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# An Ever More Powerful Court?

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*The Political Constraints of Legal Integration  
in the European Union*

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## Introduction

The ability of courts to generate political change has long been debated in studies of national, comparative, and international politics (Epp [1998]; McCann [1994]; Rosenberg [2008]; Stone Sweet [2000]). While observers agree that courts are powerful authorities in third-party dispute resolution, the broader impact of this resolution is disputed. Are courts powerful generators of change? Do court-generated principles, norms, and rights lead to changes in public policies, thus becoming generally applicable? Or do court-interpreted rules and norms merely apply to the case at hand? What are the implications for democratic politics if legislative politics is subordinated to judicial power? What factors may condition the power of courts to produce broader political change? Courts as generators of political change have been examined and questioned in studies of American, international, and European Union (EU) politics, and a debate has developed between ‘dynamic’ and ‘constrained’ views of the judiciary.<sup>1</sup>

A growing body of literature argues along the line of the ‘dynamic view’. According to this view, a judicialization of politics has occurred in which courts have become increasingly powerful, political actors in many contemporary democracies (Cichowski [2007]; Kelemen [2008, 2013]; Stone Sweet [2000, 2004]). Judicialization of politics marks ‘a process that involves greater reliance on courts and judicial procedures to address major public policy issues and political disputes’ (Kelemen [2013: 295]). In this view, courts can be key drivers of social and political change, and political autonomy becomes limited by jurisprudence. The traditional notion of parliamentary sovereignty is replaced by models of democracy in which constitutional courts have the

<sup>1</sup> To borrow the distinction from Rosenberg’s seminal work *The Hollow Hope. Can Courts bring about Social Change?* (Rosenberg [2008: 9ff.]).

power of judicial review, thereby limiting the room for politics (Kelemen [2013: 295]). Conversely, another group of scholars presents a ‘constrained view’, questioning courts’ broader societal impact and arguing that it is conditioned by a large set of institutional, political, and cultural factors (Bailey and Maltzman [2011]; Carrubba and Gabel [2015]; Conant [2002]; Epp [1998]; Hirschl [2009]; Kagan [2008]; Rosenberg [2008]; Vanberg [2005]; Wind [2010]). In this view, courts are not able to act as independent movers in fostering change, despite their power of judicial review, but depend on the countervailing political, administrative, and normative powers. Politics has the means to quell unwelcome jurisprudence (Fisher [1988]; Hirschl [2009]; Miller [2009]).

One court that has become famed—sometimes shamed—for its political power is the Court of Justice of the European Union (CJEU). In the scholarly literature, this supranational court has been regarded as a ‘master of integration’ for its capacity to strengthen integration sometimes against the will of member states (Alter [1998, 2001, 2009]; Burley and Mattli [1993]; Höpner and Schäfer [2012]; Pollack [2003]; Stone Sweet and Brunell [2012]; Weiler [1991]). In the public debate, the CJEU has been severely criticized for extending Union competences at the expense of the member states. From time to time fierce statements against the Court have been loudly expressed, as here from former German president and former president of the German Constitutional Court Roman Herzog, under the heading ‘Stop the European Court of Justice’:

Judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (ECJ), whose justifications for depriving member states of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered a great deal of the trust it used to enjoy. (Herzog and Gerken [2008: 1])

The dominant narrative about the European Court is one of an unusually powerful constitutional court, able to progress European integration over time and into new policy sectors. This narrative, however, has not gone unchallenged. Scholars have noted that, owing to our scholarly reliance on this progressive narrative, we have tended to disregard all those instances in which the Court was ignored or constrained by political, administrative, and constitutional counteractions (Carrubba and Gabel [2015]; Conant [2002, 2006]; Larsson and Naurin [2016]; Nowak [2010]; Rasmussen [2013]). It has been argued that, in our reliance on the constitutional transformation of the Community legal order, we have tended to treat law and the role of

the CJEU uncritically as instruments of integration, disregarding the more complex interplay of law and politics (Armstrong [1998]). The jury is still out, and the stark disagreement on judicial power in EU politics has recently been reinvigorated (Carrubba et al. [2012]; Stone Sweet and Brunell [2012]). In that revisited confrontation, however, the dynamic court view has not hesitated to declare itself as ‘win[ning] by a landslide’ (Stone Sweet and Brunell [2012: 204]).

Where is politics in all this? I argue that, in our preoccupation with judicial power, we have neglected to study the various ways in which legislative politics may respond to law. Political responses have mainly been examined as the ability of politics to overturn unwanted jurisprudence, and we have come to conclude that politics is unable to provide meaningful responses to what comes out of the court-room. Thus it is hardly surprising that we tend to focus on court actions in their own right and that ‘scholars who focus on courts and make them the centre of attention tend to conclude that courts and judicial initiative matter’ (McCann [2009: 838]). This book aims to uncover what becomes of law after it leaves the hands of the judiciary and enters legislative politics with its battles, dialogues, and compromises—i.e. the *ex post* legislative responses after judicial decisions have been rendered (Ginsburg [2014: 490–4]). Again, the legislative impact of jurisprudence is highly important for the extent to which court conclusions matter for the regulated, the citizens and firms, onto whom European law is applied. What became the legislative effect of all the judicial review that extended EU competences to define working time, export social assistance benefits across borders, and seek healthcare in another member state, or that limited workers’ rights to take collective action, i.e. to strike against what was regarded as social dumping? These questions are of empirical as much as theoretical relevance for the study of law and politics and are where this book begins.

