The System of Chambers at the European Court of Justice: implications for the productivity and discretion of the Court

Not for Citation

Matthew Gabel
(Washington University)

Clifford Carrubba
(Emory University)

Joshua Fjeistul
(Emory University)

Danielle Villa
(Emory University)

Paper prepared for presentation at the Annual Meetings of the Midwest Political Science Association, Chicago, IL, April 6, 2017

The European Court of Justice (ECJ) serves as the court of the European Union. The member states have delegated to the Court a series of important tasks (Pollack 2003). For one, the Court served to fill the incomplete contract of the EU treaties and secondary legislation. Given the broad heterogeneity of national laws and regulations, the Court is also expected to facilitate the harmonization of interpretation of EU law in national courts. Finally, the Court is designed to help with the monitoring and enforcement of EU law and national obligations under the Treaties.

By the standards of international courts, the ECJ has been a tremendous success in these delegated areas. Much of its jurisprudence has developed through exchanges with national courts. Through a reference for a preliminary ruling, national judges hearing cases involving EU law can ask the Court for guidance on how EU law should be applied. This has been the most common type of case for decades and has provided the Court with a steady stream of litigation with which it could build its case-law.

However, while the Court benefited from the engagement of national courts with EU law, the quantity of the case-load grew so large that by the early 1970s the Court claimed to be near capacity (Arnull 2000). Thus, an important part of the story of the success of the ECJ involves how it managed to develop a coherent and influential body of EU law with the limited resources it enjoyed.

Surprisingly, we are aware of no research that has investigated this question. A variety of scholars have described and explained the increase in references for preliminary rulings and the ways in which they empowered the Court to develop EU law (e.g., Carrubba and Murrah 2005; Alter 2001; Stone Sweet 2004). But that increased supply does not necessarily translate into influential rulings. Indeed, one might imagine that the increased supply of cases could lead to hasty, incoherent judgements.

This paper looks at one potentially important mechanism for managing the growing caseload: the development of the System of Chambers. This is a generally ignored attribute of ECJ decision-making. Since the 1980s, most of the decision by the ECJ have not been by the full Court. Instead, most of the rulings are issued through Chambers—subset of judges organized to divide up the work of the Court.

Understanding how that system evolved will give us a more complete picture of how the Court was able to manage an impressive and increasing volume of cases, both in number and in breadth.

This study also engages the broader question of whether and to what extent the Court has developed its authority and the scope of EU law beyond or different from what the member states desired. We assume that the member states wanted the Court to be busy—that way it could fulfill its delegated tasks. But, if the evidence from the use of panels on national courts is any guide, the System of Chambers may produce rulings that are systematically biased by the composition of the judges. For example, evidence from the Supreme Court of Canada, the Supreme Court of South Africa, and the Circuit Court of Appeals in the United States indicates that the distribution of cases among subsets of judges can have significant effects on the decisions of the Court (Atkins and Zavoina 1975; Heard 1991; Hausegger and Haynie 2003; Sunstein, Schkade, and Ellman 2004; Peresie 2005; Kastellec 2007). We therefore should not assume the assignment of cases to Chambers is innocuous.[1]

The paper proceeds as follows. We begin with a general introduction to the ECJ and the rules governing its authority. We then describe and characterize the evolution of the rules governing the System of Chambers. This review is generally valuable, as it provides the first comprehensive history of this institution. It also provides critical information for both developing hypotheses about how the Court has used its discretion. We are particularly interested in evaluating the extent to which the Court has improved the productivity of the ECJ while attending to the interests of the member states in developing EU law. We then conduct such an evaluation, using data on ECJ rulings from 1960-2000. That period covers the three significant enhancements to the Court's discretion over the use of Chambers.

[1] Yet, to the extent the System of Chambers is acknowledged in the literature, this is typically what is asserted. For example, Kelemen (2012) asserts that significant cases are heard in the Grand Chamber (a large formation) at the Court. While this may be true, we are aware of no study that has shown this empirically.

Some Basics on the European Court of Justice

The ECJ was created by the Rome Treaty of 1957 to serve as the judicial institution for European Economic Community. It has subsequently served as the court for the European Community and, currently, the European Union (EU). The relevant treaty articles defined its selection, composition, and basic organization. The member-state governments collectively choose the judges. In practice, each member-state has appointed one judge.[2] As a result, the number of judges has increased dramatically over time due to enlargement of EU membership. Judges serve six-year renewable terms and cannot be replaced during those terms except under exceptional circumstances.

The member states also control the rules governing the work and organization of the Court. The relevant treaties, protocols to the treaties, and the rules of procedure of the Court all require authorization by the Council, which is comprised of representatives of member-state governments. For most of the history of the Court, any such approval required unanimity.[3] It is worth noting that the member states have guarded jealously their control over the Court and its operation. This is clear from how the member states distinguish the ECJ from other international courts. For example, the EU member states are also members of the International Criminal Court and the European Court of Human Rights. The member states grant those courts complete independence in determining their Rules of Procedure (Arnull 2001: 45). Yet, for the ECJ, they have maintained strict control.

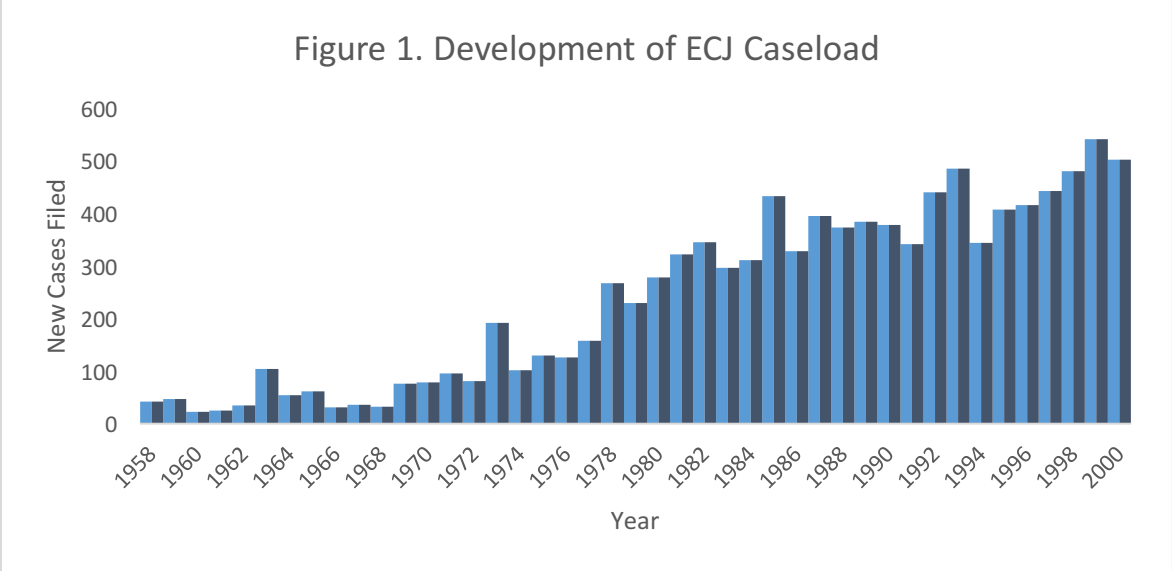
The Court is allowed by the treaties to form subgroups of judges called "Chambers", but the treaties constrained their use in adjudication (more on that below). Beyond that, the treaties do not, specify how the Court organizes its work.

