The Occurrence of Separate Opinions at the Federal Constitutional Court

An Analysis with a Novel Database

Caroline Elisabeth Wittig

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Summary

Courts exercising constitutional review belong to the most powerful actors in a political system. While institutions like the Supreme Court of the United States have been subject to extensive analyses, research on numerous other courts lags behind. This is due to several reasons: First, in former times courts were often not perceived as political actors. Second, there was no data available for larger studies. A further challenge in expediting research on courts is that existing theories are hardly applicable to certain court types. In this dissertation, I approach these aspects. I demonstrate how to build a court database; more precisely: a database of decisions of the German Federal Constitutional Court.

Furthermore, I develop a new theory for explaining the occurrence of separate opinions, suitable for all types of courts. Even more, I can explain why judges do not deviate or why they choose to deliver a full dissent, a partial dissent, or a concurrence. I argue that judges are highly determined by their expectations regarding their career after retiring from the court. If they plan to remain in the law community, they are reluctant to disclose their different opinion. By contrast, if they retire fully or turn to another field they will be less keen to refrain from public deviation.

Employing data from the new database, I apply the theory to the German Federal Constitutional Court. I can show that in the vast majority of cases the judges do not write separate opinions. However, when deviating they deliver considerably more full dissents than partial dissents or concurrences. The use of partial dissents and concurrences does not differ significantly. A further crucial finding is that it is less important whether a topic is controversial. It is rather the

amount of questions a case raises that causes a potential for disagreement: The more issues the judges have to address, the more issues they can disagree on.

Finally, I can prove that the judges' post-court plans determine their behavior: Judges leaving the law community are more likely to deliver separate opinions. In addition, the more the time of retiring from the court approaches, the more divergent is the behavior between those judges remaining in jurisdiction or jurisprudence and those leaving it.

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I will remain thankful to all the named an unnamed people who helped me succeed and close with a quote by William Shakespeare: "Farewell, fair cruelty."

Caroline Wittig, Mannheim, July 2016

[1] Dear Steffen, please note that I deviated from the alphabetical order, so you can be at least once the first one on a list.

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CHAPTER 1

Introduction

> [I]t is not the individual juryman or councillor or member of the assembly in whom authority rests, but the court, the council and the people, while each of the individuals named (I mean the councillor, the members of assembly and the juryman) is a part of those bodies. (Aristotle, Politics, III, 6; 1282a)[a]

[a] Aristotle (2007)

Approximately 2300 years ago, Aristotle identified three main columns a working polity rests upon: the court, the council, and the people. More than two millenniums later, this observation is still valid. Democracies commonly perceived as successful employ these exact parameters: citizens exert their power through elections; a council[1] governs the polity; and courts, mounting guard on both, the people and the elected council, decide disputes between them. In doing so, courts guide the communal life. Therefore, citizens, parliaments, and courts

[1] Nowadays an elected body

can be said to be the cornerstones of political systems – in Ancient Greece as well as in the 21st century.

This dissertation is concerned with one of these key institutions, namely courts. It aims at explaining why and under what conditions judges deliver separate opinions. While in some cases judges publish their individual opinion subsequent to the main ruling - be it concurring or dissenting - in other instances, they forego this opportunity. The question why and when they choose the different options at their disposal is investigated for a court that possess one of the strongest positions in a political system we know today: the German *Bundesverfassungsgericht* (Federal Constitutional Court, hereinafter FCC).

Prior to addressing separate opinions, however, three questions have to be answered: First, why is it worth studying courts? Even more, why is it worth studying the FCC? Second, why are separate opinions of special interest given that they are not even a binding part of a court's decision? Third, which means need to be employed in order to conduct thorough analyses.

1.1 Courts as Political Actors

The idea of a court being an indispensable institution for cohabitation of a large group of people has endured since Aristotle's Politics, written around 300 before Christ. In the ancient Roman empire through the Middle Ages to today, every society has relied on an actor that is responsible for deciding verdicts. Even in dictatorships courts are used to exercise power. This shows that courts are, indeed, an integral part of a political system. If aiming at learning how a political system works, which actors are influential, why, and how, it is necessary to enhance the understanding of citizens, legislature, and executive, but also and specifically of the judiciary.

This is why various scholars have engaged in research on judicial politics. In the United States courts have been subject of interest for political scientists since the 1950s (e.g. Dahl 1957). Over the past decades, other regions such as South America or Europe have started to pay more attention to courts as political actors, as well. Nevertheless, given that a considerable amount of research has been conducted, for example, on the US Supreme Court and on courts in South America, investigating a further court will add substantial benefit to science: First, most analyses have focused on Supreme Courts. Less attention, however, has been paid to constitutional courts of the Kelsenian type. This is astonishing insofar as during the third wave of democratization (Huntington 1993) many courts of this nature have been established, modeled on the FCC. Nevertheless,

research on them has not reached the level of that on the US Supreme Court and similar courts.

Therefore, it is necessary to gain knowledge on Kelsenian constitutional courts. Since the FCC has served as blue print for many courts throughout the world, investigating this particular court does not only offer insights on this single institution. It rather provides knowledge on many other courts, as well. From a more specific point of view, it is crucial to analyze the FCC's role within its political system. While overseeing all state authority, be it legislature, executive, or judiciary, the Court itself cannot be controlled. Even more, it has formed a tradition of clearly formulating directives for the legislator how to author a new law that meets constitutional requirements. Thus, some have raised the question if the FCC is a surrogate legislator (e.g. Scholz 1999). Given these extensive authorities, it is essential to learn more about this key actor in the German political system as well as in society.

Moreover, the FCC's decisions can unfold influence that exceeds Germany. During the Euro Crisis, beginning in 2010, the countries of the Euro Zone were planning an organization, the European Stability Mechanism (ESM), that would provide loans and guarantees to financially collapsing member states and in doing so prevent them from leaving the Euro Zone. In Germany, being the largest share holder of this bailout fund, opposition arouse. Around 12,000 citizens filed a constitutional complaint accompanied by a dispute between high state organs, challenging the *Bundestag's* law on joining this organization. With Germany opting out of the fund, however, the Euro Zone would clash, many actors and analysts argued. Moreover, a large economic entity like the Euro Zone falling apart would negatively impact the world economy to a huge extent. The decision of the FCC whether to uphold that law can therefore be called highly influential to the world economy. "Americans had spent months speculating breathlessly how their own Supreme Court might vote on a constitutional challenge to [...] healthcare reform" Collings (2015, xxix) describes the situation. "[B]ut the rest of the world turned its attention to [...] the German Federal Constitutional Court; and [...] a constitutional challenge to the Bundestag's approval of the European Stability mechanisms (ESM)" (2015, xxix). When the FCC rendered its decision to uphold the law, the stock markets rose, and two weeks after the Court's decision the treaty establishing the ESM came into force. This incident exemplifies that the FCC possesses not only domestically a strong position. Its rulings can also have tremendous international impact.

From what has been said so far, it is obvious that studying courts in general and specifically the FCC is a necessity. However, as I am aiming at investigating

separate opinions, it needs to be discussed in what way this contributes to gaining relevant knowledge on courts in general and on the FCC in particular.

1.2 Studying Separate Opinions

Separate opinions are a tool for judges to articulate arguments and thoughts they perceive as crucial but did not find their way into the decision itself. Subsequent to the main body of the decision, judges can express their disagreement with the result or with certain rationales and outline their point of view. Likewise, they can, although agreeing with all parts of the judgment, add further arguments, which they were not able to convince their colleagues of. Separate opinions will be portrayed in more detail in Chapter 3. But what are the benefits of studying them? Drawing on Aristotle, it is the courts as such that possess authority rather than single jurymen. However, "each of the individuals... is a part of those bodies" (Aristotle, Politics, III, 6; 1282a).[2] Hence, while the power rests in the court as a single actor delivering one decision, it is a group of people that generates this result. Consequently, the power feeds on the sum of the judges' individual assessments of a case. Thus, if it is important to enhance the understanding of how and why a court exerts its power, it is necessary to study the parts that add up to the final result. In other words: We have to analyze intra-court processes and dynamics in order to gain knowledge on why a decision was cast in a particular way.

Obviously, it is the judges' voting behavior that is the key element of such an undertaking. At the FCC, however, research faces one crucial challenge: We barely have any information about the judges' voting behavior. Unlike in the United States, in Germany the judges do not reveal their individual votes. Thus, the only individualized information available are separate opinions as they are singed by their author(s). It follows that studying separate opinions at the FCC is inevitable in order to understand this powerful actor.

Especially in the United States, the high value of analyzing individual votes of judges has been recognized for a long time. Ever since, separate opinions have been extensively studied. In other countries, research on separate opinions has been conducted, as well, and different theories have been employed to explain their occurrence. This will be demonstrated in Chapter 3. However, the existing theories of judicial decision-making all suffer from various deficiencies, especially when applied to separate opinions. Moreover, there are almost no studies on the FCC. The following sections will show this in more detail.

[2]Translation by Rackham (2007)

1.3 The Necessity of New Approaches

Judicial decision-making has been examined by a large variety of researchers. Legal scholars, political scientists, as well as psychologists and philosophers have endeavored to examine the behavior of judges from different angles with different approaches and explanations. As a result, manifold theories have been established, some of them even contradicting. However, although addressing valid points, all of them fall short when it comes to explaining separate opinions. The logic of some theories does not even allow for separate opinions. Other frameworks only account for certain aspects of a judge's decision-making while neglecting that there may be various groups of influencing parameters. Also, applying these approaches to separate opinions shows that they only address why separate opinions do occur under certain circumstances, leaving aside to elucidate those cases in which no separate opinion can be observed. Given that at many courts the number of separate opinions is low, these theories are unable to provide sufficient explanations. Moreover, they have been mainly developed for courts in common law jurisdictions. Therefore, they cannot account for the specifics of courts from other systems and other legal traditions. As procedural constraints, perceptions, costs, and benefits of judicial decision-making can vary across systems, explaining the judges' behavior requires a broader basis, which allows for more generalization.

In the following, I will expound the main theories of judicial decision-making and demonstrate in detail that they contain multiple deficiencies when applying them to explaining separate opinions.

1.3.1 Theories of Judicial Decision-Making

Research on judicial decision-making can be differentiated into three main theoretical strands. First, at the heart of the so-called legal model is the notion that judges find the solution to a legal question by neutrally applying the law through interpretive methods. Second, by contrast, the attitudinal model assumes that judges decide according to personal preferences. Third, strategic approaches explain the judges' decisions by arguing that they will factor in other actors' behavior in order to reach the best possible decision for them, acknowledging that the personally desired perfect outcome is unachievable due to others' preferences and potential actions.

Legal Model

The legal model poses that judges decide predominantly by means of the law and focuses on the use of jurisprudential methods. Put in a simple formula, one can describe the baseline of the legal model as "Rules + Facts = Decisions" (Dyevre 2008, 27). When faced with a constitutional question the judges will look into the constitution, they will employ standard methods of interpretation, and will finally find a solution for the legal problem at hand. An example for a method that is common to many legal systems is that of investigating the framers' original intent. The answer to the question what the authors of the constitution meant and what they aimed for when creating this particular rule is supposed to elucidate how the current legal problem should be solved. This shows that the underlying assumption of the legal model is that "there is a set of fundamental values and neutral principles that can be inferred from the overall spirit of the Constitution" (Pacelle, Curry, and Marshall 2011, 30) and that a constitution contains "enduring principles, even if its provisions do not provide specific answers to a particular case" (Pacelle, Curry, and Marshall 2011, 31). Thus, from the perspective of the legal model's proponents, it is not possible for judges to decide preference-based. The law will constrain these preferences, imposing a solution on the judges. Instead, it is the law and the interpretation through "judicial handcraft" (Isensee 1996, 1091, own translation) that drives a judge's decision.

Attitudinal Model

In strong contrast to the legal model stands one of the most widespread theories in judicial politics research, the attitudinal model. Developed for the US Supreme Court, it originates from the early work of Pritchett (1963), Schubert (1965), and Murphy (1973) and bases on the assumption that judges are predetermined by their attitudes. They have ideas and preferences according to which they decide. Several scholars have further developed this approach to explaining judicial decision-making over the past decades (Rohde and Spaeth 1976; Segal and Cover 1989; Segal and Spaeth 1993, 2002). Arguing that Supreme Court justices are at the pinnacle of their career, have lifetime tenure, and do not have to be responsive to any constituency, they assume that the judges are unconstrained and can freely pursue their interests when ruling. They show that the judges' decisions are driven more by what Rohde and Spaeth call "a set of interrelated beliefs about at least one object and the situation in which it is encountered" (1976, 76) than by legal considerations. Judges are assumed to have personal opinions and ideas on how the world ought to be. Preferences as to which policy serves these

perceptions best guide the judicial decision-making process and determine how a judge answers the crucial questions. In other words:

> This model holds that the Supreme Court decides disputes in the light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal. (Segal and Spaeth 2002, 86)

This means that a judge evaluates her personal position on a certain question and from that she derives the result. Therefore, in the attitudinal model the judge is perceived as a sincerely behaving actor. Nevertheless, attitudinalists have to acknowledge that interpretive methods are cited in court rulings. From their standpoint, however, methods as purported by the legal model are only a cloak in which judges pursue their personal goals. Given that judges at high courts "lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction" (Segal and Spaeth 1993, 69) they have no incentive to not follow their preferences. Consequently, attitudinalists argue that by citing standard methods of interpretation in a ruling, judges cover that their attitudes drive the decision instead of making substantial use of these methods.

One can differentiate between two strands in the development of the attitudinal model. One is a rather psychological approach focusing on preexisting personal attitudes imprinting the judges' behavior. The other one assumes that judges are policy seekers: A judge has to decide the way she does because her personal policy preferences demand it.

The roots of the psychological approach can be found in Schubert's "The Judicial Mind" (1965). In this work Schubert develops what Hammond, Bonneau, and Sheehan describe as "attitude-activation version of the attitudinal model" (2005, 41). He assumes judges to have preexisting personal values and perceptions that constitute the basis for their decision-making. Those attitudes are activated when exposed to certain stimuli, that is the "questions to which individuals respond" (Schubert 1965, 27). Positioning judges based on their ideology (i.e. on a scale ranging from liberal via moderate to conservative) and the case according to its characteristics in the same ideological space, Schubert argues that depending on how far away a judge is located from the case she will either uphold the decision or overturn it.

While the psychological take on the attitudinal model is concerned with pre-existing attitudes, it is actual policy goals of the judges that are key to another approach of the attitudinal model. For Rohde and Spaeth as one of the first proponents of this idea

> the primary goals of Supreme Court justices in the decision-making process are *policy goals*. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible to those policy preferences. (1976, 72, emphasis in the original)

What is common to both understandings of the attitudinal model is that judges employ sincere behavior when deciding on a case. According to the model's proponents, judges either follow their preexisting attitudes that have been activated by case stimuli. Or they have certain preferred policy goals the implementation of which they have in mind when deciding on a case.

Unlike the attitudinal model, the strategic model explains judicial decision-making by means of strategic rather then sincere behavior as will be outlined in the next section.

Strategic Model

Key assumption of this model is that judges are rational actors who pursue their goals strategically (e.g. Murphy 1973; Epstein and Knight 1998; Hammond, Bonneau, and Sheehan 2005). It turns from looking at the individual judge only to taking into account the fact that judicial decision-making takes place in an environment in which other players act and pursue their goals, as well. Thus, in order to successfully establish a policy in their interest, judges have to regard other actors' thoughts, goals, and behavior. Epstein and Knight being among the strongest proponents of the strategic model assume that judges are strategic actors who realize that their ability to achieve their goals depends on a consideration of the "preferences of other actors, the choices they expect others to make, and the institutional context in which they act" (1998, 10).

This means that they cannot always pursue their ideal policy position; being constrained by other actors' preferences they can only maximize it to a certain extent. They may have to compromise in order to achieve the best possible result. Thus, unlike proposed in the attitudinal model, judges acting strategically will not make their decision solely based on their desired outcome and independent of their environment. They will rather be guided by strategic considerations regarding how to maximize their utility.

In this context, two levels of strategic behavior exist: First, interaction among the judges within the panel and, second, interaction of the court as a whole with outside actors, namely the other branches of government or society. The intra-court approach of strategic models argues that judges decide strategically instead

of sincerely as posited by the attitudinal model because they are constrained by other judges. As there are diverging ideas on the panel but only one outcome – at least only one that is binding – the judges will bargain over a case in order to deliver a ruling that is as close to their own ideal result as possible (e.g. Maltzman, Spriggs, and Wahlbeck 2000; Hammond, Bonneau, and Sheehan 2005). This means, however, that they have to compromise. As a result, they have to "move from their sincere preferences in response to colleagues" (Pacelle, Curry, and Marshall 2011, 40).

The second type of the strategic model, commonly referred to as the separation of powers model, focuses on the court on the aggregate level rather than on the individual judge. It explains judicial decision making in view of the fact that it is governmental actors who have to comply with the court's rulings. In order to establish a new policy, the court's decision alone is not sufficient. It requires further actions by the legislative or the executive branch. Otherwise, the policy exhibited in the decision will not be put to use since the court itself cannot enforce the demands of its rulings. Thus, the judges need to take into consideration the governmental actors' behavior and preferences.

As a further constraint Epstein and Knight identify that judges

> operate within the greater social and political context of the society as a whole, they need to be attentive to the informal norms that reflect dominant social beliefs about the rule of law in general and the role of the [...] Court in particular. (1998, 138)

Consequently, proponents of the strategic model argue that in order to maintain the court's legitimacy, judges will find a solution that answers to the norms and beliefs of the public. By supporting the court, the public vests power in it as refraining from implementing a decision is costly for example for the legislator. By contrast, if the court lacks trust it loses its main instrument of enforcement. Thus, when ruling on a case judges will take into consideration what is acceptable for the society. Therefore, they will act strategically as to satisfying the public at least to a certain extent.

Thus, the separation of powers model argues that judges consider the behavior of crucial actors, namely the public, the legislature, and the government when ruling. They balance out these actors' preferences and align their decision accordingly in order to achieve the best possible outcome.

However, when looking at these theories, there are several reasons why they fall short, especially with regard to explaining the emergence of separate opinions. In the following, these flaws will be pointed out.

1.3.2 Deficiencies of the Theories

The models delineated above provide different approaches to explaining judicial decision-making. However, none of them is capable of covering the entire realm of aspects that come into play when judges decide on a case. This holds true for the process of judging in general and even more for separate opinions. As depicted above, the legal model assumes that it is solely the law and its application that lead to a correct final outcome. However, if rules together with facts generated an unequivocal legal outcome just as one and one undoubtedly sum up to two, it would be impossible to see judges arguing in favor of diverging results. If the judges have binding rules, that is interpretive methods, and apply them to the facts of the case they should all come to the same solution. According to this logic there is no room for differing points of view on a legal problem. Reality proves, however, that not all decisions are unanimous and that dissents and concurrences do exist. Therefore, the legal model cannot provide profound and consistent explanations for non-unanimous voting results and separate opinions. Over the twentieth century, scholars have begun to question the legal model (cf. Llewellyn 1930; Segal and Spaeth 1993). Also, other research traditions, today even legal scholars, admit that there is considerable room for judicial discretion (cf. Schlink 2007). The language of the law is not unambiguous, and interpretive methods are not predetermined fixed rules the application of which offers only one clear-cut solution. Furthermore, the judges' personal preferences are unlikely to disappear entirely when deciding a case. Therefore, the legal model is not only unable to elucidate why and when disagreement emerges. Even more, the existence of separate opinions and specifically those opinions that criticize either the wrong use of methods of interpretation or a lack thereof prove the pure legal model wrong.

Nevertheless, legal aspects do play a role. Although judges have considerable leeway, they have to rule on a legal basis, which provides a framework for their arguments – in the case of constitutional courts obviously the constitution. They have to decide under the terms of the constitution and have to base their rationale on its logic and fundamental concepts. Even more, a constitution sets certain boundaries. A bold example is a ban of the death penalty: If a constitution prohibits death penalty, there is no room for discretion for the judges. Under this condition, as soon as a law allows for capital punishment the judges have to declare it unconstitutional. This may be an extreme case but it illustrates that – contrary to the assumptions of other theories – the law as such does play a role in judicial decision-making by prohibiting the judges from purely ruling as they personally wish to. As a consequence, leaving the influence of law entirely aside does not give a full picture of how judges decide. Rather, "precedent and legal

factors play a role but are part of a broader calculus that the court and individual justices must undertake" (Pacelle, Curry, and Marshall 2011, 32).

Similar to the legal model, the attitudinal model also falls short in comprehensively explaining judicial decision-making. Judges do have a personal background that is unlikely to disappear when ruling on a case. However, whereas the legal model neglects a judge's individual perspective and the ambiguity of language, the attitudinal model overly stresses the personal factor. By focusing solely on the judges' personal preferences it leaves aside a wide array of potential further influences that may contribute to a decision. Therefore, it is criticized by other scholars as being too simplistic and unable to account for other factors such as the environment in which a judge operates, institutional constraints, or the impact of law (Pacelle, Curry, and Marshall 2011; Gillman and Clayton 1999; Baum 1997).

In addition, it is quite obvious that the attitudinal model has been designed for a special type of court, namely the US Supreme Court, and can therefore not serve as a generally valid explanation. For the attitudinal model highly relevant, it bases on the assumption that judges are unconstrained actors because they do not strive for further careers and are not accountable to any kind of electorate or other political or non-political players. However, in many judicial systems judges do not have lifetime tenure, for example in Australia, Canada, and Germany. Thus, they do have to consider potential effects for a post-court career. Also, the presumption that judges at the US Supreme Court have reached the peak of their career does not necessarily pertain to all judicial systems. As in countries with a constitutional court several high courts exist, it would be a questionable conjecture to define one court as most important. But even arguing that a constitutional court is the most prestigious one in the respective judiciary would not entail that serving at another high court means being on a lower career level. Both kinds of judges – those on high courts as well as constitutional court judges – are often equal in rank such as in Romania or Germany. In addition, there are judges who serve at a constitutional court ex officio, for example all former French presidents in case of the Conseil Constitutionnel. Moreover, there have been judges who came into an even higher office after their term at the court like Roman Herzog, becoming Federal President of Germany after serving as a judge at the Federal Constitutional Court. Therefore, one can hardly argue that judges at high courts are undoubtedly at the peak of their career. Furthermore, other institutional settings should be considered to influence the characteristics of judges such as the appointment processes or the degree of politicization (Smyth 2003). If they differ from those proposed in the attitudinal model, the explanations offered by this approach are unlikely to hold.

Moreover, besides separate opinions one can also observe unanimous rulings. If, however, the decision-making process were exclusively based on attitudes, this would be highly unlikely as unanimity would be extremely hard to achieve given the large variety of possible standpoints and backgrounds. All arguments mentioned above demonstrate that the attitudinal model contains valid points but cannot provide a comprehensive explanation for separate opinions and for judicial decision-making in general.

Having depicted the shortcomings of the legal and the attitudinal model it has to be addressed how sound strategic models can explain decision-making at courts including the existence of separate opinions. First, as according to strategic approaches a judge's "success or failure depends on the preferences of other actors and the actions she expects them to take," (Epstein and Knight 1998, 12) the model requires the actors to have a high degree of information on the standpoints and behaviors of the other actors involved. This is quite difficult to achieve. The composition of the court changes. Whereas the effect may differ between courts with life tenure and those with fixed terms, gaining a large amount of knowledge on how the interaction between the judges will happen is in both cases nearly impossible. The fluctuation at the court diminishes the chances to gain information. A new member will change the dynamics within the panel, which hampers anticipating the individual judges' behavior. Similarly, changing majorities due to elections or even changes in political perceptions towards specific topics make it difficult for a court to precisely estimate a political actor's position. Nevertheless, leaving other actors completely aside when examining a court's behavior would fall short, too, since the court is not an insulated institution in the political system and in society.

Besides those weaknesses it should be noted that a court's interaction with other players such as the legislature is only of minor importance for understanding the emergence of separate opinions, which are the focus of this work. External actors are only affected by the binding part of a ruling, meaning the result of the majority opinion. If, for example, the court declares a law void, the legislature has to react by passing a new law (or refrain intentionally from it). What matters in this scenario is the request of the majority opinion as it wants the legislator to implement the respective decision in the desired manner. Separate opinions, by contrast, do not have an immediate impact since they cannot influence directly other actors' behavior. Deciding whether to write a separate opinion or not in the light of the question how other actors will react is therefore not plausible. Moreover, the model does not include further restrictions the judges face: Neither does it address the fact that judges have a limited amount of time, which can

influence their inclination to writing separate opinions nor does it account for the confinements the law poses.

Just as the attitudinal model, strategic models neglect that judges are not entirely free when deciding on a case. There are certain regulations, for example procedural rules, that restrict them. Different procedures, for instance, provide judges with different tools to execute their influence. If examining a law directly judges can overturn it and in doing so immediately influence the law in force. Moreover, they can formulate precisely what a law complying with the constitution would look like. By contrast, deciding on whether a decision of a lower court violates the constitution or resolving disputes between political actors leads to answering one specific question with less extensive implications. Thus, the extent to which judges can act strategically – and therefore their incentives – is limited by the specifics of the case. Moreover, it is questionable not to take into account the fact that judges have to rule on the basis of statutes. In addition, proponents of the strategic models base their assumptions mainly on the situation at the US Supreme Court. However, when looking at other courts certain prerequisites present at the US Supreme Court do not exist. For example, judges without life tenure face other constraints than those with lifetime appointments. Therefore, they are not only constrained by other political actors, the society, or their colleagues. They may also be motivated by their self-perception as a legal scholar or by their image among others since they have a post-court career. This example shows that even if assuming that judges act strategically, fully relying on the "American" strategic model is insufficient.

What has been discussed above leads to various conclusions: In summary it can be stated that the existing theories of judicial decision making show several deficits as they cover only certain circumstances and aspects of judicial behavior. The legal model disregards the considerable leeway interpretive methods imply. Attitudinalists focus solely on personal preferences leaving aside that there are external constraints that curtail the judges' discretionary power. Strategic approaches base on somewhat unrealistic assumptions and alike the attitudinal model they do not account for the influence of law.

Over the past years, scholars have become aware of these shortcomings and have started attempts to build theories that integrate the key models of judicial decision making. Dyevre (2010), for example, identifies aspects that should be included in a "General Theory of Judicial Behavior" refraining from suggesting a concrete framework, though. Also, Songer and Haire (1992) try to unify the characteristics of the different models. They include various decisive variables that studies on the respective models build on. However, they do not provide a concise theory of how these aspects relate to each other. In addition, their analysis

focuses only on a single issue area arguing that their approach does not lead to meaningful results if all possible subject-matters were to be included. Therefore, the explanatory power of their approach is limited. Other scholars, although trying to unify different theories, do not provide approaches that would be able to be transferred to other judicial systems (e.g. Pacelle, Curry, and Marshall 2011). Epstein, Landes, and Posner (2013) aim for a broader understanding of judicial decision-making by drawing parallels to labor market theories. However, although covering a wide array of aspects their approach is still too narrow to be directly applied to all types of courts.

To an even larger extent the common theories of judicial decision-making fall short with regard to explaining specifically the occurrence of separate opinions. What would be the implications if the aforementioned models held true? First, following the rationale of the legal model, separate opinions should be non-existent. Employing generally valid interpretive methods for applying legal norms to a case should lead to one correct outcome. Assuming that judges strive for nothing else than this true result, the pure legal model does not leave room for separate opinions. This, however, runs counter to empirical observations.

Second, reviewing the attitudinal model with regard to separate opinions leads to the opposite result from the legal model. Every judge has her individual predisposition and preferences. Thus, sentiments within the panel should be quite heterogeneous. If judges decide on the grounds of these diverging preferences, separate opinions should be omnipresent as it is very unlikely to be able to reconcile all standpoints. Reality proves though that at several courts the percentage of separate opinions is low. Therefore, the attitudinal model falls short as well when explaining separate opinions.

Third, what would the situation regarding separate opinions look like when employing the strategic models? If intra-court considerations were the decisive factor, there should be a low dissent rate. According to this approach the judges unite in order to push through the best possible outcome. Aiming at working together should decrease the incentives to write a separate opinion.

By contrast, applying the separation of powers approach leads to expecting a high dissent rate. If a judge disapproves the majority opinion, influencing the political arena and society is only possible through separate opinions. Also, they may weaken the persuasive power of the majority opinion. Given that in a group of judges diverging views are very likely, separate opinions are very likely.

Thus, these theories lead to contradicting results. They either cannot explain separate opinions at all, or they account for only one specific phenomenon – high dissent rates or low dissent rates. In doing so, they leave aside investigating why a judge would refrain from delivering a dissent (or a concurrence) when

being in odds with the majority. Likewise, theories suggesting low dissent rates do not offer explanations for dissent-prone courts. Given that the frequency of separate opinions varies within and across courts those theories are insufficient for understanding judicial behavior with regards to separate opinions. In addition, the influence of a judge's workload in her inclination to delivering separate opinions is underrepresented.

Recently, however, Epstein, Landes, and Posner (2013) have offered an attempt to explain the absence of separate opinions, building on premises that do not hold true for all courts, though. Also, several studies focus on specific issue areas only (e.g. Brace and Hall 1993), which does not provide a complete picture of a court's work. Moreover, the literature does not take into consideration that there are different types of separate opinions. Concurrences, that is those opinions that are in "agreement with the conclusion of the majority but may state different reasons why such conclusion is reached" (Gifis 2010, CONCUR), are likely to require different circumstances to emerge than dissents and partial dissents. They are defined as opinions that

> disagree... with the disposition made of the case by the court, the facts or law on the basis of which the court arrived at its decision, and/or the principles of law announced by the court in deciding the case. Opinions may also be written which express a dissent "in part". (Gifis 2010, DISSENTING OPINION)

This demonstrates that understanding the occurrence of dissents and concurrences requires a new, comprehensive explanatory framework.

Having shown that a new theory is indispensable for explaining the occurrence of separate opinion, it is astonishing that no one has approached this issue until now.

1.4 A Novel Study

Judicial politics has been a dormant field in Germany. In the 1960s and 1970s a few scientists began delving into the idea of perceiving the FCC as political actor and to analyze the court from a political and sociological rather than from a legal perspective (Werle 1977; Dreier 1975; Damm 1972; Rottleuthner 1971, 1970; Lenk 1970; Bendix 1968; Baade 1961). Afterwards, the discourse abated. Only Landfried (1992; 1985; 1984) continued looking at the FCC from a different than the jurisprudential angle. From the mid 2000s on, however, scholars returned to perceiving the FCC as an important subject of research (e.g. van Ooyen and Möllers 2015; Kranenpohl 2010; Flick 2009; Hönnige and Gschwend 2010; Kneip

2008; Hönnige 2007; Kau 2007; Landfried 2006; Hönnige 2006; Lepsius 2005; Vanberg 2005). Petersen summarized this situation asking "Does jurisprudence need an empirical turnaround?" (2010, own translation). Many of the last-named authors would answer this question with a clear "yes". However, for conducting large quantitative studies they did not have the necessary data at their disposal. Unlike research on the US Supreme Court, which can draw upon an almost inexhaustible source for analyses, namely the Supreme Court Database, no such collection was available for the FCC.

This is why in 2011 a research project funded by the German National Science Foundation (DFG) started conceptualizing and building a database for decisions of the FCC. It enables scientists to conduct large scale research on the FCC. This dissertation presents the results of this endeavor and employs the collected data. Spanning from 1972 to 2010, the Constitutional Court Database (hereinafter CCDB) facilitates analyses with data that go way beyond case studies, and it allows to embed the examinations in a broader context. Moreover, as the data generating process is crucial for the quality of a database and therefore for all analyses that make use of these data, the dissertation will show how to build and implement such a database.

From what has been discussed above it follows that this dissertation proceeds in two steps. First, I demonstrate how to design and implement a database that provides a large array of information in order to conduct large-N analyses. Second, I will answer the substantial question why judges write separate opinions. Only basing such studies on a broader quantitative foundation can provide a full picture that goes beyond the rather narrow examinations conducted so far. Thus, the results will provide new insights and knowledge in the field of judicial politics.

1.5 Innovations

The previous sections of this chapter have shown that the dissertation offers three key innovations. First, it depicts how to build a comprehensive database on court decisions that goes considerably beyond the blueprint for such a collection of court data, the United States Supreme Court Database (Spaeth et al. 2014). In doing so, the dissertation illustrates how to translate a decision into variables and to account in detail for the specifics of a court, in particular the FCC. The data collected and stored in this database will enable future researchers to engage in analyses and broaden the knowledge of the FCC.

Second, for the first time, the dissertation develops a theoretical framework that is capable of being applied to all types of courts. Drawing on social psychology for

understanding judicial behavior, the theory approaches explanations of judicial decision-making one step prior to the common theories of judicial decision-making. By looking at reasons for a judge's motives rather than assuming specific inducements, the theory is able to forego the aforementioned deficiencies.

Third, this dissertation sheds light on inner-court processes of the FCC in a large-N study. More precisely, it answers the question under what conditions judges at the FCC deliver separate opinions. Due to a lack of data, such analyses have not been conducted so far. The new database, however, has closed this gap. By explaining why judges act the way they act, the dissertation provides a crucial contribution to understanding one of the most important actors in the German political system and society.

The dissertation will proceed as follows: After this first Chapter, Chapter 2 will show how to build a court database, namely the CCDB. Next, the focus will turn to separate opinions in Chapter 3. It discusses and defines the term, sketches the developments in the use of separate opinions, and provides an overview on the existing literature. In Chapter 4 I will present a novel theory, which will be tested in Chapter 5 by using data from the CCDB. I will conclude in Chapter 6 with summarizing the main contributions of this work and an outlook on future research.

CHAPTER 2

The Constitutional Court Database

In Europe and in particular in Germany there is so far no data except for case studies or small data sets with very limited content (e.g. Hönnige 2007; Sieberer 2006; Vanberg 2005; Landfried 1994). However, as research with data from the Supreme Court Database has proven, large-N studies contribute significantly to understanding the role of a court in the political system and the society (e.g. Epstein, Landes, and Posner 2013; Segal and Spaeth 2002; Wahlbeck 1997; Norpoth et al. 1994). Therefore, catching up with this standard in order to be able to analyze the role of courts in other political systems requires an extensive process of data collection. The Constitutional Court Database (CCDB) presented here has undertaken this ambitious endeavor for the German Federal Constitutional Court (FCC).

2.1 Premises and Conceptual Development

What are the guidelines for developing a novel database? The Supreme Court Database is undoubtedly a role model and the gold standard in this context. However, since the political role, procedural rules, or public perception vary across legal and jurisdictional systems, it is impossible to model a new database exactly on the US Supreme Court Database. This leads to significant challenges as, obviously, recreating an already existing and successful system would make

building a new construct easier. However, the distinct institutional features also provide new chances. They make it possible to go even beyond the capabilities of the US Supreme Court Database.

