

Through the examination of one of the most successful cases of a European Community (EC) law litigation strategy, this article develops a general framework for understanding when and how the EC legal system will be successfully used by domestic groups to challenge national policy. The authors show how the European legal system actually shifted the domestic balance of power in favor of equality actors, allowing a previously weak domestic group to influence the United Kingdom's gender equality policy at the height of Conservative Party rule. Expanding beyond the British case, the article develops a series of hypotheses about when the EC legal tool is likely to be used by groups to influence national policy, hypotheses that could account for cross-national variation in the impact of European Court of Justice jurisprudence on domestic policy in areas outside of equality policy.

EXPLAINING VARIATION IN THE USE OF EUROPEAN LITIGATION STRATEGIES

European Community Law and British Gender Equality Policy

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As the project of European integration continues to advance, it has become increasingly clear that the dynamics of this transnational process are producing secondary effects for domestic politics. Yet there is remarkably little systematic analysis about how European integration is transforming the national political process. This article identifies one effect that European integration, specifically the creation of a European legal system, has had on politics within the states. By providing domestic groups with a tool that can be used to impose new costs on their government, the European Union's (EU) legal system has transformed previously weak



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organizations with little leverage into political players capable of directly influencing national policy. We describe this transformative process as shifting the domestic balances of power.

The claim that the legal system can be a potent device to influence national policy is hardly novel, especially to those familiar with American judicial politics. Yet the European Community (EC) legal tool differs from a traditional litigation strategy, providing a unique means for groups to influence policy. There are different factors that influence whether an EC law litigation strategy will succeed. There are also advantages to using the EC legal tool that a domestic legal strategy does not offer. The EC legal system creates a means to circumvent opposition within the national judicial hierarchy, allowing a litigation strategy to succeed with the support of only a few lower level members of the judiciary. Furthermore, a change in policy based on EC law is much harder for national governments to reverse than a legal victory based on domestic law, because such a reversal would require legislating at the European level.

In the 1980s, the Equal Opportunities Commission (EOC) of the United Kingdom adopted a litigation strategy targeting British policies that contributed to gender discrimination in the workplace. Although activists might lament that discrimination remains a problem in the United Kingdom, the EOC had considerable success in forcing a Conservative government to accept significant changes in its equality policy based on European Court of Justice (ECJ) jurisprudence. We use this British case to identify the factors that contribute to a successful use of an EC law litigation strategy.

There are four separate steps that determine whether the EC legal tool can be successfully invoked to shift the domestic balance of power. First, there must exist a point of European law on which domestic actors can draw, and favorable ECJ interpretations of this law. Second, litigants must embrace EC law to advance their policy objectives, using EC legal arguments in national court cases. Third, national courts must support the efforts of the litigants by referring cases to the European Court and/or applying European Court jurisprudence instead of conflicting national policy. Fourth, the litigants must follow up their legal victory by drawing on legal precedents to create new

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political and material costs for the government and private actors. A litigation strategy can fail at any of the four steps.

Steps 2 through 4 involve significant actor agency. Others have hypothesized that litigants will draw on EC law to promote their interests whenever there is a potential benefit to doing so, with resource constraints being the primary barrier to litigation.¹ Despite the numerous situations in which a litigation strategy could have been profitably employed, however, EC law litigation strategies are used relatively infrequently. Indeed, in the area of equality policy, the British experience appears to be more an exception than a rule in terms of groups using EC law to circumvent national opposition and promote equality objectives. Resource constraints do not seem to have been the chief barrier preventing groups from embracing litigation strategies. The second half of the article examines the use and nonuse of European litigation strategies to promote equal pay for men and women in other European member states. From this cross-national analysis, we develop a series of hypotheses about the conditions under which the EC legal system is likely to be seized and successfully used by groups to shift the domestic balance of power. Our focus is on the area of equal pay, but the hypotheses we develop could explain cross-national variation in the impact of ECJ jurisprudence on domestic policy in a variety of issue areas.

The first section discusses how EC law allowed domestic interest groups to shift the domestic balance of power, forcing an unwilling British government to change public policy. It identifies the factors important to the EOC's success at each of the four stages of the EC legal process. The second section develops a series of hypotheses about the factors influencing the adoption of a successful EC litigation strategy.

THE EOC AND THE SHIFTING DOMESTIC BALANCE OF POWER IN GREAT BRITAIN

In perhaps the most famous EC litigation success story, private and group actors committed to expanding gender equality in the workplace (and most notably the EOC) obtained progressive expansions of gender equal treatment policy in Great Britain during the Conservative Party's reign. The equality actors turned to an EC litigation strategy after other attempts at strengthening British equality policy failed. Their litigation strategy yielded dramatic

1. Though noting that resource constraints and short termism may keep potential litigants from raising cases, some researchers imply that private litigants raise European Community (EC) legal challenges whenever EC law will further their material or political interests (Burley & Mattli, 1993; Mattli & Slaughter, 1998; Stone Sweet, in press; Stone Sweet & Brunell, 1998).

results: exciting public attention with the successful expansion of the legal protections available to women workers and creating the potential of large costs for employers who discriminated on the basis of gender.

Domestic equal treatment legislation, including the Equal Pay Act (EPA) of 1972 and the Sex Discrimination Act (SDA) of 1975, had been enacted by a Labour government as a result of growing pressure from a variety of sources, including women's rights groups, unions, women's professional organizations, and women within the Labour Party itself (Carter, 1988, pp. 112-124; Mazey, 1998, p. 134; Meehan, 1985, pp. 40-65). Yet even with this favorable alignment of political actors, the original legislation contained numerous exemptions, applied only to a proportion of the female workforce, and employed a limited conception of equality of employment opportunity (Ellis, 1988; Morris & Nott, 1991; O'Donovan & Szyszczak, 1988).

After the rise of the Conservative Party to power in 1979, even the legislation's limited aims were threatened. The EPA and SDA embodied the type of market interventionist legislation that was antithetical to the Thatcher government's *laissez faire* ideology. Domestic groups that supported gender equality policy retained little political influence and could not muster the support necessary to counter the Conservative government's antagonism toward equality policy.² The Conservative government did not enforce the existing equal opportunity legislation, weakened and withdrew legal protections that benefited women workers, and blocked efforts to legislate on social policy at the EC level (Kahn, 1985, p. 96).

Nevertheless, equality actors obtained significant advances in gender equality policy under Conservative rule by relying on the EC legal system. The process by which politically marginalized actors shifted the domestic balance of power in their favor can be broken into four separate steps, each of which contributed to the successful strategy. The first step—having the EC legal system and an EC legal basis to challenge national policy—was a precondition for an EC law-based litigation strategy. The last three steps—mobilizing interest groups around a litigation strategy, gaining national judicial support, and following through on legal victories to show the costs of not changing national policy—were necessary conditions for a

2. The coalition of promotional groups that had mobilized public support for women's rights issues in the 1970s fell apart in the wake of the passage of the Sex Discrimination Act (SDA). The decline of interest in the women's movement can be attributed to internal ideological dissension, lack of momentum, and the harsh economic and political climate of the Thatcher era (Lovenduski & Randall, 1993, pp. 94-101). The Thatcher government's attack on the system of liberal corporatism also greatly diminished the political role of the unions (Marsh, 1992; McIlroy, 1991).

shift of the domestic balance of power and the outcome of national policy change. We consider each step in turn.

