Public Awareness and the Behavior of Unpopular Courts

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Abstract

Scholars of the politics of constitutional review have increasingly pointed to public awareness as a critical condition for courts to effectively enforce their decisions. This research, however, has focused on judiciaries with public support. I consider the consequences of public awareness for the behavior of courts that lack public support. I contend that such courts are constrained by an aware public because it magnifies the incentive for elected officials to engage in political attacks against the judiciary. To develop my argument, I formalize an interaction between a government and an unpopular court engaging in constitutional review. The model yields three testable empirical implications for the consequence of public awareness for the behavior of a court lacking public support. An empirical analysis of infringement cases at the European Court of Justice (ECJ) from 1960 to 1999 supports the model’s predictions, suggesting that public awareness constrains courts that lack public support.

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An aware and informed public is widely viewed as critical for the quality of modern liberal democracies (e.g. Powell 2004). Recent scholarship, however, highlights how public awareness can, under certain circumstances, undermine the quality of democratic governance (e.g. Canes-Wrone, Herron and Shotts 2001; Prat 2005). Representatives can have an incentive to improve their electoral prospects by pandering to voters when decision-making is public (Stasavage 2007). Similarly, publicity can lead to posturing by government officials during bargaining processes (Stasavage 2004). Yet while scholars have recognized the potential drawbacks of public awareness in contexts such as international bargaining and bureaucratic decisionmaking, scholars of judicial politics have largely ignored the potentially deleterious consequences of public awareness for the effective exercise of judicial review.

This omission raises a puzzle. Recent scholarship recognizes how an aware public can create the conditions necessary for a judiciary to hold government officials accountable for breaches of their constitutional obligations (Vanberg 2001, 2005; Staton 2006, 2010; Carrubba and Zorn 2010). Courts must rely on political actors for the implementation of judicial decisions, even when carrying out the court’s demands is contrary to the interest of the actor directed to implement the decision. These works build off of Vanberg; Vanberg’s (2001; 2005) examination of the German Constitutional Court, in which he argues that an aware public is critical for compelling a government to comply with such adverse decisions. Vanberg’s key insight is that highlights how public awareness can empower a judiciary that has the public’s support. It is not clear, however, why and under what conditions an aware public constrains the ability of a judiciary to effectively exercise judicial review. The consequences of such a relationship for judicial decisionmaking are even further unclear.

I argue that public awareness constrains judiciaries when they lack public support. This, I contend, is the result of two conditions created by an attentive public. First, public awareness strengthens the incentive for government officials to seek electoral support by engaging in noncompliance with adverse decisions. Second, public awareness enhances the damage successful noncompliance does to a court’s attempts to build legitimacy. Using a
formalization of an interaction between a government and a court lacking public support, I develop a theoretical account of when and how public awareness influences an unpopular court’s decisionmaking. The formalization yields a set of empirical implications, which I test using data on infringement cases at the European Court of Justice (ECJ) from 1960 to 1999. The analysis suggests that public awareness profoundly influences the behavior of courts that lack public support.

“Unpopular Courts” and the Politics of Judicial Review

A public’s willingness to support a judiciary and accept its decisions occupies a central place in many studies on the politics of judicial review (e.g. Gibson, Caldeira and Baird 1998; Vanberg 2005). These studies focus on diffuse public support, that is citizens commitment to the institutional integrity of the judiciary (Caldeira and Gibson 1992). When a judiciary enjoys this support, the threat of electoral punishment compels elected officials to comply with decisions they would otherwise prefer to defy. When a court does not have the public’s support, however, its ability to effectively exercise judicial review is constrained by the credible threat of noncompliance. That is, “unpopular courts” cannot rely on the public to provide an electoral threat to compel government officials to comply with adverse decisions.

Unpopular courts are not, however, entirely incapable of effectively holding government officials accountable for breaching their legal obligations. Courts, even those lacking public support, can obtain compliance when they face a favorable arrangement of competing political interests. When the preferences of the other political institutions are fragmented, it is difficult for political actors to coordinate on a response to court rulings (Andrews and Montinola 2004). That is, courts can effectively exercise review when the other institutions in the political system coordinate on how to defy the court’s decision. In federal and international political systems, courts can obtain compliance when member governments credibly threaten to punish other members for noncompliance (Carrubba
and Gabel 2015).

The ability of an unpopular court to rely on such an enforcement mechanism, however, is undermined by an aware public. Citizens’ discontent with a court creates an incentive for elected officials to engage in position taking against the court (Clark 2009). This incentive is magnified by case salience; the more a case is in the public spotlight, the more a government stands to gain from rebuking the court. Furthermore, public awareness exacerbates the costs incurred by the court when the government successfully defies an adverse decision. Courts, recognizing that public support is key for becoming independent institutions, generally seek to develop the public’s trust and support. The ability of a court to do so, however, is undermined when citizens observe the government successfully defying the court’s decisions (Carrubba 2009; ?).

In what follows, I construct a formal model of an interaction between a government and an unpopular court based on the above discussion. The modeling exercise clarifies the complex strategic environment in which courts and governments operate. By specifying the actors, their preferences, and the available actions, the model logically and transparently derives empirically testable predictions about the choices each actor will make given her beliefs about what the other actor will do. Ultimately, these predictions serve to identify implications that can provide empirical support for the theoretical account.

A Model of Judicial Review by an Unpopular Court

Following the example of recent literature on the relationship between public awareness and judicial behavior (e.g. Vanberg 2001, 2005; Staton 2006, 2010), I employ a game of incomplete and imperfect information. There are three players: nature, a government ($G$), and a court with the power of constitutional review ($C$). I assume the court and government have divergent policy preferences; the government would like to have its policy upheld rather than overturned, while the court would like to veto the challenged law rather than uphold it. I further assume that the court is held in low public esteem such that voters will reward their elected officials for refusing to comply when the court
rules a statute unconstitutional.