Designing a database for a new type of court is a central novelty of this project. Finding answers to challenges emerging from complex structures and the specific role of the FCC is therefore a crucial achievement. By using this database it becomes possible for the first time to conduct large-scale research on a Kelsenian court in general and in particular on the FCC. The database enables researchers to analyze intra-court processes, the Court's role at the intersection of the judiciary, society, and politics as well as legal aspects of a case. The other highly innovative aspect of the CCDB is its three-layer design. The database is not limited to court decisions. While the SCDB contains data on the cases only, the CCDB draws a line from the Court to other political actors and to society. It connects the decisions on laws directly to the legislative process. Moreover, it includes the political context through adding ideological positions of parties and other politically relevant data. Finally, it also integrates the general environment the court is situated in by attaching information about social, economic, and other aspects.

From this it follows that there is a enormous variety of research questions that can be answered by means of the collected data. It even exceeds the scope of the most elaborate judicial database, the US Supreme Court Database. On the one hand, similar to the American case, the new database enables scientists to examine intra-court dynamics. On the other hand it additionally connects the work of the Court to that of other political actors accounting for the fact that the Court is not an isolated organization but operates in a certain political and social context.

This dissertation focuses on that part of the database that consists of data from court decisions. Elaborating more on the content of the other two layers of the database and the respective links would go beyond the scope of this work. However, when designing the section on the decisions these components were taken into consideration. Otherwise one would jeopardize the enterprise of building a well functioning, comprehensive database with three connected layers.[1]

The following sections are concerned with the database and will delineate how to build a comprehensive collection of data that goes beyond single data sets limited to only few specific issues of a case. Furthermore, they will demonstrate that besides formal aspects such as dates or the participating parties the database goes considerably into detail. It covers information on the legal content of a case

[1] For matters of verbal simplicity mentioning "the database" refers hereinafter to that part of the database that is concerned with the FCC decisions.

by accounting for the formal and jurisprudential means the court employs. Therefore, the database provides an ample picture of the Court's output. This present section will discuss the premises that lay the ground for designing the CCDB. It delineates the prerequisites, challenges, and restrictions faced when conceptualizing this database and presents the respective fundamental decisions pointing the way ahead. Subsequently, Section 2.2 describes the process of translating a court decision from plain text into meaningful variables. Section 2.3 introduces the different levels of the database and the particular variables accompanied by concluding remarks.

2.1.1 Conceptualization

Conceptualizing a database from scratch requires several preliminary considerations. First, it needs to be defined what the project is aiming at. Another central question is the starting point, meaning what should be included in the database, what information is available already, and what other data has to be collected. A further necessity is an analysis of other given conditions. Depending on the information the database is supposed to contain, what are possible structural limitations or requirements that have to be considered in the designing process? How to store the data is another question to account for. Finally, the collection procedure has to be defined. This section 2.1 addresses these issues. First, it defines the purpose of the database followed by examining what data already exists. The section continues by highlighting structural demands as well as the technical realization. It concludes with discussing methods to employ for the data collection process.

2.1.2 Purpose

What is the purpose of the Constitutional Court Database? This is the key question prior to its conceptualization. In a first step it is necessary to define the audience for such a tool. The CCDB is meant to address different types of researchers and legal practitioners as well as a broader public. Stemming from the area of social sciences the project aims at serving the respective researchers. In other words: Providing data for answering research questions in the social sciences is the first goal of this database. Thus, when conceptualizing it one has to meet the corresponding demands. In order to be useful for the entire array of research it is necessary to account for both, qualitative and quantitative approaches. Qualitative research is interested in more concrete and illustrative information such as specific rulings for conducting case studies. By contrast, scholars employing quantitative methods need rather abstract data for their

statistical analyses in the form of numbers. Accounting for both options is one crucial aspect in designing the database.

In addition, as research on the FCC addresses the law arena as well, the database also wants to approach judicial scholars and other law related professions. They are the second target group of this database. Although some information on decisions of the FCC is available through the Constitutional Court directly or law search engines and databases,[2] it lacks precision. These databases do not provide a comprehensive and systematic overview about all legally relevant issues the rulings contain. Using them enables the researcher to detect relevant decisions by means of keyword search. While it is possible to look for for rulings regarding the freedom of speech – without certainty to find all related decisions – *juris* for example does not contain data on the involved petitioners or defendants. Generally speaking, those databases' outputs are the entire decisions with only a few systematically edited data. The CCDB is designed to serve the demands of the legal profession by complementing the existing databases and extending existing information. For the law community's needs the data must adequately mirror the techniques, schemes, and concepts applied in deciding cases. Otherwise the data loses its informative content, and it becomes useless for these addressees.

Finally, journalists and the broad public are potential users of the database. They are interested in information easy to comprehend and convey. Inquiries of interest could be simple questions such as "Was the petitioner successful?" or "How often did party X approach the Court?" To meet these demands the database has to contain straightforward variables that everyone can understand without further instructions or sophisticated codebooks.

For developing the database the aspects elaborated on above generate substantial challenges. The mentioned audiences are interested not only in different information. Moreover, they need this information in diverging formats. Those who want to exert statistical analyses demand datasets in rectangular form and in a numeric or categorical format. This means that a decision's content has to be dissected, only the relevant information has to be extracted, and it finally needs to be translated into variables suitable for applying quantitative methods. By contrast, judicial scholars may be interested in formulations and the extent to which the court employs certain legal concepts. This requires working with the actual text. However, providing full texts would not simplify a scholar's life as those are available through the other databases. Therefore, the information must be structured and categorized as much as possible without losing too much content on the relevant legal aspects. In addition, to serve the public, the database

[2]Website of the FCC (www.bundesverfassungsgericht.de) and e.g. juris (www.juris.de)

has to contain interesting and socially relevant aspects apart from the focus scholars have. It must provide easy to understand information while preventing misinformation and wrong conclusions due to too much simplification.

A further consideration concerns specifically social science research and goes beyond the realm of the court's rulings. Although the work of the court as such can be attractive to scholars, the environment the court is situated in plays a major role in potential research questions. This pertains to interactions with other political actors, mainly legislatures or governments; but also to the social context at a given time, for example unemployment rates, the gross domestic product, or the citizens' attitudes toward social and political issues. Thus, creating such a database requires encompassing all these aspects and developing an overarching concept.

Summarizing all these points leads to defining the aim of this undertaking: Building a comprehensive database for the social sciences that enables researchers to examine questions in the area of courts, politics, and society. Moreover, it has to be suitable for legal research and the entire law profession as well as for the public.

2.1.3 What Data and Where to Find it

How can this be put into practice? To set the right course, it is necessary to decide what decisions to include in the database. As the court's workload is extremely high and has increased over time, it is impossible to cover all decisions: In 1972 there have been approximately 3,400 decisions. Those numbers have considerably risen. Deducting petitions that blatantly do not meet any kind of requirements, in 2010 the court has ruled on approximately 6,300 cases (Bundesverfassungsgericht 2010, 13).

There are two types of judgments. First, those that are rendered by a senate, that is a group of (regularly) eight judges. The FCC is composed of two such senates. Second, since 1993 other decisions are made by a panel called chamber, which consists of three judges out of the aforementioned eight. Each senate has three chambers (four chambers between January 2000 and April 2002). Those three judge panels are allowed to decide on certain cases only and with specific restrictions. Whereas they are granted discretion in Constitutional Complaints *(Verfassungsbeschwerde)* and Concrete Judicial Review *(Konkrete Normenkontrolle)* they are not entitled to rule in other proceedings. However, those two proceedings constitute the bulk of cases. Furthermore, a prerequisite for a case to be decided by a chamber is that the key legal question of the case has been subject to a prior judgment. In this case "the chamber may allow the complaint if it is clearly justified" (Article 93c, [I] BVerfGG). Also, if the three judges cannot reach

unanimity they have to refer the case to the senate. By implication, cases reaching the court through one of the other 20 types of proceedings and those posing new legal questions and highly controversial problems are subject to all eight judges' scrutiny. From this it follows that senate decisions are those with the greatest significance. It is only them that address new questions, possess a high degree of controversy, or are infrequent, meaning special cases. Furthermore, it should be noted that especially political players are among the petitioners that can refer a case to the court through the proceedings in which a senate decision is mandatory.

These facts guide the choice of which decisions to include in the database. As senate decisions have a considerably higher informative content they serve as source of the database. The time range from 1972 to 2010 has been chosen based on two considerations. First, the most frequently employed procedure nowadays is the constitutional complaint, constituting about ninety-seven percent of the Court's decisions (Bundesverfassungsgericht 2010, 1). Therefore, it is indispensable to include it. However, it was not introduced before 1969. This led to the decision to choose data from later than 1969. Additionally, as establishing a new procedure requires a certain amount of time, we allowed for a period of adjustment for the actors. Thus, the database should focus on data based on decisions from a considerable time later than the introduction of the constitutional complaint. Furthermore, due to reasons of availability of additional data the time frame ranges from 1972 to 2010 aiming at continuing the data collection in the future. Between January 1st, 1972 and December 31st, 2010 the senates of the FCC have rendered 2006 judgments.

A further question is that of the actual source of the text. There are four options to choose from: Firstly, the official collection of the decisions, published by Mohr Siebeck in books and available in every law school library and many others. Secondly, the publisher also offers a CD-ROM with the – presumably – identical content. Our own pre-tests have revealed that there are several typing errors and minor discrepancies, though. Thirdly, the FCC website provides the Court's decisions. Unfortunately, they date back only to 1998. Fourthly, the above mentioned *juris* database offers the text of the rulings. However, those texts are edited already. Most importantly, they do not contain the title of the judgment. This is crucial because this part comprises the information on the challenged acts, the appellants, the defendants, their lawyers, and other important data.

We excluded those sources that do not convey complete information, that is the Court's website and *juris*. Finally, we chose the digital version of the official collection as it meets the requirement of data collection for an electronic database better. Despite the incongruities of the books and the CD-ROM we are convinced

that generating our data from this source reduces errors in the final database. Coders can adjust the interface to their needs, for example font size; they have the possibility to highlight certain information in the text and delete it as they need it; also, the CD-ROM provides a search-function, which offers the coders to screen the text systematically, which is conducive to the economy of time. Finally, to have the decisions available on CD-ROM rather than in books makes handling the huge amount of texts easier as storing and carrying books requires more resources.

Since the aspiration of this database is to provide a basis for comprehensive research, information exclusively on the decisions as such is not sufficient. Despite the wide range of politically and socially relevant data, there is other information that is closely related to the decision. What are those additionally necessary data? First, rulings are made by judges. Therefore, they are decisive actors in the process of judging, which is why it is necessary to include more data on them in order to provide an encompassing array of information for thorough analyses and interesting knowledge.

The text of a decision tells us which judges participated in a decision. However, systematic information going beyond this fact is not available. Most importantly, it is completely unknown which judge served as rapporteur in a specific case. The rapporteur is the judge responsible for a first draft of a decision that serves as a basis for discussion. Hence, the position of the rapporteur is crucial for analyzing decisions, the role of judges, or the Court's work in general and is therefore a key variable. Thus, it is necessary to explore where to find information about the rapporteur. However, over the course of our investigations we found only a very few documents that give indications of who served as rapporteur in each case. Press releases of the Court informing about a judge's retirement appear to be the most valid source, although far from being complete. Those releases mention from time to time in which cases the retiring judge served as rapporteur. Nevertheless, the examinations have shown that it is only a list of the most prominent cases. Additionally, not for every judge the Court has cited cases in which she served as rapporteur. Also, screening homepages of the judges and jurisprudential literature added only a minor amount of information to the knowledge gained from the press releases.

Therefore, a central question is where to find further information. The only source is the FCC itself. Unfortunately, there are restrictions for the Court when it comes to providing this information due to data protection requirements. The authorship of the decision or at least the basis for the judges' deliberations is an individual-related information. From this it follows that every judge who appears in the database has to formally agree to publishing her role as a rapporteur.

While this would not be a major issue for the judges currently in office, it causes tremendous difficulties when it comes to judges who do not serve at the FCC anymore as they cannot be reached easily or regarding judges who have passed away. Therefore, it becomes an unfeasible undertaking.

Not being able to receive data on the rapporteur directly requires developing another means how to identify her. The scheme that determines the distribution of cases among the judges provides the respective information. It displays which judge is responsible for what topics. Knowing what area a case belongs to in combination with the case assignment plan enables us to identify who served as rapporteur in a certain case. As case assignment plans are publicly accessible only from 1993 on, it is necessary to obtain the remaining documents from the FCC. Upon request the Court provided the case assignment plans that could neither be found on the Court's website nor in the Federal Gazette. However, even at the Court, the case assignment plans do not exist completely. For the First Senate there are no plans prior to 1984. In the Second Senate they start in 1976. As identifying the rapporteur requires also a case's issue area there is further information needed. A strategy how to address this point will be presented in Section 2.3.

A further crucial point for the conceptualization of the database is the question to what extent to integrate more information about the judges. However, there is no systematic data on the judges available. What kind of information is useful? First, it is important during which time a particular judge served at the court. Thus, the data contains the first and last day of her term. Second, judges at the court are elected after being nominated through political parties either by the *Bundestag* or the *Bundesrat*. Therefore, the database has to cover this political dimension, that is for example the information which party appointed a particular judge and which body elected her. Also, several judges themselves pursued political careers prior to their time at the court. Likewise, every other professional experience may influence the judges' behavior. This is why the database also contains data on a judge's profession and academic education. A third group of variables is concerned with the judges' personal background such as their date of birth or their marital status. It constitutes a connecting factor for sociological aspects. These data on the individual judges' characteristics and on the rapporteur complement the decision-centered part of the database.

2.1.4 Structural Demands

In a next step, the decisions and all other information gathered have to be converted into usable data. The rulings' two-level structure requires an accurate

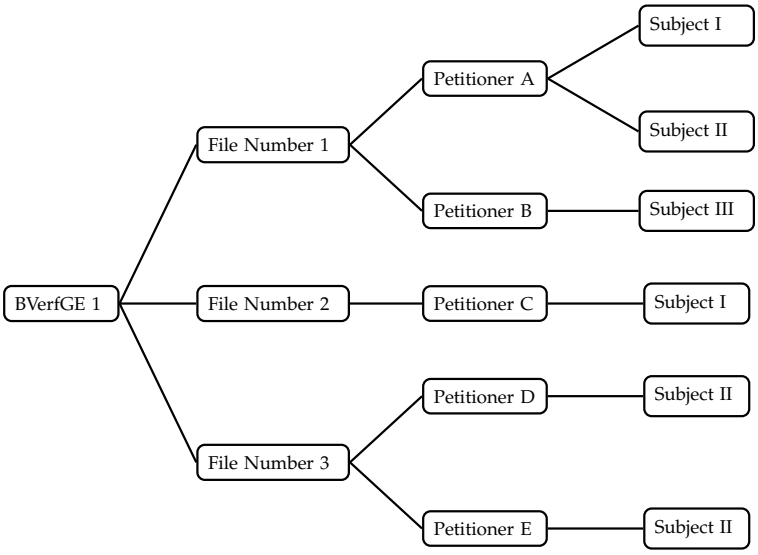
examination of the possibilities and restrictions that come along with it and a clear vision of the database's design.

What does the structure look like? A decision consists of two levels. First, there is the single case. Generally, a petitioner claims his constitutional rights to be violated by a specific act of public authority, predominately rulings of other courts, laws, and administrative acts. In the same way, other plaintiffs hand in claims considering a closely related topic, for example the same law as the previous petitioner or a court decision with similar implications for the plaintiff's rights. Thus, these claims reveal substantial similarities but differ significantly at the same time: In one case, the petitioner may be a political actor, in the other case a private person, which may result in different types of proceedings. One plaintiff may deem one article of a law unconstitutional while the second one addresses another article of the same law. When reaching the FCC, either complaint receives a separate file number. There is, however, a high chance that the FCC bundles them if they concern the same legal questions. The decision is then rendered for all of those different complaints in the same ruling. In the text the judges may or may not reference the differences between the proceedings. But either way, the results come in the same decision.

Those overall decisions are the second level. The text body is published in the aforementioned official collection, which is abbreviated *BVerfGE*. Several characteristics apply to the entire case, for example which senate was ruling, the date the decision was rendered, or whether the decision contains separate opinions. Hereinafter, I will refer to the instances classified by file number as *proceeding* and to the overall decision marked by BVerfGE as *case*. In short, one case can — and does in approximately one third of the decisions – contain multiple proceedings. On the proceeding level there are unique characteristics in comparison to other proceedings within the same case. There may be overlaps but no proceedings coincide exactly. The decisive factor for how to bundle proceedings and reach the case level is solely their content. Figure 2.1 illustrates the structure of a FCC's decision.

In this example, BVerfGE 1 contains three proceedings, namely File Number 1 to 3. Every proceeding has different petitioners. While File Number 1 and 3 are handed in jointly by two petitioners, File Number 2 was referred to the Court by Petitioner C only. Therefore, despite only three proceedings, we see five different petitioners. Moreover, those petitioners do not claim their rights to be violated by the same act of public authority; nor do they ask for an examination of only one act. Petitioner A with File Number 1 challenges Subject I and II. Within the same proceeding, Petitioner B refers to Subject III. Petitioner C – claiming to be violated by only one act of public authority – challenges the same act as Petitioner A's first

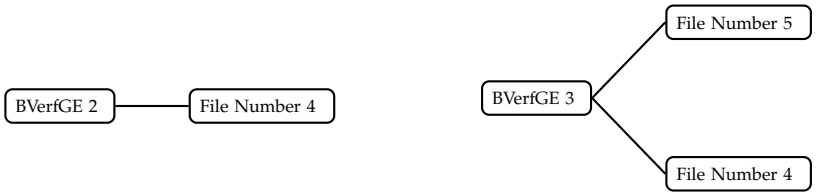
Figure 2.1: Structure of a Decision



claim, that is Subject I. Finally, in File Number 3 both petitioners want Subject II to be scrutinized, just like Petitioner A does. This example demonstrates the varying and non-uniform structures of FCC decisions. It should be emphasized again that the aforementioned situation is only one out of many possible scenarios. This is why it is impossible to predict the structure of a case and to focus on only one option.

Having described the composition of a decision there is an additional challenge with regard to the proceedings. A proceeding does not necessarily occur only once in the set of cases. In fact, one proceeding can be part of distinct cases. This is due to the fact that at the FCC multiple types of decisions exist. There are rulings prior as well as subsequent to the main judgment. Those do not decide on the matter as such but only preliminary, they concern preparatively procedural issues, or deal with executing certain consequences of a judgment such as reimbursements of process costs. Independent of whether occurring in a provisional ruling, one on the main question, or subsequently, the file number remains the same. However, since every case has its own BVerfGE number, the same file number can occur in combination with varying BVerfGE numbers. Figure 2.2 exemplifies this scenario. In situation (a) the Court renders a preliminary judgment, BVerfGE 2, regarding the petition with File Number

Figure 2.2: Two Cases with same the File Number



(a) Preliminary Procedure

(b) Main Procedure

4. BVerfGE 3 is the main ruling deciding on File Number 4 again and on File Number 5 for the first time, as illustrated in situation (b). This demonstrates one key aspect of the database's design: Only a file number in combination with a BVerfGE number can unambiguously identify a decision.

Such a structure leads to substantial challenges when designing a database. The main questions to be answered are: Which level of observation serves the goals of our database best? Is it possible to include both levels? There are several pros and cons on either side. Focusing on the proceeding level grants the chance to collect very detailed data. One can precisely differentiate between the varying types of proceeding, different petitioners and defendants as well as their lawyers, and the potentially different results of the individual proceeding within a case. Also, it allows for distinguishing between the respective acts of public authority. However, by building the database around the proceedings we run the risk of skewing the data. Assume two cases decided by the same senate with three proceedings each. If I want to know how often a specific judge has taken part in a decision, the data from a proceeding based database will, in this example, be tripled. It will tell us that this particular judge has participated six times instead of the correct two. Furthermore, ensuring differentiation between preliminary judgments, main rulings, and subsequent decisions will be almost impossible. Also, remaining at the proceeding level would require finding a solution for the ambiguity of file numbers. On the other hand, restricting the data to the case level leads to oversimplification as distinguishing between the proceedings becomes impossible. Given a case consisting of two proceedings one of which is successful while the other one is rejected: No matter what the coding scheme is, the data will never mirror the actual outcome. Labeling this as *success* because one of the plaintiffs won his case neglects the unsuccessful petitioner. Likewise, having data

saying *no success* is equally wrong. Finally, a *partial success* – although probably the most convincing coding – would not display any of the outcomes.

This demonstrates, speaking from a content focused standpoint, that it is desirable to include both levels in the database, even more so given that the risk of bias does not exist when using the data thoroughly and accounting for this issue. A huge disadvantage of this undertaking is, however, the data management. Focusing on only one level would guarantee an easy to handle format similar to a rectangular dataset: File numbers or BVerfGE in rows, the other variables in columns. Vice versa, deciding to integrate both levels will lead to different formats depending on the level the respective variable belongs to. This will aggravate the data management. Besides the handling of the data there are further pitfalls of a two level database. The links between case numbers and BVerfGE numbers become a crucial issue. As soon as a file number is linked to a wrong BVerfGE number, the connected data is hard to trace. Also, from a technical perspective, it requires more effort when programming the database and is therefore more error-prone as the connections and relations between the data are more complex.

The goal of the database to offer comprehensive and reliable data on the FCC gives the answer to the question which design to choose. We can offer a picture as full as possible only when making precise distinctions and conveying as much information as possible. This can only be ensured by encompassing both levels. Furthermore, data other than those from the decisions can be attached more accurately, either. This holds especially true for the data on the German legislature. Therefore, only a database including the two levels can guarantee comprehensive data that enable all target groups to retrieve the desired information.

2.1.5 Technical Realization

Such a complex data structure requires an adequate technical realization. For this purpose, a relational database provides the most promising design. As laid out above, the information to be gathered has different reference points. Whereas a part of the data applies to the entire case, meaning for every of its proceedings in the same way, the content of the proceedings varies within a case. One possibility would be to go to the proceeding level and to attach every data that refers to the overall decision also to every proceeding. This however, presupposes a very careful user who is aware of the fact that some data is multiplied although existing only once. Even from a technical aspect, multiplying the information does not make sense as it leads to tremendous redundancies. Given the long time range the data base covers and the high number of cases, this can result in a high demand of computational power. Avoiding those redundancies saves

processing power and ensures an easier handling for the end-user as well as for maintenance.

Therefore, the CCDB is designed as a relational database. Each group of data is represented by an individual table, which is aligned either to the proceeding or to the case level. One individual table has the structure of a dataset. In order to obtain the desired combination of data, the tables are linked through connecting tables and key variables. A crucial advantage of a relational database is that the relationships can be of different nature: one-to-one, one-to-many, and many-to-many. This ensures that it is still possible to retrieve meaningful data despite the different formats of tables and varying relationships between the tables. Furthermore, the user can request the information needed only instead of the entire enormous amount of data.

Also, every information is stored only once. To stick with the example introduced before: The date of the decision exists only in the case table as it refers to the entire case not to every proceeding individually. The decision was rendered only once. By contrast, the three proceedings the case consists of have different results. If data on the results of a decision on a specific date have to be retrieved one will be able to obtain only those and no further variables.

2.1.6 Collection Process

So far, all considerations have been of theoretical nature: Given the goal of the database, the structure of a decision, and the amount of data, a relational database is the design of choice. In a next step, it has to be put into practice. This gives rise to several pivotal issues. First, what is the best technique for extracting the data from the decisions? Second, how to practically account for the two-level structure of a decision? Third, how to minimize coding errors? Fourth, what additional information publicly and not publicly available is needed? Fifth, what variables other than the decision-variables should be included?

For extracting the data from the text two methods are available, those being hand coding and automated text analysis. For decisions of the FCC hand coding appears to be the most valid option. When converting textual information into variables, a coder needs to understand accurately a decision's content. Only within its context a statement's meaning becomes clear. For example, as the Court does not employ standardized formulations, knowing to what degree a petitioner was successful requires comparing precisely the Court's wording with the petitioner's claim. Similarly, the extent to which the Court holds a law unconstitutional is only visible when reading the text in depth. Automated text analysis is hardly capable of accounting for these nuances. Also, although coders will make coding errors those are likely to be unsystematic. For quantitative

analyses this is less of a problem than a systematic error. Automated extractions of data, however, would most likely create systematic mistakes because undetected wrong algorithms would produce the same mistake repeatedly.

While there are many arguments that speak in favor of hand coding, there are also drawbacks. It is time-consuming as the coder must read the text or at least a considerable part of it carefully. With an average length slightly above 40 pages a coder will need approximately one hour to code a decision assuming an average reading rate of 30 pages per hour: While he can extract the information fast from very structured parts like the title of the judgment, he will need considerably more time for the information that can only be obtained from the continuous text. Also, each decision contains paragraphs that are not relevant to the data collection process. Those he can skip. Nevertheless, given that in the time span the database comprises the Court rendered 2006 decisions the coding process would require about 2006 working hours, which is an extensive amount of time. Furthermore, there is plenty of room for the coders to make mistakes, and they will do so just like every human being always does. They can misunderstand information or read it wrongly as the text sometimes leaves room for interpretation. Furthermore, a coder can forget to insert information into the database or simply overlook it. Even more often, they will simply write something incorrectly or choose accidentally a wrong category in a drop-down menu. Also, inter coder reliability can become an issue.

When weighing the pros and cons, the limited capabilities of the automated text analysis are the decisive factor for the decision in favor of hand coding. By relying on computers only we would run the risk of losing information or even getting misinformation because the computer may for example assign a negation wrongly. Moreover, it is likely that those errors are systematically, which should be avoided especially when providing data for quantitative analyses.

In order to substantiate our tendency towards hand coding we ran tests trying to automatedly extract information regarding the final result of a decision. This result is summarized in a short paragraph prior to the reasons of the decision and is called *Tenor*. Our minimum goal was to retrieve the direction of the Court's ruling even relinquishing a more fine grained information: Somehow in favor or against the petitioner. First, a catalog of typical phrases the Court employs when formulating the result was developed. It appeared that the Court uses an even larger amount of differing words, phrases, and formulations than expected. Also, there is only little systematic use of the wordings. One can find common phrases that look isolated from the rest of the *Tenor* the same. However, when putting them back into the context of the entire *Tenor* they unfold differing meanings. Nevertheless, using this catalog of phrases several trials were run.

Unfortunately, reliable results could not be obtained. This is due to the above mentioned rather unstandardized use of words. Also, the complex structure of the language appeared to be an enormous problem. The fact that the trials with relatively short paragraphs and rather low expectations as to the precision of the outcome failed completely led to the conclusion that automated text analysis is, for now, not a valid option to extract information from FCC decisions. For this undertaking, we rather had to rely on hand coding. This, however, requires continuous auditing of the coders and constantly evaluating their performance in order to guarantee a high quality of the data. Having depicted why hand coding is the method of choice for collecting data on decisions of the FCC, the following paragraph turns to discussing how to instruct the coders.

There are two options how coders can collect the respective variables. Either one person codes the entire decision or several people go into the decision, each being a specialist on certain variables. In this database, each case was processed by one coder. There are several reasons for choosing this way. The main argument goes along the same lines as those that lead the decision about hand coding. Each coder has to read the entire decision. Saving time by dividing up the text between different coders does not make sense. For many variables it is essential to fully grasp the content of the entire decision as well as having knowledge about the case facts mentioned in the first part of the decision. As the legal language is only little intuitive and the judges' arguments are complex, it is in many cases inevitable to delve deeply into the decision. Often, the correct information about the content becomes accessible only in combination with other rationales. Therefore, for variables that have to be coded from the continuous text every coder has to read the entire decision regardless of whether being responsible for a limited number of variables or for every variable. If every coder has to read up on each subject anyhow, it is most efficient to let one person code one decision completely. In this case only one person has to invest time in reading and understanding a decision.

In the same vein, the structure of a case demands being coded by one person. Many decisions consist of several proceedings. Although similar, they do differ, often only slightly, though. The court addresses the legal questions first in general and responds to the individual proceedings, if necessary, later. However, these distinctions are not always explicit. Differentiating which point belongs to which proceeding is therefore an important task for a coder when extracting the respective information for each proceeding. Similarly, the real meaning of a Court's statement in the decision develops only over the course of the text. Looking at solely one part separately can lead to misinterpretations. From this it follows that the coder has to have a thorough understanding of the entire decision

in order to be able to detect these differences. Dividing up a decision would make finding small distinctions impossible.

One could argue, however, that educating specialists on each variable leads to more accuracy and consistency within the data. This holds true only to a limited extent. Due to the mere number of decisions multiple coders have to be concerned with the same variable. Letting one single person code all 2006 decisions would exceed the time frame of the project. Therefore, it is not possible to provide full consistency within a variable by means of assigning only one single person to one variable. Moreover, it would lead to an increase in systematical errors if a coder misunderstands a concept. As long as there is a considerable number of coders such a general misunderstanding will not affect the overall quality of the data given the large number cases and proceedings. If however, one out of four people responsible for one variable codes continuously wrong, one fourth of the variable will contain a systematic error.

These arguments demonstrate that there are good reasons to allocate one decision to one coder and not dividing it up. The latter approach would lead to a tremendous increase in work and time dedicated to one case while decreasing efficiency. Also, one would run the risk of overseeing nuances and would increment the chance for systematic errors to occur. Therefore, the data collection process for the CCDB is organized by assigning entire decisions to trained people, who code the content.

This section has depicted the goals of the database and the demands emanating from a decision's structure. Also, it has given an overview about the supplementary data needed to provide a useful tool for in depth research on the FCC: The CCDB is designed as a relational database in order to account for the complex structure of a decision and for the ease of use with regard to data management. Furthermore, for the process of extracting data from a decision's text hand coding is the method of choice because it provides the most reliable results in a comparatively efficient way. Finally, the decision related layer of the CCDB, which is center to this part of the dissertation, contains individual data on the judges in order to allow users to include in their analyses information about a decision's author. Having delineated these theoretical considerations the next section turns to discussing the process how to develop meaningful variables on the basis of a FCC decision.

2.2 From a Decision to Variables

Building a database requires a precise idea of the data it should contain. Guideline for specifying variables is the aspiration to mirror a decision's structure and

content precisely, while keeping in mind the goals of the database. Therefore, as a starting point it is crucial to read through decisions and analyze them from a specific angle: What information is essential for conveying the decision appropriately? With that said, five main components have been identified to be considered. First, the structure of the decision: As discussed in Section 2.1 a decision consists of two levels. Those are on the one hand the case level encompassing data that refer to the entire decision and on the other hand the proceeding level containing information with regard to each file separately. Second, facts that determine a decision: These are aspects the court does not have any influence on such as who filed a case. Third, formal rules: The Court is bound to certain formal rules, for example procedural prerequisites the law demands. Fourth, standard jurisprudential concepts: Although not explicitly defined by law, there are jurisprudential concepts the Court continuously employs when examining a case. Fifth, the content: Besides the aforementioned rather technical aspects a decision receives its meaningfulness only by its content.

The central challenge in the process of specifying variables is the large variety of unique characteristics a case exhibits. On the one hand, one has to find a way to generalize the particular attributes in order to allow for an informative overview and quantitative analyses. On the other hand one has to make sure not to lose precision with regard to the content. Keeping this in mind, thoroughly reading and analyzing several decisions lay the ground for developing variables.

Addressing these considerations, it is important to account for the two level structure of a decision as hinted at in Section 2.1. Moreover, it needs to be evaluated what the key components are that characterize a decision appropriately, while providing analyzable and informative data. This leads to examining the essential determinants of a decision along five guiding questions: Who are the actors that are involved in a case? What is subject to the Court's examination? How does the Court conduct its scrutiny? What is the essential content of a decision? What are key unequivocal facts?

2.2.1 Actors

The question who is acting in the context of a specific decision is crucial for any kind of analysis and for providing comprehensive and meaningful data for other audiences. Also, without data on the actors, the case cannot be depicted adequately. At the FCC several actors may be involved in a case. While some of them are a necessary component for a decision, others appear only under specific circumstances. Four general categories of actors can be identified. First, those who initiate a case. As the Court cannot take action by itself, they are the ones

who activate the Court. They hand in the case and claim a violation of their rights.

Second, in some cases there is an adversarial party. Goal of the initiating party is that the Court rules an action of this opponent unconstitutional. The respondent is – determined by law – always a public entity. In some cases the FCC can also answer a general legal question in addition to deciding on the constitutionality of the challenged act only. Whether there is an adversarial party varies across procedures. Also, studying a decision in depth reveals that there are actors who, although not an adversarial party by law, are still challenged by the petitioner. As the database wants to mirror a decision's content and structure, those have to be included as adversarial party as well.

Third, those who decide on the case are indispensable to incorporate. They shape the decision-making process and are responsible for the final outcome. Within this group of actors, meaning the judges, there are two positions the role of which has to be looked at: One judge, the rapporteur, is responsible for preparing a first draft of the decision. This is a position different from the other judges with a certain degree of impact, as studies on the US Supreme Court suggest (Bonneau et al. 2007; Lax and Cameron 2007; Hammond, Bonneau, and Sheehan 2005; Maltzman, Spriggs, and Wahlbeck 2000). A second, potentially influential position is that of a chief justice (Smyth and Narayan 2004; Danelski 1960). However, contrary to the US and other Supreme Courts, presidents of the FCC's senates do not possess specific rights.

Forth, there are other players who have lesser influence on the case but are still part of it. While the aforementioned actors are directly involved, the data of indirectly affected parties has to be collected as well: Those can be for example claimants or accused persons in the court decision under scrutiny. Also, there are people and organizations that give an appraisal of the legal question. Those can be invited by the court, asked by the involved parties, or authorized by law. The latter ones are not obliged to comment on the case. They can also refrain from it.

Information on the directly involved actors can be drawn from the title of the judgment. It contains all necessary data telling the reader who initiated a proceeding, whose act is challenged, and who are their attorneys. The title of the judgment also names third parties. Other actors occur in the course of the decision.

2.2.2 Subject

Core of each decision is the subject the court rules on. Which options does the procedural law provide? Common to all subjects is that they are actions by public actors. Broadly speaking, there are four categories. Those are court decisions,

administrative acts, laws, or actions by other public authorities. Which kind of subject a petitioner can challenge depends on the type of proceeding.

However, looking closer at a ruling shows that mirroring a decision precisely requires introducing more differentiations between the types of subjects than solely focusing on the four categories mentioned above. For example, a petitioner challenging one of the standard subjects such as a law can additionally file a request for the recusal of a judge. The decision on the recusal is a ruling separate from that on the law. Foregoing to take into account the difference between challenging the law and the request for a recusal would lead to providing imprecise information. Furthermore, although the procedural law may not grant a petitioner the right to claim the violation of a certain type of subject, one can still observe that petitioners challenge it indirectly as in BVerfGE 89, 381 (own translation): "Decision of the First Senate (...) 1. versus a) the decision of the district court Flensburg (...), 2. indirectly versus §56 e S.3 of the Non-Contentious Jurisdiction Act." While in the cited case the petitioner would not meet the requirements for challenging a law he does claim the unconstitutionality of it indirectly.

