Risking Precision at Courts of Precedent

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Abstract

Decisions of courts of precedent have implications for policymakers, who need to ensure that their policies are consistent with legal rules found in jurisprudence. Existing literature, however, highlights that such rules may lock-in inappropriate policies, presenting courts with a tradeoff. By resolving individual disputes without conclusively answering their underlying legal questions, courts avoid adverse knock-on effects of their rulings but allow governments and legislatures to stick with policies courts would prefer to keep off the books. I develop a formal model showing that policymakers signalling their preferences to courts in the hopes of receiving more favourable judgments inadvertently help judges to resolve this tradeoff. I present original data from preliminary references submitted to the Court of Justice of the European Union between 1998 and 2011 supporting the formal model's empirical implications.

1 Introduction

> [W]e know too little to risk the finality of precision ....
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> *Justice D. Souter*, Associate Justice of the U.S. Supreme Court (quoted in Sunstein 1996, 6)

The decisions of courts of precedent sitting at the apex of their judicial hierarchies have implications that reach beyond the individual cases that are being settled. Resolving legal disputes, courts' rulings and their underlying legal reasoning guide the future choices of other actors, who

need to ensure that their actions are consistent with courts' interpretation of the law (see Hansford and Spriggs 2006). Courts of precedent, such as the U.S. Supreme Court or the Court of Justice of the European Union (CJEU), assume their arguably most prominent—and controversial—role when their judgments shape the choices of policymakers in government cabinets and legislatures (see Staton and Vanberg 2008; Krehbiel and Cheruvu 2022; Schmidt 2018). When courts of precedent rule on the lawfulness of policy, their decisions deter elected officials from issuing policies inconsistent with these rules in the future (see Vanberg 1998; Fox and Vanberg 2014).

Prominent scholars warn that courts have thus encroached upon the responsibilities of legislatures and executives, diagnosing a "growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions" (Hirschl 2008, 95, see also Stone Sweet 2000; Tate and Vallinder 1995; Schmidt 2018). These warnings sound all the more concerning in light of scholarship highlighting that judges are often not in a position to craft 'appropriate' rules. Courts navigate a world characterized by uncertainty, lack the expertise to foresee the effects of their decisions on policy and therefore risk "announcing rules that turn out to be inappropriate ex post, and that may be difficult or costly to change" (Fox and Vanberg 2014, 356, see also Sunstein 1996, 1999; Staton and Vanberg 2008).

How do courts of precedent reconcile their mandate to issue instructive interpretations of law with their limited policy expertise? In this article, I introduce a formal model and original empirical evidence addressing this question. My analysis centres on a tradeoff characterizing judicial decisionmaking at courts of precedent: By treading carefully and resolving cases without conclusively answering the underlying legal questions, courts can avoid issuing instructions with uncertain, possibly adverse knock-on effects on policy, but also allow policymakers in governments and legislatures to pursue acts that courts would like to keep off the books (Staton and Vanberg 2008; Spriggs 1997).

The formal model investigates how courts navigate this tradeoff. The model draws on a well-established literature suggesting that policymakers have strong incentives to signal their positions on the legal questions considered by courts in the hopes of convincing the latter to submit more favourable judgments (see for example Bailey and Maltzman 2011; Shapiro 1981; Epstein and Knight 1998; Hall and Ura 2015; Larsson and Naurin 2016). With policymakers' signals, typically coming in the form of briefs submitted during case proceedings, courts gain access to information on the preferences of those who are affected by their rulings, which allows them to make an informed

choice between resolving a legal question or leaving things undecided. The model expects that despite lacking the expertise to foresee the knock-on effects of their decisions on policy, courts are less likely to leave legal questions unresolved when policymakers signal positions on legal questions that are incompatible with their own favoured positions. This expectation motivates a statistical analysis of the decisionmaking at the CJEU in preliminary reference proceedings lodged between 1998 and 2011. Drawing on original data, I show that the Court was more likely to dismiss recommendations by its chief legal advisors to leave legal questions unresolved when Member States had signalled support for answers that would preserve Member States' national autonomy and stall further European integration.

The article offers both a theoretical and empirical contribution to existing scholarship. Recent research has taken a stronger interest in understanding how courts develop precedent in a world characterized by uncertainty (see Ainsley et al. 2021; Callander and Clark 2017; Clark 2016; Fox and Vanberg 2014; Clark and Lauderdale 2012). This literature highlights that courts' expectations about policymakers' responses to jurisprudence and the types of cases judges are likely to hear in the future play a prominent role in judicial decisionmaking. However, a missing piece to the puzzle remains how courts inform their expectations about the future. The article's theoretical model shows that it is policymakers—and in particular those who disagree with courts on how to answer legal questions—who play an important role in courts' decisions of when to risk the precision of settling legal questions and when to leave things undecided.

Empirically, the article contributes to the debate on tensions between EU Member States and the Court of Justice (see Carrubba and Gabel 2015; Blauberger and Martinsen 2020; Schmidt 2018; Larsson and Naurin 2016). Existing scholarship has offered compelling evidence that the Court of Justice is—albeit not universally—receptive to the preferences of Member States to avoid national governments overriding its decisions and mitigate non-compliance risks (see Carrubba et al. 2008; Carrubba and Gabel 2015; Larsson and Naurin 2016; Garrett et al. 1998; Ovádek 2021). The narrative presented here is consistent with claims that the Court takes Member States' preferences into account when writing its judgments, and at least occasionally cedes to national governments' pressure. However, although the data available for my analysis is limited to the period between 1998 and 2011 and therefore misses important challenges the CJEU has had to face over the last decade (see Kelemen 2016; Kelemen et al. 2018), the evidence suggests that the CJEU is unwilling

to leave legal questions with implications for the future path of European integration unresolved when member states' signalled preferences diverge from the Court's position on the question.

The article proceeds as follows. The next section reviews the existing literature and discusses key assumptions that feed into the formal model. The following section then introduces the formal model's primitives and derives its key empirical implications. An empirical application of the theoretical model fielding observational data from the Court of Justice's decisions in preliminary reference proceedings follows. The final section discusses key findings of the empirical analysis and offers concluding remarks.

2 Judicial policymaking in a world of uncertainty

Courts of precedent routinely issue judgments that have implications beyond the individual cases they hear. While the dispositions in the U.S. Supreme Court's majority opinions settle the legal dispute between individual litigants in a particular case, it is the majority opinions' holding and underlying legal reasoning that amend existing legal policy and "structure the outcome of future disputes" (Hansford and Spriggs 2006, 3, for similar arguments see Hadfield and Weingast 2012; Bueno de Mesquita and Stephenson 2002; Callander and Clark 2017; Clark and Carrubba 2012; Clark 2016). Similarly, preliminary rulings issued by the Court of Justice of the European Union (CJEU) owe their significance in the EU's legal system not to the outcome they may entail for a particular dispute in the national court that had referred the reference. Rather, with its ruling in *Da Costa* (C-28/62), the CJEU had effectively established a system of precedent, where the Court relies on the holdings of its previous judgments when answering legal questions referred by national courts (Craig and de Búrca 2020, 523, see also Derlén and Lindholm 2015).

As judgments' holdings 'structure' the outcomes of future legal disputes, they become focal points for decisionmakers in government cabinets and parliaments (see Kelemen and Teo 2014). Studying courts' past judgments, political decisionmakers can reasonably anticipate how courts would decide cases with similar facts in the future, and can design policies that are likely to survive judicial scrutiny or are unlikely to be challenged in court in the first place (Blauberger 2012; Wasserfallen 2010). Legal rules defined by courts thus may put pressure on policymakers to amend existing policies and stay clear from policy options that appear at odds with jurisprudence to avoid

conflict with courts, an argument made by scholars wary of a judicialization of politics (see Stone Sweet 2000; Hirschl 2009). Put simply, the legal rules defined by courts can remove otherwise feasible policy options from the agenda of policymakers (see Schmidt 2018, 246).

While some scholars note that courts of precedent thus "may lock in certain policies, while precluding other policy options" (Blauberger and Schmidt 2017, 910), others highlight that "judges run the risk of 'locking-in' an inappropriate policy that does not achieve its desired purpose and may even produce a worse outcome" (Staton and Vanberg 2008, 506). This strand of scholarship argues that the work of courts is complicated by their limited policy expertise and uncertainty about the effects of their decisions on actual policy outcomes (Staton and Vanberg 2008; Sunstein 1996, 1999). Once a rule has been established, it is often costly to change it, as courts try to stay clear from overruling precedent all too quickly and frequently (see Spriggs and Hansford 2001; Hansford and Spriggs 2006; Callander and Clark 2017). Courts are thus well-advised to avoid "steps that might be confounded by unanticipated circumstances" (Sunstein 2006, 1903).

Existing scholarship notes that leaving as much as possible undecided is a strategy for courts to mitigate their lack of policy expertise and uncertainty about the future (see Sunstein 2006). However, Staton and Vanberg (2008) argue that leaving legal questions undecided harbours a difficult tradeoff for courts. Judgments that leave legal questions unresolved provide policymakers with discretion to pursue policies that courts otherwise would have preferred to keep off the books. Staton and Vanberg (2008, 506) cite the example of the U.S. Supreme Court's decision in *Brown* v. *Board of Education*, which required judges to determine "which specific policies will achieve [racial desegregation of schools] and with which side effects", a challenge that ultimately led the Court to shy away from specifying precise rules for policies that would be consistent with the decision. In light of the ambiguity of the Court's decision in *Brown*, public schools in parts of the United States were not desegregated in a meaningful way even long after the Court's decision was published (Staton and Vanberg 2008, 504, see also Rosenberg 1991).

2.1 Weighing risks and informing choices

I expect judges to be aware of this tradeoff and to weigh the risks of establishing precedent 'locking-in' inappropriate policies against the likelihood of policymakers pursuing 'unlawful' policies if courts leave things undecided. Existing literature suggests that courts of precedent write their judgments

based on expectations about the cases they will hear in the future (see Clark 2016; Callander and Clark 2017). Judges, however, are uncertain about the types of cases that will land in their dockets. While Staton and Vanberg's (2008) model assumes that judges have perfect information about the preferences of policymakers, courts are likely to be unsure whether future plans for policy in the drawers of policymakers (or even some existing policies) are at odds with their preferred legal rules before a case concerning these policies actually arrives on their desk. The question thus remains how courts inform their choice to leave a legal question undecided.

