

## Pathways to Karlsruhe: A Sequence Analysis of the Careers of German Federal Constitutional Court Judges

Jäckle, Sebastian

Postprint / Postprint

Zeitschriftenartikel / journal article

### Empfohlene Zitierung / Suggested Citation:

Jäckle, S. (2016). Pathways to Karlsruhe: A Sequence Analysis of the Careers of German Federal Constitutional Court Judges. *German Politics*, 25(1), 25-53. <https://doi.org/10.1080/09644008.2015.1124266>

### Nutzungsbedingungen:

Dieser Text wird unter einer Deposit-Lizenz (Keine Weiterverbreitung - keine Bearbeitung) zur Verfügung gestellt. Gewährt wird ein nicht exklusives, nicht übertragbares, persönliches und beschränktes Recht auf Nutzung dieses Dokuments. Dieses Dokument ist ausschließlich für den persönlichen, nicht-kommerziellen Gebrauch bestimmt. Auf sämtlichen Kopien dieses Dokuments müssen alle Urheberrechtshinweise und sonstigen Hinweise auf gesetzlichen Schutz beibehalten werden. Sie dürfen dieses Dokument nicht in irgendeiner Weise abändern, noch dürfen Sie dieses Dokument für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, aufführen, vertreiben oder anderweitig nutzen.

Mit der Verwendung dieses Dokuments erkennen Sie die Nutzungsbedingungen an.

**gesis**  
Leibniz-Institut  
für Sozialwissenschaften

### Terms of use:

This document is made available under Deposit Licence (No Redistribution - no modifications). We grant a non-exclusive, non-transferable, individual and limited right to using this document. This document is solely intended for your personal, non-commercial use. All of the copies of this documents must retain all copyright information and other information regarding legal protection. You are not allowed to alter this document in any way, to copy it for public or commercial purposes, to exhibit the document in public, to perform, distribute or otherwise use the document in public.

By using this particular document, you accept the above-stated conditions of use.

Mitglied der  
  
Leibniz-Gemeinschaft

**Pathways to Karlsruhe -  
A Sequence Analysis of the Careers of German Federal Constitutional Court Judges**

SEBASTIAN JÄCKLE  
University of Freiburg

**Abstract**

*Judges of the German Federal Constitutional Court can be seen as both judicial and political elites. Yet, up to now there is no systematic work on the Court's' judges and especially their careers prior to their appointments. Using sequence analysis, I identify four relatively distinct clusters of career characteristics: academia, administration (and administrative courts), ordinary jurisdiction and politics. Judges whose career background is limited to the judicial sphere mostly advance from a level below the Länder to the Länder and then on to the federal level, while those with a background in politics or administration switch less often among them. Furthermore, I find little evidence to suggest that differences in the judges' career paths can be explained by reference to the body that elected them (Bundestag or Bundesrat) or the party that nominated them (CDU/CSU or SPD). The article also illustrates the possibilities of sequence analysis for elite studies.*

**Keywords**

**Federal Constitutional Court – Politicization – Judicialization – Sequence Analysis – Elite Studies – Career – Biographies**

## INTRODUCTION

Again and again surveys show that the German Federal Constitutional Court (FCC) is among the most popular institutions with the German public.<sup>1</sup> The FCC is in a strong judicial and political position when compared to other constitutional courts due to its institutional arrangement, its formal powers<sup>2</sup>, and especially its high legitimacy.<sup>3</sup> Yet, contrary to its popularity and its wide range of power, research on the FCC – like on most other constitutional courts – has until recently been quite one-dimensional. Following the main argument in Alec Stone Sweet’s landmark book ‘Governing with Judges’<sup>4</sup>, most work on constitutional courts in Europe, including the German FCC<sup>5</sup>, has focused on the judicialization of politics<sup>6</sup> and the politicization of justice<sup>7</sup>, aiming at defining ‘a proper balance of power between Parliament and the Constitutional Court’.<sup>8</sup> Other scholars compared the FCC with other constitutional courts. They focused largely on formal powers, institutional independence, regulations regarding the appointment of judges, and the different ways in which the courts can take political action.<sup>9</sup> Most recently, some authors have analysed how FCC decisions can effect changes or new interpretations of the *Grundgesetz*.<sup>10</sup>

What is lacking, however, are systematic studies on the personal characteristics and the careers of the FCC judges:<sup>11</sup> a problem also identified by Robert van Ooyten and by Christoph Hönnige and Thomas Gschwend.<sup>12</sup> Dietrich Herrmann identifies five areas of research but in most of them he treats the FCC as a single institutional actor.<sup>13</sup> Even most studies on the nomination, election or judicial decision making of FCC judges do not elaborate on the personal or career characteristics of the individual judges.<sup>14</sup> A notable exception is Christine Landfried who provides an overview of selected aggregate characteristics regarding the individual background of FCC judges.<sup>15</sup> Yet, biographic information – particularly in their sequential form – are essential if we want to get a more comprehensive picture of the Court and its working. In the following I will briefly discuss three focus areas of FCC research to exemplify why opening the institutional “black box” and paying closer attention to the career characteristics of the judges will advance our knowledge of the Court.

### 1) Who becomes a judge at the FCC?

Studies on the selection of political elites, e.g. ministers, have shown the importance of defining the pool of potential candidates.<sup>16</sup> The number of potential candidates for the FCC cannot be limited to a small pool as all German lawyers who are at least 40 years old are

eligible for election, as long as three out of the eight judges from each senate come directly from one of the other five highest German courts. With a pool as large as in this case, it is impossible to determine all potential candidates for a meaningful and statistically sound test of the factors affecting the selection of FCC judges. Instead, as much information about the judges' pre-FCC careers should be used. Based on this information it is at least possible to identify potentially distinct pathways leading to Karlsruhe, the seat of the FCC. Combining career data with personal characteristics such as age, gender or family background could improve the analysis further. In this article I nevertheless concentrate on career information.

2) Is there a politicization of the FCC?

The standard approach used in empirical work to test the politicization hypothesis is to focus on the judges' nomination by political parties. An in-depth study of the career characteristics of FCC judges prior to election allows us to delve deeper into their political background and their relations to parties to see whether persons with a particular political background stand a better chance to be elected to the FCC.

3) How can the decision making of the FCC be explained?

In the United States the view is widely held that 'judges make policy', referring in particular to the Supreme Court.<sup>17</sup> US scholars have advanced three possible explanations to understand the decision making process at the Court: 1) According to the *legal model*, judges decide solely in light of the respective case and the 'plain meaning of the Constitution'<sup>18</sup>; 2) the *attitudinal model* assumes that judges decide in line with their ideological background, their attitudes and values<sup>19</sup>; and 3) the *rational choice model* refines the attitudinal approach. According to the rational choice model judges try to get decisions passed that are as close as possible to their own ideal policy positions, which – as in the attitudinal model – are defined by the judges' attitudes and values. Yet, rational choice theorists believe that the judges take part in strategic bargaining games with other relevant actors (other judges, the legislature, even the public) and are thus institutionally constrained in promoting their preferences.<sup>20</sup> Assuming that these three models can also (to some extent) explain the decision making of the German FCC, the need for more complete biographical information becomes obvious.<sup>21</sup> Supposing that judges' decisions could be explained by the legal model alone, information on career trajectories would not be of much relevance. In the other two models, however, knowing about careers is decisive as it increases the available information on individual actors. In these models, the starting points for explaining decisions are attitudes, values and preferences, and biographical information can serve to approximate these factors. In order to

find out whether a certain academic, jurisprudential or professional socialization influences decisions, it could for example be relevant to know at which universities the judges studied and in which areas they worked.

While the first and – at least to some extent – the second focus area will be addressed in this article, the third one is an example for future research.<sup>22</sup>

#### FOUR CONCRETE RESEARCH QUESTIONS

Four research questions will be addressed in this article to provide insights on how systematic data on the judges' careers can be applied.

- 1) Can distinct career paths leading to the FCC be identified?
- 2) Do pre-FCC careers involve a high degree involvement in political positions, thus suggesting a possible politicization of the Court?
- 3) Does a federal system provide for particular career paths in the judiciary, and what are the implications?
- 4) Are there differences between the judges' careers with respect to the party that nominated them and the selecting body (Bundestag or Bundesrat)?

The article applies sequence analysis to a newly compiled dataset comprising all judges who worked at the FCC between its establishment in 1951 and 2013. Sequence analysis, which is fairly new to political science, is particularly well suited for our purposes as it provides a holistic picture of the judges' complete careers while enabling us to systematically compare the different career stages prior to FCC appointment. The following three sections provide the background for the main analysis. They introduce the basic organisational principles of the FCC, the data used, and the method of sequence analysis. The main analysis is presented in the subsequent section. The article concludes with an overview of the results.

#### BASIC ORGANISATIONAL PRINCIPLES OF THE FCC

When examining the careers of FCC judges, it is important to keep in mind the constitutional and legal rules that make provisions for the general composition of the FCC and the question 'who is eligible as a judge?'<sup>23</sup>

Two senates constitute the FCC, each comprising eight judges.<sup>24</sup> Four judges of each senate are elected by the Bundesrat, the other four by a Bundestag committee consisting of twelve deputies.<sup>25</sup> A candidate needs a 2/3-majority in the respective electing body to be

elected.<sup>26</sup> Three judges of each senate have to be former judges at the highest federal courts.<sup>27</sup> Only fully qualified lawyers who are at least 40 years old are eligible. Judges join the FCC for one term of 12 years, without the possibility of reelection.<sup>28</sup> At the age of 68, judges have to retire. FCC judges may not be members of the Bundestag, the Bundesrat, the federal government or the corresponding institutions at the Länder level while in office.

These provisions are meant to protect the FCC from several potential problems:

- (1) The requirements regarding education and professional experience are intended to ensure that only technically qualified persons can become judges.
- (2) The political election procedure is meant to undermine the danger of judicial self-selection and is part of the system of checks and balances in the German political system.
- (3) To prevent a dominance of the governing coalition on the selection of the judges a qualified majority is required and elections are the joint responsibility of the Bundestag and the Bundesrat.
- (4) The prohibition of reelection is designed to strengthen judicial independence.

Yet, some analysts state that none of these provisions has been able to prevent the election procedure from becoming a party dominated, consociational system where judges are actually selected during informal meetings of the parties (e.g. meetings of the parliamentary groups in the Bundestag) long before the official election. Tschentscher for example argues that preliminary selections are made by only two or three politicians from each of the main parties.<sup>29</sup> In his view, the official election by the Bundestag or the Bundestag committee constitutes a merely formal act which in most cases unanimously confirms the package deals already agreed upon earlier.<sup>30</sup>

## DATA

The data consists of information about the complete pre-FCC careers of all 102 judges who worked at the Court between its establishment in 1951 and 2013, starting with their university education and concluding with the last position before being elected to the FCC. The yearly data on career stages – 50 overall – are at the centre of my analysis (see table A1).

Furthermore, the dataset contains information on socio-demographic characteristics of the judges, their party-affiliation and about whether they were elected by the Bundestag or the Bundesrat. As expected, some stages occur more frequently than others – e.g. being a judge at the Federal Court of Justice is coded in more than three percent of all cases, being a judge at

the Federal Fiscal Court only in 0.3 percent. However, it is important to take into account some form of sequentiality. For example, high percentages can be explained either by the fact that all judges have to pass through a particular career position or they could be explained by only a small number of judges remaining in a stage for a long period. Using the very detailed, complete alphabet as a basis for sequence analysis would create results difficult to interpret. Hence, I structure the stages a priori in two steps.

- 1) As a first step, I distinguish between positions within the judicial system (J), in politics (P), at universities (U), in administration (A) and other positions (O). The first letter of the code marks this differentiation.
- 2) Since this five-stage-division is probably too rough to answer many of our questions, further differentiation is necessary:
  - For the large group of positions within the judicial system, I distinguish between the five types of jurisdiction: ordinary courts (Ord), labour courts (Lab), finance courts (Fis), administrative courts (Adm), and social courts (Soc).
  - F, L and S indicate positions on the federal, the Länder or a sub-Länder level respectively for all career stages to which such a distinction applies.

The dataset is organised in state-sequence (STS) format: each line represents a judge and ‘the successive states (statuses) of an individual are given in consecutive columns’.<sup>31</sup> In the remainder of the article ‘position’ and ‘status’ are used synonymously. In order to simplify comparisons between the biographies, I centred the careers at the appointment to the FCC (see table 1 to get an impression of the data). Hans Hugo Klein for example was a member of the Bundestag (P\_F\_MP), then occupied the post of parliamentary state secretary (P\_F\_Min)<sup>32</sup> at the ministry of justice for one year before he was elected as a FCC judge. In contrast, Otto Seidl worked at the Federal Court of Justice (J\_F\_Ord) for five years before being elected as a FCC judge. Our last example, Karin Graßhof, shows a quite similar sequence of career stages: she worked at the Higher Regional Court (Oberlandesgericht) in Cologne (J\_L\_Ord) before promoted to judge at the Federal Court of Justice. Four years later, she was elected to the FCC.

