Policy Implementation, Noncompliance, and the Judicial Impact of Courts

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Abstract
Policy-makers depend on government agencies to implement laws, and courts adjudicate disputes over incorrect implementation. This paper analyzes how the politics of adjudication affect the implementation of policy. Under what conditions do government agencies more closely implement laws, and when do courts deter incorrect implementation? I model the strategic interaction between an implementing actor, a plaintiff, and a court over the implementation of a law. In equilibrium, implementing actors make concessions by implementing more complaint policies in order to avoid litigation. I find that courts are most effective at deterring noncompliance for intermediate levels of preference divergence between policy-makers and implementing actors. I test the observable implication of the model in the context of the European Union (EU) using a novel dataset of implementation opportunities and noncompliance cases.
Policy-makers depend on other actors, like government agencies, to implement laws. However, the preferences of implementing actors can run counter to those of policy-makers. This creates an incentive to implement noncompliant policies, in which case policy-makers rely on high courts to correct their noncompliance. These courts, in turn, depend on other political actors, like government agencies, to enforce their decisions (Carrubba 2005; Vanberg 2005; Carrubba 2009). Consequently, they are cautious in issuing adverse rulings: They anticipate noncompliance with their rulings by defendants, and are less likely to rule against defendants when the likelihood of noncompliance is high (Carrubba and Zorn 2010; Carrubba and Gabel 2015; Vanberg 2015).

This paper bridges the literatures on adjudication and implementation by analyzing how this strategic behavior by courts affect the implementation of policy. Anticipating potential legal challenges, under what conditions do government agencies more closely implement laws. When do courts deter incorrect implementation? To answer these questions, I present a formal model that predicts the conditions under which high courts will be most effective at deterring noncompliance by implementing actors. The model applies to constitutional courts, like the United States Supreme Court or the Bundesverfassungsgericht (the German Federal Constitutional Court), and quasi-constitutional international courts, like the Court of Justice of the European Union (CJEU), that have appellate jurisdiction over cases involving the incorrect implementation of laws.

I show that the impact of courts on policy outcomes depends not only on whether they are willing to rule against defendants, but also whether plaintiffs are willing to bring cases, and whether implementing actors adjust their behavior in anticipation of litigation. In equilibrium, courts deter noncompliance; implementing actors make policy concessions to avoid going to court. However, they do not come fully into compliance. Thus, neither implementing actors nor policy-makers achieve their first-best policy outcome. Courts are most effective at deterring noncompliance for intermediate levels of preference divergence between policy-makers and implementing actors.
This paper has important implications for recent research, particularly work on the effectiveness of quasi-constitutional international courts. A number of studies suggest that international courts are sensitive to the costs of compliance (Carrubba 2005, 2009; Gilligan and Johns 2012; Carrubba and Gabel 2015; Fjelstul and Carrubba 2018). Studies that do not account for this strategic behavior (e.g., Johns 2012, 2015) will misidentify the conditions under which plaintiffs bring cases, and therefore the conditions under which courts deter noncompliance by implementing actors.

I test the key observable implication of the model in the context of the European Union (EU), where member states are responsible for implementing EU directives (i.e., secondary laws). The European Commission is responsible for monitoring the implementation of directives and can bring cases against member states. I focus my analysis on directives that harmonize industry regulations across the European Single Market. I develop a measure of preference divergence that is specific to harmonizing directives, create a sample of over 14,000 implementation opportunities (2004–2015), and code whether the Commission brings a noncompliance case vis-à-vis each implementation opportunity. I find evidence consistent with the model and inconsistent with an alternative that does not take into account the sensitivity of courts to noncompliance with their rulings.

The Strategic Behavior of Courts

Recent studies emphasize that constitutional courts and quasi-constitutional international courts are sensitive to whether defendants are likely to comply with adverse rulings (ex post compliance) (e.g., Staton and Moore 2011; Carrubba and Gabel 2017). This paper contributes to the literature on the judicial impact of these courts by providing a general formal theory of how they affect the implementation of policy that incorporates this insight into the strategic behavior of courts.

The literature on international courts argues that member states of international organizations create courts to solve collective action problems: States often benefit from coopera-
tion but have incentives to unilaterally defect to avoid the costs of compliance. International courts serve as a fire alarm (i.e., a forum in which violations can be alleged) and an information clearing house (i.e., a forum in which interested actors can express their preferences). Since international agreements are incomplete contracts, and do not fully specify obligations under every possible set of circumstances, courts can improve cooperation by defining what constitutes an impermissible violation of the agreement (Carrubba and Gabel 2017). Courts enforce agreements by ruling against noncompliant member states when cooperation is mutually beneficial, but they permit noncompliance when the costs of compliance are so high that a defendant is unlikely to comply with an adverse ruling. As the costs of compliance increase, the probably of \textit{ex post} noncompliance — the joint probability, conditional on a case, that a court rules against a defendant and the defendant complies with the adverse ruling — will decrease (Carrubba and Gabel 2015).

The literature on constitutional courts provides empirical evidence that is consistent with the argument that courts are sensitive to noncompliance with adverse rulings. Scholars have found that noncompliance depends on whether governments believe that the public can observe noncompliant behavior (Vanberg 2005). Courts use tools like press releases to increase public awareness of rulings to increase the costs of \textit{ex post} noncompliance (Staton 2010). Courts also use citations to embed politically controversial rulings in established case law (Lupu and Fowler 2013; Lupu and Voeten 2012; Larsson et al. 2017).

Looking at the Court of Justice of the European Union (CJEU), specifically, which is the focus of my empirical test, recent studies have found evidence that the CJEU is sensitive to the preferences of member states (Carrubba and Gabel 2015; Larsson and Naurin 2016; Martinsen 2015; Blauberge and Schmidt 2017). Member states can use two mechanisms — legislative override (Larsson and Naurin 2016; Martinsen 2015) and noncompliance (Carrubba and Gabel 2015) — to constrain the Court. The Court is more likely to rule against defendants in noncompliance cases when third-party member states support the plaintiff, as the defendant is more likely to comply \textit{ex post} when other member states have an interest in enforcing an adverse ruling. The Court is less likely to rule against member state defendants
in situations where institutional rules make legislative override easier (Larsson and Naurin 2016; Martinsen 2015) and when it is easier for member states to revise the EU Treaties (Castro-Montero et al. 2018).

