

Backlash and Judicial Restraint: Evidence from the European Court of Human Rights

Øyvind Stiansen and Erik Voeten

Abstract

How does backlash from consolidated democracies affect the behavior of liberal international institutions? We argue that liberal international institutions have incentives to appease their democratic critics. Liberal institutions rely on democratic support for their continued effectiveness and can accommodate democratic critics at lower legitimacy cost than non-democratic challengers. We examine this theory in the context of the European Court of Human Rights (ECtHR) using a new dataset of rulings until 2019 and a coding of government positions during multiple reform conferences. Combining matching and a difference-in-differences design, we find strong evidence that the Court exercises restraint towards consolidated democracies that have criticized the Court in multilateral reform conferences by rendering fewer violation judgments against these states. We find some evidence that governments have also recently appointed more deferential judges. The findings suggest that backlash can affect liberal international institutions even without membership exit.

Authors' note

The authors thank the three anonymous reviewers, the ISQ editors, Sara Mitchell, Paulo Pinto de Albuquerque, Angelika Nußberger, Karen Alter, Larry Helfer, Mikael Madsen, Juan Mayoral, Robert Thomson, Erik Røsæg, Henning Finseraas, Jon Kåre Skiple, Theresa Squatrito, Nino Tsereteli, Katarína Šípulová, Daniel Naurin, and participants at panels and workshops at the 2018 Annual Conference of the International Studies Association, the 2018 Annual meeting of the American Political Science Association, the 2018 General Conference of the European Consortium of Political Research, the 2019 Annual Conference of the Norwegian Political Science Association, Georgetown University, Princeton University, iCourts, PluriCourts, and the European Court of Human Rights for helpful comments and suggestions.

Funding

This research was supported by the Research Council of Norway through its Centres of Excellence funding scheme, project number 223274 (PluriCourts).

Data statement

The data underlying this article are available on the ISQ Dataverse, at <https://dataverse.harvard.edu/dataverse/isq>.

1 Introduction

Liberal international institutions are increasingly challenged by consolidated democracies for being overly interventionist. While a growing literature considers the causes of backlash (Alter, Gathii and Helfer, 2016; Madsen, Cebulak and Wiebusch, 2018; Sandholtz, Bei and Caldwell, 2018; Hobolt, 2016; Walter, 2018; Abebe and Ginsburg, 2019; Copelovitch and Pevehouse, 2019; Naoi, 2020), we know less about how backlash affects institutional behavior. Do liberal institutions accommodate democratic critics by intervening less in the domestic affairs of democracies?

The answer to this question is not obvious. Liberal international institutions have been established to mitigate commitment problems and to protect core liberal values against shifting political winds (Moravcsik, 2000). Liberal institutions, and international courts in particular, are therefore typically designed to be insulated from government preferences (Alter, 1998, 2008). Although few would argue that institutional independence is unconstrained, the degree of institutional responsiveness to changing political environments remains subject of debate (Carubba, Gabel and Hankla, 2008; Stone Sweet and Brunel, 2012; Larsson and Naurin, 2016; Blauburger et al., 2018; Davies, 2018). In particular, institutional responsiveness to backlash may be limited by institutional design and because the legitimacy of these institutions hinges on fulfilling liberal mandates and not being perceived as catering to powerful political actors.

Backlash can shape institutional behavior through two distinct routes. First, critical governments can use their formal and informal influence to appoint agents with more restrained preferences, curtail budgets, or otherwise limit institutional reach. Fundamentally altering the course of international institutions in this way

usually requires multilateral reform coalitions.

A second possibility is that international institutions may restrain themselves to mitigate backlash, perhaps in response to signals sent by member states. In doing so, institutional actors must weigh the threat to their authority from backlash against the threat of being perceived as straying from their liberal mandate. We argue that liberal international institutions have stronger incentives to accommodate democratic critics than to accommodate non-democratic challengers. First, the effectiveness of institutions that promote and spread liberal policies depends on continued participation by consolidated democracies. Second, accommodating democratic critics do not require liberal institutions to stray as far from their liberal mandates compared to what accommodating non-democratic or backsliding critics would require. We thus expect institutional actors concerned about the authority and effectiveness of their institutions to use their agency to offer increased leeway for democratic critics.

We examine these arguments in the context of the European Court of Human Rights (ECtHR). During the 1990s, consolidated democracies strengthened the institution to cement human rights throughout Europe. The ECtHR became a full-time court with binding legal authority and individual access for over 800 million residents of 47 Council of Europe states. However, since the mid-2000s, governments in the United Kingdom, Denmark, the Netherlands, Italy, Switzerland, and other consolidated democracies have criticized the Court for being overly interventionist. This criticism has motivated reform efforts and the United Kingdom has threatened to leave the Court's jurisdiction (Madsen, 2018; Popelier, Lambrecht and Lemmens, 2016). Employing novel data on ECtHR judgments, dissenting opinions, and diplomatic statements at reform conferences, we examine

whether these shifts have influenced appointments and the Court's tendency to rule against respondent states.

We find some evidence that governments have directly influenced the Court by appointing more restrained judges. Combining matching and a difference-in-differences estimator, we find strong evidence of the Court exercising more restraint towards consolidated democracies that have publicly criticized the Court's interference with national parliaments and national courts at multilateral reform conferences. The United Kingdom – the strongest critic – is a particular beneficiary. By contrast, the Court has not deferred more to critics with less established democratic credentials.

These results are important because the Court has traditionally used rulings against consolidated democracies to help raise standards on controversial issues, such as LGBT rights, across the Council of Europe (Helfer and Voeten, 2014). This strategy hinges on the willingness of consolidated democracies to accept and implement such rulings. Even if democratizing states have incentives to commit to international human rights institutions (Moravcsik, 2000; Simmons, 2009), the effectiveness of these institutions depends on continued cooperation from consolidated democracies. The operation of liberal international institutions may change fundamentally as a result of liberal backlash even if democratic critics remain members.

2 A Liberal Backlash

A rapidly growing literature investigates the causes and consequences of backlash against international institutions, including international courts (Alter, Gathii and

Helfer, 2016; Madsen, Cebulak and Wiebusch, 2018; Sandholtz, Bei and Caldwell, 2018; Hobolt, 2016; Walter, 2018; Abebe and Ginsburg, 2019; Copelovitch and Pevehouse, 2019). Backlash refers to government actions aiming to curb the authority of an international institution. Such actions include threats to exit or reform an institution but also broader attempts at delegitimation: the process of contesting beliefs that the authority of an international institution is appropriately exercised (Tallberg and Z'urn, 2019).

Liberal international institutions, including human rights courts, have long faced challenges to their legitimacy. Moreover, compliance has always been imperfect and complex (Hathaway, 2002; Hafner-Burton, 2008; Hillebrecht, 2009; Von Stein, 2016). What is new is that their traditional protagonists, consolidated liberal democracies, are now leading the charge.

The ECtHR is a good example. The ECtHR allows individuals to bring claims against their governments for violations of the 1950 European Convention on Human Rights (ECHR) and its protocols.¹ The Convention protects a broad set of rights, including the right to life, freedom from inhuman or degrading treatment, fair trial, freedom of expression, and privacy rights. If the ECtHR finds a violation, the responding state is legally obligated to implement the judgment, which may include financial compensation but also, if necessary, changes in policy and legislation to avoid future violations (Keller and Marti, 2015). Although judgment compliance is slow and imperfect, the Court's judgments have induced meaning-

¹In addition, there have been, as of January 2020, 24 inter-state cases. See e.g. https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf (retrieved March 19th, 2020)

ful policy changes (Hillebrecht, 2014*a,b*; Keller and Stone Sweet, 2008; Helfer and Voeten, 2014; Stiansen, 2019*a,b*).

The Court issued just over 200 judgments before 1990. The end of the Cold War breathed new life into the Court as Europe’s consolidated democracies sought to integrate newly democratized states (Bates, 2010). In 1994, Council of Europe member states signed Protocol 11, making acceptance of individual petition and compulsory jurisdiction mandatory and providing individuals direct access to the Court. Protocol 11 went into force on November 1st 1998. The number of member states increased from 20 in 1990 to 47 in 2005.

By the mid-2000s, the Court evaluated over 50,000 applications and issued over 1,000 judgments on the merits annually. The Court also continued to develop its case law in ways that progressively expanded Convention rights (Madsen, 2016, 144). Yet, before the mid-2000s, governments in consolidated democracies did not challenge the Court’s authority even as they sometimes disagreed with specific rulings (Madsen, Cebulak and Wiebusch, 2018, 202–293). Instead, the United Kingdom, like other consolidated democracies, incorporated the Convention into domestic law through the 1998 Human Rights Act. Von Staden (2018) argues that while liberal democracies have tried to reduce the sovereignty costs of individual judgments by engaging in strategies of minimal compliance, they have shared a normative commitment to at least formally comply with ECtHR judgments.

This started to change in the mid- and late 2000s. For example, the *Hirst v. the United Kingdom* (2005) judgment, in which the Court ruled that a British ban on prisoner voting violated the ECHR,² created a “perfect storm” for con-

²74025/01, 6/10/2005.

servative challenges (Murray, 2012) and attracted unprecedented media attention to the Court (McNulty, Watson and Philo, 2014). The *Hirst* judgment merely required the United Kingdom to provide a rational basis for why some prisoners should not be able to vote. Yet, when the cabinet proposed such a bill in 2011, it was defeated by an overwhelming majority (234 to 22). Prime Minister David Cameron, supposedly arguing for the cabinet’s proposal, stated during the debate that: “It makes me physically ill to even contemplate having to give the vote to anyone in prison.”³

It took until 2017 for the United Kingdom to draft a solution that would allow about 100 prisoners to vote.⁴ Although a minimal level of compliance was eventually achieved, the protracted defiance demonstrated that also consolidated democracies such as the United Kingdom might defy the Court if specific judgments or the Court as such become sufficiently unpopular domestically. Moreover, the British recalcitrance may have legitimated similar defiance by other states. In 2013, the Council of Europe Commissioner for Human Rights, Nils Muižnieks, warned that continued British defiance

would send a strong signal to other member states, some of which would probably follow the UK’s lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That

³Hough, Andrew. 2011. “Prisoner vote: what MPs said in heated debate.” <http://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html> (Accessed 23 May 2017).

⁴“Council of Europe accepts UK compromise on prisoner voting rights”, *The Guardian*, December 17, 2017.

would probably be the beginning of the end of the ECHR system⁵.

Another highly controversial set of issues concerned the ECtHR's scrutiny of British responses to the 2005 terrorist attacks in London. Perhaps most controversial was the judgment prohibiting the United Kingdom from extraditing Islamic preacher and suspected terrorist Abu Qatada to Jordan for fears that he might be tortured there. The judgment upset then home secretary Theresa May so much that she argued that: "it isn't the EU we should leave but the ECHR and the jurisdiction of its court."⁶ The percentage of the British public who believed that the ECtHR is a "good thing" dropped from 71% in 1996 to 19% in 2011 (Voeten, 2013). Hillebrecht (2014a) describes how the United Kingdom has begrudgingly complied with these judgments. Yet, the controversies surrounding these judgments further undermined British support for the ECtHR and have even prompted threats of withdrawal by leading politicians.

