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# Supranationalism, constrained? Locating the Court of Justice on the EU integration dimension

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[journals.sagepub.com/home/eup](https://journals.sagepub.com/home/eup)**Michal Ovádek** 

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## Abstract

The European Court of Justice is generally known to use its institutional role to advance European integration. Scholars have disagreed, however, on the extent to which the Court fears and anticipates negative reactions to its rulings from the Member States. Without a possibility to access internal deliberations, such strategic behaviour by the Court makes it empirically challenging to identify its preferences relative to other actors. I tackle this problem using an item-response theory model designed to estimate institutional preferences from cases concerning procedural and competence disputes. I find that the Court leans on average towards more supranational positions, while also systematically adjusting its rulings in response to Member States' preferences. Controlling for these effects reveals the European Court of Justice to be even more partial to supranationalism than the pattern of its decisions suggests.

## Keywords

European Court of Justice, ideal point estimation, item-response theory, supranationalism

## Introduction

How pro-integration is the European Court of Justice (ECJ)? Much of political and legal literature portrays the ECJ as being biased towards outcomes that favour

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more European integration at the expense of national competences (Garben, 2015; Mattli and Slaughter, 1998; Moravcsik, 1999; Pollack, 2013: 1265; Rasmussen, 1986; Vauchez, 2012). These allegations are hardly groundless, even if legalists reject that judges would actively favour some political outcomes over others (Burley and Mattli, 1993; Shapiro, 1980). Ideology was shown to exert an important influence on the decision-making of the United States Supreme Court (Segal and Cover, 1989; Segal and Spaeth, 2002). Moreover, because peak courts' prominent place in institutional systems provides them opportunities to wield considerable power over legislative and constitutional direction (Davies, 2016; Dyevre, 2010), they are, similarly to political actors, not indifferent to how influence is distributed in the policy-making process (Jupille, 2004).<sup>1</sup>

Seeing the potential for courts to shape political outcomes, other institutional players seek to constrain judicial decision-making to preserve their own power. The extent to which courts' discretion has been effectively contained by political actors has fuelled considerable debate in the European Union (EU) context. Whereas some scholars see few to no political constraints on the ECJ (Davies, 2016; Mattli and Slaughter, 1998; Pollack, 1997: 118; Scharpf, 2012; Sweet and Brunell, 2012), others found threat of override, by legislative or Treaty revision means, and non-compliance, to constitute effective limits on judicial behaviour in the EU (Carrubba et al., 2008, 2012; Castro-Montero et al., 2018; Larsson and Naurin, 2016). A number of scholars reached a middle position (Blauberger and Schmidt, 2017; Martinsen, 2015b; Wasserfallen, 2010). Martinsen (2015a: 236) notes that 'judicial influence is not a question of whether but a question of degree'.

A well-known empirical challenge in this strand of scholarship is finding evidence of judicial restraint when courts are capable of strategic behaviour. Observing, as in the EU, that override and non-compliance are relatively rare is in itself insufficient to establish their irrelevance. The Court might be strategically adjusting its behaviour precisely to avoid actions that would damage its reputation or result in policy reversal (Bailey, 2007; Carrubba et al., 2008: 436). As a result, we may underestimate at once the magnitude of the ECJ's true preferences – which are generally agreed to favour advancing European integration – and the existence of political constraints on judicial discretion.

In this study, I attempt to reveal the ECJ's institutional preferences alongside and relative to the Member States, the Commission and the Parliament, while taking into account the possibility that the Court decides strategically, with potential Member State reactions on its mind. To this end, I collect a new dataset of ECJ cases concerning interinstitutional disputes relating to procedural and competence issues. I scale the positions of all actors using an item-response theory (IRT) model to obtain estimates of their ideal points along the underlying dimension of conflict which I validate as preference for supranational (intergovernmental) institutions. I find that the Court leans on average towards more supranational positions, while also systematically adjusting its rulings in response to the Member States' preferences. Controlling for these effects reveals the ECJ to be even more partial to supranationalism than the pattern of its decisions suggests.

## Institutional preferences and judicial discretion

To understand what institutional preferences of the ECJ look like, I begin from the procedural-political framework proposed by Jupille (2004). Jupille argues that actors inhabiting a certain institutional environment have preferences not only over the policies produced by the rules governing their interactions, but also about the procedures themselves, because they are instrumental in shaping the desired substantive outcomes. In the context of the EU, the various procedural rules for enacting legislation are set out in the applicable Treaties. Each policy area is associated with a given legislative procedure and in some cases different procedures are used within the same policy area. Because different procedures accord actors different degrees of influence over legislation (policy), procedural variation incentivizes conflicts over the choice of procedure, as actors seek to maximize their own influence (Jupille, 2004: 39).

In these interactions, which take place predominantly between the Commission, the Parliament and the Council/Member States, the ECJ has formally the role of an arbitrator. From a legalist perspective, the Court ensures that legislation is enacted in accordance with an appropriate legal basis which determines the applicable procedures. If a procedural dispute reaches the Court and it finds that a wrong legal basis was chosen, the contested act is struck down (Engel, 2018). Apart from being able to annul legislation, the ECJ wields the power of interpretation of what acts can be adopted under the various legal bases differentially distributing power among EU actors. As the Court proclaimed itself, this is a question of 'constitutional importance' (Opinion 2/00, para 5), because judgments in legal basis cases interpret choices – or supplant the lack thereof – made by the Member States when creating the Treaties. The political importance is compounded by the fact that Member States' veto rights are frequently at stake. For example, the Court's acceptance of Article 118a of the Treaty establishing the European Community (Maastricht version) as an appropriate legal basis for working time policies precluded the United Kingdom (UK) from vetoing the domestically controversial legislation. Loss of competences in social policy fuelled in regular intervals Conservative grievances about EU overreach until the Brexit referendum in June 2016.

Jupille (2004: 73) is agnostic about what drives the Court's decisions but admits that it should be subject to the same incentives as other actors. Assuming the Court is indeed interested in increasing its influence over policy, we should expect it to prefer outcomes shaped by legislative procedures that follow a supranational rather than an intergovernmental logic. There are two main reasons for such a preference that are consistent with Jupille's influence maximization hypothesis. First, under the comparatively most supranational, and by now ubiquitous, codecision procedure, the ECJ needs to be aligned with only one of the three main players to prevent legislative override (Dyevre, 2010: 309) or modification (Martinsen, 2015b: 1631) of its case law. Second, legislative outcomes that deepen and widen the reach of EU law – which are more likely under more

supranational procedures – also extend the influence of the Court. Where EU legislation leaves a larger regulatory imprint, the ECJ is more likely to be called upon for interpretation through the preliminary reference system, through which the Court exercises the bulk of its judicial influence (Sweet, 2004; Weiler, 1994). Note that this second motivation of supranational institutional preferences is highly consistent with established accounts of ‘integration through law’ and the constitutionalization of EU law (Burley and Mattli, 1993; Rasmussen, 2014; Sweet and Brunell, 1998, 2012; Weiler, 1991).

