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STRICTNESS AND SUBSIDIARITY: AN INSTITUTIONAL PERSPECTIVE ON AFFIRMATIVE ACTION AT THE EUROPEAN COURT OF JUSTICE

SEAN PAGER*

Abstract: The move to strict review of gender equality cases by the European Court of Justice raises questions regarding the institutional role of the Court. Comparisons between the ECJ's affirmative action case law and US jurisprudence serve to illuminate the very different role played by the ECJ as the central arbiter of a supranational judiciary. In its readiness to decide contextual issues better left to the national courts, the European Court has taken an "American approach" to affirmative action out of keeping with its role. Closer attention to the dynamics of the Court's partnership with national judiciaries would serve as a step toward a functional conception of judicial subsidiarity.

INTRODUCTION

The 1995 judgment of the European Court of Justice (ECJ) in the case of *Kalanke v. Freie Hansestadt Bremen*¹ attracted widespread attention both in the European press and in scholarly commentary.²

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¹ Case 450/93, *Kalanke v. Frei Hansestadt Bremen*, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995). Note: this article will follow the European convention of pin citing ECJ opinions by paragraph number, when available.

² See Linda Senden, *Positive Action in the EU Put to the Test: A Negative Score?*, 3 MAASTR. J. EUR. COMP. L. 146 (1996) (commenting on the unusually controversial nature of the judgment). For a sampling of commentary, see Sarah Moore, *Nothing Positive from the Court of Justice*, 21 EUR. L. REV. 156 (1996); Louis Charpentier, *L'Arrêt Kalanke: Expression du Discours Dualiste de l'Égalité*, 32 REVUE TRIMESTR. DROIT EUR. 281 (1996); Dagmar Schiek, *Positive Action in Community Law*, 25 INDUS. L.J. 239 (1996); Tita Loenen & Albertine Veldman, *Preferential Treatment in the Labour Market After Kalanke: Some Comparative Perspectives*, 12 INT'L J. COMP. LAB. L & INDUS. REL. 43 (1996); Marie-Thérèse Lanquetin, *De l'Égalité des Chances: A Propos de l'Arrêt Kalanke*, 1996 DROIT SOC. 494; Helen Fenwick, *Perpetuating Ine-*

Although it was couched in tentative language, many read the opinion as putting the handwriting on the wall for positive action programs in Europe.³ The *Kalanke* judgment was handed down the same year as the U.S. Supreme Court issued its *Adarand*⁴ ruling, which was widely viewed as having an equivalent effect on affirmative action in the United States.⁵

In hindsight, both predictions have proved premature. Although affirmative action programs in the United States remain on the defensive politically,⁶ attempts to achieve their total abolition in the courts appear to have stalled.⁷ Moreover, in Europe, what began as a vigorous legislative counterattack⁸ ultimately assumed constitutional force

quality in the Name of Equal Treatment, 18 J. SOC. WELFARE & FAM. L. 263 (1996); Sacha Prechal, *Case Law: Kalanke*, 33 COMMON MKT. L. REV. 1245 (1996); Eva Brems, *Case Law: Kalanke*, 2 COLUM. J. EUR. L. 172, 75-76 (1995/96); Anne 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).

³ See, e.g., Senden, *supra* note 2, at 146; Sionaidh Douglas-Scot, *Ruling Out Affirmative Action*, 21 EUR. L. REV. 1586 (1995). Positive action is the European term for affirmative action; in the European context, such efforts are generally focused on gender rather than race.

⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵ See, e.g., David Savage, *High Court Deals Severe Blow to Federal Affirmative Action*, L.A. TIMES, June 13, 1995, at A1; *Death by Judges? Affirmative Action*, THE ECONOMIST, June 17, 1995, at A28.

⁶ Opponents of affirmative action notched recent victories in two voter initiatives, Proposition 209 in California and I-200 in Washington, both of which repealed preference programs statewide. See *Affirmative Action Suffers Setback*, S.F. CHRON., Nov. 4, 1998, at A2 (discussing both ballot repeals). Yet, abolitionists failed in similar efforts in Houston and in the U.S. Congress. See DeWayne Wickman, *Affirmative Action Supporters Must Seize the Initiative*, Gannett News Services, Nov. 6, 1997 (describing Houston vote rejecting repeal); *House GOP Leaders Pull Support for Bill Ending Affirmative Action*, DALLAS MORNING NEWS, July 13, 1996, at 7A.

⁷ Although a federal appellate court in the Fifth Circuit issued a broad ruling holding preferences in public education unconstitutional, the Supreme Court declined to hear the case, limiting its precedential effects to that circuit. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). Courts in the Sixth and Ninth Circuits have since reached contrary results, creating a split in circuit law. See *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1200 (9th Cir. 2000); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). The Supreme Court itself has always been careful to leave a narrow window open for affirmative action in its previous rulings. Even in *Adarand*, the Court goes out of its way to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" 515 U.S. at 237.

⁸ The European Commission (the main administrative body of the European Community (E.C. or Community)) suggested amending the E.C. directive that *Kalanke* had construed in order to "clarify" the continued permissibility of positive action. See Commission Proposal for a Council Directive Amending Directive 76/207/EEC, 1996 O.J. (C 179) 8.

as part of the Amsterdam Treaty.⁹ Meanwhile, the ECJ, no doubt sensing the political tide, has shifted course.¹⁰ Its judgment in *Marschall v. Land Nordrhein Westfalen*¹¹ effectively reversed the result of *Kalanke* without overruling it.

Beneath their divergent outcomes, however, *Kalanke* and *Marschall* raise deeper questions regarding the role played by the ECJ as it moves to “constitutionalize”¹² gender equality by applying a “strict interpretation” of derogations.¹³ Although this jurisprudence has inspired a flood of commentary, the Court’s institutional role in deciding individual rights cases—and in particular its interaction with the national judiciaries and the relevance of the subsidiarity principle in this regard—remain undertheorized.¹⁴

⁹ The Treaty of Amsterdam amended the original Community treaties and the Treaty on European Union. TREATY OF AMSTERDAM, Oct. 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The latter (also known as the Maastricht Treaty) was itself a fundamental revision of Community law in 1992, which established the European Union (E.U.) as a new umbrella organization of which the E.C. constitutes the principal component. TREATY ON EUROPEAN UNION, Feb. 7, 1992, [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The basic, quasi-constitutional framework for Community law remains the EC Treaty (formerly known as the EEC Treaty or Treaty of Rome), as amended by these subsequent treaties. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. The Treaty of Amsterdam amendments to the EC Treaty inserted a provision, Article 141(4), which recognizes the legality of positive action for women as a matter of treaty law. For further discussion of Article 141(4) and the Amsterdam Treaty see *infra* notes 195–198 and accompanying text.

¹⁰ See Gillian More, *Case Law: Marschall*, 36 COMMON MKT. L. REV. 443, 451 (1999) (noting that “various external pressures had been brought to bear on the Court as a result of the *Kalanke* judgment” and that “[t]he Court does not operate in a policy vacuum”).

¹¹ Case 409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997).

¹² See Gillian More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right*, in THE EVOLUTION OF E.U. LAW 535, 535–48 (P. Craig & G. de Burca eds., 1999) (describing ECJ’s development of its equality jurisprudence from narrow instrumental origins to become an autonomous principle of individual rights).

¹³ See *infra* notes 112–114 and accompanying text.

¹⁴ See Grainne de Burca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. OF COMMON MKT. STUD. 217, 218 (1998) (arguing that the ECJ’s policy role merits closer scrutiny); Claire Kilpatrick, *Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ*, 4 EUR. L.J. 121, 145–47 (1998) (arguing that the role of the national courts in the development of gender equality remains inadequately theorized). For examples of scholarship applying an institutional analysis to Community rights protection, see generally Tamara Hervey, *Sex Equality in Social Protection: New Institutional Perspectives on Allocation of Competence*, 4 EUR. L.J. 196 (1998); Joseph Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

The present work locates the values served by subsidiarity in the positive action cases and connects them with the roles played by the ECJ and national judiciaries under the Article 234 (formerly article 177) procedure of preliminary references. Comparisons with American affirmative action jurisprudence help to clarify the meaning of "strict" judicial review and point to the very different institutional role appropriate to the central court of a supranational judiciary. By ruling on affirmative action at the European level, it is argued that the Court of Justice decided a contextually contingent question better left to the national judiciaries.

Part I of this article summarizes the *Kalanke* and *Marschall* decisions; part II compares the logic of these decisions with the rationales of American case law; part III investigates the way in which these cases analyze equality as a European right; part IV considers the relevance of the subsidiarity principle to this analysis; and part V situates the positive action cases within ECJ's fundamental rights jurisprudence.

I. FACTS AND LAW

The ECJ's rulings in *Kalanke* and *Marschall* provide a striking contrast because factually the cases are almost identical. In both cases, a male state employee challenged a promotion decision in favor of a female rival based on a preference for the "under-represented" sex where the candidates' qualifications were otherwise equal. The only factual distinction that appears relevant was that in *Kalanke* the rules governing the preference may have been more inflexible than those at play in *Marschall*.

A. *Facts of Kalanke*

Eckhard Kalanke and Heike Glissmann were candidates short-listed for a promotion in the Parks Department of the City of Bremen in 1990. Although Kalanke had received the initial recommendation for the post, resistance from the Personnel Committee led to the referral of the matter to a Conciliation Board. The Board ruled that, as both candidates possessed equivalent qualifications, Glissmann should be given priority as a woman. The board relied on a law then in force in the *Land* (province) of Bremen requiring that female candidates receive preference, all other criteria being equal, in sectors in which women were under-represented. The law defined under-representation as occurring when women constitute less than half of the employees.

Kalanke challenged this outcome under German law. He was unsuccessful in lower courts and then appealed the case to the *Bundesarbeitsgericht* (the Supreme Labor Court of Germany).¹⁵ That court again rejected Kalanke's German law arguments.¹⁶ However, faced with Kalanke's further claim that the gender preference mandated by Bremen's statute violated European Community (Community or E.C.) law, the German court requested a preliminary ruling from the ECJ under the Article 234 (formerly article 177) procedure of the E.C. Treaty.

Article 234 provides a mechanism for national courts to refer questions regarding the interpretation of Community law to the ECJ. The judgments which the ECJ issues in response to Article 234 referrals address questions of law in the abstract, leaving it to the referring court to apply the law to the facts of the case.¹⁷

B. *The Advocate General's Opinion in Kalanke*

Advocate General Tesouro presented the case to the ECJ in a detailed opinion.¹⁸ The opinion began by reciting Article 2(1) of the Equal Treatment Directive's "peremptory" mandate "that there shall be no discrimination whatsoever on grounds of sex."¹⁹ In the Advo-

¹⁵ Kalanke not only challenged the gender preference in principle, but also claimed that, in any case, he was a more deserving candidate. He justified this latter claim, in part, on "social grounds," arguing that as the sole breadwinner in his family, he deserved preference over Ms. Glissman who had no such responsibilities. See BAG, 2 NZA 77 (1994); Prechal, *supra* note 2, at 1245-1246.

¹⁶ See BAG, 2 NZA 77 (1994); Prechal, *supra* note 2, at 1245-1246.

¹⁷ Article 234 referrals operate in a manner roughly analogous (albeit inversely) to the certification procedures in many U.S. states by which federal courts may seek guidance as to novel questions of state law. Although the judgments that the ECJ issues in response to Article 234 referrals in theory only address questions of law in the abstract, it should be noted that the ECJ receives complete case records from the referring national court. The European Court often shapes its legal opinion in light of the facts before it—at times seeming to encroach on the national court's prerogative to "decide" the final outcome. See Jeffrey Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COM. L. 421, 428-30 (1996); Jens Rinze, *The Role of the European Court of Justice as a Federal Constitutional Court*, 1993 PUB. L. 426, 440-41.

¹⁸ Opinion of Advocate General Tesouro, Case 450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, [1995] 1. C.M.L.R. 175 (1995). Modeled on the French judicial system, advocate generals (AG) serve a special function within the ECJ judiciary. The AG assembles the relevant legal precedents and provides a comprehensive exploration of the issues raised by the case via a preliminary opinion on which the judges may—or may not—rely in reaching the judgment of the Court.

¹⁹ Opinion of Advocate General Tesouro, 1995 E.C.R. I-3051, at paras. 2, 6 (quoting Article 2(1) of the Council Directive 76/207/EEC, On the Implementation of the Princi-

cate General's mind, the gender-conscious basis on which the Bremen law operated clearly involved sex discrimination.²⁰ The question the Advocate General posed is whether such a law could fall into the exception provided for by Article 2(4) of the Directive, permitting "measures to promote equal opportunity . . . by removing existing inequalities which affect women's opportunities."²¹

Kalanke was not the first case in which the ECJ had interpreted Article 2(4). An earlier case, *Commission v. France*, examined the provision in connection with a panoply of special rights that French labor law accorded women, including shortened work hours, early retire-

ple of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39/40) 2 [hereinafter Equal Treatment Directive or Directive]).

Directives are a form of secondary (i.e. non-treaty) legislation which have binding force on the E.C. Member States, obligating them to fulfill certain legislative objectives while leaving it to their discretion as to the means of implementation. See EC TREATY, *supra* note 9, art. 249 (formerly art. 189); Hervey, *supra* note 14, at 213. Although Directives must be "transposed" into national law to be fully effective vis-à-vis the public, the Court has held that certain provisions of directives may have "direct effect," allowing individuals to rely on them in an action against the state. See Case 152/84, *Marshall v. Southampton & S.-W. Hampshire Area Health Auth.*, 1986 E.C.R. 723, para. 48. As its title indicates, the Equal Treatment Directive mandates that Member States implement laws ensuring equal treatment between men and women in all aspects of employment. The central provision of the Directive is contained in Article 2. It sets forth a general rule of gender-blindness in Article 2(1). Articles 2(2-4) then carve out various exceptions: Article 2(2) permits certain gender-specific jobs (BFOQs in Title VII parlance); Article 2(3) allows special measures to protect women's biological conditions, e.g. maternity leave; and Article 2(4) allows measures to equalize opportunities, i.e. positive action. The full text of Article 2 reads:

1. For the purpose of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those 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.

