Can International Courts Enhance Domestic Judicial Review? Separation of Powers and the European Court of Justice

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Abstract

How courts ensure the efficacy of their decisions poses one of the central challenges to the quality of modern liberal democracy. In this article, we consider how the ability of domestic courts to engage with their international counterparts through preliminary reference procedures can further this goal. Arguing that domestic courts use preliminary reference procedures to affect the probability their governments comply with adverse judicial decisions, we construct a formal model of the reference procedure and test a series of empirical implications with a novel dataset of domestic court cases involving the European Union's preliminary reference procedure. We find that courts are more likely to refer cases as the risk of noncompliance increases and that this relationship is conditioned by the level of public trust in the Court of Justice of the European Union and the position of a court in the domestic judicial hierarchy.

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Introduction

Enhancing the quality of domestic democratic governance is a central goal for many of the world's international organizations. Whether they accomplish this aim, however, is unclear (e.g., Gartzke and Naoi 2011; Keohane, Macedo and Moravcsik 2009). On the one hand, international organizations can expand individual rights (e.g., Squatrito 2012) or provide material and technical assistance to consolidate democratic institutions (e.g., Poast and Urpelainen 2015). On the other hand, international institutions may undermine the electoral connection between voters and policymakers (e.g., Dahl 1999). This debate is particularly consequential as liberal democracy increasingly finds itself under pressure in both established and younger democracies. While multifaceted, governments' challenges to democratic norms regularly target national judiciaries and undermine the efficacy of judicial scrutiny of their behavior. Despite having a responsibility to ensure that governments do not breach their constitutional obligations, courts' inability to directly enforce their decisions leaves them dependent on the cooperation of the governments they are meant to constrain. In response to this limitation on judicial power, courts adopt a range of strategies from varying the specificity of their decisions (e.g., Staton and Vanberg 2008; Stiansen 2019) to affecting public awareness of their rulings (e.g., Staton 2010). If international organizations can provide similar mechanisms for enhancing the efficacy of judicial review, then we might expect domestic courts to adopt a strategic approach to interactions with their international counterparts.

In this paper we argue that preliminary reference procedures – that is the ability of national courts to refer cases involving international law to an international court – can present domestic courts such an opportunity. Adopted in some form by an increasing number of international legal systems, preliminary reference procedures provide domestic courts the opportunity to request an opinion on issues of international law from the relevant international court. As a consequence, these proceedings make international courts direct and active players in domestic legal disputes. Drawing from the comparative judicial politics and international courts literatures, we develop and formalize a theoretical account of referrals as a strategic decision by domestic courts engaging their international counterparts to address potential government noncompliance with judicial decisions. We then test a series of the theoretical model's empirical implications in the context of the most widely used preliminary reference system, that of the European Union and its Court of Justice

(CJEU). Using data on over 600 cases brought to domestic courts involving EU-law in 1998 and 1999, we provide evidence that the likelihood of a referral to the CJEU increases with higher risks of noncompliance with a domestic court. We then leverage case-level information and Eurobarometer data on public trust in the CJEU to show that this relationship is limited to courts in member states with high trust in the CJEU and is stronger for lower courts than high courts. Taken together, the results provide novel evidence that separation of powers politics at the domestic level can influence judicial politics at the international level.

The remainder of the paper is organized as follows. In the next section, we situate the preliminary reference proceeding from a comparative context in the judicial toolkit for addressing separation of powers constraints on judicial authority. We then present the formal model of our argument along with a discussion of the model's results and empirical implications. We follow this section with a discussion of the setting for our empirical application, the European Union and referrals to its Court of Justice, as well as the data and measures used in the analyses. After presenting our empirical results, we conclude by discussing our findings' implications for the efficacy of international institutions, international courts' potential impact on the quality of democratic governance, and the CJEU's role in European integration.

Locating Preliminary References in the Judicial Toolkit

With "neither the power of the purse nor the sword", courts are hampered in their ability to ensure the efficacy of their decisions. Reliant on the other government institutions for implementation, courts often face strong pressures to avoid conflict with legislators and executives by taking inter-branch politics and the preferences of those other institutions into account. For example, courts can strategically tailor their decisions to align with the preferences of political officials (e.g., Helmke 2002) or strategically craft their opinions to mitigate the risk and damage of government resistance (e.g., Staton and Vanberg 2008). Alternatively, courts can use other tools available to them, such as procedural discretion (e.g., Krehbiel 2016), public relations efforts (e.g., Staton 2010), and issuing unanimous decisions (e.g., Naurin and Stiansen 2019), to make resistance to a judicial decision a costlier strategy for governments.

Table 1: Regional Legal Systems with Preliminary References

Regional Court (# of Signatories)	Treaty/Agreement and Article
Court of Justice of the European Union (28)	TFEU Article 267
European Court of Human Rights (47)	European Convention on Human Rights Protocol 16[1]
Court of Justice of the Andean Community (4)	Treaty Creating the Court of Justice Article 29
East African Court of Justice (6)	East African Community Treaty Article 34
European Free Trade Area Court (3)	ESA/Court Agreement Article 34
Caribbean Court of Justice (15)	Treaty of Chaguaramas Article 211
Central American Court of Justice (4)	Statute of the CACJ Article 22
ECOWAS Court of Justice (15)	Protocol on the Community Court of Justice Article 10
COMESA Court of Justice (21)	Treaty Establishing COMESA Article 30
MERCOSUR Court of Justice (4)	Rules of the Olivos Protocol Article 2

[1] Only 13 states have signed and ratified Protocol 16 as of December 1, 2019.

The ability to call upon international courts for interpretations of international law may similarly present an opportunity for domestic courts to address the implementation challenge posed by the separation of powers. As both the scope and complexity of international law has increased, so too have the opportunities for domestic courts to interact with their international counterparts. Such a procedure, while varying in key aspects such as which courts can access it and under what conditions they may do so, is at its most basic a form of cooperation whereby a domestic court requests that an international court provide an opinion on a case addressing a question of international law. Upon issuing such an opinion, the case then returns to the domestic court for a final judgment, thus linking domestic legal disputes with international courts in a manner that allows the latter to interpret the law without fully depriving the former of its decision making power.

As Table 1 shows, international legal systems have increasingly provided such a procedure (e.g., Virzo 2011). While scholars view the European Union's preliminary reference procedure (TFEU Article 267) as the most successful form of this dialogue (e.g., Weiler 1994), similar procedures exist in at least ten international legal systems. Some, like the Court of Justice of the Andean Community, adopted a procedure based directly off of the European Union's (e.g., Alter and Helfer 2010). Others, such as the European Court of Human Rights (ECHR) through the adoption of Protocol 16 (e.g., Gerards 2014), have developed procedures whereby domestic courts can request an advisory opinion from the international court under specific circumstances. Although courts use these procedures to varying degrees, they share the basic trait of providing an avenue for domestic

courts to bring international courts into the resolution of legal disputes.[1] In all, over 110 national judiciaries have access to an international court, and, often, to multiple such institutions.

While domestic courts' access to international courts through preliminary reference procedures have important consequences for the development of international legal orders and their relationships with domestic counterparts, scholars have also noted their potentially significant political implications, particularly with respect to government compliance with international law. For an international court concerned with obtaining compliance with its decisions, preliminary reference systems allow them to rely on domestic courts for enforcement of rulings (e.g., Burley and Mattli 1993; Weiler 1994). By such accounts, preliminary references are an institutional tool international courts can use to leverage the legitimacy of domestic courts to successfully develop their own case law and authority (e.g., Helfer and Alter 2013).

Where international courts have developed sufficient institutional capacity to obtain government compliance, however, a different dynamic may develop. In such contexts, referring a case to an international court may help domestic courts address separation of powers constraints. By making international courts active participants in the resolution of legal disputes, preliminary references allow domestic courts to affect the costs associated with noncompliance. International courts can affect costs in several ways. If they have public support, an international court can confer its legitimacy to a decision such that the threat of an electoral backlash makes noncompliance an untenable strategy for the government (e.g., Gibson, Caldeira and Baird 1998). Similarly, international courts can potentially affect the cost of noncompliance by raising a case's public profile (e.g., Staton 2010). Even international courts lacking strong public support can increase the cost of noncompliance by provoking other member states that benefit from cooperation to punish the noncomplying government (e.g., Carrubba 2005). Insofar that an international court can increase the cost of noncompliance, preliminary references can improve a domestic court's efficacy.[2]

A recent case helps illustrate this dynamic. In 2018, the Polish Supreme Court submitted a preliminary reference request with the CJEU regarding the Polish government's proposed judicial

[1]See appendix for more details on some of these preliminary reference procedures.

[2]While we generalize the mechanism here and in the model to an international court's ability to increase a government's cost of noncompliance, we test a specific way - lending its legitimacy to a decision - that an international court might do so.

reforms.[3] The court was particularly concerned by the government's creation of a new disciplinary chamber within the Supreme Court whose members the President would select on the advice of a new parliamentary-selected National Council of the Judiciary. Having already seen the government effectively neutralize the Constitutional Tribunal and refuse to comply with previous Supreme Court decisions against the government's proposals, the Supreme Court turned to the CJEU as "the CJEU would stand better chances of being respected by the Polish government than any decision by the Supreme Court" (Marcisz 2019). The CJEU's judgment emphasized the Supreme Court's authority to determine the legality of the proposed disciplinary chamber and associated National Council of the Judiciary, and in so doing forced the Polish government to publicly reaffirm its commitment to abide by the European Court's decisions under the threat of backlash from both the public and other EU member-state governments (e.g., Van Elsuwege and Gremmelprez 2020).[4]

Such a dynamic, however, depends on an international court's ability to effectively exercise its authority. If an international court's involvement is likely to spur resistance, then referring a case may instead exacerbate a domestic court's implementation problem. National courts, for example, declined to refer cases to the South African Development Community Tribunal, while member governments attacked and disbanded the institution (Cowell 2013). Even if an international court is unlikely to embolden a government to engage in noncompliance and has limited political capacity, domestic courts may see the preliminary reference process as a costly one with little benefit. For instance, the Caribbean Court of Justice, despite beginning work in 2001 and having jurisdiction over preliminary references, is yet to receive a case from any court of the Caribbean Community's member states, as it seeks to build up its authority and legitimacy (Berry 2012; Maharajh 2014).

In what follows, we formalize these dynamics by developing a simple model of an interaction between a government and a court determining whether to refer a case. In addition to providing

[3]Cases C-585/18, C-624/18 and C-625/18.

[4]A recent case involving the Norwegian government and the referral procedure at the European Free Trade Association (EFTA) Court similarly demonstrates how the threat of a preliminary reference has the potential to enhance the efficacy of domestic courts. After defying national court rulings that found regulations of the Norwegian Labor and Welfare Administration (NAV) were in violation of European Economic Area (EEA) law protecting the right to free movement, the agency abruptly brought its policies into compliance when the court threatened to refer the case to the EFTA Court (Pavone and Stiansen N.d.). See appendix for more details.

a series of empirical implications, formalizing our argument clarifies where our argument stands in comparison to existing theories of preliminary references. For example, the model distinguishes our account from studies focused on institutional factors such as the identity of the court deciding whether to refer a case, while also demonstrating how our theory complements existing accounts.

A Formal Model of References to an International Court

The game has two players: a government, G, and a domestic court, C.[5] We make two key assumptions about the players' preferences over international law: the court prefers issuing a ruling that expands the scope of international law, and the government opposes such a ruling. As noncompliance is only at issue when the court and government's preferences diverge, this approach allows us to focus on the interactions most relevant to our theory. Moreover, our assumptions conform with existing theories, as governments' preferences to preserve their sovereignty over policy making forms the basis of much work on the behavior of national governments in international legal regimes (e.g., Carrubba 2005; Koremenos, Lipson and Snidal 2001). Conversely, while not all national courts support international legal systems, professional (e.g., Burley and Mattli 1993), institutional (e.g., Alter 2001), and ideological (e.g., Pavone 2019) incentives exist for them to do so.[6] While we acknowledge that these assumptions are a simplification of the complex relationships both domestic courts and governments have with international law, this approach provides analytical leverage on the conditions under which preliminary references can enhance the authority of domestic courts.

