

1 Introduction: institutions, organizations and actors

In the late 1950s, moved by the hope for peace and economic prosperity in Europe, six governments constructed the foundations of an unprecedented form of supranational governance: the European Community. Heads of governments negotiated the rules and organizations that would govern what was largely an international economic agreement. Interest groups and civil society were not directly involved in these negotiations and public interest issues were not on the agenda.

Today, in the year 2006, this same supranational space – the European Union (EU) – possesses an ever-expanding net of public policies, including women's rights and environmental protection.¹ These policy areas have consistently been guarded by national governments, who have been hesitant to let the EU legislate in the area of national social policy and environmental preservation. Today, public interests groups and civil society – from feminist activists to environmental groups – and increasingly powerful EU organizations, such as the European Court of Justice (ECJ) – are equally present in this supranational policy arena. Individuals possess enforceable rights under EU law and public interest groups are now permanent participants in EU policy processes. This book explains how this remarkable transformation took place – how an international treaty governing economic cooperation became a quasi-constitutional polity granting individual rights and public inclusion. I argue that the ECJ and civil society were integral to this transformation.

This book examines the emergence and evolution of supranational governance in Europe. How does supranational governance – characterized by a set of binding rules and procedures governing actors and organizations in a supranational policy arena – emerge and institutionalize? By institutionalization, I mean the process by which these rules

¹ For consistency and clarity, this study will refer to the institutions and organizations of the European Union by this newer name, despite the historic nature of this research. Further, consistent with this etiquette, I will utilize the post-Treaty of Amsterdam numbering and parenthetically cite previous numbering as relevant.

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and procedures become increasingly formalized and are supported by actors and organizations with increasing competence to change these rules.² The objectives are twofold: first, to explain the sources and consequences of the institutionalization of two EU policy domains – social provisions and environmental protection. Second, the book evaluates this evolution in terms of its effects on the intergovernmental nature of the EU. Do national governments retain control over the direction of European policy development or are EU policy spaces filled with supranational organizations and civil society who can independently affect policy evolution? I examine the processes of litigation and mobilization to answer this question.

The study comes at a critical time in the EU. The voice of civil society and the people of Europe are more important than ever before to the future of European integration. The development and final ratification of the Constitutional Treaty stalled in 2005 due to the voice of the people – a resounding NO vote in public referenda in France and the Netherlands.³ At the core of this outcome was a protest – a demand that the integration project was moving forward at a pace and level that left the people of Europe too far removed from the process. Thus, many might record this as another historic moment where the integration project came to a halt or at least lost momentum and began to slow. I would disagree. Certainly, the new institutions, organizational improvements and perhaps a sense of European pride and identity that might have come with a Constitution are now on hold. Yet, constitutionalism in the EU remains vibrant; and individuals, civil society and the ECJ are at the core of this positive trajectory.

Understanding supranational governance

Like many systems of governance, the emergence and evolution of supranational governance in Europe can be characterized by a complex relationship between social actors, organizations and institutions (March and Olsen 1989; North 1990; Stone Sweet, Sandholtz and Fligstein 2001). The processes by which institutionalization in the EU

² See Stone Sweet and Sandholtz (1998: 9).

³ The Constitution for Europe (or Constitutional Treaty) was ratified by fourteen member states in 2005: Austria, Belgium, Cyprus, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Spain. Following the rejection of the Treaty in public referenda in France (29 May 2005) and the Netherlands (1 June 2005), member states have decided to enter a “period of reflection, discussion and explanation” with the hopes of successful ratification in the future (European Council, 16–17 June 2005).

takes place are many, and explanations of who controlled these processes vary. Scholars have focused on institutional change through treaty amendments (Moravcsik 1998; Tsebelis and Garrett 2001), the role of EU organizations in rule creation (Pollack 2003; Tsebelis 1994; Stone Sweet 2004; Cichowski 2004) and the significance of transnational actors in policy innovation (Sandholtz 1998), to name just a few. Their findings consistently demonstrate that the EU today embodies a complex set of EU institutions, EU organizations and, increasingly, private actors.

