Leveling and Spotlighting:
How International Courts Refract Private Litigation to Build Institutional Legitimacy

Silje Synnøve Lyder Hermansen[*], Tommaso Pavone[†], Louisa Boulaziz[‡]

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Abstract

Private litigants are increasingly turning to international courts (ICs) to pursue their claims. We argue that ICs can refract inequalities in private litigation to build institutional legitimacy. By leveling the odds for individuals and spotlighting their claims over those of more resourceful corporate actors, ICs can cultivate civil society support and legitimate judicial policymaking in intergovernmental polities with limited avenues for citizens to exercise their voice. To assess this argument we scrutinize the first IC to provide access to private litigants: the European Court of Justice (ECJ). We show that ECJ judges have privileged individuals in their public advocacy and assess if they matched words with deeds by analyzing the first dataset of parties involved in cases referred to the ECJ from national courts. We find that the ECJ "levels," supporting individual claims more than those raised by businesses boasting larger and more experienced legal teams. The ECJ also "spotlights," wielding press releases to broadcast

[*]Assistant Professor, University of Copenhagen
[†]Assistant Professor, University of Arizona
[‡]Ph.D. Candidate, University of Oslo

support for individuals and catalyze favorable commentary in law reviews. Our findings break with existing research on how the "haves" come out ahead in litigation, suggesting that the conventional wisdom does not travel to fledgling ICs seeking creative ways to build institutional legitimacy.

Introduction

Of all the transformations sparked by a cross-national "judicialization of politics," private litigants' expanding access to international courts (ICs) is amongst the most profound (Hirschl 2009, Stone Sweet and Brunell 2013, Alter et al. 2019). Gone are the days when soliciting international justice was the exclusive prerogative of sovereign states. Since 1945, seventeen "new-style" ICs (Alter, 2012; Alter, 2014) have been established with access to individuals and businesses via direct actions or referrals from national courts (see Figure 1). While some of these ICs remain dormant, others have grown to adjudicate hundreds of cases each year.

To date, political scientists and socio-legal scholars have primarily probed when and how new-style ICs expand opportunities for private actors to pursue their claims (Cichowski 2007; Vanhala 2012; Alter 2006, 2014; Helfer & Voeten 2014). But private litigation also creates opportunities for international judges themselves. Facing recurrent government backlashes and contestations of their authority (Alter et al. 2016; Madsen et al. 2018; Voeten 2020; Pavone & Stiansen 2022), judges across ICs need to cultivate alternative "compliance constituencies" to secure public support (Voeten 2013; Helfer & Alter 2013). Private litigation can thus become a vehicle for new-style ICs to build institutional legitimacy.

In this article, we argue that ICs can implement two legitimacy-building strategies that refract the outcomes of private litigation: leveling and spotlighting. ICs "level" by favoring the legal claims raised by weaker private parties - usually individuals - and counterbalancing their disadvantaged capacity to litigate vis-a-vis more resourceful private litigants - usually busi-

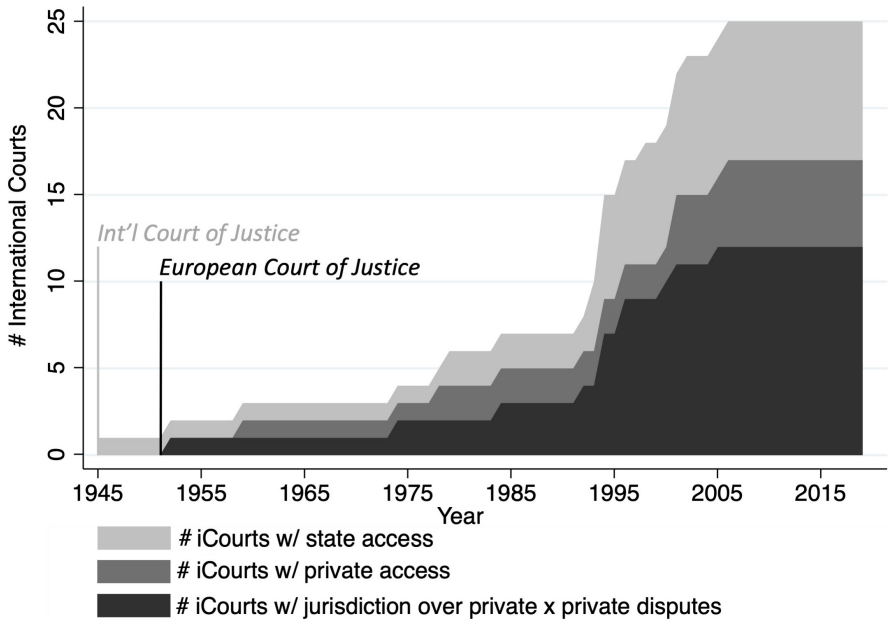

Figure 1: Proliferation of international courts with private access, 1945-2019

nesses. Leveling the odds for individuals and their claims enables ICs to justify judicial policymaking not only as rectifying inequities, but also as alleviating democratic and social deficits in intergovernmental polities with limited avenues for individuals to shape policy. To then broadcast this message, ICs "spotlight" their support for individuals to domestic compliance constituencies. By allocating larger chambers and issuing press releases when they support individual claims, ICs can focus the attention of national actors - like lawyers and judges - capable of amplifying their rulings and supporting their agenda in domestic politics (Stein 1981; Weiler 1994; Vauchez 2015; Pavone 2022).

Our theory challenges the view that ICs build their authority by stealth, concealing their actions behind the "mask and shield" of the law (Burley & Mattli 1993). We argue instead that ICs in intergovernmental polities carve an institutional role for themselves by broadcasting their policy agenda and soliciting the support of civil society. Our argument also breaks from the

conventional wisdom in judicial politics and "party capability" research that since individuals are disadvantaged in private litigation then the "haves" come out ahead (Galanter, 1974; McGuire, 1995; Songer, Sheehan, and Haire, 1999; Haire, Lindquist, and Hartley, 1999; Szmer, Johnson, and Sarver, 2007; Nelson and Epstein, 2021). While these power imbalances also exist at the international level, we argue that some new-style ICs have particularly strong incentives to counterbalance them to build their institutional legitimacy. In other words, party capability is not destiny before ICs.

To assess our revisionist theory, we scrutinize the first IC to provide access to private parties, a court that has grown into a uniquely influential international judicial policymaker: the European Court of Justice (ECJ). Although scholars agree that private litigation has fueled the ECJ's institutional development, they disagree about whether the ECJ has primarily favored individuals or businesses (Conant 2002; Borzel 2006; Cichowski 2007; Conant et al. 2018) and proceeded stealthily or publicly (Stein 1981; Burley & Mattli 1993; Blauberger & Martinsen 2020; Dederke 2022). Triangulating between the writings and public advocacy of ECJ judges and a novel dataset of nearly 7,000 cases involving private litigants referred to the ECJ by national courts, we find compelling evidence that the ECJ both "levels" and "spotlights." The ECJ disproportionately favors claims raised by individuals over those raised by businesses, even though we confirm that businesses consistently boast larger and more experienced legal teams. And the ECJ is more likely to allocate larger chambers and issue press releases when it supports individual claims, which attracts more commentaries in law reviews that amplify rulings where individuals win. The ECJ neither flies low nor favors the powerful. It flies high and favors the weak because doing so advances its institutional interests.

Our study is the first to theorize and systematically assess the relationship between judicial decision-making and private party capability before ICs. Our findings clearly break from the expectations derived from research on domestic courts, yet they can be reconciled. The fact that the ECJ favors

claims raised by individuals over those raised by businesses neither reflects the absence of inequalities in their litigation capabilities nor selection effects. Rather, our findings are driven by judicial entrepreneurs responding to a particular institutional context and seeking a legitimacy-enhancing role for themselves outside the vicissitudes of intergovernmental politics.

The rest of this article is organized as follows. We begin by elaborating our theory of judicial leveling and spotlighting, explaining why some new-style ICs are incentivized to adopt these strategies to build their institutional legitimacy. We next justify our case selection and empirical scrutiny of one new-style IC - the ECJ - and present qualitative evidence from ECJ judges' public writings that frame championing individual claiming as a means of building legitimacy. To then assess whether ECJ judges match words with deeds, we develop an econometric strategy to analyze novel data on private litigation and ECJ decision-making, uncovering supportive quantitative evidence. We conclude by highlighting how our findings advance comparative and international research on judicial politics and legal mobilization.

International Courts and Private Litigants: A Revisionist Theory

Comparative and international relations scholars agree that the expansion of private access to international justice has contributed to the judicialization of politics across many parts of the world (Alter et al. 2019). Yet this process is neither uniform nor automatic. While some functionalist studies predicted that private litigation would spark a virtuous cycle of rights-claiming, judicial policymaking, and international institutional development (Stone Sweet & Brunell 1998; Fligstein & Stone Sweet 2002), many new-style ICs are seldom solicited by private litigants (Alter 2014). In some cases, private actors are not aware of ICs and how they can benefit them; in others, recalcitrant governments deliberately attempt to starve fledgling ICs of private disputes (Madsen et al. 2018; Pavone & Stiansen 2022). Even when they are solicited

by private parties, some new-style ICs struggle to broaden their appeal beyond a narrow set of corporate litigants and government elites (Alter & Helfer 2017). This is hardly surprising, since 13 of the 17 new-style ICs established since WWII were designed as regional economic courts.

Opening an IC's doors to private litigants does not automatically flood it with rights-claims and influence. Instead, we need to understand the conditions under which private litigation opens opportunities for judicial entrepreneurs, and how judges convert these opportunities into actions to pursue their institutional agendas. Our argument is that ICs can harness private litigation to build a wellspring of social support outside intergovernmental politics by refracting power imbalances amongst private parties.

