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

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Abstract

In a recent paper published by the *APSR*, Carrubba, Gabel, and Hankla claim that the decision-making of the European Court of Justice (ECJ) has been constrained – systematically – by the threat of override on the part of Member States, acting collectively, and the threat of non-compliance on the part of any single Member State government. They further purport to have found strong evidence in favor of Intergovernmentalist, but not Neofunctionalist, integration theory. Both claims conflict with prior, serious empirical research on these issues. In this paper, we reject their claims on the basis of the same data. We show that the threat of override is not credible, and that the legal system is activated, rather than paralyzed, by Member State non-compliance. In the small number of important cases in which the Member States formally sought to curb the Court and constrain future developments, they failed miserably. Moreover, in a head to head showdown between the Commission (and Neofunctionalism), on the one hand, and the Member States (and Intergovernmentalism) on the other hand, the Commission wins in a landslide. The data also provide evidence in support of a theory of the ECJ's "majoritarian activism": when Member States encourage the Court to "punish" defendant Member States for non-compliance, the ECJ tends to do so. In such cases, the Member States work to enable the Court, not to "constrain" it.

In a recent paper, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice," Carrubba, Gabel, and Hankla [hereinafter CGH] (2008) make three provocative claims. First, CGH (436) assert "that much of the evidence that scholars employ to evaluate judicial influence [in the EU] is uninformative," and they claim that they have developed a new methodology that solves inference problems that afflicted all prior research. Their method involves examining the influence of the *amici* briefs of the Member States and the EU Commission on the rulings of the European Court of Justice [ECJ]. Second, having analyzed the Court's holdings on some 3,176 legal questions over an 11-year period (January 1987-December 1997),[1] the authors declare that the ECJ has been constrained – systematically –

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[1] CGH (2008: 440) state that their data covers a 10-year period when, in fact it covers an 11-year period.

by *the threat of override* on the part of Member States, acting collectively, and *the threat of non-compliance* on the part of any single Member State government. They summarize their findings as follows (449): "Our analysis provides systematic evidence that judges at the ECJ are sensitive to these two constraints. Moreover, these threats have a substantively large effect on judicial rulings." Third, CGH revive a classic debate in scholarship on European integration, claiming (449) that their findings support Intergovernmentalist theory, while conflicting with Neofunctionalist claims. Because this paper was published in a prominent venue, the *American Political Science Review*, and because CGH report findings that are at odds with every important empirical study on the topic of the paper ever published, each of these claims deserves close scrutiny.

METHOD AND RESEARCH DESIGN

There is nothing novel in CGH's approach to the ECJ's rulings. All of the scholars who have undertaken major research on CGH's chosen topic analyze the Court's rulings on specific legal questions, though they go well beyond CGH's primitive approach.

Since Stein's (1981) seminal paper on "The Making of a Transnational Constitution" of the Treaty of Rome, scholars have examined the relationship between (a) the legal arguments contained in the *amici* briefs filed by the Member States and the Commission in litigation before the Court, and (b) the rulings of the Court. These briefs – "Observations" in EU parlance – advise the ECJ on how it should rule on the various legal questions that constitute any given case. The briefs embody revealed preferences in a legalistic form. Stein developed the approach as one means of assessing the influence of Member State preferences, and those of the Commission, on 11 of the ECJ's foundational, "constitutional" rulings. He found that *none* of the signatories of the Rome Treaty filed a brief in support of any of the Court's major moves,

while each of the Member States opposed the Court in at least one of them. These decisions fundamentally "transformed" the treaty system (Weiler 1991), "constitutionalizing" it in all but name (Lenaerts 1990, Mancini 1991).[2]

Stein's findings are directly relevant to CGH's claims. If the legal system actually operated according to the dictates of CGH's model, this transformation would not have occurred, and the system would not have generated the data that CGH analyze.

Consider *Van Gend en Loos* (1963),[3] perhaps the most important ruling the Court has ever rendered. In that case, the briefing parties battled over "direct effect," whether a provision of the Treaty of Rome could be pleaded by a private litigant in a national court, against a Member State act. The underlying question was a momentous one: did the Treaty confer upon individuals and firms legal "rights" that national judges must protect, even against decisions taken by their own national governments? Belgium, Luxembourg, and the Netherlands had taken a collective decision to violate the Treaty, raising customs duties which harmed an importer, who sued in Dutch courts. When the case arrived before the ECJ, Belgium, Germany, and the Netherlands forcefully argued that the rights and obligations contained in the Rome Treaty were addressed to the Member States, not to individuals. 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 system, only France and Italy were not involved in the fray. Prompted by the Dutch judge of reference, and urged on by the Commission, the Court declared that the Treaty provision in question was "directly effective," and the plaintiff won. Neither the fact of non-compliance, nor the threat of override, constrained the ECJ. In subsequent cases, the Court

[2] The *constitutionalization* of the EU refers to the process by which the Rome Treaty evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons, public and private, within EC territory. The phrase thus captures the transformation of an intergovernmental organization governed by international law, into a quasi-federal legal system. For discussion of constitutionalization and its effects, see Stone Sweet (2004: ch. 2).
[3] ECJ 26/62 [1963] ECR 1.

extended the scope of its direct effect doctrines to cover a major class of EU statutes, called directives; and the ECJ announced and developed its supremacy doctrine, the rule that in *every* conflict between an EU legal norm and a national law or practice that arises before a national judge, the EU norm must prevail.[4]

Stein focused on the foundational cases, in part, because the Member States had chosen not to include a supremacy clause in the Treaty of Rome, nor had they provided for the direct effect of treaty provisions and directives. Yet, on the basis of the ECJ's positions on direct effect, supremacy, and other "constitutional" doctrines,[5] such as state liability (discussed below), the ECJ, national judges, and private litigants constructed a decentralized system for enforcing Member State compliance with EU law. As preliminary references from the national courts steadily rose under Article 267 (formerly Article 234, see Appendix), and then exploded, the ECJ found itself at the center of virtually every important policy question faced by the Member States. As has been well-documented, the Court has exercised decisive influence on the overall course of market and political integration, and on thousands of policy outcomes great and small.[6] Comparatively, the significance of the ECJ's impact on its legal and political environment rivals that of the world's most powerful national supreme, or constitutional, courts. The consolidation of supremacy and direct effect as an operative feature of the system is a *necessary* causal condition for all of this to happen. Thus, before moving on to more mundane matters, we repeat: CGH have chosen to study a legal system that developed through rulings that unambiguously count as evidence against their own theory, as CGH themselves have specified it in their hypotheses (discussed below).

