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How the EU's Legal System Does and Does Not Work

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A striking feature of European governance over the past fifty years has been the central role played by the European Court of Justice [ECJ]. At crucial moments, the Court’s case law has shaped market and political integration, the balance of power among the organs of the European Union [EU], the “constitutional” boundaries between international, supranational, and national authority, and thousands of policy outcomes great and small. Comparatively, the significance of the ECJ’s impact on its legal and political environment rivals that of the world’s most powerful national supreme and constitutional, courts.

Most readers will be familiar with these claims. One of the grand, discursive narratives of European integration recounts the “transformation” of the treaty system through judicial rulings, which Stein famously characterized as the “constitutionalization” of the regime. This transformation proceeded with the consolidation of the “constitutional” doctrines of direct effect and supremacy, first announced by the Court in the 1960s (discussed below). As lawyers, national judges, the EU’s legislative organs, and national officials worked out the implications of these and related doctrines, an expansionary, quasi-federal legal system emerged. It was in part

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1 Weiler 1991.
2 Stein 1981.
3 See also Mancini 1991.
through the efforts of social scientists to explain this process that the “Neofunctionalism” \(^6\) of Ernst Haas was resurrected, updated, and refined as a general theory of regional integration. \(^7\)

Two crucial institutional facts underpinned these outcomes. First, the ECJ’s major rulings on the EU treaties are effectively insulated from reversal on the part of the Member States. Overriding such rulings means treaty revision, which requires a unanimous vote on the part of the Member States. Second, Member State Governments [MSGs] are not able to block national judges from seeking guidance from the ECJ as to the interpretation and application of EU law in cases alleging State non-compliance. These cases, brought by private parties on the basis of the doctrines of direct effect, have comprised the bulk of the ECJ’s caseload since the entry of force of the Treaty of Rome in 1959.

In a recent article published in a prominent venue, the *American Political Science Review*, Carrubba, Gabel, and Hankla\(^8\) [CGH] analyzed every ECJ ruling rendered in the 1986-1997 period. The purported results are startling. The ECJ’s decision-making, the authors claim, is “systematically constrained” by the *threat of override* on the part of MSGs, acting collectively, and the *threat of non-compliance* on the part of any single Government. They also purport to have found strong support of Intergovernmentalist, but not Neofunctionalist, integration theory. Both results conflict with prior research; indeed, if confirmed, CGH’s findings would revive once-important theoretical debates long thought settled by a wide range of empirical research.\(^9\)

In this paper, we subject CGH’s claims to scrutiny, and we reject them on the basis of the same data. Our larger purpose, however, is to contribute to the literature on how the EU’s legal system operates. After a preliminary discussion of theoretical and methodological issues, we

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\(^7\) Burley and Mattli 1993; Mattli 1999; Stone Sweet and Brunell 1998. The major findings of contemporary research in the Neofunctional tradition is surveyed in Sandholtz and Stone Sweet 2010.

\(^8\) Carrubba, Gabel, and Hankla 2008.

\(^9\) The literature is reviewed in Stone Sweet 2010.
undertake original analysis of the rulings in CGH’s data set. The analysis shows conclusively that the threat of override is not credible, and that the legal system is activated, rather than paralyzed, by non-compliance. Unlike CGH, we also explore what happened when MSG sought to override the Court: they failed. Although CGH do not test any hypothesis derived from Intergovernmentalism or Neofunctionalism, we organize a straightforward contest between the rival theories. In a head-to-head showdown, Neofunctionalism wins in a landslide. Finally, the analysis provides support for the view that the ECJ engages in “majoritarian activism.” CGH’s most robust finding is that when Member States urge the Court to censor a defendant State for non-compliance, the ECJ tends to do so. In such cases, MSGs work to reinforce the Court’s authority, not to “constrain” it.

The paper also has relevance for judicial politics in the two other international regimes that today have serious claims to be considered “constitutional“ in some meaningful sense: the World Trade Organization (WTO),\textsuperscript{10} and the European Convention on Human Rights.\textsuperscript{11} The Appellate Body of the WTO [WTO-AB] and the European Court of Human Rights [ECHR] are both Trustee courts under the criteria laid out in the next section. We take up judicial politics under conditions of Trusteeship in international regimes again in the conclusion.

