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Courts, Constraints, and Public Opinion in Europe

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Courts, Constraints, and Public Opinion in Europe

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Abstract

Courts, Constraints, and Public Opinion in Europe
By Sivaram Cheruvu

Alexander Hamilton argues in Federalist 78 that courts "have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." In this dissertation, I ask two primary questions: what tools do courts have to counteract executives' threats of noncompliance, and under what conditions can executives affect the efficacy of courts?

In chapter 1, I argue that public support is one such tool and investigate education as a source of public support for courts. To test my argument, I examine public support for the German Federal Constitutional Court (FCC) among East Germans after the fall of the Berlin Wall. I find an additional year of exposure to a more open school environment and the West German school curriculum after the fall of the Berlin Wall caused an increase in East Germans' support for the FCC.

In chapter 2, I start from the premise that the judiciary is frequently reliant on executive and legislative bodies to implement its decisions. Scholars argue that public trust in the judiciary helps compel the other branches to comply. As noncompliance may erode public trust, courts are sensitive to government threats to not implement their decisions. Public trust, however, is also contingent on a court maintaining a consistent case law, which may require it making unpopular decisions that risk government noncompliance. How can courts manage this tension? I argue that when the legal merits favor a ruling against a government's preferences and the threat of noncompliance is high a court will provide the government more flexibility in implementing its ruling. An analysis of Court of Justice of the European Union (CJEU) decisions provides evidence supporting this account.

In chapter 3, I posit designing judicial institutions requires a trade off between insulating judges from external political pressure and keeping them democratically accountable. While scholars focus on variation in judicial retention mechanisms, I analyze how the internal procedures of courts balance this trade off. Civil law collegial courts mostly issue *per curiam* rulings in which judges' votes are not public. I claim that judges on *per curiam* courts are responsive to their appointer's preferences especially if they are subject to reappointment. I analyze decisions at the CJEU to support this account.

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This dissertation was not the product of an individual but a village. Leading that village is God, who serves as a constant reminder that my value is not rooted in my academic achievements but in Him. Without this understanding, all my failures in graduate school would have prevented me from ever finishing and my work would be without purpose. I am blessed to have my mom, dad, Anand, and Prathyusha that were incredibly supportive, even though I moved far away from Edison, New Jersey. I was lucky to write these papers under the tutelage of my advisors Cliff Carrubba, Jeff Staton, and Zac Peskowitz. Cliff kept my theoretical arguments honest and made sure that I remained logically consistent. Jeff always had his eye on the bigger picture, encouraging me to describe why my arguments mattered beyond just judicial politics. Zac was immeasurably helpful in honing my empirical strategy and always available whenever I needed advice on even the most trivial of points. I also owe a lot to all my instructors in graduate school for generously teaching and being patient with me even when I struggled. These include Michael Giles, Miguel Rueda, Jen Gandhi, Dani Reiter, Pablo Montagnes, Greg Martin, Eric Reinhardt, and Tom Clark. This experience would not have been complete without the support of my fellow graduate students within the department and outside of the department running alongside me. I would not have attended graduate school if Dennis Bathory did not pull me aside one day on College Avenue at Rutgers and tell me that I would be stupid not to do it. I further would not have the EU as one of my primary interests if I did not take Dan Kelemen's class as an undergrad. I have benefited from the mentorship of them both greatly. In high school, Benny Parekkadan taught me that intellectual curiosity and creativity were not mutually exclusive, and Andrew DeNicola and John Zazzali taught me how to be a disciplined team player. These lessons stick with me and inspire my work to this day. Lastly, thanks to my friends from Edison, Rutgers, London, Atlanta, and elsewhere for always encouraging me to pursue my passion and laughing along with me the whole time. You know who you are.

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Chapter 1

How does Education affect Public Support for Courts?

Abstract: Social scientists have long debated whether education affects citizens' support for democratic institutions. The scholarship overlooks, however, whether this relationship is more consequential for the efficacy of some institutions than others, such as courts that rely on public support to enforce their rulings. In this chapter, I argue that school environment and curriculum are two mechanisms through which education affects public support for courts. To test my argument, I examine public support for the German Federal Constitutional Court (FCC) among East Germans after the fall of the Berlin Wall. Leveraging the school enrollment cutoff date in East Germany for variation in the length of exposure to democratic education, I find an additional year of exposure to a more open school environment and the West German school curriculum after the fall of the Berlin Wall caused an increase in East Germans' support for the FCC. My findings have implications for courts in new democracies, the relationship between education and political attitudes, and the scholarship on historical legacies.

We have come to take democracy for granted, and ***civic education*** *has fallen by the wayside. In our age, when social media can instantly spread rumor and false information on a grand*

scale, the public's need to understand our government, and the protections it provides, is ever more vital.

– Chief Justice John Roberts, 2019 Year-End Report on the Federal Judiciary

Introduction

How does education affect public support for political institutions? Social scientists have extensively theorized about the relationship between education and democracy, positing that education provides the tools for citizens to effectively interact with a democratic government. For example, Dewey (1916, 96) argues, "a [democratic] society must have a type of education which gives individuals a personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder." Within the political science literature, Lipset (1959, 79) contends, "Education presumably broadens men's outlooks, enables them to understand the need for norms of tolerance, restrains them from adhering to extremist and monistic doctrines, and increases their capacity to make rational electoral choice." Furthermore, the American Political Science Association website itself includes "Promoting high quality teaching and education about politics and government" among its core objectives (American Political Science Association 2019). If socialization into democratic citizenship through education affects citizens' support and acceptance of democratic institutions then new democracies face a difficult challenge. Indeed, citizens in new democracies confront an institutional discontinuity: they interact with different institutions than the ones they were socialized into.

This challenge is particularly consequential for courts in new democracies. In Federalist 78, Alexander Hamilton argues that the judiciary is the weakest branch of government because it depends on the executive to enforce its decisions. How can courts, then, constrain the executive's behavior while relying on it for enforcement? One answer in the scholarship

is that courts can leverage their public support to compel the executive to implement their decisions (e.g., Krehbiel 2016; Staton and Moore 2011; Vanberg 2005). If the public believes the executive should obey courts' rulings, they may vote to remove an executive that disobeys rulings. Therefore, executives desiring to remain in power have incentive to comply with courts' rulings. This mechanism requires, however, that courts have – and can maintain – public support. Scholars theorize that childhood socialization in democratic political values is an important determinant of public support for courts (e.g., Caldeira and Gibson 1992; Gibson and Nelson 2014).

In this article, I argue that citizens' education under autocracy has persistent effects on their support for judicial institutions following the transition to democracy. In particular, when schooling is designed to cultivate obedience and suppress dissent against the regime, citizens are more likely to have a coercive - as opposed to consensual - relationship with the law, leading to low support for courts after the transition to democracy.[1] I propose two mechanisms through which education affects public support for courts: school environment and school curriculum.[2] School environments that encourage open discussion of government policies and political disagreement cultivate higher trust in democratic institutions (e.g., Campbell 2008; Torney-Purta 2002). Experiencing such political disagreement in school provides students with the conceptual foundations for understanding and accepting the institutionalized disagreement inherent in separation of powers politics. Complementing school environment, school curricula teaching about democratic values and civics directly provide students the knowledge to understand their relationship with their judicial institutions. This civic education, thus, serves to increase public support in courts by informing citizens of how

[1]Importantly, my argument is generalizable only to autocracies in which courts were unable to meaningfully constrain government actions. It is reasonable to expect that in regimes with active and accessible courts, citizens may have higher support for their courts after a democratic transition relative to regimes in which courts were purely instruments to advance the interests of autocrats.

[2]Other mechanisms outside of the scope of this article are educational length and educational level (e.g., Cavaille and Marshall 2019; Kam and Palmer 2008; Oreopoulos 2006).

courts function in tandem with the other governmental institutions. To evaluate my theory, I leverage German reunification as an external shock to the educational environment and curriculum of the former German Democratic Republic (GDR, East Germany) and find that an additional year of democratic education increased public support for the German Federal Constitutional Court (FCC).

This paper is organized as follows. First, I explain why public support is necessary for the efficacy of courts and how childhood socialization may affect public support. Second, I argue that education affects public support for courts and provide a theoretical foundation for the school environment and school curriculum mechanisms. Third, I describe education under the East German regime and education following the fall of the Berlin Wall. Fourth, I empirically test my theory and provide causal evidence for both theoretical mechanisms. Finally, I conclude by discussing my findings' implications for courts in new democracies, the relationship between education and political attitudes, and the scholarship on historical legacies.

Education and Public Support for Courts

Gibson, Caldeira and Baird (1998, 343) describe the fundamental tension of courts in separation of powers politics as the following: "with limited institutional resources, courts are therefore uncommonly dependent upon the goodwill of their constituents for both support and compliance. Indeed, since judges often make decisions contrary to the preferences of political majorities, courts, more than other political institutions, require a deep reservoir of goodwill." With the inability to directly enforce their decisions, courts require tools to incentivize political actors to comply with their rulings. Public support is one such tool. When citizens support their courts, the threat of electoral punishment compels political actors to comply with courts' rulings. Courts, thus, act strategically to increase public awareness of

noncompliance with the law and leverage citizens' support to increase the likelihood of compliance their rulings (e.g., Staton 2010). As such, extensive scholarship provides explanations for the conditions under which citizens support a court's rulings, even when those rulings impose limits on the power of a popularly-elected government (e.g., Vanberg 2015).

Citizens' support for a court's rulings, however, may be conditional on their instrumental benefits, also known as "specific support" (e.g., Caldeira and Gibson 1992). Differences in citizens' specific support for a court's rulings may result from, for example, differences in ideology (e.g., Bartels and Johnston 2013). Alternatively, citizens may support a court's rulings irrespective of their instrumental benefits, suggesting that they concede legitimacy to a court even when its rulings are costly to them. Measuring this diffuse form of public support - defined by Nelson and Gibson (2019, 1513) as "a fundamental commitment to an institution, grounded in those democratic values most people learn as children" - however, is difficult. Scholars have empirically relied on partisan disagreement over a court's rulings (e.g., Christenson and Glick 2015, 2019; Gibson, Caldeira and Spence 2003*b*), or shifts in partisan power (Bartels and Kramon 2020), to draw inferences about whether citizens' diffuse support for a court as an institution is a function of their specific support.

A theoretically-motivated source of diffuse support for courts is socialization in democratic values. While the aforementioned scholarship debates the relationship between specific support and diffuse support for courts, scholars agree that citizens' democratic values and knowledge are important determinants of their diffuse support. Despite this agreement, scholars have not explicitly theorized and tested explanations about the origins of democratic value orientations that in turn affect diffuse support for courts. To this end, I provide a theory that discusses citizens' acquisition of democratic values to provide an explanation of the origins of diffuse support for courts. By microfounding citizens' baseline level of diffuse support, I complement existing scholarship that debates the potential for deviations from this baseline as a result of a court's decision-making.

I argue that childhood socialization affects citizens' democratic values, which may in turn affect their diffuse support for courts. While many of these formative experiences take place in the household,[3] these experiences may also be imposed by the regime on children through education. If children are educated by the regime that the court is a legitimate institution that has the ability to overturn the actions of the government, they may have higher support for the court as adults relative to children that were not taught about the institution at all. Although this comparison may seem stark, it is the reality in many states that transitioned to democracy. Children that were socialized through education into one regime are charged with evaluating the institutions of another as adults. A previous regime's socialization of citizens through childhood education, thus, may have long term consequences for their support for courts.

Nonetheless, over time, the effects of childhood education under a previous regime may dissipate (e.g., Mishler and Rose 2007). As citizens witness a court functioning properly and instrumentally benefit from its decision-making, their diffuse support for the court may increase. Therefore, to empirically disentangle the effect of childhood education from the instrumental benefits of a court's decision-making on its diffuse support requires finding a source of exogenous variation in childhood education. Research designs leveraging such exogenous variation can provide an explicit causal mechanism for persistent differences in diffuse support for a court among otherwise comparable citizens. Since any observed differences are, by construction, independent of a court's rulings when using such a research design, these differences in diffuse support can be understood as differences resulting from childhood education.

[3]The household environment, conditioned by parenting styles (e.g., Jennings and Niemi 1968) or the presence of siblings (Healy and Malhotra 2013), for example, may affect citizens' dispositions towards their institutions.

Theoretical Mechanisms

A variety of mechanisms related to childhood education can affect public support for courts. I restrict my focus to two mechanisms: school environment and school curriculum. I argue that education affects public support for courts through these two mechanisms by determining whether citizens have a consensual relationship with the law and have knowledge about their courts.

Mechanism 1: School Environment

Scholarship in legal socialization, defined by Trinkner and Tyler (2016, 417) as "the process whereby people develop their relationship with the law via the acquisition of law-related values, attitudes, and reasoning capacities," focuses on the role of school environment. Importantly, school environment may affect whether citizens have a consensual orientation towards the law or a coercive orientation towards the law.[4] Citizens with a consensual orientation towards the law obey legal authorities because they feel a duty to do so, not because the authorities are coercing them (e.g., Tyler 2006). Having a consensual orientation is conceptually similar to the idea of diffuse support, as both emphasize citizens' deference to legal authorities because they view them as legitimate.

In many authoritarian contexts, the school environment is tightly controlled and students are discouraged from questioning the regime.[5] This control over the school environment with harsh sanctions placed on those questioning authority creates a coercive orientation towards the law among students. Therefore, students defer to school authorities because they face consequences for defying authorities. Scholars provide evidence that these citizens, having

[4]See Tyler and Trinkner (2017) for a thorough overview of this point.

[5]To be clear, similar school environments exist in democracies as well. In fact, the majority school environment scholarship focuses on western democracies. For the purposes of this article, I assume that on average school environments in autocracies are more likely to create a coercive orientation with the law than school environments in democracies.

experienced such a relationship with school authorities, tend to have lower trust in, and are less likely to participate in, democratic institutions (e.g., Kirk and Matsuda 2011; Kupchik and Catlaw 2015).

Students in "open" school environments, in which they can express dissent and can discuss their disagreements, are more likely to develop a consensual orientation towards the law, resulting in higher diffuse support for courts. When students are explicitly allowed to deliberate about government policies, studies find that students are likely to be more knowledgeable about, and have higher support for, their institutions. For example, the open classroom environment – meaning teachers emphasize discussion among students on political issues – is often linked to students having greater civic knowledge relative to teaching about civics without discussion (e.g., Kahne, Crow and Lee 2013; Persson 2015). Campbell (2008) finds that discussing contentious political issues positively impacts students' appreciation and acceptance of institutionalized political conflict.

Furthermore, these favorable attitudes towards institutions are cultivated when citizens are allowed to voice concerns and issues with school authorities. When students are allowed to voice their concerns, they are more likely to perceive the school environment as fair (Gottfredson et al. 2005). Scholars find that students' perceptions of fairness in schools lead to more positive attitudes towards judicial (and other) institutions outside of the school context (e.g., Gouveia-Pereira et al. 2003; Resh and Sabbagh 2014*a*,*b*). This theorizing leads to the following hypothesis:

Hypothesis 1. Citizens exposed to an open school environment will have higher support for courts than those exposed to a closed school environment

Mechanism 2: School Curriculum

In authoritarian regimes, school curricula are designed to indoctrinate citizens with the regime's ideology and homogenize the preferences of citizens with those of elites (e.g., Alesina, Giuliano and Reich 2019). For example, in China, Xi Jinping's government is using education as a vehicle for his ideological campaign by "restricting the use of Western sources in teaching and more aggressively pushing its official communist ideology in universities" in order to curtail "intellectuals who dare to criticize the [Communist Party] and openly call for constitutional democracy" (Zhao 2016, 91).[6] This ideological indoctrination during schooling has persistent effects on citizens' attitudes towards institutions and policies even after regimes' collapse. Voigtländer and Voth (2015), for instance, provide evidence that Germans exposed to Nazi ideology in schools were more likely to hold anti-Semitic attitudes as adults. Since education under authoritarianism is predicated on legitimizing executive control of all aspects of society, the conceptual foundation of the separation of powers that the executive, legislature, and judiciary are coequal in the governing process is absent in schooling. Indeed, Hamilton, preempting the skepticism of his readers who had recently liberated themselves from the authoritarian governance of Great Britain, acknowledges in Federalist 78 that the idea of coequal branches of government may be confusing to those who are unfamiliar to the concept.[7]

School curriculum is a vehicle through which citizens learn democratic values and the function of institutions in the governing process. Scholars argue that civic education leads to greater political knowledge (e.g., Campbell and Niemi 2016), participation (e.g., Hillygus

[6]Cantoni et al. (2017) provide empirical evidence that pro-regime curriculum change in China caused students to have more positive views regarding Chinese governance, and more skepticism of free markets.

[7]In fact, Hamilton dedicates a substantial portion of the essay explaining why the ability of the judiciary to pronounce acts of the legislature void does not presume that the judiciary is superior to the legislature. Hamilton states,"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power." Hamilton goes on to explain that the ability of the courts to pronounce a legislative act void does not suppose "superiority of the judicial to the legislative power" and tries to persuade his readership about the necessity of judicial institutions.

2005; Mayer 2015; but see Croke et al. 2016; Kam and Palmer 2008), and trust (e.g., Hooghe, Dassonneville and Marien 2015). Importantly, these effects tend to be stronger when citizens are exposed to civic education while they are school children (e.g., Torney-Purta 2002). Civic education can also be especially important following a democratic transition. Studies find that civic education programs in new democracies can have large effects on political knowledge and cultivate democratic values among citizens (e.g., Finkel 2002; Morduchowicz et al. 1996).

In particular, with regards to judicial institutions, education in civics provides students information about, and exposure to, their courts. An earlier scholarship discusses the relationship between education and support for courts, specifically with regards to the U.S. Supreme Court. Easton and Dennis (1969) argue that through education children have a "youthful idealization" of the court and believe that it is the branch of government least likely to make mistakes. Caldeira (1977) finds that school children that display knowledge of the Court did not express any negative affect towards it. More broadly, this scholarship provides evidence that children that are knowledgeable about the court are more likely to support it (e.g., Casey 1974; Murphy and Tanenhaus 1968; Tanenhaus and Murphy 1981). Contemporary scholarship similarly argues that exposure to the symbols associated with the court increases citizens' support for the court (e.g., Gibson and Caldeira 2009), and that education is a means through which citizens learn the meaning of these judicial symbols (e.g., Gibson and Nelson 2018). Citizens, therefore, are more likely to support a court when they are taught repeatedly in the educational process about the court. This theorized link between educational curriculum and public support for courts leads to the following hypothesis:

Hypothesis 2. Citizens exposed to school curricula teaching about democratic institutions will have higher support for courts than those exposed to school curricula that do not teach about democratic institutions

Education in East Germany

East German education was characterized by a classroom environment that rigidly indoctrinated students with regime ideology, encouraged student engagement with the regime insofar as it was aligned with regime activity, and disciplined students for dissent. The foundations of this education originated as a geopolitical consequence of allied bargaining at the end of World War II in 1945, resulting in the division between East and west Germany. In 1949, the Federal Republic of Germany (FRG), or West Germany, and the GDR officially became separate states. As the allies set the groundwork for the denazification and democratization of the FRG, the GDR, under the strong influence of the Soviet Union, quickly centralized power under the Socialist Unity Party of Germany (SED) and commenced the creation of a communist state.

The denazification and sovietization process in the GDR included reformulating the education system to align with communist values and purging teachers who refused to comply. By 1949, the US High Commissioner for Germany estimated that over 80% of school staff in East Germany were new teachers (Fulbrook 2015, 125). The 1959 Law Relating to the Socialist Development of Education in the GDR organized primary and secondary education as follows: students would spend their first 10 years of education in *Zehnkassige allemeine polytechnische Oberschule* (ten-year general polytechnical schoools, POS) and the following two years in either an *Erweiterte Oberschule* (extended upper school, EOS) for the academically gifted or a vocational school organized in units of socialist production. Selection into an EOS was based on academic achievement and a student's political attitudes as determined by their teachers (Weiler, Mintrop and Fuhrmann 1996).

School Environment in East Germany

The GDR school environment was one designed for indoctrination as opposed to open discussion of ideas.[8] Fulbrook (2015, 194) explains, "Pupils were taught to repeat approved positions rather than develop independent points of view [...] East German youth learned to become at least outward conformists and gained little experience of genuine debate and the toleration of alternative points of view." Although the school environment was designed to create obedient subjects to the regime, this obedience was not necessarily passive. Teachers were to encourage students to actively participate in state youth organizations and were to rouse students' active engagement with the state insofar as they were ideologically aligned with the regime. These activities of the students were often key factors in teachers' comprehensive evaluations of students' personalities.

