The Use of Judge-Made Law in European Judicial Integration: Precedent-Based Arguments in EU Inter-Institutional Disputes

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Introduction

This paper examines the role of precedent in the adjudication of 'legal basis' cases, one type of inter-institutional dispute in EU law. These are the 'hard cases' for theories of judicial integration emphasising the autonomy of the European Court of Justice to explain. In these cases, few of the factors are present which are argued to mitigate the influence of member state opposition to decisions: judgments are not transmitted through mediating national courts (Alter 1996), there is no 'mask' of technical legal language concealing the political implications of decisions (Burley and Mattli 1993) and there are no private litigants to bring pressure on member states (Alter and Vargas 2000) and to cultivate the development of linkages between themselves and Community institutions (Stone Sweet and Brunell 1998). Instead, the cases are explicitly concerned with contests of powers between the member states and the Council of Ministers and the other EU institutions. And yet, the ECJ is very much the authoritative arbiter of such conflicts. I will show that even in these, most politicised of legal battles, the Court has constructed a case law that imposes constraining rules on member states and increasingly defines the context of all such disputes. Moreover, I argue that the Court's success in doing so, has more to do with its use, and the dynamics, of a precedent based case law, than of any strategic positioning on the part of institutions.

Legal basis cases arise because of the multiplicity of procedures for passing legislation in the EU. It is a well know idiosyncrasy of the treaties that different areas of EU law-making specify different decision-making procedures. Some areas require decision-making only on the basis of a qualified (or super-) majority, while others, typically those considered more sensitive to national interests, require unanimous votes to pass legislation, in effect, reserving a veto for every member state. The European Parliament's right to be involved in the decision-making process is even more complicated, ranging from 'consultation' to 'co-decision' and mandating different rights to comment on or revise a piece of legislation, in different treaty areas.

Disputes occur when legislation could realistically derive a legitimate legal basis from multiple parts of the treaty, each specifying a different decision-making procedure. It is naturally advantageous for the Commission to take advantage of this ambiguity by citing, as the legal basis, treaty provisions that favour its agenda and for the Council to feel the need to 'add' others, which are instrumentally helpful to it. Similarly, there are great incentives for states which lose under QMV, or institutions

which feel that their policy proposals were unacceptably modified by the Council, to mount a legal challenge to validity of the legal basis of a piece of legislation. Moreover, as Advocate General Lenz observed in the first legal basis case, '...since the EEC Treaty does not provide for a special procedure for settling jurisdictional conflicts between Community institutions, such disputes have to be decided in the context of actions for annulment or for failure to act.' (45/86, §38). These disputes are, therefore, proxies for what, in many constitutional arrangements, would be unambiguous separation of powers and institutional competencies questions.

Such cases have been brought at a fairly constant rate since 1986, with the effect of generating a jurisprudence that has progressively limited the discretion that institutions have over the choice of legal basis. Although the constraints imposed by this case law were largely opposed by member states and by the Council of Ministers, all of whom have consistently lost in these legal proceedings, it is nonetheless true that there now exists a considerable body of Court created rules, consisting of general principles, as well as much more specific rules, that govern how the legal basis for any given piece of legislation may be chosen.

In the field of EU politics, there is a lively debate as to the nature and degree of judicial integration that has occurred in the European Union. In this paper, I examine the claims of 'intergovernmentalists,' writers who downplay the role of supranational organisations in driving institutional change, with regard to the European Court of Justice and compare their propositions with those generated by a theoretical approach emphasising the importance of precedent based legal argumentation to judicial outcomes.

'Liberal intergovernmentalism' asserts that significant institutional change is almost always the product of bargaining over rules, driven by member states in intergovernmental negotiation and remains, as such, the province of national executives, foreign, and finance ministries (Moravcsik 1993; Moravcsik 1995; Moravcsik 1998). Notwithstanding the fact that this theoretical approach conceded early on that it could not explain the emergence of the ECJ as an independent actor (Moravcsik 1993; Moravcsik 1995) writers nonetheless insist on the primacy of bargaining in explaining institutional arrangements and focus scholarship on the constitutional grand bargains in which, it is maintained, governments 'are relatively unconstrained by the pre-existing institutional structure of the EU' (Moravcsik and Nicolaïdis 1999: 79).

A second strand of intergovernmentalist literature focuses specifically on the ECJ and asserts that the function of the Court is to close the incomplete contracts that are presented by the treaty provisions and to deal with the other enforcement issues arising from potential defection from EU laws, so that member states can enjoy the collective benefits of the international treaty regime (Garrett 1992; Garrett 1995). As such, having an independent court is very much in member states' interests, it argued, but member states retain ultimate control over the Court because they are able to register their disapproval of any Court jurisprudence that they oppose by enacting legislation or amending the treaties in ways that qualify or overturn it. Therefore, it is argued, the substance of Court doctrine is in accordance with the wishes of the majority of the member states because they have approved it, so to speak, by not opposing individual cases from which it was generated. By these means, it is argued, that member states have influence over systemic legal change.

Recent publications have sought to specify, somewhat, the conditions under which member states will exercise this influence and how it will affect the ECJ's strategic behaviour. It has been argued that the Court has indeed been responsible for making activist judgments, which expand its authority and that of EU law, and that it accordingly has a preference to 'follow' its precedents, but that it can be pressured to deliver outcomes contrary to its preferences if a majority of member states oppose a decision (Garrett, Keleman, and Schulz 1998). Member states, it is hypothesised, will be more likely to challenge a decision as the degree of importance and the number of member states affected by it increases, and as the number of such cases adversely affecting these interests rises. The Court, in turn, will negotiate between crafting decisions that are shaped by the weight of precedent and responding to pressure from the member states, depending on how vague the precedent in that domain of law is. On one hand, this essentially makes the relatively uncontroversial argument that judicial outcomes are indeterminate and that courts are responsive to a whole range of external influences, including political pressure - an analysis which might be troubling to *very* traditional legal scholars, but falls more or less in the mainstream of public legal literature. On the other, it makes a number of specific claims about the nature of the judicial process and assumptions about the behaviour of actors within it that warrant more thorough, empirical investigation.

This paper asserts that the fundamental precondition for the judicialisation of politics is the presence of some notion of precedent and that it is the most important

factor in explaining European judicial integration. This approach is highly complementary with 'neofunctionalist' or 'supranationalist' approaches to the study of legal integration, which assert that institutional rule change is largely interstitial and that judicial integration has been driven by the development of linkages between actors formed as a result of exchanges arising as negotiation over rules and their applicability (Burley and Mattli 1993; Stone Sweet and Brunell 1998; Stone Sweet and Sandholtz 1997; Weiler 1994). Change in European rules, thus happens, in this depiction, incrementally. The relevant rules setting the context for moments of treaty revision are not only those of the previous revisions, but also of all of the small, but constant, changes that have occurred between the revisions.