**Trusteeship, Override, and Compliance**

See the paper: “Trustee Courts and the Evolution of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO,” available on SSRN.

Social scientists have produced more sophisticated research on the ECJ than on any other judicial body in the world, with the exception of the United States Supreme Court. Since the early-1990s, most of this research has deployed some version of delegation theory, the core of

\textsuperscript{10} Cass 2005; Trachtman 2006.
\textsuperscript{11} Greer 2006; Stone Sweet 2009.
which is a Principal-Agent framework.\textsuperscript{12} We develop a variant of the framework here in order to make several basic points about judicial review in international regimes.

The ECJ, the WTO-AB, and the ECHR are not simple Agents of Contracting States; they are, rather, Trustees of their respective treaty systems. In the international context, a Trustee court can be identified as such on the basis of three criteria: (a) the court is the authoritative interpreter of the regime’s law, and possesses the authority to review the legality of acts taken by any contracting State under the regime’s law; (b) the court’s jurisdiction, with regard to the contracting States, is compulsory; and (c) it is difficult, or impossible as a practical matter, for the contracting States – as Principals – to reverse the court’s important rulings on treaty law. Unlike a simple Agent, a Trustee Court possesses the authority to govern the Principals themselves. In the EU, the Member States conferred such authority on the regime’s court in order to help them overcome acute commitment problems associated with market and political integration.\textsuperscript{13} In this account, the ECJ is a Trustee of the law, principles, and values that inhere in the treaties.\textsuperscript{14} Drawing out the metaphor further, when the ECJ exercises its authority, it discharges a “fiduciary” responsibility in the name of “the Peoples of Europe.”\textsuperscript{15}

By definition, a Trustee court operates in an unusually permissive strategic environment, which we will refer to as a court’s “zone of discretion.” This zone is determined by the sum of competences explicitly delegated to a court, and possessed as a result of a court’s own accreted rulemaking, minus the sum of control instruments available for use by the Principals to override the court, or to curb it in other ways. The Principals’ grants of authority to the Court are explicit, as is the case of Articles 258, 263, and 267 TFEU (see Boxed Insert); and they are also implicit,

\textsuperscript{12} The literature on delegation theory and Trusteeship is surveyed in Stone Sweet 2010.
\textsuperscript{13} Pollack 2003; Tallberg 2002a.
\textsuperscript{14} Stone Sweet 2004.
\textsuperscript{15} Article 1 Treaty of European Union.
as when the Principals adopt relatively open-ended, or “incomplete,” legal norms. In this view, the Treaties, and much secondary legislation, are “incomplete contracts” among the MSGs that the Court completes, through interpretation and application, as conditions change. While the authority delegated to the ECJ is vast, the decision-rule governing override (unanimity) restricts the Principals’ control \textit{ex post}. As important, a Trustee court possesses the capacity to expand or contract its own authority: the ECJ is the authoritative interpreter of the scope of its own jurisdiction.

Mapping a court’s zone of discretion, of course, does not tell us what the judges will actually do with their powers. Nonetheless, we can predict that a Trustee court, rather than the Contracting States, will dominate the institutional evolution of the regime in so far as three conditions are met. First, the court must have a steady case load. If potential litigants refuse to activate the court, judges will accrete no influence over the evolution of the regime. Second, once activated, the court must resolve these disputes, while giving defensible reasons for its decisions. If it does, one output of judging will be the production of case law, a formal record of how the law has been interpreted and applied. The third condition is that a minimally robust conception of precedent must develop within the system. Those who are governed by the law must accept that legal meanings are (at least partly) constructed through judicial interpretation and lawmaking, and use or refer to relevant case law in their future decision-making. To the extent that these three conditions are met, judicial review and the regime’s law can be considered to be “effective.” Put differently, where these conditions are met, Trusteeship will produce a situation of “structural judicial supremacy.” In this mode of governance, the court’s jurisprudence will organize the processes through which the regime evolves; and judicial
lawmaking will be “sticky,” in that outcomes will be relatively immune to change except through rounds of future adjudication.