Another example is the 2009 Chamber judgment in *Lautsi v. Italy*, which reasoned that an Italian law mandating a crucifix in each public school classroom violates the freedom of religion. The ruling prompted public outcry both in Italy and other European countries (Lupu, 2013). President Silvio Berlusconi called it "one of those decisions that make us doubt Europe's common sense" (Mancini, 2010). The populist right-wing Northern League used local government control to distribute crucifixes in the main squares of villages. The ruling faced the unprecedented opposition of 13 states who joined in third-party briefs. In 2011, the

⁵<https://rm.coe.int/16806db5c2> (retrieved March 23rd, 2020).

⁶<https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>.

ECtHR's Grand Chamber reversed the unanimous Chamber judgment 15-2, arguing that "...the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State."

Starting with the 2010 Interlaken conference,⁷ states have used their Council of Europe chairmanships to organize high-level multilateral conferences on reforming the ECtHR. The reform conferences centred on Court's increasingly unmanageable caseload. Yet, some governments also explicitly, and in front of the Court's leadership, urged the Court defer more to member states. For example, the Italian representative in Interlaken stressed that:

I would like to reiterate the subsidiary role of the Court in respect of national courts. [...] the questions which touch national feelings and traditions must be regulated on a national level.

The British representative at the 2011 Izmir conference was even more explicit:

If the Strasbourg Court is too ready to substitute its own judgment for that of national parliaments and courts that have through their own processes complied with the Convention, it risks turning the tide of public opinion against the concept of international standards of human rights, and risks turning public opinion against the Convention itself.

The Dutch government stated in preparation for the Izmir conference that:

[...] the Netherlands will call for the Court to allow more scope for state

⁷See https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf (accessed 24 June 2018).

parties' 'margin of appreciation' ⁸

The Dutch criticism was fuelled both by right-wing politicians' principled resistance against international judges overriding elected politicians and by specific judgments, such as a 2010 ruling temporarily prohibiting the expulsion of a group of Iraqi asylum seekers (Gerards, 2016, 332-336).

In 2012, the United Kingdom used its chairmanship to direct the reforms towards restricting ECtHR interference with domestic decision-making. The (leaked) United Kingdom draft declaration for the 2012 Brighton conference was "a blueprint for clipping the Strasbourg Court's wings" (Helfer, 2012). Yet, there was also opposition to the United Kingdom's position and the final declaration was milder than the draft. Nevertheless, it achieved agreement on adding the principle of subsidiarity and the margin of appreciation to the Convention's preamble as part of Protocol 15.⁹ Although Protocol 15 has not yet entered into force, the Brighton conference sent a clear signal to the Court's judges that important states desired more judicial restraint (Bultrini, 2012; Madsen, 2018).

Challenges to the Court have continued since 2012. For example, the Court has become controversial in Switzerland, especially through the Swiss People's Party (SVP). Swiss criticism was fuelled in good part by decisions by Swiss courts that

⁸Ministry of Foreign Affairs, Responsible for Freedom (The Hague: MinBuza, 2011), <https://www.government.nl/binaries/government/documents/policy-notes/2011/08/17/human-rights-memorandum-responsible-for-freedom-2011/human-rights-memorandum-responsible-for-freedom-2011.pdf>.

⁹See <https://www.humanrights.ch/en/standards/ce-treaties/ap/ap15/> (retrieved March 19th, 2020)

banning of minarets would be incompatible with the Convention as interpreted by the ECtHR. The SVP has proposed constitutional reforms to reduce the influence of ECtHR judgments in the Swiss legal order (Altwicker, 2016).

During the spring of 2018, the Danish government used its Council of Europe chairmanship to promote further reforms, largely motivated by the limitations that ECtHR case law place on Danish immigration policy. Most controversially, the Danish Supreme Court blocked the deportation of Gimi Levakovic,¹⁰ a convicted criminal of Croatian nationality, because it would interfere with his Convention rights, as interpreted by the ECtHR. Levakovic had appeared in a TV documentary entitled “The gypsy boss and his notorious family” and the ruling created massive public outcry (Hartmann, 2017). In February 2018, Denmark released a draft “Copenhagen Declaration”,¹¹ emphasizing that individual states have the primary responsibility for human rights and that the ECtHR should not take on the role of national institutions.

The Court also continues to be controversial in Europe’s less democratic states. Turkey temporarily suspended the Convention in 2016 in the aftermath of the attempted coup. The Russian Constitutional Court ruled in 2017 that Russia does not have to abide by an ECtHR judgment awarding Yukos shareholders more than \$2 billion in damages. Yet, such challenges are not novel. For example, the Court’s former president was allegedly blackmailed and poisoned by Russian

¹⁰See <http://domstol.fe1.tangora.com/New-S%C3%B8geside.31488.aspx?recordid31488=1222> (accessed March 10, 2018)

¹¹See https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf (accessed 10 March 2018)

government agents over his handling of Chechen cases in 2002.¹²

In short, the multilateral reform conferences did not constrain the Court's formal institutional authority. Some measures were proposed that would have had such effects but failed to attract sufficient support. Yet, several governments used these conferences to send strong signals to the Court that in exchange for their support, they desired a more deferential Court.

3 Institutional Responsiveness to Liberal Backlash

The literature on how politics affects international courts identifies two general ways in which backlash could affect Court behavior. The first, and most obvious, is that governments maintain direct levers of influence even after delegating authority to a court (Pollack, 1997). Backlash may lead governments to propose institutional reforms, curtail budgets, or appoint institutional agents that are more attuned to state interests (Elsig and Pollack, 2014). The effectiveness of such direct levers of influence depends on institutional design. As illustrated above, in the ECtHR (and in many other multilateral institutions), institutional reforms and budget cuts are difficult to negotiate. Yet, the judicial appointment process is susceptible to unilateral political influence. Each of the 47 member states nominate three judges, one of which is elected by the Parliamentary Assembly of the Council of Europe. Since each government can only directly influence the appointment of one judge, each government's ability to influence the Court through this mechanism is limited. By contrast, in the World Trade Organization (WTO) each state can block any appointment to the Appellate Body, making the appointment process a greater

¹² "I was poisoned by Russians, human rights judge says" *The Guardian*, January 31st, 2007.

source of leverage for critics such the United States (Dunoff and Pollack, 2017). Yet, government ideology correlates with appointments to the ECtHR (Voeten, 2007). We therefore examine whether governments have appointed more restrained judges as they obtained stronger preferences for a more deferential Court. There is no particular reason to expect democracies to be more or less likely to engage in this practice. All critics of the Court could appoint more restrained judges.

Second, international courts might mitigate backlash through judicial restraint. A broad literature, with mixed findings, examines whether international courts are influenced by anticipations of non-compliance or override (Alter, 2008; Carrubba, Gabel and Hankla, 2008; Stone Sweet and Brunel, 2012; Larsson and Naurin, 2016). The implementation of ECtHR judgments is not automatic. States sometimes refuse to comply or comply slowly and/or incompletely (Hillebrecht, 2014*a*; Hawkins and Jacoby, 2010).

Scholars of domestic courts argue that courts' diffuse support, "broad institutional support for the Court as an institution" (Clark, 2009, 973), is crucial for achieving compliance also with judgments lacking specific support and maintaining judicial independence (Caldeira and Gibson, 1992; Carrubba, 2009). Although the diffuse support for international courts among the general public is at best uncertain (Gibson and Caldeira, 1995; Voeten, 2013), the ECtHR's authority and effectiveness hinges on broad support for the Court and for international human rights more generally. Von Staden (2018) argues that liberal states minimize judicial impact by implementing only the minimal remedies required, but have remained committed to formal compliance. Hillebrecht (2014*a*) similarly describes how states such as the United Kingdom "begrudgingly" comply also with costly judgments because of support for human rights norms and because the Court is

perceived as useful for strengthening the rule of law in democratizing states. This institutional support is not unconditional. The protracted British defiance of the *Hirst* judgment demonstrates that also consolidated democracies might consider blatant defiance of unpopular rulings and challenge the ECtHR's authority.

Scholars commonly assume that courts act strategically to avoid non-compliance and challenges to their authority (Clark, 2009; Larsson and Naurin, 2016; Conant, 2002). While the Court's legitimacy might survive isolated cases of non-compliance, the Court would lose much of its authority if its broad institutional support were weakened and non-compliance were to become more widespread. The Court therefore faces incentives to mitigate backlash for instance through judicial restraint. Yet, international courts also need support from individuals, lawyers, and civil-society groups that bring cases to the Court and push for compliance (Alter, 2014; Cichowski, 2013, 2007). A court failing to hold governments accountable for their human rights violations could lose the support of these compliance constituencies (Alter, 2014). The decision whether to accommodate critical governments depends on a trade-off between preserving the support from (powerful) governments and maintaining legitimacy with broader compliance constituencies.

This is not a novel claim and it applies beyond international human rights courts. For example, Kelemen (2001) argues that the ECJ and WTO engage in such trade-offs when evaluating trade-environment disputes. Our novel claim is that this trade-off depends on whether the challenge comes from consolidated democracies rather than democratizing states and non-democracies.

First, losing the support of consolidated democracies is costlier than losing the support of other states. The effectiveness of liberal institutions depends on continued participation by established democracies. The promotion of democracy and

human rights is most effective when democratizing states join international institutions with established democracies (Pevehouse, 2002; Donno, 2010; Greenhill, 2010). Holding governments to their human rights promises involves accountability politics, which depends on international and/or domestic actors' abilities to argue that defying an institution undermines a government's credibility (Simmons, 2009). This becomes more complicated when institutions are openly challenged by governments with strong human rights reputations. For instance, Kowalik-Bańczyk (2016, 202-203) notes that Polish politicians have refrained from challenging the ECtHR to avoid undermining their own reputations as committed to human rights and democracy. Such reputations are always relative. If the British and Danish governments argue that ECtHR judgments can be defied, it becomes less plausible that Polish politicians lose credibility by doing the same.

Exit and legitimacy challenges from established democracies are thus a greater threat to the authority of an international human rights court, and perhaps other liberal international institutions, than similar challenges from autocracies or new democracies. Judges that care about the continued effectiveness of the Court therefore have incentives to appease consolidated democracies.

Second, an international court's legitimacy depends at least in part on it being perceived as an impartial and consistent arbiter of international law (Çali, Koch and Bruch, 2013; Follesdal, 2009; Lupu and Voeten, 2012; Von Bogdandy and Venzke, 2012; Pelc, 2014). International courts depend on compliance constituencies who evaluate courts based on their ability to reach judgments in an independent manner consistent with professional norms (Alter, 2008). A human rights court can more easily accommodate consolidated democracies while staying within the bounds of these professional norms. For instance, the Court's current President,

Robert Spano, has explained a renewed emphasis on subsidiarity as a move towards “process-based review” in which the “Court may grant deference if national decision-makers are structurally capable of fulfilling that task. This means that the foundations of the domestic legal order have to be intact” (Spano, 2018). This is a jurisprudential technique that can be consistently and impartially applied but that nonetheless results in increased deference to consolidated democracies. It would be much harder to develop an equivalent jurisprudential technique that meets the expectations of legal compliance constituencies and that would result in greater deference towards Putin’s Russia, Orban’s Hungary, or Erdogan’s Turkey.

