How do Courts uphold the Law while facing Noncompliance? Evidence from the European Court of Justice

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Abstract

The judiciary is frequently reliant on executive and legislative bodies to implement its decisions. Scholars argue that public trust in the judiciary helps compel the other branches to comply. As noncompliance may erode public trust, courts are sensitive to government threats to not implement their decisions. Public trust, however, is also contingent on a court maintaining a consistent case law, which may require it making unpopular decisions that risk government noncompliance. How can courts manage this tension? I argue that when the legal merits favor a ruling against a government's preferences and the threat of noncompliance is high a court will provide the government more flexibility in implementing its ruling. This strategy allows courts to build public trust through the appearance of government compliance, while also building trust by advancing case law in a legally consistent manner. An analysis of Court of Justice of the European Union decisions provides evidence supporting this account.

Introduction

Almost all societies have institutionalized dispute resolution mechanisms with the task of resolving conflict between two parties. Establishing confidence in such institutions is instrumental to their efficacy (e.g., Gibson, Caldeira and Baird 1998). These institutions are often critically dependent on the voluntary compliance of the losing party, as they frequently do not have the ability to independently compel compliance by force. Without the compliance of the losing party, such an institution is unable to gain the confidence required to incentivize parties to utilize it to resolve disputes in the future (e.g., Shapiro 1981). If such an institution does not rule against parties reluctant to comply, it will never meaningfully constrain behavior. How can these institutions resolve disputes in a legally consistent manner and obtain compliance?

As a dispute resolution institution lacking the power of the purse or the sword, courts face this predicament very directly. In particular, when a court is exercising judicial review – which allows it to annul the actions of the executive – it is trying to compel compliance from the government[1] it relies on for enforcement. Since a court cannot directly enforce an adverse ruling, the government's decision to disobey a ruling is conditional on its consequences for doing so. If the government is held electorally accountable to the public, for example, noncompliance with a court decision may be politically costly. Insofar as citizens value the integrity of the judiciary and respect for its decision-making, they may punish elected officials for noncompliance with a court's rulings (e.g., Vanberg 2005). When public support for a court is not high enough, however, a court risks noncompliance if it makes an adverse ruling against the government (e.g., Krehbiel 2021). Open defiance may be costly for such courts and may make citizens less likely to punish the government for future noncompliance

[1]I use the term "government" to broadly refer to the institutions responsible for enforcing the court's decisions. Although variation exists between countries with a unitary executive (e.g., Vanberg 2001), and those with a separate executive branch responsible for enforcement (e.g., Carrubba and Zorn 2010) my theory is broadly generalizable as a long as the judicial branch lacks its own independent enforcement capability.

(e.g., Carrubba 2009). Assuming a court cares about influencing policy in the future, it has incentive to take into account the potential response of the government when making its rulings. Nonetheless, if it also cares about maintaining a coherent and legally consistent case law – which scholars argue also affects the public's perception of a court as a legitimate arbiter of disputes (e.g., Hansford and Spriggs II 2006; Zink, Spriggs II and Scott 2009) – it cannot always rule in the government's favor when it threatens noncompliance. A court, therefore, faces the challenge of legal consistency while mitigating the risk of government noncompliance.

In this paper, I argue that a court can deal with this challenge by varying what it means for a government to comply with a decision. As government noncompliance becomes more likely, a court will provide more flexibility to the government in implementing its ruling. This logic is similar to that of Staton and Vanberg (2008) who argue a court should provide maximum flexibility in cases in which noncompliance is particularly problematic. An alternative interpretation of their theory is that, in such cases, a court will not rule against the government, which a number of empirical studies provide evidence for in various contexts (e.g., Clark 2011; Herron and Randazzo 2003; Iaryczower, Spiller and Tommasi 2002). I build on this scholarship by arguing that, since maintaining a consistent jurisprudence helps build public legitimacy, it is costly for a court to not rule against a government in cases in which the legal grounds warrant it. As a result, in such cases, a court does not have the ability to credibly rule that the government does not need to change its behavior. It is in these cases in which the legal merits favor a ruling against the government and the threat of noncompliance is high that a court provides a government flexibility over implementation. This strategy allows a court to have the public appearance of government compliance, while advancing case law in a legally consistent manner. To test my theory I analyze preliminary reference cases brought to the Court of Justice of the European Union (CJEU) between 1997 - 2008. Leveraging the advocate-general's (AG) opinion as a measure for a case's legal merits (e.g., Carrubba and Gabel 2015; Larsson and Naurin 2016), I provide evidence that the CJEU is

more likely to provide member states flexibility over implementation when it agrees with the AG's recommended ruling on a case and member states threaten noncompliance.

I organize the remainder of this article as follows. First, I theorize about a court's challenge of maintaining a legally consistent case law while facing government noncompliance. Second, I provide context for the CJEU and the role of the advocate-general as a barometer for a case's legal merits. Third, I present my empirical results with evidence that the contents of CJEU judgments are responsive to member state threats of noncompliance when the CJEU agrees with the AG. Lastly, I conclude with my argument's implications for the judicial politics literature and suggest avenues for future research.

Judicial Decision-Making, Compliance, and Legal Merits

Consider the United States Supreme Court case *Brown v. Board of Education* (1955) or *Brown II*. The Court found the racial segregation of schools unconstitutional and instructed that integration should proceed with "all deliberate speed." Constructing such a ruling served the Court two purposes. First, the Court established precedent by arguing that the equal protection clause of the fourteenth amendment rendered racial segregation of public schools unconstitutional. This decision served to expand the Court's legal ability to strike down similar discriminatory laws in future cases. Second, the Court provided substantial flexibility to the states over implementing *Brown*.

Brown II effectively illustrates this problem a court faces in attempting to meaningfully constrain governments' behavior – in this case, state governments in the southern United States – while relying on it for implementation. The Court faced considerable opposition to their decision-making, as the majority of the congressional delegations from nine southern states signed the Southern Manifesto condemning the decision. If the Court enjoyed a high level of public support in the southern states, an extensive scholarship argues, the threat of

electoral punishment from citizens could have compelled policymakers to comply with the Court's ruling (e.g., Vanberg 2015). Sometimes, however, even the world's most powerful courts cannot rely on the public to compel compliance (e.g., Rosenberg 1991) and their decision-making may instead incite popular backlash (e.g., Clark 2011). Given the Court did not have sufficient public support to compel compliance with their *Brown II* decision in the southern United States, they required a creative solution.

The judges openly acknowledged this hostility and the potential problems of noncompliance during their deliberations. As Justice Frankfurter wrote in a memorandum circulated to the judges, the court needed to formulate "criteria not too loose to invite evasion, yet with enough 'give' to leave room for variant local problems" (Hutchinson 1979, 54). An available strategy for judges is to provide flexibility – or "enough 'give'," as Justice Frankfurter put it – to policymakers as to what constitutes compliance. Following a similar logic to Staton and Vanberg (2008), when a court increases flexibility over government implementation of its ruling, it augments the set of outcomes that are compliant. As a result, an executive can claim compliance with a ruling even when they have not substantially changed their behavior. In *Brown II*, the Court provided considerable flexibility to states in implementation by listing a number of reasons for why states could delay implementation and instructed lower courts to be accommodating.[2]

Adopting such a strategy raises the question as to why a court would invite an executive's substantive noncompliance – in *Brown II*, for instance, allowing a state to claim they are working towards integration with "all deliberate speed" when they have not integrated any school – by providing flexibility over what constitutes legal compliance in the first place. Suppose, for example, an alternative ruling with less flexibility that provided a date by

[2]Lower courts could grant additional time for implementation by considering problems "related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

which the southern states had to comply. If a state did not comply by this certain date, it would be in clear violation of the ruling. As Hutchinson (1979, 54-55) describes, Justice Frankfurter "worried aloud that fixing a terminal date would appear to be 'arbitrary' and would 'seem to be an imposition of our will' without consideration of local problems, which would 'tend to alienate instead of enlist favorable or educable local sentiment'." Providing a specific date to integrate schools, while clearly demarcating what constitutes compliance, may have caused even more public backlash and invited overt noncompliance of the ruling by states.

When an executive is determined to ignore a court's adverse ruling in a given case even when its noncompliance will be apparent to the public, it can highlight to the public the court's lack of enforcement power. Consequently, an executive's noncompliance in the current moment may encourage noncompliance by other policymakers in the future and ultimately erode the public's perception that the court can actually constrain behavior. Observing this interaction repeatedly over time, the public will lose confidence that the court is an institution that the executive should obey and, therefore, be less willing to punish the executive for noncompliance. As Staton and Vanberg (2008, 507) describe it, "Once defying decisions becomes a 'normal' part of politics, judges lose influence as policymakers are no longer expected to heed rulings they dislike." Such open defiance of a court threatens its long term efficacy and affects its ability to constrain the executive.