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1) [employment].

Equal Treatment Directive, *supra* note 19, at art. 2.

²⁰ See Opinion of Advocate General Tesaurò, 1995 E.C.R. I-3051, at para. 10.

²¹ *Id.* at paras. 2, 6-7 (quoting Article 2(4) of the Equal Treatment Directive).

ment, family leave, and child-care allowances.²² The case primarily analyzed the permissibility of these benefits under a different provision of the Directive, Article 2(3).²³ However, when it came to Article 2(4), the Court read that provision as “specifically and exclusively designed to allow measures which, although discriminatory in appearance, actually aim to eliminate or reduce de facto instances of inequality which may exist in actual working life.”²⁴

Advocate General Tesauro interpreted this formulation from *Commission v. France* as permitting gender-specific measures that are remedial in that they target the obstacles holding women back. By removing inequalities, he argued, positive action under Article 2(4) helps to ensure equality of opportunity, leveling the playing field for men and women. Therefore, despite a gender specific form, such measures do not represent a “genuine derogation[.]” from the principle of equal treatment.²⁵ Indeed, Tesauro commented that “it is only in this way that real and effective substantive equality will be achieved.”²⁶

In making these arguments, Tesauro implicitly adopted a process view of equality. Throughout his opinion, he emphasized that Article 2(4) of the Directive addressed equality of opportunities, not outcomes. Equality was to be regulated only as to process, not result.²⁷ This distinction lay at the heart of Tesauro’s analysis: the Advocate General rejected the employment preference applied under the Bre-

²² Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, [1989] 1 C.M.L.R. 408 (1988).

²³ Article 2(3) permits certain “provisions concerning the protection of women” to be gender-specific in form. Equal Treatment Directive, *supra* note 17, at art. 2(3).

²⁴ *Commission v. France*, 1988 E.C.R. 6315, at para. 15. Having laid out this interpretive formula for Article 2(4), the Court then merely noted that “nothing in the papers of this case, however, makes it possible to conclude that a generalized preservation of special rights for women [specified by French law] may correspond to the situation envisaged by that provision.” *Id.*

²⁵ *See id.* at paras. 16–17.

²⁶ Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 15. By contrast, Tesauro opined that pursuing a policy of formal equality of treatment without regard for unequal opportunities “would . . . be the negation of equality.” *Id.* at para. 17.

²⁷ *See id.* at para. 13. Tesauro used slightly different terminology: contrasting “starting points” with “points of arrival.” He wrote that “giving equal opportunities can only mean putting people in position to attain equal results and hence restoring conditions of equality as between members of the two sexes as regards starting points.” *See id.*

men statute because he viewed it as aimed at outcomes, not opportunities.²⁸

Tesauro argued that employment preferences were ill-suited to the task of equalizing opportunities because he saw the main structural obstacles hindering women's advancement as lying outside the workplace.²⁹ He believed that what women needed foremost in order to compete in the labor force was vocational counseling and training to upgrade their qualifications as well as progressive social policies, such as subsidized child-care, to reduce the burden of home life.³⁰ By contrast, Tesauro viewed employment preferences as "tak[ing] on a compensatory nature" linked to "historical discrimination."³¹ Such 'paybacks,' the Advocate General contended, did nothing to address the obstacles which women face today. Instead of tackling the root causes of gender inequality, preferences merely papered over defects in the process by imposing a predetermined result. As such, they offered only "illusory" progress and were "irrelevant" to the goal of enhancing opportunities in the long-run.³²

Tesauro's opinion was roundly criticized in scholarly commentary for relying on faulty premises. By assuming that preferences serve only to compensate for *past* discrimination, the Advocate General ignored the very real *present* obstacles which women face in the workplace today.³³ Tesauro suggested that because the Bremen preference only applied where "two candidates of different sex have equivalent qualification [this] implies by definition that the two candidates have had and continue to have equal opportunities"³⁴—a conclusion that

²⁸ Tesauro repeated his conviction that the Bremen law is not designed to remove any obstacle to gender equality no less than four times in as many paragraphs. *See id.* at paras. 21, 22, 24.

²⁹ Tesauro described these as "the general situation of disadvantage caused by past discrimination and the existing difficulties concerned with playing a dual role." *Id.* at para 18. "Dual role" here referred to the conflicting obligations of working women torn between their family lives and career. As for the nature of "past discrimination," the Advocate General elaborated on this in the following paragraph. *Id.* at para. 19. He referred to "different (historical) social and cultural conditions (for instance, the disparity in education and vocational training)." *Id.* at para 19. Senden, among others, argued that Tesauro's views amount to a denial of workplace discrimination. *See* Senden, *supra* note 2, at 160.

³⁰ *See* Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 9.

³¹ *See id.* at paras. 9, 19.

³² *See id.* at paras. 18, 28.

³³ Tesauro further confused the normative with the actual when he suggested that public employment represents a "sector in which equal treatment of the two sexes is by definition—or at least, ought to be—effectively guaranteed." *Id.* at para. 24.

³⁴ *Id.* at para 13. The Advocate General did acknowledge in a footnote the possibility that "the method employed to assess candidates' merits [might] indirectly discriminat[e]

assumes selections were made solely based on qualifications. In fact, commentators pointed out that the promotion in the initial round of decision-making had gone in favor of the man, Kalanke, based in part on "social criteria" discriminatory to women.³⁵

Furthermore, Tesauro's assumption that preferences acted only at the level of outcomes, not opportunities, failed to take into account the potential for a preference regime to function dynamically as an instrument of structural change. By breaking through glass ceilings and infiltrating "old boy" networks, an early vanguard of women can enact changes that make it easier for women to compete later on even terms.³⁶ Indeed, the German court which referred the *Kalanke* case to the ECJ described a very similar phenomenon when it explained that Bremen's preference scheme may "help to overcome *in the future* the disadvantages which women *currently* face" by acclimating people to seeing women in more senior posts.³⁷

against women." *Id.* at para. 14 n.12. But he considered the anti-discrimination protections of Article 2(1) sufficient to safeguard against such a possibility. *See id.* at para. 6. By contrast, Advocate General Jacobs, writing in the later *Marschall* case, acknowledged that "the fact that two candidates have equivalent qualifications does not necessarily mean that they previously had equal opportunities, since one of the two might quite simply have acquired equivalent qualifications in the face of more difficult circumstances . . ." Opinion of Advocate General Jacobs, Case 409/95, *Marschall v. Land Nordrhein Westfalen*, 1997 E.C.R. I-6363, [1998] 1 C.M.L.R. 547 (1997), para. 30. He went on to add that "where a man and woman are equally qualified for promotion, the woman will frequently be younger or have shorter service. It may be thought that in such circumstances the woman would thereby have shown herself more capable than her competitor and be the natural choice." *Id.* In fact, in such a scenario, the man would typically prevail based on seniority. *See* Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, ex parte Danfoss A/S*, 1989 E.C.R. 3199, [1991] 1 C.M.L.R. 8 (1989), para. 24 (noting that linking length of service to pay disadvantages "in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career."). *But see* Case 184/89, *Nimz v. Freie und Hansestadt Hamburg*, 1991 E.C.R. I-297, [1992] 3 C.M.L.R. 699 (1991) (requiring that seniority preferences be based on an objective correlation between time served and job performance).

³⁵ *See, e.g.*, Schiek, *supra* note 2, at 240 (noting Kalanke was given priority because his salary supported a dependent and because he had seniority); Prechal, *supra* note 2, at 1246 (priority given to Kalanke as breadwinner); Senden, *supra* note 2, at 161 (same).

³⁶ Sandra Fredman, *Affirmative Action and the European Court of Justice: A Critical Analysis, in SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION* 171, 189-90 (Jo Shaw ed., 2000); Charpentier, *supra* note 2, at 298-99; Fenwick, *supra* note 2, at 267. Examples of such structural changes could include enactment of more family-friendly policies that allow part-time work, flexible hours, and/or family leave. In addition, merely having women on employment selection committees may help to re-orient hiring practices toward gender-neutral criteria.

³⁷ *See* Kalanke, 1995 E.C.R. I-3051, at para. 14 (emphasis added). Strangely, although this observation was quoted in the *Kalanke* judgment, it did not appear in Tesauro's opinion.

Finally, Tesauro was too quick to dismiss the linkage of preferences to under-representation as purely a numbers battle.³⁸ The problem with this reading of the statute, as Tesauro himself acknowledged, was that “under-representation of women in a given sector [may] reflect[] existing inequality.”³⁹ He attempted to deflect such concerns by observing that “under-representation . . . albeit indicative of inequality, is not necessarily attributable to a consummate determination to marginalise women.”⁴⁰ Intentional discrimination is beside the point.⁴¹ Under Community law, gender imbalance constitutes *prima facie* evidence of indirect discrimination, regardless of intent.⁴² In any case, the purpose of positive action under Article 2(4) of the Equal Treatment Directive is to address proactively the more subtle barriers that hinder women’s advancement, without the need to prove discrimination of any kind.⁴³

By recognizing that under-representation *can* be “indicative of inequality,” the Advocate General opened the way to a different reading of the preference.⁴⁴ Tesauro’s qualifier, “not necessarily,” implicitly acknowledged a crucial ambiguity.⁴⁵ The fact is that, in some cases, under-representation *might* indicate gender bias that preferences *could* therefore serve to counteract. Tesauro dealt with this ambiguity procedurally by invoking the standard of review. He presented Article 2(4) as “a derogation from an individual right [that] must be inter-

³⁸ Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 28.

³⁹ *Id.* at para. 24. The link between gender imbalance and bias has also been identified by many commentators. See, e.g., Charpentier, *supra* note 2, at 12; Loenen & Veldman, *supra* note 2, at 48.

⁴⁰ Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 24.

⁴¹ See Ursula O’Hare, *Positive Action Before the European Court of Justice: Case C-450/93 Kalanke v. Freie Hansestadt Bremen*, WEB J. OF CURRENT LEGAL ISSUES (1996), at <http://www.ncl.ac.uk/~nlawwww/1996/issue2/ohare2.html> (commenting that it is unclear why lack of intent undermines need to rectify inequality).

⁴² See, e.g., Case 127/92, *Enderby v. Frenchay Health Auth.*, 1993 E.C.R. I-5535, [1994] 1 C.M.L.R. 8 (1993) (finding indirect discrimination based on disparate impact adversely affecting women). The U.S. analogue of indirect discrimination is disparate impact theory under Title VII.

⁴³ See Council Recommendation 84/635/EEC, 1984 O.J. (L 331) (calling for positive action to go beyond anti-discrimination law in eliminating gender bias in employment due to “existing attitudes, behaviour and structures”). U.S. courts also endorse a proactive rationale for affirmative action. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O’Connor, J., concurring) (in order to encourage voluntary remediation, proof of actual discrimination is not required to justify affirmative action).

⁴⁴ See Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 24.

⁴⁵ See *id.*

preted strictly."⁴⁶ For Tesauro, this strict interpretation could not be reconciled with the "element of arbitrariness in any preferential treatment which is mechanically confined to the under-represented group and based solely on that ground."⁴⁷ In other words, the ambiguity would be construed against the statute, and its arbitrariness seemed to belie a remedial intent.

In reaching this conclusion, Tesauro's assessment of the statute's function flowed directly from its form. Preferences that are "mechanically" tied to numbers, Tesauro suggested, can only serve "to rebalance the numbers of men and women, but will not remove the obstacles that brought about that situation."⁴⁸ In the absence of a more finely tuned instrument, the preference scheme must thus be rejected.

C. *The Kalanke Judgment*

The judgment of the ECJ in *Kalanke* was short and terse.⁴⁹ However, as one commentator has observed, almost everything that the ECJ did say could be traced to Advocate General Tesauro's opinion.⁵⁰ Like Tesauro, the ECJ began with the proposition that the Bremen gender preference would violate Article 2(1)'s antidiscrimination precept unless it fell within the exception carved out by Article 2(4).⁵¹ Following Tesauro, the ECJ then characterized Article 2(4) as "a derogation from an individual right laid down in the Directive [which] must be interpreted strictly."⁵² The ECJ held that national laws such as Bremen's failed this "strict" standard for two reasons.

⁴⁶ *Id.* at para. 23. Taken as a general proposition about derogations, this statement merely followed earlier precedents. What was noteworthy, however, was its implied premise that Article 2(4) was a derogation when in fact Tesauro stated at the outset of his opinion that Article 2(4) was "not [a] genuine derogation[]." *Cf. id.* at para. 17. Earlier precedents had also supported a more liberal reading of Article 2(4). *See infra* notes 104–109 and accompanying text.

⁴⁷ Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 24.

⁴⁸ *Id.* Wearing both belt and suspenders, Tesauro added the additional objection that the Bremen scheme is "disproportionate in relation to the aim pursued." Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 25. However, the ensuing clause of Tesauro's sentence made it clear that his real objection was to the "aim" of the statute. *See id.*

⁴⁹ Several commentators have suggested that the judgment's opaque style reflected internal disagreement among the presiding judges. *See, e.g.,* Moore, *supra* note 2, at 161; Senden, *supra* note 2, at 151.

⁵⁰ *See* Peters, *supra* note 2, at 191.

⁵¹ *See* Kalanke, 1995 E.C.R. I-3051, at para. 21.

