Delegation, Compliance, and Judicial Decision-making in the Court of Justice of the European Union

Sivaram Cheruvu* Jay N. Krehbiel†

April 9, 2021

Abstract

Courts regularly delegate tasks to individual or small subsets of judges. While a substantial literature addresses delegation in the context of American courts, less is known about why and how courts delegate from a comparative perspective. With many of the world's high courts using panel systems (also known as "chambers") by which the court delegates cases to subsets of judges, this limitation of the extant literature leaves a number of empirical and theoretical questions unanswered. We argue that the threat of noncompliance presents one factor influencing a court's delegation of cases to panels. From our expectation that a court will not delegate cases with a greater risk for noncompliance to panels, we then derive empirical implications for case disposition and a court's willingness to rule contrary to the legal merits in a case. An empirical analysis of panel usage in preliminary reference cases at the Court of Justice of the European Union provides evidence supporting our account.

*School of Economics, Political & Policy Sciences, University of Texas at Dallas

†Department of Political Science, West Virginia University

‡Replication materials for this article can be found on the Journal of Law and Courts dataverse.

Introduction

Delegation is a defining feature of modern liberal democracy. Facing seemingly ever more complex policy issues with limited resources, legislative and executive institutions increasingly turn to delegating key parts of the policy making process to "agents" like legislative committees and bureaucratic agencies (e.g., Callander and Krehbiel 2014; Epstein and O'Halloran 1996; Huber and McCarty 2004). While such delegation can leverage the expertise of a legislature's members or the specialization of entities within the administrative state, it comes with risks. For one, an agent who does not share the preferences of the delegating institution – the "principal" – may craft policies that diverge from what the principal would have otherwise set (e.g., Schnakenberg 2015; Moe 1990). For another, agents may base their policy decisions on different concerns than those of the principal, even when they share a policy preference (e.g., Gailmard and Patty 2007; Turner 2017). As a result, the decision of when and how to delegate poses a central question for policy makers (e.g., Bendor, Glazer and Hammond 2001; Bawn 1995).

In this paper, we extend the logic of delegation to a court's use of panels containing a subset of their judges (also known as "chambers") in the judicial decision-making process. While some courts such as the U.S. Supreme Court conduct judicial review en banc, many high courts and courts of appeal have the option of delegating decision-making authority to panels consisting of a subset of judges. Much like delegation in the legislative and executive contexts, these decisions have implications both for the effective functioning of judicial institutions and the content of judicial decisions. Using the context of the Court of Justice of the European Union (CJEU)[1] and its panel system to develop our account and test its empirical implications, we contend that the decision to delegate cases to smaller panels is in part a function of the strategic environment surrounding a case.

While extant studies of panel systems at courts such as the U.S. Courts of Appeals and the Canadian Supreme Court have largely followed the classic principal-agent theory's focus on ideological divergence between actors (e.g., Clark 2008; Giles, Walker and Zorn 2006; Giles et al. 2007; Hausegger and Haynie 2003), we build on the judicial politics literature on strategic judicial

[1]Formally the CJEU consists of the Court of Justice and the General Court. All references to the CJEU in this paper refer to the Court of Justice unless otherwise stated.

decision-making to argue that delegation to panels becomes less likely as the risk of government resistance to an adverse judicial decision increases. Our analysis of preliminary reference cases filed at the CJEU supports this expectation, as the Court was less likely to delegate cases to a panel when confronted with an incentive to behave strategically so as to avoid potential noncompliance or legislative override. Additional analyses of our theory's implications for case disposition provide further support for a strategic account of delegating cases to panels.

The remainder of the paper is organized as follows. The second section develops our theoretical account by placing the use of panels within the larger role of delegation in judicial politics. We then describe the setting for our empirical analysis, the Court of Justice of the European Union, and the data used to test our argument's empirical implications. The fourth section presents the results of our analyses. We conclude with a discussion of the paper's implications for the functioning of courts generally and the CJEU in particular.

Panel Systems and Delegation in the Judiciary

Courts' delegation of cases to subsets of their full plenum of judges are commonplace in many judiciaries around the world. Whether it is through random assignment – as is assumed to be done on many U.S. circuit courts[2] – or intentional assignment to panels,[3] courts' processes of allocating cases to their judges are consequential.[4] When discussing delegation in the judiciary more broadly, the extant principal-agent models of judicial decision-making focus on the judicial hierarchy. This scholarship addresses, among other topics, the probability a higher court will correct a lower court's decisions, how lower courts operate in this strategic environment, and the probability that a Circuit

[2]Some scholars push back against this assumption that all cases on the U.S. Circuit courts are in fact randomly assigned (e.g., Hall 2010) or make mention of the norms on the Circuit courts that each judge must serve on at least one panel with each other judge (e.g., Clark 2008).

[3]The decision-maker(s) on a court determining case assignment to panels varies from court to court. This decision can be carried out, in practice, by a court's president, a group of judges, or the entire court. To be as general as possible, we will refer to the decision-maker(s) assigning cases to panels as "the court".

[4]Some of this scholarship focuses on criminal trials. For example, scholars provide evidence that a defendant's draw of judges can affect their probability of being found guilty and the nature of the sentence they receive (e.g., Alesina and Ferrara 2014; Kastellec 2013, 2016).

court will engage in *en banc* review (e.g., Beim, Hirsch and Kastellec 2014; Cameron, Segal and Songer 2000; Carrubba and Clark 2012; Giles, Walker and Zorn 2006; Kastellec 2011; Tiller and Spiller 1999; Westerland et al. 2010).

Although these models primarily analyze the American judiciary, they are informative to our discussion of panel systems in other judiciaries. Instead of courts using *en banc* review to monitor ideologically distant panels of judges *ex post* (e.g., Clark 2008; Giles et al. 2007) – i.e., a larger panel of judges reviewing the decision already made by a smaller panel of judges – some courts with panel systems make these decisions *ex ante*. A court may be less likely to delegate a case to a specific panel of judges knowing that the judges are ideologically distant from the rest of the court. It may instead delegate a case to a panel of judges that are more ideologically comparable to the court or elect to not hear the case in panels to prevent an ideologically extreme panel from having a disproportionate influence on the court's judgment in a given case.

Similar to *en banc* review for higher courts reviewing the decisions of lower courts, hearing a case outside of panels is costly for a court.[5] For instance, many courts have large caseloads and a backlog of cases for which they have yet to issue a judgment (e.g., Bielen et al. 2018; Dimitrova-Grajzl et al. 2012; Epstein, Landes and Posner 2013; Kenney 2000; Mitsopoulos and Pelagidis 2007; Roussey and Soubeyran 2018; Tridimas and Tridimas 2004). Hearing cases outside of panels adds cases to the workload of each judge and subsequently slows down courts' processing of cases. Furthermore, in addition to the material costs, as more judges are involved in a given case, the process becomes more cumbersome. As George (1999, 218) describes, "seeking one voice can produce the opposite effect by causing intracourt acrimony, ideological polarization, and lost collegiality."[6] Consequently, courts hear considerably fewer cases outside of panels than in panels.

Accounting for the aforementioned costs, then, what are the conditions under which we should expect a court to hear a case outside of panels? Extant theories of *ex post* review emphasize the role

[5]This cost of discretionary review is made explicit in a some recent formal models (e.g., Beim 2017; Beim, Hirsch and Kastellec 2014, 2016).

[6]Epstein, Landes and Posner (2013, 270) provide empirical evidence that rates of dissent are much higher in cases that are heard *en banc* and assert, "Apart from the extra work involved [...], judges are highly sensitive to the rejection of their decisions by their colleagues, as distinct from strangers [...] As a result, frequent *en bancs* take a heavy toll on collegiality."

of judges on ideologically distant panels strategically using the power to dissent to signal to their circuits or higher courts that they should review the panel's decision on a given case (e.g., Beim, Hirsch and Kastellec 2014, 2016; Beim and Kastellec 2014). Authoring a dissent is understood in these accounts as a costly and informative signal to judges in the judicial hierarchy. Since we are interested in settings in which the decision to hear a case in panels is made *ex ante*, theoretical and empirical questions remain of what factors inform a court's decision to send a case to a panel early in the adjudication process.

While ideological accounts provide compelling explanations for the role and function of panels, they necessarily cannot fully address the multifaceted nature of judicial decision-making, particularly the potential influence of strategic concerns resulting from separation-of-powers dynamics. That is, the focus of such accounts on intra and inter-court dynamics leaves unanswered how a court's relationship with other actors in the political system, especially the legislative and executive branches responsible for implementing court decisions, might contribute to the use of panels. With a substantial literature highlighting the impact of inter-institutional dynamics on other key facets of the decision-making process at major high courts (e.g. Krehbiel 2016; Staton 2006; Vanberg 2005), it may similarly be the case that the crucial decision of determining which and how many judges will adjudicate case is at least partly influenced by a court's concern for the political reaction to its decision.

