

The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited

Tommaso Pavone – Princeton University
tpavone@princeton.edu

R. Daniel Kelemen – Rutgers University, New Brunswick
dkelemen@polisci.rutgers.edu

*Paper to be presented at the 2019 EUSA Conference, Denver, CO
Friday, May 10, 2019*

Abstract

This article analyzes how the domestic judicial politics sparked by the European Union's (EU) legal development have evolved over time. In particular, interactions between national courts and the European Court of Justice (ECJ) have been an indispensable motor of European integration. Scholars have traced how lower national courts empowered themselves by cooperating directly with the ECJ to apply EU law and challenge government statutes as well as the decisions of their judicial superiors. We argue that the institutional dynamics identified by this “judicial empowerment thesis” proved self-eroding over time, incentivizing domestic high courts to reassert control over domestic judicial hierarchies and influence the development EU law in ways that were also encouraged by the ECJ. We support our argument by triangulating between an analysis of an original dataset of all cases referred to the ECJ from national courts between 1957 and 2013 as well as case study and interview evidence. We conclude by assessing the double-edged consequences of high courts' growing role over transnational legal governance in Europe: While these evolving judicial politics signal the institutional maturation of the EU legal order, they also risk limiting access to the ECJ and weakening the decentralized enforcement of European law.

We would like to thank participants of the 2017 APSA annual meeting and the 2018 Philadelphia Europeanists (PHEW) workshop for invaluable feedback on previous versions of this manuscript. The author ordering is alphabetical: Both authors contributed equally to this manuscript. Correspondence addresses: Tommaso Pavone, 001 Fisher Hall, Princeton University, Princeton, NJ 08544, USA (tel: 248-495-4063); R. Daniel Kelemen, 89 George Street, Rutgers University, New Brunswick, NJ 08901, USA (tel: 848-932-1920).

I. Introduction

Despite being the most consolidated of all 'transnational legal orders,'¹ the European Union lacks the coercive and bureaucratic capacity that national states use to govern from the top down.² EU institutions must therefore project their authority by forging subnational 'compliance constituencies'³ comprised of on-the-ground networks of regulators, NGOs, civic organizations, and lawyers.⁴ Although by some estimates up to forty percent of Member State legislation has come to be partially or fully harmonized by EU law,⁵ the EU relies heavily on actors below the national state to invoke these rules and pressure national governments into compliance.

In this respect, there is no more essential broker of the EU's governance capacity than the national judge. Without the force of law and the authority of domestic courts, the EU would scarcely be able to govern a transnational market spanning half a billion people and over two dozen national states.⁶ This raises one of the great puzzles of European integration that we revisit in this article: How did the EU's supreme court – the European Court of Justice (ECJ)⁷ 'tucked away in the fairyland Duchy of Luxembourg' with limited resources and uncertain authority – successfully

¹ T.C. Halliday & G. Shaffer, *Transnational Legal Orders* (Cambridge University Press, 2015).

² R. D. Kelemen, 'European States in Comparative Perspective', in O. Fioretos, et al. (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016); R. D. Kelemen & K. McNamara, 'How Theories of State-Building Explain the EU', (European Union Studies Association (EUSA) Bi-Annual Conference 2017).

³ K. Alter, *The New Terrain of International Law* (Princeton University Press, 2014); K. Alter, et al., 'How Context Shapes the Authority of International Courts', (2016) 79 *Law & Contemporary Problems*, 36.

⁴ A.M. Slaughter, *A New World Order* (Princeton University Press 2004); B. Eberlein & A.L. Newman, 'Escaping the international governance dilemma? Incorporated transgovernmental networks in the European Union', (2008) 21 *Journal of Governance*, 25; K. ALTER, *Terrain*, above, no. 3; T. Pavone, 'From Marx to Market', (2019) 55 *Law & Society Review*, 1.

⁵ A. Toeller, 'Measuring and Comparing the Europeanization of National Legislation', (2010) 48 *Journal of Common Market Studies*, 417.

⁶ R. D. Kelemen, *Eurolegalism* (Harvard University, Press 2011); A. Vauchez, *Brokering Europe* (Cambridge University Press, 2015).

⁷ 'Strictly speaking, Court of Justice of the EU (CJEU) refers to the entire set of EU courts in Luxembourg including both the Court of Justice (ECJ) and the subsidiary General Court. Using the acronym CJEU to refer to the ECJ alone is improper, so we use the term ECJ instead.

join with national courts to fashion 'a constitutional framework for a federal-type structure in Europe?'.⁸ While the ECJ had a clear interest in cajoling national courts into enforcing EU law, why did domestic judges and governments cooperate and gradually accept the ECJ's transformative legal doctrines?

The 'judicial empowerment thesis' (hereafter, the JET) provided a powerful answer to this puzzle. Developed by scholars such as Weiler, Burley and Mattli, and Alter,⁹ the JET extended broader theories of the 'judicialization of politics' at the domestic and international levels.¹⁰ It suggested that ordinary judges in lower level national courts saw engaging in dialogue with the ECJ and accepting its rulings as a way to expand their own powers. The linchpin to this dialogue was a provision of the Treaty of Rome, the so-called preliminary ruling procedure, which enables even the most humble local court to send a 'reference for a preliminary ruling' to the ECJ to obtain an interpretation of those EU laws relevant to the resolution of a dispute before it.¹¹ The procedure empowered ordinary national courts, which previously lacked wide-ranging powers of judicial review and might regularly see their rulings overturned upon appeal, because it enabled them to circumvent their national judicial hierarchy. Lower courts could now refer cases directly to a higher judicial power in Luxembourg –an alternative judicial authority to domestic high courts, or what Alter vividly referred to as a 'second parent' – to challenge government policies or the

⁸ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law*, 1, at 1.

⁹ J.H.H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal*, 2403; A.M. Burley & W. Mattli, 'Europe Before the Court', (1993) 47 *International Organization*, 41; J.H.H. Weiler, 'A Quiet Revolution', (1994) 26 *Comparative Political Studies*, 510; K. Alter, 'The European Court's Political Power', (1996) 19 *West European Politics*, 452.

¹⁰ M. Shapiro & A. Stone Sweet, *On Law Politics and Judicialization* (Oxford University Press, 2002); T. Ginsburg, *Judicial Review in New Democracies: Constitutional courts in Asian cases* (Cambridge University Press, 2003); R. Hirschl, *Towards Juristocracy* (Harvard University Press, 2007); C. Davis, *Why Adjudicate?* (Princeton University Press, 2015).

¹¹ The procedure was outlined in Article 177 of the original Treaty of Rome, now in Article 267 of the Treaty on the Functioning of the European Union (TFEU).

jurisprudence of their superiors.¹² Simultaneously, this procedure empowered the ECJ by providing it with a steady flow of cases and a direct channel into national legal systems. High courts had more to lose from the ECJ's intrusion into their domestic legal orders and were far less enthusiastic; in some cases, they ardently opposed dialogue between lower national courts and the ECJ. However, when ordinary national courts referred cases and applied ECJ rulings, they made Community law¹³ a reality on the ground within Member States – and did so using a procedure that all governments had agreed to in the Treaty of Rome. If higher national courts or national governments wanted to challenge ECJ decisions or their application in their countries, they would have had to defy their own lower courts, something they were unwilling to do as it would have violated widely accepted rule of law norms.¹⁴

The JET fits within a broader scholarship probing the ways subnational domestic actors forge alliances with supranational entrepreneurs to promote policymaking beyond the direct control of state governments.¹⁵ Our goal is to unpack such claims by building on historical institutionalist approaches to the study of legal integration and political development.¹⁶ That is, we do not challenge the JET as an account of the origins of the EU legal order.¹⁷ However, we emphasize that the role subnational actors play in transnational governance may evolve over time.

¹² K. ALTER, *European*, above, n.9, at 466, 467.

¹³ 'Community Law' was the term traditionally used to refer to law deriving from the Treaties, secondary legislation and ECJ rulings. Since the entry into force of the Lisbon Treaty in 2009, Community Law is referred to as 'European Union Law.'

¹⁴ J.H.H. Weiler, *Transformation*, above, n. 8, at 2421.

¹⁵ A.M. Burley & W. Mattli, 'Europe', above, n. 9; L. Hooghe, 'Subnational Mobilization in the European Union', (1995) 18 *West European Politics*, 175; A.M. Slaughter, 'The Real New World Order', (1997) *Foreign Affairs*, 183; A.M. Slaughter, *New*, above, n.4.

¹⁶ J. Mahoney & K. Thelen, 'A Theory of Gradual Institutional Change,' In *Explaining Institutional Change*, Mahoney and Thelen, eds. (Cambridge University Press, 2010); O. Fioretos, 'Retrofitting Financial Globalization: The politics of intense incrementalism', in M. Zurn, et al. (eds), *Historical Institutionalism and International Relations: Explaining institutional development in world politics* (Oxford University Press, 2016).

¹⁷ For a recent reassessment of the JET's explanatory power in the case of Italy, see T. Pavone, 'Revisiting Judicial Empowerment in the European Union', (2018) 6 *Journal of Law & Courts*, 301.

After all, regional integration is an incremental process of institutional change whose trajectory is continually shaped and reshaped by enduring state structures.¹⁸ While this process may initially hinge on networks of subnational and supranational actors who cooperate to circumvent central state institutions, this dynamic can turn out to be only Act I of an ongoing drama. In Act II, the story-line may shift as actors at the apex of deeply entrenched, hierarchical domestic institutions respond by seeking to reassert influence over transnational political development.

That is precisely the dynamic we see unfolding in the exemplary case of European legal integration that we explore in this article. We show that the JET's account of the relationship between national courts and the European Court of Justice explains what turns out to be only Act I of Europe's process of political development through law. We offer an explanation of the new dynamics of Act II, in which national supreme courts shift from begrudgingly accepting a transnational dialogue with the ECJ to gradually displacing lower courts as the ECJ's primary interlocutors. They do not do so by prohibiting lower national courts from referring cases to the ECJ – a move that would be illegal under EU law. Rather, supreme courts transition to vigorously utilizing a dialogue with the ECJ to dissuade lower court rebellions, reassert control over their domestic legal orders, and influence the development of EU law. Importantly, this dynamic increasingly serves the interests of the ECJ, which – due to its rising caseload – now prefers to engage with a limited number of more authoritative high courts.

In short, the JET represents less of a 'self-reinforcing' process of state disaggregation and more a 'self-eroding' process that spurs apex state actors to incrementally reassert their control over domestic hierarchies without challenging the supremacy of EU law outright.¹⁹ In addition to

¹⁸ R. D. Kelemen & T. Pavone, 'The Political Geography of Legal Integration', (2018) 70 *World Politics*, 89.

