



**CHRISTOPH ENGEL**

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**THE GERMAN  
CONSTITUTIONAL  
COURT – ACTIVIST,  
BUT NOT PARTISAN?**

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Abstract

The German Constitutional Court has powers that are no weaker than the powers of the US Supreme Court. Justices are openly selected by the political parties. Nonetheless, public and professional perception are strikingly different. Justices at the German court are not believed to be guided by the policy preferences of the nominating party. This paper uses the complete publicly available data to investigate whether this perception is well-founded. It exploits two independent sources of quasi-random variation to generate causal evidence. There is no smoking gun of ideological influence. Some specifications show, however, that justices nominated by the FDP and the SPD are more activist, even in domains where activism likely runs counter the ideological preferences of these parties.

Keywords: German Constitutional Court, party influence, ideology, judicial activism, quasi-random variation

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## 1. Introduction

The German Constitutional Court is an active policy-maker. It has obliged government to inform Parliament about the number of intelligence personnel deployed abroad<sup>1</sup>, has made sure that asylum seekers receive a higher allowance<sup>2</sup>, has prohibited that intelligence agencies transmit personal data they have received<sup>3</sup>, has invalidated a rule that makes windmills categorically illegal when positioned in a forest<sup>4</sup>, has prohibited drug screenings in prison<sup>5</sup>, has given a prison inmate the right to be interviewed by a journalist<sup>6</sup>, has declared an official statement by chancellor Merkel about electing the Prime Minister of a Land with the help of the right wing Alternative für Deutschland an infringement with her duty to be neutral<sup>7</sup>, has prevented convicted criminals from being extradited to Sweden<sup>8</sup>, has declared illegal that the right wing party NPD had been prevented from running for Parliament in one of the Länder<sup>9</sup>, to list only the most salient, successful applications in a single year, 2022.

Yet the court enjoys strong public support. In 2020, in a representative survey, 80% of all respondents expressed “strong trust” or even “very strong trust” in the Constitutional Court, only surpassed by 84% support for the police. Trust in government (61%) and Parliament (57%) are considerably lower, and trust in the churches is as low as 24% (most likely due to the prominence of the sexual abuse cases)<sup>10</sup>. There is virtually no public debate over the court being in the hands of the political parties. This perception is all the more remarkable as, legally, the justices are elected by Parliament, and politically each individual justice is nominated by one of the political parties. Moreover, as the cases listed in the previous paragraph illustrate, the constitution leaves ample room for judicial policymaking. Hence in relevant respects, the institutional make-up of the German court is not fundamentally different from the US Supreme Court. Now the US Supreme Court is perceived as openly ideological, and presidents try to fill positions with candidates they trust to be ideologically close to their party line. Has the German court just been more successful with upholding the erroneous public belief of not being partisan? Or is the German Court, unlike its US counterpart, indeed activist, but not partisan?

This paper tries to answer the question empirically. It benefits from the fact that, since 1998, the Constitutional Court has posted all senate rulings, and a sizable fraction of chamber rulings, on its website. Descriptively, success with a procedural request, is indeed associated with the fraction of justices nominated by a political party likely supporting the respective

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<sup>1</sup> BVerfG 14.12.2022, 2 BvE 8/21.

<sup>2</sup> BVerfG 19.10.2022, 1 BvL 3/21.

<sup>3</sup> BVerfG 28.9.2022, 1 BvR 2354/13.

<sup>4</sup> BVerfG 27.9.2022, 1 BvR 2661/21.

<sup>5</sup> BVerfG 10.8.2022, 2 BvR 1630/21.

<sup>6</sup> BVerfG 7.7.2022, 2 BvR 784/21.

<sup>7</sup> BVerfG 15.6.2022, 2 BvE 4/20.

<sup>8</sup> BVerfG 20.4.2022, 2 BvR 1713/21.

<sup>9</sup> BVerfG 23.3.2022, 2 BvC 22/19.

<sup>10</sup> [https://www.infratest-dimap.de/fileadmin/\\_processed\\_/9/b/csm\\_Glaubwuerdigkeit\\_der\\_Medien\\_2020\\_16\\_55f0a258ef.png](https://www.infratest-dimap.de/fileadmin/_processed_/9/b/csm_Glaubwuerdigkeit_der_Medien_2020_16_55f0a258ef.png). This is in line with earlier survey data Sternberg, Sebastian, Thomas Gschwend, Caroline Wittig and Benjamin G Engst (2015). "Zum Einfluss Der Öffentlichen Meinung Auf Entscheidungen Des Bundesverfassungsgerichts. Eine Analyse Von Abstrakten Normenkontrollen Sowie Bund-Länder-Streitigkeiten 1974–2010." Politische Vierteljahresschrift 56: 570-598..

normative cause. This correlation is significant at the 10% level. Yet for the decision of the court to take a case (technically not identical with, but akin to *certiorari* in the US), the correlation is even significantly negative: if taking the case would be in line with the ideology of the nominating political party, panels with a majority of justices nominated by these parties are even less likely to take the case.

The German Constitutional Court only rarely discloses that there has been a vote, and never discloses who has voted for acceptance<sup>11</sup>. The analysis must therefore work with the fraction of justices nominated by a political party that likely supports success. The most straightforward operationalization is a dummy that is 1 if the majority of justices hearing the case have been nominated by a party that is likely in favour of the application, given its party program. If one replaces this measure by the actual fraction, one finds a significant effect on conventional levels on the propensity to grant a procedural request (but still no effect for decisions on the merits). Yet all effects are gone once one takes into account how strongly the policy preferences of the nominating political parties differ. Controlling for observable alternative explanations, like the gender, the age or the tenure of participating justices, does not change the picture, nor does controlling for subject matter.

The German Constitutional Court has jurisdiction over very different types of cases, ranging from parts of government suing each other down to a citizen bringing a constitutional complaint. More than 90% of the cases are such constitutional complaints. If one analyses them separately, the picture does not change. Arguably policy preferences matter most for salient cases. A good proxy for salience is the fact that the case has not been heard by a chamber of three, but by the full senate of eight. Zeroing in on cases heard by the senate does not produce any significant findings either. For some policy domains, party politics might be more critical than for others. If one focuses on cases involving commercial interests, or on political participation, there are again no significant effects. The only exception is cases brought by people in contact with criminal justice authorities. In such cases, if justices nominated by political parties favouring a more liberal stance are in the majority, requests for preliminary rulings are significantly more likely to be granted (but there is again no effect on the decisions on the merits).

Most importantly, correlation is not causation. Happily, there are two quasi-random events that permit a causal interpretation. The first identification strategy exploits the fact that the composition of the ruling body sometimes temporarily changes, as one or more of the justices supposed to sit on the panel are temporarily unavailable. If this happens with a senate, the senate has power to decide with a smaller number of members. Typically this implies that one of the political sides gains the majority. In a chamber, an unavailable justice is replaced by a colleague from the same senate. In about half of these cases the replacement leads to a change in the majority, defined by the nominating side of the political spectrum.

The second identification strategy exploits that chambers are regularly recomposed, and individual justices have very little influence on the recomposition. They have to come to terms with new colleagues. Again in a substantial number of cases recomposition also changes

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<sup>11</sup> Only if, additionally, there is a separate opinion, and it is signed by all justices in the minority, one can infer the votes. But this is a very rare exception.

whether a justice is in the (political) minority or majority. This provides scope for a local effect near the point in time when recomposition takes place. One small exception notwithstanding, the causal analysis does not reveal any significant influence of the nominating party on dispositions. The one exception is requests for a decision on a procedural request: if one draws the window before and after a recomposition of the chambers very wide, one finds a significant effect, for this one success variable. Yet this small qualification notwithstanding, the paper has its clear bottom line: public perception does not get it wrong. The justices on the constitutional court are not puppets of the political parties that have selected them.

Yet there is an alternative way of analysing the data. One may straightforwardly try to explain success in court with the composition of the decision-making body. In this alternative empirical approach, one simply investigates whether the number of justices on the decision-making body that have been nominated by one of the political parties makes a difference. It turns out that this is indeed the case. If the fraction of justices nominated by the FDP or SPD is higher, the probability of success with a request for a preliminary ruling or with a procedural request increases substantially, and for most specifications also significantly. This also holds if one controls for policy preferences of the nominating parties. This finding can be interpreted as a sign of judicial activism.

The remainder of the paper is organized as follows: section 2 introduces the institutional framework. Section 3 derives the claims to be tested from the literature. Section 4 describes the data set, defines measures, and explains the identification strategy. Section 5 reports results. Section 6 concludes with discussion.

## **2. The German Constitutional Court**

The social science literature on the German Constitutional Court is still relatively small. After two prominent earlier contributions (Vanberg 2004, Kranenpohl 2010), the recent literature focuses on applying advanced methods to (parts of the) court's jurisprudence, like network analysis (Coupette 2019, Rönneburg 2020), citation analysis (to define canonical rulings) (Ighreiz, Möllers et al. 2021), or discrete-choice experiments (to relate the selection of justices to public opinion) (Engst, Gschwend et al. 2020) (also see Sternberg, Gschwend et al. 2015). In an earlier paper, I have causally identified the effect of familiarity, resulting from having been jointly on the bench, on case outcomes (Engel 2022). Wittig (2016) investigates the determinants of separate opinions, Krehbiel (2016) focuses on the role of oral hearings. The paper also contributes to the nascent literature on comparative judicial politics (Carroll and Tiede 2016, Schwartz and Janelle Murchison 2016, Tiede 2016, Alarie and Green 2017, Epstein, Grendstad et al. 2024).

### **a) Composition of the court and its jurisdiction**

The German Constitutional Court consists of two "senates". Each senate is composed of eight justices. The two senates have different portfolios, defined by substance matter. Within the senate, each justice has a fixed docket, again also defined by substance matter. Typically,

justices “inherit” the docket from the justice whom they replace, and keep this docket for the entire 12 years that they (at most) are on the court. If a case falls into the domain assigned to one justice, this justice is the justice referee. She interacts with the parties, prepares the case for her colleagues, proposes a ruling, and communicates the outcome to the applicant.

For decisions on constitutional complaints, and on requests by lower courts to invalidate a statutory provision, the senates split into chambers. Each chamber consists of 3 justices. The composition of chambers is fixed for a longer period, usually for a couple of years. Every case that falls into the docket of one of the chamber members is decided by the chamber. The chamber has power to reject applications, but must do so unanimously. Otherwise the case is propelled to the complete senate. But this is a very rare event.

## **b) Scope for policy-making**

The court is in an excellent position for exerting political influence. It is the highest court in the country, with the right to overrule any other court, including the apex courts in civil and criminal matters (*Bundesgerichtshof*), administrative law (*Bundesverwaltungsgericht*), tax law (*Bundesfinanzhof*), labour law (*Bundesarbeitsgericht*) and the law of social security (*Bundessozialgericht*), § 90 II 1 BVerfGG. There is no higher court, and hence no right of appeal<sup>12</sup>. The rulings of the Constitutional Court are not only binding for the parties to the case, but for any public authority (§ 31 I BVerfGG), and under some conditions even for every private party (§ 31 II BVerfGG).

The court is insulated from direct political influence. The justices not only benefit from the guarantee of judicial independence for all judges (Art. 97 I GG). The court even has its own administration, so that the Federal Minister of Justice also has no indirect influence, e.g. through the power of the purse, or through rules for court administration (Wittreck 2006, 266-282).

The court may call on public authorities, and on any member of civil society, and ask them to hand in an *amicus curiae* brief (§ 27a BVerfGG). This makes it possible for the court to launch public discourse, and to induce stakeholders to express their position on a contested issue.

The court not only hears constitutional complaints brought by citizens (Art. 93 I Nr. 4a GG), but also cases referred to it by lower courts (Art. 100 I GG), disputes between Parliament and Government (Art. 93 I Nr. 1 GG), disputes between the Federation and one of the Länder (Art. 93 I Nr. 3 GG), and a host of further matters (listed in § 13 BVerfGG). This plurality of procedures makes it easy for the court to get a case that allows it to become politically active in a domain of interest.

While the court must officially hear every case, including thousands of constitutional complaints that citizens bring every year, it practically has almost complete docket control. The court may decide not to take the case, as the case lacks “wider relevance”<sup>13</sup> (§ 93a

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<sup>12</sup> But complainants who have lost their case may, depending on the subject matter, take their case to the *European Court on Human Rights*, or to the courts of the European Union.

<sup>13</sup> „Grundsätzliche verfassungsrechtliche Bedeutung“, in the German original.

BVerfGG). The court may even reject a constitutional complaint without giving written reasons (§ 93d I 3 BVerfGG). Hence effectively the court decides autonomously about its agenda.

As any court, the Constitutional Court may not openly express its political will. But the obligation to decide within the limits drawn by the provisions of the constitution is hardly constraining. Most provisions of the constitution are formulated in fairly broad terms that leave wide room for interpretation. This in particular holds for fundamental freedoms. They are essentially value judgments. In multiple ways, early on the court has even extended the scope for interpretation. It has interpreted Art. 2 I GG as an unspecified guarantee of personal freedom<sup>14</sup>. Likewise, Art. 3 I GG enshrines an unspecified guarantee of equal treatment. Moreover, the court has invented the “proportionality principle”<sup>15</sup>. This principle enables the court to balance individual freedom or equality with the freedom of other persons or some definition of the public good. Finally the court accepts any concern for a public good spelt out in any (substantive or procedural) provision of the constitution as a legitimate aim and hence input into balancing<sup>16</sup>. Consequently, the doctrinal standards, and hence the formal limitations, are very malleable.

The court has only two senates, with eight justices each (§ 2 BVerfGG), which makes the court highly visible. The court actively markets its rulings. It not only addresses the legal community, via the official reporter and its website. It also interacts with the general public. In all the cases listed in the introduction, the court has issued a press release that highlights the political relevance of the ruling. There is considerable media attention for the court’s rulings<sup>17</sup>.

### **c) Scope and incentives for party influence**

The court consists of two senates. Each senate is composed of eight justices. Half of the members of each senate are elected by the *Bundestag*, i.e. by Parliament. The other half are elected by the *Bundesrat*, i.e. by the representatives of the Länder (§ 5 I 1 BVerfGG). Effectively, both bodies are governed by political parties. The *Bundestag* and the *Bundesrat* take turns in electing the president of the court, and its vice president (who chairs the respective other senate), § 9 I BVerfGG.

Justices must have formal legal training (§ 3 II BVerfGG). Three of the eight justices in each senate shall have at least three years of experience at one of the five apex courts (§ 2 III BVerfGG) – but are selected by the political parties regardless. Justices must be German nationals and at least 40 years old (§ 3 I BVerfGG). These very mild requirements leave ample room for the political parties to select persons whom they trust to advance their cause.

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<sup>14</sup> BVerfG 6.6.1989, 1 BvR 921/85, BVerfGE 80, 137, R 69.

<sup>15</sup> BVerfG 11.6.1958, 1 BvR 596/56, BVerfGE 7, 377, R 71; BVerfG 14.12.1965, 1 BvL 14/60, BVerfGE 19, 330, R 22.

<sup>16</sup> BVerfG 26.5.1970, 1 BvR 83/69, BVerfGE 28, 243, R 71.

<sup>17</sup> Google counts 7.810.000 hits for the term “Bundesverfassungsgericht”, while it only counts 1.200.000 hits for the term “Marco Buschmann”, i.e. the name of the Federal Minister of Justice, and only 254.000 hits for the term “Bundesjustizminister”, i.e. the official title of the position (all counts retrieved on Jan 25, 2023).

Opposition parties often threaten government with taking their cause to the Constitutional Court, and sometimes win. A recent illustration concerns party financing. In the interest of protecting politics from donor influence, German parties who have run for Parliament are funded from the federal budget. Payments are proportional to the votes for the party at the last election. In the 2017 election, the two ruling parties CDU and SPD could continue their coalition, but both lost a lot of votes: CDU went down from 41.5% in 2013 to 32.9%, and SPD went down from 25.7% to 20.5%. To compensate for the loss in income, the majority passed a law that increased the total payments to political parties from 142 Mio € to 190 Mio €. The (then) opposition parties took the case to the Constitutional Court. The court declared the new rules void<sup>18</sup>. The court sometimes also forces items on the political agenda although the ruling parties would have other priorities. A prominent illustration is a ruling that obliges government to enforce sufficiently strict limitations for CO<sub>2</sub> emissions<sup>19</sup>. To preempt such intrusions, it would be in the interest of the ruling parties to select justices whom they expect to shield the political process from unwanted judicial interference.

In Germany, parties are represented in Parliament in proportion to the votes they have received. This has led to coalition governments ever since 1961. Even the largest party cannot be sure to be part of the next government. If a party wants to perpetuate its current influence, it might therefore want to pick a justice at the Constitutional Court whom it expects to advance its political goals.

#### **d) Constraints**

Multiple formal and informal constraints do, however, make it difficult for a political party to influence the jurisprudence of the Constitutional Court by selecting justices (cf. for the US debate Bailey and Maltman 2011). Every candidate needs a super majority of 2/3 (§§ 6 V, 7 BVerfGG). In political practice, candidates are selected in negotiations between a representative of the left-wing political spectrum and a representative of the right-wing spectrum. It is firmly established practice that, in each of the two senates, half of the justices are nominated by the left-wing, and the other half by the right-wing. While either side is free to make nominations, candidates must be acceptable for the other side of the political spectrum (Kischel 2005, § 69, R 21-26).