[4] According to the ECJ, once a European legal norm enters into force, it "renders automatically inapplicable any conflicting provision of … national law" (*Simmenthal*, ECJ 106/77, 1978), including national constitutional rules.
[5] For a summary of the case law, see Stone Sweet (2004: 64-71).
[6] For a review of the scholarly literature on the impact of the ECJ on integration, EU policymaking, and national law and politics, see Stone Sweet (2010).

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

Against this backdrop, CGH make two extraordinary claims. First, CGH (2008: 436) assert that: "While previous works focus on quantitative trends in the types of cases heard by the Court and only consider cases arising from national courts through the preliminary ruling system, we analyze actual judicial decisions, and include both preliminary rulings and direct actions [infringement proceedings]." This statement is false. To take just one example, a book they cite, Stone Sweet (2004), reports comprehensive data on both enforcement actions under Article 258 (formerly Article 226, see Appendix), and preliminary references under Article 267, and the book examines the relationship between briefs and rulings for all major rulings discussed. Whereas all other scholars in the field have traced the impact of the Court's important holdings of non-compliance on future litigation, CGH do not analyze a single ruling, nor do they follow up on any ruling of non-compliance issued by the Court.

Second, CGH claim that their research design "avoids" an endemic inference problem, one of "observational equivalence," which has rendered all previous efforts to test the impact of Member State briefs on ECJ rulings "uninformative" (436). At no point do CGH actually discuss how this problem has afflicted any specific piece of published research, with what

detrimental effects on findings. Instead, they confabulate (436): "Some scholars argue that observing governments taken to court regularly, ruled against regularly, and complying regularly is *prima facie* evidence that governments are constrained to obey adverse court rulings." To our knowledge, *no scholar has ever argued this position* (a ridiculous one), other than CGH's opponent: Professor Strawman. In the studies of the EU's legal system CGH cite to dismiss, the question of whether Member States comply with EU law and ECJ rulings is *always* treated as one of the crucial empirical questions, not least, because non-compliance is likely to activate the legal system. Yet, in contrast to prior research on their topic, CGH themselves *never* examine why or what happens when Member States choose not to comply, and they *never* analyze the effects of the Court's findings of Member State non-compliance on subsequent choices.

What is CGH's method for resolving the inference problems that have bedeviled Professor Strawman?[7] They collect and analyze data on the relationship between observations and outcomes for each legal question raised in cases that result in a final dispositive ruling by the Court. The authors write:

> [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).

[7] "This study will provide the first discriminating test of member-state government influence that avoids this observational equivalence problem" (CGH 436).

If this passage accurately describes their method, then CGH's approach to the Court's rulings adds nothing new to the basic method employed by every scholar who has engaged in serious empirical research on CGH's topic since Stein.[8]

In fact, it is standard practice in this field of research for scholars to analyze the Court's position on each legal question briefed by a Member State and the Commission, in each ruling analyzed. For Article 267 preliminary rulings, the analyst will also note which party is likely to prevail before the national judge, where it is possible to make that determination. This "issue-by-issue" approach is all but required given the nature of the Court's decision-making under Article 267. In important Article 267 cases, the national judge of reference typically asks the Court to answer multiple legal questions. In its responses to these questions, the ECJ at times makes it clear which party in the dispute ought to prevail, given the facts and the ECJ's interpretation of the applicable EU law; other times, the ECJ provides the interpretation but leaves to the national judge to decide how to apply it; in some cases, the ECJ reformulates one or more of the questions, or answers some but not all questions, and so on. Often enough to matter a great deal, the question of which party actually wins or loses is less important than how the Court interprets the law, in so far as such interpretation will determine how the system operates, or the law develops, in the future.

Consider another momentous preliminary ruling, *Costa* (1964).[9] The significance of the decision for the development of the system is not that the plaintiff, Mr. Costa, "lost," or that the defendant, the Italian national gas company, "won," though the ECJ dismissed the claim alleging Italian non-compliance. Rather, the Court used the dispute to announce its doctrine of

[8] We also reviewed the author's coding protocol and found nothing novel in their approach to rulings, beyond the fact that CGH only code arguments as supporting or opposing a plaintiff. The practice will routinely miss much of importance in ECJ rulings.
[9] ECJ 6/64 [1964] ECR 585.

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 the Treaty of Rome's *Marbury v. Madison*.[10] Yet, CGH claim, that is how everyone in the field analyzed ECJ rulings prior to their arrival on the scene. In fact, every litigator of EU law, every legal specialist employed in an EU organ or Member State agency, and every legal scholar and social scientist who examines the ECJ's case law for research purposes, analyzes preliminary rulings issue-by-issue. There is simply no other way to understand them. The practice comes naturally: the Court itself organizes its Article 267 judgments on a question-by-question basis.

It is true that CGH select their cases differently. Whereas others (e.g., Stone Sweet 2004) analyzed all of the rulings rendered in multiple domains of EU law and policy, CGH examine all of the rulings rendered in a specific time frame. CGH do not give us any reason to think that this difference should matter and, in fact, it does not matter, as we will show. The novelty of CGH's article, it turns out, lies entirely in the claim that their analysis shows that the ECJ and the legal system are *systematically* constrained by two mechanisms: the threat of override, and the threat of non-compliance.

There is broad scholarly consensus today on the view that the ECJ has been an important force, in part, because its pro-integrative rulings are effectively insulated from Member State override (e.g., Alter 2008, 2009; Cichowski 2004, 2007; Pollack 2003; Stone Sweet and Caporaso 1998; Stone Sweet 2004; Tallberg 2000, 2002).[11] The underlying rationale is straightforward: on virtually any controversial issue on which the Court will take a legal position, the Member States themselves are likely to be divided; one cannot expect them to be

[10] *Marbury v. Madison*. 5 U.S. 137 (1803). The importance of *Marbury* famously lies not in who won or lost (the Court's ruling on the point is a lesson in judicial deference), but in Marshall's assertion that the power of constitutional judicial review inheres in the grant of judicial authority under Article III of the Constitution.