## **Judicial Influence on EU Social Policy Output**

This book examines the ability of the CJEU to foster political change for an EU social policy, including healthcare. In doing so, it aims to examine the link between legal and political integration. The conventional assumption is that this causal link exists, i.e. that the rulings of the Court progress European integration. However, our understanding of when and under which conditions judicial decisions influence EU policy outputs and when they do not

remains limited. The book explores the interactions between law and politics, i.e. how judicial–legislative interactions determine the scope and limits of European integration in the daily decision-making processes of an EU social policy. In addition to investigating the dynamics of law and politics, the book examines the historical and current states of an EU social policy—a policy field marked by inherent tensions between social considerations and internal market dynamics and where the legal-political game of daily decision making determines the scope of Union policies. The book studies social policy developments over time in the large historical view from 1957 to 2014. Additionally, three detailed case studies are conducted: EU regulation of working time, patients’ rights in cross-border healthcare, and EU posting of worker regulations. For the reader uninterested in judicial influence, this book can be read as a policy process study within the social realm, examining both historical and current dynamics and content of the policy area and the inter-institutional dynamics developing this.

The effect of CJEU decisions has mainly been examined as the impact at the national level, i.e. on national court decisions or national politics. Scholarly work has advanced our knowledge considerably about the national consequences of EU litigation and when and why judicial Europeanization may occur (Alter [2009]; Alter and Vargas [2000]; Blauberger [2012, 2014]; Blauberger and Krämer [2014]; Conant [2002]; Davies [2012a, 2012b]; Martinsen [2011]; Nowak [2010]; Panke [2007]; Schmidt [2014]; Seikel [2014, 2015]; Slepcevic [2009]). Impact at the national level has been observed to vary considerably, and national compliance with judicial decisions has been identified as contained (Blauberger and Krämer [2014]; Conant [2002]; Davies [2012a]; Hatzopoulos and Hervey [2013]). Although the field of judicial Europeanization is still developing, it has made great advances over the last decade.

In contrast, our knowledge about how jurisprudence influences EU policies is vague. The causal link between judicial decisions and political integration essentially remains an unproven assumption. Although it is some years since political science discovered the role of the Court in integration—while lawyers warned that it should not be overestimated (Armstrong [1998]; De Búrca [2005]; Wincott [2001])—we lack systematic examination of the dynamics through which law may affect policies. So far, the interaction between CJEU jurisprudence and EU political decision-making has mainly been researched as the ability of EU politics to override unwanted jurisprudence,<sup>2</sup> i.e. where the

<sup>2</sup> The works of Alter and Meunier-Aitsahalia, Conant, and Nowak are seminal exceptions here, examining the political processes and outputs that followed innovative judicial decisions. Alter

legislature adopts legislation undoing the effect of the Court's judgment (Davies [2014: 1579]). Accordingly, the focus here is on legislative control of legal integration. On this point, the dynamic court view concludes that there exist no important examples of successful legislative override of legal integration (Stone Sweet and Brunell [2012: 205]). This non-finding thus proves: (1) the power of the Court, and, as the other side of the coin, (2) political disempowerment, i.e. the inability of EU legislative politics to reassert control and respond to jurisprudence in meaningful ways. Furthermore, lawyers emphasize that, because the EU is so highly constitutionalized, overriding politically unwelcome judicial decisions would usually require a Treaty amendment, making it impossible in practice (Davies [2014]). The constrained court view, in contrast, has argued that threats of non-compliance and legislative override *do* influence Court behaviour, by the judiciary exercising more self-restraint and taking political preferences into account (Carrubba and Gabel [2015]; Carrubba et al. [2008, 2012]; Garrett et al. [1998]; Larsson and Naurin [2016]). The preferences of the member states' governments affect the CJEU case law and limit the independence of the Court.

Thus, the investigation of political responses to legal integration has so far focused on legislative override—whether it occurs and whether it constitutes a credible threat that affects judicial behaviour. However, override is only one form of political reaction to CJEU jurisprudence. Other types of political response to legal integration, ranging from override to approval, may condition judicial influence on policies. In sum, our conceptual, theoretical, and empirical understanding of judicial influence on political integration remains limited. I argue that the call for advancing our understanding of judicial influence is strong because it goes to the heart of the balance of power between legislators and courts, between majoritarian and non-majoritarian institutions' capacity to steer integration. It concerns separation of power. Judicial influence on EU policies cannot be explored only by examining the possibility of override but must develop a more nuanced understanding of political reactions to unwanted and wanted CJEU judgments. Further research is needed into law as an enabling and constraining force on politics (De Búrca [2005]); however, if we are to capture the causal dynamics between legal and

and Meunier-Aitsahalia have done this for mutual recognition and the development of the Single European Act, as has Nowak (Alter and Meunier-Aitsahalia [1994]; Nowak [2010]). Conant's work *Justice Contained* analysed four cases of law—politics interaction involving liberalization of telecommunications, electricity, and social security policy, investigating legislative responses to judicial decisions (Conant [2002]).



political integration, we must also investigate how politics responds to and eventually constrains judicial impact.

The research puzzle of this book brings both judicial influence and political responses into question, examining *to what extent and under which conditions CJEU decisions influence EU social policy outputs, i.e. EU secondary legislation*. ‘Policy outputs’ are defined here as EU secondary legislation as proposed by the European Commission and adopted by the European Parliament (EP) and the Council of the European Union.<sup>3</sup> I argue that we must study the interaction between law and politics beyond or below the constitutional framework and expand our research to also cover how jurisprudence affects secondary legislation. By focusing only on constitutional responses to legal integration we miss the greater part of judicial–legislative interactions. In fact, the ordinary decision-making processes of the EU contain important attempts to codify—or correct—jurisprudence from individual decisions into general legislation. There are intense daily struggles and dialogues on what is the meaning of a Court decision, what legislative actions it permits, how can it be quelled and how future effects can be avoided. These day-to-day interactions with Court decisions take place beyond or below the high politics of constitutional reforms,<sup>4</sup> but are decisive to impact and essential to the authority of the Court. In essence, these negotiations over legislative acts are federal battles, setting the scope and limits of Union competences *versus* national ones, but are also ideological battles with political positions split along key conflict lines.

