Judicious judging: The effects of politicization on the rulings of the European Court of Justice

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Abstract

How do courts react to political debate? Their legitimacy hinges on their ability to uphold the law impervious to political pressure. The authority of the ruling follows from the court's reputation as apolitical. Politicization – understood as salient questions that divide stakeholders – threatens to erode this image. It imposes conflicting demands: Courts can prove their worth by solving questions for which there is a demand for a legal solution, but they risk their reputation in a politically divided environment.

Literature on judicial independence focuses on direct and explicit threats issued by the political branch. Arguments of legislative override typically predict that political division empowers the judiciary. In contrast, we argue that courts are sensitive even to the potential eruption of conflict because they value their diffuse legitimacy. Effective judicial policy making is thus a question of strategic timing.

To test our theory, we study the European Court of Justice. Known as the "dark horse of integration", it is an independent court with political sway. Yet politicization profoundly affects its decision making. We draw on unprecedented data mapping out the legal ambit of all preliminary cases relating to the Free movement of people throughout the history. We find that the Court holds back on the legal ambit of rulings, preferring to bolster its institutional authority, in times of political division. Reversely, it broadens the ambit when salience is high and conflict low. Thus, when salience and division combine, they null each other out; leaving traces only in the decision-making process.

Introduction

How do courts react to political debate? The legitimacy of courts hinges on their ability to uphold the law impervious to political pressure (Gibson, 2007; Gibson and Nelson, 2015). The authority of the product – the ruling and the interpretation that it lays down – directly follow from the court's reputation as apolitical and non-partisan.

Politicization threatens to erode this image. It imposes conflicting demands on courts: They can prove their worth by solving salient societal questions, but they risk their reputation in a politically divided environment. This article examines how courts resolve this dilemma.

On the one hand, diverging policy preferences regarding salient questions call for legally authoritative, generalizable resolutions of political conflict, even at a dislike of some policy makers. Political actors increasingly turn to courts when they are unable to act themselves, due to irreconcilable divisions (Hirschl, 2011). The judicialization of politics calls courts to, figuratively speaking, break the grip of the political gridlock.

On the other hand, authoritative resolutions of politicized questions can damage the institutional authority. Seizing courts as a step in the political process politicize the judicial decision-making. Regardless of the direction of the outcome, the rulings become labelled as activist, and criticized as partisan meddling unbecoming to judicial institutions (Ferejohn, 2002). These accusations potentially spark distrust in the eyes of the public (Bartels and Johnston, 2013), decreasing popular support, thus depriving courts of an important source of diffuse legitimacy and effectiveness (Gibson and Caldeira, 1995). Judicial authority, it follows, is a double edged sword.

We argue that courts resolve the dilemma by refraining from broad and authoritative answers to salient but divisive questions likely to undermine their reputation as non-partisan institutions. Although courts can profoundly shape policies through authoritative rulings, we show that they might prefer to accomplish this aim without aggravating political conflicts. In other words,

politicization pacifies rather than activates courts.

This argument is at odds with the literature suggesting that courts promote their own policy agendas more forcefully when political divisions reduce or minimize the threat of legislative override. It also conflicts with a more general argument that courts become activist when presented with an opportunity to step in the shoes of the democratically elected legislators.

The article contributes to the literature on judicial politics theoretically and methodologically.

Theoretically, we elaborate the conflicting demands of politicization that force courts to adapt their decision making process and the legal substance of their rulings. By establishing the link between judicial authority and effectiveness, we question the empirical validity and the scope of applicability of the theory of legislative override. The latter argues that courts become autonomous as the legislator becomes unable to coordinate a response to invalidate judicial decisions due to internal divisions, for instance by passing opposing statues and fashioning new policies (Ferejohn and Weingast, 1992). However, judge-made law, while unchallenged by the legislator, may lack implementation, enforcement, and any real practical effect. Although the threat of non-implementation is a well-known cause for strategic retreat (Glick, 2009), we demonstrate that it does not have to be direct or explicit to elicit a response. It suffices that divergent policy preferences render the threat credible. Non-implementation requires no action from the addressees of the rulings, while enforcement calls for coordinated action. On the international level, state governments simultaneously act as legislators and as addressees of the rulings, typically responsible for both. We argue that courts show sensitivity and respond to divergent policy preferences by refraining from bold and authoritative resolution of salient questions, directing their effort to the maintenance and defence of the existing doctrines and the scope of their application. In brief, they practice neutrality and self-restraint, refraining from legal pronouncements with a broad ambit.

In terms of methodology, we add important nuance to the understanding of judicial decision making, including the procedural and the substantive aspects of the process. Studies of strategic behavior of courts often reduce judicial responses to rather narrowly defined case outcomes. Most often, they focus on the claims that courts uphold in legal disputes and whether they strike down legislation in the process of judicial review (e.g. Vanberg, 2005; Glick, 2009; Clifford J. Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). Less frequently, scholars emphasize the use of language, especially the wording of judgements. In this context, courts that expect political support furnish clear rulings with precise statements of the terms of compliance. By contrast, they issue vague rulings with ambiguous statements, masking potential non-compliance (Staton and Vanberg, 2008; Stiansen, 2021). This narrow focus is apt to identify winners and losers of legal disputes, but overlooks the impact of politicization on the decision-making process and the legal content of the rulings.

Finally, we emphasize the value that courts attach to their institutional authority, a subject that previous literature has addressed only sporadically. Courts strenghten their institutional authority by sitting in larger and more representative formations. By enlisting more judges, courts signal that they will hear a broad specter of views and that their decision will approximate the position of the median member of the court. We show that the legal importance of cases, that is, the formal reason for courts to convene larger chambers, does not by itself dictate the procedural decision regarding the chamber size. More likely, the decision to increase the chamber size depends on the anticipated reactions, the demands and controversies that might challenge or question judicial authority. Such decisions may – or may not – precede rulings with a wide ambit of application. Our analysis importantly advances the state of the art by directly observing judicial adjustments of legal interpretations and doctrines to their political context on a fine-grained level. These rulings implicitly increase the legal relevance of the decision to

a larger number of addressees. While growing demands for judicial resolutions of salient politicized questions increase the likelihood of such rulings, diverging policy preferences and politically unstable environment have the opposite effect.

By considering two separate elements of politicization, salience and diverging policy preferences with countervailing effects, we show that politicization profoundly shapes judicial decision making, in spite being invisible in the aggregate. We test our argument on all preliminary reference judgments relating to the free movement of persons before the Court of Justice of the European Union (Court).