The treaties also defined the sources of cases for the ECJ. The Court could hear direct actions—cases brought directly to the court against member-state governments for failure to fulfill their treaty obligations and against EU institutions. Historically, the most common forms of direct actions have been

[2] When additional judge was added to ensure an odd number during periods when the number of EU members was even. This tradition ended with the accession of Croatia in 2013, when the number of judges was set at 28.
[3] Approval of the rules of procedure moved from unanimity to qualified majority voting with the Nice Treaty in 2003.

infringement proceedings brought by the European Commission against member-state governments, staff cases against EU institutions, and member-state applications to annul decisions by EU institutions. In addition to direct actions, national courts can engage the ECJ through a reference for a preliminary ruling. These are cases where a national judge considers a question of EU law pertinent to an open case before her court. She then stays the national proceedings while awaiting the ECJ ruling. Note that the ECJ stands out from most international courts because of the wide range potential litigants—particularly the opportunity of private parties to engage the Court through the preliminary reference procedure.

The number of cases before the Court grew significantly over time. Some of this was due to expansion in the number of references for preliminary rulings, as national courts increasingly accepted and engaged EU law. But it was also due to the expansion of EU membership. Figure 1 shows the number of new cases filed each year from 1958-2000. The first major growth took place in the early 1970s. Compared to 1965-1970, the caseload doubled in the first half of the 1970s and doubled again by the end of that decade. We see more modest, but fairly consistent growth thereafter.



The increased caseload had obvious benefits in terms of the member states' goals for the ECJ. More cases, coming primarily from preliminary references, meant that the court had the opportunity to

harmonize the interpretation and application of EU law across the member state through national litigation. But these demands stretched the resources of the Court. The Court expressed concerns about its capacity to manage this workload and pursued amendments to the rules accordingly (Arnull 2000: 37).

Importantly, the ECJ has no control of its docket; it must hear all valid cases brought before it.[4] Thus, the growth in cases threatened to undermine the entire judicial system. If the Court could not rule on cases in a timely manner, national courts might stop submitting preliminary references. In response, the main revision to the rules has been to increase the discretion of the Court to decide cases in Chambers. Through a division of labor, the judges could potentially resolve more disputes without significantly increasing the personnel or resources at the court. The remainder of this paper is focused on how and to what extent the expansion of this discretion has affected the productivity of the Court and its fulfillment of the original goals for the Court.

Before discussing the Chambers system and its development, it is worth briefly considering why the Court expanding the use subgroups might not have the salutary effects desired by the member states. Here we rely on standard arguments about why delegation may fail. First, the agent (the Court) may shirk its obligations by producing fewer rulings than desired by the principal (the member states). Second, the Court could "drift" in its rulings: use its discretion to advance an agenda regarding EU law that differs from the preferences of the member states. Once we have described the development of the chambers system, we return to these concerns to develop hypotheses about how the changes in the chambers system should affect the Court's behavior.

[4] The court can join similar cases.

The System of Chambers

Beginning with the original rules of procedure, the system of Chambers has always had a formal role in the Court's adjudication.[5] Once an application arrived at the Court, the President of the Court assigned the case to a Chamber, a judge in that Chamber, and an Advocate General.[6] The assigned judge would then serve as the Judge-Rapporteur (JR) for the case and work with the Advocate General (AG) and the other members of the chamber to generate a preliminary report that will be presented to the full court for discussion. That report summarizes the case, the written pleadings (which may include briefs from governments and EU institutions), and recommends any preparatory inquiries. The Court then reviews that report, considers any advice from the Advocate General, and decides whether to open the oral inquiry stage or delay it for preparatory inquiry.

The oral procedure is followed by a judgement by the Court. The members of the Court involved in the judgment depends on whether the case was assigned to a chamber or to the full plenum. As we will see the Court's discretion to decide cases in Chambers has changed dramatically over time.

Surprisingly, given the extensive literature on the jurisprudence of the ECJ, previous research has devoted almost no attention to describing or characterizing the rules governing the Chambers.[7] We are aware of only one article on the history of the Chambers systems and that was published before several significant changes in the 1990s (Guillaume 1990).[8] Thus, we provide a comprehensive description of the evolution of the rules governing the system of Chambers at the Court. In the Appendix, we present the details of relevant changes in the text of the governing documents.

[5] In 2005, the Court changed its rules of procedure (Article 9) to simply require the President to designate a Judge-Rapporteur alone, and not a chamber to which the judge is attached.

[6] The advocate General is not a judge but is selected based on the same criteria as judges and is considered a peer of the judges (Jacobs 2000). He works alongside the court, but independently, in reviewing the case and writing an advisory opinion about the proper disposition of the case. That opinion is presented to the Court at the conclusion of the oral procedure.

[7] Books on EU law often give a brief description of the Chambers system. Brown and Kennedy (2000) provides a unusually thorough description through 2000.

[8] Plendar (1991) provides a thorough review of the Chambers system circa 1991 and compares it with the system at the International Court of Justice. But this comparison does not describe the historical development of the system at the ECJ or examine its consequences for ECJ rulings.

