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**LIMITS OF THE CLASSIC METHOD:**

**POSITIVE ACTION IN THE EUROPEAN UNION AFTER THE NEW EQUALITY DIRECTIVES**

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POSITIVE ACTION IN THE EUROPEAN UNION AFTER THE NEW EQUALITY DIRECTIVES\*\***

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## Abstract

*A rather traditional version of the equality paradigm, based on individual rights and identity-neutral justice, has so far controlled the ECJ's decisions on positive action for women in the workplace. The same paradigm inspires the new equality directives, and will probably continue to guide the Court in the scrutiny of States' positive action measures in favor of racial, ethnic or religious groups. Against this trend, this article advocates a drastic revirement in the supranational adjudication of positive action disputes, leading to broader State autonomy in the experimentation of new formulae for the mainstreaming of marginalized groups. Alternative forms of European governance are apt to ensure, better than supranational judicial review, the coordination of national policies in this respect.*

*The argument builds upon three analytical pillars: a) a critique of the ECJ's positive-action case law, based on the Court's over-reliance on the prescriptive power of the group/individual rights dichotomy; b) a re-conceptualization of positive action as identity-based redistribution. Rather than exceptional aberration from the canon of individual equality and blind justice, positive action can be conceived of as one among many forms of allocation of resources in favor of identity-defined groups; c) a collection of examples of identity-based redistribution, sharing the essence, if not the form, of positive action. These examples show how measures targeting ethnic or religious groups for redistributive purposes are not at all new or uncommon in both national and supranational policies. They are natural adaptations of welfare canons to the diversity of social landscapes. The dominant rhetoric of identity-blind justice fails to capture such realities and thwarts the debate on the problems of a multicultural Europe.*

## Introduction

Against the background of divergent national approaches, the European Court of Justice, in a handful of *fin de siècle* decisions, has entrenched itself in a cautious and qualified endorsement of positive action for women in the workplace. In its pronouncements on this point, as well as in its general handling of equality issues, the Court has shown some comfort in the use of balancing tests variously designed by high judicial fora throughout the western world. It has espoused conventional methods for scrutinizing States' positive action, such as the identification of legitimate State goals and the narrow tailoring of means to ends, and it has demonstrated readiness to adopt conveniently sliding levels of scrutiny, depending on each case's circumstances. The nuances of this judicial discourse, however, fail to soften the Court's rigidly individualistic conception of rights. Rather than addressing the issue of gender-based discrimination in terms of collective justice, the ECJ has consistently spoken the language of individual equality and of neutral enforcement of non-discrimination rules. It has, in other words, clung to Europe's primeval fear of groups as potential usurpers of individual rights.<sup>1</sup>

Yet, the subject of collective justice is of growing importance. Gender equality is only one amongst many possible claims based on collective experiences of discrimination. The European project of integration, in its most updated version, extends the jurisdictional scope of the European Court of Justice far beyond its original core of subject matters. The growing impact of diversity on the social fabric of the old Continent is a matter of supranational concern. The problems of discrimination based on racial, ethnic or religious identity are now within the Court's reach. Member States are currently in the process of implementing two directives, meant to prohibit discrimination based on racial, ethnic or religious differences. Both directives make room for member States' enactment of positive action measures in favor of groups, in terms which resemble previous legislation concerning

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<sup>1</sup> This essay is mainly focused on European legal systems, and looks at their American counterpart only to highlight the pervasiveness of the fear of group justice and its ambiguous *raison d'être*. Examples are borrowed selectively from the European experience, and all revolve around the issue of legal integration within the European Union. The fear that I address, however, is by no means exclusively European. When the ECJ voices this fear, it speaks to and for the West in general. "[A] tenaciously held principle of many in our societies – a principle with undeniable constitutional roots—is that each person should be treated as an individual rather than as a statistic or as a member of a group – particularly of the group the individual did not knowingly choose to join." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1589 (2<sup>nd</sup> edition 1988). I also aim to isolate the issue of group entitlements from some of its theoretical implications. The overarching debate on the worth and on the very possibility of grouping individuals on such bases as gender, ethnicity or faith exceeds the scope of this essay. (For a sharp outline of the "what-is-a-group" debate see Claus Offe, "*Homogeneity*" and *Constitutional Democracy: Coping with Identity Conflicts through Group Rights*, 6 J. POL. PHIL. 113, 125-131 (1998)). These lines of categorization, no matter how coarse, biased and semantically questionable, feature as relevant variables in social equations. They are regularly contemplated in anti-discrimination legislation, and hence color the working hypotheses of legal decision-makers throughout Europe. For this reason only, this essay does not question their meaning, and takes them at face value as icons of identity and belonging.

gender equality. In all likelihood, the Court will interpret such terms along the lines of its previous holdings. This is, however, a chapter of EU history that should not be written.

