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

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Abstract

International courts are increasingly facing backlash from consolidated liberal democracies. Do international courts become more restrained in their rulings in order to keep their traditional allies on board? We examine this question in the context of the European Court of Human Rights (ECtHR). We evaluate two mechanisms. First, governments that are critical of the Court may nominate more deferential judges. Second, judges may behave in a more deferential way towards consolidated democracies in order to prevent future backlash. We evaluate these ideas with a new dataset of all ECtHR judgments. We estimate ideal-point models based on dissenting opinions and find that governments have indeed started to appoint more restrained judges. Five of the Court’s six most restrained judges were appointed after the 2012 Brighton conference, which strongly signaled a preference for restraint. We then use matching and a difference-in-differences design to estimate changes in the Court’s restraint versus the United Kingdom and other consolidated democracies. We find strong evidence of a new variable geometry, in which consolidated democracies are increasingly given more deference compared to non-consolidated democracies. The United Kingdom is an especially large beneficiary. However, we do not find that applicants belonging to vulnerable minorities, such as prisoners and refugees, have been disproportionally affected by the ECtHR’s increased restraint towards consolidated democracies.

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1 Introduction

Consolidated liberal democracies have increasingly started to challenge liberal international institutions (Burgoon 2009; Ecker-Ehrhardt 2014), fueling worries that the liberal international institutional order itself is at risk (Posner 2017; Walter 2018). The European Court of Human Rights (ECtHR) is a case in point. During the 1990s, consolidated democracies strengthened the institution to cement human rights in Europe. The ECtHR developed into a full-time court with binding legal authority and individual access for over 800 million residents of 47 Council of Europe member states (Bates 2010). The Court’s judgments were occasionally controversial, but governments in consolidated democracies did not challenge the Court’s authority.

This started to change in the mid-2000s, especially in the United Kingdom, where the government launched reform efforts and threatened to leave the Court’s jurisdiction (Madsen 2017). Governments in Denmark, the Netherlands, Austria, Switzerland, and elsewhere also publicly argued that the Court has gone too far in its interpretation of the European Convention on Human Rights (ECHR) and have supported reforms that would curtail the Court (Popelier, Lambrecht and Lemmens 2016).

Such challenges are not entirely surprising. Theorists have long argued that international human rights institutions help new democracies make credible commitments to reform (Moravcsik 2000; Simmons and Danner 2010; Simmons 2009). By contrast, consolidated democracies already have credibly established domestic protections and have fewer reasons to put up with interventionist human rights institutions.

Yet, credibility gains for new democracies hinge on the participation of consolidated democracies. If a backsliding state leaves a human rights court, as Venezuela did in 2013 from the Inter-American Court of Human Rights, the blame typically falls on that backsliding state. Consolidated democracies that threaten to exit, openly refuse compliance, or publicly demand restraint threaten the functioning of the system altogether. It is more difficult for pro-compliance actors to hold Poland accountable for failing to implement Court judgments when the United

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Kingdom is also defying important ECtHR judgments and is arguing that the Court has gone too far in its interventionism.

How do these new political challenges affect the ECtHR’s judgments? Some scholars maintain that established international courts like the ECtHR are typically well-insulated from political pressures (Alter, 2008; Kelemen, 2012; Sweet and Brunell, 1998, 2012). Yet others have found that political factors shape decision-making on a variety of international judicial bodies including the ECtHR, the Court of Justice of the European Union (CJEU), and the World Trade Organization Dispute Settlement Understanding (WTO DSU) (Busch and Pelc, 2010; Carrubba, Gabel and Hankla, 2008; Kelemen, 2001; Larsson and Naurin, 2016; Voeten, 2007, 2008). However, we do not yet have much evidence or theory concerning how international courts respond to fundamental threats to their authority that come from challenges from their core supporters.

We examine two routes through which backlash could lead the ECtHR to exercise more restraint. First, governments who prefer a more restrained Court could start nominating judges who are more likely to favor the raison d’État in their judgments. Governments have considerable leeway to nominate candidate judges that reflect their ideologies (Voeten, 2007). As governments have become more critical of the ECtHR, they may therefore be expected to start appointing more restrained judges. Furthermore, public challenges from consolidated democracies may have made it more acceptable for governments in both consolidated and non-consolidated democracies to put forward judges that are more likely to exercise restraint in their judgments.

Second, judges who care about the Court’s legitimacy may engage in strategic deference. Strategic models of judicial decision-making suggest that concerns about non-compliance or other types of political reactions may lead courts to show more restraint than they would otherwise have done (Vanberg, 2001, 2005; Carrubba, Gabel and Hankla, 2008; Clark, 2010; Larsson and Naurin, 2016). Because the credibility of the ECtHR is particularly vulnerable to challenges from consolidated democracies with strong human rights records, strategic deference from the ECtHR should be directed towards mitigating criticism from such states. Indeed,
legal scholars have argued that the ECtHR has started to show more deference towards the United Kingdom and other consolidated democracies while largely maintaining the same attitude towards newer democracies and states that are backsliding (Çali, 2018; Madsen, 2017). The increased deference towards consolidated democracies might be expected to be especially pronounced on those types of cases that have caused the most backlash: when the Court intervenes on behalf of unpopular minorities, such as refugees and prisoners.

We employ a new dataset on ECtHR judgments rendered by June 2016 to examine these two avenues from backlash to increased judicial restraint. First, we use public dissents to estimate levels of judicial restraint for each individual judge. We find that although there is still considerable variation concerning the judicial ideology of judges appointed to the ECtHR, there is some evidence that member states have started to nominate judges willing to offer a broader margin of appreciation to respondent states. Notably, of the judges appointed since the establishment of the permanent court in 1998, we find that five of the six judges estimated to be most deferential towards respondent states were appointed after 2011. Moreover, we find some evidence that the appointment process has become more polarized around left-right divisions during the period when the ECtHR has been subject to increased political criticism.

Second, we investigate whether the Court – as an institution – has responded to its changed political environment by showing more restraint towards the consolidated democracies it relies on for legitimacy. We address this question using data on the outcome of ECtHR judgments in cases posing new legal questions for the Court to decide. We use matching to construct comparison groups of cases that are similar in their observable characteristics. We then employ a difference-in-differences estimator to assess whether the Court has become relatively more restrained to consolidated democracies compared to European Union (and non-European Union) non-consolidated democracies after the mid-2000s. We find strong evidence for such effects. Not only has the Court become more deferential towards consolidated democracies, the United Kingdom is a particular beneficiary. Its violation rate is more than twenty percentage points lower compared to the
pre-2005 period. We also show that as the criticism facing the ECtHR has gradually intensified and spread to more consolidated democracies, the deference that the ECtHR offers to consolidated democracies has also gradually increased. This suggests that the ECtHR’s decision-making is influenced by its changing political environment.

Cases involving unpopular minorities, such as refugees and prisoners, have been central to recent controversies in a number of consolidated democracies. Yet, we do not find evidence that the ECtHR has started showing particular deference in this group of cases relative to other cases against consolidated democracies. One explanation may be that judges find it hard to predict which cases are likely to lead to controversy in the future. Correctly identifying political risks is a fundamental problem for courts, particularly at the international level (Clark, 2010; Lupu, 2013; Huneeus, 2015). Instead of directly influencing the case law on issues that have tended to generate controversy, backlash from consolidated democracies therefore leads to a general deference towards this group of states. As a result, the shift towards increased restraint may be more profound than what would have been necessary to mitigate legitimacy challenges from consolidated democracies.