STEP 1: THE EC LEGAL SYSTEM CREATES A TOOL FOR DOMESTIC ACTORS

For the EC legal mechanism to be useful to domestic policy actors, there must exist a point of EC law that litigants can draw upon. European law affects not all policy areas, and not all aspects of European law can be invoked in national courts. Equality actors in Britain were fortunate in that the EC had legislated extensively in the arena of equal employment opportunity. Article 119 of the Treaty of Rome established the principle that men and women should receive equal pay for equal work. In addition, although the Labour government was in office and under pressure from women's groups, the Council of Ministers passed 10 directives with implications for equal employment opportunity policy, including the Equal Pay Directive (EPD) and the Equal Treatment Directive (ETD) (Mazey, 1998, p. 138).

The existence of a large body of EC law pertaining to equal opportunity in the workplace—a body of law that offered more protections to female workers than did British law—gave domestic actors a legal basis to mount an EC-based litigation strategy. Because of the ECJ's supremacy doctrine, legal victories based on EC law should negate conflicting national policy (*Costa v. ENEL*, 1964). But alone, the existence of favorable legislation was not enough. The ECJ's broad interpretations of Article 119 and the Equality Directives were indispensable in creating a legal canon more favorable to female workers than that of British law (Ellis, 1991). The ECJ granted Article 119³ and the ETD⁴ direct effect, allowing private litigants to draw on these EC laws in front of national courts to challenge both government and private employers on issues encompassed by Article 119 and the ETD (Prescal & Burrows, 1990, pp. 24-45; Szyszczak, 1997, p. 105). The existence of EC law

3. The question of whether Article 119 created direct effects was explored in test cases constructed by an activist lawyer, Vogel-Polsky (see *Defrenne v. Sabena*, 1976; *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1978). It took a highly motivated Vogel-Polsky 5 years to find a plaintiff for her test case, fighting hostility to the idea of a litigation strategy from the Belgian unions along the way (Harlow & Rawlings, 1992, p. 283).

4. The Equal Treatment Directive (ETD) was given direct effect in *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* (1986). Although the Equal Pay Directive (EPD) has not been given direct effect, it has never been necessary to rely on it in national courts. The European Court of Justice (ECJ) has used the EPD to inform the principle of equal pay under Article 119, and thus, any rights contained in the EPD are by implication also contained within Article 119, which does have direct effect (Bourn & Whitmore, 1997).

in the area of gender equality, the direct effect and supremacy of these laws in the national context, and the favorable interpretations of these laws were a precondition to domestic groups using an EC law litigation strategy to challenge national policy.

STEP 2: THE MOBILIZATION OF EQUAL TREATMENT POLICY ACTORS

The mere existence of European legislation and favorable legal precedents by no means ensured policy change at the domestic level. Although the European Commission can use Article 169 of the Treaty of Rome to bring judicial proceedings against states that ignore their EC legal obligations, for many years it was reluctant to do so, allowing violations of EC law to persist (Rasmussen, 1986, p. 238). As the EOC discovered, even when the Commission wins an Article 169 case, a national government can interpret the ECJ decision in a way that allows national policy to remain intact, and goes against the spirit of the ECJ's ruling.⁵ Even when ECJ decisions are very clear, they do not carry fines or sanctions and in themselves were (until very recently) unenforceable.⁶ The existence of domestic actors with incentives to litigate EC legal questions before national courts is thus important if EC law is actually going to influence national policy.

The readiness of domestic actors to pursue a litigation strategy depends on numerous variables. Litigation strategies are at best crude instruments for policy change, entailing the risk that adverse decisions could regress policy, and are thus usually adopted only after other political avenues have failed. Indeed, even a successful litigation strategy is unlikely to result in significant policy reform because the judiciary lacks the institutional capacity to produce social change (Horowitz, 1977; Rosenberg, 1991). As the next section will discuss, factors such as the national legal culture, the availability of resources, the organizational mandate of groups, and access to other sources of influence will shape litigant decisions about using litigation strategies.

Women's groups in England had shunned a litigation strategy, largely for ideological and organizational reasons (Kenney, 1992, pp. 101-102). The

5. In 1982, the ECJ ruled in favor of the Commission in the Article 169 proceeding brought against Great Britain for failing to implement the European standard of equal pay for work of equal value. In response, the British government created new procedures "so burdensome and unnecessarily complicated—it even widened the defenses employers might use to avoid implementing equal pay policies—that many suspected the government of sabotaging the original Equal Pay legislation for which it had never held sympathy" (Vargas, 1995, p. 30).

6. In 1991, member states approved a procedure that can create fines for noncompliance with ECJ decisions. The procedure is meant to be used in exceptional cases. It is slow and cumbersome, and, in its first 9 years of existence, the procedure has rarely been used.

EOC turned to a litigation strategy when its other efforts at influencing the national political agenda failed.⁷ The EOC, created by the SDA to help eliminate discriminatory practices, was structurally and institutionally well suited to employ a litigation strategy. It had a narrow mandate to eradicate gender discrimination in the workplace, lawyers experienced in this specific area of employment law, and, as the repository for discrimination complaints against employers, a ready supply of potential complaints from which to select test cases. Furthermore, given the EOC's relatively uncontroversial statutory mandate to fund cases raising important points of law, a litigation strategy provided the EOC with a means of influencing public policy that carried little risk of exciting a negative reaction from the Conservative government (Ellis, 1988, p. 236; Lovenduski & Randall, 1993, p. 188).

Before turning to an EC litigation strategy, in the late 1970s, the EOC mounted a domestic litigation strategy. Working in conjunction with a small group of policy entrepreneurs, the EOC attempted to procure expansive readings of British equality legislation from the upper courts (Barnard, 1995; Lester Q. C., 1994). This strategy failed, partly because of the explicitly limited scope of the British legislation, but also as a result of consistently narrow rulings from the Employment Appeals Tribunal (EAT), the appellate judicial body with the authority to interpret labor legislation. The EAT interpreted the EPA and SDA to impose huge procedural burdens on plaintiffs, and limited those meager rights granted by the original legislation (Bourn & Whitmore, 1997, p. 266; Gregory, 1987).

With the national strategy at an impasse, the EOC turned to EC law (Lester Q. C., 1994). EC laws provided the EOC with a legal basis for appealing unfavorable EAT decisions to the higher courts.⁸ The EOC used EC law to

7. Although the Equal Opportunities Commission (EOC) had originally been granted formidable powers, including the authority to launch formal investigations against employers, during its first decade in existence the EOC pursued a strategy of conciliation, persuasion, and high-level negotiation with both government and employers (Kenney, 1992, pp. 92-100; Sacks, 1986). The early commissioners, selected from the ranks of business and union leadership, have been criticized for their apparent agenda of maintaining the current status of industrial relations (Gregory, 1987, pp. 137-138; Sacks, 1986). Yet Lovenduski and Randall (1993) have pointed out that the Commission was also influenced by the pragmatic concern that any flamboyant use of its investigative powers would provoke the Conservative government to strip the Commission of what resources it did possess (pp. 186-187).

