

# DEMOCRACY BY LAWSUIT

Or, Can Litigation Alleviate the European Union's  
“Democratic Deficit?”

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## ABSTRACT

Can legal mobilization be a source of democratic legitimation for polities lacking alternative sources of popular participation? In this brief article, I evaluate whether participation in the European Union (EU)'s legal order via litigation stands to assuage some of the concerns regarding the EU's “democratic deficit.” I begin by charting the evolving scope of EU law and suggesting that EU competences now extend far beyond complex economic realms over which we might legitimately delegate authority to an insulated set of technocratic institutions. Consequently, greater popular engagement in the process of EU integration would indeed be desirable. I then suggest that electoral mobilization is unlikely to resolve this problem (at least in the EU), and pivot to ascertaining whether litigation is a more fertile path forward. I suggest that, while formalized engagement with the EU legal order might beneficially contribute greater citizen input over the process of European legal development, this form of *legal* participation should complement, rather than substitute for, *democratic* participation.

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## INTRODUCTION: LITIGATION AND GOVERNANCE IN THE EUROPEAN UNION

Like all international organizations and most nascent federal states, the European Union (EU) is a decentralized polity that lacks the independent capacity to govern predominantly from the top down. Specifically, because the EU lacks a military, an independent tax system, and a large bureaucracy (Cappelletti et al. 1986),<sup>2</sup> it relies primarily on the decentralized enforcement of its legal rules, often by private parties. In fact, the EU is characterized by a participatory mode of “governance by lawsuit.” When a consumer, farmer, or import-export company lawyers up, sues a private party or the state for violating EU rules, and convinces the domestic judge that EU rules are binding, the EU’s ability to govern effectively is bolstered from the bottom up (Kelemen 2009, 2011).

The central institutional mechanism for private actors to claim and expand their EU legal rights and for judicialized governance in Europe is known as the “preliminary reference procedure.”<sup>3</sup> Established by Article 177 of the 1957 Treaty of Rome (and now governed by Article 267 of the Treaty on the Functioning of the EU),<sup>4</sup> the procedure provides that any domestic court facing a question that implicates EU law may (and sometimes must) temporarily stay the proceedings and refer the case to the EU’s supreme court—the European Court of Justice (ECJ)—so

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2. The EU’s operating budget amounts to just 1% of Europe’s GDP (compared to an average of 49% of GDP for member states)—only 6% of which is allocated to administration (EU Commission 2015a). EU funding relies upon customs duties and quasi-voluntary state contributions (EU Commission 2015b). The executive body of the EU—the European Commission—is staffed by just 33,000 employees, which is comparable to the civil service of a medium-sized city (EU Commission 2015c). No European army exists to coerce compliance with EU law (Hooghe and Marks 2001, 5; Sparrow 2015).

3. This mechanism is “central” not only because it is the primary source of opportunities for dispute-resolution for (and, consequently, law-making by) the ECJ, but also because a substantial body of empirical scholarship has demonstrated the degree to which the procedure is relatively insulated from influence by member state governments. Even the most powerful EU member states, such as France, Germany, and the United Kingdom lose more cases than they win before the ECJ (see Burley and Mattli 1993; Stone Sweet 2000; Cichowski 2007; Alter 2009; Stone Sweet and Brunell 2012; Kelemen 2012a).

4. Consolidated version of the Treaty on the Functioning of the European Union. *OJ C 326, 26.10.2012*: 47-390.

that it can interpret EU law. The ECJ then provides an interpretation and often suggests whether domestic law contravenes European rules, inviting the domestic judge to exercise judicial review powers usually denied them without reference to EU law (Weiler 1991, 1994; Alter 2001).<sup>5</sup> If it is unclear whether EU law applies, a judge should still refer the case to the ECJ.<sup>6</sup> This provision enables local judges to gain assistance from European judges, thereby generating EU standards for “naming, blaming and claiming” (Felstiner et al. 1980) that can reach local litigants in a uniform way across the EU (at least in theory).

The purpose of this brief article is to probe how the centrality of “governance by lawsuit” in the EU—which has engendered hundreds of lawsuits that are punted by domestic judges to the ECJ every year—interacts with another fundamental transformation of European politics: The growing perception of citizens, politicians, journalists, and academics that the EU suffers from a “democratic deficit.” The core of this critique charges the EU with being a “distant” technocratic monster, insulated from popular participation, free of democratic accountability, and out of touch with the realities of everyday life (see Moravcsik 2002 for an overview). The multiple, interacting crises currently plaguing the EU—the legacy of the sovereign debt crisis, the migration crisis exacerbated by the conflict in Syria, the rule of law crisis in states like Hungary and Poland as they relapse towards authoritarianism, and the recent “Brexit” vote—have only exacerbated Euroskeptical sentiment (Greene and Kelemen 2016; Kelemen 2016a; 2016b).