For present purposes, two implications of this discussion deserve emphasis. First, a Trustee court has little reason to fear reversal on the part of the Contracting States. In international regimes, the “Principal” is not a unified entity, but is instead a composite of a multiple of States whose Governments will exhibit divergent interests on any important policy matter on which the regime’s court takes a position. To the extent that this statement is true, the threat of override will not be credible. Second, in a situation of structural judicial supremacy – where the effectiveness criteria of the judicial review of a regime’s law have been met – the notion of “non-compliance” must cover politics that fall outside the dimension constituted by a State’s decision “not to comply.” In the EU, the WTO, and the Convention regimes, non-compliance with the regime’s law generates case load; cases have provoked expansive judicial lawmaking; and these new interpretations regularly put States out of compliance, generating new rounds of litigation. Non-compliance with rulings on the part of any State will not threaten the system as long as the three criteria for effectiveness continue to be met. It follows that our notion of compliance must include the various ways in which States adapt to the court’s jurisprudence, not just with respect to their national law and practices, but also to how they tailor litigation strategies to the court’s jurisprudence. When States defend positions on the basis of the regime’s case law, for example, they legitimize that law and the court in a powerful way – through use.

The European Court of Justice: Trusteeship Constrained?

In “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice,” CGH make three provocative claims. First, CGH claim (436) to employ a new
methodology that solves inference problems allegedly afflicting all prior research on the Court’s decision-making. They evaluate the influence of amici briefs, filed by Member State Governments [MSGs] and the EU Commission, on the ECJ’s rulings. Second, having examined the Court’s holdings on some 3,176 legal questions over an 11-year period (January 1987-December 1997), the authors declare that ECJ’s case law is 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 results 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 assert (449) that their findings support Intergovernmentalist theory, but conflict with Neofunctionalism. Because these claims conflict with virtually all extant empirical research, and because CGH promise to show how the case law of a Trustee court might be constrained by entities (MSGs) subject to the court’s control, they deserve close scrutiny.

Among scholars who have done empirical work on the ECJ and the EU’s legal system, there is broad consensus on the view that Court’s rulings are insulated from Member State override.16 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. In our research on the question, we found that Unanimity is the decision-rule governing override in more than 90% of the rulings in the CGH data set. In 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 do not inform

16 Alter 1998; Cichowski 2007; Pollack 2003; Stone Sweet 2004, 2010; Tallberg 2002a. To our knowledge, with the exception of Carrubba, Gabel and Hankla (2008), 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 test the proposition.
readers of the fact, there is not one significant case of override in the history of adjudicating the treaties.

While everyone agrees that the ECJ seeks to elicit compliance with its decisions, there is also strong consensus for the view that the ECJ is not constrained in any systematic way by the threat of MSG non-compliance. The EU’s legal system, after all, has uniquely evolved in order to deal with compliance failures. Over the past two decades, scholars have charted how non-compliance on the part of MSGs has organized litigation and provoked the Court’s dynamic construction of EU law (thereby creating new compliance failures). But 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 non-compliance. In their article, CGH do not identify a single instance in which a threat of non-compliance has constrained the Court.

CGH’s claims flow from flawed theory and research design, not from evidence. In CGH’s account (439), the MSGs, not the ECJ, constitute the regime’s authoritative third-party enforcement mechanism. The Court appears as a simple Agent, whose task is to ratify the MSGs’ legal preferences on an ongoing basis, as such preferences are revealed. CGH’s model denies the autonomy of the ECJ to make significant law, it also underestimates the supranational character of the system, in particular the crucial role of interactions between the ECJ and national judges. CGH fail to appreciate the fact that it is national judges who do the bulk of supervision

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18 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.”
19 If the legal system worked as CGH theorize, one might expect the Member States to sue one another for non-compliance under Article 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 Article 259 suit. To date, there have only been three such rulings.
of State compliance with EU law, and that it is national judges who work to “restore compliance,” even in politically “sensitive” areas.\(^\text{21}\)

In fact, the national courts (under Art. 267 TFEU) 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. The national legal order is, in effect, the “defendant” in these cases. If, in its answers to the referring judge, the ECJ determines (or implies) that national law is in non-compliance with EU law, then it is the national judge, not the MSG, who will take the authoritative decision “to comply” or “not to comply.” If a national judge sets aside national law, in deference to the ECJ’s case law, then how is it possible for a MSG to “implement” a decision “not to comply”? CGH do not tell us. National judges implement the Court’s preliminary rulings routinely – far more than 90% of the time,\(^\text{22}\) though CGH do not consider this fact in their account of how the legal system works.

