

**WHERE, WHEN AND HOW DOES THE EUROPEAN LEGAL SYSTEM  
INFLUENCE DOMESTIC POLICY?\***

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ABSTRACT

The EU legal system offers a powerful means for domestic actors to influence national policy. Because the EU legal tool is so powerful, many have hypothesized that groups will use EU litigation strategies whenever there is a potential benefit. In practice, however, EU law litigation strategies are seldom used. This paper develops a framework for understanding variation in the use of the EU legal system to influence national policy. It identifies four different steps in using the EU legal system to influence domestic policy, each required for the EU legal process to influence national policy. Drawing on recent research on the European Union's legal system and interest group mobilization, the paper develops a series of hypotheses about the factors affecting each step of the litigation process, identifying sources of cross-national and cross issue variation in the influence of EU law on national policy.

The European Union (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 volume—obligation, precision and delegation. All member states are legally bound to uphold the *acquis communautaire*, the body of European law including, treaties, secondary legislation, and the jurisprudence of the European Court of Justice. A failure to fulfill a legal obligation can lead to an infringement suit in front of the European Court of Justice (ECJ), and as of 1989 the failure to obey an ECJ decision can lead to a fine. Many European rules are extremely specific, unambiguously defining how states must comply with their European obligations. When there is doubt, the European Court is there to give a precise meaning to the rules. And the ECJ is perhaps the most active and influential international legal body in existence, resolving disputes between states and between the EC's constituent bodies, hearing challenges to national laws and EU laws, interpreting EU rules and creating new EU rules through its interpretations.

The advanced level of legalization in Europe is in part a result of the institutional design of the European Union. Member states set out to create an entity with supra-national powers, giving Council the power to pass legislation

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which is directly applicable in the national realm; creating a supra-national Commission to oversee implementation of the EU treaties, monitor compliance with EU law and raise infringement suits against states; and creating a supranational court with constitutional powers to hear disputes between states and the European Union's governing institutions, and to review the compatibility of national law with EU law. Through the passing of numerous new EU rules, and the expansion of European powers in treaty reforms, the number and scope of EU rules continues to expand.<sup>1</sup>

The European Court is also a key actor driving legalization in Europe, expanding the reach and scope of European law, and making European law truly binding on member states (Lenaerts, 1992; Mancini, 1989; Stein, 1981; Weiler, 1991). The key means through which the ECJ promotes legalization is the preliminary ruling mechanism (also known as the Article 177 mechanism) which allows a national court to stop domestic legal proceedings and send a question about EU law to the ECJ. Member states did not intend the preliminary ruling procedure to be a vehicle to expand the reach, scope and binding nature of EU law. The preliminary ruling system was intended to help keep the EU's power in check by facilitating challenges to excessive EU policy and helping national courts interpret complex European laws in cases before them (Alter, 1996b). The ECJ transformed the preliminary ruling system from a mechanism for national courts to question and challenge EU law into a mechanism which also allows individuals to invoke European law in national courts to challenge national law.<sup>2</sup> As transformed

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<sup>1</sup> In its 1992 annual report, the French *Conseil d'État* noted that European law included 22,445 EU regulations, 1675 directives, 1198 agreements and protocols, 185 recommendations of the Commission or the Council, 291 Council resolutions, and 678 Communications in force. Sixteen percent of all French law was of European origin, and the Community was the largest source of new law in France, with 54% of all new French laws originating in Brussels, and only 46% in Paris (1992: 16-17).

<sup>2</sup> 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). Shortly thereafter in the *Costa v. Enel* decision, the ECJ declared that European law was supreme to national law. These two decisions created the legal standing for private litigants to invoke European law to challenge national policy, and the legal basis for national courts to set aside national policies in favor of European law. *Van Gend en Loos v. Nederlandse Administratie Belastingen* ECJ decision of 26/62 (1963) ECR 1. *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ decision of Case 6/64 (1964) ECR 583. (Rasmussen, 1986; Weiler, 1991).

by the European Court, the preliminary ruling system is a conduit for private litigant challenges to national policy.

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 parties to resolve disputes. When the ECJ declared the supremacy of European law<sup>3</sup> it turned national courts into enforcers of European law in the national sphere, making previously unenforceable European rules binding obligations which states could not avoid. In the words of 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 non-compliance (Weiler, 1991).<sup>4</sup> 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 (Alter, 1996b: Chapter 7). And by granting private litigants standing to invoke EU law to challenge national law, the ECJ increased the number of cases it heard as well as the number of EU legal cases resolved by national courts.

The process of legalization in Europe—the process of expanding the extent of state's European legal obligations, the process of enhancing the precision of the legal obligations, the process of making the EU legal system an effective means to resolve disputes—was the same as the process by which European law came to have such a large impact on domestic policy. By widening access to the ECJ to allow cases raised by private litigants, the transformation of the European legal system increased the number of cases the ECJ heard, and thus the number of

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<sup>3</sup> *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ decision of Case 6/64 (1964) ECR 583.

<sup>4</sup> 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 which failed to implement directives in a timely fashion *Van Duyn v. Home Office* Case ECJ decision of 41/74 (1974) ECR 1337. *Francovich v. Italy* Cases C-6, 9/90 ECJ decision of November 19, 1991, ECR 1991

opportunities the ECJ had 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 which reach the European Court, and many if not most of the advances in Europe law have been the result of preliminary ruling references by national courts to the ECJ.<sup>5</sup> In harnessing national courts as enforcers of European law, the transformation of the European legal system also helped the ECJ to pressure national governments to change national policy which violated EU law. With national courts now able to set aside conflicting national laws, award penalties for the non-implementation of EU directives, and fines for violations of European law, national courts have also created an incentive for firms and governments to change national policies which violate European law.