Accounting for these specifics is indispensable for reaching the goal of building a database that contains precise information. Even more, beyond its importance for the collection of data on the court, the subject to be investigated is the key point of contact for linking this data to the data on the legislative process.

2.2.3 Legal Concepts

Information on who is acting and the subject of the ruling stand out immediately when reading a decision. The question how and by what means the Court conducts its examinations is less obvious. Therefore, it is necessary to analyze the techniques the Court employs. Procedural rules and standard jurisprudential concepts serve as the guideline for structuring a decision's content in order to finally derive systematic data.

Looking at a decision, the court decides in two steps: First, it discusses whether the request for constitutional review meets procedural and other formal requirements. Only if it does so the Court continues to an in depth examination of the legal question. Problems addressed in the first part of the decision are, among others, whether a petitioner is eligible for filing the case, whether the matter in dispute complies with the requirements for review, or whether the petition meets all deadlines. This part is called admissibility (*Zulässigkeit*). The second step of the examination is the decision on the merits (*Begründetheit*). In this section the Court elaborates on whether the content of the subject under scrutiny is in accordance with the Basic Law. Although not defining the terms *Zulässigkeit* and

Begründetheit the Federal Constitutional Court Act refers to them frequently (see §§24, 28, 34, 37, 39, 45, 46, 72, 81a, 87, 93c BVerfGG), and in the majority of decisions the Court explicitly states "The submissions are admissible" (BVerfGE 125, 175), "The constitutional complaint is admissible and is well-founded" (BVerfGE 127, 132) or alike. This, together with the literature (e.g. Benda, Klein, and Klein 2012, 159), demonstrates that these concepts are an integral part of constitutional review.

These two aspects structure the Court's decision and play therefore a crucial role. In addition, within examining the merits the Court employs another two tiered test. It scrutinizes a law's constitutionality on the basis of two questions: Was the law formally valid passed in the way the Basic Law requires it? And is the content of the law in accordance with the constitution? Information on these two points is crucial for understanding how the FCC reaches its final decision.

Finally, the Court's key instruments to test the constitutionality of an action are the articles of the Basic Law. They provide the essential measure for the question of accordance with the constitution. Therefore, they need to be considered when compiling the means by which the Court operates when ruling on a case.

2.2.4 Essential Content

What is the outcome of a decision? This is the guideline for a further group of data to be collected. Besides knowing who is acting and what standards the FCC applies, the result of a ruling is the most significant information. From what sections of the decision can these data be extracted? Reading through a judgment it appears that in almost every part there is informative content as to the result. At the very beginning of many decisions there are some sentences printed in bold condensing briefly the legal aspects of the decision. While these headnotes do not provide information on the concrete outcome, the next section preceding the actual reasons – the title of the judgment (*Entscheidungsformel)* – answers the question "What happens to the subjects under scrutiny?"[3]

Although this part seems to deliver the full outcome it appears while reading that there are more details in the decision's reasoning. As the reasons outline exactly what the petitioner aimed for, only comparing them with the information from the title of the judgment reveals the full meaning of the result.

Continuing screening the decision shows that the court not only elaborates on legal questions and decides whether a law, a court decision, an administrative act, or another act of a public authority is in accordance with the constitution.

[3]For example: §14.3 of the Aviation Security Act of 11 January 2005 (Federal Law Gazette I page 78) is incompatible with Article 2.2 sentence 1 in conjunction with Article 87a.2 and Article 35.2 and 35.3 and in conjunction with Article 1.1 of the Basic Law and hence void (BVerfGE 115, 118).

If a law is held unconstitutional the Court sometimes formulates instructions what the new statute needs to contain in order meet the requirements of the Basic Law. Similarly, one can find cases, in which the court sets a deadline telling the legislature by when a new law has to be implemented. These directives and deadlines are essential information in terms of conveying a decision's result and are therefore part of the database.

Besides extensive and precise arguments, which finally lead to the conclusion if a subject is unconstitutional, the Court occasionally reveals by what majority the decision was reached. However, this voting result does not always refer to the entire judgment. Instead, the judges can also vote on different sections of the decision, such as in BVerfGE 38, 258. In this ruling, section C.I.6 was reached by 5 to 3 votes whereas C.II.3 and C.III were unanimous. Similarly, votes can differ between particular proceedings within one case or even between particular subjects within one proceeding. Thus, there is not necessarily one voting result per case.

A further aspect with regard to a decision's content that should be covered are separate opinions. However, only a few decisions come with them. At the end of the decision after the judges have singed the majority opinion one can observe concurrences or dissents. However, their heading does not reveal whether it is a dissent, a partial dissent, or a concurrence that follows. They are standardized captioned with the wording "Separate Opinion of Judge X." A decision can contain more than one separate opinion. Also, one can observe that while there are concurrences or dissents authored by only one judge, others are co-authored.

2.2.5 Key Facts

Key facts are those that are identifiable without further interpretation. They are either not subject to the Court's discretion or they are set by the Court's administration prior to a case entering the actual decision-making process. In the final ruling they are clearly discernible. What are such facts? Most of them can be found at the very beginning of the judgment and in its title. Where to find the decision is the starting point. Each decision published in the FCC's official collection comes with a reference number that tells the reader where to find it. It is abbreviated with the acronym BVerfGE.

A further key information is the type of proceeding. Each file number contains this information. According to what path a petitioner treads, the FCC assigns the respective file number. The token BvR, for example, stands for constitutional complaints; BvC indicates a review of election results. Also, the ruling body can be identified by the file number. In addition, each decision commences with

the words "Decision of the x. Senate." Therefore, there are two sources for this information.

Crucial to understanding a decision is its type. The title of the judgment generally reveals the procedural purpose of the ruling at hand. While there are regular judgments there may also be those that precede the main ruling deciding for example on a judge's recusal or follow-up decisions on assessments of costs.

Other important information the title of the judgment exhibits is whether the Court held a hearing as well as the respective date. In addition, this section shows how many proceedings are part of this decision for it is good practice at the Court to decide on several claims at once.

This section has presented the results of analyzing and collecting the determining elements of a decision. It offers the answer to the key questions introduced above: Who is acting? What is the subject? How does the Court rule? What is the outcome? And what are the basic facts?

In a next step these observations have to be translated into usable data. For building an encompassing yet concise database it is of utmost importance to develop variables that cover the distinct details of a decision while still guaranteeing generalizability. Section 2.3 displays how this is done for the CCDB by presenting the respective variables.

2.3 Variables in the Database

The theoretical considerations and practical observations depicted in the previous sections lead to multifarious variables. As stressed above, one of the main challenges for the implementation is to account for the complex structure of a decision. An information can pertain either to the entire decision and thus to all proceedings within the decision. Or it refers solely to one proceeding. Given the large amount of data it therefore makes sense to sort the data and to store them in different groups according to their format. From this it follows that case level related information is stored in other tables than information based on the proceeding level. Also, in the process of coding there are three types of information to collect. First, a decision entails sections that provide unambiguously the data to be gathered. Second, there are data that have to be extracted from the full text. They require an understanding of legal concepts and a thorough evaluation of the content. Third, external sources must be consulted for additional information. Given those specifics, the variables will be presented in a corresponding order. Their names as denoted in the database are added in parentheses. The first subsection discusses variables on the case level; the second

subsection refers to the proceeding level. In order to portray the data collection process precisely, each subsection differentiates between the unambiguous, easy to code facts an those data that have to be collected from the full text or from external sources. The data that set the general frame of a case will be depicted entirely, that is including their values. Those are types of outcome, actors involved, procedure and substantive content of the case.

2.3.1 Case Level

The first group of variables belongs to the case level. All data in this group of variables provide information that apply to the entire decision. The first of the following two sections introduces those variables that are unambiguous. They are mainly drawn from the title of the judgment. Therefore, they are easy to find, and coders do not have any discretion or room for interpretation. The second section elaborates on those variables that have to be extracted from the full text or from external sources.

Unambiguous Facts

BVerfGE *(bverfge).* The BVerfGE number indicates where to find the decision. All senate cases are published in hard cover books. They serve as official collection of decisions (cf. §31 [1] BVerfGGO, Benda, Klein, and Klein (2012, 89)). The first number indicates the volume the decision is published in. The second number shows the page number. For example, the decision on the Aviation Security Act has to be cited as BVerfGE 115, 118, meaning it is published in volume 115 and starts on page 118. The BVerfGE-Number is therefore a unique identifier for a decision.

Senate *(senate).* A second important characteristic is the senate that ruled on the case. In general, the First Senate is responsible for questions regarding the legal compatibility of a norm with the Basic Rights as well as for the majority of Constitutional Complaints, while the Second Senate is mainly concerned with matters of polity, state structure, and questions of legislative powers (§14 BVerfGG, Benda, Klein, and Klein (2012, 73 f)). The information which senate rendered the decision occurs twice. Each decision starts with the words "Decision of the X. Senate...". Also, the file number tells us which senate is responsible for the ruling. A file number beginning with '1' indicates a proceeding in the First Senate, while '2' means that the case was processed in the Second Senate.

Date of Decision *(dec_date).* The date of the decision can be found at the very beginning of the decision and is included in the database.

Type of Decision *(dec_type).* At the FCC several types of senate decisions exist. While there are main decisions ruling on the actual question of the case, there are also other preliminary and subsequent judgments. They concern temporary injunctions, a judge's recusation, assessments of costs, or alike. As the decisions differ in their substantial message, it is important to distinguish between them. BVerfGE 104, 42. demonstrates the necessity of such a differentiation:

> "1. The decision of the Second Senate from May 22, 2011 is remedied for the avoidance of doubt. Item 2 of the title of the judgment (reprint page 2) is amended as follows: The commencement of Article 2 of the Elderly Care Act (*Altenpflegegesetz*) remains unaffected.
> 2. ..." (BVerfGE 104, 42., own translation)

Obviously, this is not a ruling on the pivotal question of the case. Since the database aims at mirroring the decisions precisely, it is crucial to offer data that indicate what category of ruling a case belongs to. Regularly, the type of decision is specified by the Constitutional Court Act and is mentioned in the title of the judgment. If a decision does not give any indication as to its type it is most likely a main decision. However, one can also observe decisions that are obviously not main rulings although there is no indication in the title of the judgment. This is for example the case in the quote cited above. Therefore, the database accounts for this fact. It contains those categories the law provides, those that are mentioned in the title of the judgment, as well as types that have only arisen in practice, and it differentiates between decisions on the basis of its content even if it is not explicitly indicated what kind of decision is at hand. These types are represented in the following thirteen categories:

- Main decision (cf. §13 BVerfGG)
- Preliminary judgment by the plenum (§16 BVerfGG)
- Recusal (by the judge/ by the plaintiff) (§19 BVerfGG, Benda, Klein, and Klein (2012, 13 ff))
- Provisional order (§§32, 53 BVerfGG)
- Objection (§32 [3], Benda, Klein, and Klein (2012, 538))
- Enforcement order (§35 BVerfGG)
- Statement of a Senate (Benda, Klein, and Klein 2012, 81 f)
- Permission to withdraw (Benda, Klein, and Klein 2012, 102)
- Addendum (Benda, Klein, and Klein 2012, 167)

- Assessment of costs (Benda, Klein, and Klein 2012, 172)
- Reimbursement of expenses/ assessment of value in dispute (Benda, Klein, and Klein 2012, 173)
- Reminder (Umbach, Clemens, and Dollinger 2005, 702)
- Other preliminary decision
- Peremption of other manner

Merged *(merged).* A decision can consist of different proceedings. Therefore, there are decisions with only one as well as with multiple proceedings. The variable *merged* indicates whether a decision comprises more than one proceeding.

Length of Facts *(length_facts).* This variable counts the number of paragraphs that contain the description of the case facts. Long decisions are structured by capital letters, those that are a little shorter by Roman numbers. Very brief cases do not have any structure. In the section between A. and B. or I. and II. respectively, the Court describes the case facts. The number of paragraphs in these sections constitute this variable.

Length of Reasoning *(length_reason).* After having delineated the case facts, the Court turns to the reasoning. This can be found in the sections between B. or – for shorter cases – II. and the signature of the judges. *Length of reasoning* displays the number of paragraphs in this section.

Date of Oral Argument *(date_oral).* §25 I BVerfGG demands oral arguments for every case. In those hearings, the petitioners, affected persons or organizations, certain constitutional bodies, and experts the FCC consulted present their view on the legal issues in question. However, in the vast majority of cases the Court does not hold a hearing. For constitutional complaints the Court can decide on its own to refrain from an oral argument (§24 BVerfGGO) as long as the involved constitutional bodies do not insist on it (§94 [5], 2 BVerfGG). In all other types of proceedings the parties have to agree mutually in order to forgo the oral argument. As one can observe oral arguments rarely, the actors apparently do not exert their right to demand an oral argument frequently. Whether the Court conducted a hearing and if so the date is cited at the beginning of the title of the judgment: "Decision of the First Senate from November 24, 2010 on grounds of the oral argument from June 23, 2010" (BVerfGE 128, 1). This date can be found in the database.

Headnotes *(headnotes).* The summary of the judgment precedes the main text of the decision (Benda, Klein, and Klein 2012, 160). While several rulings begin directly with the title of the judgment, that is the formal data on the case such as date of the decision, others are captioned with a summary of the decision's result and a brief explanation of the arguments. They do not cover whether the plaintiff was successful or not but recap the answer to the central legal question of the case. In order to signal that they present the central ideas of the ruling they are printed in bold. The database contains those head notes.

Title of the Judgment *(title_judgment).* In the title of the judgment, the judges summarize the outcome of the decision. Its text can be found in the database.

Respondent and Type of Respondent *(respondent, resp_type).* The respondent is the adversarial party in the case. His name as well as that of his attorney can be found in the database. Additionally, the respondents are categorized. The law specifies the procedures in which respondents appear. Those are contradictory proceedings only. Accordingly, it defines the types of respondents. However, looking at the content of a decision in depth it appears that also in cases like Constitutional Complaints the petitioner can oppose another party (Benda, Klein, and Klein 2012, 122). Since a key interest of the database is to mirror a decision's content precisely, it is crucial to account for this fact. This is done by adding other types of respondents to the list of those that the procedural law provides. All petitioners in a case oppose the same respondent. Therefore, this information does not differ across the proceedings. This is why these variables belong to the case level category. As the majority of proceedings does not have a respondent, the database includes the category "No Respondent." Apart from this, it contains sixteen categories. While the Federal Constitutional Court Act mentions several defendants directly, it refers to others implicitly. Further types have been added over time by the jurisdiction. The database contains the following sixteen categories:

- Federal judge (§§13, 58 BVerfGG)
- Federal president (§§13 no. 4, 63 BVerfGG)
- Judge of the FCC (cf. §19 BVerfGG)
- Party (in examinations of the constitutionality of political parties, Article 21 [2] GG, §43 BVerfGG)
- Bundestag (§§48, 63 BVerfGG)
- Federal agency with own constitutional rights (§63 BVerfGG)

- Federal government (§§63, 68, 71 [1] BVerfGG)
- Bundesrat (§§63, 68, 71 [1] BVerfGG)
- Land government (§§68, 71 [1], 73 BVerfGG)
- Land agency with own constitutional rights (§§68, 73 BVerfGG)
- Land parliament (§§71 [1], 73 BVerfGG)
- Local authority (§§71 [1], 73 BVerfGG)
- Court (§§71 [1], 73 BVerfGG)
- Third party (Benda, Klein, and Klein 2012, 122)

Judges *(prename, surname, senate, inauguration, resignation).* At the end of each decision's text the participating judges sign the ruling (§30 [1] BVerfGG). The signatures do not give insight on the voting result in the senate, though. They only signify who was part of the respective decision-making process. In several cases one can find the expression "Judge X is impeded to undersign" or alike. This indicates that although having contributed to the decision and having voted on the case, the judge was unable to sign the decision, for example due to sickness. Therefore, besides the other signing judges, this name is included in the data on the case as well. In addition to the judges' name, the date of their first and last day in office as well as the senate they served in can be found in the database. It should also be noted that the number of judges per decision varies over decisions. Whereas generally eight judges sit on the bench (§2 BVerfGG), the law allows down to six judges for casting a valid vote (§15 [II] BVerfGG). These situation arise typically if a judge is permanently sick or a judge has left office but a successor has not been inaugurated, yet.

Data from Full Text and External Sources

Name *(name).* Decisions of the FCC do not carry official names. However, in the jurisprudential literature and the general public the most prominent cases have received a certain label such as "Kruzifix Entscheidung" (BVerfGE 93, 1; decision about the constitutionality of a Bavarian law requiring a crucifix in each classroom of a public school). Even more, collaboration with the FCC in the course of the research project "The Federal Constitutional Court as a Veto Player" has revealed that the FCC names every key decision in the Court's internal records. The database includes these names, making them available outside the Court for the first time.

Rapporteur *(rapporteur).* The rapporteur is the judge who is preparing the first draft of the decision, which serves as the basis for discussion. It is called *Votum* (§15a BVerfGG, 23 BVerfGGO). In most decisions, the rapporteur is unknown. Only in publicly well known cases there is information on who served as rapporteur. The database, however, does provide data on the rapporteur.[4] This required two informations: First, the case assignment plans. They determine which topics each judge is responsible for. Second, the issue area a decision belongs to. Matching the issue area with the information from the case assignment plan made it possible to specify the rapporteur. As the FCC's records on a case's issue area are incomplete, we coded the issue area for each case based on the areas the case assignment plan provides and assigned the judges accordingly. Comparing this with information from the Court as well as press releases and other sources that occasionally name the rapporteur showed that our strategy was quite reliable.

Separate Opinion *(fulltext, no_minor).* The procedural rules of the FCC allow judges to publish dissents and concurrences (§§30 [2] BVerfGG, 56 BVerfGGO). They follow subsequent to the majority opinion and the judges' signatures. Their heading as well as the signature at the end of the opinion identify the author(s) of the opinion. Thus, contrary to the majority opinion a separate opinion can be attributed unequivocally to its author(s). The full text of these separate opinions can be found in the database as well as a dummy variable signifying whether a decision entails a separate opinion.

Author of Separate Opinion. The information which judge(s) wrote a particular separate opinion can be obtained though linking the separate opinions with the aforementioned data on the judges. Besides observing single-authored as well as co-authored separate opinion one can also find decisions in which a judge participated in more than one concurrence or dissent. This link provides the respective information.

Joint Separate Opinion *(joint_opinion).* Since the number of authors varies, this variable covers dichotomously the information whether a separate opinion is single- or co-authored.

Number of Separate Opinion *(sepop_number).* Several decisions include more than one separate opinion. Therefore, the number indicates whether it is the first, second, third, or fourth separate opinion following the majority opinion.

Doctrinal Argument *(doctrinal_argument).* The way of reasoning varies among separate opinions. While some elaborate more generally on the content of the

[4]For the First Senate from 1984 on, for the Second Senate from 1976 on

majority opinion or add further thoughts on certain facts, others employ doctrinal arguments. Those are well established rationales developed by jurisprudence, which do not refer to one specific problem but are applicable to a wide array of legal questions. The information whether such a reasoning can be observed in a separate opinion can be found in the database consulting this variable.

Type of Separate Opinion *(sepop_type).* A decision does not formally denote whether the separate opinion is a dissent or a concurrence. Therefore, this variable has been coded in order to indicate by three categories to what degree the separate opinion opposes the majority opinion.

Deadline and Directive. There are no formal rules that empower the FCC to prescribe the legislature when or how to implement its decisions. In practice, however, the Court does not confine itself to the question of (un)constitutionality of the act under scrutiny. Instead, in several decisions it tells the legislature rather precisely what a revised law should contain. Besides the practice of formulating directives how to implement its decisions the Court also sets deadlines until when a new or revised law has to be enacted (Benda, Klein, and Klein 2012, 557-562). The database contains variables covering these deadlines as well as the directives.

Statement. In certain types of proceedings the law grants specific actors the right to express an opinion on the case (Benda, Klein, and Klein 2012, 104 f). Those are mainly *Bundestag*, *Bundesrat*, federal government, *Land* governments, and *Land* parliaments. Furthermore, the Court can consult expert who give an opinion on the matter in question (§22 [5] BVerfGGO). These actors present statements on how they assess the legal question or issues crucial to the case. Those statements as well as the names of their authors are collected in the database.

2.3.2 Proceeding Level

The second group of variables is situated on the proceeding level. Here, the information does not pertain to the entire decision but only to its subunits. This distinction becomes vital when a case consists of more than one proceeding since facts differ among proceedings, most notably the petitioner. Approximately one third of the decisions entail more than one proceeding. Therefore, the number of proceedings exceeds the number of decisions considerably.

Unambiguous Facts

File Number *(filenumber).* The file number is the main identifier of the proceeding. It is assigned by the Court and provides information about the ruling body, that is the senate and the type of proceeding. Also, it indicates the year in which the file was handed in and how many proceedings of that same time type have reached the court until the time of receipt. For example, the tenth Constitutional Complaint for the Second Senate in 1995 has the file number 2 BvR 10/95.

Type of Procedure *(proc_type).* The type of procedure can be deduced from the file number. The database, however, also provides the names of the respective procedures. All together, the Basic Law and the Federal Constitutional Court Act currently allow for twenty-two procedures, six of which never have been employed until now. Also, there are procedures that occur only rarely whereas others are used frequently. The number of Constitutional Complaints exceeds that of all other proceedings by far, followed by Concrete Judicial Review. Nevertheless, the database comprises all currently employed procedures. Those are

- Plenary decisions (Article 16 BVerfGG)
- Forfeiture of basic rights (Article 18 GG)
- Constitutionality of political parties (Article 21 [2] GG)
- Provisional order (Article 32 BVerfGG)
- Review of election results (Article 41 [2] GG)
- Disputes between high state organs (Article 93 [1] No. 1 GG)
- Abstract judicial review (Article 93, [1] No. 2 GG)
- Federal-state conflicts (Article 93 [1] No. 3 and 84 [4], 2 GG)
- Public law conflicts (Article 93 [1] No. 4 GG)
- Constitutional complaint (Article 93 [1] No. 4a and 4b GG)
- Other disputes specified by law (Article 93 [3] GG)
- Intrastate constitutional disputes (Article 99 GG)
- Concrete judicial review (Article 100 [1] GG)
- Public international law actions (Article 100 [2] GG)

- State constitutional court references (Article 100 [3] GG)
- Continuing applicability of law as federal law (Article 126 GG)

Type of Court *(court_type).* Every German court irrespective of its level in the judicial hierarchy can file a request for concrete judicial review if it is convinced of the unconstitutionality of a norm it has to apply (Benda, Klein, and Klein 2012, 316, 375). Thus, there is a large variety of courts ranging from district courts to federal courts. Even specialized courts can hand in a request. In order to provide precise information on these courts the database differentiates between eighteen categories of courts.

Place of Court *(court_place).* Besides the type of a referring court the database also encompasses information about where the court is situated. In doing so, it provides an overview about which court exactly filed a request as well as a geographical distribution of the courts.

Subject under Scrutiny *(subject).* The subject under scrutiny is the core object of a decision. A petitioner filing a case claims to be violated by it (Benda, Klein, and Klein 2012, 178). As he can challenge multiple subjects at once, one proceeding can entail multiple subjects. It is then the Court's task to examine the constitutionality of these subjects under scrutiny. In the database one can find all subjects challenged by the petitioners.

Date of Subject under Scrutiny *(subject_date).* Each subject under scrutiny has an individual date. Even if one petitioner filed a case against more than one subject, most likely all of them will have different dates. If he, for example, challenges three decisions of lower courts, they will have three different dates. Therefore, the date of each subject under scrutiny has been collected.

Type of Subject under Scrutiny *(subject_type).* The court rules on various types of subjects. They are decisive for the process of assessment since every type of subject requires a different way of examination. In order to be able to analyze them distinctly, the different types are presented in the database in the following categories:

- Action of a federal agency (cf. §13 No. 2, 4, 5, 7, 11a BVerfGG)
- Election results (cf. §13 No. 3 BVerfGG)
- Action of a state agency (cf. §13 No. 8, 10 BVerfGG)

- Court decision (cf. §13 No. 8a BVerfGG)
- Administrative act (cf. §13 No. 8a BVerfGG)
- Legal norm (indirectly) (cf. §13 No. 8a BVerfGG)
- Legal norm (directly) (cf. §13 No. 8a, 6, 6a, 11, 12, 14 BVerfGG)
- Recusal (cf. §§18, 19 BVerfGG)
- Action of a European or international agency
- Other action of a public authority
- Plebiscitary action

Petitioner and Attorney *(petitioner_name, petitioner_attorney).* The petitioner is the person or entity that hands in the case. A proceeding can be submitted by a single as well as by multiple petitioners. Only when their file has passed the administrative department's filter it reaches the judges. Therefore, the database does not encompass petitioners who are evidently not allowed to file a case. Since in general every petitioner is represented by an attorney the database contains in addition information about the attorney.

Type of Petitioner *(petitioner_type).* As every procedure has different formal prerequisites, there are multiple types of petitioners depending on the type of procedure. Moreover, when analyzing the content of the cases one can observe that there are actors who formally do not appear as petitioners but in fact act as such. The database includes them as well. This leads to the following categories:

- Member(s) of the *Bundestag* (Art. 41 [2], 61 GG, 93 [1] no. 1, 2, Schmidt-Bleibtreu, Hofmann, and Hopfauf 2014, Art. 93, §§48, 63 BVerfGG, Lechner and Zuck 2011, §74)
- Federal government (Art. 93 [1] no. 1, 2 GG, §§36, 43, 63, 68, 71, 86 BVerfGG)
- State government (Art. 93 [1] no. 2, 2a GG, §§36, 43, 68, 71, 86 BVerfGG, Benda, Klein, and Klein 2012, 461)
- *Bundesrat* (Art. 93 [1] no. 2a GG, §§43, 63, 86 BVerfGG)
- State parliament (Art. 93 [1] no. 2a GG, Benda, Klein, and Klein 2012, 461)
- *Bundestag* (Art. 98 [2, 5] GG, §§36, 43, 63, 86 BVerfGG)
- Court (Art. 100 GG. Lechner and Zuck 2011, §86)

- Judge of the FCC (cf. §§18, 19 BVerfGG)
- Federal President (§63 BVerfGG)
- Third party (cf. §§65, 82 BVerfGG)
- Fraction of the *Bundestag* (§90 BVerfGG, Lechner and Zuck 2011, §90, Schmidt-Bleibtreu, Hofmann, and Hopfauf 2014, Art. 93)
- Party (§90 BVerfGG, Lechner and Zuck 2011, §90, Schmidt-Bleibtreu, Hofmann, and Hopfauf 2014, Art. 93)
- Private person (§90 BVerfGG, Lechner and Zuck 2011, §90)
- Juristic person (§90 BVerfGG, Lechner and Zuck 2011, §90)
- Local authority (§91 BVerfGG)
- Member(s) of a state parliament (Lechner and Zuck 2011, §71, Benda, Klein, and Klein 2012, 461)
- Fraction of a state parliament (Benda, Klein, and Klein 2012, 461)
- Other corporate body under public law (Lechner and Zuck 2011, §90, Maunz et al. 2014, §90)

Data from Full Text and External Sources

Admissibility *(admissibility).* Admissibility is the first bar a petition needs to pass (Benda, Klein, and Klein 2012, 159). The type of procedure determines the requirements for admissibility, meaning they vary across types. To be heard by the Court, a petition has to fulfill these prerequisites. In a nutshell, they concern the questions whether the particular petitioner is allowed to file the case, whether the challenged act is suitable for investigation by the FCC, and whether there is reason to believe that the act is unconstitutional. Also, the Court checks whether the case was handed in in due form and time. Whether an to what degree the Court grants admissibility is depicted in six categories:

- admissible
- partially admissible
- not admissible
- no test of admissibility
- no decision on admissibility taken

- no test of admissibility due to procedural requirements

***Merit** (merit).* The decision on the merits concerns the examination of the challenged act's constitutionality (Benda, Klein, and Klein 2012, 159). It is the core of the Court's tasks. In this part of the decision the judges investigate whether the action of a public authority meets constitutional requirements. Therefore, the court applies the Basic Law asking if the respective action is in accordance with the constitution. Only if a majority of judges decides positively on the merits the Court can hold a challenged act unconstitutional. Corresponding to the Admissibility, the merit is displayed by four values:

- with merits
- partially with merits
- without merits
- no test on the merits

***Result** (result).* After having ruled on the constitutionality of a specific action the question remains how the reasoning of the Court relates to the actual petition. This depends on what the petitioner aimed for. If he wants a court decision to be reversed but the FCC upholds it, he is obviously not successful. Vice versa, he is successful if the FCC voids the judgment. Also, the court may hold a challenged act only partially unconstitutional. However, if the petitioner claimed the violation of this part only, his petition is successful. Accordingly, a petitioner who aimed for the unconstitutionality of an entire law but the court declares it void only partially, the petitioner reaches a partial success. In addition to the described categories there is also the value 'other' as there are rulings that do not fit into the standard categories.

***No Voting** (no_voting).* At the FCC the judges can publish the voting result (§30 [2]). However, one can observe them only rarely. In the vast majority of cases, the Court does not reveal how the judges voted. The dichotomous variable *no_voting* covers the information in which proceedings it happened.

***Voting Result** (vote_result).* If the Court publishes the voting result(s), it tells the public the exact numbers how the judges cast their votes, that is for example five to three or seven to one. If a voting result could be identified, it has been collected for the database.

Passage of the Decision the Vote Refers to *(passage).* One can find decisions in which the judges voted separately on different sections of the case. In other cases the vote applies to the entire decision. To provide the respective information these data was collected, indicating to what part of the decision the respective vote refers.

Constitutionality of the Law *(unconst).* The FCC's core task is to decide on the constitutionality of a public authority's action. If a law is challenged, the Court employs a two tiered test. First, it investigates whether the process of passing the law meets procedural requirements. This concerns mainly compliance with procedural rules and competences. Second, the Court examines if a statute is substantively in accordance with the constitution. The database gives information through four categories about whether a law was constitutional, procedurally unconstitutional, substantively unconstitutional, or both.

Type of Law *(law_type).* The Court is faced with various types of laws. While some petitioners are allowed to challenge federal law only, others can call for the examination of state or even international law. As linking the data on the Court's decisions to the legislative process on the federal level is one of the key undertakings of the CCDB, information on the type of the law is crucial. Thus, if the subject under scrutiny is a law, the variable *Type of Law* indicates whether the Court is concerned with a federal, a state or another kind of statute.

Article *(article).* The articles of the Basic Law are the criteria for the FCC's examination. If the Court finds that a statute infringes one or more of these articles, it will hold it unconstitutional. However, the articles the violation of which the petitioner claims do not necessarily coincide with those the Court finds to be infringed. Therefore, the database provides two categories of the *article* variable: On the one hand those articles that are put forward by the petitioner and those that the court declares to be violated.

Date of Receipt *(date_receipt)* In a decision the date when a file reached the FCC is not cited. While the decision indicates the date of the subject, it is not mentioned when the petitioner handed in the file. The latter information is not publicly available. However, the FCC keeps it in its records. Having gathered these data from the Court directly, the database can provide the respective dates.

Analyzing what content is informative and in which format leads to the following conclusion: There are different types of meaningful information. First, the exact description of the issue, for example names of petitioners. Second,

abstract and generalized information on specific characteristics that serve the purpose of systematic analyses and providing informative overviews. Those are expressed through typecasts. Third, the content of a decision can be systematically illustrated best by classification in categories that depict the extent to what a certain factor applies. Fourth, there are facts and information such as dates or articles that have to be included without further changes.

2.3.3 Concluding Remarks

In summary, it can be stated that designing and building the CCDB followed several steps. The beginning of this process was, as outlined in Section 2.1, concerned with theoretical consideration regarding the aim of the database and the general premises: What is the purpose of the database? Which data should be included to serve the defined goal? Are the respective data available and in which format? By what means should the data be collected? What are the consequences for the practical process of building the database? From a technical point of view, what is the way for implementing the database? Answering these questions led to the decision to create a relational database accounting for the two level structure of a decision. Moreover, hand coding has been identified to be the best way to collect data from the decisions. Finally, in order to provide a comprehensive research tool, additional data have to be included.

Building on these thoughts, the second part of the process focused on their implementation. This has been done by defining five groups of relevant information: Actors, subjects under scrutiny, legal concepts, essential content, and key facts. Analyzing a decision and other available data along the line of these reference points resulted in identifying relevant variables. The final step was concerned with the detailed development of each variable, the result of which has been presented in Section 2.3.

The database built by the described process provides precise information for scientific analyses. It addresses different audiences of researchers as well as a broader target group. In doing so, the CCDB serves the purpose defined at the beginning of this part of the book.

Depicting the conceptualization and realization of the database has laid the ground for the next step of this dissertation: Explaining thoroughly why and under what conditions separate opinions occur at the FCC, while striving for analyses that go below the surface. This is only possible by means of the newly built database as this tool allows for a large-N research design, which has not been feasible up to this point. Even more, in addition to overcoming the issue of the quantity of data, the database enables analyses to add a new dimension of information. While so far, studies were limited to plain facts such as issue

areas, dates, and authors, the content of the database also provides data on the substance and techniques by which the court has ruled. In doing so, it presents a more precise picture of the judges' actual work. This is crucial for a deeper understanding of certain phenomena at the Court, also for the one at hand: separate opinions. Therefore, by employing the new CCDB, the following parts of this dissertation can provide a thorough explanation for the occurrence of separate opinions.

CHAPTER 3

Separate Opinions

Before analyzing the context of separate opinions it seems advisable to discuss the definition of that term. Moreover, for understanding their emergence it is necessary to know about their history and the varying use across judicial systems. Finally, this chapter will embed the key question of this dissertation in the scholarly literature.

A separate opinion is a statement following the main ruling. Judges – alone or together with other colleagues – express their dissatisfaction with the decision by elaborating on points of the majority decision they do not agree with. They can also claim the incompleteness of the decisions and add further arguments. These addenda are signed by the individual judge(s) so that it can be identified whose statement it is.

Evidence shows that there are different types of separate opinions. Although a universal typology does not exist, one can differentiate between two main groups. A dissenting opinion argues against the majority opinion like Hirsch, a judge at the German Federal Constitutional Court, in BVerfGE 48, 246, who introduces his statement with: "I cannot concur with the decision of the Senate. The constitutional complaint should have been successful because the challenged decision of the Federal Social Court violates Article 101, Paragraph 1, Sentence 2 of the GG" (BVerfGE 48, 246, 264, own translation). The judge is at odds with the content of the decision and articulates the reasons for his disagreement.

