Dissent in Iberia: the ideal points of justices on the Spanish and Portuguese Constitutional Tribunals

Abstract

I analyze the non-unanimous decisions of the Portuguese and Spanish Constitutional Tribunals for the periods 1989 – 2009 and 2000 – 2009 respectively. I show that judicial dissent can be predicted moderately well on the basis of judicial ideal points along a single dimension. This dimension is equivalent to the left-right cleavage in both Portugal and Spain. I demonstrate the characteristics of the recovered dimension by analyzing both properties of the cases and properties of the justices who decided them.

Keywords: judicial behaviour, Spain, Portugal, constitutional courts

Address for correspondence: Chris Hanretty, Political, Social and International Studies, University of East Anglia, Norwich NR4 7TJ, UK. E-mail: c.hanretty@uea.ac.uk

Dissent in Iberia: the ideal points of justices on the Spanish and Portuguese Constitutional Tribunals

Chris Hanretty

Abstract

I analyze the non-unanimous decisions of the Portuguese and Spanish Constitutional Tribunals for the periods 1989 – 2009 and 2000 – 2009 respectively. I show that judicial dissent can be predicted moderately well on the basis of judicial ideal points along a single dimension. This dimension is equivalent to the left-right cleavage in both Portugal and Spain. I demonstrate the characteristics of the recovered dimension by analyzing both properties of the cases and properties of the justices who decided them

Keywords: judicial behaviour, Spain, Portugal, constitutional courts

Courts are political. They are political in the 'purely definitional' sense that they 'inevitably authoritatively allocate values', and in the systemic sense, that they 'have consequences for other parts of the… political system' (Hodder-Williams 1992: 1). These characteristics apply in particular to courts which review the constitutionality of legislation. European constitutionalists understand this. After all, it was the recognition of this political role of courts that led Kelsen (1961: 268–269) to suggest concentrating constitutional review in specialized courts; and it was Kelsen's intellectual leadership that led to the widespread adoption of this model in Western Europe and a number of former European colonies.

However, courts – and constitutional courts in particular – may also be political in a further sense. Courts, or rather the justices who compose them, may decide cases so as to further their own political preferences or goals. European constitutional *engineers* have acted as if courts were political in this sense. Most Kelsenian constitutional courts in Western Europe are prohibited from issuing dissenting opinions; in most cases, practitioners have argued that dissenting opinions, by demonstrating that judicial outcomes are not automatic, create the perception that judicial decisions are motivated by (shifting, potentially arbitrary, narrowly-shared) political considerations rather than (non-discretionary, widely-shared) legal or jurisprudential considerations, thereby undermining judicial independence.[1] By banning the smallest expression of divergent preferences, of any kind, constitutional engineers obviate this risk.

European constitutional *scholars*, by contrast, have often ignored the impact of justices' political preferences in judging. This is due to a number of factors. First, the absence of dissenting opinions in a majority of Kelsenian courts in Western Europe makes it extremely difficult to study judges' political preferences as they are manifested in judicial behaviour (but see Malecki 2009).

Second, much of the literature has chosen to concentrate on properties of the court, such as independence or authority, rather than properties of justices who make up the court (Franck 2008; Amaral-Garcia et al. 2009; Fiorino et al. 2007). This is true both of the quantitative literature and of the qualitative literature. Volcansek (2000) frames her analysis of the Italian Constitutional Court in terms of a choice between 'good law' and 'good politics', where decisions that make for 'good politics' are prudential decisions that maximize compliance by the legislature. This same choice is faced by Stone Sweet's 'triadic dispute resolvers', including the French Constitutional Court (Stone Sweet 1992, 1999). Whilst justices may have strong preferences for maintaining the independence and reputation of the court, this is a political preference only in the sense of being 'politic', or prudential.

The contrast with the American literature on judicial decision making could not be greater. Here, the focus is on individual judges' ideal points – those points in some *n*-dimensional political space that they prefer to all other points in the space – and how these ideal points motivate judges' dissenting or concurring opinions. This literature has become ever more sophisticated, as scholars have moved from multi-dimensional scaling (Schubert 1958) to item response models capable of providing information about characteristics of both cases and judges (as well as uncertainty estimates for

those parameters), to dynamic models that are capable of incorporating case and judge covariates (Martin & Quinn 2002; Bafumi et al. 2005).

In this article I apply ideal point estimation techniques developed in the American context to two of the three West European Kelsenian courts that permit dissenting opinions[2] – the Spanish and Portuguese Constitutional Tribunals.

There are good reasons for studying the Spanish and Portuguese courts (and thus Spanish and Portuguese justices). First, these courts are under studied. There has been no English-language book-length study of either the Portuguese or the Spanish court (as there has been for the French Constitutional Council and German Federal Constitutional Court: Stone Sweet 1992; Kommers 1997). Those books that deal with these tribunals *qua* political bodies typically do not consider judicial behaviour (González-Trevijano Sánchez 2000; De Araújo 1997; but see Magalhães 2003). Finally, work that has concentrated on judicial behaviour has either not gone far beyond presenting the number of occasions upon which judges (dis)agreed with each other (Castillo Vera 1987), or has concentrated on judges' votes for the (un)constitutionality of laws presented for abstract review, typically modelling these votes by means of logistic regression (Amaral-Garcia et al. 2009).

Second, these courts are more political than other West European courts, in the twin senses of political noted at the beginning. Other courts of last resort in Western Europe either exercise no constitutional review or exercise such review only as part of a broader case load. If less political case loads lead to less dissent, then these courts may not exhibit sufficiently high levels of dissent for ideal points to be estimated (see, for the UK case, Robertson 1998). In any event, the court's case load gives us less reason to expect that differences of opinion on the court will reflect political rather than jurisprudential concerns.

Third, by engaging in this kind of exercise, we catch up with the level of implicit knowledge of Portuguese and Spanish politicians. In Spain, parties have recently attempted to recuse judges known to be hostile or favourable to specific legislation ('El Gobierno recusarÃ¡ por primera vez a dos jueces del Tribunal Constitucional', *El Pais*, 20 October 2007; 'Seis jueces del Constitucional desmienten los motivos del PP para recusar a tres de ellos', *El Pais*, 11 November 2007). In Portugal, squabbles over appointments to the court have left the court under manned (Magalhães 2003: 220). Parties seem to be fully aware of the relative positions of the judges on the Constitutional Tribunal – and how to manipulate the composition of the Tribunal in order to further their goals. Since parties (and their lawyers: Sala 2009: 14*fn*5) already act as if judges had ideal points that they act upon when judging, making such implicit judgements explicit narrows the gap between the practice of judicial politics and its study.

In what follows, I discuss the institutional characteristics of the Spanish and Portuguese Tribunals, and the extant literature surrounding them. I then discuss the data I have gathered on dissenting opinions, and the model I use to extract justices' ideal points from their dissenting or majority opinions. In the third section I present my results – including statistics for goodness-of-fit and judges' positions – before moving on to discuss the substance that underlies the recovered dimension. I argue that, in both countries, the recovered dimension reflects battles between left and right, rather than any other potential divide.

The institutional context

The Portuguese and Spanish courts were established as part of the constitutional settlements of 1982 and 1978 respectively. Although there were indigenous precedents – limited judicial review under both the Salazar and Francoist regimes, and a short-lived and entirely dysfunctional *Tribunal de Garantías Constitucionales* in Second Republic Spain (Magalhães 2003: 93; González-Trevijano Sánchez 2000) – both countries largely followed the structure and practice of the German Federal Constitutional Court (González-Trevijano Sánchez 2000: 51), and, to a lesser extent, the Italian Constitutional Court. The main institutional characteristics of the courts are broadly similar, and concern the method of appointment, the method of referral to the court, and the structure of court opinions. In both countries the parliament and the judiciary have the power to appoint members to the court. In Spain, eight of the court's twelve judges are nominated by the two chambers of parliament, with each chamber nominating four judges by a three-fifths majority. Two further judges are nominated by the General Council of the Judiciary (*Consejo General del Poder Judicial*, itself a politically-appointed body), and two by the government. In Portugal, ten of the thirteen judges are appointed by the parliament, and the remaining three judges are co-opted by the elected judges. Judges are appointed for terms of 9 years in both Spain and Portugal (though the term of justices appointed in Portugal before 1998 was shorter, at six years, and justices were eligible for re-appointment).