The key takeaway from these literatures is that courts do not make decisions in a vacuum. They recognize that their decisions only matter if defendants are willing to comply with them and work to anticipate when this is the case (Vanberg 2015; Carrubba and Gabel 2017; Blauberger and Schmidt 2017). In this paper, I show that failing to account for the sensitivity of a court to ex post noncompliance can yield substantively incorrect predictions about how courts affect policy implementation.

Formal Model

To identify the conditions under which courts deter the incorrect implementation of laws ex ante, I model the strategic interaction between an implementing actor, a plaintiff, and a high court over the implementation of a law. Consistent with the recent literature on international courts, I assume that the court is sensitive to the probability of ex post compliance. I show that the plaintiff anticipates the likelihood that the court will rule against a defendant and select out of cases when the likelihood of ex post compliance is low. Thus, if courts are sensitive to noncompliance with their rulings, that leads to systematic bias in the noncompliance cases that get litigated.

Implementing actors anticipate this strategic behavior by plaintiffs and make concessions to policy-makers by moderating their noncompliance; they make larger concessions when the likelihood of litigation is higher. Thus, even if a court does not rule against a noncompliant defendant in a particular case, because the court believes the member state is unlikely to

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1 See Vanberg (2015), Carrubba and Gabel (2017), and Blauberger and Schmidt (2017) for a more in-depth review of recent literature.

2 In the context of the EU, scholars have suspected that the Commission strategically chooses which noncompliance cases to pursue based on the likelihood of success (Mbaye 2001; Börzel 2003; Thomson, Torenvlied and Arregui 2007; Hartlapp and Falkner 2009; Steunenberg and Rhinard 2010). Recent empirical work finds evidence that the Commission does, in fact, strategically choose cases (König and Mäder 2014).
comply, the fact that it could have prompts the implementing actor to implement a more compliant policy in the first place. This concession, which represents the judicial impact of the court on policy outcomes, is largest for intermediate levels of preference divergence between policy-makers and implementing actors.

The model applies to a variety of institutional settings. The high court could be a domestic constitutional court or a quasi-constitutional international court (i.e., a court of last resort) that has appellate jurisdiction over cases involving the incorrect implementation of laws by implementing actors. The policy-maker could be a legislative body, an executive body with delegated policy-making authority (e.g., an executive agency or the European Commission), or an international decision-making body (e.g., the Council of the European Union). In unitary states, the implementing actor could be an executive agency; in federal states, it could be a regional government; in supranational organizations (e.g., the European Union), it could be a member state government. The plaintiff could be a private actor (e.g., a citizen, a firm, a non-governmental organization, etc.) or an institution that is tasked with monitoring and enforcing compliance (e.g., the European Commission).

**Order of Play**

The model has three players: An implementing actor, a plaintiff, and a high court. I model the court as a reduced-form actor. There is also a non-strategic policy-maker that sets a *de jure* policy, $p_m \in \mathbb{R}^1$, that the implementing actor must implement. The policy set by the policy-maker $p_m$ is exogenous. The implementing actor chooses a *de facto* policy that implements the *de jure* policy. There are two versions of the *de facto* policy: The *ex ante* policy, which is the one implemented prior to any litigation, and the *ex post* policy, which is the one implemented after any litigation. The *ex ante* policy is $p_0 \in \mathbb{R}^1$ and the *ex post* policy is $p_1 \in \mathbb{R}^1$. A correctly implemented *ex ante* policy is $p_0 = p_m$.

Figure 1 summarizes the order of play. The game starts with the implementing actor choosing an *ex ante* policy. Any *ex ante* policy that does not exactly equal the *de jure* policy, $p_0 \neq p_m$, is noncompliant. The larger the absolute difference, the more noncompliant the
policy; thus, in equilibrium, \textit{ex ante} noncompliance is \(|p^*_0 - p_m|\). The plaintiff observes this policy and decides whether or not to bring a noncompliance case.\(^3\)

\textbf{Definition 1.} \textit{Ex ante} noncompliance is the degree to which the \textit{ex ante} policy chosen by the implementing actor differs from the \textit{de jure} policy, \(|p^*_0 - p_m|\).

I model the court as a reduced-form player. Consistent with the recent literature on the strategic behavior of constitutional courts and quasi-constitutional international courts (e.g., Vanberg 2001, 2005; Carrubba 2005, 2009; Gilligan and Johns 2012; Vanberg 2015; Carrubba and Gabel 2015), the court has preferences over \textit{ex post} compliance with adverse rulings; it is hesitant to rule against a defendant that is unlikely to comply with the ruling.

If the plaintiff brings a case, there is a conditional probability of \textit{ex post} compliance, \(h(c)\), which is the joint probability that the court rules against the implementing actor and that the implementing actor complies with that adverse ruling. This joint probability depends on the cost of compliance, \(c > 0\), which is the difference in utility (for the implementing actor) between fully complying (i.e., correctly implementing the \textit{de jure} policy) and implementing an optimal policy in a counterfactual model without a court to adjudicate disputes over implementation. Consistent with the literature (e.g., Carrubba 2005, 2009; Gilligan and Johns 2012; Carrubba and Gabel 2015), as the cost of compliance increases, the probability of \textit{ex post} compliance decreases, \(h'(c) < 0\). The implementing actor becomes less likely to comply with an adverse ruling and, anticipating this, the court becomes less likely to rule against the defendant.

\textbf{Definition 2.} Conditional on a noncompliance case, the probability of \textit{ex post} compliance, \(h(c)\), is the joint probability that the court rules in favor of the plaintiff and that the implementing actor complies with that adverse ruling.

\textbf{Assumption 1.} The probability of \textit{ex post} compliance, conditional on a noncompliance case, is decreasing in the cost of compliance, \(h'(c) < 0\).

\(^3\) I do not allow the plaintiff to infer a violation where one does not exit; the plaintiff and the court both have perfect information about the degree to which the \textit{ex ante} policy is noncompliant.
**Implementation:** The implementing actor chooses an *ex ante* policy, $p_0$, that implements the *de jure* policy, $p_m$, set by a policy-maker.

**Litigation:** The plaintiff brings a noncompliance case against the implementing actor at cost $k$ or not.

**Adjudication:** If the plaintiff brings a case, there is *ex post* compliance with probability $h(c)$, in which case the *ex post* policy is $p_1 = p_m$, and *ex post* noncompliance with probability $1 - h(c)$, in which case the *ex post* policy is $p_1 = p_0$.

