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The European Court of Justice, National Governments, and Legal Integration in the European Union

Geoffrey Garrett, R. Daniel Kelemen, and
Heiner Schulz

The limits on court power in government are not set by either constitutional theory or discernible law, but rather by the tolerance of the countervailing powers.¹

The growth of European law has been central to the broader process of European integration. The accretion of power by the European Court of Justice (ECJ) is arguably the clearest manifestation of the transfer of sovereignty from nation-states to a supranational institution, not only in the European Union (EU) but also in modern international politics more generally.² The ECJ is more similar to the U.S. Supreme Court than to the International Court of Justice or the dispute panels of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO). The Court interprets EU treaties as if they represent a *de facto* constitution for Europe and exercises judicial review over laws and practices within member states. The ECJ is thus in the business of declaring extant national laws and the behavior of national governments "EU-unconstitutional." Even more significantly from the standpoint of conventional international relations, member governments often abide by such decisions.

There are two perspectives on the evolution and operation of Europe's remarkable legal system. The legal autonomy approach argues that the ECJ has been able to push forward its European integration agenda against the interests of some member states.³ According to this view, national governments paid insufficient attention to the Court's behavior during the 1960s and 1970s when the Court developed a powerful set of

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1. Dean Rusk as quoted in Rasmussen 1986, 17.

2. We follow the convention of consistently calling the European Union by its newest name.

3. See Alter 1995; Burley and Mattli 1993; Mattli and Slaughter 1995; Slaughter, Stone, and Weiler 1997; Stein 1981; and Weiler 1991.

legal doctrines and co-opted the support of domestic courts for them. By the time member governments finally realized that the ECJ was a powerful actor in the 1980s, reining in the Court's power had become very difficult.

In contrast the political power approach argues that national governments from the EU member states have not been passive and unwilling victims of European legal integration; where the ECJ has been activist, the member governments have supported this.⁴ From this perspective the member governments have given the ECJ autonomy to increase the effectiveness of the incomplete contracts the governments have signed with each other (that is, the EU treaty base). In turn the judges of the ECJ realize that their power is ultimately contingent on the acquiescence of member states and hence are reticent to make decisions of which governments disapprove.

Notwithstanding rhetorical characterizations of the ECJ either as "master" of its own destiny or as the mere "servant" of national governments, proponents of each view agree on one common assumption: the ECJ is a strategic actor that is sensitive to the preferences of EU member governments. Fertile terrain for research thus lies in specifying the conditions under which the ECJ makes decisions that declare illegal national laws, regulations, or practices and exploring how member governments react to them. These are our objectives in this article.

We begin by presenting a game theoretic analysis of the strategic environment affecting interactions between the Court and national governments in the EU. This yields three empirically testable hypotheses. The first two focus on the interaction between the ECJ and a litigant government. First, the greater the clarity of ECJ case law precedent, the lesser the likelihood that the Court will tailor its decisions to the anticipated reactions of member governments. Second, the greater the domestic costs of an ECJ ruling to a litigant member government, the lesser the likelihood that the government will abide by an ECJ decision that adversely affects its interests (and hence, all else equal, the lesser the likelihood that the Court will make such "adverse" decisions).

Our third hypothesis brings in the reactions of governments other than the litigant in a particular case. Governments that are subject to adverse decisions can engage in unilateral noncompliance. However, they can also press for the passage of new secondary EU legislation (typically requiring the support of a qualified majority in the Council of Ministers, as well as the Commission and sometimes the European Parliament) or even revision of the EU treaty base (which necessitates unanimity among the member governments and ratification in all national polities). The effectiveness of these strategies in constraining future ECJ decisions correlates positively with the difficulty of implementing them. Noncompliance may reduce the costs of an adverse decision, but it is less likely to constrain the future behavior of the ECJ than is secondary legislation. Treaty revisions are clearly even more constraining on the Court. But legislation and treaty revisions demand more coordination on the part of member governments. Our third hypothesis argues that the greater the activism of the ECJ and the larger the number of member governments adversely affected by it, the greater the likelihood that responses by litigant governments will move from indi-

4. See Cooter and Drexel 1994; Garrett 1992; Garrett 1995a; and Garrett and Weingast 1993.

vidual noncompliance to coordinated retaliation. Conversely, of course, the specter of coordinated responses will make the ECJ more reticent to make adverse decisions.⁵

It should be clear from these hypotheses that the ECJ may face conflicting incentives. The Court's legitimacy ultimately relies on the support of member governments and hence on its serving as an impartial interpreter of EU law. In order to maintain its legitimacy, the Court will seek to avoid making decisions that it anticipates governments will defy. In order to maintain its status as an independent arbiter, however, the Court must strive to maintain legal consistency and to minimize the appearance of succumbing to political pressures from interested parties. Avoiding member government defiance may call for one decision; maintaining legal consistency may demand a very different one. In making its rulings, the ECJ must weigh the legitimacy consequences of both courses of action. As a result, it is in those cases where the Court is cross-pressured that conflict with governments is likely to break out.

There is no gainsaying that it is difficult to test our hypotheses rigorously (or, indeed, any others about ECJ–government interactions). Until now the protagonists in the legal politics debate have sought to support their own arguments with selective citation of illustrative cases. We strive to do better. No single study, much less an article-length treatment, can hope to analyze the universe of ECJ decisions. Moreover, some selection bias is inherent in any sample of cases studied. This is because there is little to be gained from analyzing the vast body of ECJ case law that has not generated controversy between the Court and national governments.

The lack of acrimony surrounding some adverse decisions may indicate that member governments are relatively unconcerned about the issue at stake, that they tacitly support the Court's jurisprudence, or that they are prepared to defer to its implementation of the law. Discriminating among these interpretations is simply not possible. In contrast when decisions generate controversy, we know that member states are not only concerned about the issue at hand, but also displeased with the Court's jurisprudence. A high degree of controversy, however, does not necessarily imply a consistent pattern of outcomes. A controversy may just as easily end with Court restraint as with government noncompliance.

Our case selection strategy seeks to capture the analytic benefits of focusing on adverse ECJ decisions that prove *ex post* to be controversial (that is, eliciting government responses), but to do so while minimizing the costs of selection bias. We have chosen to analyze broad streams of controversial ECJ case law where the Court repeatedly confronts similar legal principles but in different contexts. This allows us to test each of our three hypotheses by holding the legal principles more or less constant while allowing for variation in the precedents and material interests surrounding each case.

We focus on three lines of cases that have been substantively central to the broader process of European integration. The first involves bans on agricultural imports,

5. These two statements may seem mutually inconsistent, but they are not in the context of iterated games and incomplete information.

where ECJ decisions stood on the front line in the battle between the conflicting trade liberalization and agricultural protection agendas of the EU. The second set of cases involves the application of principles of equal treatment of the sexes to occupational pensions—one of the most controversial areas of ECJ activism in recent years because of its enormous financial implications. Finally, we analyze Court decisions pertaining to state liability for the violation of EU law. These last cases arguably represent the Court's most important constitutional decisions since the early 1970s concerning the relationship between EU law and national sovereignty.

Empirical analysis of these lines of cases lends broad-based support to each of our three hypotheses. It would be imprudent to claim that this evidence constitutes conclusive proof of our specific arguments about the strategic interactions between the ECJ and member governments. Nonetheless, we believe that our research should act as a strong stimulus for further work in this vein not only concerning the EU, but also other areas of international law. For example, our framework could easily be adapted to NAFTA or the WTO, where dispute resolution panels are seeking to establish their legitimacy as arbiters of trade disputes among nations.

The article is divided into three sections. In the first section we present our game theoretic understanding of the strategic interactions between the ECJ and member governments. In the second section we outline our three hypotheses regarding the impact of ECJ precedent, domestic conditions, and EU coalitions on the behavior of litigant governments and the Court. In the third section we examine the empirical utility of our arguments against lines of cases concerning trade liberalization, equal treatment of the sexes, and state liability.

