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History of Antidiscrimination Law

The Constitution and the Search for Paradigms of Equality

Was the Constitution and its interpretation the driving influence and inspiration of antidiscrimination law? In the conversations that follow, American scholars help to deepen our understanding of the climate that produced antidiscrimination law in the United States, evoking the political and social events that shaped its uneven construction, sometimes advancing, sometimes resisting its development, and providing a cultural lens through which to understand the expansion of this law in Europe.

I. THE ORIGINS OF ANTIDISCRIMINATION LAW

The constitutional interpretation of the U.S. Supreme Court has played a pivotal role in the civil rights movement, hastening the country toward the Civil War with the landmark *Dred Scott* decision in 1857,[1] then legitimizing racial segregation laws with its "separate but equal" decision in 1896,[2] before finally introducing a more practical way to deal with inequality and paving the way for antidiscrimination protection[3] with the *Brown v. Board of Education* decision in 1954.[4] American activist organizations have also spurred antidiscrimination initiatives forward, while support from the Equal Employment Opportunity Commission (EEOC) and trade unions has been irregular, sometimes promoting but sometimes hindering the expansion of antidiscrimination law.

In Europe, the recognition of discrimination emerged from a different background, but lessons learned from the American experience can enrich the current debate in Europe over the role of the French equivalent of the EEOC, the Defender of Rights[5] (formerly HALDE), and what employee representative bodies and trade

unions should be doing to manage diversity. With the introduction of a new form of judicial review in France (called *question prioritaire de constitutionnalité*) enabling individuals to challenge laws that infringe their constitutional rights, as well as recent European case law on fundamental rights, the opportunity is ripe for a closer American analysis on the influence of constitutional jurisprudence on antidiscrimination law. This question is essential for European authorities, such as the European Union (EU) and the Council of Europe, who are developing and interpreting fundamental human rights norms and do not always know how much deference European judges must show in considering national views on the meaning of equality: what are the pros and cons of imposing this fundamental right in international law? Should they be aware of certain limitations to the application of constitutional norms and nondiscrimination as a fundamental right?

In the following excerpt, David Oppenheimer talks about the development of constitutional case law on nondiscrimination.

MARIE MERCAT-BRUNS: *Do you think employment discrimination law has succeeded in its goals?*

DAVID OPPENHEIMER: To a substantial extent, I think it has, although not nearly to the extent many of us had hoped for in the 1960s and 1970s. The view of most legal academics and most lawyers who represent plaintiffs in discrimination cases is that the law has failed. And I think in reaching that conclusion, my colleagues and friends have seen the glass as half empty. I look at that same glass, and I see it as half full.

There's much yet to be accomplished, and I worry about whether it will be accomplished, particularly given this Supreme Court. But at the same time, I think the law has accomplished a great deal in transforming our society. There have really been two transformations: a transformation through antidiscrimination and a transformation through diversity.

I'll develop on antidiscrimination transformation. I think that between 1964, when the Civil Rights Act was passed,[6] and 1978, when the *Bakke* decision was handed down,[7] there was an enormous change in the views of the American public with regard to discrimination and antidiscrimination law and the rights of minorities. If you go back into the 1950s, when the civil rights movement was becoming an important force in the United States, leading up to the 1964 Civil Rights Act, there was enormous white resistance, some by those who simply believed in white supremacy and some by those who held strong biases. There was a significant group who believed in white supremacy, especially in the southern United States. And there was a very substantial group who may have espoused a belief in equality but didn't really believe that black Americans were equal to whites in terms of intelligence or honesty or morals or ethics or loyalty or patriotism, who held very strong prejudices against black Americans.

By 1978, there had been a real transformation in American culture. Public expressions of racism were generally not tolerated in most parts of white society. Prejudice was still very strong but it was diminished, and it was probably far more subconscious or unconscious prejudice than conscious. You began to see a big difference in polling results between questions that asked explicitly about antiblack views and questions that more creatively uncovered those views.

In 1954, there was little white support for civil rights legislation. By 1964, there was support but there was also opposition. By 1978, most white Americans at least said that they thought there should be antidiscrimination legislation. There was still a significant minority who were just outright bigots. But they were much less important in American culture at that point.

The case law, Supreme Court case law in particular, between 1964 and 1978 for the most part recognized the problem of discrimination against black Americans as a serious problem for which legal remedies were necessary, and you see it in cases like *Green, Griggs,* and *Weber.*[8] You see support for a theory of adverse impact discrimination, often called in Europe "indirect discrimination." You see it in support for shifting the burden to the employer to prove nondiscrimination, which exists in Europe and has essentially disappeared in the United States. You see it in support for voluntary affirmative action[9] as a remedy for discrimination.[10] All of that starts to change in the late 1970s and, in some ways, that change is a terrible defeat for those of us who want to enforce civil rights law and those of us who want to promote racial equality.

But there is at least to some extent an explanation of that change as a reflection of transformation having worked, having happened, and the Court wanting to move on because it views the civil rights revolution as a success.

MM-B: *Do you use the term* revolution *voluntarily?*

DO: Yes. It was a revolution, a cultural revolution and a legal revolution in the United States. Not a revolution in the sense of overthrowing the state but a revolution in the sense of changing the state in a very fundamental way, changing the society in a fundamental way.

But you don't have to be very cynical to see the changes that have more recently occurred in the Supreme Court's jurisprudence as reflecting the success of a conservative ideology that was essentially anti–civil rights. It continues to be more and more anti–civil rights to this day.