A court acting to constrain the executive in cases in which noncompliance is a serious threat carries a large risk, as its public legitimacy could be at stake. One strategy for a court is to avoid the noncompliance problem altogether by not ruling against an executive in the first place. A court may defer to the executive in situations in which it expects the executive to institutionally override its decisions (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016) or when the executive is threatening the promotion and tenure of its judges or the resources of the court (e.g., Clark 2011; Helmke 2005; Ramseyer and Rasmusen 2003).

If a court consistently adopts this strategy, however, it will never build the public support necessary to meaningfully influence policy when its interests diverge from the executive.

The model from Carrubba (2009) provides insights on why a public would choose to back a court against its elected government and how a court that does not have the public support necessary to constrain a government can gain and maintain that support over time. Carrubba (2009) argues that although the public knows that its preferences are correlated with its government's, at times the government has incentive to deviate from those preferences (for example, if the government is beholden to special interests). As a result, courts provide the public the ability to actively monitor its government. Since the public is not perfectly knowledgeable about whether its government is complying with the law and properly representing its preferences, it is more likely to cue off a court's decision in order to inform their choice over whether to sanction their government. Nonetheless, this mechanism requires the public to have confidence in the court's decision-making in the first place. For a court to gain public confidence, Carrubba (2009) argues that a court must avoid being overly aggressive. That is, a court must be selective in which cases it rules against the government. As a result, in the model, a court has a weakly dominant strategy to not rule against a government if it expects noncompliance. Combining these insights together, a public's support of the court increases over time as it observes its government complying with court rulings.[3]

Building off this theory, I argue that another way a court can be strategic in building public support when facing noncompliance is by varying flexibility in its rulings. Instead of being selective simply about whether it rules against the government, a court can also be selective about which cases it will provide bright line rules as to what constitutes noncompliance and which cases it will provide flexibility over implementation. While bright line rules may make noncompliance more likely to have the corrosive effect of eroding public confidence over time, conversely, providing an executive flexibility over implementation may

[3]In the Carrubba (2009) model this occurrence is also conditional on the public benefiting government compliance with court rulings.

increase the public's trust in the court. For the public to gain confidence in a court's ability to constrain executive behavior, it must observe the government obeying the court's rulings. The court providing enough flexibility for the government to claim compliance creates a perception among the public that the government is in fact obeying the court. As this support builds over time and the public strongly values government compliance with rulings, the court will have the opportunity to make more specific rulings – laying out precise terms for what constitutes noncompliance with little room for flexibility over implementation – and expect the public's threat of punishment to compel compliance.

To adopt this strategy, however, a court needs a compelling reason to subject itself to this risk of noncompliance instead of avoiding noncompliance altogether by not ruling against the executive in the first place. I argue a court will provide flexibility over implementation in order deal with executive threats of noncompliance only when a case's legal merits support constraining executive behavior. That is, only if the relevant precedent, legal arguments, and case characteristics sufficiently support a ruling against the executive should a court wrestle with constraining the executive's authority and providing it flexibility over implementation. A court, thus, must balance the cost of making a legally questionable decision with the cost of government noncompliance. In these situations, a court has incentive to make legally consistent decisions while providing flexibility over implementation to mitigate the public perception of government noncompliance.

The legal choices judges make in resolving a case may have profound effects on the development of case law in the future. By establishing a precedent or adopting a specific logic of legal reasoning, a court may invite more litigation in a certain policy area – as potential litigants may see opportunities to have the court favorably resolve their disputes – and influence how policymakers interpret and implement its rules. A court's decisions over time also serve an informational function to policymakers, as they can anticipate the potential legal consequences of their actions and whether they can prevail in a dispute before the court (e.g., Shapiro 1965). It also allows lawyers who are arguing before a court develop

their reasoning in line with the court's past decision-making and strategically try to limit the number of alternative rulings the court can make. Put simply, a court's adherence to its past case law and the legal arguments brought before it by the relevant parties limit the number of legally defensible rulings a court may make in a given case.

Maintaining a coherent case law, furthermore, serves a legitimating function for a court. As Hansford and Spriggs II (2006, 22) explain, judges "recognize that the legitimacy of a decision is a necessary condition for it to produce the distributional effects they desire [...] [and] therefore pay attention to precedent and incorporate it into their [decisions]. In so doing, they can provide neutral, legal justifications for their decisions and thereby enhance their legitimacy." This perception of neutrality aids a court in the legitimacy-building process (e.g., Shapiro 1981), as a court must convince the public that its rulings are a result of fair decision-making criteria. Scholars have written extensively on procedural fairness in judicial decision-making, and maintaining a consistent case law is critical to these perceptions (e.g., Baird 2001; Tyler 2006). Empirically, Zink, Spriggs II and Scott (2009) provide experimental evidence that individuals are more likely to accept a court decision when it follows precedent. In addition, the maintenance of consistent legal reasoning and sound argumentation may be of particular importance to international courts that often must convince domestic courts to adopt their legal reasoning (e.g., Larsson et al. 2017; Lupu and Voeten 2012). As domestic courts increasingly accept the rulings of international courts, domestic actors are incentivized to bring cases to international courts (e.g., Simmons 2009), further legitimizing their function as an institution (e.g., Carrubba and Gabel 2017).

To not maintain a consistent and coherent case law is, thus, costly for judges for a number of reasons. First, it could erode trust in a court as an aribiter of disputes and make it less likely that societal actors will bring cases to it – exactly what it needs to build legitimacy over the long term and serve as a check on executive power. Second, it could increase uncertainty in the law and make it unclear to the public whether the government has committed a violation. Third, it substantially increases the time it takes for judges to

dispose with each individual case. As Epstein, Landes and Posner (2013, 39) explain, "it's a lot easier to decide a case because it is materially identical to one previously decided (which might be a case that had distinguished an earlier precedent in an effort to fine-tune the law) than to analyze every new case afresh." Judges are, therefore, incentivized to maintain a case law that honors the legal merits of the cases that come before them (e.g., Bailey and Maltzman 2008; Richards and Kritzer 2002) even when facing threats of noncompliance.

It is for this reason the *Brown* story cannot be told without recognizing the astute legal strategy of the National Association for the Advancement of Colored People (NAACP). By tactically bringing cases to the federal courts challenging the "equal" portion of *Plessy v. Ferguson*'s "separate but equal" doctrine, the NAACP created precedent for their future legal challenge to eliminate segregation altogether. Cases challenging segregation in higher education were considered less likely to provoke public outrage, and, thus, served as the NAACP's earliest targets. These cases included *Missouri ex rel. Gaines v. Canada* (1938) – the Court found that sending black students out of state for legal education when a state did not have an in-state law school for black students was unequal – and *Sweatt v. Painter* (1950) – the Court found that the separate law schools for black and white students in Texas were inherently unequal – which provided the legal grounds for the Court to rule segregation in primary education unconstitutional in *Brown* (e.g., Tushnet 2004).

Similarly, if the legal merits of a case support a ruling against a government's preferences, a court should increase the amount of flexibility provided to the government over implementation as the government increasingly threatens noncompliance. When the legal merits do not support constraining the executive, a court will not take the risk of ruling against the executive because it does not have sufficient legal grounds supporting such a ruling. This theorizing leads to the following hypothesis:

Hypothesis 1 *When the legal merits favor a ruling against government preferences, as the probability of government noncompliance increases a court provides more flexibility over implementation of the decision to the government*

Application: Court of Justice of the European Union

To test my hypothesis, I examine the CJEU – the highest court of the European Union. I choose to analyze the CJEU for a number of reasons. First, the CJEU has the legal opportunity to limit the authority of the EU's member states, as a diverse pool of litigants can access the Court and bring a variety of cases to its docket. Second, similar to many other courts, the CJEU lacks independent enforcement capability and is reliant on the member states for implementation of its decisions. Third, scholars have developed empirically valid strategies to measure the probability of member state noncompliance with CJEU decisions by leveraging information contained in observations (amicus briefs) member states send to the Court (e.g., Carrubba and Gabel 2015; Larsson and Naurin 2016). Lastly, the CJEU's use of advocates-general (AG) opinions provides an appropriate proxy for the legal merits of a case and counterfactual to compare the amount of flexibility over implementation the Court's ruling provided to a member state.