8. Although the Employment Appeals Tribunal (EAT) is normally the highest authority in labor law cases, a sufficiently important point of law can, in rare instances, be appealed to the higher British appellate courts, the Court of Appeal, and the House of Lords. Appeals to the higher appellate courts require the leave of either the court whose decision is being appealed or the court to which the appeal is being taken.

challenge the validity of legislation that contravened European law.⁹ The EOC also funded test cases on appeal to the ECJ, playing an active role in the development of European equality law to gain binding precedents for use at the national level (Barnard, 1995).¹⁰

As the success of the EOC's strategy became apparent, trade unions also began to use litigation strategies. Although unions had historically shown little interest in women's economic concerns (Lovenduski, 1986, pp. 186-194) and preferred collective action over litigation, EC equality law offered unions a possibility to increase their bargaining leverage—a prospect that was especially attractive because the Thatcher government's industrial relations policy had significantly weakened union power in negotiations with employers (McIlroy, 1991). Unions litigated EC equality issues to bolster their broader collective action programs. For example, the Transport and General Workers Union, UNISON, and the General, Municipal, Boilermakers and Allied Trades Union, among others, used decisions on maternity rights, part-time workers, pensions, and equal value to procure better terms for their members in collective agreements (Kilpatrick, 1992, p. 39). In 1991, the Trade Union Congress (TUC) even held a national seminar, cosponsored by the European Commission, which was designed to "assist unions [to] develop a strategy in order to best exploit the potential of European legislation and case-law . . . includ[ing] identifying potential test cases which could expand domestic law for women members and identifying legislation which could add weight to union negotiators' arguments in collective bargaining" (TUC, 1991, p. 1). Unions cosponsored cases with the EOC (Harlow & Rawlings, 1992, p. 284), advertising for possible test cases relating to issues coming up in contract negotiations and funding the most promising through the courts. When legal decisions favorable to their interests emerged, unions threatened employers violating EC law with litigation (Holland, 1994).

9. The EOC brought suit against the Secretary of State for Employment, for example, for failing to amend the 1978 Employment Protection (Consolidation) Act to conform with ECJ decisions on indirect discrimination. The EOC asserted that the 1978 Act, which prevented part-time workers from pursuing unfair dismissal claims, violated European law, as women constituted 90% of the class of part-time workers affected. In 1994 the House of Lords invalidated the exemption of part-time workers from the 1978 Act's coverage, on the grounds that the Act violated the EC Equal Treatment Directive (*Regina v. Secretary of State for Employment ex parte EOC and Another*, 1994).

10. Women's groups were also involved in positive action strategies at the European Union (EU) level (Mazey, 1998, p. 141).

**STEP 3: ELICITING NATIONAL JUDICIAL SUPPORT
TO INTERPRET EC EQUALITY LAW BROADLY**

Given the EC's legal structure, an EC litigation strategy cannot succeed without the support of the national judiciary. Private litigants cannot take their challenges to national policy directly to the ECJ; they must rely on national courts to make a preliminary reference to the ECJ. Any judge, no matter where they sit in the national legal hierarchy, can send the ECJ a question and thereby create an authoritative and binding legal precedent for both the national and European legal systems, and national courts may also interpret and apply European law on their own. Given that ECJ decisions are on their own virtually unenforceable, national court enforcement may be the only hope of forcing governments or firms to comply with EC law. But there is no way to force national courts to send references to the ECJ, or to give EC law priority over national law. Parties to a lawsuit are therefore quite dependent on the national judiciary's willingness to aid their litigation efforts.

There was no assurance that the EOC would receive national judicial support for its EC litigation strategy. British courts at the time were not favorably disposed to the EC legal process. In comparison with courts in other member states, "British judges [are] loath to make referrals and unwilling to cooperate with the ECJ in promoting European integration" (Golub, 1996, p. 368).¹¹ This reluctance to rely on EC law was evident in early equal opportunity cases: The EAT only cited European law in 12 sex discrimination and equal pay cases prior to 1986.

In Britain, national judicial support came from an unlikely source: the industrial tribunals, which are the lowest rung of the judicial hierarchy. Tribunals were created in 1964 to be fast, inexpensive, and informal bodies with jurisdiction over industrial relations cases in the first instance. Tribunals were not designed for legal innovation. All tribunals are bound by the rules of law articulated by the EAT, and their decisions have no precedential value within the legal system. Given the restrictive interpretation conferred upon national legislation by the EAT, tribunals favoring expansive interpretations of equal opportunity law had no other means of promoting their policy preferences within the national judicial system. European law provided industrial tribunals with a legitimate legal basis for advancing their agendas, allowing them to circumvent the EAT and move to the forefront of policy development. For example, one Southampton tribunal awarded a sex discrimination plaintiff more than the maximum amount allowed under British legislation,

11. Although Stone and Brunell (1998) refute this claim, others have also found British courts reluctant to embrace EC law (Craig, 1998).

arguing that EC law required a plaintiff to be fully compensated for their loss. This decision led to an ECJ ruling invalidating the legislative cap on remedies in sex discrimination cases. Furthermore, tribunals could make references to the ECJ directly, preempting the EAT and obtaining a legal precedent binding on all national courts.¹²

Several factors contributed to the disproportionate influence pro-women tribunals were able to exercise in the British legal system. First, the EOC employed a strategy of forum shopping, targeting tribunals thought to be sympathetic to the EOC's policy objectives and thus more receptive to EC law arguments.¹³ This strategy provided pro-women tribunals with strong cases to challenge established precedent. Second, a growing contingent of legal scholars supported the proposition that British equality laws must be interpreted in accordance with European principles (Gormley, 1986; McCrudden, 1987). Indeed, the only national reporting publication of industrial tribunal decision applauded the tribunals who were applying EC equality law and advocated for greater activism from other tribunals. Given the support conferred upon EC law by advocates, academics, and other tribunals, the majority of industrial tribunal chairs—who had no political preference in case outcomes and were concerned only with identifying the “correct” rule of law—grew to accept European principles as guiding the cases in front of them. The tribunals embrace of EC equality law became so pronounced that the Law Society's president, Martin Mears, declared that tribunals had been “hijacked by the discrimination industry” (Dyer, 1995, p. 8).

The EAT tried to limit the impact of European Court rulings or distinguish British cases to disable ECJ jurisprudence and to regain the policy initiative. But the EAT became increasingly less able to force industrial tribunals to follow its precedents. In one notable example, the EAT had clearly established that under British law the dismissal of a pregnant woman constituted sex discrimination only in certain rare instances (*Hayes v. Malleable Working Men's Club and Institute*, 1985). Nevertheless, when a subsequent ECJ decision established that dismissal on the grounds of pregnancy constituted per se

12. A Northern Ireland tribunal did precisely that in *RUC v. Johnson*, an ECJ decision that has had important implications for the interpretation of the ETD, and for the ability of national governments to limit plaintiff's access to national courts (Prescal & Burrows, 1990, pp. 129-135).

13. The largest number of cases were concentrated in London South, where the tribunal chair was a former legal director of the EOC and had sat on committees and working groups in Luxembourg concerning the future of EC equality law. Tribunals in Leeds, Gloucester, and South Hampton were also found to be notably more progressive on equal treatment issues than other tribunals (based on interviews with tribunal chairs in London on August 23, 1994, and August 22, 1994).

discrimination, the majority of industrial tribunals began applying the European rule.¹⁴ Although the EAT reaffirmed its original holding in a subsequent case, many lower courts continued to follow the ECJ precedent (*Webb v. EMO Air Cargo*, 1990).

The House of Lords was more friendly to ECJ jurisprudence than the EAT, but it also created barriers to European equality law. In 1988, the House of Lords held that national courts were under no obligation to interpret the British SDA in accordance with the EC ETD, a ruling that implicitly directed tribunals to follow the EAT's pregnancy ruling over that of the ECJ (*Duke v. GEC Reliance*, 1988). Tribunals still continued to apply the ECJ standard, however. Eventually the EAT's and the House of Lords' pregnancy rulings were directly rejected by the ECJ. In the 1990s, the House of Lords recast itself as a progressive force on European law and equal treatment issues. The House of Lords began interpreting EC law broadly in light of EC Directives—usually without making a preliminary reference to the ECJ. Though it is impossible to know for sure why the House of Lords started to adopt more favorable EC law interpretations, one likely impetus was the House of Lords' desire to regain control of domestic jurisprudence by asserting its own supreme authority to interpret EC law.

