

Antidiscrimination Models and Enforcement

The Constitution and the origins of antidiscrimination legislation in the United States supply a first level of insight into this body of law, but measures to combat discrimination can be grasped from other angles. The influence of constitutional rights and their interpretation in the United States does not appear to be confined to the pursuit of fundamental rights: often this influence can be felt in the models and paradigms reflected in antidiscrimination law, and that constitutes a rich matter for critical theory.

I. MODELS OF ANTIDISCRIMINATION

Antidiscrimination rules can be assessed through the lens of an existing inventory of models. American scholars have taken different paths in isolating these models: Robert Post identifies the various functions of equality law,¹ while Reva Siegel, later in this chapter, chooses to define the paradigms of equality that shape this law.

The Functions of Antidiscrimination Law

MARIE MERCAT-BRUNS: *What are the functions of antidiscrimination law?*

ROBERT POST: The first function of antidiscrimination law is to structure its intervention by creating rules to manipulate people in order to obtain a desired situation.² This is the “social engineering” function of the law. Antidiscrimination law serves as a regulatory tool instrumentalizing people to achieve equality.

In my book *Constitutional Domains: Democracy, Community, Management*, I explain this first function of antidiscrimination law using this idea of management. Management arranges social life for the achievement of given

objectives. It ignores the independent requirements of community values or identity, following instead the logic of instrumental rationality. The distinction between community and management can be seen in the contrast between a criminal law that seeks to predicate punishment on a moral allocation of blame and responsibility, and a criminal law that attempts instead narrowly and strictly to fulfill the goal of preventing harmful forms of behavior. By seeking to align criminal punishment with relevant cultural norms, the former displays the authority of community; by seeking instead instrumentally to achieve an explicit objective, the latter regulates conduct with the authority of management.³

In general, the twentieth century has witnessed a significant shift from the former to the latter. This may be seen in the striking transformation of older forms of duty-based tort law, which attempted to use the normative construction of the reasonable person to infuse legal rules with the values of the ambient community, into more modern forms of strict and efficiency-based liability rules, which seek to use tort law as a means of engineering the accomplishment of discreet objectives such as the achievement of efficient allocations of risk. The triumph of the progressive vision of the administrative state has ensured the increased prominence of management in modern law. The trend toward management compounds itself, because the growing rationalization of society undermines cultural norms that might otherwise sustain the authority of the community.⁴

Laws establishing the social order of management can be controversial. For example, disagreements can arise over the underlying mission of certain educational institutions. Managerial laws may also be challenged because they do not actually achieve their goals. Thus, the authority of the institutions implementing them can be challenged.

When we think of law and economics, it tends to treat people in that way: it creates rules that will conduce to the achievement of instrumental objectives, and it manipulates people to attain a social desire. It ignores the independent requirements of community values or identity, following instead the logic of instrumental rationality.

A second way is to express social norms in a society.⁵ Every society has social norms that define what that society is and that defines what is desirable and undesirable. We think about law in that sense as expressing the social norms of a particular culture, of a particular historical moment.

Community, as Philip Selznick writes in *The Moral Commonwealth*, turns on “a framework of shared beliefs, interests, and commitments” that “establish a common faith or fate, a personal identity, a sense of belonging and a supportive structure of activities and relationships.”⁶ Laws instantiating community seek to reinforce this shared world of common faith and fate. They characteristically articulate and enforce norms that they take to define both individual and social identity.⁷

In *Constitutional Domains*, I also offer an extended account of the common law tort of invasion of privacy, which is an exemplary instance of law organizing itself to instantiate the social order of community. Some have contended that the very existence of legal rights is incompatible with the ability of law to serve this function, because legal rights necessarily imply “an image of the rights-bearer as a self-determining, unencumbered individual, a being connected to others only by choice.”⁸ But I argue that this contention is inaccurate, for the rights created by the tort of invasion of privacy explicitly serve to define and defend social norms, which the tort conceptualizes as essential for maintaining the stable identity of individuals. Like other legal actions redressing “dignitary harms,” the tort conceives personal dignity as subsisting in socially defined forms of respect. The tort protects these forms of respect and thereby safeguards the particular community that makes this dignity possible. The tort rests “not upon a perceived opposition between persons and social life (the interests of individuals against the demands of the community), but rather upon their interdependence. Paradoxically, that very interdependence makes possible a certain kind of human dignity and autonomy which can exist only within the embrace of community norms.”⁹

The “reasonable person”¹⁰ is of course a figure who continually reappears in American common law, most especially in the law of torts. The important point about the reasonable person is that he is no one in particular,¹¹ a representative of “the normal standard of community behavior,” who embodies “the general level of moral judgment of the community, what it feels ought ordinarily to be done.”¹² The difficulty appears when tort law is subjected to rules of civility that attempt to safeguard the intimacy of individuals from intrusion and consider the demands of public accountability: these civility rules maintained by the tort embody the obligations owed by members of a community to each other, and to that extent define the substance and boundaries of community life.¹³

A third function is to transform social norms. We think about law as merely reflecting the norms of a culture, but we are seeking to transform them. So, here, law is not trying to achieve purely or instrumentally a certain goal. It is instead participating within the culture, as a way of changing the culture so as to alter the norms by which persons act and society functions. This transformation may take the form of a redistribution of rights, but it does not always take the form intended, for example, by the lawmaker.¹⁴

The fourth function of antidiscrimination law is to facilitate autonomy. Generally speaking, it is to create conditions where persons can create their own doctrine, a realm of autonomy. Antidiscrimination law is not a function of democracy and, in that sense, of autonomy. In my book *Constitutional Domains*, I describe this function.¹⁵

In contemporary constitutional adjudication, it is most common to find both community and management challenged by the claims of yet a third form of social order, which I call democracy. Democracy entails “a self-determination of the people,” in the words of Karl Marx, but it is theoretically inseparable from the question of individual self-determination. The essential problematic of democracy thus lies in the reconciliation of individual and collective autonomy.¹⁶

The American constitutional tradition understands this reconciliation to take place within an open structure of communication. I call this structure “public discourse.” If public discourse is kept free for the autonomous participation of individual citizens, and if government decision making is subordinated to the public opinion produced by public discourse, there is the possibility that citizens will come to identify with the state as representative of their own collective self-determination. Protecting freedom of public discourse thus satisfies a necessary (although not sufficient) condition for the realization of democratic self-government. That is why our constitutional tradition regards the First Amendment as “the guardian of our democracy” even though the amendment is itself frankly anti-majoritarian in purpose and effect.¹⁷

The reconciliation of individual and collective self-determination entails a serious internal tension. On the one hand, a democratic social structure must provide an appropriate space for individual autonomy. Within that space democracy must function negatively; it must refuse to foreclose the possibility of individual choice and self-development by imposing preexisting community norms or given managerial ends. On the other hand, a democratic social structure must also function positively, to foster an identification with the processes that enable the collective experience of self-determination. These processes presuppose forms of social cohesion that depend on community norms, and these processes also often require strategic managerial intervention.¹⁸

It is always open to contention whether specific behavior regulated by the law ought to lie outside the boundaries of this sphere and be ordered instead according to the logic of community or management. During the era of *Lochner v. New York*,¹⁹ for example, the sphere of democratic authority was delineated by reference to the will of the individual citizen, as concretely expressed in the institution of private property. It was believed that depriving a citizen of his “property, which is the fruit and badge of his liberty, is to . . . leave him a slave.” Hence “due protection for the rights of property” was “regarded as a vital principle of republican institutions.” Accordingly, property rights were strictly enforced as a bulwark of the struggle of democracy against socialism. But this underlying concept of the person crumbled during the

triumph of the New Deal, and a different moral image of the autonomous citizen emerged that focused on the independence of reason rather than of will.²⁰

I think antidiscrimination law hovers between these first three functions and discussions within antidiscrimination law.²¹

Sometimes antidiscrimination law seeks to reflect ambient norms of decency, respect and civility and insists that persons of color or women or minorities of various kinds are treated with full respect, the way people in society should generally be treated.

Also more generally in the United States, antidiscrimination law has been associated with the transformative idea of law; that is, norms in which minorities are treated as subordinate and the function of antidiscrimination law is to become a fulcrum by which the norms are being changed in civil society.

One has to ask some very difficult questions: Do you change the law before changing the norms? Do you have the power to change the norms in the society? Where do these new norms come from?