Both tribunals exercise abstract and concrete review of constitutionality. Abstract review may be requested by the President of the Republic (Portugal), the government, the attorney-general (Portugal only), the legislative assemblies and governments of autonomous regions (Madeira and the Azores in Portugal, even where only a small minority [at least 10 per cent] requests it; all autonomous regions in Spain), the ombudsman in each country, and a sufficiently large number of the deputies in Parliament (one tenth in Portugal, fifty deputies or senators in Spain). A priori abstract review still exists in Portugal, subject to referral by the President of the Republic and, since 1989, the prime minister and 20 per cent of the members of parliament; a priori abstract review was abolished in Spain in 1985 (Magalhães 2003: 140), except for the ratification of international treaties. Concrete review of constitutionality occurs through the Portuguese Constitutional Tribunal's appellate jurisdiction in constitutional claims; parties to a case, or the Office of the Public Prosecutor, may appeal where allegations of unconstitutionality have been made during the original trial (Art. 72, Lei do TC). In Spain, concrete review of constitutionality occurs through the Constitutional Tribunal's original jurisdiction in claims by persons alleging violations of their constitutional rights, or upon referral by a court confronted by a constitutional issue (Articles 162 and 163 of the Spanish Constitution). Additionally, both courts have original and appellate jurisdiction in a miscellany of other areas, including adjudicating electoral disputes. Finally, both courts follow the practice of the German Federal Constitutional Court in permitting concurring and dissenting opinions. Article 90 (2) of the Spanish Law on the Constitutional Tribunal allows judges on the tribunal to issue a 'particular vote' (*voto particular*) on a point of disagreement (*su opinión discrepante*), on the condition that the issue has been raised during the course of the tribunal's deliberation. Such opinions are required to be published alongside the majority opinion of the court. Article 42 of the Portuguese Law on the Constitutional Tribunal states that decisions shall be taken 'on the majority vote of members present', and that judges 'have the right to table their reasons for a dissenting vote' (court's translation), though in practice the court has noted whether a particular justice voted in the minority (that is,

whether s/he was *vencido* – literally, defeated), even where s/he has not tabled reasons for a dissenting vote.

Some of these features have attracted greater academic interest than others. There is, for example, an extremely interesting literature on the judicialization of politics that results from broad standing to refer cases for abstract constitutional review (Magalhães 2003; Sala 2009), but the dissenting votes of justices have attracted comparatively little attention. Most of this literature has focused on modelling justices' votes for or against the constitutionality of legislation by way of logistic regression, where the main theoretical interest lies in asessing judicial independence (Amaral-Garcia et al. 2009; Garoupa et al. 2010). But the study of judicial behaviour is not exhausted by considerations of judicial independence, nor by declarations of (un)constitutionality. Justices' dissenting opinions may reveal their own political preferences, which may be unrelated to the wishes of their patrons. Yet, to my knowledge, only Magalhães (2003: 298–299), Magalhães & de Araújo (1998: 17) and Castillo Vera (1987) have attempted to analyze the similarities in justices' voting patterns, and only the first of these is based on a large number of cases. These attempts suggest that both courts are cleanly split by a presumptive left-right cleavage, where inter-bloc differences dwarf intra-bloc differences, but that this finding only holds for abstract review. This literature cannot, however, make conclusions about the characteristics of cases that discriminate between judges; the relative position of judges who have never served together; or the degree of uncertainty that we should place in our estimates of judges' ideal points. All of these are provided by the model that I discuss in the next section.

Data and model

The main purpose of this article is to estimate judges' ideal points. We can estimate judges' ideal points indirectly, by modelling each judge's vote in a particular case as a function of his/her ideal point plus characteristics of the case. These item response models (sometimes called latent trait models) have become increasingly popular in political science (Poole 2008). In this context, the 'item' is the case heard by the court, and the 'response' is the judge's vote in that case – either a *voto vencido* or *voto particular*, or a vote with the majority.[3]

Let us index judges with $j=1,\ldots,J$, and cases with $i=1,\ldots,I$. We are interested in the judge's ideal point, which we denote by . We presume that this ideal point is related in some fashion to the judge's vote in the case. Let the vote of judge j in case i be . This vote is dichotomous, taking values of either one or zero: by convention, we let votes with the majority equal one.

Case characteristics tie ideal points to votes in particular cases. Each case has a location parameter, which we denote by , and a discrimination parameter, which we denote by . The location parameter represents the location of the case in the same space in which judges are located. It is sometimes referred to as the cutpoint, since it divides justices who are more likely to vote with the majority, to one side of the cutpoint, from justices who are more likely to dissent, on the other side of the cutpoint. The discrimination parameter represents the degree to which the case discriminates between judges with similar ideal points. It is analogous to a factor loading in traditional factor analysis. Cases with extremely low magnitude discrimination parameters are cases which are unrelated to the recovered dimension. Note however that the discrimination parameter can be positive or negative: cases

with a positive discrimination parameter require judges to have 'higher' values of the latent trait to vote with the majority, whereas cases with a negative discrimination parameter require judges to have 'lower' values to vote with the majority. If the recovered dimension runs from left to right, then cases with a positive discrimination parameter have a right-wing majority, and vice-versa.

Figure Error: Reference source not found helps us visualize some configurations of location and discrimination parameters. The figure shows the probability of voting with the majority, given a variety of location and discrimination parameters and a range of abilities. The dashed line shows an item that is centrally located and discriminates very well. The dotted line shows an item that is identically located but that discriminates less. Note that the probability of voting with the majority increases with more of the latent trait (more right-wing positions, in the case of a left-right dimension). Conversely, the solid line with overplotted circles shows an item that is located to the left and has moderate discrimination, but where the sign of the discrimination parameter is reversed, meaning that higher levels of the latent trait (again, more right-wing positions) make it less likely that a given judge will vote with the majority.

[Figure 1 about here: Caption: Probability of voting with the majority, given differing discrimination and location parameters]

The link function which enables us to plot Figure Error: Reference source not found is below. Specifically, we link ideal points and case characteristics to votes in particular cases by using a probit link. Thus,

where $\Phi(.)$ is the normal cumulative distribution function, and errors are normally distributed. As it stands, our model is not identified. We could flip our ideal points, or shrink or expand them, without changing the likelihood of the model. In order to impose a metric on the ideal points, I normalize them to have a mean of zero and a standard deviation of one. To ensure that the ideal points are correctly ordered, I set two judges to have negative and positive ideal points. Because we expect that the dimension underlying judicial dissents is likely to be a left-right dimension, I fixed the positions of two justices who were nominated by parties of the left and right respectively. For Portugal, I constrained the positions of Guilherme da Fonseca (nominated by the Portuguese Communist Party) and José Cardoso da Costa (nominated by the right-wing Democratic and Social Centre party) to be positive and negative respectively. For Spain, I constrained the positions of Pablo Perez Tremps (nominated by the Socialist government of José Luis Zapatero) and Roberto García-Calvo (a former regional governor under the Francoist regime, and nominated by the PP) to these same positions.[4]

Directly maximizing the likelihood of the above equation is impractical, with 821 and 2460 parameters to estimate for the Spanish and Portuguese cases respectively. The use of Bayesian Markov Chain Monte Carlo (MCMC) allows us to circumvent these computational problems, as well as providing us with credible intervals for each of the parameters produced. Bayesians arrive at parameter estimates by making inferences that are conditional on the likelihood (the probability of the data, given

current parameters) times their prior beliefs about the parameters. This results in a 'posterior distribution' for parameter estimates.