We argue that courts, or those who ultimately set a court's agenda, are sensitive to the risk of noncompliance when deciding whether to delegate a case to panels.[7] Scholars contend that threats of noncompliance affect courts' decision-making in a variety of contexts (e.g., Clark 2011; Carrubba and Gabel 2015; Helmke 2005; Rosenberg 1991; Staton 2010; Vanberg 2005). When facing potential opposition, courts are strategic in their decision-making in order to help build and maintain their institutional prestige (e.g., Gibson, Caldeira and Baird 1998; Carrubba 2009; Staton and Vanberg 2008) and take actions to try and minimize the threat of noncompliance (e.g., Krehbiel 2016; Staton

[7]To be clear, our conceptualization of noncompliance primarily encompasses the probability of legislative override (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016; Vanberg 2001) or executive noncompliance with judicial decision-making (e.g., Bailey 2007; Carrubba and Zorn 2010; Helmke 2002). We make this clarification to distinguish our account from the aforementioned discretionary review literature, which conceptualizes noncompliance as lower courts ruling against the preferences of higher courts (e.g., Beim, Hirsch and Kastellec 2014, 2016).

2006). Given the significance of panel systems for the process and outcome of cases, it is plausible, if not likely, that courts similarly view panels in terms of their strategic significance.[8]

We posit that the threat of noncompliance, and its implications for courts' institutional capacity, influences courts' willingness to delegate decisions to panels. When the risk of noncompliance is high, so too is the potential cost incurred by institution-focused judges if a panel fails to act strategically. That is, delegating a strategically significant case raises the possibility that a panel of judges will place considerations such as ideology, legal philosophy, or career aspirations ahead of concern for the court's long-term institutional position. Retaining such cases provides a clear strategy for avoiding that risk. Consequently, so long as those who determine the usage of panels have a particularly strong concern for their court's institutional position and power,[9] then they should be less likely to delegate a case to panels as the threat to those concerns increases.[10] Such institution-focused judges, nonetheless, are also balancing their preferences for policy. Indeed, inherent in this choice to delegate is perhaps a trade-off between a panel that will push policy in the direction a judge prefers and a court's full-plenum that is likely to protect the court's institutional integrity. When making such a trade-off, judges may be willing to sacrifice their preferences for a particular policy in the short term for their court having the benefits of high institutional legitimacy capable of compelling a government's compliance with its decisions in the long term (e.g., Gibson,

[8]We are not arguing that the risk of noncompliance is the only factor. Much like in classic delegation accounts, ideological differences between the composition of a panel and the full court may be important. Alternatively, delegation of cases to panels may serve a sort of logrolling function by which judges divide cases amongst themselves. Similarly, it may provide something of a spoils system if panel assignment powers are centralized.

[9]Epstein, Landes and Posner (2013) argue that the primary decision-makers at a court – the Chief Justice in the case of the United States Supreme Court – are more likely to care about the court's institutional prestige than the other judges. Using the examples of Justices Rehnquist and Stone moving from Associate Justice to Chief Justice, Epstein, Landes and Posner (2013, 117) state: "A Chief Justice has a greater interest than the other Justices in projecting a sense of a unified Court, for he'll be blamed for poor leadership if the Court is unusually divided, especially if he finds himself on the minority side of the divide. Hence we expect the Chief Justice to vote less ideologically than he did as an Associate Justice. This is not to say that his ideology will have changed, but only his incentive to express his ideology."

[10]One implication of this line of argument is that the degree to which a court's agenda is controlled by a president or comparable set of judges conditions the ability of institution-focused judges to carry out such a strategy.

Caldeira and Baird 1998). Such strategic institution-focused decision-making allows a court to build the institutional legitimacy necessary to compel government compliance with it decisions (e.g., Carrubba 2009). Similarly, we expect that the utility a judge receives from policy is conditional on the court's ability to compel a government to comply with such a policy and, therefore, affects a judge's decision to delegate. This theorizing leads us to the following hypothesis:

Hypothesis 1 *A case is less likely to be decided by a panel as the probability of noncompliance increases.*

Two empirical implications follow from this argument. First, if the risk of noncompliance is a factor in the use of panels, then it should likewise impact case disposition. Specifically, the delegation of a case to panels should correspond to the likelihood of a ruling against the interests of the government. The reason for this implication is how separation-of-powers constraints generally influence judicial decision-making. When faced with potential threats to their institution, scholars point to courts deferring to the interests of governments (e.g Carrubba, Gabel and Hankla 2008; Vanberg 2005; Staton 2006).[11] That is, empirical manifestations of strategic decision-making are typically viewed as limited to decisions that conform with a government's wishes. Consequently, if a court is more likely to send cases to panels when the need for such strategic behavior is low, then those panels should be more likely to engage in sincere rather than strategic decision-making. As a result, we should observe panels ruling against the interests of the government more frequently than cases handled by the strategically-focused larger compositions of a court. This theorizing leads to our second hypothesis:

Hypothesis 2 *A panel is more likely to rule against a government's interests.*

A second, related implication of our argument regards the likelihood of a court ruling contrary to the legal merits in a case. As noted above, strategic decision-making is often viewed as issuing decisions that conform with a government's interests. Implicit in this conceptualization of strategic behavior is that the court would have ruled otherwise had the threat of noncompliance or other

[11] As Helmke (2005) demonstrates, there are contexts in which strategic behavior entails ruling against the current government. Such environments, however, are primarily those in which concern for noncompliance is outweighed by institutional insecurity.

institutional harm not been present. If our account is correct that courts delegate less strategically constrained cases to panels, then we might expect the decisions in those cases to be more likely to correspond to non-strategic factors than those not delegated. One such factor is the objective legal merits of the case brought before a court.[12] When the legal merits line up against a government's interest in a less strategically important case, the court may be freer to follow the facts and rule accordingly. However, a constrained court may be incentivized to act strategically by ruling in the government's favor despite the legal merits opposing such a holding. Considering we propose panels are given the less strategically significant cases, we therefore anticipate that panels will be less likely than the full court to go against the legal merits by ruling in favor of the government's interests. From this logic, our third hypothesis follows:

Hypothesis 3 *A panel is less likely to rule contrary to legal merits that are opposed to a government's position.*

Application: The Court of Justice of the European Union

To test our hypotheses, we examine the use of panels at the European Union's highest court, the Court of Justice. We choose to analyze the CJEU for several reasons. First, the CJEU's panel system shares key traits with the systems used at many prominent courts such as the Spanish supreme court (e.g., Garoupa, Gili and Gómez-Pomar 2012), the German constitutional court (e.g., Vanberg 2005), and the Italian constitutional court (e.g., Pellegrina and Garoupa 2013) among others, making our analysis relevant for scholars of other judiciaries. Second, the CJEU at times faces a meaningful threat of noncompliance or override that scholars have empirically identified and measured (e.g., Carrubba, Gabel and Hankla 2008; Larsson and Naurin 2016). Third, the CJEU's use of Advocates General (AG) in cases provides a reasonably objective approximation of the legal merits. Lastly, specifically regarding the extensive literature on the CJEU, while scholars argue panel assignment is an indicator of the importance of a case (e.g., Larsson and Naurin 2016; Larsson et al. 2017; Kelemen 2012), they refrain from making a direct argument about how the

[12]Another factor might be judges' ideologies (e.g., Segal and Spaeth 2002).

court's assignment of a case to a panel is a strategic action related to affecting a case's outcome. We address this gap in the literature by positing a strategic account of the Court's use of panels.

One of the key steps in the adjudication process at the CJEU is the determination of how many judges will decide a case. When a case arrives at the Court, the president handles the case before any of the other judges. The president, then, assigns the case to a judge-rapporteur who is responsible for writing a preliminary report on the case. The judge-rapporteur in consultation with the AG (if an AG is presiding over the case) makes a recommendation to the General Assembly of the Court (consisting of all judges and AGs) as to which formation of the court should hear the case. The General Assembly then takes a vote on whether a case should be heard in panels, known as "chambers" at the CJEU, or a larger formation of the Court. Hermansen (2020) argues and provides empirical evidence that the president is strategic in allocating cases to judges-rapporteur, especially in cases in which member states have expressed conflicting positions through the observations they send to the court. We may expect, thus, that the president is likely to assign such a case to a judge-rapporteur that is likely to recommend that the a larger formation of the Court hears the case. Furthermore, according to Kenney (1998, 108) the president "chairs the administrative meeting [General Assembly] which determines the formation of the case – that is, how many judges will hear and decide the case." Although the president has only a single vote in the General Assembly, it is reasonable to expect that the president has a disproportionate informal influence in determining which formation of the Court will hear a case.[13] Drawing from interviews with référendaires (clerks) at the CJEU, Zhang (2016) states, "To be sure, judges face peer pressure when working at the Court [...] This is especially true at the Court of Justice, where the President has exercised discretion in assigning cases according to the competence and expertise of the judges. This works as both a carrot and a stick. It incentivizes the judges to perform, because otherwise they risk being marginalized – assigned to small and unimportant cases and excluded from the Grand Chamber." Since the president determines the allocation of cases, judges are incentivized to defer to the president in order to ensure that the president assigns them desirable cases in the future. Due to their formal

[13]Such informal means of influencing outcomes are common both in courts (e.g. Wahlbeck, Spriggs and Maltzman 1998) and political institutions more generally (e.g., Helmke and Levitsky 2004).

power to determine the allocation of cases to judges and the resulting informal influence over the General Assembly, the president fills the role of principal in our theoretical framework.

