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THE BLANK SHEET: SELECTIVE JUSTIFICATION IN THE GERMAN CONSTITUTIONAL COURT

The Blank Sheet

Selective Justification in the German Constitutional Court

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Abstract

The German Constitutional Court is not only selective in publishing its rulings. Actually more than 90% of the rulings do even come without written reasons (and are then not made publicly available either). As there is no comparison group to study, one cannot try to find causes, let alone rigorously identify them. But it is telling which types of cases are more likely to be reasoned (and published), and which characteristics of the 16 Justices have predictive power. This paper uses the 8888 rulings that have been decided between 1998 and 2024 and are posted on the Court's website. There are no glaring findings, and no clear biases in particular. Rather the data suggest a pronounced effect of Justice idiosyncrasies. The Court should consider formulating an explicit publication policy.

Keywords: court publication policy; rulings without written reasons; bias; Justice demographics; idiosyncrasies

1. Introduction

Adjudication is mass business. Caseload has exploded over time. For instance, in 1962 the US Federal Courts had to handle 1,800 appeals, while it were 14,500 ten years later (Hinkle 2024, 3 with refs.). The US Federal Courts of Appeals have responded with the distinction between "published" and "unpublished" rulings (Olney III 1964, Arnold 1999, Beske 2018). There is a lively academic debate whether the right to label rulings as "unpublished" has indeed made courts more efficient (Hoffman 1981, Szmer, Christensen et al. 2012, McAlister 2019), and whether this option has opened the floodgates for privileging wealthy litigants (Brown, Ford et al. 2021), for harming vulnerable parts of society (Rempell 2016), or for judicial ideology (Law 2005, Keele, Malmsheimer et al. 2009, Berdejo 2012). Hinkle (2024) has just published a comprehensive analysis of the available empirical data on these questions.

The German Constitutional Court faces the same challenge. When the court was founded, in 1951, it had 481 cases. In 1970 it had 1,677 cases, in 1980 3,107 cases, in 2000 4,831 cases, and in 2020 5,529 cases.[1] The court originally had 12 Justices in each of the two Senates. In 1963 this number was reduced to 8 Justices each.[2] In 2024, on average each of the 16 Justices had to handle 290 cases.[3] Unlike the US Supreme Court (for an overview of the pertinent literature see Brenner 2000) the German Constitutional Court is obliged to decide every case. But the legislator has helped the court in a different way. The two most frequent cases are constitutional complaints, brought by individuals, companies or municipalities (258,712 of 268,777 cases between 1951 and 2024)[4] and requests for preliminary rulings brought by a trial court that argues a statutory provision violates the constitution (4,054 of 268,777 cases between 1951 and 2024).[5]

For the purpose of handling these two classes of cases, each Senate of 8 splits into 3 chambers of 3 justices. These chambers have power to declare a constitutional complaint (§ 93a I BVerfGG) or a preliminary request inadmissible (§ 81a, 1 BVerfGG). In addition, constitutional complaints are only accepted for a decision on the merits if either of two conditions is fulfilled: the case is of general constitutional relevance, or the complainant would otherwise suffer serious harm (§ 93a II BVerfGG). Chambers must decide unanimously, or the case is propelled to the full Senate (§81a, 1 BVerfGG, § 93d III 1 BVerfGG). But most importantly for the present purpose, § 93d I 3 BVerfGG gives the chambers power to reject a constitutional complaint without written reason. This procedure is colloquially referred to as the complainant receiving a "blank sheet".

1 https://www.bundesverfassungsgericht.de/DE/Mediathek/Jahresberichte/Jahresstatistiken/2020/statistik_2020_node.html.

2 The change in composition became effective on Sep 1, 1963, Art. 2 Nr. 1 Zweites Gesetz zur Änderung des Bundesverfassungsgerichtsgesetzes vom 26.6.1959.

3 Jahresbericht 2024, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/ DE/Jahresbericht/jahresbericht_2024.pdf?__blob=publicationFile&v=2, p. 62 reports 4,640 new cases in 2024.

4 Jahresbericht 2024, p. 63.

5 Ibid.

As Figure 1 shows, this is not a rare event.[6] Every year, only a small fraction of the cases that the court has decided have actually been made publicly available.[7] While the upper line can be reconstructed from publications of the court, the lower line results from me scraping the website of the court.

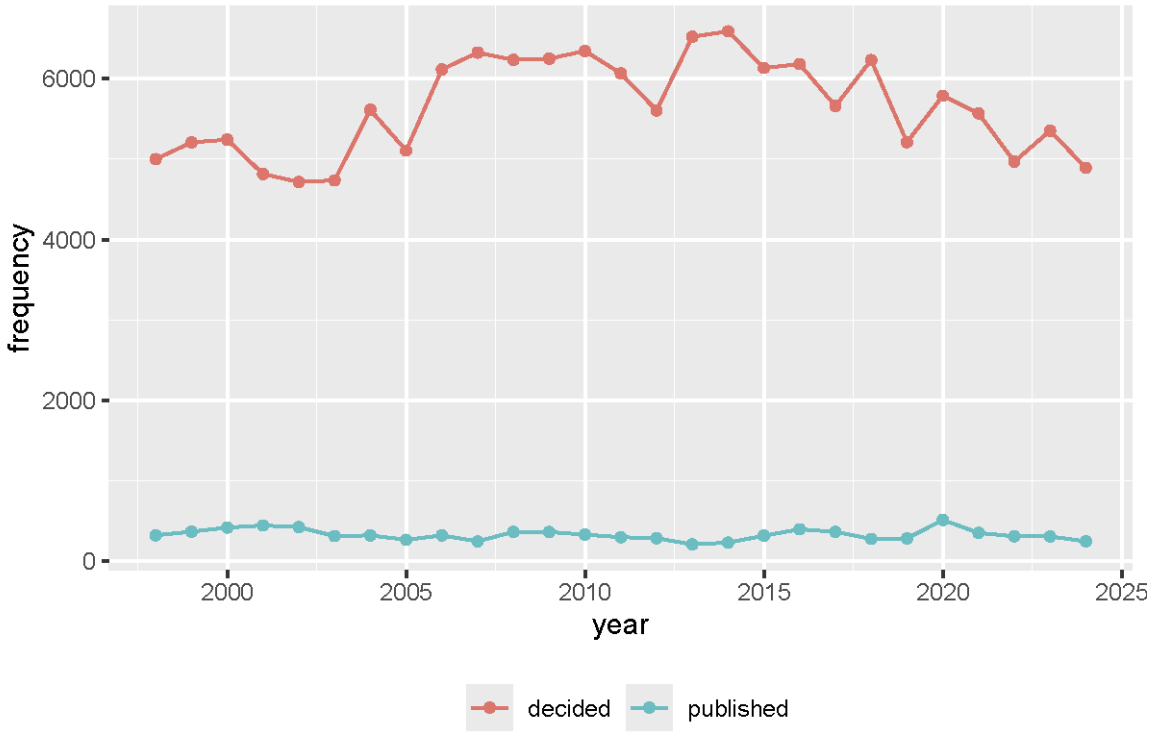


Figure 1
Frequency of Unpublished Rulings

Figure 2 represents the same data in a different format. As one sees, the fraction of publicly available cases has never reached 10% in a year, and could have been as low as a little more than 3%.

6 I am only covering the years from 1998 as this is the year when the court has started to regularly post cases on its website, https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungssuche/Entscheidungssuche_Formular.html. For earlier years there are only commercial reporters that are much more selective. In particular, in the years before 1998, only very few of the chamber decisions have at all been published. As senate rulings are very consistently published, it is only meaningful for the present research question to use the data from 1998.

7 The number of cases that have been decided from 1998-2020 is from the *Gesamtstatistik* (supra 1). The number of cases decided in the year 2021 – 2024 is taken from the *Jahresberichte*, available at https://www.bundesverfassungsgericht.de/DE/Mediathek/Jahresberichte/jahresberichte_node.html.

