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Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality

Although the principle of equality dates back to Aristotle, its incarnation as a fundamental right of the European Community (EC) has been a story of uneven progress. Just as Aristotle's Greece had slavery, EC equality law has been selective as to its domains and manner of application, constructed—like the Community itself—in stages, in a sometimes untidy process. For most of the EC's existence, equality of gender occupied a solitary and somewhat anomalous position as one of the few justiciable social rights in Community law.¹ In contrast to the pivotal role played by the rights of free movement in ensuring equality of nationality throughout the common market,² gender equality entered the EC Treaty almost by accident³ and in a far more marginal capacity: Article 119 of the Treaty of Rome guaranteed only equality of pay between men and women for identical work.

As the Community expanded into new competences, gender equality has grown steadily in scope and prominence. Subsequent directives expanded on equality of pay to require equal treatment generally in employment and social security.⁴ Recent initiatives

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1. See Miguel Poiars Maduro, "Europe's Social Self: The Sickness Unto Death," in Jo Shaw, (ed.), *Social Law and Policy in an Evolving European Union* 333 (2000) (describing gender equality as "a lone ranger").

2. See Sacha Prechal & Noreen Burrows, *Gender Discrimination of the European Community* 1 (1990) ("the main thrust of the [original E.C.] Treaty [lay] in the elimination of discrimination based on nationality"). The rights of free movement decree that workers, goods, services, and capital should be able to circulate without respect to nationality. These rights appeared in a Treaty chapter entitled "Foundations of Community." See Treaty of Rome (1957), Part II.

3. See *infra* n. 46 and accompanying text.

4. Council Directive 76/207/EEC of 9 February 1976, on Equal Treatment for Men and Women in Employment, OJ [1976] L 39/40 [hereinafter *Equal Treatment Directive* or *ETD*]; Council Directive of 19 December, 1978 on the Progressive Implementation of Equal Treatment for Men and Women in Social Security, Directive 79/7/EEC, 1978 O.J. L 113/114.

have been even grander. The 1997 Amsterdam Treaty made the task of securing equality between men and women a primary aim of the European Community, putting equality of gender for the first time on a par with that of nationality.⁵ A separate article of the revised EC Treaty calls for gender equality to be promoted in every activity the Community undertakes.⁶

Yet, even today, gender equality remains far from the uniform, all-pervasive norm that Amsterdam's aspirations would imply. Its formal domain is still limited to employment and social security, and even here its application is variable and falls short of the strict enforcement given to the rights of free movement. Viewed up close, the topology of EC gender equality law reveals both peaks and valleys, ambiguities and apparent contradictions. This article surveys that terrain from a characteristically "American" perspective: focusing on the method and intensity of judicial scrutiny by the European Court of Justice (ECJ).⁷

European scholarship on gender equality has focused on the perceived alternation by the Court between a "formal" and "substantive" conception of equality.⁸ This is not an unrelated question, since as will be shown, the intensity of equality scrutiny can be linked to the type of equality being pursued.⁹ A scrutiny-based approach, however, highlights important features of the case law that the substantive/formal dichotomy fails to capture. Commentators have often puzzled over seeming inconsistencies in the test(s) which the Court of Justice applies to gender cases.¹⁰ This article suggests that there is a method to the ECJ's apparent madness. By analyzing variations in

5. See EC Treaty, Art. 2. The text of EC Treaties, including the Treaty of Amsterdam, may be obtained at europa.eu.int.

6. *Id.* at Art. 3(2).

7. The European Court of Justice is the principal court of the European Community and the authoritative interpreter of EC law. All cites to the European Community Reporter (ECR) are to this court.

8. Shaw, "Gender and the European Court of Justice," in G. de Búrca & J. Weiler, (eds.), *The European Court of Justice* 155 (2001); Peters, "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law—A Conceptual Analysis," 2 *Eur. L.J.* 177 (1996); Fenwick & Hervey, "Sex Equality in the Single Market: New Directions for the European Court of Justice," 32 *Comm. Mkt. L. Rev.* 443 (1995).

9. See *infra* text between nn. 51 and 52.

10. See, e.g., Barnard & Hepple, "Indirect Discrimination: Interpreting Seymour-Smith," 58 *Cambr. L.J.* 399, 411 (1999) ("There seem now to be at least three tests for objective justification No explanation has been offered for these different tests."); Steiner, "The Principle of Equal Treatment for Men and Women in Social Security," in Tamara Hervey & David O'Keefe, (eds.), *Sex Equality in the European Union* 135 (1996) ("recent case law shows the Court blowing hot and cold"); Ellis, "The Recent Jurisprudence of the Court of Justice in the Field of Sex Equality," 37 *Comm. Mkt. L. Rev.* 1403, 1410 (2000) ("National courts seem, therefore, to be faced with a hierarchy of tests"); Fenwick, "Special Protections for Women in European Union Law," in Hervey & O'Keefe, cited in this note, 70 (contrasting lax scrutiny of pregnancy cases with strict indirect pay discrimination cases).

the approach by which the Court has vetted justifications for discrimination against women (or sometimes men), the article reveals patterns in the type of review applied. Such variable scrutiny, it is argued, represents a complex practice by which the ECJ reconciles Member State autonomy in social policy with the demands of equality as a fundamental right.¹¹ As will be seen, this conflict typically plays out in the case law as a tug-of-war between liberal individualism at the EU level and traditional gender roles at the national. The balance struck between these countervailing forces varies according to the nature of the justification.

Part I provides an overview of the ECJ's methodology in equality cases. Part II traces the historical background leading to the emergence of gender equality as a fundamental right. Part III examines justifications for direct discrimination under the Equal Treatment Directive and contrasts the differing focus of the Court's review under each of the three grounds for derogation. Part IV performs a similar analysis of indirect discrimination cases, revealing the stricter approach in private contexts than public. Part V then steps backward to take a broader view of some central themes that emerge from the analysis, and Part VI concludes.

I. METHODOLOGY OF EQUALITY REVIEW

The ECJ formulation of the equality right comes straight out of Aristotle: It holds that likes should be treated alike, and unlikes differently.¹² The EC Treaty lacks a general equality norm comparable to the US Equal Protection Clause.¹³ Instead, different articles of the Treaty govern particular types of equality in defined contexts, supplemented by even more specific secondary legislation. These provisions, in effect, specify the "likes" that must be treated alike (men and women, EU nationals) unless a deviation from equality (discrimination) can be objectively justified.¹⁴

In exercising judicial review over such justifications, the Court, in theory, applies the same test in all cases. Departures from equality must be based on a legitimate purpose and the chosen means must be proportionate to this end. In cases of direct (facial) discrimi-

11. Whether this practice represents a deliberate strategy is a difficult question as to which this article will remain agnostic.

12. Compare Herdegen, "The Relation Between the Principles of Equality and Proportionality," 22 *Comm. Mkt. L. Rev.* 683, 684-85 (1985) (quoting variant formulations of the equality principle in EC case law), with Aristotle, *Ethica Nicomachean*, vol. 3: 1131a-1131b (W. Ross trans. 1925).

13. While the ECJ has recognized equality as a basic principle of EC law, the principle is only actionable in domains in which the Community has exercised competence. See Case 80/70, *Defrenne v. Belgian State*, 1971 ECR 445.

14. Herdegen, *supra* n. 12, at 684-85. Objective justification amounts to a determination that the two likes are unlike for the relevant purpose. See generally Westen, "The Empty Idea of Equality," 95 *Harv. L. Rev.* 537, 564-69 (1982).

nation, the grounds for derogation are typically specified in the relevant equality norm.¹⁵ The grounds on which indirect discrimination (disparate impact) may be justified are left open. In either case, assuming the purpose is *prima facie* legitimate, the justification must be tested for proportionality. Proportionality requires that the measure be both (1) suitable and (2) necessary to meet the stated end, and that (3) the burdens it imposes be proportionate to the benefits.¹⁶ In cases referred to it through Article 234 (ex 177) preliminary references, the Court sometimes defers to the national court to assess proportionality.¹⁷

Depending on the case, the Court of Justice may subject the justification under review to a greater or lesser degree of scrutiny. The ECJ does not adhere to the rigid tiers of scrutiny that characterize US equal protection¹⁸; nor has it articulated the principles that govern its choices as to the level of scrutiny applied in its cases in the self-conscious manner of the US Supreme Court.¹⁹ However, certain patterns may be discerned. The Court often chooses a deferential approach to aspects of national law as to which it considers that Member States have the primary competence. In such cases, policy claims will often be accepted at face value, and instead of requiring a showing of necessity in its proportionality analysis, the Court may merely

15. See, e.g., *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, 1986 ECR 1651 (limiting justifications for gender discrimination to grounds specified in the governing directive).

16. As in US equal protection, proportionality thus looks at both ends and means, and establishes an appropriate relation between them. See Jans, "Proportionality Revisited," 27 *J. Legal Issues of Econ. Int.* 239, 243-48 (2000); cf. Tussman & Tenbroek, "The Equal Protection of the Laws", 37 *Cal. L. Rev.* 341, 343-53 (1949).

17. Under Article 234, the European Court's jurisdiction is limited to answering questions of European law *in abstracto*; it remains for the national court to apply this law to the facts of the case—including the proportionality assessment. In practice, the ECJ often tailors its answer according to the facts presented, and, in doing so, may engage in its own analysis of proportionality. Where the facts are technically complex or politically sensitive, the European Court is more likely to defer to the national court. See Jacobs, "Recent Developments in the Principle of Proportionality in European Community Law," in Evelyn Ellis, (ed.), *The Principle of Proportionality in the Laws of Europe* 19-20 (1999).

18. Cf., e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-30 (1995) (all racial classifications subject to strict scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny for gender). By contrast, the intensity of the ECJ's proportionality inquiry seems to vary according to the interests at stake in the individual case and the relative competence of the decision-making bodies involved. See Grainné de Búrca, "The Principle of Proportionality and its Application in EC Law," 13 *Yearbk. of Eur. L.* 105, 111-13, 146-49 (1993); Jans, *supra* n. 16, at 263-64.

19. Cf. *Adarand*, at 214-220; *Craig*, 429 U.S. at 197-199; *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). The case law on heightened scrutiny has spawned a huge secondary literature. See, e.g., John Hart Ely, *Democracy and Distrust* (1980); Fiss, "Groups and the Equal Protection Clause," 5 *J. Phil. & Publ. Aff.* 107 (1976).

verify only that the challenged measure is “not manifestly unreasonable.”²⁰

At the other end of the spectrum, free movement cases generally receive the most rigorous scrutiny and demand the most weighty justification. Just as racial equality provided the original goal of the US Equal Protection Clause and race became the paradigmatic “suspect classification,”²¹ the free movement rights enjoy a similar foundational status under Community law.²² The ECJ has held repeatedly that “derogati[ons] from the fundamental principle of freedom of movement . . . must be interpreted strictly.”²³ Even where the ECJ has been willing to grant a measure of discretion to Member States, for example, in determining grounds for derogation based on public morality or health, it has emphasized that the parameters of such choices “cannot be determined unilaterally” remain subject to strict proportionality controls.²⁴

What exactly “strict” means is unclear; there is no doctrinal equivalent of US strict scrutiny. Strictness can manifest at more than one stage of review and assume several forms. For example, a strict approach at the level of purpose might sanction only purposes deemed important: e.g. limiting a public policy derogation to a “genuine and sufficiently serious threat . . . affecting one of the fundamental interests of society.”²⁵ Alternatively, the Court might restrict purpose through a narrow or literal interpretation of the governing text: e.g., construing “national security” to include military threats, but not environmental.

Strictness also permeates the various levels of the proportionality test. Under-inclusive measures might be deemed unsuitable. Over-inclusiveness fails the test of necessity since “less restrictive op-

20. Cases 1 & 176/90, *Aragonesa de Publicidad Exterior SA v. Dep'to de Sanidad y Seguridad Social de la Gen'litat de Catalunya*, 1991 ECR 4151; See de Búrca, *supra* n. 18, at 112.

21. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81-82 (1872) (noting racial goal of Fourteenth Amendment); MacKinnon, “Reflections on Sex Equality,” 100 *Yale L. J.* 1281, 89 (1991) (“The African-American struggle for social equality has been the crucible for [U.S.] equality law”); Tussman & tenBroek, *supra* n. 16, at 356-60.

22. See Koopmans, “Equal Protection—The Social Dimension of European Community Law,” 11 *Mich. J. Int'l L.* 1, 4 (1989) (arguing that nationality under EU law has become akin to a “suspect classification” under US equal protection doctrine); Lenaerts, “L'Egalite de Traitement en Droit Comm.: Un Principe Unique aux Apparences Multiple,” 1991 *Cahiers de Droit Europ.* 3, 12-13 (1991); Maduro, *supra* n. 1, at 332 (“fundamental freedoms [of free movement] grant[ed] status similar to that of fundamental rights”); Prechal & Burrows, *supra* n. 2, at 1.

23. Case 36/75, *Rutili v. Minister for the Interior*, 1975 ECR 1219, 1231; Case 30/77, *Regina v. Bouchereau*, 1977 ECR 1999, 2013. But see Cases 90 & 176/90, *Aragonesa de Publicidad Exterior S.A. v. Dept. de Sanidad & Seguridad*, 1991 ECR 4151, 4184, ¶17 (applying weaker “not manifestly unreasonable” standard).

24. E.g., *Rutili*, 1975 ECR at 1231, ¶ 27; *Regina*, 1977 ECR at 2013, ¶ 33.

25. *Regina*, 1977 ECR at 2014; *Rutili*, 1975 ECR at 1231.

tions" would exist to achieve the desired end.²⁶ Moreover, in seeking to reconcile the derogating measure as far as possible with equality, the Court will sometimes impose affirmative conditions, e.g. requiring flexibility or reciprocity to minimize burdensome effects.²⁷

Strictness also colors the evidentiary requirements to meet these tests. A strict-minded Court is marked by skepticism; the Court will independently assess the evidence to reach its own conclusions.²⁸ It also requires evidence to conform to general standards of specificity, transparency, and consistency: Justifications must be backed by concrete evidence within an identified context (specificity)²⁹; the evidence must be presented in a form amenable to judicial review (transparency)³⁰; and stated policies must be uniformly applied without exception (consistency).³¹

The stricter the scrutiny, the greater the likelihood of judicial intervention. Strict review of free movement cases has thus meant that comparatively few import restrictions survive. Such strict enforcement of equality in the name of market integration has the potential to be profoundly subversive of cultural norms endemic to individual Member States. A good example of this is *Commission v. Germany*, where the ECJ rejected German regulations that restricted use of the designation "*Bier*," to beers conforming to traditional German standards. Brushing aside the German government's claimed need to protect consumer expectations, the Court ruled that "legislation of a Member State must not 'crystallize' consumer habits to consolidate an advantage acquired by national industries."³² German tastes had

26. E.g., Case 368/95, *Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 ECR 3689, 3717; Case 40/82, *Community v. United Kingdom*, 1982 ECR 2793, 2826-27.

27. E.g., Case 272/80, *Frans-Nederlandse Maatschappij voor Biologische Producten BV*, 1981 ECR 3277, 3291-92 (requiring reciprocal recognition of regulatory approval by other Member States to avoid unnecessary retesting); Case 178/84, *Commission v. Germany*, 1987 ECR 1227, 1274 (requiring provision for challenges to discriminatory rules).

28. See, e.g., Case 124/81, *Commission v. United Kingdom*, 83 ECR 203, 238-39 (rejecting arguments by UK based on review of technical documents); Case 153/78, *Commission v. Germany*, 1979 ECR 2555, 2565-67 (same for Germany).

29. Vague generalizations will not stand. See, e.g., Case 3/88, *Commission v. Italy*, 1989 ECR 4035, 4060-4061.

30. In other words, the Court must be able to draw meaningful answers from the evidence submitted. See, e.g., Case 470/99, *Universale-Bau AG v. Entsorgungsbetriebe Simmering GmnH*, judgment, December 12, 2002, ¶ 91.

31. See, e.g., Case 121/85, *Conegate Ltd. v. Her Majesty's Customs & Excise*, 1986 ECR 1007, 1023-24 (UK not permitted to enforce decency standard against imported goods without equivalent restriction on domestic goods).

32. The Court further observed that compulsory product labels would afford a less restrictive alternative (lack of necessity), *Commission v. Germany*, 1987 ECR at 1271, ¶ 35, and that the German legislature itself used the term "*Bier*" in a broad sense elsewhere in its own regulations (lack of consistency). *Id.* at ¶ 33.

to remain free to evolve through exposure to the common market.³³ The communal standard gave way to individual choice.

Where does the scrutiny applied to gender cases fall in this spectrum from lax to strict? The answer lies somewhere in between, akin to the "intermediate scrutiny" eventually settled on by US courts.³⁴ As with the US Supreme Court, the ECJ began with a fairly deferential approach to gender equality cases and has gradually ratcheted upward the intensity of its review. However, this progression has been anything but uniform. Indeed, one could equally say that the European Court has applied two different standards, alternating between strict enforcement of proportionality and a more deferential approach. These extremes can be illustrated by a comparison of two cases interpreting Article 2(3) of the Equal Treatment Directive.

In *Hofmann v. Barmer Ersatzkasse*,³⁵ an extended maternity leave was alleged to discriminate against men. The Court had to decide whether the benefits could be justified under Article 2(3), which granted an exception to equal treatment for "the protection of women, particularly as regards pregnancy."³⁶ The Court declined to subject the benefits to a test of proportionality, holding that "Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation."³⁷

By contrast, in *Johnston v. Constable*,³⁸ the Court held that Article 2(3) "must be interpreted strictly" as a derogation from an individual right. Accordingly, the Court refused to allow the exclusion of female police officers from duty in Northern Ireland to be justified "on the ground that public opinion demands that women be given greater protection." The Court also made clear that such derogations from equal treatment must pass a strict proportionality test limiting them to "what is appropriate and necessary for achieving the aim in view and . . . be reconciled as far as possible with [equal treatment]."³⁹ Member State discretion was entirely absent from this analysis.