2 The ECtHR and its Discontents

The ECtHR allows individuals to bring claims against their governments for alleged violations of one or more articles from the 1950 European Convention on Human Rights and its protocols. The Convention protects a broad set of rights, including freedom of speech, the right to life, freedom from inhuman or degrading treatment (including torture), fair trial, freedom of religion, freedom from arbitrary detention, and privacy. If the ECtHR finds a violation, the responsible state is legally obligated to rectify this by compensating the applicant or provide other individual measures, but also, if necessary, to change policy and legislation to avoid a similar violation to occur in the future (Keller and Marti, 2015). Although the implementation of judgments is sometimes slow and imperfect, the Court’s judg-

\footnote{There are also about a dozen interstate cases.}
ments have led to meaningful policy changes in Council of Europe member states (Hawkins and Jacoby, 2010; Hillebrecht, 2014b; Keller and Stone Sweet, 2008).

The Convention was political from the outset. For example, European conservatives, led by Winston Churchill, successfully used their electoral fortunes across Europe in the early 1950s to add a Protocol on property rights and free elections (Duranti, 2016). Yet, the Court’s activities were limited in its early decades. The Court’s binding jurisdiction and the right to individual petition depended on optional five-year renewable commitments by member states. Moreover, a commission filtered all applications. Although the Court gradually became more expansive in its interpretation of the ECHR (Madsen, 2016), it issued just over 200 judgments before 1990.

The end of the Cold War blew new life into the Court (Bates, 2010). The European Union lacked an explicit human rights component and would not immediately include all new democracies. The ECHR became the main vehicle through which new democracies could prove that their desire for reform was genuine. Consolidated democracies cared about this both because they saw protection of minority and other rights as quintessential to the modern European project (Kelley, 2004), but also because the Court enforced rights that were essential to integration, such as the right to a fair trial and property rights protection.

The Court could only fulfill this role after institutional strengthening. In 1994, Council of Europe member states agreed on Protocol 11, which made acceptance of individual petition and compulsory jurisdiction mandatory, eliminated the Commission, and created the permanent Court. Protocol 11 went into force on November 1st, 1998. The number of states under the Court’s jurisdiction increased from 20 in 1990 to 47 in 2005.

The greater institutional authority combined with increased membership produced an enormous increase in the Court’s caseload. By 2005, the Court evaluated over 50,000 applications each year and issued over 1,000 judgments on the merits annually. For an application to be admissible, individuals must first exhaust domestic remedies. Most cases get thrown out by the registry (for failing to meet formal requirements) or through Chamber decisions. While the massive increase

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in the Court’s docket increasingly overburdened the Court, it continued to develop its case law in ways that progressively expanded the scope of the ECHR (Madsen, 2016, 144).

There is some evidence that the Court’s judgments against consolidated democracies successfully raised standards elsewhere. ECtHR judgments do not have direct legal effects in countries other than the respondent state in a case. However, the ECtHR tends to consistently apply its case law across member states. This gives domestic judges and legislatures incentives to give effect to the Court’s rulings even if these are not directed against them. For example, the ECtHR gradually expanded its interpretation concerning how the Convention applies to LGBT rights. Most of the breakthrough cases were against France and the United Kingdom. Yet, these judgments affected policies in countries with less political and public support for LGBT rights (Helfer and Voeten, 2014).

Even if the Court’s judgments were sometimes controversial in consolidated democracies, these countries did not challenge the Court’s authority. In 1996, the British Lord Chancellor, Lord Mackay, expressed concerns about Strasbourg interference with domestic democracy (Bates, 2016, 268-270). However, such concerns did not provoke any broad or sustained backlash against the Court. Instead, all countries implemented the Convention into their domestic law. The United Kingdom accomplished this through the 1998 Human Rights Act, which also allowed British judges more leeway in applying ECtHR case law domestically.

The Court started to attract widespread political and public criticism in the mid-2000s, especially in the United Kingdom. In Hirst v. the United Kingdom (2005), the Court ruled that a British law that banned all prisoners from voting constituted a violation of the ECHR. The plaintiff had murdered his landlady with an axe and was photographed allegedly celebrating his court victory while smoking.

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2That is: there is no formal erga omnes effect.
3As discussed by Madsen, Cebulak and Wiebusch (2018) contestation concerning specific legal outcomes is a normal part of any legal field. Prior to the mid-2000s, there were, however, few challenges to the ECtHR’s institutional authority.
4Some countries have constitutional rules through which treaties automatically become part of domestic law.
574025/01, 6/10/2005.
a joint and drinking champagne. The ruling came in a context where rulings from British judges based on the Human Rights Act had already become politically controversial. Michael Howard, then leader of the (opposition) Conservative Party, wrote an op-ed in which he stated that:

(T)hanks to the Human Rights Act, the judges have been given the right to second-guess Parliament. The Act has led to taxpayers’ money being used for a burglar to sue the man whose house he broke into and a convicted serial killer being given hard-core porn in prison because of his “right to information and freedom of expression.” [...] If it was unpopular that British judges “second-guessed” Parliament on behalf of convicted criminals, the involvement of foreign judges created a “perfect storm” (Murray 2012) and attracted unprecedented (mostly negative) media attention to the Court (McNulty, Watson and Philo 2014). The Hirst judgment would not have been difficult to implement. The United Kingdom merely needed to provide a rational basis for why some prisoners should not be able to vote. Yet, when the cabinet proposed such a bill, it was defeated by an overwhelming majority (234 to 22). Prime Minister David Cameron, supposedly arguing for the cabinet’s proposal, stated during the debate that: “It makes me physically ill to even contemplate having to give the vote to anyone in prison.” It took until late 2017 for the United Kingdom to draft a solution that would allow about 100 prisoners to vote; a compromise that the Council of Europe’s monitoring body accepted. In the mean time, thousands of prisoners had received financial compensation because their Convention rights had been violated.

Another highly controversial set of issues revolved around the ECtHR’s scrutiny of British responses to the 2005 terrorist suicide attacks in London. Perhaps most controversial was the judgment that prohibited the United Kingdom from

extraditing Islamic preacher and suspected terrorist Abu Qatada to Jordan for fears that he might be tortured there. The judgment upset then home secretary Theresa May so much that she argued that: “it isn’t the EU we should leave but the ECtHR and the jurisdiction of its court.” In stark contrast to previous years, the ECtHR was thus subject not only to “ordinary criticism” of its judgments, but also to what can be described as sustained “backlash” against the ECtHR’s authority (Madsen, Cebulak and Wiebusch 2018).

There were also criticisms from inside the British legal system. Most influential was a 2009 speech by Law Lord Leonard Hoffman in which he accused the ECtHR of “teaching grandmothers to suck eggs” and questioned why the Strasbourg court should have the right to second guess British judges and parliament. The percentage of the British public who believed that ECtHR is a “good thing” dropped from 71% in 1996 to 19% in 2011 (Voeten 2013).