Apart from institutional motivations, the ECJ might hold a relatively integrationist ideal point because its judges could simply be ideologically more pro-European than the average member of the EU establishment. On the one hand, governments appointing ECJ judges are constrained in their selection by the availability of legal professionals interested in EU law, which likely biases the eligible sample of candidates (but see Malecki, 2012). This soft constraint has become more rigid with the entry into force of the Lisbon Treaty which set up a special panel tasked with vetting judicial candidates. On the other hand, governments should have an incentive to appoint judges who are close to their integration ideal point (Kenney, 1998: 128). A recent empirical study does not, however, support this hypothesis (Hermansen and Naurin, 2020). Member States appear more interested in judges’ economic views and their professional record than their integration preferences.<sup>2</sup> Regardless of nominations, Vauchez (2012) has argued that socialization processes at the ECJ promote a constitutional outlook on EU law, as well as judicial independence. The retention and transmission of institutional norms is also supported by a caste of largely pro-European legal clerks (Kenney, 1998, Zhang, 2016).

We begin to see the main contours of a model of the ECJ’s institutional preferences. As an influence maximizing actor, the Court should prefer more supranational procedures over more intergovernmental ones. Appointment and socialization processes are more likely to amplify than dampen these institutional preferences. The most contentious issue in this model concerns the mechanism by which the Court’s ideal point on a latent integration scale translates into observable judicial behaviour. Can the sincere, pro-integration preferences of the Court be observed in practice? Scholars have given different answers to this question. According to one school of thought, the Court is effectively unconstrained in its decision-making and can therefore freely pursue its own agenda to the fullest extent (Davies, 2016; Kelemen, 2012; Mattli and Slaughter, 1998; Pollack, 1997: 118; Scharpf, 2012; Sweet, 2004; Sweet and Brunell, 2012). Kelemen (2012) lists exhaustively possible court curbing measures, including resource punishment and jurisdiction stripping, but considers them infeasible due to high thresholds for both legislative (qualified majority voting (QMV) or unanimity) and constitutional (unanimity) override. In the case of competence disputes, to fully overturn or modify an ECJ interpretation of a legal basis, a Treaty amendment would be necessary, requiring unanimous agreement of the Member States and subsequent ratification by national parliaments or referendums.

What we can reductively call the ‘neofunctionalist’ line of scholarship has been challenged by a more ‘intergovernmental’ perspective of the Court’s judicial behaviour. Carrubba et al. (2008) claimed that threats of non-compliance and legislative override constrain the ECJ’s decision-making. The evidence they presented was, however, disputed by Sweet and Brunell (2012) who argued that precisely the opposite conclusions were to be drawn, an interpretation Carrubba et al. (2012) did not share. More recently, Larsson and Naurin (2016) and Castro-Montero et al. (2018), using larger datasets, rejected the hypothesis that the Court was not influenced by the threat of override. In response to criticism of the standard model of constraints, Larsson and Naurin (2016) qualify the theory by conditioning court behaviour on availability of information about principals’ preferences. They found that Member States exert the largest constraining effect on ECJ decision-making when override can be enacted using QMV. Castro-Montero et al. (2018), for their part, focus on constitutional rather than legislative override and highlight the importance of timing: the ECJ is more vulnerable to constitutional override when the costs of convening an intergovernmental conference (IGC) have already been committed and the threat of Treaty revision ‘punishing’ the Court becomes more credible.

For the purposes of modelling the ECJ’s institutional preferences, I take seriously both strands of literature. I assume the Court is likely to have sufficient discretion to pursue pro-supranational outcomes, while being risk-averse enough not to ignore Member State preferences entirely. I presume the threat of constitutional override or a similar court curbing mechanism constitutes a deterrent, even if actual override appears unlikely, due to the large amount of uncertainty about actors’ preferences and their willingness to pursue them (Larsson and Naurin, 2016), which is compounded by logrolling (Carrubba et al., 2012: 215). In light of these considerations, I expect the Court to be more likely to rule against the Member States when they are ideologically divided and therefore less likely to agree to rein the ECJ in. In addition, due to information scarcity I expect the Court to be sensitive to political actors communicating their preferences directly in judicial proceedings. Finally, consistent with Castro-Montero et al. (2018), I anticipate that when an IGC is already ongoing, the Court will be less likely to rule against the Member States.

## **Data**

In order to estimate the ideal point of the ECJ in a common space with other EU actors, I compile a dataset of cases for which there is enough information to identify the underlying dimension of conflict.<sup>3</sup> These are so-called ‘legal basis’ cases (Bradley, 1988, 2011). This set of cases concerns typically the settlement of interinstitutional disagreements about the scope of EU competences and applicable legislative procedures (Engel, 2018; Hartlapp, 2018; Jupille, 2004). In competence matters in particular, the Treaties can be viewed as incomplete contracts, with the ECJ in charge of residual control rights resolving competing

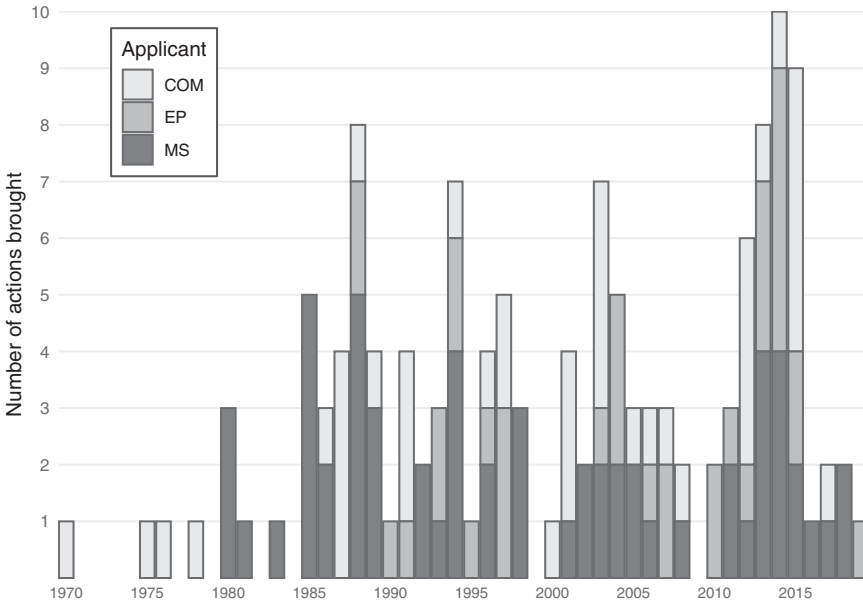
interpretations of the contract where gaps or uncertainty exist (Farrell and Héri-tier, 2007; Jupille, 2007). These cases are therefore naturally more political and less technical than the median ECJ case about the operation of the single market, customs union or agricultural policy, which constitute the bulk of the Court's work.

