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# The European Union's Legal System and Domestic Policy: Spillover or Backlash?

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The legal system of the European Union (EU) offers domestic actors a powerful tool to influence national policy. European law can be drawn on by private litigants in national courts to challenge national policies. These challenges can be sent by national judges to the European Court of Justice (ECJ), which instructs national courts to apply European law instead of national law, or to interpret national law in a way compatible with European law. Combining victories in front of the ECJ with political mobilization and pressure, litigants and groups have used the European legal system to force their governments to change national policies.

Using Europe's legal tool involves overcoming four successive thresholds: First, there must be a point of European law on which domestic actors can draw and favorable ECJ interpretations of this law. Second, litigants must embrace EU law to advance their policy objectives, using EU legal arguments in national court cases. Third, national courts must support the efforts of the litigants by referring cases to the ECJ and/or applying the ECJ's legal interpretations instead of conflicting national policy. Fourth, litigants must follow through on their legal victory, using it as part of a larger strategy to pressure the government to change public policy.<sup>1</sup> A litigation strategy can fail at any of the four steps. When private litigants can surmount these four thresholds, the EU legal system can be a potent tool for forcing a change in national policy. Stated as such, these four steps may sound onerous. But litigants have used this tool successfully many times. In one of the most well-known examples, equal opportunity groups used the EU legal system to force a Conservative British government to make considerable reforms to British equality policy at the height of British antagonism toward the EU and EU social policy.<sup>2</sup>

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1. Alter and Vargas 2000.

2. See Alter and Vargas 2000; Barnard 1995; Harlow and Rawlings 1992; and Mazey 1998. The reforms included extending work benefits to part-time workers, eliminating the cap on the size of discrimination awards, and stopping their policy of dismissing women from the military because of pregnancy.

Because the EU's legal tool can be so effective, some analysts have hypothesized that litigants will use EU litigation strategies whenever a potential benefit exists. Resurrecting Ernst Haas' neofunctionalist framework, Anne-Marie Burley and Walter Mattli have asserted that the self-interests of private litigants, national judges, and the ECJ align such that the mutual pursuit of "instrumental self-interest" leads to the expansion and penetration of European law into the domestic realm. They expected pursuit of self-interest to lead in a unidirectional way, toward ever further integration, positing that the ECJ was careful to create a system in which pursuing one's self-interest served as a "one-way ratchet" advancing legal integration.<sup>3</sup> Alec Stone Sweet and Thomas Brunell adopt similar assumptions, with similar predictions. They posit that transnational trade, when combined with third-party dispute resolution, leads to the expansion of legal rules and the construction of supranational governance.<sup>4</sup>

In this article I investigate the factors shaping each step of the litigation process. The analysis reveals many factors that keep private litigants and national courts from facilitating the expansion of European law. Furthermore, the pursuit of self-interest may also lead litigants and national courts to challenge advances in European integration. Indeed, there is much to suggest that the very factors that have led to the success of the EU legal process in expanding and penetrating the national order have provoked national courts and European governments to create limits on the legal process and to repatriate powers back to the national level. Thus the dynamic expansion created by the ECJ may well have provoked a backlash that contributed to disintegration.

I first explain how the ECJ has transformed the preliminary ruling mechanism, furthering the legalization of the EU and creating a means for private litigants to use the EU legal system to influence domestic policy. Second, I examine the different factors influencing each of the four steps, identifying sources of cross-issue and cross-national variation in the influence of EU law on national policy and summarizing a number of hypotheses about when we can expect private litigants and national judges to use the EU legal system to influence national policy. Third, I discuss the interactive effect of the four steps and suggest implications for neofunctionalist theory. Fourth, I show how the framework developed here may be generalizable outside of the EU. Many of the specifics discussed apply only to the European case, but the four-step framework and some of the factors influencing the steps are applicable in other domestic and international legal contexts.

## **Legalization in the EU and the Role of Private Litigants and National Courts**

The EU is perhaps the most "legalized" international institution in existence. It is at the far end of all three continuums for the dimensions of legalization defined in this issue of *IO*:

*Obligation:* All member states are legally bound to uphold the *acquis communautaire*, the body of European law including treaties, secondary legislation, and

3. Burley and Mattli 1993, 60.

4. Stone Sweet and Brunell 1998b, 64.

the jurisprudence of the ECJ. A failure to fulfill a legal obligation can lead to an infringement suit in front of the ECJ, and as of 1993 the failure to obey an ECJ decision can lead to a fine.<sup>5</sup>

*Precision:* Many European rules are extremely specific, unambiguously defining how states must comply with their European obligations. When there is doubt, the ECJ is there to give a precise meaning to the rules.

*Delegation:* The ECJ is perhaps the most active and influential international legal body in existence, operating as a constitutional court of Europe.

The advanced level of legalization in Europe is in part a consequence of the institutional design of the EU. Member states set out to create a supranational political entity, giving the EU Council the power to pass legislation that is directly applicable in the national realm and creating a supranational Commission to oversee implementation of the EU treaties, monitor compliance with EU law, and raise infringement suits against states. They also created the ECJ, authorizing it to hear disputes between states and the EU's governing institutions; to hear infringement suits against member states raised by the Commission; to review challenges to EU laws and Commission decisions; and to review and, if necessary, invalidate EU rules. States gave the ECJ these powers believing that the court would help them keep the other supranational bodies of the EU in check. They even created a preliminary ruling mechanism (Article 234 EEC) that allows private litigants and national courts to refer cases to the ECJ, so that they too could challenge the validity of EU law and thus hold EU legislative and executive bodies in check.<sup>6</sup>

Although member states created an unusual supranational court, the advanced state of legalization in Europe is in no small part a result of the court's own efforts. The ECJ was not designed as a tool for domestic actors to challenge national policies; these powers the ECJ created for itself, despite the intention of member states. In the 1963 *Van Gend and Loos* decision, the ECJ declared that European law can create direct effects in national law (individual rights that European citizens can draw upon in national courts).<sup>7</sup> Shortly thereafter in the *Costa v. Enel* decision, the ECJ declared that European law was supreme to national law and created an obligation for national courts to enforce EU law over conflicting national law.<sup>8</sup> Together these two doctrines turned the EU's preliminary ruling mechanism from a conduit for national court questions and challenges to *EU law* into a mechanism that also allows individuals to invoke European law in national courts to challenge *national law*.<sup>9</sup>

The transformation of the preliminary ruling system increased the extent of member state obligations under EU law, the precision of EU law, and the use of third

5. A system of sanctions was adopted as part of the Maastricht Treaty on a European Union. For a discussion of the origin and use of this sanction, see Tallberg 1999.

6. The overall model of the ECJ was the French Conseil d'État, which holds the French government accountable to correctly implementing laws as passed by Parliament. Robertson 1966, 150. The preliminary ruling mechanism was an adaptation of a feature from the Italian and German legal systems adopted to facilitate national court reviews of EU decisions and laws. Pescatore 1981.

7. *Van Gend en Loos v. Nederlandse Administratie Belastingen*, ECJ decision of 26/62 (1963) ECR 1.

8. *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ decision of 6/64 (1964) ECR 583.

9. See De Witte 1984; Rasmussen 1986; and Weiler 1991.

parties to resolve disputes—significantly advancing legalization in Europe. As the following list shows, the ECJ has played a key role in increasing legalization in Europe.

*Obligation:* When the ECJ declared the supremacy of European law it turned national courts into enforcers of European law in the national sphere. National courts set aside conflicting national laws, award penalties for the nonimplementation of EU directives, and assess fines for violations of European law, creating an incentive for firms and governments to change national policies that violate European law. In the words of Joseph Weiler, the transformation of the preliminary ruling system “closed exit” from the EU legal system, ending the ability of states to avoid their legal obligations through noncompliance.<sup>10</sup>

*Precision:* The ECJ has used preliminary ruling cases to specify the meaning of EU legal texts. Furthermore, with individual litigants raising cases and national courts sending these cases to the ECJ, states are less able to exploit legal lacunae and interpret their way out of compliance with European law.<sup>11</sup>

*Delegation:* By granting private litigants standing to invoke EU law to challenge national law, the ECJ increased the number of opportunities it has to rule on the compatibility of national policy with European law. Most of the court’s case load, most of the challenges to national policies that reach the ECJ, and many if not most of the advances in European law have been the result of national courts referring preliminary rulings to the ECJ.<sup>12</sup>

Given the key role private litigants and national judges played in advancing legalization in Europe, Burley and Mattli’s neofunctionalist explanation is quite compelling.

Although private litigants and national courts were key actors facilitating legalization of EU law in the past, they do not always play this role now. Scholars are in agreement that the transformation of the EU legal system has advanced legalization in Europe and made the EU legal system a potent tool for private litigants to influence national policy. There is also agreement that cases brought by private litigants continue to play a central role in the EU legal process. The question remains, however, whether the ECJ’s success at transforming the system with the help of private litigant cases means that a never-ending process of legal expansion has been set in motion. When do private litigants and national court actions help to advance legal integration? To answer this question, we need to better understand the interests of the ECJ’s key intermediaries (private litigants and national judges) and thus the factors shaping where, when, and why they use the EU legal system to promote their objectives.

10. Weiler 1991. In 1974 the ECJ extended member state obligations further by granting EU directives direct effects, making them more legally binding. In 1991 it created a financial penalty for states that failed to implement directives in a timely fashion. *Van Duyn v. Home Office Case*, ECJ decision of 41/74 (1974) ECR 1337. *Franco v. Italy*, C-6, 9/90, ECJ decision of 19 November 1991, ECR 1991.