The game begins with two independent moves by nature. First, nature chooses whether or not the case will garner the public’s attention. Second, nature determines whether or not a third party political institution will punish the government if it engages in noncompliance. After nature makes these moves, the government decides whether or not to legislate. If the government does not legislate, the game ends. If the government does legislate, the court then decides whether to uphold the statute or strike it down as unconstitutional. If the court upholds, the game ends. If the court strikes down the statute, the government either evades or complies with the decision. To summarize:

1. Nature chooses whether the case will garner public attention ($PA$) or not ($\sim PA$) and whether a third party political institution will punish the government for noncompliance ($T$) or not ($\sim T$).
2. Government chooses to legislate ($L$) or not ($\sim L$).
3. Court chooses to veto ($V$) or uphold ($\sim V$) the challenged law. If the court chooses $\sim V$, the game ends.
4. If the court vetoes, the government chooses to evade ($E$) or comply ($\sim E$).
5. Game ends, payoffs are realized.

The incomplete information in the game results from the players’ uncertainty over nature’s choices. Neither the court nor the government know with certainty whether or not the public will be aware of the court’s decision. Rather, both players have a common prior belief over the likelihood of public awareness. This belief is captured by the parameter $p \in (0, 1)$. Similarly, neither player is certain about whether a third party political institution will punish the government for noncompliance. Both players do, however, have a common prior belief over the probability of punishment. This belief is represented by the parameter $q \in (0, 1)$.

I now turn to the utility functions of the players. The court’s utility function is composed of two parameters, a policy component $A$ and an aversion to publicly observed
noncompliance component $I$. The policy component captures how much importance the
court places on the case. Thus, an increase in $A$ indicates an increase in the importance
of a case to the court. I assume the court places some value on all cases ($A > 0$). Import-
antly, the court receives $A$ if it strikes down the statute and obtains compliance, either
through enforcement by a third party institution or on the government’s own volition. The
second parameter captures the harm to the court’s public reputation if the government
publicly engages in successful noncompliance. The court incurs this cost if the govern-
ment successfully engages in noncompliance and the public is aware of the outcome.\footnote{Formally, the path of play for this outcome is: $PA, \sim T, V, E$.} To
summarize, the court’s utility function is:

$$EU_C = V[A(q) - R(p)(1 - q)]$$

The government’s utility function has four components. The value the government
places on the challenged policy is captured by $\alpha$, where $\alpha > 0$. This assumes that every
policy has some value to the government. The government gains $\alpha$ if either the court up-
holds or the government successfully evades a judicial veto. The second component is the
electoral benefit of pandering to voters’ disdain for the court by engaging in noncompli-
ance. The government reaps this benefit whenever it engages in noncompliance observed
by the public, regardless of whether or not a third party institution punishes. The intu-
ition is that voters will reward the government for standing up to the unpopular court,
even if the government is punished by an external actor for doing so. This is captured
in the model by the parameter $\beta$, where $\beta > 0$. The third component is cost incurred
by the government when a third party political institution punishes noncompliance. The
government pays this cost if it engages in noncompliance and is subsequently punished by
a third party political institution. This cost is captured in the model by the parameter
$\kappa$. Finally, the fourth component is the cost paid by the government to legislate. This
parameter, $\epsilon$, represents the opportunity cost associated with the legislative process.  To summarize, the utility function of the government is:

$$EU_G = L[\alpha(E)(1 - q) + \beta(E)(p) - \kappa(E)(q) - \epsilon]$$

**Results and Interpretation**

The solution concept for the game is perfect Bayesian equilibria (PBE). I limit the analysis to pure strategies. To simplify the exposition and interpretation of the results, I define several thresholds that dictate the players’ strategies. Each threshold specifies the quantity above or below which a given actor’s beliefs must be in order for that actor to take a certain action. In total, there are six such thresholds. I present them according to the game’s timing.

**Definition 1:** Define the “Public Legislating Threshold” as:

$$p^*_{G(L)} \equiv \frac{\kappa q + \alpha q - \alpha + \epsilon}{\beta}$$

**Definition 2:** Define the “Punishable Legislating Threshold” as:

$$q^*_{G(L)} \equiv \frac{\beta p + \alpha - \epsilon}{\kappa + \alpha}$$

The first two thresholds identify the conditions that must obtain for the government to legislate. In the “Public Legislating Threshold”, the government does not legislate if its belief about the probability of public awareness ($p$) does not surpass the threshold quantity. To see the intuition behind this threshold, consider the tradeoffs faced by the government at the legislative stage. Legislating provides the government with policy benefits ($\alpha$) as well as the potential benefit of engaging in public noncompliance ($\beta$), but at the cost of potential punishment ($\kappa$) and legislating ($\epsilon$). If the government’s belief about the likelihood of public awareness is not sufficiently high, the benefit of noncompliance decreases, making legislating a less attractive strategy. Formally, $p$ must

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$^2$Both $\kappa$ and $\epsilon$ are greater than 0.
be greater than the threshold for the government to legislate. I denote this threshold as $p^*_{G(L)}$. The second threshold, the “Punishable Legislating Threshold”, shows that the government does not legislate if it believes the probability of punishment is high. The intuition for this is straightforward: legislating becomes an increasingly costly strategy as the likelihood increases that the statute will be struck down and the government will be forced into compliance by a third party institution. Formally, the government will legislate only if $q$ is below the threshold. I denote this threshold as $q^*_{G(L)}$.

**Definition 3:** Define the “Public Judicial Review Threshold” as:

$$p^*_{C(V)} \equiv \frac{Aq}{R-Rq}$$

**Definition 4:** Define the “Supported Judicial Review Threshold” as:

$$q^*_{C(V)} \equiv \frac{R\rho}{R\rho+A}$$

The third and fourth thresholds define the court’s decision of whether or not to strike down the challenged statute. The “Public Judicial Review Threshold” is the cut point at which public awareness becomes sufficiently unlikely for the court to veto and risk the public observing successful noncompliance. Thus, $p$ must be less than this threshold for the court to veto. I denote this threshold as $p^*_{C(V)}$. The “Supported Judicial Review Threshold” speaks to the court’s reliance on third party institutions for enforcement of decisions. The court will only strike down the government’s statute if the court believes there to be a sufficiently high probability that noncompliance will be punished. Formally, $q$ must be greater than this threshold for the court to veto. I denote this threshold as $q^*_{C(V)}$.

