Individuals, Courts, and the Development of European Social Rights

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This article examines how litigation before the European Court of Justice (ECJ) and European Court of Human Rights (ECHR) has contributed to the development of social rights. It argues that variations in the nature of supranational rights, powers of supranational courts, and ease of access influence the opportunities individuals have to engage these courts to enforce and expand entitlement to social protection. It demonstrates that individuals have pursued social-rights claims at a much higher rate before the ECJ than the ECHR but have also begun to respond to creative ECHR interpretation that extends social rights in directions not available under European Union law. In weaving together a complementary but not a comprehensive set of social protections, the two supranational courts are constructing a safety net that extends well beyond the original intentions of member countries and empowers some of the most vulnerable members of society.

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Europe is home to the most successful international legal regimes: the European Union (EU) and the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the

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Litigation before the respective courts—the European Court of Justice (ECJ) and European Court of Human Rights (ECHR)—dwarfs that of all other international tribunals (Alter, 2006 [this issue], Table 1), and the judgments of both courts command the respect typically experienced by the domestic courts of democratic states (Conant, 2002; Moravcsik, 2000; Zürn & Joerges, 2005). Although a large literature documents the transformation of EU law into a supranational constitution and a growing literature explains how this legal system influences institutional change, the impact of the ECHR and Convention norms receives much less attention from political scientists, and few studies examine how individuals may claim complementary rights by engaging the two European courts. This gap is striking, given that the ECJ invokes ECHR case law and Convention norms, and overlap between EU members and Convention signatories places the vast majority of EU inhabitants under the protections of both legal systems. In this article, I begin to address this gap by exploring the surprising development of social rights in litigation before both the ECJ and ECHR. By social rights, I mean entitlements to social-insurance schemes that protect against risks, social-assistance benefits that serve the needy, and social-investment programs that promote future productivity such as education.

Social rights are a least likely case for supranational expansion because of both the nature of supranational rules and the amount of resources necessary to litigate. First, EU law primarily limits itself to specifying the rules of economic competition, and the Convention specifies traditional civil and political rights and excludes 20th-century conceptions of social rights (with one exception: a right to education). Even though EU law extends beyond firms to address the rights of genuine individuals, these rights focus on economic rights such as access to labor markets, safe working conditions, and fair policies for pay and promotion. As a result, no centralized or uniform supranational social benefits exist. This omission was intentional as states in both venues had no interest in creating new social rights. Historically, political communities from the municipal to the national levels created exclusive membership schemes to avoid responsibility for needy “foreigners” (Brubaker, 1992). Second, individuals seeking entitlement to social benefits are among the most vulnerable and least financially resourceful of all members of society. As a result, they face the greatest barriers to litigation in any venue.

Despite these constraints, individuals have gained access to both the ECJ and ECHR to claim social rights that states intended to restrict to particular populations. This social-rights litigation constitutes a form of individual political participation in supranational venues. In cases involving foreign residents or workers who seek entitlement to the social-protection schemes
of host states, recourse before courts is often one of the few mechanisms of voice they enjoy at all. If they are EU citizens, their explicit political right to vote can be limited to local and European Parliament elections of the host state and national elections in their home country. As expatriates, they are unlikely to constitute a significant constituency of concern to their national government. Meanwhile, non-EU citizens may be entirely disenfranchised but still enjoy legal recourse. Judges’ bias in favor of equality before the law and insulation from xenophobic pressures (Guiraudon, 1999) makes access to courts particularly valuable to individuals who are not citizens of the state in which they reside or work.

Existing research on the social rights of foreigners in Europe tends to exclude the situation of foreigners who are EU citizens and attributes expansions of rights to nonmajoritarian organizations at the national level, including courts and bureaucracies (Guiraudon, 2000; Joppke, 2001; Soysal, 1994). Litigation before the ECJ and the ECHR illustrates, however, that the rights of EU citizens remain contested as well and that national officials do not necessarily opt to grant rights to foreign residents and workers. Often, national administrators resist the extension of social benefits and services to non-nationals. Although some national judges do grant rights or refer cases to the ECJ, others decline to invoke European law (Conant, 2002). Thus, litigation at the supranational level suggests that EU citizens and third-country nationals are both finding a new space to advance their interests.

In this article, I examine European social-rights litigation to explore how individuals and courts affect the construction of supranational rights. What explains cross-court variation in social-rights litigation? To what extent have the ECJ and ECHR helped individuals to enforce existing social rights and expand their content and scope? What do the combined efforts of the European courts produce? In the first section, drawing from public-law scholarship, I explain how institutional variables including the nature of rights, power of courts, and mechanisms of individual access influence opportunities to participate in supranational venues. In the second section, I provide a cross-court analysis of social-rights litigation before the ECJ and ECHR from 1960 to 2004. This analysis is the first to offer a systematic comparative study of social-rights litigation before the two supranational courts. This overview of litigation flows is followed by a case-law analysis elaborating rights expansions and illustrating that the two supranational legal orders intersect to provide complementary but not necessarily comprehensive, social protections.
Understanding Institutional Opportunities to Participate in Europe

Opportunities to participate in the enforcement and expansion of social rights depend on the nature of supranational rights, powers of supranational courts, and individual access to justice. Supranational rights must provide a legal basis on which litigants can ground their claims. The power of supranational courts depends on many factors but minimally requires that they enjoy authoritative jurisdiction over the domain at issue and offer access to litigants to bring disputes. The availability of legal bases, scope of jurisdictional power, and mechanisms to access justice vary tremendously across national and international legal systems.