If these prior beliefs are uniform (reflecting complete prior ignorance about the parameters), the mean of this posterior distribution will be identical to a maximum likelihood estimate. However, for most real world problems, involving many parameters, 'the multivariate posterior density may not have a convenient, analytical form corresponding to one of the probability distributions from which our computer knows how to sample' (Jackman 2004: 493). MCMC allows us to arrive at the posterior density by repeatedly sampling from a larger number of simpler densities for each parameter, conditional on the data and on the last-sampled values of the other parameters. These multivariate draws form a Markov Chain. Given certain conditions, and a sufficiently large number of draws, these samples will approach the desired posterior density – that is, it will converge – giving estimates for the parameters we are interested in. A number of packages now offer routines for MCMC estimation of item response models of the kind discussed above. I used the `MCMCirt1d` routine in the MCMCpack package (Martin et al. 2005), and the default uninformative priors. My data come from the published non-unanimous decisions of the Spanish and Portuguese constitutional tribunals from 2000 – 2009 and 1989 – 2009 respectively. I first downloaded all decisions of these two courts from their respective websites, and then wrote a simple computer script to record the votes of each judge in each case – whether they joined with the majority, or were instead listed as *vencido* on a particular issue (Portugal), or attached a *voto particular* (Spain).[5]

Neither the *voto vencido* nor the *voto particular* is strictly identical to the dissenting opinions understood in the Anglo-American fashion as an opinion that disagrees on how to dispose of a given case. All 'dissenting opinions' are *votos vencidos*, or *votos particulares*, but the converse is not always true. There are conceptual and empirical reasons why the two do not coincide. First, in cases of constitutional review, and abstract constitutional review, it is often impossible to identify a single disposition that is equivalent to the decision of an appellate court in common law systems to allow or dismiss the appeal. More common are multiple holdings, or interpretations, from which judges pick *à la carte*. Second, in many Portuguese cases the reason for a judge's being defeated in a particular case is not listed, making it impossible in principle to identify whether disagreement concerned the disposition of a case, or the reasons for disposing of it in that way.

This poses no necessary problems for ideal point estimation. If disagreements over reasons for deciding a case are related to an underlying latent trait, then we have extra information capable of distinguishing between judges. If, conversely, jurisprudential disagreements are idiosyncratic preferences unrelated to an underlying latent trait (as arch legal realists would argue), then these votes are superfluous.[6] The data set includes only cases in which there was at least one *voto particular* or *voto vencido*. Within our model, a unanimous opinion provides no new information about justices' ideal points because it can always be perfectly explained either by saying that the case lay outside the set of justices' ideal points, or that the case did not discriminate (Ho & Quinn 2010). If we knew a priori that a given case outcome was 'left' or 'right' wing, we could exploit unanimous opinions – but we are very far from this. After discarding unanimous decisions, and votes by one Portuguese judge who participated in very few non-unanimous cases,[7] I was left with two data matrices of size 21 × 400 and 36 × 1212 for Spain and Portugal respectively. These data matrices are in both cases extremely sparse: because the data matrices span several different periods in the history of each court, many justices' votes in cases are missing, and many pairs of

justices have never judged together. This does not pose any problems of estimation: I simply model these courts as if they were notional 'supercourts' of 21 or 36 judges, many of whom were absent for a large number of cases.[8]

Results

Using these constraints, I ran each model for two million iterations, discarding the first 250,000 iterations as burn-in, and thinning by every 250th iteration. Inspection of the trace plots produced by the model showed no signs of non-convergence; the value of Geweke's diagnostic was outside the critical range of ±1.96 for only two judges, both Spanish (Pablo Peréz Tremps and Ramón Arribas).[9]

[Table 1 about here]

I provide a number of standard indicators of model fit, starting with the most obvious, the percentage of decisions that were correctly predicted. As is typical for item response models of deliberative bodies, the percentage of decisions correctly predicted is (misleadingly) high: whilst both models correctly predict many decisions, this is also true of a null model in which every judge always votes with the majority. The average proportional reduction in error (APRE) and the geometric mean probability (GMP) are better indicators of model fit. The APRE measures the improvement, in terms of correctly predicted decisions, relative to the null model. For each vote, the proportional reduction in error is the number of votes in the minority (in this case, dissenting opinions) minus classification errors, divided by the number of votes in the minority. The APRE is simply the average of this figure over each vote. The more errors, the lower the APRE; the null model has an APRE of zero (Poole & Rosenthal 2007: 37).

Whilst the APRE measures improvement in terms of correct or incorrect predictions, the GMP measures improvement in terms of predicted probabilities of each decision. That is, it penalizes models that assign high predicted probabilities to events that do not occur, and vice versa. A GMP of 0.5 is no better than chance; a GMP of 1 predicts perfectly (Poole & Rosenthal 2007: 38). Both the APRE and the GMP suggest that the Spanish tribunal is better predicted by a one-dimensional model than the Portuguese tribunal, though the Portuguese model has far more observations, and also far more observations per judge.

[Figure 2 about here: Caption: Spanish justices' ideal points, 95% confidence intervals]

[Figure 3 about here: Caption: Portuguese justices' ideal points, 95% confidence intervals]

A further check on the model is provided by plotting the confidence intervals surrounding each justice's ideal point. These confidence intervals – and the

substantively interesting output of the model, the ideal points for each justice – are plotted in Figures Error: Reference source not found and Error: Reference source not found, along with their 95 per cent confidence intervals. Ideal points are clustered by the appointing party or actor. The only egregiously large confidence interval is the interval surrounding Martins da Fonseca's ideal point: this, however, is largely a result of the limited number of non-unanimous cases in which Martins da Fonseca sat (16). The ideal points themselves, and the characteristics of the substantive dimension that underlie them, are discussed in the next section.

The recovered dimension

In previous sections, I noted that there was no way to know the substantive content of the recovered dimension in advance, but that nevertheless there was a strong presumption that the dimension would run from left to right. In this section, I show that the recovered dimensions in both countries are left-right dimensions. I demonstrate this by using data about properties of the judges, and properties of the cases.

Properties of the judges

If the recovered dimension is a left-right dimension, justices nominated by left-wing parties should lie to the left of the recovered dimension, and vice-versa. This expectation is reasonable, but relies on two key assumptions. First, we assume that parties have ideal points in some *n*-dimensional space; that the left-right dimension is the dominant dimension in parties' calculations; that parties wish to appoint judges who are close to their ideal point, that parties are not overly-constrained in their choice of judges; that parties make an informed judgement about their nominee's ideal point based on his/her prior behaviour; and that judges' behaviour post-appointment is reasonably similar to the behaviour that led parties to appoint them in the first place. Each of these assumptions is reasonable in the Spanish and Portuguese cases. The principal parties in each country – the PS and PSD in Portugal, the PP and PSOE in Spain – are differentiated by left and right; and expert surveys conducted in both countries rate the issue of taxes versus spending as more important than decentralization (Benoit & Laver 2006). Parties in both countries have demonstrated time and again that they consider the composition of the court to be a conflictual issue, rather than a neutral evaluation of competence: both the lengthy delays in appointing new members to each court, and the recusal processes discussed in the introduction of this article testify to this. In both countries parties are free to nominate individuals with no judicial experience, which obviates the conservative bias that Griffith (1977) claimed to exist in the British judiciary, and which might therefore hamstring socialist parties.[10] Finally, whilst there are no data to allow a comparison of nominees' judicial behaviour before and after appointment, the tenure of judges in each court (9 years in Spain and Portugal after 1998, and 6 years in Portugal before that) is not sufficiently long for judges' behaviour to alter as much as it does, say, in systems of life-time tenure.

Since Figures Error: Reference source not found and Error: Reference source not found report the party that nominated each judge, we can compare the average position on the recovered dimension of judges nominated by each party. Information on the nominating party has been taken from a variety of sources, and save for

governmental nominees in the Spanish case, these labels are subject to debate.[11] This is more true for some judges than for others: Rodriguez-Zapata's nomination is listed as the product of a consensus between the PP and the PSOE necessary to fill a spot on the Constitutional Tribunal after Garrido Falla's retirement on grounds of ill-health, but the PSOE was obliged to chose from a list of names provided by the PP, and Rodriguez-Zapata had already been mentioned as a possible nominee of the PP in its own right.

For Portugal, the judges are in approximately the rank order we would expect if parties' left-right positions were paramount in appointments. The sole CDS appointee is to the right of the mean PSD appointee, who is to the right of the mean PS appointee, who is to the right of the mean Communist appointee. Neutral appointees or co-opted members of the Tribunal tend to be in the middle of the rank order, with the exception of Martins da Fonseca, whose positioning, as I have already noted, is subject to considerable uncertainty. This rank ordering does not exclude the possibility that the recovered dimension is a centre-periphery dimension, since the Communist Party favours more decentralization than the Socialist Party, which in turn favours more decentralization than the PSD (Benoit & Laver 2006). Nevertheless, the relative positions of PCP, PS, PSD and PCP appointees are more consonant with these party's left-right positions than their more muted positions on decentralization.