This raises a critical question for constitutional scholars, democratic theorists, and analysts of European integration: To what extent does the growing vindication

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5. Recall that, in contrast to common law jurisdictions, the European civil law tradition has usually denied judges any judicial review power. Such power, where it existed, was usually monopolized by a single Kelsenian Constitutional Court, such as the Italian Constitutional Court and the German Federal Constitutional Court (Merryman and Perez-Perdomo 2007). Uniquely, in France the *Conseil Constitutionnel* was further limited to abstract review of legislation until 2008, when it was finally granted *a posteriori* review powers (Stone Sweet 2007; Fabbrini 2008).

6. In its 1978 *Simmenthal II* ruling, the ECJ held that lower courts necessitating the interpretation of EU law may leverage the procedure without first referring the case to their national supreme courts; in its 1982 *CILFIT* decision, the ECJ held that courts of last instance must use the procedure when necessitating the interpretation of EU law unless there exists a clear ECJ precedent governing the case (the so-called *Acte Clair* doctrine). More recently, in the 2006 *Traghetti del Mediterraneo* ruling the ECJ held that the State can be held liable for damages if a national court of last instance manifestly infringes EU law. See: Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978], ECR 629; Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, [1982], ECR 3417; Case 173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, [2006], ECR I-5204.

of EU rights in court not only bolster the EU's governance capacity, but also its democratic pedigree? Is the profusion of EU law litigation and referrals to the ECJ a sign that the EU is a more participatory and democratically legitimate polity than Euroskeptics may lead one to believe?

To begin to chart a tentative answer, this article is organized into three sections. Section II describes the expanding authority of the EU and the increasing number of issue areas regulated by the ECJ's case law. I suggest that EU competences now extend far beyond complex economic realms over which we might legitimately delegate authority to an insulated set of technocratic institutions. Section III then turns to adjudicating whether a judicialized mode of governance can serve as a democracy-enhancing "forum of principle." In so doing, I draw upon the law and society literature to paint a more realistic assessment of the variety of ways in which EU law litigation functions. Finally, Section IV concludes by arguing that while formalized engagement with the EU legal order might beneficially contribute greater citizen input over the process of European legal development, this form of *legal* participation is not a substitute for *democratic* participation.

## DOES THE SCOPE OF EU AUTHORITY REQUIRE DEMOCRATIC INPUT?

### The Pre-1980s Era: Technocratic Regulation of the Common Market

For a polity to suffer from a democratic deficit, it must possess jurisdiction over issue-areas that, under any realistic model of democratic governance, require some form of popular participation and accountability in policymaking. Yet in the first three decades following the founding of the European Economic Community (EEC) in the 1957 Treaty of Rome, most the EU rules that became focal points for dispute resolution, and which generated questions before domestic courts that were subsequently referred to the ECJ, were economic and technocratic in nature. That is to say, legal integration through the 1980s centered narrowly on the regulatory governance of the new European common market. As we will see, scholars have leveraged this historical fact to argue that the EU does not suffer from a democratic deficit.

Infrastructurally, it was trade and competition-based disputes that fostered political opportunities for the "constitutionalization" of the EU Treaties at the hands of the European Court of Justice (Mancini 1989, 595; Jacobs 1992, 25–32; Stone Sweet 2000). In 1962 an import-export company's challenge to a Dutch tariff invoking Article 12 of the Treaty of Rome spurred a reference to the ECJ wherein

it proclaimed that, indeed, EU law “produces direct effects and creates individual rights which national courts must protect.”<sup>7</sup> Just one year later, an Italian citizen’s challenge to the nationalization of an electric company generated a reference to the ECJ in which the European Court proclaimed that “the law stemming from the Treaty . . . could not . . . be overridden by domestic legal provisions, however framed.”<sup>8</sup> These doctrines of “direct effect” and “supremacy” emerged as the institutional cornerstones of the ECJ’s “law of integration” (Pescatore 1974) and as the mechanisms through which common market actors could partner with judges to challenge domestic regulations and expand the substantive scope of European economic governance.

Indeed, the wellsprings of European legal development through the 1980s centered almost exclusively on the economic provisions addressed by the Treaty of Rome. One fulcrum of litigation-induced legal development included the dismantling of quantitative restrictions and tariffs deemed to be protectionist in nature and disruptive of the free movement of goods. “All trading rules,” the ECJ famously proclaimed in 1974, “enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”<sup>9</sup> Another source of legal development encompassed the labeling requirements of food products: What constitutes “vinegar,”<sup>10</sup> “yogurt,”<sup>11</sup> and “sugar”?<sup>12</sup> Yet another comprised the shipping and handling of products circulating in the common market: How should margarine be packaged,<sup>13</sup> or wine bottled?<sup>14</sup> These examples illustrate how the EU’s exclusive competence over the free movement of goods, services, people, and capital—sometimes referred to as the “four freedoms” of Europe’s internal market—endowed the requisite discretion to the ECJ to construct

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7. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, ECR 1, at operative part, paragraph 3.