The Court is a hard empirical test for our argument and at first glance the most unlikely candidate to labor the point. The Court arguably did the opposite: It stepped in when the heads of states stepped out of the Council; it stepped up when the heads of states turned the legislative proposals down (Burley and Mattli, 1993). This narrative implies that international courts can leverage political paralysis to expand their decision making autonomy and political power (Kelemen, 2011; Stone Sweet, 2000).

A series of relatively recent studies has, however, showed that the Court acted much more cautiously, aligning the rulings with the 'majoritarian' view (Clifford J. Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Castro-Montero et al., 2018). These findings highlight the limits that even divided legislators can impose on judicial power. The Court, these studies concluded, responded preemptively to hostile legislative action, sensitive to the political signals. A contrario, the Court could hypothetically substitute legislative action in the absence of a clear political majority. The latter argument remains to be tested.

The present analysis draws on an original dataset, which consists of all 880 preliminary reference cases pertaining to the free movement of persons lodged between 1963 and 2017. We find that the Court seeks to strengthen its institutional authority as the support within and among the member states

towards the European integration project diversifies. The reliance on larger chambers in free movement cases increases as the likelihood of rulings with a wide ambit of application decreases. By contrast, as the salience of legal questions increases, the Court – interpreting a greater involvement of member state governments in the judicial process as a demand for clarification – tends to broaden the ambit of its rulings. The Court nonetheless still convenes a larger formation before adopting such rulings, strengthening its institutional authority.

The remainder of the article is divided in five sections: Section II situates the study in the literature on judicial politics and strategic behavior. Section III explains the Court's decision making process and hypotheses. Section III focuses on the free movement of persons as a highly salient and politically contestable policy area directly relevant to the member state support for the integration project. Section IV presents the dataset and the variables. Section V presents the results. Section VI concludes.

International politics and the European Court

Lacking purses, swords, and an international enforcement agency, international courts can hardly disregard policy preferences of national policymakers. Practical effectiveness and authority of judicial institutions depend on the willingness of sovereign states to comply with the rulings (Voeten). At the same time, courts derive authority, and indirectly effectiveness, from a general perception that they can put law above power politics. Hence, when courts are called to settle questions subject to fierce political debate, they face a dilemma. If they engage in the political conflict authoritatively, they risk to dismantle the image that sustains them (Ferejohn, 2002). If they retreat, they forego an important opportunity to realize their policy agenda and entrench their relevance (societal value) as legally authoritative arbiters of salient societal problems. The inevitable question is whether (and how) courts seek to increase their authority in times of political disagreement, solving salient but politicized questions?

The European Court of Justice presents a particularly interesting case study. Its reputation as the 'dark horse of integration' (Slaughter and Mattli, 1993) seems at odds with the mixed signals that it has been sending over the past decade. The Court appears to be in a tight spot with the rulings seeking to sway the Brexit vote (O'Brien), reverse the rule of law crisis in Hungary and Poland (Pech), salvage the stability of the Eurozone and back-up economic recovery in Europe (Kilpatrick, Micklitz, Leino, DeWitte). Those are textbook examples of a court actively handling and mishandling international politics.

Crucial to answering the question is the relationship between the Court and the member state governments, which together with the European Parliament make up the European legislator. This relationship is not only immediate and direct, e.g. when the national governments are party to court proceedings. All rulings related to the interpretation or the validity of European Union's legal acts, even when issued in disputes between private liti-

gants, affect all national governments, albeit to a varying degree.

The literature examining the interaction between courts and legislators is legion. One the one hand, studies unpack the constraints, which the political actors invariably impose on courts, observing the response of the latter, and teasing out conditions, under which political constraints will be effective. On the other hand, studies focus on the mechanisms that enable courts to acquire and maintain their law-making authority and political power (Alter et. al., 2018), as well as their legitimacy to alter the will of the legislator in the process of interpretation (Venzke, 2012, Helfer and Slaughter, 1997).

Irrespective of the vantage point, the findings converge: National and international courts adjust case outcomes to their political environment. Fearing the loss of authority, courts tend to dodge potentially harmful conflicts with power politics or respond by de facto limiting input into the political process. International courts use remedies strategically or modify their reasoning to elicit greater compliance from the contracting parties (Dothan, 2014). Weak courts deliver vague rulings when they expect defiance from popular leaders (Staton and Vanberg, 2008) and powerful courts carefully weigh pros and cons before locking horns with the legislator. For example, the United States Supreme Court with complete discretion over its docket has systematically rejected to hear cases in which following its own policy preferences would likely lead to punitive legislation by Congress (Harvey and Friedman, 2009).

Studies show that the Court responds to the same threat of legislative override as powerful national courts, incorporating policy preferences into its reasoning. Concretely, the Court addresses the member state governments, especially if they are politically powerful (Garrett, 1992; Garrett, Kelemen, and Schulz, 1998); it aligns outcomes with the 'majoritarian' policy view (Clifford J. Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Dederke and Naurin, 2017; Clifford J. Carrubba, Gabel, and Hankla, 2012).

These studies contextualize the established legal narrative of European

integration through (case)law (Stein, Weiler, Tridimas, Arnull), and question the strand of literature arguing for the limited capacity of the legislator to curb the Court's power in times of legislative stalemate and political strife (Kelemen, 2011; Stone Sweet, 2000). The latter might overestimate the Court's ability to promote integration, trade and policy agendas with impunity. One of the reasons might be the adoption of the legal narrative without considering one crucial detail: That the Court has been able to fashion principles and doctrines mostly ignored by and shielded from the 'powers that be' (Stein) and with considerable support from the national courts, the Commission, the scholars, and pro-European associations (Weiler, Alter, Schepel and Wesselink). The Court, in relative anonymity (Weiler, Stein), with a degree of legal tact (Helfer and Slaughter) and the corps of judges-diplomats (Madsen) secured the effectiveness of its most audacious rulings by bypassing rather than by confronting the national governments – that is, by de-politicizing legal matters, and avoiding power politics (Mattli and Burley, Alter).

While generally aligned along the lines of Court's responsiveness to its political context, all above accounts adopt impressionistic, crude or at times conflicting measures of the judicial response to the attempts of politicization, and the Court's general disposition to wear the legislative (policy-making) hat. The studies often fail to specify and identify the stage in the judicial decision-making process where politicization is most effective, tweaking the final ruling (and how significantly). The precise working of mechanisms that govern judicial action in political turmoil and mounting doubt in the integration project thus remains puzzling.

This problem of judicial awareness and response to power politics is distinct from the general discussion of the threat of legislative override and the more legally oriented discussion of judicial incrementalism or situation sense (Llewellyn, Shapiro). Even if step by step and context conscious decision making is the usual and preferred *modus operandi* of courts, it is an elusive

/ vague feature with a broad spectrum.