In this article, I adopt the framework outlined in the introduction to the special issue in arguing that we can expect the existence of formal supranational rules, broader judicial jurisdiction, and greater individual access to justice to enhance the opportunities of individuals and supranational courts to develop rights. First, the availability of social-rights legal bases produces sufficient legal certainty to inspire litigation to enforce rights and clarify their meaning. Laws are never perfectly specified to leave no room for ambiguity about their application to various situations and classes of individuals (Garrett, 1992; Shapiro, 1981), but clarity as to the basic nature of a right signals a potential utility in litigation. Although legal instruments, which permit varying domestic transpositions, generate ambiguities that inspire litigation before the ECJ (Cichowski, 1998, 2004), explicit articulations of rights and obligations, by providing some hope of successful claims, encourage potential litigants to sue. By contrast, the absence of social-rights provisions is unlikely to inspire confidence in potential litigants, particularly if they are actually individuals. Although an activist or interest group connected to financial resources and legal expertise may be willing to risk testing cases on the basis of legal provisions that include no mention of social rights, it is only after a court formally acknowledges social rights that individual litigation can be expected to follow. Second, courts with broader jurisdictions will have more opportunities to develop rights than courts with narrower jurisdictions simply because a greater number of disputes arise in broader jurisdictions. Although heavy caseloads, in the absence of docket control, may impede a court’s ability to develop its own policy preferences (Epp, 1998), a steady stream of cases is nonetheless essential to judicial influence. Particularly in the realm of international courts, soliciting a caseload that is large enough to exert authority is an important initial challenge (Alter, 2006,
Table 1). Third, easier individual access to courts, through liberal standing rules and opportunities for direct access, facilitates litigation (Cichowski & Stone Sweet, 2003) whereas more restrictive standing rules and constraints on access impede litigation. Liberal standing and more direct access simplify and reduce the costs associated with litigation and can be expected, therefore, to result in relatively more claims being brought before courts, particularly by individuals who will possess the fewest legal and financial resources to litigate.

Variation in the Availability of Legal Bases Concerning Supranational Social Rights

Comparison of legal provisions adjudicated by the two European courts indicates that the ECJ enforces many more legal bases that explicitly address social rights. EU provisions generate the most extensive set of social rights for EU citizens and their family members: Articles 39, 43, 49, and 18 of the Treaty Establishing the European Community (EC, 2002) guarantee the rights of workers, entrepreneurs, service providers, and EU citizens to move freely within the EU; Treaty Article 12 EC (2002) prohibits discrimination based on nationality for these migrants; and Treaty Article 42 EC (2002) and legislation specify the conditions under which EU citizens and their families gain entitlements to social-insurance and investment benefits (Commission Regulation 1251/70, 1970; Council Directive [CD] 221/64, 1964; CD 360/68, 1968; CD 34/75, 1975; CD 364/90, 1990; CD 365/90, 1990; CD 96/93, 1993; Council Regulation [CR] 1612/68, 1968; CR 1408/71, 1971; CR 1247/92; 1992). As a result, EU law formally specified social rights from the 1960s onward. EU Cooperation accords with North African states, Association agreements with Turkey (Conant, 2002, 2004), and gender-equality provisions (Alter & Vargas, 2000; Cichowski, 2004) also generate social rights, which I exclude here for the sake of brevity. This exclusion will only understate EU social-rights litigation rates relative to the Convention system where disputes include gender discrimination and third-country national claims. The Council of Europe’s Conventions on Social Security (CSS) and Social and Medical Assistance (CSMA) also articulate requirements to access the host country’s social-insurance and social-assistance benefits, but as I discuss subsequently, they formally lack judicial jurisdiction.

By contrast, the Convention makes only one explicit mention of a social right. Article 2 of Protocol 1 provides that no person shall be denied the right to education. Outside of this lone provision, the Convention articulates traditional civil and political rights that lack the clarity to provide any degree of legal certainty with respect to social-rights applications. For instance, Article
4 of the Convention, which prohibits slavery and forced labor, could include an implicit social right to maintenance in the absence of compulsion to work, but it also excludes from its definition of compulsory labor “any work or service which forms part of normal civic obligations.” Article 1 of Protocol 1 of the Convention (Council of Europe, 1950) provides for entitlement to the peaceful enjoyment of possessions. What constitutes a “possession” remains ambiguous, but an interpretive leap is required to associate personal possessions with social-insurance or assistance benefits. Article 14 prohibits discrimination on multiple grounds, including national or social origin, property, sex, and birth, which could potentially be applied to social benefits were there any mention of them in the Convention text, but there is not. The first explicit signal that the Convention could be a source of social rights came through creative judicial interpretation in a 1996 case in which the ECHR made the leap of imagination necessary to categorize contributory social-insurance benefits as a possession. Given this range of available legal bases, I expect the greatest rate of social-rights litigation related to EU legal instruments. Because social rights were not evident in Convention law until fairly recently and jurisdiction over the CSS and CSMA was unclear, I expect much lower rates of social-rights litigation concerning these texts.

**Variations in Jurisdictional Powers and Individual Access in European Courts**

Comparison of the supranational courts also demonstrates that the ECJ enjoys a broader jurisdiction that is more accessible to individuals. The ECJ has a general jurisdiction that encompasses all EU treaties and secondary legislation with exceptions confined to particular areas of intergovernmental cooperation such as the foreign and security policy. Moreover, the ECJ has expanded its jurisdiction unilaterally to encompass legal instruments that signatory states did not intend to be judicially enforceable, including EU association and cooperation accords with third countries (Conant, 2002) and, in 1998, the Council of Europe’s CSS and CSMA. By contrast, the ECHR’s jurisdiction remains limited to the human rights specified in the Convention, covering a smaller range of issues than those embodied in the immense acquis communautaire. As a result, I expect the wider jurisdiction enjoyed by the ECJ to lead to a greater degree of social-rights litigation.