Under the 1957 Rome Treaty, the Court, then composed of seven judges, was allowed to create Chambers composed of three or five judges (Article 165, EEC). In response to the Treaty, the Court established two Chambers of three judges (Article 24, Rules of Procedure, 1959; Brown and Kennedy 2000: 39). But the Treaty did not permit the Chambers to hear cases submitted to it by a Member State or by one of the institutions of the Community or through a preliminary reference. This essentially left only direct actions brought by private parties (e.g., staff cases) eligible for assignment to Chambers. The Court responded in the Rules of Procedure by designating one Chamber as the venue for all staff cases and then requiring all staff cases to be assigned to Chambers (Article 95, Rules of Procedure 1959).

The member states modified Article 165 of the EEC Treaty in 1974 to broaden slightly the use of Chambers. The stated motivation for these changes was "the considerable increase in the number of cases brought before the Court of Justice."[9] The revised Treaty allowed the Court to hear preliminary references in Chambers so long as the Rules of Procedure of the Court permitted.[10] The Court promptly modified its rule to allow Chambers to hear preliminary reference cases that were of "an essentially technical nature or concern matters for which there is already an established body of law." However, the rules only allowed Chambers in preliminary reference cases if no member-state was a party to the case or had submitted a brief. [11] The rules were expanded the role of the Judge-Rapporteur. The JR's preliminary report now also included a proposal about whether the case should be heard in Chambers.[12] The final decision on assignment was left to the full Court. The Court heard the first preliminary reference case in Chambers in 1976 (Brown and Kennedy 2000: 39).

In 1979, the Court amended its rules to allow a much broader set of cases to be assigned to Chambers. The new rules allowed Chambers to hear any case except infringements proceedings, provided no participating member state or Community institution objected and "in so far as the difficulty or the

[9] Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 12 September 1979. OJ L 238: 1.
[10] Article 95(1), 1974 Rules of Procedure of the Court of Justice of the European Communities.
[11] See, *Official Journal of the European Communities*, December, 28, 1974, 350/29, and *Rules of Procedure of the Court of Justice*, 1975, Article 95 (Brussels: Office of Official Publications of the European Communities).
[12] If assigned to Chambers, the designated chamber must include the Judge-Rapporteur.

importance of the case or particular circumstances are not such as to require the court to decide in plenary." Furthermore, the 1979 reform modified the exception for cases involving member states. The new rules stated that if either a member state or a Community institution that is party to a proceeding wanted the case heard by the full Court, it would need to make such a request. In other words, the default rule was changed so that a case could be assigned to Chambers, with the burden on the member state or Community institution to request that the case be heard by the full Court.

The Court's revisions of its rules in December 1994 further broadened its discretion. Except when a Community institution or a Member State involved with a case expressly requested the case be heard by the full Court, the Court had complete discretion as to which subset of judges would decide the case. The ability of a Member State or institution to force a case before the full court was removed in 2003, with the Nice Treaty. In place of the full court, such a request could only put the case before a subset of judges convened in the "Grand Chamber" (described below). The full Court was only required for cases brought under a set of treaty articles that generated a small number of cases. The Treaty of Lisbon essentially maintained these provisions.

In short, the treaties and rules of procedure of the Court now require very few cases be heard by the full Court. A member state or institution that is a party to the case may request a case be heard by a relatively large set of judges, but otherwise the Court has complete discretion as to which subsets of judges, sitting in Chambers, hear each case.

The number and sizes of chambers has also changed over time. Through 1979, the Court had two chambers of three judges. From 1979 to 1982, the Court had three 3-judge chambers. From 1983-84, it added two larger chambers, constituted from members of the chambers of three. The Court returned to three 3-judge chambers from 1984-1986.[13] With the 1986 enlargement, the court created six chambers: fouir chambers of 3 judges and two chambers of 6 judges. These larger chambers were composed of the members of smaller chambers (e.g., the fifth chamber consisted exclusively of members from the 3-judge

[13] *Synopsis of the Work of the Court of Justice of the European Communities in 1984-5*. Luxembourg, 1986. Pages 92-93.

first and third chambers). This arrangement continued until 2003. Starting in October 2003, the Court formed two 5-judge chambers and three 3-judge chambers. Members of the large chambers were drawn from all three small chambers. With the 2004 enlargement, the Court formed three 5-judge chambers and three 3-judge chambers. This was expanded to 8 chambers (4 3-judge, 4 5-judge).

Note that, in many years, the 3- and 5-judge chambers had more than 3 or 5 judges attached to them. For example, in 1981, when the Court had 11 judges, two of the 3-judge chambers had four judges assigned to them. The formation of Chambers beginning in October 2003 involved much larger numbers of judges attached to Chambers than 3 or 5.[14] For example, in 2005, with a Court of 25 judges, each of the six chambers of 3 or 5 had at least 7 judged attached to it. Obviously, that meant there was overlap in membership of chambers and rotation in which judges actually decided a case for a specific chamber. The result is that the Court has greatly increased the variety of combinations of judges that decide cases. At its origin, effectively all but staff case cases were heard by all seven judges. By 1980, there were three chambers of three judges, with fixed membership for two years. In contrast, the 2005 Court has three 3-judge chambers, each with seven judges attached. Thus, even ignoring the 5-judge chambers, the possible combinations of judges that could form to hear a case jumped dramatically.

Beyond the 3- and 5-judge chambers, the Court now decides cases in Grand Chamber and as a full Court. The Nice Treaty created the Grand Chamber, which is distinct from the traditional chambers of 3 and 5. The Grand Chamber consisted of 11 judges, drawn from all of the smaller chambers. The actual membership on a case varies and is based on a predetermined rotation at the start of each year. With the 2004 enlargement, the Grand Chamber was increased to 13 judges.

It is important to note that the Court has always retained the option to decide a case as a full Court. This quorum rule has been far from trivial for defining the size of the full Court. Indeed, in 1986 the Court began deciding cases in "petit plenum," which consisted of 7 judges—the quorum at the time. The petit plenum was not defined in the Court's rules of procedure or the treaties. But the Court routinely formed as

[14] The Chambers decided cases in groups of three.

the petit plenum and even formally reported its decisions as a separate formation in their annual report of the work of the Court (Synopsis 1988-89).

In sum, the last thirty years has seen a dramatic increase in the possibility for cases to be assigned to Chambers. In addition, the variety in the size and composition of Chambers has expanded. Consequently, these revisions to the organization of the Court have afforded the Court a great deal of discretion in determining which and how many judges decide cases. In the next section we investigate how the Court has used this discretion and its implications for its capacity to manage its increasing workload.