[11] To our knowledge, apart from CGH, no one since Garrett (1993, 1995) and Garrett, Kelemen, and Schultz (1998) have argued that the threat of override is credible and has had a systemic impact on the ECJ's rulings.

able to muster the necessary Unanimity required to overturn major rulings. In a less important number of cases in the CGH data set, the decision-rule governing override is a Qualified Majority [QM], which CGH (440) operationalize as 70% of the weighted votes in the Council of Ministers. Although CGH do not inform readers of this fact, there is not one important case of override in the history of adjudication under the Treaty of Rome.

There is also strong scholarly support for the view that the Court is not constrained, in any systematic sense, by the threat of Member State non-compliance. The reason, again, is straightforward. The EU's legal system is organized to deal with non-compliance: Member State non-compliance will generate legal actions and non-compliance with any important ECJ ruling will generate new litigation, and new findings of non-compliance. Note that this last statement does not reproduce Professor Strawman's position: to state that the EU's legal system processes non-compliance cases routinely and effectively, which it does, is not to assert that "governments are constrained to obey adverse court rulings"; the latter statement raises a *separate* empirical question which CGH, unlike everyone else in the field, choose not to study.

The Hypotheses

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

Let us begin with the override mechanism, represented by Hypothesis 1: "The more credible the threat of override … the more likely the court is to rule in favor of the governments' favored position" (CGH 439). So far, so good. 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). They then load the dice in favor of their preferred position – that the threat of override is a credible one –

stipulating that the decision-rule governing override will always be QM. They justify this claim as follows (440): "Unfortunately, we cannot easily distinguish which legal issues can be overridden by QM and which require unanimity support. Because the [QM] rule has become increasingly the norm since the Single European Act in 1987, we report results where the net observations are weighted by the share of Council votes." In fact, the information needed to determine the override rule is easily obtained from reading the case; each ruling highlights, up-front, what EU law has been invoked by the parties.[12] We examined every Article 258 ruling, and every Article 267 ruling in which at least one Member State filed observations; we found that, for over 90% of these judgments, the override rule is Unanimity, not QM.[13] In any event, CGH do not describe a single case in which a threat of override was actually made; nor they do theorize or stipulate a threshold point at which the threat of override could be said, implicitly, to have been made; nor do they provide even a "stylized" example of how their mechanism would work. These omissions are indefensible. Instead, CGH (436) declare that, through some (un-explained) process of "log-rolling,"[14] any Member State, or set of Member States, can "cobble together" the necessary votes to override an unwanted ECJ decision, so long as the net weight of observations filed in support of a defendant Member State is greater than zero.

With respect to non-compliance, CGH (439) propose Hypothesis 2: "The more opposition a litigant government has from other member-state governments, the more likely the

[12] In their coding protocol, CGH state that they would code the "legal basis" of the EU law being adjudicated by the Court. If so, then they have all the information required, since the legal basis determines the override rule.
[13] The result is not surprising. The Unanimity override rule governs: all rulings that apply the Treaty of Rome [now the Treaty on the Functioning of the EU], 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 fundamental rights (all of which flow from either the Treaty or the general principles that have the same status as treaty law); and more.
[14] The only passage wherein CGH discuss log-rolling is the following: "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" (CGH 2008: 436).

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

In their discussion of Hypothesis 2, CGH (439) elaborate a model of the EU's legal system in which the Member States, not the Court, constitute the EU's authoritative third-party dispute resolver,[15] though the Treaty says no such thing. Scripted as a servile agent of the Member States, the Court simply ratifies decisions already taken by them. In this discussion, CGH (439) focus exclusively on the cost entailed by a Member State in complying with the Court's decisions, while ignoring other relevant costs, including the cost of subsequent litigation, and a subsequent finding of non-compliance. Further, CGH pretend that the Commission, private litigants, and national judges do not exist, despite the fact that these actors are crucial to how the system operates, and the fact that their activities are directly relevant to the costs of non-compliance. We reject this model of the system.[16]

[15] "[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" (CGH 2008: 439).

[16] If the legal system worked as the authors theorize, one might expect the Member States to sue one another for non-compliance under Article 259 TFEU (ex-Article 170 and ex-Article 227 TEC), which is designed for that a purpose. In the period covered by CGH, however, the ECJ did not render a single ruling pursuant to an Article 259

In any event, CGH have no intention of testing whether threats of override or non-compliance constrain the Court. With respect to override, they operationalize Hypothesis 1 so as to make it virtually identical to Hypothesis 2. CGH write:

> For treaty revision and legislation requiring unanimity, the override only succeeds if all governments support the action. Thus, for overrides requiring unanimity, we expect that 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).

The first sentence in this quote relates to override (though CGH immediately tell readers that they will assume that QM governs override in all cases); but the second sentence does not follow logically from the first. Through this trick – which drives much of their analysis and findings – CGH will 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 Member State observations in favor of a plaintiff (even if only one Member State weighs in, and the override rule is Unanimity); and they will count as evidence in support of Hypothesis 2 any instance in which the Court rules against a defendant Member State when that ruling is congruent with the net weight of Member State observations against that defendant. Thus, both Hypothesis 1 and Hypothesis 2 end up testing the same relationships among variables, on precisely the same data.[17]

Without comment, CGH also include, in testing both Hypothesis 1 and 2, data from every Article 263 case in their data set. Article 263 annulment actions (see Appendix) can *only* be brought against EU organs: in such litigation, Member States can *never* be defendants. Thus, in order to test their hypothesis concerning Member State non-compliance, *CGH include data*

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suit. To date, there have only been three such rulings.

[17] Compare Hypothesis 2 ("The more opposition a litigant government has from other member-state governments, the more likely the court is to rule against that litigant government") with CGH's operationalization of 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").

drawn from 593 rulings and 662 legal questions in which Member State non-compliance can never be an issue.[18]

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

In their paper, CGH withheld the most important descriptive statistics that would allow readers, including specialists in the field,[19] to evaluate their claims. Despite repeated requests, the authors refused to provide the basic data on which *all* of their analyses are based: information on which Member States filed observations, concerning which legal questions, in which rulings, in support of which party.[20] Instead, CGH sent us aggregate data that they had processed to produce their findings; these data, included case numbers, net weights of observations (without codes for the Member States) on (unidentified) legal questions,[21] and binary codings of the ECJ's rulings. Although the ECJ numbers the legal questions it answers in its Article 267 rulings, CGH chose not to do so, making it impossible for the analyst to decipher how CGH coded the net weight of Member State observations on any question.[22] Nonetheless, on the basis of these case numbers, we gathered information that CGH chose not to disclose to readers or to us. Further, we analyzed CGH's own aggregate data, in order to assess their broader theoretical claims. We report our findings here.

