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How the European Union's Legal System Works - and Does Not Work: Response to Carruba, Gabel, and Hankla

Alec Stone Sweet, *Yale Law School*

How the Legal System of the European Union Works - and Does Not Work: Response to Carrubba, Gabel, and Hankla

Alec Stone Sweet* and Thomas Brunell**

Abstract: In a recent paper published by the *APSR*, Carrubba, Gabel, and Hankla claim that the decision-making of the European Court of Justice (ECJ) has been constrained – systematically – by the threat of override on the part of Member State Governments, acting collectively, and the threat of non-compliance on the part of any single State. They further purport to have found strong evidence in favor of Intergovernmentalist, but not Neofunctionalist, integration theory. In this paper, we reject CGH’s claims on the basis of our analysis of the same data. We show that the threat of override is not credible, and that the legal system is activated, rather than paralyzed, by non-compliance. Moreover, in a head to head showdown between the Commission (and Neofunctionalism) and the Member State Governments (and Intergovernmentalism), the Commission wins in a landslide. The data appear to provide support for the view that the ECJ engages in “majoritarian activism.” CGH most robust finding is that when Member States urge the Court to censor a defendant Member State for non-compliance, the ECJ tends to do so. In such cases, the Member States work to reinforce the Court’s authority, not to “constrain” it.

In “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice,” Carrubba, Gabel, and Hankla [hereinafter CGH] (2008) make three provocative claims. First, CGH claim (436) to have developed a new methodology that solves the inference problems afflicting all prior research. Their approach involves evaluating the influence of *amici* briefs, filed by Member State Governments [MSGs] and the EU Commission, on the rulings of the European Court of Justice [ECJ]. Second, having analyzed the Court’s holdings on some 3,176 legal questions over an 11-year period (January 1987-December 1997), the authors declare that the ECJ has been constrained by *the threat of override* on the part of MSGs, acting collectively, and by *the threat of non-compliance* on the part of any single MSG. They summarize their findings as follows (449): “Our analysis provides systematic evidence that judges at the ECJ are sensitive to these two constraints. Moreover, these threats have a substantively large effect on judicial rulings.” Third, CGH revive a classic debate in scholarship on European integration,

* Leitner Professor of Law, Politics, and International Studies, Yale Law School and Yale Department of Political Science.

** Professor of Political Science, School of Economic, Political, and Policy Sciences, University of Texas-Dallas.

claiming (449) that their findings support Intergovernmentalist theory, but conflict with Neofunctionalism. Because this paper was published in a prominent venue, the *American Political Science Review*, and reports results conflicting with virtually all of the empirical research on the topic ever published, each of these claims deserves close scrutiny.

THEORY, METHOD, RESEARCH DESIGN

There is broad scholarly consensus today on the view that the ECJ has been an important force, in part, because its pro-integrative rulings are effectively insulated from Member State override (e.g., Alter 2008; Cichowski 2007; Pollack 2003; Stone Sweet 2004, 2010; Tallberg 2000, 2002).¹ The underlying rationale is straightforward: for any controversial issue on which the Court will take a legal position, the MSGs will be divided and unable to muster the Unanimity required to overturn it. As discussed below, Unanimity is the decision-rule governing override in the vast majority of cases in the CGH data set. In less than 10% of the remaining cases, the decision-rule is a Qualified Majority [QM], which CGH (440) operationalize as 70% of the weighted votes of the MSGs in the Council of Ministers. Although CGH are silent on the issue, readers should know up-front that there is not one instance of successful override in their data set, indeed, we know of no significant case in the history of adjudicating the treaties.

While everyone agrees that the ECJ, like all courts, seeks to elicit compliance with its decisions, there is also strong scholarly consensus for the view that the ECJ is not constrained in any systematic sense by the threat of MSG non-compliance. The EU's legal system is organized to deal with compliance failures (Kelemen 2006, 2010; Tallberg 2002b). Over the past two decades, a wealth of scholarship has documented how non-compliance on the part of MSGs has organized litigation and provoked the Court's dynamic construction of EU law (thereby creating

¹ To our knowledge, apart from CGH, no one since Garrett (1992, 1995) has argued that the threat of override is credible and might have a systemic impact on the ECJ's rulings, though Garrett did not seek to test the proposition.

new compliance failures). But no one has shown that the progressive evolution of the ECJ's case law, a truly remarkable edifice, has been stunted by the threat of non-compliance. For their part, CGH do not identify a single instance in which a threat of non-compliance has constrained the Court. As we will show, CGH's claims flow from their theory, not from the evidence. In CGH's theoretical model (439), the MSGs, rather than the ECJ, constitute the EU's authoritative third-party enforcement mechanism.² The Court's job is to ratify the MSGs' legal preferences on an ongoing, *ad hoc* basis.³

Among good reasons to reject this view, CGH's model underestimates the supranational character of the system, in particular the crucial role of interactions between the ECJ and national judges (Alter 2001, Weiler 1994). The national courts, through the preliminary reference procedure (Art. 267, see Appendix), furnished nearly two-thirds of all of the legal questions in the CGH data set. The vast majority of these concern allegations of non-compliance brought to bar by individuals, firms, and interest groups. In effect, the national legal order is the "defendant" in these cases. If, in its answers, the ECJ determines (or implies) that national law is in non-compliance with EU law, then it is the national judge, not the MSG or an executive official, who will take the authoritative decision "to comply" or "not to comply." We would ask: if a national judge refuses to apply national law, in deference to the ECJ's interpretation of EU law, then how is it possible for a MSG to "implement" a decision "not to comply"? CGH need to address this question, since national judges implement the Court's preliminary rulings routinely – far more than 90% of the time (see Nykios 2003, 2006).

² CGH (439): "[T]he credibility of a litigant member state's threat of noncompliance should weaken as the likelihood of third-party (i.e., other member states) enforcement increases. And this implies that, if the Court values compliance with its rulings, the likelihood that the Court rules against the litigant government position will depend on the likelihood of this third-party enforcement."

³ If the legal system worked as the authors theorize, one might expect the Member States to sue one another for non-compliance under Article 259 TFEU, which is designed for that a purpose. In the period covered by CGH, however, the ECJ did not render a single ruling pursuant to an Article 259 suit. To date, there have only been three such rulings.

The Method: From Briefs to Rulings

Since Stein's (1981) seminal paper on "The Making of a Transnational Constitution," scholars have examined the relationship between (a) the legal arguments contained in *amici* briefs filed by the MSGs and the Commission, and (b) the ECJ's rulings. Because these briefs – "Observations" in EU parlance – advise the ECJ on how it should rule on the legal questions constituting any given case, they embody revealed preferences. Stein developed the approach as one means of assessing the influence of MSG preferences, and those of the Commission, on 11 of the ECJ's foundational, "constitutional" rulings. He found that *none* of the signatories of the Rome Treaty filed a brief in support of any of the Court's major moves, while each of the MSGs opposed the Court in at least one of them. These decisions famously "transformed" the treaty system (Weiler 1991), "constitutionalizing" it in all but name (Mancini 1991).⁴

What makes the EU unique among treaty-based regimes is the fact that Governments can be sued by individuals in national courts, and national judges have the means to make judicial rulings against Governments stick. Yet, if the legal system actually operated according to the dictates of CGH's model, this transformation would not have occurred, and the system would not have generated most of the data that CGH analyze.

Consider *Van Gend en Loos* (1963),⁵ arguably the most important ruling the Court has ever rendered. In that case, the briefing parties battled over the doctrine of "direct effect." The underlying question was a momentous one: could a private litigant plead a provision of the Treaty of Rome in a national court, against a Member State act? Belgium, Luxembourg, and the Netherlands had taken a collective decision to violate the Treaty, raising customs duties, thereby

⁴ The *constitutionalization* of the EU refers to the process by which the Rome Treaty evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons, public and private, within EC territory. The phrase thus captures the transformation of an intergovernmental organization governed by international law, into a quasi-federal legal system. For discussion of constitutionalization and its effects, see Stone Sweet (2004: ch. 2).

