Leveling and Spotlighting:

How International Courts Refract Private Litigation to Build Legitimacy

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Abstract

Private actors are increasingly turning to international courts (ICs). We argue that ICs can refract private litigation to build legitimacy and mitigate intergovernmental backlash. By leveling the odds for individuals and spotlighting their claims over those of more resourceful litigants, ICs cultivate civil society support and legitimate judicial policymaking in intergovernmental polities where individuals are disempowered. We evaluate this argument by scrutinizing the first IC with private access: the European Court of Justice (ECJ). We trace how ECJ judges privilege individuals in their advocacy and assess if they match words with deeds. Leveraging an original dataset, we find that the ECJ "levels," supporting individual claims over businesses boasting larger and more experienced legal teams. The ECJ also "spotlights" its support for individuals through press releases that get amplified in law reviews. Our findings challenge the view that ICs build legitimacy by stealth and the "haves" come out ahead in litigation.

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Introduction

Private litigants' expanding access to international courts (ICs) is amongst the most profound transformations sparked by the "judicialization of politics" (Stone Sweet and Brunell, 2013; Hirschl, 2008; Alter, Hafner-Burton, and Helfer, 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 (Figure 1). While some of these ICs remain dormant, others have grown to adjudicate hundreds of yearly cases.

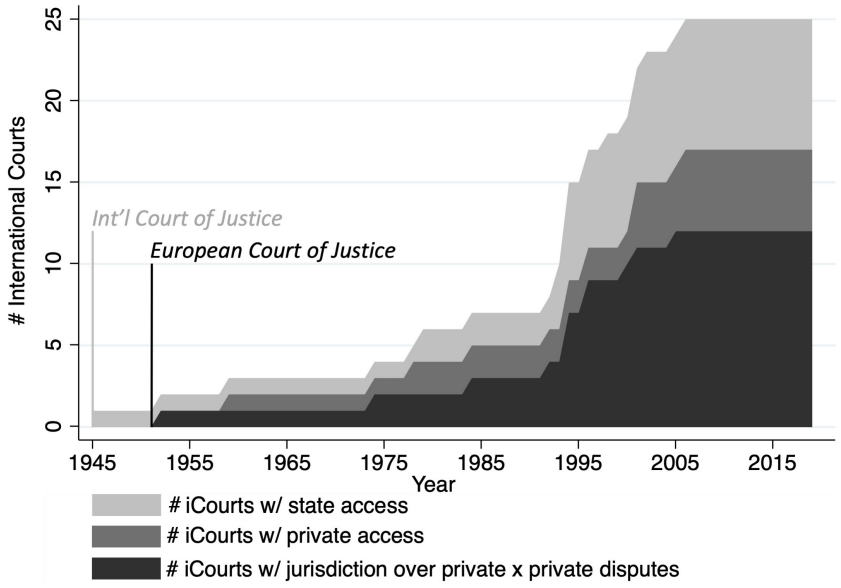

Figure 1: Proliferation of international courts with private access, 1945-2019

But ICs not only expand opportunities for private actors to pursue their claims (Cichowski, 2007; Vanhala, 2012; Alter, 2006; Alter, 2014; Helfer and Voeten, 2014); private litigation also creates opportunities that interna-

tional judges can seize. In this paper, we show how private litigation helps international judges build sociological legitimacy: the capacity to shift the perceptions and actions of social actors in ways that "allow courts to justify their practices and power" (Alter et al. 2016, 6). Accruing sociological legitimacy is vital because ICs lack independent enforcement powers and are dis-embedded from the national constitutions that traditionally legitimate judicial review (Føllesdal, 2020). ICs are thus especially vulnerable to intergovernmental backlash, including state efforts to starve them of cases and curb their jurisdiction (Alter, Gathii, and Helfer, 2016; Madsen, Cebulak, and Weibusch, 2018; Voeten, 2020; Pavone and Stiansen, 2021; Thatcher, Sweet, and Rangoni, 2022). How can ICs wield private litigation to mitigate these threats to their authority and demonstrate their relevance as policymakers?

We argue that ICs can combine two legitimacy-building strategies by harnessing and refracting private litigation through what we call *leveling* and *spotlighting*. ICs "level" by favoring the legal claims raised by private actors who are disempowered at the international level – usually individuals. Leveling can be litigant-driven, as when ICs decide individual cases by counterbalancing the capabilities of more resourceful litigants (Haynie, 1994; Miller, Keith, and Holmes, 2015). But leveling is particularly legitimacy-enhancing when it is claim-driven, as when ICs actively favor novel entitlements or rights that protect individuals from corporate or state interference. Opening the "legal opportunity structure" in individuals' favor (Vanhala, 2010; Vanhala, 2012; Vanhala, 2018) enables ICs to legitimate their role in intergovernmental polities wherein individuals lack avenues to advance their interests and shape policy.

To broadcast this message, ICs then "spotlight" their support for individual rights claims to domestic compliance constituencies. Selectively publicizing claims enables ICs to focus the attention of domestic lawyers and judges who can then amplify their rulings, attract the attention of private actors, and pursue follow-up litigation (Weiler, 1994; Vauchez, 2015; Pavone, 2022).

By wielding well-known communication strategies – like procedural tweaks and press releases (Staton, 2006; Krehbiel, 2016; Dederke, 2022) – in rulings that advance individual rights, ICs showcase their relevance as allies to civil society, interlinking individual-rights promotion with their legitimacy-building efforts as international judges.

To assess our theory, we scrutinize the first IC to provide access to private parties, a court that has grown into a uniquely influential 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; Börzel, 2006; Cichowski, 2007; Conant et al., 2018), and whether it has proceeded by stealth or public outreach (Burley and Mattli, 1993; Dederke, 2022; Blauberger and Martinsen, 2020). Triangulating between the writings of ECJ judges and a novel dataset of nearly 7,000 cases referred to the ECJ by national courts, we find compelling evidence that the ECJ both "levels" and "spotlights." The ECJ engages in claim-driven leveling, disproportionately granting rights claims raised by individuals over economic claims raised by businesses, even though businesses boast larger and more experienced legal teams. The ECJ also spotlights, allocating larger chambers and targeting press releases when it supports individual rights, which attracts commentaries in law reviews that amplify these rulings for practitioners and clients. In short, the ECJ neither lies 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 assess the relationship between judicial decision-making and party capability before ICs. We make a number of revisionist claims. First, we challenge the conventional wisdom from domestic judicial politics and party capability research that individuals disproportionately lose out in private litigation while the corporate "haves" come out ahead (Galanter, 1974; McGuire, 1995; Songer, Sheehan, and Haire, 1999; Haire, Lindquist, and Hartley, 1999; Szmer, Johnson, and Sarver, 2007; Nel-

son and Epstein, 2022). By broadening this comparative agenda to include ICs, we build on Haynie (1994) to theorize when judges level the odds in individuals' favor, demonstrating that party capability is not destiny before ICs. Second, we challenge the view that ICs build their authority by stealth, strategically "de-politicizing" their actions behind law's "mask and shield" (Burley and Mattli, 1993; Louis and Maertens, 2021). We claim instead that ICs can successfully carve a role for themselves in intergovernmental polities by broadcasting their policy agenda and soliciting the support of civil society. Finally, we develop a conceptualization and measurement strategy that parses judicial leveling into litigant- and claim-driven variants, explaining how this distinction helps researchers address adverse selection that could bias their analyses.

In the rest of this article, we first elaborate a sequential theory of judicial leveling and spotlighting, explaining why some new-style ICs are incentivized to adopt these legitimacy-building strategies. We next justify our case selection – the ECJ – and present qualitative evidence from ECJ judges' writings denoting their intention to champion individual rights claims to legitimate an expansive rule-making agenda. We then assess whether ECJ judges match words with deeds. Our econometric strategy analyzes unprecedented data on private litigation and ECJ decisions, uncovering supportive quantitative evidence. We conclude by placing scope conditions on our findings and highlighting how they advance comparative research on judicial politics and legal mobilization.

International Courts and Private Litigants: A Revisionist Theory

The expansion of private access to international justice has clearly contributed to the judicialization of politics (Alter, Hafner-Burton, and Helfer, 2019). Yet this process is neither uniform nor automatic. While some functionalist studies predicted that private litigation would spark a virtuous cy-

cle of rights-claiming, judicial policy-making, and institutional development (Stone Sweet and Brunell, 1998; Fligstein and Stone Sweet, 2002), many new-style ICs are seldom solicited (Alter, 2014). In some cases, private actors are not aware of ICs and how they can benefit them; in others, recalcitrant governments deliberately seek to starve ICs of disputes (Madsen, Cebulak, and Weibusch, 2018; Pavone and Stiansen, 2021). Even when they are solicited, a number of new-style ICs have narrowly interpreted their mandates and limited their appeal to businesses and government elites (Alter and Helfer, 2017). This is hardly surprising, since 13 of the 17 new-style ICs established since WWII were designed as regional economic courts without clear relevance for individuals and their rights.

Opening an IC's doors to private litigants does not automatically attract rights-claims and beget policy-making influence. Instead, we need to understand when private litigation opens opportunities for judicial entrepreneurs, and how judges convert these opportunities to a policy agenda that builds legitimacy.