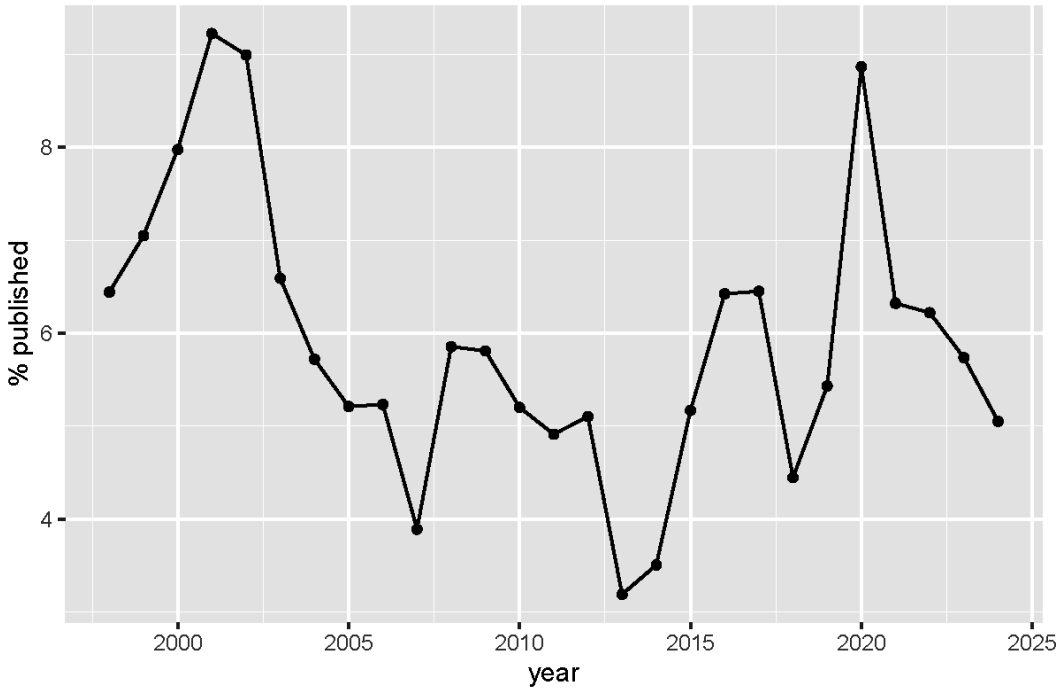


Figure 2
Publicly Available Cases as a Fraction of Decided Cases

I originally had scraped the data for other research questions (Engel 2022b, Engel 2023) and was worried about selection effects. Justice Baer was kind enough to be available for an interview. She has given me power to publish that, very rare exceptions notwithstanding (below 1% of the unpublished cases), cases are not made publicly available because the ruling actually does not come with any written reasons.

Each justice has four clerks. Many of them end up in academia. Several of my students have served in that capacity. I have asked many of them about court practice. I have always received the same response: actually there is a written advisory opinion (often prepared by one of the clerks) on every case. Before the chamber decides, all three justices read this opinion. Yet these opinions are kept strictly confidential. The most convincing explanation that I have received in such conversations resonates with a point that has been made in the US debate over "published" versus "and published" rulings of the Federal Appellate Courts (Hinkle 2024, 49): If the ruling is not published, the members of the competent chamber only have to agree on the outcome, not on the reasons. This facilitates compromise. Actually, in the German Constitutional Court this is an even more relevant concern than in the US Federal Courts. By established practice of the court, it is extremely rare for chambers to be composed of Justices that have all been nominated by the same political party (for detail about chamber composition, along the lines of the political parties that have nominated the Justices, see Engel 2023).

Note, however, a critical difference between the situation with the German Constitutional Court on the one hand and the Federal Courts of Appeal in the US on the other hand. In the US, rulings are labelled as "published", or "unpublished". This is a legally and practically important choice (for detail see Hinkle 2024, 12-18), in particular because "unpublished" rulings do not have the power of precedent (Cleveland 2008, 698). However even "unpublished" rulings are normally

posted on the courts' websites, and can therefore be investigated by attorneys, and by the wider public. More importantly even, the parties do receive written reasons, and therefore know why the court has granted or rejected the claim. By contrast, in the German Constitutional Court, unpublished rulings are indeed not publicly available. It would not even be meaningful to trace the parties and ask them for a copy, because the parties have received the proverbial blank sheet.

The resulting absence of a comparison group limits the scope for empirical analysis. I in particular cannot run regressions that explain publication status (as Hinkle (2024, 69) did for the US Federal Courts of Appeal). Yet since I have a data set with all published rulings, complete with a rich set of features that I have previously extracted, I can investigate which of these features are overrepresented in the published rulings. Let me stress that I am not in a position to substantiate causal claims. But I can compare the observed publication frequency with the frequency that is implied, had a certain feature not been relevant. I cannot say whether the association between a certain feature and publication frequency is explained by another (in particular by another unobserved) feature that is (positively or negatively) correlated with the feature in question. In that respect, all I can do is showing a smoking gun. But as the rest of the paper will demonstrate, some of these correlations are so pronounced that they tell a suggestive story.

The remainder of the paper reports data on the development of publication frequency over time between the two senates of the court (below 2), for the main topical areas (below 3), for alternative dispositions (below 4) and for a series of Justice demographics, namely the political parties that have nominated the Justices (below 5), the gender of Justices (below 6), how many of them are law professors (below 7), how long they have been on the court (below 8), and finally investigates publication as a function of individual Justices having been on the bench (below 9). The paper concludes with a policy outlook (below 10).

2. Senates

The two Senates are independent bodies, with different tasks, but also different local cultures. Figure 3 shows that these differences translate into local publication policies. In absolute terms, the first Senate publishes more rulings than the second, at least from the early 2000s on. This difference can partly be explained by different dockets. The second Senate is competent for disputes between different parts of government. Such cases are less frequent, and keep the Senate busy for a longer time. On the constitutional complaint side, the second Senate is chiefly competent for criminal matters. All the remaining constitutional complaints are dealt with by the first Senate. But differences between the Senates have been constant over time. These differences can therefore not explain the upward trend that is present in the publication policy of the first, but not of the second Senate.

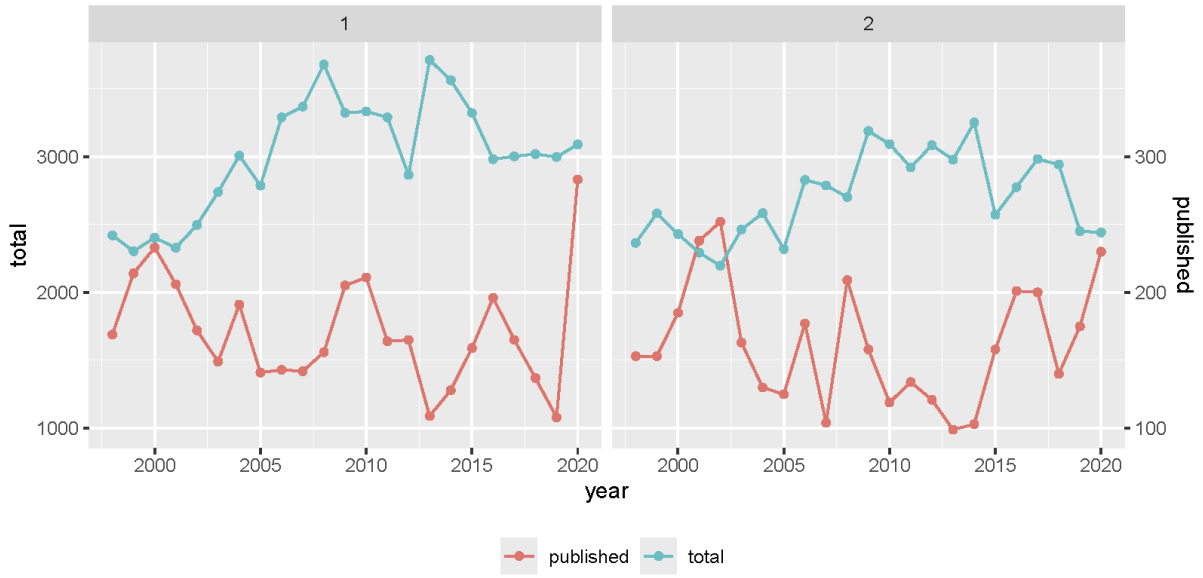


Figure 3
Total Number of Decisions, by Senate
published cases rescaled for visibility, see right y-axis

3. Issue Area

Is the court more likely to give the parties reasons, and then publish the ruling, if the case deals with specific areas of life? In the US Federal Courts of Appeals, bankruptcy cases are most likely to be labelled as published, followed by criminal cases. Torts cases are least likely to be labelled (Hinkle 2024, 61). Under German constitutional law, there is a reasonably reliable proxy for substance matter. Constitutional complaints must claim the violation of a fundamental freedom. Some of these freedoms can be quite clearly associated with certain areas of life.[8]

As Figure 4 shows, most published rulings can (at least not clearly) be mapped to one of the discriminating fundamental freedoms. For those rulings that discuss such fundamental freedoms, cases dealing with criminal law and procedure are most likely to be published, followed by cases dealing with business interests. Yet the prominence of cases discussing one of the economic freedoms has decreased over time (see in greater detail Engel 2022a).