Private litigants and national courts are key intermediaries, determining by the cases they raise and the decisions they make which national policies will come under pressure from the EU legal system. As Burley and Mattli have shown, private litigants and national courts have significant incentives of their own to aid in the enforcement of European law (Burley & Mattli, 1993). But to say that domestic actors have incentives of their own is not to say that these actors always do use the EU legal system. Private litigants and national courts have a variety of interests and objectives, and they inevitably must make choices about how to use their limited resources and which objectives to prioritize. There are many European legal texts and favorable EU legal precedents which remain unexploited even though they could create significant financial gain for businesses and private individuals, help litigants promote their objectives, and rectify national violations of European law. And national courts have been known to create significant obstacles to European Court jurisprudence in the national realm, thwarting litigants efforts to use EU law to influence national policy (Alter, 1996a; Conant, forthcoming; Golub, 1996).

This article develops a framework to understand variation in the use of the EU legal system to influence national policy. It identifies four different steps in

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<sup>5</sup> Member states have raised only seven infringement cases against each other. The commission has raised 1045 infringement cases from 1960 through 1994, 88% of which came since 1981 and most of which involved non-implementation of EU directives in a timely fashion. National courts have referred 2893 cases to the ECJ from 196-1994, not all of which

using the EU legal system to influence domestic policy, each required for the EU legal process to influence national policy. Different factors influence each of the steps, creating numerous sources of cross-national and cross issue variation in the use of the EU legal system to influence national policy. The main body of this paper explains the four steps and the different factors shaping each step.

There are some unique attributes of the EU legal system which limit the generalizability of the European case. But the four-step framework developed here is generalizable outside of the European Union, with the caveat that since the intermediaries in the legal process differ in other international legal systems, the factors which influence the use of EU law and the EU legal system at each step will be different than the factors which influence each step of other international legal systems. The framework developed here tells one where to look to understand cross-national and cross issue variation in the use of the EU legal system. It helps us understand similar variation in other international legal systems and why the European legal system has so much more influence over domestic policy compared to other international legal systems.

## **II. How and When the European Legal System Influences National Policy**

While cases raised by private litigants are not the only way that European law influences domestic policy, they are in many instances the only way to get a recalcitrant state to change its policies. Many cases which reach the ECJ via national courts get 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 European Commission to address the violation, but either the Commission dropped the case, settled the case, or the ECJ's infringement decision failed to create a change in national

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were challenges to national policy.

policy.<sup>6</sup> In these cases the only way European law will influence domestic policy is if domestic actors raise cases, and domestic courts to set aside national policy.

For the EU legal system to be used to influence national policy, four successive steps of the legal process must be fulfilled: First there must exist 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 European Court and/or applying European Court jurisprudence instead of conflicting national policy. Fourth, the litigants must follow up their legal victory to pressure the government to change public policy (Alter & Vargas, 2000). When all four steps are fulfilled ECJ decisions are likely to create a change in national policy. This section pulls together the state of our knowledge about the factors influencing each step of EU legal process and thus the factors which create 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 is that there must be a point of EU law that domestic actors can draw upon, and this law must create direct effects. Not all national policies are affected by European law, and not all aspects of European law can be invoked in front of 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 there are some biases inside of EU law which 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 European Union does not create significant social rights, or civil rights for its citizens (Shaw, 1998). Indeed women might find EU law helpful to promote equality in the workplace, but not to address larger

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<sup>6</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 169 cases raised by the Commission. Based on figures provided in (Conant, forthcoming: Figure 1).

issues of gender discrimination which do not effect their participation in the workplace. Furthermore the economic rights of European law are focused on workers and firms engaged in transnational activity. The British worker who stays at home might find European law far less helpful to challenge national rules than the French worker who moved to the United Kingdom. There are also policy areas which 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 which have been harmonized. Farmers and shopkeepers might thus find themselves impacted by EU law even if they sell all their goods on the domestic market.

Only if EU law creates direct effects can it be invoked in national courts to challenge national policy. 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 (Folsom, 1995: 86-89). 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 will 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. Alter and Garrett, Kelemen and Shultz find that the ECJ takes the concerns of member states into consideration, avoiding decisions which could create a political backlash. 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. Also when the costs of ECJ decisions are low, member states are less likely to mobilize against the decisions and the ECJ less likely to be concerned about a backlash (Garrett, Kelemen & Schulz, 1998). Alter finds that even when the costs of ECJ decisions are significant, and the decisions controversial, states usually lack a credible threat to cow the ECJ into quiescence (Alter, 1998b). When there is significant consensus

among member states against a decision, political threats can become credible and the ECJ is more likely to be influenced. These findings offer helpful starts, but do not lead to many concrete hypotheses of the how extra-legal factors shape ECJ decision-making. If the ECJ is not willing to support a litigant's efforts, the attempts of private actors to influence domestic policy through the EU legal system will be undermined.

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. Where there is EU law that can be helpful, where this law creates direct effects, and where the ECJ is willing to rule in favor of the litigant's challenge to national policy, the EU legal system can be used to influence national policy.

### Step 2: Mobilizing Litigants to Use EU Law to Promote their Policy Objectives

As mentioned, there are many European legal texts and favorable EU legal precedents which remain unexploited although they could help litigants promote their objectives, and create significant financial gain. When and which domestic actors are most likely to turn to EU litigation to promote their objectives?

There are number of factors specific to national legal systems which 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. And 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 can also affect the willingness of private litigants to pursue their legal rights. For example in the United Kingdom, 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 UK equality policy (Alter & Vargas, 2000; Barnard, 1995). Groups would be unable to follow the EOC's strategy in France,



Belgium and Luxembourg, where they are excluded from participating in equality cases (Blom, Fitzpatrick, Gregory, Knecht & O'Hare, 1995). In Denmark since gender equality clauses are part of collective agreements, only union officials can pursue equality issues. If the union will not pick up the issue, the individual facing discrimination may be of luck (Fitzpatrick, Gregory & Szyszczak, 1993: 19-20). 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. In Germany importers and exporters regularly challenge decisions of tax authorities in the tax courts, leading to many EU legal cases. Adophe Touffait, a former Procureur general at the French Court de Cassation, argued in a veiled reference to the many German cases that French enterprise would never become preoccupied with the distinction between types of flours, especially given the reluctance of commercial groups to legally challenge acts of tax administrations or customs administrations (Touffait, 1975). Touffait's argument is supported by statistics on domestic litigation rates (see table 1).