Although some idea of precedent is implicitly present in virtually every theory, intergovernmentalist, supranationalist and neofunctionalist alike, there is really no scholarship that seeks to explain the dynamics of the creation and use of precedents or their importance to judicial outcomes in a systematic manner. Logics of precedent are, however, this paper argues, exactly how this incremental change happens in legal systems. Because Garrett is correct and legal outcomes are indeterminate, it follows that judges must interpret the existing law, even if just a bit, in any given decision. In making these interpretations, judges routinely refer to the solutions to comparable legal problems that they made in past cases, and so create precedents. These precedents come to structure the framing of legal problems and the manner of legal discourse, and, ultimately, judicial decision-making.

I argue that the dynamics of legal argumentation are important to understanding outcomes of the judicial process, both in individual cases and systemically. Just as judges must frame the issues that they examine in terms of legal concepts and provide rule-based reasons for their decisions, so must litigants present rule based justifications for the self-interested positions that they advocate. The move to a precedent based legal discourse transforms judges into legislators and creates incentives for litigants to make their arguments on the basis of this judge made law. The use of precedent thus sets in motion a powerful dynamic, in which litigants wishing to make the most persuasive arguments possible, will pitch their claims to the bench on the basis of its own jurisprudence, using precedents and, temporarily at least, adopting the Court's past interpretations for their own point of view, ratifying through use these court created rules.

Over time, this paper argues, these precedents become embedded in a working understanding of the meaning and applicability of the relevant EU law that is shared by litigants and judges. Litigants will, I hypothesise, respond to the ECJ's creation of precedent, by using them in their own arguments and will, over time, even come to cite precedents which they opposed, or which were established in cases in which they were the losing party. Furthermore, precedents are not deployed individually in either arguments or in decisions, but rather in sets, which are doctrinally connected and repeated in similar cases, influencing the structure and sequencing of arguments as well as outcomes.

From the intergovernmentalist literature, I extract some central propositions about ECJ behaviour and judicial decision-making that I will investigate in light of the dynamics of precedent based adjudication of the EU's legal basis cases. I will evaluate the degree to which they Court does or does not exercise influence relative to the member states in the construction of legal doctrine and the extent to which this doctrine becomes institutionalised over time. In my conclusions, I will also assess a number of more specific claims and assumptions that intergovernmentalist scholars make about the judicial process. I will investigate whether legal deliberations are better characterised as bargaining or as argumentation, how useful the concept of the 'vagueness' of precedent is to understanding judicial behaviour and the conditions under which member states oppose Court decisions.

An Overview of the Legal Basis Cases:

Of the thirty-two legal basis cases that had been decided by the Court by March of 2001, the applicants (appellants) were fairly evenly divided between the EP, which brought eleven cases, the Commission, which also brought eleven and the various member states, which have, together, brought twelve. The most successful litigants, by far, are the Commission, which has won six of the cases that it has brought for annulment or voiding of legislation, and the Parliament which has won five. The member states, together, have only won two. These cases have been brought at a fairly constant rate of three or four a year since the first action in 1986.

The subject matter of the contested legislation varies, ranging from requirements to collect statistical data (426/93) to conditions for raising battery hens (131/86), but one can observe a few distinct clusters of case law such as agriculture, vocational training and the environment. It is, however, more useful to differentiate the cases in terms of the type of rule being contested: thus, about two thirds of cases

are disputes over whether a provision requiring QMV or unanimity is the appropriate legal basis, while another third have to do with the access of the EP to the drafting process, although several (four) cases could be argued to encompass both.

Before discussing the citation practices of the ECJ, and the ways in which it combines precedents to create new rules, it is beneficial to briefly review the most important legal basis cases and the doctrine that they generated.

In the very first legal basis case, 45/86 (*CCT Quotas*), the Court laid down a number of rules that have defined the structure of subsequent litigation; it is, in fact, the most cited precedent in this domain of law. The dispute was fairly typical of legal basis cases: the Commission proposed a regulation applying general tariff preferences for certain goods originating in developing countries and named Article 113 (requiring QMV) as its legal basis. The Council, which evidently had a long-standing dispute with the Commission over certain provisions in legislation of this sort, substantially revised the regulation, based it on 'the Treaty' without specifying an article, and voted on it unanimously. The Commission brought an action for annulment of the legislation, alleging that the Council had failed to meet the requirement stated in Article 190 of the treaties, which, the Commission argued, stipulates that one must identify a specific treaty provision as the legal basis for a piece of legislation and argued furthermore, that, for the regulation in question, the only appropriate legal basis was Article 113. The Council responded by arguing that it 'had in mind' Articles 113 and 235 when it wrote 'having regard to the Treaty' in the preamble to Regulation 3599/85 and thus the case ought not to be admissible since 235 mandates a unanimity vote anyhow, so choice of legal basis would make no material difference to the procedure used (AG report, §22).

In this case the Court first stated a number of rules that would come to define much of legal basis litigation. It asserted that the 'requirement to state reasons' (45/86, §5) of Article 190 EEC Treaties, stipulates that all legislation must explicitly state the reasons for which they are based on a given part of the treaty *and* that these justifications are adjudicable: that the choice of legal basis 'must be based on objective factors amenable to judicial review' (45/86, §11) rather than what is politically expedient to the institutions. It also established a preliminary test for admissibility: a legal basis case will be reviewed only if 'the argument with regard to the correct legal basis is not a purely formal one' but actually entails different decision making procedures which 'could thus affect the determination of the content

of a given measure' (45/86, §12). Finally, it addressed the question of the circumstances under which Article 235 could be used. It concluded that 'it follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty give the Community institutions in question the necessary power to adopt [it].' (45/86, §13).

The second legal basis case (68/86) also raises a question of balancing a provision requiring QMV against a more general one requiring unanimity. In this case, the Court applies the rule developed in 45/86 with regard to Articles 113 and 235 to a dispute over the relationship between Article 43, organising the production and marketing of agricultural products, requiring a QMV vote and the more general Article 100, allowing the drafting of legislation, in order to facilitate the approximation of Community laws, which requires unanimity. Again, the 'specific' provisions of Article 43, trumped the 'general' ones of Article 100 (68/86, §14-7) and the Court explicitly cites 45/86 as the source for this rule.

The next major evolution in legal basis cases comes several years later: in May of 1990 (*Chernobyl* 70/88) the Court announced that when the European Parliament's prerogatives are infringed by the choice of legal basis, it may bring action before the Court. This is significant because two years before, in the *Comitology* (302/87) decision, the Court had asserted that the EP had no power to bring actions for annulment of legislation before the Court. In 1991, the Court specified that the 'objective factors amenable to judicial review' which institutions must present in order to justify a piece of legislation are the 'aim and content of a measure' (300/89). It also generalised the balancing rule for QMV-Unanimity rules into the broad *lex specificus derogat legi generali*[1] principle, in order the address the conflicts between provisions requiring consultation and cooperation with the Parliament.