The British chairmanship of the Council of Europe, starting in late 2011, gave political resistance towards the ECtHR a formal outlet. The large influx of applications and the resulting backlog of cases had already motivated a reform process, starting with the 2010 Interlaken conference. The case load crisis facing the Court made reform of the ECtHR a legitimate agenda for governments across Europe. The United Kingdom used its chairmanship of the Council of Europe to direct these reforms efforts towards restricting the ECtHR’s interference with domestic decision-making. The (leaked) United Kingdom draft declaration for the 2012 Brighton conference was “a blueprint for clipping the Strasbourg Court’s wings” (Helfer 2012).

The United Kingdom did not get everything it wanted. However, it succeeded in adding the principles of subsidiarity and the margin of appreciation to the

9https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum. Qatada was extradited to Jordan in 2013 after a treaty between Jordan and the United Kingdom that would guarantee his rights not to be tortured. He was cleared by the Jordanian judicial system.


Convention’s preamble and in reducing the deadline for appealing to the ECtHR from six to four months (Bultrini 2012). The margin of appreciation is a doctrine developed by the Court itself. It holds that states should have some leeway in how they implement Convention articles. Critiques of the Court center on the idea that this margin should be wider, meaning that the Court should give more deference to national parliaments and courts when it decides on violations. The reforms do not change the formal authority of the Court (the Protocol has not been ratified by all Member States.) However, the Brighton Declaration sent a clear signal to the Court (Madsen 2017).

The ECtHR has not been as controversial in other consolidated democracies, but there has been criticism also from other states and there is support for reform outside of the UK (Bates 2016, 271;276). Most of the criticism has come in the 2010s and it has focused on immigration-related cases. For example, Marc Bossuyt, a member of the Permanent Court of Arbitration in The Hague and a former judge at the Belgian Constitutional Court, wrote an article that ECtHR judges were on “thin ice” in politically sensitive asylum cases (Bossuyt 2010). In the Netherlands, opposition to the Court reached parliament and the government in 2010 (Oomen 2016). The new government issued a statement in 2011 on its position on reform discussions:

[...] the Netherlands will call for the Court to allow more scope for state parties’ ‘margin of appreciation’ in specifically defining norms that are less directly related to the European Convention on Human Rights.12

Dutch criticism of the ECtHR in 2010 and 2011 was fueled both by right-wing politicians’ principled resistance against elected politicians being overridden by an international court (Gerards 2016, 332-333) and by specific clashes with the Court concerning asylum and social security policies. In 2010, the ECtHR intervened in an ongoing process concerning the expulsion of a group of Iraqi asylum seekers. The Court had indicated that it wished to further investigate the conditions the

asylum seekers would face in Iraq in the case of expulsion and imposed an interim measure prohibiting their expulsion. In the political debate that followed, the ECtHR was criticized by parties on the right for interfering with national sovereignty (Gerards, 2016, 335-336). Strong criticism also followed a set of national court judgments that found that social security reforms that the government had introduced to combat the financial crisis violated the ECtHR’s case law on private property rights. As a result, the ECtHR was criticized for interfering too much with decisions made by national legislators and for inspiring domestic courts to do the same (Gerards, 2016, 336).

The Court has similarly become controversial in Switzerland, especially through the right-wing Swiss People’s Party (SVP) (Altwicker, 2016, 387). The SVP, which became the largest party with 29.4 per cent of the vote in 2015 Swiss election, stated in its 2015 manifesto that:

[w]hat is referred to today as human rights in the political maneuvering for power and influence no longer has anything to do with the initial meaning of human rights, but is rather an ideologically leaning evolution and expanded interpretation of the original Universal Declaration of Human Rights by the European Court of Human Rights, usually favouring a solution that is centralised, places trust in the government and is socialist (Swiss People’s Party, 2015, 12).

To a large extent this criticism has been fueled by how initiatives, such the banning of minarets, have been deemed incompatible with the Convention by Swiss authorities (Altwicker, 2016, 410). In response, the SVP has proposed to reduce the influence of the ECtHR on the Swiss legal order by removing the existing legislative provisions that allow judgments of the Federal Supreme Court to be revised if the ECtHR later finds a human rights violation making such revisions necessary (Altwicker, 2016, 399).

In the Fall of 2017, Denmark announced its desire to continue the reform process when taking over the Council of Europe chairmanship. The Danish government openly expressed concerns that the ECtHR has become too expansive in its interpretation of the Convention and interferes too much with democratic
decision-making at the national level. The limitations that the ECtHR’s case law place on Danish immigration policy has been an important concern for Danish politicians after the Danish Supreme Court rendered a judgment that blocked the deportation of Gimi Levakovic, a convicted criminal of Croatian nationality, because this would interfere with the Convention rights, as interpreted by the ECtHR. The judgment received particular attention in Denmark because Levakovic had appeared in a TV documentary entitled “The gypsy boss and his notorious family” and the Danish governments responded by making reform of the European Human Rights system an important priority [Hartmann 2017].

In February 2018, Denmark released a draft “Copenhagen Declaration” to be enacted on a Council of Europe summit in April 2018. This draft declaration emphasized that the individual states have the primary responsibility for the human rights of its citizens and that the ECtHR should not take on the role of national institutions. The draft declaration further stressed that the ECtHR “should not act as a court of fourth instance, nor as an immigration appeals tribunal” The Danish proposal thus reflected both a general concern that the ECtHR is deciding issues that should be decided at the national level and a more specific concern for how this affects immigration policy, a policy area that is highly salient both in Denmark and in other European states.

The Danish proposal was resisted by some other states. As a result, the Copenhagen Declaration that was adopted at the April 2018 summit was milder in its criticism of the Court than the Danish proposal and did not explicitly call out immigration and asylum cases. Nevertheless, the process leading up to the Copenhagen summit showed that the ECtHR is facing increasing criticism in several consolidated democracies and that this criticism can lead to attempts to constrain the Court.

13 Available at http://domstol.fe1.tangora.com/New-S%C3%B8geside.31488.aspx?recordid31488=1222 (accessed March 10, 2018)
14 Available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf (accessed 10 March 2018)
15 Similar language had previously been used in the (adopted) 2011 Izmir Declaration. See https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf (accessed 24 June 2018).
The Court also continues to be controversial in Europe’s less liberal states. Turkey temporarily suspended the European Convention in 2016 in the aftermath of the attempted coup. The Russian Constitutional Court ruled in 2017 that Russia does not have to abide by a ECtHR judgment that awarded Yukos shareholders more than $2 billion in damages. The Hungarian government continues to ignore Court orders to improve conditions in camps for asylum seekers. Yet, challenges from Russia and Turkey are nothing new. For example, the Court’s former president was allegedly blackmailed and poisoned by Russian government agents over his handling of Chechen cases in 2002. What is new is that the Court is now routinely subject to criticism and calls for reform by its traditional supporters.

