wahlbeck (2004, December). A Conditional Model of Opinion Assignment on the Supreme Court. *Political Research Quarterly 57*(4), 551–563.

Marks, B. A. (2015, November). A Model of Judicial Influence on Congressional Policy Making: Grove City College v. Bell. *The Journal of Law, Economics, and Organization 31*(4), 843–875.

McFadden, D. (1973). Conditional logit analysis of qualitative choice behavior. In *Frontiers in Econometrics*, pp. 105–142. New York: Academic Press.

Prechal, S. (2015). The Many Formations of the Court of Justice: 15 Years after Nice Essay. *Fordham International Law Journal 39*, 1273–1288.

Scharpf, F. W. (1988, September). The joint-decision trap: Lessons from German federalism and European integration. *Public Administration 66*(3), 239–278.

Simmons, B. A. and A. Danner (2010, April). Credible Commitments and the International Criminal Court. *International Organization 64*(2), 225–256.

Staton, J. K. and W. H. Moore (2011, July). Judicial Power in Domestic and International Politics. *International Organization 65*(3), 553–587.

Staton, J. K. and G. Vanberg (2008). The Value of Vagueness: Delegation, Defiance, and Judicial Opinions. *American Journal of Political Science 52*(3), 504–519.

Stiansen, O. (2018, October). Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments.

Stone Sweet, A. and T. Brunell (2012, February). The European Court of Justice, State Noncompliance, and the Politics of Override. *American Political Science Review 106*(1), 204–213.

Stone Sweet, A. and T. L. Brunell (1998, March). Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. *American Political Science Review 92*(1), 63–81.

Tallberg, J. (2002, August). Paths to Compliance: Enforcement, Management, and the European Union. *International Organization 56*(3), 609–643.

Vanberg, G. (2005). *The Politics of Constitutional Review in Germany*. New York: Cambridge University Press.

Volkens, A., P. Lehmann, T. Matthieß, N. Merz, S. Regel, and B. Weßels (2017). The Manifesto Data Collection. Manifesto Project (MRG/CMP/MARPOR). Version 2017b.

Wahlbeck, P. J. (2006, June). Strategy and Constraints on Supreme Court Opinion Assignment. *University of Pennsylvania Law Review 154*(6), 1729.

WTO Secretariant and the Appellate Body Secretariat (Legal Affairs Division and the Rules Division) (2017). *A Handbook on the WTO Dispute Settlement System* (2 ed.). New York: Cambridge University Press.

Appendix

Variables

This section provides a full description of the variables found in the replication data (`CJEU_choiceset.rda`).

Rapporteur (binary)

(`Rapporteur`) indicates the judge who served as a the judge-rapporteur on a case.

Potential politicization – debated legislation (binary)

(`First_time_b_item_before_court`) indicates cases where at least one EU secondary law is interpreted for the first time and which passed at least once as a B-item on the Council's agenda. Information on affected legislation, it's adoption by the Council and the date of previous judgments is retrieved from EUR- Lex.

Potential politicization – several memberstates involved (binary)

(`n_ms_mention_bin`) indicates preliminary reference cases where at least two member states are mentioned in the exposition of the facts of the main proceedings and the discussion of the question referred. The variable is recoded from a count of member state mentions in the text (`n_ms_mention_bin`). It covers all court cases where the judgment contains a separate title for facts in the main proceedings and the subsequent discussion of the question(s).

Potential politicization – diverging member state observations (binary) (`disagreement`)

Distance from median judge (continuous)

(`abs(FreeEconomy.w.median-FreeEconomy_cur.w)`) measures the absolute preference distance on economic issues between a judge's current government and the median among member states. Preferences are calculated in the following way:

In the first step, I identify the government in power at the time of the appointment decision (`cabinet_current`) using the "Cabinet" data provided by the ParlGov Project (Döring and Manow, 2018). In the second step, I then identify the parties in government using the "Parties" data (Döring and Manow, 2018) and link these to the manifesto data provided by the Manifesto Project (Volkens et al., 2017). In the third step, I estimate preferences (`FreeEconomy_cur.w` and `FreeEconomy.w.median`) expressed in all party manifestoes using the vanilla method (Gabel and Huber, 2000). The indicators are questions related to the economic preferences of parties ("per401", "per402", "per403", "per404", "per405", "per406", "per409", "per410", "per412", "per413", "per414", "per415" and "per416"). Finally, in multiparty cabinets preferences are weighted according to each party's seat share in parliament.

	Carrubba & Hankla:		
		Agreement	Disagreement
Larsson & Naurin:	Agreement	73 (69%)	10 (9%)
	Disagreement	9 (8%)	14 (13%)

Table 4: Overlap in how disagreement between member state governments are coded between datasets.