Justices leave the court after 12 years, or if they reach the official retirement age of 68 (§ 4 BVerfGG). Political parties can therefore not offer retention in exchange for favorable decisions (cf. Shepherd 2009). Occasionally, former justices have adopted prominent political positions, like Roman Herzog becoming the President of the Republic after having been the president of the Court. Another example is Rudolf Mellinghoff becoming the president of the Federal Tax Court after leaving the Constitutional Court. But the large majority of former justices at the Constitutional Court either retire or go back to academia after the end of their term. This makes it difficult for political parties to promise career benefits outside the Constitutional Court for justices who have decided in their favor.

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<sup>18</sup> BVerfG 24.1.2023, 2 BvF 2/18.

<sup>19</sup> BVerfG 29.4.2021, 1 BvR 2656/18.

Effectively, the court is a staggered board, with regular opportunities to change its composition. Consequently, even if a party had been able to place a partisan justice, the influence of this justice would be limited in time. Justices are free to leave the court earlier (§ 12 BVerfGG). For instance Justice Mellinshoff has left the court after 10 years, to become the president of the (apex) Federal Tax Court. But, unlike in the US (Spriggs and Wahlbeck 1995, Bailey and Yoon 2011, Pérez-Liñán and Araya 2017), strategic retirement, to give the ruling party a chance to pick a candidate who is favorable to its cause, has never been observed. It would not make much strategic sense in the first place, given the strict informal rules about political balance.

Further constraints result from established court practice. More than 95% of all cases filed with the Constitutional Court are constitutional complaints<sup>20</sup>. Each senate splits into chambers of three justices each (§ 15a I 1 BVerfGG). Chambers do not only screen constitutional complaints for their “wider relevance” (§§ 93a II, 93b BVerfGG). They also have power to accept the complaint if it lacks wider relevance, but is of sufficiently high importance for the complainant individually (§ 93c I 1 BVerfGG). Effectively, almost all constitutional complaints are not decided by the complete senate<sup>21</sup>. The court makes a point out of avoiding that all three justices in a chamber have been nominated by the same side of the political spectrum<sup>22</sup>. This practice does not only give the one justice in the political minority the influence that has often been documented for the mixed composition of a panel (Miles and Sunstein 2006, Boyd, Epstein et al. 2010, Kastlelec 2011, Kastlelec 2021, Engel 2022), and that has also been proposed for the US Federal Courts of Appeal (Tiller and Cross 1999). Actually, the chamber does only have power to decide if the decision is unanimous (§ 93d III 1 BVerfGG). This gives the justice in the political minority veto power (Tsebelis 2002). As otherwise the court could not handle the caseload, there is strong informal pressure not to propel cases to the senate just because there is a disagreement in the chamber. This leads to a pronounced consensus culture (cf. Hettinger, Lindquist et al. 2004, 130).

Justices have the right to add a separate opinion to cases decided by the senate (§ 30 II 1 BVerfGG). But dissenting opinions are exceedingly rare in the German Constitutional Court (for a comparison across jurisdictions see Bricker 2017). From all 8194 cases posted on the court’s website between 1998 and 2022, only 66 come with a dissenting opinion, 24 in the first, and 42 in the second senate. Many justices have never published a dissent. The senates have the right to make it public if a decision has not been unanimous (§ 30 II 2 BVerfGG). But individual votes can only be reconstructed if all justices who have voted against the ruling sign a dissenting opinion. There is a pronounced consensus culture at the court (cf. Epstein, Segal et al. 2001). These rules and practices make it difficult for the nominating party to audit the decision making of the justices whom they have picked.

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<sup>20</sup> According to the latest edition of the court’s statistics, between the foundation of the court in 1951 and the end of 2020, 249,023 cases have been filed, of which 240,251 have been constitutional complaints, [https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/A-I-1.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/A-I-1.pdf?__blob=publicationFile&v=2).

<sup>21</sup> Between 1951 and the end of 2020, only 4129 of 215651 constitutional complaints have been decided by a senate. This is less than 2% (see URL in previous footnote).

<sup>22</sup> For detail see Appendix 2.

### 3. Hypotheses

Does one have reason to expect that the jurisprudence of the Constitutional Court is influenced by the political parties who have nominated the justices that decide the respective case? Despite the fact that the composition of both senates is by design balanced along the left/right divide, there is room for such influence. The influence could straightforwardly play itself out in the large majority of cases that are disposed by a chamber. It could be that the (leftwing- or rightwing) majority imposes the political will of the party that has nominated the justices. Alternatively the minority justice might successfully exercise her veto power. If the decision is taken by the complete senate and the votes of all justices are split along party lines, no violation of the constitution is established (§ 15 IV 3 BVerfGG), so that the party wins that is opposed to an intervention of the court (Hönnige 2009).

A small number of empirical papers have given partial answers to the question. Hönnige (2009) investigates 93 senate decisions about disputes regarding the constitutionality of a statute (Art. 93 I Nr. 2 GG), or disputes between the federation and one of the Länder (Art. 93 I Nr. 3 GG), heard between 1971 and 2003. He finds that, the smaller the ideological distance between the pivotal justice and the claimant, the higher the probability that the political opposition wins. Jäger (1987) studies all dissenting votes in senate rulings from 1971 to 1986, and does not find that they are significantly correlated with the nominating political party. Engst, Gschwend et al. (2017) also work with dissenting votes, but for the different time window of 2005-2016. Using network analysis, they establish a network (largely) along party lines for the subperiod of 2008-2011, but not for the period from 2011-2016.

**Personal interest.** Is it in the interest of a justice to let her decisions be influenced by the political party that has nominated her? In principle, the justice might have a personal incentive to be influenced (Posner 1993, Schauer 1999). But the institutional safeguards reported in the previous section do not leave much room for a forward-looking personal benefit from following the party line. The term is non-renewable. Sufficiently interesting positions in politics or the judiciary for the time after the constitutional court are rare. Most of the decisions have no direct bearing on the justice in person or her near personal environment (and there would be no need for these interests to align with political positions of the nominating party). Occasionally, former justices have taken up well-paid positions in industry<sup>23</sup>. This may raise questions regarding earlier decisions that affected their future employer, but it not a likely channel for influence by the nominating political party either.

Being a justice at the constitutional court is a very attractive position. Justices are not only well paid. They have a very influential and rewarding task, which gives them high visibility and reputation. It is therefore not implausible that justices are grateful to the nominating political party and want to express their gratitude by loyalty to the party line (cf. Hirschman 1970, Shachar 2003, Mayhew 2013). Justices could interpret loyalty as an act of reciprocity. Reciprocity has been shown to be a powerful motive (Berg, Dickhaut et al. 1995, Bolton and Ockenfels 2000, Falk and Fischbacher 2006, Fehr and Schmidt 2006).

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<sup>23</sup> A well-known case is former justice Christine Hohmann-Dennhardt who held positions at the boards of Daimler and Volkswagen, [https://en.wikipedia.org/wiki/Christine\\_Hohmann-Dennhardt](https://en.wikipedia.org/wiki/Christine_Hohmann-Dennhardt).

**Attitudinal model.** The political science literature on judicial decision making is dominated by a different class of preferences. It is assumed that judges do not (or at least do not predominantly) pursue personal interests. They are rather expected to be selfish in a political sense. The prominent attitudinal model posits that judges exploit the institutional and doctrinal leeway to advance their personal policy preferences (Segal and Cover 1989, Segal and Spaeth 1993, Segal, Epstein et al. 1995, Quinn 1996, Segal and Spaeth 2002, Sunstein, Schkade et al. 2007). The literature has rightly guarded against simplistically equating the judge's ideology with the position of the nominating party (Epstein, Martin et al. 2023). The two may well fall apart (Cohen 2003). This concern motivates ever more sophisticated methods for inferring each individual judge's policy preferences, either endogenously from the decisions she has taken (Martin and Quinn 2002, Bailey 2023), or exogenously from a judge's own publications before joining the court, from ideology attributions assigned to candidates in the press (Segal and Cover 1989) or by expert panels (cf. Clinton and Lewis 2008). Still the nominating party remains a reasonably good proxy for a judge's political orientation (Pinello 1999). If a political party hopes to have some impact on political outcomes by picking a justice, and if this justice is willing to exploit the effective room for political manoeuvre, the decisions influenced by this justice should move into the direction of the policy goals held by the nominating party.

Hence if either personal incentives, loyalty, or her own policy preferences guide the decisions made by a justice of the Constitutional Court, it can be expected that the ideological positions of the nominating party predict the decisions justices in the German Constitutional Court make.

**Legalism.** There are, however, counterarguments. The most radical alternative position is legalism (Morell 2023). In strict reading, it would be a behavioral claim: judges ignore their personal policy preferences, and the policy preferences of the nominating political party for that matter, and are exclusively guided by the text of the law and the professional norms for its interpretation. Even in countries less influenced by legal realism (Llewellyn, Frank 1930, Frank 1931), like Germany, this strong claim is hardly ever made. But a weaker form is plausible: Legalism works as a regulative ideal. It is not upheld in a descriptive, but in a normative sense. Even if the influence of personal predilections on judicial decision-making cannot be completely prevented, justices are aware of such influence being undesirable, and they try as best they can to contain this influence (Morell 2023). For the present purposes, this weaker claim would suffice if it makes party influence, channeled through the individual political preferences of justices, exceptional. Related to this, justices might sufficiently care about their reputation outside party politics, for instance within the professional legal community, or with their families and personal environments (Baum 2008). Since being openly partisan would likely be regarded as reproachable in the German social context, respect for such alternative audiences could also induce justices to maintain party neutrality.

**Institutionalism.** Legalism has a less normative companion, institutionalism (Clayton and May 1999, Richards and Kritzer 2002, Weinshall-Margel 2011). This school of thought argues that judicial decision making is tightly institutionally contained. Judges decide as part of a rich institutional arrangement. They must have legal training. As part of this training, (at least in Germany) the regulative ideal is regularly communicated. At the Constitutional Court, judges decide on a bench. Even if one of the justices were tempted to fall for her political

preferences, her decision is kept in check by the remaining justices on the bench. If the court wants to exert political influence, the ruling must be published. Published rulings require an explicit justification (on the likely behavioral effects see Engel 2007). In the justification, the bench must explain in which ways its decision is derived from acknowledged doctrinal principles. While none of these are hard constraints, they might still help sustain a regulative ideal with which most of the justices agree.

Finally, the attitudinal model is individualistic. It starts from the assumption that justices, no less than all human beings, are guided by the expected individual utility they derive from the choices they make. Now in a rational choice framework, an actor is not expected to always act according to her preferences. Rather she anticipates how the present decision affects her utility (Epstein and Knight 1997, Hettinger, Lindquist et al. 2004, Garoupa, Gomez-Pomar et al. 2013, Epstein and Weinshall 2021). This strategic element of decision making is particularly important if an individual does not have power to decide on her own. She may, for instance, accept an outcome which is not individually most preferred if otherwise the outcome would be even further away from her preferences. Decision makers may also be strategic in the long run. Economic theory would then model the decision problem as one of multiple periods. Not achieving the individually best outcome now may be the optimal decision for achieving the best stream of outcomes in the future.

In the present context, the strategic perspective matters as the power of the Constitutional Court as an institution is precarious. Many of the rules that make the court so powerful are not guaranteed by the Constitution. This for instance holds for the rules that effectively give the court docket control. Simple majority in Parliament would suffice to change these rules such that the court is flooded with cases and can no longer focus on the ones about which it cares. The rules that guarantee political balance could also easily be changed, making the court dependent on the political majority of the day. Given the very high public trust in the court, any attempt at curbing the court's power would likely lead to a public outcry, which protects the court. Yet the more individual justices would be perceived as partisan, the more public trust might erode.

For all these reasons, one might argue that not being openly partisan is a way how the individual justice contributes to a public good of the court at large. Precisely by maintaining public perception that the court is not in the hands of any political party gives the court influence it would risk losing otherwise. In this perspective, each justice refrains from maximizing her ideological utility ad hoc, which gives the community of all justices a higher utility in the long run (as they remain a respected, autonomous political actor). Experimental research demonstrates that even randomly composed small groups may be able to sustain cooperation, despite the fact that it would be individually profitable to exploit the community (see the summary accounts by Ledyard 1995, Zelmer 2003, Chaudhuri 2011). Such cooperative behavior is even more likely in groups that know they will have to collaborate for multiple years on a daily basis.

If either the legalistic or the institutionalistic interpretation is appropriate, or if sufficiently many justices are willing to contribute to the public good of court impact, no systematic effect of the party that has nominated the deciding justices should be observed.

**Hypotheses.** There are two options for operationalizing party influence on judicial decision-making. The first is conceptually straightforward:

**Hypothesis 1: partisan justices:** justices are more likely to hold in favor of the claimant if the claimant's position is in harmony with the ideological orientation of the political party that has selected the justice.

The second option is more subtle. Courts in general, and constitutional courts in particular, have to position themselves on the continuum of judicial self-restraint (Epstein and Landes 2012, Posner 2012) vs. judicial activism (from the rich literature see only Canon 1982, Holland 1991, Kmiec 2004). There is certainly not a one-to-one mapping of conservatism to judicial self-restraint, and of a more progressive ideology to judicial activism (Young 2002). But political parties do not only preferences for outcomes. They also have meta preferences. They put different stress on political authority and governmental efficiency<sup>24</sup>. Arguably, the more they do, the more they are opposed to the constitutional court striking down statutes or governmental acts.

**Hypothesis 2: activist justices:** justices are more likely to hold in favor of the claimant if a more activist role of the judiciary is in harmony with the ideological orientation of the political party that has selected the justice.

## 4. Method

### a) Data

From the year 1998 on, the German Constitutional Court has systematically posted decisions on its website<sup>25</sup>. Over time, the court has added earlier decisions. But coverage of earlier decisions is very selective. For the time before 1998, only (some) senate rulings are available. Yet for the present purpose, chamber decisions are of particular relevance. Rare exceptions notwithstanding, chambers are composed such that two justices nominated by one wing of the political spectrum sit together with a justice nominated by the respective other wing of the political spectrum. Hence chambers are normally dominated by justices nominated by one of the sides of the German political landscape.

Between Jan 1, 1998 and Nov 17, 2022, the court has posted 8194 rulings. 6957 have been decided by a chamber, 1229 by one of the two senates<sup>26</sup>. This is only a fraction of all decisions taken by the court. Between 1998 and 2020, 125,513 cases have been filed<sup>27</sup>. As I was concerned about selection, I had an interview with Justice Baer. She has entitled me to report

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<sup>24</sup> For Germany, data from the party manifestoes is presented below in Figure 10 and accompanying text.

<sup>25</sup>[https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche\\_Formular.html;jsessionid=1ECBFEABD8D97FE4E63EE7DA51DF349D.1\\_cid506?language\\_=de](https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche_Formular.html;jsessionid=1ECBFEABD8D97FE4E63EE7DA51DF349D.1_cid506?language_=de).

<sup>26</sup> There are also 2 decisions by the plenary of both senates, and 6 rulings by a complaints chamber. They are not used for this paper.

<sup>27</sup> [https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/A-I-2.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/A-I-2.pdf?__blob=publicationFile&v=2). The numbers are available for the moment in time when cases have been filed, not when they have been decided. Numbers for cases filed in 2021 and 2022 are not yet available.

that (a) all senate rulings are posted and (b) very rare exceptions notwithstanding (< 1% of all cases) the rulings that are not posted exploit the power to decide without giving written reasons<sup>28</sup>. Hence even if the decisions were available, they could not be analyzed.

All rulings that the court has posted until Nov. 22, 2022 on its website have been scraped, including the meta data<sup>29</sup>. Data about justice demographics are from Wikipedia<sup>30</sup>. Data about the policy preferences of the nominating political parties are from the Manifesto Project<sup>31</sup>. No data preparation step involves judgement calls about individual cases. All data preparation steps are documented in a set of R scripts, as is the data analysis. Both are in the replication package for this paper<sup>32</sup>.

## b) Measures

**Success measures.** The dependent variables are various success measures. Applicants are of course primarily interested in success on the merits. The first line of Table 1 suggests that they stand a fair chance. 31.97% of the senate rulings, and 19.85% of the chamber rulings lead to success. Yet as the second line shows, for decisions taken by one of the chambers this impression is misleading. The applicant does not reach her substantive goal if the court summarily rejects the application. It is at this stage that the court effectively exercises docket control. I am using the analogue under US law, *certiorari*, as a shorthand for this decision. If one takes this into account, applications decided by one of the chambers are only successful in 2.68% of all cases. This is due to the fact that the very large majority of constitutional complaints does not pass this first hurdle<sup>33</sup>.