Figure 1: Change in the proportion of judgments with at least one violation finding

Figure 1 shows some \textit{prima facie} evidence that the ECtHR may have been responsive to these challenges: the proportion of judgments that go beyond simply applying existing case law\footnote{This restriction is based on the classification of cases according their importance made by the ECtHR’s registry. Throughout the paper we ignore so-called level 3 judgments, defined as cases that simply apply existing case law or are settled amicably by the parties. These cases do not raise new legal issues for the Court to consider.} in which the Court has found at least one violation has dropped by about fifteen percentage points since 2005. But what does this finding

\footnote{“I was poisoned by Russians, human rights judge says” \textit{The Guardian}, January 31st, 2007.}
mean? In the remainder of this article, we consider two plausible explanations: that the changing political environment affects the appointment of judges and that the Court – as an institution – is exercising strategic deference when deciding cases brought against its traditional supporters.

3 Theory

3.1 Judicial appointments

The appointment of judges is a primary mechanism through which political actors influence judicial decision-making (Dahl, 1957; Ferejohn, 2002). The importance of appointments has been most salient in the U.S. context (Epstein and Segal, 2005), but the appointment of judges is similarly one of the primary ways that members states can exercise formal influence over international courts (Dunoff and Pollack, 2017).

The ECtHR bench consists of one judge per Member State. The Council of Europe’s Parliamentary Assembly selects each judge from a government-supplied list of three candidates[18] Prior to the entry into force of Protocol 14 to the Convention in 2010, judges were appointed for six-year renewable terms. Protocol 14 changed judges terms of office to nine years and removed the possibility for reelection. While these changes were intended to increase judicial independence, they may also increase the importance governments attach to nominations. For example, Voeten (2008) shows that ECtHR judges who were ineligible for re-election (due to mandatory retirement age) were more likely to find against their national governments. Without the opportunity to use re-appointment to influence judges, governments may therefore be more concerned about the initial appointment process.

Observers have long claimed that political considerations drive the appointment process. In 2003, a group of experts warned that “[e]ven in the most established democracies, nomination often rewards political loyalty more than merit” (Lim...
Governments more supportive of European integration have tended to appoint ECtHR judges showing less restraint towards respondent states than judges nominated by governments less supportive of European integration. Candidates for membership to the European Union showed a tendency towards appointing more activist judges, possibly to signal their commitment to human rights and rule of law standards (Voeten 2007, 693). Thus, political influence does not necessarily equate more deference. Indeed, governments appointed increasingly activist judges between 1998 and 2005.

There are two ways in which this trend may have been reversed in more recent times. First, and most straightforward, as governments have become more skeptical towards European integration and liberal international institutions, they may have started to advance more candidates that reflect these preferences. Nominees are often selected from the networks of political party elites, especially the ministers of justice and foreign affairs (Limbach et al. 2003, 9). Sometimes governments select judges with long track records as diplomats or as academics (or even politicians). They may be well aware of these views. Thus, we expect a correlation between government ideology and judicial philosophy, especially since the Court has become more broadly politicized.

Second, the UK’s and other consolidated democracies’ public defiance may have signaled to other governments that it is more acceptable to appoint judges that are expected to exercise restraint. In the late 1990s and early 2000s, governments in relatively new democracies often nominated candidates with explicit records as human rights activists, perhaps to signal their commitment to human rights law (Voeten 2007). The reform conferences in the 2010s, especially the 2012 Brighton conference, signaled that appointing more restraint judges would be acceptable and perhaps even desirable in the eyes of many governments in consolidated democracies.

**Hypothesis 1** Governments have started to nominate more deferential judges since 2005 and especially after 2011.

As discussed, the backlash against against the ECtHR in consolidated democracies has been particularly linked to right-wing resistance concerning immigration
and criminal policies as well as resistance against European and international liberal institutions. We therefore expect politicization of the nomination of ECtHR judges to be linked particularly to right-wing governments.

**Hypothesis 2** Right-wing governments have become more likely to nominate more deferential judges.

### 3.2 Strategic deference

The ECtHR’s political environment may also affect ECtHR decision-making because judges, independently of their policy preferences, act strategically to avoid non-compliance (Vanberg, 2001, 2005) or other types of political challenges that would threaten the Court’s legitimacy (Clark, 2010; Larsson and Naurin, 2016). Like other courts, the ECtHR has a strong institutional interest in avoiding blatant non-compliance (Dothan, 2011) and not to provoke states to curb its authority. Observers have suggested that such concerns have increasingly affected the Court’s decision-making.

For example, in 2009 a Chamber judgment in *Lautsi v. Italy* reasoned that an Italian law that mandates a crucifix in each public school classroom violates the freedom of religion. The decision was met with public outcry both in Italy and other European countries (Lupu, 2013, 450). President Silvio Berlusconi called it “one of those decisions that make us doubt Europe’s common sense.” The populist right-wing Northern League used local government control to distribute crucifixes in the main squares of villages. The ruling also faced the unprecedented opposition of 13 state parties who joined in third-party briefs. In 2011, the ECtHR’s Grand Chamber reversed the unanimous Chamber judgments 15-2, arguing that “..the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State.” It is at least plausible that sensitivity to their political environment motivated the judges (de Londras and Dzehtsiarou, 2015, 535).

A more general theory must specify just what aspects of its political environ-

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19 Quoted in Mancini (2010, 6).
ment should lead judges to be concerned with their legitimacy. We argue that an international human rights court is especially sensitive to challenges from states with strong reputations for upholding rights. The implementation of ECtHR judgments is not automatic: it requires cooperation from governments and domestic courts. Often state compliance is slow and imperfect [Hillebrecht 2014a, Hawkins and Jacoby 2010]. Even the German Bundesverfassungsgericht ruled in 2004 that German Courts must regard ECtHR judgments but are “not bound in its concrete result.”

Holding governments to their human rights promises involves accountability politics [Simmons 2009]. A Court’s stakeholders do not just include governments but also individuals, lawyers, and civil society groups that bring cases to the Court and push for implementation [Cichowski 2013]. A Court that would not hold governments accountable for its human rights violations would lose the support of these key compliance constituencies [Alter 2014].

At the same time, such accountability politics becomes more complicated when governments with strong human rights reputations openly defy and challenge the Court. Accountability politics depends on the ability of international and/or domestic actors to advance the argument that defying a Court order would undermine a government’s credibility or at least its reputation as being strongly committed to human rights. For instance, Kowalik-Bańczyk (2016, 202-203) notes that Polish politicians have found it difficult to challenge the ECtHR due to concerns that this would undermine their own reputations as committed to human rights and democracy. Such reputations are always relative. At the very least, the importance of a reputation depends on consequential outsiders caring about that reputation. If the UK and Scandinavian countries argue that the Court should show more deference, that its decisions need not be implemented or even that they may leave the Court, then the claim that the Polish government might lose credibility with Europe’s established democracies if it defies the ECtHR becomes less plausible.

If the ECtHR would lose the support of those states with the longest democratic pedigree, it would lose much of its credibility as a bulwark for democracy and human rights in Europe.