Finally, comparison of the two courts demonstrates that individuals have historically benefited from easier access to EU venues. Individuals enjoy indirect access to the ECJ through national courts that may refer questions about the interpretation of EU law for a preliminary ruling, which the national court then applies to the relevant case (Article 234 EC, 2002). This
indirect avenue to the ECJ has been integral to the expansion, effectiveness, and accessibility of EU law for citizens (Alter, 2001; Stone Sweet, 2004; Weiler, 1991). Although indirect, the potential for access through first-instance courts results in fairly expedient justice. By contrast, individuals enjoy direct access to the ECHR today, but only after they exhaust domestic remedies. Although an appeals structure offers more direct protection than a reference procedure, exhausting domestic remedies can be a long haul. Furthermore, individual access was optional for contracting states to the Convention (Article 25 [Council of Europe, 1950]) until the complete institutional reform of the ECHR system in 1998 when it became compulsory. Since 1998, the increasing number of individual claims highlights the growing use of this access (Cichowski, 2006, Figure 3). Yet unlike the ECJ, the ECHR limits its jurisdiction to the Convention and does not hear individual complaints regarding the Council of Europe’s social conventions. In fact, the ECHR follows the formal limits imposed on these instruments in which individuals have absolutely no legal recourse because only state authorities may engage the process of resolving disputes through negotiation and arbitration (CSMA, Article 20 [Council of Europe, 1953]; CSS, Article 71 [Council of Europe, 1972]). Given these constraints, I expect that individuals will enjoy easier access to EU judicial remedies. Yet given the recently expanded opportunities for direct access to the ECHR, I expect that its social-rights litigation could increase.

**Data Sources and Method**

To assess these expectations, I collected data on social-rights litigation rates in each European court. I searched for all litigation related to the legal bases that explicitly or implicitly address social rights (listed in Table 1) in the Celex database of ECJ case law, which I accessed through the full Lexis database and the HUDOC database on ECHR case law, both of which include full-text decisions. Celex searches on the EU legal bases generate a large body of social-rights litigation \( (N = 617) \). Article 4 and Article 2 of Protocol 1 of the Convention (Council of Europe, 1950) yield a comparatively small number of claims related to forced labor \( (N = 4) \) and education \( (N = 16) \). Article 1 of Protocol 1 considered with Article 14 on discrimination yield a substantial number of cases \( (N = 50) \), but most of these cases relate to traditional property disputes that have nothing to do with social rights. By reading these cases, I determined that only 15 address social rights \( (N = 15) \).

In the last section of the article, I analyze how this litigation has developed supranational social rights by discussing the disputes. Because a comprehensive treatment of more than 600 EU cases is beyond the scope of a single arti-
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Table 1
Social-Rights Litigation in Europe by Legal Basis and Court, 1960-2004

<table>
<thead>
<tr>
<th>EU Provisions</th>
<th>ECJ</th>
<th>ECHR</th>
</tr>
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<tbody>
<tr>
<td>Treaty Article 42 (51): Aggregation and coordination of social security</td>
<td>86</td>
<td>0</td>
</tr>
<tr>
<td>Treaty Article 18 (8a): Free movement of EU citizens</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>Council Regulation (CR) 1612/68 (1968): Free movement of workers</td>
<td>137</td>
<td>0</td>
</tr>
<tr>
<td>CR 1408/71 (1971): Social security for workers and families</td>
<td>357</td>
<td>0</td>
</tr>
<tr>
<td>CR 1247/92 (1992): Special noncontributory benefits</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Residential for EU citizens, retirees, and students</td>
<td>9</td>
<td>0</td>
</tr>
</tbody>
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<thead>
<tr>
<th>Council of Europe Provisions</th>
<th>ECJ</th>
<th>ECHR</th>
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<tbody>
<tr>
<td>Article 2 of Protocol 1: Right to education, Human Rights Convention</td>
<td>0</td>
<td>16</td>
</tr>
<tr>
<td>Article 14 and Article 1 of Protocol 1: Discrimination and enjoyment</td>
<td>0</td>
<td>15</td>
</tr>
<tr>
<td>of possessions, Human Rights Convention</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 4: Forced labor and slavery, Human Rights Convention</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Convention on Social and Medical Assistance</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Convention on Social Security</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>617</td>
<td>35</td>
</tr>
</tbody>
</table>

Note: Data denote decisions of the ECJ and ECHR on European Union and Council of Europe Treaty, Convention, and legislative provisions. Treaty articles in parentheses denote the numbering scheme used prior to 1997, which were included in the searches. EU = European Union; ECJ = European Court of Justice; ECHR = European Court of Human Rights.

Source: Celex, Lexis searches, July 22-26 and August 6, 2004; April 2, 2005; HUDOC searches July 22-26 and August 6, 2004; April 2, 2005.

In this article, I focus on a subset of the ECJ’s social-rights case law: disputes concerning the entitlement of migrating EU nationals to social assistance when they are not currently working in a host state or have not fulfilled the conditions necessary to qualify for social assistance under the CSMA. I isolated these cases by searching in Celex for litigation invoking the (a) CSMA (N = 2); (b) EU legal bases listed in Table 1 along with the terms “social assistance,” “minimum subsistence,” or “minimum within three words of subsistence” (N = 62); and then (c) reading this case law to eliminate cases in which one of the social assistance terms appears but involves no substantive dispute regarding entitlement (N = 34) or involves a dispute about the classification of social security versus social assistance (N = 12) although I mention litigation in this latter category to contextualize the ECJ’s expansionary case law (Celex, Lexis searches, July 15 to 20, 2005). After removing one double list-
ing, this leaves me with 17 ECJ cases to discuss, which is close to the entire universe of ECHR social-rights cases ($N = 15$) discussed in the final section.