Teacher evaluations were instrumental in determining a student's future career prospects (Weiler, Mintrop and Fuhrmann 1996). Thus, students were strongly incentivized to maintain political attitudes in line with the regime. Fulbrook (2015, 185) explains, "In the East political conformity was a prerequisite for career advancement and upward social mobility; or, put differently, political non-conformity would actively block chances of advancement, while political conformity was a necessary but not sufficient prerequisite for promotion prospects." The link between political attitudes and social mobility discouraged students to openly express their dissent and encouraged students to conform to the "socialist personality" the GDR government was trying to create in each student. Importantly, this rigid adherence to state doctrine permeated vocational education as well. While those in vocational schools had less direct teaching time dedicated to socialism following their graduation from POS than their EOS counterparts, they were often unable to choose their desired apprenticeship training. Available job training was completely controlled by central planning with local au-

[8] As Pritchard (1999, 129) describes, "Personal development was subordinated to the postulate of 'societal usefulness' and the 'activity principle' in education was subordinated to a rigid political line leaving little scope for innovation or for a genuinely learner-centered curriculum."

thority councils that had offices dedicated to monitoring local needs. Pritchard (1999, 128) explains that from the sixth grade on "Pupils job aspirations were systematically collected and transmitted to the advisory centers so that they could be matched up with actual needs [...] State planning resulted in a lack of freedom for individuals [...] Many apprentices were denied their top career preference."

Even if students, or their parents, wanted to express their discontent with the methods of teaching or the curriculum more generally, they were not provided institutional avenues to do so and were actively punished for questioning authority. Weiler, Mintrop and Fuhrmann (1996, 40) explain, "unless parents were in high places they rarely were able to overrule the school's decision [...] If a student did not comply with the rules or acted up in class, a 'well-oiled machine' [...] was set in motion that backed a teacher's authority." This "well-oiled machine" included calling upon other parents put in charge of the student's "class collective" to discipline the student. The socialist school had primacy above both parents and students in deciding what was best for the student's educational progress. Although parents were heavily involved in the school system, the purpose of the involvement was to draw a strong connection between home and school and draw parents into supporting the educational process at school (Rust and Rust 1995). Students in East Germany, therefore, in a school environment dominated by government control and without the means to challenge the state, were not well-equipped with the tools necessary to engage with democratic institutions and were more likely to develop a coercive-orientation towards the law.

School Curriculum in East Germany

The curriculum in GDR schools was philosophically based upon Marxism-Leninism to provide students, among other things, a justification for the leading role of the SED. Instruction was very teacher, as opposed to student, centered. The curriculum and mode of instruction was also centrally controlled and private schools not under the control of the state were

outlawed. Weiler, Mintrop and Fuhrmann (1996, 15) explain, "In GDR schools, a view of education prevailed that saw learning and instruction as scientific, non-experiential, and teacher-centered. The teacher dispensed a unified pre-planned curriculum in 45-minute segments to stable classes with very little external or internal differentiation." Teachers in East Germany were, thus, subjected to strong regulations from the central government explicitly dictating the curriculum with which they were to teach, with a strong expectation that they were to follow the curriculum strictly. Furthermore, teachers were mandated to engage in professional development programs to ensure that they were meeting the ideological and political aims of schooling (Rust and Rust 1995).

East German schools dedicated similar time to social sciences as their West German counterparts, however the emphasis of the curriculum was substantially different. The time dedicated to social sciences was designed to provide students "basic historical and political knowledge related to the advancement of socialism, the rise of the German Democratic Republic, and its historic role in socio-political-economic revolution" (Rust and Rust 1995, 73). A mandatory class in military education was also a feature of East German education. The class' primary aim was to "reinforce a perception of the west as a class enemy, increase students' identification with the GDR and their willingness to defend socialism side by side with the 'Soviet brothers'" (Weiler, Mintrop and Fuhrmann 1996, 15). Hostility to western democratic ideals, thus, was ingrained in the curriculum.

The civics classes in particular were used to promote the SED's objectives and thoroughly immerse students in the ideology of the regime. Pritchard (1999, 62) provides an example of teachings included in the civics curriculum:

> "The power of the working class, its leading role in society, are realized not only through the state but also in other organizations. In first place stands the SED as the party of the working class. The parties and mass organizations in the National Front of the GDR are ranked alongside it. They all function closely

> together under the leadership of the SED and form the political organization of socialist society."

The civics curriculum directly instilled in students that the SED holds executive control in the governing process without any checks and balances on its decision-making. Therefore, it is reasonable to expect that East Germans lacked the conceptual foundation to properly understand the separation of powers present among German institutions following reunification.

Education after the Fall of the Berlin Wall

Change in School Environment

To the shock of many in Germany and the international community, the Berlin Wall fell on November 9, 1989. In the immediate aftermath, education in East Germany changed radically. Most importantly, teachers in East Germany gained autonomy in the classroom in the midst of the rapid political change. Likewise, "many teachers broke away from the old party-line pedagogy and began to teach in an experimental manner as they sought new methods and entered into open discussions about pedagogical themes" (Rust and Rust 1995, 145). The virtually overnight removal of central control of the educational system and mode of teaching served to naturally create a more open school environment. The systems by which students were disciplined if they questioned or dissented with school curricula were eliminated.

Given teachers were experimenting with the curriculum and students were no longer subject to the rigid rules that previously characterized education in the GDR, the authority relationship between teachers and students changed. In interviews conducted with teachers in East Germany, Weiler, Mintrop and Fuhrmann (1996) found that teachers described their

changing relationship with students and parents as the most profound change after the fall of the Berlin Wall. In particular, they observed, "teachers find dialogue with their students difficult because the latter are said to be either interested in being merely disruptive or argue their point [...] Students, it seems, have become incalculable, giving in to the new stimuli of fashion, media, western youth culture, and right-wing rebellion" (Weiler, Mintrop and Fuhrmann 1996, 41).

As a result of the deteriorating power of the GDR regime around them, East German students felt empowered to question authority and actively express dissent in the classroom. The changing authority relationship between teachers and students can be understood as a sort of democratizing process by which teachers, by virtue of institutional uncertainty, had no ability to suppress and control student dissent. Weiler, Mintrop and Fuhrmann (1996, 57), writing during the early years of the transition, describe, "schools in Eastern Germany have now become more like modern democratic institutions. Mobility, individuality, openness, and voice of constituencies have increased, but so have uncertainty and strife." Therefore, East German students who were in school when the Berlin Wall fell in the 1989 – 1990 school year or later experienced a more open school environment relative to those who had already completed school.

Curriculum Change

Curriculum change in East Germany happened both in an *ad hoc* fashion around the time of the fall of the Berlin Wall and a more formalized fashion after reunification. Two previously mandatory classes, military education and citizenship education – which were particularly dedicated to instilling the GDR's socialist ideology, as mentioned previously – were cancelled.[9] The new free periods in school "were widely used for a variety of activities designed

[9]Although these two classes were cancelled by the SED government on November 2, 1989 - seven days before the fall of the Berlin Wall - a new subject named "societal education" was introduced. However without trained teachers or a well proscribed curriculum that teachers were used to, teachers used this

to help students (and teachers) cope with the new political situation" (Weiler, Mintrop and Fuhrmann 1996, 25). Despite this period of *ad hoc* change before reunification, the general structure of the curriculum remained intact (Weiler, Mintrop and Fuhrmann 1996).

Following the March 1990 elections, an educational commission was created to facilitate the process of bringing the new East German states into the West German educational tradition. Although West German states were provided some autonomy in organizing their education systems, considerable uniformity existed across the states in almost all essential aspects of education. West Germany had a preexisting set of laws that each German state had to conform to when designing their education system.[10] In contrast to the dogmatic ideological content of East German curricula, West German curricula were more pluralist in content by providing differing interpretations in ideological subjects (e.g., politics, history) and encouraged students to develop their own interpretations through critical thinking (Mintrop 1999).

The newly integrated East German states, similarly, had their own state-level educational commissions dedicated to reforming the organization and curriculum of schools. Each East German state partnered with a West German state - partnerships were primarily based on geographic proximity - to facilitate the process of reform. East German states formally changed their curricula and reorganized in the 1991 - 1992 school year (Rust and Rust 1995; Weiler, Mintrop and Fuhrmann 1996). This formal change was aided substantially by the large provision of free textbooks from West Germany (Pritchard 1999). Due to the change in curriculum, East German students in school during the 1991 – 1992 school year and afterwards had more exposure to curricula teaching about democratic institutions and values than those who completed school before the 1991 – 1992 school year.

class time to innovate and try new forms of open instruction (Weiler, Mintrop and Fuhrmann 1996, 25). Furthermore, Russian was eliminated as the mandatory first foreign language for all GDR students in favor of Western languages such as English on November 13, and the school week in the GDR was reduced from 6 days to 5 days on November 18 (Weiler, Mintrop and Fuhrmann 1996).

[10]See Rust and Rust (1995) for an explanation of the statues governing West German education.

Data and Empirical Methods

To estimate the causal effects of school environment and school curricula on support for courts, I need data on citizens' support for the German FCC and an empirical strategy to compare students with differential exposure to schooling in East Germany before and after the fall of the Berlin Wall. I use data from the German General Social Survey (ALLBUS) - a biennial survey on the attitudes of residents of Germany - for a measure of support for the FCC. ALLBUS has data on the attitudes of East Germans starting from 1991. To avoid potential noncompliance problems, I only include survey respondents in the sample that indicated that they had graduated from POS. Furthermore, I only include survey respondents born after the division of East and West Germany in 1949.

To compare students with differential exposure to the change in school environment and change in school curriculum in East Germany, I leverage the school enrollment cutoff date in the GDR for both regression discontinuity (RD) and difference-in-difference-in-differences (DiDiD) designs. Given the aforementioned centralization of educational policy in the GDR, among the uniformly implemented policies were the birth date cutoffs determining when a child began their schooling. In the GDR, children turning six on June 1 or later[11] in a given year were to start school in POS the following year in September. Importantly, ALLBUS' data only contain information about a survey respondent's birth month and birth year. Given the cutoff is on June 1, a respondent's exact day of birth is not required in order to accurately discern their school cohort.

Since the Berlin Wall fell in November of 1989, students born on June 1 or later within the 1973 – 1982 birth cohorts were exposed to an additional year of a more open school environment during their POS schooling relative to those students born before June 1 in

[11] Fuchs-Schündeln and Masella (2016) leverage these school cutoff dates to analyze the effect of exposure to socialist education on labor market outcomes. Using a difference-in-differences design, they find that an additional year of socialist education decreases an individual's probability of obtaining a university degree and has adverse affects on long term labor market outcomes for men.

each year. For example, within the 1973 birth cohort, students born before June 1 already completed POS before the fall of the Berlin Wall, while students born on June 1 or later were in their final year of education when the Berlin Wall fell and therefore had one year of exposure to a more open school environment. Similarly, within the 1982 birth cohort, those born before June 1 were exposed to a more open school environment nine out of their ten years of POS education, while those born after June 1 were exposed in all ten years of their POS education. Survey respondents born June 1 or later within the 1975 – 1984 birth cohorts were exposed to an additional year of the new curriculum after reunification. The variable *Cohort* is a binary indicator for whether a survey-respondent was born within the relevant birth cohorts (1973 – 1982 for the school environment models and 1975 – 1984 for the school curriculum models).

Dependent Variable: Trust in the FCC

I use the answers to the following survey question in ALLBUS to operationalize my dependent variable *TrustFCC*: "Please tell me for each institution or organization how much trust you place in it [...] 1 means you have absolutely no trust at all, 7 means you have a great deal of trust. You can differentiate your answers using the numbers in between. What about the Federal Constitutional Court?" I rescale this variable from 0 to 1 for ease of interpretation. I also aggregate responses from ALLBUS surveys post-reunification that asked this question (2000, 2002, 2008, 2012, 2018). Since the RD's identifying assumption is that individuals born just before the June 1st cutoff in East Germany are similar to those born after the cutoff, the RD accounts for any bias in the data due to the year in which an individual took the survey. For robustness, I include fixed-effects for survey-year in my DiDiD models as well to address any remaining concerns of survey-year bias.

Previous studies have used survey questions asking about trust in a court as a measure of diffuse support (e.g., Bartels and Johnston 2013; Gibson, Caldeira and Spence 2003*a*).[12] I leverage the school enrollment cutoff date in East Germany to isolate the effects of East German education on trust in the FCC. Since the school enrollment cutoff date provides exogenous variation in exposure to East German education, differences in trust for the FCC can be attributed to the differential exposure to the new school environment and school curriculum.

Regression Discontinuity Design

Since these data only have information about each survey respondent's birth month, the running variable for the RD design is discrete. The discrete running variable creates challenges that continuity-based RD approaches cannot properly address. The continuity-based approach for calculating robust standard errors for sharp RD designs assumes that the running variable is continuous at the cutoff and requires the presence of observations close to the cutoff in large samples. This assumption, thus, "rules out discrete-valued running variables" (Calonico, Cattaneo and Titiunik 2014, 2299). Second, since RD designs with a continuous running variable often need a substantially larger number of observations to produce the same amount of precision as a randomized control trial (Deke and Dragoset 2012), RD designs using discrete running variables are likely to be under powered when using continuity-based approaches. To check the power of the RD design empirically, I include power calculations following the recommendations of Cattaneo, Titiunik and Vazquez-Bare (2019) and using their `rdpower` package in R in figures A.4 and A.5 in the appendix. Utilizing robust standard

[12]The standard legitimacy battery includes a question asking about survey respondents trust in the court (e.g., Gibson, Caldeira and Spence 2003*a*). Given, however, that scholars have argued that questions asking about trust in institutions are capturing both diffuse and specific support (e.g., Gibson 2011; Gibson and Nelson 2015), fielding the additional questions within the legitimacy battery would be useful for effectively measuring diffuse support for the FCC. Unfortunately, within these data, only survey responses to the trust question are available.

errors as recommended by Calonico, Cattaneo and Titiunik (2014), it would require an effect size of about 20% - approximately one standard deviation - to reach statistical significance at the 10% level. The default amount most commonly used in regression discontinuity power analyses is 10% of a standard deviation (e.g., Holbein and Rangel 2020).

To properly estimate the RD, I instead opt for a local randomization-based approach. This approach assumes that the researcher can identify a randomization mechanism near the RD cutoff that determines treatment assignment such that the researcher can regard units close to the cutoff as part of a local randomized experiment (Lee 2008). Leveraging this intuition and building off of the canonical scholarship on experimental analysis in which the potential outcomes are regarded as fixed (e.g., Rosenbaum 2007; Imbens and Rosenbaum 2005), Cattaneo, Frandsen and Titiunik (2015) provide a framework and methodology using the randomization assumption to analyze RD designs. Cattaneo, Titiunik and Vazquez-Bare (2017, 678), thus, state, "If the running variable is discrete, we recommend using local randomization methods as the primary analysis."

When using the local randomization approach, researchers need to decide the window around the cutoff and the polynomial fit. To ensure that that the choice of window is data-driven, I implement the approach of Cattaneo, Titiunik and Vazquez-Bare (2016) using their `rdlocrand` package in R. Figure A.1 in the appendix provides a graphical illustration of the p-values calculated by the method at various window sizes using theoretically-motivated covariates. To be as conservative as possible, Cattaneo, Frandsen and Titiunik (2015) recommend choosing the minimum p-value in which the selected covariates are balanced. In this case, the data-driven approach suggests a window of 7 months on either side of the cutoff,[13] which, substantively, means that all available data are included in the RD models. I also opt for a linear polynomial fit, as evidence exists that there is a relationship between an

[13]Since the cutoff is June 1, the bandwidth is 5 months on the left of the cutoff and 7 months to the right of the cutoff.

individual's age in their school cohort and long term outcomes[14] that is separable from the effect of the treatment.[15] By estimating the treatment effect using a linear transformation,[16] I control for the alternative explanation that the effect at the discontinuity is simply due to a student being an older member of their school cohort. Positive and statistically significant estimates would be evidence that changes in the school environment and school curriculum caused an increase in East Germans' trust in the FCC.

Lastly, as applied to this specific research design, a crucial assumption for the RD is that the individuals born just before the June 1st cutoff are comparable to those born just after the cutoff. Since assignment to treatment is determined by one's birth date, this assumption is plausible. To sort in a means that would confound the treatment, parents would need to have information in advance about the fall of the Berlin Wall and use this information to plan their childbearing. To demonstrate the empirical validity of this assumption, I conduct McCrary (2008) tests in figure A.3 in the appendix. Furthermore, figure A.2 in the appendix shows balance among the treatment and control groups on relevant pre-treatment covariates such as birth year, sex, and parental education.

Difference-in-Difference-Differences Design

To demonstrate robustness, I employ a difference-in-difference-in-differences[17] design by comparing East German students to their West German counterparts born within and outside

[14]For example, utilizing a similar regression discontinuity design exploiting school enrollment birth day cutoffs, Matsubayashi and Ueda (2015) find that younger students in their cohort had higher mortality rates by suicide and tended to follow different career paths than relatively older members of their school cohort.

[15]Cattaneo, Titiunik and Vazquez-Bare (2017, 675) state, "If we assume that the potential outcomes are related to the score via a polynomial model whose coefficients are constant among units within each treatment group, then we can transform the potential outcomes to remove the score and adopt Fisherian randomization-inference methods on the transformed outcomes."

[16]I avoid using higher-order polynomials as Gelman and Imbens (2019, 447) provide evidence that higher order polynomials lead to "noisy estimates, sensitivity to the degree of the polynomial, and poor coverage of confidence intervals."

[17]See Atanasov and Black (2016) for a thorough overview of the difference-in-difference-in-differences framework.

the relevant birth cohorts affected by the change in school environment and the change in school curriculum. For the first difference, similar to the RD design, I exploit the school enrollment cutoff date by creating a binary variable indicating whether an individual was born on June 1st or earlier (*AfterMay*). The second difference compares survey respondents in East Germany to those in West Germany using a binary indicator for whether the respondent was born in East Germany (*East*). The third difference compares survey respondents within the relevant birth cohorts to those born outside of those cohorts using a binary indicator (*Cohort*). The parallel trends assumption in this DiDiD design is that the effect of one's birth date on trust in the FCC in East and West Germany would be the same had there not been a change in school environment (school curriculum) that affected survey respondents in East Germany born between 1973 and 1982 (1975 and 1984). Figure A.2 in the appendix shows balance among the treatment and control groups on relevant pre-treatment covariates and provides evidence justifying this assumption.

I estimate OLS models of the form

$$TrustFCC_{ics} = \beta_0 + \beta_1 \cdot East + \beta_2 \cdot AfterMay + \beta_3 \cdot Cohort + \beta_4 \cdot East \cdot AfterMay + \beta_5 \cdot East \cdot Cohort + \beta_6 \cdot AfterMay \cdot Cohort + \beta_7 \cdot AfterMay \cdot East \cdot Cohort + \psi + \epsilon_{ics} \tag{1.1}$$

with ψ_s survey-year fixed-effects. I run additional models with a linear control for a survey respondent's birth month (*BirthMonth*). The appropriate level of clustering for standard errors is the *East-Cohort-BirthMonth* level. However, since only 48 clusters exist in these data, I follow Cameron, Gelbach and Miller (2008) and calculate standard errors from 500 block-bootstrap replications. A positive β_7 would be evidence for my hypotheses.

Results

Table 1.1 presents the formal difference-in-means estimates for the RD design. Model 1 contains the RD estimate for the school environment mechanism and model 2 contains the RD estimate for the school curriculum mechanism. Constructing confidence intervals for the estimates requires an additional assumption; in particular, the local stable unit treatment value assumption.[18] Given the nature of the treatment assignment mechanism, this assumption is reasonable. Under this assumption, following the logic of Rosenbaum (2007), I calculate 90% confidence intervals under interference using the `rdlocrand` package in `R`.[19] For both the school environment and school curriculum mechanisms, I find a positive and statistically significant effects. An extra year of education in the new school environment increases an individual's trust in the FCC by 3.7%, and an extra year of education in the new school curriculum increases an individual's trust in the FCC by 3.8%. Additionally, considering the change in school curriculum occurred two years after the change in school environment, the effect of the change in school environment may be confounded by the change in school curriculum, as some survey respondents experienced both changes. To address this concern, I subset the data to include survey respondents born before 1975 (survey respondents born in the 1973 and 1974 cohorts graduated before the curriculum change) and rerun the analysis in model 1 of table A.1 in the appendix. I also subset the data to include only survey respondents in the 1983 and 1984 cohorts (the treated students did not experience the change in school environment) and rerun the analysis in model 2 of table A.1. The effects are larger in magnitude and statistically significant.