A concurrence is a second type of separate opinion. Here, a judge agrees with the decision but adds further arguments to it. An example would be the beginning of the separate opinion in BVerfGE 36, 342. Judge Geiger states: "According to the structure of the decision, the rationale in C 2 is supposed to provide a second independent buttress for the result. For this purpose I deem the following considerations necessary: ..." (BVerfGE 36, 342, 369, own translation). Mixed forms of separate opinions exist as well, such as "For the most part we support the reasoning of the decision, but we do not share the interpretation that a ban of audio and TV recordings during a trial is justifiable without exception" (Kühling, Hohmann-Dennhardt, Hoffmann-Riem, BVerfGE 103, 44, 72). The judges agree to some extent with the decision while also criticizing certain points. I will categorize this last type as partial dissent.

But why does a judge take the effort of writing additional remarks? Segal and Spaeth explain the judges' motivation as follows:

> Although the opinion of the court is controlling and authoritative, the nonmajority opinions that the justices write – concurrences and dissents – are by no means exercises in futility. Concurring opinions punctuate overstated or understated aspects of the court's opinion, indicate its scope insofar as the concurring justice is concerned, address related matters, and exhibit the extent to which the members of the majority coalition are in agreement. Dissenting opinions [...] provide the rationale whereby the majority's opinion may be undermined and/or eventually qualified or overruled. (1993, 261)

Indeed, it can be observed that the aftermath of a separate opinion leads to a change in the jurisdiction. The United States Supreme Court's landmark decision *Brown v. Board of Education* (347 U.S. 483 (1954)) took up the arguments of Justice Harlan's dissent in *Plessy v. Ferguson* (163 U.S. 537 (1896)). In Germany, Mahrenholz's and Böckenförde's standpoint in their separate opinion in the third case on party funding (BVerfGE 73, 40) found its way into the majority opinion in a follow-up decision only six years later (BVerfGE 85, 264). Although happening only rarely, this shows that there is a chance of a dissenting opinion to have an actual and concrete impact.

Also, a judge may feel morally obliged to take a standpoint different from the majority if the decision contradicts her fundamental moral, ethical, or societal ideas. In this case she can use the opportunity to make sure her concerns are heard.

A separate opinion can also serve as a judge's vehicle to display a certain image (Jaros and Canon 1971, 325). For example, if a judge wants to be recognized as a legalist she will be prone to show that she employs jurisprudential concepts. If

those are not apparent in the majority opinion she has the chance to add them by means of a separate opinion.

Having defined the term *separate opinion* the question arises in what way judges make use of it. A striking observation is the large variation with regard to the use of separate opinions (see Kelemen 2013). Although having the same mission and being similarly structured, courts deal significantly different with the possibility to write separate opinions. Even more, we find large variation within courts. While some judges tend to write dissents and concurrences, others refrain from it completely. Looking at these quite obvious differences in judicial behavior the question arises where these variations stem from. In analyzing the historical development of separate opinions it becomes clear that there are manifold rationales that speak in favor or against separate opinions.

What are these pros and cons? One of the most commonly mentioned arguments in favor of separate opinions is that they enrich the constitutional debate. Pointing out diverging views on a legal problem stirs discussions in the law community and leads therefore to higher quality, especially in countries in which the legal culture is not yet well established (Höreth 2011; Kelemen 2013). United States Supreme Court Chief Justice Stone, for example, held the view that "sound legal principles [...] are the ultimate resultant of [...] the clash of competing and sometimes conflicting ideas" (cited in Walker, Epstein, and Dixon 1988, 379). Also, they are seen as a sign of judicial independence. A functioning democracy with a functioning judiciary requires that judges can decide as they deem it right without pressure from the outside or from their colleagues. Thus, allowing separate opinions can be interpreted as an expression of granting judges this independence (Laffranque 2003). A further rationale the proponents of separate opinions cite is that they make changes in the jurisdiction more legitimate as those changes "are based on arguments that have been discussed and examined by an "open community of constitutional interpreters" Häberle (1975)" (Höreth 2011, 203, own translation; see also Stack 1996, 2239). Finally, those who agree with the notion that constitutional courts are political players argue that permitting separate opinions mirrors the reality because they demonstrate that there is a plurality of opinions, which may be not only law-driven. Acting realistically is expected to lend the court higher credibility and therefore a positive image.

Opponents of separate opinions argue that they weaken a court's standing. This would be particularly critical because a court's reputation is its main source of power when it comes to executing decisions. Only if a court speaks with one voice it can ensure its authority, they claim (Macfarlane 2010, 384). For example, United State Supreme Court Chief Justice Taft stated that "it is more important to stand by the Court and give the judgment weight than merely to record my individual

dissent" (Chief Justice Taft, cited in Murphy 1973, 61). Those opponents' stance is that it is not accurately and elaborately crafted arguments that grant a ruling power. Rather the creation of legal certainty and the elimination of doubts as such lead to the formation of a court's legitimacy (Lietzmann 1988). Separate opinions can also diminish a court's role and therefore its impact in the public because they can convey the impression of a court falling apart. The notion of a panel of judges split in two opposing groups would cast a poor light on the judges' work. In order to prevent this, judges will rather agree on a "rotten compromise" (Höreth 2011, 201, own translation). This is expected to result in a decline in the quality of jurisdiction.

Also, having the possibility to write separate opinions, judges looking for applause from the public will act rather in their personal than in the court's interest (Höreth 2011, 200, own translation). In the same vein, opponents bring forward the argument that separate opinions are detrimental to a court and the jurisdiction when judges have the chance to run for a second term. As "they want to be popular among their nominators in order to be re-elected" (Kelemen 2013, 1359) they will not strive for the best ruling but rather pursue their personal goals and cast opinions that are expected to please the nominators. The same logic applies to a judge's future career plans. A further argument against separate opinions is that they can contribute to a negative atmosphere among the judges during the deliberations as they give judges the opportunity to threaten their colleagues with public criticism, which in turn would decrease the court's or an individual judge's reputation and legitimacy.

3.1 Separate Opinions in an International Perspective

Many jurisdictions know the institution of the separate opinion. At many courts from common law systems they have a long tradition. The most prominent example is the Supreme Court of the United Stated. Although in earlier years employing a tradition of "no-dissent-unless-absolutely-necessary" (Ducat 2012, 37) US Supreme Court Justices make intensively use of the possibility to display their own standpoint. Dissent rates of over 60 percent and a very small number of unanimous decisions show that separate opinions are a crucial part of any Supreme Court decision (Epstein, Landes, and Posner 2012, 701).[1] Similar patterns can be found in Canada where one can observe split decisions regularly in

[1]The numbers Epstein, Landes, and Posner cite define unanimous decisions as those that contain dissents while they come with concurrences. Thus, when including decisions with concurrences, the percentage is even higher.

still more than 30 percent of the cases (Macfarlane 2010, 385). Likewise, separate opinions can be found in Argentina, Australia, Chile, or Mexico.

The vast majority of constitutional courts in Europe allow for separate opinions, as well. Exceptions are Austria, Belgium, France, Italy, and Luxembourg. Here, judges do not have the option to add their own standpoint to the ruling and publish it. By contrast, in the Czech Republic, Germany, Hungary, Latvia, Lithuania, Portugal, Romania, Slovenia, and Spain procedural rules grant the judges the opportunity to display their disagreement or further arguments. However, not in every country separate opinions existed from the beginning. The Constitutional Court of Romania, for example, did not allow for separate opinions until 2004, that is twelve years after the court's establishment. Similarly, in Lithuania the court began its work 1992 without the option to write dissents or concurrences. This possibility was introduced not before 2008 with a change of the law.[2]

Also, at the Constitutional Court of South Africa, which is a constitutional court as well as an appellate court, separate opinions exist. On the pan-European level the European Court of Justice does not provide the judges the opportunity to dissent or concur whereas at the European Court of Human Rights judges are allowed to deliver separate opinions. Table A.1 in Appendix A gives an overview on the existence of separate opinions at highest courts worldwide.

Looking specifically at the role of separate opinions at constitutional courts it becomes obvious that it differs from what we observe at supreme courts serving as final courts of appeal. Whereas at supreme courts in the common law tradition, for example in the United States, Canada, or Australia, separate opinions are an integral part of judicial work and often used, the picture is mixed when looking at constitutional courts. While in countries such as Germany or Romania they can be observed only rarely, other courts, for example the ones in Hungary and Spain, employ them frequently.

3.2 Separate Opinions in Germany

Center to the empirical analysis in this dissertation is the German Federal Constitutional Court. The following paragraph will sketch the history of separate opinions in Germany and will present how they are used at the FCC.

It was not until 1971 that separate opinions were introduced. In the tradition of the German judiciary deliberations and votes were kept secret.[3] Going back to the Judiciary Act of the Prussian States (Allgemeine Gerichtsordung für die Preußischen Staaten) from 1783, which had drawn from procedures in the Middle

[2]For a thorough overview over the courts in the EU, see Raffaelli (2012).

[3]For a detailed description of the history see Heyde (1970).

Ages, statutes on courts regularly did not allow for publishing addenda to the ruling containing remarks of individual judges. Over the centuries, however, some legal systems established rules that presaged the emergence of separate opinions. In the first half of the nineteenth century in the state of Baden, the information about the deliberations and the votes were not open to the public but at the highest court (Großherzogliches Badisches Oberhofgericht) practically to the parties involved. Additionally, in its yearly reports the court described a number of decisions including facts about the deliberations. However, when the pan-German Courts Constitution Act *(Gerichtsverfassungsgesetz, GVG)* was drafted in 1877 the proposal to allow for separate opinions was rejected arguing that they are "incompatible with the authority of the courts and good relations between the judges" (Kaiserliches Reichs-Justizamt 1883, 984).[4] They "would foster vanity and disputatiousness"(Kaiserliches Reichs-Justizamt 1883, 984, own translation).

Contrary to these arguments, in the state of Württemberg a law enacted 1920 required the Constitutional Court (Württembergischer Staatsgerichtshof) to publish the number of votes if it had successfully impeached a minister. Going even beyond publishing anonymous votes, in Württemberg-Hohenzollern §25 of the Constitutional Court Act stated that "judges who have been voted down [could] set forth in writing their opinion dissenting from the ruling and justify it" (cited in Heyde 1970, 207, own translation). After World War II it was the state of Bavaria that introduced in 1948 separate opinions at its Constitutional Court. However, those were and still are published without the names of the respective judges (Art. 25, V Bavarian Constitutional Court Act *(Verfassungsgerichtshofgesetz, VfGHG)*). Subsequently, at the Supreme Court of the State of Bremen a dissenting judge could request her separate opinion to be published from 1956 on. Today, §17 III of the Constitutional Court Act *(Staatsgerichtshofsgesetz, StGHG)* ensures that the judges can publish their dissents or concurrences.

On the federal level after the foundation of the Federal Republic of Germany in 1949 when the Federal Constitutional Court was about to be established, the legislature had to decide on whether the procedural rules should permit separate opinions. Whereas the Social Democratic Party (SPD) favored a law permitting separate opinions to be open for the public, the government's draft bill suggested a *special report (Sondergutachten)* that could be attached to the case file but that would remain confidential. The proponents of the latter proposal prevailed. Given the rather weak trust in the jurisdiction due to historical reasons it would harm the court's authority if it became public that a different decision would have been possible as well. Moreover, they argued that "the substantial correctness that is conceptually inherent in the judgment must not be qualified. The court

[4]Translation by von Mehren (1956, 208)

must tell those who seek law which one the only tenable decision is." (Heyde 1970, 220, own translation). In addition, it was felt that the publication of separate opinions would not be compatible with German judicial traditions (see Heyde 1970, 208).

In 1960 the discussion arose again when drafting the German Judiciary Act *(Deutsches Richtergesetz, DRiG)*. The judiciary committee of the *Bundestag* endorsed separate opinions at the FCC with a majority of 12:4 votes while their introduction was rejected for the highest federal courts due to a tie of 8:8. In later deliberations, however, the president of the FCC and the president of the Federal Administrative Court expressed their disapprobation of an introduction of separate opinions. In the following the *Bundestag* forewent further discussions of this question and abode by the tradition of not publishing dissents and voting results. Towards the end of the decade, however, the judges themselves initiated a further and successful attempt to introduce separate opinions at the FCC. In 1967 the *Plenum* of the court voted in favor of allowing separate opinions in the proceedings of the court, which caused vivid discussions in the legislature and jurisprudence. Especially at a conference in Nuremberg in September 1968[5] scholars and practitioners voted with a majority of 371:31 in favor of endorsing separate opinions. In November 1968, the federal cabinet reacted to this signal discussing it extensively (Bundesregierung 1968*a*) and decided to draft an amendment bill (Bundesregierung 1968*b*). It was brought to the parliament in March 1970 and resulted in a change of the Federal Constitutional Court Act on December 21, 1970. Nevertheless, down to the present day, at other courts separate opinions remain impossible or unpublished with a few exceptions as to state constitutional courts.

Today, with only few exceptions (e.g. Isensee 1996) there is a broad consensus that separate opinions are an essential part of the rulings of the FCC. First, they contribute significantly to the development of the law. For example, in a case on funding of political parties from 1992 (BVerfGE 85, 264) the court adopted – contrary to its former decision – Judge Böckenförde's standpoint outlined in a dissent to a ruling on a similar topic from 1986 (BVerfGE 73, 40). Also, separate opinions are perceived as being conducive to the quality of a decision and beneficial to jurisprudential discourse because the threat that a judge may write a dissent leads to more intense and thorough deliberations among the judges (Schlaich and Korioth 2007, 31). Moreover, they fit the demand for transparency of decision-making processes (Raffaelli 2012, 14).

Moreover, it seems that separate opinions have not damaged the court's legitimacy tremendously as opponents had feared. Surveys continuously show that the citizens' trust in the court exceeds that in other political institutions (ALLBUS,

[5] 47. Deutscher Juristentag in Nürnberg

GESIS - Leibniz Institute for the Social Sciences 2015). Unfortunately, surveys asking this question did not exist until 1980. Thus, it cannot be differentiated between the time prior and after introducing separate opinions. However, as the values of the survey cited above are constantly around five on a scale ranging from one to seven, the court still has an excellent reputation regardless of deviating judges.

Despite being an integral part of the court's decisions nowadays, separate opinions are still written rarely. In 2010, for example, the FCC rendered separate opinions in only 6.5 percent of its decisions. Even more, in 1999, not a single concurrence or dissent occurred. These numbers demonstrate that the use of separate opinions at the FCC gives a completely different picture from what can be observed at the US Supreme Court. Since the vast majority of research bases on data from the US Supreme Court or other courts with a more frequent use of separate opinions, it is necessary to keep in mind that the mechanisms leading to separate opinions may vary.

The explications above have given an overview on separate opinions in general and on the German case in particular. Given their prominent role in judicial systems, several scholars have strived for illuminating the factors under which they emerge. Hence, the following part will portray the current state of research.

3.3 Existing Research

In the introductory chapter, I have delineated the standard theories of judicial decision-making and their pitfalls with regard to exhaustively understanding judicial deviation. Nevertheless, until today, various scholars have sought to identify the parameters that contribute to the occurrence of separate opinions. In the following, I will sketch the existing literature on separate opinions providing an overview about the current stage of research my analysis is embedded in.

Most explanations for judicial decision-making have been developed for American courts. One approach originates from the observation that there used to be a scarce use of separate opinions. Thus, scholars argue that a certain norm of consensus existed and still to some extent does (Hendershot et al. 2012; Epstein, Segal, and Spaeth 2001; Walker, Epstein, and Dixon 1988). This informal rule was assumed to keep judges from dissenting publicly in order to maintain the court's legitimacy and the authority of judges (Rehnquist 1988).

Although not referring to the literature on the norm of consensus, Kranenpohl (2010, 181) reported a similar observation for the FCC. Interviewing judges he showed that they strive for unanimity when discussing and deciding on a case.

Another extensive strand of research has been conducted on the role ideology plays in the judicial decision-making process, and it has been proven that personal preferences shape judges' decisions considerably (e.g. Martin and Quinn 2002; Segal and Spaeth 2002; Schubert 1965). Thus, there is reason to believe that ideology has also an impact on the occurrence of separate opinions. One approach employs a spatial model using the distance of the dissenter to the majority opinion writer as an explanation, that is the larger the distance between these two, the higher the likelihood of a dissent (Corley, Steigerwalt, and Ward 2013; Collins 2008; Johnson, Black, and Ringsmuth 2008; Wahlbeck, Spriggs, and Maltzman 1999; Gerber and Park 1997). Similarly, Maltzman, Spriggs, and Wahlbeck (2000) have found that if the least extreme judge of the majority is the opinion writer there is less defection. Contradicting this finding is a study Brenner and Spaeth (1988) conducted. They showed that it does not make a difference whether the pivotal judge, meaning the ideologically closest to the dissenter, delivers the majority opinion or any other member of the majority.

Besides the spatial approach other author's have investigated the role of (political) preferences, as well. Several scholars provide evidence that the judges' personal preferences are good predictors for the occurrence of separate opinions (e.g. Basabe-Serrano 2014; Hanretty 2012; Songer, Szmer, and Johnson 2011). In addition, Tiede (2015) as well as Garoupa, Gomez-Pomar, and Grembi (2011) have examined the role of political affiliation. While for the Chilean Constitutional Tribunal Tiede could demonstrate that politically affiliated judges are more prone to dissent than those without affiliation, Garoupa's findings on the Spanish Constitutional Court were mixed. Similarly, Hanretty (2015) queries whether political incentives trigger dissents in Estonia. Akin to the results from Spain and Estonia, Edelman, Klein, and Lindquist came to the conclusion that "consensus on the [U.S. Supreme] Court cannot be explained by ideology alone" (2012, 129), which is in line with Epstein, Landes, and Posner (2011) who argue in favor of a more comprehensive understanding of judges' incentives to deviate.

The very scarce literature on separate opinions at the FCC applies a logic similar to that of the aforementioned ideology based approaches. Unfortunately, unlike research on the US Supreme Court, there are no ideology scores for FCC judges comparable to those developed by Martin and Quinn (2002) and Segal and Cover (1989). Only Wittig (2009) has shown a first attempt to designing such a measure for the German case by coding the judges' publications instead of op-eds.[6] Therefore, when including ideology in an analysis, scholars on the FCC

[6]Due to cultural and procedural differences, it is extremely challenging to employ a similar technique to that for US Supreme Court justices. For example, while in the United States there is extensive media coverage on individual judges, no such tradition exists in Germany. Thus, basing a measure on publications about the judges is hardly feasible.

have to draw on a proxy for measuring personal preferences. Hönnige (2009), for example, makes use of the fact that each FCC judge is nominated by a political party, assuming that this support mirrors a judge's preferences. He observes that "in 24 cases opinions (77 percent) were written by judges nominated by the losing [political] party", and that there are "no cases where a dissenting judge supported the losing party when he was nominated by the winning one" (Hönnige 2009, 979). And Shikano and Koch (2010) suggest that SPD-nominated judges tend to publish separate opinions with colleagues of the same ideological direction whereas conservative judges often built coalitions with judges who are not like-minded. Hence, these explanations focus on ideology in the form of political parties.

Moreover, the personality of a judge, her social background, and other personal attributes have been subject to examination as to the likelihood of formulating a separate opinion (Smyth 2005; Ulmer 1970; Schmidhauser 1962). UUlmer (1970) argues that judges have undergone certain patterns of socialization, which affect their attitude towards specific issues. If political orientation and ideology shape decisions of judges (e.g. Brace and Hall 1997; Segal and Spaeth 2002; Martin and Quinn 2002; Segal and Cover 1989; Gibson 1978; Schubert 1965) there is reason to believe that other personal attributes influence the decision to deliver separate opinions, as well (Ashenfelter, Eisenberg, and Schwab 1995).

One of those factors is the judges' former occupation. Although having enjoyed the same education, the judges pursued different professions prior to entering the court. Building on this fact, scholars argue that the different characteristics of the judges' former work shape their style of thinking and working. Whereas scholars such as law professors employ an approach that focuses on legal doctrine and theoretical reasoning, practitioners such as long-time judges or politicians argue in more practical ways (Kranenpohl 2010; Rottleuthner 1987; Schmidhauser 1962). Thus, if a ruling overturns a former decision or if the reasoning is mainly based on concrete practical considerations, scholars who tend to rely more on the theoretical approach are inclined to write a separate opinion. Vice versa, doctrinal arguments stressing interpretive methods and strong adherence to precedent encourage non-academics to dissent or concur (Schmidhauser 1962). The results, however, are mixed. While, for example, Ashenfelter, Eisenberg, and Schwab (1995) find an effect, Schmidhauser (1962) states the opposite. For the Spanish Supreme Court, Garoupa, Gili, and Gómez-Pomar show that career judges "are more willing to abdicate disposition preferences" (2012, 823). As to the FCC, Rottleuthner (1987) investigates this question. Rules of the court require three judges from the highest courts to sit on the bench of each senate. The remaining five members per senate are most often law professors and former

politicians. These differing career paths may lead to differing attitudes toward writing separate opinions. He finds that "it is apparent that dissenters are more likely to be those judges who had an atypical career: No career in the judiciary or administration but those who used to be lawyers and/or members of parliament..." (Rottleuthner 1987, 110, own translation).

As a further personal attribute, denomination is considered, depending on the subject, to be a factor contributing to a judge's dissent rate. The literature suggests that in cases that address topics such as the role of family and marriage catholics should have a higher dissent rate. When a majority opinion supports a change of such social values, catholic judges will step out of line to argue in favor of the perceptions they have due to their religious background (Smyth 2005; Ashenfelter, Eisenberg, and Schwab 1995; Wold 1974; Ulmer 1970).

Another part of the literature claims that the time judges have been in office plays a crucial role in their behavior at the court. This often called *freshmen* or *acclimation* effect draws on the argument that new judges undergo a period of adjustment until they get used to the workload and the procedures at the court. Brenner and Hagle describe it as follows: "The essence of an acclimation effect is that justices' normal behavior patterns are temporarily disrupted while adjusting to the Court's procedures and the workload" (1996, 239). Hence, in their earlier years at the court the judges are expected to write less separate opinions than later in their term in office (Lanier 2011; Boyea 2010; Hurwitz and Stefko 2004; Hettinger, Lindquist, and Martinek 2003; Brenner and Hagle 1996; Hagle 1993). Besides those studies that put the freshmen effect at the center of their attention, many other models trying to explain the rise of separate opinions control for this effect (Collins 2009; Johnson, Black, and Ringsmuth 2008; Collins 2008; Smyth 2005; Wahlbeck, Spriggs, and Maltzman 1999; Ashenfelter, Eisenberg, and Schwab 1995; Brace and Hall 1993). Although not all of these studies corroborate the freshmen hypothesis, the majority of authors finds an effect of time in office on expressing separate opinions.

Also, the role of the chief justice is seen as crucial. With his role as discussion leader he holds a special position in the deliberations. Depending on his leadership skills, personality, and perception towards unanimity his behavior should have an influence on the likelihood of separate opinions be it positively or negatively (Corley, Steigerwalt, and Ward 2013; Lanier 2011; Eisenberg and Miller 2009; Walker, Epstein, and Dixon 1988; Haynie 1992).

Strategic interactions among the judges are also assumed to influence the judges' behavior. Strategic behavior "refers to judges' actions to maximize their overall benefits in light of their expectations concerning the choices of other actors involved in the decisional process" (Hettinger, Lindquist, and Martinek 2004,

125). With regards to separate opinions and putting it in more practical terms Caldeira and Zorn state: "Reciprocity is an important norm on the Court, and if a justice refrains from dissent, he or she may well expect the same treatment in the future from the current opinion writer" (1998, 877). Likewise, Johnson, Black, and Ringsmuth (2008) and Wahlbeck, Spriggs, and Maltzman (1999) argue that a dissent is less likely to occur if a judge has cooperated with the majority author before.

Baum (2006) offers a more psychological approach to explaining judicial decision-making and opinion writing. He suggests self-presentation to be the main driving force behind the judges' decisions. Everyone strives for acceptance in her environment. Opinion writing gives a judge the opportunity to present herself in a way she wants to be perceived. Citing Atkins and Green (1976, 202) Baum argues that "[e]ven life-time appointed judges have a constituency to answer to: the bar from which they come, the social and cultural elite with whom they mix, and the general public, whose acclaim they desire. Nobody likes to be a pariah." Similarly, Collins (2009) employs cognitive dissonance theory to understand why judges write separate opinions. He argues – with mixed results – that judges "desire to avoid being viewed as inconsistent decision makers by the public" (Collins 2009, 372) Thus, they will justify a vote that is incongruent with their perceived attitudes by means of a concurrence and will abstain from dissenting.

Another factor of interest for analyzing the existence of separate opinions is a case's issue area (Songer, Szmer, and Johnson 2011; Eisenberg and Miller 2009; Gerber and Park 1997). That means some topics are expected to be more conflict-laden or, as Caldeira and Zorn simply describe it, "more important than others" (1998, 877). Most often these cases are concerned with issues that contain ethical questions or far-reaching implications for citizens as to their every day life. Since these cases contain multiple conflicting options to approach them there is more potential for separate opinions. In addition, judges feel emotionally more attached to these topics. This should trigger separate opinions, as well. Moreover, different judges might put different weight on certain issues; in other words they have "more intensely felt policy views about certain issues" (Hurwitz and Lanier 2004, 431). This means that there are on the one hand issue areas that are crucial for every judge. But on the other hand there are areas that affect the judges' tendency to deliver a separate opinion differently. One judge puts, for example, more emphasis on economic topics whereas for another one civil rights are more at the core of her concern.

Often intertwined with the analysis of the impact of issue areas is the role of salience. Highly salient cases are said to be more likely to motivate judges to

formulate a separate opinion than those that are less prominent (Songer, Szmer, and Johnson 2011; Caldeira and Zorn 1998). The literature identifies three types of salience. Publicly salient are issues that are discussed in society and therefore gain a high level of attention. Collins states: "Inasmuch as a Justice might be concerned with the public's impression of a case (or lack thereof), the public import of a case might contribute to a Justice's decision to write or join a separate opinion" (2008, 160). Thus, if a topic contains a high degree of public salience, judges will be more inclined to publicly deviate from the majority opinion.

Political or legal salience differs from public salience insofar as it does not necessarily depend on the issue's visibility in public. If a judgment establishes an important new principle it is salient per se. Given that legal key questions are complex, a majority opinion will not be able to address and reconcile all considerations and concerns the case has risen. Thus, the rate of separate opinions should be higher in these cases (Eisenberg and Miller 2009; Johnson, Black, and Ringsmuth 2008; Wahlbeck, Spriggs, and Maltzman 1999).

Finally, individual salience is mentioned to have an impact on a judge's decision to write a separate opinion. Judges can be interested in issues based on, for example, professional, intellectual, or emotional interest. If they bond with a certain issue due to personal reasons, the importance they attach to it will rise. Thus, in case of disagreement with the majority opinion these judges will feel urged to formulate their unease "in an attempt to shape legal rules announced in a case" (Collins 2008, 158). Therefore, salience due to personal reasons is expected to have a positive effect on the emergence of separate opinions.

Several studies show, furthermore, that a case's complexity influences the judges' tendency to formulate an opinion on their own (Corley, Steigerwalt, and Ward 2013; Collins 2009, 2008; Epstein, Segal, and Spaeth 2001; Wahlbeck, Spriggs, and Maltzman 1999). The more complicated a case is the more matters are under discussion and the more ways to solve the legal problem are at issue. Thus, it should be more difficult to reconcile all judges' standpoints. But as soon as they cannot agree on one outcome and one line of argumentation, the likelihood of observing a separate opinion should be higher than in other, that is less complex cases

The effect of the political and societal environment a case is situated in has found its way into research explaining separate opinions, as well. Canon and Jaros (1970) show that the more complex and conflict-laden the situation in the political arena, the economy, or regarding social issues is, the higher the dissent rate due to manifold approaches to such problems. Brace and Hall (1990), however, can show evidence only regarding the economy. High state expenditures, that is the economic situation, are positively related to writing

separate opinions. Moreover, Leonard and Ross (2014) have demonstrated that also judicial elections are conducive to observing separate opinions. Furthermore, the amount of work judges have to deal with should affect the rate of separate opinions. Since formulating an own opinion is time consuming, judges should deliver less opinions the higher the workload (Songer, Szmer, and Johnson 2011; Smyth 2005; Caldeira and Zorn 1998; Atkins and Green 1976). The results, however, are mixed. Neither Smyth (2005) nor Songer, Szmer, and Johnson (2011) can prove an effect. Atkins and Greens findings, by contrast, corroborate this hypothesis.

In the literature, many explanations for the emergence of separate opinions can be found. Although several of them have succeeded in identifying factors that lead to separate opinions, they do not constitute a coherent framework that can be universally applied to different types of courts and legal traditions. Moreover, although presenting parameters that influence judicial deviation, they provide only little insight into the fundamental reasons and mechanisms why judges deliver additional opinions.

Therefore, the next chapter will undertake the endeavor to develop a new, comprehensive theoretical framework for the occurrence of separate opinions. It will take into account for the first time the roots of judicial behavior, not simply taking certain behavior as given or customized to testing single aspects. Instead, it will delve into the motivation of the judges and the logic of judicial decision-making and will pave the way for a thorough empirical analysis.

CHAPTER 4

Theory

In order to develop a comprehensive theory it is necessary to explore the basis of the judges' behavior. All of the theories delineated before assume that judges are rational actors – at least to some extent. They either apply certain legal norms they are trained to adopt; or they follow personal preferences or strategic considerations in order to purse specific goals. Therefore, they will weigh the pros and cons of their behavior. Thus, for developing a new framework, the costs and benefits a judge faces when writing a separate opinion need to be explored.

Borrowing from social psychology (Turner et al. 1987; Hogg and Abrams 1988; Kuran 1995; Brewer 2003; Packer 2008) and linking these ideas to judicial politics research, I will introduce a new non-formal model, which covers all decisive aspects that lead a judge to deliver a separate opinion or to refrain from it. In doing so, this theory is capable of reconciling the key theories of judicial decision-making. It argues that separate opinions are a function of how much a judge identifies with the notion that a court has to act unanimously and the amount of disagreement among the judges.

4.1 Individual Costs and Benefits of Separate Opinions

Assuming judges are rational actors it is not obvious why they would put effort into delivering separate opinions at all. First of all, it is time-consuming for

formulating additional standpoints requires extra work. Furthermore, delivering a dissent has very limited impact. Contrary to the majority opinion it lacks influence. Regardless of what arguments it contains, its ideas will not be implemented. Equally irrational at fist sight are concurrences. If a judge agrees with the result of the decision her preferred outcome has been established. Why would she add further points to it? Given this lack of influence combined with the additional effort separate opinions require, potential benefits of delivering a separate opinion need to be evaluated.

Epstein, Landes, and Posner (2013, 256) argue that it can be advantageous for a judge to undermine the majority opinion in order to promote her own legal view. Moreover, they discuss the potential influence of such an opinion as to be beneficial to a judge. However, they recognize that the impact can be only of minor extent.

Another incentive for delivering a separate opinion is the chance to express stances in situations in which a judge is fundamentally at odds with the majority. There are standpoints "one cannot give up due to ones own convictions" (Kranenpohl 2010, 189, own translation). Similarly, deviating can be beneficial for a judge when she perceives presenting her opinion and being visible as a value in itself. "A judge who derives great utility from expressing his views may [...] derive a benefit from frequent dissenting that exceeds the costs he incurs in effort and in impairment of collegiality" (Epstein, Landes, and Posner 2013, 257).

The loss of collegiality is a further and often cited cost judges can face when deviating from the majority (cf. Baum 2006; Kaheny, Haire, and Benesh 2008). Constantly criticizing colleagues and sticking out of the panel runs counter to an esprit de corps present at many courts. Also, it can be detrimental to forming alliances between judges in other cases. Furthermore, a potential loss of the court's legitimacy and therefore a decline in influence of the court constitutes costs for a judge. Displaying disagreement can be perceived as weakness. By contrast, others regard separate opinions as a means to show some degree of transparency. As the deliberations take place behind closed doors for good reasons, concurrences and dissents provide insight into the decision-making process (Kranenpohl 2010, 321). As explained in Chapter 3: Dissents can undermine the majority opinion. This may be an advantage for some judges. On the other hand, if a court's decisions appear not to be convincing they will harm a court's image and influence. In the same vein, dissenting can affect a judge individually. If she contributes to weakening the court by repeatedly deviating from the majority opinion, those who perceive maintaining the standing of the court as a judge's responsibility will be critical of such behavior. Moreover, judges with a high dissent rate run the risk of being regarded as unsuitable for collaboration.

The degree to which these costs and benefits are relevant at a court and how judges weigh them will determine their behavior towards separate opinions. The following section introduces a novel theoretical framework that takes these facts into account. It is capable of including the different dimensions of costs and benefits a judge needs to reconcile when deciding whether to deliver a separate opinion.

4.2 A New Approach: The Identification-Disagreement Model

How can the observation that existing theories of judicial decision-making do not account for all aspects of the process be translated into a cohesive model? As pointed out in the previous sections, most arguments put forth by the proponents of each model are valid, yet not sufficient when trying to understand why judges write dissents or concurrences. This is why this section presents a non-formal theory that aims at providing a cohesive framework for explaining the emergence of separate opinions, the *Identification-Disagreement Model*. Following Gibson's description that "decisions are a function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible" (1983, 9) the proposed model accounts for the multiple dimensions such a decision-making process contains. Judges bring forth specific preferences and ideas when drafting a decision. In cases that allow for different view points these will collide. This may limit a judge's options to push through her preferred outcome. Thus, depending on the judges and the specifics of a case there will be more or less discord. Also, judges are constrained by procedural rules and by the guidelines the law sets. If the law demands a certain action unambiguously, the judges cannot simply forego it. Vice versa, if a provision is more ambiguous, leaving room for discretion, multiple points of view are possible. Moreover, since judges do not cast decisions for themselves but need the addressees to implement them, strategic considerations as to compliance with a decision should influence judicial behavior. These aspects constitute a potential for disagreement in the decision-making process. Therefore, the first dimension in the new model covers this disagreement-level.

The other dimension the model includes is what Gibson refers to as the judges' perceptions of an required ought, that is certain norms that determine the judges' self-understanding and subsequently their behavior. Thus, the model argues that observing separate opinions requires not only disagreement and conflict among the judges. A further factor are behavioral norms that govern judicial interaction

at a court, in particular a norm that can be often found at courts and that is widely called *norm of consensus*.

The model proposes that separate opinions are a function of a judge's identification with a norm of consensus on one dimension and the level of disagreement within the panel of judges on a second dimension. Thus, the model takes up the basic ideas of the strategic models but extends their scope. The judges evaluate the situation and adjust their behavior accordingly. The Identification-Disagreement Model leaves room for including all relevant aspects, that is the role of the judges' personal preferences, their relations to other actors, the influence of law, and other factors that have been neglected by the common models. The next paragraphs will introduce the two dimensions the model consists of, meaning the norm of consensus and the level of disagreement.