¹⁹ T. Falletti & J. Mahoney, 'The Comparative Sequential Method', in J. Mahoney & K. Thelen (eds), *Advances in Comparative-Historical Analysis* (Cambridge University Press, 2016).

contributing to debates about the evolving judicial politics of European legal integration, our argument contextualizes recent strand of scholarship analyzing efforts by some supreme courts in Europe to 'revolt' against or 'defy' the authority of the ECJ.²⁰ This literature, which has primarily focused on the efforts of a few constitutional courts, can generate the impression that high courts might actually be increasingly reluctant to cooperate with the ECJ – what Pollack terms the 'sustained resistance view.'²¹ While these outlier cases are undoubtedly important, we demonstrate through a systematic analysis of the universe of domestic court referrals to the ECJ over the past sixty years that these episodes of resistance mask a more fundamental evolution in the judicial politics underlying European integration: The ascendance of domestic high courts as the ECJ's primary interlocutors. To be sure, high courts' growing reference rates does not mean that resistance has been replaced by docile euroenthusiasm. We show with qualitative case study evidence that high courts expect a dialogue with the ECJ to be a two-way street, and they use preliminary references as much to influence the development of EU law as they do to reassert control over their domestic judiciaries.

Finally, we suggest that this institutional evolution is likely to have profound, double-edged consequences for the process of transnational integration and for the EU's rule of law. On the one hand, the growing role of authoritative high courts could encourage the uniform application of EU law within Member States. From this sanguine perspective, the resurgence of high courts can be

²⁰ H. Rasmussen, 'Present and Future European Judicial Problems After Enlargement and the Post-2005 Ideological Revolt', (2007) 44 *Common Market Law Review*, 1661; M. Bobek, 'Landtova, Holubec, and the Problem of an Uncooperative Court', (2014) 10 *European Constitutional Law Review*, 54; A. Dyevre, 'Domestic Judicial Defiance and the Authority of International Legal Regimes', (2016) *European Journal of Law and Economics*, 1; M. Madsen, et al., 'Backlash Against International Courts', (2018) 14. *International Journal of Law in Context*, 197; A. Hoffman, 'Resistance Against the Court of Justice of the European Union', 14 *International Journal of Law in Context*, 258.

²¹ M. Pollack, 'The New EU Legal History', (2013) 28 *American University International Law Review*, 1257, at 1273, 1275.

seen as a reflection of the maturing and strengthening of the EU legal order – a sign that it is coming to resemble a more traditional judicial hierarchy, in which each court 'level' interacts regularly with the one above it. As a result, actors at the apex of domestic relations of authority have less reason to worry that they are being circumvented in the integration process. However, high courts' increasing dominance of the judicial dialogue with the ECJ also has a potentially darker side. If high courts excessively recentralize control over the preliminary reference procedure, they may limit opportunities for private parties to enforce their EU rights before local courts and thus undermine one of the linchpins of the EU legal order. In light of recent attacks on judicial independence and the rule of law in some EU Member States,²² it is important to recognize that centralized systems of dialogue may be more susceptible to political capture. While these insights are derived from the EU experience, they broadly illuminate how the dynamics of judicial politics in transnational legal orders are not static: They evolve and can even partially reverse over time. This finding has particular relevance for the study of 'newer' international courts modeled on the ECJ and the future development of transnational organizations that also institutionalize a dialogue between national and international judges,²³ such as the Andean Community.²⁴

The remainder of this article is divided in four sections. In section II, we present our central arguments, explaining why the relationship between national judiciaries and the ECJ has shifted since the foundational period of EU legal integration. In section III, we provide empirical assessments for these claims through a multi-method approach. Specifically, we combine a statistical analysis of an original dataset of all preliminary references submitted to the ECJ by

²² K.L. Scheppelle & L. Pech, 'Illiberalism Within', (2017) 19 *Cambridge Yearbook of European Legal Studies*, 3.

²³ K. Alter, 'The Global Spread of European-Style International Courts', (2012) 35 *West European Politics*, 135; K. Alter, *Terrain*, above, n. 8.

²⁴ K. Alter & L. Helfer, 'Nature or Nurture? ', (2010) 64 *International Organization*, 563; K. Alter & L. Helfer, *The Law and Politics of the Andean Tribunal for Justice* (Oxford University Press, 2017).

judges in EU Member States through 2013 with a comparative case study of France and Germany and as well as interviews with ECJ judges and analysis of the Court's case law. In section IV, we conclude by discussing the double-edged implications and scope conditions of our findings.

II. Theory

The main argument of this article is that in the European Union, the causal mechanisms underlying the judicial empowerment of low-level courts have gradually given way to a new set of dynamics in which high courts are ascending into being the ECJ's main domestic interlocutors. We do not challenge that the inter-court competition and collaboration identified in JET do provide a convincing account of the origins of transnational integration in Europe. But as is so often the case in the pursuit of knowledge, understanding of the process came just when the process itself was passing away: As Hegel put it, 'the owl of Minerva begins its flight only with the onset of dusk.'²⁵ In other words, the JET illuminated a process of judicial empowerment at the very moment when that process was being gradually replaced by a new set of dynamics.

In the language of historical institutionalism, lower court judicial empowerment proved to be a critical, yet 'self-eroding' causal process.²⁶ Over the past twenty years, national courts of last instance incrementally begun to 'displace'²⁷ ordinary courts of first instance as the ECJ's most important interlocutors. We argue that this dynamic has a bottom-up and a top-down component driven by the shifting structure of incentives of domestic high courts and the ECJ.

First, our explanation elaborates an idea that was already present in Alter's early work. Alter recognized that 'sometimes high courts have made referrals because they expected a decision

²⁵ G.W.F. Hegel, *Elements of the Philosophy of Right* (Cambridge University Press, 1991), at 23.

²⁶ T. Falleti & J. Mahoney, in *Historical-Institutionalism*, above, n. 19, at 222.

²⁷ J. Mahoney & K. Thelen, 'A Theory of Gradual Institutional Change,' In *Explaining Institutional Change*, Mahoney and Thelen, eds. (Cambridge University Press 2010), 15-16.

in their favour and *sought to avoid having lower courts circumvent them by making the referral themselves*'.²⁸ We argue that over time, the incentives identified in the foregoing quote became predominant. By the time the single market was completed and the Treaty of Maastricht was ratified in the early 1990s, all national high courts accepted the European legal system as a *fait accompli*. While the 1990s do not constitute a structural break or 'critical juncture'²⁹ in a historical institutionalist sense, they represent the period when the EU legal order had become sufficiently entrenched that even the most begrudging of high courts – like the French Council of State – recognized their interest in asserting themselves as the ECJ's main domestic partners.³⁰ There are two logics underlying this new incentive structure for high courts. First, as lower courts began to challenge the jurisprudence of their superiors with direct appeals to Luxembourg, high courts had reason to discourage them from circumventing their authority by controlling the terms of the judicial dialogue with the ECJ. As the judicial politics literature has shown, courts do not like to be reversed by other courts – both because it moves the legal status-quo away from their policy preferences and because it suggests the reversed court made a mistake.³¹ This is surely doubly-so when the 'reversal'³² originates from rebellious judicial subordinates collaborating with a 'foreign' court like the ECJ. Submitting more frequent references to the ECJ thus enables high courts to preemptively limit lower court challenges and better control the dialogue with the ECJ to influence the development of EU law.

²⁸ K. Alter, *European Courts*, above, n. 9, at 466, italics added.

²⁹ G. Capoccia & R. D. Kelemen, 'The study of critical junctures,' (2007) 59 *World Politics*, 341.

³⁰ ³⁰ K. Alter, *European*, above, n.9; A.-M. Slaughter, J. Weiler, & A. Stone Sweet, eds. *The European Court and National Courts* (Hart Publishing, 1998).

³¹ R. Posner, *Overcoming Law* (Harvard University Press 1995); W.C. Murphy, et al., *Courts, Judges, and Politics* (Random House, 2005), at ch. 13; N. Garoupa & T. Ginsburg, *Judicial Reputation* (University of Chicago Press, 2015).

³² Of course, a preliminary ruling cannot 'reverse' a domestic court decision formally, but in substance the effect can be the same when its application overturns the case law of a domestic court.

Second, as lower courts began to make use of the preliminary reference procedure and to apply ECJ doctrine in heterogeneous ways, this threatened to undermine legal consistency and legal certainty within domestic legal orders, which was troubling to high courts. Following this more reactive logic, high courts were incentivized to engage in dialogue with the ECJ to settle disagreements amongst their lower courts and ensure the uniform domestic application of EU law. This claim mirrors the analyses of scholars of the American judicial hierarchy, which have found that the US Supreme Court is most likely to hear cases upon appeal (by granting *certiorari*) when there is a split in the case law of the various federal circuit courts.³³

While the foregoing dynamics should play out in all EU Member States, we do not expect them to unfold to precisely the same degree. As we have suggested elsewhere,³⁴ high courts in more centralized Member States should be better able to displace lower courts' control over the preliminary reference than their counterparts in more decentralized states. In more decentralized states, such as Germany, judges are locally recruited, appointed, promoted, salaried, and disciplined. This judicial culture of local autonomy, combined with the absence of top-down means for disciplinary control, renders it difficult for high courts in decentralized states to dissuade their inferiors from engaging in dialogue with the ECJ. By contrast, in more centralized states, such as France, the recruitment, appointment, funding, and promotion of judges is centralized in national institutions. This centralization of authority should provide more opportunities for high courts to influence the behavior of their inferiors.³⁵ Therefore, though we expect high courts in all Member States to attempt to assert greater control over the dialogue with the ECJ, we expect the share of high court references to be more pronounced in more centralized states.

³³ ex. H.W. Perry, *Deciding to Decide* (Harvard University Press, 2009).

³⁴ R. D. Kelemen & T. Pavone, *Political Geography*, above, n. 18.

³⁵ J.J. Vallbe, 'Measuring the Judicial Power of Regions', (University of Barcelona, 2014), Working Paper.

Importantly, the desire of higher national courts to dominate the dialogue with Luxembourg has also suited the ECJ's interests. In the foundational period of European legal integration, the ECJ did its utmost to encourage national courts of first instance to send it references for preliminary rulings. In that era, when the ECJ heard but a trickle of cases per year and its authority was far from entrenched, its main challenge was to find *any* partners in national judiciaries willing to send it cases and apply its rulings.³⁶³⁷ By the late 1990s, the situation had changed profoundly. The ECJ's legal authority was well established and it had a burgeoning inflow of cases, which became so numerous that lengthy backlogs developed. The ECJ no longer worried about attracting too few cases, but about being overwhelmed by too many.³⁸³⁹ Furthermore, as its own case law has expanded and crystallized in many areas, the ECJ had an incentive to promote the entrenchment of the rules already in place, encouraging high quality references that took into account previous ECJ case law. Encouraging a dialogue with high courts while tempering referrals from lower courts became a way for the ECJ to manage its workload and to bolster the effectiveness of its judicial dialogue via the reference procedure.

Indeed, the ECJ understood that with the transition from 6 Member States and only a handful of willing judicial interlocutors in the 1950s/1960s to 28 Member States with thousands

³⁶ E. Stein, above, n. 8; A. M. Burley & W. Mattli, Europe, above, n. 9; K. Alter, *Establishing the Supremacy of European Law: The making of an international rule of law in Europe* (Oxford University Press, 2001).

³⁷ The dynamics driving the early years of European legal integration have been detailed by scholars associated with what Mark Pollack and others have termed the 'new EU legal history' approach (see M. Pollack, *New*, above, n. 21). Exemplars of this approach include: B. Davies & M. Rasmussen, 'Towards a New History of European Law', (2012) 21 *European History*, 305; B. Davies, *Resisting the European Court of Justice* (Cambridge University Press 2013); A. Vauchez, above, n. 6; F. Nicola & B. Davies, *EU Law Stories* (Cambridge University Press 2017).

