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The European Court of Justice, State Noncompliance, and the Politics of Override

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In an article previously 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 by the threat of noncompliance on the part of any single state. They also purport to have found strong evidence in favor of intergovernmentalist, but not neofunctionalist, integration theory. On the basis of analysis of the same data, we demonstrate that the threat of override is not credible and that the legal system is activated, rather than paralyzed, by noncompliance. Moreover, when member state governments did move to nullify the effects of controversial ECJ rulings, they failed to constrain the court, which continued down paths cleared by the prior rulings. Finally, in a head-to-head showdown between intergovernmentalism and neofunctionalism, the latter wins in a landslide.*

In "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice," Carrubba, Gabel, and Hankla (CGH; 2008) make two startling claims. First, after examining the impact of member state government (MSG) briefs on the rulings of the European Court of Justice (ECJ) on 3,176 legal questions over an 11-year period (January 1987–December 1997), the authors declare that its decision making has been constrained by *the threat of override* on the part of governments, acting collectively, and by *the threat of noncompliance* on the part of any single MSG: "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" (449). Second, the authors state that their findings support the tenets of "intergovernmentalist" but not "neofunctional" integration theory. Because these two claims starkly conflict with virtually all of the empirical research on the topic undertaken over the past two decades, and because they were published in the *APSR*, the article attracted wide notice in the European Union (EU) politics field.

In this response, we demonstrate that neither of these claims is supported by their data. Although we believe that CGH's project is flawed in fundamental respects, we sought to evaluate it from within the parameters set by their project. We gathered and analyzed data exclusively from cases in CGH's data set; we employed the basic elements of their method for assessing the impact of MSG preferences on the decision making of the court; and we accepted, for the purposes of reply, CGH's own preferred constructions of integration theory.[1]

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[1] We discuss our own views, in light of CGH, in Stone Sweet and Brunell (2011).

THEORY AND METHOD

CGH revive ideas put forward, but not tested, by Garrett (1992) and Garrett and Weingast (1993). In this account, the policy preferences of the most powerful member states constrain the evolution of the ECJ's case law, not least because the court fears being overridden. CGH also point to a well-known methodological issue that bedevils research on anticipatory reactions more generally: When the mechanism works, there is nothing for the analyst to observe. If the threat of override effectively constrains a court, then the override power need not be used.

In the mid-1990s (Kilroy 1996; Stone Sweet and Caporaso 1998), political scientists worked to refine a method, first developed by Stein (1981),[2] to test these and other hypotheses about how the EU legal system works. This approach involves evaluating the influence of *amici* briefs—filed by MSGs and the EU Commission—on 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. The analysis of briefing activity provides leverage on the observational problem just discussed: How can the analyst assess the influence of the briefing

[2] Stein focused on the early "constitutional" decisions of the ECJ, the most important of which established the doctrines of direct effect and supremacy. The doctrine of direct effect entitles individuals to plead rights found in treaties and in directives (an important type of EU statute that member states are obliged to 'transpose" as national law), directly before national courts. The doctrine of supremacy requires national judges to resolve any conflict between EU law and national law by giving primacy to EU law. Stein found that *none* of the signatories of the Rome Treaty filed a brief in support of any of the court's major moves, whereas each of the MSGs opposed the court in at least one of them. Those who would argue that the court has been systematically constrained by the threat of noncompliance and override bear the burden of explaining these rulings (including the rulings on state liability discussed later) that the court rendered, in the face of noncompliance, to enhance the capacity of the system to deal with noncompliance. The majority of the cases in the CGH data set were brought pursuant to litigation under the doctrine of direct effect.

parties or the threat of override on the court's rulings? If, on any legal question before the court, MSGs wish to signal their legal preferences, or threaten override, they can file briefs. The analyst then tracks the court decision making with reference to briefed positions to assess not only the influence of these positions but also the threat of override.[3] Variations on the method have been applied relatively systematically, within and across legal-policy domains (e.g., Cichowski 1998; 2004; 2007; McCown 2003; Nyikos 2000; Stone Sweet 2004). The results have been remarkably consistent. Scholars have found (i) that the threat of override was not credible; (ii) that formal claims of alleged noncompliance on the part of MSGs neither intimidated nor paralyzed the court, but rather provided the ECJ with opportunities to develop an expansive and progressive case law; and (iii) that the court was far more responsive to the briefs of the commission—the ECJ's presumed partner in constructing judicial and supranational authority—than to those of MSGs, even the most powerful ones. Intergovernmentalist theory was largely abandoned, and approaches compatible with neofunctionalism flourished (literature reviewed in Stone Sweet 2010).