The apparent inconsistency between these two judgments, decided only two years apart, points to a deep ambiguity concerning the nature of gender equality in Community law. In manipulating the opposing concepts of "strictness" and "discretion," the ECJ engages in a complex dialectical practice that maintains a balance between the

33. *Commission v. Germany*, 1987 ECR 1227, 1270-71.

34. Cf. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing new intermediate scrutiny standard for gender cases).

35. Case 184/83, 1984 ECR 3047, at ¶¶ 26-27.

36. Article 2(3) of Equal Treatment Directive.

37. *Id.* at ¶ 27.

38. Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 ECR 1651 (1986).

39. *Id.* at ¶¶ 39-40. This language appeared with regard to a separate ground for justification under Article 2(2).

dictates of equality as a fundamental right and the autonomy that Member States expect over social policy.

In cases since *Johnston*, the Court has consistently continued to construe exceptions to equal treatment as derogations.⁴⁰ In its indirect discrimination cases, the Court has also applied skeptical scrutiny and strict proportionality control that at times approaches strict review.⁴¹ Yet, the Court has also continued to recognize that Member States enjoy a margin of discretion in social policy. The Court confirmed this discretion in an Article 2(3) case as recently as *Thibault* in 1998.⁴² Moreover, deference to Member State social policy has continued to play a prominent role in indirect discrimination cases.⁴³ In other words, the Court of Justice seems to want to have it both ways.

The problem that the Court faces is rooted in the historical origins of the gender equality right. Unlike free movement, gender equality did not begin with the status of a fundamental right.⁴⁴ Article 119's equal pay requirement appeared in the E.C. Treaty's chapter on social policy, an area which "Member States considered [to] l[ie] at the very heart of national sovereignty."⁴⁵ Moreover, Article 119's very existence owed more to narrow economic interest than egalitarian concern.⁴⁶ Even today, for all the symbolism of the Amsterdam amendments, the E.C. Treaty still lacks any formal requirement of gender equality beyond equal pay. Instead, broader provisions for gender equality have been added through directives and soft law. Reliance on these flexible instruments signaled a

40. See, e.g., Case 450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 ECR 3051, ¶ 21 (Article 2(4) of ETD); Case 285/98, *Kreil v. Bundesrepublik Deutschland*, 2000 ECR 69, ¶ 20 (Article 2(2)); *Secretary of State for Social Security v. Thomas*, 1993 ECR 1247, 1272, ¶ 8 (Article 7(1)(a) of the Social Security Directive).

41. Cf., e.g., Case 243/95, *Hill and Stapleton v. Revenue Comm'r*, 1998 ECR 3739, 3771-72.

42. Case 136/95, *Caisse Nat'le d'Assur. Vieillesse des Traivaill. Salaries v. Thibault*, 1998 ECR 2011, ¶ 30.

43. See, e.g., Case 167/97, *R v. Secretary of State for Employment, ex parte Seymour-Smith*, 1999 ECR 650, at ¶ 75.

44. The original Article 119 was addressed solely to Member States, and was not thought to create a right of individuals, nor any competence for Community action. See Boch, "The European Community and Sex Equality: Why and How?," in Noreen Burrows, *Sex Equality: Law and Economics* 9-11, 14 (1993).

45. Barnard, "EC 'Social' Policy," in Paul Craig & Grainné de Búrca, *Evolution of EU Law* 498 (1999), at 482; Burrows, "The Future of Sex Equality in the EC," in Burrows, *supra* n. 44, at 56; Kenner, "Citizenship and Fundamental Rights: Reshaping the European Social Model," in his, ed., *Trends in European Social Policy* 18 (1995).

46. France, which required equal pay under French law, was concerned that it would be placed at a competitive disadvantage vis-à-vis other Member States who paid women discriminatory wages. Barnard, *supra* n. 45, at 498.

strong desire by the Member states to preserve some autonomy in this domain.⁴⁷

In its early equal treatment cases, the Court obliged by deferring to Member States discretion over social policy.⁴⁸ Yet, once the Court had embarked on a jurisprudence of fundamental rights (itself not a wholly voluntary project), it was inevitable that it would have to recognize gender as one of those rights.⁴⁹ Having grasped that nettle, putting gender equality on a par with free movement, a move to strict review was the logical consequence. Instead of permitting Member States a margin of discretion, the Court now had to interpose itself between individual and state as the protector of a fundamental right.⁵⁰

It took some time for the logic of this new jurisprudential tack to work itself through the case law. In *Levy*, the Court took an evolutionary view of the process, commenting that “[w]hile it’s true that equal treatment of men and women constitutes a fundamental right recognized the Community legal order, its implementation, even at the Community level, has been gradual, requiring the Council to take action by means of directives, and those directives allow, temporarily, certain derogations from the principle of equal treatment.”⁵¹ Over time, the ECJ review of gender equality cases *has* gotten stricter. However, the Court has been selective in choosing its battlefields and matching its tactics to the terrain. By varying the intensity and focus of scrutiny according to the specific equality provision at issue, the Court of Justice has been able to combine a vigorous defense of fundamental rights with a sensitivity to Member State discretion over social policy.

II. DIRECT DISCRIMINATION

As already noted, the European Court of Justice’s approach to direct discrimination—laws that explicitly employ gender classifications—reveals a classic Aristotelian understanding of equality: Likes

47. Hervey, “Sex Equality in Social Protection: New Institutional Perspectives on Allocation of Competence,” 4 *Eur. L.J.* 196, 213 (1998) (use of directives to implement gender policy); Kenner, *supra* n. 45, at 10, 18, 40-44. This use of flexible instruments which lack horizontal direct effect can be contrasted with the free movement provisions, which have been implemented through directly effective Treaty articles and regulations. Kenner, *supra* n. 45, at 18.

48. See *infra* text accompanying nn. 54-58, 91.

49. It was not until nearly a decade into its fundamental rights jurisprudence that the ECJ took this leap with gender equality in *Defrenne* III, despite several prior opportunities to do so. See Case 149/77, *Defrenne v. Societe Anonyme Belge de Navigation*, 1978 ECR 1365, ¶¶ 26-27.

50. The link between fundamental rights and strict review was apparent in *Roberts*, the first gender case to apply such a strict interpretation, which justified its strict approach “in view of the fundamental importance of the principle of equal treatment.” Case 151/84, *Roberts v. Tate & Lyle Indus. Ltd.*, 1986 ECR 703, 721, ¶ 35.

51. Case 158/91, *Criminal Proceedings re: Levy*, 93 ECR 4287, 4305.

must be treated alike, but where they differ, differential treatment is justified (and perhaps, required). This begs two questions: What differences count? And in whose eyes are they to be assessed? These questions can be linked to the level of scrutiny.

The less deferential the judicial review, the more courts will be tempted to intervene, replacing their judgment for that of policy-makers. In cases involving direct discrimination, this has tended to press towards a formal conception of equality in which few gender differences are recognized as justifying a departure from gender-blind norms. Applied to the Equal Treatment Directive, strict review privileges Article 2(1)'s prohibition of gender discrimination over the three exceptions contained in Articles 2(2)-2(4), with the latter being construed as derogations from the former, to be narrowly construed and tightly controlled. In the case of Articles 2(2) and 2(3), and to a lesser extent Article 2(4), the result has been rulings that undermine traditional gender roles, as communal standards imposed by Member State governments are replaced with judicially-enforced autonomy. Thus, under *Johnston*, women can choose to face risks from which the public would exclude them.

Conversely, a less exacting method of scrutiny will tend to be tolerant of gender stereotypes, favoring exceptions from formal equal treatment, which may be viewed as complements to the primary rule that in fact perfect it. Thus, in *Hofmann*, one finds a conception of Article 2(3) as "offset[ing] the disadvantages" faced by women leads to a triumph for traditional motherhood.

Of course, neither link is absolute. A court applying strict review can always be persuaded that derogations are factually justified. Conversely, a more relaxed approach will not oblige Member States to implement derogating measures, unless such deviations are actually mandated by equality.

A. Article 2(3)

Article 2(3) of the Equal Treatment Directive permits Member States to exempt from equal treatment "provisions concerning the protection of women, particularly as regards pregnancy and maternity."⁵² In *Hofmann*, the Court further construed Article 2(3) as authorizing gender-specific measures to protect "the special relationship between a woman her child . . . from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment."⁵³ It has taken a restrictive view of this exception outside the context of pregnancy/maternity.

52. ETD, Art. 2(3).

53. 84 ECR at 3075, ¶ 25.

In its early rulings on Article 2(3), the Court of Justice adopted a deferential approach. As we saw, in *Hofmann*, the Court rejected a claim that an extended maternity leave should be made available to either parent. The Commission had pushed for a restrictive interpretation of Article 2(3), as a derogation from the fundamental right of equality. It argued that the goal of protecting mothers against multiple burdens could be just as easily accomplished if the father took care of the child.⁵⁴

The Court did not engage these arguments, holding instead that because “the protection of women in connection with pregnancy and maternity . . . [is] closely linked to the general system of social protection . . . Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.”⁵⁵ Recognition of this discretion foreclosed further review.

The rationale of *Commission v. Italy*, decided two years earlier, was even more abridged. In that case, the Commission, supported by Advocate General Rozes, had argued that Italy’s allowance of a three month maternity leave to mothers, but not fathers of adopted children was discriminatory.⁵⁶ As in *Hofmann*, the issue was whether the measure could be justified under Article 2(3). The Court simply accepted at face value the Italian government’s view that the discrimination was justified “by the legitimate concern to assimilate . . . the child into the adoptive family.”⁵⁷ Why only mothers, but not fathers could facilitate this assimilation was not discussed.

In neither of these cases does the ECJ enter into an analysis of proportionality. Its judicial review is confined to verifying that the stated justification accords with a recognized exception to equal treatment. Beyond that, the Court essentially leaves it to the discretion of the individual Member State to determine the content and scope of each exception. Indeed, in *Hofmann*, it made this deference explicit by recognizing a margin of discretion in social policy.

The contrast with the German *Bier* case is striking. There, the ECJ refused to allow Germany to protect consumer expectations under a communal standard that discriminated against foreign imports. Instead, consumer tastes had to be given the opportunity to evolve through competition in a free market. In the early gender cases, however, the Court proved willing to accept discriminatory rules that catered to and thus consolidated existing social conventions. In *Hofmann*, the Court stated piously that “the directive is not

54. *Id.* at ¶ 11. The Commission further argued that “[t]he fact that the leave is withdrawn in the event of the child’s death . . . demonstrates that the leave was created in the interests of the child and not the mother.” *Id.* at ¶ 10.

55. *Id.* at 3075-76, ¶¶ 25-27.

56. Case 163/82, *Commission v. Italy*, 83 ECR 3273, 3297-98.

57. *Id.* at 3299, ¶16.

designed to settle questions concerned with the organization of the family, or to alter the division of the responsibility between parents.”⁵⁸ By adopting a hands-off approach, the ECJ thus allowed Member States to settle these questions according to a communal standard that foreclosed the option for individuals to make nontraditional choices.

Hofmann did mark a departure from earlier cases in one respect. Whereas prior cases had construed the derogations purely on their own terms, in *Hofmann*, the Court moved toward a comparative approach that grounds the derogation within the underlying equality norm. Maternity leave may be limited to mothers, and not fathers, the Court explained, “in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely.” The leave thus “offset[s] the disadvantages which women, by comparison with men, suffer with regard to the retention of employment.”⁵⁹

In advancing this argument, the Court drew upon the opinion of Advocate General Darmon, who had described Article 2(3) as “merely appear[ing] to make an exception to the principle [of equal treatment]: in aiming to compensate for [disadvantage] it seeks to re-establish equality and not to prejudice it.” Because of this remedial function premised on existing gender inequality, Darmon argued that “the exception must be broadly construed.”⁶⁰ Yet, the linkage of Article 2(3) to gender differences in fact presaged the beginning of a stricter approach. If Article 2(3) hinged on differences between men and women, it followed that where men and women are deemed to be equally situated derogations would no longer be justified.

In *Johnston*, the Court signaled the beginning of a tougher approach to exceptions to equal treatment when it ruled—as it had declined to do in the previous cases—that such derogations “must be interpreted strictly.”⁶¹ In doing so, the Court again followed the lead of its advocate general—none other than AG Darmon.⁶² Predictably, the strict interpretation that followed led to the overruling of a communal standard, as Britain’s discretion to cater to public opinion was

58. 1984 ECR at 3075, ¶ 24.

59. 1984 ECR 3075, ¶¶ 26-27.

60. Opinion of Advocate General Darmon, 1984 ECR at 3082, ¶ 9; See also Opinion of Advocate General Tesauro, Case 421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt Bezirksverband Ndb/Opf eV*, 1994 ECR 1657, 1664, ¶ 11. Darmon was referring in the quoted passage to another provision of the Equal Treatment Directive, Article 2(4). Yet, later in his opinion he describes Article 2(3) as being a special case of Article 2(4). *Id.* at 3086, ¶ 12.

61. 1986 ECR at 1688, ¶ 44.

62. See Darmon opinion, 1986 ECR at 1660, ¶ 9 (calling for strict interpretation of derogation from fundamental right).

curtailed.⁶³ The rationale of the Court built on the comparative approach introduced in *Hofmann*. In refusing to permit differential treatment based on “risks which affect men and women in the same way,” the Court implied that derogations would only be allowed in situations where there were genuine differences between men and women (other than in the eyes of the public).⁶⁴

What sort of differences counted as genuine? Clearly, differences related to maternity/pregnancy qualified. Protection in this context “can be justified by an *objective difference* between [men and women] connected with a woman’s special biological make-up.”⁶⁵ Would anything else fit the bill? Further light was shed on this question in *Commission v. France* where France attempted to justify under Article 2(3) a broad assortment of employment privileges granted to women.⁶⁶ France defended the perks as making allowance for “the *de facto* situations existing in most households in France” in which women bore a double burden of work and home life. The Court, however, rejected this defense on the ground that many of the privileges “aim to protect women in their capacity as aged workers or as parents, although male workers can be in these positions as well.”⁶⁷ The fact that the position of most men differed from most women was apparently not enough.

In refusing to allow France to rely on (and thereby reinforce) *de facto* gender norms, the Court recalled the opinion of Advocate General Slynn, who had expanded on this theme at some length:

Most of the examples cited of rights given to women are not justified [because i]t cannot be said that men do not, or may not ever, need such rights or privileges or that the latter can be classified as relating solely to the biological condition of womanhood. . . . France’s insistence on the traditional role of the mother . . . ignores developments in society whereby some men in ‘single parent families’ have the sole responsi-

63. Judgment, 1986 ECR at 1688-89, ¶ 44. AG Darmon further generalized that Article 2(3) protections could never be based on “socio-cultural” reasons when invoked to reduce the rights of women.” Darmon opinion, 1986 at 1659, ¶ 8.

64. Id. at 1689, ¶ 45.

65. Opinion of Advocate General la Pergola, Case 285/98, *Kreil v. Federal Repub. Germ.*, October 26, 1999, ¶ 13.

66. 1988 ECR 6315. The privileges, authorized by French labor law, included “reduction of working time for women aged over 59 years of age or engaged in . . . typing and computer operating, the advancement of retiring age, time off for the adoption of a child, leave for sick children, a day off on the first day of the school term, some hours off on Mothers’ Day, payments to help mothers meet the cost of nurseries or childminders.” Opinion of Advocate General Slynn, id. at 6327.

67. *Commission v. France*, judgment, 1988 E.C.R. at 6336. The “special relationship” between mother and child recognized in *Hofmann* would thus seem to end shortly after childbirth.

bility for children or whereby parents living together decide that the father will look after the children.⁶⁸

This strongly egalitarian rationale went hand in hand with Slynn's conception of Article 2(3) as a derogation that must be "strictly construed"⁶⁹ and marked a further departure from the ECJ's erstwhile laissez faire approach. The single-sex adoption leave upheld in *Commission v. Italy*, for example, would no longer seem compatible with a conception of parenting in which mothers and fathers can play equal roles.⁷⁰ Whereas in *Hofmann*, the Court held that questions concerned with the organization of family life lay outside the ambit of the European equality law, Advocate General Jacobs would later argue, on the contrary, that such questions were its *raison d'être*.

[A]ssumptions . . . that in all marriages the husband will be the main breadwinner and that any paid work done by the wife will be no more than ancillary [are] themselves discriminatory. They make no allowance for couples who wish to organize their lives on alternative lines. *It was for the benefit of such people, among others, that . . . the Community's . . . legislation on equal treatment for men and women was adopted.*⁷¹

EC gender equality law so conceived assumes the subversive role reminiscent of the German *Bier* case. Instead of communal standards imposed by Member States, EC citizens have to be given the freedom to make individual lifestyle choices that can transcend traditional gender roles, in the same way that German consumers were exposed to beers brewed by nontraditional methods.

The endpoint of this jurisprudential migration was registered in *Stoeckel*, where the Court found a French law prohibiting night work by women incompatible with equal treatment.⁷² As in *Commission v. France*, France had justified the law as helping women reconcile employment with home life. In rejecting this appeal to protect family life, the Court recalled the dictum from *Hofmann* that the directive was not designed to address questions concerning family responsibili-

68. Slynn Opinion, 1988 ECR at 6328; See also Case 366/99, *Griesmar v. Ministre de l'Economie*, judgment, November 29, 2001, ¶ 56-58 (similarly rejecting pension benefits that France granted to female civil servants, but not male).

69. Slynn Opinion, 1988 ECR at 6327.

70. In the *Griesmar* judgment, the Court distinguished between "biological children" and "adopted children," implying that the career disadvantages related to maternity leave might be more easily presumed for the former. 2001 ECR at ¶ 52. This suggests that adoption leave may no longer be viewed as falling within the core focus of Article 2(3).

71. Opinion of Advocate General Jacobs, October 25, 1990, Case 373/89, *Caisse d'Assur. Soc. Pour Travailleurs Independ. [a.k.a. Integrity v. Rouvroy]*, 1990 ECR 4243, ¶ 13-14 (emphasis added).