Our starting premise is that national governments are at best fair-weather friends for new-style ICs. In fact, international judges are frequent targets of intergovernmental noncompliance campaigns, jurisdiction-stripping efforts, and vigorous public criticism of their legitimacy (Madsen et al. 2018; Voeten 2020; Stiansen & Voeten 2020). To sustain judicial policymaking given these threats, some scholars posit that ICs need to proceed by stealth and conceal their agenda behind the "mask and shield" of the law (Burley & Mattli 1993). Yet no IC can escape political contestation for long, particularly in a climate of cross-national backlash to globalization and judicialization (Pavone 2019; Blauberger & Martisen 2020; Walter 2021; Voeten 2022). Instead, recent research has illuminated that new-style ICs adopt public relations campaigns and resilience techniques to cultivate support (Caserta & Cebulak 2021; Dederke 2022) and compensate for the lack of centralized enforcement at the international level (Carrubba 2005). These efforts usually target "compliance constituencies:" interest groups and civil society actors who serve as transmission belts for ICs into domestic politics by raising awareness, amplifying their rulings, and supporting their authority (Voeten 2013; Helfer & Alter 2013). And one strategy to cultivate these constituencies is to broadcast support for particular private litigants and their claims.

Individual claimants are especially useful vehicles for judges seeking to

prove their relevance and to legitimate an active policy agenda. This is not because individuals are advantaged in the litigation process, but precisely because they are *dis*advantaged. Individuals' limited finances and capacity to hire effective legal counsel - what is usually termed "party capability" - means they are usually less successful in court compared to business litigants (Galanter, 1974; McGuire, 1995; Songer, Sheehan, and Haire, 1999; Haire, Lindquist, and Hartley, 1999; Szmer, Johnson, and Sarver, 2007; Nelson and Epstein, 2021). These power imbalances may be magnified before ICs, since mobilizing international law requires hiring expensive legal counsel with "substantive" and "process" expertise that most lawyers lack (Kritzer 1998; Pavone 2022). By counterbalancing these resource inequalities and favoring the claims raised by individuals, new-style ICs can justify judicial policymaking as amplifying the voice of the "have nots." We refer to this strategy as "leveling," in the sense of judges wielding their agency to "level the odds" for weaker private litigants (Miller, Keith, and Holmes, 2015).

While any court can "level" in principle (Epp 1999), in practice many judges do not. We posit that this legitimacy-building strategy is more likely to be deployed by ambitious new-style ICs embedded in intergovernmental economic unions. We do not make this claim because we have *a priori* reasons to believe that these ICs are more rights-conscious or inherently committed to social justice. Rather, leveling bestows a unique *raison d'etre* for judicial policymaking in these institutional contexts. First, compared to national constitutional democracies with robust mechanisms for citizen representation, the "political opportunity structure" (Kitschelt 1986) of intergovernmental polities has fewer avenues for individuals to exercise their voice, generating frequent allegations of a "democratic deficit" (Dahl 1999; Follesdal & Hix 2006). By leveling the odds for individuals, ICs can justify judicial policymaking as enhancing the democratic legitimacy of the intergovernmental regimes of which they are part. Second, leveling is especially useful for ICs designed to operate primarily as economic courts. Compared to human rights regimes whose ICs are explicitly tasked with promoting

individual rights, the "legal opportunity structure" (Vanhala 2012; 2018) in intergovernmental economic unions usually reflects the interests of states and businesses over those of individuals. By supporting individual rights that create new entitlements, ICs can frame judicial policymaking as enhancing the social legitimacy of economic integration.

On its own, leveling is insufficient for new-style ICs to build institutional legitimacy. This is because citizens and civil society actors often lack awareness of fledgling ICs and their decisions (Voeten 2013), especially when compared to the decisions rendered by established national courts. ICs must thus broadcast their efforts to level the odds for individual claiming to prospective allies in civil society. We call this complementary strategy "spotlighting." In particular, national legal communities - lawyers, legal scholars, and judges - are a key audience and compliance constituency for ICs because they can amplify their judgements in law reviews and spearhead domestic litigation campaigns (Stein 1981; Weiler 1994; Alter 2014; Pavone 2022). ICs can attract their attention by manipulating procedural rules - such as allocating larger chamber formations - and issuing press releases to spotlight cases where they support individual rights claims - an important step towards securing broader public support (Gibson & Caldeira 1995; Voeten 2013).

Figure 2 summarizes and models our theory, wherein leveling and spotlighting by ICs serves as the causal mechanism (the "entities engaging in activities;" see Beach & Pedersen 2019: 99-100) converting unequal private claiming (the inputs) into favorable attention in civil society (the outputs).

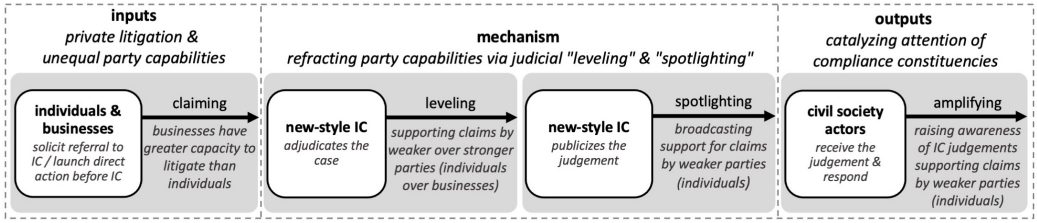

Figure 2: A theory of leveling and spotlighting by new-style ICs

In sum, our revisionist theory identifies the conditions under which the expectations of legal mobilization and judicial politics studies should be flipped on their head. From courts in the US (McGuire 1995; Songer et al. 1999; Haire et al. 1999; Johnson et al. 2006; Miller et al. 2015; Szmer 2016; Nelson & Epstein 2021), the Philippines (Haynie 1994), Canada (Szmer, Johnson, and Sarver, 2007), and Taiwan (Chen, Huang, and Lin, 2015), existing research consistently finds that businesses hire larger, more experienced legal teams than individuals and are consequently more likely to win judges' support. We have no reason to believe that these inequalities are unique to domestic litigation; in fact, we will demonstrate they also pervade private claiming before ICs. Yet in stressing how money, expertise, and information drive judicial outcomes, capability arguments understate judges' agency and neglect other attributes of legal claims that courts may value. Our takeaway is that under certain conditions, claims lacking in legal expertise and financial backing can still be better vehicles for building institutional legitimacy, incentivizing judges to refract inequalities in party capability.

The European Court of Justice, Case Selection, and Hypotheses

To apply and assess our our argument, we scrutinize patterns of private litigation and judicial decision-making at the European Court of Justice (ECJ) in Luxembourg. In this section, we justify our case selection, contextualize the ECJ within the process of European integration and the universe of new-style ICs, and derive five hypotheses capturing the observable implications of our theory for the ECJ case.

From the standpoint of case selection, there are two reasons why the ECJ is well-suited for assessing our theory. First, the ECJ is not only the first new-style IC to procure access to private litigants; it has also developed into the most active and oft-emulated IC in the world. Since the 1950s, the Court has adjudicated thousands of cases - the vast majority originating

in disputes that private litigants raised before national courts and asked to be referred to the ECJ via the "preliminary reference procedure" (under Article 267 TFEU; see Kelemen & Pavone 2019). The ECJ's success in cultivating private litigants triggered repeated attempts to "transplant" the ECJ to other regions: 11 new-style ICs established within intergovernmental economic unions were designed as "operational copies" of the ECJ (Alter, 2014; Alter, 2012, p. 1935).

Second, if it is precisely these new-style ICs that are most likely to build their institutional legitimacy by "leveling" and "spotlighting" private litigation, then we would expect to find supportive evidence in Luxembourg. In other words, the ECJ is a not only a substantively "influential" case for understanding ICs generally; it is also a theoretically "critical" case for evaluating our argument speficially (Seawright and Gerring, 2008; Gerring and Cojocaru, 2016, pp. 404–405).

That private litigation would fuel the ECJ's institutional development was neither preordained nor apparent when the Court was established. The ECJ was expected to operate as a relatively traditional IC to facilitate intergovernmental economic cooperation without compromising national sovereignty. During negotiations for the 1957 Treaty of Rome, policymakers devoted far more attention to the design of the European Community's political institutions - the Council of Ministers and the Commission - than to the ECJ (Boerger & Rasmussen 2022). "Without much discussion" they approved the design for the preliminary reference procedure that lawyers in the *groupe de redaction* had inserted into the Treaty text (Boerger & Rasmussen 2022, Chapter 4, 19). Member governments thus opened the ECJ's doors to private litigation "without awareness of this innovation's importance" and how it could empower the world's first new-style IC (Pescatore 1981, 159, 173).

By enabling private claimants to petition the ECJ, the preliminary reference procedure supplied the Court with opportunities to dismantle national barriers to the free movement of goods, person, services, and capital (Weiler 1991; Burley & Mattli 1993; Stone Sweet & Brunell 1998; Alter 2000; Ci-

chowski 2007; Kelemen & Pavone 2019; Pavone 2022). The ECJ cajoled private litigants to support its creation of "a new legal order of international law" when in 1963 and 1964 it held that European law has primacy over conflicting national law and endows businesses and citizens with rights they can invoke before domestic courts. Unsurprisingly, some member governments and national constitutional courts resisted this agenda. They targeted the ECJ's institutional legitimacy, lambasting its "activism... beyond the limits of the acceptable," accusing it of jeopardizing individual rights protections enshrined in national constitutions, and charging it with buttressing a European legal order lacking in democratic legitimacy (Rasmussen 1986, 62; Davies 2012; Pavone 2022, 39). The French government under Charles de Gaulle even sought to pack the Court and strip it of its jurisdiction to hear most preliminary reference cases (Fritz 2015).