There is broad consensus on the view that the ECJ has been a powerful catalyst of market and political integration, in part, because its pro-integrative rulings are effectively insulated from member state override (Alter 2008; Cichowski 2007; Pollack 2003; Stone Sweet 2004, 2010; Tallberg 2002a). The underlying rationale is straightforward: For any important and controversial ruling of the court, MSGs are likely to be divided and unable to muster the votes required to overturn it. We found that unanimity is the decision rule governing override in more than 90% of the cases in which MSGs filed briefs in the CGH data set. In less than 10% of these 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. There is not one instance of a successful override in their data set; indeed, we know of no significant case in the history of adjudicating the treaties. We identified two rulings in the CGH data set that provoked the MSGs to make formal decisions expressly designed to override the court or to constrain its latitude in future cases (discussed later). These efforts failed—the court brushed them aside—a fact that should weigh heavily in this debate.

Everyone agrees that the ECJ seeks to elicit compliance with its decisions and that it often leaves substantial room to maneuver to national officials, including judges, to enhance compliance. Yet there is also strong consensus for the view that the ECJ is not constrained in any *systematic* way by the threat of MSG noncompliance. After all, the EU's legal system has uniquely evolved to deal with compliance failures (Kelemen 2010; Stone Sweet and Brunell 1998; Tallberg 2002b). Over the past two decades, scholars have charted how noncompliance on the part of MSGs has generated litigation and helped organize the court's dynamic construction of EU law, thereby creating new compliance failures. However, no one has found that the progressive evolution of the ECJ's case law, a truly remarkable edifice, has been stunted by the threat of noncompliance. CGH do not identify a single instance in which a threat of noncompliance has constrained the court.

The position CGH have staked against these consensus positions is based on specific theoretical commitments, not data. In their model of the EU's legal system (439), the MSGs, rather than the ECJ and the national courts, constitute the EU's third-party enforcement mechanism.[4] The court's job in this system is to ratify the MSGs' legal preferences on an ongoing basis.[5] Compared to any other theoretical understanding of how the EU's legal system operates, CGH's model systematically underestimates the ECJ's autonomous capacity to make law and the central role played by national judges in supervising state compliance.

Under Art. 267 of the Treaty on the Functioning of the European Union (TFEU), the national courts furnished nearly two-thirds of all of the legal questions in the CGH data set; the vast majority concerned allegations of noncompliance brought by individuals, firms, and interest groups. If, in its answers to the referring judge, the ECJ determines (or implies) that national law is in noncompliance with EU law, then it is the judiciary, not the government, that will take the authoritative decision "to comply" or "not to comply."[6] When it comes to the implementation of a preliminary ruling by the judge sending the reference, judicial compliance is very high. In the most comprehensive study to date, Nykios (2003) found that referring judges implemented the ECJ's rulings in 96% of cases analyzed in five legal systems (Nyikos 2003).[7] In the EU, it is most often national judges

[3] In their discussion of earlier scholarship on this topic, CGH stated (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 one has ever argued this position. Scholars have always treated how (i) the ECJ and the national courts decide noncompliance cases and how (ii) the MSGs react to a finding of noncompliance by the courts as two distinct empirical questions.

[4] 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."

[5] Under CGH's theory, one would expect the member states to sue one another for noncompliance under Art. 259 TFEU, which is designed for that purpose. In the period covered by CGH, however, the ECJ did not render a single ruling pursuant to an Art. 259 suit. To date, there have only been three such rulings.

[6] If the courts refuse to apply a national law, in deference to the ECJ's case law, then how is it possible for an MSG to implement a decision "not to comply"? CGH do not tell us. Without the support of the courts, an MSG would be unable to sustain any administrative decision to apply a national legal norm against an individual, once that norm was found by the courts to be in conflict with EU law.

[7] Nyikos (2000) also found that MSG briefs had little effect in influencing ECJ rulings in three domains of law—equal treatment and pay, free movement of goods, and free movement of workers—during the 1961–94 period.

who work to "restore compliance" (Panke 2007), even in "politically sensitive" areas (Panke 2009).

JURISDICTION OF THE EUROPEAN COURT OF JUSTICE

The CGH data set contains information collected from European Court of Justice (ECJ) rulings that came to the court under three provisions of the Treaty of Rome, now the Treaty on the Functioning of the European Union (TFEU; entry into force December 1, 2009).

Under Art. 258 TFEU, the European Commission (EC) may initiate "infringement proceedings"—also called "enforcement actions"—against a member state for noncompliance 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 Art. 258 litigation, the defendant is always a member state, and the plaintiff is always the commission.

Under Art. 263 TFEU, the ECJ presides over "annulment actions," suits brought by private parties, the member states, or European Union (EU) organs seeking to invalidate acts of the EU's governing bodies. In this litigation, only an EU organ can ever be a defendant; the member states can *never* be defendants, and national compliance with EU law is *never* the issue before the court.

Under Art. 267 TFEU, national judges send questions—*preliminary references*—to the ECJ in order to obtain an interpretation of EU law, when it 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 these cases involve an allegation on the part of a private party (an individual, firm, or interest group) that a specific national law, or practice permitted or required under national law, is in noncompliance with EU law. The national legal order is, in effect, the "defendant" in these cases. If the allegation is upheld, the national judge is expected to give priority to EU law, while setting aside conflicting national law (under the doctrine of supremacy).