MM-B: *All the judges?*

DO: No, but a majority of the judges. One of the things that is interesting about following civil rights law and the Supreme Court is that sometimes we are looking at the question of whether Congress or the executive operated with sufficient authority, and other times we are looking at whether the states in their antidiscrimination legislation have acted with proper authority.

The Court's majority asserts that the underlying principles that drive its jurisprudence really concern states' rights, and often the rhetoric focuses on states' rights. But when we look at the outcome of a civil rights case, what we find is that whatever the underlying principles are, the conservative judges who generally claim they believe in deferring to the states are ready to change their rhetoric in order to find that the state had exceeded its constitutional authority if the state passes antidiscrimination legislation.

MM-B: *So they base their reasoning more on the authority of state and federal rights rather than looking in depth at the question of discrimination that's at hand?*

DO: That's what you would expect if the court was not result-oriented and was acting on principle, but instead I can usually predict at least eight votes out of nine based on who wins and who loses: there are four members of the court, and often a fifth, who almost always will vote to oppose any expansion of civil rights for black Americans.

MM-B: *Are you saying that it is hard to evaluate the recent effects of the civil rights legislation because there has been a more conservative Court, that its impact has been skewed as a result? Perhaps you can't really answer that question because the outcome of the law has been hindered by the Court.*

DO: One, and I will come back to this: in 1978, we started moving in a whole new direction because of the diversity justification for civil rights law.

MM-B: *So this will be your second point: transformation through diversity.*

DO: Yes. Continuing with the first point a little longer—

MM-B: *The question was whether the Court is interpreting the laws restrictively, and you said there had been progress.*

DO: Yes, there has been essentially an ongoing dispute between the Congress and the Court, in which the Congress writes a civil rights law, and the Court interprets it narrowly, saying the Congress could not have intended a broad interpretation despite the fact that often the administrative interpretations suggest a broad interpretation. Then Congress says, "We really meant it," and the Court says, "Well, no, you didn't." And so we continue to see legislation on behalf of the expansion of civil rights and on behalf of the enforcement of civil rights.

This raises for me the fundamental question about motivation. Take the issue of color blindness; color blindness goes right to the heart of the problem. Color blindness is the idea that any action by the state which recognizes race is illegitimate, even when the intent is to use race to reduce racial inequality. There are four or five members of the Court who always have the same position (a very French position) that any recognition of race by the state is illegitimate: they are Justices Thomas, Scalia, Roberts, Alito, and sometimes Kennedy.

There are four, and sometimes five, members of the Court who believe that it is proper for the state to recognize race (that is, to be conscious of race and to act on behalf of race) under certain limited circumstances, which are narrowly construed to support a compelling legitimate government purpose: this is true of Justices Ginsburg, Breyer, Souter, and Stevens. It is likely to be true of Justice Sotomayor (though it is always dangerous to predict) and is sometimes true of Justice Kennedy. (And, editing in 2014, it is true of Justice Kagan. —DO)

Do the four who have this absolutist view on color blindness take that position because they believe as a matter of principle in color blindness? Do they believe that this would help promote a better society and would help promote equality in our society? That is what they say. Should they be taken at their word? Or are they laughing behind our backs? Is it the excuse they use to vote against opportunities, progress, and equality for black Americans, because they do not share the goal of equality?

MM-B: *What do you think?*

DO: The polite answer to that question is of course they act on principle.

MM-B: *So they have a large responsibility in the status quo.*

DO: I think they have an enormous responsibility, and I am suspicious of their claim to believe in equality, but a form of equality built on color blindness.

Let me give you two examples of judges who believed in color blindness and therefore were opposed to affirmative action, where I believe they were expressing a principle they really believed in, rather than being strategic and pragmatic.

William O. Douglas was on the Supreme Court for forty years. He took courageous positions on the Supreme Court in support of civil rights. But he did believe in color blindness. In the *Defunis* case,[11] he took a position against affirmative action, even though that meant joining the conservatives with whom he usually disagreed on civil rights issues, because it was consistent with the principles he believed in.

Stanley Mosk served as the attorney general of California and then for many years on the California Supreme Court. He was a great liberal but strongly opposed to affirmative action. It conflicted with his long-expressed views that the Constitution and the law should be color-blind.

I did not doubt their commitment to color blindness, even though I disagreed with them.

But there is no reason to conclude that the conservatives on this Court are acting based on a principle of support for equality, but through color blindness. They have never supported efforts to provide opportunity and equality for black Americans. That leads me to believe their opposition to affirmative action and other civil rights remedies and other civil rights claims is not based on a position of favoring equality for black Americans.

MM-B: *Did you want to show how diversity transforms?*

DO: Sure. The diversity transformation is the second transformation and involves race, religion, and culture.

This was the most remarkable result of Justice Powell's opinion in *Bakke,*[12] which was joined by four justices in one part of his opinion and joined by the other four justices in the other part. Therefore five votes on one part and five votes on the other. So, on the one hand, the Court held that remedial affirmative action is subject to strict scrutiny,[13] and is highly suspicious because it is a race-based decision being made by the government. As a result, racial quotas in admissions violate the Constitution. But on the other hand, when a university decides that it wants to use race, among other factors, to admit a diverse group of students, this use of race is permissible under the Constitution. So, a university's desire for racial diversity justifies affirmative action.