We must uncover the dynamics between legal and political integration in the ordinary, daily, decision-making processes for two reasons. Doing so is necessary because, first, as set out above, they mirror the ability of law (as opposed to that of politics) to set the course of integration. If political integration occurs through law, the legislators have lost decision-making power to the judiciary. Second, the eventual political adoption of CJEU interpretations of the ‘law of the land’ implies that these will become more generally applicable. EU legislative politics constitutes an important threshold of

<sup>3</sup> In the Lisbon Treaty, which became effective on 1 December 2009, the Council of Ministers was renamed the Council of the European Union. In this book, the Council of the European Union will generally be referred to as ‘the Council’.

<sup>4</sup> The early work of Miller has a similar argument regarding the interactions between US federal courts and Congress, arguing that the normal day-to-day interactions in Congressional committees condition judicial influence (Miller [1992]).

what should be the broader impact of Court-generated principles and interpretations. A causal link between legal and political integration is the most important test of judicial influence because a legal decision that is codified by legislation expands from singularity to general enforceability, i.e. from specific application to the individual case at hand to application ‘across the board’ (Wasserfallen [2010]). When the interpretations and doctrines of the Court are incorporated into EU policy outputs, member states become generally bound by them and cannot shield themselves with the argument that the reasoning of the Court does not apply to their particular systems, rules, or practices. Judicial interpretations of the ‘law of the land’ come to bind all member states across European societies in general, whereas national implementation of case law remains more uncertain and variable (Wasserfallen [2010: 1129 and 1133]). Therefore, it is crucial to advance our knowledge of the extent to which—and how—legal integration may lead to political integration.

## Defining Judicial Influence

The study of power and influence forms a core part of political science and explains in part why political scientists have taken a great interest in the CJEU. Existing studies of the role of the Court in European integration tend to examine the ‘power’ of the Court. Power either is not defined or refers to Dahl’s classic pluralist definition, that being when A, the Court, has power over B, the government and its parliamentary majority, to the extent that A can induce B to take some action that B would not otherwise take (Stone Sweet [1995: 301; 2000: 75]).

The present study examines the Court’s *influence* on EU policy outputs. It focuses on the extent to which and the conditions under which Court-generated principles, reasoning, and interpretations impact on policy outputs. As March noted in 1955, influence is key to the study of decision making;

The interest in influence stems, in turn, from its conception as a fundamental intervening variable for the analysis of decision-making. Influence is to the study of decision-making what force is to the study of motion—a generic explanation for the basic observable phenomena. (March [1955: 432])

Influence involves causality and is generally understood as:

an actor's ability to shape a decision in line with her preferences, or, in other words, 'a causal relation between the preferences of an actor regarding an outcome and the outcome itself'. (Dür [2008: 561])

As noted in discussions of the concept of power, the study of influence should go beyond a classic, pluralist conception of influence as exercised in decision making and examine influence as the ability to shape the *context* and the *conduct* of actors (Hay [1997]). It should attempt to move beyond simplistic causal assumptions (Weiler [1991: 2426]). *Context-shaping influence* denotes the ability to redefine or limit the range of policy options or 'what is socially, politically and economically possible for others' (Hay [1997: 50]). In relation to the Court, this would mean that context-shaping influence forecloses a range of policy options that are not compatible with the constitutional principles of the EU, such as the free movement principles. It would thereby exert influence through shaping the context in which decisions are made, i.e. the range of options. *Conduct-shaping influence* occurs when actors shape their conduct, strategies, and behaviour to fit what the Court has already ruled or is likely to articulate in the future. According to Stone Sweet, conduct-shaping influence constitutes 'judicialisation of politics', i.e. when legislators:

routinely take decisions that they would not have taken in the absence of review, and governing majorities anticipate likely decisions of the court and constrain their behaviour accordingly. (Stone Sweet [2000: 202])

In the present study, judicial influence on policy outputs can be identified from both a more abstract perspective and a concrete, operationalized sense. In an overall, abstract view, judicial influence on EU policy outputs takes place when the established regulatory status quo ( $SQ_{reg}^1$ ) is challenged by a new court-generated status quo ( $SQ_{Court}$ ), which is then codified into or altered by EU legislation ( $SQ_{reg}^2$ ).  $SQ_{reg}^1$  can be confined to a simple statute or the Treaty. Judicial review is exercised, and its substance or scope is disturbed by  $SQ_{Court}$ . EU legislative politics is called upon to address the discrepancy between  $SQ_{reg}^1$  and  $SQ_{Court}$  and can undo or approve  $SQ_{Court}$  by means of  $SQ_{reg}^2$ . When  $SQ_{Court}$  equals  $SQ_{reg}^2$ , full codification and, hence, maximum judicial influence has occurred. When  $SQ_{Court}$  is rolled back to the conditions of  $SQ_{reg}^1$ , a legislative override has taken place.

In the concrete, operationalized sense, judicial influence on EU policy outputs takes place when Court-generated principles and interpretations are attained in the final policy outputs.

