

Judges' behaviour and relationship with political  
parties in a non-common-law country:  
The case of the German Federal Constitutional  
Court

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Oct. 2014

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\*We thank Antonia van Delden, Philip Leifeld and Ulrich Sieberer for their helpful comments. We also thank Konstantin Käppner, Anna-Katharina Koch and Katharina Meidert for their support in data collection and analysis. Earlier versions of this paper was presented at the annual meeting of the Midwest Political Science Association 2012 and the General Conference of the European Consortium for Political Research 2013. We also thank the participants in the panels for their helpful comments.

## Abstract

In contrast to common-law countries, in civil-law countries it is difficult to investigate individual judges as political actors. It is mainly due to the legal norm under the civil-law tradition which is averse to disclosing individual judges' behavior. An exception is the German Federal Constitutional Court, permitting their judges to publish dissenting opinions. This paper identifies individual judges' political orientation on an underlying dimension by applying an unfolding-type of item-response model to those dissenting opinions. We find different degrees of congruence between political parties' and judges' political orientation, which we explain by the principal-agent theory. More specifically, we argue that some characteristics of potential judges are crucial for the screening by political parties in the selection process of the judges. Our empirical analysis shows that judges' party membership and former political career promise more screening success by parties, while lifetime appointment decreases congruence of nominating parties and judges.

# 1 Introduction

If political scientists research individual judges as political actors their empirical evidence mostly comes from the United States (Schubert, 1965, 1974; Rohde and Spaeth, 1976; Segal and Spaeth, 1993; Eskridge, 1991; Epstein and Knight, 1998; Martin and Quinn, 2002). Partly this is due to the leading role of American political science within judicial politics, but it also seems to be the result of the common law tradition in the American legal system. One important characteristic is the explicit role of individual judges in judicial opinion formation. In contrast, civil law traditions emphasize a collective judgement of the whole court. This legal norm states how the court decision should be publicly announced. The actual courts' decision formation is, however, another issue. The individual judges can express a different opinion on individual cases in the course of decision making. Further, their different opinions can partly depend on their different political orientation as the attitudinalists claim (Segal and Spaeth, 1993).

Unfortunately, empirical research about the topic is disadvantaged in civil law countries. Due to their legal norm, individual opinions of judges are not disclosed, which makes it difficult for researchers to investigate the behaviour of individual judges. In this setting, the German Federal Constitutional Court (hereafter FCC) is an exception since it allows judges to publish their dissenting opinion.<sup>1</sup> To evaluate the empirical validity of attitudinalists' notion in civil law countries, this paper exploits the information provided by this exceptional rule of the German FCC.

The German FCC itself has been investigated for a long time by political science researchers. The work of Donald Kommers (1976) is known as the first systematic study of the FCC which has been followed by a series of studies (e.g. Landfried, 1992; Stüwe, 1997; Vanberg, 2005; Sieberer, 2006; Hönnige, 2009). Some concluded that the German constitutional judges are strongly oriented towards the legal norm and are independent of their political orientation and influence of other political actors (e.g. Kommers, 1976; Landfried, 1992). Others found, in contrast, that the judges also pos-

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<sup>1</sup>Some further German state-level constitutional courts also allow dissenting opinions.

sess political orientation (e.g. Hönnige, 2009). However, their empirical evidence is, mainly based on the judge's socio-economic background, composition of the court and the collective court decisions. Even though they are important information sources for individual judges' preference they are no direct measure of individual judges' behaviour. In contrast to the existing studies, this paper directly investigates individual judges' behaviour observed in dissenting opinions and shows that they have certain political orientation.<sup>2</sup> Further, this paper relates the judges' orientation to the political parties which nominated them. To relate both components we rely on the principal-agent-model. More specifically, we argue that political parties can select judges close to their ideological orientation in the nomination process via screening strategy.

This paper provides empirical evidence in three steps: First, we apply an alternative class of item response theoretical model to dissenting opinions in FCC to identify individual judges' ideological orientation and the court's decision on the same latent dimension. Second, by investigating the government's and opposition's response to the court's decision, we show that the identified dimension corresponds to the conflict line between the Social Democrats (SPD) and Christian Democrats (CDU/CSU), the two poles of the German party system (Laver and Schofield, 2001). Third, we regress the judges' ideological orientation on several covariates which can serve as a screening instrument for political parties in nominating the judges. Our results suggest that the screening process of parties is in general successful as judges nominated by those parties have corresponding ideological orientations. The screening success is most pronounced if judges are additionally party members of the nominating party and/or previously have a political career.

The remainder of this paper proceeds as follows: The next section will introduce the principal agent theory which describes the relationship of political parties and FCC judges. The third section provides empirical evidence that judges' behaviour can be attributed to their political orientation on a latent dimension. Further, we also show

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<sup>2</sup>As exception, Jäger (1987) investigated the dissenting opinion between 1970 and 1986 by clustering judges who frequently wrote dissenting opinions on the same cases. He could find only weak political orientation of the constitutional judges. His method is, however, not adequate to analyse dissenting opinions for the reason explicated below.

that this dimension corresponds to the conflict line between SPD and CDU/CSU. The fourth section presents the results of regression analysis which finds the factors for screening success and failure by parties in appointing constitutional judges. Summary and discussion of the results are provided in the last section.