Against the current trend, I advocate a policy of judicial restraint in the supranational scrutiny of positive action cases. The Court, I argue, should now allow for broader State autonomy in the experimentation of new formulae for the mainstreaming of marginalized groups. Alternative forms of European governance are apt to ensure, better than supranational judicial review, the coordination of national policies in this respect. The multifarious socio-economic and cultural problems posed by the coexistence of multiple identities within the European constituency cannot be solved by means of uniform, EU-wide solutions. Nor can supranational adjudication, based on rights and centralized enforcement, do justice to the diverse legal and political sensibilities of national or subnational decision-makers.

This argument builds upon three analytical steps. In Part I, I articulate a critique of the ECJ's positive-action case law, based on the Court's over-reliance on the prescriptive power of the group/individual dichotomy. This critique is entirely internal to the logic of the Union's legal system. The US debate on the plausibility of a group-sensitive understanding of the Equal Protection clause, started a quarter-century ago by Owen Fiss and still ongoing, is intentionally kept at the margins of the analysis.<sup>2</sup>

In Part II, I propose a re-conceptualization of positive action. Rather than exceptional aberration from the canon of individual equality and blind justice, positive action can be conceived of as one among many existing forms of allocation of resources in favor of identity-defined groups. I provide several illustrations of identity-based redistribution, sharing the essence, if not the form, of positive action. These illustrations show how measures targeting ethnic or religious groups for redistributive purposes are not at all new or uncommon in both national and supranational policies. They are natural adaptations of welfare state canons to the diversity of social landscapes. The dominant rhetoric of identity-blind justice fails to capture such realities and thwarts the debate on the problems of a multicultural Europe.

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<sup>2</sup> See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Affairs* 107 (1976). I do not intervene directly in the substantive merits of that debate for several reasons. First, rather than pointing at an EU-wide theory of collective justice, it is my aim to argue for enhanced respect of local legal sensibility and experimentation. Second, I deem it essential to avoid the trap of false comparisons in politically salient legal matters. Third, by focusing on EU law only, I am better able to show the connection between welfare goals and positive action. The US's traditional aversion to the constitutionalization of welfare rights finds no match in the constitutional traditions of the Old Continent.

In Part III, I provide specific technical ground for the argument that the ECJ should not review at all positive action policies enacted by member States.<sup>3</sup> The several prohibitions of discrimination in the EC Treaty do not provide an appropriate match for the complex theme of positive action. The subject finds better analogues in other Treaty provisions, which deal more directly with the true scope of positive action – namely, the fight against social exclusion—and open up alternative avenues for an EU-wide dialogue on the rehabilitation of marginalized collective identities.

This article contributes, from the margins, to the broader discussion on the ongoing evolution of European constitutionalism. Scholars have emphasized the chasm between the ‘classic’ method of supranational lawmaking, and the new forms of European governance.<sup>4</sup> The ‘classic Community method’ reproduces, at a supranational level, the member States’ ‘modernist tradition,’ anxious about legitimacy, constitutionalism and fundamental rights.<sup>5</sup> The new ways of European governance rely instead on grass-root deliberation and enhanced political dialogue. My contribution to that discussion lies in demystifying, with particular regard to group justice, a few myths surrounding the modernist tradition. If looked at closely, mainstream policies at both national and European level already embrace techniques for accommodating identity-based instances that a conventional rights discourse is incapable of capturing. When myths vanish, the new mechanisms of European governance seem no longer at odds with tradition, but rather placed on a continuum of plausible institutional choices.

## **I. Groups in the Jurisprudence of the European Court of Justice: Gender as a Start**

In the European context, gender is the most common basis for allocating special legal entitlements, and the only terrain upon which the ECJ has, so far, discussed positive action for groups traditionally discriminated against. As such, gender is the necessary starting point of this discussion. The analysis highlights, at first, the Court’s unconditional recital of neutrality principles as antidotes to group-based justice. This rhetoric appears to echo the ideological guidelines of continental democracies, but in fact fails to reflect the many levels of complexity characterizing equality in

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<sup>3</sup> The argument would apply identically to the Court of First instance if its jurisdiction were expanded to include preliminary references under EC Treaty Art. 234 [Consolidated Version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79].

<sup>4</sup> See Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L. J. 1 (2002). Based on the Commission's White paper on Governance [COM (2001) 428 final, *European Governance - A White Paper*, p. 8], these Authors describe the 'Classic' Community Method as composed of the following basic elements: Commission's exclusive right of legislative initiative, legislative powers of Council of Ministers and European Parliament, uniformity of rules, and central role for the European Court in guaranteeing respect for the rule of law.