Requests for preliminary injunctions are less frequent in the first place. But if the court hears such a request, and thereby accepts the urgency of the case, chances for success are brighter. 28.32% of the requests for preliminary injunctions requested by a chamber are granted. If the senate hears the case and a preliminary injunction is requested, it is even granted in 49.21% of all cases. In procedural matters, success is much more likely. 78.44% of all procedural decisions regarding the way how the court deals with a constitutional complaint end in favour of the complainant if the senate decides, and 77.47% if a chamber decides. This high success rate is very likely evidence of a selection effect. The court has posted the decision because it wanted to clarify some procedural matter. As the fraction of success in procedural matters is high, so is success in either the merits, the request for a preliminary injunction, or procedural matters, i.e. in the combined category.

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<sup>28</sup> This power is confined to constitutional complaints that do not pass the “certiorari” hurdle, § 93d I 3 BVerfGG.

<sup>29</sup> [https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche\\_Formular.html](https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche_Formular.html).

<sup>30</sup> [https://de.wikipedia.org/wiki/Liste\\_der\\_Richter\\_des\\_Bundesverfassungsgerichts](https://de.wikipedia.org/wiki/Liste_der_Richter_des_Bundesverfassungsgerichts).

<sup>31</sup> <https://manifesto-project.wzb.eu>.

<sup>32</sup> To be posted \*\*\*.

<sup>33</sup> Note that the “certiorari” cases are all *reported* cases. All the many cases that did not pass this hurdle and were not considered important enough by the court do not come with reasons, and are not reported, § 93d I 3 BVerfGG.

	senate		chamber		all	
	failure	success	failure	success	failure	success
merit	483	227	541	134	1024	361
merit + non-acceptance	516	227	4870	134	5386	361
preliminary injunction	97	94	1048	414	1145	508
procedural decision	105	361	550	2001	655	2362
combined	456	552	1343	2302	1799	2854

Table 1

*Success in the Constitutional Court*

2 cases decided by the plenary of both senates, and 6 cases decided by a special complaints chamber omitted

**Judicial activism.** The second hypothesis (judicial activism) is directly tested by measuring how well success on each of these measures maps to the fraction of the political parties that have nominated the justices on the respective bench.

**Judicial ideology.** Operationalizing the test of the first hypothesis (judicial ideology) is more challenging. The total success rate may serve as a first indicator; this is also how the prominent Martin&Quinn scores have been constructed (Martin and Quinn 2002, 137). But one may question whether justices influenced by the fact that they have been nominated by one of the more progressive political parties would always be more inclined to hold for the applicant. Finding for the applicant in a case brought by a prison inmate might resonate more with the program of one of the parties leaning towards the left, while success in a case brought by industry might resonate more with the program of the more conservative political parties. Following this logic, Spaeth, Epstein et al. (2022, 37) define “decision direction” differently for each “issue” (35).

For Germany, this can be emulated in a two-steps procedure: in a first step, one needs stylized facts about party positions. In a second step, these party positions must be mapped to case characteristics. For the first step, I exploit data from the Manifesto project. It codes party positions as expressed in publicly distributed party manifestoes (Lehmann, Burst et al. 2022). A graphical representation is in Figure 1. As one sees, the divergence is clearest with respect to equality. The parties on the left put much more stress on equality than the parties on the right. Conversely, the Christian Democrats have a pronounced appreciation for law and order. With freedom and human rights, there is a different divide: the Greens, and even more strongly the Free Democrats, place a lot of value on them, while neither the Christian Democrats nor the Social Democrats do. Finally the Greens, the SPD and the FDP put more stress on political participation than the CDU.

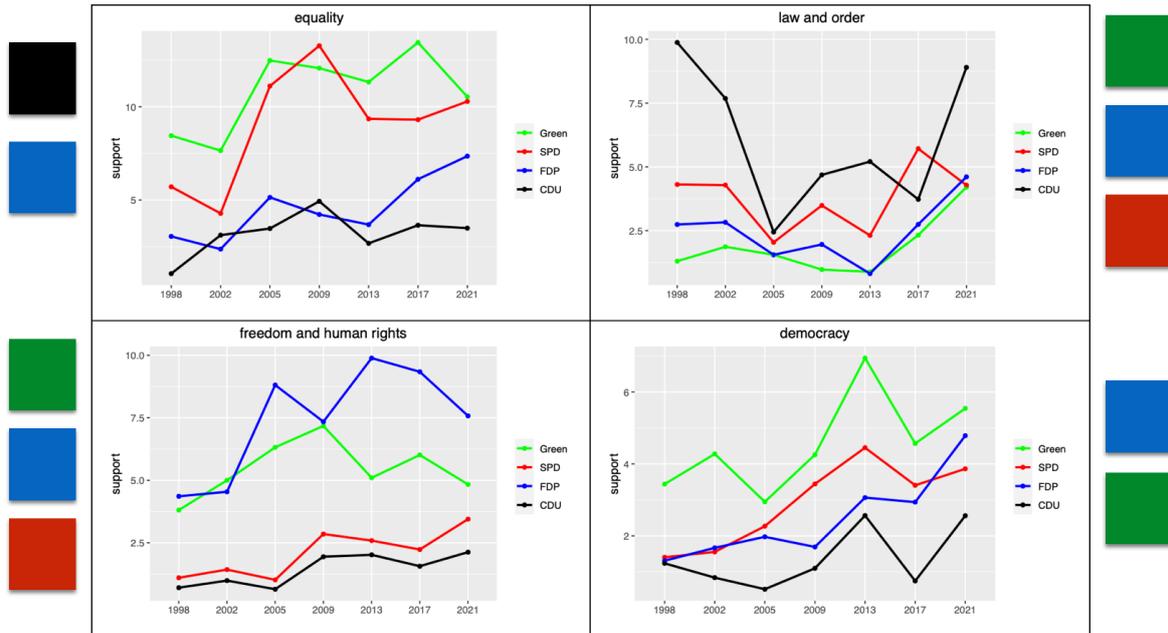


Figure 1  
Party Preferences Across Policy Areas

Now different areas of life are covered by different provisions of the constitution. Four groups of fundamental freedoms have an intuitive interpretation: business and professional matters (econ); access to the judiciary, and the way how the courts handle the case (criminal justice); freedom of the person (person); political freedoms (polit). This can be exploited for the second step: defining success in which case is aligned with the policy preference of which nominating political party.

In the Appendix (Table A1), the mapping between fundamental freedoms and these domains is explained in detail<sup>34</sup>. Unsurprisingly, there is no one to one mapping between the domain of the case, as delineated by the fundamental freedoms that the court discusses, and the political positions of the nominating parties. Domains do not perfectly split along party lines. Yet the mapping is solid enough to use domains as a proxy for the preferences of the nominating political parties. The mapping is clearest in a correlate of economic freedom: the parties on the left put much more stress on equality than the parties on the right. But there are also discernible differences in policy preferences for the remaining domains. The colored blocks in Figure 1 explain the coding: If a case discusses one of the corresponding fundamental freedoms, success is coded as being in line with the policy preferences of the listed nominating party.

This procedure constrains the data: only data from cases can be used that discusses at least one of the fundamental freedoms that can be mapped onto one of the four publicly known preferences of nominating political parties. This reduces the data from 8194 to 5606 observations. There is no need to further constrain the data if the senate decides and is split

<sup>34</sup> 2613 rulings do not fall into any of these four areas, as the court discusses none of the fundamental freedoms listed in Table A1. These rulings are only used for testing activism, not for testing partisanship.

(as 4 justices support the case, and 4 are against it). In this case, per § 15 IV 3 BVerfGG, the applicant loses.

## 5. Results

### a) Descriptives

The Manifesto data can be used in differently fine-grained ways. The most straightforward way is a dummy for “ideology” that is 1 if success in the case is in line with the preferences of the political parties that have nominated the majority of the participating justices. To illustrate: if the case is decided by a chamber, discusses economic freedoms and two of the three justices have been nominated by either the CDU or the FDP, the ideology dummy is 1. By the same token, the dummy is also 1 if the case has been brought by a prison inmate who complains about prison conditions, and two of the three justices have been nominated by the Greens, the FDP or the SPD.

For this first, coarsest measure, one must make a choice if the case discusses fundamental freedoms that have been mapped to different domains, and hence policy preferences. This happens most frequently with fundamental freedoms favouring business interests on the one hand, and fundamental freedoms favouring defendants in court on the other hand (think of a case about business crime). In such cases, the ideology dummy is coded as 1 if in at least one domain success is in line with the majority of justices, were they to follow the party line<sup>35</sup>. The regressions reported in Table 2 thus simply estimate

$$s_i = \beta_0 + \beta_1 m_i + \epsilon_i \quad (1)$$

where  $s$  is the respective success measure,  $m$  is the dummy that is 1 if winning would be in line with the policy preferences of the majority of the political parties that have nominated the justices on the panel, and  $\epsilon$  is error.

As Figure 2 shows, descriptively there is no smoking gun of party politics. If success on the merits would be in line with the political parties that have nominated the majority of the justices, 39% of the applicants win. This percentage goes up (not down) to 44% if winning is in line with the political parties that have nominated the minority of the justices. Same if one includes certiorari. Then the effect that contradicts party influence is even significant (9% for the cases in line with the preferences of the parties nominating the minority of the justices, 6% for the cases in line with the preferences of the parties nominating the majority of the justices). For the remaining success variables, descriptively the effect goes into the expected direction. But for preliminary rulings it is insignificant, for procedural requests it is only significant at the 10% level. At conventional levels, it is only significant if one pools decisions on the merit, on requests for preliminary rulings, and on procedural requests. All three effects are also very small.

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<sup>35</sup> Further operationalisations used in later regressions relax this assumption.

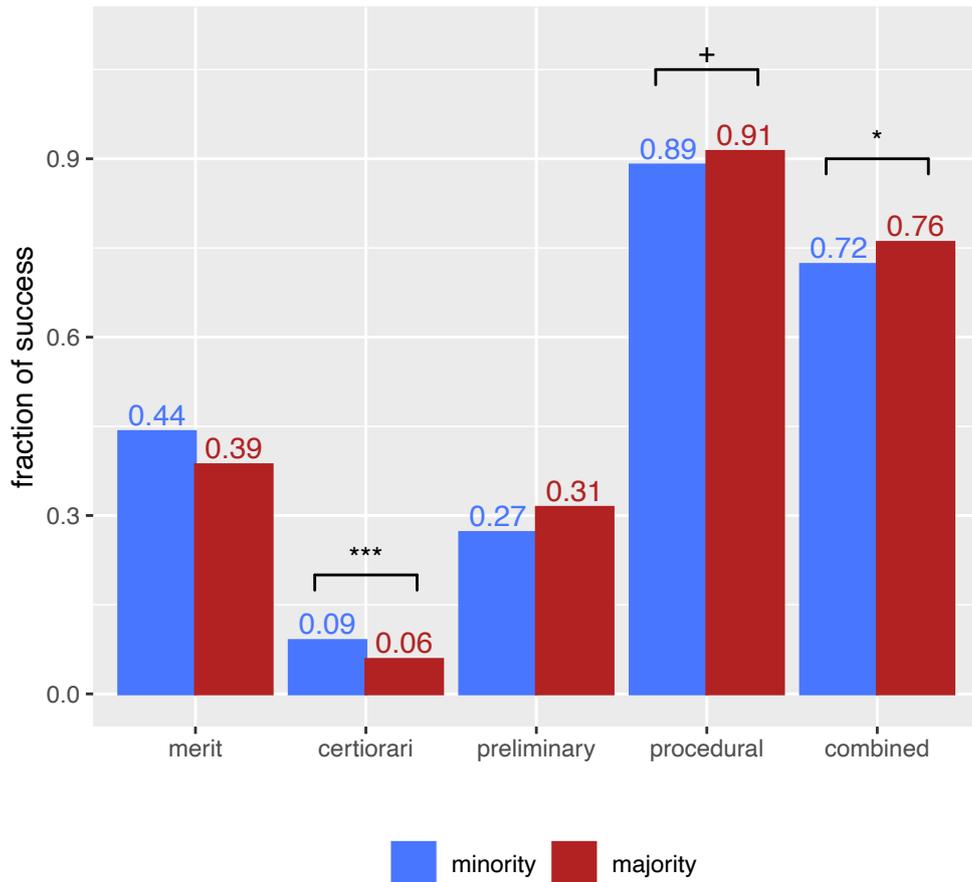


Figure 2

Probability of Success, Depending on Policy Preferences of Political Parties Nominating Majority of Decision Making Body

Dependent variable:					
	merit (1)	certiorari (2)	preliminary (3)	procedural (4)	combined (5)
ideology dummy	-0.056 (0.038)	-0.032*** (0.008)	0.042 (0.030)	0.023+ (0.013)	0.037* (0.016)
cons	0.441*** (0.024)	0.090*** (0.006)	0.271*** (0.021)	0.890*** (0.009)	0.722*** (0.011)
N	692	3,875	933	2,250	3,051

Table 2

Probability of Success, Depending on Policy Preferences of Political Parties Nominating Majority of Decision Making Body

Linear Probability Models

dvs: dummy that is 1 if applicant was successful with the respective request

iv: dummy that is 1 if success would be in line with the preferences of the political parties that have nominated the majority of the chamber or senate

standard errors in parenthesis

\*\*\* p < .001, \*\* p < .01, \* p < .05, + p < .1

## b) Alternative specifications

**Contested.** In Figure 2 and Table 2 the explanatory variable is a dummy that is 1 if the majority of the panel has been nominated by political parties that would favour the applicant. In several ways this is a rather coarse operationalization of the normative concern. First it ignores the strength of the majority, and hence the degree by which the disposition of the case would be contested in the panel, were justices to follow the respective party line. As Figure 3 shows, only in a small number of cases all the participating justices have been nominated by political parties that would want the applicant to win or to lose. The most frequent case is one where two members of the chamber have been nominated by parties that favour either side. In the senate of eight justices, this fraction is most frequently 50%, but may, depending on the subject matter and on the completeness of the senate, be lower or higher. A first additional specification replaces the dummy by this fraction.

This is particularly important for cases heard by a chamber. The chamber has only power to decide if it decides unanimously (§§ 81a I 1, 93b III BVerfGG). If the chamber is split, the case is automatically propelled to the full senate. As the court receives thousands of cases every year, as a practical matter the senates can only handle a tiny fraction of the constitutional complaints. This is why there is strong informal pressure on the chambers to dispose the cases. This practice effectively gives a minority justice on a chamber veto power.

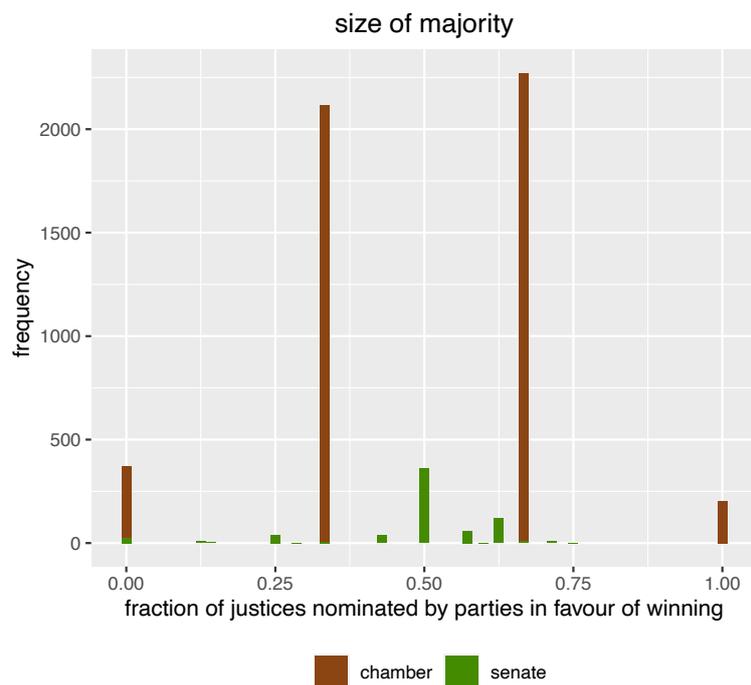
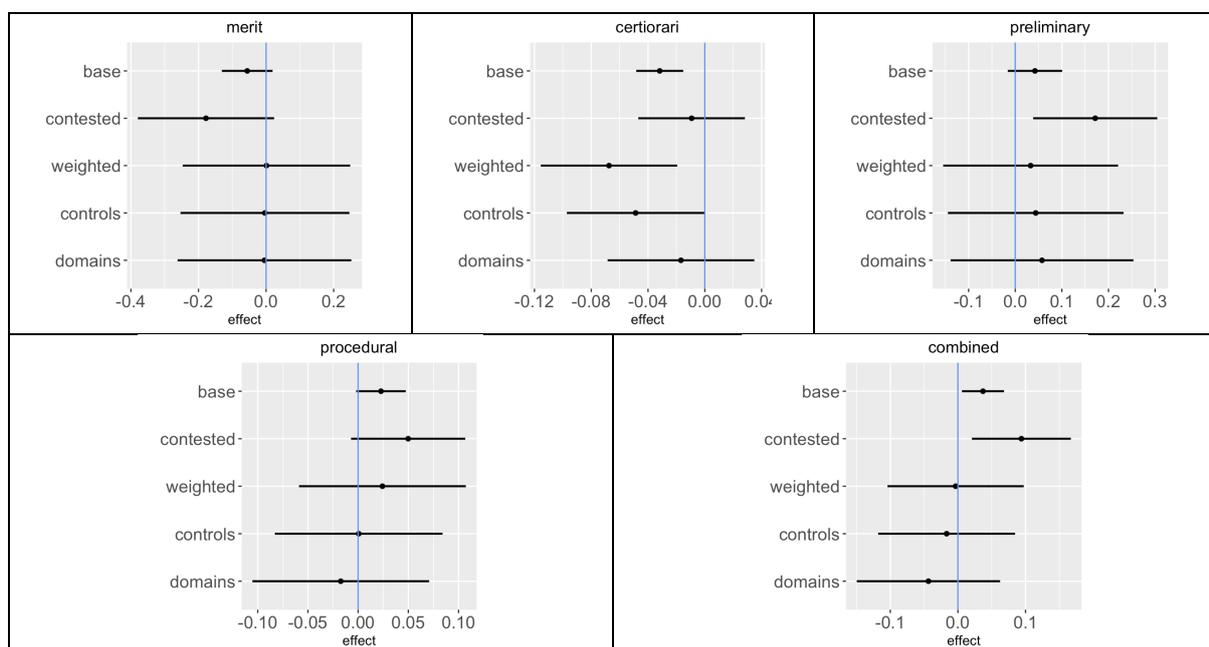


Figure 3  
Size of Majority

With this specification, the dummy in (1) is replaced by

$$m_i = (N_{CDU} + N_{SPD} + N_{FDP} + N_{Green})/N$$

Figure 4 collects regression coefficients from all alternative specifications. To facilitate the comparison, there are separate panels for each of the five dependent variables. “base” repeats the results from Figure 2 and Table 2. In each panel, the second dot and line report the result from a regression that captures ideology by the fraction of justices nominated by a political party in favour of winning. Two results change: descriptively, the result on certiorari remains negative, but it loses significance. On the other hand, the regression now also finds a significant positive effect on requests for a preliminary ruling.