**Definition 5:** Define the “Public Evasion Threshold” as:

$$p^*_{G(E)} \equiv \frac{\kappa q+aq-\alpha}{\beta}$$

**Definition 6:** Define the “Punished Noncompliance Threshold” as:

$$q^*_{G(E)} \equiv \frac{\beta p+\alpha}{\kappa+\alpha}$$
Finally, the fifth and sixth thresholds specify the necessary conditions for the government to engage in noncompliance. The “Public Evasion Threshold” defines the cut point above which \( p \) must be for the government to engage in noncompliance. Similarly, the “Punished Noncompliance Threshold” defines the quantity that must be less than \( q \) in order for the government to evade the court’s decision. Since the model assumes that the court prefers to veto the statute, these thresholds are simply subsets of the legislative thresholds defined above. That is, these thresholds are always met if the legislative threshold corresponding legislative threshold is met. The intuition for this result is that the government will only legislate if it believes it can successfully evade a judicial veto or if the court will uphold. Consequently, these thresholds will not play a central role in interpreting the equilibria. That said, they identify the bounds of the government’s actions; if one of these thresholds is not met, then the equilibrium strategy for the government is always to not legislate, thus ending the game.

The model predicts five possible equilibrium interactions. In discussing the equilibria, I group them into three distinct types. The proofs of the equilibria are left to the appendix.\(^3\)

**Proposition 1 (“Deferential Government”):**

**Equilibrium A:** For \( p < p^*_G(E) \) or \( q > q^*_G(E) \), the following strategy profile constitutes a PBE:

**Government:** \( S_G = \{\sim L, \sim E\} \)

**Court:** \( S_C = \{V\} \)

**Equilibrium B:** For \( p^*_G(E) < p < p^*_G(L) \) and \( q^*_C(V) < q < q^*_G(E) \), or \( p > p^*_G(E) \) and \( q^*_G(E) < q < q^*_G(L) \), the following strategy profile constitutes a PBE:

**Government:** \( S_G = \{\sim L, E\} \)

\(^3\)Note that when multiple conditions must be met for an equilibrium to obtain, the conditions are linked by “and”, while “or” denotes alternative configurations of conditions that yield the same equilibrium strategy profile.
**Court:** $S_C = \{V\}$

**Equilibrium C:** For $p^*_G(E) < p < p^*_G(L)$ and $q < q^*_C(V)$, the following strategy profile constitutes a PBE:

**Government:** $S_G = \{\sim L, E\}$

**Court:** $S_C = \{\sim V\}$

Proposition 1 characterizes a “deferential government” equilibrium. In these equilibria, the legislature, following one of three possible paths of play, does not legislate. Consider equilibrium A first. In this equilibrium, the court will veto the statute but one of the government’s evasion thresholds is not met. As the government will only legislate if conditions are such that evasion is a best response to a judicial veto, the government prefers to forego legislating. Substantively, this equilibrium characterizes instances where the government does not legislate because it expects to be overturned by the court and then unable to successfully evade the decision. Facing such a scenario, the government is worse off incurring the cost of legislating, and therefore does not legislate. Equilibrium B characterizes interactions when the court will veto legislation and the government will evade the decision. The government, however, does not legislate because the probability of public awareness is not high enough to make a conflict with the court worthwhile and the probability of punishment is too high to offset the cost of legislating. In other words, the government expects to face an adverse decision that can be successfully evaded, but the benefits of doing so are insufficient to offset the costs and risks of doing so. In equilibrium C the court’s supported judicial review threshold is not met, meaning that the court will not strike the law down if the government legislates. However, the government’s public legislating threshold is not met either, as the likelihood of public awareness is too low to create the electoral incentive necessary to offset the opportunity cost of legislating. As a result, the government decides not to legislate even though the law would be upheld by the court.
Proposition 2 ("Deferential Judiciary"):

Equilibrium D: For $q < q^*_{C(V)}$ and $p^*_{G(L)} < p < p^*_{C(V)}$ the following strategy profile constitutes a PBE:

Government: $S_G = \{L, E\}$

Court: $S_C = \{\sim V\}$

Proposition 2 characterizes a “deferential judiciary” equilibrium. In this equilibrium, the government legislates and is prepared to engage in noncompliance, but the court opts to uphold the statute in order to avoid a confrontation with the government. The court upholds because it believes that the probability of third party punishment for noncompliance is low. Formally, the court’s supported judicial review threshold is not met, making upholding the court’s best response. The likelihood of public awareness, however, is greater than the government’s public legislating threshold, making legislating and subsequent evasion of an adverse ruling the government’s optimal strategy. As a result, the government legislates and the court, lacking the necessary support to overcome the credible threat of noncompliance, upholds the statute.

Proposition 2a ("Publicly Deferential Judiciary"):

Equilibrium E: For $q < q^*_{G(L)}$ and $p > p^*_{C(V)}$ the following strategy profile constitutes a PBE:

Government: $S_G = \{L, E\}$

Court: $S_C = \{\sim V\}$

Proposition 2a characterizes a “publicly deferential judiciary” equilibrium. In this equilibrium, the government legislates and evades the court’s decision. The court, however, upholds rather than veto as a result of its belief that a third party institution will not punish noncompliance and the public will observe the government’s noncompliance. The high probability of public awareness differentiates this equilibrium from the deferential judiciary equilibrium. Here, the players’ belief about the likelihood of public awareness is
greater than both the court’s public legislating threshold and the government’s public legis-
slating threshold. Faced with the threat of the public observing noncompliance and thus
causing harm to the court’s public image, the court chooses to uphold the statute. Import-
antly, the court upholds even when the likelihood of a third party institution punishing
noncompliance would embolden the court to strike the statute down as unconstitutional
under less public conditions.