<sup>5</sup> For a recent critique of the modernist tradition in the context of EU law see Ian Ward, *Beyond Constitutionalism: The Search for a European Political Imagination*, 7 EUR. L. J. 24 (2001).

member States' legal systems. The focus then shifts to the Court's most recent use of the test of proportionality when scrutinizing positive action plans. In applying this test, which requires fine-tuned balancing of goals and means in the design of affirmative action plans, the ECJ faces— I argue— limits that are both theoretical and institutional. When borrowing from the US history of affirmative action, in particular, the ECJ risks making both too much and too little of the American experience. On one hand, it may overstate the persuasive force of out-of-context comparative borrowings. On the other, it may lack the institutional capacity to embark on the complexities of US-born strict scrutiny.

Differently from the vast legal scholarship on this subject, I do not attempt to provide a better doctrinal model for the judicial review of States' measures of positive action.<sup>6</sup> Nor do I believe that, in this specific context, a richer dialogue between the Court and national (or sub-national) actors would suffice. Rather, I aim at showing that the variables at stake in local positive action schemes are too complex, and too far reaching, to fit comfortably within the scope of the ECJ's jurisdiction or within its theoretical frame of reference.

### *1. The ECJ on Affirmative Action: First Steps*

The ECJ began to test affirmative action on a relatively easy battlefield: gender discrimination in the workplace.<sup>7</sup> The field was an easy one for the obvious reason that gender equality of workers – both formal and substantive— had been on the European agenda since the dawn of the project of integration.<sup>8</sup> In the original version of the Treaty of Rome, Article 119 stated that “men and women should receive equal pay for equal work.” This principle was clearly meant to equalize the cost of labor for employers throughout the Community, so to avoid price distortions due to systemic differences in production costs.<sup>9</sup> Upon this textual basis, both the Court and the legislators of the Community had given life to the principle of gender equality in the workplace for two full decades.

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<sup>6</sup> See e.g. Sandra Fredman, *Affirmative Action and the Court of Justice: A Critical Analysis*, in *SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION* 171 (Josephine Shaw ed., 2000). Fredman offers a reading of equality that renders affirmative action compatible and coherent with fundamental EC law canons.

<sup>7</sup> The ECJ's decisions on affirmative action have been the subject of extended and thoughtful commentaries. A comprehensive and updated one, with helpful comparisons to the US experience, is provided by Fredman, *supra* note 6.

<sup>8</sup> Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [EEC Treaty or Treaty of Rome], Art. 119. The original Treaty of Rome was subsequently amended, and its Articles renumbered. It is now known as the EC Treaty (*supra* note 3). This is one of the many traits that distinguish the founding document of the EU from the US Constitution. See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U.L. REV. 1229 (2000) (arguing that “[the Fourteenth] Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”)

<sup>9</sup> See Catherine Barnard, *The Economic Objectives of Article 119*, in *SEX EQUALITY LAW IN THE EUROPEAN UNION* 321 (Tamara K. Hervey & David O'Keeffe eds., 1996).



The Court had interpreted Article 119 to prohibit both direct and indirect discrimination of employees on the basis of gender. Direct discrimination – an immediate breach of formal equality requirements—involved such cases as dismissal of an employee due to pregnancy. Indirect discrimination would occur, instead, whenever an apparently gender-neutral policy resulted in the worse treatment of female employees. In terms which resemble the US category of “disparate impact,” the Court would ask employers to justify their policies in light of legitimate ends, and to give evidence of means/ends proportionality.<sup>10</sup>

In addition to this basic enforcement of the principle of equality, a 1976 directive had also made it possible for member States to “remov[e] existing inequalities which affect women’s opportunities” in access to employment and working conditions.<sup>11</sup> By the time affirmative action came to the Court’s scrutiny, the sense that women are a category worthy of special protection in the workplace because of a lengthy history of employment discrimination needed no further advocacy. One additional reason, however, made the case of women an especially easy one: women are neither a numerical minority, nor a group in any sense that is ethnically, religiously, or ideologically characterized. Because gender cuts across all cultural or political affiliations and does not affect or depend on ethnicity or nationality, identifying women as subjects of special legal entitlements would not imply any legal particularism, or the abdication of the principle of universality of the law. Or would it? At first, the Court’s response was tentative.