*Figure 4*  
*Coefficients of alternative specifications of ideological influence*  
 dot: regression coefficient  
 lines: 95% confidence interval (for two-sided test)  
 base: dummy that is 1 if majority of justices have been nominated by political parties in favour of winning  
 contested: fraction of justices nominated by political parties in favour of winning  
 weighted: additionally weighted by gap between policy preferences  
 controls: additionally controlling for gender, age and tenure  
 domains: additionally controlling for contested policy domain (“criminal” is reference category)

**Weighted.** As Figure 1 shows, policy preferences do not only substantially vary over time for one and the same political party; so does the gap between the policy preferences of different political parties on contested issues. For most periods, the gap is most pronounced for equality, and by implication for the desire that complainants bringing business cases should win. For law and order, and by implication for criminal cases, the gap is huge in early years, and again recently, but has been tiny in the intermediate time periods. For democracy, and hence cases involving political rights, the gap very much depends on the individual nominating

party. It is much more pronounced for the Greens than for the SPD or the FDP. Likewise, for personal freedoms, the gap is much bigger for the FDP than for the Greens.

The third specification of the explanatory variable not only takes the size of the majority into account, but also the width of the gap between policy preferences of the nominating political parties. It proceeds in four steps. It first gets a measure for the preference gap between each substance matter, each possible pair of political parties, and for each point in time. This measure is the difference in scores from the manifesto project, normalized by the difference between the minimum and the maximum score observed across all policy domains and periods of time. In the second step, separately for each policy domain, the measure is weighted by the composition of the panel. Let me illustrate this step with an example: consider that the case is about business rights, so that justices nominated by either the CDU or the FDP would support winning, were they to follow the party line. The panel consists of one justice nominated by the CDU, a second justice nominated by the FDP, and a third justice nominated by the SPD. In this case, the policy gap between the CDU and the SPD and the policy gap between the FDP and the SPD, for the time period in question, would be summed up and divided by the size of the majority, which is two in this case. In the third step, the domain specific score for the ideology gap is set to 0 if the majority of the panel favours that the applicant loses. This makes sure that the weight captures the degree by which the majority justices favour a positive outcome of the case. The final step takes into account that one and the same case may fall into more than one domain, since it discusses fundamental freedoms that are characteristic for more than one of the contested policy areas. If this is the case, the raw scores for each relevant domain are summed up and divided by the number of relevant domains.

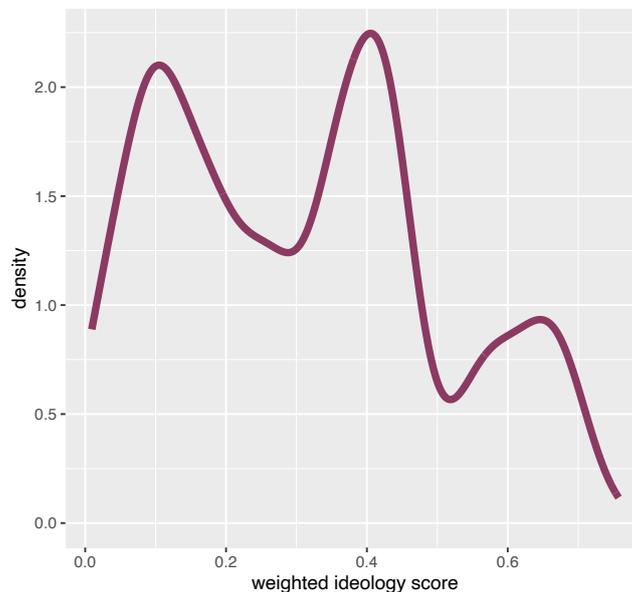
#### **pseudo code for generating ideology weights**

1. For each policy domain, for each point in time, and for each pair of political parties, calculate gap between policy preferences, using Manifesto data.
2. Normalize weights by maximum gap observed in this data.
3. For each ruling, find composition of majority and minority, by nominating political party.
4. For each policy domain and case, calculate the domain score:
  - a. For each pair of minority and majority justices, use the measure generated in steps 1 and 2
  - b. Multiply by the number of justices in the respective pair
  - c. Sum up over relevant pairs
  - d. Divide by number of justices on the panel
5. Set domain score to 0 if, with respect to this domain, the political parties nominating the majority of justices would have wanted the applicant to lose.
6. If fundamental freedoms indicating several domains are discussed, sum domain scores and divide by total number of domains that are discussed.

This last step is particularly important for political rights. Earlier research in other jurisdictions suggests that support for these rights might be conditional on the causes for which the applicants fight, rather than the result of an unconditional preference for citizen rights (Epstein, Parker et al. 2018). The last step of the weighting function takes this possibility into

account: if the ruling also discusses fundamental freedoms that are characteristic for other policy domains, the total weight is averaged over the political and this other domain.

Figure 5 shows that weighted ideology scores vary widely. There are three discernible modes: one in which the weighted ideological gap is small, one in which it is intermediate, and a considerably smaller one in which it is quite pronounced.



*Figure 5*  
*Distribution of ideology scores weighted by degree of majority, party composition,*  
*and gap between policy preferences of nominating political parties*  
kernel density plot

In Figure 4, coefficients from regressing each of the five success measures on the weighted ideology score are reported as “weighted”. As one sees, only the effect of ideology on certiorari turns out significant. Yet this effect is strongly negative, indicating that a majority of justices nominated by political parties that would favour the applicant is more likely to hold *against* the applicant.

**Controls.** The demographics of justices are observed. If one regresses success on justice gender, age and the number of days she has been on the court, one finds a fair number of significant effects. If the fraction of female justices on the panel is larger, the panel is more likely to grant certiorari (coef .066, se .020), but less likely to grant a procedural request (coef -.071, se .031). If mean age of the justices is higher, they are more likely to grant a preliminary ruling (coef .019, se .006), and success is more likely on the combined measure (coef .009, se .003). If the members of the panel have been longer on the court, they are more likely to grant certiorari (coef .00002, se .000001), and less likely to grant a procedural request (coef -.00002, se .000001). In turn, all three demographic markers predict weighted ideology (female coef -.120, se .013; age coef .003, se .001; number of days on court coef -.00001, se .000004).

Finding out to which degree agenda, age and tenure predicts ideology, or even caused them, is beyond the scope of this paper. But these findings show that it is important to control for these potentially independent determinants. The results of regressions for weighted ideology, controlling for gender, age and tenure are reported in the penultimate lines of Figure 4. When adding these controls to the specification, all effects of weighted ideology become clearly insignificant.

**Domains.** As Figure 1 shows, policy preferences vary widely across normative domains. To the extent that this is a difference in degree, expressed by a more or less wide ideology gap, the difference across domains is captured by the weighted score. It is however conceivable that there is an additional qualitative difference between domains. Ideology might loom larger for some domains than for others. To guard for this possibility, the last set of specifications does not only control for gender, age and tenure, but additionally adds dummies for the case discussing economic, political or personal rights (making criminal matters the reference category). As the last lines of Figure 4 show, point predictions for the marginal effect of a one unit change in weighted ideology are indeed affected. But the effect of weighted ideology on none of the success measures turns out significant.

### c) Constraining the sample

The next series of coefficients, reported in Figure 6, report regressions that constrain the sample, in the interest of investigating whether the overall effect is driven by specific parts of the data.

**Constitutional complaints.** The German Constitutional Court has a very wide jurisdiction, including disputes between the Federation and the Länder (§ 13 Nr. 6a, 6b, 7, 8 BVerfGG), between political entities within the federation (§ 13 Nr. 5 BVerfGG), constitutionality of statutes, upon the request of government or members of Parliament (§ 13 Nr. 6 BVerfGG), or of a court (§ 13 Nr. 11 BVerfGG). Yet more than 95% of all cases that are brought are constitutional complaints (§ 13 Nr. 8a BVerfGG). Of the 5606 cases that discuss one of the domains that are contested between the nominating political parties, 5025 originate in constitutional complaints. The first row of Figure 6 narrows the analysis down to these cases. In this subsample, none of the success variables turns out significant.

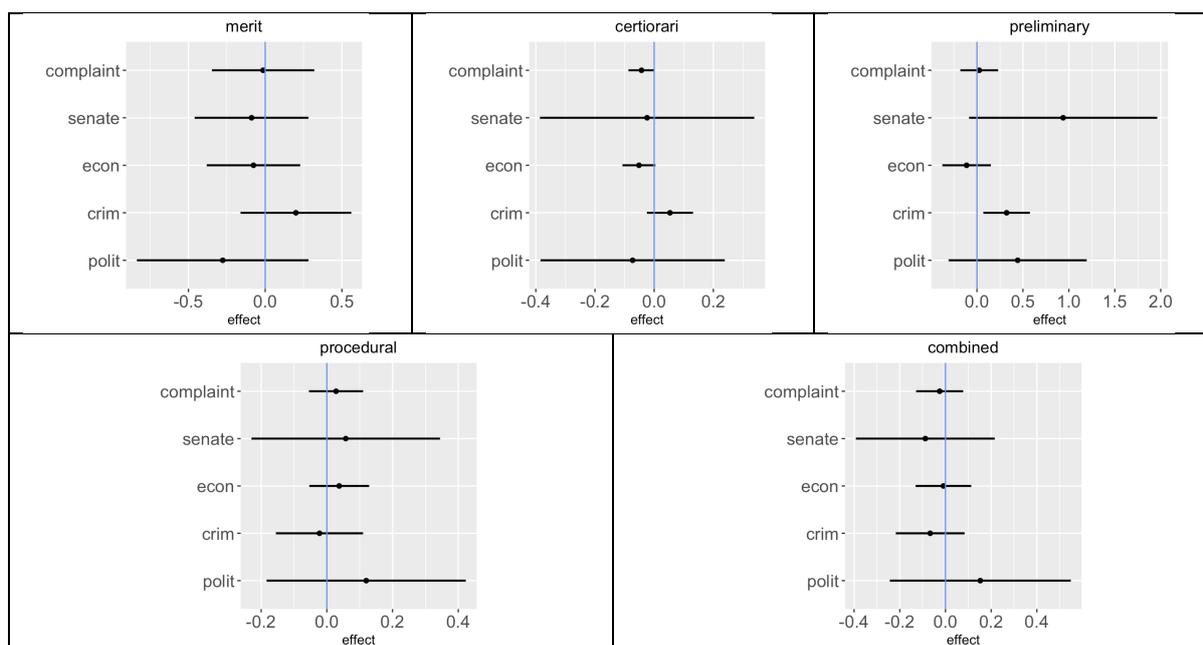


Figure 6  
Coefficients of specifications that constrain the sample

dot: regression coefficient  
 lines: 95% confidence interval (for two-sided test)  
 complaint: only constitutional complaints  
 senate: only cases decided by the senate  
 econ: only cases discussing economic freedoms  
 crim: only cases discussing law and order  
 polit: only cases discussing democratic rights  
 cases discussing person rights omitted as they have very wide confidence intervals

**Senates.** Chambers do only have jurisdiction to decide about constitutional complaints (§ 93b, 1 BVerfGG) and about the requests from lower courts for assessing the constitutionality of a statutory provision (§ 81a BVerfGG). Chambers must decide unanimously (§§ 81a, 1; 93d III 1 BVerfGG), or the case is propelled to the senate. The fact that the decision has been taken by the full senate is therefore a signal that the case is particularly salient. Of the 5606 cases that discuss one of the domains that are contested between the nominating political parties, 680 have been decided by one of the two senates. As the second row in Figure 6 shows, if one constrains the sample to these cases, none of the success variables turns out significant (and confidence intervals are wide, likely because the sample is much smaller).

**Cases discussing economic freedoms.** In the interest of maximizing statistical power (and hence not missing an effect that actually exists, just because the sample is too small), the specifications discussed in the previous section cover all cases in which at least one of the fundamental freedoms is discussed that can serve as proxies for the respective domain of social life. The weighted ideology measure takes into account which of the domains is pertinent. But the analysis pools decisions across all four policy domains. As a complement, the remaining rows of Figure 6 report results from estimations that are confined to one of these domains in isolation. For the 3257 cases discussing economic freedoms, the ideology measure is not only insignificant for all success measures. Except for procedural requests, the

coefficients are even negative: if justices nominated by political parties that support business interests hold a majority, success is even less likely.

**Cases discussing involvement with the criminal law system.** The 3361 cases discussing fundamental freedoms that protect criminal defendants are the only exception to the rule. In this subsample, one of the success measures is significant, the one for preliminary rulings. Yet all remaining success measures, including the combined measure that uses the decisions about preliminary rulings, are also insignificant with this subsample.

**Cases discussing political rights.** As the last row of Figure 6 shows, none of the success measures is significantly different from zero if one constrains the sample to the 1014 cases that discuss political rights. As this sample is considerably smaller, confidence intervals are particularly wide.

**Cases discussing freedom of the person.** Confidence intervals are even wider for the 690 cases that discuss some freedom of the person. In this subsample, no success measure is significantly affected by weighted ideology<sup>36</sup>.

#### **d) Alternative identification strategies**

**Risk of endogeneity.** The association of the fraction of justices nominated by one side of the political spectrum and case outcomes has never been investigated for the German Constitutional Court. This is why the results section starts with these descriptives. But this first set of results should be interpreted with caution. It is quite plausible that case outcomes are influenced by other variables. To the degree that potential confounds are observed, one might content oneself with controlling for these variables. In the introductory subsection of the results section, such estimations have been reported for gender, age, and tenure. Yet such control variables only mitigate omitted variable bias. There is reason to be concerned about further confounds that are harder, if not impossible, to control for.

In an earlier paper, I have even causally identified the positive effect of familiarity among the participating justices, measured by the relative frequency of jointly deciding up till the present case, on the success measures (Engel 2022). Further candidates include finer grained case characteristics, the quality of legal representation, salience of the case for an ongoing policy debate, or the strategic interest of the court in establishing a new doctrine in seemingly minor cases, to be later used for more important issues. One does therefore have reason to worry about causality. Happily, there are two alternative strategies for checking the earlier results in a way that is less vulnerable to confounding effects. Both strategies exploit quasi random changes in the composition of the decision-making body. Another potential confounding factor results from the fact that cases are not randomly assigned to panels. Rather individual justices have fixed dockets that are defined by substance matter.

**Irregular composition of the decision-making body.** The first strategy exploits the fact that the body occasionally cannot decide in its ordinary composition. Sometimes one of the

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<sup>36</sup> The cases are omitted from Figure 6 as otherwise the remaining effects would be hard to discern.

justices is recused, for instance because she had been involved in the case before joining the court (§ 18 BVerfGG). A justice may have fallen ill, or she may have been unavailable and the case was too urgent to postpone the decision. The law permits senate decisions as long as at least six justices are present (§ 15 II 1 BVerfGG). Between 1998 and 2022, 20.59% of all senate decisions have been taken by an incomplete panel.

For the court, the reasons for justices being unavailable are hard to predict, and even harder to influence. This makes it possible to consider the incompleteness of a senate as a quasi-random event. As in the ordinary composition, senates are balanced between justices nominated from the more progressive and from the more conservative part of the political spectrum, if the number of justices is odd, the senate is mechanically no longer balanced along the progressive/conservative divide. If these decisions are significantly explained by the fraction of justices nominated by either side of the political spectrum, this permits a causal interpretation. The incompleteness of the senate may also flip the majority with respect to cases discussing fundamental freedoms of defendants, political rights, or personal freedom. Actually in one respect this first causal test is particularly interesting. While chambers are forced to decide unanimously, senates are free to decide by majority. Hence the incompleteness of a senate is a particularly powerful opportunity for partisan justices; no justice has veto power.