While the Court has made increasingly frequent use of panels, it is not required to do so.[14] Rather, the Court largely retains the option of having cases decided by a large number of judges presided over by the Court's President. The precise size and composition of this option has varied over the course of the Court's development and expanded size. Prior to the 2003 Treaty of Nice, this entailed cases either going to the full court or a *petit-plenum* comprised of 9 judges. After the treaty entered into force, a newly defined Grand Chamber of 13 judges became the primary alternative venue for cases not delegated to a smaller panel.[15] In both instances of these larger compositions, the presidents of the smaller panels serve as judges, while the president of the Court presides over proceedings. As CJEU president Koen Lenaerts explained in an interview with the *Wall Street Journal*, "The president and the vice-president are the only two permanent members of the Grand Chamber for the three-year period of their mandate [...] Conducting the hearing and then the deliberations with the fifteen judges is the main task of president" (Pop 2015). Unlike in cases assigned to panels, the Court's president can directly influence the outcome of non-panel cases.

Although the Court hearing all cases outside of panels would prevent the agency costs associated with delegation, it hearing cases outside of panels is costly. One of the reasons why it is costly is that the caseload of the CJEU is large and is increasing substantially over time. The caseload is a substantial cost for a couple reasons. First, the enlargement of the EU has increased its number of member states. The enlargement has, thus, subsequently increased the number of courts that can refer cases to the CJEU through the preliminary reference procedure and the number of cases the Commission brings to the Court against member states in the infringement procedure. Second, the CJEU does not control its docket and therefore cannot refuse to hear cases that the Commission or other member state courts bring to it. Outside of the caseload burden, it is also costly to put a case before the Grand Chamber because of its impact on judges' collegiality. As former CJEU

[14] One exception to this is the ability of a member state to request a Grand Chamber decisions if it is a party to a case. While we cannot control for this since such requests are not recorded, the Court likely can anticipate such requests and preemptively assign cases to the Grand Chamber.

[15] The Grand Chamber now has 15 judges.

Judge Sir David Edward explains, "As has been proved in practice, it's extremely difficult to have a working court system in which 25 judges sit together [...] To some extent this creates a problem because the decisions of the Court of Justice are no longer the decisions of all the judges sitting together and discussing together" (University of Denver 2006, 8).

Given the Court's potential costs, we turn to factors affecting the assignment of cases to panels. A simple answer offered by the literature is that a case's importance is a determinant of the Court's decision of whether to assign a case to panels (e.g., Larsson and Naurin 2016; Kelemen 2012). Judge Edward mentions that judges-rapporteur in their preliminary reports will refer to a case's importance when suggesting to the president which formation of the Court should hear the case. Judges-rapporteur, as per an example by Judge Edward, may state, "I think this is a pretty straight forward case. I think it could easily be handled by a [panel] of three judges. Or, alternatively, this is a case of enormous significance, and [...] should go to the plenary" (University of Denver 2006, 7). Black-boxed in extant explanations, however, are the factors determining a case's importance.

We argue member states' probability of noncompliance with an adverse ruling is one such factor determining a case's importance. If the CJEU is responsive to member state preferences in its judgments, as many scholars contend (e.g., Carrubba, Gabel and Hankla 2008, 2012; Castro-Montero et al. 2018; Gabel et al. 2012; Garrett, Kelemen and Schulz 1998; Larsson and Naurin 2016; Peritz 2018), and the Court's president is more responsive to threats of noncompliance than any individual judge in panels, as we argue, then the president should also consider a member state's probability of noncompliance with an adverse ruling when assigning a case's judge-rapporteur and deciding whether to advocate for the Grand Chamber to hear a case before the General Assembly. In particular, consistent with the extant literature, we assume that in cases that come before the CJEU member states prefer to retain their sovereignty over policy making as opposed to transferring authority to the EU; the Court, conversely, prefers to rule in a direction that transfers more authority to the EU (e.g., Carrubba 2005; Carrubba and Gabel 2015; Krehbiel and Cheruvu N.d.; Rosendorff 2005; Rosendorff and Milner 2001; Koremenos, Lipson and Snidal 2001). A strategic decision by the Court, then, can be understood as one in which it decides in favor of the member states, even when the legal merits favor ruling in a pro-EU direction.

In line with our hypotheses, with regards to the CJEU, we expect that as the probability of noncompliance increases, the less likely the president assigns a case to panels. Similarly, we argue that panels are less sensitive to concerns of the Court's institutional prestige than the Court's president and therefore, on average, are more likely to rule against a government's interest than the larger compositions like the Grand Chamber and *petit-plenum*. Lastly, since strategic decision-making by the CJEU involves ruling in an anti-EU direction even when the legal merits favor a pro-EU decision, we argue that panels are less likely to side with a government's position when the legal merits favor a pro-EU decision.

The Court's behavior in the case *T-Mobile Austria GmbH v Republic of Austria* (C-284/04) highlights these potential dynamics. The case dealt with the interpretation of an EU directive related to the taxation of mobile telecommunications services. Consistent with our account, the Court decided to resolve the case in the Grand Chamber after the case drew briefs from nine member-state governments opposing a pro-integration interpretation of the directive that would have categorized national authorities' auctions of frequencies in the electromagnetic spectrum as economic activity and thus made them subject to the value added tax (VAT). In contrast, the AG argued that the legal merits of the case meant that the Court should adopt such a pro-integration opinion. Again consistent with our account, the Grand Chamber sided with the member-state governments and rejected the AG's opinion, issuing a ruling that restricted the extent of EU law with the conclusion that the actions in question do "not fall within the scope of that directive."

Data, Measures, and Empirical Approach

To test our hypotheses, we use data on the Court's most common proceeding type, references for preliminary ruling. These cases are sent to the Court by the judiciaries of the member states when they face an issue involving European Union law. By bringing the CJEU into direct contact with domestic legal systems and allowing national courts to enforce EU law, scholars describe the preliminary reference procedure as the driving force behind the transformation of the EU legal order (e.g., Alter 2001; Stein 1981; Weiler 1994). Consequently, a substantial literature focuses on the various facets of the preliminary reference procedure (e.g. Carrubba 2005; Gabel et al. 2012; Krehbiel and Cheruvu N.d.; Stone Sweet and Brunell 1998). We focus our analysis on preliminary

reference cases filed at the Court from 1999 to 2008, with judgment-level data drawn from Cheruvu (2019) and Fjelstul (2019) and data from Larsson and Naurin (2016) used to incorporate information on the specific legal issues raised in each case. In total, our data has 1326 judgments addressing 3286 legal issues.

Hypothesis 1. For our first hypothesis, the outcome of interest is whether the Court delegated a case to a panel or instead decided it in its larger composition like the Grand Chamber or *petit-plenum*. Accordingly, the variable *Panel Case* is coded 1 if a case is decided by a 3 or 5 judge panel and 0 if decided by the larger compositions of the Court. As the decision of panel assignment is made at the judgment level, this serves as the unit of analysis for the statistical models.[16]

As our first hypothesis predicts a relationship between the use of panels and the risk of non-compliance, we follow the example of recent scholarship (e.g., Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015; Larsson and Naurin 2016) by relying on the content of briefs filed by member-state governments in each case. As the revealed preferences of member-state governments, these briefs convey information to the Court about the likelihood that they will pressure or otherwise compel compliance from the member state involved in a case (Larsson and Naurin 2016). Consequently, we anticipate the likelihood of delegating a case to a panel to decrease, as the balance of such briefs skews towards opposing further European integration. To calculate this measure, we use the data provided by Larsson and Naurin (2016) on the balance between pro and anti-EU integration briefs weighted by member states' voting power in the Council of Ministers.[17] As their data is collected at the legal issue level rather than the judgment level, we calculate the average of this balance across all legal issues addressed in a judgment. The resulting variable, *Balance of Member State Briefs*, takes positive values when the weighted number of briefs favoring more EU integration outnumber those opposing such a decision and negative values for the inverse. Therefore, we

[16]While there is often a direct correspondence between case and judgment, the Court can combine cases into a single judgment. The composition of the Court is reported for each judgment, however, so we use this for our analysis. Later we control for the number of issues raised in a judgment to account for the potential impact of joined-cases on our analysis.

[17]See Larsson and Naurin (2016) for details on the data collection and coding process.

expect this variable to have a positive relationship with *Panel Case* indicating that the likelihood of delegation to a panel increases the more the balance of briefs favors greater EU integration.

We include a series of control variables to address alternative explanations for the Court's use of panels. Consider the standard account of panels focused on the salience or legal novelty of a case. As such cases may similarly be politically sensitive ones, we need measures of a case's importance to avoid confounding our key variables. To this end, we control for the total number of briefs filed by member-state governments with the variable *Total Member State Briefs*, which is weighted by a member state's voting weight in the Council. Second, the variable *Number of Legal Issues* is the total number of legal issues in a judgment identified by Larsson and Naurin (2016). Similarly, we account for the legal novelty of a case by including the variable *Number of Cited CJEU Precedents*, which is a count of the number of CJEU precedents cited in a given case. Additionally, we include a dummy variable for whether the Advocate General, whose role we discuss in greater detail in our empirical approach for the third hypothesis, provided the Court with a pro-EU integration opinion on any of the legal issues in a case.