In 1995, for the first time, the German Federal Labor Court raised the question of legitimacy, by EC standards, of a *Land* provision giving women preferential access to the workplace. The ECJ, in a much criticized holding (*Kalanke*), clung to the ideal of individual rights as conceptually opposite to group entitlements for a given gender, and deemed the provision incompatible with the Treaty.<sup>12</sup> The Court explained that the Bremen plan in question was designed to guarantee the “result” of actual employment, according “absolute and unconditional priority” to women applicants. This exceeded the

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<sup>10</sup> See Luisa Antonioli Deflorian, *The Dilemma of Affirmative Actions: A Comparison Between European Community Law and the American Experience*, in DEALING WITH EUROPEAN INTEGRATION: PERSPECTIVES FROM SEMINARS ON EUROPEAN LAW 1995-1996 (Iain Cameron & Alessandro Simoni eds., 1996).

<sup>11</sup> Council Directive No. 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L 39, Art. 2(4): “This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1(1).” This text did not explicitly allow for positive discrimination. It did not articulate, in so many words, the possibility to render women not only substantively equal, but also better positioned than their male colleagues in their quest for professional achievement.

<sup>12</sup> *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93, 1995 E.C.R. I-3051.

scope of the 1976 Directive, only allowing for equality of “opportunities,” and infringed Mr. Kalanke’s “individual right” to non-discriminatory treatment.<sup>13</sup>

Only two years later, under heavy pressure on many fronts, the Court took a more favorable look at affirmative action for women, though halting a few steps back from full endorsement. Again, as in *Kalanke*, the German provision under scrutiny provided that, between two applicants of equal merit but opposite gender, employers should choose the female one. This time, however, the provision contained a so-called 'saving clause': the male candidate (Mr. Marschall in this case) could point out alternative criteria of preference, so as to rebut the presumption in favor of his female competitor. For instance, he could give evidence of his seniority, or of his especially acute family responsibilities.<sup>14</sup> More generally, he would be entitled to thorough consideration of his professional and personal profile. “Secondary criteria of selection” (short of chauvinistic bias) would possibly lead the employer to give him the job instead.<sup>15</sup> No matter how vague and of difficult justiciability,<sup>16</sup> this saving clause eliminated the invidious automatism of gender preferences, replacing it with a personalized assessment of candidates’ qualities. This was enough, according to the Court, to do justice to the principle of equality, as well as to the axiom of individual justice.<sup>17</sup>

*Kalanke* and *Marschall* generated a flood of commentaries. Some praised the Court for its somewhat solomonic endorsement of preferential treatment for women, while others focused their criticism on the ambiguity of the latter holding. Some scholars, in particular, underlined the endemic resistance of the ECJ towards the concept of group justice, as well as its stern defense of individual entitlements against the specter of collective claims.<sup>18</sup> This point is particularly significant, as it raises the more general issue of shared identity in *fin-de-siècle* Europe. The ECJ's reply to the question of women's privileged access to the workplace might be, in fact, symptomatic of its overall attitude toward collective entitlements. The bigger question lurking behind *Kalanke* and *Marshall* was, and

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<sup>13</sup> Parr. 21-23 of the *Kalanke* judgment, at I-3078. Advocate General Tesauro, in his opinion to the Court (par. 8), had observed that “in taking the group as such into consideration, positive action marks a transition from the individual vision to the collective vision of equality” (Id. at 3057-3058).

<sup>14</sup> The government of Nordrhein-Westfalen offered the two examples of “length of service and social reasons:” Hellmut Marschall v. Land Nordrhein-Westfalen, Case C-409/95, [1997] E.C.R. I-6363, 6366-6367 (opinion of Advocate General Jacobs, par. 8).

<sup>15</sup> See par. 31 of Advocate General Saggio’s opinion in Badeck et al. v. Hessische Ministerpräsident, Case C-158/97, 2000 E.C.R. I-1875, 1891 (decided on March 28, 2000.)

<sup>16</sup> On this point see Austin Clayton, *Hellmut Marschall v. Land Nordrhein-Westfalen: Has Equal Opportunity Between the Sexes Finally Found a Champion in European Community Law?*, 16 B.U. INT’L L. J. 423 (1998).

<sup>17</sup> Neither the Court nor the AG opinions in the two cases cite *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). In that case, the US Supreme Court upheld the validity of an affirmative action plan precisely because it represented “a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of [...] women in the [...] work force” (at 642).

still is, whether it is at all plausible within the EU's legal architecture to confer any entitlements to pre-identified collectivities, even when this involves economic or political set-backs for the outsiders – a question for the 21<sup>st</sup> century indeed.