72. Case 345/89, *Criminal Proceedings Against Stoeckel*, 1991 ECR 4047.

ties.⁷³ In doing so, the Court turns the dictum on its head. In *Hofmann*, the ECJ allowed Member States to reinforce traditional gender roles because the directive was held to be neutral in such matters. In *Stoeckel*, the exact opposite occurred; the directive precluded the instantiation of a gender stereotype.

As in *Johnston*, the Court also found that “the risks to which women are exposed when working at night [were not] inherently different from those [affecting] men.”⁷⁴ Any additional security risks affecting women, it held, could be dealt with by “appropriate measures . . . without undermining the fundamental principle of equal treatment.”⁷⁵ In refusing to allow a derogation in light of non-discriminatory alternatives, the Court came close to invoking the “no less restrictive means” standard that it routinely applies in its free movement cases.

Stoeckel’s seemingly strict approach to equality did not apply, however, in one aspect where men and women were seen genuinely to differ. Whereas the Court considered the prohibition on night work by women, in general, to be based on outdated ideas of female vulnerability, it accepted a ban on such work by pregnant women unquestioningly.⁷⁶ Pregnancy, for the Court of Justice, remains the immutable boundary that EC equality law will not penetrate, where gender difference is reduced to hard, biological fact. Once women become pregnant, they fall automatically within the ambit of Article 2(3) and become eligible for special protection, with little or no proportionality controls.⁷⁷

This biologically-grounded understanding of Article 2(3) helps to explain the apparent contradiction between *Hofmann* and *Johnston*, in which both Darmon and the Court switched from a deferential reading of Article 2(3) to a strict interpretation in cases a mere two years apart. In *Hofmann*, the measure given deferential review dealt explicitly with maternity, the textual focus of Article 2(3). *Johnston*, by contrast, involved the protection of women for social reasons, as did *Commission v. France* and *Stoeckel*; strict review applied. Subsequent case law has confirmed this bifurcated approach in which protections outside Article 2(3)’s core receive much stricter review.⁷⁸

73. Id. at 4067, ¶ 17 (citing *Hofmann*, 1984 ECR 3075, at ¶ 24).

74. Id. at ¶ 15.

75. Id. at ¶ 16.

76. See Case 421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt Bezirksverband Ndb/Opf eV*, 1994 ECR 1657, 1675, ¶18 (“prohibition on night-time work by pregnant women . . . is unquestionably compatible with Article 2(3)”).

77. Cf. Kilpatrick, “How Long is a Piece of String? European Regulation of the Post-Birth Period,” in *Hervey & O’Keefe*, supra n. 10, at 96 (1996) (likening this absence of judicial scrutiny to “a black hole” within equality law).

78. Thus, in *Abdoulaye*, the ECJ upheld payments to women taking maternity leave without requiring any proportionality test, while in *Griesmar*, the Court rejected payments for child-rearing. Compare Case 218/98, *Abdoulaye v. Regie Nat’le*

In fact, the ECJ has yet to sanction *any* derogations under Article 2(3) outside the context of maternity and pregnancy, although the text of the Directive and formal structure of the Court's opinions suggest this is not ruled out in principle.⁷⁹ The Court of Justice *has* upheld unequal treatment based on biological differences other than pregnancy in an equal pay case dealing with pension funding.⁸⁰ It remains to be seen if the ECJ would do so under Article 2(3).

B. Article 2(2)

Article 2(2) permits Member States to maintain sex-specific qualifications for "occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."⁸¹ Unlike Articles 2(3) and 2(4), which can be said to complement formal equal treatment by remedying pre-existing inequalities, Article 2(2) fits most closely the classical paradigm of a derogation that is wholly exceptional. As such, one might expect such measures to be held to especially strict limits.⁸²

In fact, this has not been the case. One reason may be that, unlike Article 2(3) derogations which have a purpose tied to objective, biological differences, Article 2(2) makes the justification for gender-specific qualifications dependent on the "nature [of the activity] or the context in which they are carried out." Moreover, such derogations are to be "periodically assessed in the light of social developments."⁸³ Such open-ended criteria implicate subjective, socially-mediated variables whose content may vary between Member States. In such cases, the ECJ prefers to defer to Member States governments to decide when gender qualifications are in principle warranted,⁸⁴ just as it defers to Member States to determine public

des Usines Renault SA, 1999 ECR 5723, ¶ 22, with *Griesmar* judgment, Nov. 29, 2001, at ¶¶ 52-55.

79. Compare Slynyn Opinion, *Commission v. France* ("the word 'particularly' in Article 2(3) [contemplates] situations other than pregnancy and maternity"), 1988 at ECR 6327-28, with *la Pergola* opinion, *Kreil*, ¶¶ 13, 23 (disagreeing).

80. Case 200/91, *Coloroll v. Russell*, 1994 ECR 4389 (permitting greater employer contributions for female employee pensions than for male reflecting the longer average lifespans of women). The Court did so, however, by ruling that such contributions lay outside the scope of EC equality law entirely. *Id.* at 4424, ¶ 76.

81. Actors/actresses, fashion models, and prison guards are examples of jobs that may require sex-specific qualifications.

82. The American analogue under Title VII, known as bona fide occupational qualifications (BFOQs), for example, have been narrowly construed. See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

83. ETD, Art. 9(2).

84. See Prechal & Burrows, *supra* n. 2, at 156 (linking "margin of appreciation" left to Member States in Article 2(2) to variation in social environment between Member States).

morality grounds for derogations from free movement.⁸⁵ The European Court thus reads Article 2(2), unlike Article 2(3), to explicitly sanction the instantiation of communally-determined norms. Despite the attempts of a few Advocate Generals to subject such norms to scrutiny, the Court has generally assumed that Article 2(2) derogations have a legitimate aim and focused instead on whether the means were proportionate and confined to a specific context.

The assumption that derogations under Article 2(2) are always provisional, subject to the periodic reassessments required by Article 9(2) may provide a further explanation for the Court's willingness to defer. Advocate General Darmon stressed this evolutionary aspect of Article 2(2) in *Hofmann*, which he argued revealed legislative intent that the directive not "create rights where none exist but that it seek[] to equalize rights at work wherever the development of social attitudes so permits."⁸⁶ More recently, however, Advocate General la Pergola implied that Member States bore some responsibility to take steps to combat discriminatory attitudes that impede gender integration.⁸⁷

An early case, *Commission v. United Kingdom*, examined whether restrictions on male midwives could be justified under Article 2(2).⁸⁸ The advocate general, siding with the Commission, had pushed for a strict interpretation, arguing that the fact that the UK did permit male midwives men to train and work in two cities called into question the need for restrictions elsewhere.⁸⁹ She also noted that Britain had no similar restriction on obstetricians.⁹⁰ The Court did not address these arguments. It merely recognized that midwifery involved "personal sensitivities" that could make gender a relevant consideration and upheld the restriction as an appropriate response "at the present time."⁹¹ As with the early Article 2(3) cases, the ECJ never entered into an assessment of proportionality. Ignoring Advocate General Rozes' suggestion that patient sensitivities could be addressed by giving patients the option of requesting a female midwife, the Court essentially deferred to the British government's judgment as to when and how the profession should be opened to men.

85. See, e.g., Case 121/85, *Conegate Ltd. v. Her Majesty's Customs & Excise*, 1986 ECR 1007, 1023.

86. Opinion of AG Darmon, 1984 ECR 3082, at ¶ 9 (discussing Article 2(2) in reviewing the overall structure of the ETD).

87. Opinion of AG la Pergola, Case 273/97, *Sirdar v. Army Bd.*, May 19, 1999, ¶ 46 (suggesting that "the attitude shown by the Member State [in promoting gender sensitivity]" weigh as a factor in assessing proportionality).

88. Case 165/82, *Commission v. United Kingdom*, 83 ECR 3431.

89. *Id.* at 3460.

90. *Id.*

91. *Id.* at ¶ 20.

The Court took a more assertive stance in another aspect of *Commission v. United Kingdom*, when it invalidated the exclusion of small workplaces and domestic workers from equal treatment, rejecting Britain's categorical approach as unnecessarily broad.⁹² The Court thus established that derogations under Article 2(2) must be justified by specific tasks, not generalized categories.

The Court expanded on this precedent in *in re French Civil Service*, a case challenging French gender quotas for police and prison posts.⁹³ Following *Johnston*, Advocate General Slynn had started from the premise that, as a derogation, "Article 2(2) is to be construed narrowly."⁹⁴ He proceeded to examine with a skeptical eye France's claim that women policemen were not suitable "to perform police duties which involve[d] the display of force." Slynn dismissed the fact that "on average men are bigger and stronger than women," because some women could still compete physically with men. Although conceding that "potential delinquents [might] regard men as more ready to use force," he suggested "that in some situations with which the police have to deal the presence of women could be a deterrent to violence."⁹⁵ Moreover, even if men were better suited for such tasks, Slynn found the French quotas "disproportionate" in that they applied to all five corps of the national police and were not limited to "police officers who regularly do, or are regularly liable to" deal with violence.⁹⁶

This latter of aspect of Slynn's opinion was followed by the Court. Rather than investigate the extent to which women could or could not handle particular tasks, the Court simply took it as a given that certain police tasks were best left to men, but others were not. The Court then confirmed that as a derogation from an individual right, Article 2(2) measures must not "exceed the limits of what is necessary to achieve the legitimate objective [and be] reconcile[d], as far as possible [with] equal treatment."⁹⁷ Moreover, the derogations must "relate only to specific activities [and] be sufficiently transparent so as to permit effective supervision."⁹⁸ The Court held that France's

92. 83 ECR 3431, ¶¶ 14-15.

93. Case 318/86, *in re French Civ. Serv. [Commission v. France II]*, 1988 ECR 3559.

94. Opinion of AG Slynn, *id.* at 3570.

95. *Id.* at 3571-72 (noting that in other countries "women now appear to play [a role] in warfare and in police forces").

96. *Id.* at 3571.

97. Judgment, 1988 ECR at 3582, ¶ 28. Ergo, unlike the midwife case, proportionality controls applied.

98. This emphasis on effective supervision built on an earlier ruling in *Commission v. Germany* that had stressed the role of the Commission in supervising Articles 2(2) to ensure that Member States "eliminate progressively existing exceptions which no longer appear justified," as Article 9(2) requires. Case 248/83, *Commission v. Germany*, 1985 ECR 1459, 1486, ¶¶ 37-39. The French police ruling now added another layer of supervision: that of the courts.

use of fixed quotas failed these latter tests because the restrictions were neither linked to specific activities and “no[r] governed by any objective criterion defined in a legislative provision.” Since the Court could not exercise independent review over the quotas, it held them unjustified.⁹⁹ By invoking transparency and specificity as requirements of proportionality, the ECJ equipped itself with the tools for more assertive judicial review. In doing so, the Court emphasized—as it does in free movement cases—that the exercise of an Article 2(2) derogation could not be made by Member States unilaterally.¹⁰⁰

The ECJ’s earlier handling of the Article 2(2) issue in *Johnston* was more questionable.¹⁰¹ In formal terms, the Court’s analysis was impeccable. It recognized Article 2(2) as a derogation that must be interpreted strictly and subjected to a test of proportionality focused on specific policing functions.¹⁰² What was troubling about the judgment, however, was its acceptance of the very premise that underlay the UK’s exclusion of women from the Ulster police force. The Court held that “the possibility cannot be excluded that in a situation characterised by serious internal disturbances the carrying of fire-arms by policewoman might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety.”¹⁰³ Yet, there was no evidence of this beyond the conclusory assertion of the police chief who ordered the exclusion policy.¹⁰⁴ Moreover, as we saw, the Court had found in its Article 2(3) analysis that “the risks and dangers to which women are exposed when performing their duties in the police force in a situation such as exists in Northern Ireland are [not] different from those to which any man is also exposed.”¹⁰⁵

Formally, the Court deferred to the referring national court “to say whether the reasons [for the exclusion were] well founded” and

99. Id. at 3581-82, ¶¶ 25-27.

100. ECJ’s shift to a stricter approach became less convincing in its handling of the second issue in the case, a challenge to the single-sex basis on which the posts of prison warden were filled. The Court had accepted France’s claimed need to promote from within the ranks of prison guards, whose single-sex status was not contested, without putting the policy to a proportionality test that would have entailed an independent assessment of this necessity. 1988 ECR at 3580.

101. Britain had alleged justifications under both Article 2(2) and 2(3). *Johnston*, 1986 ECR at 1672.

102. Id. at 1686-87, ¶¶ 36-38.

103. 1986 ECR at 1686-87, ¶ 36. Note the broad license implicit in the Court’s phrase “it cannot be excluded.”

104. See Opinion of Advocate General la Pergola, Case 273/97, *Sirdar v. Army Bd.*, 1999 ECR 7403, 7424, ¶ 34 (characterizing the *Johnston* Court’s ruling as based on “unsubstantiated ‘forecasts’”; See also Anthony Arnull, *The European Union and its Court of Justice* 90 (1999) (describing sexist views of police chief who formed the policy).

105. 1986 ECR at 1689, ¶ 45. This discrepancy between *Johnston*’s Article 2(2) and 2(3) analysis was never resolved.

proportionate.¹⁰⁶ Yet, the fact that the ECJ accepted such a dubious and internally contradictory premise even in principle demonstrates the Court's obvious unwillingness to second guess the British government on a national security issue during a time of emergency.¹⁰⁷ That the Court yielded under Article 2(2) instead of Article 2(3) reveals the greater tolerance for communal gender standards under the former. Advocate General Darmon had been open about this, explicitly stating that socio-cultural values could be accommodated under Article 2(2), but not 2(3).¹⁰⁸ The Court may have also felt that a ruling under Article 2(2) would do less long-term damage in the long run, given its provisional and contextually contingent nature.

A similar set of issues returned to the ECJ in a pair of cases a decade later. In *Sirdar*,¹⁰⁹ a female army chef challenged the all-male composition of the British Royal Marines. Although most British military posts had been opened to women, the marines justified its male-only policy based on its status as an elite combat unit that served as "the point of the arrow head." To fulfill this role, the marine corps enforced a rule of interoperability that required all personnel in the corps to be capable of combat, a requirement it claimed was incompatible with female members.¹¹⁰

Britain had argued for a deferential standard of judicial review "confine[d] to the question of whether the national authorities could reasonably have formed the view that the policy in issue was necessary and appropriate."¹¹¹ The Commission had pushed for application of a more rigorous proportionality test. The Court seemed to side with the Commission initially. It ruled "that, as a derogation from an individual right[, Article 2(2)] must be interpreted strictly."¹¹² Accordingly, proportionality had to be applied in order to ensure that "the principle of equal treatment [is] reconciled as far as possible with the requirements" of public security.¹¹³ On the other hand, the Court observed that, "national authorities have a certain degree of discretion when adopting measure which they consider to be necessary [for] public security."¹¹⁴ The Court then found that the elite sta-

106. Id. at 1687, ¶ 38.

107. The Court's handoff contained more than a whiff of expediency, and its framing of the proportionality test seemed aimed more at damage control than real scrutiny. Rather than focusing on whether the seemingly implausible justification actually held up to analysis, the Court appeared mainly concerned with minimizing the burden imposed on Mrs. Johnston, instructing the national court to determine whether it might be possible to "allocat[e] to [Mrs. Johnson] duties which . . . can be performed without firearms." 1986 ECR at 1687, ¶ 39.

108. Compare Darmon opinion, 1659, ¶ 8; with id. at 1660, ¶ 9.

109. Case 273/97, *Sirdar v. Army Bd.*, 1999 ECR 7403.

110. *Sirdar*, Judgment, ¶¶ 7, 30.

111. Id. at ¶ 22.

112. *Sirdar* Judgment, id. at ¶ 23.

113. Id. at ¶ 26.

114. Id. at ¶ 27.

tus of the marines had been established, “that, within [the] corps, chefs are indeed required to serve as front-line commandos [(necessity)], that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule [(consistency)].”¹¹⁵ “In such circumstances,” the Court held, “the competent authorities were *entitled*, in the exercise of their discretion . . . to come to the view that [these circumstances] justified the [marine corps] remaining exclusively male.”¹¹⁶ In other words, the Court reverted to much the same deferential standard that the UK had sought at the outset, confirming the withdrawal from strictness implicit in *Johnston*.

In some ways, *Sirdar* may be considered an improvement over its predecessor. National security is a more sensitive area than other public employment contexts and the Court probably lacks the institutional expertise to enforce strict proportionality limits.¹¹⁷ By explicitly recognizing a margin of discretion in this area, the Court avoided the strained credulity that had marred its previous ruling and limited the precedential harm. Yet, it is troubling that nowhere in its opinion did the Court explain *why* the role assigned to the marine corps was deemed incompatible with female members. Was it because women could not fulfill the job of “front-line commandos”? Because their presence would have undermined military discipline? Or simply because Britain was entitled to keep women out of combat for cultural reasons?¹¹⁸ By ruling only that the decision was within an allowable margin of discretion, the Court avoided the need to answer such questions.¹¹⁹

A more forthright approach was taken by Advocate General la Pergola, who deferred to Britain’s military authorities as to the necessity of interoperability, but still questioned whether at least some women could fulfill the requirements. He dismissed “the argument that women are physically inferior to men,” noting several countries that “permitt[ed] women in all units, including . . . those corresponding to the Royal Marines.”¹²⁰ Moreover, studies by the Canadian military showed that the presence of women did not compromise combat effectiveness and, “far from undermining military cohesion, in fact

115. *Id.* at ¶ 30.

116. *Sirdar*, Judgment, ¶ 31 (emphasis added).

117. See de Búrca, *supra* n. 18, at 132-33; cf. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“It is difficult to conceive of an area of governmental activity in which court have less competence” than military affairs).

118. If the exclusion was justified purely on cultural grounds unrelated to military necessity then it is hard to see why such a policy could be deemed to “have the purpose of guaranteeing public security.”

119. Cf. St. J. Macdonald, “The Margin of Appreciation,” in R. Macdonald, H. Petzold, & F. Matscher, (eds.), *The European System for the Protection of Human Rights* (1993) (criticizing such ambiguous rulings).