One of the things that tells us is the way that, in various instances, antidiscrimination law in the United States is a function of the elite trying to change working-class culture, particularly in regard to things like affirmative action, and that's a challenge. Why did antidiscrimination law alienate the bulk of the working class close to the Democratic Party and allow a wave of political resentment, better associated with the populist Republican Party, to swell?

So, with this transformative way, we will always have cross-inspection.

Aspects of antidiscrimination law serve the objective of redistribution. We want to have more minority persons within the workplace, so we say we will have quotas in order to achieve this. Aspects of antidiscrimination law do that, although they tend to be very controversial. People feel more comfortable with using antidiscrimination law to reflect norms than to objectively redistribute, but there are aspects of it that indisputably help us capture this.

MM-B: *Do you think the narrow interpretation of antidiscrimination law has focused on one of these functions in particular?*

RP: Yes, I think the Supreme Court has been quite hostile to the transformative notion of antidiscrimination law. It has been hostile toward the redistributive notion of antidiscrimination law, hostile toward the notion of accommodation²² and disparate impact. And it has tended to think about antidiscrimination law as reducing disparate treatment, treating other people with the forms of civility and respect that we expect all persons to be treated with. I think that has been, speaking globally and roughly, the tendency in the last thirty years.

MM-B: *So you don't think there is the possibility of advancing toward a more transformative law? Do you think that it will be an option later on, through*

some types of legislation that change norms (through accommodation or disparate impact), or do you think this opportunity has passed and won't come back?

RP: That is a political question. It is of course possible with the right Congress, judiciary, and politics. It is a real possibility, but what it will need is politicians to push it. At the moment, I would say you don't see that. What you see is the left on the defensive on all of these issues; you don't see robust defenses of it.

Comparative Perspectives

The Functions of Antidiscrimination Law and the Proportionality Test

With his description of the different functions of antidiscrimination law, Post sheds fresh light on the development of this body of law in Europe, its influence and its limits. The first—the instrumental, management function—could be applied to early European antidiscrimination law, whose original economic aim was to eliminate market barriers by proscribing discrimination based on sex or nationality and consequently ensuring the free movement of persons. This was a crucial concern at a time when European institutions were being established and foundational laws enacted. So in its function, this law was different from the discrimination prohibition in Article 14 of the European Convention on Human Rights, in which the nonexhaustive enumeration of grounds reveals an initial attachment to the individual rather than an operational rule. This view is corroborated by the fact that in the beginning, Article 14 could not be invoked alone, but only with regard to another article of the Convention. This is no longer true, however: the European Court of Human Rights has since even recognized cases of indirect discrimination.²³

The law continues to play this instrumental role at the European level today, but increasingly it also fulfills another, more social function,²⁴ more closely resembling Post's second function of antidiscrimination law: to express social norms, such as standards of human respect and dignity. This is the direction the CJEU has taken, referring to equal treatment as a fundamental right and to general principles of law in establishing age-based discrimination.

The recognition of discriminatory harassment in Europe and then in France, which extends the definition of discrimination to harassment, also contributes to introducing violation of dignity as a defining component, and not only a consequence, of discrimination. These developments have changed the analytical approach to discrimination. Additionally, the binding character given by the Lisbon Treaty to the EU Charter of Fundamental Rights, which drew on the European Social Charter, among other sources, also reflects an underlying discourse that is more sensitive to human rights issues and the dignity of victims of discrimination.²⁵

The third function that antidiscrimination rules might serve, the transformation of social norms, does not seem to fall under the purview of European Union lawmakers, who often defer to national governments in matters where the prohibition of discrimination may conflict with the implementation of social policies to

achieve social redistribution. One of the few opportunities open to European or national judges is to assess, under the guise of EU directives, the extent to which any exemptions from the bar on discrimination, allowed for certain social policies, are justified, necessary, and proportionate.²⁶ This scrutiny does not always lead to a defense of these policies, since the general objective is to promote employment. The CJEU often recognizes the legitimacy of differential treatment to attain national social policy objectives. The application of a proportionality test, however, is where it is more difficult to distinguish the consistency or logic of the Court's adjudications.²⁷ Its action is unpredictable: if it exercises a low level of scrutiny, then policies will take precedence over the principle of nondiscrimination; if it exercises more stringent control, member states are not always successful in persuading the judges of the necessary and proportionate character of their social policies.²⁸

In addition to those pinpointed by Post, other functions of antidiscrimination law have been brought to light by European scholars such as Lisa Waddington and Mark Bell, who offer an analysis of the judicial models that could be reflected in European antidiscrimination law.²⁹ These academics offer three models of equality—equality as individual justice, equality as group justice, and equality as a positive duty, often imposed by public institutions—to guide and inform effective antidiscrimination policies.

The first model focuses on erasing the traces of an unequal treatment overlooking an individual's merit and skill, regardless of the prohibited ground used; it is similar in ways to the French concept of formal equality. Article 21 of the EU Charter of Fundamental Rights reflects this model,³⁰ which can also be detected in all of the preambles to antidiscrimination directives evoking equal treatment through the very concept of direct discrimination. It raises questions about the specific characteristics of discrimination, which vary from ground to ground, and the complexity of proving discrimination, finding a comparator, and perpetuating stigma for the individual victim whose case brought the discrimination to light. The benefit of this model is that it promotes the adoption of a general antidiscrimination principle applying to all grounds: such a general principle would require transparency in national and European laws regarding the motives for the decisions or differences in treatment underpinning the rules.³¹ This first model can be assimilated with the prescriptive, instrumental function of antidiscrimination law identified by Post and its limits, since this function is realized only through litigation.³²

The second model identified by Bell and Waddington, the group justice model, attempts to overcome the challenges of the first model by showing that the nature of the discrimination is inherently collective. References to indirect discrimination or to positive action in European directives and case law reflect this collective framework. It can also be detected through litigation, among other means, and resembles the individual justice model on that point. Where the member states

differ in their grasp of these discriminations as opposed to those following the individual justice model is tied to the fact that this prohibition of discrimination targets inequalities resulting from the identification of an individual or an employee as a member of a certain group. In France, for certain grounds such as race, antidiscrimination laws do not recognize the existence of predefined groups. This is where the paradigm approach by Bell and Waddington, proposing a group vision of equality, is especially relevant. The issue it raises is whether the lack of any overarching framework or clearly defined, homogeneous group of “victims of discrimination” makes it more difficult, in the context of European norms and their interpretation, to use collective means of proving indirect discrimination.³³

The last model identified by Bell and Waddington is one in which equality goals are promoted by positive duties and the participation of minority groups. The scholars point to the flurry of incentives in Europe and, in some member countries, the creation of organizations contributing to positive action and the participation of labor unions in developing policies to measure and promote equality. Examples are the EQUAL initiative financed by the European Social Fund, which ran until 2008 and explored new approaches through innovative collective agreements to tackling inequality, and the Equinet program, a network promoting cooperation among the national equality bodies of member states.³⁴ Member states have also engaged in this equality mainstreaming,³⁵ which offers an alternative to the litigation process as a remedy for discrimination. This equality model evokes the fourth function of antidiscrimination law, related to the participative rights of citizens and rights organizations, which is to give them a certain autonomy in defending and promoting rights. However, this comes with the risk, as emphasized by Bell and Waddington, of isolating the interests of victims of discrimination based on each prohibited ground and disregarding the existence of victims affected by multiple, simultaneous grounds of discrimination (sexual orientation and disability or age and origin, for example).³⁶

Coming back to the functions identified by Post, the fourth function, to facilitate autonomy by establishing the conditions for people to “create their own doctrine,” offers an interesting perspective. Post’s analysis that “antidiscrimination law is not a function of democracy and in that sense, of autonomy” seems responsive to the first, more traditional recognition of antidiscrimination in national and European law concentrating on flushing out differences in treatment based on specific prohibited grounds.

In comparative law, the identification of models of equality reinforces the idea that a new generation of discrimination is gradually emerging. These forms of discrimination are more closely related to freedoms protected by association than to prohibited differences in treatment. In France for example, except for provisions banning discrimination against persons who exercise their right to strike, the new strands of antidiscrimination law related to parenthood, including family status or the marital status of same-sex or mixed-sex couples, all seem to guarantee a

certain degree of autonomy to individuals, based on norms generally accepted by the community at a given point in time. In France, the existence or nonexistence of this quest for individual autonomy was a factor in establishing religious discrimination: conflicting with a desire to uphold secular values were alleged restrictions of employees' freedom, which must be justified, necessary, and proportionate, according to Article L. 1121-1 of the French Labor Code.³⁷ Also in France, although discrimination by association in relation to parenthood and the care of a disabled family member³⁸ seems to be increasingly recognized and investigated by judges and the law, inequalities faced by people in same-sex relationships have not yet been brought within the protective reach of antidiscrimination law, although European law is evolving in that direction:³⁹ the Cour de Cassation has strictly interpreted the right to paternity leave, concluding that the civil-union partner of an employee who has had a baby was not entitled to this benefit.⁴⁰ In this context, the fourth function of antidiscrimination law creates new spheres of democracy in which an individual's autonomy can be expressed. This particular function of nondiscrimination seems to more closely represent the French struggle against inequality because it focuses less on the idea of a group disadvantage than the other more complex and indirect forms of discrimination do. The violation of an individual's freedom can constitute a more palpable difference in treatment without challenging the universalist paradigm of equality that is so deeply valued by the republican tradition.