[18] See Cattaneo, Frandsen and Titiunik (2015, 6) for a formalization.

[19] Put simply, the confidence intervals are calculated by randomly separating the observations into two groups, calculating the difference-in-means between the two groups, and iterating this process a number of times. The difference-in-means between the actual treatment and control groups is compared to the randomized distribution and then used to calculate the confidence intervals. Cattaneo, Titiunik and Vazquez-Bare (2016, 340) provide a formalization of this point.

Table 1.1: RD Treatment Estimates

	Dependent variable:	
	Trust in FCC	
	(1)	(2)
Estimate	0.037*	0.038*
	(0.004,0.07)	(0.005,0.072)
Mechanism	School Environment	School Curriculum
Observations	548	557

*p<0.1; **p<0.05; ***p<0.01
90 % confidence intervals under interference calculated from the `rdlocrand` package in `R` are in parentheses.

Table 1.2: Difference-in-Difference-in-Differences Models

	Dependent variable:			
	Trust in FCC			
	(1)	(2)	(3)	(4)
Cohort	0.006*	0.006*	−0.016***	−0.016***
	(0.004)	(0.003)	(0.004)	(0.003)
AfterMay	0.002	0.018***	0.002	0.018***
	(0.002)	(0.003)	(0.002)	(0.003)
East	−0.097***	−0.097***	−0.103***	−0.103***
	(0.002)	(0.002)	(0.002)	(0.002)
Birth Month		−0.003***		−0.003***
		(0.0004)		(0.0004)
Cohort:AfterMay	−0.010*	−0.010*	−0.008	−0.008
	(0.006)	(0.006)	(0.006)	(0.006
Cohort:East	0.020***	0.021***	0.049***	0.050***
	(0.005)	(0.005)	(0.005)	(0.005)
AfterMay:East	0.006*	0.006*	0.004	0.004
	(0.004)	(0.004)	(0.003)	(0.004)
Cohort:AfterMay:East	0.032***	0.031***	0.039***	0.038***
	(0.008)	(0.007)	(0.008)	(0.007)
Subset	School Environment	School Environment	School Curriculum	School Curriculum
Survey-Year Fixed-Effects	Yes	Yes	Yes	Yes
Survey Weights	Yes	Yes	Yes	Yes
Observations	6,720	6,720	6,720	6,720
R^2	0.043	0.043	0.045	0.045

*p<0.1; **p<0.05; ***p<0.01
Standard errors calculated from 500 block bootstrap replications are in parentheses

Table 1.2 provides the difference-in-difference-in-differences results for the school environment and school curriculum mechanisms. Models 1 and 2 provide estimates for the school environment mechanism. Recall, a positive value for *AfterMay:East:Cohort* would be evidence for an effect. A survey respondent's exposure to a change in the school environment in East Germany as a result of their birth within the 1973 – 1982 cohorts on June 1st or

later causes a 3.2% increase in trust in the FCC. This increase is statistically significant ($p < 0.01$). I run additional models to demonstrate robustness. In column 2, I include a linear control for a survey respondent's birth month to control for any relationship between between distance from the cutoff and trust in the FCC. The *AfterMay:East:Cohort* coefficient remains positive and statistically significant. Additionally, I subset the data to include survey respondents that only experienced the change in school environment and rerun the analysis in table A.2. The effect size ranges from a 5.7% to 6.5% increase in trust in the FCC.

Models 3 and 4 provide estimates for the school curriculum mechanism. The birth of a survey respondent in East Germany, within the 1975 – 1984 cohorts, on June 1st or later causes a 3.9% increase in trust in the FCC. This increase is statistically significant ($p < 0.01$). I run a number of additional models to demonstrate robustness. In column 4, I include a linear control for a survey respondent's birth month. The *AfterMay:East:Cohort* coefficient remains positive and statistically significant. Additionally, I subset the data to include survey respondents in 1983 or later to remove respondents exposed to the school environment treatment and rerun the analysis in Table A.3. The effect size ranges from a 12% to 12.5% increase in trust in the FCC. The DiDiD and RD models for both the school environment and school curriculum mechanisms provide statistically significant estimates with effect sizes of similar magnitude.

Conclusion

In this article, I argue that education has persistent effects on citizens' support for institutions. In particular, I contend that school environment and school curriculum are two mechanisms through which education affects public support for courts. To test these hypotheses, I run RD and DiDiD models leveraging the school enrollment cutoff dates in East

Germany and the fall of the Berlin wall by comparing trust in the FCC across survey respondents in East and West Germany and the (un)affected birth cohorts. Since the source of variation is exogenous, the differences in trust in the FCC can be attributed to differences in childhood education. I find evidence that an additional year of exposure to a more open school environment and an additional year of exposure to the newer school curricula caused an increase in East Germans' trust in the FCC. This article contributes to and has implications for the scholarship on courts, education, and historical legacies.

First, this article has implications for the efficacy of courts in new democracies. My results provide evidence that citizens educated under a previous regime may have much lower diffuse support for their courts. Low diffuse support may empower leaders in new democracies to attack the institutional integrity of the judiciary through court curbing measures and to not comply with adverse court rulings. Although these two mechanisms are distinct, they both can result from low diffuse support. While the most popular recent examples of court curbing are Hungary and Poland (Kelemen 2017*b*), historical examples abound in states such as Argentina (Helmke 2005), Chile (Hilbink 2007), Japan (Ramseyer and Rasmusen 2003), Mexico (Staton 2010), Russia (Herron and Randazzo 2003), and the United States (Clark 2011) among others. For such courts, building diffuse support takes time. As a result, they must be cautious when exercising their judicial review powers. When diffuse support is low, courts are compelled to act strategically over time to expand their judicial review powers to build public support. Courts that act overly aggressively, however, may lose public support if their rulings are openly defied (e.g., Carrubba 2009).

Second, this article contributes to the scholarship on the relationship between education and political attitudes. My results provide evidence that exposure to a more open school environment and a school curriculum teaching about democratic institutions increases diffuse support for courts. Importantly, my article specifies the mechanisms through which education affects support for courts and why these mechanisms should lead to an *increase* in

support. However, depending on the political context, we may not necessarily expect a positive relationship between increased education in democratic values and individual political outcomes (e.g., Croke et al. 2016). As a result, the existing literature often has contradictory findings when evaluating the effect of education (e.g., Galston 2001). Carefully delineating the mechanisms through which education should affect political outcomes and the direction of these effects may help scholars make sense of findings that may seem contradictory on their face but are, in fact, conditional on important covariates.

Third, this article contributes to the extensive scholarship on historical legacies (e.g., Simpser, Slater and Wittenberg 2018). These findings are especially relevant to the scholarship on communist legacies and citizens' trust in democratic institutions (e.g., Pop-Eleches and Tucker 2014). Related to the aforementioned importance of specifying mechanisms, however, we may not expect these findings to generalize to the legacies of all authoritarian regimes. Depending on the historical role of courts in a regime (e.g., Moustafa 2014), we may have differing expectations over whether citizens will have higher (lower) support for courts after a democratic transition. Lastly, we may expect that historical legacies that predate a given regime may also have an affect on support for courts (e.g., Pop-Eleches 2014). Future research can theorize over and empirically test whether, for example, socioeconomic differences that predated an authoritarian regime and persisted through to the transition to democracy affect present-day support for courts.

Chapter 2

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

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

Introduction

Almost all societies have institutionalized dispute resolution mechanisms with the task of resolving conflict between two parties. Establishing confidence in such institutions is instrumental to their efficacy (e.g., Gibson, Caldeira and Baird 1998). These institutions are often critically dependent on the cooperation of the losing party. That is, they require the losing party to voluntarily accept their ruling, as they frequently do not have the ability to independently compel compliance by force. Without the compliance of the losing party, such an institution is unable to gain the confidence required to incentivize parties to utilize it to resolve disputes in the future (e.g., Shapiro 1981). How can these institutions resolve disputes in a legally consistent manner and obtain compliance?

As a dispute resolution institution lacking the power of the purse or the sword, courts face this predicament very directly. In particular, when a court is exercising judicial review – which allows it to annul the actions of the executive – it is trying to compel compliance from the government[1] it relies on for enforcement. Since a court cannot directly enforce an adverse ruling, the government's decision to disobey a ruling is conditional on its consequences for doing so. If the government is held electorally accountable to the public, for example, noncompliance with a court decision may be politically costly. Insofar as citizens value the integrity of the judiciary and respect for its decision-making, they may punish elected officials for noncompliance with a court's rulings (e.g., Vanberg 2005). When public support for a court is not high enough, however, a court risks noncompliance if it makes an adverse ruling against the government (e.g., Krehbiel 2020). Open defiance may be costly for such courts and may make citizens less likely to punish the government for future noncompliance (e.g., Carrubba 2009). Assuming a court cares about influencing policy in the future, it

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

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

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

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

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

Judicial Decision-Making, Compliance, and Legal Merits

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

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

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

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

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

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

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

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

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

the resources of the court (e.g., Clark 2011; Helmke 2005; Ramseyer and Rasmusen 2003). If a court consistently adopts this strategy, it will never build the public support necessary to meaningfully influence policy when its interests diverge from the executive.

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

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

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

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

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

The legal choices judges make in resolving a case may have profound effects on the development of case law in the future. By establishing a precedent or adopting a specific logic of legal reasoning, a court may invite more litigation in a certain policy area – as potential litigants may see opportunities to have the court favorably resolve their disputes – and influence how policymakers interpret and implement its rules. A court's decisions

over time also serve an informational function to policymakers, as they can anticipate the potential legal consequences of their actions and whether they can prevail in a dispute before the court (e.g., Shapiro 1965). It also allows lawyers who are arguing before a court develop their reasoning in line with the court's past decision-making and strategically try to limit the number of alternative rulings the court can make. Put simply, a court's adherence to its past case law and the legal arguments brought before it by the relevant parties limit the number of legally defensible rulings a court may make in a given case.

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

To not maintain a consistent and coherent case law is, thus, costly for judges for a number of reasons. First, it could erode trust in a court as an aribiter of disputes and

make it less likely that societal actors will bring cases to it – exactly what it needs to build legitimacy over the long term and serve as a check on executive power. Second, it would increase uncertainty in the law and make it unclear to the public whether the government has committed a violation. Third, it substantially increases the time it takes for judges to dispose with each individual case. As Epstein, Landes and Posner (2013, 39) explain, "it's a lot easier to decide a case because it is materially identical to one previously decided (which might be a case that had distinguished an earlier precedent in an effort to fine-tune the law) than to analyze every new case afresh." Judges are, therefore, incentivized to maintain a case law that honors the legal merits of the cases that come before them (e.g., Bailey and Maltzman 2008; Richards and Kritzer 2002) even when facing threats of noncompliance.

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

Similarly, if the legal merits of a case support a ruling against a government's preferences, a court should increase the amount of flexibility provided to the government over implementation as the government increasingly threatens noncompliance. When the legal merits do not support constraining the executive, a court will not take the risk of ruling against the

executive because it does not have sufficient legal grounds supporting such a ruling. This theorizing leads to the following hypothesis:

Hypothesis 3. When the legal merits favor a ruling against government preferences, as the probability of government noncompliance increases a court provides more flexibility over implementation to the government

Application: Court of Justice of the European Union

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

The CJEU is arguably the most powerful international court in the world. Although the Court's formal power in the EU treaties has remained relatively the same since the beginning of its operations, it has gradually expanded its authority over member state courts, member state law, and the EU treaties through its rulings. For example, early in its jurisprudence, the CJEU established the doctrines of *direct effect* – allowing EU citizens to bring disputes regarding EU law to member state courts even if the rights in the EU treaties were not

established in national law – and *supremacy* – stipulating that EU law should be applied when EU law and national law are incompatible. These early rulings provided the Court ample opportunity to expand its authority, as the Court provided litigants relatively easy access to it. Through the preliminary reference procedure, member state courts can refer cases to the CJEU that concern a question of EU law (e.g., Krehbiel and Cheruvu N.d.). This ability to hear cases from a variety of sources place the CJEU in a different position from many other international regimes and courts – such as the WTO's dispute settlement mechanism – in which only member states can bring cases against one another. The CJEU, thus, can adjudicate on a wide array of legal questions in which member state compliance may be at issue.

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

One way for the CJEU to deal with potential noncompliance, similar to other domestic courts, is to leverage its public support in the member states. The CJEU, however, may not always have sufficient support to compel compliance (e.g., Caldeira and Gibson 1995; Gibson and Caldeira 1995, 1998). Gibson, Caldeira and Baird (1998) provide evidence that trust in

the CJEU is lower than trust in 12 member state courts and Eurobarometer survey evidence from 2018 and 2019 show support for the CJEU under 50% across the EU. Although Kelemen (2012) argues that support for the CJEU is high by comparing it to support for national judicial systems and institutions, Krehbiel (2020, 10) describes this conclusion as problematic because "national justice systems comprise much more than national high courts (or courts in general), including citizens' relationships with the police, lawyers, [and] prosecutors [...] Consequently, trust in the national legal system as a measure of legitimacy [...] tends to be lower than theoretically grounded measures of diffuse support." While the existing literature suggests that increasing public awareness of executive noncompliance with a court decision is a strategy courts with sufficient diffuse support can use to compel compliance (e.g., Krehbiel 2016, 2019; Staton 2006, 2010; Vanberg 2001, 2005), Krehbiel (2020) finds the CJEU tends to rule against constraining member state behavior when public awareness of a CJEU decision increases, as it may serve to encourage policymakers to engage in noncompliance when the CJEU's diffuse support is low. Similarly, Turnbull-Dugarte and Devine (2021) find that a CJEU ruling on a salient case regarding a prominent Catalan separatist in 2019 caused increased euroskepticism among those exposed to the ruling in Spain. It follows, therefore, that the CJEU cannot necessarily rely on public support as a mechanism to compel member state compliance.

Despite this constraint, although it is technically a civil law court, the CJEU cares about the precedent it establishes in order to maintain a coherent case law (e.g., Larsson et al. 2017). Garrett, Kelemen and Schulz (1998) argue that the CJEU is more likely to rule to constrain member state policy making authority when available precedent supports such a disposition. However, as they explore in their article, situations arise in which precedent may clearly dictate that the CJEU constrain member states' authority, but such a ruling may provoke member states to not comply or – in the worst case – actively pass legislation or amend the EU treaties to restrain the CJEU's authority (e.g., Castro-Montero et al. 2018).

To resolve this tension, the CJEU makes rulings that "introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case" (Hartley 2007, 76). For example, in *Defrenne v. Sabena* (1976), the court ruled in favor of an airline hostess who had demanded back-pay after not receiving similar benefits to her male counterparts – thereby conferring the right to equal pay to individuals in member states – but only allowed workers who already had pending court cases at the time of the judgment to claim back pay for periods prior to the judgment date. Given member states faced substantial costs to compliance[4] and may have not complied with a ruling demanding a more expansive remedy, the Court creatively established legal precedent while providing flexibility to member states by shielding them from the potential costs of implementing the decision.

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

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

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

a case. As a result, they obscure meaningful variation in the amount of flexibility provided to member states.

A final advantage of studying the CJEU is the Court's use of advocates-general (AG) opinions to inform its judgments. When a case arrives at the Court, the Court's president assigns a case to a judge-rapporteur (responsible for drafting the Court's judgment in a case) and an AG that may in some – not all – cases write an opinion (e.g., Cheruvu and Krehbiel N.d.). As Article 252 of the Treaty on the Functioning of the European Union describes, "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement." The AG for a given case has the responsibilities of reviewing all materials and answering the legal questions. As Carrubba, Gabel and Hankla 2008, 448 explain, "The AG opinion involves a full analysis of the relevant case law and treaty articles and is sometimes significantly longer than the judgment of the Court. Importantly, the AG prepares her opinion in isolation from the judges on the Court and does not participate in their deliberations." When the judges make a ruling in a case, the AG publishes their opinion alongside it.

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

AGs are responsive to their home member states' preferences and find little evidence of such a relationship.

Data and Empirical Strategy

To test my hypotheses, I first need a strategy to measure flexibility over implementation. More specifically, a strategy to measure the change in flexibility from AG opinions to final judgments would be most appropriate to serve as the dependent variable. Using a novel dataset on references in AG opinions and CJEU judgments to sections of other documents sourcing from the CJEU database project (Brekke et al. N.d.), I create a variable indicating the percentage of references from the AG's opinion that the Court includes in its final judgment in a case[6] (IN JUDGMENT) to operationalize the change in flexibility governments have in implementing the decision.

AG opinions and CJEU judgments reference a variety of documents. These references include other CJEU judgments, AG opinions, Commission directives (secondary legislation), regulations, and the EU treaties among other documents. I argue that when judges include a reference from an AG opinion in the final judgment of a case they are providing member states *less* flexibility over implementation. Although references to some documents may be more salient than others – for example, a reference to EU treaties that are difficult to reform may be more powerful than a reference to a regulation that the Commission can easily amend – the basic intuition is the more references from the AG's opinion that are included in a final judgment, the less room for interpretation of the judgment, as the final judgment's inclusion of a reference constrains the set of actions that a member state can legally argue are compliant with a ruling. Put differently, when the Court excludes a reference in the AG's

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

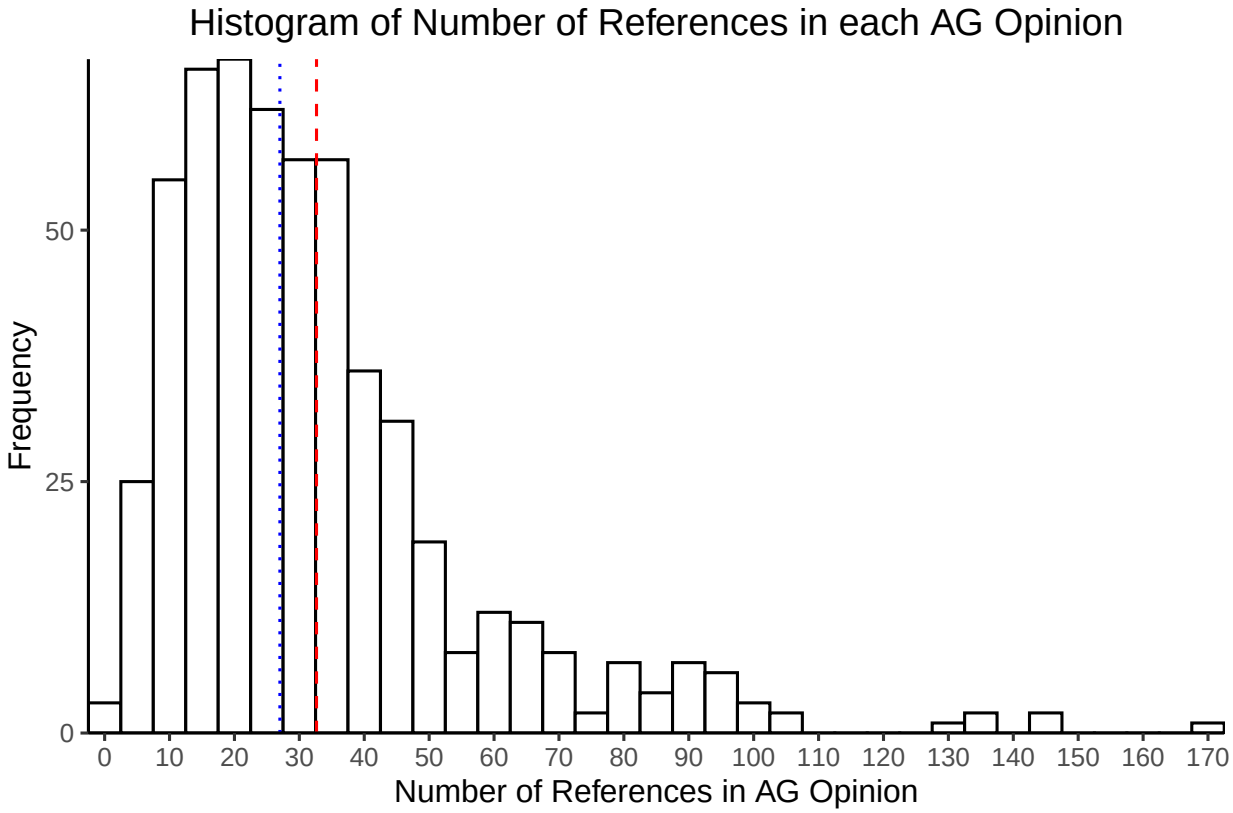

Figure 2.1: This histogram presents the distribution of the number of references to other documents in AGs' opinions in these data. The dashed line indicates the mean (32.648 references) and the dotted line indicates the median (27 references).

opinion from the final judgment, the judgment provides *more* flexibility to member states *relative* to the AG's opinion. Figure 2.1 provides a histogram of the distribution of the number of references to other documents in AGs' opinions within these data. The median AG's opinion contains 27 references while the mean opinion contains 32.648 references.