120. Opinion of AG la Pergola, ¶ 32 n.50.

even reinforced the *esprit de corps*.”¹²¹ In pursuing this line of inquiry, La Pergola assessed the justification for the exclusion policy on the basis of functional criteria, much as Advocate General Slynn had done for French police work.¹²²

Another military case, *Kreil*, came before the Court of Justice a year later, this time a challenge to a much broader exclusion of women from the German military.¹²³ In keeping with a constitutional provision that women “may on no account render service involving the use of arms,”¹²⁴ Germany restricted women to voluntary service in the medical and military-music services.¹²⁵ The restriction sought to ensure that women would neither be exposed to enemy fire, nor become prisoners of war.¹²⁶

This time, La Pergola made explicit the theme he had introduced in *Sirdar*. He suggested that derogations under Article 2(2) were permissible only where “sex is so much a determining factor that a non-discriminatory employment policy would make it extremely difficult or indeed impossible to fulfill the functions of [a particular] post.”¹²⁷ In other words, sex qualifications had to be justified instrumentally. Yet, the German government had conceded “that there was absolutely no doubt as to the suitability of either Ms. Kreil or women generally to serve in the [military’s] armed units.”¹²⁸ They were excluded on moral grounds, not functional, backed by constitutional imperative.

La Pergola did not exclude the relevance of cultural values entirely. Article 2(2) derogations could “reflect[] the cultural fabric of a country at a specific point in time,” he acknowledged, but only where linked to “specific requirements, closely bound up with the nature of an activity or . . . context.”¹²⁹ Making broader allowance for “social requirements,” would permit too much license to Member States to violate equal treatment, “a fundamental human right.”¹³⁰ In other words, cultural norms still had to fit within a functional framework.¹³¹ La Pergola noted that no other EU or NATO military retained such a categorical ban on women (thereby branding Germany as an outlier).¹³²

121. La Pergola Opinion, ¶ 45.

122. See *supra* nn. 94-95 and accompanying text. Ultimately, la Pergola would have left it to the national court to decide.

123. Case 285/98, *Kreil v. Bundesrepublik Deutschland*, 2000 ECR 69.

124. Id. at ¶ 4 (quoting Article 12a of the German Constitution).

125. Id. at ¶¶ 3-6.

126. Id. at ¶ 12.

127. Id. at ¶ 16 (citing V.T. Hervey, sect. 4.2.1.3 (1993)).

128. Id.

129. Id. at ¶ 22.

130. Id. at ¶ 20.

131. Id. at ¶ 23.

132. Id. at ¶ 16 & n.29, 30. The only other laggard, Italy, was in the process of opening its military to women. Id. at n.30. La Pergola’s attempt to assess “social

Finally, La Pergola rejected an attempt to assimilate the German exclusion to the inter-operability” rationale of *Sirdar*. La Pergola observed that a similar claim of “interchangeability” in the French police case had been rejected.¹³³ The facts of this case, he argued, resembled the latter as it involved a much broader range of positions than the British marines whose tasks were “becoming ever more specialised.”¹³⁴ La Pergola therefore concluded that the exclusion was unjustified.¹³⁵

The Court of Justice adopted a different approach. It began by restating the two questions posed in *Sirdar*: Did the measures taken “have the purpose of guaranteeing public security and [were they] appropriate and necessary to achieve that aim.”¹³⁶ One might think the answer to the first question was obvious: *no*. Germany adopted the exclusion to protect female soldiers, not public security in the usual broad sense.¹³⁷ Did the Court mean to equate the two?¹³⁸ If not, was the Court suggesting that public security could be the only legitimate purpose here? If so, this would seem an endorsement of la Pergola’s functionalist approach. Yet, the Court never addressed the question of purpose. The analysis that followed focused only on the proportionality of the chosen means.

The Court first stated that “[i]n view of its scope, such an exclusion, which applies to almost all military posts . . . cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out.”¹³⁹ In fact, in light of its true purpose, the exclusion was fairly accurately drawn: Women had been excluded from all military posts which were likely to expose them to hostile fire or enemy capture.¹⁴⁰

The Court continued with the observation that:

the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women

developments” by reference to other Member States—the judicial equivalent of peer pressure—was questionable, however, because Article 2(2) derogations were intended to be country-specific.

133. La Pergola Opinion, ¶ 36 (contrasting the two claims).

134. *Id.* at ¶¶ 27-28.

135. *Id.* at ¶ 30. For the sake of completeness, la Pergola also considered whether the exclusion was proportionate; he concluded that it was not because it was both over- and under-inclusive with respect to its stated aims. *Id.* at ¶¶ 34-36.

136. *Kreil* judgment, 1999 ECR at 106, ¶ 25.

137. The legislative history and constitutional grounding of the exclusion policy could not be plainer. See la Pergola Opinion, 1999 ECR at 77-78, ¶ 12.

138. The ECJ’s blurring of these two different aims recalled its *Johnston* judgment which similarly described the possible assassination of female police officers as “contrary to the requirements of public safety.” *Johnston*, 1986 ECR at 1687.

139. *Kreil* judgment, ¶ 27.

140. A stronger criticism would be that the exclusion was underinclusive in that it did not protect women in civilian posts who worked alongside the military. See la Pergola opinion, 1999 ECR 91, ¶¶ 33-34.

from access to military posts. As the German Government explained, in the services of the *Bundeswehr* that are accessible to women, basic training in the use of arms, to enable personnel in those services to defend themselves and to assist others, is provided.¹⁴¹

This line of argument (suggesting an inconsistency) was not convincing either. A minimal level of prophylactic training cannot be equated with military operations that deliberately put their participants in harm's way. Would the Court's judgment change if such training were to cease? Note also that the Court here understood Germany's aim as explicitly protective: to keep women away from fighting. But instead of directly confronting this aim, whose legitimacy had been called into question by *la Pergola*, the Court kept its sights fixed firmly on the means chosen, concluding:

In those circumstances, even taking account of the discretion which they have . . . the national authorities could not, without contravening the principle of proportionality, adopt the general position that the composition of all armed units . . . had to remain exclusively male.¹⁴²

Given its conclusory nature, this last proposition was hard to dispute. *La Pergola* offered plenty of reasons why the exclusion *could* be considered disproportionate. It did not prevent woman in the German military's numerous civilian posts working alongside combat troops from coming into peril. It was outdated, overbroad and non-transparent. It kept too many plum jobs for the boys (and ensured veterans' preferences for them afterward).¹⁴³ The Court's imprecision also suggested a more general meaning: that it was willing to tolerate a limited derogation to appease German cultural values, but the scope here was simply too massive to stomach.

What is clear, however, is the ECJ's determination to avoid confronting the issue of purpose head on. Indeed, one might suspect that the whole exercise was really just a diplomatic way for the Court to say it objected to the exclusion on principle, as sexist. Yet, the failure of the Court to articulate a more convincing rationale points to the weakness of means scrutiny as a surrogate.

Kreil is not the only Article 2(2) case where the Court avoided scrutiny of purpose. The Court was just as evasive as to the reason for the exclusion of women in *Sirdar* and (to a lesser extent) *Johnston*. Moreover, in every case in which the Court has found a discriminatory measure to be unjustified under Article 2(2), it has done so by holding that the means were disproportionate to the stated end, rather than declaring the end itself illegitimate. In *Commission v.*

141. *Kreil* judgment, 1999 ECR at 106, ¶ 28.

142. *Id.* at ¶ 29.

143. See *la Pergola* opinion, ¶ 35.

United Kingdom, the Court held the blanket exemption for employment in private households to be overly broad in scope. The same was true of the hiring quota in the French police case, and of *Kreil* itself. The exclusion policy in *Kreil* was also criticized for not being broad enough since women still received training in arms.¹⁴⁴ By focusing on the scrutiny of means, rather than purpose, the Court avoids having to pass judgment on gender roles in employment, a subjective and culturally contingent question that is likely to be both highly emotive and deeply contested.

This avoidance of purpose scrutiny is not at all true of Article 2(3) cases, however. In fact, the reverse applies: Where the Court has rejected Article 2(3) justifications, it has consistently done so by pronouncing the purpose impermissible. In *Commission v. France*, the ECJ held that Article 2(3) did not authorize protection of women in capacities that they shared with men, a ruling implicit in the Court's treatment of the "family responsibility" issue in *Stoeckel*. Similarly, in *Johnston*, women could not be protected against risks that affected men too. This was also the line taken in *Stoeckel*.¹⁴⁵

As already noted, the difference between Article 2(2) and Article 2(3) is rooted in the biological basis that undergirds the latter. As the ECJ began to apply stricter scrutiny to Article 2(3) cases, it stripped away the social meanings of gender as impermissible stereotypes, reducing Article 2(3) protection to its biological core of pregnancy and maternity. This winnowing process functioned entirely at the level of purpose. The Court could perform this purpose scrutiny because it had a textual anchor on which to fall back. It did not have to pronounce broader purposes as illegitimate per se, but could say merely that they were not the purposes for which Article 2(3) was intended.

By contrast, Article 2(2) is *by design* inseparable from social context.¹⁴⁶ The result is that the ECJ has steered away from purpose scrutiny. Thus, in *Johnston*, the Court accepted in principle the justification offered by the British police chief and refused to confront the blatant stereotypes on which it seemed to be founded, notwithstanding its willingness to do so under Article 2(3) in the very same case. Instead, the Court relied on a strictly-worded proportionality test to do the work of judicial review. By invoking proportionality, the Court asks whether the means fit the end, shifting the spotlight from purpose to method. As a substitute for purpose scrutiny, context (i.e.

144. This ruling by a strict-minded court in *Kreil* may be contrasted with the mid-wife case, where a (deferential) Court permitted Britain to open the profession to men in two cities, but not others.

145. The Court did invoke proportionality in *Stoeckel* to deal with security risks that the Court acknowledged *might* affect women to a greater extent than men. The structure of the Court's judgment makes clear, however, that the proportionality argument was a secondary, fallback position. *Stoeckel*, 1991 ECR at 4066, ¶ 16.

146. AG Darmon made this distinction between Articles 2(2) and 2(3) explicit in *Hofmann*. See 1986 ECR at 1659-60.

specificity) has become the key battleground in Article 2(2) cases. Stricter scrutiny has meant a narrowing of focus, as the Court sought to contain the genie of social subjectivism within the confines of specific employment functions.¹⁴⁷ This contextual straight-jacket forces Member States to justify their derogations through an logic of instrumental necessity and thus steers the debate away from broader value judgments about gender roles. It is no accident therefore that the French police, British marines, and German *Bundeswehr* all invoked some variant of the interoperability principle to try to extrapolate outwards from their strongest contextual claims.

This reliance on proportionality and specificity as the weapons of choice has its limitations, however, as the *Kreil* judgment's shortcomings revealed. La Pergola's more explicitly functionalist approach offers an attractive alternative. However, the Court's embrace of the logic of functionalism has never been as fulsome as that of its advocate generals. To do so would require the Court to openly declare that non-instrumental justifications are no longer acceptable—triggering the very debate over purpose that it has so assiduously avoided. It remains possible, however, that the Court will go further towards purpose scrutiny via functionalism as cases arise in less sensitive realms than the national security questions addressed in its last three Article 2(2) judgments.

Article 2(4)

Article 2(4) permits sex-specific measures “to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.” More than one Advocate General has commented on the affinity between Articles 2(3) and 2(4).¹⁴⁸ Just as Article 2(3) serves to offset the disadvantages of maternity, so affirmative action under Article 2(4) targets other obstacles that hold back women’s careers.¹⁴⁹ Unlike Article 2(3), however, Article 2(4) “is not linked any specific condition of women but relates to all women”¹⁵⁰ (and perhaps men).¹⁵¹ As with Arti-

147. Cf. *Johnston*, 1986 ECR 1686, ¶ 34 (Article 2(2) derogation “must be examined [in] the specific context in which the [allegedly sex-specific] activity is carried out.”).

148. Opinion of AG Darmon, *Hofmann*, 1984 ECR at 3082, ¶ 9; Opinion of Advocate General Tesauero, Case 450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 ECR 3061-62 [Hereafter cited as *Tesauero*], ¶ 17.

149. Indeed, Advocate General Darmon viewed Article 2(3) in *Hofmann* as a special case of the broader principles embodied in Article 2(4). 1984 ECR at 3086, ¶ 12.

150. *Tesauero*, ¶ 18.

151. Although affirmative action is normally restricted to women, in *Schnorbus*, the ECJ upheld preferential treatment of applicants who had completed military service—a class composed exclusively of men. Case 79/99, *Schnorbus v. Land Hessen*, Judgment of December 7, 2000, ¶¶ 44-46. *Schnorbus* was analyzed as an indirect discrimination case; yet, its rationale would seem applicable to Article 2(4).

cle 2(2), the challenge for the Court has therefore been to contain the broad discretion this open-ended provision would otherwise confer.

In *Commission v. France*, the first case that addressed Article 2(4) directly, Advocate General Slynn cautioned that “[i]t is not permissible to argue . . . that because women in general have been discriminated against then any provisions in favour of women in the employment field are per se valid as part of an evening-up process.” Slynn noted that the privileges had “never been enjoyed by men,”¹⁵² suggesting that a sort of symmetry applied: Article 2(4) would only sanction preferential treatment of women in the context of a preexisting inequality. The Court appeared to expand on Slynn’s insight in its judgment, construing Article 2(4) to have “the precise, limited object of authorising measures which, although discriminatory in appearance, actually aim to eliminate or reduce de facto instances of inequality which may exist in actual working life.”¹⁵³ It then held that France had not offered evidence to show that any of the perks served this aim.¹⁵⁴

It was left to Advocate General Tesauo in *Kalanke* to make sense of this rather ambiguous holding. *Kalanke* concerned an employment decision in which a female candidate had been preferred over an equally qualified male, based on a law giving preference to the underrepresented sex. The question for the ECJ was whether the preference could be justified under Article 2(4).

The Advocate General began by drawing a basic distinction between “starting points” (opportunities) and “points of arrival” (outcomes).¹⁵⁵ He saw Article 2(4) as solely concerned with measures to equalize the former. Leveling the playing field between men and women would put “people in a position to attain equal results,” without guaranteeing the results directly.¹⁵⁶

By contrast, Tesauo saw the preference in *Kalanke* as concerned solely with outcomes. Favoring the underrepresented sex would rebalance numbers without remedying the obstacles that caused the imbalance.¹⁵⁷ Moreover, because the two candidates had “equivalent qualification, [he argued] by definition that the two candidates have had and continue to have equal opportunities.”¹⁵⁸

152. 1988 ECR at 6329.

153. *Commission v. France*, judgment, 1988 ECR 6336-37, ¶ 15.

154. *Id.*

155. Tesauo, ¶ 13.

156. *Id.* at ¶¶ 13, 16-17, 25. As examples of starting points, Tesauo envisioned vocational counseling and training to upgrade women’s qualifications and subsidized child-care, to reduce the burdens of home life. *Id.* at ¶¶ 9, 18-19.

157. Tesauo ¶ 18, 28 (dismissing “numbers battle” as yielding “illusory” gains “devoid of all substance”).

158. Tesauo, ¶ 13. Tesauo’s reasoning assumes that selections were made solely based on qualifications. In fact, they were based partly on “social criteria” discriminatory to women. See Schiek, “Positive Action in Community Law,” 25 *Indus. L.J.* 239,

Despite the remedial promise of affirmative action, Tesauro still viewed Article 2(4) as a derogation subject to a strict proportionality test.¹⁵⁹ He pointed to the “element of arbitrariness inherent in any preferential treatment which is mechanically confined to the under-represented group and based solely on that ground.”¹⁶⁰ Such arbitrariness, Tesauro argued, belied the remedial purpose of the preference and was disproportionate to this aim.¹⁶¹

The judgment of the Court in *Kalanke* largely followed Tesauro. It noted that as “a derogation from an individual right . . . Article 2(4) must be interpreted strictly.”¹⁶² The Court then held that national laws such as Bremen’s failed this strict standard for two reasons. First, the Court stated that “[n]ational rules which guarantee women absolute and unconditional priority go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4).”¹⁶³ Second, the Court held that “in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.”¹⁶⁴

The *Kalanke* judgment provoked widespread controversy, ultimately leading to an amendment of Treaty Article 119 specifically to encourage affirmative action.¹⁶⁵ Moreover, the sparse reasoning and somewhat cryptic wording of the judgment left confusion as to its meaning.¹⁶⁶ The judgment appeared to state two distinct reasons for invalidating the preference, objecting to both the form and purpose of the preference. In objecting to the “absolute and unconditional” form of the preference, the Court portrayed it as “automatically giv[ing] priority to women in sectors where they are underrepresented”—mirroring Tesauro’s criticism of the preference’s “mechanical” nature. Similarly, the characterization of the preference as aiming at a result (equal representation) came unmistakably from Tesauro’s opportu-

240 (1996) (noting *Kalanke* was given priority because he had a dependent as well as seniority).

159. Tesauro, ¶ 23. Tesauro seemed to contradict his earlier suggestion that Article 2(4) was not a “genuine derogation” because it complemented the principle of formal equality. *Id.* at ¶ 17; cf. AG Darmon in *Hofmann*, 1984 ECR at 3082.

160. Tesauro, ¶ 24.

161. *Id.*

162. *Kalanke* judgment, 1995 ECR at 3078, at ¶ 21.

163. *Id.* at ¶ 22.

164. *Id.* at ¶ 23.

165. See Senden, “Positive Action in the EU Put to the Test: A Negative Score?,” 3 *Maastr. J. Eur. Comp. L.* 146 (1996) (re: controversial nature of judgment); Shaw, *supra* n. 8, at 104 (Treaty language inserted at Amsterdam based on fallout from *Kalanke*); See also Proposal for a Council Directive Amending Directive 76/207/EEC, OJ, C-179, p.8 (proposed “clarification” in *Kalanke* aftermath).

166. Many commentators saw *Kalanke* as sounding a death knell for affirmative action in Europe. See Douglas-Scot, “Ruling Out Affirmative Action,” 21 *Eur. L. Rev.* 1586 (1995); Senden, *supra* n. 165, at 146.

nity/outcome distinction.¹⁶⁷ It was unclear, however, whether these objections represented independent grounds for the judgment or were somehow related.