³⁸ K. Lenaerts, 'The Unity of European Law and the Overload of the ECJ', in I. Pernice, et al. (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006).

³⁹ Even as the number of ECJ judges has only grown modestly from 7 to 28, the number of preliminary references it has received has grown from a couple per year in the 1960s to over 400 per year since 2010. The CJEU as an entire institution - comprising both the ECJ and the General Court - has grown more substantially, but only the ECJ hears references for preliminary rulings.

of referring courts in the contemporary era, the risk of variegated (and sometimes conflicting) applications of EU law and ECJ jurisprudence grew. Though formally ECJ rulings in minor cases referred by lower courts could establish principles that would apply uniformly across the EU, in practice such principles were more likely to be applied far and wide if they were established in cases referred from national high courts. This is not only because the number of interlocutors (and hence the probability of divergent interpretations) is reduced, but because high courts command greater authority within their respective jurisdictions than do lower courts. As a result, when a high court applies a preliminary ruling by the ECJ, it is likely to have a greater influence throughout the country. To be sure, the ECJ still very much values receiving some references from national courts of first instance: The possibility of references from lower courts ensures that high courts cannot leverage their leading position domestically to choke off references or undermine the application of EU law. Since preliminary references remain a foundational element of the EU legal order, the ECJ has strenuously resisted any calls to limit the ability of courts of first instance to dialogue with Luxembourg.⁴⁰ But while it defends the existence of this system, the ECJ has an incentive to signal a greater openness to high courts and displeasure at excessive referrals from lower courts.

In sum, we derive the following hypotheses about the evolving relationship between national judiciaries and the ECJ. Our first hypothesis follows from our central argument that as the EU's supranational legal order becomes entrenched, national high courts should increasingly displace lower courts as the ECJ's interlocutors. A corollary observable implication of this hypothesis would be that high courts in states who acceded to the EU after its legal order had been substantially entrenched will conclude much more quickly than their counterparts in founding

⁴⁰ For instance, see the ECJ's path-breaking decisions in *Simmenthal*, 1978, and *Opinion 2/13*, 2013 at par. 176; 198-199. Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978), ECR 629; *Opinion 2/13* (2014), ECLI:EU:C:2014:2454.

Member States that they should vigorously embrace a dialogue with the ECJ. Joining an already well-developed EU legal order, national high courts in later acceding states will be aware of the experience of their counterparts in long-time Member States and will thus understand the futility of resisting the preliminary ruling system and the benefits of actively engaging in dialogue with the ECJ. In sum:

H1: *The share of national preliminary references submitted to the ECJ from high courts will increase over time as the EU legal order becomes more entrenched.*

Our next hypothesis is a corollary of the first. While we expect high courts in all Member States to increase their dominance in dialogue with the ECJ (H1), for reasons discussed above we expect that the share of high court references will be more pronounced in centralized Member States, hence:

H2: *The greater the centralization of a state, the greater will be the share of total national references submitted to the ECJ from its high courts.*

Our final hypothesis focuses on the ECJ's role in the transformation of its relations with national courts. As noted above, we argue that the concentration of reference activity in the hands of high courts has not been driven by high courts alone: the ECJ has facilitated this process. Specifically, we expect that the ECJ has acted in ways that sent shifting signals to different types of national courts, maintaining a more open posture vis-à-vis national high courts and encouraging them to send references, while signaling to lower courts that they should be more discriminating about submitting references. The ECJ has procedural tools with which it can send such signals: rather than responding to a lower court reference with a full judgment, the ECJ can reply with a reasoned order – a short decision arguing that the referring court could have derived an answer by directly applying the ECJ's existing case law – or a declaration of inadmissibility – a pronouncement that

the referring court misinterpreted the jurisdiction of the ECJ or posed a manifestly unfounded question. As subtle slaps on the wrists of the referring courts, these replies would likely temper lower court eagerness to engage in dialogue with the ECJ. The observable implication of this argument is as follows:

H3: *Over time, the rate at which the ECJ replies to lower court references with declarations of inadmissibility and reasoned orders will increase, both in absolute terms and relative to the rate at which it makes such replies to high court references.*

III: Empirics

Descriptive Statistics: From Lower Court Empowerment to High Court Resurgence

To begin to empirically assess the foregoing hypotheses, we leverage an original dataset that codes all preliminary references to the ECJ submitted by courts in all EU Member States from 1957 to 2013 (n=7969).⁴¹ The dataset was constructed by scraping data from the ECJ's case law database and by manually coding each reference as originating from a lower, mid-level, or high court.⁴² Because our argument hinges on the claim that, contrary to some scholars' assertions, high court reference activity has substantially grown over time throughout the EU,⁴³ we took care not to artificially bias the results in our favor in our coding decisions. As a result, we were particularly

⁴¹ In our dataset, Croatia is omitted, for although it joined the EU in 2013, none of its courts referred cases to the ECJ in its first few months of EU membership. Hence, the analysis covers 27 EU Member States.

⁴² In a small number sui generis cases submitted by quasi- or non-judicial bodies, such as bar associations, administrative commissions, or unique, ad-hoc bodies within Member States, it was difficult or impossible to assign a respective court level. Consequently, those few cases are omitted from empirical analyses.

⁴³ While, A. Stone Sweet & T. Brunell, 'The European Court and the National Courts', (1998) 5 *Journal of European Public Policy*, 66, at 89-90 found that in absolute terms, 'lower courts have produced a minority of references' to the ECJ, their data nonetheless demonstrated that lower court references far outnumbered those of high courts through the mid-1990s. R. Cichowski, *The European Court and Civil Society* (Cambridge University Press, 2007), Provides an updated analysis of social policy references unearthed similar results. And in a recent work exploring the reluctance of lower court judges in Nordic countries to dialogue with the ECJ (M. Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review', (2010) 48 *Journal of Common Market Studies*, 1039, at 1048), nonetheless affirms the prediction that 'lower courts... refer the greatest number of cases as a means of revolting against the often strict national legal hierarchy... for all of the Member States other than the Nordic Countries.'

generous in coding lower courts and particularly strict in coding high courts. For example, a court that has first-instance jurisdiction whose judgments cannot be appealed – such as the Dutch Tariefcommissie in the famous 1963 *Van Gend en Loos* case⁴⁴ – is bottom-coded as a lower court.⁴⁵ As a result, any evidence of growing high court reference activity will, if anything, be slightly understated. In our analyses, we focus primarily on comparing high court reference activity to that of lower courts, given some theoretical ambiguity in the JET about the structure of incentives driving the behavior of mid-level courts.

Leveraging this dataset, we see – congruent with H1 – a consistent and in some cases dramatic increase in the number of preliminary references from domestic high courts, oftentimes coming hand-in-hand with a stalling or decline of reference activity from lower courts. While, as we will demonstrate, scholars like Wind are correct that lower courts in Nordic countries are exceptional in their reluctance to dialogue with the ECJ,⁴⁶ to varying degrees all EU Member States are converging towards the Nordic model of high court-dominated reference activity.

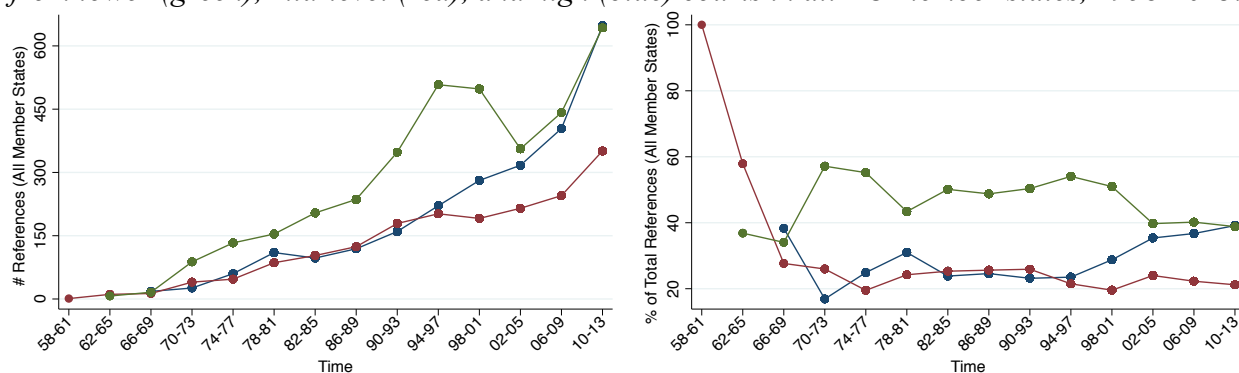
⁴⁴ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963), ECR 1.

⁴⁵ Our coding protocol was as follows: For *high courts*: If the court (a) possesses appellate jurisdiction and (b) their judgments cannot be appealed, then the court is coded as a high court (=1; Examples: Courts of Cassation, Councils of State). Constitutional Courts with constitutional review powers are automatically coded as high courts (=1; Ex: French Constitutional Council, German Federal Constitutional Court). For *mid-level courts*: If the court (a) possesses appellate jurisdiction and (b) their judgments can be appealed, then the court is coded as a mid-level court (=2; Examples: Courts of appeal, regional (as opposed to city/district) courts). If the court (a) possesses appellate jurisdiction and (b) also has first-instance jurisdiction over special cases and (c) their judgements can be appealed, then the court is still coded as a mid-level court (=2; Examples: Courts of appeal w/ first-instance jurisdiction over major crimes/high value cases). For *lower courts*: If the court (a) possesses first instance jurisdiction and (b) their judgments cannot be appealed, then the court is coded as a low court (=3; Examples: Specialized tariff, audit, or labor courts). If the court (a) possesses first instance jurisdiction and (b) their judgments can be appealed, then the court is coded as a lower court (=3; Examples: City/district courts or tribunals, justices of the peace). If the court (a) possesses first instance jurisdiction and (b) also has appellate jurisdiction over special cases and (c) their judgments can be appealed, then the court is still coded as a lower court (=3; Examples: city/district courts or tribunals that can hear appeals from low-value cases before justices of the peace.)

⁴⁶ M. Wind, *Nordics*, above, n. 40.

Beginning with aggregate trends across all EU Member States, we see that the picture is shifting over time (Figure 1). While preliminary references from all court levels grew through the 1990s, those from lower courts grew most significantly and consistently made up approximately half of all reference activity. But since the mid-1990s, the number of lower court references has stalled, while high court references have grown exponentially. As a result, since 2002 the number of references from high courts has matched that from lower courts, and in the 2010-2013 period references from a restricted number of high courts actually outnumbered references submitted by the much greater number of national lower courts.

Figure 1: Number (left-hand graph) and share (right-hand graph) of preliminary references from lower (green), mid-level (red), and high (blue) courts in all EU member states, 1958-2013.



Notes: High court references = Blue; Mid-level court references = Red; Lower court references = Green.