Chambers are not allowed to decide with less than three justices if one member of the chamber is unavailable. Instead every year the court defines, for the entire year, who is going to replace each of the justices in every chamber if this justice happens to be unavailable<sup>37</sup>. Replacement justices are taken from the same senate. In the ordinary composition, chambers are almost always mixed along party lines, with two justices nominated by the CDU or FDP, and one by the SPD or the Greens, or the other way round. This explains why a replacement justice quite often changes the majority, were justices to follow the ideological preferences of the parties that have nominated them.

It is unlikely that either the senate or a chamber decides on the case if the justice referee is unavailable. Hence irregular compositions of the panel are not likely to remove the influence of the justice referee. This could be concerning as justices have fixed dockets, and hence even after the ad hoc change in the composition of the panel, this influence persists. However, if the irregularity affects the majority (defined by the ideological positions of the nominating political parties), this potential confounding factor is at least mitigated.

The downside of this first identification strategy is power. Figure 7 shows that, pooling senate and chamber rulings, 806 decision-making bodies are irregularly composed (gross). Only in 506 of these cases, one of the fundamental freedoms has been discussed that can be associated with a policy preference from the Manifesto project (irr). Only in 196 cases the irregular composition affects the majority along political party lines (flip). Only in 144 cases this change puts justices in the majority whose nominating parties would favour the applicant (maj). Finally only in 62 cases, only a single policy domain is affected, so that one does not

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<sup>37</sup> See for instance for the First Senate and the year 2022: [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV\\_2022/GV\\_2022\\_S1\\_IV\\_Kammern.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV_2022/GV_2022_S1_IV_Kammern.pdf?__blob=publicationFile&v=3).

have to take into consideration that party lines split differently, depending on the domain (excl).

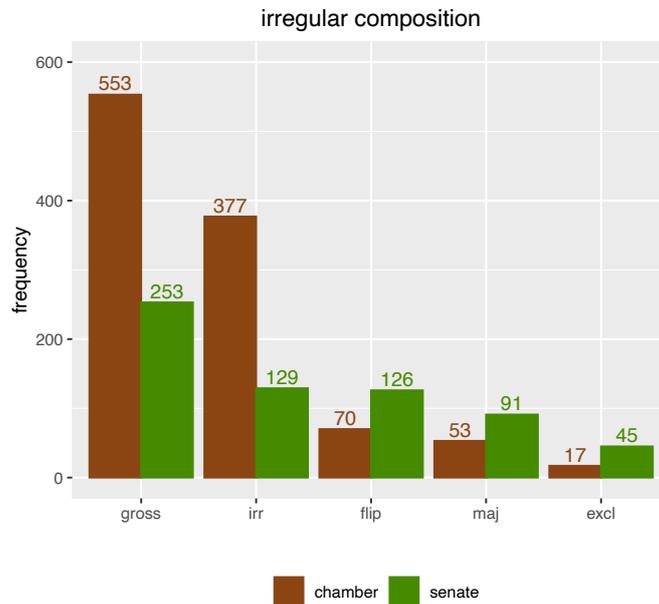


Figure 7  
Irregular Composition of the Decision-Making Body

In descriptive results (Table 2), the only effect that is significant at conventional levels is in the combined measure: while 72% are successful on either the merits, with a request for a preliminary ruling, or with a procedural request, if justices nominated by political parties favouring the applicant are in the minority, this percentage raises to 76% if these justices are in the majority. The effect happens to be significant at the 5% level ( $p = .0197$ ). Yet the effect size is rather small (Cohen's  $d = .085$ ). Achieved power is only 64.70%. If one wanted to safely identify an effect that small, i.e. if one required 80% power, one would need 4284 observations (while actually only 3050 observations are available). These power calculations cast additional doubt on the descriptive result.

Obviously, the number of observations is yet smaller if one relies on the occasional irregular composition of the decision-making body. Using all these cases (gross) would be misleading, as this subsample covers cases in which none of the four contested policy domains is discussed. If one only uses all cases with irregular composition *and* discussing one of the fundamental freedoms that signal a contested domain (irr), one can only safely identify an effect of size .250, about 3 times as big as the one observed effect. If one further constrains the sample to cases in which, due to the irregularity, the majority has flipped (flip), the effect would have to have size .402 to be safely identified at  $\alpha = .05$  and  $\beta = .2$ .

As the lower two rows of Figure 8 show, with either identification strategy, no significant effects are observed. Descriptively, many effects are even negative, indicating that a majority of justices nominated by political parties that favour the applicant makes it less likely that the applicant is successful.

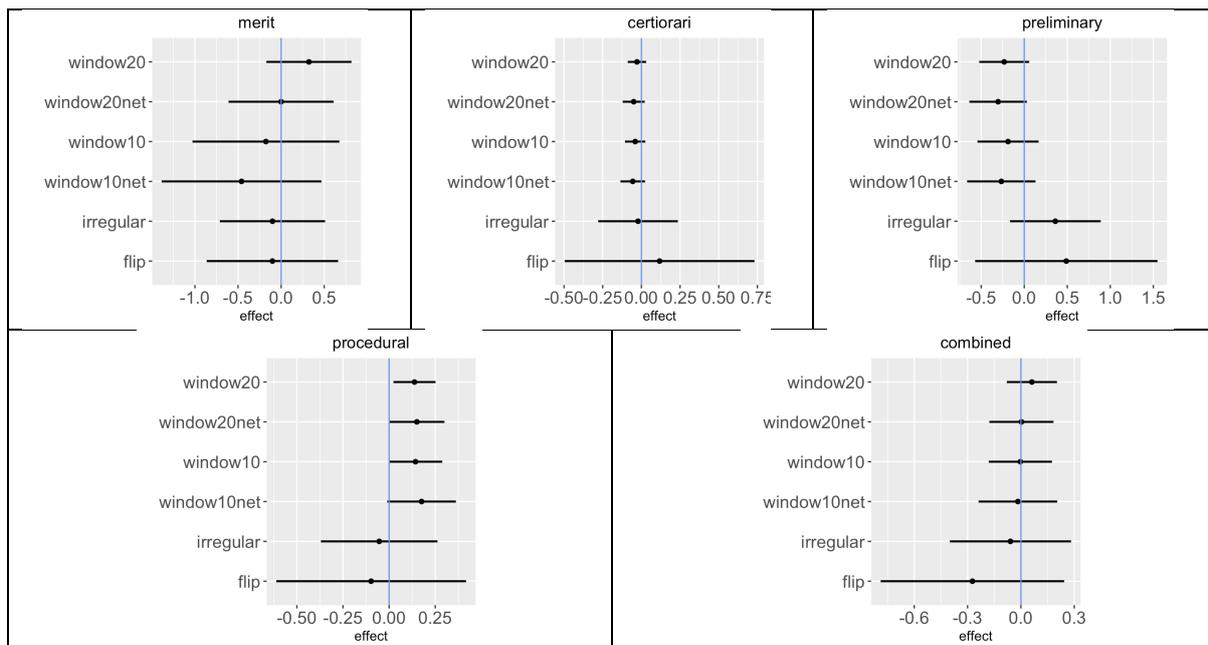


Figure 8  
Coefficients of specifications allowing a causal interpretation

flip: irregular composition, relevant domain, majority flips  
 irr: irregular composition, relevant domain  
 window10net: 10 decisions before and after chamber recomposition, duplicate cases removed  
 window10: 10 decisions before and after chamber recomposition  
 window20net: 20 decisions before and after chamber recomposition, duplicate cases removed  
 window20: 20 decisions before and after chamber recomposition

**Recomposition of chamber changes majority.** The second identification strategy exploits that chambers are regularly recomposed, in ways that are hard to predict for individual justices, and almost impossible to influence. This is why, near the point in time when recomposition occurs, justices are exposed to a quasi-random change. If this change, in the respective domain, affects the majority in terms of the nominating political party, the change provides an opportunity to identify potential party influence.

As explained above, senates split into chambers of three (§ 15a I 1 BVerfGG). Chambers have power to decide about constitutional complaints (§ 93b, 1 BVerfGG), including the option to grant a preliminary ruling in such a case (§ 93d II 1 BVerfGG), and about cases referred to the Constitutional Court by one of the ordinary courts, regarding the constitutionality of a statutory provision (Art. 100 I GG, § 81a I 1 BVerfGG).<sup>38</sup> The law only prescribes that chambers consist of three justices (§ 15a I 2 BVerfGG), and that chambers should be recomposed after three years at the latest (§ 15 a I 3 BVerfGG). Every year, each senate decides about chamber composition (§ 15a II BVerfGG).

Actually chamber composition regularly changes, chiefly for two reasons: a justice leaves the court and another joins; the tasks are rearranged across the eight justices. The latter motive stems from the fact that, for the large majority of cases, the justice referee is defined by a

<sup>38</sup> Chambers do also have jurisdiction to decide about disputes in the *Bundestag* regarding the setting up of an investigation committee, § 82a I BVerfGG, but no such cases have been brought.

domain, and caseload shall be better balanced. For instance on Jan 1<sup>st</sup>, 2013 Justice Gaier has assumed responsibility for landlord and tenant cases, and has ceased responsibility for examination cases to Justice Schluckebier<sup>39</sup>.

If chambers are reorganized, the senates do not only aim at balance in terms of the political party that has nominated the justices. The court also tries to avoid male or female only chambers. Usually one justice who has been on the court for a longer time is paired with one or two more junior justices, so that there is a balance in terms of experience on the court. The court also aims at pairing justices with an earlier career in the judiciary with justices with different professional backgrounds (which in practice mostly are law professors). Balancing chamber composition in that many dimensions makes it necessary to widely overhaul chamber composition even if the reason for changing the composition is confined to a single justice.

For the present purposes, this court practice is fortunate. Even if the moment in time when recomposition is likely may be foreseeable, for the individual justice it is close to impossible to foresee with whom she will have to collaborate in the future. No justice can prevent recomposition from happening, and she has no influence on the point in time when recomposition takes place. She has to come to terms with the fact that, for a considerable amount of time, she will have to closely collaborate with new colleagues. This makes it possible to treat the recompositions as quasi random.

Recompositions sometimes imply that a justice who had been part of the majority (in terms of the political parties nominating the justices) now finds herself in the minority, or the other way round. Figure 9 illustrates the effect with the data from the first Senate, the time from Jan 1<sup>st</sup>, 1998 – June 18, 2018, and the domain of economic rights, on which the nominating political parties split on the left-right divide (Figure 1); complete data for both senates is in the Appendix. Nominating parties are color-coded. If the respective justice had been in the minority (i.e. if she has decided together with two justices nominated by political parties from the opposite side of the political spectrum), the time period is coded in dark color. If the justice was in the majority, the time period is coded in light color. Rarely, all justices on a chamber were nominated by the same political party. In this case, the time period is coded in a very light color.

The identification strategy exploits switches from minority to majority, or the other way round. Such switches provide the opportunity to identify a LATE, a local average treatment effect. In the spirit of regression discontinuity, it is possible to causally identify the effect of the nominating party (more precisely the effect of the fraction of justices nominated by either side of the political spectrum) near the respective breakpoint. One can treat recomposition as an exogenous shock. If one finds an effect on the probability of success in the neighbourhood of this breakpoint, it must have been caused by the break, and the change in the side of the political spectrum that holds the majority to which it has led.

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<sup>39</sup> Jurisdiction until Dec 31, 2012

[https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV\\_2012/GV\\_2012\\_S1\\_IIa\\_Spinne%201.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV_2012/GV_2012_S1_IIa_Spinne%201.pdf?__blob=publicationFile&v=6); jurisdiction from Jan 1<sup>st</sup>, 2013

[https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV\\_2013/GV\\_2013\\_S1\\_II\\_Gesamt.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/GV_2013/GV_2013_S1_II_Gesamt.pdf?__blob=publicationFile&v=5).

To illustrate consider the following case: Justice A has been in a chamber with justices B and C before, and is in a chamber with justices D and E thereafter (or B and D for that matter). Justice A on the one hand, and justices B and C on the other hand, had been in different political camps, considering the domain in question and the political parties that have nominated these justices. In that same domain, justices A and D have been nominated by the same side of the political spectrum. In that situation, the 10 or 20 last chamber decisions in which justice A has participated will be considered, as will be the 10 or 20 first chamber decisions in which justice A has participated after the recomposition. The decisions before the break will be coded as minority decisions. They serve as controls for the effect of political majority, measured by the decisions made after the political majority in the chamber has switched.

As Figure 9 shows, neither does every recomposition affect each justice on the chamber, nor does every recomposition change the political balance. For instance Justice Jaeger always was in a chamber in which she and another justice nominated by the social democrats (Justice Kühling until Jan 22, 2001) or by the Greens (Justice Bryde, from Jan 23, 2001) held the majority. Consequently, for this empirical exercise, no data from Justice Jaeger is used. By contrast, before Nov 1<sup>st</sup>, 2004 Justice Bryde (nominated by the Greens) was in a chamber with Justice Jaeger (nominated by the Social Democrats) and Justice Hoemig (nominated by the Free Democrats) and hence, along the left-right divide, part of the majority. Effective on Nov 1<sup>st</sup>, 2004, Justice Jaeger was replaced by Justice Haas (nominated by the Christian Democrats), which made Justice Bryde the minority justice. Consequently, for Justice Bryde, Nov 1<sup>st</sup>, 2004 is a relevant breakpoint. If the decisions by the chamber of which Justice Bryde was a member before that point in time and the decisions by the chamber of which the justice was a member thereafter systematically differ, this may be interpreted as an effect of the nominating party on decision outcomes. Overall, there are 65 such breakpoints in the complete dataframe, which provides enough data to make the identification strategy viable.

begin	end	Jaeger	Hömig	Haas	Steiner	Papier	Hohmann-De	Hoffmann-Ri	Bryde	Gaier	Eichberger	Schluckebier
1998-01-01	1998-02-26	2	1	3	2							
1998-02-27	1998-09-28	2	1	3	2	1+3						
1998-09-29	1998-12-31	2	1	3	2+3	1+3						
1999-01-01	1999-01-10	2	1	3	2+3	1+3						
1999-01-11	1999-12-15	2	1	3	2	1+3						
1999-12-16	1999-12-31	2	2	3	1	1+3	3	1				
2000-01-01	2000-12-31	2	2	3	1	1+3	3	1				
2001-01-01	2001-01-22	2	2	3	1	1+3	3	1				
2001-01-23	2001-12-31	2	2	3	1	1+3	3	1	2			
2002-01-01	2002-12-31	2	2	3	1	1+3	3	1	2			
2003-01-01	2003-12-31	2	2	1	3	1+3	3	1	2			
2004-01-01	2004-10-31	2	2	1	3	1+3	3	1	2			
2004-11-01	2004-12-31		2	2	3	1+3	1	1	2	3		
2005-01-01	2005-12-31		2	2	3	1+3	1	1	2	3		
2006-01-01	2006-04-24		2	2	3	1+3	1	1	2	3		
2006-04-25	2006-10-01			2	3	1+3	1	1	2	3	2	
2006-10-02	2006-12-31				3	1+3	1	1	2	3	2	2
2007-01-01	2007-09-30				3	1+3	1	1	2	3	2	2
2007-10-01	2007-12-31					1+3	2	1	3	2	1	3
2008-01-01	2008-04-01					1+3	2	1	3	2	1	3
2008-04-02	2008-12-31					1+3	2		3	2	1	3
2009-01-01	2009-12-31					1+3	2		3	2	1	3
2010-01-01	2010-03-14					1+3	2		3	2	1	3
2010-03-15	2010-12-31						2		3	2	1	3
2011-01-01	2011-02-01						2		3	2	1	3
2011-02-02	2011-12-31								3	2	1	3
2012-01-01	2012-12-31								2	1	1	3
2013-01-01	2013-12-31								2	1	1	2
2014-01-01	2014-12-31								2	1	1	2
2015-01-01	2015-06-30								2	1	1	2
2015-07-01	2015-12-31								2	1	1	2
2016-01-01	2016-03-31								2	1	1	2
2016-04-01	2016-06-30								2	1	1	2
2016-07-01	2016-11-07								2	1	1	2
2016-11-08	2016-12-31									2		1+4
2017-01-01	2017-11-30										2	1+4
2017-12-01	2017-12-31										2	
2018-01-01	2018-06-18										2	

Figure 9  
Chamber Composition by Nominating Political Party  
Illustrating logic with data from first senate  
nominating party color coded: redbrown: SPD, yellow: FDP, grey: CDU, green: Greens  
opacity: dark: minority, lighter: majority, very light: unanimity

The analysis exploits the fact that, in the neighbourhood of a breakpoint, the exogenous change in the composition of the chamber is the dominant influence. If there is a significant difference between observations before and after the breakpoint, one may confidently infer that this difference has been caused by the break. Now the composition of the chamber is not the only factor that varies over time. So do the parties, the areas of law, or the political salience of the case, to only list a few of those factors. This is why the window should not be too narrow. One would not see any effect, not because the effect has not been present, but because this variance among cases makes the data too noisy. On the other hand, the window should not be too wide, as one then would have to be concerned that an observed change in outcomes is caused by other systematic changes over time that have occurred during the relevant period of time.<sup>40</sup> On the other hand, the smaller the window, the lower statistical power; one has more reason to worry that one overlooks an effect that, effectively, does exist. This is why results for a more narrow (10 cases before and after the break) and a wider window (20 cases before and after the break) are reported.