How the ECJ responded to these public attacks has generated a significant debate that our revisionist theory can advance. First, existing studies disagree about whether the ECJ responded privately or publicly. Some scholars claim that the ECJ went into hiding. "Tucked away in the fairyland Duchy of Luxembourg" (Stein 1981: 1), the Court concealed its activism in cases raised by private litigants behind the "mask and shield" of "'technical' legal garb" (Burley & Mattli 1993, 70-72). Others claim that the ECJ responded publicly, grafting a doctrine of individual rights protections onto the economic scaffolding of the Treaty of Rome (Weiler 1986; 1991). Second, scholars disagree about whether the ECJ's paeans to individual rights had a concrete impact on the outcomes of private litigation. Some suggest the ECJ did come to favor individuals and their claims (Cichowski, 2004; Cichowski, 2007; Stone Sweet, 2010), whereas others posit that the Court continued to disproportionately benefit powerful corporate interests (Conant, 2002; Börzel, 2006).

We expect that the ECJ sought to bolster its fledgling and contested institutional legitimacy by refracting private litigation via leveling and spotlighting. In particular, historians have traced how the ECJ sought to build

support amongst legal practitioners who could amplify its rulings in legal commentaries and spearhead follow-up litigation campaigns (Weiler 1994, 528-531; Vauchez 2015; Pavone 2022). European lawyers' associations like the *Fédération Internationale pour le Droit Européen* (FIDE) aspired to serve as a "private army for the []European] Communities" (Vauchez 2015, 88; Rasmussen & Martisen 2019, 262) and founded law journals - the most prominent being the *Common Market Law Review* (CMLR) - "to provide legitimacy to the new jurisprudence of the ECJ" (Byberg 2017, 46). ECJ judges tapped these support networks, contacting the CMLR's editorial board to suggest authors and topics. But what the Court most needed to supply legal practitioners and law journals was a steady diet of judgements that could be used to build public support and respond to "national [government] criticism of the ECJ's jurisprudence, to which CML[R] generally delivered counterattacks" (Ibid, 52; 57).

In short, we expect that the ECJ pitted itself on the side of individuals and broadcast support for their rights claims to legal practitioners to legitimate a pro-European legal integration agenda. This expectation can be parsed into five hypotheses that mirror our theorized sequence of unequal claiming by private litigants, leveling and spotlighting by judges, and amplifying by civil society actors:

Hypothesis 1 - unequal claiming: *Business should boast higher quality legal representation than individuals in cases before the ECJ.*

Hypothesis 2a - leveling (words): *ECJ judges should publicly claim to level the odds for individuals so as to bolster the legitimacy of European legal integration.*

Hypothesis 2b - leveling (deeds): *The ECJ should be more likely to support the claims raised by individuals than businesses in its judgements.*

Hypothesis 3 - spotlighting: *The ECJ should be more likely to publicize cases raised by individuals than businesses – particularly when it supports individual claims.*

Hypothesis 4 - amplifying: *Legal commentaries in journals – particularly European law journals like the Common Market Law Review – should focus disproportionate attention on ECJ judgements that support individual claims.*

To test these hypotheses, we adopt a multi-method research design to integrate qualitative and quantitative evidence (Seawright 2016). We first assess whether there is any historical evidence that ECJ judges were conscious of inequalities in party capability, claimed to be leveling the odds in individuals' favor, and sought to draw attention to these efforts to legitimate judicial policymaking (Hypothesis 2a). We begin at this stage to establish the face validity of leveling and spotlighting by the ECJ and assess if its judges perceive this as a useful strategy for building institutional legitimacy. To then confirm the presence of unequal litigation capabilities amongst private litigants (Hypothesis 1), assess if the ECJ has in fact refracted these inequities via leveling and spotlighting (Hypotheses 2b and 3), and probe if legal practitioners responded by amplifying the Court's agenda (Hypothesis 4), we leverage the first integrated dataset of private litigation, ECJ decision-making, and legal commentaries in journals. Figure 3 matches each step in our theory of judicial leveling and spotlighting with the five hypotheses and types of data used to evaluate their explanatory purchase for the European case.

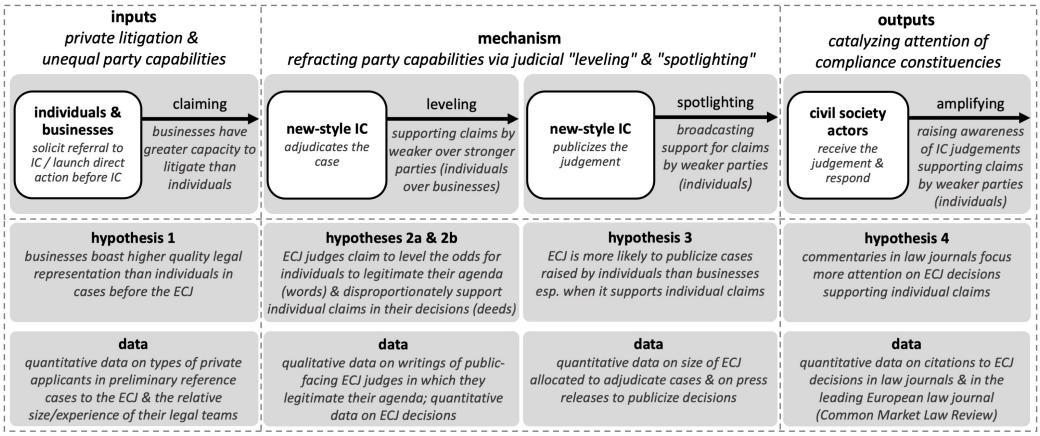

Figure 3: Correspondence of theory, hypotheses, and data

"Protector of the Individual:" The Legitimating Rhetoric of ECJ Judges

In a recent article, Conant et al. (2018, pp. 1384–1385) argue that assessing the ECJ's relative bias in favor of businesses or individuals "lies at the core of the normative argument about [... whether] European law can be a weapon of the weak or remains a 'hollow hope'." While existing research has shed limited empirical light on this puzzle, the ECJ has confronted it head-on. An historical analysis of the writings of the ECJ's most influential and public-facing judges demonstrates that they made leveling the odds for individuals a central theme in their outreach efforts, consistent with H_{2a}.

The ECJ's self-legitimation as "protector of the individual" grew out of an internal disagreement within the Court. In the early 1960s, the Court was split between a conservative and an activist wing. The more introverted and cautious wing - headed by Dutch judge André Donner - resisted public appeals to individuals and their rights. They wished "not to break with the elements of international law and instead emphasise the contractual nature of the EEC Treaty" (Rasmussen 2008: 94; Rasmussen 2012, 380). Conversely, the more public-facing and ambitious wing - headed by Italian judge Alberto Trabucchi and French judge Robert Lecourt - wished to stress the "new-style" elements of the ECJ by appealing to individual citizens. When the latter prevailed in the 1963 *Van Gend en Loos* case - holding that European law safeguards "individuals [and] is also intended to confer upon them rights... which national courts must protect" - Donner resigned as ECJ President and Lecourt took on the post (Phelan 2017; Rasmussen 2008). Lecourt became the ECJ's most influential President (Phelan 2019)[1] and pioneered a rhetoric of institutional legitimation centered on leveling the odds for individuals.

Drawing on his past experience as a journalist and political organizer,

[1]Lecourt was judge at the ECJ from 1962 to 1976 and President of the Court from 1967 to 1976, a "foundational period" characterized by a number of revolutionary judgements advancing individual rights (Phelan, 2019).

Lecourt knew that the ECJ needed to craft a public narrative to counter criticisms of its institutional authority. As Phelan (2020: 11) has shown, "many parts of the Court of Justice's distinctive information and persuasion strategy as a whole also appear to have been directly connected with judge Lecourt," who adopted the role of ECJ "publicist." Lecourt recognized that grafting a doctrine of individual rights protections onto the economic scaffolding of the Treaty of Rome was insufficient. The Court also needed to spur "publications in academic journals and mass-circulation media" so that the "Court's bold decisions were defended... and advertised to the wider public" (Ibid, 8-9).

Lecourt's most reknown work of public advocacy was his 1976 book, *L'Europe des Juges*. The book was crafted as an explicitly "popularizing" and justificatory manifesto directed at "national lawyers and judges who might apply European law in national litigation" and pen supportive commentaries (Phelan, 2017, p. 944). Therein, Lecourt repeatedly frames an ambitious judicial agenda as a means to level the odds for individuals and ensure that the EU legal order did not just serve "business Europe:"

> "The work of judges... [is] to discretely but peremptorily delegitimize the charge sometimes addressed at the [European Communities] that they are only preoccupied with business Europe. The work of judges testifies that a social Europe also exists...
>
> Certainly, litigation of Community law is most often economically-based... but... What would be the point [of the ECJ] if she did not precisely ensure the protection of individual rights... she would fail to live up to her primary role" (Lecourt, 1976, pp. 196–197, 211–212).

Lecourt concluded his book with a call to action: if legal "commentators" paid greater attention to the ECJ's role as "protector of the individual," they would help the Court build a more social and just Europe:

> "[Our] judicial motivations finally reveal an objective of the [European] Community that is rarely observed: its role as protector of the individual. . . judicial practice invites us to look beyond economic problems and to become conscious of the human objectives that they conceal. Community law would then appear in a completely new light. We would become more aware that next to a so-called technocratic Europe, or a business Europe, there also exists a Europe of consumers and shopkeepers, farmers and migratory workers, [a Europe] preoccupied with judicial protections and respect for fundamental rights, wherein the application of the law by the [ECJ] judge is dominated by their concern for protecting the weak"(Lecourt, 1976, pp. 308–309).