8 For the exact mapping, see Appendix.

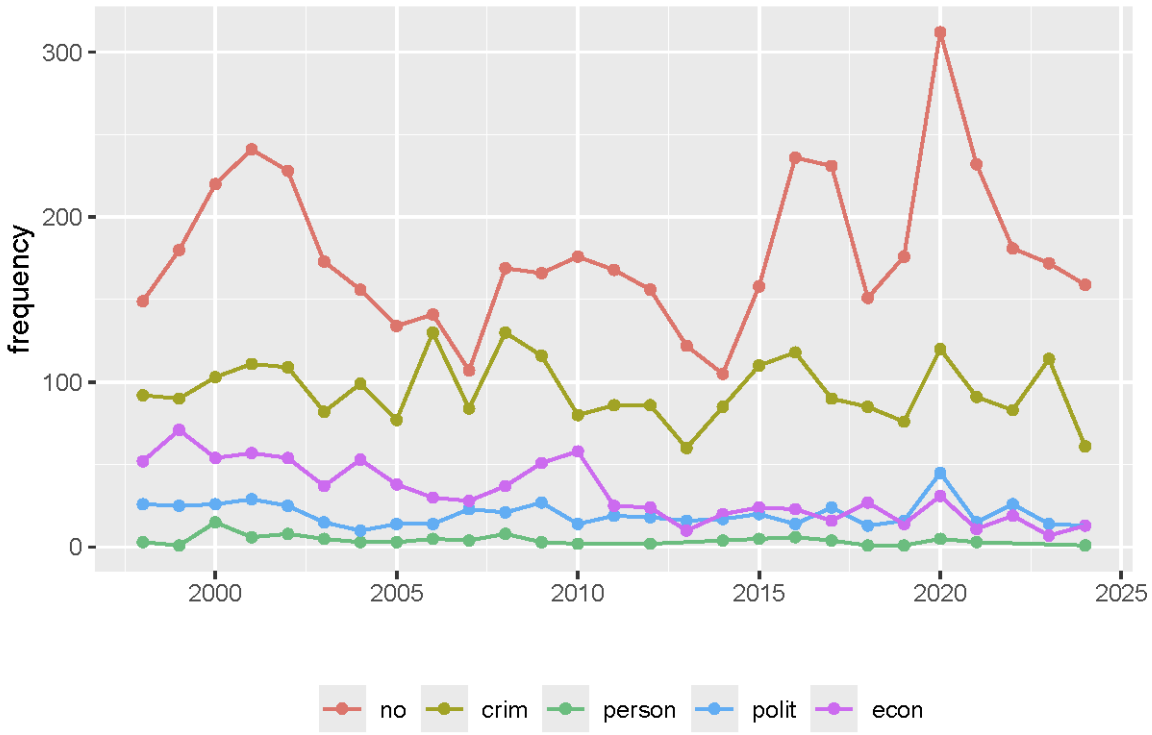


Figure 4
Frequency of Publication, by Sets of Fundamental Freedoms
for mapping of fundamental freedoms to issue areas, see Appendix

4. Case Outcomes

At a very high level, there is still a piece of ground truth. The court has published statistics about the fraction of constitutional complaints that have been successful.[9] Figure 5 compares this fraction (red line, *percsuccess*) with the fraction of published cases in which the complainant has been successful on the merits (blue line, *pubmain*). As the right to decide without reasons is confined to rejections, and as I have learned from Justice Baer that nearly all decisions that come with reasons have also been published, the difference between the red and the blue line must result from a different fraction of all constitutional complaints that have been published in the respective year. Apparently, in 2002 and 2003, as well as 2017, the court has published a larger number of unsuccessful complaints, while from 2007 to 2010 a larger fraction of the published rulings was successful.

More interestingly, the fraction of published successful cases (blue line) and the fraction of all cases that have been successful (red line) track each other reasonably well. By contrast the fraction of published cases that have been accepted for a decision on the merits (green line,

9 For the years until 2020, the data is available in the *Gesamtstatistik* (footnote 1, p. 20). For later years, this summary information is available in the respective *Jahresbericht*, available at https://www.bundesverfassungsgericht.de/DE/Mediathek/Jahresberichte/jahresberichte_node.html.

pubcert) is much smaller than the true fraction of successful cases. This shows that the publication of constitutional complaints that have only made it over the first hurdle is highly selective. As few constitutional complaints are ever decided on the merits,[10] this restrictive publication practice makes it difficult for complainants to gain a sense of what it takes to get their cases decided on the merits. Yet seemingly the court is sensitive to the concern, and has increased over time the fraction of cases that pass the first hurdle (the green line is upward sloping).

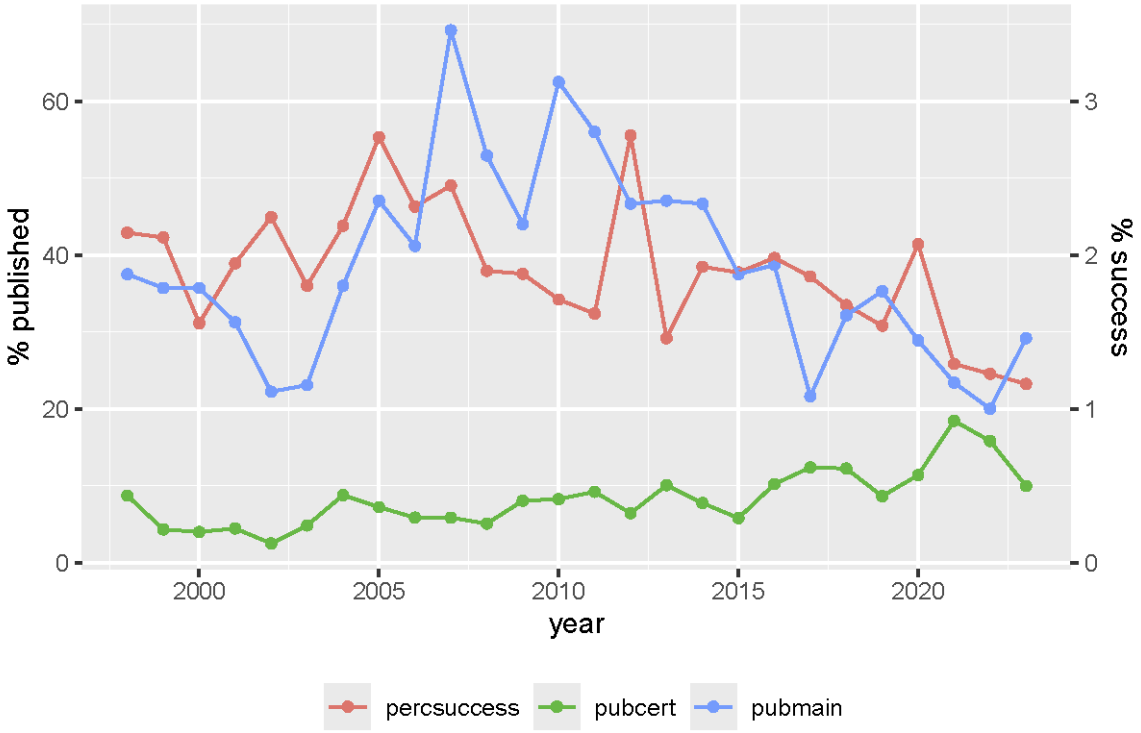


Figure 5
Publication of Constitutional Complaints by Success Rate
pubmain: % of published cases with a decision on the merits that have been successful (left y-axis)
pubcert: % of published cases with a decision about acceptance for decision on the merits that have been successful (left y-axis)
percsuccess: % of (published and unpublished) cases that have been successful (right y-axis, rescaled for visibility)

While Figure 5 can still compare published cases with a (rough) measure of all cases, Figure 6 must zero in on cases that actually have been published. This requires a change in metric. In this figure, for each of the four indicators, I define the year in which the highest number of rulings with the respective decision has been published as 100%. I express every other year as a percentage of this maximum. The red comparison line is held constant across all four sub

10 Unfortunately, the court does not publish statistics on this fraction. Among the published constitutional complaints, in no year since 1998 10% of the cases have passed this hurdle, see the blue line (*pubmcert*) in Figure 5.

panels. It is the fraction of published constitutional complaints, compared with all constitutional complaints the court has decided in the respective year (and this line is actually based on groundtruth).

In 2020 most rulings have been published (the red line is at 100%). In some respects, the fraction of decisions reporting success on the merits tracks the development of all publications. There is a decline between 2020 and 2024, a spike in 2016, and reasonably comparable ups and downs between 2004 and 2009. But in other respects the publication of successful constitutional complaints is very different from the overall publication rate. While the total rate is high between 1999 and 2003, in this period the publication of decisions with success on the merits is lowest. In the opposite direction, in 2010, 2011 and 2014, success on the merits is much more likely to be reported, compared with the overall publication rate.