Thus, this article unpacks the Court's decision making process, using more granular data. Concretely, we consider two separate stages of the proceedings and test the institutional and doctrinal (legal) response of the Court to the political environment and conflict. These render the analysis of the effects of politicization on courts concrete and nuanced and the relations between the judicial process and the political process more explicit.

Theory and hypotheses

Every case, lodged in Luxembourg, passes through a series of procedural steps specified in the Statute of the Court and the Rules of Procedure. As soon as the case reaches the Registry, the Court assigns it to the chamber. Article 16 of the Statute specifies that the Court hears cases in chambers of three or five Judges, as well as in the Grand Chamber of 15 judges, including the President, the Vice-President, and at least three Presidents of the chambers of five judges. According to the Statute, the Court shall convene the Grand Chamber at the request of a member state or an institution of the Union that is party to the proceedings. Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate General, to refer the case to the full Court composed of all 27 judges. The Court's Rules or Procedure further determine that the Court shall assign cases to the chambers of five and three Judges *in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber*. Moreover, the sitting formation hearing the case can always request that the Court rules in a larger formation. This means that the Court will convene the Grand Chamber in 'hard cases,' raising new points of law or when merited by other circumstances.

Thus, the decision on the sitting formation is not merely procedural; far from it. It reveals the Court's perception of the legal complexity of the case, the gravity of the *particular circumstances* and its perception of *exceptional importance*. In this context it is reasonable to expect that the Court will convene a large formation when responding to the potentially conflicted or hostile (*particular*) legal and political environment, and in cases raising difficult legal problems or opening salient questions. In those cases the Court is interested in strengthening its institutional authority before speaking 'law to power' as well as in signalling to the parties and the audiences that their legal arguments, considerations, and voices will be heard in the courtroom, and

their views duly considered in the deliberation chamber. Judges typically abstain from reporting cases and drafting judgments in disputes to which 'their' appointing member states are a party to, and are officially not the representatives of the appointing member state. However, their presence in the Grand Chamber might have an indirect and additional legitimizing (or placating) effect on the governments. Case formation thus also reflects the Court's perceived concern to secure the necessary procedural legitimacy and the impulse to publicly display its institutional authority.

After assigning the case to the Reporting Judge and the chamber, the Court conducts the written part of the proceedings, with the exchange of pleadings, and at times holds an oral hearing in the presence of the parties, the interveners and the Advocate General. Her opinion concludes the open part of the procedure, after which the judges proceed to secret deliberations. The Court subsequently renders the final decision on the merits of the case, ruling on the validity and the correct / authoritative interpretation of European Union law.

To summarize, the decision on substance is subsequent to the procedural decision on the composition. This implies, logically, that the Court settles on the legal ambit of the ruling after it has established the necessary institutional authority to rule in the case with relative confidence. The legal ambit of the decision refers to the scope and the concrete terms of the application of European Union law, such as its immediate and unconditional integration into the national legal orders with or without state intervention, and the effect of the ruling on the division of competences between the European Union and the member states. Key to the decision on the formation and the decision on its ambit are (1) the salience of the case and (2) the degree to which the policy preferences of the addressee governments diverge. As a peak court, the Court's primary function is to ensure that in the application and the interpretation of the Treaties, the law is observed (Article 19 of the TEU). The preliminary reference procedure is designed to further the

uniform application of European Union law by the national courts across the territory of the European Union (Jacobs, Craig and DeBurca). If a national judge, ruling in a dispute between private parties or state authorities and institutions, encounters doubts about the interpretation or validity of European Union law, she may (or in cases where it rules as the final court of appeal must) suspend the proceedings and refer the question to the Court (267 TFEU). Because the Court's 'reply' is authoritative for all member states and national courts (the so-called erga omnes effect), all member states may intervene in the proceedings. They are allowed to submit observations or amicus curiae briefs limited to the support of the order sought by any of the parties to the case. Interventions in the proceedings tend to be interpreted as the interest of the states in the outcome of the case, and their content as political signals of state preferences. The latter relate to the interpretation / construction of European Union law and the range of outcomes that the governments would readily accept (Clifford James Carrubba, 2009; Clifford J. Carrubba, Friedman, et al., 2012; Larsson and Naurin, 2016).

Studies show that the propensity to intervene in the proceedings and seize the opportunity to shape the interpretation of European law and the outcome of cases varies greatly between member states (Dederke and Naurin, 2017). A majority of the proceedings typically feature one to two amicus briefs. The number of observations is thus a reliable indicator of the political salience of the case aka its relevance to the audience beyond the parties to the dispute. Moreover, the member state participation in the proceedings is indicative of the demand for authoritative clarification of the correct interpretation of European Union law from the third parties who understand that the Court's decision will importantly affect their position. In practice, member state governments tend to intervene on behalf of fellow state governments with whom they share similar policies or legislative solutions disputed in the preliminary reference procedure.

The Court can always directly observe the salience of the case at the time

of the decision. However, the observations reflect but a fraction (albeit an important one) of the general domestic attitude toward the integration project, and thus provide only a glimpse in government attitudes. Governments are sectoral repeat players, focusing on selected policies; the United Kingdom submitted most observations in the social policy cases probably driven by the continuous pressure of the Equal Opportunity Commission, while France focused on competition law and free movement of goods, possibly owing to its strong agricultural lobby (Granger). Thus, we assume that the judges consider the more general indicators of support, that is, the spread (divergence) in the general attitudes of governments towards European integration, to gauge the scope of divergence of governmental policy preferences. The latter are key to the reception of the ruling and effectiveness writ large.

Because we argue that the Court's decisions are strategic and contingent, we discuss them in reverse order.

Deciding the ambit of the ruling Politicized cases are cases (1) where more member state governments express an interest in interpretation and case outcome; (2) which occur in a context where the political distance between state governments is wide and sizeable and thus (3) present the Court with conflicting demands.

On the one hand, we expect that the Court covets the opportunity to prove its relevance especially in cases that are salient to several member states. It can do so, inter alia, by increasing the ambit of the ruling. All else equal, as the salience of the dispute increases, we expect the Court to adopt a clear and decisive doctrinal position, thereby furnishing the member states with a general, far-reaching and directly applicable pronouncement akin to the abstract rule.

Hypothesis 1 *The Court is more likely to broaden the ambit of the ruling in politically salient cases.*

On the other hand, the demand for judicial intervention in the salient politicized domain risks to expose the Court, especially when the process of European integration is subject to strong and highly diverging views and policy preferences. Judicial interference can deepen the existing political rift and worse, cast a spotlight on the Court's policy making and activism. Thus, while we may expect the Court to broaden the ambit of the rulings in salient cases, we also expect it to practice self-restraint when the integration project is subject to politically divisive debate. In other words, we expect that divergent policy preferences of the political actors push the Court to narrow the legal ambit of its rulings.