⁵ ECJ 26/62 [1963] ECR 1.

harming an importer, who sued in Dutch courts. In their briefs, Belgium, Germany, and the Netherlands pointed out that the Treaty creates rights and obligation only for the Member States, not private parties. In fact, the Member States had expressly chosen *not* to provide for the direct effect of Treaty provisions in national legal orders. Of the six members of the EU, only France and Italy were not involved in the fray. Prompted by the Dutch judge of reference, and urged on by the Commission, the Court declared that the Treaty provision in question was “directly effective,” and the plaintiff won. Neither the fact of non-compliance, nor an implied threat of override, constrained the ECJ. The Court subsequently extended the scope of direct effect to cover a major class of EU statutes, called directives; and the ECJ announced and developed its doctrine of supremacy, the rule that in *every* conflict between *any* EU legal norm and *any* national law or practice that arises before a national judge, the EU norm *must* prevail.⁶

The Member States had chosen not to include a supremacy clause in the Treaty of Rome, and they did not provide for the direct effect of treaty provisions and directives. Yet, on the basis of the ECJ’s doctrines and its case law on other issues,⁷ such as state liability for compliance failures (see below), the courts were successful in constructing a decentralized system for enforcing EU law (Burley and Mattli 1992). As references from the national courts steadily rose, and then exploded, the ECJ found itself at the center of virtually every important policy question faced by Governments. As has been well-documented, the Court has exercised decisive influence on the overall course of market and political integration, and on thousands of policy outcomes great and small.⁸ The consolidation of supremacy and direct effect is a *necessary* causal condition for all of this to happen, yet the result appears to be a theoretical impossibility in

⁶ Once a European legal norm enters into force, the ECJ ruled, it “renders automatically inapplicable any conflicting provision of ... national law” (*Simmmenthal*, ECJ 106/77, 1978), including national constitutional rules.

⁷ For a summary of the so-called “constitutional” case law, see Stone Sweet (2004: 64-71).

⁸ For a recent review of the scholarly literature on the impact of the ECJ on integration, EU policymaking, and national law and politics, see Stone Sweet (2010).

CGH's model. Put differently, CGH have chosen to study a legal system that developed through rulings that unambiguously count as evidence against their own theory.

In the 1990s, political scientists refined Stein's method, to make it more rigorous and amenable to quantitative analysis (beginning with Kilroy 1996; Stone Sweet and Caporaso 1998). Political scientists then began to use it, relatively systematically, within legal-policy domains, comparatively across domains, and diachronically. Well before CGH began their research, the method CGH claim to have originated had become standard in the field. Variations had been deployed in the projects that CGH explicitly criticize and others they chose not to cite (e.g., Cichowski 1998, 2004, 2007; McCown 2003; Nykios 2003, 2006).

Against this backdrop, CGH make two extraordinary claims. First, CGH (2008: 436) assert that: "While previous works focus[ed] on quantitative trends in the types of cases heard by the Court and only consider[ed] cases arising from national courts ..., we analyze actual judicial decisions, and include both preliminary rulings and direct actions [Article 258 infringement proceedings]." This statement is false. To take just one example, Stone Sweet (2004), reports comprehensive data on both infringement proceedings under Article 258 (see Appendix), and preliminary references under Article 267, and the book examines the relationship between briefs and rulings for major rulings discussed. Whereas other scholars in the field took pains to trace the impact of the ECJ's findings of non-compliance on the future politics of litigation and compliance, CGH do not analyze the content of a single judicial decision.

Second, CGH assert that their design "avoids" an inference problem, one of "observational equivalence," which has rendered previous efforts to test the impact of briefs on ECJ rulings "uninformative" (436). CGH do not discuss how this problem has afflicted any specific research, with what detrimental effects on findings. Instead, they confabulate (436):

“Some scholars argue that observing governments taken to court regularly, ruled against regularly, and complying regularly is *prima facie* evidence that governments are constrained to obey adverse court rulings.” To our knowledge, no scholar has ever argued this position.⁹ To state that the EU’s legal system processes non-compliance cases routinely, which it does, is *not* an assertion, as CGH would have it, that MSGs “are constrained to obey adverse court rulings.” On the contrary, (a) how the courts decide non-compliance cases, and (b) how the MSGs react to a finding of non-compliance by the courts, are two separate empirical questions. Unlike the rest of the field, the latter is a question that CGH chose not to study.

What is CGH’s method for avoiding the inference problems that have afflicted all extant scholarship?¹⁰ The authors put it as follows:

[W]e develop a novel measurement strategy for coding court decisions. Decisions by the ECJ ... often consist of multiple legal issues over which the court may not always favor the same side. Summarizing the decision as pro-plaintiff or pro-defendant, which is common practice, therefore ignores potentially important variation in court behavior and, at a minimum, introduces measurement error. We avoid this problem by creating a dataset of decisions on within-case legal issues rather than cases themselves (CGH 436).

As described, CGH’s method adds nothing new to the basic approach developed post-Stein. We also reviewed their coding protocol and found nothing novel in their approach to rulings. In “analyzing” the substance of the Court’s rulings, CGH limit themselves to coding decisions as either supporting or opposing the plaintiff, and they ignore the impact of rulings on the substantive law of the EU and the Member States.

It is standard practice in this field to analyze the Court’s position on each legal question briefed by a MSG and the Commission, in each ruling analyzed. For Article 267 preliminary rulings, this “issue-by-issue” approach is obligatory. In important cases, the national judge of

⁹ The only scholarship cited is Stone Sweet and Brunell 1998, without a page number to support the quote.

¹⁰ “This study will provide the first discriminating test of member-state government influence that avoids this observational equivalence problem” (CGH 436).

reference typically asks more than one legal question. In responding, the ECJ often makes it clear which party in the dispute ought to prevail, given the facts and the ECJ's interpretation of the applicable EU law; other times, the ECJ provides an interpretation on EU law, but leaves it to the national judge to decide how to apply it. Often, the ECJ does not answer all of the questions. The issue of which party "wins" may be less important than how the Court interprets the law, in so far as such rulings will help to determine the future evolution of the system.

To illustrate, consider another momentous preliminary ruling: *Costa* (1964).¹¹ The significance of the decision is not that the plaintiff, Mr. Costa, "lost," or that the defendant, an Italian public utility, "won," though the ECJ dismissed the claim alleging Italian non-compliance. Rather, the Court used the dispute as a vehicle to announce its doctrine of supremacy, which Italy had opposed in its brief. Any analyst who would read this case and then note only that the plaintiff "lost," would miss one of the major judicial decisions of the 20th century. Yet, CGH believe that everyone in the field analyzed ECJ rulings in this way prior to their study. In fact, every litigator of EU law, every legal specialist employed in an EU organ or Member State agency, and every scholar who reads the ECJ's case law for research purposes, analyzes Article 267 rulings issue-by-issue. There is no other way to understand them. The practice comes naturally: the Court organizes these judgments on a question-by-question basis.

CGH adopt a variation of the basic method. Whereas others analyzed the relationship between briefs and decisions on legal questions in every ruling rendered in multiple domains of EU law since the beginning, CGH examined all of the rulings rendered in a specific time frame. CGH coded, among other information, how the Court addressed the various legal questions raised in each ruling (in binary terms: whether Court sided with or against the plaintiff), and how the Commission and the MSGs briefed these same questions. Quite sensibly, CGH "weigh" each

¹¹ ECJ 6/64 [1964] ECR 585.