STEP 4: FOLLOW-THROUGH: CREATING NEW COSTS FOR NATIONAL GOVERNMENTS AND FIRMS

Although a court victory may sometimes be enough to obtain all of the litigant's goals, more often litigation strategies are part of a multipronged strategy designed to gain leverage in extra-judicial negotiations (S. M. Olson, 1981).¹⁵ The multipronged strategy is prudent because EC judicial decisions are seldom enough to create policy change on their own (Alter & Meunier-Aitsahalia, 1994). This was certainly the case with respect to equality policy where, according to Harlow and Rawlings (1992), women's groups saw early on "the need for political campaigning in parallel to litigation" (p. 147). We call "follow-through" the process of making the potential political and financial costs of continued noncompliance clear. The EC legal

14. See *Dekker v. Stichting Vormingcentrum voor Jonge Volwassenen* (1991). Where national courts followed the *Dekker* rule, women plaintiffs were successful 93% of the time, as opposed to 57% under the EAT rule.

15. American women's groups, for example, pursued a litigation strategy not because they believed legal victories alone could change the status of women, but because the threat of legal action in a legal climate favorable to women's issues could force concessions from employers and government officials (McCann, 1994).

victories were an important part of the overall strategy because they created concrete bargaining leverage for the EOC and unions. But the EOC and unions had to make it very clear to the government and employers that a failure to change their policy was likely to be costly.

For example, the EOC had unsuccessfully lobbied the government since 1988 to raise the legislative cap on awards in sex discrimination cases. British awards to compensate for gender discrimination were legislatively capped at £11,000, a low sum that discouraged most women from bringing cases (Leonard, 1987) and removed the incentive for employers to end discrimination. Having failed to convince the government to change its policy, the EOC helped fund the *Marshall II* case, where the ECJ held that public sector plaintiffs must be fully compensated for detriment caused by discrimination.¹⁶ Within months of the decision, the Department of Employment completely removed the cap for both public and private employees, exceeding the requirements of the ECJ decision.¹⁷ A few factors explain the government's volte-face and its willingness to go beyond the requirements of *Marshall*. The EOC and trade unions advertised in trade journals for possible claims they could pursue on issues related to their lobbying agenda. This meant that the government and employers could expect legal claims to be forthcoming. Furthermore, legal claims seemingly had the support of the domestic judiciary; indeed, tribunals had begun applying the *Marshall* decision directly to grant awards well in excess of the cap before the Department of Employment even had a chance to amend the legislation.¹⁸ There was also concern that under the ECJ's *Francovich v. Italy* (1993) doctrine a private employee precluded by national law from pursuing an EC legal claim against their employer could potentially recover against the government. With the EOC and unions advertising for cases, the potential threat that the *Francovich* doctrine would make the government financially liable for private sector

16. See *Marshall v. Southampton and South-West Hampshire Area Health Authority* (1993). The EOC was actually a latecomer to this case. Marshall funded the first two rounds of appeals herself.

17. The *Marshall* decision was based on a directive, and thus did not apply to private employers, but the government changed the national legislation with respect to the private sector as well (Sex Discrimination and Equal Pay [Remedies] Regulations 1993).

18. These decisions surprised the government's lawyers in the Treasury Solicitor's office. In an interview, one lawyer commented: "Once they were given the option by *Marshall* to apply higher awards, tribunals took it with open arms. They have been following the ethos of *Marshall* . . . applying the decision in the gap before the government legislated . . . we never thought we would have to face such large awards, because it goes against traditional legal argument on personal injury law and compensation" (interview with official from Treasury Solicitor's office, August 11, 1994).

discrimination,¹⁹ and a clear indication that the national judiciary was likely to award larger discrimination fines, the government decided to change its policy.

Lobbying to create political costs was also necessary lest the government respond to a legal decision by eliminating or lowering the benefit for both men and women. In another example, political cause groups found a test case where a woman was denied government benefits designed for men who leave the workforce to care for an invalid. As the case progressed, it was rumored that the Conservative government would respond to a legal loss by eliminating the benefit altogether. After winning in the ECJ, the groups launched a large media campaign with grassroots meetings and conferences, and with lobbying of both Houses of Parliament.²⁰ The campaign made it politically too embarrassing for the supposedly family-oriented Conservative government to deprive caretakers and the disabled from benefits. The result was the extension of government benefits to women who leave the workforce to care for disabled family members (Harlow & Rawlings, 1992, p. 146).

The private sector is also facing increased pressure to reform business practices in light of new financial liabilities created by EC law. Prior to the *Marshall II* decision, employers found it more expensive to restructure their businesses than to pay damages to potential plaintiffs. This is no longer the case. Several companies have made headlines in the past few years by paying large settlements to women who brought sex discrimination claims against them (Foster, 1996; Taylor, 1996). Industrial Relations Services, an independent labor market analyst, found that in the 2 years following the implementation of *Marshall II*, the average award in sex discrimination cases rose from £2,940 to £12,172. New penalties have translated into new victories for trade unions; the TUC reported a 50% increase in collective bargaining deals following the elimination of the cap on awards (Bassett, 1996).

By following through, activists have translated legal victories into social policy changes with real impacts on the conduct of employers and the government. This observed effect is in keeping with Rosenberg's (1991) contention that courts are more likely to be successful in influencing social policy when extra-judicial actors offer positive incentives for compliance, or impose costs to induce compliance with judicial decisions (pp. 33-36). If the government or business knows that they will lose in the courts, they can

19. Department of Employment officials conceded that they were largely motivated by *Francovich* concerns. One official stated that "it was seen as a straight choice—the government changes the law and the employer pays the balance, or we don't change the law, and the U.K. pays the balance" (interview with official, July 20, 1994). Another Department official agreed: "*Francovich* was one of the most important factors, if not the most" (interview with official, August 4, 1994).

20. The *Drake v. Chief Adjudication Officer* (1985) case was funded by the EOC.

Table 1
Four Factors in Building a Successful Litigation Strategy

EC legal system: A tool to influence national policy

Direct effect of EC law creates legal standing for plaintiffs to draw on EC law in national courts. The supremacy of EC law creates a legal basis for national courts to apply EC law instead of conflicting national law. Article 119 EEC and Equal Pay directives create an EC point of law for national groups to invoke. ECJ found that Article 119 and the directives on equal pay created direct effects, and gave favorable readings to these EC law provisions.

Mobilization of domestic groups

The EOC was committed to a litigation strategy based on national law, but the strategy failed when the EAT interpreted British law narrowly. The EOC turned to EC law to circumvent the EAT and hopefully get more favorable readings of EC law. In light of EOC victories, unions followed the EOC's strategy, choosing test cases on issues related to collective bargaining goals.

Gaining national judicial support

The EOC sought friendly tribunal chairs to make references to the ECJ. The preliminary ruling procedure allowed pro-women tribunal chairs to circumvent the EAT. The actions of first-instance industrial tribunals, combined with more favorable EC legal texts and ECJ jurisprudence, reverberated through the national legal system. Eventually, the House of Lords and the EAT retreated from their own narrow legal precedents, and adopted ECJ jurisprudence.

Follow-through: Creating political costs

The EOC and unions solicited copycat cases, eliminating the possibility to settle the individual case and making it clear that noncompliance would be costly. If the government or business knew that they would lose in the national courts, regardless of if a case was actually brought, they became willing to adjust policies. The threat of an EC legal case in light of ECJ jurisprudence became a weapon in itself.