## **Operationalizing Judicial Influence**

The case law of the Court may impact on different sequences of policy making; agenda setting, preference shaping, and decision making. It may influence concrete decisions and shape conduct and context. Studying judicial influence resembles the study of ideas' impact on policies, enquiring into which ideas, norms, principles, or rule interpretations come to produce change, and how and why they do while others do not (Campbell [2002]). As known from the study of ideas, it involves considerable analytical challenges to link those transformative processes from idea through polity onto policy outputs. However, this effort is necessary when we enquire into the transformative impact of jurisprudence.

To meet this challenge, I have developed a 'law attainment' approach as a first step to analysing judicial influence on EU policy outputs. The 'law attainment' approach draws on the 'preference attainment' approach developed for the study of interest organizations' influence on policy outputs (Dür [2008]; Klüver [2011]). However, the purpose is not to research whether the preferences of the Court are attained but rather whether the rules, principles, and interpretations generated by the Court are attained in legislative acts, i.e. cause political integration—or whether they are overridden. I compare the interpretation of rules and principles as established by judicial decisions and as proposed by the Commission with the final policy outputs adopted by the EU legislators. If judicial interpretations of rules and norms are attained in the final policy outputs, then judicial influence has been exercised.

However, as noted by Klüver, studying the attainment of preferences, or, as here, judicial interpretations, has an important shortcoming: it is unable to open the black box 'of processes through which influence is exercised' (Klüver [2011: 490]). Thus the law attainment approach cannot investigate the dynamics of politics and law in this area, which is likely to affect which judicial interpretations do and do not endure. This approach is unable to map out the importance of different political positions, how and why they might change, how and why jurisprudence shapes context and conduct, and so forth.

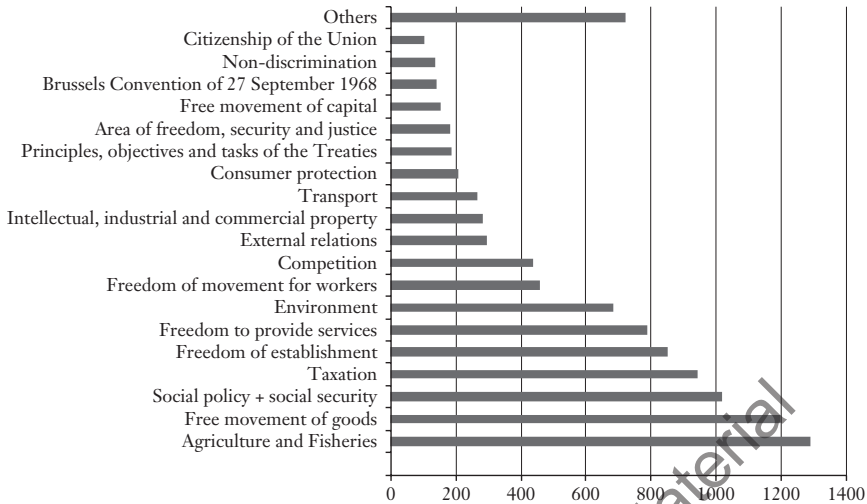
Therefore, three case studies have been added to research this process and thus under which conditions CJEU decisions can come to influence policy outputs. The case studies intend to capture how political positions may be formed for or against the case law of the Court, how political conduct may be shaped by jurisprudence, and how context, i.e. policy options, may change owing to judicial decisions.

## **On Methods, Case Selection, and Data**

The case study is found to be the appropriate method for this book's type of social enquiry because it allows us to examine the details of the dynamics and the factors of judicial influence that condition policy outputs (Gerring [2004: 348–9]). The case study method is employed to uncover new areas in the complex and dynamic relationship between law and politics, which large-n quantitative studies may overlook. As a method, the 'law attainment' approach has been combined with process tracing to 'open the black-box' between judicial decisions and policy outputs (Klüver [2011: 490]). Process tracing allows us to try to establish causality between different judicial decisions, legislative proposals, political positions, interactions, and policy outputs (Beach and Pedersen [2013]; George and Bennett [2005]). It allows us to link these incidents between different points in time,  $T_1$  and  $T_2$ , and establish why judicial influence may occur as a result of one political decision-making process but not another. Process tracing enables us to systematically connect the dots from initial legislation, to jurisprudence, to member state reactions, to legislative reactions and interaction, to final outputs. Process tracing is thus a meaningful tool to analytically revisit expectations as to when and why judicial influence on policy outputs occurs.

EU social policy, including healthcare, has been selected as the case.<sup>5</sup> I argue that EU social policy constitutes a strong test case (George and Bennett [2005: 120–3]) for uncovering a potential causal link and mechanisms between legal and political integration because the policy area fulfils two criteria: first, legal integration has occurred to a relatively large extent in the policy area; second, when legal integration occurs, we should assume that politicians will engage.

<sup>5</sup> Social policy is defined across the broad spectrum of welfare policies, including the labour market, healthcare, gender equality, and welfare-redistributive policies, but not education policies.



**Fig. 1.1** Preliminary References and Infringement Procedures in Total 1961–2014

As to the first criterion, the CJEU issued rulings in 1,025 EU social policy cases between 1961 and 2014, out of a total of 7,547 cases, making social policy the policy area with the third most Court cases within EU jurisdiction.<sup>6</sup> The rulings have been sorted according to the CJEU's categories of substantive matters. The category 'Approximation of laws' is not included in figure 1.1 because it does not represent a policy area as such. The categories 'Social provisions' and 'Social security' have been merged in the figure. Only agriculture and fisheries and the free movement of goods have been the subjects of more cases before the CJEU than social provisions and social security.