MSG's brief according to the number of votes that MSG has been assigned in the Council of Ministers under Qualified Majority Voting (QMV) rules.¹² They can then derive a "net weighted position," which can be either (a) positive, when weighted briefs sum up to support the plaintiff, (b) negative, when the weighted briefs sum up to oppose the plaintiff, or (c) zero, when no MSG filed a brief on a question, or when the briefing MSGs cancel one another out.

CGH then use various quantitative techniques to assess the extent to which ECJ's rulings align with, or depart from, the net weighted position of the MSGs and the Commission brief. It is crucial to understand that, for CGH, any ECJ decision coded as congruent with the net weighted position of the MSGs counts as support for their theory. That is, in all such cases, CGH assume that the ECJ was "constrained" to decide as it did, due to the threats of override and/or non-compliance. In our view, CGH's method tests, at most, the "influence" of briefs on outcomes; their method does not test their proposed *explanation* of this influence, as our discussion of how CGH operationalize their hypotheses will make clear.

The Hypotheses

In fact, CGH do not design their research to test the robustness of the threat of override, or the threat of non-compliance, as constraints on the ECJ's decision-making.

Hypothesis 1 embodies the override mechanism: "The more credible the threat of override ... the more likely the court is to rule in favor of the governments' favored position" (CGH 439). CGH further suggest, reasonably, that "the threat of legislative override increases with the likelihood that a sufficiently large coalition of member states would pursue legislation or treaty revision in response to an ECJ ruling" (440). CGH then load the dice in favor of their preferred position – that the threat of override is a credible one – by stipulating that the decision-

¹² These rules governed the passage of EU statutes deemed necessary for the completion of the Common Market, pursuant to the Single European Act, which entered into force 1 July 1987

rule governing override will *always* be QM. They justify this move as follows (440):

“Unfortunately, we cannot easily distinguish which legal issues can be overridden by QM and which require unanimity support.” The information needed to determine the override rule is easily obtained: each ECJ ruling highlights, up-front, the provisions of EU law being litigated.¹³ We examined every ruling pursuant to an infringement proceeding (Article 258), and every preliminary ruling (Article 267) in which at least one Member State filed observations in the CGH data set. We found that, for over 90% of the cases, the override rule is Unanimity, not QM.¹⁴

Because CGH do not stipulate a threshold point at which the threat of override can be assumed to have been registered, it is difficult to see how they could actually test Hypothesis 1. Further, they do not describe a single instance in which a threat of override was actually made, nor do they provide even a “stylized” example of how their mechanism might work. Instead, CGH (436) declare that the necessary votes to override can be gathered through “log-rolling.” The entire discussion of this “log-rolling” process occurs in the following passage (436): “Override requires a government, or set of governments, opposed to the Court’s preferred ruling to cobble together a logroll. Further, protocols can ease the logrolling process in treaty revision.” In fact, CGH assume that the necessary votes can be “cobbled” together so long as the net weight of observations filed in support of a defendant Member State is greater than zero. Although Hypothesis 1, as originally stated, implied that the threat of override would only be registered

¹³ In their coding protocol, CGH state that they coded the “legal basis” of the EU law being adjudicated by the Court. Legal basis, the rule governing adoption of a legal provision, determines the override rule.

¹⁴ The result is not surprising. The Unanimity override rule governs: all rulings on treaty law, including all cases in the domains of free movement of goods, services, and workers, anti-trust, and every legal basis dispute under Article 263; all rulings that concern EU legislation adopted under unanimity rules, the vast majority of statutes litigated in CGH’s data set; all rulings pursuant to Article 267 preliminary questions related to direct effect, supremacy, remedies, and general principles of EU law, including fundamental rights; and more.

when a “sufficiently large coalition” of MSGs weighed in, CGH go on to treat the threat as present even in cases when only one MSG, as small as Luxembourg or Portugal, has filed a brief.

With respect to non-compliance, CGH (439) propose Hypothesis 2: “The more opposition a litigant government has from other MSGs, the more likely the court is to rule against that litigant government.” Note that Hypothesis 2 focuses attention on situations in which at least one non-litigating MSG *encourages* the Court to punish a defendant MSG; the logic of the mechanism is *permissive* not *constraining*. In their discussion, CGH do not help us to identify, or to understand what happens, when a threat of non-compliance is actually made. Instead, CGH assume that the threat of non-compliance is inherent *in every case*, and that the threat will *in every case* constrain the ECJ except when the Court is supported by the non-defendant Member States. “If governments have the ability to ignore adverse rulings,” CGH (439) declare, “the Court can only expect compliance with its rulings when nonlitigating governments are willing to punish the defecting government for noncompliance.”¹⁵

In the end, CGH do not evaluate the effects of their two mechanisms separately. Readers may be surprised to learn that CGH operationalize Hypothesis 1 (“as the net number of member-state observations in favor of the plaintiff (defendant) increases, the likelihood that the Court rules for the plaintiff (defendant) increases”) to make it virtually identical to Hypothesis 2 (“The more opposition a litigant government has from other member-state governments, the more likely the court is to rule against that litigant government”). This move drives CGH’s analysis: (1) they can now count as evidence in support of Hypothesis 1 any instance in which the Court rules in favor of a plaintiff when that ruling is congruent with the net weight of MSG observations in favor of a plaintiff (even if only one MSG weighs in, and the override rule is

¹⁵ In this discussion, CGH (439) focus exclusively on the cost entailed by a MSG in complying with the Court’s decisions, while ignoring the cost to the MSG of subsequent litigation, and a subsequent finding of non-compliance.

Unanimity); and (2) they can now count as evidence in support of Hypothesis 2 any instance in which the Court rules against a defendant MSG when that ruling is congruent with the net weight of MSG observations against that defendant. Operationalized in this way, Hypothesis 1 and Hypothesis 2 test the same relationships among variables, on precisely the same data. In our view, CGH end up testing only the extent to which briefs (the independent variable) predict ECJ rulings (the dependent variable) on any given legal question. The design, however, cannot test a theory of override, since whatever results are generated will stand irrespective of whether the threat of override is credible for any legal question.

Without comment, CGH also include data from Article 263 annulment actions (see Appendix) in what they assert are tests of Hypotheses 1 and 2. Annulment actions can *only* be brought against EU organs; MSGs can *never* be defendants. Thus, in order to test propositions concerning MSG non-compliance, CGH include data drawn from 593 rulings and 662 legal questions (more than 20% of the total number of observations in their data set) in which national non-compliance can *never* be a legal issue!¹⁶ How can one explain why CGH would include Article 263 in analyses that purport to test Hypothesis 2? If we are correct, and CGH's project is actually designed to evaluate the "influence of briefs on the ECJ's rulings" – rather than to test the threat of override and non-compliance as causal mechanisms that constrain the Court's decision-making – then it would make sense to include Article 263 cases.

II. ANALYSIS (1): THE BRIEF FOR OVERRIDE AND NON-COMPLIANCE

In their article, CGH withheld the most important descriptive statistics that would allow readers to evaluate their claims. Despite repeated requests, the authors did not provide the basic data on which their analyses are based: information on which MSGs filed observations, concerning which legal questions, in which rulings, in support of which party. Instead, CGH

¹⁶ MSGs filed observations in only 8.8% (58/662) of the legal questions raised in these rulings.

sent us aggregate data that they had processed to produce their findings. These data included case numbers, net weights of observations (without codes for the briefing MSGs) on (unidentified) legal questions,¹⁷ and whether the plaintiff won or lost. Although the ECJ numbers the legal questions it answers in its Article 267 rulings, CGH chose not to do so, making it impossible for the analyst to decipher how CGH coded the net weight of MSG observations on any legal question.¹⁸ Nonetheless, on the basis of these case numbers, we gathered and analyzed the information that CGH did not disclose, in order to assess their broader theoretical claims. We report our findings here.

