

Checks and balances on the Court

Inter-judge relationships

Silje Synnøve Lyder Hermansen

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Introduction

Where are we?

Courts are political actors because their decisions have political consequences

- ▶ regulate political activity
- ▶ distribute competences
- ▶ **make policies** by performing judicial review
 - ▶ inadvertently
 - ▶ intentionally

⇒ *what are the judges' motivations?*

Last week

- ▶ the Court can pursue policies *collectively* through case law (e.g. “embedding”) (Caporaso and Tarrow 2009; Höpner and Schäfer 2012)
- ▶ judges’ *personal* qualities and perception of the law matter for individual rulings (Zhang, Liu, and Garoupa 2018)

This week

Politics thrive in legal uncertainty (which is why we have peak courts in the first place)

- ▶ who fills the legal gaps?
- ▶ what are their motivations?
 - ▶ attitudes and bargaining among judges (this week)
 - ▶ pressures/judicial accountability (next week)

⇒ *checks and balances matter when influence and preferences vary among judges*

Your turn

What “stuck with you” the most in the readings for today?

To answer, go to www.menti.com and enter the code 1749 9521

Why delegate?

Why delegate?

- ▶ the CJEU's work load has varied substantially over time and across the two courts (Fjelstul, Gabel, and Carrubba 2023)
- ▶ judges' career patterns and influence (distribution of tasks) vary substantially (Krenn 2022)

Fundamental principles

- ▶ **collective decision making:**

- ▶ to arrive at the “correct” solution (“Condorcet jury theorem”)
- ▶ diversity prevents “group think” and ensure broad competences
- ▶ national representation on international courts
- ▶ for checks and balances

- ▶ **immutability of judges:**

- ▶ none should be able to choose the judge

Workload

Workload

Excessive case load compared to resources will hamper court decision making

- ▶ lengthy proceedings
- ▶ lower-quality decisions
- ▶ less independent and/or political court

⇒ *strapping courts for resources is a classical court-curbing technique*

The case-load of the CJEU (Fjelstul 2023)

The CJEU has become “too” popular for its own good

- ▶ steady increase in cases
 - ▶ a relevant court
 - ▶ not only related to EU enlargement
 - ▶ more “political opportunities”
- ▶ how to address this?
 - ▶ more resources (from governments):
 - ▶ 1989: lower-level court for direct actions (General Court)
 - ▶ 2015: doubling the number of judges (General Court)
 - ▶ EU enlargements
 - ▶ digitalization
 - ▶ more staff
 - ▶ more delegations (from governments + court):
 - ▶ 2003: chambers; small plenary (90-ies)
 - ▶ 2010: more discipline (merit selection of judges)
 - ▶ 2000-s: more “sorting” of cases (orders)

⇒ *what are the costs?*

Your turn

In your opinion, what are the democratic costs of these reforms?

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Most courts divide labor

Tasks

- ▶ sorting of cases
- ▶ information collection
- ▶ organizing and presiding meetings
- ▶ drafting of judgments

Actors

- ▶ chambers and panels
- ▶ (vice-) president
- ▶ chamber president
- ▶ reporting judge

⇒ *delegations from the plenary*

Chain of delegation

beginning of each three-year term

- ▶ plenary elects the president and chamber presidents
- ▶ president proposes chambers

each case

- ▶ president chooses the reporting judge / chamber
 - ▶ Court of Justice: rapporteur, chamber follows from there
 - ▶ General Court: chamber, rapporteur chosen by chamber president
- ▶ plenary chooses:
 - ▶ panel size (a subset of the chamber)
 - ▶ hearing/AG
- ▶ deliberations (on panel)
 - ▶ chamber president leads the deliberations
 - ▶ rapporteur informs and proposes a draft
 - ▶ voting
 - ▶ final writeup

Internal hierarchy (Krenn 2022)

A hierarchy has emerged within the Court

- ▶ more leadership
 - ▶ president's power
 - ▶ middle management
- ▶ influence of “rank-and-file” judges (rapporteur)
 - ▶ distinct according to the “salience”/important of cases
- ▶ consequences:
 - ▶ more need for “a sense of common purpose” (coordination)
 - ▶ disciplinary actions

Your turn

Who are the key players on the Court, and how is their influence kept in check?