⁵² *See* Peters, *supra* note 2, at 191.

First, the ECJ asserted 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).”⁵³ Second, the ECJ 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.”⁵⁴

Based on these objections, the ECJ declared that gender preferences of the kind used in Bremen contravened the Equal Treatment Directive.⁵⁵ The case then returned to the national (German) judiciary for further proceedings in which the *Bundesarbeitsgericht* annulled the promotion decision in favor of Ms. Glissmann and ordered that the candidates be judged anew.⁵⁶

D. Kalanke's *Aftermath and the Run Up to Marschall*

In addition to its controversial result, the paucity of analysis in the *Kalanke* judgment proved unsatisfying to many of its readers. The judgment appeared to state two distinct reasons for invalidating the preference: objecting to both its “absolute and unconditional” form and the numerical equality which it “seeks to achieve.”⁵⁷ The ECJ did not elaborate further as to the rationale behind either objection, although both appeared traceable to language used in the Advocate General's opinion.⁵⁸ Moreover, one is left guessing as to whether the ECJ's objections represent separate and independent grounds for the decision, or whether they are somehow interrelated.⁵⁹

This led to much speculation on the part of commentators as to what sorts of positive action schemes would pass muster in the aftermath of the *Kalanke* ruling.⁶⁰ The European Commission, in its

⁵³ See *Kalanke*, 1995 E.C.R. I-3051, at para. 22.

⁵⁴ *Id.* at para. 23.

⁵⁵ *Id.* at para. 24.

⁵⁶ See BAG 14 NZA 751 (1996); Prechal, *supra* note 2, at 1249.

⁵⁷ *Kalanke*, 1995 E.C.R. I-3051, at paras. 22, 23.

⁵⁸ Compare *Kalanke*, 1995 E.C.R. I-3051, at paras. 22–23, with Opinion of Advocate General Tesouro, 1995 E.C.R. I-3051, at paras. 22, 24–25.

⁵⁹ Something of the same problem applied to Tesouro's opinion, which provided many more reasons for rejecting the preference; some of these were clearly interrelated, but Tesouro never identified which were necessary or sufficient.

⁶⁰ See O'Hare, *supra* note 41 (posing hypothetical preference schemes under various conditions and asking which would pass muster); Brems, *supra* note 2, at 175–76 (same); Senden, *supra* note 2, at 152–54 (same).

official pronouncement on the case, chose to emphasize the “absolute and unconditional” language of the judgment. By this reading, the *Kalanke* judgment did not invalidate gender preferences per se. Rather, the ECJ struck down the Bremen preference only because its terms were too extreme. Yet, in what way is the preference “absolute and unconditional?” Far from offering unconditional priority to women, the statute stipulated that both candidates must have equal qualifications, and it only applied to sectors where one sex is under-represented.⁶¹

One way to make sense of this somewhat cryptic phrase is to read “absolute and unconditional” to mean “automatic,” in so far as the wording of the preference law, on its face, admitted no grounds for deviation once the relevant prerequisites were satisfied. Indeed, when the ECJ summarized its ruling at the end of the judgment, it referred to “rules . . . which *automatically* give priority to women in sectors where they are under-represented.”⁶² On this view, the judgment echoed Tesauro’s rejection of the “arbitrariness” of preferences that are “mechanically” applied in the face of ambiguous evidence.⁶³

The ECJ’s second objection, concerning the result which the Bremen statute “seeks to achieve,” also raised questions.⁶⁴ The Court saw the statute as directly imposing a result instead of intervening at the level of opportunity (i.e., process) as Article 2(4) envisages. The

⁶¹ See Moore, *supra* note 2, at 158 (“there are grounds on which it might be argued that the [Bremen law] is not absolute and unconditional”); Brems, *supra* note 2, at 175 (same); see also Senden, *supra* note 2, at 152–53 (speculating as to meaning of “unconditional,” and querying whether “unconditional” and “absolute” represent distinct tests that must be either separately or cumulatively satisfied).

⁶² *Kalanke*, 1995 E.C.R. I-3051, at para. 24 (emphasis added).

⁶³ The German court, in referring the case to the ECJ, made it clear that a degree of inherent flexibility must be read into all such laws by virtue of the German constitution and that, in appropriate cases, exceptions must be made. The ECJ acknowledges this implied flexibility in paragraph nine of its opinion, but it seems to have counted for naught in the final analysis. Upon remand, the German court again called attention to this inherent flexibility, chiding the ECJ for paying insufficient attention to this facet of German law, but ultimately, it concluded that the scope of this leeway might fall short of the flexibility which European law demanded, and thus accepted the ECJ judgment as precluding the operation of the statute on that basis. See BAG 14 NZA 751 (1996); Prechal, *supra* note 2, at 1256–57; see also Senden, *supra* note 2, at 153 (“[o]ne cannot conclude whether the Court deemed this facet [flexibility] irrelevant or whether it did not take [implied flexibility] into consideration because it was not explicitly introduced in the preliminary questions”).

⁶⁴ See *Kalanke*, 1995 E.C.R. I-3051, at para. 23. Some read this language as potentially banning positive action altogether. See, e.g., Sionaidh Douglas-Scott, *Ruling Out Affirmative Action*, 145 New L.J. 1586 (1995). One could equally read the objection as one of degree, invalidating only those laws which “seek[] to achieve equal representation in all grades and levels within a department.” *Kalanke*, 1995 E.C.R. I-3051, at para. 23 (emphasis added).

ECJ did not explain why it read the statute as limited to outcomes. However, the contrast it drew between outcomes and process came unmistakably from Tesouro. As such, it would seem that the second objection flowed from the first. Because the statute operated “automatically” to rebalance numbers, it could not be trusted as a remedial tool. Again, form revealed function.

In any event, European jurists did not have to wait long for further clarification from the ECJ as, two years later, a case with almost identical facts appeared before the Court, again as a preliminary reference under Article 234.⁶⁵ This case also hailed from Germany, this time from the *Land* of North Rhine-Westphalia. It, too, dealt with a promotion decision between a male and female candidate with equal qualifications. As in *Kalanke*, the man, Hellmut Marschall, was protesting a preference granted to his female rival based on a *Land* law virtually identical to that of Bremen’s.⁶⁶

There was one crucial difference between the two statutes, however. The North Rhine-Westphalian version contained an additional proviso which stated that a preference need not be awarded where “reasons specific to an individual male candidate tilt the balance in his favor.”⁶⁷ In other words, whereas the Bremen law was phrased in absolute terms, the law from North Rhine-Westphalia had a built-in “savings clause” to permit exceptions for hardship cases.

E. *The Advocate General Opinion in Marschall*

Advocate General Jacobs, in presenting the *Marschall* case to the ECJ, naturally reviewed the logic and structure of the earlier *Kalanke* opinions. He was of the opinion that the two cases were indistinguishable. Rejecting the argument that the flexibility provided by the “savings clause” sufficed to circumvent *Kalanke*’s ban on “absolute and unconditional” preferences, Jacobs noted that the Bremen statute itself had a degree of constitutionally-implied flexibility. “Since the Court in *Kalanke* recognized that the rule in issue in that case was subject to exceptions, the reference to ‘automatic’ priority should be read in that light.”⁶⁸ Indeed, Jacobs stated flatly that “the national rule at issue in *Kalanke* was not in fact absolute and unconditional.”⁶⁹

⁶⁵ See Marschall, 1997 E.C.R. I-6363.

⁶⁶ See *id.* at paras. 8–12.

⁶⁷ *Id.* at paras. 13, 24.

⁶⁸ Opinion of Advocate General Jacobs, 1997 E.C.R. I-6363, at para. 28.

⁶⁹ *Id.*

The Advocate General's reading of *Kalanke* looked instead to the "seeks to achieve" language as controlling. Jacobs observed that in both cases, preferences were awarded only where two candidates have equal qualifications. Echoing Tesauro, Jacobs therefore concluded that, by definition, the candidates already had equal opportunity, and that any award of preferences must therefore be viewed as aiming at imposing a result, rather than remedying deficiencies in the process.⁷⁰ Although the "savings" clause may have still intervened to override the preference, Jacobs pointed out that its application was supposed to be limited to exceptional cases.⁷¹ Therefore, although such added flexibility may have mitigated the statute's flaws, it hardly erased them. The statute remained impermissibly focused on outcomes, instead of opportunities. Accordingly, Advocate General Jacobs recommended ruling against the preference.⁷²

F. *The Marschall Judgment*

The *Marschall* Court started from the same principles and quoted the same law as the earlier opinions. However, it reached very different conclusions. One obvious change between *Kalanke* and *Marschall* is that the *Marschall* Court openly acknowledged the reality of discrimination in the workplace. It observed that:

[E]ven where 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.⁷³

For these reasons, the ECJ recognized that "the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances," thereby rejecting the false equation

⁷⁰ *Id.* at para. 30.

⁷¹ *Id.* at para. 34.

⁷² *Id.* at para. 58.

⁷³ Opinion of Advocate General Jacobs, 1997 E.C.R. I-6363, at para. 29.

of equal qualifications with equality of opportunity exhibited in the two Advocate General opinions.⁷⁴

This belated recognition by the ECJ of the discrimination which female candidates face in the workplace made it possible to view some employment preferences as equalizing opportunities (by remedying an unequal process), instead of merely balancing outcomes. Yet, the question remains: How does one tell the difference? The ECJ was noncommittal. It stated only 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.”⁷⁵ Under this ambiguous formula, preferences could be viewed as going *either* to outcome *or* opportunity.⁷⁶

To resolve this ambiguity, one might expect that the *Marschall* Court would have examined more closely the context in which the preference functioned. This would have led the Court to face a further ambiguity which had confronted Tesauro: What is the significance of the mere fact of underrepresentation? Yet, the *Marschall* judgment did not discuss underrepresentation or any other contextual criteria. Instead, it focused on the savings clause. Somehow, the addition of the savings clause permitted the preference to be deemed a process remedy within the scope of Article 2(4) of the Equal Treatment Directive.

The judgment of the *Marschall* 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.”⁷⁷ The Court accepted this approach, although it required that “the candidates [be] the subject of an objective assessment [that] take[s] into account all criteria specific to the individual candidates” and also stipulated that “such criteria are not such as to discriminate against female candidates.”⁷⁸ The Court failed to explain

⁷⁴ Marschall, 1997 E.C.R. I-6363, at para. 30.

⁷⁵ *Id.* at para. 31 (emphasis added).

⁷⁶ As one commentator noted, “the acceptance that preferential treatment may legitimately function as a compensatory mechanism to ‘counteract’ such discrimination is a conspicuous shift away from the Court’s formalistic reading of ‘promoting equal opportunity’ in *Kalanke*.” More, *supra* note 10, at 450.

⁷⁷ Marschall, 1997 E.C.R. I-6363, at para. 5.

⁷⁸ *Id.* at para. 35. This last condition presumably responds to the concern raised by the Advocate General that allowing open-ended criteria to be taken into account at this stage could reintroduce the very same discriminatory attitudes that the preference was ostensibly designed to overcome. See Opinion of Advocate General Jacobs, 1997 E.C.R. I-6363, at

how undertaking such an assessment would resolve the ambiguity that it found fatal in *Kalanke*.⁷⁹ Nothing about “criteria specific to the individual candidates” could be indicative of gender bias, which by its very nature is a group phenomenon.⁸⁰ Although less “automatic,” the preference was no less arbitrary.

Formally, the *Marschall* opinion continued to label Article 2(4) of the Directive as a derogation, which would imply a strict interpretation.⁸¹ However, the judgment appeared anything but strict. Instead, the Court used highly hedged language (“may . . . if . . . may”) to skirt one ambiguity and entirely ignore another. Moreover, in relying on the savings clause in *Marschall* to distinguish *Kalanke*, the ECJ let the largely symbolic value of individualized review take the place of a more substantive resolution of the underlying issues.

II. RATIONALES FOR PREFERENTIAL TREATMENT

Notwithstanding these theoretical deficiencies, the ECJ has adhered to its formula of accepting employment preferences that are based on an “objective assessment” of individual candidates,⁸² and rejecting those that are “automatic” (i.e., not subject to individualized review)⁸³ in two subsequent cases. In doing so, the ECJ appears to

para. 36. The Advocate General noted pointedly that the drafters of the Bremen preference law had declined to include such a savings clause because of just such a danger. *Id.* at para. 36 n.39. Yet, again the ECJ fails to provide any guidance as to what these criteria might be. “In effect, the Court requires that an individual appraisal of the candidates should be fully informed by the structural factors which militate against women’s promotion. A tall order . . .” More, *supra* note 10, at 451.

⁷⁹ At best, the savings clause merely introduces additional tie-breaking criteria, the priority accorded female candidates being premised on the candidates being equal in other respects. In any case, the recourse to the savings clause determines whether the preference should be disappplied in exceptional cases, a secondary decision made after one resolves whether it should be imposed in the first instance. *See* Fredman, *supra* note 36, at 179 (questioning whether the saving clause made any logical difference).

⁸⁰ Looking at the criteria of individuals to determine if an employment process discriminates against women as a group is just as fallacious as the Advocate Generals’ assumption that equal qualifications implies equality of opportunity. In both cases, the position of individuals is evaluated without its necessary context.

⁸¹ *Marschall*, 1997 E.C.R. I-6363, at para. 32.

⁸² Case 158/97, *Badeck v. Hessischer Ministerpräsident*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6 (2000), para. 38.