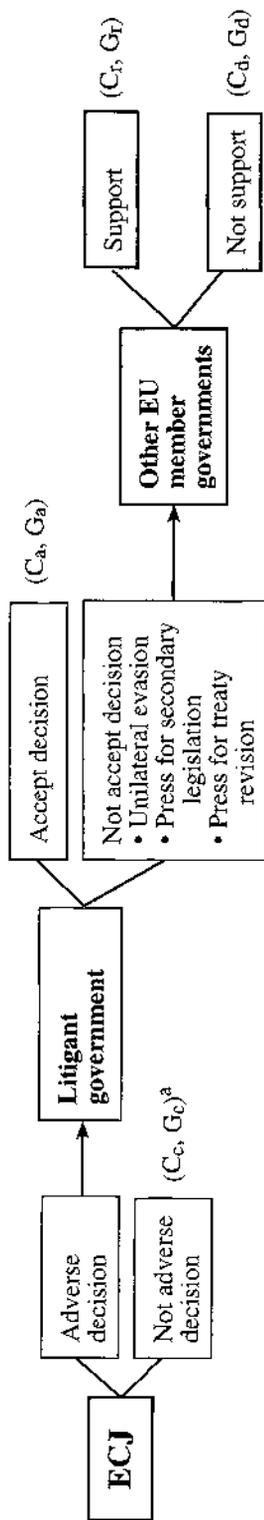
The Legal Politics Game in the European Union

Asserting that ECJ decision making is strategic is no longer controversial, even among international lawyers.⁶ The Court's preferences regarding how EU law should be interpreted often differ from those of the member state governments affected by ECJ decisions. In their ongoing strategic interactions, both the Court and the member governments try to generate outcomes that they prefer. To understand the dynamics of this process, one must develop a theoretical model of the ECJ–government interaction and then identify the factors that affect the preferences of the Court and the member governments and the strategies they employ to further these preferences.

We analyze the ECJ–litigant government interaction as a noncooperative stage game that is repeated indefinitely and in which actors discount the future at a reasonable rate (see Figure 1).⁷ In the stage game the ECJ moves first by ruling on the legality of an existing national law or practice with respect to European law (embodied in EU treaties, directives, regulations, and decisions made pursuant to the

6. See Burley and Mattli 1993; Mattli and Slaughter 1995; and Weiler 1991.

7. Our use of game theory is largely heuristic; it is not our intent to prove theorems. Nonetheless, we believe that our theoretical model sheds important light on the strategic nature of the Court's behavior.



^aItems in parentheses are payoffs:

C = ECJ

G = Member government involved in case

a = Affected government acquiesces in adverse decision

c = ECJ conciliates with government

d = Adversely affected government unilaterally defies ECJ

r = Member governments collectively restrain ECJ

FIGURE 1. *The legal politics game*

treaties or previous Court decisions).⁸ If the Court decides that the national law or practice is consistent with EU law, the status quo is not disturbed (“conciliation” between the ECJ and the relevant government results in payoffs of C_c and G_c , respectively).⁹

If, however, the ECJ rules against an extant national law or practice, the adversely affected member government must choose whether or not to abide by the ruling. Acceptance entails changing national practices or laws to conform with the decision or compensating the party that has suffered losses as a result of them (payoffs from such “acquiescence” are C_a , G_a). If the government chooses not to abide by the decision, it has three ways to respond. The government may engage in overt or concealed evasion of the decision, it may press for new EU legislation to overturn the decision, or it may call for changes in the constitutional foundations of the Court by proposing revisions to the EU treaty base.

The final part of the stage game concerns the reactions of the remaining EU member governments to the decision by one of its members not to accept an ECJ decision. If the other governments support their colleague by “restraining” the ECJ (through new legislation or treaty revisions), the resulting payoffs to the Court and the adversely affected government are C_r and G_r . If the other governments do not support nonacceptance, the adversely affected member government will have to engage in isolated “defiance” of the ECJ (C_d , G_d).

This is the end of the stage game, but the process continues with the next Court decision. The Court’s strategic choice is the same: it must decide whether to interpret EU law in a way that adversely affects a member government. In the second round, however, the Court takes into account the information it gained in the previous play of the game (that is, whether the member government complied with the Court’s decision and the ramifications of this behavior for the Court and the government in terms of their reputations with other members of the EU). The government that plays in the second iteration of the game may be the same as in the first round, or it may be different. After the second decision and reaction by the litigant government and by other EU members, the actors update their information, and the stage game is played again. The indefinite repetition of this process determines the evolution of the EU legal system.

In the stage game, the basic preference ordering of the ECJ (assuming that *prima facie* legal grounds justify an adverse decision) can be described by the following inequality:

$$C_a > C_d > C_c > C_r \quad (1)$$

8. In practice, of course, numerous steps take place prior to the Court’s decision (including previous plays of the government–ECJ game). Perhaps the most important of these that we do not analyze is the referral of cases to the ECJ by national courts—the *preliminary judgments* procedure of Article 177 of the Treaty of Rome; for in-depth studies of this topic, see Slaughter, Stone, and Weiler 1997. Although this process is important, it does not affect our argument. Hence we do not add preliminary judgments to our analysis because it would complicate matters considerably.

9. For definition of terms, see Figure 1.

The ECJ has a clear institutional interest in extending the scope of Community law and its authority to interpret it.¹⁰ The best way for the Court to further this agenda is through the gradual extension of case law (that is, the replacement of national laws and practices by ECJ decisions as the law of the land in EU member states). In the context of our game theoretic analysis, one can think of the conciliation outcome (for which the Court's payoff is C_c) as maintaining the status quo: the ECJ does not expand the scope of its case law, but its authority is not questioned by government defiance.¹¹ From the Court's perspective, situations in which it makes adverse decisions that the relevant members' government accepts are clearly preferable to the status quo ($C_a > C_c$). However, if an adverse ECJ decision results in other EU governments rallying around in support of the litigant government to restrain the Court (in the most extreme case, with a treaty revision), this would be a worse outcome for the ECJ than maintaining the status quo. The Court's ability to extend its body of case law is contingent on a stable statutory and constitutional base in which governments allow the ECJ considerable latitude in the translation of its general mandate into specific decisions. As a result, $C_c > C_r$.

The Court's preferences are less clear-cut regarding the situation in which an adverse ruling is not followed by the litigant government, but that government's position is not supported by its EU colleagues (C_d). The Court would clearly prefer that the litigant government accept its adverse decision (that is, $C_a > C_d$); the worst outcome for the ECJ would be where a government's nonacceptance of an adverse decision is supported by the other EU governments ($C_d > C_r$). But how should the Court compare isolated defiance with maintenance of the status quo? We believe that, in general, $C_d > C_c$. Our reasoning is that at least one EU member state (tacitly) approves of the Court's decision (in cases where unanimity is required to restrain the Court), or a substantial minority (under qualified majority voting). Even though having even a single government flout its authority is a matter of concern for the ECJ, this would likely be outweighed by the implicit support of the decision by other member governments. Nonetheless, it should be pointed out that our analysis does not depend on $C_d > C_c$ (see the next section). The thrust of our analysis would still hold if this particular inequality were reversed.