Moreover, although both consolidated democracies and other states may face reputational costs for leaving or openly defying the Court, the Court is more likely to be blamed for critiques or exit from consolidated democracies than from states with little credibility. After Venezuela withdrew from the Inter-American Court of Human Rights, the blame was put on Venezuela rather than the Court (Soley and Steininger, 2018). By contrast, if a consolidated democracy leaves a human rights institution, the institution risks being accused of being overly interventionist, for “overlegalizing” (Helfer, 2002), or for “undermining democracy and trampling national sovereignty” (Alter, 2003, 73). The implication is that the institution could have accommodated its critics while staying within its mandate (Contesse, 2016, 144-155). The discussion earlier in this paper mentions several such charges from politicians in consolidated democracies. The message is that the Court is exceeding its authority by interfering with human rights compliance in well-functioning democracies whereas it should focus on more readily observable rights violations in less well developed democracies (Stoyanova, 2018).

We are not arguing that there are no legitimacy costs to accommodating con-

solidated democracies. Instead, we claim that these legitimacy costs are relatively lower, especially if the Court develops general jurisprudential techniques rather than selectively deferring in politically sensitive cases. Identifying politically sensitive cases may present informational problems for international judges who are not intimately familiar with the politics of respondent states (Lupu, 2013; Huneus, 2015). Although judges “read the morning papers” (Blauberger et al., 2018) and understand that some issue areas are particularly controversial, pin-pointing which cases will provoke the most controversy can prove challenging. The ECtHR only infrequently receives third-party submissions that could signal the potential for controversy (Cichowski, 2016). The Court may not have predicted that ruling on prisoner voting rights in the United Kingdom or crucifixes in Italian schools would provoke the amount of controversy that these judgments did.

To some extent, institutional design may alleviate informational challenges. Judges participate in all Chamber and Grand Chamber cases against their nominating states. The national judges may provide valuable information concerning how a judgment is likely to be received in the respondent state. However, to the extent that national judges tend to favor their nominating states, as suggested by Voeten (2008), these judges may not necessarily be able to credibly signal political sensitivity. Government agents, which may similarly signal a case’s controversy in pleadings before the Court, also face incentives to overstate the case’s sensitivity. Thus, even if ECtHR judges are unlikely to be completely in the dark concerning the political sensitivity of the cases they adjudicate, they may face challenges in predicting exactly which violation judgments are most likely to spark further backlash against the Court

As such, the Court is more likely to develop general jurisprudential techniques

that help navigate backlash from liberal democracies. Legal scholars have argued that the Court has done just that. Madsen (2018) finds that the Court is referring more frequently to the “margin of appreciation” since the Brighton Declaration and that Europe’s established democracies are the greatest beneficiaries. References to the subsidiarity principle have also increased (Mowbray, 2015). Çali (2018) argues that the ECtHR has developed a “variable geometry” allowing more deference to states “deemed to act in good faith when applying the Convention” than to states for whom the good faith assumption does not apply. For example, in *Van Hanover v. Germany*, a case balancing the right to privacy of Princess Caroline of Monaco and German newspapers’ freedom of expression, the Court argued that:

where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case law, the Court would require strong reasons to substitute its view for that of the domestic courts (quoted in Çali, 2018).

Another example is a ruling which found that France’s “burqa ban” did not violate the Convention:

[...] the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of

the domestic policy-maker should be given special weight¹³

Judges have also noted these jurisprudential changes. In a 2017 dissenting opinion in *Hutchinson v. the United Kingdom*, Judge Pinto de Albuquerque laments the privileges afforded to the UK and other consolidated democracies:

Of course, this also entails a biased understanding of the logical obverse of the doctrine of the “diversity of human rights”, namely the doctrine of the margin of appreciation: the margin should be wider for those States which are supposed “to set an example for others” and narrower for those States which are supposed to learn from the example. This evidently leaves the door wide open for certain governments to satisfy their electoral base and protect their favourite vested interests.¹⁴

Thus, at least according to some judges and legal scholars, the ECtHR has started to apply different standards to consolidated democracies and other states. We test this hypothesis more systematically below.

4 Empirical Analysis

4.1 Hypotheses

Our core hypothesis examines whether the Court has become more cautious towards consolidated democracies that have publicly criticized the Court. States have a variety of avenues for expressing dissatisfaction with the Court including

¹³*S.A.S v. France*, 43835/11, 1 July 2014, at 159

¹⁴*HUTCHINSON v. THE UNITED KINGDOM* (57592/08, 17 January 2017)

blatant non-compliance, threats of withdrawing from the Court’s jurisdiction, criticism in the media, increased third-party participation to signal a desire for judicial restraint, and proposals for reforms aiming to make the Court more deferential.

While the Court may rely on different types of criticism as signals of backlash, empirically we focus on public criticism of the Court at the reform conferences of the 2010s. Through the public statements offered at these reform conferences, we are able to systematically measure criticism from across the Council of Europe at regular intervals. Moreover, states that have employed other strategies of criticism seem generally to also have used the reform conferences to forward their criticism, making it a useful proxy for criticism of the Court more generally. We thus investigate whether the Court is more restrained in cases involving consolidated democracies expressing criticism of the Court at the reform conferences compared to other states and compared to consolidated democracies that do not (yet) use the reform conferences to criticize the Court.

We measure restraint as reductions in the violation rate in merits judgments. Any individual residing in a Council of Europe state may submit an application to the ECtHR alleging a violation of their Convention rights. Applications are screened for whether they meet formal admissibility requirements and whether they are not “manifestly ill-founded” (Article 35(3)(a) ECHR). In contrast to many domestic high courts, such as the US Supreme Court, the ECtHR cannot selectively accept (or avoid) cases for their importance. Scholars and judges have long debated whether greater docket control would help the ECtHR manage its caseload and exercise its constitutional role more effectively (Dzehtsiarou and O’Meara, 2014; Greer and Wildhaber, 2012). There have been some reforms. Most notably, Protocol XIV, ratified in 2010, introduces the admissibility requirement

that the applicant has suffered “a significant disadvantage” and the Court adopted a priority policy in 2009 that allowed it to speed up the processing and adjudication of the most serious and urgent cases. This has made it less likely that less meritorious cases proceed to the merits stage (de Londras and Dzehtsiarou, 2015), which should bias merits judgments against our hypotheses of increased violation findings. The Court may very well exercise discretion behind the veneer of strict admissibility rules (Tickell, 2011; Shelton, 2016) but there is no systematic empirical research that uncovers the direction of the resulting biases. If the processes that lead to deference in the admissibility stage reflect those in the merits stage, then we may well underestimate effects. Indeed, one study suggests that the Court has become unduly deferential to the UK in the admissibility stage (Graham, 2020). We should expect strong feedback effects, since a finding of no violation on the merits can provide reasons future inadmissibility decisions. We thus focus our examination on the merit stage.

Hypothesis 1 *Expression of criticism of the Court at reform conferences is associated with a reduced violation rate that is greater for consolidated democracies than for other states.*

As a secondary aim, we also examine whether changes in the Court’s behavior are a consequence of changes in judicial appointments since the start of the multilateral reform process.

Hypothesis 2 *Governments have started to nominate more deferential judges after 2010.*

The quantitative empirical analysis proceeds in two parts. We first use data from dissenting opinions to estimate judicial ideology and assess hypothesis 2.

These estimates are also used to test hypothesis 1, as we need to ascertain whether changes in the Court’s decision-making are due to the appointment of new and more restrained judges or is rather explained by strategic deference.

4.2 Estimating judicial ideal points

Scholars of domestic, and in particular American, judicial behavior have long used split judgment votes to estimate variation in judicial ideologies (Bailey, 2007; Hanretty, 2013; Martin and Quinn, 2002; Segal and Cover, 1989). International courts, however, typically either do not allow public dissents or have too few judgments to make ideal-point estimation feasible (Dunoff and Pollack, 2017). The ECtHR is an exception. Voeten (2007) uses judges’ votes on split judgments to estimate variation among judges along a single dimension separating judges who believe that the Court should show a great deal of deference to the *raison d’etat* and judges who adhere to a more expansive interpretation of the Convention.

To measure the votes of individual judges on split judgments, we collected the text of all dissenting opinions until October 31st 2019 from the Court’s Hudoc website. We manually coded dissents arguing against violation findings as “pro-government” and dissents arguing that the majority erred in not finding violations as “pro-applicant”. More precisely, what we observe is not that the dissenting opinion is “pro-government” or “pro-applicant” *per se*, but that a subset of judges wanted the Court to show more (less) restraint than their colleagues. If judgments invited multiple dissents, we coded the different coalitions using the principles outlined above.

The data matrix V has judges (j) in rows and issues (i) in columns. Each entry V_{ij} takes the value 1 if judge j is more favorable to the government on issue

i than her colleagues and 0 if judge j is more favorable to the respondent. If a judge did not serve on the panel, the value is missing. Chambers consist of 7 judges, including one from the respondent government. The others are assigned by rotation within the Court’s five sections. The Grand Chamber of 17 judges is chosen by lot for each judgment although it always includes a national judge and the section presidents. We only include regular judges who were involved in at least ten divisive votes. We do not consider the votes of national judges, because national bias is a real concern (Voeten, 2008).

We follow Voeten (2007) in estimating an item-response theory model with a robust logistic link discussed by Bafumi et al. (2005). Each judge j has an ideal point θ_j and each item (issue) i has a difficulty parameter α_i and discrimination parameter β_i . The probability that each observed vote choice V_{ij} equals 1 is given by:

$$\pi(V_{ij} = 1) = \delta_0 + \frac{1 - \delta_0 - \delta_1}{1 + \exp(\alpha_i - \beta_i \theta_j)}$$

The δ parameters define the robust reparametrization. The difficulty parameter α_i is an issue-specific cut-point reflecting variation in legal issues. If the difficulty parameter is large and positive (negative), only the most restrained (activist) judges are expected to dissent from the majority. The discrimination parameter β_i reflects that some issues better discriminate between activist and restrained judges than other issues. We assume that $\beta_i > 0$, meaning that judges with larger values for their ideal points θ_j are more likely to side with the government. This assumption also defines the polarity of the latent ideal-point space.¹⁵

¹⁵We also estimated alternative models that identified the polarity by restricting judges to

We estimated the model with 140 judges and 1757 issues. The ideal points are comparable over time because only a small number of judges gets appointed to new nine-year terms each year. We can therefore determine whether more recently appointed judges tend to be more restrained than the judges they replace. We used the `MCMCirtKdRob` function from `MCMCPack` in R (Martin, Quinn and Park, 2011). We ran the model for 1 million iterations. Convergence was assessed through the Geweke diagnostics. The point estimates correlate highly (.85) with the point estimates from Voeten (2007).