The debate

There is much less agreement over *how* this complex system emerged and to what degree EU policy processes remain controlled by member state governments. Regional integration scholarship has largely developed out of an attempt to theorize the interactive effects that policy actors (national government executives and transnational actors) and EU organizations (the ECJ, Commission, Parliament or Council) have on the process of European policy making (the production of new European rules through secondary legislation, treaty revisions and the ECJ's jurisprudence). Neofunctionalists argued that new areas of supranational policy would emerge from the transnational activism of interests, the policy innovations of supranational organizations and the pressure these groups put on national governments (Haas 1958; 1964). Supranational organizations and transnational society are instrumental components of this explanation of how EU rules become institutionalized and subsequently "spill over" to other policy domains, ultimately shifting policy competence to the supranational level.

Conversely, intergovernmental approaches privilege the role of national government executives in the integration process (Moravcsik 1998; Garrett 1992). Domestic policy actors, in particular, commercial and economic interests, are important to the extent that they influence national government preferences and thus affect policy preferences asserted at the bargaining table. But ultimately, supranational governance is a product of the relative bargaining power of member state governments as constrained by decision-making rules. Consistent with regime theory, intergovernmentalism argues that EU organizations stabilize supranational policy coordination between national governments by reducing the costs of information and policy innovation (Keohane 1984). In this explanation, supranational organizations and organized interests do not exert any autonomous or direct influence on EU rule making.

An alternative approach

While both of these explanations recognize that governance in the EU contains both supranational and intergovernmental elements, there is a clear need for explanatory theory that can account for this variation. Motivated by this problem, this study further develops a theoretical approach that examines supranational governance as a process of institutional change. Explicit in this approach, and consistent with new institutionalism scholarship more generally, the constituent elements of institutional evolution are a dynamic interaction between institutions, organizations and actors – the macro, meso and micro levels in any political space. For the purposes of this analysis, I adopt the generally agreed distinctions between these three entities (see North 1990; Hall and Taylor 1996):

- **Institutions** constitute the macro level. They are complexes of rule systems that pattern and prescribe human interaction. In the EU, these are treaty provisions, secondary legislation, ECJ precedent and the procedures that govern rulemaking.
- **Organizations** make up the meso level and they are more or less formally constituted spaces occupied by groups of individuals pursuing collective purposes. The ECJ is an example of an EU organization.
- **Individual action** occurs at the micro level. In the EU, these are individuals and groups involved in transnational action.

This approach is consistent with neofunctionalism in that it privileges the role of EU organizations and transnational society in integration processes. Integration evolves in any given policy sector as a result of the growing intensity and presence of three factors: EU rules, EU organizations and transnational society. In particular, Stone Sweet and Sandholtz argue that movement along these three dimensions constitutes a shift from intergovernmental politics to supranational politics (1998: 11). Furthermore, growth on any one of these dimensions may stimulate movement within the other elements. For example, an expansion of EU organizational power can provide new opportunities that actors will be motivated to exploit, thus expanding transnational society. In response to these new supranational rules, societal actors will adjust their behaviors and in doing so these rules are reinforced. Neofunctionalism helped us understand why there was a functional demand for supranational governance, yet it tells us little about how and when this may develop. While my approach is consistent with neofunctionalism, it differs by not *a priori* suggesting that European integration will move forward smoothly; instead it provides the heuristic device to examine individual policy areas, over time, and evaluate whether they are more or less intergovernmental and how this may change over time.