The game begins with the court deciding whether to refer a case to an international court ($R = 1$) or refrain from doing so ($R = 0$). The court then issues its decision in the case either with or without an opinion from the international court. This decision can either favor a greater role for international law in domestic policy making ($P = 1$) or oppose expanding international law at the

[5] In the conclusion, we consider a potential extension of the model including an international court as an additional player.

[6] For those courts opposed to such a position, engaging an international court is an unlikely strategy given their consistent tendency to favor expanding international law (e.g., Wind, Martinsen and Rotger 2009). A potential scope condition of our theory is that domestic courts may be unlikely to use preliminary references as an institutional tool if their policy preferences are against expanding international law, even if the international court has significant political authority.

expense of national sovereignty ($P = 0$). If the court does the latter, the game ends. If, however, the court issues a decision favoring greater international regulation, then the government decides whether to comply with the court and implement its decision ($D = 0$) or defy the court and engage in noncompliance ($D = 1$). To summarize:

1. Court chooses to refer ($R = 1$) or not ($R = 0$)
2. Court chooses to issue a pro-international regulation ruling ($P = 1$) or a pro-national sovereignty ruling ($P = 0$). If the court chooses $P = 0$, the game ends.
3. If the court issues a pro-international regulation interpretation, the government chooses to defy ($D = 1$) or comply ($D = 0$).
4. Game ends, payoffs are realized.

The court's utility function is composed of three parameters. First, the court derives a policy-related benefit λ when the government complies with a pro-international law decision. This benefit can be, for example, a result of the court's ideology, policy preferences, or legal approach. Second, the court incurs the cost π when the government engages in noncompliance. This cost captures the institutional harm done to a court when other institutions in the political system ignore or otherwise defy its decisions (e.g., Staton 2010; Vanberg 2005). Finally, the court pays a cost ϵ for referring a case. While domestic courts do not pay a literal financial cost to refer a case to an international court, a positive opportunity cost exists (e.g., Tridimas and Tridimas 2004). Filing the application for a preliminary reference and preparing the relevant case materials takes away time that the court can use on another case. Furthermore, referring leaves a case open until after the court receives the international court's decision. Consequently, judges with substantial workloads may be disincentivized to refer cases, as an extensive scholarship shows the effect of high workloads and other institutional constraints on judicial decision-making (e.g., Cheruvu 2019; Epstein, Landes and Posner 2013).[7] To summarize, the utility function of the court is:

[7]Describing interviews with judges in Italy regarding the European Union's preliminary reference system, Pavone (2018, 319) states "[A] judge only refers when 'the question jumps before your eyes' since, in terms of work, a reference 'is like writing ten judgments.' 'Over that period where you're writing the reference,' confirms another colleague, 'you could lose three, four, five working days. And so, inevitably, if you're suffocated by the docket [...] you'll never refer at all.'"

$$EU(C) = P[D \cdot \pi + (1 - D) \cdot \lambda] - R \cdot \epsilon$$

The utility function for the government has three components. The value the government places on the challenged policy is captured by α, where $\alpha > 0$. The government gains α if either it defies a pro-international regulation ruling or the court issues a pro-national sovereignty decision. The second component, β, where $\beta > 0$, is the cost incurred by the government for engaging in noncompliance when the court does not refer the case. This cost corresponds to the backlash a government suffers for violating the rule of law by defying the country's courts (e.g., Gibson, Caldeira and Baird 1998; Vanberg 2005). The third component, κ, is this cost of noncompliance when the court does refer the case. While we assume $\kappa > 0$, we do not assume whether it is greater than, less than, or equal to β. That is, the court referring a case can increase, decrease, or have no effect on the government's cost of noncompliance. This feature allows the model to account for the differing effect of preliminary references across international courts of varying levels of institutional capacity and authority. To summarize, the utility function of the government is:

$$EU(G) = P[D \cdot \alpha - R \cdot \kappa - (1 - R) \cdot \beta] + (1 - P) \cdot \alpha$$

Results and Interpretation

The solution concept for the game is subgame perfect equilibria (SPE), which we limit to pure strategies. In total, there are five such equilibria.

Proposition 1 *Separation of Powers*

For $\alpha < \beta$ and $\alpha < \kappa$, the following constitutes a SPE:

Government: $S_G = \{Comply\}$

Court: $S_C = \{Not\ Refer,\ Pro\text{-}International\ Regulation\}$

The "Separation of Powers" equilibrium obtains when the government is compelled to comply with the court's decision by domestic political conditions. In this equilibrium, the court is free to decide a case based on its preferred outcome without referring because noncompliance is too costly for the government. This equilibrium corresponds to environments in which the efficacy of

courts is highest as they can effectively constrain the other branches of government. Since the court can obtain its preferred outcome based on the threat of punishment for noncompliance, it decides without incurring the cost of referring the case even when that cost is trivial.

Proposition 2 *Dominant Government*

For $\alpha > \beta$ and $\alpha > \kappa$, the following constitutes a SPE:

Government: $S_G = \{Defy\}$

Court: $S_C = \{$*Not Refer, Pro-National Sovereignty*$\}$

Proposition 2 characterizes the "Dominant Government" equilibrium. In this equilibrium, the government cares sufficiently about the policy at stake in the case before the court that it will defy a pro-international regulation decision even if the court refers the case. In such cases, the court is constrained by the government's acceptance of the cost for noncompliance and, as a result, opts to avoid conflict and issues a pro-national sovereignty ruling without referring the case. Notably, this unwillingness to refer a case holds in this equilibrium irrespective of the court's cost of referring, suggesting that even when the cost of referring is low courts may remain reluctant to use the procedure when confronted with a recalcitrant government.

Proposition 3 *Detrimental Referrals*

For $\kappa < \alpha < \beta$, the following constitutes a SPE:

Government: $S_G = \{Comply\}$

Court: $S_C = \{$*Not Refer, Pro-International Regulation*$\}$

In this equilibrium, referring a case results in lowering rather than increasing the government's cost of noncompliance. Since the cost of noncompliance without a referral is sufficient to incentivize the government to comply with a pro-international regulation ruling, the court opts not to refer and instead issues such a ruling on its own.

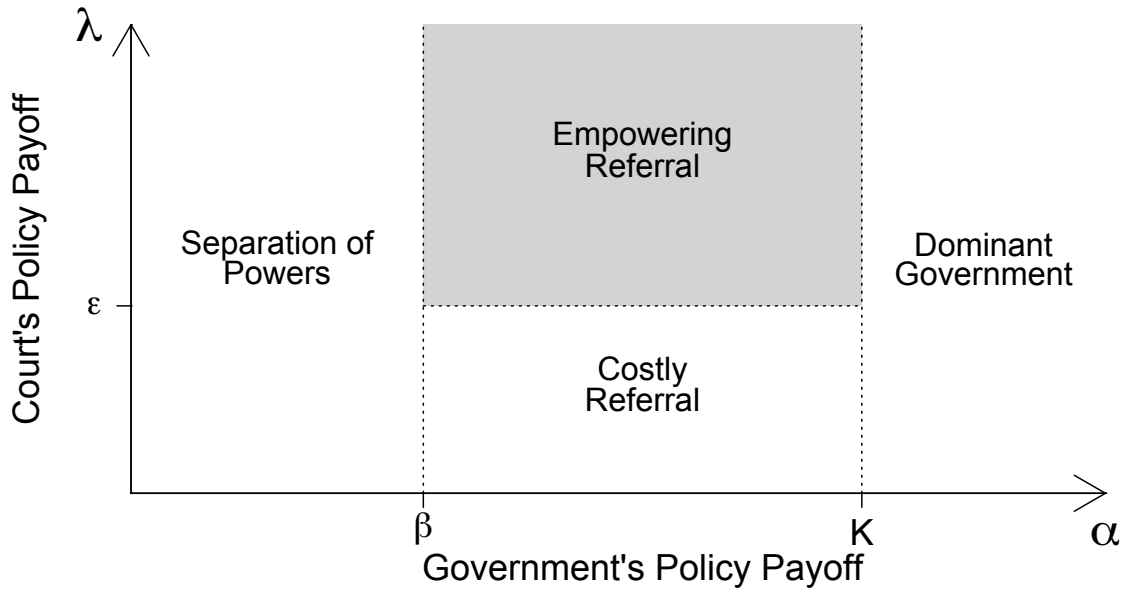
Proposition 4 *Costly Referral*

For $\beta < \alpha < \kappa$ and $\epsilon > \lambda$, the following constitutes a SPE:

Government: $S_G = \{Defy\}$

Court: $S_C = \{$*Not Refer, Pro-National Sovereignty*$\}$

Figure 1: Equilibrium Predictions When $\beta < \kappa$



Proposition 4 characterizes the "Costly Referral" equilibrium. This equilibrium results when referring a case would engender compliance from the government but the court opts not to refer because the cost of doing so outweighs the court's policy benefit.

Proposition 5 *Empowering Referral*

For $\beta < \alpha < \kappa$ and $\epsilon < \lambda$, the following constitutes a SPE:

Government: $S_G = \{Comply\}$

Court: $S_C = \{Refer,\ Pro\text{-}International\ Regulation\}$

Proposition 5 characterizes the "Empowering Referral" equilibrium. In this equilibrium, referring a case increases the cost of noncompliance such that it alters the government's strategy from noncompliance to compliance. Since the cost of referring is outweighed by the court's policy benefit of obtaining compliance, the court chooses to first refer the case and then issue a pro-international regulation ruling that the government accepts. If courts' referral strategy is influenced by concerns for noncompliance, then it is in this environment that we should observe court's referring cases.

Figure 1 provides a graphical representation of the equilibrium predictions when $\beta < \kappa$.[8] With the government's policy payoff α on the x-axis and the court's cost of referring ϵ on the y-axis,

[8]Note that the court has a dominant strategy of not referring ($\sim R$) when $\beta > \kappa$.

the figure depicts the parameter space occupied by each of the four potential equilibria. Using the figure, we structure our discussion of the results around three key observations.[9]

Observation 1 *The court is more likely to refer a case as the government's cost of noncompliance with a non-referred decision decreases.*

As β increases and approaches (or exceeds) κ, the range of possible cases for which referring incentivizes government compliance decreases. As Figure 1 shows, increasing β corresponds to a narrowing of the parameter space characterized by the "Empowering Referral" equilibrium. In contrast, lowering the value of β expands this space at the expense of the "Separation of Powers" equilibrium, indicating that the potential value of referring increases as the initial cost of noncompliance shrinks. Substantively, this suggests that a court concerned with compliance should be less likely to refer cases when it expects existing pressures, such as a potential electoral backlash, to deter noncompliance. Conversely, referrals should be more likely when a domestic court faces a credible threat of government noncompliance.

Observation 2 *The relationship defined in Observation 1 depends on a referral increasing the government's cost of noncompliance.*

Shifts in the value of β only alter the court's equilibrium strategy when it is less than κ. When β surpasses κ, meaning a referral *decreases* the government's cost for noncompliance, the court has no incentive to refer. This insight is intuitive, as referring is a suboptimal strategy if it weakens rather than strengthens the court's position. Consequently, the effect of increasing or decreasing β is limited to cases where referring makes noncompliance costlier for the government. In Figure 1, increases in β decrease the likelihood of a referral. However, when a referral decreases the government's cost of noncompliance, shifts in β do not affect the court's likelihood of referring a case. This highlights that the responsiveness of a court's referring strategy to the threat of noncompliance is conditioned by the consequences of a referral for the government's response.

Observation 3 *The relationship defined in Observation 1 weakens as the cost of referring increases.*

[9]In the remainder of the article we refer to cases not referred as "non-referred."

As ϵ increases, indicating that the court's cost for referring a case is growing, the parameter space characterized by the "Empowering Referral" equilibrium shrinks. Consequently, shifts in β have a decreasing impact on the court's referral strategy. This dynamic is well illustrated by Figure 1. Consider first the impact of a decrease in β when ϵ is low. Such a change in β extends the "Empowering Referral" equilibrium almost the entirety of the y-axis. As ϵ increases, however, the same shift in β adds less and less parameter space to that equilibrium. For a court concerned with compliance, then, the degree to which the threat of noncompliance influences the decision to refer a case is itself in part a function of the cost incurred by referring.