## 2. *The Current Paradigm of Positive Action*

The Treaty of Amsterdam, signed by the member States' governments in 1997 and effective as of May 1, 1999, modified the original provision on gender equality by adding to it an explicit, though vague, endorsement of affirmative action.<sup>19</sup> The new Treaty Article 141 (formerly 119) was fully in force by the time the ECJ had to adjudicate further episodes of the saga.

Underlying the Court's reasoning in *Kalanke* was a sharp distinction between equality of opportunities and equality of results, the latter being prohibited by EC law. *Marschall* brought about a major change by allowing, in the presence of adequate saving clauses, preferential treatment in actual hiring – arguably, a matter of results.<sup>20</sup> In the German system, such result-oriented measures are in large part mitigated by *Marschall*-type saving clauses, and therefore their validity is not, at present, in dispute. Moreover, the *Marschall* formula still requires that male and female candidates be equally qualified in order for preferential criteria to apply. Meritocracy still controls: nobody else, in the pool of applicants, has better qualifications than the person who gets the job. When the two safeguard mechanisms—saving clause and par qualifications—are not present, the ECJ does not approve of result-oriented schemes, also known as fixed-quota systems.

In a further case on affirmative action (*Badeck*), the ECJ upheld a statute enacted by the German *Land* of Hesse, establishing a system of “flexible result quotas.”<sup>21</sup> The argument canonically raised by the applicants – that the principle of equal treatment confers rights upon individuals, and

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<sup>18</sup> See Antonioli De Florian, *The Dilemma*, *supra* note 10, and Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329 (1999), esp. at 353-356.

<sup>19</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997). After the Treaty of Amsterdam, Art. 141.4 of the EC Treaty reads: “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

<sup>20</sup> The development is highlighted by AG Saggio in par. 26 and 28 of his opinion in *Badeck*, *supra* note 15, at 1888 and 1889.

<sup>21</sup> In *Badeck*, *supra* note 15, strict quotas were not tolerated with regard to results (actual employment); however, the ECJ was prepared to accept measures which imposed a strict quota reserving at least 50% of training places for women, and reserving at least 50% of all job interviews to female candidates (par. 55 and 63 of the *Badeck* judgment, *id.*, at 1927 and 1929). See Lisa Waddington & Mark Bell, *More Equal Than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587, 602-603 (2001).

therefore “prohibits giving privileged treatment to a specific group”<sup>22</sup>— was dismissed due to the highly nuanced character of the quota system under scrutiny. Most importantly, the Hessian scheme required full evidence of equal qualifications prior to the triggering of gender preferences, and was riddled with exceptions.<sup>23</sup> It met, in other words, the two safeguard mechanisms required by the *Marschall* holding.

The rationale of *Kalanke*, *Marschall* and *Badeck* sheds light on the semantics of ‘positive action.’ The choice of this heading reflects Europe’s attempt to diversify its practices from US-born ‘affirmative action.’ The alleged distinction lies in the fact that positive action is conceptually in tune with the principle of equality, while affirmative action is not. Positive action aims at leveling the field for all players. It favors traditionally discriminated categories of individuals by allowing them to compete on an equal footing, but it does not promise them victory. It consists of a number of techniques, such as special training and educational opportunities, which do involve redistribution, or diversion of resources from one group to another. Yet, these techniques are only meant to allow for fair game. Positive action is, in other words, inspired by the goal of substantive equality, which demands that unequal situations be not treated equally. But it never makes the playing field rougher for individuals outside of the protected categories. It does not really cause reverse discrimination.<sup>24</sup> In those occasions in which actual hirings or promotions are based on preferential criteria, reverse discrimination *might* be an issue.<sup>25</sup> But individual rights are still guaranteed by meritocratic assessment and by suspension or reversal of such criteria in light of specific circumstances.

While their validity by EC standards is beyond question, the effectiveness of positive action plans of this sort is a different matter. One of their most debatable features is the need to demonstrate equivalent qualifications of male and female candidates before any preferential criterion may be triggered. Where these schemes have been applied, the increase in female representation in the workplace has seemed a continuation of existing trends rather than a real step-function. An expert of the German labor market, commenting on such data, has observed that “[i]t is fairly easy to evade decision quotas by simply denying the presence of equal qualifications.”<sup>26</sup> If this is true, the type of positive action endorsed by the ECJ may arguably be missing the real point. Such remarks may not concern the Court in Luxembourg so long as its own vetting of positive action coincides with the law

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<sup>22</sup> See par. 11 of the Court’s judgment in *Badeck*, *supra* note 15, at 1915.

<sup>23</sup> See par. 34-35 of the Court’s judgment (*Badeck*, *supra* note 15, at 1921-1922), summarizing the intervention of the Prime Minister of the *Land* of Hesse, and explaining that, among others, applicants with a record of voluntary service in the army are given priority over women.