Before proceeding, we need to clear away a false issue. We agree with CGH that the best practice for evaluating the robustness of "political constraints" on ECJ decision making is to analyze the court's position on every legal question briefed by an MSG and the commission.[8] Among other information, they code how the court addressed the various questions raised in each case (in binary terms: whether the court sided with or against the plaintiff) and how the commission and the MSGs briefed these same questions. Quite sensibly, CGH then "weigh" each MSG's brief according to the number of votes that MSG has been assigned in the Council of Ministers under qualified majority (QM) voting rules. They can then derive a "net weighted position," which can be either (i) positive, when weighted briefs sum up to support the plaintiff; (ii) negative, when the weighted briefs sum up to oppose the plaintiff; or (iii) zero, when no MSG filed a brief on a question or when the briefing MSGs cancel each other out.

CGH use various statistical techniques to measure the extent to which ECJ rulings align with the positions briefed, but depart from standard practice in one crucial respect: They count *every* ECJ decision that is congruent with the net weighted position of the MSGs as support for their hypotheses. In such cases, CGH assume that the ECJ was "constrained" to decide as it did, because of the threats of override and noncompliance. The approach, however, can only help the analyst assess the "influence"—or persuasive effect—of briefs on outcomes; it cannot directly evaluate the proposed *explanation* of this influence (see the later discussion). If a court follows a line argued in one of the briefs submitted to it, why should an observer presume that the outcome can only be explained by "political" threats? We submit that CGH's approach would not make sense in any other legal system in which effective judicial review has been established, and it makes no sense for the EU.

HYPOTHESES AND RESEARCH DESIGN

Hypothesis 1 (H1) 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). We consider this formulation to be appropriate and reasonable. CGH further suggest, sensibly, 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). Yet CGH then stack the deck in favor of their position, stipulating that the decision rule governing override will *always* be QM, arguing as follows (440): "Unfortunately, we cannot easily distinguish which legal issues can be overridden by QM and which require unanimity support."

In fact, determining the override rule for each case is straightforward.[9] Unanimity governs override for the following: all rulings on treaty law, including every case in the domains of free movement of goods, services, and workers, antitrust, and every legal basis dispute under Art. 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 Art. 267 preliminary questions related to the

[8] Although CGH (436) claim that their method is "novel," it is a variation of the approach developed by scholars whom CGH criticize in their article.

[9] In their coding protocol, CGH state that they coded the "legal basis" of the EU law being adjudicated by the court. Legal basis determines the rule governing adoption of a legal provision and thus determines the override rule.

doctrines of direct effect, supremacy, remedies, and general principles of EU law, including fundamental rights; and more. As noted, for more than 90% of the cases in which MSGs weighed in, the override rule was unanimity, not QM.

Because CGH do not stipulate a threshold point at which the threat of override is credible, H1 would appear to be impossible to test. Further, CGH do not describe a single instance in which a threat of override was actually made, and they do not even provide a "stylized" example of how their mechanism might work. Instead, CGH (436) declare that the necessary votes to override can be gathered through "logrolling," the entire discussion of which is as follows (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." Although H1 implies, and rightly so, that the threat of override would be credible only when a "sufficiently large coalition" of MSGs weighs in, CGH treat the threat as present even in cases when only one MSG, which might be as small as Luxembourg or Portugal, has filed a brief in favor of a defendant member state. This move conflicts with the precepts of intergovernmentalism, which predicts that only powerful states can constrain the court (e.g., Garrett 1992).

Hypothesis 2 (H2) embodies their approach to noncompliance: "The more opposition a litigant government has from other MSGs, the more likely the court is to rule against that litigant government" (439). Note that testing H2 as formulated does not give us information on the extent to which the threat of noncompliance actually constrains the court's decision making. Instead, H2 focuses attention on what happens in situations in which at least one nonlitigating MSG *encourages* the court to punish a defendant MSG. The logic of the mechanism is *permissive* rather than *constraining*. CGH do not identify any instance in which a threat of noncompliance has constrained the court, and they do not furnish criteria for determining when a threat of noncompliance is actually made. Instead, they assume that (a) the threat of noncompliance inheres *in every case* and that (b) the threat will *in every case* constrain the ECJ except when the court is supported by the nondefendant member states. "If governments have the ability to ignore adverse rulings," CGH (439) declare, "the court can only expect compliance with its rulings when non-litigating governments are willing to punish the defecting government for noncompliance." CGH present no data or analysis on noncompliance, beyond alleged instances that generate a judicial ruling. Instead, CGH test H2, which does not test the effect of a threat of noncompliance on the court's decision making.

Most worrisome, CGH choose not to test H1—whether the threat of override constrains the court's decision making—as originally formulated. Instead, they operationalize H1 "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" (440), which makes it virtually identical to H2 (CGH, 438: "The more opposition a litigant government has from other member-state governments, the more likely the court is to rule against that litigant government"). The move has dramatic consequences for how findings will be interpreted. CGH can now count as evidence in support of H1 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 unanimity), and they can count as evidence in support of H2 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. Thus altered, H1 and H2 will test the same relationships among variables, on the same data.