8. Case 6/64, *Costa v. ENEL*, [1964], ECR 587, at page 594, paragraph 4.

9. Case 8/74, *Dassonville* [1974], ECR 837, at law part, paragraph 5. See also: Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979], ECR 749.

10. Case 193/80, *Commission v. Italy* [1981], ECR 3019.

11. Case 298/87, *Smanor* [1988], ECR 4489.

12. Case 241/89, *SARPP* [1990] ECR 4695.

13. Case 261/81, *Walter Rau* [1982], ECR 3961.

14. Case 176/84, *Commission v. Germany* [1986], ECR 3879.

what Miguel Maduro (1998) terms a “European economic constitution.” And since most Europeans had little time or interest to contemplate “technical legal garb” (Burley and Mattli 1993, 70) detailing how margarine should be packaged, the primary beneficiaries of pre-1980s European legal development were those economic “repeat players” (Galanter 1975) with a stake in liberalizing the common market: Import-export companies, large-scale agricultural enterprises, and financial institutions.

In light of the foregoing set of technocratic competences focused on economic governance, Giandomenico Majone (1998) conceptualizes the EU as a narrowly-focused “regulatory state” rather than a full-fledged federal state necessitating democratic participation and accountability. Building on Majone, Andrew Moravcsik (2002, 606) argues that Europe is characterized by a “division of labour in which commonly delegated functions tend to be carried out by the EU, while those functions that inspire and induce popular participation remain largely national. This gives observers the impression that the EU is undemocratic, whereas it is simply specializing in those functions of modern democratic governance that tend to involve less direct political participation.”

These arguments legitimate the EU by focusing on its limited competences and technocratic expertise, a move familiar to philosophers of law probing possible sources of obeisance to legal rules lacking in democratic authorship. “Imagine,” writes Joseph Raz (1984, 146), “that I use in the course of my employment tools which may create a safety hazard . . . The government has issued safety regulations. The government experts who laid down these safety regulations are experts in their field. Their judgment is much more reliable than mine. I am therefore duty bound to obey the regulations which they have adopted.” While the centrality of economic “repeat players” in providing the ECJ with opportunities to expand the reach of EU economic laws might give us pause, perhaps the EU’s limited regulatory authority and expertise is nonetheless sufficient to counter critiques of its democratic *bona fides*.

### The Post-1980s Era: Expansion to Social Policy and Fundamental Rights

Even if we accept the logic of the foregoing argument, the EU today can no longer be characterized as solely an economic union endowed with purely technocratic regulatory powers. Increasingly, the EU also possesses an extensive social- and rights-based corpus of regulatory provisions and case law.

Harbingers of this legal development date back to the early 1970s, when the ECJ timidly proclaimed that the protection of fundamental rights is one of the

governing principles of the Union.<sup>15</sup> Yet the ECJ's motives were more so grounded in political realism than rights-focused progressivism, seeking to assuage the German Constitutional Court's fears that European integration would trample over the civil rights of German citizens protected under Basic Law (Weiler 1986; Davies 2014). Further, such paeans to fundamental rights were at least a decade away from growing the teeth necessary to have a concrete impact on the lives of everyday citizens.

The origins of this incremental transformation are illustrated by the ECJ's pay equity case law in the late 1970s and 1980s. Upon the persistent invitation of pay equity advocates, the ECJ creatively leveraged the economic logic of market competition to dip its toe into the domain of social policy (Cichowski 2007). In 1976 the ECJ proclaimed equal pay for equal work as a binding principle of EU law, since one must "avoid a situation in which undertakings established in States [in this case, France] which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition . . . [T]his . . . forms part of the social objectives of the Community, which is not merely an economic union."<sup>16</sup> By 1990 the ECJ had established employment protections for pregnant workers,<sup>17</sup> and these rulings have since been bolstered by a series of directives drafted by the EU Parliament and the Council of Ministers promoting equal treatment in employment.<sup>18</sup>

More broadly, some commentators suggest that a "rights revolution" is in full swing in EU law: The protection of disabled workers<sup>19</sup> and transsexual workers against employment discrimination,<sup>20</sup> asylum rights for gay persons facing the threat of imprisonment,<sup>21</sup> and criminal defendant rights<sup>22</sup> have all seen expansion and explicit incorporation within EU law. Furthermore, in 2000 the EU's European

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15. Case 29/69, *Erich Stauder v. City of Ulm*, [1969], ECR 566; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970], ECR 1126; Case 4/73, *Nold, Kohlen und Baustoffsgrohandlung v. Commission of the European Communities*, [1974], ECR 492.