Before 1977, the principal justification for affirmative action was as a remedy for discrimination. But after *Bakke,* in 1978, we see this shift in American law and society, so the primary justification for affirmative action, and eventually all kinds of civil rights enforcement and remedies, is diversity. That's been the second transformation of American society coming out of the civil rights era: the embracing of diversity, including racial diversity, including cultural diversity, including religious diversity. It is a fundamental change.

When I was growing up in the 1950s and 1960s, the prevailing view on how different kinds of Americans should join together was a model of assimilation. Today the prevailing view is celebrating our differences by embracing diversity. It is a remarkable change. Much of that change came out of the Harvard admissions plan embraced by Justice Powell in the *Bakke* decision. People just turned to that and said, "Wow, here is a justification in which there is no guilt, in which there is no accusation of racism, in which there is no history, so we can completely look forward and say, 'Yes! we want diversity.'"

MM-B: *So you agree with the analysis that the argumentation for diversity since* Bakke *has been to look to the future, whereas the previous logic was to remedy past discrimination?*

DO: There was a fundamental shift from figuring out who did something wrong, and therefore there is compensation for their wrongful act, to seeking diversity. Before *Bakke,* an attempt to engage in affirmative action required an analysis of guilt and remedy and compensation and wrongdoing. It was all looking backwards.

So this shift meant people could stop looking backwards and look forwards towards diversity. And this was a new kind of diversity, an idea of diversity not as simply difference in hobbies or geography or interests, but suddenly race and ethnicity become legitimate forms of identity to be included within a policy favoring diversity. That was transformative and continues to be the driving force behind many of the positive actions taken in the United States to reduce racial inequality.[14]

Comparative Perspectives

In his historical panorama, Oppenheimer describes a certain pattern of Supreme Court decisions, in which the Court's positioning has alternately embraced or rejected more advanced reflection on discrimination. But no matter which way the majority leaned, the Court's action has been decisive in shaping equality and diversity principles and in the interpretation of more specific legislation on these matters, providing a useful lens through which to examine how these concepts were formed in France and Europe and their different trajectories.

In Oppenheimer's view, constitutional case law—that is, the constitutional law decisions of the Supreme Court and its interpretation of the constitution—has helped to establish important milestones for equality and eventually led to the introduction of the concept of diversity. Despite mixed results, in this contribution, Oppenheimer sees a gradual improvement in attitudes toward racial diversity.

In the United States, the Supreme Court justices attempted to establish the idea of diversity as a legal concept: the notion of diversity emerged from a constitutional review of equality in a race discrimination case, outside the realm of employment. In contrast, France's approach to diversity is more recent and does not seem to have originated in a judicial understanding of the issue:[15] it is "not so much a critique of the affirmative action model as a critique of a formal equality model that long remained 'blind' to the inequalities and discriminations it engendered."[16]

What the French achieved, in addition to the enactment of a French law on equal opportunities *(loi sur l'égalité des chances),*[17] was to bring the issue into the collective bargaining arena. In France, the general provisions of the labor code are supplemented by the provisions of the applicable collective bargaining agreement, which is different for each sector or industry. In this highly context-dependent environment, the reigning uncertainty has less to do with legal ambiguities than with the interpretation of diversity, which is invoked without any clear definition of what it covers.[18]

Since 2010, France has had a new power of judicial review.[19] Has France's Conseil Constitutionnel (Constitutional Council) taken advantage of this new clout to fill in the blanks between diversity and equality? France can now expand its case law, implementing a more proactive idea of substantive equality and thereby address inequalities engendered by the application of the law. The judiciary has shown a relatively high degree of deference to legislation, even though laws based on the principle of equality are frequently subjected to a judicial review.[20] To date, the Conseil Constitutionnel has adhered to the clear-cut but relatively prudent approach to equality originally drawn from decisions of the Conseil d'État, France's administrative supreme court, which selects, with the Cour de Cassation, the cases for judicial review.[21] It seems rather that judicial review has reinforced the French supreme courts' (Conseil d'État, Cour de Cassation) power rather than

the Conseil Constitutionnel's sphere of influence in matters of equality. Compared to other constitutional courts or councils, the Conseil Constitutionnel exercises greater self-restraint, limiting its scrutiny of the legal norm to an appreciation of its internal coherence: differences of treatment should reflect objective differences of situation which are directly and sufficiently related to the pursuit of the law.[22]

In the United States, shortcomings in governmental efforts to battle discrimination in the employment field have prompted corporate human resources departments to devise their own strategies aiming to promote diversity and value differences regardless of origin.[23] In France, the campaign to root out discrimination is gaining momentum while, at the same time, diversity talk is expanding. These two policies on antidiscrimination and diversity and the legal instruments used do not interrelate in any systematic, organized fashion. In fact, they sometimes clash, although Oppenheimer shows us how the diversity narrative can be a driving force. Is there a risk that these competing norms in France will create an obstacle to the fight against discrimination (the problem with measuring diversity), as it did in the United States? The fact that European antidiscrimination law exists and continues to grow, combined with the availability of collective bargaining, seem to suggest that diversity and antidiscrimination norms will either complement each other or continue along parallel paths without intersecting or reinforcing each other.[24]Antidiscrimination law, based on evidence and judiciary review, is more operational, while diversity is associated with discourse and stated objectives. This distinction is clearly illustrated in European reports on the search for social cohesion, diversity, and equal opportunities for all.[25]

Affirmative action tools in French law are even proliferating: a constitutional revision has enabled specific mechanisms such as quotas for women board members, first in listed companies, to be introduced into French law, although the purview of these tools must be nuanced.[26] The 2013 law on higher education has adopted a new affirmative action plan, resembling the Texas and California percentage plans, in which a certain percentage of the top-performing high school students earn admission to preparatory programs enabling them to access selective higher education establishments (this includes France's elite *"grandes écoles,"* which represent a much more exclusive track than the French university system).[27]

It is interesting to note that the affirmative action issue has permeated the realm of education as well as employment, simultaneously influencing these two spheres in the United States.

