Women's Rights, the European Court, and Supranational Constitutionalism

Rachel A. Cichowski

This analysis examines supranational constitutionalism in the European Union (EU). In particular, the study focuses on the role of the European Court of Justice in the creation of women's rights. I examine the interaction between the Court and member state governments in legal integration, and also the integral role that women's advocates—both individual activists and groups—have played in the development of EU social provisions. The findings suggest that this litigation dynamic can have the effect of fueling the integration process by creating new rights that may empower social actors and EU organizations, with the ultimate effect of diminishing member state government control over the scope and direction of EU law. This study focuses specifically on gender equality law yet provides a general framework for examining the case law in subsequent legal domains, with the purpose of providing a more nuanced understanding of supranational governance and constitutionalism.

In the last forty years, we have witnessed the evolution of an unprecedented form of supranational governance in Western Europe: the European Union (EU). The European Court of Justice (ECJ) has played a powerful role in this transformation. The Court's activism in the 1960s and 1970s is now widely accepted as having transformed the Treaty of Rome, an international treaty governing nation-state economic cooperation, into a "supranational constitution" granting rights to individual citizens (Lenaerts 1990; Mancini 1989; Weiler 1981, 1991). The Treaty of Rome stands today as the backbone of a supranational legal regime

The author wishes to acknowledge the MacArthur Foundation and the Woodrow Wilson Foundation for generously supporting the data collection included in this analysis. The study also benefited from the invaluable comments of Alec Stone Sweet and many scholars at the European University Institute, Fiesole, Italy, where I conducted the research. I would also like to thank the special issue editor, Kim Lane Scheppele, and two reviewers for insightful comments on both the empirical analysis and the pregnancy case law. An earlier version of the pregnancy and maternity case law analysis appears in Cichowski (2001). Address correspondence to Rachel Cichowski, Assistant Professor, Department of Political Science, University of Washington, Box 353530, Seattle, WA 98195; e-mail: rcichows@u.washington.edu.

Law & Society Review, Volume 38, Number 3 (2004)
© 2004 by The Law and Society Association. All rights reserved.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

governing not only transnational free trade issues but also national women's rights provisions.

How did this remarkable transformation take place? How did the text of an international treaty that was mainly concerned with protecting businesses from unfair competition evolve into an elaborate set of policy arenas and procedures that today govern women's rights throughout Europe? And subsequently, has this institutionalization of EU "constitutional" rights remained controlled by national governments? This is the puzzle my research attempts to explain. The answers are important for scholars concerned with understanding the evolving dynamic of European legal integration and a European rule of law system. And perhaps more important, it is also significant for those interested in the role of supranational constitutionalism in international and domestic policy processes. How are individuals and groups empowered by these new constitutional rights? How does the enforcement of supranational law change the balance of power between national governments, individuals, and international organizations? And finally, how do these supranational rights enhance the role of national and supranational judges in judicial policymaking?

To answer these questions, the analysis examines the role of the ECJ in the expansion and institutionalization of EU policy and how this dynamic process can empower individuals vis-à-vis their own governments. In particular, this article examines the evolution of supranational constitutionalism in the area of EU women's rights.[1] I study the ECJ's social provisions case law pursuant to Article 234 of the Treaty of Rome (previously numbered Art 177) and explore how this procedure served as an avenue to both expand EU women's rights protection and strengthen national compliance with these new constitutional rights. Article 234, also known as the preliminary ruling procedure, allows (and in some cases requires) national judges to ask the ECJ for a correct interpretation of EU law if it is material to the resolution of a dispute being heard in a national court. The national court then applies the ECJ decision (the preliminary ruling) to resolve the case. This procedure links domestic and international legal orders through an ongoing dialogue between national judges and the ECJ. Scholars now recognize the importance of this procedure, as it was primarily through this case

[1] In this analysis, I focus on judicial decisionmaking. This necessarily leaves important questions unanswered. Others have studied the national-level impact of ECJ rulings (Conant 2002), and other research has questioned whether ECJ decisions and the EU equality laws they invoke embody inherent limitations, rather than gains, for women (e.g., Cichowski 2002; Kenney 1992; Lovenduski 1997; Mazey 1988; Pillinger 1992; Prechal & Burrows 1990; Sohrab 1996). Rather than focusing on the implementation phase as the above studies do, I study decisionmaking to understand factors shaping the decisions and to examine whether these decisions expand EU law.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

law that the Court began to develop and construct its expansive constitutional doctrine (e.g., Weiler 1981, 1991). Through the constitutional doctrines of supremacy and direct effect, the Court's rulings expanded supranational governance not only by strengthening the Court's own authority, but also by empowering national judges and stimulating national legal action by individuals and groups (e.g., Alter 1998, 2001; Cichowski 1998, 2001; Mattli & Slaughter 1998; Slaughter, Stone Sweet, & Weiler 1998).[2]

The article is organized as follows. I begin by introducing a set of theoretical expectations that guide the analysis. Then I present quantitative analyses of the ECJ's social provisions case law; in particular, the role of EU law, EU organizations, and member state governments in impacting the Court's decisionmaking. The analysis is the first to offer a systematic and comprehensive policy-level examination of the Court's social provisions case law over time. The majority of decisions in this legal domain involve EU gender equality laws, with other cases invoking specific areas of social protection and health and safety regulations. In the second part, I supplement this quantitative data with an in-depth case law analysis of a single subfield of social provisions: pregnancy and maternity rights. This provides greater detail to the general patterns highlighted in the quantitative analyses. Through process tracing, I examine how the ECJ's judicial policymaking has expanded the protection and rights available to women. National governments, EU organizations, and individuals and groups are all participants in this process of institutionalization. Supranational constitutionalism in the EU evolves as a dynamic process operating both above and below the state.

Conceptualizing Judicial Policymaking and Institutionalization

The analysis adopts the assumption that through litigation, a court's resolution of societal questions or disputes can lead to the clarification and expansion of existing laws and to the construction of new rules (Shapiro 1981). Thus, in any system of governance with an independent judiciary, litigation provides a potential avenue for institutional change. While scholars illustrate that ECJ rulings can effectively expand the scope of EU rules, the dynamics of this process and subsequent effects of this judicial policymaking are less clear. I use the term *judicial policymaking* to refer to the

[2] The supremacy doctrine requires that national judges give precedence to EU rules over any national law or procedure that comes in conflict with these supranational rules, and direct effect gives individuals directly enforceable rights under EU law. See the *Costa* decision (ECJ 1964) and the *Van Gend en Loos* decision (ECJ 1963).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

Court's authoritative interpretation of the treaty and secondary legislation, which results in the clarification of EU laws. It is well documented elsewhere (Alter 2001; de la Mare 1999; Mancini 1989; Cichowski 1998, 2001) that these interpretations can significantly alter the original measure in a way that changes what is lawful and unlawful behavior for individuals and public and private bodies operating under EU law.

