Comparative Political Studies
Volume 39 Number 1
February 2006 101-127

10.1177/0010414005283219
http://cps.sagepub.com
hosted at
http://online.sagepub.com

Suing for Europe

Adversarial Legalism and European Governance

R. Daniel Kelemen
Lincoln College, University of Oxford, United Kingdom

This article develops a conceptual framework linking processes of regional integration with transformations in litigation. The analysis fuses the work of American public law scholars and European integration experts to examine if, how, and why an American "adversarial legalism"–style is developing in the European Union (EU), why this is causally linked to processes of integration, and what this means for democracy in the EU. The article provides a systematic and comparative cross-sector analysis of EU policy to reveal both the change in rights available to citizens and how these affect legal claims and democracy.

Keywords: *European Union; law; judicialization; European Court of Justice; litigation*

Many Europeans view American legal and regulatory style with an air of detached amusement. They view the proliferation of ambulance-chasing lawyers, class-action lawsuits, massive damage awards, and, more generally, adversarial, litigious relationships between regulators, regulated industries, and interest groups as distinctively American phenomena from which they are, thankfully, immune. The literature on comparative regulatory policy supports this common wisdom, showing that the United States

Author's Note: The author thanks Karen Alter, Roderick Bagshaw, Erhard Blankenburg, Tanja Börzel, Rachel Cichowski, Lisa Conant, Paul Craig, Elizabeth Fisher, David Hine, Christopher Hodges, Robert Kagan, Xavier Lewis, Duncan Liefferink, Walter Mattli, Christopher McCrudden, Claudio Radaelli, Martin Shapiro, and Alec Stone Sweet for their comments, as well as participants in seminars and panels at the European Commission, University of Oxford, the University of Amsterdam, the University of Washington, and the American Political Science Association Convention. The author also thanks Timo Idema and Oliver Munn for their research assistance and thanks the Zilkha Fund at Lincoln College and the Department of Politics and International Relations, University of Oxford, for financial support for this project. Please address correspondence to R. Daniel Kelemen at Lincoln College, University of Oxford, Oxford, OX1 3DR, United Kingdom; e-mail: daniel.kelemen@lincoln.oxford.ac.uk

does rely on a particularly adversarial, legalistic regulatory style, distinguished by its emphasis on detailed rules, substantial transparency requirements, adversarial procedures for resolving disputes, costly legal contestation involving many lawyers and frequent judicial intervention in administrative affairs (Kagan, 2001). Although most Europeans may feel secure in their immunity to this 'American Disease,' there are increasing indications that the American legal style is spreading across Europe. A debate has emerged among scholars of comparative law and public policy as to whether American legal style is taking hold in Europe and supplanting established national styles. Some scholars have argued that patterns of law and regulation across Europe are converging on an American model (Galanter, 1992; Kelemen & Sibbitt, 2004; Shapiro, 1993; Shapiro & Stone, 1994; Trubek et al., 1994; Wiegand, 1991), whereas others have argued that entrenched national legal institutions and cultures will block convergence (Kagan, 1997; Legrand, 1996; van Waarden, 1995).

This article links this emerging debate on styles of governance with the literature on European integration, arguing that a shift toward American legal style is occurring in the European Union (EU) and that its spread is inextricably linked to the process of European integration. European integration encourages the spread of adversarial legalism as a mode of governance through two related mechanisms. The first involves the process through which the economic liberalization associated with the EU's Single Market undermines cooperative, informal, and opaque approaches to regulation at the national level. To achieve their regulatory objectives in a liberalized environment, national policy makers are pressured to rely on more formal, transparent regulations and private enforcement, often at the EU level. The second mechanism stems from the policy-making dynamics lawmakers encounter when they reregulate at the EU level. The EU is a highly fragmented regulatory state with a powerful judiciary. The fragmentation of power between institutions at the EU level encourages the adoption of laws with strict, judicially enforceable goals, deadlines, and transparent procedural requirements. Also, given the EU's limited implementation and enforcement capacity, EU lawmakers have an incentive to empower private parties with justiciable rights and rely on adversarial legalism as a means of decentralized enforcement. Far from advocating the spread of adversarial legalism, EU policy makers profess their commitment to adopting flexible, informal approaches to governance. Although the EU does employ a variety of informal, flexible policy instruments, the impact of such initiatives is overshadowed by the less discussed but more pervasive spread of adversarial legalism across a number of policy areas.

The shift toward adversarial legalism in European governance involves changes in the three institutional variables identified in the introduction to this special issue. Adversarial legalism relies on an expansion in the range of EU rights, the empowerment of national and EU courts, and the enhancement of access to justice for private parties. The normative implications of the spread of adversarial legalism are ambiguous. Although many observers would view this shift as the regrettable spread of an American disease, others would view it as enhancing transparency, access to justice, accountability, and public participation. The expansion of rights strengthens democracy, and enhanced access to justice constitutes a vital form of democratic participation, if not the form that critics of the EU's democratic deficit have in mind. Ultimately, any normative assessment must weigh the gains in terms of transparency, rights, and access to justice for previously marginalized groups against the deadweight losses involved in increased legal expenses, slower policy-making processes, and diminished cooperation between stakeholders in affected policy arenas. Like other contributions to this special issue, this article recognizes that increased access to justice can enhance the quality of democracy; however, this article raises a note of caution concerning the undesirable side effects of opening the courtroom doors.

The remainder of this article is divided into three sections. The first section details my explanation for the spread of American legal style across the EU and considers rival arguments. Next, I turn to an initial empirical assessment of the argument, discussing both overarching trends and developments in four policy areas. The final section considers normative implications of this phenomenon, particularly concerning the nature and quality of democracy.

Explaining the Spread of Adversarial Legalism

Given the significant differences in regulatory styles across member states and policy areas (Richardson, 1982), any effort to make broad generalizations about these styles is problematic. Nevertheless, a number of common attributes do distinguish traditional European regulatory styles from the American style (Kagan, 2001). The approaches to regulation that long predominated across Western Europe were more informal, cooperative, and opaque and relied less on lawyers and courts than those in the United States. Systems of regulation prevalent across Europe, ranging from the corporatism found in Austria, Sweden, and Germany (Lehmbruch & Schmitter, 1982), to the *dirigisme* of France (Suleiman, 1978), to the chummy coopera-

tive style of British regulation (Vogel, 1986), all relied heavily on closed policy-making networks and empowered regulators to pursue informal means of achieving regulatory objectives. Network insiders had no need to resort to litigation. Outsiders had greater incentives to do so but typically found courts unwilling to block policy initiatives developed within elite networks.

The confluence of two developments has sparked a shift toward adversarial legalism in European regulatory style since the mid-1980s. First, the economic liberalization resulting from the 1992 Single Market initiative and ongoing efforts to complete the Single Market undermined traditional approaches to regulation at the national level. Many national regulations have been struck down by the European Court of Justice (ECJ) as illegal nontariff barriers to trade, and other informal regulatory practices are regularly attacked for their lack of transparency and legal certainty. The growing diversity of players in liberalized markets has subverted informal, opaque systems of regulation that relied on insider networks and trust. As traditional approaches break down, national regulators seek new means by which to pursue their regulatory goals, better suited to the liberalized environment. Following a fundamental insight of the sociology of law, one would expect that as the social distance and distrust between regulators and regulated actors in markets increases, laws and regulatory processes will become more formal, transparent, and legalistic (Black, 1976). As a result, some movement toward adversarial legalism would have been likely even had reregulation been conducted exclusively at the national level. In the EU, however, much of the reregulation that has complemented the construction of the Single Market has occurred at the EU level.