4.3 Changes in Ideal Points over Time

Figure 1 displays estimated ideal points and 95% credible intervals for judges appointed since 1998. Note that judges appointed after 2016 did not have sufficient votes to be included. Variation in the uncertainty surrounding ideal-point estimates can either be due to differences in the number of votes or because the voting patterns of some judges do not fit the one-dimensional model as well. The ideal points are scaled on a standardized normal distribution, meaning that the average judge is at 0. A value of 1 indicates a judge who is one standard deviation above the mean in her level of restraint.

Five of the six most restrained judges were appointed in 2012 or thereafter. Polish judge Krzysztof Wojtyczek, estimated to be the most restrained judge, lays out his philosophy clearly in a dissent in a follow-up case to *Hirst*:

be positive or negative and by imposing an an informative Normal prior $N(1, .2)$ on the discrimination parameters. Our approach differs from other ideal-point models because we have an unambiguous coding of whether dissents favor the respondent government or the applicant.

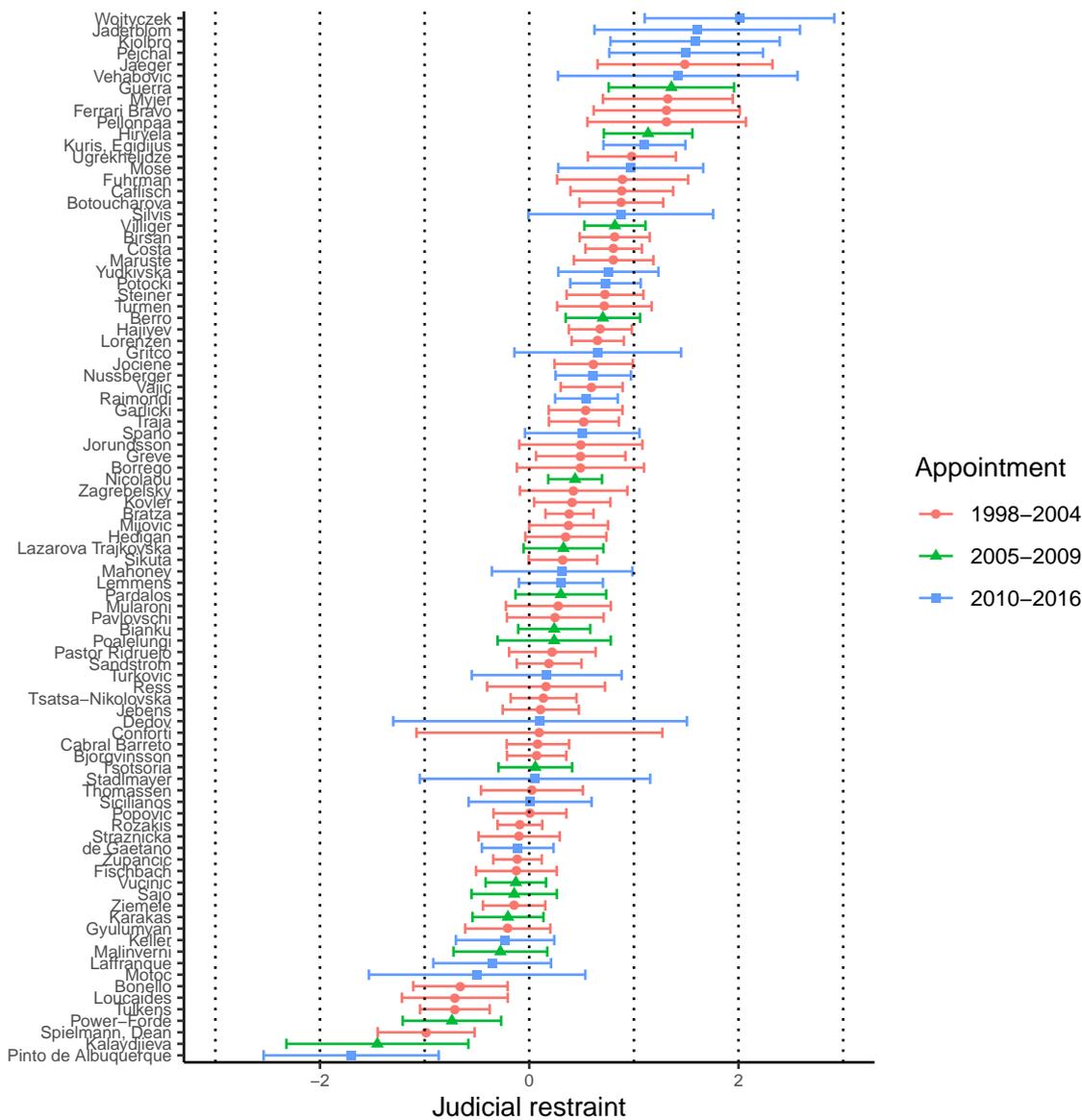


Figure 1: Estimated Ideal Points of ECtHR Judges Appointed Since 1998

[..] the Preamble emphasises the function of “an effective political democracy” as a tool for maintaining fundamental freedoms. Democracy and rights are thus not seen to collide but rather to be in a symbiotic relationship with each other. The wording used may be understood [..] as justifying a presumption in favour of broad powers of national legislatures.¹⁶

In a case regarding Italy’s refusal to register same-sex marriages conducted abroad, judge Wojtyczek and Czech judge Jan Pejchal concluded that:

[..] in our view the majority have departed from the applicable rules of Convention interpretation and have imposed positive obligations which do not stem from this treaty. Such an adaptation of the Convention comes within the exclusive powers of the High Contracting Parties. We can only agree with the principle: “no social transformation without representation”.¹⁷

Swedish judge Helena Jäderblom’s best-known dissent was in an activist direction, arguing that the Court should have found that France’s ban on burqas in public spaces violates the Convention.¹⁸ Yet, her other dissents tended to favor governments (although note the relatively large uncertainty around her ideal point). Danish judge Jon Fridrik Kjølbro was nominated in 2014 by a conservative government. He previously served as the vice-chairman of the Refugee Board which

¹⁶*Firth and Others v. the United Kingdom*, 47784/09, August 12, 2014.

¹⁷ORLANDI AND OTHERS v. ITALY 26431/12, 14/12/2017.

¹⁸*S.A.S. v. France*

deals with asylum cases, a major concern for Denmark. Many of judge Kjølbros' dissents are in asylum cases where he has highlighted the “the subsidiary role of the Court”.¹⁹

By contrast, the judge estimated to be the most activist, Portuguese judge Paulo Pinto de Albuquerque (nominated by a Socialist-led government in 2011) has actively lamented the Court's turn towards restraint. In a 2017 speech, he stated that “[b]oth the UK rebellion against Hirst, and the Court's backtracking from its own principles of interpretation, have had an enduring, negative effect on the European system of human rights protection.”²⁰

Based on a coding of all separate opinions in Grand Chamber judgments, (Helfer and Voeten, 2020) find that “walking back dissents” – minority opinions arguing that the majority is backtracking – have increased sharply since 2012. This suggests that at least some judges believe that the Court has become more restrained.

While there is still considerable variation in the judicial philosophies of newly appointed ECtHR judges, figure 2 shows a weak trend towards appointing more restrained judges. This includes governments in backsliding states, such as Poland, which appointed more activist judges when they were democratizing (Voeten, 2007). It is plausible that resistance from countries like the UK and Denmark have made such appointments more acceptable. We leave the sources of variation

¹⁹M.A. v. SWITZERLAND, 52589/13, 18 November 2014

²⁰“Is the ECHR facing an existential crisis?” Paulo Pinto de Albuquerque Judge at the European Court of Human Rights Speech delivered at the Mansfield College, Oxford 28 April 2017, https://www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf

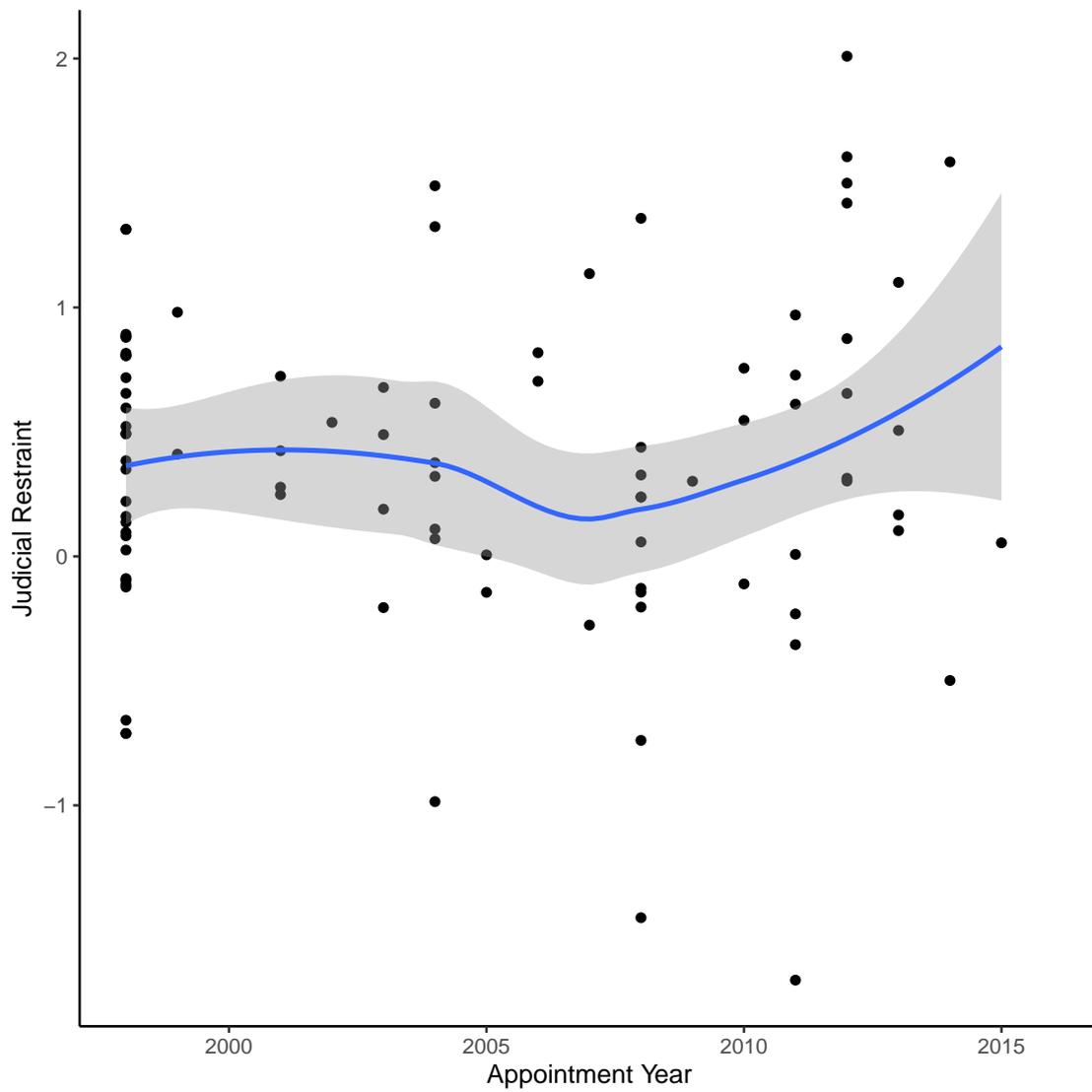


Figure 2: Temporal Changes in Appointment of More Restrained Judges

in judicial appointments for future research.