⁸³ Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539, paras. 52–53. *Abrahamsson* differed from the previous three cases in that the preference applied even though the female candidate had slightly inferior qualifications; this seems to have been an additional factor motivating the judgment. Having rejected the preference under the Equal Treatment Directive, the ECJ then considered whether the provision might be justified under Article 141(4) of the E.C. Treaty, the positive action provision inserted by the Am-

have opted for a solution much like that introduced by Justice Powell of the U.S. Supreme Court in his celebrated *Bakke* opinion.⁸⁴ Although rejecting the use of strict racial quotas in admissions to medical school, Justice Powell sanctioned consideration of race as a factor that could be taken into account among other criteria specific to each individual candidate.⁸⁵ Although other members of the Supreme Court observed that such a method would in practice yield the same result as a quota,⁸⁶ the symbolic appeal of Powell's individualized approach was undeniable, and Powell's opinion has remained, in practice, the law of the land ever since.⁸⁷

Justice Powell, however, justified preferences to underrepresented groups based on an underlying theory as to the value of diversity in a university context.⁸⁸ Positive Action under Article 2(4) of the Equal Treatment Directive, in contrast, is premised on a remedial rationale—promoting equal opportunity by remedying procedural bias in employment decisions—a very different rationale. In this respect, an analogy may be drawn with another line of U.S. affirmative action cases that also considered preferences justified on remedial grounds. In *Croson v. City of Richmond*,⁸⁹ the Supreme Court overturned a preference scheme that purported to remedy the effects of discrimination

sterdam Treaty in response to *Kalanke*. Here, the Court held in conclusory fashion that the preference was “[o]n any view . . . disproportionate to the aim pursued.” *Id.* at para. 55.

⁸⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). I am grateful to Martin Shapiro for this insight.

⁸⁵ *Id.* at 306–11, 315–19. Powell's individualized approach was endorsed obliquely in *Johnson v. Santa Clara City Transport. Dep't*, 480 U.S. 616, 638 (1987), where the Court cited the non-automatic, individualized nature of the Santa Clara preference scheme as a factor justifying its validity under federal employment law. *Cf.* More, *supra* note 10, at 450 (portraying savings clause in *Marschall* as vehicle by which “a vision of balancing one individual's right against another is maintained” as an “acceptable compromise” between treating candidates as individuals and remaining mindful of group needs).

⁸⁶ See *Bakke*, 438 U.S. at 378 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Charpentier makes the same point about the savings clause in *Marschall*. See Louis Charpentier, *The European Court of Justice and the Rhetoric of Affirmative Action*, 4 Eur. L. J. 167, 185 (1998) (“[savings clause] can easily be manipulated . . . in the same way the so-called ‘absolute and unconditional’ quota in *Kalanke* would.”).

⁸⁷ The U.S. Court of Appeals for the Fifth Circuit alone has rejected Powell's *Bakke* opinion as controlling authority in *Hopwood v. Texas*, 78 F.3d 932, 942 (5th Cir. 1996). The Ninth Circuit subsequently reaffirmed the *Bakke* rule, creating a split in the Federal Courts of Appeal. See *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1200 (9th Cir. 2000). A district court of the Sixth Circuit also recently rejected *Hopwood* in *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000); that case is currently under appeal.

⁸⁸ See *Bakke*, 438 U.S. at 311–15.

⁸⁹ *J.A. Croson Co. v. City of Richmond*, 488 U.S. 469, 486 (1989).

against minority-owned companies in bidding for municipal contracts. The Court held that evidence of societal discrimination against such minorities, by itself, would not suffice to justify such preferential treatment. Instead, the Court required that government actors muster "particularized" evidence of discrimination against specific minority groups in the precise context where the preference would apply.⁹⁰

In making this distinction between societal and particularized discrimination, the Supreme Court, speaking through Justice O'Connor, emphasized that its rejection of the former should not be read to minimize the widespread social injustice that many minority groups had faced. The problem with societal discrimination was that its contours were too "amorphous" to be measured with the precision required for a judicially-determinable remedy.⁹¹ Without more particularized evidence, Justice O'Connor worried that courts could not make "[p]roper findings . . . to define both the scope of the injury and the extent of the remedy necessary to cure its effects."⁹² Their inability to do so raised the "danger that a racial [preference could be] merely the product of unthinking stereotypes or a form of racial politics."⁹³ Therefore, while not denying that minorities had been treated unequally, the Supreme Court refused to accept this as a constitutionally cognizable injury because the Court could not be sure enough of the facts to control the remedy.⁹⁴

Throughout these affirmative action cases, the Supreme Court has underscored the profound distrust with which it views racial classifications of any kind. While defenders of affirmative action on

⁹⁰ *Id.* at 500–06.

⁹¹ *Id.* at 497 (citing *Bakke*, 438 U.S. at 307).

⁹² *Croson*, 488 U.S. at 510; *see also id.* at 505–06 (for the Court) ("The dream of a Nation of equal citizens . . . would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("[A]s the basis for imposing discriminatory legal remedies . . . societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

⁹³ *Croson*, 488 U.S. at 510.

⁹⁴ Strictly speaking, the rule against societal justifications for affirmative action applies only to racial preferences. The Supreme Court upheld a gender preference justified on societal grounds in 1977. *See Califano v. Webster*, 430 U.S. 314, 317–18 (1977) (per curiam) (upholding a social security provision favoring women as justified by the societal disadvantage which women face in the working world). However, recent cases suggest that the Court may be tightening its standards with respect to gender classifications. Accordingly, lower courts have restricted such remedies to particular economic spheres. *See Jason Skaggs, Comment, Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1202–04 (1998).

the Court have argued that a less stringent standard of review is merited where racial classifications are undertaken for "benign" purposes than that applied in earlier racial segregation cases,⁹⁵ the majority has rejoined that "strict scrutiny" applies to all uses of race precisely because its benign nature cannot be taken for granted.⁹⁶

It is interesting to note that Advocate General Tesauro made extensive citation to American affirmative action case law in his *Kalanke* opinion.⁹⁷ His doing so was quite unusual for an E.C. opinion.⁹⁸ One may speculate that in citing the U.S. cases, Tesauro was gesturing toward the jurisprudence of distrust that this case law embodies. That both his opinion and the judgment of the ECJ apply a "strict" interpretation of Article 2(4) of the Directive as a derogation from equal treatment suggests, at minimum, a discomfort with ascriptive, status-based norms that parallels their U.S. counterparts.

In ruling out societal justifications for affirmative action, however, the Supreme Court acted based on second order criteria, namely its concern over the limitations of judicial review, rather than any real principle of equality. In doing so, the Court makes a powerful statement of centralized authority from its position at the apex of an integrated federal judiciary. I will argue that this model is inappropriate in Europe, where the ECJ engages in a very different relationship with the national judiciaries of the E.C. Member States. In rejecting the Bremen preference, the *Kalanke* Court assumed the prerogative to pass judgment on a question better left to the national courts.⁹⁹

III. EQUALITY AS A EUROPEAN RIGHT

The controversy that accompanied the ECJ's *Kalanke* decision has been only partially tempered by its *Marschall* opinion. Although *Mar-*

⁹⁵ See *Adarand*, 515 U.S. at 245 (Stevens, J. dissenting) (distinguishing between a "welcome mat" and a "No Trespassing" sign); see also *Bakke*, 438 U.S. at 358-59 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (endorsing lower scrutiny for racial preferences administered through bona fide affirmative action plan).

⁹⁶ See *Adarand*, 515 U.S. at 226 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are motivated by illegitimate notions of racial inferiority or simple racial politics.").

⁹⁷ Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 9 n.10 (citing *Croson*, *Bakke*, *Adarand*, et. al.).

⁹⁸ See Erika Szyzszak, *Positive Action After Kalanke*, 59 MOD. L. REV. 876, 881 (1996) (commenting on Tesauro's unorthodox citation to American precedent).

⁹⁹ To the extent that *Croson*, in particular, influenced the *Kalanke* judgment, the ECJ may also have mistaken the second order rationale of the former for first order reasoning.

shall "corrected" the result of *Kalanke* by imputing a different purpose to the preference at issue, it perpetuated the analytic framework and centralized mode of decision-making which *Kalanke* established. In this respect, despite their superficial difference in outcome, the two opinions have more in common than may be initially apparent.

A. Article 2(4) as a Derogation

As a starting matter, the ECJ's decision in *Kalanke* to construe Article 2(4) of the Equal Treatment Directive as concerned with opportunities and not outcomes is both reasonable and textually supported.¹⁰⁰ The controversy revolves around how the ECJ distinguishes between them. Amendments to employment criteria to remove or offset gender-specific effects seem clearly permissible as means to equalize opportunities.¹⁰¹ Likewise, a decision to strike down a fixed 50–50 gender quota solely concerned with outcomes would probably not be questioned¹⁰² *Kalanke* and *Marschall* represent more difficult cases because the preferences were less intrusive instruments that arguably could have served a remedial function.

The key move that the ECJ makes to resolve this ambiguity in *Kalanke* is the decision to treat Article 2(4) of the Directive as a derogation from the Equal Treatment principle of Article 2(1). This approach allows the ECJ to enforce a "strict interpretation" by which ambiguities are construed against the preference and the statute fails unless shown to be remedial. In imposing this "strict" construction, both Tesouro and the Court cite *Johnston v. Constable* for authority.¹⁰³ *Johnston* was a case interpreting Article 2(2), which grants an exception to equal treatment for occupations "in which the sex of the

¹⁰⁰ The focus of Article 2(4) on opportunities is explicit; the provision refers to "measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities."

¹⁰¹ See Case 237/85 Rummeler v. Dato-Druck GmbH, 1986 E.C.R. 2101, [1987] 3 C.M.L.R. 127 (1986), para. 15 (stating that use of employment criteria such as strength should be offset, where possible, by other criteria more favorable to women). In *Badeck*, the ECJ goes further, approving criteria that it recognized as generally favoring women. *Badeck*, 2000 E.C.R. I-1875, at paras. 31–32.

¹⁰² But see Peters, *supra* note 2, at 188–90 (noting some support for equal representation as a legitimate goal of E.C. law).

¹⁰³ See *Kalanke*, 1995 E.C.R. I-3051, at para. 21; Opinion of Advocate General Tesouro, 1995 E.C.R. I-3051, at para. 23 n.20 (both citing Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, [1986] 3 C.M.L.R. 240 (1986)). The *Marschall* Court, in turn, cites to *Kalanke* for the same proposition. See *Marschall*, 1997 E.C.R. I-6363, at para. 32 (citing *Kalanke*, 1995 E.C.R. I-3051, at para. 21–22).

worker constitutes a determining factor.”¹⁰⁴ Such a provision operates in the traditional fashion of a derogation running contrary to the very principle of equal treatment.¹⁰⁵ Therefore, the Court was correct to adopt a restrictive view in that case. To import such logic to *Kalanke*, however, is arguably to misunderstand the complementary nature of the right that Article 2(4) promotes. Instead of citing *Johnston*, the Court might have followed the earlier example of *Hofman v. Barmer Ersatzkasse*,¹⁰⁶ in which Advocate General Darmon pursues this reasoning to its logical conclusion:

The exception set out in Article 2(4) is in a category of its own. . . . It merely appears to make an exception to the principle [of equal treatment]: in aiming to compensate for existing discrimination it seeks to re-establish equality and not to prejudice it. In other words, since it presupposes that there is an inequality which must be removed, the exception must be broadly construed.¹⁰⁷

In substance, Darmon’s position mirrors that of the U.S. Supreme Court minority that advocated a more lenient standard of re-

¹⁰⁴ Equal Treatment Directive, *supra* note 19, at art. 2(2). Specifically, *Johnston* considered the legitimacy of a rule banning women from police service in Northern Ireland due to alleged security concerns. *Johnston*, 1986 E.C.R. 1651, at para. 4.

¹⁰⁵ The American analogue would be Title VII’s “bona fide occupational qualification” exemption, which U.S. courts have construed very narrowly. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

¹⁰⁶ Case 184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3047, [1986] 1 C.M.L.R. 242 (1984).

¹⁰⁷ *See* Opinion of Advocate General Darmon, Case 184/93, *Hofmann v. Barmer*, 1984 E.C.R. 3047, [1986] 1 C.M.L.R. 242 (1984). *Hofmann* was an Article 2(3) case, but Advocate General Darmon was discussing Article 2(4) here because he saw the two provisions as pursuing similar functions within the directive, with the former possibly a special case of the latter. *Id.* These sentiments are hardly unique to *Hofmann*. In Case 421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt*, 1994 E.C.R. I-1657, [1994] 2 C.M.L.R. 681 (1994), none other than Advocate General Tesauo displayed a similar logic in refusing to construe Article 2(3) as a derogation. *See* Opinion of Advocate General Tesauo, Case 421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt*, 1994 E.C.R. I-1657, [1994] 2 C.M.L.R. 681 (1994) (“Article 2(3) of the directive cannot properly be called [a] derogation[] from the principle of equality, in that [it] seek[s] rather to ensure that principle operates in substance, by permitting such inequalities as are necessary in order to achieve equality.”). Even in *Kalanke*, Tesauo appears to have flirted with an alternate approach in which positive action would be seen as complementing equal treatment, not a derogation from it. *See* Opinion of Advocate General Tesauo, 1995 E.C.R. I-3051, [2001] 2 C.M.L.R. 6 (2000), at para. 17. Even after *Marschall*, the same rationale was argued by Advocate General Saggio in *Badeck*. *See* Opinion of Advocate General Saggio, Case 158/97, *Badeck v. Hessischer Ministerpräsident*, 2000 E.C.R. I-1875, at para. 26. The Court apparently declined his invitation to reconsider its stance.

view in the affirmative action cases. By constructing Mr. Kalanke's right to equal treatment as the fundamental right recognized by the directive and Ms. Glissmann's claim to positive action as a derogation from that right, the ECJ rejects this more permissive model and elects to strictly construe Article 2(4) in a manner no different than Article 2(2).