11. Alter 1996b, chap. 7.

12. Dehousse 1998, 51–52. Member states have raised only four infringement cases against each other. The Commission raised 1,045 infringement cases from 1960 through 1994, 88 percent of which were after 1981 and most of which involved nonimplementation of EU directives in a timely fashion. National courts have referred 2,893 cases to the ECJ from 1960 to 1994, not all of which were challenges to national policy. (Data from the information services of the ECJ and from Commission reports).

## How and When Do Private Litigants and National Courts Use the European Legal System to Influence National Policy?

By focusing on private litigants and national judges, I am not implying that private litigant cases are the only factor contributing to increased legalization in Europe or that EU law influences domestic policy only through private litigant suits. Member states advance legalization when they pass new legislation at the EU level and grant EU bodies new powers—of which they do plenty. According to a report by the French Conseil d'État, by 1992 European law included 22,445 EU regulations, 1,675 directives, 1,198 agreements and protocols, 185 recommendations of the Commission or the Council, 291 Council resolutions, and 678 communications. The Community had become the largest source of new law, with 54 percent of all new French laws originating in Brussels.<sup>13</sup> Because national governments fear expansive interpretations of EU rules, and in order to bind each other more fully, they are also now more precise when they draft EU law. The Commission also has a key role in legalization. It offers interpretations of EU rules and raises infringement suits against member states. And even without a legal suit being raised, the EU legal system impacts national policy by creating anticipatory reactions within states. Most national governments automatically review the compatibility of prospective legislation with EU legal obligations.<sup>14</sup> They do this in a good faith effort to comply with EU law.<sup>15</sup>

But private litigant cases can in many instances be the only way to persuade a recalcitrant state to change its policies. Many cases that reach the ECJ through national courts arrive there because other avenues of influencing domestic policy failed. The litigant has tried to negotiate with the national administration about the policy. The litigant might also have worked with the Commission to address the violation, but either the Commission dropped or settled the case, or the ECJ's infringement decision failed to create a change in national policy. If there were no EU legal tool for private litigants, the case would end in noncompliance. But private litigants can use the EU legal system to pressure a government to comply with EU law. Knowing that private litigants will challenge questionable national policies, member states are more likely to avoid violations of EU law in the first place. Thus the existence of the EU's legal tool is crucial to increasing state compliance, even when the tool itself is not invoked. The key is that it must be available for use.

Using the EU legal tool to influence national policy involves overcoming four successive thresholds: First, there must be a point of European law on which domestic actors can draw and favorable ECJ interpretations of this law. Second, litigants must embrace EU law to advance their policy objectives, using EU legal arguments in national court cases. Third, national courts must support the efforts of the litigants by referring cases to the ECJ and/or applying ECJ jurisprudence instead of conflict-

13. Conseil d'État 1992, Rapport Public, 16–17.

14. For example, in Germany proposed legislation is reviewed by the Justice Ministry to ensure its compatibility with EU law. In France, the Conseil d'État conducts a similar review.

15. Usually all that is needed is a change in language to avoid a conflict with EU law, with the overall substance and objective of the policy remaining intact.

ing national policy. Fourth, the litigants must follow up their legal victory to pressure the government to change public policy.<sup>16</sup>

Because EU law influences domestic policy in other ways—by being directly applicable in the national realm, by being incorporated into national law by national governments, by creating anticipatory effects in the national government, or by the Commission raising an infringement suit—one cannot say that these four thresholds represent necessary conditions for EU law to influence domestic policy. But at least the first three are necessary if private litigants are to effectively use the EU legal system to influence national policy, with the caveat that if it is clear that these four thresholds are likely surmountable, then a group might be able to get its way simply by threatening to mount a litigation campaign.

In this section I pull together the state of our knowledge about the factors influencing each step of the EU legal process. These factors can potentially help to explain cross-national and cross-issue variation in the impact of EU law on domestic policy.

### *Step 1: EU Law and Domestic Policy*

The first step of the EU litigation process involves identifying a point of EU law on which domestic actors can draw. Not all national policies are affected by European law, and not all aspects of European law can be invoked before national courts.

EU law reaches quite widely. In addition, if a national policy indirectly affects the free movement of goods, people, capital, or services (the four freedoms) there might be an EU legal angle of attack. But EU law contains biases that make it more useful for some issues than for others. EU law creates significant legal rights for its citizens, but these rights are primarily economic citizenship rights directed at obtaining the four freedoms. The EU has created far fewer social rights and civil rights for its citizens.<sup>17</sup> Indeed, women might find EU law helpful in promoting equality in the workplace but not in addressing larger issues of gender discrimination that do not affect their participation in the workplace. Furthermore, the economic rights of EU law are focused on workers and firms engaged in transnational activity. The British worker who stays at home might find EU law far less helpful in challenging national rules than the French worker who moved to the United Kingdom. There are also policy areas that fall under the EU's jurisdiction and tend to be covered by EU law, including customs law, agricultural policy, transport policy, certain taxation issues, and policy areas that have been harmonized. Farmers and shopkeepers might thus find themselves affected by EU law even though they sell all their goods on the domestic market.

In most cases EU law must create direct effects before it can be invoked in national courts to challenge national policy, meaning that the ECJ must determine if the law in

16. Alter and Vargas 2000.

17. See Ball 1996; and Shaw 1998. EU law does create some citizen rights regarding consumer protection, environmental protection, and workplace safeguards. Although these rights exist, they are limited. The vast majority of the private litigant cases before the ECJ either directly concern the economic rights created by EU law or are couched in terms of economic rights created under EU law.

question confers legal standing for individuals in national courts.<sup>18</sup> The ECJ decides on a statute-by-statute basis if EU law creates direct effects, taking into account the specificity of the law, whether the statute is clear and unconditional, and whether the statute leaves states significant discretion.<sup>19</sup> Regulations are directly applicable in the national realm, allowing litigants to invoke them directly to challenge national policy. Directives only sometimes create direct effects, mainly when the obligation they impose is very specific and the time period for adoption has expired.

A separate issue is whether the ECJ would be willing to interpret EU law in the litigant's favor once a case is raised. There is relatively little research on the factors shaping ECJ decision making, but it is clear that the ECJ makes strategic calculations in its decision making, avoiding decisions that could create a political backlash. Geoffrey Garrett, Daniel Kelemen, and Heiner Schulz argue that the greater the clarity of EU legal texts, case precedent, and legal norms in support of a judgment, the less likely the ECJ is to bend to political pressure.<sup>20</sup> In addition, the smaller the costs a legal decision creates for a state, the more likely the ECJ is to apply the law even if it means deciding against a powerful member state.<sup>21</sup> But as I argue elsewhere, even when the costs of ECJ decisions are significant, and the decisions are controversial, states usually lack a credible threat to cow the ECJ into quiescence. When a significant consensus exists among key member states against a decision, political threats can become credible and the ECJ is more likely to be influenced.<sup>22</sup> George Tsebelis and Geoffrey Garrett further hypothesize that when the voting rule to overturn an ECJ decision requires a qualified majority, the ECJ will have less leeway to stray from the wishes of member states.<sup>23</sup> Their argument remains rather vague and they do not provide evidence to support their claim—indeed it is far from clear that the ECJ is less bold in cases involving regulations and directives that only require qualified majority votes. Nonetheless, most analysts agree that mobilizing a credible threat will be less difficult, though still difficult, when states only need a qualified majority vote to overturn the ECJ than when unanimity is required (such as when the decision is based on the treaty itself).

These findings offer helpful starts, but they do not lead to many concrete hypotheses of how extralegal factors shape ECJ decision making. What we can say for now is that systematic biases in EU law shape which national policies can be influenced by the EU legal process and which actors will find EU law most helpful to promote their objectives. EU law is mostly concerned with economic issues with a transnational dimension, and thus economic issues involving transnational elements are more likely to be affected by EU litigation. Laws that are more specific are more likely to

18. The ECJ's *Francovich* doctrine implies that plaintiffs can challenge a state's nonimplementation of a directive regardless of whether the directive itself creates direct effects. This is a small exception on the general rule that EU law must create direct effects to be invoked before national courts. I am indebted to Steve Weatherhill for pointing this out.

19. See Chalmers 1997; and Folsom 1995, 86–89.

20. Garrett, Kelemen, and Schulz 1998.

21. See Alter 1996a; and Garrett, Kelemen, and Schulz 1998.

22. Alter 1998b.

23. Tsebelis and Garrett n.d.

create direct effects; and when the ECJ's doctrine is more developed, the ECJ is more likely to rule against a national policy.<sup>24</sup> The ECJ can be influenced by national governments to decide in favor of existent national policy, but in most situations member states lack a credible threat to cow the ECJ into quiescence. Furthermore, even when member states can muster a credible threat, the ECJ may prefer to stick to the letter of the law to maintain support by the legal community<sup>25</sup> or to make a ruling that encourages the Council to enact new legislation or change its legislation at the EU level.

*Step 2: Mobilizing Litigants to Use EU Law to Promote Their Policy Objectives*

The Commission can raise cases against member states, but for a variety of reasons it often chooses not to.<sup>26</sup> From 1982 to 1995, the number of complaints received by the Commission was more than three times greater than the number of official inquiries undertaken by the Commission and was fourteen times greater than the number of Article 226 cases raised by the Commission.<sup>27</sup> If the Commission will not raise a case, private litigants must pursue the issue on their own. This seems to be the norm; indeed, starting in the 1970s, private litigant cases overtook the Commission in the supply of cases involving conflicts between national law and EU law by a very significant margin.<sup>28</sup>

There are many European legal texts and favorable EU legal precedents that remain unexploited even though they could help litigants promote their objectives and create significant financial gain. When are domestic actors most likely to turn to EU litigation to promote their objectives? Which domestic actors are most likely to find litigation an attractive strategy to influence national policy?