**Table 1: Domestic Civil Litigation Rates Compared**

Civil litigation per 100,000 inhabitants			
	Civil Procedures	First Instance Adversarial	Appeal de Novo
<b>West Germany (1989)</b>	9,400	4,911	251
<b>England/Wales (1982)</b>	5,300	1,200	16
<b>France (1982)</b>	3,640	1,950	250

Source: Erhard Blankenburg, "Changes in political regimes and continuity of the rule of law in Germany: *Courts, Law and Politics in Comparative Perspective*, Herbert Jacob, Erhard Blankenburg, Herbert Kritzer, Doris Marie Provine, Joseph Sanders eds (New Haven: Yale University Press, 1996) p. 295. Reprinted in (Conant, forthcoming).

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? Conant argues that law is 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, 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 (Conant, 1998: Chapter 3). Of the privileged actors, firms and private lawyers are more likely to use litigation than organized interests, although organized interests are often more able to use a test case strategy, picking cases with favorable fact situations and shopping for a supportive legal forum shop.

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 distribution of these benefits across members of the group may not be very important, as long as the potential benefits are significant (Conant, 1998: Chapter 3). Alter and Vargas find that one must go beyond the magnitude of the benefits to explain cross-national variation in the use of EU law litigation to promote gender equality in the work place. The way groups were organized at the national level influenced whether or not specific groups employed litigation. The more narrow the interest group's mandate and constituency, the more likely it was to turn to a litigation strategy. The more broad and encompassing the interest group's mandate and constituency, the less likely it was to turn to litigation strategy to promote gender equality. This explained why unions comprised predominately of women and single issue agencies like the British Equal Opportunities Commission were the main actors using litigation to promote gender equality, while broad based unions and women's groups avoided gender equality litigation (Alter & Vargas, 2000).

Another factor which mattered was whether an interest group enjoyed influence and access to policy making. Litigation tends to be a last choice strategy for groups, used after other avenues of influence have failed. In political negotiation groups can usually strike a deal which 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 means to influence policy, organized interests prefer to work through political channels (Alter & Vargas, 2000). The greater the political strength of a group, and the more access the group has to the policy-making process, the less likely a group was to mount a litigation campaign. For example in Belgium neither unions nor women's groups use litigation to pursue equality issues, preferring instead to use their access to the policy making process to influence Belgium policy (Fitzpatrick et al., 1993: 89).

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

### 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 get a national court to either refer the case to the ECJ, or to interpret EU rules itself and set aside national law. If a lawyer argues for a reference to the ECJ and indicates a willingness to accept the financial and time consequences of a reference, national judges are more likely to be willing to refer a case to the ECJ. But even then, there are many reasons national courts will avoid a reference to the ECJ.

While national courts have an obligation to ensure that national law complies with EU law and are supposed make a reference to the ECJ any time there is a question and if they are a court of last instance,<sup>7</sup> in practice national courts often do not refer questions to the European Court and do not apply the ECJ's interpretation of EU laws. In the end of the day there is little a litigant can do to pressure a national court to make a reference to the ECJ, or to accept the ECJ's interpretation of EU law.<sup>8</sup> A lower court's refusal can be appealed to a higher court in hopes of 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 different courts (table 2).

**Table 2: Reference Patterns in the EU Member States (1961 to 1997)**

Country	1961-1969		1970-1974		1975-1979		1980-1984		1985-1989		1990-1997		Total	
Germany	30	40%	121	56%	163	36%	175	31%	171	25%	414	27%	1064	30%
France	7	9%	18	8%	67	15%	119	21%	166	24%	200	13%	578	16%
Netherlands	22	29%	32	15%	76	14%	96	17%	93	13%	153	10%	472	13%
Italy	3	4%	21	10%	63	15%	66	12%	59	9%	331	21%	543	15%
Belgium	10	13%	23	11%	54	12%	58	10%	84	12%	112	7%	385	11%
Luxembourg	3	4%	2	1%	2	*	4	1%	13	2%	16	1%	40	1%
UK	-	-	-	-	20	4%	30	5%	55	8%	139	9%	245	7%
Ireland	-	-	-	-	6	1%	6	1%	9	1%	13	1%	34	1%
Denmark	-	-	-	-	6	1%	10	2%	15	2%	40	3%	71	2%
Greece	-	-	-	-	-	-	-	-	21	3%	27	2%	48	1%
Spain	-	-	-	-	-	-	-	-	5	1%	61	4%	66	2%
Portugal	-	-	-	-	-	-	-	-	1	*	23	2%	24	1%
Total	75	99%	217	101%	457	100%	564	101%	692	100%	1529	100%	3570	100%

Based on the statistics in the European Court's 1997 Annual Report

Rather than trying to explain judicial behavior, most scholarship has focused on explaining this variation. Early studies explained the relative reticence of

<sup>7</sup> SRL CILFIT v. Ministry of Health (I) ECJ decision of Case 283/81, (1982) ECR 1119.

<sup>8</sup> 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.

some national judiciaries by the whether a national legal system was monist or dualist (Bebr, 1981), whether there was a tradition of judicial review in the country (Vedel, 1987) and whether the country had a federalist or constitutional model (Cappelletti & Golay, 1986). But none of these explanations led to consistent explanations of judicial behavior across countries, nor could they account for significant variation in reference rates and in support within national judiciaries (Alter, 1998a: 231-232).

Stone and Brunel find a correlation between variation in national reference rates and the level of transnational activity, arguing that the more transnational activity, the more conflicts between national and EU law and thus the more references by national courts (Stone & Brunel, 1997; Stone Sweet & Brunel, 1998). Their findings are suspect for a number of reasons.<sup>9</sup> Perhaps most problematic is that their causal argument implies that the numerous references to the ECJ involve conflicts between national and EU law, when their data does not distinguish between cases where there is a conflict of law and cases where there are simply questions about the EU law, or where the EU law itself is being challenged.<sup>10</sup> Indeed when Jürgen Schwartz analyzed the content of German references to the ECJ, he found that only 37% of references were about conflicts between EU law and German law. The rest were questions about EU law and challenges to the EU law itself (Schwartz, 1988). Lisa Conant also found that if policy sectors which did not involve transnational activities were excluded, for the United Kingdom at least Stone and Brunel's correlation would not hold (Conant, forthcoming). Even if their statistics were a more meaningful measure of national

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<sup>9</sup> This scholarship is new, and has not been critiqued yet by many. But some complaints include that Stone and Brunel do not control for other explanations, and they are unable to establish more than a correlation.