In the formal model introduced below, I draw on a strand of literature, which highlights that policymakers have incentives to signal their preferences on answers to legal questions to courts in the hopes of eliciting more favourable judgments (see Hall and Ura 2015; Segal et al. 2011; Carrubba et al. 2008; Carrubba and Zorn 2010; Larsson and Naurin 2016). Both courts and policymakers know that the former lack the 'power of the purse and sword' and cannot enforce compliance with their own judgments or prevent overrides of their decisions (Vanberg 2005; Carrubba and Zorn 2010; Larsson and Naurin 2016; Larsson 2020). Courts' reliance on policymakers for the effective implementation of their decisions tilts the balance of power between the judiciary and the political branches, and existing work has offered evidence suggesting that courts are (at least occasionally) prepared to concede to external pressure from policymakers (see Segal et al. 2011; Hall and Ura 2015; Harvey and Friedman 2006; Carrubba et al. 2008; Carrubba and Zorn 2010; Whittington 2003). Evading compliance with court judgments may be politically costly and override attempts may ultimately fail (Vanberg 2001; Clark 2010; Larsson 2020), hence policymakers have incentives to signal their preferences to courts (e.g. in briefs submitted during case proceedings) *before* legal constraints on their policy choices are established in the first place. As long as there is a realistic chance that a court would opt for a rule that limits their policy choices, policymakers have an incentive to make their voices heard.

In the following, I discuss how courts' uncertainty about the policy effects of their rulings and policymakers' motivation to signal their positions on legal questions with ramifications for policy interact. I offer a formal theoretical model that explores how a court responds to incentives to leave legal questions unresolved that are highlighted in existing literature (Fox and Vanberg 2014; Staton and Vanberg 2008; Sunstein 1996, 1999), albeit amid uncertainty about the true preferences of policymakers who are affected by its rulings.

2.2   Model primitives

The formal model of imperfect information involves two players: a court of precedent (C) hearing a legal question with implications for policy, and a policymaker (L), who must decide whether to communicate its position on the legal question to the court. The court is asked to rule on the legal question but at least occasionally lacks the expertise to foresee the effects of its decision on policy. By settling the legal question nonetheless, the court risks defining a rule with adverse policy effects. Leaving the legal question unresolved, however, the court foregoes an opportunity to shape the behaviour of policymakers. Both the court and policymaker choose their actions in the face of imperfect information. While the policymaker has imperfect information on the court's policy expertise, the court has imperfect information on the policymaker's type (more on this below).

The model's sequence of play, displayed in Figure 6 in the online appendix, starts with two random draws, determining the state of the world, ω, and the policymaker's type, θ. The model distinguishes between two states, $\omega = A$ drawn with probability p, and $\omega = \overline{A}$ drawn with probability $1 - p$. Whenever $\omega = A$, the court lacks relevant expertise to foresee the knock-on effects of its rule on policy when settling the legal question itself. Otherwise, given $\omega = \overline{A}$ the court has sufficient expertise to answer the legal question without facing unexpected, adverse policy effects of its judgment. Unlike the court, the policymaker is uncertain about the state of the world, with their prior beliefs characterized by $Pr(\omega = A) = p$. The distinction between these two states is stylized and in reality we can reasonably assume that the court's uncertainty about the policy effects of its ruling is a matter of degree rather than a dichotomous distinction (i.e. courts are neither clueless nor fully informed about the policy effects of their rulings). However, the distinction between these states keeps the model tractable and allows me to explore how the court responds to signals sent by policymakers when it would ceteris paribus prefer to leave a legal question unresolved, $\omega = A$.

The second random draw then determines the policymaker's type, $\theta = D$ with probability q, and $\theta = \overline{D}$ with probability $1 - q$. The policymaker's type indicates whether or not their position on the legal question diverges from the court's position. Both the court and policymaker know that any rules the former establishes when answering a legal question can have consequences for policies, and both the court and policymaker have preferences over rules in a uni-dimensional space $\mathbb{R}$ (for a similar approach, see Fox and Vanberg 2014). Without loss of generality, let the court's

preferred rule be set at 0, and set the policymaker's preferred rule at z. Hence, the parameter $|z|$ captures the gap between the policymaker and the court's preferred rule.[1] Given $\theta = D$, the court and policymaker's preferences diverge. Otherwise, given $\theta = \overline{D}$, the court and policymaker share the same position (i.e. $z = 0$). While the policymaker knows their own type, the court has only imperfect information whether or not the policymaker's preferences diverge from its own preferences, with its beliefs about the policymaker's type characterized by $Pr(\theta = D) = q$.

To summarize, while the Court has private information about its policy expertise, $\omega \in \{A, \overline{A}\}$, the policymaker has private information about its type, $\theta \in \{D, \overline{D}\}$. Following these draws, the policymaker decides whether to signal its position on the legal question to the court, $g \in \{m, \overline{m}\}$, with m indicating that they reveal their preference, and $\overline{m}$ indicating otherwise. The game ends should the policymaker choose not to reveal their preference, with the court then leaving the question unresolved when $\omega = A$ and submitting its preferred rule when $\omega = \overline{A}$. Should the policymaker signal their preference, the court chooses from two options, $f \in \{d, \overline{d}\}$, with $\overline{d}$ indicating that it leaves the question unresolved, and d indicating that it settles the question. Following the court's choice, the game ends and payoffs are allocated.

2.3 Payoffs

The court pays a cost c whenever its decision mismatches the state of the world, either choosing to resolve the question when it lacks relevant expertise, $\theta = A$, or leaving things undecided when it has no reason to do so, $\theta = \overline{A}$.[2] Turning to the policymaker, signalling their preferences comes at a (possibly small) cost k, as a brief or submission to the court needs to be prepared, binding the policymaker's resources.[3] Yet, by signalling their preferences, the policymaker can induce the court to opt for a more favourable rule closer to the policymaker's preference. The policymaker thus can

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[1]To save on notation but without loss of generality, I assume throughout the following that z is non-negative.

[2]There are several interpretations for the cost the court pays whenever it chooses to delegate despite having no reason to do so. One interpretation may be that the court then can expect to hear future cases, which bind time and resources, which it could have avoided had it set a precedent that resolved similar future cases as well. Another interpretation may be that this cost is reputational, as a court of precedent is generally expected to develop case law and precedent when it has sufficient information to do so.

[3]We can safely assume that these costs are small. Nonetheless, engaging in a case, learning the case facts and preparing a brief is surely more costly for the policymaker than simply not engaging with the case.

secure an outcome that is preferable over an outcome had they not signalled their position.

The model does not assume that a signalling policymaker always succeeds in pressuring a court to offer concessions. Instead, whenever the policymaker signals their preference and the court subsequently decides to settle the legal question itself, a lottery determines their payoffs. The policymaker receives a payoff z with probability r (i.e. with probability r they succeed in eliciting a concession matching their preferred rule) and a payoff of 0 with probability $1 - r$. Similarly, the court receives a payoff of $-z$ with probability r (i.e. reflecting the cost it pays for offering a concession to a divergent policymaker) and a payoff of 0 with probability $1 - r$.

The lottery simplifies the tension between policymakers and courts, and the actors' strategic motives highlighted in existing literature (see Staton and Vanberg 2008; Carrubba and Zorn 2010; Clark 2010). Yet, it captures the basic tenets of this tension while keeping the model tractable. Divergent policymakers generally have an incentive to signal their preferences to secure more favourable outcomes, and there is a chance that courts give in to external pressure. The probability $r \in (0, 1)$ reflects the power (im-)balance between the court and policymakers, tipping in favour of policymakers as r increases.

Based on these primitives, a strategy for the policymaker is a mapping from their type and prior beliefs about the state of the world into a decision to signal their preferences, $g : \theta \times (0, 1) \to \{m, \overline{m}\}$. A strategy for the court is a mapping from the state of the world and its prior beliefs about the policymaker's type into a decision whether or not to delegate, $f : \omega \times (0, 1) \to \{d, \overline{d}\}$.

2.4   Analysis

The model supports four pure strategy perfect Bayesian equilibria (PBE). In the following, I state equilibrium existence conditions for each of these PBE and then discuss their empirical implications in turn. The proofs for the model's PBEs are discussed in Section A of the online appendix. I begin my analysis with a separating PBE in which the policymaker with divergent preferences signals these preferences to the court, while the non-divergent policymaker chooses not to signal. The court then can perfectly update its prior belief about the policymaker's type and chooses to resolve the legal question despite lacking policy expertise whenever the following conditions hold.

Proposition 1. Given $z \geq \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE (*Separating 1*) exists in which the

policymaker signals if their type is divergent $\theta = D$ and does not signal if $\theta = \overline{D}$, while the court settles the legal question upon observing the policymaker's signal, regardless of its policy expertise.

Consider the two thresholds concerning the preference gap between the policymaker and the court, $z^* \equiv \frac{c}{1-r}$, and another concerning the policymaker's beliefs about the court's policy expertise, $p^* \equiv \frac{rz-k}{z}$. The separating equilibrium introduced above holds for wider preference gaps, $z \geq z^*$, and when the policymaker has little reason to believe that the court lacks policy expertise, $p \leq p^*$, which are further discussed below. Next, I show that a second separating equilibrium exists when z falls below the threshold z^*, however the court now leaves the question unresolved when it lacks policy expertise despite the policymaker signalling a preference gap.

Proposition 2. Given $z < \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE (*Separating 2*) exists in which the policymaker signals if their type is divergent $\theta = D$ and does not signal if $\theta = \overline{D}$, while the court observing the policymaker's signal leaves the legal question unresolved if it lacks policy expertise and resolves the question otherwise.

Finally, I identify two pooling equilibria in which the policymaker never signals their preferences to the court, which is therefore unable to update its prior beliefs about the policymaker's type. The two pooling equilibria differ only in the off-the-equilibrium path behaviour of the court (i.e. how the court would have reacted if the policymaker had signalled their preferences).

Proposition 3. Given $p > \frac{rz-k}{z}$, two pooling PBE exist in which neither type of policymaker signals, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise. Given $z \geq \frac{c}{1-r}$, off-the-equilibrium path a court lacking policy expertise would resolve a legal question upon observing the policymaker's signal (*Pooling 1*). Given $z < \frac{c}{1-r}$, off-the-equilibrium path a court lacking policy expertise would leave a legal question unresolved upon observing the policymaker's signal (*Pooling 2*).