A number of factors specific to national legal systems affect litigants' willingness to use EU law to challenge national policy. Restrictions in legal standing may make litigation harder to pursue in certain countries and certain issue areas. Other factors include procedural rules on how complaints are filed and investigated, variations in the existence of legal aid, requirements that losers in cases compensate winners, time limits for raising cases, rules limiting the size of awards, and rules regarding the burden of proof. In the United Kingdom, for example, a cap on discrimination awards limited the number of claimants willing to raise discrimination suits, but the Equal Opportunities Commission's (EOC) activism led to a number of British cases challenging U.K. equality policy.<sup>29</sup> Groups would be unable to follow the EOC's strategy in France, Belgium, and Luxembourg, where they are excluded from participating in

24. But when it is clear from the ECJ's doctrine how it will decide, states are also more likely to settle out of court in the shadow of the law, and thus the case may never go to court. Alter forthcoming.

25. Mattli and Slaughter 1995.

26. On the difficulty of mobilizing the Commission to pursue infringements, see Weatherhill 1997.

27. Conant forthcoming, fig. 1. For a study on the use of the infringement procedure by the Commission, see Tallberg 1999.

28. Dehousse 1998, 52.

29. See Alter and Vargas 2000; and Barnard 1995.

TABLE 1. *Comparison of domestic civil litigation rates (per 100,000 inhabitants)*

	<i>Civil procedures</i>	<i>Cases heard in first instance legal bodies</i>	<i>Cases heard on appeal</i>
West Germany (1989)	9,400	4,911	251
England/Wales (1982)	5,300	1,200	16
France (1982)	3,640	1,950	250

*Source:* Blankenburg 1996, 295.

*Note:* In Germany the total volume of litigation initiated by private actors (civil litigation) is unusually high. If the procedures raised in administrative and labor courts were added to the figures for Germany, the rate of civil procedures would increase by another 1,350 per 100,000, and the appeal rate would rise accordingly.

equality cases.<sup>30</sup> In Denmark only union officials can pursue equality issues, since gender-equality clauses are part of collective-bargaining agreements. If the union refuses to pick up the issue, the individual facing discrimination may be out of luck. This type of variation can lead to cross-national and cross-issue variation in the impact of EU law on domestic policy.

The litigiousness of a society also influences whether litigants use the EU legal process. Importers and exporters in Germany regularly challenge decisions of tax authorities in the tax courts, leading to many EU legal cases. Making a veiled reference to numerous German cases involving customs classifications, Adophe Touffait, a former procureur general at the French Court de Cassation, argued that French enterprises would never become preoccupied with the distinction between types of flours, especially given the reluctance of commercial groups to legally challenge acts of tax or customs administrators.<sup>31</sup> Touffait's argument is supported by statistics on domestic litigation rates. As Table 1 shows, German citizens raise far more legal cases than do British or French citizens. Indeed, most commercial disputes in France continue to be resolved by arbitration rather than through the legal system.

A clever lawyer, however, can often find ways to surmount national legal and procedural barriers, if they or their clients are highly motivated. Which litigants are more likely to be motivated and more likely to raise EU law cases? Drawing on U.S. public law scholarship, Lisa Conant argues that law is at the service of the privileged; litigants with financial resources at their disposal and significant legal know-how are more likely and able to use litigation to promote policy objectives. With respect to EU law, Christopher Harding and Conant find that interest groups, large firms, and lawyers who can provide their own services are the privileged actors most able and likely to pursue an EU legal claim.<sup>32</sup> Of the privileged actors, firms and private lawyers are more likely to use litigation than organized interests, although organized

30. See Blom et al. 1995; and Fitzpatrick, Gregory, and Szyzszak 1993, 19–20.

31. Touffait 1975.

32. See Conant 1998; and Harding 1992.

interests are often more able to use a test-case strategy, picking cases with favorable fact situations and shopping for a supportive legal forum.

Which firms and groups are most likely to use litigation, and when are they likely to use litigation? Conant argues that when the potential benefits are significant for an individual or group, litigants are more likely to mobilize to use litigation. The more concentrated the benefits, the greater the likelihood of strategic, coordinated litigation campaigns.<sup>33</sup> Karen Alter and Jeannette Vargas argue that independent of the size or concentration of benefits, how interest groups are organized at the national level influences whether or not specific groups employ litigation. They found the more narrow the interest group's mandate and constituency, the more likely it was to turn to a litigation strategy; and the more broad and encompassing the interest group's mandate and constituency, the less likely it was to turn to a litigation strategy to promote gender equality. This is because broad-based groups often have competing objectives. Thus it was unions composed predominately of women and single-issue agencies like the British Equal Opportunities Commission that used litigation to promote gender equality, whereas broad-based unions and women's groups avoided gender-equality litigation and focused instead on broader employment and family issues.<sup>34</sup>

Another important factor was whether an interest group enjoyed influence in and access to policymaking. In political negotiation, groups can usually strike a deal that will leave them at least better off than before. With legal decisions, groups could well end up with a policy that is more objectionable and harder to reverse than the previous policy. For this reason, and because of the risk and relative crudeness of litigation as a means of influencing policy, organized interests generally prefer to work through political channels.<sup>35</sup> The greater the political strength of a group, and the more access the group has to the policymaking process, the less likely a group is to mount a litigation campaign. In Belgium, for example, neither unions nor women's groups use litigation to pursue equality issues, preferring instead to use their access to the policymaking process to influence Belgian policy.<sup>36</sup>

Litigation is more likely in countries where actors commonly use litigation to challenge policy and where the rules on legal standing and procedures make EU law litigation feasible and profitable. One can expect litigation from wealthier individuals and firms or from lawyers who can provide their own legal council, especially when these actors face potential benefits of significant magnitude. Ironically, although interest groups can perhaps most effectively use test-case litigation strategies, they are the least likely actors to adopt such a strategy. But if political channels are closed, groups might find litigation their best option for influencing public policy. Narrowly focused groups and groups that do not enjoy significant influence over policymaking are most likely to find litigation enticing.

33. Conant 1998, chap. 3.

34. Alter and Vargas 2000.

35. *Ibid.*

36. Fitzpatrick et al. 1993, 89.

TABLE 2. Reference patterns in EU member states (1961–97)

Country	1961–69	1970–79	1980–89	1990–98	Total
Germany	30 (40%)	284 (42%)	346 (28%)	463 (26%)	1,123 (30%)
France	7 (9%)	85 (13%)	285 (23%)	216 (12%)	593 (16%)
Netherlands	22 (29%)	108 (16%)	189 (15%)	174 (10%)	493 (13%)
Italy	3 (4%)	84 (12%)	125 (10%)	370 (21%)	582 (15%)
Belgium	10 (13%)	77 (11%)	142 (11%)	124 (7%)	353 (9%)
Luxembourg	3 (4%)	4 (1%)	17 (1%)	18 (1%)	42 (1%)
United Kingdom	—	20 (3%)	85 (7%)	163 (9%)	268 (7%)
Ireland	—	6 (1%)	15 (1%)	16 (1%)	37 (1%)
Denmark	—	6 (1%)	25 (2%)	47 (3%)	78 (2%)
Greece	—	—	21 (2%)	32 (2%)	53 (1%)
Spain	—	—	5 (—)	116 (7%)	121 (3%)
Portugal	—	—	1 (—)	30 (2%)	31 (1%)
Total	75 (100%)	674 (100%)	1,256 (100%)	1,769 (101%)	3,774 (99%)

Source: Based on the statistics in the 1997 annual report of the ECJ.

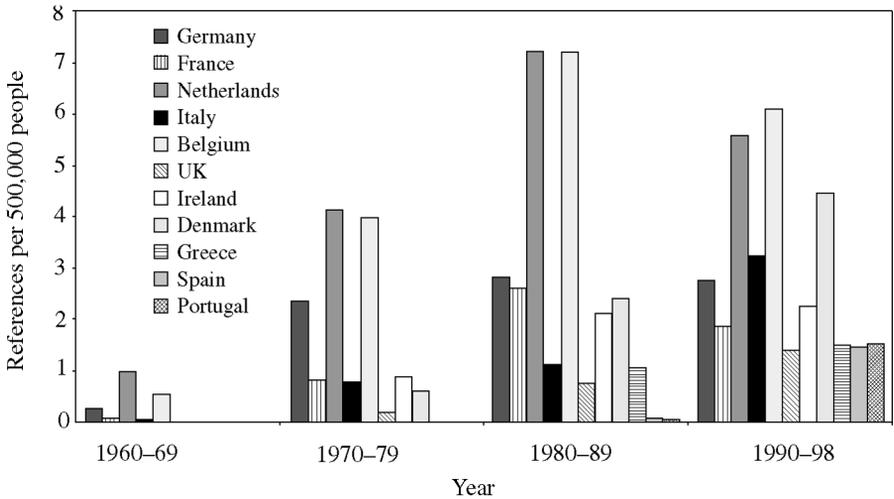
### Step 3: Eliciting National Judicial Support

When there is a point of EU law that creates direct effects, private litigants can draw upon this law in national courts to challenge national policy. Not all potential beneficiaries of EU rules will mobilize to challenge national policy through litigation, and even when they do, formidable barriers to changing national policy lay ahead. One challenge will be to persuade a national court to either refer the case to the ECJ or to interpret EU rules itself and set aside national law.