4.2.1 Norm of Consensus

The outcome of every judicial action is "influenced by the prevailing norms of decision-making on the Court" (Smyth 2004, 226). In general, norms are "social institutions that provide information about how people are expected to act in particular situations" (Knight 1992, 53). One informal rule that has caught considerable attention throughout the literature is the so called norm of consensus. It asks judges to avoid expressing disagreement. Accordingly, a consensual norm is a social institution that tells a judge how to act when ruling on a case. The norm of consensus defines the level of dissent that is acceptable at the respective court (Smyth 2004, 2005). Unfortunately, the norm of consensus has been postulated widely without scrutinizing its roots and why it exists. This leads to a lack of precision in understanding judicial decision-making. I will close this gap in the following, addressing this deficiency and substantiating the norm of consensus.

The main source of this informal rule are concerns about the court's legitimacy and reputation. Murphy reporting a correspondence between Justice Frankfurter and Justice Murphy proves that such a thinking was present at the US Supreme Court. He cites, for example, Frankfurter trying to deter Murphy from dissenting by arguing that it is necessary "to do all that is humanly possible to maintain and enhance the *corporate* reputation of the Court" (Murphy 1973, 46, emphasis in the original). Moreover, several articles have shown for the US Supreme Court and the US Court of Appeals that such an informal requirement of concord existed, diminishing over time, though (Epstein, Segal, and Spaeth 2001; Caldeira and Zorn 1998; Walker, Epstein, and Dixon 1988; Atkins and Green 1976).

While for Australia a study on the issue could not prove such striving for public unanimity (Smyth 2002), in civil law traditions the notion that a court should not display disagreement is prevailing, however, showing tendencies

towards a decline (Merryman and Pérez-Perdomo 2007, 122). The judges "favor ... consensus and dislike ... dissent on the bench" (Garoupa, Gomez-Pomar, and Grembi 2011, 521). Similar to the situation in the United States, concerns about legitimacy, collegiality, and loss of influence are the roots of this regime (Tiede 2015; Baum 2006).

The fact that a norm demands specific behavior does not imply that the addressees adhere to it. Since judges are – as discussed above – rational actors, it depends on how they weigh the costs and benefits they receive from following it. Thus, the utilities a judge derives from complying with the norm have to be evaluated.

4.2.2 Utilities of Norm Adherence

If every judge followed the norm of consensus there would be no public deviation. Nevertheless, we do observe separate opinions. Whether or not a judge will formulate a separate opinions depends in essence on how much she profits from abiding by this norm.

The judges have to decide on a case. Due to their preferences they develop certain stances on the crucial questions. If they can reach a unanimous decision, no problems arise. However, the preferences can vary among the judges. As soon as a decision does not match the opinion of a judge, she faces the question how to convey her preferences (Kuran 1995, 24). She has two general options at her disposal. First, she can express her sincere preferences, which would give rise to a dissent and would not conform with a consensual norm. Second, she can adapt her behavior according to what the leading rules demand. This would result in refraining from public deviation. However, the latter choice suppresses her sincere preferences. Moreover, it curtails her decision whether to express herself publicly for matters of individuality and self-presentation. She would rather be absorbed by others' expectations and opinions.

Kuran (1995) describes these aspects by means of three categories of utilities: intrinsic, expressive, and reputational utility. Intrinsic utility is rooted in sincere preferences (Kuran 1995, 24). A person maximizes her intrinsic utility if she chooses out of all available options the one that is in accordance with her true perceptions and opinions, leaving aside strategic considerations. Therefore, if a proposition does not reflect someone's sincere preferences, maximizing the intrinsic utility requires expressing one's own, diverging standpoint.

Expressive utility arises from a person's need to display individuality and to counter the notion of conformism. Psychological experiments have shown that every individual has a "need for self-assertion" (Kuran 1995, 33). Therefore,

emphasizing own standpoints in order to fulfill the need for autonomy and individuality serves the expressive utility.

A third type of utility Kuran identifies is reputational utility. This term describes the benefits someone gains from "preference falsification" (1995, 26). If the private, sincere preferences do not coincide with what others expect, a person may consider adjusting her publicly displayed preferences to these expectations. Otherwise she runs the risk of losing reputation.

As said above, expressing sincere preferences serves what Kuran calls "intrinsic utility" (1995, 24). Therefore, sincere preferences not concurring with the outcome of the case lead to separate opinions when maximizing intrinsic utility. By conveying her differing stance on a legal question, the judge gives utterance to her disagreement, motivated solely by the differences between her view and the one of the majority. Similarly, a judge can display disagreement publicly because she seeks authentic actions and acting autonomously. While intrinsic behavior is solely led by the contentual consideration "what is my opinion on a specific question," expressive utility serves self-presentation and the desire to act as an individual. Translating this into explaining separate opinions means that a judge's written disagreement or concurrence with the majority opinion signifies two aspects: In addition to displaying her disagreement with the decision she also shows that she does not follow the norm. She rather demonstrates that she chooses autonomously how to react to the other judges' actions and to a leading social institution. Therefore, maximizing expressive utility would lead to separate opinions in those situations in which the judge does not approve the majority opinion. From this it follows that separate opinions originate from maximizing intrinsic and expressive utility. By contrast, the norm of consensus is a manifestation of reputational utility: In order to ensure a good reputation of the court and herself, a judge cannot publicly deviate from the majority opinion. Otherwise she jeopardizes the court's legitimacy. Putting this main source of the court's raison d'être at risk is expected to be detrimental for a judge's standing (Garoupa, Gomez-Pomar, and Grembi 2011, 521). Furthermore, she potentially puts her own reputation at risk when not adhering to commonly accepted norms.

The comparison of these three types of utilities reveals that they have different origins. Reputational considerations are determined by actors other than a judge. It is not the judges but their environment that creates the expectations the judges aim to meet (or not). By contrast, the other two types of considerations are defined by the judges themselves. Individual preferences are formed separately from what others think. They emerge from personal opinions, experiences, and perceptions. Likewise, the decision of whether to express her opinion in order to convey her independence and fulfill the desire to decide autonomously is at

the discretion of the judge only. It is independent of exogenous factors such as the expectation of other's. Therefore, when the court takes a decision a judge disagrees with, there are two dimensions. The first one concerns personal standpoints. A judge has to ask herself: Is it worthwhile for me to formulate the arguments publicly, given the intrinsic and expressive utility emanating from it? Second, she needs to evaluate to what extent a public dissent affects her reputational utility taking into consideration what other actors expect her to do.

From this it follows that there are two aspects determining separate opinions. First, it is decisive to what extent a judge, incited by reputational considerations, adheres to the norm of consensus. If for reputational reasons the judge perceives it as crucial to comply with the norm of consensus she will behave differently than without such concerns. Second, in order to observe separate opinions, there must be disagreement that stirs a judge to deviate publicly due to intrinsic utility. Without disagreement, there would be no need to deviate as the majority opinion would already cover a judge's preferences.

The expressive utility will be oftentimes high without or with only little disagreement. Nevertheless, there is also a possibility to bring it to bear if desired. Although a judge may agree with the rest of her colleagues, she may still want to satisfy the need to decide autonomously and individually. Concurrences grant such an opportunity. Maximizing her expressive utility would therefore result in public remarks on the case. Thus, due to the absence of disagreement she will endorse the decision while still commenting on it.

In summarizing the points made above one arrives at the conclusion that the decision whether to write a separate opinion is driven by reconciling the different utilities a judge derives from dissenting or concurring. The judges have specific goals but several other factors curtail them. They have to weigh costs and benefits, and if a specific goal is "very important, they will sacrifice other considerations" (Garoupa, Gomez-Pomar, and Grembi 2011, 521). Two dimensions depict these costs and benefits: Disagreement among the judges and reputational considerations. The latter manifests itself in the norm of consensus. Therefore, the following paragraphs are concerned with the question of what leads judges to comply with this norm or to reject it.

4.2.3 Norm-Identification

As stated above, I suggest separate opinions to be a function of disagreement among the judges and identification with the norm of consensus. The latter can be briefly described as a behavioral rule that requires a court to speak in its decisions with one voice not displaying disagreement. The extent to which judges feel obliged to this norm will influence their behavior concerning separate

opinions. Given the fact that judges are faced with the norm of consensus, the question arises what causes variations in the degree of how much they follow it. Based on the premise that reputational utility is decisive for a judge's willingness to adhere to the norm of consensus, the mechanism leading to such conformity needs to be understood. In the following, I will propose that it depends on a judge's self-perception and her understanding of her role. If a judge defines herself mainly as being a part of the law community, she will comply more with the norm of consensus whereas someone whose main interest does not lie within the realm of the law profession will identify less with this rule.

Explanations for discovering one's own reputational utility can be drawn from social identity theory. According to it, people classify themselves with regard to objects, people, or experiences. This process is called self-categorization (Hogg and Abrams 1988, 21). If someone becomes a member of a group, she will conform with the norms in the respective social group. However, as there are multiple groups a person can belong to, an individual must be exposed to certain stimuli that make her classifying herself as member of one or the other group. As a consequence, once a person has aligned herself with a specific group, the behavior shifts from being solely motivated by individual reasons to acting according to group norms. Self-categorization can, therefore, be described as "process which transforms individuals into groups." (Hogg and Abrams 1988, 21). If a person has categorized herself as member of a group, she is exposed to this group's norms and will finally embrace them. As a result, she will conduct what is called ingroup normative behavior or conformity (Hogg and Abrams 1988, 172).

How does this relate to judges at supreme and constitutional courts? Although sharing the identity of being judges at the same court, there are several groups they can belong to: They have pursued different professions prior to their position at the court, their political views differ, and they come from various social backgrounds. Moreover, their future career plans may vary. Thus, although serving at the same court in the same position there are significant differences and similarities. Therefore, judges will perceive themselves as being a member of one of the relevant groups if certain stimuli activate the process of self-categorization. Eventually, this will result in "an agreed way of acting" (Hogg and Abrams 1988, 157).

In the social psychology literature the process of self-categorization as leading to conformity has been regarded as a psychological phenomenon rather than as strategic action. Posner (2008) and Epstein, Landes, and Posner (2013) have applied the idea of group membership affecting the judges' behavior to judicial politics and specifically to dissenting behavior. However, they treat what they

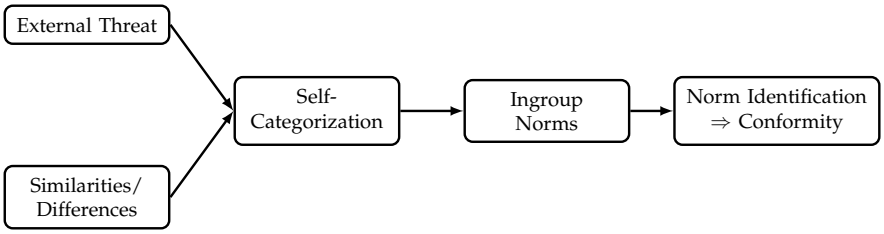
call "dissent aversion" (Epstein, Landes, and Posner 2013, 145) as strategic. This appears convincing as casting a vote at a court is of a different nature than the rather abstract and general behavior social psychologists describe. Judicial decision-making is always focused on one specific issue and is made by actors who, as discussed above, pursue certain goals in the light of strategic considerations. Therefore, following Posner (2008) and Epstein, Landes, and Posner (2013), self-categorization will be regarded as induced by strategic considerations.

A person can belong to several groups or sub-groups. Depending on the context she can choose between multiple options. In one setup she will align herself with one group while under other circumstances this group is irrelevant and another one prevailing. What causes the decision for one category and against another? Self-categorization requires certain triggers. A widely accepted basis of self-categorization is the perception of being similar to or different from others in a specific context (Turner et al. 1987; Hogg and Abrams 1988; Stets and Burke 2000; Brewer 2003). But differences and similarities as such do not lead automatically to categorization because "[s]ome category memberships may be highly meaningful in one [...] context [...] and irrelevant in others" (Brewer 2003, 6). Thus, only if a topic becomes relevant for an individual, she will accentuate the differences and similarities and eventually class herself with one or the other category.

Additionally, we find in literature that external threat lies at the root of self-categorization. Flippen et al. (1996, 892), for example, detected in four experiments that "when people believe that others are acting in a manner that is contrary to the best interests of their group, they discriminate against everyone who may be one of those acting against them." In other words: If someone discerns a potential threat by behavior detrimental to herself, she will be keen to unite with a group that serves expedient purposes.

Summarizing the previous points, it can be stated that self-categorization and eventually norm-identification is activated by self-perceived strong and salient similarities and differences. In addition, an external threat makes people unite along the divide who is threatened and who is not. This will result in identification with the respective group's norms. Applied to courts, if a judge neither discerns similarities and differences nor perceives an external threat, self-categorization and in the sequel norm-identification will not occur. Figure 4.1 illustrates this process. Facing external threats and discovering similarities and differences between themselves and other judges leads a judge to identify with groups she thinks she belongs to. The new group member will discover the ingroup norms and will adhere to them as she expects it to be beneficial to her.

Figure 4.1: Formation of Norm-Identification



This leads to the question what differences and threats exist in practice. For judges one can identify three key sources of threats: first, the loss of the court's legitimacy. It would jeopardize the court's power and, on an individual level, the judges' standing. Second, damaging the legal profession is a common concern among judges since it runs counter to the professional ethos. Third, a decline in collegiality can be a threat to the judges as they constantly work together and are dependent on each other when ruling.

The loss of legitimacy is a frequently cited threat (e.g. Tiede 2015; Epstein, Landes, and Posner 2011; Baum 2006; Kranenpohl 2010). This holds true especially for constitutional courts as they do not possess the power to enforce their decisions. Instead, they are entirely reliant on the legislator with regard to the implementation of rulings. As long as the court enjoys support from the citizens, non-compliance with its decisions will harm the legislator and will potentially affect reelection negatively. If, however, the court loses legitimacy and therefore support from the citizens, non-compliance will not be detrimental to the legislator but further marginalize the court. Thus, in order to keep up its influence, a court needs to possess legitimacy. Its loss is therefore a threat to the court as such. At first sight, this logic holds only for the court as a whole. However, it also applies to the individual level. Whether it is of key interest for an individual judge depends on the importance she personally attaches to the legitimacy question and her personal reputation.

For those judges who plan on continuing their career in the judiciary or in other legal areas after their term at the constitutional court, perpetuating the court's legitimacy is crucial. They need the court's strength to maintain their own reputation because serving at a marginalized court will harm their standing. Likewise, it will be detrimental to a judge's aim to be a distinguished actor in the law community if during her time in office the impact of the court diminishes, that is if she contributes to a loss of influence. Thus, a decreasing legitimacy

would endanger a judge's personal reputation and is therefore an external threat, which can cause self-categorization.

A further common issue is the concern about the legal profession in general. Some judges may want to prevent it from being damaged whereas others do not regard this as an important task of judges. Also, professional ethos plays a role in terms of a judge's self-perception and therefore self-categorization. Being a law professor, for example, implies a certain understanding of one's role in academia and society. Likewise, judges on all levels of the judiciary are shaped and driven by the job they execute (e.g. Klein and Morrisroe 1999; Baum 1994; Kranenpohl 2010). Refraining from abiding by common rules can impair their professional standing. Thus, they align themselves to the dos and dont's of the profession and internalize the respective behavior.

Politicians who have been exposed to yet another bundle of informal rules will employ an, again, different behavior than the aforementioned groups. The same holds true for other professional backgrounds. By experiencing such differences judges will contrast themselves with their colleagues.

Furthermore, collegiality is expected to shape a judge's perceptions (e.g. Garoupa, Gomez-Pomar, and Grembi 2011; Kranenpohl 2010; Kaheny, Haire, and Benesh 2008; Baum 1994). Constant disagreement with colleagues damages the atmosphere within the panel. Moreover, it can be detrimental to convincing colleagues in other decisions. Thus, it constitutes a risk for a judge's individual influence at the court.

Baum, building categories of judicial aims, summarizes the factors that create threats and lead judges to contrast their goals with those of other's as: life on the court, career, and personal standing (1994, 752). While the perceptions toward life on the court should be similar among the judges – every judge benefits from a good atmosphere, efficient work, and alike – concerns about career and personal standing should vary due to differing individual plans and conceptions. Hence, the latter two categories are decisive for constituting threats and alignments with a certain group, eventually resulting in norm-identification.

Thus, depending on their career goals and their self-understanding, judges will perceive distinct as well as shared characteristics among themselves, and they will identify threats. This leads to classing themselves with those groups the norms of which serves their aims best. If the group they belong to is prone to identify with the norm of consensus, the respective judge will be as well.

What has been set forth shows that norm-identification depends on which group judges class themselves with. If the process of self-categorization leads them to being inclined to a group of those who promote the legal profession and pay attention to the court's standing, they will strongly identify with the norm of

consensus. Those, however, who are not attached to these groups will be weaker identifiers.

Having discussed the first dimension of the Identification-Disagreement Model, the next section turns to the second dimension, that is the level of disagreement among the judges.

4.2.4 Level of Disagreement

Disagreement is the second determinant of separate opinions. As long as a decision is fully in line with a judge's ideas, stances, and arguments, a separate opinion does not provide any utility. As the decision contains the sincere preferences of a judge, there is no necessity to deviate on the basis of intrinsic utility. Only if the opinions on the questions under discussion diverge and conflict arises, a judge will have reason to object the majority opinion. A ruling in disagreement with a judge's standpoint provides an incentive to deviate overtly as the judge gains intrinsic utility from expressing her sincere preferences.

In a decision that is entirely in accordance with the judge's view, deviating from the ruling does not serve the expressive utility, either. Since all aspects are covered, there is no room for additional remarks. Although fostering the notion of being an individual standing out against others, further comments on the case would be at odds with the judge's opinion. Therefore, also in the eyes of expressive considerations, conflict is needed for observing separate opinions.

From this it follows that disagreement and therefore separate opinions require a certain degree of conflict. As long as all judges assess a case similarly, there will be a limited amount of discord and, thus, a low level of disagreement. Under these circumstances, separate opinions should be less likely.

As soon as a majority opinion does not cover all aspects a judge deems important, the level of disagreement rises. There may be arguments one judge views as crucial for the rationale of the decision. A majority of judges, however, may not agree with this argument or even assess it as detrimental to the ruling. If this point is important to the judge in the minority, she will consider making it public. As long as there is consensus with regard to the result, the extent of conflict will remain on a medium level. In order to observe a dissent, there has to be significant dispute among the judges. If their legal understanding, their personal opinions, and strategic considerations on the respective topics are strongly diverging, it will become difficult to find a common ground for a final ruling. The more diverging, the higher is the level of disagreement.

What factors are the sources of disagreement and determine its intensity? Drawing on the findings of the attitudinalists, the level of conflict employed in the Identification-Disagreement Model is dependent on the judges' personal

preferences. Assuming that those preferences are diverging among the judges, they are one of the roots for disagreement. Judges have differing stances and ideas of how the world ought to be. Therefore, in a panel of judges we will always find what Kranenpohl calls "heterogeneity of preconceptions" (2010, 240, own translation). Through their social upbringing and multifaceted experiences judges have developed ideological, social, and political views and beliefs. Therefore, they will assess problems and questions a case poses differently. Even more, not only will they evaluate a case in a manner predetermined by their background. They can, moreover, actively pursue their policy preferences. For the US Supreme Court research has already proven that judges' "votes are strongly dependent upon their attitudes, values, or personal policy preferences" (Segal and Cover 1989, 557). As manifold attitudes, worldviews, and political opinions exist, there is a high possibility that different stances on issues may clash.

Further influences on the level of disagreement are of exogenous nature. While the previous paragraph has depicted sources for conflict rooted in the judges individually, there are also factors that influence the level of disagreement without stemming directly from the judges' personal perceptions. First, the content of the case lays the ground for potential disagreement. Cases on highly controversial topics, for example value-laden issues, will cause more diverging views and therefore more incentives to deviate than uncontroversial cases. Similarly, a complex set of facts "should be more variable than decision-making in more routine cases" (Kaheny, Haire, and Benesh 2008, 494). If a case includes manifold problems there is much room for debate. This should have an impact on the judges' behavior.

Also, the role of the law should not be neglected. As shown above and contrary to the propositions of the legal model, the law – through interpretive methods – generally does not provide precise and indisputable answers. However, some questions do not allow for discrepancies. A law legalizing death penalty will be unconstitutional in a country in which the constitution prohibits capital punishment. Thus, "legalism plays a role, too" (Epstein, Landes, and Posner 2013) and should negatively affect the level of disagreement.

The level of disagreement and norm-identification are the main dimensions defining separate opinions. Having delineated these two dimensions, in the next section I will turn to introducing a new non-formal model that bases on these assumptions.

4.3 The Identification-Disagreement Model

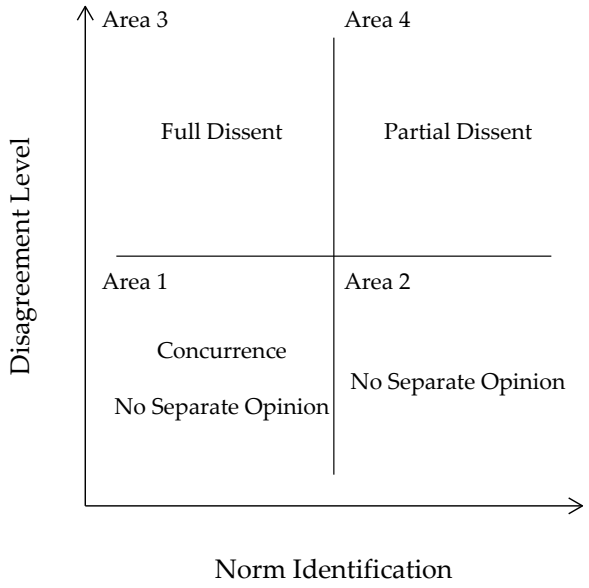
The judges' decision whether to write a separate opinion and which kind of separate opinion is determined by two dimensions: The degree of identification with the norm of consensus and the level of disagreement. One could argue, however, that those judges who have a high norm-identification are always less prone to conflict. In this case, norm-identification and the level of disagreement would not be independent. But looking at the sources that determine the level of disagreement shows that this concern is unsubstantiated. Disagreement arises when distinct personal preferences come into conflict. Thus, only if judges with high norm-identification had fewer opinions, norm-identification and the level of disagreement would be dependent on each other. However, there are no reasons why with varying attitudes toward the norm of consensus the amount of preferences should change. The extent to which a judge lays weight on her preferences when deciding whether to deviate or not is then a matter of individual costs and benefits.

Figure 4.2 illustrates the basic logic of the Identification-Disagreement Model.

Area 1 represents those situations, in which a judge identifies only weakly with the norm of consensus, so the disagreement level is low. If there is no or only little disagreement, a judge does not have an incentive to deviate. This holds true regardless of the extent to which she abides by the norm of consensus. As long as all judges are of the same opinion on the topic in question or differ only marginally, there is no reason why major discord would occur. Even if a judge dismisses the norm entirely, she will not write a dissent due to a lack of dispute. In a very similar constellation, however, a judge may write a separate opinion, namely a concurrence. If she wants to add arguments to the ruling that other judges reject to include in the decision, she will write a concurrence. Due to low norm-identification but some kind of disagreement, she will not abstain from adding her further thoughts. Therefore, in this situation we will observe a concurrence.

A judge will deviate fully when there is a considerable disagreement level and, at the same time, she has a low degree of identification with the norm of consensus. This is depicted in Area 3. In this situation, the judge is faced with a solution for the case that is unacceptable for her. Therefore, she has an incentive to deviate in order to put forward her opinion. Contrary to weak identifiers, in this scenario deviation requires less disagreement. The judges do not possess a high degree of norm-identification. Therefore, they do not feel obliged to forego a separate opinion. Hence, there is no reason for a judge to restrain her opposition to the decision. She will therefore publish a full dissent.

Figure 4.2: The Identification-Disagreement Model



The set-up in which a judge being a strong identifier with the norm of consensus faces only a low disagreement level is covered by Area 2. Under these circumstances, a separate opinion will not occur. First, an absence of disagreement makes deviation highly unlikely to occur. Second, contrary to the situation in Area 1, a low degree of conflict is unlikely to trigger deviation. Even in case of minor disagreement a strong adherence to the norm of consensus will deter the judge from dissenting. By revealing a lack of cohesion, the judges still run the risk of weakening the court and facing other costs stemming from deviating. In other words, the low degree of disagreement is not worth risking the court's and one's own standing. Therefore, any kind of separate opinion is unlikely to occur because it would display a lack of unity. Hence, in Area 2 I do not expect to observe deviation.

The last situation is mapped in Area 4. Here, we will observe mainly concurrences, as well. At first sight one would argue that a high level of conflict always leads to a high level of dissent. However, a strong proponent of the norm of consensus will not deviate fully. Despite her unease with the decision, she will restrain herself with regard to criticism while not refraining from it because she still identifies strongly with the norm of consensus. Striving for reconciling these two aspects, she will express her objections in a way that minimizes deviation from the norm. For this purpose, she has two options at her disposal: concurrences and partial dissents. The former is more in accordance with the norm of consensus, while the latter is an effluence of rising disagreement. Given the judge's strong identification with the norm, a concurrence should be the separate opinion of choice as long as the level of disagreement allows for it.

So far, the model has not explicitly addressed the role of partial dissents. This is due to the fact that they constitute a state of transition. Weak identifiers do not have a strong incentive to choose a partial dissent as they do not have to restrict themselves in terms of deviation. Thus, if they agree with the decision in general with minor discounts, they will opt for a concurrence. If they disagree, they can dissent fully. However, there may be situations in which the disagreement is just not strong enough for a full dissent. In these cases, they will choose a partial dissent.

Partial dissents can be a valid option for strong identifiers, as well. In general, they try to avoid dissent. Thus, they will prefer not to deviate at all. Nevertheless, in some instances there is just too much disagreement to forego dissent. In these situation, they would write a partial dissent. Hence, also for those adhering strongly to the norm of consensus, partial dissents serve as a transition between the other types of separate opinions. Therefore, they will occur less often than other types.

What has been sketched so far is an idealized model. However, in order to provide a more precise explanation and understanding, it is necessary to look at it in more detail. The boundaries of each category are obviously not as clear cut as displayed in Figure 4.2. More importantly, the stylized model cannot account for the possibility that there may be situations in which for an individual judge the impact of disagreement trumps norm-identification. In this respect, Preisendörfer argues that there is an "interaction effect in a way that the behavioral efficacy of attitudes differs dependent on the cost intensity of the situation" (2004, 280, own translation). He reasons that in situations where the difference between the costs for distinct actions is low, the personal attitudes affect an individual's decision more than in situation with a large difference. Applying this argument to judges yields the following result: At a very high level of disagreement, judges fear a negative impact on their future career when deviating. However, when refraining from disagreeing, they act to a high degree against their conviction. Both options are highly undesirable. Thus, in such a situation, the personal attitudes are expected to be amplified.

Figure 4.3 shows are more elaborate illustration of the Identification-Disagreement Model. The brightest area depicts those situations, in which a separate opinion does not occur. By contrast, the darkest area illustrates full dissents.

4.4 Hypotheses

From the Identification-Disagreement Model I will now derive five hypotheses. The first three focus on the overall occurrence of separate opinions in the light of disagreement and norm-identification. As the model allows for explaining different levels of deviation, the Hypotheses 4a and 4b are concerned with the differences between the types of separate opinions (full dissent, partial dissent, concurrence). The final hypothesis examines the theory from another angle: Simply put, if the judges orientate their behavior to their post-court career, they should behave accordingly the more this time is imminent. Hypothesis 5 will delve into this observable implication.

The FCC serves as case for applying the theory. Here, the existence of the norm of consensus leads obviously to a general reluctance with regard to writing separate opinions. The mere numbers as shown in Figure 4.4 provide evidence for this claim: The quantity of none-votes exceeds that of any other vote type by far. Looking at Figure 4.2, this is very intuitive as regardless of the level of norm-identification a none-vote can occur. The entire spectrum of norm-identification allows for non-deviation. however, according to the theory, the other dimension determining separate opinions is the level of disagreement among the judges.

Figure 4.3: The Identification-Disagreement Model

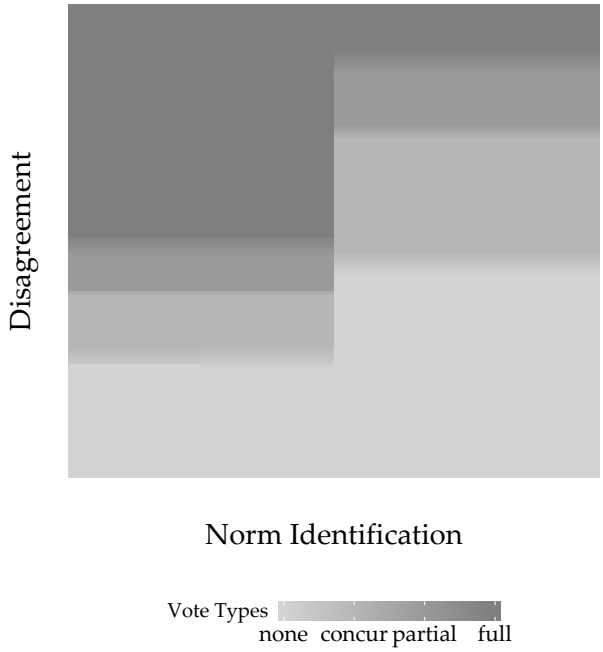
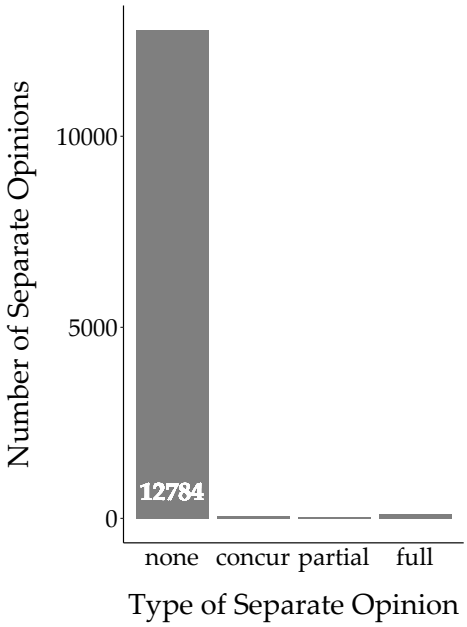


Figure 4.4: Numbers of Votes by Type



If disagreement is absent, there will be no deviation. The lower part of Area 1 and Area 2 of Figure 4.2 illustrates this. By contrast, in the upper part (areas 3 and 4) of Figure 4.2, depicting a high level of disagreement, separate opinions arise. Therefore, Hypothesis 1 can be formulated as follows:

Hypothesis 1 *The probability of observing a separate opinion is higher in situations with a high level of disagreement than in situations with a low level of disagreement.*

The second hypothesis concerns the role of norm-identification. As expounded in the theory, judges are more inclined to deliver separate opinions when they identify weakly with the norm of consensus. Figure 4.2 illustrates this as it displays on the left side full dissents as well as concurrences. By contrast, in the right part of the plot, only partial dissents are depicted. Thus, Hypothesis 2 suggests:

Hypothesis 2 *The probability of observing a separate opinion is higher for judges with low norm-identification than for judges with high norm-identification.*

Norm-identification and disagreement influence each other. According to the theory, even judges supporting strongly the norm of consensus may reach a point at which their unease with the majority opinion will trump their norm adherence. Although norm-identification is high, judges are still prone to deviate. From this it follows that with increasing disagreement the difference between the professions is expected to decrease. In a situation with high disagreement, all judges will be prone to deliver a separate opinion, regardless of their career plans (see Figure 4.2, Areas 3 and 4). Therefore, Hypothesis 3 proposes:

Hypothesis 3 *The higher the level of disagreement, the lower the effect of norm-identification and, thus, the smaller the difference between the professions.*

After having referred to the occurrence of separate opinions in general, the subsequent hypotheses focus on explaining the specific types of deviation and the lack thereof, respectively. In the following, I examine full dissents. As Figure 4.2 shows, they are expected to occur in those situations, that are characterized by a high(er) potential for disagreement and low norm-identification (Area 3). Unsurprisingly, judges who are less prone to follow the norm of consensus require less disagreement for writing any kind of separate opinion and in particular full dissents as this is the strongest type of deviation. By contrast, judges with high norm-identification will be eager to avoid full dissents. Even more, those judges endorsing the consensual norm are reluctant to deviate at all. This leads to Hypothesis 4a:

Hypothesis 4a *The proportion of full dissents is larger than that of partial dissents or concurrences.*

Besides deviating fully, judges have also partial dissents and concurrences at their disposal. When do they choose these options? Those judges who support the norm of consensus strongly will try to avoid deviation. Only at a high level of disagreement they will consider to not comply with the norm. In this case, however, a partial dissent will be the first choice as it displays less opposition to the majority than a full dissent. Nonetheless, those judges will be reluctant to make use of it. For judges who are less supportive of the norm, there is no reason to restrict themselves to partial dissents. From a certain level of disagreement on they can deviate fully. If, however, the situation lacks sufficient disagreement for dissent but there is still no agreement with the majority, the judges will choose a concurrence. Nevertheless, due to their low norm-identification they will not forego deviation. In other words: While strong identifiers will try to avoid a separate opinion and consider partial dissents only as an exit option, weak identifiers can write a concurrence without hesitation. Thus, Hypothesis 4b can be formulated as follows:

Hypothesis 4b *The proportion of concurrences is larger than that of partial dissents.*

So far, the hypotheses have addressed the occurrence of separate opinions directly, drawing on disagreement and norm-identification. However, testing the theory thoroughly requires additional examinations. If the theory holds true and norm-identification operates as proposed, towards the end of their term, judges identifying strongly with the norm of consensus should act considerably different from weak identifiers. As argued above, the post-court career is a driving force behind the judges' behavior. Those who plan on leaving the law area will pay less attention to the customs at the court and the profession. By contrast, judges remaining in the law community will adhere to the leading norms. This behavior should be more pronounced as the time this strategical consideration becomes relevant, approaches. Since the latest actions are the most visible ones, judges who rely on the norm of consensus will be eager to exhibit the required behavior, particularly before (re-)entering the law community outside the FCC. Furthermore, while at an early stage at the court a judge may not know how to proceed after the term at the FCC, this will become clearer the more the day of resigning from office appears on the horizon. Specifically for those retiring fully or pursuing a position other than in the realm of law, this results in fewer restrictions with regard to separate opinions. Thus, Hypothesis 5 proposes:

Hypothesis 5 *The closer the date of the decision to the date at which the judge will leave the office, the larger the difference between the professions.*

This chapter has developed a theory for explaining separate opinions. For the first time, such a framework is capable of being employed for all types of courts, for example constitutional courts of the Kelsenian design and high courts as known from the Anglo-Saxon tradition. Moreover, while the majority of literature focuses on the emergence of separate opinions only, disregarding the question why they do not occur, this theory addresses this issue explicitly. In doing so, it sheds light more precisely on understanding intra-court processes. Eventually, the theory allows for explaining the different levels of judicial deviation, namely concurrences, partial, and full dissents. Building on this framework, I have derived six hypotheses that will now be put to the proof empirically. The analysis is conducted for the German FCC, utilizing novel data from the CCDB as introduced in Chapter 2. It will be presented in the next chapter.