Almost all competence disputes occur through the annulment procedure in which an applicant challenges, within a three month window, a legal act adopted by an EU institution. If the ECJ finds that an incorrect legal basis was used to enact legislation, the disputed act is almost always annulled (except if there are no procedural consequences). Additionally, under Article 218(11) of the Treaty on the Functioning of the European Union, EU institutions 'may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties'. This rarer procedure is another conduit for judicial escalation of what Jupille (2004) calls 'procedural politics'.

The dataset of relevant court cases is selected in accordance with a set of criteria that each case must fulfil in order to warrant inclusion in the sample. First, I only look at annulment and opinion cases, because in preliminary references the positions of third parties submitting observations are not always described in sufficient detail by the Court and are open to interpretation. Second, the parties to a case must be institutional actors within the EU system, as these are the main protagonists whose preferences we are interested in scaling. Third, only cases concerning the choice of legal basis are eligible. The Court of Justice is tasked with adjudicating the different positions of EU institutions which ultimately forces it to take a side as regards the existence of a competence and the applicable procedure. These choices can be coded as more or less integrationist, which is crucial for validating estimates of actors' ideal points.

This sampling strategy yields 122 cases. For each case I code the (1) applicant; (2) defendant; (3) date of submission; (4) date of decision; (5) court formation; (6) judge-rapporteur; (7) Advocate General; (8) actors intervening or submitting observations and in support of whom; (9-12) the preferred legal basis of the applicant, the defendant, the Court and the Advocate General; (13) contested act or agreement; and (14) party whose legal basis preference is endorsed by the Court ('winner'). Figure 1 shows the number of cases in the dataset by applicant over time. The other variables are broken down in the Online appendix.

What is interesting about the temporal pattern is that despite the number of Member States swelling from nine when the first case was filed to 28 and later 27, the Member States are not pleading significantly more legal basis infringements. Because the Member States are each able to bring disputes before the Court, the Council acts as applicant only very rarely, but it is almost always on the defendant's side in annulment cases as the institution adopting most legal acts. When it comes to the Commission and the European Parliament (EP), both have initiated a steady stream of cases over the years. Prior to the 1980s, Jupille (2004) found that the conditions of procedural politics, notably procedural variation incentivizing



**Figure 1.** Legal basis court cases by applicant and year of submission.  
 Note: COM: European Commission; EP: European Parliament; MS: Member States.

interinstitutional conflict, were not fully present in the EU. My dataset is consistent with this finding.

When it comes to litigation success (see the Online appendix), there are great disparities not only between individual actors but also when comparing the overall group win rate of the EU institutions against the Member States. The Member States win on average only approximately one in four cases, whereas the Commission wins 60% and the EP 68% of the cases they bring. Among repeat Member State plaintiffs, France has the best record and Spain the worst. The most active Member State plaintiff is the UK and its win rate is similar to the Member State average.

Does the basic discrepancy between the success rate of the EU institutions and the Member States automatically mean that the Court is biased? Not necessarily. A distinguishing feature of Member State annulment actions is that they typically relate to being outvoted in the Council, either on content, procedure or both. As a result, when a suit is initiated by a Member State, it likely begins from a loser status quo position. Siding with the already formed majority in the Council should be politically more expedient for the Court, which would explain the low success rate of Member States in legal basis disputes. The same reasoning does not conversely apply to the high success rate of the Commission and the Parliament, however. Rather, Commission and EP challenges force the Court to pick a side, and more often than not, the ECJ goes along with the arguments of the EU institutions in competence disputes.



On its own, the identity of the applicant would be insufficient to robustly scale the preferences of all actors. Fortunately, annulment cases contain also interventions. Any number of actors – from the same set of EU institutional players – can intervene in support of either the applicant or the plaintiff. A major advantage of these interventions is that they explicitly indicate the direction of support, removing need for additional manual coding.

## Ideal point estimation

We can think of each legal basis dispute as an opportunity for actors to cast a vote on a given competence issue. Ideal point models – and spatial models of politics more generally – assume that these votes are to at least some degree an expression of actors’ most desired state of the world. We will call the procedural issues at the heart of each dispute ‘items’. Items effectively elicit responses (votes) from actors that enable us to measure their behaviour.

I estimate the positions of EU institutional actors using a Bayesian ideal point item-response theory (IRT) model. The model takes as input actors’ responses to a set of items and estimates on this basis the ideal position of each actor on a latent dimension. Because legal basis cases offer a well-defined set of items where actors respond to a relatively consistent type of issues – i.e. what degree of supranationalization should pertain to a given legislative area – my focus is on a unidimensional ideal point model along a latent supranational-intergovernmental continuum (but see Hix and Crombez, 2005). Compared to existing efforts in EU studies, which have scaled the voting behaviour in the EP or the Council but not both together (Hagemann, 2007; Hix and Crombez, 2005; Hix et al., 2006; Lindstadt et al., 2011; Lo, 2018; Thomson et al., 2004), a major contribution of my ideal point model is that it estimates the positions of all relevant institutional actors at once and locates them in a common space, including the elusive ECJ.

I code each case as a vote on a given legal basis issue. Actors, including the Court and the Advocate General (AG), either support the judicial action (1) or oppose it (0). Support is expressed either by bringing an action (applicant), intervention in support of another actor, or, for the Court and the AG, granting or rejecting the application. I exclude defendants from the dataset because they have little discretion in deciding how to ‘cast a vote’ in court cases.

An IRT ideal point model is comprehensively described and dissected by Bafumi et al. (2005). The model, along with Bayesian estimation of its parameters, was notably popularized in political science by Jackman (2000) and Clinton et al. (2004). Programmatically, I rely on software developed by Kubinec (2019b) in R and Stan. Although notation used in the literature varies to some extent (I follow Bafumi et al., 2005), a basic two-parameter IRT ideal point model can be written as:

$$Pr(y_i = 1) = \text{logit}^{-1}(\gamma_{k(i)}(\alpha_{j(i)} - \beta_{k(i)})) \quad (1)$$

where the probability of the  $i$ -th response (vote cast)  $y$  depends on the ideal point  $\alpha$  of person  $j$ , the ‘difficulty’ parameter  $\beta$  of item  $k$  and the discrimination parameter  $\gamma$  of item  $k$ . The subscript  $i$  captures the fact that not every person responds to every item, so each response is indexed separately (Bafumi et al., 2005: 172). The main difference between traditional IRT and an ideal point model is that whereas the direction of the discrimination parameter and the ‘ability parameter’ (the ideal point) are constrained in their direction – a correct answer on a test is associated with higher ability and vice versa – in ideal point models, these parameters are unconstrained (Kubinec, 2019a: 6). When a Member State brings an annulment action against the Council in a legal basis dispute it is most often because it was outvoted by other Member States. In such circumstances the plaintiff seeks a more intergovernmental procedure (one that would confer a veto) than the status quo. On the contrary, actions brought by the Parliament typically seek the imposition of a procedure on the opposite (supranational) end of the integration dimension. Unlike traditional IRT, ideal point models allow the same outcome (annulment) to be associated with diametrically different points on the latent scale.