Table 2.1 provides an example from these data. In case number C-201/99 (*Deutsche Nichimen GmbH v Hauptzollamt Düsseldorf*), the AG's opinion had five references to other documents. Out of those five references, the Court included four of them in the final judgment. The variable IN JUDGMENT, thus, takes the value of 0.8. This table also demonstrates how fine grained these data are as, while the AG's opinion references Regulation 2658/47

Table 2.1: Example Case for References from AG Opinion Included in Final Judgment

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

four times, I can distinguish whether the final judgment included the specific sections from each document the AG referenced.

I use data from Larsson and Naurin (2016), which cover preliminary reference cases brought to the CJEU between 1997 - 2008 in which an oral hearing was held for measures of the disposition of the AG's opinion, the CJEU's judgment, and member states' preferred outcome for a case as measured by the observations they submitted to the court. These data comprise of 1,599 cases and 3,845 legal questions, which is the unit of observation. I create variables to distinguish each combination in which the CJEU, AG, and the member states agree (or disagree) on their preferred outcome for a case. I create four binary variables for each combination of the CJEU and AG's decision-making (CJEU Pro-Integration and AG Pro-integration, or CJEU Anti-Integration and AG Pro-integration, etc.) and create three separate variables denoting whether on balance member states favored a pro-integration outcome (Member States Pro-Integration), an anti-integration outcome (Member States Anti-Integration), or if the balance of observations was 0 (Member States Neutral) – meaning member states filed an equal number of observations favoring a pro and anti integration position or filed none at all. The value of Member States Pro-Integration (Member States Anti-Integration) becomes larger as more member state observations favor a pro (anti) integration decision, while Member States Neutral is a binary variable.

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

Validating the Dependant Variable. Since this measure of flexibility is relatively crude, however, it is important to provide evidence of its validity. To accomplish this task, I draw on data from Zglinski (2020) that measures deference the CJEU provided to EU member states over implementing its decisions in free movement cases. Zglinski (2018) argues that the Court increasingly refrains from providing specific legal and regulatory remedies, but it defers to member states instead and that "Such deference has become prominent when the Court granted a government agency a 'margin of appreciation' to balance free movement with free speech, when it let a local body define the meaning of human dignity, and when it allowed a member state to choose whether to prohibit the carrying of nobility titles." This concept of deference to member states is virtually identical to my conceptualization of the Court providing member states flexibility over implementation. Empirically, Zglinski (2020) analyzed the Court's free movement case law for cases decided every fifth year from 1974 to 2013 and coded in which cases the Court provided a member state institution a "margin of appreciation'," or, put differently, "the widest leeway: not only can they take the

policy decision they want, they can also choose how to reach their decision" (Zglinski 2018, 1345). I combined these data with my coding of the In Judgment variable, resulting in 203 cases. I run a simple regression with In Judgment as the dependent variable and a binary independent variable indicating whether the Court provided a member state a "margin of appreciation" in a case.[7] The Court granting a member state a margin of appreciation is correlated with a statistically significant 7.6 percentage point decrease ($\beta = -0.076$, $p < 0.05$, $R2 = 0.02$) in the references from the AG's opinion the Court includes in its final judgment, supporting my dependant variable as a reasonable measure for the Court providing member states flexibility over implementation.

Substantive Example. An example case from these data that helps clarify my measurement strategy is *Tanja Kreil v Bundesrepublik Deutschland* (Case C-285/98). It concerned the European Council's Equal Treatment Directive (76/207/EEC), as Tanja Kreil brought a sex-discrimination case against the German armed forces (Bundeswehr). The Bundeswehr rejected Kreil's application to serve in electronics weapons maintainence because of a German law banning women from military posts that involve the use of arms. This case was highly salient and controversial and drew observations from Germany, the United Kingdom, and Italy, all of which supported an anti-integration position (Member States Anti-Integration = 3) – in this case, that the Court should not rule that the German law is incompatible with EU law. In the end, the AG and the Court both supported a pro-integration position (AG Pro-Integration and CJEU Pro-Integration = 1), but the Court only included 33% (In Judgment = 0.333) of references from the AG's opinion in its final judgment.

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

AG Opinion

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

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

Court Judgment

On those grounds,

THE COURT,

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

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

Figure 2.2: This figure compares the AG opinion's recommendation to the operative clause in the Court's judgment in Case C-285/98.

Figure 2.2 compares the AG opinion's recommendation in the case to the operative clause in the Court's opinion. The AG's recommendation is very specific – in particular, it directly references clauses in German legislation – implying that the exclusion of women from a "combat unit" of the armed forces is incompatible with EU law. The Court's judgment is identical to the AG's recommendation until it comes to referring to the particular legislation violating EU law. Instead, it broadly refers to "German law" and only mentions a "general exclusion of women from military posts involving the use of arms" as contravening EU law. In sum, the Court's judgment provides more flexibility to the German legislature by allowing laws that restrict women from certain combat units, while the AG's opinion does not. The AG's opinion includes a reference to the Court's judgment in Case C-1/95 in which it cites Article 3(1) of the Council Directive at issue stating, "It should be recalled that Article 3(1) of the Directive prohibits any discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of

activity, and to all levels of the occupational hierarchy." The Court excluded this reference in the AG's opinion to its past case law in its judgment. Substantively, if the Court were to include this reference, it would not provide the German legislature much flexibility over implementing its ruling. The Court, thus, strategically broadened the interpretation of its ruling by excluding a reference to case law that would have made almost any restriction on a women's service in the Bundeswehr incompatible with EU law.

Controls. I also operationalize a number of theoretically motivated control variables for my analysis. The variable CHAMBER is the number of judges that are sitting on a given case as a proportion of the total number of judges sitting on the Court. Scholars argue that chamber (panel) size is an indication of a case's salience (e.g., Kelemen 2012) and that the Court may strategically assign cases to larger chambers to manage the potential threat to compliance (e.g., Cheruvu and Krehbiel N.d.). I may expect, thus, that judges will be more likely to grant flexibility to member states over implementation in more salient cases, as member states' noncompliance may be more damaging to the court's public legitimacy in higher salience cases (Krehbiel 2020). The variable COMPROINT is a variable that takes average of the Commission's pro-integration position over the legal issues of a given case based off the observations it sent to the Court. Higher values indicate the Commission supported a more pro-integration position. Existing scholarship argues that the Commission has a substantial impact on the decision-making of the CJEU (e.g., Stone Sweet and Brunell 2012). I also include a variable for the number of legal issues in a case.

Next, I include a series of control variables for case policy areas such as free movement of goods, agriculture, free movement of workers, right to establishment, free movement of services, free movement of capital, transport, competition, taxes, customs union, social provisions, environment, and consumer protection. As Kelemen (2012, 43) observes, "As EU law expands into more sensitive areas of national policy, such as healthcare, education and

Table 2.2: Descriptive Statistics

Statistic	Mean	St. Dev.	Min	Max
In Judgment	0.537	0.240	0.000	1.000
AG Pro-Integration and CJEU Pro-Integration	0.648	0.478	0	1
AG Pro-Integration and CJEU Anti-Integration	0.330	0.471	0	1
AG Anti-Integration CJEU Pro-Integration	0.007	0.085	0	1
AG Anti-Integration and CJEU Anti-Integration	0.014	0.119	0	1
Member States Pro-Integration	0.300	0.842	0	10
Member States Neutral	0.199	0.399	0	1
Member States Anti-Integration	1.199	1.628	0	14
Chamber Size	0.336	0.193	0.111	1.000
Commission Pro-Integration	0.952	0.192	0	1
Goods	0.097	0.297	0	1
Agriculture	0.134	0.341	0	1
Workers	0.135	0.342	0	1
Establishment	0.182	0.386	0	1
Services	0.152	0.359	0	1
Capital	0.065	0.247	0	1
Transport	0.014	0.119	0	1
Competition	0.177	0.382	0	1
Tax	0.197	0.398	0	1
Customs	0.045	0.208	0	1
Social Provisions	0.085	0.279	0	1
Environment	0.023	0.152	0	1
Consumer Protection	0.049	0.216	0	1
Number of Legal Issues	1.426	0.774	1	6

taxation, the [CJEU] is pressed to step into terrain where its decisions are more likely to spark public outcries and political reprisals." Therefore, the probability of noncompliance, and subsequently the amount of flexibility the CJEU provides to member states over implementation in a given case, may be dependent on the policy area. Table 2.2 provides descriptive statistics for all variables included in the models.

Empirical Approach. To test my hypothesis I run a series of OLS models with separate interactions for each combination of AG and CJEU dispositions with member state prefer-

ences over the outcome of a case. This strategy allows me to use all the available data to draw inferences as opposed to subsetting the data for each category relevant to my hypothesis (e.g., Kam and Franzese 2007). Recall that hypothesis 4 argues that when the legal merits favor a ruling against government preferences, a court will provide more flexibility over implementation as the probability of noncompliance increases. The two scenarios in which we should expect the CJEU to provide more flexibility over implementation are: (1) when it makes a pro-integration decision and the AG favors a pro-integration decision, while the member states prefer an anti-integration decision and (2) when it makes an anti-integration decision and the AG favors an anti-integration decision, while the member states prefer a pro-integration decision. Therefore, the two interactions of interest are MEMBER STATES ANTI-INTEGRATION × AG PRO-INTEGRATION AND CJEU PRO-INTEGRATION and MEMBER STATES PRO-INTEGRATION × AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION. For each of these two interaction terms, my theory predicts a negative and statistically significant relationship between it and the dependent variable IN JUDGMENT. Note that the coefficient for MEMBER STATES PRO-INTEGRATION × AG ANTI-INTEGRATION AND CJEU PRO-INTEGRATION does not exist, as these data have 0 observations in which MEMBER STATES PRO-INTEGRATION takes a positive value when AG ANTI-INTEGRATION AND CJEU PRO-INTEGRATION = 1. Since the constituent terms for each of the interactions are perfectly colinear, they are excluded from the models. After running models with just the interactions, I include models with AG fixed-effects and include models with the aforementioned control variables. For all models, I cluster standard-errors at the AG level.

Results

Table 3.2 presents the results. Model 1 presents just the interaction terms, model 2 has AG fixed effects, model 3 includes relevant control variables, and model 4 incorporates both

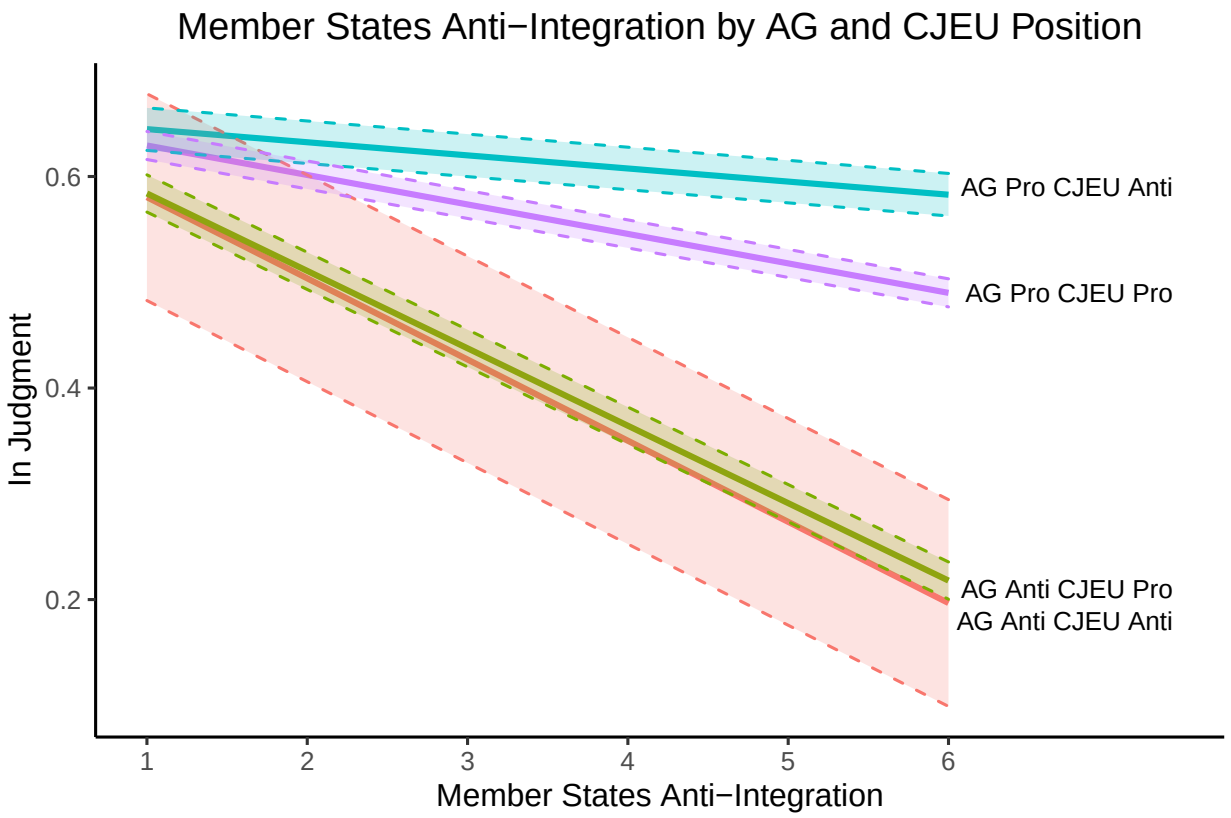

Figure 2.3: This figure shows the predicted values for each AG-CJEU combination as member states anti-integration increases with 90 percent confidence intervals clustered at the advocate general level. Based on the results in table 3.2 model 4.

AG fixed effects and controls. Across all model specifications the interaction term MEMBER STATES ANTI-INTEGRATION × AG PRO-INTEGRATION AND CJEU PRO-INTEGRATION is negative and statistically significant. Similarly, the interaction term MEMBER STATES PRO-INTEGRATION × AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION is also negative and statistically significant across all model specifications. In tandem these two results provide evidence supporting my primary hypothesis that the CJEU provides more flexibility to member states when it agrees with the AG and member states' probability of noncompliance increases.

My models also produce an unexpected result as MEMBER STATES ANTI-INTEGRATION × AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION is also negative and statistically

significant. To make sense of this finding, figure 2.3 provides predicted values for each interaction term as MEMBER STATES ANTI-INTEGRATION increases. The relevant comparisons are the change in the CJEU's position when the AG position stays the same. When the AG prefers a pro-integration decision, as member states become increasingly anti-integration the slope for the CJEU ruling in a pro-integration direction decreases more quickly relative to when the CJEU rules anti-integration. This result is intuitive and is in line with theoretical expectations, as I should only expect the CJEU to provide more flexibility over implementation when the AG prefers a pro-integration ruling and the CJEU also rules pro-integration. Alternatively, consider in the figure when the AG prefers an anti-integration decision. The slopes for when the CJEU rules in a pro-integration direction relative to when it rules in anti-integration are almost indistinguishable. This result indicates that, substantively, irrespective of whether the CJEU rules in a pro or anti-integration direction, its behavior does not change when the AG prefers an anti-integration ruling as member states become increasingly anti-integration. Therefore, despite the MEMBER STATES ANTI-INTEGRATION × AG ANTI-INTEGRATION AND CJEU ANTI-INTEGRATION coefficient's statistical significance, it still comports with my theoretical expectations regarding the CJEU's judgment-writing behavior.

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

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

Conclusion

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

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

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

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

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

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

Table 2.3: Model Results

	In Judgment			
	(1)	(2)	(3)	(4)
Member States Pro-Integration × AG Pro-Integration and CJEU Pro-Integration	0.0026	0.0080	0.0066	0.0135
	(0.0086)	(0.0088)	(0.0085)	(0.0084)
Member States Pro-Integration × AG Anti-Integration and CJEU Anti-Integration	-0.3523***	-0.3350***	-0.3801***	-0.3047***
	(0.0475)	(0.0330)	(0.0865)	(0.0992)
Member States Pro-Integration × AG Pro-Integration and CJEU Anti-Integration	0.0156	0.0140	0.0359	0.0436
	(0.0360)	(0.0304)	(0.0363)	(0.0351)
Member States Anti-Integration × AG Pro-Integration and CJEU Pro-Integration	-0.0338***	-0.0351***	-0.0271***	-0.0279***
	(0.0078)	(0.0084)	(0.0071)	(0.0081)
Member States Anti-Integration × AG Anti-Integration and CJEU Anti-Integration	-0.0940**	-0.0888**	-0.0811	-0.0767
	(0.0408)	(0.0416)	(0.0606)	(0.0594)
Member States Anti-Integration × AG Anti-Integration and CJEU Pro-Integration	-0.0915***	-0.0907***	-0.0742***	-0.0732***
	(0.0130)	(0.0120)	(0.0123)	(0.0107)
Member States Anti-Integration × AG Pro-Integration and CJEU Anti-Integration	-0.0176**	-0.0192*	-0.0113	-0.0124
	(0.0074)	(0.0104)	(0.0095)	(0.0122)
Member States Neutral × AG Pro-Integration and CJEU Pro-Integration	-0.0375	-0.0303	-0.0331	-0.0247
	(0.0355)	(0.0388)	(0.0330)	(0.0362)
Member States Neutral × AG Anti-Integration and CJEU Anti-Integration	-0.1378***	-0.0828***	-0.0879	-0.0312
	(0.0359)	(0.0291)	(0.0566)	(0.0411)
Member States Neutral × AG Anti-Integration and CJEU Pro-Integration	0.1480***	0.2084***	0.0359	0.0931***
	(0.0238)	(0.0156)	(0.0382)	(0.0300)
Member States Neutral× AG Pro-Integration and CJEU Anti-Integration	-0.0298	-0.0182	-0.0268	-0.0215
	(0.0528)	(0.0552)	(0.0512)	(0.0552)
Chamber			-0.0698	-0.1118
			(0.0740)	(0.0743)
Commission Pro-Integration			0.0455	0.0613
			(0.0622)	(0.0659)
Goods			-0.0415	-0.0715***
			(0.0290)	(0.0223)
Agriculture			0.0494*	0.0567**
			(0.0271)	(0.0224)
Workers			-0.0388	-0.0454
			(0.0439)	(0.0446)
Establishment			0.0259	0.0374
			(0.0247)	(0.0294)
Services			-0.0201	-0.0127
			(0.0396)	(0.0406)
Capital			-0.0930**	-0.0783
			(0.0402)	(0.0457)
Transport			-0.1094	-0.1167
			(0.0997)	(0.0980)
Competition			-0.0754**	-0.0761**
			(0.0287)	(0.0302)
Tax			0.0858**	0.0913**
			(0.0333)	(0.0339)
Customs			-0.0124	0.0152
			(0.0597)	(0.0623)
Social Provisions			0.0214	0.0324
			(0.0382)	(0.0407)
Environment			0.0015	0.0266
			(0.0820)	(0.0766)
Consumer Protection			0.0234	0.0542*
			(0.0427)	(0.0300)
Number of Legal Issues			0.0398***	0.0365***
			(0.0125)	(0.0121)
R^2	0.03815	0.12823	0.09945	0.19623
Observations	554	554	554	554
AG fixed effects		✓		✓

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

Chapter 3

Does the Secret Ballot protect Judicial Independence? Evidence from the European Court of Justice

Abstract: Designing judicial institutions requires a trade off between insulating judges from external political pressure and keeping them democratically accountable. Although most scholars focus on variation in judicial selection and retention mechanisms, I analyze how the internal procedures of courts balance this trade off. Civil law collegial courts mostly issue *per curiam* rulings in which judges' votes are not public. Do judges on *per curiam* courts adjust their decision-making to increase their chances of reappointment? Does keeping their votes secret insulate judges from this career pressure? Arguing a judge's appointer can make inferences about their behavior on a collegial court even if their votes are not public, I claim that judges on *per curiam* courts are responsive to their appointer's preferences especially if they are subject to reappointment. I analyze decisions at the Court of Justice of the European Union to support this account.