In a relatively few cases then, the Court defines the ground rules for the resolution of legal basis disputes: cases will be admissible if it can be demonstrated that the choice of one provision over another makes a difference to the outcome of a case, and, in the Parliament's case, only if it can show that its rights to be involved in the legislative process were abridged by an improperly chosen legal basis. Different provisions will be evaluated on the basis of first their aim, and then their content, to identify the appropriate legal basis and, when two provisions still seem applicable, the

[1] '[In a conflict of laws] specific laws have primacy over general laws.'

more specific one trumps the more general one. Furthermore, quite specific rules are created, stating that where Article 113 is sufficient, Article 235 is always illegitimate, as is 100, when in conflict with Article 43.

Precedent Citation and Legal Basis

Given that, aside from Article 190, the applicable rules organising the evaluation and resolution of legal basis cases are court-created, rather than treaty-stipulated, it is no surprise that precedents are cited often in these cases. Eleven of the thirty-one cases are used repeatedly (more than twice) as a precedent, with 45/86, cited eighteen times and 300/89, ten times. (See Table 1 for a complete listing).

It becomes clear when reading the cases, however, that the ECJ uses the same precedents in different ways - 45/86, for example, is sometimes used to support the assertion that the choice of legal basis must be based on objective factors amenable to judicial review and sometimes in order to evaluate the appropriateness of Article 235 as the legal basis of a given case. Moreover, 45/86 isn't the only precedent that can be cited in support of either the choice of legal basis resting on objective factors principle, or the one balancing specific and general treaty provisions.

This is counteracted, however, by an interesting citation habit of the court. It has been anecdotally observed by several legal scholars that the ECJ will sometimes quote passages verbatim from previous cases in the text of a current decision without attributing the sources (Arnull 1993; Mackenzie Stuart and Warner 1981). In the legal basis cases it is, in fact, evident that this is a far more standardised practice than these writers suggest. The Court regularly encodes judge-made law as text-rules that are repeated from case to case, making quite clear, what the governing judge made rule in a given circumstance is. In the legal basis cases, I have identified at least five of these rules, which are used multiple times. As the reader will, by now, expect, the first, and most common, one is the rule 'the choice of legal basis must rest on objective factors amenable to judicial review.' This rule is found 23 times in 16 separate cases. That 'these factors include in particular, the aim and content of a measure' is explained in 18 documents, both as a rule stated by the court and as a justification by litigants. Table 2 lists the verbal rules that I have found, followed by the number of times they're cited and in which cases.

It is clear that these rules change, slowly, with the addition of clauses such as 'the aim and content' provision, or the generalisation of the Article 235, 100

restrictions. Furthermore, textual analyses reveal that litigants begin to make arguments on the basis of these text rules, and so they come to organise the structure of arguments. Judges seem to use these rules to clearly distinguish the *obiter dicta* from the *ratio decidendi* of a case. These text rules provide the doctrinal organisation connecting the sets of precedents cited in cases and act as the glue holding them together. Since citing case numbers isn't always specific enough, especially when the judge made rule being invoked is a meta-rule, such as a balancing or procedural rule, the use of these text rules has the effect of bolstering the precision of legal argumentation.

Legal Argumentation in Legal Basis Cases:

Litigants and judges argue over, and make decisions on the basis of, rules, stated both as precedent case numbers and as text rules. While the data presented in the first part of this paper might make it seem that precedents are cited somewhat erratically, and that they're perhaps more an *ex post facto* justification of decisions which really reflect little besides judges' ideological preferences, more extended analyses reveal the process of generating and using judge-made rules to simply be more complex than is commonly anticipated. In this section, I will assert that these rules are, complexity aside, cited in meaningful, non-random ways and that they, moreover, come to structure legal argumentation and thus have a powerful effect on outcomes.

An important dynamic to examine in evaluating the degree to which the Court cites precedents that are meaningfully connected with a particular fact context or legal question, is that constituted by the exchanges between the Advocate General and the judges. Previous work has examined the degree to which Court decisions follow or diverge from those recommended by the Advocate General (Stein 1981) but not the specific arguments that were made. If judges were simply randomly citing precedents, one would expect there to be little correspondence between court decisions and Advocate General reports. In fact, however, out of a total of 103 precedents cited by the ECJ in 26 cases[2] 60, or 58%, were first cited by the AG. On average, then, 61% of

[2] Five cases had to be excluded because the official Court Reports failed to include a complete Advocate General Report.

the precedents in a case were cited in response to arguments raised by the AG (See Table 3).

A similarly compelling citation pattern to study is that of the litigants. This data is far less complete, since one must reply on the accounts of precedents cited in proceedings as given in the Advocate General report or the Court decision. Therefore, one only has information on the precedents to which the Court has responded, by either distinguishing or upholding them, but not those that the Court may have ignored, or instances in which the litigants chose not to cite precedents. The reported data does, however, provide evidence of a series of genuine arguments over the meaning and applicability of court created rules, casting doubt on theories of citation that portray the practice as a 'cloak' for mindlessly pro-integrationist decisions. In a total of seventeen cases, it is reported that an institution cites at least one, and usually several, precedents, in the course of arguing about the appropriate decision to a case. The Council is noted as citing precedents nine times, while six precedent based arguments of the Commission are recorded, five of the UK, one of France and Germany, two of Spain and one of Portugal, which more or less reflects the number of cases brought by each. Particularly interestingly, one can observe a litigant or observer citing a case which they had, in the past, explicitly opposed, or been the losing party in, on eight occasions. It is a particularly powerful logic of precedent based arguments that, because legal proceedings compel actors to argue over rules, rather than political outcomes, and these rules are court created, when framing these entirely self interested arguments, litigants find themselves actively espousing (at least temporarily) the past view points of the court.

It is possible to identify several ways in which litigants' arguments changed in response to the Court's jurisprudence. As early as the fourth legal basis case, the UK is recorded as asserting that a case a piece of legislation ought to be annulled, not because it, the UK, was outvoted under QMV (which it was) but because 'the statement of reasons [given by the Council] was insufficient.' (131/86). The UK, apparently having identified the sorts of arguments to which the ECJ was responsive, directly mimicked the phrasing of the court, in applying one of its rules. Member states obviously regard precedents as containing binding rules, too - it is noted dryly by the Court in one case, that the UK 'withdraws [an argument] following the Court decision in case 357/89' (295/90). In 1994, the Council gives a hint as to the way in which legislation is drafted, by insisting that it 'correctly applied the case-law of the

court' in preparing a regulation (268/94, §33). Litigant behaviour can be seen as changing the most consistently in three particular ways, however. Litigants begin to make arguments as to the admissibility of a case in terms of its 'formal' versus substantive effects, they increasingly present justifications of the choice of a particular legal basis specifically in terms of a piece of legislation's 'aim' and 'content,' and they start to systematically structure arguments to address those points and to argue in terms of general versus specific treaty provisions.