I utilize this framework to examine the sources and consequences of the institutionalization of EU social provisions and environmental protection policies. Furthermore, the research evaluates this institutional evolution in terms of its effects on the intergovernmental nature of EU governance. In particular, I ask whether the institutional and organizational changes associated with these public policy developments affected public access and participation in the EU, and subsequently I ask how this may alter the balance of power in EU politics between member state governments, EU organizations and citizens. How do we measure this process of institutionalization? Using the above theoretical argument as a guide, institutionalization can be measured in three ways:

- **Institutions.** Institutionalization in a given policy sector can be measured in terms of whether the EU institutions (rules and procedures) governing that legal domain become more binding, precise and enforceable and whether they expand in scope. We know institutionalization is occurring when EU rules increasingly govern and sustain the activities (at both the national and transnational level) between social, political and economic actors in a given policy sector.
- **Organizations.** EU organizations will exert greater influence on supranational policy outcomes and processes the greater degree of institutionalization that occurs in a given area. In a fully institutionalized space, EU organizations act autonomously, that is, they are able to exert independent influence on policy outcomes.
- **Actors.** We know institutionalization is occurring when there is an increasing intensity and presence of transnational actors in supranational policy processes. In intergovernmental politics, domestic actors exert pressure on national governments to bring supranational policy change. National governments remain the mediators between domestic actors and supranational policy decisions. In sites of supranational governance, we would expect these actors to pressure for change at both the national level and the supranational level. In particular, we would expect greater institutionalization in a policy area the extent to which this action becomes more formally organized and collective and increasingly permanent.

Litigation, mobilization and governance

This study moves beyond the existing European integration scholarship by analyzing how institutionalization can occur through the processes of supranational litigation and transnational mobilization. I argue that much like domestic politics, litigation and social activism in the EU provide avenues for institutional change. By this I mean that these

processes can lead to a change in the rules and procedures that govern any particular policy arena (i.e. change in opportunity structures). Litigation enables individuals and groups, who are often disadvantaged in their own legal systems, to gain new rights at the national and EU level. Judicial decisions can be particularly powerful in the extent to which they expand the scope or alter the meaning of treaty provisions – rules that are otherwise relatively immune to alteration. This is not unique to the EU, as courts and processes of legalization are increasingly shaping supranational and international governance (Alter 2006; Slaughter 2003, 2004; Cichowski 2006a; Scheppele 2004). Further, EU citizens who may be excluded from EU politics can gain new power and voice through the mobilization of transnational public interest groups. This action can shape policy development as well as expand the boundaries of EU politics by giving civil society a voice and place in EU politics. A similar dynamic is evolving at the global level as civil society and transnational activists are increasingly present and participating in international politics (Keck and Sikkink 1998; Tarrow 2005).

Institutional change in the EU takes place through a host of processes, such as intergovernmental treaty negotiations (Moravcsik 1998), parliamentary policy agenda setting (Tsebelis and Kreppel 1998) and policy development by the Commission (Pollack 2003). Unlike these other integration processes, litigation and mobilization introduce a dynamic in which institutional change can occur from below. The interaction between law, politics and society has been an important avenue of institutional change in Europe (Cichowski and Börzel 2003). Further, the analytic focus of this study provides a test for scholarship that argues European integration is best understood by the “formal” interaction of EU organizations, an approach that may operate above the radar of citizen politics (Tsebelis and Garrett 2001: 388). Instead, beyond high politics, this study complements research illustrating why courts may provide a more responsive institutional form of democracy for the public than do traditional representative organizations (e.g. Graber 1993; Lovell 2003; Zemans 1983). To be clear, litigation and mobilization do not replace the importance of legislative and executive decision-making processes, but instead complement and enhance these equally important modes of democratic governance.

In any system of governance, litigation and mobilization present avenues for institutional change, and thus are particularly fruitful for exposing the many processes through which supranational governance can evolve. Litigation enables actors to question existing rules and procedures. And the court’s judicial rulemaking can lead to the creation of new rules and procedures that sometimes serve as new opportunities for action (Shapiro

1981; Stone Sweet 2000). By judicial rulemaking, I mean, *a court's authoritative interpretation of existing rules and procedures, which results in the clarification of the law or practice in question*. Mobilization processes involve the strategic action of individuals and groups to promote or resist change in a given policy arena (Tarrow 1998; Marks and McAdam 1996). This study examines public movement activism. By movement activism, I mean *sustained challenges, by individuals or groups with common purposes, to alter existing arrangements of power and distribution*. I adopt this general definition to examine the importance of both individual and group activism.⁴ Rule change occurs through mobilization when activists utilize available opportunity structures to pressure governing organizations to create or amend rules that will satisfy their goals. In particular, movement activism has historically operated to expand the boundaries of politics, a strategy that can lead to change in the rules and procedures that impact who has access to these policy spaces (Dalton, Kuechler and Burkin 1990).