Empirical Application: The EU's Preliminary Reference Procedure

To assess the empirical implications of the theoretical model, we examine the preliminary reference procedure at the Court of Justice of the European Union (CJEU). As the European Union's highest court, the CJEU adjudicates issues of European law and treaties. Through its use of this authority, the CJEU is a significant player in both the European legal system and more broadly in European politics. Consequently, the CJEU is one of the most influential international courts. Nonetheless, the extent of the Court's power and role in driving European integration is the subject of extensive scholarly debate (e.g., Carrubba and Gabel 2015; Stone Sweet and Brunell 1998).

Although the CJEU receives cases from a variety of sources, the Court's development, and consequently European law's development, is defined in many respects by the preliminary reference procedure. Making up the majority of the CJEU's docket, the preliminary reference procedure allows national courts to refer questions on the interpretation of EU law to the CJEU when European law is relevant to resolving the case.[10] After receiving an interpretation from the CJEU, the domestic court then makes the final decision on the case. This powerful tool allows *any* national court to refer a case pertaining to EU law to the CJEU, irrespective of its placement in the judicial hierarchy. By bringing the CJEU into direct contact with domestic legal systems and allowing national courts to enforce EU law, scholars have described the preliminary reference procedure as the driving force behind the transformation of the EU legal order (e.g., Alter 2001; Weiler 1994).

[10]See appendix for a figure comparing the number of preliminary references heard by the CJEU to all other procedures.

This significant role has made identifying the determinants of domestic courts' use of preliminary references a core empirical question in the literature. For example, explanations of country-level variance in the rate of referrals identify and debate factors such as intra-EU trade levels, public support for membership in the EU, and legal traditions (e.g., Pitarakis 2004). Similarly, the "judicial empowerment thesis" argues that lower courts use the preliminary reference procedure to bolster their institutional standing relative to courts higher in the judicial hierarchy (e.g., Alter 2001).

While such approaches provide valuable insight into why one member state's courts refer at a higher rate than another's courts, or why certain types of courts are more likely than others to refer a case to the CJEU, they do not provide a case-level explanation micro-founded on the costs and benefits associated with a domestic court's decision to refer or not in each case involving EU law (e.g., Hornuf and Voigt 2015). Consequently, the scholarship is limited in its ability to provide a systematic explanation for why a court might refer one case and not another. This limitation of the literature is significant, as ultimately the decision of whether to refer a case to the CJEU lies solely with the domestic court adjudicating the case.[11] Addressing this shortcoming, then, requires identifying the case-level factors that influence a court to refer a case to the CJEU. Our theory's focus on a court's concern for the implementation of its decisions provides one such explanation.[12]

Beyond being the most prolific preliminary reference system, several aspects of the EU and referrals to the CJEU make it an appropriate setting for an analysis of the theoretical model's empirical implications. First, both the CJEU and domestic courts in the EU operate with bounded discretion. With respect to CJEU rulings, as Carrubba and Gabel (2015, 76) note, a threat of noncompliance exists because, "[CJEU] rulings often have broad policy implications, including requiring changes to national law or administrative practices." Similarly, the compliance challenge facing domestic courts is well documented even in the context of the EU's established democracies like Germany (e.g., Vanberg 2005) and Austria (e.g., Kettemann 2010) as well as the more recently

[11]While high courts are formally required to refer cases to the CJEU, they are often reluctant to do so (e.g., Alter 2000; Weiler 1994)

[12]Our argument does not preclude the potential influence of other factors that could affect decision making, such as the extent of legal mobilization (e.g. Conant 2002) or the actions of lawyers (Pavone 2019). Indeed, such explanations may be particularly relevant in instances where the assumptions of the model do not apply, such as when government compliance is not at issue.

democratized member states of central and eastern Europe (e.g., Herron and Randazzo 2003). Although government compliance is not at issue in all disputes involving European law, neither domestic courts nor the CJEU can be assured of compliance with their decisions when it is at issue.

Second, bringing the CJEU into the adjudication process has the potential to directly influence a government's costs and benefits from compliance. For one, the Court can act as a fire alarm for signaling possible violations by member-state governments and an information clearinghouse (e.g., Carrubba 2005) for other member states to weigh in on the issue at hand in a case. For another, it links the CJEU's institutional prestige and legitimacy to a case. As a result, noncompliance with a domestic court's final decision after referring a case requires the government to go against both one of its own national courts and the EU's highest court. Following public support accounts of judicial power (e.g. Gibson, Caldeira and Baird 1998), if the CJEU has the trust of citizens in a member state then its association with a case should increase a government's cost from engaging in noncompliance. Additionally, as the EU's high court, the CJEU's decisions can generate substantial media attention. Between its own press relations office and regular coverage of the Court's activities by European media, referring to the CJEU can raise a case's public profile. With public awareness key for public support to serve as a mechanism for enforcing judicial decisions (e.g., Staton 2010), the increased attention resulting from a domestic court referring a case to the CJEU has the potential to alter a government's costs for defying its own judiciary.

The model's assumptions regarding the players' preferences further relate to important aspects of the political dynamics of interpreting and implementing EU law. Previous studies generally work from the assumption that, all else equal, member-state governments prefer to retain authority over ceding it to the EU, while the CJEU's decision making tends toward the promotion of a pro-EU integration agenda (e.g., Carrubba 2005). With respect to the model's assumption that domestic courts favor greater international regulation, scholars have long noted the willing participation of EU domestic courts in the furtherance of European integration (e.g., Burley and Mattli 1993). While such courts are of course not universally in favor of an expansive interpretation of EU law, their active role in the "continued expansion and acceptance of Community law at the national level" points to "professional, financial, and social" interests of national judges to support European integration (Golub 1996, 363). Indeed, national courts more often than not express support for EU integration in their references to the CJEU (e.g., Leijon 2020). Taken together, while the

assumptions of the model and their application to the context of the EU are both restrictive and imperfect reflections of the preliminary reference system, they help to focus the theoretical and empirical analyses on an inter-institutional dynamic central to understanding the efficacy of member state courts in furthering European integration.

Data. To test the model's empirical implications, we require data on both the cases domestic courts refer *and* the cases they choose not to refer. While previous studies rely primarily on the former and consequently are limited in their analysis to studying case referral volume, our study incorporates data on domestic cases involving European law, including those that domestic courts decide to adjudicate themselves without an opinion from the CJEU. To do so, we use data from the National Decisions database, also known as "Dec.Nat". Compiled by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA) with the aid of the CJEU's Research and Documentation Service, Dec.Nat contains information on national court decisions involving EU law (ACA 2017; Hübner 2016). This information comes primarily from five sources: national court decisions taken after a preliminary reference to the CJEU, legal reviews (e.g., law journals), websites of the respective national courts, the ACAs own Jurifast database, and decisions forwarded to the CJEU's Research and Documentation directorate from the national courts themselves. The database provides case details such as the identity of the national court, the date of its decision, the subject matter, and whether the national court referred the case to the CJEU. It has over 29,000 cases covering every European Union member state from 1959 to 2017.

This database is not, however, without its limitations (Hübner 2016). Most consequential among these limitations is that the criteria for inclusion in the database may not be consistent across years and countries. As a result, the database may be, if not likely is, missing some number of potentially relevant cases. If cases are missing systematically, the database's construction could potentially introduce bias into our analyses. We believe, however, that such potential inconsistencies in Dec.Nat do not compromise our analysis. For one, we have no evidence of systematic missingness. If observations are missing from the database at random it will not affect our substantive findings in this article. For another, if missingness is not random, then it is most likely systematic with respect to one of two factors. First, some national judiciaries may be more thorough in their reporting of relevant cases. If so, then the cases drawn from the database may overrepresent some member

states and underrepresent others. While we cannot directly evaluate whether, and if so to what extent, imbalances are present in the database, the existing literature on preliminary references by EU courts suggests an empirical test for assessing if the database is generally capturing the quantity of legal disputes involving EU law in the member states. Previous accounts of preliminary references (e.g., Stone Sweet and Brunell 1998) have linked a high level of intra-EU trade with greater quantities of legal disputes involving EU law. Consequently, if the Dec.Nat database is a reasonably accurate reflection of the frequency of cases related to EU law, then the number of cases from a member state should be positively correlated with its share of intra-EU trade. An analysis of the 1,921 cases from 1998-1999 in the database reveals just such a relationship, with a country's number of cases and its share of 1998 intra-EU trade correlated at 0.625 with a p-value of 0.012.

Second, perhaps minor or trivial cases are systematically missing. Given the database's partial reliance on self-reporting by domestic and European institutions, it is plausible that these courts and organizations might fail to include routine, non-contentious cases. Even if this systematic exclusion exists, it does not undermine our results since it suggests that cases outside the scope of our theory - ones for which noncompliance is not relevant due to a case's insignificance - are excluded. Given the extensive nature of the database and the considerable number of cases included, if such systematic exclusion is occurring it is primarily keeping minor cases out. Consequently, if the database is missing cases, it likely does not preclude theoretically relevant cases from our analyses.

Our empirical approach further departs from previous studies by considering public support for EU-integration in specific policy areas rather than as a whole. Whereas studies have examined, for example, whether public support for EU membership affects the volume of cases sent by national courts to the CJEU (e.g., Carrubba and Murrah 2005), we leverage Eurobarometer data to link national court judges' decisions to refer cases with public opinion on further EU integration in the specific policy area at issue in a case. While limiting our analysis to cases addressing policy areas for which Eurobarometer data is available, this approach allows us to leverage both across and within country variation in public opinion to explain referral behavior at the case-level.[13] This approach,

[13]This subset does not differ substantially on key metrics from the full 1921 cases in Dec.Nat for the years in our dataset. For example, 33.5% of cases in the full Dec.Nat database from 1998-1999 resulted in a referral to the CJEU while 29.6% did in the cases used for our analyses. The two are also similar with respect to whether a case was handled by an apex court or lower court, with 49.7% of cases coming from high courts in the full data compared 54.6% of cases in our analyses.

in addition to being more nuanced than relying exclusively on country-level variables, provides a closer correspondence between the parameters of the theoretical model and our empirical measures. The resulting data set contains case-level information about the national court involved, whether the national court referred the case to the CJEU, and the policy area at issue in the case, as well as within-country information on public support for EU integration in that policy area. In total, we identified six policy areas that clearly correspond to the case information provided by Dec.Nat: agriculture, competition, consumer rights, environmental protection, social policy, and taxation.

This approach of using the Dec.Nat database and Eurobarometer, however, has two key limitations. First, the rules for inclusion of cases in the Dec.Nat database became substantially more restrictive in 2003. As a result, effectively only cases from national high courts continued to be included (Hübner 2016). Second, Eurobarometer does not consistently ask about public views on each of the six policy areas in our data. While we have data for each of the six policy areas prior to 2000, from 2000 forward the Eurobarometer only included three of the policies in its battery (agriculture, environmental protection, and social policy). As a result of these two constraints, for our analysis we use data on cases in Dec.Nat for the years 1998 and 1999.[14]

Empirical Strategy. Turning to the variables for our analysis, the outcome of interest is whether the national court handling a case refers it to the CJEU. Accordingly, the variable *Referral* is coded 1 if the national court refers a case to the CJEU and 0 if it does not. Of the 689 cases in our dataset, national courts referred 204 of them to the CJEU. Figure 2 presents the geographical makeup of the data, with the right pane displaying the source of all cases comprising our data and the left pane showing the country-by-country distribution of preliminary references to the CJEU.

The main explanatory variable needed for the analysis is an indicator of the cost of noncompliance incurred by a member-state government. While it is difficult to directly measure a government's interest in each case given the wide range of countries and courts included in our dataset, we can measure public support for EU-level authority over the policy areas at issue in cases. For cases involving a policy area that a member state's public supports as the proper purview of the EU, a

[14]To ensure that our results are not an artifact of this temporal restriction, we collected data from Dec.Nat through 2002 for the three policy areas for which Eurobarometer data is available after 2000. Our results are robust to this alternative data approach. See appendix for details.