Quantitative Evidence

Article 258 infringement proceedings are brought by the Commission against a Member State for alleged non-compliance with EU law (Appendix). These suits constitute the set of observations that are directly relevant to the question of whether the threats of non-compliance and override constrain the legal system. We read and coded all of these cases. Adjusting for errors,¹⁹ we believe that there are 444 such rulings in the CGH data set. The Member States filed zero observations (or did not take a weighted position) in 93.5% (415/444) of these rulings, more than 90% of which the Commission won. Thus, the Member States are only occasional participants in the only legal procedure specifically designed to deal with Member State non-compliance with EU law.

¹⁷ In rulings in which the Court decided more questions than CGH identify and code, it is impossible to know which questions CGH left out and, therefore, impossible to assess CGH's coding decisions.

¹⁸ CGH do not provide a key to how they have weighted each MSG, making checking their coding decisions impossible. Further, CGH apparently give different weights to the same Member State in different cases, presumably due to the effects of enlargement but, again, it is impossible to know.

¹⁹ At least two rulings were erroneously coded as Article 258 enforcement actions (320/95 is a preliminary ruling; 129/86 is an annulment action). The data sets are riddled with errors (documentation upon request), one of which is systematic and deserves mention. The coders did not code the number of issues in Article 258 infringement proceedings consistently, even in similar cases. We decided that the best way to handle this problem would be to treat all Article 258 rulings as involving a single legal question: compliance or non-compliance. Unfortunately, to do so does violence to the richness of many important rulings. In our qualitative analysis of key decisions, we found a many significant coding errors (see Stone Sweet and Brunell 2010).

Twelve of these rulings concerned cases brought by the Commission for failure on the part of a MSG to comply with a *prior* Article 258 ruling, and the defendant MSG lost all of these. These 12 cases are relevant to CGH's assumptions about the costs of non-compliance. Although neither the Commission nor the Court can force a MSG "to obey adverse rulings" (CGH 436), MSG decisions to refuse to comply with an ECJ ruling did not paralyze the system. Rather, non-compliance generated more litigation and more rulings of non-compliance.

In only 6.5% (n=29) of Article 258 rulings, did the MSGs register a weighted position;²⁰ in all 29 cases, the override rule was Unanimity, *not* QM. In only 15 rulings did the net weight of observations favor the defendant State. The distribution is as follows: in 1 case, 3 MSGs supported the defendant; in 4 cases, two did so; and in the remaining 10 cases, one MSG supported the defendant. Thus, in a paltry 3.4% of cases in which Member State non-compliance was the issue and override was on the table, the mean weighted position of MSGs (as coded by CGH) in support of the defendant State was 12.6% of the vote under QM procedures, whereas 100% would have been necessary to override.

Recall that Hypothesis 1 states that "threats of override are potentially credible whenever a government, or set of governments, can produce a coalition sufficient to override the Court's decision." Given their theory, this version of Hypothesis 1 deserved to be tested, but CGH chose not to do so. The data show that in no Article 258 case does a coalition of MSGs supporting a defendant State on a legal question exceed 25% of the short-end of Unanimity (12-15 votes). With respect to outcomes, of the 15 rulings in which the Commission's arguments are pitted against the net weighted position of MSGs in support of a defendant State, the Commission wins a majority (8/15). CGH's data confirm what we knew: the threat of override does not constrain

²⁰ CGH's data set contains 17 such cases, but two rulings (141/87 and 137/96) were coded erroneously, since in fact no Member State filed a brief in either. We attached these rulings to the list of cases in which CGH report a weighted score of zero, for the purposes of the analysis in this section.

the Court, because it is not a credible threat. Outcomes are also broadly consistent with the findings of prior studies.²¹ CGH should explain why they did not report basic statistics like these in their paper.

We now turn to CGH's data on Article 267 activity, in which the Court responds to questions referred by national judges. CGH code 2,048 legal questions answered in 1209 rulings.²² In the *majority* of legal questions raised (1122/2048), either no MSG filed a brief, or CGH coded the net weighted position as zero. There are, in fact, only 6 instances in which MSGs took a net weighted position against the plaintiff-individual that reaches at least 50% of a vote under the QM procedure (the plaintiff "wins" in three of these cases, and "loses" in three). In each of these cases, however, the rule governing override was Unanimity, not QM. In only one Article 234 ruling (of 1209), does a coalition of MSGs reach as many as 6 of the 12-15 votes necessary to override the Court during the period in question. CGH do not report this information, but instead expect readers to believe that a "log-rolling" process, left unexplained, can "cobble together" a unanimous vote.

Now let us consider CGH's data as a whole. Figure 1 depicts the distribution of values on CGH's main independent variable: Member State briefs weighted as a function of their share of votes in the Council of Ministers under QM voting procedures. In more than two-thirds of all issues coded, the Member States take no position. In 11.8% of the legal questions in the data set

²¹ Börzel, Hofman, and Panke (2008) collected comprehensive data on Article 258 actions and outcomes for the 1978-99 period, a time-frame that subsumes CGH's data. The Commission brought more than 5,000 proceedings against Member States, the vast majority of which were settled before a ruling, after the defendant State agreed to change its law or practices. The Commission referred to the Court one-third of all cases (n=1,646), leading to a final ECJ judgment in slightly less than half of these (n=808). The ECJ found against the Member States in 95% of its Article 258 rulings, suggesting why the settlement regime is so effective. In "about 100 cases," the Commission brought a second action after the defendant Member State failed to comply with the ECJ's ruling. These cases either were then settled to the Commission's satisfaction, or the ECJ found against the MS a second time. Stone Sweet (2004) reports similar results for rulings pursuant to all Article 258 actions against Member States in multiple domains of law.

²² We eliminate from our analysis, as CGH do, rulings that CGH code as missing data.

(375/3176), CGH code the Member States as taking a position in favor of the plaintiff. The mean average score in such cases is 14.4% of a QM in the Council, slightly more than the vote of one Member State on the order of France, Germany, or the UK. In 20.3% of the legal questions in the data set, CGH code the Member States as taking a position in favor of the defendant, the mean score of which is 15.1% of a QM vote, again, far short of the combined votes of even two important Member States. As figure 1 makes clear, the Member States do not come close to reaching a QM, let alone Unanimity, in any systematically-meaningful way. If, as CGH argue (338), the threat of override is not credible, then it cannot constrain the ECJ. CGH's claim to the contrary therefore seems inexplicable.

---- Figure 1 here ----

We also examined what happened when the MSGs actually took measures to override major rulings. Although they do not mention this fact, the CGH data set contains two such episodes, concerning occupational pensions,²³ and the designation of wildlife preservation areas.²⁴ Followed rulings taken in the face of MSG opposition (decisions that must count against their theory of how threats of non-compliance work in the EU),²⁵ the MSGs moved to override the Court. In both instances, override measures failed to constrain subsequent decision-making: the ECJ continued down the path cleared by its previous rulings. The CGH data set also contains a set of landmark “constitutional” rulings that established the doctrine of state liability: that a Member State can be held financially responsible, in national courts, for damages caused to individuals due to failure to implement or apply EU law properly.²⁶ These rulings were taken in

²³ *Barber*, ECJ C-262/88 [1990] ECR I-1889; *Vroege*, ECJ C-57/93 [1994] ECR I-4541; *Fisscher*, ECJ C-128/93 [1994] ECR I-4583.

²⁴ *Commission v. Germany*, ECJ C-57/89 [1991] ECR 2849; *Commission v. Spain*, ECJ C-355/90 [1993] ECR I-4221; *Lappel Bank*, ECJ C-44/95 [1996] ECR I-3805.