Generally, the institutionalization of an EU policy area evolves over time as a product of a dynamic relationship between institutions (treaty provisions, secondary legislation), organizations (the ECJ), and actors (litigants and national governments). By institutionalization, I mean the process by which new arenas of supranational governance emerge and evolve (see Stone Sweet & Sandholtz 1998:9). This study understands institutionalization as a process of rule construction that is endogenous to existing governance structures (March & Olsen 1989). That is, the Court's judicial policymaking capacity operates within the constitutional framework of the Treaty, yet the Court's jurisprudence can subsequently alter these institutions. This approach is not unfamiliar to scholars of judicial rule making (Shapiro 1988; Stone Sweet 2000).

How can one measure this change in institutions or rights? Institutionalization in any legal domain begins by looking at whether the Court's jurisprudence has transformed or changed the EU institutions governing activity in this legal domain. First, I examine the impact of ECJ jurisprudence on EU institutions and ask whether these rules have changed in precision and if they have become more binding and enforceable. As European rules become more precise and noncompliance is met with greater enforceable penalties, we can expect this set of rights to become more institutionalized at the EU level. Second, institutionalization can be measured in terms of whether ECJ rulings have changed the scope of EU institutions. As the purview of EU rules expands, one can expect a greater number of actions to be formally governed by EU law. As we move across this continuum of precision, enforceability, and scope, we find institutionalization at the EU level taking place.[3] This process of rule construction through litigation subsequently has significant consequences on the relative influence that EU organizations (such as the ECJ) and individuals exert on supranational policy outcomes. Scholars assert that through its jurisprudence the ECJ operates to expand its own competence and uphold EU interests with the effect of diminishing member government control over integration (e.g., Burley & Mattli 1993; Stone Sweet & Brunell 1998).

[3] For an examination of institutionalization in other EU policy domains, see Stone Sweet and Sandholtz (1998).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

The ECJ's constitutional doctrine is an example of the Court enhancing its own power relative to member governments (see Mattli & Slaughter 1998). I examine whether this same dynamic influences the future development of EU policy—in particular, women's rights. Have the Court's rulings led to the construction of new rules, and how do these judicial outcomes affect the relative influence of the Court vis-à-vis member state governments in shaping future policy developments? Simply, do ECJ decisions reflect the policy preference of powerful member states, as some scholars argue (e.g., Garrett, Kelemen, & Schulz 1998; Garrett 1995), or does the ECJ operate to expand EU competence, often in the face of member state opposition (e.g., Burley & Mattli 1993; Cichowski 1998)? Further, we would expect the relative clarity of EU law to matter in this judicial decisionmaking. Scholars have argued that the ECJ is more likely to issue adverse or expansive rulings the greater the clarity of the EU law in question (Garrett, Kelemen, & Schulz 1998). I argue instead that the Court's expansive decisionmaking will disproportionately involve vague EU norms. This legal uncertainty has resulted in a growing number of disputes, which subsequently activate the EU legal system, enabling the ECJ to fulfill its duty of clarifying EU law, irregardless of the potential impact on national legal practices (see Cichowski 1998). Together, these expectations guide the following analyses.

Constructing Supranational Rights in the Face of Opposition

In 1958, women's rights were not on the agenda for the newly forming European Economic Community (EEC). However, certain national governments were concerned with protecting business from unfair competition created by existing wage disparities and thus provided that under the Treaty of Rome, men and women would receive equal pay for equal work (Article 141, previously numbered as Article 119). This provision was intended to bestow obligations on national governments and to prevent competition distortion. Today this same social provision bestows a positive right on individuals throughout the member states, a judicially enforceable right that remains the backbone of an expanding net of European gender equality rights. In this section, I turn our focus to the factors that shape ECJ decisions. I explore whether the ECJ acts to uphold EU interests and clarify EU law or whether it operates to preserve national government policy positions.

Data Sources and Methodology

The data set includes all ECJ rulings pursuant to Article 234 preliminary references in the policy sector of social provisions,

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

from the first ruling in 1971 to 1993 (N = 88).[4] I compiled the decisions from the *European Court Reports*, a full text compendium of ECJ decisions. Integral to the Article 234 procedure are "observations," which are written briefs filed by the European Commission[5] and the member state governments stating how they believe the case should be decided (or more generally, how the EU law should be interpreted in relation to the national practice). Governments can submit observations in any case, even those not originating from their own legal system. Scholars note that member state governments and EU organizations submitting observations are interested in having their policy position considered, in an attempt to affect the potential policy outcomes of the decisions (de la Mare 1999:243–44). Thus, this is often the place where one might expect to see national resistance to supranational policy.

I coded the data in the following manner. The rulings were all categorized by country of origin and EU law invoked in the case. Each ruling was coded into one of two categories:

- **Consistent ruling:** The Court accepted a national rule or practice as consistent with EU law.
- **Adverse ruling:** The national rule was declared to be in violation of EU law.

This measure gives us some idea of whether ECJ rulings operate to preserve national legal practices in any systematic way or whether the rulings serve to uphold and expand EU competence. Formally, Article 234 does not enable the ECJ to directly rule on the compatibility of national rules with EU law. However, the practical reality of the ECJ's interpretation of EU law, in a context determined by national legislation, is often a determination of the validity of these national laws (see de la Mare 1999). The written observations were also coded into two categories:

- **Successful:** The observation was successful at predicting the ECJ's ruling.
- **Unsuccessful:** The observation was unsuccessful at predicting the ECJ's ruling.

[4] The quantitative analysis ends in 1993, as this was the last year the *European Court Reports* published the written observations in their entirety. The case law analysis extends the data set to 1998 to provide a comprehensive study of the Court's pregnancy rights case law and include important cases occurring in the post-1993 period. The trends in the Court's rulings are not appreciably different, other than increasing numbers of claims in the area of social provisions.

[5] The Commission is the EU institution responsible for proposing and implementing the legislative decisions of the other two EU bodies: the European Parliament and the Council of Ministers. While the Parliament represents the interests of European citizens and the Council embodies the interests of the member states, the Commission upholds the interests of the EU as a whole.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

This enables us to measure the direct impact of both the member states' and the EU Commission's policy positions on ECJ rulings. Finally, by reading the case law, I can examine the impact of ECJ precedent on subsequent decisionmaking. Through process tracing, I trace the Court's case law, examining whether these rulings change the precision and scope of EU law and how this may create new rights that are linked to subsequent action and litigation.