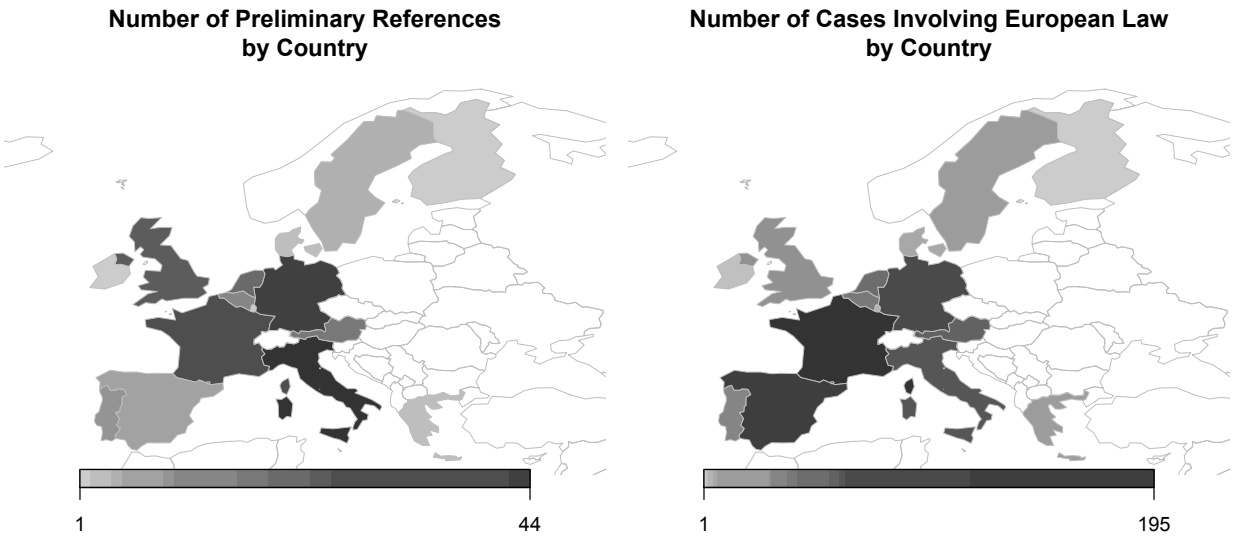


Figure 2: This figure shows the geographical distribution of cases in the dataset. Darker shades indicate higher numbers of cases or references. The highest number of references (44) came from Italy, while France had the highest number of cases (195).

government engaging in noncompliance risks countering public opinion and suffering an electoral backlash. When a member state's public prefers that its national government retains authority over a policy area, however, the punishment for noncompliance with a pro-EU decision should be lower since in those instances the incentive to seek votes by following public opinion matches the government's own incentive to avoid losing policy making authority to the EU.

To measure the level of public support for EU-level policy making in an issue area, we match the subject matter information for each case provided by Dec.Nat with national-level data from Eurobarometer's question "For each of the following areas, do you think that decisions should be made by the (NATIONALITY) government, or made jointly within the European Union?" This question, which is sporadically asked regarding 40 policy areas, taps into public support for further EU integration in specific policy contexts. Due to the inconsistent fielding of the question, however, we are limited to six policy areas that both correspond clearly onto areas of European law and were asked within the same time frame.[15] These six policy areas are agriculture, competition, consumer rights, environmental protection, social policy, and taxation. Importantly, these areas cover a diverse range of issues that vary in a number ways, including political salience and complexity.

[15]See appendix for details, including the specific Eurobarometers including each question.

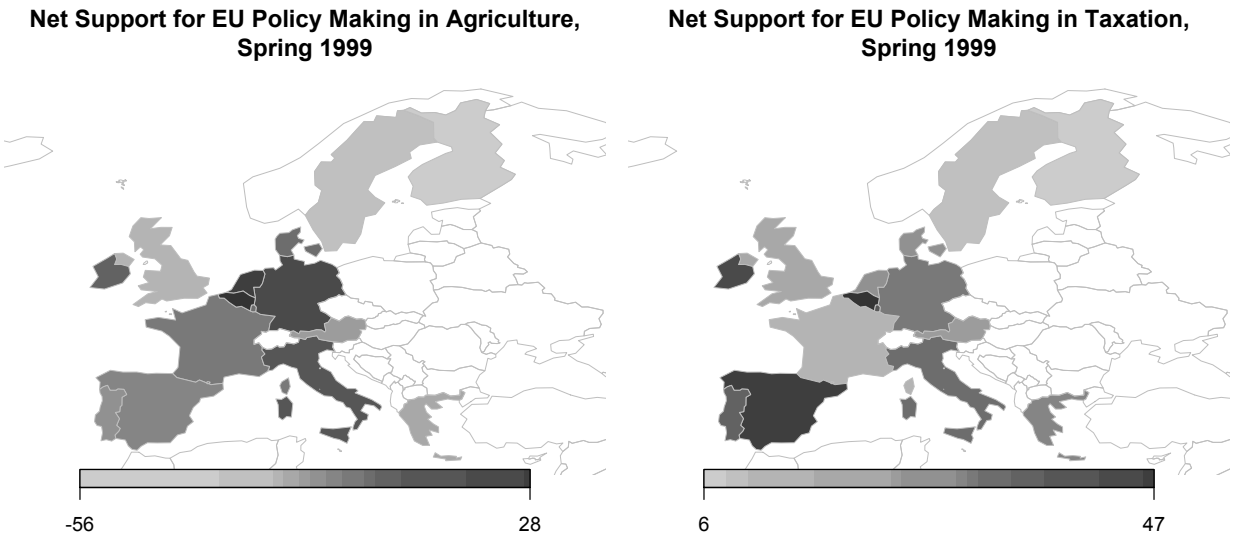


Figure 3: Based on *Net Support for EU Integration* variable.

Following the standard practice for accounting for "Don't Know" responses (e.g., Carrubba and Murrah 2005), our variable *Net Public Support for EU Integration* is the percentage of a country's respondents indicating support for EU-level policy making minus the percentage favoring policy making by the national government in the survey most proximate to the national court's decision. Figure 3 provides a visualization of this variable for two policy areas, agriculture and taxation, for the Spring 1999 Eurobarometer. The variable takes on a positive value when public support in a country favors EU-level policy making and is negative when citizens prefers that policy making authority be retained by their national government. Accordingly, for our first hypothesis we expect the variable to have a negative relationship with *Referral*.

Hypothesis 1 *The probability of a referral decreases as the public support increases for EU integration in the policy area at issue in a case.*

We turn now to the operationalization of the model's second implication that such an effect is conditional on a referral increasing a government's cost of noncompliance. As we noted earlier, there are several possible ways the CJEU may affect a government's political calculus. To empirically test the model's prediction, we require information about the CJEU's relative political authority in both referred and non-referred cases. Although the wealth of information provided by the CJEU, such as the position of other member-state governments and legal opinions by the Court's advocates-

general, is available in referred cases, such systematic data is unavailable for cases handled solely by domestic courts. Similarly, it is difficult to evaluate the likelihood a non-referred case would have generated substantial public awareness had a domestic court sent it to the CJEU. Thus, we must focus our analysis on a mechanism we can evaluate for both referred and non-referred cases.

One such mechanism is that preliminary references allow domestic courts to borrow from the legitimacy of the CJEU. Scholars of judicial legitimacy have long linked a court's degree of public support and legitimacy with the costs associated for a government engaging in noncompliance (e.g., Gibson, Caldeira and Baird 1998). Applying the core finding of this judicial legitimacy literature to the context of the CJEU, when the public in a member state holds the CJEU in high esteem, noncompliance should become costlier since it requires a government to contravene the opinion not only of its own domestic judiciary but also that of a well-regarded CJEU. In contrast, defying an unpopular CJEU is less likely to incur as significant of a cost and may even improve a government's electoral prospects (e.g., Krehbiel 2020). As such, courts in member states with a high level of public trust in the CJEU may expect referring to increase the cost of noncompliance with their final ruling. Conversely, low trust in the EU's highest court may lead referrals to have the opposite impact. Importantly, existing research finds substantial variation in the level of public support for the CJEU across member states (e.g., Gibson and Caldeira 1998; Kelemen 2012).

Therefore, we operationalize whether referring a case increases the cost of noncompliance by considering the level of public trust enjoyed by the CJEU in the member state from which a case originates. To approach this empirically, we consider each member state public's trust in the CJEU. Although an imperfect measure for legitimacy, the regular inclusion of consistent survey questions on trust in courts, including international courts, has made such an approach common in the CJEU literature (e.g., Kelemen 2012). We follow this example by basing our measure on data from the Eurobarometer question asking respondents whether if they tend to trust the CJEU or tend not to trust it. Similar to our approach for *Net Public Support for EU Integration*, we then calculate the difference between the percentage of respondents indicating they tend to trust the CJEU and the percentage that tends not to trust the Court. Recall, that the conditional effect highlighted by the theoretical model and detailed by Observation 2 is whether referring increases the cost of noncompliance rather than the degree of such an increase. That is, the cost of noncompliance with a referral (κ) serves as a threshold only below which shifts in the baseline cost of noncompliance (β)

affect the likelihood of a referral. Therefore, to map this threshold from the theoretical model to our empirical analyses we create a dichotomous variable, *Low Trust in the CJEU*, which is coded 1 when the net level of trust in the CJEU is in the bottom third of observed values (13 or less) and 0 for those for which net trust is above this level.[16] This observation leads to our second hypothesis:

Hypothesis 2 *The effect of public support for EU integration on the likelihood of a preliminary reference is conditioned by public trust in the CJEU.*

Turning to the model's third observation, which considers the conditioning effect of the cost associated with referring, we consider a court's position in its national judicial hierarchy. Scholars have noted that lower courts are more likely to refer cases to the CJEU, while courts of last instance are generally reluctant to do so (e.g., Alter 2000; Weiler 1994). For apex national courts, referrals to the CJEU represent a risk to their control over the domestic legal order (e.g., Alter 2001). In contrast, scholars note that lower courts stand to benefit from engaging in the preliminary reference procedure. By providing them an avenue for bypassing the normal route through the judicial hierarchy, referrals allow lower courts to bolster their standing and institutional prestige relative to other courts in the judicial hierarchy (e.g., Alter 2001; Weiler 1994). Consequently, high courts should, at least on average, incur a higher cost for referring than lower courts.

To empirically distinguish between apex courts and lower courts, the variable *High Court* is coded 1 if a case comes from an apex court and 0 otherwise. This variable accounts for the varied nature of member state judiciaries, as many have multiple high courts. For example, Germany has a Federal Constitutional Court for constitutional issues, a Federal Court of Justice for criminal and civil matters, and then a specialized high court each for administrative, labor, social, and tax matters. We code a case as 1 if it comes from any such court of last resort.[17] All other courts, such as intermediate appeal courts and subnational courts, are coded as 0. Based on this measure, we state our third hypothesis as follows:

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[16]We opt for this approach over a continuous variable as such a measure would imply that the effect of shifts in β are conditional on the value of κ, which is not the case in our model. The analyses are robust to setting the cutoff point at the mean level of net support.

[17]See appendix for list of courts present in our data coded as a high court.

Hypothesis 3 *The effect of public support for EU integration on the likelihood of a preliminary reference is greater for lower courts than high courts.*

The extant literature and concern for potential confounding of our results inform the inclusion of several control variables. First, we include country-policy area fixed effects. This broadly accounts for factors unique to each policy area in each member state. We then account for overall public support for their country's membership in the European Union. Previous studies find a relationship between referral frequency to the CJEU and public support for the EU (e.g., Carrubba and Murrah 2005; Stone Sweet and Brunell 1998). As such support likely also correlates with support for EU integration in specific policy areas, failing to account for it could confound our analysis. We address this concern by following the example of previous studies and using Eurobarometer data for the question "Generally speaking, do you think that (your country's) membership of the European Union is (1) a good thing; (2) a bad thing; (3) neither good nor bad; (4) don't know." The variable *Net Pro-EU Membership* is the percentage of respondents describing membership as a good thing minus the percentage viewing it as a bad thing. We also include the dichotomous variable *Founding Member State* since the six original members states account for a substantial share of referrals.