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**Figure 1.** Order of Play

*Note:* This figure shows the order of play. Note that the probability of *ex post* compliance, $h(c)$, is the joint probability that the court rules against the implementing actor and that the implementing actor complies with the ruling. The probability of *ex post* noncompliance, $1 - h(c)$, is the probability that the court rules in favor of the implementing actor plus the joint probability that the court rules against the implementing actor and that the implementing actor does not comply with the ruling.

If there is *ex post* compliance, the implementing actor’s *ex post* policy is the *de jure* policy, $p_1 = p_m$, regardless of whatever its *ex ante* policy was. If there is not *ex post* compliance, then the implementing actor’s *ex post* policy is the same as its *ex ante* policy, $p_1 = p_0$, just like when the plaintiff does not bring a case. Thus, the *ex post* policy can only take one of two values, $p_1 \in \{p_0, p_m\}$.\(^4\) In equilibrium, *ex post* compliance is the absolute difference between the *ex post* policy chosen by the implementing actor and the *de jure* policy set by the policy-maker, $|p_1^* - p_m|$. If the plaintiff does not bring a case, the *ex post* policy is the same as the *ex ante* policy and *ex ante* noncompliance is the same as *ex post* noncompliance. Since litigation is a stochastic process, *ex post* noncompliance is an expectation, $|E[p_1^*] - p_m|$.

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\(^4\) I assume that the implementing actor either fully complies with an adverse ruling, $p_1 = p_m$, or fully ignores it and keeps whatever policy it has chosen *ex ante*, $p_1 = p_0$. Allowing the implementing actor to partially comply *ex post* would not substantively change its *ex ante* policy-implementation behavior in equilibrium. Even if the implementing actor only partially complies *ex post*, that outcome will still incentivize the implementing actor to try to avoid litigation by making a policy concession. This is true as long as the concession that the implementing actor makes *ex post* is worse than the concession it makes *ex ante*. 

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Definition 3. Expected \textit{ex post} noncompliance is the degree to which the \textit{ex post} policy produced by the litigation process differs from the \textit{de jure} policy set by the policy-maker in expectation, \(|E[p^*_1] - p_m|\).

Preferences

The implementing actor has a preference over its \textit{ex post} policy \(p_1\). Its utility is given by a quadratic loss function, defined over \(p_1\): \(u_A(p_1) = -(p_1 - p_i)^2\), where \(p_i\) is its ideal point. I assume, without loss of generality, that the implementing actor prefers a policy to the right of the \textit{de jure} policy, \(p_i > p_m\), which I normalize, \(p_m = 0\). Preference divergence, in the context of the model, is the absolute difference between the implementing actor’s ideal point and the \textit{de jure} policy set by the policy-maker, \(|p_i - p_m|\). Preference divergence will be the primary exogenous parameter of interest.

Definition 4. Preference divergence is the absolute difference between the ideal point of the implementing actor and the \textit{de jure} policy, \(|p_i - p_m|\).

The plaintiff also has a preference over the \textit{ex post} policy. If the plaintiff brings a case, it pays a cost of litigating, \(k > 0\), which is private information. The plaintiff learns \(k\) before deciding whether or not to bring a case. This cost is drawn from a probability density function \(f(k)\) with a finite mean and variance. The support of \(f(k)\) is \(k \in [0, \infty)\). It has a cumulative distribution function \(F(k)\), where \(F'(k) > 0\). Low-cost litigation is more likely than high-cost litigation, which implies that the probability density function \(f(k)\) is decreasing in \(k\), \(F''(k) = f'(k) < 0\). I also assume that the plaintiff prefers the \textit{de jure} policy (i.e., that the preferences of the policy-maker and the plaintiff are aligned). Thus, the plaintiff’s utility is as follows:

\[
u_P(p_1) = \begin{cases} 
-(p_1 - p_m)^2 & \text{if there is no case} \\
-(p_1 - p_m)^2 - k & \text{if there is a case and no \textit{ex post} compliance} \\
-k & \text{if there is a case and \textit{ex post} compliance.}
\end{cases}
\]
To summarize the information structure, the model assumes (a) that noncompliance is always strategic, and not accidental; (b) that the plaintiff and the court are fully informed about the degree to which the implementing actor has correctly implemented the *de jure* policy set by the policy-maker; and (c) that the costs of litigation are private information, but are known to the plaintiff before the plaintiff decides whether or not to bring a case. Thus, if the court sides with the implementing actor, it is making a political decision to issue a ruling contrary to the legal merits of the case.

**Equilibrium Behavior**

I derive a unique subgame perfect equilibrium by backwards induction. See Appendix A for formal proofs. I present the equilibrium in reverse-chronological order. Note that all play is on the equilibrium path.

I start by considering the counterfactual: The policy the implementing actor would choose if there were no court to adjudicate disputes. In the counterfactual, there are no institutional constraints on the implementing actor (i.e., no prospect of costly litigation). Thus, the implementing actor simply chooses to implement its preferred policy. Since there is no prospect of litigation, the *ex ante* and *ex post* policy are one in the same.

**Lemma 1.** In the counterfactual, the implementing actor is free from institutional constraints and chooses an optimal policy equal to its ideal point, $p^* = p_i$.

The behavior of the court depends on the cost of compliance, which is an equilibrium quantity. The cost of compliance is how much worse off the implementing actor would be if it fully complied instead of choosing the policy it would choose in the counterfactual. This is the absolute difference in utility between complying with the *de jure* policy and choosing an optimal policy in the counterfactual.

**Lemma 2.** The implementing actor’s cost of compliance in equilibrium is the absolute difference in its utility between correctly implementing the *de jure* policy set by the
policy-maker, $p_1 = p_m$, and choosing an optimal policy in the counterfactual, $p^* = p_i$:

$$c^* = \left| u_A(p_m) - u_A(p_i) \right| = p_i^2.$$

The plaintiff observes *ex ante* noncompliance and decides whether or not to bring a noncompliance case. Intuitively, the plaintiff brings a case when the cost of litigation is sufficiently small relative to the degree of *ex ante* noncompliance and the conditional probability of *ex post* noncompliance.

**Proposition 1.** The plaintiff observes *ex ante* noncompliance, $|p_0^* - p_m|$, anticipates the conditional probability of *ex post* noncompliance, $h(c^*)$, and brings a case when the cost of litigation is sufficiently low, $k < k^*$, where $k^* = (p_0^*)^2 h(p_i^2)$. The probability that the plaintiff brings a case is $\Pr(k < k^*) = F(k^*)$.