CHAPTER 5

Empirics

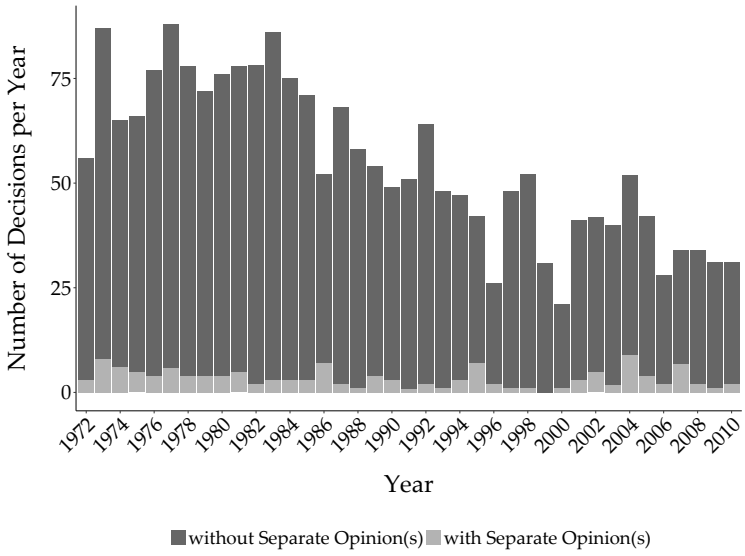
Over the past decades, conducting large-N research on the FCC has been nearly impossible due to a lack of data. Only case studies and smaller samples with a limited amount of variables could be used to examine the court's behavior (e.g. Hönnige 2009, 2007; Rottleuthner 1987; Heyde 1970; Baade 1961). Frequently, only certain types of procedures were subject to research, and these studies often suffered from sparse information regarding important factors that would most likely influence the analysis. The CCDB has resolved these limitations to a huge extent. Relying on data from the CCDB extended by further information, the following analysis proves the comprehensiveness and precision the database allows for.

5.1 Data Set and Case Selection

The data set is composed of selected variables from the CCDB and extended by self-collected information. It covers the time span from 1972 to 2010 and bases on all decisions in the database, regardless of its type or the type of proceeding. This amounts to a total of 2006 decisions and 3284 proceedings.

Unit of analysis is a judge's individual vote. Whether she delivered a separate opinion (and if so, which kind of) serves as dependent variable. The judges' votes refer to the entire decision, not to every proceeding separately. Thus, information

Figure 5.1: Absolute Numbers of Decisions by Year

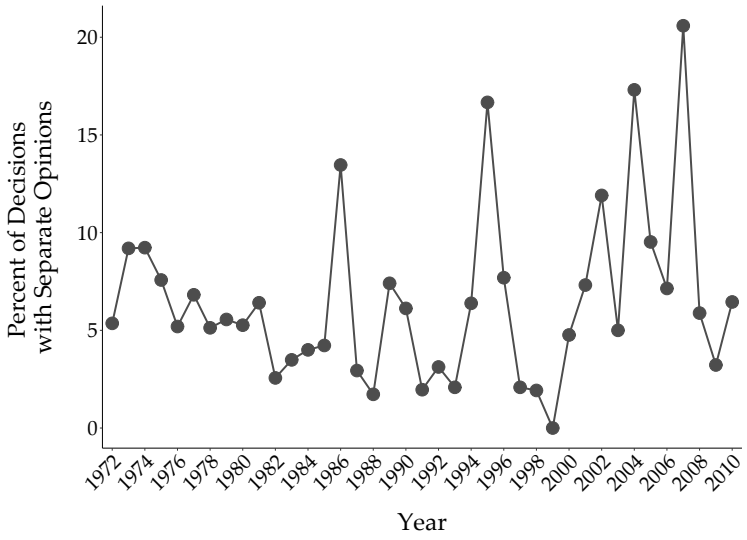


the CCDB provides on the proceeding level had to be collapsed in order to conduct a meaningful analysis. Figure 5.1 gives an overview about the quantity of FCC decisions, combined with the information how many of these decisions contain a separate opinion. The entire bar depicts the overall number for each year, the brighter area displays the number of decisions that come with a separate opinion.

Looking at the figure, it appears that the amount of decisions per year has considerably decreased over time. That is due to a change of the Federal Constitutional Court Act in 1992. While heretofore all eight judges in a senate had to decide on every case, the amendment to the Act introduced three judge committees that can now decide on less important cases if reaching unanimity. Those cases are not in the official proceedings of the court and therefore not part of the data base.[1] Thus, the decreasing number of cases decided by the two senates is not a sign of decreasing output by the court or less workload, but only a result of an organizational change. As this work aims at understanding why a single judge decides on delivering a separate opinion or not, this is not crucial for the analysis to follow.

[1] Cases decided by these so called chambers cannot contain separate opinions.

Figure 5.2: Percentage of Decisions with Separate Opinions



A second remarkable observation is the small amount of separate opinions. While the maximum number of decisions goes up close to 90 in 1977 and after 1993 to roughly about 50 in 1998 and 2004, the amount of separate opinions remains always below ten with even no separate opinions at all in 1999. Thus, already from looking at the absolute numbers it is obvious that FCC judges are not prone to deviate.

Due to the decreasing number of senate decisions and the rather stable number of separate opinions, there is an upward trend in the relative frequency in terms of writing separate opinions. Figure 5.2 illustrates this by plotting the percentage of decisions with separate opinions for every year. However, the values still range from zero in 1999 to about 20 percent in 2007. Thus, there is no clear pattern or trend as to the occurrence of separate opinions despite the fact that the deviation level remains comparatively low.

The aforementioned numbers and figures refer to decisions and separate opinions on the aggregate level. However, it is the individual vote of a judge that is of interest and that constitutes the dependent variable. Thus, the dataset provides the data on the individual level: One observation consists of a single judge's vote on a decision. This leads to a data structure of multiple observations per decision – as many observations as judges took part in the decision. If eight judges decided on the case, the data shows eight observations. There is

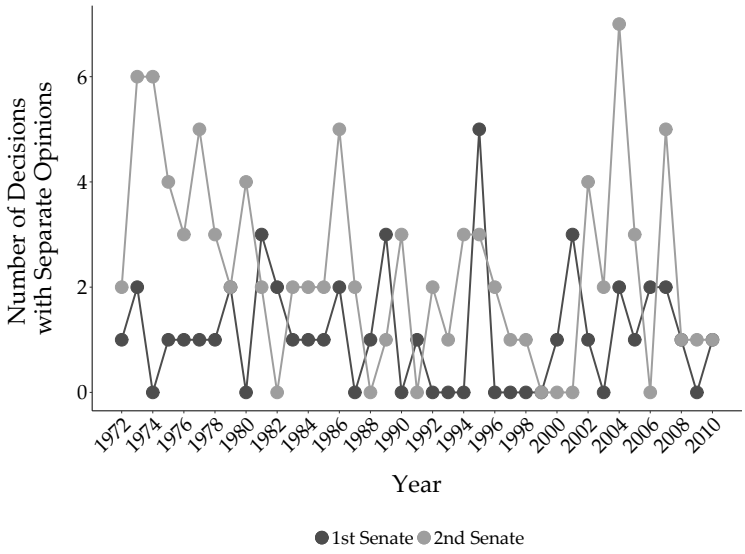
one exception, though. In the very rare case of a judge delivering two separate opinions, the data contains two votes of the same judge. If judges write a separate opinion jointly, which is a common practice at the FCC, each author gets the respective vote assigned. Usually, a senate consists of eight members. However, the number can vary between six and eight, for example if a retired judge has not been replaced by the time of the decision or if a judge has been sick. On average, approximately 7.5 judges per decision sit on the bench. This amounts to a total of 15,015 votes. They stem from 67 judges, and 243 of them are separate opinions. As the court consists of two senates, differentiating between the two panels provides a more precise picture of the judges' deviation behavior. Figure 5.3 displays the number of separate opinions per year for each senate. Unambiguous trends cannot be observed. However, in the first decade, the Second Senate (light grey line) made use of the newly established option to write separate opinions comparatively often. In 1974, the third year after their introduction, the Second Senate delivered eleven separate opinions, a number that has been exceeded only in 2004. During the Eighties and the Nineties, the amount of separate opinions dropped considerably, down to zero in 1982, 1988, 1991, and 1999. Nevertheless, the peak in those years consists of seven separate opinions in 1986, followed by six in 1996. Thus, there is a notable variance. Between 2000 and 2010 this difference increases. At a minimum, there is no separate opinion at all in 2000, 2001, and 2006 compared to fourteen in 2004 and ten in 2007.

By contrast, the First Senate has been rather reluctant in terms of deviating. Until 1994, the highest amount of separate opinions can be found in 1979 and 1989, namely five. But the First Senate has continued to publish relatively few separate opinions. In 1995, however, the number jumps to twelve, while in the years prior and following this observation, no separate opinions have been delivered. After this peak in 1995, the amount always remains below five.

In general, the graph shows that the Second Senate is more prone to deviation. Only in nine out of thirty-eight years, the number of separate opinions delivered by the First Senate exceeds that of the Second Senate (1982, 1988, 1989, 1991, 1995, 2001, 2006, 2008, 2010).

The ups and downs – in both senates – demonstrate that there are no obvious patterns in the judges' deviation behavior. Nevertheless, there are some peaks, for example in 1974, 1980, 1995, 2001, or 2004. This suggests that specific incidents may have influenced the emergence of separate opinions. However, these high values do not occur simultaneously in the senates. If it had been certain events that caused those peaks, they would have affected both senates.

Figure 5.3: Number of Separate Opinions by Senate

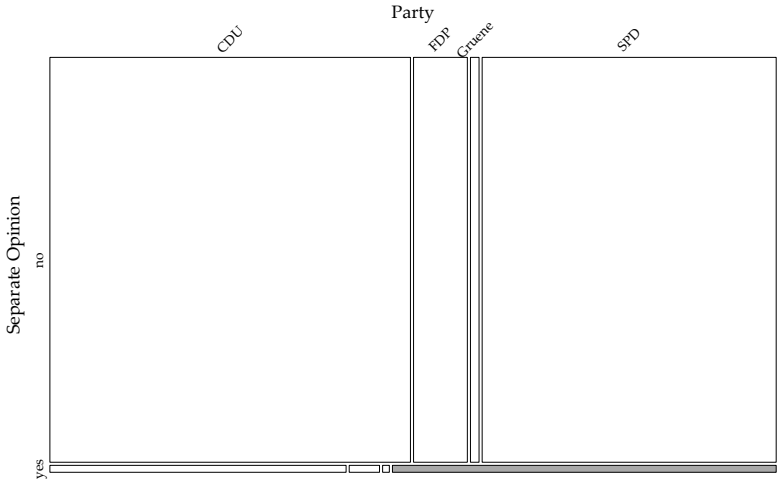


Moreover, although the amount of senate decisions decreases due to a change of the law in 1993, the senates' deviation behavior does not change. This is in line with the overall numbers shown in Figure 5.1.

Having shown that it is difficult to identify certain deviation patterns and therefore to draw first explanations from the numbers, it may be insightful to address an argument oftentimes put forward in the literature as well as in the media in Germany: As the judges are nominated by parties, the different party tickets are said to be decisive for judicial behavior. But do the numbers for separate opinion mirror this claim? Figure 5.4 is a mosaic plot illustrating the amount of votes with and without separate opinions for each group, that is CDU, SPD, FDP, and Gruene judges.[2] Moreover, it displays the proportions between the two types of votes (separate opinion yes and separate opinion no). Thus, it allows for comparing the deviation behavior across parties. The width of the columns displays the overall number of votes cast by the respective party nominees. As between 1972 and 2010 only one Green party nominee has been sitting on the bench, the column for the Green party is the narrowest. This holds true for votes without separate opinions (upper row) as well as for deviations (lower row). Likewise, the most non-deviating votes have been cast by CDU-judges since

[2]CDU = Chrisitan Democratic party, SPD = Social Democratic party, FDP = Free Democratic party, Gruene = Green party

Figure 5.4: Separate Opinions by Party



the CDU has nominated more judges than any other party. Interestingly, SPD nominated judges deviated more often than expected as the wider, dark shaded area proves.

The height of the rows mirrors the proportion between yes (separate opinion) and no (no separate opinion) for each group of judges. In all columns, that is for each party, it remains almost the same. Thus, regardless of the party-group, the proportion between deviating and not deviating does not vary. From this it follows that drawing on the different party labels when explaining separate opinions is not promising.

Having looked at the case selection and structure of the dataset, the following section focuses on the concepts and means the analysis bases on when explaining the occurrence of separate opinions.

5.2 Operationalization

A concise examination of the judges' behavior in terms of separate opinions requires sensible measurement of the factors determining the judges' votes. This section introduces the respective concepts. After elaborating on the dependent variable it will turn to delving into the explanatory factors before listing necessary control variables.

5.2.1 Dependent Variable: A Judge's Vote

When do judges deliver a separate opinion and if so, what kind of deviation do they choose? As this dissertation's key research question focuses on the judges' individual choices, the level of observation is each judge's vote on a decision.

Thus, the dependent variable needs to cover information on whether an individual judge wrote a separate opinion and, if necessary, on the content of the deviation. Besides the choice to forego a separate opinion, a judge can write a concurrence, a partial dissent, or a full dissent. The variable *Type of Vote* from the CCDB provides this content-related information. Each separate opinion is coded with a focus on the result of the decision. A concurrence agrees with the outcome of the decision but adds further arguments to the decision's reasoning. A partial dissent does not agree entirely with the result but explicitly states some kind of agreement in addition to its criticism. Obviously, a full dissent disagrees completely with the outcome of the decision without mentioning support.

Therefore, the data on a judge's individual vote has four categories: *none, concurrence, partial dissent, full dissent*. While *none* means no deviation at all, *concur* stands for a slight disagreement with the majority. Although not opposing the result, there are still issues the deviating judge considers to be lacking. By contrast, a *partial* dissent does indicate dissatisfaction with the result. However, there are still points the judge agrees with. Finally, a *full* dissent stands for a completely disagreeing judge. Thus, the values embrace a specific order. *Type of Vote* is therefore an ordered variable with four levels, starting with none as lowest and full as highest level.

As explained and illustrated in Figure 4.3 of the preceding chapter, the question under what conditions different types of separate opinions occur can be mapped onto two dimensions: The extent to which a judge is willing to adhere to a consensual norm and the potential for disagreement a particular case bears. Within this framework, further factors determine whether a separate opinion occurs and if so, what type.

5.2.2 Explanatory Variables

Norm-Identification

The first of the main explanatory factors is identification with the norm of consensus. It originates from self-categorization. As pointed out in the theory chapter, depending on how judges perceive themselves, they affiliate either with a group that supports the consensual norm, or they fall into line with those who do not endorse it. This decision is driven by the consequences that result from

disregarding or approving the norm. What does this mean for the German case? Judges have to leave the court either after twelve years in office or when reaching retirement age. They can also terminate their time at the court voluntarily, for example when taking up another position. Thus, FCC judges need to consider what to do after leaving the court. Therefore, it is future career plans that are decisive for a judge's behavior at the court (cf. Bendix 1968, 143) in terms of norm adherence. Hence, norm-identification is operationalized as profession a judge pursued after her time in office.[3]

Research on the role of professional judges[4] has shown that being part of the system of the judiciary influences identification with the organization's goals, and that it shapes considerably the judges' perception of how to behave (Werle 1977, 335). As the norm of consensus is a central idea within the judiciary, those actors who have been socialized in this organization should behave in conformity with this norm. In addition, as the inclination to the norm of consensus at ordinary courts is widely known, FCC judges who aim for a position in the judiciary after their time in office will behave accordingly. Seconding this argument, Werle (1977, 294) extrapolates that this implies a deprecating attitude towards separate opinions. Thus, judges seeking a position as professional judge following their term at the FCC are strong identifiers with the norm of consensus.

A similar logic holds for those FCC judges who pursue or continue a career as scholar after their time in office. Traditionally, many FCC judges are recruited from the group of law professors at a German university. This is the only position FCC judges are allowed to hold during their time in office (§3 IV BVerfGG). When retiring from the court, they can return to carrying out fully their job as a professor. Moreover, even if they have reached the age limit they can still continue conducting research. Similarly, there are FCC judges who turn to working on scholarly commentaries or publish scholarly articles without having been a professor prior to entering the FCC. They are expected to identify equally strong with the norm of consensus since, as Fromme (2005) explains, it is a question of appropriate behavior to make no public statements. Thus, if acting against the consensual norm, scholars, although usually free of constraints, jeopardize their reputation and run the risk of being less successful.

Conversely, those judges who decide to retire fully after their time at the FCC are expected to be weak identifiers. Also, those judges who plan on engaging in

[3]One may argue that only those judges are selected and agree to serve at the court who possess already a high norm-identification. However, this seems unlikely because for members of the selection committee it would be difficult to detect the candidates' norm adherence. Furthermore, judges are unlikely to decline a nomination due to the high prestige of the position. Moreover, even if this argument holds true, the effects obtained in the analysis would only be underestimated.

[4]The term *professional judge* refers to those judges who work full-time in the system of ordinary courts.

professions outside the legal arena are less likely to feel obligations with regard to loyalty to the court. Both types of judges do not need later support from a community that highly values consensual judicial decision-making in general and therefore the idea of the court being a unified actor. From this it follows, that they do not have to restrict themselves when considering to deviate. Thus, to future retirees as well as to judges who pursue a career outside the legal community, the same argument as known from the literature on life tenured judges applies: As these judges do not have any further ambitions in the field of law, they are free to behave as they wish because they do not face any kind of consequences.

Therefore, measure for norm-identification is the profession a judge pursues after her time in office. It refers to general areas in which the judges act after retiring from the FCC. One could challenge this measure, arguing that it suffers from endogenity because the judges' actions at the court determine their future career and not the other way around. However, as laid out in the theory, I assume judges to be strategic actors who adapt their behavior to their future career plans. Thus, it is rather the expectations regarding the period following the time at the court that shape the judges' actions.

The variable *Profession* covers the respective information. It consists of categorical values indicating whether a judge after her time in office served as a judge at another court, as legal scholar, became a politician, worked in another area, or retired entirely. A sixth category marks those judges who are still in office. The current data contains only one judge that went into politics after leaving the office at the FCC. This is the very special case of Roman Herzog, serving at the court from 1983 to 1994 and subsequently becoming Federal President. However, the role of the Federal President is extremely exceptional. Although elected through a political procedure, the president is expected to behave non-partisan. Even more, it is hardly plannable to achieve this position due to its uniqueness. Therefore, this situation is not comparable to the one of a "normal" politician. Thus, I abstain from including Judge Herzog in the analysis. From this it follows, that the category *Politician* is dropped. Furthermore, I exclude those judges who are still in office as, contrary to those who have already finished their term, their career patterns cannot be measured. Those judges who were still in office by 2010 – the end of the time span the data set covers – but have left the court by now, are, however, part of the analysis as their post court career is known today. After having dropped these cases, four categories are left, those being *Judge*, *Scholar*, *Other*, and *Retirement*. To what extent a FCC judge returning into academia employs different behavioral patterns than someone who seeks office at another court is hard to distinguish as the categories may overlap. A professional judge can publish scholarly articles, professors or other scholars can also serve

as voluntary judges or alike. Therefore, keeping scholars and judges as distinct categories would lead to imprecision. Also, there are no theoretical expectations why judges would behave differently when planning to abstain from professional work and to fully retire instead of engaging in other responsibilities.[5] In either case there should be only little interest in the court after the judges' time in office. Thus, these categories will be conflated. This results in a dichotomous variable indicating whether a FCC judge belongs to the group of judges continuing a career in the law community or not.

Ideally, a more precise measure for norm-identification would be available. Given that it is an individual perception that guides the judges in their assessment of the norm of consensus, a survey including the question to what extent they endorse the norm of consensus would be most informative. However, this approach suffers from two shortcomings. First, it would be difficult to recruit judges who are willing to give information about their approach to the norm. Second, in order to measure norm-identification by means of such a survey precisely, one would need to ensure that the judges answer sincerely. Besides the fact that some of the judges in the sample have already passed away, the rather small number of judges would not guarantee anonymity. Thus, the judges' answers would suffer from a social desirability bias. Therefore, employing the profession after time in office for measuring norm-identification is, as of today, the best and most sensible approach.

Time in Office

An aspect adding to norm-identification as conceptualized above is the time a judge has been in office. Its influence on judicial behavior, especially with regard to separate opinions, has been widely discussed. In the literature on high courts it has been operationalized as freshman-effect, that is the assumption that judges who are new at a court are less likely to write a separate opinion (e.g. Lanier 2011; Boyea 2010; Brenner and Hagle 1996). They are not used to the practices and conventions of the court and therefore anxious to behave in line with key norms. However, this freshman-effect lacks precision at courts that do not have life tenure. In this case, the more decisive reference point for judicial behavior is the day a judge is leaving the court since she needs to think about her future career. Obviously, the freshman effect diminishes over time. By contrast, judges who have to pursue a further career will take into consideration the consequences of their behavior during their entire time at the court. One may argue that there is still something like a freshman-effect. However, looking at the data for the

[5] One prominent example for pursuing a career outside the legal realm is that of Christine Hohmann-Dennhardt who joined the managing board of Daimler after leaving the FCC.

FCC, the freshman variable coded as one year in office or less is – unsurprisingly – highly correlated with the judge's remaining time in office, as shown in Table B.1 in Appendix B. Thus, if choosing one of these time related variables, for the FCC it is more reasonable to operationalize this aspect as time between the day of the decision and the judges' retirement from the court.

The variable employed in the model contains the number of months between the date of decision and the month the judge is resigning from office, ranging from -8.87 to 176.4, with a lower number indicating fewer months until leaving the court. The negative values appear astonishing. However, sometimes a decision's date is later than the day a judge has left the court. In this case, the judge took part in the voting but retired from the court before the decision was officially issued. *Days to Exit* contains therefore positive as well as negative values. Nevertheless, these negative values exist technically but do not have a peculiar meaning. The actual decision was taken when the judge was still in office. Thus, the respective strategic considerations were made the day the judge left office at the latest. Therefore, negative values are recoded to zero.

Disagreement Potential

Disagreement is a further key prerequisite for the occurrence of separate opinions. Chapter 4 proposes that each case entails a certain potential for disagreement. In cases with a high potential for disagreement, separate opinions are more likely to occur than in decisions with a lower potential. Such potential arises mainly from two sources. First, there is an endogenously given, abstract characteristic, that is a certain level of complexity. While some decisions are concerned with only one legal question, others comprise multiple diverse issues. Also, some subjects under scrutiny may lead to a more extensive inquiry than others. For example, examining a law the formal prerequisites of which are under review as well as the content will require more effort than investigating the content only. In line with Corley, Steigerwalt, and Ward (2013, 70) I argue that these differences lead to a varying potential for disagreement. The more complex a case, the more chances exist to disagree on certain points. Furthermore, in complex cases a clear-cut solution is less likely since (too) many aspects have to be reconciled, and a solution may be less obvious than in simpler cases. This complexity is measured by the length of the section in which the decision depicts the facts of the case. Length of a text as indicator for complexity has also been applied by Kousser (2006) coding the complexity of laws. Similarly, Huber and Shipan (2002) have utilized the scope of a bill to identify what they call specificity, that

is the amount of points the legislator has addressed – the more issues, the more complicated the content, the longer the text.[6]

In an FCC decision, these case facts can be found in section A of the decision, and in briefer cases, in which the highest level of the structure is annotated with Roman letters, in section I. They are composed of the description of the case, the plaintiff's arguments, the respondent's standpoint (in a contradictory procedure), and of statements by other actors eligible for an assessment of the case.[7] The variable *Paragraphs* contains the number of the paragraphs written in the respective section.

A preliminary look at the data corroborates the assumption that the length of the case facts indeed captures the case's complexity. If the question a case poses is complicated, it should take the judges a considerable amount of space to discuss the case and to decide on it. Thus, the length of the decision (excluding case facts) should be positively correlated with the length of the complexity measure, that is the length of the case facts. A correlation coefficient of 0.63, listed in the correlation table in Appendix B, affirms this conjecture.

The variable ranges from 0 to 521. However, Figure 5.5 reveals a high density at a low number of paragraphs. With an increasing number, it decreases considerably, approaching zero. In order to base the analysis on a more realistic picture of the overall situation at the FCC and to avoid biased results, I exclude the values with an extreme low density. At around 200, the curve approximates zero and remains on a low level. Thus, I cut off the variable *Paragraphs* at 200.[8]

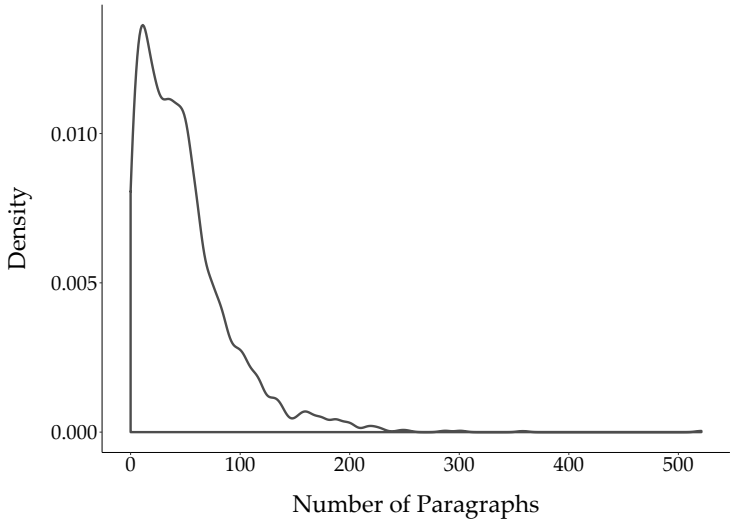
Besides this abstract form of disagreement that exists irrespective of the judges' personal perceptions, another factor that influences the conflict among the judges is the actual content of a case. Some decisions' topics are of minor importance while there are other, highly divisive and therefore controversial issues (see Zuck 1974). For example, a decision on landlord–tenant law (e.g. BVerfGE 90, 22) is undoubtedly less controversial than a case on abortion (e.g. BVerfGE 88, 203). Questions posed in the former example are of rather technical nature and do not affect the judges directly. Thus, consensus is easier to reach, and even if the judges cannot agree on one solution they will be more willing to concede due to a lack of importance. By contrast, a case can still be highly controversial, even if it only purports one single question. Subjects raising moral, ethical, or fundamental

[6]There are other, more prominent measures of complexity. The Supreme Court Database uses the number of issues a case contains. Vanberg (2005) labels certain topics as (non-)complex. However, these issue-related measures are unable to account for the fact that one single issue may comprise several crucial questions the court has to address.

[7]Typically, the group of actors authorized to deliver statements consists of federal and state governments, interest groups, and experts.

[8]Table B.4 in Appendix B shows that the results remain stable when logarithmizing the variable. This question will also be discussed later in this chapter.

Figure 5.5: Kernel Density of Number of Paragraphs (Case Facts)



political topics confront the judges with sensitive issues that touch their personal perceptions and understanding of shoulds, oughts, and musts. Thus, a judge will be less likely to give in during the process of reaching a decision. From this it follows that the potential for disagreement and therefore the likelihood to dissent varies across topics (Corley, Steigerwalt, and Ward 2013, 91; Hurwitz and Lanier 2004, 431; Hensley and Johnson 1998, 404).

Therefore, the second variable determining the level of disagreement indicates whether a case involves a controversial issue. What is highly contentious or of lower importance varies across societies. Thus, for the analysis at hand it has to be defined explicitly for the German case. The CCDB provides in its section on case-external data the information on the policy area a case belongs to, assigned on the basis of the *The German agenda-setting project* (http://www.gpa.uni-konstanz.de/the-project/).[9] I coded those topics as controversial that concern the basic questions of the polity as they touch issues of democracy and basic rules of cohabitation in the state. Moreover, ethically laden cases were included. The respective policy areas from the agenda-setting project are *2 – Human Rights, Basic Rights, Discrimination*; *20 – State Structure, Government Operations*; *31 – Church and Religion*, including the reference to *320 – Ethical Medical Questions*; and *608*

[9] As of July 2016, this section is at an interim stage. Thus, the data employed are preliminary.

– *Private and Denominational Schools*. Thus, the variable *controversial* is a dummy variable indicating whether a case is controversial or not. This coding is derived from Zuck. Area 20 contains what he labels as "area of formal and organizational rules" (1974, 366, own translation). The other group of highly political and therefore controversial topics are according to Zuck "all fundamental and basic rules (...) such as human dignity, personal freedoms, equality before the law, and the fundamental state objectives such as the principles of the rule of law (Rechtsstaatsprinzip), democracy, and social welfare state" (1974, 366, own translation). These topics are mirrored by the issues of Area 2, 31, 320, and 608. The variable *controversial* is therefore constructed as a dummy variable, indicating whether the case is controversial or not.

So far, this section has argued that separate opinions require a certain potential for disagreement. It is determined by two concepts. First, the potential for disagreement emanating from a case's abstract predispositions, that is the complexity of a case. If a case contains multiple points of discussion, there are simply more questions to disagree on. In addition, the content of a case contributes to the potential for disagreement. If it encompasses an issue highly controversial for the judges individually, the potential for disagreement rises.

5.2.3 Control Variables

Besides norm-identification and the level of disagreement, there are certain factors that have to be controlled for as they may impact the judicial decision-making process in general and the occurrence of separate opinions in particular. One kind of such influences are institutional rules of a court, the other potential impact that should not be neglected is the role law plays in a FCC decision.

Institutional Rules

Each court is governed by specific rules that frame the decision-making process in a specific way. Although not directly influencing the judges' behavior in terms of separate opinions, they define parameters such as procedural rules, the personnel, or the allocation of certain positions. Thus, they are included in the analysis as control variables. For the FCC those are a case's admissibility, the parties that nominated the judges, the structure of the court, and the position as president of a senate.

Admissibility. At the FCC, procedural specifics play a central role in a judge's opportunities to deliver a separate opinion. While several courts such as the US Supreme Court have complete control over their docket, other courts are

compelled to hear a case if it meets certain procedural conditions. The FCC employs such a system. However, since research on courts with admissibility requirements is scarce and not much data are available, this aspect has not found its way into empirical studies, yet. Being able to draw on the CCDB, the analysis to follow accounts for this procedural rule for the first time. At the court, the examination of a case consists of two parts. First, the judges scrutinize the admissibility of a case. Only if a plaintiff's request meets certain formal and substantial criteria the court proceeds to examining the questions on the merits. Thus, the content of a case may be extremely complex, highly controversial, and the judges split over the topic; but if a plaintiff's application is inadmissible, neither the high degree of controversy nor the discordance within the senate will come into effect. Nevertheless, it should be noted that although implying clear criteria, the check for admissibility still provides some room for discretion. Therefore, rejecting a request on grounds of inadmissibility does not exclude separate opinions per se, yet it curtails it. Still, in order to cover the conditions under which a decision is made, the procedural confinement of admissibility needs to be included in the analysis.

In the dataset the variable *Admissibility* comprehends the information whether a case was admissible or not. However, these data are collected in the CCDB on the proceedings level. Therefore, I collapsed it in order to include it in an analysis on the case level. Whenever one of the proceedings was at least admissible in parts, the variable was coded 1 as even a partial admissibility leads to examination on the merits. 2 stands for inadmissibility and 3 for those three categories that cover decisions in which for different reasons the court could not examine the admissibility.

Number of Parties. In addition, the rules that guide the composition of the court need to be incorporated as they determine who sits on the bench. FCC judges are elected in equal shares by a committee of the *Bundestag* (parliament) and by the *Bundesrat* (second chamber). On the basis of an informal rule, the two large parties have alternately the right to nominate candidates, or they grant the right for one seat to their coalition partner. This gives rise to the assumption that the parties tend to nominate judges they assume to be close to their own standpoints. However, as an election requires a two third majority, it is unlikely that an extreme candidate will prevail. Nevertheless, personal preferences of the judges do play a role in the appointment process and potentially in the judicial decision-making behavior.

This is in line with the rationale of the attitudinalists. As outlined in Chapter 1, they argue that personal preferences of the judges are decisive for judicial behavior

and base their explanation mainly on a spatial model proposing that a judge's ideological distance from the case is crucial for her decision. However, for understanding separate opinions the distance from judge to the case is less important. It is rather the differences among the judges that govern their behavior. As long as personal preferences on the bench are homogeneous, the judges will find a common solution. By contrast, if they are scattered over the spectrum of attitudes, it will be more difficult to agree on an outcome. Thus, the heterogeneity of preferences has to be operationalized in order to be able to account for the influence of attitudes. This is done by counting the number of parties that nominated at least one judge. In a scenario in which party A and B both nominated four judges, I expect the bench to be less diverse than in a situation in which party A nominated three judges, party B four, and party C one judge. Therefore, *Number of Parties* displays the quantity of parties that have nominated one member (or more) of the respective senate. This serves as a proxy for diverging attitudes. As the CCDB lists each judge's party label, this variable is a count of how many party labels can be found for a particular case. It varies between two and four. Over time, in the First Senate one can find judges who have been nominated by either CDU, SPD, FDP, or the Green Party, while in the Second Senate only judges elected on a CDU or SPD ticket have been sitting on the bench.

Structure of the Court and Political Procedure. Also, the specific institutional structure of the court needs to be included. The FCC operates in two senates. This design emanates from the intention to establish efficiently a court with two types of jurisdiction. First, the FCC is concerned with the Basic Rights, which affect a person directly such as the freedom of opinion or equality. Second, the court rules on the rather technical aspect of the structure and the organization of the state. While Basic Rights are supposed to be processed mainly by the First Senate, the organizational cases are meant to be decided by the Second Senate. This results in a divide: the majority of procedures initiated by a private person should be decided in the First Senate while those cases brought to the court by political actors should be the responsibility of the Second Senate. However, this strict distinction has been loosened in order to balance out uneven workload. Thus, if following the rationale of the court's organizational design, it is rather the type of procedure that mirrors this structural distinction than the Senate as such. Therefore, data on whether a case is decided by means of a political procedure provides the more precise measure. Constitutional Complaints and Concrete Judicial Reviews as well as lower courts' requests regarding the existence of an international law are defined as *unpolitical* as they are filed by non-political

actors. Moreover, cases in which the FCC officiates as state constitutional court are coded as unpolitical for the consequences of such a decision are not generally binding on the federal level. The remaining proceedings count as *political* due to being initiated by political actors. Preliminary rulings (BvQ) constitute a separate, third category coded 99. Thus, cases requiring a political actor in order to be filed are coded 1, otherwise a 0 is assigned. As the analysis refers to the case level and not to the proceeding level, the data had to be collapsed. If a case comprising multiple proceedings contains at least one political procedure the variable *Political Procedure* is coded 1 because they prevail when the judges decide on the systematics how to conduct the examination.

