

CHAPTER ONE

THE POLITICS OF GHOSTWRITING LAWYERS

This is a book about political actors who rarely make the headlines and a political outcome that often does. It is about the concealed politics behind a conspicuous transformation: the growing reliance on law and courts to shape public policy and resolve political struggles. Across many countries, memories of men on horseback past who built states through war¹ have been gradually displaced by jurists in robes who govern through law.

This transformation is often attributed to the political empowerment of courts and the activism of judges themselves. As successive waves of democratization swept the post–World War II (WWII) world, many countries across Europe, Asia, the Americas, and Africa committed to liberal constitutionalism. Two dozen transnational courts with permanent jurisdiction proliferated alongside states' obligations under international law. As judicial supremacy waxed, parliamentary sovereignty and executive power partially waned. Policymakers were increasingly forced to govern alongside an emboldened network of judges at home and abroad. Scholars, journalists, and politicians disagree about whether to celebrate or malign this “judicialization of politics,” but few deny this momentous change.²

¹ See: Finer, Samuel. 1966. *The Man on Horseback*. London: Pall Mall Press; Tilly, Charles. 1993. *Coercion, Capital, and European States, A.D. 990–1992*. New York, NY: Wiley-Blackwell.

² For some exemplary contributions to this debate, see: Shapiro, Martin, and Alec Stone Sweet. 2002. *On Law, Politics, and Judicialization*. New York, NY: Oxford University Press; Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York, NY: Cambridge University Press; Hirschl, Ran. 2007. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.

The European Union (EU) is widely regarded as the “model of expansive judicial lawmaking” propelling this “new world order.”³ For it is national judiciaries that enable the EU to govern through law and implement policy across twenty-seven member states without a supranational army, an independent tax system, and a capacious bureaucracy. In this view, audacious national judges mobilized to hold states accountable to their treaty obligations and claim judicial review powers denied by their domestic legal orders. They referred cases of state noncompliance to the EU’s supreme court – the European Court of Justice (ECJ) – and refused to apply national laws violating supranational rules. Along the way they Europeanized domestic public policies and supported the ECJ’s rise as “the most effective supranational judicial body in the history of the world.”⁴

The Ghostwriters challenges this judge-centric narrative by showing how it conceals a crucial arena for political action. Without decentering courts as fulcrums of policymaking and governance, it uses the puzzle of how Europe became “nowhere as real as in the field of law”⁵ to rethink the origins, agents, and mechanisms behind the judicialization of politics. Contrary to the conventional wisdom, I argue that the promise of uniting Europe through law and exercising judicial review was not sufficient to transform national courts into transnational policymakers. National judges broadly resisted empowering themselves with European law, for they were constrained by onerous workloads, lackluster legal training, and the careerist pressures of their domestic judicial hierarchies. The catalysts of change proved instead to be a group of lesser-known “Euro-lawyers” facing fewer bureaucratic shackles.⁶ Under the sheepskin of rights-conscious litigants and activist courts, these World War II survivors pioneered a remarkable

Cambridge, MA: Harvard University Press; Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton, NJ: Princeton University Press.

³ Alter, Karen, and Laurence Helfer. 2017. *Transplanting International Courts*. New York, NY: Oxford University Press, at 4; Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton, NJ: Princeton University Press, at 33–34; 134–135.

⁴ Stone Sweet, Alec. 2004. *The Judicial Construction of Europe*. New York, NY: Oxford University Press, at 1.

⁵ Vauchez, Antoine. 2015. *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*. New York, NY: Cambridge University Press, at 1.

⁶ I borrow this term from: Dezelay, Yves, and Bryant Garth. 1995. “Merchants of Law as Moral Entrepreneurs.” *Law & Society Review* 29(1): 27–64, at 54; Vauchez, Antoine. 2009. “The Force of a Weak Field: Law and Lawyers in the Government of Europe.” *International Political Sociology* 2(2): 128–144, at 132. I explain and distinguish how I use the term “Euro-lawyer” later in this chapter.

repertoire of strategic litigation. They sought clients willing to break national laws conflicting with European law, lobbied judges about the duty and benefits of upholding EU rules, and propelled them to submit cases to the ECJ by ghostwriting their referrals.

Beneath the radar, Europe has to a large extent been built by lawyers who converted state judiciaries into transmission belts linking civil society with supranational institutions. Yet Euro-lawyering was neither limitless in its influence nor static in its form. Over time, burgeoning networks of corporate law firms displaced the more idealistic pioneers of Euro-lawyering, and the politicization of European integration exposed the limits of strategic litigation in the absence of vigorous public advocacy. These evolutions stratified access to transnational justice, catalyzed new risks and opportunities for court-driven change, and continue to refract the EU's capacity to govern through law.

By shadowing lawyers who encourage deliberate law-breaking and mobilize courts against their own governments, this book reworks conventional understandings of judicial policymaking, advances a novel narrative of the judicial construction of Europe, and illuminates how the politics of lawyers can have a profound impact on institutional change and transnational governance.

1.1 A THEORY OF LAWYERS, COURTS, AND POLITICAL DEVELOPMENT

This book “starts with individuals to better understand institutions – to show how institutions impose themselves on actors while institutions themselves are also the product of the actors’ continuing struggles.”⁷ Specifically, it uses the European experience as a springboard to tackle three broad questions:

- First, how do political orders forged through multilevel networks of courts emerge and evolve?
- Second, why would judges resist these institutional changes if they would augment their own power?
- Finally, under what conditions can lawyers mobilize as agents of change and overcome resistances to judicialization?

⁷ Dezalay, Yves, and Bryant Garth. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago, IL: University of Chicago Press, at 16–17.

Answering these queries begets a number of important payoffs. First, it pushes us to critically assess a “long presump[ption]” that courts in Europe are the primary architects of their own empowerment and are uniquely supportive of transnational governance.⁸ If European integration has been spearheaded by a spontaneous, self-reinforcing, and jointly empowering partnership between national judges and their counterparts at the ECJ,⁹ then the European experience has little in common with other world regions where judiciaries are less independent and courts are reluctant to flex their policymaking muscles. But if European judges have actually borne similar apprehensions and wrestled with their own institutional constraints, then the judicial construction of Europe may be less exceptional and more comparable than we thought. Even in what appears to be a transnational cradle of judicial activism, judicialization may be less of an inevitable process driven by the ambitions of judges and more of a contingent process hinging on how “judicial institutions interact with the nonjudicial world.”¹⁰

Second, this revisionist lens invites us to unpack when lawyers can erode judicial obduracy and become motors of court-driven change. It focuses our gaze on the fact that judges and lawyers do not always work in tandem: though they jointly constitute the heart of a “legal complex” of professionals, surface-level alliances for judicial policymaking may conceal deeper struggles between bar and bench.¹¹ Identifying when and why lawyers are the first movers pushing for institutional change requires that we take their agency seriously instead of focusing predominantly on structural factors.¹² It also requires that we resist vaporizing lawyers into go-betweens¹³ or pawns maneuvered

⁸ Alter and Helfer, *Transplanting International Courts*, at 7–8, 16.

⁹ For a discussion of this view, see: Stone Sweet, *Judicial Construction of Europe*, 20–21; Kelemen, R. Daniel, and Alec Stone Sweet. 2017. “Assessing the Transformation of Europe.” In *The Transformation of Europe*, Marlene Wind and Miguel Poiars Maduro, eds. New York: Cambridge University Press, at 204.

¹⁰ Gonzáles-Ocantos, Ezequiel. 2016. *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America*. New York, NY: Cambridge University Press, at 289.

¹¹ See: Halliday, Terence, Lucien, Karpik and Malcolm Feeley. 2007. *Fighting for Political Freedom*. New York, NY: Bloomsbury, at 9–23.

¹² For more on this critique, see: Vanhala, Lisa. 2009. “Anti-discrimination Policy Actors and Their Use of Litigation Strategies.” *Journal of European Public Policy* 16(5): 738–754, at 740–741.

¹³ For instance, Fligstein and Stone Sweet describe legal mobilization in the EU as a sequence of “lawyers activated by their clients and judges activated by lawyers”:

by other actors – such as social movements, interest groups, and resourceful clients¹⁴ – presumed to be the true protagonists of political action. A few perceptive studies have begun trekking this path by demonstrating that the experience, reputation, and size of lawyers' teams condition judicial decisions.¹⁵ But political scientists still need to move beyond probing *attributes* of lawyer capability to portray how their *agency* can shape processes of political development transcending individual wins or losses in court. This is surprising, given that one of the central concerns of political science – the development of the modern state – is intimately tied to the rise of the legal profession.¹⁶ As states bestowed status to lawyers by granting them monopoly rights to legal representation, lawyers labored to legitimate rule-based social order and supplied expertise to fledgling bureaucracies.¹⁷ From

Fligstein, Neil, and Alec Stone Sweet. 2002. "Constructing Politics and Markets." *American Journal of Sociology* 107(5): 1206–1243, at 1222; See also: Shapiro, Martin. 1993. "The Globalization of Law: An Institutional Account of European Integration." *Indiana Journal of Global Legal Studies* 1(1): 37–64, at 41–42.

¹⁴ See: Hilson, Chris. 2002. "New Social Movements: The Role of Legal Opportunity." *Journal of European Public Policy* 9(2): 238–255; Smith, Miriam. 2005. "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada." *Politics & Society* 33(2): 327–353; Szmer, John, Donald Songer, and Jennifer Bowie. 2016. "Party Capability and the US Courts of Appeals: Understanding Why the Haves Win." *Journal of Law and Courts* 4(1): 65–102.