Figure 1 summarizes the four equilibria discussed above. Figure 1 shows that above the threshold $p^* \equiv \frac{rz-k}{z}$ no policymaker invests the effort to signal their preference to the court. As long as policymakers have sufficient reason to believe that a court will not settle a legal question (i.e. $p > p^*$), they are better off not investing the effort to communicate their preferences. Once their prior beliefs about the court's policy expertise fall below the threshold p^*, policymakers expect
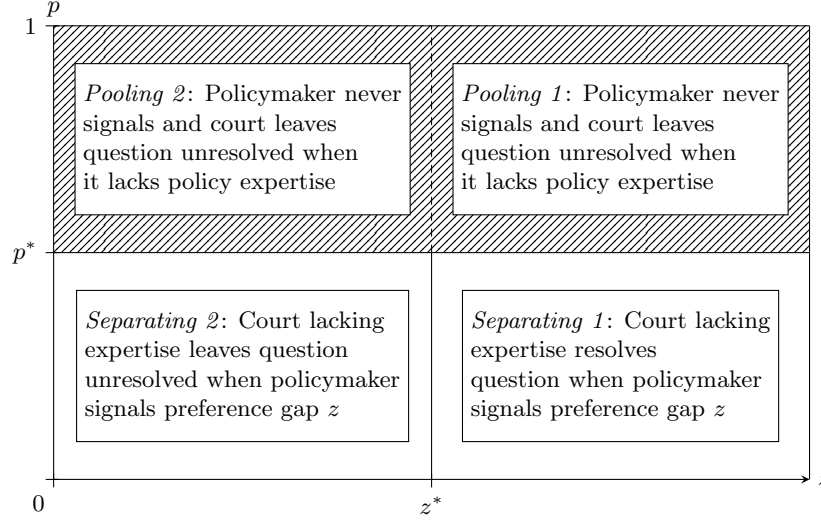
Figure 1: Equilibrium predictions. On the vertical axis, z denotes the preference gap between the court and the policymaker. On the horizontal axis, p denotes the policymaker's prior beliefs that the court lacks policy expertise. The thresholds are defined as $z^* \equiv \frac{c}{1-r}$ and $p^* \equiv \frac{rz-k}{z}$. The equilibria *Pooling 1* and *Pooling 2* differ in the court's off-the-equilibrium path strategies not shown here, see discussion in the online appendix.

the court to settle the legal question and therefore signal their preferences to try to get a more favourable answer. The parameters determining where this threshold lies, $p^* \equiv \frac{rz-k}{z}$, are intuitive. First, note that p^* decreases as the costs of preparing a brief k increase. As the time and resources policymakers have to bind to signal their preferences to the court increase, the region covered by the two pooling equilibria in Figure 1 expands, indicating that ceteris paribus we should see fewer policymakers signalling their preferences.

In contrast, note that the threshold p^* increases with r, the probability that the court actually concedes to policymakers' pressure and offers a more favourable rule when settling the legal question. Intuitively, ceteris paribus, when policymakers can expect that their signalling of preferences will push the court to offer concessions, they have stronger incentives to invest effort into signalling. Further, the threshold p^* increases with the preference gap between policymakers and the court, z. If policymakers expect that their preferences over legal rules diverge substantially from the court, they will invest efforts to signal these preferences even if their prior beliefs that the court lacks policy expertise and would leave a legal question unresolved are relatively high. Put simply, those policymakers who have a lot to lose should a court opt for a rule that constrains their policy choices are also the ones who have stronger incentives to signal their preferences to the court. This

expectation is summarized in the following observation.

Observation 1. As policymakers' preferred legal rule diverges further from a court's preferred rule, policymakers face stronger incentives to signal these preferences to a court.

Now consider the scenarios in which policymakers with divergent preferences choose to signal their preferences to the court, the bottom two quadrants of Figure 1. In scenarios captured by the bottom-left quadrant, the signalled preference gaps between policymakers and the court are relatively small, falling below the threshold $z^* \equiv \frac{c}{1-r}$. Here, the model expects that a court lacking policy expertise will leave the legal question unresolved to avoid setting a precedent with unintended, adverse consequences. Given the signalled preference gap is small, leaving a policymaker with somewhat divergent preferences room to manoeuvre is preferable over the risk of 'locking-in' inappropriate policies. The incentives of a court lacking policy expertise, however, change when the signalled preference gap is wider, falling above the threshold z^*. In these scenarios, captured by the bottom-right quadrant of Figure 1, the court considers the costs of providing discretion to policymakers with clearly divergent preferences higher than the costs that may arise from setting an inappropriate precedent. This expectation is summarized in the following observation.

Observation 2. When policymakers signal wider preference gaps, courts lacking policy expertise should be less likely to leave legal questions unresolved.

The parameters that determine where the threshold determining the court's actions falls, $z^* \equiv \frac{c}{1-r}$, are again intuitive. The threshold increases with c, the costs the court faces from issuing an answer to a legal question amid high risks of adverse knock-on effects on policy. As these costs increase, the space covered by the bottom-left quadrant in Figure 1 increases to the right, and the court will leave legal question unresolved even if policymakers signal wider preference gaps. The same holds for the parameter r. As the balance of power between the court and policymakers tilts in favour of the latter (i.e. as the term $1-r$ decreases), a court lacking policy expertise will leave legal questions unresolved even when policymakers signal wider preference gaps.

To summarize the gist of the formal model and the insights from its analysis, courts of precedent may not always have all the expertise required to settle a legal question without risking adverse consequences and face incentives to leave things undecided. Leaving the answer to legal questions

in the hands of other actors, however, also opens up the possibility that policymakers may continue to implement policies courts would otherwise like to see off the books. The model shows that we should be more likely to observe courts settling legal questions themselves when policymakers signal support for answers to legal questions that courts disagree with, and that policymakers with more extreme preferences for legal rules relative to a court should generally be more likely to signal these preferences. In other words, policymakers inadvertently reveal information that allows a court to make a more informed choice between settling a legal question itself or leaving things undecided. In the following, I turn to the decisionmaking of the Court of Justice of the European Union in preliminary reference proceedings for an empirical application of these claims.

3   Empirical application

The CJEU serves as the European Union's "central dispute settlement mechanism" (Carrubba and Gabel 2015, 61), and is tasked with clarifying the implications of European law through the preliminary reference procedure (Craig and de Búrca 2020, 496). Answering preliminary references from national courts, the CJEU routinely clarifies whether individual Member States had met their obligations under European law, and its interpretations are relevant for policymakers in capitals throughout the Union (Blauberger and Schmidt 2017). Recent research, however, has highlighted that the CJEU occasionally opts not to answer the referred questions (see Tridimas 2011; Zglinski 2018; Davies 2012). By leaving a legal question unresolved and 'handing responsibilities back' to national courts (Zglinski 2018), the CJEU skips an opportunity to write an interpretation that shapes the behaviour of policymakers across Member States—unlike jurisprudence of the CJEU, national courts' reasoning does not carry weight beyond the borders of their Member States.

Typically, when leaving legal questions unresolved, the CJEU acts on the advice of its Advocate Generals, the Court's chief legal advisors. To illustrate, in *Case C-478/07 Budějovický Budvar National Corporation v Rudolf Ammersin GmbH*, which involved a dispute between a Czech beer brewery and an Austrian beverage distributor, the Advocate General recommended leaving it for the referring Austrian court to decide which instrument is appropriate to determine if a brand name serves as an indication of provenance—and the CJEU followed this recommendation. In the following, I discuss how I leverage information on whether the Advocate General had recommended

leaving a legal question unresolved and for national courts to determine for the empirical application of the formal model's comparative statics.

The empirical analysis presented in the following relies on data provided by the IUROPA project, a multidisciplinary platform to support research on judicial politics in the European Union (see Brekke et al. 2021, see also further information on the collected data and coding protocols in the online appendix). The use of this data has several advantages, first and foremost providing an indicator that allows me to capture cases where an independent legal advisor to the court recommended leaving a legal question unresolved. Nonetheless, the data that includes this information has a drawback as it only covers preliminary references lodged with the CJEU between 1998 and 2011.[4] Hence, the inferences we can draw from the following analyses are limited to a period prior to challenges the CJEU experienced in the context of the United Kingdom's exit from the EU and democratic backsliding in Central European Member States (Kelemen 2016; Kelemen et al. 2018). Nonetheless, the analyses offer a novel insight into the determinants of courts leaving legal questions undecided.

3.1   Empirical strategy

For each question referred by national courts to the CJEU between 1998 and 2011, the data indicates whether or not the CJEU found that the answer to a referred question is *For the national court to determine* (i.e. the outcome variable), with 1 indicating that the CJEU found that the answer to a question is to be determined by the referring national court, and 0 indicating otherwise. The data shows that for the 4,520 questions the CJEU considered in preliminary references between 1998 and 2011, the Court left the question unresolved in 272 instances, roughly six percent of all questions. In other words, the CJEU rarely misses an opportunity to settle legal questions itself.

This pattern may not surprise as it is the premise of the preliminary reference proceeding that the CJEU itself clarifies EU law in response to these questions. The rarity of this event also makes the CJEU's decisions in preliminary reference proceedings a suitable empirical target for the comparative statics of the formal model's equilibria discussed above, as it is likely that policymakers

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[4]The data collection, including the Advocate General's recommendations, relied on written reports of hearings held at the CJEU in preliminary reference proceedings, which are available to scholars only for preliminary references lodged by national courts prior to 2012.

in Member States have generally little reason to expect the CJEU to leave things undecided.

I require a proxy indicating whether judges a priori (i.e. irrespective of Member States' preferences) thought that a legal question should be left unresolved and hence which 'state of the world' the CJEU is navigating. Lacking access to documentation of judges' internal deliberations, the next best alternatives are the opinions issued by the Court's Advocate General in the course of case proceedings. The Advocate General (throughout the following, AG) is an officer who "is generally considered a legal expert, writes thorough legal analyses of the legal questions in each case, and provides a published advisory opinion to the [CJEU]" (Carrubba and Gabel 2015, 88). Hence, the AG's opinion serves as an indicator which questions should be left unresolved based on an expert legal analysis, distinguishing between the formal model's two 'states of the world'. I have access to data indicating whether or not the AG assigned to a case advised the CJEU to let the referring national court decide the answer to a legal question before the Court. The variable *AG recommendation* is binary, with 1 indicating that the AG recommended leaving the question unresolved and 0 indicating otherwise.

My analysis in the following proceeds in two steps. First, I consider the effect of the number of briefs (in EU jargon referred to as observations) Member States had submitted during case proceedings on the CJEU's decision to follow the AG's advice. In the second step of the analysis, I then take a closer look at effects of the positions Member States communicate to the Court. The formal model suggests that the CJEU should be less likely to leave a legal question unresolved when submitted observations had signalled a gap in the preferred answers to a legal question between Member States and the Court. The data allows me to capture Member States' positions on the legal question before the Court with respect to its implications for Member States' national autonomy (see Larsson and Naurin 2016, 2019; Ovádek 2021). For each submitted Member State observation on each legal question before the Court, the data indicates whether the submitting national government preferred fewer restrictions to national autonomy, more restrictions to national autonomy, or whether the government's position was ambivalent and could not clearly be categorized as either of the two preceding types of positions.