We thus have reason to assume that legal integration propels political integration in the social policy area, calling for politicians to respond and change the established regulatory status quo. Concerning the second criterion, we assume that judicial interpretations of social legislation matter to politicians. EU social policy constitutes a policy field where much is at stake and politicians disagree on the way forward (Ferrera [2005]). It is a policy area likely to

<sup>6</sup> The data on CJEU case law have been compiled by means of the Court of Justice of the European Union's database, <http://curia.europa.eu>. All judicial decisions between 1 January 1958 and 1 July 2014 have been compiled for cases ruled under articles 258 and 267 in the Treaty on the Functioning of the European Union (TFEU). The data-set is accessible at the author's webpage at [www.politicalscience.ku.dk](http://www.politicalscience.ku.dk). Article TFEU 258 specifies the infringement procedure according to which the European Commission can take a member state to the CJEU for non-compliance with EU law. Article 267 specifies the preliminary reference procedure by which national courts

create divergent political positions owing to ideological controversies and the increased socio-economic heterogeneity of an EU consisting of twenty-eight member states (Höpner and Schäfer [2012: 436–8]). EU social policy often intersects with the internal market and thus divides political actors along key conflict lines: market freedom *versus* social rights, deregulation *versus* social (re)-regulation, EU integration *versus* subsidiarity, open labour markets *versus* protection of national job markets, and so forth. Judicial decisions interpret along these conflict lines and do not occur in a political vacuum. We should assume political contestation when the Court rules along these dimensions (Marks and Steenbergen [2002]). In other instances of legal integration, politicians might be neutral or indifferent because the integration does not challenge what are regarded as important political ideas or institutions. However, as noted elsewhere, a certain degree of conflict or ideological controversy is required to fruitfully examine the relationship between law and politics.<sup>7</sup>

Judicial influence will be analysed over time for the social policy area, from when the first proposal was presented by the European Commission in 1958 to July 2014. Furthermore, three case studies will be conducted to examine and explain variation in judicial influence and political responses: EU regulation of working time, patients' rights in cross-border healthcare, and EU posting of workers' regulation. The studies were selected because they were main initiatives in EU social and health policies negotiated within the constitutional framework of the Lisbon Treaty. They were identified as main initiatives by key respondents during an explorative round of interviews conducted in the spring of 2009. Choosing these three as case studies has made it possible to trace the negotiation processes as they unfolded between and within the European Commission, the Council and the EP, and thus to collect empirical data on more recent political responses to CJEU jurisprudence, i.e. those that unfolded between 2009 and 2014. The three case studies provide insight into the current dynamics, scope, and limits on Social Europe of EU28.

So far, studies of the dynamics between law and politics have mainly investigated the period before the 2004 enlargement (see e.g. Carrubba and Gabel [2015]; Carrubba et al. [2008]; Stone Sweet and Brunell [2012]). This book takes a historical view but proceeds to the latest institutional and

can send preliminary references to the CJEU to obtain its interpretations of EU law (Stone Sweet and Brunell [2012: 206]).

<sup>7</sup> For similar arguments discussing where the relationship between law and politics can most fruitfully be examined, see Garrett et al. (1998: 151); Rosenberg (2008: 4). In many other areas

socio-economic setting of the EU, enabling us to revisit our empirical and theoretical knowledge based on evidence collected in the most recent context. The three cases are characterized by a high degree of legal certainty, with the Court having interpreted a number of cases over a considerable period, creating judicial precedent. In the case of patients' rights and in part in that of the posting of workers, judicial decisions were based on Treaty interpretations, while in that of working time and in part in that of the posting of workers legal interpretations were based on secondary legislation. The cases chosen thus imply different institutional thresholds for politics to respond to jurisprudence. As demonstrated below, political actors responded to jurisprudence both on an ideological left *versus* right conflict line and on a conflict line for or against further European integration (Marks and Steenbergen [2002]). Judicial decisions did not leave politics indifferent.

Data for this book have been collected from official and unofficial documents and through a large set of semi-structured interviews with key respondents involved in the decision-making processes. Seventy-eight interviews were conducted with key actors, including:

- Council representatives, who included:
  - civil servants from the national representations,
  - national experts negotiating in Council working groups and the Permanent Representatives Committee (Coreper), and
  - Presidency civil servants;
- Commission civil servants from the different Directorates General involved;
- national civil servants;
- Members of the European Parliament (MEP), including:
  - rapporteurs,
  - shadow rapporteurs,
  - ordinary members, and
  - EP policy advisors;
- representatives of national and European social partners; and
- representatives of national parliaments.

The interviews were conducted between February 2007 and April 2014 to identify policy processes as they unfolded. The interviews were carefully planned. An early interview was held in February 2007, at that time examining



the law–politics dynamics within the field of social security for migrant workers, which generated the motivation and idea to examine these complex interactions for the entire EU social policy area, including healthcare. A new set of explorative and preparatory interviews was held in February 2009 to identify the main social policy initiatives under legislative consideration. Against this background, the key respondents were identified and the plans for additional interviews were made. At the end of each interview, the respondent was asked to identify other key respondents for the subject matter, which over time expanded the number of interviewees and made it possible to identify and gain access to the relevant actors. At the beginning of the interviews, the respondents were promised anonymity and informed how citations would be used with reference only to their institutions and the dates of the conducted interviews. All interviews but one were recorded.<sup>8</sup> Almost all the interviews were subsequently transcribed.<sup>9</sup>

To conduct the analysis of Court influence on EU social policy outputs over time, all the new regulations, directives, and subsequent major amendments adopted between 1 January 1958 and 1 July 2014 were compiled. Where possible to trace, rejected policy proposals were also included in the compilation. All the original Commission proposals were collected by a small research team. The early Commission proposals were difficult to acquire because they were not available on the internet nor in the hands of the relevant ministries or information offices. However, with the help of the ‘Historical Archives of the Commission’, we managed to also collect the early original proposals, allowing us to carry out a ‘law attainment’ examination for the entire period. Chapter 3 will further detail the analytical steps for the analysis of judicial influence over time.