The CJEU is arguably the most powerful international court in the world. Although the Court's formal power in the EU treaties has remained relatively the same since the beginning of its operations, it has gradually expanded its authority over member state courts, member state law, and the EU treaties through its rulings. For example, early in its jurisprudence, the CJEU established the doctrines of *direct effect* – allowing EU citizens to bring disputes regarding EU law to member state courts even if the rights in the EU treaties were not established in national law – and *supremacy* – stipulating that EU law should be applied when EU law and national law are incompatible. These early rulings provided the Court ample opportunity to expand its authority, as the Court provided litigants relatively easy access to it. Through the preliminary reference procedure, member state courts can refer cases to the CJEU that concern a question of EU law (e.g., Krehbiel and Cheruvu 2021). This ability to hear cases from a variety of sources place the CJEU in a different position from many other international regimes and courts – such as the WTO's dispute settlement mechanism – in which only member states can bring cases against one another. The CJEU,

thus, can adjudicate on a wide array of legal questions in which member state compliance may be at issue.

While the CJEU has the legal opportunity to limit the authority of member state governments, compliance with its rulings is not a foregone conclusion. If the CJEU were to rule to expand EU law in a given policy area by, for example, requiring member states to meet a more strict environmental standard, it would be costly for member states to adopt the standard. Member states that find compliance with the standard too costly may not comply with the ruling by implementing a standard that is not as stringent as the one the Court prescribed or may outright defy such a standard altogether (e.g., Kaeding 2008). Irrespective of how noncompliance manifests, the Court faces credible threats of noncompliance because, similar to many domestic constitutional courts, it lacks the ability to enforce its decisions without the cooperation of the member states or the other EU institutions. Furthermore, for preliminary reference cases, member state courts may not adhere to the CJEU's recommended ruling in a case or refuse to refer at all (e.g., Golub 1996).

One way for the CJEU to deal with potential noncompliance, similar to other domestic courts, is to leverage its public support in the member states. The CJEU, however, may not always have sufficient support to compel compliance (e.g., Caldeira and Gibson 1995; Gibson and Caldeira 1995, 1998). Gibson, Caldeira and Baird (1998) provide evidence that trust in the CJEU is lower than trust in 12 member state courts and Eurobarometer survey evidence from 2018 and 2019 show support for the CJEU under 50% across the EU. Although Kelemen (2012) argues that support for the CJEU is high by comparing it to support for national judicial systems and institutions, Krehbiel (2021, 1610) describes this conclusion as problematic because "national justice systems comprise much more than national high courts (or courts in general), including citizens' relationships with the police, lawyers, [and] prosecutors [...] Consequently, trust in the national legal system as a measure of legitimacy [...] tends to be lower than theoretically grounded measures of diffuse support." While the existing literature suggests that increasing public awareness of executive noncompliance

with a court decision is a strategy courts with sufficient diffuse support can use to compel compliance (e.g., Krehbiel 2016, 2019; Staton 2006, 2010; Vanberg 2001, 2005), Krehbiel (2021) finds the CJEU tends to rule against constraining member state behavior when public awareness of a CJEU decision increases, as it may serve to encourage policymakers to engage in noncompliance when the CJEU's diffuse support is low. Similarly, Turnbull-Dugarte and Devine (2021) find that a CJEU ruling on a salient case regarding a prominent Catalan separatist in 2019 caused increased euroskepticism among those exposed to the ruling in Spain. It follows, therefore, that the CJEU cannot necessarily rely on public support as a mechanism to compel member state compliance.

Despite this constraint, although it is technically a civil law court, the CJEU cares about the precedent it establishes in order to maintain a coherent case law (e.g., Larsson et al. 2017). Garrett, Kelemen and Schulz (1998) argue that the CJEU is more likely to rule to constrain member state policy making authority when available precedent supports such a disposition. However, as they explore in their article, situations arise in which precedent may clearly dictate that the CJEU constrain member states' authority, but such a ruling may provoke member states to not comply or – in the worst case – actively pass legislation or amend the EU treaties to restrain the CJEU's authority (e.g., Castro-Montero et al. 2018). To resolve this tension, the CJEU makes rulings that "introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case" (Hartley 2007, 76). For example, in *Defrenne v. Sabena* (1976), the court ruled in favor of an airline hostess who had demanded back-pay after not receiving similar benefits to her male counterparts – thereby conferring the right to equal pay to individuals in member states – but only allowed workers who already had pending court cases at the time of the judgment to claim back pay for periods prior to the judgment date. Given member states faced substantial costs to

compliance[4] and may have not complied with a ruling demanding a more expansive remedy, the Court creatively established legal precedent while providing flexibility to member states by shielding them from the potential costs of implementing the decision.

Since member states' likelihood of compliance with a ruling can affect the CJEU's decision-making, scholars have developed an empirical measurement strategy that leverages member states' observations submitted for a given case to proxy for member states' probabilities of noncompliance (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016). These observations are a public signal of member states' positions on the legal questions in a case that are available to the judges and used to inform their decision-making process. Utilizing member state observations, therefore, provides a straightforward quantitative method to measure the probability of noncompliance with relatively few assumptions. These studies, however, rely on relatively crude outcome measures[5] about the disposition of a case. As a result, they obscure meaningful variation in the amount of flexibility provided to member states.

A final advantage of studying the CJEU is the Court's use of advocates-general (AG) opinions to inform its judgments. When a case arrives at the Court, the Court's president assigns a case to a judge-rapporteur (responsible for drafting the Court's judgment in a case) and an AG that may in some – not all – cases write an opinion (e.g., Cheruvu and Krehbiel 2021). As Article 252 of the Treaty on the Functioning of the European Union describes, "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement." The AG

[4]Hartley (2007, 76-77) explains, "In particular, if back-pay could be claimed by all women who suffered discrimination, the economic consequences would be serious: according to the United Kingdom government, many British firms would be driven to bankruptcy if the right to equal pay were backdated to Britain's entry into the [European] Community."

[5]The outcome measure for Larsson and Naurin (2016) is whether the court rules in a pro-EU direction and the outcome measure for Carrubba, Gabel and Hankla (2008) is whether the court rules for the defendant or the plaintiff in a case.

for a given case has the responsibilities of reviewing all materials and answering the legal questions. As Carrubba, Gabel and Hankla (2008, 448) explain, "The AG opinion involves a full analysis of the relevant case law and treaty articles and is sometimes significantly longer than the judgment of the Court. Importantly, the AG prepares her opinion in isolation from the judges on the Court and does not participate in their deliberations." When the judges rule in a case, the AG publishes their opinion alongside it.

Due to the separation of AGs from the judges' deliberations and their responsibility solely to the Court – as opposed to the litigants of a case – scholars argue that AG opinions are a valid proxy for the legal merits of a case (e.g., Larsson and Naurin 2016; Carrubba and Gabel 2015, ch.4). Importantly, however, AGs are not perfectly insulated from the political pressure that the Court faces. Member states appoint AGs to the Court for six-year terms, the Court publishes their opinions with the name of the AG who wrote them, and AGs – like judges themselves – have motivations regarding their future career opportunities that may affect their behavior (e.g., Epstein, Landes and Posner 2013). Nonetheless, since AGs do not write opinions on cases originating from their member state, the likelihood of this potential conflict of interest is limited. Carrubba and Gabel (2015) empirically test whether AGs are responsive to their home member states' preferences and find little evidence of such a relationship.