Note: EC = European Community, EEC = European Economic Community, ECJ = European Court of Justice, EOC = Equal Opportunities Commission, and EAT = Employment Appeals Tribunal.

become more willing to adjust policies, regardless of if a legal case is actually brought. If EC law and ECJ jurisprudence are clear, the credible threat of a national legal case can be a weapon in itself, altering the strategic calculations of the government and firms.

**SHIFTING THE DOMESTIC BALANCE OF POWER:
 DO DOMESTIC GROUPS REALLY HAVE NEW POWERS?**

There were four factors that made the EOC's threat credible and contributed to the EOC's success in influencing national policy (see Table 1). The EC legal tool created an important shift in the domestic balance of power,

turning weak domestic actors with little leverage into political players capable of influencing national policy. With the power of the EC legal tool on their side, pro-equality actors won important victories, including the extension of work benefits for part-time workers and the equalization of pension benefits for men and women. They eliminated the cap on discrimination awards and obtained benefits for women dismissed because of pregnancy. The equality actor's victories were especially impressive because they were won against a Conservative government at the height of the Conservative Party's antagonism toward EC social policy and European encroachments on national sovereignty.²¹ Undeniably, litigation was not the exclusive strategy pursued by activists. For example, positive action programs, many initiated at the EU level, were also used. But even with positive EU programs, the British government often had to be forced to implement the programs in full (Mazey, 1998, p. 144; Meehan & Collins, 1996). Although inequality persists and limits to the litigation strategy have become apparent, the significance of the changes in British equality policy created through litigation should not be discounted.

But how durable are these legal victories? To sustain the claim that the EC legal system actually shifts the domestic balance of power, governments must not be able to thwart a litigation strategy, or easily reverse victories won through litigation. The evidence suggests that national governments are limited in their ability to stop an EC law litigation strategy, or reverse victories won through an EC law litigation strategy. Litigation campaigns can be implemented with relatively minimal financial resources, and although the government has significant political resources with which to mount an attack against domestic interests, the source of these actors' empowerment—EC law and domestic courts—is not easily assailable.²² Short of limiting access to the courts, there is little that can be done to directly prevent a group or individual from pursuing a litigation strategy. Although in this case the government had the power to eliminate the EOC altogether, political constraints prevented it from abolishing an agency designed to fight gender discrimination simply because the agency was successful.²³ It is also hard to stop national courts from sending cases to the ECJ. Because a single court located anywhere

21. On the Conservatives agenda vis-à-vis EC social policy, see Streek (1995). On the Conservatives agenda vis-à-vis the ECJ, see Brown (1995) and Smith (1990).

22. Though litigation may be costly for individuals, as group strategies they are relatively inexpensive (especially when compared to the costs of lobbying and mobilizing public opinion).

23. Streek (1995) notes that nondiscrimination was consistent with the liberal ideology of the Conservative party. It is also doubtful whether at the point the EOC's success was apparent such a strategy would have helped. The legal precedents were there, and national courts were applying them.

in the national legal hierarchy can make a reference to the ECJ and thus help create binding national legal precedent, trying to control national legal bodies through the appointment process is difficult at best.

The Conservative government did, however, make a significant effort to limit EC law victories. The Conservatives tried to rally support among other member states to change the social provisions of EC law, and eventually opted out of the EC's social protocol. The Conservative government also tried to create a political check on the ECJ and pressure the ECJ into limiting its jurisprudence in social policy.²⁴ But existing ECJ decisions are hard to reverse. Because EC law is supreme to national law, a national government cannot simply legislate over an ECJ decision at the national level. Furthermore, as the Conservative government found, changing EC law at the EC level is also difficult. Even with the majority of member states in accord, a joint decision trap makes it exceedingly difficult to change existent EC legislation when the voting rule is unanimity (Alter, 1998b; Scharpf, 1988). Any ECJ decision based on Article 119 of the Treaty requires unanimous support to change the EC Treaty itself; thus, legislating over an unwanted ECJ decision based on Article 119 faces all the problems of the joint decision trap. Making changes to EC directives is theoretically easier than legislating over Treaty provisions, but considering how isolated Thatcher's and Major's governments were on issues of social policy, building support among other states to change EC directives in this area was, as a practical matter, impossible.

This does not mean that EC laws can never be changed. When the ECJ's *Barber* decision threatened the financial integrity of the British, Dutch, and German social security systems, member states were able to coordinate a response. The Barber Protocol limited the retrospective effects of the ECJ's *Barber* judgment regarding the equalization of pensions. But it is important to note that member states were still required to change their policies and equalize pensions lest they be liable for financial claims in the future. Member states have also legislatively reversed the ECJ's *Kalanke v. Frei Hansestadt Bremen* (1995) ruling, where the ECJ made a decision against women-owned firms, finding that national affirmative action policies were inconsistent with the wording of an EC directive. In the Treaty of Amsterdam member states redrafted EC law to make it more favorable to government policies, trying to promote women- and minority-owned firms.

24. The British demanded the scheduling of an intergovernmental conference to discuss the roles and powers of EC institutions, including the Court's powers. British Euroskeptics forced the British government to put into the negotiating process of the 1996 intergovernmental conference a series of proposals to make the ECJ more politically accountable and to limit the cost of ECJ decisions. See Alter (1998b, pp. 140-142) for an explanation of what happened.

The EOC and union victories have been difficult to reverse at the EC level, and the policy changes won through the litigation process have been enduring. EC legislation came to be seen as the best ally of unions and women's groups during a long period of Conservative Party rule. With the Labour government signing on the social protocol, an additional source of leverage for British labor and social groups is being created, a leverage that cannot be eliminated by a change in the ruling party.

Though the equality victories remain entrenched, the Conservative government has arguably had some success in influencing the ECJ's subsequent equality jurisprudence. The *Kalanke* decision was taken as a sign that the ECJ was retreating from its equality activism. The ECJ has also disappointed homosexual groups in their efforts to use EC equality law to stop discrimination against homosexuals. These decisions, however, should be seen in the larger context of the ECJ's equality jurisprudence. The ECJ has already gone further than most national courts and national governments in expanding equality protections under law, and there is no sign that the ECJ is retreating from its basic equality jurisprudence. With affirmative action policies now explicitly authorized under European law, such policies are better protected now than they were before *Kalanke*. The ECJ may well be moderating its handling of explosive social policy issues, but it is still one of the best aids for domestic policy actors challenging national policy.

WHEN WILL DOMESTIC ACTORS EMBRACE EC LAW TO SHIFT THE DOMESTIC BALANCE OF POWER?

The British case, because of its success, is well known. Yet despite the clear opportunities, and despite the European Commission's efforts to publicize the EOC's success, to share best strategies across women's groups and labor unions, and to build policy networks (Harlow & Rawlings, 1992, pp. 283-284; Mazey, 1995), outside of the United Kingdom there has been a dearth of individuals and national actors turning to European law to promote the equality rights of women. Beyond the issue of equal pay, the apathy of organized groups in drawing on EC law is equal, if not greater. We have discussed why the EOC turned to a litigation strategy. The question remains: Why have actors in similar situations in other countries not done so?

This section investigates a number of factors that influence the steps of the legal process identified as important in the British case. We focus on equality policy, but the hypotheses are of a general nature and could explain cross-national variation in the use of EC law litigation strategies in areas outside of gender equality. We rely in this analysis on three excellent studies in

which researchers investigated gender equality policy and the use of sex equality litigation procedures in EU member states (Blom, Fitzpatrick, Gregory, Knecht, & O'Hare, 1995; Fitzpatrick, Gregory, & Szyszczak, 1993; Vogel-Polsky, 1985).²⁵ The cross-national studies find that there were actors that could effectively use a litigation strategy to influence national policy, but most of these actors chose not to use litigation strategies. The studies cannot actually test any of the hypotheses we develop, but they do provide suggestive evidence that allows us to examine the hypotheses in a preliminary way. The evidence is provided in the Notes section and the text that follows.