For Spain, the party system theoretically provides more potential leverage, in that there are parties of the centre that nevertheless have marked positions on the issue of decentralization, such as Convergència y Unió (CiU). These smaller parties, however, have been marginalized within the appointments process ('El PSC cree que el PP ha "menospreciado" a una CiU "sumisa"', Spanish Newswire Service, 1 October 2001). Consequently, only PP and PSOE nominees are shown in Figure Error: Reference source not found. Once again, nominees are in approximately the right rank order if parties' left-right positions are paramount, though a number of consensus nominees occupy extreme positions, and Jiménez de Parga is an outlier amongst PSOE-nominated judges. Nominees are more strongly clustered than in Portugal: one can identify a large group of centre-left judges, from Pablo Perez Tremps to Jimenez Sanchez, and a subsequent minority group of eight more conservative judges, which in turn is divided into a moderate group (Delgado Barrio, Rodriguez Arribas, and Garrido Falla), an unusual combination of Jiménez de Parga, Conde Martín de Hijas and de Mendizábal Allende, and a final outlying duo. Again, however, the positions of the nominees of each party do not exclude the possibility that the recovered dimension is a left-right dimension. Below I go on to demonstrate that properties of those cases that discriminated with respect to the recovered dimension show that the dimension in Portugal is much more likely to be a left-right dimension, and that cases that involve centre-periphery relations discriminate less. Conversely, cases involving centre-periphery relations discriminate much more in Spain, and therefore it is worth spending extra time assessing judges' positions in order to ascertain whether what separates, say, Delgado Barrio from Conde Martin de Hijas, is a difference between left and right or a difference between centre and periphery. To do so, I turn to the media coverage of the judges during their tenure on the court. Media descriptions of judges have a long pedigree in judicial research, from Segal & Cover (1989) onwards. It is notable that the Spanish media is almost unanimous in describing judges' orientations in terms of left and right rather than in terms of 'centralists' or 'separatists'. Judges on the court are repeatedly divided into progressive and conservative 'blocs' ('La recusación del PP rompe en dos el bloque conservador del Constitucional', *El Pais*, 17 November 2007). This is so even in newspaper coverage of cases that explicitly involve a centre-periphery dimension, such as the decision in

the Catalonian Statute case (‘El término ‘nación’ se cae del Estatuto’, *El Pais* 22 November 2009).

Moreover, the judges who compose each bloc could be predicted on the basis of Figure Error: Reference source not found. One untitled sidebar in *ABC* in 2008 described justices Casas Baamonde, Pérez Vera, Gay Montalvo, Sala Sánchez, Aragón Reyes, and Pérez Tremps as belonging to the progressive bloc, whilst justices Conde Martin de Hijas, Delgado Barrio, Rodriguez Arribas, Rodríguez-Zapata and García-Calvo were described as members of the conservative bloc. All of the first group are to the left of the median justice (Cachón Villar); all of the second group are to the right.

When the media do differentiate between justices within these blocs, the rank-ordering of justices again matches that found in Figure Error: Reference source not found. After Roberto Garcia-Calvo’s death, *El Pais* described Jorge Rodríguez Zapata as ‘the most irrecondite ultraconservative of all the Court’ (‘El término ‘nación’ se cae del Estatuto’, *El Pais*, 22 November 2009); Garcia-Calvo in turn was obliged to describe himself as a ‘judicial conservative’, if only to forestall accusations from the PSOE that he was an anti-constitutional extremist, in what was a clear reference to Garcia-Calvo’s past role as Governor of Almeria under the Francoist regime (‘Garcia Calvo ve insultante consideren ultra y anticonstitucional’, Spanish Newswire Services, 25 October 25 2001).

Justices whose ideal points are not extreme are also accurately described by the media: Aragón Reyes’ moderate positions, for example, are often noted (‘El Estatuto mete al Constitucional en un callejón sin salida’, *El Pais*, 29 November 2009, p. 14). The only cases where media descriptions of judges badly conflict with the ideal points plotted in Figure Error: Reference source not found come about when the media attribute moderate positions to justices on the extremes. This, for example, is the case for Gonzalez Campos, who is described as ‘largely non-sectarian’, despite his position to the left of most current and former justices of the Court. (Having said this, the 95 per cent confidence interval for Gonzalez Campos’ ideal point does suggest that his position was harder to pin down than most).

The link between nominating parties’ left-right positions and judges’ ideal points, and for Spain, the link between media descriptions of justices in terms of left and right and those justices’ ideal points, both strongly suggest that the recovered dimension is a left-right dimension. With only a score of justices in each country, however, this evidence is necessarily limited. I now turn to properties of the cases involved in the analysis, to see whether they clarify the substantive content of the recovered dimension.

Properties of the cases

If the recovered dimension is a left-right dimension, then, first, cases with a clearly party-political character should discriminate more with respect to the recovered dimension than cases without a clearly party-political character; and second, cases that are initiated by left- or right-wing partisans should discriminate more with respect to the recovered dimension than cases initiated by individuals or organizations that represent opposite poles of other political dimensions.

[Table 2 about here]

I therefore disaggregate figures on the percentage of cases that discriminated according to four types of case. **Horizontal political disputes** are typically those that involve the court as a notional 'third chamber' to stall the adoption of national legislation, but also include cases brought by parliamentary minorities against changing parliamentary procedure employed by the majority, including parliamentary procedure in regional assemblies.[12] **Vertical political disputes** are those that are brought by central authorities against regional authorities, or vice-versa. **Electoral disputes** are those cases that are referred to the court under its original (Portugal) or appellate (Spain; *recursos de amparo electoral*) jurisdiction in electoral disputes. **Other disputes** are all those cases brought by other actors, including the Ombudsman and Office of the Public Prosecutor (see Table Error: Reference source not found).

If the recovered dimension is primarily a left-right dimension, then we should expect that horizontal political disputes and electoral disputes will be most likely to discriminate (that is, a larger percentage of cases in this category will have discrimination parameters whose 95% confidence intervals do not include zero). Conversely, if the recovered dimension is primarily a centre-periphery dimension, we should expect vertical political disputes to be most likely to discriminate.

Figure Error: Reference source not found shows the percentage of discriminating cases by case type as well as the total number of cases.

[Figure 4 about here: Caption: Discrimination by area. Sub-captions: (a) Portugal; (b) Spain]

In both cases, horizontal disputes are most likely to discriminate. Vertical political disputes discriminate least well in Portugal, and discriminate averagely well in Spain. Electoral disputes, which we might expect to embody clashes between left and right, discriminate relatively well in Portugal, discriminating even more than the vast bulk of the Tribunal's ordinary caseload. Conversely, only a few of the limited number of (non-unanimous) electoral disputes heard by the Spanish Constitutional Tribunal discriminated.

In both countries, but particularly in Spain, these findings are relatively brittle, in that they rely on a small number of cases in important categories. Changes to a few cases might alter the ordering of types of cases. In isolation, these data do not provide sufficient evidence that the recovered dimension is indeed a left-right dimension, and does not mask a centre-periphery dimension. They should therefore be interpreted alongside the data on judge characteristics.

Conclusion

Thus far I have shown that the non-unanimous decisions of the Spanish and Portuguese constitutional tribunals can be analyzed using the kind of ideal point models that have previously been used to study the United States Supreme Court. Using these models, we can explain judging on the Spanish and Portuguese constitutional tribunals as being a function of judges' positions on a dimension

running from left to right. However, this left-right dimension structures more of the Spanish court than the Portuguese court, and we can better predict the far fewer split decisions of the Spanish court.

These findings should be interpreted carefully. In particular, they cannot be used to make comparisons between ideal points of justices on different courts. We have no way of knowing whether the most left-wing judge on the Spanish court is to the left or right of the most left-wing judge on the Portuguese court. Even if we did know that Pablo Pérez Tremps was far to the left of Fernanda Palma Pereira, we would still have to be cautious about describing Pérez Tremps as a more left-wing judge, since dissenting opinions are less frequent on the Spanish court, perhaps indicating that even judges who are extreme on some issues will readily agree on other issues with judges who have very different political opinions.