16. Case 43/75, *Defrenne v Sabena* [1976], ECR 456, at law part, paragraph 10.

17. Case 177/88, *Dekker v. VJV-Centrum*, [1990], ECR I-3941

18. Directive 92/85/EEC [1992], OJ L348/1 (The Pregnancy Directive); Directive 2006/56/EC [2006], OJ L204/23 (The Equal Treatment Directive).

19. Case C-303/06, *Coleman v. Attridge Law* [2008], ECR I-5603.

20. Case 13/94, *P v. S and Cornwall County Council* [1996], ECR I-02143.

21. Joined Cases C-199/12, C-200/12, C-201/12, *X, Y, Z v Minister voor Immigratie en Asiel* [2013], OJ C-217.

22. Directive 2013/48/EU, OJ L294 (The Directive on Access to a Lawyer in Criminal Proceedings).

Council proclaimed a Charter of Fundamental Rights, and in 2007 Article 6 of the Treaty of Lisbon endowed it with the same legal status as the EU Treaties, meaning that it binds EU institutions as well as domestic states when implementing EU regulations and directives.<sup>23</sup> The ECJ has also begun to reference the extensive fundamental rights jurisprudence of the European Court of Human Rights (ECtHR) when interpreting EU law, enabling litigants to invoke ECJ case law to indirectly force states to comply with the European Convention on Human Rights.<sup>24</sup> It is hard to deny that something like a European social rights constitution is under construction alongside its longstanding economic counterpart.

### The Resulting Problem

Yet this rosy narrative presents two problems. First, the EU's expansion of competences breaches the domain of those technocratic economic provisions that might plausibly be delegated to a political authority insulated from public deliberation, as Majone and Moravcsik contend. Second, it is dubious that the ECJ has substituted rights protection for market integration as its animating objective.

Consider, for example, the European Arrest Warrant (EAW)<sup>25</sup> instituted in 2002, which requires the courts of a given EU member state to surrender a citizen to their counterparts in another EU member state where the suspect is accused of committing a crime. In adjudicating cases implicating the EAW, the ECJ has refused to rule that a warrant need not be executed if a national court is concerned that the receiving state would fail to protect the rights of the criminal defendant.<sup>26</sup> Given the recent relapse to authoritarianism in Hungary under the nationalist-populist leadership of Viktor Orban (Scheppele 2015) and indications that Poland is following suit via the ruling Law and Justice Party's all-out assault on the Polish Constitutional Tribunal (Buckley and Foy 2016; Kelemen 2016b), any "mutual

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23. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C306.

24. The first case explicitly referencing the ECtHR was Case 185/85, *Baustahlgewebe GmbH v. Commission of the European Communities* [1998], ECR I-08417. This path may be attractive to litigants, as opposed to a direct action before the ECtHR, because it does not require exhausting all domestic legal remedies as in the ECtHR framework, and because the ECtHR, unlike the ECJ, can only adjudicate the individual controversy rather than proclaim that domestic law being challenged should be set aside.

25. Council Framework Decision 2002/584/JHA [2002], OJ L190/1.

26. Case 303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007], ECR I-3633; See also Case C-399/11, *Stefano Melloni* [2013], ECLI:EU:C:2013:107.



trust” that all EU member states have comparable and adequate protections for criminal defendants rests on very shaky ground. Unfortunately, the ECJ has so far privileged bolstering inter-judicial cooperation via mutual recognition over safeguarding individual rights (Douglas Scott forthcoming, 38–39).

More broadly, even as the ECJ has advanced the rights of transsexuals, gay asylum seekers, and female employees, its jurisprudence is far from unequivocally progressive. It has refused to find that the Equal Treatment Directive protects gay persons from employment discrimination.<sup>27</sup> It has denied that women who have a child through a surrogate mother have the right to maternity or adoption leave.<sup>28</sup> Even though it has expansively interpreted that the Charter of Fundamental Rights applies when national laws fall “under the scope of EU law,”<sup>29</sup> so far it has invoked its protections narrowly and sparingly (de Burca 2013). Indeed, by underscoring that the ECJ is more eager to invoke fundamental rights to protect mobile common market actors (what of those European citizens lacking the means for cross-border mobility?), some have charged the ECJ’s rights jurisprudence as amounting to the law of “taking a bus,” “protecting the market from the citizens, rather than the other way round” (Kochenov forthcoming, 65; 6). Finally, the ECJ has vetoed a multi-year process of negotiations for the EU’s accession to the European Convention of Human Rights, explicitly grounding its decision not in a logic of rights protection but in the defense of the EU legal order’s autonomy and its own position as Europe’s supreme court.<sup>30</sup> It is unsurprising, therefore, that expert observers have accused the ECJ of being more concerned with preserving its own power than promoting the rights of European citizens (Spaventa 2015; Douglas Scott forthcoming).