II. MORE ON THE ORIGINS OF ANTIDISCRIMINATION LAW

In our conversation, Linda Krieger commented on the Supreme Court's current position on the use of affirmative action and expressed her apprehension about key Supreme Court decisions to come.

LINDA KRIEGER: In the United States, people today are not talking about affirmative action for anyone because of the current Supreme Court. Everyone I know who is on the employee-women-and-minorities side of the civil rights movement is dreading the next Supreme Court affirmative action case. I think if the current Supreme Court were to get a case involving a preferential form of affirmative action in the employment context, it would overrule all the previous cases permitting affirmative action in certain circumstances and find it violative of Title VII, and if it is a public employer, violative of the Fourteenth Amendment. The swing vote is Justice Kennedy. Justice Kennedy has never voted in favor of an affirmative action program in any case he's ever sat, including when he was in the Ninth Circuit. I think we would have a majority of five justices on any case concerning a preferential form of affirmative action.[28]

As Krieger suggests, the United States is currently moving in the opposite direction from France. The promotion of diversity in the United States has confirmed the unconstitutionality of numerical quotas, found to be incompatible with equal protection of the laws in the *Bakke, Grutter,* and *Parents Involved* decisions on school and university admissions policies.[29] Some states have decided that affirmative action plans based on race are unconstitutional. This is why indirect affirmative action mechanisms, such as the percentage plans used in Texas and California, have been introduced into the field of education.[30] These plans take a geographic approach to diversity. In France, the Sciences Po law school attempted a similar approach, later taken by the previously mentioned 2013 law on access to selective higher education, basing preferential treatment on academic ranking.

These subtler initiatives remain under rigorous scrutiny by the Supreme Court if the programs use race as a factor after having applied the percentage plan. In *Fisher v. University of Texas at Austin,* Fisher did not graduate in the top 10 percent of her high school but could still be admitted to the university by scoring high in a process evaluating applicants' "talents, leadership qualities, family circumstances and race." She was denied admission and filed suit against the university, alleging discrimination on the basis of race in violation of her Fourteenth Amendment right to equal protection. Writing for the majority, Justice Kennedy concluded that the lower court had failed to apply strict scrutiny in its decision affirming the admissions policy: "The Fifth Circuit held petitioner could challenge only whether the University's decision to use race as an admissions factor 'was made in good faith.' It presumed that the school had acted in good faith and gave petitioner the burden of rebutting that presumption." In his argument, Kennedy affirmed the *Grutter v. Bollinger* ruling, placing the burden of persuasion primarily with the university "to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."

Reva Siegel recounts the 2012 Supreme Court term and shows us how minority claims in other fields of law are not successful.[31] Recent Supreme Court cases failed to "[address] minority claims of racial profiling in enforcement of criminal and

immigration law,"[32] shaping "the Court's unprecedented decision to strike down a key provision of the Voting Rights Act of 1965 in *Shelby County v. Holder.*[33] *Shelby County* interprets equality law with solicitude for Americans who claim they have been injured by laws that protect the rights and opportunities of minorities."[34]

Adding to this historical overview by Oppenheimer and Krieger, Robert Post comments on the foundations of antidiscrimination law.

MARIE MERCAT-BRUNS: *Do you agree with the statement that the basic foundations of antidiscrimination law are in tort, but discrimination law has been inspired by constitutional grounds? How powerful has the constitutional influence on antidiscrimination law been as opposed to the impact of tort law?*

ROBERT POST: The Constitution of the United States requires state action so that a private person, including an employer, cannot violate the Constitution. So the constitutional influence on antidiscrimination law comes up with state action. It is a very powerful norm because courts are quasi-sovereign. To put that sovereignty on the basis of that norm is an extremely powerful statement of national ideals and values.

And this spreads horizontally into the private sphere. It causes the rest of the society to be much more aware of these issues and to want more directives. I think this is a causal matter; the fact that we looked at the state, which is supposed to be supremely neutral, led people to think about the relationship between race and private action and led to legislation. These are complementary. It is not either-or. The Supreme Court has been in retreat on questions of constitutional requirements for antidiscrimination even though the Congress has persistently defended antidiscrimination law. We have some disparities there.

I think people in the United States feel more comfortable making statutes and then revising them. The constitutional matter will be much less likely to be on structural redistribution and structural changes because it's constitutional, so it is taking it away from the legislator. We are more cautious in that area and more cautious to things being taken over by social scientists and their statistics, and we are more comfortable allowing a statutory case of antidiscrimination to be determined by statistics because, in the end, if we don't like that, we can change, whereas constitutional change is harder.

There is an inherent tendency to make constitutional law general, and there is more of an opportunity to make statutory law impact-oriented. Even there, there has been in retreat in the courts.

MM-B: *So what you are saying is that you go farther with the statute: in terms of the symbol, it is very important that you have a constitutional principle.*

RP: Exactly. The symbol is acutely powerful because it stands for the national values. And we argue about that symbol that brings us together in a way the statute doesn't.