We now consider the basic preference order of the litigant member government in the stage game, which we assume to be generally expressed by the following inequality:

$$G_c > G_r > G_a > G_d \quad (2)$$

Following the argument of Geoffrey Garrett and Barry R. Weingast, we assume the EU member governments support a powerful system of EU law in which the ECJ

10. See Stein 1981; and Weiler 1991.

11. It is important to remember here that the ability of the ECJ to engage in judicial review of legislation is not guaranteed by the founding treaties of the EU. As was the case for the U.S. Supreme Court (beginning with the famous *Marbury v. Madison* decision), the ECJ has had to accrue power by making decisions that subsequently have been followed by politicians.

faithfully implements the governments' intentions as laid out in the EU treaty base.¹² Governments understand that having a well-defined rule of law fosters mutually beneficial economic exchange. But it is very difficult, if not impossible, to write complete contracts (in the case of the EU, treaties). Delegating authority to the ECJ is thus essential to the efficient functioning of the rule of law in Europe, that is, applying the general spirit of the treaties to the particular circumstances of the specific dispute. Any time a member government rejects an ECJ decision, this not only undermines the legitimacy of the EU legal system, but also threatens to earn for the government a reputation as an actor that does not play by the rules. By contrast, when member states comply with an adverse ruling, they strengthen the EU legal system's norm of reciprocity and enhance their own reputation for playing fair. The more a member government benefits from the economic exchanges made possible by the rule of law in Europe, the greater is likely to be its respect for ECJ decisions.

At the same time, however, adverse decisions will always be costly to governments, not only in terms of a reduced autonomy in general, but also because adverse decisions will invariably harm some of their domestic constituents or impose more direct costs on governments. As a result, the status quo is the best outcome for the litigant government (G_c). Once the Court makes an adverse decision, however, the litigant government would most prefer the situation in which it does not accept the decision (that is, does not suffer the costs associated with acceptance) and where it is supported by the other EU member governments through new legislation or a treaty revision that restrains the ECJ (that is, $G_r > G_a$). Finally, we assume that the worst outcome for a litigant government is isolated defiance of an adverse ECJ decision (C_d). Such behavior will signal to the rest of the EU that this government is unwilling to play by the game rules of the EU, including accepting "appropriate" (that is, accepted by other governments) ECJ decisions. As was the case with the Court's preference order, however, our analysis would be unaffected if we were to assume that governments might prefer isolated defiance to acceptance (that is, $G_d > G_a$)—for example, by virtue of placing a very heavy weight on sovereignty concerns.

We have now described the preference orders of the ECJ and litigant governments in the legal politics stage game. The equilibrium outcome in the stage game depends on the behavior of the EU member governments that are not party to the case at hand. If they support the litigant government, optimally the ECJ would not make an adverse decision, since the litigant government would not abide by the ruling (this is because $G_r > G_a$ and $G_c > G_r$). If, on the other hand, the other governments decide not to act, the ECJ would rule against the litigant government, which in turn would accept the decision (because $G_a > G_d$ and $C_a > C_c$). Moreover, changes in the legislative rules of the EU will also affect the behavior of the ECJ and litigant governments. All else equal, the use of qualified majority voting makes collective resistance easier and more likely. This suggests that court activism should have decreased since the ratification of the Single European Act in 1987. These insights into the political

12. Garrett and Weingast 1993.

nature of ECJ jurisprudence are likely to be overlooked by analysts focusing solely on the protagonists in individual cases.¹³

The stage game needs to be augmented, however, in at least two ways. First, ECJ–member government interactions are ongoing in the real world. Second, variation may occur over time and across cases in the preference orderings depicted in this section. The gaps between the payoffs associated with different behaviors may change (which could alter equilibrium behaviors in the iterated game), and the preference orderings may themselves change under some conditions. The next section discusses these possibilities with respect to the effects of ECJ case law precedent, domestic political conditions in litigant states, and EU coalitional politics.

ECJ Precedent, Domestic Politics, and EU Coalitions

If the theoretical framework presented in the preceding section is to provide us with analytic leverage over the actual jurisprudence of the ECJ, it must generate comparative statics results that relate differences in the specific circumstances of a case to variations in outcomes (both case law and government reactions to decisions). We begin this task by discussing the factors that will influence the preferences of the ECJ and member governments as the dynamics of the legal politics game unfold over time with respect to lines of case law.

The ECJ

As other research has emphasized, legal precedent greatly concerns the ECJ.¹⁴ All independent judiciaries are expected to make decisions based on legal principles. Although the foundations for such principles are often enshrined in constitutions (or treaties in the case of the EU), they are invariably modified in case law where courts assert powers or interpretations that are not transparent in such foundational documents. If a court's jurisprudence were to change frequently from case to case in response to pressure from the actors involved, however, the court would surely lose legitimacy. This is because a court's claim to power ultimately rests on its image as an impartial advocate for "the law." Thus, just as defiance by governments impugns courts' legitimacy, so too does a history of decisions that appear to be swayed by interested parties.

This argument suggests that from the standpoint of the ECJ, a tension will often exist between the desire not to make judgments that adversely affect the interests of member governments and the importance of legal consistency. Avoiding member government defiance may call for one verdict; following precedent may dictate another. Can we put a metric on the costs of inconsistency for the ECJ? The simple answer is that these costs are a function of the clarity of existing precedent. Where

13. See Cooter and Drexler 1994; and Bednar, Ferejohn, and Garrett 1996.

14. Slaughter and Mattli 1995.

there are more conflicting cases on the books or where the treaties of the EU are more ambiguous on a given point of law (for example, Articles 30 and 36 concerning “free movement”), the costs of inconsistency will be lower.¹⁵ More generally:

H1: The greater the clarity of EU treaties, case precedent, and legal norms in support of an adverse judgment, the greater the likelihood that the ECJ will rule against a litigant government.

This hypothesis suggests that the Court’s *ceteris paribus* preference ordering outlined in inequality (1) should be modified to take into account the clarity of legal precedent in a specific case. Consider a scenario in which case law precedent is transparent and dictates that the ECJ should take an adverse decision against a member government.¹⁶ The effects of this change on the first part of the game tree in Figure 1 are clear. Unambiguous precedent increases the attractiveness to the ECJ of taking an adverse decision that the litigant government subsequently accepts (that is, the gap between C_a and C_c would increase). Of more importance is the impact of the clarity of precedent on the Court’s evaluations of the costs and benefits of taking adverse decisions that litigant governments do not support. Clear precedent should also increase the utility the Court would derive from the isolated defiance outcome relative to the situation in which the litigant government’s defiance is supported by other ECJ governments (thus, the gap between C_d and C_r would increase).

But what if the Court prefers an outcome in which its (precedent-driven) decision ultimately leads the member governments collectively to restrain the ECJ to the scenario in which the Court does not make an adverse decision in the first place and hence does not provoke an intergovernmental reaction (that is, if $C_r > C_c$)? This change in the Court’s preferences would have a dramatic impact on the legal politics game. The Court would now have a dominant strategy of making an adverse decision. Irrespective of how the litigant government and its other EU colleagues behaved, the Court would still rule the extant national law or practice illegal. In this extreme case, the litigant government would face a clear choice between accepting the decision (G_a) and trying to enlist the support of the other member governments to restrain the Court (G_r). The litigant government’s preferred outcome (G_c) would no longer be feasible. Clearly, litigant governments will always prefer G_r to G_a , but restraint can only be achieved with the support of other member governments (later we discuss the conditions that make this more likely with respect to H3). It should be reiterated at this point, however, that whether clarity of precedent is so powerful a driver of ECJ jurisprudence is ultimately an empirical question and one to which we return in the third section.

15. Garrett 1995a.

16. The Court may construct precedent strategically. For example, the ECJ may try to embed decisions with potentially important long-term consequences for EU jurisprudence in relatively uncontroversial cases. We find considerable support for this supposition in the lines of cases analyzed in the third section of this article.

The Litigant Government

The international preferences of national governments over foreign policy no doubt contain both internal and external elements. For some, government preferences are largely a function of the constellation of domestic interests,¹⁷ perhaps conditioned by the institutional structure of national polities.¹⁸ But observers of the EU often suggest that sovereignty concerns are preeminent for at least some member governments, notably Denmark and the United Kingdom. These two views can be integrated by arguing that governments typically value sovereignty because they view it as a prerequisite for winning in domestic politics.¹⁹ Although this is not always the case, it is a reasonable simplifying assumption.