The publication policy regarding the first step, i.e. the decision of the court to decide the case on the merits, is clearly discernible from the upper right panel. From 2016 on, the fraction of cases that have been accepted for a decision on the merits very closely tracks the fraction of all published cases. By contrast in earlier years, the court has been much less likely to publish a ruling if the complainant has only been successful on the first step, but not on the merits (there is a huge gap between the red and the blue lines).

Differences are much less pronounced for the remaining two indicators of success. If the total fraction of published decisions goes up, so does the fraction of rulings that report granting a preliminary injunction, or success on merely procedural grounds. Deviations are rather exceptional: for 2006 and 2007, the fraction of rulings reporting that a preliminary injunction has been granted are much lower than the average publication rate. Between 2006 and 2015 the fraction of decisions reporting success with a procedural request have been more likely to be published than the average.

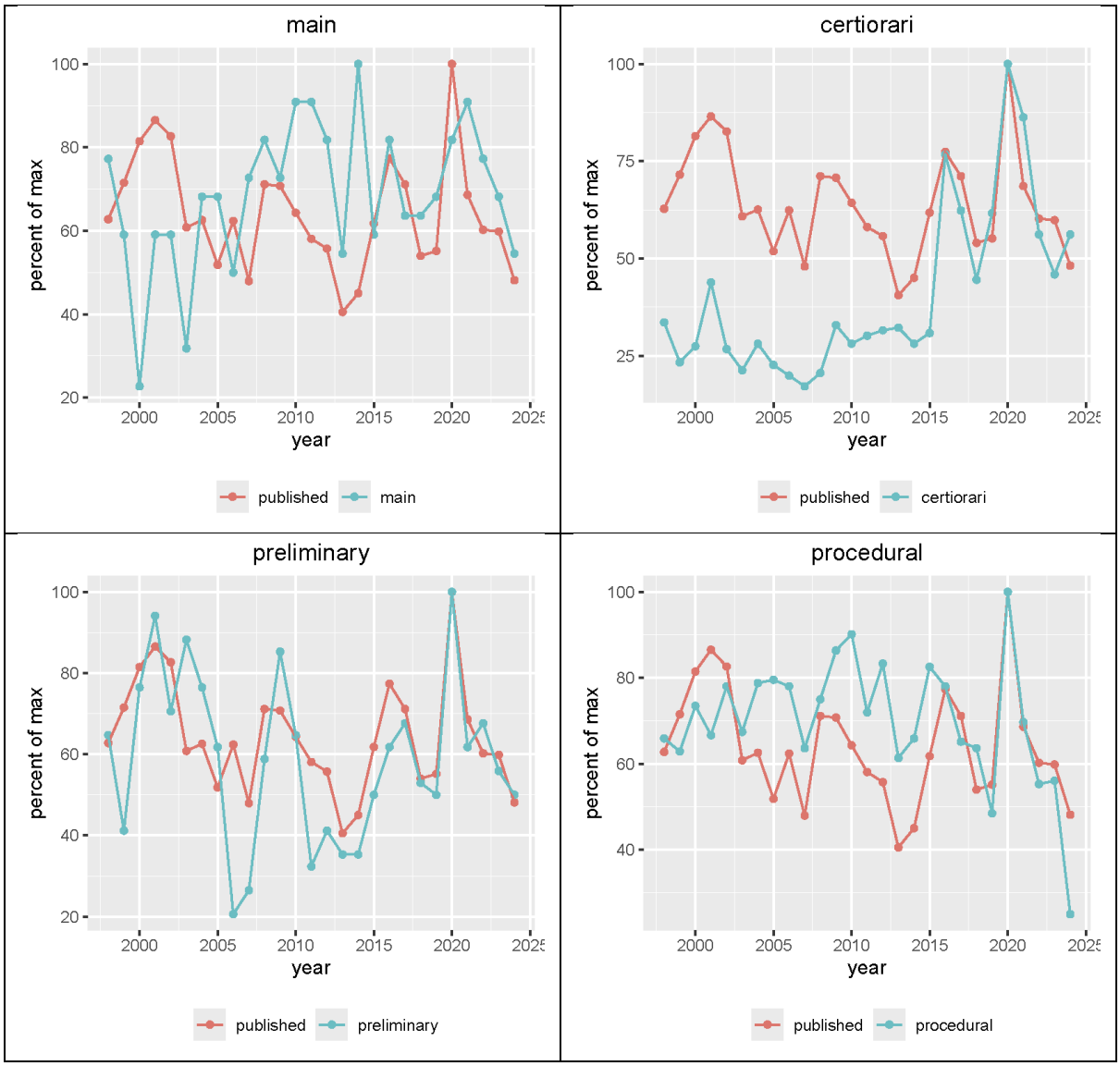


Figure 6
Likelihood of Publication of Constitutional Complaint by Different Indicators of Success
all values relative to maximum during period of observation (1998-2024)

5. Nominating Political Party

In the US, the main concern about selectively classifying appellate court rulings as "published" is ideology (Carlson, Livermore et al. 2020, Hinkle 2024, 48 with refs.). As one observer has put it:

> "[T] he fact that they [judges] choose which of their opinions will be binding in future cases offers them a further opportunity to advance their preferences by engaging in what amounts to selective lawmaking: they may attempt to steer the evolution of the law in a particular ideological direction by publishing opinions they like, while burying in unpublished form those they do not" (Law 2004, 820).

For the US Federal Courts of Appeal and the decision to label the ruling as published, Rachael Hinkle finds significant effects, all in the expected direction, for panel alignment with the outcome, ideologically split panels, and the ideological distance between the panel and either the circuit or the Supreme Court, but all effects are extremely small (Hinkle 2024, 58).

In a different paper, I have shown a striking difference between the US (and in particular the US Supreme Court) and the German Constitutional Court. Justices in both courts are openly nominated by political parties. In the US, a whole industry of political scientists documents in which ways loyalty with the nominating party, as well as personal ideological positions, explain the decisions taken by the Supreme Court (see only Segal and Cover 1989, Segal and Spaeth 1993, Segal, Epstein et al. 1995, Segal and Spaeth 2002, Sunstein, Schkade et al. 2007). As I have shown, despite institutional similarity, over nearly 70 years the German Constitutional Court has been almost perfectly shielded from such ideological influence (Engel 2023). Still it is a relevant question whether the political party that has nominated a Justice predicts how this Justice acts and, specifically for this paper, whether this Justice prefers rulings to be published.

In a way, this analysis is made more complicated by an institutional feature of the German Constitutional Court. It is known which Justices have decided. But votes are not made public. Actually vote differences do not even exist, given the chamber loses its decision-making power if it is not unanimous (§81a, 1 BVerfGG, § 93d III 1 BVerfGG). Consequently all I can exploit for analysis is the fraction of Justices nominated by one of the four political parties, in the respective decision-making body. This also implies that I cannot use the methods that US scholars have developed for the more fine-grained analysis of judicial ideology; these methods require individual votes (Martin and Quinn 2002, Bailey 2023).

Yet the analysis is meaningful as there is variance: within the Senates of 8 as these are staggered boards, the composition of which changes regularly (and as sometimes the Senates are incomplete, which also changes their demographic composition). More importantly even, more than 90% of all published rulings have been decided by one of the chambers of three, which mechanically creates demographic differences between decision making bodies.

Figure 7 shows the evidence for the German Constitutional Court. In this figure, I compare the observed fraction of published cases with the theoretical expectation. If the nominating political party has no predictive power, all dotted lines should be at zero. If the respective line is above zero, a higher fraction of Justices nominated by the respective political party predicts a higher fraction of publications. If the line is below zero, a higher fraction of Justices nominated by this party predicts a lower fraction of publications.

As one sees, the only flat lines are the lines for Justices nominated by the Greens or (overlaid and therefore not immediately visible) by the Liberals, in the second Senate. But this is mere artefact: as long as these lines had been flat, not a single Justice had been nominated by these two parties for a position in the second Senate.

The second message is comforting: neither line is consistently above or below 0. There is not a clear bias such that some political parties have nominated Justices who favour publication,

whereas others have nominated Justices that prefer to publish little. Still there are discernible differences over time. In the early years (covered by the data set), Justices nominated by the Social Democrats were more in favour of publication, and those nominated by the Christian Democrats less so. This trend has swapped in the early 2000s. The nominees by the Christian Democrats were again more in favour of publication by the end of the observation period. In either Senate, and at each point in time, there was at most a single Justice nominated by the Liberals or by the Greens. Especially in the first Senate, Justices nominated by either of these small parties were pushing more strongly for publication. This might suggest that a single Justice who brings in a different perspective feels a stronger urge to make this perspective known to outside observers.