CGH's design—a point that applies to the standard method they have adapted—provides the observer with information on the extent to which briefs (the independent variable) predict, or presage, or are consistent with ECJ rulings (the dependent variable) on any given legal question. The design, however, is not capable of testing H1, as originally stated, because CGH do not assess the credibility of the threat. In addition, CGH do not test the effects of a threat of noncompliance on the court's decision making. Instead, they test H2, which provides information only on whether the ECJ responds favorably when MSGs urge it to censure a defendant MSG.

ANALYSIS (1): OVERRIDE AND NONCOMPLIANCE

In this section, we respond to two empirical questions. First, how credible is the threat of override? For the mechanism to constrain the court *systematically*, the evidence must show that the threat of override is credible. Second, to what extent does the evidence show that noncompliance on the part of MSGs constrains the court? CGH do not report the data that directly bear on these questions.[10] Nonetheless, on the basis of the case numbers contained in CGH's data set and their coding of the net weighted positions of the MSGs, we collected and analyzed this information. We report our findings here.

The data set contains cases that come to the court through three procedures, only two of which are relevant to CGH's project: Articles 258 and 267 TFEU.[11] CGH also include data from Art. 263 annulment actions in tests of H1 and H2. Yet suits under Art. 263 can *only* be brought against EU organs; MSGs can *never*

[10] CGH declined to provide us with the data on which their analyses are based: information on which MSGs filed observations, concerning which legal questions, in support of which party. Thus, it is often impossible to verify whether the net weighted positions of MSGs were coded correctly on any question. CGH provided us only with the aggregate data to replicate their specific models, withholding what is most important: the raw underlying data. In our own analysis of important rulings, we found coding errors (reported in Stone Sweet and Brunell 2011).

[11] Provisions of the Treaty on the Functioning of the European Union.

be defendants. Thus, to test propositions concerning MSG noncompliance, 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 noncompliance can *never* be the legal issue.

Art. 258 infringement proceedings are brought by the European Commission alleging member state noncompliance with EU law. These suits directly involve the question of whether the threats of noncompliance (the MSG has decided not to comply with the law as the commission understands it, under the threat of adjudication) and override constrain the legal system. We analyzed 444 Art. 258 rulings in the CGH data set.[12] MSGs filed zero observations or did not take a weighted position in 93.5% (415/444) of these cases. Thus, MSGs are only occasional participants in the only legal procedure specifically designed to deal with member state noncompliance with EU law. The ECJ sides with the commission against the defendant state in more than 90% of these cases.[13]

The member states registered a weighted position in only 6.5% ($n = 29$) of these rulings. Of these 29 cases, MSGs supported the defendant state in 15[14]; that is, in only 3.4% of all Art. 258 cases was override a possible consideration. Although the override rule was unanimity in each of these 15 cases, the mean weighted position of MSGs in support of the defendant state was 12.6% of the vote under QM procedures. It deserves emphasis that 12.6% of a QM is less than the weight of one large state, such as France, Germany, or the United Kingdom. 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." In not one Art. 258 case does a coalition of MSGs supporting a defendant state on a legal question exceed 25% (3 of the 12–15 votes needed to override). The threat of override does not constrain the court, because it is not a credible threat.

We now turn to CGH's data on Art. 267 activity, cases in which the court responds to questions referred by national judges; most but not all of these questions relate to compliance issues. CGH code 2,048 legal questions answered in 1,209 ECJ rulings. On the majority of questions raised (1,122 of 2,048), either no MSG filed a brief or CGH coded the net position as zero. In only six instances did MSGs take a net position against the plaintiff-individual that reached at least 50% of a vote under the QM voting procedure (plaintiffs "win" three of these cases), although the rule governing override in each was in fact unanimity. In only one of 1,209 rulings does a coalition of MSGs reach as many as 6 of the 12–15 votes necessary to override the court on any question. CGH do not report this information, but instead suggest that an unexplained "logrolling" process can "cobble together" a unanimous vote.

Now 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, MSGs take no net weighted position. In 11.8% of the legal questions in the data set (375/3,176), CGH code MSGs as registering 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 large state. In 20.3% of the legal questions in the data set, CGH code MSGs as taking a position in favor of the defendant (in CGH's model, override is a consideration), the mean score of which is 15.1% of a QM; again, this is short of the combined votes of, say, France and any other state. As Figure 1 makes clear, MSGs do not come close to reaching a QM, let alone unanimity, in any systematically meaningful way. Moreover, in many rulings, the net weighted positions are the result of a split, in which at least one MSG had submitted a brief supporting each side.[15] Under unanimity rules, the potential for MSGs to logroll a decision to override in cases where MSGs are split must be very close to zero. If, as CGH argue (338), the threat of override is not credible, then it cannot constrain the ECJ, let alone systematically. CGH's claims to the contrary are inexplicable.