Lecourt's appeals to legal practitioners meant to mobilize a key compliance constituency in light of backlash by some member governments and constitutional courts in the 1960s and 1970s (Davies, 2012; Rasmussen and Martinsen, 2019). His emphasis on protecting individual claimants was designed to disarm concerns that the EU legal order would prioritize trade and corporate interests and run roughshod over individual rights.

As European integration became increasingly salient in domestic politics in subsequent decades, resistance to EU law and the ECJ was increasingly mobilized by a rising constellation of populist and Eurosceptic political parties (Hooghe Marks 2009). By then, another set of judges had taken the mantle of ECJ "publicists." As charges that the EU legal order suffered from a "democratic deficit" became recurrent (Føllesdal and Hix, 2006), individuals and their claims again served as vehicles for European judges to cast their agenda as an antidote. None was more prolific than judge Federico Mancini, who served as the Court's most influential judge from 1982 until his death in 1999. Mancini penned dozens of articles justifying the ECJ's activism as "distill][ing] as much equality as possible" for individual claimants and alleviating the EU's democratic deficit:

> "the Court has used Article 177 [enabling national courts to re-

> fer cases raised by private litigants to the ECJ]... to reduce the democratic deficit which has blighted the Community since its inception...
>
> ...[ECJ] activism was often driven by a desire to extend the jurisdiction of the Community... to make up for the set-backs which... [it] has suffered at the decision-making level at the hands of the Member States... What is said about the founding fathers' frigidity towards social issues does not apply to the Judges of the Court. If ours is not just a traders' Europe, and if it is good that this is so, it is the Judges of the Court whom we must thank.
>
> Whilst not taking the "affirmative action" route, the Court has attempted to distill as much equality as possible from the EC Treaty and secondary legislation" (Mancini, 2000, pp. 24, 100, 128).

Like Lecourt before him, Mancini often concluded his public writings with calls to action. Acknowledging that the Court's authority "is still challenged and [its] jurisprudence has at times been the subject of threats" because it "is sadly lacking in democratic legitimacy" (ibid., pp. 142, 165), Mancini called on "ordinary men and women" to support the ECJ:

> "Perhaps, as the Court of Justice becomes increasingly visible... and as more and more people become aware of its ability to impinge positively on their lives, the politicians of Europe will realize that a further emasculation of the Court does not necessarily provide a vote-winning platform in elections or referenda... Perhaps... they will do well to look closely at the Court's case law and remember how many of Europe's citizens have benefited directly as a result of the Court's rulings...

> As long as the Court goes on handing down judgements that enable ordinary men and women to savor the fruits of integration, it will continue to demonstrate its usefulness. And the Member States, whose systems of government are... founded on the principles of democracy, will surely hesitate before embarking on an incisive whittling down of its powers" (Mancini and Keeling, 1995, pp. 24, 100, 128).

Consistent with H_{2a}, the rhetoric and outreach campaigns of leading ECJ judges like Lecourt and Mancini wielded individuals and their claims as legitimating vehicles. They highlighted the business-centered foundations of EU law and individuals' limited capacity to exercise their voice in EU policymaking to carve a role for the ECJ beyond intergovernmental politics. They cast the Court as the protector of individuals and a counterbalance to "business Europe;" they likened their efforts to affirmative action; and they claimed to be bolstering the social and democratic legitimacy of European legal integration. This qualitative evidence confirms that ECJ judges perceived inequities amongst private litigants and claimed to refract them to cultivate support amongst legal practitioners and civil society. Yet rhetorical appeals do not necessarily align with judicial practice. To assess whether the ECJ converted words into deeds, we need to turn to quantitative evidence.

From Words to Deeds? Quantitative Data and Modeling Strategy

To assess whether unequal litigation capabilities exist amongst private parties in cases before the ECJ and whether the Court actually refracts these inequities via leveling and spotlighting, we compiled an original dataset of all parties and their legal counsel involved in the 6,919 cases referred to the ECJ (under Article 267 TFEU) from 1961 to 2016. For each case, we documented the litigants and the people (usually lawyers or teams of lawyers) that rep-

resented them. We categorized litigants according to their type (*individual*, *business*, *interest group*, *state institutions* and *others*). This constitutes the main explanatory variable in our empirical analyses, wherein we focus on comparing individuals and businesses.

Measuring and Modeling Unequal Claiming

Our first objective is to empirically capture whether the distinction between individuals and businesses involved in ECJ cases aligns with the distinction between the "haves" and the "have-nots" that predominates party capability research (H_1). Both the ECJ judges cited in the prior section and existing research on EU legal mobilization assume that businesses are "comparatively [more] resourceful" than individuals (Conant et al., 2018, p. 1384), but we do not want to take this for granted.

To this end, we follow existing capability studies focusing on the quality of legal representation that private parties can muster (McGuire 1995; Wahlbeck 1997; Szmer et al. 2016; Nelson & Epstein 2021). We measure this capacity to litigate in three ways and will show that each confirms that businesses have a significant capability advantage compared to individuals.

First, we consider whether litigants submitted an *observation* before the ECJ, coding this as a binary variable. When cases are referred to the ECJ by national courts, the private parties involved are invited to submit their views in a written observation. If the Court proceeds to an oral hearing, the parties are also invited to clarify their positions through oral observations. While it may seem self-evident that making your voice heard matters, litigants lacking quality legal counsel might not recognize its importance: some 37% of the litigants in our data set did not communicate their views to ECJ judges.

We then use two indicators to proxy for the lawyers' "substantive" and "process" expertise (Kritzer 1998): larger legal teams are more likely to hold specialized knowledge of EU law through their division of labor, while more experienced litigators are more likely to dexterously navigate the ECJ's procedures. The *size of parties' legal team* varies substantially. While the median

private litigant that submitted an observation relied on a single lawyer, one in five had a team of two or more lawyers on their payroll. Finally, *lawyer experience* counts the number of ECJ appearances of the most experienced member of a party's legal team.

Our modeling strategy is to first run a series of regressions probing whether the quality of legal representation is unequally distributed among private litigants to assess H_1. We treat each side in a case as a litigant and thus obtain a data set with 12,142 applicants and defendants. Our dependent variable is the *quality of legal representation* that these parties mustered.

Our first model captures the probability that a litigant submitted an observation. Given that this is a binary dependent variable, we use a binomial logistic regression. When estimating the quality of the legal team, however, we rely on hurdle models: we treat the size and experience of the team as a joint probability of first submitting an observation (a binary outcome) and – conditional on this outcome – hiring high-quality legal counsel (a count outcome) (Long, 1997). Our explanatory variables of interest are the type of litigant (individual vs. business). The models control for whether several cases where joined together by the ECJ (*joined case*), whether the litigant is an applicant or defendant, and decade fixed effects.

Measuring and Modeling Leveling, Spotlighting, and Amplifying

In a second series of models, we probe *judicial outcomes* to evaluate whether the ECJ refracts inequalities amongst private litigants in individuals' favor. We first discuss our strategy to model the ECJ's relative propensity to support claims raised by individuals and businesses (H_{2b}). We explain how we account for the possibility of adverse selection or other confounders. We next discuss how we model the ECJ's relative propensity to spotlight cases involving particular litigants and claims (H_3).

Leveling

To measure which claims the ECJ supports, we rely on two influential projects that have coded the legal positions of litigants and the ECJ, enabling us to assess if their positions matched. We first run a regression that includes ECJ judgments from 1961 and 1994 (Carrubba, Gabel, and Hankla, 2008). We then run a second regression using a more fine-grained outcome measure that distinguishes amongst different issue areas within judgments from 1996 and 2008 (Larsson and Naurin, 2016). By measuring who wins in two ways, across two time periods, using two established coding schemes, our goal is to bolster confidence that our results are not time-dependent or driven by idiosyncratic measurement choices.

In our analyses, we code *win* as a binary variable indicating if the Court supported the applicant's claims. Descriptive statistics already suggest that the ECJ favors the claims raised by individuals over those raised by businesses: in the 1961-1994 period, the ECJ supported 57% of individual claims, compared to only 42% of business claims. Yet these descriptive statistics may be spurious and biased by two types of errors.

First, our analysis may *underestimate* the ECJ's propensity to level the odds. If capability theories are correct that better legal representation increases a litigant's chances of winning, the ECJ's higher base-line propability to support individual claims may be masked by individuals' capability disadvantage vis-a-vis businesses. We therefore control for the net difference in the quality of legal counsel between the parties. Nevertheless, we will show that even when taking quality of legal representation into account, this capability advantage has no impact on ECJ decison-making.

On the other hand, our results might be *overstated* because of adverse selection. Because individuals have a capability disadvantage, perhaps they will only solicit a referral to the ECJ when they have exceptionally well-founded claims. Businesses, on the other hand, may have sufficient resources to also pursue claims with a lower likelihood of success (Galanter, 1974). Individuals' higher win-rate would thus be due to adverse selection rather

than judicial leveling.

We assuage concerns about an adverse selection effect by drawing on existing research and in our modeling strategy. We also test the observable implications of our theory that cannot be driven by adverse selection - namely concerning the Court's effort to selectively spotlight particular cases.

First, if individuals only go to court when they have well-founded claims, then this selection effect should also be discernible in domestic litigation. Yet as we outlined, unequivocally domestic party capability studies find that individuals lose more often than businesses. This is likely because individuals tend to be "one-shotters" (Galanter, 1974) who lack sufficient procedural and substantive knowledge of the legal system to predict their likelihood of winning in the first place (Kritzer 1998). It is true that national courts can in principle level the odds for individuals by only referring well-founded claims to the ECJ by their own motion. Yet recent studies of European legal mobilization have uncovered that most national judges lack the time, resources and knowledge to solicit ECJ on their own accord (Pavone 2018; Glavina 2020; Pavone 2022).