Introduction

Virtually all societies institutionalize dispute resolution systems to resolve conflicts between two parties. Establishing confidence in such systems is essential to maintaining their efficacy (e.g., Shapiro 1981). One mechanism these systems employ is blinding the disputing parties to the process by which the adjudicators came to their decision. That is, by allowing the adjudicators to deliberate in private and reach a decision without revealing which side each one preferred to prevail in the dispute, the system creates the appearance that the adjudicators are independent, unified, and not biased in favor of one party over the other. This logic underlies why civil law courts issue almost all of their decisions *per curiam* (e.g., Kelemen 2017*a*), meaning "by the court" – rendering an outsider's task of identifying who is in the majority and the minority virtually impossible. This feature alone, however, is not sufficient to ensure independence. An extensive scholarship analyzes how the various mechanisms of judicial selection and retention – such as merit selection (e.g., Arrington 2020; Garoupa and Ginsburg 2009), executive and legislative (re)appointment (e.g., Tiede 2020; Voeten 2007), and (non)partisan elections (e.g., Canes-Wrone, Clark and Kelly 2014; Huber and McCarty 2004) – can bias judicial decision-making. Why, then, would simply obscuring the decision-making process sufficiently counterbalance these threats to judicial independence?

As former Court of Justice of the European Union (CJEU) judge Josef Azizi (2011, 55-56) explains, revealing judges' positions on cases could put a judge "under pressure to change his or her attitude in order to be in line with his or her member state [...] and, consequently, bias his or her vote in an anticipative manner [...] Every time a judge in office knows he or she will have to find himself or herself a future professional career [...] the perception of his or her judicial behavior by a potential employer might have an influence on that behavior." If a court were to publish judges' votes, proponents of *per curiam* decisions argue that political actors unsatisfied with a judge's performance may seek retribution against them

and influence their votes on future cases. The aforementioned literature on judicial retention details this phenomenon of judges altering their behavior to appease their appointer[1] for a simple reason: they prefer to keep their jobs. Do judges on *per curiam* courts adjust their decision-making to increase their chances of reappointment? Does keeping their votes secret insulate judges from this career pressure?

Although *per curiam* opinions do not reveal the votes of the judges *individually*, I argue an appointer can evaluate their appointee judge through their panel's decision-making. If a judge's panel renders a series of adverse decisions, the appointer may infer that their appointee is not properly representing it on the court. A judge desiring reappointment, therefore, has incentive to advocate for their appointer's position on a case to their panel. The dynamics of the decision-making process, in particular having to repeatedly decide cases with the same group of people and desiring to maintain collegiality their colleagues, encourages judges to defer to one another when their appointers have strong preferences regarding the outcome of a case. I evaluate my arguments with an empirical analysis of member state observations (*amici curiae* briefs) submitted to the CJEU, a *per curiam* court. I find when a judge receives an observation on a case from their appointer, the judge's panel is more likely to favor the position of the judge's appointer. This relationship is stronger when a judge served as the rapporteur (opinion-writer) for a case, however, does not exist for judges at the CJEU that were not subject to reappointment.

I organize this article as follows. First, I describe the civil law tradition and how it impacts internal procedures of judicial decision-making on courts. I proceed to argue how the norm of consensus on civil law *per curiam* courts implores a judge's colleagues to defer to them when their appointer expresses their preferences over the outcome of a case. I follow this section by applying my theory to the CJEU and providing supporting empirical evidence.

[1]Throughout this article I use the term "appointer" to refer to those involved in the process of (re)appointing a judge.

I conclude by discussing my article's implications for the design of judicial institutions and the efficacy of courts in modern liberal democracies.

Per Curiam Decisions, Collegiality, and Accountability

The vast majority of courts around the world issue their decisions *per curiam*. This practice traces its lineage from the broader tenets of the civil law tradition that place an emphasis on the certainty of the law. Unlike the common law tradition in the United Kingdom and United States in which judges can interpret and make law, in the civil law tradition only the legislature makes law with the judge applying the law as an "expert clerk. Presented with fact situations to which a ready legislative response will be readily found [...] the judge's function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union" (Merryman and Pérez-Perdomo 2019, 36). With this civil law understanding of the role of the judge combined with its high value on legal certainty, many such courts publish *per curiam* judgments without identifying an individual judge's position on a case – as dissenting votes and opinions, or concurrences undermine this certainty.

Without the ability for judges to write separately, a panel must produce a single judgment that accurately reflects its judges' viewpoints. Opinions produced by French courts, for example, are often a "terse and opaque summary of the outcome and the reasons for it," (Wells 1994, 92) as the judges must reach an outcome based on consensus. Similarly, CJEU President Koen Lenaerts (2013, 1351) observes, "As consensus-building requires to bring on board as many opinions as possible, the argumentative discourse of the [CJEU] is limited to the very essential. In order to preserve consensus, the [CJEU] does not take 'long jumps' when expounding the rationale underpinning the solution given to novel questions of constitutional importance." This task of consensus-building undoubtedly requires judges

to have a good working relationship with one another. A substantial literature addresses these deliberative features of the collegial decision-making process on courts (e.g., Edwards 1998, 2003). Hinkle, Nelson and Hazelton (2020) argue that one mechanism at work during the collegial decision-making process is deference to colleagues.[2] This explanation focuses on, among other factors, the costs to collegiality associated with disagreeing with colleagues. On courts that employ chamber systems in which small panels of three to five judges hear cases together consistently for a number of years – such as the CJEU, and the Italian Constitutional Court – collegiality is even more important. Given judges are frequently deciding cases in small groups, collegial relations with one's colleagues are often essential for effective decision-making.

The existing scholarship predominantly argues that publishing a single judgment insulates judges from outside political pressure since their individual positions are not revealed. Dunoff and Pollack (2017, 238) argue *per curiam* opinions reduce judges' "vulnerability to retaliation for unwelcome rulings." This viewpoint, however, fails to take into account how an appointer may attribute an adverse decision to a judge even if they do not know their precise vote on a case. For example, Ramseyer and Rasmusen (2003) provide evidence that judges on three-judge panels that ruled against Japan's Liberal Democratic Party's preferences at lower rates than their colleagues were more likely to receive promotions to better positions. These Japanese collegial courts, like many of their global civil law counterparts, issue *per curiam* decisions. The Japanese case is illustrative of another important point: although a judge may have opposed their colleagues' decision in private deliberations, their appointer may nonetheless punish them for the outcome of the case. Put differently, a judge on a *per curiam* court cannot institutionally signal *independently* from their panel – through

[2]In their paper, Hinkle, Nelson and Hazelton (2020) refer to this mechanism as "aquiesence."

authoring a dissenting opinion, for example[3] – they supported their appointer's position on a case. A judge, therefore, is incentivized to lobby their panel to support their appointer's position on a case.

This problem is mitigated when the judges on a panel share the same appointer. In these institutional settings, all judges have similar career incentives to appease their shared appointer. It is, consequently, substantially less likely any one judge will be confronted with a situation in which their panel deviates from their appointer's preferences. On many domestic courts with mixed selection systems – whereby a proportion of judges are selected by different government institutions – and international courts, however, judges sitting on the same panel have different appointers. Each judge, thus, may have different career incentives driving their decision-making. An extensive literature illustrates this dynamic. For example, Tiede (2020) provides evidence that on the Chilean and Columbian constitutional courts – both of which apply mixed selection systems – judges' votes are correlated with the preferences of their institutional appointer. Similarly, analyzing the European Court of Human Rights, Voeten (2008) finds that judges are likely to rule in favor of their appointing member state when their member state is a party to a case. Posner and De Figueiredo (2005) also report an analogous finding at the International Court of Justice. Since these courts publish votes, judges can signal to their appointer that they are advocating for their appointer's interests on the court, even when their panel rules against their appointer's preferences.

Judges on *per curiam* courts that have differing appointers have a unique predicament: they cannot individually signal their position on a case to their appointer, and they are *more likely* to have incentives driving their decision-making that are at-odds with their colleagues relative to when all judges have the same appointer. In this setting, the only way judges can *institutionally* signal to their appointers that they are faithfully representing their interests

[3]For example, Black and Owens (2016) provides evidence that circuit court judges in the United States are more likely to write dissenting opinions to signal to the president when vying for an open seat on the Supreme Court.

on such a court is through their panel's decisions. The stakes of disagreement, therefore, are higher than just bad relationships with colleagues. If a panel judge does not defer to a colleague when their colleague's appointer has a vested interest in a case, they may end up costing their colleague's job. In equilibrium, a judge may be willing to support an outcome with which they disagree to shield their colleague when their colleague's appointer has a preference over the outcome of a case and expect their colleague to return the favor in the future. For example, if a panel has three judges – A, B, and C – and judge A's appointer prefers a ruling in favor of the plaintiff in the case, judge B's appointer has no preference, and judge C's appointer has no preference for the case's outcome, judge B and judge C may be willing to rule in favor of the plaintiff to protect judge A. If judge B's appointer were to instead prefer a ruling in favor of the defendant in the case, in expectation judge A would not defer to judge B and vice-versa (on average, judge C would have no collegial benefit for siding with one judge over the other). If this expectation of deferential behavior among panel judges is correct, it raises normative concerns about how *per curiam* decisions – instead of protecting judicial independence – may be adversely affecting decision-making on domestic courts with mixed-selection systems and international courts. This theorizing leads to the following hypothesis:

Hypothesis 4. On a *per curiam* court, if a judge's appointer expresses their preferences over the outcome of a case, the judge's panel is more likely to rule in favor of the appointer's preferred outcome

Another internal feature of civil law courts that may affect the relationship described in hypothesis 4 is a court's assignment of a judge-rapporteur (JR) for each case. The JR is responsible for writing the court's judgment in a case. A court – in almost all cases the court's president[4] – assigns a JR immediately after the court receives a case and before any

[4]How a court's president assigns a rapporteur varies. As Kelemen (2017*a*, 35-36) explains, "There are different methods for appointing the rapporteur judge. In Belgian practice, cases are assigned on the basis of

discussion among the court's judges about the case. The JR is responsible for collecting materials and information regarding the case and for drafting a preliminary judgment for deliberations with the panel. As a result, the JR plays an agenda-setting function and their opinion "has a greater weight in the eyes of the other judges [...] [T]he rapporteur holds a near monopoly over knowledge of facts and other materials concerning the case, including the competing arguments, so the other judges may be left at an informational disadvantage" (Kelemen 2017*a*, 43). The other panel judges, therefore, must exert effort to alter the JR's opinion, which may be especially costly if they have a substantial workload (e.g., Bielen et al. 2018; Roussey and Soubeyran 2018).[5] Likewise, scholars provide empirical evidence that the JR has a disproportionate influence over case outcomes (e.g., Cheruvu 2019; Pellegrina and Garoupa 2013; Zhang, Liu and Garoupa 2018). A judge that wants to convince their panel to support their appointer's position on a case, thus, should be in a more advantaged position to do so when they are serving as the JR. Returning to the earlier example – if judge A is the JR and their appointer favors a ruling in favor of the plaintiff in the case; judge B's appointer favors a ruling in favor of the defendant in the case; and judge C's appointer has no preference over the outcome – judge C should be more likely to side with judge A in the case because judge A is the JR. This expectation leads to the following hypothesis:

Hypothesis 5. The relationship described in hypothesis 4 is stronger if the judge-rapporteur's appointer expresses their preferences over the outcome of a case

Although hypotheses 4 and 5 describe the existence of a relationship between an appointer's expressed preferences and a judge's behavior, I need to distinguish the mechanism

a complex rotation system [...] In German practice this is done on the basis of the judges' expertise, which is the case also in Austria. The president of the Austrian Constitutional Court [...] must choose among the so-called 'permanent reporters' elected by the plenum."

[5]As Kelemen (2017*a*, 42-43) describes, "The pressure of time often prompts judges to defer to the rapporteur's opinion. In these circumstances the other members of the panel are less likely to conduct their own research. So, in most cases the rapporteur's opinion becomes the opinion of the court, and s/he is also the author of the judgment."

of a judge's desire to retain their position from alternatives. A judge may be likely, for example, to rule in favor of their appointer's expressed preferences because they share similar policy preferences to their appointer. As a result, scholars have used the partisan affiliation of a judge's appointer to proxy their policy preferences (e.g., Harris and Sen 2019). Another alternative mechanism is persuasion. On international courts, for instance, judges may be more likely to be persuaded by the arguments of their appointing state because they use familiar legal reasoning (e.g., Voeten 2008). Furthermore, this logic can extend to a judge's colleagues on a panel whose appointing states share a similar legal culture or system (e.g., La Porta, Lopez-De-Silanes and Shleifer 2008). If my proposed mechanism is separable from the alternatives – that is, a panel is willing to defer to a judge if the judge's appointer has expressed preferences over a case's outcome in order to shield the judge from potential retaliation from their appointer – this relationship should be weaker if the judge cannot be reappointed. In other words, judges that cannot be reappointed for institutional reasons are not subject to the same career concerns as their colleagues trying to retain their jobs and, thus, will have less pressure to convince their colleagues to rule according to the preferences of their appointer. Therefore, I posit the following hypothesis:

Hypothesis 6. On a *per curiam* court, if the appointer of a judge not subject to reappointment expresses their preferences over the outcome of a case, the likelihood the judge's panel rules in favor of the appointer's preferred outcome is unaffected

Application: Court of Justice of the European Union

To test my theory about decision-making on *per curiam* courts, I examine the European Union's highest court, the Court of Justice. Its internal procedures are largely modeled on the French Conseil d'État, a civil law court. I choose to analyze the CJEU for a few reasons. First, the CJEU is a powerful court, and EU member states have a vested interest

in affecting its decision-making. Second, the CJEU is a *per curiam* court in which each member state appoints one judge for a six-year renewable term. Although the EU treaties state that judges "shall be appointed by common accord of the governments of the Member States," in practice member states have historically seldom opposed other member states' appointments to the Court.[6] As a result, a member state can appoint their judge to the Court without objection from others, unlike, for example, the World Trade Organization's Appellate Body in which a member state can block another member state's appointment (e.g., Dunoff and Pollack 2017). Third, previous research provides a method to measure member states' preferences over case outcomes on the Court by leveraging observations (*amici curiae* briefs) that member states sent to the Court (e.g., Carrubba and Gabel 2015; Larsson and Naurin 2016). Fourth, the CJEU's system of panel decision-making (known as chambers) is similar to other judiciaries, making my analysis' implications for panel decision-making relevant to other judiciaries, especially those – such as the Italian constitutional court (e.g., Pellegrina and Garoupa 2013) – that employ *per curiam* decisions and mixed-selection systems. Fifth, the Court's President assigns a JR to each case that arrives at the CJEU, with the JR having similar responsibilities to those at other civil law courts (e.g., Zhang, Liu and Garoupa 2018). Lastly, few articles focus on how individual judges on the CJEU affect the Court's decision-making as a whole (e.g., Frankenreiter 2017; Hermansen 2020). I address this gap in the literature by arguing that member states' pressures on individual judges may adversely affect a panel's decision-making.

The CJEU's primary task is to adjudicate disputes regarding the application of and compliance with EU law. Disputes arrive at the Court through a variety of mechanisms and parties. A domestic court, for example, can ask the CJEU for an advisory opinion on a

[6]The Lisbon Treaty introduced a panel to evaluate judges member states appointed to the CJEU. Although this panel serves as a quality check, member states still retain the ability to ignore the panel's recommendations and appoint their judge even if the panel disapproves of their selection. See Dumbrovsky, Petkova and Van Der Sluis (2014) for a thorough overview.

case through the preliminary reference procedure if a party (private or public) challenges the legality of EU law or a member state's compliance with the law (e.g., Alter 1998; Krehbiel and Cheruvu N.d.; Pavone 2018). Alternatively, the European Commission – the executive body of the European Union – can bring cases against member states they believe are not properly applying EU law to the CJEU through the infringement procedure (e.g., Fjelstul and Carrubba 2018; König and Mäder 2014). The CJEU's wide jurisdiction and ability to exercise judicial review has substantial implications for member states and can adversely affect, for instance, their gains from trade (e.g., Gabel et al. 2012). Likewise, member states have strong incentives to influence the Court's decision-making. Scholars have theorized that member states attempt to influence the Court's decision-making through threats of noncompliance and legislative override (e.g., Larsson and Naurin 2016).[7] Drawing from canonical accounts of courts' concern for the implementation of their decision-making (e.g., Ferejohn and Weingast 1992) and the legitimacy costs of override (e.g., Vanberg 2005), they argue the CJEU is likely to defer to member states' interests when the probability member states will legislatively override an adverse decision is high.

While noncompliance and legislative override are two mechanisms through which member states may seek to influence the CJEU's decision-making, relatively unexplored in the literature is whether member states attempt to influence the Court through the judges they appoint.[8] Since judges are subject to six-year renewable terms without any term limits, they have strong incentives to please the member states that appointed them if they prefer to keep their jobs. To reduce the likelihood of this conflict of interest, CJEU judges do not

[7]Whether member states can credibly threaten legislative override is subject to substantial debate within the CJEU literature. See Carrubba, Gabel and Hankla (2012) and Stone Sweet and Brunell (2012) for a discussion.

[8]Dumbrovsky, Petkova and Van Der Sluis (2014), Gill and Jensen (2020), and Kenney (1998) provide accounts regarding the appointment of judges to the CJEU that are primarily focused on who member states appoint and the domestic procedures by which member states appoint them. Alter (1998) and Kelemen (2012) entertain the possibility that member states could affect the Court's jurisprudence through appointments but conclude that any impact is likely minimal.

hear infringement cases brought against their member state or preliminary reference cases originating from a domestic court in their member state. Nonetheless, since court rulings in cases originating in another member state or cases the Commission brings against another member state may affect the interpretation and application of law across the EU, member states may have a vested interest in cases that do not directly involve them as a party.

One means by which member states express their interest in a case is through submitting observations directly to the Court. All EU member states and institutions have the ability to submit observations on any pending case before the CJEU. Member states use these observations to express their beliefs on how the Court should rule in a particular case (e.g., Dederke and Naurin 2018; Stein 1981). Some issue areas are more important to a member state than others. For example, "French, Spanish, German and Austrian observations regarding free movement can be linked with implementation deficits. The French government's observations in agricultural matters have to be connected with the strength of the French agricultural lobby" (Granger 2004, 15-16). Some scholars also view these observations as informative signals by member states regarding their probability of noncompliance with a decision or the likelihood that a group of member states may legislatively override an adverse decision (e.g., Carrubba and Gabel 2015; Larsson and Naurin 2016).

Complementary to these explanations, I argue an observation can be particularly influential if a panel receives one from the appointing member state of one of their judges. The judge, placing a value on their long term retention prospects, has incentive to vote in favor of their member state's position on the case. Furthermore, the observation allows a judge to credibly claim to their colleagues that their member state desires a particular outcome in a case and that their future career opportunities may depend on it. The judge's colleagues, who may similarly encounter such a situation in the future, may defer to the judge's wishes in order to maintain collegiality and increase the probability of reciprocity. Former CJEU judge Ulrich Everling (1984, 1296) provides an insight into how this mechanism may work.

Although each judge technically does not represent their country on the court, "Nevertheless, each judge has the important function of introducing the legal thinking and basic concepts of the member state to which he belongs into the Court's consideration. Each judge must also ensure that the decision and the reasoning on which it is based are expressed in such a way that they may be understood in his home country." With an observation in hand from their appointing member state, a judge can more credibly explain and convince their colleagues to decide in favor of their member state's position on a given issue.

Such a judge may be in a more advantageous position if they are serving as the JR for the case. Similar to other civil law courts, the CJEU's president assigns the JR before any deliberations. The JR must collect information germane to the case, engage in a legal analysis, present a preliminary report to the General Assembly of the Court that decides the size of the chamber to hear the case, and prepare a draft judgment (e.g., Cheruvu and Krehbiel N.d.). As Zhang, Liu and Garoupa (2018, 146) explain, "even though conceptually each judge in the chamber is entitled to the same voting power, in reality their influence may vary depending on [whether they are the JR] in any given case. This group dynamic may, therefore, influence judicial voting." In their empirical analysis of the CJEU's General Court, they find that if a JR comes from a member state with a strong French administrative law influence, a panel's decision is more likely to favor the Commission. Similarly, I expect that if a judge that is serving as the JR receives an observation from their member state, their panel is more likely to favor the position of their appointing member state than if they were not serving as the JR.