Data and Empirical Strategy

To test my hypothesis, I first need a strategy to measure flexibility over implementation. More specifically, a strategy to measure the change in flexibility from AG opinions to final judgments would be most appropriate to serve as the dependent variable. Using a novel dataset on references in AG opinions and CJEU judgments to sections of other documents sourcing from the CJEU database project (Brekke et al. N.d.), I create a variable indicating the percentage of references from the AG's opinion that the Court includes in its final

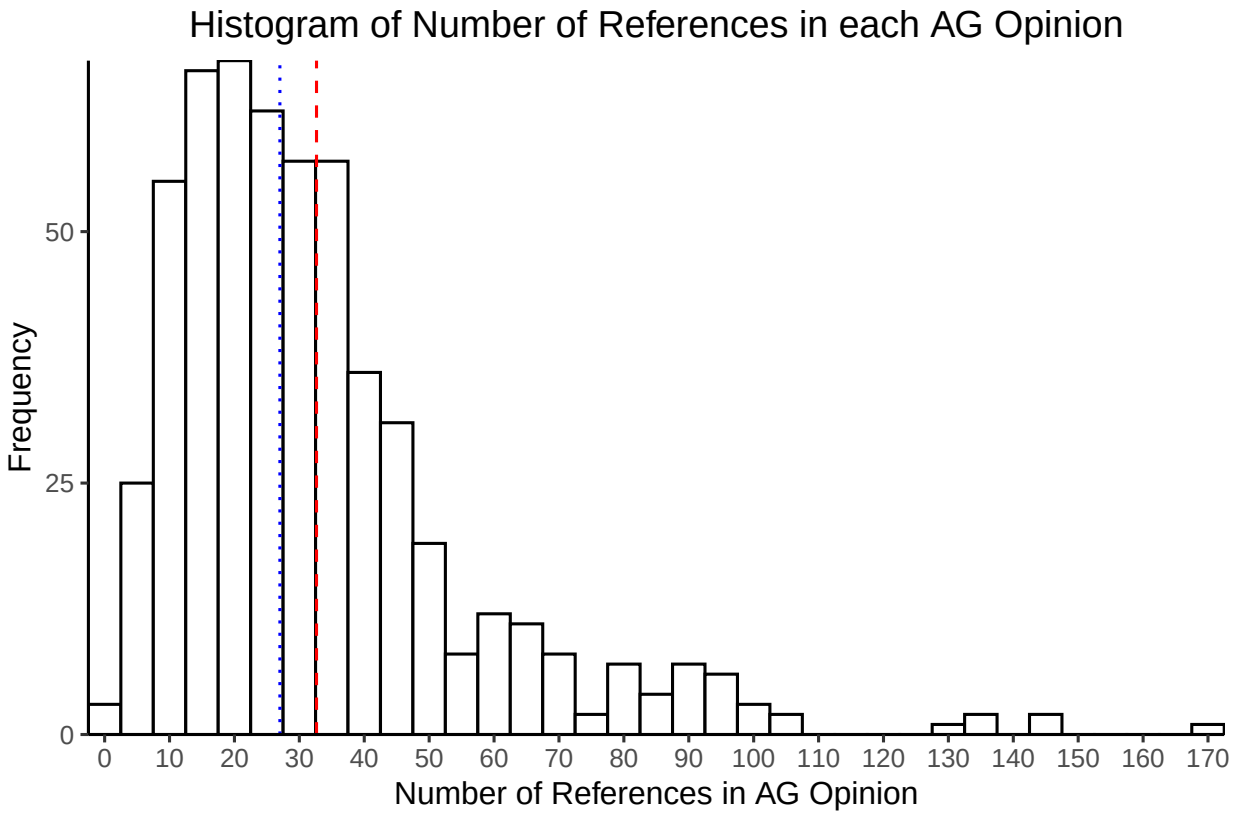

Figure 1: This histogram presents the distribution of the number of references to other documents in AGs' opinions in these data. The dashed line indicates the mean (32.648 references) and the dotted line indicates the median (27 references).

judgment in a case[6] (IN JUDGMENT) to operationalize the change in flexibility governments have in implementing the decision.

AG opinions and CJEU judgments reference a variety of documents. These references include other CJEU judgments, AG opinions, Commission directives (secondary legislation), regulations, and the EU treaties among other documents. I argue that when judges include a reference from an AG opinion in the final judgment of a case they are providing member states *less* flexibility over implementation. Although references to some documents may be more salient than others – for example, a reference to EU treaties that are difficult to

[6]Frankenreiter (2017) adopts a similar strategy by observing which case-law references in AG opinions are included in final judgments to analyze whether CJEU judges are more likely to include references from case-law adjudicated by judges appointed by governments with similar ideologies.

Table 1: Example Case for References from AG Opinion Included in Final Judgment

Case Number	Document	Section	IN JUDGMENT
C-201/99	Regulation 2658/87	Point 21	1
C-201/99	Regulation 2658/87	Points 24 - 43	1
C-201/99	Regulation 2658/87	Points 44, 47	1
C-201/99	Regulation 2658/87	Point 22	1
C-201/99	Regulation 884/94	Points 42, 43	0
C-201/99			$\frac{4}{5} = 0.8$

reform may be more powerful than a reference to a regulation that the Commission can easily amend – the basic intuition is the more references from the AG's opinion that are included in a final judgment, the less room for interpretation of the judgment, as the final judgment's inclusion of a reference constrains the set of actions that a member state can legally argue are compliant with a ruling. Put differently, when the Court excludes a reference in the AG's opinion from the final judgment, the judgment provides *more* flexibility to member states *relative* to the AG's opinion. Figure 1 provides a histogram of the distribution of the number of references to other documents in AGs' opinions within these data. The median AG's opinion contains 27 references while the mean opinion contains 32.648 references.

Table 1 provides an example from these data. In case number C-201/99 (*Deutsche Nichimen GmbH v Hauptzollamt Düsseldorf*), the AG's opinion had five references to other documents. Out of those five references, the Court included four of them in the final judgment. The variable IN JUDGMENT, thus, takes the value of 0.8. This table also demonstrates how fine grained these data are as, while the AG's opinion references Regulation 2658/47 four times, I can distinguish whether the final judgment included the specific sections from each document the AG referenced.

I use data from Larsson and Naurin (2016), which cover preliminary reference cases brought to the CJEU between 1997 - 2008 in which an oral hearing was held for measures of the disposition of the AG's opinion, the CJEU's judgment, and member states' preferred outcome for a case as measured by the observations they submitted to the court. These data comprise of 1,599 cases and 3,845 legal questions, which is the unit of observation. I create

variables to distinguish each combination in which the CJEU, AG, and the member states agree (or disagree) on their preferred outcome for a case. I create four binary variables for each combination of the CJEU and AG's decision-making (CJEU Pro-Integration and AG Pro-integration, or CJEU Anti-Integration and AG Pro-integration, etc.) and create three separate variables denoting whether on balance member states favored a pro-integration outcome (Member States Pro-Integration), an anti-integration outcome (Member States Anti-Integration), or if the balance of observations was 0 (Member States Neutral) – meaning member states filed an equal number of observations favoring a pro and anti integration position or filed none at all. The value of Member States Pro-Integration (Member States Anti-Integration) becomes larger as more member state observations favor a pro (anti) integration decision, while Member States Neutral is a binary variable.

Since I cannot properly map references to legal questions within a given judgment or opinion, I aggregate Larsson and Naurin's data to the case level in a few steps. First, I removed all cases that had legal questions in which it was ambivalent whether the AG's opinion or the CJEU's judgment was pro or anti-integration. Second, I removed cases with multiple legal questions in which the AG's opinion or the CJEU's judgment had both a pro- and anti-integration disposition. For example, if a case had two legal questions and the CJEU ruled pro-integration for one question and anti-integration for the other, I removed it. Third, for cases that had multiple legal questions, I took the mean of the balance of member state observations across all legal questions. Lastly, I remove cases in which the AG did not write an opinion or the opinion did not reference any other documents, leaving me with a total of 554 cases for analysis.

Validating the Dependant Variable. Since this measure of flexibility is relatively crude, however, it is important to provide evidence of its validity. To accomplish this task, I draw on data from Zglinski (2020) that measures deference the CJEU provided to EU member

states over implementing its decisions in free movement cases. Zglinski (2018) argues that the Court increasingly refrains from providing specific legal and regulatory remedies, but it defers to member states instead and that "Such deference has become prominent when the Court granted a government agency a 'margin of appreciation' to balance free movement with free speech, when it let a local body define the meaning of human dignity, and when it allowed a member state to choose whether to prohibit the carrying of nobility titles." This concept of deference to member states is virtually identical to my conceptualization of the Court providing member states flexibility over implementation. Empirically, Zglinski (2020) analyzed the Court's free movement case law for cases decided every fifth year from 1974 to 2013 and coded in which cases the Court provided a member state institution a "margin of appreciation'," or, put differently, "the widest leeway: not only can they take the policy decision they want, they can also choose how to reach their decision" (Zglinski 2018, 1345). I combined these data with my coding of the In Judgment variable, resulting in 203 cases. I run a simple regression with In Judgment as the dependent variable and a binary independent variable indicating whether the Court provided a member state a "margin of appreciation" in a case.[7] The Court granting a member state a margin of appreciation is correlated with a statistically significant 7.6 percentage point decrease ($\beta = -0.076$, $p < 0.05$) in the references from the AG's opinion the Court includes in its final judgment, supporting my dependant variable as a reasonable measure for the Court providing member states flexibility over implementation.