4.4 Strategic Deference: Data and Method

Has the ECtHR – as an institution – engaged in strategic deference in response to criticism from consolidated democracies? We investigate this question by analyzing the outcomes of ECtHR judgments rendered since the establishment of the permanent Court on November 1st 1998. We consider the ECtHR to have ruled against the respondent state if it finds one or more violations of the Convention or its protocols. As a robustness test, we also consider the proportion of alleged violations for which the Court finds a violation.

We define consolidated democracies as countries that had been continuously democratic for at least twenty years in 1998. We used a Polity score of 7 as the cut-off for democracy. We also counted some of the micro-states that are not included in Polity as consolidated democracies.²¹

For measuring backlash, we rely on the states' public statements at the reform conferences discussed above (starting with Interlaken in 2010). Specifically, we read each member state's opening statement at each conference and coded whether it criticized the Court for not offering a sufficiently broad margin of appreciation to domestic authorities or expressed support for reforms aimed at making the Court more deferential. Some states have expressed criticism of the Court at one or more conferences, but have then not repeated this criticism at later conferences.

²¹The consolidated democracies are: Andorra, Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, and the United Kingdom

For instance, at the 2011 Izmir Conference, Sweden argued that the Court should “exercise restraint in reconsidering questions of fact and national law that have been considered and decided by national courts”, but Sweden has not repeated such calls at later reform conferences. We therefore code states as public critics from the year in which they first criticize the Court and until the year of a reform conference in which they decide to not reiterate their criticism.

Measuring backlash against the Court based on reform conference statements has multiple advantages. First, the reform conferences provide a common forum for all Council of Europe governments to discuss the future of the Court. We can therefore measure the attitudes expressed by all Council of Europe members, irrespective of whether their stance towards the Court has previously received attention in the media or in academic scholarship. Secondly, the Court has been represented at each of the reform conferences by its president. It is therefore reasonable to assume that Court’s leadership is aware of the signals sent by member states at these conferences.

Yet, our strategy for measuring public criticism of the Court may be considered relatively conservative. The reform conferences are diplomatic settings where member state representatives may be reluctant to voice their harshest criticism of the Court. Moreover, and particularly so in periods where multiple years have passed between the conferences, there may be time lags between the Court first becoming subject to controversy in a specific state and that state expressing criticism at a reform conference. Our measure may therefore underestimate the degree to which the Court has become subject to criticism from member states. If we nonetheless find that the Court is responsive to criticism expressed at the reform conferences, we would consider this strong evidence of the Court exercising strate-

gic restraint.

Table 1 displays a two-by-two matrix of whether a state is considered a consolidated democracy and whether it has expressed public criticism of the Court at one or more of the reform conferences. Years in parentheses refer the years in which the state is coded as expressing public criticism. As the table shows, the reform conferences have been used both by long-time critics of the Court such as Russia and Turkey and consolidated democracies such as the United Kingdom and the Netherlands to criticize the Court. At the same time, there are also multiple states both among the consolidated democracies and other states that have not (yet) used the reform processes for this purpose. Again, if the Court is exercising strategic restraint, we would expect this variation to also influence the likelihood of violation findings.

Because the first reform conference was held in 2010, our measurement strategy does not pick up cases of controversy prior to that year. To separate the effect of public criticism from the effect of a broader change in the Court's decision-making during the same period, we therefore include a dummy that takes the value of 0 if the case was decided prior to 2010 and the value of 1 if it was decided in 2010 or later. We also consider models estimated only on judgments rendered since 2010.

In the remainder of this section, we investigate whether the Court has been particularly responsive to criticism from consolidated democracies. Making such comparisons between consolidated democracies and other states poses obvious causal inference problems. The lower likelihood of violation findings may simply reflect that human rights violations in consolidated democracies are not as severe as in other states (Grewal and Voeten, 2015). Developments over time may reflect changes in the types of cases that reach the Court (Davies, 2018). We employ

	~Consolidated democracy	Consolidated democracy
~Public criticism	Armenia, Romania, Poland, Azerbaijan , Ukraine, Moldova, Montenegro, Czechia, FYR Macedonia, Croatia, Slovenia, Estonia, Albania, Bosnia and Herzegovina	Greece, Austria , Luxembourg, Cyprus, Germany, France, Finland, Liechtenstein, Norway, Belgium, San Marino, Andorra, Iceland, Monaco
Public criticism	Turkey (2010–2017), Russia (2010–2019), Lithuania (2010–2011), Hungary (2010–2011,2018–2019), Bulgaria (2011, 2018–2019), Slovakia (2011), Serbia (2010–2019), Latvia (2010), Georgia (2011–2019)	Denmark (2018–2019), Malta (2010, 2012–2017), Netherlands (2011–2017), Italy (2010–2011), Switzerland (2011, 2018–2019), Portugal (2011), Ireland (2011), Spain (2015–2017), United Kingdom (2010–2019), Sweden (2011)

Table 1: Public criticism at reform conferences for consolidated democracies and other states

three strategies to ameliorate these inferential threats. First, the Court makes many routine decisions considering repetitive applications from individuals suffering from very similar circumstances as previous applicants (Keller and Marti, 2015, 830). For example, there are many thousands of cases filed by British prisoners who request monetary compensation for their inability to vote, which follow from the United Kingdom’s unwillingness to implement the *Hirst* judgment. Similarly, there are a large number of cases involving prison conditions in Russia or non-implementation of domestic court judgments in Ukraine due to these states failing to comply with previous judgments of the Court and because systematic human rights violations in these states affect many applicants. These cases are routinely decided in the same way. To avoiding essentially counting the same rulings multiple times, we therefore exclude judgments classified by the Court’s registry as merely reapplying existing case law. As shown in the Supplementary materials, our results are, however, robust to including these judgments.

Second, we match on observed characteristics of cases brought in consolidated and non-consolidated democracies to avoid implausible counterfactuals (King and Zeng, 2006; Ho et al., 2007). We match on the Convention articles that the respondent state is alleged to have violated. We also match on whether the applicant was

identified by the judgment as a prisoner or refugee/asylum seeker because these are controversial cases that historically have low success rates.

In addition, we consider the applicant's legal representation. Lawyers specializing in bringing cases to Strasbourg may be more successful either because they select cases more carefully or because they are more experienced. Repeat players in the Court tend to focus their attention on relatively severe human rights violations. For instance, the Stichting Justice Initiative has represented more than 300 applications to the ECtHR. All the 110 cases that had received a judgment by 2019 resulted in at least one violation finding. To measure legal experience, we count the number of previous ECtHR judgments resulting in a violation finding in which the applicant's lawyer acted as legal counsel.

The likelihood of violation findings may depend on the respondent state's response to previous judgments. Although we drop cases that merely reapply existing case law, previous compliance might be indicative of the respondent state's general respect for Convention rights. We therefore match on previous compliance performance, measured as the proportion of pending judgments that the state successfully implemented during the previous year.

To account for whether the case raised new legal issues, we match on the importance level of the case (as categorized by the Court's registry). We also match on whether the case was dealt with by the Court's Grand Chamber, which may capture both legal difficulty and salience.

To distinguish between strategic restraint and reduced violation rates due to the appointment of more restrained judges, we include the estimated level of restraint of the median judge on the panel deciding the case (from the previous section). Finally, we match on the judgment year to ensure comparisons between cases from

the same period.

Our preferred matching method is coarsened exact matching (Iacus, King and Porro, 2012),²² but we also consider results based on genetic matching (Diamond and Sekhon, 2013). The original sample included 5540 judgments and the matched sample (using coarsened exact matching) 2811 judgments. Essentially, what we do is to compare only cases with comparable facts, although matching cannot correct for unobserved differences between cases.

Third, we use a difference-in-differences design to investigate whether there is a reduction in the violation rate for states expressing public criticism of the Court that is significantly stronger for consolidated democracies than for other states. In other words, we are not only comparing the differences in the likelihood of a violation finding between consolidated democracies and other states, but rather how much this difference change as states publicly criticize the Court. We estimate variations of the following model:

$$y_i = \beta_0 + \beta_1 * Consolidated_i + \beta_2 * Critic_i + \beta_3 * Consolidated_i * Critic_i + \mathbf{Controls}_i \gamma + \epsilon_i,$$

where y_i equals 1 if the Court finds a violation and 0 otherwise. β_3 reflects how the difference in the probability of finding a violation during periods in which a state publicly criticizes the Court differ between consolidated democracies and

²²All but four variables are dichotomous. We bin year into two-year interval. For the median judge, compliance with previous judgments, and the experience of the applicant's lawyer we manually chose bins to achieve high balance while retaining a sufficiently large number of observations.

other respondent states. To the extent that there are not unmeasured changes in the cases against consolidated democracies and other states coinciding with criticism at the reform conferences, β_3 may be interpreted as a causal effect.

Figure 3 displays balance between consolidated democracies and other states before and after reform conference criticism for the unprocessed and the matched data. The figure shows imbalances on some covariates in the raw data, but the covariate balance is considerably improved after matching. Some imbalances, particularly with respect to compliance history and the experience of the legal counsel, remain. We control for remaining imbalances by controlling for the covariates in the subsequent regression models (Ho et al., 2007).

These fixes do not eliminate all threats to causal inference. We must still assume that there are no unobserved changes in the types of cases facing consolidated democracies and the comparison group coinciding with periods of public criticism. Still, this assumption is weaker than in most designs relying on observational data.

We estimate weighted²³ linear probability models on the matched sample, controlling for the same covariates that we matched on.

4.5 Has the Court exercised restraint towards democratic critics?

Has the Court become more lenient towards the UK and other states that are “supposed to set an example for others”? Our difference-in-differences design allows us estimate the reduction in the violation rate attributable to increased deference towards consolidated democracies that publicly criticize the Court.

Figure 4 displays the coefficients of our main model which compares consol-

²³Weights come from the matching procedure.