A small example of an organisation adapting its argumentation to a Court created text rule, is that of the Council adopting ECJ arguments about the admissibility of legal basis cases. A typical opening defence argument in a legal basis case challenges the admissibility of the case. As the ECJ has declared that a case will be reviewed where 'the argument with regard to the correct legal basis is not a purely formal one' but rather 'the choice of legal basis...could affect the determination of the content of the contested regulations' (45/86, §12) it is logical for defendants to try to claim inadmissibility due to lack of effect. The Council has, in the past, tried to insist that small changes which it made to a directive, after it was proposed by the Commission were 'purely formal changes, not affecting the substance of the instrument itself' (§59, 131/86). On another occasion, while seeking to reject a Parliament action, it argued that 'any unlawfulness attaching to the choice which it made between these two legal bases would be a purely formal defect which could not make the directive void' and then refers the Court to precedent (165/87). The use of this particular rule in actors' arguments is relatively rare, because it is infrequent that litigants go to the expense and time of bringing a suit in which it is questionable whether or not the choice of legal basis had effects, but it is striking to see their willingness to use it, when an opportunity presents itself.

After the *Titanium Dioxide* (300/89) decision in which the Court specified that the 'objective legal factors amenable to judicial review' upon which the chosen legal basis should rest were 'the aim and content of the measure,' the ECJ begins to use this, not simply as a rhetorical device, but as a test against which actors' arguments are measured. By 1996, it is quite formal about this: stating that 'the criteria to be followed in resolving the case at issue is to be found in the court's settled case law' and then cites the aim and content test (22/96, §4). Other actors gradually begin to organise their arguments in this fashion too. As early as 1991, the Council justifies its choice 'in terms of aim and content' of a regulation (155/91§6, see also Advocate

General report case 350/92). Member states adopt this pattern relatively quickly and without objection, the Netherlands, for example, casually noting in *European Parliament v. Council* (295/90) that the 'aim and content of the measure [being challenged] went beyond the scope of Article 7 of the treaty, thus necessitating recourse to Article 235.' (295/90, §17).

The ECJ however, soon begins to actually divide arguments into separate sections devoted to the aim and the content of the contested legislation (cf. 155/91, §7-8.) Member states and other organisations are quite responsive to these changes, such that by the mid-90s, they too systematically structure arguments in similar ways with separate sections devoted to arguing about the aim and the content of legislation. In case 187/93, Spain crafts an argument asserting that the aim of a regulation, made the use of Article 100 most appropriate, abandoning its usual, favourite, argument that the Council was simply not competent to make a decision on the basis of the contested Article.[3] Germany in 436/93(§26) also submits observations about the aim of a measure and implicitly discusses its contents. The UK, in *UK* v. *Council* (84/94) structures its argument in terms of ECJ created rules: it presents a claim about admissibility, and then addresses the aim (§26) and subsequently the content (§31) of the measure that it challenges. This becomes standard practice in most subsequent cases,[4] the ECJ having successfully dictated the form of acceptable arguments.

The principle of *lex specialis derogat legi generali*, that in conflicts of applicability between two legal provisions, the more specific one must be chosen over the more general one, was present in EU law and used very occasionally in the resolution of a few cases, even before the rise of legal basis adjudication.[5] It was in the types of conflicts that tend to become legal basis disputes that it found widespread applicability, however. It took root in two streams of case law - that of the applicability of Article 235, a very generally phrased treaty provision, requiring unanimity voting, but allowing the drafting of legislation not specifically enabled in other parts of the Treaties and that of Article 100, a very similarly structured one allowing the approximation of laws in order to foster the development of the Common Market.

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[3] For an example of the latter, see 350/92

[4] Council at §17-19, Commission at §29, 271/94; Portugal at §49-51 in 268/94; EP at §28-29, Council at §31-32 in 42/97; Council §19-20, France §21 in 209/97; Council in 269/97, especially at §27.

[5] Cases 2/56, 45/75, 91/78, 799/79, 543/79 and 70/80.

These rules were generated quite early in the legal basis litigation case history: the Court declared in the first case that 'it follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question' (45/85, §13) creating an oft-repeated text rule, and implicitly declaring that Article 113 constitutes a *lex specialis* with regard to 235. The next legal basis case to be brought before the Court consisted of a clash between Article 43, allowing the drafting of legislation in order to facilitate the production and marketing of agricultural products, and requiring QMV and Article 100, allowing the approximation of laws, but stipulating unanimity. Here the ECJ states quite explicitly that 'the Treaty gives precedence to specific provisions in the agricultural field over general provisions relating to the establishment of the single market' (68/86, §15) and creates a text-rule, arguably parallel to the 235 rule. The member states proved not to be particularly open to this line of reasoning, preferring to argue in a case-by-case way - explaining that a given case was different from ordinary agricultural or vocational training legislation, because of a particular feature, which made it necessary to rely on one of the provisions which conveniently required unanimity voting. The judiciary grows rather acerbic in response - in one case the AG remarked that 'it is frankly difficult to understand what led the applicants, given there are specific provisions for research, to argue that the contested decision would still require Article 235 as a legal basis' (Advocate General Tesauro, 51/89).

In subsequent years however, this principle embeds itself in the legal discourse of all disputes over the addition of provisions requiring unanimity to the legal basis of legislation. The Council, strikingly, is the first institution to adopt it. The Council is an interesting body to study, because while it does not necessarily regard the restriction of its discretion to choose legal bases as being in its interests, because it is inevitably the defendant in these cases, it is the only party that must regularly argue both for and against choices that invoke both QMV and unanimity. As such, it quickly comes to be an advocate for predictability and regularity - by 1994, observing with irritation, that it doesn't see why a case had come to be adjudicated as it believed that it had 'correctly applied the case-law of the Court' in framing the disputed regulation (268/94, §33). In 131/86, the Council cites the *lex specialis* rule by name (see AG report). The Commission tries it (successfully) in 1989 in *Titanium Dioxide*. By 1994, this kind of argument has been adopted by all the actors (c.f. the European Parliament

in 271/94 and 22/96). In one case, the same argument is mounted by opposing sides: the Parliament argues that an Article, 129d 'is a more specific provision' and should be taken as the legal basis (271/94), while the Council asserts that 'in the absence of specific powers, Article 235' was the appropriate legal basis. Member states even try it, negatively: Portugal argues that 'in the absence of specific powers of action, the Applicant considers the Community should have had recourse to Article 235' (268/94, §49) and positively, by Germany: 'with the adoption of Article 129a, a specific title 'Consumer Protection' was added to the Treaty' and should be chosen as the appropriate legal basis (233/94 §46).

One of the final legal basis cases (269//97), gives a wonderful example of the degree to which litigants have adapted to precedents, even those they initially opposed, and resist changes to the settled case law, arguing vociferously in the language of the Court. In the context of legal proceedings challenging the use of Article 43 as the legal basis for a Council regulation (820/97) establishing a system for labelling and identifying cattle in the aftermath of the English BSE crisis, the Commission and the Parliament argued for a reversal of the Court's position with regard to Article 43 and 100, asserting that Article 100a, or alternately 100a and 43 together, would be the appropriate legal basis, primarily because, since the SEA and Maastricht Treaties, Article 100a called for the use of the co-decision procedure, rather than Parliament consultation. All of the parties concerned are well aware, that the issue at hand is the reversal of a substantial body of case law, and

> 'the Commission acknowledges that the Court has, on many occasions held that Article 43 of the Treaty constitutes the appropriate legal basis for all rules concerning the production and marketing of agricultural products ... Nevertheless, it considers that a distinction must be made because, since those judgements, the Treaty has evolved...'(269/97, §33).