<sup>40</sup> Note, however, that the regressions work with a separate window for each justice and breakpoint. Consequently windows are at different points in calendar time. This feature of the dataset makes it less likely in the first place that alternative, longer-term influences are systematic *with respect to the breakpoints*.

A further potential concern originates in the composition of the cases that are in the windows of several justices. Not so rarely, one and the same breakpoint affects more than one justice. It then can happen that cases feature in the windows of more than one justice. In the resulting dataset, these cases feature twice. As the complete window for two justices is never identical (otherwise there would not be a breakpoint), one may be willing to accept the duplication, as it captures the differences in experiences the affected justices have made. But one might also worry that the sample is artificially enlarged. To be on the safe side, for both window sizes, (net) estimations that remove the duplication are reported as well.

The main advantage of this second over the first identification strategy is statistical power. With the window10net sample, at the conventional levels of  $\alpha = .05$  and  $\beta = .8$ , one can safely expect to identify an effect of Cohen's  $d = .181$ ; with the window10 sample (that includes duplicate cases), a smaller effect of size  $.153$  can be identified; with window20net, an effect of size  $.134$ ; and with window20, and effect of size  $.111$ .

The upper four specifications in Figure 8 show that, despite considerably bigger power, with one exception all effects remain insignificant. With the widest window (window20) and at the 5% level, there is a  $.129$  increase in the probability of success with a procedural request if weighted ideology<sup>41</sup> increases from 0 to 1. This effect also remains significant if, as an additional safeguard, one adds a random effect for each individual breakpoint to the specification.

#### **e) Activism**

The preferences of political parties do not only differ across policy areas (Figure 1). The parties also put different degrees of stress on political authority and on government efficiency (Figure 10). Hence the political parties do also have what one might call meta preferences. The more they care about authority and government efficiency, the more they could be sceptical about an activist constitutional court. The less they care, the more they could favour that the court plays a more active role in the polity. This meta preference might translate into the decision-making of justices whom they have nominated.

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<sup>41</sup> For the definition and calculation of the weights, see Figure 5 and accompanying text.

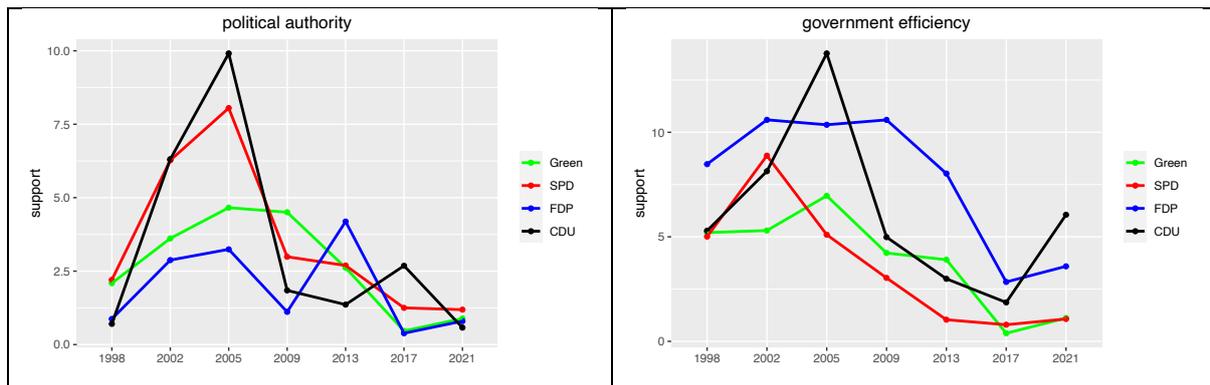


Figure 10  
Meta Party Preferences

Judicial activism is a fairly contested term (for overviews see Kmiec 2004, Lindquist and Cross 2009). Many of the more elaborate definitions do not fit the present research question. If one requires that an activist judge imposes her own ideology (Cross and Lindquist 2006), the distinction I want to draw vanishes. Ignoring precedent (Kmiec 2004, 1466) or departures from commonly accepted methodology (Kmiec 2004, 1473) are beyond the scope of this investigation. I stick to the most traditional definition: a judge is considered activist if she strikes down contested action of other branches of government (Sunstein 2009, 42), or makes this more likely, by intervening on behalf of the applicant with a preliminary ruling or a procedural request. Hence, the more the applicants have success in court, the more the more I consider the panel to be activist<sup>42</sup>.

This conceptualization is straightforward with the 88.96% of (reported) cases that originate in a constitutional complaint. In another 4.85% of all cases, a lower court requests that the constitutional court declare a statutory provision unconstitutional. This can be interpreted as an attack on the legislature. Most of the 3.34% of all cases deciding about a request for a preliminary ruling are also associated with a constitutional complaint. Hence almost all reported decisions are directed against an act by government or Parliament. This is why the interpretation of success in the constitutional court as activist is warranted.

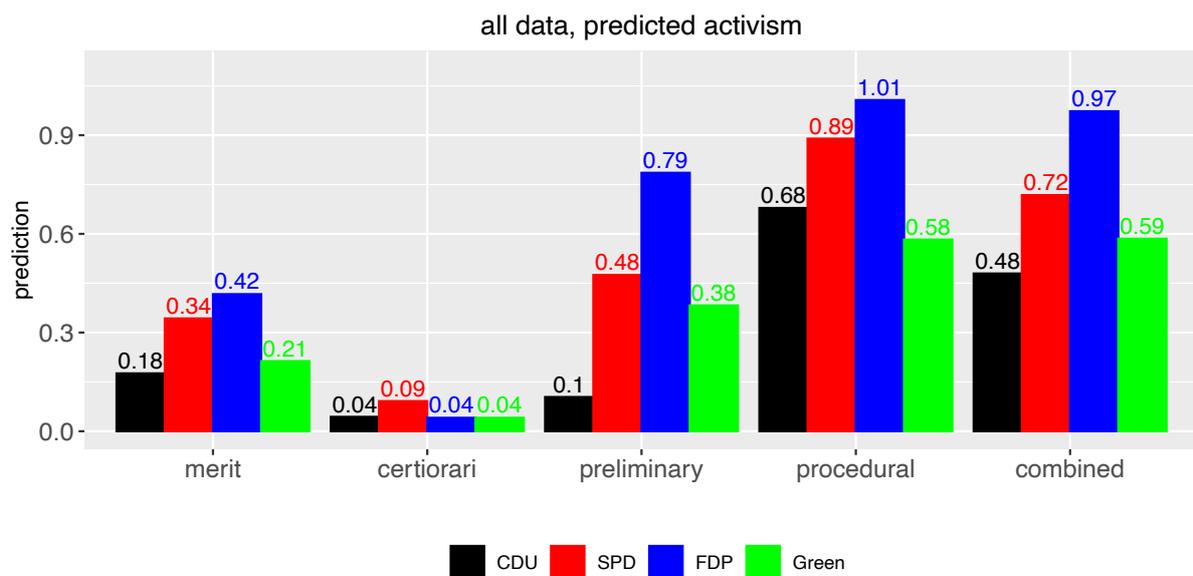
Figure 11 shows that, descriptively, the nominating party is indeed predictive for success. The most transparent way of showing the relevance of the nominating party is predicted values from regressing each of the five success variables on the fraction of justices nominated by either party. The resulting predicted values measure what the outcome would have looked like, had the decision-making body been exclusively composed of justices nominated by any one of the four political parties<sup>43</sup>.

<sup>42</sup> Note that, in the German legal and political discourse, “activism” does not have the negative connotation the term has acquired in the US. Most observers condone a politically active court, as long as this court is perceived to be non-partisan.

<sup>43</sup> Technically, for the reference category (CDU), the predicted value is the constant of the respective regression. For the remaining parties, it is the constant + the party coefficient.

Descriptively success on the merits is least likely if many justices have been nominated by the CDU. Nomination by the Greens only increases predicted success on the merits by 3 percentage points. By contrast, nomination by the SPD increases the probability of success to 34% and nomination by the FDP even increases the probability to 42%. Coefficients are small overall if one adds the possibility that the court does not accept the application in the first place (certiorari). But in relative terms, nomination by the SPD more than doubles the probability of success on this measure. Party effects are huge for success with a request for a preliminary ruling. Were the panel exclusively composed of justices nominated by the CDU, the odds of winning with the request are very small. They are considerably bigger in a fictitious panel exclusively composed of justices nominated by the Greens. Chances are again substantially higher with the SPD, and extremely high with the FDP.

Interestingly, with a procedural request, chances for success are lowest with justices nominated by the Greens. They grow a tad if justices are nominated by the CDU. They are fairly high with justices nominated by the SPD, and near perfect with justices nominated by the FDP. Finally, for the combined measure, CDU and the Greens are close, while the SPD and even more so the FDP are much higher.



*Figure 11*  
*Activism, Descriptives*  
 predicted degree of success, assuming a panel composed by only justices nominated by one political party  
 predicted values from regressing success on the fraction of justices from either party, using all data

If one takes the descriptives at face value, the chances for success on all measures are significantly higher if justices have been nominated by the SPD<sup>44</sup>. Except for certiorari, this also holds for justices nominated by the FDP. Justices nominated by the Greens are only significantly more likely than justices nominated by the CDU to grant an application for a

<sup>44</sup> For success on the merits, the effect is, however, only significant at the 10% level.

preliminary ruling (coefficients and confidence intervals are reported in the bottom line of Figure 12).

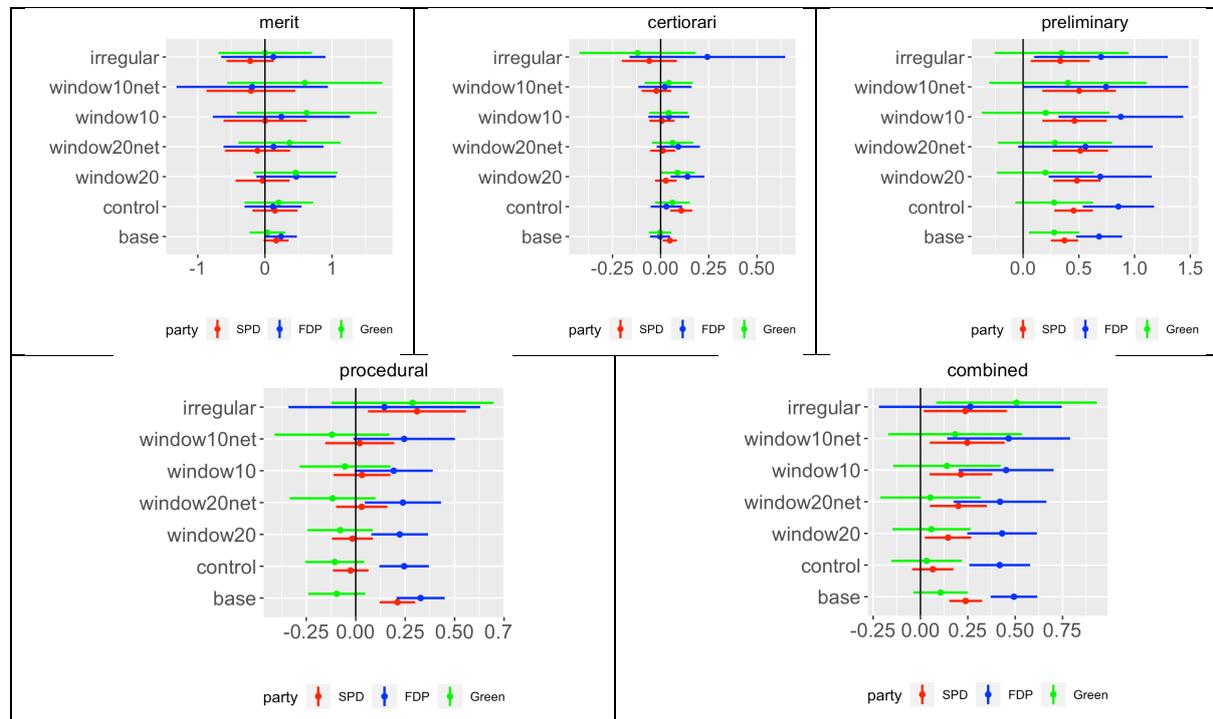


Figure 12  
Coefficients of alternative specifications testing judicial activism

base: using all data  
control: all data, controlling for weighted ideology  
window10net: 10 decisions before and after chamber recomposition, duplicate cases removed  
window10: 10 decisions before and after chamber recomposition  
window20net: 20 decisions before and after chamber recomposition, duplicate cases removed  
window20: 20 decisions before and after chamber recomposition

One may, alternatively, be interested in the effect of the nomination by one of the political parties after controlling for (weighted) ideology<sup>45</sup>. If one still finds a significant effect, this shows that the influence of substance matter policy preferences and of preferences for judicial activism or self-restraint are independent from each other. More importantly even: such effects show that justices are activist even if this runs counter the substantive policy preferences of the political party that has nominated them. As the penultimate lines in Figure 12 show, partly this is indeed the case. Even when taking the preferences of the nominating party for outcomes out of the equation, one still finds a significant effect of the justice being nominated by the SPD on both success on certiorari and on a request for a preliminary ruling. Likewise, even with this control, the effect of justices being nominated by the FDP remains significant for preliminary rulings, procedural requests, and the combined measure.

<sup>45</sup> For the construction of the weights, see Figure 5 and accompanying text.

There is, of course, no reason to be less worried about identification when testing for determinants of judicial activism. The remaining lines of Figure 12 therefore apply the identification strategies that have been developed for an effect of substance matter preferences to this alternative test for party influence. In one respect, there is even more scope for a test that permits a causal interpretation. Judicial activism may occur in any ruling of the constitutional court. Hence there is no need to constrain the sample to cases that have discussed one of the contested fundamental freedoms.

As Figure 12 shows, not all descriptive effects survive. For certiorari, the effect of the SPD disappears. With the most liberal definition of the window about recomposition of the chambers (window20), one newly finds an effect for justices nominated by the FDP on success with certiorari. Except for the test using irregular compositions of the panel, and for the strictest definition of the window about recomposition (window10net), there is a significant effect of justices being nominated by the FDP on procedural requests. Effects on requests for preliminary rulings are fairly consistent. The effect for justices nominated by the SPD holds for all specifications. The effect for justices nominated by the FDP does not hold for the two definitions of the window about recomposition that remove duplicate observations, but holds otherwise. Likewise, for the combined measure the effect of justices being nominated by the SPD turns out significant in all samples. The effect for justices nominated by the FDP becomes only insignificant when testing it on irregularly composed panels.

These findings are not a close match to the preferences of the corresponding political party for state authority, or for efficient government (Figure 10). One should therefore not overinterpret these results. To the degree that the association between nomination by the SPD or the FDP remains significant when using most or even all of the identification strategies, the causal link is beyond doubt. But one cannot conclude that the effect is resulting from a meta preference of these two parties. It rather is a signal of a greater openness of these two parties for individuals whom they suspect to be more activist when on the court.

## **6. Discussion**

Legal realists, and their political science companions who adhere to the attitudinal model, take it for granted that judges exploit doctrinal leeway to advance their personal political ideology. The German Constitutional Court applies provisions of the constitution that essentially consist of normative concerns to be taken into account, and to be balanced against each other. Hence doctrine is not very constraining. Justices at the Constitutional Court are openly selected by the political parties. It is publicly known which justice has been nominated by which political party. Presumably, the parties pick candidates whom they expect to be largely in line with their political positions. Justices might also feel morally obliged to be loyal to the party which has given them their attractive and influential position. For both reasons, one might expect that the nominating party predicts the decisions made by the Constitutional Court.

Yet unlike the situation in the US, there is no public debate over partisan decision making in the German Constitutional Court. Scientific observers have argued that, at least for certain periods of time, dissenting opinions can be organized along party lines (Shikano and Koch

2010, Engst, Gschwend et al. 2017). But in the German court, dissenting opinions are rare. They could be the exception that proves the rule of no ideological influence. To the best of my knowledge, this paper is the first comprehensive attempt at documenting party influence in the German Constitutional Court. The paper uses all published rulings since Jan 1998 (when the court started to systematically post rulings on its website). It turns out that, descriptively, there is a small effect of party allegiance on a success measure that combines success on the merits, on a request for a preliminary ruling, and on a procedural request (but for none of these success measures in isolation). All effects turn out insignificant when weighting ideology by the gap between party preferences in the respective domain, and by the degree of the majority in the respective panel (as measured by the nominating political party). There is also no significant effect when constraining the sample to decisions taken by the full senate; arguably these are the politically more salient cases.