Empirical Implications of Rules Changes on Use of Chambers

In developing hypotheses about the process of case assignment to Chambers, we make five assumptions about the motivations of the judges and the member-state governments. First, we assume the judges on the Court have policy goals and they have budget constraint (e.g., their effort/time). They would like to have the greatest policy impact with the least amount of effort. Second, we assume that the judges may differ from one another in their policy goals but that their individual preferences are positively correlated with those of their appointing governments. Third, policy impact is a function of the disposition of individual rulings and the development of a coherent and consistent body of case-law.

Fourth, the member-state governments, collectively, would like the Court to interpret and apply EU law in a coherent fashion and consistent with their preferences over policy. Fifth, both the judges and member-state governments assume that the likelihood of error in judgement (e.g., failure to understand or apply relevant case-law) declines at the number of judges deciding a case increases.[15]

These assumptions generate the standard delegation concerns regarding assignment to Chambers. Expansion of the use of Chambers to the Court can help the Court achieve the goals of the member states because it can increase the number of rulings. And, if used carefully, it can do this without sacrificing the

[15] One can think of this as a standard "wisdom of crowds" argument, often modeled along the lines of the Condorcet Jury Theorem (see, for example, Page 2008).

quality of the rulings. But, there is no guarantee the Court will be a perfect agent of the Member States. First, more discretion will allow the Court to "shirk" on its production of rulings. Particularly where the judges have similar preferences, they would prefer to dispose of more cases with less effort by using Chambers. This will not necessarily lead to more rulings. In contrast, the Member States would like the Court to only use Chambers when necessary due to capacity constraints. Second, more discretion can lead to "drift" in terms of the policy impact of ECJ rulings. In the full Court, we expect the collective preferences of the judges to generally resemble those of the member states. But, subsets of the judges could differ substantially from that of the member states. And, for a variety of reasons, the Court may be willing to facilitate that drift through the assignment of cases to Chambers.[16] Further, to the extent the judges have a collective bias relative to the preferences from the member states, they can pursue more policy in their preferred direction by splitting up the work amongst themselves. This threat of drift has been noted by a number of authors, who posit that the ECJ judges are generally more pro-integration than are the member state governments (e.g., Hartley 2007: 76).

These assumptions support three observations. First, the Court and the member states share several important concerns over the use of Chambers. For example, both the Court and member states want rulings to achieve policy goals and will prefer the full Court to Chambers for legal issues that are relatively complicated to resolve and of high salience. They may differ, of course, in what they consider salient. Second, the Court's interest in minimizing effort should lead them to use Chambers more than the Member States would prefer. For example, even when demand for rulings is low, we expect the Court to use Chambers as much as possible. Third, the Court has a strong incentive to faithfully follow the rules as intended by the member-state governments until they have sufficient discretion to pursue their own agenda. This is because any change to the rules required unanimous support among the governments. Consequently, the Court had little hope of gaining support for wider discretion if it did not faithfully

[16] One obvious reason is to reduce their effort. Judges may be willing to allow Chambers to adopt polices away from the median judge if it lowers their workload. Judges also might have different policy priorities and be willing to log-roll across policy areas.

anticipate the intent of the member-states with the early changes to discretion. However, once they were given broad discretion, they could deviate from the intent of the member-states up to the point where they would provoke the member-state governments to revise the rules. Given the unanimity[17] requirement for changes to the rules, the Court could exercise some independence from the member states that they would not have attempted earlier. We now apply these considerations to the evolution of the rules and identify specific hypotheses.

a. Pre-1974

Until 1974, the rules dictated that the Court could essentially only use Chambers in one type of litigant: EU staff cases. If our expectations are correct, the Court will maximize the use of the Chambers for this purpose, even if the Court is under its capacity to hear cases. Otherwise, we expect the Court to strictly follow the prohibitions on the use of Chambers.

b. 1975-1979

Due in part to the increasing number of new cases, the member states relaxed the rules such that, for references for preliminary rulings, the Court could use Chambers in so far as the cases were of "an essentially technical nature or concern matters for which there is already an established body of case law" and did not involve a government litigant or a government brief. Here, we would expect the Court to continue to use Chambers for staff cases. Otherwise, the Court should faithfully follow the limits on the new discretion. That means we expect to see preliminary reference cases assigned to Chambers only if there is no government involvement, when the Court can easily discern the legal merits of the case, and where the complexity is low. We also expect the Court to interpret these conditions politically, meaning that the Court should avoid Chambers when their rulings are consistent with the member-states'

[17] Now this is super-majority rule, adopted with the Nice Treaty.

preferences over the legal issues. And, we expect the use of Chambers to increase as the number of new cases rises.

c. 1980-1994

The member states further relaxed the rules on preliminary rulings and direct actions, requiring only that infringement cases be decided in plenum. The Chambers could be used for any other case "in so far as the difficulty or the importance of the case or particular circumstances are not such as to require the court decide in plenary." Again, we expect the Court to interpret this language so as to faithfully follow the intent of the member states. That should go beyond attending to objective indicators of legal difficulty or importance. For example, we expect the Court to avoid Chambers when the case involves a member-state government as a litigant or where the member states find the case is salient and disagree on the correct judgement. And, as above, we would expect the Court to be reluctant to use the Chambers in cases where their rulings conflict with member-state interests or existing case-law. Finally, we expect the use of Chambers to increase with the number of new cases filed.

d. 1994-2000

With the 1994 reforms, the Court gained wide discretion over assignment of cases to Chambers. The rules maintained much the same language about when discretion was warranted. But, given the rules in the Council for altering the level of discretion, we expect the Court to be less faithful to the member states' intent. In particular, we would not expect to see the Court as sensitive to political considerations: i.e., the participation of a member-state as a litigant and the agreement between the Court's ruling and the preference of the member-states. By using Chambers, the Court would devote less of their time/effort to these cases. In addition, to the extent the judges have a distinct agenda and policy goals from the member states, the use of Chambers allows them to more efficiently advance that agenda. As earlier, we expect the Court to increase the use of Chambers as the number of new cases rises.

Data, Measurement, and Analysis

Data:

To bring data to bear on these hypotheses, we exploit information about rulings by the Court from 1960-2000 available from Carrubba and Gabel (2014) supplemented with information about the chamber size and the issue areas of the cases. These additional pieces of information were extracted from the digital records of rulings by the Court.[18] The 1960-2000 period of time allows us to examine the assignment of cases to Chambers across the three significant changes in the discretion exercised by the Court.