An opportunity for clarification arose two years later when *Marschall*,¹⁶⁸ a case with almost identical facts, came before the Court. The only difference was the addition of proviso that the preference for the underrepresented sex could be withheld where “reasons specific to another [i.e. male] candidate tilt the balance in his favor.”¹⁶⁹ This “savings clause” was designed to address Court’s “absolute and unconditional” objection in *Kalanke*.

Advocate General Jacobs was of the opinion that preference still concerned outcomes, not opportunities and thus fell within *Kalanke*’s second objection.¹⁷⁰ The *Marschall* Court, however, took a different view. It observed that:

even when male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudice and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.¹⁷¹

In acknowledging the prejudices that women faced in the employment market, the Court clearly rejected Tesauro’s assumption that equal qualifications meant equal opportunity.¹⁷² The Court therefore reasoned that preferences to women “*may* fall within the scope of Article 2(4) if such a rule *may* counteract [prejudice against] female candidates . . . and thus reduce actual instances of inequality which *may* exist in the real world.”¹⁷³ The tentative language here showed that the Court’s reasoning was contingent. The purpose may be viewed as equalizing starting points, not outcomes only if one can assume there *is* preexisting prejudice to counteract. Yet, the only indicator of prejudice in the case at hand was the numerical fact of underrepresentation—hardly an unambiguous criterion. Indeed, for Tesauro the linkage to underrepresentation showed just the opposite: that the preference aimed at an outcome (balancing numbers) instead

167. Cf. Tesauro, ¶ 25

168. Case C-409/95, *Marschall v. Land Nordrhein Westfalen*, 1997 ECR 6363.

169. *Id.* at ¶¶ 13, 24.

170. Opinion of Advocate General Jacobs, 1997 ECR at 6374-75, ¶¶ 32-33.

171. *Marschall* judgment, ¶ 29.

172. Jacobs had echoed Tesauro in committing this fallacy. Jacobs Opinion, ¶ 30.

173. *Marschall* judgment, ¶ 31 (emphasis added).

of opportunity.¹⁷⁴ The *Marschall* judgment left the ambiguity hanging without further comment.

Having thus skirted *Kalanke*'s objection to the preference's purpose, the only question was one of means. Here, the Court focused on the saving clause as embodying a decisive difference from *Kalanke*'s "automatic" preference. The Court did not explore what additional criteria could warrant invoking the savings clause, but noted only that the *Land* chose "a legally imprecise expression in order to ensure flexibility."¹⁷⁵ The Court accepted this approach, although it required that "the candidates [be] the subject of an objective assessment [that] take[s] account of all criteria specific to the individual candidates" and also stipulated that "such criteria are not such as to discriminate against female candidates."¹⁷⁶

Formally, the *Marschall* opinion continued to label Article 2(4) as a derogation, which would imply a strict interpretation.¹⁷⁷ However, the judgment appeared anything but strict. The Court relied on two crucial assumptions, one explicit (women tend to be discriminated against even where equally qualified) and one implicit (underrepresentation is an indicator of prejudice). Its willingness to sanction a derogation from equal treatment under Article 2(4) on the basis of such unexamined assumptions contrasts with its rejection of similar generalizations in Article 2(3) cases as based on impermissible stereotypes. Moreover, the Court's acceptance of a savings clause whose meaning was deliberately imprecise seemed at odds with its emphasis on transparency in Article 2(2) cases.¹⁷⁸

The apparent relaxation of the Court's affirmative action scrutiny in *Marschall* did not pass unnoticed. In the ensuing *Badeck* case,¹⁷⁹ Advocate General Saggio concluded that a strict interpretation of Article 2(4) was no longer justified.¹⁸⁰ Saggio further argued

174. Tesauro, ¶¶ 18, 28.

175. *Marschall* judgment, ¶ 5.

176. *Id.* at ¶ 35. This last condition presumably responded to the concern raised by Advocate General Jacobs that allowing open-ended criteria to be taken into account at this stage could reintroduce the very same discriminatory attitudes that the preference was designed to overcome. See Jacobs Opinion, ¶ 36 n.39.

177. *Marschall* judgment, ¶ 32.

178. The ECJ's stipulation that the candidates be subjected to an "objective" assessment that takes into account criteria specific to the individual candidates hardly resolves the problem because the Court gives no indication what such criteria might be, other than the vague proviso that they not "discriminate against the female candidates."

179. *Badeck v. Hessischer Ministerpraesident*, Case 158/97, 2000 ECR 1875, 1923, ¶ 38.

180. Opinion of Advocate General Saggio, Case 158/97, June 10, 1999, 2000 ECR at 1887-88, ¶ 26. Saggio revived Advocate General Darmon's argument in *Hofmann* that Article 2(4) measures complement the formal equality and help to perfect it, and thus cannot be considered "in the nature of [an] exception [that] must therefore be interpreted strictly." *Id.* Saggio noted that the Amsterdam Treaty had specifically amended Article 119 to encourage affirmative action. *Id.*

that, contrary to Advocate General Tesauro's view, Article 2(4) measures should not be restricted merely to starting points.¹⁸¹ Nonetheless, Tesauro's starting point/endpoint distinction remained prominent in both Saggio and the Court's *Badeck* analysis.

In addition to upholding a direct, but flexible hiring preference similar that endorsed in *Marschall*,¹⁸² the Court approved a variety of auxiliary measures designed to improve the ability of women to compete for civil service posts. These included a set-aside for women of at least half the places in occupational training for jobs in which women were underrepresented and a similar quota on interview slots. The ECJ justified these measures as designed to equalize starting points, not results. The Court emphasized that "[i]t is not places in employment which are reserved for women but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service."¹⁸³ Likewise, the interview provision did not seek to "achieve a final result—appointment or promotion—but [to] afford women who are qualified additional opportunities."¹⁸⁴

Despite the ECJ's disclaimer that these quotas did not "necessarily entail total inflexibility,"¹⁸⁵ their allocation of placements was governed by sex and numbers, as opposed to individual criteria, to a greater extent than in *Kalanke*.¹⁸⁶ The difference for the Court was clearly the starting point/endpoint distinction. The ECJ was prepared to tolerate stricter quotas for preferences deemed to involve starting point than it had in *Kalanke* and *Marschall* in a contest over outcomes.

As in *Marschall*, the Court of Justice never really questioned the purpose or necessity of these quotas. It referred generally to findings by the Hesse legislature that "in social reality women continue to be disadvantaged and that . . . 'in particular in employment, women do not have equal access to qualified . . . positions.'"¹⁸⁷ Yet, the Court did not investigate the extent to which increased access to training and interviews will remedy such disadvantage.¹⁸⁸ Having estab-

181. Id. at points 27-28 (arguing that such a limitation "would enormously reduce the scope of [affirmative] action, depriving it of substance" and effectiveness).

182. The *Badeck* preference rule differed slightly in that it imposed a "binding target" of gender integration to be met within a proscribed time, which arguably provided an added incentive for administrators to favor women candidates. Id. at ¶ 14.

183. *Badeck* judgment, ¶ 52.

184. Id. at ¶ 60.

185. Id. at ¶ 51.

186. Indeed, the Hesse legislature itself referred to the measures as a "strict result quota." Id. at ¶ 50.

187. *Badeck* judgment, ¶ 49.

188. There was no evidence that access to training and interviews were bottlenecks halting the advancement of women, nor that women were being unfairly excluded. The Court simply accepted that the measures chosen had the potential to benefit women and never inquired as to the merits of alternatives.

lished a general need for affirmative action, the Court deferred to the legislature to select appropriate measures.

Even looser scrutiny applied to a requirement of equal representation of women on administrative and supervisory bodies. The Court presented this quota as flexible, explaining that it was "not compulsory" and permitted "to some extent, other criteria to be taken into account."¹⁸⁹ In upholding the quota on this basis, the Court went against its Advocate General, who viewed the quota as strict.¹⁹⁰ Its reliance on the "non-compulsory" nature of the quotas ignored the *de facto* consequences of such a rule.¹⁹¹ Moreover, nowhere did the Court inquire why such a quota was needed. Getting women appointed to such committees might be justified as a means to equalize starting points for female employees by breaking up old boys clubs and facilitating the adoption of family-friendly policies (although the judgment did not say so). Even so, was it necessary to enforce strict parity?

Although the *Badeck* judgment continued the relaxed scrutiny seen in *Marschall*, it did not adopt Saggio's call to formally revoke the strict interpretation of Article 2(4) established in *Kalanke*. The ensuing case, *Abrahamsson*,¹⁹² decided three months later, perhaps showed why. The case concerned yet another hiring preference for women which, unlike those at stake in earlier cases, would permit even slightly less qualified women to be chosen over men where women were underrepresented.

The Court began its analysis on a well-worn path. It noted that the selection went "automatically" to the candidate from the underrepresented sex, "subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirements of objectivity in making appointments."¹⁹³ "The scope and effect of that condition," said the Court, "cannot be precisely determined Moreover, candidates are not subjected to an objective assessment taking account of the specific personal situations of all the candidates."¹⁹⁴ Therefore, the Court held the preference impermissible under Article 2(4).¹⁹⁵

189. *Id.* at ¶ 65.

190. Saggio *Badeck* Opinion, ¶ 42 (characterizing the quota as impermissibly rigid).

191. Contrast *Commission v. United Kingdom* 1983 ECR 3431, ¶¶ 9-11 (observing that such formal commitments "even if they are not legally binding . . . have important *de facto* consequences for the employment relationships . . . in so far as they determine the rights of the workers [which], in the interests of industrial harmony, undertakings [must] satisfy").

192. Case C-407/98, *Abrahamsson v. Anderson*, 2000 ECR 5539, 5582-3, ¶ 52-53.

193. *Id.* at ¶¶ 51-52.

194. *Id.* at ¶ 53.

195. The ECJ then considered whether the provision might be justified under Article 141(4) of the E.C. Treaty, a provision inserted at Amsterdam in response to *Kalanke*. Here, the Court held only that the preference was "on any view . . . dispro-

On its face, the Court's rejection of a preference that was automatic and not subject to an objective assessment of individuals seemed nothing more than a restatement of *Marschall*. Yet, its emphasis on "clear and unambiguous" selection criteria represented a tightening of the standard. Indeed, the Court stated explicitly that such criteria "must be transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates."¹⁹⁶ It seems doubtful that the deliberately vague "savings clause" in *Marschall* would have met this standard.

The Court's failure to address squarely the issue of awarding preference to less qualified candidates—the distinguishing feature of the *Abrahamsson* preference—is puzzling. The Court was clearly troubled by the fact that "selection . . . is ultimately based on the mere fact of belonging to the under-represented sex . . . even if the merits of the candidate so selected are inferior."¹⁹⁷ Unlike Advocate General Saggio,¹⁹⁸ the Court did not directly condemn this practice, perhaps reflecting a lack of consensus among the judges. Yet, the critical tone of the Court's reference to "selection . . . based on the mere fact of belonging to the under-represented sex" underscored the Court of Justice's limited tolerance for gender preferences that go to outcomes. Thus, it seems that ECJ has moved toward a two-level approach to Article 2(4) derogations, whereby measures that fall within Tesouro's starting point paradigm are treated more indulgently than those deemed to aim at results.

This distinction was maintained in *Lommers*, where the ECJ approved subsidized child-care for female employees as aimed at starting points, not results.¹⁹⁹ The Court held that the "primary object and effect of such a measure . . . is to facilitate" employment by parents and noted that a lack of

suitable and affordable nursery facilities is like to induce more particularly female employees to give up their jobs . . . That being so, [subsidized child-care] forms part of the restricted concept of equality of opportunity in so far as it is not places of employment which are reserved for women but

portionate to the aim pursued." Id. at ¶ 55. The Court's reluctance to give more substance to Article 141(4) may have reflected an element of judicial pique toward a provision originally intended to reverse its *Kalanke* judgment.

196. *Abrahamsson* judgment, at 5582, ¶¶ 49-50.

197. Id. at ¶ 53.

198. See Opinion of Advocate General Saggio, in Case 407/98, *Abrahamsson v. Anderson*, November 16, 1999, ¶ 28 (protesting that preferring less qualified candidates would "give rise to a system according absolute and unconditional priority and consequently reserving posts for women").

199. Case 476/99, *Lommers v. Minister van Landouw, Natuurbeheer en Visserij*, Judgment of March 19, 2002, ¶ 38.

enjoyment of certain working conditions designed to facilitate their . . . career.”²⁰⁰

In upholding the scheme, the ECJ appeared to contradict its prior judgment in *Commission v. France*, which had rejected similar child-care subsidies under both Articles 2(3) and 2(4).²⁰¹ The Court distinguished the Article 2(4) analysis in the prior case on the ground that France had not offered a specific rationale to justify such subsidies, which had been lumped into a set of undifferentiated “special rights” for women. Yet, many of the other provisions would also seem to conform to the Court’s starting points paradigm.²⁰² The suspicion thus remains that the different outcome in *Lommers* reflected the ECJ’s more receptive attitude to affirmative action post-*Marschall*.

An even clearer contrast may be drawn between *Lommers* and *Commission v. France* with respect to the Article 2(3) analysis in the latter. Had the Court applied the logic of Article 2(3) to *Lommers*, the recognition of gender differences in parental roles would have been rejected as an impermissible stereotype. The *Lommers* Court took a step in this direction when it noted that “[t]he situations of a male employee and female employee, respectively father and mother of young children, are comparable as regards the possible need for them to use nursery facilities.” It would follow under an Article 2(3) approach that fathers could also benefit from, and should be eligible for subsidies.²⁰³

Yet, the Court does not say this. Rather it recognizes the prevailing social reality that it is mothers, not fathers who are liable to bear the primary burden of child-care and are thus “more particularly” in need of aid—precisely the sort of recognition of *de facto* gender roles it has ruled out under Article 2(3). Furthermore, in accepting that Article 2(4) measures can target broader societal inequalities only indirectly connected to employment, the Court opens the door to a much wider range of affirmative action. Unlike *Marschall*, where the preference was justified as counteracting discrimination in the work-

200. *Id.* at ¶¶ 29, 37-38. The Court drew an analogy to the reservation of training places in *Badeck*, although the *Lommers* set-aside went further in scope in that 100% of the places were reserved for women, instead of merely half. *Id.* at ¶ 33.

201. The Court also implicitly rejected AG Slynn’s view that Article 2(4) could not justify privileges “never enjoyed by men.” The child-care program in *Lommers* had been specifically created to benefit female employees. *Id.* at ¶ 9.

202. These provisions included, *inter alia*, “time off for sick children, extra days’ holiday each year per child, [and] a day off on the first day of the school term,” all of which could arguably help working mothers to reconcile parenting with continued employment in a similar manner. *Comm. v. France*, 1988 ECR at 6327. Indeed, the originator of the starting point paradigm, Advocate General Tesauero, writing in *Kalanke*, had felt that the Court had taken an overly harsh view of these measures in *Commission v. France*. See Tesauero opinion in *Kalanke*, 1995 ECR at 3063, ¶ 18.

203. *Cf. Comm. v. France*, judgment, 1988 ECR at 6336 (rejecting parenting rights reserved for women).

place, in *Lommers*, the reservation of subsidized child-care to female employees is justified as a remedy to inequalities in parenting.

Perhaps conscious of the need to counterbalance this expansion of rationales, the ECJ emphasized—where *Badeck* had not—that even affirmative action aimed at starting points remained subject to proportionality control.²⁰⁴ The Court then explained that extending the childcare benefit to male employees was impractical since “insufficiency of supply” meant that there were not enough subsidized places even for female employees.²⁰⁵ Yet, as Advocate General Slynn pointed out in *Commission v. France*, a lack of resources is no excuse. “Practical difficulties . . . cannot permit a member-state unilaterally to opt out of fulfilling its obligations” to implement gender equality.”²⁰⁶ Nor did the Court’s observation that male employees could purchase child-care elsewhere offer much consolation since such placements would have to be purchased at market cost.²⁰⁷ Viewed in this light, instead of being merely a means to an end, such subsidies could be seen as an employment perk in their own right, making their allocation resemble more outcome than starting points.

The Court’s proportionality analysis did lead it to impose one substantive restriction. It noted assurances offered during the proceedings that single fathers would have access to the subsidized placements on the same basis as women and warned that without such a provision the women-only policy would “interfer[e] excessively with the individual right to equal treatment.”²⁰⁸ In other words, the Court made its approval conditional on a sort of savings clause to prevent gender preferences from losing track of individual need.

Just as *Abrahamsson* tightened the standard from *Marschall* by requiring “clear and unambiguous” criteria “amenable to review,” *Lommers* may be seen as tightening up *Badeck* by invoking proportionality controls even for preferences deemed to aim at starting points. Yet, the scrutiny that the Court actually applies remains relatively light. Instead of getting stricter over time, the ECJ’s Article 2(4) jurisprudence has thus taken a more erratic course than that seen in the other derogations from equal treatment. In some ways, *Kalanke* still represents the high water mark of affirmative action scrutiny. There was a strong grain of individualism running through Advocate General Tesaurio’s *Kalanke* opinion (which the Court seemed to adopt), opposing a “collective vision of equality” in which individual rights are sacrificed to compensate a disadvantaged

204. *Lommers* judgment, ¶ 39.

205. *Id.* at ¶¶ 42-43.

206. Slynn opinion, 1988 ECR at 3572; See also Case 243/95, *Hill and Stapleton v. Revenue Comm’r*, 1998 ECR 3739, 3769, ¶¶ 39-40 (increased cost of compliance cannot alone justify discrimination).

207. *Lommers* judgment, ¶ 44.