The highly fragmented institutional structure of the EU has encouraged the reliance on adversarial legalism as a mode of governance. Democracies vary considerably and systematically in the specificity of the legal obligations (statutes, contracts, court rulings) and in their reliance on litigation as a means of enforcement (Kagan, 2001). Comparative research suggests that the fragmentation of political power is a primary cause of judicial empowerment in general (Ferejohn, 2002; Ginsburg, 2003; Shapiro, 1981) and of adversarial legalism as a policy style in particular (Kagan, 2001; Kelemen & Sibbitt, 2004). Political fragmentation creates agency problems and simultaneously offers a tempting solution to them. Where political authority is fragmented, legislative principals will have difficulty assembling the coalitions necessary to control executive agents to whom they have delegated power. Political fragmentation also enhances the durability of legislation and judicial independence. Anticipating difficulties in controlling bureaucracies ex post, lawmakers's draft detailed statutes that limit bureaucratic discretion

and establish causes of action that enable private parties to enforce legal norms in court (McNollgast, 1999).

The transfer of regulatory authority to the EU level has increased the fragmentation of political authority. Authority in many policy areas is divided vertically between the EU and member state governments and horizontally at the EU level between the Council, the Parliament, the Commission, and the ECJ. This fragmentation of power has encouraged the production of detailed laws with strict goals, deadlines, and procedural requirements and has encouraged an adversarial, judicialized approach to enforcement (Franchino, 2004; Kelemen, 2004; Prechal, 1995). Ironically, member state governments have supported this approach because they doubt one another's commitment to implementation and seek to facilitate enforcement actions against noncompliant states (Majone, 1995). The European Parliament favors this approach, as it distrusts member states and seeks to limit their discretion and encourage the Commission or private parties to take enforcement actions against laggard states (Franchino, 2004; Kelemen, 2004). More generally, widespread criticisms of the EU's 'democratic deficit' and distrust of distant Eurocrats have generated public demands for transparency and public participation in regulatory processes (Harlow, 1999; Vogel, 2003). Satisfying these demands has required further formalization of EU regulations and administrative procedures.

Finally, the fragmentation of power in the EU has enhanced the power and assertiveness of the ECJ. Divisions between the Council, the Parliament, and the Commission make it difficult for these political branches to act in concert to rein in the ECJ. The ECJ can take an assertive stance in enforcing EU law against noncompliant member states with little fear of political backlash (Garrett, Kelemen, & Schulz, 1998). Knowing that the ECJ and many national courts are independent and assertive, EU lawmakers regularly enlist them as agents of policy enforcement, inviting the Commission and private parties to enforce community law in court.

EU treaties, secondary legislation, and expansive ECJ interpretations have also created a number of legally enforceable rights for private parties. Pursuing policy aims through a rights strategy has several advantages in the EU context. Above all, it is inexpensive. By establishing EU rights and relying on private parties to enforce them, EU lawmakers can avoid the cost of funding the extensive Eurocracy and large-scale programs that would otherwise be necessary to implement and enforce policy. By presenting policy goals as individual rights that private actors and governments are obliged to respect, the EU can readily shift the costs of compliance to the private sector and member state governments. The creation of these individual rights has enabled private parties to bring litigation against governments before

national courts and access the EU judicial system via the preliminary ruling procedure, although the impact of such litigation has varied across member states and policy areas (Alter, 2001; Cichowski, 2006; Conant, 2002). With time, the number and scope of EU rights is likely to proliferate as the EU's institutional structure encourages what Eskridge and Ferejohn (1995) have termed virtual logrolling in which the legislature and the judiciary defer to one another's rights-creating preferences.

The argument set out above challenges existing orthodoxies concerning EU governance and prominent arguments concerning the resilience of national legal styles and patterns of policy diffusion. First, although the European Commission (Commission of the European Communities, 2001a) and scholars (Héritier, 2002; Radaelli, 2003) emphasize the EU's role in promoting new, flexible modes of governance relying on voluntary agreements, framework directives, soft law, self-regulation, and the open method of coordination, my argument suggests that we should actually observe EU involvement pushing national policy styles in a more formal, adversarial direction. Second, other scholars have suggested that impediments to litigation entrenched in national institutions and legal cultures across the EU will block the spread of adversarial legalism in general (Kagan, 1997) and of EU rights litigation specifically (Alter & Vargas, 2000; Burke, 2004; Conant, 2002; Harlow, 1999). These arguments identify a variety of institutional impediments to litigation—such as restrictive rules of standing, inadequate financial support and incentives, the absence of class actions—and deeply embedded norms concerning the role of law and lawyers that all seem to make Europe inhospitable terrain for the growth of adversarial legalism. As a result of such impediments, the impact of adversarial legalism and EU rights creation will vary across member states and policy areas and is unlikely to generate many of the notorious excesses of the U.S. system. Nevertheless, these authors have overestimated the strength of these barriers, many of which are already crumbling. Finally, even those who agree that adversarial legalism is on the rise across Europe might attribute this to a different set of causes than those identified here. The most common explanations for the diffusion of policy styles across countries are based on regulatory competition or emulation. Regulatory competition (i.e., race-to-the-bottom pressure) has not driven the EU to adopt adversarial legalism as a way of enhancing its competitiveness. Quite to the contrary, adversarial legalism often imposes far greater costs than more informal approaches to regulation. Nor is American regulatory style spreading primarily through a process of social learning or emulation. Although many U.S. laws and policies may be viewed as laudable models, most European policymakers view adversarial legalism as anathema. Thus, the explanation for the spread of adversarial legalism presented above

both challenges arguments that emphasize institutional barriers to litigation and differs from those typically associated with policy diffusion (Kelemen & Sibbitt, 2005).

Assessing the Spread of Adversarial Legalism

The primary aim of this article is not to explain variation in change of legal style across member states or policy areas, though explaining such variation is certainly important. The aim, rather, is to examine whether adversarial legalism is emerging as a prevalent mode of governance across a wide range of policy areas, to explain the phenomenon, and to assess its normative implications. In pursuit of this broad ambition, this section begins by analyzing a series of general developments in EU law and regulation that suggest a shift toward adversarial legalism. Next, the assessment turns to case studies of four disparate policy areas—environmental policy, securities regulation, anti-discrimination law, and consumer protection. These policy areas were selected to reflect the wide range of areas of regulatory policy, both economic and social, in which the EU is involved and thus to demonstrate the breadth of the phenomena. Although the case selection is not based on a most different systems design in a strict sense, the comparisons enable us to examine whether and how the EU encourages adversarial legalism in policy areas characterized by different legal norms, institutions, and actors.

Overarching Trends

A number of overarching developments evidence the spread of adversarial legalism as a mode of governance in the EU. First, the steady expansion of the catalogue of EU rights and the persistent tendency of EU lawmakers to draft action-forcing laws replete with justiciable provisions have expanded the bases for legal action. Second, the European Commission has taken an adversarial, legalistic approach to enforcement. Third, the EU actively seeks to expand access to justice and encourages private parties to enforce community law through national courts. Finally, the legal services industry across Europe is experiencing a transformation that will strengthen the legal infrastructure for adversarial legalism.

The range of individual rights protected under EU Treaties and secondary legislation has expanded dramatically. In addition to well-known treaty-based rights such as free movement or equal treatment, the EU's legislative actors and the ECJ have established a wide catalogue of fundamental human and citizenship rights along with a host of issue specific rights for workers,

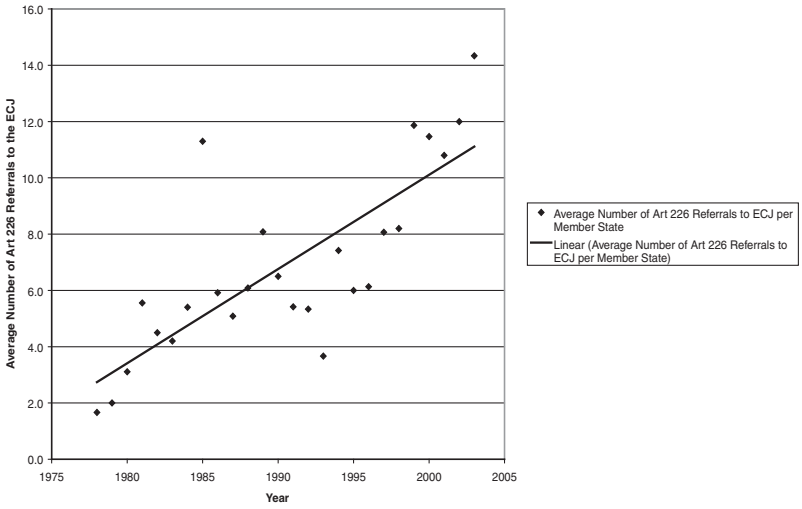
consumers, shareholders, immigrants, and others (De Búrca, 1995; Engel, 2001; Kelemen, 2003; Stone Sweet, 2000).