¹⁵ See: McGuire, Kevin. 1995. "Repeat Players in the Supreme Court." *Journal of Politics* 57(1): 187–196; Kritzer, Herbert. 1998. *Legal Advocacy: Lawyers and Nonlawyers at Work*. Ann Arbor, MI: University of Michigan Press; Haire, Susan, Roger Brodie, and Stefanie Lindquist. 1999. "Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the US Courts of Appeals." *Law & Society Review* 33(3): 667–686; Szmer, John, Susan Johnson, and Tammy Sarver. 2007. "Does the Lawyer Matter? Influencing outcomes on the Supreme Court of Canada." *Law & Society Review* 41(2): 279–304.

¹⁶ Halliday, Terence, and Lucien Karpik. 1997. *Lawyers and the Rise of Western Political Liberalism*. New York, NY: Oxford University Press; Dezelay, Yves, and Mikael Rask Madsen. 2012. "The Force of Law and Lawyers." *Annual Review of Law & Social Science* 8: 433–452, at 439–440.

¹⁷ Abel, Richard. 1988. "Lawyers in the Civil Law World." In *Lawyers in Society, Volume II: The Civil Law World*, Richard Abel and Philip Lewis, eds. Berkeley and Los Angeles, CA: University of California Press; Bourdieu, Pierre. 1986. "The Force of Law." *Hastings Law Journal* 38: 805–853, at 820, 846.

Hungary to Italy to the United States,¹⁸ lawyers made states and states made lawyers.

To be sure, tracing the constitutive relationship between lawyering and political development can prove remarkably elusive. Lawyers rarely spearhead protests, mount coups, levy taxes, or pass controversial legislation that make the headlines, least of all in their own name. As Alexis de Tocqueville wrote in *Democracy in America*:

[L]awyers ... form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time ... it acts upon the country imperceptibly, but it finally fashions it to suit its purposes.¹⁹

The challenge of intercepting the imperceptible ways that lawyers fashion politics renders polities that govern through courts ideal laboratories for social inquiry. With less of a role for soldiers and bureaucrats, these “law-states”²⁰ allow us to place the politics of lawyers in starker relief. While there are many examples of such polities – from the nineteenth-century American “state of courts and parties”²¹ to present-day “transnational legal orders” like the Andean and Caribbean Communities²² – none is as exemplary and successful as the EU. Having grown into the world’s only quasi-federal, supra-national polity, EU officials have nonetheless lacked the resources to

¹⁸ Malatesta, Maria. 1995. “The Italian Professions from a Comparative Perspective.” In *Society and the Professions in Italy, 1860–1914*, Maria Malatesta, ed. New York, NY: Cambridge University Press, at 23; Olgiati, Vittorio, and Valerio Pocar. 1988. “The Italian Legal Profession: An Institutional Dilemma.” In *Lawyers in Society, Volume II*, Richard Abel and Philip Lewis, eds. Berkeley and Los Angeles, CA: University of California Press, at 342–343.

¹⁹ Tocqueville, Alexis de. 2003 [1862]. *Democracy in America, Vols. I & II*. New York, NY: Barnes & Noble Books, at 254–255.

²⁰ Strayer, Joseph. 1970. *On the Medieval Origins of the Modern State*. Princeton, NJ: Princeton University Press, at 61. See also: Kelemen, R. Daniel, and Tommaso Pavone. 2018. “The Political Geography of Legal Integration: Visualizing Institutional Change in the European Union.” *World Politics* 70(3): 358–397, at 358–360.

²¹ Skowronek, Stephen. 1992. *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*. New York, NY: Cambridge University Press, at 29.

²² Halliday, Terence, and Gregory Shaffer. 2015. *Transnational Legal Orders*. New York, NY: Cambridge University Press; Caserta, Salvatore. 2020. *International Courts in Latin America and the Caribbean: Foundations and Authority*. New York, NY: Oxford University Press; Alter and Helfer, *Transplanting International Courts*.

command compliance²³ and emulate the pathways of traditional state-building.²⁴ Yet their postwar commitment to building a transnational “community based on the rule of law”²⁵ opened a political opportunity to invoke the force of law to mobilize judges, reshape state institutions, and compensate for the EU’s weak military and administrative capacity.

But why, precisely, was it lawyers that grabbed the baton of change, and what was the extent of their influence? This is the political story that remains untold. In the United States, studies of cause lawyering, elite law firms, and lawyer-politicians²⁶ have peeled back how “lawyers make the politics and produce the law.”²⁷ Yet these accounts often presume that lawyers’ political influence may not travel beyond the uniquely litigious American system of “adversarial legalism.”²⁸ In response, other scholars have started uncovering how lawyers in authoritarian and transitional regimes are often at the

²³ The EU’s budget relies upon customs duties and semi-voluntary state contributions, and amounts to just 1 percent of Europe’s GDP – only 6 percent of which is allocated to administration. The executive body of the EU – the European Commission – is staffed by just 33,000 employees, comparable to the civil service of a medium-sized European city. See: European Commission. 2015a. “Myths and Facts.” Available at: http://ec.europa.eu/budget/explained/myths/myths_en.cfm; European Commission. 2015b. “Frequently Asked Questions.” Available at: http://ec.europa.eu/budget/explained/faq/faq_en.cfm; European Commission. 2015c. “Who We Are.” Available at: http://ec.europa.eu/civil_service/about/who/index_en.htm.

²⁴ Kelemen, R. Daniel, and Kathleen McNamara. 2021. “State-building and the European Union: Markets, War, and Europe’s Uneven Political Development.” *Comparative Political Studies* (ahead of print): 1–29.

²⁵ Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1339, at par. 23; For historical overviews, see: Scheingold, Stuart. 1965. *The Rule of Law in European Integration*. New Haven, CT: Yale University Press.

²⁶ For instance, see: Sarat, Austin, and Stuart Scheingold, eds. 2006. *Cause Lawyers and Social Movements*. Stanford, CA: Stanford University Press; Halliday, Terence. 1987. *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*. Chicago, IL: University of Chicago Press; Hain, Paul, and James Piereson. 1975. “Lawyers and Politics Revisited.” *American Journal of Political Science* 19(1): 41–51.

²⁷ Dezalay, Yves, and Bryant Garth. 1997. “Law, Lawyers, and Social Capital.” *Social & Legal Studies* 6(1): 109–141, at 132.

²⁸ See: Kagan, Robert. 2003. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press; Kagan, Robert. 1997. “Should Europe Worry About Adversarial Legalism?” *Oxford Journal of Legal Studies* 17: 165–184. For a nuanced retort, see: Kelemen, R. Daniel. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Cambridge, MA: Harvard University Press.

forefront of civil rights battles in the name of political liberalism.²⁹ Yet in the liberal civil law states of post—WWII Europe, the absence of such dramatic political struggles and the specter of “legal science” continues to obscure lawyers’ influence “behind a cult of traditions or legal technique.”³⁰ Even the few instances where lawyer activism is acknowledged³¹ usually end up being treated as curiosities or exceptions that prove the rule. And the presumed rule is that the judicial construction of Europe has always been “essentially, if not exclusively, a judicial task” wherein courts actively “retain control over such matters.”³² Or, as the French government tersely put it in 1958: “The [European] common market can have nothing to do with lawyers.”³³

Yet there is more to this story than meets the eye. Europe’s political development through law is an exemplary story of how lawyers mobilize courts to catalyze institutional change, alongside the limits, mutations, and consequences accompanying these efforts. To make this case, this book combines a geocoded dataset of thousands of lawsuits, hundreds of interviews across three of the EU’s founding states, and historical evidence from newspaper and court archives. In so doing, I build a historical institutionalist theory explicating when lawyers – and not other potential change agents – are best placed to advance political development through law, alongside the obstacles they encounter and

²⁹ Halliday, Karpik and Feeley, *Fighting for Political Freedom*; Liu, Sida, and Terence Halliday. 2016. *Criminal Defense in China: The Politics of Lawyers at Work*. New York, NY: Cambridge University Press; González-Ocantos, *Shifting Legal Visions*; Massoud, Mark. 2021. *Shari’a, Inshallah: Finding God in Somali Legal Politics*. New York, NY: Cambridge University Press.

³⁰ Dezelay and Garth, “Law, Lawyers, and Social Capital,” 132; See also: Merryman, John Henry, and Rogelio Perez-Perdomo. 2007. *The Civil Law Tradition*, 3rd ed. Stanford, CA: Stanford University Press, at 61–67.

³¹ One well-known example is of Belgian lawyer Éliane Vogel-Polsky’s campaign for gender equality in the ECJ’s *Defrenne* cases. See: Cichowski, Rachel. 2004. “Women’s Rights, the European Court, and Supranational Constitutionalism.” *Law & Society Review* 38(3): 489–512.

³² Schermers, Henry. 1987. “Introduction.” In *Article 177 EEC*, Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 12; Koopmans, Thijmen. 1987. “The Technique of the Preliminary Question – A View from the Court of Justice.” In *Article 177 EEC: Experiences and Problems*. Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 328.

³³ Quote from a reply to the national bar association president, found in: Laguette, Serge-Pierre. 1987. *Lawyers in the European Community*. Luxembourg: Office for Official Publications of the European Communities, at 269.

the conditions under which their efforts take (and do not take) root. The result recasts judge-centric narratives of European integration and reveals how legal mobilization in Europe takes on a different hue from the better-known American context.