Turning to the source and subject matter of the cases, the variable *High Court Referral* is coded 1 if a case was referred by a member state's high court and 0 otherwise. We further control for the relative size of the member state in which a case originated by including the variable *Member State QMV Share*, which is the voting power of the originating member state in the qualified majority voting procedure. We also include both member state fixed effects and a series of dummy variables for the following policy areas: free movement of goods, agriculture, free movement of workers, right to establishment, free movement of service, free movement of capital, transportation, competition, taxation, customs union, social provisions, environment, and consumer protection. As a judgment can address multiple policy areas, each policy area is coded as a separate variable.

We additionally control for political and institutional factors surrounding each judgment. To account for the position of the government of the member state from which a case originated, the variable *Government EU Integration Position* uses the Chapel Hill Expert Survey's question on the "overall orientation of the party leadership towards European integration." On a scale from 1 (Strongly Opposed) to 7 (Strongly in Favor), we assign each judgment the value given to the head of government's party in the survey fielded closest to the government's election or reelection to

office.[18] To account for revisions to the Court's procedure that came into effect in 2005, we include the dichotomous variable *Post-2005 Decision* that takes a value of 1 for decisions issued after 2005.

Table 1: Descriptive Statistics of Judgment Data

Statistic	N	Mean	St. Dev.	Min	Max
Panel Case	1,326	0.783	0.412	0	1
Balance of Member State Briefs	1,326	−0.038	0.101	−0.667	0.474
Total Member State Briefs	1,326	0.112	0.095	0.000	0.733
Number of Legal Issues	1,326	2.478	1.836	1	18
Government EU Integration Position	1,304	6.063	0.686	2.890	7.000
High Court Referral	1,326	0.414	0.493	0	1
Member State QMV Share	1,322	0.072	0.033	0.011	0.117
Number of Cited CJEU Precedents	1,326	7.904	6.796	0	49
Post-2005 Decision	1,326	0.511	0.500	0	1
Free Movement of Goods	1,326	0.109	0.311	0	1
Agriculture	1,326	0.149	0.357	0	1
Free Movement of Workers	1,326	0.103	0.304	0	1
Right to Establishment	1,326	0.158	0.365	0	1
Free Movement of Services	1,326	0.137	0.344	0	1
Free Movement of Capital	1,326	0.065	0.246	0	1
Transportation	1,326	0.029	0.167	0	1
Competition	1,326	0.199	0.399	0	1
Taxation	1,326	0.173	0.379	0	1
Customs Union	1,326	0.077	0.267	0	1
Social Provisions	1,326	0.083	0.276	0	1
Environment	1,326	0.041	0.198	0	1
Consumer Protection	1,326	0.048	0.213	0	1

Hypothesis 2. Turning to the second and third hypotheses, which focus on the Court's judgments, we use the data provided by Larsson and Naurin (2016) on the Court's disposition in legal issues raised in preliminary references.[19] Consider the second hypothesis, which predicts that cases delegated to panels will be more likely to result in a ruling counter to the government's interests. Following our earlier discussion on the EU integration-national sovereignty dimension largely defining CJEU decisions, the outcome of interest for each legal issue is whether or not the Court ruled in a manner that expands or otherwise favors increased European integration. The variable *Pro-EU Integration Ruling* is thus coded 1 if the CJEU ruled in a pro-integration direction on a legal issue and 0 otherwise.

The independent variable of theoretical interest for the second hypothesis is *Panel Case*, as our argument posits that cases delegated to smaller panels are more likely to result in a ruling contrary to the government's preferred outcome. Accordingly, we expect *Chambers* to have a positive rela-

[18]The survey was fielded in 1999, 2002 and 2006 during the time period of our study. However, not all countries were included in these surveys and so we draw on the results provided in later surveys fielded in 2010 and 2014. This issue, however, only affects a small number of cases coming from smaller member states like Luxembourg.

[19]This approach of focusing on the Court's decisions at the legal issue rather than judgment level is similar to that adopted by Carrubba, Gabel and Hankla (2008) and Carrubba and Gabel (2015).

tionship with *Pro-EU Integration Ruling*. We then include a series of control variables to account for alternative explanations and address potential omitted variable bias. We include *Balance of Member State Briefs*, as we expect it to correspond with *Panel Case* and previous work has shown a relationship between such briefs and case disposition (Larsson and Naurin 2016; Carrubba, Gabel and Hankla 2008). To address potential confounding by member-state government preferences regarding EU integration, we include *Government EU Integration Position*. Similarly, we include *Advocate General Opinion* as a control for the legal merits supporting a pro-EU integration ruling and the case-level variable *Number of Cited CJEU Precedents* to control for legal novelty. The variable *Member State QMV Share* accounts for the possibility that the Court considers the relative size of member states when engaged in decision-making. We again account for the Court's 2005 procedural change by including the variable *Post-2005 Decision*. Finally, we include the policy area controls described in our empirical approach for the first hypothesis.

Hypothesis 3. Lastly, we turn to our empirical approach for the third hypothesis. Recall that this hypothesis predicts that one implication of the strategic behavior we propose is that a full court (or comparable composition) is more likely than panels to rule in favor of a government's preferred position despite legal merits to the contrary. As such, we need a variable capturing instances of the Court's deciding to not issue a pro-EU integration ruling even though the legal merits of the case support such a ruling. We accomplish this by leveraging information on both the Court's disposition of legal issues and the Advocate-General's opinion on those same legal issues.

Although appointed by member states, AGs do not serve as judges at the Court but rather a form of "legal expert helping the ECJ make good law" (Carrubba and Gabel 2015, 93). This role has led scholars to use the AG's opinion on legal issues as a proxy measure for the legal merits independent of the political context surrounding a case (e.g. Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015; Larsson and Naurin 2016). Similar to previous studies, we argue that the AG's position is a reasonable approximation for a case's legal merits. The AG does not represent a litigant in a case but rather is an institutional member of the CJEU that has the responsibility of reviewing case materials and writing an opinion to answer a case's legal questions. The AG writes their opinion independently of the judge-rapporteur and delivers it at the end of the oral procedure. Importantly, the AG does not participate in the judges' deliberations. As Dashwood

(1982, 211) describes, "Once the [AG's] opinion has been read the case disappears behind the wall of secrecy that surrounds the Judges' deliberations." Although AGs at the Court are subject to six-year renewable terms and therefore may be susceptible to political pressure from the member states, Carrubba and Gabel (2015, ch.4) provide evidence that AGs are generally not responsive to the preferences of the member state that appointed them when their member state sends a brief to the Court supporting a particular outcome in the case. They further provide evidence that member states only send briefs to the AGs they appointed to the Court in 6 percent of the legal issues in their dataset spanning cases from 1960 - 1999. Given the descriptive and empirical evidence, we argue that our presumption that AGs' opinions are reflective of a case's legal merits is well-substantiated by the existing literature. Thus, we consider a pro-EU integration opinion from the AG to be indicative of an issue for which the legal merits are in opposition to a member-state government's preferences. The strategic behavior of interest in the third hypothesis, therefore, is instances of the Court not issuing a pro-integration ruling on an issue despite the presence of a pro-integration AG opinion. The variable *Contrarian Decision* is coded 1 in such instances and 0 otherwise.

The key independent variable for the analysis of the third hypothesis is *Panel Case*, which we anticipate having a negative relationship with *Contrarian Decision*. With respect to control variables, we seek to address the possibility that a relationship between panels and decisions contrary to AG opinions is a consequence of the AG simply getting a case "wrong" in the particularly complex or otherwise difficult cases handled by Court's larger compositions. We do so by including two variables that might explain instances of the Court ruling contrary to the AG's opinion. First, the variable *Anti-EU Integration Commission Brief* is coded 1 if the European Commission files a brief arguing against greater EU integration ruling on an issue. Second, we include *Balance of Member State Briefs* since the Court may be more likely to ignore the AG's opinion when the balance of briefs oppose more EU integration. In addition to these controls, we include member state and policy area controls, *Member State QMV Share*, *Government EU Integration Position*, *Number of Cited CJEU Precedents* and *Post-2005 Decision* to again address the Court's procedural development. Table 2 provides descriptive statistics for the legal issue-level variables used in the analyses of hypotheses 2 and 3.