## IS LITIGATION THE ANSWER TO THE EU’S DEMOCRATIC DEFICIT?

The foregoing discussion should render it clear that critics of the EU’s democratic credentials have not been dealt anything like a *coup de grace*. The expansion of EU law in the criminal, social, and fundamental rights domains invalidates the claim

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27. Case 249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd* [1998], ECR I-621.

28. Case C-167/12, *C.D. v. S.T.* [2014], ECLI:EU:C:2014:169; and Case C-363/12, *Ț v Government Department and the Board of Management of a Community School*, [2014], ECLI:EU:C:2014:159.

29. Case C-617/10, *Aklangaren v. Hans Akerberg Fransson* [2013], ECLI:EU:C:2013:105, at paragraph 19.

30. Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECLI:EU:C:2014: 2454.

that the EU is merely a technocratic regulator of economic transactions in the common market. And it is tenuous to argue that supranational EU institutions—the ECJ included—should be trusted to handle these new issue areas on their own and in an enlightened way. The EU, now more than ever, stands to benefit from increased popular “voice” (Hirschman 1970) in decision-making.

That being said, the electoral mechanism seems like a poor means to bolster democracy in the EU. This is not only due to the fact that participation in elections to the European Parliament continues to decline (plunging to a record low 42% in the 2014 elections),<sup>31</sup> but also because, as R. Daniel Kelemen (2011) has written, legal development in the EU predominantly constitutes a judicialized form of governance authored in domestic courtrooms and the ECJ rather than the halls of the Parliament. Indeed, as we will see shortly, the European Parliament is far from the dominant policymaking institution in the EU. In this light, to what extent can litigation provide an alternative avenue for democratic engagement in, and popular authorship over, the process of European legal development? Can the *lawsuit* and the *courtroom* serve as functional equivalents to the *vote* and the *polling place* in legitimating the process and outcomes of European integration?

### The Tenuous Dworkinian Legitimation of Judicialized Governance

At first glance, one strand of the philosophy of law literature, principally associated with Ronald Dworkin,<sup>32</sup> would be optimistic about the virtues of popular participation in the EU legal order via courtroom litigation.

For Dworkin, we must distinguish constitutional democracy from alternative forms of democratic rule. In defending the central role that judges play in the political life of the United States, Dworkin (1978, 142) notes that “constitutionalism—the theory that the majority must be restrained to protect individual rights—may be a good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust. So principles of fairness seem to speak against, not for, the argument from democracy.” Furthermore, “there is no reason to credit any other particular group with better facilities of moral argument” than judges (Dworkin 1978, 159). In fact, a good Dworkinian might praise a judicialized mode of governance precisely when a polity begins to enter the domain of social, economic, and political rights. As “fora

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31. *EuroActiv*. “It’s official: Last EU election had lowest-ever turnout.” Aug. 7, 2014.

32. Other prominent legal theorists, like Christopher Eisgruber (2007), have made similar claims.

of principle,” courts are better able to treat rights as “trumps” over utilitarian policy considerations, which are the domains of the political branches of government. In perhaps his most renown and poetic excursus of this view, Dworkin (1985, 71) writes: “We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.”

A Dworkinian approach might thus suggest that the EU’s emergent social- and rights-based constitution should be constructed, interpreted, and applied precisely in judicial fora, where litigants bring rights claims before domestic and European judges who subsequently join together to incorporate principles of social justice within the economic *grundnorm* of the Union. Such an approach might even go so far as to flip the “democratic deficit” critiques on their head: Perhaps it was the early years of the economic policy-driven EU, rather than the contemporary era of social- and rights-based litigation, that suffered from a democratic deficit.

Yet beyond the empirical objection, noted earlier, that the ECJ does not currently appear willing to take on the role of fundamental rights protector, conceptually the validity of this approach depends on the comparability of the EU to a constitutional democracy like the United States. In point of fact, the first component of the premise—that the EU is a “constitutional” polity—seems to stand on solid ground. Observers on both sides of the “democratic deficit” debate, including Moravcsik (2002), Weiler (1991), Stone Sweet (2000), Kelemen (2006), and Mancini (1989), have noted a “remarkable process of constitutionalization” in the EU, “which has transformed it from a treaty-based international organization into a quasi-federal polity based on a set of treaties which is a constitution in all but name” (Kelemen 2006, 1302). Eschewing the traditional inter-state contract model of international law (Phelan 2016),<sup>33</sup> the doctrine of “direct effect” of EU law instead creates a “social contract” with “community citizens” (Burley and Mattli 1993, 61). This transformation is crucial, for as Weiler (2011, 263) has perceptively noted, “one of the things that happens in the move from the ‘international’ to the ‘constitutional’ is an important political shift: the bonds of the states which unite in a federal state are not only among such states, but among their citizens, jointly and