TABLE 1  
 SNAPSHOT FROM THE DATA – STS-FORMAT CENTERED AT THE FIRST  
 APPOINTMENT

name	id	birthyear	Proposed by	Elected by	...	a05	a04	a03	a02	a01
Klein, Hans Hugo	59	1936	CDU/CSU	Bundesrat	...	P_F_MP	P_F_MP	P_F_MP	P_F_MP	P_F_Min
Seidl, Otto	60	1931	CDU/CSU	Bundestag	...	J_F_Ord	J_F_Ord	J_F_Ord	J_F_Ord	J_F_Ord
Graßhof, Karin	61	1937	SPD	Bundestag	...	J_L_Ord	J_L_Ord	J_F_Ord	J_F_Ord	J_F_Ord

## SEQUENCE ANALYSIS – A VALUABLE METHOD FOR ELITE STUDIES

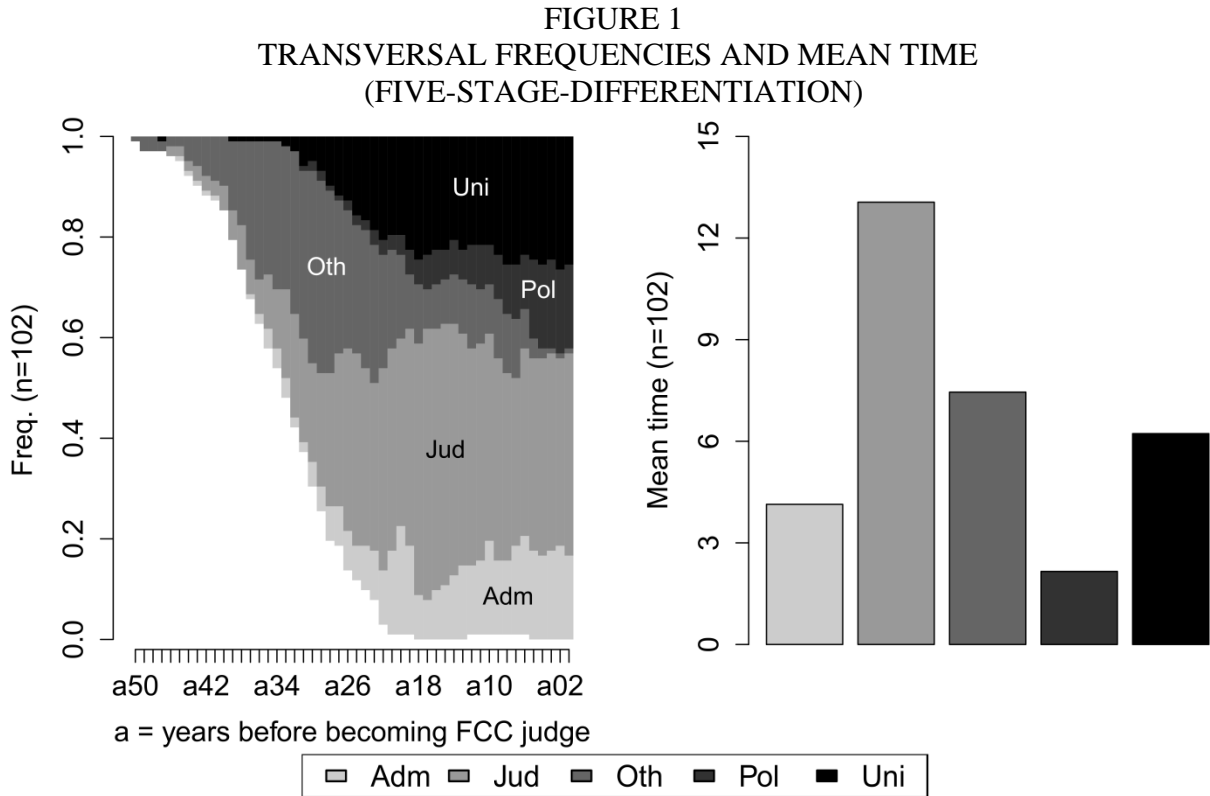
Originally developed for analysing DNA, sequence analysis presents yet another example of a fruitful transfer of methods from the natural sciences to political science. Already in the 1990s sociologists recognized its potential for the study of biographies.<sup>33</sup> Sequence analysis facilitates the analysis of biographical data with respect to its different partitions while still keeping the holistic view of the complete sequence: sequence analysis simultaneously takes into account statuses, their order and their durations. This feature makes the method much more appropriate to examine complete biographies than techniques focusing solely on certain single statuses (such as the last position before assuming office) or approaches that cumulate all career-stages without taking into account their order or duration.<sup>34</sup> A second benefit of sequence analysis is the use of clustering algorithms to systematically compare complete sequences with the aim to inductively detect general patterns within the set of observed careers. As a primarily exploratory approach sequence analysis would be less well-suited for a deductive analytical proceeding. In our case, this drawback does not present a major obstacle since the purpose of this article is first and foremost to identify systematic patterns in the data.<sup>35</sup> A third argument in favour of sequence analysis is that it does not require any distributional assumptions. Furthermore, ‘sequence analysis can play a fundamental role in bringing the much neglected trajectory concept, the actual ‘course,’ back into the life course’.<sup>36</sup> In contrast, event history analysis, the dominant methodology in life course research, focuses solely on single transitions. Sequence analysis is well-suited to the analysis of political elites and their careers, but – at least to my knowledge – has been rarely applied within the field of political elite studies. Up to now, none of the few analyses that have been carried out has been published.<sup>37</sup>

I clarify the steps of the following sequence analysis before the data are presented. To exemplify the method, I will use the very rough differentiation between the five stages J, P, A, O and U.



a) Describing the complete population

As a first step, it makes sense to present some aggregate measures of the complete population to get a first impression of the data. For this purpose, transversal frequency plots as well as the mean time persons remain in each status are presented (see fig. 1).<sup>38</sup>



Each column indicates the frequencies of the statuses in a given year. For example, about 20 to 25 percent of the FCC judges pursued academic careers at universities in the 20 years before being elected to the FCC. The white area represents not existing values.<sup>39</sup> These not existing values occur only rarely for the 20 years prior to election. In contrast, for more than 40 years prior to election hardly any career information is available. The judge with the longest pre-FCC career was Hermann Höpker-Aschoff, who began his law studies in 1901, 50 years before his election to the Court. The bar plot in the right shows the mean time during which judges remained in the five positions. The time spent within the judiciary is clearly the modal category. Even if the time spent in political and administrative positions is taken together, it only adds up to half the time spent in judicial positions.

b) Comparing sequences and calculating similarity measures between them

The systematic analysis of the sequences begins with calculating proximities between them. For this purpose, I deviate from the widely-used optimal matching procedure. Optimal matching (OM) has been the most common technique for the analysis of sequence data. It was developed in the context of genome analysis but has been applied widely in the social sciences.<sup>40</sup> The OM similarity measure ‘expresses distances between sequences in terms of the minimal amount of energy, measured in terms of edit operations, that is required to change two sequences such that they become identical’.<sup>41</sup> While this reasoning may make sense for analysing DNA-sequences, Dijkstra and Taris<sup>42</sup> as well as Wu<sup>43</sup> show that in social sciences applications of the OM- technique are often based on a different understanding of *similarity*.<sup>44</sup> For this reason, I apply the Longest Common Subsequence (LCS) metric proposed by Elzinga<sup>45</sup> which measures the resemblance of career trajectories in a way coming close to a social scientists’ understanding of the term similarity. Following the same line of reasoning, Kerby and Real Dato also opted for the LCS-metric in their career studies.<sup>46</sup> To illustrate the LCS-concept let me assume the following three example sequences:<sup>47</sup>

X: U A U P U A  
Y: A U J O  
Z: U A P U J O O

Position at/in: U = University; A = Administration; P = Politics; J = Judicial System; O = other position.

First, I identify the LCS and its length by comparing the sequences with each other.<sup>48</sup> The common subsequence ‘A U’ occurs both in X and Y when comparing the two. No other subsequence is common between these two sequences. The length of this common subsequence is two. Comparing X and Z I find one subsequence of the length four: ‘U A P U’ appears in X as  $x_1x_2x_4x_5$  and in Z as  $z_1z_2z_3z_4$ . The same holds true for Y and Z: The complete sequence of Y can be found in Z in the positions  $z_2z_4z_5z_7$ . Again, the longest common subsequence is four stages long. By using this information on the LCS, distance and similarity measures can be calculated.<sup>49</sup> To account for the different lengths of the sequences, these distances are normalized ‘to relativize distances such that a dissimilarity of say 10 between sequences of length 100 becomes less important than a dissimilarity of 10 between sequences of length 5’.<sup>50</sup>

### c) Clustering the sequences

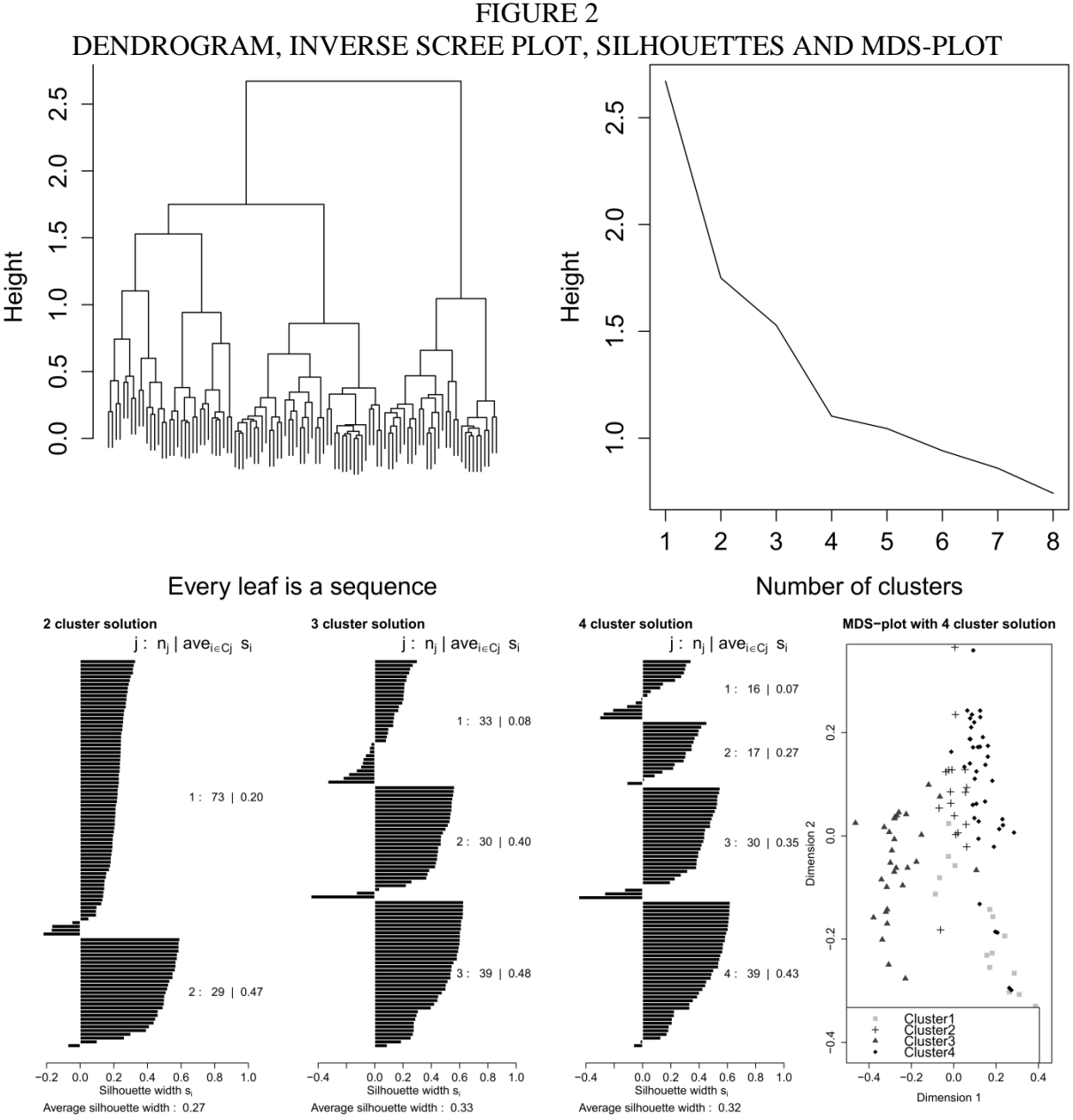
The next step is then to find groups of similar career patterns. Cluster analysis is not the only possibility for detecting such groups. Other approaches such as latent class analysis (LCA) or multi-dimensional scaling (MDS) could also be used. LCA can be an alternative to the sequence analysis approach but is problematic when investigating the longitudinal dimension of life course trajectories. It is also less functional compared to sequence analysis if the ‘sequences have variations within a group due to sequencing [...] and timing’.<sup>51</sup> Within the sequence analysis framework, I prefer to use clustering algorithms – the standard approach in sequence analysis literature<sup>52</sup> – instead of MDS because they produce relatively homogenous clusters, which is important for the subsequent interpretation. Particularly the Ward-method which is used as a clustering algorithm in this paper is known for creating very homogenous clusters.<sup>53</sup> Based on exactly the same LCS-distance matrices a two-dimensional MDS, in contrast, produces a picture which makes it more difficult to clearly distinguish distinct career groups. Furthermore, by its nature, MDS always raises the question how to substantially interpret the dimensions. I use MDS, however, as a means to check for the robustness of the identified clustering solution (see next section).

### d) Testing for the optimal number of clusters

For any given number of clusters, the hierarchical clustering algorithm tells us which sequence should be put in which cluster. It does not, however, identify the best clustering solution. To establish the optimal number of clusters, I pursue a fivefold strategy:

For a first impression, I look at the dendrogram; secondly I make the inverse scree test<sup>54</sup>; thirdly I apply silhouette analysis<sup>55</sup>; and fourthly, as recommended by Piccarreta and Lior<sup>56</sup>, I inspect whether the elements of the found clusters are also situated within reasonably close range in a two dimensional MDS-plot. Figure 2 shows the results for each of the four different stages. The dendrogram as well as the inverse scree test (elbow criterion) favour either a two- or a four-cluster-solution. Silhouettes can be interpreted in the following way: If the right-hand side clearly dominates and the average  $s_i$ -value is relatively high, the cluster can be regarded as homogenous. If, however, a significant proportion of all cases within a cluster is found on the left-hand side and the average  $s_i$ -value is low or even negative, the clustering solution does not fit the data very well. The silhouette analysis shows that the three-cluster-solution would produce two quite homogenous clusters and one that is less uniform. The four-cluster-solution again produces one very fuzzy cluster while the other three

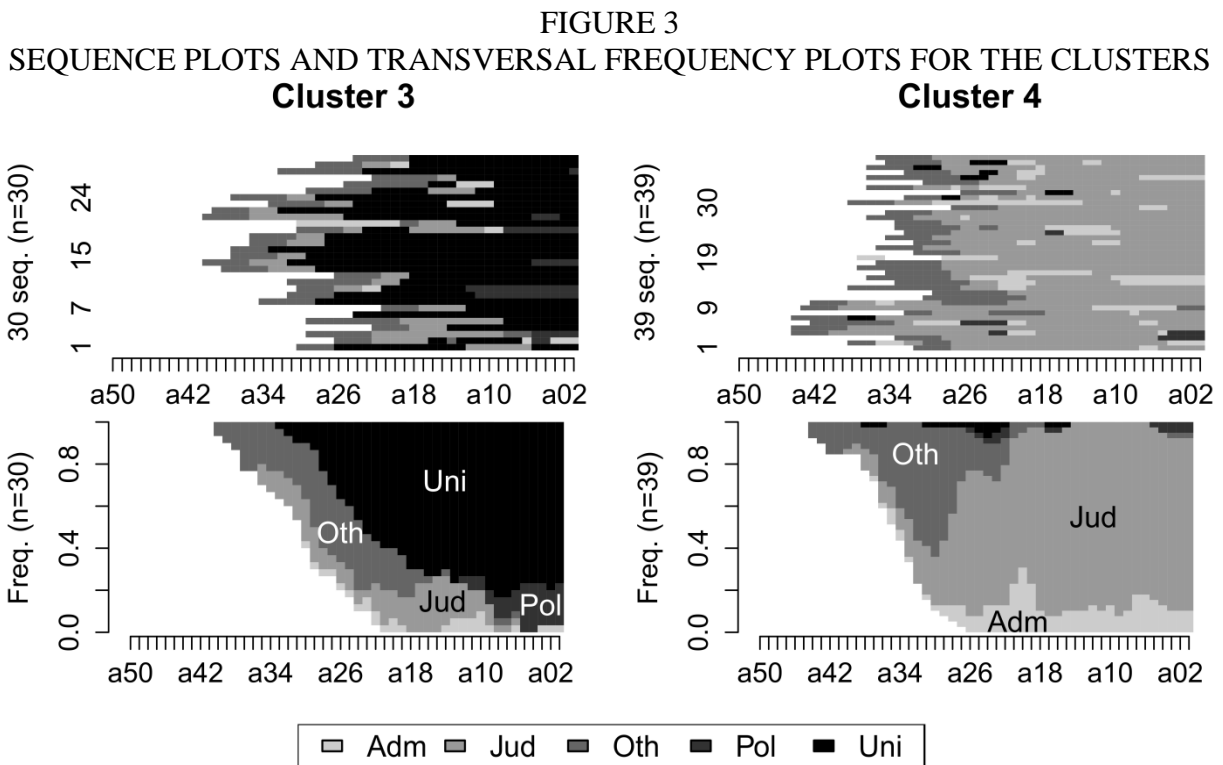
clusters are rather homogenous. The MDS plot labelled according to the four-cluster-solution also shows that cluster 1 is much more heterogeneous than the other three which separate quite well from each other.