We further control for member states' political, economic and legal characteristics. We account for the ideology of the national government at the time of each case. This variable, *Government Ideology*, is Right-Left score assigned to the head of government's party in the 1999 Chapel Hill Expert Survey (Steenbergen and Marks 2007). Turning to economic variables, we include each member state's percentage of intra-EU trade with the variable *Share of Intra-EU Trade* since the level of intra-EU trade may condition both the supply and demand of referrals (e.g., Stone Sweet and Brunell 1998).[18] Second, the variable *GDP Growth* accounts for the linkage between economic performance and support for European integration (e.g., Gabel and Palmer 1995). A third economic control variable, *Share of EU GDP*, accounts for the size of each member state's economy as a percentage of the overall EU economy. Lastly, we account for features of member state legal systems by controlling first for whether a member state has a monist or dualist legal tradition (e.g., Carrubba and Murrah 2005) and for the legal origin for each member state. The former variable, *Monist Legal System*, is coded 1 for states with a monist system and 0 for those with a dualist

[18]Source: The 2003 External and Intra-European Union Trade Statistical Yearbook.

system, while for the latter we use the coding scheme of La Porta, Lopez-de Silanes and Shleifer (2008) to identify member state legal origins as either British, French, German, or Scandinavian.[19]

We estimate the predicted relationships using linear probability models with standard errors clustered around the 63 member state-policy area combinations. As Hypothesis 2 predicts a conditional relationship between public support for EU-level policy making and trust in the CJEU, we estimate a model with an interaction between *Net Public Support for EU Integration* and *Low Trust in the CJEU* with the expectation that the coefficient of the interaction term will be positive and statistically significant. For Hypothesis 3, which predicts the effect of the probability of compliance on the probability of case referral to be greater for low courts than high courts, we estimate a model with an interaction between *Net Public Support for EU Integration* and *High Court*. We expect the interaction term in this model to be positive and statistically significant.

Results. The results of our analyses are presented in Table 2. Consider Hypothesis 1, which anticipates a negative relationship between the probability of a domestic court referring a case and the cost of noncompliance as measured by the level of public support for EU-level policy making in the issue area addressed in a case. The results for this analysis are reported as models 1 and 2 in the table, with the former model including only the variable *Net Support for EU Integration* and country-policy fixed effects while the latter includes control variables. As expected, in both models the coefficient for *Net Public Support for EU Integration* is negative and statistically significant, indicating that the probability of a court referring a case to the CJEU increases as support for EU-level policy making in the policy area at issue in the case decreases. That is, the more the public in a member state prefers the national government rather than the EU to handle a given policy, the more likely courts in that member state are to refer a case dealing with that policy to the CJEU. Critically, as model 2 shows, this result is robust to the inclusion of key control variables. As we use a linear probability model to estimate these relationships, the coefficient for *Net Public Support for EU Integration* indicates that a net increase of 1% in support for EU-level policy making in the issue area in a case corresponds to around a 0.6% decrease in the predicted probability of the domestic court referring the case to the CJEU. Consequently, a shift in *Net Public Support for EU*

[19]We define dualist states here as those for which international treaties must be transformed through enabling legislation and monist states as those for which treaties are directly applicable.

Table 2: Linear Probability Models of Referrals to the CJEU (1998-1999)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Net Support for EU Integration	-0.00581*	-0.00645*	-0.00955**	-0.00924**	-0.00732**	-0.00864**
	(0.00343)	(0.00345)	(0.00406)	(0.00433)	(0.00363)	(0.00387)
Low Trust in the CJEU		-0.124	-0.276***	-0.198**		-0.117
		(0.206)	(0.0472)	(0.0978)		(0.199)
Net Public Support for EU Integration × Low Trust in the CJEU			0.00863**	0.00702*		
			(0.00384)	(0.00357)		
High Court		-0.161***		-0.159***	-0.192***	-0.190***
		(0.0469)		(0.0459)	(0.0428)	(0.0437)
Net Public Support for EU Integration × High Court					0.00294**	0.00316**
					(0.00137)	(0.00140)
Net Pro-EU Membership		0.00489		0.00432		0.00570
		(0.00348)		(0.00342)		(0.00343)
Share of Intra-EU Trade		0.0306		0.0768		0.0623
		(0.117)		(0.121)		(0.115)
Monist Legal System		-4.225		-3.105		-4.619*
		(2.585)		(2.441)		(2.566)
GDP Growth		-0.0469		-0.0556		-0.0326
		(0.109)		(0.110)		(0.114)
Founding Member State		-0.994		-1.003		-1.329
		(0.814)		(0.839)		(0.801)
Share of EU GDP		-34.97		-23.43		-36.85
		(24.47)		(23.26)		(24.11)
Government Ideology		0.0173		0.0153		0.0180
		(0.0439)		(0.0414)		(0.0447)
Constant	0.301***	6.728	0.356***	4.347	0.471***	6.653
	(0.0947)	(4.648)	(0.0971)	(4.499)	(0.102)	(4.593)
Country-Policy Area Fixed Effects?	Yes	Yes	Yes	Yes	Yes	Yes
Legal Origin Fixed Effects?	No	Yes	No	Yes	No	Yes
N	689	686	689	686	689	686

Standard errors clustered by country-policy area. *p<0.1; **p<0.05; ***p<0.01

Integration across the variable's inter-quartile range from -6 to 31 lowers the predicted probability of a referral by more than half from 41% to 17%.

Our analysis for Hypothesis 2 is reported by models 3 and 4. We find evidence supporting our expectation that public trust in the CJEU conditions the impact of potential noncompliance on the probability of a referral. As anticipated, the coefficient for *Net Public Support for EU Integration*

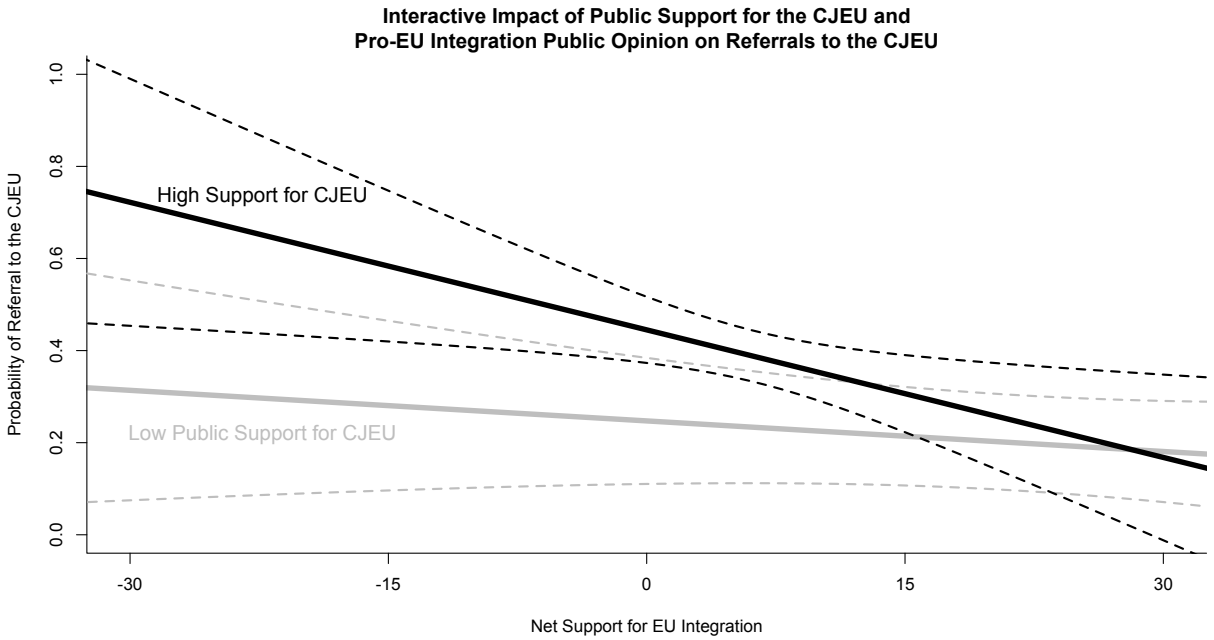

Figure 4: Based on results of Model 4. Black lines indicate the predicted probability of referral when *Low Trust in the CJEU* equals 0, while gray lines indicate when this variable is 1. Dashed lines are 90% confidence intervals.

remains negative and statistically significant while the interaction between this variable and the dichotomous variable *Low Trust in the CJEU* is positive and statistically significant. Substantively, this result suggests that while the cost of noncompliance influences the use of referrals, its impact is limited to cases originating in member states with sufficient public trust in the CJEU. The result is further robust to the inclusion of several control variables and country-policy area fixed effects. As predicted by the formal model, this indicates that potential noncompliance only motivates the use of referrals when referring to the CJEU is likely to make noncompliance costlier.

Figure 4 addresses the substantive significance of this result by presenting predicted probabilities of a referral to the CJEU based on *Net Public Support for EU Integration* for both values of *Low Trust in the CJEU*. In the figure, the black line indicates the probability of a referral when the CJEU enjoys a strong level of public support (*Low Trust in the CJEU* is 0) and the gray line represents this probability when trust in the CJEU is low (*Low Trust in the CJEU* is 1). As the difference in the lines' slopes indicates, the relationship between the use of referrals and public support for EU-level policy making weakens when low public support for the CJEU makes referring less likely to increase the cost of noncompliance. For example, whereas a shift in *Net Public Support for EU*

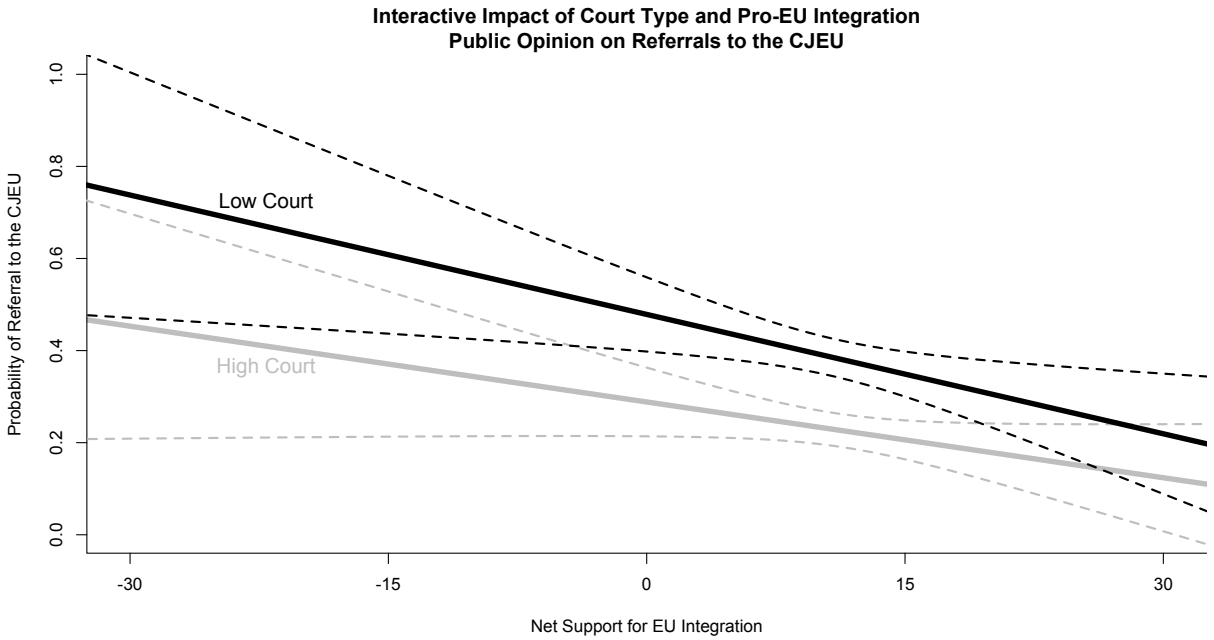

Figure 5: Based on results of Model 6. Black lines indicate the predicted probability of referral by lower courts, while gray lines indicate this probability for cases at high courts. Dashed lines are 90% confidence intervals.