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*The Standard Method: From Briefs to Rulings*

Since Stein’s seminal paper of 1981,\(^\text{23}\) 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. These briefs – “Observations” in EU parlance – advise the ECJ on how it should rule on the legal questions constituting any given case; they thus embody revealed preferences. Stein used the approach to assess the influence of MSG preferences, and those of the Commission, on eleven 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. A preliminary, but


\(^{22}\) Nykios 2003.

\(^{23}\) Stein 1981.
key point: if the legal system actually operated according to the dictates of CGH’s model, constitutionalization would not have occurred, and the system would not have generated most of the data that CGH analyze.

Consider Van Gend en Loos (1963), 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 momentous: could a private party plead a provision of the Treaty of Rome in a national court, against a Member State measure? Belgium, Luxembourg, and the Netherlands had taken a collective decision to violate the Treaty, raising customs duties, thereby 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, but not for 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 stayed out of 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.

As noted above, a Trustee court possesses the capacity to expand or contract its own zone of discretion. The Treaty of Rome contained no supremacy clause, and the Member States did not provide for the direct effect of Treaty provisions or directives. Yet the Court, in

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25 Once a European legal norm enters into force, the ECJ ruled, it “renders automatically inapplicable any conflicting provision of … national law” (Simmenthal, ECJ 106/77, 1978), including national constitutional rules.
collaboration with national judges, secured both. Deep, structural transformation of the regime was the result. 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 used these opportunities to jump-start market and political integration at crucial moments, and to maintain momentum in the face of inertia and doubt.\textsuperscript{26} The consolidation of supremacy and direct effect is a \textit{necessary} causal condition for this to happen, yet the outcome is a theoretical impossibility in 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 adapted Stein’s method, to make it more rigorous and amenable to quantitative analysis.\textsuperscript{27} Political scientists then began to use it, relatively systematically, within specific 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,\textsuperscript{28} and others they do not cite.\textsuperscript{29} The method was refined, in part, as a means of evaluating claims made, but left untested, by Garrett and Weingast\textsuperscript{30} and Garrett.\textsuperscript{31} These studies uniformly rejected Garrett and Weingast claims, though it is these propositions that CGH (437-38) now seek to revive.

CGH assert that their design “avoids” an inference problem that has rendered previous efforts to test the impact of briefs on ECJ rulings “uninformative” (436). CGH do not discuss how this problem has actually contaminated the findings of any specific piece of research.

\textsuperscript{26} For a recent review of the scholarly literature on the impact of the ECJ on integration, see Stone Sweet 2010.
\textsuperscript{27} Kilroy 1996; Stone Sweet and Caporaso 1998.
\textsuperscript{28} E.g., Stone Sweet 2004.
\textsuperscript{30} Weingast and Garrett 1993.
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. To state that the EU’s legal system processes non-compliance cases routinely, which it does, is not an assertion that MSGs “are constrained to obey adverse court rulings.” On the contrary, (a) how the ECJ and the national courts decide non-compliance cases, and (b) how MSGs react to a finding of non-compliance by the courts, are two separate empirical questions, and have always been treated as such by scholars in this sub-field.

What is CGH’s method for avoiding the inference problems that have afflicted all extant scholarship?32 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 (here and in their coding protocol, which we reviewed), CGH’s method does not move beyond the basic approach developed post- Stein.

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.33 For Article 267 preliminary rulings, this “issue-by-issue” approach is obligatory. In important cases, the national judge of 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

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

33 E.g., Cichowski 2007; McCown 2003; Nykios 2003; Stone Sweet 2004.
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). 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 assert that everyone in the field analyzed ECJ rulings in this way prior to
their study. In fact, litigators of EU law, legal specialists employed in an EU organ or Member
State agency, and scholars all analyze Article 267 rulings on issue-by-issue basis. There is
simply no other way to understand them; and the practice comes naturally, since the Court
organizes its judgments on a question-by-question basis.