Quantitative Analysis

Article 258 infringement proceedings are brought by the Commission against a Member State for alleged non-compliance with EU law (Appendix). These suits constitute the set of

[18] Member States filed observations in just 8.8% (58/662) of the legal questions raised in these rulings.
[19] After reading CGH's paper, we could not determine if or how their data analysis produced evidence in support of the claims made, which prompted this response.
[20] CGH's research project was funded by a National Science Foundation grant, which requires recipients to share data collected.
[21] In a ruling in which there is more than one legal question raised, there is no way for the analyst to identify one legal question from another. In those cases in which the Member States and the Commission briefed, and the Court decided, more questions than CGH identify and code, it is impossible to know which questions CGH left out.
[22] CGH do not provide a key to how they have weighted each Member State, a problem given that CGH give different weights to the same Member State in different cases, presumably due to the effects of enlargement.

cases 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,[23] we believe that there are 444 such rulings in the CGH data set. The Member States filed zero observations (or did not take a weighted position) in 93.5% (415/444) of these rulings, more than 90% of which the Commission won. Thus, the Member States are only occasional participants in the only legal procedure specifically designed to deal with Member State non-compliance with EU law.

Twelve of these rulings concerned cases brought by the Commission for failure on the part of the Member State to comply with a *prior* Article 258 ruling, and the defendant Member State lost them all. These 12 cases are relevant to CGH's assumptions about the costs of non-compliance. Although, neither the Commission nor the Court nor Professor Strawman can force a Member State "to obey adverse rulings" (CGH 436), actual choices on the part of a Member State not to comply with EU law, or the Court's rulings, do not paralyze the system. Rather, non-compliance generates more litigation and more rulings of non-compliance.

In only 29 Article 258 rulings (6.5%), did the Member States register a weighted position;[24] in all 29, we found that the override rule was Unanimity, *not* QM. In only 15 rulings did a net weight of observations favor the defendant Member State. The distribution is as follows: in 1 case, 3 Member States supported the defendant; in 4 cases, two did so; and in the remaining 10 cases, one supported the defendant. Thus, in the paltry 3.4% of cases in which

[23] At least two rulings were erroneously coded as Article 258 enforcement actions (320/95 is a preliminary ruling; 129/86 is an annulment action). The data sets are riddled with errors (documentation upon request), one of which is systematic and deserves mention. The coders did not code the number of issues in Article 258 infringement proceedings consistently, even in similar cases. We decided that the best way to handle this problem would be to treat all Article 258 rulings as involving a single legal question: compliance or non-compliance. Unfortunately, to do so does violence to the richness of many important rulings, such as *Leybucht Dykes* (discussed below).

[24] 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 here.

Member State non-compliance was the issue and override was on the table, the mean weighted position of Member States (as coded by CGH) in support of the defendant Member State is 12.6% of the vote under QM procedures, whereas 100% would be necessary to override.

CGH (438) state 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." We agree. The data, however, show that in not one of these cases does a coalition of Member States supporting a defendant 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 the Member States in support of the defendant Member State, the Commission wins a majority (8/15)! The 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.[25] Curiously, these data were not reported by CGH in their article.

We now turn to CGH's data on Article 267 activity, in which the Court responds to questions referred by national judges. CGH code 2,048 legal questions answered in 1209 rulings.[26] In the *majority* of legal questions raised (1122/2048), no Member States files a brief, or the net weighted score is zero. There are, in fact, only 6 rulings in which Member States took a net weighted position against the plaintiff-individual that reaches at least 50% of a vote under

[25] 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. They report that the Commission brought more than 5,000 proceedings against the Member States; the vast majority of which were settled before being referred to the ECJ after the defendant 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 (which is one reason 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.

[26] We eliminate from our analysis, as CGH do, rulings that CGH code as missing data.

the QM procedure (the plaintiff "wins" in three of these cases, and "loses" in three). In all of these cases, the rule governing override was Unanimity, not QM. In only one Article 234 ruling (of 1209), does a coalition of Member States reach as many as 6 of the 12-15 Unanimity votes necessary to override the Court during the period in question. CGH do not report these data

Now let's consider CGH's data as a whole. Figure 1 depicts the distribution of values on the CGH's main independent variable: Member State briefs weighted as a function of their share of votes in the Council of Ministers under QM voting procedures. In more than two-thirds of all issues coded, the Member States do not weigh in at all. 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 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. As CGH themselves argue (338), if the threat of override is not credible, it cannot constrain the ECJ. CGH's claim to the contrary is therefore inexplicable.

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

What did CGH find that led them, somehow, to over-claim so much? Their broad claims are based on one narrow finding[27]: when the Member States weigh in on an issue, the ECJ will, more often than not, decide the question in ways that are congruent with that weighting. When the Member States side with the plaintiff (n=375, typically, urging the Court to find against laws

[27] The numbers may provide a clue as to why CGH did not design their data analysis to test directly the threat of either override or non-compliance. Instead, their hypotheses (see footnote 17) appear to be carefully tailored to fit this finding.

and practices in place in another Member State), the Member States' rate of success is 70.9%. In such cases, of course, they are not working to "constrain" the Court at all; formally and literally, they are encouraging it to constrain a Member State. When the Member States side with the defendant (n=646, typically against the Commission or an individual, and in support of another Member State's law and practices), their rate of success is 58.5%. Note that the Member States' success rate is far higher when it *enables* the ECJ (to punish a Member State) than when it seeks to *constrain* the Court (from finding against a Member States' law and practices), though it participates in the latter activity far more than in the former. We will return to these findings below, not least, in our discussion of CGH's assertion that they provide support for Intergovernmentalism.