These findings should also not be interpreted as claims about alternate ways of viewing the court. Sala (2009) and Garoupa et al. (2010) have discussed the important role that the constitutional court plays in adjudicating constitutional disputes between centre and periphery. In this article, I have shown that a single latent dimension discriminates much more in cases involving horizontal disputes – and thus disputes that we would presume to be between left and right – than vertical disputes. This does not mean that a second centre-periphery dimension does not also structure judicial decisions, merely that this dimension is not primary. There clearly are cases that reflect tensions between centre and periphery: the Spanish tribunal's decision on the Treaty establishing a European Constitution (Schutte 2005) is one example. Yet here, the voting patterns of justices can be accounted for perfectly well by a single dimension, since the judges who opposed ratifying the transfer of further powers to the European Union (Rodriguez Arribas, Garcia Calvo y Montiel and Delgado Barrio) were all right-wing judges. A multidimensional analysis of the court might shed light on this issue. Whilst multi-dimensional MCMC models are perfectly feasible, they are only rarely successful. Typically only in legislative settings are multiple dimensions sufficiently clear to emerge in the analysis: when carrying out an analysis such as this one on a relatively sparse data matrix, there is a great risk that the Markov Chain Monte Carlo sampler will travel between multiple posterior modes and fail to achieve convergence (Jackman 2001). This seems to be the case for the Spanish tribunal: even with informative priors for some key disputes between centre and periphery, the model fails to converge. Further dimensions of judicial decision making on the Portuguese and Spanish Constitutional Tribunals may well exist, but scholars may need to leverage auxiliary information to uncover them.

Acknowledgements

I should like to thank Nuno Garoupa, Juan Antonio Mayoral Diaz, Sergi Pardos Prado and Gemma Sala for comments on a previous draft of this article. All errors are my own.

References

Amaral-Garcia, S., Garoupa, N., & Grembi, V. (2009). Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal. *Journal of Empirical Legal Studies*, *6*(2), 381–404.

Bafumi, J., Gelman, A., Park, D. K., & Kaplan, N. (2005). Practical issues in implementing and understanding Bayesian ideal point estimation. *Political Analysis*, *13*(2), 171–187.

Benoit, K., & Laver, M. (2006). *Party policy in modern democracies*. Routledge.

Castillo Vera, P. (1987). Notas para el estudio del comportamiento judicial: el caso del Tribunal Constitucional. *Revista Española de Derecho Constitucional*, (20), 177–194.

De Araújo, A. (1997). *O Tribunal Constitucional: 1989-1996: um estudo de comportamento judicial*. Coimbra Editora.

Fiorino, N., Padovano, F., & Sgarra, G. (2007). The Determinants of Judiciary Independence: Evidence from the Italian Constitutional Court (1956-2002). *Journal of Institutional and Theoretical Economics*, *163*(4), 683–705.

Franck, R. (2008). Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959-2006. *Journal of Law, Economics, and Organization*, *25*(1), 262–284.

Garoupa, N., Gomez-Pomar, F., & Grembi, V. (2010). Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court. Unpublished working paper.

González-Trevijano Sánchez, P. J. (2000). *El Tribunal Constitucional*. Elcano: Editorial Arazandi.

Griffith, J. (1977). *The politics of the judiciary*. Manchester: Manchester University Press.

Ho, D., & Quinn, K. (2010). How Not To Lie with Judicial Votes: Misconceptions, Measurement, and Models. *California Law Review (forthcoming)*, *98*.

Hodder-Williams, R. (1992). Six Notions of 'Political' and the United States Supreme Court. *British Journal of Political Science*, *22*(1), 1–20.

Jackman, S. (2001). Multidimensional analysis of roll call data via Bayesian simulation: Identification, estimation, inference, and model checking. *Political Analysis*, *9*(3), 227–241.

Jackman, S. (2004). Bayesian Analysis for Political Research. *Annual Review of Political Science*, *7*, 483–505.

Kelsen, H. (1961). *General Theory of Law and State*. New York: Russell and Russell.

Kommers, D. P. (1976). *Judicial Politics in West Germany*. Beverley Hills, CA: Sage Publications.

Kommers, D. P. (1997). *The constitutional jurisprudence of the Federal Republic of Germany*. Duke University Press.

Laffranque, J. (2003). Dissenting Opinion and Judicial Independence. *Juridica International*, *8*, 162–166.

Magalhães, P. C. (2003). *The limits to judicialization: legislative politics and constitutional review in the Iberian democracies*. Ph.D. thesis, Ohio State University.

Magalhães, P. C., & de Araújo, A. (1998). A Justiça Constitucional entre o Direito e a Política: o Comportamento Judicial no Tribunal Constitucional Português. *Análise Social*, *33*, 7–53.

Malecki, M. (2009). Judicial Behavior Behind Mask and Shield: Modeling the European Court of Justice. Paper presented the 2009 APSA meeting in Toronto.

Martin, A., Quinn, K., & Park, J. H. (2005). MCMCpack: Markov chain Monte Carlo (MCMC) Package.

Martin, A. D., & Quinn, K. (2002). Dynamic ideal point estimation via Markov chain Monte Carlo for the US Supreme Court, 1953-1999. *Political Analysis*, *10*(2), 134–153.

Mastor, W. (2005). *Les opinions séparées des juges constitutionnels*. Paris: Economica.

Poole, K. (2008). The Evolving Influence of Psychometrics in Political Science. In J. M. Box-Steffensmeier, H. Brady, & D. Collier (eds) *The Oxford Handbook of Political Methodology*, (pp. 199–213). Oxford: Oxford University Press.

Poole, K., & Rosenthal, H. (2007). *Ideology and Congress*. New Brunswick, NJ: Transaction Publishing.

Robertson, D. (1998). *Judicial discretion in the House of Lords*. Cambridge: Cambridge University Press.

Sala, G. (2009). The impact of Judicial Review on Federalism in Spain. Paper presented at the 2009 Midwest Political Science Association, Chicago, April 2-5.

Schubert, G. (1958). The study of judicial decision-making as an aspect of political behavior. *The American Political Science Review*, *52*(4), 1007–1025.

Schutte, C. (2005). Spain. Tribunal Constitucional on the European Constitution. Declaration of 13 December 2004. *European Constitutional Law Review*, *1*(2), 281–292.

Segal, J., & Cover, A. D. (1989). Ideological Values and the Votes of US Supreme Court Justices. *American Political Science Review*, *83*(2), 557–565.

Stone Sweet, A. (1992). *The birth of judicial politics in France: the constitutional council in comparative perspective*. Oxford: Oxford University Press.

Stone Sweet, A. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies*, *32*(2), 147–184.

Volcansek, M. L. (2000). *Constitutional politics in Italy: the constitutional court*. New York: St. Martin's Press.

[1] For France, see Mastor (2005: 181–182); for Italy, Constitutional Court decision no. 18/1989, cited in Volcansek (2000: 27); Laffranque (2003) offers a general summary.

[2] The German Federal Constitutional Court has permitted dissenting opinions since 1971 (Kommers 1976: 195), but explicit dissenting opinions issued under the names of particular judges are rare, with only 37 in the past twelve years, none of which have been in the plenary, making it difficult if not impossible to place all judges during the period on a comparable metric.

[3] Here, I am using the word 'majority' loosely, to refer to those judges who did not issue a *voto particular* or *voto vencido*, though in theory, it would be possible for a majority of judges to have written conflicting *votos particulares*.

[4] The directionality constraint was set within MCMCpack; the scaling constraint was imposed by post-processing the output of MCMCpack. An earlier version of this article set the four above-mentioned judges to fixed points at plus and minus two; in the Portuguese case this over-stated the extremism of both Guilherma da Fonseca and Cardoso da Costa. Similar results were obtained by constraining other judges to have positive and negative ideal points. These results are available on request.

[5] These computer scripts were revised several times to deal with changes in the way decisions in each country were reported.

[6] For completeness, I re-ran my analysis of the Spanish court eliminating 29 cases where judges clearly marked their *votos particulares* as concurring. The results were almost identical, and are available on request.

[7] Rui Pereira was nominated as a Constitutional Tribunal Justice in April of 2007, but left to become Minister of the Interior the following month.

[8] This approach has also been used by Bafumi et al. (2005)

[9] Trace plots are available from the author on request.

[10] Appointees must, however, have previous experience of the law.