Post's nomenclature describing the functions of antidiscrimination law probably contributes to a better understanding of the relative reluctance of national judges and other stakeholders to incorporate antidiscrimination norms into internal law. This resistance originates, for different reasons, from employers, trade unions, certain political parties, and the legislative and executive branches of government.

Employer Resistance to Antidiscrimination Law and the "Management" Perspective

A first source of internal resistance to the application of antidiscrimination law, brought to light through Post's reading, are employers and certain members of employer associations. Antidiscrimination law is often perceived in the workplace as a management issue. The logic of employment discrimination law in corporate management is to eliminate discrimination as an economic barrier in the labor market and the workplace, set on promoting good work performance and diversity.⁴¹ However, beyond this sphere, the application of criminal sanctions to employers in France has been rather unpopular. These sanctions also perform the "community" and "transformation" functions of antidiscrimination law by punishing violations of the dignity of employee victims of discrimination and providing financial compensation for individual and systemic inequalities, especially in

pay, in the form of social redistribution. Meanwhile, civil suits for discrimination, brought with greater ease and success due to the shifting of the burden of the proof, probably have the same cultural and ethical impact as criminal charges. In France, however, litigation does not necessarily lead to the award of large civil remedies as in the United States, where criminal sanctions for workplace conduct do not exist. France's former equality body, the HALDE, which contributed significantly to the broader ambition to deeply transform the behavior of social partners by participating in investigations of discrimination complaints, was perceived as overstepping its authority.⁴² Yet the independent administrative authority was merely applying the multiple dimensions of antidiscrimination law across society, a mission conferred by the European employment discrimination directives adopted in 2000, but in insufficiently precise terms. A valid question that can be raised is whether the work of the HALDE was hampered by a general misunderstanding, on the part of the government in particular, of the diverse nature of its activities due to the varied functions of antidiscrimination law, and whether this lack of understanding hastened its demise.

Some opposition to the incorporation of antidiscrimination law is also led by organizations in charge of protecting previously acquired social benefits in France, especially certain members of trade unions or political parties. This criticism is directed at the management rationale of antidiscrimination law, which may threaten the welfare state. Antidiscrimination law has resulted in a series of decisions, mainly by the EU court, on night work for women and can be perceived as undermining certain pension plans implementing measures that are not necessary or not proportionate to the employment or health policies promoted by the member states.⁴³ This judicial standard can be perceived as driven by a management rationale. However, an approach that seeks to identify sources of indirect discrimination can assign a redistribution function to antidiscrimination law, going beyond a simple examination of torts to instead scrutinize the institutions producing the discrimination. Such scrutiny can consist of exposing certain operating mechanisms of government bodies and businesses and examining laws and norms relating to training, working time, retirement, seniority, and other collective bargaining issues that seem neutral but can unfairly disadvantage certain groups (people who are ill, old, young, female, who work part-time, etc.). The power of antidiscrimination law to transform social norms, even if not always in the intended way, can be seen in these areas.

Finally, the executive and legislative bodies of government show a certain reluctance to apply "imported" aspects of antidiscrimination law, whose interaction with the existing republican dogma on equality is not clearly understood and difficult to implement but offers rich possibilities.⁴⁴ Although community and management approaches have been taken by successive governments in laws transposing EU directives⁴⁵ and in collective bargaining, the legislative and executive branches nevertheless seem to be a long way away from supporting the idea

that antidiscrimination law seeks to change not only individual stereotypes but also facially neutral, uniform, systemic rules implemented by the government that directly or indirectly perpetuate discrimination (based on disability and age, for example).⁴⁶ The creation of the Défenseur des droits (Defender of Rights, formerly the HALDE)⁴⁷ in France echoes the reaction from employer associations and probably translates a desire to prevent the antidiscrimination organization from treading on the territory of government bodies by limiting its powers, in particular its power of recommendation.⁴⁸ What Post's paradigm brings into focus is that antidiscrimination law is simply accomplishing its transformative function, rather than infringing on the separation of powers or overstepping its authority as an independent administrative body.

Once public opinion and government bodies accept that antidiscrimination law and its regulatory authority are not stifling democratic debate, the law can perform its functions of transformation and community (promoting the cultural values of respect and dignity) with no threat to democracy—quite the contrary.⁴⁹ If we consider the fourth function identified by Post, which is tied to democracy, antidiscrimination norms can enlighten our understanding of the relationships between equality, liberty, and nondiscrimination, which are fundamental to a well-functioning democracy. This function seems to be shared by France's judicial review process (QPC) in that it incites the various executive, legislative, and judicial powers to each assume their part of responsibility in this area.⁵⁰

Models of Equality

Unlike Post, Reva Siegel focuses mainly on constitutional case law on the equality principle to show how the U.S. Supreme Court has taken three different stances. Each of these positions translates a different concept of equality. Siegel mentions a new concern of the high court in its appraisal of equality: a desire to maintain social cohesion, a theme that is also of capital importance to European courts.

In the following conversation, Reva Siegel describes her three models of interpretation of “the equal protection of the laws.”

REVA SIEGEL: In the United States, social struggle over the reach and proper understanding of equal protection in matters of race has been articulated as the struggle between two competing conceptions of equal protection: an anticlassification understanding of equal protection and an antisubordination understanding of equal protection.

In an article called “Equality Talk,”⁵¹ which provides a half-century account of the struggle for the enforcement of *Brown v. Board of Education*, I trace the rise and spread of these competing understandings of the American equal protection tradition and take on a fundamental question about an embodied understanding of our tradition in authoritative legal sources: how courts actually interpreted the meaning of the Fourteenth Amendment's Equal Protection Clause.

The conventional view is that courts have embraced an anticlassification position and that proponents of a so-called antisubordination position have been relegated to a strenuous but dissenting critique of official doctrine. In my “Equality Talk” article, I show how this is an oversimplification of this body of law. I show that cocompeting accounts emerged after *Brown* and that the path the court has picked can be responsive to each of these two understandings of equal protection.

At times, equal protection case law embraces views that are generally associated with anticlassification, validating protection of the individual and concerned with wrongful differentiation. But at other times equal protection case law in fact espouses views that are much more resonant with an antisubordination understanding, which is concerned with issues of group equality. In this article, I trace ways in which American law ambivalently has shifted between these two views of equal protection.⁵²

In recent work, I have been exploring whether there might be some third view emerging from conflict between these two conceptions of equal protection articulated by the “centric” judges on the Court: [Justice] Powell, the author of the diversity opinion in *Bakke*; [retired Justice] O’Connor; and now [Justice] Anthony Kennedy. In this more recent work, which draws on the opinions of these three justices and some of the commentary in the Academy on them, I explore whether the ambivalent embrace of affirmative action that you see in decisions like Powell’s *Bakke* opinion or O’Connor’s opinion in *Grutter*⁵³ might not instead reflect an effort to prevent social division and balkanization.

Justice Kennedy reasons from antibalkanization values in the recent cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Ricci v. DeStefano*. There Justice Kennedy affirms race-conscious facially neutral laws that promote equal opportunity (such as disparate impact claims in employment discrimination laws) so long as the enforcement of such laws does not make race salient in ways that affront dignity and threaten divisiveness. . . . Attending to the antibalkanization values that led Justice Kennedy to write separately from conservatives and progressives in *Parents Involved*⁵⁴ in turn illuminates these same concerns in the opinion Justice Kennedy authored for five members of the Court in *Ricci*,⁵⁵ and so identifies a basis, grounded in the text of the decision and in several decades of constitutional history, for reading *Ricci* as vindicating antibalkanization—rather than colorblindness—values.⁵⁶

More generally, this work helps explain the shape of the Court’s equal protection decisions. It highlights points of convergence and disagreement among conservatives and progressives on the Court and explores the questions they pose to one another. Striving to understand disagreements about equality can help to transform the way we understand equality.