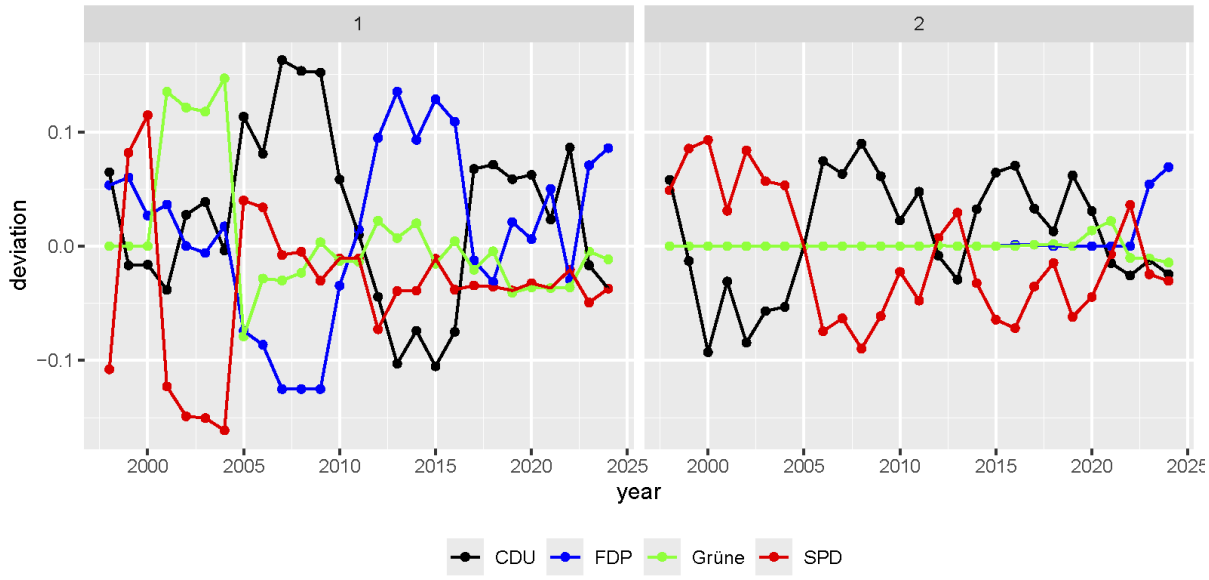


Figure 7
Likelihood of Publication by Fraction of Justices Nominated by either Political Party
measure: difference between observed and implied representation of Justices nominated by respective political party
implied: fraction of Justices nominated by the political party on the bench, in the Senate during the respective year
observed: frequency of Justices nominated by the political party, in the year and Senate, that have participated in deciding published cases

6. Gender

The number of female justices on the Constitutional Court has been continuously on the rise. In 1998 (when this data starts), there had been 5 female Justices. In 2016, this number had been risen to 6, to reach 9 in 2020 (but is now down to 7).[11] In the US Court of Appeals, gender diverse panels are slightly, but significantly less likely to label rulings as “published” (Hinkle 2024, 58).

11 The data is prepared at https://de.wikipedia.org/wiki/Liste_der_Richter_des_Bundesverfassungsgerichts#cite_note-3.

As there are no individual votes, I must again work with the fraction of female Justices in the decision-making body. My measure is again the deviation from a distribution that is invariant to gender. Hence if gender is immaterial, both lines should be at 0 in all years. For the second Senate, this is essentially what I find. But in the first Senate, from 2011 on the fraction of female Justices was a strong predictor of publication, only ceasing to have explanatory power from 2022 on: some of the female members of this Senate clearly pushed for publication.

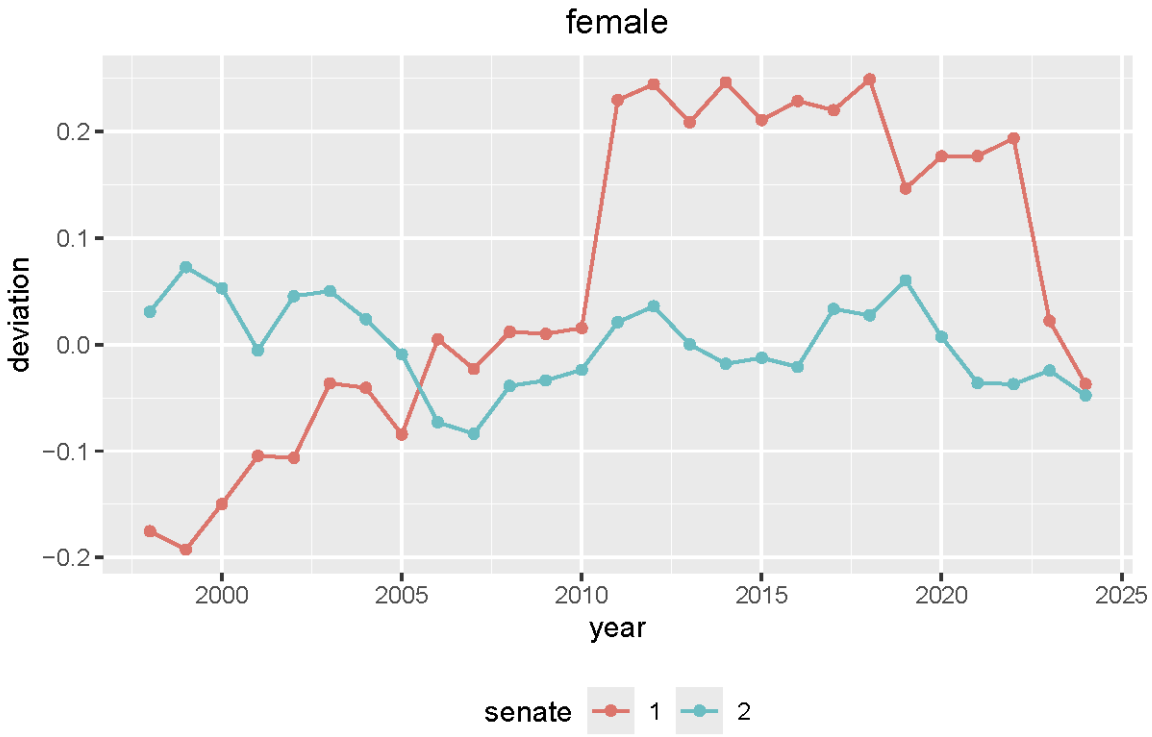


Figure 8
Likelihood of Publication by Fraction of Female Justices
measure: difference between observed and implied representation of female Justices
implied: fraction of female Justices in the Senate, during the respective year
observed: frequency of female Justices, in the year and Senate, that have participated in deciding published cases

7. Professors

A peculiarity of the German Constitutional Court is the high number of law professors on the bench. During the years for which at least a substantial body of rulings is available online, never less than 6 of the 16 Justices were professors (1998; 2024), and in one year even 9 of 16 Justices. The mean professorial share over all published decisions is 53.15%.

One might think that academics have a stronger urge to make their voices heard, or to make sure the court in engaging in a dialogue with the scientific community. But as Figure 9 shows, the story is more nuanced. In the second Senate, the professorial members only pushed for publication in the early years, and again in 2011-2012. By contrast the professors sitting in the

first Senate were always more inclined to publish rulings, most strongly in the early and in the late years (of my observation period).