The broader effects of resistance from consolidated democracies might be directly observed in the context of prisoner voting rights. Following blatant British defiance of the 2005 Hirst judgment, other states such as Russia and Turkey have also refused to comply with ECtHR judgments concerning prisoner voting rights. For instance, the Russian Constitutional Court ruled in 2016 that the 2013 ECtHR judgment in the case of Anchugov and Gladkov v. Russia – which held that the Russian ban on prisoner voting violated the ECHR – was inconsistent with the Russian constitution and therefore not enforceable. As noted by Dzehtsiarou (2017), the pressure on Russia and other countries to comply with this set of judgments is “very limited because the UK has failed to implement an identical judgment.”

If the ECtHR judges care about their Court’s legitimacy, then we may expect that the Court has become more restrained towards consolidated democracies, and especially the UK, since the outburst of criticism in the mid-2000s. An underlying tone in many of the criticisms is that the ECtHR was created to rectify “real” human rights violations in countries that lack strong domestic legal systems and not “imaginary” violations, such as depriving prisoners of the right to vote, in countries that are perfectly capable of defending human rights by themselves. We therefore expect a shift in the ECtHR’s decision-making to have occurred after 2005, which is the year of the Hirst judgment and the time when the ECtHR started to become subject to increasing political resistance (at least within the United Kingdom).

**Hypothesis 3** Since the mid-2000s, the ECtHR has become less likely to rule that consolidated democracies, and especially the United Kingdom, have violated the European Convention.

Because the criticism of the ECtHR gradually spread to other consolidated democracies, the increased restraint towards consolidated democracies other than the United Kingdom may have come from 2011. By that time, the criticism had
become widespread (this is also when hypotheses 1 and 2 anticipate the general shift towards the appointment of more restrained judges) \( (\text{Bates, 2016, 271}) \). We therefore also investigate a version of Hypothesis 3 where we allow the change in the violation rate to have occurred from 2011 for consolidated democracies other than the United Kingdom.

Legal scholars have already amassed considerable qualitative evidence for hypothesis 3. For example, Çali (2018) argues that the ECtHR has developed a “variable geometry,” which allows more deference for those member states “who are deemed to act in good faith when applying the Convention” than to those states for whom the good faith assumption does not apply. For example, in \textit{Van Hanover v. Germany}, a case that balanced the right to privacy of Princess Caroline of Monaco and the freedom of expression of German newspapers, the Court argued that:

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

Another example is a ruling in which the Court found that France’s “burqa ban” did not constitute a violation of the Convention:

[..] the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight\(^{21}\)

The Court typically does not afford the same weight to polities with less firmly established democratic practices.

\(^{21}\text{S.A.S v. France, 43835/11, 1 July 2014, at 159}\)
Similarly, Madsen (2017) has found that the Court has started to refer much more frequently to the “margin of appreciation” since the Brighton Declaration and that Europe’s consolidated democracies are the greatest beneficiaries of this new jurisprudential direction.

Judges have also picked up on this tendency. In a 2017 dissenting opinion in Hutchinson v. the United Kingdom judge Pinto de Albuquerque laments the privileges afforded to the UK and other consolidated democracies by the Court:

> Of course, this also entails a biased understanding of the logical obverse of the doctrine of the “diversity of human rights”, namely the doctrine of the margin of appreciation: the margin should be wider for those States which are supposed “to set an example for others” and narrower for those States which are supposed to learn from the example. This evidently leaves the door wide open for certain governments to satisfy their electoral base and protect their favourite vested interests. In my humble view, this is not what the Convention is all about.\(^{22}\)

In addition, we might also expect the ECtHR to show particular restraint when ruling on issues that repeatedly have provoked strong political reactions. Identifying politically sensitive cases presents a significant informational problem for judges (Clark, 2010) and this challenge might be particularly strong for international court judges that are not intimately familiar with the politics of respondent states (Lupu, 2013; Huneeus, 2015). The Court may have simply not foreseen that the Hirst and Lautsi judgments would create the kind of backlash that they did. This problem might be more significant in the context of the ECtHR than some other international courts because the ECtHR judges often receive little warning that a case is controversial prior to rendering its judgment. This situation is different from the CJEU, which Larsson and Naurin (2016) argue can rely on signals of preferences provided through government’s written briefs to infer the risk of legislative override. The ECtHR only infrequently receives third-party submissions from governments and civil-society organizations that could signal which judgments are

\(^{22}\)HUTCHINSON v. THE UNITED KINGDOM (57592/08, 17 January 2017)
likely to be controversial (Cichowski, 2016). Thus, even if ECtHR judges are sensitive to the controversies that have arisen in consolidated democracy, they may find it hard to predict which judgments will further undermine its support within those states.

There might, however, be exceptions to the inability of judges to predict controversy. In particular, judges may be expected to pick up on the types of issues that tend to spur controversy across multiple states. Much of the criticism against the ECtHR relates to judgments concerning groups that have been targeted by right-wing politicians, such as refugees, foreign criminals, and suspected terrorists (Donald, 2017, 98). Concerns about such cases have also been directly communicated by member states. In the Izmir declaration of the 2011, the Council of Europe states also communicated their view that the ECtHR should not become a “Court of fourth instance,” nor an “immigration Appeals Tribunal”. As discussed, similar language was also part of the Danish draft for the 2018 Copenhagen Declaration, although these provisions did not make it into the final Copenhagen Declaration. Due to the repeat controversy and strong political signals surrounding these types of cases, we therefore expect strategic deference to be particularly likely for cases involving unpopular minorities, such as prisoners and refugees:

**Hypothesis 4** The increased deference towards consolidated democracies since the mid-2000s is more pronounced in cases involving prisoners and refugees.

### 3.3 Empirical Approach

The quantitative empirical analysis proceeds in two parts. We first use data from dissenting opinions to estimate judges’ judicial ideology and investigate whether there has been a development towards the appointment of judges willing to offer respondent states a greater margin of appreciation. We then use detailed data on cases and judgments to examine if and how the Court has altered its decision-making since the mid-2000s.

The basis for both analyses is a new dataset on all ECtHR judgments until June 1st 2016 (Stiansen and Voeten, 2017). The data is based on information from
the Court’s own HUDOC database and includes information about all ECtHR judgments and decisions in the relevant period, including case details, whether the case posed new legal questions for the Court to consider, and whether the judges ended up finding a violation. The data also includes information that allow us to investigate judicial ideology, such as the identities of judges deciding each case, whether there was disagreement concerning the outcome, and, if so, the position of dissenting judges as expressed through their dissenting opinions.

4 Have Governments Started Appointing More Restrained Judges?

4.1 Estimating Judicial Ideologies

Scholars of domestic judicial behavior have long used dissenting opinions to estimate variation in judicial ideologies (Bailey, 2007; Hanretty, 2013; Martin and Quinn, 2002; Segal and Cover, 1989). International courts, however, typically either do not allow public dissents or have too few judgments to make ideal point estimation feasible (Dunoff and Pollack, 2017). The ECtHR is an exception. Voeten (2007) uses public dissents to estimate variation among judges along a single dimension. The dimension separates judges who believe that the Court should show a great deal of deference to the *raison d’etat* and judges who adhere to a more expansive interpretation of the Convention. Since judges are not replaced all at once, there are always judges that voted together with the new judges and the judges they replaced. This allows us to determine whether more recently appointed judges tend to be more restrained in their exercise of judicial authority than the judges that they replace.