Hypothesis 2 *The Court is more likely to narrow the ambit of a ruling when policy preferences of the political actors diverge greatly (member states are divided).*

Strengthening institutional authority Before delivering the final decision, the Court takes several procedural steps intended to increase the chances of its reception (effectiveness). Specifically, in the initial stage of the proceedings, the Court collects available information about the context of the case. The decision on chamber size features prominently in this context. We expect that the decision on chamber size mirrors the Court's perceived need for institutional authority and procedural legitimacy. The Court will increasingly perceive such need when preparing the ground for rulings with a wider ambit and when its authority as a relevant European decision maker may already be at issue.

Larger chamber formations confer more authority to the judgment and signal to the member states that the Court has carefully and fully considered their arguments and positions. Judges bring different perspectives, arguments, and expertise to the table. Those foster a more comprehensive and multi-faceted legal debate, as well as a fuller consideration of the broader context and the potential implications of the ruling.

While individual judges are not the representatives of their member states and required to act with complete independence and impartiality, their presence in the decision making process might nevertheless have a placating and legitimizing effect on the state governments (Vauchez). More judges thus means greater representation, more information and more checks and balances.

This view is supported by the common practice of sovereign states, establishing international courts to ensure the representation of their diverse interests. Moreover, judicial appointments to these courts are deeply political events (Elsig and Pollack, 2014), which follow geographical quotas. In the European Union, member states select one judge at regular intervals, with newly established governments often preferring to appoint a 'new judge' (Silje Synnove Lyder Hermansen and Naurin, 2019).

The Court's chambers reflect the same principle of heterogeneity. The President of the Court assigns judges to chambers before the case reaches the Court Registry, and judges tend to sit together for extended periods (typically three years). While the Court's Rules of Procedure provide no guidelines, the President usually seeks to form balanced chambers in terms of geographical representation, experience, expertise, language, gender and legal tradition (Vauchez).

This quasi-gerrymandering greatly contrasts with the system of random chamber assignments as applied elsewhere, for instance in the appellate courts in the United States. The President is practically free to allocate outliers across chambers and potentially contain their influence. Studies have shown that the median Court judge in a chamber displayed less variation in the 2009-2012 period than a random assignment would indicate (Frankenreiter, 2018). The system implies that member state governments receive a reasonable assurance that individual rulings reflect a carefully negotiated consensus. Notwithstanding the plausible strategy to contain the influence of policy outliers, larger chambers could potentially also decrease the likelihood

that outliers influenced the final decision or built a majority. Even if the latter was possible, the Court – in contrast to the United States Supreme Court, for example – proverbially strives for consensus and tends to avoid voting. It is thus conceivable that larger formations allow for a set of decision makers to police each other.

We therefore hypothesize that the Court increases its chamber size in response to the immediate or potential need to strengthen its institutional authority. Thus, we expect that the Court deliberates in larger chambers when it taps into an ongoing debate between state governments with highly divergent policy preferences.

Hypothesis 3 *The Court is more likely to convene a larger chamber in cases that involve political actors with incompatible (highly divergent) policy preferences.*

Finally, as the choice of chamber size is strategic, we also expect that the Court increases the number of sitting judges when contemplating the possibility to increase the ambit of rulings in response to the demand from the member states.

Hypothesis 4 *The Court is more likely to convene a larger chamber in politically salient cases.*

Although larger chambers arguably brace for a judgment with a wider ambit, we do not expect that the Court will necessarily follow suit. During the course of the deliberations, the judges may decide against it. Nor do we expect larger chambers to issue all rulings with a wide ambit. If the Court considers that the decision will not intensify a political debate, it may chose to save its resources by convening a smaller chamber.

Free movement of persons: A salient policy area central to European integration

Free movement of persons is simultaneously one of the founding principles of the Treaties establishing the European Community (The Treaty of Rome, 1957) and the epitome of judge-driven policy change. The following features make it a highly pertinent and valuable source in the analysis.

First, free movement of persons has been central to the European integration project from the beginning, but its salience has varied over time (Blauberger et al., 2021). It directly affects all European Union citizens, and the flows of migration give rise to fierce political debates and contestation. Compared to the free movement of goods and services, which primarily Europeanize member states' economic policies, the free movement of persons is highly salient as it directly benefits the individual citizens who move. The right to move and reside freely within the territory of the European Union is the right to seek economic prosperity without discrimination – an idea that becomes unattractive when the demands of the national economy, public health, value choices, or public safety conflict with the common European good.

The Treaty of Rome contained the provisions on the free movement of workers, which applied to employed and self-employed persons, as well as to other economically active migrants. Persons who qualified as workers had the right to accept offers of employment, to move freely and reside within the territory of the member states for the purpose of work and employment, and remain in the host member state when they retired, became unemployed or otherwise unable to work. Importantly, migrant European workers were to be treated the same as the national workers regarding the access to and the conditions of employment. The introduction of European Citizenship in the Maastricht Treaty (1993) added layers of interpretations to the existing rights, extending them to economically non-active citizens, third country

nationals caring for minor European citizens, and relaxing the so-called cross border requirement. Citizens no longer had to cross the national border to acquire European rights.

Second, free movement has generated ample jurisprudence. Since 1965, the Court has put flesh on the bones of the Treaty rules and secondary legislation, fashioning *inter alia* a supranational definition of a European worker, establishing the right of workers and their family members to export pensions, child allowances and social-security benefits, dismantling the education quotas and abolishing university fees for European students, instituting the right to equal pay as a matter of European principle of non-discrimination, and pronouncing that European citizenship constituted the fundamental status of those who moved.

Third, the Court has traditionally enjoyed a large discretion to fill the legislative gaps. Although the Treaties of Rome and Maastricht established the basic framework, they gave the European legislator - including the member states who assembled in the Council - the power to impose conditions by secondary legislation (directives and regulations). And while the legislator has been dragging its feet, the Court has been filling the blanks. Even the long awaited Citizen Rights Directive (Directive 2004/38/EC), aiming to replace a bulk of patchy sector-by-sector legal acts with a single comprehensive codification, largely codified the case law, imposing few limits on the Court's action.

Finally, the Court's audacious rulings might have inadvertently contributed to the increasing salience of free movement of persons and the clashing political (and public) views regarding its scope and general appeal. The scholars, the policy makers and the general public have celebrated, praised, welcomed, disputed and dismissed the Court's rulings. The latter have frequently taken centre stage in the debates of the Court's pro-integrationist agenda and unbridled activism.