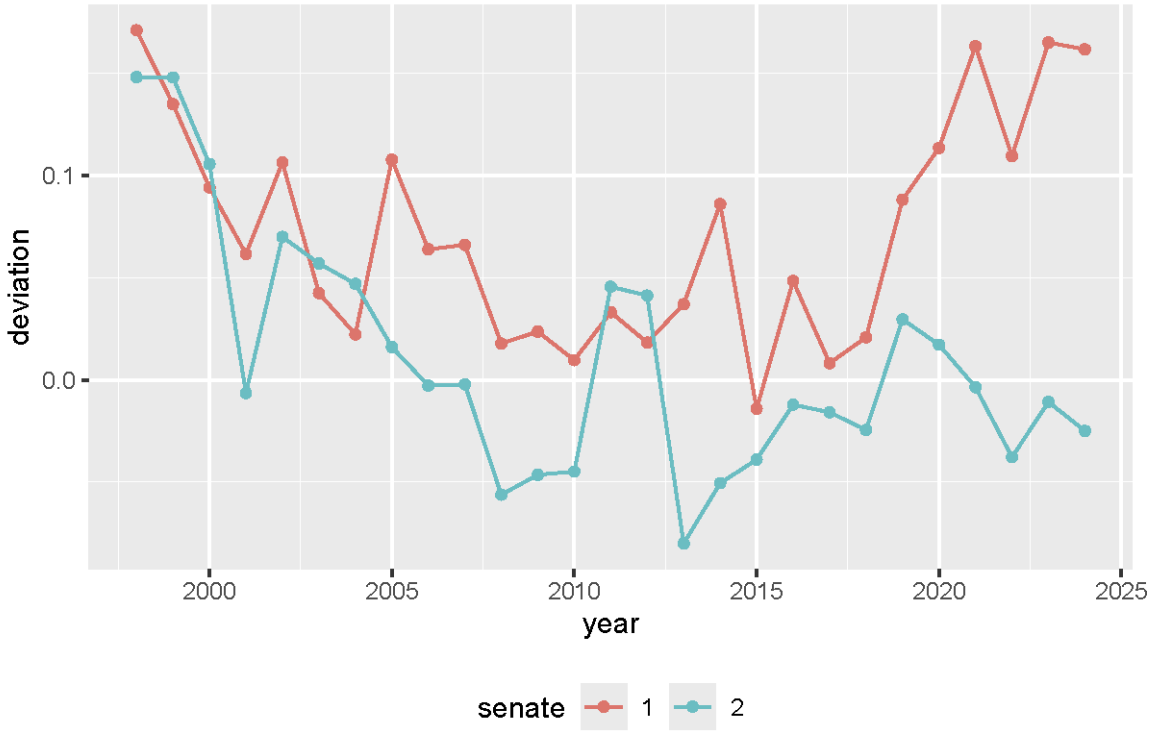


Figure 9
Likelihood of Publication by Fraction of Law Professors
measure: difference between observed and implied representation of Justices who are law professors
implied: fraction of Justices in the Senate who are law professors, during the respective year
observed: frequency of Justices who are law professors, in the year and Senate, that have participated in deciding published cases

8. Tenure

Justices have a non-renewable term of 12 years. If they turn 68 before the end of the 12 years, this is when their term ends (§ 4 BVerfGG). Practically, the two Senates are staggered boards. In composing chambers, the court tends to match Justices who have been on the court for a long time with newly arrived members. On average, the Justices on the bench have been 1972 days in office. Theoretically, both could be rationalized: newer Justices might feel a stronger urge to publish, but more experienced Justices might find it easier to prepare a ruling for publication.

Unsurprisingly, effects are less pronounced for Senate rulings (Figure 10): as Senates are composed of 8 Justices, there is regression to the mean. Consequently, in the second Senate deviations from the expected value of 0 are rare. Between 2004 and 2015, longer mean tenure was associated with a stronger inclination to publish. The effect swapped in 2016. The effects are strikingly different for the first Senate though. Until 2005 and from 2019 onwards, tenure

did essentially not have an effect on publication rates. But this was radically different between 2006 and 2018. The effect was even stronger for chamber decisions.

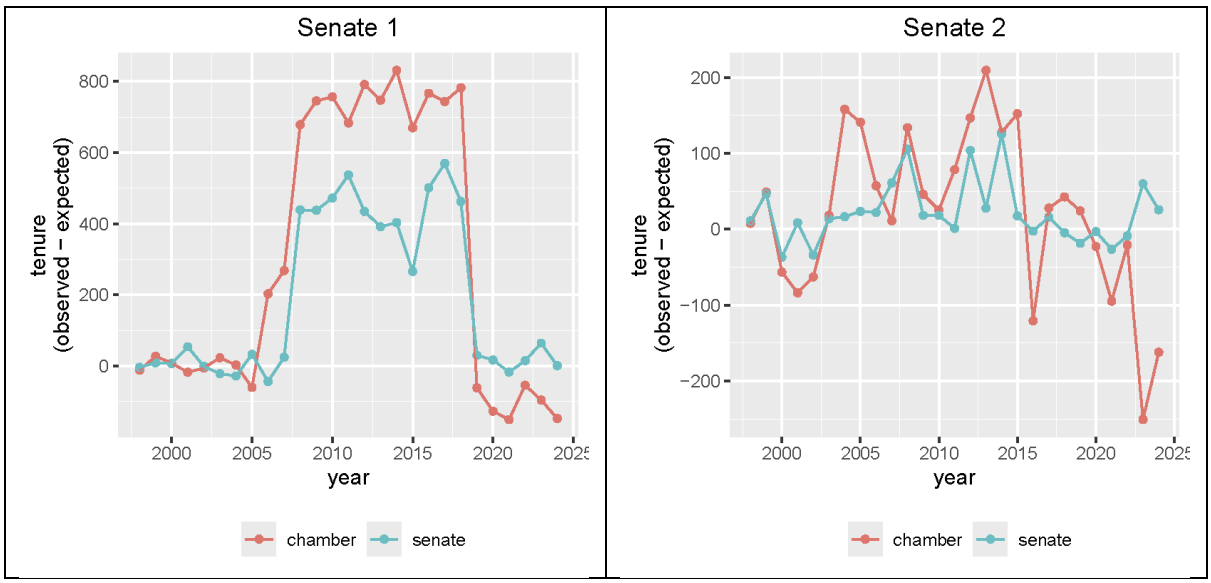


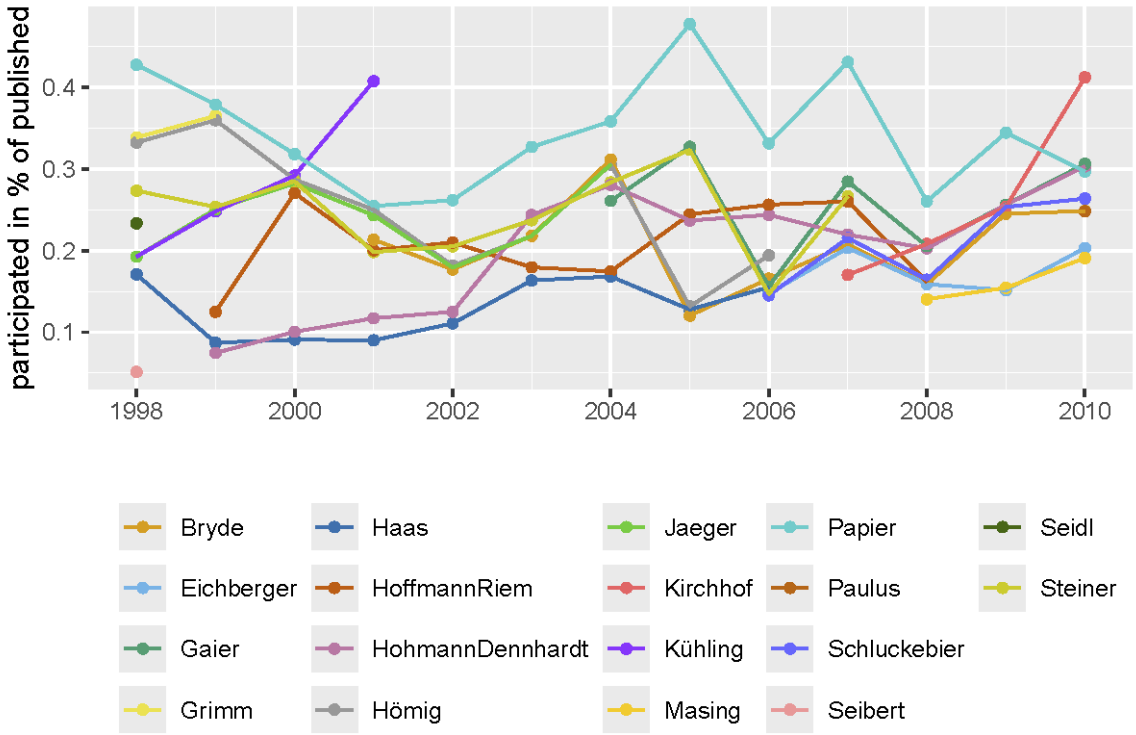
Figure 10
Likelihood of Publication by Mean Tenure of Justices on the Bench
measure: difference between observed and implied tenure of Justices
implied: mean tenure of all Justices in the Senate, at the day when ruling has been made
observed: mean tenure of Justices that have participated in deciding the published case in question

9. Individual Justices

As I have repeatedly stressed, the German Constitutional Court does not make votes public. The majority of cases is decided by a chamber. The chamber loses competence if it does not decide unanimously. Consequently it is not possible to trace publication to the influence of an individual justice. But there is a proxy. One may investigate whether rulings are more likely to be published if an individual justice has been on the bench. This is what I report in this section. To increase visibility, I split the total time span into three sections of 12 years each, with a small overlap.