²⁵ Opposition included formal positions taken by the Council of Ministers.

²⁶ *Francovich*, Case C-6 & 9/90 [1991] ECR I-5357; *Brasserie du Pecheur*, Case C-46/93 and C-48/93 [1996] ECR I-1029.

the face of unusually strong opposition on the part of the many MSGs who filed briefs. MSGs argued, among other things, that EU law does not require state liability (the Treaty is silent on remedies), and that such a remedy could only be lawfully provided through legislation, not through judicial fiat. The Court rejected these arguments, siding with the Commission. We provide a full account of these episodes, in light of CGH's treatment of them, elsewhere (Stone Sweet and Brunell 2010).

Given the paucity of evidence in support of their theory, what did CGH find that led them to overclaim so much? In fact, CGH found that MSG briefs have a positive predictive effect on ECJ rulings. Although CGH interpret this result as providing evidence in support of the proposition that the threats of override and non-compliance constrain the ECJ, there is no reason to believe that the finding is related to the proposed explanation. CGH demonstrate only that when MSGs weigh in on an issue, the ECJ will, more often than not, decide the question in ways that are congruent with that weighting. When MSGs side with the plaintiff (n=375, typically, urging the Court to find against laws and practices in place in another State), the MSG's rate of success is 70.9%. When MSGs side with the defendant (n=646, typically against the Commission or an individual, and in support of another State's law and practices), their rate of success is 58.5%. Note that the MSG's success rate is far higher when they *encourage* the ECJ (to punish a Member State) than when they seeks to *constrain* the Court (from finding against a defendant States' law and practices), though it participates in the latter activity far more than in the former. In our view, these findings are intriguing and worthy of further exploration, not least, in light of CGH's third major claim, that the data provide evidence in support of Intergovernmentalist integration theory (Part III below).

Qualitative Evidence

CGH restrict their inquiry to the quantitative analysis of the coded rulings. In contrast to other political scientists who have undertaken empirical research on their topic, CGH do not supplement statistical analyses of briefs and rulings with thicker, descriptive analyses of the relationship between non-compliance and judicial process. CGH's failure to do so renders their claims deeply suspect. Most important, using CGH's thin approach to law and judicial process, the analyst cannot distinguish between a profoundly important legal question, and a minor one. Whereas others took care to examine how prior case law (argumentation and precedent) structures litigation, identifying those rulings that are most important in generating future streams of litigation, CGH treat all issues and all rulings as if they were equally significant, and they do not follow-up on any ruling in their data set.

In fact, In CGH's data set, one finds two instances in which the MSGs formally sought to constrain the Court after it took positions opposed by Governments. Neither succeeded.

The first attempt was provoked after the ECJ held, in *Bilka* (1986),²⁷ that benefits under occupational social security schemes were covered by Article 157 of the Treaty, which mandates "equal pay for male and female workers for equal work." Prior to 1986, the Member States believed that such schemes did not provide "pay" within the meaning of Article 157; further, they had adopted EU statutory provisions that had expressly excluded retirement and old age pensions from the coverage of Article 157. Following the *Bilka* ruling, the Council of Ministers adopted the Directive on Occupational Social Security (1986), which again carved out exceptions to the application of equal pay for the sexes, including the determination of pensionable age. In October 1987, the Commission submitted draft legislation to end this derogation, but the UK and France blocked it in the Council of Ministers (Curtin 1990). The proposal required unanimity to pass.

²⁷ ECJ 170/84 [1986] ECR 1607.

In *Barber* (1990),²⁸ the ECJ enacted the reform as an interpretation of Article 157.²⁹ In response, the Member States adopted the so-called “Barber Protocol,” which they attached to the 1992 Treaty on European Union. Echoing the decision, the Protocol states:

For the purposes of Art. [157] of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to May 17, 1990 [the date of the ECJ’s ruling in *Barber*], except in the case of workers ... who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

The Barber Protocol did not reverse the Court’s ruling. On the contrary, the Member States sought to fix one reading of its temporal effects, an understanding that the Court had no reason to reject (see *Ten Oever*³⁰).

The Barber Protocol nonetheless generated a line of cases that is relevant to CGH’s arguments, given that at least some MSGs believed that the Protocol applied to *all* “benefits under occupational social security schemes.” If the Protocol applied to the field as a whole, then the Court’s holding in *Bilka* – that pension benefits are pay under Art. 157 – would be subject to the same time limitations. *Vroege* (1993)³¹ directly raised the issue. In this case, the UK and Belgium argued that the Protocol applied to “every kind of discrimination based on sex which may exist in occupational pensions,” a view the ECJ forcefully dismissed. In line with the Commission’s brief, the Court held that the right of access to an occupational pension plan had been settled by *Bilka*, and was left untouched by *Barber*. Since the *Bilka* judgment “included no limitation in time,” the Court held, “the direct effect of Art. [157] can be relied upon in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme.” Thus, neither the *Barber* Protocol nor the briefed preferences of the MSGs induced the ECJ to abandon its pre-Protocol case law. As a result, *Bilka* continues to organize a continuous

²⁸ ECJ C-262/88 [1990] ECR I-1889.

²⁹ In order to override this ruling, the Member States would have to revise Article 157, not the Directive. The outcome has thus been “constitutionalized.”

³⁰ ECJ C-109, 110, 152, and 200/91 [1993] ECR I-4879.

³¹ ECJ C-57/93 [1994] ECR I-4541. See also *Fisscher*, ECJ C-128/93 [1994] ECR I-4583.

flow of litigation in the national courts, while the *Barber* limitation applies only to cases that are factual analogs to the original case, that is, when the determination of pensionable age is at issue.

Among the rulings in CGH's data set, one also finds an attempt to reverse the Court's interpretation of a 1979 directive on the conservation of wild birds. In *Leybucht Dykes* (1991),³² the Court dismissed an enforcement action against Germany, finding that it had been justified, on conservation grounds, in changing the area of a special preservation area (SPA) designated to protect wild birds. CGH code the ruling as a win for the defendant State, supported by the brief of the UK. We would not have coded the case this way, since the UK lost the major interpretive issue raised in its brief. Germany and the UK had argued that the Member States should be permitted to take into account economic and other societal interests when they altered or reduced SPAs, under Article 4 of the Wild Birds Directive. The Court disagreed, holding that a Member State could never give more weight to "economic and recreational requirements" than to bird conservation in such decisions.

The doctrine developed in *Leybucht Dykes* was extended in *Santoña Marshes* (1993),³³ which involved an area that Spain had not designated as an SPA, though seemingly required under the Wild Birds Directive. With respect to the issue at hand, the ruling states:

The Spanish Government takes the view that the ecological requirements laid down in that provision must be subordinate to other interests, such as social and economic interests, or must at the very least be balanced against them. That argument cannot be accepted. It is clear from the Court's judgment in ... [*Leybucht Dykes*] that, in implementing the directive, Member States are not authorized to invoke ... grounds of derogation based on taking other interests into account.

In response, the Council of Ministers amended the Wild Birds Directive, through the 1992 Habitats Directive, in order to recalibrate the balance between ecological and economic considerations in government decisions. The Birds Directive would henceforth permit

³² *Commission v. Germany*, ECJ C-57/89 [1991] ECR 2849.

³³ *Commission v. Spain*, ECJ C-355/90 [1993] ECR I-4221.

development in SPAs “for imperative reasons of overriding public interest, including those of a social or economic nature.”