Ideally, I would then compare these communicated preferences to the CJEU's position on the legal question to see whether the Court is less likely to leave a question unresolved when Member States' observations revealed a preference gap. However, as for previous analyses of the CJEU's

strategic decisionmaking (see Carrubba et al. 2008; Larsson and Naurin 2016), I lack information on the Court's 'true' preferences, which may not be reflected in its observable decision—the CJEU may after all strategically offer concessions to Member States. While previous studies relied on the position communicated by the AG as an independent legal advisor to proxy the CJEU's sincere preferences (see Carrubba and Gabel 2015; Larsson and Naurin 2016), this strategy is not an option here. Research assistants had been instructed to code that the AG's position could not be categorized as either in favour or against further restrictions to national autonomy whenever the AG recommended to leave a question unresolved.

While I am unable to directly measure a preference gap between Member States and the CJEU, existing research has highlighted that—unlike Member States—existing research has shown that the Court tends to prefer advancing European integration over the preservation of Member States' national autonomy (see Ovádek 2021; Larsson and Naurin 2016; Martinsen 2015). Therefore, we should be more likely to observe preference gaps between Member States and the Court when the former argue against further restrictions to their national autonomy, than when they voice positions favouring further European integration or as Larsson and Naurin (2016) put it 'more Europe'. The variable *MS opposing restrictions* counts the number of Member States voicing opposition to further restrictions to their national autonomy, while the variable *MS favouring restrictions* counts the number of Member States supporting such restrictions, favouring more Europe. *MS ambivalent* count the number of Member States supporting such restrictions or issuing observations with ambivalent positions.

Regressing the outcome variable *For the national court to determine* on interactions between the AG's recommendation to leave the legal question question unresolved and the explanatory variables discussed above allows me to compare how different types of positions voiced by Member States reflect in the CJEU's choice to follow the AG's advice and leave legal questions unresolved.

3.2   Estimation and control variables

Given the event I am interested in, the CJEU's decision to let a national court determine the answer to a legal question, is relatively rare, I am estimating Rare Events Logistic Regression Models, relying on the **Zelig** package for the programming environment R, correcting for the bias that occurs when observed events on the outcome variable are rare (see King and Zeng 2001). The

units of analysis are the 4,520 legal questions considered by the CJEU in preliminary references lodged between 1998 and 2011. I have reason to believe that potential outcomes for legal questions with higher values on the key explanatory variables systematically differ from legal questions with no or few submitted Member State observations.

It is possible that the CJEU's decisionmaking differs between highly politicized questions that concern a Member State's derogation from the principles of free of movement of goods, persons, services and capital on the one hand, and other types of legal questions on the other, with Member States more likely to make their voices heard on question concerning derogation. Therefore, I control for a binary variable *Derogation*, with 1 indicating that the referred question concerns whether a derogation from the principles of free movement is justified, and 0 indicating otherwise. Similarly, given the CJEU may be more likely to leave questions for national courts to decide in certain policy areas but not others, while Member States may be more likely to submit observations in some policy areas, I include fixed-effects the areas of national law a legal question concerns.[5]

In addition, I control for the number of Member States issuing positions that could not clearly be categorized as either in favour or against further restrictions to national autonomy, labelled by Larsson and Naurin (2016) as 'ambivalent' positions. Higher numbers of Member States signalling ambivalent positions may reflect uncertainty among national governments about the correct answer to a legal question, indicating a stronger demand for the CJEU to clarify EU law and resolve a question, and controlling for an alternative theoretical narrative for why the Court would not leave legal questions unresolved.

Further, the data also shows that the AG is not the only actor issuing recommendations to leave a legal question unresolved. Such recommendations may also be voiced by the European Commission as well as Member States themselves. It is likely that the AG and Commission's recommendations to leave a legal question unresolved are correlated, while the CJEU may be more likely to follow such advice when it comes from both actors. Further, for legal questions with several Member States submitting observations, it is more likely that we find observations recommending to leave

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[5]I include dummy variables for the following national areas of law in my statistical models: agriculture, environment, health care, intellectual property, labour law, migration, social policies, tax and technology. I also include dummy variable indicating whether the legal question exclusively concerns EU law. Note that a legal question may concern up to two national areas of law.

	Model 1	Model 2	Model 3	Model 4
Number of observations	0.03	0.00	0.04	−0.04
	(0.03)	(0.03)	(0.04)	(0.05)
AG recommendation		3.57	3.96	3.54
		(0.16)	(0.26)	(0.33)
Number of observations × AG recommendation			−0.14	−0.28
			(0.07)	(0.10)
Commission recommendation				2.56
				(0.20)
Member States recommendation				0.72
				(0.14)
Derogation				0.50
				(0.26)
Number of previous interpretations				0.00
				(0.08)
AIC	2059.26	1627.80	1626.20	1390.52
BIC	2072.09	1647.05	1651.86	1505.35
Log Likelihood	−1027.63	−810.90	−809.10	−677.26
Deviance	2055.26	1621.80	1618.20	1354.52
Num. obs.	4,520	4,520	4,520	4,358

Table 1: Rare events logistic regression coefficients with standard errors reported in parentheses. Model 4 includes fixed-effect controls for national areas of law (not shown here).

the legal question unresolved, which may be systematically linked to the CJEU's decisionmaking. I therefore control for the variables *Commission recommendation* (a binary variable, with 1 indicating the Commission recommends leaving the question unresolved and 0 otherwise), and the variable *Member States recommendation* (indicating the number of Member States recommending to leave the legal question unresolved). Finally, it is plausible to assume that the CJEU's choice to leave a legal question unresolved and Member States incentives to signal their positions is linked to the extent of already existing precedent on the legal question heard by the Court. To control for the CJEU's previous decisionmaking, I include the variable *Number of previous interpretations* obtained from replication data provided by Hermansen (2020), which counts how often the CJEU had already considered the piece of EU law addressed by the legal question in its previous decisions.
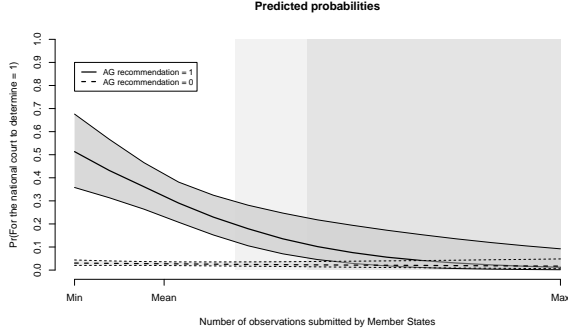
Figure 2: Predicted probabilities across the range of *Number of observations*. Light-grey shaded areas indicate values one SD above the variable's mean, dark-grey shaded areas indicate values more than two SD above the mean.
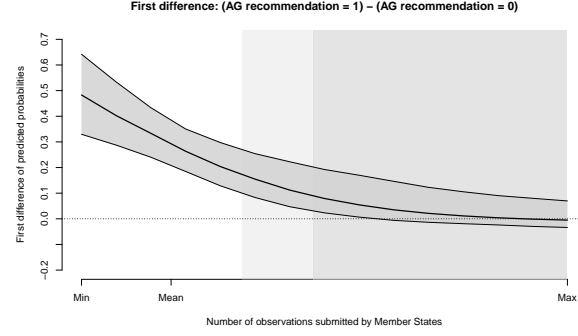
Figure 3: First difference of predicted probabilities across the range of *Number of observations*. Light-grey (dark-grey) shaded areas indicate values one (more than two) SD above the variable's mean.

3.3   Results

I begin my empirical analysis by regressing the outcome variable *For the national court to determine* on the variable *Number of observations* (Model 1). Table 1 shows that there is no distinguishable effect of the number of observations submitted by Member States on the CJEU's decision to leave the question unresolved. In Model 2, I add the variable *AG recommendation* showing that, as expected, the CJEU is more likely to leave a legal question unresolved whenever the AG recommends doing so, while the variable *Number of observations* continues to have no discernible effect.

This however changes once we include an interaction of the two variables in Model 3. While the main effect for the variable *Number of observations* remains close to zero, the coefficient for the interaction effect is negative and distinguishable from zero. Whenever the AG recommends leaving a legal question unresolved, each additional observation submitted by Member States decreases the probability that the CJEU follows the AG's advice. This effect remains robust after introducing the control variables in Model 4 (complete results are presented in Table C.1 in the online appendix). To offer a substantive interpretation of the observed effect, I calculate predicted probabilities based on on 1,000 simulations from coefficients of Model 4, manipulating values on the main explanatory variables of interest (*Number of observations* and *AG recommendation*) while holding all other variables constant at their appropriate measures of central tendency. Figures 2 and 3 plot the predicted probabilities and first difference for the scenarios *AG recommendation* = 0 and *AG recommendation* = 1 across the range of the variable *Number of observations*. We can see that

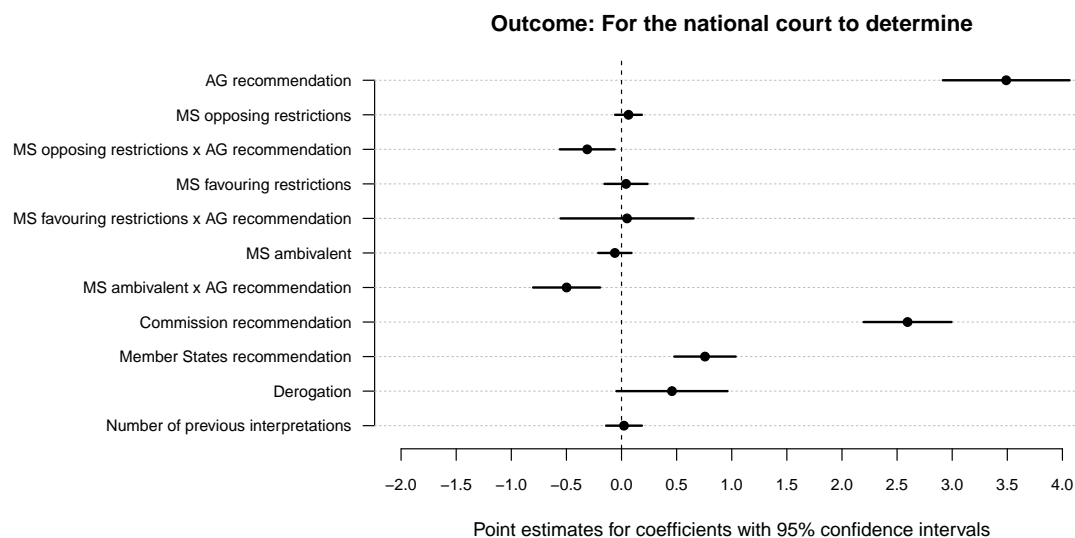**Outcome: For the national court to determine**

Figure 4: Rare events logistic regression coefficient estimates from Model 5. Model 5 includes fixed-effect controls for national area of law (not shown here).

while the CJEU tends to follow the AG's advice in roughly half of the cases when no Member State signalled its position, the probability of the Court heeding such advice drops significantly as the number of observations received from Member States increases.