We also examined what happened when MSGs adopted measures designed to override or constrain the scope of rulings rendered by the ECJ. The data set contains two major episodes: one concerning occupational pensions[16] and the other the designation of wildlife preservation areas.[17] In both instances, the measures taken failed to constrain the court. This outcome deserves emphasis. When MSGs actually made good on their threat to nullify the effects of ECJ rulings, the ECJ prevailed.

[12] We left out two rulings that CGH erroneously coded as Art. 258 enforcement actions (320/95 is a preliminary ruling; 129/86 is an annulment action). The data sets are riddled with errors, one of which is systematic. CGH did not code the number of issues in Art. 258 infringement proceedings consistently, even in similar cases. We decided that the best way to handle this problem would be to treat all Art. 258 rulings as involving a single legal question: compliance or noncompliance.

[13] Twelve rulings pursuant to infringement proceedings concerned cases brought by the commission for failure on the part of an MSG to comply with a *prior* Art. 258 ruling, and the defendant state lost all of these. Although we agree with CGH that neither the commission nor the court can force an MSG "to obey adverse rulings" (CGH 436), noncompliance with an ECJ ruling generates more proceedings, settlement activity, and more rulings of noncompliance when efforts to settle fail, as more comprehensive studies have shown (Börzel, Hofman, and Panke 2008). We do not see how this dynamic can be squared with CGH's claims.

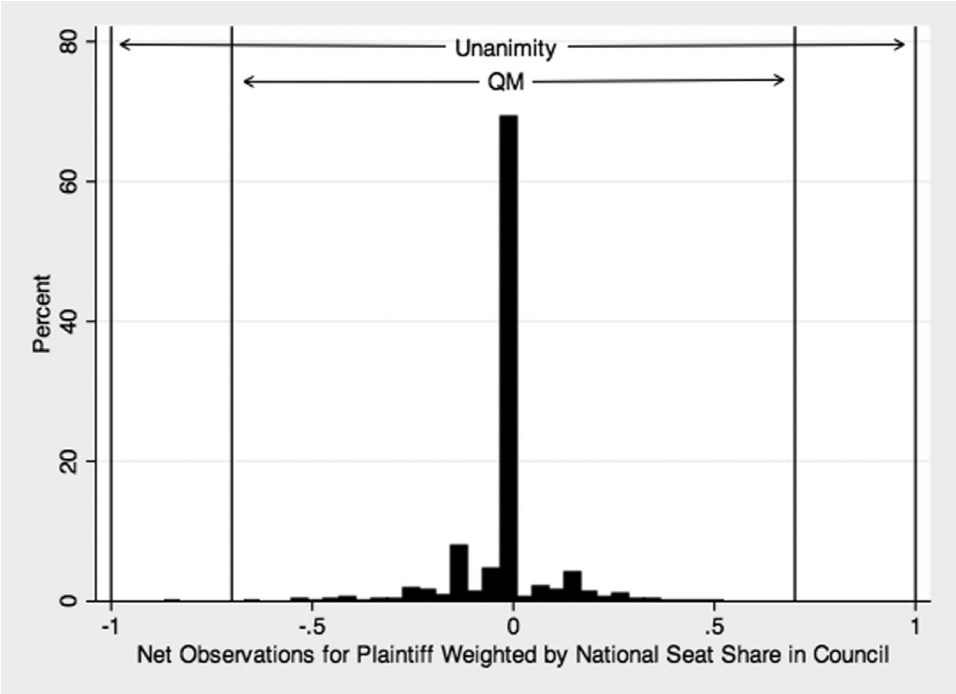
[14] The distribution: in one case, three MSGs supported the defendant state; in four cases, two did so; in ten cases, one MSG supported the defendant state. CGH's data set contains 17 such cases, but two rulings (141/87 and 137/96) were coded erroneously, because in fact no member state filed a brief in either.

[15] For reasons discussed in footnote 11, it is impossible to count how many such splits occurred.

[16] *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.

[17] *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.

FIGURE 1. Distribution of Net Weighted Positions Taken by the Member States on Legal Questions in the CGH Data Set



Note: 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 (N = 3,269). Source of the data: CGH (2008).

The CGH data set also contains a set of landmark "constitutional" rulings that established the doctrine of state liability: holding that a member state can be held financially responsible, in national courts, for damages caused to individuals due to compliance failures.[18] The court, in partnership with national judges, developed this case law in the face of an exceptional number of MSGs (France, Germany, Ireland, Italy, and the Netherlands) filing briefs on the major legal questions. MSGs argued, among other things, that EU law does not require state liability (the TFEU is silent on remedies) and that a remedy for state noncompliance with EU law must be provided through legislation or express treaty revision, not through judicial fiat. The court rejected these arguments, siding with the commission.

We provide a detailed account of all three episodes elsewhere (Stone Sweet and Brunell 2011). Taken together, the cases provide a crucial (qualitative) test of the claims of CGH and Garrett and Weingast (1993) at issue here, in that they are cases "most likely" to fit an override model: The court should have been constrained.

