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WASHINGTON UNIVERSITY IN ST. LOUIS

Department of Political Science

Dissertation Examination Committee:

Matthew J. Gabel, Chair

Jeff Gill

Edward Greenberg

Nan Lin

Andrew D. Martin

James F. Spriggs, II

The Politics of Constitutional Review: Evidence from the
European Court of Justice

by

Michael Malecki

A dissertation presented to the
Graduate School of Arts and Sciences
of Washington University in
partial fulfillment of the
requirements for the degree
of Doctor of Philosophy

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ABSTRACT OF THE DISSERTATION

The Politics of Constitutional Review: Evidence from the European Court of Justice

by

Michael Malecki

Doctor of Philosophy in Political Science

Washington University in St. Louis, 2010

Matthew J. Gabel, Chair

Judges who perform judicial review have the extraordinary power to strike down laws that do not conform to their own policy preferences. Their political independence is generally regarded as a normative good. In this work, I consider the microfoundations of judicial preferences and how those preferences interact with institutional independence to determine the policy impact of judicial review.

The following argument is developed in the context of the Court of Justice of the European Union (European Court of Justice, or ECJ). Constitutional Courts generally and the ECJ in particular are considered “independent” when they enjoy discretion to act counter to the interests of other policymaking bodies and their political principals. In the European Union, the primary political actors are the member states, which directly appoint the judges and play a significant role in the legislative process. But whether their independence implies policy outcomes that exploit this discretion depends on the preferences of the judges – which may or may not diverge from those of the principals. Indeed, in standard theories of delegation, broad discretion is likely to be granted when policy preferences of principal and agent align.

A considerably body of scholarly work has asserted that the ECJ’s institutional independence has implied behavioral independence: in short, that the ECJ has pursued a pro-integration agenda counter to member state governments’ preferences. The typical expla-

nation for this apparently independent behavior is that judges share a common preference for expanding the authority of the Court and EU generally. The claim that individual ECJ judges share a uniform preference for integration has never been tested due to the institutional cover of the court's collective decisions, by thwarting scholars' efforts to evaluate individual judicial behavior. But while individual judges' behavior is not directly observable, a feature of the organization of the ECJ, its system of Chambers, provides a potentially valuable window on judges' decisions. Specifically, I contend that we can infer individual behavior from the collective judgments made in chambers because most judgments are made by different combinations of judges. I develop a general statistical model for aggregate data produced by subsets of deciders by extending the item-response model to account for selective participation in decisions. In addition, I explicitly model other known features of the parameters of the item-response model to enable inference about both judges and cases.

Results show that judges do not share a common preference for integration – that institutional independence has provided cover not only for Europhiles but Euroskeptics as well, contrary to the claim that ECJ judges all share a motivation for more integration. In fact, the heterogeneous preferences of judges are predictable based on the preferences of the member states at the time of appointment. Extant results about judges' responsiveness to member state governments is confirmed with microfoundations, and extended to allow for selective responses. I show that institutional independence does not imply behavioral independence – much less, the behavioral independence that ECJ scholars have assumed the ECJ has engaged in, pushing for greater integration. Instead, because judges are institutionally shielded, member state governments appear to appoint judges with preferences similar to their own.

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Chapter 1

Unaccountable but Representative: Collective Decisions, Delegation, and Compliance

One of the normative goals of institutional judicial review is to insulate the reviewing institution from political pressures that would sway its rulings. In other words, to enable constitutional judges to exercise their judgment, striking laws that are unconstitutional. Ideally, constitutional judges would have special insight into the meaning of founding texts and apply this insight to their legal reasoning. However, knowing that judges, though usually quite learned and respected, are no less human than other members of government, practically all high courts provide for both institutional insulation (often called “judicial independence”) as well as some constraints such as limited term lengths and often diverse sources of appointment. These constraints place limits, albeit often quite ambiguous ones, on the autonomy and discretion of constitutional-court judges. In the study of judicial independence, which varies tremendously among democracies old and new alike, judicial independence is if not causally linked to the rule of law, closely

correlated with it. In general, the judicial independence literature generally adopts an implicitly legalist view of judicial behavior which rejects importance of judges' policy preferences. If judges' preferences are either undefined or irrelevant, the argument for judicial independence under a legalist model is identical to one that says judges should be unencumbered in enacting their own policy preferences. Instead, judicial independence is indicated by 1) the absence of constraints on judges through term limits, removal, salary, budget, and other features of the court itself, and 2) the frequency or presence of compliance by affected affected parties – litigants, citizens, legislators. But these two metrics confound another – in particular a constrained and unconstrained court that enjoy compliance are observationally equivalent. One cannot tell whether the court is exercising its true preferences and the government complies because it wants to show respect for the rule of law, or responding to constraints that induce a government-friendly judgment. Observing those two indicators still does not imply that judges are making judgments Without taking seriously the policy preferences of judges and governments, institutional and behavioral independence remain inextricable. Whether institutional independence implies policy outcomes that exploit discretion depends on the preferences of the judges – which may or may not diverge from those of the principals.

In a distinct literature on a particular constitutional court, the European Court of Justice, the independence and autonomy of the institution is closely associated with behavioral independence of a particular type: the issuance of judgments that expand the scope of supranational (European Union) level authority. The theoretical claim is that the Court of Justice has pursued an integrationist agenda, and as a result of institutional insulation behaved “independently” of member state preferences. The claim about judges' preferences is that the high level of institutional independence or insulation enjoyed by the Court of Justice has given its judges the latitude to enact their true policy preferences. Indeed it is commonly asserted that the true policy preferences of the ECJ [judges] is for

more integration and greater European-level authority than member state governments agree on. Attention has turned to (non)compliance and the threat of override of the court's expression of such policies. The assumption that judges share a common preference for integration has never been tested. This presents a puzzle, though: are judges' policy preferences really 1) all the same, and 2) so distinct – and in a specific way – from those other policymakers? In addressing whether and to what extent this is true in the context of judges at the European Court of Justice, this dissertation engages more broadly with empirical institutional political science. Empirical institutional political science is about describing the way that decision-making institutions, broadly defined, shape policy outcomes. Whether electorates or legislatures, presidents or judges, the endeavor rests on the description of inputs, the measurement of outputs, and something – a model – connecting the two.

The primary empirical focus of this work is the European Court of Justice (ECJ), which motivates a statistical model with broader potential applications. Collective decisions are a feature of a much larger group of institutions that influence policy, but where individual level actions are not observed. In cabinets and governments to executive agencies, some administrative courts and ordinary courts, to legislative committees, individual decisions with direct effects on policy outcomes are made without the possibility of holding individuals accountable. This collective cover may affect the quality of democracy or representation inasmuch as it strives to balance competing interests in society fairly, transparently, and in such a way that it enjoys not just compliance through force but deeper legitimacy – Easton's (1965; 1975) “reservoir of goodwill.”

The ECJ combines features of an appointed delegative agency, an international court, a court of appeals, and a constitutional court in terms of its ability to shape public policy. Like an agency, its policymaking capacity is presumably constrained by its charter and by the principals who wrote the charter, in this case the treaties of the European Union. If it

strayed too far from the policies its principals preferred, it could suffer some curbing action to reduce its power. The balance of power between other EU institutions has been shaped in this manner. The role of the Parliament has grown at the expense of Commission, for example, both through ECJ decisions and explicit treaty reform. Like an international court or tribunal, compliance with the ECJ's policies is far from certain. Even if (conceived as an agency) it were not explicitly rebuked, or constitutionally or legislatively overruled, the subjects of many of its rulings – the EU member state governments – could, conceivably, collectively simply ignore it. Created by treaties, it has a nationally representative membership, but apart from that and unlike national constitutional courts, it sits at greater distance, insulated from national politics. Like a court of appeals or another ordinary court, it has no control over its agenda, a daunting docketful of cases, and has developed a sophisticated mechanism for handling hundreds – nearly a thousand – cases per year. Chapter 2 discusses in detail the specific innovation of the ECJ's system of Chambers to divide work. It hears cases arising in national court systems that raise questions about EU law, as well as cases brought by member states or EU institutions, and also reviews, on appeal, cases that originate at the General Court (formerly the Court of First Instance). Finally, the ECJ is like a constitutional court in both its sometime function (implicitly, in the treaties; explicitly, in its jurisprudence) and in several features it has in common with other constitutional courts. When it finds that a national law is in conflict with European-level law, its preliminary rulings may find the conflicting national law “inapplicable,” effectively striking them down. This itself is the basic definition of judicial constitutional review. Its members are appointed from multiple sources (by the individual member state governments), serve for a (renewable) fixed term, and it is the court of last resort about the meaning of the foundational European Union treaties.

Each of the resemblances above suggests a different approach to studying the European Court of Justice to learn about how and to what extent judges on the court exert influence

on public policy independent of other policymakers. As we shall see, however, they all suffer from the common fallacy of treating the institution as a unitary actor, rather than considering its several members. Each approach in turn has yielded important insights regarding the role of the ECJ in the EU, which I discuss in general terms below. In order to reconcile and unify them, the common element is the implications that each would have for individual, rather than collective, behavior.

Legislatures and executives *delegate* some policy-making authority away from themselves for a multitude of reasons. They may not be experts; they may not agree except on the need for some amount of government intervention; they may wish to commit to a policy but lack credibility if they have the opportunity to change it themselves so they “tie their hands” through delegation.

At the same time, delegates are understood to be constrained. The latitude they enjoy as agents in discretion is conditional on their not straying too far from their principals’ preferences, even if they are monitored loosely and “punished” infrequently (McCubbins and Schwartz, 1984). Backed up by the knowledge that threats and sanctions could exist, most evidence seems to show that the behavior of agents does not stray far from principals’ wishes. I call this the “invisible leash” argument: an agent’s behavior is observationally equivalent whether it is on a leash or not. For some, delegation cannot exist without a leash, and even without observing any reining-in, it must be constrained.

To build a theory of the behavior of individual judges (and their response to incentives and constraints) requires looking behind a crucial feature of the Court of Justice from which it derives some of its independence, legitimacy, and compliance: the collective nature of its official judgments. By masking dissent in this way, the ECJ claims to speak for all its members more forcefully than merely a majority; and it enables the efficient handling of its large non-discretionary docket. Agencies derive legitimacy through oversight by an elected legislature or executive; constitutional courts, through the

willingness of governments to both seek and accept their judgment. Elected officials, in turn, derive legitimacy through their conditional service, their fulfillment of their end of the electoral bargain. Supporters of minority parties in government accept the majority's policies with the hope that in a future election they might gain the majority and, with it, the opportunity to enact their own policies and undo those of their opponents.

Huber (1996, 11) calls this the problem of “anthropomorphizing” the institution (for him, the French Parliament), treating it as a “coherent actor in the political process” without accounting for the individual motivations of its members: “Why,” he asks, “would individuals bother to ‘legitimate’ the policies of the executive on the floor of the legislature? Why would they want to use the rostrum of parliament to educate the masses about good and bad public policy?” (12). The question at the heart of the present work is whether and to what extent individual members of the Court of Justice advance a policy agenda of European integration, as it is often claimed “the Court” as a coherent actor has done. I develop the necessary theory to connect the policy preferences of judges, the pressures and constraints on their policymaking capacity, and the observed policy outcomes.

Individual behavior and incentives have been extensively studied in the context of legislators in legislatures, having largely overcoming the fallacy of anthropomorphizing the institution. In the study of legislatures, scholars have focused appropriately on the behaviors of individuals, primarily through floor roll-call voting behavior. Individual behavior is observed in campaigns and elections, through speeches, and on roll-call floor votes. Some attention has been devoted to the potential selection bias of roll-call votes (Carrubba et al., 2006). Do legislators vote differently when they are individually observed than when they are not? Even in electoral legislative politics, collectively revealed decisions abound, reducing the electoral cost of compromise and coalition-building (Cox, 1987). In parliamentary systems the internal workings of the cabinet may be well hidden. In the American Congress, individual votes in committee are usually not revealed (Krehbiel,

1990; Krehbiel, Shepsle, and Weingast, 1987; Gilligan and Krehbiel, 1987, 1989, 1990). Finally, in most legislatures, even floor votes by individual members are not revealed or published for a large majority of bills (Carrubba et al., 2006; Saalfeld, 1995; Carey, 2003). In some other settings, there may reasonable doubt about the sincere expression of preferences in “unanimous” votes, as might well be true for the 20% that must be discarded for the analysis of the Bank of England in Hix, Høyland, and Vivyan (2010). The ability to mask individual behavior to some extent is provided for by a majority of constitutions the world over. My focus is less on partisan behavior (floor votes, party homogeneity, etc.) than on the behavior of members of other political institutions whose behavior is rarely if ever observed at the individual level.

1.1 Constitutional Courts, Legitimacy, and Compliance

The existence of a standard by which to determine the validity of legislation gives rise to the problem of who decides whether the standard is met. Constitutional review, whether by a constitutional court or otherwise, is an important activity in liberal democracies in order to uphold the ideals set out in the constitution. Constitutional review is the power to review acts of the executive and legislature to ensure they comply with those liberal ideals. Unlike parliaments or presidents or ordinary courts, constitutional courts are a relatively new institutional innovation. Although constitutional adjudication role of the United States Supreme Court is generally traced to *Marbury v. Madison* (1803)¹ few other countries and constitutions allowed for laws to be struck down by any kind of court until

¹The development of judicial review and the power of the United States Supreme Court is the subject of Whittington (2007); in hindsight, *Marbury v Madison* is evidently seminal, but the story and context are of course richer. Likewise, *Van Gend & Loos* and *Costa* are seminal in the development of ECJ power and judicial review, and are discussed at greater length here in Chapter 2.

the twentieth century. The power of courts relative to legislatures and governments is a challenge for democratic theory (Ramseyer, 1994).

It is not obvious that constitutional courts are the only or best way to ensure that policies are in line with liberal principles. After all, democratic accountability is another strong normative goal in liberal democracies. Without any constraints, a court could interpret limits arbitrarily. Therefore it is necessary to have some institutional means to have confidence that the court will not stray too far from the policy preferences of the executive or legislature.

In order to have an impact, the reviewing institution needs legitimacy and compliance. In general, constitutional courts – among them the ECJ – derive some measure of representative legitimacy through diversity of appointment procedures. The judges of the Constitutional Court of Spain, for just one example, are appointed by the legislature (four from each chamber), the executive (two), and the regular judiciary (two). Independence of constitutional judges is usually considered a function of appointment length (though lifetime appointments are rare) and difficulty of removal. Helmke (2005) has considered other potential limits on independence as well, such as judges' salaries or resources available to the court. In addition, many courts (constitutional and otherwise) tip the balance toward independence by shielding individual judge-decisions from scrutiny. The feature of collective decisions taken by diverse membership is a common one in institutions that balance independence and representativeness.

There are several explanations for why constitutional designers and later amenders would restrict the power of more democratically accountable branches and grant some to a less accountable court. Indeed, legislators even have incentives for endogenously creating constitutional review (e.g. Whittington, 2005; Stephenson, 2003).² The first is the time

²It is important to remember that constitutions are the products not only of their writers, but those who later take the opportunity to amend them. Procedures for amendment vary, but constitutional amendment may be a policy tool in addition to regular legislation (Lutz, 1994; Levinson, 1995).

horizon of actions that those in power would like to be able to commit to, but have short-term electoral incentives to renege on (Majone, 1996). This follows the same logic as the delegation of monetary policy to central banks (Heisenberg and Richmond, 2002; Cukierman and Buckle, 1992; Fischer, 1995; Goodman, 1991). This is essentially “insurance” under uncertainty that the majority party will lose in an election and wish to see its policies upheld and the new majority’s agenda thwarted (Whittington, 2005, 2007; Ginsburg et al., 2008).

A third reason that politicians might grant broad constitutional authority to a court is to seek “outside” legitimacy in the imprimatur of the court’s affirmation of their policies (Gibson and Caldeira, 2008; Gibson, Caldeira, and Baird, 1998). Because constitutional review is an important activity to safeguard liberal constitutional ideals, it is also necessary for the reviewing institution to enjoy legitimacy and compliance. Legitimacy bolsters compliance for courts which often lack “teeth” or punitive enforcement mechanisms. Gibson and Caldeira (1995, 1998), concerned with the ECJ’s reservoir of popular legitimacy, find that it compares unfavorably to national high courts, which themselves are not wellsprings of legitimacy. The ECJ’s assertion that “European” legal questions should be directed to it via preliminary references thus reach quite different audiences, with implications for the role not only of the ECJ but of the national courts as well.

Constitutional designers to grant review to a court is that the drafters of constitutions can agree on language but not necessarily principle; the court is called upon to “complete the contracts” that are laid out in the constitutional text but not fully explicated because there is not agreement upon them (North and Weingast, 1989; Posner, 1995; Landes and Posner, 1987; Posner and Rosenfield, 1977; Milsom, 1981; Garrett, Kelemen, and Schulz, 1998; Pollack, 2002) . Finally, as with any other agency, legislators and executives might actually constrain the possible actions of the constitutional court (Epstein, Knight, and Shvetsova, 2001; Maveety and Grosskopf, 2004). Even under new constitutions that appear

to grant courts broad authority, they may not be willing or able to exercise it as freely as designers may have intended (Herron and Randazzo, 2003).

Even if a constitutional court enjoys compliance, it might be subject to other sanctions or manipulations. A court might be unwilling to overrule legislation if members had uncertain tenure, or could see their pay reduced following a decision to which the legislature or executive objects (Helmke, 2005). In the aftermath of World War II, the institutions of government on the European continent were completely reinvented, with explicit concern for the prevention of another war through strong constitutions, providing for strong institutions checking one another. However they also explicitly sought to avoid copying the American model. For an accounting of the spread of national constitutional courts and their design considerations in Europe, see Stone Sweet (2000) and Kavass (1992). On the development of judicial review by the Supreme Court in the United States, see Whittington (2007). Today, “constitutionalism” and judicial review in some form are a common feature of democratic governments (Ackerman, 1997; Hirschl, 2004, 2000).

1.1.1 Constitutional Courts in Practice

The independent role of constitutional courts – moreover, the distinctness of their preferences from those of other institutions – is normatively interesting because they are designed to be the least responsive of democratic institutions (Waldron, 2005). Two key features that speak to the institutional independence of constitutional courts are the sources of appointment and tenure of judges. The size and term length are detailed for a sample of countries in Table 1.1; the sources of appointment are listed for the same countries in Table 1.2. Few provide for life tenure, many for service until some retirement age; still others hold fixed terms, some renewable and some not.

The sources of appointment also vary considerably: in many countries, judges are appointed simply by the legislative chamber, others provide for nomination and

confirmation by executive and legislature, or vice versa; still others divide control over appointment explicitly between other institutions.

Table 1.1: A descriptive sample of several constitutional courts around the world, size, and term length.

Country	Judges	Term / Retirement	Renewable	Chambers
Austria	14	age 70	—	Specialized
Belarus	12	11 years or age 60	Yes	No
Belgium	12	age 70	—	Language
Bulgaria	12	9 years	No	No
Canada	9	age 75	—	No
Croatia	11	8 years	No	
Cyprus	13	age 68	—	
Czech Republic	15	10 years	Yes	
Denmark	17	age 70	—	
Estonia (Panel of National Court)	5	5 years	Once	
Finland	≥15	age 67	—	
France (<i>Conseil Constitutionnel</i>)	9	9 years	No	
Germany	16	12 years	No	
Hungary	11	9 years	Once	
Ireland	5	age 72	—	
Iceland	8	retirement age	—	
Italy	15	9 years	No	
Japan	15	age 70	—	
Lithuania	9	9 years	No	
Netherlands	34	age 70	—	
Norway	18	age 70	—	
Poland	12	8 years	No	No
Portugal	13	9 years	Yes	No
Romania	9	9 years	No	No
Slovakia	10	7 years	No	Yes
Slovenia	9	9 years	No	Specialized

Country	Judges	Term / Retirement	Renewable	Chambers
South Africa	11	12–15 years	No	No
Spain	12	9 years	Yes	Specialized
Sweden	≥16	age 65	—	No
Switzerland	38	6 years	No	Specialized
Ukraine	15	10 years	No	No
United States	9	life	—	No

Sources: Kavass (1992); Bell (2004), GlobalLex (www.nyulawglobal.org/globalex), and various national Supreme / Constitutional Court web sites.

Table 1.2: Composition (source of appointment) for constitutional courts around the world

Country	Appointment
Austria	President
Belarus	President, 6; National Assembly, 6
Belgium	2/3 majority alternates between Senate and Chamber of Representatives
Bulgaria	Parliament, 4; President, 4; Cour de Cassation & Supreme Administrative Court, 4
Canada	Prime Minister
Croatia	Chamber of Representatives
Cyprus	President
Czech Republic	President with Senate
Denmark	Minister of Justice
Estonia	National Assembly, Chairman; Court, 4
Finland	President
France	President, with Presidents of National Assembly and Senate
Germany	Bundestag and Bundesrat
Hungary	Parliament
Ireland	President on Government recommendation
Iceland	President
Italy	Parliament, 5; President, 5; Courts, 5
Japan	Cabinet
Lithuania	Parliament confirms appointments by President, 3; Parliament, 3; Court, 3
Netherlands	Government
Norway	
Poland	Parliament
Portugal	Parliament, 10; Court, 3
Romania	Chamber of Deputies, 3; Senate, 3; President, 3

Country	Appointment
Slovakia	President, confirmed by National Assembly
Slovenia	President, confirmed by Assembly
South Africa	President from Judicial Service Commission list
Spain	Representatives, 4; Senate, 4; Judicial Council, 4
Sweden	Government, consulting Court
Switzerland	Federal Assembly, with linguistic balance
Ukraine	Chair of Parliament and President alternate
United States	President, confirmed by Senate

Given these normative concerns, how can we assess the “independence” of constitutional judges’ behavior? Presumably they face incentives and constraints that affect their individual ability to pursue independent policy goals. In collegial bodies, such as the ECJ, isolating the individual effect of institutional constraints is even more difficult. In most of the literature considered above, the logic of delegation and compliance apply to the level of the agency or court — to the collective units rather than to individuals serving on those collective units. Agencies are curtailed as a whole; courts curbed as a whole. For many decision-making bodies, including the ECJ, this theoretical treatment derives at least in part from the collective nature of its decisions. Because individual Judges are not directly accountable, and dissent is hidden, governments and other EU institutions must interact with it as a whole. For any body that employs collective decision-making as a feature of independence, we can’t evaluate its effectiveness at doing so without undoing some of that anonymity.

In other bodies where votes are disclosed, an individual-level theory has been easier to develop and deploy. Posner and de Figueiredo (2005) show that the judges at the International Criminal Court exhibit “bias” with regard to their home countries, as well as economically similar ones. Voeten (2008) finds similar patterns at the European Court of

Human Rights, with some interesting implications for the ECJ. Four current ECJ justices, all from post-Communist states, previously served at the European Court of Human Rights, where their individual decisions were observable. This is curious in light of Voeten's finding that such judges at the ECHR were systematically more likely to find against other post-Communist states. In the European Union, the behavior of European Commissioners has been analyzed at the individual level (Doring, 2007; Wonka, 2007; MacMullen, 1997) but to date it has been impossible to get a handle on the behavior of the members of collegial courts such as the ECJ.

1.2 Plan of the Dissertation

In the next chapter, I introduce and discuss the European Court of Justice. I show that the ECJ has the means, opportunity, and institutional cover, to exhibit behavioral independence. The ECJ has, in large part by its own judgments, asserted the means by inventing novel doctrines of EU law, direct effect and supremacy, that give it broad authority to act as a constitutional court for the European Union. It also has the opportunity to issue judgments on a wide variety of cases that are not subject to control by any government or other EU institution, but which have the potential to expand EU competence. A considerable body of scholarly literature has suggested that the ECJ has, in fact, exerted an independent and unwanted push for more integration and supranational authority than member states desired. I discuss the individual implications of such a claim, before explaining the organizational feature of the ECJ that offers a unique empirical opportunity to test claims about individual preferences both innate and induced. In Chapter 3, I develop a statistical model for such an application. What I call the "ecological item-response model" has more general application, however, to other systems such as the House of Lords and the US Courts of Appeals, in which ostensibly unanimous decisions

result from variously composed groups called chambers or panels. I show how the model works with varying degrees of randomness in simulated data. In Chapter 4, I bring the statistical model to bear on actual decisions of the European Court of Justice. I consider two potential sources of judges' underlying preferences, which are shown to be heterogeneous and weakly predicted by features of appointing member state governments. I also extend the model of Chapter 3 by introducing a way to model selective effects or inducements to the preferences of individual judges on the collective chambers, and test for a selective effect of home-government observations. I conclude in Chapter 5 that the members of the ECJ, though they have means, opportunity, and cover, seem to exhibit behavior consistent with predictable underlying motivations rather than an independent endemic Euro-federalism.

Chapter 2

Application: The European Court of Justice

In this chapter, I place the Court of Justice¹ in the context of other constitutional courts laid out earlier. I discuss its method of review and relationship with the other EU² and national institutions, how its members are appointed, and its features which relate to how institutional scholars evaluate “independence.” I first discuss the basis in the European Union treaties³ establishing the ECJ, the types of cases it hears and the procedure before the Court. Next, I briefly review the development of direct effect and supremacy and the Court’s role in “constitutionalizing” the Treaties. Then, I turn to the organization of the Court into Chambers and review the development of the system of Chambers in Treaties, the Court’s Rules of Procedure, and what this has meant in practice.

¹Though typically referred to as the European Court of Justice, the official name of the Court was changed with the Lisbon Treaty, which went into effect in December 2009. The Court of Justice of the European Union comprises both the Court of Justice and the General Court, which had previously been called the Court of First Instance. What had been the Court of Justice of the European Communities is now simply the Court of Justice.

²I use the term EU, which is the contemporary name for the supranational institutions. They are often called the European “Community” institutions or “EC” institutions. For simplicity and because there are no EU institutions outside the set of EC ones, I use “EU” to denote supranational treaties, laws, and institutions.

³I use the names, language, and article numbers in the most recent treaty, the Treaty on the Functioning of the European Union, concluded at Lisbon, and entered into force in December 2009. Scholars, however, may be familiar with previous article numbering, so for some articles I provide the former article numbers. For example, a considerable body of scholarly work in both political science and law refer often to “Article 177” but not Article 177 EC. The Commission publishes in the *Official Journal* along with the text of each new treaty, a table of correspondences with the treaty being replaced.

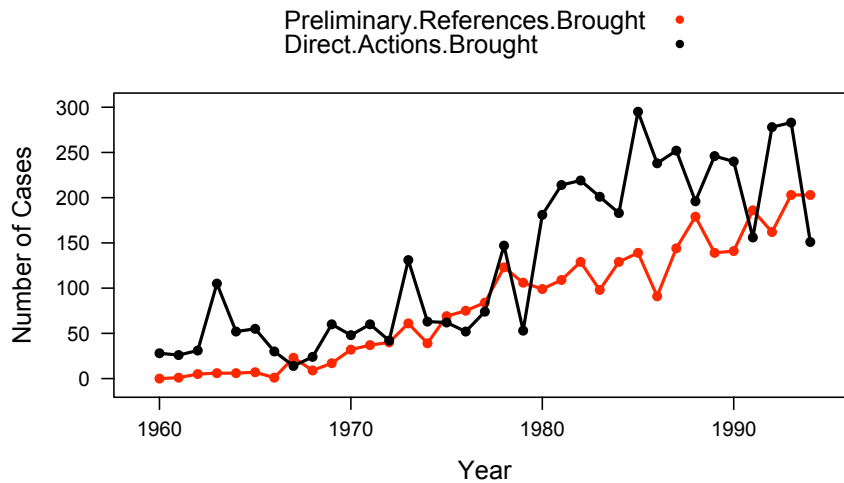
The development of EU law, and role of the European Court of Justice (ECJ) in that process, have attracted considerable attention in the past twenty years. In particular, a variety of scholars have examined how the ECJ, through interaction with national courts and private litigants, has established a supranational legal order that arguably exceeds what the Member States of the European Union (EU) desired (e.g. Alter, 2001; Stone Sweet and Brunell, 1998; Mattli and Slaughter, 1995, 1998a; Garrett, 1995). The general focus of this research was how the ECJ, pursuing a pro-integration agenda, was able to develop a legal system whereby its legal interpretations of the Treaties and the legislation of the EU gained the force of law in national legal systems. In so doing, the ECJ was able to make itself both a venue for dispute resolution and, to some extent, a legislative institution (Stone Sweet, 2000; Rasmussen, 1986).

Before considering what the Treaties say and how the Court itself has expanded upon them, it is necessary to discuss one of the key differences among EU member states with respect to international law: monism versus dualism. In a monist legal order, international law – and thus the Treaties – has authority above national law, and might provide an easier fit for the supranational judicial review that the Court today exercises. However it does not imply that an international court has the means to declare national laws invalid (or “inapplicable” in the ECJ’s language).

In a monist legal order, a treaty that the national government agrees to becomes automatically a part of the national law, invalidating national laws that are in conflict with it. International law automatically takes precedence in this way in the monist systems of Greece, Spain, Portugal, Belgium, the Netherlands, and Luxembourg.

In a dualist order – the United Kingdom is the typical example, along with Ireland and Denmark – international law and treaties have no effect until they are implemented or ‘transformed’ by the legislature. Moreover, any national laws that would be in conflict, must be stricken by the national government (the problem of *lex posteriori*). As we shall

Figure 2.1: Number of each type of case brought to the ECJ. Source: Annual Reports of the Court of Justice, various years.

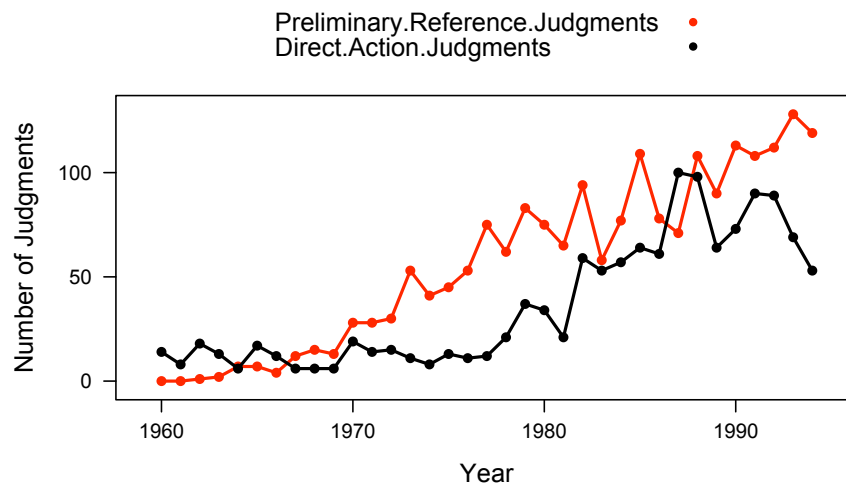


see, the ECJ’s doctrines of direct effect and supremacy are essentially monist answers to how EU law relates to national law.

2.0.1 Treaty Basis and Jurisdiction

The Court of Justice is created by the European Treaties, starting with the Treaty of Rome, and is established in what is now the Treaty on the Functioning of the European Union (TFEU or “Lisbon Treaty”), in articles 220–281. These articles establish the composition of the court, its jurisdiction, and some aspects of its functioning including the system of Chambers, discussed at length in section 2.3. The ECJ has jurisdiction in two types of procedures before it: *Direct Actions* and *Preliminary References*. Figure 2.1 shows the trend over time in the types of cases brought before the ECJ, in which direct actions constitute a slight majority. Figure 2.2 shows the volume of output of the court: the number of judgments in each type of case. The Court has, with a few exceptional years, issued more judgments in preliminary references than in direct actions.

Figure 2.2: Number of ECJ Judgments for direct actions and preliminary references. Preliminary references make up the majority of the ECJ's output. Source: Annual Reports of the Court of Justice, various years.



Direct Actions

Direct Actions are cases against either member states or EU institutions. Member States and EU institutions have automatic legal standing to bring direct actions against one another, and individuals in fairly unlikely circumstances.⁴ For an exhaustive treatment of the *locus standi* of individuals under EU law, see Albers-Llorens (1996).

Enforcement actions – cases against member states alleging that they have “failed to fulfil an obligation under the Treaties” (Articles 258, 259 TFEU) – are the most common direct actions. These are almost universally brought by the Commission against member states (Article 258 TFEU⁵), rather than by one member state against another (Article

⁴According to Article 263 TFEU, “Any natural or legal person may ...institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.” Most regulations are written such as to require implementing measures, and few if any Directives or Regulations are addressed to individuals rather than member states. If an individual does have *locus standi* to bring an action for annulment of EU law, it would be heard before the General Court (formerly Court of First Instance), with the remote possibility of appeal before the Court of Justice. An individual action for damages caused by EU institutions would, if the individual had standing, be heard by the Court of Justice.