Data & Empirical evidence

To test my theory, I require data on member state observations to the CJEU, the outcomes of CJEU cases, and the composition of panels hearing CJEU cases. Carrubba and Gabel

(2015) provide information on member state observations and case outcomes. These data divide cases into individual legal issues and detail observations member states sent to the Court for each legal issue. For example, if a case had two legal issues and France sent an observation to the Court regarding the first legal issue and not the second, this within-case variation is reflected. For information on the composition of panels hearing CJEU cases, I use data from Cheruvu (2019) and Fjelstul (2019).

Data. Carrubba and Gabel (2015) conducted the first large scale systematic data collection effort to assess member state observations' impact on the CJEU's decision-making.[9] Covering every judgement the Court issued from 1960 - 1999 (4,942 cases), they use these data to test a series of hypotheses regarding the Court's sensitivity to threats of noncompliance and legislative override. In an earlier article, Carrubba, Gabel and Hankla (2008) used a subset of these data to test a similar set of hypotheses. The unit of analysis within these data is within-case legal issues (7,080 legal issues across the 4,942 cases). As Carrubba, Gabel and Hankla (2008, 440) explain, "This coding scheme has at least two advantages. First, we can accurately depict the Court's ruling when, in the same case, its ruling favors one litigant on one set of issues but the other litigant on other issues. Second, we can map third-party [observations] filed in a case to the particular issues the [observations] discuss." The dependent variable of interest in these data is a binary variable (*CJEU Ruling for Plaintiff*) that takes the value of 0 when the Court ruled against the plaintiff's position in the legal issue and the value of 1 when the Court rules in favor of the plaintiff's position. Although this dependent variable coding may not be the most substantively useful for researchers interested in the Court's impact on European integration, for my purposes it is the most straightforward and objective yardstick of the Court's decision-making.

[9]Larsson and Naurin (2016) also have a publicly available dataset on CJEU decisions. Nonetheless, it is impossible to tell within these data the content of each member state observation (i.e., whether the member state favored more or less EU integration). As a result, I cannot leverage these data for my analysis.

Additionally, for each legal issue these data include whether an actor (member state or European Commission) submitted a brief in favor of the plaintiff or defendant. Combining these data with data from Cheruvu (2019) and Fjelstul (2019) on panel composition, I then create the variable *Home Net Observations* – taking positive values if a member state submitted an observation in favor of the plaintiff to a panel that includes the judge they appointed to the Court and negative values if they submitted an observation in favor of the defendant. For example, the panel consisting of judges Gulmann (Denmark), Moitinho de Almeida (Portugal), and Puissochet (France) heard the case *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* (CELEX number 61993CJ0446). Portugal submitted an observation favoring the position of the defendant to the panel in this case specifically regarding the legal issue (as these data describe) "Is article 4(2)(c) invalid?" Since Portugal submitted this observation favoring the position of the defendant to a panel including the judge they appointed to the Court (Moitinho de Almeida), *Home Net Observations* takes the value of -1 for this legal issue. A potential problem with this variable is that a panel receiving 0 observations from their appointers and a panel receiving 1 observation favoring the plaintiff and 1 observation favoring the defendant from their appointers would be quantitatively equivalent, as in both scenarios *Home Net Observations* take the value of 0. To address this concern, I separate *Home Net Observations* into two separate variables (*Home Observation Plaintiff* and *Home Observation Defendant*) indicating the number of observations a panel receives from their appointers favoring the plaintiff and the number of observations favoring the defendant. Table C.1 in the appendix demonstrates the results are robust to this alternative specification.

I also include a number of theoretically relevant controls in my analyses. First, I control for the type of case the panel heard (infringement, preliminary reference, annulment, failure to act, staff case). This distinction may be relevant since the Court, for example, tends to overwhelmingly rule in favor of the Commission in infringement cases (e.g., Castro-Montero

et al. 2018). As a result, the probability a member state observation affects a case's outcome may differ depending on the type of case. Relatedly, I control for whether the Commission is a plaintiff or defendant in a case and whether the Commission submitted an observation favoring the plaintiff or defendant in the case. Previous research finds that the Commission has a substantial influence on the Court's decisions (e.g., Stone Sweet and Brunell 1998). Furthermore, I control for whether a government is a litigant in a case. Carrubba, Gabel and Hankla (2008) provide evidence that member states' observations are more influential in the Court's decision-making when a government is a litigant.

Two additional controls merit more extensive discussion. First, I control for the advocate-general's (AG) position for each legal issue using a binary variable that takes the value of 1 when the AG favors the plaintiff. The AG has the task of analyzing the relevant legal issues in a case and presenting an independent opinion for the Court's consideration (e.g., Dashwood 1982). As such, the AG does not have any formal decision-making power. Scholars find, nonetheless, that the AGs' opinions are strongly correlated with the Court's decision-making (e.g., Frankenreiter 2017; Tridimas 1997). Carrubba and Gabel (2015) and Larsson and Naurin (2016) argue that the AG's opinion is a plausible control for the legal merits of an issue. For my purposes, if member states' observations to the Court are simply reflective of the legal merits of an issue, and member states are not strategically sending observations to the Court in order to influence the decision-making of their judges, then including this control should eliminate the effect of *Home Net Observations*.

Second, I include a control for the net total of all observations member states submitted for a given legal issue favoring the plaintiff or the defendant (*Net Observations*) excluding observations already included in the statistical model through the *Home Net Observations* variable. For example, the panel consisting of judges Bahlmann (Germany), Due (Denmark), and Schockweiler (Luxembourg) heard the case *Trans Tirreno Express SpA v. Ufficio provinciale IVA* (CELEX number 61984CJ0283), which only concerned a single legal issue.

Table 3.1: Descriptive statistics for variables in models

Variable	Mean	St. Dev.	Min	Max
Home Net Observations	−0.099	0.795	−10	10
JR Net Observations	−0.014	0.215	−1	1
Extra Judge Net Observations	−0.005	0.147	−1	1
Regular Judge Net Observations	−0.052	0.455	−1	1
Commission Observation Plaintiff	0.246	0.431	0	1
Commission Observation Defendant	0.256	0.437	0	1
Commission is Plaintiff	0.125	0.331	0	1
Commission is Defendant	0.175	0.380	0	1
AG for Plaintiff	0.513	0.500	0	1
Government is Litigant	0.250	0.433	0	1
Net Observations	−0.023	0.539	−8	7
Infringement Case	0.114	0.318	0	1
Annulment Case	0.095	0.294	0	1
Failure to Act Case	0.004	0.062	0	1
Preliminary Reference Case	0.625	0.484	0	1
Staff Case	0.106	0.308	0	1

Germany submitted an observation in favor of the plaintiff, France submitted an observation in favor of the defendant, and Italy submitted an observation in favor of the defendant for this case. Since Germany submitted an observation in favor of the plaintiff to a panel involving the judge it appointed to the Court, *Home Net Observations* takes the value of 1. Additionally, since Italy and France submitted observations favoring the defendant, *Net Observations* takes the value of −2. By including this control in my models, I am accounting for the possibility that panels are ruling in favor of the plaintiff (defendant) to preclude the possibility of legislative override and not only catering to the preferences of the member state that appointed one of its judges. If panels are mainly concerned with the probability of legislative override, then including this control should also eliminate the effect of *Home Net Observations*. A statistically significant effect for my independent variable of interest would empirically distinguish my account from Carrubba and Gabel (2015). Table 3.1 provides descriptive statistics for variables included in the models.

Empirical Approach (Hypothesis 4). I estimate a series of linear probability models to test my hypothesis. My results are also robust to a logit specification. Formally, the OLS model for my analysis where i indexes the legal issue is:

$$\textit{CJEU Agrees with Plaintiff}_i = \beta_1 \cdot \textit{Home Net Observations} + \delta\mathbf{X} + \psi + \lambda + \epsilon_{ipt} \tag{3.1}$$

with $\delta\mathbf{X}_i$ a vector of the aforementioned control variables, ψ_p panel fixed-effects, λ_t year fixed-effects, and ϵ_{ipt} standard errors clustered by panel and year. A positive β_1 would be evidence in support of my hypothesis indicating that for each additional observation member states send to the judges they appointed favoring the position of the plaintiff, the probability that the CJEU rules in favor of the plaintiff increases. The year fixed-effects control for time trends that may affect case outcomes. For example, over time the proportion of preliminary reference cases at the Court increased as did the number of member states with judges on the Court and, subsequently, the number of member states submitting observations.

The panel fixed-effects merit additional discussion as they control for factors relevant to my theory as well as the existing literature. First, the panel fixed-effects control for heterogeneity among panels by disentangling the *within-panel* variation of the probability the panel rules in favor of the plaintiff. Some panels may be more likely than others to be responsive to the member state of one of their judges sending them an observation. Figure 3.1 provides an illustration of five panels within these data. For example, in comparison to the other panels in this figure, the panel consisting of judges Everling, Galmot, and Kakouris (Grévisse, Moitinho de Almeida, Zuleeg) was more likely to rule in favor of the plaintiff (defendant) when one of these judges received an observation from their member state favoring the plaintiff (defendant) relative to when none of them received an observation from their member state. Second, these fixed-effects control for panels that may be likely to receive certain types of cases because of their judges' expertise (Hermansen 2020), or panels

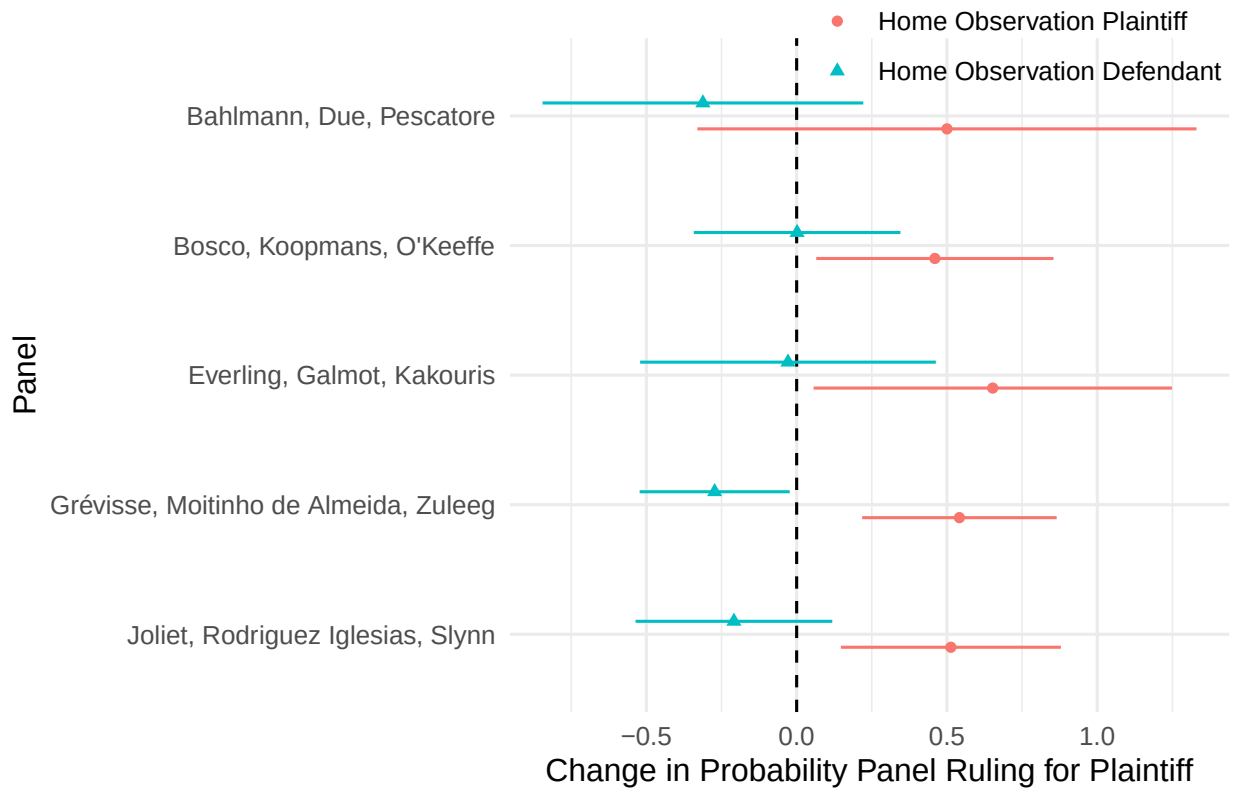

Figure 3.1: This plot displays five panels within these data and each panel's probability of ruling for the plaintiff. The triangles (circles) indicate the estimate for Home Observation Defendant (Plaintiff) with 95% confidence intervals for each panel.

that may have judges that are more ideologically diverse than others (Wijtvliet and Dyevre 2021). Third, the panel fixed-effects control for chamber size. Scholars argue that larger chambers often hear more important cases (e.g., Kelemen 2012). Robust estimates for my independent variable of interest across panels of different sizes would be evidence in favor of panel members deferring to a judge when they receive an observation from the member state that appointed the judge. If a member state's observation to the Court only changes the vote of the judge they appointed, I should seldom observe a change in a panel's outcomes once a panel is sufficiently large – as a judge's vote is less likely to affect the outcome, for example, on a panel of seven relative to a panel of three. Alternatively, if a judge's colleagues are willing to defer to them when they receive an observation from their member state, *Home*

Table 3.2: Hypothesis 4 Results

	CJEU Agrees with Plaintiff					
	(1) OLS	(2) OLS	(3) OLS	(4) Logit	(5) Logit	(6) Logit
Home Net Observations	0.0801***	0.0833***	0.0287***	0.3564***	0.4471***	0.3992***
	(0.0120)	(0.0129)	(0.0071)	(0.0621)	(0.0765)	(0.1038)
Commission Observation Plaintiff			0.1217***			1.133***
			(0.0183)			(0.1704)
Commission Observation Defendant			-0.1245***			-1.103***
			(0.0200)			(0.1617)
Commission is Plaintiff			0.1238**			0.9752*
			(0.0510)			(0.5067)
Commission is Defendant			-0.0262			-0.1972
			(0.0253)			(0.2505)
AG for Plaintiff			0.6285***			3.980***
			(0.0189)			(0.1581)
Government is Litigant			0.0327***			0.3177**
			(0.0112)			(0.1380)
Net Observations			0.0187**			0.2449**
			(0.0082)			(0.0982)
Infringement Case			0.0519			0.3851
			(0.0510)			(0.5463)
Annulment Case			0.0382			0.3032
			(0.0258)			(0.2728)
Failure to Act Case			-0.0098			-0.4908
			(0.0569)			(0.7683)
Preliminary Reference Case			0.1147***			0.9554***
			(0.0340)			(0.3072)
Staff Case			0.0074			0.0680
			(0.0341)			(0.3621)
Year fixed effects		✓	✓		✓	✓
Panel fixed effects		✓	✓		✓	✓
Pseudo R^2	0.01173	0.14871	0.72724	0.01287	0.08373	0.55828
Observations	7,080	7,080	7,080	7,080	6,389	6,389

Standard errors clustered by panel and year (909 clusters) are in parentheses *p<0.1; **p<0.05; ***p<0.01

Net Observations should be positive and statistically significant when controlling for the number of judges hearing a case through these panel fixed-effects.

Results (Hypothesis 4). Table 3.2 presents the results of this analysis. Conforming with expectations, the results indicate that for each additional observation favoring the plaintiff member states submit to a panel containing a judge they appointed the probability that the panel rules in favor of the plaintiff increases. Model 1 presents the results for a bivariate regression with *Home Net Observations* as the independent variable. Each additional

observation favoring the plaintiff increases the probability the CJEU rules in favor of the plaintiff by 8 percentage points ($p < 0.01$). Model 2 shows that this result is robust to the inclusion panel and year fixed-effects ($\beta = 0.083$, $p < 0.01$). Model 3 includes the relevant control variables. The coefficient for *Home Net Observations* is positive ($\beta = 0.029$) and statistically significant ($p < 0.01$) when including both panel and year fixed-effects as well as the relevant control variables – providing evidence supporting hypothesis 4. For robustness, I run the specifications in models 1, 2, and 3 as a logit in models 4, 5, and 6. The OLS and logit results are similar.

The control variables I included in these models also provide some interesting results. As expected, across all model specifications, when the Commission submits an observation favoring the plaintiff (defendant) it is positively (negatively) and significantly correlated with the probability the CJEU rules in favor of the plaintiff. Likewise, when the Commission is the plaintiff in a case it is positively correlated with the probability the CJEU rules in favor of the plaintiff – as the vast majority of cases in which the Commission is a plaintiff are infringement cases in which they strategically decide which cases to bring the CJEU. Infringement cases may also explain why the CJEU having a government as a litigant is also positively correlated with the CJEU ruling for the plaintiff, since the Commission wins the vast majority of infringement cases it brings against member states. Furthermore, the AG's opinion is highly correlated with the CJEU's decision-making in accordance with the existing literature, as an AG opinion in favor of the plaintiff correlates with a 63 percentage point increase in the probability the CJEU rules in favor of the plaintiff. Lastly, *Net Observations* has a positive and statistically significant coefficient indicating that for each additional observation member states submitted to the Court in favor of the plaintiff for a given legal issue, the Court is about 1.9 percentage points more likely to support the plaintiff in a legal issue, complementing the primary result from Carrubba and Gabel's analysis. The magnitude of this coefficient is notably smaller than the magnitude of the coefficient

for *Home Net Observations* indicating that observations sent to a panel from the judges' appointing member states is more strongly correlated with the Court's decision-making than observations sent from other member states.

Empirical Approach (Hypothesis 5). Hypothesis 5 argues the relationship described in hypothesis 4 is stronger if the JR's member state sends an observation favoring a particular outcome. To analyze this hypothesis empirically, I create a variable indicating whether the JR of a case received an observation from their member state favoring the plaintiff or the defendent in a case (*JR Net Observations*). For example, the panel consisting of judges Strauss (Germany, JR), Donner (Netherlands), Lecourt (France), Mertens de Wilmars (Belgium), Trabucchi (Italy) heard the case *Firma Milchwerke H. Wöhrmann & Sohn KG v Hauptzollamt Bad Reichenhall* (CELEX number 61967CJ0007) that consisted of a single legal issue. Germany submitted an observation in favor of the defendant. Since Germany submitted an observation in favor of the defendant to a panel that contained the judge it appointed to the Court and their judge is the JR, *JR Net Observations* takes a value of -1.

I estimate a series of linear probability models to test hypothesis 5. My results are also robust to a logit specification. Formally, the OLS model for my analysis where i indexes the legal issue is:

$$\begin{aligned} \textit{CJEU Agrees with Plaintiff}_i = \beta_1 \cdot \textit{JR Net Observations} + \beta_2 \cdot \textit{Home Net Observations} + \\ \beta_3 \cdot \textit{JR Net Observations} \cdot \textit{Home Net Observations} + \delta \mathbf{X} + \psi + \lambda + \epsilon_{ipt} \end{aligned} \tag{3.2}$$

with $\delta \mathbf{X}_i$ a vector of the aforementioned control variables, ψ_p panel fixed-effects, λ_t year fixed-effects, and ϵ_{ipt} standard errors clustered by panel and year. A positive and statistically significant β_3 would be evidence in support of my hypothesis that panels are more likely to

Table 3.3: Hypothesis 5 Results

	CJEU Agrees with Plaintiff					
	(1) OLS	(2) OLS	(3) OLS	(4) Logit	(5) Logit	(6) Logit
JR Net Observations	0.0883**	0.0596	0.0072	0.4568**	0.3811	0.1732
	(0.0377)	(0.0448)	(0.0207)	(0.1782)	(0.2399)	(0.2713)
Home Net Observations	0.0755***	0.0830***	0.0300***	0.3497***	0.4734***	0.4325***
	(0.0129)	(0.0135)	(0.0072)	(0.0658)	(0.0781)	(0.1044)
JR Net Observations × Home Net Observations	0.0413***	0.0557***	0.0181**	0.2672***	0.4326***	0.3052**
	(0.0121)	(0.0201)	(0.0084)	(0.0683)	(0.0970)	(0.1274)
Commission Observation Plaintiff			0.1199***			1.109***
			(0.0185)			(0.1739)
Commission Observation Defendant			-0.1257***			-1.122***
			(0.0201)			(0.1654)
Commission is Plaintiff			0.1240**			0.9788*
			(0.0510)			(0.5092)
Commission is Defendant			-0.0261			-0.1990
			(0.0252)			(0.2505)
AG for Plaintiff			0.6285***			3.980***
			(0.0189)			(0.1568)
Government is Litigant			0.0326***			0.3198**
			(0.0112)			(0.1384)
Net Observations			0.0177**			0.2174**
			(0.0080)			(0.0961)
Infringement Case			0.0517			0.3720
			(0.0509)			(0.5455)
Annulment Case			0.0384			0.3025
			(0.0256)			(0.2709)
Failure to Act Case			-0.0113			-0.5197
			(0.0577)			(0.7957)
Preliminary Reference Case			0.1142***			0.9533***
			(0.0339)			(0.3066)
Staff Case			0.0070			0.0653
			(0.0339)			(0.3607)
Year fixed effects		✓	✓		✓	✓
Panel fixed effects		✓	✓		✓	✓
Pseudo R^2	0.01315	0.15026	0.72759	0.01487	0.08624	0.55874
Observations	7,080	7,080	7,080	7,080	6,389	6,389

Standard errors clustered by panel and year (909 clusters) are in parentheses *p<0.1; **p<0.05; ***p<0.01

be responsive to observations a judge's appointing member state sends to the panel when the judge is the JR.