CGH adopt a slight variation on the basic method. Whereas some 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 arguments
made by the plaintiff), and how the Commission and the MSGs briefed these same questions.
Quite sensibly, CGH “weigh” each MSG’s brief according to the number of votes that MSG has

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been assigned in the Council of Ministers under Qualified Majority Voting (QMV) rules.\textsuperscript{35} 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.

As others in the field did before them, CGH then use various statistical techniques to assess the relationship between briefs and rulings, in order to measure the extent to which ECJ’s rulings align with, or depart from, the net weighted position of the MSGs and the Commission brief. What is unusual and, in our view, indefensible, is that CGH count as support for their hypotheses every ECJ decision that is congruent with the net weighted position of the MSGs. In such cases, CGH assume that the ECJ was “constrained” to decide as it did, due to the threats of override and/or non-compliance. At most, CGH’s approach can test the “influence,” or a “presumed persuasive effect,” of briefs on outcomes; but it does not test the proposed explanation of this influence. If a court follows a line argued in one of the briefs submitted to it, why should the analyst believe that the outcome can only be explained with reference to one of two “political” threats? We submit that this approach would not make sense with respect any other legal system in which effective judicial review has been established, and it makes no sense for the EU.

\textit{The Hypotheses}

The basic method CGH deploy is the best available method for testing their major claims. It was developed, after all, for the express purpose of assessing whether the revealed preferences of MSGs, through threats and other mechanisms, constrain the ECJ’s decision-making in a

\textsuperscript{35} 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.
systematic sense, as Garrett and Weingast, Garrett, and now CGH propose. Unfortunately, CGH do not actually test their hypotheses, as we will now demonstrate.

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-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.” In fact, the information needed to determine the override rule is easily obtained: each ECJ ruling highlights, up-front, the provisions of EU law being litigated.36 We examined every ruling pursuant to an infringement proceeding (Article 258), and every preliminary ruling (Article 267) in which at least one MSG filed an observation in the CGH data set. We found that, for over 90% of the cases, the override rule is Unanimity, not QM.37

CGH will not actually test Hypothesis 1, at least not as originally formulated. They choose not to stipulate a threshold point at which the threat of override can be assumed to have been registered. 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

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36 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.

37 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.
work. Instead, CGH (436) declare that the necessary votes to override can be garnered through “log-rolling.” The entire discussion of “log-rolling” 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 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. The move fundamentally conflicts with the Intergovernmentalist theory they claim to embrace; Garrett stresses that only the most powerful states can constrain the Court.38

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.” Stated in this way, 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, they 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

38 Garrett 1995.
In the end, CGH do not evaluate the effects of their two mechanisms separately. The crucial move comes when 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” (CGH 440) – to make it virtually identical to Hypothesis 2 (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.”

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 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. The design actually tests only the extent to which briefs (the independent variable) influence or presage ECJ rulings (the dependent variable) on any given legal question. The design cannot test Hypothesis 1, as originally formulated, since the analysis will never address whether the threat of override is credible for any legal question.40

Analysis (1): The Brief for Override and Non-compliance

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39 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.  
40 Inexplicably, CGH also include data from Article 263 annulment actions 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. For the record, MSGs filed observations in only 8.8% (58/662) of the legal questions raised in these rulings.
In their article, CGH chose not to report the most important aggregate statistics that would allow readers to evaluate their claims, such as the mean number of briefs filed, and the mean net weighted positions taken, by the MSG on legal questions. Despite repeated requests, the authors refused to provide us with 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 made available only the aggregate data processed in order to produce their findings. These data included case numbers, net weights of observations (without codes for the briefing MSGs) on (unidentified) legal questions, and whether the plaintiff won or lost. 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 (see Box). 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, 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

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41 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.

42 Although the ECJ numbers each 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. CGH also 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.

43 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.
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.

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. Thus, although, neither the Commission nor the Court can force a MSG “to obey adverse rulings” (CGH 436), a decision on the part of a MSG to refuse to comply with an ECJ ruling did not paralyze the system. Instead, non-compliance generates more cases and more rulings of non-compliance, as other studies, more comprehensive than CGH’s, have found.44

In only 6.5% (n=29) of Article 258 rulings, did the MSGs register a weighted position45; 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 the 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% of votes would have been necessary to override.

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44 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.

45 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.
Recall that Hypothesis 1, as originally formulated, 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 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 the Court, because it is not a credible threat. Outcomes are also broadly consistent with the findings of prior studies.