We collected the text of all dissenting opinions by scraping the corpus of ECtHR judgments. We then manually coded each dissenting opinion for which aspect of the majority decision it disagreed with. For the purpose of ideal-point estimation we only use the information on whether the dissenting opinion expressed that the Court should have been more favorable to the applicant or the respondent.
government. For example, we coded a dissenting opinion as “pro-government” if it argued that the majority found violations where it should not have. By contrast, if the dissent argued that the majority erred in not finding violations on specific articles then we coded the dissent as “pro-respondent.” More precisely, what we observe here is not that the dissenting opinion is “pro-government” or “pro-respondent” per se but that a subset of judges on a Chamber wanted the Court to show more (less) restraint on a case than their colleagues. We are interested in identifying these coalitions. If judgments invited multiple dissents, we coded the different coalitions using the principles outlined above.

This leaves us with a matrix $V$ with judges ($j$) in rows and issues ($i$) (coalition splits) in columns. Each entry $V_{ij}$ takes the value 1 if judge $j$ is more favorable to the government on issue $i$ than her colleagues and 0 if judge $j$ is more favorable to the respondent. If a judge did not serve on the panel, the value is missing. We only include regular judges who were involved in at least ten judgments with a dissenting opinion. We do not consider the votes of judges when their national government is the respondent government. Judges are much more likely to be pro-government on national cases (Voeten, 2008). Including these cases might therefore distort our estimates given the large divergence in cases against different respondent governments.

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

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

The $\delta$ parameters define the robust reparametrization but are not of substantive interest. The difficulty parameter $\alpha_i$ is an issue-specific cut-point that reflects variation in legal issues. On some issues even quite restrained (activist) judges would (not) want the Court to find a violation. If the difficulty parameter is large and positive (negative), only the most restrained (activist) judges are expected
to dissent from the majority. The discrimination parameter $\beta_i$ reflects that some issues better discriminate between activist and restrained judges than other issues. As in classical IRT models, we assume that $\beta_i > 0$, which means that judges with larger values for their ideal points $\theta_j$ are more likely to side with the government. This assumption also defines the polarity of the latent ideal-point space and it captures our concept of interest, which is whether more recently appointed judges have started to show more deference than judges that were appointed earlier.

We estimated the model with 140 judges and 1757 issues on which at least one non-national judge voted differently from the majority. We used the MCMCirtK-dRob function from MCMCPack in R [Martin, Quinn and Park, 2011]. We ran the model for 1 million iterations. Convergence was assessed through the Geweke diagnostics. The point estimates correlate highly (.85) with the point estimates from Voeten (2007).

4.2 Results

Figure 2 displays the estimated ideal points of all judges appointed since 1998, when the permanent Court was established, and their 95% credible intervals. Variation in the uncertainty surrounding ideal-point estimates can either be due to differences in the number of votes or because the voting patterns of some judges do not fit the one-dimensional model as well. The ideal points are scaled on a standardized normal distribution, meaning that the average judge is at 0 and a value of 1 indicates a judge who is one standard deviation above the mean in her level of restraint.

Five of the six most restrained judges were appointed in 2012 or thereafter. Polish judge Krzysztof Wojtyczek, estimated to be judge most inclined to apply a wide margin of appreciation, lays out his philosophy clearly in a dissent in a

\footnote{We also estimated alternative models that identified the polarity by restricting judges to be positive or negative and by imposing an an informative Normal prior $N(1, 2)$ on the discrimination parameters. Note that our approach differs from other ideal point models because we have an unambiguous coding of whether a dissent favors the respondent government (always in a position to defend itself against an alleged rights abuse) and the applicant. We typically do not have such a coding for left-right issues.}
Figure 2: Estimated Ideal Points of ECtHR Judges Appointed Since 1998

Judicial restraint

Appointment
- 1998-2005
- 2006-2011
- 2012-2016
follow-up case to *Hirst*:

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

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

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

Swedish judge Helena Jäderblom’s best-known dissent was in an activist direction, arguing that the Court should have found that France’s ban on burqas in public spaces violates the Convention. Yet, her other dissents tended to favor the government’s side (although note the relatively large uncertainty around her ideal point). Danish judge Jon Fridrik Kjølbro was nominated in 2014 by a conservative government. He previously served as the vice-chairman of the Refugee Board which deals with asylum cases, a major concern for Denmark. Many of judge Kjølbro’s dissents have come on asylum cases where he has highlighted the “the subsidiary role of the Court” and he has expressed concerns that a judgment would have “significant and negative consequences for the proper functioning of the cooperation between EU Member States regarding the processing of requests for asylum.”

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24 *Case of Firth and Others v. the United Kingdom*, 47784/09, August 12, 2014.
25 CASE OF ORLANDI AND OTHERS v. ITALY 26431/12, 14/12/2017.
26 S.A.S. v. France
27 CASE OF M.A. v. SWITZERLAND, 52589/13, 18 November 2014
28 CASE OF V.M. AND OTHERS v. BELGIUM, 60125/11, 7 July 2015
By contrast, the judge estimated to be on the most activist side of the spectrum, the Portuguese judge Paulo Pinto de Albuquerque (nominated by a Socialist-led government in 2011) has actively lamented the Court’s turn towards restraint. In a 2017 speech, he stated that: “Both the UK rebellion against Hirist, and the Court’s backtracking from its own principles of interpretation, have had an enduring, negative effect on the European system of human rights protection,” before concluding that: “The Convention is not what Strasbourg judges say it is, it is a constitutional instrument of European public order, and like any other Constitution it evolves.”

While there continues to be variation in the judicial philosophies of newly appointed ECtHR judges, figure 3 shows that there is, on average, a trend towards

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appointing more restrained judges. In line with hypothesis [1], there is thus some evidence that governments have started to appoint judges that will be more deferential towards respondent states.

To investigate hypothesis [2], we correlate judges’ ideal points with the ideological position of the governments responsible for their nomination. Figure 4 suggests that the appointment of ECtHR judges has become more polarized with time. Whereas the regression line between judge and cabinet left-right ideology is basically flat before 2005, it is positive for the 2006-2011 period and the slope is quite steep for the 2012-2016 period. We cannot draw hard conclusions from this given the limited amount of data. Yet, this descriptive evidence is consistent with the observation that the Court has become more politicized over time and that right-wing governments are increasingly responsible for the appointment of ECtHR judges that are more deferential to state interests.

5 Strategic Deferece

5.1 Data and Method

We now turn to investigating whether the ECtHR – as an institution – has engaged in strategic deference in response to the increased criticism from consolidated democracies. We investigate this question by analyzing the outcome of ECtHR judgments. We consider the ECtHR to have ruled against the respondent state if the judges find one or more violations of the Convention or its protocols. In the analysis of case outcomes, we exclude judgments in those cases that concerned only the application of existing case law. The judgments we consider thus offer some opportunity for the judges to decide new legal questions. We identify the judgments raising new legal questions based on the classification of case importance in the ECtHR’s HUDOC database. We also focus only on judgments rendered after Protocol 11 established the permanent court on November 1st 1998.