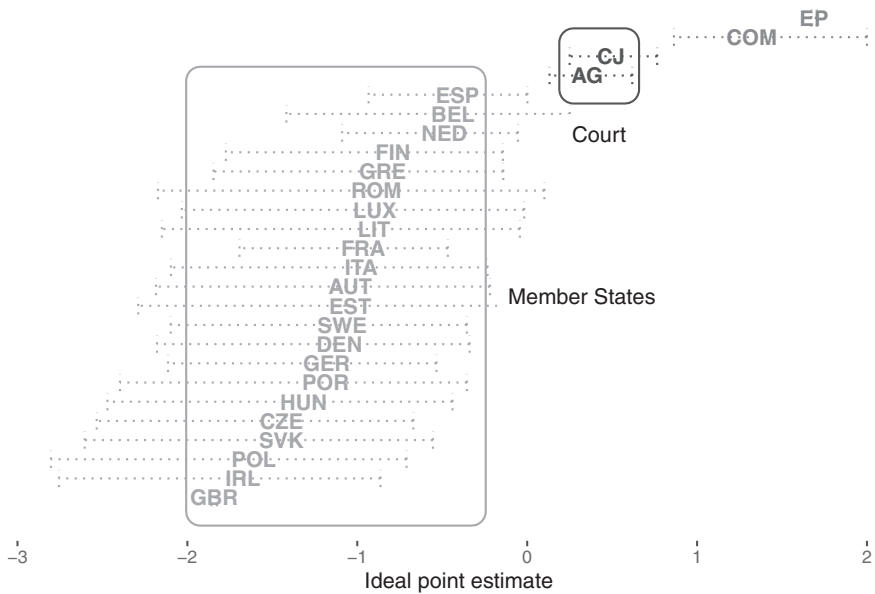
In the most common Bayesian implementation of this model, the unobserved parameters  $\alpha_j$ ,  $\beta_k$  and  $\gamma_k$  are random variables with normal prior distributions (Kubinec, 2019a: 8):

$$\begin{aligned}\alpha_j &\sim N(0, 1) \\ \beta_k &\sim N(0, 2) \\ \gamma_k &\sim N(0, 5)\end{aligned}\tag{2}$$

One of the advantages of this estimation framework is that it enables us to include predictors that systematically influence the priors of items and persons. The regression coefficients in such a multilevel setting help identify the model by breaking reflection invariance resulting from the unconstrained parameters (Bafumi et al., 2005: 178). But first I estimate ideal points with only weakly informative priors to establish the general validity of this approach and only later add predictors to adjust the model according to theoretical expectations.

I estimate a time-invariant ideal point model from 788 observations of actor positions (‘votes’) in 122 legal basis cases.<sup>4</sup> In addition to defendants’ votes I exclude those of actors who cast less than three votes in total, yielding estimates for 26 unique actors. The model is fitted using Stan’s (full Bayesian inference) Markov chain Monte Carlo (MCMC) sampler – the so-called No-U-Turn Sampler (NUTS), a variant of Hamiltonian Monte Carlo (Gelman et al., 2013). Although my interpretation relates to the ideal point estimates, the results should always be seen in the context of the credible interval. The larger the interval, the less certainty we should attach to the ideal point estimate.<sup>5</sup>

The fitted model shows intuitively understandable separation between the ideal points of EU actors and the Member States (Figure 2). The latent dimension can be *prima facie* interpreted as spanning from ‘more supranationalism’ to ‘more



**Figure 2.** Ideal point estimates (with 95% credible intervals) of EU institutional actors based on positions in legal basis cases.

Note: AG: Advocate-General; AUT: Austria; BEL: Belgium; CJ: Court of Justice; COM: European Commission; CZE: Czechia; DEN: Denmark; EP: European Parliament; ESP: Spain; FIN: Finland; FRA: France; GBR: United Kingdom; GER: Germany; GRE: Greece; HUN: Hungary; IRL: Ireland; ITA: Italy; NED: Netherlands; POL: Poland; POR: Portugal; ROM: Romania; SVK: Slovakia; SWE: Sweden.

intergovernmentalism’ with the EP occupying the most supranational position and the notoriously Eurosceptic UK the most extreme intergovernmental pole. The much greater support for EU integration in the Parliament and the Commission as compared to the Council is in line with previous scaling efforts using different data (Kaeding and Selck, 2005: 283; Thomson et al., 2004: 250). The application of alternative scaling techniques, reported in the Online appendix, yields comparable ideal point estimates.

The Commission’s ideal point, while relatively supranational, is closer to the Member States than the EP’s, which is consistent with Jupille (2004: 96) but divergent from Selck (2004: 209), Thomson et al. (2004: 250) and Tsebelis and Garrett (2000: 15). Among the Member States we can note the proximity of Ireland to the UK, as well as the four Visegrad countries huddled together nearer the intergovernmental side of things. Conversely, compared to other Member States, Belgium, the Netherlands and Spain come out as supporters of supranational procedures, which makes intuitive sense.

The ECJ is located between the Member States and the Commission and the Parliament, but leaning more towards supranational rather than intergovernmental preferences, which conforms to the consensus in the literature (Pollack, 2013:

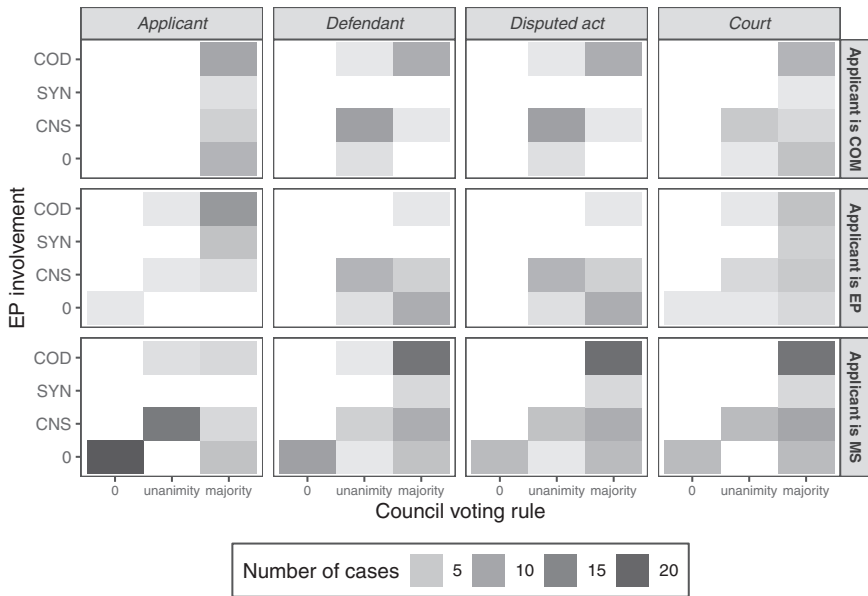
1265). At this point, the interpretation of the model depends on one's theoretical perspective and belief in the strength of existing empirical research on court curbing. If, following Sweet and Brunell (2012), Kelemen (2012) and others, the ECJ is effectively unconstrained in its decision-making, then this model shows the true ideal point of the Court. However, if Larsson and Naurin (2016) and Castro-Montero et al. (2018) are right, the Court's decisions respond strategically to Member State preferences, in which case, what we see in this model is not the ECJ's *ideal* point but rather a summary of strategic behaviour intended to approximate the ideal point. I investigate this possibility later and include covariates in the ideal point estimation intended to reveal the true latent institutional preference of the Court. But, first, I validate the latent dimension in the model.