If anticlassification is concerned with protecting the individual from the wrong of classification and antisubordination is concerned with protecting groups from subordinating practices, the “third way” is concerned with protecting society from the threat of balkanization. Judges concerned about the threat of balkanization support interventions like affirmative action that seek to alleviate extreme social stratification. Yet their very effort to promote social solidarity also produces concern that remedial interventions like affirmative action might inflame social resentment. So judges who approach equality with attention to social solidarity will at times sanction affirmative action (or indirect versions of it), while imposing stringent limits on the intervention.

What is important to see about this middle position is that it is not embracing colorblindness as such: it is neither a legal formalist position nor only concerned with individuals. Rather, it is concerned with the question of social cohesion. It understands *different* threats to social cohesion—the threat of gross social stratification *and* the threat of heavy-handed rectification of social stratification—as potential harms.

MARIE MERCAT-BRUNS: *In European law and institutions, the discourse on social cohesion is also very prevalent, as illustrated by certain research papers.*⁵⁷

This shared interest in social cohesion calls for a comparison with European law.

RS: I am working on an essay in which I reflect on the tension between these two views.⁵⁸

Judges committed to this antibalkanization approach talk about diversity rather than inequality. And they promote diversity in ways they hope will diffuse the visibility of race remediation practices, so that race-conscious remedies can function as transformative remedies. The judges following this antibalkanization approach are concerned about interventions that might reinscribe the original categories of injury. They want government to represent the problem of inequality in such a way as to lead people away from the old categories. This is the most progressive interpretation of the antibalkanization decisions of judicial moderates.

The good news is that the judicial moderates do seem to be responsive to concerns about gross social stratification as well as to concerns about the resentment that racial remedies can produce. The bad news is that the exponents of this middle position seem far more attuned to the risk of majority resentment than they are moved by the risk of minority anomie or estrangement. A race-progressive might find some aspects of the moderates’ approach attractive. But one wonders whether its exponents on the court are as sensible of the risks to social solidarity caused by gross stratification and minority anomie as they are sensible of the risk to social solidarity caused by race remediation and the estrangement or resentment of majority groups.

This framework is a framework for thinking about why we might adopt terms that are analytically blurry.⁵⁹

Siegel's work⁶⁰ offers a new way of modeling the standards of assessment of equality in Supreme Court jurisprudence. Siegel shows that the analysis of the tensions between a formal concept of equality, concerned with individuals and the eradication of categories (anticlassification), and a more substantive concept seeking a more structural remedy for socially excluded groups (antisubordination) can be enriched by a third, middle view taken by certain judges. This view does not lean toward one principle or another: instead, it strives to achieve an equality that preserves social cohesion. Siegel therefore departs from pessimistic commentaries on U.S. constitutional case law, deploring a preference by a majority of judges for the application of the anticlassification principle and limiting any equality debate to the subject of the alarmingly conservative progress made by Supreme Court. In her article "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Quality Cases," she explains this middle stance, using two main examples to illustrate this tendency among certain judges and open a new perspective on the interpretation of equality.

What is interesting about this classification of the positions of each judge is that it clarifies our understanding of certain concepts that are difficult to define, such as diversity, and certain mechanisms that are not easy to employ, such as disparate impact or indirect discrimination. In her article employing this triadic model, the first case examined by Siegel is *Parents Involved*.⁶¹ An association representing parents of schoolchildren in a Seattle school district protested against an affirmative action plan for assigning students to highly popular magnet schools, which used race as a criteria to break the tie in the event of an oversubscription. Justice Kennedy adopted neither an anticlassification nor an antisubordination reading; he applied a strict scrutiny framework to racial classifications but considered that colorblindness could not be interpreted as a rule designed to prevent the government from promoting racial integration in schools.⁶²

Governments implement race-conscious but facially neutral policies to promote racial integration, of which Justice Kennedy gives many examples in his concurring opinion in *Parents Involved*.⁶³ However, a racial classification of individuals raises questions about human dignity and the risk of social divisiveness:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand, race-conscious measures that

do not rely on differential treatment based on individual classifications present these problems to a lesser degree.⁶⁴

These include strategically selecting the location of new schools, taking neighborhood demographics into account in drawing school attendance zones, allocating resources for special programs, recruiting students and teachers in a more targeted manner, and tracking enrollments, academic performance, and other statistics by race.

These more subtle measures of classification do not require as stringent a level of review with respect to equality. As Justice Kennedy explained, although they are racially sensitive, these types of mechanisms are unlikely to require strict scrutiny to be found permissible by judges: "Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decision maker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly."⁶⁵ If instead of school district maps taking racial data into account, the district schools had used individual applications to determine assignment to magnet schools and promote integration, Justice Kennedy would have considered these practices to be constitutional. Neither the anticlassification reasoning that rejects all race classification nor the antisubordination reasoning that accepts all integration efforts adequately explains Justice Kennedy's position, since he impugned the challenged practice in this case. Siegel therefore describes his perspective as embracing a third vantage point, which she terms "antibalkanization."

Justice Kennedy warns against all race classifications due to the inherent risk of creating racial dividing lines between whites and nonwhites, yet he is reluctant to reject affirmative action. The social cohesion component is the decisive factor.

Comparative Perspectives

Siegel draws inspiration from Justice Kennedy's opinion to propose a new way of understanding the "dilemma of difference":⁶⁶ doing nothing at all or doing too much both pose a threat to social cohesion. In its initiatives and hesitations, France's position is comparable and reflects the same ambivalence about the quest for equality: it is deeply attached to a republican, universalist ideal of equality, close to the American anticlassification principle, and rejects the construction of policies based on ethno-racial groups but nevertheless currently allows measures to target certain groups, particularly women, such as the law establishing a quota of 20–40 percent of women on boards of large companies.⁶⁷ "Positive discrimination" initiatives like the Priority Education Agreements signed between the elite Sciences Po university in Paris and high schools located in disadvantaged areas take a middle road, applying different rules for access to higher education based

on geographic criteria. This intermediate position is not unlike that expressed in the *Parents Involved* opinion written by Justice Kennedy, who did not disapprove of more subtle forms of integration.⁶⁸ In the United States, the percentage plans implemented by the states of Texas and California are conceived in the same spirit: they guarantee admission to their state universities to a certain percentage of the best students from disadvantaged geographies.⁶⁹

Can this same framework be used to present the advantages of social cohesion as a hybrid model that supports positive action but tempers the differences in the treatment of one group over another by employing more neutral mechanisms? Can other positive action “dilemmas” be found in Europe—with respect to women, for example? France has a long tradition of implementing pregnancy and maternity protection, which can in turn provide a motive for employment discrimination. On another level, Europe’s drive to expand the recognition of parenthood in national laws seems to promote antibalkanization values by avoiding family status distinctions that would pit the interests of men against those of women.

Siegel cites another decision by Justice Kennedy as an example of this social cohesion principle: *Ricci v. DeStefano*.⁷⁰ This time, the case involves disparate impact discrimination and reveals a conflict between disparate impact and disparate treatment discrimination frameworks. A group of firefighters, having passed a test used to determine eligibility for promotion, brought suit against the city of New Haven for disparate treatment discrimination after the city decided to throw out the test, which was thought to have a disproportionate discriminatory effect on black firefighters. The disparate impact of this test could establish the city’s liability under Title VII of the Civil Rights Act, which prompted the city to discard it. The Court’s decision, authored by Justice Kennedy, stated that the withdrawal of the test for race reasons (a potential disparate impact discrimination liability, according to the city) led to disparate treatment discrimination against the white candidates who had passed the test: if an employer takes an intentionally discriminatory decision—discarding the test because white candidates scored significantly higher—to avoid or offset disparate impact discrimination, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability. If not, and this is the case here, it constitutes disparate treatment discrimination. According to Siegel, Kennedy’s position again illustrates a third reading of equality that seeks to maintain social cohesion, by preventing cause for resentment among those who passed the test and denouncing the reverse discrimination resulting from concerns about disparate impact discrimination against nonwhites. A disparate impact discrimination approach is often supported by antistatutory advocates, while anticlassification proponents tend to interpret discrimination more narrowly as exclusively disparate treatment.