In the end, CGH's major claims are based on one positive result: On a legal question in which MSGs register a net weighted position, the ECJ is likely to decide the question in congruence with that weighting. Except for CGH's assertions, however, there is no reason to believe that this result is due to the threats of override and noncompliance. The data reported in Figure 1, coupled with qualitative analysis of what happened when the MSGs formally sought to constrain the court, provide good reason to reject their claims.

ANALYSIS (2): INTERGOVERNMENTALISM VERSUS NEOFUNCTIONALISM

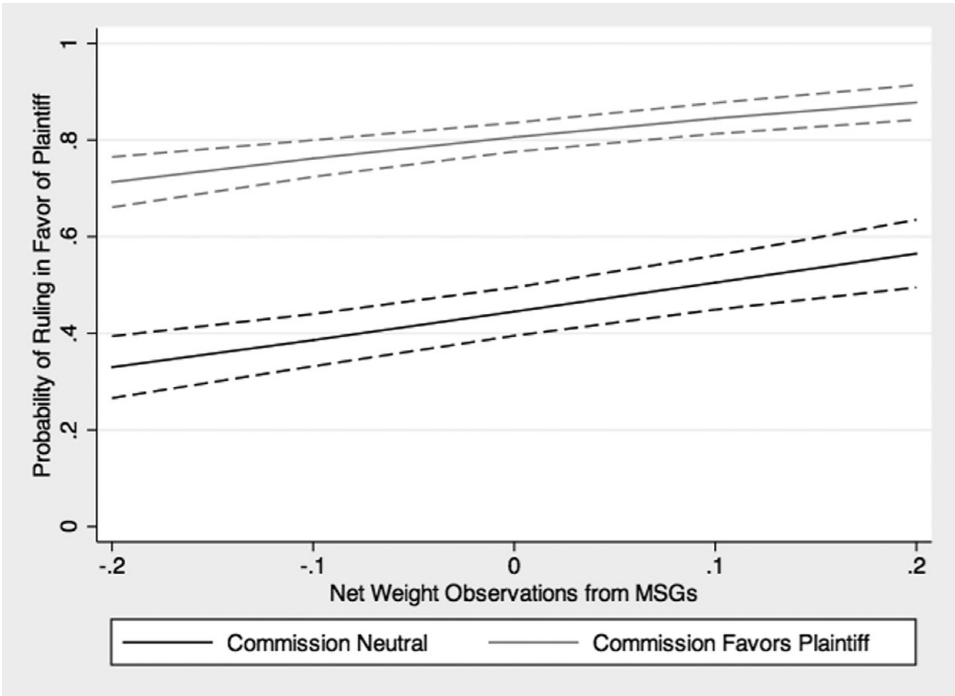
CGH also claim (449) that their purported findings—that the threats of override and noncompliance on the part of MSGs "have large, systematic, and substantively significant effects on judicial decision making"—strongly support intergovernmentalist integration theory. They argue that the evidence conflicts with approaches associated with neofunctionalism, which hold 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" [emphasis added].

Put in the most basic terms, contemporary neofunctionalists[19] argue that the court and the commission help the member states resolve the fierce

[18] *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.

[19] For an analysis of the evolution of neofunctionalist theory as an approach to European integration, see Sandholtz and Stone Sweet (2010).

FIGURE 2. The Impact on ECJ Decisions of Observations Filed by the Commission and Member State Governments



Note: The figure, based on CGH's Model 1 (CGH, Table 2: 443), plots the predicted probabilities of the ECJ ruling in favor of the plaintiff. All other variables are set at the mean or mode ($N = 3{,}176$). The Commission Neutral line represents the predicted probability when the commission does not express a preference on a legal question; the Commission Favors Plaintiff line represents the predicted probability when the commission files a brief in favor of the plaintiff. Dashed lines trace the 95% confidence interval for these predicted probabilities.

cooperation dilemmas that attend market and political integration, not least, through forging links with national judges and transnational elites who are willing to invest in these projects (Burley and Mattli 1993; Mattli 1999; Stone Sweet 2004). In the standard account, the legal system evolves under the tutelage of the ECJ, which works in conjunction with those who activate the court for their own purposes, including the commission under Art. 258 (enforcement actions) and private litigants and national judges under Art. 267 (preliminary references). In their empirical research, neofunctionalists found that the legal system developed in a progressive, self-sustaining way, because the court's rulings tend to promote integration (values that inhere in the treaties), and because decision rules governing override (unanimity) favor the court's dominance over treaty interpretation.

CGH (442) declare that, although "the ECJ may, on the margin, favor the commission," the MSGs are the actors who count, because they "systematically" constrain the court; however, CGH do not test the proposition. Confronted with this binary opposition, a neofunctionalist would predict *exactly the opposite*—that the ECJ will side with the commission's briefs, relatively systematically, although the MSGs may influence the court on the margins, partly as supplemental to the weight of the commission. Here we assess the extent to which the ECJ "favors" the positions of the MSGs relative to those of the commission.