One can presume that national courts will be more likely to refer a case to the ECJ when asked to do so by one of the parties to the case. But even then, national courts may avoid referring a case for many reasons. Although national courts are supposed to make references to the ECJ any time a question of EU law arises and if they are a court of last instance,<sup>37</sup> in practice national courts cannot be compelled to refer a case.<sup>38</sup> A lower court's refusal can be appealed to a higher court in hopes of a reference or a more friendly interpretation, but often the most reticent courts are the highest courts. If the highest court refuses to refer the case, the litigant is simply out of luck. The varying willingness of national judges to make references and enforce EU law is reflected in part in variation in the total number of references to the ECJ by courts of different countries (see Table 2), a variation that cannot be explained by population size alone (see Figure 1).

37. *SRL CILFIT v. Ministry of Health* (I) ECJ decision of 283/81 (1982) ECR 1119.

38. In Germany it is a constitutional violation for national courts to deny the plaintiff their legal judge by refusing a reference to the ECJ. But appeals of a decision not to refer a case tend to languish on the docket of the German Constitutional Court, and in no other system is there a way to force a judge to make a reference or to apply EU law correctly.



Note: Figure excludes Luxembourg.

FIGURE 1. Reference per 500,000 population by country

Early studies explained the relative reluctance of some national judiciaries to refer cases by whether a national legal system was monist or dualist,<sup>39</sup> whether a tradition of judicial review existed in the country,<sup>40</sup> and whether the national legal system had a constitutional court.<sup>41</sup> But none of these explanations holds across countries, nor can they account for significant variation in reference rates within countries.<sup>42</sup>

Stone Sweet and Brunell have done the most complete quantitative analysis of reference rates to the ECJ. They find a correlation between variation in national reference rates and the level of transnational activity; they argue that the more transnational activity, the more conflicts between national and EU law and thus the more references by national courts.<sup>43</sup> There are reasons to question their causal argument and to be suspicious of the data they use to support their claims. Stone and Brunell imply that the numerous referrals to the ECJ involve conflicts between national and EU law and are provoked by transnational activity. But referrals for preliminary rulings also include challenges to the validity of EU rules themselves as well as questions about how national governments are applying these rules. Indeed, when Jürgen Schwartz analyzed the content of German references to the ECJ between 1965 and 1985, he found that only 37 percent of references were about conflicts between EU law and German law; 40 percent were challenges to the validity of EU law and Commission decisions.<sup>44</sup> And of the cases involving national policy, many

39. Bebr 1981.

40. Vedel 1987.

41. Cappelletti and Golay 1986.

42. Alter 1998a, 231–32.

43. See Stone Sweet and Brunell 1998a,b.

44. Schwartz 1988.

are not inspired by transnational activity. Rather, domestic groups may simply be capitalizing on the EU legal system to push their domestic agendas.<sup>45</sup> Conant found that if policy sectors not involving transnational activities were excluded from the reference figures, Stone Sweet and Brunell's correlation would not hold, at least for the United Kingdom.<sup>46</sup> The only way to understand the significance of the reference figures would be to read and analyze the substance of the 3,570 cases that have been referred to the ECJ. Even then, however, one would only capture a fraction of national court cases involving EU law, since the majority of these cases are not referred to the ECJ.<sup>47</sup>

As lawyers will attest, certain courts are more receptive than others to EU legal arguments. National court support cannot be captured by the number of references. Some courts accept ECJ jurisprudence without making a reference, whereas other courts reject key tenets of EU legal doctrine and thus do not make a reference. Some courts refer far-reaching questions of law to the ECJ, whereas other courts only refer narrow technical questions about EU legal texts, resolving the more significant issues about the impact of EU law in the national legal system on their own and only sometimes in accordance with ECJ jurisprudence.<sup>48</sup>

Case study analysis risks being more impressionistic than quantitative. But given the over-aggregated nature of the ECJ's reference data, and the current impossibility of determining the number and content of national court cases that are not referred to the ECJ, it may be the only way to capture the many factors shaping judicial behavior. The following observations come in large part from my own detailed research on the French and German judiciaries. I used variation in reference rates within each judiciary to garner an overall impression of which courts were referring cases to the ECJ; and I interviewed over a hundred judges, lawyers, and government officials to gain insight into the sources of variation in judicial behavior. Research has revealed five factors that contribute to variation in the behavior of national courts vis-à-vis EU law: (1) the substance of EU law and jurisdictional boundaries; (2) rules of access to national courts; (3) the identity of a court; (4) how EU law affects the influence, independence, and autonomy of the national court vis-à-vis other courts; and (5) the policy implication of ECJ jurisprudence. The first four factors create cross-court and

45. See Alter 1996a; Schepel 1998; and Chalmers 2000b.

46. Conant forthcoming.

47. It is hard to know how national judges deal with cases that are not referred. Damian Chalmers has made a heroic effort to find British cases involving EU law. He found 1,088 cases where British judges addressed questions of EU law. This number is nearly five times the number of British references to the ECJ (269). And Chalmers' data include only "reported cases" that were passed on to the Registry of the ECJ or published in one of twenty-seven publications. Lower court cases involving EU law are significantly underrepresented. Chalmers analyzes these cases for the most comprehensive study to date on how national courts are applying EU law. Chalmers 2000b.

48. For example, the German Federal Tax Court has sent over 140 references to the ECJ, probably more references than any other national court in the EU. But the tax court is well known for referring picky technical questions about the meaning of EU laws, wanting to know, for example, how to classify turkey tails and jeans with button flaps. Zuleeg 1993. The tax court is also well known for openly flouting the ECJ's doctrine on the direct effect of directives, reversing a lower court reference to the ECJ, and deciding important questions of legal principle on its own, without reference to the ECJ. Bebr 1983.

cross-branch variation and can cumulatively lead to cross-national variation. The last factor contributes to both cross-court and cross-national variation. I will briefly address each factor.

**The influence on judicial behavior of variations in the substance of the law and in jurisdictional boundaries.** Variation in reference rates is caused in part by variation in legal substance and in the jurisdictional divisions of courts. The more harmonized EU legislation is, the more courts having to deal with this legislation will consult with the ECJ. In Germany, for example, because customs regulations of the EU were the first to be harmonized (in the 1960s) and because tax law is one of the most harmonized areas of EU law, tax courts have been more involved in legal integration from an early period than penal courts, which deal almost exclusively with national law.<sup>49</sup> Because the Federal Office of Nutrition and Forestry and the Federal Office for the Regulation of the Agricultural Market are located in Frankfurt, the Frankfurt administrative court hears nearly all challenges to the validity of EU agricultural policies. This helps to explain why the administrative court in Frankfurt accounted for 9 percent of all German references from 1960 to 1994.<sup>50</sup>

**The influence of access rules on judicial behavior.** We have seen that access rules shape litigant incentives and their ability to pursue an EU law litigation strategy. They also influence judicial behavior vis-à-vis EU law because they affect the ability of national courts to influence the development of European and national law and the incentives of judges to refer cases to the ECJ. France provides a good example of how access rules shape judicial behavior vis-à-vis EU law.

Compared with the active role played by the German and Italian Constitutional Courts in EU legal issues, the French Conseil Constitutionnel's position is bizarre: in all but a few narrow issues the Conseil Constitutionnel refuses to be involved in controlling the compatibility of French law with international law.<sup>51</sup> Access rules explain this position. Laws only make it to the Conseil Constitutionnel for review before they have actually been promulgated and only if political disagreement exists within the government or between the government and the legislature. Many laws of questionable constitutionality are never referred to the Conseil Constitutionnel, and when laws are referred, the Conseil Constitutionnel has only two months to make a decision. According to Bruno Genevois, the secretary general of the Conseil Constitutionnel, the Conseil Constitutionnel is concerned that a national law it finds to be compatible with EU law could be implemented in a way that violates EU law or could be found to be incompatible with EU law by the ECJ or—even more embarrassing for a court charged with upholding the rights of its citizens—by the European Court of Human Rights (ECHR). Because of its inability to systematically ensure that national law complies with international law, and because of the embarrassing

49. Indeed, in Germany tax courts, the smallest branch of the judiciary, with less than 3 percent of all judges, account for 49 percent of German references.

50. Seidel 1987.

51. Luchaire 1991.

possibility that it could later be contradicted by the ECJ or the ECHR, the Conseil Constitutionnel prefers not to be involved in enforcing the supremacy of international law.<sup>52</sup>

Access rules also make it hard for French litigants to seek out the most friendly national courts for EU legal challenges. The “ordinary courts” are clearly the most willing to make references to the ECJ (indeed they account for nearly 90 percent of all French references to the ECJ).<sup>53</sup> But constructing a case to challenge EU law is difficult for these courts.<sup>54</sup> The administrative court system deals with direct challenges to administrative acts and national law and, for most of these cases, the Conseil d’État is the court of first and last instance. For reasons that will be discussed, the Conseil d’État is not receptive to EU legal challenges, and in most cases it cannot be circumvented or pressured from courts beneath it.<sup>55</sup> The lack of judicial support from the court best placed to entertain challenges to national policy is a big reason why there are fewer litigant challenges to national policy in France and relatively few significant developments in European law based on references from French courts.

**The influence of judicial identity on judicial behavior.** As many scholars have argued, the identity of judges shapes their behavior vis-à-vis EU law.<sup>56</sup> Judicial identity is shaped by the training of judges, the selection process for judges, and the role the court plays in the legal and political process—all factors that can vary by country, by judicial branch, and by court.