Our premise is that governments are at best fair-weather friends for ICs. To be sure, noncompliance, jurisdiction-stripping and virulent criticism can afflict all courts. However, ICs are particularly vulnerable to such threats (Madsen, Cebulak, and Weibusch, 2018; Stiansen and Voeten, 2020; Pavone and Stiansen, 2021; Thatcher, Sweet, and Rangoni, 2022). Lacking centralized enforcement and the imprimatur of legitimacy that comes with being embedded in a state constitution, intergovernmental backlash and noncompliance campaigns can cripple an IC (Carrubba, 2005; Pollack, 2021). To sustain judicial policy-making a perilous environment, some scholars posit that ICs depoliticize their agenda by concealing it behind the "mask and shield" of the law (Burley and Mattli, 1993; Louis and Maertens, 2021). Yet in a climate of cross-national backlash to globalization and judicialization, no IC can escape political contestation for long (Blauberger and Martinsen, 2020; Walter, 2021; Voeten, 2022). Instead, recent research illuminates that some new-style ICs adopt public relations campaigns to cultivate social support

(Caserta and Cebulak, 2021; Dederke, 2022). These efforts target compliance constituencies: civil society actors who serve as domestic transmission belts for ICs by raising awareness amongst private litigants and supporting their authority (Voeten, 2013; Alter and Helfer, 2013; Pavone, 2019). One strategy to cultivate these constituencies is to broadcast support for claims that only private litigants can raise.

Individuals and their claims are especially useful vehicles for judges seeking to prove their relevance and legitimate an active policy agenda. This is precisely because individuals are *dis*advantaged in international litigation. Individuals' limited finances and capacity to hire effective lawyers – their "party capability" – means they tend to be 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, 2022). These inequities are magnified before ICs, since mobilizing international law requires hiring expensive and specialized counsel (Kritzer, 1998; Pavone, 2022), and since individuals cannot turn to democratic avenues at the supranational level to exercise their voice. By counterbalancing individuals' dis-empowerment and favoring their rights claims, new-style ICs can justify judicial policy-making as empowering the "have nots." We refer to this strategy as "leveling," whereby judges wield their agency to level the odds for weaker private litigants.

While the concept of leveling is not new (Haynie, 1994), existing research attributes it to lawyers instead of judges (Miller, Keith, and Holmes, 2015; Miller and Curry, 2022) and is unclear about whether it is driven by litigants' identities or claims (Epp, 1999). Distinguishing *litigant-driven leveling* and *claim-driven leveling* matters because they imply different legitimation strategies, audiences, and effects. Litigant-driven leveling is retrospective, case-specific, and concealable behind law's "mask and shield" (Burley and Mattli, 1993). By tipping their dispositions in individuals' favor irrespective of the quality of their lawyers or claims, judges counterbalance their disadvantages. This strategy has limited scope, however, because it does not

create new legal entitlements or signal an ambitious policy agenda to audiences beyond the courtroom. Claim-driven leveling, on the other hand, is prospective, rule-creating, and public-facing. By issuing rulings that expand the stock of individual rights for entire classes of disadvantaged actors, judges create a more favorable "legal opportunity structure" (Vanhala, 2012; Vanhala, 2018) and signal a law-making agenda to a broader audience, inviting future litigation by the "have nots." Claim-driven leveling is thus a proactive strategy tying the court's legitimacy to its efforts to reshape the legal regime of which it is part.[1] While conceptually distinct, in practice claim-driven leveling can beget litigant-driven leveling, as when judges favor the rights claims that are disproportionately raised by individuals.

Both forms of leveling are especially useful to new-style ICs wishing to legitimate a law-making agenda[2] while embedded in intergovernmental economic regimes. While these ICs may not be more rights-conscious or inherently committed to social justice than other courts, leveling bestows a powerful *raison d'etre* for judges. First, claim-driven leveling enables ICs designed as economic courts to demonstrate their relevance as rights protectors. Compared to human rights courts tasked with promoting individual rights, the legal opportunity structure in intergovernmental economic regimes usually reflects the interests of states and businesses over individuals. By forging new individual rights and entitlements, ICs can cast themselves as bolstering the long-term interests of individuals and reorienting the trajectory of economic integration. Second, litigant-driven leveling is especially useful to ICs compared to domestic courts. In contrast to constitutional democracies with robust means for citizen representation, the "political opportunity structure" (Kitschelt, 1986) of intergovernmental polities has fewer avenues for individ-

[1] Legal opportunity structures (LOS) are more open or closed to individuals depending on (i) access rules, (ii) the stock of justiciable rights, and (iii) judges' receptivity (De Fazio, 2012). Claim-driven leveling opens the LOS more than litigant-driven leveling because it expands (ii) and signals (iii), whereas litigant-driven leveling only signals (iii).

[2] As Alter and Helfer (2013) and Alter and Helfer (2017) have shown, there is variation in the degree of lawmaking ambition amongst ICs, with some sticking narrowly to their mandates and others pursuing ambitious agendas.

uals to exercise their voice (Dahl, 1999; Føllesdal and Hix, 2006). By leveling the odds for individuals and siding with "the little guy," ICs can claim to boost individuals' voice and participation at the international level (Burley and Mattli, 1993, p. 64).

Yet on its own, leveling is insufficient for building legitimacy. Individuals often lack awareness of ICs and their rulings, especially compared to established national courts (Voeten, 2013; Pavone, 2022; Caldeira and Gibson, 1995; Gibson and Caldeira, 1995). ICs must thus broadcast their efforts to level the odds to prospective allies in civil society: what we call "spotlighting." Spotlighting is most effective when it targets domestic intermediaries who can inform individuals of their rights and steer them to the fora wherein to claim them. IC judgments are thus amplified when they spark debates in law reviews that inform practitioners of new legal opportunities, enabling lawyers and judges to spearhead litigation to entrench new entitlements (Weiler, 1994; Alter, 2014). ICs can attract coverage in law reviews by manipulating procedural rules and issuing press releases to spotlight cases where they support individual rights claims (Dederke, 2022; Krehbiel, 2016; Staton, 2006). When national legal communities pick up and amplify these cases, ICs are well on their way towards building public support.

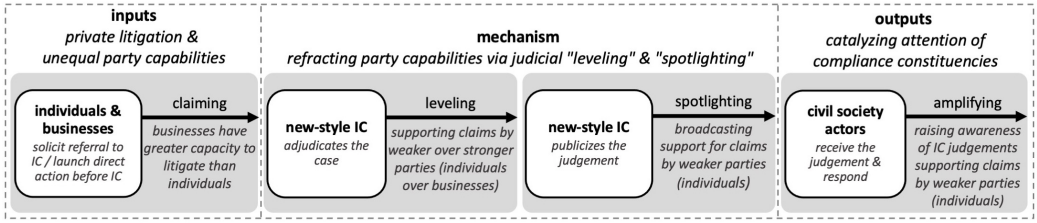

Figure 2: A theory of leveling and spotlighting by new-style ICs

Figure 2 summarizes our argument, wherein leveling and spotlighting serves as the causal mechanism (the "entities engaging in activities;" see Beach and Pedersen (2019, pp. 99–100)) converting unequal private claiming (the inputs) into attention in civil society (the outputs). Our theory thus draws

on Haynie (1994) – who theorized how national courts may favor the "have nots" to legitimize and stabilize the regimes in which they are embedded – to explain when the expectations of legal mobilization and judicial politics research should be flipped on their head. From courts in the US (McGuire, 1995; Songer, Sheehan, and Haire, 1999; Haire, Lindquist, and Hartley, 1999; Johnson, Wahlbeck, and Spriggs, 2006; Miller, Keith, and Holmes, 2015; Szmer, Songer, and Bowie, 2016; Nelson and Epstein, 2022), Canada (Szmer, Johnson, and Sarver, 2007), Denmark and Norway (Skiple, Bentsen, and McKenzie, 2021) and Taiwan (Chen, Huang, and Lin, 2015), studies consistently find that businesses hire larger, more experienced legal teams than individuals and are more likely to win judges' support. These inequalities are not unique to domestic litigation; we demonstrate that they also pervade international litigation. Yet in stressing how money and expertise 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 expertise and financial backing can still be better vehicles for building legitimacy, incentivizing judges to refract inequalities in party capability.

The European Court of Justice, Case Selection, and Hypotheses

To assess our argument, we scrutinize patterns of private litigation and judicial decision-making at the ECJ. In this section, we justify our case selection, contextualize the ECJ within the process of European integration and the universe of ICs, and derive five hypotheses capturing the implications of our theory.

There are two reasons why the ECJ is well-suited for testing our theory. First, the ECJ is an "influential" case for understanding ICs broadly (Seawright and Gerring, 2008; Gerring and Cojocaru, 2016, pp. 404–405). The Court is not only the first new-style IC to procure access to private

litigants; it has also developed into the most active and 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 (Kelemen and Pavone (2019)). The ECJ's success in cultivating private litigants triggered attempts to "transplant" the Court: 11 new-style ICs established within intergovernmental economic unions were designed as "operational copies" of the ECJ (Alter, 2014, p. 1935; Alter, 2012).

Second, the ECJ is also a "critical" case (Seawright and Gerring, 2008; Gerring and Cojocaru, 2016, pp. 404–405) for evaluating arguments that the Court has forged its authority by concealing its agenda (Burley and Mattli, 1993; Blauberger and Martinsen, 2020) and "respond[ing] to the economic interests of business enterprises and capital owners" (Conant, 2002; Börzel, 2006; Louis and Maertens, 2021; Scharpf, 2010, pp. 221–222). If the world's most active new-style IC has built its authority by stealth and by favoring corporate interests, it would call into question whether ICs can ever function as accountable rights-promoters.