1.1.1 Euro-lawyers and a Repertoire for Court-Driven Change

Why have lawyers, rather than judges, tended to be the drivers of the EU's political development through law? What advantages did lawyers have as agents of institutional change? In this prototypical struggle between innovation and inertia, the key is to consider the extent to which prospective change agents are anchored in place by preexisting institutions.

After all, processes of political development do not occur atop a *tabula rasa*: they are reconstructions of previous relations of authority.³⁴ By the time the European Community was born in 1957, national states initially broken by war boasted reformed judiciaries and increasingly entrenched constitutions. Unwilling to displace these structures and give up the sovereignty necessary to create a European superstate, postwar statesman opted for a more incremental process of integration instead.³⁵ For example, rather than creating a US-style federal system of European courts, the Treaty founding the European Community provided for a single supreme court: the ECJ in Luxembourg. It then granted national courts the ability to apply European rules in the disputes before them, and to refer interpretive questions or noncompliance cases to the ECJ.³⁶ As European law was “layered”³⁷ atop national law, areas of ambiguity and conflict were bound to emerge. And national courts, through their prospective dialogue with the ECJ, became the stage upon which these incongruences would be resisted to maintain the status-quo or exploited to promote European integration.

³⁴ Orren, Karen, and Stephen Skowronek. 2004. *The Search for American Political Development*. New York, NY: Cambridge University Press, at 21.

³⁵ Boerger-de Smedt, Anne. 2012. “Negotiating the Foundations of European Law, 1950–57.” *Contemporary European History* 21(3): 339–356, at 347–348.

³⁶ This mechanism, the “preliminary reference procedure,” is described in detail in Chapter 2.

³⁷ See: Streeck, Wolfgang, and Kathleen Thelen. 2005. *Beyond Continuity*. New York: Oxford University Press, at 22–30; Mahoney, James, and Kathleen Thelen. 2010. “A Theory of Gradual Institutional Change.” In *Explaining Institutional Change: Ambiguity, Agency, and Power*, James Mahoney and Kathleen Thelen, eds. New York, NY: Cambridge University Press, at 16–22.

Upon this stage, the prospect of institutional change is likely to be perceived first by those actors least constrained by preexisting relations of authority. When institutions evolve incrementally, those most embedded in existing institutions will seldom incur the short-term costs of long-run change:³⁸ everyday habits and forms of consciousness tied to the application of entrenched rules can powerfully obscure the benefits of novelty.³⁹ In contrast, mediatory actors facing fewer constraints who stand to ideologically or materially benefit from a new institutional environment are more likely to mobilize as innovators. Historically, then, judges anchored in civil service judiciaries have tended toward stasis, whereas lawyers shuttling between states, societies, and nascent international institutions have tended toward change.

This claim flips the conventional wisdom that national judges bore sufficient discretion and institutional incentives to spur their participation in the construction of Europe. In this view, judges in lower national courts in particular became “wide and enthusiastic” “motors”⁴⁰ of European integration by referring cases of state noncompliance with EU law to the ECJ.⁴¹ Through this “quiet revolution,”⁴² judges empowered themselves to disapply national legislation and rebel against disliked decisions of their own supreme courts.⁴³ They acquired expansive judicial review powers unavailable under domestic law and

³⁸ Bednar, Jenna, and Scott E. Page. 2018. “When Order Affects Performance: Culture, Behavioral Spillovers, and Institutional Path Dependence.” *The American Political Science Review* 112(1): 82–98, at 94.

³⁹ González-Ocantos, *Shifting Legal Visions*, at 32–36.

⁴⁰ See, respectively: Weiler, Joseph. 1991. “The Transformation of Europe.” *The Yale Law Journal* 100: 2403–2483, at 2426; Alter, Karen. 1996. “The European Court’s Political Power.” *West European Politics* 19(3): 458–487, at 467.

⁴¹ This book spans the periods before and after the Treaty of Maastricht subsumed the European Economic Community (EEC) into one of the three pillars of the EU in 1993 and the EU acquired a single legal personality in 2009 via the Treaty of Lisbon. For ease of reading, I use European, Community, and EU law interchangeably, though I try to avoid using “EU” anachronistically.

⁴² Weiler, Joseph H. H. 1994. “A Quiet Revolution: The European Court of Justice and Its Interlocutors.” *Comparative Political Studies* 26(4): 510–534.

⁴³ Other works in this tradition include: Burley, Anne-Marie, and Walter Mattli. 1993. “Europe Before the Court.” *International Organization* 47(1): 41–76; Alter, Karen. 2001. *Establishing the Supremacy of European Law*. New York, NY: Oxford University Press. For a critical review, see: Pavone, Tommaso. 2018. “Revisiting Judicial Empowerment in the European Union.” *Journal of Law & Courts* 6(2): 303–331.

supplied the ECJ with a stream of cases to “federaliz[e] the polity in all but name” via path-breaking judgments,⁴⁴ thereby opening the floodgates to subsequent litigation.⁴⁵

By positing that European integration is driven by judicial activism, this “judicial empowerment thesis” became the dominant explanation of Europe’s political development through law.⁴⁶ While perceptive in many ways, this narrative under-theorizes or dismisses the role of litigants and lawyers⁴⁷ while ignoring the enduring constraints on judges in civil service judiciaries. Lower court judges in continental Europe resemble “street-level bureaucrats”⁴⁸ more than they do the “culture heroes” animating the history of the common law.⁴⁹ Historically undertrained in European law, swamped by piles of case files involving routine national rules, and subject to careerist pressures within their judicial hierarchies that dissuade Europeanizing rebellions, these judges have had plenty of pressing institutional incentives to *resist their own empowerment*. In turn, these incentives cultivated a set of entrenched habits and what I will call an “institutional consciousness” favoring inertia: for judges to break free of it, they would have to be pushed by outside actors intent on minimizing the costs and highlighting the benefits of judicial policymaking.

It was in this light that in the 1960s and 1970s, a small group of Euro-lawyers mobilized to advance the judicial construction of Europe. By “Euro-lawyers,” I do not mean jurists within the Brussels bubble or global fields such as international commercial arbitration. While the latter have animated several important studies,⁵⁰ the protagonists of this book are a vanguard of lesser-known attorneys who kept their feet

⁴⁴ Stone Sweet, *Judicial Construction of Europe*, at 1.

⁴⁵ Cichowski, Rachel. 2007. *The European Court and Civil Society: Litigation, Mobilization, and Governance*. New York, NY: Cambridge University Press.

⁴⁶ Kelemen and Stone Sweet, “Assessing the Transformation of Europe,” at 193.

⁴⁷ For instance, Weiler claims that “litigants are usually not politically motivated” and act “willy-nilly”; Weiler, “Transformation of Europe,” at 2421; Mattli and Slaughter suggest that lawyers and litigants act as a “constraint” on judicial policymaking: Mattli, Walter, and Anne-Marie Slaughter. 1998. “The Role of National Courts in the Process of European Integration.” In *The European Court and National Courts*, Alec Stone Sweet, Anne-Marie Slaughter, and Joseph Weiler, eds. New York, NY: Hart, at 264.

⁴⁸ Lipsky, Michael. 2010. *Street-Level Bureaucracy*, 30th ed. New York, NY: Russell Sage.

⁴⁹ Merryman and Perez-Perdomo, *The Civil Law Tradition*, at 34–37.

⁵⁰ See: Dezelay and Garth, “Merchants of Law as Moral Entrepreneurs”; Vauchez, *Brokering Europe*; Avril, Lola. 2019. “Le Costume Sous la Robe: Les avocats en

in their home states and sought to change the behavior of local courts. They did not so much labor to construct a supranational legal order to which they could escape as they sought to bring home Europe's "juris touch."⁵¹

To be sure, some of these entrepreneurs did have stints working at fledgling European institutions, and all were WWII survivors eager to found and participate in lawyers' associations across national borders. While their aspiration to function as a "private army of the [European] Communities"⁵² may be overstated, their room for political maneuvering was significant. Unlike domestic judges or EU bureaucrats, lawyers could shuttle between their local community, state judiciaries, and European institutions, mobilizing courts and clients along the way. Yet they were not completely free-floating actors, and this is key. Their embeddedness in society endowed them with the local knowledge to cultivate potential litigants and salient controversies for legal mobilization. Their transnational expertise and institutional access enabled them to translate these controversies into courtroom disputes revealing noncompliance with EU rules or enticing opportunities for Europeanization via judicial policymaking. By working this Janus-faced embeddedness,⁵³ lawyers moved beyond a passive role as go-betweens without disturbing the appearance that other actors – namely litigants and judges – were doing all the work (see Figure 1.1). Instead of agency flowing through them it radiated out of them:⁵⁴ they became *ghostwriters* of change, catalyzing a rights-consciousness in litigants and an activism in judges appearing to be innate.

The evidence suggests that these political entrepreneurs were neither principally driven by "ruthless egoism" nor because "this course appear[ed] profitable," as many existing accounts imply.⁵⁵ Few could imagine the importance that the fledgling European Community would

professionnels multicartes de l'État régulateur européen." PhD dissertation, Université Paris 1 Panthéon-Sorbonne.

⁵¹ Kelemen, *Eurolegalism*, at 19.

⁵² Vauchez, *Brokering Europe*, at 88.

⁵³ On conceptualizing this type of "boundary work," see: Liu, Sida. 2013. "The Legal Profession as a Social Process." *Law & Social Inquiry* 38(3): 670–693, at 673.