Judicial training varies across countries, and even within countries there can be significant variation in how EU legal issues are taught. In most European countries, ordinary court judges participate in specialized training for judges that imparts to them a specific understanding of their role in the political system and how they are to deal with EU legal issues (this education has changed with time, creating generational differences within national judiciaries). Outside ordinary courts are a series of first instance legal bodies (some called courts, others tribunals, and others by other names) which have a different mode of appointment that does not necessarily involve training in judge schools. High court appointees may come from academia or political office, bringing a variety of training experiences and backgrounds. These different life experiences lead judges to act differently when confronted with EU legal issues.

The fairly antagonistic position the French Conseil d’État has taken vis-à-vis EU law, for example, is often explained by the identity of Conseil d’État judges, an

52. Genevois 1989, 827.

53. “Ordinary courts” is a category in France and in other countries. Ordinary courts in France are contrasted to administrative courts and the Constitutional Council.

54. Ordinary courts hear mainly civil and penal law cases. For a civil law case, either the case has to emerge from a dispute between private parties or from a government action against a private actor.

55. In the 1990s the Conseil d’État was more receptive to EU legal arguments, following its change in position on EU law in the *Nicolo* case. Plötner claims that litigants have been more successful in front of the Conseil d’État since then, but it is only a matter of degree. Plötner 1998. Few would say that the Conseil d’État welcomes EU legal arguments, and reference rates from the administrative branch to the ECJ remain abysmally low.

56. See Chalmers 1997; Conant forthcoming; and Mattli and Slaughter 1998b, 200–201.

identity imparted to them in their training at the elite Ecole National d'Administration,<sup>57</sup> which teaches French high administrators to have a strong identification with the French state.<sup>58</sup> Equally important is that members of Conseil d'État float freely in and out of the government and private sector and the Conseil d'État. As Weil has argued,

the Conseil d'État is too close, by virtue of its recruitment, its composition, and the climate in which it is enmeshed, to the centers of political decision-making to not function on the same wavelength as [the government], to not feel vis-à-vis the authority which it is called upon to control a sympathy in the strongest sense of the word, which explains the self-censorship [the Conseil d'État] imposes on itself and the selectivity in the control it exercises.<sup>59</sup>

The background of a Conseiller d'État affects its jurisprudence on a number of issues, including EU law.<sup>60</sup> A similar argument was made for the German Federal Tax Court by Gert Meier, who claimed that having themselves served many years in the administration before becoming judges, Federal Tax Court judges tended to give the benefit of the doubt to the tax administration.<sup>61</sup>

Variation in how judges understand their legal and political mandates creates cross-national and cross-issue variation in how courts deal with EU legal issues. A number of first instance legal bodies, for example, do not consider themselves to be "courts" and for this reason do not see themselves as qualified under Article 234 EEC to make a reference to the ECJ. In the United Kingdom, for example, first instance industrial tribunals will make references to the ECJ, whereas in the Netherlands and Ireland the legal bodies that deal with equality cases in the first instance do not see themselves as authorized to refer cases to the ECJ.<sup>62</sup> Some countries have legal bodies staffed by lay judges or a mix of lay and professional judges that attempt to be less formal than courts and function more like arbitrating bodies. For example, most commercial disputes in France begin and end in arbitration and thus are not referred to the ECJ.<sup>63</sup> Some countries have mid-level appellate courts that, in essence, are staffed by a few law professors who review the legal basis of lower court decisions and who tend not to make references to the ECJ.

**Variations in how EU law affects the influence, independence, and autonomy of national courts in relation to each other.** A significant amount of evidence indicates that the more EU law and the ECJ are seen as undermining the influence, independence, and autonomy of a national court, the more reluctant the national court will be to refer far-reaching and legally innovative cases to the ECJ. As I have argued elsewhere, lower courts are often more willing to make references because a

57. Plötner 1998, 55–56.

58. See Bodiguel 1981; and Kessler 1986.

59. Weil 1972, ix.

60. Loschak 1972.

61. Meier 1994.

62. Fitzpatrick et al. 1993.

63. Touffait 1975.

reference bolsters their authority in the national legal system and allows the court a way to escape national legal hierarchies and challenge higher court jurisprudence.<sup>64</sup> Lawyers attest to the greater openness of lower courts when it comes to making a reference to the ECJ, and statistics support this claim, showing that even though lower courts are not legally obliged to make a reference to the ECJ, lower and midlevel courts refer the vast majority of all references to the ECJ (73 percent). Judges and scholars have also argued that lower courts have in many instances been the driving force in expanding ECJ doctrine and in promoting change in national doctrine.<sup>65</sup> Indeed, of the ECJ's preliminary ruling decisions discussed in two legal textbooks (and thus by implication the most significant of the ECJ's jurisprudence) 62 percent of the references had been made by lower courts.<sup>66</sup>

Last instance courts are often more reluctant to make a referral to the ECJ, especially when they are threatened by the existence of the ECJ as the highest court on questions of European law or are upset at how EU law undermines their own influence and the smooth operation of the national legal process. Indeed, courts with constitutional powers have made virtually no references to the ECJ, and doctrinal analyses reveal clear efforts by national high courts to position themselves vis-à-vis the ECJ to protect their independence, authority, and influence.<sup>67</sup>

**Variation in the impact of EU law on national law.** Judges do take into account the political implications of their decisions. Some ECJ decisions have created a divergence in the levels of legal protection and in legal remedies available under national law and under EU law, advantaging citizens who can draw on EU law over those who must rely on national law alone. ECJ jurisprudence has also resulted in great complexities for national legal systems and problematic outcomes. The seeming perversities created by the ECJ and EU law, as well as interpretations with which national courts simply disagree, can sap the willingness of national judiciaries to support the ECJ.

Many scholars (including early neofunctionalist theorists) believed that the largest barrier to national judicial support was ignorance about the EU legal system. With knowledge, they assumed, should come support. Although hearing more cases does seem to lead to more references to the ECJ, it does not necessarily lead to greater acceptance of ECJ jurisprudence. As Renaud Dehousse explains,

From the standpoint of a national lawyer, European law is often a source of disruption. It injects into the national legal system rules which are alien to its traditions and which may affect its deeper structure, thereby threatening its coherence. It may also be a source of arbitrary distinctions between similar situa-

64. Alter 1996a.

65. See Alter forthcoming; Alter and Vargas 2000; Mancini and Keeling 1992; Burley and Mattli 1993; and Weiler 1991.

66. Alter forthcoming, chap. 2.

67. My study of national court acceptance of EU law supremacy shows how the highest national courts are demarcating the borders of the national constitutional order so as to limit future encroachments of European law and ECJ authority into the national domain. Alter forthcoming.

tions. . . . What appears as integration at the European level is often perceived as disintegration from the perspective of national legal systems. . . . Moreover, preliminary references are one of the central elements in the interface between Community law and national law. The ECJ is therefore perceived as the central agent in a process of perforation of national sovereignty.<sup>68</sup>

Controversial ECJ decisions have led to rebukes by judges as well as attempts to avoid references to the ECJ and the application of EU law. For example, the ECJ's jurisprudence regarding labor law and especially its decision that employers must accept medical certificates from other member states, even when an Italian family of four working in Germany had for four years in a row all "fallen ill" during their vacations in Italy, have led the German Federal Labor Court to openly criticize the ECJ and assert that EU law creates a danger for the consistency of codified law in Germany.<sup>69</sup> According to Jonathan Golub, because British judges believe that the ECJ will interpret environmental directives more broadly than necessary, British judges have withheld references to the court in environmental issues.<sup>70</sup> Chalmers finds a greater resistance to EU law when national judges perceive EU law to undermine the capacity of British institutions to promote social conformity.<sup>71</sup> And Carol Harlow predicts a national judicial backlash against ECJ jurisprudence on state liability, possibly expanding to a larger political backlash.<sup>72</sup>

There is no way to ensure that a national court will refer a case to the ECJ or apply EU law as it should. If the litigant indicates a preference for a reference, presumably the likelihood of a reference will increase. If the ECJ's jurisdictional authority in the area is undisputed, and if the ECJ's jurisprudence is uncontroversial within the national legal community, it is also more likely that national courts will either make a reference or apply the ECJ's case law themselves. Lower courts appear relatively more willing than higher courts to make a reference. Courts where appointees have fewer connections to the government seem more likely to act more favorably to challenges to national policy. Lawyers have a sense of which judges are more "friendly" to EU law arguments. Litigants who can shop for legal venues in which judges are thought to be receptive to EU legal arguments are most likely to succeed in getting their cases referred to the ECJ. Interest groups may be able to select among a variety of potential cases, and firms with numerous offices across regions and countries might have the opportunity to raise a case where judges tend to be more open to EU law arguments. The litigant should look for a court that accepts for itself a role filling in lacunae in legal texts, making references to the ECJ when necessary, and setting aside contradictory national laws. The judges must also be willing to challenge both national legal precedent and political bodies—something required when litigants use the EU legal system to influence national policy.

68. Dehousse 1998, 173.

69. Kokott 1998, 124.

70. Golub 1996.

71. Chalmers 2000a.

72. Harlow 1996, 31.

*Step 4: Following Through on Decisions: Creating Political and Financial Costs*

Just because the ECJ decides in favor of the plaintiff challenging national policy, one should not assume that the government will change its policy. The government may simply compensate the litigant while leaving the legislation in effect and administrative policy unchanged. Or it can change the language of a national law to technically comply with the decision, without significantly changing domestic policy. Or it can simply ignore an adverse ECJ ruling, knowing that the plaintiff likely will not endeavor to have the decision enforced and that the government will not lose an election because it failed to respond to the ECJ's legal decision.