With respect to domestic factors, the short-termism inherent in democratic politics means that distributive politics will generally tend to dominate the incentives to increase aggregate prosperity. ECJ decisions often threaten to impose heavy costs on segments of the economy—for example, by overturning national laws that act as nontariff barriers supporting specific sectors. Other Court decisions may harm the agendas of feminist, environmental, or other interest groups. For governments, the operative question is the importance of these groups to their reelection efforts. Governments will more likely abide by an ECJ decision when the interests adversely affected by the decision are politically salient.

But ECJ decisions may also have deleterious consequences for national governments in a more direct sense—for example, by imposing new responsibilities on the state or by reducing tax receipts. Finally, the potential for governments to be held liable for the violation of EU law increases the threat that the Court could impose sanctions itself—for example, through orders to compensate citizens and firms that have suffered due to the violation. Our intent here is not to develop a detailed algorithm for weighting these various factors.²⁰ Rather, we only wish to propose the following hypothesis:

H2: The greater the domestic costs of an ECJ ruling to a litigant government, the lesser the likelihood that the government will abide by an adverse ECJ decision.

We now consider how variations in litigant government costs might affect the comparative statics of our legal politics game. The simplest consequence of H2 is that the gap between G_c and all other outcomes would increase with the greater costs to the government of an adverse decision. That is, the desirability to the litigant government of the Court's not taking an adverse decision would rise. H2 also implies that the payoff gap between collective restraint of the ECJ (G_r) and accepting adverse decision (G_a) would increase as well.

17. See Frieden 1991; and Frieden and Rogowski 1996.

18. Garrett and Lange 1995.

19. Powell 1991.

20. Our primary purpose in this article is to establish that the Court's behavior is affected by the anticipated reactions of litigant governments. Once this proposition is entrenched, future research should seek to attach weights to different parts of the utility function of litigant governments.

The pivotal issue, however, concerns how the litigant government's domestic circumstances would affect its utility comparison between G_d and defying the ECJ in isolation (G_d). If the government is sufficiently concerned about the domestic costs of an adverse decision, then $G_d > G_a$. As was the case for the Court's decisional calculus, this would give the litigant government a dominant strategy in cases where the ECJ makes an adverse decision. The government would not accept the decision, irrespective of whether it thought other member governments would support its defiance. Again, our case analysis sheds light on the circumstances in which this proposition might hold.

Other Member Governments

Euro-skeptics regularly, and even Euro-enthusiasts occasionally, denounce ECJ activism. Numerous proposals for constraining the Court have been floated through the years, ranging from allowing justices to issue dissenting opinions, to only giving national high courts the right to refer questions of law to the ECJ, and even to allowing the Council to overturn ECJ decisions directly. Although the last outcome would clearly reduce the activism of the ECJ, it would also undermine the reason for having an effective legal system in the EU in the first place. Courts that can be easily overruled by legislatures lose their ability to impartially enforce incomplete contracts. As a result, when thinking about collective responses to ECJ activism, it is more useful to consider less extreme responses that conform with the broader set of rules of the game that apply in the EU.

The most decisive way that member governments can restrict ECJ activism without violating the basic tenets of the EU legal system is to revise EU treaties. Although this has occasionally been done (see our discussions of the Barber protocol in the next section), the threshold to such constitutional revision is very high—unanimity among the EU member governments and subsequent ratification by national parliaments, national referendums, or both.

An easier path for restraining legal activism is the passage of new EU legislation to counteract the effects of ECJ decisions. Only a treaty revision can overrule an ECJ interpretation of the treaties, but many ECJ decisions involve interpretations of secondary legislation (that is, directives, regulations, and decisions). These can be overturned by passing new laws, the hurdles for which are considerably lower than for treaty revisions. New secondary legislation can be produced at any time. Moreover, since the mid-1980s much legislation requires only the support of a qualified majority in the Council, significantly reducing the obstacles to passage.²¹

Clearly, however, an inverse relationship exists between the ECJ-restraining power of these strategies and their ease of implementation. Secondary legislation is relatively easy to pass, but it cannot be guaranteed to rein in the Court's activism in a given area. The ECJ could simply respond by arguing that its interpretation is consistent with the EU treaty base, and that the new legislation is not. Treaty revision is

21. For a more detailed analysis of the legislative process in the EU, see Garrett 1995b.

much harder to achieve, but it is the ultimate constraint on the Court (which views itself as the protector of the treaties).

When should we expect the EU governments collectively to seek to restrain ECJ activism? Two conditions stand out. First, the greater the importance of a particular case to more member governments, the greater the likelihood that they will collectively support a litigant government seeking to defy an adverse judgment. Second, the greater the number of cases within a similar branch of the law that the Court adversely decides, the greater the likelihood of a collective response to constrain the ECJ. Isolated adverse judgments might be acceptable to other member governments either because they believe the litigant government was at fault or because they hope that defiance by the government would prompt the ECJ to be more circumspect in the future. With the accretion of similar adverse decisions, however, general tolerance for Court activism is likely to decrease.²²

Thus our third hypothesis is:

H3: The greater the potential costs of a case, the larger the number of governments potentially affected by it, and the larger the number of adverse decisions the ECJ makes in similar areas of the law, the greater the likelihood that the EU member governments will respond collectively to restrain EU activism.

The effects of variations in EU-wide support for litigant governments on the legal politics game are straightforward. The greater the probability of a collective restraint response to adverse ECJ decisions, the lesser the weight that the Court and the litigant government should attach to the pair of payoffs C_d , G_d . Indeed, if both actors were to attach zero probability to this outcome, the strategic dynamics of the legal politics game would change considerably. The litigant government would know that its defiance would be supported by its EU colleagues. It would thus not accept any adverse decision by the ECJ because it could always do better by pressing for new secondary legislation or treaty revisions (because $G_r > G_d$). In turn the ECJ would not make an adverse decision in the first place, because conciliating the litigant government is better for it than inciting a collective act of restraint ($C_c > C_r$).

A Strategic History of ECJ Case Law

The preceding two sections have developed a simple game theoretic framework for analyzing the EU legal politics stage game and generated a set of hypotheses that facilitate comparative statics predictions about the dynamics of ECJ–litigant government interactions. This section assesses how well our theory and hypotheses fit the actual history of ECJ jurisprudence, using three lines of cases: nontariff barriers to

22. Note that another dynamic may be at work. The more cases the ECJ has decided in a similar way, the clearer the Court's precedent will have become. Following H1, this should make it more likely that the ECJ will continue to make adverse judgments in the future. It is ultimately an empirical matter, however, as to which of these two forces is the more powerful.

agricultural trade, equal treatment of the sexes, and state liability for the violation of EU law.

Import Bans on Agricultural Products

The 1958 Treaty of Rome demanded as part of the effort to create a common market that extant trade quotas among member states be abolished during a transitional period ending on 31 December 1969 (Articles 8 and 32). The treaty spelled out a detailed timetable for the progressive elimination of these quotas (Article 33). The treaty also required that the establishment of a Common Agricultural Policy among the member states (Article 38 (4)) accompany the development of the common market. Thus domestic deregulation was combined with reregulation at the EU level: national marketing regimes for agricultural products that restricted trade among member states were to be replaced with EU-wide marketing organizations.

By the end of the transition period, however, member states had not established common policies for a few agricultural products. In the 1970s the ECJ heard a series of cases concerning the effect of the Rome treaty on these products. In 1974 the French Conseil d'Etat referred the first such case to the ECJ. The *Charmasson* case involved a requested annulment of a quota for banana imports imposed by the French government on 28 October 1969.²³ *Charmasson* argued that the quota violated the timetable set forth in Article 33 for eliminating quantitative restrictions to trade. The French government contended that because a national marketing organization for bananas was already in place in 1958, Article 33 did not apply. In its reference to the ECJ, the Conseil d'Etat asked whether the preexistence of such a national marketing organization for an agricultural product precluded the application of Article 33 to that product.