That private litigation would fuel the ECJ's institutional development was not apparent upon the Court's establishment. The ECJ was expected to facilitate 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 than to the ECJ (Boerger and Rasmussen, 2023). "Without much discussion" they approved enabling national judges to refer cases to the ECJ - the "preliminary reference procedure" that lawyers (and future ECJ judges) in the *groupe de redaction* had inserted into the Treaty text (ibid., Chapter 4, 19). Governments thus opened the ECJ's doors to private litigants "without awareness of this innovation's importance" and how it could empower the world's first new-style IC (Pescatore, 1981, pp. 159, 173).

By enabling private litigation, the preliminary reference procedure supplied the Court with opportunities to dismantle national barriers to the free

movement of goods, persons, services and capital (Weiler, 1991; Burley and Mattli, 1993; Stone Sweet and Brunell, 1998; Alter and Vargas, 2000; Cichowski, 2007; Kelemen and Pavone, 2019). The ECJ cajoled private parties to support its agenda when in 1963 and 1964 it held that European law has primacy over conflicting national law and endows citizens and businesses with rights they can invoke before domestic courts (Rasmussen, 2014). Unsurprisingly, some governments and constitutional courts resisted this agenda. They targeted the ECJ's legitimacy, lambasting its "activism (...) beyond the limits of the acceptable," accusing it of jeopardizing individual rights protected in national constitutions, and charging it with buttressing an undemocratic supranational legal order (Davies, 2012; Rasmussen, 1986, p. 62). The French government even sought to pack the Court and strip its jurisdiction to hear most national court referrals (Fritz, 2015).

How the ECJ responded to these attacks has generated a debate that our theory can advance. Some scholars claim that the ECJ went into hiding. "Tucked away in the fairyland Duchy of Luxembourg" (Stein, 1981, p. 1), the Court concealed its activism in"'technical' legal garb" (Burley and Mattli, 1993, pp. 70–72). Others claim that the ECJ responded publicly, grafting individual rights protections onto the economic corpus of the Treaty of Rome (Weiler, 1986; Cichowski, 2007). Scholars also disagree about whether the ECJ's paeans to individual rights had a concrete impact. Some suggest the ECJ did come to favor individuals and their claims (Burley and Mattli, 1993; Cichowski, 2004; Cichowski, 2007; Stone Sweet, 2010), whereas others posit that the Court continued to benefit corporate interests (Conant, 2002; Börzel, 2006; Scharpf, 2010).

We expect that the ECJ worked to legitimize judicial policy-making by leveling and spotlighting private litigation. We begin by deriving three hypotheses concerning leveling. First, the distribution of resources amongst private litigants should be stacked against individuals. Studies of domestic litigation consistently show that corporations boast bigger and more experienced legal teams than individuals, which puts individuals at a disadvantage

when claiming their rights. We have no reason to expect that litigation before ICs is any different (H_1):

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

Second, we expect the ECJ's members to highlight these inequities in their writings, to claim to be refracting them, and to suggest that this agenda bolsters their legitimacy through the legitimacy of EU law. Given their well-documented ambition to serve as judicial rule-makers, we also expect the Court's judges to stress claim-driven leveling over litigant-driven leveling: to emphasize their efforts to open the EU's legal opportunity structure via the creation of individual rights that counterbalance the economic thrust of EU law. We also expect ECJ judges to justify these efforts as empowering individuals to reap the benefits of European integration (H_{2a}):

Hypothesis 2a - leveling (words): *ECJ judges should claim to be creating a more favorable legal opportunity structure for individuals to bolster the legitimacy of European legal integration.*

Third, we expect the Court to match words with deeds. By granting new entitlements to individuals via claim-driven leveling, the Court can back its self-legitimizing narrative with concrete decisions that can subsequently be broadcast to the legal profession. Since cases featuring individual rights are more likely to be raised by individuals, judicial outcomes may appear consistent with litigant-driven leveling. However, we expect individuals' disproportionate win rate to be driven by cases wherein they raise the individual and social rights that legitimize expansive rule-making (H_{2b}).

Hypothesis 2b - leveling (deeds): *The ECJ should be more likely to support individuals than businesses when individuals raise social and individual rights claims.*

Next, we expect the Court to strategically spotlight its pro-individual rights decisions in order to cultivate a compliance constituency beyond governments. Historians have demonstrated that legal academics have been allies for the Court and cultivators of its legitimacy. European lawyers' associations have long aspired to serve as a "private army for the [European] Communities" (Rasmussen and Martinsen, 2019; Vauchez, 2015, p. 88) and have founded law journals – most prominently the *Common Market Law Review* (CMLR) – "to provide legitimacy to the new jurisprudence of the ECJ" (Byberg, 2017, p. 46). ECJ judges are known to tap these support networks, contacting the CMLR's editorial board to suggest commentaries. The Court has thereby summoned legal academics to "delive[r] counterattacks" to"national [government] criticism of the ECJ's jurisprudence" (ibid., pp. 52, 57). While positive commentaries would certainly be welcomed, even heated debates concerning the Court's judgments catalyze awareness and place the ECJ center-stage as a forum wherein new rights can be claimed. For judicial spotlighting to have an impact, then, what the Court most needs is the attention of the legal profession.

How might the Court make its case law known to the legal community? One answer is to have its decisions discussed in law reviews. To this end, the ECJ can make case-by-case procedural choices that are central to its outreach strategy. First, the Court can allocate larger chambers to signal a case's "significance" (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Kelemen, 2012; Dederke, 2022, p. 51). Second, alongside other courts the ECJ can issue press releases to broadcast and frame particular rulings (Staton, 2006). The Court's in-house communications unit deliberately wields press releases to shape the "the opinion marketplace" by publicizing some rulings over others (H_3) (Dederke, 2020, pp. 105–108):

Hypothesis 3 - spotlighting: *The ECJ should be more likely to publicize cases raised by individuals than businesses by allocating larger chambers and issuing press releases – particularly when it supports individual rights claims.*

Finally, we build on studies probing news coverage of ECJ rulings (Ded-

erke, 2020; Dederke, 2022) to assess if lawyers are responsive to the Court's spotlighting efforts in their commentaries. If the Court has mobilized the legal profession into a key compliance constituency , then legal commentaries should amplify rulings that support individual rights claims (H_4):

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

To test these hypotheses, we integrate qualitative and quantitative evidence (Seawright, 2016) to trace if the Court levels and spotlights private litigation in ways that build legitimacy. We assess each hypothesis separately but bolster confidence in the results step-by-step. While validating each individual hypothesis may not prove causality, we build a cumulative and complementary body of support for our claims.

We first establish the face validity of leveling and spotlighting by assessing if ECJ judges present this as a strategy that they indeed employ. Specifically, we scrutinize historical evidence that ECJ judges were sensitive to how EU law dis-empowered individuals, claimed to be leveling the odds in individuals' favor, and sought to draw attention to these efforts to legitimate judicial policy-making (H_{2a}).

Next, we move to an econometric approach. We verify the presence of unequal litigation capabilities amongst private litigants (H_1), assess if the ECJ has refracted these inequities via leveling and spotlighting (H_{2b} and H_3), and probe if legal commentators have amplifed the Court's agenda (H_4). To this end, we leverage the first dataset integrating private litigation, ECJ decisions, and legal commentaries in journals. Figure 3 matches each step in our theory with the five hypotheses and the data used to evaluate them for the European case.

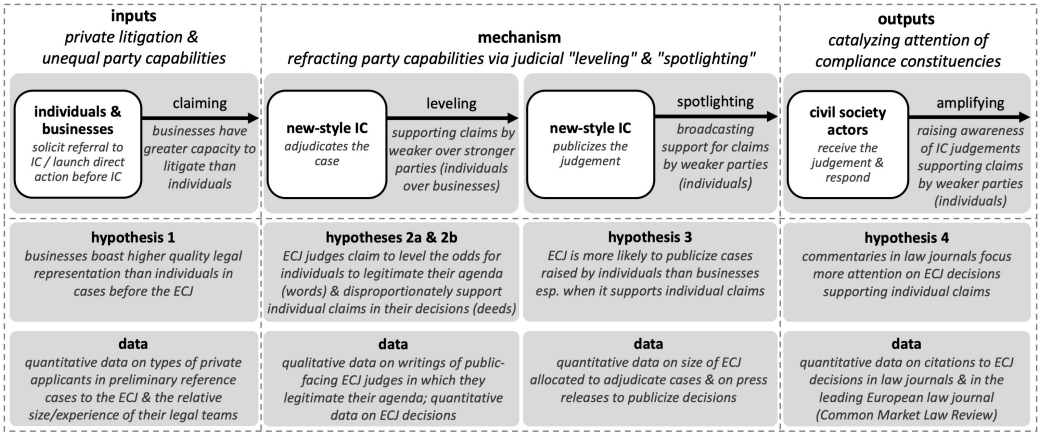

Figure 3: Correspondence of theory, hypotheses, and data

"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 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 sheds limited empirical light on this puzzle, we show via an analysis of the writings of the ECJ's most influential judges that they confronted it head-on. Therein, leveling the odds for individuals proved a recurrent theme, consistent with H_{2a}. ECJ judges particularly stressed claim-based leveling over litigant-based leveling: empowering individuals by creating new rules and entitlements (rather than by tipping the disposition of individual cases). By highlighting blind spots in EU law and its tendency to serve "business Europe," the judges justified the creation of novel rights to prove the ECJ's relevance, bolster the legitimacy of EU law, and cultivate compliance constituencies.