Qualitative Analysis

CGH restrict their inquiry to the quantitative analysis of the coded rulings. In contrast to every other political scientist who has undertaken empirical research on their topic, CGH do not supplement statistical analyses of briefs and rulings with thicker, descriptive analyses of the relationship between non-compliance and judicial process. There are several reasons why CGH's failure to do so renders their claims deeply suspect. First, using CGH's thin approach to law and judicial process, the analyst cannot distinguish between a profoundly important legal question, and a minor one. Whereas others took care to examine how prior case law (argumentation and precedent) structures litigation, identifying those rulings that are most important in generating future streams of litigation, CGH treat all issues and all rulings as if they were equally significant, and they do not follow-up on any ruling in their data set. Second, CGH do not examine the legal context of any dispute. The kinds of questions that have animated the field are simply not asked. Among them: why do some regimes, in some policy domains,

chronically generate non-compliance cases (e.g., Conant 2002; Panke 2007, 2009)? Why did the Commission or the national litigant bring any suit in the first place (e.g., Börzel 2003)? Did the national judge, in its preliminary questions, signal to the Court the type of answer it wished for in return (e.g., Alter 2001; Nyikos 2003, 2006)? What effects do rulings have on legislative processes and outcomes (e.g., Cichowski 2004, 2007; Jupille 2004; Kelemen 2006, 2010; Stone Sweet 2004). Third, CGH do not even engage the extant literature on Member State non-compliance (e.g., Tallberg 2002; Börzel 2001, 2003), nor do they identify a single attempt on the part of the Member States to constrain the ECJ.

In fact, one finds in CGH's data set two instances in which the Member States sought to constrain the ECJ after the Court took positions opposed by the Member States. Both are well-documented, including in research CGH cite.

The first attempt was provoked after the ECJ held, in *Bilka* (1986),[28] that benefits under occupational social security schemes were covered by Article 157 of the Treaty (formerly Article 119 and Article 141), which mandates "equal pay for male and female workers for equal work." Prior to 1986, the Member States believed that such schemes did not provide "pay" within the meaning of Article 157; further, they had adopted EU statutory provisions that had expressly excluded retirement and old age pensions from the coverage of Article 157. Following the *Bilka* ruling, the Council of Ministers adopted the Directive on Occupational Social Security (1986), which again carved out exceptions to the application of equal pay for the sexes, including the determination of pensionable age. In October 1987, the Commission submitted draft legislation to end this derogation, but Member States, including the UK and France, blocked it in the Council of Ministers (Curtin 1990). The proposal required unanimity to pass.

[28] ECJ 170/84 [1986] ECR 1607.

In *Barber* (1990),[29] the ECJ enacted the reform as an interpretation of Article 157.[30] 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 the determination of pensionable age, for an employee who had been fired, was covered by Article 157. Thus, the ECJ found for Mr. Barber, who was 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).[31] The Court, rightly in our view, did not think it fair to apply the holding retroactively, given that it would directly impact the thousands of companies across the EU that "were reasonably entitled to consider that Article [157] did not apply to [such] pensions," since "derogations from the principle of equality between men and women [had been] permitted in that sphere." Accordingly, it held that "the direct effect of Article [157] of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law."

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.

[29] ECJ C-262/88 [1990] ECR I-1889.
[30] In order to override this ruling, the Member States would have to revise Article 157, not the Directive. The outcome has thus been "constitutionalized."
[31] CGH code the case as raising only four legal questions, when in fact 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*[32]).

The Barber Protocol nonetheless generated a line of cases that is relevant to CGH's arguments, given that at least 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 be subject to the same time limitations. *Vroege* (1993)[33] 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.

Among the rulings in CGH's data set, one also finds an attempt to reverse the Court's interpretation of a 1979 directive on the conservation of wild birds. In *Leybucht Dykes* (1991),[34] 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

[32] ECJ C-109, 110, 152, and 200/91 [1993] ECR I-4879.
[33] ECJ C-57/93 [1994] ECR I-4541. See also *Fisscher*, ECJ C-128/93 [1994] ECR I-4583.
[34] *Commission* v. *Germany*, ECJ C-57/89 [1991] ECR 2849.

interpretive issue raised in its brief. Germany and the UK had argued that the Member States should be permitted to take into account economic and other societal interests when they altered or reduced SPAs, under Article 4 of the Wild Birds Directive. The Court disagreed, holding that the Member States could never give more weight to "economic and recreational requirements" than to bird conservation in such decisions.

The doctrine developed in *Leybucht Dykes* was extended in *Santoña Marshes* (1993),[35] which involved an area that Spain had not designated as an SPA, though seemingly required under the Wild Birds Directive. With respect to the issue at hand, the ruling states:

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

In response, the Council of 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."

At the time *Leybucht Dykes* was being decided, the saga of the Lappel Bank's status as an SPA was heading for the UK courts. The Lappel Bank is a mudflat on the North coast of Kent, part of the Medway Estuary and Marshes system, and also an important feeding, nesting, and staging ground for migratory birds, including endangered species. Unfortunately for the birds, the mudflat lies adjacent to the Port of Sheerness, the fifth largest cargo facility in the UK. In 1989, local officials authorized the Port to expand into the Lappel Bank, but the Secretary of

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

State for the Environment quashed the decision in 1991, partly on the grounds that the project would violate the Wild Birds Directive. Two years later, after intense lobbying on both sides of the issue, the Medway system was classified as an SPA. The Lappel Bank, however, was excluded from the designation, the Secretary of State having determined that the economic benefits of the Port's expansion outweighed the value of bird conservation.

The Royal Society for the Protection of Birds challenged this decision, arguing that the Secretary of State had given too much weight to economic, rather than ornithological, considerations. Although the port expansion was well underway and could not be stopped, the case carried important implications for future planning decisions. Although the Royal Society had lost in the lower courts, the 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?[36]

The Commission sided with the Royal Society, arguing that economic interests could only be "ancillary" to "ornithological criteria" in any decision to classify an area as a protected zone. France, supporting the UK, argued that the Member States "must be guided by considerations of an economic nature in carrying out their obligations to create SPAs." In *Lappel Bank* (1996), the Court, after summarizing the briefs of the UK and France, bluntly rejected them: "a Member State is not authorized to take account of the economic requirements … when designating an SPA and defining its boundaries." The Court treated the second question as decided by settled case law. Citing to *Leybucht Dykes* and *Santoña Marshes*, it held that economic requirements could never rise to "a general interest superior to that represented by

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

the ecological objective" of the Wild Birds Directive, and that the 1992 amendment did not apply to "classification of an area as an SPA." The House of Lords therefore held that the Government had acted illegally, and it was ordered to pay the Royal Society's costs, some 140,000 pounds.