[11] For Spain: 'Las cuatro vacantes del constitucional', *El Pais*, 19 July 2001 (Pérez Vera); 'TC renovacion, Bereijo propone reformar Ley TC y Ministra muestra disposicion', Spanish Newswire Services, 17 December 1998 (Casas Baamonde, Garrido Falla, Jiménez Sanchez, Conde Martín de Hijas); 'El catedratico Pedro Cruz Villalon elegido Presidente del Constitucional por 7 votos', *El Pais*, 22 December 1998 (Viver Pi-Sunyer, González-Campos); 'El PSC cree que el PP ha "menospreciado" a una CiU "sumisa"', Spanish Newswire Service, 1 October 2001 (Gay Montalvo); 'El magistrado del Supremo Rodriguez Zapata sustituira a Garrido en el TC', *El Mundo*, 17 December 2002 (RodrÃguez-Zapata Pérez); 'Tribunal Constitucional, Pedro Cruz Villalon elegido presidente por mayoria absoluta', Spanish Newswire Service, 21 December 1998 (Cruz Villalon); 'Organos constitucionales, Garcia-Calvo ve insultante consideren ultra y anticonstitucionalÂ ', Spanish Newswire Services, 25 October 2001 (Garcia-Calvo).

For Portugal: nominating parties as noted in Amaral-Garcia et al. (2009), except for 'PS e PSD acordaram seis novos juizes', TSF Radio Noticias, 21 March 2007 (Pinto Correia, Guerra Martins and Fernandes Cadilha); and 'Joaquim de Sousa Ribeiro tomou hoje posse como juiz do Tribunal Constitucional', Diario Economico, 13 July 2007 (de Sousa Ribeiro).

[12] See, for example, decision STC 227/2004, concerning the dissolution of the Galician parliamentary commission investigating the *Prestige* disaster.

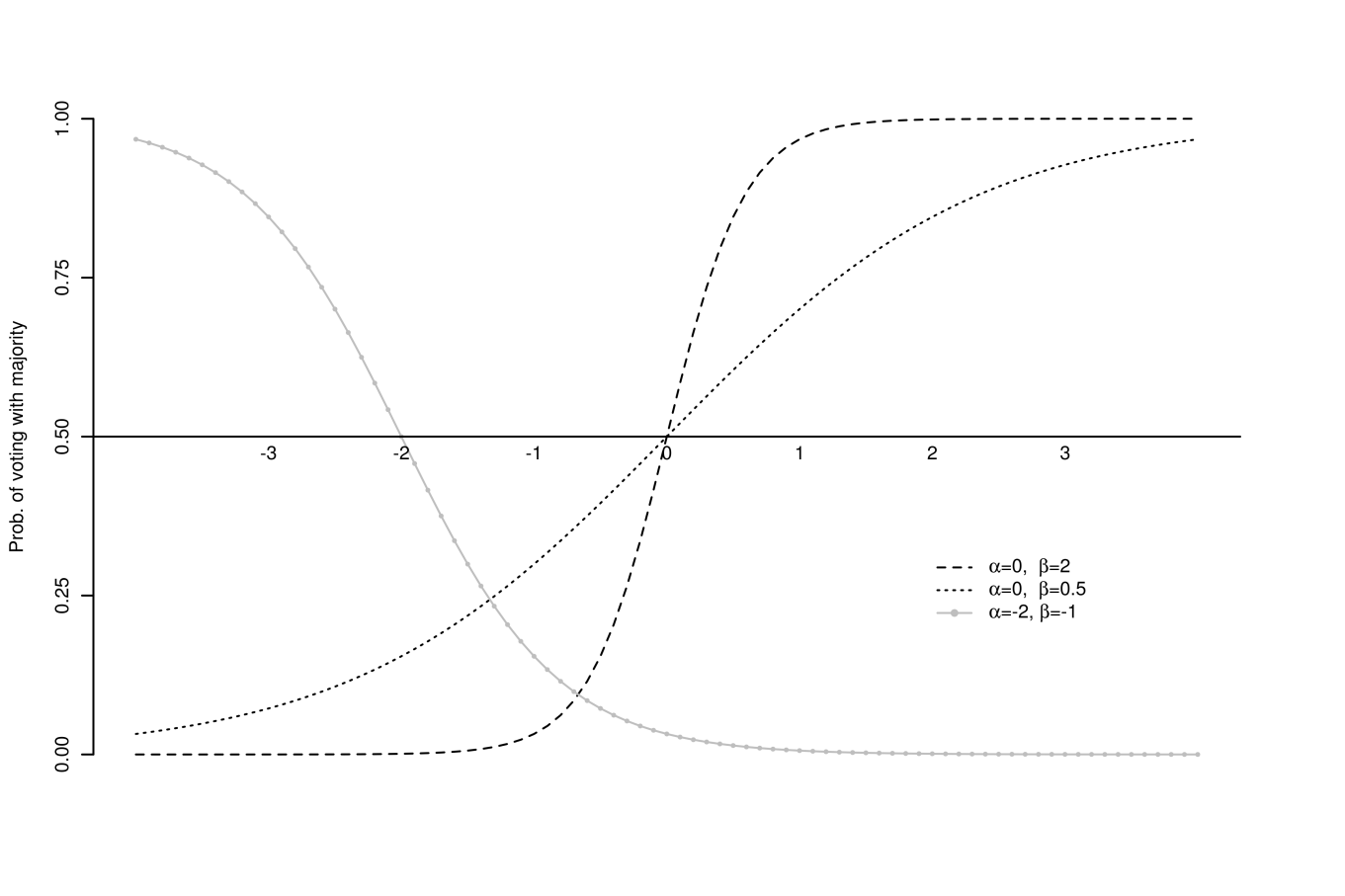
Table 1: Model Fit Statistics

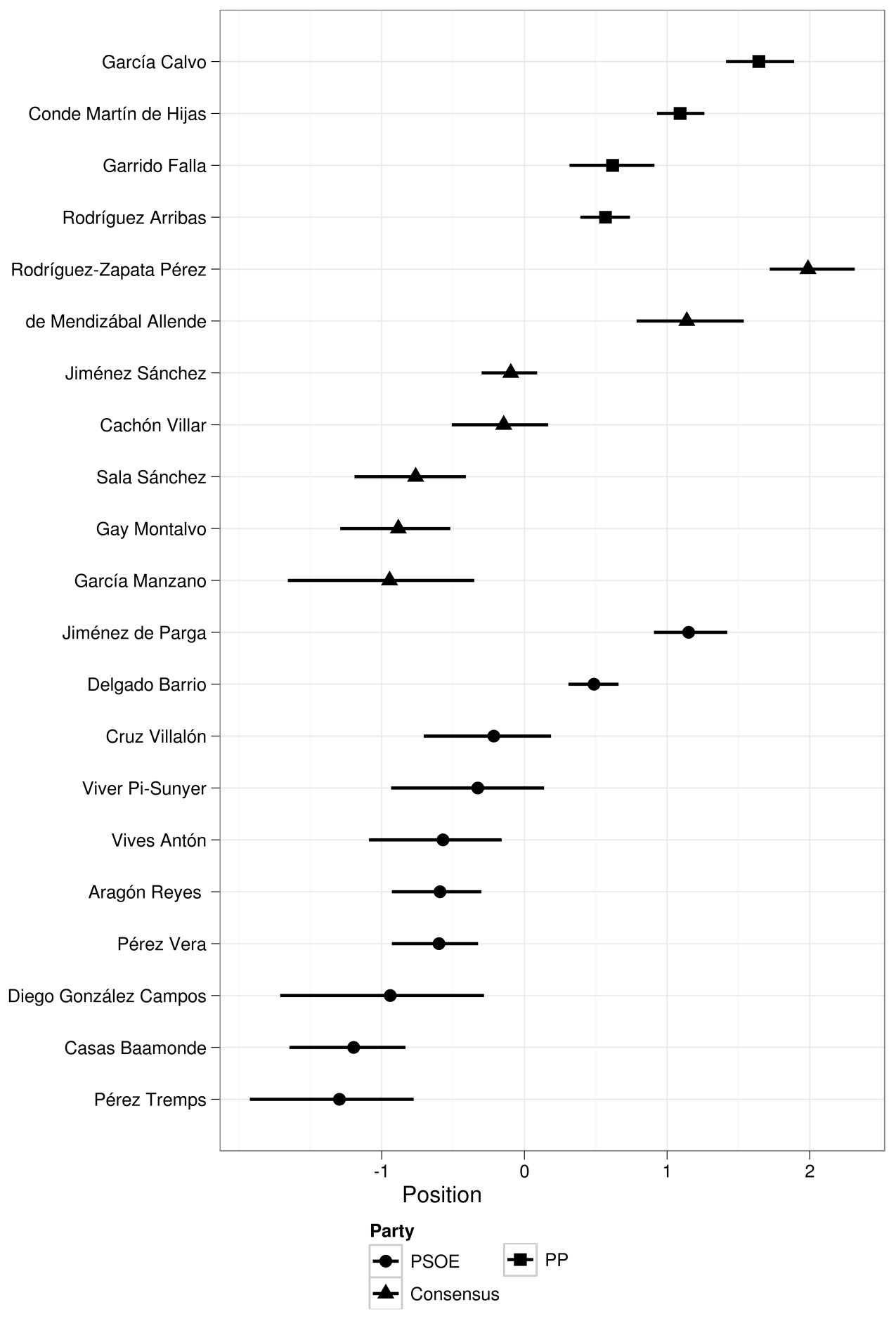
	Spanish TC	Portuguese TC
Data matrix	21 x 400	36 x 1212
Decisions predicted correctly	89.2%	84.4%
Best, by judge	Reyes (97%)	Fernanda Palma Pereira (98%)
Worst, by judge	Allende (75%)	Pizarro Beleza (59%)
Log-likelihood	-792.6	-2908.3
GMP	0.79	0.72
APRE	0.47	0.41
Discriminating cases	51.4%	36.3%