### Validation of the latent dimension

An important aid for the interpretation of the latent dimension is contained in the legal bases defended by the various parties in the course of court proceedings. I convert the legal basis positions expressed in cases into procedural preferences and manually scale these according to how much power they confer on the EP and the adoption rule in the Council (in other words, the degree of supranationalism): QMV in the Council is more supranational than unanimity which is nonetheless more than no competence at all (*majority* > *unanimity* > 0); EP consultation is more supranational than no parliamentary involvement but both are inferior to the cooperation (SYN) and codecision procedures (*COD* > *SYN* > *CNS* > 0) (Jupille, 2004: 62).

Figure 3 plots the distribution of procedural preferences revealed by the various actors in court proceedings, conditional on actor (including status quo set by procedure used to enact disputed act) and who the applicant was (grouped under 'MS' if applicant is Member State). Moving up and/or to the right, the legislative procedures become more supranational. The bottom-left starting point signifies no competence, denoted by zero, on both the EP and Council axes. In the top-right corner is the most supranational of the standard legislative procedures, the codecision (or ordinary legislative) procedure.

The data support our interpretation of the latent dimension behind legal basis disputes as preference for supranationalism. Actors are shown to choose procedures in a self-interested and strategic manner as predicted by the theory of procedural politics (Jupille, 2004). When the Commission or the EP challenge an act, they tend to argue most often that the procedure that should have been used is the codecision procedure. On the contrary, when the applicant is a Member State – a situation arising typically following a lost QMV vote in the Council – it tends to argue that the EU had no competence or that the Council should have decided by unanimity in the disputed file. Expectations of procedural theories regarding actors' ideal points are borne out even in the details: the Commission argues exclusively for majority voting in the Council but is more willing to compromise



**Figure 3.** Distribution of procedural preferences conditional on actor and applicant. The top two rows show procedural preferences of the four different actors plus status quo procedure (disputed act) when the applicant is the Commission or the Parliament. The third row shows the procedural choices when the applicant is one of the Member States. White space signifies zero observations.

Note: CNS: consultation; COD: codecision; COM: European Commission; EP: European Parliament; MS: Member State; SYN: cooperation.

on EP involvement whose increase limits the Commission’s power (Jupille, 2004: 62; Tsebelis and Garrett, 2001: 374).

Roughly the same dynamics can be observed from the perspective of the defendant. A challenging Member State is rebuffed as the defending side protects the status quo, which was achieved most often by the application of QMV in such cases. Conversely, when the Commission or the EP are attacking, it is usually because a more intergovernmental alternative was chosen and the defendant (the Council) stands up for that original choice. The Court appears to balance the interests of the EU players and the Member States, subject to the caveat that we have not yet modelled the effects of the theorized constraints on judicial behaviour.

### Judicial behaviour under constraints

I return to the specific issue of judicial decision-making and the possibility that the ECJ’s discretion is constrained by threat of override or a similar court curbing mechanism. As an initial step, I estimate the possible effects of three independent variables on the probability of the Court granting an action, conditional on

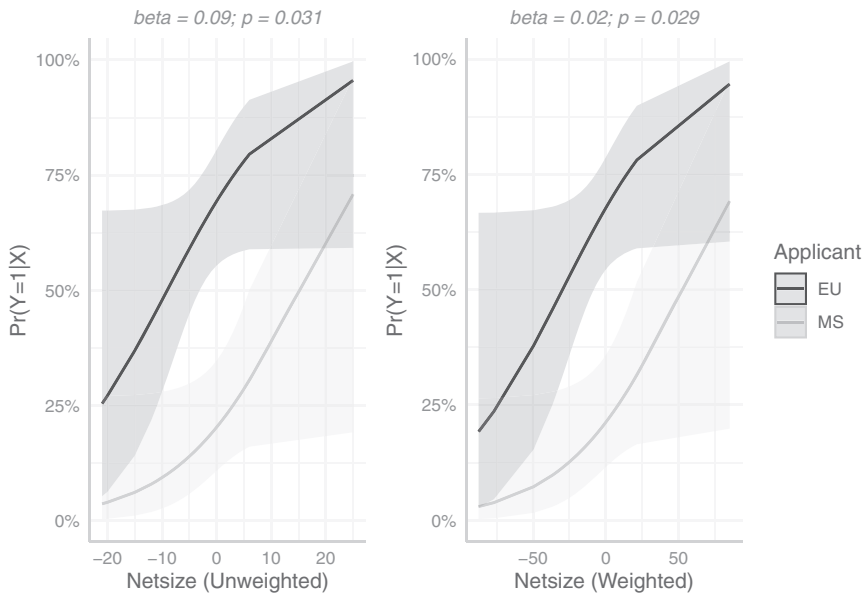
whether the applicant is an EU institution or a Member State. First, I look at the size of litigant coalitions supporting and opposing each action. Owing to uncertainty about actors' positions and importance attached to them, I hypothesized that the ECJ will be sensitive to Member States openly communicating their position by submitting interventions. The more Member States support (oppose) an action, the more likely the Court grants (rejects) it. Second, ideological heterogeneity in the Council should decrease the probability of a ruling favourable to the Member States, as the likelihood of court curbing action is lower. Third, I expect the Court to be more accommodating towards the Member States during IGCs when Treaties can be more easily revised: the Court should be less likely to rule against the Member States in order to avoid an adverse Treaty amendment.

I differentiate the size of Member State litigant coalition on each side (including applicants, defendants and interveners) to create the variable *netsize*. The unweighted variable is negative when more Member States oppose an action than support it. The more robust weighted variable employed below takes the number of votes each intervening Member State has in the Council (to account for their relative power), divides it by the total number of Member States (to account for a changing size of the pool of potential litigants) and corrects for the general propensity of Member States to litigate and intervene in interinstitutional cases (see the Online appendix for further details). I estimate the effect of this variable on the probability of the ECJ deciding in favour of the *i*-th application via logistic regression:

$$\log \frac{p(y_i = 1)}{1 - p(y_i = 1)} = \beta_0 + \beta_1 \text{netsize}_i + \beta_2 \text{applicant}_i + \beta_3 \text{chambersize}_i + \beta_4 \text{actiontype}_i \quad (3)$$

The model controls for whether the action was brought by an EU institution or a Member State, the judicial procedure (annulment or opinion) and the weighted size of the deciding court chamber. The latter variable is measured as a proportion of all ECJ judges at the time of the ruling, which also captures the salience of the case, at least as perceived by the Court. However, because the chamber system was only created in response to a rising caseload, the variable is weighted by the backlog pressure on the ECJ (number of pending cases at the time of the decision) to capture the stark increase over time in the number of cases the Court deals with.