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33. As Phelan (2016) has written, one of the foundational principles of the EU legal order that distinguishes it from other international organizations like the WTO is the fact that “self-help” countermeasures—“the principle that a contract does not need to be fulfilled in favor of a party that is themselves failing to execute it”—have been explicitly deemed illegal by the ECJ. See: Joined Cases 90/63 91/63, *Commission v. Luxembourg & Belgium* [1964], ECR 625.

severally.” Indeed, the ECJ’s jurisprudence has increasingly expanded not just the “vertical direct effect” of EU law—which enables European citizens to challenge state legislation contravening “higher” EU law—but also the “horizontal direct effect” of some EU legal provisions, enabling them to impose obligations upon private actors as well.<sup>34</sup> Furthermore, Stone Sweet has suggested that the growing centrality of fundamental rights in the EU, epitomized by the promulgation of the Charter of Fundamental Rights, demonstrates the EU’s convergence upon the “basic formula” of post-World War II constitutionalism in Europe: “an entrenched, written constitution; a charter of rights; and a mode of constitutional judicial review” (Stone Sweet 2012, 65; 60).

The problem, however, arises with regards to the second necessary element for a Dworkinian theory to apply: If the EU is “constitutional,” is it a “democracy”? It is true that one branch of the EU—the European Parliament—has been directly elected by European citizens since 1979. It is also true that the Parliament’s power has been continuously expanded over time. Before 1986, the Parliament possessed merely a “consultative” role under the Treaty of Rome, and oftentimes the EU’s Council of Ministers—the true legislative forum representing the intergovernmental interests of member state executives—did not even bother to go through the motions of consulting the Parliament.<sup>35</sup> In the 1986 Single European Act’s “coordination procedure,” the Parliament was endowed with the ability to demand a “second reading” of a majority of Council legislation, and its “assent” was now required before the Council could draft legislation (Hix and Hoyland 2011, 53). The 1993 Maastricht Treaty then replaced the “coordination” procedure with a “co-decision” procedure requiring both Parliamentary and Council assent for legislation to pass (Ibid). The 1999 Treaty of Amsterdam and 2007 Lisbon Treaty further extended the reach of the co-decision procedure to virtually all areas of EU law, such that it is now referred to as the “ordinary legislative procedure” (Ibid). Additionally, Hix et al. (2007) have found compelling empirical evidence that the legislative politics of the Parliament are increasingly ordered along cross-national partisan lines (crystallizing into the center-right European People’s Party (EPP) and

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34. For example, the equal pay principle was endowed with horizontal direct effect in the ECJ’s *Defrenne II* ruling mentioned previously. As another example, treaty provisions concerning the free movement of persons were endowed with horizontal direct effect by the ECJ in: Case 281/98, *Angonese v Cassa di Risparmio di Bolzano SpA* [2000], ECR I-4139.

35. At one point it generated a lawsuit before the ECJ where it invalidated Council legislation for having failed to consult the Parliament: Case 138/79, *SA Roquette Freres v Council of the European Communities* [1980], ECR 3334.

the center-left Social Democratic Party (S&D)) rather than in ways that purely reflect member state interests. Finally, in the 2014 elections Parliamentarians succeeded in linking the selection of the European Commission president directly to the outcome of Parliamentary elections (Matthijs and Kelemen 2015). In short, the EU does contain a democratically elected and accountable institution with growing powers and whose political dynamics mirror those of ordinary legislatures.

And yet the EU is far from representing a model of “Parliamentary sovereignty,” and it is difficult to argue that the Parliament lies at the heart of policymaking in the EU. Recent European crises—particularly the sovereign debt crisis and the migration crisis—have showcased the degree to which intergovernmental bargaining amongst the most powerful EU member states and the burgeoning agenda-setting powers of the heads of state (or government) in the European Council continue to out-shadow the Parliament when it matters most (Pavone 2012; Kelemen 2015). At best, then, the Parliament is an increasingly central veto-player in the politics of the EU but remains far from being “first among equals.” Further, and as mentioned previously, popular participation in Parliamentary elections is in continuous decline, and what residual participation does occur often represents a referendum of the national government rather than a decision about the course of Parliamentary policymaking (Moravcsik 2002). In short, if the Parliament represents the democratic “heart” of the Union, then the EU is in serious need of a pacemaker.<sup>36</sup>

Hence a Dworkinian approach—justifying a judicialized mode of governance as a principled, constitutional check upon a pre-existing and robust apparatus for majoritarian democracy—does not seem to “fit” the institutional reality of the EU.