So far, I have considered the number of observations submitted by Member States, without taking the content of these observations into account. Figure 4 plots coefficient point estimates and 95 percent confidence intervals for Model 5, where I include interactions between *AG recommendation* and *MS opposing restrictions* as well as *MS favouring restrictions*, respectively (complete results are presented in Table C.1 in the online appendix). Figure 4 shows that while the coefficient for the interaction between *AG recommendation* and *MS favouring restrictions* is effectively zero, the interaction effect for *AG recommendation* and *MS opposing restrictions* is negative and distinguishable from zero. There is evidence that the pattern observed in Model 4 is driven by Member State observations arguing against restrictions to national autonomy—and therefore Member State positions that are more likely to diverge from the CJEU's preference for answers that would foster rather than stall European integration.

Figure 5 provides a substantive interpretation of the observed interactions effects for the variables *MS opposing restrictions* and *MS favouring restrictions*. The plotted point estimates and their 95% confidence intervals show the effect of a one standard deviation increase from the mean of the
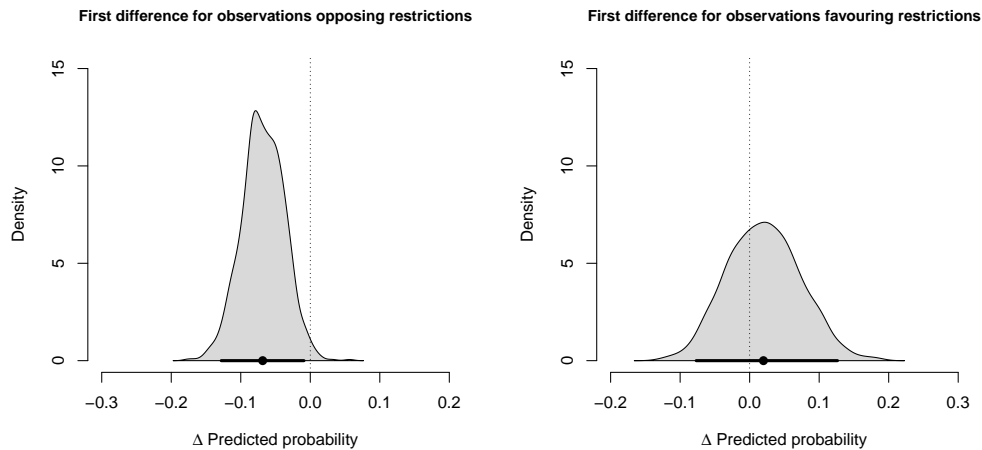
Figure 5: Distribution of the first differences in average marginal predicted probabilities for the variables *MS opposing restrictions* and *MS favouring restrictions*, given *AG recommendation* = 1. Point estimates and 95% intervals indicate first difference between mean values on the three variables and values one standard deviation above the respective means.

respective variables on the predicted probability of the Court leaving the question unresolved given *AG recommendation* = 1. The evidence suggests that the CJEU is roughly 7 percentage points less likely to follow the AG's advice and leave the legal question unresolved as the number of Member States opposing restrictions increases from its mean value to a standard deviation above its mean. No such effect is observable for the variable *MS favouring restrictions*).

To summarize, the evidence presented here suggests that despite receiving advice from the AG to allow a referring national court to determine the answer to a legal question, the likelihood that the CJEU follows this advice decreases as additional Member States signal their interest in the legal question before the Court. Further, it appears that Member State observations opposing further restrictions to national autonomy through the Court's jurisprudence drive this relationship. This evidence is consistent with the key empirical implication of the formal model introduced above. We should expect to see policymakers in Member States make their voices heard when they anticipate (and oppose) further restrictions to their national autonomy and hence their policy choices (see Schmidt 2018). In signalling their preferences, however, policymakers also help the CJEU to identify preference gaps and push the Court to issue answers to legal questions that shape the choices of policymakers, even when the Advocate General advised against doing so.

4 Conclusion

The decisions of courts can have significant consequences for the choices of policymakers and remove otherwise feasible options from the latter's agenda (see Schmidt 2018). However, existing literature highlights that courts do not always have the necessary expertise to foresee the effects of their jurisprudence on policy, and courts run the risk of establishing rules "that turn out to be inappropriate ex post" (Fox and Vanberg 2014, 356, see also Staton and Vanberg 2008; Sunstein 1999). Staton and Vanberg (2008) highlight that courts then face a tradeoff. Courts may leave legal questions undecided to avoid 'locking-in' inappropriate policies, yet consequently need to accept that policymakers may stick to policies they would otherwise prefer to keep off the books.

In this article, I explored how courts navigate the dilemma of their limited policy expertise in a world characterized by uncertainty. I developed a formal model showing that policymakers have incentives to signal their preferences to courts whenever they expect that rules defined by courts may constrain their preferred policy options. Signalling their preferences, policymakers inadvertently help courts to spot preference gaps—and push the court to resolve legal questions despite its lack of policy expertise when these gaps are particularly wide. The narrative presented here ties in with two strands of research in judicial politics that appear otherwise irreconcilable. On the one hand, scholars have argued that courts strategically respond to threats of override and non-compliance with their decisions by accommodating to the views and preferences of policymakers in their rulings (see for example Carrubba et al. 2008; Carrubba and Zorn 2010; Vanberg 2005). On the other hand, others have disputed accounts of courts' strategic deference to policymakers and argued that courts gradually expand the set of rules that shape and constrain the choices of political decisionmakers (see Stone Sweet and Brunell 2012; Stone Sweet 2000; Hirschl 2008).

Considering these two camps of scholarship, the theoretical model's main takeaway appears to fit neatly with the latter. Faced with the prospect of policymakers pursuing acts that the court would consider unacceptable, we should expect judges to prioritize limiting policymakers' discretion through their jurisprudence over concerns over their limited policy expertise. However, consistent with expectations of strategically deferential judges, the model expects that the court at least occasionally accommodates to policymakers' preferences in its jurisprudence—and it is the prospect of judges' strategic accommodation that pushes policymakers to signal their divergent

preferences to the court in the first place.

The empirical application presented in this article offers evidence consistent with the formal model's key empirical implications and offers a new perspective on the role of Member State observations in the CJEU's decisionmaking that complements existing research (see Carrubba and Gabel 2015; Larsson and Naurin 2016; Larsson et al. 2017). Communicating their positions on legal questions, Member State governments' observations provide the CJEU with information it would otherwise have no access to. The evidence presented here implies that judges at the CJEU carefully consider the effects of their decisions on the policymaking in Member States, and that the information national governments provide in their observations helps the Court to weigh the costs and benefits of the different options available to them—including the likely costs of leaving a legal question unresolved. I find that the CJEU is less likely to follow recommendations by its chief legal advisor, the Advocate General, to leave legal questions unresolved when Member State governments signalled that they oppose further restrictions on their national autonomy.

To summarize, we should generally expect courts concerned about their lack of policy expertise to stay clear from developing rules that 'lock-in' certain policies and preclude others (Sunstein 1996, 1999). However, the main takeaway from the theoretical model and its empirical application presented in this article qualifies this expectation. Ultimately, there are limits to courts' willingness to let concerns about their lacking policy expertise drive their choice which legal questions to resolve and which ones not. Where a court expects that political actors favour policies that fall far from what it would consider acceptable, leaving a legal question with implications for these policies unresolved becomes an unattractive option—and concerns about leaving policymakers with discretion to pursue unlawful policies thus trump courts' concerns about their limited policy expertise.

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A   Supplementary Material: Formal proofs

The sequence of play of the game described in the main manuscript is displayed in Figure 6. The game supports four pure strategy perfect Bayesian equilibria (PBE): Two separating equilibria, in which the court is able to perfectly update its prior beliefs about the policymaker's type based on the latter's actions; and two pooling equilibria, in which both types of policymakers play the same strategy and the court is unable to update its prior beliefs. In the following proofs, I consider each of the four strategy profiles and beliefs for the court and policymaker in turn and derive the conditions under which they can be part of a PBE.

A.1   Separating PBE 1

Consider a scenario in which the following strategies and beliefs constitute a separating PBE: The policymaker always signals, $g = m$, if it has a divergent type, $\theta = D$, and never signals, $g = \overline{m}$, if $\theta = \overline{D}$. Upon observing the policymaker signalling, the court always resolves the legal question, $f = d$, irrespective of its policy expertise. If the court does not lack policy expertise it likewise always resolves the legal question. Given these strategies, the application of Bayes' rule suggests that the court's posterior beliefs upon observing the policymaker's signal are given by $Pr(\theta = D|m) = 1$ and $Pr(\theta = \overline{D}|m) = 0$.

Despite lacking policy expertise, $\omega = A$, the court has no incentive to deviate from its strategy of resolving the legal question after the policymaker's signal as long as $-rz - c \geq -z$. Solving for z yields the inequality $z \geq \frac{c}{1-r}$. Whenever z falls above the threshold $z^* \equiv \frac{c}{1-r}$, a court lacking policy expertise has no incentive to deviate from its strategy of settling the legal question. Whenever the court does not lack policy expertise, $\omega = \overline{A}$, resolving the legal question strictly dominates leaving the question undecided.