It then seeks to modify this tone a bit, and to argue that the regulation at issue is quite general, and so, in any event, should be taken on the basis of Article 100 and that one can therefore conclude that its new interpretation ' is not inconsistent with the case law [on Article 43]' (§17). The Parliament is more straightforward, and asserts that previous 'decisions are no longer applicable since they were given before the date of the entry into force of the Treaty on European Union.' (§23).

The past case law sets out a well laid plan of argument for the defendant, which the Council unhesitatingly deploys. It commences by recalling, 'the case-law of the Court according to which the choice of the legal basis for a measure must rest on

objective factors amenable to judicial review.' (§ 27). It discusses systematically, the aim (§28) and the content (§29-32) of the measure and argues that in light of these factors the measure is most appropriately based on Article 43. It evaluates the cases cited by the Commission, and observes that the Court has, 'in particular declared that Article 38(2) of the Treaty...guarantees the pre-eminence of the specific provisions relating to agriculture, over the general provisions concerning the functioning of the single market.' (§35). Finally, it wraps its argument up by accusing the Commission of changing its position with regard to the appropriate legal basis 'for political reasons following an undertaking given to the Parliament.' It piously concludes that 'The solution arrived at by the case-law, according to which objective criteria must be applied in the choice of a legal basis, is the only one which fully complies with the Treaty. It makes is possible to avoid subjectivity on the part of the institutions and therefore the temptation to indulge in political opportunism.' (§40). Reiterating many of the same precedents and text rules, it takes the Court less than two pages to uphold the Council's argument and dismiss the claim.

The *Commission v. Council* case (269/97) is an excellent example of why it is that any given actor having influence over the outcome of cases, can still not be argued to have control over the development of the legal system as a whole, and why, even if they were to have the authority to approve or reject the decisions reached in every case, they might well find, as the Commission and Parliament did, that rules which seemed to guarantee them their preferred material outcomes, have different consequences, given other environmental changes, or changes in other parts of the rule systems.

Nonetheless, there is little evidence that member states either individually, or acting collectively as the Council, do control outcomes. In fact, rather the reverse appears to be the case - over time, the incentives of the legal process seem to be such that actors adopt Court created arguments as they use them to argue their particular positions in individual cases, even using text-rule principles and precedents they had previously opposed. Far from not taking issue with the legal system, because they had overseen and approved every judicial decision, actors more or less agree with the jurisprudence because it is such a central part of the rule system that they, too, rely on it when making rule based arguments in the legal context.

Systemic or 'Constitutional' Change

The major outcome of the legal basis litigation is the progressive restriction of member states' prerogatives, both individually, and as the Council of Ministers, to arbitrarily choose the legal basis of legislation. This has happened despite the outright opposition of at least six member states at various junctures, and has largely taken the form (in 18 cases) of overturning measures adopted unanimously by the Council of Ministers. The member states have not, at most points in this process, really seen this as advantageous to them, but have, nonetheless, applied the precedents of the Court, adapted their behaviour, and even their point of view, in response to them. This is particularly visible in two lines of case law: that regarding the right of the European Parliament to bring actions for annulment of legislation and that of the use of Article 235.

There is a line of legal basis case law that is affiliated with some of the Court's most controversial and activist jurisprudence: the position and rights of the European Parliament. The EP cases are a classic example of constitutional rule making that proceeded in the face of member state opposition and an effective illustration of the influential dynamics of precedent based arguments in legal disputes. Although member states argued, individually, and, through the Council, against the admissibility of actions to annul brought by the EP[6] the ECJ consistently extended and defined the EP's right to bring action to defend its legislative prerogatives. Furthermore, it is clear that, in making these very arguments about admissibility, the litigants progressively accept the previous Court interpretations.

In case 70/88 (*Chernobyl*), the European Court of Justice, in opposition to member states' opinions, parts of its own past case law, and possibly the intent of the Treaties, ruled that in certain, although limited, circumstances, the European Parliament had the right to bring actions for annulment of EU legal provisions. This was politically quite significant, because it suddenly added another actor to the array of litigants enabled to bring legal basis cases.[7] The Court had previously denied that the Parliament had the right to bring actions for the annulment, on the grounds that the Treaties, in listing the institutions having the right to bring action under Article 173, had excluded the Parliament, and argued that the Parliament's rights, while important

[6] It was 1994 before the EP brought its first case, the admissibility of which was not contested.
[7] Previously the EP had only been empowered to intervene in proceedings before the Court, brought by other institutions; to bring action for 'failure to act' under Article 175 of the Treaties (138/79, *Roquette Frères SA* v. *Council*, '*Isoglucose*'); and to be the subject of action to declare its own acts void and for its acts to be the subject of preliminary references (294/83,*Les Verts*).

to the 'organisation of powers' in the EU would be more than adequately protected by the Commission (*Comitology* 302/87).

In *Chernobyl* (70/88) the European Parliament contended that in cases in which its position vis à vis a contested piece of legislation differed from that of the Commission, it could hardly be understood that the Commission was effectively representing it, and challenged the judges that 'there is a legal vacuum which the Court must fill' (§8). The Council countered this with a classic intergovernmentalist response, repeated from *Comitology*: that ' neither the spirit nor the scheme of the Treaty supports an interpretation of Article 173 which would make it possible to include the Parliament among potential applicants.'[8]

At this point the nature of the previous legal basis case law comes to be important - the admissibility of cases had, by this time, come to be dependent on the choice of legal basis having effects. The European Parliament essentially extends this line of reasoning: asserting that in cases in which its prerogatives were affected and that the exercise of those prerogatives could make a difference to case outcomes, it ought to have a right to bring action (70/88, §8). The Court accepts this reasoning, declaring that 'an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible, provided the action seeks only to safeguard its prerogatives and is founded only on submissions alleging a breach of them.' (70/88, §27). This principle and its conditions are encoded as a text-rule and as a precedent (70/88 is cited 6 times, over the next 9 cases) and generate a whole line of case law.

Chernobyl is precisely the sort of juncture in which the Court should be most likely to give in to the inter-governmental point of view, according to Garrett - the past case law, such as it exists, seems to favour of the member states' point of view; the 'weight of precedent is vague' (Garrett, Keleman and Schulz 1998), or, as the EP put it, a 'vacuum'; and it is an area which is acknowledged to be controversial; and yet the Court decides, in a limited manner, in favour of the EP. Several parties are not at all reconciled with this; in fact, the Advocate General in *Comitology*, noted, even before *Chernobyl*, that he was 'aware that the case-law on that subject remains controversial and that it is slightly differently construed by the parties before the

[8] 302/87 Advocate General Report, §2. In 70/88, the Court simply notes that the Council puts forth the same arguments against the admissibility of the action as it had in Comitology II and argued that that was indeed interpretation confirmed by the case law (70/88, ECR, §5).