### Insights from Law & Society: Varieties of Legal Mobilization in the EU

But perhaps one can draw from more sociological approaches, central to the law and society literature, and ask whether legal mobilization in the EU nonetheless

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36. Of course, parliaments are not all-powerful even in domestic settings, and the combination of a global trend of “judicialization of politics” (Hirschl 2004) and the incremental growth of executive power (in part as a result of the centrality of executive-led intergovernmentalism in EU-style international organizations (see Moravcsik 1994)) should push us not to overstate the power of national parliaments. But, as a matter of degree, it is undeniable that the EU Parliament would be an exceptionally weak parliament if transplanted in a domestic setting; Contrariwise, the ECJ would be exceptionally strong—perhaps comparable in lawmaking power to the US Supreme Court—if transplanted to a domestic setting. The point is that legal integration in the EU has deepened and accelerated trends in judicialization and erosion of parliamentary sovereignty that, while a fairly general phenomenon, are much more pronounced in the EU.

enables European citizens to claim their EU legal rights, to push for vindication and expansion of these rights in court, and to foment a European “rights consciousness” via litigation (*a la* Felstiner, Abel, and Sarat 1980; McCann 1994). Here, however, the evidence appears contradictory *prima facie*.

On the one hand, some scholars argue that the burgeoning participation of interest- groups, human rights NGOs, consumer protection associations, and ordinary citizens in the EU legal system promotes liberal democracy, namely by rendering it “more difficult for policy-makers to pursue policies formulated to serve general public interests where these might conflict with individual rights claims” (Kelemen 2012b, 63). This mode of governance can also empower marginalized groups in Europe: Rachel Cichowski (2006, 54), for example, argues that the “ECJ’s gender equality case law is now heralded as having not only brought procedural and substantive change in EU law . . . but also having mobilized women to bring subsequent rights cases,” thereby “[increasing] opportunities for participation through law enforcement, rights claiming, and expanded protection.”

On the other hand, some scholars have pointed to a “paradox that may arise from EU legal institutions increasing opportunities for participation: The empowerment of the already powerful” (Borzel 2006, 130). Indeed, Lisa Conant (2002) demonstrates that “commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to courts to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation.”

So where does evidence from law and society scholars put us? In some of my own fieldwork (Pavone 2015), I tried to assess these two diametrically opposed evaluations of whether EU litigation is monopolized by the powerful or open to participation by the marginalized. By mapping the location and frequency of lawsuits referred to the ECJ by Italian courts, I demonstrated that through the 1990s, EU litigation was overwhelmingly concentrated in richer, northern Italian cities like Genoa and Milan, where interviewees highlighted the presence of an internationalized, resource-rich “litigation support structure” (Epp 1998) as a critical reason for the early reception and practice of EU law. In particular, most interviewees stressed the superior resources and “well-equipped law firms” “modeled on the Anglo-Saxon big-law template” available in northern Italy, “where money flows more freely” and “where inter-business disputes gravitate, and obviously . . . businesses can [then] empower themselves with more high-profile, specialized law firms, which have a greater possibility to discover a question of incompatibility [of

national law] with EU law . . . [because] they have more resources.”<sup>37</sup> This evidence seems to accord with Conant (2002) and Borzel (2006)’s assessment that economic “repeat players” remain the primary beneficiaries of European legal integration.

Yet over the past 20 years, economically underdeveloped and marginal communities across southern Italy have also increasingly vindicated EU rights in court. Interviewees suggested that since the 1990s, efforts to organize training opportunities in EU law in the cities of Naples, Bari, and Palermo helped foment participation in the EU legal system. For example, one summer school institutionalized in the past fifteen years with the “goal of exchanging knowledge” and “supporting a Europeanist profession” is held yearly in the small Campanian town of Castellabate, an hour south of Naples: “Perhaps thirty people participated in the first iterations of the summer school . . . now 300 or 400 lawyers attend.”<sup>38</sup> Lawyers who participated in this enterprise became convinced that “European law represented the future,”<sup>39</sup> and that, by gaining knowledge of EU law, southerners would be able to “reclaim the lost identity of the legal profession along with its centrality in society” (Senatore 2011, 183). Indeed, in southern Italian cities like Naples, lawyers and judges have increasingly leveraged EU litigation to protect the benefits of unemployed workers,<sup>40</sup> to defend the property rights of private citizens,<sup>41</sup> and to improve the provision of vital social services like waste collection.<sup>42</sup> This alternative narrative seems to accord more with Cichowski (2006) and Kelemen (2012b)’s assessment that litigation in the EU is expanding the ability of ordinary citizens to claim social, civil, and economic rights denied to them by the state.