Measurement:

We measure whether a case was assigned to Chambers with a dummy variable, *Chambers (small)*. This is coded (1) for cases decided by the chambers of the smallest type (three judges).[19] During the period under study, assignment to a small chamber was always available. This was true regardless of the number of member-states or the configuration of Chambers, which changed over time. Moreover, it is assignment to small chambers where the potential gains from division of labor are the greatest, but also where concerns over abuse of discretion are highest. Thus, we consider this coding of particular interest.

We first describe variables created to capture factors that should increase the use of small chambers if the Court is following the intent of the member-state governments. We include a measure of the number of new cases filed each year in our data. Perhaps the most important motivation for enhancing the use of chambers was to mitigate the growing caseload of the Court in the 1970s. Thus, particularly during that period of dramatic growth in cases, we would expect a positive relationship between the number of new cases and the use of small chambers. This variable is called *New cases* and consists of the data presented in Figure 1. Second, the one consistent area of discretion for the Court has been cases involving EU staff. In the very first Rules of Procedure, the Court designated these case to

[18] These are available from the website of the Court of Justice: http://curia.europa.eu/jcms/jcms/Jo2_7045/en/.
[19] This may include chambers that have more than three judges assigned to them. The key distinction is number of judges needed for a quorum. The treaties require that this is always an odd number.

typically be heard in 3-judge chambers. Thus, we would expect that the court routinely sends staff cases to small chambers more than other cases. To test this, we created a dummy variable, *Staff cases*.

To measure the general importance of the legal issue under consideration, we use the number of briefs filed by the member states on each legal issue.[20] During the written procedure, the member states and Community institutions (e.g., the Commission) are permitted to submit briefs related to the case. These briefs are part of the written record that the Judge-Rapporteur reviews before recommending an assignment to chambers. The data on rulings by Carrubba and Gabel (2014) includes information about these government briefs. For each brief submitted, their dataset indicates whether it supported the plaintiff or defendant in the case. We use this information to create the variable *total government briefs (%)*, which is the total number of briefs divided by the total possible number. This adjustment ensures comparability over time, as the number of governments increased from 6 to 15 during the period of our study. If the Court considers the importance of the case in its use of discretion, we expect the Court will be less likely to send a case to small chambers as this variable increases.

We measure the level of difficulty or complexity of the case in two ways. First, we use the level of conflicting briefs from the member-state governments. The variable *balance of government briefs* is the absolute value of the difference in the number of briefs filed for the plaintiff and for the defendant. This variable is normalized by the total number of briefs filed. As a result, it ranges from 0 to 1. If the Court is sensitive to the complexity of the case, it will be more likely to send a case to small Chambers as this variable increases in value. Second, we expect systematic difference in legal complexity and difficulty across policy areas. We, as yet, do not have a systematic way to distinguish among policy areas. But we do have a set of dummy variables identifying whether a case falls in one of the prominent areas of EU law (e.g., agriculture).[21] We include the full set of these variables. At a minimum, their inclusion reduces the chance of omitted variable bias in our estimates.

[20] Carrubba and Gabel (2014) measure rulings at the level of the legal issue, where there may be multiple legal issues in the same case.

[21] The areas we include are based on the categories used by the Court legal services, which is based on the pertinent areas of the treaties. The full set of categories is available at: http://eur-lex.europa.eu/browse/directories/case-

To measure the political importance of the case, we created three variables. First, we consider cases where a member-state government is a litigant as politically important. To that end, we created a dummy variable, *government litigant*. Assignment of cases to chambers with a government litigant was strictly forbidden originally. And, once that constraint was relaxed, governments maintained special prerogatives to demand a ruling by the full court. Thus, when the Court has discretion, we expect a politically sensitive Court to be, *ceteris paribus*, less likely to send a case to a small chamber when a government is a litigant.

Second, we expect the court to avoid small chambers when they anticipate making a politically controversial ruling. Recall that, at the end of the written procedure, the judge-rapporteur submits a preliminary report to the Court, which convenes with the Advocate General and decides whether to send the case to chambers. The judge-rapporteur and Advocate General will typically be the only attendees who have carefully reviewed the written submissions, which include any government briefs. Regardless of whether the case is assigned to chambers or not, the Judge-Rapporteur will continue as the leading judge on that case and will participate in the decision. Thus, we expect that Judge-Rapporteur to have a decent forecast of the disposition of the ruling on the legal issues in the case. As such, we expect a politically sensitive Judge-Rapporteur's recommendation of chambers assignment to reflect her expectations over types of politically costly outcomes. For one, the court may rule counter to the recommendations of the Advocate General.[22] The Advocate General's opinion on the legal issues generally reflects the balance of the legal merits (Carrubba and Gabel 2014). The opinion is extensively researched and is often longer and better anchored in case-law than is the Court's subsequent published opinion. Not surprisingly, the Court generally agrees with the AG's opinion. Diverging from the AG's position thus signals the Court is breaking from the legal merits, which raises the political and legal

law.html?root_default=RJ_1_CODED%3DB#arrow_B. Note that the EU added policy areas over the time period covered in this study, so not all categories were available for each sub-period of analysis.

[22] The AG participates in the hearing on the preliminary report but does not submit a formal document stating his position. However, the Court is explicitly instructed in the rules of procedure to take account of the AG's advice in its deliberations over whether to conduct preparatory work and whether to assign the case to chambers.

salience of the ruling. We therefore expect small chambers to be less often used on legal issues where the Court will diverge from the AG. To measure this, we created a dummy variable *Court-AG disagreement*, which is coded (1) when the ultimate ruling by the Court is counter to the position supported by the AG's written opinion. We expect this variable to be negatively associated with the use of small chambers.