The marginal effects plots (Figure 4) show that the probability of winning a legal basis case grows with the size of the net coalition backing the plaintiff and vice versa. As hypothesized, the more Member States support (oppose) an action, the more (less) likely it succeeds before the Court. Net opposition by 10 Member States translates into a probability of 10% that a challenging Member State wins their case, while, at the same level of opposition, the Commission and Parliament

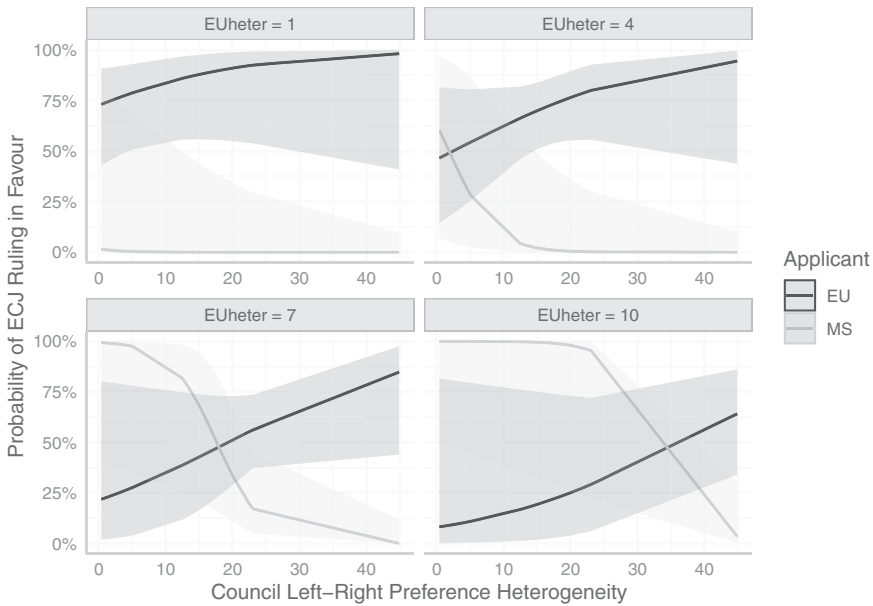


**Figure 4.** Probability of ECJ ruling in favour of an application conditional on net coalition size with 95% confidence intervals. The two panels show results using different specifications of the independent variable.

Note: ECJ: European Court of Justice; EU: European Union; MS: Member States.

have a nearly 50% chance of winning, reflecting the statistically significant discrepancy in how the two sets of actors are treated on average. With a net support of 10 Member States, the chances of winning are considerably higher at 38% for the Member States and 85% for the EU institutions. The chances of the Commission and the Parliament therefore increase slightly more over this interval, although their slope begins to flatten around net support of five. The opposite is true for the Member States' applications whose chances rise faster as numbers mount. This curve (over the observable range of data) is approximately consistent with the mechanism of the threat of (constitutional) override, as its credibility should depend on reaching a numerous coalition.

Second, I examine the possibility that ideological heterogeneity among Member States enables judicial discretion. I consider both the traditional left-right dimension of political conflict, as well as Member State governments' positions on EU integration. Following König (2001) and Jupille (2004), I use the maximum left-right and EU integration distance between any two Member States at any given moment as a proxy for measuring heterogeneity. Because the type of applicant is a critical component conditioning the variables of interest, I resort to interaction terms in the logistic regression, in addition to controlling for the mean levels of



**Figure 5.** Probability of ECJ ruling in favour of an application given Council preference heterogeneity along left-right and EU integration dimensions.

Note: ECJ: European Court of Justice; EU: European Union; EUheter: Heterogeneity in preference for European integration; MS: Member States.

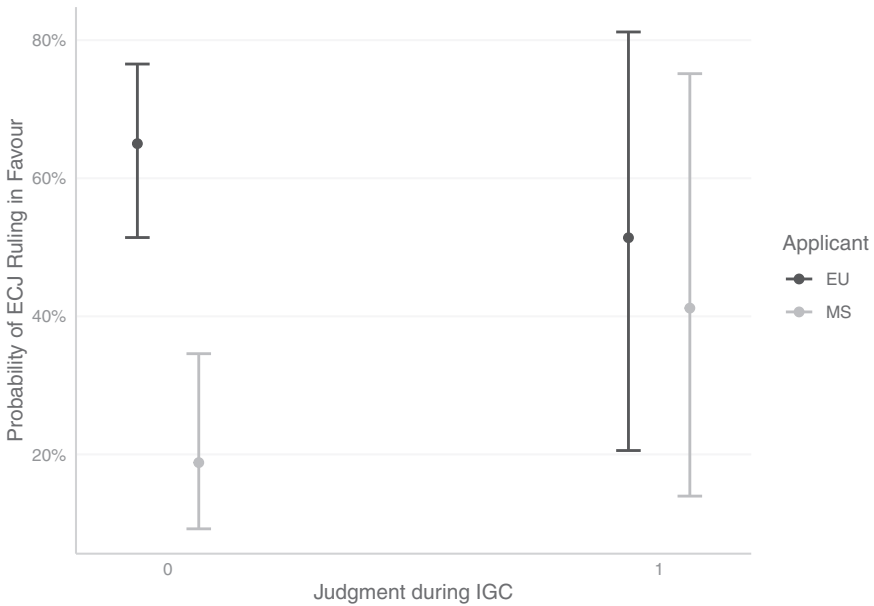
integration and left-right preference:

$$\log \frac{p(y_i = 1)}{1 - p(y_i = 1)} = \beta_0 + \beta_1 applicant_i + \beta_2 chambersize_i + \beta_3 EUlevel_i + \beta_4 LRlevel_i + \beta_5 EUheter_i + \beta_6 LRheter_i + \beta_7 actiontype_i + \beta_8 (applicant_i \times EUheter_i) + \beta_9 (applicant_i \times LRheter_i) \quad (4)$$

In this equation, I model the possible heterogeneity effects without the *netsize* variable tested above. Due to the considerable disagreement in the literature about the feasibility and prevalence of constraints on judicial behaviour, I entertain the possibility that not all hypothesized effects will actually be observed and therefore treat them first separately. Results from regression models aggregating all variables are discussed later.

The marginal effects of the two interaction terms tell a complex story (Figure 5). First, as anticipated, left-right heterogeneity – which portends difficulty obtaining unanimity needed for constitutional override – makes the Court more likely to rule in favour of EU institutions and less likely to rule in favour of the Member States.





**Figure 6.** Probability of ECJ ruling in favour depending on whether it was handed down during an IGC or not.

Note: ECJ: European Court of Justice; EU: European Union; IGC: Intergovernmental Conference; MS: Member States.