Comparative Perspectives

Post points out that constitutional jurisprudence has had, and continues to have, strong symbolic value in the area of discrimination and equality. In the United States, constitutional case law has acted as a catalyst by recognizing the merits of substantive equality,[35] affirmative action, and attempts to promote diversity, while possibly inhibiting the scope of indirect discrimination claims.[36] As a result, the net effect of constitutional case law has not necessarily been favorable to expanding antidiscrimination law. The Supreme Court has been a beacon in many cases, enshrining certain key interpretations of law relating to discrimination or equality, but currently, as Krieger notes, the Court is restricting the development of law in this field.

In comparison, what has been the influence of the formal recognition of equality and nondiscrimination as a fundamental norm in European and national law?[37] Although European courts had to contend with the issue of existing German case law on fundamental rights,[38] it can be said that the idea of nondiscrimination and equal treatment as fundamental rights[39] in European law became more legitimate in France once a review mechanism was actually used for the application of European norms in national law, through the process of preliminary rulings. "The expression 'fundamental rights' is more commonly used by the European Union:[40] the Court of Justice prefers to speak of 'fundamental rights and freedoms' rather than 'human rights' and this vocabulary can also be found in Article 6(2) of the EU Treaty."[41] The use of the term *fundamental rights* makes it possible to extend human rights from physical persons to legal persons, notably companies.[42]

In addition, the scope of these rights is surely being amplified by the cross-fertilization occurring between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), in their roles of interpreting the fundamental rights of the European Union and the rights set out in the European Convention on Human Rights, respectively. The Strasbourg court [ECtHR] refers increasingly often to the Charter of Fundamental Rights,[43] and the Luxembourg court (CJEU) is traditionally receptive to the influence of the ECtHR, even though the CJEU has recently proposed certain adjustments for the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[44] The path opened by nondiscrimination or the principle of equal treatment is influential, because it is increasingly used by both courts, which not only employ the same concepts of direct and indirect discrimination, but also apply similar forms of scrutiny: they look for objective justification of a difference in treatment in laws or decisions, as applicable, and also perform the proportionality test required to qualify a difference as indirect discrimination.[45]

In other words, in their approach to nondiscrimination and equal treatment, the ECtHR and the CJEU generally favor either a human rights perspective or an economic perspective. The ECtHR's case law can be rather unpredictable in terms

of substantive equality, depending on whether it takes into account the state's margin of appreciation.[46] However, with the formal recognition of the fundamental principles of equal treatment and of antidiscrimination based on age, the CJEU appears to be heading in the opposite direction from the United States. Empowered by the recently binding character of the EU Charter of Fundamental Rights, which is an integral part of the EU treaties since Lisbon,[47] the CJEU is journeying toward a consolidation of the normative legitimacy of antidiscrimination law at the highest level.[48]

Even if Article 14 of the European Convention on Human Rights pertaining to nondiscrimination cannot be invoked alone and Protocol No. 12 to the Convention has not yet proven its efficacy, the EU Charter of Fundamental Rights cites some of the same grounds in its list of prohibited grounds (sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status), showing that economic considerations are no longer the main rationale for fighting discrimination believed to obstruct the market. Furthermore, a diverse legal culture among judges on the ECtHR is helping the recognition of certain problematic concepts such as indirect discrimination, a typically Western notion unfamiliar to the courts in Eastern European countries.[49]

Post confirms the influence of Supreme Court case law due to the symbolic power of the Constitution and to the role of constitutional review in the development of law in general. Can a parallel be drawn with EU case law and its influence in protecting the fundamental rights of member-state citizens?[50] If this reasoning is followed, the fundamental right to equal treatment becomes a defining characteristic of European citizenship.[51] The second part of the Treaty of Lisbon is entitled "Nondiscrimination and Citizenship of the Union."[52] Doesn't the Treaty therefore advance social progress by establishing fundamental rights as the European Union's primary driver of consolidation, notably by incorporating the EU Charter of Fundamental Rights into its body of treaties? The charter plays a role that goes beyond the symbolic value of its enunciation of principles.[53] European judges ensure the interpretation of these principles and have the power to disapply inconsistent norms with horizontal direct effect on national private law.[54]

Yet equal treatment and antidiscrimination are not necessarily the bricks and mortar of a European social model,[55] since the application of these principles does not always lead to the recognition of substantive rights. In fact, the opposite can be true.[56] But sometimes the need to ensure the effectiveness of directives and principles is enough to overcome national resistance to new concepts, such as broader meanings of parenthood and couples.[57] A preliminary ruling from the CJEU even recognized that a French collective bargaining agreement reserving access to employment benefits exclusively to married couples constituted direct discrimination against same-sex couples based on sexual orientation.[58] This decision was

handed down before the French law on same-sex marriage was adopted.[59] By effectively fighting indirect discrimination and enforcing equal pay, Europe is improving real access to certain employment rights. If we accept that the components of contemporary European citizenship are, as Richard Bellamy asserts, "membership of a democratic political community, the collective benefits and rights associated with membership, and participation in the community's political, economic and social processes,"[60] then the recognition of equal pay for men and women nevertheless enabled the acquisition of substantive rights.[61]

In the United States, Supreme Court judges have often implied that it is not their role to support a certain model of economic or social policy.[62] Some scholars ascribe an even greater purpose to Europe's fundamental values, considering that a fully fledged "European social program" underlies the Treaty of Lisbon, as seen in its "high social ambitions" and commitment to "human dignity [and] solidarity," the fact that it makes the well-being of the European people one of the Union's aims, and the affirmation in the Charter of Fundamental Rights that the Union "places the individual at the heart of its activities."[63]