I focus on the ECJ’s treatment of social-assistance claims because it is among the least hospitable areas for rights expansion for multiple reasons. First, the nature of supranational rights makes it obvious that signatory states did not intend to offer these benefits to foreign residents: EU law excludes social assistance from the social-security coordination regime (CR 1408/71, 1971) and allows member states to deny residence rights to EU citizens who pose a burden to the social-assistance system (CD 364/90, 1990; CD 365/90, 1990; CD 96/93, 1993). Furthermore, the CSMA allows signatory states to deport foreign social-assistance dependents if they have been resident for fewer than 5 years (10 if they entered the host after the age of 55) unless they have close ties to the community or are unfit to travel (Articles 6 and 7 of the CSMA). Second, EU member states unanimously overruled the ECJ in response to prior expansions in entitlement to benefits that states considered to be social assistance but that the ECJ had generously classified as social security to extend access (Conant, 2002). Legal realists argue that courts in supranational and domestic settings avoid such punishing treatment by aligning their rulings to suit dominant political interests (Ferejohn & Weingast, 1992; Garrett, 1992; Spiller & Gely, 1992) whereas neofunctionalist integration scholars tend to dismiss legislative overrule as a near institutional impossibility (Stone Sweet, 2004). Finally, comparative research suggests that courts tend to be hostile arenas for individuals to pursue social-justice claims (Hirschl, 2004). Despite this daunting context, the social-assistance case law will show the ECJ directly flaunting “original intents” to expand entitlement to social assistance.

The Impact of Institutional Opportunities on Social-Rights Litigation

Social-rights litigation is becoming a significant part of European law. Even when national officials narrowed social rights, the ECJ and ECHR expanded the net of protection offered to both citizens and foreigners alike. Yet social-rights litigation before the ECJ currently dwarfs that before the ECHR. I argue that the nature of supranational rights, scope of judicial power, and degree of individual access are critical to understanding this variation. In this section, I demonstrate how litigation rates in the two supranational courts are consistent with these institutional factors. Table 1 compares the total volume of social-rights litigation before the ECJ and ECHR between 1960 and 2004. The ECJ has had 17 times as much litigation on
specific social-rights issues as the ECHR, illustrating the importance of the existence of social-rights legal bases on which to ground claims, a clear jurisdiction in these areas, and faster and simpler individual access to judicial remedies.

More specifically, litigation rates on particular legal provisions reflect the impact of each of these institutional variables. First, the data suggest that a greater number of explicit social-rights legal bases inspires more litigation. Within the set of EU social-rights provisions specified in Table 1, the benefits of formal rules are evident in the fact that litigation concerning the Council Regulation on social security (CR 1408/71, 1971) is four times greater than litigation on the treaty article declaring the right to aggregate and coordinate social security (Article 42, EC, 2002). Although member states must theoretically implement regulations as specified in the text, what that text actually means in practice is often unclear. Relative to the two-part declaration of the treaty article, the more numerous rules articulated in the regulation provide multiple avenues on which individuals can base their claims. Judicial enforcement of these social rights has been critical because EU member states have contested their application since the ink dried on these provisions (Conant, 2002, 2004).

Furthermore, within the set of Convention legal provisions, the only social right that is explicitly articulated, Article 2 of Protocol 1 (Council of Europe, 1950) on the right to education, inspired an application as early as 1972 and produced the greatest number of cases so far. Article 4 of the Convention, by specifying a prohibition against forced labor, is the next most evident source of social rights in the Convention. The single handful of cases started early indeed, in 1966, but the applicants’ lack of success did not inspire much further litigation (Table 1). By contrast, it took until 1985 and 1990 for applicants to invoke the more general Convention provisions on discrimination (Article 14 [Council of Europe, 1950]) and property (Article 1 of Protocol 1 [Council of Europe, 1950]) to claim social rights that are parallel to ECJ social-insurance litigation. Cases invoking Article 14 and Article 1 of Protocol 1 of the Convention are a close second to those invoking the right to education, but these cases total only 15 (Table 1), whereas the ECJ litigation on the primary social-rights regulations (CR 1612/68, 1968; CR 1408/71, 1971; and CR 1247/92, 1992) totals more than 500 cases (Table 1). The litigation flow that has recently developed in response to the ECHR’s granting of social rights under these provisions suggests that judicial formalization of rights provided a crucial signal about the availability of social rights under provisions that did not appear to cover anything but traditional civil rights. Applicants litigated 11 social-rights cases on these provisions be-
tween 2002 and 2004, and 7 of these 11 cases are copycat claims against the United Kingdom.

Further confirmation of the importance of formal rules can be inferred from the contrast in litigation rates concerning social and civil rights under the Convention framework. Convention articles that specify civil rights have all inspired significant litigation. The legal right to access justice is the overwhelming leader and property-rights cases follow well ahead of other provisions (see Cichowski, 2006, Table 2). Those denied a judicial proceeding can readily understand that the Convention asserts this right under Article 6 and those who face disputes relative to land or home ownership can easily assume that their dispute fits under Article 1 of Protocol 1 (Council of Europe, 1950) that mentions possessions.

Second, the data provide compelling evidence that a broader jurisdiction contributes to higher rates of social-rights litigation. Table 1 specifies the litigation rates for EU provisions that generate social rights. ECJ jurisdiction to adjudicate disputes related to these provisions was evident from their adoption, and individuals have invoked all these legal instruments, starting as early as 1964, with the primary EU regulation on social security (CR 1408/71, 1971) generating more than one half of the cases (58%). By contrast, Table 1 indicates that the CSMA and CSS have been the subject of only a few cases before the ECJ. This is striking because CSS provisions specify social-insurance benefits in a similar manner as EU provisions and CSMA provisions address social-assistance benefits that are absent from EU legislation. The major difference between the EU provisions on one hand and the CSS and CSMA provisions on the other hand has been the presence or absence of judicial jurisdiction. The texts of the CSS and CSMA provided for no judicial jurisdiction; the ECJ created its own jurisdiction by invoking the CSMA for the first time in 1998 and both the CSS and CSMA in 2001. Although still sparse, this recent litigation represents an advance over the intergovernmental bargaining called for in the CSS and CSMA texts and reflects that the two supranational courts have taken a different approach to jurisdictional boundaries. In contrast to the ECJ, the ECHR acts as a specialized court with a jurisdiction limited to the Human Rights Convention: It has never extended its purview to consider CSMA and CSS disputes (HUDOC search, August 6, 2004).