The ECJ decided that the existence of a national marketing organization could preclude the application of Article 33 and made it clear that the French quota scheme could be viewed as such a national organization. In these respects the judgment appeared to support the French government's position. The Court added, however, that such marketing organizations could suspend the application of Article 33 only during the transitional period. After 31 December 1969 Article 33 would have to be applied, regardless of whether or not the member states had established a community-wide marketing organization.

How can we interpret this judgment in light of the hypotheses presented in the previous section? The contradictions between a free-trade article (Article 33) and the agricultural provisions (Articles 38–46) gave the ECJ leeway in interpreting the Rome treaty. The Court made a bold pro-integration interpretation by ruling that national marketing organizations could not stand in the way of free trade after the end of the transition period. Even the Commission opposed the Court's position, asserting that

23. Case 48/74, *Mr. Charmasson v. Minister for Economic Affaires and Finance* [1983] ECR 1383. For analyses, see Buffet-Tchakaloff 1983, 97, 194; and Paulin and Forman 1975. We thank Karen Alter for sharing her insights regarding this case.

national marketing organizations should be allowed to remain in place until member governments agreed on a common organization.²⁴ The French government opposed this interpretation and, given the domestic sensitivity of the banana sector, was likely to defy the ECJ (consistent with H2).²⁵ The likelihood of immediate French defiance, however, was somewhat tempered by the Court's use of the classic *Marbury v. Madison* technique. The ECJ decided for the French government in the case at hand (because the quota in question had been enacted before the end of the transitional period), while establishing a principle that the government opposed (Article 33 would be applied after the end of the transitional period). Nonetheless, the French government was likely to oppose the dissolution of its banana marketing organization.

Why did the Court make such a pro-integration ruling, knowing that it would likely provoke French defiance? Consistent with H3, the fact that the ECJ had little reason to expect a collective response from the member governments was likely very important. *Charmasson* involved the interpretation of treaty articles; therefore, overturning the decision would require unanimous member state support for a treaty revision. Given the divisive nature of banana politics in the EU, and because few other products had not yet been incorporated into the Common Agricultural Policy, a treaty revision was most unlikely.²⁶ A more probable collective response was that the ruling would spur the member states to create a common marketing organization for bananas (which is what the Court wanted).

The *Charmasson* precedent was subsequently tested in a dispute over potatoes. In the *Potato* case, the Commission challenged the United Kingdom's national market organization, which restricted imports.²⁷ As in *Charmasson*, there was no EU-wide market scheme for potatoes. As had the French for bananas, the U.K. government argued that under a special provision pertaining to its accession to the EU in 1973, it was entitled to maintain national market organizations that existed at that time—even if this violated the Rome treaty's free-trade articles.

The precedent established in *Charmasson* made it more likely that the ECJ would rule against the United Kingdom in the *Potato* case—as eventually transpired. The Court reiterated that protectionist measures could only be tolerated during the transition period for accession of new members.²⁸ Since this period had expired, the British restrictions on potato imports should have been removed.²⁹

The next development in this line of ECJ jurisprudence was the *Sheep Meat* case, in which the French government claimed that it should be allowed to maintain its

24. Paulin and Forman 1975, 402.

25. The French market organization gave preference to imports from French overseas departments and former colonies who were heavily dependent on revenue from banana sales in France.

26. See Everling 1996, 401–406, who notes that disputes between member states over bananas date back to the Treaty of Rome negotiations.

27. Case 231/78, *Commission v. UK* [1979] ECR 1447.

28. The transition period relevant in *Charmasson* only applied to the original six member states. The new member states, including the United Kingdom, were subject to the transition period provided for in the Act of Accession.

29. Rasmussen 1986, 282–83.

national market organization for mutton.³⁰ The government did not dispute the principles established in *Charmasson* or the *Potato* case; instead it asked the ECJ to grant France an extension before eliminating its mutton marketing organization. The French government asserted that in the period between the abolition of its national rules and the establishment of EU rules, domestic producers would be unfairly disadvantaged in competition with British producers who were subsidized by their government.³¹ The French government argued that a number of poor regions largely dependent on sheep rearing could suffer serious socioeconomic dislocations as a result.³² The French government also declared that it would continue banning imports regardless of the Court's decision.³³ Nonetheless, the Court held that the French sheep meat regime had to be discontinued. This decision sparked what came to be known as the "sheep meat war." France refused to comply with the Court's ruling, declaring that it would do nothing until a common market organization for sheep meat was established.³⁴

The domestic costs of the *Sheep Meat* decision led the French government to defy the ECJ (consistent with H2). Given the high cost of an adverse decision to French farmers and given the French government's open unwillingness to comply with an adverse decision the Court might have chosen not to rule against France. This was a case, however, where H1 and H3 dominated H2. On the one hand, the ECJ knew that if it violated its own clear and recent precedents under pressure from the French, it would lose legitimacy as an impartial arbiter in the eyes of other member governments. On the other hand, the Court had little reason to believe that the member governments would act collectively to oppose its decision. Overturning the decision would require unanimous member government support for a treaty revision, whereas at least one member government, the United Kingdom, was known to oppose the French position (as it was eager to export sheep meat to France). In this case, the cost of caving in to member government pressure apparently was higher to the Court than the cost of isolated French defiance.

The sheep meat dispute was ultimately resolved in the manner suggested by the French government—a common market organization for sheep meat was established at the Dublin meeting of the Council in May 1980. At the same meeting, in a clear reference to the *Sheep Meat* ruling, President Valéry Giscard d'Estaing of France suggested that the member states should jointly constrain the ability of the ECJ to make "illegal decisions."³⁵ Giscard suggested an institutional reform that would have given the "big four" member governments an additional judge on the Court (similar to Roosevelt's efforts to pack the Supreme Court with New Dealers in 1936).³⁶ Ultimately, however, no such changes were made.

30. Case 232/78, *Commission v. France* [1979] ECR 2729.

31. Rasmussen 1986, 339.

32. See Gormley 1985, 25; and Buffet-Tchakaloff 1983, 182.

33. Rasmussen 1986, 286.

34. *Ibid.*, 340.

35. *Ibid.*, 354.

36. *Ibid.*, 356.

In sum, this line of cases provides some support for each of our three hypotheses. The ECJ took advantage of the conflict between a free-trade provision (Article 33) and agricultural policy provisions (Articles 38–46) to establish a controversial precedent. Moreover, the Court used one of the strategies we described earlier: establishing a controversial principle while imposing no costs on the member government in the case at hand. With the principle established (in *Charmasson*) and reaffirmed (in the *Potato* case), the Court's position became entrenched (H1). The conflict came to a head in the *Sheep Meat* case, and when push came to shove the French government was not prepared to back down given the high domestic costs of so doing (H2). The Court was willing to maintain its adversarial stance because it did not think that a restraining collective response from the member governments was likely (H3).

Equal Treatment of the Sexes

Article 119 of the Treaty of Rome states that men and women should receive equal pay for equal work. Pay is defined broadly (in ironically sexist language) as “the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.” This loose definition has prompted numerous ECJ cases concerning the benefits that fall under the rubric of Article 119 and what constitutes a violation of the equal treatment principle. Perhaps the most important issue has been the application of Article 119 to age pensions.

The first significant case was *Defrenne No. 1*.³⁷ The ECJ held that pensions paid under statutory (that is, publicly mandated) social security schemes did not constitute pay as defined in Article 119. This decision resolved only the status of publicly mandated age pensions; it did not address the question of whether occupational pensions constituted pay. In *Defrenne No. 2*, the ECJ declared that Article 119 had direct effect; individuals could rely on Article 119 in cases before national courts.³⁸ The Court applied a retrospective limitation to its judgment so that states would not have to answer to complaints regarding violations of Article 119 prior to the date of the *Defrenne No. 2* decision. This was expedient since it was clear that acting otherwise might have run some national pension schemes into bankruptcy.³⁹ This decision left unanswered the question of whether Article 119 applied to occupational pensions.