<sup>10</sup> The data includes many cases where no question about national law or national policy is raised. Preliminary ruling references also include challenges to EU policy, and questions about the application of EU regulations and directives by national governments. And of the cases involving national policy, many are not inspired by transnational activity rather domestic groups are simply capitalizing on the EU legal system to push their domestic agenda (Alter, 1996a; Schepel, 1998). Furthermore the majority of national court cases involving EU law are not referred to the ECJ, but rather are resolved directly by national courts (In a Lexus Nexus search on British citations to European jurisprudence, Conant found citations of ECJ decisions in 478 decisions, while only 186 references to the ECJ (Conant, forthcoming).) There is no way to know how national judges deal with cases that are not referred, and even where rulings are published (which is rare for lower courts) one still cannot know how many EU legal arguments were rejected by national judges.

judicial support, their transactional explanation still can not account for significant variation within national judiciaries and thus cannot explain when national judges will aid or block a challenge to domestic policy raised in a national court. Certain courts are clearly more receptive to EU legal arguments than others. Table 3 provides a sample of the variation in references across branches of the judiciary, and across level of court making a reference, focusing on the German and French judiciaries. There is also much variation which is not captured by the statistics.

**Table 3**  
**Preliminary Ruling Reference Patterns from German and French Judiciaries (1961-1994)<sup>11</sup>**  
**German Courts**

	Civil & Penal Courts		Labor Courts		Administrative Courts		Social Courts		Tax Courts		Totals							
	# ref.	% ref.	# ref.	% ref.	# ref.	% ref.	# ref.	% ref.	# ref.	% ref.	# ref.	% ref.						
High	Federal Court of Appeals	27	3%	Federal Labor Court	10	1%	Federal Administrative Court	37	4%	Federal Social Court	43	5%	Federal Tax Court	140	16%	All Federal Courts	257	29%
	Court of Appeals	27	3%	Court of Labor Appeals	2	0	Court of Administrative Appeals	10	1	Social Court of Appeals	27	3%				All Appeal Courts	66	7%
Low	District & County Courts	58	6%	Lower Labor Courts	38	4%	Lower Administrative Courts	148	16%	Lower Social Courts	31	3%	Lower Tax Courts	303	33%	All Lower Courts	578	64%
	Total by Branch	112	12%		50	5%		195	22%		101	11%		443	49%	n=	901	100

Percent equals the percent of total references by German courts. \*= <1%

### French Courts

	Penal		Administrative		Civil/Commercial		Social		Other		Total							
	n	% ref.	n	% ref.	n	% ref.	n	% ref.	n	% ref.	n	% ref.						
High	<i>Cour de Cassation</i> (penal)	8	2%	<i>Conseil d'État</i>	13	3%	<i>Cour de Cassation</i> (civil & commercial)	19	4%	<i>Cour de Cassation</i> (social)	18	4%	<i>Cour de Cassation</i> (Plenary)	2	*	Total Supreme Courts	60	12%
	<i>Cour d'appel</i> (penal)	15	3%	<i>Cour admin. d'appel</i> (since 1989)	2	*	<i>Cour d'appel</i> (civil & commercial)	38	7%	<i>Cour d'appel</i> (social)	49	10%				Total Appeals Courts	103	20%
Low	<i>Tribunal Correctionnel</i>	3	*	<i>Tribunal admin.</i>	39	8%	<i>Tribunal de grand instance</i>	146	29%	<i>Tribunal des affaires de sécurité social</i>	11	2%						
	<i>Tribunal de police</i>	27	5%			<i>Tribunal d'Instance</i>	66	13%	<i>1er instance du contentieux de la sécurité sociale</i>	30	6%							
						<i>Tribunal commerce</i>	22	4%					<i>Other lower courts</i>	3	*	Total Lower Courts	347	68%
	Total Penal Courts	53	10%	Total Admin Courts	54	10%	Total Civil/Commercial	291	57%	Total Social Courts	108	21%						511

Percent equals the percent of total references by French courts. \*= <1%

<sup>11</sup> The figures in these chart are calculated based on data provided by the research and documentation division of the Court of Justice. Included are references for opinions even if the opinion did not result in an ECJ decision reported in the ECJ's Annual Report, thus the total number of references varies slightly from the number reported by the ECJ. The division by branches varies in the German and French judiciaries varies, but I tried to make the branches as comparable as possible based on the data available (Alter, 1996b).

Focusing on the number of references can be a misleading indicator of support for the ECJ. Some courts accept ECJ jurisprudence without making a reference, while other courts reject key tenets of EU legal doctrine. Some courts refer far reaching questions of law to the ECJ, while other courts only refer narrow technical question 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.

Qualitative analysis reveals five factors which create variation in the behavior of national courts vis-à-vis EU law: 1) variations in substance of EU law and in jurisdictional boundaries shapes the number of EU law cases a court hears, the number of references it makes but not necessarily how the court deals with EU law cases; 2) variation in rules of access to national courts shapes the number of EU law cases a court hears and to some extent how the court deals with cases involving EU law; 3) the identity of a court shapes the number of references a court makes and how the court deals with EU law cases; 4) variations in how EU law affects the influence, independence and autonomy of the national court vis-à-vis other courts shapes the number and type of references a court makes and how the court deals with EU legal issues; and 5) variation in the policy implication of ECJ jurisprudence shapes the number of references a court makes and how it deals with EU legal issues. The first four factors create cross court and cross-branch variation, and can cumulatively lead to cross-national variation. The last factor contributes to both cross-court and cross-national variation.

*The influence of variations in substance of the law and in jurisdictional boundaries on judicial behavior*

Variation in reference rates are caused in part by variation in legal substance and in the jurisdictional divisions of courts. The more harmonized EU legislation, the more courts having to deal with this legislation will consult with the ECJ. 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 European Community law, tax courts have been more involved in legal integration from an early period compared to penal courts which deal almost exclusively with

national law.<sup>12</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 explain why the administrative court in Frankfurt accounted for 9% of all German references from 1960-1994 (Seidel, 1987).