<sup>24</sup> Steven M. Teles, *Why Is There No Affirmative Action in Britain?*, 41 AM. BEHAV. SCIENTIST 1004 (1998).

<sup>25</sup> Par. 20 of AG Saggio’s opinion in *Badeck*, *supra* note 15, at 1884.

<sup>26</sup> Ninon Colneric, *Making Equality Law More Effective: Lessons From The German Experience*, 3 CARDOZO WOMEN’S L. J. 229, 245 (1996).

and policy choices prevailing in the *Land* of Hesse or in Germany at large.<sup>27</sup> But the issue is one of practical importance, because other EU member States have indeed conceived of much more aggressive plans in favor of women.

### 3. *The Paradigm's Teeth*

It is at least plausible, especially in such debatable rankings concerning academic worth or aesthetics, that the requirement of equal qualifications be the stumbling block of even the most earnest affirmative efforts. For these reasons, a 1995 Swedish regulation, limited in scope to teaching posts in higher educational institutions, did away with the usual pre-requisite of par qualifications: a woman possessing “sufficient qualifications for the post” could be appointed in preference to a male candidate who would otherwise have been chosen. This rather blunt form of positive discrimination came with a correcting device. It could only operate “if the difference between the two candidates’ qualifications was not so great as to breach the requirement of objectivity in the making of appointments.”<sup>28</sup> In a case recently brought before the ECJ (*Abrahamsson*), such affirmative guidelines had led to the appointment of a female professor of hydrosphere sciences at the University of Göteborg.<sup>29</sup> The referring court, relying on the intervention of the Swedish government, validated as correct the reading of the constitutional principle of objectivity as applied in Göteborg. In the implementation of the relevant affirmative scheme, high academic standards had been preserved; administrators had struck the right balance between the objective assessment of candidates’ overall qualities and the need to promote gender equality in academia.<sup>30</sup> The ECJ, however, did not find this analysis persuasive. The Swedish scheme could not pass muster for a number of reasons: a) it contained no saving clause for the male candidate and therefore operated in an impermissibly automatic fashion; b) it did not use, in the assessment of candidates, sufficiently clear and unambiguous criteria; and c) to the extent that it pursued the legitimate goal of compensating for women’s professional disadvantage, it did so disproportionately.

The Commission welcomed the *Abrahamsson* decision. Interestingly, in its official website, the Commission advertised the case as one that “upheld Swedish measures to combat female under-

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<sup>27</sup> Manfred Zuuleg, *Gender Equality and Affirmative Action Under the Law of the European Union*, 5 COLUM. J. EUR. L. 319, 328 (1999), concludes that “[after *Marschall*,] the ECJ’s approach is in harmony with the German Constitution promoting factual reinforcement of legal equality for men and women.”

<sup>28</sup> Swedish Regulation 1995:936 concerning certain professors’ and research assistants’ posts created with a view to promoting equality, Art. 3.

<sup>29</sup> *Abrahamsson et al. v. Fogelqvist*, Case C-407/98, 2000 E.C.R. I-5539, decided on July 6th, 2000.

<sup>30</sup> Par. 25 of the *Abrahamsson* judgment.

representation in employment.”<sup>31</sup> This is only partly true. The court did confirm the plausibility of positive discrimination in favor of women. However, *Abrahamsson* curtails significantly the scope of the Swedish regulation in question. The administrators of the University interpreted it to mean that, because the principle of objective assessment was not violated (the female candidate was certainly worthy of that academic post,) the requirement of par qualifications could be mildly relaxed. Quite to the contrary, after *Abrahamsson*, the formalistic threshold of equal qualifications must be unquestionably met. The female candidate must be just as good as her male competitor. At that point only, rather than tossing a coin, University deans can use gender as a basis for their final decision.

This case is highly meaningful on two fronts. First, it reveals a serious clash of attitudes between the ECJ and a member State on affirmative action. The *Marschall* pre-requisite of par qualifications is clearly inadequate, in the Swedish establishment’s view, to address representational deficiencies in the academic community, yet it continues to control the legitimacy of positive discrimination in Luxembourg. Second, the test of proportionality is now promoted to fundamental canon for the scrutiny of state measures on group affirmation. This is also a radical step, seemingly adding nuance to the rigid parameters of *Kalanke*.<sup>32</sup>