Figure 11 reports the data for the first Senate. The two presiding Justices Papier (1998-2010) and (Ferdinand) Kirchhof (2010-2018) are clearly overrepresented. Yet this effect is almost mechanical. Each Senate has eight justices, but splits into three chambers of three justices each. Consequently one Justice must sit on two chambers. In the time from 1998 to 2018, in the first Senate the presiding Justice has shouldered this additional burden. But other outliers are not mechanical. Rulings in which Justice Kühling participated were much more likely to be published, as were rulings in which Justice Kirchhof participated even before he became presiding Justice (2008-2010), rulings in which Justice Hohmann-Dennhardt participated, in particular in the years 2010-2011, rulings in which Justice Bryde participated, in particular by the end of his term (2009-2011), rulings in which Justice Radtke participated and, albeit only with two years of observation, rulings in which Justice Wolff participated. On the low side, Justices Haas, Eichberger, Britz and Masing are noticeable.

It is particularly interesting to compare publication frequency if a docket shifts from one Justice to another, most frequently since the successor inherits the docket from her predecessor. In the German Constitutional Court, dockets are defined by substance matter, which makes this exercise meaningful. In 2007, responsibility for social security cases shifted from Justice Steiner to Justice Kirchhof. In 2018 it shifted to Justice Harbarth. In 2020, Justice Harbarth became president of the court, and handed over social security to Justice Wolff. The last three shifts suggest that the higher publication frequency is due to substance matter. But this cannot explain the shift in 2008: obviously Justice Steiner held a different opinion about the desirability of publication. Another very visible shift is in family law. Up till 2011, Justice Hohmann-Dennhardt held this docket. In 2011 it shifted to Justice Britz. At this point, publication rates plummeted. In 2018, Justice Britz convinced her colleagues to let her move to a field closer to her professoral expertise (regulation), and Justice Radtke took over with family law. Publication rates again went up. This suggests a personal style of Justice Britz, who did not seem to favour publication. A last illustration is Justice Bryde, the first Justice nominated by the Greens. Especially in the last years of his term (ending in 2011), the frequency of rulings in which he participated went up. This contrasts with the rather low publication rate of rulings in which his successor participated, Justice Baer.



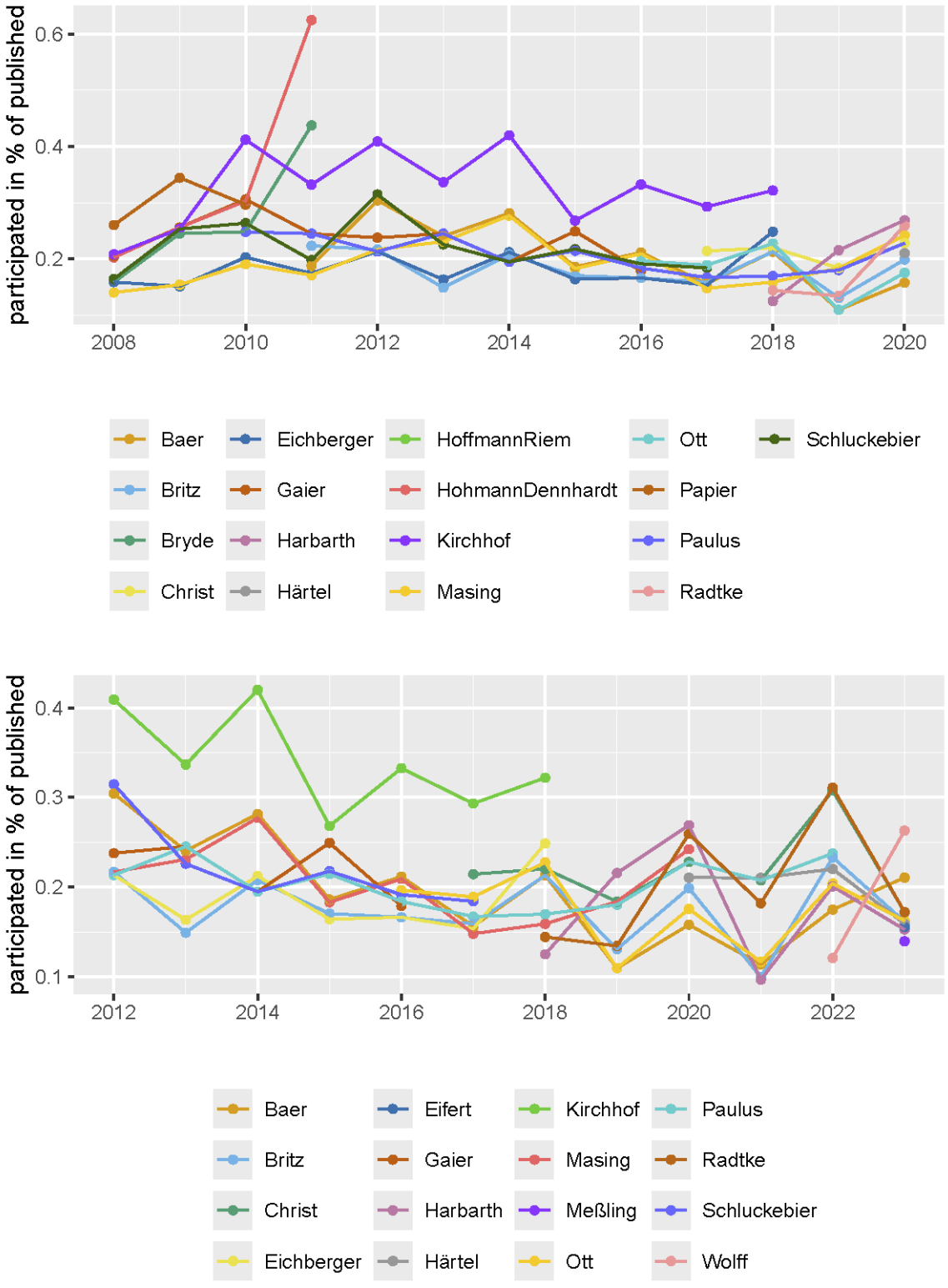
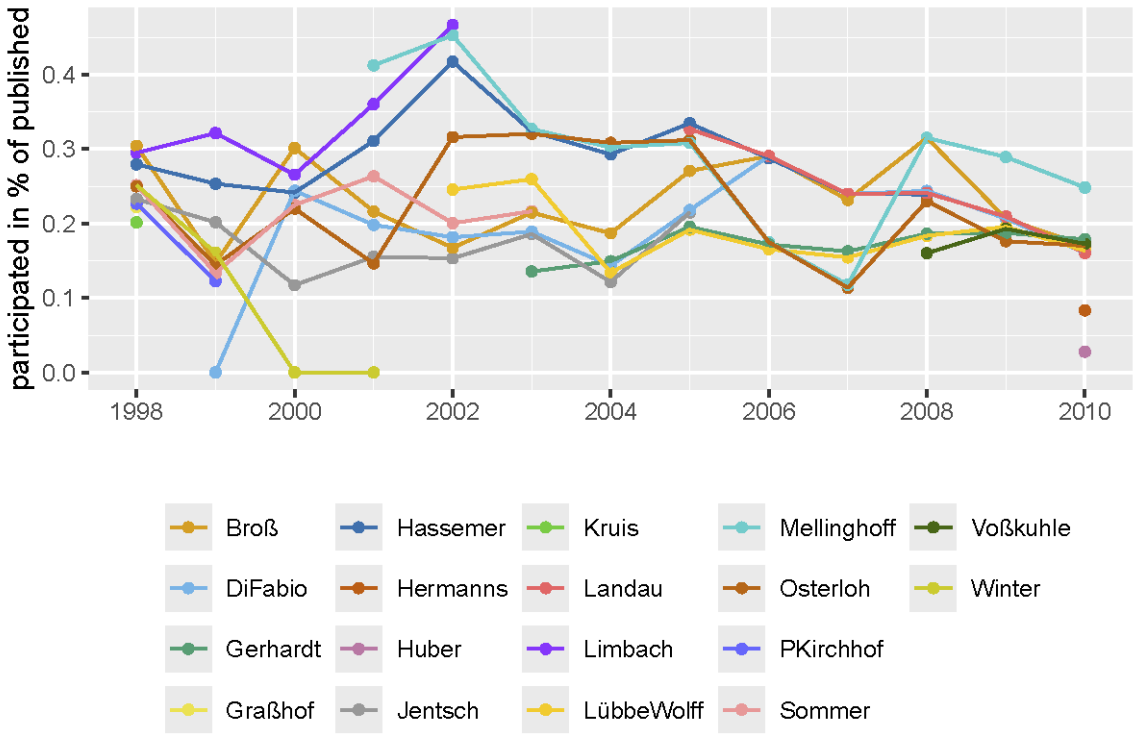