⁵ex Article 226 TEC; ex Article 169 EC

259 TFEU⁶). (There have been just four such cases lodged before the ECJ, two of which were withdrawn, presumably resolved by other means, before they reached a judgment. Beach (2001) attributes their rarity to the process being “too politically charged.”) The other direct actions are against EU institutions on the legality of their action or failure to act (Article 230–233 TFEU) and in suits for compensation for damage caused by EU institutions (Article 235 TFEU). Direct actions are initiated by the filing of an “application” with the Court.

Most direct actions are of two types, either an action for the annulment of EU law filed by a member state government, or an enforcement, filed by the Commission, against a member state. The ECJ cannot refuse to hear direct actions from any party with legal standing, but it does throw out some cases on the basis of inadmissibility for standing.⁷ Lasok (1994, 1991) lists the main criteria of admissibility: jurisdiction (basis in Treaties); standing (*locus standi*); relevance or legal interest (whether the outcome would cause a change in the applicant’s position); time limit (for example, actions for annulment must be filed within a period after a regulation’s publication); and some details regarding the parties’ participation in other cases pending or decided. The matter of admissibility is the only means by which the ECJ has any control over the cases before it, and it has exercised this control with respect to individuals seeking annulment (Schepel and Blankenburg, 1998; Harlow, 1992; Rasmussen, 1998).

References for Preliminary Ruling

The second domain in which the Court of Justice is granted jurisdiction by the Treaties is in what are called *references for preliminary ruling* concerning:

⁶ex Article 227 TEC; ex Article 170 EC

⁷For example, until the Maastricht Treaty (TEU) the European Parliament did not have *locus standi* according to the Treaty, but now is the equal of the other EU institutions in that regard.

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. (Article 267 TFEU)⁸.

Preliminary rulings make up the majority of the ECJ's work. They are initiated by judges in national courts or tribunals,⁹ by sending to Luxembourg a summary of the case before the court, the questions of EU law raised, the national law alleged to be in conflict with EU law, the positions of the parties, and any opinion the national court has about the answers to the questions raised.¹⁰

References for preliminary ruling have served as the basis for many if not most of the ECJ's landmark decisions that have increased its own power and furthered integration. Moreover, they provide a source of cases – opportunity – for the Court (or, more specifically, Judges of the Court) to advance their agenda(s) completely irrespective of either the member state governments or of the Commission. Unlike actions for annulment, brought predominantly by member states against the Commission, or infringement proceedings, brought by the Commission against member states, the rate of

⁸ex Article 234 TEC; ex Article 177 EC

⁹The Treaty does not define what constitutes a national court or tribunal, so the decision has been left to the Court from whom it will admit a preliminary reference. According to a judgment in a disputed reference, “the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent” (Case C-54/96 (1997), ECR I-04961, 23).

¹⁰“Information note on references from national courts for a preliminary ruling.” OJ 2009 C 297/1.

preliminary references is not subject to political control. It is conceivable that member states' policy preferences could constrain the cases they bring as actions for annulment, or they may not want to signal preferences at odds with treaty bargains struck with the other member states. Likewise, the Commission might hesitate to press its own integrationist agenda through infringement proceedings. The Commission might want to avoid confrontation with specific member states, having to target them one at a time with infringement actions. Preliminary references, sent by national courts, are not subject to either of these political considerations. On the other hand, they are subject to the discretion of lower courts. Golub (1996) purports to show that lower court judges' preferences for strong environmental protection declined to make references to the ECJ where national law provided stronger protections than EU law. As Mattli and Slaughter (1998*b*) note, however, "courts' ability to pick and choose cases to refer will be progressively limited both by the pressure of individual litigants and by lower courts" (195). Nevertheless, it should be noted that judicial discretion is quite different from national political control. Golub's (1996) claim – that British lower court judges had a preference for environmental regulation that caused them to collectively withhold references – requires an improbable amount of coordination and shared policy preference among lower court judges. No mechanism of such coordination exists and there is no reason to believe lower court judges would share such a preference.

2.0.2 Procedure before the Court

For all cases at the ECJ, the procedure is similar. Upon receipt of a reference or application for direct action, the Registrar sends it to the President of the Court for assignment to a Judge Rapporteur and an Advocate General (AG). This assignment is nearly but not entirely random; according to most sources the main concern is the equal distribution of

cases to judges. Mancini (2000, 214) allows that the process is not strictly random (thus done by the President and his staff, rather than by the Registrar and an algorithm):

“Judges who have dealt previously with certain specific issues may find, however, that they are called to act as rapporteur in a case involving similar or related issues. As a result of this practice, one of the Court’s Judges has become intimate with the intricacies of the European wine market, while others hold sway in their knowledge of milk quotas or the protection of wild birds.”

Sometimes references are not admitted for various technical reasons, such as those detailed in Barnard and Sharpston (1997), but the Court has made a point not to exercise substantive agenda control in anything like the *certiorari* process of the highly selective US Supreme Court (Rosenfeld, 2006; Bell, 2004; Mancini, 2000; Edward, 1995). The case is assigned a Judge Rapporteur and an Advocate General, and handled by the ECJ in essentially the same way as direct actions.¹¹

Interventions and Observations

The positions of the Commission and other member states are crucial components of the procedure at the Court of Justice. These are similar to *amicus curiae* briefs before the U.S. Supreme Court, except that only member state governments and EU institutions are able to make them.¹² In this way, they make their positions known. The Commission makes observations in almost all preliminary reference cases, having a full-time Legal Service to monitor, prepare, and argue cases before the ECJ. The observations in a case are

¹¹Personal interview with ECJ Registrar’s staff, April 2009; see also Kenney (1998); Mancini and Keeling (1994*b*); Edward (1995).

¹²The procedure for interventions / observations is contained in the Statute of the Court of Justice (Protocol 3, Annex to TFEU/TEU/Euratom, Article 23): “The parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.” Some further implementation details are contained in the Rules of Procedure.

confidential between the parties in the case and the Court, with no national government willing to make its written arguments public, and the Commission claiming its own right to secrecy under the Privacy Directive.¹³ According to the Commission Legal Service,¹⁴ it “routinely” intervenes in preliminary observations; it is generally accepted and expected that the Commission Legal Service will present the EU position on any matter before the Court.

The resources of the member states vary, as does the frequency with which they submit observations. The United Kingdom is, based on the author’s search, the only one to provide citizens the means to request the submission of an observation.¹⁵ Granger (2006) calls intervention in ECJ cases a “tool for influence” (35) that governments were slow to exploit. In recent years patterns in observation-making behavior are still inconsistent and vary as much with governments as with issue areas, though some are evident, for example, that “Scandinavian countries and Austria tend to be very active in environmental matters” and “the southern countries, such as Greece, Portugal, Spain and Italy, as well as France, put a great focus on agricultural issues” (Granger, 2006, 38). Earlier on, however, governments tended to make observations more often when a preliminary reference was made by one of their own courts (i.e., it was their own national law alleged to be in conflict with EU law). Stein (1981) highlights the national governments’ failure to make observations in early seminal preliminary-reference cases such as *Costa* (see Section 2.1 below).

The procedure consists of a written part, in which the parties to the case and any interveners (discussed below) submit their arguments; and an oral part, in which the parties lay out their arguments before the judges and respond to questions from the bench.

¹³Directive 95/46/EC, OJ L 281, 23/11/1995 pp. 31–50.

¹⁴European Commission, “The Commission’s Agent in Court”. ec.europa.eu/dgs/legal_service/agent_en.htm accessed 15 May 2010.

¹⁵Even then, only on cases relating to intellectual property as determined by the Treasury Solicitor of the UK. See “Handling of cases before the Court of Justice of the European Union”, available at www.ipo.gov.uk/policy/policy-information/ecj/ecj-refs.htm. Intellectual Property Office, United Kingdom. Accessed 16 April 2010.

Prior to the oral part the Judge Rapporteur prepares a summary of the written part called the “Report for the Hearing” (*Rapport d’Audience*) which, until 1993, was published along with the judgements but since then is made available only on the day of the hearing in the language of the case. Registry and translation service staff claim that this is due to the translation burden; now, the Report for Hearing exists only in the language of the case.¹⁶

Shortly thereafter, the Advocate General synthesizes the written and oral arguments and presents his or her Opinion before the Court. The Judges deliberate in secret, vote by majority (in order of reverse seniority)¹⁷, and issue a judgment.

In the oral procedure, all of the parties to the case, which include the national government or the Commission through “interventions” (direct actions) and “observations” (preliminary references) present their arguments to the Court. For preliminary references, the language of the case may be any of the 23 official languages of the EU. In practice the language of the case is most often French, German, or English.¹⁸ Many portions of the oral procedure are based on the written submissions. The judges ask questions of the lawyers for each of the parties, in an exchange that can be as spirited as any between bench and bar (Edward, 1995).

The lawyers present at the oral procedure may be any designee qualified at the bar of their member state. In other words, government observations and interventions are often argued by lawyers in private practice contracted by their national governments. In other cases, lawyers employed by the government may prepare and present the case. As with the allocation of national resources to monitor references and make observations, these practices vary considerably among member states. According to several private lawyers,

¹⁶Personal interview with Registrar and Translation Service staff.

¹⁷Rules of Procedure of the Court of Justice, OJ 1991 L 176, p. 7; OJ 1992 L 383 (corrigenda); and 18 further amendments. The Court publishes an unofficial consolidated text of its Rules of Procedure at curia.europa.eu/jcms/jcms/P_63182, accessed 16 April 2010.

¹⁸Personal interview with registrar, interpretation, and translation staff, April 2009.

they develop an expertise in arguing cases before the ECJ, but also in specific subject areas for which they expect to be called upon by the government in the future.

Although the Rules of Procedure allow the Court to rule without an opinion prepared by the Advocate General following the oral procedure¹⁹ in most cases the AG assigned to the case drafts an opinion, drawing on previous case-law and the written and oral arguments.

Deliberation and Judgment

Only a few people – the judges and former judges – know firsthand what deliberations at the ECJ look like. Several of them have written about their time at the court, following their service. Both Edward (1995) and Mancini and Keeling (1994*b*) describe the process in some detail. The hearing judges formally present their opinions in order from junior to senior. The AG is not present at deliberations.

Interestingly, the Judge Rapporteur is obliged to write the text of the judgment even when he disagrees with the majority opinion: “He must still draft the judgment in spite of his dissent. In Washington an altogether healthier practice has developed, whereby a member of the majority is designated to write the Court’s ‘opinion’” (Mancini, 2000, 167).

Former Judge Edward saw value in the continued active participation of minority judges:

The minority may be quite as active as the majority in testing the soundness of the legal reasoning in the draft. ... Subsequent discussion, which may go on over weeks or even months, may produce changes of allegiance and it may be very difficult to remember, when the judgment is finally approved, who voted which way at the beginning. The Court may indeed only be able to agree as to

¹⁹Article 44a, Protocol 3 TFEU, Statute of the Court of Justice of the European Union. The 1991 revision of the Protocol allowed the Court to dismiss with the AG opinion.

the real issue in the case after the Rapporteur has produced several different drafts, so the initial vote may become totally irrelevant by the end” (Edward, 1995, 557).

Nevertheless, the final judgment with respect to the parties, irrespective of the language used, is decided by a majority vote of the judges hearing the case. For a judge in the voting minority, whatever his involvement in the legal reasoning, “All he can do is grit his teeth and sign the ostensibly unanimous, collegiate judgment” (Mancini, 2000, 167).

2.1 The ECJ’s role in making the Treaties a Constitution and Itself their Interpreter

In most accounts of European integration, the Court is portrayed as pushing the federalist cause beyond what member states agreed to in the Treaties. It did so either by strategically finding the outermost limit of supranational power acceptable to member state governments (Garrett, 1995), or as a result of the mask of technical legal language and shield of civil-law traditions of judicial political independence (Mattli and Slaughter, 1995, 1998*b*). In either account, the Court is portrayed as having a uniform collective preference for a greater degree of European integration, and more power for the supranational EU institutions, than a majority of member state governments. The evidence for this claim seems to be that because the Court found the opportunity, through the preliminary reference procedure described in Section 2.0.1, and it found the *means*, described below, to advance a Euro-federalist agenda, increasing the scope of EU law and the authority of EU institutions over national ones.

The ECJ’s assertion that “European” legal questions should be directed to it via preliminary references thus reach quite different audiences, with implications for the role

not only of the ECJ itself but of the national courts. The instruments at the core of establishing the ECJ as a constitutional court for the European Union are well known and well studied. The ECJ decides constitutional questions, advising that national laws are “inapplicable” when they conflict with EU law. It encouraged lower national courts to make references about questions of European law and asserted that it is their responsibility to ensure the application of European law over national laws. It has rejected the claim that only national constitutional or special courts could make references. Thus, preliminary references provide the ECJ judges with a unique and unfettered *opportunity* to pursue an agenda independent of member state governments’ control.

The preliminary reference system provides more than just a steady stream of cases, though. The nature of the cases themselves is more likely, given the confrontational nature of legal proceedings, to lie at the boundary of EU law, and thus presenting the ECJ greater opportunity to expand that boundary. Litigants have incentives to raise points of EU law and creatively interpret it to their advantage. In turn they prompt national court judges to refer questions to the ECJ. This contrasts sharply with direct actions, both by the member states, which engage primarily in actions for annulment, and the Commission, which may under many circumstances hesitate to bring infringement actions targeting member states. The preliminary reference system produces a great variety of opportunities to define the boundary of EU law.

However, the opportunity to rule on cases of the character described above does not imply the means to promote integration. The capacity alone to review cases relevant to EU law does still does not imply that the court can implement its vision of an EU legal order. Specifically, the *means* are not implied: the ECJ is not necessarily the solitary venue where questions of EU law are decided, as opposed to within the national courts systems or national constitutional courts. The following is a discussion of how the court asserted the dominant authority of the Treaties and its primacy in interpreting them.

Like *Marbury v Madison* (1803) in the United States was central in establishing judicial review by the Supreme Court, a series of ECJ judgments established the twin doctrines of “direct effect” and “supremacy” for EU law. Just as Whittington (2007) argues that *Marbury* did not necessarily imply judicial supremacy, neither did the Treaties alone nor even the key judgments of the ECJ: “constitutionalisation was neither preordained by the Treaties, nor an unforeseen consequence of them (e.g., as a result of functional spillover)” (Stone Sweet, 1998, 306). As with *Marbury*, the development of judicial review is more complicated than the issuance of judgments that are later recognized as seminal.

The Treaties became the ‘constitutional charter’ (irrespective of the failed draft Constitutional Treaty, and subsequent scrubbing of the word “constitution” from the Lisbon Treaty) chiefly through judgments made by the ECJ and the subsequent acceptance of those judgments by the member states. Below, I summarize briefly how the ECJ created judicial constitutional review for itself and national courts.

The legal doctrine of direct effect of EU law, even in the absence of national law implementing or transposing the EU law, was established in the 1963 judgment called *Van Gend & Loos*²⁰ The next year, the judgment in *Costa v E.N.E.L*²¹ asserted the doctrine of supremacy, writing, “the Member States have limited their sovereign rights ...and have thus created a body of law which binds both their nationals and themselves.” It has gone on without rebuke to call the Treaties the “constitutional charter”²² *Costa* asserted both that national law was subject to review by the Court of Justice, but also empowered the national and subnational courts to engage in that review of national law with it through the preliminary reference procedure. Both of the seminal cases (*Costa* and *Van Gend & Loos* establishing the ECJ as the ultimate interpreter of the Treaties and the place of the Treaties

²⁰Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 1.

²¹Case 6/64 *Flaminio Costa v E.N.E.L.* (1964) ECR 585.

²²Case 294/83 *Parti écologiste “Les Verts” v European Parliament* (1986) ECR 1339.

as a “constitutional charter” were judgments issued in cases that came before the ECJ as references for a preliminary ruling from national courts.

Costa made the ECJ’s rulings on preliminary references authoritative and far-reaching in that they applied not only to the requesting court but to all national courts. Another case, *CILFIT*²³ widened their applicability even further: “those rulings were now to have authority for situations in which the point of law was the same, even though the questions posed in earlier cases were different, and even though the proceedings in which the issue originally rose differed.”

Direct Effect

The *Van Gend & Loos* decision laid out four novel assertions which had a profound impact on the subsequent development of EU law, the ECJ’s role, and the role of national courts:

1. “The Community constitutes a new legal order of international law”;
2. “[Member] States have limited their sovereign rights, albeit within limited fields,” and in those fields, specifically related to the development of the Common Market, transferred them to the Community institutions;
3. “Community law has an authority which can be invoked by [individuals] before [national] courts and tribunals;
4. “Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage,” that is, part of national law.

At issue in *Van Gend & Loos* was whether Treaty Article 12 EEC had direct effect. Article 12 of the Treaty of Rome read, “Member States shall refrain from introducing

²³Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, (1982) ECR 3415.

between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.” The company *Van Gend & Loos* alleged that the Netherlands had introduced a new customs duty on urea formaldehyde, raising the tax from 3% to 8%, after the entry into force of the Treaty. The ECJ held that the obligation in Article 12 was “clear and unconditional”²⁴ and therefore produced direct effects in the relationship between member state and citizen.

Further judgments defined which provisions had direct effect and which did not, in more specific terms than the “clear and unconditional” specified in *Van Gend & Loos*. So, Article 5 EEC²⁵ did not have direct effect because it sets out a general objective and implies that implementing national legislation is needed. The condition that such provisions be “sufficiently precise” leaves room for interpretation; thus although the German government claimed that Article 95 EEC’s use of the phrase “similar domestic products” was not sufficiently precise, the Court held in *Fink-Frucht*²⁶ that “Although this provision involves the evaluation of economic factors, this does not exclude the right and duty of national courts to ensure that the rules of the treaty are observed whenever they can ascertain that the conditions necessary for the application of the article are fulfilled.” Not such “economic factors” give rise to direct effects, however; in *Salgoil*²⁷ the ECJ denied the direct effect of Treaty articles relating to import quotas as a function of “total value” and “national production”, both of which terms were too vague to confer obligations on member states. Moreover, to be directly effective, an article of EU law (treaty, regulation, directive, or decision) must not be subject to other conditions, such as a decision by the

²⁴The criteria the Court has defined and elaborated upon often go by the French term *acte clair*.

²⁵“Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.”

²⁶*Fink-Frucht v Hauptzollamt Münchent-Landsbergstrasse*, Case 27/67 (1968) ECR 223.

²⁷*Salgoil v Italian Ministry of Foreign Trade*, Case 13/68 (1968) ECR 453.

Commission or the Council, as is the case with state aid (see Case 77/72, *Capolongo v Azienda agricola Maya* (1973) ECR 611).

In subsequent cases the ECJ went further than it had in *Van Gend & Loos*, where it held that Treaty provisions created direct effects. Not only did the clear and unconditional provisions of the Treaties produce such obligations directly. So too might EU regulations, directives, decisions, and treaties between the EU and third countries. Thus in *Ratti*²⁸ it held that secondary legislation such as Regulations “are directly applicable, and consequently, capable of producing direct effects.” Further, even EU Directives, which generally require implementing laws, may produce direct effects for citizens: “A Member State which has not adopted the implementing measures required by the directive in the prescribed period may not rely... on its own failure to perform the obligations which the directive entails.”

The doctrine of direct effect is inherently monist. In a dualist framework, national governments would be able to decide that they did not, in fact, have direct obligations stemming from EU Treaties or secondary legislation. By contrast, the ECJ’s articulation of direct effect says that many EU laws are automatically a part of national law and therefore must be applied by national courts.

Supremacy

The doctrine of Direct Effect and the sweeping judgment in *Van Gend & Loos* were but one of the bases on which the ECJ defined its central role in constitutional adjudication. The second is the concept of supremacy, that when an EU-level law (treaty article, directive, regulation) is in conflict with a national law, it is the EU law that should be applied.

Although implicit in *Van Gend & Loos* the judgment in *Costa v E.N.E.L*²⁹ the following

²⁸Case 148/78, *Publico Ministerio v Ratti* (1979) ECR 1637.

²⁹Case 6/64 *Flaminio Costa v E.N.E.L.* (1964) ECR 585.

year asserted the doctrine of supremacy, writing, “the Member States have limited their sovereign rights ...and have thus created a body of law which binds both their nationals and themselves.” The court advanced four arguments for the supremacy of EU law:

1. the EU represents “a Community... having its own institutions, its own personality, its own legal capacity;”
2. “it [is] impossible for the States... to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of *reciprocity*” (emphasis added);
3. “Member states have limited their sovereign rights;”
4. “Community law cannot vary from one State to another in deference to subsequent domestic laws” (the consistency and integrity of the EU law.

Further rulings crystallized the power of judicial review and the mutual relationship between the ECJ and national courts. The next critical case is *Simmenthal*,³⁰ which pressed ordinary, lower courts into the service of EU law. The case dealt with what the ECJ ruled was a barrier to the free movement of goods (in this case beef and veal) and a violation of a community Regulation passed in 1968. Italy however had passed its law in 1970, and its constitutional court had already upheld the constitutionality of its law which established an inspection régime. The lower-court judge who had referred the case asked whether his court, rather than only the Italian Constitutional Court, could find the Italian law in violation of EU law. The ECJ’s judgment held,

“Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may

³⁰Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978) ECR 629.

conflict with it, whether prior or subsequent to the Community rule”
(*Simmenthal*, para. 21).

The same year, in the *Factortame* series of cases,³¹ arising as references for preliminary ruling from the United Kingdom against a Spanish fishing company, national court judges were granted even broader authority to strike national laws.³²

The boldness of the supremacy claim was recognized immediately. Indeed Italy did not send another reference for a preliminary ruling to the ECJ for four years;³³ the “acceptance” of supremacy by both ordinary courts and constitutional courts in Belgium, France, Germany, Italy, the Netherlands, and the United Kingdom is the subject of the first part of Slaughter, Stone Sweet, and Weiler (1998). In each of them, national constitutions, and existing institutions’ place in any hierarchy, steered the path for eventual (often reluctant) acceptance of the supremacy of EU law, even in monist legal orders.

Although generally credited in the political science literature to Alter (1998); Alter and Meunier-Aitsahalia (1994), the enlistment of national courts to bolster the status of the Court of Justice has been asserted by a retired ECJ Judge in 1989, who calls national courts and the Commission “mighty allies” as “the Court sought to ‘constitutionalize’ the Treaty, that is to fashion a constitutional framework for a federal-type structure in Europe” (Mancini, 1989, 596–7). Later, he somewhat coyly calls the doctrine of supremacy, though now “undisputed,” “the product of judicial creativeness” (Mancini, 2000, 4).

Regardless, national courts – even in countries in which they are not endowed with judicial review (the power to strike down laws) – have effectively teamed with the ECJ in the constitutionalization of the Treaties. Slaughter, Stone Sweet, and Weiler (1998) provide the best summary of the circumstances in various countries that led to the acceptance of

³¹see “*Factortame I and II*”, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* Case C-213/89 (1990) ECR I-2433 and Case C-221/89 (1991) I-3905.

³²Hartley (1986, 216) draws a narrow distinction between invalidating or “making void” national provisions and declaring them “inapplicable.”

³³The next case, *Salgoil*, was referred by an order on 9 July 1968.

the ECJ's doctrines of supremacy and direct effect. Alter (1996, 1998) calls this a strategy of "mutual empowerment." The use of preliminary references by the national courts is evidence of the acceptance of supremacy of EU law.

The ECJ has long maintained that it believes its judgments, though they are not binding in the same way as precedent in common-law systems, should be followed in a precedent-like manner, both in its own future judgments and by national courts (Lasok, 1994). This claim was made explicit in its ruling in *International Chemical Corporation*:³⁴

"although a judgment of the court given [in a preliminary reference] declaring an act of an institution, in particular a council or commission regulation, to be void is directly addressed only to the national court which brought the matter before the court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which is has to give; that assertion does not however mean that national courts are deprived of [the right to make their own reference to the ECJ]" (para. 18).

This has led some to conclude that the case-law of the ECJ amounts to a "common law for Europe" (Edward, 1995, 548), despite the fact that the vast majority of the countries have a civil law tradition.

Expanding the Scope of EU Law

The ECJ has also expanded the scope of European political integration by its interpretation of the Treaties. Specifically, it has read into them implications for EU law protecting the environment, women's rights, and human rights; in short, a broad range of policy areas beyond the four economic freedoms (the free movement of persons, goods, capital, and services). This expansion of EU competences has occurred in a wide variety of policy

³⁴Case 66/80 *International Chemical Corporation* (1981) ECR 1191.

domains from environmental law to pensions and health to women's rights (Cichowski, 1998, 2001; Hoskyns, 1996; Mazey, 1998; Cichowski, 2004; Conant, 2006; Stone Sweet and Brunell, 1998).

The Court's approach to basic fundamental rights or human rights protections is illustrative. The ECJ asserted that EU law protected basic rights in the 1970s, but no mention of fundamental rights was introduced to the Treaties until the Lisbon Treaty in 2009. Thus EU law has had protections of fundamental rights above and beyond those of many national constitutions, solely as a result of the ECJ's action.

By some accounts, this is an example of functional spillover (Mattli and Slaughter, 1998a; Alter, 2001, 1998, 1996; Alter and Meunier-Aitsahalia, 1994; Mattli and Slaughter, 1995; Burley and Mattli, 1993). Based in the economic freedoms guaranteed by the Treaties for the establishment of a common market, the Court read into the Treaties a much broader notion of basic rights. Moreover, the economic rights with which the Treaties were concerned overlapped, in a sense, with broader human rights, in particular the guarantee of equal pay for equal work between male and female workers, and in the free movement of workers.

In a series of judgments the ECJ read into the Treaties the same protections as the German constitution. Subsequently, the German Constitutional Court affirmed that the ECJ's protection of human rights was sufficient. The approach of the ECJ can be viewed as a strategic maneuver to assure the acceptance of supremacy by the German Constitutional Court. Starting with *Stauder*³⁵ and *Internationale Handelsgesellschaft*³⁶ the ECJ recognized a general right of liberty, and declared that EU law protected it. This was important for the acceptance of supremacy in Germany; it would have been a contradiction to accept the

³⁵Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* (1969) ECR 419.

³⁶Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1125.

supremacy of EU law without its protection of the same human rights as the German basic laws. *Nold*³⁷ and *Rutili*³⁸ pushed even further: in *Nold* the Court held,

“[F]undamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law” (Weiler, 1986, fn63).

The ECJ’s judgments in *Rutili* and *Hauer*³⁹ made nearly identical claims, but with specific application to the European Convention on Human Rights (ECHR), to which all member states at the time were signatories individually, but which was not a part of EU law.

In the area of sex discrimination, the Court has found horizontal direct effect of EU Treaties, where it declined to do so in *CILFIT*. The landmark judgment in *Defrenne*⁴⁰ held that the Treaty Article guaranteeing equal pay had direct effect and created not only “vertical direct effect” or obligations upon member states as above, but “horizontal direct effect”, creating rights for individuals enforceable in private contracts. As with the other “economic” cases establishing (vertical) direct effect, the ECJ cast itself as the lead interpreter. Even in cases where it essentially must balance the Treaty’s guarantee of free movement against and the Court’s own interpretation of fundamental rights, the ECJ often

³⁷Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft* (1977) ECR 1.

³⁸Case 36/75 *Roland Rutili v Ministre de l’intérieur* (1975) ECR 1219

³⁹In Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* (1979) ECR 3727

⁴⁰Case 43-75 *Defrenne v Société Anonyme Belge Sabena* (1976) ECR 455.

rules in favor of the latter.⁴¹ It has done so with the tacit support of the national courts through the preliminary reference system.

The relationships between EU institutions, EU law, and the ECHR protections of fundamental rights are somewhat nebulous. The Treaty on European Union (TEU, “Maastricht Treaty”) which entered into force in 1993, was the first to include any language about human rights protections, and it used essentially the same language that the ECJ had in *Nold* and *Rutili*: Article 6 TEU set forth the general principle of “respect for human rights and fundamental freedoms... as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” However, in 1996 the ECJ advised the Council that the Treaties did not give the EU the power to set down laws or conclude international agreements on human rights.⁴² Through the next several treaty revisions the EU still lacked this competence, until (as with the Charter of Fundamental Rights) it was included in the Lisbon Treaty; the EU stands set to join the European Convention on Human rights with the entry into force of Protocol 14 of the Convention in June 2010.

The result has been that for 40 years, from 1970 to 2010, the ECJ’s assertion that EU law applied to individuals and protected their fundamental rights stood uncontested and even expanded. Part of the explanation lies in the strategy of using human rights protections to gain support for the potentially more contentious doctrine of supremacy. Despite the Opinion in 1996 about the EU’s inability to conclude agreements about human rights, the Court still found that EU law protected fundamental rights. Not until December 2009 with the entry into force of the Lisbon Treaty did the Treaties themselves contain any language relating to fundamental rights.

⁴¹see C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (2003) ECR I-5659.

⁴²Opinion 2/94 on *Accession by the Community to the ECHR* (1996) ECR I-1759.

2.2 Judicial Independence and the ECJ

The ECJ has the *means*, through the doctrines of direct effect and supremacy that it has asserted for itself, and the *opportunity*, through the stream of cases from private litigants pressing the boundary of European law, to act independently of the member states' policy preferences with respect to integration. It also has a high degree of institutional independence, which would provide *cover* for just this type of behavioral independence. But means, opportunity, and cover still do not imply a *motive* for the Court to push for a federal Europe.

Using the preliminary reference procedure, the ECJ partnered with national courts to acquire the opportunity to pursue an independent pro-integration agenda. At the same time, it developed the means by which it would be able to do so, through the doctrines of direct effect and supremacy of EU Treaties, Regulations, and Directives. The expressed discontent, from time to time, of one or more member state governments at losing judgments, is often taken as evidence of the ECJ's rogue federalism (Alter, 1998).

On the other hand, the same evidence supports the claim that the ECJ has navigated carefully the demands of member-state principals. For most of its existence, the ECJ lacked any kind of enforcement mechanism, though now under some circumstances it can levy fines for failure to comply with judgments. Viewed this way, the Court has sought to maximize compliance with judgments, and therefore has refrained from issuing judgments that would likely face noncompliance on the part of member states. In Garrett's (1995) analysis, this means more often than not pushing integration exactly as far France and Germany were likely to comply with. The empirical fact that member states comply with ECJ judgments, and that the ECJ has made some daring judgments and earned compliance, variously measured, despite some member state governments' grouching, does not establish independent unwanted action on the part of the court. Although Garrett and some

subsequent work such as Kilroy (1999) find only limited support for deference to some member states, it is hardly definitive; still, it does not account for judges' behavior but only aggregate outcomes. There is a more general argument about constraints, noncompliance, and override, in such work as Stone Sweet and Brunell (1998), who argue that the Court follows the Commission more than member states, as well as Carrubba, Gabel, and Hankla (2008), who find some conditional support for member state influence in observations.

In a largely distinct literature on the power and autonomy of constitutional courts, independence is usually considered a function of appointment length (though lifetime appointments are rare) and difficulty of removal. Helmke (2005) has considered other potential limits on independence as well, such as judges' salaries or resources available to the court.

“Independence” is a normatively freighted word, especially when applied to a court. It merits a brief aside to discuss judicial independence, delegation, and discretion to clarify their different meanings and implications. In the view of Weiler (1994), and Stone Sweet (2000), and Rasmussen (1986), and to a lesser extent Burley and Mattli (1993) and Mattli and Slaughter (1995) independence for the ECJ equals its deliberate pursuit of “normative supranationalism” (Weiler, 1981, 270), rooted in “Court’s strong and bold pro-Community policy preference” (Rasmussen, 1986, 3). In this view, which contrasts with how scholars usually think about judicial independence and the rule of law, the ECJ’s independence from political constraints is a bad thing, because it allows the Court to pursue a rogue agenda of more integration than member state governments agree to.

Used in the negative sense just described, an “independent” Court of Justice fits in the rationalist principal-agent framework in the following way. The member states have “delegated upward” to the supranational EU institutions some of their powers (Pollack, 2003, 2002, 1998, 1996). They have placed some constraints on the delegated institutions – the Commission, the Court, and the Parliament, most especially the latter (Vaubel, 2006;

Wonka, 2004; Franchino, 2004; Hug, 2003; Pollack, 2003; Thatcher and Stone Sweet, 2002; Thatcher and Sweet, 2002; Tallberg, 2002; Pollack, 2002; Doring, 2007). The level of discretion allowed to the “agents” is related to the level of agreement over policy between principals and agents, and the amount of uncertainty about those policy preferences (Huber and Shipan, 2002; Epstein and O’Halloran, 1999). Specifically with respect to government-judicial interactions, “whether the government has the means to bend the judiciary to its will depends... on variables such as the ability of the political branches to agree among themselves on how to deter or upend judicial rulings” (Helmke and Rosenbluth, 2009, 347). The problem is compounded in the EU where it is not just an intragovernment institutional coordination problem, but a intergovernmental coordination problem to jointly defy the ECJ, legislate in response, or in the extreme revise the Treaties (Garrett and Weingast, 1993; Carrubba, Gabel, and Hankla, 2008).