Proposition 3 (“Executive-Judicial Conflict”):

Equilibrium F: For $q^*_C(V) < q < q^*_G(E)$ and $p^*_G(L) < p < p^*_C(V)$, the following strategy
profile constitutes a PBE:

Government: $S_G = \{L, E\}$

Court: $S_C = \{V\}$

Proposition 3 characterizes an “executive-judicial conflict” equilibrium. In this equi-
librium, the government legisitates because the likelihood of public awareness is sufficiently
high to offset the cost of legislating. The court, buoyed by its belief that a third party in-
stitution will punish noncompliance, strikes down the legislation as unconstitutional. The
government responds by engaging in noncompliance, however, as it believes the public
will observe the case and thus reward noncompliance. For this equilibrium to obtain, the
court must believe there is both a sufficiently high probability that the government will
be punished for noncompliance and low probability of public awareness. Additionally, the
government’s public legislating threshold must be met. If this is the case, the government
will pass a bill and evade the court’s decision to annul the statute. Observationally in
this equilibrium, the court rules against the government because it expects a third party
institution to punish noncompliance. The government, however, expects the likelihood
of public awareness and its accompanying electoral benefits to offset the potential cost
of punishment. As a result, both player pursue their most favored outcome even though
sometimes evasion will be punished and at other times it rewarded.

Figure 1 provides a graphical representation of the equilibria when the court’s public
judicial review threshold \( (p_{C(V)}^*) \) is greater than the government’s public legislating threshold \( (p_{G(L)}^*) \). When \( p \) is less than \( p_{G(L)}^* \), the model predicts the deferential government equilibrium regardless of \( q \). Conversely, if \( p \) is greater than \( p_{C(V)}^* \) the model predicts the publicly deferential judiciary equilibrium, even if the court’s supported judicial review threshold is met. When \( p \) falls between the public judicial review and public legislating threshold thresholds, the equilibrium predicted by the model depends on whether or not the probability of third party punishment \( (q) \) meets the court’s supported judicial review threshold \( (q_{C(V)}^*) \). When \( q \) meets the threshold, the model predicts the executive-judicial conflict equilibrium. If this threshold is not met, however, the judicial deference equilibrium is expected.

Analysis of the results produces several implications for the interactions between constitutional courts and governments. I organize the discussion around three observations.

**Observation 1:** The court is less likely to rule against the government as the likelihood of public awareness increases.

Formally, as \( p \) increases, the court’s supported judicial review threshold increases and the more likely \( p \) is to be greater than the court’s public judicial review threshold. That is, the conditions necessary for the executive-judicial conflict equilibrium to obtain become more stringent as the likelihood of public awareness increases. Substantively, this means that the court is more constrained in cases likely to garner public attention than those unlikely to place the court in the public spotlight. This dynamic is apparent from Figure 1. When the likelihood of public awareness \( (p) \) is low, the court does not need to strike down the statute because the government does not legislate (deferential government equilibrium). As \( p \) increases, however, the government becomes willing to both legislate and evade an adverse decision. When \( p \) is between the government’s public legislating threshold and the court’s public judicial review threshold, the court only rules against the government when the probability of third party enforcement of the decision \( (q) \) surpasses

\[ 4 \text{Formally, the figure presents equilibrium predictions when } p > p_{G(E)}^*, q < q_{G(E)}^*, \text{ and } q_{C(V)}^* < q_{G(L)}^*. \]
the court’s supported judicial review threshold. As \( p \) becomes increasingly high, however, the publicly deferential judiciary obtains and the court upholds in order to avoid the cost of being publicly defied.

**Observation 2:** As the likelihood of public awareness increases, the court’s decisionmaking is decreasingly influenced by the likelihood of third party political institutions punishing noncompliance.

Conditional on the government legislating, increases in \( p \) shift the court’s strategy from being determined by \( q \) to being exclusively deferential. This dynamic is most easily related through Figure 1. When \( p \) is less than the court’s public judicial review threshold, the court’s strategy is determined by its belief about the likelihood of a third party institution punishing the government for noncompliance. One of two equilibria obtain: the executive-judicial conflict equilibrium or the deferential judiciary equilibrium. While the government’s strategy is identical in these two equilibria, the court’s decision is determined by whether or not \( q \) meets the supported judicial review threshold. If \( q \) is below the threshold, the court upholds and the deferential judiciary equilibrium obtains. If, however, \( q \) meets the threshold, the court strikes the statute down. This dynamic, however, does not hold when \( p \) increases beyond the court’s public judicial review threshold. Once \( p \) increases beyond this level, the publicly deferential judiciary equilibrium obtains and the court always upholds, regardless of \( q \). This makes intuitive sense since increasing the likelihood of public awareness weakens the court’s position vis-a-vis the legislature.

**Observation 3:** As the likelihood of public awareness increases, the court is increasingly constrained by the cost of publicly observed noncompliance.

As \( p \) increases, the public judicial review threshold is more likely to be surpassed. In order for the executive-judicial conflict equilibrium to obtain as \( p \) increases, the value of the threshold must similarly increase. This occurs when the cost of publicly observed noncompliance \((R)\) decreases.\(^5\) Substantively, this means that as the likelihood of public

\[\frac{\partial V^{(V)}}{\partial R} = \frac{-R + Rq}{(R - Rq)^2} < 0\]
awareness increases, the court will become less likely to overturn cases when doing so will most harm the court’s attempts to build public trust. Putting it differently, public awareness leads the court to rule against the government more selectively, specifically with respect to how it expects the public to react to such a decision.

Based on this analysis, the model suggests the following three empirical hypothesis:

**Hypothesis 1:** As the likelihood of public awareness of the decision increases, a court lacking public support is less likely to rule against a government.

**Hypothesis 2:** As the likelihood of public awareness increases, the threat of third party institutions punishing noncompliance has a decreasing impact on the decisionmaking of a court lacking public support.

**Hypothesis 3:** As the likelihood of public awareness increases, a court lacking public support is more likely to rule in a manner that minimizes the cost of publicly observed noncompliance.

**Empirical Application: The European Court of Justice**

To test these hypotheses, I examine the European Court of Justice (ECJ). The ECJ, the European Union’s highest judicial body, adjudicates disputes over the interpretation and application of EU law. The ECJ’s jurisdiction and procedures allow for greater legal integration and interactions between member state and European political and judicial institutions. As such, the ECJ occupies a prominent place in the institutional structure of the EU and contributes to the overall performance of the EU.