Theoretically, we would expect to find complex linkages between litigating, mobilization and rulemaking in the EU (Börzel and Cichowski 2003; Stone Sweet and Caporaso 1998; Cichowski 2004). As EU rules and the ECJ present social activists with the opportunity to bring new legal claims, we would expect activists to mobilize and exploit these new opportunities. This litigation in turn can empower the ECJ by providing the opportunity to clarify and construct new EU rules. In response to these new supranational rules, actors adjust their behaviors in a way that makes these institutions increasingly difficult to change. Furthermore, once these actors gain some access to this new arena, they will push for greater inclusion. As the policy process becomes more dependent on this increasingly present transnational civil society, for legitimacy and efficiency reasons, we can expect the rules to change in a way that formally includes these actors in the supranational policy space. Through these processes supranational governance can emerge and evolve. By further developing a theoretical approach that understands supranational governance as multiple processes of institutional change involving varying actors and organizations, this study brings into question theories that limit the emergence and evolution of European integration to a set of intergovernmental bargains and policy decisions dominated by national governments (Moravcsik 1998; Garrett et al. 1998).

⁴ Alongside collective action taken by movement organizations, scholars highlight the importance of activities carried out by individual activists who are often bound together in informal networks, but whose challenging action can be equally as effective as collective action by movement organizations (e.g. Katzenstein 1998a).

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In the remaining part of this chapter, I elaborate the approach that underlies this study.

The litigation dynamic

In this section, I focus on the various stages of the litigation dynamic. First, I suggest the necessary conditions for litigation. This is followed by a discussion of the feedback effects of litigation on governance (the rules and procedures). Finally, I explore how this litigation dynamic can affect mobilization.

The necessary conditions for litigation: making a legal claim

The litigation dynamic begins as a result of strategic action by individuals who are either disadvantaged or advantaged by an available set of rules. This stage is characterized by both action and at least some necessary rule or procedure that is invoked in the legal claim. In particular, social movements have experienced relative success at utilizing litigation as an avenue to pressure for social change and have done so by utilizing an explicit or implied set of rights (McCann 1994; Handler 1978; Vose 1959; Walker 1990; Kluger 1975). In the United States, there is a long tradition of marginalized groups utilizing the courts as an opportunity to challenge existing governance structures and exclusionary policies. Most notable are the activities of the early civil rights movement on issues such as school segregation (for example, the *Brown v. Board of Education* decision, see Morris 1984) and also a host of other social movements, including the American labor movement (Forbath 1991; Tomlins 1985), the women's movement (Costain 1992; O'Connor 1980), the welfare movement (Piven and Cloward 1977), and the animal rights movement (Silverstein 1996).

There is a considerably shorter history of this type of litigation in Europe. From what we know generally about public interest litigation in Europe, environmental and women's group activation of courts is minimal, yet present (Krämer 1996; Harlow and Rawlings 1992; Cichowski 1998; 2004; Kelemen 2006; Cichowski and Stone Sweet 2003). Unlike a long tradition of social movement use of the courts in the United States, many European legal systems have only recently provided *locus standi* for groups (for France and the United Kingdom see Harlow and Rawlings 1992). However, in the area of environmental protection we do find groups throughout Europe increasingly engaging in legal action despite sometimes restrictive access to justice rules (e.g. Führ and Roller 1991; CEC 2002a) and with increasing success utilizing EU law to bring legal proceedings against their own governments (Cichowski

1998; Krämer 1996). Similarly, women's rights litigation utilizing EU gender equality law may benefit from the organized interests and activists that generate this seemingly individual litigation (Hoskyns 1996; Harlow and Rawlings 1992; Cichowski 2001). Although not class action suits in terms of a vast general interest, EU gender equality litigation increasingly involves multiple litigants, who may or may not work for the same employer, but who share a common complaint. These interests are joined not by chance, but through strategic organization.⁵

Stated generally, the litigation dynamic begins with the following two factors:

- the strategic action on behalf of an individual or group interest, in our case movement activists, to invoke this rule and make a claim before a court.
- at least some necessary rule or procedure, embodying an explicit or implied right.