In her article “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases,” Siegel highlights where this third perspective, emerging from tensions between the antistatutory and the anticlassification standards, breaks with the former view of equality. Antistatutory proponents

do not generally view antidiscrimination law as a threat to civil solidarity or see racial repair as triggering resistance to the antistatist theory. Comparison with antibalkanization concerns may prompt antistatist advocates to devote more attention to questions about whether and how the law can respond to anger and resentment caused by racial repair. If equality is not abstract or imposed, but inherent to social relations, then equality law must show whether equality has been achieved through the existing social understanding and related social arrangements. The race conservative vision requires law to anticipate and adjust to resistance to the evolution of racial norms in order to preserve social solidarity. Race progressives instinctively balk at this question. Accommodation has a long history. Who should pay the cost, and for how long? This line of questioning leads to further queries about the problems of transitional justice, encouraging antistatist proponents to share their vision of how equality should be implemented in a racially unequal world.

Race progressives can also prompt race moderates to think about implicit assumptions in the antibalkanization principle. Should the law be concerned with issues of estrangement and mistrust? Can the antibalkanization principle be upheld equitably, and does it respond to the risk of estrangement of minority communities as well as majority communities? If so, then why were the majority of the equality cases reviewed by the Supreme Court in recent years brought by white plaintiffs? Has the Court failed by applying a lower standard of scrutiny of equality for government practices that estrange minority communities, in particular with respect to racial profiling? Do cases alleging reverse discrimination call for the same or a higher level of scrutiny? Will the antibalkanization principle be vindicated in ways that entrench historical injustice—or that forge bonds of identity and empathy that a community needs to transcend historical injustice? Is the concern about social cohesion an alternative to race equality—or a predicate of it?⁷¹

Siegel shows how Barack Obama's "A More Perfect Union" speech delivered in 2008,⁷² offering a universal vision of the race issue, seeks to appease the anger and resentment of black and white Americans alike, conveying an unspoken desire for cohesion and social peace. In "Equality Divided,"⁷³ Siegel takes a step back showing how the judicial scrutiny of the Equal Protection Clause of the U.S. Constitution reflects the power plays between the different branches of government. Siegel offers a doctrinal and political account of how the Supreme Court changed its interpretation of equal protection from the 1970s to the 2013 term, from a minority-protective understanding of equal protection to a predominantly (though not exclusively) majority-protective understanding of equal protection. The Warren Court saw its role as protecting minorities from majority prejudice. The Burger Court sought to limit the Court's superintendence of politics and handed much of the role of protecting minorities to the political branches (to representative government). The Rehnquist and Roberts Courts began to reassert a judicial role in superintending politics but now are acting increasingly to limit how the political

branches can protect minorities—that is, to impose equal protection limits on civil rights initiatives—of the sort expressed in 2013 when the Roberts Court decided *Fisher*, further restricting affirmative action, and *Shelby County*, striking down a crucial provision of the Voting Rights Act.

Social cohesion also figures prominently in the European discourse,⁷⁴ but are the reasons for this interest the same? The contemporary debate over the integration of Roma people⁷⁵ and the rise of nationalist movements indicate that, outside of the domain of employment discrimination, the emergence of conflicts between social groups is a risk, in spite of the diversity management discourse promoted by the European Union. The September 2015 terrorist attacks in Paris might have fueled more social tension in France and Belgium. The references to fundamental rights in Europe's rejected constitutional treaty and in the Charter of Fundamental Rights of the European Union have not yet won widespread support.

The question posed by Siegel's presentation of antibalkanization is also a procedural one. Aside from the economic dimension of discrimination, isn't it a question of trust and confidence that a selection process is fair to both majority and minority group members and of the transparency of employment practices? If antidiscrimination law based on indirect discrimination principles is perceived as conferring advantages to certain categories of citizens, how can it be supported consensually by all groups unless it is better explained?⁷⁶ Against the backdrop of a global economic slowdown, in the United States and even in France,⁷⁷ greater attention is being paid to the "social meaning"⁷⁸ of antidiscrimination norms and consequently their ricochet effect on society, through which the selection of visible, "protected" groups leads to the emergence of ideas about whiteness, masculinity, singleness, queer theory, and gender deconstruction.⁷⁹ Is the lack of a communitarian spirit in France and the absence of organizations drawing attention to race, barring a few exceptions such as Conseil Représentatif des Associations Noires (CRAN),⁸⁰ enough to counter the risk of social divisiveness between interest groups? On the possible emergence of a generational conflict, Louis Chauvel does not exclude an interpretation that attributes the tensions to the advantages accorded to certain age groups over others.⁸¹ Does age antidiscrimination law have the power to aggravate or alleviate these tensions?⁸²

In any case, Siegel's work underscores the important role of constitutional case law in gaining valuable perspective and analyzing the overall social effects of the different models that can frame equality and its interpretation by judges, making a rich contribution to international comparison.

II. PUBLIC AND PRIVATE ENFORCEMENT OF ANTIDISCRIMINATION LAW

Antidiscrimination law cannot be effectively compared and understood without also contrasting the bodies in charge of enforcing this law: in both France and the

United States, labor unions participate in this enforcement but, most importantly, independent agencies have been established with the sole aim of applying anti-discrimination law. In the United States, this authority is the Equal Employment Opportunity Commission (EEOC).⁸³ Chai Feldblum, one of the scholars interviewed for this book, has been an EEOC commissioner since 2010. The fact that France's equivalent entity, the HALDE, was dismantled and its authority transferred to the Defender of Rights in 2011, makes a comparison all the more welcome. Employee trade unions also seem to have an ambivalent attitude toward antidiscrimination law, which I will attempt to clarify in the following conversations with American scholars. Another interesting point of comparison between the French and American situations focuses on the civil sanctions available⁸⁴ for infringements of antidiscrimination laws:⁸⁵ In the United States, the amount of damages awarded in a civil suit can be much higher than in France, especially if punitive damages are included.⁸⁶ In both countries, if the employee is not reinstated, judges will strive to redress in full the damages suffered as from the first discriminatory act.⁸⁷

Public Enforcement of Antidiscrimination Law

In the following conversation, David Oppenheimer compares the enforcement of antidiscrimination law in the United States and in France.

MARIE MERCAT-BRUNS: *What means and resources are available for the enforcement of antidiscrimination laws?*

DAVID OPPENHEIMER: One of the things I have been thinking about since I have been coming to France studying comparative antidiscrimination law is why we use the enforcement mechanisms we use in American antidiscrimination law. When I first started asking the question a couple of years ago, I started doing some research on it, which was very revealing to me. I have not published anything on it yet. Some other people have.⁸⁸ This is not breaking news, but it's not much discussed.

There are at least five ways that we might enforce antidiscrimination law: criminal sanctions; voluntary mediation and conciliation; government agency with an administrative process; government agency with prosecution functions so it could go into civil courts on behalf of the government; and private enforcement in the courts. Let's take these one at a time.

The penal process: should we make antidiscrimination law part of the penal code, as you have in France?

The only discussion I have seen in the United States is by conservatives who oppose civil rights laws and who proposed it with the knowledge (in my opinion) that it would never be successful, because juries in the United States are not about to convict companies of discrimination except under the most horrendous circumstances.

MM-B: *So it would make discrimination law ineffective?*

DO: Exactly. To my knowledge, there was no discussion in the Congress in 1963 or 1964 about such a method.

Second method: voluntary mediation and conciliation. That's the method that was favored in the 1940s, '50s, and into the '60s by those conservatives in the United States who believed in promoting an antidiscrimination agenda but did not believe in requiring employers to stop discrimination. A sizable group that felt way.

So you could divide the United States in the '40s, '50s, and into the '60s into basically three groups. First: those who were opposed to any kind of civil rights enforcement or civil rights law because they were white supremacists and antigovernment and antilaw; in Congress those were basically the Southern Democrats. The second group: those who favored an antidiscrimination law and one with real teeth; most of whom were Northern Democrats, Western Democrats, and Northern Republicans. There were a few Northern Republicans in that category: John Lindsey, Jake Javitz. The third group, the Midwestern Republicans, did not want a civil rights law but did want companies to start voluntarily adopting civil rights policies. This was the "business roundtable" approach to civil rights, and they were a force until the 1980s. I think President George H. W. Bush (the first Bush) believed in that kind of civil rights enforcement, in a kind of "noblesse oblige" third method.

The third way to enforce antidiscrimination law is through a government agency with administrative hearings. That's the model of the NLRB [National Labor Relations Board] enforcing the NLRA [National Labor Relations Act],⁸⁹ and it's a potentially very powerful agency. It's powerful because its decisions can be reviewed only by the Court of Appeals, and they can be reviewed only for mistake of law or abuse of discretion. What that means is that usually the decision of the administrative agency will be the final decision. The administrative agency's lawyers and hearing officers are selected by the Administration, by the government. Sometimes they are civil servants. They work for the State. At the higher levels, they are political appointees selected by the Administration. These agencies are potentially very independent and very powerful.