Despite recurrent commitments from EU law makers to simplifying EU regulation and moving to new, flexible approaches, EU regulation remains on the whole, highly detailed and prescriptive and places increasing emphasis on procedural formality and transparency (Prechal, 1995; Senden, 2004). As part of the drive to relaunch the Single Market in the mid-1980s, the Commission and the member states called for a new approach to regulation that promised to move away from a model in which directives harmonized rules in painstaking detail and to a model based on minimal harmonization and mutual recognition. Examining an original dataset of directives adopted from 1958 to 1993, Franchino (2006) finds that the shift to the new approach was indeed associated with, "a moderate shift toward shorter, more concise legislation" since the early 1980s. However, the movement toward simpler legislation was short lived. With the advent of the codecision procedure, Parliament added precision to directives and enhanced possibilities for judicial oversight, with the aim of reducing discretion for the Commission and member state administrations. (Franchino, 2006).

The precision of EU law is backed by a coercive approach to enforcement. The Commission has strengthened its enforcement activities radically since the mid-1980s (Börzel, 2003). For years, the Commission only pursued infringement cases when member states blatantly failed to transpose directives into their national legal systems. During the 1980s, the Commission expanded the forms of noncompliance in regard to which it pursued cases and initiated proceedings against member states that complied on paper but not in practice. Also, the Commission and the ECJ often support strict interpretations of directives, finding member states to be in noncompliance even in cases where EU directives appeared to provide member states with considerable discretion. In recent years, the Commission regularly initiates nearly 1,000 infringement procedures annually (Börzel, 2003; Commission of the European Communities, 2004b). Although the vast majority of cases are settled before being formally referred to the ECJ, the number of infringement cases brought to the ECJ has risen steadily, with the average number of cases brought per member state per year more than doubling since the mid-1980s (see Figure 1).

At Maastricht, the member states granted the Commission the authority to request that the ECJ impose penalty payments on member states that failed to comply with ECJ rulings in infringement cases (Article 228). Since 1997, the Commission has initiated more than 100 of these cases. The threat of sanctions has proven extremely effective in pressuring errant member states to comply with EU law, and most such cases are settled before the ECJ rules.

Figure 1
Average Number of Article 226 Referrals to the European Court of Justice (ECJ) Per Member State, 1978 to 2003



Source: Börzel, 1999; Comission of the European Communities, 2004b

However, the ECJ has imposed penalties on three occasions, most recently imposing a record 20 million Euro penalty on France for violating EU fisheries regulations, coupled with rolling penalties of 57.8 million Euro every 6 months until France complies (Minder, 2005, July 13).

Enforcement litigation brought by the Commission constitutes only the tip of the EU litigation iceberg. Recognizing the limits on the Commission's capacity to enforce EU law single-handedly, the Commission, the Council, and above all, the European Parliament have consistently encouraged the empowerment of private actors to enforce EU law through the courts. The EU has long relied on private parties to serve as the eyes, ears, and ultimately, the long arm, of community law (Alter, 2001; Schepel & Blankenburg, 2001). Decentralized enforcement by private parties before national courts relying on the Article 234 (ex Art. 177) preliminary reference procedure has grown steadily through the years (see Figure 2).

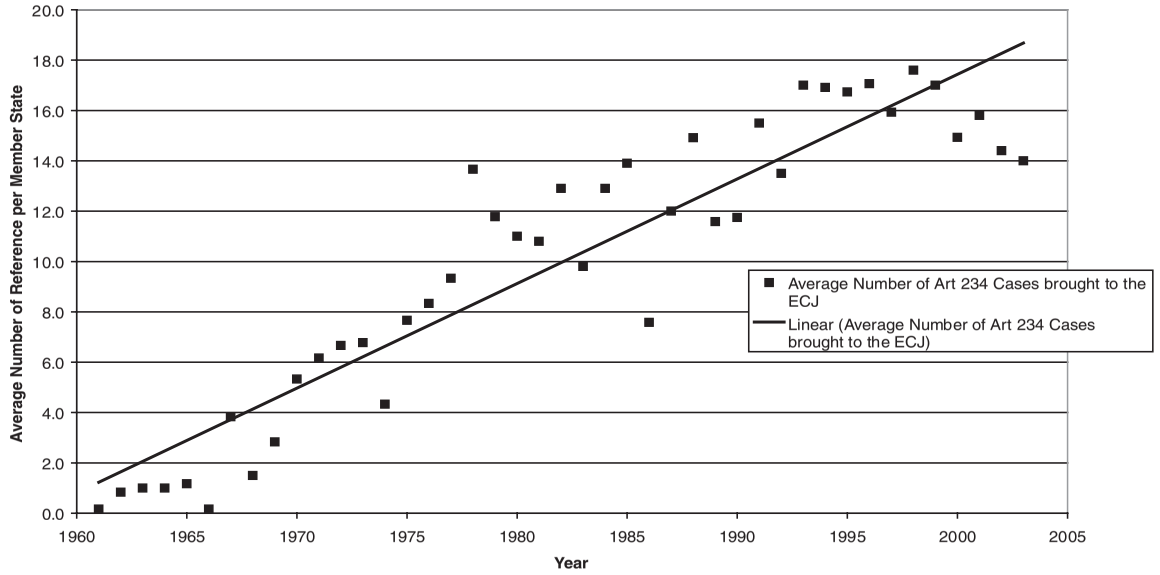
The increased frequency of referrals for preliminary rulings to the ECJ from national courts is a natural byproduct of the expanded scope of European law and the growth in trade and other forms of exchange (i.e., movement of persons) between member states (Fligstein & Stone Sweet, 2001).

However, the increased frequency of such decentralized litigation is also the consequence of a deliberate political strategy. The EU's effort to promote dialogue among European courts and to build a common 'judicial area' dates back decades (Alter, 2001) and intensified dramatically in recent years. Prodded on by a Commission communication emphasizing obstacles to justice and the need to ensure "equal access to rapid, efficient and inexpensive justice" (Commission of the European Communities, 1997), the Tampere European Council asked the Commission to launch a series of judicial cooperation initiatives to create a "European area of justice" based on transparency, democratic control, and access to justice (Commission of the European Communities, 1999a).

The EU is actively working to expand financial support for private enforcement and to spread awareness of the potential for private parties to enforce EU law. In 2002, the Council adopted a Regulation (European Community, 2002) concerning judicial cooperation in civil matters, one central aim of which is to improve access to justice across the EU. Pursuant to this regulation, the Commission proposed an access to justice directive (Commission of the European Communities, 2002a) that would have required member states to provide legal aid to individuals who could not meet the cost of litigation in cross-border disputes and fund litigation by public interest organizations. The Parliament strongly supported the proposal and called for the guarantee of legal aid to be extended to all civil and commercial cases, not just those with a cross-border dimension. The Council ultimately adopted a watered down directive (European Community, 2003a) that was limited to cross-border disputes and only guaranteed aid for 'natural persons' (not for public interest groups). Nevertheless, this directive constitutes an important step toward harmonizing legal aid rules, and with ongoing pressure from the Commission and Parliament, further developments are likely.

The ECJ also has worked to empower litigants, most famously through its establishment of the doctrines of supremacy (European Court of Justice [ECJ], 1964) and direct effect (ECJ, 1963) and its development of the doctrine of state liability (ECJ, 1991). In a series of rulings beginning with *Francovich*, the ECJ has developed a doctrine of state liability that establishes conditions under which member states can be held liable for damages suffered by individuals as a result of the member state's failure to implement community law. More generally, a series of ECJ decisions have increased the level and range of damages that litigants can claim under community law. For instance, in *Von Colson* (ECJ, 1984), the court emphasized that damages function not only as a form of redress but also as a deterrent to future harm. In *Marshall II* (ECJ, 1993), the ECJ ruled that member states must allow full compensation for damages concerning violations of the Equal Treatment

Figure 2
Average Number of Article 234 References Brought to the European Court of Justice (ECJ) per Member State, 1961 to 2003



Source: European Court of Justice, 2003.