The implementing actor anticipates the probability that the plaintiff will bring a case and the conditional probability of *ex post* compliance. Recall that the implementing actor has a preference over the *ex post* policy. Since litigation is a stochastic process, in equilibrium, the implementing actor chooses an *ex ante* policy that maximizes its utility in expectation. The cost of bringing a case for the plaintiff is private information, so the implementing actor only knows the probability of a case.

If the plaintiff brings a case, with probability $F(k^*)$, there is some probability that the court will rule against the implementing actor and that the implementing actor will comply, $h(c^*)$. In this case, the implementing actor implements the *de jure* policy and receives $u_A(p_m)$. With probability $1 - h(c^*)$, there is *ex post* noncompliance.\(^5\) In this case, the implementing actor’s *ex post* policy is equal to its *ex ante* policy, $p_1 = p_0$, and the implementing actor receives $u_A(p_0)$. If the plaintiff does not bring a case, with probability $1 - F(k^*)$, the implementing actor’s *ex post* policy is also equal to its *ex ante* policy. Thus, the implementing actor’s expected utility is as follows:

$$E[u_A(p_0)] = F(k^*) \left[ h(c^*) u_A(p_m) + (1 - h(c^*)) u_A(p_0) \right] + (1 - F(k^*)) u_A(p_0). \quad (1)$$

\(^5\) Recall that there are two ways to get *ex post* noncompliance, conditional on a case. Either the court does not rule against the implementing actor, or it does and the implementing actor ignores the ruling.
The implementing actor’s expected utility captures a basic tradeoff between improving the policy (i.e., moving the policy closer to its ideal point) and triggering a court battle, which could end in \textit{ex post} compliance (the worst-case policy outcome for the implementing actor). The implementing actor can reduce the likelihood of litigation by compromising — by implementing a policy that is closer to the \textit{de jure} policy — but this comes at the cost of a worse policy outcome if there is not a case (or if there is and the court rules in favor of the implementing actor).\footnote{This expected utility equation is a globally concave, single-peaked function, which guarantees a unique global maximum.} In equilibrium, the implementing actor chooses the \textit{ex ante} policy that optimally balances this tradeoff (i.e., the point where the marginal increase in its utility equals the marginal decrease).

**Proposition 2.** The implementing actor chooses an optimal \textit{ex ante} policy $p^*_0$. There is a unique solution, but there is not a closed-form expression. The implicit solution for $p^*_0$ is given by the following first-order condition (FOC):

$$2p^*_0 h(p^*_i)^2(p_0 - p_i)F'(p^*_0 h(p^*_i)) + 2(p_0 - p_i)[h(p^*_i)F(p^*_0 h(p^*_i)) - 1] = 0.$$ 

In equilibrium, the implementing actor’s optimal \textit{ex ante} policy is a concession by the implementing actor to the policy-maker; it is a compromise between its ideal point and the \textit{de jure} policy.\footnote{In other words, $p_m < p^*_0 < p_i$.} The effect of the court on the \textit{ex ante} policy (and on \textit{ex ante} compliance) in equilibrium is the size of this optimal concession, which depends on the level of preference divergence between the policy-maker and the implementing actor.

**Proposition 3.** The court incentivizes the implementing actor to make a policy concession, which is the absolute difference between the optimal \textit{ex ante} policy and the optimal policy in the counterfactual, $|p^*_0 - p^*|$. This is the judicial impact of the court on policy implementation.

This behavior is intuitive. The court constrains the policy-implementation behavior of the implementing actor. The prospect of losing in court incentivizes the implementing actor
to trade a worse policy for a lower probability of going to court (i.e., a lower probability of enforced compliance). In short, the shadow of enforced compliance induces more compliant behavior by the implementing actor. The question, though, is not only whether a court can improve the *ex ante* compliance (if the court matters at all, this should be true), but also the conditions under which the court is most effective at deterring *ex ante* noncompliance. In other words, when is the optimal concession larger or smaller?

**Comparative Statics**

I use this equilibrium to analyze how preference divergence affects the behavior of the plaintiff and the implementing actor. The key prediction of the model is that the judicial impact of a court on policy outcomes will be greatest for intermediate levels of preference divergence between policy-makers and implementing actors. I show that if the court were not sensitive to noncompliance with adverse rulings (e.g., if going to court were a simple random lottery) we would reach an entirely different conclusion: The impact of the court in equilibrium would be strictly increasing in preference divergence. In institutional settings where the implementing actor is a member state of an international organization, this creates an incentive to exit the regime to avoid enforced compliance over the long term.

This key prediction is not directly testable because there is no plausible control group for the counterfactual (i.e., policy implementation without a court). However, the model also predicts that the probability of litigation is highest for intermediate levels of preference divergence, and this prediction is testable. In fact, this is the reason why the judicial impact of the court is greatest under these conditions. Conditional on empirical support for the model, if we assume that the model captures the data-generating process, we can also infer (a) the degree to which a court is sensitive to the cost of compliance, and (b) the severity of the compliance deficit caused by strategic noncompliance.

I present the comparative statics in reverse-chronological order. See Appendix A for proofs. I confirm all comparative statics using a computational simulation. Figure 2 summar-

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8 In model notation, the probability of enforced compliance is $F(k^*)h(c^*)$. 

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Figure 2. Summary of Comparative Statics

Note: This figure summarizes the comparative statics using a numerical simulation of the model. I use an exponential distribution for \( F(k) \) and a logistic function for \( h(c) \).

I summarize all of the comparative statics using the output of this computational simulation. To sign the comparative statics, it will be necessary to choose functional forms for \( F \) and \( h \). I assume that the functional form of \( F \) is the CDF of the exponential distribution and that the functional form of \( h \) is the logistic function.\(^9\)

I start with the equilibrium behavior of the court: The probability of \( ex \ post \) compliance, conditional on a case, is decreasing in preference divergence. Intuitively, as preference divergence increases, the cost of compliance increases (Figure 2, Result 1a); when the imple-

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\(^9\) I use Monte Carlo simulations to demonstrate the robustness of the results to variation in the rate parameter of the exponential distribution, the shape parameter of the logistic function, and the location parameter of the logistic function.
menting actor and the policy-maker disagree, it is more costly for the implementing actor to fully comply with the *de jure* policy. Consequently, the conditional probability of *ex post* compliance decreases (Figure 2, Result 1b), according to Assumption 1. The court becomes more hesitant to rule against the implementing actor out of concern that the implementing actor will ignore its ruling.

**Result 1a.** In equilibrium, as preference divergence increases, the implementing actor’s cost of compliance is increasing.