A number of commentators have criticized this approach as reflecting a truncated, and overly procedural conception of equality.¹⁰⁸ They see the equality right under European law as encompassing divergent ideals which stand in tension with one another.¹⁰⁹ Scholars argue that, by failing to distinguish between Articles 2(2) and 2(4) in *Kalanke*, the ECJ "does not do justice to preceding Community law."¹¹⁰ By contrast, the *Marschall* decision is seen as a shift toward a more progressive reading of equality, whereby the Court acknowledges the "'lived experience' of women in the workplace."¹¹¹

These analyses overlook the fact that, despite its effective reversal of *Kalanke's* outcome, the *Marschall* Court continues to construe Article 2(4) as a derogation, implying, at least formally, that a "strict interpretation" applies.¹¹² Cases following *Marschall* have confirmed that

¹⁰⁸ See Pedro Cabral, *A Step Closer to Substantive Equality*, 23 EUR. L. REV. 481, 486 (1998); Sophia Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality: Are International and Community Law Converging?*, 11 REV. EUR. DE DROIT PUBLIC 514 (1999); Marie-Therese Lanquetin, *supra* note 2, at 98; Peters, *supra* note 2, at 190; Charpentier, *supra* note 2, at 4-7; Titia Loenen & Albertine Veldman, *supra* note 2, at 50-52. These critiques reflect the dominant paradigm in European equality law that distinguishes between formal and substantive equality. Formal equality is equated with "procedural" equality (i.e. no distinction between genders), while "substantive equality" is conceived of as a departure from formal equality to take into consideration "the real situation of many women which may place them in a weaker position in the market." See Helen Fenwick & Tamara Hervey, *Sex Equality in the Single Market: New Directions for the European Court of Justice*, 32 COMMON MKT. L. REV. 443, 445-46 (1995). Because this terminology tends to become subjective and contextual, this article refers instead to "process" versus "outcome."

¹⁰⁹ Peters, *supra* note 2, at 179-90 (describing tensions arising from a multiplicity of paradigms); see also Fenwick & Hervey, *supra* note 108, at 449-69 (tracing alternation between formal and substantive conceptions of equality in ECJ jurisprudence); Christa Tobler, *Procreation Time: Pregnancy and Childbirth in EC Sex Equality Law*, 5 TIME & SOCIETY 363, 370, 379 (1996) (same).

¹¹⁰ Peters, *supra* note 2, at 192.

¹¹¹ Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in German and the U.S.A.*, 5 COLUM. J. EUR. L. 329, 361 (1999); More, *supra* note 10, at 450 (ruling in *Marschall* shows "that the Court has moved towards a substantive meaning for equality"); Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562, 577 (2000) ("*Marschall* is the closest the Court has come to recognizing a substantive approach to equality").

¹¹² *Marschall* does not actually repeat the language in *Kalanke* referring to a "strict" interpretation, and, in fact, the rationale it follows seems anything but strict. The same can

derogations from equal treatment require strict review.¹¹³ Although the degree of rigor clearly varies according to the case at hand, the appearance of strict review in gender equality cases marks a departure from earlier judgments in which the ECJ stressed the “margin of discretion” that Member States enjoy in implementing directives on social policy.¹¹⁴ A more nuanced understanding of strictness in the European context holds the key to unraveling the conceptual incoherence of the positive action cases.

B. *Strict Review*

The usual test applied by the ECJ in reviewing a measure justified under a derogation is that of proportionality, which has three parts: suitability, necessity, and proportionality *strictu sensu*. Suitability asks whether the measure accords with the purpose of the derogation. Necessity investigates whether the chosen means are necessary to pursue this goal. Proportionality *strictu sensu* then balances the goal of the derogation against the burdens that it may engender.¹¹⁵

be said of *Badeck*, which legitimizes quotas for women in vocational training, job interviews, and administrative committees with virtually no judicial review. Yet, as noted, the Court declined Advocate General Saggio’s invitation in *Badeck* to reconsider its strict interpretation. Moreover, in *Abrahamsson*, the Court tightened its grip on preference regimes and confirmed that its tolerance for such measures remains limited. See *infra* note 83 and surrounding text. Although willing to bend the rules, the Court thus appears committed to the formal structure that *Kalanke* established.

¹¹³ Case 285/98, Kreil v. Germany, 2000 E.C.R. I-69, [2002] 1 C.M.L.R. 36 (2000), para. 20; Case C-273/97, Sirdar v. Army Board, 1999 E.C.R. I-7403, [1999] 3 C.M.L.R. 559 (1999), para. 26; Case C-154/96, Wolfs v. Office Nat’l des Pensions, 1998 E.C.R. I-6173, [2000] 3 C.M.L.R. 1414 (1998), para. 24.

¹¹⁴ One can see the difference by contrasting the positive action cases with earlier gender decisions. For example, in *Hofmann*, a 1984 case, the ECJ had to decide whether extended maternity benefits (beyond six months) could be justified under Article 2(3) of the Equal Treatment Directive. The Court held that, although such benefits applied only to women and thus discriminated against men, so long as they could be shown to bear an objective relationship to the purpose of Article 2(3)—namely, the protection of women’s biological condition—the measures need not pass any test of strict necessity. Hofmann, 1984 E.C.R. 3047, at paras. 26–27. Rather, the Court held that “the Member States enjoy a reasonable margin of discretion regarding both the nature of the protective measures and the detailed arrangements for their implementation.” *Id.* at para. 27. In *Habermann*, a case heard only a year before *Kalanke*, the Court repeated similar language about Member State discretion over social policy and cited *Hofmann* for authority. Habermann, 1994 E.C.R. I-1657, at para. 22. By contrast, in *Kalanke*, the Court adopts a “strict” approach, and although the Court relaxes its judicial review after *Kalanke*, its more indulgent approach in *Marschall* and *Badeck* is not premised on Member State discretion. See *Kalanke*, 1995 E.C.R. I-3051, at para. 21.

¹¹⁵ See Takis Tridimas, *Searching for the Appropriate Standard of Scrutiny, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 65, 68 (E. Ellis ed., 1999).

Although the ECJ has never spelled out what it means by "strict" review, this seems to describe the intensity with which the proportionality inquiry is conducted, with the Court applying a more exacting standard to one or more prongs of the test.¹¹⁶ The ECJ most often lays its stress on the second prong, necessity.¹¹⁷ A strict reading of necessity may require showing that no less intrusive measures were available. Thus, Advocate General Jacobs comments in *Marschall* that "a gender-specific measure will not to my mind be proportionate . . . if the same result could be achieved by a gender-neutral provision."¹¹⁸ The ECJ's insistence on flexibility in the positive action cases, however, most likely stems from its assessment of proportionality *strictu sensu*. In addition to the symbolic value of treating candidates as individuals, flexibility ensures that the preference regime will not penalize "innocent" males unduly.¹¹⁹

An unstated aspect of strict review is skepticism. Justifications for derogations may no longer be taken on faith because "what appears to be a [remedial] measure . . . may easily turn into a measure which is perpetuating and even legitimizing the traditional division of roles between men and women."¹²⁰ Instead, "exceptions . . . must be sufficiently transparent so as to permit effective supervision by the Commission [and the courts]."¹²¹ This means that potentially dis-

¹¹⁶ *Id.* at 66.

¹¹⁷ *Id.*

¹¹⁸ Opinion of Advocate General Jacobs, 1997 E.C.R. I-6363 at para. 43; *see also* Prechal, *supra* note 2, at 1253 (strict proportionality test means the objective cannot be reached by gender-neutral means).

¹¹⁹ This may be seen more clearly in *Badeck* and *Abrahamsson*, where *Marschall's* stipulation about taking into account "all criteria specific to the individual candidates" is rephrased as "tak[ing] into account the specific personal situations" of the candidates—a formulation more evocative of the individual hardships that this aspect of proportionality is geared towards. *See* *Badeck*, 2000 E.C.R. I-1875, at para. 23; *Abrahamsson*, 2000 E.C.R. I-5539, at para. 43. *Cf. Johnson*, 480 U.S. at 638 (non-automatic preference minimizes burden on male candidates).

¹²⁰ Prechal, *supra* note 2, at 1253.

¹²¹ Case 318/86, *In re Sex Discrimination in the Civil Service: Commission v. France*, 1988 E.C.R. 3559, [1989] 3 C.M.L.R. 663 (1988), at para. 25 (rejecting justifications for gender-specific criteria for police and prison staff as insufficiently transparent); *Abrahamsson*, 2000 E.C.R. I-5539, at paras. 49–50; *see also* Case 262/88, *Barber v. Guardian Royal Exchange Assurance Group*, 1990 E.C.R. I-1889, [1990] 2 C.M.L.R. 513 (1990), at para. 34 (effective judicial review requires transparency to prevent discriminatory employment practices); Case 109/88, *Ex parte Danfoss A/S*, 1989 E.C.R. I-3199, at paras. 11–15 (1991) (same).

criminary measures must be "governed by [] objective criteri[a] defined in a legislative provision."¹²²

In applying this intense scrutiny of both ends and means, European strict review resembles the "searching judicial inquiry" of American strict scrutiny.¹²³ In both cases, the proceedings are animated by a distrust of political actors operating in the name of protecting individual rights.¹²⁴ A basic difference between American and European methodology, however, concerns the procedure for preliminary references. In exercising this shared jurisdiction, the ECJ often defers to the national courts to apply proportionality; it does so habitually in its indirect discrimination cases.¹²⁵ This display of judicial comity comports with Article 234 (formerly article 177), which reserves questions of fact to be determined by the referring court.

The U.S. judicial system, by contrast, permits far greater latitude for centralized adjudication of constitutional rights. The Supreme Court's direct appellate jurisdiction over both state and federal courts gives it unquestioned control over all facets of federal law, including fact finding and remedies.¹²⁶ In *Kalanke* and *Marschall*, the ECJ appears to arrogate to itself a similar prerogative to rule on proportionality as a matter of Community law. As will be suggested below, in doing so, the ECJ seems to resemble more an American than European court by acting outside of its role in a supranational regime. The key difference between *Kalanke* and *Marschall* concerns their reading of

¹²² *In re Sex Discrimination*, 1988 E.C.R. 3559, at para. 26. Similarly, the Court's indirect discrimination cases require employers to demonstrate "objectively justified factors which are unrelated to any discrimination based on sex" in order to withstand a prima facie showing of disparate impact. Case 170/84, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, 1986 E.C.R. 1607, [1986] 2 C.M.L.R. 701 (1986), para. 31; *Ex parte Danfoss A/S*, 1989 E.C.R. I-3199, at paras. 15-16 (lack of transparency places burden on employer to prove absence of discrimination); *Fenwick & Hervey*, *supra* note 108, at 466 (citing other cases).

¹²³ *Croson*, 488 U.S. at 493; *see also* *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (describing the "skeptical, questioning, beady-eyed scrutiny that the law requires when public officials use race to allocate burdens or benefits"). To survive this "intense scrutiny . . . [government actors must] show that they are motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern. They must show that they had to do something and had no alternative to what they did. The concern and the response, moreover, must be substantiated and not merely asserted." *Id.*

¹²⁴ *See Croson*, 488 U.S. at 493 ("the purpose of strict scrutiny is to 'smoke out' illegitimate uses of . . . suspect tool[s]"); *Adarand*, 515 U.S. at 233 (describing skepticism as a basic principle of strict scrutiny); *see supra* notes 122-124 and accompanying text.

¹²⁵ *See Hervey*, *supra* note 14, at 212-14.

¹²⁶ *See infra* note 147 and accompanying text.

purpose: did the preference aim at outcomes or opportunity? Unfortunately, as seen earlier, the ECJ never resolved this fundamental ambiguity. In *Kalanke*, Tesauro incorrectly assumed that qualifications are synonymous with opportunity. In *Marschall*, the ECJ recognized that such assumptions could be belied by gender bias, but saw no need to identify the context in which such bias existed. Moreover, in endorsing the deliberately opaque wording of the savings clause, the ECJ violated its own rule that prima facie discrimination can only be justified by objective criteria, not generalizations.¹²⁷

To some degree, the ECJ appeared to remedy this latter defect in *Abrahamsson*, where it “emphasise[d] that the application of [selection] criteria must be transparent and amenable to review . . . based on clear and unambiguous criteria.”¹²⁸ However, the ECJ seemed no clearer in its fourth preliminary ruling on the subject of these criteria than it was in its first.¹²⁹

In *Badeck*, the ECJ more explicitly embraced the opportunity/outcome dichotomy, introduced by Advocate General Tesauro, to justify strict gender quotas on allocations of employment training and job interview slots.¹³⁰ Yet, it has continued to encounter difficulties applying this paradigm to preferential selection schemes. In *Abrahamsson*, the ECJ was clearly troubled by the fact that, unlike the prior cases, preferences could be granted even though the beneficiary had slightly inferior qualifications. The judgment comes close to suggesting that such preferences must be rejected as solely

¹²⁷ See Case 171/88, *Rinner-Kuhn v. FWW Spezialgebaudereinigung GmbH & Co. KG*, 1989 E.C.R. 2743, [1993] 2 C.M.L.R. 932 (1989), paras. 12, 14–15. Advocate General Jacobs seems to have anticipated this danger when he reminded the Court that “the protection of individuals require[s] . . . that . . . legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.” Opinion of Advocate General Jacobs, 1997 E.C.R. I-6363, at para 35.

¹²⁸ *Abrahamsson*, 2000 E.C.R. I-5539, at paras. 49–50; see also *id.* at para. 53 (criticizing one such criterion because its “scope and effect . . . cannot be precisely determined”).