Yet correlation is not causation. The paper offers two alternative approaches to causally identifying party influence. Both approaches exploit quasi-random variation in the party that has nominated the majority of the senate or the chamber. The first approach exploits the fact that, not so rarely, the composition of the decision-making body has been irregular. Senates have decided with less than eight justices. As a rule, both senates of the court are balanced along party lines. They consist of four justices nominated by the more conservative side of the political spectrum (CDU or FDP), and another four justices nominated by the more progressive side of the political spectrum (SPD or Greens). If, exceptionally, the number of justices is odd, this automatically gives one side of the political spectrum a majority. This may also hold if the senate decides with only six justices. Likewise, sometimes, a justice is not available to decide on a chamber of which she is a member. This justice is then replaced by another justice from the same senate. In about half of these cases, the replacement justice comes from the other side of the political spectrum, so that the majority flips. This quasi-random event permits identifying a potential effect of party politics.

The second identification strategy rests on the fact that chambers are regularly recomposed. For the individual justice it is difficult to predict, and essentially impossible to influence, with whom she will have to interact in the future. In a total of 65 of these recompositions, a justice finds herself in a chamber with a majority that differs from the previously existing majority (defined in terms of nominating political parties). Comparing decisions in a window before and after the recomposition makes it possible to identify a local effect of the political orientation of the nominating parties.

Results slightly differ across these two independent causal estimations. But the message is always the same: there is a (more or less pronounced) sign of judicial activism the larger the fraction of justices nominated by left-wing parties. But there is no sign of justices nominated by one side of the political spectrum trying to decide in line with the policy preferences of the nominating political party; there is no sign of ideological decision-making.

An insurmountable limitation of the investigation results from the publication policy of the court. While the number of publicly available chamber rulings is substantial, the large majority of the decisions made by one of the chambers is not published. Yet for the present research question, this limitation is not severe. If the ruling is not posted on the court's website, the court has almost always used the power to decide without written reasons. All the applicant

learns is that her application has been rejected. It could of course be that a decision on the merits would have forced the court to express itself on a politically salient matter. The decision could be political in the sense that the court avoids publicly taking a position. But at any rate an unpublished ruling cannot exert any positive political influence. By contrast the rulings with high political salience are all available (as the full senate has decided), as are the rulings that a chamber has considered sufficiently important to give explicit reasons.

Not finding a hypothesized effect is of course not the same as proving that the effect is absent. This cautious note is particularly appropriate as both identifications strategies substantially reduce the sample, and hence statistical power. Still it is remarkable that there is no evidence for partisanship. One may confidently claim that, at the German Constitutional Court, there is no smoking gun of ideological party influence. The justices do not seem to act as agents of the political parties that have nominated them.

There is, by contrast, a rather robust effect of nomination by either the SPD or the FDP on granting a preliminary ruling, or a procedural request. Interestingly, these effects do not map onto meta preferences of these two parties, that one can infer from their position on state authority, and on government efficiency. This suggests a more subtle influence of the nominating party. It seems that the SPD and the FDP are more willing to nominate justices whom they expect to be activist when on the court.

It is beyond the scope of this paper to discriminate between two alternative explanations for this finding. Being activist could result from a procedural policy preference. If true, these justices would consider being activist, irrespective of substantive domain, to be desirable. Alternatively, the justices might be guided by a strategic motive (as discussed by Bailey and Maltman 2011): as they care about being activist in domains where supporting the complainant is in line with their substantive policy preferences, they might want to nurture a culture of activism, even if in the concrete case a more cautious decision would have been closer to their substantive preferences.

The logical next step would be investigating what shields the court from ideological party influence. Are the formal safeguards effective? Each justice needs a supermajority in the nominating body. Senates and chambers are balanced along party lines. Chambers do only have power to decide if they decide unanimously. Are informal safeguards critical? In German legal education, legalism is taught. Legalism is also the predominant attitude in legal scholarship. Or are the justices able to sustain public perception of them not being partisan as a public good? If true, individual justices would be strategic, but would place sufficient weight on the long-term power of the court, which they would not want to put at risk by being perceived as followers of the political party that has nominated them. Either way, one would come to the conclusion that, effectively, the German Constitution court is political, but not partisan.

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## The German Constitutional Court – Activist, but not Partisan?

### Appendix

#### 1. Discussion of fundamental freedoms as markers for policy domains

issue area	fundamental freedom	subject	frequency
<b>econ</b>	Art. 2 I	general freedom	1127
	Art. 3 I	equality	1954
	Art. 9 III	labour coalitions	71
	Art. 12 I	freedom of profession	776
	Art. 14 I, II	property	690
<b>justice</b>	Art. 2 II	life and limb, integrity	665
	Art. 10	interception	55
	Art. 11	freedom of movement	18
	Art. 13	search and seizure	188
	Art. 16 II	extradition	26
	Art. 19 IV	access to justice	1314
	Art. 101	right to a lawful judge	630
	Art. 103 I	due process	1376
	Art. 103 II, III	nullum crimen, ne bis in idem	235
	Art. 104	habeas corpus	279
<b>political</b>	Art. 5 I, II	speech	407
	Art. 5 III	art and research	95
	Art. 8	manifestation	84
	Art. 9 I, II	association	47
	Art. 28 II	municipalities	60
	Art. 33 II-V	public service	276
	Art. 38	elections	155
	Art. 4 I, II	religion	93
<b>person</b>	Art. 6	family	529
	Art. 7	school	35
	Art. 16a	asylum	75
	Art. 140	religious communities	23

*Table 1  
Fundamental Freedoms Defining Issue Areas*

#### 2. Chamber Recompositions

<see separate document>

### 3. Regression Tables

#### a) Alternative Specifications of Ideological Influence (Figure 4)

##### i. base

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
ideology2majority	-0.056 (0.038)	-0.032*** (0.008)	0.042 (0.030)	0.023+ (0.013)	0.037* (0.016)
Constant	0.441*** (0.024)	0.090*** (0.006)	0.271*** (0.021)	0.890*** (0.009)	0.722*** (0.011)
Observations	692	3,875	933	2,250	3,051
R <sup>2</sup>	0.003	0.004	0.002	0.001	0.002
Adjusted R <sup>2</sup>	0.002	0.003	0.001	0.001	0.001
Residual Std. Error	0.493 (df = 690)	0.263 (df = 3873)	0.454 (df = 931)	0.299 (df = 2248)	0.438 (df = 3049)
F Statistic	2.119 (df = 1; 690)	14.101*** (df = 1; 3873)	2.020 (df = 1; 931)	3.267+ (df = 1; 2248)	5.443* (df = 1; 3049)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

ii. contested

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
degmaj	-0.178 <sup>+</sup> (0.103)	-0.009 (0.019)	0.172 <sup>*</sup> (0.068)	0.050 <sup>+</sup> (0.029)	0.094 <sup>*</sup> (0.037)
Constant	0.507 <sup>***</sup> (0.054)	0.079 <sup>***</sup> (0.010)	0.207 <sup>***</sup> (0.037)	0.876 <sup>***</sup> (0.016)	0.693 <sup>***</sup> (0.020)
Observations	692	3,875	933	2,250	3,051
R <sup>2</sup>	0.004	0.0001	0.007	0.001	0.002
Adjusted R <sup>2</sup>	0.003	-0.0002	0.006	0.001	0.002
Residual Std. Error	0.493 (df = 690)	0.263 (df = 3873)	0.453 (df = 931)	0.299 (df = 2248)	0.438 (df = 3049)
F Statistic	2.989 <sup>+</sup> (df = 1; 690)	0.234 (df = 1; 3873)	6.370 <sup>*</sup> (df = 1; 931)	2.951 <sup>+</sup> (df = 1; 2248)	6.321 <sup>*</sup> (df = 1; 3049)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iii. weighted

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	0.001 (0.126)	-0.067** (0.025)	0.033 (0.096)	0.024 (0.042)	-0.003 (0.051)
Constant	0.432*** (0.023)	0.090*** (0.006)	0.293*** (0.018)	0.890*** (0.008)	0.726*** (0.010)
Observations	606	3,193	791	1,789	2,493
R <sup>2</sup>	0.00000	0.002	0.0002	0.0002	0.00000
Adjusted R <sup>2</sup>	-0.002	0.002	-0.001	-0.0004	-0.0004
Residual Std. Error	0.496 (df = 604)	0.274 (df = 3191)	0.457 (df = 789)	0.310 (df = 1787)	0.446 (df = 2491)
F Statistic	0.0001 (df = 1; 604)	7.581** (df = 1; 3191)	0.119 (df = 1; 789)	0.326 (df = 1; 1787)	0.004 (df = 1; 2491)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iv. controls

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.004 (0.128)	-0.049* (0.025)	0.044 (0.096)	0.001 (0.043)	-0.017 (0.052)
fem	-0.078 (0.110)	0.077*** (0.022)	-0.055 (0.074)	-0.119*** (0.034)	-0.089* (0.042)
age	0.006 (0.009)	-0.003 (0.002)	0.021*** (0.006)	0.003 (0.003)	0.010** (0.003)
tenure	0.00002 (0.00003)	0.00002** (0.00001)	-0.00000 (0.00003)	-0.00002* (0.00001)	0.00001 (0.00001)
Constant	0.054 (0.482)	0.188+ (0.104)	-0.887* (0.347)	0.775*** (0.155)	0.173 (0.192)
Observations	606	3,193	791	1,789	2,493
R <sup>2</sup>	0.003	0.010	0.017	0.011	0.006
Adjusted R <sup>2</sup>	-0.004	0.009	0.012	0.008	0.004
Residual Std. Error	0.497 (df = 601)	0.273 (df = 3188)	0.454 (df = 786)	0.309 (df = 1784)	0.445 (df = 2488)
F Statistic	0.466 (df = 4; 601)	8.316*** (df = 4; 3188)	3.327* (df = 4; 786)	4.773*** (df = 4; 1784)	3.686** (df = 4; 2488)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

**v. domains**

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.005 (0.131)	-0.017 (0.026)	0.057 (0.100)	-0.017 (0.045)	-0.044 (0.054)
fem	-0.054 (0.111)	0.089*** (0.022)	-0.034 (0.074)	-0.112** (0.035)	-0.100* (0.042)
age	0.006 (0.009)	-0.003 (0.002)	0.021*** (0.006)	0.003 (0.003)	0.009** (0.003)
tenure	0.00003 (0.00003)	0.00002** (0.00001)	0.00000 (0.00002)	-0.00002+ (0.00001)	0.00001 (0.00001)
cldomainperson	0.082 (0.072)	0.036* (0.018)	0.181** (0.070)	0.033 (0.028)	0.047 (0.035)
cldomainpolit	0.009 (0.050)	0.119*** (0.016)	0.132** (0.047)	0.049+ (0.027)	-0.059* (0.028)
cldomainecon	0.095 (0.059)	-0.004 (0.012)	0.053 (0.050)	0.040* (0.020)	0.051* (0.025)
Constant	0.036 (0.483)	0.158 (0.103)	-0.982** (0.346)	0.778*** (0.157)	0.191 (0.193)
Observations	606	3,193	791	1,789	2,493
R <sup>2</sup>	0.009	0.029	0.033	0.014	0.011
Adjusted R <sup>2</sup>	-0.003	0.027	0.024	0.011	0.008
Residual Std. Error	0.496 (df = 598)	0.271 (df = 3185)	0.451 (df = 783)	0.309 (df = 1781)	0.444 (df = 2485)
F Statistic	0.774 (df = 7; 598)	13.543*** (df = 7; 3185)	3.833*** (df = 7; 783)	3.727*** (df = 7; 1781)	3.912*** (df = 7; 2485)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

**b) Constrained Samples (Figure 6)**

**i. complaint**

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.014 (0.170)	-0.043+ (0.023)	0.024 (0.105)	0.028 (0.042)	-0.025 (0.053)

Constant	0.491 <sup>***</sup> (0.031)	0.066 <sup>***</sup> (0.005)	0.270 <sup>***</sup> (0.020)	0.894 <sup>***</sup> (0.008)	0.753 <sup>***</sup> (0.011)
Observations	353	2,837	611	1,717	2,188
R <sup>2</sup>	0.00002	0.001	0.0001	0.0003	0.0001
Adjusted R <sup>2</sup>	-0.003	0.001	-0.002	-0.0003	-0.0004
Residual Std. Error	0.501 (df = 351)	0.239 (df = 2835)	0.446 (df = 609)	0.305 (df = 1715)	0.433 (df = 2186)
F Statistic	0.007 (df = 1; 351)	3.630 <sup>+</sup> (df = 1; 2835)	0.054 (df = 1; 609)	0.443 (df = 1; 1715)	0.235 (df = 1; 2186)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

ii. senate

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.089 (0.189)	-0.024 (0.185)	0.938 <sup>+</sup> (0.523)	0.058 (0.146)	-0.088 (0.155)
Constant	0.457 <sup>***</sup> (0.031)	0.424 <sup>***</sup> (0.029)	0.422 <sup>***</sup> (0.057)	0.862 <sup>***</sup> (0.025)	0.664 <sup>***</sup> (0.025)
Observations	349	372	89	249	473
R <sup>2</sup>	0.001	0.00005	0.036	0.001	0.001
Adjusted R <sup>2</sup>	-0.002	-0.003	0.025	-0.003	-0.001
Residual Std. Error	0.499 (df = 347)	0.495 (df = 370)	0.495 (df = 87)	0.340 (df = 247)	0.475 (df = 471)
F Statistic	0.220 (df = 1; 347)	0.017 (df = 1; 370)	3.220 <sup>+</sup> (df = 1; 87)	0.155 (df = 1; 247)	0.323 (df = 1; 471)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iii. econ

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.076 (0.155)	-0.051 <sup>+</sup> (0.029)	-0.113 (0.135)	0.038 (0.047)	-0.009 (0.062)
Constant	0.466 <sup>***</sup> (0.034)	0.087 <sup>***</sup> (0.008)	0.295 <sup>***</sup> (0.033)	0.913 <sup>***</sup> (0.011)	0.762 <sup>***</sup> (0.015)
Observations	302	1,736	234	827	1,111
R <sup>2</sup>	0.001	0.002	0.003	0.001	0.00002
Adjusted R <sup>2</sup>	-0.003	0.001	-0.001	-0.0004	-0.001
Residual Std. Error	0.500 (df = 300)	0.270 (df = 1734)	0.451 (df = 232)	0.275 (df = 825)	0.427 (df = 1109)
F Statistic	0.241 (df = 1; 300)	3.237 <sup>+</sup> (df = 1; 1734)	0.706 (df = 1; 232)	0.656 (df = 1; 825)	0.021 (df = 1; 1109)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iv. crim

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	0.200 (0.184)	0.053 (0.040)	0.322* (0.129)	-0.022 (0.068)	-0.067 (0.077)
Constant	0.388*** (0.033)	0.065*** (0.007)	0.237*** (0.021)	0.877*** (0.011)	0.725*** (0.013)
Observations	295	1,713	522	1,152	1,539
R <sup>2</sup>	0.004	0.001	0.012	0.0001	0.0005
Adjusted R <sup>2</sup>	0.001	0.0005	0.010	-0.001	-0.0002
Residual Std. Error	0.492 (df = 293)	0.255 (df = 1711)	0.436 (df = 520)	0.331 (df = 1150)	0.449 (df = 1537)
F Statistic	1.181 (df = 1; 293)	1.806 (df = 1; 1711)	6.219* (df = 1; 520)	0.109 (df = 1; 1150)	0.758 (df = 1; 1537)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

v. polit

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.277 (0.285)	-0.073 (0.159)	0.443 (0.383)	0.120 (0.155)	0.153 (0.202)
Constant	0.415*** (0.038)	0.168*** (0.019)	0.316*** (0.043)	0.908*** (0.021)	0.657*** (0.026)
Observations	227	549	175	280	488
R <sup>2</sup>	0.004	0.0004	0.008	0.002	0.001
Adjusted R <sup>2</sup>	-0.0003	-0.001	0.002	-0.001	-0.001
Residual Std. Error	0.490 (df = 225)	0.371 (df = 547)	0.476 (df = 173)	0.275 (df = 278)	0.472 (df = 486)
F Statistic	0.941 (df = 1; 225)	0.210 (df = 1; 547)	1.332 (df = 1; 173)	0.600 (df = 1; 278)	0.570 (df = 1; 486)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

vi. person

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	no variance	-0.766 (1.056)	no variance	0.405 (1.111)	0.930 (1.528)
Constant	0.456*** (0.061)	0.097*** (0.017)	0.333*** (0.060)	0.882*** (0.025)	0.728*** (0.030)
Observations	68	324	63	170	229
R <sup>2</sup>	0.000	0.002	0.000	0.001	0.002
Adjusted R <sup>2</sup>	0.000	-0.001	0.000	-0.005	-0.003
Residual Std. Error	0.502 (df = 67)	0.295 (df = 322)	0.475 (df = 62)	0.324 (df = 168)	0.446 (df = 227)
F Statistic		0.526 (df = 1; 322)		0.133 (df = 1; 168)	0.370 (df = 1; 227)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

c) Specifications Allowing a Causal Interpretation (Figure 8)

i. flip

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.101 (0.389)	0.118 (0.313)	0.489 (0.541)	-0.097 (0.262)	-0.273 (0.263)
Constant	0.434*** (0.081)	0.301*** (0.063)	0.420*** (0.084)	0.872*** (0.051)	0.679*** (0.054)
Observations	74	98	48	72	132
R <sup>2</sup>	0.001	0.001	0.017	0.002	0.008
Adjusted R <sup>2</sup>	-0.013	-0.009	-0.004	-0.012	0.001
Residual Std. Error	0.500 (df = 72)	0.470 (df = 96)	0.505 (df = 46)	0.350 (df = 70)	0.481 (df = 130)
F Statistic	0.068 (df = 1; 72)	0.141 (df = 1; 96)	0.817 (df = 1; 46)	0.138 (df = 1; 70)	1.074 (df = 1; 130)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

ii. irregular

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.101 (0.312)	-0.022 (0.131)	0.361 (0.269)	-0.054 (0.161)	-0.059 (0.174)
Constant	0.376*** (0.063)	0.153*** (0.028)	0.434*** (0.049)	0.889*** (0.032)	0.665*** (0.036)
Observations	99	239	137	146	266
R <sup>2</sup>	0.001	0.0001	0.013	0.001	0.0004
Adjusted R <sup>2</sup>	-0.009	-0.004	0.006	-0.006	-0.003
Residual Std. Error	0.486 (df = 97)	0.359 (df = 237)	0.499 (df = 135)	0.323 (df = 144)	0.476 (df = 264)
F Statistic	0.104 (df = 1; 97)	0.028 (df = 1; 237)	1.804 (df = 1; 135)	0.110 (df = 1; 144)	0.115 (df = 1; 264)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iii. window10net