There are four key aspects of the ECJ that make it an appropriate case for testing the theoretical model’s empirical implications. First, the ECJ has the opportunity and preference to rule against the interests of EU member states. With its wide jurisdiction

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6The 2009 Treaty of Lisbon changed the official name of the ECJ to the Court of Justice. However, since the Court was known as the ECJ for the time period considered here and is referred to as such in the relevant literature, I will refer the Court as the ECJ.
and the variety of sources from which cases can brought, the ECJ finds itself regularly making decisions on issues of importance to member state governments. In particular, the ability of the European Commission to bring a direct action against member states for failing to fulfill their treaty obligations presents the ECJ with a large number of cases where member state interests are at stake. Consequently, the ECJ has the opportunity to rule against the interests of member states in a considerable proportion of its caseload. Furthermore, differences between the Court’s preferred policy outcomes and the preferences of member governments approximate the model’s assumption that the court prefers to strike down the challenged statute. Specifically, the ECJ tends to interpret EU law in a manner that expands integration and favors the extension of EU law over national laws (e.g. Alter 2001; Carrubba and Gabel 2015).

Second, the ECJ faces the possibility of noncompliance by member states (Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015; Panke 2010). With the opportunity to rule against the interests of member states comes the risk that member states will engage in noncompliance. The ECJ faces political constraints resulting from the institutional structure of the Court and the EU. Lacking the capacity to directly implement its decisions, the ECJ is reliant on the member states themselves for implementation. Such reliance can be problematic for the ECJ, particularly when compliance requires a member state to act contrary to its own interests. This problem is not lost on the ECJ; scholars have provided compelling theoretical accounts and empirical evidence of the influence political constraints have on ECJ rulings (e.g. Carrubba 2005; Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015; Garrett 1995; Panke 2010).

Third, the ECJ has not historically enjoyed a high level of public support (Gibson and Caldeira 1995; Caldeira and Gibson 1995; Gibson and Caldeira 1998). Concerns of a “democratic deficit” have plagued the institutions of the European Union and its predecessors for much their history, leaving many EU citizens suspicious, or at least unsupportive, of many European institutions. This strained relationship between EU citizens and their institutions is particularly problematic for the ECJ, as it leaves the
Court without the public support necessary for voters to effectively compel member state
governments to comply with ECJ decisions. In their study of public support for the ECJ,
Gibson and Caldeira (1995) conclude that “not many citizens of the EU are willing to
accept a Court [ECJ] decision to which they object”, going on to note that such a lack of
support raises serious concerns over the ECJ’s ability to obtain compliance (483). Under
such conditions, the Court appears to face not only an unsupportive public, but also a
public with a tendency to support its respective member state government rather than
the ECJ.

Fourth, the ECJ can obtain compliance as a result of inter-institutional politics. Carr-
rubba and Gabel (2015) model the EU legal system as a prisoners dilemma in which
member states have an incentive to shirk from their treaty obligations. Compliance with
EU law is costly, as it often requires member states to enact policies disliked by domes-
tic interests. However, the threat of sanctioning by third-party member states, that is
member states not actively involved in the litigation, can compel compliance (see also
Carrubba 2005). As the number and strength of member states willing to punish non-
compliance increases, the ECJ can increasingly expect compliance. When this condition
does not hold, however, the ECJ cannot rely on such pressure to obtain compliance.
Empirical and theoretical work on the relationship between ECJ decisionmaking and the
preferences of nonlitigating member states supports this account (Carrubba, Gabel and
Hankla 2008; Carrubba and Gabel 2015), highlighting the ECJ’s capacity to, at times,
effectively exert its authority despite lacking broad public support.

In addition to the ECJ fitting the conditions and assumptions specified in the model,
there is reason to believe that the account presented here comports with the ECJ’s behav-
ior. Scholars have observed that the Court has typically avoided public attention. Gibson
and Caldeira (1998), for example, comment that the ECJ has been “largely sheltered from
close public scrutiny” for much of its history, allowing the Court to issue decisions outside
of the political limelight (72). Similarly, Vanberg (2001) comments that the ECJ’s deci-
sions tend to attract little media attention, while Dehousse (1998) notes that the highly
technical nature of most ECJ decisions makes media attention of the Court’s activities rare. In short, the claim that the ECJ seeks to avoid public scrutiny of its decisions is not entirely new; the theory presented here provides an explanation for why we observe this behavior and its consequences for the Court’s decisionmaking.

**Empirical Analysis**

**Data.** I use data from Carrubba and Gabel’s European Court of Justice Rulings Database. The dataset covers a wide range of rulings, but I limit my analysis to infringement proceedings (also called “enforcement actions”) brought against member state governments by the European Commission between 1960 and 1999. I focus on infringement cases brought by the Commission for three reasons. First, I wish to limit the analysis to cases involving challenges to member state governments, as these cases present the most obvious potential for noncompliance. Second, limiting my dataset to cases brought by the European Commission allows me to control for the plaintiff. As EU law and the ECJ’s jurisprudence have expanded, so has the variety of sources of cases brought before the Court. Focusing on a single plaintiff rules out concerns that varying levels of resources and expertise available to litigants influences results. Third, I focus on the Commission because doing so creates a harder test to find support for my hypotheses. The Commission serves as the executive and bureaucratic body of the European Union, making it an important repeat player before the court. This status gives the Commission’s opinion significant influence at the ECJ, with the Court having a strong tendency to issue decisions that align with the Commission’s position (Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015; Stone Sweet and Brunell 1998). As such, the influence of considerations such as public awareness should be more difficult to discern than it might be for a sample including cases involving less influential litigants. The dataset totals 840 cases.\(^7\)

\(^7\)Descriptive statistics are presented in the Supporting Information section.
**Outcome Variable.** Since the individual case is the unit of analysis, I use the Court’s disposition in each case as the outcome variable. This variable, *Pro-Commission Decision*, is coded 1 if the ECJ rules in favor of the Commission and 0 if the Court decides in favor of the defendant member state government.