Table 2: Descriptive Statistics of Legal Issue Data

Statistic	N	Mean	St. Dev.	Min	Max
Pro-EU Integration Ruling	3,286	0.364	0.481	0	1
Contrarian Decision	3,286	0.059	0.235	0	1
Panel Case	3,286	0.743	0.437	0	1
Advocate General Opinion	3,286	0.322	0.467	0	1
Balance of Member State Briefs	3,286	−0.035	0.112	−0.740	0.486
Member State QMV Share	3,253	0.069	0.033	0.011	0.117
Number of Cited CJEU Precedents	3,286	8.588	7.292	0	49
Post-2005 Decision	3,286	0.346	0.476	0	1
Anti-EU Integration Commission Brief	3,286	0.251	0.434	0	1
Free Movement of Goods	3,286	0.114	0.318	0	1
Agriculture	3,286	0.156	0.363	0	1
Free Movement of Workers	3,286	0.096	0.294	0	1
Right to Establishment	3,286	0.165	0.371	0	1
Free Movement of Services	3,286	0.144	0.351	0	1
Free Movement of Capital	3,286	0.061	0.239	0	1
Transportation	3,286	0.036	0.187	0	1
Competition	3,286	0.194	0.396	0	1
Taxation	3,286	0.158	0.364	0	1
Customs Union	3,286	0.073	0.260	0	1
Social Provisions	3,286	0.082	0.274	0	1
Environment	3,286	0.047	0.213	0	1
Consumer Protection	3,286	0.048	0.213	0	1

Empirical Approach. For ease of interpretation, we estimate a series of linear probability models. As Angrist and Pischke (2009) demonstrate, OLS provides results similar to logit when utilizing a binary dependent variable. For robustness we include logit results for our models of interest in the appendix. For each of the hypotheses, we first estimate a bivariate model with issue area and member state fixed effects, and then include the relevant control variables. As the data for the second and third hypotheses is structured by legal issue, we estimate models with standard errors clustered by judgment.

Results

Table 3 presents the results of our analysis of the first hypothesis. As expected, the results indicate that the likelihood of a case being delegated to one of the CJEU's panels increases as the risk of noncompliance decreases. Importantly, this result is robust to the inclusion of a series of control variables accounting for case aspects like the total number of member state briefs and the number of legal issues raised in each judgment [20] As the results of Model 2 demonstrate, *Balance of Member State Briefs* exerts a substantively significant influence on the Court's decision to assign a case to

[20]The results are additionally robust to the inclusion of year fixed effects and the use of logistic regressions. See appendix for details and results of each robustness test.

panels even after accounting for the total number of briefs and legal issues in a case.[21] As the coefficient indicates, a shift in *Balance of Member State Briefs* from -0.5 to 0.5, which covers nearly the full range of the variable, corresponds to a 23.5% increase in the probability of a case being assigned to panels. Or, to give a concrete example, a shift in *Balance of Member State Briefs* from two standard deviations below to two standard deviations above the mean, which is roughly equivalent to comparing a case where Germany and France oppose greater EU integration with one in which those major member states do favor such a ruling, increases the likelihood of a case going to a panel by nearly 11%. Although such a comparison is one between two extremes with one case generating unusually strong pro-EU integration sentiment from the member states and one that instead generates strong anti-EU integration views from EU governments, it provides a sense of the upper-bound of the potential impact the threat of noncompliance may have on the Court's procedural choice. As Figure 1 shows, though, the substantive significance of this relationship is not limited to such extreme outlier cases and shifts in member-state government briefs. The figure presents the predicted probability of the Court delegating a case to a panel based on the balance of member-state government briefs, with negative values on the x-axis indicating member state opposition to a pro-EU integration ruling and positive values indicating support for such a decision. A modest shift of one standard deviation - the rough equivalent of a brief filed by one of the EU's smaller member states like Hungary or the Netherlands - increases the likelihood of a case being heard a panel by nearly 3%. Given that the vast majority (74%) of cases go to panels, even this modest shift represents a non-trival impact on the Court's behavior highlights the sensitivity of the Court to member state interests and reflects similar findings regarding the

[21]These results further appear robust to potential unmeasured confounding. Following the methodology proposed by Linden, Mathur and VanderWeele (2020), Mathur et al. (2018), and VanderWeele and Ding (2017), we calcuate the "e-value" for each model including control variables. This measures "the minimum strength of association on the risk ratio scale that an unmeasured confounder would need to have with both the exposure and the outcome, conditional on the measured covariates, to fully explain away a specific exposure-outcome association" (Mathur et al. 2018, e45). Consequently, higher values indicate that stronger confounders would be necessary to explain away the relationship between the covariate of interest and the outcome variable. For *Balance of Member State Briefs* in Model 2, the e-value is 2.75 with a lower confidence bound of 1.21, meaning that to explain away the variable's relationship there would have to be an unmeasured confounder associated with both variables by a risk-ratio of 2.75 above and beyond the measured confounders.

Court's decision-making (Carrubba, Gabel and Hankla 2008; Carrubba and Gabel 2015; Larsson and Naurin 2016).

Table 3: OLS Analysis of Panel Use at the CJEU (H1)

	Model 1	Model 2
Balance of Member State Briefs	0.568***	0.235**
	(0.111)	(0.113)
Total Member State Briefs		-0.982***
		(0.126)
Number of Legal Issues		-0.0126**
		(0.00629)
Number of Cited CJEU Precedents		-0.00815***
		(0.00167)
Post-2005 Decision		-0.0531
		(0.0377)
Advocate General Opinion		-0.0221
		(0.0219)
High Court Referral		-0.0271
		(0.0234)
Member State QMV Share		-4.320**
		(1.522)
Government EU Integration Position		0.00570
		(0.0217)
Constant	0.810***	1.173***
	(0.0448)	(0.163)
Member State Fixed Effects	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Observations	1324	1304

Note: *p<0.1; **p<0.05; ***p<0.01. Standard errors in parentheses.

The results of the analysis for the second hypothesis are presented by Models 3 and 4 in Table 4. As predicted by the theory, legal issues decided by the Court's smaller three and five judge panels were more likely to result in a pro-EU integration decision that those handled by the Court's larger compositions. Notably, this empirical relationship holds even after accounting for factors like the legal merits, positions of member-state governments, and policy area.[22] As the predicted probabilities presented in Figure 2 demonstrate, the substantive magnitude of this relationship is not trivial.[23] Whereas the probability of legal issues handled by panels resulting in a pro-EU integration direction is 39%, this drops to 34% for those disposed of by the Court's larger compositions. Although smaller than the impact of the AG's opinion or large shifts in the balance of member state briefs, this change in the likelihood of a pro-EU integration decision corresponds

[22]The e-value for *Panel Case* in Model 4 is 1.414 with a lower confidence bound of 1.13.

[23]We note that although the confidence intervals nearly overlap, this does not mean that the difference between the two is not statistically significant (e.g., Austin and Hux 2002).

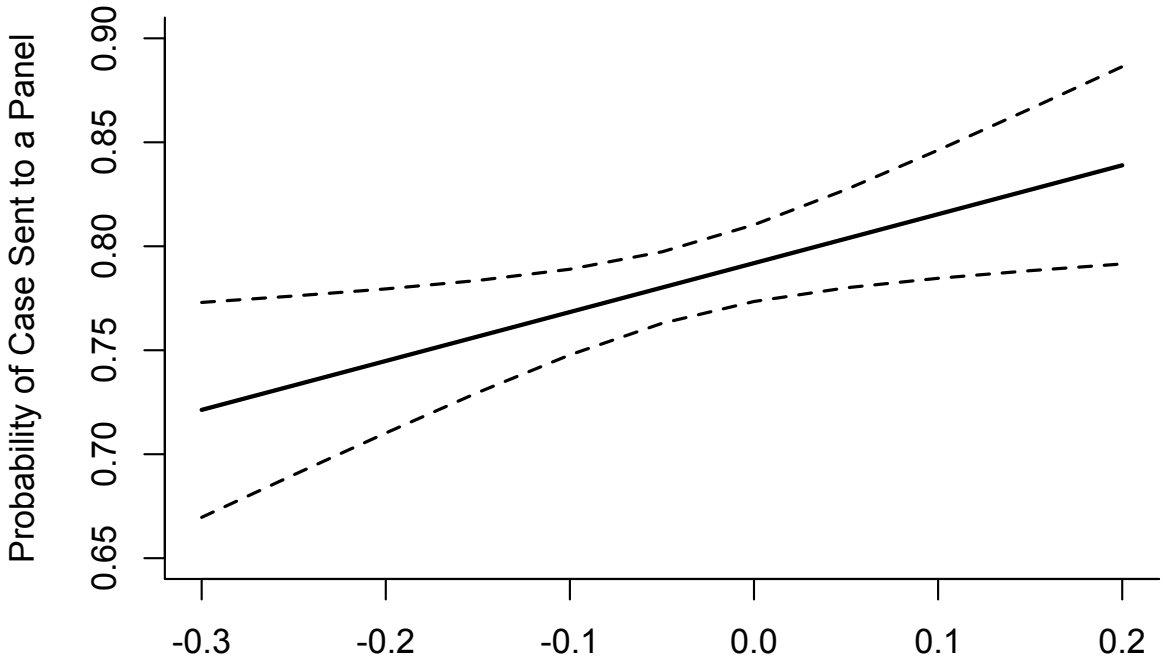

Figure 1: Based on results of Model 2. Dashed lines indicate 90% confidence intervals.

roughly in magnitude to that of adding a large member state like Germany or France to the balance of member state briefs.