Integration from the 25th to 75th percentile (from -6 to 31) decreases the likelihood of a referral from 50% to 16% in cases originating in member states with high support for the CJEU, such a shift in countries with low public support the CJEU only lowers this probability from 26% to 18%.

Models 5 and 6 report the analyses for Hypothesis 3. This hypothesis predicts that the relationship between *Net Public Support for EU Integration* and referrals to the CJEU is stronger for lower courts than apex courts. The results support this expectation. Not only is the coefficient for *Net Public Support for EU Integration* negative and statistically significant, but the interaction term for *Net Public Support for EU Integration* and *High Court* is positive and statistically significant. Substantively, this conforms with our argument that the cost of noncompliance exerts a stronger impact on the referring behavior of lower courts than high courts. Figure 5 shows this conditioning effect of court type. The black line in the figure indicates the predicted probability of a referral by a lower court while the gray line does so for high courts. Consider first a shift from one extreme indicating a high level of opposition to EU-level control of a policy (*Net Support for EU-Integration* of -30) to an extreme level of support for EU policy making (*Net Support for EU-Integration* of +30). Whereas such a shift decreases the likelihood of a lower court referring a case from 74% to

22%, for a high court this decrease is from 45% to 12%. Notably, this highlights the conditional effect of court type on referrals, as the difference between high and lower courts dissipates as the threat of noncompliance decreases thanks to public support for EU-level policy making.

Conclusion

In this article we provide a case-level theoretical account of domestic courts' willingness to engage in international legal processes. Using data on cases involving European law handled by the courts of the European Union's member states, we show that domestic political conditions exert influence over the decision to refer cases to the EU's highest court, the Court of Justice. We turn now to a few implications of these findings.

Our argument has implications for the efficacy of international courts. One of the central debates in the international courts literature is whether, and if so to what degree, international courts are responsive to the preferences of governments (e.g., Carrubba and Gabel 2015; Stone Sweet and Brunell 1998). These studies typically use international courts' decisions to conduct analyses of decision making with an eye to finding influence (or the lack thereof) of government preferences. Such an empirical approach, however, typically leave the international court's docket as exogenously determined by other actors.[20] As our analysis of preliminary references to the CJEU demonstrates, the decision to contribute to an international court's docket can itself be a strategic decision on the part of domestic legal institutions facing a risk of noncompliance. As a consequence, the cases sent to the CJEU may often be those for which noncompliance is likely to be at issue. If so, then our account is consistent with empirical analyses showing the CJEU's responsiveness to member state government preferences, as that responsiveness is itself in part a function of the strategic selection of which cases to refer. By identifying one path by which a court such as the CJEU receives cases with a potential for noncompliance in the first place, this article contributes to our broader understanding of the dynamics at work in international adjudication processes.

This article has implications for our understanding of the interaction between international institutions and its constituent member state countries. Consider the extensive literature on the

[20]While the theoretical accounts of some work, such as Carrubba and Gabel (2015), account for the case generation process, the subsequent empirical analyses do not explicitly examine it.

monitoring and enforcement of international agreements (e.g., Carrubba 2005; Downs, Rocke and Barsoom 1996; Koremenos, Lipson and Snidal 2001). These arguments conceptualize international institutions as an information clearinghouse through which incidences of member state noncompliance are made public to all member states. The success of such institutions can rely on the ability and willingness of either citizens or their domestic institutions to bring forward cases. Without cases, an international court risks irrelevance or even dissolution (e.g., Cowell 2013). Our theory and accompanying analysis provides a novel case-level explanation for why in some contexts domestic courts have enthusiastically availed themselves of international courts. Further specifying this mechanism and other case-level mechanisms provide an avenue for future research on the conditions that help and hinder the development of international legal institutions.

This article makes several contributions to the existing theoretical and empirical literature on the EU's preliminary reference procedure. First, our theory generates clean empirical predictions with an explicit causal mechanism accounting for a court's case referral's impact on a government's costs and benefits from compliance. Second, we make use of the "Dec.Nat" database to examine referral behavior using both referred cases and cases that domestic courts did not refer to the CJEU. While the empirical scholarship finds evidence suggesting a positive relationship between public support for integration and preliminary references (e.g., Carrubba and Murrah 2005; Stone Sweet and Brunell 1998), it is reliant on analyses using cases *referred* to the CJEU, not *potentially referable* cases. As a result, the extant scholarship lacks an appropriate quantitative empirical study comparing cases referred to the CJEU to cases not referred to the CJEU.[21] Third, using policy issue-level Eurobarometer data to proxy for public opinion towards the specific case facts allows us to design a more nuanced quantitative empirical test about the relationship between public support for EU integration and the referral behavior of domestic courts.

The results additionally yield novel empirical evidence of strategic judicial behavior. As one of the central debates in the judicial politics literature, scholars have identified a range of contexts and conditions under which courts act strategically (e.g., Carrubba and Gabel 2015; Larsson and

[21] Alter (2000, p. 501) mentions this problem directly: "Case study analysis risks being more impressionistic than quantitative. But given the over-aggregated nature of the [CJEU's] reference data, and the current impossibility of determining the number and content of national court cases that are not referred to the [CJEU], it may be the only way to capture the many factors shaping judicial behavior."

Naurin 2016; Staton 2010; Vanberg 2005). Yet the extent to which strategic behavior affects the relationship between domestic and international courts has largely been examined through broad institutional and country level explanations. By developing a micro-founded theory of domestic courts' behavior at the case level, we have identified one mechanism by which separation of powers constraints at the domestic level can have an impact beyond domestic legal disputes. While a robust literature examines the nature and extent of governments' abilities to pressure international courts through mechanisms like appointments (e.g., Voeten 2007), withdrawing or revising treaties (e.g., Burley and Mattli 1993), or threatening court-curbing measures (e.g., Kelemen 2012), our findings suggest that governments can affect international legal processes through their relationship with the domestic judiciary. Our empirical evidence of such strategic judicial behavior in as developed of an international legal system as the European Union reinforces the potential significance of this dynamic for the functioning of international courts.

We also note the potential for future research to both extend and test additional implications of our theory. As we noted earlier, an international court may affect the cost of noncompliance in several ways. While we focused on an international court's legitimacy as one such mechanism for systematic empirical evaluation, future work may consider examining other potential mechanisms affecting the use of preliminary references. For example, if domestic courts benefit from increased public awareness of their decisions, then they may be more likely to refer a case to when an international court is likely to effectively raise the case's salience. Similarly, our formal model lends itself to further extensions. Our focus on the behavior of domestic courts led us to exclude an active international court from our model. As international courts face their own political constraints and institutional concerns (e.g., Carrubba and Gabel 2015), introducing an international court to the model may yield insights into both stages of decision making in the preliminary reference process, such as conditions under which domestic courts refrain from referring a case because it anticipates the international court to be ineffective at generating compliance with its decision. Such extensions, both theoretical and empirical, may further inform our understanding of the growing number of international courts around the world.

Lastly, this article highlights the potential insights to be gained by drawing from both the comparative courts and international courts scholarship. As Staton and Moore (2011) note, relaxing the boundaries between the subfields and instead focusing on the common challenges courts face has

the potential to yield novel theoretical and empirical findings that can contribute to a broader and deeper understanding of judicial politics at the domestic and international level. Our incorporation of theoretical insights from the domestic courts literature on compliance and judicial authority to explain references to an international court provide one example of the analytical benefits of such an approach. Future research on courts such as the CJEU may similarly benefit from drawing from the broader judicial politics literature to explain the behavior of international courts and the domestic institutions with which they interact.

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Supplemental Appendix for "Can International Courts Enhance Domestic Judicial Review? Separation of Powers and the European Court of Justice"

Preliminary Reference Systems

Below we provide additional information on several of the preliminary reference systems beyond that of the EU.

Caribbean Community. Article 214 of the Caribbean Community's Treaty of Chaguaramas details the ability of domestic courts to refer to the Community's Caribbean Court of Justice.

> Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.

East African Community. Article 34 of the East African Community Treaty specifies the preliminary reference procedure for sending cases to the East African Court of Justice. Despite the Court's provision of guidelines for national courts, as of 2011 no referrals had been sent.

> Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.

European Convention on Human Rights. Entering into force on August 1, 2018, Protocol 16 allows a nation's highest court to request an advisory opinion from the European Court of Human Rights "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto." The protocol has been signed and ratified by Albania, Andorra, Armenia, Estonia, Finland, France, Georgia, Greece, Lithuania, Netherlands, San Marino, Slovenia and Ukraine. In addition, Belgium, Bosnia and Herzegovina, Italy, Luxembourg, Norway, Moldova, Romania, Slovakia, and Turkey have signed but not ratified the protocol. The first opinion using Protocol 16 was issued in April 2019 for a case sent by the French Court of Cassation. The text of Article 1 of the protocol is provided below.

> Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

European Free Trade Area (EFTA). The EFTA Court adjudicates questions regarding the European Economic Area Agreement. Similar to the EU's preliminary reference, any court or tribunal of a EEA member state (Iceland, Liechtenstein, and Norway) may ask the EFTA Court for an interpretation of EEA law or the EEA agreement. As of October 2017, 124 such requests have been lodged at the EFTA Court.[22] The procedure is provided for by Article 34 of the ESA/Court Agreement.

> The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion. An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

Common Market for Eastern and Southern Africa (COMESA). Article 30 of the Treaty Establishing COMESA allows the courts of member states to request an advisory opinion from the Court of Justice.

> Where a question is raised before any court or tribunal of a Member State concerning the application or interpretation of this Treaty or the validity of the regulations, directives and decisions of the Common Market, such court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling thereon.

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[22] Prior to their accession to the EU, courts in Austria, Finland, and Sweden also could access the EFTA Court through the advisory opinion procedure. In total, 5 requests were made by the courts of those three countries.

Case Example: Norway and the EFTA Court

A recent case involving the Norwegian government and the referral procedure at the European Free Trade Association (EFTA) Court demonstrates how the threat of a preliminary reference has the potential to enhance the efficacy of domestic courts. In violation of European Economic Area (EEA) law protecting the right to free movement, the Norwegian Labor and Welfare Administration (NAV) from 2012 to 2019 charged thousands of citizens for welfare fraud while living outside of Norway. As Pavone and Stiansen (N.d.) explain, NAV's noncompliance was not accidental but continued despite repeatedly receiving information that their practices were unlawful. Despite rulings by the Norwegian National Insurance Court (NIC) declaring NAV's policy a violation of EEA law,[23] the agency continued to implement the restrictions in defiance of the court's decision, resulting in nearly 2400 individuals receiving fines and prison terms for 48 individuals.[24] The policy, however, was abruptly brought into compliance with the NIC's ruling in 2019 when the court threatened to refer the case to EEA's adjudicatory body, the EFTA Court. As Pavone and Stiansen (N.d., 22) explain, "In particular, it appears that the NAV seriously considered ways to block the case from reaching the EFTA Court such that it would not have to adopt any policy changes. For instance, on January 16th 2019, the NAV sent an email to the Ministry of Foreign Aairs querying if it could be argued that the NIC lacked the authority to submit a case to the EFTA Court." Whereas the NIC could not change the Norwegian government's behavior on its own, the threat of bringing the EFTA Court into the process, and the potential subsequent political cost from a likely adverse decision, compelled the government to admit that its policy was in err and bring it into compliance with EEA law as ordered to by the NIC.

[23]The Local. 2019b. Norwegian public prosecutor expects more cases in NAV social security scandal. The Local. URL: https://www.thelocal.no/20191113/ norwegian-public-prosecutor-expects-more-cases-in-nav-social-security-scandal (Retrieved August 24, 2020)

[24]The Local. 2020. Six things to learn from Norways NAV social security scandal hearings. The Local. URL: https://www.thelocal.no/20200110/six-things-to-know-from-norways-nav-social-security-scandal-hearings (Retrieved August 24, 2020)

Formal Model Parameters

Table A1 provides a summary of the utility function components

Table A1: Model Parameters

Utility Components		
λ	Court's policy payoff	$\lambda > 0$
π	Court's noncompliance cost	$\pi > 0$
ϵ	Court's referral cost	$\epsilon > 0$
α	Government's policy payoff	$\alpha > 0$
β	Government's noncompliance cost without a referral	$\beta > 0$
κ	Government's noncompliance cost with a referral	$\kappa > 0$

Proofs

The solution concept for the game is subgame perfect equilibrium (SPE). I limit the analysis to pure strategies.