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A theory of judicial bargaining (Lax 2011)

Lax' ambition

Shape a new politics of legal doctrine

- ▶ the legal and the attitudinal approaches hold two opposing views of law:
 - ▶ constraint (legalists)
 - ▶ a cloak (attitudinalist, strategists)
- ▶ united through the strategic account

⇒ *How can judges both care about the law and have political preferences?*

Three points of contention between theorists

Lax seeks to bridge several debates

- ▶ doctrinal instrumentalism: what is law?
 - ▶ judges have preferences over rules
- ▶ legal instrumentalism: what is legal discourse?
 - ▶ effectiveness (influence beyond the case) requires us to communicate rules
- ▶ case-space: what is policy?

Legislative vs. judicial decision making

Spatial models of judicial decision making come from parliamentary research

- ▶ dimension: policy vs. case space (sets of facts)
- ▶ preferences: judges/MPs have ideal points
- ▶ bargaining features: status quo vs. alternative outcomes (dispositions)
- ▶ decisions: laws (points) vs. rule (law is translated to a cut point in a set of case facts)

⇒ *behavior is consistent w/legal theory in form and function, but consistent with polisci in incentives judges face*

Empirical application

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- Caporaso, James A., and Sidney Tarrow. 2009. "Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets." *International Organization* 63 (4): 593–620.
<https://doi.org/10.1017/S0020818309990099>.
- Fjelstul, Joshua C., Matthew J. Gabel, and Clifford James Carrubba. 2023. "The Timely Administration of Justice: Using Computational Simulations to Evaluate Institutional Reforms at the CJEU." *Journal of European Public Policy* 30 (12): 2643–64.
<https://doi.org/10.1080/13501763.2022.2113115>.
- Höpner, Martin, and Armin Schäfer. 2012. "Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting." *International Organization* 66 (3): 429–55.
<https://doi.org/10.1017/S002081831200015X>.
- Krenn, Christoph. 2022. "A Sense of Common Purpose: On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice." In *Researching the European Court of Justice*, edited by Mikael Rask Madsen, Fernanda Nicola, and Antoine Vauchez, 1st ed.,

The effect of ideology on court rulings: the role of judges in state aid and anti-trust litigation before the Court of Justice of the EU

Silje Synnøve Lyder Hermansen and Erik Voeten

September 26, 2024

Motivating Research Questions

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⇒ *difficult to answer because court publishes judgments as a collective*

Lack of data does not equal lack of relevance

We link government economic ideology to case outcomes through their appointees in competition cases

- ▶ Governments individually responsible for judicial appointments

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- ▶ Ideological divisions over government intervention in the economy

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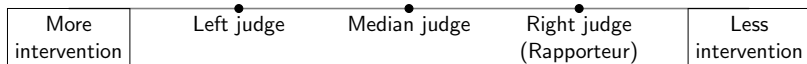
We link government economic ideology to case outcomes through their appointees in competition cases

- ▶ Governments individually responsible for judicial appointments
- ▶ Ideological divisions over government intervention in the economy
- ▶ Delegation to panels and especially reporting judges

A unidimensional space with majority vote

In a world where decisions are made under an open rule...

- ▶ ... by majority vote
- ▶ ... with an agenda setter (rapporteur)
- ▶ ... but no cost for counter proposals



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- ▶ ... with an agenda setter (rapporteur)
- ▶ ... but no cost for counter proposals
- ▶ ... and proposals only differ in their disposition

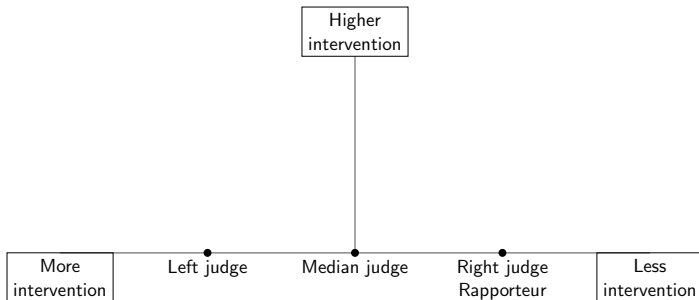
⇒ *outcomes would reflect the median panelist.*



Case-space model with rapporteur as agenda setter

The case-space model adds...