The portrayal of the Court’s independent push for integration is further complicated by recent evidence that judges respond to common stimuli that provide signals either about the likelihood of (non)compliance. In Garrett (1995), it is the anticipation of the preferences of “large member states,” and in Dehousse (1998) the “political climate” overall being more or less favorable to integration that prompts the judges (uniformly) to adapt their preference for integration into more tailored judgments. Kilroy (1999) considers specific “coalitions” of parties among observations and interventions in a similar manner. In Carrubba, Gabel, and Hankla (2008), judges uniformly respond to the perceived threat of noncompliance or override, as indicated by observations and interventions.

The fact that the Court of Justice has made the transformative judgments discussed above does not, in and of itself, indicate a federalist motive, only that it developed the means by which it would be able to shape EU law. The variation of member states’ acceptance of direct effect and supremacy, examined at length in Slaughter, Stone Sweet, and Weiler (1998), does not indicate an agency amok. One must remember that the ECJ

also has the means to reinforce provisions of EU law that member states like. Indeed the opportunities for ECJ independence multiplied as national courts became more aware of their own power under the preliminary reference provision. The Court's willingness to broadly expand the scope of EU law in a number of policy domains is also not enough to show that the court has behaved "independently" or more precisely, inconsistently with the preferences of the member state governments.

It is necessary to consider what judges' behavioral independence would imply. To do this, we must consider what "dependent" behavior would look like, and how we could tell the one from the other. Even if we grant that the decisions of the Court have advanced integration, which much evidence supports, that does not establish independence. Both overall and in many specific policy areas, the Commission position predicts the Court decision over 70% of the time. To consider dependence or independence more closely, then, we have to consider the member state governments' preferences and their institutional capacity to constrain the Court, and crucially the policy preferences of the judges of the Court. For judges to evince independent behavior consistent with the common claim in the literature, they would have to be both unconstrained and have divergent policy preferences from member states. Agreeing with the Commission does not establish that point; the Commission itself is appointed by member states. Alone, agreement with the Commission does not establish any relationship with member states' preferences.

The normative basis for institutional insulation is to ensure that the Court does not face (or at least respond to) pressure to rule in a particular way. In other words, insulation or cover seeks to remove the possibility of inducing a change between the true policy preferences of judges and their revealed preferences or behavior. Therefore, selection should matter even more to member states, and they should want to choose ECJ members

with preferences reflective of their own – even more so because of the institution’s insulation.

Empirical claims of the ECJ’s independent assertion of a pro-integration agenda are based on variously convincing, but incomplete, circumstantial evidence of the means and opportunity to defy member state interests. They are incomplete because in addition, *pace* Huber and Shipan (2002), members of the Court would also have to have an underlying motivation to pursue integration at the expense of national sovereignty. This motivation takes the form of the underlying policy preferences of the judges at the ECJ. In other words, they must individually have the “strong and bold pro-Community policy preference” Rasmussen (1986) spoke of. This is a strong claim about the preferences of judges. Specifically in the EU context, the means, opportunity, and cover still do not provide a basis for believing that members of the ECJ should all develop homogenous pro-integration preferences. So it is interesting to note that the bulk of the literature on the developing of EU law by the ECJ indicates that the court has ruled not only discordantly with the wishes of the member states, but in a federalist direction.

The logical fallacy here is that the cover provided by the institution implies the behavioral independence of the judges. Even if this were true – if judges’ behavior were completely unconstrained and independent – it does not imply anything about the underlying preferences of the judges. Most emphatically, it does not imply a Euro-federalist agenda.

There is no reason to expect that national governments deliberately appoint judges that have this character. There is simply no reason to assume that a Europe-wary government would appoint a federalist Judge to the ECJ. Likewise, it is probable that member state governments somewhat favorably inclined toward Europe have appointed judges that similarly favor more integration rather than less. Thus, depending on the composition of the court, it is more than plausible that “independent” decisions actually reflect the opinion

of a majority of judges and, by imperfect proxy, a majority of member state governments that appointed them. The authors that engage the question of motivation beyond a legalist perspective uniformly assert that judges are uniformly pro-integration, when in fact only a majority need be so to result in the observed judgments. Thus, an alternative claim is that the court is acting within its discretion and has not been curtailed because the preferences of the judges *are not at odds with those of the member states*.

The institutional insulation of the court (not to be called home mid-term, renewable terms of fixed length, and collegial decisions) does not imply a motive for individual judicial rulings. It simply provides cover, which Euroskeptics as well as Europhiles on the court can avail themselves. Recognizing this, we are confronted with the difficult question of what motivates judges. The most common claim is that that they seek greater powers for the supranational institutions (Rasmussen, 1986, 1998; Hartley, 2007; Weiler, 1994). Hartley puts it succinctly:

“One of the distinctive characteristics of the European Court is the extent to which its decision-making is based on policy. By policy is meant the values and attitudes of the judges – the objectives they wish to promote. The policies of the European Court are basically the following: 1) strengthening the Community (and especially the federal elements in it); 2) increasing the scope and effectiveness of Community law; 3) enlarging the powers of Community law. They may be summed up in one phrase: the promotion of European integration” (Hartley, 2007, 76).

2.2.1 Appointment and Judicial Motivations

The current evidence and theoretical treatment does not give us any evidence about what motivates the Judges of the European Court of Justice. The only suggestion to be found for

this motivation is that judges essentially adopt the prevailing preferences (which is in favor of integration) of sitting members of the court and abandon any they previously held in the interest of collegiality (Edward, 1995; Mancini and Keeling, 1994a). But these same authors, both former judges, both acknowledge “diverse” underlying preferences, and Mancini and Keeling (1994b) even suggests their systematic correlation with features of the appointing governments, in particular the left-right ideological outlook of governments. The selection process varies considerably, but there are institutional factors to the selection process that should give some idea of judges’ underlying motivations – at any rate, a picture of these motivations more theoretically sound than endemic Euro-federalism.

The selection process for appointment to the Court promotes judges who share some or all of the political and national interests of the appointing national government. The EEC Treaty and subsequent revisions never included any provision for judges to represent national governments. The Treaty simply stated that a certain number of judges (originally, seven) would be appointed by common accord of the governments of the Member States for six-year renewable terms. The Treaty also stipulated that the judges must be chosen from among “persons of indisputable independence who fulfill the conditions required for the holding of the highest judicial office in their respective countries or who are lawyers of a recognized competence” (EEC Treaty Article 167 (1)). In practice, however, each Member State proposes one judge and these choices have never been overturned by the other Member States.⁴³

Before the revised 2009 Treaty on the Functioning of the European Union (“Lisbon Treaty”), the number simply corresponded to the number of member states, with appointment by “common accord” which resulted in *de facto* deference to each member state’s government in appointment. The Lisbon treaty reform formally established

⁴³In periods with an even number of Member States, the Court included an extra judge to ensure an odd number. That additional member was agreed by common consent of the Member States.

appointment by member states but now in consultation with an advisory panel including members of the ECJ, the Council, and the European Parliament. During the Constitutional treaty drafting process, the European Parliament sought an even more active role, perhaps even an appointment of its own; in the end, the opinion of the advisory panel is non-binding on the governments making appointments in a given year.

According to some scholars, this has injected some political considerations into the recruitment process (e.g. Dehousse, 1998, 7).⁴⁴ For one, the member-state governments, who have policy and electoral goals that might be affected by decisions by the Court, have an incentive to select judges who, in addition to meeting the standards of the Treaty, also share their policy goals and views on EU law. In addition, the opportunity for re-appointment each six years provides national governments with the opportunity to replace judges. This may be attractive to a government when it considers re-appointment of a judge that was appointed originally under a different government. It may also serve as a means by which a government can punish/reward a judge for the decisions of the Court.

It is important to recall that the votes of individual judges are not published, so Member States cannot monitor the voting behavior of its judges. Furthermore, explicit evidence of governments exerting pressure on judges is rare. Dehousse (1998, 12) notes the Judge Zuleeg, appointed by the West German government, felt pressure from West German Chancellor Kohl of ECJ rulings regarding social security for migrant workers in 1990. Thus, the appointment process provides some incentives for judges to pay attention to the preferences regarding EU law of Member State governments, but admittedly a national government cannot easily monitor the behavior of its judge.

However, the appointment process can affect the preferences of judges in another way. Even if governments cannot monitor and punish judges for their voting behavior, they can

⁴⁴Unfortunately, we know very little about the details of the selection process by national governments. See Brown and Kennedy (1995) for some related discussion.

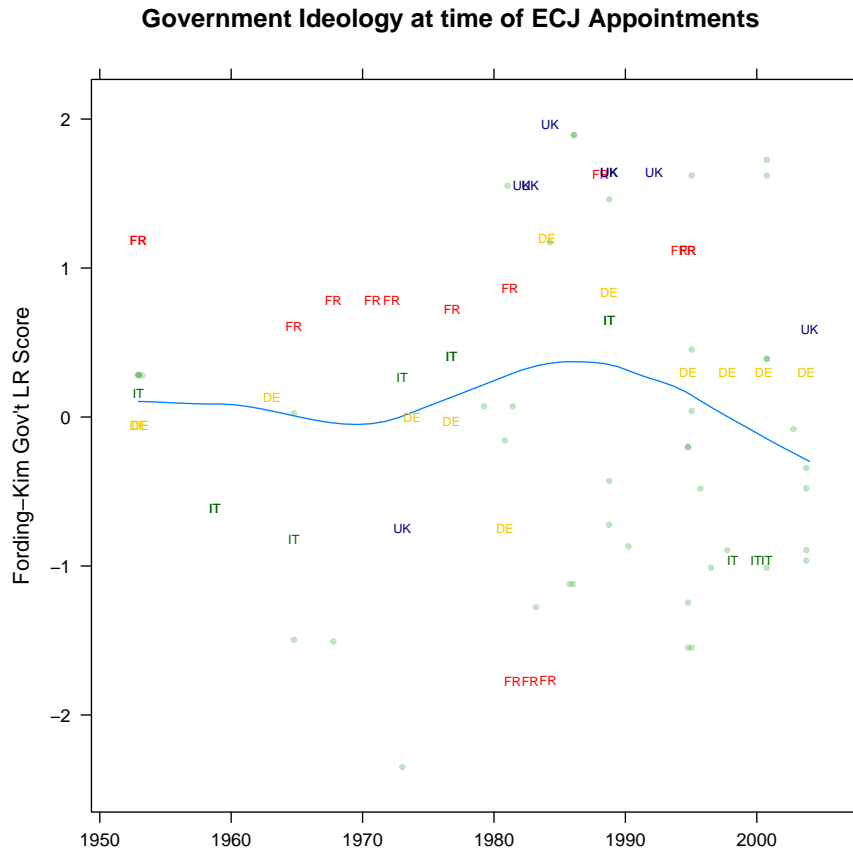
choose judges who share their preferences over the interpretation of EU law and the policy consequences of Court decisions. One might counter this point by noting that governments are not, in practice, free to choose anyone they please. Governments have followed at least the spirit of the Treaty and limited their appointments to lawyers or judges who have served or are eligible for selection to the highest judicial office in their country. This includes judges on constitutional courts and lawyers/academics with the potential to do so. These candidates are hardly typical party politicians, practiced in following government directions, or legislators.

While this is true, the recent history of EU national governments in selecting members of constitutional courts points in the direction of politicized ECJ judges. National governments, or their party members in the legislatures, generally have the opportunity to select members of constitutional courts in the EU Member States. Evidence from the behavior of judges on constitutional courts indicates that national governments are able to use these appointments to place judges who share their political leanings on the bench. Since these are the same national governments who appoint judges to the ECJ, it seems reasonable to assume they also select judges for the ECJ that share their political goals regarding EU law and meet the qualifications demanded by the Treaty.⁴⁵ Indeed, it would be odd to assume that governing officials lose their interest in and aptitude for selecting like-minded judges when the appointment is to the ECJ.

In addition, evidence from the behavior of constitutional courts indicates that once appointed to the bench, these judges often behave as “legislators”, using their rulings to affect public policy outcomes in the ideological direction of their appointing government (Stone Sweet 2000). The same pool of candidates that staff constitutional courts with such policy-conscious judges is also the pool from which the ECJ judges are drawn (Volcansek,

⁴⁵On the appointment of members to national constitutional courts, see Stone Sweet (2000). The role of the national government varies from country to country, but the legislative parties that form governments usually play a central role in the selection of judges.

Figure 2.3: Ideology of appointing governments of ECJ judges over time by weighted cabinet average.



1992; Stone Sweet, 2000). Consequently, we should expect ECJ judges to have policy preferences and to understand how to write decisions that reflect them.

Finally, there is very good reason to think the policy preferences of the appointing governments vary, sometimes dramatically, over time and across countries. Figure 2.3 plots each judge as a point based on the left-right position of the government making the appointment. Government positions are taken from Kim and Fording (2002), in which ideology is estimated from party manifesto data and weighted by the composition of

governments. A line traces the locally weighted average, and exhibits a pronounced conservative trend over time.

The notion that judges are appointed on the basis of preferences similar to their appointing governments is a common theme in scholarship of the ECJ. It is acknowledged explicitly by judges at the court itself:

“In one sense the Court is highly representative. Its composition reflects Europe’s diversity with great precision and the appointment of its members by the common accord of the governments contributes to making it *politically balanced*. Because each Judge’s term of office expires after six years and because governments change with equal or greater regularity in most Member States, it is in fact likely that at any given time roughly half the members of the Court will have been nominated by a conservative administration and roughly half by a socialist or liberal one” (Mancini, 2000, 213, emphasis mine).

Given a choice of whether to appoint a judge or allow the seat to be filled by another country (perhaps one with more integrationist preferences) even recalcitrant Britain sends a judge to the ECJ. Appointment, especially given long tenure and inability to recall judges, is an imperfect means of control. Still, it is not as Volcansek (2007) claims, that “Europeans have come down firmly on the side of judicial independence” when it comes to the ECJ. Even if it cannot observe if the judge was the sole dissenter on every vote; still, it would like to replace the judge with a more persuasive one when it has the chance.

Kenney (1998) finds evidence that appointments to the ECJ are handled differently across member states. Some, such as the Netherlands, tend to appoint professors who have studied European law and are known, generally, to have a more pro-integration stance. Only in the case of Germany does she find overt politicization of the role; a referendaire

she interviews says he could not hope to be a judge because he didn't have a party card. Her study omits, however, any mention of actual court decisions.

Beach momentarily considers and dismisses the possibility that appointment is a means of "control" of the ECJ, concluding that "matters of nationality and past experience do not significantly affect the way judges behave in the Court." He goes on to discount evidence the Germany appoints judges on a political basis: "It is however common practice for Germany to not re-appoint its judges, as the post of ECJ judge is part of a larger internal political game, where the major German political parties divide senior judicial posts between themselves" (Beach, 2001, 79). Appointment, especially given long tenure and inability to recall judges, is at best an imperfect means of control. Still, this is not a reason to conclude, as does Volcansek (2007), that "Europeans have come down firmly on the side of judicial independence" when it comes to the ECJ. In other words, there is still no evidence that judges should have the *motive* of divergent preferences from their appointing member state governments.

A seemingly simple question – does a new government prefer to appoint a new judge whenever it has the opportunity – has no simple answers.⁴⁶ On one hand, a seat at the ECJ could be a reward the winning party or coalition can deliver. Many judges have served national-level non-judicial (appointive) posts, where they could demonstrate their fealty to national interest. But judges' terms are staggered, and elections are not at regular intervals, so a government does not know if it is going to be able to appoint a judge. A newly elected government may have to appoint a judge soon into its term, which may in fact drive reappointment when governments do not invest in evaluating the sitting judge's behavior compared to their preferences.

⁴⁶The contrast with the US Supreme Court is stark: a president always wants to appoint justices as ideologically close to himself as the Senate will confirm.

The most comprehensive study of the members of the court to date is Kenney (1998). Her archival and interview research reveals the greatest extant detail on who the judges of the ECJ were and are and how they got there – but she took these features as independent of the court’s own activities. That is, even though she discusses the explicit politicization of the appointment process in Germany, never does she consider monitoring activities or reactions to Court decisions.

Table 2.1 shows the mean number of terms served by judges from each member state from the time of its entry to 2009; thus the six founding member states have had more opportunities to appoint, but even these are seen to vary considerably. Later-joining countries, for example, Spain, and Portugal which joined at the same time have quite distinct patterns of appointment. Portugal has consistently reappointed its judge, while the Spanish government has appointed a new judge at each occasion.

Table 2.1: The mean number of terms served by ECJ judges.

Country	Judges	Mean Terms
Belgium	6	1.76
Denmark	5	1.12
France	6	1.25
Germany	8	1.14
Greece	5	0.31
Ireland	6	1.05
Italy	10	0.99
Luxembourg	6	1.64
Netherlands	7	1.00
Portugal	1	3.25
Spain	4	1.00
United Kingdom	6	0.87

In the aggregate, the median time served is one term. A considerable number serve less than one full term⁴⁷, and many are reappointed. Quite few are reappointed for a third term (any duration beyond 2.0).

The appointment process, and the pool of potential appointees, varies considerably among the member states. It has also changed over time within member states. For example, according to Kenney (1999), ECJ judges from the United Kingdom are selected usually in consultation with the Scottish Office, because Scotland shares some of the continent's civil law tradition in a way that the common-law British judges might not. In France, Plotner (1998, 68) claims that the *Conseil d'État* had become dissatisfied with its role as being the source of ECJ Advocates General, and sought to appoint a Judge instead in 1982. In Germany and Austria, it is typical for ECJ judgeship to be allocated like a ministerial portfolio (Beach, 2001; Kenney, 1998). In Italy and the Netherlands, ECJ judgeships have generally gone to academic legal scholars, rather than national-court judges.

Figure 2.4 presents the same data as figure 2.3 on page 50 collapsed along the x axis, so that instead of ordering across time, the judges are ordered by the ideology of their national governments at the time of their initial appointment to the ECJ. If national governments select judges that hold motivations similar to their own, judges' own motivations can be expected to correlate systematically with a distribution like the one shown. The widely accepted claim that ECJ judges are uniformly pro-integration has two parts, which are not tested and have heretofore been untestable: 1) that ECJ judges' preferences are uniform, and 2) that judges' preferences have no systematic relationship with those of member state governments. In graphical terms, this is to suggest that the expected distribution of judges' motivations would be represented by points in a straight line down the right side of

⁴⁷I do not account for end-truncation in this discussion. Indeed some of the less-than-one durations (and others) are currently sitting judges.

Figure 2.4: Ideology of governments at the time of initial appointment of ECJ judges, using party ideology estimates weighted by cabinet seats (Kim and Fording, 2002).

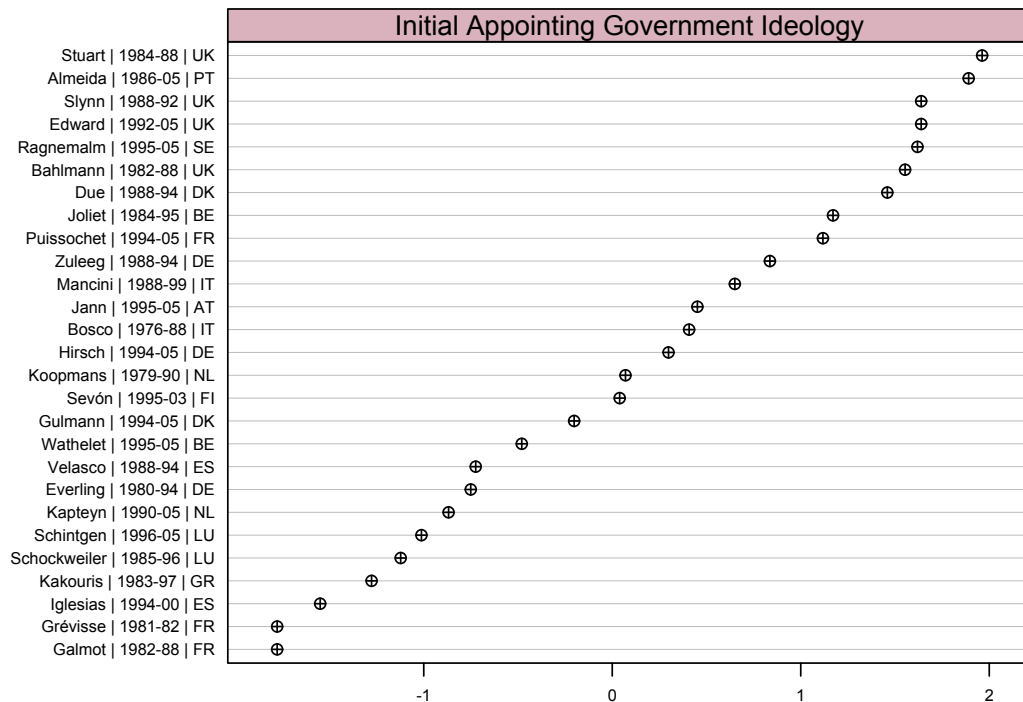


figure 2.4. Scholars have by and large accepted both of these claims without evidence. To reiterate, this is an empirical claim about individual judges. To date, nearly all research on the Court of Justice has had to assume that judges are homogenous and respond uniformly; moreover, it has been impossible to test claims about individuals, either their predispositions or contextual behavior. If one wants to evaluate whether and to what extent judges' behavior is independent of member state preferences this is what we need to know.

2.2.2 Conclusion: Sources of Diversity of Judicial Motivations

In conclusion, two features of the methods of appointment to the ECJ suggest potential differences in the goals, preferences, and motivations of judges. The first is of course

cross-national variation resulting from different approaches to appointment and renewal or non-renewal. The second is, particularly for those countries that are more likely to make new appointments after each six-year term, that variations in the ideologies of national governments would plausibly affect the types of judges they select. It is at least plausible that governments would seek to appoint judges that share their preferences about the appropriate amount of government involvement in economic and social matters, or the appropriate level of government (i.e., national or European). It follows that one should expect judges of the Court of Justice to have a diversity of opinion – not a uniform pro-integration stance. Nevertheless, the claim that the Court has pushed for more integration and more supranational authority rests on this assumption of uniform pro-integration preferences of judges. It has been impossible, because of collective ostensibly unanimous decisions, to test any empirical claims about ECJ judges' individual preferences and their effect on case outcomes. However, the organization of the court, in particular its system of Chambers, provides an indirect way to observe how outcomes vary from the changing composition of Chambers. In the next section, I discuss the development of the chambers system, which enables the court to handle a massive case-load especially of preliminary references, and also enables my novel empirical application.

The selection process leads to two predictions about what sorts of concerns will define the preferences of judges in interpreting EU law. First, one would expect judges to share the policy preferences on the socio-economic issues relevant to the appointing government. Depending on the partisan make-up of government across the EU, this may vary across Judges more in some periods than others. Second, one would expect judges to be sympathetic (relative to the other judges) to their national government's position when it is party to a proceeding.

I will revisit this issue and derive specific empirical implications that will be tested with observed data from the Court of Justice in Chapter 4. Because a wide variety of cases are heard by different combinations of judges, it may be possible to model the different judges' predispositions. To understand the modeling implications, it is first necessary to explain the organizational innovation of the Court of Justice that provides leverage, indirectly, on the observation of case-level variation arising from individual-level variation.

2.3 Empirical Opportunity: the System of Chambers

The actual practice of the Court of Justice provides a rare opportunity to test whether its judges in fact have a uniform motive to promote integration. The system of Chambers, described below, reveals patterns in decision-making that vary not only with known features of cases, but with the composition of the Chamber hearing the case. To date, all analyses of the court have had to assume that all judges hold uniform preferences (generally assumed to be pro-integration), and that they all respond to signals and incentives uniformly. The variation in Chambers also undermines theories that would take the Court median as a measure of the ECJ's preferences, because each chamber median must be considered.

I develop a research design to infer the dispositions of individual judges. I also provide a means for individual judges in a chamber to respond non-uniformly and test for the first time whether judges evince any greater sympathy for their own governments' observations in preliminary references. No study to date has considered the distribution of preferences of ECJ judges, or the potential for selective rather than uniform departure from underlying preferences.

Chambers or subsets of collegial judges – those that do not make public their internal disagreements through either votes or published dissents from decisions – enable a body of

judges to divide work among its members. This increases efficiency, and may bolster the reputation and legitimacy of the court as a whole by shielding individual judges from public scrutiny. However, this shield depends on an assumption of uniformity among chambers, and more importantly, among judges. As shown above, however, judges should be expected to have different underlying preferences that vary systematically with other known features, in particular who appointed them.

The system of chambers at the Court of Justice has evolved over time from an innovation in the Rules of Procedure and some codification in the Treaties back to greater latitude for the Court to self-regulate. Although the membership was ostensibly fixed for two to three years at a time, enlargements, retirements, and replacements create more variation even among older cases than the two-year duration would suggest.

Given that ECJ decisions now affect policy in a broad array of areas, it is surprising that so little research has addressed how the ECJ decides cases. In particular, I am aware of no research that has systematically described or examined the internal organization of the Court or that has explored the consequences of that organization for legal outcomes.⁴⁸ Standard descriptive treatments of the Court usually mention briefly that the Court often assigns cases to subsets of judges, called Chambers, who rule on the case. However, studies of ECJ rulings or the politics of the Court rarely even mention this feature of decision-making. This is puzzling for two reasons. First, almost all rulings by the ECJ are made by a subset of judges, not the full court. Since 2004, only three cases have been heard

⁴⁸One exception is Naômé (2008), who considers two possible effects of enlargement on the jurisprudence of the Court. First, she worries that “different compositions of the Grand Chamber could lead to... different majorities in similar cases; the presence of the presidents (of the Court and of the chambers of five) is not a guarantee of consistency: they do not have the majority in the Grand Chamber and, in any event, they are not expected to agree on all points of law” (109). Second, she considers the chamber assignments of new member states after the 2007 enlargement: “In January 2007, the judges of the new member states were thus spread evenly in the four chambers of five, three of them belonging to each chamber. The rules on the appointment of the judges sitting in a case mean that judges from new member states could form a majority” in both Chambers of Five and potentially the Grand Chamber (Naômé, 2008, 107–108).

by the full court; in recent years only about 15% have been heard by the “grand chamber” of 13 judges. Thus, assignment to chambers is very common.

Second, both past research on the use of panels and a realistic consideration of the composition of the ECJ suggest the use of chambers should influence the rulings of the Court. For example, evidence from the Supreme Court of Canada, the Supreme Court of South Africa, and the Circuit Court of Appeals in the United States indicates that the distribution of cases among subsets (panels) of judges can have significant effects on judicial outcomes (Atkins and Zavoina, 1974; Heard, 1991; Hausegger and Haynie, 2003; Sunstein, Schkade, and Ellman, 2004; Sunstein et al., 2006; Peresie, 2005; Kastellec, 2007). The key point from these studies is that, when the judges on a bench differ in their views on a case, the final outcome can change solely as a result of the composition of panel.

It seems at least plausible that the composition of ECJ chambers might also affect its judgments systematically; i.e., that outcomes of the same case could counterfactually have been different if heard by a different chamber. When cases are assigned to different subsets of judges, there is the opportunity for this assignment to affect the outcome of the case. Indeed, Advocate General Francis Jacobs has expressed concern about the very possibility. According to Andenas (1994, fn 54), Jacobs stated that the three-judge chamber “does not always lead to a consistent practice,” and predicted that the five-judge chamber will likely become standard practice, with the more important cases being heard by the full Court. “Few of our cases are really so trivial,” Jacobs has remarked, “that they can really... be entrusted to a three-judge chamber.”⁴⁹ After all, the studies cited above involve judges from the same national legal system. In contrast, ECJ judges have varying levels of experience with EU law, specific areas of domestic law, and even the working languages of the Court.

⁴⁹In 1996 the United Kingdom expressed concern that, due to variation in composition, different chambers might reach contradictory judgments about similar questions (Due, 1998). Thus, the UK government proposed that all decision by chambers would be subject to appeal to the full plenary in its memorandum to the intergovernmental conference on the Amsterdam Treaty (Due, 1998). This proposal was not adopted in the Treaty.

Moreover, they are trained in different national legal systems. Thus, in addition to the typical reasons we might expect differences of opinion among judges on national courts (e.g., varying legal philosophies), ECJ judges bring potentially important national perspectives to the bench. These perspectives are relevant most of all in constitutional cases. According to Edward (1995, 553),

“[M]any of the cases before the Court are “constitutional” in character or at least raise points that deserve the input of a judge from each Member State and each legal tradition. Also, where a chamber finds that a case raises points of principle that ought to be dealt with by the plenary, there must then be a second oral hearing and a second Opinion from the Advocate General. A year or more may then be lost before judgment is given. There is therefore a tendency, at the stage of the General Meeting to maintain a case before the plenary, or at least the petit plenum, if there is a serious risk that a chamber would find itself unable to decide it.

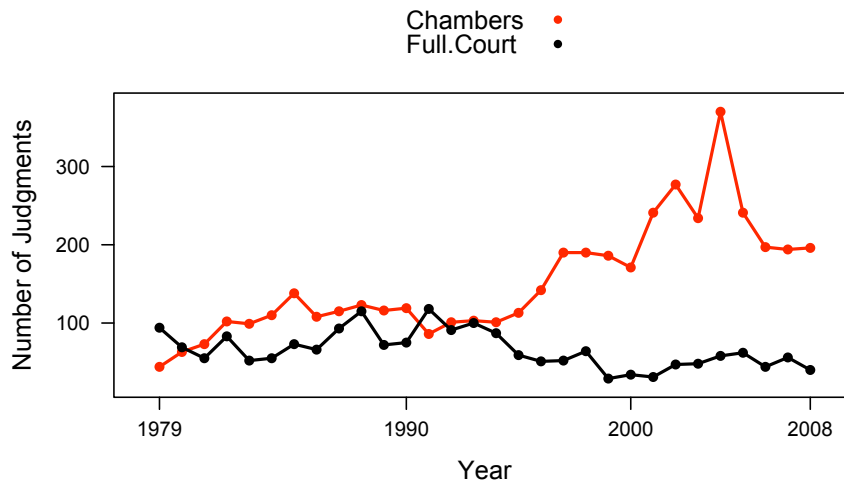
In these discussions, and in the deliberations later, the role of the judge of the country from which the case comes (the so-called “national judge”) is not to urge on the Court a solution favorable to that Member State. Such advocacy would almost certainly be counterproductive. But it is important that the Court should be aware of all dimensions of the cases it has to decide. It is therefore expected that the judge of the country from which the case comes should draw the Court’s attention to any special features of the case of which the Rapporteur and Advocate General may have been unaware. This may be a significant deciding factor in determining how the case should be dealt with.”

Consequently, we might expect that the distribution of cases to Chambers would also have an important influence on ECJ rulings.

With scant prior research on the system of Chambers, this section provides the first comprehensive account of how the system of Chambers has developed over time and presents systematic evidence regarding its use. In particular, I focus on the limitations imposed by the Treaties governing the formation of the Court and the Court’s Rules of Procedure on which types of cases can be heard in Chambers.

By the mid-1980s the Court was deciding many more cases in Chambers than in full plenary. The Court had also developed a more complicated system of Chambers. In 1986,

Figure 2.5: Number of judgments issued by chambers and by the full court. Source: Annual Reports of the Court of Justice, various years.



the Court, preparing for enlargement to thirteen members, created six Chambers: the first, second, third and fourth chambers consisting of three judges; the first and third combining to create the fifth chamber and the second and fourth chambers combining to create the sixth chamber.⁵⁰ And, in 1986 the Court began to sit in a “Small Plenum” of seven judges, which was the quorum for decisions by the full Court. The “Small Plenum” was an innovation of the Court itself taking advantage of the quorum established in the Treaties, and a former judge wrote shortly after that “the expressions grand and petit plenum have been coined by the Court itself and are not to be found in any text” (Mancini, 2000, 214). Effectively, this allowed the Court to assign cases to a subset of judges without formally assigning the cases to Chambers. As a result, the actual use of the full Court, including all fifteen then judges, became a rare event. By the mid-1990s, less than twenty per cent of ECJ decisions were made by the full Court.

⁵⁰Because the EEC Treaty permitted only Chambers of three or five judges, the fifth and sixth chambers sat with only five of the six members of their constituent lower Chambers.

Crucially, the chambers have never specialized into different areas of law. Micklitz (2005) refers to two features of assignment relating to the national origin of cases: that in general a Judge-Rapporteur is not assigned preliminary references from his own country of origin; and the Advocate-General is also generally from a different country of origin. Neither of these is anywhere codified. To the contrary, although far from commonplace, both such assignments have occurred.