The contestation culminated during the 2010s. Taking back control over

European immigration was cited as one of the primary reasons for the withdrawal of the United Kingdom from the Union (Brexit) in 2016. The free movement of persons moreover proved a major obstacle in the subsequent Brexit negotiations, with the European negotiators flatly rejecting any free-trade agreement without it. Brexit is arguably an extreme example, however, several member states have flirted with the idea of limiting free movement rights, changing the legislation to curb the benefits especially for the economically non-active citizens, and taking a more restrictive approach to expulsion of long term residents committing serious crimes.

In spite of occasionally heated political discussions, to which the Court responded by limiting rights (Shuibhne, 2015) if only to rebuild them after Brexit, the case law has overall left a significant mark on the policy area. In this context, the Court has been able to strategically mold the scope of free movement by adjusting the legal ambit of its rulings. As we demonstrate in the following section, the Court has expanded the ambit of rights and competences when the preferences for European integration were relatively aligned and its intervention coveted.

Data and variables

The data consists of all 880 preliminary references (Article 267 TFEU), lodged between 1963 and 2017 in the policy area of free movement of persons. In other words, we include judgments issued in response to the questions of interpretation and validity of European Union law, which national courts encountered in the disputes between private state administrations.

We are interested in the initial procedural decision on the chamber size and the subsequent ruling on the legal substance: We hypothesize first that chamber size reflects the Court's perception of the need to strengthen its institutional authority (H_3 and H_4). Second, and conditional on that choice, we focus on the Court's decision to extend the legal ambit of the ruling, thereby intensifying the requirement for the uniform application of European Union law. While all rulings on interpretation and validity of European Union law apply to all similar situations across the Union territory, some are more audacious – meaning doctrinally more invasive and consequential than others. They have a greater potential to upset the established allocation of competences, rights, state obligations, and a wider range of related national policies (H_2 and H_1).

Dependent variables

Institutional authority – The composition of the court is an ordinal variable reporting the chamber size in each case. In our sample, the Court deliberates in three formations: small (3 judges), medium (5-sitting judges and small plenary) and large (Full Court/Grand Chamber).

We have reason to assume that the composition of the Court is strategic, apart from objectively reflecting legal complexity and raising new points of law (Lenaerts et al., 2015). This implies that the chamber size also captures the anticipated reception of the ruling. The Statute and the Rules of procedure allow the Court to determine the chamber size in the prelim-

inary reference procedure relatively freely, following its own legal judgment and the assessment of the broader context of the case. Thus, the chamber size reveals its perceived need to strengthen or publicly display its institutional authority. We thus expect that the Court decides on the chamber size considering the political context and the legal complexity of the dispute. As argued above, larger chambers signal a more comprehensive and multifaceted or legally thorough deliberation, reassuring the member state governments of the wide consensus among the sitting judges regarding the outcome.

In the first step of the analysis, we rely on the results from an ordered logistic regression describing the Court's choice of chamber size. The size of the Court as well as its internal organization have changed substantially over the 60-year period of study. Notably, the Court today usually deliberates in chambers of 3 or 5 judges, while until the early 1990s it typically deliberated as the full court. As there were fewer member states, this effectively meant 7 judges until 1973, nine judges until 1981 etc. Our models therefore account for the propensity of the Court to sit in different formations. Thus, we control for the share of all preliminary reference cases (not merely those pertaining to the free movement of persons) decided by the same-sized formation each year. The effect of our predictors can therefore be read as a deviation from the norm at the time of the decision.

Legal ambit of the ruling indicates one of three measures the Court can employ to make its ruling relevant beyond the parties to the conflict. It indicates cases in which the Court (1) expands the European Union's competences to policy areas beyond the free movement of persons, and beyond the strict limits of the Treaties, thereby also expanding its own jurisdiction to hear future cases in that area; (2) rules that a provision of European Union law has direct effect for the first time, or expands the direct effect of a provision of European Union law; or (3) adopts a strong doctrinal outcome.

Expanding competences refers to the likely effect of the Court's ruling on the de facto allocation of competences between the European Union and the

member states. Competence has a relatively precise legal meaning, based on the Treaty (principle of conferral). Expansion of competences tends to additionally tighten the ability of member states to adopt legislation or conduct policies independently. For instance, a broad interpretation of free movement right can 'create' the European competence in income taxation, reducing this competence for the state. The states, who did not confer this competence to the Union in the Treaty, must nonetheless align its exercise with the Court's interpretation. In short, expanding Court competences means restricting member states' autonomy.

Direct effect refers to the Court's decision that a specific provision of European Union law, which meets the criteria established by the Court, becomes directly applicable. This means that private individuals can enforce the rights that the provision confers on them before the national courts, potentially overriding conflicting national legislation. For instance, the Court can rule that the provision of a Directive giving equal rights to part-time workers fulfils the conditions for direct effect. All part-time teachers can claim the right against their employers and in case of refusal, they can take their case before the national courts, even if the national law does not give them such rights. They can moreover do so even if the national legislator did not transpose the directive into national law. In other words, direct effect is a way for the Court to short circuit the political level to impose its case law directly (Alter, 1998).

Finally, strong doctrinal outcomes reflect the Court's willingness to entrench, strengthen or expand European doctrines, create new concepts, rights, or develop principles of European Union law. Importantly, because the Court's pronouncements replace conflicting national rules (the principle of primacy), these rulings risk to dismantle the existing legal arrangements. For instance, the Court can adopt a broad interpretation of a free movement Treaty provision, and decide that the children of frontier workers have a 'new' right to free health care and subsidized loans under European Union law in

the state of employment. The affected member states with similar rules will have to change their legislation to accommodate the Court's ruling. In many ways, these strong doctrinal outcomes are instances where the Court most openly acts as a policy maker.

When the Court expands the legal ambit of the ruling (and European Union law), it effectively makes new law for '27 Member States' instead of or despite the European and the national legislators, possibly against the interests of individual governments. Because it assumes the role of a law maker and effectively replaces the potentially divergent legislative arrangements of those states, it is necessarily addressing a wide audience.

Explanatory variables

(Political) salience – proportion of member state observations reports the share of member states that submitted an amicus curiae brief (observations). It is a proxy for governments' demand for generally applicable legal solutions from the Court. Governments do not frequently use the opportunity to submit their views on the case to the Court. The median case contains only 3 observations – usually from the member state in which the preliminary reference originated. Around 10% most salient cases attracted the observations from more than 25% of the member states. Given that the European Union's membership has increased from the original 6 to the current 27 states during the period of study, we calculate salience as the proportion of governments that could potentially submit their views.

Divergent policy preferences – spread in pro-integration attitudes among governments is measured as the standard deviation of governments' policy preferences. As such, it reflects to what extent the Court faces a divided legislator in the Council. It is based on weighted mean of cabinet parties' attitudes towards European integration estimated from party manifestos (Volkens et al., 2017). In practice, this variable varies between 0.04 and 0.36.