Results (Hypothesis 5). Table 3.3 presents the results of this analysis. Providing evidence for hypothesis 5, across all model specifications the coefficient for *JR Net Observations*×*Home Net Observations* is positive and statistically significant. Model 1 presents the results without any controls or fixed effects ($\beta_3 = 0.041$, $p < 0.01$), model 2 demonstrates

that these results are robust to the inclusion of panel and year fixed effects ($\beta_3 = 0.056$, $p < 0.01$) and model 3 shows that these results are robust to the inclusion of relevant control variables ($\beta_3 = 0.018$, $p < 0.05$). For robustness, I run the specifications in models 1, 2, and 3 as a logit in models 4, 5, and 6. The OLS and logit results are similar.

Figure 3.2 addresses the substantive significance of this result by presenting predicted probabilities of the CJEU ruling in favor of the plaitiff on *Home Net Observations* for all three values of *JR Net Observations*. In this figure, the solid lines indicate the probability of a ruling in favor of the plaintiff when *JR Net Observations* $= -1$, 0, or 1 and the dashed lines indicate 95% confidence intervals around these probabilities. The values for *Home Net Observations* on the x-axis cover approximately four standard deviations on both sides of the mean. As the differences in the line's slopes indicate, the relationship between *Home Net Observations* and the probability the CJEU rules for the plaintiff is stronger when the *JR Net Observations* $= 1$ and weaker when *JR Net Observations* $= -1$ relative to when *JR Net Observations* $= 0$. Consider, for example, when *Home Net Observations* $= 3$, meaning three more judges on a panel received observations from their member states supporting a ruling in favor of the plaintiff than the defendant. If *JR Net Observations* $= 1$, or the the JR receives an observation from their member state favoring the plaintiff, the probability the panel will rule for the plaintiff is 94%. Alternatively if *JR Net Observations* -1, or the JR receives an observation from their member state favoring the defendant, this probability drops to 51%. This finding provides evidence that a judge receiving an observation from their member state is more likely to influence the outcome of a case when they are serving as the JR.

Empirical Approach (Hypothesis 6). Although the hypothesis 4 and 5 models provide evidence that a member state can affect the outcome of a case at the CJEU by sending an observation to a panel including the judge it appointed to the Court, these results cannot

distinguish the mechanism by which an observation affects a judge's decision-making. To test hypothesis 6 and isolate the mechanism of a judge's desire to retain their position on the Court from alternative mechanisms, I require a means to separate judges that are subject to reappointment from those that are not. A historical artifact of the CJEU provides such an opportunity. In the early years of the Court from 1952 to 1972, the European Coal and Steel Community (a precursor to today's EU) had only six member states. Each member state appointed one judge and one member state had the opportunity to appoint "one additional judge to prevent a tie. Van Kleffens (Netherlands) served for one term, followed by two Italian judges, Catalano and Trabucchi, who served until 1973" (Kenney 1999, 151). These additional judges were not subject to reappointment. After the accession of Denmark, Ireland, and the United Kingdom in 1973, the Court had an odd number of judges and did not require a member state to appoint an additional judge. However, following the accession of Greece in 1981, and continuing through the 1985 accessions of Spain and Portugal, the Court once again had an even number of judges until the 1995 enlargement that brought the EU to 15 members. From 1981 to 1995 judges Grévisse (France), Bahlmann (Germany), Diez de Valesco Vallejo (Spain), and La Pergola (Italy) served as the extra judge to the Court (Kenney 1999, 152).

I argue that since these extra judges to the Court were not subject to reappointment they serve as a relevant counterfactual to their colleagues who were subject to reappointment. Importantly, I assume that the extra judges were, similarly to their colleagues subject to reappointment, exposed to the alternative mechanisms through which observations could affect a judge's decision-making (e.g., persuasion, legal origin, ideology). This counterfactual, however, is not perfect. Although the aforementioned judges were not subject to reappointment, they may have had other reasons to act in the best interest of their government to obtain a better appointment domestically. Furthermore, following his term on the court as an extra judge, France appointed Grévisse to the court five years later. None of the other

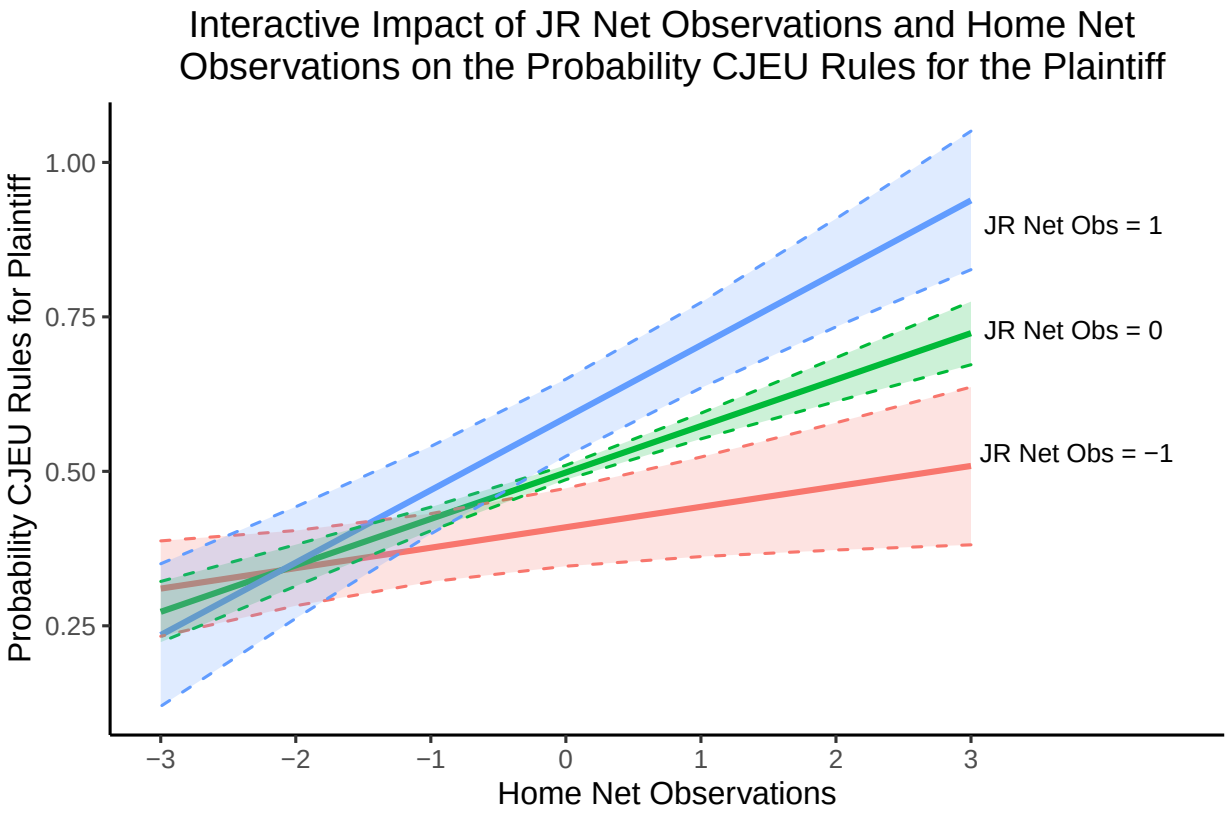

Figure 3.2: Based on the results of Table 3.3 model 1. Solid lines indicate the predicted probability the CJEU ruling for the plaintiff and the dashed lines indicate 95% confidence intervals. As the differences in the line's slopes indicate, the relationship between *Home Net Observations* and the probability the CJEU rules for the plaintiff is stronger when the *JR Net Obs* $= 1$ and weaker when *JR Net Obs* $= -1$.

extra judges went on to serve on the court after their short stint. While this measure has drawbacks, I argue that these judges relative to their counterparts subject to appointment were *less likely* to take career concerns into account while serving as an extra judge. At the very least, I expect that an observation from their appointer will be less likely to influence the behavior of their panel than an observation from the appointer of a judge subject to reappointment.

To analyze this hypothesis empirically, I separate *Home Net Observations* into two variables: *Regular Judge Net Observations* and *Extra Judge Net Observations*. *Regular Judge*

Net Observations takes positive values if member states that appointed a judge subject to reappointment on a panel hearing a case submit observations favoring the plaintiff and *Extra Judge Net Observations* takes positive values if member states that appointed a judge not subject to reappointment on a panel hearing a case submit observations favoring the plaintiff. For example, the panel consisting of judges Mackenzie Stuart (United Kingdom), Bosco (Italy), Rodriguez Iglesias (Spain), Koopmans (Netherlands), Bahlmann (Germany, extra judge), Joliét (Belgium), and O'Higgins (Ireland) heard the case *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (CELEX number 61986CJ0145). For the legal issue that begins with, as described by these data, "If Q2 is affirmative [...],"Germany submitted an observation in favor of the defendant and the UK submitted an observation in favor of the plaintiff. Since Germany submitted an observation in favor of the defendant to a panel that contained the extra judge it appointed to the Court, *Extra Judge Net Observations* takes a value of -1. Additionally, since the UK submitted an observation in favor of the plaintiff to a panel that contained the judge it appointed to the Court (and given that judge was subject to reappointment), *Regular Judge Net Observations* takes a value of 1.

I estimate a series of linear probability models to test hypothesis 6. My results are also robust to a logit specification. Formally, the primary OLS model for my analysis where i indexes the legal issue is:

$$\begin{aligned} \textit{CJEU Agrees with Plaintiff}_i = \beta_1 \cdot \textit{Regular Judge Net Observations} + \\ \beta_2 \cdot \textit{Extra Judge Net Observations} + \delta\mathbf{X} + \psi + \lambda + \epsilon_{ipt} \end{aligned} \tag{3.3}$$

with $\delta\mathbf{X}_i$ a vector of the aforementioned control variables, ψ_p panel fixed-effects, λ_t year fixed-effects, and ϵ_{ipt} standard errors clustered by panel and year. A positive and statistically significant β_1 in combination with a β_2 of smaller magnitude would be evidence in support of my hypothesis that panels containing a judge not subject to reappointment less likely to be responsive to observations the judge's appointing member state sends to the panel.

Table 3.4: Hypothesis 6 Results

	CJEU Agrees with Plaintiff					
	(1) OLS	(2) OLS	(3) OLS	(4) Logit	(5) Logit	(6) Logit
Regular Judge Net Observations	0.1464***	0.1676***	0.0580***	0.6037***	0.7932***	0.7119***
	(0.0185)	(0.0188)	(0.0129)	(0.0814)	(0.0952)	(0.1675)
Extra Judge Net Observations	0.0382	0.0043	0.0088	0.1643	0.0337	0.2121
	(0.0553)	(0.0557)	(0.0261)	(0.2434)	(0.2797)	(0.3096)
Commission Observation Plaintiff			0.1211***			1.136***
			(0.0186)			(0.1726)
Commission Observation Defendant			-0.1229***			-1.094***
			(0.0202)			(0.1634)
Commission is Plaintiff			0.1239**			0.9697*
			(0.0506)			(0.5070)
Commission is Defendant			-0.0256			-0.1986
			(0.0254)			(0.2526)
AG for Plaintiff			0.6281***			3.986***
			(0.0191)			(0.1589)
Government is Litigant			0.0309***			0.3224**
			(0.0111)			(0.1396)
Net Observations			0.0160**			0.2007**
			(0.0079)			(0.0974)
Infringement Case			0.0523			0.3668
			(0.0504)			(0.5442)
Annulment Case			0.0375			0.2838
			(0.0253)			(0.2683)
Failure to Act Case			-0.0088			-0.4614
			(0.0574)			(0.7904)
Preliminary Reference Case			0.1152***			0.9374***
			(0.0338)			(0.3067)
Staff Case			0.0081			0.0678
			(0.0341)			(0.3601)
Year fixed effects		✓	✓		✓	✓
Panel fixed effects		✓	✓		✓	✓
Pseudo R^2	0.01350	0.15326	0.72854	0.01422	0.08743	0.55934
Observations	7,080	7,080	7,080	7,080	6,389	6,389

Standard errors clustered by panel and year (909 clusters) are in parentheses *p<0.1; **p<0.05; ***p<0.01

Results (Hypothesis 6). Table 3.4 presents the results of this analysis. Providing evidence for hypothesis 6, across all model specifications the coefficient for *Regular Judge Net Observations* is positive, statistically significant, and of greater magnitude than the results for *Extra Judge Net Observations* – which is not statistically significant. Model 1 presents the results without any controls or fixed effects. For each additional observation favoring the plaintiff that a member state submits to a panel containing a judge it appointed, the probability that the panel rules in favor of the plaintiff increases by 14.6 percentage points ($p < 0.01$).

If the judge is an extra judge that is not subject to reappointment, this probability decreases to 3.8 percentage points and is not distinguishable from 0. Model 2 demonstrates that these results are robust to the inclusion of panel and year fixed effects ($\beta_1 = 0.168$, $p < 0.01$). Model 3 includes relevant control variables. The coefficient for *Regular Judge Net Observations* is positive ($\beta_1 = 0.058$) and statistically significant ($p < 0.01$), while the coefficient for *Extra Judge Net Observations* is positive ($\beta_2 = 0.009$) but not statistically significant. For robustness, I run the specifications in models 1, 2, and 3 as a logit in models 4, 5, and 6. The OLS and logit results are similar.

Comparing these results to those for hypothesis 4, across all model specifications the magnitude of the coefficient for *Regular Judge Net Observations* in table 3.4 is substantially greater than the coefficient for *Home Net Observations* in table 3.2, which is inclusive of observations member states sent to the extra judges. This difference provides evidence that judges subject to reappointment were more responsive to observations they received from their appointing member states than judges that were not subject to reappointment. The positive coefficients for *Extra Judge Net Observations* provide some descriptive evidence for the alternative mechanisms through which an observation a judge receives from their appointing member state may affect their behavior, as these coefficients have the expected positive sign. Nonetheless, these coefficients' lack of statistical significance may portend that the reappointment considerations driving a judge's behavior after receiving an observation from their appointing member state trumps the potential alternatives.

Conclusion

In this article I provide a theoretical account detailing how *per curiam* decisions may have adverse affects for the collegial decision-making process on courts. I argue that when a court does not publish judges' votes, a judge is unable to institutionally signal to their appointer

that they are a loyal judge *independently* from the other judges on their panel. When judges are subject to retention by different appointers, judges are willing to defer to their colleagues if one of their colleague's appointers has a vested interest in a case. I test this theory with an analysis of decisions at the Court of Justice of the European Union and find results consistent with my theory.

These results have implications for courts with judges subject to retention. I contribute to an extensive literature about how a judge's desire for retention affects their decision-making (e.g., Canes-Wrone, Clark and Kelly 2014; Epstein, Landes and Posner 2013; Helmke 2005). These studies typically leverage judges' ability to author separate opinions on a case as a means to adjudicate whether they adjust their opinions to appease their appointer. These empirical approaches, however, largely exclude courts – particularly civil law courts – that have a tradition of not publishing separate opinions on cases and, therefore, obfuscate any dissenting voices from the public view. My analysis fills this gap in the literature by providing evidence that appointers can influence the decision-making of their judges even though their judges' votes are secret. These findings challenge a largely theoretical scholarship arguing that appointers "can protect [their] judges' independence by minimizing judicial transparency or identifiability" (Dunoff and Pollack 2017, 238) and provides an avenue for scholars to empirically explore whether these findings hold across other contexts in which courts publish only *per curiam* opinions.

This article also has implications for courts that employ mixed-selection systems and international courts. Consider the literature on judges sitting on panels together that are accountable to different appointers (e.g., Posner and De Figueiredo 2005; Voeten 2008). These articles provide evidence that judges are likely to vote in favor of the interests of their appointers and, importantly, they study contexts in which judges' votes are publicly revealed. Theoretically, these articles broadly conceive of this mechanism as a bias that affects the behavior of individual judges and not its implications for the collegial decision-making

process. Although individual judges may be more likely to rule in favor of their appointer, a single judge's vote may be largely immaterial to the development of jurisprudence if they are not pivotal. My argument and results implicate how limiting the ability of judges to publicly signal their positions on a case can adversely affect the collegial decision-making process.

Furthermore, I contribute to the growing literature on decision-making on collegial courts (e.g., Boyd, Epstein and Martin 2010; Grossman et al. 2016; Hinkle, Nelson and Hazelton 2020; Kastellec 2013) and, in particular, on mixed-selection courts (e.g., Tiede 2020). None of the aforementioned articles evaluate courts that issue *per curiam* opinions and have judges that are beholden to different appointers. I theorize that judges, in order to maintain collegiality and to ensure reciprocity, have incentive to defer to their colleague when their colleague's appointer demonstrates a vested interest in a case. The mechanism underlying my empirical results, thus, may provide a fruitful avenue for scholars to explore how variations in judicial institutions may affect collegial decision-making on courts. Future research can aim to further distinguish empirically the mechanisms through which these effects occur on mixed-selection *per curiam* courts.

This article makes a series of contributions to the existing theoretical and empirical scholarship on the CJEU. First, I provide theoretical foundations and empirical evidence suggesting that the member states attempt to affect the decision-making of their judges sitting on the CJEU. To date, no other study has provided systematic evidence of member states' influence affecting the behavior of individual judges on the Court. Second, I contribute to a growing literature examining the behavior of individual judges on the CJEU and how it affects the Court as a whole (e.g., Cheruvu 2019; Frankenreiter 2017; Hermansen 2020; Malecki 2012; Wijtvliet and Dyevre 2021). Third, I examine a mechanism in addition to legislative override and noncompliance through which member states can affect the Court's decision-making. Scholars can build upon the existing literature on CJEU appointments

(e.g., Dumbrovsky, Petkova and Van Der Sluis 2014; Kenney 1998; Gill and Jensen 2020) and empirically analyze whether member states are affecting the Court's jurisprudence through the judges they appoint to the Court.

Lastly, this article heeds the call of Staton and Moore (2011) and draws upon the American, comparative, and international courts scholarship. By integrating insights from across the subfields, scholars can engage in more productive dialogue about the challenges courts face as institutions and produce novel theoretical and empirical implications that they can test across contexts. My leveraging of the literature on retention as well as the literature on collegial decision-making across contexts is illustrative of how researchers can build upon this rich scholarship across subfields for theoretical development. Future research can similarly benefit by learning from the extensive literature regarding the constraints judges' face across contexts to explain the behavior of judges who simply desire to retain their place on the judiciary.

Appendix A

How does Education affect Public Support for Courts

Table A.1: RD Treatment Estimates

	Dependent variable:	
	Trust in FCC	
	(1)	(2)
Estimate	0.115**	0.106***
	(0.025,0.206)	(0.005,0.072)
Mechanism	School Environment	School Curriculum
Observations	93	102

*p<0.1; **p<0.05; ***p<0.01
90 % confidence intervals under interference calculated from the `rdlocrand` package in `R` are in parentheses.