The internal organization of the Court is largely ignored in scholarship and legal commentary on the Court. We are aware of only one article on the history of the Chambers systems and that was published before several changes in the 1990s (Guillaume, 1990).⁵¹ Thus, before discussing how the Chambers system might affect ECJ decision-making, we provide an over-view of the Chambers system and its historical development. We will emphasize two lines of change in this system. First, the system has increased in complexity in terms of the number of chambers and therefore the diversity of the sets of judges that might decide a case. Second, the types of cases heard by chambers have increased dramatically over times. This is true both in terms of the legal basis of appeal to the Court and in terms of issue areas.

While essentially no cases of legal import could be assigned to Chambers at the origin of the EEC, the Court now has the prerogative of assigning any case to Chambers. Tables 2.2 and 2.3 summarize chronologically the changes in the rules governing the Court's organization. Table 2.2 describes relevant changes in the Treaties and their protocols that granted discretion to the Court to alter the Chambers system. Table 2.3 chronicles the amendments to the Rules of Procedure of the Court that define the Chambers system.

⁵¹Plendar (1991) provides a thorough review of the Chambers system circa 1991 and compares it with the system at the International Court of Justice. But this comparison does not describe the historical development of the system at the ECJ or examine its consequences for ECJ rulings.

The Rome Treaty creating the European Economic Community created the European Court of Justice and permitted it to sit in Chambers. Specifically, the Court, then composed of seven judges, was allowed to create Chambers composed of three or five judges.⁵² In response to the Treaty, the Court established two Chambers of three judges that heard only cases regarding Community personnel.⁵³ After the completion of the written procedure, the reporting judge for that case recommended the case be assigned to a specific chamber or to the full Court, who then decided its assignment. But the Treaty did not permit the Chambers to hear cases submitted to it by a Member State or by one of the institutions of the Community and cases involving preliminary references. This left only staff and personnel cases to be decided in chambers.

2.3.1 Expansion of the scope of cases assigned to chambers

The Member States modified Article 165 of the EEC Treaty in 1974 to broaden slightly the use of Chambers. The revised Treaty allowed the Court to hear preliminary reference requests in Chambers so long as the Rules of Procedure of the Court permitted. Very shortly thereafter, the Court adapted its Rules of Procedure. The stated motivation for these changes was “the considerable increase in the number of cases brought before the Court of Justice.”⁵⁴ The rules were modified to allow Chambers to hear preliminary reference cases that were of “an essentially technical nature or concern matters for which there is already an established body of law.”⁵⁵ But, such a case could still require a plenary decision if a member state or a Community institution submitted a written observation on

⁵²Article 165 EEC

⁵³Article 24, Rules of Procedure, 1959; Brown and Kennedy 2000: 39

⁵⁴Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 12 September 1979. OJ L 238: 1.

⁵⁵See *Official Journal of the European Communities*, December, 28, 1974, 350/29, and Rules of Procedure of the Court of Justice, 1975, Article 95 (Brussels: Office of Official Publications of the European Communities).

the case and did not consent in that observation to permit a ruling from a chamber.⁵⁶ The Court heard the first such case in Chambers in 1976 (Brown and Kennedy, 2000, 39).

In 1979, the Court amended its rules once more to allow a much broader set of cases to be assigned to Chambers. The Court allowed Chambers to hear any case except infringements proceedings (Article 169 EC) provided no relevant Member State or Community institution objected. Furthermore, the 1979 reform modified the exception for cases involving Member States. The new rules stated that if either a Member State or a Community institution that is party to a proceeding wanted the case heard by the full Court, it would need to make such a request. In other words, the default was now that a case could be assigned to Chambers, with the burden on the Member State or Community institution to request the case to the full Court.

To provide a sense of how these reforms altered the work of the Court, one can compare the distribution of the Court's decisions in years on either side of this latest reform: 1978 and 1980.⁵⁷ In 1978, the Court decided 97 cases, with the full Court ruling on 71 cases (20 direct actions; 51 preliminary rulings). The chambers ruled on 26 cases, comprised of 11 preliminary rulings, and 15 staff cases. In 1980, this Court decided 132 cases. Chambers ruled on 62 of these, including 4 direct actions and 35 preliminary rulings. Thus, the chambers significantly increased their share of ECJ rulings (from 27% to 47%) and heard cases in a broad range of EU policy domains.

This trend continued. As Figure 2.5 indicates, by the mid-1980s the Court was deciding many more cases in Chambers than in full plenary. The Court had also developed a more complicated system of Chambers. In 1986, the Court, preparing for enlargement to twelve members, created six Chambers: the first, second, third and fourth chambers consisting of three judges; the first and third combined to create the fifth chamber and the

⁵⁶Article 95(1), 1974 ROP.

⁵⁷Synopsis of the Work of the Court of Justice of the European Communities in 1983. Luxembourg, 1984. Page 23.

second and fourth chambers combined to create the sixth chamber.⁵⁸ And, in 1986 the Court began to sit in a “Small Plenum” of seven judges, which was the quorum for decisions by the full Court. Effectively, this allowed the Court to assign cases to a subset of judges without formally assigning the cases to Chambers. The Nice Treaty replaced the Small Plenum with the Grand Chamber, which now consists of 13 judges. As a result, the actual use of the full Court of fifteen judges became a rare event. By the mid-1990s, less than twenty per cent of ECJ decisions were made by the full Court. Moreover, the “full” Court did not usually include all judges. For example, the quorum was 9 judges with the 15-judge Court and was raised to 15 for the current Court of 27.

The Court’s revisions of its rules of procedure in 1991 further broadened the latitude of the Court to assign cases to Chambers. Except when a Community institution or a Member State involved with a case expressly requested the case be heard by the full Court, the Court had complete discretion as to which subset of judges would decide the case. This exception was removed in 2003, with the Nice Treaty. The Treaty leaves the assignment of cases to Chambers completely at the discretion of the Court’s rules of procedure. The Treaty also formally recognized the use of the Small Plenum, which the Court had used prior to that point but was not found in any of the treaties.⁵⁹

In sum, by the late 1970s over half of the Court’s decisions came from subsets of judges, sitting in Chambers. From that point on, the Court decided the bulk of its cases in Chambers. In addition, by the early 1990s the Court had the prerogative of assigning any case to Chambers, absent a request from a Member State or Community institution to have the case heard in plenary. Thus, the internal organization of the Court into Chambers certainly allows for a large number of ECJ cases brought under a variety of legal bases to be decided by only subsets of judges sitting in Chambers.

⁵⁸Because the EEC Treaty permitted only Chambers of three or five judges, the fifth and sixth chambers sat with only five of the six members of their constituent lower Chambers.

⁵⁹see Mancini (2000, 214).

Table 2.2: Rules of Procedure of the Court Relevant to Use of Chambers

Date	Formal Number & Size	Actual Number & Size	Scope of Case Assignment to Chambers
1959 ⁶⁰	2 chambers of 3	2 chambers of 3	no specific mention; see Treaty provisions in Table 2
1974 ⁶¹	2 chambers	2 chambers of 3	<p>(1) Cases referred for a preliminary ruling under article 177 may be assigned by the Court to Chambers. This provision shall apply to cases which are of an essentially technical nature or concern matters for which there is already an established body of case law.</p> <p>(2) A case may not be so assigned if a Member State has exercised its right to submit a statement of case or written observations, unless the state concerned has signified that it has no objection, or if an institution expressly requests in its observations that the case be decided in plenary session.</p>
1979 ⁶²	In accordance with second paragraph of 165 EEC	3 chambers of 3	<p>(1) The Court may assign to a chamber any reference for a preliminary ruling or any action instituted under articles 172, 173, 175, 178, and 181, in so far as the difficulty or the importance of the case or particular circumstances are not such as to require that the Court decide in plenary session.</p> <p>(2) A case may not be so assigned if a Member State or an institution of the Communities, being a party to the proceedings, has requested that the case be decided in plenary session.</p>

Date	Formal & Size	Number	Actual Number & Size	Scope of Case Assignment to Chambers
1981			2 chambers of 3 1 chamber of 4 (3 decide) 1 chamber of 5	
1986			4 chambers of 3 2 chambers of 5	
1995			2 chambers of 7 (5 decide) 2 chambers of 4 (3 decide) 2 chambers of 3	(1) The Court may assign any case before it to a Chamber insofar as the difficulty of the case or particular circumstances are not such as to require that the Court decide it in plenary session. (2) same.
2003	grand chamber of 11 chambers of 3 and 5 in accordance with article 16 of the Statute		grand chamber of 11 3 chambers of 5 3 chambers of 3	a case may not be assigned to a Chamber of five or three judges if a Member State or an institution of the Communities, being a party to the proceedings, has requested that the case be decided by the Grand Chamber.
2004	3 chambers of 5 3 chambers of 3 Grand Chamber of 13			Each five-judge chamber consists of eight judges and each three-judge chamber of seven judges, who sit in rotation, in accordance with the relevant provisions of the Rules of Procedure. It should also be noted that the three Presidents of the five-judge Chambers do not belong to a three-judge Chamber.
2006	4 chambers of 5 4 chambers of 3 Grand Chamber			Each five-judge chamber is composed of six judges, and each three-judge chamber of five judges, who sit in rotation in accordance with the relevant provisions of the Rules of Procedure
2009 ⁶³	Full court; Grand chamber of 13; chambers of 3 or 5		4 chambers of 5 4 chambers of 3 Grand Chamber	Member-state or Institution, that is party (or intervener or submitted written observations) to the case, can request grand chamber. According to Statute 16, the Court will hear some cases in Full Court.

Source: Annual Report on the Activities of the European Communities, various years; Rules of Procedure the Court of Justice, various years.

⁶⁰Rules of Procedure of the Court of Justice of the European Communities of 3 March 1959. OJEC 31.12.1972, No Special Edition 1959-1962, p.3. Article 24.

⁶¹Rules of Procedure of the Court of Justice of the European Communities of 4 December 1974, OJEC 28.12.1974, p.5. Articles 9, 95.

⁶²Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 12 September 1979, OJEC 21.9.1979, pp.1, 4-5. Articles 95.

⁶³Current Rules of Procedure.

Table 2.3: Treaty Constraints on the Composition of the Court and the use of Chambers.

Date	Article	Provisions for size of Chambers	Limits on use of Chambers
1958 (EEC Treaty)	165	“It may, however, set up chambers, each consisting of three and five judges...”	“The Court of Justice shall, however, always sit in plenary session in order to hear cases submitted to it by a Member State or by one of the institutions of the Community or to deal with preliminary questions submitted to it pursuant to Article 177.”
1974	165	Change due to accession and request by the ECJ	“Whenever the Court of Justice hears cases brought before it by a Member State or by one of the institutions of the Community or, to the extent that the chambers of the court do not have the requisite jurisdiction under the Rules of Procedure, has to give preliminary rulings on question submitted to it pursuant to Article 177, it shall sit in plenary session.”
1981 1990	165 Statute, EEC Protocol	quorum of 7	
1993	165	Same as before, 3 and 5 judges	“The Court of Justice shall sit in plenary session when a Member State or a Community institution that is party to the proceedings so requests.”
1995 1999	165 Article 221 (Amsterdam Treaty)	“It may... form chambers each consisting of three, five, or seven judges...”	

Date	Article	Provisions for size of Chambers	Limits on use of Chambers
2001 & 2002 (comes into force on Feb 1, 2003	Nice Treaty Proto- col, statute article 16; OJ C325; 14/12/2002	Same as below except grand chamber is 11	The exceptions w.r.t. commissioners and ombudsman: article 159(2), 213(2), 216, 247 (7) EC Treaty
2004	Statute, 2003, OJ 310 16/12/2004	Same as below	Same as below
2008	Statute of court of justice, article 16; OJ L 115 9/5/08		Full court only for the rare exceptions re. ombudsman and commissioners; grand chamber at request of institution or member-state

Source: Annual Report on the Activities of the European Communities, various years; Rules of Procedure the Court of Justice, various years.

2.4 Conclusion: Implication of Heterogeneous Preferences at the ECJ

The European Court of Justice, originally conceived as an international intergovernmental dispute resolution body, has evolved into the de facto constitutional court of the European Union. Largely through its own assertions, it has the *means* to exercise judicial review, striking national laws that it finds incompatible with European law. The “supremacy” of European law over national law is the main source of authority of the Court of Justice in this constitutional way.

The means of judicial review would not be enough to enable the Court to press for integration over objections of member states, however. It would also require the *opportunity* to hear cases that could give rise to interpretations that expand EU-level competence. The combination of the doctrine of direct effect, and the Treaties’ provision for national courts to make references for preliminary rulings provide the ECJ the opportunity to issue judgments potentially expanding the scope of EU law. Unlike infringement actions or actions for annulment, this source of cases is not subject to the control of either the Commission or the member state governments. Because private litigants have incentives to seek interpretations of EU law that give them particular advantages, preliminary references are even more likely to challenge national laws and invite the ECJ to strike them in favor of EU Treaty Articles, Regulations, or Directives.

The ECJ also enjoys considerable institutional insulation or *cover* under which it might advance a federalist agenda. Judges are shielded from individual scrutiny by fixed renewable terms of office (not subject to recall), and their decisions are all ostensibly unanimous. No dissenting opinions about particular cases have ever been revealed, either in extended reasoning or simple individual voting details. The Court is clear that disagreements do arise in the secret deliberations, and that final decisions are made by

majority rule. To date no theoretical or empirical work has addressed the existence of this heterogeneity of opinion in outcomes, much less its sources, because of the Court's institutional cover.

If we believe that disagreements do occur between judges voting on a case, then we must confront the fact that judges bring to bear their individual motivations when deciding cases. Furthermore we must accept that although surely they share a common respect for the law, they must differ along a number of other dimensions that give rise to differences of interpretation.

Given that the court has the means, opportunity, and institutional cover to pursue a federalist agenda. In order to believe that the Court has acted "independently" at odds with the wishes of the member states, it is necessary to believe that the judges also possess the *motive* to do so. It is not obvious where such a motive would come from. Indeed, given the Court's diverse sources of appointment, there is even greater reason to expect that the judges would have a common, uniform preference, much less one for integration. I have argued that it is at least plausible to expect member states in the aggregate to select judges that have heterogeneous preferences that reflect to some degree the preferences of the several member state governments.

The organization of the ECJ into Chambers, and the features of reorganization and overlap of the system of chambers, provides an opportunity to indirectly observe the effects of individual judges' presence on some cases and not others. In the next chapter, I develop a statistical model to look for variations that might arise if judges had heterogeneous preferences. The Chambers of the European Court of Justice is just one stylized application of a more general model. In the model, I connect observed case outcomes, through judge preferences, to the known attributes of appointing governments that might give rise to the possible heterogeneity of opinion on the bench. Given what we know about the preferences of member states about government involvement in economic and social life, and the

appropriate level of government (i.e., national or European), we would expect systematic differences among judges that reflect in some way the partisan differences of governments. Given what we know about the preferences of parties in government in the member states, it is reasonable to think that they would appoint judges that reflect their values.

Chapter 3

A Model of Individual Contributions to Collective Decisions

Above, in Section 2.3, I explained how the system of Chambers of the European Court of Justice might indirectly reveal the effects of individual judges' dispositions, even though judgments are collegial and ostensibly unanimous. The hope is that if enough randomness of composition of chambers exists, if enough permutations are observed, a measure of individual judges' preferences might emerge consistent with the observed chamber composition and judgments. In short, a model must consider both outcomes and participation in chambers that produced them, and how decisions in chambers are arrived at.

In this chapter I develop just such a model, with more general features that might be applied to other contexts. To do this, I combine the item-response model of individual decisionmaking with the knowledge of individuals' selective (quasi-random) participation on cases. Then, I build an explicitly hierarchical or multilevel model that considers predictors of the primary parameters of interest. In a further extension in section 4.2.3, I allow features of a case that apply to specifically identifiable judges, rather than the entire

chamber. But first, I review the intuition and specification of the standard item-response model and my extensions to it. I show how the model performs at predictive accuracy and parameter recovery in a series of simulations. In order to be clear about how the model will (in Chapter 4) be applied to observed ECJ data, I develop the specification below with a few proper nouns (e.g., pro-EU) in describing the measurement strategy, so that the intuition is clear. The results of the simulations also provide valuable guidance to scholars interested in applying this or a similar model to decisions produced by other collegial bodies.

3.1 The Item-Response Model for Observed Votes

The item response model is a standard tool for analyzing legislative voting histories and estimating legislators' preferences (Jackman, 2001; Clinton, Jackman, and Rivers, 2004). Packages such as Jackman's "pscl" and Martin, Quinn, and Park's "MCMCpack" (Martin, Quinn, and Park, 2003-) have made item-response models readily usable, and political scientists have brought such methods to bear on an ever-widening variety of data. The standard specification is consistent with a quadratic-loss utility function around a so-called ideal point. I assume, consistent with the standard "spatial" model of voting, that each judge's vote depends only on the value that he attaches to the status quo or policy alternative in a particular case.

The Bayesian framework naturally considers the ideal points as distributions rather than point estimates. Applications in political science have often focused on the ready availability of standard errors for ideal points (Han, 2007) and the strength of Bayesian methods with small datasets (Hagemann, 2007). Modeled subject parameters have been suggested as a way to identify the model, but not generally as parameters of interest themselves (Bafumi et al., 2005). rather than a scaling exercise, the advantages of including relevant prior information are obvious. It would be foolish to ignore or discard directly

relevant information, such as possible loyalty or prospects career advancement in the national setting, from a model of judicial behavior.

Although some earlier critiques of Bayesian methods were skeptical of the explicit inclusion of prior knowledge for having too much influence over parameter estimates and model fit, today it is more widely recognized that many of the assumptions underlying classical techniques can be subsumed as “special cases” of Bayesian priors, and often ones that researchers would not adopt if forced to specify them in a Bayesian framework. The choice of prior distributions and hyperprior parameters gives analysts the tools to test the sensitivity of models to different possible alternatives. After all, all modeling requires researchers to make skilled, informed modeling choices, of which prior distributions are one. A “hierarchical” model such as the one used here allows us to encode information about units (cases, judges) that distinguish them and therefore distinguish outcomes.

In addition, hierarchical modeling is much more straightforward in the Bayesian setup, where parameter distributions are modeled, than in the classical one, where attention focuses on correlation structures of “error” terms.

3.2 An Ecological Item Response for Unobserved Votes

In this section I adapt the item-response model to data where individual decisions are not observed. I call this an *ecological item response model*, abbreviated ECO-IRT. I use the latent parameters of the Bayesian item response model to develop a method of sampling the person-varying ones for the relevant subset of the population involved in the decision. After considering the model and sampler in general terms, I present two simulations where known (generated) parameter values are recovered by the ecological sampler.

The outcome modeled here is whether the Court agreed with the Commission. Agreement with the Commission is assumed to be a *pro-integration* decision (Stone Sweet

and Brunell, 1998). It is reasonable to take the Commission's preference as at the forefront of integration for several reasons. The Commission favors negative integration, or the removal of national laws that hinder interstate trade, and was instrumental in constructing the Single European Act and the common market. It also favors positive integration, the passage of new laws at the European level (that it would draft and propose). Stone Sweet and Brunell (1998) concludes that "supranational institutions – especially the Commission and the Court – operate to facilitate transnational activity, not to codify or give legal comfort to the preferences of the dominant states" (75).

The simulations span two archetypes of how courts organize chambers and divide work among themselves: the first is a random draw of 3–7 members, and the second is a rotation of members among stable chambers for a period of time. The random-selection model is most like that of the US Courts of Appeals, while the latter is an approximation of the Rules of Procedure of the Court of Justice until 2004.

The parameters of interest in the model are judge ideal points and case location parameters. Define the set of judges $j = 1, 2, \dots, J$. A judge's ideal point is denoted θ_j .

The usual "two-parameter" IRT model is so called because each item k has both a location and relevance parameter (a and b respectively), and is fully described by $2 \times K + J$ parameters estimated from $J \times K$ data points. The relevance parameter is analogous to a factor loading. In practice, researchers often examine which bills have high relevance to bolster their claims about the measured latent ideal points. (High relevance of items relating to government involvement in the economy, for example, support the claim that measured ideal points pertain to left–right ideology.) The outcome I model here, pro-Commission decisions, lets me assume constant relevance b and fit a "one-parameter" or Rasch model, estimating only location.

Formally, let $k = 1, 2, \dots, K$ be the vector of cases (legal issues) and $y_k \in Y$ be the observed decisions:

$$y_k = \begin{cases} 1 & \text{if pro-EU} \\ 0 & \text{if anti-EU} \end{cases} \quad (3.1)$$

The model deals with the probability that an outcome y_k is observed to be 1; in English, a decision on a legal issue is in favor of the Commission. Formally we model

$$\Pr(y_k = 1) = \Phi(f(\theta^g, a_k)), \quad (3.2)$$

which is a mapping into a probability of case parameters and judge parameters. Now we turn to a discussion of f .

Denote the judges on a given chamber j^g and all others j^{-g} . Thus each case is informative about θ^g and not about θ^{-g} . It is worth noting that in contrast to the typical item-response framework, we observe a single outcome per case, netting K total data points, rather than the $J \times K$ matrix of individual judge-votes.

To identify the model we must take care to restrict the number of parameters estimated below this upper bound. The reason we have any traction on this model at all is through the organization of judges into chambers and the rotation of members on chambers. Each case is heard by one and only one chamber comprising a subset of judges. In a hypothetical one-judge chamber $f(\cdot)$ would simply be the probability that judge j sided with the Commission. But the smallest chamber is 3 judges, so label for each $j \in g$ this probability as ω_{jk} :

$$\omega_{jk} = \Phi(a_k + \theta_j). \quad (3.3)$$

To complete the definition of f , aggregate Ω over the j^g judges. The simplest chamber-judge allocation function is the mean of ω ,

$$\frac{\sum_{j=1}^{\#j^g} \omega_{jk} | \theta_j \in \theta^g}{\#j^g}. \quad (3.4)$$

Because decisions in chambers are actually made by majority rule, we might have f return the probability that the *median* judge voted pro-EU. The chamber-judge weighting function –mean, median, or other – is not a purely technical point; it relates to procedures at the Court itself. For example, if the judge-rapporteur were somehow more strongly influential on case outcomes than her peers, the model should make a judge’s “own” cases contribute more heavily to the estimate of preference. Of course, as we saw in Section 2.0.2, the opportunity for such influence is very small (in the writing of the Report for the Hearing), since the rapporteur writes the judgment even in cases where he voted in the minority, and the most junior judge reveals his opinion first in deliberation.

In terms of implementation, we use a “participation matrix,” W where entries are 1 for judges hearing a case and 0 for all others. The contribution of each case for those judges is the result of a typical data-augmentation draw from a truncated normal distribution (truncated at 0 from below when $Y = 1$ and at 0 from above when $Y = 0$), with the mean from equation (3.3). All other judges on the given case are considered missing and the data are uninformative; conversely all other cases for a given judge are missing and uninformative. Missing data result in sampler draws from a standard normal distribution.¹

In concrete terms, the vector of case outcomes (rows k) is expanded into a matrix in which the same outcome attaches to the participating judges (columns j).² For an

¹In fact, the sampler explores the density much more quickly (achieves “better mixing”) when the augmented-data variance is scaled randomly. The inclusion of a random Gamma-distribution scale parameter here is an example of “parameter expansion” which reduces the autocorrelation of Gibbs samples.

²In section 3.3.4, a percentage of individual votes are revealed. In the example, if we knew the judge in column 1 had voted “1” on the first case, the participation matrix would remain unchanged, the overall outcome would still be “0” but the entry $Y_{1,1} = 1$.

illustrative example, consider three cases and four judges, and outcomes $\{0, 1, 1\}'$. A data and participation matrix for these outcomes might look like this:

$$y = \begin{pmatrix} 0 \\ 1 \\ 1 \end{pmatrix} \Rightarrow Y = \begin{pmatrix} 0 & 0 & 0 \\ 1 & & 1 & 1 \\ 1 & 1 & 1 \end{pmatrix} \quad W = \begin{pmatrix} 1 & 1 & 0 & 1 \\ 1 & 0 & 1 & 1 \\ 1 & 1 & 1 & 0 \end{pmatrix} \quad (3.5)$$

A chamber-median function is created as follows. First, for each case the product of the previous iteration's samples of judge parameters θ is multiplied by the participation matrix, selecting only those judges present in the chamber (the probability that any draw will be exactly 0 is, by definition of a continuous probability distribution, exactly 0). Then, the median of the nonzero elements is returned using the “ n th element” partial-sort variant of the quicksort algorithm.

C++ Code

```

1   using std::vector;
2   using std::nth_element;
3   // ...
4   for (unsigned int i = 0; i < lengths[0]; i++) {
5       if(args[0][i]!=0) { // ignore if zero
6           value.push_back (args[0][i]) ; }
7   }
8   std::vector<double>::iterator z = value.begin();
9   std::vector<double>::size_type m = value.size()/2;
10  std::nth_element(z, z+m, value.end());
11  *x = value.at(m); }

```

Typically, both item-response models and other techniques such as NOMINATE require for identification that at least one subject be either fixed at a point (most liberal, most conservative) or constrained to positive or negative values. In addition, for convenience, normally all θ are sampled from the same $\mathcal{N}(0, \sigma_\theta^2)$ distribution, except for some, which are fixed at a point or constrained to be positive or negative. Such a strategy incorporates a small amount of prior knowledge, enough to identify the model – but not in the case of

grouped data. In the typical setup we learn what the latent θ are, but practically nothing about them other than their distribution. The hierarchical setting enables us to incorporate other knowledge directly that we have about all the judges and also learn about the relationship between these characteristics and their observed behavior. Thus, I specify that ideal points θ have a person-specific mean and common variance:³

$$\theta_j \sim \mathcal{N}(X_j\beta, \sigma_\theta^2)$$

$$a_k \sim \mathcal{N}(G_k\gamma, \sigma_\gamma^2)$$

$$\beta \sim \mathcal{N}(b_o, B_o)$$

$$\gamma \sim \mathcal{N}(g_o, G_o),$$

$$\sigma_\theta^2 \sim \mathcal{IG}(v_\theta/2, v_\theta/2)$$

$$\sigma_a^2 \sim \mathcal{IG}(v_a/2, v_a/2)$$

where x is a vector judge covariates and g a vector of case covariates. Under this model the ideal point is effectively constrained to an interval subset of θ , and β tells us the effect of each judge attribute. The hierarchical model more closely resembles the typically identified IRT model when we fix values $\sigma^2 = 1$, and as few as one j to have $X_j\beta = \{-1, 1\}$ and for all others $x = 0$. Even then these are weaker assumptions than the strong constraining identification strategy, which actually fixes θ for some j . By varying the location and precision of the parameters β and γ , we can detect the sensitivity of the model to the prior.

The intuition and interpretation of the second-level parameters is straightforward and powerful:

³Recently some models (e.g. Lauderdale, 2010) have allowed for computation of heteroskedastic variance of the person parameters. A similar approach would be suitable for ECO-IRT estimation but is not implemented here.

- Ideal points are estimated using both person-level predictors and a vector of outcomes. Variance σ_θ^2 decreases as the effect of $X_j\beta$ explains vote choices. Put simply, to the extent that β explains vote choices, the lower the uncertainty contained in σ^2 .
- The model reduces to a standard unidentified ideal-point model as $X\beta \rightarrow 0$ (that is, all ideal points would be draws from the same normal distribution with mean μ_θ).
- Predictions about ideal points (and behavior) can be made given only the elements of x , judge characteristics. In other words, given absolutely no voting history, the ideal point of a new member can be estimated, with appropriate uncertainty, knowing only those attributes that make up x . Predictions of voting behavior could be made by specifying the location of a number of cases.

The joint posterior distribution is then given by:

$$p(\theta, a, \beta, \gamma, \sigma_\theta^2, \sigma_a^2 | Y) \propto p(Y | \theta, a, \beta, \gamma, \sigma_\theta^2, \sigma_a^2) \cdot p(\theta, a, \beta, \gamma, \sigma_\theta^2, \sigma_a^2) \quad (3.6)$$

But the expression on the right can be simplified because of the hierarchical structure. The second-level parameters β and γ are conditioned only on the first-level parameters θ and a . We can thus write the following marginal-conditional form of the model (dependence of θ on X and a on G are suppressed for notational convenience):

$$p(\theta, a, \beta, \gamma, \sigma_\theta^2, \sigma_a^2 | Y) \propto p(Y | \theta, a) \underbrace{p(\beta | \sigma_\theta^2) p(\sigma_\theta^2 | \beta) p(\theta | \beta, \sigma_\theta^2)}_{\text{Judge part}} \underbrace{p(\gamma | \sigma_a^2) p(\sigma_a^2 | \gamma) p(a | \gamma, \sigma_a^2)}_{\text{Case part}}. \quad (3.7)$$

Implementing the Eco-IRT Model

The model described above, especially the connection of person-varying parameters to the observed data, would be expected to give rise to unusually shaped posterior distributions.

Several situations could cause complications, where the observed data would not neatly fit the assumed prior model. In one scenario, not enough combinations exist of chamber membership to distinguish the marginal members of each chamber. This could come about because members always served together, did not serve with a wide enough variety of other members, or because the decisions with other chambers are indistinguishable from those made jointly – the mean or median of two of a member's chambers is the same for a large number of decisions. It would also be expected when the model itself is specified with the theoretically motivated median function allocating judge preferences to decisions. In effect the mean, or consensus, model, incorporates and smooths over chamber members' positions. By choosing the median judge we admit uncertainty at the case level over which judge was the median. If there is enough ambiguity on enough cases, we would expect that the median model would generate distributions representing a mixture of each possible location. Depending on the number of groupings, there could be several distinct modes, each of which represents a plausible latent preference for the individual in question.

A fully Bayesian Markov Chain Monte Carlo simulation produces samples from a posterior distribution which may have a form that is intractable to other estimation strategies. At the same time, the method allows us to vary the initial assumptions (called the prior distribution) about the model.

Other methods of statistical inference rely on optimizing values of the parameters of distributions in the model with respect to the data. In other words, the distributional assumption is applied to the data itself. For example, if we assumed that the latent person parameters that drove the item-response function were normal, the quantities of interest in

the model would be the parameters of the normal distribution, just two – the mean and central tendency.

Under many circumstances, such an approach makes sense. But, with such coarse data, saying that the latent judge preferences are described by a single symmetric normal distribution is an extremely strong assumption. Furthermore, it may not be possible to integrate or optimize the latent distribution in the data. Optimization algorithms that perform “hill-climbing” would get stuck in one mode. We have no guarantee that the maximized mode is the global maximum for any given parameter (especially the highly indeterminate judge latent preference parameters); indeed, we expect that in many cases multiple modes would arise from the observed data.

Fortunately, using MCMC, we can produce an arbitrarily accurate picture of posterior distributions even for complex models and coarsely observed data like that from collective chamber decisions. By “arbitrarily accurate” I mean that the level of detail about the posterior distribution is a function only of the number of samples we wish to draw and retain after we are confident that the algorithm is drawing samples from the target density.

The MCMC sampling algorithm that we will use is a common special case of a general algorithm for Bayesian sampling from posterior distributions: the Gibbs algorithm requires that each parameter at each iteration be fully defined, conditional on the values of all the other parameters. The chief innovation of the ECO-IRT model is in *data augmentation*. All model parameters are always sampled conditional on the data; data augmentation is a way of representing the data in a way that enables the Gibbs conditional updates of the other parameters.

In a sense, a Markov Chain Monte Carlo algorithm turns the model in reverse as it steps through the data to build the samples of the posterior distribution. As we built the model, the result was the outcome Y ; as we sample the parameters, we start with Y and step through each observation’s contribution first to item parameters a and then to judge

parameters θ . With the data-level model sampling thus complete, it then proceeds up to the next level of inference, about the distribution of model-level parameters conditional on other prior predictors. Again, at every step the order of sampling (learning from the likelihood contributions of the data) proceeds “backwards” to greater levels of abstraction or distance from the data.

The method of data augmentation is owed originally to Tanner and Wong (1987). Later, Albert and Chib (1993) demonstrated how it could be used for binary data in Gibbs sampling. The method uses the observed data Y to generate values from a truncated normal distribution, where the location or mean parameter μ is conditioned on all the other variables in the model, and truncation occurs based on Y .

Sampling algorithm

The results in both this chapter and the empirical application to the Court of Justice in Chapter 4 are sampled using JAGS, with the stylized median function described above. Each parameter is updated in sequence as described below, using a full conditional sampling distribution (there are no Metropolis-Hastings update steps).⁴ The resulting joint distribution is the posterior $p(\theta, \beta, a, \gamma, \sigma_\theta^2, \sigma_a^2 | Y)$.