**STEP 1: WHEN WILL THE EC LEGAL SYSTEM
PROVIDE A USEFUL TOOL FOR DOMESTIC ACTORS?**

For an EC law litigation strategy to be used, there must be a legal basis in European law for a litigant to draw on, and this law must create direct effects. Where there is a relevant EC law, it should provide the same legal opportunities for litigants across member states. But whether EC law and the ECJ are seen as a useful ally may depend on the nature of the national legislation protecting gender equality in the workplace. A potential source of cross-national variation could come from variation in the nature of national equality legislation.

Hypothesis 1: In countries with strong domestic legislation protecting workers against gender discrimination, the need to draw on EC legal remedies should decrease.

All EC member states, in fact, have enshrined a fundamental right to equal pay for equal work into national law and have legislation that allows this right to be asserted in national courts (Fitzpatrick et al., 1993, chap. 5). Furthermore, according to Vogel-Polsky (1985), by 1985 a cross-national convergence in legislation and objectives regarding gender equality was apparent (p. 107). Indeed, none of the analysts find variations in national laws contributing significantly to the variation in the use of equality litigation strategies.²⁶ Blom

25. The latter two studies were completed before the latest enlargement of the EU; thus, they do not include Austria, Sweden, or Finland.

26. The one possible exception is Germany, because the German constitution arguably includes a guarantee of broad rights to protect individuals from discrimination. But German courts are not interpreting national protections as widely as some women's groups and individuals facing discrimination might hope. Fitzpatrick, Gregory, and Szyszczak (1993) find that "advocates in Germany may be trying to exploit the possibilities of Community law in order to circumvent more restrictive interpretations on German constitutional law emanating from the Federal Labor Court and the Federal Constitutional Court" (p. 91). The German case implies that regardless of what the national legislation says, as long as national courts interpret national laws

et al. (1995) point out, however, that national legislation often does not address the larger social, economic, and political factors that are the main cause of gender discrimination in the workplace. With governments striving to increase labor flexibility through the use of part-time workers and temporary contracts, the number of workers (especially female workers) not protected by national legislation is growing (p. 11). In addition, a number of other national practices—such as relying on word-of-mouth recruitment, concentrating training resources on workers in higher grades, and requiring geographical relocation or work during off-hours—undermine the ability of women to participate in the workforce on the same terms as men (pp. 6-11). Blom et al. see opportunities for groups to use EC law to address these and other issues in virtually all member states. Although we cannot rule out a correlation between the extent of national legislative protections and the number of national cases, the fact that there is favorable national legislation does not mean that EC litigation strategies are not useful. As Vogel-Polsky (1985) argued, “It is illusory to think that the law can overcome discrimination. When legal discrimination has been formally abolished social discrimination remains and adopts new and sometimes much more subtle forms. The law must therefore . . . contain the principles of positive action . . . [which] requires a combination of promoters, forces, restraints and inducements” (p. 108).

Another way that national legislation may matter is that it will determine who has legal standing to raise cases, and thus shape how discrimination cases are pursued.

Hypothesis 2: The more limited the legal standing of private litigants or groups to draw on national law, the less able or likely individuals or groups are to mount a litigation strategy.

Many of the member states examined in the cross-national studies had restrictions in legal standing that make group litigation strategies harder to pursue. Indeed, the studies' examples provide anecdotal support for Hypothesis 2, at least with respect to group litigation.²⁷ Group locus standi limitations could be changed, given sufficient pressure. Alternatively, they could be sur-

narrowly, and as long as there is a possibility that the ECJ may give or EC law may allow a more favorable reading, there is an attraction to a European strategy.

27. In Luxembourg, groups are not allowed litigation rights (Fitzpatrick et al., 1993, p. 96), although unions have been given access to the judicial process in equal pay cases (p. 24). In France, common interests groups are only allowed to litigate autonomously in criminal courts (p. 91). In Denmark, gender equality clauses that are part of collective agreements can only be pursued by union officials. If the union will not pick up the issue, the individual is often out of luck—individuals not covered by collective agreements, however, can use labor courts (pp. 19-20). In Ireland, cases must first go to an equality officer and only after that to a labor court. The Employment Equality Agency can also investigate and fund cases, but it must be active in the case from

mounted through the simple expedient of having agency lawyers act in a private capacity. Thus, the existence of limited locus standi rights for groups might in itself be a manifestation of the lack of group mobilization around equality litigation strategies.

National procedural factors might also limit the number of equality cases.

Hypothesis 3: Procedural rules concerning how complaints are filed, legal aid availability, attorney fee shifting, statute of limitations, award caps, and the burden of proof can also affect the willingness of private litigants to pursue their legal rights.

These factors seem especially relevant for private litigants in the sensitive area of discrimination policy. The emotional and financial costs to litigants, especially those bringing a case against their current employer, can be very high, and if procedural rules reduce the chance of victory, few will wish to incur those costs.²⁸ Procedural barriers might be more significant for private litigants than for group actors, because groups have the ability to find optimal test cases and the resources to develop those cases. Indeed, in Britain there was a cap on awards, restrictive time limits in which the cases had to be raised, provisions that shifted the costs of litigation to the losing party, and a lack of legal aid funding until a case reached the higher courts. The dedication and resources of the EOC made these barriers surmountable. This would seemingly also be possible in other member states.

Though there is significant variation in national equality legislation, all of it must comply with EC law. All countries have problems with gender discrimination in the workplace, and the cross-national reports imply that in all countries groups could benefit from drawing more on EC law litigation.

STEP 2: WHEN WILL DOMESTIC GROUPS MOBILIZE AROUND A LITIGATION STRATEGY?

Blom et al. (1995) identify many groups that could usefully employ EC law litigation strategies to promote gender equality, including unions, women's groups, and equality agencies. Most of these groups are not

the beginning. It cannot pick up cases raised by private litigants, even if it has been assisting in these cases (pp. 22-23). Because of the Employment Equality Agency's restricted ability to participate in equality cases, "The body most likely to promote a reference to the ECJ is prevented from doing so and is reliant upon outside lawyers to take over a case which it has been overseeing" (p. 94). It is hard to go beyond anecdotal evidence because there is no good cross-national data on the number equality cases. Because many national courts interpret EC law without referring the case to the ECJ, the number of references in equality issues cannot serve as proxy data.

28. The Fitzpatrick et al. (1993) report notes that in Portugal, the heavy burden of proof limits the ability of private litigants to bring cases (p. 99).

following the EOC's strategy, however. When can we expect litigants with an interest at stake and with legal standing to raise a case to turn to a legal strategy to promote their cause? Or, to use Harlow and Rawling's (1992) term, What determines when there will be a "good fit" between the goals of a group and the benefits of a litigation strategy?

A litigation strategy is generally a last-choice strategy to affect policy change, because it is hard to know if a court will decide in your group's favor or actually set back the group's cause. Also, litigation strategies are designed to remove objectionable legislation. They are not very helpful in constructing legislation that promotes a group's interests. In the area of equality policy, Blom et al. (1995) find that "litigation is generally avoided, and considered an effective means only as a threat to unwilling employers: use is only made of it when all other alternatives have failed to produce acceptable results" (p. 18). Because of the risks involved in litigation strategies, they are most attractive to actors with few other options to influence national policy.