Expanding the European Rule of Law

I begin by examining the preliminary rulings over time. Table 1 displays the percentage of annual rulings in which the ECJ found the national practice to be in violation of EU law (I refer to this as an adverse ruling) between 1971 and 1993. The findings are dramatic. The majority of these cases resulted in an adverse ruling (56%). The first decade of social provisions litigation contained few adverse rulings, with only five rulings during this time. Yet even when the ECJ found no violation, these rulings did often make bold moves to expand EU law through the Court's argumentation (notably the *Defrenne* decisions, which are discussed in greater detail below). Further, throughout the 1980s and early 1990s, the ECJ held in almost half or more of these cases that national practices were in violation of EU law. Remarkably, this trend occurred even during a time when there was a general slowing of EU integration processes in the 1980s, especially in the social policy sector, as member state governments preferred to focus on domestic policy concerns rather than the development of supranational policy. For example, the United Kingdom (UK) government continually

Table 1. ECJ Rulings Pursuant to Article 234 in the Area of Social Provisions by Policy Subfield, Judicial Outcome, and Year, 1971–1993

	Total Rulings	Adverse Rulings (%)
Policy Subfield		
Equality Legislation	40	70
Equality Treaty	21	62
Health & Safety	4	25
Social Protection in Transport	11	10
Social Protection in Transfer Ownership	13	46
Time Periods		
1971–1979	5	40
1980–1989	42	43
1990–1993	46	55
Totals	88	56

Note: Total rulings column denotes the number of cases in each subfield of social provisions and in each time period. The percentage of adverse rulings column denotes the percentage of rulings in which the ECJ declared a national practice to be in violation of EU law by subfield and time period.

Source: Data compiled by the author from Court of Justice of the European Communities, *European Court Reports* (Luxembourg: Office for Official Publications of the European Communities, various years).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

dragged its heels on EU social legislation during the period of this study, yet British legal practices were in question in more than one-quarter of these cases (24 cases), with the ECJ finding violations in almost half of these rulings (46%). Overall, these data bring into question the assertion that the ECJ systematically acts to uphold national practices.

Table 1 also includes data on the EU rules invoked in the cases. This enables us to test how the clarity of EU rules may impact ECJ decisionmaking. ECJ decisions upholding national practices were disproportionately in those subfields invoking EU laws with more clearly defined norms: Health & Safety and Social Protection in Transport. The ECJ found national practices to be in violation of EU law in only 25% of Health cases and 10% of Transport disputes—a much lower rate than all other subfields, whose violation rates were 70% (Equality Legislation), 62% (Equality Treaty Provisions), and 46% (Social Protection in Transfer of Ownership).

This disparity is not surprising, as EU legislation in the Health and Transport cases was mainly Council Regulations whose policy prescriptions are directly applicable and binding in all member states. The resulting consequence is greater specificity, which ensures direct and uniform application in the legal systems of all member states and leads to fewer disputes. Alternatively, Council Directives are binding only to the end to be achieved but leave open to member state governments the form and method of how this will be transposed into domestic law. In the social provisions domain, many Directives possess vague policy prescriptions that result from unanimity voting. These lowest common denominator positions illustrate an overall hesitation by member state governments to specify concrete EU rules in the area of equality between men and women (Hoskyns 1996). Subsequently, these varying national implementations are the basis of disputes coming before the ECJ. As the data suggest, when legal questions arose from these vague policy prescriptions, the ECJ did not hesitate to expand both the meaning and scope of this equality legislation, often in the face of member state opposition.

Almost half of the social provisions preliminary rulings involved the Gender Equality Directives (40 out of 88 rulings). And in 70% of these cases (28 out of 40), the ECJ found national practices to be in violation of EU law. This is an astonishing number for a policy area that was intended to remain governed mostly by national measures rather than EU law. Similarly, the ECJ does not hesitate to expand the scope of Article 141 when confronted with the possible rights implied by this treaty "constitutional" provision (see the *Defrenne* decisions ECJ 1971, ECJ 1976, and ECJ 1978). In 21 different rulings, the ECJ was asked to interpret the meaning of this right in relation to national practices: 62% of these rulings

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

declared national laws to be in nonconformity with Article 141. We might expect more adverse rulings involving this Treaty provision, as fundamental EU rights give the ECJ greater latitude to dismantle national practices and expand EU rules (Ellis 1998).

Table 2 provides a general picture of how the rulings evolved cross-nationally. Aggregating results from litigation involving "powerful" member state governments (France, Germany, Italy, and the UK) (Garrett 1995), the Court declared violations in more than one-half of these cases (57%). These data also give some preliminary indication that national legal regimes enshrining the least integrative rules are asked to upgrade to conform with EU law. British laws were the subjects of more than one-quarter of all the rulings in this legal domain (27%). This is not surprising. The UK has continually taken the "opt-out" position to even the most flexible of EU social policy regulations (Pierson & Leibfried 1995). These data confirm the expectation that rulings disproportionately involve legal disputes arising from legal systems operating to downgrade EU laws.

Further, the findings suggest another explanation for cross-national variation. Germany, the Netherlands, and the UK possess a comparatively high degree of legal expertise in the area of gender equality law. Thus, while these legal systems may afford greater legal protection from sex discrimination (Germany and the

Table 2. ECJ Rulings Pursuant to Article 234 References in the Area of Social Provisions by Country and Judicial Outcome, and as Predicted by Written Observations, 1971–1993

	Total Rulings	Adverse Rulings (%)	Total Observations	Success Rate (%)	Intervention Rate (%)
Belgium	11	36	7	57	0
Denmark	10	40	16	81	8
France	2	100	6	67	5
Germany	15	67	17	53	3
Ireland	4	100	6	33	2
Italy	3	67	9	55	7
Netherlands	18	67	26	35	11
Portugal	0	0	2	50	2
Spain	1	0	1	0	0
United Kingdom	24	46	52	56	44
Commission			88	91	100*

Note: N = 88

Success rate denotes the percentage of cases in which a member state government's written observation (written brief) successfully predicted the final ECJ ruling. Intervention rate denotes the rate at which a given member state intervened (by submitting an observation) in cases beyond those involving its own legal system.

*Intervention rate for the Commission was calculated as the percentage of all cases in which the Commission submitted observations.

Source: Data compiled by the author from Court of Justice of the European Communities, *European Court Reports* (Luxembourg: Office for Official Publications of the European Communities, various years).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

Netherlands in particular), compared to other member states, they also possess a greater number of equality law experts who systematically test the scope of both EU law and their own national laws by providing real situations for previously vague EU equality laws (see cases such as *Kalanke*, ECJ 1995; *Bilka*, ECJ 1986; *Dekker*, 1990c; *Ten Oever*, ECJ 1993; *Webb*, ECJ 1994b).[6] The rights argumentation of activist lawyers and the practical situation of the dispute provide the basis for the ECJ's decision. In an attempt to bring greater clarity to the EU right in question, the Court often dismantles national practices, regardless of member state opposition. Dutch practices were the subject of preliminary rulings 20% of the time (18 out of 88 rulings). Further, the ECJ declared Dutch practices as inconsistent with EU law in 67% of these cases. Similarly, German practices are increasingly the subject of adverse rulings in the area of equality: 67% of German preliminary references in this area ended in the ECJ declaring that the national practice was in violation of EU law.