We now turn to the 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. 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 to 15 votes necessary to override the Court. CGH do not report this information, but instead expect readers to believe that a “log-rolling” process, left unexplained, can “cobble together” the necessary votes.

Now let us consider the data as a whole. Figure 1 depicts the distribution of values on the independent variable: MSG 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 MSGs
take no position. In 11.8% of the legal questions in the data set (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 is inexplicable.

---- Figure 1 here -----

Given the paucity of evidence in support of their theory, what did CGH find that led them to over claim so much? CGH are able to 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; their design does not test the robustness of the proposed mechanisms (the threat of override and non-compliance respectively).

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%. The MSG’s success rate 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 States’ law and practices), though MSGs participates in the latter activity far more than in the former. There is a fundamental
difference between situations in which (a) MSGs ask the Court not to develop EU law in new directions, and (b) MSGs urge the Court to find against a defendant State on the basis of common understandings of EU law. In the first, MSGs seek to constrain the Court, in the second they enable it. CGH’s design does not distinguish between these two situations.

*Qualitative Evidence*

CGH restrict their inquiry to statistical analysis of the coded rulings. In contrast to others in the field, CGH do not supplement statistical findings with thicker, descriptive analyses of the relationship between non-compliance and judicial process. Using CGH’s approach, of course, 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. Most important, CGH do not engage the extant literature on Member State non-compliance,\(^46\) nor do they identify a single attempt on the part of the Member States to override the ECJ.

In fact, the data set contains two instances in which MSGs formally sought to constrain the ECJ pursuant to major rulings, rulings that must count as evidence against CGH’s theory. The first was provoked after the ECJ held, in *Bilka* (1986),\(^47\) 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, MSGs had adopted EU legislation that expressly excluded retirement and old age pensions from the

\(^{46}\) Including Tallberg 2002b.

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 Member States, including the UK and France, blocked it in the Council of Ministers. The proposal required unanimity to pass.

In Barber (1990), the ECJ enacted the reform as an interpretation of Article 157. Citing Bilka, the Court rejected the UK’s retro-claim that Article 157 did not apply to private pension schemes; and it held, counter to UK’s briefed position, that Article 157 covered the determination of pensionable age for a fired employee. Thus, the ECJ found for Mr. Barber, as supported by the Commission (in error, CGH code the Commission as not submitting a brief). The ECJ also followed the Commission’s suggestion that it consider limiting the temporal effects of the ruling (CGH do not code for this question at all). The Court, rightly in our view, did not think it fair to apply the holding retroactively: thousands of companies across the EU “were reasonably entitled to consider that Article [157] did not apply to [such] pensions,” given that “derogations from the principle of equality between men and women [had been] permitted.”

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.

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49 In order to override this ruling, the Member States would have to revise Article 157, not the Directive. The outcome has thus been “constitutionalized.”
50 CGH code the case as raising only four legal questions, though the ruling addresses five.
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\textsuperscript{51}).

The Barber Protocol generated a line of cases that is relevant to CGH’s arguments, in that some Member States 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 fall under the same time limitations. Vroege (1993)\textsuperscript{52} 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 Member States induced the ECJ to abandon its pre-Protocol case law. As a result, Bilka continues to organize a continuous 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.

A second case of attempted override followed a line of decisions interpreting the 1979 directive on the conservation of wild birds. In Leybucht Dykes (1991),\textsuperscript{53} 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 Member 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

\footnotesize{\textsuperscript{51} ECJ C-109, 110, 152, and 200/91 [1993] ECR I-4879.}
\footnotesize{\textsuperscript{52} ECJ C-57/93 [1994] ECR I-4541. See also Fisscher, ECJ C-128/93 [1994] ECR I-4583.}
\footnotesize{\textsuperscript{53} Commission v. Germany, ECJ C-57/89 [1991] ECR 2849.}
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 the Member States could never give more weight to “economic and recreational requirements” than to bird conservation in such decisions. In response, the Council of Members 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 development in SPAs “for imperative reasons of overriding public interest, including those of a social or economic nature.”