**Explanatory Variables.** I use the proximity of the preceding national election to measure the likelihood of the public becoming aware of an ECJ decision. Election campaigns typically increase press and public attention to all political matters, including constitutional review. Consequently, rulings issued in that period are more likely to garner greater public awareness than those issued far from the spotlight of election campaigns. Although the hypotheses refer to the proximity of the next election, the nature of elections in most EU nations make the timing of elections uncertain and difficult to forecast. In some countries, the prime minister can call an early election before the next scheduled election. As a result, measuring the proximity of the next election by considering the time between a decision and the next election date assumes information that was unlikely to be available to the ECJ at the time of the decision. While the exact timing of the next election is uncertain, it can be estimated based on the time elapsed since the most recent election. Most EU countries require the prime minister to hold an election within a certain time frame, such as at least once every 5 years. Furthermore, the likelihood of an exogenous event necessitating an election increases with time. Thus, the ECJ may expect an election to be more likely to occur in the near future if it has been four years since the last election than if only one year had passed. The variable *Years Since Last Election* measures the number of years between the date the ECJ issues its decision and
the date of the most recent national election preceding the case.\textsuperscript{8}

Elections are not, however, the only occurrences that can bring EU issues into the public spotlight. Major events can bring public attention to issues involving the European Union and European institutions, including the ECJ. When such rare events happen, the impact of the electoral cycle on ECJ decisions is likely diminished, as the likelihood public awareness is high regardless of the proximity of the previous election. Failure to account for this possibility could mask the relationship between the electoral cycle and the likelihood of the ECJ ruling against a member state government. One prominent type of event that could have this confounding effect is the ratification of European treaties. Treaties serve as the core documents for establishing European institutions and defining the competencies granted to those institutions. As such, the ratification process of major treaties is highly politicized, and publicized, event that is likely to make citizens more aware of European Union politics, including judicial politics and decisions of the ECJ. If the ECJ seeks to avoid the public spotlight when ruling against member state governments, we should expect the ECJ to be less likely to rule against member states during the treaty ratification process, regardless of the electoral cycle. Furthermore, the electoral cycle should only influence the Court in non-treaty years. There were three major treaties signed during the time period of my dataset: the Single European Act in 1986, the Maastricht Treaty of 1992, and the Amsterdam Treaty of 1997. The variable \textit{Treaty Year} takes a value of 1 if a case was decided in a year that one of these treaties was ratified and 0 otherwise.

For the second hypothesis I require a measure for the probability of third party member states punishing noncompliance. I follow the example of recent ECJ research (Carrubba, \textsuperscript{8}The variable is calculated by taking the number of days since the previous election, dividing by 365, and rounding to the nearest year. This approach mitigates the impact of outliers on the analysis by effectively condensing the distribution of the data and addressing the positive skew present when the time elapsed is measured in days. Using alternative transformations of the data, including counts of six month intervals instead of years and taking the log of the number of days, does not substantively impact the results.}
Gabel and Hankla 2008; Carrubba and Gabel 2015) and use written briefs filed by member states as a statement of member states’ preferences in a case. These briefs, called interventions, are similar to amicus briefs in the U.S. judicial system in that they are opinions filed by member state governments stating their position on the case at hand. All member state governments have the right to submit an intervention in ECJ cases, although they are not required to do so. To capture the balance of briefs, I create the variable *Net Number of Pro-Commission Briefs*. To construct this measure, I subtract the number of briefs supporting the defendant government from the number of briefs supporting the Commission. Thus, a positive number indicates that the number of member state governments filing briefs supporting the Commission is greater than the number filing briefs supporting the defendant member state government, while a negative number indicates greater support for the defendant member state government than the Commission.

For the third hypothesis I require a measure of the cost incurred by courts when the public observes successful noncompliance. Recall, this aspect of the model focuses on the court’s concern that its decision will harm attempts to gain the public’s trust and thus develop institutional independence. The relationship between citizens and courts is fundamentally shaped by citizens’ perceptions of courts as principled decisionmaking institutions whose decisions are grounded in legal norms rather than political expediency (e.g. Gibson and Spence 2003). For a court lacking public support, this dynamic is particularly important. Courts with public support can fall back on their institutional legitimacy to ameliorate citizens’ concerns for politicized judicial behavior. An unpopular court, however, is already viewed with suspicion by citizens. As a result, issuing publicly salient decisions that run counter to the legal norms can appear politicized and thus undermine the court’s attempts to build public support. Therefore, the cost of observed noncompliance should be higher when the ECJ issues decisions in conflict with the legal merits of a case.

I borrow from recent scholarship (Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015) and use the opinion of the ECJ’s Advocates General (AG) as a proxy for
the legal merits of a case. Typically drawn from the ranks of national judiciaries and academics, AGs are widely seen as apolitical officers of the Court who provide the judges with accurate, impartial legal analysis (Brown and Kennedy 2000). The AG does not represent a litigant in a case, but rather is an actor within the ECJ who reviews all case materials and develops answers to the legal questions facing the Court. Importantly, the AG does this in isolation from the judges themselves, allowing the AG to fully draft an opinion before submitting it to the Court. Upon submitting the opinion, the AG’s role is complete, taking no part in the deliberations or further proceedings of the Court. Furthermore, Advocate Generals are insulated from political pressures as a result of a rule that prevents an AG from being assigned to a case involving her home country’s government.\footnote{Carrubba and Gabel (2015) conduct a thorough empirical analysis of AG opinions and the potential for political influences. They conclude that AGs are by and large protected from the pressure of career concerns stemming from the desires of member state governments, and when the possibility of political influence on the AG is strongest, the ECJ appears to discount the AG’s opinion. For more, see Carrubba and Gabel (2015), Chapter 4.}

Importantly, these factors allow the AG’s opinion to most accurately approximate the objective legal environment of a case. To capture this empirically, I create the variable, Pro-Commission AG Opinion, which takes a value of 1 when the AG agrees with the Commission’s position and 0 when the AG’s opinion aligns with that of the defendant member state.