I further explore the impact of national factors on ECJ decisionmaking by examining the written observations in each case. Again, member state governments and EU organizations (primarily the EU Commission) file these written briefs stating how the case should be decided. These legal arguments reveal the policy preferences of member state governments and EU organizations. The data in Table 2 include all the written observations submitted in preliminary rulings in the area of social provisions between 1971 and 1993. In general, the findings are consistent with what we know about the Commission's self-decided policy of intervening in preliminary ruling cases. The Commission submitted observations in all cases, as noted by the 100% intervention rate (88 observations out of 88 cases)—an act that reflects this organization's "desire for influence" in EU policy decisions (de la Mare 1999:244). Further, the data display that whether a country's legal practice is in question does not necessarily determine its general level of participation in submitting observations. The Dutch government intervened in 11% of preliminary rulings that did not directly involve Dutch national practices, compared to less active member states, such as Belgium, which not only did not intervene beyond its own cases but also did not submit observations in four of its own cases. Germany and Ireland were also less likely to intervene beyond their own cases, with intervention rates of 3 and 2%, respectively. Beyond the Dutch participation rate, the United Kingdom government has been astonishingly active by intervening in 28 out of 64 cases (44%)

[6] In the UK case, scholars observe the importance of national equality agencies, such as the Equal Opportunities Commission, in supporting this discrimination litigation (see Kenney 1992; Alter & Vargas 2000).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

that did not directly involve United Kingdom legal practices. This may suggest that the UK takes seriously the potential policy impact, in all member states, of these preliminary rulings. Thus, in the same way the British government has acted in the Council of Ministers to defend its position that social protection should be dealt with at the national level rather than EU level, the UK takes seriously the opportunity to participate in the policy discussions and decisions that transpire during the preliminary ruling procedure.[7]

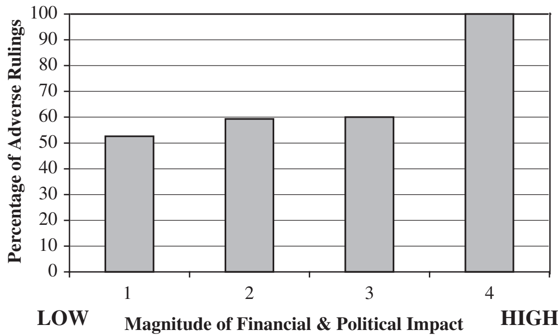
How do these member state interventions affect the ECJ's decisionmaking? The most interesting finding is that the Commission's observations predict ECJ rulings far better than do observations filed by member state governments. The Commission's success rate was approximately 91%: 80 out of 88 observations were successful at predicting the final ECJ decision. The UK's rate of success is much lower by comparison, at 56%. It is interesting to note that while Denmark's success rate was high (81%), in one of its observations the Danish government actually filed an observation stating it believes its national law is in violation with EU law (government preferences in all other cases took a stance to defend or preserve national law), and the ECJ concurred (see ECJ 1996). In general, the findings presented in Table 2 suggest that some member states take seriously the policymaking function of the ECJ preliminary ruling. Further, the findings bring into question claims that ECJ decisions are systematically influenced by the policy positions of member states. Instead, as the ECJ acts to protect its legitimacy and uphold EU interests, it is not surprising that the Commission's position is much more likely to predict the final outcome of the case.

Figure 1 displays a test of the success rates of member state governments at predicting ECJ decision in major cases, or cases with higher political or financial costs. The figure displays the percentage of adverse rulings by four categories denoting the magnitude of the political and financial impact of the case: 1 denotes low impact, and 4 is the highest. In general, a greater number of member states file written observations in cases with potentially high political and financial costs (major cases) (de la Mare 1999). Thus, the number of member states filing observations in a case becomes a proxy for the level of political and financial

[7] During the time of this study, the UK government exhibited hesitation toward a common EU social policy. The first concrete set of social rights was established through the Social Charter Action Program decided in Strasbourg in 1989. All member states except the UK signed the political declaration. Further, pressure to expand social protection in the negotiations leading up to the Treaty of European Union (TEU) was "met with stubborn resistance on the part of the UK" (Barnard 1999:485). The EU developed the "Social Chapter" (the Social Policy Agreement and the Social Policy Protocol) as treaty amendments, but they were relegated to an annex of the TEU to secure the UK's opt-out position.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

Figure 1. Magnitude of Political and Financial Impact as a Predictor of Adverse ECJ Rulings Pursuant to Article 234 References in the Area of Social Provisions, 1971–1993



Notes: N = 88. Percentage of adverse rulings denotes the total number of rulings in which the ECJ found the national law or practice to be in violation of EU law as a percentage of the total number of social provisions rulings. Each preliminary ruling is also categorized as having a low to high financial impact. The categories of magnitude denote the total number of member state governments filing observations in each case. These totals serve as a proxy for the magnitude of impact, as cases with a larger impact elicit a greater number of member state governments participating in the case.
Source: Data compiled by the author from Court of Justice of the European Communities, *European Court Reports* (Luxembourg: Office for Official Publications of the European Communities, various years).

impact. These data begin to help us understand whether the ECJ is less likely to issue an adverse ruling in major cases. As most national governments submit observations to defend national practices, this also tells us whether member states' observations are more or less successful at predicting the final decision in major cases.

The findings are significant. In the social provisions domain, there was little evidence that the ECJ is *less* likely to make an adverse ruling when a greater potential financial impact is associated with the ruling. In cases with a higher impact (magnitude of 4), the ECJ issued an adverse ruling finding the national practice in violation of EU law 100% of the time. And out of those cases with little impact, the ECJ was comparatively less likely to hand down an adverse ruling (52% of cases with a magnitude of 1).

Supranational Constitutionalism and Gender Equality Rights: From Pay to Pregnancy

These data reinforce predictions arguing that the preferences of powerful member state governments do not generally constrain the Court's judicial outcomes. To elaborate on how this litigation

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

dynamic develops and how this changes the balance of power between EU organizations, member state governments, and ordinary citizens, I rely on the content of the case law. In the remaining part of the analysis, I examine the cases in a single area of social provisions: pregnancy and maternity rights. The analysis focuses on the expansion of constitutional rights. This emphasis is important, as it elaborates how the ECJ, national courts, and individual litigants have shifted significant constitutional questions away from member state government control. While scholars highlight the inherent limitations that often exist for women in constitutional politics, especially in pregnancy and maternity litigation both in the EU (Kenney 1992, 1995; More 1992; Shaw 1999; Szyszczak 1993) and more generally (Chamallas 2003; Weisberg 1996), this case law analysis asks the question of how these rights emerged in the first place and how the Court expands them over time.