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

Finally, we note that the CGH data set also contains landmark constitutional rulings ranking in importance with those analyzed by Stein (1981), discussed above. In *Francovich* (1991),[37] 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 individuals due to failure to transpose or implement an EU directive. The issue of state liability was extensively debated. Italy, Netherlands, and the UK filed briefs, supported by Germany in oral argument, asserting, among other things, that EU law does not require such a remedy (the Treaty, in fact, has nothing to say on the question), and that if it were to do so in the future, liability must be provided for in EU legislation, not by judicial fiat. Comforting the Commission's position, the Court rejected the Member States' arguments. Citing its foundational rulings on direct effect and supremacy, the ECJ held that:

> The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community

[37] Case C-6 & 9/90 [1991] ECR I-5357.

> 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),[38] individuals are entitled to reparation when any EU legal norm is "intended to confer rights upon them, the breach is sufficiently serious, and there is a direct causal link between the breach and the damage sustained by the individuals." Where state liability is found, it is up to the national court to assess damages, to be determined by the domestic law of remedies, subject to certain conditions. In this complex ruling, 8 Member States and the Commission filed briefs on a wide range of issues, two of which deserve our attention. First, the ECJ dismissed a German objection in these terms:

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

The passage makes it clear that the Court is the authoritative interpreter of the Treaty, not the Member States, as CGH would have it, and that national judges are autonomous actors within the system. Second, the Court rejected the briefed positions of France, Germany, Ireland, and the UK to the effect that EU law may not require remedies that are not already extant in national

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

law. On the contrary, the Court stressed, EU law establishes certain minimal criteria, including the provision of certain remedial forms even when they are unknown in the national regime. These cases have provoked a complex process of adaptation, on the part of national legal orders, accompanied by a steady case load to the Court.

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

III. ANALYSIS (2): THE BRIEF FOR INTERGOVERNMENTALISM

In the last section, we showed that neither the quantitative evidence, nor the analysis of rulings taken in the face of direct political opposition, provide support for CGH's claims. If anything, the evidence strongly conflicts with both their theory and purported findings. We now turn to CGH's attempt to revive the contest between Intergovernmentalist and Neofunctionalist theories of integration, as applied to the EU's legal system. The debate, one would have thought, had been settled, in favor of the latter.[39]

CGH state (449) that their analysis supports Intergovernmentalist claims to the effect that "political constraints" – through mechanisms triggered by threats of override and non-compliance – "have large, systematic, and substantively significant effects on judicial decision

[39] The literature is reviewed in Stone Sweet (2010).

making"; but the evidence conflicts with Neofunctionalist claims "that, while these constraints might matter on the margin, the court has had the latitude to pursue an agenda independent of and contrary to member-state governments' interests." Analysis of the cases in CGH's own data set demonstrate conclusively that the threat of override is not credible; the authors have not shown that the threat of non-compliance has constrained the Court in any systematic way, if at all; and they do not discuss how the substantive development of any area of EU law has been stunted by their two mechanisms. Moreover, CGH neither test any specific hypothesis ever proposed by an Intergovernmentalist or Neofunctionalist,[40] nor do they engage the relevant scholarly literature that has put Intergovernmentalism to the test. In fact, no prior research project designed to test claims to the effect that Member State Governments constrain the evolution of the legal system (e.g., of Garrett 1993, and Tsebelis and Garrett 2001) has found any empirical support for Intergovernmentalist claims.

Our analysis of CGH's data provide overwhelming evidence in support of a basic Neofunctionalist position, and none for Intergovernmentalism. Put in the most basic terms, Neofunctionalists argue that the EU's supranational organs, especially the Court and the Commission, help the Member States resolve the fierce collective actions problems that attend market and political integration, while forging links with and between transnational actors and others who are willing to invest in integration (for a review, see Sandholtz and Stone Sweet 2010). In the standard account (Burley and Mattli 1993; Stone Sweet 2004: chapters 1 and 2), the legal system evolves under the tutelage of the ECJ, which works in conjunction with those who activate the ECJ for their own purposes: the Commission under Article 258 (enforcement actions), and private litigants and national judges under Article 267 (preliminary references). Neofunctionalists also claim that the system has developed in a progressive, self-sustaining way,

[40] In fact, CGH do not, in their paper, identify any Intergovernmentalist or Neofunctionalist by name.

in part, because the Court works to promote integration (values that inhere in the treaties) and, in part, because the decision rules governing Member State override are enabling, not constraining, of pro-integrationist positions taken by the Commission and the Court.

CGH (442) claim that "the ECJ may, at least on the margin, favor the Commission," but they argue that the real focus should be on the actors who systematically constrain the Court: the Member States. In contrast, a Neofunctionalist, if faced with this binary opposition,[41] would respond by predicting that the ECJ will side with the Commission, relatively systematically, and that the Member States will influence the Court on the margins, not least, as a supplement to the weight of the Commission. As shown above, the evidence from Article 258 rulings in their data set provide strong support for Neofunctionalist, and no support for the Intergovernmentalist, claims.[42] What about preliminary rulings under Article 267?

Let's assume that the CGH data set contains no errors. Of the 2,048 questions on which the ECJ rendered a ruling, the Commission filed observations in 77.7% (n=1588), whereas the Member States produced a weighted position in only 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

[41] Neofunctionalists would always supplement the analysis with consideration of the policy issues and interests at play in any case, as these are brought forward by the Commission, private litigants, and national courts.

[42] 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." If anything, this is a Neofunctionalist, not an Intergovernmentalist, argument: 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 progressively, and the ECJ responds positively, a dynamic CGH do not consider. If the Article 258 system 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 typically 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). For Article 267 cases, if the legal system worked as CGH claim it does, then the doctrines of direct effect, supremacy, and state liability would never have emerged in EU law, and most of the Article 267 cases, which are the majority of cases in their data set, would not exist.

the time, a result to be compared to the Member States lower 70.8% success rate in fewer cases (n=342).

---- See Table 1 -----

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).