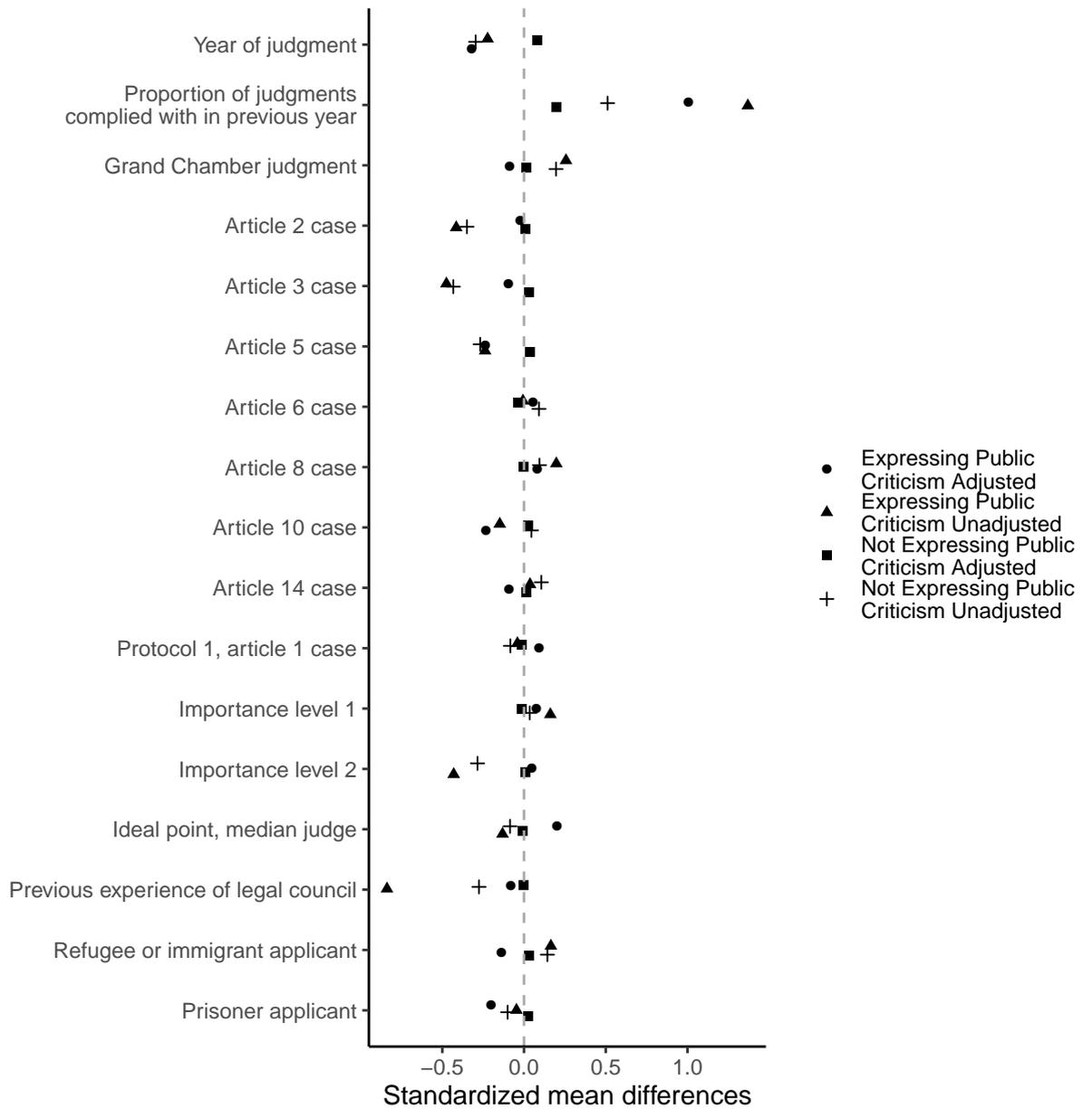


Figure 3: Imbalance between consolidated democracies and other states on included covariates.

idated democracies to all other states after balancing the data using coarsened exact matching. There is a lower likelihood of violation findings against consolidated democracies also when the consolidated democracy is not a public critic of the Court. In the absence of public criticism, our model suggests a difference in the violation rate of approximately ten percentage points even after conditioning on case characteristics. Importantly, and consistent with hypothesis 1, this difference increases with about fourteen percentage points for consolidated democracies that publicly criticize the Court at the reform conferences of the 2010s. For states other than consolidated democracies, public criticism is not associated with a reduced violation rate. If anything, the model suggests that the Court has become somewhat stricter towards non-democratic critics during the same period. These findings are consistent with legal scholarship suggesting that the Court has responded to criticism by applying a “variable geometry” in which the deference offered by the Court varies depending on whether a “good faith” presumption is extended to the respondent state Çali (2018). Importantly for our purposes, the increased deference is significantly greater for consolidated democracies that publicly criticize the Court than for other consolidated democracies.

Our results are robust to different specifications. Because our main concern is how much the deference towards consolidated democracies has increased as states have started publicly criticizing the Court, the remainder of our discussion is centered on these differences (equivalent to the interaction term in figure 4). Full regression results are available in the Supplementary Materials.

Figure 5 displays estimated differences in violation rates based on linear proba-

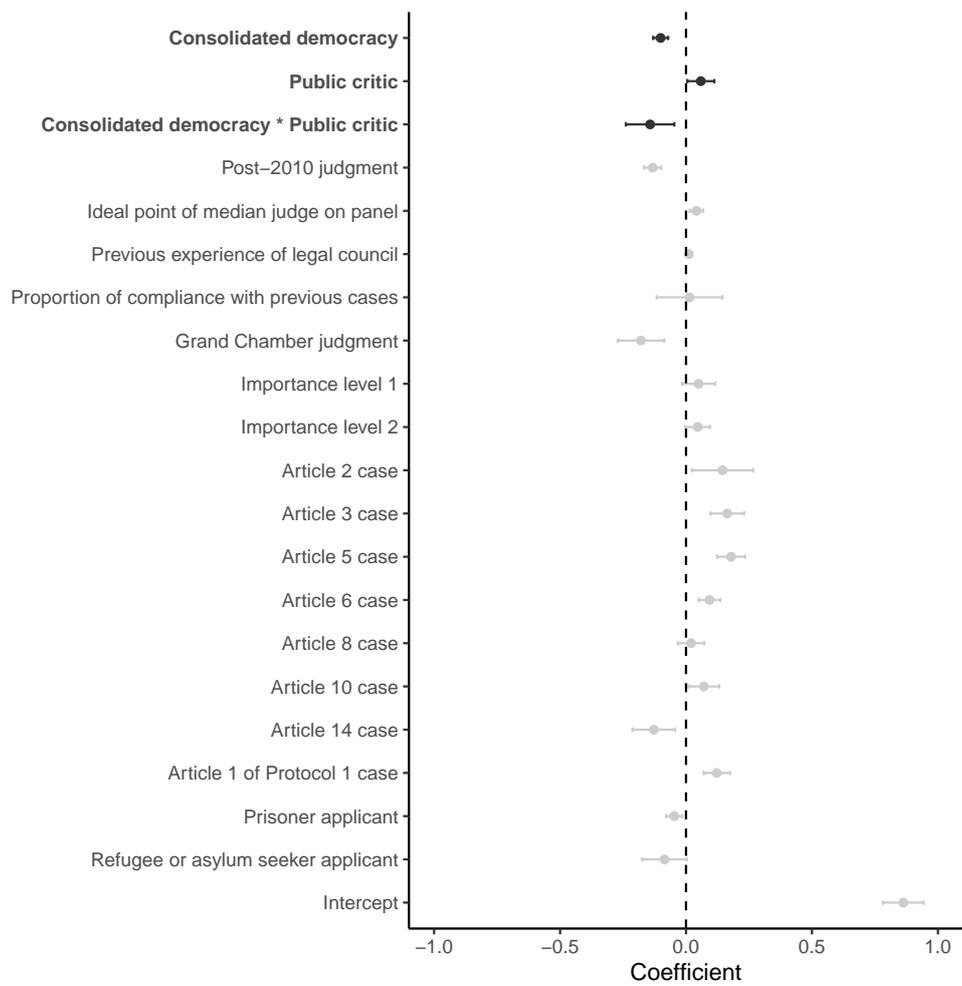


Figure 4: Model 1: Linear probability model of violation rulings 1998-2019, error bars indicate 95%-confidence intervals.

bility models.²⁴ The error bars indicate 95%-confidence intervals. Other covariates are conditioned on both using matching and as control variables in the statistical model.

Model 2 makes the same comparison as Model 1, but considers as the dependent variable the share of violations alleged by the applicants for which the Court found a violation. This alternative measure accounts for how the Court may exercise restraint even in violation judgments by ruling narrowly. This alternative operationalization yields very similar results. We therefore proceed using whether the Court found at least one violation as our dependent variable.

Model 3 makes the same comparison, but conditions on covariates using genetic matching (Diamond and Sekhon, 2013), which automates the process of achieving good balance by employing a genetic search algorithm to find the weights for each covariate that results in the best balance.²⁵ The choice of matching algorithm has very little influence on our results.

The control groups in models 1-3 consist of a heterogeneous group of states, including both authoritarian states such as Azerbaijan and Russia and new democracies that have now become European Union members, such as Romania and Czechia. Model 4 compares consolidated democracies against other states that have become European Union members. Our results do not hinge on the com-

²⁴Logistic regression models are reported in the supplementary materials and yield very similar results.

²⁵To avoid retaining cases in consolidated democracies do not have any good comparisons for other states, we drop cases that do not have match within one standard deviation on each of the covariates.