We define a consolidated democracy as a country that had been continuously democratic for at least twenty years at the start of the new post-Protocol 11 court in 1998. We used a Polity score of 7 as the cut-off for democracy, but also counted some of the micro-states that are not included in Polity as consolidated democracies (although they have very few judgments in the data).\footnote{The consolidated democracies are: Andorra, Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, and the United Kingdom.}

Comparing judgments against consolidated democracies and other Council of Europe member states poses an obvious causal inference problem: The greater likelihood of violation findings in non-consolidated democracies may simply reflect that human rights violations in those countries are more severe (Grewal and Voeten 2015). Davies (2018) similarly warns against comparing violation rates over time, because differences may be due to the type of cases that are being litigated. We follow two strategies to ameliorate this inferential threat.

First, we match on observed characteristics of cases brought in consolidated and non-consolidated democracies. Since cases between these two groups are likely quite distinct, it is important to avoid implausible counterfactuals (King and Zeng).
We match on the Convention articles a state is alleged to have violated, the importance level of the case (defined by the Court’s registry), whether the case was dealt with by the Court’s Grand Chamber, whether it was brought by a refugee or prisoner, the year of the ruling, the states’s level of compliance with previous judgments measured as the proportion of pending judgments that the state successfully implemented during the previous year, and finally the estimated level of restraint of the median judge on the chamber (from the previous section). Our preferred approach is to use coarsened exact matching (Iacus, King and Porro 2012) but we also consider results based on genetic matching (Diamond and Sekhon 2013). The original sample included 5227 judgments and the matched sample (using coarsened exact matching) 2952 judgments. Essentially what we do here is compare only those cases where the facts are comparable, although matching cannot correct for unobserved differences between cases.

Second, we compare the groups both before and after the Court became the subject of challenges from consolidated democracies. This allows us to use a difference-in-differences design to investigate whether there has been a reduction in the violation rate after 2005 that is significantly stronger for consolidated democracies than for other states. That is we estimate:

\[ y_i = \beta_0 + \beta_1 \times \text{Consolidated} + \beta_2 \times \text{Post2005} + \beta_3 \times \text{Consolidated} \times \text{Post2005} + \epsilon_i \]

Where \( y_i \) equals 1 if the Court finds a violation and 0 otherwise. \( \beta_3 \) reflects how much greater (or smaller) is the difference in the probability of finding a violation between consolidated and non-consolidated democracies post-2005 compared to the earlier period. We estimate this as a weighted linear regression model on the matched sample and control for the case characteristics that were also included in the matching process. These two fixes do not eliminate all threats to causal inference. We must assume that there are no unobservable changes in the types

\[ \text{weights come from the matching procedure.} \]
of cases facing consolidated democracies and the comparison group between the pre-2005 era and afterwards. Still, this assumption is weaker than in most designs relying on observational data. In particular, our design is better able to isolate the effects of strategic deference by the Court from other reasonable explanations, such as changes in the type of cases reaching the Court (Davies 2018) and changes in the judicial ideology of the judges (Blauberger et al. 2018 8).

The difference-in-difference estimator estimates the average change in the deference towards consolidated democracies (relative to other states) during the post-2005 period. Although this change is an important quantity of interest, this approach is sensitive to the choice of break point. The estimation of an average treatment effect might also mask how the deference towards consolidated democracies may have increased gradually during the post-2005 period. We therefore also report results from a regression model where consolidated democracies are interacted with a set of year dummies. This approach allows us to better assess temporal variation in the deference offered to consolidated democracies.

Because of the limited number of cases involving refugees and asylum seekers prior to the mid-2000s, we use a regression model estimated on the unprocessed data to investigate hypothesis 4.

5.2 Has the Court become more restrained towards the UK and other consolidated democracies?

Has the Court has become more lenient towards the UK and other states that are “supposed to set an example for others”? Figure 5 suggests as much. Panel A examines all judgments posing new legal questions. Since the mid-2000s, the proportion of judgments in which there is at least one finding of a violation has decreased for both groups of countries. However, the decline is much sharper among consolidated democracies.

The greater likelihood of violation findings in non-consolidated democracies may simply reflect that human rights violations in those countries are more severe (Grewal and Voeten 2015). Panel B corrects for such differences by matching on observed characteristics of cases brought in consolidated and non-consolidated
Figure 5: Differential findings of violations against consolidated and non-consolidated democracies

A. No matching

B. Coarsened Exact Matching
democracies. After matching, there is little difference between violation rates in judgments on consolidated democracies and other Council of Europe member states until the mid-2000s. Yet, after 2005 these differences appear to increase considerably. In line with hypothesis 3, there is thus evidence that the ECtHR has started showing a greater deference towards consolidated democracies since the mid-2000s.

Our difference-in-differences design allows us estimate the reduction in the violation rate that may be attributed to increased deference towards consolidated democracies. Figure 6 displays the estimated differences in the violation rate based on a set of linear probability models. The error bars indicate 95%-confidence intervals. Other covariates are conditioned on both using matching and as control variables in the subsequent statistical model.

Model 1 is based on the comparison between consolidated democracies and all other states after balancing the data using coarsened exact matching. The estimated difference is strongly statistically significant and consistent with hypothesis 3. Specifically, we find that consolidated democracies have experienced an approximately fourteen percentage points reduction in the violation rate compared to the 1999-2005 period.

Model 2 is based on the same comparison, but adjusts for differences in case characteristics using genetic matching (Diamond and Sekhon, 2013). Using genetic matching, we avoid pruning any of the judgments against consolidated democracies and retain the cases against other states that are most similar to the cases facing consolidated democracies. The point estimate is slightly reduced compared to one based on coarsened exact matching, but remains substantially and statistically significant.

The control group in models 1 and 2 consists of a heterogeneous group of states, which includes both authoritarian states such as Azerbaijan and Russia and new democracies that have now become European Union members, such as Romania and the Czech Republic. Model 3 is based on a comparison between the group of consolidated democracies and other states that have succeeded in becoming

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34 Logistic regression models are reported in the supplementary materials and yield very similar results.
European Union members. As is seen in figure 6, our results are not driven by the comparison between consolidated democracies and the most authoritarian states. The point estimate based on model 3 suggests an approximately ten percentage points reduction in the violation rate and is statistically significant.

The ECtHR has experienced criticism and backlash in several consolidated democracies, but the criticism has been particularly harsh in the UK. If the Court is responding to criticism by exercising strategic restraint, we would therefore expect it to be particularly deferential towards the UK. In model 4, we compare the UK against the remaining group of consolidated democracies. The difference is striking. In the post-2005 period the United Kingdom has experienced a reduction in the violation rate of more than twenty percentage points. This difference provides strong evidence of the Court engaging in strategic deference as a response to political resistance.

While the particularly strong reduction in the violation rate in cases involving the UK provides strong evidence for hypothesis 3, it is important to assess whether there has been a similar development for other consolidated democracies or whether the effect in its entirety is driven by the UK. Moreover, in many other consolidated democracies, the increase in criticism occurred a few years later than in the UK. To the extent that the ECtHR is responding to the development in the political situation within each democracy, we would therefore expect the change in violation rate to occur later for consolidated democracies than for the UK. Models 5 and 6 are estimated after excluding the UK from the dataset and help answer these questions.