⁵⁴ In my reading, scholars have recognized the "radiating effects of courts," but have paid less attention to the radiating effects of lawyers. See: Galanter, Marc. 1983. "The Radiating Effects of Courts." In *Empirical Theories about Courts*, Keith Boyum and Lynn Mather, eds. New York, NY: Longmans.

⁵⁵ This assumption underlies accounts inspired by "neofunctionalist" theory. See: Haas, Ernst. 1958. *The Uniting of Europe: Political, Social, and Economic Forces*,

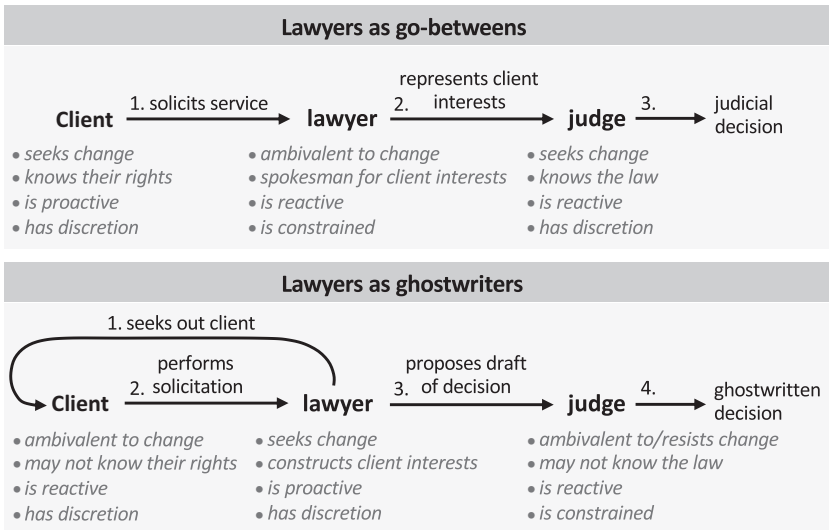


Figure 1.1 The radiating effect of lawyers: from go-betweens to ghostwriters

eventually muster, and it was hardly evident in the 1960s and 1970s that there was money to be made in the construction of what the ECJ hoped would become a “new legal order of international law.”⁵⁶ More decisive in light of their WWII experience was their idealism (favoring a liberal Europe governed by the rule of law) and their pleasure of exercising their agency (to challenge and reshape state policies); self-interest (to gain a competitive advantage in the legal services market) played a secondary role. Despite being a relatively uncoordinated group, these pioneers encountered shared institutional obstacles and consequently converged upon a common, transposable *repertoire for change* via the construction of test cases. They sought clients willing to break national laws conflicting with EU law, occasionally turning to friends or family if a “real” client was unavailable. In so doing, they began to cultivate a European “legal consciousness” within civil society.⁵⁷ Once in court, they pivoted from nurturing local

1950–1957. Stanford, CA: Stanford University Press, at xxxiv; Burley and Mattli, “Europe before the Court,” at 54; Stone Sweet, *Judicial Construction of Europe*, at 41.

⁵⁶ Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I, at 12.

⁵⁷ Sarat, Austin, and William Felstiner. 1989. “Lawyers and Legal Consciousness.” *Yale Law Journal* 98(8) (1989): 1663–1688.

knowledge to mobilizing labor and expertise.⁵⁸ They educated judges about the duty and benefits of upholding EU rules – even in the face of contradictory legislation or supreme court decisions – by drafting detailed memos serving as crash courses in European law. And they ghostwrote the referrals to the ECJ that judges were unable or reluctant to write themselves, supplying the European Court with opportunities to deliver pathbreaking judgments.

Lawyers thus worked to emancipate judges from the institutional constraints obstructing Europeanization and to integrate them within a fledgling transnational network of European courts. At the same time, their efforts were most effective when they least upset existing bureaucratic relations of authority: that is, in decentralized judiciaries where lower courts were already habituated to occasionally engage in bottom-up policymaking. Europe's judicial construction does not so much invert or revolutionize domestic judicial politics, as is often claimed.⁵⁹ Rather, it tends to channel and build upon these politics.

Finally, this account suggests that it was not only – or primarily – the supranational entrepreneurship of the European Court that “convinced lower national courts to leapfrog the national judicial hierarchy and work directly with the ECJ.”⁶⁰ The more proximate and decisive pushes came from the bottom-up. By the close of the 1970s, nearly half of all national court referrals to the ECJ from the three largest founding member states of the EU (Italy, France, and Germany) could be retraced to just a handful of enterprising lawyers, who traveled from city to city and courtroom to courtroom soliciting the judicial construction of Europe.

1.1.2 The Evolution of Euro-Lawyering and Judicial Policymaking

Legal mobilization and judicial policymaking did not stop with the first Euro-lawyers. Since the 1980s, this process has evolved and become unevenly institutionalized across space and time. While ghostwriting permitted the first Euro-lawyers to cultivate the sense that a “rights revolution” was blossoming,⁶¹ it also produced a repertoire for court-

⁵⁸ By expertise, I mean both “substantive expertise” concerning European laws and principles and “process expertise” concerning how to solicit the ECJ. On this distinction, see: Kritzer, *Legal Advocacy*, at 203.

⁵⁹ Weiler, “Quiet Revolution”; Alter, *Establishing the Supremacy of European Law*, at 20.

⁶⁰ Burley and Mattli, “Europe before the Court,” at 62, 58, fn.78.

⁶¹ Kelemen, R. Daniel. 2003. “The EU Rights Revolution: Adversarial Legalism and European Integration.” In *The State of the European Union 6: Law, Politics, and*

driven change that rising networks of corporate law firms could co-opt and whose limits crystallized with heightened contestation of judicial policymaking. As Euro-lawyering began clustering within corporate law firms, it both regularized and stratified access to the EU's multilevel judicial system. And as compliance with disruptive judicial interventions could no longer be presumed in an increasingly politicized climate, it illuminated the neglected importance of pairing strategic litigation with vigorous public advocacy.

The evolution of Euro-lawyering thus represents a broader passage from idealism to interest and from concealment to contestation. In the first instance, studies of institutional change often begin with individuals with strong normative commitments and participatory drives.⁶² That the first European lawsuits were of limited worth hardly dissuaded the first Euro-lawyers. But as the judicial construction of Europe progressed, it could no longer rest on the shoulders of a few idealistic World War II survivors: mobilizing European law had to become perceived as advantageous to later generations of practitioners. This is why Euro-lawyering took root in cities such as Milan, Paris, and Hamburg with burgeoning business clusters ready to reward specialized legal services. Facing this clientele "situated" lawyers' legal consciousness,⁶³ as some practitioners began treating local practice and European law as an inseparable and professionally lucrative ecology. As lawyers agglomerated into larger "Euro-firms"⁶⁴ to navigate this ecology, interactions between businesses, Euro-lawyers, and specialized chambers of local courts regularized hand-in-hand with the judicialized enforcement of EU law. And as Euro-firms displaced the first Euro-lawyers, soliciting the ECJ to further business interests began trumping the ideal of building a political community based on the rule of law.

Yet Euro-lawyering did not corporatize and become entrenched everywhere. Across many subnational communities, the political economy of litigation was (and remains) hostile to Euro-lawyering and judicial policymaking. In cities such as Marseille, Naples, and Palermo, the

Society, Tanja Borzel and Rachel Cichowski, eds. New York, NY: Oxford University Press.

⁶² Parsons, Craig. 2003. *A Certain Idea of Europe*. Ithaca, NY: Cornell University Press; St. John, Taylor. 2019. *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences*. New York, NY: Oxford University Press.

⁶³ Nielsen, Laura Beth. 2000. "Situating Legal Consciousness." *Law & Society Review* 34(4): 1055–1090.

⁶⁴ Vauchez, Antoine, and Bruno de Witte, eds. 2013. *Lawyering Europe: European Law as a Transnational Social Field*. New York, NY: Hart.

legal profession remains balkanized into generalist solo-practitioners. While a few stubborn lawyers may try to mobilize European law, these efforts are crowded out by streams of more localized and mundane lawsuits. In turn, tending to the variegated demands of a poorer clientele cultivates a place-based identity⁶⁵ that dismisses specializing in EU law as a one-way ticket to unemployment instead of a tool to attract clients. Mobilizing European law and the ECJ becomes perceived as something one does in “global cities,”⁶⁶ but not in communities at the margins of globalization. And with no lawyers invoking EU law and soliciting referrals to the ECJ, local judges have little incentive to shed entrenched habits and do so themselves.

This argument builds on studies emphasizing that litigation depends on resource mobilization, thus stratifying which social actors take advantage of judicial policymaking.⁶⁷ It also integrates a more recent strand of sociological institutionalist scholarship highlighting identity and legal consciousness as drivers of legal mobilization.⁶⁸ Yet *The Ghostwriters* adds four distinct contributions.

First, I leverage a bottom-up perspective to illuminate why legal mobilization and judicial policymaking are not destined to generate an expansive litigation cycle. Functionalist scholars argue that as national courts solicit rulings from the ECJ, these rulings set off a “feedback loop” where new areas of noncompliance are exposed, new rights claims are generated, and new litigation opportunities are mobilized.⁶⁹ Yet these opportunities do not cascade upon all people and places equally. I will show that a cycle of litigation and judicial policymaking can take hold in fertile terrains where Euro-lawyers and Euro-firms cluster, but it emphatically does not characterize lived experience in communities where the ECJ’s on-the-ground authority

⁶⁵ Altman, Irwin, and Setha Low, eds. 1992. *Place Attachment*. Boston, MA: Springer.