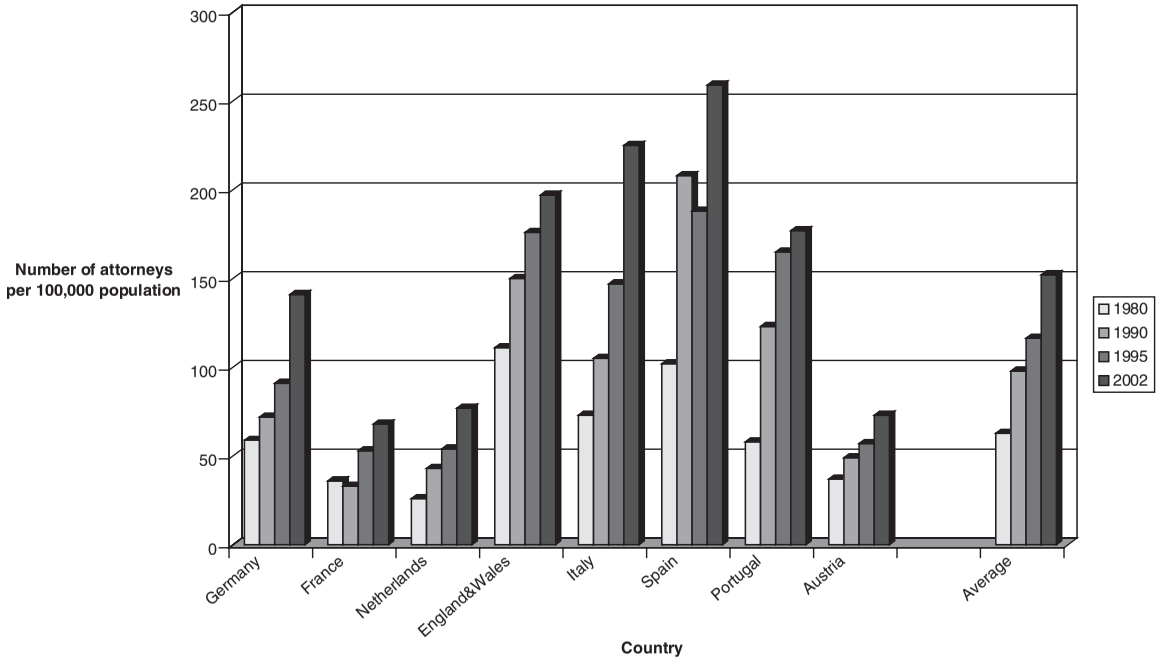
Directive. Taken together, such legal developments promise to increase opportunities and incentives for private parties to bring litigation to enforce their EU rights.

The European legal services industry has undergone a profound transformation in recent years, such that there are increasingly strong 'legal support structures' (Epp, 1998) for many forms of litigation. Lawyers are the sine qua non of adversarial legalism. Although they do not generate this mode of governance on their own, they are necessary for its operation and contribute to its spread. The number of registered attorneys across the EU has increased dramatically during the past 20 years (see Figure 3). The unweighted average increase in lawyers per capita between 1980 and 2002 in the eight member states for which data are available is 142%. Increases were considerable across all eight states, from a low of a 77% increase in England and Wales to a high of a 208% increase in Italy.

Not only is the number of lawyers increasing, they are also adopting forms of organization and patterns of practice that resemble those found in the United States. Between 1985 and 1999, the number of offices of American law firms in Western Europe more than doubled, and the number of lawyers they employ has increased nearly six-fold, from 394 to 2,236 (Kelemen & Sibbitt, 2004). American firms have flourished in Europe because they had the size, forms of organization, and experience in legal fields that became vital for corporate clients in the increasingly liberalized market. Faced with competition from American firms, European firms have adopted many of their legal techniques and have increased their size significantly (Kelemen & Sibbitt, 2004). Through such changes in the legal services industry, private parties, at least in the corporate sector, now have access to law firms that are oriented to providing American style legal services. However, as the case studies below reveal, the impact of changes in the legal services industry is thus far limited to policy areas affecting large corporations. By contrast, less privileged parties, such as diffuse public interest groups and aggrieved individuals, may have access to some form of legal aid but typically lack access to legal service providers oriented to European litigation strategies (Conant, 2002; Kelemen, 2003). The recent spread of class-action rules to a number of EU member states, however, promises to increase litigation opportunities for more diffuse and less well-resourced plaintiffs (Hodges, 2001; Hollinger, 2005; Fleming; 2005; Jacoby, 2005).

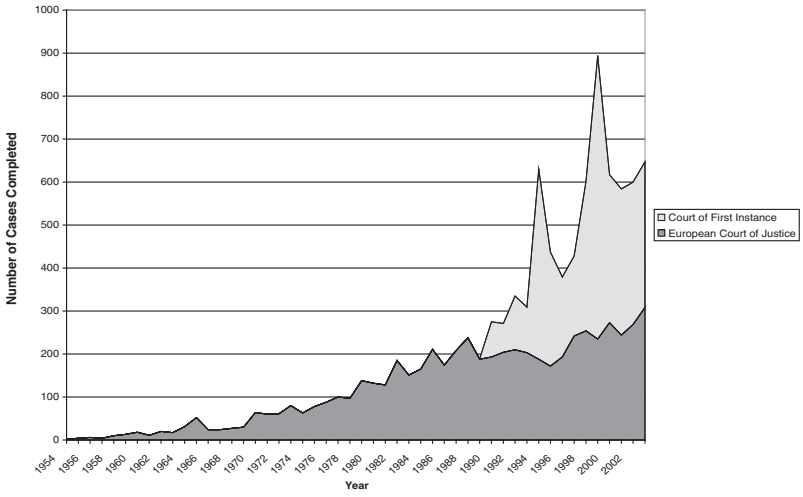
It is tempting to equate the spread of adversarial legalism with simply more litigation; certainly, the overall volume of litigation at the European level has increased dramatically, more than tripling since the 1980s (see Figure 4). However, much of what is distinctive about adversarial legalism in the United States and what may be spreading in some form to the EU, involves

Figure 3
Attorneys per Capita in Eight Member States



Source: Contini, 2000; Council of Europe, 2004.

Figure 4
Total Cases Completed by the European Court of Justice and the Court of First Instance (1954 to 2003)



Source: European Court of Justice, 2003

not litigation itself but changes in behavior in the shadow of potential litigation. Reflections of adversarial legalism, such as lengthy product safety warning labels, exhaustive due diligence in corporate transactions, and high medical malpractice insurance premia are not evident in litigation rates. One such indirect indicator of increased concern with litigation risks is the growth of the legal expenses insurance industry across Europe. Between 1992 and 2001, the inflation adjusted growth rate of spending on legal expenses insurance across the EU was 3.1% per year (Comité Européen des Assurances, 2003). To detect the more subtle manifestations of adversarial legalism, we must move beyond aggregate measures and turn to detailed case studies.

Case Studies

Environmental Regulation

In the 1980s and 1990s, substantial academic literature demonstrated that compared to the adversarial legalism characteristic of U.S. environmental policy, national approaches to environmental policy across Europe were more cooperative, flexible, and informal (Kagan, 2001; Vogel 1986). EU

involvement in environmental policy has grown dramatically since the early 1980s. The EU has developed an inflexible, adversarial approach to environmental regulation that has pressured member states to adopt this model in implementing EU environmental law. The EU's proclivity for formal laws and strict enforcement relying heavily on private parties is rooted in the EU's fragmented institutional structure. The agency problems and distrust discussed above have encouraged the drafting of laws designed to be strictly enforced by the ECJ and national courts (Kelemen, 2004). Recognizing the Commission's limited enforcement capacity, lawmakers, particularly those in the European Parliament, promote decentralized, private enforcement.