While suggestive, Figure 1 collapses all EU Member States within the same graph, potentially masking region or country-specific trends. Is it possible – as Wind suggests –⁴⁷ that lower courts continue to dominate reference activity in most Member States, and that overall trends are mostly driven by the accession of Finland and Sweden in 1995? A cursory examination of aggregate statistics on references (Table 1) might suggest that this is the case. Relying on categorizations of

⁴⁷ Id.

member states common to the literature on EU legal integration, we see that lower court references make up a slight majority of references in the six founding Member States that inspired the JET (50.9%; compared to 30.5% from high courts) and the nine Postcommunist Member States (37.89%, compared to 35.05% for high courts). Only in the three Nordic countries have high courts made up the greatest share of all references (45.05%, compared to 22.22% for lower courts).

Table 1: *Aggregate preliminary reference totals by court level across EU regions, 1958-2013*

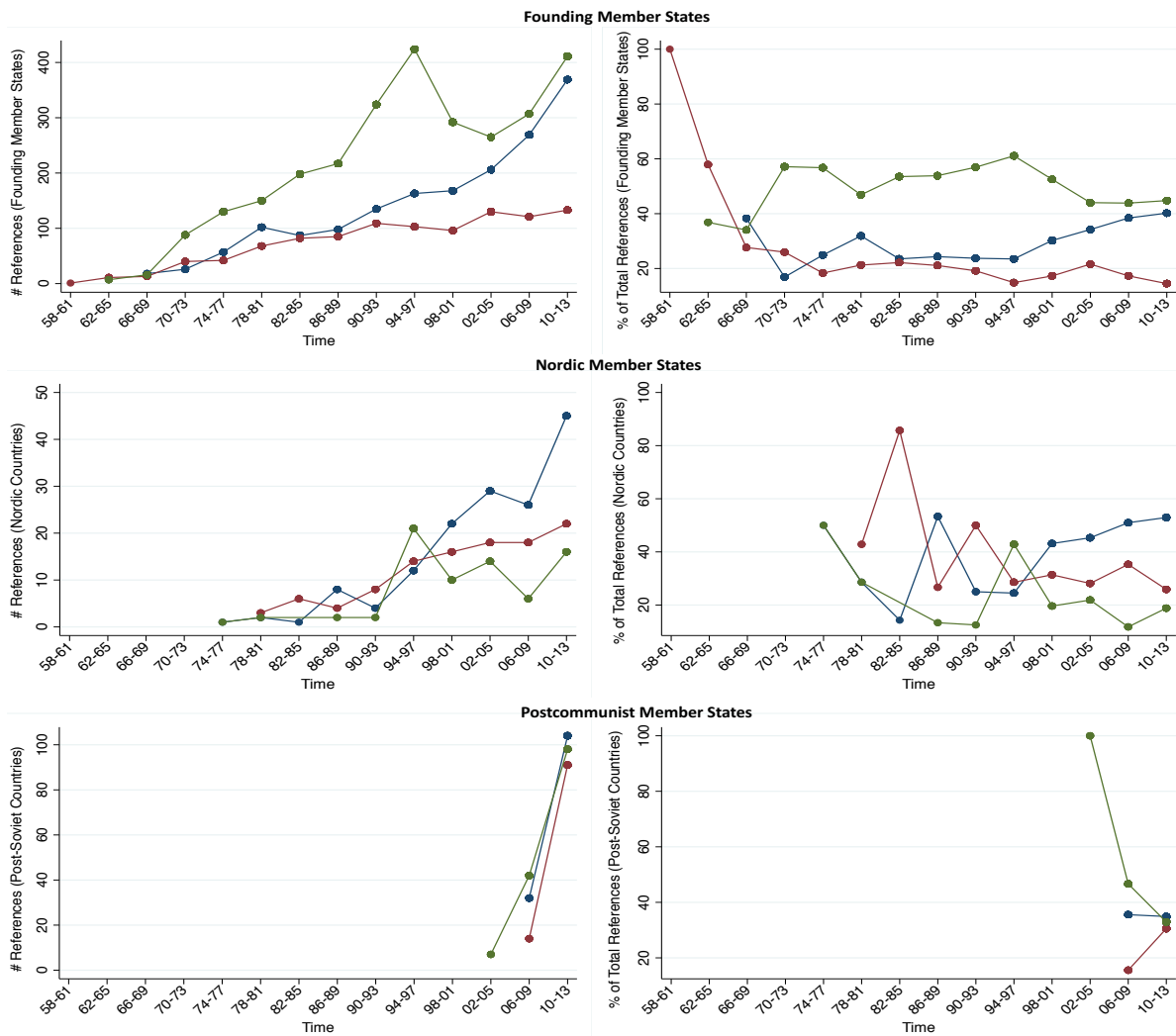
	High Court Refs (#, %)	Mid Court Refs (#, %)	Lower Court Refs (#, %)
Founding MS (n=6)	1698 (30.5%)	1034 (18.6%)	2829 (50.9%)
Nordic MS (n=3)	150 (45.05%)	109 (32.73%)	74 (22.22%)
Postcommunist MS (n=9)	136 (35.05%)	105 (27.06%)	147 (37.89%)
Other MS (n=9)	477 (29.41%)	560 (34.53%)	583 (35.94%)

The foregoing figures, however, mask crucial temporal shifts. Disaggregating Figure 1 into region-specific graphs – in Figure 2 – demonstrates the degree to which the recentralization of reference activity over time in high courts is a cross-regional trend. In the six founding Member States, lower court reference activity peaked in share and absolute numbers in 1994-1997 (and comprised over half of all preliminary references through the 1990s). Since then, lower court references have plateaued and occasionally decreased, whereas high court references have spiked – approaching the totals from lower courts in 2010-2013. In the Nordic Member States analyzed by Wind,⁴⁸ dominance of high courts is in one sense more dramatic (in that high court references have far outnumbered those from lower and mid-level courts since 1998) and in another sense less dramatic (in that lower court references have never consistently referred a majority or plurality of

⁴⁸ Id.

references).⁴⁹ In Postcommunist states that acceded to the EU in the 2004 and 2007 enlargement, high courts have quickly begun referring cases to the ECJ, with their reference activity making up a plurality in 2010-2013 (consistent with H1). Overall, a rise of a high court-driven dialogue with the ECJ is discernible in nearly three quarters of all EU member states.⁵⁰

Figure 2: Number (left-hand) & share (right-hand) of references from lower (green), mid-level (red), & high (blue) courts in founding, nordic, & postcommunist member states, 1958-2013.



⁴⁹ This evidence is consistent with Wind’s argument that the JET holds less explanatory power in Nordic countries. But it is also consistent with a ‘late joiner’ effect: The fact that Sweden and Finland joined a European legal system in 1995 that was already up and running, rendering high court resistance of the preliminary reference system futile.

⁵⁰ Specifically, in 18 of 25 member states from which national courts referred cases to the ECJ through 2013.

Notes: High court references = Blue; Mid-level court references = Red; Lower court references = Green. The y-axis has a different scale for founding, Nordic, and Postcommunist member states to account for different baseline levels in reference activity and make the temporal trends in the graphs easier to read.

The extent of high courts' resurgence is captured by an eye-popping fact: A few dozen high courts across all EU Member States now submit a volume of references to the ECJ comparable to that submitted by thousands of courts of first instance. Furthermore – and providing further support for H1 - the time frame that it takes a Member State's high courts to begin to dominate the judicial dialogue with the ECJ appears to be 'speeding up'. In founding Member States, it has taken nearly six decades for high courts to incrementally match and surpass lower courts in reference activity. In the Nordic states that acceded in the mid-1990s, it has taken less than 20 years. And in the most recent enlargements comprised primarily of Postcommunist countries, high courts have established themselves as the ECJ's primary interlocutors in less than a decade.

Econometric Analysis

To unpack this descriptive finding and move towards explaining variation in the degree of high courts' resurgence, we conducted a cross-sectional time series analysis. First, we seek to assess whether the temporal entrenchment of the EU legal order is an explanatory factor behind the rising references from high courts. After all, extending the JET suggests a sequential interaction between domestic courts and the ECJ. For founding Member States, in Act I lower courts submit references to empower themselves, while high courts resist the ECJ's doctrines of supremacy and direct effect. In Act II, high courts seek to reassert their authority: They accept the supremacy and direct effect of EU law and becoming the primary source of preliminary reference activity (H1). More recently acceding Member States are expected to join the drama in the middle of Act II, thereby truncating the dynamics of high court resistance altogether.

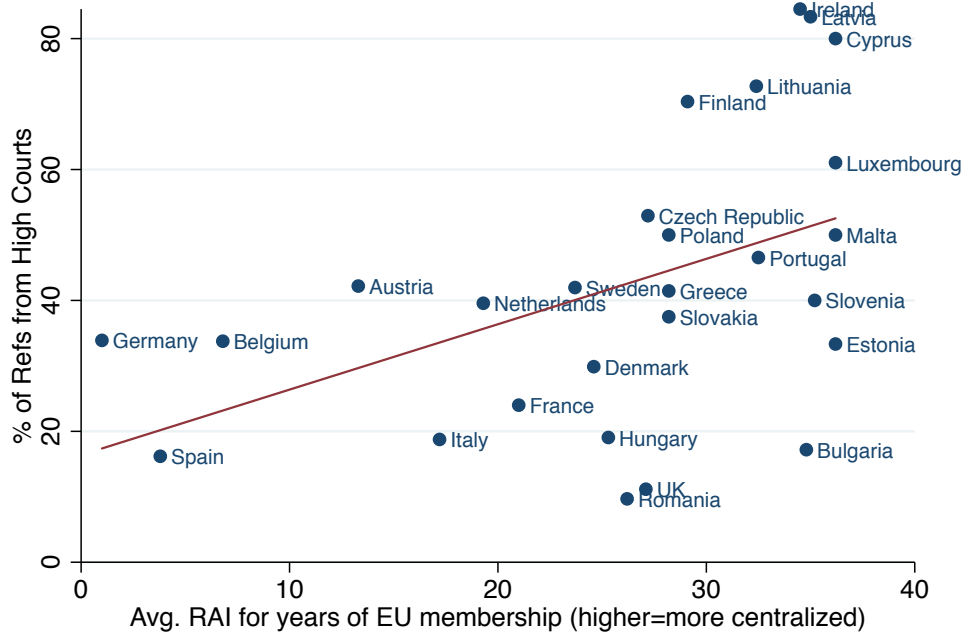
We would thus expect that, *ceteris paribus*, as the lifespan of the EU legal order increases, so would the share of high court references within a Member State. Nevertheless, we expect the share of high court references to be conditioned by the degree of centralization of a state (H2). In our analysis we therefore include a leading measure of state centralization and incorporate country fixed-effects in order to control for unobserved inter-state variation. Specifically, we include a rolling four-year average measure of centralization – the Regional Authority Index (RAI) – developed by Hooghe et al.⁵¹ The RAI is a composite measure of ten dimensions of state (de)centralization,⁵² which capture the 'self-rule' capacity of subnational jurisdictions as well as their ability for 'shared rule,' or to influence national policymaking. In Hooghe et al.,⁵³ a higher RAI indicates a more decentralized state; In the following analyses, we reverse-code the RAI to ease interpretability and ensure the same directionality as our other explanatory variable (time). As a result, in our reversed coding, a higher RAI indicates a more centralized state. To provide some suggestive evidence that the gradual resurgence of high courts' preliminary reference activity may be conditioned by the degree of state centralization, Figure 3 visualizes how more centralized states (with a higher RAI) tend to have a higher share of references from high courts, and vice versa. Indeed, high courts in the most centralized Member States tend to submit more than 50% of all references, whereas in the most decentralized states their share of reference activity is roughly 25%.