⁶⁶ Sassen, Saskia. 2004. “The Global City: Introducing a Concept.” *Brown Journal of World Affairs* 11(2): 27–44.

⁶⁷ Galanter, Marc. 1974. “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change.” *Law & Society Review* 9(1): 95–160.

⁶⁸ Vanhala, Lisa. 2011. *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization*. New York, NY: Cambridge University Press; Arrington, Celeste. 2016. *Accidental Activists: Victim Movements and Government Accountability in Japan and South Korea*. Ithaca, NY: Cornell University Press.

⁶⁹ Stone Sweet, Alec, and Thomas Brunell. 1998. “The European Court and National Courts.” *Journal of European Public Policy* 5(1): 66–97; Stone Sweet, *Judicial Construction of Europe*, at 41; Cichowski, *European Court and Civil Society*, at 16–22.

is hard to perceive and the political economy of litigation obstructs mobilizing EU law. Instead of a uniformly rising tide, Euro-lawyering in national courts generates a patch-worked quilt whose transformative opportunities are increasingly “contained”⁷⁰ within resourceful client markets.

Second, although the demands of resource mobilization condition where EU judicial enforcement becomes *entrenched*, they do not explain how this process *emerged* in the first place. These two dimensions are often collapsed in American studies of litigation where the “haves” consistently come out ahead.⁷¹ For instance, the US Supreme Court tends to only hear cases after a broad “litigation support structure” has financed lawsuits across multiple jurisdictions and spurred conflicts among lower federal courts.⁷² Yet because the ECJ proved more accessible,⁷³ the first Euro-lawyers could develop a repertoire for court-driven change before anything like a litigation support structure emerged. Indeed, the institutional environment in Europe retarded such resource mobilization: to resist US-style adversarial legalism, states such as Germany, Italy, and France forbade legal partnerships well into the 1970s,⁷⁴ businesses, NGOs, and interest groups were initially reluctant to invoke their EU rights in court, and even law schools resisted integrating European law in their curricula.⁷⁵

Third, existing studies tend to collapse lawyers into proxies of social movements or big business, while neglecting the spatial and professional logics of legal mobilization. On the one hand, some treat lawyers as part and parcel of the advocacy groups they represent.⁷⁶ On the other hand, some cast lawyers as a bundle of “resources (person power,

⁷⁰ Conant, Lisa. 2002. *Justice Contained: Law and Politics in the European Union*. Ithaca, NY: Cornell University Press.

⁷¹ Songer, Donald, Reginald Sheehan, and Susan Haire. 1999. “Do the Haves Come Out Ahead Over Time?” *Law & Society Review* 33(4): 811–832.

⁷² See: Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago, IL: University of Chicago Press; Perry, H. W. 1994. *Deciding to Decide*. Cambridge, MA: Harvard University Press.

⁷³ If stubborn lawyers could persuade *any* judge, even the humblest local court, to refer a case, the ECJ’s mandatory jurisdiction in reference cases would usually require it to answer.

⁷⁴ Partnerships of more than five lawyers were permitted in France after 1972; In Italy, partnerships were legalized in 1973; In Germany, as late as 1967 no law firm had more than nine employees. See: Abel, “Lawyers in the Civil Law World,” at 19–20.

⁷⁵ Kelemen, *Eurolegalism*; Vauchez, *Brokering Europe*, at 77.

⁷⁶ Cichowski, *European Court and Civil Society*.

expertise, money)” wielded by “the already powerful.”⁷⁷ In truth, Euro-lawyering is neither a social movement nor a mere corporate resource. Lawyers have their own interests and identities shaped by the contexts they inhabit, and these play a key role in how lawyers mobilize civil society and businesses dependent on their tactical repertoires. The evolution of Euro-lawyering thus follows its own situated logic: it hinges on how practitioners rework political economy and the demands of their clientele into a place-based consciousness that structures the costs and benefits of mobilizing EU law.

Finally, Euro-lawyering has not only undergone a “big, slow-moving ... and invisible”⁷⁸ process of uneven corporatization. Since the 1990s the judicial construction of Europe has also been politicized and subjected to occasionally vigorous contestation,⁷⁹ raising questions about the capacity of lawyers to act as brokers of compliance when controversy erupts. Scholars worry that as public scrutiny of European policymaking grows and backlash against disruptive ECJ rulings becomes more frequent, law may no longer serve as a “mask and shield” for political development,⁸⁰ foreshadowing a possible “dejudicialization of international politics.”⁸¹ While this narrative perceptively highlights that judicialization is not inherently self-reinforcing, it also

⁷⁷ Börzel, Tanja. 2006. “Participation through Law Enforcement.” *Comparative Political Studies* 39(1): 128–152, at 130.

⁷⁸ Pierson, Paul. 2003. “Big, Slow-Moving, and ... Invisible: Macrosocial Processes in the Study of Comparative Politics.” In *Comparative Historical Analysis in the Social Sciences*, James Mahoney and Dietrich Rueschemeyer, eds. New York, NY: Cambridge University Press.

⁷⁹ Hooghe, Liesbet, and Gary Marks. 2009. “A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus.” *British Journal of Political Science* 39(1): 1–23; Zürn, Michael. 2016. “Opening up Europe: Next Steps in Politicisation Research.” *West European Politics* 39(1): 164–182.

⁸⁰ Blauburger, Michael, and Dorte Martinsen. 2020. “The Court of Justice in times of politicisation: ‘Law as a Mask and Shield’ Revisited.” *Journal of European Public Policy* 27(3): 382–399.

⁸¹ Madsen, Mikael Rask, Pola Cebulak, and Micha Weibusch. 2018. “Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts.” *International Journal of Law in Context* 14: 197–220; Voeten, Erik. 2020. “Populism and Backlashes against International Courts.” *Perspectives on Politics* 18(2): 407–422; Abebe, Daniel, and Tom Ginsburg. 2019. “The Dejudicialization of International Politics?” *International Studies Quarterly* 63(3): 521–530; Turnbull-Dugarte, Stuart, and Daniel Devine. 2021. “Can EU Judicial Intervention Increase Polity Scepticism?” *Journal of European Public Policy* (online first): 1–26; Conant, Lisa. 2021. “Failing Backward? EU Citizenship, the Court of Justice, and Brexit.” *Journal of European Public Policy* 28(10): 1592–1610.

risks trading one teleology for another. Politicization and backlash campaigns are not destined to yield regressive outcomes,⁸² and under certain conditions they can actually broaden opportunities for court-driven change.

This counterintuitive outcome hinges on lawyers “creating their own legal opportunities” by supplementing behind-the-scenes ghost-writing with proactive public advocacy.⁸³ As choreographers of strategic litigation, Euro-lawyers can time when the law is mobilized and the ECJ is solicited to take advantage of favorable shifts in the political climate and to blindsight potentially recalcitrant interest groups. Even when these efforts provoke protest and backlash, the resulting controversies also illuminate the relevance of EU law and generate public demand to “vernacularize” the prospect of socio-legal change.⁸⁴ Here, Euro-lawyers’ capacity to translate between European legal expertise and local knowledge positions them favorably to act as *interpretive mediators*⁸⁵ in the public sphere. By proactively engaging local stakeholders and the press, they can translate EU laws into popular discourse to promote change, preempt backlash, and awaken dormant “compliance constituencies.”⁸⁶ Conditional on tapping into some diffuse public support, contentious politics can magnify Euro-lawyers’ capacity to cultivate people’s legal consciousness and make EU law “real” on the ground.⁸⁷

In short, as politicization intermittently punctures a process of European “integration by stealth,”⁸⁸ a broader array of stakeholders can be made aware, often for the first time, that European law is relevant to daily life and can serve as a tool for change. Public controversies can be negotiated to amplify “the radiating effects of courts” and law.⁸⁹ It is in the absence of mediatory public advocacy that politicization

⁸² Alter, Karen, and Michael Zürn. 2020. “Theorising Backlash Politics.” *British Journal of Politics and International Relations* 22(4): 739–752, at 740.

⁸³ Vanhala, Lisa. 2012. “Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK.” *Law & Society Review* 46(3): 525.

⁸⁴ Merry, Sally Engle. 2009. *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago, IL: University of Chicago Press, at 193–194.

⁸⁵ Fischer, Frank. 2000. *Citizens, Experts, and the Environment*. Durham, NC: Duke University Press, at 80.

⁸⁶ Alter, *New Terrain of International Law*, at 19.

⁸⁷ Vanhala, *Making Rights a Reality?*

⁸⁸ Majone, Giandomenico. 2005. *Dilemmas of European Integration*. New York, NY: Oxford University Press.

⁸⁹ Galanter, “Radiating Effects of Courts.”

spikes the risk that EU law is scorned as “descend[ing] on the everyday as an all-powerful outsider,”⁹⁰ emboldening backlash and entrenching noncompliance. Lawyers can play a key role in tipping the scales, but only if they shed the ghostwriter’s cloak and plunge into the public sphere.

To put the puzzle pieces together, Figure 1.2 breaks down the outline of the foregoing argument into time periods, explanatory variables, mechanisms, outcomes, and scope conditions. I next turn to the research design and data that I use to evaluate this theory, concluding with a road map for the rest of this book.

1.2 TRACING THE POLITICS OF LAWYERS

1.2.1 Case Selection and Research Design

The contours of this book’s argument first emerged in the summer of 2015, when I was conducting a set of preliminary interviews with jurists in Italy. I was interested in what the judicial construction of Europe looked like from the ground-up, and the patchwork of local socio-legal communities in one of the EU’s largest founding member states seemed like a fertile place to start. While I brought little theoretical baggage with me, through “soaking and poking”⁹¹ I expected that my fieldwork would primarily focus on the behavior of entrepreneurial judges within national judiciaries and interest groups within civil society.