¹²⁹ The *Abrahamsson* Court cites approvingly selection criteria applied in *Badeck* designed to emphasize traits that “in general favour women” and thereby “reduc[e] *de facto* inequalities [and] compensate for disadvantages in the professional career of [women].” *Id.* paras. 47–48. However, the application of such criteria can only be seen as providing an alternative to preferential selection, not the foundation of it.

¹³⁰ *Badeck*, 2000 E.C.R. I-1875, at paras. 54–55, 60–62. The Court accepted these measures as designed to put “women . . . on an equal footing with men” without pre-determining outcomes in terms of employment placement; no proportionality test was required. *Id.* at paras. 52, 54.

outcome-oriented.¹³¹ Yet, the same arguments about bias used in *Marshall* to get around *Kalanke* would seem applicable here: assessment of qualifications can just as easily be infected by bias as the selections based upon them.

It is also telling that the ECJ's reasoning on this point was intertwined with condemnation of the "automatic" operation of the preference and its lack of individualized recourse to objective criteria. As in *Kalanke*, the Court thus continued to look at the form of the statute as indicative of its function. A similar approach was taken by the *Badeck* Court, which endorsed the use of "binding targets" for female advancement and equal representation of men and women on supervisory and administrative bodies. The Court based its decision on the ground that such quotas were flexibly implemented, without bothering to verify that they had a remedial purpose and were necessary in light of that goal.¹³²

In structuring the analysis in its positive action rulings around these twin dichotomies—outcome versus opportunity, automatic versus flexible—the ECJ's reasoning has assumed an overly formal character that seems inconsistent with the strict proportionality analysis required for derogations from an individual right. The inability of the ECJ to articulate a more convincing framework to assess the proportionality of positive action arguably stems from its failure to consider the context in which the court applied the preference statutes.¹³³ Only

¹³¹ The Court notes that "it does not appear . . . that [selection] is based on clear and unambiguous criteria such as to prevent or compensate for disadvantages in [women's] professional career[s]." *Abrahamsson*, 2000 E.C.R. I-5539, at para. 50. Instead, the Court asserts 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 to those of a candidate of the opposite sex." *Id.* at para. 53.

¹³² *Badeck*, 2000 E.C.R. I-1875, at paras. 41–44 and 65–66. In the latter case, the Court went against the recommendation of its Advocate General, see Opinion of Advocate General Saggio, 2000 E.C.R. I-1877, at para. 43. Moreover, the Court's emphasis on the "non-compulsory" nature of both these quotas seemed to contradict prior case law. *Cf.* Case 165/82, *Commission v. United Kingdom*, 1983 E.C.R. 3431, [1984] 1 C.M.L.R. 44 (1983), para. 9 (rejecting justification based on the non-binding character of collective agreements containing gender quotas that discriminated against men). In *United Kingdom*, the Court noted that "even if they are not legally binding [such agreements] nevertheless have important *de facto* consequences for the employment relationships to which they refer, particularly in so far as they determinine the rights of the workers [which], in the interests of industrial harmony, undertakings [are obliged] to satisfy." *Id.* at para. 11. This observation was particularly applicable to the "binding targets" in *Badeck*, as failure to fulfil the targets would have led to more intrusive administrative controls. *See* *Badeck*, 2000 E.C.R. I-1875, at para. 9 (in regard to para. 10(4) of the Hesse statute).

¹³³ The Court continued to emphasize both criteria in its most recent positive action ruling. *See* Case 476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*,

by doing so can one speak meaningfully about their purpose and effects.¹³⁴

C. Context

There are many contextual criteria which the ECJ could have examined. To begin with, built into the statutes was the precondition of gender imbalance that was itself a *prima facie* indication of bias.¹³⁵ The ECJ seemed to ignore this implication of underrepresentation, dismissing gender balancing in *Kalanke* as purely a matter of outcome, and omitting any discussion of underrepresentation in *Marschall*, where references to gender bias remain tentative and generalized.¹³⁶ Tesauro's was the only opinion to acknowledge, albeit grudgingly, the potential link between gender imbalance and bias.¹³⁷

Of course, evidence of gender bias need not be confined to a specific workplace. The important factor is the establishment of a context in which proportionality can be assessed on the basis of objective criteria. By ruling against the Bremen preference on principle, *Kalanke* made the question of context irrelevant.¹³⁸ *Marschall* held the opposite, but its ruling was just as peremptory.¹³⁹ It assumed that gender bias is so pervasive as to legitimize preferences Community-wide. In neither case did the Court permit much, if any, leeway upon re-

2002 E.C.R. I-2891, paras. 38, 45–47 (upholding subsidized childcare scheme restricted to female employees).

¹³⁴ For example, a rule giving preference to a certain minority group may be legitimated by a history of discrimination against that group. Without such a history, the rule might itself be deemed discriminatory.

¹³⁵ To be sure, imbalances per se are of limited diagnostic value. A more refined methodology would define underrepresentation by reference to the pool of qualified candidates of each gender. So-called "Croson studies" documenting such disparities constitute the most widely relied on evidence of discrimination in the U.S. to validate affirmative action. Statistically significant "underutilization" may legitimate a narrowly tailored remedial preference. See *Croson*, 488 U.S. at 509. In Europe, a similar approach to positive action is applied under Dutch law. See Brems, *supra* note 2, at 175 & n.14; Prechal, *supra* note 2, at 1257 n.26. The preference statute reviewed in *Badeck* also employed this more sophisticated definition of underrepresentation. See *Badeck*, 2000 E.C.R. I-1875, at para. 42.

¹³⁶ See *Marschall*, 1997 E.C.R. I-6363, at para. 29.

¹³⁷ Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 24 (conceding that underrepresentation of women may be "indicative of inequality," but "not necessarily attributable to a consummate to marginalise women") (emphasis added).

¹³⁸ See *Kalanke*, 1995 E.C.R. I-3051, at para. 22.

¹³⁹ See *Marschall*, 1997 E.C.R. I-6363, at para. 35.

mand to the national court to judge the preferences within the national context.¹⁴⁰

Yet, because Article 2(4) of the Directive grounds positive action in an explicitly remedial rationale, attention to context is critical. It may well be that gender bias is pervasive; however, accepting this notion does not end the proportionality analysis. The problem may vary in kind and degree in different contexts, as may the availability of alternative remedies,¹⁴¹ making the proportionality of the remedy dependent on the facts of the specific case.¹⁴² The *Marschall* Court ignored these considerations in favor of a bright-line rule.¹⁴³

The later judgments followed roughly the same pattern, but in the reverse. *Badeck* upheld a raft of supporting measures beyond preferential selection, all as a matter of European law.¹⁴⁴ At times, the ECJ seemed to gesture toward proportionality assessment,¹⁴⁵ but it did not address the issue of necessity, nor did it charge the national court with this task. *Abrahamsson* rejected the Swedish preference *a priori*, once again with no consideration of context.¹⁴⁶

In issuing these Community-wide judgments, the ECJ followed the example of the U.S. Supreme Court, whether consciously or not.¹⁴⁷ In doing so, the ECJ broke with earlier cases in which it de-

¹⁴⁰ See *Kalanke*, 1995 E.C.R. I-3051, at para. 24; *Marschall*, 1997 E.C.R. I-6363, at para. 34.

¹⁴¹ Cf. *Croson*, 488 U.S. at 507 (criticizing city officials for failing to consider race-neutral alternatives to preference regime).

¹⁴² See Sandra Fredman, *After Kalanke and Marschall: Affirming Affirmative Action*, 1 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 199, 212 (1998) (“[I]t is striking that a test of proportionality has been entirely absent from the decision-making of the European Court of Justice on affirmative action.”).

¹⁴³ See *Marschall*, 1997 E.C.R. I-6363, at para. 35. One might say that the Court’s blanket endorsement of flexible preferences is itself in need of a savings clause.

¹⁴⁴ See *Badeck*, 2000 E.C.R. I-1875, at para. 38.

¹⁴⁵ Such nods toward proportionality can be discerned at several junctures. The Court noted that the quotas on employment training places only applied to state-run programs and that male candidates had recourse to the private sector. *Badeck*, 2000 E.C.R. I-1875, at para. 53. It emphasized that other quotas were flexibly implemented, *id.* at paras. 41, 51, 65, or that they were set by reference to the pool of available candidates, *id.* at paras. 42, 57. These observations are relevant to the third prong of proportionality—balancing burdens against benefit—but ignore the issue of whether the measures were necessary to begin with.

¹⁴⁶ See *Abrahamsson*, 2000 E.C.R. I-5539, at para. 1. *Lommers*, the most recent positive action case, to some extent breaks from this mold in that the judgment does refer to specific findings by Dutch government linking the underrepresentation of women in the relevant ministry to a lack of affordable childcare and thus arguably makes its ruling limited to such a context. See *Lommers*, *supra* note 134, at paras. 36–38.

¹⁴⁷ Tesauro’s citation of the U.S. case law shows that the Court was at least aware of this precedent. See Opinion of Advocate General Tesauro, 1995 E.C.R. I-3051, at para. 9 n.10.

ferred to the national court on such matters. Even in *Johnston*, the precedent on which *Kalanke* relied for its "strict" interpretation of the derogation, the judicial review exercised at the supranational level was minimal. The *Johnston* Court intoned some warnings about the need for periodic reassessments of "social developments," but left it entirely to the national courts to ensure that the justifications proffered in that case were "well founded."¹⁴⁸ Despite its claim to strictly enforce individual rights, the ECJ thus gave the United Kingdom carte blanche to defend overt discrimination against policewomen in its own home court based on amorphous and unproven assertions of security risks.¹⁴⁹

IV. JUDICIAL SUBSIDIARITY

There are sound reasons for the ECJ to defer to national courts in assessing the justification for positive action. The European Union (E.U.) may aspire to become "an ever closer union,"¹⁵⁰ but the current status of Community law is far from the integrated federal system over which the U.S. Supreme Court presides. A U.S. model of centralized adjudication may be therefore inappropriate for positive action cases in Europe.

The direct appellate jurisdiction exercised by the Supreme Court gives it the last word on questions of federal law, from fact-finding to remedies, even for cases arising in state court.¹⁵¹ American affirmative

¹⁴⁸ See *Johnston*, 1986 E.C.R. 1651, at para. 39. See Fenwick, *supra* note 2, at 268 (arguing that *Kalanke* was inconsistent with *Johnston* in failing to defer to the national court to assess proportionality).

¹⁴⁹ See *Johnston*, 1986 E.C.R. 1651, at paras. 44–45. Britain claimed that female police officers in Northern Ireland stood in danger of assassination. Yet, the British government offered scant evidence that the situation faced by policewoman differed in any material respects from their male counterparts. The suspicion arises that the only reason for excluding women was that the public would not accept female casualties—a rationale that the Court rejected as impermissible. See *id.*; Opinion of Advocate General Pergola, Case 273/97, *Sirdar v. Army Board*, 1999 E.C.R. I-7403, [1999] 3 C.M.L.R. 559 (1999), paras. 34, 43 (criticizing this stance and advocating a more skeptical approach to justifications based on national security).

¹⁵⁰ EC TREATY, *supra* note 9, pmb1.

¹⁵¹ See *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927) (Supreme Court has jurisdiction to review state court fact finding on federal questions); *Testa v. Katt*, 330 U.S. 386, 391 (1947) (same for remedies). The Court does not review questions of state law; state courts remain the ultimate authority on that. See *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943). However, the ECJ respects the authority of national judiciaries on domestic law questions to at least the same degree. See, e.g., Case 136/95, *Caisse Nationale d'Assurance. Vieillesse des Travailleurs Salaries v. Thibault*, 1998 E.C.R. I-2011, [1998] 2 C.M.L.R. 516 (1998),

action cases bear the imprints of this centralized authority. The Supreme Court's decision in *Croson*, which rules out societal discrimination as a justification for preferential treatment based on second order prudential concerns, provides a strong example of the top-down control that the Supreme Court exercises over constitutional law.¹⁵²

In comparison, the ECJ stands in a very different relationship with the national judiciaries.¹⁵³ "The constitutional discourse in Europe must be conceived as a conversation of many actors . . . rather than a hierarchical structure with the ECJ at the top."¹⁵⁴ The foundation of this relationship is the Article 234 procedure for preliminary references, which accounts for well over half of the ECJ's caseload, and almost all of its gender equality cases.¹⁵⁵ Under Article 234, the ECJ is restricted to answering questions on E.U. law certified to it by national courts. Jurisdiction to make factual determinations, to apply the law to the facts, and to determine remedies remains with the referring court.¹⁵⁶ These jurisdictional constraints limit the ECJ's ability to impose its fiat unilaterally. Although the ECJ's supremacy on issues of E.U. law is no longer challenged overtly, the ECJ depends on national courts both to refer cases and to implement its rulings afterward, which gives national courts subtle powers of resistance.¹⁵⁷ Lack-

para. 21. Moreover, there is no Community law equivalent to diversity jurisdiction whereby U.S. federal courts adjudicate cases under state law.

¹⁵² See *Croson*, 488 U.S. at 498.

¹⁵³ See generally Weiler, *supra* note 14, at 1103-10.

¹⁵⁴ Joseph Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order: Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 447 (1996); DAVID ANDERSON, REFERENCES TO THE EUROPEAN COURT 1-2 (1995).

¹⁵⁵ See Catherine Barnard, *The Changing Face of Article 177 References*, 34 COMMON MKT. L. REV. 1113, 1158 (1999); More, *supra* note 12, at 541 (describing inexorable progress of Community gender equality law "by means of a plethora of preliminary references"). As of January 1, 2001, there had been 106 references to gender equality. Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE 31, 32 n.5 (Silvana Sciarra ed., 2001). Article 234 has been widely acknowledged as "the most fundamental element in the constitutional architecture of the European Community legal order." J.H.H. Weiler, *The European Court, National Courts and References for Preliminary Rulings—the Paradox of Success: A Revisionist View of Article 177 EEC*, in ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS 366, 366 (H. Schemmers, C. Timmerman et al. eds., 1987); Anderson, *supra* note 155, at 21-24.