1. Sample the latent data $Z | Y, \theta, a$. This is the data-augmentation step that turns the dichotomous Y into a continuous Z by drawing from a distribution centered at z^* computed from the previous iteration’s conditioning variables, and truncated at 0 depending on the value of Y . The data Y is a $K \times J$ matrix, with values 0, 1, or NA.

⁴If there is more than one covariate X or G , JAGS actually uses a Metropolis jump for the multivariate Normal update of β or γ , rather than the Gibbs update described here.

The participation matrix is also used in this step to compute the value of θ^* , used to sample Z .

$$\begin{aligned}\Omega_{\text{mean}}(\theta_{j \in g}^*) &= \sum w_k \theta^* / \#g \\ \Omega_{\text{median}}(\theta_{j \in g}^*) &= \text{gmedian}(w_k \theta^*) \\ z^* &= a^* - \Omega(\theta_{j \in g}^*); \end{aligned}$$

The stylized `gmedian` function, given in the code block on page 80, returns the median element that does not exactly equal o.⁵

$$z_{j \in g, k} \sim \begin{cases} TN^+(z^*, \zeta^2) & \text{if } y=1, \\ TN^-(z^*, \zeta^2) & \text{if } y=0, \end{cases} \quad (3.8)$$

The variance of the augmented data (ζ) follows exactly the parameter-expanded Probit scheme of Liu and Wu (1999, 1272). This parameter expansion greatly speeds the sampler's convergence, reducing the serial correlation in Z . Every subsequent step is normalized with respect to ζ , and I suppress that notation below because it is unrelated to the data or any parameter of interest.

2. Sample the case parameter ($a|\theta, Z$), and the second-level regression of its mean ($Gy|a$) and standard deviation σ_a^2 . Both a and θ are essentially Gaussian Bayesian regressions on the other terms, where the updates below are the typical Gaussian update in which the prior mean is the linear predictor Gy or $X\beta$.

⁵Other ways of computing the median or general “ n th element” are possible but the method here exploits the fact that double-precision floating point random deviates will basically never exactly equal o.o.

$$a \sim \mathcal{N}\left(\mu = \begin{bmatrix} \frac{\theta'\theta}{\sigma_\theta^2} + \frac{1}{\sigma_a^2} \end{bmatrix}^{-1} \begin{bmatrix} \frac{\theta'Z}{\sigma_\theta^2} + \frac{G\gamma}{\sigma_a^2} \end{bmatrix}, \Sigma = \begin{bmatrix} \frac{\theta'\theta}{\sigma_\theta^2} + \frac{1}{\sigma_a^2} \end{bmatrix}^{-1}\right) \quad (3.9)$$

$$\gamma \sim \mathcal{N}\left(\mu = \begin{bmatrix} \frac{G'G}{G_o} + g_o^{-1} \end{bmatrix}^{-1} \begin{bmatrix} [G'a]^{-1} + G_o^{-1}g_o \end{bmatrix}, \Sigma = \begin{bmatrix} \frac{G'G}{G_o} + g_o^{-1} \end{bmatrix}^{-1}\right) \quad (3.10)$$

$$\sigma_a^2 \sim \text{IG}\left(\frac{\nu_a + \#a}{2}, \frac{\nu_a + \text{SSE}(a)}{2}\right) \quad (3.11)$$

3. Sample θ , and the second-level regression of β and σ_θ^2 :

$$\theta \sim \mathcal{N}\left(\mu = \begin{bmatrix} \frac{1}{\sigma_\theta^2} + \frac{X\beta}{\sigma_\theta^2} \end{bmatrix}^{-1} \begin{bmatrix} \frac{1}{\sigma_\theta^2}[A - Z] + \frac{X\beta}{\sigma_\theta^2} \end{bmatrix}, \Sigma = \begin{bmatrix} \frac{1}{\sigma_\theta^2} + \frac{X\beta}{\sigma_\theta^2} \end{bmatrix}^{-1}\right) \quad (3.12)$$

$$\beta \sim \mathcal{N}\left(\mu = \begin{bmatrix} \frac{X'X}{B_o} + b_o^{-1} \end{bmatrix}^{-1} \begin{bmatrix} [X'\theta]^{-1} + B_o^{-1}b_o \end{bmatrix}, \Sigma = \begin{bmatrix} \frac{X'X}{B_o} + b_o^{-1} \end{bmatrix}^{-1}\right) \quad (3.13)$$

$$\sigma_\theta^2 \sim \text{IG}\left(\frac{\nu_\theta + \#\theta}{2}, \frac{\nu_\theta + \text{SSE}(\theta)}{2}\right) \quad (3.14)$$

3.2.1 Simulations: Courts with Chambers and Collective Decisions

In this example I generate a stylized set of known parameters to explore how observed outcomes from groups varies when groups are recombined. Of interest are the Chambers of the European Court of Justice, which will serve as the motivating example and also inform the nomenclature I use for the discussion, and notation choices.

The Court of Justice comprises a set of Judges $j = 1, \dots, J$ who sit on a vector of Chambers (groupings) $g = 1, \dots, G_{\max}$. The chambers decide on a non-overlapping set of cases $k = 1, \dots, K$ by majority vote whether the Commission is right (1) or wrong (0) on a point of European law. Each judge decides based on his individual utility function:

$$U_{j,k}(\text{yea}) - U_{j,k}(\text{nay}). \quad (3.15)$$

Each judge's utility function $U(\cdot)$ is a function of his private preference θ_j and case parameter (a_k), which map, with a friendly Probit transformation, into a dichotomous vote choice Y^* that we do not observe:

$$Y_{j,k}^* \sim \Phi(-a_k + \theta_j + \varepsilon_{jk}). \quad (3.16)$$

Then the chamber votes and (only) the majority opinion is revealed as the actual case outcome $Y \in \{0, 1\}$.

The court comprises 12 members, each of whom sit on either 3 or 4 chambers. The chamber size s is either 3, 5, 9, or 11. Initially we will consider Judges' utilities to be distributed Normal with wide variance, $\theta \sim \mathcal{N}(0, 4)$. We might also consider an underlying mixture of distributions representing blocs of pro- and anti-integration judges giving rise to a bimodal distribution or one with heavier tails (i.e., a t distribution). These very likely will be important underlying distributions to consider but for now we stick to the simpler case.

Next we group the judges into chambers.

3.2.2 Assigning Cases & Calculating the Outcomes

Each case is assigned randomly to a chamber. We also consider what would have happened if it were randomly assigned to a different chamber, to show that sufficient variation in outcome occurs as a result solely of chamber assignment. The purpose of this is to illustrate how over time, collective decisions will evince patterns that may be revealing of the individual members' preferences despite individual votes never being observed.

Then, for each judge in the assigned chamber we calculate Y^* which is a dichotomous unobserved vote, and take the chamber median's vote as the final case outcome Y . The code for this is shown below.

```
1 > ## Get the chamber outcome from a case and vector of judges
2 > ## Args: 1 x 2 case parameters
3 > ##      jg x 1 judge ideal points
4 > ## Out: chamber's outcome the median judge's preference
5 >
6 > cases$chamber <- sample(1:ncol(chambers), K, replace=TRUE)
7 > chamberDecision <- function( case, judges ) {
8 +   Ystar <- sapply(judges, function(x){
9 +     theta_j <- x
10 +     ystar_jk <- -case["a"] + theta_j
11 +     return(ifelse(ystar_jk > 0, 1, 0))
12 +   })
13 +   return(median(Ystar))
14 + }
15 > cases$Y <- apply(cases, 1, function(x) {
16 +   case <- x
17 +   judges <- theta[chambers[,case["chamber"]]==1]
18 +   return(chamberDecision(case, judges))
19 + })
```

It was necessary to construct several configurations of simulated data to show how the algorithm performed with different types of variation in the ecological groupings of members into chambers. I show four pairs of simulated results, in decreasing order of randomness of composition. The pairs are made up of the two allocation functions in the data augmentation sampler, using the mean of the members, or the median. In the first, most random pair of simulations, all possible combinations of twelve-choose-three are observed more than once. In the second pair of simulations, the size of the chambers is allowed to vary, which causes the mean or median allocation to be slightly more blurry about the individual contributions on the observed data. The next pair takes a fixed number of possible groupings – smaller than than the total possible combinations of twelve-choose-three or twelve-choose-five, but larger than a single rotation of chamber membership – and allocates cases randomly among these possible established chambers. Finally, the last set of simulations presumes that some of the individual decisions (five percent) are actually revealed. Instead of marking all the participating judges as having the

same observed vote as we must under “unanimous” collective decisions, dissenters guide the sampler to greater precision.

The first simulation shows that it is possible for data augmentation, through the chamber allocation function, to recover the ordering and magnitudes of distances for individuals based on a completely selection into chambers of three. This is closest to the allocation of chambers (called panels) in the United States Courts of Appeals, and the House of Lords in the United Kingdom.

The second simulation shows that the size of the groups can vary; the chambers comprise either three or five judges from the pool of twelve. This scenario is again not unlike some courts where the decision of a three-judge panel may be separately decided on appeal by a larger chamber. The Federal Courts in India function in this manner, where chambers of five rule on appeals of decisions by chambers of three. I do not explicitly simulate this procedure, repeating a proportion of the case parameters in chambers of each size, but its feasibility is established in the second simulation (Section 3.3.2).

The third simulation (Section 3.3.3) is the closest to my main empirical focus, the European Court of Justice. A smaller number of chambers are stable and decide a large number of cases together. The number of established chambers is smaller than the total number of combinations of three or five that are possible, but large enough to incorporate joint service of most members with each other multiple times.

In all of the simulations, identification is achieved by a credible signal of the location of the case parameter – a covariate γ indicating its direction and magnitude. In addition, the scale of the latent space is identified through a parameter expansion: the cases and judges’ positions are all relative to the mean of all the judges and scaled by the spread (standard deviation) of the judge preferences. The data-agumentation step is also scaled by an unidentified random gamma draw of ζ , which is integrated out immediately, but dramatically improves convergence.

3.3 Results from Simulated Data

For each of the following subsections, I present the results in the following way, with selected additional diagnostic information in the Appendix. The `ECO-IRT` model is run in `JAGS 1.04` (Plummer 2009), with the stylized median function discussed in Section 3.2 added to the appropriate module. Each module is run for 20,000 iterations in two parallel chains with different random starting values. An initial “burn-in” of 500 iterations is discarded and the output of the two chains is combined and thinned by an interval of 20. Despite the relatively short burn-in, the parameter expansions used ensure quick convergence to the target distribution.

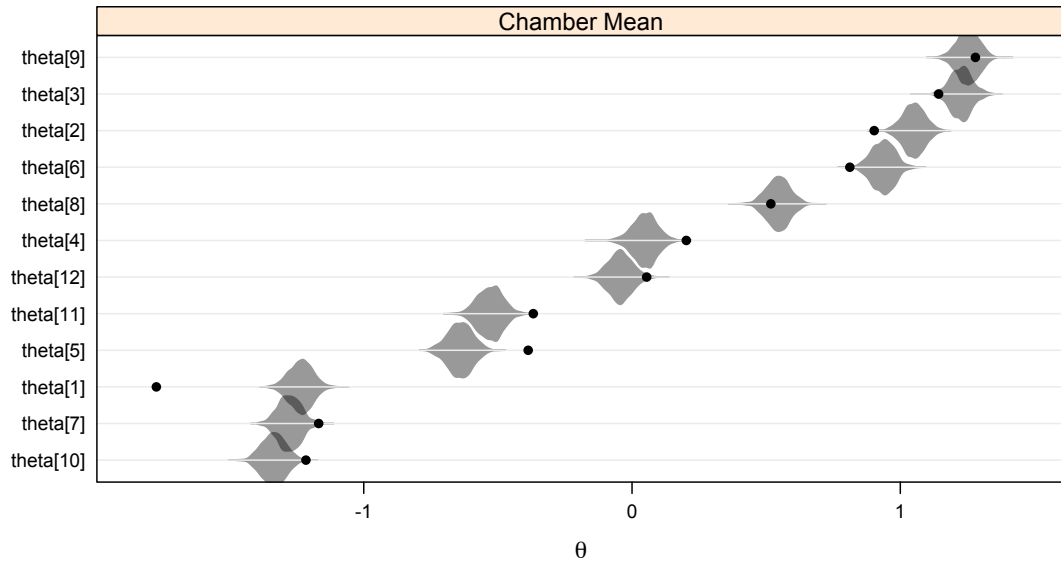
For each simulation, we can calculate how accurate the model is at predicting the outcomes. At each iteration i (or a sample of posterior iterations), calculate

$$Z^i = \Phi(a^i - \text{median}(\theta^i; \theta \in \theta_g)). \quad (3.17)$$

If case parameters a are not saved, a less accurate abstraction can be accomplished using G and γ . Then each iteration’s accuracy is the proportion of outcomes correctly predicted. In this way each simulation yields a distribution of accuracies based on the underlying posterior samples. Of the 1000 saved values for each iteration, I use a random sample of 100 iterations to compute the predictive accuracy. The predictive accuracy of all of the simulations is discussed in Section 3.4.

The results for the main parameter of interest – the “judge” parameters θ – are shown as “violin plots”, which are mirrored kernel density estimates from the entire posterior sample of θ . They are shown below for each simulation (mean and median) with the usual “post-processing” transformation (Clinton, Jackman, and Rivers, 2004), normalized at each iteration. The generating values for θ are also normalized and are shown as solid dots.

Figure 3.1: Actual and recovered value for θ for random 3-member draws using the chamber-mean sampler.



3.3.1 Random Compositions of 3

The first simulation is intended simply to show that individual parameters can be recovered from collectively observed data at all. Indeed the chains show evidence of convergence, and, tellingly, the ordering of the posterior means is nearly identical to the values of θ used to generate the sample data.

```

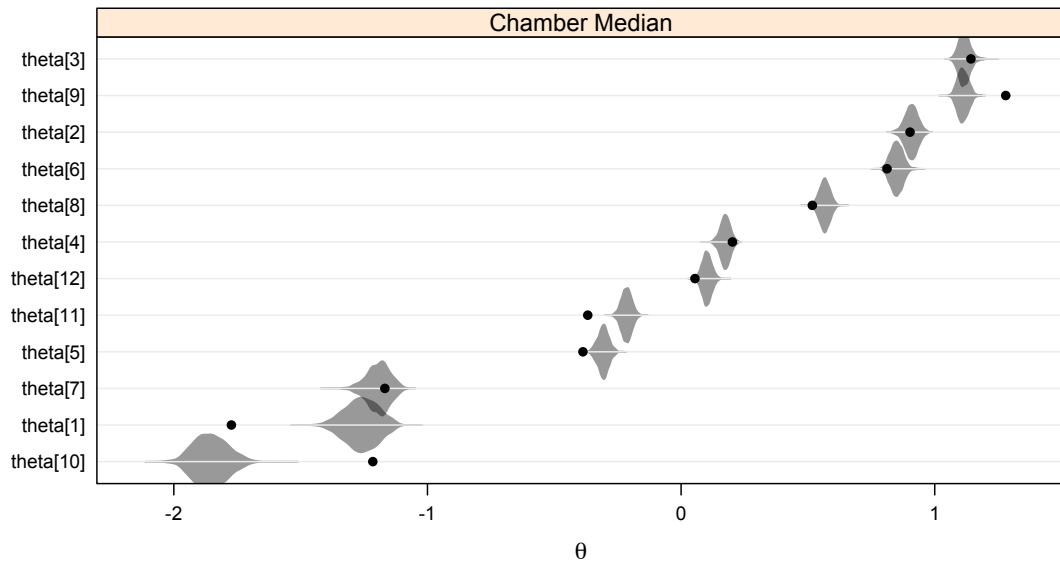
_____ R Code _____
1 > order(theta) # Order of the known generating values
_____

| [1] 1 10 7 5 11 12 4 8 6 2 3 9
|
_____ R Code _____
1 > order(apply( sim1.theta, 2, mean)) # Order of posterior means
_____

| [1] 10 7 1 5 11 12 4 8 6 2 3 9
|

```

Figure 3.2: Actual and recovered values for 3-member chambers, chamber median sampler



To generate this graph, we can simply sum the number of iterations in which $\theta_{col} > \theta_{row}$ in the posterior sample, and divide by the number of saved iterations . We will see more of these plots later, with observed rather than generated (known) simulated data. As one would expect, for those values where the model did not recover the correct order, we have less confidence in the ordering as shown on the pairwise matrix.

Convergence

The model converges to the unique target distribution very quickly due to the parameter expansions used to decrease autocorrelation of the chains. Below are trace-plots and autocorrelation plots for the first simulation for a short run of three chains with distinct starting values.

Figure 3.3: The matrix of pairwise comparisons of judges' preference estimates. Numbers indicate the degree of certainty of the ranking of the row relative to the column.

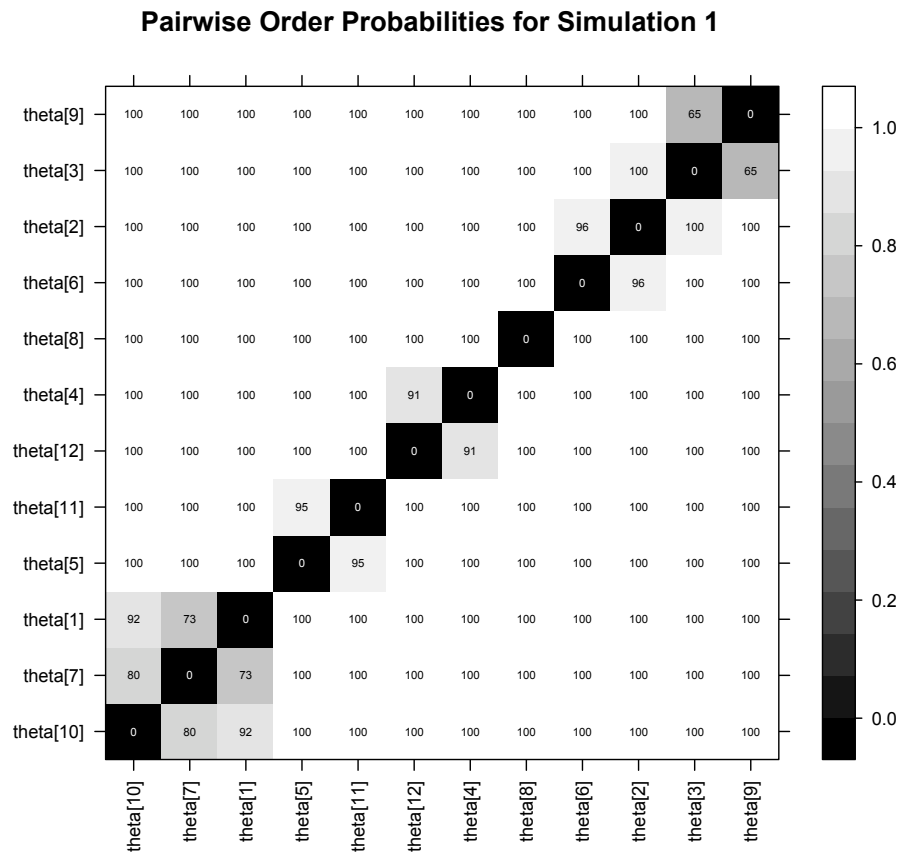


Figure 3.4: Trace plot of 3-chain simulation 1, selected parameters.

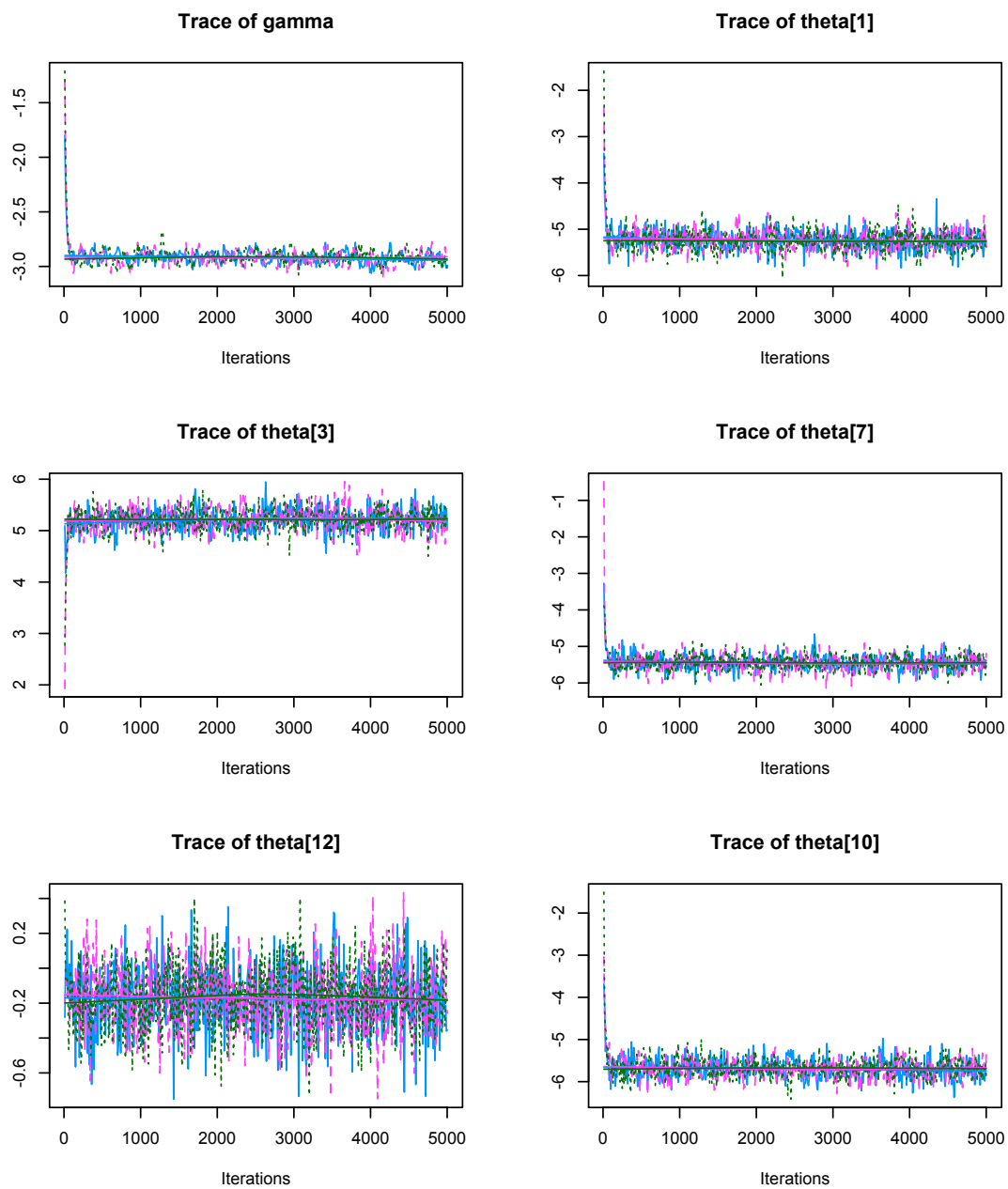


Figure 3.5: Autocorrelation plot of 3-chain simulation 1.

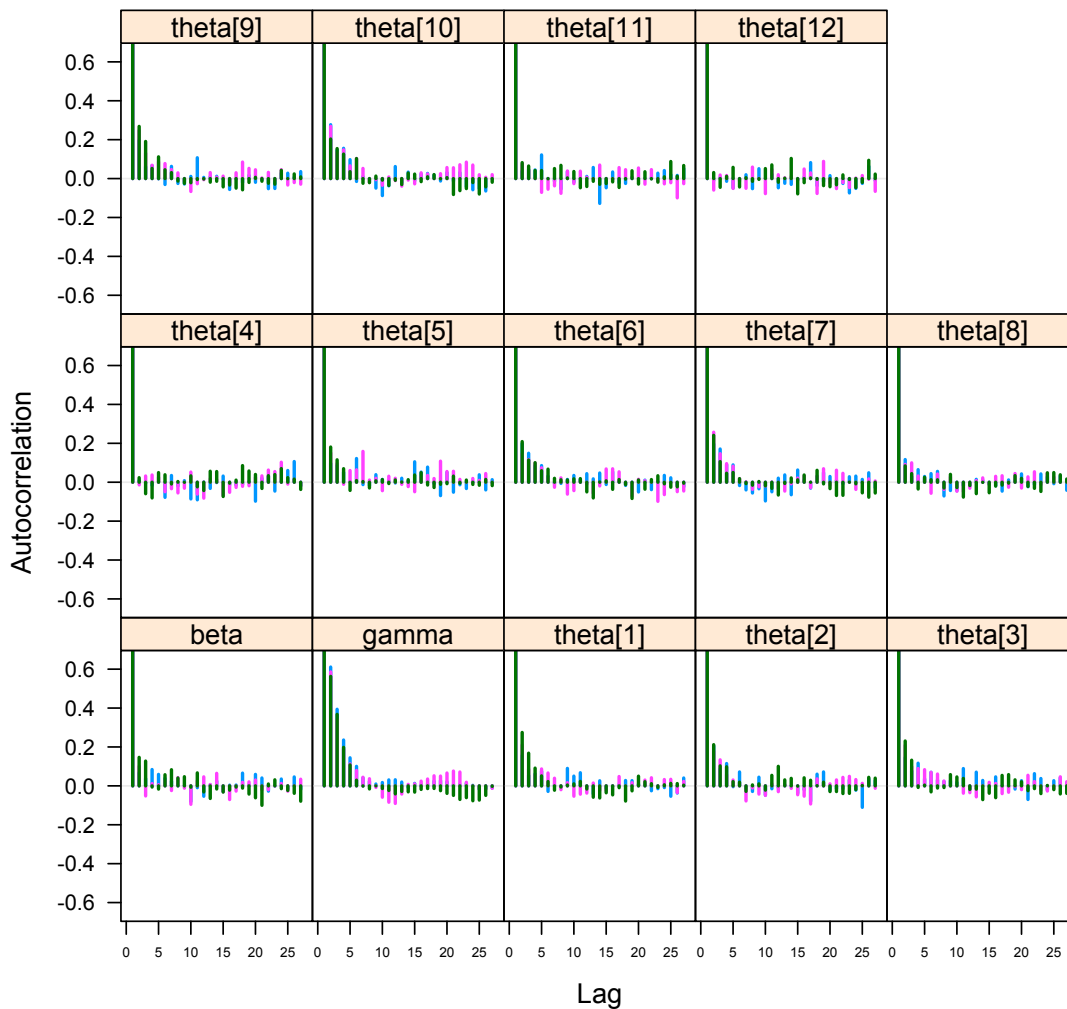
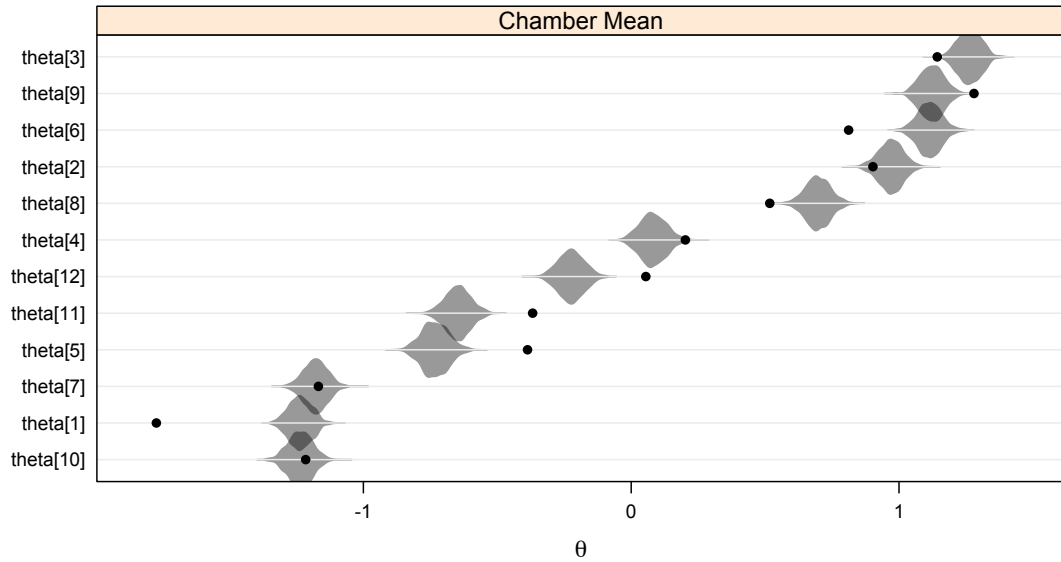


Figure 3.6: Actual and recovered values for random 3- or 5-member chambers, chamber mean sampler.



3.3.2 Random Compositions of 3 or 5

Next, consider the chambers of either three or five. This pair of simulations (again, using either the mean or median of the chamber in the data-augmentation step) yields similar results to the first.

```

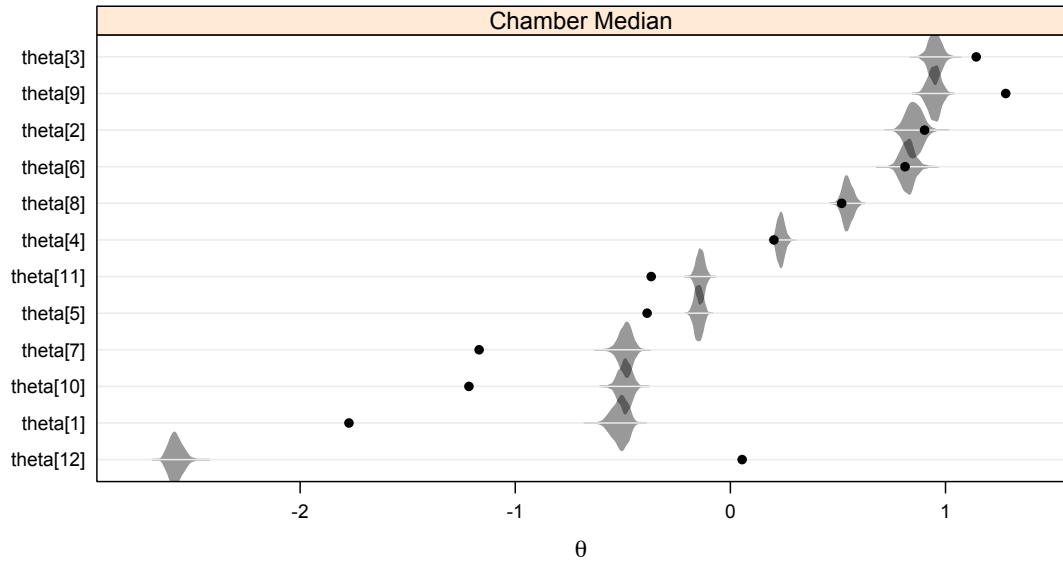
_____ R Code _____
1 > order(theta) # Order of the known generating values
_____

| [1] 1 10 7 5 11 12 4 8 6 2 3 9
|
_____ R Code _____
1 > order(apply( sim3.theta, 2, mean)) # Order of posterior means
_____

| [1] 10 1 7 5 11 12 4 8 2 6 9 3
|

```

Figure 3.7: Actual and recovered values for random 3- or 5-member chambers, chamber median sampler.



The orderings above are each not perfect, only very close to the original generating values of θ . To further explore the simulated model fit, I present the matrix of pairwise order probabilities. Each cell in the square represents the probability of the given order: for example, starting at the lower left-hand corner, moving right, the figure represents the probability that θ_7 is to the right or higher than θ_{10} .

Figure 3.8: The matrix of pairwise comparisons of judges' preference estimates. Numbers indicate the degree of certainty of the ranking of the row relative to the column.