## **2 Judges in FCC and political parties in the principal-agent relationship**

By relying on the principal agent (PA) theory, we model the relationship of political parties and judges in FCC and derive some implications. For this purpose, we start with some relevant information about institutional settings in particular that of the German FCC.

The German FCC is not the highest court in the system of ordinary jurisdiction, this is the Federal Court of Justice (Bundesgerichtshof). The FCC is independent of the ordinary jurisdiction and can only be called if the legal dispute is a matter of constitutionality. Besides judicial review in the conventional sense (in German “abstrakte” and “konkrete Normenkontrolle”) FCC also decides over constitutional complaints made by any individual persons (Verfassungsbeschwerde) and institutional disputes (Organstreit) which include those between federal and state governments. Thus, FCC is one of the influential actors in the German political process. At the same time, FCC is not a fully independent power, as its judges are selected by the legislature which is explained in the following.

FCC consists out of two senates with eight judges in each senate. Four judges of each senate are appointed by the federal parliament (Bundestag) and the other four by the federal council (Bundesrat). There is an unwritten agreement between both large parties CDU/CSU and SPD to split the nomination of judges equally between them (Lamprecht, 1996; Landfried, 2006). More precisely, one of four judges should be neutral even if she or he is nominated by a political party. If one of the largest parties is in power with a small partner in coalition the small partner can eventually

nominate one judge (Hönnige, 2009, 967). Due to this informal rule, each senate currently consists of four judges nominated by the liberal-conservative parties and the other four by the social democrats/the greens with some exceptional cases. In the 70's when the social-liberal coalition was in power the judges were divided between SPD/FDP and CDU/CSU.

In light of the selection procedures of the constitutional judges and political parties' influential role, we can conjecture that constitutional judges are the agent of political parties. That is, by nominating certain judges, political parties expect that the judges will operate in the parties' interest. Given a judge is nominated by a party which supports a specific bill. If a constitutional complaint against the bill is raised, the judge is expected to vote against the complaint so that the bill is not blocked. Vice versa, a judges nominated by a party which is against the bill is expected to support the complaint.

The judges do not necessarily operate in the interest of nominating parties. Differently from political parties who pursue certain political goals, judges might have other goals like the independence of FCC, a consistent judicial discourse, dissenting ideological believes in this particular case or simply their own reputation. Furthermore, the judges possess more detailed information about the case in question as well as special knowledge in jurisprudence. These circumstances correspond to both causes of agency dilemma: inconsistent interests between principals and agents and information asymmetry.

Being confronted with this situation, what options do political parties have as principal? Kiewiet and McCubbins (1991) suggested the following four as principal's possible strategies: contract design, screening procedures, monitoring devices and institutional checks. Among them, contract design and monitoring seem to be unfeasible to utilize. It is ethically problematic to give material incentives through a certain contract design. In the context of the German FCC, such incentives are unethical. The principle of the court's independence conflicts with monitoring as strategy. Institutional checks seem slightly more realistic. That is, political parties can let individual

judges control each other. For example, the judge nominated by SPD can control the other judges, also nominated by SPD, whether they behave in line with the SPD's policy goal. This would not solve the fundamental problem since judges can share some common interests against political parties and they have the same informational advantage to political parties. In comparison with these three strategies, screening is the only realistic way how political parties can influence judges of the FCC (see also Sweet, 2000). As introduced above, the judges are nominated by political parties in their appointing process. Political parties can try to nominate judges who share certain common political orientations. As the simplest indicator, political parties can utilize the party membership of candidate judges. Furthermore, they can screen judges' past career, involvement in certain cases or public statements in media etc.

In reality, however, the screening by political parties can be successful to different degrees. In particular, we can expect that the judges without party membership tend to behave less in the interest of nominating political parties. Furthermore, screening operates only before appointment. Therefore, the agency dilemma can increase across time. The current rule, introduced in 1970, is that judges are appointed for 12 years and they cannot be re-elected, which was possible before. Therefore, at the beginning of the 70's there are some judges who had served for more than 20 years. For all of those judges, it is unrealistic to expect an effect of a successful screening after 20 years. Rather, it is more plausible that their long-term experience and their increasing belief in the independence of FCC should play a more important role in decision making. A similar reasoning can also be made concerning judges' career path before appointment. In particular, there are three different professions before appointment: judge in other courts, university professorship and political/party offices. In this regard, we can expect that judges with a political career tend to show more consistent ideological orientation with the nominating parties than the others. This might be since they have more experience to work with other political leaders. As a consequence the belief for the court's independence may be less internalized.

To evaluate the conjectures above we need to measure certain matches of judges'

and parties' political orientation. Solving this task is straightforward for investigation of judges in common-law countries. Researchers observe the judges' behaviour and infer their political orientation. In contrast, among civil-law countries generally no information about the judges' individual voting behaviour is available. Therefore, the existing studies mostly utilize other indicators like judges' socio-demographic background to infer their political orientation (e.g. Hönnige, 2009). Fortunately, the judges in the German FCC have been allowed to publish their dissenting opinion (Sonder-votum) since 1970, which this paper exploit to infer their political orientation in a systematic way. We identify the positions of individual judges as well as those of court's collective decisions on an ideological dimension via a statistical method introduced below.