For some, branding European principles as "values" serves an ideological function. However, this is potentially undesirable because it portrays the founding principles of the Treaty of Lisbon as "an expression of the ethical convictions of EU citizens" built on "sociological" and "paternalistic" assumptions, instead of focusing on the constitutional dimension of these principles.[64]

At the national level, we can question whether the introduction of a form of judicial review in France (*question prioritaire de constitutionnalité* [QPC]) will shape the path of employment equality case law, as it has in the United States. According to certain scholars, the existence of a posteriori constitutional review is not necessarily synonymous with an enriched body of equality case law. "It will all depend on the level of scrutiny exercised by appeal courts on the seriousness of the grievances, as well as the level of scrutiny to be exercised by the Conseil Constitutionnel on the legislative work."[65] The decision on the full-face veil already reflects the judicial stance on equality and religion in the public sphere, which has been echoed by the high court in the employment sector concerning the head veil.[66] This case law on the principle of equality has followed that of the Conseil d'État (the French administrative supreme court), which often leads to two types of review: a review of the legitimacy of the legislature's infringement of the principle of equality, by identifying differences in circumstances and ways of thinking that led the legislature to treat people in potentially comparable situations differently, and a proportionality test that does not always go by that name.[67]

The Conseil Constitutionnel has "discretionary power in assessing the fit between the aim and the measures implemented by the law, without necessarily examining, however, whether the aim assigned to the legislature could be achieved by other means," but in the past it has not hesitated to "shift the focus of its scrutiny

as desired" and "point out a manifest error of assessment or a disproportionate error committed by the legislature,"[68] especially where an infringement of freedom is involved. But QPC, France's judicial review mechanism, can be useful by bringing proportionality testing to the table. The Council is often cautious, stating that "the principle of equal treatment is not opposed to the legislature ruling differently in different situations nor with a departure from equality in order to serve the general interest, provided that, in both cases, the resulting difference in treatment remains directly proportionate to the purpose of the law from which it originates."[69] "The Conseil adjusts the level of its scrutiny" of equality based on the matters under consideration: "greater for civil and political rights and . . . more relaxed for economic and social rights,"[70] upon which employment rights partly depend.[71] Through QPC, the Conseil has nevertheless affirmed, on the issue of retirement pensions paid to Algerian nationals, that "although the legislature can base a difference of treatment on the place of residence, taking into account differences in purchasing power, it cannot establish, with respect to the purpose of the statute, any difference based on nationality between holders of civil or military pensions paid from the budget of the State or of public institutions of the State and residing in the same foreign country."[72] The Conseil ruled in the same direction regarding different pension amounts based on the beneficiary's level of disability.[73]

Since the introduction of QPC, the trajectory of equality case law to date has not yet been significantly altered,[74] and will also be influenced by the screening work of the Cour de cassation, France's supreme court, which has a chamber for employment and labor law.[75] For now, the Conseil continues to exhibit a certain deference to the legislature when the equality issue depends on a certain political maturity, as illustrated by the decision on same-sex marriage,[76] or on a clear orientation of more global social policy reforms, as shown in the QPC decision on the constitutionality of a mandatory retirement age.[77] This reasoning is reminiscent of certain conservative positions of the U.S. Supreme Court, in which the Court took into account the societal issues at play to determine how the equality principle or questions about freedoms would impact the equality of American citizens.[78]

American case law does not apply a proportionality test as such, however, preferring to balance the interests of different groups with federal or state interests in assessing equality.[79] However, for its a posteriori constitutionality reviews of the principle of equality, France can draw inspiration from the proportionality test already used by various courts to determine equal treatment:[80] the CJEU, the Conseil d'État, and even the Cour de Cassation[81] use proportionality to assess the equality principle, the antidiscrimination principle, and numerous legal exceptions, respectively, which must show that they have a legitimate purpose and are proportional to that aim or fall into the category of prohibited discrimination on the basis of age or disability.[82] Proportionality is probably less of a cure-all when used to secure legitimacy for a judicial interpretation or policy orientation than

to clearly delineate a principle.[83] But the other prong of the necessity-and-proportionality test, consisting of the search for a less restrictive alternative, can prove to be rewarding, by showing lawmakers the concrete, context-related options that are available to them to differentiate among people.

The proliferation of rulings on the scope of equality arising from different judicial systems makes it necessary to determine a hierarchy: France's organic law of December 10, 2009, gives priority to the QPC decision if a complaint for incompatibility with the convention is submitted at the same time,[84] but the order of authority between the CJEU and the Conseil Constitutionnel is not so clearly defined.[85]

Put simply, should we be comforted or concerned that when applying EU interpretations of community norms and the constitutional principle of equality, national judges may sometimes implicitly incorporate political and separation of powers issues into their determination of equality or nondiscrimination? These judges must also endeavor, in each individual case, to balance the protection of individual and group rights by applying a proportionality test to certain internal social policies considered to be critical, such as retirement and employment. Due to these internal tensions, this jurisprudence does not necessarily contribute in a harmonious manner to the consolidation of European fundamental rights or reinforce the legitimacy of building a coherent European social policy on nondiscrimination.[86]

The same cautiousness regarding the need for high-level constitutional review of nondiscrimination and equality can also be found in the United States, in the assessment of the effectiveness of constitutional norms in a social context. American scholars temper the idea that the influence of constitutional norms in America has been essential in antidiscrimination law. They critique the role of these fundamental rules as a catalyst of social progress, even when they are enshrined in legislation and extensively interpreted by judges.