⁵¹ L. Hooghe, et al., *Measuring Regional Authority* (Oxford University Press, 2016).

⁵² State centralization is a multi-dimensional concept subject to being measured via multiple complementary indicators (ex. D. Treisman, 'Defining and Measuring Decentralization', (2002) Working Paper; D. Ziblatt, *Structuring the State* (Princeton University Press, 2007)). We focus on Hooghe et al. (2016)'s RAI index because it is arguably the most holistic measure developed to date. Dimensions in Hooghe et al. (2016)'s measure are: institutional depth, policy scope, fiscal and borrowing autonomy, representation, law making, executive, fiscal, and borrowing control, and constitutional reform.

⁵³ L. Hooghe et al., *Measuring*, above, n. 47

Figure 3: *Bivariate relationship between degree of centralization (RAI score) and share of a member state's references originating from high courts*



To more rigorously assess H1 and H2, we run an Ordinary Least Squares (OLS) regression of the yearly share of total references from high courts (the dependent variable) within a given Member State, using a dataset comprising 592 country-year observations. In Model 1, we include our independent variables (a rolling four-year interval and a state's average RAI for each four-year period) and control for country fixed effects; in Model 2, we include a term capturing the potential interaction between the two. Figure 4 displays the regression results, which are consistent with our theoretical expectations. First, Model 1 denotes that the passage of each four-year period – from 1958-61 to 1962-1965, etc. – is associated with a statistically significant 2.56% increase in the share of high court references, holding state centralization constant and controlling for country fixed-effects. This finding corroborates our argument about the evolving nature of judicial politics in the EU legal order as it matures. Since the 1990s, direct effect and supremacy – along with use of the preliminary reference procedure – have been established as the law of the land in the EU.

Consequently, high courts have every reason to assert their authority by becoming the ECJ's primary interlocutors.

Figure 4: *Ordinary Least Squares (OLS) regression of yearly share of high court preliminary references on the passage of time and decentralization (w/ country fixed-effects)*

<i>Independent Variables</i>	Model 1	Model 2
	<i>DV: Yearly HC Share of References</i>	<i>DV: Yearly HC Share of References</i>
4-year interval	2.56*** (5.98)	3.05*** (5.09)
4-year avg. RAI Score	1.21** (2.46)	1.43*** (2.65)
Time*RAI Interaction		-0.02 (-0.7)
Country Fixed-Effects?	Y	Y
Constant	-4.1	-9.17
# of observations	592	592

*p<0.1, **p<0.05, ***p<0.01

Second, Model 1 predicts that moving from the 25th percentile of observed RAI scores (RAI=15, denoting a fairly decentralized state) to the 75th percentile (RAI=31, denoting a more centralized state) is associated with a nearly 20% increase in the share of high court references (from 26.4% to 45.7%), holding other covariates at their means. This supports our claim (H2) that the concentration of authority at the apex of the judiciary in more centralized states provides more opportunities for high courts to assert their pre-eminence in the dialogue with Luxembourg. The inclusion of an interaction term in Model 2 confirms these results and finds that there is no significant interaction between time and state centralization. This is important, because it suggests that there is little evidence of a negative interaction or 'saturation effect', whereby greater state centralization levels off or attenuates the increase in high court references (under the logic that the greater preexisting authority of high courts in centralized states reduces their need to reassert

themselves via a vigorous dialogue with the ECJ). In sum, Figures 5 and 6 visualize the combined effect of time and state centralization in Model 2 to facilitate interpretability:

Figure 5: *Predicted share of high court references from a more centralized and a more decentralized state, 1962-2013*

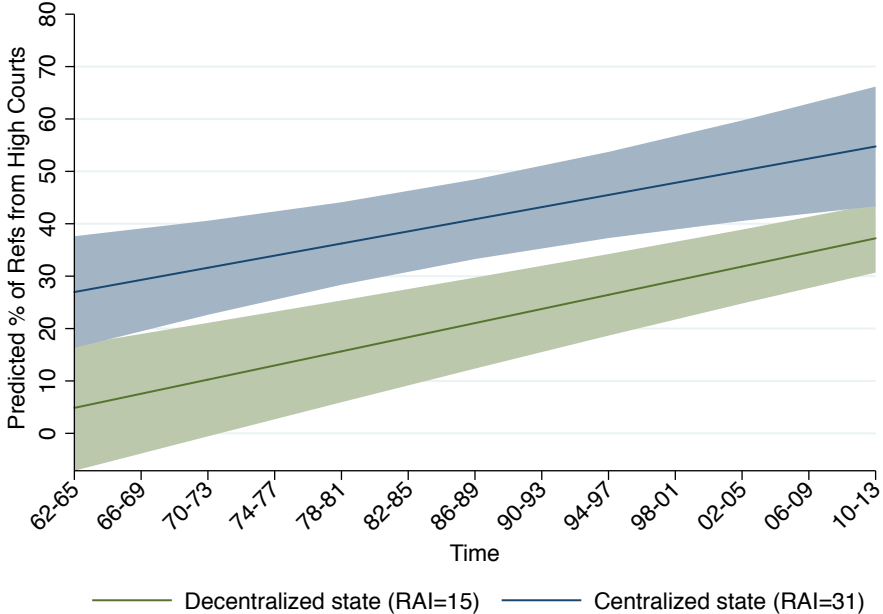
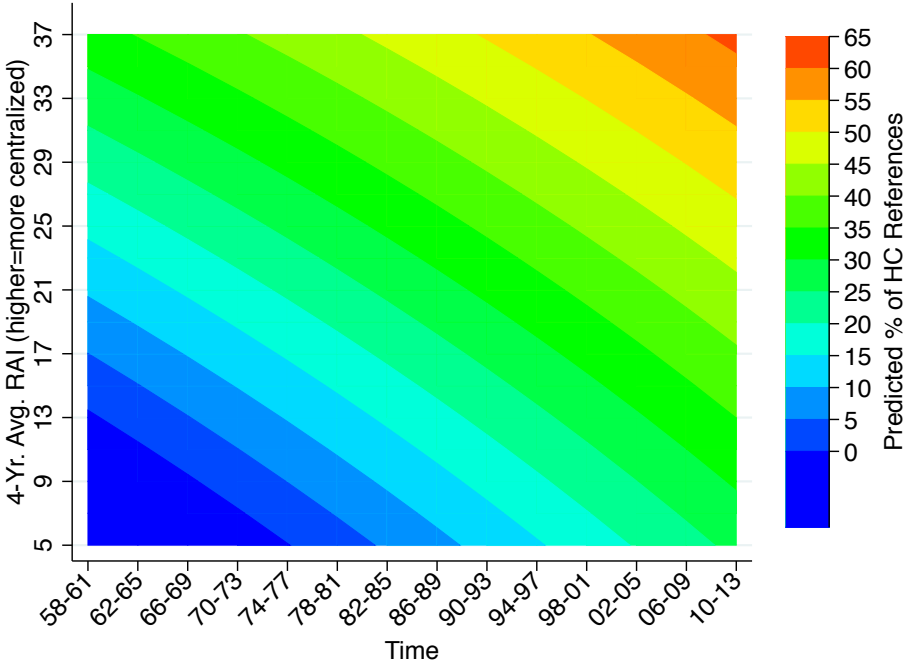


Figure 6: *Contour plot of the predicted share of high court references as a function of time and state centralization*



Specifically, Figure 5 displays a plot of the growing predicted high court reference share for an EU Member State as time passes for both a fairly decentralized state (whose RAI=15 (25th percentile)) and a more centralized state (whose RAI=31 (75th percentile)), holding other covariates at their means. Figure 6 visualizes this result with a contour plot, illustrating via color coding the predicted share of ECJ referrals from high courts for any given combination of time period and RAI score (where the colors range from blue (high courts are predicted to account for 0% of all national referrals to the ECJ) to red (high courts are predicted to account for over 60% of all national referrals to the ECJ)). Taken together, Figures 5 and 6 demonstrate that the share of high court references from a decentralized state with a RAI of 15 is predicted to have increased by approximately 30% over sixty years, from below 5% in the early 1960s to 35-40% in the early 2010s. The parallel prediction for a centralized state with a RAI of 31 is a 30% increase in the share of high court references over the same time period, from 25-30% in the early 1960s to 55-60% in the early 2010s. In other words, Model 2 predicts that as the EU legal order has entrenched itself over the past six decades, high courts in the more centralized Member States should tend to submit more references to the ECJ than all mid-level and lower courts combined.

Unpacking High Courts' Variegated Resurgence: A Comparison of France and Germany

While the foregoing econometric analysis is consistent with our argument, qualitative case study analysis is best suited to unpacking the mechanisms underlying the variegated resurgence of high courts over the preliminary reference procedure. In particular, it allows us to unpack whether variables that can only be proxied imperfectly via quantitative measures – such as the temporal entrenchment of the EU legal order – are shaping judicial politics within specific domestic contexts. While a parsing of the historical record for all Member States is beyond the scope of this

article, we conduct a comparative case study of two Member States – France and Germany – to qualitatively unpack and assess our causal claims.

The selection of France and Germany is appropriate for several reasons. First, both are founding Member States of the EU, such that both countries' judicial politics have been shaped by the progressive entrenchment of the EU legal order over the past six decades.⁵⁴ Second, France is a more centralized unitary state (with an average recoded RAI of 21) whereas Germany is a more decentralized federal state (with an average recoded RAI of 1), allowing us to assess how the hierarchical organization of state authority conditions the evolution of preliminary reference activity. Third, a comparative case study analysis allows us to measure centralization more precisely than the RAI – by probing the organization of France and Germany's judiciary – and to provide a fine-tuned cross-country comparison. In this light, we focus on the French and German administrative judiciaries. This not only ensures that we are comparing courts with similar jurisdiction (rather, than, say, comparing preliminary references from French civil courts to German fiscal courts, whose competences are very different), but it equally maximizes variation in centralization across the two cases.

Specifically, the French administrative hierarchy is exemplary of a centralized, hierarchical judiciary: The supreme administrative court – the Council of State – not only centralizes continuing judicial training (in its Bureau de Formation), but it also appoints its own 'councillors' to preside the courts of appeal, chairs the body that handles judicial promotions and careers, manages resources for the lower courts (through its General Secretariat) and adjudicates appeals of disciplinary sanctions against judges (in its Litigation Section).⁵⁵ Conversely, the German administrative judiciary allocates substantial autonomy to lower administrative judges, who are

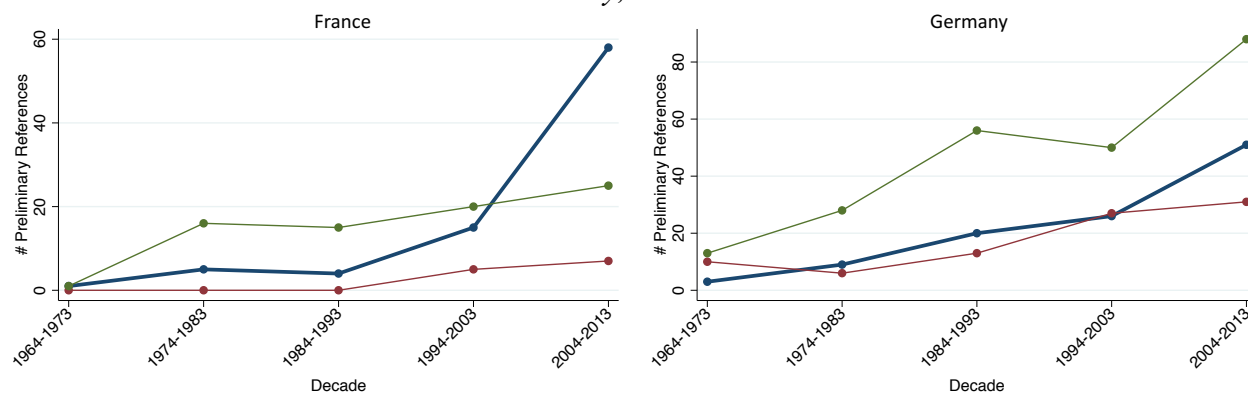
⁵⁴ See, K. Alter, *Establishing*, above, n. 33.