Second, we address adverse selection in our empirical analysis by comparing the success rates of individuals with similar party capabilities. We screen the claims that litigants raise based on how much they align with the ECJ's purported pro-individual rights agenda. We thus build a logit model that includes an interaction term of the type of litigant and the type of claim. In so doing we compare the win-rate of individuals that claim individual rights (such as social benefits and fundamental rights) to individuals that raise the same economic claims as corporations (usually as farmers and small business owners).

Finally, our models control for other common explanations for court outcomes. First, we control for the net number of government observations, since existing studies have shown that the ECJ tends to follow the majority of observations submitted by governments in preliminary reference cases (Castro-Montero et al., 2018; Larsson and Naurin, 2016; Carrubba, Gabel,

and Hankla, 2008). Second, we control for whether litigants invoke well-established and interpreted EU laws (which diminishes uncertainty and thus increases likelihood of success) or newer EU laws (Hermansen, 2020). Lastly, we control for the few instances where litigants challenge the validity of EU laws, since such cases may have a lower success rate given the ECJ's pro-integration bias.

Spotlighting & Amplifying

Finally, we devise a modeling strategy to investigate whether the Court has disproportionately spotlighted cases involving individuals over those involving businesses (H_3), and if this bias has been amplified by legal practitioners in their journal commentaries (H_4).

The Court has several procedural choices at its disposal to publicize particular cases. The ECJ can begin to attract attention to a case before it even delivers a decision. That is, we code the *size of the chamber* that the ECJ allocates to hear the case (small (3 judges)/medium (5-7 judges)/large (grand chamber, full court)). After it delivers a ruling, the ECJ can issue a *press release* to further publicize its support for particular claims. Previous research has shown that ECJ press releases are effective in attracting public attention to the cases the Court seeks to spotlight (Dederke, 2022). We are particularly interested in whether the ECJ disproportionately allocates larger chambers and issues press releases in cases where individuals win.

Next, we assess whether the ECJ's efforts to spotlight particular cases are then amplified by the legal community by drawing attention to the ECJ's support for individual rights claims. As mentioned previously, ECJ judges have historically sought to catalyze favorable commentaries in law reviews, especially in European law journals like the *Common Market Law Review* (CMLR). We assess whether commentaries in law journals amplify judicial leveling and spotlighting by counting the number of *annotations* that ECJ judgements generate in law journals and the CMLR. Only some cases manage to attract the attention of this compliance constituency: for instance,

only 10% of ECJ judgments have received annotations in the CMLR. To model and evaluate whether these annotations disproportionately focus on cases wherein the ECJ supports individual rights claims, we run poisson and logistic regressions on the chamber size that the ECJ allocates to a dispute, whether ECJ issued a press release, and the number of annotations in law reviews and the CMLR.

Econometric Results

Unequal claiming (H_1): Individuals have a capability disadvantage in ECJ litigation

In H_1, we hypothesized that individuals should have lower capacity to litigate than businesses involved in cases before the ECJ. In other words, our expectation is that private litigation before new-style ICs is plagued by the same inequalities amongst litigants raising claims before national courts. Our analysis provides strong support for this hypothesis. Results are reported in Table 1 and illustrated in Figure 4. In sum, individuals are less likely to submit observations before the ECJ and rely on smaller and less experienced legal teams compared to businesses.

Specifically, businesses are 1.9 times more likely to submit an observation to the ECJ than individuals involved in comparable disputes. One in four individuals do not submit an observation (a predicted submission rate of 78%), whereas only about 1 in 10 companies similarly neglect to do so (a submission rate of 87%). To the extent that it is important for litigants to communicate their legal claims to ECJ judges in a dispute that involves them, then businesses have a notable capability advantage. Businesses' resource advantage is also suggested by the fact that they outnumber individuals 3 to 2 in ECJ disputes, which provides them with more opportunities to influence ECJ case law.

Inequities in party capability also surface in the subset of private litigants

Table 1: Variation in the average size and experience of legal teams for different types of parties.

	Dependent variable: Quality of legal representation		
	Submitted observation	Size of legal team	Lawyer experience
	logistic	*hurdle*	*hurdle*
Individual (ref. company)	-0.650^{***}	-0.151^{***}	-0.392^{***}
	(0.060)	(0.028)	(0.016)
Interest group (ref. company)	0.732^{***}	0.275^{***}	-0.345^{***}
	(0.151)	(0.043)	(0.030)
State institution (ref. company)	-2.158^{***}	-0.170^{***}	-0.346^{***}
	(0.055)	(0.034)	(0.020)
Other (ref. company)	-0.083	0.168^{***}	-0.060^{**}
	(0.102)	(0.044)	(0.025)
Defendant in main proceedings	-0.450^{***}	-0.091^{***}	-0.247^{***}
	(0.048)	(0.025)	(0.014)
Joined cases	0.431^{***}	0.695^{***}	0.028
	(0.081)	(0.029)	(0.022)
Constant	1.924^{***}	0.330^{***}	1.489^{***}
	(0.059)	(0.026)	(0.014)
Observations	12,286	12,286	12,286
Log Likelihood	$-6{,}505.624$	$-16{,}529.580$	$-44{,}933.640$
Akaike Inf. Crit.	13,035.250		
Note:			*p<0.1; **p<0.05; ***p<0.01

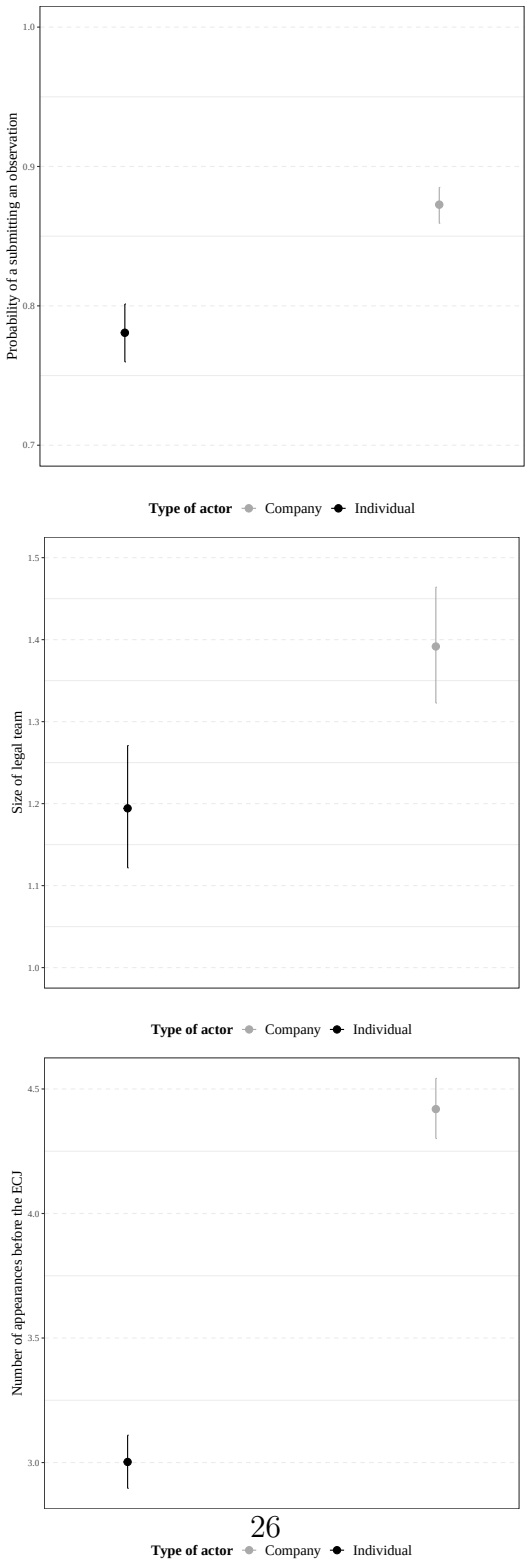

Figure 4: Businesses boast larger and more experienced legal teams than individuals. These figures illustrate the case of an applicant in the 2000s.

that submit observations. Individual hire legal teams that are 14% smaller than those of businesses on average. Since team size tends to correlate with "substantive" expertise (Kritzer 1998), then businesses possess a clear advantage. Businesses are also advantaged when we consider the experience of their legal counsel. Individuals rely on lawyers with 32% less experience of litigating prior cases before the ECJ than the lawyers hired by businesses. Since lawyers who repeatedly appear before a court accrue greater "process expertise" (Ibid), this result once again indicates that individuals at a disadvantage.

In sum, we confirm that the same capability inequalities afflicting private litigation before national courts also surface in litigation before the ECJ. This begs the question of whether the ECJ has wielded its agency to refract these inequalities and level the odds for disadvantaged individuals. In other words, has the European Court matched words with deeds?

Judicial Leveling and Spotlighting

Leveling (H_{2b}): the ECJ is more likely to support individuals who raise rights claims than businesses

In contrast to the prevailing findings in studies of domestic judicial-decision-making, we find compelling evidence that the ECJ disproportionately supports individual claims despite individuals' capability disadvantages compared to businesses. In other words, the ECJ appears to match words with deeds and to level the odds in individuals' favor, consistent with H_{2b}. Furthermore, we find that this result is driven by cases in which individuals raise different claims than businesses - namely individual rights claims. Evidence consistent with judicial leveling by the ECJ are displayed in Table 2 and visualized in Figure 5.