III. THE LIMITATIONS OF FUNDAMENTAL RIGHTS

Richard Ford, Julie Suk, and Janet Halley clarify certain critiques regarding the application of fundamental rights in the United States contained in the Constitution and implemented in law.

Richard Ford is a Stanford law professor and an expert on civil rights and antidiscrimination law. He has authored an extensive body of legal scholarship on race and social criticism.

RICHARD FORD: Does antidiscrimination law allow the vindication of lofty abstract rights? Many people would say that the Civil Rights Act is a constitutional statute. So there is a tendency to focus a lot on courts applying big principles. But I think that practically speaking on the ground, it is really an

administrative remedy and most of the work is getting done by trial courts and by administrative agencies like the EEOC and in settlements. For example, management and HR offices will say, "That is sexual harassment; you need to stop that or you are fired" even if the harassment is not unlawful under Title VII.

MARIE MERCAT-BRUNS: *So are you minimizing the significance of constitutional case law in the construction of antidiscrimination law?*

RF: Yes. I would not say it hasn't any significance. I would say that I am pushing back from the tendency of most American lawyers to look at it primarily in terms of vindication of constitutional rights.

But to be sure, the fact that it is widely understood as a statute vindicating quasi-constitutional rights—that matters. It gives it additional weight. It does affect the way the courts interpret the law.

MM-B: *These statutes are therefore seen as fundamental rights? In European case law, there is a rather specific idea of what a fundamental right is.*

RF: Title VII is not seen as a fundamental right. You have fundamental rights in the Constitution, but that is different.

MM-B: *But equality is a fundamental right?*

RF: But that is equality under the Fourteenth Amendment. Formally speaking, that is a different jurisprudence.

MM-B: *It is just the parties that are different; one, the states, and one, private parties. That is all.*

RF: That is a big distinction. It remains the case that if constitutional lawyers talk about fundamental rights, they would include rights under the Fourteenth Amendment but not under Title VII.

MM-B: *But you are looking at the same mechanism, a difference of treatment. They are just seen through a different light?*

RF: Yes, they are seen through a very different light. In the American jurisprudential tradition and constitutional tradition, your rights against the state and state action are very different from your rights against private actors.

We think that on the one hand, the state, with its monopoly of coercive power, must be held to a higher standard than the private sector, where the argument is made that if you do not like it, you can find a different job. It is a market.

MM-B: *In France, it is almost the opposite. We have an administrative supreme court, the Conseil d'État. When there is a public interest* (intérêt général), *the state has some power, and it instigates some deference.*

We also have formal equality in France. This is a different jurisprudence. It plays a significant role, and it is rather strictly interpreted.

In the private sector, things are different. The individual contract is often considered inherently unequal because of unequal parties. It is therefore important

to compensate for this inequality. There is a presumption that the employer might be wrong in the absence of convincing evidence from the parties. This presumption is implicitly justified by the employer's position of power, and it affects the rules of evidence. If the judge is not convinced by either party, the "doubt benefits the employee" and in that case, he or she prevails. This benefit of the doubt given to the employee does not extend to antidiscrimination rules, in which there is a shift of the burden of proof in favor of the presumed victim of discrimination.

RF: That is almost the opposite in the United States. We have had moments in American jurisprudence where people might say something like "The employment contract is inherently unequal or inherently favors the employer." But for the most part, there is an extremely powerful idea that this is a neutral, reciprocal arms-length relationship between two freely consenting entities. Certainly when you get into things like discrimination, the burden of proof is borne by the employee.

Julie Suk is more radical in her assessment of the scope of antidiscrimination norms, including statutory norms.

JULIE SUK: Regarding the influence of the Age Discrimination in Employment Act (ADEA), which embeds the principle of equality and nondiscrimination in law, my point (which is a larger theme in my work) is this: U.S. law often turns to antidiscrimination as a solution to a wide variety of complex social problems (such as aging at work, work-family balance). It is limited in its ability to address these problems, and sometimes it actually poses barriers to innovative experimentation in policies to address these complex problems.

Before I respond to the thoughts of Ford and Suk, consider Harvard Law School Professor Janet Halley's take on fundamental rights discourse and its shortcomings through her personal experience.

MARIE MERCAT-BRUNS: *How has queer theory*[87] *inspired your work on law and power? For Europeans, it can be interesting to understand how legal theory can draw from other disciplines, sometimes in a very pragmatic way.*

JANET HALLEY: Let me say a couple of words how I experience the connection between queer theory and legal studies.

While I was in literary studies, we began to see the rise of queer theory in American thought generally. . . . While I was in law school . . . there was a decision of the Supreme Court called *Bowers v. Hardwick* that held that it was perfectly constitutional . . . for a state to prohibit and to criminalize same-sex sodomy. . . . I was strongly affiliated at that time with the gay rights bar. We were wanting to expand the rights of homosexuals, and it was horrible living under *Bowers v. Hardwick;* it was a terrible decision. . . . Many of us dedicated ourselves to getting it reversed. . . .