Many Republicans were concerned that if there were a civil rights enforcement agency with these powers, it would be too powerful and too political. This was the model favored by liberals, who wanted a strong enforcement agency. The CRA [Civil Rights Act] was introduced in 1963.

MM-B: *Wasn't it the EEOC?*

DO: The EEOC, as originally conceived, was going to be just like the NLRB.

MM-B: *But they are not similar?*

DO: No. The NLRB has exclusive jurisdiction, which means if you want to bring a claim for a violation of the NLRA, the only place you can bring it is in front of the Board. And in 1963, Republicans in Congress were upset with the

NLRB because they felt that it had become too liberal, too political, too much of a Democratic Party institution.

They feared the creation of an EEOC just as powerful and just as political. So a compromise solution was to have an EEOC, an antidiscrimination enforcement agency, but its cases would be prosecuted not before the agency but instead in civil court in front of federal judges who have been appointed by the President and confirmed by the Senate—judges who act in a very public forum, judges who reflect broadly the communities they come from. Well, this resulted in the appointment of lots of segregationist judges. In John Kennedy's case, every Southern judge he appointed until very late in his term were pro-segregation because they were Southern Democrats. The Southern Democratic Party "decided" who the President would appoint to the bench in their state. You had to go through the Senators from those states. You didn't have to as a matter of law, but politically you had to. It was politically required, so that the President could have a good relationship with the Senate.

So, back to the negotiations over the Civil Rights Act. At the very end of the process, Everett Dirksen, a conservative Republican from Illinois who served as the Senate minority leader, held the trump card. Was he going to support the Civil Rights Act or not? Well, he was very distressed about government enforcement of the Civil Rights Act. Basically he had the business roundtable point of view about how the law should be enforced. So he proposed a compromise, in which he would weaken the employment enforcement mechanism, providing that enforcement would be strictly through private law suits.

Now, how many private lawyers were there at that time in the United States who could bring plaintiffs' employment discrimination cases? Virtually none. There were a few people with the NAACP [National Association for the Advancement of Colored People],⁹⁰ a few people at the ACLU [American Civil Liberties Union]⁹¹ (where Ruth Bader Ginsburg led its efforts on women's rights issues), and a few people with the National Lawyers Guild.⁹² There were a few such organizations. That was it.

Senator Dirksen never imagined that he would create a whole new career path for American lawyers. There are now thousands of lawyers who make a living representing plaintiffs in employment discrimination cases.

MM-B: *Are there that many representing plaintiffs or employers?*

DO: Many more represent employers, but thousands represent plaintiffs. It was unimaginable at that time. That compromise had really been intended to kill enforcement.

MM-B: *Is private action efficient?*

DO: We are not nearly there yet. That was step one. Step two: in 1972, in broadening the CRA,⁹³ Congress gave the EEOC power to have hearings and to do some of the things the NLRB does, although not exclusively and not with

review limited to the courts of appeals. But the EEOC was never given the budget needed to do its job in a meaningful way.

MM-B: *Can it already be a party in the case?*

DO: It can bring a case, acting as the complaining party. It has had that authority since 1964, which provided that the Attorney General can bring a pattern and practice case on behalf of the EEOC.

In 1972, the EEOC was given the right to intervene in a civil action, and to conduct its own hearings. That's the fourth way to enforce antidiscrimination law. The fifth way is private enforcement action.

So that really leads to two further questions: Has private enforcement worked? Has EEOC enforcement worked since 1972? I think the answer to both questions comes all the way back to the very first question we discussed: Should we see the glass half empty or half full?

Private enforcement has, in some ways, been terribly disappointing. It turns out that these cases are very hard to win. It turns out that these cases are very expensive. It turns out that most lawyers who go into this area to represent plaintiffs find that they can't survive financially, and if they continue to do it, they do it as only part of their practice, and it is not the part of the practice where they are making money. There are a few notable exceptions.

MM-B: *We are talking about the ones who represent plaintiffs.*

DO: It turns out that there is enormous judicial bias against employment discrimination claims.

MM-B: *And is that also from liberal judges, or is it just because they are conservative judges?*

DO: Conservative judges are very conservative concerning such claims. Even liberal judges are probably more skeptical than they ought to be about such claims because there is a very pervasive rhetoric of skepticism about civil rights claims that has had a social and psychological effect, making people believe that discrimination is something that is easily claimed. I think the opposite is probably true.

MM-B: *Why do you think there is that perception? Because they think the burden of proof in employment discrimination shifts?*

DO: Do people believe that to be true? I doubt many people give much thought to burdens of proof, even judges. I think the problem is racial bias, often unconscious bias, against minorities, which is often expressed as skepticism about discrimination law.

MM-B: *They feel it is hostility towards them?*

DO: Certainly anyone accused of discrimination feels very much accused of something terrible.

MM-B: *Does it trigger something on the part of the judge?*

DO: Yes, there is always discussion about empathy and how much a judge should be empathetic. My sense is that many judges feel empathy for the defendants

in discrimination cases. I think they identify with defendants, who tend to be more like them in terms of their social status. They tend to be people who are educated, who are affluent (because there is no point in suing poor people), and as a result, if you observe the courtroom in a typical employment discrimination case and ask who does the judge feel empathy with, all too often you can sense that the judge feels empathy with the defendant, a sense of identification with the defendant. And the Supreme Court decisions make these cases harder and harder to prove.

Now, recall that the glass is half full. There are cases where private enforcement has been wonderfully effective. First of all, the class action area for a period of time was very effective, and that continues to be true although there are new limits on class actions.⁹⁴ There are class action practitioners who are plaintiffs' lawyers, who are very skilled, and who have lots of resources available. They bring important cases that really do influence the workplace. Occasionally, cases that involve terrible acts of discrimination get in front of judges who are somewhat sympathetic and juries who are somewhat sympathetic, and that produces big damage awards that get lots of publicity.

As a result, I think there is substantial fear on the part of employers about being sued. If employers were more aware of how hard it is to actually win a discrimination suit, they might be less fearful. But part of what they fear is not losing but the cost of litigation whether they win or lose.

Private enforcement has been a mixed bag. There are lots of examples you can point to where it has been very important. There are industries where it has had a big impact. On the other hand, the cases are very hard to bring, very hard to win, and it is much harder to win a discrimination case than most other kinds of civil cases.

MM-B: *Is it easier to win a race case than a sex case? Does the ground play a role in the success of the litigation? Is it easier to bring a suit alleging race discrimination than one alleging sex discrimination?*

DO: The cases that are more likely to succeed are whistleblower cases and sexual harassment cases. Sexual harassment cases end up in a whole other category. Part of the reason is the sexual harassment cases are actually litigated. They are often the quid pro quo cases, where the behavior is pretty bad. In such cases it is easy to get the judge and the jury angry at the defendant.

I have done a study, which was published in the UC Davis law review, looking at jury verdicts in California in employment cases over a two-year period.⁹⁵ What I found is that sexual harassment cases were the most frequently won by plaintiffs. The hardest cases to win were race discrimination cases brought by black women and age discrimination cases brought by women over the age of 50. I also found that sexual harassment cases brought by men claiming harassment by other men were among the easiest cases to win. Perhaps these cases appeal to the jury's homophobia.

MM-B: *Is there a contradiction in saying that antidiscrimination law has transformed society and that private enforcement is not that effective?*

DO: Yes. But even if private enforcement has not been that effective in resolving cases, it does not mean it has not been effective in terms of employer behavior, because employers fear not just liability but the cost of litigation.

MM-B: *In France, we see similar employer reactions to the HALDE's more proactive measures facilitating private enforcement. So you are saying that this enforcement is dissuasive?*

DO: Yes. I used to think the EEOC was an unusually ineffective, highly politicized administrative agency; I was very critical.

MM-B: *Have you written about that?*

DO: No, I haven't written about that. Julie Suk, whom I admire very much, has persuaded me that I need to reexamine that opinion.⁹⁶ Let me channel Julie a little bit here, if I may. The EEOC has passed important regulations,⁹⁷ which for the most part have been progressive and influential, even though in some instances the Supreme Court has rejected them.⁹⁸

MM-B: *So the EEOC has played a doctrinal role?*

DO: Yes, the EEOC has played an important doctrinal role. They influence government hiring and private-sector hiring through their regulations, their interpretations, and their questions and answers.