Consider the final stage of the game when the government decides whether to defy ($D = 1$) or comply ($D = 0$) with a Pro-EU court decision. Assuming the government otherwise complies with an anti-EU decision, there are two possible cases.

Case 1: The court did not refer the case ($R = 0$)

$$\begin{aligned} EU_G(D = 1) &= \alpha - \beta \\ EU_G(D = 0) &= 0 \end{aligned}$$

The government defies a pro-EU ruling if $\alpha > \beta$.

Case 1: The court referred the case ($R = 1$)

$$\begin{aligned} EU_G(D = 1) &= \alpha - \kappa \\ EU_G(D = 0) &= 0 \end{aligned}$$

The government defies a pro-EU rulings if $\alpha > \kappa$.

Now consider the previous stage of the game in which the court decides whether to issue a pro-EU ($P = 1$) or anti-EU ($P = 0$) integration decision. There are 8 possible cases.

Case 1: The court did not refer ($R = 0$) and $\alpha < \beta$ and $\alpha < \kappa$

$$\begin{aligned} EU_C(P = 1) &= \lambda \\ EU_G(D = 0) &= 0 \end{aligned}$$

The court always issues a pro-EU ruling since $\lambda > 0$.

Case 2: The court referred ($R = 1$) and $\alpha < \beta$ and $\alpha < \kappa$

$$\begin{aligned} EU_C(P = 1) &= \lambda - \epsilon \\ EU_G(P = 0) &= -\epsilon \end{aligned}$$

The court always issues a pro-EU ruling since $\lambda > 0$.

Case 3: The court did not refer ($R = 0$) and $\beta < \alpha < \kappa$

$$\begin{aligned} EU_C(P = 1) &= -\pi \\ EU_G(P = 0) &= 0 \end{aligned}$$

The court never issues a pro-EU ruling since $\pi > 0$.

Case 4: The court referred ($R = 1$) and $\beta < \alpha < \kappa$

$$\begin{aligned} EU_C(P = 1) &= \lambda - \epsilon \\ EU_G(P = 0) &= -\epsilon \end{aligned}$$

The court always issues a pro-EU ruling since $\lambda > 0$.

Case 5: The court did not refer ($R = 0$) and $\kappa < \alpha < \beta$

$$\begin{aligned} EU_C(P = 1) &= \lambda \\ EU_G(P = 0) &= 0 \end{aligned}$$

The court always issues a pro-EU ruling since $\lambda > 0$.

Case 6: The court did not refer ($R = 1$) and $\kappa < \alpha < \beta$

$$\begin{aligned} EU_C(P = 1) &= -\pi - \epsilon \\ EU_G(P = 0) &= -\epsilon \end{aligned}$$

The court never issues a pro-EU ruling since $\pi > 0$.

Case 7: The court did not refer $(R = 0)$ and $\alpha > \beta$ and $\alpha > \kappa$

$$\begin{aligned} EU_C(P = 1) &= -\pi \\ EU_G(D = 0) &= 0 \end{aligned}$$

The court never issues a pro-EU ruling since $\pi > 0$.

Case 8: The court referred $(R = 1)$ and $\alpha > \beta$ and $\alpha > \kappa$

$$\begin{aligned} EU_C(P = 1) &= -\pi - \epsilon \\ EU_G(P = 0) &= -\epsilon \end{aligned}$$

The court never issues a pro-EU ruling since $\pi > 0$.

Finally, consider the first stage of the game in which the court decides whether to refer $(R = 1)$ a case or not $(R = 0)$. There are four possible cases.

Case 1: $\alpha < \beta$ and $\alpha < \kappa$

$$\begin{aligned} EU_C(R = 1) &= \lambda - \epsilon \\ EU_G(R = 0) &= \lambda \end{aligned}$$

The court never refers since $\epsilon > 0$.

Case 2: $\beta < \alpha < \kappa$

$$\begin{aligned} EU_C(R = 1) &= \lambda - \pi \\ EU_G(R = 0) &= 0 \end{aligned}$$

The court will refer if and only if $\lambda > \pi$.

Case 3: $\kappa < \alpha < \beta$

$$\begin{aligned} EU_C(R=1) &= -\pi \\ EU_G(R=0) &= \lambda \end{aligned}$$

The court never refers since -π cannot be greater than λ.

Case 4: $\alpha > \beta$ and $\alpha > \kappa$

$$\begin{aligned} EU_C(R=1) &= -\pi \\ EU_G(R=0) &= 0 \end{aligned}$$

The court never refers since $\epsilon > 0$.

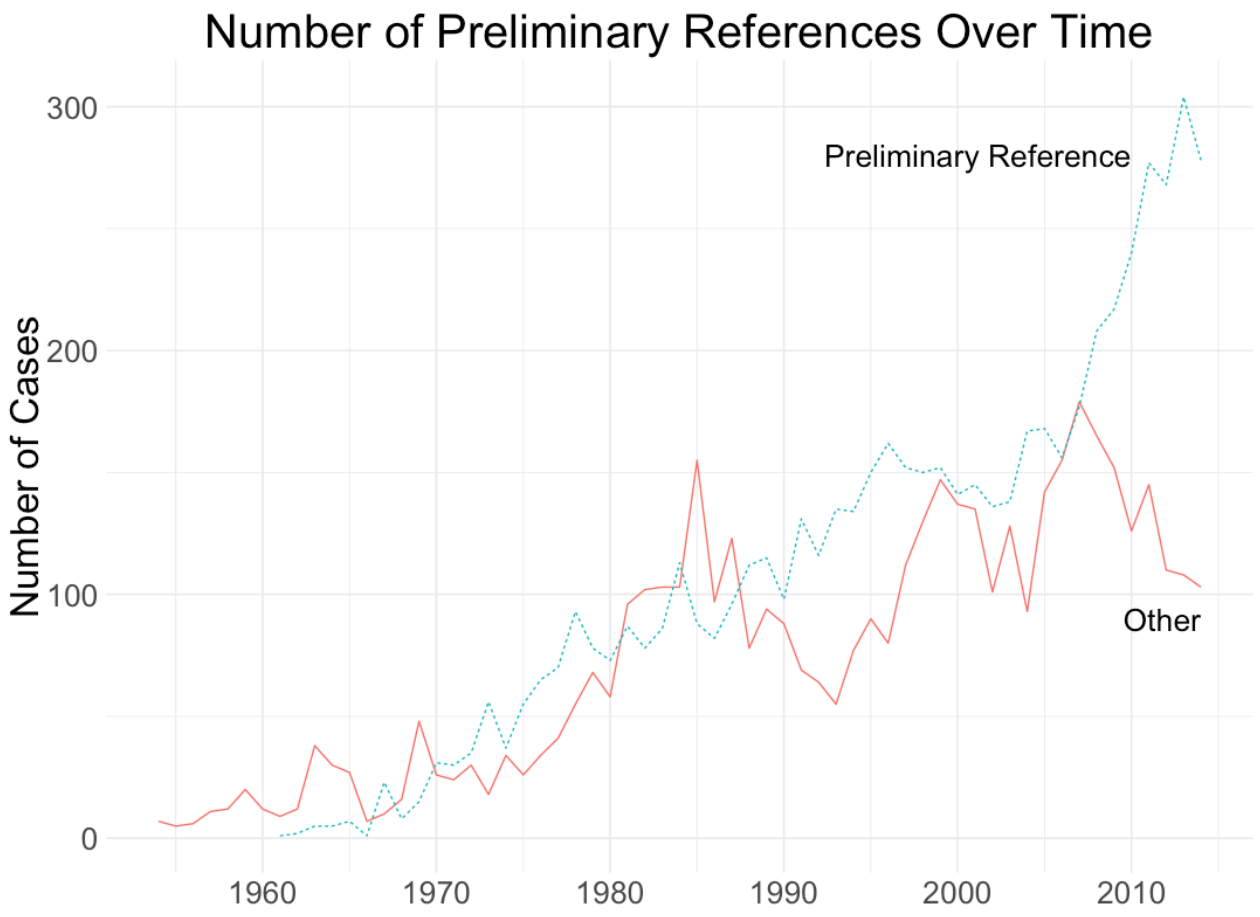

Figure A1: This figure shows the number of preliminary reference cases heard by the CJEU relative to other cases from its founding to 2014. Preliminary references cases make up the majority of the CJEU's docket over time.

Eurobarometer Surveys

For the measure *Net Support for EU Integration* we used Eurobarometer survey results to the question "For each of the following areas, do you think that decisions should be made by the (NATIONALITY) government, or made jointly within the European Union?" Data was collected for the following policy areas from the listed Eurobarometer survey release dates.

Table A2: Eurobarometer Surveys

Policy Area	Question Wording	Survey Dates
Agriculture	Agriculture and Fishing Policy	10/1997, 10/1998, 3/1999, 10/1999
Competition	Competition Policy	2/1996
Consumer Protection	Consumer Protection	2/1996
Environment	Protection of the Environment	10/1997, 4/1998, 10/1998, 3/1999, 10/1999
Social Policy	Health and Social Welfare	10/1997, 4/1998, 10/1998, 3/1999, 10/1999
Taxation	Taxation	4/1998, 10/1998, 3/1999

High Courts

Table A3 lists the courts coded as being a high court by country in the full 1998-1999 Dec.Nat data. Note that not all high courts are present in the data used for our analysis, and some courts may have no cases present in the years coded from the database.

Table A3: High Courts by Country

Country	Court
Austria	Oberster Gerichtshof
Austria	Verfassungsgerichtshof
Austria	Verwaltungsgerichtshof
Belgium	Conseil d'Etat/Raad van State
Belgium	Cour d'arbitrage
Belgium	Cour de cassation/Hof van Cassatie
Denmark	Hojesteret
Finland	Korkein hallinto-oikeus/Hogsta Forvaltningsdomstolen
Finland	Korkein oikeus
France	Conseil constitutionnel
France	Conseil d'Etat
France	Cour de cassation
Germany	Bundesarbeitsgericht
Germany	Bundesfinanzhof
Germany	Bundespatentgericht
Germany	Bundessozialgericht
Germany	Bundesverwaltungsgericht
Germany	Bundesgerichtshof
Greece	Areios Pagos
Greece	Symvoulio Epikrateias
Ireland	Supreme Court
Italy	Consiglio di Stato
Italy	Corte Costituzionale
Italy	Corte di Cassazione
Luxembourg	Cour administrative de Luxembourg
Luxembourg	Cour de Cassation
Netherlands	Hoge Raad
Netherlands	Raad van State
Portugal	Supremo Tribunal Administrativo
Spain	Tribunal Constitucional
Spain	Tribunal Supremo
Sweden	Hgsta domstolen
UK	House of Lords

Descriptive Statistics

Table A4 provides descriptive statistics for each of the variables in our dataset. Although legal origin is not included in the table, 31 cases originated in British-based legal systems, 528 in French systems, 117 in German systems, and 13 in Scandinavian systems.

Table A4: Descriptive Statistics

Variable	Mean	St. Dev.	Min	Pctl(25)	Pctl(75)	Max
Referral	0.30	0.46	0	0	1	1
Net Public Support for EU Integration	11.26	28.32	−81	−6	31	68
High Court	0.55	0.50	0	0	1	1
Low Trust in the CJEU	0.37	0.48	0	0	1	1
Net Pro-EU Membership	41.58	15.172	−1	33	54	78
Share of Intra-EU Trade	9.23	6.3	0.4	3.2	14.1	21.9
Monist Legal System	0.88	0.32	0	1	1	1
GDP Growth	3.51	1.01	1.56	3.34	4.31	10.5
Founding Member State	0.58	0.49	0	0	1	1
Share of EU GDP	0.120	0.076	0.003	0.032	0.183	0.25
Government Ideology	4.459	1.288	3	3.429	5.77	7.11

Note: N = 689

Results Including Legal Origin Coefficients

Table A5 reports the results of our analyses including the findings related to the legal origins variable.