Finally, the data suggest that the indirect method by which individuals access justice in the EU, involving references from even first-instance national courts, has facilitated more social-rights litigation. Table 1 demonstrates that the Convention has inspired only a small trickle of social-rights cases before the ECHR in comparison to the large body of litigation before the ECJ. However, large litigation flows related to civil-rights disputes
(Cichowski, 2006, Table 2) suggest that the Convention’s direct appeals process is accessible to many parties. It is possible that variations in the nature of civil and social rights in the Convention provide a better explanation of distinct litigation rates than variation in individual access, but public-law scholars also suggest reasons why the poor, who benefit most from social rights, face more obstacles to legal access than the typically middle-class groups and upper-class groups most interested in civil rights. Research on the legal consciousness of the poor demonstrates that their underrepresentation in legal arenas results in part from their failure to conceptualize grievances legally and their understanding of legal arenas as instruments of repression (Gilliom, 2001; Handler, 2004). These factors impede litigation at all levels, but it is reasonable to expect that those interested in social rights may be more easily deterred by a lengthy vertical appeals process. A possible alternative explanation—that a low level of social-rights litigation is an indicator that social rights are readily available to all who wish to redeem them—is not tenable given evidence of serious impediments to the realization of social rights in practice (Daly, 2002).

Weaving the Web of European Social Rights Through the Case Law

The data on litigation rates illustrate that individuals have participated in supranational venues by claiming social rights. In this section, I analyze ECJ and ECHR case law to show how litigation has contributed to the development of supranational rights. Comparing the rights articulated by each court and contrasting these rights with EU and Convention legal provisions allows me to identify how the two legal orders expand European social rights. I demonstrate that the ECJ broadened entitlement to host-state social assistance. The ECHR’s innovative interpretation of Convention provisions, meanwhile, created social rights that fell outside the scope of EU law. Yet limitations have also coincided with this expansion. In particular, individuals who are not transnationally mobile, steadily employed, or members of traditional families face important exclusions.

The Development of European Social Rights Before the ECJ

The ECJ expanded social rights by interpreting EU provisions to broaden entitlements to social assistance. Member states clearly signaled that they did not intend to provide social assistance to migrant EU nationals by either
omitting it from consideration in EU provisions (CR 1612/68, 1968) or mentioning it only to exclude its availability (CD 364/90, 1990; CD 365/90, 1990; CD 96/93, 1993; CR 1408/71, 1971). Despite these limitations, the ECJ defined social security so broadly as to include noncontributory benefits that displayed features of social assistance (starting with ECJ, 1972) and held that the provision of CR 1612/68 (1968) that grants migrant workers equal access to social advantages includes social assistance (ECJ, 1985a, 1985b, 1986a). Member states reasserted their desire to exclude EU migrants from social assistance by unanimously adopting an exclusionary list of exempt benefits in CR 1247/92 (1992) in response to the ECJ’s social-security classification efforts, which I mention here to situate further developments (Conant, 2002). Although the ECJ’s initial incorporation of social assistance under the rubric of social advantages preceded the incident of legislative overrule, its expansive rulings in this area nonetheless directly contravened state preferences as they were expressed in existing legal instruments and observations at the court. Because states did not consider social assistance to be a social advantage, they relied on the 5-year residence requirement under the CSMA to exclude migrant EU nationals from entitlement. By classifying social assistance as a social advantage, however, the ECJ denounced the residence requirement as nationality discrimination if applied only to EU nationals who had exercised their free movement rights. As a result, applicants in these cases gained access to social assistance even though they had worked only intermittently or part-time in a host state for a fairly short period of time (ECJ, 1985a, 1985b, 1986a). Seven years after the original cases, the ECJ enforced its innovative interpretation in an infringement proceeding against Belgium (ECJ, 1992).

The ECJ continued to develop social rights by enforcing and expanding residential rights for EU citizens. Infringement proceedings demanded that Germany transpose residence directives into national law (ECJ, 1997) and denounced Italy for requiring EU students to provide proof of adequate resources to avoid becoming a burden on the social-assistance system rather than merely declaring that they possessed adequate resources (ECJ, 2000). Despite its unsuccessful effort to reclassify disputed benefits as social security, the ECJ began to limit the ability of states to rely on exemptions that they wrote into residence directives, definitively expanding entitlement to social assistance. It granted a French student access to the Belgian minimum subsistence allowance for his final year of university study in Belgium on the grounds that he had already financed his studies for 3 years and his dependence on social assistance would be temporary and therefore not a sufficient burden to justify denial (ECJ, 2001a). Another French student won access to subsidized loans to cover his living costs while attending university in the
United Kingdom on the grounds that he had been lawfully resident as an EU citizen for the 3-year period prior to his university study, a residence condition required of U.K. citizens as well (ECJ, 2005). In a case concerning a French participant in a Salvation Army reintegration program in Belgium, the ECJ argued that entitlement to social assistance from a host state could be grounded either on (a) EU citizens’ right to reside according to Article 18 EC (2002) and the prohibition against nationality discrimination (Article 12 EC, 2002) if they possess residence permits, which signify legal presence and are typically valid for 5 years or (b) migrant EU workers’ right to reside under Article 39 EC (2002) as long as the nature of any paid activity was real and genuine. A national court had already determined that the Salvation Army activity constituted work because it involved subordination and remuneration, albeit in the form of room, board, and pocket money. The only requirement to determine if such work was real and genuine was if the services performed could be considered part of the normal labor market (ECJ, 2004a).