At the time *Leybucht Dykes* was being decided, the saga of the Lappel Bank’s status as an SPA was heading for the UK courts. The Lappel Bank is a mudflat on the North coast of Kent, part of the Medway Estuary and Marshes system, and also an important feeding, nesting, and staging ground for migratory birds, including endangered species. Unfortunately for the birds, the mudflat lies adjacent to the Port of Sheerness, the fifth largest cargo facility in the UK. In 1989, local officials authorized the Port to expand into the Lappel Bank, but the Secretary of State for the Environment quashed the decision in 1991, partly on the grounds that the project would violate the Wild Birds Directive. Two years later, after intense lobbying on both sides of the issue, the Medway system was classified as an SPA. The Lappel Bank, however, was excluded from the designation, the Secretary of State having determined that the economic benefits of the Port’s expansion outweighed the value of bird conservation.

The Royal Society for the Protection of Birds challenged this decision, arguing that the Secretary of State had given too much weight to economic, rather than ornithological, considerations. The port expansion was well underway and could not be stopped, but the case carried important implications for future planning decisions, so the plaintiffs persevered. Although the Royal Society had lost in the lower courts, its appeal induced the House of Lords to send two questions to the ECJ. First, in designating an SPA, was a Member State allowed to consider economic interests? Second, “if the answer to Question 1 is ‘no,’” does either the ruling in *Leybucht Dykes*, or the 1992 amendment to the Birds Directive, provide justification for taking into account “superior” public interests of an economic kind?³⁴

³⁴ *Lappel Bank*, ECJ C-44/95 [1996] ECR I-3805.

The Commission sided with the Royal Society, arguing that economic interests could only be “ancillary” to “ornithological criteria” in any decision to classify an area as a protected zone. France, supporting the UK, argued that the Member States “must be guided by considerations of an economic nature in carrying out their obligations to create SPAs.” In *Lappel Bank* (1996), the Court, after summarizing the briefs of the UK and France, bluntly rejected them: “a Member State is not authorized to take account of the economic requirements ... when designating an SPA and defining its boundaries.” The Court treated the second question as decided by settled case law. Citing to *Leybucht Dykes* and *Santoña Marshes*, it held that economic requirements could never rise to “a general interest superior to that represented by the ecological objective” of the Wild Birds Directive, and that the 1992 amendment did not apply to “classification of an area as an SPA.” The House of Lords therefore held that the Government had acted illegally, and it was ordered to pay the Royal Society’s costs, some 140,000 pounds.

CGH, for their part, erroneously code the case as raising only 1 issue (the Court decides 3 issues); and they code the case as attracting no *amici* briefs (the UK, France, and the Commission filed observations). Because CGH coded the case as having “missing data,” the case was excluded from the analysis when they ran their models.

Finally, we note that the CGH data set also contains landmark constitutional rulings ranking in importance with those analyzed by Stein (1981), discussed above. In *Francovich* (1991),³⁵ the Court announced the doctrine of state liability. In this ruling, the Court held that a State could be held financially responsible for damages caused to individuals due to failure to transpose or implement an EU directive. The issue of state liability was extensively debated. Italy, Netherlands, and the UK filed briefs, supported by Germany in oral argument, asserting, among other things, that EU law does not require such a remedy (the Treaty, in fact, has nothing

³⁵ Case C-6 & 9/90 [1991] ECR I-5357.

to say on the question), and that if it were to do so in the future, liability must be provided for in EU legislation, not by judicial fiat. Comforting the Commission's position, the Court rejected the MSGs' arguments. Citing its foundational rulings on direct effect and supremacy, the ECJ held that:

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is *inherent* in the system of the Treaty [emphasis added].

As subsequently extended in *Brasserie du Pecheur* (1996),³⁶ individuals are entitled to reparation when any EU legal norm is “intended to confer rights upon them, the breach is sufficiently serious, and there is a direct causal link between the breach and the damage sustained by the individuals.” Where state liability is found, it is up to the national court to assess damages, to be determined by the domestic law of remedies, subject to certain conditions. In this complex ruling, 8 MSGs and the Commission filed briefs on a wide range of issues, two of which deserve our attention. First, the ECJ dismissed a German objection in these terms:

The German Government ... submits that a general right to reparation for individuals could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty. It must, however, be stressed that the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court. In this case, as in *Francovich* ..., those questions of interpretation have been referred to the Court by national courts... Since the Treaty contains no provision

³⁶ Case C-46/93 and C-48/93 [1996] ECR I-1029.

expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court ... to rule on such a question in accordance with generally accepted methods of interpretation ...

The passage makes it clear that the Court is the authoritative interpreter of the Treaty, not the Member States, as CGH would have it, and that national judges are autonomous actors within the system. Second, the Court rejected the briefed positions of France, Germany, Ireland, and the UK to the effect that EU law may not require remedies that are not already extant in national law. On the contrary, the Court stressed, EU law establishes certain minimal criteria, including the provision of certain remedial forms even when they are unknown in the national regime. These cases have provoked a complex process of adaptation, on the part of national legal orders, accompanied by a steady case load to the Court.

We have not chosen these cases arbitrarily. Although these are cases “most likely” to conform to CGH’s expectations, the outcomes conflict with CGH’s model of the legal system, while fitting comfortably the models they dismiss. These lines of case law have another quality in common. Each involves judicial lawmaking that congealed as a precedent-based, doctrinal framework which, in turn, organized future litigation that would propel the system forward. Such lawmaking is inexplicable under CGH’s theory, and CGH have no account of how past rulings might influence future litigation. In the end, CGH tell readers nothing about why the cases in their data set came to the Court, how the Court adjudicated them, or how the MSGs reacted to rulings, with what effects.

III. ANALYSIS (2): THE BRIEF FOR INTERGOVERNMENTALISM

We now turn to CGH’s attempt to revive the contest between Intergovernmentalist and Neofunctionalist theories of integration as applied to the EU’s legal system.

CGH assert (449) that the data support Intergovernmentalist claims to the effect that the threats of override and non-compliance “have large, systematic, and substantively significant effects on judicial decision making”; but, they argue, the evidence conflicts with Neofunctionalist claims “that, while these constraints might matter on the margin, the court has had the latitude to pursue an agenda independent of and contrary to MSGs interests.” We have shown that the threat of override is not credible; CGH do not show how the threat of non-compliance has constrained the Court in any systematic way; and CGH do not discuss how the substantive development of any domain of EU law has been stunted by their two proposed mechanisms. Further, CGH do not engage the relevant scholarly literature that has put Intergovernmentalist theory to the test (reviewed in Stone Sweet 2010).

Our analysis of CGH’s data provides strong support of the basic Neofunctionalist position, and no support for Intergovernmentalism. Put in the most basic terms, Neofunctionalists argue that the EU’s supranational organs, especially the Court and the Commission, help the Member States resolve the fierce collective actions problems that attend market and political integration, while forging links with and between transnational actors and others who are willing to invest in these projects.³⁷ In the standard account (Burley and Mattli 1993; Stone Sweet 2004), the legal system evolves under the tutelage of the ECJ, which works in conjunction with those who activate the Court for their own purposes: the Commission under Article 258 (enforcement actions), and private litigants and national judges under Article 267 (preliminary references). Neofunctionalists have also demonstrated that the system developed in a progressive, self-sustaining way, in part, because the Court’s rulings tend to promote integration (values that inhere in the treaties) and, in part, because the decision rules governing

³⁷ For a recent review of the evolution of Neofunctionalist and relevant findings, see Sandholtz and Stone Sweet (2010).

Member State override facilitate, rather than constrain, the pro-integrative positions taken by the Commission and the Court.