Yet, instead of following these tests blindly, in a fifth step I check whether the clustering solution with the best fit from a mathematical point of view also produces a meaningful result when applied to specific research questions. I advocate an approach that favours meaningful data for interpretation over perfect clustering solutions.

e) Presenting the clusters

After the best-fitting clustering solution has been identified, the clusters are then presented in the form of transversal frequency and regular sequence plots. As an example, figure 3 shows the two most homogenous clusters from the four-cluster-solution with these kinds of plots. The transversal frequencies help to get an idea of the general patterns within a cluster, whereas the regular sequence plots show for the career of each judge which career-steps follow upon each other.



**EMPIRICAL ANALYSIS<sup>57</sup>**

*Last Position before Coming to the FCC*

Before discussing the sequences in detail, I take a short look at the last position the judges held just before being elected to the FCC (see table 2). The majority of the judges were university professors, had a position within the federal or Länder administration or worked at one of the highest courts (particularly at the Federal Court of Justice and the Federal Administrative Court). Only 17 out of 102 left a political position to become a judge at the FCC. The opposite is true when we look at the chief judges of both senates (the president and the vice president of the FCC): Eight out of the 11 chief judges worked as a politician just

before being elected to the FCC. And, even more interesting, not even one president or vice president came directly from an administration position or one of the major courts.<sup>58</sup>

TABLE 2  
LAST POSITION BEFORE BEING ELECTED TO THE FCC

<i>Last position</i>	<i>N</i>	<i>President/ Vice President</i>
University professor	24	2
Judge at the Federal Court of Justice (BGH)	17	
Judge at the Federal Administrative Court (BVerwG)	9	
Administration Länder level	8	
Administration Federal level	7	
Minister Länder level	6	3
Member of the Bundestag	4	3
Lawyer	3	
Member of a Länder Parliament	3	
Judge at the Federal Fiscal Court (BFH)	2	
Judge at the Federal Labour Court (BAG)	2	
Judge at the Federal Social Court (BSG)	2	
Prime minister of a Land	2	1
Judge at a constitutional court of the Länder	1	1
Member of the European Parliament	1	1
Other Positions (single mentions)	11	
<i>Sum</i>	102	11

### *Sequence Analysis*

Using the complete alphabet for the sequence analysis would produce an extremely fuzzy picture that is difficult to interpret. It is therefore advisable to reduce the number of statuses as explained above:

- 1) To test the influence of the *different types of jurisdiction*, I distinguish between administrative, fiscal, social, labour and ordinary courts. Further categories tested alongside are administration, times in education (student, trainee lawyer), staff at courts (lawyer and state attorney), university, and a residual category of ‘other positions’.
- 2) To test the influence of the *different levels of the German federal system*, I distinguish between administrative, judicial, and political positions at the federal, the Länder and the sub-Länder level.

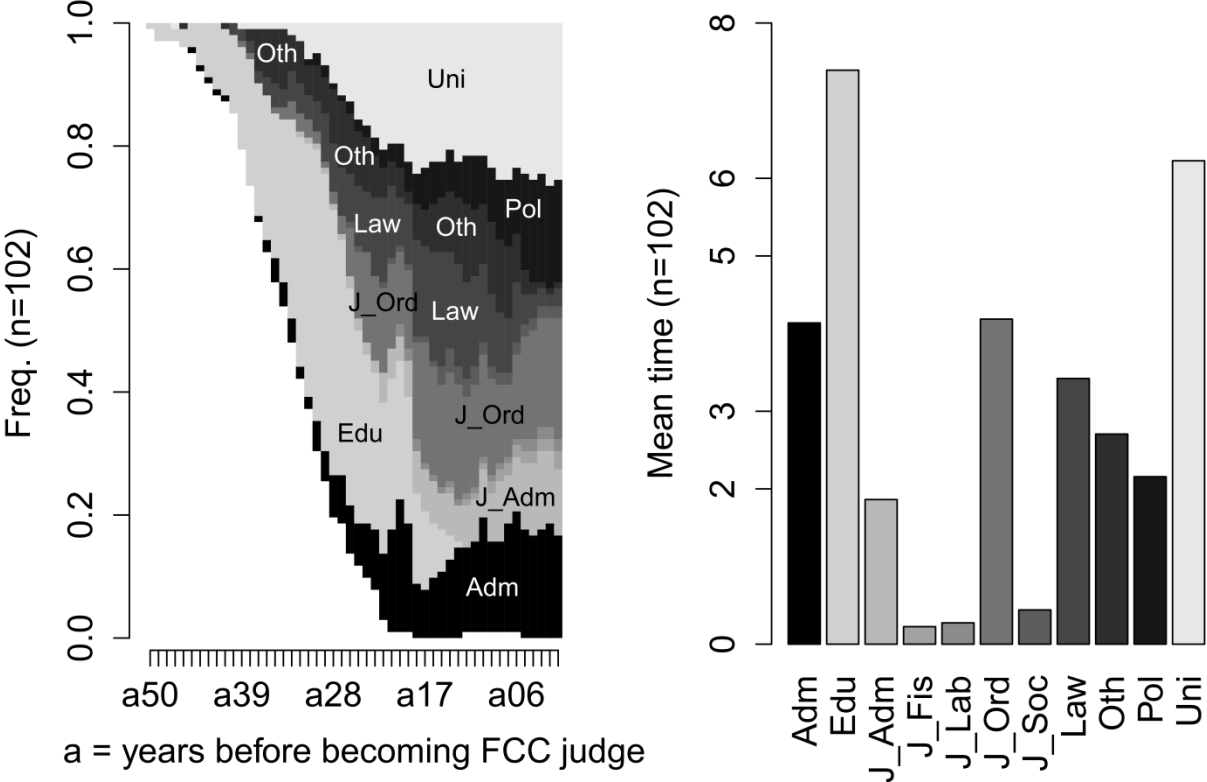
Both reduced alphabets can be found in table A2 in the annex.

### *Aggregate characteristics for the differentiation by type of jurisdiction.*

The overall pattern within the sequence data can be recognized by inspecting the transversal frequencies (see fig. 4). Some conclusions can already be drawn: First, 10 to 20 years before becoming a FCC judge, a rather large number of judges worked as lawyers (ca. 15 per cent). Immediately before being elected to the FCC their share drops to only 2 per cent. This sharp

decline suggests that being a lawyer is a good starting point for some trajectories leading to the FCC, but after that, other positions (e.g. in politics, administration or the judiciary) have to follow. Second, the opposite is true for those judges who have held positions in politics and the administrative courts as their numbers increase prior to FCC election. Third, only judges socialized within the ordinary or the administrative jurisdiction play a considerable role in filling the positions at the FCC. The second plot in figure 4 shows the mean time spent at each career stage. Again, it becomes obvious that of the five types of jurisdiction the ordinary and the administrative jurisdiction matter most for career advancement.

FIGURE 4  
 TRANSVERSAL FREQUENCIES AND MEAN TIME  
 (DIFFERENTIATION BY TYPE OF JURISDICTION)



*Cluster analysis for different types of jurisdiction*

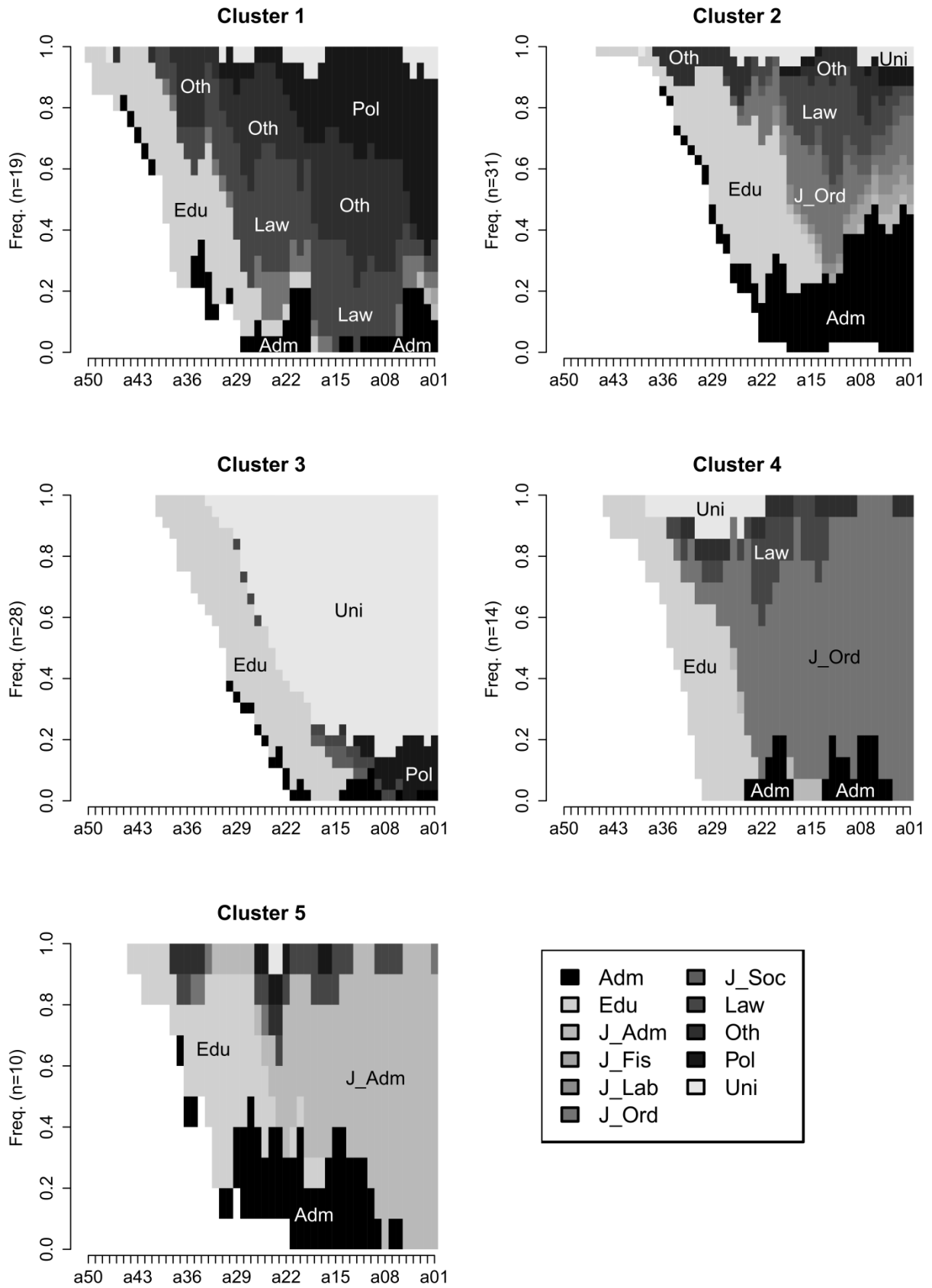
After calculating the matrix of distances based on the LCS-metric, I cluster them using the Ward-method. From a mere inspection of the dendrogram (see figure O1 in the online-annex), it is not completely self-evident what the optimal number of clusters would be. The inverse scree test (see fig A1) favours either a two- or a five-cluster-solution. According to the silhouettes (see fig. A1), the two-cluster-solution produces the most homogenous clusters. All of the other solutions show at least one cluster that is very fuzzy. However, the two cluster solution does not tell much of a story: The result would be to end up with one cluster

consisting only of persons who had been working at universities before being elected to the FCC and another cluster containing all the other persons. I thus opted for the five-cluster-solution as it allows a better interpretation of the data. The MDS-plot (see fig A1) shows that the university cluster 3 is clearly separated, while the other clusters exhibit more overlap. Figure 5 presents the respective transversal frequencies.<sup>59</sup>

The last three clusters show one clearly dominant colour (Uni; J\_Ord; J\_Adm) whereas the first two are relatively fuzzy. Still, each of the fuzzy clusters also includes one status that steadily increases up to the point of being elected to the FCC. In the case of the first cluster, political positions are dominant; in the case of the second administrative positions prevail. The first cluster illustrates that judges with a political background often also worked as lawyers or in other positions (residual category). Within all five clusters, these two categories come along most often with the category 'political positions'. This fact makes the combination of these three positions another specific pathway to the Court – although the cluster itself is relatively fuzzy. The second cluster includes large component of administrative positions and FCC judges who worked at the federal fiscal, labour and social courts (these three courts make up such small shares that they cannot be labelled in fig. 5). The third cluster is the most homogenous one. It consists primarily of persons working in academia. The fourth cluster contains FCC judges who previously worked within the ordinary judiciary. A look at the sequence plots in the online-annex (see fig. O2) shows that careers in academia and at ordinary courts are less volatile than in the other clusters where there is more change from one status to another. Cluster five depicts yet another path to the Court: it contains FCC judges who worked at administrative courts before election to the Court, often interrupted by administrative positions.