Essentially indigent since his arrival in Belgium in 2000, this claimant epitomizes the EU citizen whose subsistence states did not want to support. Furthermore, the ECJ expanded entitlement to social-security benefits that provide a minimum subsistence to individuals who have not yet worked in the relevant state. Disagreeing even with the European Commission’s support of the Austrian law at issue, the ECJ ruled that public advances on child-support payments constitute family benefits and must therefore be provided by a host state to the children of resident EU citizens on the same condition as national citizens. The Austrian state, therefore, had to take on the obligation to maintain German children that a self-employed German father failed to meet (ECJ, 2001b). In D’Hoop, a recent Belgian graduate of a French university won access to an unemployment benefit for first-time job seekers when the ECJ denounced Belgium’s discrimination against EU citizens who completed either high school or postsecondary education in another member state but have clear ties to the state where they seek employment. Paradoxically, it required EU law to entitle a Belgian citizen to Belgian benefits in this case (ECJ, 2002a).

By contrast, the ECJ upheld the social-assistance exclusion in two cases, but only to justify why states had no legitimate reason to expel resident EU citizens. First, the ECJ ruled that the right of a third-country child to continue her education in a host state and the third-country mother’s right to stay as the primary parent enabled the German father, Baumbast, to remain although he had ceased his economic activity in the United Kingdom and his German health insurance did not cover emergency medical care there. Pointing out that Baumbast and his family had made no use of social assistance, the ECJ declared that expulsion for lack of emergency medical coverage constituted a
disproportionate interference with the right to free movement, which expanded social rights by effectively granting access to in-kind sickness benefits (ECJ, 2002b). In the second dispute, the ECJ decided that the lack of recourse to social assistance left the United Kingdom with no grounds to reject the residence of an EU citizen and her third-country mother as the primary parent, even though the mother had given birth in Ireland to obtain EU citizenship for the child (ECJ, 2004b).

The Development of European Social Rights Before the ECHR

The ECHR has begun to affect the development of European social rights as well. Few claims invoking Article 2 of Protocol 1 (Council of Europe, 1950) have been successful, but most of these disputes have involved religious controversies, restrictions on the placement of Roma caravans, and the public care of children rather than genuine restrictions on access to education. The ECHR did enforce rights to education in an early case against Belgium, in which the court guaranteed the right of children in Flemish districts access to French-language instruction (Use of Languages, ECHR, 1968). The ECHR also denounced a British school for suspending a student who refused to submit to corporal punishment (Campbell & Cosans v. United Kingdom, ECHR, 1982a). Yet it is the creative interpretation of Convention provisions on discrimination and the right to enjoy possessions that has produced the most dramatic expansions in social rights.

Fifteen cases invoking both Article 14 and Article 1 of Protocol 1 of the Convention (Council of Europe, 1950) involved benefits that are parallel to the ECJ’s social-rights case law. One dispute occurred between a Finnish national and Sweden before Finland and Sweden became EU member states: Darby successfully challenged a municipal Swedish tax exemption that arbitrarily discriminated between residents and workers formally resident in another state (Darby v. Sweden, ECHR, 1990). The other 14 cases involved individuals who can enjoy EU rights but whose entitlement to particular rights fell outside the scope of EU law. Thus, the ECHR’s interpretation of Convention provisions facilitated individual efforts to fill gaps in EU social protection. For example, Van Raalte successfully challenged a Dutch law that created a tax advantage for unmarried women above the age of 45 who have no children relative to men in similar circumstances (Van Raalte v. Netherlands, ECHR, 1997a). Because this case was internal to the Netherlands and involved a childcare benefit, it fell outside the scope of equal treatment for migrant workers and equal treatment in social security for men and women, which exempts child rearing (CD 779, 1979; CR 1612/68, 1968; CR 1408/71, 1971).
Gaygusuz represents the first case in which the ECHR recognized access to a social-security benefit as a property right that could not be denied according to forms of discrimination listed in Article 14 of the Convention (Council of Europe, 1950). In this case, the ECHR found that Austria could not deny a Turkish national entitlement to an emergency benefit to which a similarly situated Austrian worker would enjoy access on the basis of a prior history of work and contributions (Gaygusuz v. Austria, ECHR, 1996). As a result, the classic prohibition against nationality discrimination available under EU law to select categories of individuals extends to any individual in a signatory state who has made the requisite contributions to a social-insurance scheme. The ECHR continued to attach property rights to social benefits that derive from contributions to social insurance when it denounced efforts to deny a British widower, Willis, the same social protections that a widow would have received in the similar situation of being the surviving spouse of a primary earner (Willis v. United Kingdom, ECHR, 2002a). This individual victory circumvented the exclusion of survivors’ benefits from the scope of equal treatment in social security between men and women (CD 7/79, 1979; Article 3, paragraph 2). The ECHR presided over six friendly settlements related to parallel claims brought by widowed men against the United Kingdom (Sawden v. United Kingdom, ECHR, 2002b, Downie v. United Kingdom, ECHR, 2002c, Loffelman v. United Kingdom, ECHR, 2002d, Rice v. United Kingdom, ECHR, 2002e, Atkinson v. United Kingdom, ECHR, 2003a, Owens v. United Kingdom, ECHR, 2004a). In the Matthews case, the ECHR presided over another friendly settlement that eliminated sex discrimination in the granting of free public-transit passes to elderly British men and women of different ages (Matthews v. United Kingdom, ECHR, 2002f). Under EU law, nationality discrimination in access to such a social advantage could not proceed (CR 1612/68; Article 7, paragraph 2), but sex discrimination could, given the lack of connection to employment.