Court and by legal writers, particularly in regard to its potential evolution.' (302/87, §2). As noted above, the admissibility of the EP as an applicant is challenged in the next set of cases, but only with the effect of clarifying and sustaining the Courts' initial interpretation.

The second case that the EP brought was challenged by the UK which alleged that the judgement in 70/88 implied that it was only able to bring action where it differed from the Parliament (295/90, §9). The ECJ does not accept this argument, and states that the EP may bring any action, as long as it can demonstrate that its prerogatives were infringed (repeating the text-rule formulated in 70/88). What is particularly noteworthy about this case is that, in order to make its argument, the UK had to accept, in principle, the judgement in 70/88. This practice of acceding to a decision, at least in a *de facto* way, by using it to impose a qualification in a subsequent case, is the way in which many precedents become inserted into a member state's argumentation. In procedural cases, such as this, this appears to be a particularly powerful logic, which works rather inexorably on the parties, particularly the Council.

In 316/91, Spain and the Council jointly challenge the admissibility of the EP's action, giving the Court the opportunity to re-visit this question. In this case, because the Council had voluntarily consulted the Parliament, before proceeding to base the measure in question on Article 235, the defendant and intervener alleged that the EP's prerogatives were not actually infringed, because whether it had happened by legal mandate or not, it had been consulted, and so the effects of the choice of legal basis would be 'purely formal' (§19). The Court rejected this interpretation, repeating the rule that EP actions are admissible, provided that 'the Parliament is only trying to safeguard its prerogatives, founded only on submissions alleging their infringement.' Defining this more precisely, the ECJ makes another rule of admissibility, stipulating that 'that condition is satisfied where the European Parliament indicates in an appropriate manner, the substance of the prerogative to be safeguarded and how that prerogative is allegedly infringed.' (§13). Therefore, like the 'aim and content' clause established in the *lex specialis* case law, the Court sets forth a rule which will

structure Parliamentary submissions[9] and challenges to them, in much of the subsequent litigation.[10]

The vast majority of legal basis cases are devoted to delineating the boundaries between provisions of the Treaties requiring the use of unanimity voting in the Council and those stipulating less demanding measures of consensus. Cases exploring the limits of Article 235, alone, comprise over half the cases and are, themselves evenly divided between cases brought by institutions and by member states (See Table 4). Studying them, it is possible to see the ways in which the Court has gradually narrowed the circumstances under which Article 235 may be used, consistently denied member states the option of adding it to the legal basis of legislation to build in a veto for themselves, and contributed to the broadening of the applicability of other parts of the Treaties.

The ECJ has enjoyed a steady stream of cases that either advocate or contest the inclusion of Article 235 as the legal basis of various Community provisions. The ECJ decided in favour of a restricted interpretation of 235 in 14 of the 16 cases.[11] In the 8 cases that were brought by member states (UK, France, Germany, Spain, Greece and Portugal) all of them petitioned for the addition of Article 235 as the legal basis and all were dismissed by the Court. The cases cover a wide range of disputes: tariff classification schemes (45/86), vocational training (242/87), statistical collection (426/93), generally testing legislation which falls at the 'borders' of some well defined Community competence, questioning provisions which seem to range beyond what is called for in a particular part of the Treaty. While the disputes are rather diverse, one well-defined set is that of the relationship between the common commercial policy (Article 113) and the achievement of objectives falling under it, and Article 235.

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[9] cf. 187/93 AG report 35-40; 22/96, §18, 360/93, §10

[10] 187/93, §11,13; 360/93 §14-15.

[11] Possibly fifteen: In case 165/87, the Commission brought action for the annulment of a Council regulation, alleging that 235 (in addition to 113 and 28) was an incorrect legal basis. The Court dismissed the case, because the legislation in question was passed before the SEA and so Article 28 also required unanimity voting, and thus the effects of the inclusion of 235 were 'purely formal' (§19). Nonetheless, the Court did not endorse the use of Art. 235 in its decision: it indicated that 'recourse [to Art. 235] may be contemplated only if the institution in question cannot base is power on any other provision of the Treaty.' (§17), stated baldly that Articles 113 and 28 alone were the correct legal bases (§13). When a second case arose (275/87), in which the Council had added Article 235 to legislation based on 113 and 28, it annulled the regulation.

The common commercial policy has, in some ways, been the 'inter-state commerce clause' of the EU (Sandalow and Stein 1982), being gradually broadened to grant the EU wider powers, while restricting those of the member states. As in the US, where the Supreme Court 'has promoted economic union by invalidating state laws that were hostile to the national common market' (Collins 1988:43) and creating harmonising national ones, in the EU, the use of Article 113, has been an important tool of integration (Alter and Meunier-Aitsahalia 1994; Craig and De Búrca 1998; Stone Sweet and Brunell 1998).

In the context of legal basis, states seeking to check this process will often try to argue that a provision ranges beyond the authority granted by Article 113, and must be based also on 235, thereby giving them a veto. The ECJ has, however, developed a case law that tends to interpret 113 more expansively, eliminating potential qualifications and tending to interpret it, as it does Article 43, as being quite encompassing. Furthermore, in these cases, the growing set of legal basis rules are, as they're developed, applied quite faithfully to the decisions, such that it is possible to see the impact of these developing rules on the shape of the common commercial policy.

The early legal basis cases essentially repel attempts on the part of member states and the Council to add qualifications to the applicability of Article 113. The very first legal basis case (45/86) is also a common commercial policy case in which the Council tries to argue that if measures pursue additional, secondary objectives, to the common commercial policy, they ought to rely also on 235. The Court flatly rejects this potential condition, as it does the suggestion in 165/87 that if a common commercial policy measure might affect another piece of legislation, which is legitimately based on 235, than it, too, should rest on 235. Later in the same year, litigants attempt another qualification arguing that a temporary measure, inserted into a measure based on 113, could be based on 235 (275/87). The Court instead construes these cases generally and, at the same time, generates a number of the general principles that will regulate legal basis cases: 45/86 cites 158/80 for the 'reasons requirement' of Article 190. 168/87 cites 45/86 in support of the 235 text-rule and 138/79 in accordance with the right of institutions to consult Parliament. 275/87 likewise cites 45/86 as the source of the 235 rule.

Later 113 cases, explore the boundaries of the common commercial policy as it touches on public health and foreign relations. In case 62/88, Greece challenges a

Council regulation setting minimum acceptable levels of radiation for certain foodstuffs imported from areas affected by the Chernobyl nuclear reactor accident. Greece alleged that such a measure couldn't be based simply on common commercial policy provisions, but, because of its significant public health implications, must be based on 235 as well. The Court, citing 45/86 in support of the text rule that the appropriate legal basis must rest on 'objective factors amenable to judicial review' and 242/87 in support of the 235 text-rule that that Article may only be used if the Council 'cannot base its power on any other provision of the Treaty', rejected this argument. A later case, brought in 1994, challenged the right of the EU to base a trade agreement with a third country, which also called for cooperation in areas such as drug-interdiction and intellectual property rights enforcement solely on the basis of 113, since the latter objectives are areas in which EU competences are formally rather limited. The Court constructed a highly structured legal basis argumentation framework: rejecting the applicants' objections in one area as resulting in 'defects that are purely formal' (citing 131/86); reminding all parties that 235 is a residual provision that may only be used as a last resort (citing 45/86 and 271/94); and asserting that the appropriate legal basis is one that is 'based on objective legal factors' including the 'aim and content' of the measure (300/89 and 84/94). At the end of this rather formal and lengthy analysis, the Court decided that indeed such a measure did not need to rest on 235, as it called only for cooperation, not an actual delegation of authority.