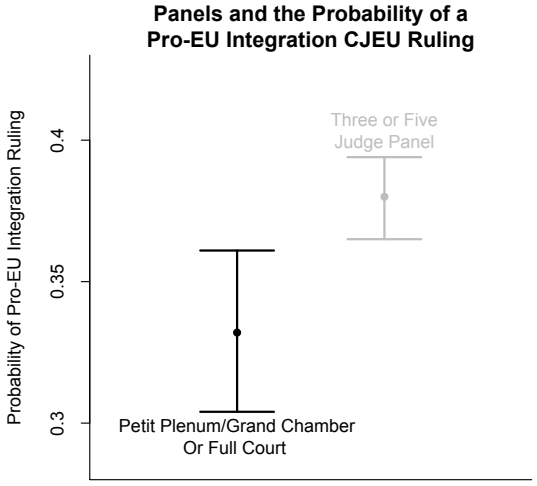

Figure 2: Based on results of Model 4. Bars indicate 90% confidence intervals.

Table 4: Panels and CJEU Decisions (H2 and H3)

	H2 (Case Disposition)		H3 (Contrarian Decisions)	
	Model 3	Model 4	Model 5	Model 6
Panel Case	0.0467*	0.0475**	-0.0323**	-0.0376**
	(0.0263)	(0.0204)	(0.0129)	(0.0134)
Balance of Member State Briefs		0.371***		-0.00383
		(0.0730)		(0.0502)
Advocate General Opinion		0.648***		
		(0.0171)		
Number of Cited CJEU Precedents		0.00235**		-0.000556
		(0.00117)		(0.000646)
Member State QMV Share		-0.285		-0.425
		(0.827)		(0.516)
Government EU Integration Position		-0.0142		-0.0101
		(0.0172)		(0.0100)
Anti-EU Integration Commission Brief				0.0345**
				(0.0119)
Post-2005 Decision		-0.000195		-0.00906
		(0.0212)		(0.0121)
Constant	0.324***	0.188	0.0931***	0.180**
	(0.0511)	(0.124)	(0.0250)	(0.0727)
Policy Area Fixed Effects	Yes	Yes	Yes	Yes
Member State Fixed Effects	Yes	Yes	Yes	Yes
Observations	3279	3214	3279	3214

Note: *p<0.1; **p<0.05; ***p<0.01. Standard Errors clustered by case. Outcome variable is measured at the level of legal issue.

Lastly, we turn to the results of models 5 and 6 in Table 4 testing our third hypothesis. Recall that this hypothesis predicts that panels are less likely than a full court to rule against a government's interests when the legal merits favor such a decision. Empirically, we expect, therefore, that issues decided by panels are more likely to conform with an opinion by the Advocate General recommending a pro-EU integration decision. The results of Models 5 and 6 support this expectation.[24] Issues decided by panels are more likely to conform with an AG's opinion promoting a pro-EU integration. In contrast, the larger compositions were more likely to disregard such a pro-integration opinion from the AG by ruling instead in a manner preserving national sovereignty.[25] While, as Figure 3 shows, the likelihood of such decisions is low, the difference between panels and the larger compositions of the Court is substantial. Whereas the probability of a panel decision against a pro-EU integration AG opinion is only roughly 5%, the probability of a larger composition

[24]The result of Model 6 is particularly noteworthy given the inclusion of a control variable for a Commission opinion not favoring a pro-EU integration decision. Substantively, this suggests that the Court is more likely to disregard the AG's opinion when it has an observation from the Commission supporting such a decision.

[25]The e-value for *Panel Case* in Model 6 is 1.58 with a lower confidence bound of 1.26.

of the Court doing so is nearly double at 9%. To the extent that such decisions reflect strategic behavior, these results further support our argument linking the delegation of decision-making to panels with the political environment surrounding a case.

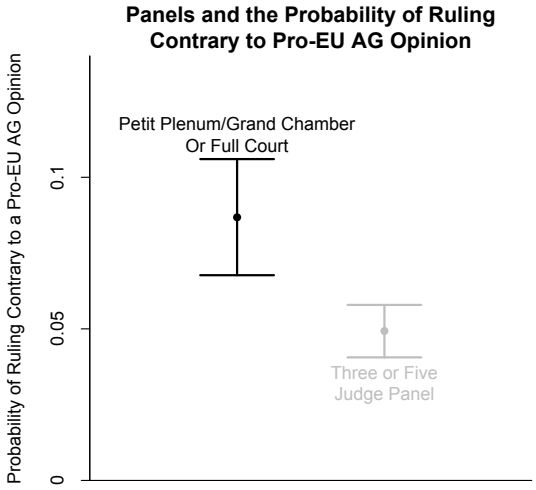

Figure 3: Based on results of Model 6. Bars indicate 90% confidence intervals.

Conclusion

Just as examples of delegation abound in the context of legislative and executive institutions, courts regularly delegate tasks to individual or small subsets of judges. While a substantial American politics literature has addressed instances of such delegation like opinion assignment at the Supreme Court (Lax and Cameron 2007; Maltzman and Wahlbeck 2004) and the use of *en banc* review at the Courts of Appeals (Clark 2008; Giles, Walker and Zorn 2006; Kastellec 2011), less is known about why and how courts delegate from a comparative perspective. With many of the world's high courts using panel systems by which the court delegates cases to subsets of judges, this limitation of the extant literature leaves a number of empirical and theoretical questions unanswered. Building on standard delegation accounts, we argue that institutional concerns raised by the threat of noncompliance present one factor influencing the use panels. From our expectation that cases with a greater risk for noncompliance will not be sent to panels, we then derive empirical implications for case disposition and the willingness of a court to rule contrary to the legal merits in a case.

An empirical analysis of panel usage in preliminary reference cases at the Court of Justice of the European Union provides evidence supporting our account.

These results have a number of implications for the functioning and operation of courts in general and the CJEU in particular. First, we contribute to an extensive literature analyzing how courts leverage institutional tools when facing threats of noncompliance (e.g., Krehbiel 2016; Staton 2010; Vanberg 2005). Second, our theory and results are consistent with other studies that demonstrate the effectiveness and pitfalls of panel decision-making at courts (e.g., Grossman et al. 2016; Farhang and Wawro 2004; Kastellec 2013, 2016; Malecki 2012; Glynn and Sen 2015). Third, with regards to the CJEU, an extensive debate exists regarding whether, and to what extent, the CJEU is responsive to the preferences of member states (e.g., Carrubba, Gabel and Hankla 2008, 2012; Larsson and Naurin 2016; Larsson et al. 2017; Stone Sweet and Brunell 1998, 2012). In addition to analyzing the disposition of cases, we theorize over and provide empirical evidence that the probability of member state noncompliance affects the president's decision over panel assignment. Our argument goes beyond the previous scholarship in asserting that the probability of member state noncompliance affects a case well before the Court writes its judgment.

Our theoretical account and empirical findings also point to potential avenues for future research on both the use of panels specifically and procedural aspects of the judicial process more generally. While we have identified one potential influence on the assignment of cases to panels, a number of other factors likely exist whose influence remain an open empirical question. For example, the role of ideology or the internal politics of a court could well inform which cases are sent to a panel and which are not. Moreover, such factors could interact with concern for compliance. Although we see our theory and empirical analysis as not being specific to the context of the CJEU, the substantial variation in panel systems when viewed from a comparative perspective remains a largely untapped source of leverage for theory development and empirical analysis. Future research may consider other examples of delegation in the judicial context. At the CJEU, for example, the President's assignment of the judge rapporteur for each case presents a clear instance of delegation. In other courts, such as the German Constitutional Court, the distribution of specific issue areas to subsets of the Court or individual judges similarly provide potential examples of delegation taking place within the judiciary.

References

Alesina, Alberto and Eliana La Ferrara. 2014. "A test of racial bias in capital sentencing." *American Economic Review* 104(11):3397–3433.

Alter, Karen J. 2001. *Establishing the supremacy of European law: The making of an international rule of law in Europe.* Oxford University Press.

Angrist, Joshua D and Jörn-Steffen Pischke. 2009. *Mostly Harmless Econometrics: An Empiricist's Companion.* Princeton University Press.

Austin, Peter C and Janet E Hux. 2002. "A brief note on overlapping confidence intervals." *Journal of Vascular Surgery* 36(1):194–195.

Bailey, Michael A. 2007. "Comparable Preference Estimates across Time and Institutions for the Court, Congress, and Presidency." *American Journal of Political Science* 51(3):433–448.

Bawn, Kathleen. 1995. "Political Control Versus Expertise: Congressional Choices about Administrative Procedures." *American Political Science Review* 89(1):62–73.

Beim, Deborah. 2017. "Learning in the Judicial Hierarchy." *Journal of Politics* 79(2):591–604.

Beim, Deborah, Alexander V Hirsch and Jonathan P Kastellec. 2014. "Whistleblowing and compliance in the judicial hierarchy." *American Journal of Political Science* 58(4):904–918.

Beim, Deborah, Alexander V Hirsch and Jonathan P Kastellec. 2016. "Signaling and Counter-Signaling in the Judicial Hierarchy: An Empirical Analysis of En Banc Review." *American Journal of Political Science* 60(2):490–508.

Beim, Deborah and Jonathan P Kastellec. 2014. "The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Cases." *Journal of Politics* 76(4):1074–1088.

Bendor, Jonathan, Amihai Glazer and Thomas Hammond. 2001. "Theories of Delegation." *Annual Review of Political Science* 4:235–269.