Model 5 shows that even when the UK is excluded from the data, there still a significant reduction in the violation rate associated with post-2005 period. In most consolidated democracies other than the United Kingdom, the strong public resistance against the ECtHR did, however, not start until after 2010. Model 6 therefore investigates whether our results are robust to investigating changes in the violation rate associated with the post-2010 period. Comparing the point estimates from models 5 and 6 shows that our findings remain robust to choice of break points for consolidated democracies other than the United Kingdom.
Figure 6: Difference-in-differences results: Estimated changes in the violation rate
5.3 How has the deference towards consolidated democracies evolved over time?

The differences in the violation rate reported in figure 6 are average changes in the violation rate since criticism of the ECtHR erupted in the United Kingdom and other consolidated democracies in the mid-2000s. Although the 2005 Hirst judgment represents an important turning point – especially for the United Kingdom – the spread of controversy to other consolidated democracies was gradual. Accordingly, we might expect the ECtHR deference towards consolidated democracies to have gradually increased as signs of backlash have become evident in more countries and have intensified. Such a development is also suggested by figure 5.

To investigate how the deference towards consolidated democracies has evolved over time, we estimate a linear probability model in which we interact consolidated democracies with a set of year dummies. This model allows us to assess non-linear changes in the ECtHR’s approach towards each group of states. As before, we control for case characteristics to account for how consolidated democracies and other states differ in the types of cases they are exposed to.

Based on this regression model, figure 7 reports the annual reductions in the differential violation rate for consolidated democracies versus non-consolidated democracies compared to the 1999 baseline. The figure confirms that the marginal effect of consolidated democracy was relatively stable during the early 2000s and then gradually decreased each year until 2011. Since 2011, the violation rate for consolidated democracies has been relatively stable (although 2013 is an anomaly), but at a much lower level than in the early 2000s. This development confirms that the increased deference towards consolidated democracies is a phenomenon of the post-2005 period, but which has gradually increased as the ECtHR has been subject to increasingly strong criticism from a growing set of consolidated democracies.
5.4 Has the Court become especially restrained in cases involving refugees and prisoners?

We now turn to the question of whether the increased deference towards consolidated democracies is particularly pronounced in cases where the applicant is from an unpopular minority as suggested by hypothesis 4. For this analysis we only consider cases against consolidated democracies. We measure applicant characteristics based on key word searches of the judgment sections that describe the “Facts” of each case. To investigate how the violation rates for the groups of cases involving unpopular minorities have changed, we use a difference-in-differences approach similar to the one above. Specifically, we estimate models where we interact the dummies for prisoner and refugee/asylum seeker applicants with dummies for whether the judgments was rendered after the eruption of criticism in consolidated democracies in 2005. We also consider models where the break point is set to 2010, which is when criticism had intensified and spread to a broader set of consolidated democracies.
democracies. In all the models, we control for the full set of case characteristics to account for how cases might differ on other characteristics than the identity of the applicant. Because of the relatively few cases, we do, however, not use matching to pre-process the data.

Estimated changes in the violation rates and associated 95% confidence intervals are reported in figure 8. The two estimates at the bottom of the figure are changes in the violation rate for prisoner applicants in cases against consolidated democracies. This group of cases has been particularly controversial in the UK following the 2005 Hirst judgment, but the ECtHR has been accused of favoring prisoners and making it more difficult to be “tough on crime” also in other countries. Cases involving prisoners are identified based on whether the judgment describes the applicant as a “prisoner” or as “detained”. The figure suggests a slight reduction in the violation rate after 2005, but the change is small and is not statistically significant at conventional levels ($p = .08$). When looking at changes after 2010 when the backlash against the ECtHR had become more widespread, we find no evidence of a change in the violation rate.

The remaining estimates are for cases where the applicant is identified as a “refugee”, as an “asylum seeker”, or as someone subject to “extradition” or “expulsion”. Judgments favoring refugees and asylum seekers have also been the subject of criticism in many consolidated democracies. Refugees and asylum seekers are minority groups that generally have been targeted by right-wing populist mobilization. We consider changes both after 2005 and 2010. Although hypothesis 4 is concerned with changes against consolidated democracies, we also consider the full population of cases involving refugees and asylum seekers. The reason is that this is a legal area where consolidated democracies may have reasons to be concerned about the jurisprudential effects of judgments also against other types of states.

None of the four models provide evidence of a particular reduction in the violation rate in cases involving refugees in asylum seekers. Contrary to hypothesis 4, our results thus do not provide evidence for unpopular minorities being disproportionately targeted by the increased deference the ECtHR displays towards
One plausible explanation for this non-finding is that courts, and particularly international courts, find it difficult to predict the type of judgments that prompt resistance and backlash (Clark 2010; Lupu 2013; Huneeus 2015). Rather than adapting their approach to the type of judgments that have been controversial in the past, judges might therefore be tempted to adopt a more general policy of restraint towards those states it relies on support from. As argued by Larsson and Naurin (2016, 378), one result of this inability to predict which cases are associated with political risk is that international judges can become “unnecessarily’ constrained” in their decision-making.

6 Conclusion

Our evidence suggests that the public criticism coming from the UK and other consolidated democracies has succeed in constraining the ECtHR. As the ECtHR has faced increasingly strong resistance from consolidated democracies, the ECtHR has become more restrained when ruling on cases brought against these countries. The ECtHR’s decision-making is also affected by the appointment of more restrained judges during recent years, particularly by right-wing governments. These developments have important consequences for future of the European human rights system. At the very least, the more challenging political environment that the ECtHR currently faces restricts its ability to continue the progressive expansion of convention rights that has previously characterized its case law. While previous scholarship has indicated that judges of international courts enjoy a form of constrained independence (Busch and Pelc 2010; Carrubba, Gabel and Hankla 2008; Kelemen 2001; Larsson and Naurin 2016; Voeten 2007, 2008), our results thus show how a changing political environment influences the political constraints on international adjudication.

The ECtHR is not the only international institution that has come under fire from powerful consolidated democracies in recent years. While it may not be possible to replicate our precise research design, we nonetheless believe that there are
Figure 8: Annual changes in violation rate for cases involving unpopular minorities

Change after 2010 for refugee asylum seeker applicants in all cases

Change after 2005 for refugee asylum seeker applicants in all cases

Change after 2010 for refugee asylum seeker applicants in cases against consolidated democracies

Change after 2005 for refugee asylum seeker applicants in cases against consolidated democracies

Change after 2010 for prisoner applicants in cases against consolidated democracies

Change after 2005 for prisoner applicants in cases against consolidated democracies

Estimated change in violation rate
good reasons to suspect similar effects elsewhere. Indeed, Blauberger et al. (2018) have recently explained changes in the CJEU’s European citizenship jurisprudence in terms of changes in its political environment (but see Davies, 2018 for a different account). Compared to most other international institutions, ECtHR judges are relatively well-insulated and can refer to a very large body of judicial precedent. Yet, we still find large effects on the Court’s behavior. These findings suggest that even well established international courts are vulnerable to changes in their political environment. The other side of this coin is that liberal international institutions, such as the ECtHR, can succeed in adapting to changing political environments. This ability may well be important in preserving these institutions as populism and nationalism are on the rise the countries that have been their traditional supporters.

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