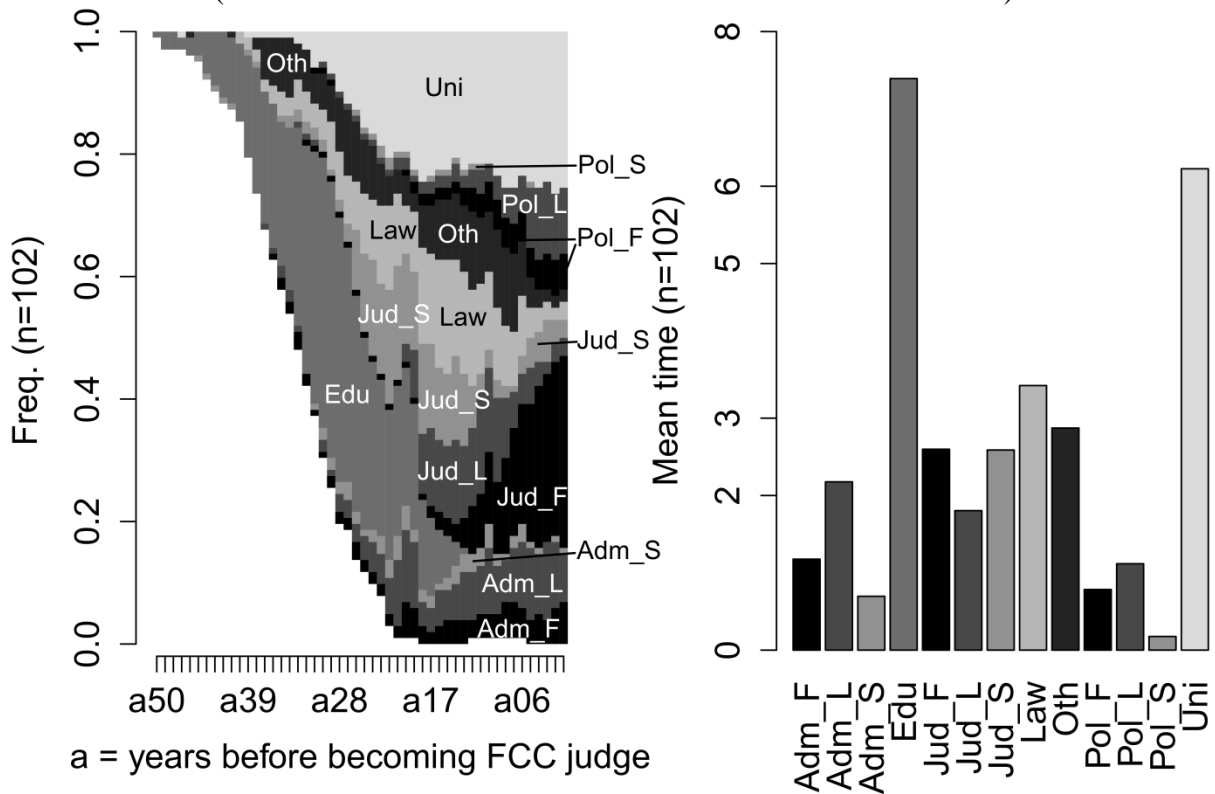
FIGURE 5  
 TRANSVERSAL FREQUENCIES FOR THE FIVE CLUSTER SOLUTION  
 (DIFFERENTIATION BY TYPE OF JURISDICTION)



*Aggregate characteristics for the differentiation by level of the federal system*

The second differentiation reduces the complete alphabet according to the three levels of the German federal system: the federal, the Länder and the sub-Länder level. Figure 6 shows the transversal frequency plot for the complete sample and the mean time in each status. For the positions in the judiciary advancement is gradual and steady: FCC judges from this domain start their careers at a court on the sub-Länder level, progress to the Länder level, and finally to the federal level from where they enter the Court. Only very few are elected directly from the lower judiciary levels. For positions in administration and politics no such pattern can be observed. In both cases, the majority of positions held are at the Länder and the federal level, particularly shortly before the election to the FCC. In contrast, the sub-Länder level contributes only marginally to the overall frequencies in these two groups. This pattern can also be seen by looking at the mean time in each status. For the judiciary it is the other way around: here, the judges work for the longest time at the federal level, followed by the sub-Länder level. Nevertheless, compared to positions at universities, the time judges remain in these three types of preceding positions is rather short.<sup>60</sup>

FIGURE 6  
 TRANSVERSAL FREQUENCIES AND MEAN TIME  
 (DIFFERENTIATION BY LEVEL OF FEDERAL SYSTEM)

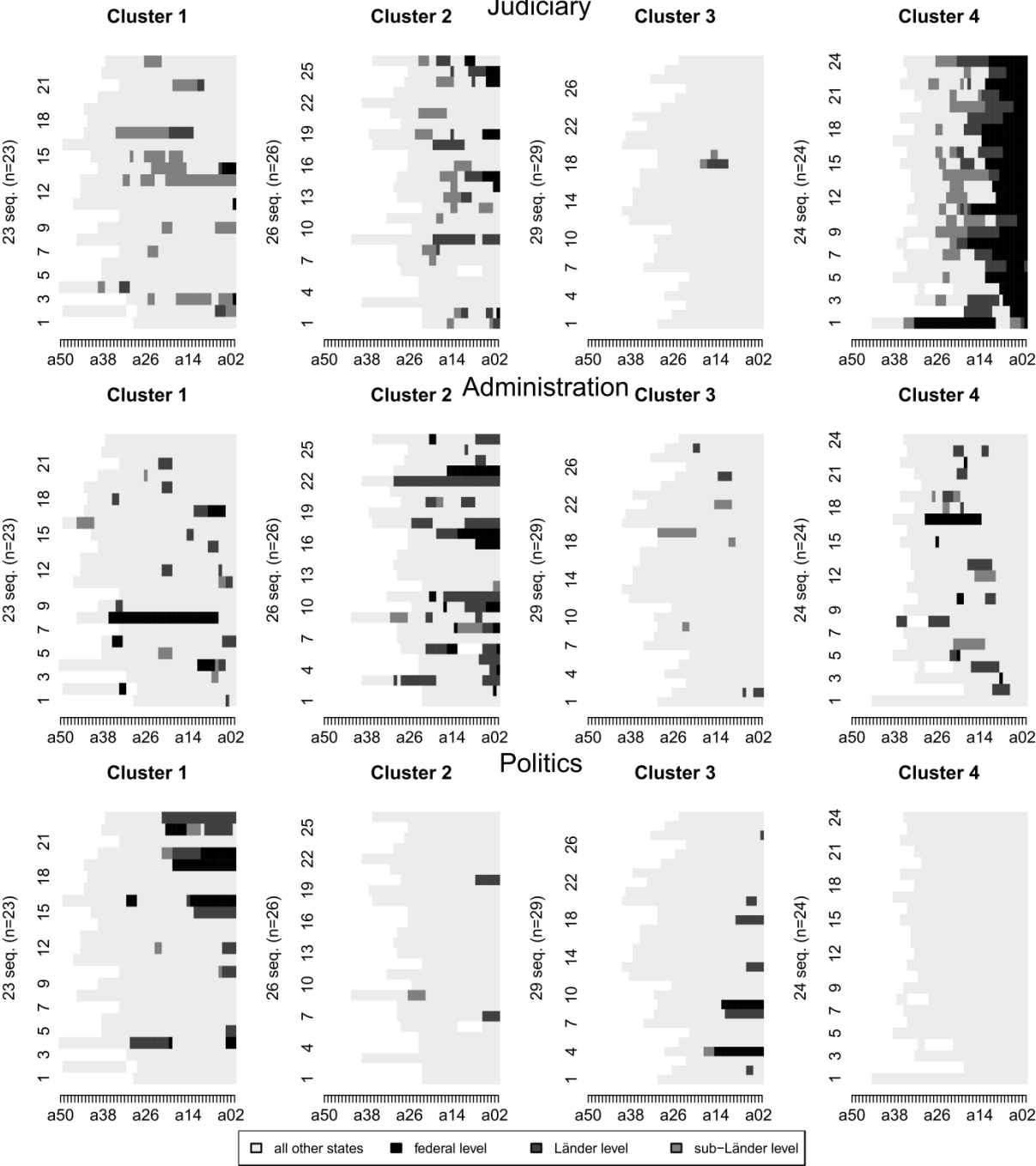


*Cluster Analysis for different levels of the federal system*

I calculate the matrix of LCS-distances and cluster them using the Ward-method. The dendrogram (see fig. O1 in the online-annex) as well as the inverse scree test (see fig A2) do not produce a clear result. A two- or four-cluster-solution seems most adequate. The silhouettes favour a two- or three-cluster-solution (see fig A2). Yet, I present the more detailed four-cluster-solution because the two fuzzy clusters the clustering algorithm produces – in addition to the two homogenous clusters (university and judiciary) – can also be included in the interpretation: these fuzzy clusters primarily contain the political and administrative careers. The MDS-plot roughly confirms the results of the cluster analysis (see fig. A2). Marking the careers according to the four-cluster-solution shows that the careers of one cluster are mostly situated quite near to each other. Cluster 3 is again clearly distinct from the other clusters. The transversal frequencies for these four clusters can be found in the online-annex (fig. O3). In order to test whether the federal system in Germany impacts the types of career paths, I draw sequence plots for all four clusters, focusing separately on positions within the judiciary, administration and politics (see fig. 7). This representation illustrates that in nearly all cases the judicial career path presents a steady march through the different levels of the federal system, from the sub-Länder to the Länder and finally to the federal level before

eventually becoming a judge at the FCC (from left to right the careers take on darker colours). Such a career pattern cannot be delineated for judges coming from an administrative or political background. Here, switching between levels is less common and often the judges remain at just one level – mostly Länder or federal level.

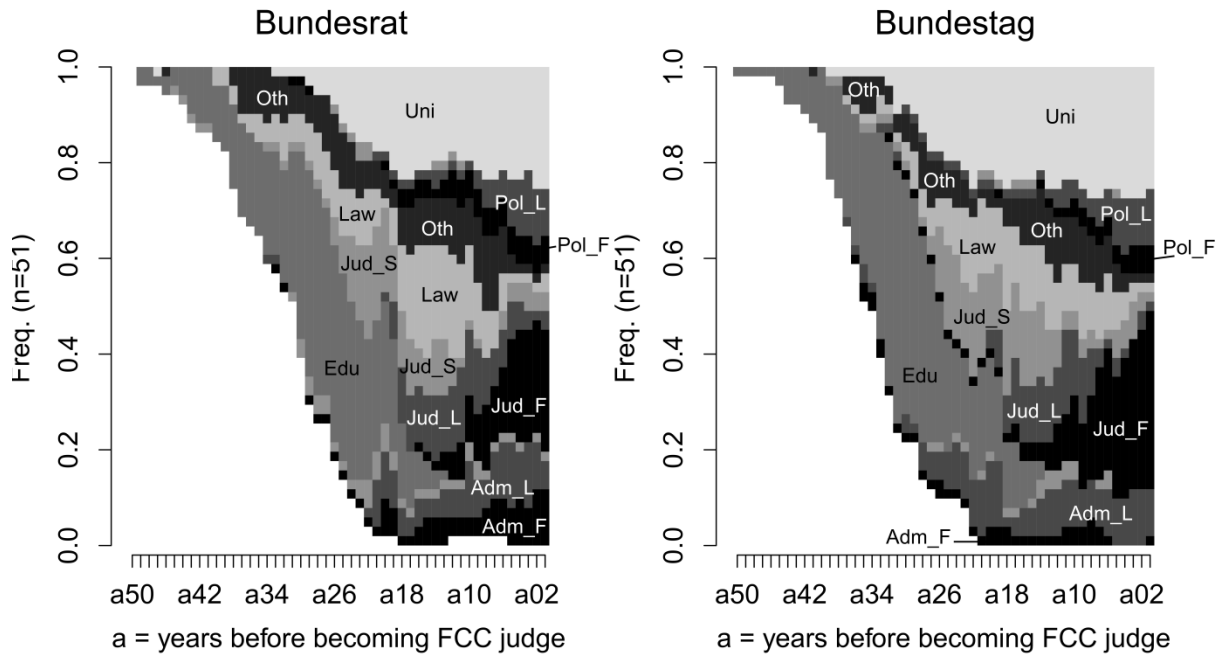
FIGURE 7  
SEQUENCE PLOTS FOR THE FIVE CLUSTER SOLUTION  
(DIFFERENTIATION BY LEVEL OF FEDERAL SYSTEM)



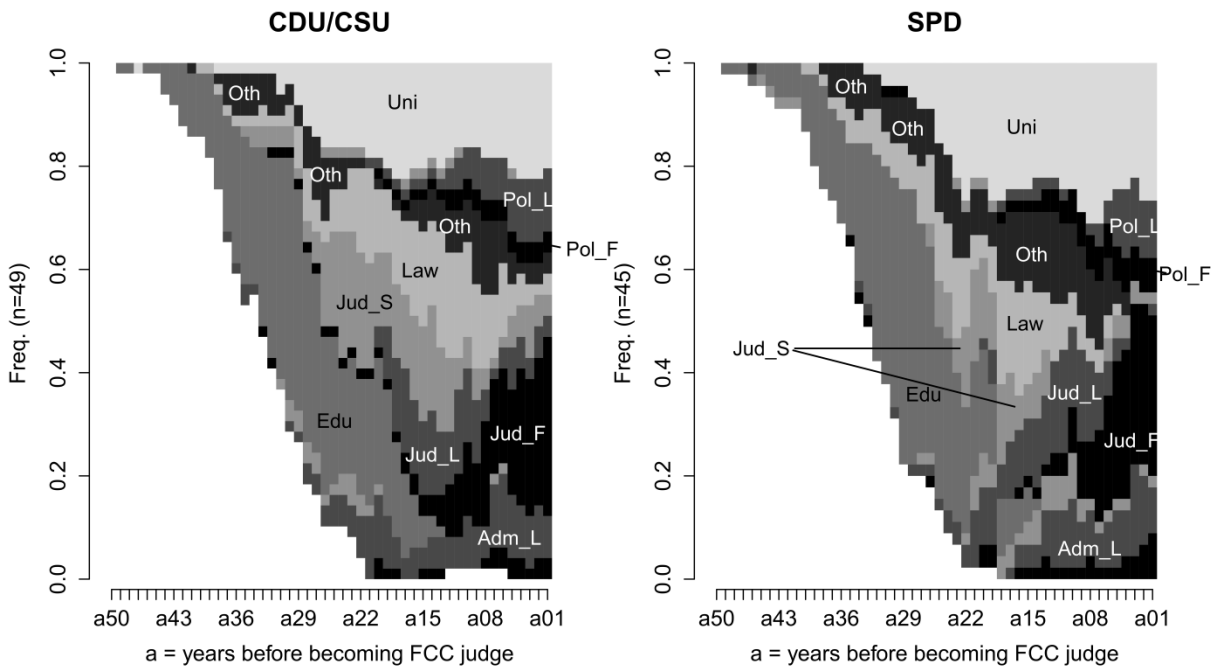
### *Effects of the electing body or the nominating party?*

Previous research (e.g. by Christine Landfried<sup>61</sup>) reveals that the professional background of FCC judges is diverse but no systematic analysis has tried to link differences in judges' biographies with the nominating party or electing body (Bundesrat/Bundestag). It could, for example, be assumed that the Bundesrat favours persons working at the Länder administrations as they are more familiar with the particular problems the Länder are dealing with. Or it might be the case that different parties prefer certain pre-FCC career paths: for example, one could imagine the SPD to promote persons with a background in the social and labour judiciaries in order to boost these typical social democratic issue areas in the highest court. It is equally possible, however, that the informal and consociational nomination and election procedure, is not conducive for differentiation. To check for effects of the electing body or nominating party, I use the alphabet reduced by the different levels of the federal system (see table A2). I compare the transversal frequency plots for FCC judges elected by the election committee of the Bundestag and the Bundesrat (see fig. 8) respectively. Likewise, I compare the frequency plots for judges nominated by the CDU/CSU with those for judges nominated by the SPD (see fig. 9).<sup>62</sup> The graphs look almost identical. The career patterns of FCC judges do not vary significantly according to the body that elected them or the party that nominated them. If anything, the Bundesrat elects more judges with a background in administration (contrary to what was expected, many of them holding positions at the federal level), while the Bundestag elects slightly more judges with a background in the federal judiciary. Differences are similarly small when I disaggregate the data according to nominating parties: slightly more FCC judges with a background in academia have been nominated by the SPD, whereas the judges proposed by CDU/CSU tend to have worked longer at courts at the sub-Länder level. These minor differences notwithstanding, the overall congruency is remarkable. Using the other reduced alphabet (by type of jurisdiction) produces similar results. Here, the only noteworthy discrepancy is the one expected: FCC judges with a background in labour and social courts have been almost exclusively nominated by the SPD.<sup>63</sup>

**FIGURE 8**  
**TRANSVERSAL PLOTS BY ELECTING BODY**  
**(DIFFERENTIATION BY LEVEL OF FEDERAL SYSTEM)**



**FIGURE 9**  
**TRANSVERSAL PLOTS BY NOMINATING PARTY**  
**(DIFFERENTIATION BY LEVEL OF FEDERAL SYSTEM)**



**CONCLUSION**

Relatively few scholars have analysed the career characteristics of FCC judges which is surprising, considering their relevance in the judicial and political system. I argue that more

attention should be paid to the composition of the judges as they are important actors and, indeed, are often considered political actors in their own right. A systematic analysis of the career paths of the judges – prior to their work at the FCC – contributes to our understanding of the politicization of constitutional courts. I proposed sequence analysis as a well-suited technique for the systematic study of biographies as it enables the identification of general career patterns within the careers and, at the same time, provides a holistic picture of entire career paths. Sequence analysis was applied to a new data set which encompasses the career stages of all FCC judges between 1951 and 2013. In what follows, I summarize the findings and connect them to the four research questions posted earlier.