The Necessary Conditions for Legal Claims and Litigation

Article 141 of the Treaty of Rome provides the legal basis for EU gender equality. Essential to the evolution of the litigation was, first, a decision by member state governments to include the provision in the Treaty of Rome. The origins of Article 141 are embedded in economic rather than social justice concerns. Inclusion of Article 141 in the treaty was an attempt to protect French businesses from unfair competition created by less stringent policies or a lack of equal pay laws in other member states. Yet given this necessary rule, how did individuals come to utilize a treaty provision for their own protection against discriminatory national practices? This treaty provision was meant to place duties on member state governments, not to provide directly enforceable rights for individuals. Thus, the second necessary condition for this activism and litigation was an ECJ decision that transformed this treaty provision into an enforceable rights provision. Together, these two factors activated a dynamic of litigation that ultimately led to a complex set of rules governing gender equality in Europe. Thus, our case law analysis begins with this important landmark decision, the *Defrenne II* decision (ECJ 1976).

Until the late 1960s, not one national government had undertaken domestic policy changes to implement Article 141. However, this equal pay provision was far from dead, as it was soon to gain life as a result of the strategic action and activism of a Belgian lawyer. Elaine Vogel-Polsky, who specialized in social and labor law, regarded Article 141 as a stepping-stone to expanding women's labor rights. Through a series of test cases involving Gabrielle Defrenne, a flight attendant with the Belgian national airline, Sabena, Vogel-Polsky worked with the ECJ to expand the scope of the

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

provision and to begin to provide real situations in which Article 141 was applicable. The conditions behind these cases are as follows. Until 1966, Sabena's male flight stewards earned higher wages, were allowed to retire 15 years later, and were entitled to a special pension plan, all benefits that their female counterparts failed to receive. Job responsibilities of flight attendants were identical. Vogel-Polsky challenged these inequalities and sought protection for her client under EU law. The Court's *Defrenne* judgments (ECJ 1971, 1976, 1978) (in particular, the second case) were critical in transforming Article 141 by establishing its direct effect, and in doing so they provided EU citizens with individual rights enforceable under EU law.

In the *Defrenne II* decision (ECJ 1976), the Court expanded the scope and purpose of Article 141 by stating that the principle was creative of enforceable rights in national courts, regardless of national implementing legislation, and that the scope required further clarification and development. In its reasoning, the Court emphasized what it saw as the dual function of Article 141, as both economic and social (see ECJ 1976:470). Not all parties participating in this case concurred with this expansive reading of the treaty. The governments of both the United Kingdom and the Irish Republic exercised their right to submit a written observation, stating how they believed the Court should decide the case. In their opinion, Article 141 did not confer rights on individuals, citing the potential cost of the operation if the Court was to find the principle directly effective, especially retroactively. The Court did not concur.

The Path of Institutional Evolution

Activated by Vogel-Polsky's test case strategy, the Court's judicial rule-making in the *Defrenne II* decision enabled Article 141 to become the site for an expansive rights discourse. This treaty provision became the driving force behind EU gender equality legislation in the 1970s and 1980s. Further, the transformation of Article 141 had consequences not only for legislative action, but also for the litigating environment. The institutional path was paved. Individuals were provided with a new arsenal to demand rights under EU law before national courts. In this section, I examine all of the cases involving pregnancy rights referred to the Court through 1998 and explore how this changed the rights available to women.

Legal Basis for Pregnancy Rights

The litigation primarily grew out of rights claimed under Article 141 and the Equal Treatment Directive.[8] The majority of these

[8] Council Directive 76/207/EEC.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

cases focused on women who experienced discrimination in terms of either access to or dismissal from employment on the basis of pregnancy. Even though the Equal Treatment Directive was more applicable to these cases, Article 141 continued to be important because the Court's *Defrenne* decisions found a general principle of equal treatment in Article 141. Litigants and their lawyers acted strategically by invoking this constitutional right as they provided the Court with a powerful tool to decide the case. General principles, in theory, do not have the ability to override treaty provisions, yet they have enabled the ECJ to justify a "liberal interpretation of what might otherwise seem to be a narrow rule" (Ellis 1998:181). As for the equal treatment principle, the ECJ has utilized it to both dismantle discriminatory administrative decisions and justify broad interpretations of EU secondary legislation.

Pregnancy, Discrimination, and Judicial Policymaking

The Court first considered the rights of pregnant workers under EU law in the *Dekker* case (ECJ 1990a). The case was brought before the ECJ by a Dutch court in 1988. Mrs. Dekker applied for a job with a Dutch company, VJV, and after an interview was found to be the most qualified for the job. She was three months pregnant at the time, and while the hiring committee recommended employment, VJV management decided not to employ Dekker because its insurer would not cover the necessary maternity pay. Dekker instigated legal proceedings against VJV, claiming that she had been discriminated against on the basis of her sex. The case was referred to the ECJ for a preliminary ruling on the protection of Dekker under Article 141 and the Equal Treatment Directive.

In this 1990 ruling, the Court found that discrimination in employment opportunities on the grounds of pregnancy constitutes direct sex discrimination, contrary to the Equal Treatment Directive. The ruling in effect created new European rules by providing explicit protection of pregnant workers under EU law and also created a new interpretation of sex equality for women, emphasizing the disadvantage to women rather than comparable treatment with men. Later that same day, the Court made a similar ruling in a case originating from the Danish courts, the *Hertz* case (ECJ 1990b), concluding that the dismissal of a pregnant employee also amounts to discrimination under EU law.

This question of protection against dismissal is further raised in a case originating from Germany in 1992. *Habermann-Beltermann v. Arbeiterwohlfahrt* (ECJ 1994a) concerned the dismissal of a pregnant woman who had been employed on an indefinite contract to work at night, despite the national law that forbade night work by pregnant women. The Court decided the case by emphasizing that the national law affects only a limited contract, in contrast to the

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

unlimited contract in question, and found that dismissal under these circumstances is contrary to the Equal Treatment Directive.

However, a closer look at these ECJ rulings reveals many unanswered questions regarding pregnancy, maternity, and discrimination. In particular, when is pregnancy regarded as the determining factor in discriminatory treatment? In a now pivotal case in the development of EU equality law, the British House of Lords sent a reference in the *Webb* case (ECJ 1994b) asking the ECJ to bring clarity to this question. Mrs. Webb, who was pregnant, had her indefinite employment contract terminated when her employer found out that she would be absent from work during the same period as another pregnant employee whom she was hired to replace. The House of Lords decided that while Webb had no rights under UK law, she may have had rights under EU law, and so the House of Lords asked for a preliminary ruling.

The Court reaffirmed its early ruling in *Dekker* and found that "dismissal of a pregnant worker on account of pregnancy constitutes direct discrimination on grounds of sex" (ECJ 1994b: para. 19). The Court continued by arguing that the need for special protection of pregnant workers is embodied in the Equal Treatment Directive and also in the Pregnancy Directive,[9] which had not come into force yet when the case arose. The Court, in balancing the interests in the case, concluded that greater weight could not be attached to the reasons for recruitment. The defendant's argument of hardship was viewed not as the reason for dismissal, but as justification for the discriminatory treatment. Under EU law, once direct discrimination is established, it cannot be justified (Boch 1996). The Pregnancy Directive later moved beyond these earlier pieces of equality legislation by creating protection specifically for pregnant workers, although in reality it did not go much further than codifying many of the rights already extended by the Court.