¹⁵⁶ See Cohen, *supra* note 17, at 28-30.

¹⁵⁷ The starkly varying rates at which different national judiciaries have sent preliminary references to Strasbourg underline the discretion that national courts enjoy in this regard. See Kilpatrick, *supra* note 156, at 32-33 n.6. Although the making of such references may be taken to demonstrate a degree of good faith in the ECJ's authority, some references may, in fact, reflect insubordinate motives. See *id.* at 47; Paul Davies, *Transfers of Undertakings—Preliminary Remarks*, in LABOUR LAW IN THE COURTS, *supra* note 156, at 131,

ing appellate enforcement power, the ECJ must therefore engage in a discourse of comity and mutual respect in its rulings, if only to encourage national court compliance.¹⁵⁸

At some level, the ECJ must also take account of the subsidiarity principle, the E.U.'s basic principle of federalism. Elevated to the status of a fundamental norm of E.U. law at Maastricht in 1992, the subsidiarity principle requires that the Community act only "in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."¹⁵⁹ Viewed primarily as a rule of comparative efficiency, the rule has a normative political element as well. As expressed in the preamble to the Treaty on European Union, it calls for "decisions [to be] taken as closely as possible to the citizen."¹⁶⁰

The ramifications of subsidiarity on Community law remain unsettled. Although it has confirmed that the principle is justiciable, the ECJ has yet to imbue subsidiarity with much substantive content.¹⁶¹ Most scholarly analysis to date has focused on the way in which subsidiarity might operate as a legislative constraint.¹⁶² Yet, subsidiarity considerations would also seem applicable to judicial action taken by

139 (describing how national courts sometimes make successive references on the same issue to urge the ECJ to reconsider its prior rulings).

¹⁵⁸ See Thomas de la Mare, *Article 177 in Social and Political Context*, in *THE EVOLUTION OF EU LAW*, *supra* note 12, at 228. Cynical observers may dismiss this rhetorical gambit as mere window dressing, see HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* 152-53 (1998). Yet, one would hardly expect the strategy to succeed if the rhetoric were not matched by at least some degree of substance.

¹⁵⁹ EC TREATY *supra* note 9, at art. 3(b); Anderson, *supra* note 155, at 1-2, 24.

¹⁶⁰ TEU *supra* note 9, at art. A. The Maastricht Treaty also contains numerous implicit references to subsidiarity principles. Almost every treaty chapter it adds contains language underscoring the intent of the Member States to continue to exercise primary responsibility in the new Community spheres. See George Berman, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 345-47 (1994) (providing numerous examples).

¹⁶¹ See Case 377/98, *Netherlands v. European Parliament*, 2001 E.C.R. I-7079, [2001] C.M.L.R. 49 (2001), paras. 30-33 (providing cursory review of challenge on subsidiarity ground); Case 415/93, *Union Royale Belge des Sociétés de Football Assoc. v. Bosman*, 1995 E.C.R. I-4921, [1996] 1 C.M.L.R. 645 (1995), para. 81 (passing acknowledgement of subsidiarity); see also de Burca, *supra* note 14, at 220-29 (summarizing other subsidiarity decisions).

¹⁶² See Berman, *supra* note 161, at 400 (generalizing about prior analysis); see also A.G. Toth, *Is Subsidiarity Justiciable?*, 19 EUR. L. REV. 268, 281 (1994); Virginia Harrison, *Subsidiarity in Article 3b of the E.C. Treaty—Gobbledegook or Justiciable Principle*, 45 INT'L & COMP. L.Q. 431, 435 (1996).

the ECJ.¹⁶³ Even if it is not legally bound by subsidiarity, the Court arguably still has to take account of the constitutional values which the principle embodies.¹⁶⁴ Indeed, the subsidiarity principle was introduced into E.C. law in part as a reaction to activist rulings from Luxembourg.¹⁶⁵

The division of judicial roles under Article 234 might be said to embody a kind of judicial subsidiarity, broadly (and anachronistically)¹⁶⁶ understood, whereby responsibility for decision-making is allocated between national courts and the ECJ according to comparative institutional expertise.¹⁶⁷ One example of this logic may be the level at which the proportionality test is applied. Commentators suggest that the ECJ is prone to deferring to the national courts to assess proportionality in cases of political sensitivity or highly complex or localized fact-patterns.¹⁶⁸ Such delegation of decision-making authority to national courts permits decisions to be "taken as closely as possible to the citizen."¹⁶⁹

There are practical reasons for ECJ deference when it comes to positive action. The ambiguous nature of preferences, which aim to establish equality through means that on their face violate equal treatment, requires particular attention to context to ensure that they rest on genuine need, not stereotype. Moreover, the proportionality of such remedies hinges upon highly contingent factors: historical patterns of inequality, lingering effects, and availability of alternative forms of relief, among others. National contexts vary,¹⁷⁰ and indeed,

¹⁶³ See Daniel Murphy, *Subsidiarity and/or Human Rights*, 29 U. RICH. L. REV. 67, 94-97 (1994) ("Clearly, the court as a Community institution is bound to . . . act in accord with the principle"); de Burca, *supra* note 14, at 229-32 (arguing that policy choices by ECJ constitute a "law-making function [that] play[s] a significant part . . . in developing and shaping substantive law"); Berman, *supra* note 161, at 400-01 (speculating on the effects of subsidiarity on ECJ's willingness to assert E.C. jurisdiction).

¹⁶⁴ See Theodor Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle*, 14 Y.B. EUR. L. 203, 215-16 (1994) (distinguishing between subsidiarity in the narrow sense of a legal rule and its broader political meaning as a constitutional value).

¹⁶⁵ See W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT'L L. 61, 67-68 (1995).

¹⁶⁶ Clearly, the principles underlying this division of roles were developed prior to the adoption of subsidiarity.

¹⁶⁷ Cf. Murphy, *supra* note 164, at 96 & n.112 (analyzing the Art. 234 (formerly Art. 177)) procedure in accordance with subsidiarity principle).

¹⁶⁸ See Tridimas, *supra* note 116, at 78-80; de Burca, *supra* note 14, at 224.

¹⁶⁹ TEU, *supra* note 9, at art. A.

¹⁷⁰ Cf. Opinion of Advocate General Warner, Case 96/80, *Jenkins v. Kingsgate Ltd.*, 1981 E.C.R. 911, 930-31, [1981] 2 C.M.L.R. 24 (1981) (comparing the wage disparities experienced by female part-time workers across several different Member States).

the relevant context will often be sub-national.¹⁷¹ National courts are better equipped than the ECJ to perform such fact-intensive evaluations, and under the division of labor established by Article 234, the task should be theirs.

To be sure, the ECJ can always interpret the law in a manner that resolves factual issues implicitly by generalizing, as it did in *Marschall*. Yet, by their very nature, such omnipurpose rulings rest on unsubstantiated assumptions incompatible with the strict review the ECJ has professed.¹⁷² No one remedy can anticipate every contingency. Stronger measures may be justified in contexts where discrimination remains entrenched, especially when previous remedies have been ineffective. Such was arguably the case in *Abrahamsson*, where the ECJ rejected a preference scheme that went beyond those of previous cases without considering the contextual justifications offered by the scheme's defenders.¹⁷³ Conversely, preferential treatment may be unwarranted in fields where women have historically predominated, such as nursing.¹⁷⁴

A different issue is raised by a judgment such as *Kalanke*, where the ECJ appears to have acted from reasons of principle, irrespective of the factual context. Clearly, the ECJ has the power to exclude certain justifications as a matter of E.U. law.¹⁷⁵ Could the *Kalanke* opinion have done this regarding societal discrimination, following the example of the U.S. Supreme Court in *Croson*? An analogy can be made to

¹⁷¹ Note that the preference regimes at issue in *Kalanke*, *Marschall*, and *Badeck* were all instituted by German *lande* (i.e. at the provincial level).

¹⁷² See MALCOLM JARVIS, *THE APPLICATION OF EC LAW BY NATIONAL COURTS* 437 (1998) (arguing that when the ECJ assesses proportionality in free movement cases, its rulings lack subtlety and often rest on flawed assumptions).

¹⁷³ See *Abrahamsson*, 2000 E.C.R. I-5539, at paras. 50–53. The Swedish government adopted preference law in *Abrahamsson* only after it determined that progress toward equality of the sexes had been unacceptably slow and required “an extraordinary effort . . . to ensure, in the short term, a significant increase in the number of female professors.” *Id.* Cf. *United States v. Paradise*, 480 U.S. 149, 166–71 (1987) (strict quota upheld where intransigence by police department caused more flexible measures to fail).

¹⁷⁴ Cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982) (holding that nursing school for women could not be justified as compensation for past discrimination). Normally, one might expect women to be over-represented in such “female” professions, making the need for preferences moot. However, that might not be the case if gender balance were assessed at an administrative level that lumped nurses with other medical staff.

¹⁷⁵ Cf. Case 343/92, *De Weerd v. Bestuur van de Bedrijfs vereniging voor de Gezondheid*, 1994 E.C.R. I-571, [1994] 2 C.M.L.R. 325 (1994), para. 35 (budgetary considerations cannot serve as justification for indirect discrimination); *Johnston*, 1986 E.C.R. 1651, at paras. 44–45 (societal disdain for female casualties cannot justify restricting women from dangerous posts).

the ECJ's indirect discrimination case law, which also deals with structural factors that disadvantage women. Recognizing the heavily factual nature of such investigations, the ECJ has consistently deferred to the national courts in these cases to assess justifications and apply proportionality.¹⁷⁶ However, the ECJ *has* ruled out some justifications on principle as non-transparent or overly generalized.¹⁷⁷

Yet, to extrapolate from those rulings a decision as far-reaching as *Croson* would be rash. The ECJ excluded the justifications in those cases because they masked other, more objective criteria that could have been examined instead.¹⁷⁸ The U.S. Supreme Court did not reject societal discrimination in *Croson* because of a lack of objective criteria supporting it. Rather, it worried that an overabundance of evidence would make it impossible to control the objectivity of the lower courts' fact-finding used to justify preferential remedies. Yet, unlike its U.S. counterpart, the ECJ has no general jurisdiction over fact-finding.¹⁷⁹ Moreover, such a strongly centralized ruling would violate the institutional norms within which the ECJ operates as the central organ of a supranational judiciary. Both the prudential understandings implicit in Article 234 and judicial subsidiarity principles outlined above weigh heavily against it.

This is not to say that the ECJ should have no role in vetting positive action plans. It may rule some things out of bounds entirely. For example, in rejecting outcome-based justifications for preferences, the ECJ acted within its prerogative to interpret an E.C. directive. Deciding *which* preference regimes operate in the realm of outcomes versus opportunities is a different matter, likely to be settled only through application of the proportionality test. Here, the ECJ should frame the analysis in legal terms and, if possible, identify the factors to

¹⁷⁶ See Rinner-Kuhn, 1989 E.C.R. 2743, at para. 15; Enderby, 1993 E.C.R. I-5535, at para. 25; Bilka-Kaufhaus, 1986 E.C.R. 1607, at para. 36; Kowalska v. Freie und Hansestadt Hamburg, 1990 E.C.R. I-2591, para. 15; Nimz, 1991 E.C.R. I-297, 1992, at para. 14; Hervey, *supra* note 13, at 212-14.

¹⁷⁷ See Rinner-Kuhn, 1989 E.C.R. 2743, at para. 15 (justification cannot be mere generalization); Enderby, 1993 E.C.R. I-5535, at paras. 22-23; Bilka-Kaufhaus, 1986 E.C.R. 1607, at para. 36 (separate collective bargaining not justification because non-transparent); Case 109/88, Handels-og Kontorfunktionwvnernes, 1989 E.C.R. 3199, at para. 20 (rejecting "quality of work" as criteria justifying disparate impact); see also Opinion of Advocate General Darmon, 1991 E.C.R. I-297, at para. 11 ("Although it is not for the Court to appraise the facts, it seems to me that there is nothing to prevent the Court from stating, if necessary, that arguments which are too general may not be regarded as objective criteria.").

¹⁷⁸ See Fenwick & Hervey, *supra* note 108, at 466-67.

¹⁷⁹ See, e.g., Bilka-Kaufhaus, 1986 E.C.R. 1607, at para. 36 (national court alone is competent to assess facts).

balance.¹⁸⁰ By supplying extremely detailed guidelines, the ECJ can emphasize that strict review is required.¹⁸¹ The ultimate analysis should rest, however, with the national courts.

Devolving more of such decisions to national courts would help to reconcile the "strict interpretation" demanded by a derogation against an individual right, with the flexibility that Community law has traditionally allowed Member States implementing a directive on social policy.¹⁸² The difference would be that, instead of deferring to the discretion of national governments, the ECJ would defer to national judiciaries.

V. FUNDAMENTAL RIGHTS: COOPERATION VS. CONFLICT

Along with *Johnston*, the positive action cases mark the initial stages of the ECJ's "constitutionalization" of gender equality, extending to gender cases the same "strict interpretation" that the ECJ applies to economic expressions of the equality right. The change can be linked, at least rhetorically, to the ECJ's fundamental rights jurisprudence. The ECJ has made this linkage explicit in its social security cases.¹⁸³ In *Johnston* and *Kalanke*, the Court merely refers to equality as an individual right contained in a directive, but the fundamental rights dimension emerges in the Advocate Generals' opinions. Advocate General Darmon, writing in *Johnston*, states flatly that "a derogation from a human right as fundamental as that of equal treatment

¹⁸⁰ Cf. Combined Cases 46/93 and 49/93, *Brasserie du Pecheur SA v. Bundesrepublik Deutschland*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889 (1996), para. 58 (where the ECJ observes that while it "cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings . . . it will be helpful to indicate a number of circumstances which the national courts might take into account.").