An ECJ decision is likely to lead directly to a change in national policy in certain cases. Anne-Marie Slaughter has claimed that the more a national political ethos supports the rule of law, the more likely groups are to castigate government actions that violate the rule of law and the more likely a government is to change its policy in light of a legal decision.<sup>73</sup> Also, if a legal decision is made in an area of high political salience, where the government can anticipate copy-cat cases or political pressure, legislators are more likely to respond to the decision automatically. An ECJ decision is also more likely to influence the policy in the country that referred the case, because at least there the national court will be likely to enforce the decision.<sup>74</sup>

In many cases, however, translating a legal victory into a policy victory will take follow-through—a second strategy to show a government that there will be costs (financial, political, or both) to not changing its policy. Follow-through has taken a number of forms. Harlow and Richard Rawlings give examples of interest groups publishing pamphlets advertising the EU legal rights of citizens and including a complaint form and of groups distributing videos explaining how to use the EU legal process. In some cases groups have solicited complaints through mass mailings, simultaneously submitting them to the government and the Commission with demands for legislative change.<sup>75</sup> Michael McCann highlighted another strategy where litigation was used to dramatize issues to strengthen political movements, and favorable decisions were invoked in bargaining with employers and public bodies.<sup>76</sup> Combining a legal victory with a political strategy shows the government that the legal case will not be isolated and that faced with a legal challenge, the government would likely lose.

When are we most likely to find follow-through from an EU law legal victory and thus have a legal decision that leads to policy change? Little research has been done

73. Slaughter 1995a. Technically, all EU member states are rule-of-law liberal democracies, thus there should be little variation in compliance across them. Yet it is clear that certain EU countries have worse compliance rates than others with ECJ decisions. Furthermore, even the clearly more law-abiding countries have been willing at times to ignore an ECJ decision.

74. Studies have found that national courts nearly always enforce ECJ rulings they receive as a result of their preliminary ruling reference. See Dashwood and Arnulf 1984; Kellermann, Levelt-Overmars, and Posser 1990; and Wils 1993.

75. See Harlow and Rawlings 1992, 276; and Meier 1994.

76. McCann 1994.

on this question; thus most of what follows should be taken as hypotheses rather than findings.<sup>77</sup> Private litigants might be satisfied with winning their cases and have less incentive to make sure that the government changes its policy. However, when organized interests or repeat players use litigation with the intent of influencing public policy, the resulting decision is more likely to be invoked in bargaining with the government. From this one can hypothesize that interest group or repeat-player litigation (when successful) is more likely to create policy change than a decision in a one-shot case raised by a private litigant.<sup>78</sup>

It is also possible that legal victories can be picked up by groups to create broader policy change. Drawing on Mancur Olson, Conant argues that distribution of the costs and benefits will influence whether groups mobilize in the aftermath of a legal decision. If there are significant benefits to be won by securing a change in policy, and these benefits fall narrowly on a group of people, it is more likely that individuals and groups will mobilize around a legal decision. When the benefits are distributed widely, an ECJ decision will garner less mobilization. Conant also points out that if the costs of policy change are narrowly focused, there can be a countermobilization against a legal decision. In this case the outcome will be a “compromised acceptance” of an ECJ decision, with the government working out a compromise with the groups involved, and perhaps also with the EU institutions. ECJ decisions where the costs are distributed widely, and the benefits distributed narrowly, may lead to policy change without countermobilization and thus a full acceptance of the decision.<sup>79</sup>

Certainly groups are more likely to mobilize when benefits are narrowly focused than when they are widely distributed, but there are numerous examples of groups mobilizing even when the benefits are unevenly distributed.<sup>80</sup> In each case, however, the groups mobilizing around the legal victory were preexisting. One could add to Conant’s hypothesis that legal decisions in areas where there are preexisting mobilized interests are more likely to provoke follow-through. The earlier hypotheses on group mobilization may be less important at the follow-through stage: groups with narrow mandates and single issue concerns that start a litigation strategy are likely to follow through on it; however, even encompassing groups may draw on a favorable legal decision in bargaining.

### *Interaction Effects of the Four Steps in the Litigation Process*

I summarize in Table 3 the factors that can influence each step of the litigation process. I have categorized the factors according to whether they create cross-national and/or cross-issue variation, and, where possible, I have developed hypoth-

77. Most work on the political impact of ECJ decisions has focused on the influence of ECJ jurisprudence on EU policy.

78. Dehousse 1998, 111.

79. Conant 1998, chap. 3. Conant supports these arguments with case study analyses of national responses to EU liberalization and ECJ jurisprudence involving two industries (electricity and telecommunications) in three countries (the United Kingdom, France, and Germany).

80. Alter and Vargas find groups mobilizing around issues of equal pay, and Harlow and Rawlings significant mobilization of consumer groups and environmental groups. See Alter and Vargas 2000; and Harlow and Rawlings 1992.

TABLE 3. *Factors influencing the four steps in the EU legal process*

<i>Step of legal process</i>	<i>Sources of cross-national variation</i>	<i>Sources of cross-issue variation</i>	<i>Where and when the EU legal system will most likely be used to influence domestic policy</i>
Step 1: When will EU law provide a legal basis to challenge national policy?	<p>For most EU legal texts, all states have the same legal obligations; thus these texts do not give rise to cross-national variation.</p> <p>Opt-out clauses in a few EU agreements could create some cross-national variation in the effect of EU law on domestic policy, but this will be the exception.</p>	<p>Variation based on substance of EU law.</p> <p>Variation based on whether EU law creates direct effects.</p> <p>Variation based on jurisprudence of the ECJ.</p> <p>Variation based on political consensus of member states.</p>	<p>EU law is mostly concerned with economic issues with a transnational dimension, but the EU has jurisdiction in some national policy areas (such as agriculture, value-added tax, and external trade); these are the areas of national policy most likely to be affected by EU litigation.</p> <p>Direct effects are likely to be created by laws that take the form of regulations and by directives and treaty articles that are specific.</p> <p>The ECJ is more likely to rule against a national policy in areas where ECJ doctrine is well developed than where it is not.<sup>a</sup></p> <p>The ECJ is more likely to rule against a national policy when the material and political costs of the legal decision are relatively low than when they are relatively high.<sup>b</sup></p> <p>The ECJ is more likely to rule against a national policy when there is no political consensus against the ECJ's decision among member states.<sup>c</sup></p> <p>When only qualified majority voting is required, the ECJ may be more susceptible to influence.<sup>d</sup></p>
Step 2: When will litigants mobilize to use EU law to promote their policy objectives?	<p>Variation based on national procedural and legal standing rules.</p> <p>Variation based on litigiousness of population.</p> <p>Variation based on how interests are organized at domestic level (narrow groups vs. encompassing groups).</p> <p>Variation based on access of domestic groups to policy-making process.</p>	<p>Variation based on wealth and legal know-how of litigants.</p> <p>Variation based on magnitude of potential benefits of litigation.</p> <p>Variation based on how interests are organized at domestic level (narrow groups vs. encompassing groups).</p> <p>Variation based on access of domestic groups to policy-making process.</p>	<p>Private litigant challenges to national policy are more likely to arise in countries where citizens and businesses commonly use litigation to pursue interests and where the legal system generally works.</p> <p>Wealthy individuals and large firms are more likely than others to raise cases and be able to use the legal system to their advantage.<sup>e</sup></p> <p>Private litigants are more likely to raise cases when the benefits of doing so are significant.<sup>e</sup></p> <p>Narrowly focused groups are more likely to turn to litigation than groups with broader mandates and more encompassing constituencies.<sup>f</sup></p> <p>Groups with limited or no access to the political process are more likely to turn to litigation to promote their objectives than groups with greater access.<sup>f</sup></p>

TABLE 3. continued

<i>Step of legal process</i>	<i>Sources of cross-national variation</i>	<i>Sources of cross-issue variation</i>	<i>Where and when the EU legal system will most likely be used to influence domestic policy</i>
Step 3: When will national judges refer cases and apply ECJ jurisprudence?	<p>Variation in rules of access to legal bodies (influences judicial behavior toward EU law).</p> <p>Variation in national legal training (may influence judicial identity and judicial behavior toward EU law).</p>	<p>Variation in rules of access to legal bodies (influences judicial behavior toward EU law).</p> <p>Variation in legal substance (leads some national courts to deal with EU legal issues more than other courts, influencing number of references but not necessarily judicial openness to EU law and ECJ jurisprudence).</p> <p>Variation in judicial identity (influences judicial behavior toward EU law).</p> <p>Variation in how EU law affects the independence, influence, and authority of judges (influences judicial willingness to send references and accept ECJ jurisprudence).</p> <p>Variation in the policy and legal impact of EU law on national law (influences judicial willingness to refer cases and accept ECJ jurisprudence).</p>	<p>If litigants indicate a willingness to pay and wait for a preliminary ruling decision, the likelihood of a referral increases.</p> <p>Legally uncontroversial ECJ decisions are more likely than controversial decisions to be accepted by national courts.</p> <p>A legal issue is more likely to be heard by the ECJ when litigants can forum-shop for sympathetic judges than when they cannot.</p> <p>Lower courts are often more willing than higher courts to make a reference.<sup>8</sup></p> <p>Courts with judges who have not previously served for long periods in the national administration are more likely than others to be sympathetic to challenges to national policy.</p>