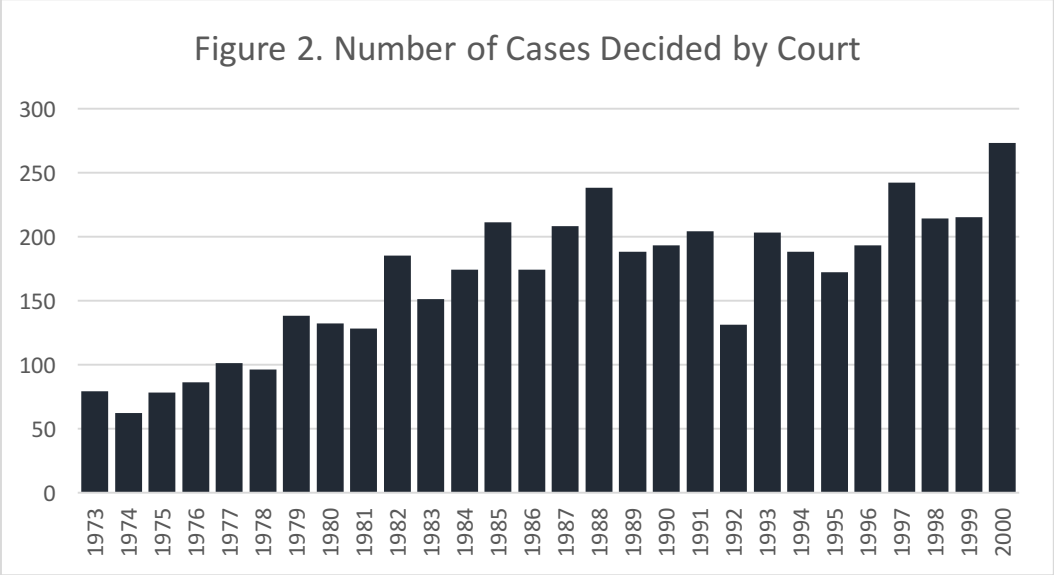
Similarly, we expect the Court to avoid small chambers when it anticipates deciding counter to the positon of the member-state governments. We created the dummy variable *Court-Governments disagreement*, which is coded (1) when the ultimate ruling by the Court is counter to the balance of member-state government briefs on the legal issue in question. Again, the Judge-Rapporteur is aware of the written briefs from the member-states when he writes his preliminary report and the Court is apprised of these in the deliberations over assignment to Chambers. Thus, the Court can forecast whether their ruling is likely to be politically controversial and avoid a small chamber accordingly. We created the dummy variable *Court-Governments disagree*, which is coded (1) when the ultimate ruling by the Court is counter to the balance of member-state government briefs on the legal issue in question.

Analysis

In the pre-1974 period, the rules dictated that the Court could not use Chambers for any case brought by a member-state government or a Community institution, or for preliminary rulings. That left only staff cases or direct actions brought by private parties. The Court adhered strictly to these rules. Almost every staff case, of which there were many, was assigned to Chambers. Also, a small number (3) of annulment rulings were issued by a Chamber, but these cases were not brought by member-state governments. As result, 25% of the rulings in this period were made in Chambers. Note that the number of decisions over this period remained significantly below the numbers in subsequent decades. This strongly suggests that the judges were below capacity, but still maximized their use of Chambers. This is consistent with our earlier discussion of the incentives of the Court to reduce its workload.

The reform of 1974 enhanced slightly the discretion for assignment to Chambers. The Court could now assign references for preliminary rulings if the case did not involve a member-state

government either through submitting a brief or through participation as a litigant. This led to a gradual increase in the assignment of preliminary references cases, with 58% of eligible references for preliminary rulings assigned to chambers in 1979 compared with only 2% in 1975. The Court faithfully adhered to the rules prohibiting Chambers hearing direct actions or references for preliminary rulings with government litigants or government briefs. Interestingly, the share of rulings in this period that were decided in Chambers changed very little from the previous period. The main reason was that staff cases were a smaller share of litigation between 1975-1979 than they had been prior to 1975 and the Court was slow to refer preliminary references to chambers. That said, as shown in Figure 2 the Court's productivity increased over the period.



source: *Synopsis of the Work of the Court of Justice*. Various years.

As in the pre-1974 period, the data do not permit examination of most of our hypotheses because there is no variation on the variables of interest. For example, in the cases where the Court had discretion over Chambers assignment, no government filed a brief. Thus, all the variables constructed from

government briefs are constant (zero) across the cases with discretion in this time period. Furthermore, the Court assigned all staff cases to Chambers.

We can estimate the effects of the number of new cases, Court-AG disagreement, and the issue areas on case assignment. Table 1 presents the results of a Logit model of assignment to small chambers. The unit of analysis is a ruling by the ECJ on a legal issue in a case. Some cases have multiple legal issues, but those legal issues all share case-level characteristics (e.g., assignment to chambers). We estimate robust standard errors clustered by case to correct for this.[23] We excluded all cases where the Court was not allowed to exercise (and, in fact, did not) discretion. For example, that means we do not include infringement cases.

The results reveal some very basic structure to the case assignment process. All else equal, Chambers assignment increases slightly with the number of new cases (the odds-ratio is 1.016). Policy areas differ significantly in their assignment. The 32 rulings in several policy areas—budget, external trade (commercial policy), approximation of national laws, state-aid and taxation—were never assigned to chambers in this period. These policy areas are generally very politically sensitive at the national level and the court recognizes that. Several other policy areas (e.g., free movement of goods) are also systematically less likely to be assigned to chambers than are other more technical policy areas (e.g., agriculture). We cannot, however, easily distinguish between technical difficulty and political sensitivity interpretations of these results. Finally, the court is no less likely to use Chambers when it rules contrary to the legal merits.

[23] In this an all subsequent analyses, we have also estimated the same model using the case as the unit of analysis. All inferences drawn here are supported by these supplemental analyses.

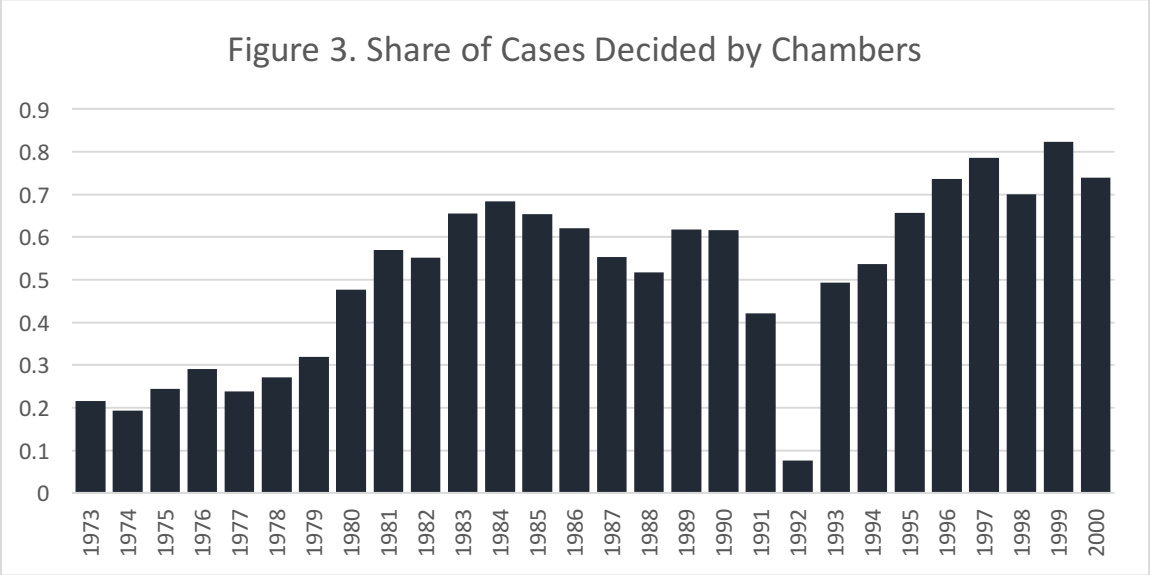
Table 1. Logit Models of Case Assignment to Chambers