They have at times been politicized, and the EEOC under President Reagan took some dreadful positions, especially when Justice Thomas was the chair. The EEOC convinced the Court to interpret sexual harassment law in ways that have hurt women very badly.

MM-B: *According to a former EEOC commissioner whom I met, the fight is clearly based on ideological differences of opinions of commissioners. At the same time, when the majority of the members of the EEOC are liberals, then it can expand the breadth of antidiscrimination law.*

DO: The problem is, how can we accept a system where justice for the victims of discrimination depends on these political questions? The EEOC does process a lot of complaints. But it doesn't fully investigate enough of them, and that's a terrible shame.

MM-B: *Not enough money to investigate?*

DO: Partly it is funding. Partly it has been a lack of leadership and political support. But given the limitations of private enforcement, that agency enforcement becomes more attractive, for all its faults.

Robert Post contributes his views on the relationship between the administrative state and antidiscrimination law and the role of institutions like the EEOC, since the European Equal Equality Employment Directive (Directive 2000/78/EC) invites member states to create or to consolidate the action of antidiscrimination law enforcement bodies.

ROBERT POST: You can think about antidiscrimination law on the model that it polices wrongdoing, so it is like a tort system: it focuses on an employer's act to do a bad thing, to discriminate against a worker . . . the antidiscrimination law comes along and it remedies it. So the worker has to bring suit either before an administrative agency or before a court to remedy the wrong. That is one model of antidiscrimination law. It is a remedy for individual wrongs.

But if you think about antidiscrimination law in a more transformative way, or if you think about antidiscrimination law as a mechanism of redistribution, then this account is more or less inadequate. It puts the burden on those who are victims of discrimination to come forward—that is more or less a contingent fact. They are going to be discouraged by transactions costs, by the fact they are going to put their jobs at risk, and so on. So you want to be more proactive. Also you would want to make the systemic aspects of the problem visible. They are not visible when discrimination is treated as a phenomenon that is only cognizable on a case-by-case basis. So it is in that context that the administrative state becomes especially important.

The administrative state (a) is proactive—it prevents the problem before it happens—and (b) is capable of employing mechanisms like statistics that make a problem visible, that are structural, and that are not merely the sum of individual pieces. So what allowed antidiscrimination law to be truly transformative in the United States was the use by the EEOC of administrative law techniques like recording requirements and statistical requirements that make patterns visible. Once you see the patterns, then you can intervene at a different level and much more effectively, rather than a series case-by-case, and you can imagine this in the sense of changing the distribution of what is normal in a society and making the distribution visible first. It is a typical function of the administrative state and the use of statistics.

[Later in the interview, Post comes back to the topic of antidiscrimination enforcement agencies.]

MM-B: *What do you think of the difference between the federal EEOC agency and regional agencies? Is it important? In the United States, state laws on discrimination are less visible, and you have regional administrative bodies.*

RP: Yes, we are not centralized, and there are advantages to local law enforcement agencies which are closer to the ground; they see more of what is happening; they are more in touch with local grievances.

At the same time, local bodies are more subject to capture by local elites, and the national one is less subject to local pressures. They have complicated trade-offs and different vulnerabilities than nationals. By having duplication of enforcement mechanisms, you make up for the characteristic weaknesses of each. Although I am not sure this is true, antidiscrimination commissions began at the state level and then moved to the national level. It is the case that when we think about these questions, local levels might be more subject to

innovation. The barrier to entry is higher at the national level, and so it makes sense to have avenues of local experimentation. In antidiscrimination law, you can see what works and what doesn't, and we ban different forms of discrimination in different localities.⁹⁹ For example, housing courts ban discrimination if your housing is supported by the federal government. So this allows us to see and to experiment and to learn which forms are best suited to prevent discrimination.

Comparative Perspectives

In Oppenheimer's presentation of the various ways to enforce American antidiscrimination law, a few points are particularly worthy of note. The first is a certain skepticism that can be detected regarding the effectiveness of repressive criminal sanctions and, conversely, of the mediation work of the HALDE. Oppenheimer emphasizes the loftier standard of evidence required in a criminal case—showing guilt beyond a reasonable doubt—combined with the fact that in many cases, discrimination is an unconscious act occurring without discriminatory intent. A second point to be highlighted is the influential role of the regulations issued by the EEOC in the United States if litigation is not intentionally circumvented by deferring to employer grievance mechanisms or limited to summary judgment.¹⁰⁰ Judges often use the regulations promulgated by the EEOC as guidance in identifying admissible evidence in a civil proceeding, grasping the particularities of specific grounds of discrimination (reasonable accommodation in religious discrimination, for example), using statistics to show disparate impact, and so on. The HALDE's annual reports and published decisions also influenced the decisions of French judges.¹⁰¹ Will the Défenseur des Droits fulfill the same role as a quasi-doctrinal source of expertise?

Like Oppenheimer, other scholars evoke the different forms of antidiscrimination enforcement. They discuss the contribution of collective bargaining to employment discrimination law and to diversity. Robert Post looks at the broader picture of employment law in the context of globalization. The following insights of Post and Frank Dobbin suggest that the interplay between collective bargaining, diversity, and globalization in employment discrimination is a current trend in the United States, but the scholars illustrate the risks, challenges, and potential benefits of this multifaceted approach.

Collective Bargaining, Diversity and Globalization

Robert Post comments on the effectiveness of collective bargaining agreements on diversity.

MARIE MERCAT-BRUNS: *French law encourages trade unions and employer associations to enter into collective agreements on diversity. Do you think that this can be an effective means of promoting equal opportunity? Do you think that*

*collective bargaining agreements on diversity can be a mode of transformative law (according to the models you described earlier) or it is just discourse?*¹⁰²

ROBERT POST: In the United States, collective bargaining is associated with the labor movement, and the labor movement was in tension with antidiscrimination law. When Nixon started introducing goals in affirmative action, he did it self-consciously to split the labor movement from the Democratic Party [which was identified with civil rights and people of color]. So collective bargaining is typically a norm in which the consciousness of the working class is reflected. Antidiscrimination is not, and in the United States, this has been a source of great tension.

MM-B: *I think in France it is quite similar. A lot of unions say antidiscrimination law is not labor and employment law in the traditional sense. Antidiscrimination law is seen as a conservative, capitalistic, European-inspired economic law that will destroy the basic rights of the workers. A lot of the unions don't believe in it, actually, in France.*

RP: In Europe, in the context that you are talking about—correct me if I am wrong—antidiscrimination law is discrimination law between nationals of the different countries. So what you get is the law of the European Union, which says that countries cannot discriminate against the workers of other member states, and that means it is very hard to have national labor policies. It's neoliberal in the sense that it opens up the labor market and makes it an open market, whereas unionization is often on a national scale. So there is a tension with antidiscrimination law viewed as a matter of discrimination between nationals and a national labor movement. That is different from antidiscrimination law against Muslims, for example. That would not be neoliberal because it would not be market-oriented.

MM-B: *Actually, the European directives adopted in 2000 prohibiting discrimination in employment sought to ensure equal treatment among European Union citizens regardless of their nationality or sex and to promote fundamental EU values by helping to combat race and sex discrimination. The two goals (the removal of market barriers based on nationality and the enshrinement of non-discrimination in employment as a fundamental right with respect to a certain number of grounds) are often conflated. This makes it difficult to promote within member states the idea that labor rights acquired nationally and those acquired at the EU level must be protected to the same degree. A valid question therefore is whether we are converging toward a level of social protection that represents the lowest common denominator among EU member states, choosing equal treatment at all costs, even if it means a gradual narrowing of the scope of employment rights already acquired in certain countries.*

RP: I think that it is correct to distinguish between discrimination based on nationality and discrimination based on race or sex. The underlying logic of the former is based on the idea of a unified labor market. From the viewpoint

of a particular member state, the protection afforded by such a unified market can either raise the bar—increasing worker protection—or lower it to a common denominator—reducing their protection. In contrast, the underlying logic of the prohibition of racial or sex discrimination is based on the idea that all citizens *within* a state must have equal access to national labor market opportunities regardless of their race or sex. This logic is intrinsically hostile to the creation of national protections in labor law. In the United States, there are some unions that see the future of union movement as international. For collective bargaining, they organize at an international level, against multinational corporations, or in countries, through labor courts. So there is beginning to be a different sensibility among organized labor in the United States. Labor is seen as an international commodity; if you have a union, it has to be an international union. This is happening in the United States, but it is a relatively recent development.