Using the analytics underlying CGH's Model 1 (CGH, Table 2: 443), we generated predicted probabilities that would be comparable to the findings they reported (CGH, Figure 1: 444), adding values for the commission's briefing activity. In Figure 2, the y-axis plots the probability that the ECJ will rule in favor of the plaintiff. The x-axis charts the distribution of the CGH's main variable of interest: the proportion of MSGs filing an observation in support of the plaintiff. The top line represents predicted probabilities when the commission favors a ruling for the plaintiff, and the bottom line plots predictions when the commission is neutral. Note the gap between the lines. When the commission favors the plaintiff, the court listens. The slope of the line indicates that the positive and statistically significant impact of MSG briefs in support of the plaintiff is actually relatively modest. A modestly significant finding such as this one is not necessarily a substantively interesting finding, and CGH provide no evidence that the finding is of substantive interest. As important, we see no reason to accept that CGH's finding constitutes sufficient support for CGH's proposed causal explanation or intergovernmentalist claims, given that the rest

of the evidence strongly indicates that their theory is wrong.

Figure 2 reports a finding for all rulings in the CGH data set. For contestable reasons, CGH do not consider the outcome of Art. 258 enforcement actions, which directly concern state noncompliance with EU law, to be a fair test of their theory.[20] As noted, the commission prevails against the defendant member state in 90% of the ECJ's Art. 258 decisions, which would presumably count against CGH's positions. We therefore examine what remains: rulings generated by the Art. 267 preliminary reference procedure.

Of the 2,048 questions on which the ECJ rendered a preliminary ruling, the commission filed observations in 77.7% ($n = 1{,}588$), and MSGs produced a weighted position in 45.2% ($n = 926$). When the commission takes the plaintiff's side ($n = 841$), the court rules in favor of the plaintiff 79.9% of the time, compared to the member states' lower (70.8%) success rate in far 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, compared to the member states' far lower (57.2%) success rate ($n = 584$). The success rate of MSGs is far higher when they *encourage* the ECJ to punish a member state than when they seek to *constrain* the court from finding against a defendant state's law and practices, although MSGs participate in the latter, less successful activity far more than they do in the former.

We see 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 ECJ to find against a defendant state on the basis of common understandings of EU law developed by the court. In the latter situation, the MSGs are not so much "constraining" the court, as enabling it. Further, as just noted, the MSGs' rate of success is highest when they join the commission against the defendant state. In testing their theory, CGH do not distinguish between these situations. Instead, instances in which the MSGs join the commission in encouraging the court to punish a defendant state are actually counted as evidence in support of *both* hypotheses, and then against neofunctionalist theory.

The critical question 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 favors the commission only "on the margins"—then one should expect the commission's briefs to be relatively ineffectual when opposing 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. Thus, when MSGs oppose the commission ($n = 330$), the commission prevails more than two-thirds of the time—a landslide. CGH report no findings on the questions raised in this section. Instead, they assert that their more general data analysis somehow constitutes support for intergovernmentalism (449).

In Table 1, we present a comprehensive probit analysis of these relationships. We sought to determine the effect on ECJ rulings of two of the court's important constituents: the commission and the MSGs.[21] 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. In the same way, either the commission filed an observation for the plaintiff, the defendant, or no observation at all.[22]

The commission and the MSGs may take one of three different positions: in favor of the plaintiff, in favor of the defendant, or remaining 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 toward the preferred disposition of the case). For a neofunctionalist-based approach 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 1 shows, both conditions are met.

[20] To explain away why "the Court should not typically face threats of override" in the Art. 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 to induce the ECJ to build the law in a progressive fashion, and then the ECJ responds positively, a dynamic that CGH do not consider. If the Art. 258 system actually worked the way the CGH claim, then it is unclear how the court's case law of "clear legal principles" emerged in the first place, because such principles are commonly built on findings of noncompliance in cases in which member states rarely file observations. In CGH's theoretical world, the court should have been constrained.

[21] We are not claiming that these are the court's only or most important constituents. In Art. 267 cases, private litigants and national judges are the crucial actors.

[22] The design allows us to compare what happens when the MSGs (a) are on the same side as the commission, (b) oppose the commission, or (c) register no net weighted position relative to one taken by the commission, an analysis that CGH's model does not permit. In CGH's model, the dependent variable ranges from −1 to 1, but as Figure 1 shows, variation on the variable is narrow, and the net weighted positions of MSGs never approach a level in which the threat of override could be considered credible.

TABLE 1. Probit Analysis of the Relationship between Briefs and European Court of Justice Rulings for the Plaintiff under Art. 267 TFEU

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 pseudo-likelihood	−1,119.00

Notes: Entries are unstandardized probit coefficients with standard errors in parentheses. We used robust standard errors with clusters for each case. Source of the data: CGH (2008).
*** $p < .001$, two-tailed test.

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 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.