- ▶ a second dimension: all judges care about higher-quality judgments
- ▶ counter proposals are costly

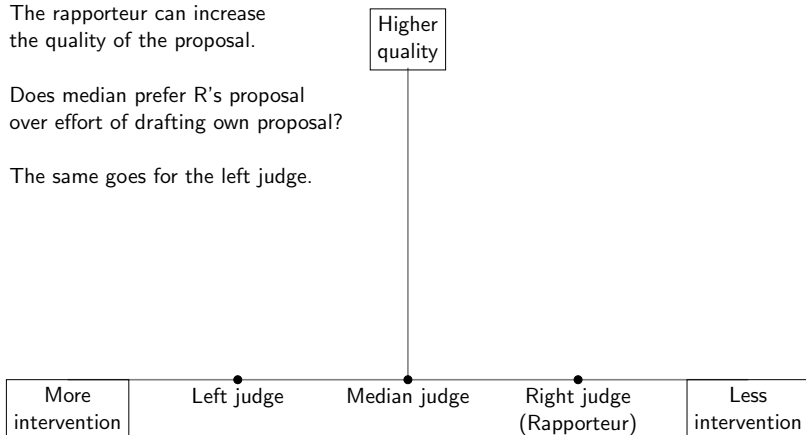


Case-space model with rapporteur as agenda setter

The rapporteur can increase the quality of the proposal.

Does median prefer R's proposal over effort of drafting own proposal?

The same goes for the left judge.



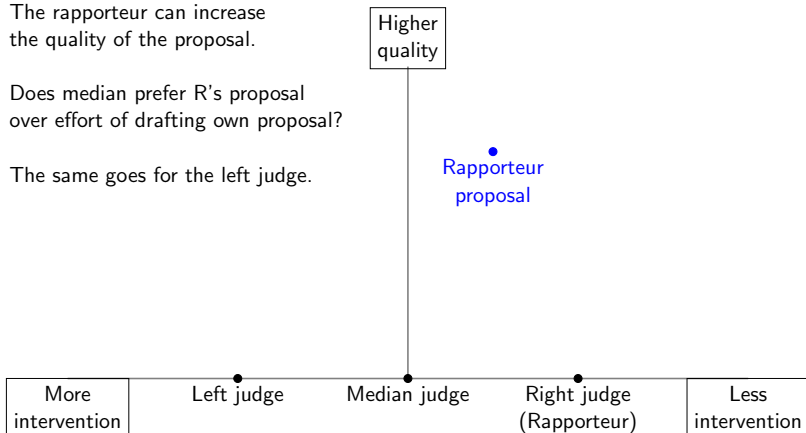
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- ▶ **H2:** The probability of accepting economic intervention decreases as the reporter judge is more towards the right of the median panel judge
- ▶ **H3:** The effect of the distance between reporter and median panel judge is larger as the ideologically distant judge has a larger case load

The data

Data structure

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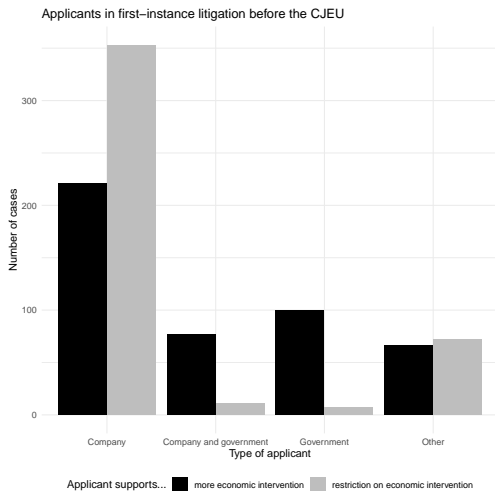
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Who litigates?