Scholars both laud and criticize the Court's decision in *Webb*. The ruling clearly emphasizes and expands the EU's goal of protecting pregnant workers from discriminatory action, despite the harmful costs inflicted on employers and member state governments. Yet these rulings also highlight a significant area of equality law that needs further clarification. In both the *Webb* and *Hertz* decisions, the Court implied that the Equal Treatment Directive leaves unanswered the question of whether pregnant women in fixed-term employment are protected. While the Pregnancy Directive is not explicit about unlimited coverage, the Court in the *Larsson* decision (ECJ 1997) concluded that Article 10 of the Pregnancy Directive in fact offers such blanket protection. Interestingly

[9] Council Directive 92/85/EEC.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

enough, in this case originating from the Danish courts, the Court found that the dismissal of a woman due to pregnancy-related illness is in fact lawful under the Equal Treatment Directive—again, the facts of the case were prior to implementation of the Pregnancy Directive—when the dismissal takes place after the end of her maternity leave. The Court's clarification of the Pregnancy Directive and the extension of protection came as a side remark stating that if the Pregnancy Directive were in force, the Court would have found the action unlawful.

This remark clearly foreshadows the Court's *Brown* ruling (ECJ 1998a), a case referred from the British House of Lords. Mrs. Brown was absent from work for more than six months during her pregnancy for pregnancy-related reasons. All employees at Rentokil Ltd, her employer, are governed by the policy that absences of six months due to sickness justify dismissal. Accordingly, Brown was dismissed. The Court held, in an explicit reversal of the *Larsson* decision, that it was contrary to the Equal Treatment Directive to dismiss a woman for pregnancy-related illnesses during her pregnancy.[10] Scholars rightly argue that this reversal does little to clarify EU rules in this area, as it contradicted its earlier interpretation of the Equal Treatment Directive (Ellis 1999).[11]

The final set of cases demonstrates the Court's further expansion of pregnancy rights in areas other than dismissal and refusal to hire. We can also observe an increasing occurrence of group litigation strategies: women joining together to bring these claims.

In the *Gillespie* case, the Court received a set of questions regarding the applicability of EEC law to levels of maternity pay (ECJ 1996). The referral came by way of a Northern Ireland appeals court after the lower industrial tribunal dismissed the case of 17 plaintiffs. This type of organized litigation strategy, while not historically observed in Europe, is increasingly common in EU litigation (Cichowski 1998, 2001; Harlow & Rawlings 1992). The plaintiffs were all on maternity leave from their employment in various offices of the Northern Ireland Health Services during a

[10] As in the *Larsson* case, the facts of this case arose before the Pregnancy Directive came into force, so the Equal Treatment Directive was the only instrument available to the litigants.

[11] In particular, the Court's adherence to the rule that where the discriminatory treatment is based on the fact of pregnancy, since only women can become pregnant, this must amount to discrimination based on sex. The *Brown* decision takes this a step further by arguing that pregnancy-related illness is inseparable from the fact of pregnancy, and therefore similar treatment as a result of this condition is also discrimination on grounds of sex. Mainly, this is problematic because it again reduces pregnancy to the status of illness; in addition, this reliance on illness rather than absence as the cause for dismissal removes the employer's interests from the situation. This later logic could dilute the complexity of the situation and thus impede the Court from doing its job in balancing all the interests in the dispute at hand. See Ellis (1999) for further discussion.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

period when a proposed back-pay increase was planned. The maternity leave received by Health Service employees consists of a percentage of their given wage. The plaintiffs instigated proceedings on the grounds that they suffered sex discrimination because they did not receive the full benefit of the back-dated pay raise because they were receiving a reduced amount of their wage while on maternity leave. The Court ruled in favor of the plaintiffs, and its judgment further clarifies how national maternity policies must be interpreted in light of Article 141 and the Equal Pay Directive.[12]

The second case involves the protection of employee rights regarding assessment and evaluation while absent on maternity leave. It is worth mentioning that while the facts of the *Thibault* case (ECJ 1998b) took place after the implementation of the Pregnancy Directive, the only instrument that can be relied upon where unfavorable treatment takes a form other than dismissal or refusal to employ is still the Equal Treatment Directive. The case arose when Mrs. Thibault registered a complaint with the labor tribunal in Paris against her employer for failing to perform her annual performance evaluation, which is linked to a minimum 2 percent pay raise and promotion, because she did not fulfill the requisite six months' attendance within the evaluation year. Mrs. Thibault was on maternity and pregnancy-related leave for seven months of this time, and she argued that her employer's failure to assess her performance based on absences related to maternity leave was discriminatory. Despite the observation submitted by the British government stating that the employer's action did not constitute sex discrimination under EU law, the Court expanded the rights under the Equal Treatment Directive by concluding that it was unlawfully discriminatory to deny a woman the right to possible promotion because of her absence on maternity leave.

The final two cases represent the Court's first opportunity to rule on the Pregnancy Directive. In the *Boyle* case (ECJ 1998c), six female employees of the British Equal Opportunities Commission applied to the industrial tribunal in Manchester for a complaint that the maternity leave policy offered by this governmental agency was incompatible with EU law. In particular, the litigants argued that requirements governing the connections between sick leave and maternity leave were contrary to Article 141 of the Treaty of Rome, the Equal Pay and Equal Treatment Directives, and the Pregnancy Directive.[13] It is interesting to note that this joint claim was both from and against a British government equality agency that continues to support a considerable amount of the EU gender equality litigation (Cichowski 2001; Alter & Vargas 2000; Kenney

[12] Council Directive 75/117/EEC.

[13] Council Directives 75/117/EEC, 76/207/EEC, and 92/85/EEC.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

1992). The Court based its ruling on the Pregnancy Directive and stated that while this legislation affords some national discretion regarding commencement of leave, it found that a contract prohibiting a woman from taking sick leave during maternity leave without returning first to work was contrary to this EU law.

In the month following the *Boyle* ruling, the Court gave its second decision involving the Pregnancy Directive in the *Pedersen* case (ECJ 1998d). By way of the Danish Commerce Court, the four plaintiffs challenged a national law stating that women who were unfit for work for reasons connected with pregnancy before the third trimester were not entitled to full pay. Three women were declared unfit to work, while one was declared only partially unfit to work during this period, and thus their employer ceased to pay them. The four women claimed this law was contrary to the rights given pregnant workers under the same EU laws as invoked in the *Boyle* case. The Court ruled in favor of the plaintiffs, finding that Danish legislation does not aim to protect women's specific health conditions but rather favors the interests of the employer. This case represents the first time the Court was asked to interpret the rules governing the duties of employers regarding adjusting the workplace to the needs of pregnant workers. Pregnancy Directive Articles 4 and 5 require an employer to introduce temporary adjustments to working conditions and hours in response to risk assessment of the pregnant worker's situation. The Danish employer failed to provide other opportunities to these women. The Court gave breadth to the Pregnancy Directive by defining the scope of this right. Scholars emphasize the importance of the Court's interpretation of Articles 4 and 5 of the Pregnancy Directive in that it imposes duties on the employers, and in doing so the Court recognizes that pregnancy and maternity may require reorganization of the workplace (Caracciolo di Torella 1999).