Specifically, from 1961 to 1994 the ECJ was 61% more likely to support claims raised by individuals compared to claims raised by businesses. This figure remains essentially the same for the 1995 to 2008 period (66%).

Table 2: Variation in the ECJ's likelihood of supporting particular litigants and claims.

	Dependent variable:			
	Wins the case			
	logistic			
	1961-1994	1961-1994	1996-2008	1996-2008
Individual * individual rights		0.516**		0.458**
		(0.260)		(0.231)
Individual rights		−0.179		0.201
		(0.183)		(0.136)
Individual (ref. company)	0.473***	0.255	0.504***	0.100
	(0.116)	(0.160)	(0.102)	(0.164)
Interest group (ref. company)	0.166	0.193	0.309*	0.316*
	(0.241)	(0.242)	(0.177)	(0.178)
State institution (ref. company)	0.288	0.283	0.217	0.208
	(0.178)	(0.179)	(0.161)	(0.161)
Other (ref. company)	0.142	0.195	−0.092	−0.087
	(0.248)	(0.256)	(0.328)	(0.330)
Net support from MS observations	0.500***	0.500***	0.303***	0.304***
	(0.054)	(0.054)	(0.029)	(0.028)
First time an EU law is applied	−0.256**	−0.246**	−0.361***	−0.372***
	(0.113)	(0.113)	(0.110)	(0.112)
The validity of an EU law is in question	−0.650***	−0.636***	−0.588***	−0.600***
	(0.154)	(0.154)	(0.201)	(0.201)
Defendant is ... an individual (ref company)	−0.249	−0.193	0.133	0.118
	(0.174)	(0.178)	(0.178)	(0.182)
... interest group (ref. company)	0.007	−0.027	0.016	−0.062
	(0.267)	(0.270)	(0.274)	(0.275)
... state institution(ref. company)	0.023	−0.009	0.381***	0.397***
	(0.141)	(0.142)	(0.114)	(0.115)
... other type of actor (ref. company)	0.203	0.135	0.152	0.076
	(0.198)	(0.202)	(0.221)	(0.223)
Difference in legal team size	0.005	0.013	−0.040	−0.045
	(0.042)	(0.042)	(0.031)	(0.031)
Difference in lawyer experience	−0.004	−0.004	0.009	0.009
	(0.007)	(0.007)	(0.007)	(0.007)
Constant	0.006	0.033	−0.756***	−0.790***
	(0.138)	(0.139)	(0.092)	(0.096)
Observations	1,828	1,828	2,521	2,521
Log Likelihood	−1,183.469	−1,181.307	−1,529.548	−1,521.745
Akaike Inf. Crit.	2,384.938	2,394.615	3,087.096	3,075.491

Note: *p<0.1; **p<0.05; ***p<0.01

Furthermore, the ECJ's pro-individual bias is driven by cases where citizens claim rights as individuals - that is, precisely the types of fundamental rights, pension rights, and workers' rights highlighted by judges Lecourt and Mancini in their public writings. Indeed, the ECJ does not level the odds for individuals that make claims mirroring those raised by businesses - such as tax-related claims invoked by individuals in their capacity as business owners (this effect is visible from the interaction terms in the 2nd and 4th columns of 2). This finding is consistent with the ECJ favoring precisely the types of individual rights claims that we theorized are most useful for new-style ICs seeking to build institutional legitimacy.

The behavior of our control variables is consistent with previous research, bolstering confidence in our analysis. The ECJ is less likely to support claims hinging on the interpretation of new EU legislation or challenging the validity of EU laws. Furthermore, the ECJ tends to support claims that are also supported by the majority of member state submissions (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). Our results imply that for a business to equalize its probability of winning the ECJ's support vis-a-vis individuals, it would need to receive between 1 and 1.7 additional supportive government observations. Strikingly, the fact that businesses tend to boast larger and more experienced legal teams than individuals has no impact on ECJ decision-making. This confirms that party capability is not destiny before the European Court.

To be sure, even if the ECJ levels the odds for individual claimants, judicial entrepreneurship cannot fully erase inequities in party capability. For instance, because businesses have greater financial capacity to absorb the costs of litigation, they are 50% more likely to figure amongst the applicants in disputes adjudicated by the Court. In other words, they appear before the ECJ much more often than individuals. When we integrate this advantage with our finding that businesses have 39% lower marginal likelihood of winning the ECJ's support (34% in the second time period) than individuals, their predicted marginal win rate rises up to 59% (52%).

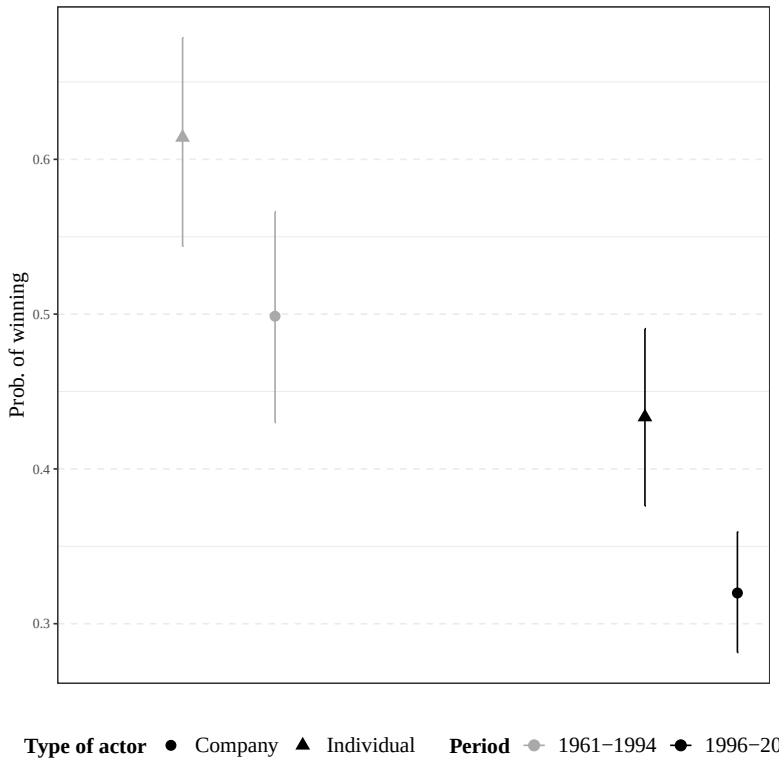

Figure 5: Probability of winning the Court's support.

In sum, the ECJ consistently refracts structural inequalities amongst private litigants by leveling the odds in favor of individuals raising rights claims. While this result breaks from the prevailing findings of the party capability literature, it is consistent with the public assertions of ECJ judges and the expectations of our revisionist theory.

Spotlighting (H_3): the ECJ is more likely to publicize cases involving individual claims

Granting wins to citizens when individual rights are involved may provide the ECJ with occasional victories. Yet we have argued that the Court's endgame has been to establish itself at the origin of a new rights regime. To

obtain that status, it is reliant on domestic actors to pick up and actively claim rights based on the Court's case law. In H_{3a}, we therefore hypothesized that the Court has sought to raise awareness in the legal community about the new legal opportunities it creates by spotlighting select cases. We test this in three different ways. We expect that the Court devotes more resources to cases involving individuals both during the proceedings and in their communication afterwards; and more so when individuals win. This spotlighting may however be directed at a broader public (Dederke, 2022). We therefore also verify if the Court's communication is received by the legal community. Thus, we test in four different ways if the ECJ's priorities are mirrored in the legal comments published in academic journals (H_{3b}).

Results are reported in Tables 3 and 4 as well as illustrated in Figure 6. In line with our expectations, they indicate that the ECJ spotlights cases strategically to fit its broader purpose, and that publications in the legal-academic community mirror that priority.

Even when controlling for the newness of the case and the political attention it receives from governments, we find that the likelihood of the ECJ deciding the case in a larger chamber increases by 48% when individuals are involved compared to businesses. After its conclusion the Court is also almost twice as likely to issue a press release. Only references involving interest groups obtain a similar level of spotlighting (models 1 and 2 in Table 3). Among these cases, we further find that the Court is more than twice as likely to highlight cases when the individual applicant wins rather than when they lose (model 1 in Table 4). No other type of applicant sees the same distortion in the Court's outreach strategy depending on who wins the case.

The Court's communication strategy is furthermore reflected by the publication profile in academic journals. A case involving an individual attracts 17% more journal annotations and is no less than 81% more likely to receive a commentary in the *Common Market Law Review* compared to a case involving a business. This attention is also conditional on who won the case. The

Table 3: Variation in issue attention across cases depending on the type of litigants involved.