**Result 1b.** In equilibrium, as preference divergence increases, the probability of *ex post* compliance, conditional on a case, is decreasing.

Turning next to the plaintiff, the probability of litigation is largest for intermediate levels of preference divergence (Figure 2, Result 2). When preference divergence is low, the plaintiff has little incentive to bring a noncompliance case. Noncompliance is minimal, so the value of correcting noncompliance is low relative to the costs of litigating. The potential benefit of bringing a case does not justify the costs of litigation. As preference divergence increases, the costs of compliance also increases, creating an incentive for the implementing actor to implement a less compliant *ex ante* policy (see Result 3a below). For the plaintiff, which prefers the *de jure* policy, the value of correcting noncompliance is increasing, so the costs of bringing a case are more likely to be justified. At the same time, however, the probability of *ex post* compliance, conditional on a case, is dropping (Assumption 1). As the cost of compliance increase, the court becomes less likely to rule against the implementing actor, which deters the plaintiff from bringing a case.

Thus, as preference divergence increases, the plaintiff faces a trade-off. The benefits of successful litigation are increasing, but the probability of successful litigation is decreasing. This trade-off produces a non-monotonic effect: The probability that the plaintiff brings a case is increasing as the benefits of correcting noncompliance increase, but past a certain point, the costs of litigating are no longer justified, given the falling probability of successful litigation, and the probability that the plaintiff brings a case starts to decline. The plaintiff
is most likely to bring a case for intermediate levels of preference divergence. There is a systematic bias in the types of cases that get litigated.

**Result 2.** In equilibrium, as preference divergence increases, the probability that the plaintiff brings a noncompliance case is increasing, then decreasing.

Turning to the implementing actor, as preference divergence increases, the *ex ante* policy that the implementing actor chooses diverges from the *de jure* policy (Figure 2, Result 3a). As preference divergence increases, the cost of compliance increases; when the implementing actor and the policy-maker disagree, it is more costly for the implementing actor to fully comply with the *de jure* policy. This creates an incentive for the implementing actor to diverge from the *de jure* policy. This effect carries over to the *ex post* policy in expectation (Figure 2, Result 3b).

**Result 3a.** In equilibrium, as preference divergence increases, the optimal *ex ante* policy that the implementing actor chooses is increasing. Thus, the *ex ante* noncompliance deficit is increasing.

**Result 3b.** In equilibrium, as preference divergence increases, the *ex post* policy produced by the litigation process is increasing in expectation. Thus, the *ex post* noncompliance deficit is increasing in expectation.

The bias in which cases are litigated affects the degree to which the court can constrain the *ex ante* policy chosen by the implementing actor and the degree to which the court affects the *ex post* policy. Despite the fact that *ex ante* and *ex post* noncompliance are both increasing in preference divergence (Results 3a and 3b), the ability of the court to constrain the behavior of the implementing actor is not strictly decreasing in preference divergence. Instead, specifically because of this bias, the judicial impact of the court is larger for intermediate levels of preference divergence (Figure 2, Result 4).\(^\text{10}\)

\(^{10}\text{Looking at Panel 4 in Figure 2, the size of the optimal concession is the vertical difference between the solid line (indicating the optimal *ex ante* policy in equilibrium) and the dashed line (indicating the optimal policy in the counterfactual).}\)
The intuition is that the implementing actor anticipates the probability of the plaintiff bringing a case, and when that probability is high, it is willing to make a larger concession to reduce the probability of litigation. Recall that the implementing actor wants to avoid litigation because going to court risks \textit{ex post} compliance (i.e., the worst-case policy outcome). When preference divergence is minimal, the government wants to comply, and there is little tension. When preference divergence is substantial, on the other hand, the optimal concession disappears because the implementing actor knows the plaintiff is unlikely to bring a case. If the plaintiff did bring a case, the court, knowing the implementing actor would be unlikely to come into compliance with an adverse ruling, would likely rule in favor of the implementing actor, despite the merits of the case.

**Result 4.** In equilibrium, as preference divergence increases, the effectiveness of the court at deterring noncompliance (i.e., the size of the optimal concession) increases, then decreases.

This result is driven entirely by the systematic bias in which cases the plaintiff chooses to pursue (Result 2), which is driven by the fact that the court is sensitive to noncompliance with adverse rulings. If going to court were a simple random lottery, in which the court rules probabilistically and the implementing actor complies with adverse rulings probabilistically, the optimal concession would be strictly increasing in preference divergence (Figure 2, Result 5). In fact, it would be increasing at an increasing rate. This is true regardless of how likely the implementing actor is to comply with an adverse ruling.

We can model this by assuming that the probability of \textit{ex post} compliance, conditional on the plaintiff bringing a case, is a constant, \( h(c^*) = w \), where \( w \) is the probability that the court rules in favor of the plaintiff. We can think of \( w \) as capturing preference divergence between the court and the policy-maker. When \( w \) approaches 1, the court is predisposed to agree with the policy-maker, and when \( w \) approaches 0, the court is predisposed to agree with the implementing actor. Regardless of the value of \( w \), the optimal concession is always increasing in preference divergence.
Result 5. If the court were not sensitive to the costs of compliance, and the probability of ex post compliance, conditional on a case, were a constant, the judicial impact of the court on policy implementation (i.e., the size of the optimal concession) would be strictly increasing in preference divergence.

In sum, the model predicts that courts are most effective at deterring ex ante non-compliance for intermediate levels of preference divergence between implementing actors and policy-makers. If we do not take into account the political of adjudication (i.e., the sensitivity of a court to ex post noncompliance with adverse rulings), we get an entirely different result: The judicial impact of the court on policy implementation would be strictly increasing in preference divergence.

Empirical Analysis

I test the key empirical implication of the model — that the probability of litigation is increasing, then decreasing in preference divergence (Result 2) — in the context of the European Union (EU).\textsuperscript{11} The EU is a multi-level supranational organization. The EU legislative institutions — the Council of the European Union (Council) and the European Parliament (EP) — create policy with the input of member states. The primary legislative instrument in the EU is a directive. Directives specify a policy outcome that all member states must achieve, but allow member states considerable flexibility in terms of how to achieve it. EU member states are responsible for implementing EU directives by transposing them into national law by the stated deadline.