The bivariate relationship between our measure of political division and

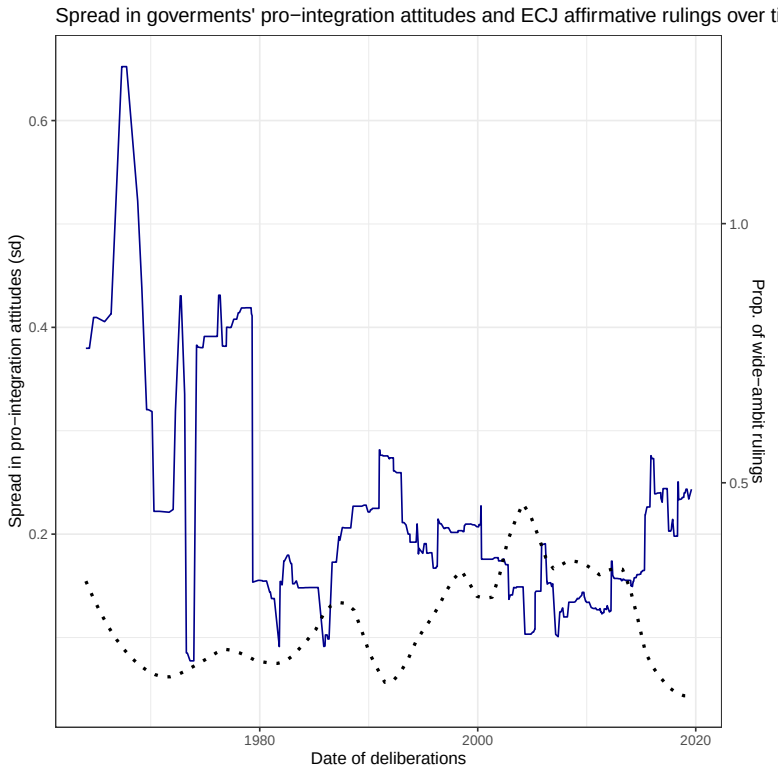

Figure 1: There has been substantial variation in the spread in member state preferences (dotted line) as well as the Court's propensity to expand the ambit of its rulings over time (solid line).

the Court's decision to expand the ambit of its ruling is illustrated in figure 1. As is clear from the figure, in periods where state governments are situated far apart (divergence is high, dotted line), the proportion of rulings with a broad ambit (solid line) is low and vice-versa.

Finally, when we estimate the effect of political division on the ambit of the rulings, we control for the Court's choice of chamber size. Since both regressions contain the same predictors, this means that their total effects are different from their isolated effects and must be simulated.

Control variables

The Court may seek to strengthen and publicly display its authority or widen the ambit of its rulings for various reasons. Both models therefore include a set of control variables designed to capture alternative explanations.

Pro-integration attitudes of the median state government reflects the preferences over European integration of the pivotal actor in the Council. Previous studies have argued that the Court adjusts its rulings to what it believes is the likelihood that there is a majority in the Council willing to override the Court by adopting new legislation. Pro-integration attitudes variable captures this scenario. Each government preference is first estimated by a weighted mean of cabinet parties' attitudes towards European integration estimated from party manifestos (Volkens et al., 2017). The final variable then weighs each government's preference according to their voting weight in the Council to report the preferences of the pivotal actor under qualified majority. In practice, this variable varies between ∞ and $-\infty$.

There are other contexts where the Court may seek to assert its institutional authority or provide ready made general legal solutions. *Constitutional capacity - Treaty article* indicates whether the legislation affected by the case included a Treaty provision. About 40 % of the free movement cases affect at least one Treaty article. When the Court acts in its constitutional capacity (as the guardian of the Treaties) it is less accountable to the legislator. It

arguably also enjoys a wider discretion and a greater interpretive authority. However, law making based directly on broad Treaty provisions rather than on concrete and narrower legislation also risks to animate potentially harmful debate about the (undemocratic) Court's legitimacy to usurp the role of the (democratically elected) legislator (Herzog and Gerken, 2008).

First interpretation of a text indicates whether this is the first time that the Court encounters the legislative act ("affected"). The Court faces greater uncertainty when legislation is new. In this case, the Court has less information about the range of acceptable outcomes from the member states and may react to the situation by increasing the number of sitting judges. Often, new legislation might raise new points of law, which would call for a larger chamber according to the Statute and the Rules of Procedure. The Court can take cues from the Council negotiations to assess and counteract the potential divergent policy preferences related to its decision making. However, this effect diminishes as the Court's interpretation of the law crystallizes (Hermansen, 2020).

Results

Table 1 reports the results of the analysis, which largely support our expectations. The table reports the median effects from both models, as well as the symmetric posterior density intervals in parenthesis. The latter can be read as the range of most probable effect sizes if the models provide an appropriate description of the data.

The two models describe different stages in the same decision making process. First, we can observe that the Court's decision on chamber size is closely linked to the subsequent decision to widen its legal ambit. Thus, considering a low-salience case with a typical distribution in government policy preferences [1], the predicted likelihood of a ruling with a broad ambit is 30 percentage points in grand chamber cases, while the same outcome in small chambers is a rare – but not impossible – event (9 percentage points). Importantly, while choices are linked, their relationship is not deterministic. This also means that a chamber of three judges can occasionally issue a ruling with a broad legal ambit. Smaller chambers can thus possibly contribute to the legal development, widen the scope of direct enforcement of rights, and encroach on policies beyond the limits of the Treaty.

Second, and related to the first point, we have hypothesized the independent effect of politicization on the legal ambit of the Court's rulings. Thus, both models contain our measures of political salience and division. By controlling for chamber size, the total effect of politicization on the legal ambit of the ruling is in parts integrated / assimilated in the Court's choice of chamber.

We have theorized that courts faced diverse and possibly conflicting demands. On the one hand, the Court can prove its relevance relative to

[1] All examples drawn from a scenario where the European Union has 15 members. We consider cases with one member state observation as "low salience". Unless otherwise stated, member states attitudes – their pivotal actor in the Council and the divergence of policy preferences toward European integration – are set to their mean value.

domestic courts by meeting a demand for judicial resolution of salient and politically contentious legal questions at the wider – European or supranational – level (H_1). On the other hand, such 'judicial harmonization' begs the question why courts as non-majoritarian bodies composed of non-elected judges unrepresentative of the wider population should replace or amend the decisions of elected policy makers. We have therefore hypothesized that the Court would seek to insert all available checks and balances in the decision-making process when contemplating to meet conflicting demands (H_3). We find support for both claims.