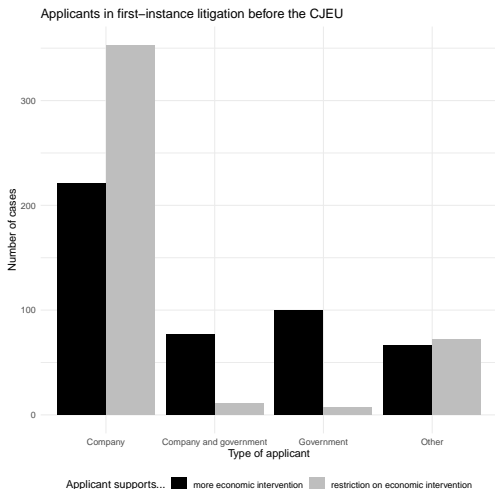
- ▶ companies with a proven (economic) interest in the Commission's decision (79%)



The litigants

Who litigates?

- ▶ companies with a proven (economic) interest in the Commission's decision (79%)
- ▶ in two-thirds of the cases the government whose policy is in question *did not* submit an observation



Variables

Outcome

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- ▶ appointing government's left-right position on economic policies
- ▶ from the national parties' electoral manifestos
- ▶ 12 indicators on the state's role in the economy

Predictors

Judges' appointing government's ideology

- ▶ *Median judge's ideology*

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Controls

- ▶ *government submissions*: political influence of third-party governments

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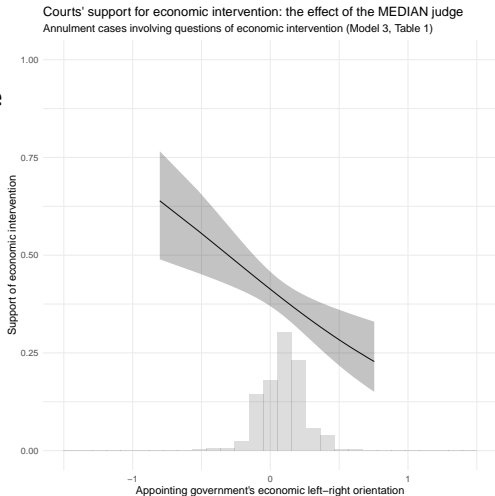
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- ▶ *government submissions*: political influence of third-party governments
- ▶ *support from the affected government*: threat of non-implementation

Effect of the final vote: MEDIAN judge's ideology (H_1)

If we consider the difference between two panels

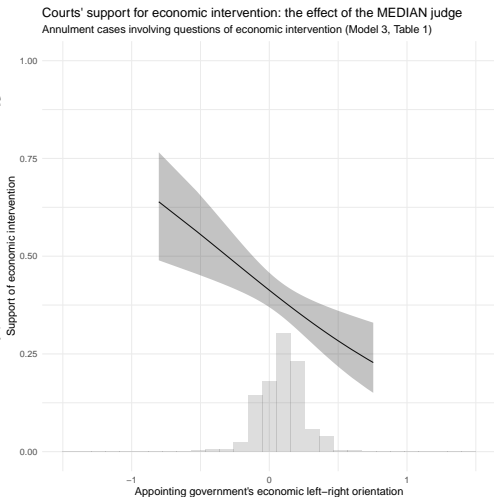
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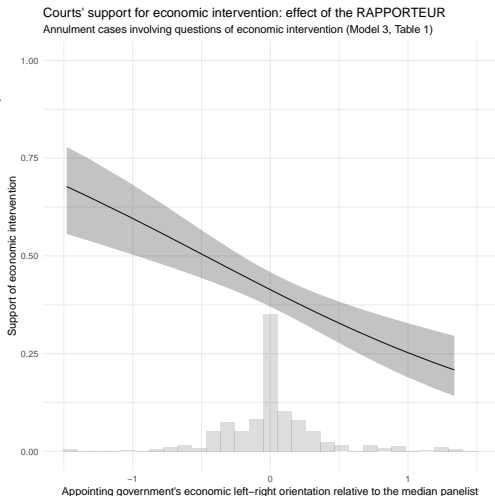
- ▶ a typical move to the right, results in 20% decrease in support for state aid (interquartile range).
- ▶ a full move from left to right results in a 81% decrease in support for state aid.