Substantive Example. An example case from these data that helps clarify my measurement strategy is *Tanja Kreil v Bundesrepublik Deutschland* (Case C-285/98). It concerned the European Council's Equal Treatment Directive (76/207/EEC), as Tanja Kreil brought a sex-discrimination case against the German armed forces (Bundeswehr). The Bundeswehr

[7] Zglinski (2020) distinguishes between partial and full margin of appreciation. For the purposes of this exercise both partial and full margin of appreciation recieve a value of 1 while cases without any margin of appreciation receive a value of 0.

AG Opinion

39 The question submitted by the Verwaltungsgericht Hannover should therefore, in my view, be answered as follows:

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions, such as the third sentence of Paragraph 1(2) of the Soldatengesetz in the version of 15 December 1995, most recently amended by the Law of 4 December 1997, and Paragraph 3a of the Soldatenlaufbahnverordnung in the version adopted on 28 January 1998, which exclude all women from recruitment to any `combat' unit of the armed forces.

Court Judgment

On those grounds,

THE COURT,

in answer to the question referred to it by the Verwaltungsgericht Hannover by order of 13 July 1998, hereby rules:

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services.

Figure 2: This figure compares the AG opinion's recommendation to the operative clause in the Court's judgment in Case C-285/98.

rejected Kreil's application to serve in electronics weapons maintainence because of a German law banning women from military posts that involve the use of arms. This case was highly salient and controversial and drew observations from Germany, the United Kingdom, and Italy, all of which supported an anti-integration position (Member States Anti-Integration = 3) – in this case, that the Court should not rule that the German law is incompatible with EU law. In the end, the AG and the Court both supported a pro-integration position (AG Pro-Integration and CJEU Pro-Integration = 1), but the Court only included 33% (In Judgment = 0.333) of references from the AG's opinion in its final judgment.

Figure 2 compares the AG opinion's recommendation in the case to the operative clause in the Court's opinion. The AG's recommendation is very specific – in particular, it directly references clauses in German legislation – implying that the exclusion of women from a "combat unit" of the armed forces is incompatible with EU law. The Court's judgment is identical to the AG's recommendation until it comes to referring to the particular legislation

violating EU law. Instead, it broadly refers to "German law" and only mentions a "general exclusion of women from military posts involving the use of arms" as contravening EU law. In sum, the Court's judgment provides more flexibility to the German legislature by allowing laws that restrict women from certain combat units, while the AG's opinion does not. The AG's opinion includes a reference to the Court's judgment in Case C-1/95 in which it cites Article 3(1) of the Council Directive at issue stating, "It should be recalled that Article 3(1) of the Directive prohibits any discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy." The Court excluded this reference in the AG's opinion to its past case law in its judgment. Substantively, if the Court were to include this reference, it would not provide the German legislature much flexibility over implementing its ruling. The Court, thus, strategically broadened the interpretation of its ruling by excluding a reference to case law that would have made almost any restriction on a women's service in the Bundeswehr incompatible with EU law.

Controls. I also operationalize a number of theoretically motivated control variables for my analysis. The variable CHAMBER is the number of judges that are sitting on a given case as a proportion of the total number of judges sitting on the Court. Scholars argue that chamber (panel) size is an indication of a case's salience (e.g., Kelemen 2012) and that the Court may strategically assign cases to larger chambers to manage the potential threat to compliance (e.g., Cheruvu and Krehbiel 2021). I may expect, thus, that judges will be more likely to grant flexibility to member states over implementation in more salient cases, as member states' noncompliance may be more damaging to the court's public legitimacy in higher salience cases (Krehbiel 2021). The variable COMPROINT is a variable that takes average of the Commission's pro-integration position over the legal issues of a given case based off the observations it sent to the Court. Higher values indicate the Commission supported a more pro-integration position. Existing scholarship argues that the Commission

Table 2: Descriptive Statistics

Statistic	Mean	St. Dev.	Min	Max
In Judgment	0.537	0.240	0.000	1.000
AG Pro-Integration and CJEU Pro-Integration	0.648	0.478	0	1
AG Pro-Integration and CJEU Anti-Integration	0.330	0.471	0	1
AG Anti-Integration CJEU Pro-Integration	0.007	0.085	0	1
AG Anti-Integration and CJEU Anti-Integration	0.014	0.119	0	1
Member States Pro-Integration	0.300	0.842	0	10
Member States Neutral	0.199	0.399	0	1
Member States Anti-Integration	1.199	1.628	0	14
Chamber Size	0.336	0.193	0.111	1.000
Commission Pro-Integration	0.292	0.909	-1	1
Goods	0.097	0.297	0	1
Agriculture	0.134	0.341	0	1
Workers	0.135	0.342	0	1
Establishment	0.182	0.386	0	1
Services	0.152	0.359	0	1
Capital	0.065	0.247	0	1
Transport	0.014	0.119	0	1
Competition	0.177	0.382	0	1
Tax	0.197	0.398	0	1
Customs	0.045	0.208	0	1
Social Provisions	0.085	0.279	0	1
Environment	0.023	0.152	0	1
Consumer Protection	0.049	0.216	0	1
Number of Legal Issues	1.426	0.774	1	6

has a substantial impact on the decision-making of the CJEU (e.g., Stone Sweet and Brunell 1998). I also include a variable for the number of legal issues in a case.

Next, I include a series of control variables for case policy areas such as free movement of goods, agriculture, free movement of workers, right to establishment, free movement of services, free movement of capital, transport, competition, taxes, customs union, social provisions, environment, and consumer protection. As Kelemen (2012, 43) observes, "As EU law expands into more sensitive areas of national policy, such as healthcare, education and taxation, the [CJEU] is pressed to step into terrain where its decisions are more likely to spark public outcries and political reprisals." Therefore, the probability of noncompliance,

and subsequently the amount of flexibility the CJEU provides to member states over implementation in a given case, may be dependent on the policy area. Table 2 provides descriptive statistics for all variables included in the models.

Empirical Approach. To test my hypothesis I run a series of OLS models with separate interactions for each combination of AG and CJEU dispositions with member state preferences over the outcome of a case. This strategy allows me to use all the available data to draw inferences as opposed to subsetting the data for each category relevant to my hypothesis (e.g., Kam and Franzese 2007). Recall that hypothesis 1 argues that when the legal merits favor a ruling against government preferences, a court will provide more flexibility over implementation as the probability of noncompliance increases. The two scenarios in which we should expect the CJEU to provide more flexibility over implementation are: (1) when it makes a pro-integration decision and the AG favors a pro-integration decision, while the member states prefer an anti-integration decision and (2) when it makes an anti-integration decision and the AG favors an anti-integration decision, while the member states prefer a pro-integration decision. Therefore, the two interactions of interest are MEMBER STATES ANTI-INTEGRATION $\times$ AG PRO-INTEGRATION AND CJEU PRO-INTEGRATION and MEMBER STATES PRO-INTEGRATION $\times$ AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION. For each of these two interaction terms, my theory predicts a negative and statistically significant relationship between it and the dependent variable IN JUDGMENT. Note that the coefficient for MEMBER STATES PRO-INTEGRATION $\times$ AG ANTI-INTEGRATION AND CJEU PRO-INTEGRATION does not exist, as these data have 0 observations in which MEMBER STATES PRO-INTEGRATION takes a positive value when AG ANTI-INTEGRATION AND CJEU PRO-INTEGRATION $= 1$. Since the constituent terms for each of the interactions are perfectly colinear, they are excluded from the models. After running models with just the interactions, I include models with AG fixed-effects and include models with the aforementioned control variables. For all models, I cluster standard-errors at the AG level.

Results

Table 3 presents the results. Model 1 presents just the interaction terms, model 2 has AG fixed effects, model 3 includes relevant control variables, and model 4 incorporates both AG fixed effects and controls. Across all model specifications the interaction term MEMBER STATES ANTI-INTEGRATION × AG PRO-INTEGRATION AND CJEU PRO-INTEGRATION is negative and statistically significant. Similarly, the interaction term MEMBER STATES PRO-INTEGRATION × AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION is also negative and statistically significant across all model specifications. In tandem these two results provide evidence supporting my primary hypothesis that the CJEU provides more flexibility to member states when it agrees with the AG and member states' probability of noncompliance increases.