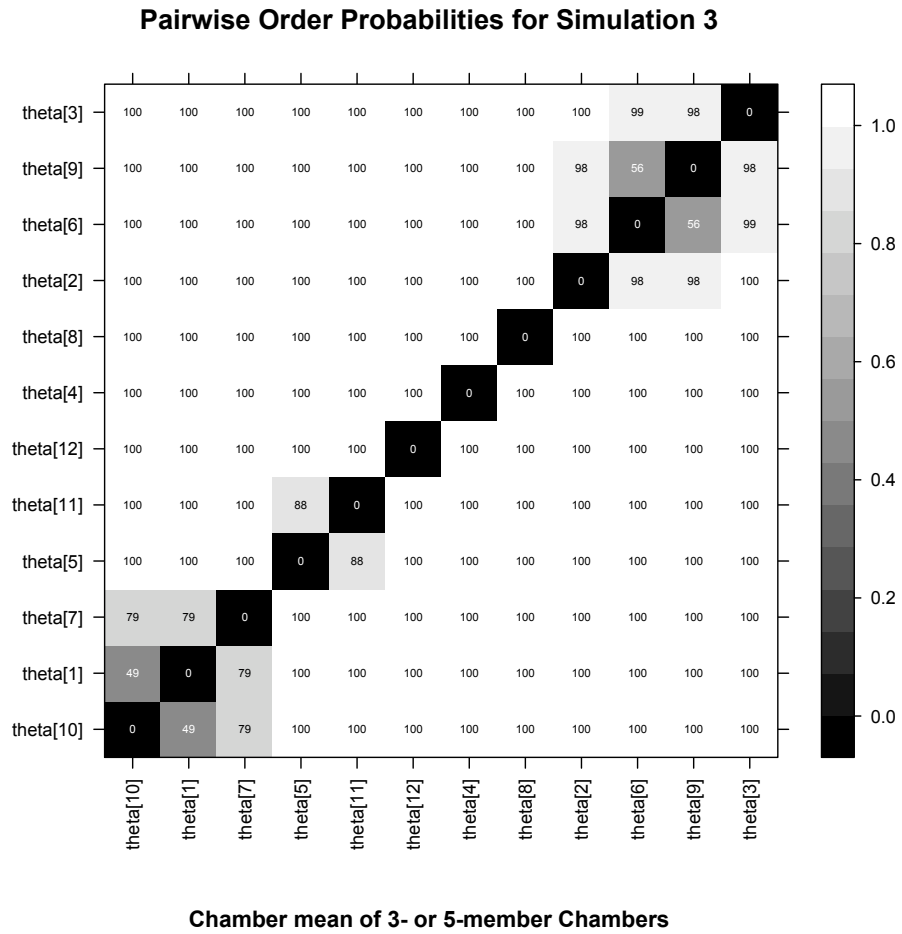
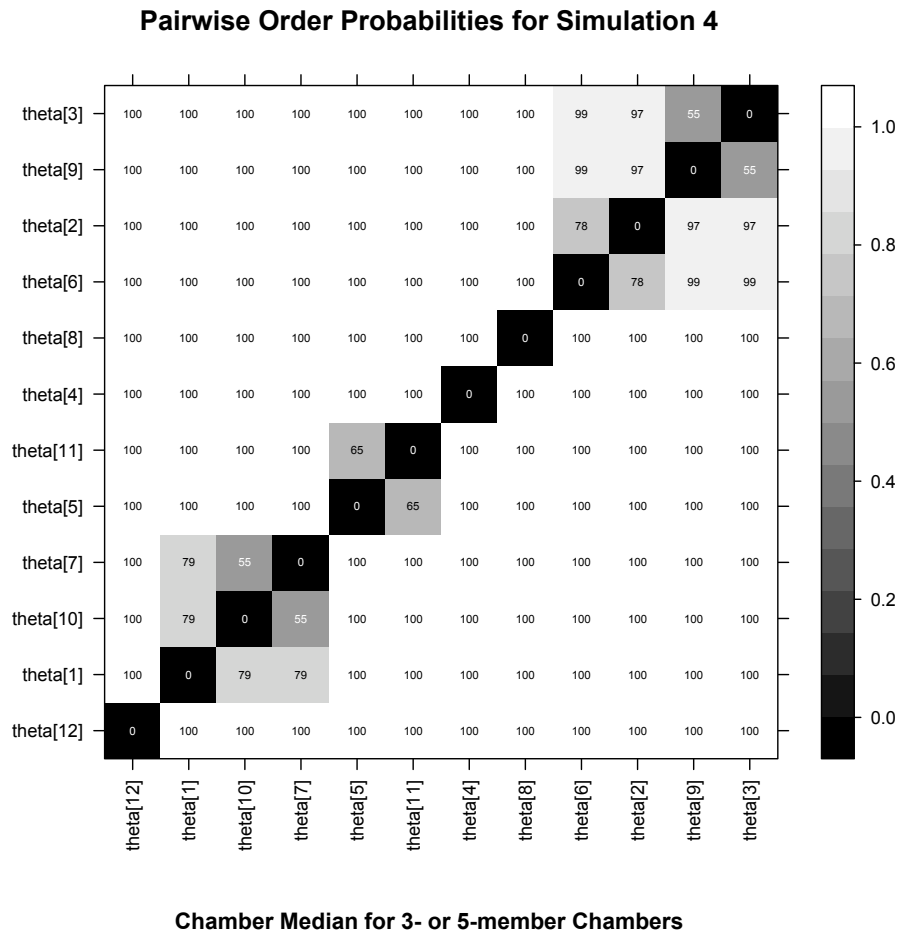


Figure 3.9: The matrix of pairwise comparisons of judges' preference estimates for random 3- or 5-member chambers. Numbers indicate the degree of certainty of the ranking of the row relative to the column.



3.3.3 Random Assignment to Relatively Stable Chambers

In constructing the last simulated participation matrix, each case drew three or five judges completely at random each time. In a set of twelve members, there exist 220 possible combinations of 3, and 792 possible combinations of 5. However in order to approach data more closely resembling the membership on chambers of the European Court of Justice, we need to approximate more stable groupings that decide many cases together, but where members serve with each other in distinct combinations. The Rules of Procedure would suggest considerable stability, with chambers defined and fixed for two years at a time. The participation matrix for the actual data, which is discussed in Section 4.1, actually reveals almost 300 distinct combinations, where a strict reading of the Rules of Procedure would imply about one-third that number.⁶ Therefore, to simulate “stable” chambers, I draw 50 possible 3- or 5-member chambers, and each case is assigned to one of these fixed chambers.

⁶In the data considered in Chapter 4, there are 29 judges serving at different times, over several enlargements of the European Union and thus of the size of the Court of Justice. Although they obviously did not all serve together, there are about 3600 possible combinations of 3, and 118,000 combinations of 5 among 29 members.

Figure 3.10: Actual and recovered values for 50 stable 3- or 5-member chambers, chamber mean sampler.

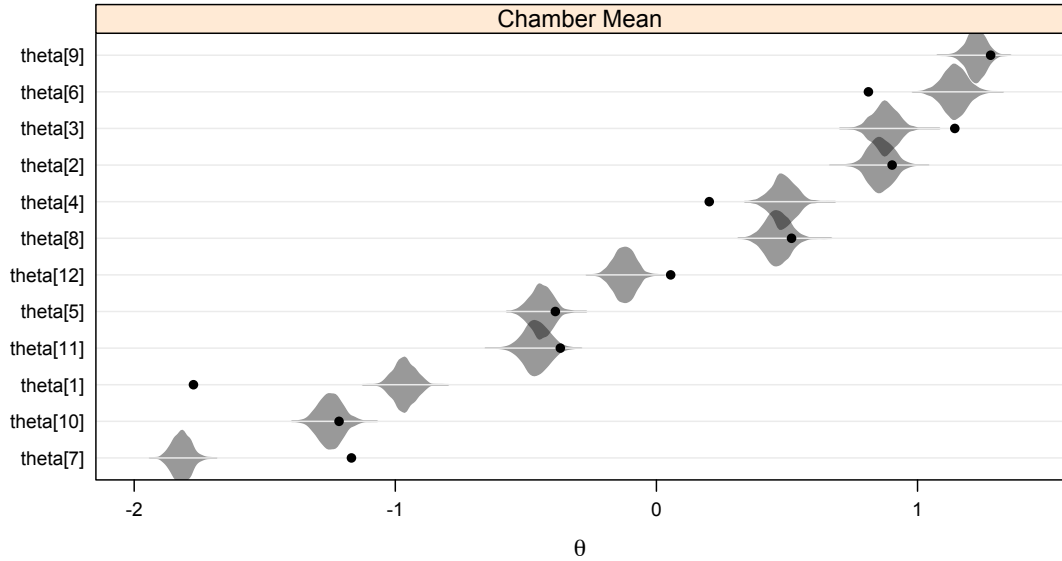


Figure 3.11: Actual and recovered values for 50 stable 3- or 5-member chambers, chamber median sampler.

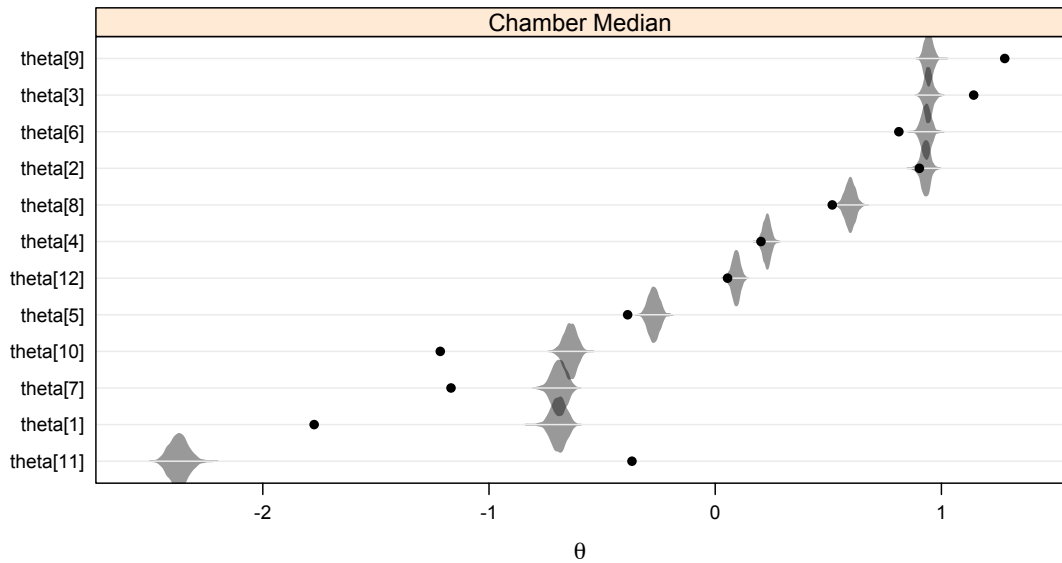


Figure 3.12: The matrix of pairwise comparisons of judges' preference estimates for 50 stable 3- or 5-member chambers. Numbers indicate the degree of certainty of the ranking of the row relative to the column.

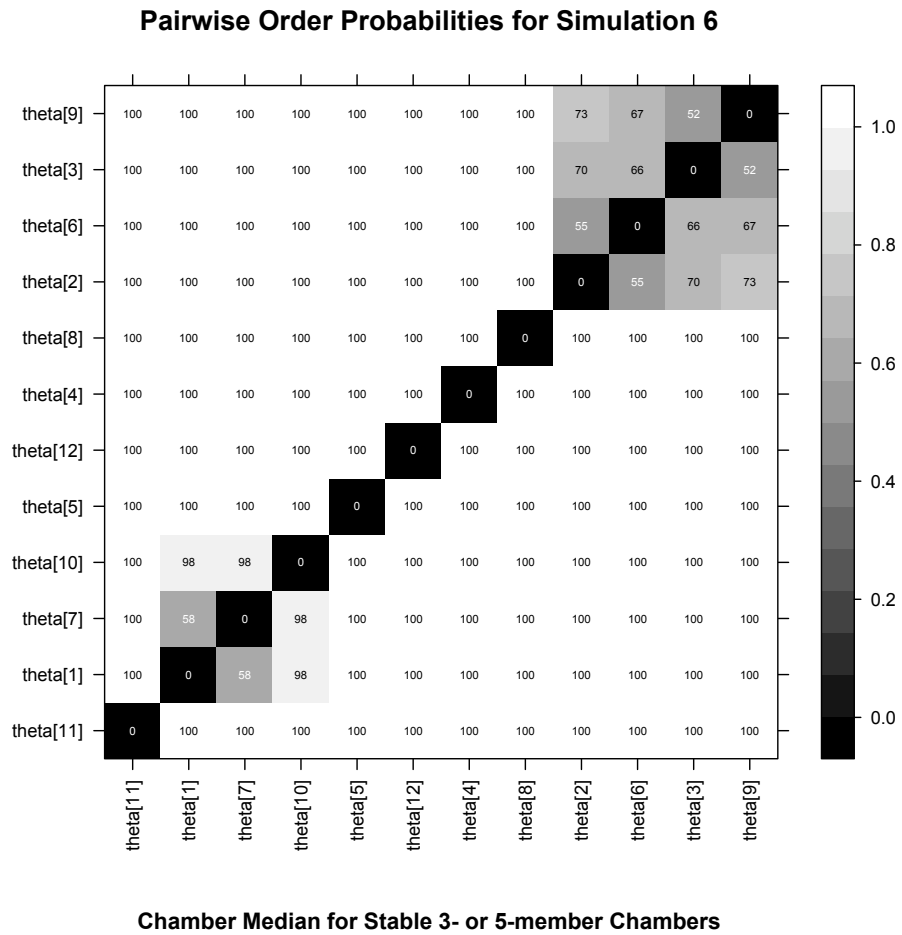
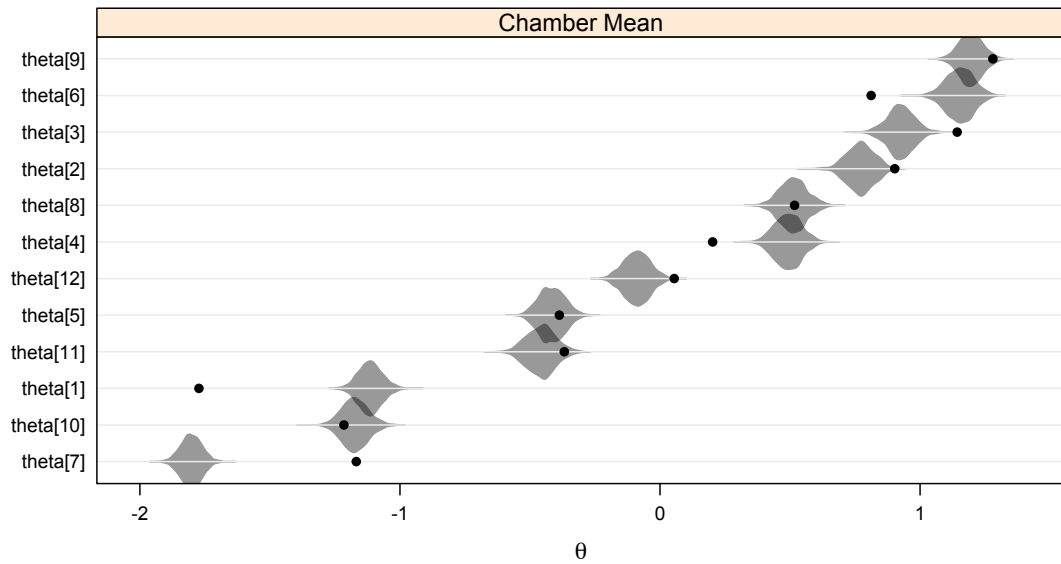


Figure 3.13: Actual and recovered values for stable 3- or 5-member chambers with 10% revelation, chamber mean sampler.



3.3.4 Random Assignment to Relatively Stable Chambers, with 10% of Votes Revealed

This final pair of simulations investigates the performance of the ECO-IRT model when just some of the individual data are revealed. Where before the outcome matrix was the same (1 or 0) for all members who participated in a decision (1 in the participation matrix), this time ten percent of all outcomes are revealed. In many instances, the “revealed vote choice” is the same as it would have been. In some others, however, it represents a dissent. Many courts or other institutions feature low frequency of revelation of dissent, such that the ECO-IRT model may be an appropriate way to model the remainder of their choices.

Figure 3.14: Actual and recovered values for 50 stable 3- or 5-member chambers, chamber median sampler.

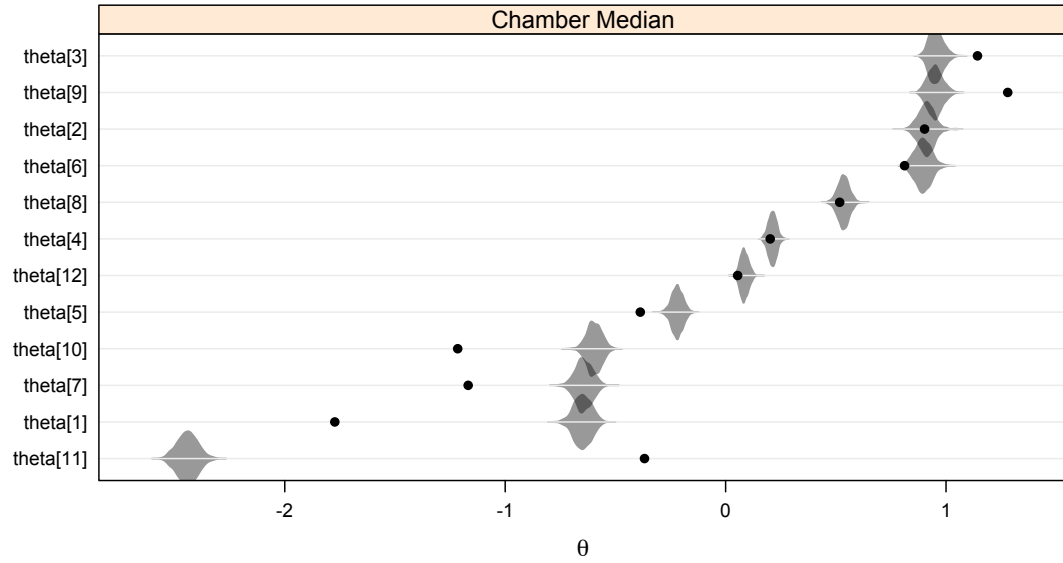
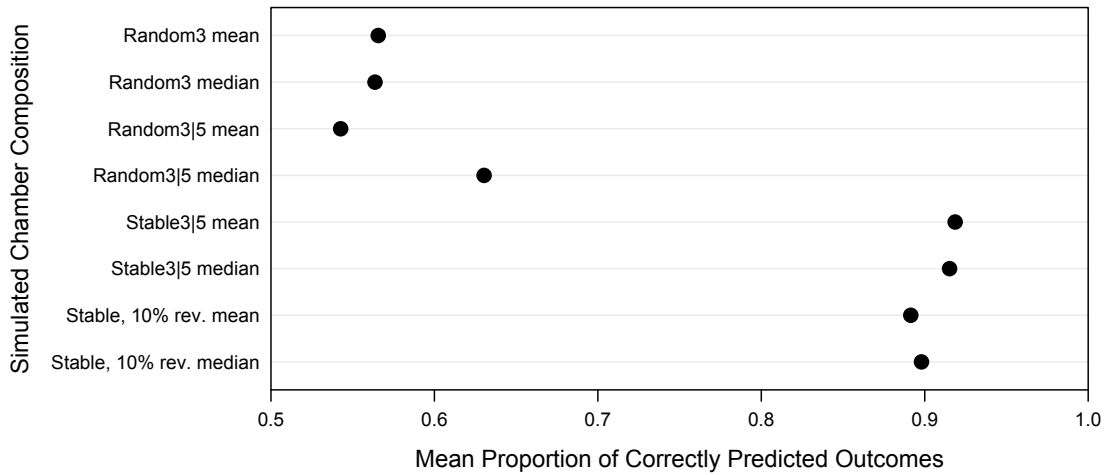


Figure 3.15: Posterior predictive accuracy for simulated data.

Posterior Predictive Accuracy for Simulations



3.3.5 Predictive Accuracy of Simulations

As one would expect, unanimous chamber decisions are able to either conceal or distort some of the true underlying values of θ in the simulations above. Nevertheless, by considering results from both mean and median samplers, we uncover striking heterogeneity. Later, I introduce two refinements to the model that attempt to account for, using other known predictors, the heterogeneity of preferences revealed by the model. Further, given a stylized set of random data, the samplers are quite accurate at predicting outcomes. Figure 3.15 shows the proportion of outcomes correctly predicted by the model for all of the simulations presented above.

The most random data, representing a random draw of three judges, or three or five judges, produced the most accurate recovery of generating judge preference values. For three-judge chambers, Figures 3.1 and 3.2 show estimates remarkably close to the generating values. Nevertheless, tested against the same outcomes, the model is accurate only about 57% of the time, using either the mean or median of the random groupings.

When random draws are either three or five in size, the chamber-mean sampler (judge estimates in Figure 3.6) is about as accurate at prediction (54%) as with 3-member chambers, but the chamber-median sampler (Figure 3.7) is better at prediction, yielding correct predictions of outcomes in 63% of cases. When a limited number of fixed compositions are specified at the outset, the data are coarser, and more prone to reveal alternative, incorrect explanations of the data-generating process such as the incorrect orderings in Figures 3.10–3.14. The “incorrect” estimates of θ in these figures show a pattern revealed by the specific participation pattern used for all of them. As it happens, the pattern produced by the permutation of the data is in fact far better at predicting the outcomes than either of the first two models that were more accurate in θ . The less random compositions were between 89 and 91% accurate at predicting outcomes. Having some “revealed” knowledge, as in the last two simulations (Figures 3.13 and 3.14), made θ slightly more accurate, and prediction slightly less so. In reality, the permutations of membership on Chambers at the European Court of Justice and grouped decisions show data that is somewhat less random than my “stable” simulation, but not fully random. Where random chambers result in accurate estimates of θ , greater stability results in a model better at prediction. Likewise the chamber mean and chamber median allocation functions trade off, in a sense, faithful estimation of particular parameters of interest and predictive accuracy.

3.4 Conclusion

The simulations have shown that collective decisions, without revealed votes or dissents, can in fact still bear the fingerprints of individual actors when there is sufficient variation in chamber composition. They have also suggested that if any votes, even very few, were revealed via published dissents or votes, accuracy would be improved. The

data-augmentation step of the algorithm would be identical; it is the data in this case that would produce a cleaner, narrower estimate of individual judge parameters I call θ .⁷

The second simulation in each pair introduces the behavior of the *chamber-median* ECO-IRT data augmentation step. In this scenario, the decision of the chamber – the only decision observed – is based on the preference of the median member of the chamber. Because subsequent steps of the sampler are conditioned on the “augmented” data Z , cases are more likely to contribute the same value to all members if a member is frequently the median. The *chamber-mean* sampler, on the other hand, theoretically represents the consensus decision. It is indeed likely that many changes of chamber composition – either by replacement or reshuffle – that would affect a chamber’s mean but not the median. In the analysis of actual ECJ cases in the next chapter, we will continue to use both the chamber-mean and chamber-median samplers. They provide complementary information about what patterns show in the data.

The chamber median data augmentation sampler represents an important feature of Bayesian modeling of processes with so much imputed or missing data. We need to consider the full distribution of values that members could have, given what little data we observe. Classical methods of optimizing a likelihood would neglect one of the multiple modes that arise from the missing-data problem. Under the coarser actual data we investigate later, the median sampler indeed reveals a split with unequal density in two modes.

I have presented each successively-less-random grouping of judges into chambers in pairs based on the data-augmentation chamber allocation function being the mean or the median. Under the still quite random mixture of random draws of three or five members

⁷Data augmentation defines the sampler in terms of the distribution of parameters given data and augmented data. In other words, the estimate of $(\theta|Z)$, the augmented data, is the same as $(\theta|Y)$; the difference is only that we know how to sample from the conditional distribution of $(\theta|Z)$ because it has an amenable functional form.

per chamber, the chamber-median result is for one judge quite far from the generating value, even though the chamber-mean algorithm correctly locates the same parameter.

The model developed here depends heavily on the structure of the data – that is, the participation of judges on different combinations in chambers. The most random situation may apply to ad-hoc panels, while the more stable composition more closely resembles the European Court of Justice, whose chambers system was reviewed at length in section 2.3. The next chapter builds on the model developed here. I construct a participation matrix for observed data from the Court of Justice, and also model known features of both cases and judges with hierarchical predictors.

Chapter 4

Modeling the ECJ: Preferences, Influence, and Outcomes

In Chapter 1, I introduced a variety of “constitutional” and other courts, while paying some special attention to the method of appointment to them. Source of appointment and length of judges’ terms are to key attributes of institutions that define their independence from the more democratically accountable branches of government. We considered reasons why legislatures and executives would “tie their hands” by subjecting their legislation to review. One of the key formal results relating to delegation to independent institutions relates to time inconsistency: that someone in power would like to have a hand in appointing an “independent” (unaccountable) reviewer so that policies may survive a change in power (be “upheld” as constitutional). Of course, this comes at the cost of potentially having one’s own policies invalidated by previous-term appointees to the court.

Chapter 2 introduces the European Court of Justice (ECJ), which functions as a constitutional court for the European Union based on the EU Treaties as the “constitutional charter” of the EU.¹ It is well established that the ECJ, in concert with national courts

¹Case 294/83 *Parti écologiste “Les Verts” v European Parliament* (1986) ECR 1339.

through the preliminary reference procedure, performs this role and has expanded its own power through key judgments that give EU law (including Regulations and Directives, within limits set essentially by the ECJ) both *direct effect*, producing obligations on national governments, and *supremacy* over any national laws that conflict with the EU law. These daring moves of “judicial creativity”, in addition to “constitutionalizing the treaties” (Mancini, 1989), indeed tilted the balance of power from member states toward the EU institutions. The gradual acceptance of this jurisprudence in all the member states and continued – even expanded – use of preliminary references was in a way surprising. Member state governments expressed discontent at times, even outrage; even so, the constitutional character of the Treaties is by now quite firmly established.

Both the broad strokes of legal theory and fine details of refining judgments have led scholars to conclude that the ECJ has been an “engine of integration” at the forefront of federalizing the EU, often against member states’ wishes (Alter, 2001; Stone Sweet and Brunell, 1998; Mattli and Slaughter, 1995, 1998a; Garrett, 1995)

What past analyses of the ECJ have overlooked, however, is one of its defining features, and one of the bases of independence of any delegated body and of many constitutional courts . The diverse sources of appointment, and relatively short term length of 6 years (renewable), provide a means for national governments to both “tie their hands” and make credible commitments to upholding the Treaties, as well as influence the direction of ECJ jurisprudence through the appointment of its members.

Because by design the Judgments of the Court are ostensibly unanimous –no individual disagreements, much less formal dissenting opinions to judgments have ever been revealed, formally or informally, either from the bench or in the writings of the judges after their service – scholars have had no choice but to treat the ECJ as a unitary actor. The Court of Justice, rather than its member judges, has been the motor of European integration. For many judgments over many years it was reasonable to consider the court as a monolith.

However, as documented at length in Chapter 2, the ECJ has long divided its workload among various Chambers. At first, Chambers heard only EU staff cases. Later they began to hear preliminary references and the ECJ sat less often as a full court. Privileged parties, member states and the EU institutions, could always request that a case be heard by the full court. In the 1980s the court invented a non-chamber chamber called the “*petit plenum*” consisting of a quorum of members. After the revision of the rules of procedure in 1991, even a government request for a full-court hearing was subject to the discretion of the court. The system of Chambers complicates even the claim that the *median* of the ECJ is consistently pro-integration, because each chamber median has its own median judge.

The growth of the use of chambers inadvertently provides an empirical opportunity to assess to what extent the Judges of the Court of Justice evince homogeneity of preferences with respect to integration as commonly alleged. In addition, we can test alternative hypotheses regarding the dependence of judges relating to their heterogeneity of policy preferences or behavior. In Chapter 3 I developed a model for this type of application. In particular, I extend the commonly used item-response model in two novel ways. First, I wrap the model at the level of the data in what I call the “chamber allocation function” that implies each case contributes equally to the judges hearing it. The chamber allocation function may be the mean, representing something like consensus among members, or the median, reflecting the provision for majority voting in chambers. As the simulations in Chapter 3 showed, the exact permutations of judges and chambers may lead to a series of outcomes where the mean and median samplers produce estimates that are both wrong in different ways. Therefore, I will consider both as providing distinct and complementary views. Second, I identify parameters of both cases and judges with predictive hierarchical prior distributions. In other words, rather than simply scaling the latent parameters like NOMINATE or a common IRT model, my ECO-IRT model is designed to enable inferences about what predicts both the judge and case parameters estimated by the data. Despite

common and increasing application of the IRT model and Bayesian Markov chain Monte Carlo estimation thereof, few studies seem to take into account hierarchical prior predictors.

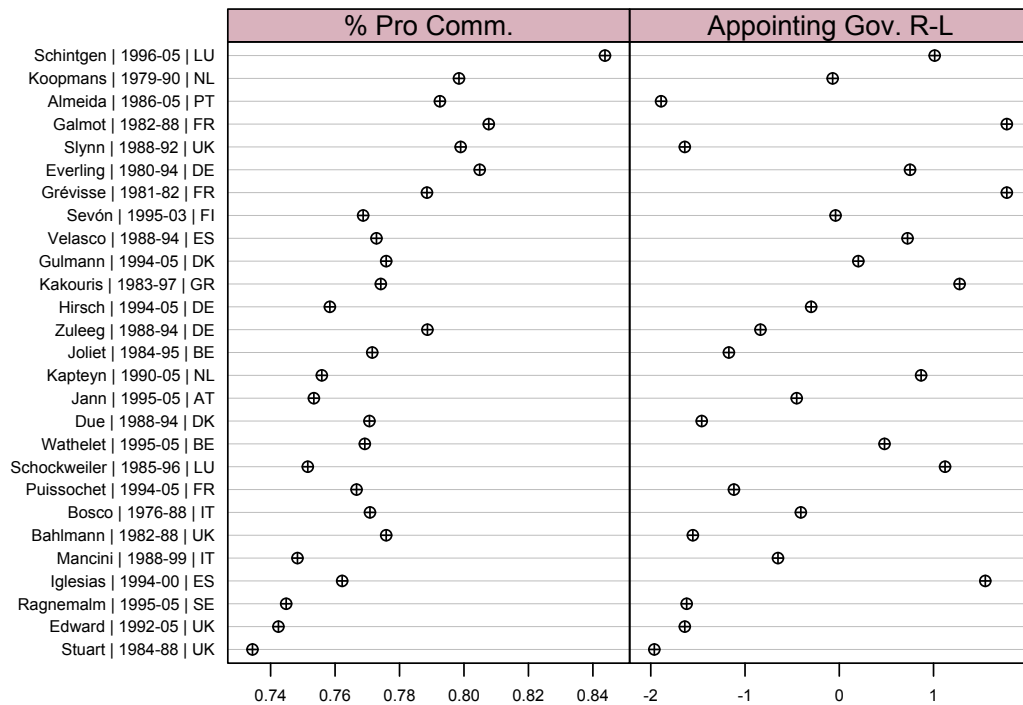
I must emphasize that my claim is not that the Court of Justice has become either inconsistent in its application of the law, or that the system of Chambers has undermined its jurisprudence. These claims cannot in any rigorous way be evaluated, because decisions of the court are not subject to appeal; one cannot challenge the judgment of a chamber before the full court. Further, my model depends on leverage from cases decided in Chambers of 3 or 5, and therefore I assume that judges' underlying preferences are constant from one chamber to another, and that they behave the same way even when they do sit as a *grand plenum* or full court.

Figure 4.1 plots the two other measures of judge positions (percentage of cases siding with the Commission and appointing government R–L score from Kim and Fording (2002)). At the left of the figure is the proportion of cases on which each judge participated where the outcome was in favor of the Commission. Even using this aggregate measure, one might conclude that judges' dispositions were not homogenous. Of course, it lacks a model of individual judge and chamber decisionmaking, so one still could not attribute these outcomes to variation in judge preferences.

4.1 Data

The data observed comprise a single outcome, attributed to a chamber of judges, per legal issue. A complete “case” before the Court may encompass several legal issues, with a ruling on each of them. Furthermore, observations tendered by the Commission or member states may pertain to one or several legal issues. The fact that cases may contain several

Figure 4.1: Evidence from judges’ aggregate behavior, and a possible source of motivations on the bench: the percentage of cases each judge heard in any chamber in which the outcome was in favor of the Commission; and the right–left ideology of their national government at the time of their appointment. The latter is used as a predictor in the hierarchical model. The scale is reversed so that the theoretical prediction that right or conservative governments appoint more Euroskeptical judges. The ordering below is the same as in Figure 4.3.



legal issues is irrelevant and potentially confusing, since the data are observed at the level of legal issue. I will therefore use the terms “case” and “legal issue” interchangeably to mean “the object upon which observations are submitted, decisions are made, and outcomes revealed.”

The model has a huge number of “moving parts,” or sampled posterior distributions. They are needed, though, to answer the central questions of this research. First, do the data reveal heterogenous judge preferences? This is answered by considering the marginal distributions of judge parameters. Second, can we predict judge positions with other

theoretically derived covariates? I consider two separate judge-level variables that enter the model as linear predictors of judge positions. And third, do judges show signs of greater responsiveness to their own governments' observations? We extend the model described above to account for attributes of cases to affect some but not all judges in the chamber.

Here I consider $N = 1549$ Article 267² cases – preliminary references – from 1970 to 1997, in which the Commission announced a position via a written observation and argued its position at the hearing. These cases were heard by 296 unique combinations of judges (called g in earlier notation); the median number of cases per unique composition of chamber is 2 and the mean 5; the maximum is 95 for the chamber of Judges Zuleeg, Montinho de Almedia, and Grévisse.

Larger configurations of seven, nine, eleven, or thirteen judges (the *petit plenum*, *grand plenum*, and quorum of the full court) have also existed but were used far less frequently and not at all after the 2005 reform of the Rules of Procedure. The model, of course, is agnostic of formal membership in Chambers or the order of rotation – for all (and only) the judges hearing a given case, a case makes a contribution to judges' estimate if they are coded as 1 in the participation matrix.