Finally, in *Bilka* the Court declared that occupational pensions constituted pay under Article 119.⁴⁰ The specifics of the case concerned the exclusion of part-time workers (mostly women) from an occupational pension scheme in a German company. In its decision the Court said that occupational pensions constituted pay and that denying access to an occupational pension scheme to a group consisting predominantly of women violated Article 119. The ramifications of this decision were potentially enormous and extremely costly to employers. This seems inconsistent with H3

37. Case 80/70, *Defrenne v. Belgium* [1971] ECR 445 at para. 6.

38. Case 43/75, *Defrenne v. SABENA* [1976] ECR 455.

39. Moore 1995, 164.

40. Case 170/84, *Bilka Kaufhaus GmbH v. von Hartz* [1986] ECR 1607.

because the Court could have expected a collective restraining response from the EU member governments.

Indeed, the Council made a quick, if somewhat messy, effort at damage control. Two months after *Bilka* the Council passed a new directive on occupational pensions.⁴¹ The directive gave occupational pension schemes until 1993 to comply with the equal treatment principle but exempted the use of sex-based actuarial assumptions and survivors' pensions from the equal treatment doctrine altogether. The directive also delayed the requirement to equalize pensionable ages.⁴²

The ECJ moved next. In the *Barber* case the Court ruled that sex-based differences in pensionable ages violated Article 119 and had to be eliminated.⁴³ This decision was at odds with the Council's directive regarding pensionable ages and in effect overruled it. However, the Court reduced the potential tensions by limiting the retrospective application of the principle.⁴⁴ The Court's language was vague:

The direct effect of Article 119 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.

This could be interpreted in many ways. At the conservative extreme the Court's ruling might imply that only workers who joined occupational pension schemes after the date of the judgment are eligible for equal benefits. The liberal interpretation would be that the equal treatment principle applies to future pension payments for all workers regardless of when they joined.⁴⁵

Why did the Court leave its retrospective limitation so ambiguous? One plausible interpretation is that the ECJ may have made a vague ruling in order to gauge the reaction of member governments. Their reaction was swift and decisive. The EU governments were extremely worried by the enormous financial implications of the *Barber* decision, and they reacted in the strongest possible way—through treaty revision. The governments added a protocol to the Maastricht Treaty that limited the application of the equal treatment principle to periods of work after the *Barber* judgment.⁴⁶

The ECJ responded to the "Barber protocol" in the 1993 case *Ten Oever*.⁴⁷ In this case the Court was asked to clarify the retrospective limitation it had imposed in

41. Directive 86/378 OJ 1986 L225/40.

42. Whiteford 1995.

43. Case 262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889.

44. Honeyball and Shaw 1991, 55.

45. See Moore 1995, 163; and Honeyball and Shaw 1991, 56–57.

46. Treaty on European Union, Protocol No. 2 on Article 119. The protocol states that "for the purposes of Article 119 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 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law."

47. Case 109/91, *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakebedrijf* [1993] ECR I-4879.

Barber. The Court judged this case after the Maastricht Treaty had been signed but before it had legal effect. If the Court chose an interpretation other than that adopted by the member states in the protocol, the protocol might have been open to legal challenge on the grounds that it violated the principle of legal certainty.⁴⁸ The Court chose to avoid such a messy battle and instead affirmed the governments' preference as expressed in the protocol. In effect the Court's ruling said: "this is what we meant all along. The member governments did not overrule us; they simply helped us clarify a point."

In two subsequent cases, however, the ECJ behaved in ways that arguably challenged the Barber protocol. The *Vroege*⁴⁹ and *Fisscher*⁵⁰ cases concerned whether the retrospective limitation with regard to pensionable ages established in *Barber*, and affirmed in the protocol, also applied to the right to join occupational pension schemes.⁵¹ The Court decided that the retrospective limitation in *Barber* applied only to equalization of pensionable ages and did not apply to the right to join pension schemes. Therefore, *Vroege* and *Fisscher* could date the right to join their pension schemes back to 8 April 1976, the date when Article 119 had been given direct effect in *Defrenne No. 2*.⁵²

Ostensibly, these bold decisions circumscribed the applicability of the Barber protocol to the specific issue involved in the *Barber* case (differences in pensionable ages) when it was likely that the governments had intended the protocol to limit the retrospective application of Article 119 in general. But the ECJ provided member states with methods for limiting the financial consequences of these decisions. The Court held that women would have to pay their back-contributions in order to join the schemes retroactively—making it extremely unlikely that many would choose this option. More importantly, the ECJ allowed member states to maintain existing legislation limiting retrospective claims or to pass new laws to this effect.⁵³ Women are now entitled to receive equal treatment under pension schemes, but the full impact of this change will not be felt for years, when this generation of workers retires.

We can learn three important lessons from this line of cases about the interaction between the ECJ and the member governments. First, in instances where the potential domestic ramifications of adverse ECJ decisions are great—as was clearly the case with respect to the Court's mandating increases in the scope and generosity of both state and private pensions—member governments are unlikely to passively abide by Court decisions. This is completely consistent with H2.

48. Moore 1995.

49. Case 57/93, *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

50. Case 128/93, *Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583.

51. *Vroege* and *Fisscher* were female employees who were denied the right to join pension schemes because they were married (there was no similar exclusion for married men). *Vroege* was also denied on the ground that she was a part-time worker.

52. Whiteford 1995, 810–11.

53. Whiteford 1995, 813–17.

Second, as H3 suggests, Court decisions with costly domestic ramifications for all member governments are likely to provoke collective responses to rein in the Court. In this instance government responses escalated over time with the increasing potential costs associated with ECJ rulings. The member governments responded to *Bilka* by passing a directive on occupational pensions. After the *Barber* decision they went a step further by agreeing to a treaty protocol. In this line of cases the ECJ was willing to circumvent secondary legislation passed by the Council. Once the governments clearly signaled their resolve through a treaty revision, however, the Court retreated.

Finally, this line of cases illustrates that the ECJ–member state game is not one of complete information. If it were, the Court would not have pushed so hard for an expansive interpretation of “equal pay”—because it would have known that this was universally unacceptable among EU member governments. In reality the Court did not anticipate the strength of government opposition. Thus it floated a series of trial balloons—in the form of open-ended decisions—designed to test the resolve of governments. Because the precedents established in these decisions were vague, they did not constrain the Court. Consistent with H1, the Court thus had room to modify its interpretation in subsequent judgments to accommodate member government preferences. This is consistent with H1.

State Liability for the Violation of EU Law

One of the central ways in which EU policy is made is through directives. These are pieces of secondary legislation that member governments are required to transpose into national law. This process, however, is plagued by a fundamental problem. Governments that do not approve of an EU directive (typically when passed by a qualified majority in the Council) may not transpose it into national law on time, may transpose it incorrectly, or may not transpose it at all. Moreover, until Maastricht, the EU treaties made no provision for sanctioning member states that failed to implement directives. Under Articles 169 and 170 of the Rome treaty, the Commission or other governments may take a member state to the ECJ for failing “to fulfill an obligation under this Treaty.” If the Court finds the state to be in violation of a directive and that the relevant government failed to remedy the problem, the plaintiff can take the government back to the ECJ (Article 171). But governments that ignored ECJ rulings faced no penalties until the ratification of the Maastricht Treaty.⁵⁴

The Court sought in a series of decisions to increase the effectiveness of EU directives, primarily by granting individuals legal recourse to them in national courts even if their government had failed to transpose them into national law (that is, the “direct effect” of directives). But direct effect did not apply to all directives, and member governments continued to evade their obligation to abide by them. Then in the landmark 1991 *Francovich* decision the ECJ ruled that governments must compensate

54. At Maastricht, Article 171 was amended to allow the Court to impose penalties on member governments that failed to comply with its judgments.