My models also produce an unexpected result as MEMBER STATES ANTI-INTEGRATION × AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION is also negative and statistically significant. To make sense of this finding, figure 3 provides predicted values for each interaction term as MEMBER STATES ANTI-INTEGRATION increases. The relevant comparisons are the change in the CJEU's position when the AG position stays the same. When the AG prefers a pro-integration decision, as member states become increasingly anti-integration the slope for the CJEU ruling in a pro-integration direction decreases more quickly relative to when the CJEU rules anti-integration. This result is intuitive and is in line with theoretical expectations, as I should only expect the CJEU to provide more flexibility over implementation when the AG prefers a pro-integration ruling and the CJEU also rules pro-integration. Alternatively, consider in the figure when the AG prefers an anti-integration decision. The slopes for when the CJEU rules in a pro-integration direction relative to when it rules in anti-integration are almost indistinguishable. This result indicates that, substantively, irrespective of whether the CJEU rules in a pro or anti-integration direction, its behavior does not change when the AG prefers an anti-integration ruling as member states become increasingly anti-integration. Therefore, despite the MEMBER STATES ANTI-INTEGRATION ×

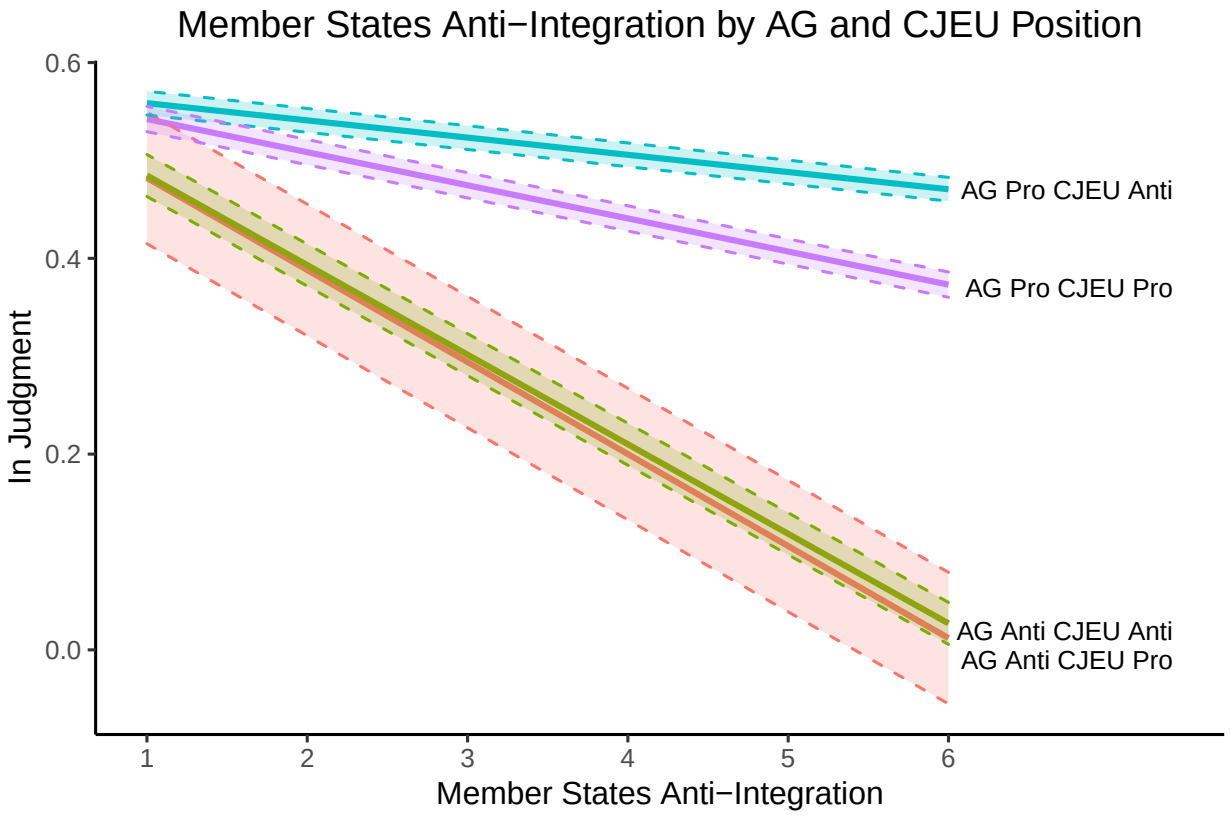

Figure 3: This figure shows the predicted values for each AG-CJEU combination as member states anti-integration increases with 90 percent confidence intervals clustered at the advocate general level. Based on the results in table 3, model 1.

AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION coefficient's statistical significance, it still comports with my theoretical expectations regarding the CJEU's judgment-writing behavior.

Furthermore, my models rely on a critical assumption that the relationship between member states' observations whether pro-integration or anti-integration and the amount of flexibility the CJEU provides in a judgment is linear. Given that I may expect threats of noncompliance by larger member states such as Germany and France relative to smaller member states to be more influential in the CJEU's decision-making, this assumption may not hold. To address this potential confounding, other studies have weighted member states' observations by their Qualified Majority Voting share (e.g., Larsson and Naurin 2016) or by their GDP (e.g., Carrubba, Gabel and Hankla 2008). However, both of these strategies

require making substantial assumptions about how exactly member state observations influence the CJEU's decision-making. To be conservative as possible, I rerun the models with control variables for the integration preference of each member state – taking the value of -1 if anti-integration, 0 if neutral or no observation submitted, or 1 if pro-integration – in table A1 in the appendix. The coefficients and statistical significance for my primary independent variables of interest remain robust to this alternative specification.

Conclusion

How do courts uphold the law while facing noncompliance? In this paper, I argue that as a government's probability of noncompliance with an adverse court ruling increases and legal merits favor a decision against a government's preferences, judges are more likely to provide it flexibility over policy implementation. By providing more flexibility, judges can both expand case-law in their preferred direction and obscure noncompliance from public view. I provide evidence for my theory by comparing advocates-general opinions to judgments at the CJEU across cases with varying probabilities of member state noncompliance. By using references to other documents in AG opinions as a proxy for constraints on member states' behavior in implementation, I provide evidence that as the probability of noncompliance increases and the legal merits go against the position member states' observations favor, the CJEU is more likely to exclude references from the AG's opinion in its final judgment in a case.

My findings build on existing scholarship that theorizes about this relationship between noncompliance and judicial decision-making. Although an extensive scholarship finds a relationship between the probability of noncompliance and whether a court rules to constrain executive (e.g., Carrubba, Gabel and Hankla 2008; Clark 2011; Herron and Randazzo 2003; Iaryczower, Spiller and Tommasi 2002), it does not postulate how courts can strategically advance case law according to its preferences while simultaneously mitigating compliance. By theorizing that courts can accomplish this goal strategically by allowing executives flexibility

over implementation, I provide an avenue to bridge the divide that often exists between social science and legal scholarship. Judges care about maintaining a coherent case law, but they are also acutely aware of this threat of noncompliance they face. Political science scholarship often argues that judges will deviate from the legal merits of a case when a large enough threat to a court's institutional legitimacy exists. Legal scholars frequently emphasize the relevant law that informs judges' decision-making. Specifying the conditions under which judges manage this trade off, while also taking into account the legal merits of a given case can provide a means through which both scholarships can engage in thoughtful conversation with one another by acknowledging both the political and legal constraints affecting a court's decision-making. Such theorizing will be profitable in pushing both the legal and social science scholarship forward.

Empirically, I provide a measurement strategy that satisfies Staton and Vanberg's (2008, 505) suggestion to "focus on the quality of the rules courts produce and not just on binary characteristics of merits votes" by evaluating characteristics of individual judicial decisions beyond whether they are simply pro- or anti-government. Additionally, I contribute to recent scholarship that aims to quantify and test strategic judicial behavior within the texts of rulings (e.g., Gauri, Staton and Cullell 2015; Staton and Romero 2019; Stiansen 2021) in a comparative context. Inferentially, however, it is empirically difficult to separate whether differences in flexibility over implementation provided to policymakers may be due to judges accounting for the probability of noncompliance as opposed to the idiosyncrasies of the case at hand. By utilizing the counterfactual of AG opinions, I provide a more fine-grained analysis of how judges may strategically alter a ruling in anticipation of noncompliance. Future scholarship can leverage institutional features of courts to provide a counterfactual for the amount of flexibility provided in a ruling in order to improve inference. Although the measurement strategy I use to evaluate flexibility – the percentage of references from an AG's opinion the CJEU includes in its ruling – is an improvement over previous efforts, the availability of natural language processing techniques and machine learning provides a fruitful

avenue for future scholarship. Existing scholarship provides proof of concept that meaningful political dimensions such as delegation are quantifiable beyond hand-coding efforts (e.g., Anastasopoulos and Bertelli 2020). By utilizing these relatively newer empirical techniques, scholars can systematically uncover nuances within the texts of judicial rulings to further examine how the strategic institutional environment affects judicial decision-making.