Table A.2: Difference-in-Difference-in-Differences Models 1974/75 Cohorts (School Environment)

	Dependent variable:			
	Trust in FCC			
	(1)	(2)	(3)	(4)
Cohort	0.016***	0.018***	0.016***	0.018***
	(0.0002)	(0.0002)	(0.0003)	(0.0002)
After May	−0.004***	−0.003***	−0.001	0.003
	(0.0004)	(0.0002)	(0.003)	(0.003)
East	−0.128***	−0.122***	−0.128***	−0.122***
	(0.0002)	(0.0002)	(0.0002)	(0.0001)
Birth Month			−0.001	−0.001**
			(0.0005)	(0.0005)
Cohort:After May	−0.026***	−0.033***	−0.026***	−0.033***
	(0.0005)	(0.0002)	(0.0002)	(0.0002)
Cohort:East	−0.007***	−0.019***	−0.007***	−0.018***
	(0.001)	(0.001)	(0.001)	(0.001)
After May:East	0.010***	0.008***	0.010***	0.008***
	(0.0002)	(0.0002)	(0.0001)	(0.0002)
After May:East:Cohort	0.057***	0.065***	0.057***	0.065***
	(0.001)	(0.0004)	(0.0005)	(0.001)
Survey-Year Fixed-Effects	Yes	Yes	Yes	Yes
Survey Weights	No	Yes	No	Yes
Observations	5,427	5,427	5,427	5,427
R^2	0.085	0.075	0.085	0.075

*p<0.1; **p<0.05; ***p<0.01
Standard errors calculated from 500 block bootstrap replications are in parentheses

Table A.3: Difference-in-Difference-in-Differences Models 1983/84 Cohorts (School Curriculum)

	Dependent variable:			
	Trust in FCC			
	(1)	(2)	(3)	(4)
Cohort	−0.035***	−0.036***	−0.035***	−0.037***
	(0.002)	(0.002)	(0.002)	(0.002)
After May	0.013*	0.013*	0.008	0.009
	(0.008)	(0.007)	(0.007)	(0.008)
East	−0.057***	−0.049***	−0.057***	−0.049***
	(0.0004)	(0.0003)	(0.0004)	(0.0004)
Birth Month			0.001	0.001
			(0.001)	(0.001)
Cohort:After May	−0.039***	−0.031***	−0.038***	−0.030***
	(0.001)	(0.001)	(0.001)	(0.001)
Cohort:East	0.018***	0.015***	0.018***	0.014***
	(0.001)	(0.001)	(0.002)	(0.002)
After May:East	0.006***	0.006***	0.006***	0.006***
	(0.002)	(0.002)	(0.0004)	(0.0004)
After May:East:Cohort	0.125***	0.121***	0.125***	0.120***
	(0.0005)	(0.0004)	(0.001)	(0.001)
Survey-Year Fixed-Effects	Yes	Yes	Yes	Yes
Survey Weights	No	Yes	No	Yes
Observations	1,110	1,110	1,110	1,110
R^2	0.024	0.020	0.024	0.020

*p<0.1; **p<0.05; ***p<0.01
Standard errors calculated from 500 block bootstrap replications are in parentheses

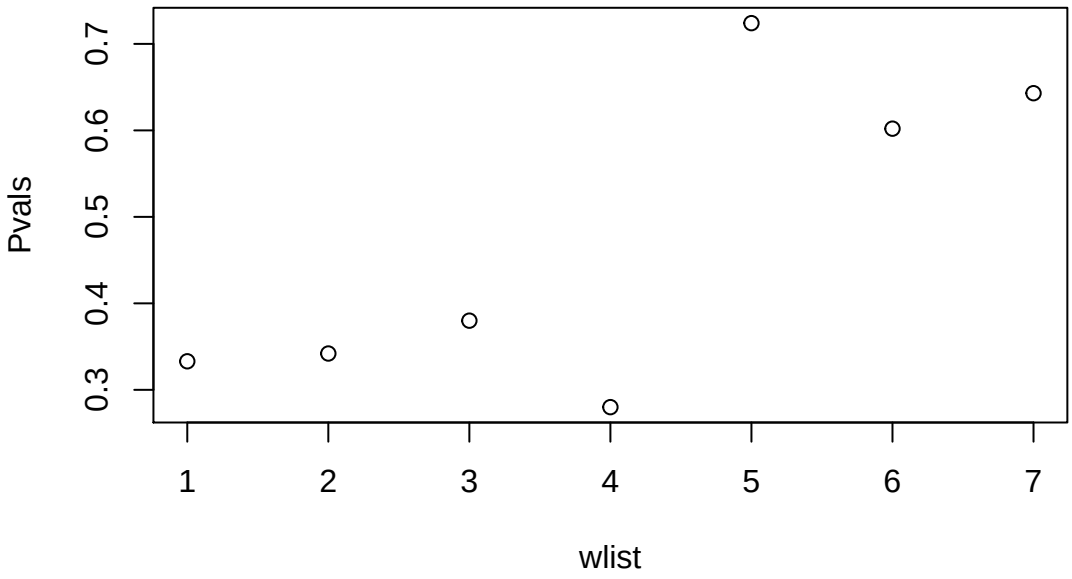

Figure A.1: This figure, produced by the `rdlocrand` package in `R`, plots the p-values for different bandwidths utilizing the covariates in figure A.2. The largest window in which the set of covariates is balanced is 7 months on each side of the cutoff, or, substantively, all of the available data.

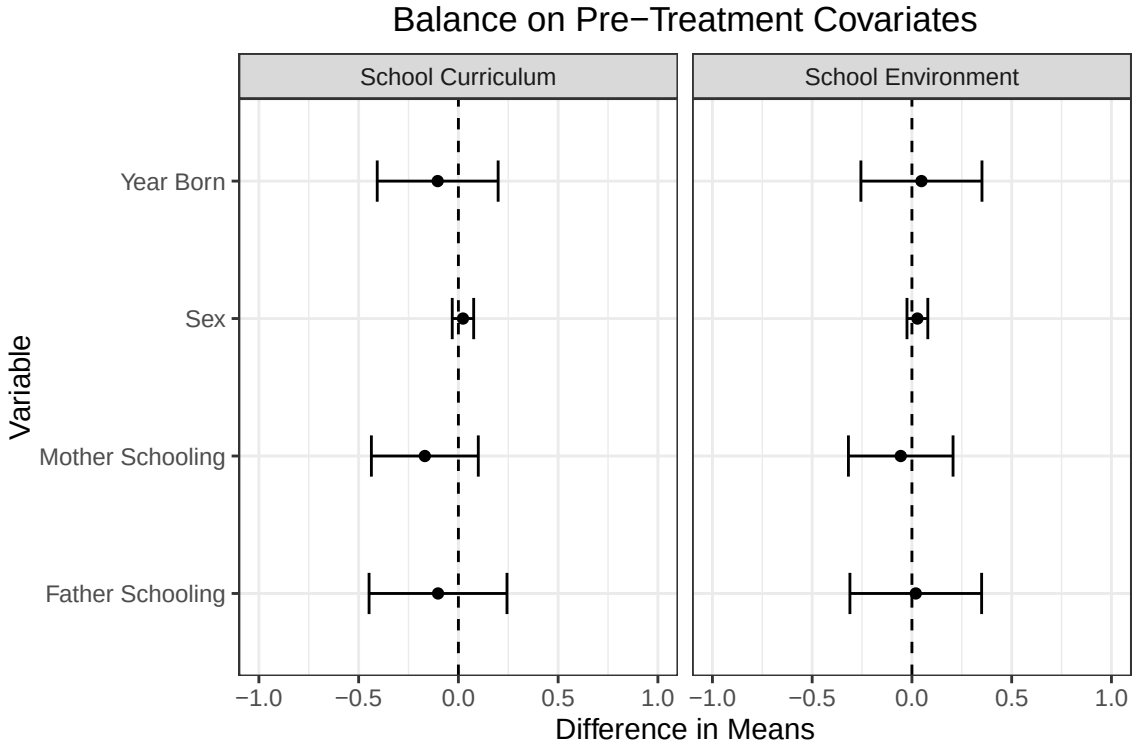

Figure A.2: This figure plots the covariate balance among the treatment (born June 1st or later among the affected cohorts) and control groups (born before June 1). The black dots indicate the difference in means among covariates and the error bars represent 95% confidence intervals. Statistically significant differences do not exist between the treatment and control groups.

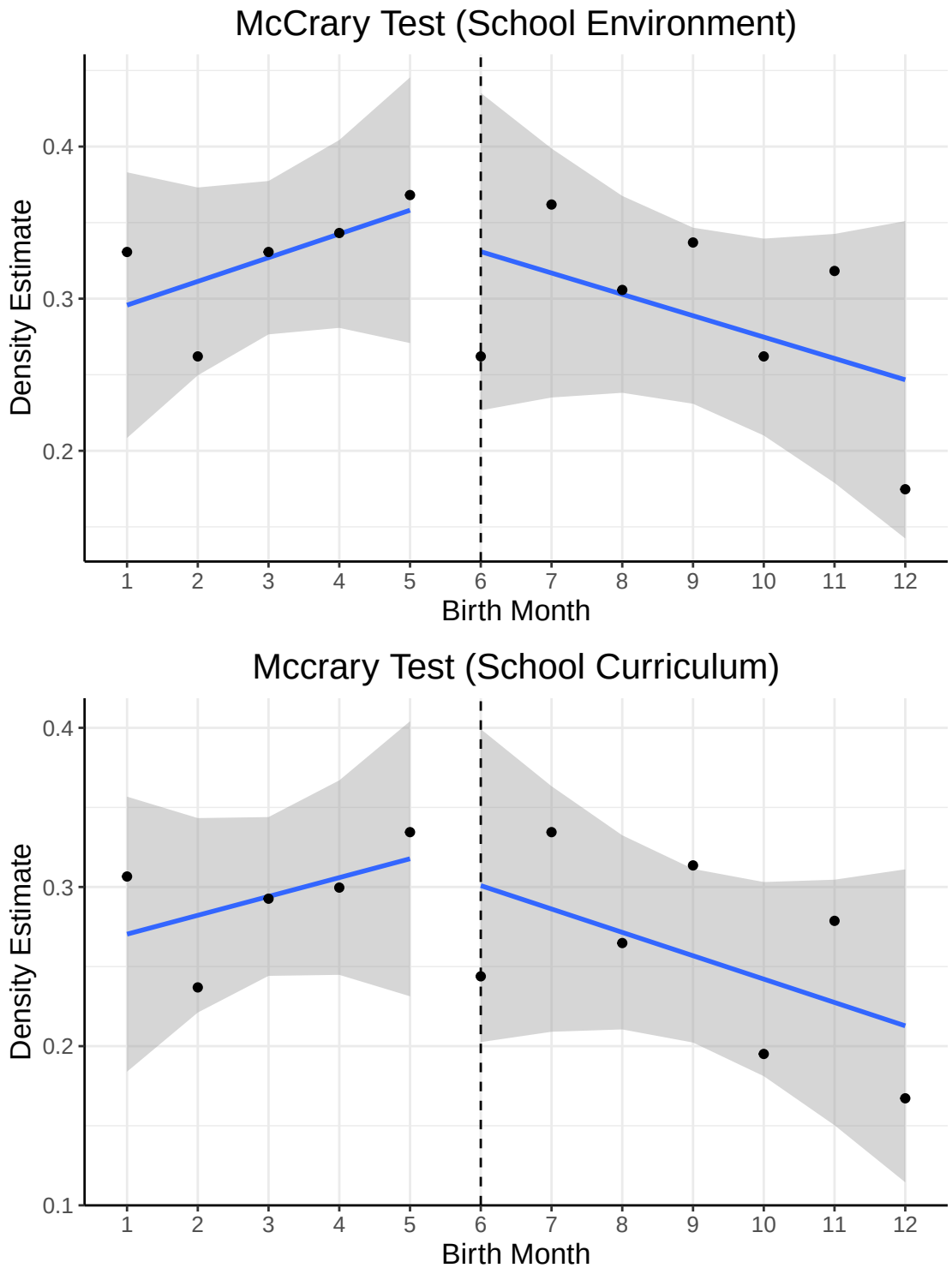

Figure A.3: This figure shows McCrary Tests for the running variable (birth month) for both the school environment and school curriculum data using the `rdd` package in `R`. The confidence intervals overlap substantially, casting doubt on any potential sorting around the cutoff.

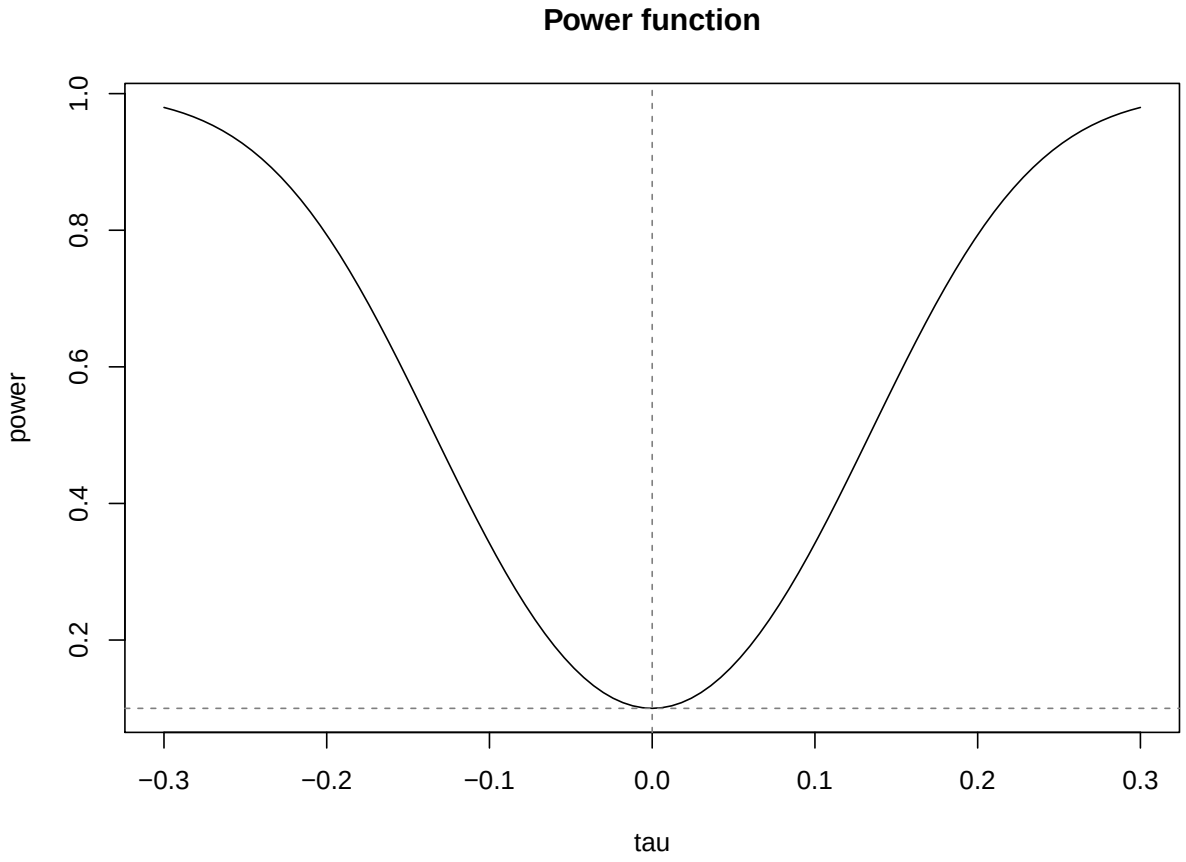

Figure A.4: This figure plots the power test as suggested by Cattaneo, Titiunik and Vazquez-Bare (2019) for the School Environment models. As demonstrated by the plot, it would require an effect size of .2 or a full standard deviation to observe an effect.

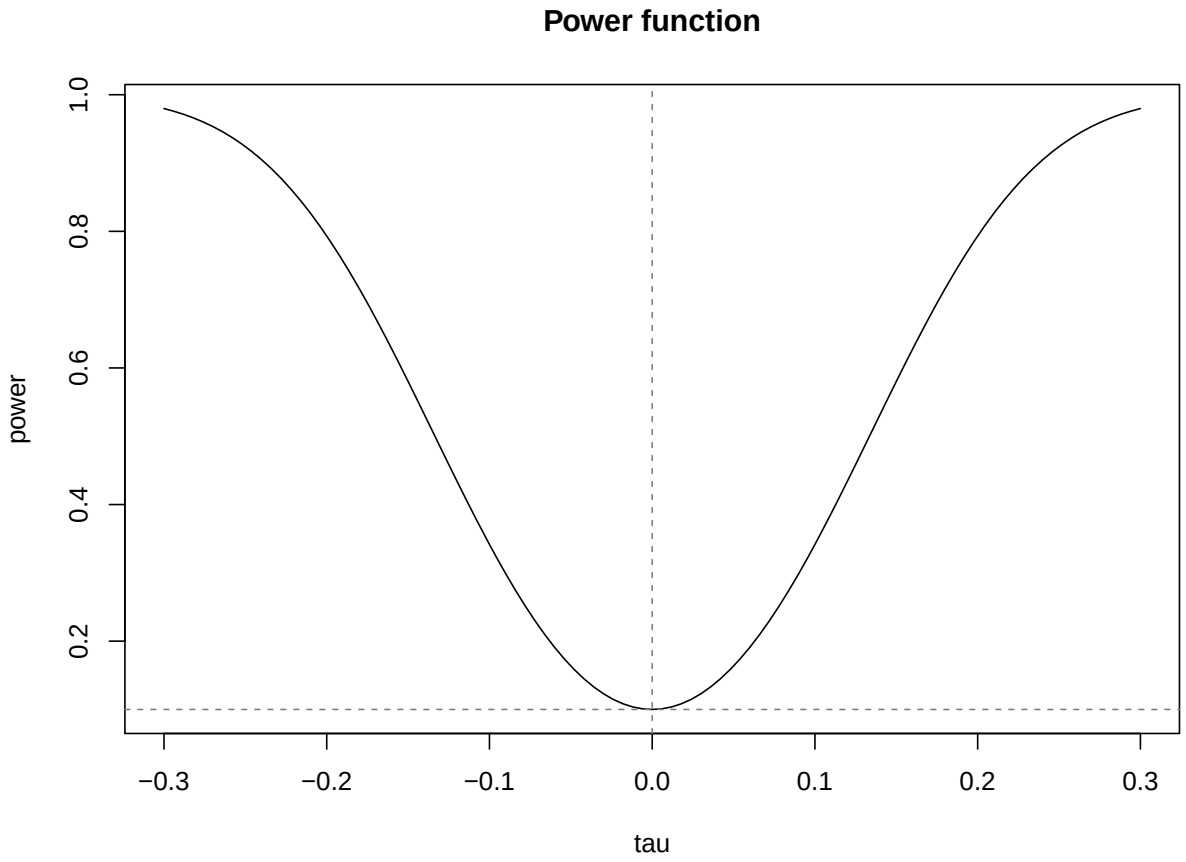

Figure A.5: This figure plots the power test as suggested by Cattaneo, Titiunik and Vazquez-Bare (2019) for the School Curriculum models. As demonstrated by the plot, it would require an effect size of .2 or a full standard deviation to observe an effect.

Appendix B

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

Table B.1: Model Results with member state controls

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

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

Appendix C

Does the Secret Ballot protect Judicial Independence? Evidence from the European Court of Justice

Table C.1: Robustness separating *Home Net Observations* in *Home Observation Plaintiff* and *Home Observation Defendant*

	Dependent variable:			
	CJEU Agrees with Plaintiff			
	(1)	(2)	(3)	(4)
Home Observation Plaintiff	0.140***	0.144***	0.037***	0.043***
	(0.016)	(0.015)	(0.009)	(0.010)
Home Observation Defendant	−0.053***	−0.048***	−0.029***	−0.020**
	(0.012)	(0.016)	(0.008)	(0.009)
Commission Observation Plaintiff			0.131***	0.117***
			(0.021)	(0.018)
Commission Observation Defendant			−0.132***	−0.129***
			(0.020)	(0.019)
Commission is Plaintiff			0.081*	0.123**
			(0.047)	(0.051)
Commission is Defendant			−0.035*	−0.027
			(0.020)	(0.025)
AG for Plaintiff			0.611***	0.628***
			(0.019)	(0.019)
Government is Litigant			0.027**	0.033***
			(0.012)	(0.011)
Net Observations			0.016**	0.018**
			(0.007)	(0.008)
Infringement Case			0.097**	0.052
			(0.041)	(0.052)
Annulment Case			0.050*	0.039
			(0.026)	(0.026)
Failure to Act Case			−0.052	−0.011
			(0.060)	(0.057)
Preliminary Reference Case			0.098***	0.113***
			(0.028)	(0.034)
Staff Case			0.010	0.005
			(0.028)	(0.034)
Panel Fixed Effects?	No	Yes	No	Yes
Year Fixed Effects?	No	Yes	No	Yes
Observations	7,080	7,080	7,080	7,080
R^2	0.022	0.198	0.582	0.652

Standard errors clustered by panel and year are in parentheses *p<0.1; **p<0.05; ***p<0.01

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