President. Another control variable included in the analysis is the role of a senate's president. For the US case, the literature suggests the position of presiding the group of judges to be influential (e.g. Lanier 2011; Klein and Morrisroe 1999; Haynie 1992). The rules of the FCC demand that each senate is led by a president. One of them then acts as president of the entire court. However, in terms of influence on the decision-making process it is only the position of a senate's presiding judge that is relevant while the role of the entire court's president is of negligible importance: A senate's president acts as moderator of the deliberations and is therefore directly involved in the judicial decision-making process in the respective senate. Likewise, also the entire court's president is concerned with cases in her senate only. Therefore, it is necessary to operationalize this aspect as indicating whether a judge is president of a senate or not. In the present data set, the variable *President* is coded 1 if a judge served as president in one of the senates.

The Role of Law

A further subject to consider is the role of the law. Although the assumptions of the legal model are rather unrealistic, neglecting the existence and influence of legal provisions and previous jurisdiction entirely does not capture precisely the environment in which judges cast their votes. Just as a judge is unlikely to employ the law in a way the legal model suggests, she is equally unlikely to ignore it. If the law is able to provide a clear-cut answer to a legal question, a judge should not openly deviate as advocating a standpoint contrary to the constitution would endorse an infringement of the law. Thus, the more solutions to a legal question are at the judges' disposal, the less opportunities they have to dissent. Hence, the role of the law has to be factored into the analysis, as well. Therefore, the analysis requires a measure for the "amount of law" a decision

contains. It is operationalized as the number of court decisions[10] the FCC cites as well as references to the scholarly literature in relation to the number of paragraphs the decision contains. This approach is based on Vanberg's (2005) idea to account for the use of law by looking at how other crucial members of the law community assess a particular problem. He relies on whether other courts deem a law (un)constitutional. However, he uses only cases that deal with the constitutionality of a law, leaving aside verdicts of lower courts. As in this dissertation the entire spectrum of decisions is included, this approach does not hold. Thus, I rely on the quantity of references to scholarly literature as well as to important judicial decisions. The FCC cites such decisions and the literature in order to support its arguments. Therefore, akin Vanberg, this measure also mirrors whether the FCC followed the leading opinion and jurisdiction. Since negative citations are uncommon at the FCC[11], it is reasonable to argue that the more the court cites, the more it has paid attention to the law. Admittedly, this is a very rough measure. However, as of today, there is no convincing approach developed for the FCC. For the US Supreme Court Bailey and Maltzman (2008) have constructed such a measure. Unfortunately, differences between the courts and the political systems do not allow for applying it to the German case easily. Therefore, I include the variable *Ratio* to have at least some proxy for the role of law in a decision. More precisely, it is quantified through the number of scholarly citations in the decision in relation to the number of paragraphs the decision contains.[12] These informations are obtained through automated text analysis. Each decision was analyzed by an algorithm searching for citations of common legal literature, decisions of the FCC itself, and decisions of all other Federal High Courts.[13] The variable *Ratio* ranges from zero to 0.31.

5.2.4 Descriptive Statistics

So far, I have explained the concepts and measures the analysis will build on. For a better understanding of the eventual analysis, the following paragraphs will provide a brief (graphical) overview about the numbers of the pivotal variables. In addition, Table 5.1 will list the summary statistics for all variables the analysis includes.

Since the conditions under which a judge delivers a separate opinion are the key question, unit of analysis is a single judge's vote. Thus, each observation

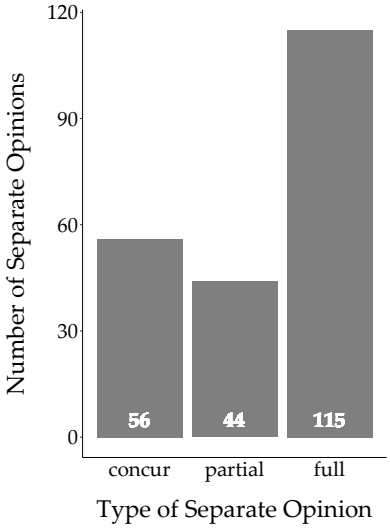
[10] Decisions of the Federal Constitutional Court itself and of all other Federal High Courts.

[11] This can bee seen when reading the official collection of FCC decisions, BVerfGE 1 to 129.

[12] The length of the decision does neither include the case facts nor separate opinions.

[13] Common literature was identified by the keywords *Aufl* (abbreviation of *Auflage* (edition)); court decisions by the official way of citing them: stRspr, BGHZ, BGHSt, BVerwGE, BFHE, BSGE, BAGE.

Figure 5.6: Numbers of Separate Opinions by Type



in the data set refers to the individual behavior of a judge in the respective decision. This results in a data set of 15,015 observations. As several outliers and unusual cases have to be dropped, the final size of the analyzed data is N = 12,999. The following descriptive statistics base on this reduced dataset, that is on observations of N = 12,999.

Dependent Variable

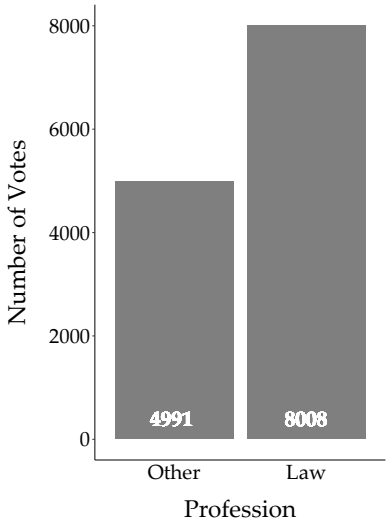
As described above, the dependent variable *Type of Vote* consists of four levels, those being no separate opinion, which is the case in the vast majority of decisions, concurrences, partial dissents, and full dissents. Figure 5.6 displays the frequency of each type.[14]

Explanatory Variables

The independent variable *Profession* is constructed as the position a judge holds after her time in office. One group of judges remained in the law area the other one left it. The former group consists of 32 judges, the latter of 21. Together, they

[14]For matters of better visualization I exclude the bar for type *none* as it would exceed the others by far (n = 12,784).

Figure 5.7: Number of Votes by Profession



have cast 12,999 votes, the distribution of which can be seen in Figure 5.7. 215 of them are separate opinions.

According to the theory, judges continuing their career outside the law community should be more prone to deviate. Figure 5.8 points in this direction. Out of the votes this group has cast, 1.94 percent are separate opinions. By contrast, judges staying in the field deviated in 1.47 percent of their votes.

In addition to the abstract level of disagreement mirrored by the variable *Paragraphs*, the potential for disagreement builds on the controversy of a case's topic. As discussed above, there are issues that are typically perceived as being particularly controversial. Therefore, *Controversial* is a dummy variable indicating whether the topic of a case is controversial or not. In Figure 5.9 it is displayed how many percent of the votes are on controversial and on uncontroversial topics, respectively.

The preceding paragraphs have set forth the operationalization of the concepts to be utilized. Moreover, they have provided an overview about the actual data that will be applied for testing the hypotheses postulated in the theory. This lays the ground for discussing the relevant methods before presenting the results of the analysis.

Figure 5.8: Percentage of Separate Opinions written by Profession

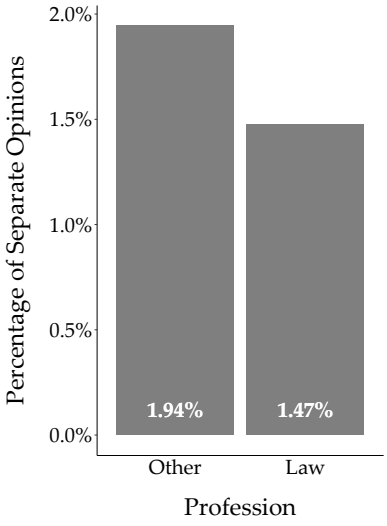


Figure 5.9: Percentage of Controversial and Uncontroversial Cases

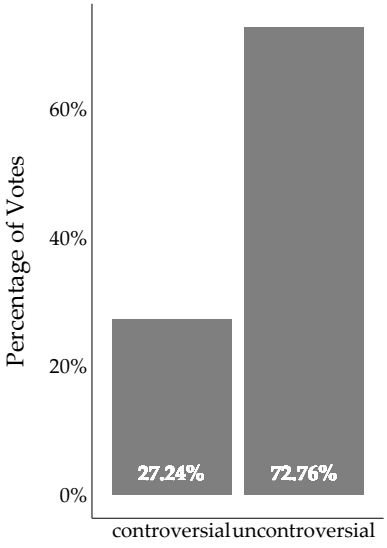


Table 5.1: Summary Statistics

Statistic	N	Mean/Mode*	St. Dev.	Min	Max
Type of Vote (4 Types)	12,999	"none"	–	"none"	"full"
Profession	12,999	1	0.49	0	1
Months to Exit	12,999	68.55	41.49	0.00	176.41
Controversial yes/no	12,999	0	0.45	0	1
Paragraphs	12,999	46.48	38.18	0	200
Admissibility	12,999	1	–	0	3
Number of Parties	12,999	2.59	0.60	2	4
Political Procedure	12,999	0	–	0	99
President	12,999	0	0.38	0	1
Ratio	12,999	0.02	0.03	0.00	0.31

*mean displayed for numeric variables, mode for categorical variables

5.3 Methods and Estimation Strategy

Two approaches are employed for putting the theory developed in Chapter 4 to the proof. First, I conduct an ordered logistic regression, investigating the conditions under which separate opinions emerge, explicating the different types of votes, and exploring observable implications. Second, I test for the differences between proportions of vote types in order to examine variation in their use.

For examining the conditions that lead to observing separate opinions, the method of choice is an ordered logistic regression as the dependent variable *Type of Vote* consists of four levels having a meaning and a specific order: not delivering a separate opinion is less disagreement than a concurrence; a concurrence is less disagreement than a partial dissent; and a partial dissent is less disagreement than a full dissent. I also tested for the proportional odds assumption, proving that it holds, which is reported in the Appendix B. Therefore, the requirements for employing an ordered logistic regression are met.

In the present case, three cutpoints for the continuous latent variable y^* determine the categories of the dependent variable y. The cutpoint between falling into the none- and the concur-category is τ_0. τ_1 differentiates between concurrences and partial dissents, and τ_2 constitutes the cutpoint between partial and full dissents. Thus,

$$y_i = \begin{cases} none \text{ if } y^* \leq \tau_0 \\ concur \text{ if } \tau_0 < y^* \leq \tau_1 \\ partial \text{ if } \tau_1 < y^* \leq \tau_2 \\ full \text{ if } \tau_2 \leq y^* \end{cases} \tag{5.1}$$

The model includes the aforementioned independent variables *Profession*, *Months to Exit*, complexity measured by *Paragraphs*, and whether the topic is *Controversial*. *Admissibility*, *Number of Parties* that have nominated judges, *Political Procedure* and whether a judge has served as *President* of the respective senate are added as control variables as well as *Ratio* as proxy variable for the role of law.

Moreover, in the Theory chapter I argue that the effect of norm-identification depends on the level of disagreement. To account for this, the model contains an interaction term between the measure for norm-identification, that is the profession after time in office, and the dummy variable signaling whether the topic of a case is controversial. Although the number of paragraphs in the case facts contributes to the disagreement potential as well, the degree of controversy inherent in the topic is pivotal for the interaction effect. Complexity (measured by the number of paragraphs) is only an abstract influence indicating more possibilities to disagree. By contrast, the variable on controversy is directly related to the content of the case and affects each judge individually. Thus, the effect of the profession will depend rather on controversy than on complexity. The latter constitutes the basis for separate opinions by providing points to be split over. The former triggers the actual disagreement.

In addition, an interaction term between profession after the time at the FCC and days until leaving office is included in the model. If the theory is valid, the time until resigning from the court should impact the effect of norm-identification. The further the day leaving the office is away, the less the judges care about their post court career, or they have not made up their mind, yet. This changes as they approach their retirement from the FCC, which should be reflected in an increasing difference between the two groups of professions.

These considerations lead to the actual model. For estimating the probabilities of falling into the different categories of votes, it can be formulated as

$$P(y_i = j|\mathbf{x}_i, \boldsymbol{\beta}, \boldsymbol{\tau}) = \Lambda(\tau_j - \mathbf{x}_i\boldsymbol{\beta}) - \Lambda(\tau_{j-1} - \mathbf{x}_i\boldsymbol{\beta}) \tag{5.2}$$

with

$$\begin{aligned} y^* = {} & \beta_1 \text{Profession} + \beta_2 \text{Paragraphs} + \beta_3 \text{Controversial} + \beta_4 \text{Months to Exit} \\ & + \beta_8 \text{Profession} \times \text{Months to Exit} + \beta_9 \text{Profession} \times \text{Controversial} \\ & + \beta_5 \text{Admissibility} + \beta_6 \text{No. of Parties} + \beta_{10} \text{Political Procedure} \\ & + \beta_{11} \text{President} + \beta_{12} \text{Ratio} + \varepsilon \end{aligned} \tag{5.3}$$

and with the respective link function

$$P(y^* \leq \tau_j) = \frac{exp(\tau_j - \mathbf{x}\boldsymbol{\beta})}{1 + exp(\tau_j - \mathbf{x}\boldsymbol{\beta})} \tag{5.4}$$

Running simulations on different scenarios will give insights into the factors underlying the occurrence of separate opinions. It needs to be addressed, however, that the data are not a sample from a larger population. Covering all senate decisions between 1972 and 2010, the data constitute rather the entire population for these respective years. Therefore, the question arises whether including a stochastic component in the analysis is justifiable. Broscheid and Gschwend (2005) suggest that "stochasticity comes always into play when examining empirically general explanations of social reality" (O-17, own translation). They argue that statistical models are always less complex than reality, and variables can suffer from measurement errors. Moreover, variables do not always measure precisely the proposed concepts, and there may be influences that are invisible and cannot be measured (O-19). Therefore, Broscheid and Gschwend advocate the inclusion of stochastic elements in the analysis even if it is based on a population instead of a sample. Hence, I will run simulations and report the respective uncertainty measures.

Apart from explaining under what conditions separate opinions occur, the theory suggests that due to the logic underlying judicial behavior judges do not make use of each option, meaning the different types of votes, equally. The numbers presented in Figure 5.6 support this conjecture. This leads to the question whether the vote types indeed differ significantly as proposed in Hypotheses 4a and 4b. While for none-votes the mere numbers prove this assumption right, the other three types do not differ that widely empirically. Thus, I employ the Marascuilo procedure (Marascuilo and McSweeney 1967), a specific chi-square test that compares multiple proportions and tests for their equality. It allows for testing simultaneously the differences between proportions

and, thus, investigating which proportions differ (Levine et al. 2007, 474). First, I calculate the proportions p for each type of vote i, that is

$$p_i = \frac{x_i}{n_i} \tag{5.5}$$

Second, I compute the absolute difference between these proportions for each pair, $|p_i - p_j|$ (where $i \neq j$). Third, the critical value of the chi-square test statistics needs to be defined. With a significance level of $1 - \alpha$ and $c - 1$ degrees of freedom (where c is the number of categories), the critical range for each pair of proportions is then calculated by

$$r_{ij} = \sqrt{\chi^2_{1-\alpha,c-1}} \sqrt{\frac{p_i(1-p_i)}{n_i} + \frac{p_j(1-p_j)}{n_j}} \tag{5.6}$$

If the difference of $|p_i - p_j|$ exceeds this critical range r_{ij}, the proportions differ significantly and do not vary by chance.

5.4 Results

The results confirm the proposed expectations. In general, it can be noted that the probability of observing separate opinions is very low, as expected when looking at Figure 5.6. Furthermore, the findings also support what could be presumed from Figure 5.8: Judges who stay in the law community after retiring from the FCC are less likely to deviate than their colleagues leaving the profession.

Table 5.2 reports the regression coefficients from three ordered logistic regressions. Besides the full model (1), two other models were run. All of them include the control variables (*Admissibility*, *Number of Parties*, *Political Procedure*, *President*, *Ratio*) while the explanatory variables vary. One model (2) focuses on norm-identification and includes only those explanatory factors that are associated with this concept. Model 3 is concerned with the variables measuring the level of disagreement. In general, the coefficients show the expected directions. Staying in the law community after retiring from the FCC has a negative effect on writing separate opinions; and the variables capturing the level of disagreement, namely whether a case is controversial and the length of the case facts, are positively related to the occurrence of separate opinions. The positive effects of the interaction terms corroborate the expectations just as the control variables. These observations hold true across all three models.

A comparison of the models reveals that, in accordance with the presumptions, the full model is the one of choice for explaining separate opinions as it provides

Table 5.2: Results from Ordered Logit Models

	Full	Norm	Disagreement
	(1)	(2)	(3)
Profession (Law)	-0.628^{**}	-0.373^{**}	
	(0.288)	(0.147)	
Months to Exit	-0.001	-0.001	
	(0.003)	(0.002)	
Controversial (yes)	0.090		0.201
	(0.230)		(0.155)
Paragraphs	0.011^{***}		0.011^{***}
	(0.001)		(0.001)
Admissibility (no)	-1.631^{***}	-2.100^{***}	-1.631^{***}
	(0.423)	(0.418)	(0.423)
Admiss. (other)	-0.992^{*}	-1.512^{***}	-0.974^{*}
	(0.590)	(0.586)	(0.590)
Number of Parties	0.147	0.113	0.144
	(0.115)	(0.116)	(0.112)
Political Procedure	0.930^{***}	1.300^{***}	0.955^{***}
	(0.183)	(0.166)	(0.182)
Pol. Proc. (prelim)	0.664	0.266	0.650
	(0.517)	(0.512)	(0.517)
President (yes)	-0.378^{*}	-0.361^{*}	-0.185
	(0.203)	(0.202)	(0.192)
Ratio	4.739^{**}	3.545^{*}	4.372^{**}
	(2.066)	(1.945)	(2.070)
Profession x Months to Exit	0.002		
	(0.003)		
Profession x Controversial	0.221		
	(0.294)		
τ_0: none|concur	4.912^{***}	4.168^{***}	5.247^{***}
	(0.393)	(0.362)	(0.343)
τ_1: concur|partial	5.223^{***}	4.477^{***}	5.557^{***}
	(0.395)	(0.364)	(0.346)
τ_2: partial|full	5.553^{***}	4.806^{***}	5.887^{***}
	(0.398)	(0.367)	(0.349)
Observations	12,999	12,999	12,999
Log Likelihood	-1234.72	-1260.67	-1239.46
AIC	2501.45	2545.34	2502.93
PCP	98.35	98.35	98.35

the lowest AIC. By contrast, the models that comprise only disagreement variables or those for norm-identification fit less, which, again, supports the theory.

In order to conduct further robustness checks, I ran analyses with different subsets of the data. One is reduced to the most important types of decisions (main decisions, preliminary rulings, and (self-)refusals). In another set, I recoded the dependent variable. Instead of four, the variable consists of only three vote types, combing those with the lowest frequency, namely concurrences and partial dissents. For the third subset, the variable *Paragraphs* was logged. Comparing the outcomes of ordered logistic regressions with these subsets to the analysis conducted with the original data reveals that the results remain stable across all models. The respective regression table B.4 can be found in Appendix B.

Unfortunately, the structure of the data does not allow for applying the often insightful measure of percentage predicted correctly by the model. Due to the fact that the number of *none* votes exceeds that of the other vote types by far, *nones* can be predicted very precisely, which leads to a value of 98.35% for the models shown in Table 5.2. Thus, deriving sensible conclusions from these numbers is not possible. Nevertheless, for a precise overview I provide Table 5.3, which displays for the full model the observed and predicted outcomes for each type of vote as well as percent correctly predicted for each type of vote.

Table 5.3: Observed and Predicted Outcomes

	Predicted				
	none	concur	partial	full	PCP
none	12,784	0	0	0	100
concur	56	0	0	0	0
partial	44	0	0	0	0
full	115	0	0	0	0

So far, I have given a broad overview about the results. However, when going into detail, raw coefficients from ordered logistic regressions are only little intuitive and difficult to interpret. Therefore, I will present the results for varying scenarios in the form of quantities of interest, namely predicted probabilities and first differences, which are obtained through simulations with 1000 runs. All of the following graphs as well as the reported numbers base on simulations over the full model. Those independent variables that are not set to a specific value are kept at their mean (numeric) or mode (categorical). The discussion will proceed in the order of the hypotheses formulated in Chapter 4. First, it focuses

on norm-identification and disagreement before looking in more depth at the differences between the different types of separate opinions. A final analysis is concerned with the role of time in office: If the theory captures the underlying mechanisms correctly, one should observe an increasing difference between the professions over time. Whether this holds true will be examined at the end of this section.

In a graphic presentation of predicted probabilities, the disagreement-dimension is displayed by the number of paragraphs. This allows for illustrating the influence of the abstract level of disagreement while being able to differentiate between the two scenarios for concrete disagreement, that is controversial and uncontroversial issues, through simulations. Likewise, norm-identification in form of a judge's later profession is represented by two lines, which makes it possible to see the differences between the two groups immediately. For examining the differences between the vote types, they are also depicted as lines in order to visualize them easily.

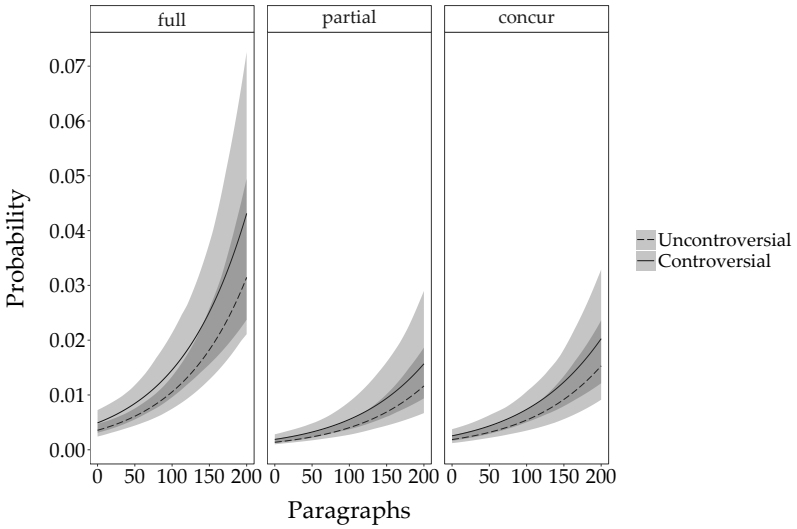
Some hypotheses are less concerned with the different levels of dissent. Nevertheless, since the theory is capable of distinguishing between the types of separate opinions, the figures will always depict them separately even if the hypothesis does not explicitly draw on the differences.

5.4.1 Hypothesis 1: Potential for Disagreement

The role of disagreement is one of the key aspects for explaining judicial behavior with respect to separate opinions. In this context, scholars often draw on the influence of an issue's controversy (e.g. Boyea 2010; Hurwitz and Lanier 2004; Walker, Epstein, and Dixon 1988; Hall 1987). However, the results of the present analysis prove this claim wrong. The probability of observing a separate opinion is not higher in controversial than in uncontroversial cases. Figure 5.10 shows scenarios from two simulations: The solid line represents the situation in which the variable *controversial* is held to 1, that is cases with controversial content. The values depicted by the dashed line are the results of the simulation when controversy is zero. Again, the x-axis shows the abstract level of disagreement measured by a case's complexity. I omitted the picture for type *none* as its high values would not allow for a clear visualization of the other vote types.

Looking at the differences between the two curves, it appears as if in cases with a high level of controversy judges are more likely to deviate than in those without controversy. Taking the solid line (controversial cases) the predicted probability of observing a full dissent is at a maximum of complexity slightly above 0.04. By contrast, in uncontroversial cases (dashed line) the predicted probability lies

Figure 5.10: Predicted Probabilities of Observing Separate Opinions for Controversial and Uncontroversial Cases

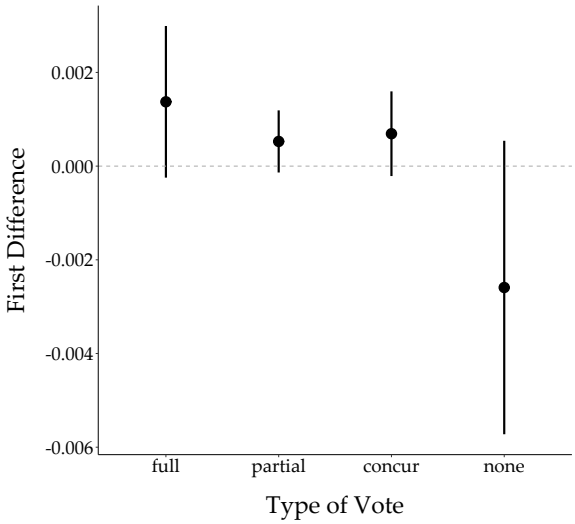


around 0.03. For concurrences and partial dissents, the results point in the same direction, on a lower level of probability and with smaller differences, though.

However, the confidence intervals for all types of votes overlap considerably, and with rising complexity they increase, especially for full dissents.

In order to examine the differences of judicial behavior between controversial and uncontroversial cases more precisely and to provide an exact picture of the results, I simulated first differences in predicted probabilities between these two scenarios. I set the value for the variable *Paragraphs* to a typical case length (mode), that is zero. This number does not only mirror the typical length of cases in the entire dataset. Even if looking at controversial and uncontroversial cases separately, for both groups the mode remains zero. As visible in Figure 5.11, the first differences are in line with what the predicted probabilities and their heavily overlapping confidence intervals suggested: Judicial behavior in controversial and uncontroversial cases is not significantly distinct. For all types of votes, the confidence intervals include zero (highlighted by the gray line). Thus, the probability of observing a certain type of vote cannot be said to differ between the levels of controversy. Setting the case length to its mean yields almost the same results, which can be seen in Figure B.1 in Appendix B.

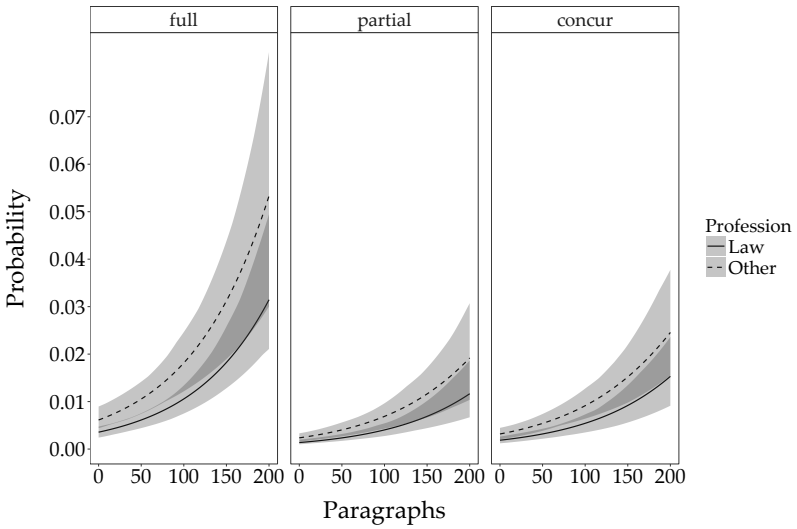
Figure 5.11: Simulated First Differences in Predicted Probabilities between Uncontroversial (reference group) and Controversial Cases at a typical Length of Case Facts



5.4.2 Hypothesis 2: Norm-Identification

After having investigated the role of disagreement, I now draw attention to norm-identification. Hypothesis 2 proposes that the probability of observing a separate opinion is higher for judges with low norm-identification than for judges with high norm-identification. Since I measure norm-identification by the profession after a judge's time in office, the analysis focuses on the difference between the aforementioned two groups of judges. Hereinafter, I will refer to the group that remains in the law community simply as *Law* and to those who leave it as *Other*. The predicted probabilities of observing separate opinions (or not) for *Law* judges versus *Others* are plotted in Figure 5.12. The graph yields the expected results: Judges pursuing a career outside the law community – displayed by the dashed curve – have a higher probability of deviating than their colleagues, represented by the solid line. While judges from the group *Other* have a probability of a little bit above 0.05, *Law* judges only deviate fully with a probability of approximately 0.03. In delivering partial dissents, the groups of judges differ in the same way. *Law* judges dissent partially with a probability of roughly 0.01, *Others* with about 0.02. Finally, for concurrences, judges from the *Law* group yield a probability of

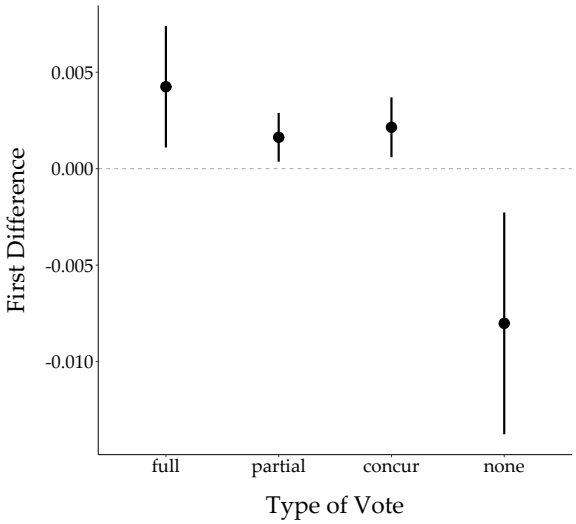
Figure 5.12: Predicted Probabilities of Observing Separate Opinions for the Groups Law and Other



slightly above 0.01, whereas that for *Others* lies between 0.02 and 0.03. Again, type *none* is not depicted.

Simulating first differences between the two professions substantiates Hypothesis 2. While in Figure 5.12 the confidence intervals overlap, taking a look at the simulated first differences at the mean of *Paragraphs* in Figure 5.13 reveals that the differences between the two groups of judges do, nevertheless, not equal zero. The obtained values show how much the predicted probabilities for judges of the category *Other* differ from those of the category *Law* (reference group, represented by the horizontal line). For full dissents the first difference is approximately 0.004. Such values may appear small at first sight. However, given a predicted probability of observing a full dissent of about 0.05, partial dissents not exceeding a predicted probability of 0.02, and the upper confidence bound for concurrences ending at around 0.03, these numbers constitute considerable effects. Like full dissents, for partial dissents and concurrences the differences are positive, indicating that those who leave the law sphere act substantially different from the *Law* group. More precisely, they are more likely to deliver a concurrence or a partial dissent. Accordingly, the negative first difference between the two groups of judges for *none* complement these results: *Others* refrain from deviating less often than *Law* judges. Moreover, for none of the vote types, the confidence

Figure 5.13: Simulated First Differences in Predicted Probabilities between the Groups Other (reference group) and Law



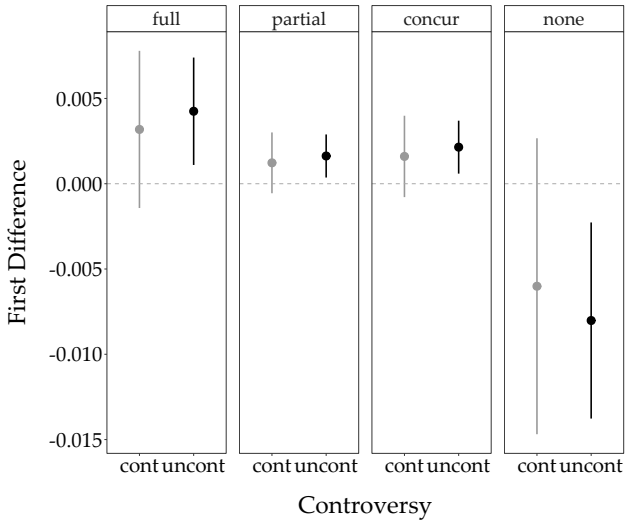
interval crosses the line representing zero. Thus, the hypothesis that judges who possess more norm-identification due to pursing a post court career in the law area write less separate opinions than weak identifiers holds true.

Contrasting Hypotheses 2 and 1 reveals a striking observation: The effect of norm-identification is stronger than that of controversy. Although in line with the theory, this result is counter-intuitive. Whereas controversy is part of almost every analysis in the literature on separate opinions, consensual norms are mostly disregarded. Therefore, one could expect the former to be more decisive than the latter. However, the findings of the present analysis show that inclination to the norm of consensus has a higher influence than controversy. This demonstrates the importance of including the norm of consensus.

5.4.3 Hypothesis 3: Differences between Professions in Controversial and Uncontroversial Cases

As discussed in Chapter 4, the levels of disagreement and norm-identification are assumed to interact. The influence of norm-identification should decrease with a high level of disagreement as the latter is expected to negatively impact the judges' willingness to forego public deviation. Thus, the difference between the

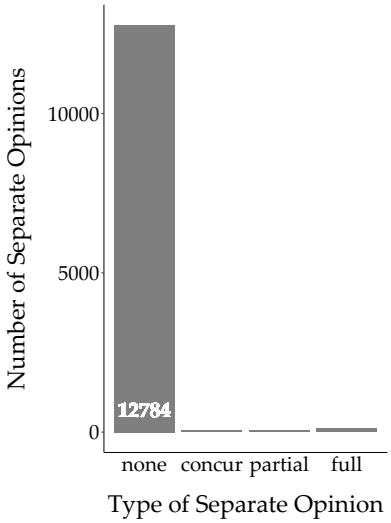
Figure 5.14: Simulated First Differences in Predicted Probabilities between Professions for Controversial and Uncontroversial Cases



professions should be larger in uncontroversial than in controversial cases. The interaction term in Table 5.2 proves this effect right. However, the visualization in Figure 5.14 does not allow for claiming a strong result.

It depicts simulated first differences in predicted probabilities between the professions for both levels of controversy. The left, gray points represent the difference between the groups *Law* and *Other* in controversial cases. The right, black point stands for the difference between the professions in uncontroversial cases. Both values are depicted with their 95% confidence interval. For each type of separate opinion, the gray values are closer to zero than those in black. Thus, the results point in the expected direction: The differences between the professions seem to be smaller in controversial than in uncontroversial cases. However, as the confidence intervals overlap considerably, it is hardly arguable on these grounds that Hypothesis 3 is corroborated. Nevertheless, the difference between *Law* and *Other* in controversial cases (gray) is not significant while the confidence interval of the difference in uncontroversial cases does not include zero, as the black lines show. This supports that the level of controversy affects the two groups of professions differently and in the expected direction.