### **3 Estimation of judges' political orientation**

To provide empirical evidence for the principal-agent relationship of constitutional judges and political parties, we first need to estimate the ideological orientation of individual judges on a certain latent dimension. To validate the identified dimension, it is also necessary to estimate the position of each court decision on the same dimension. This task is done by analysing the individual judges' behaviour which is expressed in written or non-written dissenting opinions. In the following, we briefly introduce the dissenting opinion in the German FCC and the statistical model applied below.

#### **3.1 Data: dissenting opinion in the German FCC**

Since 1970 individual judges in the German FCC have been able to publish a dissenting opinion to court decisions. Between 1970 and 2014 dissenting opinions were expressed to 112 decisions in the second senate.<sup>3</sup> The dissenting opinion can be expressed to the reasoning of the decision as well as to the decision itself. In some cases, judges wrote a dissenting opinion together. In other cases, a judge followed another judges'

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<sup>3</sup>We do not utilize data of the first senate in which a very low number of dissenting opinions were expressed.

dissenting opinion. For the following analysis, we focus on dissenting opinions which explicitly disagree with the court decision. Such cases are 93 out of all 112 decisions with dissenting opinions. For each of those cases, we coded the judges agreeing with the court decision by one, while the judges supporting the dissenting opinion by zero. In our data, we did not differentiate whether a judge wrote the dissenting opinion alone, wrote it together with others or followed another’s dissenting opinion.<sup>4</sup>

46 out of 93 cases are of constitutional complaint. In 93 decisions, 39 judges are involved. The data set has a form of unbalanced panel data, since individual judges are/were active in the senate for different time periods. In average, a judge is involved in 20.43 decisions with dissenting opinions and published 4.74 dissenting opinions. Hirsch is the judge who published the most dissenting opinions (16 cases). In contrast, there are also some judges who have never published any dissenting opinion.

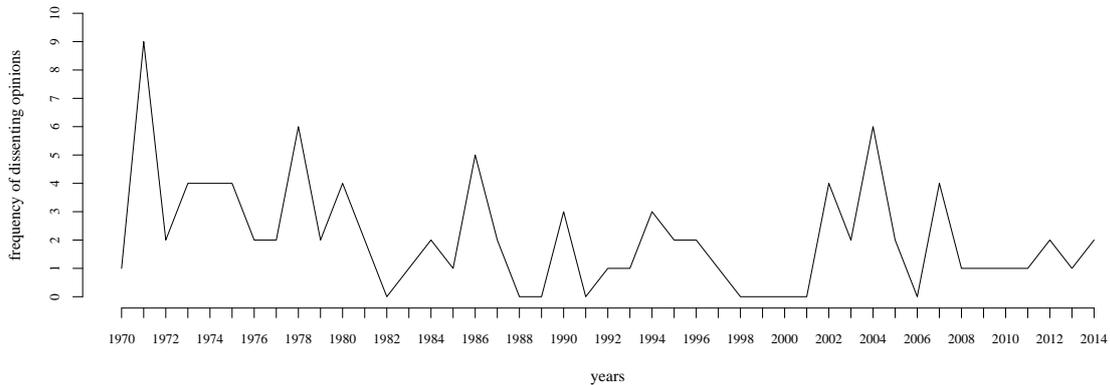


Figure 1: The absolute number of dissenting opinions for each year between 1970 and 2014.

Figure 1 displays the absolute number of dissents between 1970 and 2014 across years. The data does not show clear decreasing or increasing patterns over the years except for 1971. The peak with a total number of 9 dissenting opinions was the first year after the option to write a dissenting opinion was introduced. There are few years without dissenting opinions and the average number of dissenting opinions per year is

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<sup>4</sup>In some dissenting opinion it is clearly stated that the judge does not agree with the reasoning of the decision but agrees with the final decision while others are not as obvious to differentiate. The data is based on a conservative coding of such unclear cases, however, small variation in the interpretation of dissenting reasoning or dissenting opinion barely changed the estimated ideal position of judges.

2.83.

One might concern that the number of dissenting opinions is very low and they are rare cases (Vanberg, 2005, 91). First, the cases with dissenting opinions deal with more controversial issues. Second, these cases can be also characterized by a lacking cooperation in the decision process, which leads to some judges' frustration (Millgramm, 1985). Against these arguments, we maintain that the small case number would not lead to a seriously biased estimation of the results. First, we assumed that a judge writes a dissenting opinion if the discrepancy between the judge's position and the court's decision is large enough relative to the cost of publishing a dissenting opinion (Epstein, Landes and Posner, 2011). Therefore, cases with less conflict potential would not provide information about the judge's ideological orientation. Second, we find the lacking cooperation in the decision process as induced endogenously by controversial issues.