CGH (442) argue that “the ECJ may, at least on the margin, favor the Commission,” but that our real focus should be on the actors who systematically constrain the Court: MSGs. If confronted with this binary opposition,³⁸ a Neofunctionalist would predict the opposite. We would expect, for example, that the ECJ will side with the Commission’s briefs – relatively systematically – and that MSGs will influence the Court on the margins, partly as supplemental to the weight of the Commission. As the last section shows, the evidence from infringement proceedings under Article 258 provides overwhelming support for our prediction (the Commission wins more than 90% of the time). For contestable reasons, CGH do not consider the outcome of infringement proceedings to be a fair test of their theoretical claims.³⁹ We therefore examine what’s left: rulings generated through the Article 267 preliminary reference procedure.

Of the 2,048 questions on which the ECJ rendered a preliminary ruling, the Commission filed observations in 77.7% (n=1588), whereas the Member States produced a weighted position in 45.2% (n=926). In these cases, the Commission’s success rate is far more impressive than that of the Member States. When the Commission takes the Plaintiff’s side (n=841), the Court rules

³⁸ Neofunctionalist research on the legal system always supplements quantitative analysis with consideration of the policy issues and interests at play in any case, as these are brought forward by the Commission, private litigants, and national courts.

³⁹ To explain away why “the Court should not typically face threats of override” in the Article 258 setting, CGH (436) state that “the Commission normally brings an infringement charge against a member state on questions where a clear legal principle has emerged based on a series of previous cases. In other words, the Commission’s position is normally based on an interpretation of EU law that has survived multiple opportunities for member states to challenge or amend it via legislative override.” This argument resembles a Neofunctionalist, not an Intergovernmentalist, position: the Court builds the law that the Commission exploits in the service of its own policy agenda. In fact, it is often the case that the Commission brings actions in order to induce the ECJ to build the law in a progressive fashion, and the ECJ responds positively, a dynamic that CGH do not consider. If the Article 258 system actually worked the way the CGH claim, then the Court’s case law of “clear legal principles” would not have emerged in the first place, since such principles are commonly built on findings of non-compliance in cases in which Member States rarely file observations; the Court should have been constrained in CGH’s model.

in favor of the plaintiff 79.9% of the time, a result to be compared to the Member States lower 70.8% success rate in fewer cases (n=342). When the Commission files observations against the Plaintiff (n=747), the ECJ rules in favor of the defendant 77.7% of the time, to be compared to the Member States far lower 57.2% success rate in fewer cases (n=584).

---- Tables 1 and 2 about here ----

The critical question in CGH's supposed contest between Intergovernmentalism and our version of Neofunctionalism is the following: what happens when the Commission *opposes* the net weighted positions taken by the MSGs? If CGH are right – that the ECJ is constrained by the MSGs and follows the Commission only “on the margins,” then one would expect the Commission's briefs to be relatively ineffectual when it opposes the MSGs. There are 96 legal questions in the data set on which the Commission supported the Defendant, and MSGs took a weighted position supporting the Plaintiff; in these, the ECJ favored the MSGs position in only 36.5% (n=35) of these cases. There are 234 legal questions in which the Commission filed an observation in favor of the Plaintiff, and MSGs took a net weighted position supporting the Defendant. On 70.1% of these issues (n=164), the Court agreed with the Commission, finding for the Plaintiff. Overall, when MSGs oppose the Commission, the Commission prevails more than two-thirds of the time – a landslide. Thus, using CGH's own data, preferred methods, and theoretical constructions of integration theory, it is indisputable that, in a head-to-head showdown, the Commission (and Neofunctionalism) dominates the MSGs (and Intergovernmentalism) as a predictor of ECJ rulings. Tellingly, CGH report no findings on the questions raised in this section.

---- Table 3 here ----

In Table 4, we present a comprehensive probit analysis of these relationships. Using CGH’s preferred methods and research design, we sought to determine the effect on ECJ rulings of two of the Court’s important constituents: the Commission and the MSGs.⁴⁰ For the Member States, we used the CGH’s own “net weighted observations” variable. Following CGH’s design, if, on any legal question, that variable took on positive values, we coded the MSGs position as favoring the Plaintiff; if it was negative, we coded their position as favoring the Defendant; and when the variable took on values of zero, we coded the MSGs preference as neutral on the question. The coding of the Commission’s briefs is straightforward: either the Commission files an observation for the Plaintiff, the Defendant, or no observation at all.

---- Table 4 here ----

The Commission and the MSGs may take one of three different positions: in favor of the Plaintiff; in favor of the Defendant; or they may remain neutral. Because there are nine possible combinations, we created a series of dummy variables for eight of these nine combinations (the excluded category containing those cases on which both the Commission and the MSGs are neutral towards the preferred disposition of the case). For us to prevail, the coefficients must take on positive values when the Commission favors the Plaintiff (the dependent variable takes on the value of 1 when the ECJ finds in favor of the Plaintiff, and 0 when it finds for the Defendant), and negative values when the Commission favors the Defendant. As table 4 shows, both conditions are met. *Whenever* the Commission favors the Defendant, regardless of the position of the MSGs, the coefficient is negative and statistically significant – even when the Governments’ “net weighted” position favors the Plaintiff. The reverse is also true: when the Commission sides with the Plaintiff, the coefficient is positive and statistically significant, even

⁴⁰ We are not claiming that these are the Court’s only, or most important, constituents. In Article 267 cases, private litigants and national judges are the crucial actors.

when the MSGs have taken a position in favor of the Defendant. Thus, when the Commission and the MSGs oppose one another, the ECJ finds in favor of the side the Commission supports in a statistically significant fashion.

Now consider what happens when the Commission does not file an observation. When the Commission is neutral, and the MSGs favor the Plaintiff, the coefficient takes on a bare positive value, but it is statistically indistinguishable from zero. In instances when the Commission is neutral and, on balance, the MSGs favor the Defendant, the coefficient takes on a positive value, which indicates that more cases are being decided for the Plaintiff; yet, the variable is not statistically significant. In sum, when the Commission takes a position on how a legal question should be decided, the Court tends to comfort that position, in a statistically significant way, even when the MSGs prefer the opposite outcome. But when the Commission takes no position on how a legal question ought to be decided, we find no statistically significant evidence that the ECJ favors the side preferred by the Governments.

Analysis of CGH's data does not provide evidence in support of the Intergovernmentalist position, but rather reconfirming prior findings rejecting that position.

CONCLUSION

We conclude that CGH have failed to support all three of their major claims. Although CGH assert that the data fundamentally challenge prior empirical research on their topic, in fact, the evidence supports, rather banally, the basic scholarship produced over the past fifteen years. Every scholar in the field assumes that the Court pays attention to the legal positions of the MSGs, and everyone agrees that the Court cares about compliance with its rulings. But there is no reason for anyone to believe that the Court does so because of the threat of override, or that non-compliance has "systematically" stunted the evolution of the Court's case law.

CGH's analysis does generate an interesting finding, which is also their most robust: the ECJ tends to censor a defendant State when MSGs, on balance, oppose the defendant State. Three points deserve emphasis. First, the MSGs' rate of success in these cases *declines* when they are not joining the Commission against the defendant State. Second, in such cases, the MSGs are not so much "constraining" the Court, as enabling it. We think there is a fundamental difference between situations in which (a) the MSGs ask the Court *not* to develop EU law in new directions, and (b) the MSGs urge the Court to find against a defendant State on the basis of common understandings of EU law, including case law. CGH presumably disagree. Third, the finding may support notions of the ECJ's "majoritarian activism."

Maduro (1998) coined the phrase to describe a persistent pattern found in free movement of goods cases: the Court tends to rule *against* a defendant State when its market regulations are out of synch with regulations in place in a majority of the other States; and it tends to rule *for* the defendant State when its policies are shown to be more similar to those in place in a majority of States. Beginning in the 1980s, the Court asked the Commission to provide such information in its submission of materials to the ECJ on litigation before it. During the period studied by CGH, the Court routinely referenced these reports. In the area of sex equality, Stone Sweet (2004: ch. 4) and Cichowski (2007) also found that the ECJ regularly enacted, through its rulings, legislative proposals that had been blocked under unanimity rules by a minority of MSGs. The Court did so by treating these policies as embedded in, and thus required by, Treaty law. The time-frame of this research overlaps the period studied by CGH.