Proportionality, now a well-established concept in the jurisprudence of the ECJ, is a most typical feature of German public law. At its start, it was invoked in the context of policing, in order to curb excessive forms of repression.<sup>33</sup> It is now a form of heightened scrutiny in Germany’s equal protection jurisprudence, meant to be applied when the legislation under review draws differences on the basis of such “immutable characteristics” as listed in Article 3.3 of the *Grundgesetz*.<sup>34</sup> The test of proportionality consists of three parts, meant to determine: a) whether a given legislative or administrative measure aims at a *legitimate* goal; b) whether the challenged measure is in fact *necessary* to pursue the identified goal; and c) whether the means envisaged are not *disproportionate* to the goal pursued. Unquestionably, each step of this scrutiny engages the German judiciary in a delicate balance of institutional competences, and in the extremely complex art of ranking, by importance, multiple policy objectives of the Federal constituency. The same test has, for many years,

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<sup>31</sup> [http://www.europa.eu.int/comm/employment\\_social/equ\\_opp/news/abrahamsson\\_en.html](http://www.europa.eu.int/comm/employment_social/equ_opp/news/abrahamsson_en.html)

<sup>32</sup> The Advocate General’s opinion in *Kalanke* already resorted the proportionality test, but the Court then did not adopt it for the scrutiny of positive action. Luisa Antonioli Deflorian, *Affirmative Action in the US: The Legal Dimension*, in *COMBATING RACIAL DISCRIMINATION. AFFIRMATIVE ACTION AS A MODEL FOR EUROPE* 81, 94 (Erna Appelt and Monika Jarosch eds. 2000), commenting on *Kalanke* and *Marschall*, noted the “oddity” of using the proportionality test in indirect discrimination cases but not with regard to positive action.

<sup>33</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 350 (2<sup>nd</sup> ed 1998).

<sup>34</sup> Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PENN. J. CONST. L. 284 (1998). The use of the proportionality test in matters of equality is fairly new in German constitutional jurisprudence. Until 1980, the formula for equality

guided the ECJ in determining whether Community legislation and/or state action falling into the sphere of Community competences would overstep the boundaries of means-to-ends proportion. The bulk of proportionality review is to be found in the Court's control over state measures impinging upon the free movement of goods, services or persons for the alleged purpose of protecting public health or *ordre public*. It is also common for the ECJ to employ a proportionality test in cases of indirect discrimination, i.e. of seemingly gender-neutral rules which happen to have negative consequences for one gender only.<sup>35</sup> In these contexts, the ECJ's institutional or actual competence to handle proportionality review is often taken for granted. One may question, however, the usefulness or propriety of imparting proportionality review upon States' affirmative action plans. In an article on proportionality in EC law, Gráinne DeBúrca wrote:

“In certain specific political contexts ... courts tend to be considerably more deferential in their review. They are more reluctant to adjudicate if the interest affected is seen as a collective or general public interest rather than an individual right, and if the interest of the State is a mixed or complex one, e.g. in an area involving national economic and social policy choices... Or even if [the challenged measure] does affect a recognized right, [it may be that] it also concerns many other interests, both individual and general, over which the policy maker has presumably deliberated at length in coming to a decision...The ways in which a court may defer in such circumstances range from deeming the measure non-justiciable, to refus[ing] to look closely at the justification for [its] restrictive effects...”<sup>36</sup>

As a matter of fact, where doubts have arisen as to its full understanding of the means/ends inquiry in a given context, the ECJ has engaged in self-restraint, leaving national courts in charge of the final findings.<sup>37</sup> But self-restraint is certainly not the key-note of the *Abrahamsson* decision. With *Abrahamsson*, the ECJ has taken upon itself the role of arbiter on such issues as the relevance, for the Swedish constituency, of diverse representation in academic institutions. It has also claimed competency to second-guess that State's educational values: traditional scholarly ranking, according to the Court, must still prevail over more rounded concepts of objectivity, even when the local governance has come, over time, to a different conclusion.<sup>38</sup>

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review had been *Willkür*, or arbitrariness. See Christian Starck, Art. 3, margin 10 and 11, in *DAS BONNER GRUNDGESETZ: KOMMENTAR* 319-21 (Christian Starck ed., Franz Vahlen 1999).

<sup>35</sup> See e.g. *Hellen Gerster v. Freistaat Bayern*, Case C-1/95 [1997] E.C.R. I-5253.

<sup>36</sup> Gráinne DeBúrca, *The Principle of Proportionality and Its Application in EC Law*, 13 Y. B. EUR. L. 111-112 (1993).

<sup>37</sup> Anthony Arnall, *What shall we do on Sunday?* 16 EUR. L. REV. 112 (1991).