The implications of the foregoing vignettes—northern Italian cities pregnant with economic “repeat players” and a robust, internationalized litigation support structure, and southern Italian professionals determined to claim their stake over EU law by fomenting local training opportunities in EU law—suggest that there exist varieties of legal engagement in the EU. If we only focus on EU litigation

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37. Interview with Lawyer and Law Professor 6 (In-person, Naples, July 21, 2015); Interview with Judge 10 (On phone, September 1, 2015); Interview with Lawyer 8 (On phone, July 23, 2015); Interview with Lawyer 5 (In-person, Rome, June 25, 2015).

38. Fattibene 2013: XI-XII; Interview with Lawyer 12 (In-person, Naples, July 29, 2015).

39. Interview with Lawyer 12 (In-person, Naples, July 29, 2015).

40. Case 361/12, *Carratu v. Poste Italiane SpA* [2013], ECR 2013-00000.

41. Case 423/98, *Alfredo Albore* [2000], ECR I-5995.

42. Case 108/98, *R.I.SAN v. Comune di Ischia and Others* [1998], ECR I-5238.

emerging from financial powerhouses like Milan, Frankfurt, and London, we might come to the Galanter-esque conclusion that in the EU it is the “haves” that come out ahead (Galanter 1975). But if we consider the emergence of a distinctly more social, rights-focused pattern of litigation across peripheral European communities like Naples and Palermo, we might note that the efforts of individuals determined to participate in a European community of law can make a difference. This becomes possible when the efforts of pioneers of EU legal practice are directed towards building the infrastructure necessary to remedy resource scarcities and when legal mobilization centers on the expansion of social and civil rights.

### **CONCLUSION: WHEN PARTICIPATION BY LAWSUIT DOES NOT EQUAL DEMOCRACY BY LAWSUIT**

The social reality of legal mobilization in the EU is one filled with “equifinality” (Mahoney 2008, 424; Goertz and Mahoney 2012)—or the fact that there are many avenues for legal mobilization within the EU legal order. The expansion of EU legal provisions beyond the restricted and technocratic domain of common market regulation has bestowed upon a new class of social actors the incentive to participate in the process of “governance by lawsuit.” This means that European legal development need not necessarily be a process monopolized by powerful interests, even if these actors’ informational and material advantages will always provide them with a “head start” over the marginalized or the individual citizen. In this light, the judicialization of politics and the expansion of competences within the EU does present the opportunity of incorporating a greater diversity of actors within the legal governance of the Union, which is itself valuable.

But opportunities opened are not the same as opportunities realized. As Borzel (2006, 149) reminds us, “citizens and groups should not be treated as if they were equally endowed with the resources necessary to exploit the opportunities offered by the expansion of judicial power in international and domestic politics. As a result, the transformative effects of courts on democracy and participation may be less pervasive than expected.” Put differently, whereas participation in elections in most modern democracies is governed by the principle of “one person, one vote” (and both formal and informal barriers to voting are usually few and far between), the material and informational pre-requisites for participation via litigation renders it difficult to posit the correlative principle of “one person, one lawsuit.” “One-shotters” may well be able to join “repeat players” in vindicating their EU legal rights, but the efforts that must be undertaken to overcome their informational and resource disadvantage are considerable. Perhaps their disadvantage shows in



the correlative outcomes of their litigation efforts: Although the ECJ has enshrined social and fundamental rights protections as governing principles of the EU, as noted previously, it often turns a deaf ear on litigants asking it to place the protection of fundamental rights above the economic interest in market integration. In a full-fledged democracy, the “losers” in the judicial arena could shift their resources and mobilizational strategies to the electoral arena (McCann 1994). At the European level, however, this alternative democratic avenue is stymied by the circumscribed role that the European Parliament plays in EU policy making.

In short, although legal mobilization may offset declining electoral participation in European parliamentary elections by bolstering popular engagement with the EU’s legal order, legal participation is not synonymous with or a substitute for democracy. Courts may well serve as “fora of principle,” but they will only be democracy-enhancing to the extent that the political economy of litigation is free of major informational and material inequities and to the extent that robust democratic institutions operate alongside their judicial counterparts.<sup>43</sup>

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43. This conclusion is not meant to paint an idealized picture of democracy; it is merely meant to suggest that what makes constitutional democracy work is the counterbalancing interaction between rights-protecting institutions, like the judiciary, and more majoritarian, policymaking institutions, like representative parliaments. I share with Moravcsik (2002) a skepticism of arguments in favor of democratizing the EU by expanding direct democratic channels (one need only look to the misinformation that plagued the recent “Brexit” referendum to note how problematic it can be to put complex decision-making vis-à-vis the EU directly in the hands of citizens). But representative forms of democratic representation in the EU could certainly be strengthened, and the complex legislative process of the EU—whose opacity naturally favors special interests with the lobbying capacity and specialized knowledge to influence decision-making—could be simplified and streamlined to facilitate popular oversight and debate.

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