> But the lower courts started expanding it, saying, . . . "Well, you can prohibit the conduct, so you can also not hire people in the workplace who are likely to commit the conduct; the greater deprivation of rights includes the lesser." Now that's a move from conduct to identity and that expands *Bowers v. Hardwick.* In a way, the criminalization of sodomy was narrow: who is really going to get punished for committing sodomy? . . . But you do need a job, and so the courts were making *Bowers* much more expansive.
>
> Where I came in was trying to understand the conduct-identity relationship. What was the relationship of an act to an identity? As it happens, the French philosopher Michel Foucault . . . helped me to understand how slippery and contingent the relationship between conduct and identity was.
>
> I came in as a law professor still trying to do gay rights—my stance was we need rights—but I was also dedicated to doing it using French critical theory. I wrote a whole bunch of articles on *Hardwick;* then Congress passed the don't-ask-don't-tell policy that said that you could be kicked out of the military if you showed a propensity to engage in same-sex conduct. . . . So I came in analyzing these contraptions through the tools that were given to me by Foucault.
>
> The thing that really astonished me was that, as I worked my way into these arguments, the rights claims weren't watertight; you could not find absolute decisive rights claims that everybody had to accept. The rights I thought we needed were not logically built into the law. I continually found a gap, a hole, a place where there needed to be a political move, there needed to be an alliance, there needed to be some kind of decision on behalf of the judge or the legislator.
>
> Our Constitution and our rights regime didn't mandate those rights; they just made them possible. That was just a severe surprise to me, and that made me understand how contingent these legal rights are on politics. I had my loss-of-faith moment. That's when I turned from being a rights person to becoming a member of the critical legal studies movement, which understands law as a contingent social network of practices rather than as a mandatory normative order.

Comparative Perspectives

These commentaries reveal the tensions underlying the fundamental rights talk:[88] On the one hand, it attributes great symbolic meaning to equality and nondiscrimination and places these principles high up in the hierarchy of norms. On the other hand, this discourse can also overshadow the difficulties experienced by victims of discrimination in accessing economic and social rights in the broader context of social protection.[89] Most of the critical analysis of American antidiscrimination law has arisen from the development of equality and nondiscrimination rights discourse in constitutional case law and federal law, which is seen as having limited

scope. Can this critique be explained by the fact that an extensive body of law has been produced in interpreting the concepts of equality and freedom without any corresponding development of a welfare state? This is what Suk claims when she compares gender equality and antidiscrimination norms, which have undermined the organization of collective solutions to resolve work and family conflicts in the United States.[90] But recognizing the limitations of American antidiscrimination law can open up other avenues to gender equality and nondiscrimination: by expanding the social protection system to better incorporate family interests, while continuing to prohibit discrimination.[91]

Critical thinking on antidiscrimination law in the United States originated as a movement of a group of law professors, members of the critical legal studies (CLS) movement,[92] among others, inspired by the analyses of French philosophers Michel Foucault and Jacques Derrida on the relationship between law and power.[93] Although a similar critical legal movement certainly existed and still exists in Europe, it was more deeply rooted in Marxist-inspired ideological debate, at least in France.[94] What this emphasis on the influence of critical thought in antidiscrimination law in the United States shows is that theoretical work on the effectiveness of law and its political, economic, and sociological imprints is not disconnected from the analysis of legal relationships between private individuals; on the contrary, it can enrich the arguments used by lawyers. For those who construe critical thought as undermining the law, its rigor, and the importance of a dogmatic approach to law and the roles of legal practitioners, these conversations demonstrate that critical thought is neither incompatible with nor detrimental to legal practice and its proper functioning. The opposite is true, since critical thought can inform law.[95]

For example, critical theory produced by feminist lawyers[96] made it possible for the concept of sexual harassment, as conceived by Catharine MacKinnon, to inspire Supreme Court case law; for the notion of reasonable accommodation in disability discrimination laws, as conceived by two rational feminists, Martha Minow and Chai Feldblum, to emerge; for ways to prove systemic gender discrimination—by detecting discriminatory biases, as shown by Christine Jolls, and by identifying bias in employer evaluations of women's performance, as shown by Vicki Schultz and embraced by the courts—to be discovered; and for an analogy to be drawn—thanks to the queer theory promoted by Janet Halley, which deconstructed gender in employment—between the construction of sexual orientation stereotypes, leading to discriminations that are not prohibited by federal law in the United States, and the construction of female stereotypes, a factor of sex discrimination.[97]

Critical thought in law breaks down barriers that compartmentalize legal analysis. In France, in particular, the doctrine is often corralled by disciplinary boundaries between public and private law, between contract law and corporate law on

the one hand and employment law on the other. Critical thought is a framework that engages with all of the individual and collective mechanisms established by law, in a similar fashion to the way that international private law and comparative law associate different disciplines to resolve questions about the application of law. Some of the scholars interviewed have not merely set out to deconstruct law; they also offer new readings of the use of legal concepts and mechanisms that can inspired lawmakers, because they place problems like discrimination into the broader sociological context from which they arise. In each discipline of law, vehicles of individual and institutional discrimination can therefore be found.[98] These questions sometimes transcend the inherent limitations of a unidisciplinary reading of law.

For other American scholars, critical theory is especially vital in the area of antidiscrimination law, because it deals with the legal subject; that is, the person. Its ambitions are vast and sometimes considered unrealistic.[99] Who is this person possessing none of the (twenty in France) characteristics that the law is attempting to protect in employment?

Lastly, another way to comprehend the critique of fundamental rights talk is to observe the models produced by this body of law. Certain scholars have embarked on this path, either to identify the purpose of antidiscrimination rules or to associate them with a paradigm, as representations of equality.