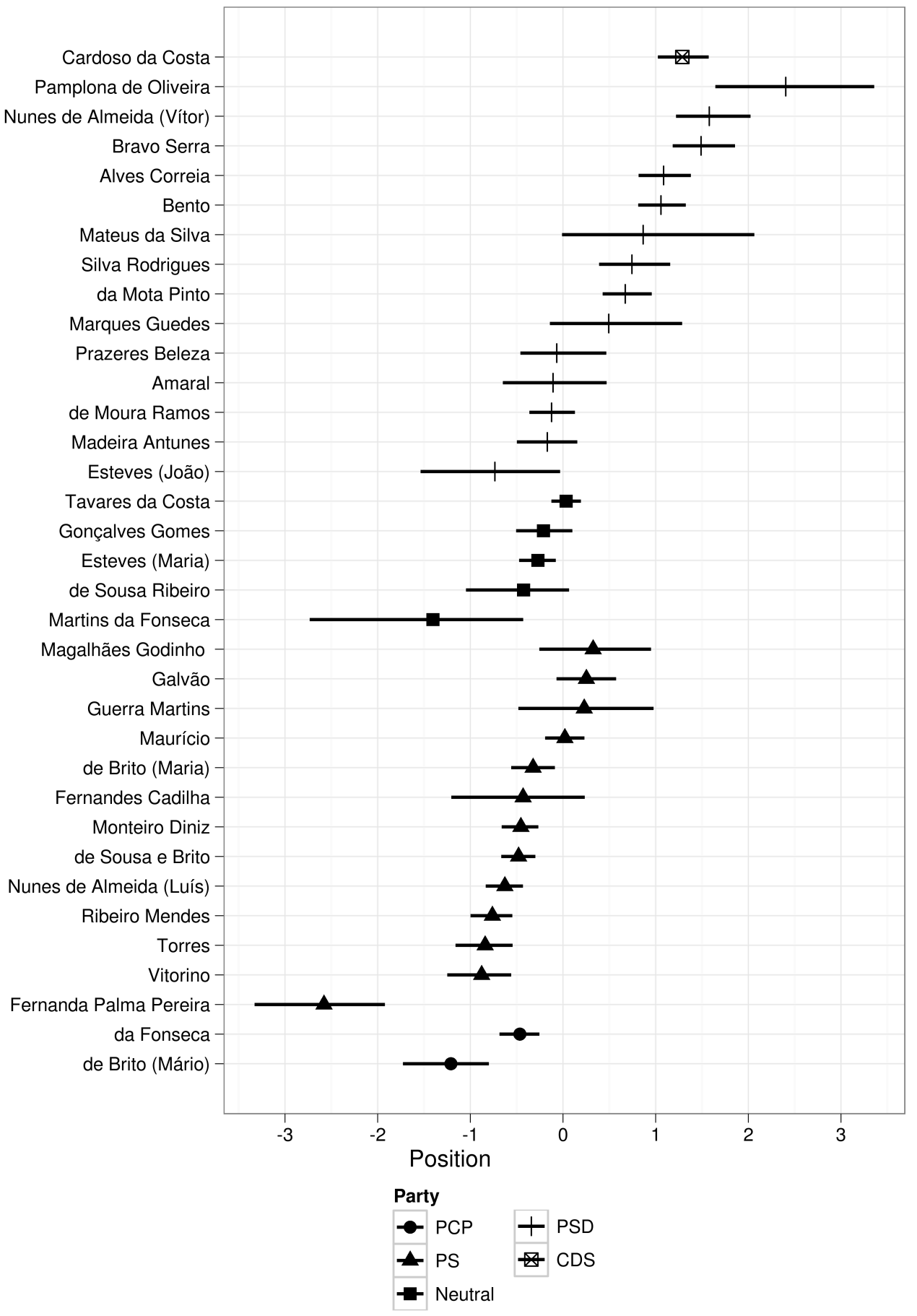
Note: 'Discriminating cases' are those cases which had a discrimination parameter whose 95% credible interval did not encompass zero.

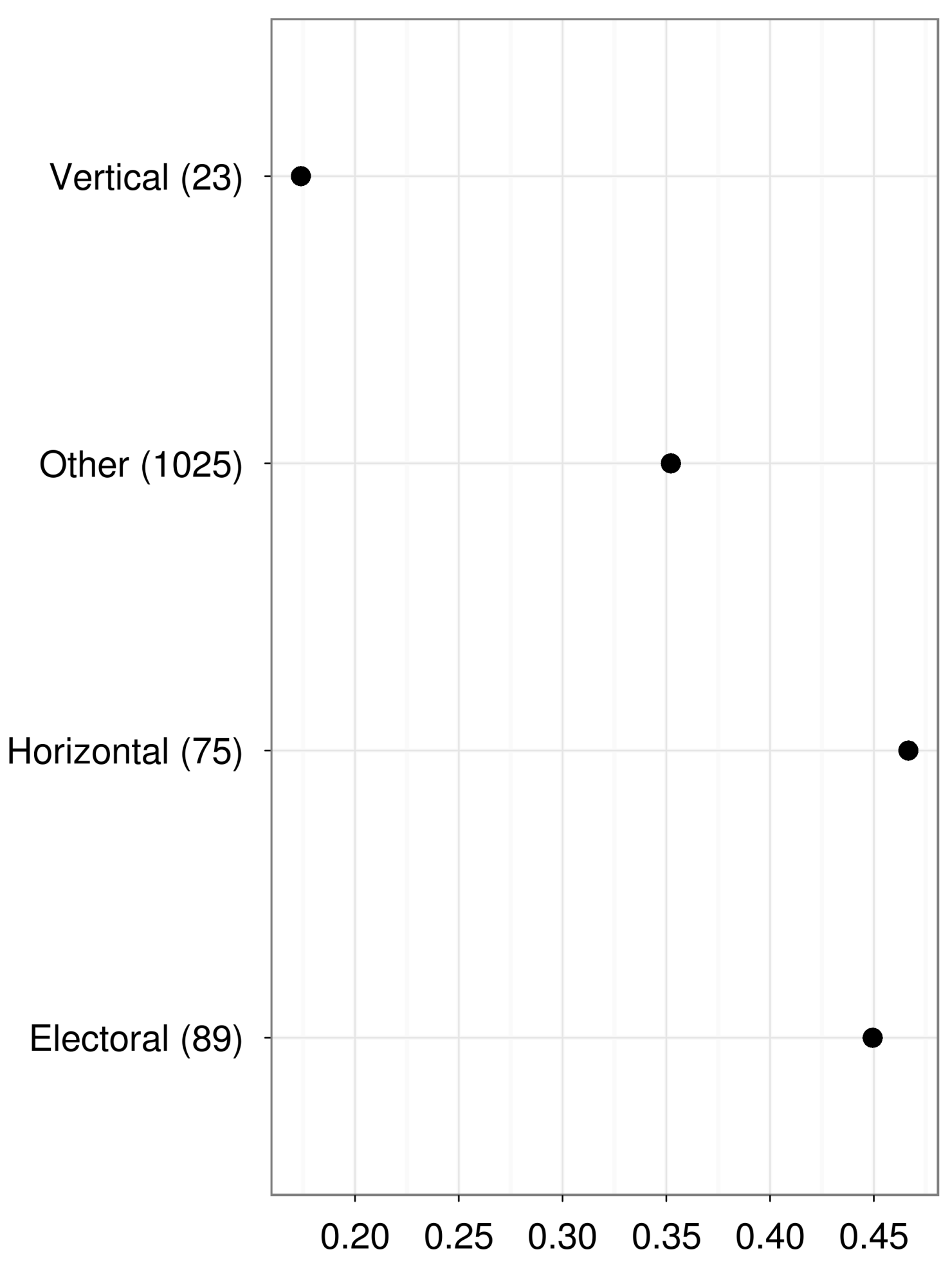
Table 2: Cases by the nature of dispute involved