## **Structure of the Book**

This book is divided into seven chapters, including this introduction. Chapter 2 sets out the theoretical framework to examine and explain judicial

of EU law, such as environmental policy, justice and home affairs, taxation, financial regulation, education, and agriculture, we should expect similar degrees of political contestation.

<sup>8</sup> This respondent from the Council refused to have the interview recorded; accordingly, notes were taken instead.

<sup>9</sup> A small number of interviews deemed less important were not transcribed.

influence on legislative outputs. It presents the scholarly debate from the 1990s onwards on the power of courts to alter politics, unfolding in a somewhat dichotomous span between a 'dynamic' and a 'constrained' court view. This point of departure is found insufficient to capture and explain when and why jurisprudence does and does not affect legislation. To theoretically and analytically identify different types of judicial influence, a taxonomy of judicial influence is developed. In part, the taxonomy is derived from the existing scholarly debate on judicial impact; however, it presents additional types of political response with implications for judicial influence. The taxonomy presents four types of legislative response that—if occurring—cause variation in judicial influence: codification, modification, non-adoption, and override. The rest of the chapter discusses what may condition judicial influence. Why should this influence vary over time and in context when we generally rely on the progressive narrative of legal integration? Scholarly work has refuted the ability of legislative politics to condition judicial influence for two general reasons: (1) EU politics is too fragmented to be able to respond, and (2) politicians have a shorter time horizon than judges and therefore tend to disregard what might be longer-term implications of judicial decisions. I argue for the need to revisit these more general assumptions. Four explanatory factors that may account for variation in judicial influence are derived: time as a factor, decision-making rules, the role of the Commission, and political positions. Chapter 2 presents these factors as expectations as to the conditions under which jurisprudence may influence policy outputs.

Chapter 3 turns to the policy field under examination—social policy, including healthcare. It presents the achievements, dynamics, and tensions of the policy area as it has unfolded over time. After setting out the state of an EU social policy, the chapter initiates the empirical analysis of *the extent to which and the conditions under which judicial decisions influence EU social policy outputs*. Judicial influence over time is examined by using the 'law attainment' approach that I have developed, as presented above. Variation in judicial influence is identified, and explanations as to why are sought out. The statistical associations among key factors, such as time, political disagreements, and the likelihood of codification, are tested. The analysis over time proceeds by means of qualitative examinations of three decision-making processes that led, individually, to codification, modification, and legislative override of judicial decisions. Among other findings, Chapter 3 demonstrates 'time' and 'politics' to condition the likelihood of codifying jurisprudence into policy outputs.

Judicial influence on EU working time regulation is examined in Chapter 4. The chapter traces the dynamics between law and politics as they unfolded between the early 1990s and 2014. The analysis first sets out the process through which the working time directive was initially adopted, establishing  $SQ_{reg}^1$  but subsequently challenged by CJEU case law. Political disagreements over how to respond to the case law of the Court became severe within and between institutions. The political responses to  $SQ_{Court}$  are investigated by tracing why judicial influence on the policy output was ultimately rejected despite intense and prolonged interaction between political actors and institutions. Political gridlock and non-adoption became the policy response, creating a state of legal uncertainty marked by a considerable discrepancy between  $SQ_{reg}^1$  and  $SQ_{Court}$  and ‘rules that nobody follows’.

Chapter 5 conducts the second case study on patients’ rights in cross-border healthcare. It examines how EU integration of cross-border healthcare has unfolded in the exchange between law and politics. The chapter takes a long historical view, covering the period from the 1970s, when the original regulatory status quo  $SQ_{reg}^1$  was adopted; it was then challenged by early Court rulings but re-established by political override. The chapter then turns to the next sequence of Court interpretations  $SQ_{Court}$ , when internal market principles were applied to the healthcare sector and severely disturbed  $SQ_{reg}^1$ . Politics responded first by requesting a Treaty amendment, then by demanding that the Court be reined in by means of secondary legislation. The chapter analyses how the Commission and different political actors interpreted and responded to the jurisprudence through the bits and pieces of daily decision making. This process unfolded with much dispute within and between institutions; however, the patients’ rights directive in cross-border healthcare was finally adopted. The political actors thereby managed to agree upon a new regulatory status quo  $SQ_{reg}^2$ , modifying the impact of judicial decisions and re-establishing a considerable degree of national control over where to seek healthcare. Chapter 5 also identifies subsequent judicial adaptation to the political correction of past legal integration.

Chapter 6 contains the third case study—EU regulation of the posting of workers. The chapter traces the process of regulation back in time. It sets out the fundamental regulatory dilemmas contained in the posting of workers’ directive as it was originally adopted in 1996. The chapter analyses the process through which the directive was first adopted and how member states originally codified the early case law of *Rush Portuguesa* into the directive as a justification for applying national labour laws to posted workers. This regulatory status quo  $SQ_{reg}^1$  was, however, severely disrupted by the ‘Laval

quartet' case law. The subsequent sections of the chapter examine how legislative politics responded to the Commission's proposals to adopt the Court's interpretations into secondary law. First, the national parliaments rejected the Monti II proposal. Then, the European legislators managed to establish a compromise with the enforcement directive that modified judicial influence. However, with the non-adoption of the Monti II proposal, the discrepancy between  $SQ_{reg}^1$  and  $SQ_{Court}$  on the right to collective action *versus* free movement principles remains a wide one; consequently, there remains a loud call for political responses to legal integration.