Hypothesis 4: Groups with significant influence over the policy-making process are less likely to turn to a litigation strategy, because a litigation strategy is usually a last-choice tool. The greater the political strength of a group, and the more access the group has to the policy-making process, the less likely a group is to mount a litigation campaign.

The cross-national reports lend some support to this hypothesis. It was certainly true in the British case that the EOC turned to a litigation strategy because its other efforts had failed to influence public policy. The cross-national reports note that equality was part of the agenda of many groups, but they were adopting other means to promote equality besides litigation. Unions promoted equality in collective bargaining arrangements and supported their members in arbitration when the collective agreement was breached. Work councils were also a venue in Germany to pursue equality issues. Blom et al. (1995) also observe that

the national authorities and their agencies often work on the presumption that a sufficient legal framework for sex equality at work has been established so that no further action in this field is necessary. This does not always mean that they ignore women's interests, but when campaigns exist they often focus on stimulating positive action programmes, and on issues concerned with family responsibilities and tend to ignore existing direct and indirect discrimination within the present labour market structure. (p. 15)

In addition, in many cases, groups that did challenge policy would in effect be challenging the rules and agreements they themselves helped fashion. Blom et al. (1995) note that unions are concerned that "litigation could . . . antago-

nize employers—who will have to be met again in future rounds of negotiations—and might furthermore be considered particularly odd in cases where a union challenges a collective agreement to which it is a party (a concern of Dutch trade unions)” (pp. 14, 18). This evidence is hardly conclusive, but it does suggest support for Hypothesis 4.

The ability to influence the policy-making process clearly is not the full story of why there is cross-national variation in the use of litigation strategies. Though not articulating this argument, Blom et al.’s (1995) observations about the use of litigation strategies imply a sort of Olsonian logic (M. Olson, 1965).

Hypothesis 5: The more narrow the interest group’s mandate and constituency, the more likely it will be to turn to a litigation strategy. The more broad and encompassing the interest group’s mandate and constituency, the less likely it will be to turn to litigation strategy.

The reports provide significant evidence to support this argument. According to Blom et al. (1995), groups that were broader and more encompassing saw many disadvantages to litigation, and put other goals above ensuring equality. Blom et al. found that unions prioritize other objectives over equality, in part because they fear equal treatment objectives “can only be achieved by the rest of the workforce forgoing a pay increase” (pp. 14-18). They also found that when the task of equality was assigned to offices that oversee all labor issues (thus broader labor offices), equality remained a low priority and litigation was seldom used (p. 15). And surprisingly, women’s groups were not active in promoting gender equality. Blom et al. assert that women’s groups assumed that unions handled women’s workplace issues and chose to focus instead on issues affecting a broader base of women, such as family interests (pp. 17-18). Vogel-Polsky (1985) attributes the lack of women’s group activism to the group’s origins (the civil rights movements that led them to focus on the right to vote, civil rights, and the right to inheritance) and structure (their largely consultative status and their links to political parties) (pp. 195-197).

Litigation seemed to be most attractive to more narrowly focused groups. The EOC was a single-issue agency, focused exclusively on promoting gender equality in the workplace. And whereas unions have largely avoided litigation, the unions that embraced litigation to promote gender equality were those with narrow constituencies, such as the Danish clerical worker’s union that has high female membership and the entirely female Danish Women’s Workers Union (KAD) (Fitzpatrick et al., 1993, pp. 89-90). These examples

support the hypotheses that the more narrowly focused the group, the more likely it is to adopt a litigation strategy. In addition, the recommendations put forth by Blom et al. (1995) for increasing the use of EC equality law reflect their implicit Olsonian understanding of the logic of collective action. Blom et al. suggest that the creation of more equality agencies would increase the likelihood that litigation strategies would be used.²⁹ They also look to women-dominated unions as the best hope for unions adopting gender equality as an objective and litigation as a strategy to achieve that objective. But they find hostility to this suggestion in many countries. The broader, more encompassing groups do not want to create rival groups, and do not want to give up their influence over equality issues even if they are not exercising all of their options to promote gender equality (Blom et al., 1995).

If it is true that narrowly focused groups with less access to policy making are more likely to adopt litigation strategies, then cross-national variation in the use of litigation strategies could be explained by how interests are organized within European societies. Some countries have the type of narrowly focused interest groups that are likely to adopt litigation strategies, and other countries only have larger encompassing groups representing women and dealing with the issue of equity in the workplace. Increasingly, scholars are looking toward these types of factors to explain cross-national variation in the use of litigation strategies (Caporaso & Jupille, *in press*; Conant, 1998).

STEP 3: WHEN WILL NATIONAL COURTS SUPPORT LITIGANTS' EFFORTS?

In theory, groups in all member states should have access to the EC legal system through national courts. But in practice, there is great variation in the willingness of national courts to rely on EC legal arguments or to make references to the ECJ. The cross-national studies did find "a reluctance amongst the judiciary, and other adjudicators, to give effect to Community law principles" (Blom et al., 1995, p. 35), and saw this reluctance as influencing plaintiff calculations regarding whether to pursue litigation—especially where there was a significant risk for the litigant pursuing the case, as in discrimination cases. Indeed, in the British case there was evidence that negative EAT decisions had set in motion a vicious circle of equality cases where low rates of success discouraged would-be applicants from bringing cases, leading to a

29. Blom, Fitzpatrick, Gregory, Knegt, and O'Hare (1995) argued that "where women-only trade unions have taken up sex equality issues, the results are frequently dramatic, providing a tantalizing glimpse of what could be achieved if there were to be a major policy shift within the trade union movement at both the national and local level" (p. 7).

lack of expertise in the courts and more unfavorable judgments (Pannick, 1985; Rubenstein, 1991).³⁰

Scholars have identified many factors influencing national judicial openness to EC law, including variations in how EU law affects the influence, independence, and autonomy of national courts vis-à-vis each other (influenced by the organization of the national judiciary); judicial identity and legal culture (which influence whether judges see themselves as authorized to make a referral to the ECJ); the appointment process (which determines the interests of judges); and rules of access to courts (which influence the types of cases heard) (Alter, 1998a; Alter, in press; Golub, 1996; Mattli & Slaughter, 1998). But it is hard to assess the link between these factors and cross-national variation willingness of national judges to embrace EC legal arguments or ECJ jurisprudence. Reference rates to the ECJ are not a good measure, because so many EC law cases are decided without a reference to the ECJ (and not always in accordance with ECJ jurisprudence), and many cases referred to the ECJ do not involve challenges to national policy.³¹

What is clear is that no national legal system, no judicial identity, no appointment criteria, and no legal culture is so monolithic or complete as to preclude the existence of sympathetic judges. All it takes is one judge located anywhere in the national legal system to create a favorable EC legal precedent and create pressure within the national system for doctrinal change. Indeed, the change in the United Kingdom came from a very small number of first-instance tribunals. The key is to find a sympathetic judge. Forum shopping can help, but groups may be better positioned than private litigants to practice forum shopping, because groups can seek out test cases that fall under the jurisdiction of more sympathetic judges. Private litigants may have far less options, and basically have to take who they get. From this observation, one could posit the following hypothesis:

Hypothesis 6: Groups are more likely than private litigants to find sympathetic judges because of their ability to forum shop. Where groups are actively and carefully pursuing litigation strategies, national judicial support is more likely to be found.

30. According to the Annual Report of the Equal Opportunities Commission in 1982, whereas in 1976 1,742 equal pay claims and 243 sex discrimination claims were brought, by 1982 that number had dropped to 39 equal pay claims and 150 sex discrimination claims. Success rates also declined from 1976 when 213 equal pay claims and 24 sex discrimination claims were upheld, to only 2 equal pay claims and 16 sex discrimination claims being upheld in 1982. In her study of the operation of the tribunal system in sex discrimination and equal pay cases, Leonard (1987) found that of the 6,090 claims brought during the first 8 years of the legislation, most had been brought in the first 2 years, with a success rate of less than 11%.