### **3.2 Statistical model**

In order to estimate the judges' position from their dissenting opinion, we utilized a specific class of item response theoretical model (IRT): unfolding IRT. The crucial difference between the conventional IRT-models and the unfolding IRT lies in the form of the item response function. The former has a monotonically increasing or decreasing function while the latter has a single peaked function. Our data consist of the binary response of individual judges to the court decision: agree (1) or disagree with a dissenting opinion (0). Obviously, application of conventional IRT-models is inappropriate since left-wing and right-wing oriented judges can simultaneously publish their dissenting opinion from the majority court decision which is located in the mid of the ideological scale. This constellation cannot be adequately modelled by a monotone item response function, but by a unimodal item response function. For the same reason, the analysis of Jäger (1987) who exceptionally investigated the dissenting opinions is inadequate as well. His method, "block-analysis", clusters judges who frequently wrote dissenting opinions to same cases. However, judges can also write

dissenting opinion to a same case even though they do not share the same political orientation as discussed above.

In the following we utilize amongst others PARELLA of Hoijtink (1997) due to its flexible form of the item response function. The PARELLA model is applied to binary responses,  $y_{ij}$ , of individual  $i$  to item  $j$ .  $y_{ij}$  is modelled as follows:

$$\Pr(y_{ij} = 1) = \frac{1}{1 + |x_i - a_j|^{2b}} \quad (1)$$

where  $x_i$  is  $i$ 's position and  $a_j$  is  $j$ 's position on the latent dimension. Eqn 1 shows clearly that the probability of response 1 is 100% if an individual's position is exactly identical with that of an item on the latent dimension ( $x_i = a_j$ ). The decreasing probability in increasing distance between  $x_i$  and  $a_j$  is determined by  $b$ . Figure 2 presents three item response functions with different sets of parameters. If one looks at the item response function with  $b = 10$ , an individual gives the response 1 only if she is very close to the item. Its relationship is virtually deterministic. In contrast, the item response function with  $b < 1$  is quite probabilistic so that individuals relatively distant from an item still have a nonzero probability to give a response 1.<sup>5</sup>

For parameter estimation, we employ a Bayesian approach to estimate parameters as it is also the case for the conventional IRT (Martin and Quinn, 2002; Clinton, Jackman and Rivers, 2004). This approach has an important advantage in particular in treating missing values. As mentioned above, our data set has an unbalanced panel structure. Therefore, the data matrix of individuals and items has a number of missing values. These missing values can be treated by Bayesian as parameters to be estimated. Bayesian estimation requires prior information for parameters to be estimated. This is, however, rather an advantage in the context of estimation of IRT-models. Just like factor analytic methods, IRT-models also suffer from identification problems. The latent dimension to be extracted has arbitrary directions and scale. This problem can

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<sup>5</sup>The PARELLA-model is not the only probabilistic unfolding model. It is also possible to take other formulation of the item response function. Andrich and Luo (1993) and Andrich (1997), for example, suggested a hyperbolic cosine model. This paper preferred the PARELLA model due to the flexible form of its item response function.

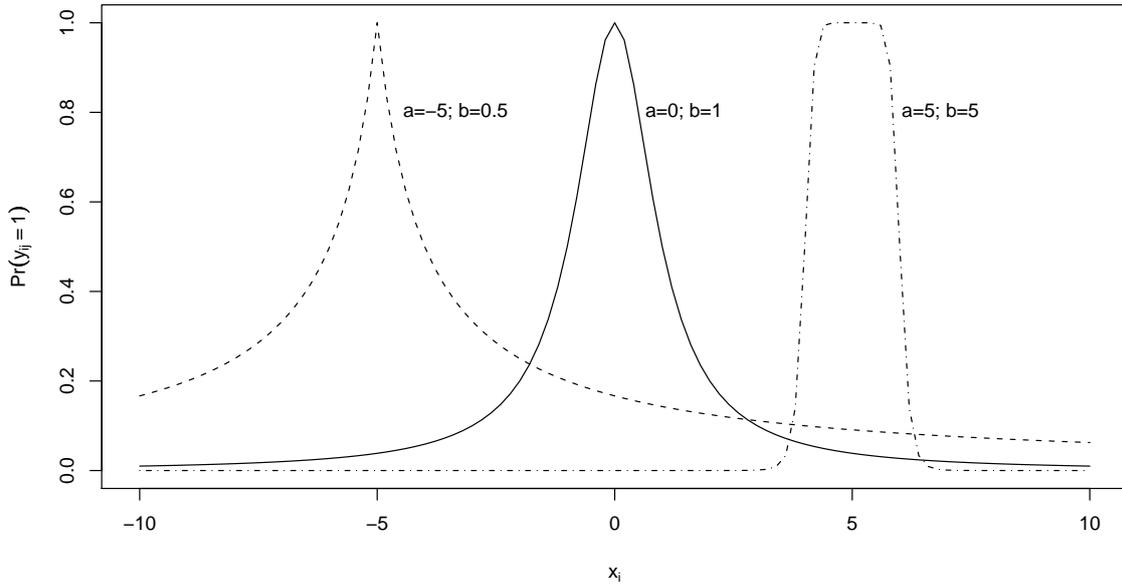


Figure 2: Item response functions of PARELLA

be solved by setting appropriate prior information to some of the parameters.