In three other cases related to pensions, the ECHR upheld rights for individuals whose circumstances did not fall under EU provisions on labor migration or sex discrimination. The ECHR denounced the Czech Republic’s variable pension scheme for similarly situated former military personnel (Buchen v. Czech Republic, ECHR, 2002g), required Greece to adjust a widow’s pension (Vasilopoulou v. Greece, ECHR, 2002h), and required Iceland to adjust a seaman’s disability pension (Asmundsson v. Iceland, ECHR, 2004b).

In two subsequent disputes, the ECHR ventured beyond contributory social insurance to award individuals benefits that bore no connection to prior contributions. Wessels-Bergervoet successfully challenged Dutch rules that provided a full pension on the basis of work or residence but discrimi-
nated against married women whose husbands worked and paid social-security contributions abroad (such discrimination was not true of married men). The applicant could not rely on EU law because CR 1612/68 (1968) and CR 1408/71 (1971) deal with the transfer of benefits from the state where the spouse works whereas CD 7/79 (1979) deals only with the working population (Article 2). Because Wessels-Bergervoet did not work and her husband worked abroad, her claim to entitlement based on residence in the Netherlands did not involve contributions to the relevant social-insurance scheme (Wessels-Bergevoet v. Netherlands, ECHR, 2002i).

In Koua Poirrez, the ECHR once again denounced discrimination that could have proceeded legally under EU law and expanded access to a benefit that bore no relationship to prior contributions or work. France refused disability allowance to an Ivory Coast national who had been adopted by a French citizen but was too old to naturalize, on the grounds that Koua Poirrez was neither French nor a national of a state with a reciprocity agreement. EU law was of no help in denouncing this nationality discrimination because the adoptive father had never exercised his free movement rights, and therefore, his third-country family members had no access to EU social rights. The ECHR rejected French claims that the right of property under Article 1 of Protocol 1 (Council of Europe, 1950) could not be extended to noncontributory benefits. Instead, the ECHR found that pecuniary rights can also involve noncontributory benefits that take on the character of social assistance (Koua Poirrez v. France, ECHR, 2003b).

**Gaps in the Web of Social Protection:**
**Remaining Exclusions in Social Rights**

Although individuals may invoke ECJ and ECHR rulings to claim complementary protections, gaps persist that discriminate according to transnational mobility, employment history, and family status. First, the dependence of some EU social rights on the exercise of free movement excludes individuals on the sole grounds that they have not crossed borders in the EU. In the joined cases of Khalil et al. (ECJ, 2001c), four stateless persons and the spouse of a refugee contested, respectively, a discontinuation of child benefits and a refusal of child-raising allowance in Germany. Stateless persons and refugees were included in the scope of many European social-rights provisions to accommodate the international obligations of member countries. Unfortunately for these parties, all of whom fulfilled the residence requirements of the CSMA, the benefits in question fall under the category of social security in CR 1408/71 (1971) rather than social assistance in the CSMA.
Designed to facilitate labor mobility within the EU, CR 1408/71 (1971) does not apply where the situation of a worker links it solely with a nonmember country and one EU member state. As a result, the ECJ concluded that stateless persons or refugees would need to move between EU member states before CR 1408/71 (1971) would come into effect (ECJ, 2001c). Such a requirement is virtually unattainable for these parties because stateless persons and refugees do not enjoy free movement rights within the EU.

Second, at the same time that individuals who remain in one state may fail to qualify for rights, those who are unemployed outside of their country of origin face barriers that do not affect nationals. In Collins, the ECJ upheld the requirement of “habitual residence” before a migrant EU citizen could receive a jobseekers allowance, an unemployment benefit that provides for subsistence while individuals search for work in the United Kingdom. Despite the advent of European citizenship, the ECJ finds it legitimate to limit such social-security benefits to those who have established a genuine link with a national labor market (ECJ, 2004c). In the absence of prior residence as the child of EU migrant workers or national citizens (ECJ, 1996, 2002a), equal treatment for EU citizens will exclude access to social insurance until labor market participation is evident.

Two other cases demonstrate that gaps in European social rights can also exclude unemployed EU migrants from important social protections in host states where they are long-term residents. In the Sala case (ECJ, 1998a), the ECJ extended its jurisdiction to affirm the unemployed Spanish national’s legal residence in Germany despite her dependence on social assistance under Articles 6 and 7 of the CSMA. But the ECJ then refrained from determining whether Sala could be considered a worker under EU law, a status that would then entitle her to the child-raising allowance she sought. With respect to this status, Sala faced a predicament: If she were not a worker under EU law, she could be denied access to social-insurance benefits such as the child-raising allowance in a host state, but the German allowance only applies to individuals who are not engaged in gainful employment or not so engaged on a full-time basis. Before the advent of EU citizenship and the ECJ’s invocation of the CSMA, an earlier dispute suggested that nearly lifelong EU national residents enjoyed no right to social assistance. In response to a social-assistance claim by the adult daughter of a retired EU migrant worker, the ECJ ruled that descendants of migrant workers do not retain equal rights to access social benefits after they have reached the age of 21, are no longer dependent on their parents, and do not have the status of workers themselves. Although it accepted that dependence resulted from the factual situation of reliance on parental support, the ECJ subjected equal treatment
to social advantages to the condition that it benefit the worker himself. Because the applicant in this case, Lebon, had left her father’s home to receive medical care in another community, her social assistance would presumably no longer be any benefit to him (ECJ, 1987). As the children of migrant workers who chose to remain in the host states where they grew up, both Sala and Lebon faced discrimination relative to national citizens.