Meeting demands – political salience We interpret political salience as a demand for a general solution to a problem that affects more governments apart from the government directly affected by the Court's interpretation. Thus, we find that an increase in the proportion of member states that submit observations (amicus briefs) also increases the likelihood that the Court will convene a larger chamber and issue a ruling with a wide legal ambit. For example, an additional member state observation among the Union of 15 member states would imply a 61% marginal increase in the likelihood of the Court opting for a larger chamber. Once this initial procedural choice is made, we see an additional 15% in the likelihood of a broad ruling at the deliberation stage due to the salience of the case. The first pane in figure 2 illustrates this effect.

While member state observations may be interpreted as higher demand for general (policy) solutions, we also include indicators of opportunities for the Court that it may or may not seize. From the first column in the table, we see that, overall, the Court will seek to display the legal quality of its decision-making process and the inclusiveness of its deliberations when the legal context offers a larger margin of discretion. Thus, the relative likelihood of increasing the chamber size increases by 87% when the Court interprets the Treaty as a quasi-constitutional document (Mancini, Stein), acting as a

quasi-constitutional court. It more than doubles when the Court is called to interpret novel legislation. Both opportunities may eventually lead the Court to assert its legal authority. However, the choice of chamber size mediates these effects. By contrast, we observe a degree of path-dependency in the Court's rulings with a wide ambit: the Court is likely to strengthen and re-affirm its authority with regard to the same legislation. It does not, however, automatically adjust its strategy by increasing the chamber size in all cases where it has previously established its authority.

Conflict avoidance – divided preferences We argued that legislators with heterogeneous preferences regarding European integration pose a threat to the CJEU's legitimacy insofar as an assertive court would fuel an already polarized debate. We have hypothesized that, to counteract this situation, the CJEU will on the one hand assert its institional authority by increasing its chamber size (H_4) and, on the other hand, practice restraint (H_2). We find support for both claims.

As divergence between member state governments' attitudes towards the European integration project increases, the Court's ruling necessarily taps into an ongoing political debate. Our results show that the Court perceives this threat and responds by strengthening its institutional authority. An increase in preference divergence from low to high (from the 20^{th} to the 80^{th} percentile) increases the likelihood that the Court will rule in a larger formation (increase the chamber size) by 69%.

The second pane in figure 2 illustrates the effect of divergent policy preferences of the policy makers on the legal ambit of the Court's rulings. Conditional on chamber size, an increase in preference divergence from low to high decreases the likelihood of a ruling with a broader ambit by 40%. The choice of chamber size is an intermediate stage in the Court's decision making. The total effect of such an increase would decrease the probability of an audacious ruling by 30%. That is, the Court tends to narrow the legal

ambit of its rulings in periods when governments have variegated European ambition rendering its political environment more tense.

This also suggests that in periods with growing degree of consensus on questions of European integration, the Court will rely more on smaller chambers in free movement cases. This trend would increase in parallel to the Court's propensity to broaden the legal ambit of the rulings.

Discussion

Conflicts between and within governments, parties to the international regime, expose the precariousness of judicial authority and international rule of law.

According to our findings, diverging policy preferences regarding the European integration project (1) raise the Court's need to outwardly strengthen its institutional authority, signalling the legitimacy of the judicial process and (2) taper its inclination to make ersatz rules and policies.

We may therefore ask how the Court reacts when cases politicize? Scholars often define politicization as a combination of high-salience issues where a large number of stakeholders take interest in its outcome, but where their preferences diverge (Wilde, Leupold, and Schmidtke, 2016). We show that the two elements of politicization – salience and polarization – work to counteract each other. While a highly politicized case[2] would predict a wide-ambit outcome in 20% of the Court cases, this is only marginally different from the predicted ambit of a low-salience case in times with low political division (18%). To the occasional observer of the Court's rulings, it may seem that the judiciary is insulated from politicization. We show, to the contrary, that the conflicting demands on the Court have a profound impact throughout its decision making.

[2]We define high politicization as a high-salience case in EU-15 (3 observations) in an environment with highly divided preferences (80^{th} percentile), while a case with low politicization has low salience (1 member state observation in EU-15) and low division in preferences (20^{th} percentile). All other variables are set to zero, except for the pro-integration preference of the pivotal memberstate in the Council.

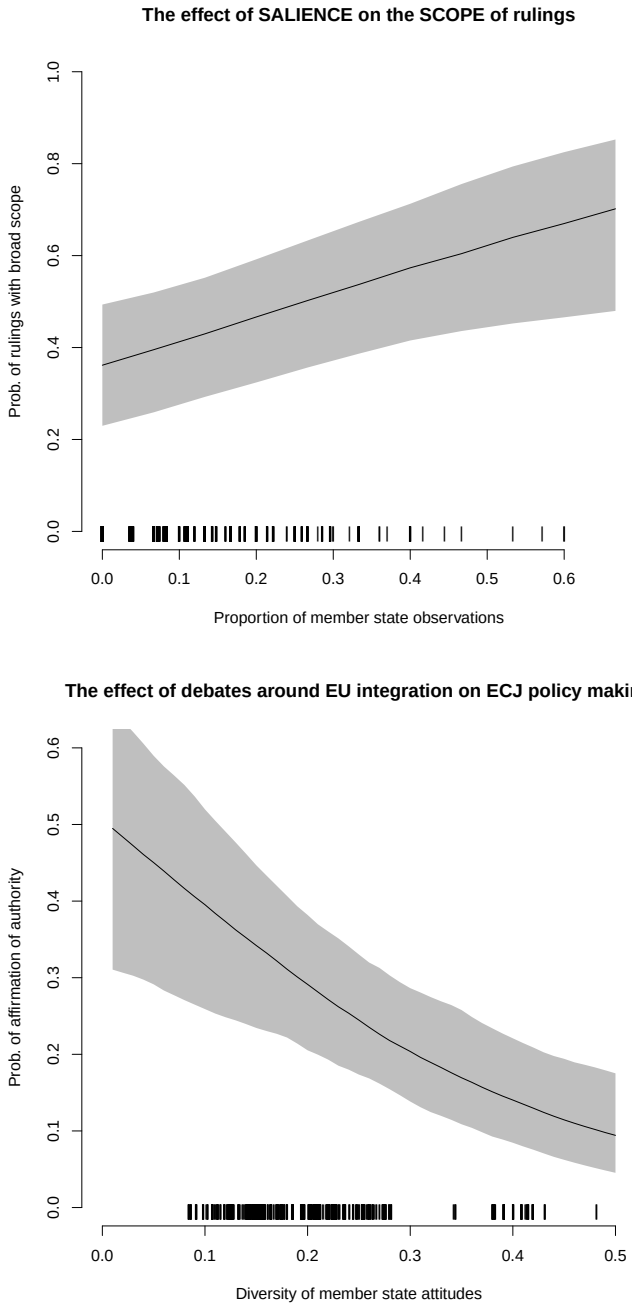

Figure 2: The mixed effect of politicization on the CJEU's propensity to broaden the scope of its rulings.