Sensitive to critiques of its command-and-control approach, the Commission frequently declares its commitment to new instruments and approaches designed to be more flexible and informal, to employ market mechanisms and to encourage cooperation with regulated entities (Lenschow, 2002). Although the EU has issued a number of directives that incorporate such instruments, the vast majority of EU directives continue to include rigid deadlines, detailed substantive and procedural requirements, and rights that private parties may later rely on in court. When existing EU environmental laws were amended during the 1990s, their strict, nondiscretionary approach was left in place (Jordan, Wurzel, Zito, & Brückner, 2003). Most environmental directives adopted in the 1990s took an inflexible command-and-control approach (Rittberger & Richardson, 2003). The Commission consistently brings cases against member state governments for infringements of EU environmental directives. Indeed, environmental policy is the sector in which member states are subject to the greatest number of infringement cases. Even where directives appear to grant member states considerable discretion as, for instance, in the designation of bathing waters or bird protection areas, the Commission and the ECJ have aggressively restricted member state discretion. Not only has the Commission challenged member states on substantive violations, it has also forced member states to replace informal administrative measures with inflexible, legally binding instruments (Kelemen, 2004). It is telling that the EU's most prominent example of applying new instruments of governance in environmental policy—the carbon dioxide emissions trading scheme—has itself become enmeshed in litigation (ENDS, 2005).

As mentioned above, the Commission recently started requesting that the ECJ impose penalty payments (under Treaty Art. 228 (ex Art. 171)) on member states that fail to comply with ECJ rulings. Here, too, environmental cases have led the way; the first five such cases involved violations of community environmental law (Kelemen, 2004). As of 2003, 40 of the 69 penalty cases in motion involved violations of environmental law (Commission of

the European Communities, 2004b). Through such enforcement mechanisms, the EU has forced significant shifts in policy instruments and policy styles in many member states.

In addition to enforcement actions brought by the Commission, the EU is creating greater opportunities and incentives for private enforcement of environmental law. Many environmental directives create substantive and procedural rights for individuals. Although there are no comprehensive data on environmental litigation rates across the member states, EU environmental law has certainly increased opportunities for litigation before national courts. As for references to the ECJ, as of 2003, 71 preliminary ruling references for environmental cases had been sent to the ECJ (Cichowski, 2006). Although the pace of referrals from national courts accelerated in the late 1990s and has started to play an important role in areas such as nature conservation, the impact of the preliminary ruling procedure on environmental policy remains limited. One key reason for the infrequency of such cases is that many national legal systems restrict standing for environmental nongovernmental organizations. However, since the mid-1990s, the Commission and Parliament have been pressuring member states to harmonize their rules on access of private parties to national courts. In 1998, member states and the EU itself signed the UN Aarhus Convention, which includes commitments concerning access to justice in environmental policy making. The Commission and member state environmental inspectorates have interpreted them to demand that environmental NGOs have the opportunity to challenge administrative decisions.

In 2004, the EU introduced a Directive on Environmental Liability (European Community, 2004a) that invites environmental organizations to participate in holding polluters accountable. Article 12 of the directive empowers any 'natural or legal person' that is (a) affected by environmental damage or can demonstrate either (b) sufficient interest or (c) impairment of a right to bring a request for a liability action to the relevant national authority. The directive specifies that environmental NGOs can bring liability actions on these grounds. As member states have until 2007 to comply with the directive, it is too early to assess its impact. However, many environmental NGOs campaigned for the directive and are eager to put it to use.

Lofty rhetoric notwithstanding, the prospects for informal modes of governance are limited. The European Parliament has great power in environmental policy, and its distrust of member states has led it to oppose the use of voluntary agreements and other nonbinding approaches and to demand transparent, legally binding measures backed by private enforcement.

Securities Regulation

The EU's program of liberalizing European financial markets in the 1980s and 1990s ran headlong into established patterns of securities regulation at the national level. Securities exchanges across Europe relied on flexible, informal self-regulation by limited networks of repeat market players (Karmel, 1999). Most member states imposed few disclosure requirements for securities transactions and did little to restrict insider trading (Warren, 1994). These regulatory regimes created very few private causes of action, and shareholder litigation against financial intermediaries or listed companies was nearly nonexistent.

The Commission recognized that divergence between national standards would continue to fragment the market and, therefore, backed its market liberalization with a program of financial market reregulation at the EU level (Warren, 1994). The Commission proposed a series of directives establishing minimum standards for (a) public offerings and listings, (b) trading activities, and (c) financial intermediaries (Lannoo, 2001). Many of these directives were consolidated in the 1993 Financial Services Directive. Compared to regulatory regimes that existed at the national level, EU securities regulation relies on detailed laws focusing on disclosure, transparent regulatory processes, and an adversarial, judicialized approach to enforcement by both government and private parties.

In the run up to the launch of the Euro, the Commission presented a Financial Services Action Plan (Commission of European Communities, 1999b) proposing a series of measures aimed at completing the single market in financial services by 2005. Subsequently, the EU adopted a series of measures designed to enhance transparency and disclosure (Commission of the European Communities, 2002b). The fragmentation of political power at the EU level has had a major impact on the shape of new legislation. The European Parliament has sought to limit the discretion of the agencies involved in implementing EU securities regulation and has emphasized that such bodies must be structured in a transparent, democratically accountable manner (European Parliament, 2001). Parliament proposed hundreds of amendments to securities directives aimed at forcing regulators to protect consumer interests. As a result, the EU's most recent securities directives, such as the prospectus (European Community, 2003b), transparency (European Community, 2004b) and market abuse (European Community, 2003c) directives, are extremely detailed and create justiciable rights for shareholders (Lannoo, 2001).

Finally, the EU is moving to take a stricter, more judicialized approach to enforcement. In response to implementation failures of some member states

throughout the 1990s, the Parliament and the Council have called on the Commission to bring more infringement cases before the ECJ. As part of its Action Plan on Modernising Company Law (Commission of the European Communities, 2003a), the Commission has launched a public consultation on its plan to propose a new directive extending shareholder rights. Shareholders are already invoking their existing EU rights and using litigation to enforce securities regulations. American institutional investors in Europe have begun employing their shareholder activism techniques, including litigation. Shareholder activism has increased markedly in a number of member states, including France, the United Kingdom, and Germany (Kelemen & Sibbitt, 2004). Such activism has generated high-profile securities litigation against Deutsche Telekom, Parmalat, and Railtrack and has increased pressure on jurisdictions across Europe to permit securities class actions (Budras, 2004).

Antidiscrimination Policies

Eager to appeal to citizens by expanding the social dimension of the EU but lacking the resources necessary to pursue social policies that rely on fiscal transfers, the EU has focused on establishing social regulations that create rights for individuals (Majone, 1993). To date, the EU has had the greatest impact in the area of equal treatment of the sexes, one of the few areas of antidiscrimination law enshrined in the treaties since the founding of the communities (Treaty Art. 141, ex Art. 119). EU treaties and secondary legislation have established a number of legally enforceable rights designed to ensure equal treatment of the sexes, and ECJ interpretations of these treaty provisions and directives have served to expand their scope significantly. As has been well documented, women's rights organizations have employed litigation strategies whereby they use lawsuits brought by individuals to pressure their governments to equalize treatment of women in areas ranging from pay, to pregnancy, pensions, and to part-time work (Alter & Vargas, 2000; Cichowski, 2006).

More recently, other groups that suffer from discrimination have mobilized to pursue a rights-litigation strategy similar to that pioneered by women's rights groups. For instance, in the mid-1990s, disability rights groups and nongovernmental organizations representing racial and ethnic minorities, gays and lesbians, and religious minorities lobbied for the inclusion of nondiscrimination rights in the Treaty of Amsterdam (Burke, 2004). A list of nondiscrimination rights (concerning sex, race and ethnicity, religion and belief, disability, age and sexual orientation) was included in Article 13 of the treaty. The article was drafted explicitly to not create direct effect (Flynn, 1999); however, subsequent secondary legislation on equal treatment has

created directly effective provisions. The 2000 Racial Equality Directive (European Community, 2000a) and Equal Treatment Framework Directive (European Community, 2000b) create new bases for antidiscrimination litigation (Bell, 2002). The latter directive includes a reasonable accommodation requirement similar to that found in the Americans with Disabilities Act and requires member states to grant disabled persons standing to sue in cases of employment discrimination.