While MSGs were busy overriding the Court, the Lappel Bank’s status as an SPA was heading for the UK courts. The Lappel Bank, part of the Medway Estuary and Marshes system, is 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 partly on the grounds that the project would violate the Wild Birds Directive. In 1993, 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. Although the port expansion was well underway and could not be stopped, the case carried important implications for future planning decisions. On appeal, the UK’s highest court (House of Lords) sent 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?54

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 its ruling (Lappel Bank, 1996), the Court bluntly rejected France and the UK’s briefed arguments: “a Member State is not authorized to take account of the economic requirements … when designating an SPA and defining its boundaries.” Citing to Leybucht Dykes and other cases, 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.\footnote{55 CGH, for their part, erroneously code the case as raising only one issue (the Court decides 3); and they code the case as attracting no \textit{amicus} briefs (the UK, France, and the Commission filed observations), so the ruling was excluded from their analysis.} In this saga, MSGs succeeded in reversing the Court’s interpretation of an important statute, but the ECJ overrode the override.

Finally, the CGH data set contains a set of landmark constitutional rulings ranking in importance with those analyzed by Stein. In \textit{Francovich} (1991),\footnote{56 Case C-6 & 9/90 [1991] ECR I-5357.} the Court announced the doctrine of state liability. In this ruling, the Court held that a Member State can be held financially responsible for damages caused to private parties for 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 since the Treaty says nothing on the question, the new remedy must be provided for, if at all, in EU legislation, not through judicial fiat. Comforting the Commission’s position, the Court rejected the Member States’ arguments:

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), individuals and firms 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.” In this complex ruling, eight Member States and the Commission filed briefs on a wide range of issues. The ECJ dismissed a German objection in terms that echo our discussion of Trusteeship:

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 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. The Court also rejected the positions of France, Germany, Ireland, and the UK to the effect that EU law may not require a remedy that does not already exist in national law. On the contrary, the Court stressed, EU law establishes certain minimal criteria, including the provision of certain remedial forms, like state liability, even when they are unknown to national law.

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.

The outcomes of these three episodes conflict with CGH’s model of how the legal system works, 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 dynamics are inexplicable under CGH’s theory.

**Analysis (2): The Brief for Intergovernmentalism and Neofunctionalism**

In their paper, CGH attempt to revive the contest between Intergovernmentalist and Neofunctionalist theories of integration as applied to the EU’s legal system.

CGH claim (449) that the data support Intergovernmentalism 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 Neofunctionalism which, they state, holds 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.] CGH do not actually discuss extant research on the question, or put previous findings to a new test. Instead, their claim is based on the results already obtained in their test of Hypotheses 1 and 2.

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. 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: 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 override facilitate the institutionalization of the pro-integrative positions taken by the Commission and the Court.

CGH (442) declare that, although “the ECJ may, on the margin, favor the Commission,” our real focus should be on the MSGs, who “systematically” constrain the Court. If confronted with this binary opposition, a Neofunctionalist would predict exactly the opposite. The ECJ will side with the Commission’s briefs – relatively systematically – though the MSGs may influence the Court on the margins, partly as supplemental to the weight of the Commission. The evidence from infringement proceedings provides overwhelming support for this 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 claim. We therefore examine what’s left: rulings generated through the Article 267 preliminary reference procedure.

59 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.
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 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).

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. Unfortunately, CGH report no findings on the questions raised in this section. Instead, they simply assert that their findings with respect to
Hypotheses 1 and 2 somehow constitute support for Intergovernmentalism, while resolving the inference problems that have afflicted all past research on the topic (CGH: 449).

---- 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. 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 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 4 shows, both conditions are met. Whenever the Commission favors the

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60 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.

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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.

Thus, using CGH’s own data, method, and their preferred theoretical constructions of integration theory, we reject each of CGH’s major claims. The threat of override has not constrained the ECJ in any systematic sense, because the threat is not credible. Compliance failures, far from bringing the system to a standstill, feed and maintain a system whose expansive dynamics continued unabated throughout the period CGH chose to study. Last, in a head-to-head showdown, the Commission (and Neofunctionalism) dominates the MSGs (and Intergovernmentalism) as a predictor of ECJ rulings. In sum, our findings strongly confirm
results produced by more than a decade of empirical scholarship, research that had disconfirmed the theoretical positions CGH seek to revive.