(coefficient, with clustered robust standard errors reported in parentheses)

	Model 1 (1975-1979)	Model 2 (1980-1993)	Model 3 (1994-2000)
New cases	0.012**	-0.004**	0.006**
	(0.004)	(0.001)	(0.003)
Staff cases	*a*	2.50**	-
		(0.29)	
Government briefs (%)	-	-8.87**	-7.29**
		(1.13)	(2.41)
Balance of government Briefs	-	0.47**	0.89**
		(0.18)	(0.35)
Government litigant	-	-0.94**	-0.38
		(0.19)	(0.25)
Court-AG disagreement	-0.87*	-0.36**	-0.95**
	(0.50)	(0.15)	(0.29)
Court Governments disagreement	-	-0.50**	-0.37
		(0.19)	(0.30)
Policy Areas:			
Approximation of Laws	*a*	0.75*	-1.31*
		(0.42)	(0.60)
Budget	*a*	0.76*	-1.10
		(0.47)	(0.74)
Commercial	*a*	-1.47**	-0.73**
		(0.43)	(0.78)
Competition	1.30	-2.26**	-0.75
	(1.30)	(0.49)	(0.63)
Free Movement of Goods	3.00**	0.93**	0.96**
	(0.82)	(0.18)	(0.31)
Free Movement of Services	0.64	0.96**	-0.69
	(0.76)	(0.20)	(0.30)
Agriculture	0.63	0.76**	0.33
	(0.72)	(0.18)	(0.29)
Social	-	-0.81**	-0.98*
		(0.34)	(0.50)
Environment	-	*a*	0.02
			(0.53)
State Aid	*a*	*a*	-3.73**
			(1.22)
Taxation	*a*	-0.19	-1.02**
		(0.32)	(0.41)
Transport	-0.01	0.63*	0.71
	(1.34)	(0.56)	(0.57)
Constant	-3.89**	0.99**	-3.73**
	(1.17)	(0.42)	(1.22)
N	239	3,072	1442

*p<.10; **p<..05; *a*: the variable perfectly predicts no assignment to Chambers.

The reform of 1979 created significantly more discretion. Recall that the only strict stipulation was that the Court could not use Chambers to decide infringement proceedings. The Court faithfully followed that rule during this period. Otherwise, the Court generally assigned cases to Chambers so long as it did not find the case important, difficult, or particular in some way. With this new discretion, the Court dramatically increased the share of cases it ruled on through Chambers. Figure 3 shows the progression in delegation to Chambers. This was driven primarily by assignment of references for preliminary rulings to Chambers. And, if we consider the sizable increase in rulings during this period (see Figure 2), it appears the judges did more than simply reduce their effort through the division of labor.



source: *Synopsis of the Work of the Court of Justice*. Various years.

The significantly enhanced discretion in this reform allows us to examine our hypotheses about how the Court manages case assignment. Table 1 reports the results from the Logit model of case assignment for the 1979-1993 time period.[24] The results are strongly consistent with the hypotheses. As expected, staff cases were much more likely (odds ratio= 12) to be assigned to Chambers than the typical

[24] As before, we exclude types of cases where the Court was prohibited from assigning to Chambers. For this time period, that means we excluded infringement cases. The Court never assigned these cases to Chambers.

preliminary reference or annulment action. Cases were less likely to be assigned to Chambers as the number of government briefs increased, but that effect was tempered by the balance of the briefs. That is, for a given number of briefs, the chances of assignment to Chambers decreased as the number of briefs on each side equalized. Also, cases where the rulings diverged from the position taken by the balance of member-state governments or from the position favored by the Advocate General were less likely (odds ratio: 0.6) to be decided in Chambers. Cases with government litigants were less likely heard in Chambers. Finally, we find some similar patterns to earlier periods with regard to policy areas. State aid and commercial policy cases were less likely to be decided in Chambers than were cases involving agricultural policy or free movement of services. However, there were also some important shifts among policy areas. Again, we are unable to provide clear interpretations of these patterns. Finally, the number of new cases has the opposite relationship to Chambers assignment than was expected. As we see in Figure 1, this period did not see as clear and dramatic a rise in cases as we saw in the 1970s. There were several ups and downs. But we suspect the main reason for the negative relationship is the introduction of larger (6-member) chambers in the late 1980s, which was also when the number of new cases increased. The availability of large chambers would have reduced the use of small chambers just as the number of new cases was rising into the early 1990s. This would cause a negative relationship between new cases and the likelihood of assignment to small chambers.

Finally, we turn to the post-1994 period, when the Court's discretion was widened to essentially its current level. Recall that this reform removed all limitations based on the type of litigation (e.g., infringement cases) or the types of parties to case (e.g., national governments). The court's rule simply said that the court may assign any case before it to a Chambers "insofar as the difficulty of the case or particular circumstances are not such as to require the Court to decide it in plenary."[25] The result, shown in Figure 3, is that the use of Chambers rose significantly. Over 60% of the rulings by the Court after

[25] The rules of procedure did add some exceptions, but these were for new parts of the treaty and applied in only very rare circumstances.

1994 were in Chambers. This coincided with a gradual rise in number of decisions by the Court (see Figure 2).