We have argued first, that the Court's sensitivity to the preferences of policy makers is greater and more nuanced than the existing literature has thus far acknowledged. Second, we have proposed an alternative measure of political divisions, which does not rely on the preferences of member states expressed in a single case. Specifically, our analysis suggests that the Court reacts to political divisions even in the absence of direct signals and nudging from member state governments. Moreover, the Court exercises its sensitivity by adjusting the procedural arrangements and the substance of its rulings to the political context. Third and finally, we have investigated the Court's propensity to increase the legal ambit of its rulings, effectively assuming a legislative role.

Clifford J. Carrubba, Gabel, and Hankla (2008) argued that the Court, fearing political push-back, rules in line with the preferences of the majority of the member states. Empirically, the authors demonstrated that the Court was more likely to rule in favor of the plaintiff when a majority of the member states that submitted amicus briefs (observations) supported the plaintiff's claims. In other words, as the political pressure on the Court increases, the legal outcomes progressively cease to reflect its own sincere preferences. They become more strategic.

Our study relates to this insight in two ways. First, government views as expressed in their observations to the Court are pronounced political signals directed to the Court. While the Court may respond by complying with the majority view, it still runs the risk of alienating parts of its audience. Mixed signals, therefore would spur the Court to refrain from generalizing its ruling through an audacious outcome. Its rationale is to avoid fueling further debates about its role in policy making.

Second, while the Court complies in how it resolves the case for strategic reasons, it might not be willing to make a principled statement about its future behavior. Although we cannot know the Court's true preferences, we may assume that its likelihood of being sincere in its support for the

plaintiff decreases with governments' net support. We would expect the Court's likelihood of issuing an audacious ruling to decrease accordingly.

In the following, we rely on the part of the authors' replication data pertaining to the Free movement of people to demonstrate how our argument relates to theirs. We begin by exactly matching court cases according to the number of member state observations and the size of the EU at the time of the decision. We use disagreement between governments as a treatment and run two linear probability models in which we hold the case salience constant.

The first column in table 2 reports the results from a simple model. In line with our expectations, we find a 23 percentage point drop in the Court's propensity for an audacious ruling when facing mixed signals. The second column in table 2 then goes on to investigate how the probability of an audacious ruling changes as evidence of effective political pressure increases on the Court. We use the combination of political pressure with the Court's final support for the plaintiff as a proxy for its increasing insincerity. Once again, we find what we are looking for. In instances where the Court has backed the plaintiff, its likelihood of issuing an audacious ruling decreases by 19 percentage points for each additional government that also backed the plaintiff compared to when the Court supports the defendant without political pressure.

The main takeaway is that the Court is both more and less responsive to its political context than previously accounted for. On the one hand, it reacts to political divisions in its environment and not merely at direct pressures. On the other hand, the Court uses its discretion in how it formulates judgments to limit the future consequences when, indeed, it succumbs to political pressure.

Our results show that the Court is aware of the downside of non-majoritarian law making in times of political division and legislative stalemates, even when such law making appears solicited. While legislative impasse presents an outstanding opportunity to further its own policy agenda and the integration

project, demonstrating the societal relevance and political power, it also has the opposite effect. The Court risks its authority, which derives from apolitical law application and faithful interpretation of rules made by the legislator. The Court refuses to assume the role of the final arbiter of legality when the support for the integration project in the member states increasingly diversifies and salient societal questions politicize. On the contrary, the Court practices self-restraint. At the same time, it carefully guards the legal authority of its rulings, more often sitting in larger and more representative formations when ruling on salient societal questions.

Dependent variable: 'Court decision making'	Chamber size	Ambit	Ambit (tot.)
Latent dissent (division in European attitudes)	4.733	-4.57	-3.195
	(2.938,6.512)	(-6.914,-2.131)	(-5.43,-1.093)
Member state observations (prop.)	7.116	2.09	3.352
	(5.633,8.729)	(0.548,3.645)	(1.888,4.958)
Constitutional capacity (only treaty affected)	0.652	0.17	0.308
	(0.378,0.948)	(-0.186,0.51)	(0.003,0.643)
First iteration	0.63	0.406	0.569
	(0.172,1.133)	(-0.094,0.956)	(0.04,1.048)
Legal ambit of prior ruling	0.402	0.584	0.653
	(0.03,0.776)	(0.159,1.002)	(0.216,1.067)
Reference from a higher court	0.134		
	(-0.161,0.465)		
Pivotal member in the Council	-0.625	0.344	-0.025
	(-1.521,0.31)	(-0.608,1.308)	(-0.887,0.919)
Prop. small chamber (ref. medium)	-5.576		
	(-6.583,-4.536)		
Prop. large chamber (ref. medium)	-0.962		
	(-3.053,1.068)		
Intercept (small—medium)	-1.16		
	(-1.792,-0.512)		
Intercept (medium—large)	1.775		
	(1.161,2.452)		
Small chamber (ref. medium)		-0.628	
		(-1.147,-0.174)	
Large chamber (ref. medium)		0.845	
		(0.441,1.225)	
Intercept		-1.027	-1.233
		(-1.716,-0.299)	(-1.92,-0.644)
Number of observations	840	879	879
Proportion of correct predictions	0.58	0.536	0.633
... correct positive predictions		0.587	0.606
... correct negative predictions		0.519	0.641

Median effects with 95% symmetric posterior density interval in parenthesis.

Table 1: Effect of politicization: Choice of chamber size and scope of ruling in the CJEU. Results from an ordinal and a binomial logistic regression, respectively.

Table 2: The effect of mixed signals i and the Court's strategic compliance on the legal ambit of its rulings. (Results from a linear probability model with exact matching.)

	Dependent variable:	
	Ambit	
	(1)	(2)
Division in member state submissions (treatment)	-0.227^{**}	-0.258^{***}
	(0.091)	(0.096)
Court support for plaintif		-0.065
		(0.105)
Net MS support for plaintiff		0.058
		(0.056)
Audacious prior ruling	0.028	-0.012
	(0.146)	(0.139)
Net MS support when Court supports plaintiff		-0.181^{**}
		(0.070)
Constant	0.276^{**}	0.378^{**}
	(0.117)	(0.142)
Observations	66	66
R^2	0.360	0.462
Adjusted R^2	0.270	0.352
Residual Std. Error	0.365 (df = 57)	0.344 (df = 54)
F Statistic	4.008^{***} (df = 8; 57)	4.213^{***} (df = 11; 54)
Note:		*p<0.1; **p<0.05; ***p<0.01

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