The ECJ's self-legitimation as "protector of the individual" grew out of a disagreement within the Court. In the 1960s, the Court was split between a conservative and an activist wing. The conservative wing – headed by Dutch

judge André Donner – resisted appeals to individuals and their rights. Its adherents wished "not to break with the [traditional] elements of international law" (Rasmussen, 2008a, p. 94). Conversely, the activist 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 individuals. 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, 2008b). Lecourt then pioneered a legitimating rhetoric centered on leveling the odds for individuals.

Drawing on his past experience as a journalist and political organizer, Lecourt knew that the ECJ needed to counter criticisms of its rule-making authority and the legitimacy of the international regime of which it was part. As Phelan (2020, p. 11) has shown, "many parts of the Court of Justice's distinctive information and persuasion strategy (...) have been directly connected with judge Lecourt," who adopted the role of ECJ "publicist." Lecourt perceived that the Court could prove its relevance by grafting individual and social protections onto the predominantly economic scaffolding of European law. He also recognized that judicial leveling was necessary but insufficient: The Court also needed to spur "publications in academic journals and mass-circulation media" so that its "bold decisions were defended... and advertised to the wider public" (ibid., pp. 8–9).

Lecourt's most renown work is his 1976 book, *L'Europe des Juges*. The book was crafted as a "popularizing" manifesto for "national lawyers and judges who might apply European law in national litigation" (Phelan, 2017, p. 944). Its pages stress an ambitious judicial agenda to embed individual rights within the EU legal order and ensure that European integration would not just serve repeat players within "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 for legal "commentators" to pay greater attention to the ECJ's role as "protector of the individual:"

> "[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"(ibid., pp. 308–309).

Lecourt's appeals to legal practitioners intended to mobilize them in light of backlash by some member governments and constitutional courts in the 1960s and 1970s (Davies, 2012; Fritz, 2015; Rasmussen and Martinsen, 2019). His writings were designed to disarm allegations that EU law and the ECJ would prioritize trade and corporate interests and run roughshod over individual rights. But Lecourt's efforts were proactive as well as defensive. By linking the Court's legitimacy to its reorientation of EU law to protect the rights of the weak, Lecourt broadened the Court's mandate beyond economics

and justified judicial interventions that would tip the scales from "business Europe" towards "social Europe."

As European integration grew increasingly salient in domestic politics, resistance to EU law and the ECJ was also mobilized by a rising constellation of populist and Eurosceptic political parties (Hooghe and Marks, 2009). By the 1980s and 1990s, a new generation of judges donned the mantle of ECJ "publicists." As charges that EU law suffered from a "democratic deficit" became recurrent (Føllesdal and Hix, 2006), European judges again cast themselves as antidotes. None was more prolific than judge Federico Mancini, who served as the Court's most public-facing 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. But he also stressed more clearly than Lecourt that the Court could only protect citizens by "extend[ing] the jurisdiction of the Community" to make up for the lack of EU legislation granting enforceable rights:

> "the Court has used [national court referrals of cases raised by private litigants] 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 concluded his 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" (Mancini, 2000, pp. 142, 165), Mancini hoped that through judicial leveling the Court could raise public awareness and prompt "ordinary men and women" to support it:

> "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 (...) (...) As long as the Court goes on handing down judgments 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).

By the turn of the millennium, a third generation of ECJ judges took on the task of justifying their agenda as a counterbalance to the economic focus of EU law. As Vassilios Skouris – the Court's President from 2003 to 2015 – put it:

> "the development of a system of protection of fundamental rights in the EU legal order was a necessary complement to the transformation of the [...] economic freedoms of the EC Treaty [into] fundamental principles conferring rights on individuals (...) [economic] integration can be extremely problematic without the necessary guarantees for the protection of fundamental rights (...) This is why the Court has often used fundamental rights [as a] counterbalance..." (Skouris, 2006, p. 238)

By forging "a system of protection of fundamental rights," Skouris emphasized that the Court "contributed to the advancement of European inte-

gration" by "enhance[ing] the democratic legitimacy of the European Union itself" (Skouris, 2006, p. 238).

Skouris' successor – Koen Lenaerts – agreed. In his view, the Court transformed the EU legal order from an "economic device" into a tool for "protecting the fundamental rights of the people," thereby "recruit[ing]. . . private parties as allies" (Lenaerts, 1992, pp. 1–4, 23). Although "[the] EEC was essentially an economic organization", "the Court could not simply ignore" the social rights of citizens and workers: "today's Social Europe would not be what it is without the Court's contribution" (Lenaerts, Adam, and Van de Velde-Van Rumst, 2023, pp. 4, 29).

What these writings share, is their authors' insistence that judicial leveling has bolstered the legitimacy of EU law and – consequently – of the Court itself. Consistent with H_{2a}, their writings wielded individual claims as legitimating vehicles for expansive rule-making. They highlighted the business-centered foundations of EU law and its scant protection of individuals to justify an expansion the Court's mandate and its conversion of uncertain principles into enforceable rights. Instead of hiding behind law's "mask and shield" (Burley and Mattli, 1993), they cast the ECJ as the disruptive protector of individuals and a necessary policy-maker to counterbalance "business Europe." Yet rhetorical appeals do not necessarily align with the realities of judicial practice or achieve their intended ends. To assess whether the ECJ converted words into deeds, we turn to quantitative evidence.

From Words to Deeds? Quantitative Data and Modeling Strategy

Our quantitative analysis proceeds in two steps to evaluate if ECJ decision making reflects judges' stated strategy of leveling and spotlighting. We compile an original dataset of all parties and their legal counsel involved in 6,919 cases referred to the ECJ from 1961 to 2016. For each case, we document the litigants and their lawyers. We then categorize litigants according to their type (*individual*, *business*, *interest group*, *state institutions* and *others*) and cases according to their topic (*individual rights*) and outcome (*win*). Our focus throughout is on comparing individuals and businesses (for details, see the Appendix).

Unequal Claiming and Judicial Leveling

We begin by corroborating whether the Court levels the odds for individuals and whether it is litigant- or claim-driven. To this end, we show that litigation before the ECJ is plagued by the same inequalities in party capability as before domestic courts, yet individuals' win rate is far higher than expected given their capability disadvantages. We then trace this discrepancy back to individual-rights cases, evidencing the Court's claim-based leveling.

Unequal claiming (H_1): Individuals have a capability disadvantage

Both the ECJ judges cited above and existing research on EU legal mobilization assume that businesses are "comparatively [more] resourceful" than individuals (Conant et al., 2018, p. 1384). Yet this claim has never been systematically verified. Here, we show that the capabilities of individuals and businesses appearing before the Court align with the distinction between the "have nots" and the "haves" (H_1).

Our dependent variable captures the *quality of legal representation* that private parties muster. To ensure that our results are comparable with ex-

isting research, we draw on three common operationalizations of capability (McGuire, 1995; Wahlbeck, 1997; Szmer, Songer, and Bowie, 2016; Nelson and Epstein, 2022) and include these measures in three regression models.

First, we consider whether litigants submitted an *observation* before the ECJ. When cases are referred to the Court, all parties involved are invited to submit their views in a written observation. If the Court holds a hearing, parties may also clarify their claims via oral observations. While it may seem self-evident that making your voice heard matters, poorly-represented litigants might not recognize its importance: some 19% of the private litigants in our dataset did not communicate their views to the ECJ. Our first model is a binomial logistic regression that captures the probability that a litigant submitted an observation.

We then use two indicators to capture the quality of the legal team. These measures approximate what Kritzer (1998) refers to as "substantive" and "process" expertise. Larger legal teams more likely hold specialized knowledge of EU law through their division of labor, while more experienced litigators will more likely 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. Next, *lawyer experience* counts the number of ECJ appearances of the most experienced member of the team. Both measures serve as dependent variables in hurdle models: We treat the size and experience of the legal team as a joint probability of first submitting an observation and – if so – the quality of the legal counsel. The models treat each side in a case as a litigant, resulting in a data set with 12,142 observations. Our explanatory variable of interest is the type of litigant involved in a dispute (individual vs. business). The models control for whether several cases were joined together by the ECJ (*joined case*), whether the litigant is an applicant or defendant, and decade fixed effects.

The results are reported in Table 1 and illustrated in Figure 4. In line with H_1, individuals have lower capacity to litigate than businesses across all three measures. They are less likely to submit observations before the ECJ, and – when they do – they rely on smaller and less experienced legal teams.

Table 1: Variation in quality of representation across parties: Companies rely on average on larger and more experienced teams than individual litigants.