Lastly, I heed the call of Staton and Moore (2011) by drawing on the American, comparative, and international relations scholarship on judicial institutions to develop theoretical expectations about the behavior of courts in the face of noncompliance. Relaxing the boundaries between the subfields and focusing on how courts in differing contexts face similar challenges has the potential to produce new theoretical insights that can contribute to a much more thorough understanding of judicial institutions at the domestic and international level. My incorporation of scholarship on public support for courts at domestic level with scholarship about compliance with international agreements is one example of the analytical benefits of adopting such an approach. Research on international courts such as the CJEU can similarly draw upon the domestic courts literature to explain a court's constraints when trying to advance the law and influence a government's behavior.

Table 3: Model Results

	In Judgment			
	(1)	(2)	(3)	(4)
Member States Pro-Integration × AG and CJEU Pro-Integration	0.0026	0.0080	0.0130	0.0188**
	(0.0086)	(0.0088)	(0.0087)	(0.0090)
Member States Pro-Integration × AG and CJEU Anti-Integration	-0.3523***	-0.3350***	-0.4749***	-0.4116***
	(0.0475)	(0.0330)	(0.0848)	(0.0779)
Member States Pro-Integration × AG Pro-Integration and CJEU Anti-Integration	0.0156	0.0140	0.0200	0.0279
	(0.0360)	(0.0304)	(0.0368)	(0.0341)
Member States Anti-Integration × AG and CJEU Pro-Integration	-0.0338***	-0.0351***	-0.0224**	-0.0236**
	(0.0078)	(0.0084)	(0.0086)	(0.0098)
Member States Anti-Integration × AG and CJEU Anti-Integration	-0.0940**	-0.0888**	-0.0972	-0.0939
	(0.0408)	(0.0416)	(0.0583)	(0.0562)
Member States Anti-Integration × AG Anti-Integration and CJEU Pro-Integration	-0.0915***	-0.0907***	-0.0662***	-0.0664***
	(0.0130)	(0.0120)	(0.0131)	(0.0120)
Member States Anti-Integration × AG Pro-Integration and CJEU Anti-Integration	-0.0176**	-0.0192*	-0.0173*	-0.0179
	(0.0074)	(0.0104)	(0.0084)	(0.0110)
Member States Neutral × AG and CJEU Pro-Integration	-0.0375	-0.0303	-0.0221	-0.0155
	(0.0355)	(0.0388)	(0.0357)	(0.0384)
Member States Neutral × AG and CJEU Anti-Integration	-0.1378***	-0.0828***	-0.0820*	-0.0311
	(0.0359)	(0.0291)	(0.0423)	(0.0236)
Member States Neutral × AG Anti-Integration and CJEU Pro-Integration	0.1480***	0.2084***	0.0578	0.1127***
	(0.0238)	(0.0156)	(0.0373)	(0.0302)
Member States Neutral × AG Pro-Integration and CJEU Anti-Integration	-0.0298	-0.0182	-0.0511	-0.0448
	(0.0528)	(0.0552)	(0.0463)	(0.0487)
Chamber			-0.0713	-0.1147
			(0.0712)	(0.0717)
Commission Pro-Integration			-0.0333**	-0.0302**
			(0.0144)	(0.0140)
Goods			-0.0410	-0.0723***
			(0.0311)	(0.0241)
Agriculture			0.0446	0.0530**
			(0.0283)	(0.0233)
Workers			-0.0386	-0.0449
			(0.0428)	(0.0433)
Establishment			0.0285	0.0392
			(0.0231)	(0.0277)
Services			-0.0271	-0.0203
			(0.0404)	(0.0422)
Capital			-0.0874**	-0.0756
			(0.0397)	(0.0450)
Transport			-0.1011	-0.1068
			(0.0965)	(0.0935)
Competition			-0.0788**	-0.0790**
			(0.0302)	(0.0314)
Tax			0.0870**	0.0925**
			(0.0329)	(0.0340)
Customs			-0.0185	0.0078
			(0.0596)	(0.0630)
Social Provisions			0.0193	0.0289
			(0.0381)	(0.0400)
Environment			0.0010	0.0252
			(0.0813)	(0.0760)
Consumer Protection			0.0160	0.0498
			(0.0442)	(0.0292)
Number of Legal Issues			0.0411***	0.0371***
			(0.0122)	(0.0123)
R^2	0.03815	0.12823	0.10994	0.20344
Observations	554	554	554	554
AG fixed effects		✓		✓

Standard errors clustered by AG are in parentheses
*p<0.1; **p<0.05; ***p<0.01

References

Anastasopoulos, L Jason and Anthony M Bertelli. 2020. "Understanding Delegation Through Machine Learning: A Method and Application to the European Union." *American Political Science Review* 114(1):291–301.

Bailey, Michael A and Forrest Maltzman. 2008. "Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court." *American Political Science Review* 102(3):369–384.

Baird, Vanessa A. 2001. "Building Institutional Legitiimacy: The Role of Procedural Justice." *Political Research Quarterly* 54(2):333–354.

Brekke, Stein Arne, Joshua C Fjelstul, Silje Synnøve Lyder Hermansen and Daniel Naurin. N.d. "The CJEU Database Platform: Decisions and Decision-makers.".

Caldeira, Gregory A and James L Gibson. 1995. "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support." *American Political Science Review* 89(2):356–376.

Carrubba, Clifford J. 2009. "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems." *Journal of Politics* 71(1):55–69.

Carrubba, Clifford J and Christopher Zorn. 2010. "Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States." *Journal of Politics* 72(3):812–824.

Carrubba, Clifford J and Matthew Gabel. 2017. "International Courts: A Theoretical Assessment." *Annual Reviews of Political Science* 20:55–73.

Carrubba, Clifford J, Matthew Gabel and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102(4):435–452.

Carrubba, Clifford J and Matthew J Gabel. 2015. *International Courts and the Performance of International Agreements: A general theory with evidence from the European Union*. Cambridge University Press.

Castro-Montero, José Luis, Edwin Alblas, Arthur Dyevre and Nicolas Lampach. 2018. "The Court of Justice and treaty revision: A case of strategic leniency?" *European Union Politics* 19(4):570–596.

Cheruvu, Sivaram and Jay N Krehbiel. 2021. "Delegation, Compliance, and Judicial Decision-making in the Court of Justice of the European Union." *Journal of Law and Courts* p. Forthcoming.

Clark, Tom S. 2011. *The Limits of Judicial Independence*. Cambridge University Press.

Epstein, Lee, William M Landes and Richard A Posner. 2013. *The behavior of federal judges: A theoretical and empirical study of rational choice*. Harvard University Press.

Frankenreiter, Jens. 2017. "The Politics of Citations at the ECJ - Policy Preferences of E.U. Member State Governments and the Citation Behavior of Judges at the European Court of Justice." *Journal of Empirical Legal Studies* 14(4):813–857.

Garrett, Geoffrey, R. Daniel Kelemen and Heiner Schulz. 1998. "The European Court of Justice, National Governments, and Legal Integration in the European Union." *International Organization* 52(1):149–176.

Gauri, Varun, Jeffrey K Staton and Jorge Vargas Cullell. 2015. "The Costa Rican Supreme Court's Compliance Monitoring System." *Journal of Politics* 77(3):774–786.

Gibson, James L and Gregory A Caldeira. 1995. "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice." *American Journal of Political Science* 39(2):459–489.

Gibson, James L and Gregory A Caldeira. 1998. "Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis." *British Journal of Political Science* 28(1):63–91.

Gibson, James L, Gregory A Caldeira and Vanessa A Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92(2):343–358.

Golub, Jonathan. 1996. "The politics of judicial discretion: Rethinking the interaction between national courts and the Eurpean court of justice." *West European Politics* 19(2):360–385.

Hansford, Thomas G and James F Spriggs II. 2006. *The Politics of Precedent on the U.S. Supreme Court*. Princeton University Press.

Hartley, Trevor. 2007. *The Foundations of European Community Law*. New York: Oxford University Press.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.

Herron, Erik S and Kirk A Randazzo. 2003. "The Relationship Between Independence and Judicial Review in Post-Communist Courts." *Journal of Politics* 65(2):422–438.

Hutchinson, Dennis J. 1979. "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958." *Georgetown Law Journal* 68(1):1–96.