208. *Id.* at ¶ 47.

group.²⁰⁹ Women could not be preferred “simply because they are women.”²¹⁰ By contrast, under *Marschall*, such preferences were permitted, so long as individual criteria were not entirely effaced.²¹¹ The resurgence of individualist rhetoric in *Abrahamsson*, which again criticized preferences based on “the mere fact of belonging to the under-represented sex” is consistent with that judgments’ more assertive judicial review.²¹² Similarly, in *Lommers*, the ECJ pointed to the flip side of the individualist coin: the danger that affirmative action will “perpetuate a traditional division of roles between men and women.”²¹³

One might quibble that such concerns are misplaced in a case concerning childcare intended to help women break free from their traditional caregiver role. Indeed, this transformational aim of Article 2(4) may explain the Court’s relative indifference to justifications based on generalizations. The concern that gender-specific measures might rest upon, and in turn legitimize, gender stereotypes seems less acute than in Article 2(2) and 2(3) cases. Yet, some forms of affirmative action can give rise to harmful stereotypes: e.g., a belief that beneficiaries of preferential treatment are unqualified.²¹⁴

The nature of judicial review in Article 2(4) cases has changed in more than just rhetorical tone. In *Kalanke* and (possibly) *Commission v. France*, the Court of Justice began with a fairly robust purpose-scrutiny reminiscent of Article 2(3), rejecting in each case preferential treatment deemed incompatible with Article 2(4)’s intent. Perhaps due to the controversy *Kalanke* generated, the Court retreated in *Marschall* to the scrutiny of means, as in Article 2(2).²¹⁵ There is, however, a difference. In Article 2(2) cases, the ECJ has emphasized the second prong of the proportionality test, necessity. Where it has rejected sex qualifications, it has done so on the ground that they are unnecessarily broad in light of the stated aim.²¹⁶

209. Tesauro Opinion, 1995 ECR at 3057, ¶ 7-8.

210. Id. at ¶ 22. Such individualist rhetoric is echoed in Advocate General Jacobs subsequent *Marschall* opinion. See Jacobs Opinion, 1997 ECR at 6374, ¶ 31-32 (decrying appointment based “solely by virtue of [candidate’s] sex.”).

211. See More, “Case Note on *Marschall*,” 36 *Comm. Mkt. L. Rev.* 443, 450-51 (1999) (describing *Marschall* as compromise between individual and group rights).

212. See *Abrahamsson* judgment, 2000 ECR at 5582, ¶ 53.

213. *Lommers* judgment, ¶ 41.

214. See Krieger, “Civil Rights Perestroika: Intergroup Relations After Affirmative Action,” 86 *Cal. L. Rev.* 1251, 1264-70 (1998).

215. See Jean-Guy, “Les Discriminations Indirectes et les Discriminations Positive,” in Gabrielle Vonfeldt (ed.), *L’Egalite de Traitement entre Hommes et Femmes* 54-55 (2000) (describing the shift made in *Marschall*).

216. Thus, in *Commission v. UK*, the Court found that not all household employment was of a gender-sensitive nature; in *Commission v. France*, it found that not all police work involved dealing with violence; and in *Kreil*, it seems to have considered the exclusion of women from the *Bundeswehr* just plain overbroad. The only exception is *Johnston*, which emphasized minimizing burdens, possibly because the Court knew that its necessity analysis stood on infirm ground.

By contrast, Article 2(4) cases from *Kalanke* onward have focused on the third prong of proportionality, whether undue burdens are imposed on others, a concern generally ignored in Article 2(2). As Advocate General Saggio explained in *Badeck*, inserting a “savings clause” to temper the automatic priority given to women “allows other candidates to be considered and lessens the discriminatory effect of that requirement on those candidates.”²¹⁷ Hence, running through the Court’s cases is a basic dichotomy contrasting flexible preferences (good) with automatic (bad).

The starting point/result distinction supplies the other axis of the ECJ’s affirmative action review. Given that starting points typically involve nonzero-sum contexts, their status as the preferred terrain for Article 2(4) remedies is consistent with an emphasis on minimizing burdens on non-beneficiaries. After *Lommers*, both starting points and results appear subject to proportionality, however, so the distinction in the Court’s review has to some extent blurred. More fundamentally, as *Lommers* shows, it is not always easy to say which is which. In conditions of scarcity, almost any benefit granted to women, but not men, can be characterized as a result. For this reason, the starting point/outcome distinction has been criticized as analytically thin and misleading.²¹⁸

Missing from this analytic framework is any notion of necessity. In *Marschall*, Advocate General Jacobs argued that “a gender-specific measure will not . . . be proportionate if the same result could be achieved by a gender-neutral provision.”²¹⁹ In *Lommers*, the Court itself seemed almost ready to contemplate such a standard.²²⁰ Yet, the social disadvantage that affirmative action targets is such an amorphous phenomenon that appraisals of instrumental necessity are hard to carry out. Unlike pregnancy in Article 2(3), the rationales for affirmative action are not confined to a single core objective. Nor can their context be defined with precision as with Article 2(2); after *Lommers*, the locus of potential inequality extends to home life as well as the office. Judicial review of Article 2(4) remedies must therefore tolerate a degree of ambiguity and generalization that would be unacceptable under Article 2(2) or 2(3). The Court’s emphasis on minimizing burdens does not so much solve the problem as change the subject.

Curiously, in each of the last five Article 2(4) cases decided was a criterion that provided, at least *prima facie*, some indication of necessity: underrepresentation of women in the relevant workforce. The

217. AG Saggio’s *Badeck* opinion, 2000 ECR 1891 ECR, ¶ 31.

218. See, e.g., Williams, “The Idea of Equality,” *Problems of the Self* (1973).

219. AG Jacobs, 1997 ECR 6377-78, ¶ 43. This resembles the “no lesser alternative” test applied in free movement cases.

220. *Lommers* judgment, ¶ 42.

ECJ has rarely commented on this facet of the cases.²²¹ Its Advocate Generals have been only slightly less reticent. In *Kalanke*, Tesaurio acknowledged that under-representation could be an indicator of disadvantage, but then downplayed its significance.²²² In *Badeck*, Saggio suggested that *de minimis* underrepresentation would fail the test of necessity.²²³ The reverse may also be true: Greater necessity—severe gender imbalance, particularly where resistant to prior remediation—should justify stronger preferential measures. Such circumstances were alleged in *Abrahamsson*; yet, the Court's analysis made no allowance for such details.²²⁴

Ultimately, of course, underrepresentation can tell but half the story; it can locate a problem, but not the cure. Only by inquiring into the causes of gender imbalance can an appropriate set of remedies can be identified and evaluated—a contextual question arguably better suited to the national judiciaries.²²⁵ As the ECJ continues to tighten its review of affirmative action after *Lommers*, hopefully it will move to prescribe a more robust form of necessity scrutiny along these lines.

III. INDIRECT DISCRIMINATION

The universe of facially-neutral norms having differing effects on men than women encompasses a much broader spectrum than the gender-specific norms caught by the prohibition on direct discrimination. This makes indirect discrimination scrutiny a potentially powerful tool to root out hidden structural biases that hold women back.²²⁶ At the same time, the scope for justification of such disparate impacts is much broader as it is no longer restricted to defined derogations. Therefore, the bite of indirect discrimination scrutiny depends in large part on what sort of justifications are permissible.²²⁷ Instead of progressively interpreting a limited set of derogations, the Court must therefore make a series of ad hoc judgments that balance

221. Only *Lommers* placed any emphasis on gender imbalance as a justifying factor. See *Lommers* judgment, ¶¶ 36, 50.

222. See Tesaurio, 1995 ECR at 3066, ¶ 24 (arguing that underrepresentation does not necessarily prove discrimination).

223. See Saggio opinion, 2000 ECR at 1891, ¶ 32.

224. See *Abrahamsson* judgment, 2000 ECR 5570, ¶ 13 (slow progress towards gender parity deemed to justify “an extraordinary effort . . . to ensure, in the short term, a significant increase in the number of female professors”).

225. See Pager, “Strictness and Subsidiarity: An Institutional View of Affirmative Action at the European Court of Justice,” 26 *B.C. J. Int’l & Comp. L.* 35, 65-70 (forthcoming 2003).

226. Feminists thus view such scrutiny as essential to a “substantive equality” approach. See, e.g., More, “‘Equal Treatment’ of the Sexes in European Community Law: What Does ‘Equal’ Mean?,” 1 *Fem. Leg. Stud.* 45, 64-71 (1993).

227. See Evelyn Ellis, *Sex Discrimination Law* (2d ed., 1998).

competing priorities.²²⁸ Perhaps for this reason, the Court has often preferred to defer to national courts to assess justification, as they are more likely to be familiar with the facts of the particular case. When the ECJ has intervened, it has generally done so at the level of purpose, vetting justifications *a priori*, while leaving proportionality to be assessed by the national court.

Since most of the European Court of Justice's indirect discrimination cases have involved unfavorable treatment of part-time workers among whose ranks women predominate,²²⁹ part-time status functions as a proxy for women. As the Court's scrutiny has tightened, it has exposed generalizations about this category of workers that are often thinly-veiled stereotypes. Despite the focus of indirect review on ostensibly gender-neutral norms, stricter scrutiny in such cases has therefore served to uproot discriminatory attitudes in much the same way as direct review.

A. *Towards Strictness*

The ECJ's indirect gender discrimination jurisprudence began with *Bilka*,²³⁰ a case in which the exclusion of part-time workers from the company's occupational pension scheme was alleged to discriminate against female employees, since part-timers were mostly women. The company justified the exclusion "as intended solely to discourage part-time work." It explained that "in general part-time workers refuse to work in the late afternoon and on Saturdays . . . to ensure the presence of an adequate workforce during those periods, it was therefore necessary to make full-time work more attractive than part-time" by restricting the pension scheme to full-time employees.²³¹

The Court subjected this defense to a fairly stiffly-worded proportionality test. To justify the discriminatory impact, "the measures chosen by Bilka [had to] correspond to a real need on the part of the undertaking, [be] appropriate with a view to achieving the objectives pursued and [be] necessary to that end." The exclusion would appear disproportionate on its face. The company's declared interest in obtaining late-afternoon and weekend workers could have been addressed more directly through other (non-discriminatory) incentives.

228. As Sacha Prechal has explained, "the objective pursued . . . must take priority over the principle of equal treatment (i.e., must be sufficiently important). This test implies in fact that a balancing of interests must be made." Prechal, "Combatting Indirect Discrimination in the Community Law Context," 1993 *Leg. Issues of Eur. Integ.* 81, 87.

229. See Opinion of AG Warner, Case 96/80, *Jenkins v. Kingsgate Ltd.*, 1981 ECR 911, 930 (giving Community statistics).

230. Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 1986 ECR 1607. An earlier case, *Jenkins*, had confused matter by suggesting that proof of discriminatory intent might be required. See *Jenkins*, 1981 ECR 911, 926, ¶ 14.

231. *Bilka* judgment, 1986 ECR at 1627-28, ¶ 33.

Moreover, the exclusion was overbroad in that it penalized all part-time employees for the preferences of a few. Yet, having framed the test, the Court of Justice deferred without comment to the national court to perform the analysis.²³²

The ECJ continued its hands-off approach in *Kowalska*,²³³ another case involving part-time employees, this time excluded from a severance grant upon termination. The stated justification—that part-timers were less likely to have dependants to support—relied on a generalization that would itself be deemed discriminatory under the analysis applied in the Court's Article 2(3) case law.²³⁴ Yet, once again, the Court deferred without comment to the national court to determine whether the discriminatory impact of the exclusion could be justified.²³⁵

In *Rummler*,²³⁶ the ECJ took a small step toward stricter review (and more active supervision at the European level). The case considered whether "muscle demand" could be used as a criterion to determine pay, even though this would "tend to favour male workers [who] in general . . . are physically stronger."²³⁷ The Court held that use of such a criterion was permissible, if objectively justified by the nature of the work. It noted that a contrary rule would have the perverse effect of making women higher-cost employees, encouraging discrimination. The Court did stipulate, however, that the job classification system must be considered as a whole and that it must "be established . . . if the nature of the tasks in question so permits [that] regard is had to other criteria in relation to which women workers may have a particular aptitude."²³⁸

*Danfoss*²³⁹ showed some further signs of tighter judicial scrutiny. Because the pay criteria used by the employer was "so completely lacking in transparency [that] female employees [could not] establish different[ial]" treatment in individual cases, the Court reversed the burden of proof, placing the onus of the employer to prove an absence of discrimination, citing precedent from its Article 2(2) cases.²⁴⁰

232. *Id.* at ¶ 36.

233. Case 33/89, *Kowalska v. Freie und Hansestadt Hamburg*, 1990 ECR 2591.

234. *Cf. Comm'n v. France*, 1998 ECR at 6336, ¶ 14 (rejecting benefits premised on traditional notion of female caregiver).

235. 1990 ECR at 2611-12; See Arnall, *supra* n. 104, at 489 (criticizing ECJ for failing to challenge "implausible" generalization in *Kowalska*); Ellis, *supra* n. 10, at 130 (same).

236. Case 61/81, *Rummler v. Dato-Druck GmbH*, 1982 ECR 2601.

237. *Rummler*, judgment, ¶¶ 8, 15. The plaintiff had sought to have pay based on effort exerted, a standard which would permit women to be paid more for lifting the same amount. *Id.* at ¶¶ 4, 18.

238. *Id.* at ¶ 15. The Court did not offer examples of such "female" criteria, nor elaborate on how to identify them.

239. Case 109/88, *Handels-OG Kontorfunktion Aerernes Forbund i Danmark v. Dansk Arbejdsgiverforening*, ex parte *Danfoss A/S*, 1989 ECR 3199.

240. *Id.* at 3225, ¶ 12 (citing in re French Civ. Serv., the French police case; emphasis added).

Transparency was also invoked in *Enderby* where the Court of Justice held that pay disparities could not be justified on the mere ground that the pay for different groups been set by separate collective bargaining, given the nontransparent nature of such processes.²⁴¹ Instead, it required that justification be based on “objective criteria,” such as “market forces.”²⁴²

Danfoss, too, pushed for objectivity in pay criteria. Taking another device from its Article 2(2) tool kit, the ECJ restricted consideration of employee training and “mobility” (adaptability to variable hours and places of work), requiring employers to show that such criteria were “of importance for the performance of *specific* tasks entrusted to the employee.”²⁴³ Moreover, the Court flatly rejected “quality of work” as a pay criterion where “it systematically works to the disadvantage of women [since] it is inconceivable that the quality of work done by women should generally be less good.”²⁴⁴

The European Court loosened its grip a notch, however, when it held that length of service could be rewarded “without having to establish the importance it has in the performance of specific tasks.” The Court justified this ruling on the ground that “length of service goes hand in hand with experience and . . . experience *generally* enables the employee to perform his duties better.”²⁴⁵ Acceptance of such generalizations without further scrutiny seems incongruous with the Court’s other holdings. Indeed, even in *Kowalska*, the Court’s tolerance of a stereotype had been at least mitigated by the promise of further scrutiny by the national court.

Strictness returned with new vigor in *Rinner-Kühn*,²⁴⁶ a case where sick pay had been denied to employees working less than ten hours weekly on the ground that such staff were “not as integrated” into the workforce.²⁴⁷ The Court refused to accept this claim because it rested on unproven generalizations.²⁴⁸ *Rinner-Kühn* was in turn cited in *Nimz*, where the Court reversed its position on seniority, holding that the link between seniority and performance needed to be established in each case based on “the relationship between the na-

241. Case 127/92, *Enderby v. Frenchay Health Auth.*, 1993 ECR 5535, 5574, ¶¶ 22-23.

242. *Id.* at 1275, ¶¶ 25-27; but see Case 400/93, *Specialarbejderforbundfet i Danmark v. Dansk Industrie*, *ex parte* Royal Copenhagen, 1995 ECR 1275, 1317 (holding that collective bargaining could still be considered as a relevant factor).

243. *Id.* at 3228, ¶ 23 (emphasis added).

244. *Id.* at ¶ 20. The Court felt that such outcomes could “only be because the employer has misapplied” the criterion. *Id.*

245. *Id.* at ¶ 24 (emphasis added).

246. Case 171/88, *Rinner-Kuhn v. FWW Spezialgebaudereinigung GmbH Y& Co*, 1989 ECR 2743.

247. *Id.* at 2761, ¶ 13. As usual, the ranks of ineligible part-timers were predominantly female. *Id.* at 2759, ¶ 5.

248. *Id.* at 2761, ¶ 14. The Court did allow the possibility for further justification upon remand.

ture of the work performed and the experience gained" over time.²⁴⁹ More broadly, it stated explicitly that "generalisations about certain categories of workers" could not justify measures having discriminatory impact.²⁵⁰

A strict line was also taken in *Ruzius-Wilbrink*, where the Court refused to allow lower disability benefits granted to part-time workers to be justified under an alleged policy of preventing benefits from exceeding prior income because the Dutch government had made exceptions to the policy in other areas (i.e. the rule of consistency—often invoked in free movement cases—had not satisfied).²⁵¹

B. Discretion Revived

In these cases, one can see the Court of Justice gradually abandoning the largely passive role that it had played in early cases to move toward more vigorous scrutiny. Up to this point, the ECJ made little distinction between the type of norm under review. Most of these cases involved discrimination within the context of a specific employment relationship. However, *Rinner-Kühn* and *Ruzius-Wilbrink* dealt with statutory welfare provisions that applied to all workers in the Member State. Advocate General Darmon had argued in both cases that where a "legislative," as opposed to a "contractual" provision was at stake, the burden should remain on the plaintiff to prove that the discrimination was not justified.