individuals for the loss caused to them resulting from the nonimplementation of directives, even those without direct effect.⁵⁵ In practice, however, the implications of *Francovich* are still not clear; the Court has yet to establish a system of state liability for the violation of EU law. Here we speculate on the likely course of interaction between the ECJ and member governments that will determine the shape of such a system. We expect the Court to take possible member government reactions into account when refining the principles established in *Francovich*. Four recent cases provide a preliminary test for our theoretical expectations.⁵⁶

History of Direct Effect

We begin by sketching briefly the thirty-year history of the Court's efforts to empower individuals with respect to EU law. In 1963 the Court decided that some EU provisions could have direct effect, conferring rights on individuals rather than simply imposing duties on governments.⁵⁷ For a provision to be directly effective it had to be clear and unambiguous, unconditional, and not dependent on further action being taken by EU or national authorities. The ECJ then decided in *Van Duyn* that direct effect applied, in principle, to directives.⁵⁸ This decision was subsequently clarified, stating that directives are only subject to direct effect when the deadline for national implementation has passed.⁵⁹

In 1986 the Court ruled that private parties could sue only the state, not other private parties, for violating directives that have not been transposed into national law.⁶⁰ The Court's next decision then sidestepped the whole notion of direct effect. In *Marleasing* the Court ruled that where a directive had not been incorporated into national law, domestic courts had to interpret existing national law in light of that directive. This was so even when invoked against a private party (and hence not directly effective) and irrespective of whether the national provisions in question were adopted before or after the directive.⁶¹

But the ECJ was not yet finished with the issue of conferring individual rights under EU directives. With the passage of the Single European Act and the spate of directives issued pursuant to it in order to complete the internal market, the Commission stepped up its proceedings against member governments with respect to the nonimplementation or "incorrect" implementation of directives.⁶² The effectiveness of using Articles 169–171, however, was limited by the lack of enforcement provisions. As a result, disobedient governments simply refused to implement judgments.

55. Joined cases C-6/90 and 9/90, *Francovich and Others v. Italy* [1991] ECR I-5357.

56. As a result we do not wish to reanalyze in detail the evolution of direct effect (on which we largely agree with Weiler's 1991 analysis); rather, we look forward to the evolution of a state liability regime.

57. Case 26/62, *Van Gend en Loos* [1963] ECR I.

58. Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337.

59. Case 148/78, *Ratti* [1979] ECR 1629.

60. Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

61. Case C-106/89, *Marleasing* [1990] ECR I-4135.

62. Curtin 1990, 709–11.

The best way to ensure real member government compliance with directives was for individuals to bring cases against their governments in national courts for violations of their rights under EU law. In *Francovich* the Court had the opportunity to make this possible.

The Francovich Ruling

Francovich concerned Italy's failure to implement a directive intended to ensure that employees received full payment of salary arrears if their employers became insolvent.⁶³ Even though the Commission brought a successful proceeding against Italy under Article 169, Italy still took no action to implement the directive.⁶⁴ *Francovich* and others, who were owed arrears of salary, then sued the Italian government. The case was ultimately referred to the ECJ.

The Court held that the insolvency directive was not directly effective.⁶⁵ It also ruled, however, that member governments are liable to compensate individuals for losses resulting from the nonimplementation of a directive—even if the national legal systems do not permit such liability—provided that three conditions are met. First, the directive must confer rights on individuals. Second, these rights must be identifiable from the provisions of the directive. Finally, a causal link must exist between the breach of EU obligations by the national government and the loss suffered by the individual.

Francovich thus represented a quantum leap in the Court's intervention inside member states because it asserted that individuals' claims to damages from the violation of EU law did not depend on the doctrine of direct effect.⁶⁶ The decision sent shock waves through European capitals. Although *Francovich* concerned only a small number of limited claims, the potential range of claimants and size of damages under the state liability principle were virtually without limit.

The ECJ, however, did not address in *Francovich* the scope of the state liability principle. A number of outstanding issues remained to be resolved. Did the principle extend to cases where the Court ruled that national implementing measures were inadequate? What about much broader, and more vague, obligations under EU treaties? How far should state liability go? What conditions should be established before states are liable to pay damages?

How the ECJ answers these questions will ultimately determine the impact of *Francovich*. An extensive interpretation by the Court would institutionalize an EU-wide system of state liability for the violation of EU law and would be the capstone on more than thirty years of effort by the ECJ to expand and entrench its authority. It is equally clear, however, that member governments will not passively accept such

63. Directive 80/987 OJ L283/23, 1980 ("Insolvency Directive").

64. Case 22/87, *Commission v. Italy* [1989] ECR 143.

65. Although the Italian government had to set up institutions guaranteeing the payment of salary arrears, it was not itself responsible for the payments (para. 25).

66. Steiner 1993, 9–10.

an interpretation. We now explore the responses of member governments to *Franco-vich*.

Government Responses to Francovich

Earlier we sketched three possible responses by governments to adverse ECJ decisions. The first—noncompliance by the litigant government—is not at issue with respect to *Franco-vich* because the Italian government has already accepted the decision. The other two collective responses—statutory legislation and treaty revision—have been widely discussed by member governments. Not surprisingly, the U.K. Conservative government took the lead in trying to restrict the scope of *Franco-vich*. It claimed that the question of state liability should be a matter of national law—subject to a minimum EU standard based on the principles regulating the noncontractual liability of EU institutions themselves (Article 215 of the Rome treaty). This would limit state liability to cases in which governments have shown “grave and manifest disregard” of their EU obligations—a very strict condition that is rarely fulfilled.⁶⁷ The British government also advocated a statute of limitations restricting damage payments to recent violations of EU norms.⁶⁸ Furthermore, it demanded that existing national laws be allowed to stand that limit the time span over which damages must be paid.⁶⁹

The broader issue of constitutional (that is, treaty) limitations on the ECJ was widely discussed in the context of the 1996–97 Intergovernmental Conference. The U.K. government proposed that a qualified majority in the Council should be able to overturn ECJ decisions. This would clearly represent a radical violation of the principle of judicial autonomy. A somewhat less controversial British proposal sought to restrict to the highest court in each member country the right to refer cases to the ECJ for “preliminary judgments” (Article 177 EC).⁷⁰ Given that these courts have shown less willingness to refer cases than lower courts, a treaty amendment in this direction would considerably reduce the scope of ECJ authority.

As in so many other issues, however, British Conservatives were outliers in Europe.⁷¹ Some members of the EU—most notably, France and Germany (along with their economic allies among the Benelux countries and Austria)—attach a greater positive weight to the presence of an effective legal system in Europe. These countries strongly support the EU legal system for at least two reasons. First, the French

67. Submission of the British government to the ECJ regarding *Factortame No. 3* (see later). Hartley 1994, 226–27; and Albers 1995, chap. 2.

68. See *Daily Mail*, 24 October 1995, 22; and *The Times*, 23 October 1995.

69. For example, when the British government was recently ordered by the Court to change its prescription charge laws—a ruling that threatened to cost up to £500 million due to reimbursing all men between the ages of sixty and sixty-four for charges dating back five years—it cited a 1993 regulation applying a three-month time limit, reducing the overall costs of compliance with the ruling to £40 million; *Daily Mail*, 24 October 1995, 22.

70. See *Financial Times*, 2 February 1995, 10; 3 April 1995, 17; 22 August 1995, 10; and *The Times*, 23 October 1995.

71. This is not to deny that many other governments may tacitly support some of the United Kingdom's positions and are more than happy to let the British government take the lead.

and German governments are deeply committed to expanding European integration as a means of stabilizing geopolitics on the continent. Second, the economies of the northern core of the EU are those that benefit most from the removal of nontariff barriers to trade in the EU, and the ECJ has been a powerful actor in furthering this agenda. Thus these governments have strong incentives not to emasculate the ECJ, even in the face of an incendiary decision such as *Francovich*.