Conclusions

The EU today governs what is historically a protected national legal domain, social policy, of which pregnancy and maternity rights are an integral part. This expansion in EU competence was unimaginable in the 1950s, when the Treaty was signed and member state governments did not all welcome the policy implications. The findings in this article illustrate that the ECJ and women activists played a powerful role in this transformation.

The analysis explains how supranational constitutionalism can lead to the expansion of rights. Faced with little or no protection under domestic law, women experiencing discrimination have utilized general EU gender equality laws to bring claims before their

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

national courts. The findings illustrate that this litigation is often the result of test case strategies and groups of women mobilizing to bring a claim. Through the preliminary ruling system, these cases are referred to the ECJ. Operating to uphold EU interests and bring greater clarity to EU law, the ECJ resolves the dispute, and in doing so is given the opportunity to expand the meaning and scope of EU social provisions, often in the face of member state opposition. This judicial rule-making can create the opportunity for subsequent legal action. In particular, we have seen this constitutional rights expansion when the ECJ transformed Article 141, a treaty provision governing equal pay and fair competition, into a positive right. This was a radical move, as the EU legal system was suddenly opened up to previously disadvantaged women. The subsequent discrimination claims enabled the ECJ to further expand EU gender equality laws to areas as diverse as pensions and pregnancy rights. Supranational constitutionalism in the EU has meant a growing body of rights protecting women throughout Europe.

I conclude by suggesting a set of broader lessons for scholars concerned with the effects of supranational constitutionalism on newly evolving political spaces. First, beyond substantive rights creation, court rulings can change the balance of power in and openness of international policy processes.[14] Social groups that are otherwise excluded from EU policymaking can utilize the ECJ to achieve significant policy reform and inclusion. The Court's jurisprudence can have the effect of shifting the distribution of gains away from dominant political interests, such as the business community, to less powerful individuals. The door is opened to those who historically may be excluded from EU decisionmaking. Women, as legal experts, group activists, and individual litigants, have become integral components in the process of European integration. This inclusion can also alter the balance of power between social groups and national governments in international politics. The EU becomes less "intergovernmental," as national governments no longer remain the sole gatekeepers to EU policy reform (Moravcsik 1998). This supranational constitutionalism has led to both the expansion of EU law and the opportunity for social groups to bring claims against their own governments and dismantle discriminatory national practices. This dynamic process provides a way to drag national governments into an ever-greater union of the sort that the politically excluded are interested in creating.

Second, and related to the first point, to the extent to which court rulings create new rights, they may have transformative effects on democracy and public inclusion (Cichowski & Stone Sweet

[14] From a domestic politics perspective, legal mobilization scholars have observed this possible effect of court rulings (see for example, McCann 1994).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

2003). Rather than engaging what American analysts would see as the counter-majoritarian difficulty of courts, the ECJ's role in integration can open up democratic participation within the EU. The litigation process illustrates how citizens are directly engaged with the EU legal system and can in effect narrow the distance that might otherwise exist between national and EU politics. The ECJ rulings can also change who is provided legal protection and inclusion in important EU rights reforms. Despite the intentions of member state governments, EU policies, which disproportionately favor capital over labor, often had significant unintended consequences on expanding social access. Finally, the findings illustrate that increasingly women are joining together to make these discrimination claims—transnational mobilization that illustrates quite clearly that reform movements are effectively and directly becoming active participants in the expansion of EU politics.[15]

It is through the dynamic interaction of litigation and social mobilization that supranational constitutionalism can evolve. Certain rules are created, and through the actions of individuals and groups these rules can be expanded in a direction that leads those governed by these rules down a path that becomes increasingly hard to change (Pierson 2000; North 1990). Powerful actors produce rules and organizations that embody their interests, yet these opportunities can be used in unintended ways. These outcomes can change who controls the trajectory of international politics. Supranational constitutionalism in the EU does not only hinge on a series of executive and legislative choices, but has also evolved as the accumulation of strategic activism by courts and social activists, operating above and below the nation-state.

References

Alter, Karen (1998) "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice," 52 *International Organization* 121–47.

——— (2001) *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford Univ. Press.

Alter, Karen, & Jeannette Vargas (2000) "Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy," 33 *Comparative Political Studies* 452–82.

Barnard, Catherine (1999) "EC 'Social' Policy," in P. Craig & G. de Búrca, eds., *The Evolution of EU Law*. Oxford: Oxford Univ. Press.

Boch, Christine (1996) "Case Law: Court of Justice," 33 *Common Market Law Rev.* 547–67.

[15] Reform movements in the EU have experienced less success with utilizing protest tactics as a transnational mobilizing strategy (see Imig & Tarrow 2001). However, reform activists are increasingly becoming common actors in both EU and global politics (see Marks & McAdam 1998; Keck & Sikkink 1998).

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

Burley, Anne-M., & Walter Mattli (1993) "Europe Before the Court: A Political Theory of Legal Integration," 47 *International Organization* 41–76.

Caracciolo di Torella, Eugenia (1999) "Recent Developments in Pregnancy and Maternity Rights," 28 *Industrial Law J.* 276–82.

Chamallas, Martha (2003) *Introduction to Feminist Legal Theory*, 2d ed. New York: Aspen Publishers.

Cichowski, Rachel A. (1998) "Integrating the Environment: The European Court and the Construction of Supranational Policy," 5 *J. of European Public Policy* 387–405.

——— (2001) "Judicial Rulemaking and the Institutionalization of EU Sex Equality Policy," in A. Stone Sweet, W. Sandholtz, & N. Fligstein, eds., *The Institutionalization of Europe*. Oxford: Oxford Univ. Press.

——— (2002) "'No Discrimination Whatsoever': Women's Transnational Activism and the Evolution of European Sex Equality Policy," in N. Naples & A. Desai, eds., *Women's Community Activism and Globalization*. New York: Routledge.

Cichowski, Rachel, & Alec Stone Sweet (2003) "Participation, Representative Democracy and the Courts," in B. Cain, R. Dalton, & S. Scarrow, eds., *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies*. Oxford: Oxford Univ. Press.

Conant, Lisa (2002) *Justice Constrained: Law and Politics in the European Union*. Ithaca: Cornell Univ. Press.

de la Mare, Thomas (1999) "Article 177 in Social and Political Context," in P. Craig & G. de Búrca, eds., *The Evolution of EU Law*. Oxford: Oxford Univ. Press.