There is a difference in nature between an employer for whom pay policy is one of the most important parts of his business strategy and the legislature, the trustee of the public interest, which must take account of a very large number of social, economic and political factors, of which the ratio between male and female workers is just one aspect. Consequently, although it may be legitimately presumed . . . that a wage measure adopted by [an employer] is unlawful, the same does not apply to a national legislature.²⁵²

Darmon's argument was not adopted by the Court in either judgment. Accordingly, Darmon tried a different tack in *Commission v. Belgium*, citing *Hofmann* for the proposition that Member States "enjoy a reasonable margin of discretion" in social policy.²⁵³ By this point, the ECJ had largely abandoned *Hofmann's* erstwhile deference

249. Case 184/89, *Nimz v. Freie Und Hansestadt Hamburg*, 1991 ECR 297, 319, ¶ 14.

250. *Id.*

251. Case 102/88, *Ruzius-Wilbrink v. Bestuur van de Bedrijfsvereniging voor Overheidsdienster*, 1989 ECR 4311.

252. Opinion of Advocate General Darmon, in *Ruzius*, 1989 ECR at 4324-25; in *Rinner-Kühn*, 1989 ECR at 2753-54.

253. Opinion of Advocate General Darmon, Case 229/89, *Commission v. Belgium*, 1991 ECR 2205, 2220, points 20-22.

to social policy in Article 2(3) cases. However, the Court endorsed such an approach in *Commission v. Belgium*, echoing Darmon that “in the current state of Community law[, social policy] is a matter for the Member States which enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.”²⁵⁴ The Court then held that Belgium had shown that its system of benefits was suitable and necessary to achieve its social policy and was therefore justified.

The phrasing of this conclusion indicated that the burden had remained on Belgium to prove justification, notwithstanding its margin of discretion. Nonetheless, the Court seemed to have lowered the barrier that Member States had to meet. This was confirmed in the ensuing *Molenbroek* case,²⁵⁵ where the Court approved a system of pension supplements designed to guarantee pensioners with a younger dependant spouse a minimum income; a scheme for which many more men than women qualified.²⁵⁶ The Court accepted that the supplements served a legitimate social policy aim as to which the Netherlands enjoyed a margin of discretion.²⁵⁷ The Court then held

the fact that at times the supplement is granted to persons who, having regard to the income which they receive from other sources, do not *need* it in order to guarantee a minimum level of subsistence cannot affect the fact that the means chosen are *necessary* having regard to the aim.²⁵⁸

This holding bordered on the tautological. The Court failed to explain how something could be “necessary” when it is not “need[ed].” In fact, the only reason for tolerating the overpayments would seem to be administrative convenience.²⁵⁹ The Court’s failure to question the necessity of the payment system bespoke the reemergence of its formerly indulgent approach to social policy.

This weakened understanding of necessity was made explicit in *Nolte*,²⁶⁰ where the Court accepted the exclusion of employees working less than 15 hours a week from statutory old-age insurance based on Germany’s claim that the insurance scheme could not accommodate such employees and that any attempt to do so would sacrifice

254. 1991 ECR at 2229.

255. Case 226/91, *Molenbroek v. Bestuur van de Sociale Verzekeringsbank*, 1992 ECR 5943.

256. The supplements were alleged discriminatory because many more men than women qualified for them. *Id.* at ¶ 12.

257. *Id.* at 5968, ¶¶ 14-15.

258. *Id.* at 5969, ¶¶ 17-18 (emphasis added).

259. See Ellis, *EC Sex Equality*, *supra* n. 227, at 301 (agreeing that Court passes over the necessity issue).

260. Case 317/93, *Nolte v. Landesversicherungsanstalt Hannover*, 95 ECR 4625; See also Case 444/93, *Megner & Sheffel v. Innungskrankenkasse Vorderplatz*, 1995 ECR 4741 (decided contemporaneously).

jobs or foster a black market in "minor employment."²⁶¹ The Court made no attempt to subject these claims to independent scrutiny, but simply held that that in exercising its discretion to pursue its "social . . . policy aim. . . the [German] legislature was *reasonably entitled to consider that the legislation in question was necessary*."²⁶²

Not only did the Court thus apply a lower standard of necessity, but it broke its usual practice of deferring to national courts to assess justification. In fact, Germany's conclusory assertions seemed hardly self-evident, let alone proportionate. Advocate General Leger, for one, expressed doubt as to whether the exclusion was justified (although he would have deferred to the national court).²⁶³ He also noted that several Member States did not impose such restrictions on participation in comparable schemes, and that among those that did, Germany imposed the highest threshold, leaving almost 15% of the workforce excluded (thus inviting the Court to rule against Germany as an outlier).²⁶⁴

In subsequent social security cases, the Court has continued to apply this "reasonableness" standard in assessing the necessity of social policies enacted by the Member States, and, in each case, has concluded itself that the Member State had met the standard.²⁶⁵ Although such deferential review falls short of the reversal of presumption originally sought by Advocate General Darmon, it comes close. This deference regarding the choice of means has not, however, stopped the Court from intervening on matters of principle where it deems necessary to ensure effective judicial review.²⁶⁶

Yet, during roughly the same period, the Court handed down a trio of judgments that took a strict line concerning compensation for service on German staff councils, bodies designed to promote labor-management harmony. German law limited compensation for training courses attended by employees serving on the councils to the replacement of income from lost work-time. In *Bötel*,²⁶⁷ decided the same year as *Molenbroek*, the Court observed that this limit meant

261. Id. at 4659-60, ¶¶ 29, 31-32; Germany's claims were supported by the U.K. and Ireland. Id. at 30.

262. Id. at 4660, ¶ 34 (emphasis added).

263. See Opinion of AG Leger in *Nolte*, 1991 ECR 4627, 4647, points 76-78.

264. Id. at 4646, ¶ 75.

265. See Case 8/94, *Laperre v. Bestuurscommissie Beroepszaken in de Provincie Zuid-Holland*, 1996 ECR 273, 295-96, ¶ 19; Case 280/94, *Posthuma-van Damme v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, 1996 ECR 179, 204-05.

266. Cf., e.g., *Comm. v. Belgium*, 1991 ECR at 2228, ¶¶ 17-18 (discrimination in welfare benefits cannot be justified merely by pointing to demographic disparities); *De Weerd v. Bestuur van de Bedrijfsvereniging voor de Gezondheid*, 1994 ECR at 600, ¶ 35 (budgetary considerations cannot in themselves justify sex discrimination).

267. Case 360/90, *Arbeiterwohlfahrt der Stadt Berlin eV v. Bötel*, 1992 ECR 3589.

that part-time workers were likely to get less compensation than their full-time colleagues for the same number of hours.²⁶⁸

[S]uch a situation is likely to deter employees in the part-time category, in which the proportion of women is undeniably preponderant, from serving on staff councils or from acquiring the knowledge needed in order to serve on them, thus making it more difficult for that category of women to be represented To that extent, the difference in treatment in question cannot be regarded as justified.²⁶⁹

The *Bötel* judgment provoked intense controversy in Germany.²⁷⁰ Invited explicitly to reconsider its stance in two subsequent references from German courts, the Court of Justice accepted that the restriction could, in principle, be justified as part of a German social policy intended “to place the independence of staff council members above financial inducements for performing staff council functions.”²⁷¹ However, the Court held the restriction subject to the strict proportionality test of *Bilka*, not the looser *Nolte* standard, but deferred to the national courts to decide the matter.²⁷² Its judgment emphasized that the German courts must find a genuine necessity, having consideration for alternative (less burdensome) means to achieve the policy aim. This latter requirement—often seen in free movement cases—set a fairly strict standard. The Court of Justice also pointedly recalled its holding in *Bötel* regarding the deterrent effect of the compensation limits on the representation of women—a clear signal of doubt as to whether the policy could pass the test.²⁷³

This second round of staff council judgments appeared the year after *Nolte* and within weeks of the Court’s *Laperre* decision reaffirming *Nolte*’s weak standard of necessity and finding that standard met on the evidence submitted. One might explain the stricter necessity test set in the staff council cases as a reflection of the ECJ’s doubts as

268. This is because part-timers would reach the cap on total compensation sooner since they had fewer work hours to lose.

269. 1992 ECR at 3613-14. The ECJ did leave the door open for further justification before the national court. *Id.*

270. Prechal, “Combatting Indirect Discrimination in the Community Law Context,” 1993 *Leg. Issues of Eur. Int.* (1993) 81, 93, n.52; Arnall, *supra* n. 104, at 492.

271. Case 278/93, *Freers & Speckmann v. Deutsche Bundespost*, 1996 ECR 1165, 1192, ¶ 26; Case 457/93, *Kuratorium für Dialyse und Nierentransplantation v. Lewark*, 1996 ECR 243, 269-70, ¶ 35.

272. The two advocate generals had split on the test outcome. AG Darmon, who had also written the opinion in *Bötel*, would have found the policy disproportionate. Opinion of AG Darmon, *Freers & Speckmann*, 1996 ECR at 1178-80; AG Jacobs was inclined to accept it as justified. Opinion of AG Jacobs in *Lewark*, 1996 ECR at 257-58.

273. 1996 ECR 270, ¶¶ 37-38; 1996 ECR 1192-93, ¶¶ 29-30; Arnall, *supra* n. 104, at 493 (describing skeptical tone of judgment). Arguably, the Court should have stuck its ground and invalidated the policy. Given the Court’s acceptance that the policy had a deterrent effect, a justification based on an avowed policy of avoiding inducement rings hollow.

to justifiability, edged perhaps by a touch of judicial displeasure at the request for reconsideration. Having chosen to defer to the German courts on what was evidentially a matter of national concern, the Court may have also erred deliberately on the side of strictness to compensate for possible German bias. Another explanation would be to ascribe the conflicting approaches to the different chambers of the Court hearing these cases.²⁷⁴ Or did the Court of Justice really intend a stricter standard for non-social security policy cases?

Further evidence arrived with the *Seymour-Smith* judgment.²⁷⁵ At issue was Britain's two-year probation period for new employees before actions for unfair dismissal could be brought. The UK justified the requirement as part of a social policy of encouraging recruitment by employers who might otherwise be unwilling to risk taking on new hires. The Court of Justice accepted this as *prima facie* legitimate.²⁷⁶ As in the staff council cases, however, the Court stressed the need to consider "the possibility of achieving the social policy aim in question by other means,"²⁷⁷ again setting a fairly strict standard of necessity. Yet, the Court had to reconcile this language with the more lenient "reasonableness" standard of *Nolte* relied on by the UK. The ECJ began by acknowledging the broad margin of discretion recognized in *Nolte*, then continued:

However, although social policy is essentially a matter for the Member States under Community law as it stands, the fact remains that the broad margin of discretion available to the Member States in that connection cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women. Mere generalizations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could be reasonably considered that the means chosen were suitable for achieving that aim.²⁷⁸

What to make of this holding? On the one hand, the Court employed the deferential "reasonableness" language from *Nolte*. Indeed, the test could even be seen as weaker than *Nolte* in that it omitted mention of necessity entirely and seemed only to require suitability. Yet, the invocation of fundamental rights served as a signal that the

274. The *Bötel* and subsequent *Freers* judgments were issued by the Court's Sixth Chamber, whereas the *Nolte* line of cases came from either the Court's Second or Fourth Chambers or the Court en banc.

275. Case 167/97, *R v. Secretary of State for Employment, ex parte Seymour-Smith*, 1999 ECR 623.

276. *Id.* at 685, ¶¶ 70-71.

277. *Id.* at ¶ 72.

278. *Id.* at ¶ 74.

ECJ wanted to impose a limit on *Nolte* discretion. Moreover, unlike *Nolte* where the Court was content to accept conclusory allegations as the basis for justification, the Court of Justice now demanded actual evidence. In assessing such evidence, the national court would presumably bear in mind the judgment's earlier call to investigate alternative solutions. The judgment thus seemed to strike a middle path between the strict stance taken in the staff council cases and the lenient *Nolte* test. The somewhat awkward marriage of these conflicting approaches perhaps reflected indecision within the Court itself.²⁷⁹

The ambiguous nature of *Seymour-Smith* left open the question of whether the Court has two approaches to social policy scrutiny—one for social security, another for other contexts—or only one. The Court has placed particular emphasis on ensuring the financial stability of social security schemes in its direct discrimination cases.²⁸⁰ Judicial deference on the indirect side might therefore be explained by a reluctance to upset the (nest) egg basket. Yet, the deferential approach of *Nolte* and its progeny has been justified all along based on respect for Member State discretion over social policy generally. The muddled middle course set in *Seymour-Smith* could therefore represent a unification of the two lines of cases.

Despite the confusion surrounding the Court's standard(s) for social policy review, it is clear that whatever deference is thus entailed applies only to public norms, as opposed to private employment rules.²⁸¹ This basic distinction envisioned by Advocate General Darmon was made plain in *Krüger*,²⁸² a case that, like *Nolte*, addressed the exclusion of employees working less than 15 hour-weeks from a benefit—in this case, a Christmas bonus. Unlike *Nolte*, the exclusion was not statutory in nature, rather but contractual. Advocate General Leger saw no difference between the two cases.²⁸³ In a rather Grinch-like opinion, he argued that “to include persons in minor employment . . . [in] the Christmas bonus, would radically alter the very concept of this type of employment.”²⁸⁴

The Court, however, took a different approach, observing that: the main proceedings concern a situation which is different from those in *Nolte* In this case, it is not a question of either a measure adopted by the national legislature in the context of its discretionary power or a basic principle of the

279. See Hepple & Barnard, *supra* n. 10, at 411 (“judgment [in *Seymour-Smith*] reeks of compromise” between judges).

280. See, e.g., *Queen v. Secretary of State for Health, ex parte Richardson*, 1995 ECR 3407, 3431; *Secretary of State for Soc. Sec. v. Thomas*, 1993 ECR 1247, 1272. The long-term timeframes involved makes this concern particularly salient.

281. See Ellis, *supra* n. 10, at 1410 (describing three-level “hierarchy of tests for justification of indirect discrimination”).

282. Case 281/97, *Krüger v. Kreiskrankenhaus Ebersberg*, 1999 ECR 5127.

283. Opinion of AG Leger, Case 281/97, *Krüger*, at 5138-39, ¶¶ 53-55.

284. *Id.* at 5139, ¶ 57.

German social security system, but of the exclusion of persons in minor employment from the benefit of a collective agreement which provides for the grant of a special annual bonus, the result of this being that, in respect of pay, those persons are treated differently from [other employees]. . . . In the light of the foregoing . . . exclusion [from the] bonus . . . constitutes indirect discrimination.²⁸⁵

This 180-degree reversal in outcome from *Nolte*, whereby a private norm was subjected to more rigorous equality enforcement than *Nolte*'s treatment of its public equivalent mirrors a similar public/private split in other gender equality cases dealing with affirmative obligations under Article 2(3), where private actors are once again held to a higher standard. Thus, in *Gillespie*, the Court declined to require women on maternity leave to be paid full salary, treating this as a question of social policy for Member States²⁸⁶; yet, the Court insisted that the same women receive, in full and retroactively, a pay raise from their employer awarded during their absence.²⁸⁷ Similarly, in *Thibault*, the Court contrasted the discretion that Member States have "as to the social measures they adopt in" implementing Article 2(3), with "treatment of a woman regarding her working conditions" during maternity, a private employment question as to which equal treatment was to be strictly enforced.²⁸⁸

The Court of Justice has continued to demonstrate vigorous scrutiny of indirect discrimination in other "private" employment cases. In *Hill & Stapleton*, the ECJ reviewed a employee pay system that penalized workers converting from job sharing position to full-time

285. *Krüger* judgment, 1999 ECR at 5149, ¶¶ 29-30. The ECJ has shown a similar reluctance to allow private schemes to justify discrimination by linkage to public norms under article 7(1)(a) of the Social Security Directive. See Thomas, 1993 ECR at 1275, ¶ 20 (permitting linkage only where scheme is "objectively and necessarily linked" to retirement-age). As with the Article 2(3) cases cited in the following notes, private actors are thus held to a higher standard of equality.

286. Case 342/93, *Gillespie v. Northern Health and Soc. Svc. Bd.*, 1996 ECR 484, 499, ¶ 17. The Court did impose a sort of minimum adequacy requirement tied to the Member States system of social protection. See *id.* at 500, ¶¶ 20-21.

287. *Id.* at 501, ¶ 22. The shift in the Court's rhetoric is striking. In the first instance, it noted that "women taking maternity leave . . . are in a special position . . . not comparable with that of [their colleagues] actually at work," whereas in the second it held that "a woman who is still linked to her employer by . . . an employment relationship during maternity leave must, like any other worker, benefit from any pay rise" just as she "had she not been pregnant."

288. Case 136/95, *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries v. Thibault*, 1998 ECR 2011, ¶¶ 29-31 (holding that "a woman who continues to be bound to her employer by her contract of employment during maternity leave [could] not be deprived" of an annual performance review that could qualify her for promotion).

work.²⁸⁹ Reviewing the justifications offered by the employers in question, the Court shot them down one by one:

[N]either the justification . . . that there is an established practice . . . of only 'crediting' only actual service, nor that stating that this practice establishes a reward system which maintains a reward system which maintains staff motivation, commitment and morale, is relevant. The first justification is no more than a general assertion unsupported by objective criteria. With regard to the second, the system of remuneration for employees working on a full-time basis cannot be influenced by the job-sharing scheme.²⁹⁰

The Court then established through analysis of the applicable rules that granting the requested relief would not constitute discrimination in favor of female workers, and ruled out justification on economic grounds because "an employer cannot justify discrimination . . . solely on the ground that avoidance of such discrimination would involve increased costs."²⁹¹

Nor did the Court stop there. It also noted that 83% of job-sharers had chosen that option:

in order to be able to combine work and family responsibilities, which invariably involve caring for children. Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is . . . the natural corollary of the equality between men and women [and a basic principle] recognised by Community law.²⁹²

The exacting review the ECJ applied in *Hill* was a far cry from its early indirect cases. Not only did the Court pierce generalizations and independently assess the evidence, its dismissal of economic justifications and avowed purpose of "adapt[ing] working conditions" to family life reveal the potential for indirect discrimination scrutiny to become a powerful agent of social change.

As with the ECJ's direct cases, the Court's scrutiny of disparate impact in employment has clearly grown increasingly exacting over time, driven notably by rulings of the Court's Sixth Chamber.²⁹³ Yet,

289. Case 243/95, *Hill and Stapleton v. Revenue Comm'r*, 1998 ECR 3739, 3769, ¶¶ 30-33. As might be expected, women comprised over 98% of job sharers. *Id.* at 3767, ¶ 25.

290. *Id.* at ¶ 38.

291. *Id.* at ¶¶ 39-40.