Bielen, Samantha, Wim Marneffe, Peter Grajzl and Valentina Dimitrova-Grajzl. 2018. "The duration of judicial deliberation: Evidence from Belgium." *Journal of Institutional and Theoretical Economics JITE* 174(2):303–333.

Callander, Steven and Keith Krehbiel. 2014. "Gridlock and Delegation in a Changing World." *American Journal of Political Science* 58(4):819–834.

Cameron, Charles M, Jeffrey A Segal and Donald Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme." *American Political Science Review* 94(1):101–116.

Carrubba, Clifford J. 2005. "Courts and Compliance in International Regulatory Regimes." *Journal of Politics* 67(3):669–689.

Carrubba, Clifford J and Christopher Zorn. 2010. "Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States." *Journal of Politics* 72(3):812–824.

Carrubba, Clifford J, Matthew Gabel and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102(4):435–452.

Carrubba, Clifford J, Matthew Gabel and Charles Hankla. 2012. "Understanding the Role of the European Court of Justice in European Integration." *American Political Science Review* 106(1):214–223.

Carrubba, Clifford J and Matthew J Gabel. 2015. *International Courts and the Performance of International Agreements: A general theory with evidence from the European Union*. Cambridge University Press.

Carrubba, Clifford J and Tom S Clark. 2012. "Rule Creation in a Political Hierarchy." *American Political Science Review* 106(3).

Carrubba, Clifford James. 2009. "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems." *Journal of Politics* 71(1):55–69.

Castro-Montero, José Luis, Edwin Alblas, Arthur Dyevre and Nicolas Lampach. 2018. "The Court of Justice and treaty revision: A case of strategic leniency?" *European Union Politics* 19(4):570–596.

Cheruvu, Sivaram. 2019. "How do institutional constraints affect judicial decision-making? The European Court of Justice's French language mandate." *European Union Politics* 20(4):562–583.

Clark, Tom S. 2008. "A Principal-Agent Theory of En Banc Review." *Journal of Law, Economics, and Organization* 25(1):55–79.

Clark, Tom S. 2011. *The Limits of Judicial Independence*. Cambridge University Press.

Dashwood, A. A. 1982. "The Advocate General in the Court of Justice of the European Communities." *Legal Studies* 2:202–215.

Dimitrova-Grajzl, Valentina, Peter Grajzl, Janez Sustersic and Katarina Zajc. 2012. "Court output, judicial staffing, and the demand for court services: Evidence from Slovenian courts of first instance." *International Review of Law and Economics* 32:19–29.

Epstein, David and Sharyn O'Halloran. 1996. "Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test." *Journal of Politics* 58(2):373–397.

Epstein, Lee, William M Landes and Richard A Posner. 2013. *The behavior of federal judges: A theoretical and empirical study of rational choice*. Harvard University Press.

Farhang, Sean and Gregory Wawro. 2004. "Institutional Dynamics on the U.S. Court of Appeals-Minority Representation under Panel Decision Making." *Journal of Law, Economics, & Organization* 20(2):299–330.

Fjelstul, Joshua C. 2019. "The Evolution of European Union Law: A new data set on the Acquis Communautaire." *European Union Politics* 20(4):670–691.

Gabel, Matthew J, Clifford J Carrubba, Caitlin Ainsley and Donald M Beaudette. 2012. "Of Courts and Commerce." *Journal of Politics* 74(4):1125–1137.

Gailmard, Sean and John W Patty. 2007. "Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise." *American Journal of Political Science* 51(4):873–889.

Garoupa, Nuno, Marian Gili and Fernando Gómez-Pomar. 2012. "Political Influence and Career Judges: An Empirical Analysis of Administrative Review by the Spanish Supreme Court." *Journal of Empirical Legal Studies* 9(4):795–826.

Garrett, Geoffrey, R. Daniel Kelemen and Heiner Schulz. 1998. "The European Court of Justice, National Governments, and Legal Integration in the European Union." *International Organization* 52(1):149–176.

George, Tracey E. 1999. "The Dynamics and Determinants of the Decision to Grant En Banc Review." *Washington Law Review* 74:213–274.

Gibson, James L, Gregory A Caldeira and Vanessa A Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92(2):343–358.

Giles, Micheal W, Thomas G Walker and Christopher Zorn. 2006. "Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals." *Journal of Politics* 68(4):852–866.

Giles, Micheal W, Virginia A Hettinger, Christopher Zorn and Todd C Peppers. 2007. "The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals." *American Journal of Political Science* 51(3):449–463.

Glynn, Adam N and Maya Sen. 2015. "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" *American Journal of Political Science* 59(1):37–54.

Grossman, Guy, Oren Gazal-Ayal, Samuel D. Pimentel and Jeremy M. Weinstein. 2016. "Descriptive Representation and Judicial Outcomes in Multiethnic Societies." *American Journal of Political Science* 60(1):44–69.

Hall, Matthew. 2010. "Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals." *Journal of Empirical Legal Studies* 7(3):574–589.

Hausegger, Lori and Stacia Haynie. 2003. "Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division." *Law & Society Review* 37(3):635–657.

Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy." *American Political Science Review* 96(2):291–303.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina.* New York: Cambridge University Press.

Helmke, Gretchen and Steven Levitsky. 2004. "Informal Institutions and Comparative Politics: A Research Agenda." *Perspectives on Politics* 2(4):725–740.

Hermansen, Silje Synnve Lyder. 2020. "Building legitimacy: strategic case allocations in the Court of Justice of the European Union." *Journal of European Public Policy* 27(8):1215–1235.

Huber, John D and Nolan McCarty. 2004. "Bureaucratic Capacity, Delegation, and Political Reform." *American Political Science Review* 98(3):481–494.

Kastellec, Jonathan P. 2011. "Hierarchical and Collegial Politics on the U.S. Courts of Appeals." *Journal of Politics* 73(2):345–361.

Kastellec, Jonathan P. 2013. "Racial Diversity and Judicial Influence on Appellate Courts." *American Journal of Political Science* 57(1):167–183.

Kastellec, Jonathan P. 2016. "Race, Context, and Judging on the Courts of Appeals: Race-Based Panel Effects in Death Penalty Cases.".

Kelemen, R. Daniel. 2012. "The political foundations of judicial independence in the European Union." *Journal of European Public Policy* 19(1):43–58.

Kenney, Sally J. 1998. "The Members of the Court of Justice of the European Communities." *Columbia Journal of European Law* 5:101–133.

Kenney, Sally J. 2000. "Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S Supreme Court." *Comparative Political Studies* 33(5):593–625.

Koremenos, Barbara, Charles Lipson and Duncan Snidal. 2001. "The Rational Design of International Institutions." *International Organization* 55(4):761–799.

Krehbiel, Jay N. 2016. "The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court." *American Journal of Political Science* 60(4):990–1005.

Krehbiel, Jay N and Sivaram Cheruvu. N.d. "Can International Courts Enhance Domestic Judicial Review? Separation of Powers and the European Court of Justice." *Journal of Politics*. Forthcoming.

Larsson, Olof and Daniel Naurin. 2016. "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU." *International Organization* 70(2):377–408.

Larsson, Olof, Daniel Naurin, Mattias Derlén and Johan Lindholm. 2017. "Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union." *Comparative Political Studies* 50(7):879–907.

Lax, Jeffrey R and Charles M Cameron. 2007. "Bargaining and Opinion Assignment on the US Supreme Court." *Journal of Law, Economics, & Organization* 23(2):276–302.

Linden, Ariel, Maya B Mathur and Tyler J VanderWeele. 2020. "Conducting sensitivity analysis for unmeasured confounding in observational studies using E-values: The evalue package." *The Stata Journal* 20(1):162–175.

Malecki, Michael. 2012. "Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers." *Journal of European Public Policy* 19(1):59–75.

Maltzman, Forrest and Paul J. Wahlbeck. 2004. "A Conditional Model of Opinion Assignment on the Supreme Court." *Political Research Quarterly* 57(4):551–563.

Mathur, Maya B., Peng Ding, Corinne A Riddell and Tyler J VanderWeele. 2018. "Web Site and R Package for Computing E-values." *Epidemiology* 29(5):e45–e47.

Mitsopoulos, Michael and Theodore Pelagidis. 2007. "Does staffing affect the time to dispose cases in Greek courts?" *International Review of Law and Economics* 27:219–244.

Moe, Terry. 1990. "Political Institutions: The Neglected Side of the Story." *Journal of Law, Economics and Organization* 6:213–253.

Pellegrina, Lucia Dalla and Nuno Garoupa. 2013. "Choosing between the government and the regions: An empirical analysis of the Italian constitutional court decisions." *European Journal of Political Research* 52(4):558–580.

Peritz, Lauren. 2018. "Obstructing integration: Domestic politics and the European Court of Justice." *European Union Politics* 19(2):427–457.

Pop, Valentina. 2015. "ECJ President On EU Integration, Public Opinion, Safe Harbor, Antitrust.".
URL: *https://blogs.wsj.com/brussels/2015/10/14/ecj-president-on-eu-integration-public-opinion-safe-harbor-antitrust/*

Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Second ed. Chicago: University of Chicago Press.

Rosendorff, B Peter. 2005. "Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure." *American Political Science Review* 99(3).