	Dependent variable: Political, judicial and academic attention		
	Chamber size	Press release	Annotated in CMLR
	ordered logistic	*logistic*	*logistic*
individual	0.391^{***}	0.648^{***}	0.594^{***}
	(0.056)	(0.161)	(0.107)
ngo	0.241^{**}	0.526^{**}	0.189
	(0.102)	(0.254)	(0.169)
state_institution	-0.186^{***}	-0.409^{**}	-0.161
	(0.063)	(0.184)	(0.117)
other	-0.185^{**}	-0.537	-0.347^{*}
	(0.090)	(0.346)	(0.183)
log(n_lawyers_applicant + 1)	0.526^{***}	1.052^{***}	0.717^{***}
	(0.060)	(0.194)	(0.110)
log(n_lawyers_defendant + 1)	0.332^{***}	0.319^{*}	0.347^{***}
	(0.068)	(0.193)	(0.119)
log(n_appearances_applicant + 1)	0.091^{**}	-0.064	0.077
	(0.037)	(0.102)	(0.067)
log(n_appearances_defendant + 1)	0.0003	-0.313^{**}	0.029
	(0.051)	(0.151)	(0.089)
log(n_iteration)	-0.044^{***}	-0.116^{**}	-0.225^{***}
	(0.015)	(0.047)	(0.035)
observations_prop_tot	8.314^{***}	7.034^{***}	5.200^{***}
	(0.337)	(0.780)	(0.412)
small|medium	-0.033		
	(0.106)		
medium|large	2.771^{***}		
	(0.113)		
Constant		-2.729^{***}	-3.823^{***}
		(0.323)	(0.213)
Decade fixed effects	Yes	Yes	Yes
Observations	5,928	1,100	5,928
Note:			*p<0.1; **p<0.05; ***p<0.01

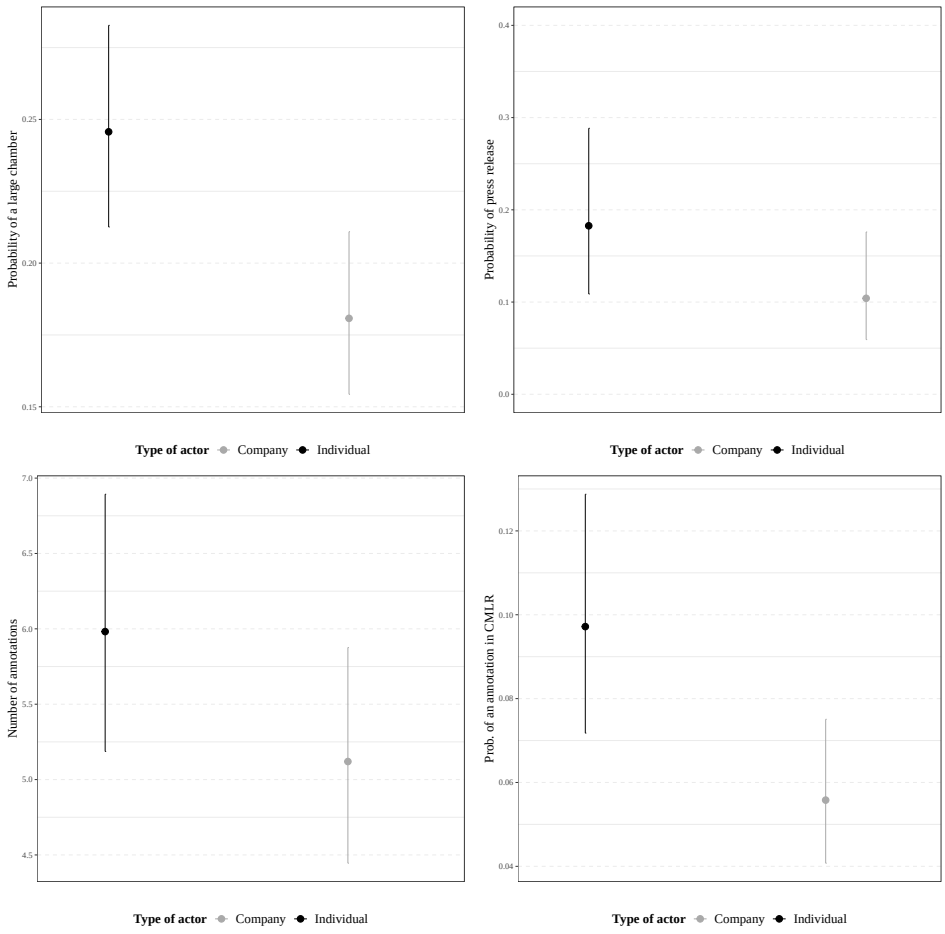

Figure 6: Issue attention among political and judicial policy makers.

Common Market Law Review is 79% more likely to publish a commentary when an individual has won compared to when they have lost. The result is somewhat less clear when we consider the total number of journal commentaries. Cases brought by individual applicants receive on average more attention compared to businesses, but receives disproportionately more attention only compared to public institutions, interest groups and other types of actors when they win. In the appendix, we further build the link between ECJ spotlighting and journal mirroring by showing that both chamber size and press releases are predictive of academic attention.

These results suggest that ECJ adjudication disproportionately amplifies the legal claims and issues raised by individual litigants. Not only does the ECJ tend to 'level the odds' by deciding more cases in individuals' favor, but it tends to allocate a larger chamber and issure more press releases to a select group of disputes involving individual litigants. Their effort helps, in turn, attract the attention of the legal community that may echo these claims in the future.

Table 4: ECJ spotlighting as a function of whether the individual applicant wins.

	Dependent variables: Spotlighting and reflection	
	Press release	Annotated in CMLR
	logistic	*logistic*
	1997-2008	1961-94;96-2008
Times an EU law is applied (log)	−0.127***	−0.170***
	(0.047)	(0.045)
Proportion of MS observations	7.637***	5.009***
	(0.792)	(0.501)
Applicant won	−0.118	−0.063
	(0.229)	(0.211)
Applicant is... other type of actor (ref. company)	0.216	−0.347
	(0.609)	(0.618)
... state institution (ref. company)	−0.079	−0.042
	(0.351)	(0.303)
... interest group (ref. company)	0.670*	0.830***
	(0.372)	(0.305)
... an individual (ref company)	0.232	−0.026
	(0.225)	(0.213)
Applicant won * other type of actor (ref. company)	0.081	−0.237
	(1.107)	(0.971)
... won * state institution (ref. company)	−0.113	−0.226
	(0.577)	(0.461)
... won * interest group (ref. company)	0.342	−0.963*
	(0.587)	(0.577)
... won * an individual (ref. company) (H3)	0.744**	0.585*
	(0.352)	(0.307)
Intercept	−2.086***	−2.798***
	(0.775)	(0.188)
Year fixed effects	Yes	No
Decade fixed effects	No	Yes
Observations	1,100	2,929
Note:		*p<0.1; **p<0.05; ***p<0.01

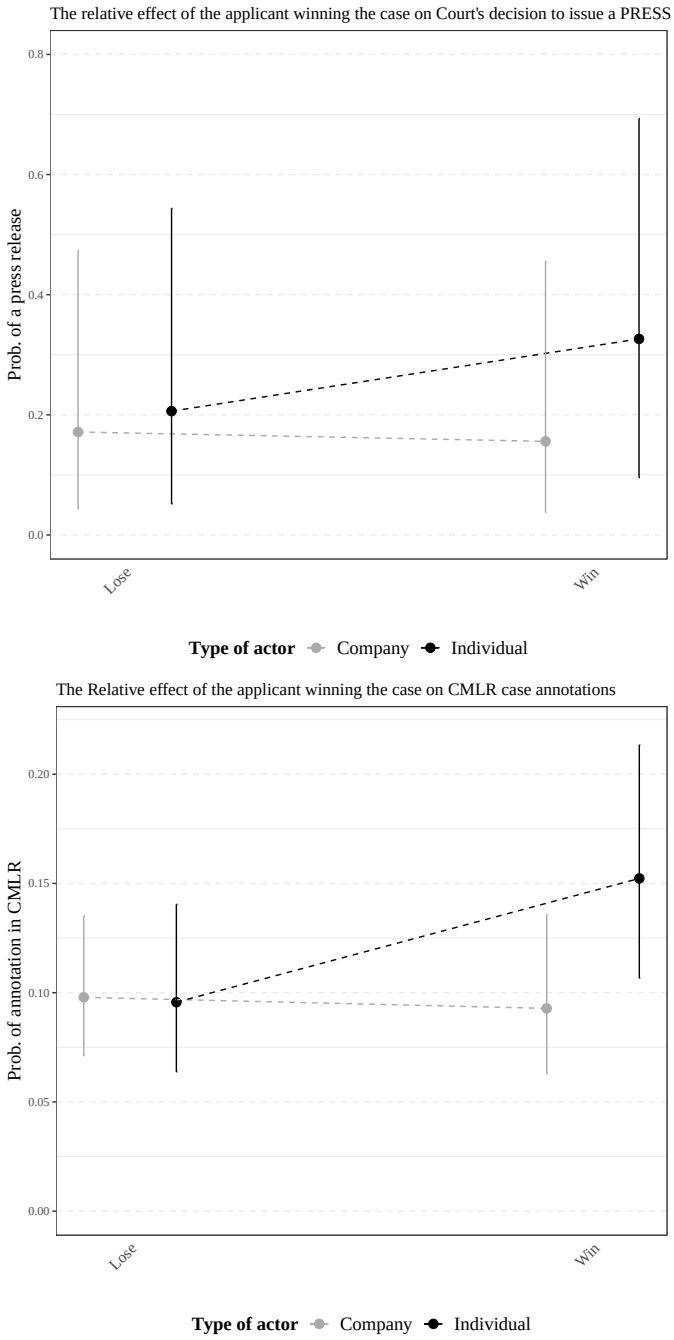

Figure 7: Spotlighting: The Court is more likely to issue a press release, and the Common Market Law Review is more likely to publish an annotation, on a case in which an individual applicant has won.

Conclusion: The Advantages of the Disadvantaged

That the "haves" come out ahead is arguably the most consistent finding across studies of litigation at the national level. Yet we have shown that party capability is not destiny before "new-style" ICs. Before the prototypical IC with private access - the ECJ - it is actually the "have nots" that tend to come out ahead. Not only are individual claimants more likely to win the ECJ's support than better-resourced businesses, but their claims tend to attract more attention both inside and outside the courtroom.