Ellis, Evelyn (1998) *European Community Sex Equality Law*, 2d ed. Oxford: Oxford Univ. Press.

——— (1999) "Case Law: Court of Justice," 36 *Common Market Law Rev.* 625–33.

Garrett, Geoffrey (1995) "The Politics of Legal Integration in the European Union," 49 *International Organization* 171–81.

Garrett, Geoffrey, R. Daniel Kelemen, & Heiner Schulz (1998) "The European Court of Justice, National Governments, and Legal Integration in the European Union," 52 *International Organization* 149–76.

Harlow, Carol, & Richard Rawlings (1992) *Pressure Through Law*. London: Routledge.

Hoskyns, Catherine (1996) *Integrating Gender*. London: Verso.

Imig, Doug, & Sidney Tarrow (2001) "Mapping the Europeanization of Contention: Evidence from a Quantitative Data Analysis," in D. Imig & S. Tarrow, eds., *Contentious Europeans: Protest and Politics in an Emerging Polity*. Lanham, MD: Rowman & Littlefield Publishers, Inc.

Keck, Margaret, & Kathryn Sikkink (1998) *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca: Cornell Univ. Press.

Kenney, Sally (1992) *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain*. Ann Arbor: Univ. of Michigan Press.

——— (1995) "Pregnancy Discrimination: Toward Substantive Equality," 10 *Wisconsin Women's Law J.* 351–402.

Lenaerts, Koen (1990) "Constitutionalism and the Many Faces of Federalism," 38 *American J. of Comparative Law* 205–64.

Lovenduski, Joni (1997) "Sex Equality and the Rules of the Game," in F. Gardiner, ed., *Sex Equality Policy in Western Europe*. London: Routledge.

Mancini, G. Federico (1989) "The Making of a Constitution for Europe," 24 *Common Market Law Rev.* 595–614.

March, James G., & Johann P. Olsen (1989) *Rediscovering Institutions*. New York: Free Press.

Marks, Gary, & Doug McAdam (1998) "Social Movements and the Changing Structure of Political Opportunity in the European Union," in G. Marks, F. Scharpf, P. Schmitter, & W. Streek, eds., *Governance in the European Union*. London: Sage Publications.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

Mattli, Walter, & Anne-Marie Slaughter (1998) "Revisiting the European Court of Justice," 52 *International Organization* 177–209.
Mazey, Sonia (1988) "European Community Action on Behalf of Women: The Limits of Legislation," 27 *J. of Common Market Studies* 63–84.
McCann, Michael W. (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: Univ. of Chicago Press.
Moravcsik, Andrew (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca: Cornell Univ. Press.
More, Gillian (1992) "Reflections on Pregnancy Dismissal Under European Community Law," 1 *The J. of Social Welfare and Family Law* 48–56.
North, Douglass (1990) *Institutions, Institutional Change, and Economic Performance*. New York: Cambridge Univ. Press.
Pierson, Paul (2000) "Increasing Returns, Path Dependence, and the Study of Politics," 94 *American Political Science Rev.* 251–67.
Pierson, Paul, & S. Leibfried, eds. (1995) *European Social Policy: Between Fragmentation and Integration*. Washington, D.C.: Brookings Institute.
Pillinger, Jane (1992) *Feminising the Market*. London: MacMillan Press.
Prechal, Sacha, & Nancy Burrows (1990) *Gender Discrimination Law of the European Community*. Brookfield, VT: Gower Publishing Company.
Shapiro, Martin (1981) *Courts: A Comparative and Political Analysis*. Chicago: Univ. of Chicago Press.
——— (1988) *Who Guards the Guardians: Judicial Control of Administration*. Athens: Univ. of Georgia.
Shaw, Jo (1999) "Pregnancy, Maternity and Dismissals: A Clarification?," 21 *The J. of Social Welfare and Family Law* 81–88.
Slaughter, Anne-Marie, Alec Stone Sweet, & Joseph H. H. Weiler, eds. (1998) *The European Court and the National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context*. Oxford, UK: Hart Press.
Sohrab, Julia (1996) *Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law*. Aldershot, UK: Ashgate Publishing Limited.
Stone Sweet, Alec (2000) *Governing with Judges*. Oxford: Oxford Univ. Press.
Stone Sweet, Alec, & Tom Brunell (1998) "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," 92 *American Political Science Rev.* 63–81.
Stone Sweet, Alec, & Wayne Sandholtz (1998) "Integration, Supranational Governance, and the Institutionalization of the European Polity," in W. Sandholtz & A. Stone Sweet, eds., *European Integration and Supranational Governance*. Oxford: Oxford Univ. Press.
Szyszczak, Erika (1993) "Sex Discrimination and Pregnant Women," 22 *Industrial Law J.* 136–52.
Weiler, Joseph H. H. (1981) "The Community System: the Dual Character of Supranationalism," 1 *Yearbook of European Law* 268–306.
——— (1991) "The Transformation of Europe," 100 *Yale Law J.* 2403–83.
Weisberg, D. Kelly, ed. (1996) *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work and Reproduction*. Philadelphia: Temple Univ. Press.

Cases Cited

ECJ 1963. *Van Gend en Loos,* Case 26/62, ECR 1963: 1.
ECJ 1964. *Costa,* Case 6/64, ECR 1964: 585.
ECJ 1971. *Defrenne I,* Case 80/70, ECR 1971: 445.
ECJ 1976. *Defrenne II,* Case 43/75, ECR 1976: 455.
ECJ 1978. *Defrenne III,* Case 149/77, ECR 1978: 1365.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press

ECJ 1986. *Bilka,* Case 170/84, ECR 1986: 1607.
ECJ 1990a. *Dekker,* Case C-177/88, ECR 1990: 3941.
ECJ 1990b. *Hertz,* Case C-179/88, ECR 1990: 3979.
ECJ 1993. *Ten Oever,* Case C-109/91, ECR 1993: 4879.
ECJ 1994a. *Habermann-Beltermann v. Arbeiterwohlfahrt,* Case C-421/92, ECR 1994: 1657.
ECJ 1994b. *Webb,* Case C-32/93, ECR 1994: 3567.
ECJ 1995. *Kalanke,* Case C-450/93, ECR 1995: 3051.
ECJ 1996. *Gillespie,* Case C-342/93, ECR 1996: 475.
ECJ 1997. *Larsson,* Case C-400/95, ECR 1997: 4135.
ECJ 1998a. *Brown,* Case C-394/96, ECR 1998: 4185.
ECJ 1998b. *Thibault,* Case C-136/95, ECR 1998: 2011.
ECJ 1998c. *Boyle,* Case C-411/96, ECR 1998: 6401.
ECJ 1998d. *Pedersen,* Case C-66/96, ECR 1998: 7327.

https://doi.org/10.1111/j.0023-9216.2004.00055.x Published online by Cambridge University Press