1) Can distinct career paths leading to the FCC be identified?

Four relatively distinct career clusters emerged and they centred on positions within academia, administration, politics and ordinary courts. These different career paths reflect diverse socialization and professional experiences which, in turn, may influence the Court's rulings. The academia cluster and the ordinary courts cluster are both very homogenous – i.e. most of these FCC judges had solely worked at universities (or ordinary courts respectively) before election to the FCC. The other two clusters show considerable fuzziness. Administrative background is, for example, often combined with positions at administrative courts. Judges with a certain background in politics have in most cases passed through a number of other positions too, e.g. at law firms, or within private business. Their way to the Court is thus much less standardised compared to the careers within the ordinary courts or academia clusters.

2) Do pre-FCC careers involve a high degree involvement in political positions, thus suggesting a possible politicization of the Court?

Former politicians make up about 23 per cent of all FCC judges. At first this finding suggests that this career type, being by far not the modal category within the Court, may not be that important. However, judges with a background in politics have a much higher chance of obtaining one of the prestigious posts of chief judge of the Court. Judges whose careers have been confined to the judicial arena have a much lower chance to advance to the president or vice-president of the FCC. The significance of this finding in terms of a possible politicization of the Court is clearly one of the aspects that needs to be addressed more thoroughly in future research.

- 3) Does a federal system provide for particular career paths in the judiciary and what are the implications?

FCC judges with a career confined solely to the judicial sphere often pass through all the levels of the federal system before election to the FCC, beginning at the sub-Länder level, then proceeding to the Länder, and finally the federal level. FCC judges with a background in politics or administration differ. They hardly switch between positions at the Länder and at the federal level; the sub-Länder level is irrelevant for their careers. Put another way, political or administrative pre-FCC positions at the Länder level seem to be sufficient for advancement whereas a federal judiciary experience is a requirement for those judges whose careers are confined to the legal sector. This finding can to some extent be explained by the official provision that six out of the sixteen FCC judges are promoted from one of the highest federal courts. Nevertheless, it does not explain why nearly all of the FCC judges with a judicial background have worked at one of the five federal courts. Appointment to one of these courts and, in particular, the Federal Court of Justice and the Federal Administrative Court, is an important stepping stone in the career of those potential FCC judges with a background in the judiciary. At least for this subcategory of FCC judges, this finding can help to determine a confined pool of potential candidates.

- 4) Are there any differences between the judges' careers with respect to the party that nominated them and the selecting body (Bundestag or Bundesrat)?

Very few differences in the career pattern between FCC judges can be discerned with respect to the nominating party (CDU/CSU or SPD) and the selecting body, which is in line with earlier studies which have emphasized the consociational character of the nomination and election procedures. Still it is striking that virtually no differences exist in career patterns, independent of whether the CDU/CSU or the SPD nominated FCC judges. One exception refers to the selection of judges who have served on social and labour courts: almost all have been nominated by the SPD. These findings suggest that differences in party preferences for FCC judges are minimal but not completely negligible.

Although not addressed in this paper, data on the careers of FCC judges may also provide insights into decision-making processes at the Court. Most judicial decision making studies to date on the FCC rely on party affiliation but not on attitudes and preferences deduced from previous career experiences.<sup>64</sup> Career data should enable scholars to test, in a more rigorous way, rational choice as well as attitudinal models of judicial decision-making – well known



from research on the US Supreme Court – also for the German FCC. Knowing about the input-side is, of course, only one side of the coin: decision-making studies also need to measure the dependent variable, i.e. the decisions of the Court. This is complicated in the case of the FCC, as individual votes which could be related to the judges' career data are in general not recorded. To circumvent this problem one could use dissenting opinions (*Sondervoten*) which are recorded for each judge individually. They are, however, rarely used, hampering their usability for representative studies of FCC decision-making.

On a methodological level, this article has illustrated the usefulness of sequence analysis for career and elite studies. But sequence analysis is not a panacea for all elite studies. For example, the determination which distance metric is most appropriate depends on the research question. In this article, I argue that the Longest Common Subsequence metric represents the idea of similarity between careers better than the often used Optimal Matching metric but this reasoning does not necessarily apply to other elite studies. In addition, sequence analysis allows for some analysis but is first and foremost a descriptive approach. This can be seen as an advantage at the first stages of a research project, as in the case of this article. The graphical representations are easy to read and illustrate findings that would be difficult to detect otherwise. For further research the full amount of information included in the sequence data should be used and adjusted to a more analytical framework.<sup>65</sup>

# ANNEX

FIGURE A1  
 INVERSE SCREE TEST, SILHOUETTES AND MDS-PLOT  
 (DIFFERENTIATION BY TYPES OF JURISDICTION)

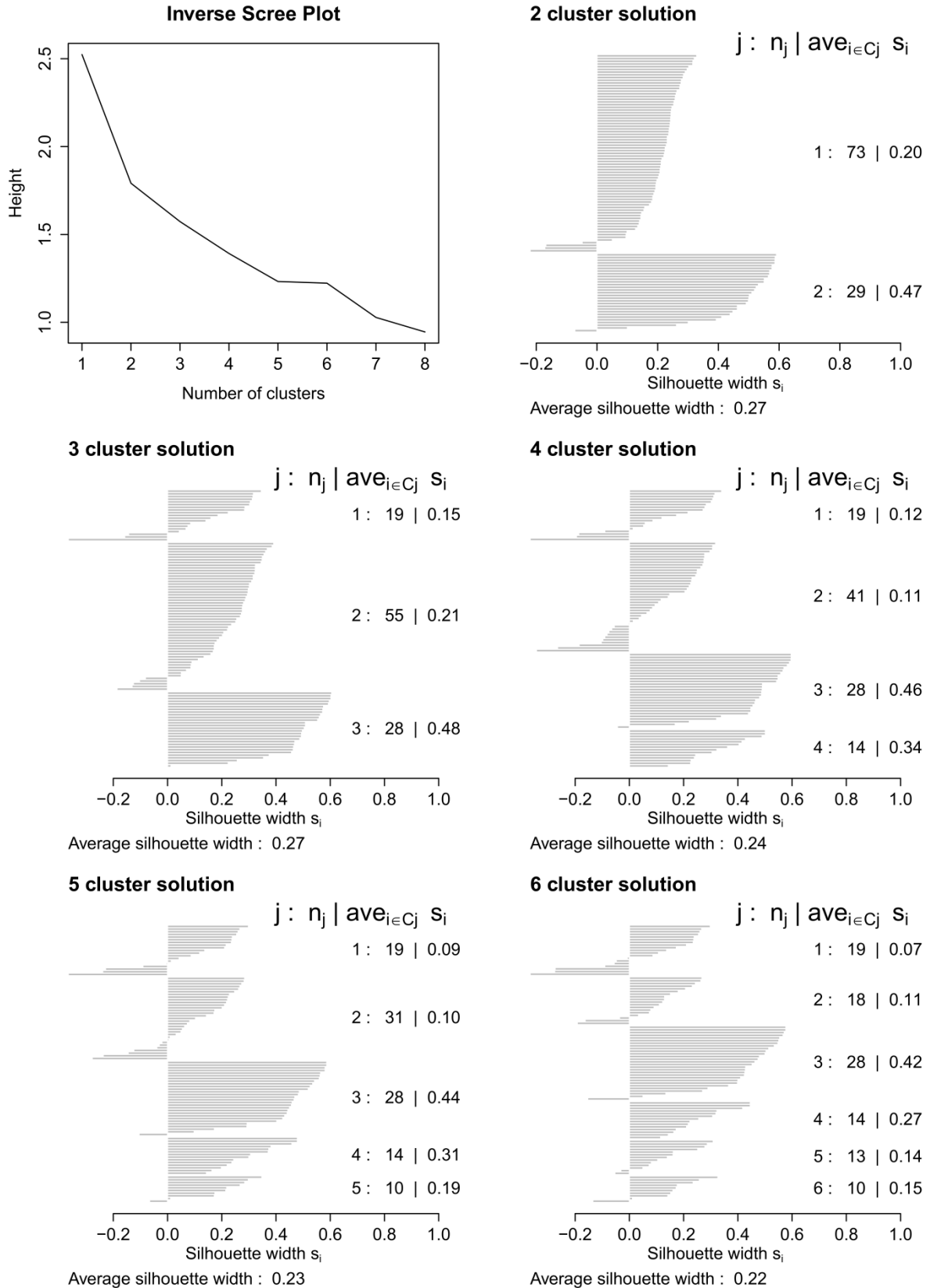


FIGURE A2  
 INVERSE SCREE TEST, SILHOUETTES AND MDS-PLOT  
 (DIFFERENTIATION BY LEVEL OF FEDERAL SYSTEM)

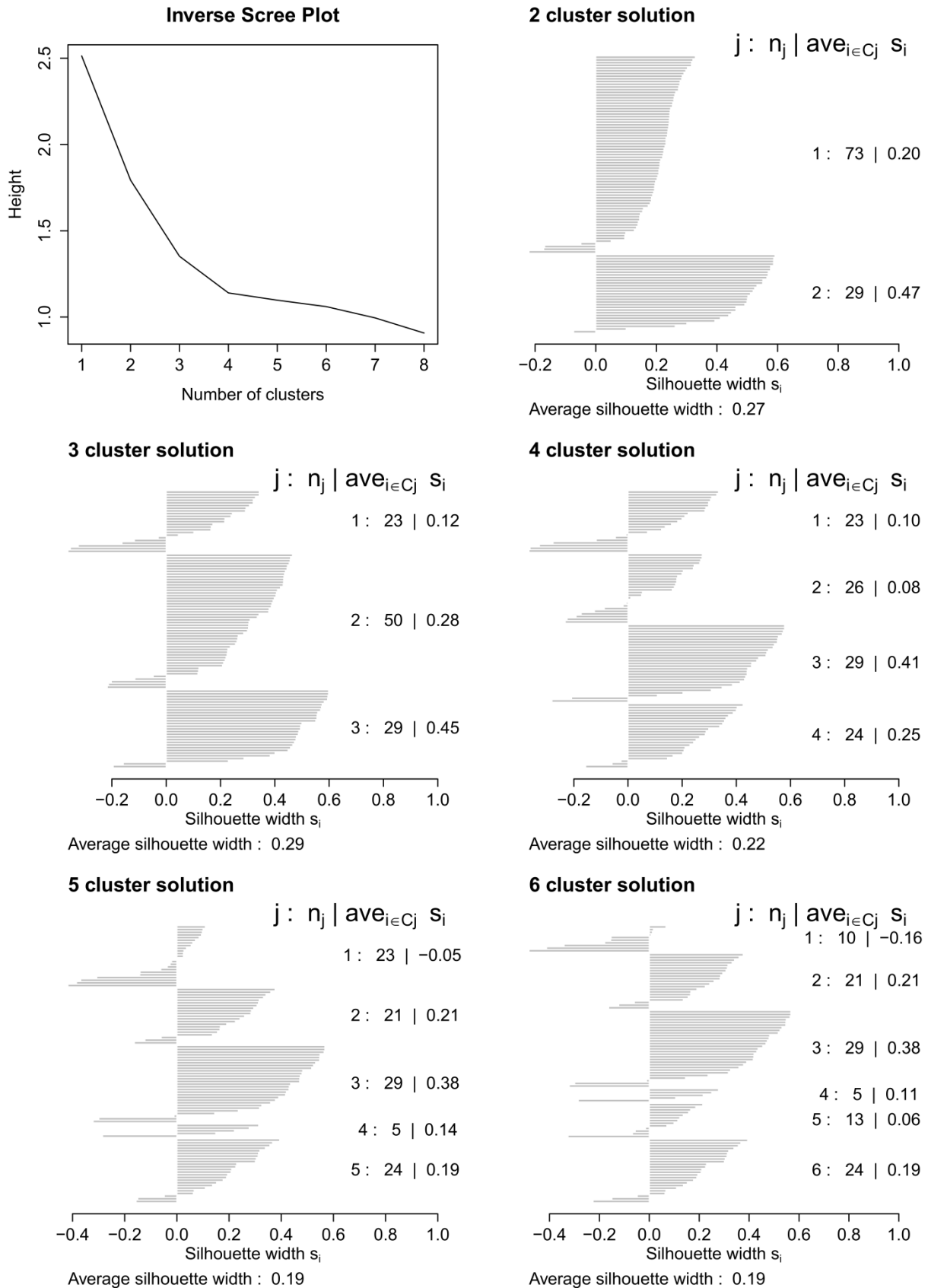


TABLE A1  
COMPLETE ALPHABET

Code	Position	% of total
<i>Administration</i>		
A_CJ	position in church administration	0.27
A_F	administration federal level	3.56
A_L	administration Länder level	6.59
A_S	administration sub-Länder level	2.11
<i>Judicial System</i>		
J_CJ	employed in church jurisprudence	0.21
J_F_AdM	judge at the Federal Administrative Court (Bundesverwaltungsgericht BVerwG)	3.29
J_F_Fis	judge at the Federal Fiscal Court (Bundesfinanzhof BFH)	0.30
J_F_Lab	judge at the Federal Labour Court (Bundesarbeitsgericht BAG)	0.62
J_F_Ord	judge at the Federal Court of Justice (Bundesgerichtshof BGH) or federal public prosecutor (Bundesanwaltschaft)	3.15
J_F_Soc	judge at the Federal Social Court (Bundessozialgericht BSG)	0.50
J_L_AdM	judge at a Superior Administrative Court (Oberverwaltungsgericht OVG)	1.37
J_L_Fis	judge at a Fiscal Court (Finanzgericht FG)	0.39
J_L_Lab	judge at a Superior State Labour Courts (Landesarbeitsgericht LAG)	0.09
J_L_Ord	judge at the Higher Regional Court (Oberlandesgericht OLG)	3.03
J_L_Soc	judge at a Superior State Social Courts (Landessozialgericht LSG)	0.59
J_Law	Lawyer	5.49
J_S_AdM	judge at an Administrative Court (Verwaltungsgericht VwG)	0.98
J_S_Lab	judge at a Labour Court (Arbeitsgericht ArG)	0.12
J_S_Soc	judge at a Social Court (Sozialgericht SG)	0.24
J_S1_Ord	judge at a Amtsgericht (AG)	2.34
J_S2_Ord	judge at a Landgericht (LG)	4.16
J_SA	state Attorney	0.80
J_St_F	staff at a Federal Court	3.27
J_St_L	staff at a Länder Court	0.21
J_St_LO	staff at a law office	0.33
J_St_S	staff at a sub-Länder level court	0.06
J_TL	trainee Lawyer (up to the second state examination)	8.01
<i>Other Positions</i>		
O_Auth	free author	0.21
O_CC	staff at chamber of commerce	0.06
O_Econ	position in the private economy	1.45
O_Exile	exile during Nazi regime	1.51
O_IO	employed at an International Organisation	0.09
O_Media	position in the Media (e.g. public broadcasting)	0.15
O_NJE	non judicial employment (especially during Nazi-regime when the judge was not allowed to work in jurisprudence)	0.47
O_Stu	student (up to the first state examination)	14.37
O_Union	staff of Unions and employee organisations	0.24
O_War	participation in war as soldier, prisoner of war. military administration ...	4.01
<i>Politics</i>		
P_EU_MP	member of the European parliament	0.09
P_F_Min	federal minister (or parliamentary state secretary)	0.09
P_F_MP	member of the Bundestag (or parliamentary council = Parlamentarischer Rat)	2.20
P_L_Min	Länder minister (or State Secretary Staatssekretär)	1.51
P_L_MP	member of a Landtag	1.22
P_L_PM	prime minister (Ministerpräsident)	0.65
P_Party	working for party (e.g. as an consultant for the parliamentary group in the Bundestag)	0.09
P_S	political position on sub-Länder level (e.g. mayor. member of municipal council. district administrator = Landrat)	0.53
P_SA	working for the NSDAP, SS or SA (Sturmabteilung)	0.15
<i>Academia</i>		
U_P	professor at law faculty /or Max Planck	10.09
U_P_CJ	professor in church law	0.59
U_S	academic staff at law faculty / or Max Planck	7.95
U_S_CJ	academic staff in church law	0.21