Figure 5.15: Numbers of Separate Opinions by Type – four Types

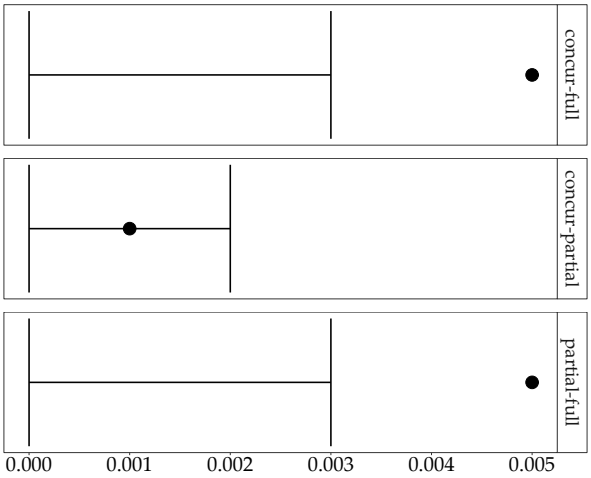


5.4.4 Hypotheses 4a & 4b: Types of Separate Opinions

Unlike all other theories concerning separate opinions, the identification disagreement model is capable of explaining why a certain type of separate opinion occurs. The theory as well as the empirical findings suggest that judges more often refrain from writing separate opinions than make use of this possibility. Figure 5.15 visualizes this, again: The number of *none* votes exceeds that of the other types by far.

Drawing further on this theory, Hypothesis 4a has proposed that judges are more prone to write a full dissent than a partial dissent or a concurrence. Moreover, according to Hypothesis 4b judges rather deliver a concurrence than a partial dissent. All graphs shown so far have pointed in this direction. Taking a closer look at the differences, Figure 5.16 supports what has been expected. It displays the differences in proportions between concurrences and full dissents, concurrences and partial dissents, and partial and full dissents along with the respective critical range, indicated by the bars. The large differences in proportions between concurrences and full dissents as well as between partial and full dissents demonstrate that judges diverge considerably in using these types of votes. Moreover, both differences exceed their respective critical value, displayed

Figure 5.16: Differences in Proportions between Vote Types



by the bar limits, by far and are thus statistically significant. This corroborates Hypothesis 4a.

By contrast, Figure 5.16 proves Hypothesis 4b wrong since the proportions of concurrences and partial dissents do not differ significantly from each other. The difference is located at 0.001 whereas the critical value lies at 0.002. Thus, although the descriptive statistics give rise to the assumption that there is a higher probability of observing a concurrence than a partial dissent, this effect lacks significance.[15] Hence, it cannot be concluded that judges tend to write more concurrences than partial dissents, and Hypothesis 4b needs to be rejected.

So far, for the most part the results are in line with the theory: The potential for disagreement – stronger in the form of a case's complexity than due to controversial topics – has a pivotal impact on the occurrence of separate opinions. Moreover, norm-identification appears to be a significant factor, as well. Also, the proportion of full dissents is larger than that of the other types of separate opinions. Concurrences, however, do not constitute a significantly larger proportion than partial dissents.

[15] A table with exact numbers can be found in Appendix B.

Nevertheless, if the mechanisms indeed work as proposed in Chapter 4, the temporal distance between a decision and the end of a judge's term in office should influence the judges behavior regarding separate opinions.

5.4.5 Hypothesis 5: Time and Norm-Identification

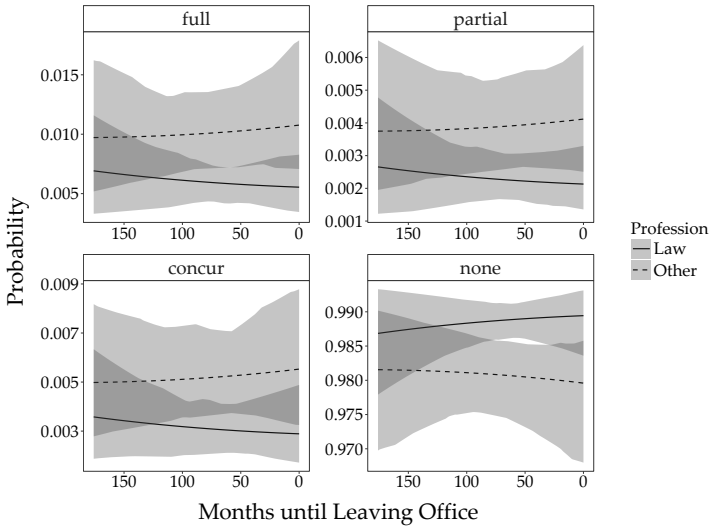
So far, the focus of the analysis has been specifically on disagreement and norm-identification. However, if the theory is accurate, one should observe a growing difference between the judges' behavior towards the end of their time at the FCC. Since the judges will be more aware of their future role, and their latest actions will be most visible for future colleagues, their behavior should be more pronounced as the end of their term in office approaches. Hence, Hypothesis 5 proposes that the differences between the professions should grow the closer the date of the decision gets to the date at which the judge will leave office.

Figure 5.17 illustrates that the difference between the professions increases towards the end of the term.[16] It depicts the predicted probabilities for each group of judges over their time in office.[17] The x-axis displays the number of months between the judge's vote and the month she is leaving the court. Thus, the value at the right end of the x-axis is 0, indicating that the decision was taken during the judge's last month in office. The results show that with growing proximity to the date of leaving office, the predicted probabilities of observing the respective vote for the groups *Law* and *Other* diverge more. This holds true regardless of the type of vote. Taking full dissents as an example, it can be seen that at the beginning, meaning 176 months prior to resigning from the FCC, the predicted probability for the *Law* group is at around 0.01, while *Others* deviate with a probability of roughly 0.007. In the month of leaving office, this difference has grown showing a probability of below 0.006 for the *Law* group, in contrast to slightly more than 0.01 for *Others*. All other types of deviation follow the same direction, on a lower level, though. For *none* votes the distance increases as well. The curves in Figure 5.18 displaying simulated first differences between the professions over time highlight this finding. Full dissents exemplify once more the results for the other types of separate opinions. While at the beginning at 0.0015, at the end of the term the difference between the *Law* group and *Others* has increased by approximately 0.001. For *none* votes the first differences range from about -0.005 to roughly -0.008. Again, these seem to be quite small values. However, looking at the predicted probabilities they constitute a considerable effect. In addition, it has to be noted that in the early stages at the judges' time in office, the differences between the groups of judges cannot be said to differ with

[16] Note that the scales differ for each type of vote.

[17] Negative values, that is decisions taken after the official month of exit, are set to zero.

Figure 5.17: Predicted Probabilities for Law and Other over Time in Office

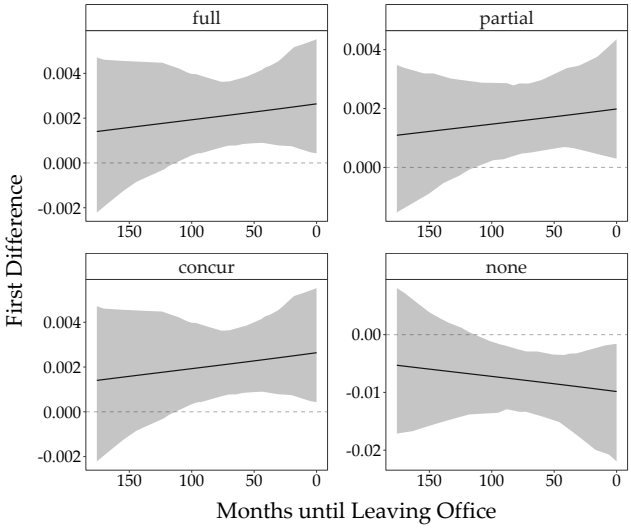


certainty since the confidences intervals contain zero. Over time, however, the first differences turn significant. Thus, the outcomes corroborate Hypothesis 5.

This section has tested the hypotheses formulated in Chapter 4. The findings demonstrate that, as argued in the theory, norm-identification and disagreement are the driving forces behind the occurrence of separate opinions. However, while the literature claims the controversy of an issue to capture disagreement best, the results at hand show that this does not yield the expected results. It is rather the complexity of a case that causes disagreement by providing various facts to be split over. In doing so, it affects the occurrence of separate opinions. Moreover, the results elucidate how and why the different types of votes judges have at their disposal arise. Depending on their expectations as to their future, some judges are more prone to deviate than others. In addition, casting a separate opinion requires a certain level of disagreement among the judges. And, indeed, the results prove that conflict laden cases cause more deviation than uncontroversial issues.

Furthermore, in accordance with the theory, the analysis has shown that the vast majority of votes does not include a separate opinion. Moreover, on the rare occasion of a deviation, the probability of observing a full dissent is higher than that of a partial dissent or a concurrence. Also, although the results are indicative

Figure 5.18: Simulated First Differences between Law (Reference Group) and Other over Time in Office



of concurrences to appear more often than partial dissents, this finding cannot be approved fully due to a large uncertainty.

A further test has corroborated the assumption that a judge adapts her behavior to her post court career. It proves the judge's later profession to be influential for the occurrence of separate opinions: The more a judge's last day in office approaches, the larger the differences between the behavior of the two groups of professions.

What has been examined in the past chapters provides a better understanding of judicial behavior at the FCC, especially in terms of casting votes on senate decisions. Beyond the German case, I developed a general framework for explaining separate opinions, which can be put to test for all types of courts. An overview on the scientific achievements of this dissertation will be presented in the following, final chapter. Moreover, I will discuss implications before concluding with an outlook on future research.

CHAPTER 6

Conclusion

"[I]t is not the individual juryman or councillor or member of the assembly in whom authority rests, but the court, the council and the people, while each of the individuals named (I mean the councillor, the members of assembly and the juryman) is a part of those bodies" (Aristotle 2007, III, 6; 1282a). Aristotle's claim is as valid in the twenty-first century as it was in the fourth century BC. Today, *it is not the individual judge or representative or voter in whom the authority rests, but the court, the parliament, and the people, while each of the individuals named (I mean the representative, the voter, and the judge) is a part of those bodies* (cf. Aristotle (2007)).

On representatives, parliaments, and people (voters), many research has been conducted. In Germany, however, courts and judges have been mainly neglected. Besides a missing awareness for the court as a political institution, the lack of data has been a major obstacle to gaining knowledge on the FCC. This dissertation has added to filling this gap. But why choosing separate opinions for such an undertaking? Although not exerting power individually, it is not the individual judge but the court as a unified actor who exerts power. Only the court in form of the majority opinion defines binding results. However, if we want to understand how this actor operates and what processes generate the outcomes, we need to investigate the parts it consists of. This is why I have sought to shed light on the judges' individual behavior utilizing the only precisely observable individual information, that is separate opinions.

Moreover, I have addressed the absence of data on the FCC by demonstrating how to develop a tool to conduct research on courts, namely the CCDB. Finally, I have identified that research on courts, to a special degree on separate opinions, lacks compelling theories. Thus, I have developed a new theoretical framework that is capable of accounting for the varying specifics inherent in every court. In the following, I will present these key accomplishments in detail.

6.1 Scientific Contributions

The scientific achievements of this dissertation are manifold and can be separated into three main categories: First, the work provides substantial progress for research on courts in general and on the FCC in particular by portraying how to design and realize a judicial database. Second, it develops a new theoretical framework. More specifically, it offers an explanation for separate opinions that is driven by the inquiry *why* judges act in a particular way rather than *how* they behave. Therefore, the framework is broadly applicable, going beyond theories that have been developed for courts so far. Third, this dissertation sheds light in detail on the question why and under what conditions judges at the FCC deliver separate opinions. By means of the new database, it is possible for the first time to conduct a large-N study, which allows for understanding in depths the emergence of concurrences and dissents. Moreover, by presenting a variety of descriptive statistics, it gives unprecedented insights into judicial behavior at the FCC. The following sections will discuss these three aspects in more detail.

6.1.1 Building a Database

The first major scientific progress this dissertation offers is portraying how to develop a database on court rulings, in particular on decisions of the Federal Constitutional Court in Chapter 2. Depicting how to translate a case and the respective judicial decision-making process into abstract data, this work can serve as guidance for building further a judicial databases. For the German case the contribution is fundamental for the entire field of judicial politics research. Until now, studies with large-N designs were impossible due to a lack of data. The CCDB closes this gap. With its large variety of variables the database covers a broad spectrum of information on the FCC, which can be utilized for numerous analyses.

One of the most innovative characteristics of the database is its ability to account for the complex structure of a case. The data does not only capture the decision but also its various subunits. As a case at the FCC can consist of multiple proceedings, the characteristics of every proceeding are covered. Those are, for

example, the type of proceeding (which can vary within a case), the different petitioners, the different dates of the subject under scrutiny, and even the different outcomes if present. From this is follows that analyses can be conducted on different levels and from different angles, that is proceeding and case level, judge centered, petitioner centered, respondent centered, subject centered and the like.

In addition, so far, research on judicial decision-making has been focusing primarily on specific proceedings, those being Disputes between High State Organs, Abstract Judicial Review, and Federal-State Conflicts. The CCDB, however, contains all types of proceedings. Given that the vast majority of cases are Constitutional Complaints and Concrete Judicial Reviews, this is a major step towards comprehensive research on the FCC.

Moreover, given that the database presented here is part of an overarching framework that incorporates the legislative process and the political an societal environment, these information on the court are embedded in a broader context. With this unique feature, the CCDB facilitates research that goes far beyond the possibilities of existing databases.

Finally, the database does not only offer information for political science but also for other disciplines such as sociology and law. Thus, it enriches a wider range of science.

Given all these aspects presented above, the database enables researchers in Germany to catch up with leading judicial politics research, mainly conducted in the United States. Moreover, it even exceeds the opportunities other databases provide.

6.1.2 A New Theoretical Framework

As a second key contribution, the dissertation offers a sound theory that is concerned with the mechanisms of why separate opinions occur. While up until today research has built on theories that illuminate how separate opinions occur by identifying a variety of (potentially) relevant variables, the framework developed in this dissertation approaches this question one step prior to existing theories. Delving into the judges' motivations enables the theory to account for specifics of a judicial system, procedural restraints, and the like.

Moreover, applying the identification-disagreement model provides explanations for the occurrence of different types of opinions. So far, judicial decision-making in terms of opinion writing has predominantly been explained as the discrete choice whether to deviate or not. The new model, by contrast, accounts for the fact that the judges have scaled means at their disposal when reacting to a ruling. Procedural rules permitting, they can concur, dissent in parts, and dissent

fully. The theory provided in this dissertation is capable of explaining why and when a judge chooses either of these options.

A further innovative characteristic of the new theory is its capability to explain why and when judges do *not* publish a separate opinion even if they disagree with the decision. The vast majority of research addresses the emergence of separate opinions or focuses on unanimity. The aspect that judges do not necessarily publish their opposition to the ruling has not been under scrutiny, yet. The identification-disagreement model, however, does provide an explanation for this scenario.

Hence, the new theory advances not only knowledge why separate opinions occur at the FCC. It rather provides a general framework for a broad array of courts, building on the underlying mechanisms of judicial behavior in terms of separate opinions. Moreover, it adds explanatory power to understanding the different types of separate opinions as well as to their non-occurrence.

6.1.3 Separate Opinions at the FCC

While the aforementioned achievements convey a meaning for research on courts in general, the dissertation has also answered a very specific question, which gives significant insights into judicial behavior at the FCC: Why and under what conditions do judges at the FCC deliver a separate opinion? If they deviate, what kind of option do they choose? The results obtained in Chapter 5 have answered these questions in-depths and in a large-N study for the first time. First, the numbers show that judges at the FCC are extremely reluctant when it comes to separate opinions. Splitting up the opinions into the different types reveals that the largest share of separate opinions are full dissents. Less often judges make use of concurrences while they choose partial dissents the least.

Moreover, the results prove that – in accordance with the theory – the profession a judge pursues after her time in office is a decisive factor when explaining separate opinions. Judges leaving the law area are more inclined to deviate than those remaining in the field. Even more, with the end of their time in office approaching, judges leaving the law profession enhance their activity with regard to delivering any type of separate opinion. Those planning on staying in the law profession reduce it. Thus, the difference between these two groups rises with growing proximity to their day leaving office. This demonstrates the so far neglected but crucial influence of the judges' expectations regarding their time after retiring from the court.

Besides the role the profession plays, the present analyses have demonstrated that one assumption, often taken for granted, does not hold entirely: The level of conflict inherent in a topic does not impact a judge's likelihood to deviate as much

as expected. Judges are not significantly more inclined to deviate in whatever manner in controversial than in uncontroversial cases. In uncontroversial cases, the behavior of judges differs substantially depending on their later profession. By contrast, in controversial cases, this significance vanishes. However, looking at the differences between professions in controversial cases does not show substantial deviation from the difference in uncontroversial cases.

The knowledge gained on separate opinions is therefore threefold. First, the detailed numbers give a precise picture of judicial behavior, which has not been available so far. Second, the aspect that judges adapt their actions to their future plans has been entirely neglected but has now been proven to be influential. Third, the impact of a case's topic and in particular how much a topic induces conflict is not as large as expected. It is rather the amount of legal questions that increase disagreement.

Having summarized the scientific achievements of this dissertation, I will now discuss the implications of these contributions for future research.

6.2 Implications for Further Research

So far, the leading research in the field of judicial politics has been conducted in the United States. Besides other reasons, this is due to an extensive amount of data. The Supreme Court Database (Spaeth et al. 2014) and the High Court Database (Haynie et al. 2007), for example, provide an almost inexhaustible source for analyzing courts and judges. With the newly built CCDB, scientists examining the FCC can now engage in answering a similarly wide scope of research questions. This will enable them to start closing the gap between judicial politics research abroad and in Germany.

A further implication of the new data is that it may change the understanding of the FCC's role in the political system. In Germany, the common public perception is that of the FCC being a neutral player. Nevertheless, especially in the political arena the discussion to what extent the court casts its decisions politically is highly controversial. The few scientists engaging in these questions disagree about the answers or even base their research on differing assumptions. Employing the newly available data will shed light on how to perceive the FCC and how to approach further research.

In addition, this dissertation has proven that individual plans shape the judges' actions. However, it is not necessarily political preferences and strategies, attitudes to morality, or the like as oftentimes claimed. Rather "neutral" factors such as career plans can influence judicial behavior, as well. This observation contains two implications. First, when analyzing court decisions both, the aggregate and

the individual level have to be taken into consideration. Second, on the individual level, it should not be neglected that judges employ different types of motivations. While most research focuses on political preferences and strategic considerations, "neutral" personal reasons have to be addressed, too.

What has been depicted in this chapter so far calls for continuing this research agenda. Thus, in the final section I will point out potential future research.

6.3 Outlook on Future Research

Analogous to the key focuses of this dissertation, there are two groups of prospective research topics that are worth investigating: First, the future of the database; second, further research on separate opinions, that is mainly their content and their influence.

The first aspect is the database. So far, it covers the time from 1972 to 2010. As the FCC rendered its first decision in 1951, there are twenty-one years of data prior to the current database to be added. Similarly, the database can be updated with data from 2011 onwards. Expanding the database's time span would enable researchers to receive a full picture of the FCCs work including the first years of the Court.

Second, multiple questions concerning separate opinions are still unanswered. Given that I have developed an entirely new framework that approaches the emergence of separate opinions more fundamentally than theories so far, it should be tested for other courts. Such investigations pave the way for examining separate opinions from manifold comparative angles and research designs. Since there are various other courts that operate on similar organizational and procedural grounds, the theory needs to be put to the test for these institutions. For the German case, making use of the constitutional courts of the *Länder* would offer valuable insights into judicial decision-making in Germany. From an international perspective, conducting cross country studies on courts of the same type appears promising. Similarly, contrasting courts of different types and from different countries would amount to serious progress in the judicial politics literature.

Moreover, it should also be investigated whether arguments put forward in separate opinions find their way into new laws. If a law is held unconstitutional and a new legislative process starts, the legislator can consider not only the ruling. He can also take into account arguments formulated in separate opinion. Moreover, the arguments discussed in a separate opinion can be relevant to other laws at a later date. Thus, there may be multiple occasions in which an argument from a separate opinion can be implemented. Therefore, although not binding, a separate opinion can still have influence on the amendment process.

Given this potential influence on the legislative process, it is obvious that the content of separate opinions is a promising subject to closer scrutiny. So far, there is no precise knowledge on which topics the judges dissent on. Investigating the content of separate opinions would provide a more fine grained understanding of what judges disagree on. Equally little is known about the way they deviate. What type of arguments do they use in order to make their point convincing? Do they build on conventional methods of legal interpretation - be it sincerely or to cloak personal or political motivation? Or do they openly reveal their personal and political views without covering it by having recourse to the standard methods of interpretation? Similarly, the way they structure their opinions has not been examined, yet. Thus, there is only little knowledge on how court decisions in general and separate opinions in particular influence the legislative process.

In addition, coalition building in decisions at the FCC has not been addressed, yet. If we want to learn and understand the internal processes of the Court, for example how politicized and influenced it is by political partisanship, it is indispensable to look at the joint writing of separate opinions.

Finally, I want to point out some general questions for German judicial politics research that are worth being addressed in the future: The present analysis has employed a rather imprecise measure of law. Thus, for further research on courts it will be a valuable undertaking to develop new, more fine-grained means to account for the amount of law a decision contains. Moreover, explaining other observations than separate opinions, for example the case outcome, seems promising. Another large area of research has to focus on the implementation process. If the FCC holds a law unconstitutional, the legislator has to comply with the ruling. To what extent it, indeed, does follow the court's demands has not been examined so far. Investigating this interaction between court and legislation will provide major insights into the German political system.

In conclusion, this work has largely unraveled the occurrence of separate opinions at the German Federal Constitutional Court. Moreover, it has presented how to build a database that empowers researchers to engage in analyzing the court. Beyond this domestic level, the findings also gain overall importance for research on judicial politics as they provide generally valid explanations. Knowledge on judicial decision-making still needs to be broadened. If we analyze and understand judicial decision-making we add crucially to understanding the political system. The Constitutional Court Data Base is a powerful tool to proceed with such research. Continuing this endeavor will open new frontiers not only for research but also for the political arena and society.

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APPENDIX A

Separate Opinions

The following table provides an overview on the use of separate opinions world wide. It lists if at courts that exert constitutional review judges are allowed to write separate opinions and if those opinions are made public. Moreover, it shows whether the judges sign them or if they are delivered anonymously.

Table A.1: Separate Opinions at Courts with Constitutional Review

Country	Separate Opinion	Public	by Name
Europe			
Albania	✓	✓	✓
Armenia	✓		
Austria	✓	x	
Azerbaijan	✓	✓	✓
Belarus	✓	✓	✓[8]
Belgium	✓	x	
Boznia and Herzegovina	✓	✓	✓
Bulgaria	✓	✓	✓[4]
Croatia	✓	✓	✓
Cyprus	✓[3]	✓	[3]
Czech Republic	✓	✓	✓

Denmark	✓[3]	✓	✓
Estonia	✓[3]	✓	✓
Finland	✓[3]	✓	✓
France	✓	x	
Georgia	✓	✓	✓
Germany	✓	✓	✓
Greece	✓[3]	✓	✓ / x[1]
Hungary	✓	✓	✓
Iceland	✓[3]		
Ireland	✓	x[2]	
Italy	✓	x	
Latvia	✓	✓	✓
Lithuania	✓	✓	✓
Luxembourg	✓	x	
Macedonia	✓	✓	✓
Malta	✓	x	
Moldova	✓	✓	✓
Montenegro	✓	✓	✓
Netherlands	x[3]	x	
Norway	✓[3]	✓	✓
Poland	✓	✓	✓
Portugal	✓	✓	✓
Romania	✓	✓	✓
Russia	✓	✓	✓
Serbia	✓	✓[7]	✓[7]
Slovakia	✓	✓	✓[4]
Slovenia	✓	✓	✓
Spain	✓[10]	✓	✓
Sweden	✓[3]	✓	✓
Switzerland	✓[6]	✓	x
Turkey	✓	✓	✓
Ukraine	✓	✓	✓
United Kingdom	✓[3,5]	✓	✓
The Americas			
Argentina	✓[3,10]	✓	✓
Brazil	✓	✓	✓
Canada	✓	✓	✓
Chile	✓[10]	✓	✓
Colombia	✓[10]		
Costa Rica	✓[3,10]	✓	✓

Dominician Republic	✓[10]	✓	✓
Ecuador	✓[10]	✓	✓
Guatemala	✓[10]	✓	✓
Mexico	✓[3,10]	✓	✓
Peru	✓[10]		
United States of America	✓[3]	✓	✓[5]
Venezuela	✓[10]	✓	✓
Asia			
India	✓[3]		
Indonesia	✓	✓	
Japan	✓	✓	
Kazakhstan	✓[3]	✓	
Kyrgyzstan	✓[3]	✓	
South Korea	✓[9]	✓	✓
Taiwan	✓	✓	
Thailand	✓	✓	✓
Oceania			
Australia	✓[3]	✓	✓[5]
Africa			
Mozambique	✓	✓	✓
South Africa	✓	✓	✓

[1] Separate opinions supporting the majority opinion are published with the judges' names. Separate opinions constituting or supporting a minority opinion are published anonymously.
[2] Separate opinions exist only for regulations passed before 1937.
[3] Diffuse judicial review system and therefore not a pure constitutional court.
[4] Separate opinions in some situations not permitted.
[5] Seriatim Decisions: Instead of having one judge writing an opinion on behalf of the court, every judge reads his or her own opinion.
[6] Very limited constitutional review. Results are not binding for the legislature. Thus, the Court may have to apply unconstitutional law.
[7] In the case of Serbia it is not yet clear whether the Constitutional Court publishes the dissenting opinions on a regular basis. The sources available imply that justices decide whether or not to make their dissenting opinion public. However, no evidence denies that the CC actually discloses the identity of the dissenting justices. The Website of the CC is currently under construction which limits the research today.
[8] No reliable sources. Thus, uncertain information.
[9] No review of administrative action.
[10] Amparo proceedings.

APPENDIX B

Empirics

In the following, I provide supplementary information for Chapter 5. First, I show a correlation matrix with all variables included in the analyses. Second, I give additional insights into the effect of a case's controversy. Third, I provide the numbers from testing for proportions (Hypotheses 4a and 4b) before illustrating that choosing an ordered logit model meets the required assumptions. Subsequently, I present robustness checks for the model employed. At the end, I attach a table listing the names of each variable as it can be found in the data set.

B.1 Correlations

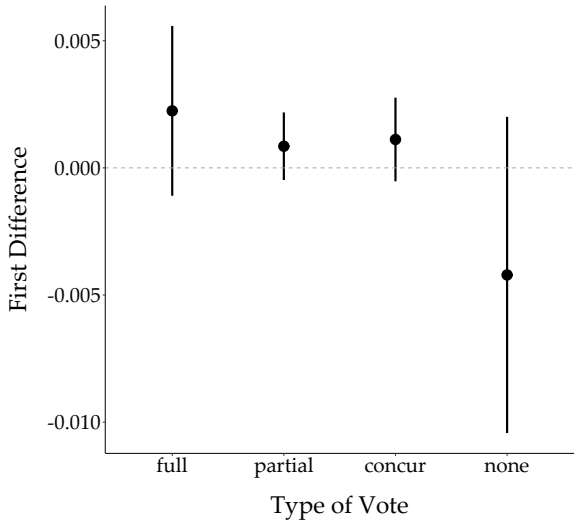
Table B.1 depicts the correlation matrix for all variables in the analysis. It demonstrates that the models do not suffer from multicollinearity. Moreover, as discussed in Chapter 5, different options exist to measure somewhat similar concepts. In this regard, I have argued that the respective variables I choose fit the intended purpose best. Given a high correlation between the two possible alternatives, the correlation table proves that including both variables is not sensible.

Table B.1: Correlation Matrix for Independent Variables

	Prof	Months	Fresh	Cont	Para	Par log	Par Rat	Admis	Parties	Proc	Pres	Ratio	Sen
Prof													
Months	0.054												
Fresh	0.030	0.814											
Cont	0.018	-0.032	-0.068										
Para	0.070	-0.087	-0.083	0.022									
Par log	0.072	-0.075	-0.054	0.0001	0.821								
Par Rat	0.058	-0.067	-0.076	0.086	0.635	0.507							
Admis	-0.053	0.057	0.074	0.107	-0.494	-0.389	-0.659						
Parties	-0.056	-0.037	-0.028	-0.026	-0.007	0.014	-0.033	-0.129					
Proc	-0.044	-0.001	-0.032	0.499	0.006	-0.138	0.091	0.265	-0.207				
Pres	-0.589	0.048	0.043	0.018	-0.008	-0.004	-0.021	-0.005	0.038	-0.013			
Ratio	0.054	-0.034	-0.025	-0.034	-0.033	0.029	-0.020	-0.007	-0.017	-0.128	-0.015		
Sen	-0.250	0.091	0.025	0.089	-0.047	-0.096	0.043	0.206	-0.223	0.584	-0.072	-0.006	

Prof = Profession
Months = Months to Exit
Fresh = Freshman
Cont = Controversial
Para = No. Paragraphs Facts
Par log = No. Paragraphs logged
Par Rat = No. Paragraphs Rationale
Admis = Admissibility
Parties = No. Parties
Proc = Political Procedure
Pres = President
Ratio = Ratio
Sen = Senate

Figure B.1: Simulated First Differences in Predicted Probabilities between Uncontroversial (reference group) and Controversial Cases at Mean of Paragraphs



B.2 Effect of Controversy at Mean of *Paragraphs*

Figure B.1 displays first differences between controversial and uncontroversial cases when the variable *Paragraphs* it set to its mean.

B.3 Proportions of Vote Types

Although the descriptive statistics seem to show that there are considerable differences in the use of vote types, it has been examined whether these differences are significant. Table B.2 displays the differences between the proportions of the vote types. The confidence interval not including zero shows that the use of *none* votes and separate opinions is significantly distinct. When testing multiple proportions, those cases in which the differences exceed the critical value, the proportions of vote types can be said to differ significantly.

Table B.2: Differences between Pairs of Proportions

Difference	Critical Range	Pair of Difference
0.001	0.002	concur - partial
0.005	0.003	concur - full
0.006	0.003	partial - full

Table B.3: Approximate Likelihood-Ratio Test of Proportionality of Odds across Response Categories

χ^2	34.32
Prob $>\chi^2$	0.1272

B.4 Proportional Odds Assumption

In order to run an ordered logit model, the data has to fit the proportional odds assumption. For testing it, I ran a likelihood-ratio test examining whether the coefficients are equal across the categories. As the insignificant results presented in Table B.3 show, the model does not violate the proportional odds assumption. Thus, it is reasonable to employ an ordered logistic regression.

B.5 Robustness Checks

As hinted at in Section 5.4, the following tables provide robustness checks for the analysis conducted in Chapter 5. Table B.4 shows the results from running models with different subsets of the data. For a better overview, the full model as employed in the main analysis ("Complete") is added to the table.

B.6 Variable Names

In the text body, the variables are denoted in a way that maximizes the readability and comprehensibility. However, those are not the exact same labels as in the dataset. Table B.5 lists the names of the variables as referred to in the text and the respective names in the dataset.

Table B.4: Results from Ordered Logit Models with Complete Data, Reduced Data, Three Types of Votes, and Logged Data

	Complete	Reduced	Three Votes	Log Paragr.
	(1)	(2)	(3)	(4)
Profession (Law)	-0.628^{**}	-0.653^{**}	-0.629^{**}	-0.626^{**}
	(0.288)	(0.288)	(0.288)	(0.288)
Months to Exit	-0.001	-0.001	-0.001	-0.001
	(0.003)	(0.003)	(0.003)	(0.003)
Controversial (yes)	0.090	0.062	0.090	0.088
	(0.230)	(0.232)	(0.230)	(0.229)
Paragraphs	0.011^{***}	0.011^{***}	0.011^{***}	
	(0.001)	(0.002)	(0.001)	
Paragraphs logged				1.244^{***}
				(0.211)
Admissibility (no)	-1.631^{***}	-1.783^{***}	-1.631^{***}	-1.539^{***}
	(0.423)	(0.461)	(0.423)	(0.424)
Admiss. (other)	-0.992^{*}	-0.882	-0.992^{*}	-0.889
	(0.590)	(0.589)	(0.590)	(0.592)
Number of Parties	0.147	0.157	0.147	0.133
	(0.115)	(0.116)	(0.115)	(0.115)
Political Procedure	0.930^{***}	0.930^{***}	0.930^{***}	1.048^{***}
	(0.183)	(0.184)	(0.183)	(0.180)
Pol. Proc. (not identifiable)	0.664	0.735	0.665	0.819
	(0.517)	(0.518)	(0.517)	(0.522)
President (yes)	-0.378^{*}	-0.360^{*}	-0.380^{*}	-0.379^{*}
	(0.203)	(0.203)	(0.203)	(0.203)
Ratio	4.739^{**}	4.918^{**}	4.753^{**}	4.249^{**}
	(2.066)	(2.083)	(2.065)	(2.096)
Profession x Months to Exit	0.002	0.002	0.002	0.002
	(0.003)	(0.003)	(0.003)	(0.003)
Profession x Controversial	0.221	0.257	0.222	0.202
	(0.294)	(0.295)	(0.294)	(0.293)
τ_0: none|concur	4.912^{***}	4.891^{***}		6.252^{***}
	(0.393)	(0.394)		(0.527)
τ_1: concur|partial	5.223^{***}	5.203^{***}		6.562^{***}
	(0.395)	(0.396)		(0.528)
τ_2: partial|full	5.553^{***}	5.536^{***}		6.893^{***}
	(0.398)	(0.399)		(0.531)
none|intermediate			4.911^{***}	
			(0.393)	
intermediate|full			5.552^{***}	
			(0.398)	
Observations	12,999	12,614	12,999	12,999
Log Likelihood	-1234.72	-1225.39	-1166.10	-1238.25
AIC	2501.45	2482.78	2362.20	2508.50
PCP	98.95	98.30	98.95	98.95

Table B.5: Names of Variables in Text and Data Set

Name in Text	Name in Data Set
Type of Vote	type_result
3 Vote Types	type_result3
Type of Vote dummy	result_du
Profession	professionpost
Days to Exit	daysexit
Controversial	controv
Paragraphs	paragraphs_facts
Paragraphs logged	paragraphslog
Paragraphs Rationale	paradec
Admissibility	admissibility
Number of Parties	partyno
Political Procedure	polproc
President	president
Ratio	ratio
Freshman	freshman
Senate	senate

Courts with the right to constitutional review exert considerable power in a political system. However, especially for Kelsenian constitutional courts there are hardly any large-N studies. This is mainly due to a lack of data. For the German Federal Constitutional Court, this gap has been closed by building a novel database, the development of which is depicted in this book. Employing data from this database, the occurrence of separate opinions in general and their different types in particular are analyzed. The book introduces a new, universal theory that reconciles and expands existing explanations. In a second step, the theory is applied to the German Federal Constitutional Court. It can be proven that one factor that has been neglected so far plays a decisive role: The judges' behavior depends on the profession they pursue after their time in office. Moreover, the study shows that – contrary to the common literature – it is not mainly the topic that determines a case's conflict potential but rather the number of issues a decision has to address.

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