⁵⁵ J. Bell, *Judiciaries Within Europe* (Cambridge University Press, 2006) at 50, 51.

recruited and salaried at the regional (Land) level, and whose careers are scarcely dependent upon the preferences of judges at the Federal Administrative Court.⁵⁶

If our arguments hold, we would expect evidence of high court resurgence in both French and German administrative courts – but that the French Council of State should have been more successful in displacing lower courts as the ECJ's primary interlocutor than the German Federal Administrative Court. Figure 7 provides some supportive longitudinal evidence:

Figure 7: Preliminary references from low, mid, and high administrative courts in France and Germany, 1964-2013



Notes: High court references = Blue; Mid-level court references = Red; Lower court references = Green.

Specifically, while in both France and Germany the supreme administrative court has submitted a growing number of references to the ECJ over the past five decades (the blue line in Figure 7), in France the Council of State now refers more cases than all lower courts combined. Conversely, in Germany lower administrative courts continue to submit a majority of references to the ECJ, despite the growing willingness of the Federal Administrative Court to dialogue with its counterparts in Luxembourg.

Interviews with judges at both the French Council of State and the German Federal

⁵⁶ Id. at 111,120; N. Foster & S. Sule, *German Legal System and Laws* (Oxford University Press, 2010), at 87 & 104.

Administrative Court suggest that this divergence is not due to the differential preferences of supreme court judges. In both high courts, judges expressed a willingness to dialogue with the ECJ to assert greater influence over the development of EU law and its domestic application. In France, the *Commissaire du Gouvernement* invoked this reasoning in the foundational 1989 *Nicolo* case to cajole the Council of State into embracing the supremacy and direct effect of EU law.⁵⁷ Today, counsellors are adamant that they are more than willing to refer cases to the ECJ with the intent 'to ask the Court to specify its jurisprudence, to complete it...[or] because we disagree with its case law, and we want to make it evolve...we make it clear we would like for it to move.'⁵⁸ As a former French administrative judge emphasizes, 'It's rather a more intelligent approach, an approach of influence rather than confrontation or of ignorance...' 'We will dialogue with you, and we will try to influence you. We'll listen to you, but you listen to us as well.'⁵⁹

Judges at the German Federal Administrative Court highlight a similar, gradual shift in motives. Initially, some Federal Court chambers held a 'psychologically counter position' to dialoguing with the ECJ. With time, however, use of the preliminary reference procedure has been 'accepted,' especially to promote the 'quality progress' of ECJ rulings: 'I think there's also a strategic thing,' conveys one Federal administrative judge, 'you see...we motivate our decisions we give to Luxembourg. And we motivate them very exactly.' The purpose is equally to dissuade rebellious references from lower courts, since 'they, from our point of view, [may] misinterpret the national law [when] they pose [a] European question.'⁶⁰ For instance, a lawyer who regularly represents the German state in preliminary references submitted by administrative courts notes how the recent

⁵⁷ J.H.H. Weiler, *Quiet*, above, n. 9, at 522.

⁵⁸ Interview with Mattias Guyomar, Council of State, October 5th, 2017 (in-person).

⁵⁹ Interview with French lawyer and former administrative judge of first instance, September 26th, 2017 (in-person).

⁶⁰ Interview with Ingo Kraft, Federal Administrative Court, January 12, 2018 (in-person).

wave of asylum cases produced divergent applications of EU law, prompting the Federal Administrative Court to submit 'a dozen referrals...to the European Court of Justice in this area of law, which is quite new...two years, three years ago, it was the lower administrative courts [instead].'⁶¹

Importantly, however, the greater autonomy and decentralized organization of German administrative judges provides them with continued discretion to refer cases to the ECJ along the lines suggested by Alter's 'inter-court competition' theory.⁶² The former president of the Federal Administrative Court admits that 'there are quite a lot of 'rebels' in German courts... the higher courts have to be open to new and better arguments of the lower courts... they might have to change their former case law. Wh[ich] happens sometimes!' Another Federal administrative judge emphasizes that 'it's absolutely different [from France],' for lower courts 'try to deviate for sure!... [if] we made a decision, they put the parallel decision up to Luxembourg.'⁶³ Lower administrative judges similarly emphasize that if they are 'not convinced' by the Federal Court's interpretation of EU law, 'we don't have any problems deciding in a different way' or by issuing a preliminary reference. For instance, in 2001 one judge in Baden-Wuerttemberg prominently rebelled against the Federal Administrative Court by referring to the ECJ a politically sensitive case regarding the expulsion of a medically-ill Italian criminal.⁶⁴ When asked about whether he was concerned about how his Federal counterparts interpreted this rebellion, the judge replied: 'I'm a judge of the Land. They have no influence at all here, or nearly none.'⁶⁵

⁶¹ Interview with Ralf Kanitz, Lawyer at the German Ministry of Economic Affairs, November 16, 2017 (in-person).

⁶² K. Alter, *European Courts*, above, n. 9; K. Alter, *Establishing*, above, n. 33.

⁶³ Interview with Ingo Kraft, Federal Administrative Court, January 12, 2018 (in-person).

⁶⁴ See: Joined Cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Wuerttemberg* [2004], ECRI-5257, at operative part, par. 3.

⁶⁵ Interview with Jan Bergmann, Regional Administrative Court of Mannheim, November 28, 2017 (in-person).

Conversely, in France it is an open secret at the Council of State - and at the ECJ - that lower administrative courts 'hesitate, perhaps too much' to dialogue with Luxembourg, their number of preliminary references being 'excessively limited.'⁶⁶ In a recent exchange between the Council and the European Court, one counsellor recalls that the Luxembourg judges inquired with concern, 'why aren't there many referrals from the Tribunals and the Courts of Appeal?' 'We have a problem,' the counsellor admits, 'the Council of State refers a lot, but the other administrative jurisdictions no, or very little anyway.'⁶⁷ This reluctance, the judge adds, is tied to the Council's centralized authority:

'when you refer something, that it's not certain that the Council of State will appreciate it... You must know that the Council of State is not just the supreme administrative court, it's also its administrative organ... It's the Council that administers, that allocates the budget, the resources, that handles judges' careers, et cetera. So there's more influence, if you will, on judges, because everything, everything depends upon the Council of State.'⁶⁸

Indeed, the fact that the Council once infamously quashed a lower court reference in the 1978 *Cohn Bendit* case⁶⁹ sent a signal to the lower courts that still reverberates today: As one former administrative judge explains, 'there was truly a censure. Don't have fun referring questions, it's not worth it.'⁷⁰ Indeed, in contrast to their more rebellious German counterparts, French lower administrative judges emphasized that most preliminary references comprise 'questions that we let the Council of State pose,' since 'for us, it would be an error to detach ourselves from the

⁶⁶ Interview with Bernard Stirn, Council of State, September 20th, 2017 (in-person).

⁶⁷ Interview with Patrick Frydman, Council of State and Paris Administrative Court of Appeal, September 25th, 2017 (in-person).

⁶⁸ Ibid.

⁶⁹ Conseil d'Etat, Assemblée, 22/12/1978, ministre de l'intérieur c/ Cohn-Bendit, Published in the Recueil Lebon, pg. 524.

⁷⁰ Interview with French lawyer and former administrative judge of first instance, September 26th, 2017 (in-person).

jurisprudence of the Council of State and to address ourselves directly to the ECJ.⁷¹ As a result, the dialogue with the European Court is increasingly 'traced at the highest level.'⁷²

This comparative case study suggests that a common logic behind high courts' growing willingness to dialogue with the ECJ is to assert greater influence over the development of EU law and its domestic application. However, the degree to which high courts can succeed is conditioned by the hierarchical organization of the state and its judiciary. In a hierarchical judiciary embedded in a centralized state like France, lower courts are more likely to defer to their superiors and allow them to dominate the dialogue with the European Court. In more decentralized judiciaries embedded within federal states like Germany, inter-court competition is more likely to fuel a continued supply of lower court references.

The ECJ and the Encouragement of High Court Resurgence

The evolving relationship between national judiciaries and the ECJ is not exclusively driven from the bottom-up: The European Court itself has played an important role. Like high courts, the ECJ too has experienced a change in its incentive structure. In the early years, the entrenchment of ECJ authority depended upon lower courts ignoring the resistance of their superiors and dialoguing with it. Kochenov notes that ECJ judges popped open a bottle of champagne to celebrate the first referral from a (lower) national court in 1961.⁷³ But as the number of lower courts referring cases proliferated, as new Member States acceded to the EU (adding even more judicial interlocutors), and as high courts reconsidered their initial reluctance to submit references, encouraging dialogue

⁷¹ Interview with Ghislaine Markarian, Administrative Court of Marseille, October 23rd, 2017 (in-person); Interview with Helene Rouland-Boyer, Administrative Court of Marseille, October 23rd, 2017 (in-person).

⁷² Interview with Fabien Raynaud, Council of State, September 29th, 2017 (in-person).

⁷³ D. Kochenov, "Book Review: Preliminary References to the European Court of Justice, by Morten Broberg and Niels Fenger," (2010) *Legal Issues of Economic Integration* 37.

with domestic high courts – and limiting excessive referrals from lower courts - became increasingly attractive to the ECJ. This 'paradox of success,' as both Joseph Weiler and ECJ President Koen Lenaerts referred to it,⁷⁴ incentivizes the ECJ to ensure that it does not 'collapse under its case-load' by promoting 'a measure of self-restraint on the part of both national courts and this Court.'⁷⁵

Numerous interviews with ECJ judges and Advocates General, as well as an analysis of the ECJ's own case law and practices, further support this interpretation of the Court's motives. For instance, in an interview one Advocate General emphasized that 'the classic case law was to ensure that national courts followed the obligation to send preliminary rulings – in circumstances when there were few cases... now that capacity [to handle preliminary rulings] is exhausted, the court says, 'You are Union courts' – it means do it yourself. Don't send too many references.'⁷⁶ Similarly, an ECJ judge explained that when making presentations on EU law to judges in his home country, 'I often say don't send all EU related cases – I try to tell lower court judges.'⁷⁷ Indeed, as early as the 1995 *Wiener SI* case, Advocate General Jacobs proposed that since 'excessive resort to preliminary rulings seems...increasingly likely to prejudice the quality, the coherence, and even the accessibility, of the [ECJ's] case-law,' lower courts should only refer cases 'of general importance...likely to promote the uniform application of the law,'⁷⁸ a guideline which, while not explicitly formalized by the ECJ, 'captured the attention' of its judges.⁷⁹ As we will see, it also increasingly underlies the ECJ's practices.