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.459 (0.473)	-0.058 (0.040)	-0.254 (0.213)	0.169 <sup>+</sup> (0.091)	0.010 (0.110)
Constant	0.475 <sup>***</sup> (0.082)	0.046 <sup>***</sup> (0.010)	0.309 <sup>***</sup> (0.043)	0.877 <sup>***</sup> (0.020)	0.763 <sup>***</sup> (0.024)
Observations	48	533	136	321	411
R <sup>2</sup>	0.020	0.004	0.010	0.011	0.00002
Adjusted R <sup>2</sup>	-0.001	0.002	0.003	0.008	-0.002
Residual Std. Error	0.502 (df = 46)	0.195 (df = 531)	0.453 (df = 134)	0.307 (df = 319)	0.426 (df = 409)
F Statistic	0.943 (df = 1; 46)	2.059 (df = 1; 531)	1.416 (df = 1; 134)	3.418 <sup>+</sup> (df = 1; 319)	0.008 (df = 1; 409)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iv. window10

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.177 (0.435)	-0.041 (0.033)	-0.242 (0.186)	0.133 <sup>+</sup> (0.071)	0.009 (0.089)
Constant	0.455 <sup>***</sup> (0.075)	0.041 <sup>***</sup> (0.008)	0.319 <sup>***</sup> (0.036)	0.890 <sup>***</sup> (0.016)	0.780 <sup>***</sup> (0.020)
Observations	59	721	190	452	579
R <sup>2</sup>	0.003	0.002	0.009	0.008	0.00002
Adjusted R <sup>2</sup>	-0.015	0.001	0.004	0.005	-0.002
Residual Std. Error	0.504 (df = 57)	0.187 (df = 719)	0.459 (df = 188)	0.293 (df = 450)	0.415 (df = 577)
F Statistic	0.165 (df = 1; 57)	1.485 (df = 1; 719)	1.698 (df = 1; 188)	3.456 <sup>+</sup> (df = 1; 450)	0.009 (df = 1; 577)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

v. window20net

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.080 (0.309)	-0.056 (0.036)	-0.322 <sup>+</sup> (0.177)	0.137 <sup>+</sup> (0.073)	0.021 (0.089)
Constant	0.525 <sup>***</sup> (0.055)	0.062 <sup>***</sup> (0.008)	0.293 <sup>***</sup> (0.031)	0.879 <sup>***</sup> (0.014)	0.756 <sup>***</sup> (0.018)
Observations	104	979	251	589	756
R <sup>2</sup>	0.001	0.003	0.013	0.006	0.0001
Adjusted R <sup>2</sup>	-0.009	0.002	0.009	0.004	-0.001
Residual Std. Error	0.504 (df = 102)	0.228 (df = 977)	0.443 (df = 249)	0.311 (df = 587)	0.429 (df = 754)
F Statistic	0.067 (df = 1; 102)	2.470 (df = 1; 977)	3.302 <sup>+</sup> (df = 1; 249)	3.519 <sup>+</sup> (df = 1; 587)	0.055 (df = 1; 754)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

vi. window20

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	0.273 (0.247)	-0.030 (0.030)	-0.288 <sup>+</sup> (0.154)	0.129 <sup>*</sup> (0.055)	0.082 (0.069)
Constant	0.509 <sup>***</sup> (0.046)	0.059 <sup>***</sup> (0.007)	0.290 <sup>***</sup> (0.026)	0.891 <sup>***</sup> (0.011)	0.772 <sup>***</sup> (0.014)
Observations	145	1,395	349	878	1,115
R <sup>2</sup>	0.008	0.001	0.010	0.006	0.001
Adjusted R <sup>2</sup>	0.002	0.00001	0.007	0.005	0.0004
Residual Std. Error	0.500 (df = 143)	0.228 (df = 1393)	0.444 (df = 347)	0.295 (df = 876)	0.415 (df = 1113)
F Statistic	1.219 (df = 1; 143)	1.011 (df = 1; 1393)	3.510 <sup>+</sup> (df = 1; 347)	5.480 <sup>*</sup> (df = 1; 876)	1.421 (df = 1; 1113)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

vii. window10net cluster breakpoints

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.459 (0.473)	-0.056 (0.041)	-0.266 (0.203)	0.176 <sup>+</sup> (0.095)	-0.017 (0.113)
Constant	0.475 <sup>***</sup> (0.082)	0.046 <sup>***</sup> (0.011)	0.321 <sup>***</sup> (0.060)	0.871 <sup>***</sup> (0.025)	0.762 <sup>***</sup> (0.029)
Observations	48	533	136	321	411
R <sup>2</sup>	0.020	0.004	0.032	0.083	0.020
Adjusted R <sup>2</sup>	-0.001	0.002	0.024	0.080	0.017
F Statistic	0.943	1.876	1.721	3.430 <sup>+</sup>	0.023

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

viii. window10 cluster breakpoints

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
wideology	-0.177 (0.435)	-0.040 (0.034)	-0.188 (0.181)	0.143 <sup>+</sup> (0.074)	-0.003 (0.091)
Constant	0.455 <sup>***</sup> (0.075)	0.042 <sup>***</sup> (0.010)	0.325 <sup>***</sup> (0.052)	0.889 <sup>***</sup> (0.019)	0.781 <sup>***</sup> (0.021)
Observations	59	721	190	452	579
R <sup>2</sup>	0.003	0.003	0.021	0.050	0.008
Adjusted R <sup>2</sup>	-0.015	0.002	0.016	0.048	0.007
F Statistic	0.165	1.407	1.073	3.712 <sup>+</sup>	0.001

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

**ix. window20net cluster breakpoints**

<i>Dependent variable:</i>					
	succmain	succmcert	succprelim	succproc	succcomb
	(1)	(2)	(3)	(4)	(5)
wideology	-0.001 (0.311)	-0.050 (0.036)	-0.304 <sup>+</sup> (0.170)	0.150 <sup>*</sup> (0.076)	0.003 (0.092)
Constant	0.504 <sup>***</sup> (0.063)	0.061 <sup>***</sup> (0.012)	0.315 <sup>***</sup> (0.048)	0.871 <sup>***</sup> (0.019)	0.748 <sup>***</sup> (0.025)
Observations	104	979	251	589	756
R <sup>2</sup>	0.007	0.002	0.033	0.068	0.022
Adjusted R <sup>2</sup>	-0.003	0.001	0.029	0.067	0.021
F Statistic	0.00001	1.876	3.178 <sup>+</sup>	3.885 <sup>*</sup>	0.001

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

**x. window20 cluster breakpoints**

<i>Dependent variable:</i>					
	succmain	succmcert	succprelim	succproc	succcomb
	(1)	(2)	(3)	(4)	(5)
wideology	0.322 (0.252)	-0.029 (0.030)	-0.233 (0.148)	0.138* (0.058)	0.062 (0.072)
Constant	0.494*** (0.053)	0.060*** (0.010)	0.300*** (0.044)	0.886*** (0.015)	0.772*** (0.019)
Observations	145	1,395	349	878	1,115
R <sup>2</sup>	0.007	0.002	0.020	0.059	0.021
Adjusted R <sup>2</sup>	-0.0001	0.001	0.017	0.058	0.021
F Statistic	1.638	0.877	2.477	5.572*	0.735

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

d) Activism

i. base

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	0.167 <sup>+</sup> (0.095)	0.048 <sup>*</sup> (0.019)	0.371 <sup>***</sup> (0.062)	0.211 <sup>***</sup> (0.046)	0.238 <sup>***</sup> (0.044)
fdp	0.241 <sup>*</sup> (0.120)	-0.003 (0.027)	0.682 <sup>***</sup> (0.106)	0.328 <sup>***</sup> (0.062)	0.493 <sup>***</sup> (0.063)
green	0.037 (0.135)	-0.003 (0.030)	0.279 <sup>*</sup> (0.115)	-0.096 (0.073)	0.106 (0.073)
Constant	0.176 <sup>***</sup> (0.048)	0.044 <sup>***</sup> (0.010)	0.104 <sup>**</sup> (0.032)	0.679 <sup>***</sup> (0.024)	0.479 <sup>***</sup> (0.023)
Observations	1,390	5,752	1,654	3,022	4,660
R <sup>2</sup>	0.005	0.002	0.043	0.020	0.018
Adjusted R <sup>2</sup>	0.003	0.001	0.041	0.019	0.018
Residual Std. Error	0.438 (df = 1386)	0.243 (df = 5748)	0.452 (df = 1650)	0.409 (df = 3018)	0.483 (df = 4656)
F Statistic	2.162 <sup>+</sup> (df = 3; 1386)	3.041 <sup>*</sup> (df = 3; 5748)	24.540 <sup>***</sup> (df = 3; 1650)	20.845 <sup>***</sup> (df = 3; 3018)	28.974 <sup>***</sup> (df = 3; 4656)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

ii. control

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	0.150 (0.171)	0.107*** (0.029)	0.453*** (0.088)	-0.026 (0.046)	0.065 (0.056)
fdp	0.121 (0.216)	0.030 (0.042)	0.855*** (0.163)	0.244*** (0.064)	0.418*** (0.082)
green	0.206 (0.261)	0.061 (0.046)	0.279 (0.178)	-0.106 (0.076)	0.032 (0.095)
wideology	-0.033 (0.134)	-0.068** (0.025)	-0.132 (0.096)	-0.019 (0.044)	-0.077 (0.053)
Constant	0.354*** (0.085)	0.043** (0.014)	0.074+ (0.043)	0.895*** (0.022)	0.683*** (0.027)
Observations	606	3,193	791	1,789	2,493
R <sup>2</sup>	0.002	0.007	0.060	0.009	0.011
Adjusted R <sup>2</sup>	-0.005	0.006	0.056	0.007	0.009
Residual Std. Error	0.497 (df = 601)	0.274 (df = 3188)	0.444 (df = 786)	0.309 (df = 1784)	0.444 (df = 2488)
F Statistic	0.282 (df = 4; 601)	5.575*** (df = 4; 3188)	12.648*** (df = 4; 786)	4.043** (df = 4; 1784)	6.811*** (df = 4; 2488)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iii. window20

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	-0.034 (0.205)	0.027 (0.029)	0.483*** (0.108)	-0.017 (0.053)	0.145* (0.062)
fdp	0.467 (0.302)	0.140** (0.045)	0.692** (0.236)	0.222** (0.073)	0.431*** (0.094)
green	0.456 (0.319)	0.088+ (0.045)	0.199 (0.222)	-0.078 (0.084)	0.058 (0.105)
Constant	0.464*** (0.105)	0.027+ (0.014)	0.038 (0.055)	0.897*** (0.027)	0.694*** (0.032)
Observations	170	1,735	424	1,109	1,380
R <sup>2</sup>	0.042	0.008	0.065	0.009	0.018
Adjusted R <sup>2</sup>	0.025	0.006	0.058	0.006	0.016
Residual Std. Error	0.495 (df = 166)	0.218 (df = 1731)	0.434 (df = 420)	0.301 (df = 1105)	0.410 (df = 1376)
F Statistic	2.418+ (df = 3; 166)	4.704** (df = 3; 1731)	9.657*** (df = 3; 420)	3.266* (df = 3; 1105)	8.273*** (df = 3; 1376)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

iv. window20net

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	-0.110 (0.248)	0.012 (0.033)	0.513*** (0.127)	0.030 (0.066)	0.200** (0.077)
fdp	0.129 (0.380)	0.092 (0.057)	0.560+ (0.308)	0.239* (0.098)	0.420*** (0.125)
green	0.365 (0.389)	0.062 (0.055)	0.285 (0.261)	-0.117 (0.111)	0.052 (0.135)
Constant	0.499*** (0.128)	0.036* (0.017)	0.030 (0.065)	0.872*** (0.034)	0.659*** (0.040)
Observations	122	1,216	299	739	930
R <sup>2</sup>	0.018	0.003	0.061	0.010	0.017
Adjusted R <sup>2</sup>	-0.007	0.001	0.051	0.006	0.014
Residual Std. Error	0.504 (df = 118)	0.215 (df = 1212)	0.437 (df = 295)	0.310 (df = 735)	0.420 (df = 926)
F Statistic	0.705 (df = 3; 118)	1.332 (df = 3; 1212)	6.377*** (df = 3; 295)	2.380+ (df = 3; 735)	5.493*** (df = 3; 926)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

v. window10

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	0.005 (0.316)	0.007 (0.033)	0.461** (0.147)	0.032 (0.074)	0.213* (0.084)
fdp	0.244 (0.521)	0.043 (0.054)	0.876** (0.286)	0.192+ (0.101)	0.452*** (0.128)
green	0.621 (0.532)	0.041 (0.051)	0.203 (0.292)	-0.055 (0.117)	0.139 (0.145)
Constant	0.355* (0.162)	0.025 (0.016)	0.064 (0.073)	0.874*** (0.037)	0.660*** (0.043)
Observations	72	895	234	586	728
R <sup>2</sup>	0.030	0.002	0.086	0.006	0.025
Adjusted R <sup>2</sup>	-0.012	-0.002	0.074	0.001	0.021
Residual Std. Error	0.497 (df = 68)	0.177 (df = 891)	0.443 (df = 230)	0.305 (df = 582)	0.409 (df = 724)
F Statistic	0.708 (df = 3; 68)	0.449 (df = 3; 891)	7.169*** (df = 3; 230)	1.261 (df = 3; 582)	6.131*** (df = 3; 724)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

vi. window10net

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	-0.209 (0.338)	-0.022 (0.039)	0.502** (0.169)	0.020 (0.089)	0.247* (0.101)
fdp	-0.190 (0.575)	0.022 (0.070)	0.743+ (0.377)	0.245+ (0.131)	0.466** (0.166)
green	0.593 (0.589)	0.042 (0.064)	0.402 (0.360)	-0.120 (0.148)	0.183 (0.180)
Constant	0.450* (0.175)	0.040* (0.020)	0.042 (0.084)	0.875*** (0.046)	0.637*** (0.051)
Observations	59	660	163	411	511
R <sup>2</sup>	0.045	0.002	0.080	0.010	0.025
Adjusted R <sup>2</sup>	-0.007	-0.002	0.062	0.002	0.020
Residual Std. Error	0.494 (df = 55)	0.184 (df = 656)	0.443 (df = 159)	0.312 (df = 407)	0.416 (df = 507)
F Statistic	0.871 (df = 3; 55)	0.527 (df = 3; 656)	4.589** (df = 3; 159)	1.327 (df = 3; 407)	4.388** (df = 3; 507)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001

vii. irregular

	<i>Dependent variable:</i>				
	succmain (1)	succmcert (2)	succprelim (3)	succproc (4)	succcomb (5)
spd	-0.220 (0.180)	-0.059 (0.073)	0.333* (0.135)	0.310* (0.126)	0.237* (0.112)
fdp	0.126 (0.396)	0.243 (0.206)	0.699* (0.306)	0.145 (0.247)	0.263 (0.246)
green	0.004 (0.355)	-0.120 (0.154)	0.345 (0.307)	0.287 (0.209)	0.507* (0.216)
Constant	0.369*** (0.099)	0.151*** (0.041)	0.211** (0.078)	0.667*** (0.071)	0.434*** (0.063)
Observations	233	504	276	274	559
R <sup>2</sup>	0.009	0.005	0.039	0.023	0.016
Adjusted R <sup>2</sup>	-0.004	-0.001	0.028	0.013	0.011
Residual Std. Error	0.444 (df = 229)	0.329 (df = 500)	0.486 (df = 272)	0.365 (df = 270)	0.491 (df = 555)
F Statistic	0.683 (df = 3; 229)	0.817 (df = 3; 500)	3.668* (df = 3; 272)	2.162+ (df = 3; 270)	3.039* (df = 3; 555)

+ p < .1, \* p < .05, \*\* p < .01, \*\*\* p < .001