292. *Id.* at ¶¶ 41-42; See also Case 1/95, *Gerster v. Freistaat Bayern*, 1997 ECR 5253, ¶ 38 (mandated "strict proportionality" review in private employment case).

293. The Sixth Chamber accounted for the move to strictness in *Nimz* and *Rinner-Kuhn*, as well as the later assertiveness seen in *Krüger* and *Hill*, notwithstanding an almost total change of membership on the panel over this period. As noted, *Bötel* might also be seen as an attempt by the Sixth Chamber to resist the more relaxed

with respect to social policy, the ECJ has moved in the opposite direction, resurrecting a margin of discretion long since abandoned, for all intents and purposes, in the direct equal treatment cases. Two factors may account for this difference. As noted at the outset, the potential reach of indirect scrutiny is much broader. Such scrutiny is also likely to be more controversial. Whereas direct discrimination cases often place the alleged offender in the morally difficult position of having to justify outmoded gender distinctions, indirect discrimination is often easier to defend.²⁹⁴ When the long-arm of the Court's indirect review places in jeopardy long-standing social institutions, such as the German staff councils in *Bötel*, Member States are liable to protest vehemently, raising politically resonant, albeit legally non-availing appeals to subsidiarity.²⁹⁵ Allowing a margin of discretion in social policy thus protects the Court from being forced to pass judgment on policy questions that the Member States regard as outside the Community's concern.²⁹⁶

Fear of Member State backlash doubtless also figures in the ECJ's practice of deferring to national courts in indirect gender cases to a greater extent than it does in either its direct gender cases or its indirect free movement rulings.²⁹⁷ The Court has departed from this practice only in the *Nolte* line of cases whose weakened standard posed less of a threat. When the Court's scrutiny did bite in the staff council cases, it was careful to defer the critical decision in the judgments after *Bötel*, accepting Germany's claimed social policy at face value while outsourcing the proportionality review. It is probably also no coincidence that the Court preferred to recast the question as one of proportionality—relying on the scrutiny of means to avoid a showdown over purpose, just as it did with the Article 2(2) cases.

scrutiny of the *Nolte* line of cases. See *supra* n. 274 and text. On this view, *Kowalska* (also a Sixth Chamber ruling) stands as something of an anomaly.

294. Stereotypes about part-time workers go over better in public opinion than stereotypes about women, even if in practice they may amount to the same thing. Moreover, while direct discrimination can almost be presumed intentional, disparate impacts in indirect cases are not necessarily the product of gender bias and have quite benign explanations.

295. Cf. AG Leger Opinion, *Nolte*, 1995 ECR at 4642, ¶ 69 (addressing subsidiarity objection raised by Germany); Prechal, *supra* n. 270, at 93 n.52 (noting that German Chancellor accused ECJ of "going beyond its competences" in *Bötel*).

296. For much the same reason, the US Supreme Court has excluded indirect scrutiny entirely from constitutional Equal Protection review, while permitting actions for disparate impact under statutory Title VII employment law. Compare *Washington v. Davis*, 426 U.S. 229, 248 (1976), with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

297. See Watson, "Equality of Treatment: A Variable Concept?," at 24 *Indus. L.J.* 33, 40-47 (1995) (contrasting more deferential approach in indirect gender cases with that of free movement case law).

IV. THE BIG PICTURE

In order to bring into sharper relief some of the common themes that preceding sections have touched upon, it may be helpful to step back from the minutia of case law to consider the collective body of ECJ gender decisions as a whole. The characteristics of this jurisprudence will be explored from three perspectives: methodological, theoretical, and chronological.

A. *Modus Operandi*

Running throughout the European Court of Justice's gender case law is a delicate balance between enforcement of equality and respect for Member State discretion. To reconcile these often conflicting aims, the Court follows a multidimensional practice of variable review, tailoring the focus and intensity of its scrutiny to fit the characteristics of the provision under appraisal, according to established patterns. Each method of scrutiny has its benefits and drawbacks. For example, purpose scrutiny makes for cleaner dividing lines, although it requires a vision as to what the acceptable purposes may be. When, as inevitable, this vision clashes with that of other policy actors, it can also place a court in an unduly confrontational stance. Means scrutiny provides a softer, more finely-tuned instrument, but requires a court to second-guess questions of instrumental policy that may go beyond its institutional competence. Deferring to a national court takes the heat of the ECJ and offers greater factual sensitivity, but risks losing the forest in the trees and encourages conflicting results.

Similar tradeoffs enter the decision as to the level of scrutiny to be applied. More intense scrutiny means a greater likelihood of judicial intervention. This may reflect a presumption that gender distinctions in a given area are inappropriate, and/or that such policy choices are better regulated under European law than national. Looser scrutiny generally implies the opposite.

As the preceding discussion indicates, choosing between these options implicates a complex mixture of principled and prudential motives that vary according to the context. By adjusting its choice of weapons and tactics accordingly, the Court maximizes the efficiency of its review, while minimizing resistance from the Member States. Thus, for Article 2(3), the Court has relied on a textually-anchored notion of purpose that enables it to draw a clear dividing line, applying lenient review to measures that fall within Article 2(3)'s pregnancy/maternity core and strict review to those that do not. By contrast, Article 2(2)'s more subjective and contextually-defined content makes purpose-scrutiny problematic. Instead, the Court of Justice has focused on ensuring an instrumental connection between means and stated aim within a specific context. The margin of dis-

cretion recognized in national security cases reflects both the Court's limited competence to decide such questions and its desire to avoid antagonizing Member States in a sensitive realm. With Article 2(4), the amorphous nature of affirmative action resists both purposive and instrumental controls. Instead, the Court has sought to ensure that remedial measures minimize burdens on non-beneficiaries, by favoring measures that target starting points over results and by requiring flexibility. The ECJ's reluctance to engage in even minimal necessity-scrutiny, however, suggests that the backlash from *Kalanke* continues to haunt its judges.

Yet another approach is taken in the indirect discrimination cases, where the ECJ has divided responsibilities according to institutional strengths, with the European Court concentrating on purpose scrutiny and delegating to national courts to assess proportionality. The distinction made between enforcement of public norms, where the Court is careful to defer to Member States, and private employment rules, where more stringent review applies, doubtless reflects both the principled reasons outlined by Advocate General Darmon, as well as the Court's self-protective instincts in the face of controversies such as *Bötel*. This basic public/private distinction is replicated in the affirmative obligation cases under Article 2(3).

Such tactical variations in methodology increases the likelihood that conflicting results will obtain in cases involving overlapping norms. This may sometimes lead to awkward discrepancies, as between the Articles 2(2) and 2(3) analysis in *Johnston*, or between the Article 2(3) analysis in *Commission v. France* and *Lommers'* Article 2(4). Yet, such incongruities seem a small price to pay for more efficient judicial review.

Variable scrutiny is not the only technique by which the ECJ defuses Member State resistance. Whenever possible, the Court of Justice bases its judgment on objective criteria; hence, its frequent recourse to the principles of consistency, specificity, and transparency. The ECJ also craves consensus. It is much more comfortable taking a firm line when it knows that most Member States support its position. Hence, its willingness to confront Germany in *Kreil* where the *Bundeswehr* was out-of-line with its peers, but not to take on the British marines in *Sirdar*.²⁹⁸ Moreover, the Court is highly attuned to cues from the Community legislator, which, after all, also reflect the views of the Member States. When the Council shows willingness to exercise competence in an area, the Court will be emboldened to forge ahead judicially as well, even to the extent of

298. See also Cases 122 & 125/99, *D. v. E.U. Council*, Judgment, May 31, 2001, ¶¶ 49-50 (citing diversity of approaches to gay marriage in laws of Members States as reason not to require equal treatment as a matter of Community law).

preempting a Council directives, as it did in *Gillespie*.²⁹⁹ Conversely, legislative silence may serve as a brake, as occurred in *Grant*, where the Court took the failure of the Council to legislate against sexual orientation discrimination as a signal to go-slow in that area. Such accommodation has its limits, however. Legislative measures directed against specific judgments of the Court have received a less welcoming reception. Witness *Abrahamsson*'s cursory treatment of Article 141(4).³⁰⁰

B. *Community vs. Autonomy*

Notwithstanding these variations in methodological emphasis, the effects of changes in the intensity of judicial scrutiny have tended to conform to fairly predictable patterns. In general, the stricter the scrutiny, the more it privileges individual autonomy at the expense of communal standards. Just as free movement compels German consumers to be exposed to foreign beers, so gender equality requires that individuals be given the freedom to choose nontraditional lifestyles, irrespective of gender. No longer tolerant of stereotypes and generalizations, equal treatment demands that men be recognized as parents potentially in need of leave (*Comm. v. France*); that women can be police or soldiers (*in re French Civil Serv., Kreil*); and that allowance be made for men with special needs, as well as women (*Marschall, Lommers*). Similar patterns can be seen in indirect pay discrimination cases, where the Court's review of discrimination against part-time employees works to uncover bias against women (*Hill, Rinner-Kuhn*).

Beyond the inherent value of individual autonomy, the ECJ has justified such rulings, in part, based on the hidden costs of gender-specific norms. Even well-intended measures providing special treatment for women, it has argued, risk stigmatizing them as higher cost employees (*Rummler, Herz*), or perpetuating stereotypes (*Lommers, Comm. v. France*). Such claims have been criticized, however, by feminist scholars who consider the benefits of special treatment to outweigh the harm. They note that the Court of Justice has no power to order "leveling up"; rather than expanding such benefits to allocate them on a gender-neutral basis, Member States may withdraw them

299. Compare 1996 ECR at 500, ¶¶ 20-21, with Council Directive 93/85, Art. 11. A similarly anticipatory ruling implemented by judicial fiat the equal value standard that was to be the Equal Pay Directive's primary innovation.

300. Article 141(4) had been inserted at Amsterdam in response to *Kalanke*. See Shaw, *supra* n. 8, at 104. A similar fate befell the "Barber Protocol," adopted in the wake of *Barber v. Guardian*. See Arnall, *supra* n. 104, at 474-75.

entirely.³⁰¹ In this respect, gender equality differs from beer: There may not be market providers to fill the void left by the state.

In any case, the linkage between strict review and individual autonomy is hardly inevitable. Alternative methods of review could lead to different consequences. Such contrapuntal themes occasionally surface in EC case law. For example, instead of striving to eliminate gender as a factor, a different approach would be to embrace it. One see this in *Rummler*, where the Court sought to balance male strength against other pay criteria that would play to female advantage. Advocate General Slynn displayed a similar logic in the French police case when he argued that, in some cases, the presence of women could deter violence as much as men. This approach would build on the insights of "difference feminists" such as Carol Gilligan.³⁰² Yet another approach would apply the anti-subordination principle espoused by feminist scholars such as Catherine MacKinnon and Ruth Colker.³⁰³ It is unclear what role such a rationale plays in ECJ case law. The affirmative action cases after *Kalanke* might be seen as moving in this direction, as might cases such as *Hill*—at least rhetorically—where the Court speaks of adapting working conditions to home life.

C. A Chronological Perspective

Given the many different strands and complexities of ECJ gender case law, it may be dangerous to attempt a portrait of its development over time. The nature of the balance struck between strictness and discretion varies case by case. Nonetheless, three main periods can be tentatively identified. The first period spans the equal treatment cases in the early 1980s, during which the Court exercised a deferential review that declined to second-guess the policy decisions of the Member States and, in *Hofmann*, explicitly recognized a margin of discretion. A second period begins with *Johnston* in 1986, when the Court's scrutiny became more exacting. Gender-specific norms were deemed derogations from equality and subjected to strict review, and discrimination against part-timers was increasingly scrutinized.

The shift to period three is harder to locate, and its characteristics more complex. However, some time in the mid-1990s, the Court began pulling back a little in several areas. One sees this most clearly in indirect discrimination cases where a margin of discretion

301. See, e.g., Fredman, "The Poverty of Equality: Pension and the EC," 25 *Indus. L.J.* 91, 96 (1996) (arguing that "leveling down" is the more likely outcome and citing examples).

302. See generally Carol Gilligan, *In a Different Voice* (1982).

303. See Colker, "Anti-Subordination Above All: Sex, Race, and Equal Protection" 61 *N.Y.U. L. Rev.* 1003 (1986); Catharine MacKinnon, *Difference and Dominance* (1984).

in social policy is revived. A similar margin is recognized in national security cases under Article 2(2). The affirmative action cases after *Kalanke* also reveal a more indulgent approach; the same applies (to a lesser degree) to the German staff council cases after *Bötel*.

Doubtless, no one set of factors accounts for this ratcheting downward of ECJ scrutiny. In part, the Court may have been a victim of its own success. Having struck down the more obvious instances of gender discrimination, it began to confront increasingly controversial issues. In the early 1990s, decisions such as *Kalanke*, *Bötel* and *Barber*³⁰⁴ (a direct pay discrimination case) provoked angry reactions from the Member States affected who accused the Court of exceeding its competence. *Kalanke* and *Barber* prompted Treaty Amendments to mitigate their impact, while German courts sought reconsideration of *Bötel*.³⁰⁵ A more circumspect approach by the Court may thus be explained as a measure of self-protection.³⁰⁶

One could also link this judicial retrenchment to broader trends. The exclusion of the European Union's two new pillars from ECJ jurisdiction at Maastricht arguably bespoke a growing mistrust of the Court among Member State governments.³⁰⁷ The elevation of the subsidiarity principle to constitutional status similarly reflected, among other things, disquiet over ECJ activism.³⁰⁸ The early 1990s also brought signs of incipient rebellion by the constitutional courts of several Member States.³⁰⁹ The Court's new-found respect for Member State discretion could be seen as a response to these shifts in its constitutional landscape, and its relaxation of gender scrutiny compared to the even more dramatic pull-back it effected for free movement of goods in *Keck* during the same period.³¹⁰

Although it is premature to say, one could argue that this period of retrenchment has now come to an end. Decisions such as *Abrahamsson*, *Lommers*, *Kreil*, *Hill* and (in some respects) *Seymour-Smith* may herald the return of a more robust approach to judicial scrutiny, and the Amsterdam amendments' strong mandate for enforcement of gender equality may be seen as providing a green light to supplant Maastricht's red. The level of scrutiny in gender cases

304. Case 262/88, *Barber v. Guardian Royal Exchange Assur. Group*, 1990 ECR 1889. *Barber* extended Article 119's reach to private pension schemes.

305. See *supra* n. 300; Arnall, *supra* n. 104, at 473-74.

306. Cf. Shapiro, "The European Court of Justice," in Craig & de Búrca, *supra* n. 45, at 336-39 (making similar argument re: free movement cases and *Keck*).

307. See *id.* at 339.

308. See Vause, "The Subsidiarity Principle in European Union Law—American Federalism Compared," 27 *Case W. Res. J. Int'l L.* 61, 68 (1995).

309. The headliner among these was, of course, the German Constitutional Court's notorious "Maastricht decision." 89 BverfGE 155 (judgment of Oct. 12, 1993); See also Weiler, "Epilogue: The Judicial Après Nice," in de Búrca & Weiler, *supra* n. 8, at 220-21 (citing case law from the Italian, Danish, Belgian and Spanish constitutional courts).

310. Cases 267/91 & 268/91, *Keck and Mithouard*, 1993 ECR 6097.

probably still falls short of that seen in free movement; however, the Court has gone a long way toward erasing this historic inequality of equalities and giving real meaning to the promise of fundamental rights.

V. CONCLUSION

By analyzing the pattern of review in EC gender cases, we have seen the European Court of Justice develop a sophisticated methodology for judicial review that adapts the scrutiny applied according to the nature of the provision under review. In doing so, the Court has attempted to reconcile the conflicting demands of fundamental rights and respect for Member State discretion.

Left unanswered by the present study is the extent to which this variable approach represents a deliberate strategy of the Court. At some level, it is clear that the ECJ does intentionally manipulate the opposing concepts of "strictness and "discretion" (as well as "fundamental rights" and "social policy"). Cases such as *Sirdar* or *Thibault*, where the Court feints one way and veers the other, exemplify this sort of dialectical minuet. Yet, the lines drawn overall reflect a complex of principled and prudential motives, some of which might have structural origins beyond the Court's awareness or control. A degree of path-determinancy may thus underlie what appear to be choices made on a more or less ad hoc basis.

Unfortunately, without better insight into the decision-making within the Court of Justice, this question may prove impossible to resolve. The sparse reasoning and impersonal abstraction of the ECJ's gender rulings shed little light on the question, and the advocate general opinions are, by nature, an imperfect proxy. Doubtless some part of this may be ascribed to difficulties inevitable to a multinational institution in which judges from very different legal traditions must agree on a single text. Yet, it sometimes seems as if obfuscation is practiced as a deliberate tactic. Given the political sensitivities within which the Court must operate, a degree of tact is doubtless prudent. However, in the long run, well-reasoned judgments remain essential for both the integrity of Community law and the Court's own institutional credibility.

Such criticisms are hardly original.³¹¹ Yet, they assume added force in this context. If, as most commentators agree, the Court does vary the rigor with which its proportionality test is applied according

311. See, e.g., Weiler, *supra* n. 309, at 219-21 (criticizing "outmoded" style of ECJ decisions and noting existing of "a certain credibility issue" based on poorly reasoned rulings emanating from Luxembourg); Bengoetxea, McCormick, & Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice," in de Búrca & Weiler, *supra* n. 8, at 46-47, 82-86 (underlining importance of rulings based on principled justification).

to the demands of particular cases, then it is essential for the Court to articulate the factors that justify such choices,³¹² lest its manipulation of the standard of review become (or be seen as) a device to predetermine substantive outcomes. The European Court of Justice has been far less responsive to this task than its US counterpart. The principles underlying the European Court's variable approach may be more intricate than those accounted for in the rigid tiers of US equal protection, yet the burden of justification is no less great. This paper has suggested that the Court's gender review has adhered to consistent patterns that have responded in a nuanced manner to conflicting imperatives. The result has been a rich and, for the most part, satisfying body of case law that constitutes a collective study in judicial resourcefulness. The real wonder then about the Court's under-reasoned opinions may be that they do not take more credit for this achievement.

312. De Búrca, *supra* n. 18, at 149-50.