⁷⁴ J.H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999); K. Lenaerts, in 'Future', above, n. 35, at 212.

⁷⁵ Opinion of Advocate General F.G. Jacobs, Case C-338/95 *Wiener SI* [1997], ECR I-6495, at paragraphs 14, 18.

⁷⁶ Interview, advocate general at the CJEU, July 14, 2014 (in-person).

⁷⁷ Interview, judge at the CJEU, October 12, 2016 (in-person).

⁷⁸ See supra note 34, at paragraphs 60, 20.

⁷⁹ K. Lenaerts, in *Future*, above, n. 35, at 220.

Indeed, evidence from the ECJ's own case law suggests that its judges have sought to encourage references from high courts while gradually and subtly discouraging lower courts from sending many references. A crystallized body of ECJ case law emphasizes the fact that high courts – unlike lower courts – have an obligation to refer cases to the ECJ (*CILFIT*, 1982) in most instances and that Member States can be held liable for damages wrought by a high court's failure to refer to the ECJ (*Köbler*, 2003; *Traghetti del Mediterraneo*, 2005).⁸⁰ While important, as Figure 1 shows, these cases did not produce a spike or structural break in the number or share of preliminary references from high courts, suggesting a relatively muted doctrinal effect. Indeed, the ECJ's more subtle yet powerful tool to encourage high court references and temper lower court references involves the dialogue enabled by the preliminary reference procedure itself. Specifically, the ECJ increasingly signals whether it is pleased or displeased with the references it receives – and its displeasure is increasingly directed at lower courts (H3).

Its first – and subtler – declaration of displeasure is to reply to the national judge not with a full-fledged judgment, but with a brief 'reasoned order.' Specifically, under Article 99 of the ECJ's rules of procedure, 'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may...decide to rule by reasoned order.'⁸¹ Put simply, an order amounts to the ECJ telling the national judge that had they read up on EU law and the ECJ's jurisprudence, they would have been able to apply EU law on their own

⁸⁰ See: Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (1982), ECR 3415; Case C-224/01, Gerhard Köbler v Republik Österreich (2003), ECR I-10239; Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana* (2006), ECR I-05177.

⁸¹ Court of Justice of the European Union, 'Consolidated Version of the Rules of Procedure of the Court of Justice of 25 September 2012,' at pg. 42. Accessed October 21, 2018, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf

without bothering the ECJ. This response puts into action Advocate General Jacobs' guideline in *Wiener* that lower court references are 'least appropriate where there is an established of case-law,' such that the appropriate ECJ reply is 'simply [to] recall its existing case-law.'⁸²

Its second – and far less subtle – declaration of displeasure is to declare the national judge's preliminary reference manifestly inadmissible. Specifically, under Article 53 of the Court's rules of procedure, 'Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may...decide to give a decision by reasoned order without taking further steps in the proceedings.'⁸³ Unsurprisingly, national judges appear eager to avoid a declaration of inadmissibility. Supporting this interpretation, Pavone's fieldwork and interviews with Italian lower court judges finds that the prospect of a declaration of inadmissibility provokes substantial reticence to refer to the ECJ and is interpreted as an attack on a judge's reputation.⁸⁴ Lower court judges find that 'it's very risky to refer [to the ECJ...because your reference could be declared inadmissible. And this becomes known,' particularly given that the outcomes of preliminary references not only generates local attention, but 'circulates at the European level' as well.⁸⁵

Importantly, although the ECJ increasingly replies to preliminary references by reasoned order or declarations of inadmissibility (see Fig. 8) high courts have mostly been spared. Rather, it is lower courts that have borne the brunt of the ECJ's negative replies, as H3 predicts (see Table 2). References from lower courts are declared inadmissible at four times the rate that high court references are, and they are replied to with a reasoned order at more than twice the rate.

⁸² Opinion of Advocate General F.G. Jacobs, Case C-338/95 *Wiener SI* [1997], ECR I-6495, at paragraphs 20-21.

⁸³ See: Court of Justice of the European Union, *supra* fn. 38, at pg. 28.

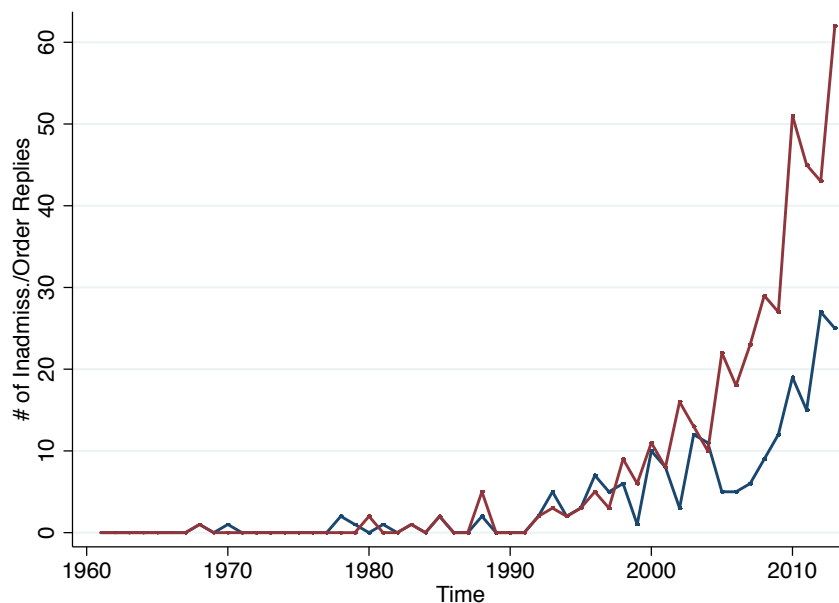
⁸⁴ T. Pavone, *above*, n. 17.

⁸⁵ *Id.* at 317.

Table 2: ECJ declarations of inadmissibility and replies via reasoned order, by level of referring court, 1958-2013

	Ref. Declared Inadmissible (#, %)	Reply w/ an Order (#, %)
High Court	23 (0.94%)	73 (2.97%)
Mid-Level Court	46 (2.55%)	96 (5.31%)
Lower Court	131 (3.6%)	243 (6.7%)

Figure 8: Yearly ECJ declarations of inadmissibility (blue) and replies by reasoned order (red), 1958-2013



To better assess the degree to which court level is associated with the probability that the ECJ issues a reasoned order or declaration of inadmissibility, we run four logistic regressions, where the dependent variable in model 1 is a binary indicator of whether the ECJ replied to the reference via a court order, and in model 2 the dependent variable is a binary indicator of whether the ECJ replied to the reference via a declaration of inadmissibility. Models 3-4 repeat the analysis, but limit the temporal scope to the post-1995 period – that is, after Advocate General Jacobs' influential opinion in *Wiener*, when the ECJ began to systematically issue reasoned orders and

declarations of inadmissibility. The independent variable of interest is an ordinal categorical measure of court level (1=High, 2=Mid, 3=Low). We also control for whether the reference emerges from a court located in a founding, Nordic, or Postcommunist Member State (to control for any regional biases the ECJ may have), along with the date of EU accession of the state within which the referring court is located and the state's RAI. The results corroborating H3 are captured in Fig. 9, which demonstrate that court level is the strongest predictor of whether a reference is declared inadmissible or receives a reply via reasoned order.

Figure 9: Logistic regression of ECJ replies via order and inadmissibility

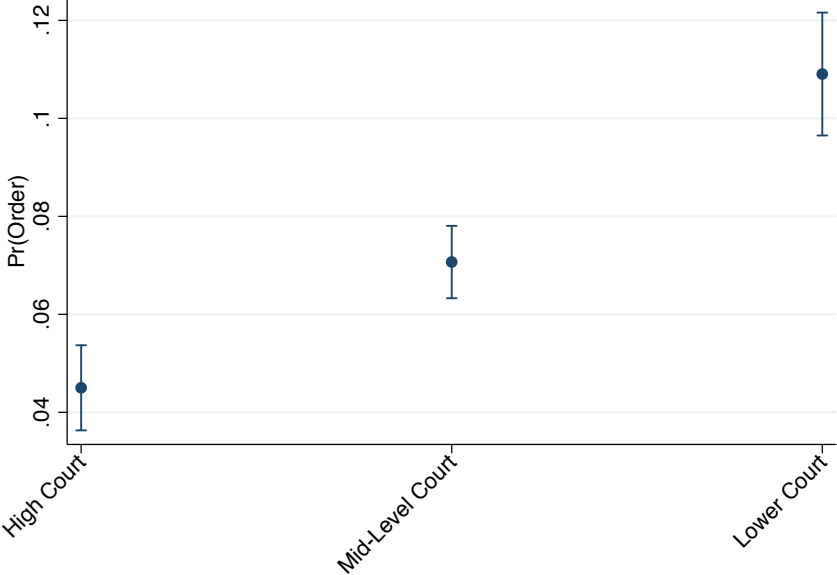
<i>Independent Variables</i>	<i>DV: ECJ Reply via Order</i>	<i>DV: ECJ Reply of Inadmissibility</i>	<i>DV: ECJ Reply via Order (post-1995)</i>	<i>DV: ECJ Reply of Inadmissibility (post-1995)</i>
Court Level	1.55*** (6.75)	1.89*** (6.4)	1.62*** (7.38)	1.93*** (6.43)
Founding MS	2.5** (2.49)	4.4** (2.42)	2.07* (1.9)	5.68** (2.54)
Nordic MS	0.42** (-2.39)	0.1** (-2.26)	0.46** (-2.12)	0.11** (-2.11)
Postcommunist MS	1.41 (1.11)	1.2 (0.41)	1.84* (1.93)	1.36 (0.68)
Date of EU Accession	1.04*** (3.3)	1.07*** (3.46)	1.02 (1.43)	1.06*** (2.71)
RAI Score	1.02*** (3.62)	1.01 (0.87)	1.02*** (3.31)	1.01 (1.06)
Constant	6.27e [^] (-36)***	5.15e [^] (-58)***	1.98e [^] (-17)	1.42e [^] (-50)***
# of observations	7905	7875	5079	5052

*p<0.1, **p<0.05, ***p<0.01

Notes: z-statistics in parentheses; Odds ratios displayed instead of partial regression coefficients. The RAI score is reverse coded such that a higher score indicates a more centralized state.

To visualize the effect that court level has on the ECJ's propensity to reply with a court order or a declaration of inadmissibility, Figures 10-11 plot the predicted probabilities of both types of responses by court level (for the post-1995 period) based on the logistic regression results, holding other covariates at their means. Specifically, Figure 10 shows that the predicted probability of a high court reference receiving a reply by reasoned order is only 3% (post-1995 it is 4.5%); For lower courts, however, the probability of a reasoned order is over twice as high at approximately 7% (10.9% post-1995).