This is a remarkable and heartening finding, and it may appear implausible at first glance. Yet we have shown that it need not rest on optimistic assumptions or be cast as a mere byproduct of an adverse selection process. Instead, this finding is consistent with international judges instrumentally seeking to overcome the institutional challenges that they face. Like other international institutions, ICs face two major obstacles as policymakers: Their fledgling legitimate authority is regularly contested, and prospective compliance constituencies at the national level tend to ignore their existence or their impact. Tipping the scales in favor of the "have nots" - and publicizing these efforts as much as possible - enables new-style ICs to tackle both problems. It allows ICs to justify expansive judicial policymaking as democracy-enhancing, assuaging the critique that the international regimes in which they are embedded suffer from a "democratic deficit" (Føllesdal and Hix, 2006). And it allows ICs to cultivate the attention and support of key domestic allies - such as legal academics - who can amplify their rulings and prove their relevance. The "have nots" may be unable to trade resources and information in the courtroom as effectively as corporate litigants. But individuals can trade in legitimacy, and it is legitimacy, perhaps above all else, that is in short supply for ambitious ICs who must confront the threats of backlash, noncompliance, and court-curbing campaigns (Alter and Helfer, 2013; Cohen et al., 2018; Voeten, 2020; Pavone and Stiansen, 2021).

In other words, we see the capacity of the "have nots" to come out ahead as contingent on their capacity to serve as instruments for institution-building and legitimation. While this is a story of how judicial entrepreneurship refracts the impact of party capability, our findings also highlight opportunities that can be strategically mobilized by litigants. Amongst the three obstacles that private litigants must overcome to effectively mobilize ICs – obtaining access, winning the case, and catalyzing issue attention – only the first obstacle – access – may systematically tip the scales in favor of the "haves." For most of the seventeen new-style ICs, this access problem hinges on persuading a national court to refer a case to an international court (Alter, 2014; Pavone, 2022): it is at this stage that private litigants may need to be most proactive in mobilizing the resources necessary to compete with powerful repeat-players. Once before an IC, however, the advantages of party capability may whither away, as judges face institutional incentives to "level the odds" in favor of individual claimants (Miller, Keith, and Holmes, 2015).

Our findings also provide novel empirical support for a consequential conclusion: judicial activism is not merely a potential source of backlash, but also a means of building legitimacy (Alter and Helfer, 2013; Hermansen, 2020). In particular, ICs who deliver expansive rulings in the politically salient issue areas that tend to fuel individual claiming - social security, immigration, fundamental rights, consumer protections, etc. - may not be doing so willy-nilly, backlash be damned. Rather, ICs may be acting strategically to justify their own policy activism and to court the attention of potential allies in national legal systems. Whether the "haves" or the "have nots" come out ahead before ICs is not merely a question of amassing the most resources, the most information, and the most lawyers. It is also a question of serving as a vehicle to legitimate and amplify judicial policymaking. And at least in this respect, it is pensioners, consumers, and migratory workers who are better positioned than their corporate counterparts.

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1 Appendix

1.1 Data and variables

We rely on four different data frames which draw on largely the same variables to perform our analyses.

1.1.1 Variables

Company `type_company` A dummy. The litigant is a company. This variable is used as the reference category in the analyses.

Individual `type_individual` A dummy. The litigant is an individual.

Interest group `type_ngo` A dummy. The litigant is an interest group.

State institution `type_state_institution` A dummy. The litigant is a public body/state institution.

Other `type_other` A dummy. All other actors are lumped together in this category. It includes such bodies as social security bodies, etc.

Role `role` Categorical. Actors are classified as being either the applicant or the defendant in the main proceedings (i.e. the case before the national court). The original data also include observers. These form the basis for our count of member state observations in the analysis of issue attention.

Defendant in the main proceedings Binary. Flags whether the actor was the defendant in the main proceedings. Derived from the above-mentioned variable.

Joined case Binary. Flags whether several cases where joined by the ECJ into the same judgment. The number of actors behind the data point – and thus the likelihood of seeing some legal representation among parties on the same side of a conflict – is higher in these cases.

Written observation Binary. Flags whether the actor submitted an observation to the Court.

Legal team size `n_lawyers` Count. Enumerates the number of lawyers that submitted the observation.

Lawyer experience `n_appearances` Count. Enumerates the number of times the most experienced lawyer on the team has appeared before the ECJ.

Wins the Court's support `win` Binary. Reports whether the applicant in the main proceedings wins the ECJ's support (`win == 1`). However, the Court may provide a mixed answer or an answer that is irrelevant to the case of the applicant. In other words, the reference category is not that the applicant "loses", but rather does not win (`win == 0`). The variable is derived from two different coding project. For more information, please refer to the discussion on the data structure.

Net support from member state observations `I(govobspl - govobsdef)` Numeric. Reports the net support in favor of the applicant among member state governments who submitted an observation. The variable is derived from two different coding project. For more information, please refer to the discussion on the data structure.

Number of times the most recent EU `n_iteration` Count. Reports the number of times the ECJ has interpreted the same EU law. To aggregate the data, we report the relevant number of the most recent EU legislation applied by the ECJ in the judgment.

First time an EU law is applied `I(n_iteration == 1)` Binary. Derived from the previous variable. Source: EUR-Lex.

The validity of an EU law is in question `challenge` Binary. Flags cases where the Court has decided on the validity of one or more EU laws. Source: EUR-Lex.

Difference in legal team size `I(n_lawyers_applicant - n_lawyers_defendant)` Numeric. Derived from the previous variables on role and legal team size.

Difference in lawyer experience `I(n_appearances_applicant - n_appearances_defendant)` Numeric. Derived from the previous variable on role and lawyer experience.

Individual rights `ind_rights` Binary. Flags cases involving issue areas in which the Court has taken a proactive role in granting rights to individuals. These include the free movement of people/workers, social policy including pensions, consumer rights and fundamental rights.

In order to obtain a comprehensive coding, the cases are identified using two sources: The Court's reporting of the "subject matter" of the case as well as from the keywords reported in the head of each judgment. The vocabulary we searched for was the following: Subject matter:

"Social security", "Freedom of movement for workers", "Social policy", "Consumer protection", "non-discrimination". Keywords: "free movement of persons", "freedom of movement for persons", "workers - freedom of movement", "free movement - workers", "freedom of movement for workers", "freedom of movement - workers", "freedom of movement of persons", "freedom of movement - migrant worker", "free movement of workers", "social security", "social policy", "handicapped ", "sickness insurance","citizenship","vocational training", "pension", "social provision", "social legislation","consumer protection" ,"protection of consumer", "fundamental rights", "fundamental human right", "fundamental personal right".

MS observations `I(n_observations)` Count. Reports the number of governments that submitted an observation during the procedure *exept* for any observation from the member state in which the case originated.

Proportion of MS observations `prop_observations` Numeric. Reports the proportion of member states that submitted an observation *exept* for the member state of origin. The size of the EU has changed substantially over the period of study, so the variable is a normalization of the attention that governments give the case.

Chamber size `chamber_size` Ordinal. Reports the size of the chamber in which the judgment was passed. The effective number of judges assigned to cases has changed over time. We therefore rely on a normalization of the chamber size ranging from "small" (3 judges), "medium" (5-7 judges; small plenary/chamber of 5) and "large" (¿7 judges; full court/grand chamber).

Press release `press_release` Binary. Reports whether the Court issued a press release in relation to the publication of the judgment. Press releases are available from 1996 and on wards. We combine this with data on the outcome of cases, such that the analysis is based on Court

judgments published in the period between 1996-2008.

Annotations `n_annotations` Count. Reports the number of publications discussing the case in academic venues; i.e. "case annotations". Source: EUR-Lex.

Annotations in the Common Market Law Review `I(n_annotations_cmlr >0)` Binary. Reports whether the cases was annotated in the *Common Market Law Review*. The review has existed since the beginning of the Court's history and has reported on approximately 10% of the Court's cases per year. Source: EUR-Lex.

1.1.2 Data structures

Our original data frame lists all lawyers and actors involved in a case: the litigants, third party observers as well as government- and EU-level observers in all of the preliminary reference cases delivered by the ECJ (1961-2016). However, our analyses are performed on aggregated versions of the data. Because of data availability on court outcomes, our relevant models also only rely on a subset of the cases.

Quality of legal representation: Data on each side of a litigation (`df_role`) The unit of analysis is defendants and applicants in the case referred from the domestic court. We thus have 12286 observations of litigants nested in 6143 ECJ judgments. All criminal cases are excluded, since there is only one applicant (against) their state.

While there may be several litigants on each side – for example because several cases were joined to receive the same decision by the ECJ – we have aggregated the data so that one observation remains for each side. As a result, an actor may be coded as several types. A worker ("individual") may for example be joined by a trade union ("interest group") when bringing their case to the Court.

Gaining the Court's support: Data on applicants (`df_app`; `df2_app`) We rely on two previous coding projects to identify whether the applicant in the main proceeding gains the Court's support. As a result, we rely on two different data sets.

The period 1961-1994 uses applicants at the case-level. We thus end up with a data frame listing 1867 applicants in as many cases. We outcome variable as well as the position of the member states are based on the efforts done to identify actors' positions in the European Court of Justice Data project (Carrubba and Gabel, 2011). All positions are reported at the judgment level and as a function of whether the actor supported the applicant.

The period 1996-2008 uses applicants at the issue-level nested within each court case. We thus end up with a data frame listing positions in 3094 issues nested in 1369 cases. It is based on the efforts done to identify actors' positions by Larsson and Naurin (2016). Coders where instructed to identify questions asked to the court and reformulate these into "yes"/"no" answers. All actors may thus be coded as "yes"/"yes, but" and "no"/"no, but", as well as various other categories. We have coded as a "win" when the applicant and the Court both answer yes/no, while all other answers are coded as non-support. The member states' positions are coded in the same way.

Issue attention: Data on the case level `df_case` The data frame aggregates