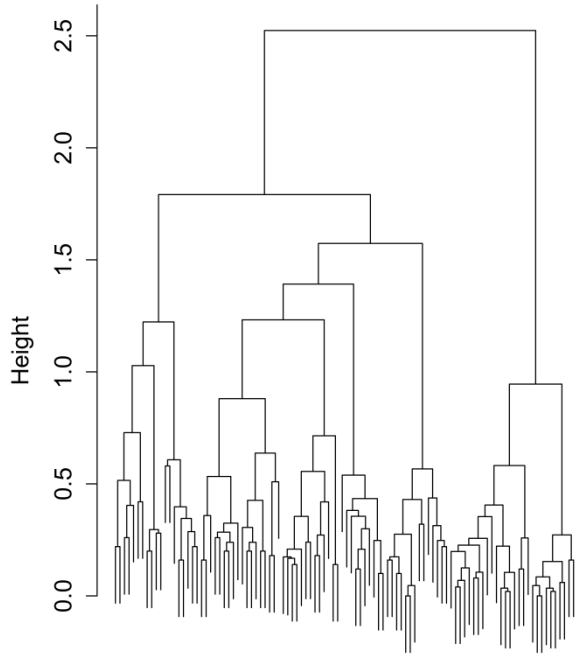
TABLE A2  
THE TWO REDUCED ALPHABETS

I. Differentiation by types of jurisdiction			II. Differentiation by level of the federal system		
Code	Position	% of total	Code	Position	% of total
<i>Judge at a court</i>			<i>Federal level</i>		
J_AdM	Administrative Courts	5.64	Adm_F	Administration Federal Level	3.56
J_Fis	Fiscal Courts	0.68	Jud_F	Judiciary Federal Level	6.59
J_Lab	Labour Courts	0.83	Pol_F	Politics Federal Level	2.11
J_Ord	Ordinary Courts	12.67	<i>Länder level</i>		
J_Soc	Social Courts	1.34	Adm_L	Administration Länder Level	7.87
<i>Positions not at a court</i>			Jud_L	Judiciary Länder Level	5.46
Adm	Administration	12.53	Pol_L	Politics Länder Level	7.84
Edu	Education (Student. Trainee Lawyer)	22.38	<i>Sub-Länder Level</i>		
Law	Staff / Lawyer / State Attorney	10.36	Adm_S	Administration Sub-Länder Level	2.37
Oth	Other Positions	8.19	Jud_S	Judiciary Sub-Länder Level	3.38
Pol	Politics	6.53	Pol_S	Politics Sub-Länder Level	0.53
Uni	University	18.85	<i>Further Positions</i>		
			Edu	Education	22.38
			Law	Lawyer	10.36
			Oth	Other Positions	8.70
			Uni	University	18.85

**ONLINE-ANNEX**

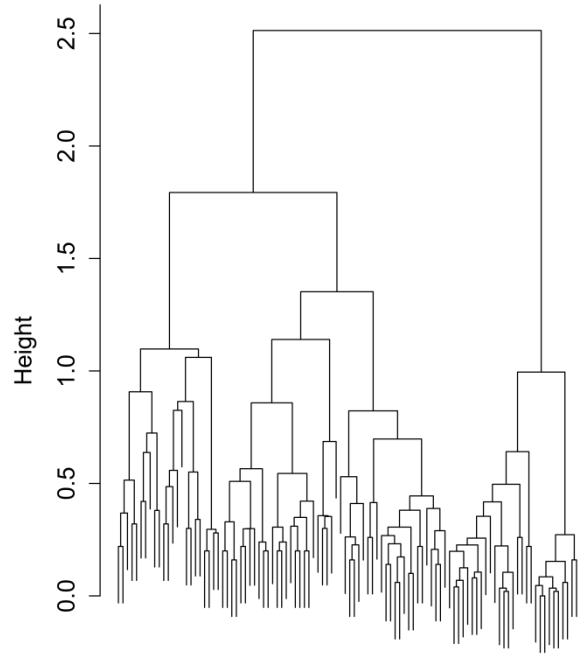
**FIGURE O1  
DENDROGRAMS (WARD-METHOD)**

**Diff. by Type of Jurisdiction**



Every leaf is a sequence

**Diff. by Level of the Federal System**



Every leaf is a sequence

FIGURE O2  
 SEQUENCE PLOTS FOR THE FIVE CLUSTER SOLUTION  
 (DIFFERENTIATION BY TYPE OF JURISDICTION)

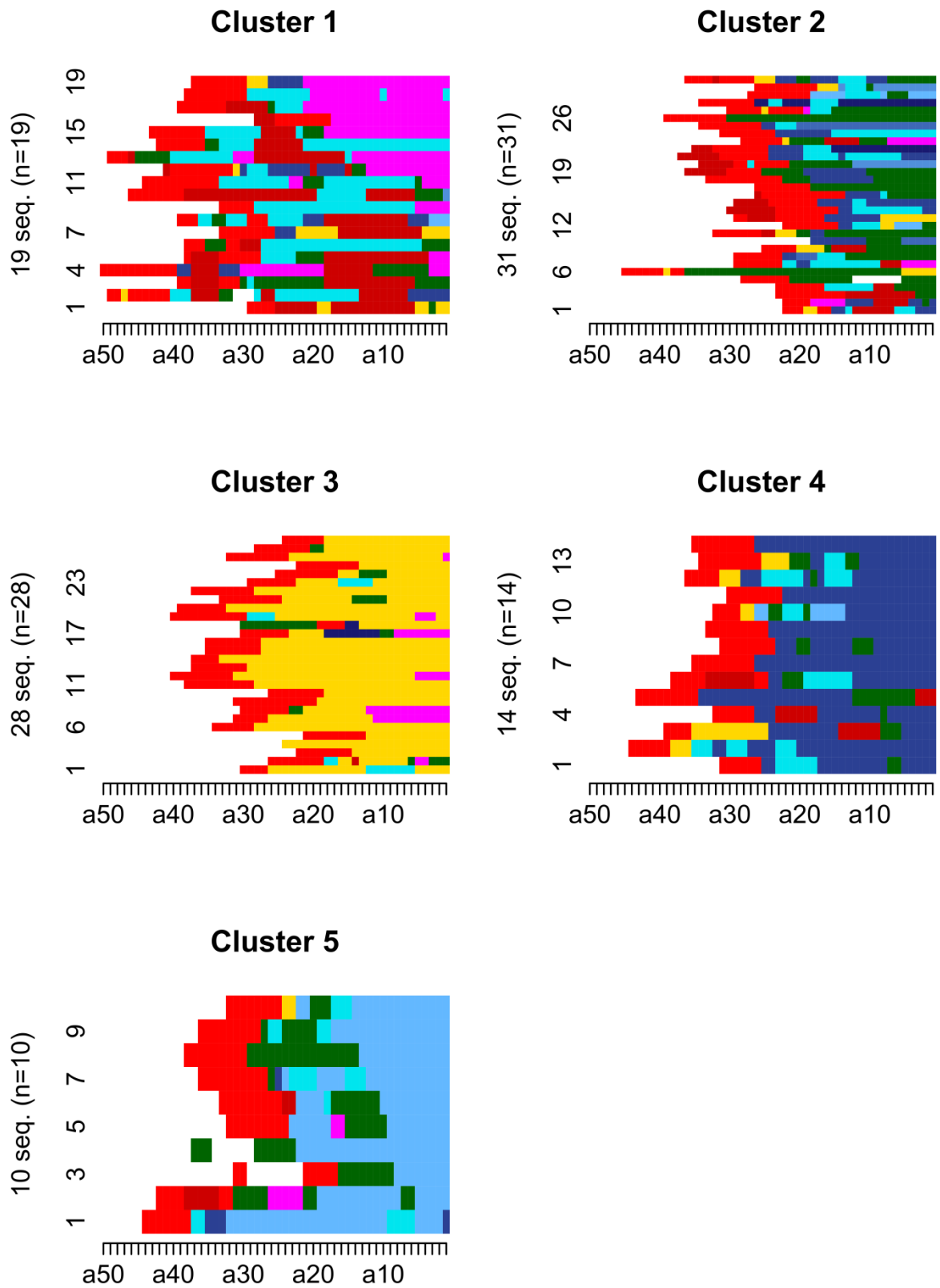


FIGURE O3  
 TRANSVERSAL FREQUENCIES FOR THE FOUR CLUSTER SOLUTION  
 (DIFFERENTIATION BY LEVEL OF THE FEDERAL SYSTEM)

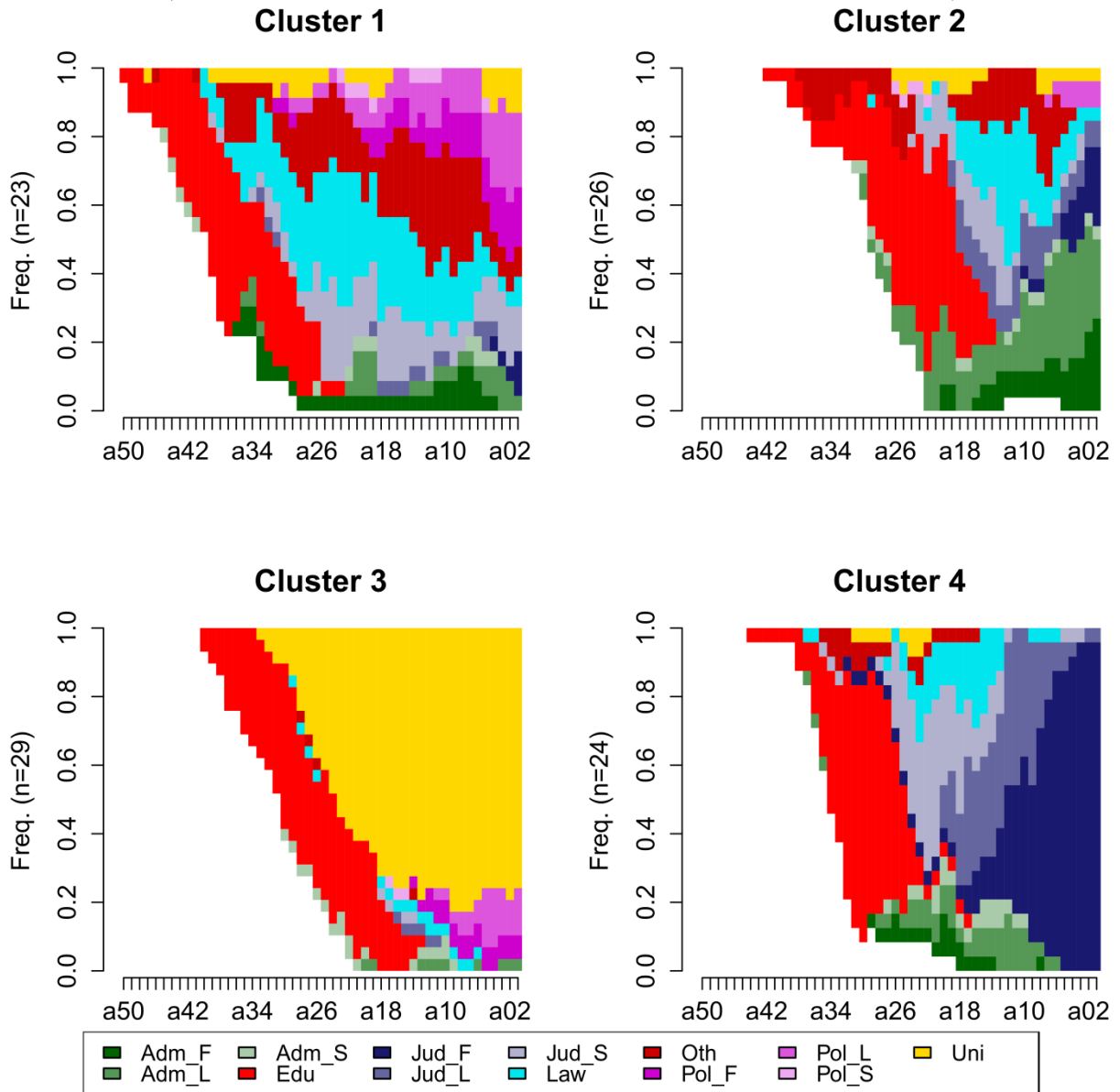




FIGURE O4  
 TRANSVERSAL PLOTS BY ELECTING BODY  
 (DIFFERENTIATION BY TYPE OF JURISDICTION)