The Commission makes and supports more observations than any other party (as discussed in section 2.0.2, its policy is to contribute an observation in very nearly all preliminary reference cases), but it is frequently joined or opposed by other governments. The position of other member state governments is used to predict the location of the case-specific parameter of the model. The rationale here is as follows: if the Court and Commission together are motivated by greater supranational authority, more regulation at the supranational level, and less regulation at the national level – all of these are the components of both positive and negative integration – such a preference will be manifest in case outcomes in which the Court sides with the Commission. Moreover, the member

²ex Article 234; ex Article 177

states' observations represent the threat of override or noncompliance when they oppose the Commission, and would more likely predict an anti-Commission judgment. Conversely, member states' observations that side with the Commission should indicate a willingness to comply and agreement with the integration stance that the Commission advocates. When member states oppose one another in these observations results in a net case prediction of 0.

Overall, the Court sides with the Commission in Preliminary References about 75% of the time in the dataset. The model depends on the composition of the chambers deciding against the Commission. Accounting for the participation matrix, judges side with the Commission in these cases from 72% to 85% of the time. Thus, by extension, judges are relatively pro-integration when using the Commission as a proxy of integrationist tendency.

4.1.1 Prior Predictors for Judges and Cases

Judges appointed by national governments must be minimally acceptable to the government making the appointment. Judges appointed by right or anti-EU governments will be more likely to decide cases against the Commission. Since member states can only evaluate judges at the outset, at the time of appointment, the measure must be observed for governments at each time they make an appointment. In addition, it needs to vary at the level of the *government*, so for coalitions should be weighted by cabinet-seat share of parties. Few measures meet these criteria.

Some scholars consider expert surveys of party positions to have the greatest face validity and cross-national comparability. Beginning with Ray (1999), they have conducted surveys of most European parties in order to describe party positions on relevant and timely matters of European integration, as well as left-right economic concerns (Marks et al., 2007; Marks and Steenbergen, 2002; Marks et al., 2006; Ray, 2008; Marks, Wilson,

and Ray, 2002; Ray, 2007). Unfortunately, these surveys only began in 1999, and therefore measure aspects of integration that may not apply earlier in time, even to the same parties. Budge (2000) writes of using expert surveys to gauge party positions,

“If they are based even in part on behaviour they cannot be used to explain behaviour such as the type of party government which forms. Yet this is one of the main reasons why estimating party policy positions has become so important in contemporary political science. If expert judgements do not constitute pure measures of intentions and preferences they lose most of their analytic use” (111).

It would be unwise to infer positions on integration of governments based on party positions taken from collections of different experts at different times as a meaningful measure of government preferences over integration (and thus disposition in choosing ECJ judges).

I use measures derived from another comparative approach to measuring policy preferences of parties, based on the text of “manifestos” or programs presented by parties at each election (Budge et al., 2001). In each party manifesto from 1948 onward, native speakers of the language have coded every “quasi-sentence” for its content relative to a rubric of policy content. The policy domains can be aggregated to form sets of items that correspond to the theoretical concept of ideological dimensions, such as “left–right” with left favoring greater government involvement in the economy and greater support for government provision of social welfare funded by taxes, and right favoring a lower amount of government regulation of business, lower taxes, and the private provision of social welfare needs. Budge et al. (2001) demonstrate that both specific policy domains and the summary measures provide a valid basis for comparison of parties’ policy proposals across countries and over time. Although other problems of comparability or salience of certain

issues may arise by using party manifestos, they at least have the property of attaching at the same relative time to the same relative parties that make up governments Budge et al. (2001); Kim and Fording (2002); Budge (2000), and reflect pre-electoral positions rather than a mix of positions and behavior in coalition formation, as may be the case with surveys.

Next, what specific attributes of governing parties are most likely to influence the choice of ECJ judges? Some scholars find that parties take meaningful positions on European integration, in other words that it is a strong “second dimension” of political competition Marks and Steenbergen (2004). One of the disadvantages of using manifesto (Budge et al., 2001) data is that it offers little in the way of policy domains that amount to “integration.” It does contain a pair of items for manifesto statements that are positive or negative about the EU; I supplement this with manifesto items about liberalization of trade versus protectionism. The ECJ may advance integration, but it does so through cases that are primarily economic. This EU-liberalization measure therefore captures aspects of free trade and support for EU “negative integration” that differentiate parties on the “second dimension” of European political competition that might be different from the “first dimension” of economic left–right position.

However, the dominant left–right ideological dimension of political competition of mainstream political parties in Europe has been demonstrated to correlate strongly with positions and policies regarding European integration. More specifically, the policy content of the left–right ideological dimension relating to regulation and the role of government in economic affairs relates directly to the cases that come before the ECJ. Although extreme parties of both the left and the right often strongly oppose integration, within the mainstream – those parties that govern or join governing coalitions – left parties are consistently more supportive of supranational governance than right parties (Hix, 1999; Hix and Lord, 1997). This is even true for the United Kingdom, where the

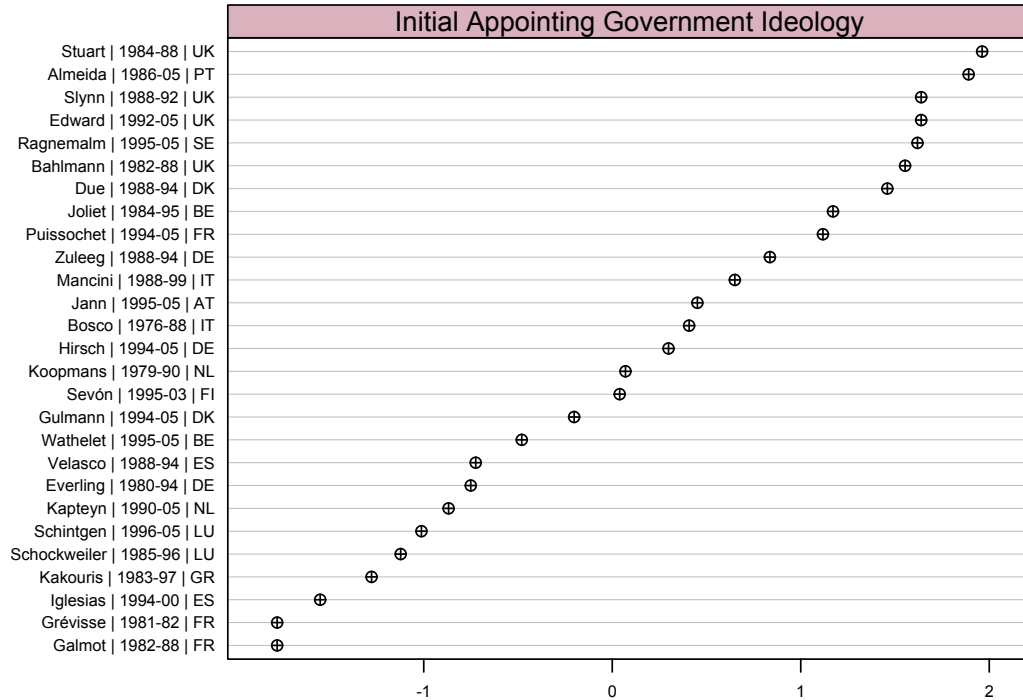
ideological drive for deregulation might have led the Conservative party to favor “negative integration;” it did not, presumably because the Tories strongly preferred deregulation at their own hand rather than by any supranational authority (Featherstone, 1988, 1999). Aspinwall (2002) writes, “the location of parties and governments in Left–Right space serves as a good independent explanation of preferences on integration” (82). McElroy and Benoit (2007) find from their own survey of party experts that left parties tend to favor integration more than right parties.

I expect that this relationship holds in the judges they would appoint to the ECJ. As a measure of the left–right orientation of the government at the time of first appointment, I use cabinet-share weighted manifesto scores from Kim and Fording (2002).

Hypothesis: Judges In Chapter 2 I remarked upon a commonly accepted but untested assumption that judges share a uniform preference for integration. If this is true, judge preference estimates will be undifferentiated, or highly dependent on the model prior distribution. For interpretation, the model is specified such that an increase in the value of θ judge position is associated with a greater propensity to decide cases *against* the Commission.

Hypothesis: Judge Predictors Judges appointed by right or anti-EU governments will be more likely to decide cases against the Commission. Two separate predictors are used, as discussed above, both derived from cabinet-weighted party positions on both the left–right ideological space, and a measure of pro-EU and free trade versus anti-EU and protectionism. In both cases, *Positive* values of the parameter β attached to the judge predictor are should increase the “distance” in the latent utility space, resulting in a lower propensity to vote in favor of the Commission.

Figure 4.2: Left–right ideology of governments appointing ECJ judges. Figures are based on party Manifesto scores of Budge et al. (2001), weighted by cabinet seats, to arrive at the overall government position (Kim and Fording, 2002). The values below make up X : the predictor $X\beta$ is the hierarchical prior mean of the distribution of judge preferences θ .



Hypothesis: Selective Judge Effects In section 4.2.3 below, I consider a further refinement to the model of judges’ individual behavior. If so, and if judges preferences are indeed distinct from one another, it is possible that they will respond to their own home governments’ observations with greater acuity than other governments. *Negative* values of δ , discussed in Section 4.2.3, are consistent with this prediction.

Hypothesis: Cases Some attributes of cases apply to all the judges on the panel. Carrubba, Gabel, and Hankla (2008) suggested that member state observations may signal the threat of noncompliance and showed that the balance of observations is a strong predictor of case outcome. In Chapter 3 I generated a covariate based on the actual

case position. The net number of observations with respect to the Commission (opposing minus supporting) thus predicts the location of the case parameter in the latent space. *Negative* values of γ would be consistent with the findings in Carrubba, Gabel, and Hankla (2008). In other words, an increasing number of observations against the Commission provide a signal about potential noncompliance or override, which in the case-level analysis of Carrubba, Gabel, and Hankla (2008) is shown to affect all the judges on the chamber.

4.2 Results

4.2.1 Individual Judge Preference Estimates

Figure 4.3 shows the estimated ideal points of judges from 1549 preliminary references and the predictors discussed above for judge and case positions. The model here is identical to those developed in Chapter 3; its purpose is to recover estimates based on variations in outcomes as a result of composition of chambers. A chamber-allocation function aggregates over the judges in the chamber; case and judge positions are estimated in latent space and their distance results in the mean value for a data-augmentation probit link function connecting the observed dichotomous data with the augmented continuous data. Further, the model is identified with respect to the latent space through the use of a hierarchical prior predictor for the case position. In Chapter 3, I generated this value calling it a “credible signal” of a theoretical value. Above, I explained that the predictor (the net number of observations with respect to the Commission position) is revealed to all judges, and if it is a signal of potential noncompliance it should affect all the judges on the chamber uniformly. In other words, as in Carrubba, Gabel, and Hankla (2008) and Garrett (1995), even if judges were homogenous in their own preferences for integration, the threat of noncompliance affects them all equally and would cause them to rule differently from

their preference for integration. The same assumption underlies most work on the ECJ's role in making European policy.

The joint distribution of judge preferences in figure 4.3 shows strong evidence that judges do not share a common motivation to integrate Europe. As predicted, the insulation of the institution has provided equal cover to relative euroskeptics and europhiles alike. The variation in chamber composition has enabled us to separate the likely effects of the different groupings, controlling for the attributes of the case that would affect any chamber equally. However, because we do not observe every possible combination of judges, we learn more about some judges than others. (As I noted earlier, the chamber of Zuleeg–Almeida–Grévisse heard more cases together than any other grouping and is thus poorly separated.)

Figure 4.3 alone contradicts the strong claim that is either implicit or explicit throughout the literature about the Court of Justice, that its judges are all motivated by a common drive for greater integration. The results show that judges in fact have divergent preferences, and that their imputed policy preferences vary in systematic ways. This result is robust to the precision of the prior and alternative starting values.³ Even when we begin with relatively strong or weak beliefs about judge parameters, the data imply a posterior distribution like the one in Figure 4.3.

³All the models in the paper have attained conventional measures of convergence, often relatively quickly and with very low autocorrelation thanks to a parameter-expansion sampling scheme. All starting values are random draws at the time of initialization and multiple chains yielded similar posterior draws; only draws from one chain are presented. The variance of hyperpriors – the spread of β and γ – was set at 1, 10, and 100 with similar results. The models presented have a relatively “flat” prior variance of 10 for both β and γ .

Figure 4.3: Estimated ECJ judge positions (θ) from ecological item response (ECO-IRT) model.

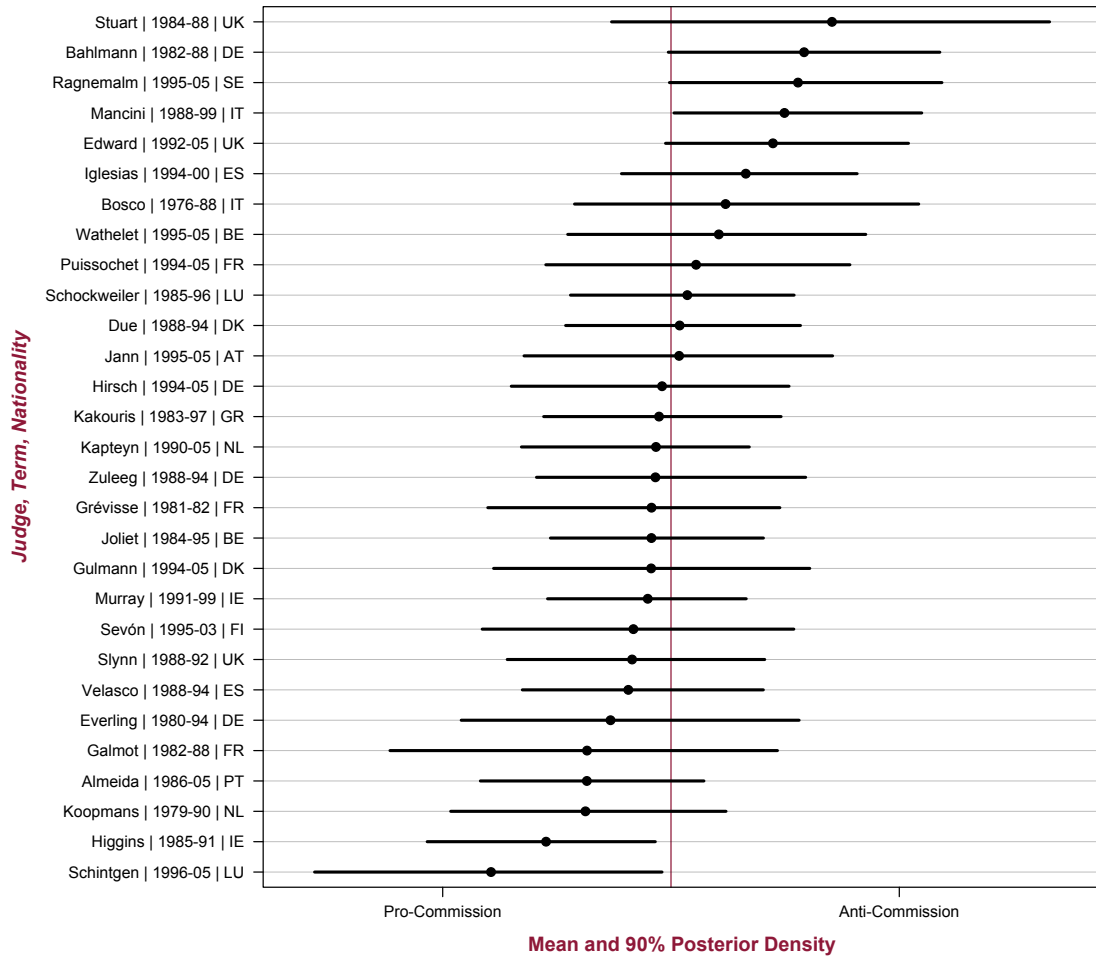
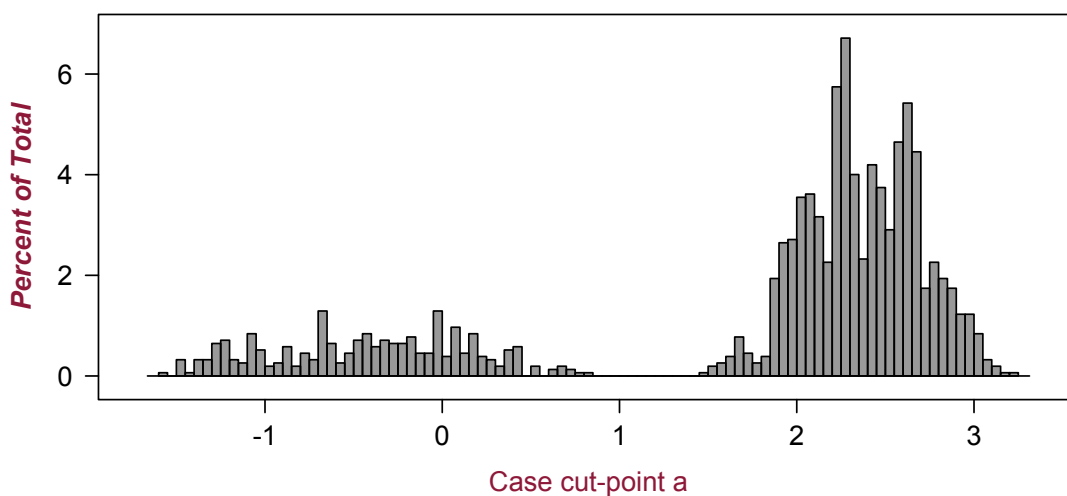


Figure 4.4: The distribution of case parameters a from the full model.



Case parameters

The sampled distribution of case parameters is shown below in Figure 4.4. The majority of cases have values greater than 1, which means that only the most committed anti-federalist judges would be predicted to vote against the Commission, though the model does predict that some judge parameters θ are high enough to imply an anti-Commission vote with greater than .5 probability even for those cases. Thus, the recovered dimension of the model, and the range of θ , appear to explain some amount of substantive variation.

4.2.2 Predictors of Judge Preferences

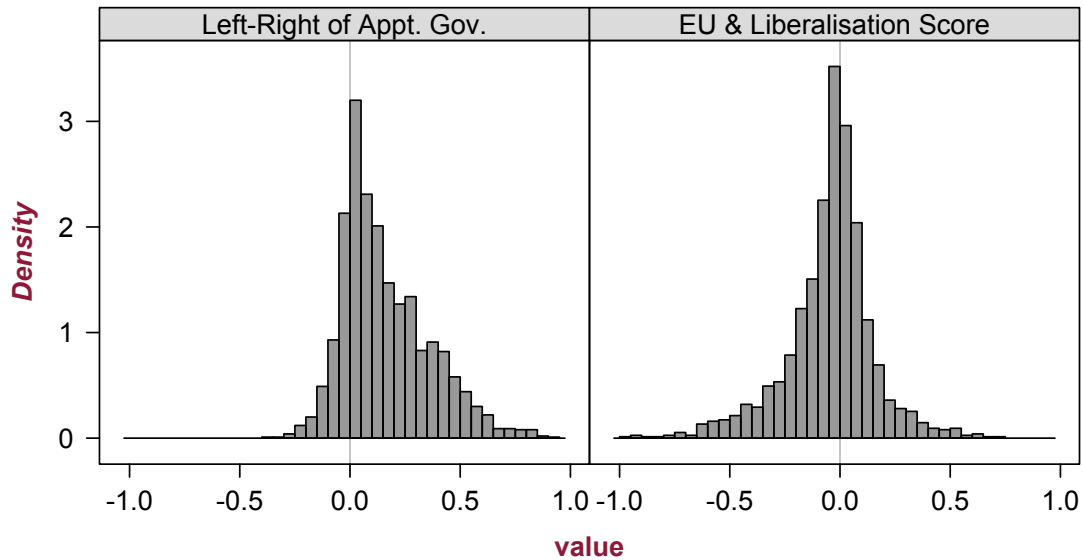
I turn now to the second related but distinct claim about ECJ judges: that their motivation for integration is either at odds with, or simply distinct from (uncorrelated with) the preferences of member states. Given that the judges are appointed one per member state, this would require that member state governments disregard their own European dispositions in selecting judges, or that they can't select well, or that the judges' preferences

change once they are in Luxembourg. In figure 4.5, I show the posterior distributions from the model for two predictors of judge positions. The predictors are based on information available at the level of parties and aggregated to governments by proportion of cabinet seats (Kim and Fording, 2002). On the left is the left–right ideology as measured by party Manifesto coding; on the right is an alternative measure of parties’ positions on European integration (Hooghe and Marks, 2000).

Figure 4.5 shows two alternative covariates to predict judge behavior: the left–right cabinet median discussed earlier, and a similar cabinet median of a similar normalized index of two other items coded in the Comparative Manifesto Project dataset: position (positive or negative) on the European Communities / European Union, and position on liberalization versus protectionism.⁴

⁴This alternative “integration index” is available at the same level of precision (all countries in all years) as the Manifesto-based left–right index. It correlates weakly with the L–R measure and identifies the same countries as being “anti-integration” as expert surveys that only classify parties/governments into three categories. A trichotomous coding (pro, anti, neutral) produces almost identical results to those presented in Figure 4.5 with the continuous Manifesto-based covariate.

Figure 4.5: Posterior density plots of two prior predictors of judges' preferences.



The posterior distributions of these hierarchical prior predictors produce two notable findings: First, the distribution of β_{LR} is heavy at 0, with another peak around 0.4. Eighty percent of the distribution lies on the positive side of zero, indicating a weak prediction that judges appointed by right governments are more likely to take positions against the European Commission; and judges appointed by left governments are more favorably inclined toward the Commission's position. The shape of the posterior distribution is inconsistent the claim that some left governments would appoint protectionist judges and some right governments free-market crusaders: these claims would together imply negative β . Instead it is apparent that for some judges the appointing government's left-right ideology has no predictive power, while for others it is stronger.⁵ These findings

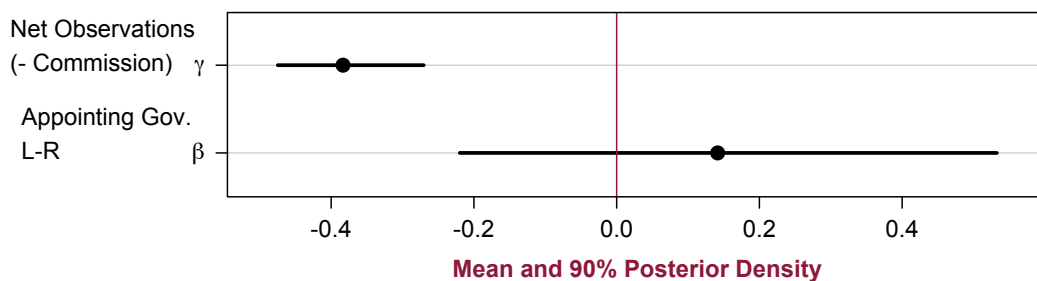
⁵Indeed oddly-shaped posterior distributions like the one for β_{LR} above is a major advantage of Bayesian modeling: we do not have to assume that the effect is normally distributed about some value of β . A mixture makes sense, given the variations in appointment patterns described earlier. It is likely that countries where ECJ appointments are politicized and contentious are the ones contributing higher positive values of β here. Coding and controlling for these country-level variations is the subject of future research.

are also robust to the specification of “skeptical” (negative mean) or less informative (wide variance) values for (b_o, B_o) , the prior distribution of β .

Second, the left–right positions of parties in government is a better indicator of the kinds of judges governments will appoint than is a comparable Manifesto-based indicator of their positions on the European Union and market liberalization. Other expert assessments of left–right or pro–anti-integration correlate strongly with the measures used here, and do not do a better job predicting judges’ observed behavior of siding with or against the European Commission, taken as an indicator of support for integration or regulation at the European rather than national level, which is centered at -0.03 and almost perfectly symmetric about zero.

We also tested whether observations from national governments predicted case positions. The quantity γ is the estimate of the influence of each additional government on the “location” of the case. It is the unit effect that applies to all the judges in the chamber. Consistent with previous findings, observations from national governments are a strong predictor of case outcomes.

Figure 4.6: Prior predictors β and γ for judges and cases, respectively.



Estimates of the regressions of case and judge covariates on the hierarchical priors are shown in Figure 4.6. Above, I noted that the posterior distribution of second-level prior predictors, in particular those pertaining to judges, could be used to test theories about the

influences on judicial behavior. The posterior distribution of β , the vector of coefficients in the regression of predictors on judge preference estimates, allows us to do exactly that.

4.2.3 Selective Judge-Specific Observation Effects

The next model estimates the effect of a judge's own country's observations on outcomes of preliminary references. In Carrubba, Gabel, and Hankla (2008), observations are assumed by necessity to affect all of the hearing judges equally. Likewise Garrett (1995) assumes that all judges are equally responsive in tailoring their rulings to the anticipated preferences of powerful member states. Kilroy (1999) tests, again assuming uniform judge responses, the effects of several combinations or ad-hoc coalitions of governments making observations / interventions. All of these findings are based on the assumption that judges respond uniformly to all observations. By contrast, the following model allows us to test whether under specific conditions judges respond differently to some observations than others.

One obvious selective condition, which I test below, is the position of their own country's government in those cases where it submits an observation. This finding could plausibly be interpreted as one of national governments controlling or communicating how they wish the judge to vote – rather, for the same reasons judges may serve in a Chamber on cases to which their national government is a party: they are more familiar than the other judges with the national laws and legal systems. They may furthermore, especially in preliminary references, be the only judge in the chamber to speak the language of the case as a mother tongue. Of course, the stronger claim of responding to a government's indicated preferences is possible as well, but it is by no means the only reason that judges might respond differently than their peers on the Chamber to their own government's observations.

A $(k \times j)$ matrix is constructed where entries D are 1 when a judge's (columns j) member state submits an observation on the same side as the Commission in case k , -1

when a judge's member state submits an observation against the Commission's position. This type of model which estimates an effect conditionally for some subjects on some items is typically called "differential item functioning" and implies the following model:

$$\omega_{jk} = \Phi \left(a_k - \frac{\sum_{j=1}^{\#g} \theta_j | \theta_j \in \theta^g}{\#j^g} - \delta_{jk} D \right) \quad (4.1)$$

where a is still predicted by γ times case covariates c that affect the whole panel, and θ by judge covariates x that affect the judge on all cases with strength β .

The number of nonzero entries in D ranges (by judge) from 0 to 95, with a median and mean both around 25. It assumes that observations for and against the Commission have the same weight. Not surprisingly, controlling for these observations increases slightly the precision of the estimates of judges' positions, shown in Figure 4.7. The order of a few is changed, but in broad strokes the results are the same.

Hypothesis: Own-Country Observations Observations from a judge's own government sway opinion independently and more strongly than those from other governments. A *negative* value of δ is evidence of responsiveness in the expected direction given the coding of D . (An observation *with* the Commission, coded +1, selectively decreases the judge's position from the case position in the latent space. An observation *against* the Commission, coded -1, increases that distance.)

I first present the model's new estimates of judge positions θ , having controlled for the possibility that the heterogeneity revealed in figure 4.3 on page 123 could be a result of this selective differential response to observations. Figures 4.7– 4.9 show that this is not the case. Controlling for individually selective response to observations, judges show a similar degree of heterogeneity of preferences. Figure 4.9 shows these same results estimated using

the chamber-median sampler, and reveals a specific type of multimodal uncertainty that can arise in data-augmentation settings.

Figure 4.7: Estimated ECJ judge positions (θ), controlling for the presence and direction of their own governments' observations in cases.

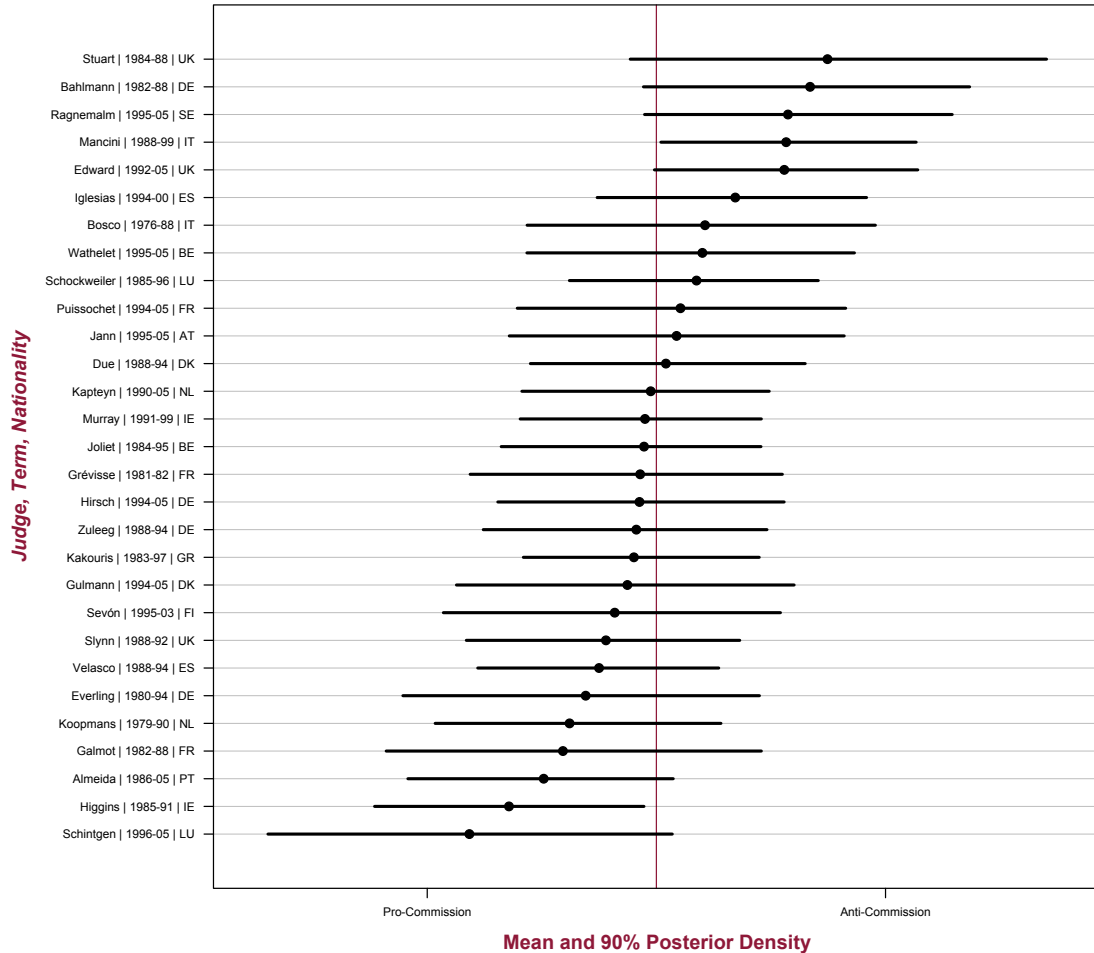
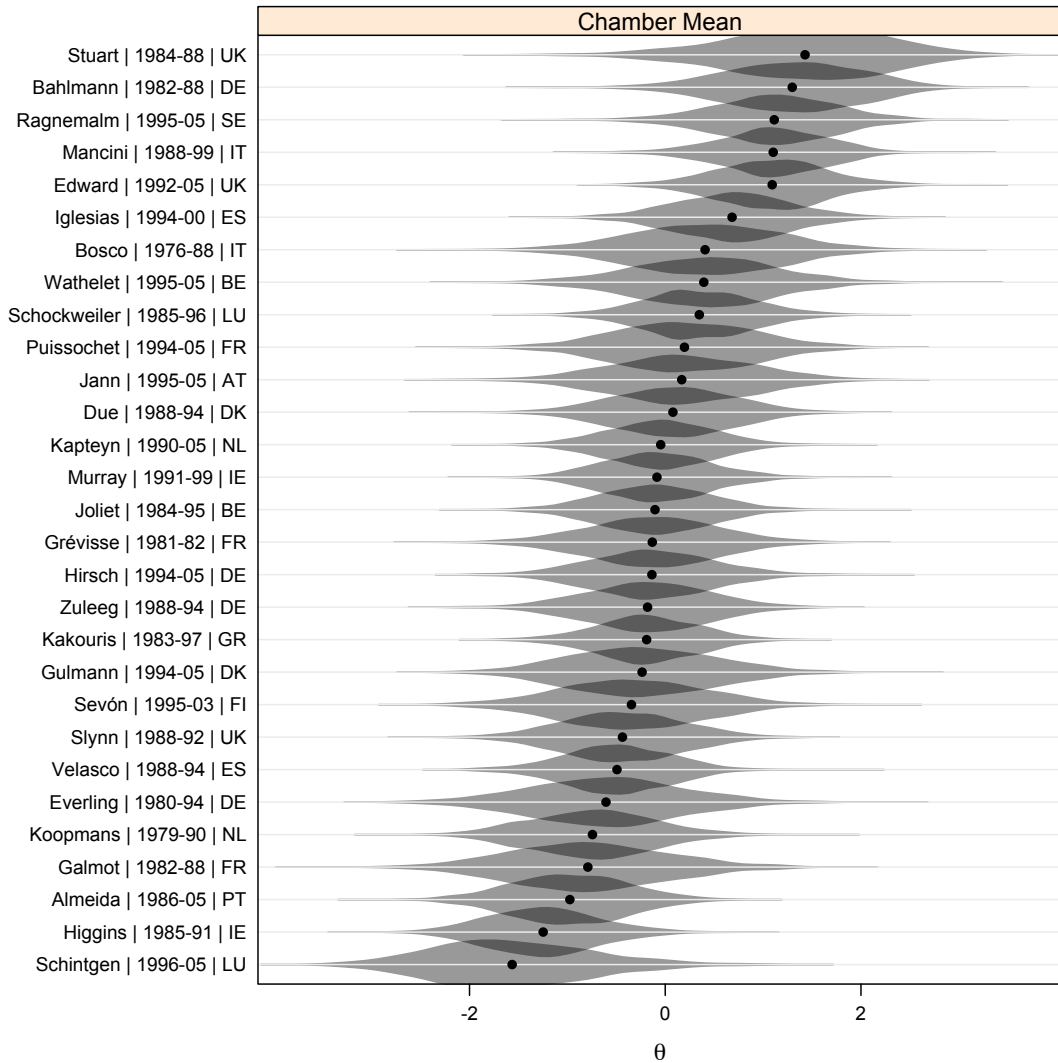


Figure 4.9 below shows the results for judge parameters for the same model, on the same data, using the *chamber-median* ECO-IRT sampler. The difference in allocation function reveals a particular kind of uncertainty in the model: where for large numbers of cases different judges were the median in the chamber.