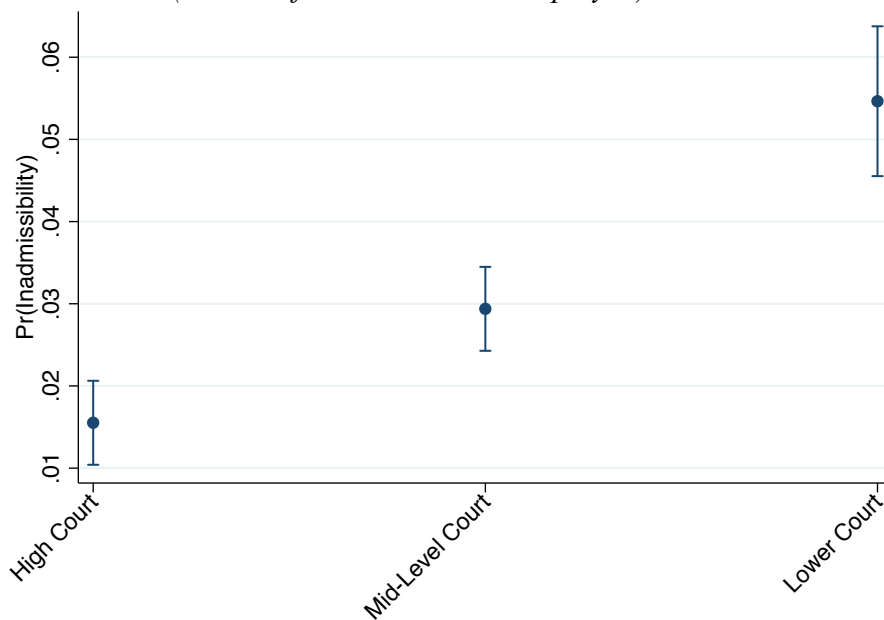
Figure 10: Predicted probability of an ECJ reply via court order by referring court level (95% confidence intervals displayed), 1995-2013



Similarly, Figure 11 denotes that the predicted probability of a high court reference being declared inadmissible is roughly 1% (1.6% post-1995), whereas for lower courts it is almost four times higher at 3.8% (5.4% post-1995). While the foregoing probabilities remain quite low, they are not insignificant. Even for a low court judge, receiving either a declaration of inadmissibility or a reply by reasoned order remains a low likelihood event, but one that could carry significant reputational costs. Having a case be in essence rejected on these grounds could be a source of considerable

embarrassment even if the probability of such a rejection remains low, as hundreds of interviews with Italian judges conducted by Pavone suggest.⁸⁶ Judges who receive such a response may feel – rightly or wrongly – that their domestic colleagues will see it as calling into question their understanding of EU law or their professional competence more generally.⁸⁷ Hence the results support the claim that the ECJ is subtly contributing – decision by decision – to high courts' efforts to replace lower courts as the ECJ's primary interlocutors through the preliminary reference procedure.

Figure 11: Predicted probability of an ECJ declaration of inadmissibility by referring court level (95% confidence intervals displayed), 1995-2013



To be sure, in principle an alternative explanation for the differences in rates of reasoned orders and declarations of inadmissibility could be that the quality of lower court references (relative to high court references) is lower. Yet this explanation is inconsistent with temporal trends.

⁸⁶ Id

⁸⁷ N. Garoupa & T. Ginsburg, *Judicial*, above, n. 35.

Specifically, subsetting the foregoing analysis into two time periods – 1990-2001 and 2002-2013 – reveals that the predictive power of our 'court level' variable (low, mid, high) increases over the two periods - from being significant at the 90% level ($z=1.93$) to the 99.9% level ($z=8.11$) for ECJ replies by reasoned orders, and from being significant at the 99% level ($z=2.94$) to the 99.9% level ($z=6.01$) for ECJ replies of inadmissibility. Furthermore, the divergence in probabilities for lower vs. high courts increases modestly over time - from lower courts being 2.14 times and 3.55 more likely to receive replies by reasoned order or inadmissibility, respectively, vis-à-vis high courts in the 1990-2001 period, to lower courts being 3.55 and 3.76 times more likely to receive replies by reasoned order or inadmissibility, respectively, for the 2002-2013 period. If it were primarily the quality of referrals driving the ECJ's behavior, such findings would imply that lower court references are decreasing in quality over time, at least vis-à-vis high court references. However, given that knowledge of EU law and familiarity with the preliminary ruling system has increased over time across national legal orders (thanks in part to the establishment of the European Judicial Training Network (EJTN) in 2000, which explicitly targets lower court judges), this alternative interpretation is less plausible than the argument that the ECJ prefers to dialogue more frequently with high courts.

IV: Conclusions

The European Union is an exemplary case of how transnational integration can be driven by an evolving judicial politics within national states. While the EU began with a single court, over time these judicial politics have embedded the ECJ within a pan-European judiciary. Over six decades hundreds of national courts have sent nearly 8,000 cases to the ECJ. Most of the bedrock principles of EU law were established in these preliminary ruling cases. The willingness of national courts

to refer cases to the ECJ and to apply its judgments domestically has been the most important single factor in establishing the EU legal order. Though they do not all see themselves this way,⁸⁸ national courts are, *de jure*, EU courts. European Commission Vice President Frans Timmermans captured this notion in a recent speech explaining why the EU would not tolerate the Polish government's ongoing assault on the independence of the Polish judiciary. As he put it, when Polish courts enforce EU law – from the EU rights of Polish citizens to the rights of companies doing business in Poland - they act as the 'judges of the European Union.'⁸⁹

The preliminary reference procedure has played and continues to play an indispensable role in linking national courts to the ECJ in Luxembourg. But the precise role played by the procedure has evolved. In the early days of European legal integration, humble local courts and an obscure EU court with grand ambitions collaborated to empower one another by using the procedure to circumvent recalcitrant national governments and high national courts. The JET provided a compelling explanation of this process. But the JET's insights revealed these institutional dynamics at the very moment that they were beginning to fade away.

Over time, after national high courts came to accept the ECJ's authority, they preferred to dominate this judicial dialogue so as to prevent lower courts from circumventing their authority and to promote the uniform development of the law. With more than enough cases to fill its docket, the ECJ was content to see most reference activity shift to national high courts. Not only did this serve to keep the volume of cases under control, judgments in references from high courts would attract more attention and have more legal impact domestically. The ECJ thus subtly began to

⁸⁸ J. Mayoral, et al., 'Creating EU Law Judges', (2014) *21 Journal of European Public Policy*, 1120.

⁸⁹ Timmermans, Frans. 'Opening remarks of First Vice-President Frans Timmermans.' Brussels, 19 July 2017, available at: http://europa.eu/rapid/press-release_SPEECH-17-2084_en.htm

dissuade excessive lower court reference activity by increasingly replying to them with a reasoned order or an embarrassing declaration of inadmissibility.

Importantly, references to the ECJ sent by courts of first instance continue to serve as an essential check on the functioning of the system: the mere threat of lower court references to the ECJ incentivizes high courts to comply with its rulings and to avoid cutting off a dialogue with Luxembourg. Furthermore, because lower courts are the first judicial actors to hear novel disputes wrought by social, economic, or technological change, their references remain important to promptly deal with new EU legal issues as they arise without having to wait for these disputes to percolate upwards to courts of last instance. At the same time, in what proved a 'self-eroding' process, with their early willingness to dialogue with the ECJ, lower courts' sowed the seeds of their own displacement as the primary drivers of European legal integration. For the most part the EU legal system has come to resemble a more traditional judicial hierarchy in a federated or multi-level system, wherein lower courts dialogue primarily with their domestic judicial superiors, which, in turn, become the primary interlocutors of the ECJ.

The resurgence of high courts through their dialogue with the ECJ may enhance the authority of ECJ preliminary rulings domestically and promote the uniform application of EU law. However, if taken too far, high courts' resurgence poses great risks. Lower court references continue to be an essential conduit between local actors in civil society and the European Court, and the implicit threat that they may rebel against the decisions of their superiors is an essential driver of domestic compliance with EU law. Indeed, if high courts were to completely monopolize the domestic dialogue with the ECJ, this would render it easier for Member State governments to undermine the application of EU law by packing or capturing these courts, as has occurred in

Hungary and Poland.⁹⁰ Another concern highlighted even by the ECJ's former judges, like Carl Otto Lenz, is that channeling preliminary references through high courts would mean that 'the road to the European Court of Justice would then be open only to those parties able and willing to exhaust all legal remedies'.⁹¹ That is, it would 'have the perverse effect of encouraging litigants to pursue their cases to the highest court simply to gain access to the Court of Justice,⁹² a waste of time and resources that only wealthy litigants may be able to afford. Decentralized enforcement is the surest form of insurance against European legal integration being coopted by illiberal governments and only becoming accessible to resource-rich litigants. In short, although lower national courts may no longer be quite the 'motors' of transnational described by Alter and others in the 1990s,⁹³ lower courts' dialogue with the European Court remains an essential safeguard for a European Union based on the rule of law.

Although our analysis centers on the European experience, we believe that under certain restrictive conditions the dynamics we have described could gradually emerge in other transnational legal orders. The Andean Community, the East African Community, and the Caribbean Community all establish mechanism similar to the EU's preliminary reference procedure to connect national courts with their respective regional courts.⁹⁴ Nevertheless, as Alter and Helfer persuasively argue,⁹⁵ the mere presence of an institutional structure mirroring the EU's

⁹⁰ B. Miklos, et al., 'Hungary's Illiberal Turn', in P. Kasztev & J.V. Til (eds), *The Hungarian Patient* (Central European University Press, 2015); K.L. Scheppele & L. Pech, *Illiberal*, above, n. 22.

⁹¹ C.O. Lenz, 'The Role and Mechanism of the Preliminary Ruling Procedure', (1994) 18 *Fordham International Law Journal*, 388, at 409.

⁹² M. Broberg & N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, 2014), at 31.

⁹³ K. Alter, *European Courts*, above, n. 9, at 467.

⁹⁴ K. Alter, *Global*, above, n. 23; S. Caserta & M. Madsen, 'Between Community Law and Common Law', (2016) 79 *Law & Contemporary Problems*, 89; S. Caserta, 'Regional Integration Through Law and International Courts', (2017) 30 *Leiden Journal of International Law*, 579; A. Huneeus & M. Madsen, 'Between Universalism and Regional Law and Politics', (2018) 16 *International Journal of Constitutional Law*, 136.

⁹⁵ K. Alter & L. Helfer, *Nature*, above, n. 24; K. Alter & L. Helfer, *Andean*, above, n. 24.

is insufficient for a European-style process of transnational judicialization. Indeed, we have argued that the ascendance of domestic supreme courts as central actors in a judicial dialogue with the ECJ has been due to their gradual recognition of European integration as a *fait accompli*: A new institutional landscape that can surely be reshaped, but not resisted outright. To date, perhaps only the Andean Community has witnessed sufficient national court referrals and institutional entrenchment to prompt a similar logic on behalf of national high courts. Where regional integration is more superficial or unstable, domestic supreme courts have little institutional incentives to adjust their behavior. Finally, the ability of European high courts to reassert control over domestic judicial hierarchies is premised on these hierarchies being well-functioning and entrenched in the first place. In countries where judiciaries are under-resourced, where the rule of law is less entrenched, and where supreme courts historically command less authority over national policymaking, apex judicial actors may lack the institutional capacity necessary to become the domestic protagonists of transnational legal governance.