MM-B: *What unions are involved?*

RP: The Service Employees International Union (SEIU)¹⁰³ is very organized internationally. [In the early 20th century, Samuel] Gompers and the AFL¹⁰⁴ organized Mexican workers because they realized that unless you organize workers on the other side of the border, you could organize all you want in Texas, but it would be undercut and mean nothing. So David Montgomery, a labor historian, wrote that the way to organize labor is to organize it traditionally.¹⁰⁵

MM-B: *This is really important, because in Europe we should know more about the American organized labor movement. On the international level, do the unions use ILO conventions?*

RP: Yes. The SEIU uses the standards set out in ILO conventions and has filed complaints for violations of the freedom of association affecting the organization of workers in various countries where multinationals are operating. The SEIU also works with the OECD [Organization for Economic Co-operation and Development]. Their strategy is to collaborate with their counterparts, trade unions in other countries, in negotiating global framework agreements with multinational companies to strengthen the enforcement of ILO standards.

For example, within the world's largest employer of security guards, they not only organized in the United States but they organized in the different countries where they operate in the labor market with very successful campaigns. It was not a rights-based campaign. It was a collective bargaining campaign.

MM-B: *I want to come back to the nature of collective bargaining compared to legislative norms. When you use collective bargaining, the production of this norm is very different. Of course, there is a power play, but basically it is putting norm into context. Do you think that if we could use collective bargaining in*

the United States (I know its influence is quite narrow today in the workplace), it could help to better implement antidiscrimination policies there? That is one aspect of the trend in France: you can't look at antidiscrimination law in the banking sector the way you look at it in the building sector, so we need customized tools, and collective bargaining can help us with that.

RP: I think about this sociologically: I ask who is the source of authority in collective bargaining, who is the source of authority in legislation, who is the source of authority in judge-made law? And people are making the law in each norm. So collective bargaining is either coming out of a given workplace, so some bargain is struck between the working class and owners, or it is between unions more generally understood to represent the working class and owners, whereas legislation is deemed more populist generally, which can be more progressive or more regressive depending on the political state of the country. Judges are a form of administrative elite, and they are speaking from that language and with that authority.

The first question is, where is the source of authority? And the second question is, over whom does the norm extend? Does it extend over only the workplace or the society at large? These are rather large differences, so I don't think they are susceptible to general answers.

You are going to have to ask, what are the interests and the consciousness of the working class—either a particular plant or particular union—and can that be the instrument or not of progressive antidiscrimination law? In history, it has not been, but maybe things are changing. There are now organizations and unions that are trying to organize immigrants, for example.

Their consciousness is quite different than the traditional working-class consciousness: you have to ask, what is the organizational basis of the union, what union, which plant, and so on? I don't think it is susceptible to generalizations.

Frank Dobbin adds his view on how collective bargaining can be used to achieve diversity.

FRANK DOBBIN: In a system with a wide number of trade unions representing people in different industries, as in France, trade unions probably have very different effects by industry. In service industries where lots of their members are women and minorities, we may expect them to be proponents of equal opportunity. But in some of the skilled manufacturing industries where there are few women and members of minority groups, they may not see a problem to solve and may be inclined to practice what sociologists call "social closure"—cutting off access to these highly paid jobs to groups that are not already well-represented and reserving the best jobs for people like themselves.

Comparative Perspectives

Whether or not labor unions have helped advance the fight against discrimination and the enforcement of antidiscrimination law is a difficult question to answer. In France and the United States, conflicting pulls between the activity of unions and the expansion of antidiscrimination law can be observed.¹⁰⁶ On the one hand, unions are intended to advance workers' rights in this era of globalization, so discrimination, especially discrimination based on trade union membership, is being fought at an international as well as a national level. Unions have actively participated in this combat, as attested by union demands, ILO standards,¹⁰⁷ and the union protection rules in the NLRA. Specific case law generated by national bans on antiunion discrimination has been gradually emerging.¹⁰⁸ It is interesting to note that although the European Social Charter protects collective action,¹⁰⁹ the European Union has only begun to refer to this by incorporating the right to collective action into its Charter of Fundamental Rights. French case law on discrimination based on union membership also contains novel decisions regarding evidence of such discrimination in performance appraisals and career advancement.¹¹⁰ In addition, the "equal pay for equal work" principle arising from the fight for pay equity between men and women led to a sharper demarcation of the meaning of *equal work* in environments in which discrimination is systemic and results from a historical or stereotyped attribution of occupations or responsibilities that should be remunerated equally.¹¹¹

On the other hand, in seeking to win the support of a broad population of employees, labor unions have not always seen their mission as compatible with championing the claims of minority groups or, in the case of women, specific claims not applicable to all employees. Leaving aside old cases of discrimination by majority unions, such as the Supreme Court case of *Steele v. Louisville*¹¹² in the United States, will France's recent reforms changing the rules for union representativeness, which is no longer presumed but dependent on the share of votes cast in workplace elections, be any help in addressing claims concerning a minority of employees?¹¹³ Should the existence of a plurality of trade unions in France have facilitated the representation of multiple viewpoints, such as those of people from diverse backgrounds? Although strategic alliances are still being formed between unions based on certain commonalities in their demands, they do not necessarily reflect minority interests. Furthermore, in the past, a presumption of representativeness probably lent legitimacy to the main national confederations, which up to now have traditionally defended those causes that concern all workers (retirement, wages, and working conditions).

Given the ambivalent role of labor union activity in the fight against all forms of discrimination, what are the benefits and drawbacks of organizing workers in a way that reflects their diverse identities? According to Maria Ontiveros, the SEIU and other unions have shaped campaigns and initiatives according to the cultural

habits and identities of certain employees, such as Hispanic service workers in California.¹¹⁴ Such identity-based organizing is possible in a country with a communitarian tradition in which multiethnic and multicultural values intertwine with everyday life. But with the current postmodern rejection of rigidly constructed identities, especially in countries that value universalism and deny the existence of groups, this type of organization focusing on cultural interest groups raises many questions. As observed by Michael Selmi and Molly McUsic,¹¹⁵ even if there is no longer such a thing as a “universal worker,” implicitly embodied by the married, white, male worker in the United States, fears that identity-based unions will lead to dispersion and a fragmentation of the power of its members are valid. Instead, inspired by French theory among others, the scholars turn to the concept of a “cosmopolitan unionism” embracing commonalities while recognizing differences: they envision not a union based on cultural identities but a union that is organized and functions in ways that leave room for identity-based claims to be discussed and debated.¹¹⁶ In the United States, this would necessarily require a reform of the majority system under the National Labor Relations Act (NLRA). As European labor unions gradually organize, the moment is well chosen to initiate broader reflection on incorporating forums for discussion ensuring the contribution of cultural interest groups to union negotiations, because the implicit, homogenous “universal worker” model is not necessarily still relevant across Europe.

Diversity and Trade Unions

Frank Dobbin continues the conversation on diversity and trade unions.

MARIE MERCAT-BRUNS: *France has developed collective bargaining agreements: do you think using the social partners to create norms on diversity might be a more effective way to promote equal opportunity?*

FRANK DOBBIN: I can say unequivocally that this strategy was a disaster in the United States. For the most part, unions hindered the achievement of equal opportunity. From the very earliest days, unions were segregated by race and gender. Even after they were required to integrate, most union leaders saw no benefit in promoting race and gender equality at work. Perhaps it will be different in France, but in a workplace that is not yet fully integrated, in an economy with high levels of unemployment, it isn't clear to me that the current union members would have a strong interest in promoting diversity. Perhaps some would for ideological reasons, but those who are hoping to get their sons and nephews into the union may be happy if their union doesn't get into the business of social advocacy in favor of equality of opportunity.

Dobbin's book *Inventing Equal Opportunity* traces the history of how companies have integrated antidiscrimination law into their practices through their human resource teams and not their legal departments.¹¹⁷ Neither labor unions

nor the government have been effective in interpreting antidiscrimination laws and diversity norms such as equal employment opportunity (equal access to jobs and promotions). Dobbin assesses these integrated norms and shows how diversity and bias training to raise awareness have tended to minimize the causes of discrimination instead of bringing them to the forefront. Affirmative action tools have proved to be much more effective in actually bringing a critical mass of people representing minorities into different job levels and promoting the benefits of diversified a labor force. These are valuable insights for France, where collective agreements on diversity have been adopted. An analysis of the diversity tools they cover and of the role of labor unions in France can be informed by these comments as well as emerging studies on the reach of these collective agreements.¹¹⁸