However, the level of polarization on the EU integration dimension has the opposite effect. Under the conditions of consensus on EU integration (and controlling for its mean level), the ECJ is very likely to rule in favour of the Commission and the Parliament, while the Member States are almost certain to lose. The probability that the Commission or the Parliament win a case they initiated increases by approximately 16 percentage points as we move from low to average left-right heterogeneity (with other variables at reference or mean levels). Conversely, the Member States become less likely to win over the same interval by nearly 45 percentage points. But under the conditions of dissensus – that is, when the Council is more polarized – the Member States are more likely to win a case than the EU institutions. I interpret this result as indicating that, whereas policy-preference heterogeneity in the Council is something the ECJ might be willing to exploit, EU integration polarization makes it more wary. Unlike left-right positions, preference for integration is of constitutional importance for the EU and can, at extremes, result in a Member State’s exit, which means a complete loss of influence for the Court. Provoking an already divided Council might therefore represent too risky a strategy for the ECJ and lead to greater cautiousness instead. In other words, fear of constitutional defection seems to outweigh potential gains from preference heterogeneity along the integration dimension.

**Table 1.** Litigation success in legal basis cases.

Dependent variable:		Log-odds of litigation success				
Logistic		(1)	(2)	(3)	(4)	(5)
Intercept		1.218** (0.144, 2.291)	5.165** (0.131, 10.199)	5.056** (0.057, 10.055)	1.225** (0.157, 2.292)	5.833** (0.459, 11.207)
Applicant = MS		-2.051*** (-2.990, -1.111)	-7.244** (-14.311, -0.177)	-6.940** (-14.025, 0.145)	-2.082*** (-3.076, -1.088)	-12.339* (-27.934, 3.256)
Chamber size		-0.001 (-0.004, 0.001)	-0.001 (-0.005, 0.003)	-0.002 (-0.006, 0.002)	-0.001 (-0.004, 0.001)	-0.002 (-0.006, 0.003)
Procedure = OPIN		0.087 (-1.306, 1.480)	-0.820 (-3.165, 1.524)	-1.342 (-3.450, 0.766)	-0.341 (-1.660, 0.977)	-0.866 (-3.377, 1.646)
Net coalition size		0.025** (-0.001, 0.051)	0.019 (-0.021, 0.060)			0.017 (-0.029, 0.063)
EUheter			-0.436** (-0.897, 0.025)	-0.379** (-0.821, 0.063)		-0.449** (-0.924, 0.026)
LRheter			0.077* (-0.024, 0.178)	0.067* (-0.032, 0.166)		0.076* (-0.029, 0.180)
Mean EU integration			-1.365* (-3.179, 0.449)	-1.324* (-3.133, 0.486)		-1.458* (-3.303, 0.386)
Mean left-right score			0.069 (-0.170, 0.308)	0.094 (-0.139, 0.326)		0.104 (-0.168, 0.377)
Applicant = MS × EUheter			1.957*** (0.381, 3.534)	1.906*** (0.326, 3.487)		2.703** (-0.260, 5.665)
Applicant = MS × LRheter			-0.363*** (-0.605, -0.121)	-0.357*** (-0.598, -0.116)		-0.424** (-0.791, -0.058)
During IGC					-0.564 (-2.058, 0.930)	-1.065 (-3.457, 1.327)
Applicant = MS × during IGC					1.670* (-0.569, 3.909)	3.822* (-0.880, 8.524)
Observations	119	92	92	92	119	92
Log likelihood	-69.324	-39.783	-40.213	-40.213	-70.225	-38.089
Akaike inf. crit.	148.649	101.566	100.426	100.426	152.450	102.177

Note: \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .

95% confidence intervals in parentheses. P-values are one-tailed. For categorical (binary) variables, the intercept absorbs the reference level.

MS: Member State; OPIN: Opinion procedure; EUheter: Heterogeneity in preference for integration; LRheter: Left-Right heterogeneity; EU: European Union; IGC: Intergovernmental conference

Third, I examine the thesis advanced by Castro-Montero et al. (2018), namely that the ECJ is more vulnerable to override – and therefore more cautious – at times when an IGC is underway. I add a dummy variable to the models to capture when a ruling is made during an ongoing IGC and interact it with the type of applicant. This design suffers from the shortcoming that the Court’s decisions about the timing of rulings are to some extent endogenous, an issue the authors of the original study were likewise not able to overcome (Castro-Montero et al., 2018: 591). Nonetheless, plotting the dates of all cases against IGCs reveals that even in the worst-case scenario only a minority of cases could be strategically deferred by the Court (see the Online appendix). Frequently, the ECJ cannot avoid deciding during an IGC and in these cases the hypothesized cautiousness should be observable.

The direction of the interaction effects here supports the IGC hypothesis (Figure 6). The Commission and the Parliament are less likely to win during IGCs, while Member States are, on the contrary, more likely to obtain a favourable outcome. However, the result is only statistically significant at a higher long-run Type I error rate of  $p < 0.1$  and only for the higher probability of Member States winning their actions. What we thus have is a soft, tentative indication that the Castro-Montero et al. (2018) findings might hold also in other contexts than direct infringement proceedings against Member States.

Finally, I report the complete output from all relevant regression models (Table 1). Several remarks are in order. First, the coefficients and significance tests from the fully specified model cast doubt on whether the three hypothesized effects coexist all at once. Whereas the effects concerning ideological heterogeneity are robust both when tested separately and alongside other independent variables, the net coalition size is only significant when tested on its own. Probing further, I found that *netsize* is affected by the drop in sample size resulting from including covariates relating to ideological heterogeneity in the Council. When tested on the same sample (see the Online appendix), the value of the Akaike Information Criterion shows a lack of statistical significance and worse model fit than the heterogeneity model. The implication is that the degree of ideological heterogeneity among Member States is both a more robust and comparatively more important constraint on ECJ behaviour. As regards the IGC hypothesis, its individual explanatory power is lower but unlike *netsize* has a higher effect in the reduced sample setting.

## The Court’s ideal point

Having identified the underlying dimension of conflict in competence cases, as well as some constraining effects on the ECJ’s decision-making, I return to the problem of estimating the Court’s ideal point alongside the rest of the institutional players. To recap, the first IRT ideal point model we estimated only represented the true ideal point of the Court under the assumption that threats of override were not credible in the EU system and therefore the decision-making of the Court was not

restrained by the positions of the Member States. In the previous section we have shown that, at least to some extent, the ECJ does react to Member State preferences, which is broadly consistent with the findings of Larsson and Naurin (2016). In the final step, I incorporate these constraints into the IRT ideal point model.