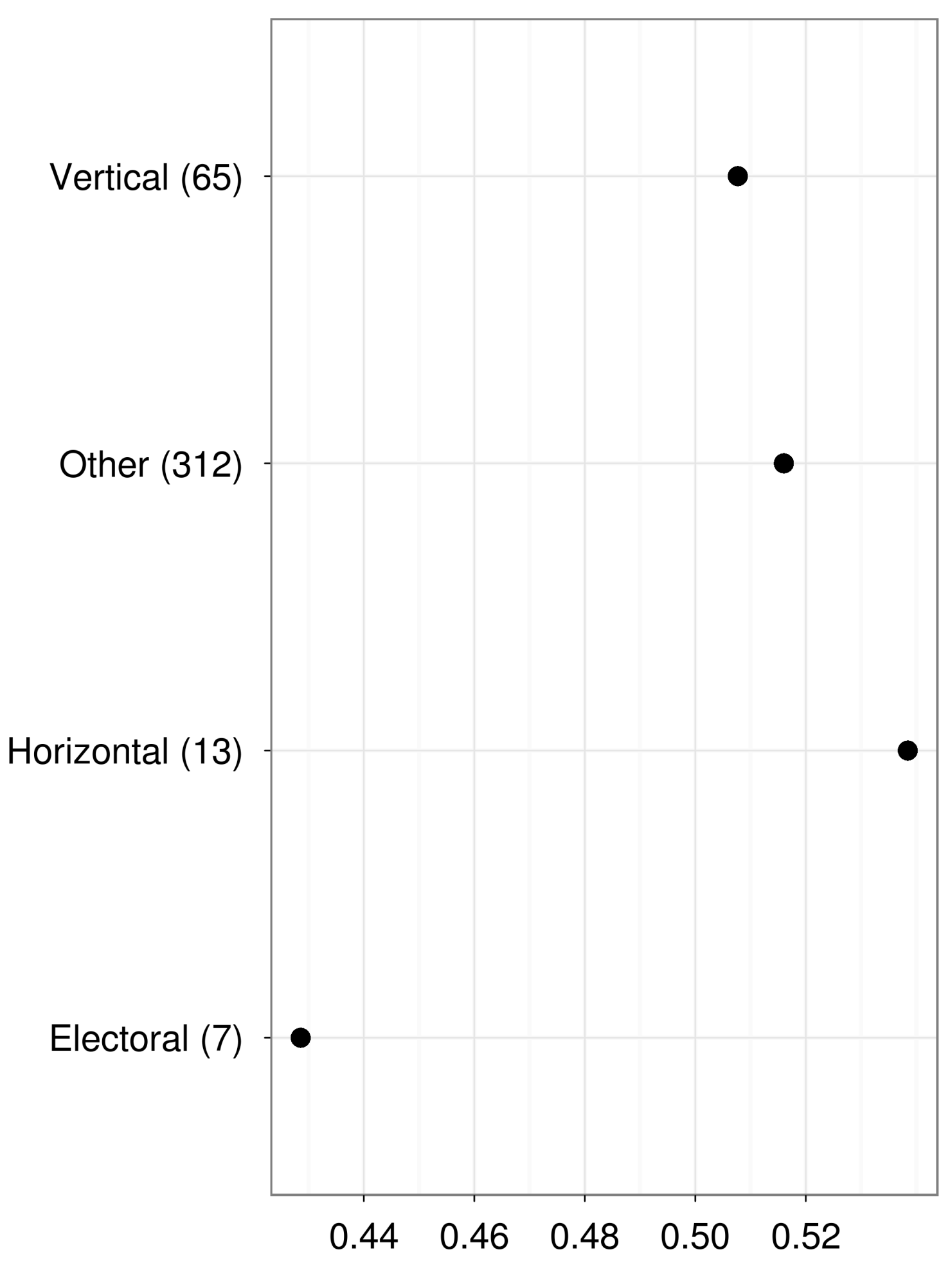
Type of dispute	Spain	Portugal
Horizontal, political	Referral by 50 deputies or senators concerning national legislation; referral by executives and assemblies of autonomous communities concerning regional legislation (Art. 162§1(a))	Referral by the President of the Republic (Art. 278§1, 281§2(a)), by the prime minister, or one-tenth of deputies (Art. 278§4, Art. 281§2(c,f)) concerning national legislation or decrees.
Vertical, political	Referral by the prime minister or 50 deputies or senators concerning regional legislation; referral by the executives and assemblies of autonomous communities concerning national legislation (Art. 162§1(a))	As above, except where the referral concerns regional legislation; additionally, referral by the Ministers for the Azores and Madeira; by the executives or regional assemblies in the Azores or Madeira.
Electoral	Referral under Art. 114 of the *Ley de Régimen Electoral*	Referral under Art. 223 of the Constitution
Other concrete review	Referral by the Ombudsman or the Office of the Public Prosecutor, *recursos de amparo* under Art. 162 §1(b)	Referral by the Ombudsman or Attorney-General, referral under the Court's appellate jurisdiction (Art. 280)


Prob. of voting with majority
1.00
0.75
0.50
0.25
0.00
-3
-2
-1
0
1
2
3
α=0, β=2
α=0, β=0.5
α=-2, β=-1


García Calvo
Conde Martín de Hijas
Garrido Falla
Rodríguez Arribas
Rodríguez-Zapata Pérez
de Mendizábal Allende
Jiménez Sánchez
Cachón Villar
Sala Sánchez
Gay Montalvo
García Manzano
Jiménez de Parga
Delgado Barrio
Cruz Villalón
Viver Pi-Sunyer
Vives Antón
Aragón Reyes
Pérez Vera
Diego González Campos
Casas Baamonde
Pérez Tremps
-1
0
1
2
Position
Party
PSOE
PP
Consensus


Cardoso da Costa
Pamplona de Oliveira
Nunes de Almeida (Vítor)
Bravo Serra
Alves Correia
Bento
Mateus da Silva
Silva Rodrigues
da Mota Pinto
Marques Guedes
Prazeres Beleza
Amaral
de Moura Ramos
Madeira Antunes
Esteves (João)
Tavares da Costa
Gonçalves Gomes
Esteves (Maria)
de Sousa Ribeiro
Martins da Fonseca
Magalhães Godinho
Galvão
Guerra Martins
Maurício
de Brito (Maria)
Fernandes Cadilha
Monteiro Diniz
de Sousa e Brito
Nunes de Almeida (Luís)
Ribeiro Mendes
Torres
Vitorino
Fernanda Palma Pereira
da Fonseca
de Brito (Mário)
-3
-2
-1
0
1
2
3
Position
Party
PCP
PS
Neutral
PSD
CDS


Vertical (23)
Other (1025)
Horizontal (75)
Electoral (89)
0.20
0.25
0.30
0.35
0.40
0.45


Vertical (65)
Other (312)
Horizontal (13)
Electoral (7)
0.44
0.46
0.48
0.50
0.52