	Dependent variable: Quality of legal representation		
	Submitted observation	Size of legal team	Lawyer experience
	logistic	*hurdle*	*hurdle*
Individual (ref. business)	-0.665^{***}	-0.151^{***}	-0.396^{***}
	(0.060)	(0.028)	(0.016)
Interest group (ref. business)	0.755^{***}	0.266^{***}	-0.309^{***}
	(0.152)	(0.043)	(0.029)
State institution (ref. business)	-2.172^{***}	-0.171^{***}	-0.350^{***}
	(0.055)	(0.034)	(0.020)
Other (ref. business)	-0.086	0.170^{***}	-0.064^{**}
	(0.103)	(0.044)	(0.026)
Defendant in main proceedings	-0.446^{***}	-0.089^{***}	-0.244^{***}
	(0.048)	(0.025)	(0.014)
Joined cases	0.434^{***}	0.696^{***}	0.029
	(0.081)	(0.029)	(0.022)
Constant	1.933^{***}	0.331^{***}	1.495^{***}
	(0.060)	(0.026)	(0.014)
Observations	12,286	12,286	12,286
Log Likelihood	$-6,496.740$	$-16,518.890$	$-45,051.410$
Akaike Inf. Crit.	13,017.480		
Note:			*p<0.1; **p<0.05; ***p<0.01

Insofar as it matters for litigants to communicate their claims to ECJ judges, businesses have a clear advantage. Businesses are almost twice as likely to submit an observation than individuals in comparable disputes. One in four individuals do not submit an observation, with a predicted submission rate of 78%. By contrast, only about 1 in 10 corporate litigants neglect to communicate their views (87%). Inequities in party capability persist among those that submit observations. Individuals hire legal teams that are on

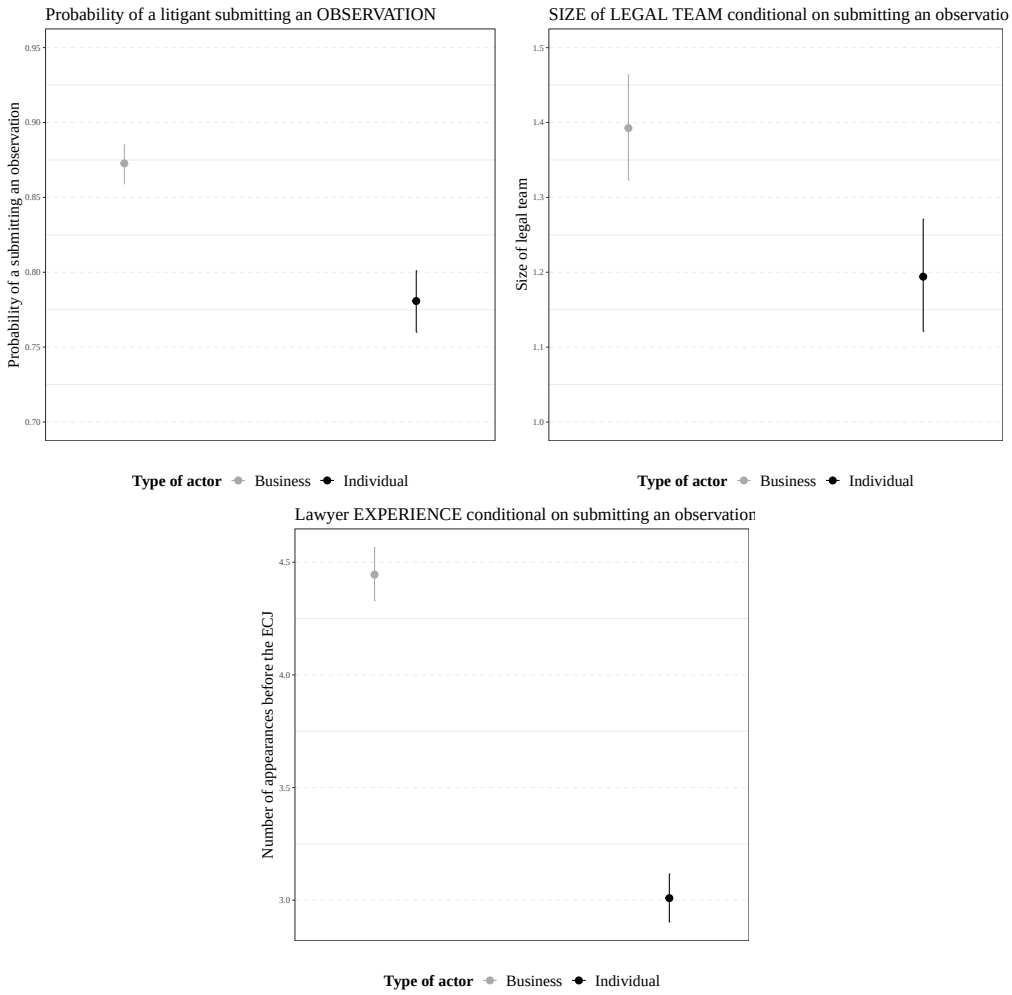

Figure 4: Unequal claiming: businesses are represented by larger and more experienced legal teams than individuals (illustration of models in Table 1).

average 14% smaller and with 33% less experience than those of businesses. In other words, compared to businesses, individuals' legal representation is hampered by less "substantive" and "process" expertise.

In sum, the same capability inequalities afflicting private litigation before national courts also surface before the ECJ. This begs the question of whether the ECJ has wielded its agency to level the odds for disadvantaged

individuals.

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

While resource inequalities may have prevented individuals from arguing their case effectively, ECJ judges have also lamented the absence of legislation governing the types of claims that individuals bring. These two obstacles create opportunities for two types of judicial leveling. The Court could adopt litigant-driven leveling – compensating for the resource inequities by tipping the disposition of cases in individuals' favor – or it could fill in the gaps in individual rights protections left by legislators. As we saw, the Court's judges have asserted the latter. Politics thrive in legal uncertainty, and by making concrete the legal claims brought by a dis-empowered group of litigants, ECJ judges sought the role of protectors of the weak.

Is there evidence that the Court's judges matched words with deeds, and – if so – did they prioritize claim-driven leveling? In a second series of models, we probe litigants' win rate and assess whether outcomes are driven by individuals' substantive claims.

Our dependent variable, *win*, indicates if the Court supported an applicant's claims. It builds on two influential projects coding the legal positions of litigants and ECJ decisions. Both projects elaborate an outcome measure for (potentially) different legal questions nested within judgments. We run two identical linear probability models: one that includes ECJ judgments from 1961 to 1997 (Carrubba, Gabel, and Hankla, 2008), then another from 1996 to 2008 (Larsson and Naurin, 2016). Since the type of litigants only vary at the case level, we weigh down cases by the number of questions and cluster the standard errors accordingly. By measuring who wins across two time periods using two established coding schemes, we aim to bolster confidence that our results are neither time-dependent nor driven by idiosyncratic measurement. Descriptive statistics already suggest that the ECJ favors the claims raised by individuals: in the 1961-1997 period, the ECJ supported

58% of individuals' claims (41% in 1996-2008), compared to only 45% of business' claims (30% in 1996-2008).

We test the Court's claim-driven leveling through an interaction between the type of litigant (*individual*) and their claim (*individual rights*). To identify individual rights cases, we rely on the Court's topic classifications (see the Appendix). Many of these cases mobilize the EU legal principle of free movement of people, such as family rights and social benefits for migrant workers. The Court has over the years given a broad interpretation of what constitutes a worker with rights of residence and family reunification to include students and job seekers. This category also includes questions relating to fundamental rights, social security and pensions, as well as freedom from sexual, racial and religious discrimination.

Theoretically, the interaction zooms in on the political opportunities that individual litigants bring. Their claims are substantially different. First, individuals overwhelmingly raise exactly the types of cases that the Court needs to prove its relevance. Specifically, 61% of the disputes brought by individuals in the 1961-2016 period pertain to topics relating to individual and social rights, compared to only 13% for businesses. Second, the lack of legislation governing these topics leaves a larger interpretative space for judges to craft a case law that favors individuals. Third, the consequences of these claims are potentially disruptive. Individual rights constrain the power of governments almost by definition: 79% of ECJ rulings favoring individual rights in the 1995-2011 period simultaneously constrained the autonomy of member states. By comparison, other claims – such as the economic claims that businesses raise – only led to restrictions in 23% of the decisions (Larsson et al., 2022). In short, we assess the win rate in cases that allow the Court to simultaneously challenge governments and cajole a new compliance constituency in civil society.

Since the EU legal opportunity structure is stacked against individuals, a higher win rate is a telltale sign of judicial agency. Nevertheless, our empirical strategy aims to rule out potential litigant-driven explanations for

individuals' relative success (Priest and Klein, 1984). For instance, since businesses boast sufficient resources to pursue weaker claims (Galanter 1974; although see Skiple, Bentsen, and McKenzie (2021)), might not the claims raised by individuals be systematically stronger on the merits? We address the possibility of adverse selection in two ways.

First, our interaction effect operationalizes the theoretical distinction between litigant- and claim-based leveling. Since individuals and businesses sometimes overlap in the claims they bring, we can compare the win rates of individuals who raise the same economic claims as businesses (usually as farmers and small business owners) to individuals with similar resource endowments, but who instead raise individual and social rights claims. This within-individual comparison not only helps us assess the presence of claim-based leveling; it also enables us to better match litigants on their financial capacities and thus hold constant their capacity to absorb the costs of litigation.

Second, we account for the merits of litigants' claims by controlling for the information available to them concerning the Court's previous case law. Private litigants have a harder time predicting whether their claims are well-founded the first few times they ask the Court to interpret an EU rule. For in the absence of clear precedents, the Court is more likely to defer to the unpredictable political signals of member states (Hermansen, 2020). We thus introduce fixed effects to compare judicial outcomes strictly between cases involving laws litigated an equal number of times.

Yet we also do not want to underestimate the extent of judicial leveling. Existing research argues that because individuals rely on weaker legal representation than businesses, they also tend to raise weaker arguments, generating a lower win rate. We therefore control for the size and experience of litigants' legal teams (*Difference in lawyer experience/legal team size*).