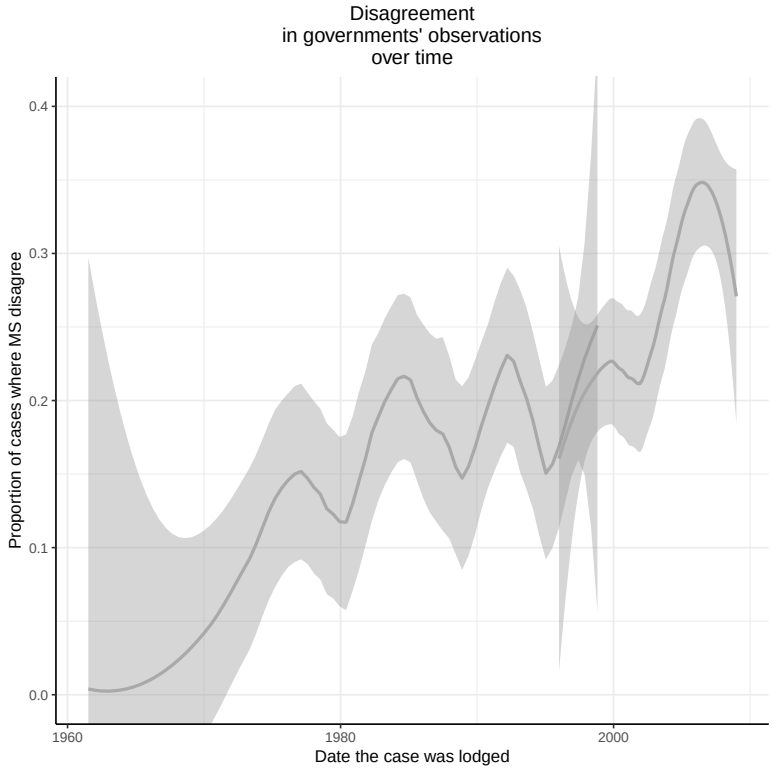

Figure 7: Proportion of the coded preliminary reference cases where member states file different opinions.

Alternative models

Effect of government preferences

Dependent variable: 'Allocation of report'	1970-2015	1958-2007	1958-1999	1996-2007
Distance from median judge	-0.023	0.06	0.062	0.006
	(-0.226,0.174)	(-0.071,0.193)	(-0.081,0.192)	(-0.408,0.381)
Distance from median judge * Debated legislation	-0.928			
	(-1.618,-0.287)			
Distance from median judge * Disagreement MS observations		-0.48	-0.212	-1.329
		(-0.912,-0.054)	(-0.716,0.227)	(-2.186,-0.433)
Expertise (overlap in affected cases)	1.489	1.06	0.975	1.182
	(1.443,1.536)	(1.004,1.117)	(0.895,1.052)	(1.096,1.264)
Expertise (overlap in topics)	0.33	0.158	0.088	0.285
	(0.284,0.378)	(0.101,0.214)	(0.011,0.156)	(0.205,0.369)
Ties to member state (Case from MS)	-2.65	-0.95	-0.699	-2.674
	(-3.113,-2.244)	(-1.1,-0.798)	(-0.846,-0.533)	(-3.407,-2.116)
Past cases	-0.511	-0.303	-0.261	-0.412
	(-0.549,-0.473)	(-0.35,-0.26)	(-0.318,-0.203)	(-0.479,-0.346)
Membership unclear	-1.123	-0.635	-0.337	-1.632
	(-1.257,-0.981)	(-0.775,-0.513)	(-0.486,-0.208)	(-1.88,-1.369)
Participation	0.047	0.053	0.049	0.05
	(0.043,0.05)	(0.049,0.056)	(0.044,0.054)	(0.045,0.056)
Leadership (President)	-0.593	-0.658		-0.699
	(-0.693,-0.495)	(-0.844,-0.467)		(-0.918,-0.493)
Number of observations	112525	64999	30164	37095
Number of choice sets	4580	3896	2433	1611
Proportion of correct predictions	0.699	0.66	0.659	0.665
Prop. of correct positive pred.	0.648	0.597	0.536	0.688
Prop. of correct negative pred.	0.701	0.664	0.67	0.664

Median effects with 95% HDI in parenthesis.

Table 5: The effect of the CURRENT government's WEIGHTED preferences on allocation of preliminary reference cases. Results from a hierarchical conditional logit.

Dependent variable: 'Allocation of report'	1970-2015	1958-2007	1958-1999	1996-2007
Distance from median judge	0.026	0.048	-0.017	0.288
	(-0.134,0.176)	(-0.068,0.17)	(-0.141,0.133)	(0.055,0.527)
Distance from median judge * Debated legislation	-0.749			
	(-1.26,-0.285)			
Distance from median judge * Disagreement MS observations		-0.278	-0.26	-0.506
		(-0.593,0.08)	(-0.75,0.11)	(-0.988,0.001)
Expertise (overlap in affected cases)	1.489	1.059	0.976	1.171
	(1.44,1.535)	(1.002,1.117)	(0.906,1.057)	(1.095,1.262)
Expertise (overlap in topics)	0.333	0.158	0.086	0.28
	(0.282,0.383)	(0.107,0.215)	(-0.002,0.158)	(0.203,0.365)
Ties to member state (Case from MS)	-2.651	-0.944	-0.694	-2.665
	(-3.118,-2.27)	(-1.09,-0.803)	(-0.862,-0.549)	(-3.327,-2.111)
Past cases	-0.512	-0.303	-0.269	-0.411
	(-0.549,-0.471)	(-0.352,-0.255)	(-0.324,-0.204)	(-0.484,-0.353)
Membership unclear	-1.121	-0.641	-0.352	-1.639
	(-1.247,-0.978)	(-0.761,-0.513)	(-0.475,-0.232)	(-1.91,-1.384)
Participation	0.047	0.052	0.05	0.051
	(0.043,0.05)	(0.048,0.056)	(0.045,0.055)	(0.044,0.056)
Leadership (President)	-0.585	-0.649		-0.634
	(-0.693,-0.481)	(-0.845,-0.459)		(-0.834,-0.456)
Number of observations	112525	64999	30164	37095
Number of choice sets	4580	3896	2433	1611
Proportion of correct predictions	0.699	0.661	0.659	0.663
Prop. of correct positive pred.	0.646	0.599	0.539	0.688
Prop. of correct negative pred.	0.701	0.665	0.669	0.662