Many scholars assume that the largest barrier to national judicial support is ignorance about the EU legal system. With knowledge, they assume, comes national judicial support. While hearing more cases does seem to lead to more references to the ECJ, it does not necessarily lead to greater acceptance of ECJ jurisprudence. While it may make many references to the ECJ, the Frankfurt administrative court has not hesitated to challenge ECJ legal doctrine, and was the court behind the first German rebuke of EU law supremacy (the *Solange I* decision) and the current challenges to the authority of EU law raised by the banana saga.<sup>13</sup> The Federal Tax Court of Germany, which has referred more cases to the ECJ than any other national court, is famous for technical questions about the classification of goods while it is also well known for avoiding references when issues of the compatibility of national law and EU law are at stake (Bebr, 1983: 465-467; Zuleeg, 1993).

Legal substance and jurisdictional boundary lines combined with the relative litigiousness of German importers account only in part of the large number of references coming from these courts. German tax courts have referred a disproportionate number of cases, more cases than the entire judiciaries of Belgium, the Netherlands, and Italy. Clearly there are other factors involved which account for this cross-national variation.

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<sup>12</sup> Indeed in Germany, tax courts, the smallest branch of the judiciary with less than 3% of all judges, accounts for 49% of German references.

<sup>13</sup> VWG Frankfurt reference to BVerfG- decision from 14.7.1971 II/2- E 228/69 VWG Frankfurt decision of July 14, 1971 , Außenwirtschaftsdienst des Betriebs-Beraters 1971 Heft 11 541-546. VWG Frankfurt reference to BVerfG 24 October 1996. EUZW 1997, 82.



*The influence of access rules on judicial behavior*

We saw 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 impact 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 to the active role in EU legal issues played by the German and Italian Constitutional Courts, the French *Conseil Constitutionnel's* position is bizarre: in all but a few narrow issues *Conseil Constitutionnel* refuses to be involved in controlling the compatibility of French law with international law (Luchaire, 1991). Access rules explain this position. Laws only make it to the *Conseil Constitutionnel* for review before they have actually promulgated, and only if there is political disagreement within or between the government and the legislature. Many laws of questionable constitutionality never get referred to the *Conseil Constitutionnel*, and when laws do get 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* was concerned that a national law that it found to be compatible with EU law could be implemented in a way which violated EU law, or could be found to be incompatible by the ECJ or—even more embarrassing for a court charged with upholding the rights of man—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 possibility that it could later be contradicted by the ECJ or the ECHR, the *Conseil Constitutionnel* preferred not to be involved in enforcing the supremacy of international law (Genevois, 1989: 827)

Access rules also make it hard for French litigants to seek out the most friendly national courts for the EU legal challenges. The so-called ordinary courts (court's under the *Cour de Cassation's* supreme authority) are the most willing to make references to the ECJ (indeed they account for nearly 90% of all French references to the ECJ). But it is hard to construct a case to challenge EU law for these courts.<sup>14</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 which 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 below it.<sup>15</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 (Chalmers, 1997; Conant, forthcoming; Mattli & Slaughter, 1998: 200-201). 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 which can vary by country, by branch of national judiciary 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 which 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

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<sup>14</sup> Ordinary courts hear mainly civil law cases, and penal law cases. They do not hear direct challenges to national policy. 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.

<sup>15</sup> In the 1990s the *Conseil d'État* has been more receptive to EU legal arguments, following its sea 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.

through time, creating generational differences within national judiciaries). Outside of 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 do not necessarily involve training in judge schools. High court appointees may come from academia or political office bringing a different training and background. These different life experiences lead judges to act differently when confronted with EU legal issues.

For example, the fairly antagonistic position the French *Conseil d'État* has taken vis-à-vis EU law is often explained by the identity of *Conseil d'État* judges, an identity imparted to them in their training at the elite *Ecole Nationale d'Administration* (ENA) where French high administrators are educated (Plötner, 1998:55-56). An ENA education imparts a strong identification with the French state (Bodiguel, 1981; Kessler, 1986). An appointment to the *Conseil d'État* is an appointment for life, and *Conseiller d'État* float freely in and out of the government and private sector and the *Conseil d'État*. The background of *Conseiller d'État* affects its jurisprudence on a number of issues (Loschak, 1972), including EU law.

There is also some evidence that judges who have served for a long time in public bureaucracies are more sympathetic to government defenses of national policy. 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 (Weil, 1972: p. IX).

Gert Meir argued 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 (Meier, 1994).

Self conceptions of judicial identity also influence the actions of other national courts vis-à-vis EU law, creating cross-national and cross-issue variation in how courts deal with EU legal issues. There are a number of first instance

legal bodies which do not consider themselves to be 'courts' and for this reason do not see themselves as qualified under Article 177 EEC to make a reference to the ECJ. For example, in the United Kingdom, first instance industrial tribunals will make references to the ECJ whereas in the Netherlands and Ireland, the legal bodies which deal equality cases in the first instance do not see themselves as authorized to refer cases to the ECJ (Fitzpatrick et al., 1993). Some countries have legal bodies staffed by lay judges or a mix of lay and professional judges which attempt to be less formal than courts and function more like arbitrating bodies. For example in France most commercial disputes start and end in arbitration and thus are not referred to the ECJ (Touffait, 1975). Some countries have some mid level appellate courts which 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 vis-à-vis each other*

Cross-national, cross-court and cross branch variation in the number of references to the ECJ, the type of references to the ECJ, and positions taken on EU legal issues can be explained in part by how ECJ jurisprudence affects the independence, influence and autonomy of different courts. The more EU law and the ECJ is seen as undermining the influence, independence and autonomy of a national court, the more reticent the national court is to refer far reaching and legally innovative cases to the ECJ.