The idea is that the Commission and the ECJ act as agents of the majority, when that majority cannot be realized its goals under Unanimity rules. (The hypothesis can be adapted to QM voting). Of course, when the Court engages in majoritarian activism, it has no reason to fear

reprisal. If the reader will consider again how CGH operationalized Hypotheses 1 and 2, they will see that CGH's design is more relevant to the dynamics of "majoritarian activism," than it is to how threats of override and non-compliance constrain the Court.

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APPENDIX: THE JURISDICTION OF THE ECJ

The CGH data set contains cases that came to the Court through three provisions of the Treaty of Rome, now contained in the Treaty on the Functioning of the European Union (TFEU).

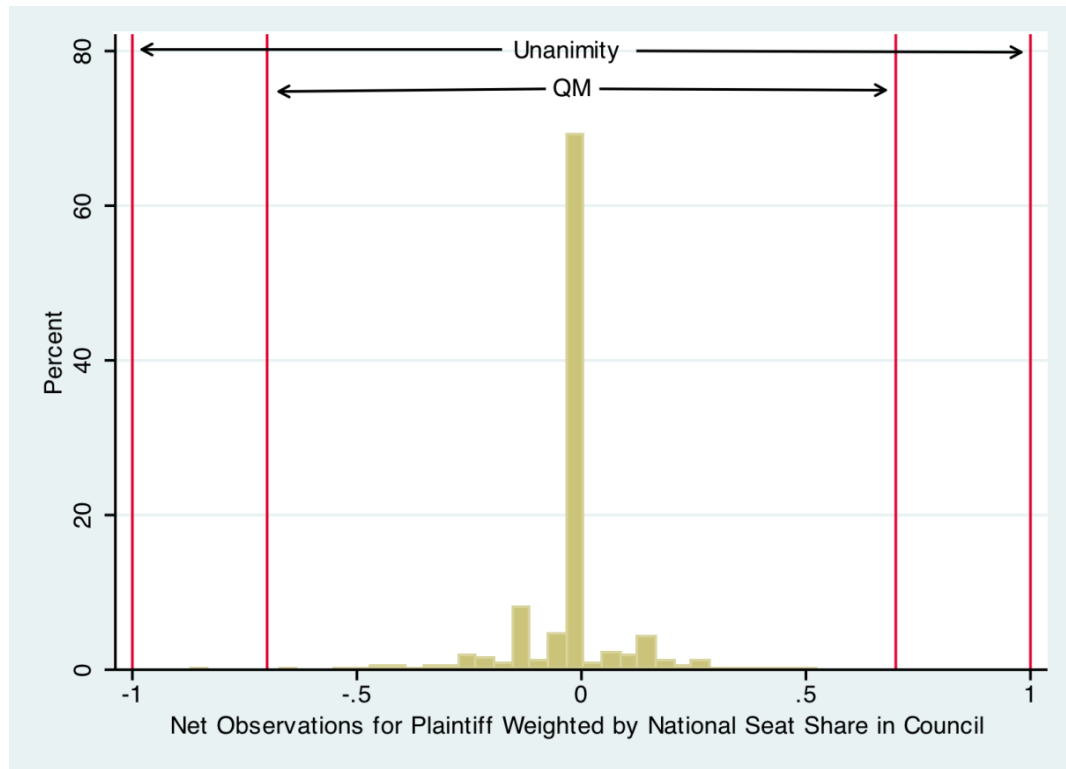
Under Article 258 TFEU, the Commission may initiate “infringement proceedings” – also called “enforcement actions” – against a Member State for non-compliance with EC law; rounds of negotiation ensue; if these fail, the Commission may refer the matter to the ECJ for decision. The Commission’s discretion to bring such suits is absolute. In Article 258 litigation, the defendant is always a Member State, and the plaintiff is always the Commission.

Under Article 263 TFEU, the ECJ presides over “annulment actions,” suits that seek to invalidate decisions of the EU’s governing bodies. In this litigation, only the EU’s institutions can be defendants; the Member States can *never* be defendants, and national compliance with EU law is *never* an issue before the Court.

Under Article 267 TFEU, national judges send questions – *preliminary references* – to the ECJ in order to obtain an interpretation of EU law, when the latter is material to the resolution of a dispute at national bar. The ECJ responds in the form of a judgment – a *preliminary ruling* – that the referring judge is expected to apply to resolve the case. The vast majority of cases in the CGH data set involve an allegation, on the part of an individual, firm, or interest group, to the effect that national law and practice is in non-compliance with EU law. If the allegation is upheld, EU law must take precedence (the doctrine of supremacy).

FIGURE AND TABLES

Figure 1: Distribution of Net Weighted Positions taken by the Member States on Legal Questions in the CGH Data Set



* The graph depicts the distribution of the major independent variable in CGH (2008): the normalized net weighted positions taken by the Member States in briefs to the ECJ on legal questions in the CGH data set. Source of the Data: CGH (2008).

Table 1: The EU Commission's Observations and Rulings on Questions Raised in Article 267 References

	Observation from Defendant	No Observation from Defendant	Observation from Plaintiff	Total
ECJ Rules for	579 (77.%)	227 (49.%)	168 (20.%)	974 (47.%)
ECJ Rules for	168 (22.%)	237 (50.%)	677 (79.%)	1,042 (52.%)
Total	747	464	845	2,056

Entries refer to the Commission's briefs on legal questions raised by national judges in preliminary questions in the CGH dataset; column percentages are in parentheses. Source of the Data: CGH (2008).

Table 2: Member States' Observations and Rulings on Questions Raised in Article 267 References

	MS's Favor	No Observations Both Sides	MS's Favor	Total
ECJ Rules for	334 (57.%)	54 (48.%)	100 (29.%)	974 (47.%)
ECJ Rules for	250 (42.%)	58 (51.%)	247 (70.%)	1,042 (52.%)
Total	584	1,12	347	2,056

Entries refer to the Member States' briefs on legal questions raised by national judges in preliminary questions in the CGH dataset; column percentages are in parentheses. Source of the Data: CGH (2008).

Table 3: Percentage of Rulings in Favor of the Plaintiff on Questions Raised in Article 267 Preliminary References

		Commission		
		Support D	Neut	Support P
Member State C	Support D	16.	50.	70.
	Neut	23.	49.	82.
	Support P	36.	66.	86.

Entries refer to the briefs on legal questions raised by national judges in preliminary questions in the CGH dataset under Article 267 in the CGH dataset. Source of the Data: CGH (2008).

Table 4. Probit Analysis of the Relationship between Briefs and ECJ Rulings for the Plaintiff under Article 267

Commission Plaintiff, Member States Plaintiff	1.131*** (0.138)
Commission Plaintiff, Member States Defendant	0.552*** (0.121)
Commission Defendant, Member States Defendant	-0.950*** (0.125)
Commission Defendant, Member States Plaintiff	-0.321*** (0.159)
Commission Neutral, Member States Defendant	0.040 (.173)
Commission Neutral, Member States Plaintiff	0.455 (.241)
Commission Defendant, Member States Neutral	-0.705*** (0.109)
Commission Plaintiff, Member States Neutral	0.948*** (0.115)
Constant	-0.025 (0.082)
N	2,048
Pseudo R ²	0.21
Log psuedolikelihood	-1,119.00

Entries are unstandardized probit coefficients with standard errors in parentheses. We used robust standard errors with clusters for each case.

*** p<.001, two-tailed test.

Source of the Data: CGH (2008).