The EU's competence and the catalogue of EU antidiscrimination rights remains limited. The decision by the member state governments at the 2000 Nice European Council, to not fully incorporate the Charter of Fundamental Rights into the treaties reduced the ability of societal actors to bring rights-based litigation in recent years (de Búrca, 1995; Flynn, 1999). Emerging research emphasizes that EU rights produce less litigation and have less impact in member states that limit access to the courts and provide little legal aid (Alter & Vargas, 2000; Conant, 2002; Harlow, 1999). To date, the Commission's effort to promote harmonization of conditions for access to justice in the member states have met with limited success. However, looking to the future, it is very likely that the role of antidiscrimination litigation will increase. The Anti-Discrimination Unit of the Commission's Directorate–General Employment and Social Affairs is working to spread awareness of individual rights under EU antidiscrimination legislation and is funding a network of pan-European nongovernmental organizations that support rights litigation. The doctrine of state liability generates powerful financial incentives for some forms of rights litigation in the EU. Finally, if the EU's Constitutional Treaty is eventually adopted, its Charter of Fundamental Rights will provide citizens with firmer legal ground for antidiscrimination claims and will encourage more rights litigation. Although the member states' limited the conditions under which they will be bound by the Charter (European Community 2000c, at Art 51), the ECJ's well-established history of taking expansive readings of community legal obligations suggests that the ECJ will interpret these conditions loosely.

Consumer Protection

The substance of much of EU consumer protection regulation seems conducive to adversarial legalism, as it emphasizes transparency, disclosure, and the empowerment of private actors to play a role in enforcement. Yet to date, the patterns of legal practice in consumer protection have not followed an American model. There has been no flood of consumer protection litigation. Developments in the area of products liability law in the EU illustrate the limits of the spread of adversarial legalism in Europe. Although political fragmentation and economic liberalization associated with European integration

have encouraged Americanization of the substance of products liability law, this has not been followed by a shift in legal practice.

Traditionally across EU member states, a variety of legal principles and institutions, such as the need to prove negligence or intentionality and the absence of contingency fee arrangements, class actions, and punitive damages deterred products liability litigation (Hodges, 2000). Following the thalidomide tragedy in the early 1960s, member state governments increased their efforts to protect consumers from unsafe products. The Commission recognized that differences in the emerging national product safety policies could distort the Single Market. The threat posed to the Single Market gave the Commission a strong incentive to harmonize product safety regulations and products liability law at the European level (Hodges, 2000). Moreover, the Commission was sensitive to critiques that the EU served the interests of big business, and it was eager to adopt consumer-friendly policies (Stapleton, 2002). Given the EU's small budget and staff, using product liability law to protect consumers had the added advantage in that it did not require the establishment of a vast regulatory bureaucracy. Instead, consumers could be legally empowered to protect their own interests in court.

In 1985, after a 10-year deadlock, the Council reached a compromise and adopted the Product Liability Directive (Directive 85/374). The directive reflected many legal concepts of U.S. products liability law, including the doctrines of strict liability, joint and several liability, expansive definitions of liable parties, and the notion of a "defect." Debate on the directive resurged briefly in the wake of the mad cow crisis, and the European Parliament called for a substantial strengthening of the position of the consumer under the Directive (European Parliament, 1998). However, business interests expressed strong opposition to many of these proposals, and for the time being, the Commission has not pressed ahead with a strengthening of the position of the consumer in EU products liability law (Commission of the European Communities, 2000).

Despite the adoption of much of the substance of American products liability law in the 1985 directive, the practice of products liability law in the EU has not gone down the path of adversarial legalism. The dearth of data makes it difficult to assess the impact of the directive, but it clearly has not stimulated the flood of litigation, astronomical damage awards, and unpredictability associated with the American system. Although it is quite possible that the directive has led to an increase in claims leading to out-of-court settlements, these settlements remain confidential. The European Consumers' Organisation (BEUC) reports that it has not observed an increase in smaller product liability claims, that it is unaware of any major multiparty actions or large damage awards to consumers under the directive, and that there are still

few reported cases based on new standards established by the Directive (BEUC, 2000). For the time being, it seems that institutional impediments and financial disincentives of the sort highlighted by Kagan (1997) and others continue to discourage product-liability litigation.

Although the product liability directive itself has not yet succeeded in enlisting private litigants as the long arm of Brussels, the Commission continues to create consumer-protection legislation in other areas based on a model of enhancing transparency and creating enforceable individual rights. For instance, in the area of air transport, a 2004 EU regulation (European Community, 2004c) gave passengers rights to compensation (for canceled or delayed flights) that can be enforced in national courts. The Commission has advertised these rights in airports across Europe and airlines have received a dramatic upsurge in claims (Minder 2005, August 23). In May 2005, the EU adopted an Unfair Commercial Practices Directive (European Community, 2005), which empowers individuals, consumer organizations, or competitors to take legal action against firms that engage in unfair commercial practices, such as pressure selling, misleading advertising, and directly exhorting children to buy products. In the areas of transport and utilities regulation, the Commission issued a Green Paper in May 2003 (Commission of the European Communities, 2003b), which included proposals for extending the model of passenger rights adopted for air transport to other modes of transport, imposing disclosure requirements on energy suppliers, and guaranteeing consumers the right to choose suppliers. To be sure, the EU is sponsoring the establishment of non-judicial fora for alternative dispute resolution, such as the EEJ–Net (European Extrajudicial Network) and FIN–Net (Consumer complaints network for financial services). Nevertheless, the emphasis on empowering consumers to bring legal action through the courts when necessary continues.

Conclusion and Normative Implications

Consumers, airline passengers, shareholders, environmental nongovernmental organizations, victims of discrimination, and firms do not sue for Europe. They sue for themselves. Yet in doing so, they serve as the eyes, ears, and long arm of Brussels, providing strength to an otherwise weak state (Dobbin & Sutton, 1998). Although individuals may occasionally have incentives to litigate and although EU lawmakers may have incentives to recruit them as their watchdogs, few actors in the regulatory process would explicitly advocate a shift toward adversarial legalism. Nevertheless, for the reasons discussed above, the process of European integration is encouraging just such a shift.

The normative implications of this trend are ambiguous (Kagan, 2001). Vices of this legal style are infamous and are already subject to criticism in the EU. British Euroskeptics regularly rail against the inflexible regulations emanating from Brussels, whereas Chirac's recent discussion of introducing class-action lawsuits in France was greeted with condemnation by business leaders who raised the specter of American-style litigation (Hollinger, 2005). The growth of the EU's regulatory authority has been accompanied by a proliferation of inflexible, prescriptive regulations. Policy implementation and enforcement processes grow more expensive and slower and invite costly litigation. Although such vices are well known, adversarial legalism also promises less obvious virtues. The shift to adversarial legalism promises to enhance opportunities for broader, more active public participation in governance and thus improve the quality of democracy in ways that undermine some of the most common critiques of the EU's democratic deficit.

The EU certainly lacks some fundamental features of a democratic polity, particularly on the electoral dimension; however, many criticisms levied by the democratic deficit literature are misguided (Hix, 2003; Moravcsik, 2002). Much of the literature on the democratic deficit focuses on the EU's alleged shortcomings in terms of openness, transparency, and accountability. Critics argue that policy making at the EU level reduces opportunities for effective public participation in the democratic process (Follesdal, 1997). Such critiques hold up the EU against an ideal type and do not withstand comparative scrutiny with existing democracies (Zweifel, 2002). The shift in authority from constituent states to the EU level has moved the locus of decision making further from the citizen. However, this loss of democracy is compensated for in significant ways by the growing emphasis the EU places on transparency, openness, and accountability in policy making and implementation, particularly as the European Parliament increases pressure in this regard. Traditional regulatory approaches in the EU (e.g., the corporatism, dirigisme, and the "chummy" styles discussed above) had many virtues, but these did not include transparency, openness, and accountability. The ongoing harmonization of administrative procedures on the EU model is increasing access points and resources and enhancing opportunities for democratic participation in administrative processes throughout the EU (Shapiro, 2001). The impact will be greatest in member states and policy areas where traditional policy-making processes were most closed and opaque. In such cases, European integration promises to open new opportunities for participation, including through litigation, for previously excluded groups.