---- See Table 2 -----

The critical question in this supposed contest between Intergovernmentalism and Neofunctionalism is the following: what happens when the Commission takes a position at odds with the net weighted position taken by the Member States? There are 96 legal questions in the data set on which the Commission supported the Defendant, and the Member States took a weighted position supporting the Plaintiff; in these, the ECJ favored the Member State's 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 the Member States 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 the Member States oppose the Commission, the Commission prevails more than two-thirds of the time – a landslide. Thus, using CGH's own data, preferred methods, and theoretical constructions of integration theory, it is indisputable that, in a head-to-head showdown, the Commission (and Neofunctionalism) dominates the Member States (and Intergovernmentalism) as a predictor of ECJ rulings. Tellingly, CGH report no findings on the questions raised in this section.

---- Table 3 -----

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 the ECJ of two of its important constituents: the Commission and the Member States. We are not claiming that these are the Court's only, or most important, constituents. In many, perhaps most, Article 267 cases, private litigants and national judges are the crucial actors; in Article 267 cases, the Commission and the Member States are formally, but indirectly, involved only to the extent that they file briefs. According to CGH, Intergovernmentalists believe that the Member States will exercise dominant influence on the Court's rulings, through their briefs, whereas Stone Sweet and Brunell, as "modified neo-functionalists," (Stone Sweet and Sandholtz 1997), expect that the Commission's impact will dominate that of the Member States. In CGH's design, the observations filed in any case are the primary indicators of the respective preferences of the Commission and the Member States; these briefs are addressed to the Court, and advise it on how any given legal question should be decided. 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 Member States as favoring the Plaintiff; if it was negative, we coded the Member States as registering a preference in favor of the defendant; and when the variable took on values of zero, we coded the Member States' preference as neutral. 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 -----

The Commission and the Member States 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, leaving the excluded category for those cases when both the Commission and the Member State Governments are neutral towards the preferred disposition of the case. For the Neofunctionalists to prevail, the coefficients must take on positive values when the Commission favors the Plaintiff (the dependent variable takes on values of 1 when the ECJ finds in favor of the Plaintiff, and 0 when it finds for the Defendant), and negative values when the Commission favors the Defendant. As table 4 shows, both conditions are met. *Whenever* the Commission favors the Defendant, regardless of the position of the Member States, the coefficient is negative and statistically significant – even when the Member States' "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 Member States have taken a position in favor of the Defendant. Thus, when the Commission and the Member States support different parties on a given question, 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 Member States 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 Member States 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 favor the party that stands to gain from the Commission's position, in a statistically significant way, even when the Member States 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 Member States.

Thus, CGH data do not provide evidence in support of the Intergovernmentalist position; in fact, their data reconfirm, yet again, the Neofunctionalist position. It bears emphasis that, in our analysis, we accepted CGH's preferred theoretical constructions, as well as their preferred indicators and measures of key variables; and we relied entirely on quantitative analysis of CGH's own data. We did so for the sake of argument and analysis, not because we think that CGH's approach to the EU's legal system makes sense or is appropriate.

CONCLUSION

We conclude that CGH's data do not support any of their major claims. Rather, their paper seriously misrepresents how the EU's legal system works, as well as the state of knowledge in the field. Although the authors assert that the evidence marshaled from their data fundamentally challenges all of the important empirical research on their topic, in fact, the evidence supports, rather banally, the basic findings of every other serious empirical study ever undertaken. As we knew, the Commission is the dominant, non-judicial actor in the system, not the Member States. Under Article 258, the Commission brings all non-compliance cases against Member States; in the CGH data set, it wins more than 90% of these cases, and it even prevails in the majority of those cases in which the Member States have expressly taken a position in defense of the defendant Member State. In Article 267 cases, where the national judges are the crucial actors, the Commission files briefs in more cases than all Member States combined. Moreover, its success rate is substantially greater than that of the Member States, even when it takes a position at odds with express positions taken by the Member States. Every scholar in the field assumes – for good reasons – that the Court pays attention to the Member States' views and

legal positions, and everyone agrees that the Court cares about compliance with its rulings. But there is no reason for anyone to believe that the Court does so because of the threat of override.

Finally, CGH's analysis generates only one interesting finding, which is also, in statistical terms, their most robust: the Court tends to "punish" a defendant Member State when the other Member States, on balance, oppose the defendant Member State. Three points deserve emphasis. First, the Member States' rate of success in these cases *declines* when they are not joining the Commission against the defendant Member State. Second, the finding does *not* bear on the question of whether the Member States "constrain" the Court through positions taken in their briefs. On the contrary, in such cases, the Member States encourage the ECJ to rule against a defendant Member State, they do not "constrain" its capacity to do so. Third, the finding gives support to a theory that has apparently escaped CGH's attention, that of "majoritarian activism."

Maduro (1998) coined the phrase to describe a persistent pattern that he found in free movement of goods cases: the Court tends to rule *against* a defendant Member State when its market regulations are out of synch with regulations in place in a majority of the Member States; and it tends to rule *for* the defendant Member State when its policies are shown to be more similar to those in place in a majority of Member States. Beginning in the 1980s, the Court asked the Commission to provide such information in its submission of materials to the ECJ on litigation before it. During the period studied by CGH, the Court routinely referenced these reports (on the extent of variance in national law relevant to the case before it). Moreover, in the area of sex equality, Stone Sweet (2004) and Cichowski (2004, 2007) found that the ECJ regularly enacted, through its rulings, legislative proposals that had been blocked under unanimity rules, while being supported by the Commission and a majority of the Governments in the Council of Ministers. The Court did so by treating these policies as embedded in and

required under Treaty law. The *Barber* saga, discussed above, is just one instance. The time-frame of this research overlaps the period studied by CGH.

Generalized and stated as a testable hypothesis: the ECJ will act as an agent of the majority of the Member States when that majority cannot be realized under Unanimity rules, because one or more Governments in the minority are willing to use their veto. (The hypothesis can be adapted to QM voting). Of course, when the Court engages in majoritarian activism, it has no reason to fear reprisal. If the reader will consider again how CGH operationalized Hypotheses 1 and 2,[43] they will see that the design is more appropriately labeled a test of this "majoritarian activism" hypothesis, than it is a test of the robustness of the threats of override and non-compliance. Further, CGH's analysis actually provides support for the notion of the Court's "majoritarian activism," whereas it provides no support for any of their own theoretical claims.