Chapter 7 concludes on the findings. The analysis has demonstrated variable judicial influence on EU policy outputs and presented political responses as the overall condition for the legislative impact of judicial decisions. The findings contest the two general claims in studies of EU law and politics—that EU politics is not too fragmented to respond to litigation and that EU political actors engage in and correct legal integration as persistent actors rather than individuals with short time horizons. Time, decision-making rules, political positions, and interaction within and across institutions come to condition judicial impact on EU policies. The European Commission is the important first mover to decide which judicial decisions qualify for political adoption or correction. Its ability to steer the process to completion is, however, crippled by its own internal disagreements on the way forward and inter-institutional conflicts on how to respond. As a result of these day-to-day judicial–legislative interactions, the scope and limits of European integration are set. These findings invite us to revisit the image of progressive judicialization beyond political control. The findings demonstrate that both codification and overriding of judicial decisions are unlikely in the contemporary EU28 of fragmented politics. However, modification and non-adoption constitute other political responses where modification is able to attenuate unwelcome jurisprudence and constrain the legislative impact of judicial decisions.

## References

- Alter, K. (1998) 'Who are the 'Masters of the Treaty'? European governments and the European Court of Justice', *International Organization* 52(01): 121–47.
- Alter, K. (2001) *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press.

- Alter, K. (2009) 'The European Court's political power across time and space', *Revue Française de Science Politique* 59: 1–24.
- Alter, K. and Meunier-Aitsahalia, S. (1994) 'Judicial politics in the European Community: European integration and the pathbreaking Cassis de Dijon decision', *Comparative Political Studies* 26(4): 535–61.
- Alter, K.J. and Vargas, J. (2000) 'Explaining variation in the use of European litigation strategies. European Community law and British gender equality policy', *Comparative Political Studies* 33(4): 452–82.
- Armstrong, K.A. (1998) 'Legal integration: theorizing the legal dimension of European integration', *JCMS: Journal of Common Market Studies* 36(2): 155–74.
- Bailey, M.A. and Maltzman, F. (2011) *The Constrained Court: Law, Politics, and the Decisions Justices Make*, Princeton, NJ: Princeton University Press.
- Beach, D. and Pedersen, R.B. (2013) *Process-tracing Methods: Foundations and Guidelines*, Ann Arbor, MI: University of Michigan Press.
- Blauberger, M. (2012) 'With Luxembourg in mind .... the remaking of national policies in the face of ECJ jurisprudence', *Journal of European Public Policy* 19(1): 109–26.
- Blauberger, M. (2014) 'National responses to European Court jurisprudence', *West European Politics* 37(3): 457–74.
- Blauberger, M. and Krämer, R.U. (2014) 'Europeanisation with many unknowns: national company law reforms after Centros', *West European Politics* 37(4): 786–804.
- Burley, A.-M. and Mattli, W. (1993) 'Europe before the Court: a political theory of legal integration', *International Organization* 47(01): 41–76.
- Campbell, J.L. (2002) 'Ideas, politics, and public policy', *Annual Review of Sociology* 28: 21–38.
- Carrubba, C. and Gabel, M. (2015) *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union*, Cambridge: Cambridge University Press.
- Carrubba, C.J., Gabel, M., and Hankla, C. (2008) 'Judicial behavior under political constraints: evidence from the European Court of Justice', *American Political Science Review* 102(04): 435–52.
- Carrubba, C.J., Gabel, M., and Hankla, C. (2012) 'Understanding the role of the European Court of Justice in European integration', *American Political Science Review* 106(01): 214–23.
- Cichowski, R.A. (2007) *The European Court and Civil Society, Litigation, Mobilization and Governance*, Cambridge: Cambridge University Press.
- Conant, L. (2006) 'Individuals, courts, and the development of European Social rights', *Comparative Political Studies* 39(1): 76–100.
- Conant, L.J. (2002) *Justice Contained, Law and Politics in the European Union*, Ithaca, NY: Cornell University Press.

- Davies, B. (2012a) 'Pushing back: what happens when member states resist the European Court of Justice? A multi-modal approach to the history of European law', *Contemporary European History* 21(Special Issue 03): 417–35.
- Davies, G. (2012b) 'Activism relocated. The self-restraint of the European Court of Justice in its national context', *Journal of European Public Policy* 19(1): 76–91.
- Davies, G. (2014) 'Legislative control of the European Court of Justice', *Common Market Law Review* 51(6): 1579–607.
- De Búrca, G. (2005) 'Rethinking law in neofunctionalist theory', *Journal of European Public Policy* 12(2): 310–26.
- Dür, A. (2008) 'Measuring interest group influence in the EU. A note on methodology', *European Union Politics* 9(4): 559–76.
- Epp, C.R. (1998) *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press.
- Ferrera, M. (2005) *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection*, Oxford: Oxford University Press.
- Fisher, L. (1988) *Constitutional Dialogues: Interpretation as Political Process*, Princeton, NJ: Princeton University Press.
- Garrett, G., Kelemen, R.D., and Schulz, H. (1998) 'The European Court of Justice, national governments, and legal integration in the European Union', *International Organization* 52(1): 149–76.
- George, A.L. and Bennett, A. (2005) *Case Studies and Theory Development in the Social Sciences*, Cambridge, MA: MIT Press.
- Gerring, J. (2004) 'What is a case study and what is it good for?', *American Political Science Review* 98(02): 341–54.
- Ginsburg, T. (2014) 'Political constraints on international courts', in C. Romano, K.J. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication*, Oxford: Oxford University Press, pp. 483–502.
- Hatzopoulos, V. and Hervey, T. (2013) 'Coming into line: the EU's Court softens on cross-border health care', *Health Economics, Policy and Law* 8(01): 1–5.
- Hay, C. (1997) 'State of the art: divided by a common language: political theory and the concept of power', *Politics* 17(1): 45–52.
- Herzog, R. and Gerken, L. (2008) 'Stop the European Court of Justice', *EU Observer*, 10. September.
- Hirschl, R. (2009) 'The realist turn in comparative constitutional politics', *Political Research Quarterly* 62(4): 825–33.
- Höpner, M. and Schäfer, A. (2012) 'Embeddedness and regional integration: waiting for Polanyi in a Hayekian setting', *International Organization* 66(03): 429–55.
- Kagan, R.A. (2008) 'The "non-Americanisation" of European law', *European Political Science* 7(1): 21–31.
- Kelemen, R.D. (2008) 'The Americanisation of European law? Adversarial legalism à la Européenne', *European Political Science* 7(1): 32–42.