### 3.3 Results: judges' estimated political orientation

Figure 3 presents the estimated ideal positions of 39 judges of the second senate along with the 80% credible interval. Some judges (Kutscher, Müller and Kessal-Wulf) have a large credible interval since each of them was only involved in a small number of decisions with dissenting opinions. In contrast, the credible intervals of the other judges are relatively small. Furthermore, the locations of most judges are more or less grouped depending on their nominating party. Judges nominated by Social Democrats (red in the figure) tend to be on the left side of the latent dimension and those nominated by Christian Democrats (black in the figure) on the right side.

The latent dimension identified above is reasonable since judges nominated by Social Democrats and Christian Democrats are grouped with some exception left and right to the courts decisions. With this result, however, we cannot necessarily conclude that the political parties' screening strategy in selecting judges works well. In the case of successful screening, Christian Democrats and Social Democrats should be located

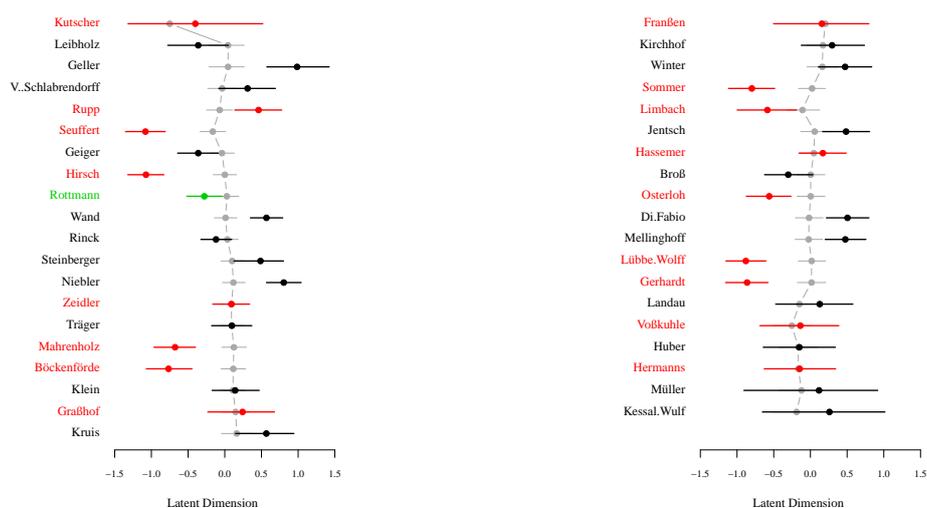


Figure 3: Location of judges on the dimension extracted by PARELLA and the average court’s decisions, each with 80% credibility intervals (red: nominated by Social Democrats; black: by Christian Democrats; green: by Liberals; grey: average court’s decisions)

on the same side of “their” judge on the identified dimension. To evaluate this point, we collected information whether the individual political parties approve or oppose the court decision. This kind of information appeared mostly in media report, but also in books or academic articles.<sup>6</sup>

Figure 4 presents the mean estimates of court decisions under different federal-level coalition governments between 1970 and 2014. The grey stars present the mean estimate of all decisions in each legislative period. The red filled triangles correspond to the mean court decisions supported by SPD; the black filled triangles to those supported by CDU/CSU. The reversed empty triangles mark the mean court decisions rejected by SPD (red) or CDU/CSU (black).<sup>7</sup> As a general pattern, SPD supports the court decisions on the left side and rejects those on the right side of the mean decision (grey stars). Concerning CDU/CSU, the reversed pattern is visible. The only clear exception is the Social democrats’ response during the grand coalition between 2005 and 2009. This is reasonable since SPD was the junior partner of CDU/CSU under this

<sup>6</sup>Most statements are made by federal-level political actors. We also included some statements exceptionally made by state-level political actors which concern party political issues apart from federal-state-conflict.

<sup>7</sup>Missing triangles indicate that there was no explicit information available during the corresponding period.

grand coalition. Therefore, they are more or less constrained to act together in public. After 2009, the court positions opposed by CDU/CSU (reversed empty triangles in black) also do not correspond to the expected pattern, but the corresponding estimates also have no clear deviation from the overall mean (grey stars). At the same time, SPD supported the court decisions on the clearly left side to the mean, therefore we may conclude that the identified dimension corresponds to the conflict line between SPD on the left and CDU/CSU on the right side of the scale.