Table A5: Linear Probability Models of Referrals to the CJEU (1998-1999)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Net Support for EU Integration	-0.00581*	-0.00645*	-0.00955**	-0.00924**	-0.00732**	-0.00864**
	(0.00343)	(0.00345)	(0.00406)	(0.00433)	(0.00363)	(0.00387)
Low Trust in the CJEU		-0.124	-0.276***	-0.198**		-0.117
		(0.206)	(0.0472)	(0.0978)		(0.199)
Net Public Support for EU Integration × Low Trust in the CJEU			0.00863**	0.00702*		
			(0.00384)	(0.00357)		
High Court		-0.161***		-0.159***	-0.192***	-0.190***
		(0.0469)		(0.0459)	(0.0428)	(0.0437)
Net Public Support for EU Integration × High Court					0.00294**	0.00316**
					(0.00137)	(0.00140)
Net Pro-EU Membership		0.00489		0.00432		0.00570
		(0.00348)		(0.00342)		(0.00343)
Share of Intra-EU Trade		0.0306		0.0768		0.0623
		(0.117)		(0.121)		(0.115)
Monist Legal System		-4.225		-3.105		-4.619*
		(2.585)		(2.441)		(2.566)
French Legal Origin		0.632		0.829		1.043
German Legal Origin		-5.405		-3.376		-5.425
Scandinavian Legal Origin		-5.080		-3.148		-5.103
GDP Growth		-0.0469		-0.0556		-0.0326
		(0.109)		(0.110)		(0.114)
Founding Member State		-0.994		-1.003		-1.329
		(0.814)		(0.839)		(0.801)
Share of EU GDP		-34.97		-23.43		-36.85
		(24.47)		(23.26)		(24.11)
Government Ideology		0.0173		0.0153		0.0180
		(0.0439)		(0.0414)		(0.0447)
Constant	0.301***	6.728	0.356***	4.347	0.471***	6.653
	(0.0947)	(4.648)	(0.0971)	(4.499)	(0.102)	(4.593)
Country-Policy Area Fixed Effects?	Yes	Yes	Yes	Yes	Yes	Yes
Legal Origin Fixed Effects?	No	Yes	No	Yes	No	Yes
N	689	686	689	686	689	686

British legal system is the reference category for the legal origin variable. Standard errors clustered by country-policy area.
*p<0.1; **p<0.05; ***p<0.01

Expanding the Data: Three Policy Areas from 1998-2002

As our primary analyses are limited to 1998 and 1999 due to data constraints, one potential issue is that our results are dependent on some unobserved factor related to that specific timeframe. To address this concern, we carry a robustness analysis using data from 1998 to 2002 of cases involving the three policy areas in our study for which we have Eurobarometer data past 1999: agriculture, environmental protection, and social policy. This resulting dataset has a total of 870 cases. As for Eurobarometer data, the question "For each of the following areas, do you think that decisions should bemade by the (NATIONALITY) government, or made jointly within the European Union?" was asked for these three policy areas twice in 2000, once in 2001, and twice in 2002. The variables we use for this robustness analysis are the same as those in the primary analyses in the manuscript, with one exception.[25] We recalculate the threshold for *Low Trust in the CJEU* to reflect the bottom third of observations in this extended dataset. This results in a cutoff value of 18, at or below which observations are coded as 1. Table A6 provides descriptive statistics for each of the variables.

[25]As the Chapel Hill Expert Survey does not have data for the French *Union for a Popular Movement* (UMP) coalition that won the 2002 legislative elections, for those cases dated after the UMP came to office we use an average of the values assigned to the three major parties constituting the coalition: Rally for the Republic, Liberal Democracy, and the Union for French Democracy. The resulting score of 6.64 is reasonably close to the 7.44 score given to the UMP in the 2006 edition of the survey. In all this coding decision effects 10 cases.

Table A6: Descriptive Statistics, 1998-2002

Statistic	Mean	St. Dev.	Min	Max
Referral	0.361	0.481	0	1
Net Public Support for EU Integration	−4.544	29.660	−81.000	68.500
Low Trust in the CJEU (Net Trust < 19)	0.331	0.471	0	1
High Court	0.586	0.493	0	1
Share of Intra-EU Trade	10.739	6.409	0.200	22.000
GDP Growth	2.828	1.487	−0.198	10.504
Founding Member State	0.648	0.478	0	1
Net Pro-EU Membership	39.689	18.368	−4	80
Government Ideology	4.689	1.373	3.000	7.110
Share of EU GDP	0.130	0.080	0.003	0.250
Monist Legal System	0.552	0.498	0	1
Share of EU GDP	0.130	0.0796	0.003	0.25
Government Ideology	4.689	1.373	3	7.11

Note: N = 870

We replicate each of the six models from the manuscript using this data. The results of these models are presenting in Table A7. As was the case with our analyses in the manuscript, the results conform with the expectations of our theoretical model. First, we see that the coefficient for *Net Support for EU Integration* is negative, indicating that the likelihood of a court referring a case decreases as public support for greater EU integration in the policy area at issue increases. Second, we see that this relationship is conditioned by trust in the CJEU (Models 3A and 4A) and where in a country's judicial hierarchy the case originates (Models 5A and 6A). For the latter, we see this with the statistically significant interaction term between *High Court* and *Net Support for EU Integration*. For the former, the dichotomous nature of *Low Trust in the CJEU* informs our interpretation of the coefficients both of the constituent terms and the interaction term. Specifically, the statistical significance of the *Net Support for EU Integration* constituent term suggests that this variable's relationship with the use of preliminary references is limited to those contexts in which the CJEU has the public's trust.

Table A7: Linear Probability Models of Referrals to the CJEU (1998-2002)

	Model 1A	Model 2A	Model 3A	Model 4A	Model 5A	Model 6A
Net Support for EU Integration	-0.00470*	-0.00434*	-0.00466*	-0.00423*	-0.00641**	-0.00684***
	(0.00276)	(0.00216)	(0.00262)	(0.00221)	(0.00260)	(0.00223)
Low Trust in the CJEU		-0.0953***	-0.0919*	-0.0995***		-0.0943***
		(0.0278)	(0.0521)	(0.0328)		(0.0282)
Net Public Support for EU Integration × Low Trust in the CJEU			0.000138	-0.000410		
			(0.00170)	(0.00113)		
High Court		-0.327***		-0.327***	-0.347***	-0.308***
		(0.0516)		(0.0516)	(0.0495)	(0.0433)
Net Public Support for EU Integration × High Court					0.00334**	0.00352***
					(0.00133)	(0.00118)
Net Pro-EU Membership		0.00634**		0.00641**		0.00673***
		(0.00256)		(0.00258)		(0.00242)
Share of Intra-EU Trade		0.0270		0.0297		0.0235
		(0.120)		(0.122)		(0.120)
Monist Legal System		5.561***		5.539***		5.689***
		(1.203)		(1.216)		(1.187)
French Legal Origina		-1.710		-1.682		-1.696
		(1.181)		(1.201)		(1.163)
German Legal System		8.305***		8.312***		8.534***
		(1.539)		(1.538)		(1.563)
Scandinavian Legal Origin		7.748***		7.761***		7.997***
		(1.503)		(1.503)		(1.515)
GDP Growth		0.00748		0.00803		0.00471
		(0.0156)		(0.0159)		(0.0155)
Founding Member State		1.568*		1.550*		1.609*
		(0.885)		(0.900)		(0.878)
Share of EU GDP		55.09***		54.94***		56.42***
		(10.25)		(10.30)		(10.23)
Government Ideology		-0.00574		-0.00493		-0.00655
		(0.0323)		(0.0327)		(0.0336)
Constant	0.709***	-8.912***	0.773***	-8.932***	0.950***	-9.180***
	(0.0732)	(1.986)	(0.0770)	(1.988)	(0.0698)	(2.032)
Country-Policy Area Fixed Effects?	Yes	Yes	Yes	Yes	Yes	Yes
Legal Origin Fixed Effects?	No	Yes	No	Yes	No	Yes
N	870	859	870	859	863	859

British legal system is the reference category for the legal origin variable. Standard errors clustered by country-policy area.
*p<0.1; **p<0.05; ***p<0.01

To see this conditional relationship more clearly, we subset the data based on *Low Trust in the CJEU* and replicated Models 3 and 4. The results are presented in Table A8, with Models 3B and 4B estimated using the subset of data for which *Low Trust in the CJEU* is 0 and Models 3C and 4C estimated using the subset of data for which that variable is 1. As the results show, the relationship between *Referral* and *Net Support for EU Integration* only reaches statistical significance for those cases in which the public trusts the CJEU. That is, in Models 3B and 4B this relationship is negative and statistically significant, while in Models 3C and 4C this is not the case. Taken together, this conforms with the expectation of our theoretical model and second hypothesis that the impact of public support for greater EU integration only holds where the CJEU is not held in low regard.

Table A8: Linear Probability Models of Referrals to the CJEU (1998-1999): Subsetted Data Based on Trust in CJEU

	Model 3B	Model 4B	Model 3C	Model 4C
Net Support for EU Integration	-0.00633**	-0.00444*	-0.00348	-0.00336
	(0.00259)	(0.00248)	(0.00396)	(0.00312)
High Court		-0.392***		-0.245**
		(0.0531)		(0.0877)
Net Pro-EU Membership		0.00768*		0.00454
		(0.00454)		(0.00458)
Share of Intra-EU Trade		0.0267		-0.151
		(0.165)		(0.153)
Monist Legal System		5.685***		-0.623
		(1.495)		(1.744)
GDP Growth		0.0133		-0.0191
		(0.0218)		(0.0522)
Founding Member State		1.700		0.484
		(1.236)		(2.278)
Share of EU GDP		56.66***		8.492
		(11.73)		(19.24)
Government Ideology		-0.00917		-0.00825
		(0.0328)		(0.0723)
Constant	0.845***	-1.545*	0.654***	0.826
	(0.0633)	(0.874)	(0.109)	(3.616)
Public Trust in the CJEU?	Yes	Yes	No	No
Country-Policy Area Fixed Effects?	Yes	Yes	Yes	Yes
Legal Origin Fixed Effects?	No	Yes	No	Yes
N	582	571	288	288

British legal system is the reference category for the legal origin variable.
Standard errors clustered by country-policy area.
*p<0.1; **p<0.05; ***p<0.01

Alternative Measure for *Low Trust in CJEU*

Table A9 shows the results of linear probability models replicating Models 2, 3, 4, and 6 using the mean level of Trust in the CJEU (18) as the cut-off for the *Low Trust in CJEU* variable.

Table A9: Linear Probability Models of Referrals to the CJEU (1998-1999) with Alternative *Low Trust in CJEU* Measure

	Model 3D	Model 4D
Net Support for EU Integration	-0.0112**	-0.0105**
	(0.00493)	(0.00501)
Low Trust in the CJEU	-0.178***	-0.150**
	(0.0616)	(0.0658)
Net Public Support for EU Integration × Low Trust in the CJEU	0.00795**	0.00649*
	(0.00382)	(0.00373)
High Court		-0.161***
		(0.0461)
Net Pro-EU Membership		0.00425
		(0.00376)
Share of Intra-EU Trade		0.0222
		(0.121)
Monist Legal System		-3.258
		(2.322)
French Legal Origin		0.356
		(1.107)
German Legal Origin		-4.256
		(3.593)
Scandinavian Legal Order		-3.965
		(3.464)
GDP Growth		-0.0834
		(0.108)
Founding Member State		-0.597
		(0.831)
Government Ideology		0.0225
		(0.0331)
Share of EU GDP		-26.88
		(22.17)
Constant	0.380***	5.568
	(0.105)	(4.376)
Country-Policy Area Fixed Effects?	Yes	Yes
N	689	686

Standard errors clustered by country-policy area. *p<0.1; **p<0.05; ***p<0.01