31. Stone and Brunell (1998) attempt to conduct this type of statistical analysis.

Given the paucity of known EC law litigation strategies, and the lack of information about the origin of most EC law cases, we cannot assess this hypothesis.

STEP 4: WHEN WILL GROUPS FOLLOW THROUGH AND CREATE POLITICAL COSTS?

In the British case, groups triggered a political response by finding numerous similar cases that could be filed. We call this strategy "follow-through," and argue that follow-through was key in showing the British government that nonaction would create significant costs. There is evidence of similar strategies being used in other cases as well, though mostly in the United Kingdom.³² When are we most likely to get follow-through?

Individuals are usually most concerned with the outcome of their particular case, and thus are less likely to follow through on legal victories. If an interest group goes to the trouble of putting together a test case strategy, it is likely that it will follow through and use the case in bargaining. Indeed, as S. M. Olson (1981) argued, groups usually employ litigation as part of a multipronged strategy.

Hypothesis 7: Individuals are less likely to follow through on legal victories, because a legal victory will likely be sufficient to achieve the individual's objective. Because groups are more likely to employ litigation strategies as part of a multipronged strategy, legal decisions in cases where a group is involved are more likely to generate follow-through.

Another possibility is that groups can pick up on a legal decision in a case raised by a private litigant, or by a group in another country. There is not enough evidence in the cross-national studies to evaluate this issue, but Conant's (1998) work suggests the following (Mancur) Olsonian hypothesis:

Hypothesis 8: Groups are more likely to mobilize around legal decisions where the benefits of policy change are narrowly focused and the costs of policy change widely distributed.

The main factor that keeps EC law from shifting the domestic balance of power more often is that groups tend not to mobilize around a litigation strat-

32. Environmental, trade, and consumer groups have disseminated forms that individuals can fill out as a first step in a legal case. Groups have published pamphlets advertising rights of citizens under EC law, including a pro forma complaint form; have created videos distributed to local environmental groups that explain how to use the EC legal process to enforce EC law; and have solicited complaints through mass mailings (the complaints are then simultaneously submitted to the government and the Commission with demands for legislative change) (Harlow & Rawlings, 1992, p. 276).

egy. Thus, neither forum shopping nor follow-through occurs. Because there are relatively few examples of groups trying a litigation strategy, there is little empirical evidence to evaluate the factors shaping the last two steps of a successful litigation strategy. What we can say is that the problems of finding sympathetic judges and following through on cases would seem to be the most easily surmountable by interest groups committed to a litigation strategy.

CONCLUSION: EC LAW AS A TOOL TO SHIFT THE DOMESTIC BALANCE OF POWER

The EC legal system provides a tool that domestic actors can use to circumvent national policy barriers and to create new sources of leverage to influence national policy. Neo-functionalist theory has long argued that private interests pursuing their own agendas by turning to the EU realm contribute (perhaps unintentionally) to European integration (Burley & Mattli, 1993; Mattli & Slaughter, 1998; Stone Sweet & Brunell, 1998). Our finding that the British case has been the exception in terms of group strategies to promote gender equality raises a question about the often implicit assumption in neo-functionalist analysis that where there is a potential benefit, it will be pursued. There are many factors, beyond cost and ideology, that lead groups not to use litigation, even when such a strategy might be beneficial. Though we could not definitively support or refute any of the hypotheses we proposed, there was suggestive evidence that would lead to a preliminary vetting of the different hypotheses. There was little evidence to support Hypothesis 1 that the greater the protection of individual or group rights under national law, the less need there is to turn to EC law to promote litigant interests. And the procedural barriers identified in Hypothesis 3 seemed to be more of a problem for private litigants than for groups, and could not account for the lack of interest group mobilization. There was support for three other hypotheses we examined. Rules on locus standi (Hypothesis 2) did seem to hinder some group actors from pursuing litigation strategies, but it was possible that the lack of favorable locus standi rules was itself an artifact of low interest group mobilization around litigation strategies. The greater the political strength of a group, and the more access the group had to the policy-making process, the more reluctant the group seemed to mount a litigation campaign (Hypothesis 4). And the more narrow the interest group's mandate and constituency, the more likely it seemed to turn to a litigation strategy. However, the more broad and encompassing the interest group's mandate and constituency, the less likely it was to turn to litigation strategy (Hypothesis 5). We did

not have enough evidence to investigate Hypotheses 6, 7, or 8 even in a preliminary way.

Our study also raises a question about the recent work by Stone and Brunell that shows a correlation between increased transnational activity and increased Article 177 references to the ECJ (Stone & Brunell, 1998; Stone Sweet & Brunell, 1998). To make an obvious point, the numerous cases involving equality policy have nothing to do with transnational activity. Equality policy might well be an exception to the rule, but Schepel (1998) also finds a number of famous EC law cases in which the objective of the plaintiff was to challenge national policy, and the link to transnational activity was tenuous at best. Indeed, it is not clear that even most of the cases referred by national courts to the ECJ involve transnational activity. Many are challenges to EC rules and questions about EC policies. And many are attempts to shift the domestic balance of power and achieve domestic objectives. Correlation does not prove causation. Even if litigants highlight a connection to transnational activities (to the four freedoms) to strengthen their legal case, this does not mean that transnational activity or a desire to capture the benefits of increased trade is the dominant factor mobilizing them to raise EC legal cases.

Finally, most of the EC law literature talks about repeat players, putting individual, corporate, or group repeat players in the same category. Our study implies that one should not consider private litigant incentives in the same way as group litigant incentives. The calculation of groups to use litigation strategies differs from the calculations of individuals to use litigation strategies, and the ability of groups to use a litigation victory to change national policy also differs. One way to read our comparative analysis is that ironically, those actors who can most effectively use EC law litigation to promote national policy change (mainly groups) often have the least incentive to try an EC law litigation strategy. And those with the least incentive to follow through with their victories to effect policy change (private litigants) have the greatest incentive to adopt litigation strategies. This is not to say that litigation raised by private litigants is insignificant. If the private litigant is a wealthy or well-connected firm, or part of an industrial association that may join their cause, it may be possible for private litigants to use EC law to influence national policy. Well-targeted litigation might also lead to the elimination of a national law on the books. And private litigants may reveal to groups the potential of EC law, and create legal precedent that is later picked up by groups to promote changes in national policy. But the issue of follow-through is crucial if legal decisions are to lead to policy change, and one cannot assume that there will be follow-through on legal victories, especially for cases raised by individuals.

EC law litigation strategies are one way that European integration is changing domestic politics. But the argument we make—that domestic groups can pull in EC law in a strategy to shift the domestic balance of power—raises almost as many questions as it answers. It is time to move beyond vague statements that actors following their interests further integration. We need to develop understandings of how actors determine their interests to understand when actors will see an interest in behaving in ways that intentionally or unintentionally promote integration. We also need to open up the possibility that actors following their interests might contribute to disintegration rather than integration (Shaw, 1994, Alter, in press). We have suggested a number of factors that may influence the decision-making process of national actors, almost all of which are domestic political factors. Our research shows that groups are often motivated by domestic political incentives more than they are by transnational incentives. The hypotheses we developed represent a first step. We leave it to later studies to investigate whether the factors we identify contribute to changes in interest group mobilization, in national policy, and in shifts in the domestic balance of power.

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