The EU uses a centralized monitoring system to monitor and enforce compliance with EU law. The European Commission uses a multi-stage procedure called the infringement procedure to manage noncompliance. If the Commission suspects that an EU member state has committed an infringement, it can initiate an infringement case by sending a letter of

\textsuperscript{11} Since the counterfactual is not observable, we cannot test the effect of preference divergence on the size of the optimal concession. Result 2 is an observable implication because we can identify opportunities for implementing actors to implement a policy and we can observe whether plaintiffs bring cases \textit{vis-à-vis} each implementation opportunity.
formal notice to the member state. If the member state does not come into compliance, the Commission can send a reasoned opinion, which lays out a formal legal argument against the member state. If the member state still does not come into compliance, the Commission can refer the case to the Court of Justice of the European Union (Article 258 TFEU). The CJEU then determines whether the member state has committed an infringement. The CJEU issues a binary ruling on each count. If the CJEU rules in favor of the Commission, the member state must come into compliance.

Since Result 2 is a non-monotonic prediction, the sign of the average marginal effect that we should expect to recover by estimating a statistical model on data will depend on the region of the equilibrium space that the data come from, which is unknowable. In the context of the EU, however, there are theoretical reasons to expect that the data come from the region where the effect is negative, which is the region in which the model makes a prediction that differs from the prediction of an alternative model in which the court is not sensitive to ex post compliance.

In the model, the cost of litigation deters the plaintiff from bringing cases when preference divergence is low. As preference divergence increases, bringing a case is more likely to be worth the cost, resulting in a positive effect. If bringing a case were costless, the predicted effect would always be negative. The Commission handles thousands of noncompliance cases at the same time, which implies that the marginal cost of bringing a case is very low. Thus, we should expect to be in the region of the equilibrium space where the effect is negative. Finding a negative effect would be discriminating, but finding a positive effect would be consistent with both.

**Research Design**

To test Result 2, I create a sample of implementation opportunities — opportunities for EU member states to implement EU directives — and estimate the unconditional probability that the Commission brings an infringement case *vis-à-vis* each implementation opportu-
nity.\(^{12}\) We cannot observe noncompliance directly with the data that are available, but this is not necessary to test this prediction because the model predicts the unconditional probability of litigation, given an implementation opportunity.

I focus on EU directives that harmonize technical regulations. I develop a novel measure of preference divergence that is specific to this category of directives (see below). Technical regulations are economic regulations that restrict what kinds of goods can legally be sold.\(^{13}\) Harmonization is the process of standardizing technical regulations across EU member states, which facilitates intra-EU trade by reducing the regulatory burden on firms and making it easier for firms to sell their products in other member states.\(^{14}\) Over time, the EU has attempted to harmonize technical regulations in more and more industries.

I start by creating a novel dataset of the universe of implementation opportunities for the period 2004–2015.\(^{15}\) I code one implementation opportunity per member state per directive. I do not code implementation opportunities for directives that member states implement as part of the accession process. In other words, I only code an implementation opportunity if a member state has already joined the EU by the date the directive was published. I collect metadata on 1,019 directives published between May 1, 2004 (the date that the EU officially expanded to 25 member states) and December 31, 2015 from EUR-Lex, the Commission’s online database of EU legal documents. This is the universe of directives during this period. I exclude a small number of directives that are not addressed to all member states. There are a total of 26,684 implementation opportunities in the dataset.

\(^{12}\) A number of studies look at the likelihood of infringement cases, conditional on opportunities to transpose directives, but they generally look at small samples and do not consider the strategic behavior of the Commission (e.g., Thomson, Torenvlied and Arregui 2007).

\(^{13}\) According to the Commission, technical regulations include (a) technical specifications, (b) rules on providing services, and (c) regulations that prohibit the manufacture, importation, or marketing of a product. A technical specification is a required characteristic of a product, such as “dimension, labelling, packaging, [or] level of quality.”

\(^{14}\) According to the Commission, “Many products on the EU market are subject to harmonized rules that protect consumers, public health, and environment. Harmonized rules preclude the adoption of possibly divergent national rules and ensure the free circulation of products within the EU. Some sectors are still governed by national provisions however. The principle of free movement of goods ensures that these provisions do not lead to the creation of unjustified barriers to trade.”

\(^{15}\) This period is limited by the availability of case-level data on infringement cases.
I use regular expressions to extract the subject matter classifications that the Commission assigns to each directive. Since my measure of preference divergence applies specifically to harmonization directives, I only include directives that the Commission codes as dealing with harmonization (55.27 percent of all implementation opportunities).\textsuperscript{16} The final dataset includes a total of 14,747 implementation opportunities.

For each implementation opportunity, I code whether the Commission opens an infringement case against the member state by sending a letter of formal notice, which marks the start of litigation.\textsuperscript{17} There is a large literature on how the Commission chooses to open cases (Börzel 2001; Mbaye 2001; Jensen 2007; Sedelmeier 2008). I use a dataset of infringement cases from Fjelstul and Carrubba (2018), which covers 2003–2013. I update the dataset through 2015. It is important to note that just because the Commission brings a case against a member state, that does not mean that the case will reach the CJEU. Member states and the Commission can settle cases at any point in the infringement procedure.

Measuring Preference Divergence

I develop a behavioral indicator of preference divergence between member states and EU policy-makers that is specific to harmonizing directives: How frequently member states use technical regulations as \textit{de facto} trade barriers in non-harmonized sectors. By standardizing technical regulations across member states at the EU-level, harmonization prevents member states from using technical regulations as \textit{de facto} trade barriers. Thus, the more frequently a member state attempts to use technical regulations to discriminate against firms from other EU member states in non-harmonized industries, the more resistant we should expect that member state to be to implementing new harmonizing directives that take away that tool, which implies a higher level of preference divergence.

\textsuperscript{16} Harmonization directives are marked with the subject matter code “approximation of laws.”

\textsuperscript{17} There are three types of infringement cases: Non-communication cases, non-conformity cases, and bad application cases. I only consider non-communication cases, which the Commission initiates when member states fail to pass domestic legislation that transposes directives by the specified deadline.
In non-harmonized industries, governments often use technical regulations as *de facto* trade barriers to protect domestic firms (in violation of the EU Treaties). By imposing a new technical regulation that domestic firms already comply with, a government can discriminate against foreign firms without imposing tariffs or quantitative restrictions (which are easier for the Commission to identify). Since detecting discriminatory regulations requires substantial industry-specific knowledge, technical regulations are a popular way to protect domestic firms. Noncompliance in the implementation of harmonizing directives provides domestic firms in the newly harmonized industry with a competitive advantage. If domestic firms are spared from having to comply with new regulations (which can be very costly), while firms in other EU member states are not, those domestic firms have an opportunity to expand market share, gaining a competitive advantage.