Linkage of social protection to some form of employment is likely to remain unchallenged given existing case law on Article 4 of the Convention (Council of Europe, 1950) on forced labor. In a handful of disputes on this provision, the ECHR has found a number of labor obligations to be compatible with the notion of “work or service, which forms part of normal civic obligations” (Article 4, paragraph 3d). States may require individuals convicted of theft or vagrancy to earn a sufficient income from poorly paid prison labor before they are released (De Wilde et al. v. Belgium, ECHR, 1971, Van Droogenbroeck v. Belgium, ECHR, 1982b). They may also require lawyers to perform unpaid legal aid services for the benefit of indigent clients (Van der Mussele v. Belgium, ECHR, 1983a) and citizens to perform public service such as participation in fire brigades (Karlheinz Schmidt v. Germany, ECHR, 1994). Given this approach to normal civic obligations, it is unlikely that the ECHR would reject policies that link social protections to some type of work.

Germany’s denial of a child-raising allowance to Sala reflects a third important limitation in European social rights: privilege conferred on traditional families often excludes single parents and nonmarried couples. Raising a child would have earned Sala the disputed allowance if she had been married to an EU citizen working in Germany. Nationality discrimination is also evident, as a German stay-at-home mother would be entitled to the allowance without a husband (ECJ, 1998a). Furthermore, research documents discrimination against nontraditional partnerships (Elman, 2000). For example, unmarried heterosexual partners may gain spousal rights only if a host member state grants such rights to its own nationals and their foreign (either EU or third-country) partners (ECJ, 1986b), and homosexual partners are denied treatment accorded to spouses (ECJ, 1998b) even when the relationships are officially registered in the member state of origin (Court of First Instance, 1999). The ECHR has adopted a similarly conservative approach: It has denied family status to homosexual relationships (X & Y v. United Kingdom, ECHR, 1983b, X, Y, & Z v. United Kingdom, ECHR, 1997b), and it upholds state prohibitions against adoption by homosexuals (Frette v. France, ECHR, 2002)).
Conclusion

Individual participation in supranational legal venues has contributed to the expansion of social rights beyond the national community. This development marks a major departure from the traditional domination of states in international politics and exclusive commitment to the social welfare of fellow national citizens. This departure is striking because even the most vulnerable individuals in society have gained access to supranational courts despite the efforts of national governments to avoid responsibility for poor foreigners by excluding their access to social assistance under EU law and allowing states to deport assistance recipients who do not fulfill lengthy residence requirements. Supranational rights, enforceable by supranational courts and accessible to individuals, have developed far beyond the original intentions of their drafters. The evidence presented in this article suggests that a greater number of formal supranational rules addressing social rights, broader judicial jurisdictional powers, and easier individual access to justice in the EU context facilitated higher rates of social-rights litigation. Yet judicial formalization of social rights in the narrower Convention jurisdiction, along with the increasing availability of direct access, has also begun to inspire litigation that develops social rights.

Individual engagement needs to increase substantially, however, if the democratization of supranational legal venues is going to serve the diverse interests of European society in any remotely representative way. What remains evident from existing research on supranational litigation is that Marc Galanter’s (1974) “haves” still come out ahead. Outside of the legal mobilization of economic enterprises (Alter & Meunier, 1994; Conant, 2002, 2003; Harlow & Rawlings, 1992), most public interest mobilization (Alter & Vargas, 2000; Börzel, 2006 [this issue]; Cichowski, 1998, 2004; Kelemen, 2006 [this issue]) has concentrated on the concerns of middle- to upper-income groups. Although the presence of any social-assistance litigation is striking on its own, legal mobilization that addresses social rights remains comparatively underdeveloped (Conant, 2002, 2004; Guiraudon, 2000).

Moreover, gaps in social protection still persist for individuals who reside exclusively in a single state, migrate while unemployed, or fall outside of traditional families. The typical premium placed on movement may remain because it is consistent with the interests of EU organizations, which, in creating a transnational class of Europeans who enjoy expanded rights, may redirect loyalties to the EU (Haas, 1958). From a comparative perspective, this strategy has its precedents in national political development: The U.S.
federal state selectively offered benefits such as military pensions and land grants to reward service to the federal union and create a national identity (Jensen, 2003). Yet national institutions may play a role in addressing this gap and constructing the future dimension of European social rights more generally. For example, national governments may remove migration requirements because they seek to avoid treating stationary nationals worse than EU migrants or mobile nationals. And as the supranational courts hesitate to recognize nontraditional relationships, official recognition of these families within states is increasingly common. Pending (or failing) ratification of the EU Treaty establishing a Constitution for Europe, which prohibits discrimination based on sexual orientation (Title III, Article II-21 [European Union, 2003]), national governments may be a more likely source of expansion of social rights in this area than the ECJ and ECHR.

Finally, national and EU leaders may want to rethink policies that impede the movement of the unemployed. Although officials shun “social-welfare tourism,” achieving greater labor mobility is one of few means available to counteract asymmetric cyclical downturns in the aftermath of monetary union, which eliminates interest-rate and exchange-rate adjustments and stringently restricts deficit spending. National governments may unilaterally circumvent unwelcome extensions of rights for the unemployed, however, because all social benefits derive from national provisions that are vulnerable to retrenchment. As long as the desire to provide protections to a national community is stronger than the desire to exclude foreigners, however, European social rights may continue to extend the safety net supranationally.

References


European Court of Justice. (2002a). D’Hoop, Case C-224/98, European Court Reports, I-6191.
European Court of Justice. (2002b). Baumbast & R, Case C-413/99, European Court Reports, I-7901.
European Court of Justice. (2004a). Trojan, Case C-456-02, European Court Reports, not yet reported.
European Court of Justice. (2004b). Zhu & Chen, Case C-200/02, European Court Reports, not yet reported.
European Court of Justice. (2004c). Collins, Case C-138/02, European Court Reports, not yet reported.
European Court of Justice. (2005). Bidar, Case C-209/03, European Court Reports, not yet reported.
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