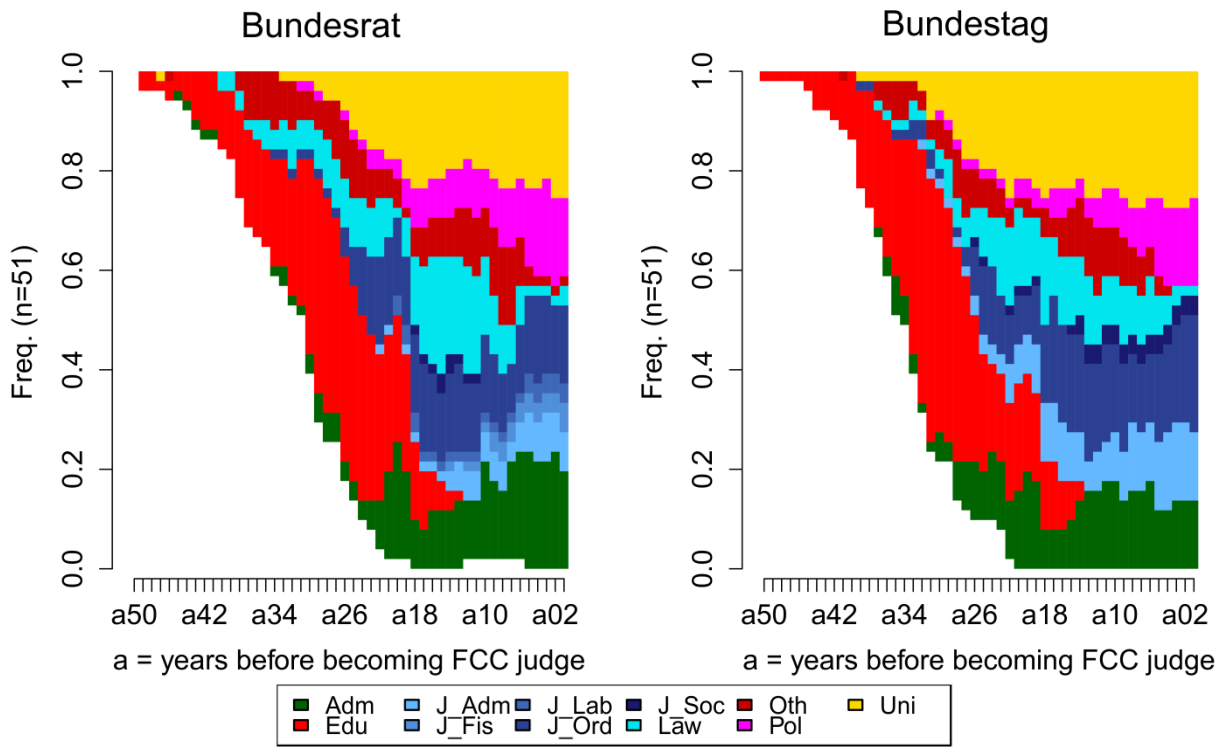
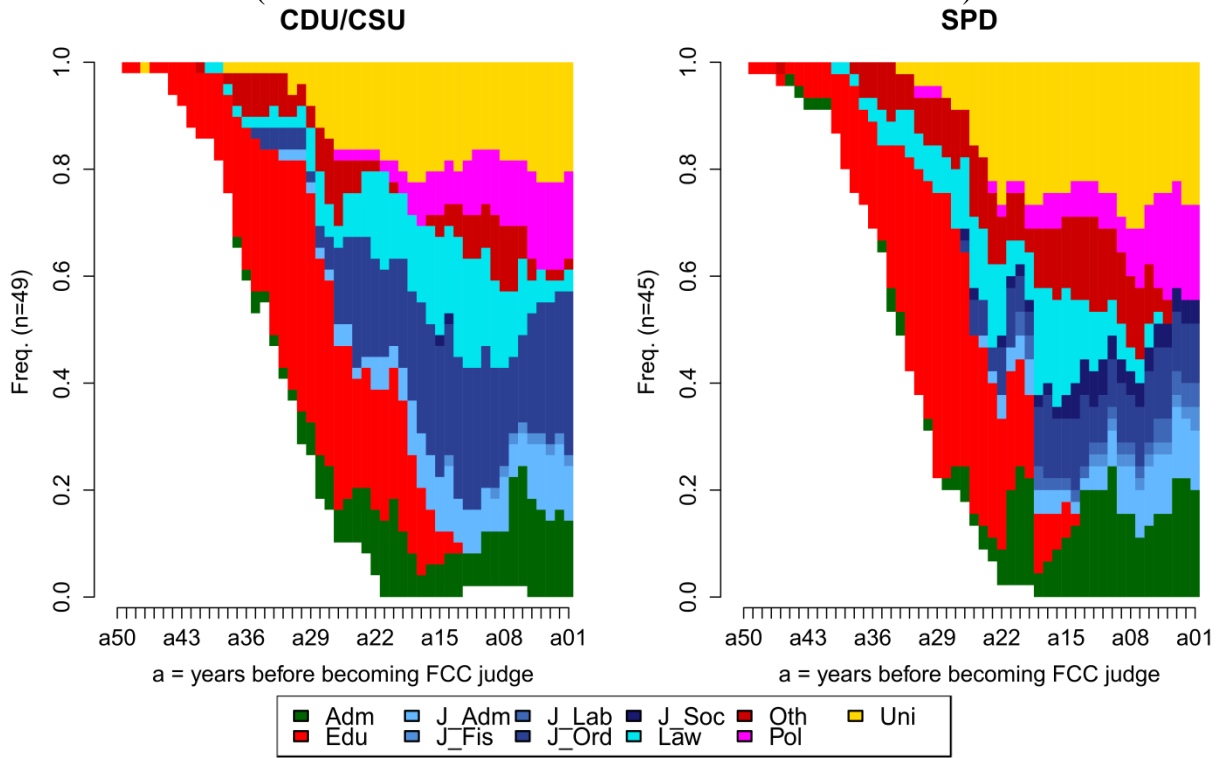


FIGURE O5  
 TRANSVERSAL PLOTS BY NOMINATING PARTY  
 (DIFFERENTIATION BY TYPE OF JURISDICTION)



## **ACKNOWLEDGEMENTS**

The author would like to thank the anonymous reviewers for their valuable comments as well as Paula Krieg and the editor for improving the readability of the article. Matthias Böhme, Johanna Budke, Julian Erhardt, Alena Hahn, Cornelia Klatt, Patrick Schweiß and Charlotte Wittnebel helped to compile the dataset – many thanks to them!

## ENDNOTES

<sup>1</sup> W.J. Patzelt, 'Warum verachten die Deutschen ihr Parlament und lieben ihr Verfassungsgericht? Ergebnisse einer vergleichenden demoskopischen Studie', *Zeitschrift für Parlamentsfragen* 36/3 (2005), pp.517-38; H. Vorländer and A. Brodacz, 'Das Vertrauen in das Bundesverfassungsgericht. Ergebnisse einer repräsentativen Bevölkerungsumfrage', in Vorländer (ed.), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (Wiesbaden: VS Verlag, 2006), pp.259-95.

<sup>2</sup> During the last decades a number of countries (e.g. Spain, Portugal and the Czech Republic) have established constitutional courts quite similar to the German FCC in terms of their formal competences. See S. Kneip, 'Rolle und Einfluss des Bundesverfassungsgerichts in international vergleichender Perspektive', *Zeitschrift für Politik* 60/1 (2013), pp.72-89, p.78. For some of them the FCC served as a blueprint. Kneip also shows that the constitutional courts in Portugal, Slovakia, Hungary Slovenia and Cyprus outperform the German FCC when only their institutional powers are taken into account. The constitutional courts in Belgium, Latvia and Lithuania are on par with the German counterpart regarding institutional independence. See S. Kneip, 'Verfassungsgerichtsbarkeit im Vergleich', in Gabriel and Kropp (eds.), *Die EU-Staaten im Vergleich* (Wiesbaden: VS Verlag, 2008), pp.631-55, p.648.

<sup>3</sup> S. Kneip, 'Rolle und Einfluss des Bundesverfassungsgerichts', p.88-89.

<sup>4</sup> A. Stone Sweet, *Governing with judges: constitutional politics in Europe* (Oxford: Oxford University Press, 2000).

<sup>5</sup> See C. Landfried, 'The judicialization of politics in Germany', *International Political Science Review*, 15/2 (1994), pp.113-24; S. Kneip 'Gegenspieler, Vetospieler oder was? Demokratiefunktionales Agieren des Bundesverfassungsgerichts 1951-2005', *Politische Vierteljahresschrift* 52/2 (2011a), pp.220-47; C. Hönnige 'Beyond judicialization: why we need more comparative research about constitutional courts', *European Political Science*, 10/3 (2011a), pp.346-58.

<sup>6</sup> Regarding a potentially dangerous judicialization of politics, some authors see the FCC as a 'major restraint to policy-makers', an 'alternative legislator', a 'third legislative chamber' or they warn that the FCC could emerge as some kind of 'super-legislation' out of its factual position as a court of final appeal for sub-constitutional, regular laws. See in the order of the citations: M.G. Schmidt, 'The Grand Coalition State', in J.M. Colomer (ed.), *Political institutions in Europe* (London: Routledge, 1996), pp.62-98, p.87; U. Karpen (ed.), *Der Richter als Ersatzgesetzgeber* (Baden-Baden: Nomos, 2002), author's translation; M. Shapiro and A. Stone, 'The New Constitutional Politics of Europe', *Comparative Political Studies* 26/4 (1994), pp.397-420, p.404; K. Hesse, 'Verfassungsrechtsprechung im geschichtlichen Wandel', *Juristenzeitung* 50 (1995), pp.265-73, p.267; R. Scholz, 'Verfassungsgerichtsbarkeit im gewaltenteiligen Rechtsstaat', in U. Karpen (ed.), *Der Richter als Ersatzgesetzgeber*, pp.15-26, p.19. A number of studies regards the FCC as a 'veto player'. See for example N. Alivizatos, 'Judges as veto players', in H. Döring (ed.), *Parliaments and majority rule in Western Europe* (Frankfurt M.: Campus, 1995), pp.566-89; U. Wagschal, 'Kompetitive und Konsensuale Vetospieler in der Steuerpolitik', in S. Ganghof, C. Hönnige and C. Stecker (eds.), *Parlamente, Agendasetzung und Vetospieler. Festschrift für Herbert Döring* (Wiesbaden: VS Verlag, 2006b), pp.117-35; U. Wagschal, 'Verfassungsgerichte als Vetospieler in der Steuerpolitik', in M. Becker and R. Zimmerling (eds.), *Politik und Recht. PVS-Sonderheft 36/2006* (Wiesbaden: VS Verlag, 2006a), pp.559-84. Others qualify the Court as a 'conditional' or 'triggered veto player' – because the FCC can only come into play *a posteriori* when a third party within the policy-process chooses to appeal to it. See S. Kneip, *Verfassungsgerichte als demokratische Akteure* (Baden-Baden: Nomos, 2009), p.21, author's translation; R. Lhotta, 'Das Bundesverfassungsgericht und die "Generationengerechtigkeit"', in A. Gohr and M. Seeleib-Kaiser (eds.), *Sozial- und Wirtschaftspolitik unter Rot-Grün* (Wiesbaden: Westdeutscher Verlag, 2003), pp.307-27; S. Kneip, 'Gegenspieler, Vetospieler oder was?', p.225. Others are less critical of the work of the FCC. Kneip for example makes the point that the Court has only in 'very rare instances overexpanded its functional role within the system of separated powers' *ibid.*, author's translation. C. Rath argues that it is not an active, FCC-controlled judicialization of politics that causes transitional rules from Karlsruhe to become permanent laws in the end but rather the 'accommodativeness and risk-aversion of the legislative bodies'. See C. Rath, *Der Schiedsrichterstaat: Die Macht des Bundesverfassungsgerichts* (Berlin: Verlag Klaus Wagenbach, 2013), p.54, author's translation.

<sup>7</sup> Two arguments are central to the debates on a politicization of the judiciary: First, the opposition parties and/or Länder governments instrumentalise the FCC, trying to reverse laws that have been adopted in parliament without their consent. See R. Voigt, *Recht - Spielball der Politik* (Baden-Baden: Nomos, 2000), p.198-200. According to this argument the FCC is an 'extended tool of the opposition'. See, for example K. Stüwe, 'Das Bundesverfassungsgericht als verlängerter Arm der Opposition?', *Aus Politik und Zeitgeschichte* 37-38 (2001), pp.34-44, p.34, author's translation. In contrast, the former FCC judge Jutta Limbach speaks of only few cases where the Court was used as an arena to perpetuate political fights. In her view, these decisions do not support generalizations that politics abuses the FCC. See J. Limbach, 'Mißbrauch des Bundesverfassungsgerichts durch

---

die Politik?', *Gegenwartskunde* 48/1 (1999), pp.11-18, p.17. Second, the government parties themselves try to shy away from their responsibility to take painful or unpopular decisions that could undermine their chances of reelection. This legislative fainéance pushes the FCC automatically into a more active political role: the Court has to decide because politics ducks out of unpleasant decisions.

<sup>8</sup> C. Landfried, 'Germany', in C.N. Tate and T. Vallinder (eds.), *The global expansion of judicial power* (New York: New York University Press, 1997), pp.307-24, p.307.

<sup>9</sup> See C. Hönnige, 'Verfassungsgerichte in den EU-Staaten: Wahlverfahren, Kompetenzen und Organisationsprinzipien', *Zeitschrift für Staats- und Europawissenschaften* 6/3 (2008), pp.524-53; S. Kneip, 'Rolle und Einfluss des Bundesverfassungsgerichts'; S. Kneip, 'Verfassungsgerichtsbarkeit im Vergleich'.

<sup>10</sup> S. Kneip, 'Spiel über Bande. Intendierter und nicht-intendierter Verfassungswandel durch Klagen vor dem Bundesverfassungsgericht', in C. Hönnige, S. Kneip and A. Lorenz (eds.), *Verfassungswandel im Mehrebenensystem* (Wiesbaden: VS Verlag, 2011b), pp.228-48; C. Hönnige 'Impliziter Verfassungswandel durch das Bundesverfassungsgericht in gesellschaftlichen und politischen Fragen', (ibid.), pp.249-71.

<sup>11</sup> The only data occasionally available are listings of the party affiliation of judges, or at least of the parties that nominated them. See for example U. Wagschal, 'Der Parteienstaat der Bundesrepublik Deutschland', *Zeitschrift für Parlamentsfragen* 32/4 (2001), pp.861-84, p.88; C. Hönnige, 'The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts', *West European Politics* 32/5 (2009), pp.963-84, p.971; G. Vanberg, *The politics of constitutional review in Germany* (Cambridge: Cambridge University Press, 2005), p.84 and 86.

<sup>12</sup> See R. C. van Ooyen, 'Amerikanische Literatur zum Supreme Court – Lücken bei der Forschung zum Bundesverfassungsgericht' *Zeitschrift für Politikwissenschaft* 18/4 (2008), pp.515-522, p.515-516; C. Hönnige and T. Gschwend, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?' *Politische Vierteljahresschrift* 51/3 (2010), pp.507-530, p.513.

<sup>13</sup> See D. Herrmann, 'Politikwissenschaftliche Forschung zum Bundesverfassungsgericht', in K. H. Schrenk and M. Soldner (eds.) *Analyse demokratischer Regierungssysteme* (Wiesbaden: VS-Verlag, 2006), pp.401-424.

<sup>14</sup> See for example U. Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts in der Bundesrepublik Deutschland. Band III* (Heidelberg: C. F. Müller, 2005), pp.1233-1283; Y. Jäger, 'Entscheidungsverhalten und Hintergrundfaktoren der Bundesverfassungsrichter' *Zeitschrift für Rechtspolitik* 20/10 (1987), pp.360-363; C. Hönnige, *Verfassungsgericht, Regierung und Opposition* (Wiesbaden: VS-Verlag, 2007).

<sup>15</sup> See C. Landfried, 'Die Wahl der Bundesverfassungsrichter und ihre Folgen für die Legitimität der Verfassungsgerichtsbarkeit' in R. C. van Ooyen and M. H. Möllers (eds.), *Das Bundesverfassungsgericht im politischen System* (Wiesbaden: VS-Verlag, 2006), pp.229-241.

<sup>16</sup> See J. Fleischer and M. Seyfried, 'Drawing from the bargaining pool: Determinants of ministerial selection in Germany', *Party Politics*, (June 19, 2013), available from <http://ppq.sagepub.com/content/early/2013/06/14/1354068813487108.full> (accessed 08.05.2014); E. O'Malley, 'Ministerial Selection in Ireland: Limited Choice in a Political Village', *Irish Political Studies* 21/3 (2006), pp.319-36.