As the results from Table 1 show, in the post-1994 period the Court's pattern of assigning cases was largely consistent with our expectations. There are three notable differences from the results for the 1979-1993 period. First, the number of new cases is positively related to assignment to Chambers. This is consistent with our explanation for the negative relationship in the previous period. There was no major innovation in the Chambers system during this time, and the number of cases grew steadily. Second, the results indicate the Court became less sensitive to the member states. We find that the presence of a government litigant no longer has a statistically significant relationship with case assignment. And, we find that the Court is no longer reluctant to use the Chambers when its ruling will disagree with the briefs filed by the member-state governments. Third, the Court became less responsive to the number of briefs filed, particularly when the briefs disproportionately favor one side or other. Finally, the court became much more sensitive to the merits of the case. Compared to the previous period, the Court was less willing to assign a case to Chambers if the Court would ultimately disagree with the position of the Advocate General on the ruling (odds ratio=0.38).

Conclusion

The results of the analysis indicate that the Court has been careful to use the Chambers when the case under consideration was relatively low salience and the legal issues were relatively straightforward and uncontentious. This suggests that the Chambers system has not been used to advance a novel agenda. The Court may have been doing that, but it was through rulings in larger formations than small Chambers. However, the member states may not see the use of Chambers as strictly benign. We found that, once the Court obtained broad discretion in 1994, the ECJ became less politically sensitive to the member states' interests. When the Court ruled in cases involving governments or ruled counter to the expressed positions of the governments, the Court gave the cases no special consideration in its assignment. As a

result, any heterogeneity in the preferences of the different chambers could have direct consequences for rulings that are salient to the member states.

This raises an important further question about the System of Chambers: how does the Court determine the assignment of cases to Judge-Rapporteurs and to particular formations within the system? Given that the Judge-Rapporteur likely has special influence over the ruling and will certainly participate in its deliberation, that assignment decision would appear important to understanding the character of ECJ rulings. But we also might expect some systematic differences in the policy preferences, expertise, and experience of judges in different chambers. Does the Court take this into account when assigning cases to Chambers? Does the Court encourage policy specialization among the Chambers? These are all intriguing questions and relevant to understanding how the System of Chambers affects ECJ rulings. We have relevant data to explore these questions and intend to address them in future research.

Turning to productivity, our results indicate that the Court has increased its output in terms of rulings. It appears the Chambers System has contributed to that. However, we would like to make more precise statements about that. For example, we intend to generate simulations, based on the actual distribution of cases heard by the Court, of the maximum and minimum number of rulings the Court could make in the years we have covered in our study. We could also compare that with simulations of what the Court would have produced had it retained earlier rules of discretion. That would give us a much clearer sense of how much any increases in rulings were due to the use of Chambers.

Looking forward, the management of the caseload at the Court remains an important issue. In 2016, the Court issues 412 judgments, received 692 new cases, and had a backlog of 872 cases. On average, cases take considerably more than a year to resolve (15 months for preliminary references; 19 months for direct actions).[26] Yet, the vast majority (88%) of rulings are made in 3- or 5-judge chambers.[27] The Court has introduced an extraordinary reform in its size, with the intention of growing to 56 judges (two for each member state). This could help with the productivity of the Court, particularly with a high

[26] *Annual Report, 2016 Judicial Activity*. 2017. Court of Justice of the European Union: Luxembourg.
[27] *Annual Report, 2016 Judicial Activity*. 2017. Court of Justice of the European Union: Luxembourg.

use of Chambers. However, as the number of judges increases, the heterogeneity across chambers in terms of preference distribution and experience likely grows. Thus, the price of greater productivity could be more variance in rulings and less coherence in the case-law of the EU. A better understanding of the distribution of cases to Judge-Rapporteurs and particular Chambers would help us evaluate whether this price is worth paying.

References

Alter, Karen J. 2001. *Establishing the supremacy of European law: The making of an international rule of law in Europe*. Oxford: Oxford University Press.

Arnull, Anthony. 2001. "Modernising the Community Courts." *Cambridge yearbook of European legal studies* 3: 37-63.

Atkins, Burton and William Zavoina. 1974. "Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit Court*." American Journal of Political Science* 18 (4): 701-711.

Brown, L. Neville and Tom Kennedy. 2000. *The Court of Justice of the European Communities*. London: Sweet and Maxwell. Chapter 4.

Carrubba, Clifford and Matthew Gabel. 2014. *International Courts and Performance of International Agreements*. New York: Cambridge University Press.

Carrubba, Clifford J., and Lacey Murrah. "Legal integration and use of the preliminary ruling process in the European Union." *International organization* 59.02 (2005): 399-418.

Edward, David. 1995. "How the Court of Justice Works." *European Law Revie* Heard, Andrew. 1991. "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal." *Canadian Journal of Political Science* XXIV: 2.6: 539.

Guillaume, Gilbert. 1990. "Le Subdivisions Internes des Jurisdictions Internaionales: Le Cas de la Cour de Justice des Communautés Européenes." *Revue Internationale de Droit Comparé*, 2: 729-736.

Grossman, Guy, Oren Gazal-Ayal, Samuel Pimental, and Jeremy Weinstein. 2016. "Descriptive representation and judicial outcomes in multiethnic societies." American Journal of Political Science 60(1): 44-69.

Hartley, Trevor. 2007. *The foundations of European Community law*. Oxford University Press, USA.

Hausegger, Lori and Stacia Haynie. 2003. "Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division." *Law and Society Review* 37 (3): 635-658.

Heard, Andrew. 1991. "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal." *Canadian Journal of Political Science* XXIV: 2.

Jacobs, Francis. 2000. "Advocates General and Judges in the European Court of Justice: Some Personal Reflections." In David O'Keeffe and Antonio Bavasso (eds), Judicial Review in European Union Law. London: Kluwer.

Kastellec, Jonathan. 2007. "Panel Composition and Judicial Compliance on the US Court of Appeals." *Journal of Law, Economics, and Organization*. 23 (2): 421-441.

Kelemen, Daniel. 2012. "The Political Foundations of Judicial Independence in the European Union." *Journal of European Public Policy* 19(1): 43-58.

Peresie, Jennifer. 2005. "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts." *Yale Law Review* 114: 1759-1790.

Plender, Richard. 1991. "Rules of Procedure in the International Court and the Euopean Court." *European Journal of International Law* 2(1): 1-30.

Sunstein, Cass, David Schkade, and Lisa Ellman. 2004. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation." *Virginia Law Review* 90: 301-354.

Pollack, Mark. 2003. *The Engines of European Integration*. New York: Oxford University Press.

Synopsis of the Work of the Court of Justice of the European Communities, various years. (Luxembourg: Office of Official Publications of the European Communities).