\textbf{Control Variables.} I control for the results of the most recent election. While governments generally prefer not to have courts strike down their policies (but see, e.g., Whittington 2005), they may be willing to see the policies of their predecessors struck down. As a result, when the ECJ faces a first term government due to a turnover in government in the last election, it may be less likely to confront an issue of compliance. If this is the case, then the measure Years Since Last Election may be capturing the likelihood that the case before the ECJ involves an action taken by a government no
longer in power. I control for this potential issue by including the measure *Government Change*, which takes a value of 1 when the previous election resulted in a new political party taking control of the government. *Government Change* takes a value of 0 when the same political party controls the government both before and after the previous election. In the event of coalition governments, I code according to the party of the executive. I further include an additional measure for changes in government, *Prime Minister Change*, which includes for changes in the government that occur without a change of the party in control. This measure takes a value of 1 when the election results in a new Prime Minister and 0 otherwise.

I control for the legal merits of each case in the analyses for Hypotheses 1 and 2. While the argument posited here focuses on the influence of politics on ECJ decisions, this does not mean that legal considerations cannot play an important role in decisionmaking. Rather than ruling based on concerns of public awareness and noncompliance, the ECJ may be ruling solely based on the legal merits of each case. Failure to account for such a possibility could lead to a misspecification of the empirical model and biased results, as the legal merits of the case might correlate with both the outcome of the case and the timing of the decision. For example, the Commission may take the level of public scrutiny for a case into consideration when initiating an infringement proceeding and accordingly strategically time its submission of the case to the Court. Furthermore, the Commission may use such a strategy in combination with considerations for the strength of the Commission’s legal argument. If so, then the *Years Since Last Election* measure may be capturing the Commission’s litigation strategy rather than a response by the ECJ to the risk of public awareness. To account for these concerns, I include *Pro-Commission AG Opinion* in the analysis of Hypotheses 1 and 2.

**Methodology.** I estimate logistic regressions for each hypothesis. Recall that the key explanatory variable *Years Since Last Election* is conditioned by the variable *Treaty Year*. Therefore, I follow the recommendation of Kam and Franzese (2007) and es-
timate models using interactions between the explanatory and conditioning variables.\textsuperscript{10} For Hypothesis 1, I estimate a model including an interaction between \textit{Treaty Year} and \textit{Years Since Last Election}, with the expectation that \textit{Years Since Last Election} (which represents the effect of the variable when \textit{Treaty Year} equals 0) and \textit{Treaty Year} will have negative and statistically significant coefficient estimates. I expect the interaction term (which represents the effect of \textit{Years Since Last Election} when \textit{Treaty Year} equals 1) to not reach statistical significance. For the second hypothesis, I estimate a model including a triple interaction between \textit{Treaty Year}, \textit{Years Since Last Election}, and \textit{Net Number of Pro-Commission Briefs}. I expect the interaction between \textit{Years Since Last Election} and \textit{Net Number of Pro-Commission Briefs} to be negative and statistically significant, which represents the relationship between the variables when \textit{Treaty Year} equals 0. I do not expect the triple interaction term to reach statistical significance, as that coefficient corresponds to the interactive effect between \textit{Years Since Last Election} and \textit{Net Number of Pro-Commission Briefs} when \textit{Treaty Year} equals 1. For hypothesis 3, I estimate a model including a triple interaction between \textit{Treaty Year}, \textit{Years Since Last Election}, and \textit{Pro-Commission AG-Opinion}. As both \textit{Treaty Year} and \textit{Pro-Commission AG Opinion} are dichotomous, the coefficient of interest is \textit{Election Years}, which estimates the relationship between \textit{Election Years} and \textit{Pro-Commission AG Opinion} when the AG’s opinion supports the defendant member state (\textit{Pro-Commission AG Opinion} equals 0) and the case was not decided during a treaty ratification process (\textit{Treaty Year} equals 0). I expect this estimate to be negative and statistically significant.

\section*{Results}

The results of the empirical models are presented in Table 2. The results are largely supportive of the three hypotheses. First, consider the analysis of Hypothesis 1, which predicted the ECJ to be less likely to rule in favor of the Commission as the likelihood

\textsuperscript{10}For a discussion on the benefits of this approach over alternatives, such as separate subsample analyses, see Kam and Franzese 2007 pgs. 103-111.
of public awareness increases. The results of models 1 and 2, presented in the first and second columns of Table 2, support this expectation. As expected, the coefficients for Years Since Last Election and Treaty Year are negative and statistically significant, while the interaction term between these two variables does not reach statistical significance. This result supports the claim that the ECJ is constrained by public awareness of its decisions. The Court is less likely to rule against member states during the highly salient process of treaty ratification. And when treaties are not driving public awareness, the ECJ is less likely to rule against a member state government as the likelihood of a national election and the accompanying public attention to politics increases. Importantly, this is the case while controlling for the legal merits and whether or not a new government (or prime minister) came to power in the last election.

Figure 2 presents the substantive significance of these relationships. The figure provides the predicted probability of the ECJ issuing a pro-Commission decision based on Years Since Last Election, with the solid line depicting the relationship in years that no treaty ratification took place and the dashed line the relationship in years a treaty was ratified. The figure highlights three key trends. First, in non-treaty years, the Commission is predicted to win with a probability of 95% in cases decided within six months of the last election. This probability, however, decreases to 88% when the last election occurred four years prior to the decision. Second, the concerns over the effect of the treaty ratification process on my key explanatory variable, Years Since Last Election, are borne out in the figure. In years that a treaty was ratified, Years Since Last Election does not have a statistically significant relationship with ECJ decisions. Third, the likelihood of a pro-Commission decision is generally lower in treaty years, although the difference does not reach statistical significance when the likelihood of an election is high. This result makes intuitive sense, as the Court is seeking to avoid public awareness, something the ratification of treaties has minimal impact on when public awareness is already likely due to the pending nature of a national election. When the election cycle is unlikely to generate public awareness, the substantive magnitude of the relationship between ECJ
decisions and treaty ratification is sizable. For example, when the last election occurred within a year of a decision, the probability of a pro-Commission decision decreases from 95% in non-treaty ratification years to 82% in years a treaty was ratified.