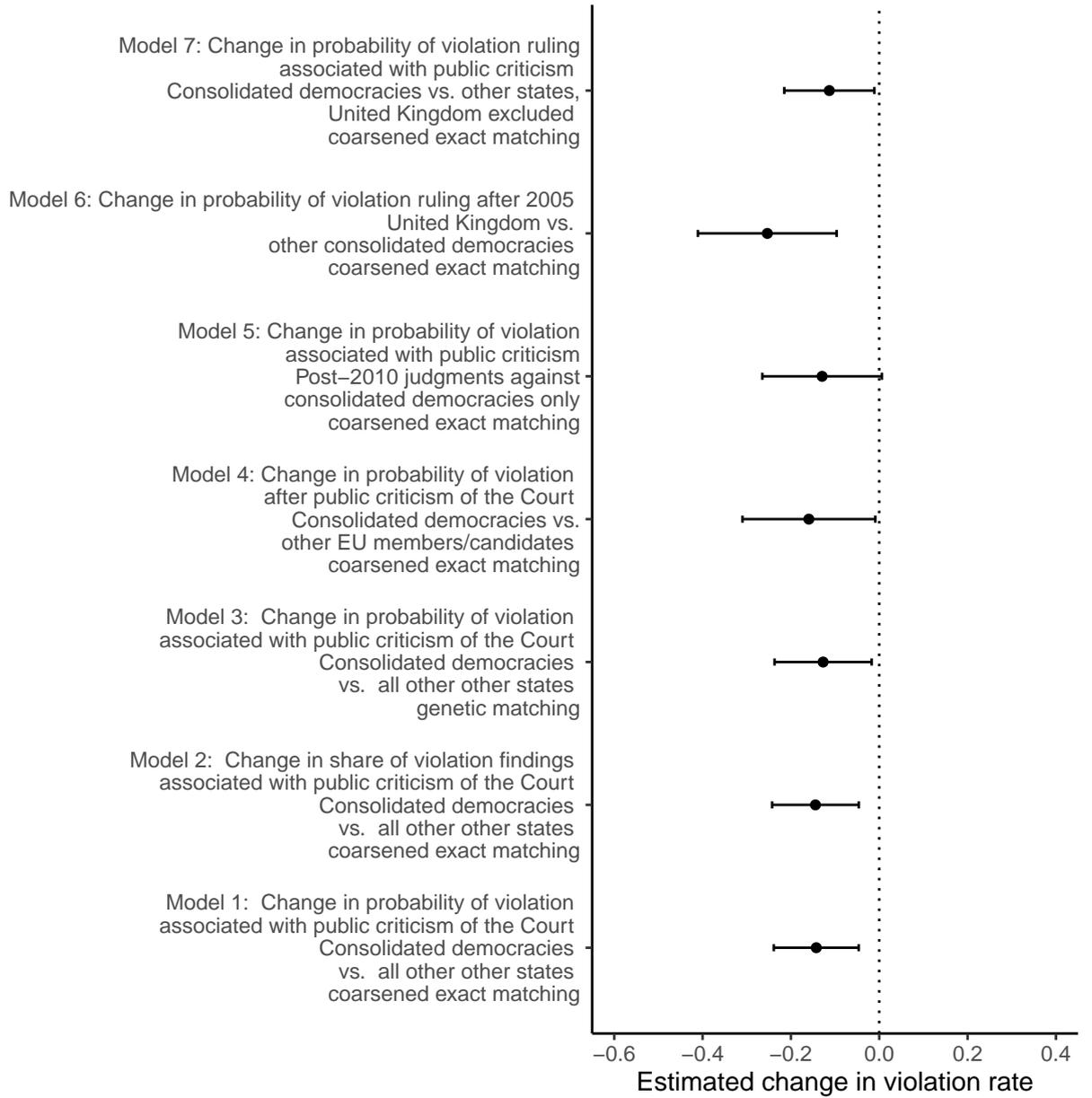


Figure 5: Difference-in-differences results: Estimated changes in the violation rate

parison between consolidated democracies and the most authoritarian states: The point estimate from model 4 suggests an approximately sixteen percentage points difference and is statistically significant.

The results presented so far center on the difference in violation rates associated with being a public critic of the Court for consolidated democracies relative to the difference for other states. Is this difference driven by consolidated democracies being offered particular restraint after publicly criticizing the Court or is it instead explained by changes in the Court's treatment of non-democratic critics? Model 5 is estimated only on judgments against consolidated democracies in the post-2010 period after matching on whether the respondent state was a public critic of the Court in the judgment year. The reported difference is the estimated treatment effect of public criticism for consolidated democracies in the post-2010 period, which is thirteen percentage points. Although this difference fails to reach conventional levels of statistical significance ($p = .06$), it provides additional evidence that the democratic critics of the Court are being offered more deference than other consolidated democracies.

Criticism against the ECtHR has been stronger and started earlier in the United Kingdom than in other consolidated democracies. The United Kingdom may therefore have benefited more and from an earlier point in time than other democratic critics. As discussed, backlash against the ECtHR in United Kingdom was related to the 2005 *Hirst* judgment and judgments concerning the treatment of suspected terrorists since the mid-2000s. Model 6 considers whether the change in the United Kingdom's violation rate after 2005 is greater than for other consolidated democracies. In the post-2005 period, the United Kingdom experienced a more than twenty-six percentage points drop in the violation rate when comparing with sim-

ilar cases against other consolidated democracies. This difference provides strong evidence of the Court engaging in strategic deference towards its strongest democratic critic.

Has the increased deference also been extended to other consolidated democracies or is the difference primarily driven by the United Kingdom? Model 7 is estimated after excluding the United Kingdom and consolidated democracies other than the United Kingdom have experienced a significant reduction in the violation rate of about eleven percentage points associated with their public criticism of the Court.

5 Conclusion

We have two main findings. First, governments have gradually appointed more restrained judges. Second, and more importantly, the Court has become more reluctant to rule against democratic critics. The most important assumption in the empirical analysis is the parallel trends assumption, which is that there are no unobserved changes in the nature of cases facing democratic critics and other states. We matched on and controlled for a large number of observable indicators of the nature and quality of cases, but cannot rule out unobserved changes coinciding with consolidated democracies starting to urge the Court towards more restraint. Yet, our quantitative evidence makes a plausible case for strategic restraint, especially in light of the qualitative evidence put forth by legal scholars and dissenting judges.

These findings have important implications for the future of the European human rights system. At the very least, the political challenges currently facing

the ECtHR restricts its ability to continue the progressive expansion of convention rights that previously characterized its case law. Previous scholarship suggests that international court judges enjoy a form of constrained independence (Busch and Pelc, 2010; Carrubba, Gabel and Hankla, 2008; Kelemen, 2001; Larsson and Naurin, 2016; Voeten, 2007, 2008). Our results show how a changing political environment can shape international adjudication. The other side of this coin is that liberal international institutions can succeed in adapting to changing political environments. This ability may help preserve these institutions as populism and nationalism are on the rise in their traditional supporters (Helfer, 2020).

The ECtHR is not the only international institution challenged by powerful consolidated democracies in recent years. While it may not be possible to replicate our precise research design, we believe there are good reasons to suspect similar effects elsewhere. Our theory potentially applies to institutions seeking to spread liberal norms to both consolidated democracies and other states, whose decisions have domestic political implications, and who have some agency in how they fulfill their mandates. For example, investment arbitration tribunals may well be more responsive to backlash from established democracies with strong reputations for protecting property rights. Like human rights courts, these institutions may be less affected if Venezuela leaves than if an established democracy exits. Moreover, these institutions are able to develop jurisprudential techniques that grant leeway to democracies. One potential implication of the theory is that authoritarian states are more likely to follow through on exit threats because they are less likely to get concessions from institutions. Future research should determine not just if other institutions are indeed employing similar strategies, but also if these strategies help retain support from consolidated democracies.

References

- Abebe, Daniel and Tom Ginsburg. 2019. “The Dejudicialization of International Politics?” *International Studies Quarterly* 63(3):521–530.
- Alter, Karen J. 1998. “Who are the “masters of the treaty”?: European governments and the European Court of Justice.” *International organization* 52(1):121–147.
- Alter, Karen J. 2003. “Do international courts enhance compliance with international law?” *Review of Asian and Pacific Studies* 25:51–78.
- Alter, Karen J. 2008. “Agents or trustees? International courts in their political context.” *European journal of international relations* 14(1):33–63.
- Alter, Karen J. 2014. *The new terrain of international law: Courts, politics, rights*. Princeton University Press.
- Alter, Karen J, James T Gathii and Laurence R Helfer. 2016. “Backlash against international courts in west, east and southern Africa: causes and consequences.” *European Journal of International Law* 27(2):293–328.
- Altwickler, Tilmann. 2016. Switzerland: The Substitute Constitution in Times of Popular Dissent. In *Criticism of the the European Court of Human Rights. Shifting the Dynamics of the Convention System: Counter-Dynamics at the National and EU level*, ed. Patricia Popelier, Sarah Lambrecht and Koen Lemmens. Intersentia.
- Bafumi, Joseph, Andrew Gelman, David K Park and Noah Kaplan. 2005. “Practi-

- cal issues in implementing and understanding Bayesian ideal point estimation.” *Political Analysis* 13(2):171–187.
- Bailey, Michael A. 2007. “Comparable preference estimates across time and institutions for the court, congress, and presidency.” *American Journal of Political Science* 51(3):433–448.
- Bates, Ed. 2010. *The evolution of the European Convention on Human Rights: from its inception to the creation of a permanent court of human rights*. Oxford University Press.
- Blauberger, Michael, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Angelika Schenk, Jessica Sampson Thierry and Benjamin Werner. 2018. “ECJ judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence.” *Journal of European Public Policy* 25(10):1422–1441.
- Bultrini, A. 2012. *The Future of the European Convention on Human Rights After the Brighton Conference*. IAI working papers Istituto affari internazionali.
URL: <https://books.google.com/books?id=b21HAQAACAAJ>
- Busch, Marc L and Krzysztof J Pelc. 2010. “The politics of judicial economy at the World Trade Organization.” *International Organization* 64(2):257–279.
- Caldeira, Gregory A and James L Gibson. 1992. “The etiology of public support for the Supreme Court.” *American journal of political science* 36(3):635–664.
- Çali, Başak. 2018. “Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights.” *Wisconsin International Law Journal* 35(2).

- Çali, Başak, Anne Koch and Nicola Bruch. 2013. "The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights." *Human Rights Quarterly* 35(4):955–984.
- Carrubba, Clifford J, Matthew Gabel and Charles Hankla. 2008. "Judicial behavior under political constraints: Evidence from the European Court of Justice." *American Political Science Review* 102(4):435–452.
- Carrubba, Clifford James. 2009. "A model of the endogenous development of judicial institutions in federal and international systems." *The Journal of Politics* 71(01):55–69.
- Cichowski, Rachel A. 2007. *The European court and civil society: litigation, mobilization and governance*. Cambridge University Press.
- Cichowski, Rachel A. 2013. "Mobilisation, litigation and democratic governance." *Representation* 49(3):321–332.
- Cichowski, Rachel A. 2016. "The European Court of Human Rights, Amicus Curiae, and Violence against Women." *Law & Society Review* 50(4):890–919.
- Clark, Tom S. 2009. "The separation of powers, court curbing, and judicial legitimacy." *American Journal of Political Science* 53(4):971–989.
- Conant, Lisa J. 2002. *Justice contained: law and politics in the European Union*. Cornell University Press.
- Contesse, Jorge. 2016. "Contestation and Deference in the Inter-American Human Rights System." *Law & Contemp. Probs.* 79(2):123–145.

- Copelovitch, Mark and Jon CW Pevehouse. 2019. "International organizations in a new era of populist nationalism." *The Review of International Organizations* 14(2):169–186.
- Davies, Gareth. 2018. "Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication." *Journal of European Public Policy* 25(10):1442–1460.
- de Londras, Fiona and Kanstantsin Dzehtsiarou. 2015. "Managing Judicial Innovation in the European Court of Human Rights." *Human Rights Law Review* 15(3):523–547.
- Diamond, Alexis and Jasjeet S. Sekhon. 2013. "Genetic matching for estimating causal effects: A general multivariate matching method for achieving balance in observational studies." *Review of Economics and Statistics* 95(3):932–945.
- Donno, Daniela. 2010. "Who is punished? Regional intergovernmental organizations and the enforcement of democratic norms." *International Organization* 64(4):593–625.
- Dunoff, Jeffrey L and Mark A Pollack. 2017. "The Judicial Trilemma." *American Journal of International Law* 111(2):225–276.
- Dzehtsiarou, Kanstantsin and Noreen O'Meara. 2014. "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?" *Legal Studies* 34(3):444–468.
- Elsig, Manfred and Mark A Pollack. 2014. "Agents, trustees, and international

- courts: The politics of judicial appointment at the World Trade Organization.” *European Journal of International Relations* 20(2):391–415.
- Follesdal, Andreas. 2009. “The legitimacy of international human rights review: The case of the European Court of Human Rights.” *Journal of Social Philosophy* 40(4):595–607.
- Gerards, Janneke. 2016. The Netherlands: Political Dynamics, Institutional Robustness. In *Criticism of the the European Court of Human Rights. Shifting the Dynamics of the Convention System: Counter-Dynamics at the National and EU level*, ed. Patricia Popelier, Sarah Lambrecht and Koen Lemmens. Intersentia.
- Gibson, James and Gregory Caldeira. 1995. “The legitimacy of transnational legal institutions: Compliance, support, and the European Court of Justice.” *American Journal of Political Science* 39(2):459–489.
- Graham, Lewis. 2020. “Strategic admissibility decisions in the European Court of Human Rights.” *International & Comparative Law Quarterly* 69(1):79–102.
- Greenhill, Brian. 2010. “The company you keep: International socialization and the diffusion of human rights norms.” *International studies quarterly* 54(1):127–145.
- Greer, Steven and Luzius Wildhaber. 2012. “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights.” *Human Rights Law Review* 12(4):655–687.