The applicability of Article 235 has thus considerably narrowed through the legal basis litigation while the scope of other treaty provisions has concomitantly widened, although in accordance with argumentation structures organised in previous cases. These are interesting cases because the member states so uniformly oppose them, but to little avail. Not only do they fail in their attempts to use 235 as a tool for inserting an optional veto in the legislative process, but find that a by-product of this litigation is the enlargement in scope of other treaty provisions.

The legal basis cases are an interesting set of case law in which to examine the relationship between court jurisprudence and treaty change because, although a small set of cases, they span several treaty revisions, with the Maastricht Treaty falling directly in the middle. Two particular examples emerge from the legal basis case law and its relationship to the TEU - that of the European Parliament and that of the treaty

provisions introduced in order to give a specific legal basis to development cooperation.

The European Parliament's right, under limited conditions, to bring action for annulment before the Court was, as discussed above, quite contentious. Nonetheless, the Court did create and develop such a right for the EP, to exist in circumstances in which, absent such an authority the 'organisation of powers' in the EU might be disrupted. During the Maastricht treaty revision, which occurred subsequent to these cases, the member states proved themselves to have been more convinced by, than opposed to, the Court's jurisprudence. Far from reversing these case law changes, they codified them, echoing the language of the Court and stating that the ECJ shall review 'actions brought by the European Parliament...for the purpose of protecting its prerogatives' (173(3) TEU). This is suggestive of the influence of precedent based argumentation in legal discourse, and its importance to judicial integration - revisiting the same court created rules in case after case, allows courts to further refine and elucidate principles, and creates great incentives for individuals to argue in terms of them.

Development cooperation draws a compelling picture of a legal domain in which the interaction, over several decades, of Commission activity and Court case law, had the effect of explicitly placing the policy issue on the agenda during the TEU treaty negotiations. Although a formal and specific legal basis for development cooperation was first inserted in to the Treaties with the TEU, as AG La Pergola notes, it 'constituted an important objective of Community action even before the Maastricht Treaty was adopted' (268/94, §9). In fact, the conclusion of the Yaoundé Conventions in 1974 first raised the question of the Community competence to conclude foreign agreements having development policy implications. As the Commission began make mention of secondary development goals in the context of subsequent trade agreements, the Court became quite busy constructing a case law which allowed development cooperation measures to be lawfully be applied in the context of the common commercial policy,[12]which is, of course, how they came to be adjudicated as legal basis cases.[13] In 45/86, development cooperation was finally given a specific legal basis as a legitimate secondary effect or goal of agreements concluded with third countries on the basis of Article 113 common commercial policy

[12] 8/73, 1/75, 41/76, 1/78.
[13] 45/86, 316/91, 268/94.

measures. Thus, by the time it was formally codified in the Maastricht Treaty, one could see that 'if we look at the objective and scheme of powers laid down in the TEU, the rules therein fully reflect the substantive implication of the concept of development resulting from the 3rd generation agreements' (AG at §11 in 268/94) created by the Commission and the Court. Indeed not only did the activities of the supranational institutions set the agenda for treaty revision, in 268/94, the Court signalled its intention to henceforth interpret the TEU in the light of, and in conformity with, the pre-TEU case law.

Is clear that far from waiting for treaty revision to provide needed rule changes, the legal basis cases show a Court willing to go ahead and create the rules necessary to govern these new, contentious types of disputes. Far from setting the agenda, the Member states simply 'enshrined', as the AG rather grandly put it in case 360/93, the principles that the Court had already created and that had become standard practice in allocating outcomes.

Conclusions

In short, precedent matters, and does so far more that most contemporary scholars acknowledge. It structures outcomes and progressively controls behaviour in the legal context. Making precedent based decisions fundamentally shifts the advantage to the Court because it creates incentives for all parties to argue in terms of precedents, or rather, to use the Court's own interpretation of law to justify case outcomes.

Thus legal argumentation is very significant to judicial integration - as Weiler pointed out, it makes a difference, that parties must conduct political disputes as legal discourse, not only because actors then must speak 'in the language of duties and obligations, right and wrong' rather than power politics (Weiler 1991), but, more importantly because having to conduct political disputes in the legal context means that they must be structured as legal rule based arguments. Thus a portrayal of the judicial process as one of discursive argumentation is much more appropriate than one of bargaining.

The demands of formal, legal argumentation, require the arguers to give rule based reasons for action and, in a precedent based system, they find many of these rules in the past interpretations of the court. This drives the tendency for actors to, over time, adopt the court's point of view: England in citing 70/88, was making an

argument about how the EP's power to bring actions should be narrowly interpreted, based on the limitations specified in *Chernobyl* by the Court, but in doing so, implicitly acknowledged, that the EP did have a general power to bring actions and accepts the Court's delineation of the EP's competences. It also makes the dynamics of negotiation more important and the power of persuasion significant. As Shapiro (1992) points out, it is a small step from having to give reasons to having to give good reasons, and in the legal context there is a great deal of competitive pressure to make ever better, more persuasive, rule based arguments. The structure of legal arguments does, therefore, have an impact on decisions and the structure of such argumentation is defined by courts. Furthermore this structure is reproduced from case to case, firmly institutionalising, with the help of litigants, the Court's interpretations.

This analysis suggests that the intergovernmentalist characterisations of the legal process are, in some ways, fundamentally flawed. Garrett, Keleman and Schulz' rational choice approach, for instance, tends to treat judicial decision making as a black box, opaquely producing decisions that the member states rather passively await and then either acquiesce to or protest. In fact, this paper demonstrates that member states are actively engaged in the process of developing doctrine: member states bring legal actions, they argue as defendants, and they file observations in cases in which they are not a litigant but do feel that their interests, material or ideological, are affected. The ECJ therefore has quite good information about their opinions at the time of making its decisions, but nonetheless rules against them fairly often. Speaking of precedent as 'vague' or not, is not very useful: to the degree to which judicial outcomes are always somewhat indeterminate, the law is always a bit vague and thus the paradox arises that the occasions on which Garrett et al predict that the Court will be most likely to defer to member states' opinions are also those in which it is most likely to set precedents. Garrett et al fail to specify the conditions under which vagueness will result in activism or court reticence and, in this analysis, the former seems vastly more common than the latter.