As conversations with Italian jurists proceeded, it became clear that lawyers had played a pivotal role and I lacked a ready-made theory to make sense of it. As I scouted the existing literature, it felt like much scholarly theorizing echoed Dick the Butcher in Shakespeare’s *Henry VI*: “The first thing we do, let’s kill all the lawyers.”⁹² I therefore developed a research design to enable me to trace how Euro-lawyering emerged, evolved, and impacted judicial policymaking. I chose to focus on Italy, France, and Germany for two reasons:

- *Empirical and historical importance*: As the three largest founding member states of the EU, Italy, France, and Germany provide six decades’ worth of historical record that can be probed and compared

⁹⁰ Sarat, Austin, and Thomas Kearns. 1995. *Law in Everyday Life*. Ann Arbor, MI: University of Michigan Press, at 5.

⁹¹ Fenno, Richard. 1978. *Home Style: Congressmen in Their Districts*. New York, NY: Little, Brown, and Company, at 250–252.

⁹² Boyarsky, Saul. 1991. “Let’s Kill All the Lawyers’.” *Journal of Legal Medicine* 12: 571–574.

Periodization	Explanatory variables		Mechanisms	Outcomes	Scope Conditions
Origins 1960s to early 1980s	Embeddedness in preexisting institutional environment	<i>Higher:</i> national judges	Labor and career costs of embracing new practices	Resistance to change	Less careerist judges in decentralized judiciaries more open to change
		<i>Lower:</i> national lawyers	Pleasure in agency and discretion to pursue new practices	Openness to change	Most lawyers continue with business as usual
Evolutions late 1980s to present	Resourcefulness of local market for legal services	<i>Higher:</i> corporate hubs and wealthier cities	Incentives to specialize in EU law and corporatize	Hot spot of litigation and judicialization	Politicization may deepen or erode hot spot
		<i>Lower:</i> rural regions and poorer cities	Disincentives to specialize in EU law and corporatize	Cold spot of litigation and judicialization	Politicization may deepen or erode cold spot

Figure 1.2 Theory road map: lawyers and the judicial construction of Europe

to trace the evolution of Euro-lawyering and its impact on judicial policymaking. Indeed, these states account for about a third of *all* national court referrals to the ECJ from the EU's twenty-seven member states. Furthermore, many of these references enabled the ECJ to deliver pathbreaking decisions advancing the EU's political development, such as those establishing the supremacy of European law, the doctrine of fundamental rights protections, the principle of mutual recognition, and the principle of state liability.⁹³ Hence in both quantitative and qualitative terms, Italy, France, and Germany account for an important share of lawsuits undergirding the judicial construction of Europe.

- *Theoretical relevance:* Italy, France, and Germany represent the very cases that inspired the prevailing understanding of the judicial construction of Europe as an outcome spurred by the empowerment of courts and the activism of judges. They thus serve as crucial “pathway cases”⁹⁴ to retrace the sources of courts’ behavior and probe the hitherto neglected role that lawyers may have played. Furthermore, these three countries’ judicial hierarchies vary in ways that enable testing this book’s argument that bureaucratic pressures constrain judges’ willingness to turn to EU law and embrace judicial policymaking. Embedded in a centralized state, the French courts – particularly the administrative courts – are more hierarchically organized than Italy’s, which in turn is a more hierarchical judiciary than Germany’s. We should thus expect French judges to have been more resistant to Euro-lawyers’ efforts than their German counterparts. Finally, these three countries boast diverse subnational political economies ranging from financial centers such as Paris to global port cities such as Hamburg to more economically marginalized cities such as Naples. This subnational tapestry allows us to unpack the variegated corporatization of Euro-lawyering and explain why Euro-lawyers clustered in some communities over others.

Of course, fieldwork is never undertaken in countries as a whole, but in specific field sites. In identifying these sites, I did not seek to

⁹³ Case 6/64, *Flaminio Costa v. ENEL* [1964], ECR 1141; Case 11/70, *Internationale Handelsgesellschaft* [1970], ECR 1126; Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (“Cassis de Dijon”) [1979], ECR 649; Joined cases C-6/90 and C-9/90, *Andrea Francovich and others v. Italian Republic* [1991], ECR I-5357.

⁹⁴ Gerring, John. 2007. “Is There a (Viable) Crucial-Case Method?” *Comparative Political Studies* 40(3): 231–253.

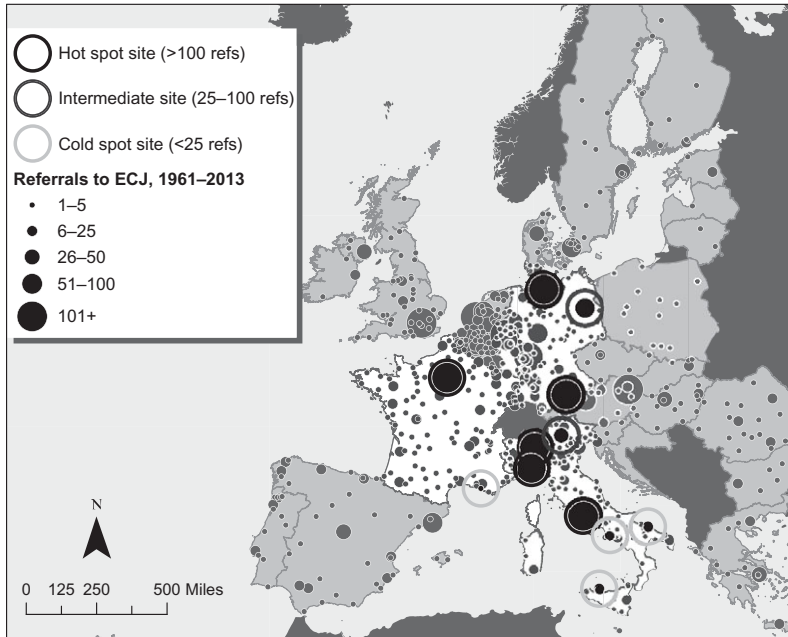


Figure 1.3 Referrals to the ECJ from national courts (1961–2013), with field sites
Note: Map excludes referrals from supreme courts with nation-wide jurisdiction, since including these referrals can generate an inflated picture of the extent to which local judges solicit the ECJ.

approximate a random or representative sample of subnational communities. Rather, I aimed to follow previous field researchers who purposively visited a variety of local contexts and interacted with diverse sets of people.⁹⁵ In particular, I selected sites that maximized my capacity to trace the impact of Euro-lawyering on judicial policymaking and to compare how Euro-lawyering evolves and becomes unevenly rooted. I started by geocoding a proxy measure for my outcome variable: the number of cases referred from national courts to the ECJ from 1961 to 2013. Figure 1.3 visualizes the distribution of these referrals, with Italy, France, and Germany in lighter shading. Drawing on these maps to finalize site selection, I balanced what I will call “hot spots” – cities where judges started dialoguing with the ECJ in the 1960s, and local (non-supreme) courts have since referred many (over 100) cases to the ECJ – with “cold spots” – cities where this judicial dialogue struggled

⁹⁵ Pachirat, Timothy. 2018. *Among Wolves: Ethnography and the Immersive Study of Power*. New York, NY: Routledge, at 85–88.

Case types	Cases	Nat'l judicial organization	Field sites	# Local court referrals to ECJ (1964–2013)	
Theory building → Theory testing	Italy: Jun–Aug '15; Sept '16–Apr '17	Hierarchical: <i>all jurisdictions</i>	Rome	Hot spot	246
			Genoa	Hot spot	101
			Milan	Hot spot	102
			Trento/Bolzano	Hot spot	46
			Naples	Intermediate	15
			Bari	Cold spot	12
			Palermo	Cold spot	19
Theory testing	France: Sept–Oct '17	Very hierarchical: <i>admin courts</i> hierarchical: <i>civil courts</i>	Paris	Hot spot	129
			Marseille	Cold spot	4
	Germany: Nov '17–Jan '18	Less hierarchical: <i>all jurisdictions</i>	Berlin	Hot spot	74
			Munich	Hot spot	127
			Hamburg	Hot spot	178




Key
 “Hot spot” field site (>100 refs) 
 Intermediate field site (25–100 refs) 
 “Cold spot” field site (<25 refs) 

Figure 1.4 Case selection design and primary field sites

Note: Preliminary reference statistics comprise local non-supreme courts in each site.

to take root and less than 25 references originated during the same time period.⁹⁶ A mapping of the twelve primary field sites within the overall case selection design is summarized in Figure 1.4. To be sure, I also took side trips when possible to meet with critical interviewees or acquire additional archival materials.

Ultimately, the most extensive fieldwork period (ten months) was undertaken in Italy, for two reasons. First, Italy has received less attention in studies of European integration than France and Germany, yet as we will see, litigation before Italian courts was central to the judicial construction of Europe. Second, I used a comparative-

⁹⁶ On the promise of studying European integration by looking outward from a variety of cities, see: Mamadouh, Virginie, and Anne van Wegeningen, eds. 2016. *Urban Europe: Fifty Tales of the City*. Amsterdam: Amsterdam University Press.

sequential approach, wherein Italy first served as a “theory-building” case study to generate inductive insights in a preliminary phase of fieldwork. As a native Italian and fluent speaker, Italy was the best context to gain initial access and start soaking and poking. Then in a second fieldwork phase, I returned to Italy and expanded research to France and Germany, which approximated “theory-testing” case studies to corroborate findings, explore generalizability, and identify scope conditions.⁹⁷ Since fieldwork in France and Germany was more targeted, it did not need to be as exhaustive or intensive.