Iaryczower, Matias, Pablo T Spiller and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935-1998." *American Journal of Political Science* 46(4):699.

Kaeding, Michael. 2008. "Lost in Translation or Full Steam Ahead." *European Union Politics* 9(1):115–143.

Kam, Cindy D and Robert Franzese. 2007. *Modeling and Interpreting Interactive Hypotheses in Regression Analyses*. Ann Arbor: University of Michigan Press.

Kelemen, R. Daniel. 2012. "The political foundations of judicial independence in the European Union." *Journal of European Public Policy* 19(1):43–58.

Krehbiel, Jay N. 2016. "The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court." *American Journal of Political Science* 60(4):990–1005.

Krehbiel, Jay N. 2019. "Elections, Public Awareness, and the Efficacy of Constitutional Review." *Journal of Law and Courts* 7(1):53–79.

Krehbiel, Jay N. 2021. "Public Awareness and the Behavior of Unpopular Courts." *British Journal of Political Science* 51(4):1601–1619.

Krehbiel, Jay N and Sivaram Cheruvu. 2021. "Can International Courts Enhance Domestic Judicial Review? Separation of Powers and the European Court of Justice." *Journal of Politics* p. Forthcoming.

Larsson, Olof and Daniel Naurin. 2016. "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU." *International Organization* 70(2):377–408.

Larsson, Olof, Daniel Naurin, Mattias Derlén and Johan Lindholm. 2017. "Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union." *Comparative Political Studies* 50(7):879–907.

Lupu, Yonatan and Erik Voeten. 2012. "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights." *British Journal of Political Science* 42(2):413–439.

Ramseyer, J Mark and Eric B Rasmusen. 2003. *Measuring Judicial Independence: The Political Economy of Judging in Japan*. University of Chicago Press.

Richards, Mark J and Herbert M Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96(2):305–320.

Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Second ed. Chicago: University of Chicago Press.

Shapiro, Martin. 1965. "Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis." *Law in Transition Quarterly* 2:134–157.

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. University of Chicago Press.

Simmons, Beth A. 2009. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.

Staton, Jeffrey K. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50(1):98–112.

Staton, Jeffrey K. 2010. *Judicial Power and Strategic Communication in Mexico*. Cambridge University Press.

Staton, Jeffrey K and Alexia Romero. 2019. "Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System." *International Studies Quarterly* 63(3):477–491.

Staton, Jeffrey K and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science* 52(3):504–519.

Staton, Jeffrey K and Will H Moore. 2011. "Judicial Power in Domestic and International Politics." *International Organization* 65(3):553–587.

Stiansen, Øyvind. 2021. "Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments." *British Journal of Political Science* 51(2):899–907.

Stone Sweet, Alec and Thomas L Brunell. 1998. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." *American Political Science Review* 92(1):63–81.

Turnbull-Dugarte, Stuart J. and Daniel Devine. 2021. "Can EU judicial intervention increase polity scepticism? Quasi-experimental evidence from Spain." *Journal of European Public Policy* .

Tushnet, Mark V. 2004. "Litigation Campaigns and the Search for Constitutional Rules." *Journal of Appellate Practice and Process* 6(1):101–112.

Tyler, Tom R. 2006. "Psychological Perspectives on Legitimacy and Legitimation." *Annual Review of Psychology* 57(1):375–400.

Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45(2):346–361.

Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany*. Cambridge University Press.

Vanberg, Georg. 2015. "Constitutional Courts in Comparative Perspective: A Theoretical Assessment." *Annual Review of Political Science* 18:167–185.

Zglinski, Jan. 2018. "The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement." *Common Market Law Review* 55:1341–1386.

Zglinski, Jan. 2020. *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law*. Oxford University Press.

Zink, James R, James F Spriggs II and John T Scott. 2009. "Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions." *Journal of Politics* 71(3):909–925.

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Appendices

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Table A1: Model Results with member state controls

	In Judgment		
	(1)	(2)	(3)
Member States Pro-Integration × AG Pro-Integration and CJEU Pro-Integration	0.0492	0.0843**	0.0894**
	(0.0376)	(0.0390)	(0.0423)
Member States Pro-Integration × AG Anti-Integration and CJEU Anti-Integration	-0.3434***	-0.3063***	-0.2409**
	(0.0756)	(0.0665)	(0.0982)
Member States Pro-Integration × AG Pro-Integration and CJEU Anti-Integration	0.0678	0.0978*	0.1244**
	(0.0559)	(0.0492)	(0.0563)
Member States Anti-Integration × AG Pro-Integration and CJEU Pro-Integration	-0.0853*	-0.1158***	-0.1051**
	(0.0417)	(0.0408)	(0.0460)
Member States Anti-Integration × AG Anti-Integration and CJEU Anti-Integration	-0.1572**	-0.1826***	-0.1597*
	(0.0640)	(0.0646)	(0.0887)
Member States Anti-Integration × AG Anti-Integration and CJEU Pro-Integration	-0.1773***	-0.2066***	-0.1943***
	(0.0478)	(0.0455)	(0.0498)
Member States Anti-Integration × AG Pro-Integration and CJEU Anti-Integration	-0.0793*	-0.1133**	-0.1048*
	(0.0456)	(0.0462)	(0.0518)
Member States Neutral × AG Pro-Integration and CJEU Pro-Integration	-0.0429	-0.0346	-0.0263
	(0.0353)	(0.0384)	(0.0367)
Member States Neutral × AG Anti-Integration and CJEU Anti-Integration	-0.1371**	-0.0728*	-0.0030
	(0.0527)	(0.0362)	(0.0623)
Member States Neutral × AG Anti-Integration and CJEU Pro-Integration	0.1097	0.1640**	0.0745
	(0.0746)	(0.0707)	(0.0675)
Member States Neutral × AG Pro-Integration and CJEU Anti-Integration	-0.0319	-0.0175	-0.0168
	(0.0585)	(0.0619)	(0.0602)
Austria	0.0032	-0.0171	-0.0155
	(0.0384)	(0.0398)	(0.0425)
Belgium	-0.0384	-0.0706	-0.0837
	(0.0439)	(0.0435)	(0.0492)
Cyprus	-0.1544***	-0.1628**	-0.1618*
	(0.0474)	(0.0651)	(0.0871)
Denmark	-0.0240	-0.0236	-0.0344
	(0.0738)	(0.0690)	(0.0718)
Estonia	0.2167**	0.1344	0.2491***
	(0.1027)	(0.1078)	(0.0746)
Finland	-0.0667	-0.0961	-0.0778
	(0.0618)	(0.0621)	(0.0642)
France	-0.0870*	-0.1211**	-0.1300**
	(0.0487)	(0.0536)	(0.0553)
Germany	-0.0320	-0.0682	-0.0654
	(0.0456)	(0.0453)	(0.0456)
Greece	-0.0612	-0.0740	-0.0774
	(0.0618)	(0.0582)	(0.0633)
Hungary	-0.0563	-0.0669	-0.0186
	(0.0462)	(0.0666)	(0.0821)
Ireland	-0.1881**	-0.2343***	-0.2595***
	(0.0730)	(0.0620)	(0.0639)
Italy	-0.1029**	-0.1444***	-0.1357**
	(0.0462)	(0.0467)	(0.0524)
Lithuania	-0.1176	-0.1659**	-0.1794***
	(0.0693)	(0.0669)	(0.0555)
Luxembourg	0.1041	0.0601	0.0366
	(0.0669)	(0.0628)	(0.0541)
Netherlands	-0.0542	-0.0752	-0.0674
	(0.0486)	(0.0507)	(0.0625)
Poland	-0.0293	-0.0855	-0.0719
	(0.0547)	(0.0635)	(0.0581)
Portugal	-0.0955	-0.1400*	-0.1099
	(0.0763)	(0.0770)	(0.0926)
Spain	-0.0648	-0.1043	-0.1008
	(0.0613)	(0.0635)	(0.0638)
Sweden	-0.0773	-0.1144*	-0.1333**
	(0.0533)	(0.0579)	(0.0562)
United Kingdom	-0.0171	-0.0486	-0.0488
	(0.0382)	(0.0391)	(0.0449)
Chamber			-0.1117
			(0.0857)
Commission Pro-Integration			0.0769
			(0.0603)
Number of Legal Issues			0.0396***
			(0.0115)
R^2	0.07663	0.17290	0.24164
Observations	554	554	554
AG fixed effects		✓	✓
Policy-Area Controls			✓

Standard errors clustered by AG are in parentheses
*p<0.1; **p<0.05; ***p<0.01