Effect of the delegation: REPORTING judge's ideology (H_2)

If we consider the rapporteur-median difference

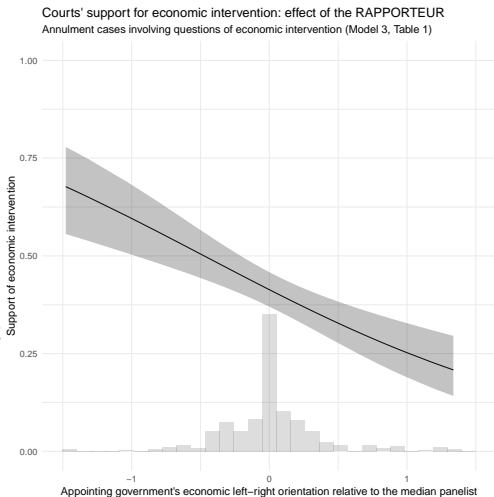
- ▶ a typical move to the right, results in 30% decrease in support for state aid (interquartile range).



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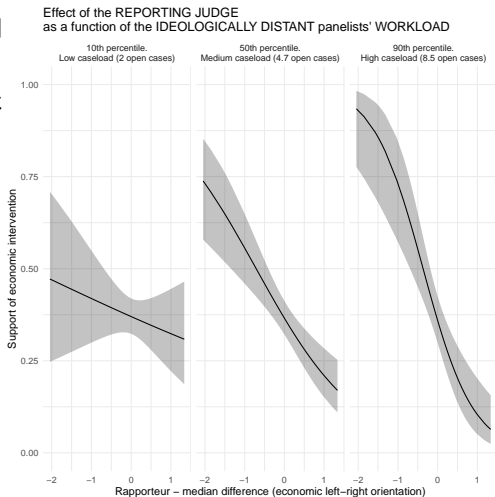
- ▶ a typical move to the right, results in 30% decrease in support for state aid (interquartile range).
- ▶ a full move from left to right results in a 92% decrease in support for state aid.



Effect of workload on: REPORTING judge's influence (H_3)

If we consider a typical rapporteur-median difference, what's the effect of the distant panelist's workload

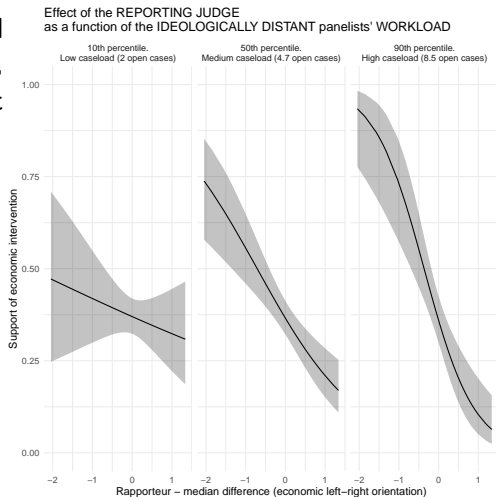
- ▶ when workload is low (2 cases) a typical move to the right, results in 11% decrease in support for state aid (interquartile range).



Effect of workload on: REPORTING judge's influence (H_3)

If we consider a typical rapporteur-median difference, what's the effect of the distant panelist's workload

- ▶ when workload is low (2 cases) a typical move to the right, results in 11% decrease in support for state aid (interquartile range).
- ▶ when workload is high (8.4 cases) a typical move to the right, results in 52% decrease.



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 - ▶ the distant judges: because of the cost of drafting high-quality judgments
- ▶ ⇒ *outcomes are shaped by i) court rules, ii) judges' preferences and iii) resources*