CONCLUSION

CGH's major claims are not supported by their own data. The threat of override was not credible and could not constrain the court in any systematic way. When member state governments did move to nullify the effects of controversial ECJ rulings, they failed to constrain the court, which continued down paths cleared by the prior rulings. CGH did not show how the substantive development of any domain of EU law has been stunted by the threat of noncompliance, and the ECJ's case law has continued to grow into a dense and imposing edifice. State noncompliance stimulated rather than paralyzed the development of the EU's legal system; the emergence of the doctrine of state liability, which was strongly opposed by MSGs but supported by the commission, is a striking example. The data also show that, in a head-to-head showdown, (i) the commission and neofunctional theory dominate (ii) the MSGs and intergovernmentalist theory as predictors of ECJ rulings. In sum, using CGH's own data, preferred methods, and theoretical constructions of integration theory, we confirm the findings of prior scholarship on the ECJ and legal integration, and refute CGH's claims.

REFERENCES

Alter, Karen. 2008. "Agent or Trustee: International Courts in their Political Context." *European Journal of International Relations* 14 (1): 33–63.

Börzel, Tanja, Tobias Hofmann, and Diana Panke. 2008. "Opinions, Referrals, and Judgments: Analyzing Longitudinal Patterns of Non-compliance." Free University of Berlin. Unpublished manuscript.

Burley, Anne-Marie, and Walter Mattli. 1993. "Europe before the Court: A Political Theory of Legal Integration." *International Organization* 47 (1): 41–76.

Carrubba, Clifford, Mathew Gabel, and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102 (4): 435–52.

Cichowski, Rachel. 1998. "Integrating the Environment: The European Court and the Construction of Supranational Policy." *Journal of European Public Policy* 5 (3): 387–405.

Cichowski, Rachel. 2004. "Women's Rights, the European Court, and Supranational Constitutionalism." *Law and Society Review* 38 (3): 489–512.

Cichowski, Rachel. 2007. *The European Court and Civil Society: Litigation, Mobilization and Governance*. Cambridge: Cambridge University Press.

Garrett, Geoffrey. 1992. "International Cooperation and Institutional Choice: The European Community's Internal Market." *International Organization* 46 (2): 533–60.

Garrett, Geoffrey, and Barry Weingast. 1993. "Ideas, Interests and Institutions: Constructing the EC's Internal Market." In *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, eds. J. Goldstein and R. Keohane. Ithaca, NY: Cornell University Press, 173–206.

Kelemen, Daniel R. 2010. *Eurolegalism: The Rise of Adversarial Legalism in the European Union*. Cambridge, MA: Harvard University Press.

Kilroy, Bernadette A. 1996. "Member State Control or Judicial Independence? The Integrative Role of the European Court of Justice, 1958–1994." University of California, Los Angeles. Unpublished manuscript.

Mattli, Walter. 1999. *The Logic of Regional Integration: Europe and Beyond*. New York: Cambridge University Press.

McCown, Margaret. 2003. "The European Parliament before the Bench: ECJ Precedent and European Parliament

Litigation Strategies." *Journal of European Public Policy* 10 (6): 974–95.

Nyikos, Stacy. 2000. *The European Court of Justice and National Courts: Strategic Interaction within the Preliminary Reference Process*. Ph.D. diss. University of Virginia.

Nyikos, Stacy. 2003. "The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment." *European Union Politics* 4 (4): 397–419.

Panke, Diana. 2007. "The European Court of Justice as an Agent of Europeanization: Restoring Compliance with EU Law." *Journal of European Public Policy* 14 (6): 847–66.

Panke, Diana. 2009. "Social and Taxation Policies –Domaine Réservé Fields? Member States Non-compliance with Sensitive European Secondary Law." *Journal of European Integration* 31 (4): 489–509.

Pollack, Mark. 2003. *The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union*. Oxford: Oxford University Press.

Sandholtz, Wayne, and Alec Stone Sweet. 2010. "Neofunctionalism and Supranational Governance." http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1585123 (accessed April 12, 2011).

Stein, Eric. 1981. "Lawyers, Judges, and the Making of a Transnational Constitution." *American Journal of International Law* 75: 1–27.

Stone Sweet, Alec. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press.

Stone Sweet, Alec. 2010. "The European Court of Justice and the Judicialization of EU Governance. " *Living Reviews in EU Governance*. http://europeangovernance.livingreviews.org/ (accessed April 12, 2011).

Stone Sweet, Alec, and Thomas Brunell. 1998. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." *American Political Science Review* 92 (1): 63–81.

Stone Sweet, Alec, and Thomas Brunell. 2011. *How the European Legal System Works: Override, Non-Compliance, and Majoritarian Activism in International Regimes*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1780902 (accessed April 12, 2011).

Stone Sweet, Alec, and James Caporaso. 1998. "From Free Trade to Supranational Polity: The European Court and Integration." In *European Integration and Supranational Governance*, eds. W. Sandholtz and A. Stone Sweet. Oxford: Oxford University Press, 92–133.

Tallberg, Jonas. 2002a. "Delegation to Supranational Institutions: Why, How, and with What Consequences?" *West European Politics* 25 (1): 23–46.

Tallberg, Jonas, 2002b. "Paths to Compliance: Enforcement, Management, and the European Union." *International Organization* 56 (3): 609–43.