Finally, our models control for other factors that influence ECJ decisions. The ECJ tends to align with the majority of governments' observations ("amicus curiae briefs") (Castro-Montero et al., 2018; Larsson and Naurin, 2016;

Carrubba, Gabel, and Hankla, 2008). As individual rights cases tend to constrain member states' autonomy, all models control for intergovernmental pressures by including the *net number of government observations* favoring the applicant. We also control for the few instances where *the validity of an EU law is challenged*, given the ECJ's purported pro-EU law bias. Lastly, we control for the type of litigant that the applicant is facing.

Evidence consistent with judicial leveling is displayed in Table 2 and visualized in Figure 5. In contrast to studies of domestic judicial decision-making, we find compelling evidence that the ECJ disproportionately supports the claims that individuals raise (H_{2b}). As the first and third columns in Table 2 make clear, the ECJ is 11% more likely to support claims raised by individuals compared to businesses (11.4% in 1961-1997; 10.7% in 1995-2008).

Our interaction term in the second and fourth columns in Table 2 helps us distinguish whether individuals' higher win rate is due to ligitant- or claim-driven leveling. It strongly indicates that the ECJ's pro-individual rulings are driven by cases wherein individuals raise individual rights claims – that is, precisely the types of worker, pension, and fundamental rights highlighted by ECJ judges like Lecourt and Mancini. The two effect sizes are similar, although in the second model the effect falls just shy of conventional thresholds for statistical significance. When individual rights are invoked in the 1961-97 period, the probability of an individual winning the Court's support is 14.4% (10.9% in the 1996-2008 period) higher than if the case was brought by a business or if an individual raised other types of claims. Importantly, there is no indication that the ECJ levels the odds for individuals when their claims mirror the predominantly economic ones raised by businesses. 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 legitimate an expansive rule-making agenda.

The behavior of our control variables aligns with previous research, adding

Table 2: Variation in the likelihood of winning among applicants accross types of litigants.

	Dependent variable:			
	Wins the case			
		panel linear		
	1961-1997	1961-1997	1996-2008	1996-2008
Individual rights		−0.041		0.053
		(0.047)		(0.054)
Individual (ref. business)	0.114***	0.050	0.107***	0.010
	(0.029)	(0.040)	(0.040)	(0.063)
Interest group (ref. business)	0.035	0.043	0.017	0.016
	(0.061)	(0.062)	(0.068)	(0.067)
State institution (ref. business)	0.037	0.034	0.092	0.091
	(0.045)	(0.045)	(0.065)	(0.065)
Other (ref. business)	0.033	0.041	−0.105	−0.100
	(0.063)	(0.065)	(0.111)	(0.111)
Net support from MS observations	0.088***	0.088***	0.056***	0.057***
	(0.009)	(0.010)	(0.008)	(0.009)
The validity of an EU law is in question	−0.120***	−0.115***	−0.083	−0.087
	(0.038)	(0.038)	(0.062)	(0.061)
Defendant is ... an individual (ref. business)	−0.082*	−0.066	−0.021	−0.025
	(0.045)	(0.046)	(0.069)	(0.072)
... interest group (ref. business)	−0.024	−0.032	0.026	0.007
	(0.068)	(0.069)	(0.099)	(0.096)
... state institution (ref. business)	−0.003	−0.010	0.058	0.066
	(0.034)	(0.034)	(0.043)	(0.043)
... other type of actor (ref. business)	0.003	−0.014	0.023	0.005
	(0.047)	(0.048)	(0.094)	(0.095)
Difference in legal team size	0.002	0.004	−0.0004	−0.001
	(0.010)	(0.010)	(0.012)	(0.012)
Difference in lawyer experience	−0.002	−0.002	0.001	0.002
	(0.002)	(0.002)	(0.002)	(0.002)
Individual * individual rights		0.144**		0.109
		(0.066)		(0.091)
Fixed effects for iteration of interpretation	Yes	Yes	Yes	Yes
Observations	3,608	3,608	2,512	2,512
R^2	0.054	0.059	0.060	0.067
Adjusted R^2	−0.006	−0.001	−0.037	−0.030
Note:				*p<0.1; **p<0.05; ***p<0.01

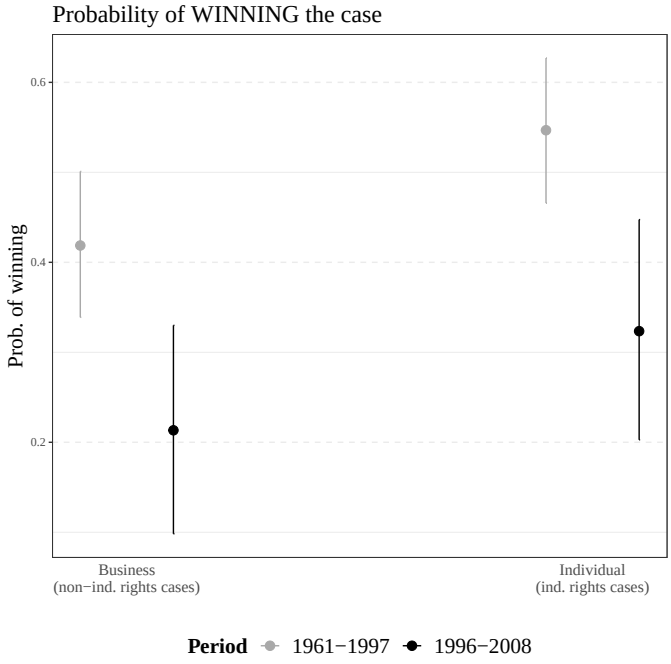

Figure 5: Leveling the odds: the ECJ is more likely to support claims raised by individuals than businesses for both periods under study (illustration of models 1 and 3 in Table 2).

confidence in our analysis. The ECJ is less likely to support challenges to 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). For a business to match an individual's probability of winning, it would need to receive one (1961-97) and 1.7 (1996-2008) additional government observations supporting its case. Strikingly, our findings do not support the conventional claim that the quality of legal representation impacts ECJ decisions. Larger and more experienced legal teams give no traction over judicial outcomes.

Despite our findings, to causal observers, it may appear that the ECJ has a pro-business bias. Why? Businesses outnumber individuals 3 to 2 in ECJ disputes. This lopsided distribution likely reflects the disproportionate

stock of justiciable corporate rights as well as businesses' capacity to absorb the costs of litigation. Thus, even if the ECJ wields its agency to bolster individual rights protections under EU law, on aggregate it delivers more judgments supporting business claims (735 vs 676 supportive judgments in 1961-97, and 463 vs 252 supportive judgments in in 1996-2008).

In sum, the ECJ consistently levels the odds in favor of individuals – but only when they claim individual rights. While this result breaks from prevailing research on party capability, it is consistent with our revisionist theory.

Spotlighting & Amplifying: Broadcasting Decisions Where Individuals Win

Granting relevant wins to citizens is only half the battle. To cultivate support in civil society by establishing itself as the fulcrum of a new individual rights regime, the ECJ must also attract the attention of compliance constituencies capable of amplifying its judgments. Here, we provide compelling evidence that the ECJ disproportionately spotlights decisions where it supports individuals' claims (H_3) and verify that the Court's message is amplified by commentaries in law journals (H_4).

Spotlighting (H_3): the ECJ is more likely to publicize decisions that support individual claims

The Court has several procedural choices at its disposal to publicize cases. We test whether the ECJ makes use of this discretion in three ways.

First, during the proceedings, the number of judges allocated to a case can serve as a signal of the "significance" that the Court attributes to it (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Kelemen, 2012, p. 51). Our first (ordinal) model regresses the *size of the chamber* (small/medium/large) on the type of applicant, contrasting individuals with businesses. However, since the Court determines the size of the chamber

before it decides a case, chamber allocation is an admittedly noisy proxy for judicial spotlighting (Larsson and Naurin, 2016; Dederke, 2020, p. 87).

Second, measuring spotlighting more precisely, we also probe what the Court does after it delivers a ruling. One of the Court's key public outreach tools is wielded by its in-house communications team when it issues a *press release* (Dederke, 2020; Dederke, 2022). Our second (binomial logit) model therefore captures whether the ECJ disproportionately issues press releases in cases involving individuals. Third, since press releases are issued after the ruling, our final model includes an interaction effect to assess if the ECJ conditionally spotlights decisions where individuals win.

Our data is at the case level. While the first model covers the entire history of ECJ preliminary references, our model of press releases is limited to the years where these data are available (1995-2016). Similarly, our third model is limited to cases where the outcome is available (1995-2008). All three models include the same control variables. Since the Court often convenes a larger chamber in response to governments' attention (Sadl and Hermansen, forthcoming), we control for the *proportion of member states submitting observations* in any given case. We also control for the number of *times that EU law is applied* as well as the size and experience of parties' legal teams. Finally, since the Court's reliance on smaller chambers and its use of press releases has increased over time (Kelemen, 2012; Fjelstul, 2023; Brekke et al., 2023), all models include decade fixed effects.

Evidence consistent with judicial spotlighting is reported in Tables 3 and 4 and illustrated in Figure 6. The ECJ disproportionately publicizes cases involving individuals rather than businesses, and especially if individuals win.