Lower courts tend to be more willing than higher courts to make a reference to the ECJ. Even though lower courts are not legally obliged to make a reference to the ECJ, lower and mid level courts refer the vast majority of all references to the ECJ (73%). And lower courts are credited as being a driving force in expanding ECJ doctrine in many areas of law, and in promoting change in national doctrine (Alter, 1996b; Alter & Vargas, 2000; Mancini & Keeling, 1992). 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% of the references

had been made by lower courts.<sup>16</sup> Karen Alter argues that lower courts are more willing to make references because a reference bolsters lower court authority in the national legal system, and allows the court a way to escape national legal hierarchies and challenge higher court jurisprudence (Alter,1996).

Last instance courts have made far fewer references than one would expect given that they are the only courts formally obliged to refer questions of interpretation to the ECJ. Alter explains this reticence by the different position the higher court holds in the national legal system. The highest level courts have a dominant influence over the development of national law and the execution of public policy and are responsible for ensuring legal consistency within the national legal system. They look at the overall impact of ECJ legal doctrine on the national system, and can be threatened by the existence of the European Court as the highest court on questions of European law and upset at how EU law undermines their own influence and the smooth operation of the national legal process. Intermediary courts fall in between, sometimes finding EU law to undermine their authority vis-à-vis lower courts, and sometimes using EU law to challenge courts above them.

#### *Variation in the impact of EU law on national law*

Judges do take into account the policy implications of their decisions. Some ECJ decisions have created a divergence in the levels of legal protection and in legal remedies under national law and EU law, making citizens which can draw on EU law advantaged compared to citizens which must rely on national law alone. ECJ jurisprudence has also created great complexities for national legal systems and problematic outcomes. The seeming perversities created by the ECJ

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<sup>16</sup> Statistics compiled by the author based on ECJ decisions in preliminary ruling cases cited by two major textbooks on European law. The texts were: (Bermann, Goebel, Davey & Fox, 1993; Dinnage, ).

and EU law, as well as interpretations with which national courts simply disagree, can sap national judicial willingness to support the ECJ.

Controversial ECJ decisions have led to rebukes by judges, and 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 have to 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 (Kokott, 1998: 124). According to Golub, because British judges believe that the ECJ will interpret environmental directives more broadly than necessary, British judges have withheld references from the Court in environmental issues (Golub, 1996). And Harlow predicts a national judicial backlash against ECJ jurisprudence on state liability, possibly spreading to a larger political backlash (Harlow, 1996: 31).

There is no way to assure that a national judge will refer a case to the ECJ or apply EU law as they should. If the litigant indicates a preference for a reference, the likelihood of a reference increases. 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 more likely that national courts will either make a reference or apply the ECJ's case law themselves. Lower courts are relatively more willing than higher courts to make a reference. Courts where appointees have fewer connections to the government are likely to act more favorably to challenges to national policy. The best hope for a litigant in finding judicial support is when she can forum shop for a legal venue where judges are known to be receptive to EU legal arguments. 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 friendly. 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 be willing to challenge both national legal precedent and political bodies—something required when litigants use the EU legal system to influence national policy.

#### Step 4: Follow-through on decisions: Creating Political and Financial Costs

Even if there is a national court decision in the plaintiff's favor, this will not necessarily lead to a change in national policy. There are some cases where an ECJ decision is more likely to lead directly to a change in national policy. The more there is a national political ethos which supports the rule of law, the more likely groups are to castigate government actions which violate the rule of law and the more likely a government is to change its policy in light of a legal decision (Slaughter, 1995). Also if the ECJ decision was 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 influence the policy in the country which referred the case, because at least there the national court will likely enforce the decision.

Generally law abiding countries have been known to avoid changing policy despite an ECJ ruling against them. Government sometimes simply compensate the litigant while leaving the legislation in effect and administrative policy unchanged. Or they change the language of national law to technically comply with the decision, without significantly changing domestic policy. Sometimes governments simply ignore an adverse ECJ ruling, knowing that the plaintiff likely will not take the effort to get the decision enforced and that the government will not lose an election because they failed to respond to a legal decision.

In most cases, translating a legal victory into a policy victory takes 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 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 which explain 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 (Harlow & Rawlings, 1992: 276; Meier, 1994). McCann highlighted another strategy where litigation was used to dramatize issues to strengthen the political movements, and favorable decisions were invoked in bargaining with employers and public bodies (McCann, 1994). 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 get follow-through from an EU law legal victory, and thus have a legal decision lead to policy change? Not much research has been done on this question, thus most of what follows is at the level of hypotheses.<sup>17</sup> A private litigant might be satisfied with winning their case and have less incentive to make sure that the government changes their policy. 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 off-case raised by a private litigant.

It is also possible that legal victories can be picked up by groups to create broader policy change. Drawing on Mancur Olson, Lisa 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 policy change, and these benefits fall narrowly on a group of people, it is more likely that individuals and groups will mobilize around a legal decision. ECJ decisions where the benefits are distributed widely will garner less mobilization. Conant

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<sup>17</sup> Most work on the political impact of ECJ decisions has focused on the influence of ECJ jurisprudence on *EU policy*.



also points out that if the costs of policy change are narrowly focused, there can be a counter mobilization 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 counter-mobilization and thus a full acceptance of the decision (Conant, 1998: chapter 3).

Certainly groups are more likely to mobilize when benefits are narrowly focused. But there are numerous examples where there is follow-through even though the benefits of policy change are widely distributed.<sup>18</sup> In each case, it was preexisting groups which drew on the legal victory. One could add to Conant's hypothesis: legal decisions which come down in areas where there are pre-existing mobilized interests are more likely to provoke follow-through. It is likely that the earlier hypotheses on group mobilization are less important at the follow-through stage: groups with narrow mandates and single issue groups that start a litigation strategy are likely to follow-through on it, but even encompassing groups may draw on a favorable legal decision in bargaining.

#### Taking The Four Steps Together: Interaction Effects Of The 4 Steps In The Litigation Process:

All four steps in the litigation process must come together fortuitously for EU legal system to influence domestic policy. There are factors at each step of the process which can lead to cross-national and cross-issue variation in the impact of EU law on national policy. Table 5 summarizes these factors, as they were discussed in this section.