- Grewal, Sharanbir and Erik Voeten. 2015. "Are New Democracies Better Human Rights Compliers?" *International Organization* 69(02):497–518.
- Hafner-Burton, Emilie M. 2008. "Sticks and stones: Naming and shaming the human rights enforcement problem." *International Organization* 62(4):689–716.
- Hanretty, Chris. 2013. "The decisions and ideal points of British Law Lords." *British Journal of Political Science* 43(3):703–716.
- Hartmann, Jacques. 2017. "A Danish Crusade for the Reform of the European Court of Human Rights." *EJIL: talk!* .
URL: <https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>
- Hathaway, Oona A. 2002. "Do human rights treaties make a difference?" *The Yale Law Journal* 111(8):1935–2042.
- Hawkins, Darren and Wade Jacoby. 2010. "Partial compliance: a comparison of the European and inter-American courts of human rights." *Journal of International Law & International Relations* 6(1):35–85.
- Helfer, Laurence. 2020. Populism and International Human Rights Institutions: A Survival Guide. In *Human Rights in a Time of Populism: Challenges and Responses*, ed. Gerald L. Neuman.
- Helfer, Laurence and Erik Voeten. 2020. "Walking Back Human Rights in Europe?" *Unpublished Manuscript* .
- Helfer, Laurence R. 2002. "Overlegalizing human rights: International rela-

- tions theory and the Commonwealth Caribbean backlash against human rights regimes.” *Columbia Law Review* 102(7):1832–1911.
- Helfer, Laurence R. 2012. “The burdens and benefits of Brighton.” *Esil Reflections* 1(1):1–5.
- Helfer, Laurence R and Erik Voeten. 2014. “International courts as agents of legal change: evidence from LGBT rights in Europe.” *International Organization* 68(01):77–110.
- Hillebrecht, Courtney. 2009. “Rethinking compliance: the challenges and prospects of measuring compliance with International Human Rights Tribunals.” *Journal of Human Rights Practice* 1(3):362–379.
- Hillebrecht, Courtney. 2014a. *Domestic politics and international human rights tribunals: the problem of compliance*. Cambridge University Press.
- Hillebrecht, Courtney. 2014b. “The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change.” *European Journal of International Relations* 20(4):1100–1123.
- Ho, Daniel E, Kosuke Imai, Gary King and Elizabeth A Stuart. 2007. “Matching as nonparametric preprocessing for reducing model dependence in parametric causal inference.” *Political analysis* 15(3):199–236.
- Hobolt, Sara B. 2016. “The Brexit vote: a divided nation, a divided continent.” *Journal of European Public Policy* 23(9):1259–1277.
- Huneus, Alexandra. 2015. “Reforming the State from Afar: Structural Reform

- Litigation at the Human Rights Courts.” *The Yale Journal of International Law* 40(1):1–40.
- Iacus, Stefano M, Gary King and Giuseppe Porro. 2012. “Causal inference without balance checking: Coarsened exact matching.” *Political analysis* 20(1):1–24.
- Kelemen, R Daniel. 2001. “The limits of judicial power: trade-environment disputes in the GATT/WTO and the EU.” *Comparative Political Studies* 34(6):622–650.
- Keller, Helen and Alec Stone Sweet, eds. 2008. *A Europe of rights: the impact of the ECHR on national legal systems*. Oxford University Press.
- Keller, Helen and Cedric Marti. 2015. “Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments.” *European Journal of International Law* 26(4):829–850.
- King, Gary and Langche Zeng. 2006. “The dangers of extreme counterfactuals.” *Political Analysis* 14(2):131–159.
- Kowalik-Bańczyk, Krystyna. 2016. Poland: The Taming of the Shrew. In *Criticism of the the European Court of Human Rights. Shifting the Dynamics of the Convention System: Counter-Dynamics at the National and EU level*, ed. Patricia Popelier, Sarah Lambrecht and Koen Lemmens. Intersentia.
- Larsson, Olof and Daniel Naurin. 2016. “Judicial independence and political uncertainty: how the risk of override affects the Court of Justice of the EU.” *International Organization* 70(2):377–408.

- Lupu, Yonatan. 2013. “International Judicial Legitimacy: Lessons from National Courts.” *Theoretical Inquiries in Law* 14(2):437–454.
- Lupu, Yonatan and Erik Voeten. 2012. “Precedent in international courts: a network analysis of case citations by the european court of human rights.” *British Journal of Political Science* 42(2):413–439.
- Madsen, Mikael Rask. 2016. “The challenging authority of the European Court of Human Rights: from Cold War legal diplomacy to the Brighton Declaration and backlash.” *Law & Contemporary Problems* 79(1):141–176.
- Madsen, Mikael Rask. 2018. “Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?” *Journal of International Dispute Settlement* 9(2):199–222.
- Madsen, Mikael Rask, Pola Cebulak and Micha Wiebusch. 2018. “Special Issue—Resistance to International Courts Introduction and Conclusion.” *International Journal of Law in Context* 14(2):193–196.
- Mancini, Susanna. 2010. “The crucifix rage: supranational constitutionalism bumps against the counter-majoritarian difficulty.” *European Constitutional Law Review* 6(1):6–27.
- Martin, Andrew D and Kevin M Quinn. 2002. “Dynamic ideal point estimation via Markov chain Monte Carlo for the US Supreme Court, 1953–1999.” *Political Analysis* 10(2):134–153.
- Martin, Andrew D, Kevin M Quinn and Jong Hee Park. 2011. “MCMCpack: Markov chain monte carlo in R.” *Journal of Statistical Software* 42(9):1–21.

- McNulty, Des, Nick Watson and Gregory Philo. 2014. "Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate." *The Howard Journal of Crime and Justice* 53(4):360–376.
- Moravcsik, Andrew. 2000. "The origins of human rights regimes: Democratic delegation in postwar Europe." *International Organization* 54(2):217–252.
- Mowbray, Alastair. 2015. "Subsidiarity and the European Convention on Human Rights." *Human Rights Law Review* 15(2):313–341.
- Murray, Colin RG. 2012. "A perfect storm: parliament and prisoner disenfranchisement." *Parliamentary Affairs* 66(3):511–539.
- Naoi, Megumi. 2020. "Survey Experiments in International Political Economy: What We (Don't) Know About the Backlash Against Globalization." *Annual Review of Political Science* 23:333–356.
- Pelc, Krzysztof J. 2014. "The politics of precedent in international law: A social network application." *American Political Science Review* 108(3):547–564.
- Pevehouse, Jon C. 2002. "Democracy from the outside-in? International organizations and democratization." *International organization* 56(3):515–549.
- Pollack, Mark A. 1997. "Delegation, agency, and agenda setting in the European Community." *International organization* 51(1):99–134.
- Popelier, Patricia, Sarah Lambrecht and Koen Lemmens. 2016. *Criticism of the European Court of Human Rights*. Intersentia.

- Sandholtz, Wayne, Yining Bei and Kayla Caldwell. 2018. 11. Backlash and international human rights courts. In *Contracting Human Rights: Crisis, Accountability, and Opportunity*, ed. Alison Brysk and Michael Stohl. Edward Elgar Publishing p. 159.
- Segal, Jeffrey A and Albert D Cover. 1989. “Ideological values and the votes of US Supreme Court justices.” *American Political Science Review* 83(2):557–565.
- Shelton, Dinah. 2016. “Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights.” *Human Rights Law Review* 16(2):303–322.
- Simmons, Beth A. 2009. *Mobilizing for human rights: international law in domestic politics*. Cambridge University Press.
- Soley, Ximena and Silvia Steininger. 2018. “Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights.” *International Journal of Law in Context* 14(2):237–257.
- Spano, Robert. 2018. “The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law.” *Human Rights Law Review* 18(3):473–494.
- Stiansen, Øyvind. 2019a. “Delayed but not derailed: legislative compliance with European Court of Human Rights judgments.” *The International Journal of Human Rights* 23(8):1221–1247.
- Stiansen, Øyvind. 2019b. “Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments.” *British Journal of Political Science* FirstView:1–9.

- Stone Sweet, Alec and Thomas Brunnel. 2012. "The European Court of Justice, state non-compliance, and the politics of override." *American Political Science Review* 106(1):204–213.
- Stoyanova, Vladislava. 2018. "Populism, Exceptionality and the Right of Migrants to Family Life Under the European Convention on Human Rights." *European Journal of Legal Studies* 10(2):83–125.
- Tallberg, Jonas and Michael Z'urn. 2019. "The legitimacy and legitimation of international organizations: Introduction and framework." *The Review of International Organizations* 14:581–606.
- Tickell, Andrew. 2011. "Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a "Bureaucratic Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights." *German Law Journal* 12(10):1786–1812.
- Voeten, Erik. 2007. "The politics of international judicial appointments: evidence from the European Court of Human Rights." *International Organization* 61(4):669–701.
- Voeten, Erik. 2008. "The impartiality of international judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102(4):417–433.
- Voeten, Erik. 2013. "Public Opinion and the Legitimacy of International Courts." *Theoretical Inquiries in Law* 14(2):411–436.
- Von Bogdandy, Armin and Ingo Venzke. 2012. *Beyond Dispute: International*

- Judicial Institutions as Lawmakers. In *International Judicial Lawmaking*, ed. Armin Von Bogdandy and Ingo Venzke. Springer pp. 3–33.
- von Staden, Andreas. 2018. *Strategies of Compliance with the European Court of Human Rights: Rational Choice Within Normative Constraints*. University of Pennsylvania Press.
- Von Stein, Jana. 2016. “Making promises, keeping promises: democracy, ratification and compliance in international human rights law.” *British Journal of Political Science* 46(3):655–679.
- Walter, Stefanie. 2018. “The Mass Politics of International Disintegration.”. Unpublished working paper.
- URL:** <http://www.stefaniewalter.de/app/download/8479824/2018.Walter.Disintegration.Harvard.pdf>