APPENDIX: JURISDICTION

On December 1, 2009, the Treaty of Lisbon entered into force. One of the effects of the Lisbon Treaty was to revise and reorganize the Treaty of Rome (1958), which established the European Economic Community, as amended thereafter. Among other things, the basic Treaty was renamed the Treaty on the Functioning of European Union (TFEU), and its provisions were (again) renumbered.

The CGH data set contains cases that came to the Court through three provisions of the TFEU. Under Article 258 TFEU (formerly Article 169 TEC and Article 226 TEU), the Commission may initiate "infringement proceedings" – also called "enforcement actions" – against a Member State for non-compliance with EC law; rounds of negotiation with the Member

[43] See footnote 17 above.

State ensue; if these fail, the Commission may refer the matter to the ECJ for decision. The Commission is under no obligation to bring proceedings; its discretion to do so is absolute. In Article 258 litigation, the defendant is always a Member State, and the plaintiff is always the Commission.

Under Article 263 TFEU (formerly Article 173 TEC and Article 230 TEU), the Court presides over "annulment actions," litigation seeking to invalidate acts of the EU's governing bodies. Annulment actions come in two basic forms, implicating two different functions of the Court. First, any Member State, the Parliament, the Council of Ministers, and the Commission may bring suits against a lawmaking body for having legislated in ways that violate the Treaty. In the most important class of cases falling under this heading, called "legal basis" disputes, the Court functions, in effect, as a constitutional jurisdiction, determining which legislative procedures must be used to adopt a particular piece of legislation. Second, the ECJ and the Court of First Instance (now known as the General Court) act as administrative courts: they review the lawfulness of acts taken by the EU's institutions at the behest of private parties. In Article 263 actions, a Member State can never be a defendant.

Under Article 267 TFEU (formerly Article 177 TEC and Article 234 TEU), national judges send questions – in the form of a *preliminary reference* – to the ECJ in order to obtain an authoritative interpretation of EU law (of the Treaty, statutes, and so on) when EU law is material to the resolution of a dispute at national bar. The ECJ responds in the form of a judgment – called a *preliminary ruling* – which provides the interpretation of EU law that the referring judge is expected to apply. The provision was designed to promote the consistent application of EU law within national legal orders. With the consolidation of supremacy, direct effect, and related "constitutional" doctrines, Article 267 evolved as an autonomous,

decentralized system for enforcing compliance. For a summary of the Court's "foundational-constitutional" case law, as it relates to litigating EU law in the national courts, see Stone Sweet (2004: 64-71). In Article 267 cases, the ECJ is activated by national judges, usually at the behest of private litigants seeking to vindicate rights or entitlements under EU law. At least indirectly, Member State non-compliance with EU law is often, but not always, at issue in these proceedings.

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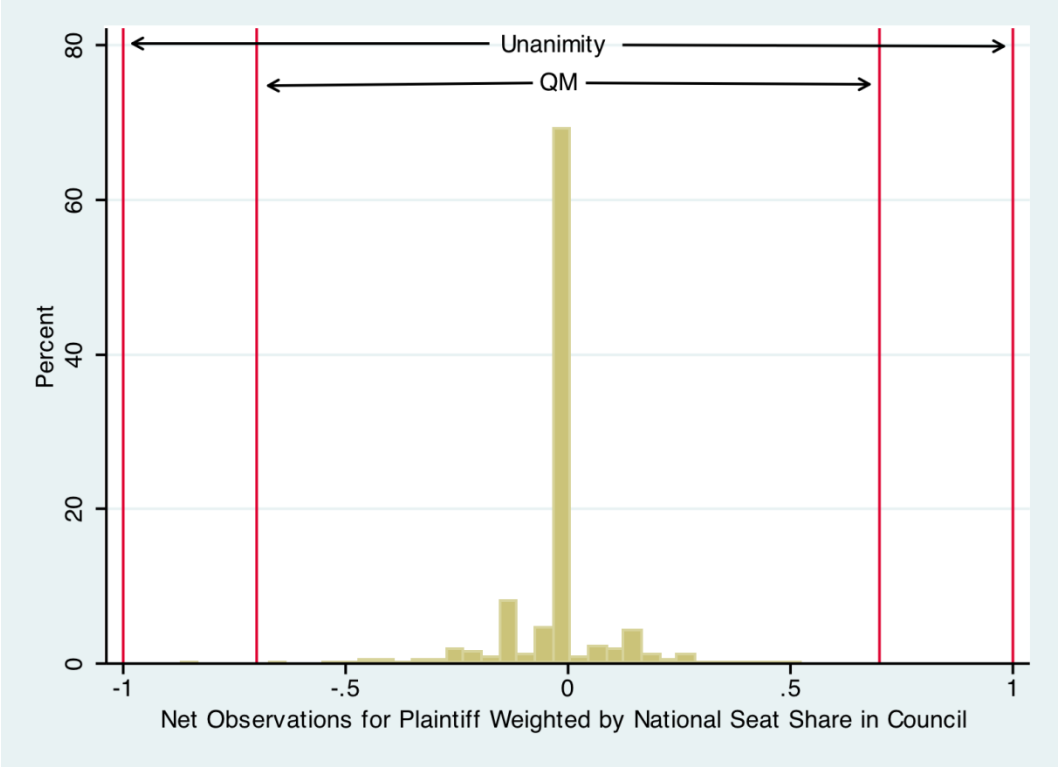
FIGURE AND TABLES

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



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

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

	Observation from Commission for Defendant	No Observation from Commission	Observation from Commission for Plaintiff	Total
ECJ Rules for Defendant	579 (77.5)	227 (49.5)	169 (20.1)	975 (47.6)
ECJ Rules for Plaintiff	168 (22.5)	232 (50.5)	672 (79.9)	1,072 (52.4)
Total	747	459	841	2,047

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

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

	MS's Favor Defendant	No Observations or Balanced on Both Sides	MS's Favor Plaintiff	Total
ECJ Rules for Defendant	334 (57.2)	541 (48.2)	100 (29.2)	975 (47.6)
ECJ Rules for Plaintiff	250 (42.8)	581 (51.8)	242 (70.8)	1,073 (52.4)
Total	584	1,122	342	2,048

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

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

		Commission		
		Support Defendant	Neutral	Support Plaintiff
Member State Governments	Support Defendant	16.5	50.6	70.1
	Neutral	23.2	49.1	82.1
	Support Plaintiff	36.5	66.7	86.6

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

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

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

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