First, *ceteris paribus*, the likelihood that the Court allocates a larger chamber to a case increases by 48% if a dispute involves individuals compared to businesses. After delivering the ruling, the Court is then twice as likely to issue a press release (columns 1 and 2 in Table 3). Only the comparatively rare cases involving interest groups are spotlighted as often.

Table 3: Spotlighting and amplifying: Judicial and academic issue attention depend on the type of litigants involved.

	Dependent variable: Judicial and academic attention			
	Chamber size	Press release	Case annotations	CMLR annotation
	ordered logistic	*logistic*	*negative binomial*	*logistic*
	1961-2016	1995-2016	1961-2016	1961-2016
Applicant is... an individual (ref. business)	0.391^{***}	0.592^{***}	0.152^{***}	0.591^{***}
	(0.055)	(0.150)	(0.029)	(0.107)
... interest group (ref. business)	0.252^{**}	0.557^{**}	0.074	0.199
	(0.101)	(0.235)	(0.051)	(0.168)
... state institution (ref. business)	-0.183^{***}	-0.541^{***}	-0.671^{***}	-0.158
	(0.063)	(0.170)	(0.032)	(0.117)
... other type of actor (ref. business)	-0.190^{**}	-0.540^{*}	-0.367^{***}	-0.341^{*}
	(0.090)	(0.321)	(0.048)	(0.184)
Size of applicant's legal team (log + 1)	0.527^{***}	0.906^{***}	0.272^{***}	0.716^{***}
	(0.060)	(0.178)	(0.032)	(0.111)
Size of defendant's legal team (log + 1)	0.329^{***}	0.309^{*}	0.232^{***}	0.340^{***}
	(0.068)	(0.183)	(0.035)	(0.119)
Experience of applicant's lawyer (log + 1)	0.091^{**}	-0.082	-0.095^{***}	0.076
	(0.037)	(0.095)	(0.020)	(0.067)
Experience of defendant's lawyer (log + 1)	0.005	-0.308^{**}	-0.018	0.038
	(0.051)	(0.146)	(0.026)	(0.089)
Times an EU law is applied (log)	-0.044^{***}	-0.109^{**}	0.004	-0.225^{***}
	(0.015)	(0.044)	(0.008)	(0.035)
Proportion of MS observations	8.315^{***}	7.093^{***}	4.659^{***}	5.186^{***}
	(0.337)	(0.734)	(0.139)	(0.412)
Small—medium chamber	-0.026			
	(0.106)			
Medium—Large chamber	2.778^{***}			
	(0.113)			
Intercept		-2.498^{***}	1.579^{***}	-3.829^{***}
		(0.300)	(0.077)	(0.214)
Decade fixed effects	Yes	Yes	Yes	Yes
Country of origin fixed effects	No	No	Yes	No
Observations	5,928	1,288	5,928	5,928

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

Table 4: Spotlighting and amplifying: Issue attention as a function of whether the individual applicant wins.

	Dependent variables: Spotlighting and amplifying		
	Press release	Case annotations	Annotated in CMLR
	logistic	*negative binomial*	*logistic*
	1997-2008	1961-2008	1961-2008
Times an EU law is applied (log)	−0.127***	0.038***	−0.181***
	(0.044)	(0.013)	(0.042)
Proportion of MS observations	7.776***	4.672***	5.161***
	(0.750)	(0.199)	(0.478)
Applicant won	−0.064	0.094	0.136
	(0.245)	(0.071)	(0.214)
Applicant is... other type of actor (ref. business)	0.100	−0.069	−0.223
	(0.642)	(0.178)	(0.637)
... state institution (ref. business)	−0.192	−0.077	0.00002
	(0.357)	(0.099)	(0.314)
... interest group (ref. business)	0.594	0.235*	0.759**
	(0.367)	(0.138)	(0.321)
... an individual (ref. business)	0.128	−0.031	−0.028
	(0.227)	(0.073)	(0.215)
Applicant won * other type of actor (ref. business)	0.542	−0.043	−1.282
	(1.166)	(0.285)	(1.370)
... won * state institution (ref. business)	−0.096	−0.460***	−0.689
	(0.611)	(0.157)	(0.535)
... won * interest group (ref. business)	0.427	0.064	−0.980
	(0.633)	(0.219)	(0.618)
... won * an individual (ref. business) (H3)	0.773**	0.251**	0.520*
	(0.368)	(0.109)	(0.316)
Intercept	−15.894	1.537***	−2.858***
	(338.456)	(0.125)	(0.187)
Decade fixed effects	Yes	Yes	Yes
Country of origin fixed effects	No	No	Yes
Observations	1,288	3,232	3,232
Note:			*p<0.1; **p<0.05; ***p<0.01

Even more revealing are the findings concerning press releases: it is only when individuals win that a significant pro-individual bias in spotlighting emerges. The Court is more than twice as likely to publicize judgments via a press release where it *supports* an individual's claim compared to when individuals lose (column 1 in Table 4). No other type of litigant sees the same favorable shift in the Court's outreach strategy when they win their case.

These findings support the inference that the ECJ is most concerned with drawing attention to its decisions when they align with a pro-individual rights narrative. Yet, is the Court's strategy successful? Do compliance constituencies amplify the Court's agenda?

Amplifying (H_4): Legal commentators reinforce the ECJ's spotlighting strategy

As we have argued, ECJ judges have sought to catalyze commentaries in law reviews, especially in journals like the *Common Market Law Review* (CMLR) (Byberg, 2017; Phelan, 2017; Phelan, 2020). Commentaries of judgments (referred to as "annotations" amongst legal scholars) are important sources of information about new legal opportunities that national lawyers, judges, and academics can seize in litigation campaigns to pressure governments into compliance. Legal commentaries are thus a crucial mechanism for international judges to broadcast their relevance and build sociological legitimacy.

We consider the *annotations* that ECJ judgments generate in law journals generally and in the CMLR specifically. In so doing, we focus on whether these commentaries amplify the ECJ's spotlighting strategy by disproportionately highlighting ECJ decisions that support individual claiming.

We first run a poisson model to estimate the total number of annotations in legal journals that an ECJ decision attracts, with fixed effects to control for the national origin of the underlying dispute. Annotations prove quite rare, even in journals founded to popularize knowledge of the ECJ and its case law. For instance, only 10% of ECJ judgments have received annotations

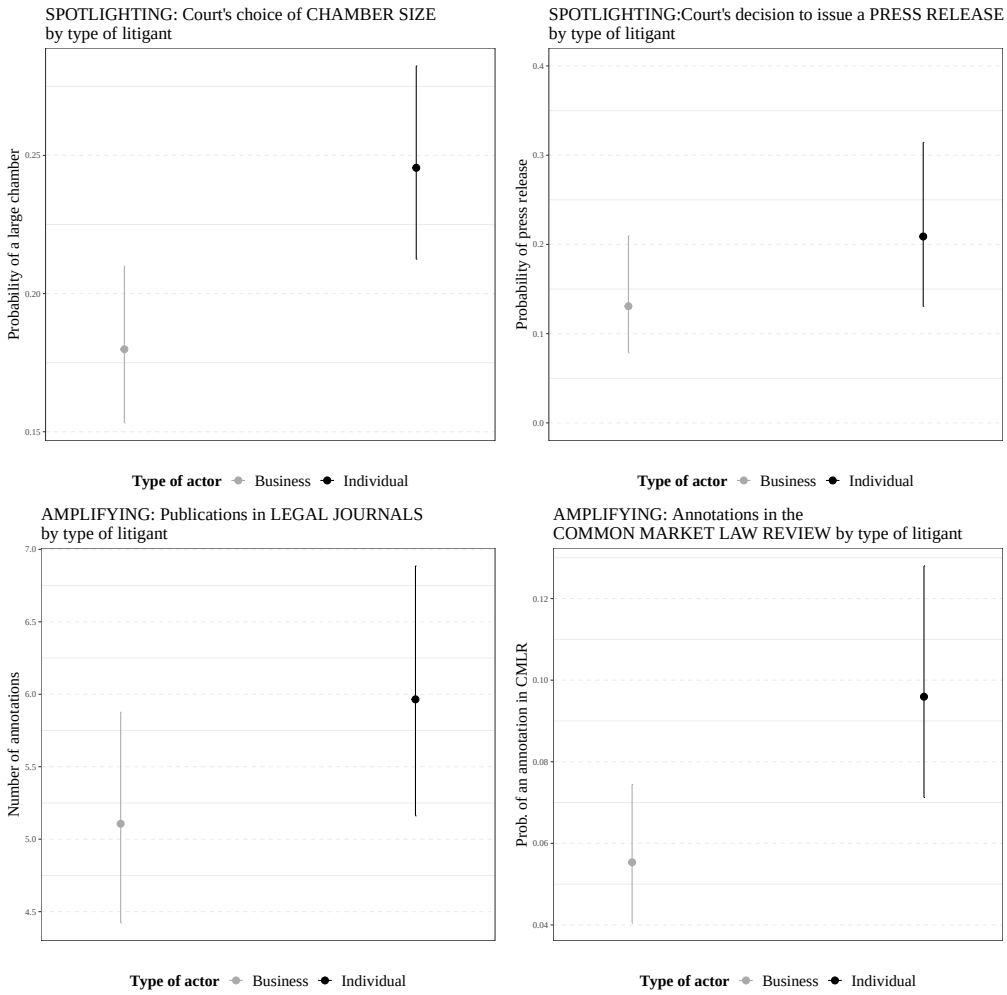

Figure 6: Spotlighting and amplifying: The ECJ and legal commentators disproportionately publicize cases involving individual claims compared to business claims (illustration of models in Table 3).

in the CMLR. To zero-in on the CMLR's coverage, we therefore rely on a binomial logistic regression estimating which ECJ decisions are most likely to be discussed, using the same set of controls.