- Kelemen, R.D. (2013) 'Judicialisation, democracy and European integration', *Representation* 49(3): 295–308.
- Klüver, H. (2011) 'The contextual nature of lobbying: explaining lobbying success in the European Union', *European Union Politics* 12(4): 483–506.
- Larsson, O. and Naurin, D. (2016) 'Judicial independence and political uncertainty: How the risk of override impacts on the Court of Justice of the EU', *International Organization*, 70(2).
- March, J.G. (1955) 'An introduction to the theory and measurement of influence', *American Political Science Review* 49(02): 431–51.
- Marks, G. and Steenbergen, M. (2002) 'Understanding political contestation in the European Union', *Comparative Political Studies* 35(8): 879–92.
- Martinsen, D.S. (2011) 'Judicial policy-making and Europeanization: the proportionality of national control and administrative discretion', *Journal of European Public Policy* 18(7): 944–61.
- McCann, M. (1994) *Rights at Work: Pay Equity, Reform and the Politics of Legal Mobilization*, Chicago: The University of Chicago Press.
- McCann, M. (2009) 'Interests, ideas, and institutions in comparative analysis of judicial power', *Political Research Quarterly* 62(4): 834–9.
- Miller, M.C. (1992) 'Congressional committees and the Federal courts: a neo-institutional perspective', *The Western Political Quarterly* 45(4): 949–70.
- Miller, M.C. (2009) *The View of the Courts from the Hill: Interactions between Congress and the Federal Judiciary*, Charlottesville, VA: University of Virginia Press.
- Nowak, T. (2010) 'Of garbage cans and rulings: judgments of the European Court of Justice in the EU legislative process', *West European Politics* 33(4): 753–69.
- Panke, D. (2007) 'The European Court of Justice as an agent of Europeanization? Restoring compliance with EU law', *Journal of European Public Policy* 14(6): 847–66.
- Pollack, M.A. (2003) *The Engines of European Integration, Delegation, Agency, and Agenda Setting in the EU*, Oxford: Oxford University Press.
- Rasmussen, M. (2013) 'Rewriting the history of European public law: the new contribution of historians', *American University International Law Review* 28(5): 1187–223.
- Rosenberg, G.N. (2008) *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago: University of Chicago Press.
- Schmidt, S.K. (2014) 'Judicial Europeanisation: the case of Zambrano in Ireland', *West European Politics* 37(4): 769–85.
- Seikel, D. (2014) 'Nationale Anpassungsstrategien an das Fallrecht des Europäischen Gerichtshofes. Europäisierung durch Richterrecht und innenpolitische Veto-Positionen', in WSI-Diskussionspapier, no. 189: 1–26.
- Seikel, D. (2015) 'Class struggle in the shadow of Luxembourg. The domestic impact of the European Court of Justice's case law on the regulation of working conditions'. *Journal of European Public Policy* 22(8): 1166–85.

- Slepcevic, R. (2009) 'The judicial enforcement of EU law through national courts: possibilities and limits', *Journal of European Public Policy* 16(3): 378–94.
- Stone Sweet, A. (1995) 'Governing with judges: the new constitutionalism', in J. Hayward and E.C. Page (eds), *Governing the New Europe*, Cambridge: Polity Press, pp. 286–315.
- Stone Sweet, A. (2000) *Governing with Judges: Constitutional Politics in Europe*, Oxford: Oxford University Press.
- Stone Sweet, A. (2004) *The Judicial Construction of Europe*, Oxford: Oxford University Press.
- Stone Sweet, A. and Brunell, T. (2012) 'The European Court of Justice, state noncompliance, and the politics of override', *American Political Science Review* 106(01): 204–13.
- Vanberg, G. (2005) *The Politics of Constitutional Review in Germany*, Cambridge: Cambridge University Press.
- Wasserfallen, F. (2010) 'The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union', *Journal of European Public Policy* 17(8): 1128–46.
- Weiler, J. (1991) 'The transformation of Europe', *Yale Law Journal* 100: 2403–83.
- Wincott, D. (2001) 'The Court of Justice and the European policy process', in J. Richardson (ed.), *European Union, Power and Policy-Making*, London: Routledge, 179–97.
- Wind, M. (2010) 'The Nordics, the EU and the reluctance towards supranational judicial review', *JCMS: Journal of Common Market Studies* 48(4): 1039–63.