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<sup>18</sup> Alter and Vargas find groups mobilizing around issues of equal pay, and Harlow and Rawlings significant mobilization of consumers groups and environmental groups. [Alter, 1997 #452; Harlow, 1992 #435]

Step of Legal Process	Sources of Cross-National Variation	Sources of Cross-Issue Variation	Where and when is EU law most likely to influence domestic policy?
<p>Step 1: When will EU law provide a legal basis to challenge national policy?</p>	<p>For most EU legal texts all states have the same legal obligations thus they do not give rise to cross-national variation. Opt-out clauses in a few EU agreements could create some cross-national variation in the impact of EU law on domestic policy, but this will be the exception.</p>	<p>Variation based on substance of EU law. Variation based on whether EU law creates direct effects. Variation based on the jurisprudence of the ECJ.</p>	<p>EU law mostly concerns economic issues with a transnational dimension. There are also some policy areas where EU has jurisdiction (Ag, VAT, external trade...). These areas of national policy are mostly likely to be effected by EU litigation. Laws that take the form of regulations, and directives and treaty articles which are more specific are more likely to create direct effects. When ECJ doctrine is well developed, the ECJ is more likely to rule against a national policy (Garrett et al., 1998). When the costs of the legal decision are relatively low, the ECJ is more likely to rule against a national policy (Garrett et al., 1998). When there is no political consensus among member state against an ECJ decision, the ECJ is more likely to rule against a national policy (Alter, 1998b).</p>
<p>Step 2: When will litigants mobilize to use EU law to promote their policy objectives?</p>	<p>Variation based on national procedural and legal standing rules. Variation based on litigiousness of population. Variation based on how interests are organized at domestic level (narrow groups vs. encompassing groups). Variation based on access of domestic groups to policy-making process.</p>	<p>Variation based on wealth and legal know-how of litigants. Variation based on magnitude of potential benefits of litigation. Variation based on how interests are organized at domestic level (narrow groups vs. encompassing groups). Variation based on access of domestic groups to policy-making process.</p>	<p>Countries where citizens and businesses are used to using litigation to pursue interests and where the legal system generally works are likely to have more private litigant challenges to national policy. Wealthy individuals and large firms are more likely to raise cases, and be able to use the legal system to their advantage (Conant, 1998). When benefits are significant, private litigants are more likely to raise cases (Conant, 1998). Narrowly focused groups are more likely to turn to litigation than groups with broader mandates and more encompassing constituencies (Alter &amp; Vargas, 2000). Groups which do not enjoy access to the political process are more likely to turn to litigation to promote their objectives (Alter &amp; Vargas, 2000).</p>

<b>Step of Legal Process</b>	<b>Sources of Cross-National Variation</b>	<b>Sources of Cross-Issue Variation</b>	<b>Where and when is EU law most likely to influence domestic policy?</b>
Step 3: When will national judges refer cases and apply ECJ jurisprudence?	Variation in rules of access to legal bodies influence judicial behavior vis-à-vis EU law. Variation in national legal training can influence judicial identity and judicial behavior vis-à-vis EU law.	Variation in rules of access to legal bodies influence judicial behavior vis-à-vis EU law. Variation in legal substance leads some national courts to deal with EU legal issues more than others, influencing number of references but not necessarily judicial openness to EU law and ECJ jurisprudence. Variation in judicial identity influences judicial behavior vis-à-vis EU law. Variation in how EU law influences the independence, influence and authority of judges influences the willingness of judges to send references and accept ECJ jurisprudence. Variation in the policy and legal impact of EU law on national law influences judicial willingness to refer cases and accept ECJ jurisprudence.	If litigants indicate a willingness to pay and wait for a preliminary ruling decision, the chance of a referral increases. Legally uncontroversial ECJ decisions are more likely to be accepted by national courts. When litigants can forum shop for sympathetic judges, there is a greater chance the legal issue will make it to the ECJ. Lower courts are often more receptive to making a reference than higher courts (Alter, 1996b). Courts where the judges have not previously served for long periods in the national administration are more likely to be sympathetic to challenges to national policy.
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.	Variation based on the political salience of the ECJ decision, and the likelihood the decision will mobilize domestic actors. Variation based on whether the ECJ decision was made in a case referred by a national court in the country which needs to change its policy. Variation based on whether the case originated as a test case and has interest group support. Variation based on the size and distribution of potential benefits of policy change in light of a legal decision. Variation based on the organization of domestic interests (pre-existing groups are more likely to pick up on favorable legal decisions).	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 (Slaughter, 1995). National legal decisions of high political salience are more likely to provoke mobilization and thus are more likely to be respected. National legal decisions upheld by higher instance courts are more likely to be respected than lower court decisions, although lower court decisions based on ECJ preliminary ruling decisions are usually upheld by higher courts. <u>When we will get follow-through?</u> Follow-through is more likely in cases constructed by groups to challenge national policy, compared to cases raised by private litigants. Follow-through is more likely where the benefits of policy change are narrowly focused and the costs of policy change widely distributed (Conant, 1998). Follow-through is more likely in policy areas where groups are mobilized and vigilant of government behavior.

While different factors influence each step of the EU litigation process, there will clearly be interaction effects across steps. A favorable ECJ decision may lead private litigants to raise more cases in national courts. Or a factor which discourages a litigant from raising a legal case may also discourage a national court from referring the case. And the fact that national courts do not refer cases, or that their decisions do not lead to policy changes, may lead litigants to discount the value of a litigation strategy. Scholars disagree about whether interaction effects create a positive circle increasing EU law's influence on national policy, or a negative circle decreasing EU law's influence on national policy.

Neo-functional theory assumes positive interaction effects. It expects the process of European integration to increase transnational trade, creating more actors winning from this trade, more EU legal cases and thus an increase in the influence of EU law on domestic policy (Burley & Mattli, 1993; Stone Sweet, forthcoming). There is anecdotal evidence that one litigant's success in utilizing EU law has triggered other actors to mimic the strategy. It is also true that the body of EU rules keeps expanding, as do the levels of trade, creating more opportunities for litigants to draw on European law.

But it is also possible for a negative feedback loop to emerge. Factors which 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. Negative ECJ rulings can be especially dissuasive for group litigants, which have more to lose in unsuccessful litigation. While reference rates continue to increase, national courts' ambivalence about EU law and their opposition to key tenets of ECJ jurisprudence seems to grow through time. 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 on states to comply with EU law.