1.2.2 Original Data

Novel arguments often require novel data. So from 2015 to 2019, I developed a tripartite empirical strategy to gather data impinging on this book’s argument (see Figure 1.5). In particular, I combine the satellite view of the transnational using geospatial data, the granular view of the subnational using fieldwork, and the temporal view of the past using oral histories and previously unavailable archival sources.

First, I built upon my efforts with R. Daniel Kelemen to construct the first geocoded dataset of national court referrals to the ECJ from the 1960s to the present.⁹⁸ Spatial analyses of these data not only helped me identify and select sites for fieldwork, but they also enabled me to visualize the evolving geography of national court referrals to the European Court. These empirics lie at the heart of my analysis of the origins and evolution Euro-lawyering. Throughout this book, geospatial data anchor, complement, and set the stage for qualitative evidence.

⁹⁷ On inductive or iterative research designs for comparative analysis, see: Pavone, Tommaso. 2022. “Selecting Cases for Comparative Sequential Analysis: Novel Uses for Old Methods.” In *The Case For Case Studies*, Michael Woolcock, Jennifer Widner, and Daniel Ortega-Nieto, eds. New York, NY: Cambridge University Press; Yom, Sean. 2015. “From Methodology to Practice: Inductive Iteration in Comparative Research.” *Comparative Political Studies* 48(5): 616–644.

⁹⁸ For the first publication using these data, see: Kelemen, R. Daniel, and Tommaso Pavone. 2016. “Mapping European Law.” *Journal of European Public Policy* 23(8): 1118–1138. For more recent analyses using geospatial data, see: Dyeve, Arthur, and Nicolas Lampach. 2020. “Subnational Disparities in EU Law Use Exploring the GEOCOURT Dataset.” *Journal of European Public Policy* 28(4): 615–631; Pavone, Tommaso. 2020. “Putting European Constitutionalism in Its Place: The Spatial Foundations of the Judicial Construction of Europe.” *European Constitutional Law Review* 16: 669–690.

Type of original data	Functions	Sources
Geocoded litigation data: preliminary references from national courts to ECJ	Identify field sites and visualize the evolving geography of Euro-lawyering and national courts' engagement with EU law	Online case law database of the European Court of Justice
Semi-structured interviews: with 353 lawyers, judges, and law professors	Provide oral histories and testimony of how lawyers mobilize EU law and catalyze judicial policymaking	Fifteen months of field research in Italy, France, and Germany, 2015–2018
Archival data: original dossiers of references to ECJ, newspaper records	Corroborate and complement oral histories, reveal textual evidence of lawyers' litigation and public advocacy strategies	Historical archives of the EU, lawyers' personal archives, newspaper archives
Participant observation: in national courts across 12 European cities	Contextualize interviews with judges concerning their habits and behavior under institutional constraints	Fifteen months of field research in Italy, France, and Germany, 2015–2018

Figure 1.5 Types, functions, and sources of original data gathered

Second, I conducted 353 semi-structured interviews with lawyers, judges, and law professors (the list of interviewees is included in the Appendix). More than any other data gathered, interviews barraged me with serendipitous insights that prompted revisions and refinements to this book's argument. First, I managed to interview nearly all of the first Euro-lawyers who are still alive, and these conversations provided key oral histories. Second, interviews opened unexpected opportunities to access documents from lawyers' personal archives. Third, interviewees helped me perceive the preliminary work and tacit practices left out of official litigation records. To construct as unbiased a narrative as I could, I repeatedly "triangulate"⁹⁹ between conversations with lawyers and judges. Only speaking to lawyers about their efforts would offer no way of evaluating the extent to which they might "exaggerate their roles."¹⁰⁰ In the spirit of the dictum to "trust but verify,"¹⁰¹ conversations with judges thus proved essential for validating lawyers' claims to agency and influence.

Third, whenever possible I conducted scattershot participant observation in national courts. I asked to meet judges in the places where

⁹⁹ Arksey, Hilary, and Peter Knight. 1999. *Interviewing for Social Scientists*. Thousand Oaks, CA: SAGE, at 21–32; Gallagher, Mary. 2013. "Capturing Meaning and Confronting Measurement." In *Interview Research in Political Science*, Layna Mosley, ed. Ithaca, NY: Cornell University Press.

¹⁰⁰ Berry, Jeffrey M. 2002. "Validity and Reliability Issues in Elite Interviewing." *PS: Political Science & Politics* 35(4): 679–682, at 680.

¹⁰¹ Moravcsik, Andrew. 2014. "Trust but Verify." *Security Studies* 23(4): 663–688.

they work and kept a fieldnotes journal¹⁰² of these visits that ultimately spun a couple hundred pages. I depended heavily on these observations and “notes to self” to reconstruct the daily pressures and practices embodied by judges. Visiting national courts alerted me in a way that no phone interview could to the ways that courthouses, as built and resource-scarce spaces, can ensconce habits and institutional identities resistant to change. I left convinced that the value of interview evidence is impoverished if it is not contextualized with an ethnographic sensibility.¹⁰³

Finally, I benefitted immensely from a stroke of luck: “In 2014, the [European] Court of Justice ... began shipping more than 270 boxes of official documents with restricted access to the public to Villa Salviati, home of the Historical Archives of the European Union at the European University Institute (EUI) in Florence.”¹⁰⁴ For a notoriously secretive institution that had been denying researchers access to any archival evidence for decades, the ECJ’s move was something of an unexpected coup. In the subsequent two years, I requested and obtained access to over 100 of the original dossiers for the first lawsuits punted to the European Court in the 1960s and 1970s, and I received permission to reproduce excerpts of these files in this book. These materials reveal traces and corroborations of the “hidden transcript”¹⁰⁵ of Euro-lawyering that was first relayed to me by interviewees. In particular, they provide granular historical evidence of lawyers ghostwriting national courts’ referrals to the ECJ, enabling an initial archival reconstruction of how lawyers educated, cajoled, and partially substituted themselves for national judges. To trace selected lawsuits in greater depth and compensate for the unavailability of

¹⁰² I relied heavily upon: Sanjek, Roger. 1990. *Fieldnotes*. Ithaca, NY: Cornell University Press.

¹⁰³ On the value of taking institutional and spatial context seriously in interview research, see: Smith, Dorothy. 2005. *Institutional Ethnography: A Sociology for People*. New York, NY: Rowman & Littlefield; Cramer Walsh, Katherine. 2012. “Putting Inequality in Its Place: Rural Consciousness and the Power of Perspective.” *American Political Science Review* 106(3): 517–532; Schatz, Edward. 2009. “Ethnographic Immersion and the Study of Politics.” In *Political Ethnography*, Edward Schatz, ed. Chicago, IL: University of Chicago Press, at 5.

¹⁰⁴ Nicola, Fernanda, and Bill Davies. 2017. *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. New York, NY: Cambridge University Press, at 1.

¹⁰⁵ Scott, James C. 1990. *Domination and the Arts of Resistance: Hidden Transcripts*. New Haven, CT: Yale University Press, at 4–5; 183–184.

dossiers, I supplement this evidence with newspaper records, secondary historical accounts, and the personal archives of lawyers.

1.3 THE ROAD AHEAD

What can readers expect from the rest of this book, and what are the primary empirical findings and theoretical takeaways of each chapter that follows?

The Ghostwriters is organized into three parts, each comprised of two to three chapters, followed by a conclusion that evaluates the overall findings. The logic of this road map is as follows. First, I explain why national judges embedded in civil service judiciaries have, on their own, historically been ill-suited as agents of institutional change, how the EU's political development builds upon domestic judicial politics, and how these findings reconfigure predominant understandings of judicial empowerment (Part II: Chapters 2–4). Second, I reconstruct the origins of Euro-lawyering and trace its impact on judicial behavior, unpacking the repertoire for court-driven change that lawyers developed and how it was gradually co-opted by clustered networks of corporate law firms (Part III: Chapters 5 and 6). Third, I explain how the growing politicization of European integration reshapes Euro-lawyering and opens new risks and opportunities for legal mobilization and judicial policymaking (Part IV: Chapters 7 and 8). Finally, I take stock of this book's findings in light of the mounting challenges plaguing democracy, the rule of law, and judicial policymaking in Europe (Chapter 9). A more detailed mapping of the proposed theory to this book's chapters is provided in Figure 1.6.