I leverage public reporting requirements to identify attempts by member states to use technical regulations as *de facto* trade barriers. Before a member state government can adopt a proposed technical regulation, it must notify the Commission under a monitoring procedure called the 2015/1535 procedure. Governments must do this early enough in the policy-making process that the notified technical regulation can still be substantively amended. The Commission uses a public database called the Technical Regulation Information System (TRIS) to track notified technical regulations. Over the period I am considering (2004–2015), there are 8,090 notified technical regulations. There is an automatic 3 month standstill period in which the notifying member state cannot adopt the notified technical regulation. If a third-party member state believes that a notified technical regulation would...

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18 The EU Treaties prohibit member states from creating *de facto* trade barriers that discriminate against firms from other EU member states (Articles 34–36 TFEU).

19 The CJEU ruled in *CIA-Security* that if a member state enacts a technical regulation without notifying the Commission under the 2015/1535 procedure, national courts can invalidate the regulation.

20 The 2015/1535 procedure is named after the most recent directive that amended it, Directive (EU) 2015/1535. The procedure was originally created by Council Directive 83/189/EEC and was previously amended by Directives 98/34/EC and 98/48/EC.

21 The Commission can block a regulation for 12 months if it is working on a directive that will harmonize the industry. The standstill can be extended to 18 months if the Council adopts a common position during the original 12 month standstill period.
Figure 3. Geographical Distribution of Independent and Dependent Variables

Note: This figure shows the average level of preference divergence (the independent variable of interest) and the unconditional probability of an infringement case (the dependent variable) by member state across the entire sample (2004–2015).

constitute a *de facto* trade barrier, it can submit a *detailed opinion* (a formal complaint) to the Commission, which extends the standstill to 6 months.\(^{22}\)

We can interpret a detailed opinion as an allegation by a third-party member state that the notifying member state is attempting to use a notified technical regulation as a *de facto* trade barrier.\(^{23}\) Detailed opinions are credible allegations because they prohibit the parliament of the notifying member state from adopting the notified technical regulation for 6 months, which is a significant restriction on sovereignty.

Using the TRIS database, I calculate the average number of detailed opinions per notified technical regulation per member state (the notifying member state) per year. This is a time-varying measure of how much push-back a member state is getting from third-party member states in response to any new technical regulations it is trying to enact. Higher values indicate a preference for using technical regulations as *de facto* trade barriers, and

\(^{22}\) The CJEU ruled in *Unilever* that if the notifying member state does not respect the standstill, national courts can invalidate the technical regulation.

\(^{23}\) Opinions only indicate opposition to proposals, not support.
therefore higher preference divergence between the member state and EU policy-makers. If a member state has notified fewer than 3 technical regulations in a year, I code the variable as missing (there is too little information to code the variable). This reduces the sample from 14,747 observations to 13,413 observations. Figure 3 shows the average level of preference divergence and the unconditional probability of an infringement case by member state across the entire sample (2004–2015).

In sum, the average number of detailed opinions per notified technical regulation captures a preference for using technical regulations as de facto trade barriers. Since harmonizing directives eliminate the opportunity to use technical regulations in this manner, this measure captures the divergence in the policy preferences of individual member state governments and the EU policy-making institutions.

Estimation and Analysis

To test Result 2, I estimate Bayesian multilevel logit models. Observations are not independent because implementation opportunities are nested within member states. Thus, the errors for observations involving the same member state are likely to be correlated. Multilevel models explicitly account for this nested structure. I estimate varying-intercept multilevel logit models, where the intercept varies by member state.

In a Bayesian framework, the data are fixed and the parameters have a distribution. We start with prior beliefs about the parameters and use the data to update our beliefs, resulting in a posterior distribution. I use weakly informative priors. Trace plots indicate

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24 An industry-specific measure would be ideal, but it is not possible to code the industries that notified technical regulations apply to with available data. The TRIS database does not provide enough information about the specific content of notified technical regulations to cleanly map them to directives that harmonize technical regulations in the same industries.

25 I estimate all models using Stan via rstanarm in R (Carpenter et al. 2017), which performs Markov chain Monte Carlo (MCMC) sampling of the posterior distribution using the NUTS algorithm (instead of the Metropolis-Hastings algorithm). Fewer MCMC samples are needed because the algorithm provides better coverage of the posterior distribution (Hoffman and Gelman 2014). I estimate 4 MCMC chains with 2,000 iterations each and a burn-in period of 1,000 iterations, producing a sample of 4,000 draws.

26 I prefer weakly informative priors to flat priors, which put too much probability on extreme values (Gelman 2006; Gelman and Hill 2006).
that the models converge. The MCMC chains are stationary and there is high mixing. Autocorrelation plots show low autocorrelation for all parameters. Frequentist multilevel models yield similar results.

I control for three potentially confounding attributes of harmonizing directives. First, I control for whether the directive was enacted by the Council or the Commission. Second, I control for the relative influence of the member state in the legislative process using its qualified majority voting (QMV) weight. I normalize the QMV weights based on the number of member states so that it captures the relative influence of each member state over time. Third, I control for the number of cases in the Commission’s docket. This captures the opportunity cost of bringing a case.

Figure 4 shows the posterior distributions of the independent variables. It includes the mean of the posterior distribution for each covariate (the points), 50 percent Bayesian credible intervals (the thick lines), and 95 percent Bayesian credible intervals (the thin lines). There is an 95 percent chance that the parameter effect is in the 95 percent credible interval. In Models 1 and 2, I measure preference divergence as the mean number of detailed opinions per notified technical regulation. In Models 3 and 4, I use an alternative measure: The proportion of notified technical regulations where at least one member state files a detailed opinion. Models 1 and 3 use the full sample (13,413 observations), whereas Models 2 and 4 only include implementation opportunities involving Council directives, which are more politically salient than Commission directives (5,400 observations).

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27 Commission directives are enacted using delegated powers, so there is room for the Commission to enact policies that member states disagree with, which would result in higher preference divergence on average. Alternatively, member states might not have well-formed preferences over Commission directives, which are more technical and less politically salient than Council directives. This would result in lower preference divergence on average. The Commission could prioritize bringing infringement cases for Council directives, due to their higher political salience, but they could also prioritize bringing cases for Commission directives because there is a better chance they will be able to correct noncompliance.