¹⁸¹ Francis Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE*, *supra* note 115, at 1, 19. Compare Case 368/95, *Vereinigte Familienpress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 E.C.R. I-3689, [1997] 3 C.M.L.R. 1329, in which the court offered more than five paragraphs of guidance to the national court on how to apply proportionality in the context at issue.

¹⁸² See *supra* note 114 and accompanying text. The ECJ continues to respect a broad margin of discretion for Member States over social policy in its indirect discrimination cases. See, e.g., Case 167/97, *Regina v. Sec'y of State for Employment*, *ex parte Seymour-Smith*, 1999 E.C.R. I-623, para. 74.

¹⁸³ See, e.g., Case 137/94, *Secretary of State for Social Security v. Thomas*, 1993 E.C.R. I-1247, [1993] 3 C.M.L.R. 880 (1993), para. 8 ("[I]n view of the fundamental importance of the principle of equal treatment . . . the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7 must be interpreted strictly").

must be appraised in a restrictive manner."¹⁸⁴ Tesauero's opinion in *Kalanke* terms equality "a fundamental right the observance of which [Community law] ensures" and invokes the catch-words of the ECJ's fundamental rights jurisprudence, describing equality as both "a fundamental value of every civil society"¹⁸⁵ and "a principle which is safeguarded constitutionally in most of the Member States' legal systems."¹⁸⁶ Previously, the ECJ had enforced such strict interpretations only in its free movement cases, where the equal treatment norm was instantiated in the E.C. Treaty.¹⁸⁷ By treating the right to gender equality as "fundamental," these opinions thus place it on par with the quasi-constitutional force of the "fundamental liberties" of free movement.

Strict review in gender cases, however, cuts against the margin of discretion traditionally granted to Member States implementing directives on social policy.¹⁸⁸ Constitutionalizing gender equality has therefore added to the already swelling controversy that surrounds E.U. fundamental rights. In *Kalanke*, the ECJ construed equal treatment as a Community norm to reverse the outcome reached under an almost identical provision of the German Constitution.¹⁸⁹ The provision in question had been amended specifically to permit positive action following a decision by the German Constitutional Court endors-

¹⁸⁴ Johnston, 1986 E.C.R. 1651, at para. 9.

¹⁸⁵ Opinion of Advocate General Tesauero, 1995 E.C.R. I-3051, at para. 28.

¹⁸⁶ *Id.* at para. 9; see also *id.* at para. 27 (referring to the "fundamental inviolable objective of equality . . . a fundamental principle").

¹⁸⁷ See, e.g., Case 67/74, *Bonsignore v. Oberstadtdirektor der Stadt Koln*, 1975 E.C.R. 297, [1975] 1 C.M.L.R. 472 (1975), para. 6 ("departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed"); Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, [1975] 1 C.M.L.R. 1 (1974), para. 18 ("derogati[on] from the fundamental principle of freedom of movement for workers, must be interpreted strictly"); Case 152/73, Opinion of Advocate General Mayras, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 153, 169 (freedom of movement requires strict interpretation as fundamental liberty guaranteed by the E.C. Treaty).

¹⁸⁸ See Case 176/97, *Seymour-Smith v. Sec'y of State for Employment*, 1999 E.C.R. I-623, [1999] 2 C.M.L.R. 273 (1999), para. 75 (Member State discretion bounded by fundamental right to equality).

¹⁸⁹ Article 3(2) of the *Grundgesetz* states both that "men and women have equal rights," and that "[t]he state fosters the actual achievement of equal entitlement between women and men and strives to eliminate existing disadvantage." 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 106, apps. ix, xiii (Albert Blawstein & Gisbert Flanz eds., 2000). The relationship between these two sentences of Article 3(2) thus resembles that between Articles 2(1) and 2(4) of the Equal Treatment Directive. The German proceedings in *Kalanke* that preceded the reference to the ECJ upheld the Bremen preference as a legitimate means to promote equal opportunity for women. See BAG 2 NZA 77 (1994); Prechal, *supra* note 2, at 1246.

ing positive measures in pursuit of gender equality.¹⁹⁰ Inevitably, commentators saw the *Kalanke* decision as “food for a new fundamental rights conflict” between the ECJ and Germany’s Constitutional Court.¹⁹¹

Unsurprisingly, the *Kalanke* decision prompted muttering in German accents about the need to construe fundamental rights in light of subsidiarity.¹⁹² In *Marschall*, the ECJ defused these tensions by smuggling in Member State discretion through the back door of the savings clause.¹⁹³ However, the Court’s adherence to a formal structure that treats Article 2(4) of the Equal Treatment Directive as a derogation requiring strict review promises further conflicts to come. Originally conceived as a shield against Community action, E.U. fundamental rights, strictly enforced, will increasingly function as a sword that cuts into the constitutional autonomy of the national judiciaries.¹⁹⁴

The inevitable conflicts that will be generated will continue to press the issue of the relevance of subsidiarity in the field of funda-

¹⁹⁰ See Manfred Zuleeg, *Gender Equality and Affirmative Action Under the Law of the European Union*, 5 COLUM. J. EUR. L. 319, 319–20 (1999); Ninon Colneric, *Making Equality Law More Effective: Some Lessons from the German Experience*, 3 CARDOZO WOMEN’S L.J. 229, 236–37 (1996) (same).

¹⁹¹ Prechal, *supra* note 2, at 1259. Note that the conflict here presents the inverse of the situation in the *Solange* and “Banana” cases in which the ECJ and *Bundesverfassungsgericht* also clashed. In those cases, the German court sought to ensure that the fundamental rights of their citizenry would be protected against the effects of European law in a manner equivalent to the protection afforded under the German constitution. See Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in THE EVOLUTION OF E.U. LAW, *supra* note 12, at 203. Yet, in contrast to this essentially defensive conception of EC fundamental rights, *Kalanke*, and more recently *Abrahamsson*, present cases of a European right intervening where the national equivalent would not intervene, to invalidate a subnational rather than a national norm.

¹⁹² See, e.g. Senden, *supra* note 2, at 162 (noting that the German government questioned the ECJ’s jurisdiction over positive action cases in light of subsidiarity principles); Schiek, *supra* note 2, at 43 (ECJ ignored subsidiarity issue).

¹⁹³ See Charpentier, *supra* note 86, at 193 (arguing that savings clause in *Marschall* returns margin of discretion to Member States *sub rosa*).

¹⁹⁴ The ECJ embarked on its fundamental rights jurisprudence largely as a defensive reaction to the threat that national judiciaries would apply their own constitutional review of Community law, undermining the supremacy of the latter. See Davies, *supra* note 158, at 133; de Witte, *supra* note 192, at 202–03. Yet, by extending such fundamental rights review to national legislation that implements a European directive, as in the positive action cases, the Court has gained a powerful tool to extend its reach into domestic law—raising the spectre of new fundamental rights conflicts. See Joseph Weiler, *Fundamental Rights and Fundamental Boundaries*, in THE EUROPEAN UNION AND HUMAN RIGHTS 67 (N.A. Neuwahl & A. Rosas eds., 1995) (describing the added tension engendered by these “more direct” assaults on the constitutional autonomy of Member States).

mental rights.¹⁹⁵ Some commentators have proposed borrowing a “margin of appreciation” approach from the European Court of Human Rights to accommodate differing conceptions of equality among the Member States.¹⁹⁶ This article has suggested, however, that at least in the case of positive action and other contextually contingent questions, a potential for diversity already exists within the present structure of Community law. The distinctive roles which the two levels of E.U. judiciaries play under the Article 234 procedure lend themselves naturally to the application of subsidiarity principles. In contrast to the usual portrayal of fundamental rights as an arena in which the ECJ and national courts compete in a zero-sum game,¹⁹⁷ this provides a model of judicial subsidiarity in which the two levels can be viewed as allies, not antagonists, in their common role as protectors of individual rights.¹⁹⁸

CONCLUSION

This article has revealed the shortcomings of the European Court of Justice’s positive action jurisprudence. In relying on “flexibility” as its guiding principle to reconcile individual rights with the competing equality claim of working women, the ECJ has substituted a facile formula in place of the substantive analysis that its putative strict review would imply. Moreover, in ruling on these issues at the Community level, the ECJ has precluded the sensitivity to context that would have been possible had it left the assessment of proportionality to the national courts. These defects stem, in part, from a failure of the ECJ

¹⁹⁵ Supporters of a robust European fundamental rights jurisprudence argue that the principle supports broader recognition of rights at the European level as the foundation of a “Citizen’s Europe.” See Philip Alston & J.H.H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy*, in *THE EU AND HUMAN RIGHTS 27* (Philip Alston ed., 1999); Denis Edwards, *Fearing Federalism’s Failure: Subsidiarity in the European Union*, 44 *AM. J. COMP. L.* 537, 562–63 (1996). *But see* Weiler, *supra* note 195, at 66–74 (offering a more nuanced view of judicial subsidiarity). Opponents favor a pluralist approach, keeping most rights at the national level, where they can be implemented according to the salient political and cultural traditions of each Member State. See Leonard Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 *COMMON MKT. L. REV.* 629, 674–78 (1998).

¹⁹⁶ See Eva Brems, *supra* note 2, at 79; Weiler, *supra* note 195, at 73.

¹⁹⁷ See Besselink, *supra* note 196, at 665–78 (discussing various models designed to mediate conflicts between divergent levels of rights protection).

¹⁹⁸ Cf. Weiler, *supra* note 195, at 71 (advocating a cooperative approach to fundamental rights for the ECJ and its national counterparts); Robert Post, *Justice Brennan and Federalism*, 7 *CONST. COMMENT.* 227, 235–38 (1990) (exploring a similar vision for U.S. federalism).

to give adequate consideration to its institutional role in interpreting a Community right through its Article 234 interlocution with national courts.

In the years since *Kalanke* and *Marschall*, several amendments to the E.C. Treaty have altered the landscape of gender equality law. The Amsterdam Treaty included a specific provision, Article 141(4), designed to reverse the result of *Kalanke* through a somewhat incongruous appendage to what started as the Equal Pay Article of the E.C. Treaty.¹⁹⁹ After the *volte face* executed by the ECJ in *Marschall*, this provision has seemed perhaps superfluous.²⁰⁰ In *Abrahamsson*, the Court declined to give Article 141(4) any independent substantive meaning, although it remains open for it do so in the future.²⁰¹

The Amsterdam Treaty has also led to greater Community involvement with social equality. Article 13 of the Treaty provides the E.C. with broad enabling powers to enact anti-discrimination measures protecting specified status groups.²⁰² A pair of new directives passed under this Article have added race, ethnicity, religion, belief, disability, age, and sexual orientation to the list of categories protected from discrimination by E.C. employment law.²⁰³ The E.U.'s new Charter of Fundamental Rights contains its own expansive non-discrimination and positive action clauses.²⁰⁴

¹⁹⁹ See TREATY OF AMSTERDAM, *supra* note 9, at art. 141(4) (formerly article 119(4)). The full text of Article 141(4) reads:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or compensate for disadvantages in professional careers.

See id.

²⁰⁰ Article 141(4) first appeared in draft form prior to the *Marschall* judgment, when the impact of *Kalanke* appeared to leave positive action in doubt.

²⁰¹ See *Abrahamsson*, 2000 E.C.R. I-5539, at para. 55 (holding in conclusory fashion that Sweden's preference was disproportionate under Article 141(4)—a conclusion it had already reached under Article 2(4)).

²⁰² See TREATY OF AMSTERDAM *supra* note 9, at art. 2(7).

²⁰³ Council Directive 2000/43/EC, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180/22); Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303/16). See generally Lisa Waddington & Mark Bell, *More Equal Than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. REV. 587 (2001).

²⁰⁴ See Charter of Fundamental Rights of the European Union, 43 O.J. (C 364) 13, arts. 20, 23. The Charter was "solemnly proclaimed" by the European Council, Commission,

This continued “constitutionalizing” of equality in Community law will put added pressure on the ECJ to balance the vigilant scrutiny needed to protect fundamental rights against a respect for Member State sovereignty in social policy. The recently enacted Race Directive, in particular, will require even greater attentiveness to context than is the case with gender because race as a construct is much more contextually contingent.²⁰⁵ To perform this juggling act, the ECJ will need to pay closer attention to managing its cooperative partnership with the national judiciaries. As the ECJ continues to articulate the institutional logic underpinning this shared jurisdiction, it may be possible to develop a viable conception of judicial subsidiarity.²⁰⁶

and Parliament, but has not yet been made justiciable; its status is to be reconsidered in 2003.

²⁰⁵ See generally Ian Haney-Lopez, *The Social Construction of Race: Some Observations on the Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 42–61 (1994) (describing how notions of race are highly contextualized and can only be understood by examining the specific communities in which they operate).

²⁰⁶ The beginning of such an effort was made by Advocate General Jacobs in Case 457/93, *Kuratorium für Dialyse und Nierentransplantation v. Lewark*, 1996 E.C.R. I-243, 256, where he contrasted economic and social policy justifications offered in indirect discrimination cases, arguing that the ECJ can generalize more regarding the latter. Relevant points of comparison may be drawn from the example of U.S. judicial federalism—e.g. the prudential considerations embodied in the federal abstention and adequate state grounds doctrines. Such comparative analysis will have to await future study.