A second critique of the EU's democratic deficit concerns the purported imbalance between negative and positive integration in the EU. Scharpf (1996, 1999, 2003) has argued that there is an asymmetry between the

strength of the ECJ's ability to eliminate national social rights and protections in the name of the market and the limited ability of EU legislative actors to adopt new social policies and rights at the EU level and that this asymmetry systematically undermines the social rights agenda of social democratic majorities. This critique underestimates the degree to which new positive rights are being created at the EU level. Negative integration has undermined national governments's efforts to protect vulnerable groups in some cases. However, such negative integration has generated political pressure for positive integration, and the EU has responded with the positive rights agenda discussed above. Litigating may not be the form of participation that most advocates of democracy have in mind. However, in a liberal democracy subject to the rule of law, litigating to defend one's rights or to challenge bureaucratic malfeasance is every bit as legitimate a form of participation as voting or marching in a protest. The EU has intended its initiatives in civil justice cooperation to "bring the European Union closer to the people" (Hartnell, 2002, p.81; Schepel & Blankenburg, 2001). In areas ranging from environmental protection, to shareholder rights, to antidiscrimination to consumer protection, the emphasis on creating rights for private parties and expanding their access to justice to enforce those rights constitutes a legitimate form of European governance. To the extent that citizen awareness of their community rights grows, this may enhance their sense of European identity and citizenship. Thus, although the growth of the EU's authority has shifted the locus of decision making in many areas further from the citizen, this is being compensated for in crucial respects by the enhancement of transparency and accountability in policy making at the national level and by the proliferation of rights for individuals at the EU level.

References

Alter, K. (2001). *Establishing the supremacy of European law.* Oxford, UK: Oxford University Press.

Alter, K., & Vargas, J. (2000). Explaining variation in the use of European litigation strategies. *Comparative Political Studies*, *33*(4), 452-482.

Bell, M. (2002). Beyond European labour law? *European Law Journal*, *8*(3), 384-399.

BEUC (Bureau Européen des Unions de Consommateurs). (2000). BEUC response to the Commission's green paper on liability for defective products. BEUC Position Paper, No. BEUC/X/031/2000. Retrieved November 1, 2005, from www.beuc.org

Black, D. (1976). *The behavior of law.* New York: Academic Press.

Börzel, T. (1999). *Database on EU member state compliance with community law.* Florence, Italy: European University Institute. Retrieved November 20, 2005, from http://www.iue.it/RSCAS/Research/Tools/ComplianceDB/Index.shtml

Börzel, T. (2003). Guarding the treaty. In T. Börzel & R. Cichowski (Eds.), *The state of the European Union, Vol. 6*. Oxford, UK: Oxford University Press.

Budras, C. (2004, November 23). Deutsche Telekom's 8-Ton Filing Shows 'Americanized' Lawsuits. *Bloomberg News*. Retrieved November 1, 2005, from www.bloomberg.com

Burke, T. (2004). The European Union and the diffusion of disability rights. In *Transatlantic policymaking in an age of austerity*. Washington, DC: Georgetown University Press.

Cichowski, R. (2006). *The European court, civil society and european integration*. Cambridge, UK: Cambridge University Press.

Comité Européen des Assurances. (2003). *European insurance figures*. Brussels, Belgium: Author.

Commission of the European Communities. (1997). *Commission communication to the Council and the European Parliament—Towards greater efficiency in obtaining and enforcing judgments in the European Union*. COM (1997) 609 final.

Commission of the European Communities. (1999a). *Bulletin of the European Union*, EU 10-1999, Tampere European Council Presidency Conclusions.

Commission of the European Communities. (1999b). *Financial services action plan. Communication from the Commission*. COM (1999) 232 final.

Commission of the European Communities. (2000). *Report from the Commission on the application of directive 85/374 on liability for defective products*. COM (2000) 893 final.

Commission of the European Communities. (2002a). *Commission proposal for a council directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings*. COM (2002) 13 final.

Commission of the European Communities. (2002b). *Financial services action plan, sixth report*. COM (2002) 267 final.

Commission of the European Communities. (2003a). *Communication from the Commission to the Council and the European Parliament. Modernising Company Law and enhancing corporate governance in the European Union—A plan to move forward*. COM (2003) 284 final.

Commission of the European Communities. (2003b). *Green paper on services of the general interest*. COM (2003) 270 final.

Commission of the European Communities. (2004a). *Governance: A white paper.* COM (2001) 428 final.

Commission of the European Communities. (2004b). *Report from the Commission on monitoring the application of community law 2003, 21st annual report*. COM (2004) 839 final.

Conant, L. (2002). *Justice contained*. Ithaca, NY: Cornell University Press.

Contini, F. (2000). *European data base on judicial systems*. Bologna, Italy: Instituto di Ricerca sui Sistemi Giudiziari/ Consiglio Nazionale delle Richerche.

Council of Europe. (2004). *European judicial systems, 2002*. Brussels, Belgium: Council of Europe.

De Búrca, G. (1995). The language of rights and European integration. In J. Shaw & S. Moore (Eds.), *New legal dynamics of European Union*. Oxford, UK: Oxford University Press.

Dobbin, F., & Sutton, J. (1998). The strength of the weak state. *American Journal of Sociology*, *104*, 441-476.

ENDS. (2005, April 12). Commission rules on climate plans. Issue 1857.

Engel, C. (2001). The European Charter of Fundamental Rights. *European Law Journal*, *7*(2), 151-170.

Epp, C. (1998) *The rights revolution*. Chicago: University of Chicago Press.

Eskridge, W., & Ferejohn, J. (1995). Virtual logrolling: How the court, congress, and the states multiply rights. *Southern California Law Review*, *68*, 1545.

European Community. (2000a). Council Directive 2000/43/EC, O.J. (L 180/22).

European Community. (2000b). Council Directive 2000/78/EC, O.J. (L 303/16).

European Community. (2000c). Charter of Fundamental Rights of the European Union, 2000/C, O.J. (C 365/1).
European Community. (2002). Council Regulation (EC) 743/2002, O.J. (L115).
European Community. (2003a). Council Directive 2002/8/EC, O.J. (L 26/41).
European Community. (2003b). Directive 2003/71/EC, O.J. (L 345/64).
European Community. (2003c). Directive 2003/6/EC, O.J. (L 96/16).
European Community. (2004a). Directive 2004/35/EC, OJ. (L 143/56).
European Community. (2004b). Directive 2004/109/EC, O.J. (L 390/38).
European Community. (2004c). Regulation (EC) No 261/2004, O.J. (L 46/1).
European Community. (2005). Directive 2005/29/EC, O.J. (L 149/22).
European Court of Justice. (1963). *Van Gend en Loos*, Case 26/62, ECR 10.
European Court of Justice. (1964). *Costa v ENEL*, Case 6/64, ECR 585.
European Court of Justice. (1984). *Von Colson*, Case 14/83. ECR 1891.
European Court of Justice. (1991). *Francovich*, Joined cases C-6/90 and C-9/90, ECR I-5357.
European Court of Justice. (1993). *Marshall II*, Case C-271/91 ECR I-4367.
European Court of Justice. (2003). Annual report of the European Court of Justice, 2003. Retrieved November 20, 2005, from http://www.curia.eu.int/en/instit/presentationfr/.
European Parliament. (1998, November 23). *Opinion of 5.11.98* (O.J. No. C 359).
European Parliament. (2001, March 15). *Resolution on the final report of the Committee of Wise Men on the regulation of European Securities Markets*. RSP/2001/2350.
Ferejohn, J. (2002). Judicializing politics, politicizing law. *Law & Contemporary Problems*, *65*(3), 41-68.
Fleming, C. (2004, February 24). Europe learns litigious ways. *The Wall Street Journal*, p. 16.
Fligstein, N., & Stone Sweet, A. (2001). Institutionalizing the Treaty of Rome. In A. Stone Sweet, W. Sandholtz, & N. Fligstein (Eds.), *The Institutionalization of Europe*. Oxford, UK: Oxford University Press.
Flynn, L. (1999). The Implications of Article 13 EC. *Common Market Law Review*, *36*, 1127.
Follesdal, A. (1997). Democracy and federalism in the European Union. In A. Follesdal & P. Koslowski (Eds.), *Democracy and the European Union*. Berlin, Germany: Springer-Verlag.
Franchino, F. (2004). Delegating powers in the European Community. *British Journal of Political Science*, *34*, 449-476.
Franchino, F. (2006). *The powers of the Union*. Cambridge, UK: Cambridge University Press.
Galanter, M. (1992). Law abounding. *Modern Law Review*, *55*(1), 1-24.
Garrett, G., Kelemen, R. D., & Schulz, H. (1998). The European Court of Justice, National governments and legal integration in the European Union. *International Organization*, *52*(1), 149-176.
Ginsburg, T. (2003). *Judicial review in new democracies*. New York: Cambridge University Press.
Harlow, C. (1999). Citizen access to political power in the EU (Working Paper Robert Schuman Centre No. 99/2). Florence, Italy: European University Institute.
Hartnell, H. (2002). EUstitia. *Northwestern Journal of International Law & Business*, *23*, 65-138.
Hix, S. (2003). The end of democracy in Europe? Unpublished manuscript, London School of Economics.
Héritier, A. (Ed.). (2002). *Common goods*. Lanham, MD: Rowman & Littlefield.
Hodges, C. J. S. (2000). Product liability in Europe. *Business Law International*, *3*, 171-191.
Hodges, C. J. S. (2001). Multi-party actions. *Duke Journal of Comparative and International Law*, *11*, 321.