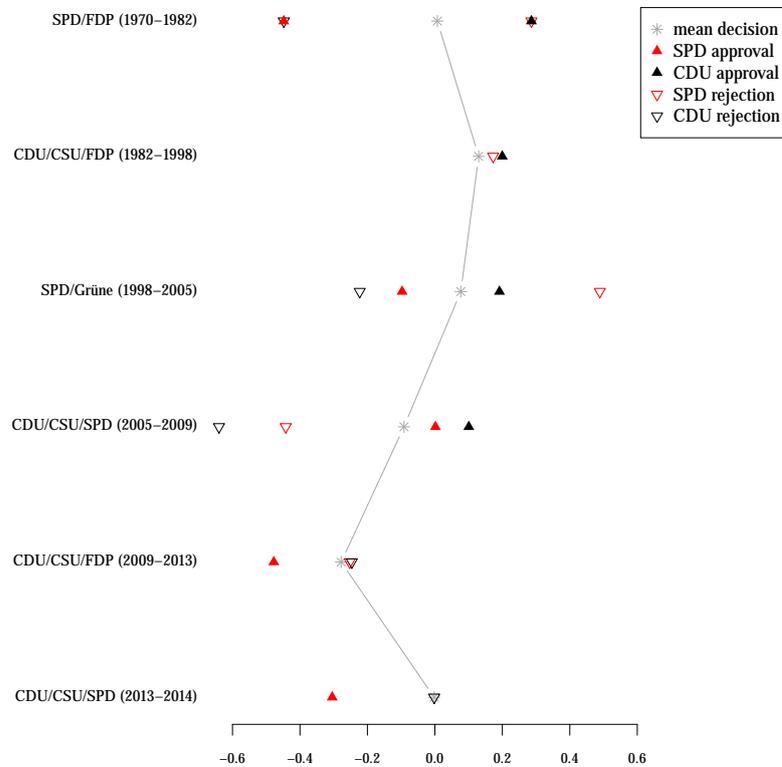


Figure 4: Grey stars give the mean estimate of decisions across each legislative period. The red filled triangles mark the mean estimates of decisions which the SPD publicly supported and the black once those which the CDU/CSU publicly supported. The reversed empty triangle mark the mean estimate of decisions which are publicly rejected by SPD (red) or CDU/CSU (black).

We turn again to Figure 3. We now focus on the average court’s decisions in which each judge was involved with its credibility interval (grey in the figure). As shown above, the identified dimension reflects the conflict line between SPD and CDU/CSU.

Therefore, in case of successful screening, judges nominated by SPD are expected to be left and those nominated by CDU/CSU are expected to be right of the average court's decisions. According to the figure, screening by political parties in general works quite well as the overall average of conformity with the nominating party is 73%. However, Figure 3 also displays a few exceptions on both sides where the screening methods of parties seems to have failed. Among the judges nominated by CDU/CSU, this is most obvious for the judges Leibholz, Geiger and Broß whose positions are much more left to the average court's decisions than the others. Among the judges nominated by SPD the most critical one is judge Rupp whose position is estimated more right to the average court's decisions than the others.<sup>8</sup> The judge Rottmann, nominated by FDP (the Liberals), is clearly left of the average court's decisions as well. However, this finding is in line with the expectation, as Rottmann was nominated by the social-liberal coalition and therefore was expected to behave in line with the SPD and not with CDU/CSU.<sup>9</sup>

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<sup>8</sup>The judges Kutscher, Müller and Kessal-Wulf are not considered here since the uncertainty of their ideal positions is too large to make adequate statements.

<sup>9</sup>To simplify further analysis, we consider Rottmann as nominated by the SPD.

## 4 Factors behind screening success and failure

In the last section we found that the constitutional judges are more or less grouped on a latent dimension in line with their nominating parties. At the same time, we also found some deviating cases in which judges and nominating parties are located on different sides of the mean court decision. Among those in line with their nominating parties, the judges vary in their political orientation. As discussed above, the political parties can take certain screening strategies in the selection process since the post hoc control of judges' behaviour is unrealistic. It is an interesting question which characteristics of judges promise political parties more successful screening.

To answer this question, we regress deviation of the judges estimated positions from the mean court decision on characteristics which are visible to the nominating parties in the selection process. As such traits we consider the judges' party membership and earlier career. Concerning the first trait, the political parties do not always nominate judges with the same party membership. Among 39 judges in our data, 10 judges possess no party membership. They are reasonably assumed to behave in a more deviating way from the nominating party than the judges with party membership. Concerning the second trait, constitutional judges can have different career paths before their appointment. Some were judges in other courts in Germany or university professor and others had a political and/or party office before their appointment to the FCC. Among those, successful screening seems more promising for the nomination of a judge with a political and/or party office career. The former university professors and judges in other courts more strongly internalized the norm of judicial independence. The experience of political/party office can weaken this internalized norm as independent judge and could lead to more consideration of political circumstances in the judgement.

Besides parties' screening strategy, there can be another factor for screening success/failure: life-time appointment as judge. The judges of the FCC were appointed for life time until 1970 when the 12-year term without re-appointment was introduced. The judges with life time appointment can be assumed to be more independent from

the nominating political parties since they do not have to care about their career after FCC.

To set up the regression model we have to consider the following two points: First, the dependent variable, deviation of judges' political orientation from the mean court decision, is based on estimates with different magnitude of variance. To appropriately model this kind of dependent variable we employ feasible generalized least squares (FGLS) estimators suggested by (Lewis and Linzer, 2005). Second, the dependent variable is the estimated judges' political orientation. The effect of screening success/failure should have, if any, effects in different directions depending on the nominating party. Correspondingly, we include the interaction terms between the factors discussed above and the nominating party. The statistical model is specified as follows:

$$x_i = \beta_0 + \beta_1 Z_i^{SPD} + \beta_2 Z_i^{pm} + \beta_3 Z_i^{PC} + \beta_4 Z_i^{la} + \beta_5 Z_i^{SPD} Z_i^{pm} + \beta_6 Z_i^{SPD} Z_i^{PC} + \beta_7 Z_i^{SPD} Z_i^{la} + \epsilon_i \quad (2)$$

$Z^{SPD}$  is a dummy variable whether judges are nominated by SPD.  $Z^{pm}$ ,  $Z^{PC}$  and  $Z^{la}$  are dummy variables whether judge have party membership, a political/party career and lifetime appointment, respectively.