I follow the same estimation procedure as before, only now instead of modelling the ideal points as coming from a basic normal distribution  $\alpha_j \sim N(0, 1)$ , the constraint variables are added as hierarchical predictors (only for  $j = ECJ$ ), while also controlling for actors' overall propensity to litigate and intervene (heterogeneity model):

$$\alpha_{ECJ} \sim N(\delta_0 + \delta_1 LRheter + \delta_2 EUheter + \delta_3 LRlevel + \delta_4 EUlevel + \delta_5 applicant + \delta_6 (applicant \times LRheter) + \delta_7 (applicant \times EUheter), 1) \quad (5)$$

$$\alpha_j \sim N(\delta_0 + \delta_1 propensity_j, 1) \quad (6)$$

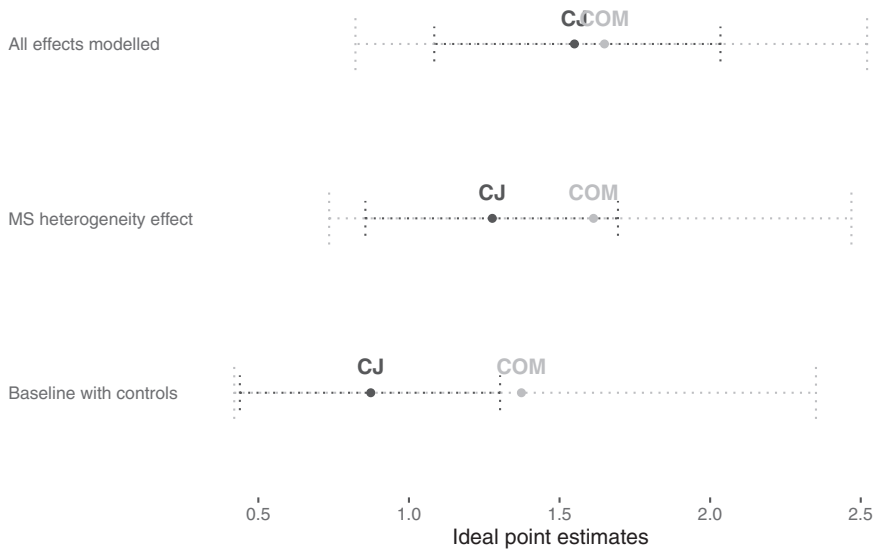
We will also let the item discrimination parameter be affected by *chambersize* and *actiontype* to control for case importance and judicial procedure (annulment or opinion procedure), as done in the logistic regressions:

$$\gamma_k \sim N(\delta_0 + \delta_1 chambersize_k + \delta_2 actiontype_k, 5) \quad (7)$$

I estimate three models with covariates included in total: a new baseline model with controls for *chambersize*, *actiontype* (item level) and *propensity* (person level); a model with the same controls plus only the most robust constraining effect on the Court emerging from the regressions above, namely ideological heterogeneity among Member States; and a full model with all covariates, including *netsize* and *duringIGC*, evidence for which has been shown to be less robust. If the underlying assumptions about judicial self-restraint in the face of override threats are correct, we should see the ECJ's ideal point shift rightward as we model more of the hypothesized effects.

In Figure 7, we can observe that modelling the theorized constraints on judicial discretion produces the anticipated results. Both in absolute and relative terms (distance to the Commission's ideal point), the ECJ's institutional ideal point turns out more pro-supranational than if these effects are unaccounted for. This result is a high-level confirmation of the estimates obtained previously from the simpler logistic models, but we derive additional robustness from the fact that the positions of all actors across all cases in the sample are included alongside the Court's decisions. More importantly, this finding speaks directly to the empirical challenge of revealing courts' preferences in the presence of strategic adjustment to institutional context (Carrubba et al., 2008: 436).

As with all estimates, the credible intervals cast a shadow of uncertainty on the exact location of the ideal points. Moreover, the models do not explain all variation in the data. The in-sample predictive accuracy of the full model is at 77%



**Figure 7.** Comparison of the ECJ's ideal point across different models.

Note: CJ: Court of Justice; COM: European Commission; MS: Member State.

lower than the classification accuracy of the baseline model (although still considerably better than random). While the inclusion of additional covariates aligns the model with our theoretical understanding of litigation dynamics and hopefully improves its external validity, the unknown parameters in a model without covariates can be optimized (overfitted) to the data, resulting in a somewhat better in-sample classification capacity (see the Online appendix).

## Conclusion

This study attempted to locate the most important EU actors in a common space, using data on procedural and competence disputes. This class of cases enabled me to not only tap into the positions of Member States, the Commission and the Parliament revealed in litigation, but also to validate the underlying latent variable used to reduce the dimensionality of the data. I resorted to an IRT ideal point model to scale what I argue are institutional preferences – ranging from more supranational to more intergovernmental – of all the main EU players, including the ECJ. The inter-organizational, as opposed to the more common intra-organizational (e.g. MEPs), space in which these actors are located by the model constitutes the first contribution of this study.

The second major contribution concerns the estimation of the ideal point of the ECJ. The difficulty of observing strategic behaviour responding to court-curbing or non-compliance threats is well-known (Bailey, 2007; Carrubba et al., 2008). I try to overcome this problem by identifying and testing a set of factors in response to

which the Court might adjust its decisions. These factors are derived from literature on override (Castro-Montero et al., 2018; Larsson and Naurin, 2016) and relate to whether the ECJ potentially fears a negative reaction from the principals of the EU system, the Member States. I find that (1) the Court is sensitive to the number of Member States signalling their stance on a case through interventions; (2) ideological heterogeneity among Member States along the left-right dimension affords the Court more discretion but has the opposite effect along the EU integration dimension; and (3) the Court is more likely to rule in favour of the Member States and less likely to rule in favour of the Commission and the EP when an IGC is underway. However, the statistical significance of effects in findings (1) and (3) is not robust to all model specifications. Integrating these variables into the overall IRT model, the results indicate that the ECJ's 'true' ideal point is (even) more supranational compared to what the pattern of its decision-making suggests.

The findings add to and solidify our stock of empirical knowledge about the ECJ and judicial behaviour more generally. The models confirm the consensus about the Court's pro-supranational inclination but reject the narrative that it is completely unfettered in its pursuits. The 'hidden' ideal point of the ECJ shows that its preference for supranational institutions is possibly equivalent to the Commission's, while the Parliament emerges consistently as the most pro-EU actor. At the same time, we should not exaggerate the degree of self-restraint exercised by the Court. It finds itself on the more supranational side of the spectrum even when its decisions are approached superficially. The Court is, in other words, more supranational than constrained, without one excluding the other.

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## Supplemental material

Supplemental material for this article is available online.

## Notes

1. This is not to say that policy or institutional preferences are not compatible with the law as such. The law and notions such as legality provide the overarching argumentative basis for the work of judges and lawyers.
2. Member States' ability to monitor judicial behaviour is in any case limited due to the most important aspects of judicial decision-making being shrouded in secrecy and behind a collective veil.

3. I acknowledge that the sampling strategy involves a trade-off between statistical power and validation.
4. Running a model allowing for time variation shows that positions do not change significantly over time. I therefore choose to ignore the time dimension for reasons of parsimony and sample size limitations.
5. Note that two credible intervals are missing, because the model uses one actor to constrain each end of the scale.

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