Now consider the policymaker' choice. The policymaker's choice to signal is strictly dominated by not signalling whenever their type is $\theta = \overline{D}$. Whenever the policymaker has a divergent type, $\theta = D$, they have no incentive to deviate from their strategy of signalling if $p(rz-k)+(1-p)(rz-k) \geq pz$. Solving for p yields the inequality $p \leq \frac{rz-k}{z}$. As long as the divergent policymaker's prior beliefs about the court's policy expertise fall below the threshold $p^* \equiv \frac{rz-k}{z}$, signalling is their best response.
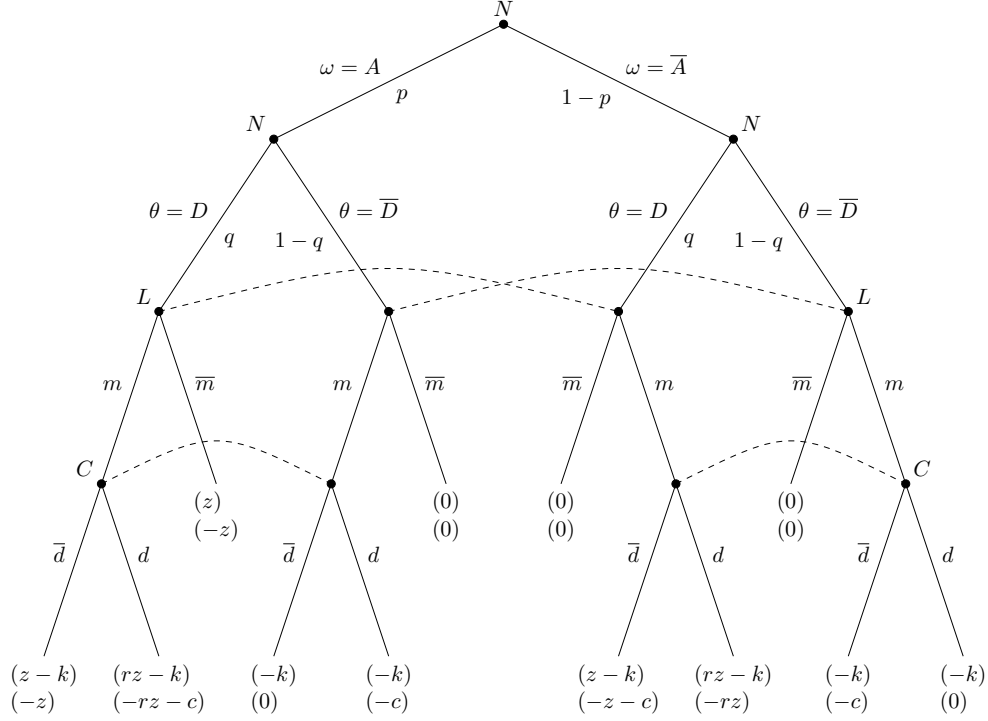
Figure 6: Sequence of play. Payoffs for the policymaker (L) are listed first, payoffs for the court (C) are listed second. Dashed lines indicate players' information sets.

Given $z \geq \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE exists in which the policymaker signals if their type is divergent $\theta = D$ and does not signal otherwise, while the court settles the legal question upon observing the policymaker's signal, regardless of its policy expertise.

A.2 Separating PBE 2

Now consider a scenario in which the following strategies and beliefs constitute a second separating PBE: As in the equilibrium discussed above, the policymaker always signals, $g = m$, if it has a divergent type, $\theta = D$, and never signals, $g = \overline{m}$, if $\theta = \overline{D}$. Now, however, the court leaves the legal question unresolved upon observing the policymaker signalling when it lack policy expertise, $\omega = A$, while it resolves the question when $\omega = \overline{A}$. In light of the policymaker's strategy profile and upon applying Bayes' rule, the court's posterior beliefs are given by $Pr(\theta = D|m) = 1$ and $Pr(\theta = \overline{D}|m) = 0$.

Upon observing the policymaker signalling, the court's best response is to resolve the legal question, $f = d$, whenever $\omega = \overline{A}$, but to leave the question unresolved when it lacks policy expertise, $\omega = A$, and when $z < \frac{c}{1-r}$ (providing the threshold $z^* \equiv \frac{c}{1-r}$). As long as the preference

gap z falls below the threshold z^*, a court lacking policy expertise has no incentive to deviate from its strategy of leaving the legal question unresolved.

Now consider the policymaker' choice. As above, the policymaker's choice to signal is strictly dominated by not signalling whenever their type is $\theta = \overline{D}$. Whenever the policymaker has a divergent type, $\theta = D$, they have no incentive to deviate from their strategy of signalling if $p(rz - k) + (1 - p)(rz - k) \geq pz$. Solving for p yields the inequality $p \leq \frac{rz-k}{z}$. As long as the divergent policymaker's prior beliefs about the court's policy expertise fall below the threshold $p^* \equiv \frac{rz-k}{z}$, signalling is their best response.

Given $z < \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE exists in which the policymaker signals if their type is divergent $\theta = D$ and does not signal otherwise, while the court always leaves the legal question unresolved if it lacks policy expertise and resolves the question otherwise.

A.3   Pooling PBE 1

Next, I show that the following strategies and beliefs support a pooling equilibrium: The policymaker never signals regardless of their type, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise. Applying Bayes' rule Bayes' rule given the policymaker's strategy profile, the court is unable to update its prior beliefs, hence its posterior beliefs are given by $Pr(\theta = D|m) = q$ and $Pr(\theta = \overline{D}|m) = 1 - q$.

Given the policymaker never signals, I need to determine the court's out-of-equilibrium beliefs. Here, I follow the intuitive criterion by Cho and Kreps (1987), which places zero probability on the type of policymaker which could not gain any benefit from deviating from its strategy of not signalling. It is easy to see that given the non-divergent policymaker's choice to signal is strictly dominated by not signalling (hence, they cannot gain any benefit from deviating), the court places zero probability on the non-divergent policymaker off the equilibrium path. Hence, off the equilibrium path (i.e. the policymaker signals), the best response of a court lacking policy expertise is to resolve the legal question when $z \geq \frac{c}{1-r}$, i.e. when $z \geq z^*$. The divergent policymaker has no incentive to deviate from their strategy of not signalling if $p(rz - k) + (1 - p)(rz - k) < pz$, yielding the inequality $p > \frac{rz-k}{z}$. As indicated above, the non-divergent policymaker never has an incentive to deviate from not signalling.

Given $z \geq \frac{c}{1-r}$ and $p > \frac{rz-k}{z}$, a pooling PBE exists in which neither type of policymaker signals,

while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise.

A.4   Pooling PBE 2

Finally, I show that the following strategies and beliefs support a pooling equilibrium: As before the policymaker never signals regardless of their type, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise. Given the policymaker never signals, the court is again unable to update its prior beliefs, hence its posterior beliefs are given by $Pr(\theta = D|m) = q$ and $Pr(\theta = \overline{D}|m) = 1 - q$.

Given the policymaker never signals, the court's out-of-equilibrium beliefs are determined applying the intuitive criterion hence the court places zero probability on the non-divergent policymaker off-the-equilibrium path. Observing the policymaker signalling off-the-equilibrium path, the best response of a court lacking policy expertise is to leave the question unresolved when $z < \frac{c}{1-r}$, i.e. when $z < z^*$. The divergent policymaker has no incentive to deviate from their strategy of not signalling if $p(rz - k) + (1 - p)(rz - k) < pz$, yielding the inequality $p > \frac{rz-k}{z}$. As indicated above, the non-divergent policymaker never has an incentive to deviate from not signalling.

Given $z < \frac{c}{1-r}$ and $p > \frac{rz-k}{z}$, a pooling PBE exists in which neither type of policymaker signals, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise.∎QED

B   Supplementary Material: Coding protocols

The data for the empirical analysis presented in Section 3 was collected as part of a multi-annual research environment project, aiming to establish a comprehensive database on the characteristics of the cases heard by the Court of Justice of the European Union (CJEU). The project employed several trained hand-coders with academic or professional backgrounds in European law. In the following, I present the coding instructions the hand-coders had received from the project leads for key variables in the analysis and discuss the reliability of their coding.

For each case involving a preliminary reference from a national court to the CJEU covered in the article's empirical analysis (i.e. preliminary references lodged between 1998 and 2011), hand-

coders had access to the full judgment text and more importantly written reports of the hearings the CJEU had held for each case. These documents cover not only the Court's eventual decision in the case, but also detail the positions various other actors, including the Advocate General, the European Commission and Member State governments, had taken on the referred legal questions. Based on the information found in these documents coders were asked to identify how the different actors answered the referred legal questions. While coders could freely choose how to describe positions, they were instructed to keep position descriptions short and state affirmative or negating positions (e.g. coders were instructed that often the alternatives "Yes" and "No" would suffice to capture positions on a legal question).

Once a position description was formulated, coders were asked to list the actors that held this particular position, allowing for multiple actors to hold the same position (e.g. the CJEU, the Advocate General and Germany could all answer "Yes" to a particular legal question, while the Commission and the Netherlands could answer "No"). Further, coders were then instructed to categorize a position in terms of its effect on the legislative and/or executive autonomy (hereafter "autonomy") of the Member State from which the case before the CJEU originated (i.e. the country where the referring national court resides), the variable *pos_auto*. The variable *pos_auto* has the following five categories:

- 0 = If this position would be the judgment, the autonomy of the Member State would not be more restricted than before.

- 1 = If this position would be the judgment, the autonomy of the Member State would be more restricted than before.

- 97 = The position cannot be easily categorized as 0 or 1, e.g. because it implies that autonomy would be restricted in one aspect and not restricted in another aspect.

- 98 = The position cannot be easily categorized as 0 or 1, because the position (if it would be the judgment) would not affect the autonomy of the Member State.

- 99 = The effect on autonomy is uncertain, because information on the position is missing or is incomprehensible.

In addition, hand-coders were instructed to record whether an actor's position held that the legal question is for the referring national court to determine, with 1 indicating that the actor (e.g. the Advocate General or the European Commission) held that position and 0 indicating that the actor did not hold that decision.

Based on the coding, I was able to identify the positions the CJEU, the Advocate General and the European Commission held on the legal questions the Court considered in its preliminary rulings, and also count the number of Member States which held the various positions.

Reliability checks for the coding were carried out in two rounds. First, between July and September 2020, three coders completed the coding for 100 preliminary rulings, which had been referred to the CJEU in 2010. Subsets of these 100 preliminary rulings were randomly assigned to pairs of coders.[6] After coders had completed their work for the first round, a workshop was organised with coders, addressing differences in coding that were identified in the first round of reliability checks. Between October and December 2020, coders then completed the coding for an additional 50 preliminary rulings lodged with the CJEU in 2010, with subsets of these cases again randomly assigned to pairs of coders.[7]

B.1 Positions on national autonomy

To evaluate the reliability of the coding for the variable *pos_auto*, three metrics were calculated: ε_{wrong}, indicating the share of "wrong" coding choices (i.e. Coder 1 categorized a position as not further restricting national autonomy, "0", whereas Coder 2 categorized the same position as further restricting national autonomy, "1"); $\varepsilon_{ambiguous}$ indicating the share of "ambiguous" coding choices (i.e. any other types of disagreement, for instance coders disagreed between assigning the codes "0" and "97"); and γ_{pos_auto}, indicating the share of coding choices where coders agreed.

Figures B.1a and B.1b plot the frequency distributions of the types of disagreements and the frequency of matching coding decisions ("agreement") between coders for coding decisions for the variable *pos_auto* for the position of the CJEU. In both rounds of the reliability checks coders

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[6]In the first round, Coder 1 and Coder 2 each coded 33 identical preliminary rulings, Coder 1 and Coder 3 each coded 33 identical preliminary rulings, and Coder 2 and Coder 3 each coded 34 identical preliminary rulings.