Rosendorff, B Peter and Helen V Milner. 2001. "The Optimal Design of International Trade Institutions: Uncertainty and Escape." *International Organization* 55(4):829–857.

Roussey, Ludivine and Raphael Soubeyran. 2018. "Overburdened Judges." *International Review of Law and Economics* 55:21–32.

Schnakenberg, Keith E. 2015. "Expert advice to a voting body." *Journal of Economic Theory* 160:102–113.

Segal, Jeffrey A and Harold J Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited.* New York: Cambridge University Press.

Staton, Jeffrey K. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50(1):98–112.

Staton, Jeffrey K. 2010. *Judicial Power and Strategic Communication in Mexico.* Cambridge University Press.

Staton, Jeffrey K and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science* 52(3):504–519.

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

Stone Sweet, Alec and Thomas Brunell. 2012. "The European Court of Justice, State Noncompliance, and the Politics of Override." *American Political Science Review* 106(1):204–213.

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

Tiller, Emerson H and Pablo T Spiller. 1999. "Strategic Instruments: Legal Structure and Political Games in Administrative Law." *Journal of Law, Economics, and Organization* 15(2):349–377.

Tridimas, George and Takis Tridimas. 2004. "National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure." *International Review of Law and Economics* 24:125–145.

Turner, Ian R. 2017. "Working smart and hard? Agency effort, judicial review, and policy precision." *Journal of Theoretical Politics* 29(1):69–96.

University of Denver. 2006. "Judge David Edward Oral History.".
URL: *https://www.law.du.edu/documents/judge-david-edward-oral-history/full-transcripts.pdf*

Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45(2):346–361.

Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany.* Cambridge University Press.

VanderWeele, Tyler J and Peng Ding. 2017. "Sensitivity Analysis in Observational Research: Introducing the E-Value." *Annals of Internal Medicine* 167(4):274.

Wahlbeck, Paul J, James F Spriggs and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court." *American Journal of Political Science* 42(1):315.

Weiler, J H H. 1994. "A Quiet Revolution." *Comparative Political Studies* 26(4):510–534.

Westerland, Chad, Jeffrey A Segal, Lee Epstein, Charles M Cameron and Scott Comparato. 2010. "Strategic Defiance and Compliance in the U.S. Courts of Appeals." *American Journal of Political Science* 54(4):891–905.

Zhang, Angela Huyue. 2016. "The Faceless Court." *University of Pennsylvania Journal of International Law* 38(1):71–136.

Delegation, Compliance, and Judicial Decision-making in the Court of Justice of the European Union

Appendices

Robustness Analyses

Full Results. The tables below provide our analysis with the results for the issue area fixed effects. Note that competition is the reference category.

Table A1: OLS Analysis of Panel Use at the CJEU (H1) with Issue Area Results

	Model 1	Model 2
Balance of Member State Briefs	0.568***	0.235**
	(0.111)	(0.113)
Total Member State Briefs		-0.982***
		(0.126)
Number of Legal Issues		-0.0126**
		(0.00629)
Number of Cited CJEU Precedents		-0.00815***
		(0.00167)
Post-2005 Decision		-0.0531
		(0.0377)
Advocate General Opinion		-0.0221
		(0.0219)
High Court Referral		-0.0271
		(0.0234)
Member State QMV Share		-4.320**
		(1.522)
Government EU Integration Position		0.00570
		(0.0217)
Free Movement of Goods	-0.0770*	-0.0373
	(0.0436)	(0.0423)
Agriculture	0.0727**	0.0354
	(0.0356)	(0.0348)
Free Movement of Workers	-0.0776**	-0.0337
	(0.0383)	(0.0375)
Right to Establishment	-0.0998**	-0.0774**
	(0.0393)	(0.0382)
Free Movement of Services	0.0550	0.0715*
	(0.0425)	(0.0412)
Free Movement of Capital	0.0115	0.0284
	(0.0466)	(0.0459)
Transportation	-0.173**	-0.131**
	(0.0658)	(0.0642)
Free Movement of Capital	0.0137	0.0246
	(0.0356)	(0.0345)
Taxation	0.183***	0.152***
	(0.0365)	(0.0355)
Customs Union	0.187***	0.113**
	(0.0538)	(0.0523)
Social Provisions	-0.000193	-0.0161
	(0.0431)	(0.0421)
Environment	0.0699	0.0590
	(0.0572)	(0.0552)
Consumer Protection	0.0257	0.0487
	(0.0527)	(0.0511)
Constant	0.810***	1.173***
	(0.0448)	(0.163)
Member State Fixed Effects	Yes	Yes
Observations	1324	1304

Note: *p<0.1; **p<0.05; ***p<0.01. Standard errors in parentheses.

Including Year Fixed Effects. To ensure that our results are not an artifact of the Court's growing caseload over the time period of our data, we re-estimate Model 2 with year fixed effects. The results of the analysis for the first hypothesis are presented in Table A2, while A3 does so for the second and third hypotheses.

Table A2: OLS Analysis of Panel Use at the CJEU (H1) with Year Fixed Effects

	Model 1A	Model 2A
Balance of Member State Briefs	0.569***	0.221*
	(0.111)	(0.113)
Total Member State Briefs		-1.036***
		(0.128)
Number of Legal Issues		-0.0128**
		(0.00631)
Number of Cited CJEU Precedents		-0.00817***
		(0.00166)
High Court Referral		-0.0303
		(0.0234)
Member State QMV Share		-4.211
		(2.622)
Government EU Integration Position		-0.00162
		(0.0224)
Advocate General Opinion		-0.0218
		(0.0220)
Post-2005 Judgment		-0.203***
		(0.0598)
Constant	0.752***	1.231***
	(0.0547)	(0.224)
Member State Fixed Effects	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Year Fixed Effects	Yes	Yes
Observations	1324	1304

Note: *p<0.1; **p<0.05; ***p<0.01

Table A3: OLS Analysis of Panel Use and CJEU Decisions (H2 and H3) with Year Fixed Effects

	H2 (Case Disposition)	H3 (Contrarian Decisions)
	Model 4?	Model 6?
Panel Case	0.0431**	-0.0369**
	(0.0206)	(0.0134)
Balance of Member State Briefs	0.365***	-0.00529
	(0.0731)	(0.0502)
Advocate General Opinion	0.646***	
	(0.0173)	
Member State QMV Share	-1.273	-1.278
	(1.957)	(1.251)
Number of Cited CJEU Precedents	0.00232*	-0.000657
	(0.00118)	(0.000654)
Anti-EU Integration Commission Brief		0.0368**
		(0.0118)
Post-2005 Decision	-0.00533	-0.0382
	(0.0475)	(0.0258)
Constant	0.284	0.198*
	(0.183)	(0.107)
Policy Area Fixed Effects	Yes	Yes
Member State Fixed Effects	Yes	Yes
Year Fixed Effects	Yes	Yes
Observations	3214	3214

Note: *p<0.1; **p<0.05; ***p<0.01

Logistic Regressions. We re-estimate our OLS models 1-6 as logistic regressions. The results of the analysis for the first hypothesis are presented in Table A4, while A5 does so for the second and third hypotheses.

Table A4: Logistic Analysis of Panel Use at the CJEU (H1)

	Model 2B	
Balance of Member State Briefs	3.329***	1.299*
	(0.714)	(0.769)
Total Member State Briefs		-6.057***
		(0.916)
Number of Legal Issues		-0.0875**
		(0.0423)
Number of Cited CJEU Precedents		-0.0522***
		(0.0118)
High Court Referral		-0.194
		(0.173)
Member State QMV Share		-37.00**
		(12.39)
Advocate General Opinion		-0.198
		(0.162)
Government EU Integration Position		0.0279
		(0.169)
Post-2005 Judgment		-0.573*
		(0.315)
Constant	1.569***	4.576***
	(0.293)	(1.321)
Member State Fixed Effects	Yes	Yes
Policy Area Fixed Effects	Yes	Yes
Observations	1308	1290

Note: *p<0.1; **p<0.05; ***p<0.01

Table A5: Logistic Analysis of Panels and CJEU Decisions (H2 and H3)

	H2 (Case Disposition)		H3 (Contrarian Decisions)	
	Model 3?	Model 4?	Model 5?	Model 6?
Panel Case	0.206*	0.365**	-0.527**	-0.611**
	(0.119)	(0.160)	(0.194)	(0.197)
Balance of Member State Briefs		3.081***		-0.0575
		(0.639)		(0.799)
Advocate General Opinion		3.283***		
		(0.123)		
Member State QMV Share		-2.406		-8.402
		(6.290)		(9.244)
Number of Cited CJEU Precedents		0.0179**		-0.00839
		(0.00867)		(0.0114)
Anti-EU Integration Commission Brief				0.568**
				(0.178)
Post-2005 Decision		0.00393		-0.151
		(0.161)		(0.210)
Constant	-0.744***	-1.483	-2.287***	-0.673
	(0.224)	(0.906)	(0.366)	(1.371)
Policy Area Fixed Effects	Yes	Yes	Yes	Yes
Member State Fixed Effects	Yes	Yes	Yes	Yes
Observations	3258	3194	3224	3166

Note: *p<0.1; **p<0.05; ***p<0.01