Figure 4.8: Violin plot of chamber-mean estimated judge positions (θ) accounting for own-government observations' effect δ .



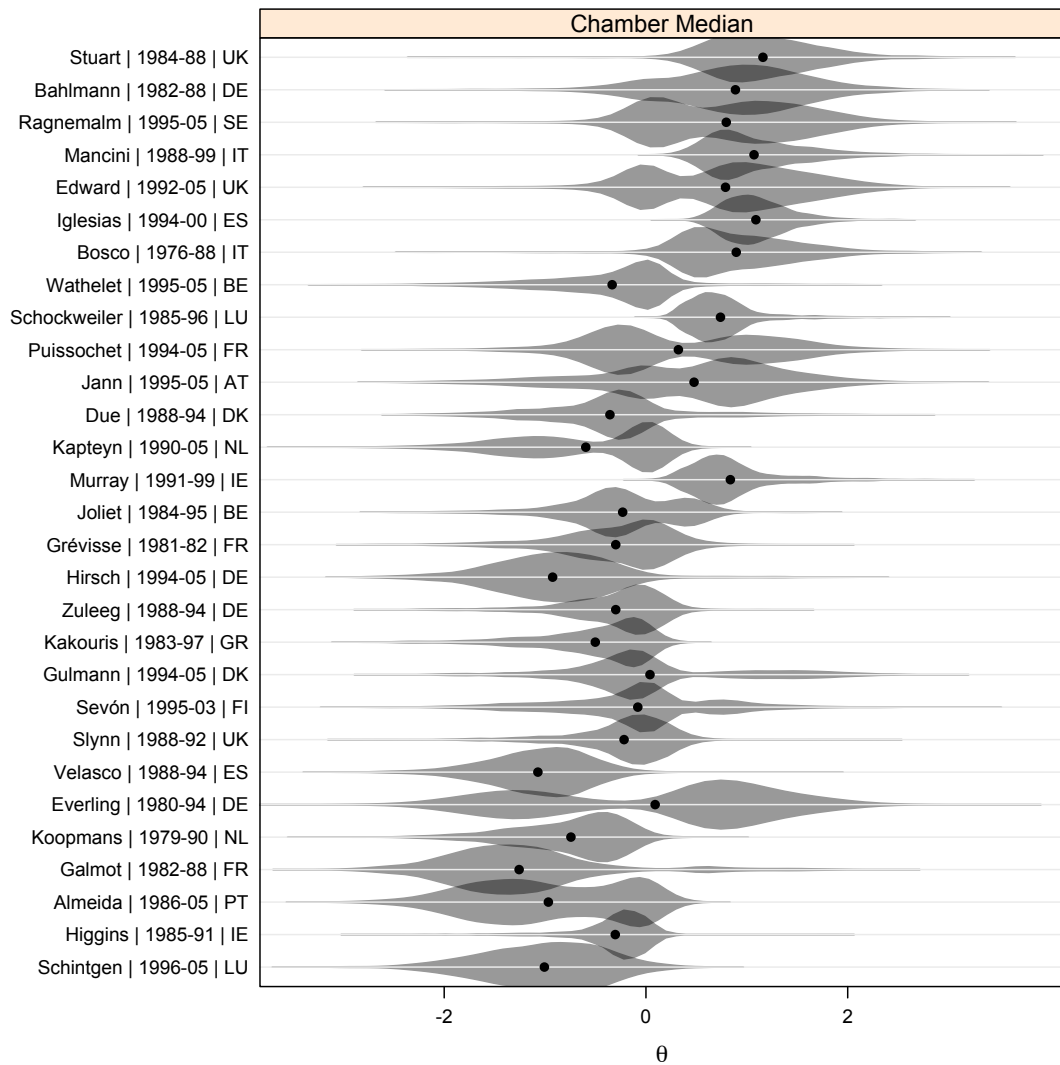
In general the chamber mean sampler smooths over these alternatives presented by the permutations of chambers in the data. Both produce accurate predictions in 73% of cases when tested with saved case parameters, 57% (chamber mean) and 59% (chamber median) when tested with G and posterior γ ; and 64% and 65% when tested with G , γ , D , and δ . Compared to the performance of the ECO-IRT model at parameter-recovery and predictive accuracy, discussed in section 3.3.5 on page 106, the it is no surprise that accuracy falls somewhere in between the randomly-constituted 3- or 5-member chambers and the more stable set of possible chambers: the distribution of cases to judges appears less than purely random, but with more permutations (296) than the simulations (50).

It is possible that the model is recovering, as did the simulations using stable chambers, an alternative distribution of judge preferences that predicts the data given the permutations of chambers. It would be unwise to take the estimates in figure 4.7 very far from the context of the model. For this reason, I do not do a two-step estimation procedure for the predictors of judge positions; this would throw out the uncertainty and admit potential bias if, for example, I purported to predict a point estimate such as the posterior mean, using covariates. The hierarchical model ensures that uncertainty in θ is propagated through to the estimates of β .

The purpose of estimating the case-judge-specific effect δ was to test the hypothesis that national governments influence their judges through the observations they submit. Indeed, this is the case, as the distribution of δ and β in Figure 4.10 shows.

Figure 4.10 presents evidence that individual judges may have specific, contextual responses to certain observations. Above I suggested several reasons that observations from one's own home country's government might produce an effect distinct from that of the "piling on" of observations from other governments. It may be a greater understanding of national law and legal system, which the government helpfully clarifies and the judge is

Figure 4.9: Violin plot of chamber-median estimated judge positions (θ) accounting for own-government observations' effect δ , using chamber-median sampler. Because many contain multiple modes and to facilitate comparison with Figure 4.8, points are ordered by the mean of the chamber-mean estimate.



able to convey to the rest of the chamber. It may be a matter of language, especially in preliminary references where the judge may be the only native speaker of the language of the case. It may also result from a concurrence of preference between the national government and the judge, the former having been revealed in the observation.

To interpret the results for δ , the specific effect of the judge's home government's observation, consider the latent space. The distance between a judge and a case produces an outcome in favor or against. The effect of δ is to perturb the judge's distance from the case, all else equal. Suppose a case is somewhat pro-integration and two governments oppose it. A judge's own government presents an observation in favor of the Commission, *reducing* the latent distance and increasing the probability that the judge votes in favor of the Commission, while allowing his own underlying preference to remain unchanged. In this sense it "controls" for the unusual presence of home-government observations.

The wide, overlapping bands in Figure 4.3 understate just how much information the model has actually recovered from the permutations of chambers. Although we have not observed a single within-chamber judge-vote, the ordering and position of judges relative to one another is described by the pairwise comparison of their marginal distributions. The matrix of these pairwise comparisons is shown in Figure 4.11.

Figure 4.10: Prior predictors β , δ , and γ : judge positions, the effect of home-government observations, and chamber effects of all observations.

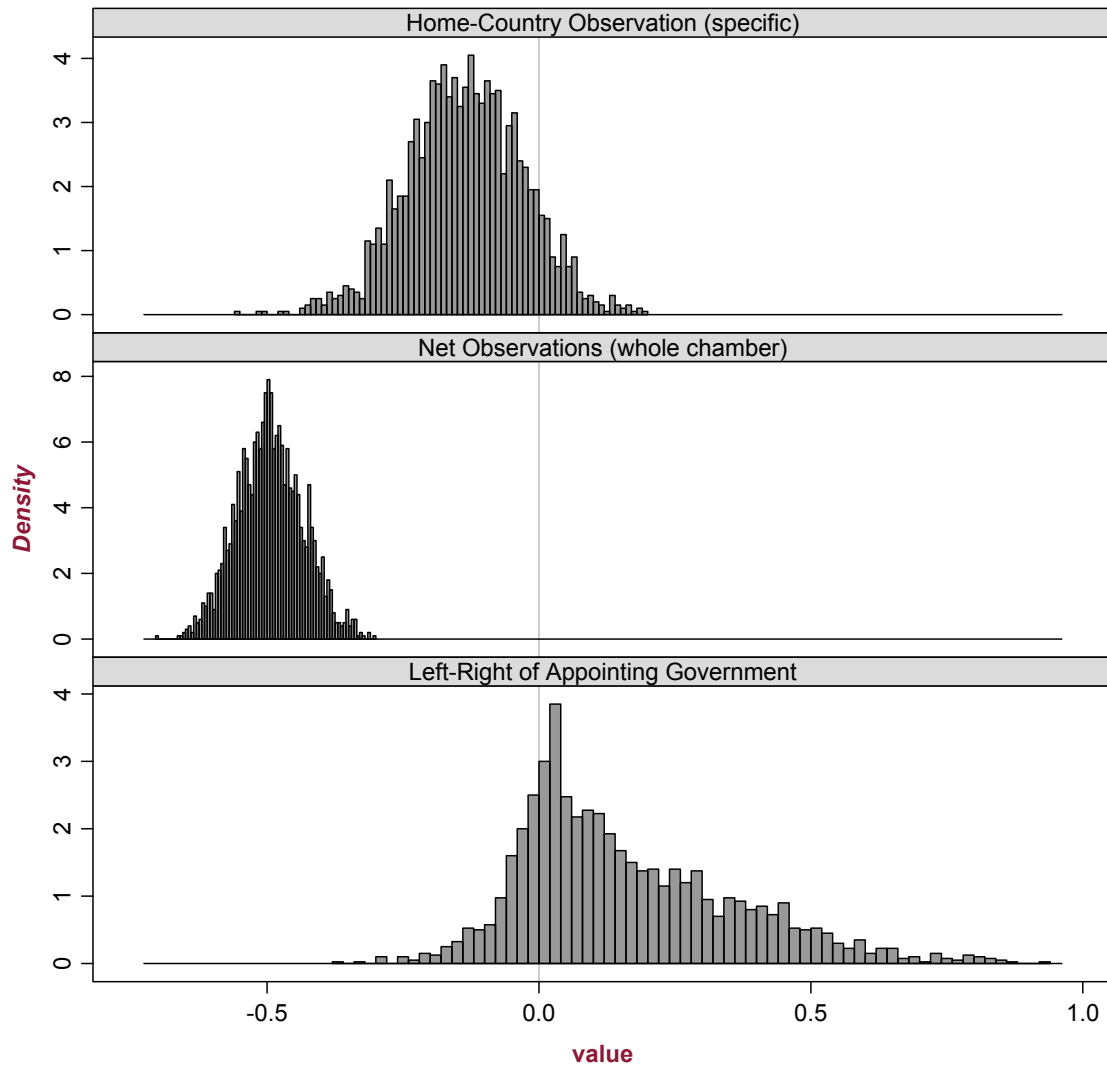
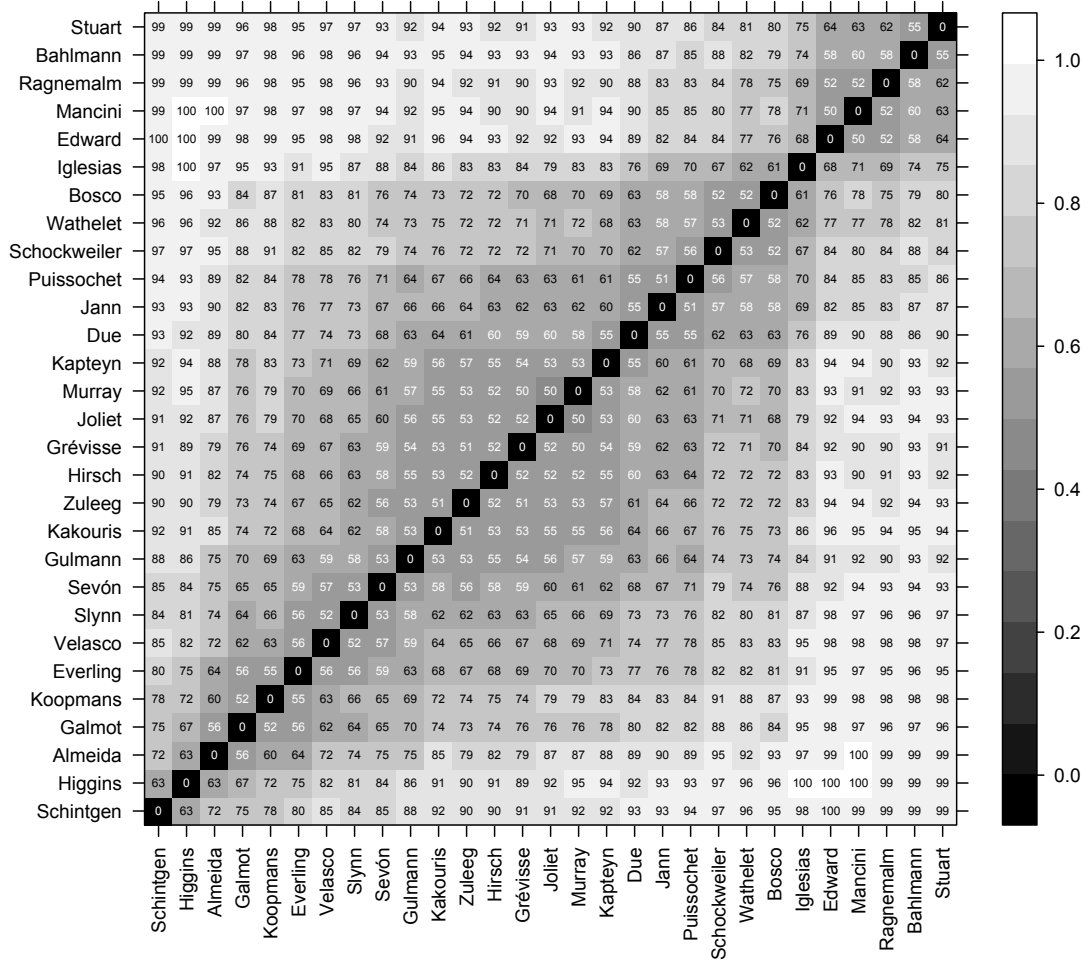


Figure 4.11: The matrix of pairwise comparisons of judges' preference estimates. Numbers indicate the degree of certainty of the ranking of the row relative to the column. For example, the model is 63% certain that Schintgen lies to the left of Higgins and 80% certain he is left of Everling. Even though both ends of the joint distributions in Figure 4.7 – Judges Schintgen and Stuart – overlap each other, the model is 99% certain that Stuart is to the right of Schintgen.



Convergence

I presented graphical convergence diagnostic plots for the first, most random simulation in Section 3.3.1, and suppressed the subsequent repetitive plots. It is worth showing the behavior of the median sampler with the actual data – as before, a shorter run of three distinct chains with different starting values. For the parameters showing multiple modes, notice that all three chains visit the same regions. The results presented in Figures 4.9 and 4.10, and discussed in the text are from 50,000 iterations of a single chain, retaining every 50th sample, discarding a burn-in period of 5000 iterations – an extremely conservative choice given the evident mixing of the chains.

Figure 4.12: Trace plot of 3-chain chamber-median sampler with judge-specific δ , selected parameters.

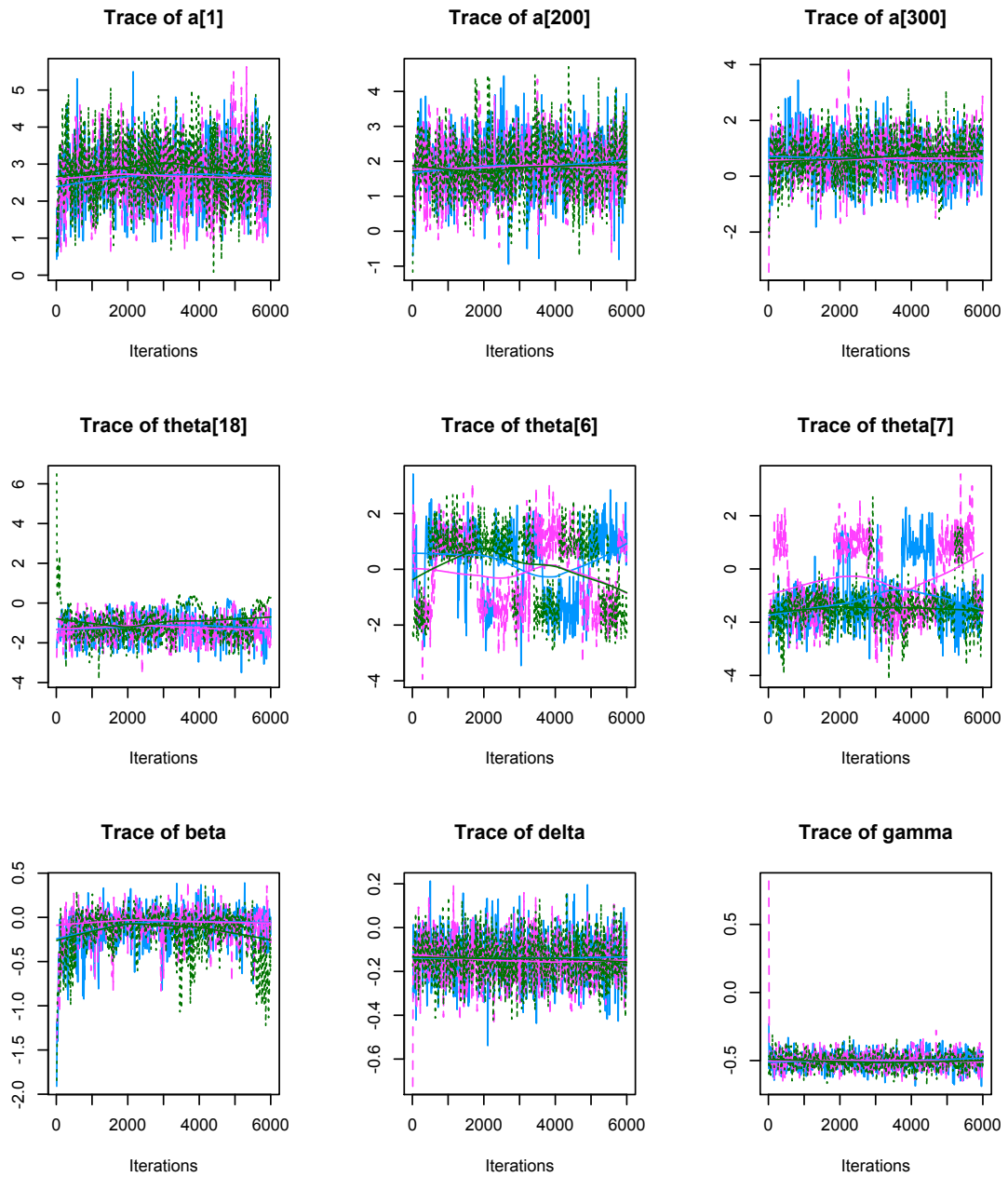
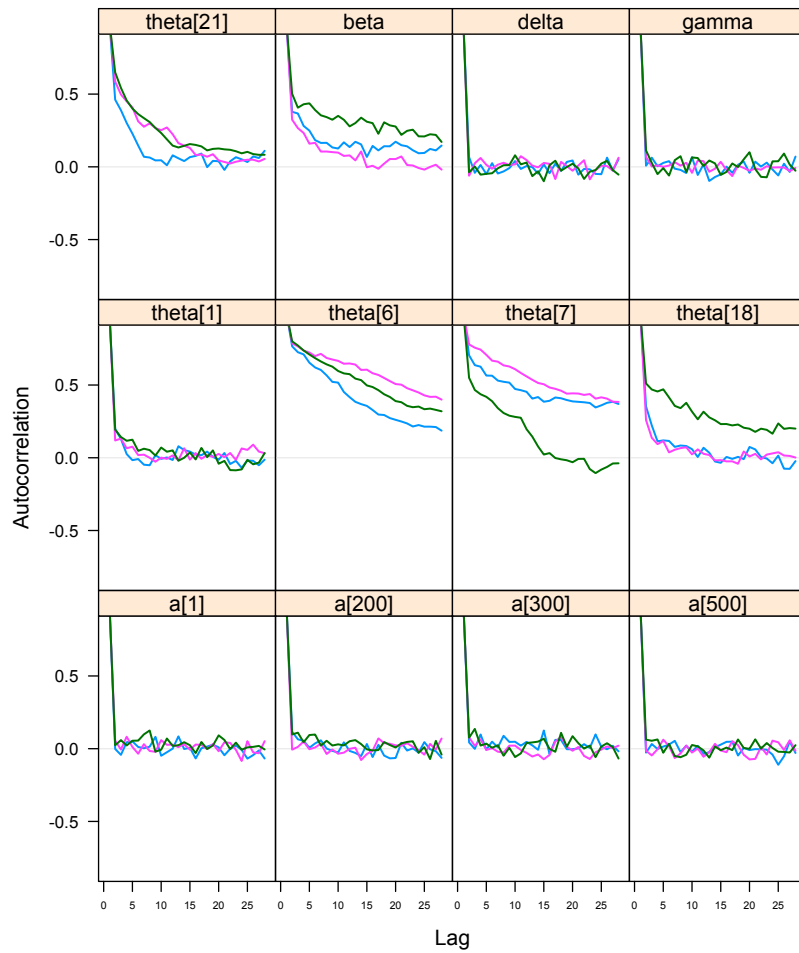


Figure 4.13: Autocorrelation plot of 3-chain median sampler with judge-specific δ for 6,000 iterations, retaining every 10th sample.



4.3 Summary

As discussed in Chapter 2, the ECJ is a powerful institution affecting policy in the European Union. Because of its institutional insulation from the member states and the other supranational institutions – the Commission and the Council – it has the capacity to affect policy with few constraints. Many scholars believe that it has advanced integration independently and counter to member states’ preferences. Moreover, it has the means to do so, through the doctrines of direct effect and supremacy; and it has the opportunity, through a steady stream of preliminary references from national courts with litigants seeking European remedies against national laws. Having means, opportunity, and institutional insulation though do not imply that the individual judges have a motive to pursue integration against the will of the member states. It is therefore surprising that so strong a claim could be made as that of Hartley, which I restate:

“One of the distinctive characteristics of the European Court is the extent to which its decision-making is based on policy. By policy is meant the values and attitudes of the judges – the objectives they wish to promote. The policies of the European Court are basically the following: 1) strengthening the Community (and especially the federal elements in it); 2) increasing the scope and effectiveness of Community law; 3) enlarging the powers of Community law. They may be summed up in one phrase: the promotion of European integration” (Hartley, 2007, 76).

The same basic claim is either stated or implied in the work of Carrubba, Gabel, and Hankla (2008); Alter (2001, 1998, 1996) – that judges possess not only the means and opportunity but also the *motive* to decide cases in favor of integration. The claim has two parts: first, judges’ motivations are homogenous (they all prefer integration to roughly the

same degree) and second, they develop this preference endogenously on the court, and their federalist predilections are unalterable and unpredictable.

In response to the first question, Do judges reveal observable patterns of heterogeneous preferences? Yes, though as in most item-response models, the positions of adjacent judges are sometimes ambivalent. Two types of null result were possible: the distributions could exhibit greater, or even total, overlap; or they could be overly sensitive to the prior information. Instead, the preference estimates of the judges is determined by the data rather than the prior distributions.

The second part of the claim that judges have a common preference for integration is more subtle. It suggests that their behavior would reveal such motives regardless of the preferences of the member states. As I discussed in section 2.2.1 on page 46, if this were true, there would be no systematic relationship between judges' behavior or revealed preferences and the preferences of member state governments that appoint them. My findings do not support this claim. We can predict the dispositions of judges based on other information. Consistent with expectations, the median left–right position of the government that initially appointed each judge is a (weak) predictor of judges' preference estimates. An alternative measure of government positions based on the median party's position on the EU and trade liberalization, did not predict the judges' positions at all. In addition, do judges respond more strongly to observations submitted by their own home governments? Again, evidence supports the claim that judges favor the position of the observation of their own governments, whether supporting or opposing the Commission, over and above other governments' observations.

The model here offers an additional way to test the effects of government observations, with microfoundations that account for the heterogeneity of judges' preferences, and the organization of the court into chambers. As figure 2.5 on page 61 shows, most of the work of the court is in chambers, so it is increasingly important to account for the composition

of the chambers and how outcomes might be affected by different judges, since it is clear that they are not interchangeable.

Most normative and positive theories about constitutional review are based on the incentives presented to individual judges. Institutions are designed to safeguard independence, but constraints such as the threat of override and the threat of removal (or non-reappointment) also encourage more responsive behavior. Theories about the ECJ have been stymied by the ecological problem of collective decisions, which is a common attribute of “independence” especially for constitutional courts. Greater institutional insulation is a necessary but not sufficient condition for independent behavior. It is equally plausible that the institution is insulated and unconstrained in order to maximize the policymaking capacity of judges whose ideology reflects that of member state governments.

The model developed here uses the organization of the court into chambers of various compositions to infer individual judges’ preferences. To date, little research has conceptualized the court as a collection of individuals each with interests and preferences. The ECO-IRT model developed here offers new, more rigorous tests for existing theoretical hypotheses about the ECJ’s deference to certain actors and preference for integration. The complex interactions of national politics, integration, and enlargement offer a rich vein for future research.

Finally, and most broadly, I would speculate that some of the ECJ’s design features – above all the multiple sources of appointment – that it shares with other constitutional courts probably has similar effects in other settings. Whoever makes appointments can be expected to appoint like-minded individuals as judges; judges, in turn, appear to behave in both representative and responsive ways.

Chapter 5

Institutional vs. Behavioral Independence

The primary puzzle addressed by this work is the relationship between institutional and behavioral independence. Scholars focusing on institutional independence have largely overlooked the behavioral consequences of providing judges with the means and opportunity to exert their own policy preferences. This oversight stems from a deliberate agnosticism regarding the preferences of judges, and a focus on features that would induce a departure from true preferences. The implication there is that judges should be unencumbered from implementing their own policy preferences. Scholars focused on the ECJ have assumed that judges share a particular policy preference, for supranational authority and more integration.

To what extent do the guarantees of institutional independence for constitutional courts – a normative means to bolster the rule of law – empower judges to exhibit behavioral independence? One of the major empirical hurdles to assessing judicial independence is its measurement. In general judicial independence is indicated by 1) the presence of constraints on judges through term limits, removal, salary, budget, and other features of the court itself, and 2) the frequency of compliance, noncompliance, and override of judgments of the court. But these two metrics confound another – in particular

a constrained and unconstrained court that both enjoy compliance are observationally equivalent. One cannot tell whether the court is exercising its true preferences and the government complies because it wants to show respect for the rule of law, or the court is responding to constraints that induce a government-friendly judgment. Without taking seriously the policy preferences of judgments and governments, institutional and behavioral independence remain inextricable. We cannot infer from the absence (presence) of constraints or the frequency of (non)compliance anything about the relationship of the preferences of the court relative to the government. “Dependent” and “independent” behavior are equivalent unless the policy preferences of both government and judges are specified.

The normative basis for institutional insulation is to ensure that a court does not face (or at least respond to) pressure to rule in a particular way. In other words, insulation or cover seeks to remove the possibility of inducing a change between the true preferences of judges and the revealed preferences or behavior.

I developed this argument in the context of the European Court of Justice, which provides both a good example of a court possessing the means and opportunity and institutional cover to act unconstrained, but also one that is subject to strong claims about the *motive* of judges to exhibit behavioral independence of a particular type. Most scholars of the European Court of Justice tend to believe that its judges, possessing the means and opportunity to advance integration, also possess a motive to do so. The logical fallacy here is that the cover provided by the institution implies the behavioral independence of the judges. Even if this were true – if judges’ behavior were completely unconstrained and independent – it does not imply anything about the underlying preferences of the judges. Most emphatically, it does not imply a Euro-federalist agenda. Nevertheless strong claims have been advanced about the independent, integrationist preferences of ECJ judges.

One feature that ought to correlate meaningfully with judges' preferences is the preferences of whoever appoints judges. In the judicial independence literature diverse sources of appointment are generally associated with greater independence (a normative good), and most constitutional courts have some degree of this feature. Therefore, selection should matter even more to member states, and they should want to choose ECJ members with preferences reflective of their own – even more so because of institutional isolation.

In large part, previous research on the ECJ, and other work on judicial decision-making, is thwarted by one of the features that provides cover for judges' behavior. Like many courts, ECJ judgments are issued collectively. Unlike, for example, the United States Supreme Court, no one knows how individual judges voted on any case. This feature reinforces the claim that ECJ judges are predisposed toward integration – but I argue in Chapter 2 that the institutional cover for Europhiles applies conversely perhaps even more, by masking the dissents of minority Euroskeptics under the “unanimous” collegial decisions. However, teasing potential anti-integration dissents out of the data requires some way to map the individual contributions to each decision.

Fortunately, the ECJ also provides unique leverage on the individual contributions to decisions. Its way of dividing work among judges in “Chambers” means that the actual deciding judges are known – on any given case, they are a subset of the full court, and to some extent random. The specific nature of case participation determines how well the model can pick up on individual judge differences.

In Chapter 3, I develop a model to account for decisions taken by subset groups like the Chambers of the ECJ, in which individual member votes are not revealed. However, the design of the participation matrix means that it applies to a broader class of subset decisions; and the outcome matrix also allows for selective revelation (some votes revealed). In addition, I show how the decision rule within chambers can also be modeled explicitly, and develop samplers for both a mean and median function representing

consensus and strict majority rule. The model developed in Chapter 3 enables inferences about the ECJ, but should be portable to other contexts as well. In Chapter 4 I extend the model further by modeling selective responsiveness to case attributes.

Using observed data from the Court of Justice, comprising thousands of preliminary references, and almost 300 distinct combinations of hearing judges, I show in Chapter 4 that judges' preferences are not uniformly pro-integration and in fact correlate as expected with the preferences of the member-state governments that appoint them. In the present work, I add precision to the finding of Carrubba, Gabel, and Hankla (2008) that judges respond in a particular way to government observations. In fact, I show that while this is true overall, judges seem to pay particular heed to the governments of their home countries. The statistical machinery used in section 4.2.3 has myriad potential further applications where judges might respond selectively to some governments more than others.

The modeling strategy used here has many future applications and refinements. Potential applications include not only the ECJ but other courts, including the British House of Lords, as in Robertson (1982), the Courts of Appeals, as in Hausegger and Haynie (2003), and the United States Courts of Appeals, as in Sunstein, Schkade, and Ellman (2004), all of which use some degree of random subset chambers or panels to decide cases, but which have not benefitted from an individual judge-level model of decisions. It may also be applicable to institutions in which published dissent is rare but observed sometimes, and an individual-level model of heterogeneous preference would make sense for decisions that would otherwise have to be discarded from the analysis.

In sum, the data, model, and results show that the ECJ's institutional independence has not necessarily led to the behavioral independence that ECJ scholars have assumed the Court has engaged in, pushing for greater integration. Instead, because judges are institutionally shielded, member state governments appear to appoint judges with

preferences similar to their own. The judgments result not from the collective application of a common preference for integration, as has been commonly assumed, but from the majority decision of judges with different policy preferences.

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