28 Member states with a large QMV weight are less likely to be outvoted in the Council, which means their preference divergence should be lower on average. Their influence in the Council could make it easier for them to stand up to the Commission, which may deter the Commission from bringing a case. At the same time, though, bringing these member states into compliance is a bigger win for the Commission.

29 I standardize the QMV weight and docket size variables to have a mean of 0 and a standard deviation of 1 to help the models converge and to aid interpretation.
In all four models, preference divergence has a negative effect on the probability that the Commission opens an infringement case. This is consistent with my expectation that the data is likely to come from the region of the equilibrium space where the effect of preference divergence on the probability of litigation should be negative. This finding is consistent with the model, but inconsistent with the predictions of a model that does not take into account the strategic behavior of the court. The credible intervals for the measures of preference divergence exclude 0, indicating that there is a greater than 95 percent chance that increasing preference divergence decreases the likelihood of an infringement case.
Figure 5. Marginal Effect of Preference Divergence

Note: This figure shows the effect of preference divergence on the probability that the Commission opens an infringement case based on Models 1 and 2. Model 1 includes all directives and Model 2 includes only Council directives. In Model 1, the predicted probability of a case decreases from approximately 24 percent to 21 percent. In model 2, it decreases from approximately 31 percent to 25 percent.

To understand the substantive significance of the results, I plot marginal effects. First, I simulate data, varying preference divergence (from the in-sample minimum to the in-sample maximum) while holding the other covariates at their means. Second, I draw 4,000 outcomes (0 or 1) from the posterior predictive distribution (4,000 is the size of the posterior sample, which is the combined length of the four MCMC chains after discarding the burn-in period) conditional on the simulated data. Thus, there are 4,000 draws from the posterior predictive distribution for each simulated value of preference divergence. Third, I plot the predicted probability of the case as a function of preference divergence by taking

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30 I do not condition on the member state-specific intercepts.
the mean of the 4,000 simulated outcomes at each simulated value of preference divergence. I also include a best-fit line.

Figure 5 shows the average marginal effects for Models 1 and 2. In Model 1, the predicted probability of an infringement case decreases from approximately 24 percent to 21 percent. In Model 2, which only includes Council directives, it decreases from approximately 31 percent to 25 percent, a 20 percent decrease. It makes sense that the average marginal effect is larger in Model 2, as Council directives are more politically salient than Commission directives; consequently, the CJEU is more likely to care about ex post compliance, which should induce a larger change in the behavior of the Commission. The estimated marginal effects for Models 3 and 4 are substantively similar.

Using Model 2 (Council directives only), I estimate the average marginal effect for each member state, conditioning on the member state-specific intercepts, setting the docket size variable at its global in-sample mean, and setting the QMV weight variable at its within-member state mean. Note that because Model 2 is a non-linear model, the effect of preference divergence depends on the values of the covariates, including the member state-specific intercepts. Figure 6 shows the predicted change in the probability that the Commission opens an infringement case associated with varying preference divergence from its global in-sample minimum to its global in-sample maximum. The effect varies from a decrease of approximately 4.75 percentage points to a decrease of approximately 7.25 percentage points. If we assume that the model captures the data generating process, we can infer that the Court is more sensitive to ex post compliance by member states for which the estimated effect is larger, such as the United Kingdom, Italy, and Greece.

If we are willing to assume that my formal model captures the data generating process, these findings imply that the CJEU is sensitive to ex post noncompliance with adverse rulings (Assumption 1). Consistent with Carrubba and Gabel (2015), the preferences of member states constrain the ability of the CJEU to correct noncompliance. These findings

31 The effects are similar for my other measure of preference divergence, which is the proportion of notified technical regulations per year in which at least one detailed opinion is filed.
Figure 6. Marginal Effect of Preference Divergence by Member State

Note: This figure shows the predicted change in the probability of an infringement case associated with a change in preference divergence from its global in-sample minimum to its global in-sample maximum. (based on Model 2). The size of the effects varies from a decrease of approximately 4.75 percentage points to a decrease of 7.25 percentage points.

also imply a compliance deficit in the EU due to strategic noncompliance, which is consistent with recent empirical work (König and Mäder 2014; Fjelstul and Carrubba 2018).

Conclusion

This paper contributes to the literatures on courts and policy implementation by analyzing how the politics of adjudication affect the implementation of policy. Recent research shows that constitutional courts and quasi-constitutional international courts anticipate noncom-
compliance with their rulings and are hesitant to rule against noncompliant defendants when it is costly to comply with an adverse ruling (e.g., Carrubba and Gabel 2015).

My model predicts that implementing actors will more closely implement laws for intermediate levels of preference divergence between the implementing actor and a policy-maker. For low values of preference divergence, the plaintiff is unlikely to bring a case because the benefits of correcting minimal noncompliance do not justify the costs of litigating. For high values of preference divergence, on the other hand, the plaintiff is unlikely to bring a case because the court, anticipating noncompliance with an adverse ruling, is unlikely to rule against the defendant. Looking at the Court of Justice of the European Union (CJEU), I find empirical evidence that is consistent with the model.

This study expands our understanding of how courts affect the behavior of implementing actors. I find that implementing actors try to thread a needle: They choose to implement a policy that is not fully compliant, but complaint enough that the likelihood of litigation is not too high. They trade a worse policy outcome for a lower chance of going to court. Consequently, none of the actors get their first-best policy outcome; implementing actors make concessions to avoid litigation, and plaintiffs are deterred from litigating the most severe instances of noncompliance, which means that policy-makers have to settle for partially correct implementation in expectation.

This study also has important implications for our understanding of the conditions under which international courts, like the CJEU, are effective at facilitating international cooperation. If courts are not sensitive to noncompliance with their rulings (ex post noncompliance), then when the cost of compliance is high, member states could prefer to exit rather than complying with adverse rulings or paying the political costs of ignoring them (Johns 2015). However, if they are sensitive to ex post noncompliance, then international courts facilitate the stability of international agreements at the expense of higher levels of noncompliance. When the cost of compliance is high, the court is not effective at deterring noncompliance, so member states can get away with implementing policies that are more consistent with their preferences; thus, they do not have an incentive to exit the regime.
Future research on courts and policy implementation should endogenize the policy-making process (i.e., the legislative process by which policy-makers bargain over *de jure* policies) and look for evidence of the discriminating predictions of the model in other empirical contexts. Future research should also consider how the internal judicial politics of constitutional and international courts affects their ability to strategically anticipate non-compliance with adverse rulings, as that strategic behavior drives their effectiveness at deterring noncompliance by implementing actors.
References