[7]In the second round, Coder 1 and Coder 2 each coded 16 identical preliminary rulings, Coder 1 and Coder 3 each coded 17 identical preliminary rulings, and Coder 2 and Coder 3 each coded 16 identical preliminary rulings.
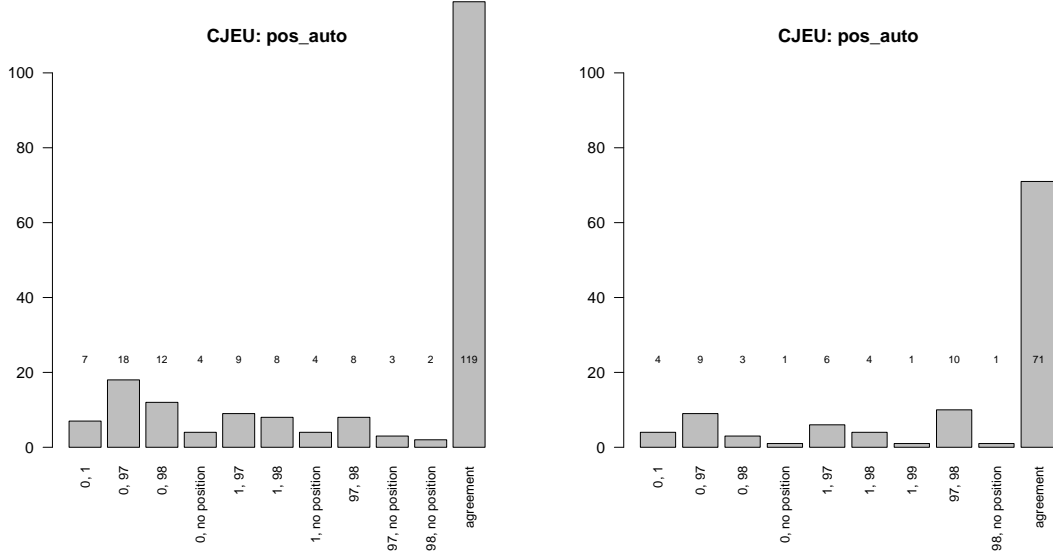
(a) First round of reliability checks ($N = 194$) (b) Second round of reliability checks ($N = 110$)

Figure B.1: Overview over agreement and disagreement types in coding decisions in the first and second round of reliability checks.

agreed in most of their coding choices. Further, coders rarely fundamentally disagreed on their coding choices, indicated by the relatively low frequencies for the disagreement "0, 1". However, the figures also show that "ambiguous" disagreements (e.g. "0, 97" and "1, 97") between coders were somewhat common in both rounds of the reliability checks.

Figures B.1a and B.1b also show that coders occasionally disagree when assigning the codes "97" and "98", with both categories indicating that the position cannot be easily categorized as 0 or 1, albeit for different reasons. Therefore, the codes "97" and "98" were collapsed into a single category, which indicates that no clear implication in terms of member state autonomy could be drawn from the position (i.e. not counting "97, 98" as a disagreement among coders).

Table B.1 displays results for the three metrics, ε_{wrong}, $\varepsilon_{ambiguous}$ and γ_{pos_auto}, across all actors and for selected individual actors, respectively (here results for actors with more than 20 coded positions are displayed). Two patterns emerge from Table B.1. First, coders rarely fundamentally disagree over the coding of the variable *pos_auto* (i.e. wrong decisions are very rare across all actors). Second, the reliability of the coding improved after the first round of reliability checks in light of the additional training coders received. Table B.1 shows that after the second round of reliability checks, coders agreed in 75 percent of their coding decisions.

pos_auto	ε_{wrong}	$\varepsilon_{ambiguous}$	γ_{pos_auto}
First round			
All actors	**0.03 (42 of 1261)**	**0.27 (345 of 1261)**	**0.70 (874 of 1261)**
CJEU	0.04 (7 of 181)	0.26 (47 of 181)	0.70 (127 of 181)
Commission	0.05 (9 of 172)	0.30 (51 of 172)	0.65 (112 of 172)
Advocate General	0.04 (5 of 133)	0.29 (39 of 133)	0.67 (89 of 133)
Plaintiff	0.02 (3 of 142)	0.29 (41 of 142)	0.69 (98 of 142)
Defendant	0.05 (3 of 56)	0.27 (15 of 56)	0.68 (38 of 56)
Germany	0.04 (3 of 86)	0.27 (23 of 86)	0.69 (60 of 86)
France	0.00 (0 of 24)	0.21 (5 of 24)	0.79 (19 of 24)
Second round			
All actors	**0.04 (31 of 723)**	**0.21 (149 of 723)**	**0.75 (543 of 723)**
CJEU	0.04 (4 of 107)	0.21 (22 of 107)	0.75 (81 of 107)
Commission	0.02 (2 of 93)	0.23 (21 of 93)	0.75 (70 of 93)
Advocate General	0.03 (3 of 90)	0.19 (17 of 90)	0.78 (70 of 90)
Plaintiff	0.08 (6 of 76)	0.18 (14 of 76)	0.74 (56 of 76)
Defendant	0.03 (1 of 35)	0.23 (8 of 35)	0.74 (26 of 35)
Germany	0.02 (1 of 55)	0.18 (10 of 55)	0.80 (44 of 55)
France	0.04 (1 of 23)	0.26 (6 of 23)	0.70 (16 of 23)

Table B.1: Intercoder reliability for the position-level variable *pos_auto*, shown for all coded positions and for a selection of actors where the number of positions coded is > 20.

B.2   For the national court to determine

Turning to the variable *natcourtdet*, inspection of the data shows that in more than half of all coded positions in both the first and second round, coders did not assign any category for the variable *natcourtdet*, instead leaving the placeholder for the variable empty. Conversations with coders revealed that rather than always representing missing values, coders often chose not to enter a value for the variable *natcourtdet* when the position did not state that the answer to the issue is for the national court to determine (i.e. leaving the placeholder blank rather than assigning the category "0"). This implies that for some observations of the variable *natcourtdet*, blank placeholders should often be replaced with the category "0", although it is not clear which ones should be replaced.

    To nonetheless assess the reliability for of the coding for the variable, two separate analyses are presented. In the first analysis, instances where one coder assigned the category "1" while the other coder left the placeholder for the variable blank is counted as disagreement between the coders. However, instances where one coder assigned the category "0" while the other coder left

natcourtdet	Include missing observations	Exclude missing observations
First round		
All actors	**0.95 (1371 of 1442)**	**0.90 (385 of 427)**
CJEU	0.94 (186 of 198)	0.88 (54 of 61)
Commission	0.93 (182 of 195)	0.83 (52 of 63)
Advocate General	0.91 (131 of 144)	0.88 (37 of 46)
Plaintiff	0.99 (158 of 160)	0.99 (39 of 40)
Defendant	0.94 (62 of 66)	0.94 (17 of 18)
Germany	0.94 (100 of 106)	0.94 (29 of 31)
France	0.93 (25 of 27)	0.89 (8 of 9)
Second round		
All actors	**0.96 (782 of 812)**	**0.95 (210 of 222)**
CJEU	0.92 (103 of 112)	0.87 (33 of 38)
Commission	0.94 (95 of 101)	0.94 (32 of 34)
Advocate General	0.97 (95 of 98)	0.96 (26 of 27)
Plaintiff	0.99 (89 of 90)	1.00 (29 of 29)
Defendant	0.95 (39 of 41)	0.92 (11 of 12)
Germany	0.95 (61 of 64)	1.00 (13 of 13)
France	1.00 (26 of 26)	1.00 (5 of 5)

Table B.2: Intercoder reliability for the position-level variable *natcourtdet*, shown for all coded positions and for a selection of actors where the number of positions coded is > 20.

the placeholder blank, as well as instances in which both coders left the placeholder blank, are not counted as disagreement. Effectively, instances where coders did not assign any category for the variable *natcourtdet* are then counted as if they had assigned the category "0" (i.e. the position does not state that the answer to the legal issue is to be determined by the national court). The second analysis then focuses exclusively on comparing coding choices where both coders in a coder pair actually assigned a category, "0" or "1".

Table B.2 shows the share of coding decisions where coder pairs agreed on the same category for *natcourtdet* for the first and second round of reliability checks for both types of analyses. The table shows that coders almost always agreed on the chosen category in both rounds of reliability checks and irrespective of whether missing values are treated equivalently to the category "0" or not.
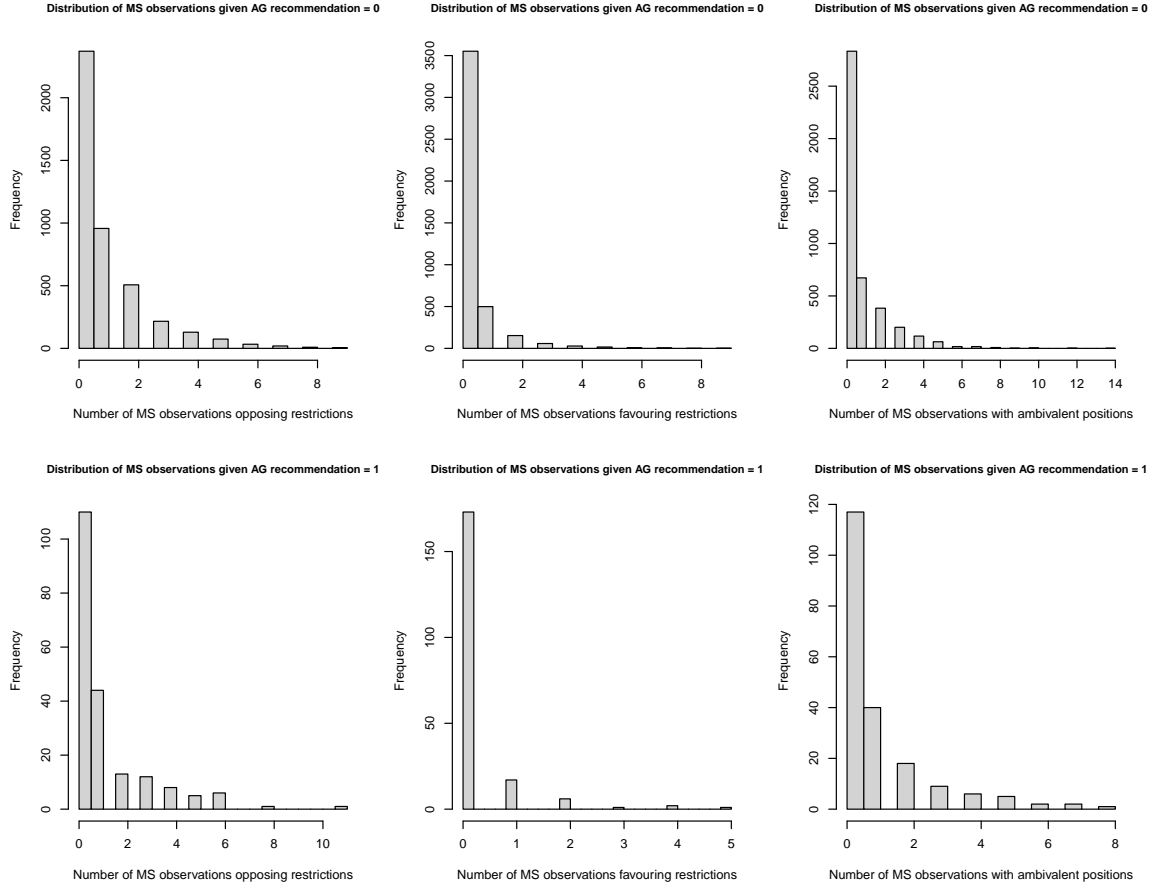
Figure C.1: Frequency distributions of the variables *MS opposing restrictions*, *MS favouring restrictions* and *MS ambivalent*, by the variable *AG recommendation*.