**Conclusion: Trusteeship in International Regimes**

See the paper:

“Trustee Courts and the Evolution of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO,” available on SSRN.

**References**


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Stone Sweet, Alec. 2010. The European Court of Justice and the Judicialization of EU Governance. *Living Reviews in EU Governance*. On-line at:

http://europeangovernance.livingreviews.org/.


BOXED INSERT: THE JURISDICTION OF THE ECJ

The CGH data set contains information collected from ECJ rulings rendered during an 11-year period (January 1, 1987 to December 31, 1997). These cases came to the Court under three provisions of the Treaty of Rome. Since December 1, 2009, these provisions appear 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 brought by private parties seeking to invalidate decisions of the EU’s governing bodies. In this litigation, only the EU’s institutions can ever 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 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 non-compliance with EU law. If the allegation is upheld, the national judge is expected to give priority to EU law, while setting aside conflicting national law (the doctrine of supremacy).
Figure 1: Distribution of Net Weighted Positions taken by the Member States on Legal Questions in the CGH Data Set

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

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<th>Observation from Commission for Defendant</th>
<th>No Observation from Commission</th>
<th>Observation from Commission for Plaintiff</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ECJ Rules for Defendant</strong></td>
<td>579 (77.5)</td>
<td>227 (49.5)</td>
<td>169 (20.1)</td>
<td>975 (47.6)</td>
</tr>
<tr>
<td><strong>ECJ Rules for Plaintiff</strong></td>
<td>168 (22.5)</td>
<td>232 (50.5)</td>
<td>672 (79.9)</td>
<td>1,072 (52.4)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>747</td>
<td>459</td>
<td>841</td>
<td>2,047</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th></th>
<th>MS’s Favor Defendant</th>
<th>No Observations or Balanced on Both Sides</th>
<th>MS’s Favor Plaintiff</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ECJ Rules for Defendant</strong></td>
<td>334 (57.2)</td>
<td>541 (48.2)</td>
<td>100 (29.2)</td>
<td>975 (47.6)</td>
</tr>
<tr>
<td><strong>ECJ Rules for Plaintiff</strong></td>
<td>250 (42.8)</td>
<td>581 (51.8)</td>
<td>242 (70.8)</td>
<td>1,073 (52.4)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>584</td>
<td>1,122</td>
<td>342</td>
<td>2,048</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Member State Governments</th>
<th>Commission</th>
<th>Support Defendant</th>
<th>Neutral</th>
<th>Support Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Support Defendant</td>
<td>Neutral</td>
<td>Support Plaintiff</td>
</tr>
<tr>
<td>Support Defendant</td>
<td>16.5</td>
<td>50.6</td>
<td>70.1</td>
<td></td>
</tr>
<tr>
<td>Neutral</td>
<td>23.2</td>
<td>49.1</td>
<td>82.1</td>
<td></td>
</tr>
</tbody>
</table>
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>
<thead>
<tr>
<th>Support Plaintiff</th>
<th>36.5</th>
<th>66.7</th>
<th>86.6</th>
</tr>
</thead>
</table>


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

<table>
<thead>
<tr>
<th>Category</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission Plaintiff, Member States Plaintiff</td>
<td>1.131***</td>
<td>(0.138)</td>
</tr>
<tr>
<td>Commission Plaintiff, Member States Defendant</td>
<td>0.552***</td>
<td>(0.121)</td>
</tr>
<tr>
<td>Commission Defendant, Member States Defendant</td>
<td>-0.950***</td>
<td>(0.125)</td>
</tr>
<tr>
<td>Commission Defendant, Member States Plaintiff</td>
<td>-0.321***</td>
<td>(0.159)</td>
</tr>
<tr>
<td>Commission Neutral, Member States Defendant</td>
<td>0.040</td>
<td>(.173)</td>
</tr>
<tr>
<td>Commission Neutral, Member States Plaintiff</td>
<td>0.455</td>
<td>(.241)</td>
</tr>
<tr>
<td>Commission Defendant, Member States Neutral</td>
<td>-0.705***</td>
<td>(0.109)</td>
</tr>
<tr>
<td>Commission Plaintiff, Member States Neutral</td>
<td>0.948***</td>
<td>(0.115)</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.025</td>
<td>(0.082)</td>
</tr>
</tbody>
</table>

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.