<sup>17</sup> J.A. Segal and H.J. Spaeth, *The Supreme Court and the attitudinal model revisited* (Cambridge: Cambridge University Press, 2002), p.6.

<sup>18</sup> Ibid.

<sup>19</sup> See J.A. Segal, L. Epstein, C.M. Cameron and H.J. Spaeth, 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited', *The Journal of Politics* 57/03 (1995), pp.812-23.

<sup>20</sup> See L. Epstein and J. Knight, 'Mapping out the strategic terrain: The informational role of Amici Curiae', in C.W. Clayton and H. Gillman (eds.), *Supreme Court Decision-Making* (Chicago: University of Chicago Press, 1999), pp.215-35, p.218-19.

<sup>21</sup> See C. Hönnige for a similar argument (C. Hönnige 'Beyond judicialization').

<sup>22</sup> Compared to analysts of decision making within the US Supreme Court students of the German FCC have to deal with a much more limited availability of data. In general, individual votes are not recorded, which makes it impossible to relate personal characteristics of the judges with their decisions and to analyse the dynamics of intra-court decision making. Only for the so-called *Sondervoten* (dissenting opinions) a personalized record is available. Nevertheless, since the introduction of this transparency measure in 1971 only 151 out of the 2.107 decisions taken by the FCC have featured dissenting opinions (see <https://www.bundesverfassungsgericht.de/organisation/gb2013/A-I-7.html>). The relatively low number of *Sondervoten* hampers their usability for representative studies about the judges' decision making. Alternatively, one could aggregate the judges' individual characteristics to the level of the senate to relate them with the collective Court decisions. Hönnige for example used the party affiliation of the judges to determine the median judge within each senate. He found the decisions to be highly affected by the party affiliation of the median judge which is, according to his view, the pivotal judge. See C. Hönnige 'The Electoral Connection'. The

---

problem with such an approach is that it is impossible to know whether the aggregation procedure resembles the process of decision making within the group of eight judges. Hönnige's study asks the question whether the FCC takes a decision in favour of the government or in favour of the opposition. However, in a more y-centred research design, explaining in more detail the variation among the Court's decision making, party affiliation is a rather crude approximation for other potentially explanatory variables like the position of the judge on specific ideological scales. Additional information about the judges is therefore a necessary precondition for more profound analyses of FCC decision making.

<sup>23</sup> For a detailed description of the legal framework for the election of FCC judges see A. Tschentscher, 'Rechtsrahmen und Rechtspraxis der Bestellung von Richterinnen und Richtern zum Bundesverfassungsgericht', in J.-R. Sieckmann (ed.), *Verfassung und Argumentation* (Baden-Baden: Nomos, 2005), pp.95-113.

<sup>24</sup> The number of judges at the FCC was gradually reduced from 24 in 1951 to 16 in 1970. Since then it has been stable. See S. Kneip, *Verfassungsgerichte als demokratische Akteure*, p.194.

<sup>25</sup> The deputies of this committee are appointed by the Bundestag through proportional representation.

<sup>26</sup> Until 1956 even a 3/4-majority was necessary. See W. Rudzio, *Das politische System der Bundesrepublik Deutschland* (Wiesbaden: VS Verlag, 2011), p.298.

<sup>27</sup> These are the Federal Court of Justice (Bundesgerichtshof BGH), which is the supreme court for all matters of private and criminal law, the Federal Administrative Court (Bundesverwaltungsgericht BVerwG) being the court of the last resort for disputes between citizens and the state, the Federal Labour Court (Bundesarbeitsgericht BAG), which is responsible for all final decisions on labour law (e.g. disputes between employees and employers or cases of strikes), the Federal Fiscal Court (Bundesfinanzhof BFH) being the final court of appeal for customs and tax matters and the Federal Social Court (Bundessozialgericht BSG), which is the supreme court for cases of social security deciding on such matters as public health insurance or pension insurance.

<sup>28</sup> In the early days of the Court there was no such provision.

<sup>29</sup> A. Tschentscher, 'Rechtsrahmen und Rechtspraxis', pp.111-13.

<sup>30</sup> It is doubtful whether the currently debated reform considerations, which demand an election of the FCC judges by the plenum of the Bundestag, would actually change this informal preliminary decision making process significantly.

<sup>31</sup> A. Gabadinho, G. Ritschard, M. Studer and N.S. Müller, 'Mining sequence data in R with TraMineR package: A user's guide' (University of Geneva, 2011a), p.28.

<sup>32</sup> Given their de facto political position I coded parliamentary state secretaries same as ministers.

<sup>33</sup> A. Abbott, 'Sequence Analysis: New methods for old ideas', *Annual Review of Sociology* 21 (1995), pp.93-113; A. Abbott and A. Tsay, 'Sequence Analysis and Optimal Matching Methods in Sociology: Review and Prospect', *Sociological Methods & Research* 29/1 (2000), pp.3-33.

<sup>34</sup> For such an approach see J. Borchert and K. Stolz, 'German Political Careers: The State Level as an Arena in its Own Right?', *Regional & Federal Studies* 21/2 (2011), pp.205-22.

<sup>35</sup> I agree with Real-Dato and Alarcón-González that the inductive sequence analysis approach complements the conventional deductive approach being used for the study of political elites and their careers. See J. Real-Dato and F.J. Alarcón-González, 'The significance of the European Parliament in political careers: evidence from the careers of Spanish MEPs (1986-2010)', Paper Presented at the 'General Conference of the ECPR Standing Group on Parliaments', Dublin, 24-27 Jun. 2012. For applications of the deductive approach see J. Borchert and K. Stolz, 'Individual Ambition and Institutional Opportunity: A Conceptual Approach to Political Careers in Multi-level Systems', *Regional & Federal Studies* 21/2 (2011), pp.117-40; S. Scarrow ('Political Career Paths and the European Parliament', *Legislative Studies Quarterly* 22/2 (1997), pp.253-63.

<sup>36</sup> S. Aisenbrey and A. E. Fasang, 'New Life for Old Ideas: The 'Second Wave' of Sequence Analysis Bringing the 'Course' Back Into the Life Course', *Sociological Research and Methods* 38 (2010), pp.420-462, p.450.

<sup>37</sup> See M. Kerby, 'A Sequence Analysis of Canadian Supreme Court Judicial Careers', Paper Presented at the 'ECPR General Conference', Bordeaux, 4-7 Sep. 2013; J. Real-Dato and F.J. Alarcón-González, 'The significance of the European Parliament'; M. Tepe and K. Marcinkiewicz, 'Career Paths of the German Administrative Elite. A Quantitative Sequence Analysis of Administrative State Secretaries' Biographies', Paper Presented at 'ECPR General Conference', Bordeaux, 4-7 Sep. 2013.

<sup>38</sup> The graphical presentation of sequence data works best with a complete rgb-colour palette. The graphs in the online-annex are thus in full colour. In the article itself I use a grey scale. Nevertheless, I tried to enhance the interpretability of the graphs, e.g. I additionally labelled the areas in the transversal plots.

<sup>39</sup> It is important to note that these 'not existing values' are not missing due to a lack of information, but because of the different length of pre-FCC careers. The pre-FCC career of judge A who enters the FCC at the age of 40, cannot exceed 20 years (starting with university education), while judge B who enters the FCC at the age of 60 may have worked in other positions for 40 years. The twenty years A lacks in contrast to B are coded as 'not existing values'. There are only two cases of missing data for very few years that are due to a lack of information: Theodor Rittersbach (1939-1945) and Georg Fröhlich (1920 and 1922).

---

<sup>40</sup> See A. Abbott and A. Tsay, 'Sequence Analysis and Optimal Matching'.

<sup>41</sup> C.H. Elzinga, 'Sequence analysis: metric representations of categorical time series' (Vrije Universiteit Amsterdam, 2007), p.3.

<sup>42</sup> Dijkstra and Taris, 'Measuring the Agreement between Sequences', *Sociological Methods & Research* 24/2 (1995), pp.214-31.

<sup>43</sup> Wu criticises that classic OM does not account for the ordering and the timing of the transitions. See L.L. Wu, 'Some Comments on 'Sequence Analysis and Optimal Matching Methods in Sociology: Review and Prospects'' *Sociological Research and Methods* 29 (2000), pp.41-64.

<sup>44</sup> Dijkstra and Taris' example shall be stated here as it illustrates the problems of the OM-metric very well. Let us assume that there are three sequence objects X, Y, and Z, each having six statuses. X: aaabcd; Y: bcdeee; Z: ffffff. Applying the OM-metric leads to the result, that the distance between sequence X and Y is six (every status in Y has to be replaced to get a sequence identical to X). Accordingly, the distance between X and Z is also six. In the context of career-studies this does not make any sense, because obviously sequence X and Y are much more similar: they share three statuses which are even in the same order, whereas there are really no similarities between X and Z and between Y and Z. See *ibid.* p.216. Furthermore the OM edit operations would mean an interference in the timescale as careers are – as opposed to DNA-sequences – time referenced. See N. Barban and F. C. Billari, 'Classifying Life Course Trajectories: A comparison of latent class and sequence analysis' *Journal of the Royal Statistical Society. Series C Applied Statistics* 61/5 (2012), pp.765-784, p.769.

<sup>45</sup> See C.H. Elzinga, 'Sequence analysis'. Another alternative to the OM-metric proposed by Elzinga is the Longest Common Prefix. Two sequences are here considered to be similar if the very first common subsequence is long compared to other pairs of sequences. See A. Gabadinho, G. Ritschard, N.S. Müller and M. Studer, 'Analyzing and visualizing state sequences in R with TraMineR', *Journal of Statistical Software* 40/4 (2011b), pp.1-37, p.25. This metric is of course not very well suited for our purpose, as the similarity measure would be based on the first years, primarily the time when the FCC judges studied law and worked as trainee lawyers.

<sup>46</sup> See M. Kerby, 'A Sequence Analysis of Canadian Supreme Court Judicial Careers' and J. Real-Dato and F.J. Alarcón-González, 'The significance of the European Parliament'.

<sup>47</sup> This example is adapted from C.H. Elzinga, 'Sequence analysis', p.14.

<sup>48</sup> Another advantage of the LCS-metric is the fact that it is able to handle data with internal gaps within the sequences. These missing values are considered by the program 'as an additional valid state'. See A. Gabadinho, G. Ritschard, M. Studer and N.S. Müller 'Mining sequence data in R with TraMineR package: A user's guide' (University of Geneva, 2011a), p.94.

<sup>49</sup> For the exact formula see C.H. Elzinga 'Sequence analysis: metric representations of categorical time series' (Vrije Universiteit Amsterdam, 2007), p.15; A. Gabadinho et al. 'Mining sequence data in R', p.93.

<sup>50</sup> A. Gabadinho et al. 'Analyzing and visualizing state sequences in R', p.28.

<sup>51</sup> N. Barban and F. C. Billari, 'Classifying Life Course Trajectories' p.781.

<sup>52</sup> See B. Halpin and T. W. Chan, 'Class Careers as Sequences: An Optimal Matching Analysis of Work-Life Histories' *European Sociological Review* 14/2 (1998), p.111-130.

<sup>53</sup> Checks with other clustering algorithms (average, complete and single linkage) produce no systematically different results.

<sup>54</sup> For a description of the inverse scree test see U. Wagschal, *Statistik für Politikwissenschaftler* (München: Oldenbourg, 1999), p.270-72.

<sup>55</sup> Silhouettes are another possibility to check the fit of a cluster solution. See P.J. Rousseeuw, 'Silhouettes: A graphical aid to the interpretation and validation of cluster analysis', *Journal of Computational and Applied Mathematics* 20/0 (1987), pp.53-65. Their basic idea is simple: One starts with a given clustering solution with  $k$  clusters. Furthermore, one needs the dissimilarity-matrix between all objects. Then one compares for each case  $i$  in the dataset the average distance to the other cases within its own cluster (call this  $a_i$ ) with the minimum of the average dissimilarities of  $i$  to all the other clusters (i.e. the average distance to its neighbouring cluster, called  $b_i$ ). The silhouette-measure for each case  $s_i$  is then calculated as follows:  $s_i = \frac{b_i - a_i}{\max\{a_i, b_i\}}$ . When  $s_i$  is close to 1, the average distance to the nearest other cluster ( $b_i$ ) is much bigger than the average distance of  $i$  within its own cluster ( $a_i$ ). In such a case one would say that the clustering algorithm has definitely put object  $i$  into the right cluster. If  $s_i$  is close to zero the object can be regarded as a kind of intermediate case which could have also been assigned to the neighboring cluster as the distances  $a_i$  and  $b_i$  are almost equal. The worst case for the quality of a clustering solution is when  $s_i$  is negative. Then  $i$  lies on average closer to the neighboring cluster than to the other objects within its own cluster. Summing up,  $s_i$  'measures how well object  $i$  matches the clustering at hand (that is, how well it has been classified)' *ibid.*, p.56. Plotting the silhouette measures by cluster enables us to compare different clustering solutions, or as Rousseeuw writes to 'distinguish "clear-cut" clusters from "weak" ones' *ibid.*

---

<sup>56</sup> See R. Piccarreta and O. Lior, 'Exploring sequences: a graphical tool based on multi-dimensional scaling' *Journal of the Royal Statistical Society. Series A Statistics in Society* 173/1 (2009), pp.165-184, p.176.

<sup>57</sup> I use the TraMineR package for R. Melinda Mills gives a short introduction to this package. See M. Mills, *Introducing Survival and Event History Analysis* (London: Sage, 2011), p.215-26. For all further technical questions, consult the handbook or the developers' own articles. See A. Gabadinho et al., 'Analyzing and visualizing state sequences in R'; G. Ritschard, A. Gabadinho, N.S. Muller and M. Studer, 'Mining event histories: a social science perspective', *International Journal of Data Mining, Modelling and Management* 1/1 (2008), pp.68-90; A. Gabadinho et al. 'Mining sequence data in R'. The data-set and R-code can be downloaded from <http://www.sebastianjaeckle.de/publications.html>.

<sup>58</sup> The only chief judge who held a position within the judicial system directly before being elected as a FCC judge in 1953 was Josef Wintrich, who worked at the higher regional court in Munich and was vice president of the Bavarian Constitutional Court.

<sup>59</sup> The regular sequence plots can be found in figure O2 in the online-annex.

<sup>60</sup> To some extent, this is a result of combining university professors and university staff into the single category *university*.

<sup>61</sup> See C. Landfried, 'Die Wahl der Bundesverfassungsrichter'.

<sup>62</sup> For reasons of space I leave aside the seven judges nominated by DP, FDP, and the Greens.

<sup>63</sup> See fig. O4 and O5 in the online-annex.

<sup>64</sup> For example law students' socialization at different universities could affect the judges' attitudes and in turn their decisions.

<sup>65</sup> For this purpose, one possible starting point could be the use of temporal qualitative comparative analysis (tQCA) as introduced by Caren and Panofsky. See N. Caren and A. Panofsky, 'TQCA: A Technique for Adding Temporality to Qualitative Comparative Analysis' *Sociological Methods & Research* 34/2 (2005), pp. 147-172.