Without these two factors, we might expect this process to fail, or rather that there would be less public interest litigation in a given legal system relative to others. In this study, I explore and elaborate the underlying forces that can alter these necessary conditions. Subsequently, a court is asked to resolve the dispute, leading to the next stage in the litigation process: the judicial decision.

Litigation feedback effect on governance

I start with the assumption that through litigation, a court's resolution of societal questions or disputes can lead to the clarification, expansion and creation of rules and procedures that are structures of governance (Shapiro 1981: 35–37). Thus, in any system of governance with an independent judiciary possessing judicial review powers, the judicial decision provides a potential avenue for institutional change. For example, in the case of the American civil rights litigation, activists questioned the constitutionality of school segregation (*Brown v. Board of Education*, see Morris 1984). The US Supreme Court found that racial segregation in schools was unconstitutional, and thus changed what was a lawful practice protected by the US Constitution. In order to understand this

⁵ See Chapter 3 and Chapter 5 in this book. In the area of EU pregnancy and maternity rights, there are a series of cases involving multiple litigants who share a similar claim (see Gillespie ECJ 1996a; Boyle ECJ 1998c; Pedersen ECJ 1998d). The Boyle case for example was organized by a lawyer working within the British Equal Opportunities Commission (EOC) who filed a case against the EOC (a UK governmental agency responsible for implementation and oversight of UK equality policies) on behalf of six of her colleagues. This is an example of women's organized activism from within public and private organizations (e.g. Katzenstein 1998b).

dynamic process of judicial rulemaking, this study adopts an approach that understands the process of rule construction as endogenous to existing governance structures (March and Olsen 1989). That is, a court's rule-making capacity operates within the institutional framework of an existing body of rules and procedures (e.g., a constitution or legislation), yet a court's jurisprudence can subsequently alter these institutions. This approach is not unfamiliar to scholars of judicial politics (Shapiro 1981, 1988; Stone Sweet 2000; Jackson and Tate 1992; Ginsburg 2003).

I refer to this process of institutional change through a court's decisions as *judicial rulemaking*. In the European context, it is well documented elsewhere that these interpretations can significantly alter the original measure in a way that changes what is lawful and unlawful behavior for individuals and public and private bodies operating under EU law (Alter 1998; de la Mare 1999; Mancini 1989; Cichowski 1998, 2004; Stone Sweet 2004). For example, when the ECJ interprets Article 141 of the Treaty of Rome (ex Article 119, the Equal Pay Principle) in a way that now brings maternity pay under the purview of EU equal pay provisions, this creates a new rule (Cichowski 2004). The behavior of public and private bodies must reflect this new rule. And if they do not, individuals now have the ability to claim recourse before national courts.

Stated generally, through litigation and the resolution of a dispute, judicial rulemaking can lead to:

- the construction of new rules and procedures that expand rights
- and, thus, can expand the institutional framework that governs individual and group action (new rights that grant greater access, standing and the judicial obligation to protect).

When might this judicial rulemaking capacity be constrained? This study explores and elaborates the factors arising from the law that may explain a court's decision-making in a given legal system relative to others. Given that judicial rulings can alter governance structures, I now elaborate how this may impact mobilization. In particular, this study focuses on the impact of court rulings on the rules and procedures that are opportunities for social movement action.

Litigation feedback effect on mobilization: opportunities for action

Through the construction of a new rule (expanding the scope, meaning or precision of a right), a court's judicial rulemaking may have general consequences for the balance of power in any political system by providing new opportunities for action (McCann 1994; Epp 1990; 1998; Cichowski 2004, 2006b; Cichowski and Stone Sweet 2003). The ways in which this may provide new opportunity structures for social movement