PART ONE

INTRODUCTION
CHAPTER ONE

THE POLITICS OF GHOSTWRITING LAWYERS

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

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


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

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

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

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

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

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

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

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

8 Alter and Helfer, Transplanting International Courts, at 7–8, 16.
13 For instance, Fligstein and Stone Sweet describe legal mobilization in the EU as a sequence of “lawyers activated by their clients and judges activated by lawyers”: 
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by other actors – such as social movements, interest groups, and resourceful clients – presumed to be the true protagonists of political action. A few perceptive studies have begun trekking this path by demonstrating that the experience, reputation, and size of lawyers’ teams condition judicial decisions. But political scientists still need to move beyond probing attributes of lawyer capability to portray how their agency can shape processes of political development transcending individual wins or losses in court. This is surprising, given that one of the central concerns of political science – the development of the modern state – is intimately tied to the rise of the legal profession. As states bestowed status to lawyers by granting them monopoly rights to legal representation, lawyers labored to legitimate rule-based social order and supplied expertise to fledgling bureaucracies. From


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

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

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

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


command compliance\(^{23}\) and emulate the pathways of traditional state-building.\(^{24}\) Yet their postwar commitment to building a transnational “community based on the rule of law”\(^{25}\) opened a political opportunity to invoke the force of law to mobilize judges, reshape state institutions, and compensate for the EU’s weak military and administrative capacity.

But why, precisely, was it lawyers that grabbed the baton of change, and what was the extent of their influence? This is the political story that remains untold. In the United States, studies of cause lawyering, elite law firms, and lawyer-politicians\(^{26}\) have peeled back how “lawyers make the politics and produce the law.”\(^{27}\) Yet these accounts often presume that lawyers' political influence may not travel beyond the uniquely litigious American system of “adversarial legalism.”\(^{28}\) In response, other scholars have started uncovering how lawyers in authoritarian and transitional regimes are often at the

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foreground of civil rights battles in the name of political liberalism.29 Yet in the liberal civil law states of post—WWII Europe, the absence of such dramatic political struggles and the specter of “legal science” continues to obscure lawyers’ influence “behind a cult of traditions or legal technique.”30 Even the few instances where lawyer activism is acknowledged31 usually end up being treated as curiosities or exceptions that prove the rule. And the presumed rule is that the judicial construction of Europe has always been “essentially, if not exclusively, a judicial task” wherein courts actively “retain control over such matters.”32 Or, as the French government tersely put it in 1958: “The [European] common market can have nothing to do with lawyers.”33 Yet there is more to this story than meets the eye. Europe’s political development through law is an exemplary story of how lawyers mobilize courts to catalyze institutional change, alongside the limits, mutations, and consequences accompanying these efforts. To make this case, this book combines a geocoded dataset of thousands of lawsuits, hundreds of interviews across three of the EU’s founding states, and historical evidence from newspaper and court archives. In so doing, I build a historical institutionalist theory explicating when lawyers – and not other potential change agents – are best placed to advance political development through law, alongside the obstacles they encounter and


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

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

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

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

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