Hollinger, P. (2005, January 7). France mulls allowing class-action suits. *Financial Times*, p. 7.
Jacoby, M. (2005, September 2). For the tort bar, a new client base: European investors. *The Wall Street Journal*, p. 1.
Jordan, A., Wurzel, R., Zito, A., & Brückner, L. (2003). European governance and the transfer of new environmental policy instruments in the EU. *Public Administration*, *81*(5), 555-574.
Kagan, R. (1997). Should Europe worry about adversarial legalism? *Oxford Journal of Legal Studies*, *17*(2), 165.
Kagan, R. (2001). *Adversarial legalism*. Cambridge, MA: Harvard University Press.
Karmel, R. S. (1999). The case for a European Securities Commission. *Columbia Journal of Transnational Law*, *38*, 9.
Kelemen, R. D. (2003). The EU rights revolution. In T. Börzel & R. Cichowski (Eds.), *The State of the European Union, Vol. 6:*. Oxford, UK: Oxford University Press.
Kelemen, R. D. (2004). *The rules of federalism*. Cambridge, MA: Harvard University Press.
Kelemen, R. D., & Sibbitt, E. C. (2004). The globalization of American law. *International Organization*, *58*(1), 103-136.
Kelemen, R. D., & Sibbitt, E. C. (2005). Lex Americana? *International Organization*, *59*(2), 485-494.
Lannoo, K. (2001). *Updating EU Securities Market regulation*. Brussels, Belgium: Centre for European Policy Studies.
Legrand, P. (1996). European legal systems are not converging. *International and Comparative Law Quarterly*, *45*, 52-81.
Lehmbruch, G., & Schmitter, P. C. (1982). *Patterns of corporatist policy making*. London: Sage.
Lenschow, A. (2002). New regulatory approaches in 'greening' EU policies. *European Law Journal*, *8*(1), 19-37.
Majone, G. (1993). The European community between social policy and social regulation. *Journal of Common Market Studies*, *31*(2), 153-170.
Majone, G. (1995). Mutual trust, credible commitments and the evolution of rules for a single European market (EUI Working Paper No. RSC 95/1). Florence, Italy: European University Institute.
McNollgast (Matthew McCubbins, Roger Noll, & Barry Weingast). (1999). The political origins of the administrative procedure act. *Journal of Law. Economics & Organization*, *15*, 180-217.
Minder, R. (2005, July 13). France fined €20m over fish stocks. *Financial Times*. Retrieved November 20, 2005, from www.ft.com.
Minder, R. (2005, August 23). EU Airlines count the cost of compensation confusion. *Financial Times*, p. 16.
Moravcsik, A. (2002). In defense of the "Democratic Deficit": Reassessing the legitimacy of the European Union. *Journal of Common Market Studies*, *40*(4), 603-634.
Prechal, S. (1995). *Directives in European community law.* Oxford, UK: Oxford University Press.
Radaelli, C. (2003). *The open method of coordination: A new governance architecture for the EU?* (Report 1). Stockholm: Swedish Institute for European Policy Studies.
Richardson, J. (Ed.). (1982). *Policy styles in Western Europe*. London: George Allen & Unwin.
Rittberger, B., & Richardson, J. (2003). Old wine in new bottles? The Commission and the use of environmental policy instruments. *Public Administration*, *81*(3), 575-606.
Scharpf, F. (1996). Negative and positive integration in the political economy of European welfare states. In G. Marks, F. Scharpf, P. Schmitter, & W. Streeck (Eds.), *Governance in the European Union*. London: Sage.

Scharpf, F. (1999). *Governing in Europe. Effective and democratic?* Oxford, UK: Oxford University Press.
Scharpf, F. (2003). Problem-solving effectiveness and democratic accountability in the EU (MPI Working Paper No. 03/1). Cologne, Germany: Max Planck Institute.
Schepel, H., & Blankenburg, E. (2001). Mobilizing the ECJ. In G. De Búrca & J. Weiler (Eds.), *The European Court of Justice* (pp. 9-42). Oxford, UK: Oxford University Press.
Senden, L. (2004). *Soft law in European Community law.* Oxford, UK: Hart.
Shapiro, M. (1981). *Courts*. Chicago: University of Chicago Press.
Shapiro, M. (1993). The globalization of law. *Indiana Journal of Global Studies*, *1*(1), 37-64.
Shapiro, M. (2001). The institutionalization of the European administrative space. In A. Stone Sweet, W. Sandholtz, & N. Fligstein (Eds.), *The institutionalization of Europe*. Oxford, UK: Oxford University Press.
Shapiro, M., & Stone, A. (1994). The new constitutional politics of Europe. *Comparative Political Studies*, *26*(4), 397-420.
Stapleton, J. (2002). Bugs in Anglo-American products liability. *South Carolina Law Review*, *53*, 1225-1261.
Stone Sweet, A. (2000). *Governing with judges*. Oxford, UK: Oxford University Press.
Suleiman, E. (1978). *Politics, power and bureaucracy in France.* Princeton, NJ: Princeton University Press.
Trubek, D., Dezalay, Y., Buchanan, R., & Davis, J. R. (1994). Global restructuring & the law. *Case Western Law Review*, *44*, 407-498.
van Waarden, F. (1995). Persistence of national policy styles. In B. Unger & F. van Waarden (Eds.), *Convergence or diversity? Internationalization and economic policy response*. Aldershot, UK: Avebury.
Vogel, D. (1986). *National styles of regulation*. Ithaca, NY: Cornell University Press.
Vogel, D. (2003). The hare and the tortoise revisited. *British Journal of Political Science*, *33*, 557-580.
Warren, M. G. (1994). The European Union's Investment Services Directive. *University of Pennsylvania Journal of International Business Law*, *15*, 181.
Wiegand, W. (1991). The reception of American law in Europe. *American Journal of Comparative Law*, *39*(2), 229-249.
Zweifel, T. (2002). *Democratic deficit? European Union, Switzerland, United States*. Lanham, MD: Lexington Books.

R. Daniel Kelemen is a fellow in politics, Lincoln College, University of Oxford. He is author of *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004) and articles on European Union politics, federalism, and judicial politics in journals including *International Organization*, *Comparative Political Studies*, *West European Politics,* and *Journal of Public Policy.*