TABLE 3. continued

<i>Step of legal process</i>	<i>Sources of cross-national variation</i>	<i>Sources of cross-issue variation</i>	<i>Where and when the EU legal system will most likely be used to influence domestic policy</i>
Step 4: When will a legal victory lead to policy change? When are litigants likely to follow through on a legal victory?	Variation based on effectiveness of national legal system and political elite's belief in and general adherence to a rule of law.	<p>Variation based on the political salience of the ECJ decision and the likelihood that the decision will mobilize domestic actors.</p> <p>Variation based on whether the ECJ decision was made in a case referred by a national court in the country targeted to change its policy.</p> <p>Variation based on whether the case was brought by a "repeat player" and/or has interest group support.</p> <p>Variation based on the size and distribution of potential benefits of policy change in light of a legal decision.</p> <p>Variation based on the organization of domestic interests.</p>	<p>The more a country tends to abide by its own court's decisions, the more it is likely to abide by a decision in an EU legal case.<sup>h</sup></p> <p>National legal decisions of high political salience are more likely than other decisions to provoke mobilization and thus to be respected (or legislatively overturned).</p> <p>Follow through on challenges to national policy is more likely to occur in cases constructed by groups or repeat players than in isolated cases raised by private litigants.<sup>i</sup></p> <p>Follow through is more likely to occur when the benefits of policy change are narrowly focused and the costs of policy change are widely distributed.<sup>e</sup></p> <p>Follow through is more likely to occur in policy areas where groups are mobilized and vigilant toward government behavior. Preexisting groups are more likely than others to mobilize around favorable legal decisions.</p>

<sup>a</sup>Garrett et al. 1998.<sup>b</sup>See Garrett et al. 1998; and Alter 1996.<sup>c</sup>Alter 1998b.<sup>d</sup>Tsebelis and Garrett n.d.<sup>e</sup>Conant 1998.<sup>f</sup>Alter and Vargas 2000.<sup>g</sup>Alter forthcoming.<sup>h</sup>Slaughter 1995.<sup>i</sup>Dehousse 1998.

eses about where and when private litigants are most likely to successfully use the EU legal system to influence national policy.

### **A Challenge to Neofunctionalist Theory: Negative Interactive Effects and the Process of Disintegration**

While different factors influence each step of the EU litigation process, there will clearly be interaction effects across steps. Neofunctionalist theory assumes positive interaction effects. Burley and Mattli envisioned a general harmony of interest among private litigants, national judges, legal scholars, and the ECJ propelling the process forward while they pursued their instrumental self-interests in a mutually reinforcing way.<sup>81</sup> Stone Sweet and Brunell expect the legal process to have its own dynamic, with litigants raising ever more cases and judges inevitably building law as they attempt to resolve disputes where the law is not clear.<sup>82</sup> It is true that the body of EU rules is expanding, driven by national governments who want to build a common market and now a monetary union. Levels of trade are expanding, driven by the completion of the common market and globalization more broadly. As a result, litigants have more opportunities and incentives to draw on European law. Furthermore, evidence indicates that one litigant's success in utilizing EU law can trigger other actors to mimic the strategy. Thus plenty of suggestive material exists to support any theory that predicts legal expansion. The key question is whether neofunctionalist theory can predict or account for the limits to the process of integration that appear along the way. The failure of neofunctionalist theory to account for these limits is what originally led Ernst Haas to abandon the theory.<sup>83</sup>

A virtuous circle, where successful litigation encourages more cases to be raised, and more references to the ECJ may certainly emerge, but it is not the only possibility. Negative feedback loops may also emerge. Factors that undermine each step of the litigation process can reverberate through all four steps, leading to fewer cases involving EU law and a diminishing impact of EU law on national policy. Once litigants are stung by an undesirable ECJ ruling, they may hesitate to raise ambiguous cases in the future. And though reference rates continue to increase, the ambivalence of national courts toward EU law and their opposition to key tenets of ECJ jurisprudence are also increasing. If national courts are not receptive to EU legal arguments, lawyers may well advise their clients not to pursue an EU legal case. The less domestic actors are mobilized to capture the benefits of EU law, the less pressure states will be under to comply with EU law.

In addition to negative interactive effects, the success of EU legal integration may have instigated a larger backlash. Faced with unacceptable ECJ decisions, member

81. Burley and Mattli 1993.

82. Stone Sweet and Brunell 1998b.

83. Haas 1975. It has historically been the case that neofunctionalist theory works as long as (and only when) integration is moving forward. For a review of the rise and fall of neofunctionalist theory in the study of the EU, see Caporaso and Keeler 1995.

states have passed protocols and laws at the EU level that reverse or qualify the effects of ECJ rulings, such as the famous Barber Protocol of the Maastricht Treaty that limits the retrospective effects of the ECJ's *Barber* ruling. Although there are relatively few examples where member states have reversed the effects of ECJ rulings, states have sought to constrain the ECJ's activism. Having seen how the ECJ used legal lacunae to seize new powers and delve into areas that member states considered to be their own exclusive realm, national governments have constructed legislative barriers to ECJ legal expansion. Member states have also taken to writing clauses into EU treaties and legislation protecting national policies, sometimes in ways that violate the spirit of the EU and contradict ECJ doctrine. For example, the Danish government insisted on a provision in the Maastricht Treaty that allows it to ban Germans from buying vacation homes, and the Irish government demanded a protocol making it clear that nothing in EU law will interfere with Ireland's constitutional ban on abortion. According to the *Economist*, EU legislation is filled with secret footnotes designed to protect national policies. For example,

[The 1994] directive on data protection attracted 31 such [exception] statements. Britain secured an exemption for manual filing systems if—work this one out—the costs involved in complying with the directive outweigh the benefits. Germany secured the right to keep data about religious beliefs under wraps. Since these and other statements are not published, Joe Bloggs will know about these maneuverings only by chance or if his government chooses to tell him.<sup>84</sup>

These protections are designed to limit the reach of EU law, so that states do not have to change a valued national policy. States have also excluded the ECJ entirely from some of the new areas of EU powers (such as common foreign and security policy, and issues of justice and home affairs that affect domestic security and a country's internal order). And states are writing provisions into EU law that limit the ECJ from expanding the legal effects of EU law into the domestic realm. The new Treaty of Amsterdam, for example, states that policies adopted under the EU framework with respect to Article K.6 will not create direct effects—making private litigants unable to draw on them to challenge national provisions.

Having figured out that lower courts are much more willing to send references to the ECJ, and that their references are allowing the ECJ to expand its own authority and compromise national sovereignty, member states are much more reluctant to open new access to the ECJ for lower courts. Since 1968, the extension of preliminary ruling rights to lower courts has been contested and often limited when the ECJ's legal authority has been expanded to new areas of EU law.<sup>85</sup> Most recently, member states allowed national governments to limit the reference rights of lower courts with respect to new areas of ECJ competence gained in the Treaty of Amsterdam.<sup>86</sup> These efforts are aimed at limiting the future expansion of EU law into the national realm.

84. Seeing Through It, *The Economist*, 16 September 1995, 59.

85. Alter 1998b.

86. Article K.7 of the Treaty of Amsterdam.

Member states have also sought to regain national control over certain policy issues. The Maastricht Treaty articulates a “subsidiarity principle” authorizing the Community to undertake actions only “if and so far as the objectives of the proposed action cannot be sufficiently achieved by the member state.”<sup>87</sup> This principle has provided a political/legal basis to repatriate powers back to the national level. Politicians, citizen groups, and journalists invoke the subsidiarity principle to argue against EU legislation. And member states have used this principle to reclaim power that the ECJ had claimed for the EU.<sup>88</sup> The ECJ has also invoked the concept of subsidiarity to revise its earlier jurisprudence in favor of national prerogatives.<sup>89</sup>

National high courts are also concerned that the EU and the ECJ have gained too much power, and they are creating their own limits on the expansive reach of EU law. Indeed, though early neofunctionalist theory predicted that greater experience would induce greater support for the process of integration, the opposite seems to have occurred. The more national courts have seen how the process of European integration is influencing the domestic administrative, political, and legal order, the more they seem willing to question the validity of EU law, of ECJ and Commission decisions, and even of their own governments’ decisions taken at the EU level. For example, having seen the ECJ give expansive interpretations to the EU treaties in the past, in 1993 the German Constitutional Court ruled that ECJ interpretations that extend the treaty will not be valid in Germany.<sup>90</sup> The court warned the ECJ to protect Germany’s subsidiarity rights, and it set limits on the German government’s authority to transfer decision-making authority to the EU level.<sup>91</sup> In France the Conseil Constitutionnel has asserted its authority to evaluate the constitutionality of EU rules and declared that the French parliament may not ratify, validate, or authorize an international (that is, EU) engagement contrary to the constitution.<sup>92</sup>

87. Article 3b TEU. This clause pertains to areas that do not fall under the Community’s exclusive competence. For more on this clause, see Bernard 1996.

88. For example, member states included Article 126 TEU, which instructs the EU to respect “the responsibility of the member states for the content of teaching and organization of the educational system.” This clause asserts state power in an area that the ECJ had previously denied states power. Dehousse 1998, 166.

89. *French Penal Authorities v. Keck and Mithouard*, ECJ decision of 24 November 1993, C-267 and 268/91 ECR I-6097.

90. They stated: “Whereas a dynamic extension of the existing Treaties has so far been supported . . . in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty . . . interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.” Interestingly, the German citizens who raised the challenge to the Maastricht Treaty were members of the European Parliament and a high-level civil servant of the European Commission. *Brunner and Others v. The European Union Treaty*, BVerfG decision of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92; published in *Common Market Law Reports* (hereinafter CMLR), January 1994, 57–108. Quoted from p. 105 of the decision.