Results consistent with law journals amplifying the ECJ's agenda (H_4)(H_4) are reported in the two last columns in Tables 3 and 4 and illustrated in the two bottom panes of Figure 6. They reveal an astonishing similarity between the Court's judicial leveling and spotlighting efforts and the rulings that are amplified by lawyers' commentaries.

First, judgments involving an individual attract 16% more journal annotations on average than cases involving businesses. This pro-individual bias in coverage is even more stark when we consider the CMLR: ECJ decisions concerning individual claims are 81% more likely to be annotated in the CMLR compared to decisions on claims brought by business.

Second, Figure 7 reveals that law journals devote greater attention to precisely the subset of outcomes that the ECJ broadcasts in its press releases. When individuals win support for their claims, the number of commentaries in legal journals increases by 29% compared to when they lose. Similarly, the CMLR is 68% more likely to publish a commentary on an ECJ decision when individuals win. By contrast, minimal attention is devoted to individuals and businesses when the ECJ does not support their claims. Even when businesses win, the judgements attract little attention. Figure 7 thus places in stark relief how an IC's efforts to spotlight a pro-individual rights agenda is amplified by a crucial domestic compliance constituency.

Conclusion

That the "haves" come out ahead may be the most consistent finding across studies of legal mobilization. Yet we have shown that judges can systematically counterbalance resource-inequalities amongst private litigants and the ways that these inequities are reinforced by law. Judges facing legitimacy deficits and the threat of government backlash may find individual rights claims useful for cultivating the support of civil society. Drawing on novel

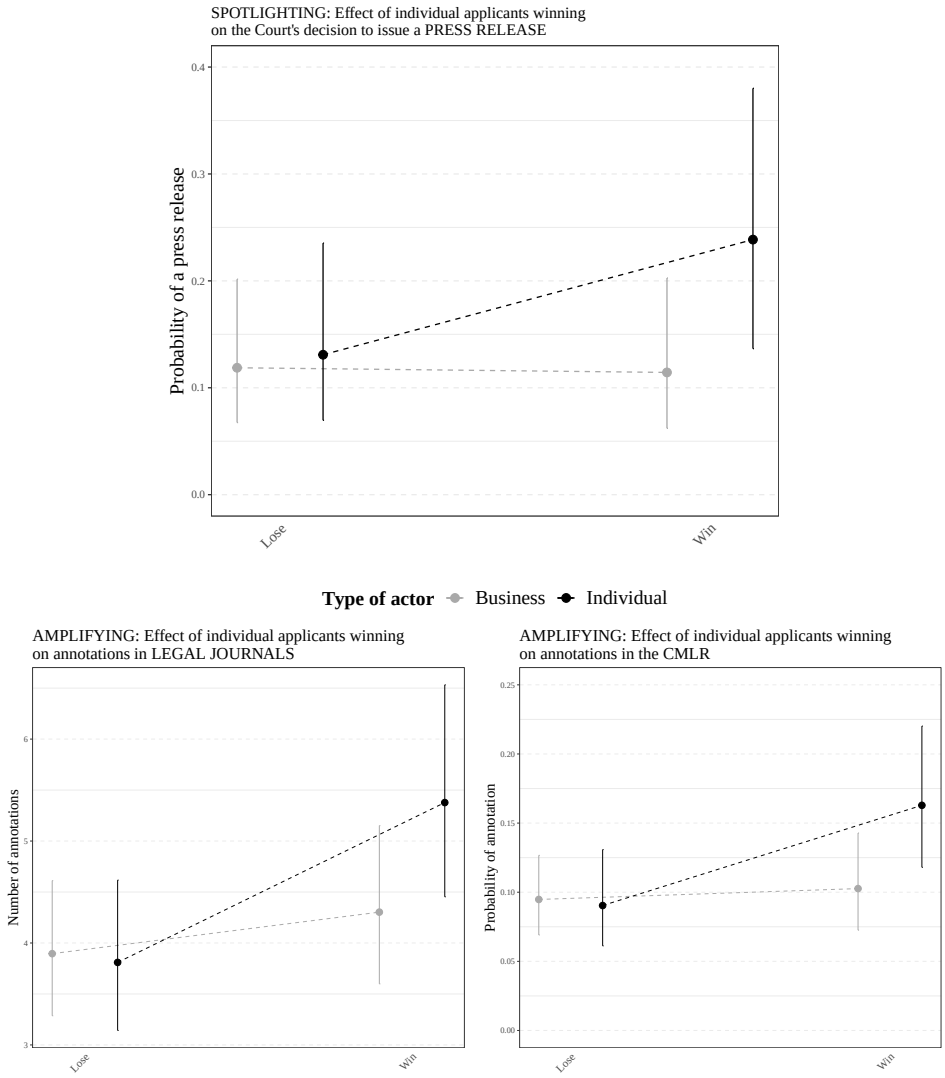

Figure 7: Spotlighting and Amplifying: The ECJ is more likely to issue press releases (pane 1) and legal journals are more likely to publish commentaries (panes 2 & 3) for cases where individuals win support for their claims.

qualitative and quantitative data of private litigation before the world's first new-style IC – the ECJ – we demonstrate that it is actually the "have nots" that tend to come out ahead. Not only is the ECJ more likely to support the

claims that individuals raise than their better-resourced corporate counterparts; European judges also broadcast their agenda in ways that get amplified law journals. Through this sequential strategy of leveling and spotlighting, ECJ judges demonstrate that party capability is not destiny before ICs.

To our knowledge, this is the first study to theorize and substantiate when international judges are most likely to level the odds for individuals and spotlight their claims. Our findings may be heartening, yet they need not rest on optimistic assumptions about judges' commitment to social justice. Instead, leveling and spotlighting are "resilience strategies" for ICs (Caserta and Cebulak, 2021; Gonzalez-Ocantos and Sandholtz, 2022) seeking to overcome the institutional challenges they face (Føllesdal, 2020). Like other international institutions, ICs' legitimacy is regularly contested by national governments, and prospective compliance constituencies may ignore their relevance. Broadcasting a disruptive case law on individual rights enables ICs to tackle both problems. It allows ICs to justify judicial interventions that bolster the legitimacy of the international regimes of which they are part. It furthermore allows ICs to cultivate the attention of prospective allies in the legal profession who can amplify their rulings and pressure governments into compliance. Individuals may be unable to amass resources and expertise as effectively as corporations, yet they can trade in legitimacy, and it is legitimacy – perhaps above all else – that is in short supply for international judges (Alter and Helfer, 2013; Cohen et al., 2018; Voeten, 2020; Pavone and Stiansen, 2021).

Our findings imply that concealment and "depoliticization" (Louis and Maertens, 2021) may not be the most effective strategy for international institution-building, and that some judges know it. Depoliticization decouples ICs from civil society, precluding their members from building a reservoir of social support beyond the vicissitudes of intergovernmental politics. True, via rule-making in salient policy areas like fundamental rights, immigration, and labor and consumer protections, ICs risk attracting intergovernmental backlash. But this strategy also enables judges to broadcast their agenda

and solicit the attention of civil society. What tends to distinguish effective from ineffective ICs is their degree of social embeddedness and capacity to cultivate compliance constituencies that render them less dependent on intergovernmental support (Alter, 2014).

Our argument also opens avenues for future research. Scholars could probe the portability of our theory by assessing if other new-style ICs in economic regimes – such as the Andean Tribunal or the European Free Trade Area Court (Alter and Helfer, 2017; Pavone and Stiansen, 2021) – also prove more supportive of individual claiming than party capability theories would predict. Our theory also implies that leveling and spotlighting waxes and wanes with judicial ambition and the vibrancy of civil society. Where international judges do not seek to legitimate an expansive policy-making role or face a prostrate civil society, the dynamic of claiming, leveling, spotlighting, and amplifying that we identified may never take root. An IC whose judges embrace judicial leveling but fail to cultivate social support by broadcasting their efforts is less likely to build sociological legitimacy and attract private litigants. Similarly, judicial spotlighting is more likely to fall flat where autonomous networks of legal professionals are lacking. By highlighting these scope conditions, we invite scholars to craft a more nuanced comparative understanding of how private litigation and judicial empowerment interact.

Although we advance a story of judicial entrepreneurship, our findings also highlight opportunities that private litigants and the "have nots" can exploit. Individuals tend to be dis-empowered in international regimes since they lack direct avenues of democratic participation. Whereas resourceful corporations can influence international policy-making via lobbying (Coen and Richardson, 2009), turning to new-style ICs may be individuals' best bet to advance their interests and shape policy. To be sure, this route is not without obstacles: to effectively mobilize ICs, private litigants must obtain access, win support for their claims, and draw attention to their cause. Persuading national courts to refer disputes to ICs can be a serious bottleneck. Once before an IC, however, individuals may face a surprisingly favorable

opportunity structure. Whether the "haves" or the "have nots" come out ahead is not merely a question of amassing the best lawyers. It is also a question of raising claims that are useful to judges seeking to legitimate their authority. At least in this respect, it is pensioners, consumers, and migratory workers who are better positioned than their corporate counterparts.

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