Median effects with 95% HDI in parenthesis.

Table 6: The effect of the CURRENT government's preferences on allocation of preliminary reference cases. Results from a hierarchical conditional logit.

Dependent variable: 'Allocation of report'	1970-2015	1958-2007	1958-1999	1996-2007
Distance from median judge	-0.008	-0.024	-0.024	-0.161
	(-0.15,0.129)	(-0.149,0.104)	(-0.168,0.129)	(-0.467,0.069)
Distance from median judge * Debated legislation	-0.304			
	(-0.773,0.165)			
Distance from median judge * Disagreement MS observations		-0.21	0.143	-0.535
		(-0.557,0.121)	(-0.302,0.569)	(-1.054,0.04)
Expertise (overlap in affected cases)	1.49	1.059	0.981	1.178
	(1.445,1.541)	(1.006,1.113)	(0.907,1.055)	(1.088,1.253)
Expertise (overlap in topics)	0.331	0.159	0.083	0.287
	(0.289,0.377)	(0.102,0.213)	(0.013,0.154)	(0.206,0.362)
Ties to member state (Case from MS)	-2.666	-0.94	-0.703	-2.648
	(-3.088,-2.295)	(-1.093,-0.8)	(-0.853,-0.558)	(-3.292,-2.079)
Past cases	-0.51	-0.307	-0.262	-0.419
	(-0.548,-0.474)	(-0.35,-0.261)	(-0.321,-0.21)	(-0.476,-0.342)
Membership unclear	-1.115	-0.642	-0.346	-1.634
	(-1.25,-0.986)	(-0.775,-0.522)	(-0.492,-0.205)	(-1.912,-1.365)
Participation	0.047	0.052	0.049	0.051
	(0.043,0.051)	(0.049,0.056)	(0.044,0.055)	(0.045,0.057)
Leadership (President)	-0.587	-0.641		-0.701
	(-0.684,-0.478)	(-0.848,-0.45)		(-0.899,-0.466)
Number of observations	112525	64999	30164	37095
Number of choice sets	4580	3896	2433	1611
Proportion of correct predictions	0.699	0.661	0.659	0.665
Prop. of correct positive pred.	0.648	0.595	0.538	0.69
Prop. of correct negative pred.	0.701	0.665	0.669	0.664

Median effects with 95% HDI in parenthesis.

Table 7: The effect of the APPOINTING government's preferences on allocation of preliminary reference cases. Results from a hierarchical conditional logit.

Dependent variable: 'Allocation of report'	Only B-items	Only MS disagreement	Only several affected MS
Distance from median judge	-0.867	-0.384	-0.662
	(-1.501,-0.238)	(-0.815,0.043)	(-1.003,-0.307)
Expertise (overlap in affected cases)	2.375	1.076	1.248
	(1.997,2.752)	(0.949,1.216)	(1.173,1.316)
Expertise (overlap in topics)	0.38	0.166	0.385
	(0.238,0.526)	(0.04,0.311)	(0.321,0.451)
Ties to member state (Case from MS)	-3.035	-1.526	-3.656
	(-4.828,-1.863)	(-2.089,-1.053)	(-4.671,-2.862)
Past cases	-0.411	-0.283	-0.459
	(-0.53,-0.292)	(-0.388,-0.17)	(-0.508,-0.409)
Membership unclear	-1.011	-1.083	-1.668
	(-1.456,-0.626)	(-1.464,-0.736)	(-1.913,-1.417)
Participation	0.04	0.047	0.043
	(0.028,0.051)	(0.038,0.057)	(0.038,0.048)
Leadership (President)	-0.19	-0.395	-0.398
	(-0.503,0.092)	(-0.703,-0.072)	(-0.518,-0.283)
Number of observations	10234	13049	62921
Number of choice sets	424	644	2378
Proportion of correct predictions	0.617	0.66	0.676
Prop. of correct positive pred.	0.58	0.661	0.658
Prop. of correct negative pred.	0.618	0.66	0.676

Median effects with 95% HDI in parenthesis.

Table 8: Comparing periods: The effect of the current government's weighted preferences on allocation of preliminary reference cases. Results from a hierarchical conditional logit.