We are not saying that those member governments that generally support the rule of EU law should be expected to sit idly by and allow the ECJ to entrench the state liability principle. They were, however, reticent to follow the British lead of institutionalizing political intervention in European law. The political consensus in the EU seems to support two objectives limiting the *Francovich* ruling. The first is to adopt restrictive criteria for establishing the liability of member states. The second is to circumscribe the retrospective application of all ECJ rulings, not only *Francovich*, and to allow existing national laws to stand that constrain the time span over which damages must be paid.⁷²

Toward a System of State Liability for the Violation of EU Law

How should we expect the ECJ to react to this political environment? Given that the costs of *Francovich* to all member states are potentially enormous (H2, H3), and given that the exact nature of the precedent set in the case is unclear (H1), we anticipate that in the future the Court will voluntarily restrict the application of the state liability doctrine in ways desired by the bulk of member governments.

Four recent cases provide a preliminary test for our predictions. First, in *Brasserie du Pêcheur* a French brewing company sought damages from the German government for losses incurred when forced to stop exporting beer to Germany because its product did not comply with the German beer purity law (declared in violation of EU law by the ECJ in 1987).⁷³ Second, in *Factortame No. 3* a group of Spanish fishermen claimed damages from the British government for losses incurred as a result of the 1988 Merchant Shipping Act, ruled illegal by the ECJ in 1991.⁷⁴ Third, in *British Telecommunications* the plaintiff sought damages from the U.K. government for losses following the failure to implement appropriately a directive on procurement procedures for utilities.⁷⁵ Finally, in *Dillenkofer* a number of German tourists claimed damages from the German government for its failure to implement a 1990 EU directive on package tours.⁷⁶

On 5 March 1996 the ECJ delivered its rulings in the *Brasserie du Pêcheur* and *Factortame* cases.⁷⁷ The ECJ reaffirmed the principle established in *Francovich*. It ruled that states have to pay damages if three conditions are met: (1) the violated EU

72. *The Times*, 23 October 1995.

73. Case C-46/93.

74. Case 48/93.

75. Case C-392/93.

76. Joined cases C-178/94, C-179/94, 188/90, 189/94, and 190/94.

77. Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur* and *Factortame* [1996] ECR I-0000.

law must confer rights on individuals, (2) the violation must be sufficiently serious, and (3) the damage must have been directly caused by the violation. The ECJ stated that a violation of EU law is "sufficiently serious" if it has persisted despite a court ruling or if it is clear in light of settled case law. The decisive test is whether the government has "manifestly and gravely" disregarded the limits of its discretion.

This formulation corresponds to the Court's interpretation of Article 215 EC, which governs the noncontractual liability of EU institutions. The ECJ left it to national courts to decide whether a violation of EU law is sufficiently serious. National courts must also decide on the level of damages. However, the ECJ ruled that damages must be no less than the compensation for similar claims under domestic law. The Court held that national liability laws apply as long as they do not make it "excessively difficult or impossible" to obtain effective compensation.

The ECJ ruled on the *British Telecommunications* case three weeks later.⁷⁸ The Court held that the conditions for establishing state liability set out in its 5 March decision also applied to cases where a government had incorrectly transposed a directive into national law. In this case the ECJ ruled that the British government did not have to pay damages to British Telecommunications because the United Kingdom's incorrect implementation of the 1990 public utilities directive was not a "sufficiently serious" breach of EU law. On 8 October 1996 the ECJ delivered its ruling in the *Dillenkofer* case.⁷⁹ The Court reaffirmed the conditions set out in *Brasserie du Pêcheur* and *Factortame* and ruled that the failure to take any measure to transpose a directive on time constituted a sufficiently serious violation of EU law.

The Court's reasoning in these cases follows in three important ways the prior proposals of national governments regarding limitations of the *Francovich* principle. First, the "manifest and grave" violations proviso is a very strict condition. The ECJ thus followed the demands of member governments to base state liability on the principle regulating the noncontractual liability of EU institutions themselves. Second, the Court held that only violations of clear and unambiguous provisions would give an automatic right to compensation; otherwise, clarification by national courts or the ECJ would be required. This is consistent with the member governments' express desire to restrict the retrospective payment of damages. Third, the ECJ left it to national courts to adjudicate state liability cases according to national liability laws. The Court thus followed government demands that state liability should be a matter of national law, subject to a minimum EU standard based on the principles governing the liability of EU institutions.

These cases suggest that the ECJ is willing to tailor its state liability rulings in ways that the core member governments, especially France and Germany, wish. Nonetheless, a number of issues remain to be resolved. The fact that liability claims are to be adjudicated according to national liability laws raises the question of the extent to which the Court will allow national statutes of limitation to stand. In most member states the state incurs liability only under very restrictive substantive and procedural

78. Case 392/93, *British Telecommunications* [1996] ECR I-0000.

79. Joined cases C-178/94, C-179/94, 188/90, 189/94, and 190/94, *Dillenkofer* [1996] ECR I-0000.

conditions.⁸⁰ Thus national liability laws may provide member states with an effective shield from liability in most cases and with an effective cap on retrospective payments of damages. The Court's statement that national liability laws apply as long as they do not make it "excessively difficult or impossible" to obtain effective compensation is open to a wide variety of interpretations. We expect that, in the future, the Court will allow restrictive national statutes of limitation to stand. Moreover, we believe that the ECJ will opt for a restrictive interpretation of the "impossible or excessively difficult" proviso. This would provide further evidence that Court activism has been tempered by the preferences of the member governments.

Conclusion

The existing literature on legal integration in the EU poses a stark dichotomy between two views of ECJ–government interactions: the legal autonomy and political power perspectives. This article has developed a theoretical framework that is subtler and more balanced than either of these perspectives. Moreover, we have subjected our view to empirical tests that are much less vulnerable to the "sampling on the dependent variable" critique. Our theoretical framework generated three independent hypotheses about the strategic interactions between the Court and member governments. These hypotheses were then tested against a carefully selected set of cases in which we sought to hold constant as many factors—other than those of direct bearing on our hypotheses—as possible.

The starting point of our theoretical analysis is that the ECJ is a strategic actor that must balance conflicting constraints in its effort to further the ambit of judicial review in the EU. On the one hand, the Court's legal legitimacy is contingent on its being seen as enforcing the law impartially by following the rules of precedent. On the other hand, the Court cannot afford to make decisions that litigant governments refuse to comply with or, worse, that provoke collective responses from the EU governments to circumscribe the Court's authority. Understanding how these conflicting constraints function requires careful delineation of the legal and political conditions in particular cases.

The empirical analysis generated strong support for our three hypotheses. First, the greater the clarity of EU treaties, case precedent, and legal norms in support of an adverse judgment, the greater the likelihood that the ECJ will rule against litigant governments. Second, the greater the costs of an ECJ ruling to important domestic constituencies or to the government itself, the greater the likelihood that the litigant government will not abide by the decision. Third, the greater the costs of a ruling and the greater the number of EU member governments affected by it, the greater the likelihood that they will respond collectively to rein in EU activism—with new secondary legislation revisions of the EU treaty base.

80. Schockweiler, Wivens, and Godart 1990.

So much for the normal science. Our analysis also sheds light on the broader issue of whether the ECJ is the master of legal integration or, ultimately, the servant of national governments. The ECJ is manifestly neither master nor servant. As is more generally true with respect to scholarship on European integration, engaging in labeling debates—neofunctionalism versus intergovernmentalism, for instance—is unproductive. Instead, research should concentrate on deriving empirically testable propositions from logical theoretical arguments and then systematically evaluating them against the data. This article represents our attempt to do this in the context of the strategic interactions between the ECJ and EU member governments.

Our basic approach should be equally applicable to other facets of the legal politics game in Europe, such as the relationship between the ECJ and courts within member states. Our argument could also shed light on the behavior of the dispute resolution panels that have been set up in the context of NAFTA and the WTO. In both cases the institutional foundations of the panels are considerably weaker than those underpinning the ECJ. As a result, one would expect the panels to be even more strategic in their decision making than we have argued is the case in the EU.

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