Finally, if the Court does not particularly seem to conform to the behaviours predicted by the Garret-Keleman-Schulz model, neither do those of the member states. As mentioned above, they are quite engaged in the legal process, even if they are hardly supportive of it all the time. When governments oppose Court doctrine, however, they do not really do it in the concerted, effective manner that they predict, although all of the legal basis cases seem to meet the model's criteria for stimulating

member state opposition. The decisions are of importance to a great number of states (2/3 of them do, after all, overturn legislation adopted unanimously), as the effect of this jurisprudence is to profoundly curtail their discretion over framing legislation, and the number of cases which do so, increased quite steadily over the decade scrutinised. Nonetheless, there was no significant, united opposition by the member states to this jurisprudence and even in cases in which they presented rather strong objections, such as *Chernobyl*, the Court ruled against them, anyhow.

Even if decisions are indeterminate, it is not accurate to speak of member states as 'controlling' the path of law. There is little evidence to suggest that member states purposively control outcomes in most disputes or that this translates into influence over the development of a legal domain as a whole. A better explanation, more consistently upheld by a detailed analysis of cases, shows member states and the Council adopting arguments constructed by the Court, even when they previously opposed them. These arguments, through use, set the context of future cases and define the contours of future argumentation such that even treaty revisions are greatly influenced by the ECJ's body of case law.

Table 1: Precedents and Number of Times Cited, Where >1.

Precedent	Number of Times Cited
45/86	19
300/89	10
271/94	6
68/86	6
70/88	6
131/86	5
155/91	4
165/87	4
242/87	3
138/79	3
42/97	2
83/78	2
84/94	2
138/78	2
22/96	2
156/93	2
426/93	2
164/97	2
177/78	2
187/93	2
268/94	2
293/83	2
303/94	2
139/79	2

Table 2: Text rules.

Text Rule	Cited in	Total times Used
'The choice of legal basis should be based on objective factors amenable to judicial review.'	45/86, 68/86, 131/87, 11/88, 62/88, 300/89, 295/90 (x2), 155/91 (x2), 187/93 (x2), 360/93 (x2), 426/93 (x2), 233/94, 268/94 271/94 (x2) , 84/94 (x2), 22/96, 189/97, 209/97, 269/97	23 times in 16 documents.
'These objective include, in particular, the aim and content of the measure.'	300/89 (x4), 295/90, 155/91 (x3), 350/92AG, 187/93 (x3), 360/93AG, 360/93, 426/93 (x3), 84/94 (x2), 233/94AG, 233/94, 268//94, 271/94, 22/96AG, 22/96, 42/97, 209/97, 269/97	28 times in 18 documents.
[An action of Parliament to annul]... 'is admissible provided that action seeks only to safeguard its prerogatives and is founded only on submissions alleging a breach of them.'	70/88 (x2), 295/90, 316/91, 187/93, 360/93	6 times in 5 documents.
[The effects of a choice]... 'are purely formal.'	45/86, 68/86, 131/86AG (x2), 131/86, 131/87, 165/87 (x2), 242/87AG, 62/88, 51/89AG (x2), 360/93 233/94AG	14 times in 11 documents.
[A provision]... 'is justified only when no other provision of the Treaty gives the Community institution the necessary power to adopt the measure.'	45/86 (x2), 68/86AG 242/87AG, 242/87, 56/88, 62/88AG, 62/88, 51/89AG, 51/89, 295/90, 350/92AG, 268/94, 271/94, 22/96AG, 22/96	16 times in 15 documents.
'A Council practice...cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on the institutions.'	68/86 (x2), 131/86 (x2), 242/87AG, 426/93 (x2), 84/94, 271/94 (x3)	11 times in 6 documents.

Table 3: AG-ECJ Precedent Citation.

Case No	Total # Precedents	# Precedents cited by AG	
45/86	3	2	66.7%
68/86	4	4	100.0%
131/86	5	3	60.0%
165/87	2	1	50.0%
51/87	5	4	80.0%
131/87	3	2	66.7%
242/87	5	3	60.0%
11/88	3	1	33.3%
62/88	2	2	100.0%
70/88	1	1	100.0%
51/89	2	2	100.0%
300/89	6	4	66.7%
295/90	5	3	60.0%
155/91	4	3	75.0%
316/91	6	3	50.0%
350/92	5	4	80.0%
187/93	3	1	33.3%
360/93	2	2	100.0%
426/93	3	0	0.0%
84/94	9	4	44.4%
233/94	5	1	20.0%
268/94	7	3	42.9%
22/96	4	2	50.0%
42/97	3	1	33.3%
209/97	4	3	75.0%
269/97	3	1	33.3%
			60.8%
Total	104	60	57.7%

Case Number	Applicant	Arguing against 235?	Legislation Annulled?	Interveners for Council
45/86	Commission	Yes	Yes	
165/87	Commission	Yes	No*	
175/87	Commission	Yes	Yes	
242/87	Commission	Yes	No	France, UK, FRG
56/88	UK	No	No	
62/88	UK, France, FRG	No	No	
295/90	Parliament	Yes	Yes	UK, Netherlands
350/92	Spain	No	No	
426/93	FRG	No	No	
84/94	UK	No	No	Spain, Commission, Belgium
233/94	FRG	No	No	Commission
268/94	Portugual	No	No	Greece
271/94	Parliament	Yes	Yes	Commission
22/96	Parliament	Yes	Yes	Commission
209/97	Commission	Yes	No	Parliament

Table 4: Article 235 Cases.

*But, disallowed because the Commission failed to show 'formal effects' arising from choice of legal basis, there is no formal endorsement of the use of Article 235.

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1/75 *Opinion of 11/11/1975, Opinion 1/75,* ECR 1975: 1355.
45/75 *REWE Zentrale / Hauptzollamt Landau-Pfalz,* ECR 1976: 181.
41/76 *Donckerwolke and others / Procureur de la République and others,* ECR 1977:1921.
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799/79 *Brückner / Commission and Council,* ECR 1981: 2697.
70/80 *Vigier,* ECR 1981: 229.
158/80 *Rewe / Hauptzollamt Kiel,* ECR 1981: 1805.
294/83 *Les Verts / Parliament,* ECR 1986: 1339.
*45/86 *Commission / Council,* ECR 1987: 1493.
*68/86 *United Kingdom / Council,* ECR 1988: 855.
*131/86 *United Kingdom / Council,* ECR 1988: 905.
*165/87 *Commission / Council,* ECR 1988: 5545.
*242/87 *Commission / Council,* ECR 1988: 1425.
*275/87 *Commission / Council,* ECR 1989: 259.
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*316/91 *Parliament / Council,* ECR 1994: I-625.
*187/93 *Parliament / Council,* ECR 1994: I-2857.
*360/93 *Parliament / Council,* ECR 1996: I-1195.
*426/93 *Germany / Council,* ECR 1995: I-1985.
*84/94 *United Kingdom / Council,* ECR 1996: I-1689.
*233/94 *Germany / Parliament and Council,* ECR 1997: I-2405.
*268/94 *Portugal / Council,* ECR 1996: I-5755.
*271/94 *Parliament / Council,* ECR 1996: I-1195.
*22/96 *Parliament / Council,* ECR 1998: I-3231.
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