Figure 5 displays the estimated coefficients and the 95% confidence intervals. Interpretation of multiplicative interaction models is not straightforward (Brambor, Clark and Golder, 2006). Therefore, we further predicted the political orientation of different types of judges (Figure 6). Based on the predicted orientation, we evaluate the marginal effects concerning the different screening strategies.

The first two predicted orientations are based on judges without any traits (party membership, political/party office, lifetime appointment). The credibility intervals show that the predicted position of SPD-nominees without party membership differs but not significantly from that of the CDU/CSU counterpart.

If one compares the predicted position of the judges with party membership the difference between SPD and CDU/CSU-nominees is very clear. Party membership is

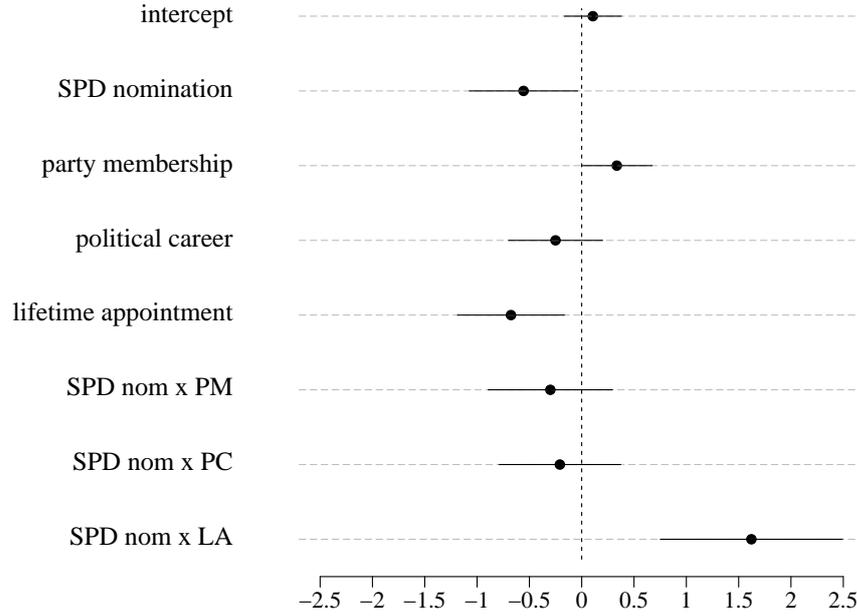


Figure 5: Estimated coefficients of the regression model, each displayed with its 95% confidence interval.

particularly important for CDU/CSU in nominating constitutional judges. In comparison with the CDU/CSU-nominees without party membership, those with CDU/CSU membership deviate in a larger magnitude from the mean court decision in favour of the nominating party. Concerning this point, the SPD-nominees' deviation from the court decision remains constant but its uncertainty decreases.

Also the judges with political career differ between SPD and CDU/CSU-nominees. We consider here judges with party membership since there are no judges in our data without party membership, but a political career. In contrast to party membership, the former political career is more crucial for SPD's screening: the SPD-nominees with former political career deviate more on average than those without political career. In contrast, the CDU/CSU-nominees deviation decreases on average if they had a political career before appointment.

Finally, if one focuses on judges with party membership and lifetime appointment there are no clear differences. The mean estimates of prediction are even reversed compared to party directions. This shows that the lifetime appointment disturbs