More precisely, Chapter 2 sets the descriptive, theoretical, and methodological stage for probing the behavior of national courts in the process of European integration. I describe the central mechanism through which national courts can partner with the ECJ to apply EU law and promote integration: the preliminary reference procedure. I summarize how courts' use of this procedure has been theorized by the prevailing account of Europe's judicial construction: the "judicial empowerment thesis." And I highlight suggestive qualitative and quantitative evidence that this thesis may conceal as much as it reveals. This chapter concludes by outlining the fieldwork strategy deployed to revisit the thesis and probe whether national judges have harbored more diffuse and persistent resistances to EU law, the ECJ, and judicial review than has been acknowledged. Readers familiar with the judicial

Periodization	Explanatory variables	Mechanisms	Outcomes	Scope conditions	
Origins 1960s–early 1980s	Embeddedness in preexisting institutional environment	<i>Higher:</i> national judges	Labor and career costs of embracing new practices	Resistance to change	Less careerist judges in decentralized judiciaries more open to change
		<i>Lower:</i> national lawyers	Pleasure in agency and discretion to pursue new practices	Openness to change	Most lawyers continue w/ business as usual
Evolutions late 1980s–present	Resourcefulness of local market for legal services	<i>Higher:</i> corporate hubs and wealthier cities	Incentives to specialize in EU law and corporatize	Hot spot of litigation and judicialization	Politicization may deepen/erode hot spot
		<i>Lower:</i> rural regions and poorer cities	Disincentives to specialize in EU law and corporatize	Cold spot of litigation and judicialization	Politicization may deepen/erode cold spot

Road map of the Book

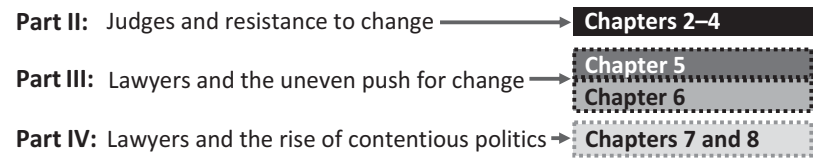


Figure 1.6 Theory: chapter road map

empowerment thesis or agnostic about methodological preliminaries can skip this chapter without losing the narrative thread.

Chapter 3 unpacks why judges broadly eschewed turning to EU law and the ECJ when doing so could bolster their own power. It reveals historically rooted practices and knowledge deficits embodied in the trudge of daily judicial work that entrenched what I call an “institutional consciousness” of path dependence: an accrued social identity tied to institutional place that magnifies the reputational risks and labor costs of mobilizing EU law. This consciousness reifies judges’ sense of distance to Europe, legitimating a renouncement of agency and a tacit resistance to change. The core of this chapter revolves around interviews and oral histories with 134 judges across French, Italian, and German courts, contextualized via ethnographic fieldnotes, descriptive statistics, and secondary sources. This chapter will speak to readers interested in a sociological understanding of what path dependence looks, sounds, and feels like in the courthouse, why judges in civil service judiciaries can be likened to street-level bureaucrats, and how immersive fieldwork can illuminate the habitual practices subtly calcifying the behaviors and identities of judges.

Chapter 4 broadens the scope of inquiry from daily judicial routine to the bureaucratic politics of hierarchy within civil service judiciaries. Contra the judicial empowerment thesis’ claim that applying EU law and soliciting the ECJ emancipated lower courts from supreme court control, it argues that the few low-level judges who wield EU law to empower themselves are most likely to be positioned within decentralized judiciaries wherein they already enjoy sufficient autonomy and discretion to occasionally promote bottom-up change. European legal integration thus builds upon these preexisting hierarchical politics within national judiciaries. To support these claims, I compare the willingness of lower courts to solicit the ECJ and rebel against their superiors in the French administrative judiciary – a rigid hierarchy under the Council of State – and the French civil judiciary – a less hierarchical order under the Court of Cassation. For external validity, I conclude with a shadow case study of the politics of rebellion in Germany’s more decentralized administrative judiciary. This chapter should appeal to readers interested in the mechanisms of bureaucratic domination within judiciaries, the institutional conditions that enable and quash judicial rebellions, and how hierarchical politics constrain judges’ capacity to serve as agents of change.

Chapter 5 pivots to this book’s heart: if the judicial construction of Europe was not catalyzed by innately activist judges, who were

the pioneers of change? Focusing on the 1960s, 1970s, and early 1980s, I introduce the first Euro-lawyers: a vanguard of independent-minded WWII survivors committed to liberal legality and to uniting Europe from the ground up. Less institutionally constrained than their judicial counterparts, they nonetheless had to erode ubiquitous knowledge deficits, entrenched habits, and reticences embodied by courts and clients. This chapter traces how they cultivated local litigants and salient controversies exposing national barriers to European integration; constructed test cases to introduce local judges to European rules they hardly knew; cajoled their interlocutors to solicit the ECJ by subsidizing their labor and ghostwriting their referrals; and in so doing generated opportunities for the ECJ to advance Europe's political development. I support these inferences by combining oral history interviews with the first surviving Euro-lawyers, original dossiers from the ECJ and lawyers' personal archives, secondary historiographies and newspaper records, and geocoded data of the first cases referred to the ECJ. This chapter speaks to readers seeking a new perspective on the origins of European integration, the creativity and mischievousness of strategic litigation, how lawyers choreograph the rights-consciousness of litigants and the activism of judges, and how individuals promote new rules and practices that cut against imagined possibilities.

Chapter 6 tackles the passing of the pioneers and the evolution of Euro-lawyering. The repertoire of strategic litigation and judicial ghostwriting developed by the first Euro-lawyers only took root in those communities where practitioners came to perceive it as professionally advantageous. Beginning at the close of the 1980s, Euro-lawyering has clustered within networks of corporate law firms for whom mobilizing EU law is a tool to tend to a resourceful clientele and charge hefty legal fees. Conversely, in more resource-scarce client markets practitioners continue to perceive mobilizing EU law as impractical at best. Since the only national courts routinely solicited to apply EU law and refer cases to the ECJ are in cities where big law firms cluster, the judicial construction of Europe has evolved as patch-worked ecology hollowed by black holes. I support this argument by complementing geospatial clustering analysis with comparative fieldwork across five cities where Euro-lawyering was corporatized – Rome, Milan, Paris, Hamburg, and Munich – and four cities where Euro-lawyering never took root – Palermo, Naples, Bari, and Marseille. Readers curious about how lawyers rework economic and spatial inequities into place-based identities, how these identities refract citizens' access to courts and

contain the opportunities sparked by judicial policymaking, and how repertoires of legal mobilization can be repurposed and corporatized will find this chapter of interest.

Chapters 7 and 8 transition to how the politicization of European integration since the 1990s disrupts Euro-lawyering, and how legal entrepreneurs can shape the legacies of controversial judicial decisions. In moments of protest and breaking news, lawyers intent on sustaining judicial policymaking and compliance with EU law cannot fall back on behind-the-scenes ghostwriting: they must embrace vigorous public advocacy and engage both local stakeholders and the press. I illustrate this argument by comparing two explosive controversies in Italy that generated litigation before the ECJ and subsequent backlash: the 1991 *Port of Genoa* case (Chapter 7), which quashed the control over port labor of a centenarian union of dockworkers, and the 2015 *Xylella* case (Chapter 8), which mandated the eradication of thousands of centenarian olive trees. While equally controversial, *Port of Genoa* produced a legacy of Europeanization and compliance whereas *Xylella* emboldened backlash and noncompliance. Via comparative process tracing, I tie the source of this divergence to how Euro-lawyers in *Port of Genoa* proactively mobilized public support by supplementing strategic litigation with media-savvy public advocacy, whereas lawyers in *Xylella* did not mobilize as intermediaries and reactively bolstered efforts to resist compliance. These chapters speak to readers interested in how contentious politics transform legal mobilization, how lawyers can serve as interpretive mediators in the public sphere, and why similar backlashes against laws and courts produce divergent legacies of compliance.

Finally, Chapter 9 proposes a normative and historical evaluation of the foregoing findings. I first consider how lawyers compare to other ghostwriters of institutional change, suggesting that what distinguishes lawyers is their capacity to wield a mediatory, boundary-blurring agency to seize opportunities for change that may be lost upon actors shackled to single institutional settings. I then address the ethics of lawyers' ghostwriting, submitting that while concealed actions pushing the bounds of the acceptable are often necessary to jump-start institutional change, Euro-lawyering became more normatively problematic as it corporatized. I conclude by taking stock in light of the contemporary challenges plaguing the rule of law in Europe. As a wave of illiberalism and constitutional breakdowns has swept some EU member states, Euro-lawyers have gained a new *raison d'être* in the struggle to reclaim the elusive liberal promise of the judicial construction of Europe.

Ultimately, *The Ghostwriters* reveals but the initial submerged parts of a large iceberg of litigation, judicialization, and political development in one region of the world. My aim is to contribute meaningfully to this iceberg's study, not to settle the debate or to weave a seamless analytic web.¹⁰⁶ While in every empirical chapter I critically engage and sometimes challenge existing arguments, I largely build upon the perceptive scholarship that inspired me to write this book in the first place. And although *The Ghostwriters* revolves around the politics of lawyers, I emphatically do not wish to portray lawyers as herculean, to imply that they single-handedly advanced European integration, or to lose sight of how litigation is “just one potential dimension or phase of a larger, complex, dynamic, multistage process of disputing.”¹⁰⁷ This book, then, is not a holistic history. It is rather a selective archeology, an exhumation of some of the under-appreciated ways that lawyers shaped the tortuous development of the world's sole supranational polity.

¹⁰⁶ For instance, this book says relatively little about how the ECJ decides cases, illuminating this process indirectly like astronomers who study black holes by observing how they effect surrounding matter. This analogy is a bit misleading, however, for despite the Court's best efforts to evade the gaze of social science, we actually know a lot more about its pro-integration proclivities and about what goes on in its *Palais de Justice* than in countless local communities where the disputes that fuel judicial policymaking originate (or not), and where lawmaking is translated into practice (or not). These are the black holes that preoccupy this book.

¹⁰⁷ McCann, Michael. 2008. “Litigation and Legal Mobilization.” In *The Oxford Handbook of Law and Politics*, Gregory Caldeira, R. Daniel Kelemen, and Keith Whittington, eds. New York, NY: Oxford University Press, at 525.