91. *Brunner and Others v. The European Union Treaty*, BVerfG decision of 11 January 1994, 2 BvR 2134/92 and 2 BvR 2159/92, 57–108. For an analysis of this decision, see Weiler 1995; and Alter forthcoming, chap. 3.

92. See *Maastricht I Conseil Constitutionnel*, decision of 9 April 1992, 92–308 DC; and *Case 91-294 Conseil Constitutionnel*, decision of 25 July 1991, Schengen Decision, 1991, 173. For an analysis of these decisions, see Pellet 1998; and Zoller 1992, 280–82. Both the French and German rulings are designed to position these courts to serve as a second review, a national-level review, of the validity of EU law in the

By opening up the possibility of national constitutional constraints to EU law, supreme courts have also created a national means for individuals, groups, and minority factions to challenge deals made at the EU level.<sup>93</sup> German Länder governments have drawn on the German constitution to challenge an EU directive regarding television programming that the ECJ had upheld,<sup>94</sup> and German importers of restricted bananas have used German courts and the German constitution to challenge the EU's banana regime.<sup>95</sup> These examples show that national and EU legal systems can also be used by private litigants to challenge advances in European integration agreed to by their governments.

Certainly, as long as European governments seek to facilitate more trade through drafting common rules, the present trajectory toward more integration and more EU law will continue. But negative feedback between the four steps of the litigation process can undermine the influence of EU law on domestic policy. Clearly, even in the legal realm the forces that led to increased legalization in the past are not now nearly so unidirectional. Indeed, even Burley and Mattli have backed away from their neofunctionalist argument, noting that neofunctionalism has "no tools to determine when self-interest will align with further integration . . . and when it will not."<sup>96</sup>

Burley and Mattli suggest returning to midrange theories about private litigant and national court behavior, like the hypotheses explored here. But there is certainly also room to theorize more broadly on the systematic factors that contribute to moves toward disintegration. There is much to suggest that the forces for disintegration are created by the process of European integration itself.<sup>97</sup> As European integration expands, it upsets more national policies. As more power is transferred to EU institutions, national actors (national courts, national administrators, national parliaments, and national interest groups) find their own influence, independence, and autonomy undermined. These actors may in the past have used the EU legal and political system to promote their objectives, and they may continue to do so when convenient. But they are also quite willing to use both EU and national political and legal systems to challenge EU authority in order to protect their influence, independence, and authority, and when doing so promotes specific objectives. The ECJ's intermediaries are often fair-weather friends. Much to the surprise of the ECJ and pro-integration actors, they are increasingly vocal critics, too.

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national realm. Their goal is to pressure the ECJ to scrutinize the validity of EU law more carefully, to take national judicial concerns into account in its decision making, and to be more sensitive to national sovereignty considerations. Supreme courts also hope to influence their governments to be more careful in what they agree to at the EU level. Alter forthcoming.

93. Because French citizens cannot bring cases to the Conseil Constitutionnel, they are less able to use the French legal system to challenge the constitutionality of EU law. Some observers speculate that the Conseil d'Etat may eventually create a means for private litigants in France to invoke the French constitution to challenge EU law.

94. *Bayerische Staatsregierung v. Bundesregierung*, BVerfG decision of 11 April 1989, 2 BvG 1/89, CMLR 1990 1 649–655; and BVerfG decision of 22 March 1995, 2 BvG 1/89, EuGRZ 1995, 125–37.

95. See Cassia and Saulnier 1997; Everling 1996; and Reich 1996.

96. Mattli and Slaughter 1998b, 185.

97. For an argument to this effect, see Dehousse 1998, 173; and Suleiman 1995.

## Generalizing from the European Case to Elsewhere

The European legal system has some unique attributes that have allowed it to contribute to legalization in Europe and that give it leverage to influence domestic policy. Access to the ECJ is far wider than for most international legal bodies, with states, the European Commission, and private litigants empowered to use the EU legal system to challenge national policy. The wide access gives the ECJ more opportunities to influence national policy, and the numerous cases have allowed the ECJ to develop EU law incrementally, a strategy that has been important in building support for its jurisprudence and enhancing the effectiveness of the EU legal system.<sup>98</sup> The EU's preliminary ruling system is also unique. It is hard to underestimate how much the preliminary ruling mechanism has mattered in creating a national source of pressure to comply with EU law and in coordinating national legal interpretation across countries.

Because of the unique nature of the EU legal system, the EU experience is not necessarily the model of what will happen in other international legal systems. The framework developed in this article, however, can help one think about how international legal mechanisms can be used to influence national policy in other contexts.<sup>99</sup> The four steps of the litigation process identified in this article still need to be fulfilled for international legal mechanisms to be a tool for domestic actors to pressure for change in domestic policy. But the factors influencing each step will vary because both the source of international law and the intermediaries in the legal process will be different.

The first step in the EU litigation process involves having a body of EU law that can be invoked in a legal system to challenge national policy. There are many international legal texts that can be invoked by legal bodies (national and international) to challenge national policies. But the ability of litigants to invoke this law will vary depending on the binding nature of the legal text, on whether the national system recognizes the legal text as creating direct effects, and on access and legal standing rules that will influence whether or not litigants can effectively use the legal system to challenge a country's policy. As in the EU case, limitations created by the law and the allocation of legal standing will engender biases by which actors can benefit from the law. Because of biases, international rules may significantly advantage some domestic groups (such as economic actors favoring liberalization) over other domestic groups. This bias helps explain why some actors oppose increased international legalization.

The second step of the litigation process involves mobilizing the potential beneficiaries to draw on international law and use the international legal mechanisms. Where private litigants have access to international legal mechanisms, the factors identified in this article—such as the magnitude of potential benefits and how interests are organized—could matter. Indeed, Christina Sevilla's study on the use of the

98. See Burley and Mattli 1993; Hartley 1994; Helfer and Slaughter 1997; and Weiler 1991.

99. The framework could apply to domestic situations as well.

GATT legal mechanisms confirms Conant's hypothesis that most cases are brought by and targeted at the largest trading countries where the potential benefits are the highest.<sup>100</sup>

Where only states have access to legal systems, the dynamics will be different. States tend to be more reluctant than private litigants or national courts to use international legal mechanisms. Governments often fear that the outcome of a legal case could be worse than a negotiated outcome, that a legal ruling could create domestic backlash, or that a legal ruling will be less flexible, tying the hands of governments in the future.<sup>101</sup> This is in large part why Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter expect legalization to progress further in transnational compared with interstate legal systems.<sup>102</sup> National governments still might have an incentive to please a domestic group by raising a case. In this situation, domestic political factors, such as the extent to which interest groups can penetrate the political system,<sup>103</sup> the political strength of the domestic group desiring the legal case, and where the party in charge of the government finds its largest domestic political support, will likely be important. International-level factors, such as the relations between the state raising the case and the target state and the number of other interstate issues of potentially higher priority, will also likely influence a state's calculations.<sup>104</sup>

The third step in the EU case—finding national judicial support—is not a factor in legal systems where states or litigants raise their cases directly in front of an international legal body. But in some international systems an international commission or a public prosecutor acts as a gatekeeper deciding whether or not to bring a case to court (such as the original system of the European Convention on Human Rights, the present system for the Inter-American Court of Human Rights, and the proposed system for the International Criminal Court). Where it is up to the discretion of a commission or prosecutor to pursue a legal violation, the factors shaping these actors' decisions will matter. Some of the factors identified here will surely matter, such as the legal rules defining the mandate of the commission or prosecutor, how the commission or prosecutor understands its mandate, and how a case influences the political process. In addition, the ability or inability of the commission or prosecutor to find relevant facts or gather evidence will likely shape what types of cases are pursued.<sup>105</sup>

Follow-through, the fourth step, will also be important in other international legal contexts. Few international legal bodies are able to issue sanctions against states. In most cases a political body must authorize or take a separate action to create a penalty for a violation of international law. It cannot be assumed that states will follow through on their legal victories. Following through on a legal victory might be more

100. Sevilla 1997.

101. See Alter 2000; and Levi 1976.

102. See Keohane, Moravcsik, and Slaughter, this issue.

103. For example, Super 301 in the United States virtually forces the executive branch to investigate and act on complaints raised by U.S. firms.

104. Alter 2000.

105. Helfer and Slaughter 1997.

costly than initiating legal proceedings. And time will certainly have elapsed between the original decision to raise a legal case and the potential decision to pressure for sanctions against the offending state, allowing other political factors to be put on the agenda and other political actors to assume control of the government. Because states—not groups, as in the European context—are the actors that must follow through, the factors influencing whether follow-through will occur will be different. But in contexts outside of Europe, this step will be no less important, and possibly even more important, than in the EU.

The European legal system is unique in its ability to be used by domestic actors to pressure for change in national policy. There is great variation in the ways private litigants actually do use the EU legal system to influence national policy, and private litigants can also use the EU legal system to challenge EU policies and rules. For political scientists who prize parsimony, the answer to the questions of where and when domestic actors will use the EU legal system to influence national policy is, unfortunately, complex. Even assuming rational behavior, no human error, and full information—unsustainable assumptions to be sure—where EU law influences national policy depends on the wording of the EU law, on ECJ legal doctrine and ECJ decision making, on private litigant mobilization, on national court support, and on follow-through. Some of these factors will matter in other international contexts. And there are likely additional factors that are important because the main intermediaries in other international legal systems differ. I have been able to suggest only a few factors that might matter in other contexts. There is fertile ground for future research.

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