The results for hypothesis 2 are provided by models 3 and 4 in the third and fourth column of Table 2. Recall, the theoretical model predicts the impact of third party political institutions’ preferences to decrease as public awareness becomes more likely. The empirical results conform to this prediction, as the coefficient for the interaction of Net Pro-Commission Briefs and Years Since Last Election is negative and statistically significant. Substantively, third party briefs have a statistically significant influence on ECJ decisions when the likelihood of public awareness is low. This influence, however, decreases as the likelihood of a national election and the accompanying public awareness increases. Indeed, the interaction term between Net Pro-Commission Briefs and Treaty Year does not reach statistical significance, indicating that briefs do not have a statistically significant relationship with ECJ decisions in years that the EU ratifies a major treaty.

Figure 3 provides a graphical representation of the substantive significance of this relationship. The effect of third party briefs is limited to those cases for which the likelihood of public awareness is low. The right panel of the figure shows that third party briefs do not have a statistically significant impact on cases that are publicly salient as a result of a treaty ratification. The left side of the panel shows the interactive relationship between Years Since Last Election and Net Pro-Commission Briefs. In cases decided within the first few years of an election, an increase in support for the Commission corresponds to a higher likelihood of the ECJ ruling against the defendant member state. When the decision comes two years after the last election, the effect of a net positive number of pro-Commission member state briefs becomes statistically indistinguishable from the impact of third party briefs when the number of pro-Commission briefs equals the number of pro-defendant member state briefs. For example, when Net Pro-Commission Briefs equals 2 and the last election was was two years before the decision, the ECJ is 5.5% more likely to make a pro-Commission decision than if the briefs were equally split be-
tween the Commission and defendant.\textsuperscript{11} This difference shrinks, however, to 3\% and does not reach statistical significance when the decision comes four years after the last election.

Models 5 and 6, presented in the fifth and sixth columns of Table 2, provide the analysis for the third hypothesis. This hypothesis predicts the Court to be increasingly constrained by the cost of publicly observed noncompliance as public awareness becomes more likely. The results support this expectation; the effect of the AG’s opinion on ECJ decisions is strongest when the likelihood of public awareness is highest. The Court is less likely to rule counter to the AG’s opinion if the decision is issued in a year a treaty was ratified. In those years that a treaty was not ratified, the likelihood of the ECJ ruling opposite of the AG’s opinion is decreasing as the number years since the last national election increases.

Figure 4 presents these relationships. The right panel shows the relationship in years a treaty was ratified. The probability of a pro-Commission decision when the AG’s opinion supports the defendant member state is below 11\%, regardless of the electoral cycle. Turning to the left panel, which shows the relationship in non-treaty years, the likelihood of a pro-Commission decision in spite of an AG opinion supporting the member state is sharply decreasing as the time since the previous election increases. The probability of a pro-Commission decision despite a pro-defendant AG opinion is 57\% when the last election was held less six months prior to the decision. This probability decreases to 21\% for cases decided four years after the previous election.\textsuperscript{12}

Conclusion

This article develops a theoretical account of public awareness’ impact on the decisionmaking of judiciaries that lack public support. Building on the extant theoretical and empirical judicial politics literature, the theory suggests that public awareness constrains the ability of “unpopular” courts to effectively exercise judicial review by magnifying the

\textsuperscript{11}This estimate is statistically significant at the 0.10 level.
\textsuperscript{12}This difference is statistically significant at the 0.10 level.
incentives for government officials to engage in position taking against the judiciary. A formalization of the theory reveals the extent of the consequences public awareness has on interactions between governments and judiciaries. The model identifies a set of empirically testable hypotheses. First, an unpopular court should be less likely to rule against a government when the public is likely to be aware of the case. Second, the influence of third party support for the court should be decreasing as public awareness becomes more likely. Third, an unpopular court should be increasingly constrained by the cost of observed noncompliance as the likelihood of public awareness increases. Using Carrubba and Gabel’s data on infringement cases adjudicated by the European Court of Justice from 1960 to 1999, I find empirical support foe each of the theoretical model’s empirical implications.

This analysis also has implications for the study of the ECJ. Scholars have recognized the Court’s lack of public support and the consequences for the Court’s ability to obtain compliance from member states (e.g. Gibson and Caldeira 1995, 1998). While much of the compliance literature on the ECJ has focused on how the role of the member states, this study highlights the interactive nature between public support, public awareness, and the institutional dynamics that do permit the Court to obtain compliance. In doing so, we see an ECJ that is constrained not only by the interests of member state governments, but also by the lack of support from the publics who elect those governments.
References


Panke, Diana. 2010. The Effectiveness of the European Court of Justice. Manchester University Press.


Note: Equilibrium predictions when $p > p^*_{G(E)}$, $q < q^*_{G(E)}$, $p^*_{G(L)} > p^*_{C(V)}$, and $q^*_{C(V)} < q^*_{G(L)}$. 

Figure 1: Equilibrium Predictions
Table 1: Logit Analysis of ECJ Decisions

<table>
<thead>
<tr>
<th></th>
<th>Model 1 (H1)</th>
<th>Model 2 (H1)</th>
<th>Model 3 (H2)</th>
<th>Model 4 (H2)</th>
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Standard errors in parentheses
* significant at $p < .10$; ** $p < .05$
Figure 2: The Impact of Years Since the Last Election and Treaty Year on the Probability of a Pro-Commission ECJ Decision (H1)

Note: Results are from Model 1. The solid line indicates cases decided in non-treaty ratification years. The dashed line indicates cases decided in treaty ratification years. Shaded bands indicate 90% confidence intervals.
Figure 3: The Impact of Government Briefs on ECJ Rulings Interacted with Years Since Last Election and Treaty Year (H2)

Note: Results are from Model 3. Solid lines indicates cases in which the number of member states filing briefs supporting the Commission was equal to the number supporting the defendant member state. Dashed lines indicates cases in which the number of briefs filed by member states supporting the Commission was two more than the number of briefs supporting the defendant member state. Shaded bands indicate 90% confidence intervals.
Figure 4: The Impact of Pro-Commission AG Opinion on ECJ Rulings Interacted with Years Since Last Election and Treaty Year (H3)

Note: Results are from Model 5. Dashed line indicates AG opinion favors the Commission’s position. Solid line indicates AG opinion favors defendant’s position. Shaded bands indicate 90% confidence intervals.