C   Supplementary Material: Additional results

In this section, I present additional results supplementing the evidence presented in Section 3 of the main manuscript. I begin by plotting descriptive statistics for the key explanatory variables *MS opposing restrictions*, *MS favouring restrictions* and *MS ambivalent* (i.e. the number of Member States opposing or favouring further restrictions on their national autonomy, and the number of Member States holding ambivalent positions). Figure C.1 plots the variables' frequency distributions by the two categories of the variable *AG recommendation*, indicating whether the Advocate General recommended leaving the legal question for the referring national court to determine.

Figure C.1 shows that distributions for all three variables are skewed to the right, and legal questions that received more than three Member State observations arguing either in favour or against further restrictions or communicating ambivalent positions are relatively rare. Further,

Figure C.1 shows that the CJEU generally receives fewer observations arguing in favour of further restrictions to national autonomy. This pattern is consistent with the claim that Member States are less likely to push for additional restrictions on their national autonomy in the course of European integration than the Court of Justice or the European Commission. However, it also raises concerns that the results for the variable *MS favouring restrictions* and its interaction with *AG recommendation* discussed for Model 5 in Section 3 of the main manuscript may partially be driven by a relatively low number of observations (e.g. there are only 27 instances of Member States arguing in favour of restrictions when the Advocate General recommends leaving the legal question for the national court to determine). Nonetheless, while the relatively small number of observations favouring restrictions can account for the wide confidence intervals of the interaction coefficient between *MS favouring restrictions* and *AG recommendation* in Model 5, the results still show that the coefficient's point estimate is effectively zero, supporting the expectation that observations that are unlikely to conflict with the CJEU's own position do not push the Court to resolve a legal question despite its lacking policy expertise.

	Model 4	Model 5
(Intercept)	-3.52	-3.68
	(0.20)	(0.19)
AG recommendation	3.54	3.49
	(0.33)	(0.29)
Number of observations	-0.04	
	(0.05)	
Number of observations $\times$ AG recommendation	-0.28	
	(0.10)	
MS opposing restrictions		0.06
		(0.06)
MS opposing restrictions $\times$ AG recommendation		-0.31
		(0.13)
MS favouring restrictions		0.04
		(0.10)
MS favouring restrictions $\times$ AG recommendation		0.05
		(0.31)
MS ambivalent		-0.06
		(0.08)
MS ambivalent $\times$ AG recommendation		-0.50
		(0.16)

Continued on next page

Table C.1 – continued from previous page

	Model 4	Model 5
Commission recommendation	2.56	2.60
	(0.20)	(0.20)
Member States recommendation	0.72	0.76
	(0.14)	(0.14)
Derogation	0.50	0.46
	(0.26)	(0.26)
Number of previous interpretations	0.00	0.02
	(0.08)	(0.08)
Agriculture	−0.17	−0.05
	(0.45)	(0.45)
Environment	0.37	0.36
	(0.35)	(0.36)
Healthcare	−0.25	−0.35
	(0.46)	(0.46)
Intellectual property	−0.14	0.05
	(0.36)	(0.36)
Labour laws	0.41	0.43
	(0.27)	(0.27)
Migration	0.31	0.18
	(0.41)	(0.41)
Exclusively EU law	−0.45	−0.33
	(0.26)	(0.26)
Social policies	−0.10	−0.10
	(0.32)	(0.32)
Tax laws	0.40	0.36
	(0.24)	(0.24)
Technology	0.09	0.05
	(0.47)	(0.48)
AIC	1390.52	1394.27
BIC	1505.35	1534.62
Log Likelihood	−677.26	−675.13
Deviance	1354.52	1350.27
Num. obs.	4358	4358

Table C.1: Rare events logistic regression coefficients with standard errors reported in parentheses for Model 4 and Model 5 discussed in the main manuscript, including fixed-effect coefficients for national areas of law.

Next, Table C.1 presents the complete results for Models 4 and 5 discussed in the main manuscript, including results for the fixed-effect controls for areas of national law affected by the legal question considered by the CJEU. Table C.1 shows that there are no clearly distinguishable

effects in any area of law, albeit some tentative evidence that the Court appears to be more likely to leave legal questions unresolved when they concern Member States' labour laws.

Finally, I turn to present results from several alternative model specifications to supplement the analyses covered in Section 3. I begin by estimating two rare events logistic regression models that consider the effects of weighted counts of Member States' positions on the CJEU's decision to allow the referring national court decide a legal question, following the assumption by Larsson and Naurin (2016) that the voices of politically powerful Member States are more likely to be reflected in the CJEU's decisionmaking. In Model 6, the variable *MS Anti* reflects the counts of Member State observations arguing against further restrictions to their national autonomy but weighs these counts by Member States' voting power in the Council of the European Union (using the normalized Banzhaf voting power index, see Larsson and Naurin 2016, 397). The variable *MS Pro* weighs the counts of Member States arguing in favour of more restrictions in the same way.

	Model 6	Model 7	Model 8	Model 9
(Intercept)	−3.58	−3.59	−3.66	−3.62
	(0.17)	(0.16)	(0.16)	(0.16)
AG recommendation	2.83	2.85	2.98	2.74
	(0.22)	(0.21)	(0.22)	(0.21)
MS Anti	−1.80			
	(1.24)			
MS Anti × AG recommendation	−0.40			
	(2.64)			
MS Pro	1.74			
	(1.82)			
MS Pro × AG recommendation	2.52			
	(8.27)			
MS Net		1.75		
		(1.04)		
MS Net × AG recommendation		0.53		
		(2.54)		
MS Net count			−0.05	
			(0.05)	
MS Net count × AG recommendation			0.20	
			(0.12)	
Disagreement MS				−0.08
				(0.29)
Disagreement MS × AG recommendation				0.97
				Continued on next page

Table C.2 – continued from previous page

	Model 6	Model 7	Model 8	Model 9
				(0.77)
Commission recommendation	2.54	2.54	2.57	2.56
	(0.20)	(0.20)	(0.20)	(0.20)
MS recommendation	0.62	0.62	0.62	0.62
	(0.13)	(0.13)	(0.13)	(0.13)
Derogation	0.50	0.51	0.46	0.45
	(0.26)	(0.26)	(0.26)	(0.25)
Number of previous interpretations	0.00	0.00	0.02	0.01
	(0.08)	(0.08)	(0.08)	(0.08)
Agriculture	−0.09	−0.09	−0.09	−0.08
	(0.44)	(0.44)	(0.44)	(0.44)
Environment	0.40	0.40	0.39	0.38
	(0.35)	(0.35)	(0.35)	(0.35)
Healthcare	−0.27	−0.28	−0.29	−0.32
	(0.46)	(0.46)	(0.45)	(0.46)
Intellectual property	−0.19	−0.19	−0.15	−0.13
	(0.36)	(0.36)	(0.36)	(0.36)
Labour laws	0.42	0.42	0.40	0.42
	(0.27)	(0.27)	(0.27)	(0.27)
Migration	0.18	0.18	0.17	0.18
	(0.43)	(0.43)	(0.41)	(0.42)
Exclusively EU law	−0.39	−0.39	−0.36	−0.36
	(0.25)	(0.25)	(0.25)	(0.25)
Social policies	−0.03	−0.03	−0.05	−0.02
	(0.32)	(0.32)	(0.32)	(0.32)
Tax laws	0.45	0.45	0.40	0.43
	(0.24)	(0.24)	(0.24)	(0.24)
Technology	0.12	0.12	0.06	0.02
	(0.46)	(0.46)	(0.47)	(0.47)
AIC	1404.81	1400.95	1402.32	1403.26
BIC	1532.41	1515.79	1517.15	1518.09
Log Likelihood	−682.41	−682.47	−683.16	−683.63
Deviance	1364.81	1364.95	1366.32	1367.26
Num. obs.	4358	4358	4358	4358

Table C.2: Rare events logistic regression coefficients with standard errors reported in parentheses.

Model 7 includes the variable *MS Net*, which captures the net value of these weighted counts, subtracting *MS Anti* from *MS Pro*. Accordingly, negative values on the variable *MS Net* indicate that Member States overall argued against further restrictions to their national autonomy, while

positive values indicate that Member States overall argued in favour of such restrictions. For Model 8 the variable *MS Net count* simply subtracts the count of Member States arguing against further restrictions from the count of Member States arguing in favour, without weighting these counts by Member States' voting power in the Council. Model 9 then includes a dummy variable *Disagreement MS* indicating whether at least one observation submitted by Member States argued against further restrictions while another argued in favour (*Disagreement MS* = 1, *Disagreement MS* = 0 otherwise). Across Models 6 to 9, all variables discussed here are interacted with the variable *AG recommendation* to evaluate their effect on the CJEU's decision to leave a legal question unresolved when the AG recommends doing so.

Results for Models 6 to 9 are displayed in Table C.2. We can see that neither the main effects of the variables discussed above nor their interactions with the variable *AG recommendation* are distinguishable from zero. While the evidence presented in the main manuscript suggests that the CJEU is less likely to follow the advice by its Advocate General to leave a legal question unresolved as additional Member States signal resistance against jurisprudence limiting their national autonomy, there is no evidence suggesting that the Court is more receptive to the views of politically powerful Member States when making this choice. Further, there is no indication that the CJEU considers the overall trend in positions argued by Member States in its decision to leave legal questions unresolved, nor is the Court more or less likely to follow the Advocate General's advice when at least two Member States disagreed on their preferred direction of the Court's jurisprudence.