Figure 11
Likelihood of Publication by Participation of Individual Justices, First Senate

Figure 12 repeats the exercise for the second Senate. In the early years, the then president of the Court stands out, Justice Limbach. She too was shouldering the extra burden of sitting in two chambers. The two peaks in the publication rate of rulings in which Justice Mellinghoff

participated (2001-2002; 2008-2010) might have the same reason. But there are more noticeable peaks: by Justice Hassemer, Justice Hermanns, Justice Landau and Justice Kessal-Wulff. On the lower end, Justices DiFabio, Jentsch, Langenfeld, Voßkuhle and Müller are noteworthy. One docket is particularly interesting, the one for substantive criminal law. Until 2000, it was held by Justice Winter (with lower and lower rates of publications if he was on the bench), from 2000-2008 by Justice Hassemer (with a very high frequency of publications if he was on the bench), from 2008-2016 by Justice Landau (with publication rates starting low, but growing over time), and from 2016-2023 by Justice Kessal-Wulff (with very high publication rates initially, but decreasing in more recent years). This suggests that the personal style of the Justice responsible for the subject matter had an impact on the decision to publish a ruling.



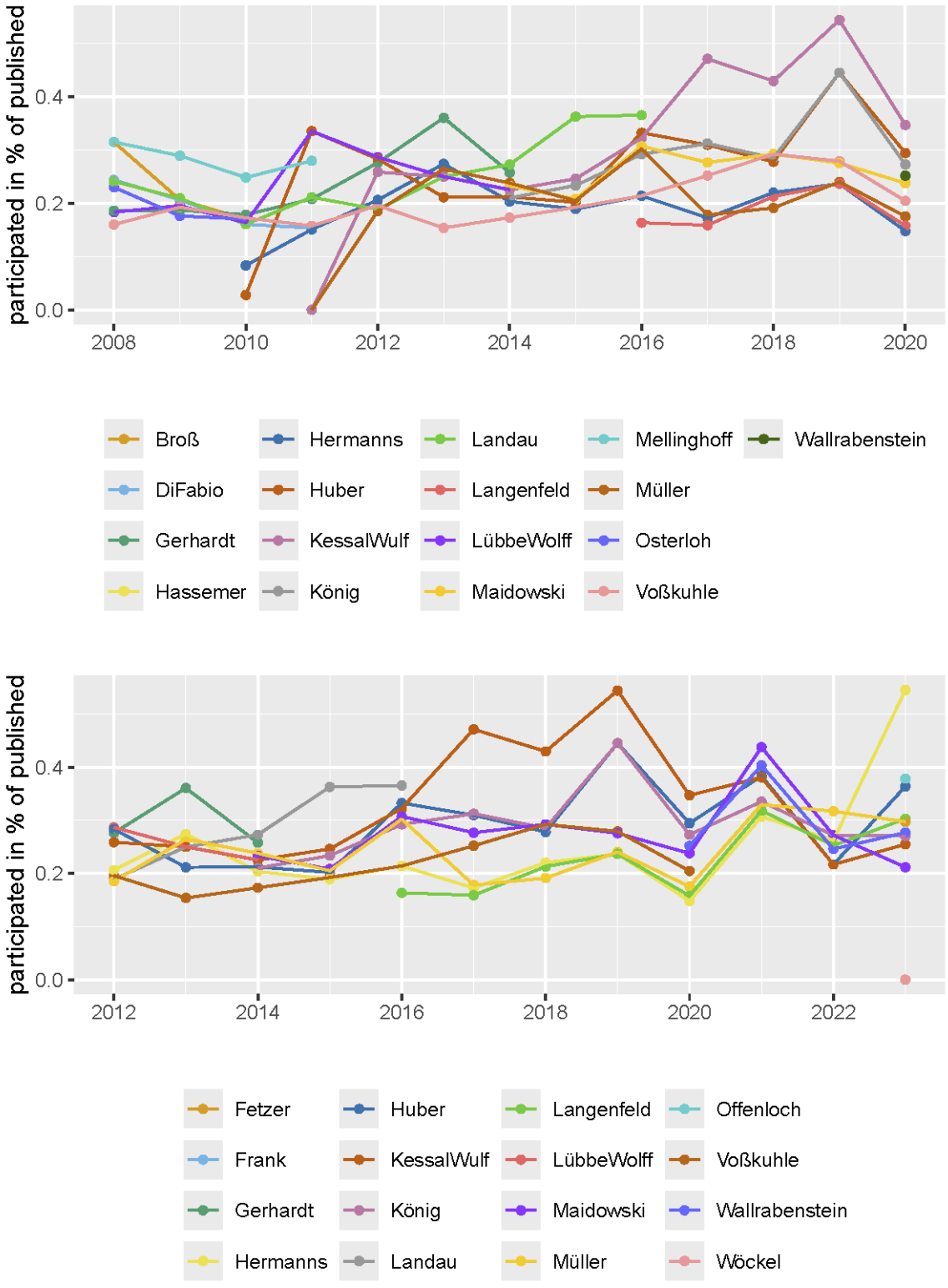


Figure 12
Likelihood of Publication by Participation of Individual Justices, Second Senate

10. Discussion

There is no glaring finding. There is not one class of cases that is clearly privileged over others. Some characteristics of the Justices on the bench have predictive power. But none of these differences cries out as manipulative or abusive. The data leaves more the impression of idiosyncrasies. In some periods of time, and in one of the two Senates, Justices nominated by the Christian Democrats seemed to push for publication, and in other periods of time more the Justices nominated by the Social Democrats (Figure 7). If a single justice is nominated by either the Greens of the Liberals, this Justice seemed to be more in favour of publication. But this effect is not ubiquitous either (Figure 7). Gender is predictive in the first, but not in the second Senate, and only for a somewhat longer stretch of years (Figure 8). Likewise the fraction of professors is only predictive in the first, but not in the second Senate (Figure 9). Tenure is very important for some years in the first Senate, but not in the second (Figure 10).

The idiosyncrasy explanation is further supported by the association between individual Justices participating in the decision and its publication (Figure 11, Figure 12). These associations are particularly telling if a predecessor and successor have had the same docket. There might of course be unobserved changes in circumstances. But in all the examples discussed above the two consecutive Justices did not only keep their docket. They had also been nominated by the same political party (following the custom that certain seats at the court are politically considered to be in the portfolio of one of the bigger parties). These circumstances make it particularly plausible that observed changes in publication frequency result from the personal style of the respective Justice.

In some respects, variance may be a good thing. Those affected by a strand of jurisprudence, and broader society for that matter, are not forever stuck with a given policy. But if rulings remain unpublished, they have no chance to influence the development of the law. Perhaps even more importantly, since they receive a “blank sheet”, complainants will feel treated unfairly if they lose (which they do by design, since a ruling without reasons is not permitted otherwise). The German Constitutional Court might therefore consider adopting an explicit, and a sufficiently differentiated, publication policy. In designing such a policy, the court might benefit from the parallel debate in the US Federal Courts of Appeals (Reynolds and Richman 1981, Morande 2003, Hinkle 2024, 8-10, with refs.). This debate shows that designing such a policy is not easy, and that all criteria risk being debated. Still having a policy, rough as it may be, would still be preferable over leaving both complainant and the wider public completely in the dark.

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Appendix

issue area	fundamental freedom	subject	frequency
(social justice vs.) business interests	Art. 12 I	freedom of profession	456
	Art. 14 I, II	property	455
	Art. 19 III	corporation	81
law and order	Art. 10	interception	17
	Art. 13	search and seizure	99
	Art. 16 II	extradition	13
	Art. 101	right to a lawful judge	433
	Art. 103 I	due process	896
	Art. 103 II, III	nullum crimen, ne bis in idem	145
	Art. 104	habeas corpus	129
civil rights	Art.4 I, II	religion	53
	Art. 16a	asylum	47
	Art. 140	religious communities	8
democratic participation	Art. 5 I, II	speech	206
	Art. 5 III	art and research	56
	Art. 8	manifestation	15
	Art. 9 I, II	association	26
	Art. 28 II	municipalities	28
	Art. 33 II-V	public service	153
	Art. 38	elections	30

Table 1
Mapping Fundamental Freedoms to Issue Areas
frequency: in all published decisions between 1998 and 2024