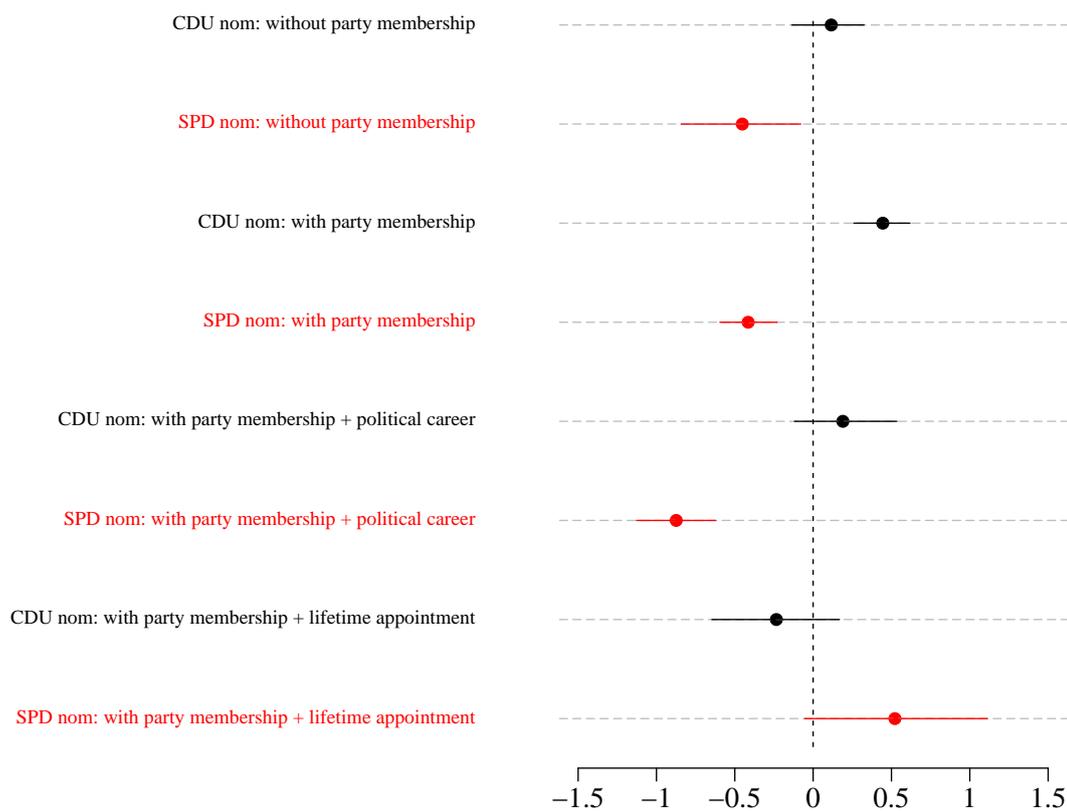


Figure 6: Predicted political orientation of different types of judges, each displayed with its 95% confidencecredibility interval.

the principal-agent relationship between political parties and constitutional judges. In contrast, party membership and earlier political career can serve as important indicator for political parties in screening judges. In particular, party membership is a crucial cue in screening.<sup>10</sup>

In sum, both party membership and early political career play important roles in screening judges prior to appointment. Our results also show that these traits work differently for SPD and CDU/CSU. For SPD, the former political career is crucial to appoint judges which behave in favour of the party. For CDU/CSU, judges with party membership but without political career promise more favourable behaviour in the future.

<sup>10</sup>In general, the CDU/CSU-nominees are closer to the court decision. This is due to the fact that the mean court decisions are often closer to the position of CDU as Figure 4 showed.

## 5 Discussion

This paper examined a principal-agent-relationship between political parties and constitutional judges in non-common-law countries. In particular, we investigated whether judges viewed as agent share the same political orientation as their nominating party which is the principal. Further we also tested whether political parties can take the screening strategy to reduce the agency dilemma. This is an uneasy task since individual judges' behaviour is in general not disclosed in the countries due to their legal norm. As an exception the German Federal Constitutional Court allows individual judges to publish their dissenting opinion from the court decision. The paper exploited this information. We applied a specific class of item response theoretic model to the judges' behaviour observed as dissenting opinion. As results we identified a latent dimension on which individual judges as well as the court decisions are located. By evaluating the political parties' response to individual court decisions, we confirmed that the identified dimension corresponds to the conflict line between both large parties, SPD and CDU/CSU. We also found judges' positions are more or less grouped along the party line. From this result we can conclude that German constitutional judges also possess political orientation as confirmed for the US Supreme Court. At the same time, we can also find different degrees of congruence between judges' and parties' orientation. This can be explained through parties' screening strategies in the appointment process. The important traits for the nominating parties are party membership (in particular for CDU/CSU) and former political career (in particular for SPD). Further, the lifetime appointment which was abolished in 1970 served as disturbing factor for the principal-agent-relationship.

Lifetime appointment as the disturbing factor could have an alternative explanation. Leibholz, Rupp and Geiger are the prototype of judges with lifetime appointment and deviating political orientation from the nominating parties. All of them were appointed in 1951 as the German FCC was founded. When the dissenting opinion was introduced in 1970 they were almost 20 years in the FCC. Given this, not the lifetime appointment, but time duration after appointment may be crucial for screening failure.

That is, the longer a judge works in the constitutional court, the more independent he/she is from political influence. Our individual-level analysis cannot test this factor since our estimates of each judge's political orientation are assumed to be constant over time. Instead, we also estimated each judge's political orientation separately for the first three years and thereafter. According to the results we could not find a clear pattern for most judges' political orientation. Their credible intervals are much longer than those in Figure 3, which is due to the smaller number of cases for each judge per time period. Exceptionally, Rinck (nominated by CDU/CSU), Böckenförde (by SPD) and Lübke-Wolff (by SPD) clearly came closer to the mean court decision over time. Further, Niebler (by CDU/CSU) showed the reversed pattern. In sum, there is not enough evidence that time duration after appointment is more crucial than the lifetime appointment.<sup>11</sup>

We have to be careful in generalizing this paper's result beyond Germany. Germany is known to be a political system in which political parties take a central role. Furthermore, the selection process of constitutional judges is also strongly dominated by both large parties, which is not always the case in the other civil-law countries. In this sense, Germany may be a special case in favour of the principal-agent-relationship discussed above. Still, we should underscore that despite the norm in civil-law-countries, German constitutional judges possess political orientation and behave more or less consistently with their nominating parties.

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<sup>11</sup>The more detailed estimation results are available from the authors upon request.

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