While the trajectory in Europe is towards more integration and more EU law, there is evidence that a backlash is also occurring. The ECJ has been excluded from some of the new areas of EU powers (such as common foreign and security policy, and all issues of justice and home affairs which affect domestic security and country's internal order). Learning from the ECJ's past activism, states are writing into EU law provisions which limit the ECJ from expanding EU law's legal effects in the domestic realm. For example the new Treaty of Amsterdam stated that policies adopted under the EU framework with respect to Article K.3 will not create direct effects—making private litigants unable to draw on them to challenge national provisions. Member states are also including 'secret footnotes' in EU law which limit the usability of EU law for domestic groups.<sup>19</sup> Politicians figured out early on that lower courts were much more willing to send references to the ECJ, and that their references were allowing the ECJ to expand its own authority and compromise national sovereignty. 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 law (Alter, 1998b). And the limits of national judicial support for the ECJ are being exposed, with the German Constitutional Court reasserting its right to decide when EU law will not apply in Germany, and threatening to exercise this right in the banana case (Reich, 1996). In light of these factors, the ECJ has slowed its activism and even reversed some of its earlier jurisprudence (Mancini & Keeling, 1994). A more significant

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<sup>19</sup> According to an article in the *Economist*, this practice has "out of proportion."

[The 1994] directive on data protection attracted 31 such 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.

It is not clear if these secret footnotes are legally valid. See *Seeing Through It. The Economist*, September 16, 1995, pp. 59.

domestic political backlash against European integration could also be brewing (Harlow, 1996), which would make the ECJ more hesitant to inflame public passions, and national courts more willing to question the ECJ and to protect domestic rules from the encroachment of EU law. These factors indicate at a minimum a slower future for the expansion of EU law and possibly even a retrenchment of EU law in some areas.

Negative feedback between the four steps of the litigation process can undermine the influence of EU law on domestic policy. Few aspire to be Cassandra, which may be why the issue of backlash and negative interactive effects of the integration process is greatly under-theorized.<sup>20</sup> One can't say that the neo-functional trajectory is more likely than the negative trajectory. The reality is probably that in some areas and for some issue the world looks like neo-functional theory predicts, but that negative interactive effects also emerge which slow and re-direct the integration process, even reversing certain advances.

### **III. Generalizing From the European Case to Elsewhere**

The European legal system has some unique attributes which has allowed it to contribute to legalization in Europe and which give it leverage to influence domestic policy. Access to the European Court is far wider than for most international legal bodies with states, the European Commission and private litigants all able to invoke EU law 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 which has been important in building support for its jurisprudence and enhancing the effectiveness of the EU legal system (Burley & Mattli, 1993; Hartley, 1994; Slaughter & Helfer, 1997; Weiler, 1991). The EU's preliminary ruling system is also unique. One can not underestimate how much the preliminary ruling

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<sup>20</sup> Shaw makes an attempt to theorize about this issue (Shaw, 1994).

matters in creating a national sources 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>21</sup> The four steps of the litigation process identified in this article still need to be fulfilled for international legal mechanisms to be used to influence domestic policy. But the factors influencing each step will vary because the source of international law will be different and the intermediaries in the legal process different.

The first step in the EU litigation process involved having a body of EU law that could be invoked in a legal system to challenge national policy. There are many international legal texts which can be invoked in national courts and in international courts to challenge national policies. But the ability of this law to be invoked will vary based on the binding nature of the legal text, whether the national system recognizes the legal text as creating direct effects in the national system, and access rules to the international legal system which will influence whether or not it can be effectively used to challenge a country's policy. As in the EU case, biases in the law will create biases in which actors can benefit from the law. The end result may be that international law significantly advantages some domestic groups (such as economic actors favoring liberalization) over other domestic groups, and that has a bias in how it reshapes domestic policy.

The second step of the litigation process involved mobilizing the potential beneficiaries to draw on international law and use the international legal mechanisms. There are other international legal systems that allow independent commissions to raise cases (the European Convention on Human Rights has an independent commission which investigates state compliance and refers cases to the European Court of

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<sup>21</sup> The framework could also apply to domestic situations as well.

Human Rights, and war crimes courts have prosecutors). In addition some international legal systems allow private litigant access (for example Chapter 19 of the NAFTA agreement allows private litigants to raise cases in front of bi-national panels and legal bodies created to deal with the freezing of assets in Iran and the damage done in Kuwait also accept complaints by private litigants). Where private litigants do have access, the factors identified in this chapter—such as the magnitude of potential benefits and how interests are organized—could matter. Indeed Sevilla's study on the use of the 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 (Sevilla, 1997).

The third step in the EU case—finding national judicial support—is probably less of a factor for other international systems. Since states are often the only actors authorized to use international legal mechanisms, the relevant variable may be finding state support to raise the case. For a variety of reasons, states tend to be more reluctant than private litigants or national courts to use international legal mechanisms. But the national government 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>22</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.

The fourth step of follow-through will also be important in other international legal contexts. Few international legal bodies are able to issue sanctions against states. In most cases, there needs to be a separate action authorized by or taken by a political body for a penalty for a violation of

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<sup>22</sup> For example, super 301 in the United States virtually forces the executive branch to investigate and act on complaints raised by American firms.



international law to be created. It cannot be assumed that states will follow-through on their legal victories. It might be more costly to follow-through on a legal victory than it was to initiate legal proceedings. And time will certainly have elapsed between the original decision to raise a legal case and the decision of whether or not 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 are the actors which must follow-through, compared to groups in the European context, the factors which influence whether or not there will be follow-through will be different. But the step of follow-through will be no less, and possibly even more important.

The European legal system is unique in its ability to influence domestic policy. But even in a highly legalized system like the EU's there is great variation in where the EU legal system actually does influence national policy. For political scientists who prize parsimony, the answer to the question where and when will EU law influence national policy is unfortunately complex. Even assuming rational behavior and no human error, 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 may be additional factors which are important because the main intermediaries in other international legal systems differ.

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