<sup>38</sup> See the legislative history of Swedish Regulation 1995:936 as reconstructed in the *Abrahamsson* opinion, par. 13. The following critique seems particularly well placed here: “[I]n the context of gender ... the bare realities of legal interpretation have tended more often than not to reassert themselves, leaving the highly formal legacy of an equal treatment principle based on notions of comparison rather than structural disadvantage and societally

#### 4. "Group Rights" in the ECJ Discourse

In order to find, in the records of the ECJ, an open discussion of the individual-versus-group dilemma, one must look, oddly enough, into *Neath v. Steeper* – one in a series of highly technical cases concerning pension benefits.<sup>39</sup> The conundrum at the base of this case stemmed from the simple fact that women live, on average, longer than men. Therefore men usually collect pension benefits for a lower number of years. According to the British system under scrutiny in that case, employees could opt to cash all future benefits in a lump sum at the time of retirement. In such a case, on the basis of gender-related actuarial calculations, the lump sum would be lower for male retiring employees than it would be for their female colleagues. Was such a scheme incompatible with the principle of equal pay for equal work, as embodied in Article 119 of the EEC Treaty?

The ECJ decided the case on the basis of technical distinctions between regular pension benefits (upon which the principle of equal pay has direct bearing) and actuarial calculations of lump-sum allowances. The latter might exceptionally take into account statistical differences in life-length, in order to allow higher accuracy in employers' book-keeping.<sup>40</sup> The British scheme, due to its narrow, exceptional scope, survived the Court's scrutiny.

The group/individual dilemma, therefore, remained at the margins of the actual holding, and was left at the level of unresolved arguments between Advocate General Van Gerven and the intervening parties.<sup>41</sup> But it is exactly in this incidental debate that the court developed the natural building blocks for the ECJ's decision in *Marschall* a few years later. The arguments of the Advocate General lay out in stark terms the group/individual dichotomy:

“It is true that women as a group prove to live longer than men. It is, however, equally true that not all individual men and women exhibit the average characteristics of their sex: many women live for a shorter time than the average man and many men live longer than the average woman. The key question, therefore, is whether discrimination, within the meaning of Article 119, exists when men and women are treated, not *as individuals*, but *as a group* and unequal treatment for individual men or women arises as a result.”<sup>42</sup>

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based inequality.” Jo Shaw, *Gender and the Court of Justice*, in *THE EUROPEAN COURT OF JUSTICE* 87, 142 (Gráinne De Búrca & J.H.H. Weiler eds., 2001).

<sup>39</sup> Case C-152/91, *Neath v. Hugh Steeper Ltd.*, Judgment of 22 December 1993, [1993] I-6935. See Tamara K. Hervey, *Note*, 31 COMMON MKT. L. REV. 1387 (1994). For critical remarks on this opinion see Evelyn Ellis, *The Principle of Equality of Opportunity Irrespective of Sex: Some reflections on the present State of European Community law and its future development*, in *THE PRINCIPLE OF EQUAL TREATMENT IN E.C. LAW* 172, 177 (Alan Dashwood & Siofra O’Leary eds., 1996).

<sup>40</sup> “[E]mployers' contributions which ensure the adequacy of the funds necessary to cover the cost of the pensions promised, so securing their payment in the future, [...differ from...] periodic payment of pensions [...]. The] inequality of employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not struck at by Article 119” (parr. 31-32 of the Court's judgment in *Neath*, *supra* note 39, at 6962-6963).

<sup>41</sup> On April 28, 1993, AG Tesaro rendered his opinion in the *Neath* case in conjunction with other pending cases: [1993] E.C.R. I-4879.

<sup>42</sup> AG opinion, par. 35 (emphasis added), *supra* note 41, at 4918-4919.



The Advocate General would have answered the question in the affirmative. The 1964 Civil Rights Act, he argued, is the main text of reference. That American document is expressly conceived in terms of individual justice only. Our Article 119 is not as clear, but it must certainly be read in the same way: gender equality is only about protecting individual entitlements, not about granting collective rights. Women cannot collect systematically higher lump-sum benefits just because of their gender. And there is no other objective justification (say, difference in smoking habits or in health risks) for economic discriminations based on gender lines. The Commission sided with the AG:<sup>43</sup>

“...[I]t is not acceptable for an individual to be penalized on account of assumptions which are not certain to be true in his specific case.”<sup>44</sup>

The Danish Government, intervening, took the opposite side of the debate: if we were to equalize one-time pensions for the two sexes, we might well avoid subsidization of women's pensions at the expense of male workers; however, we would end up with an equal evil, i.e. the chronic subsidization of male retirees at the expenses of women in the work-force.<sup>45</sup> The argument was cunning in its obviousness. It pointed at a much discussed feature of group politics in US jurisprudence: most often, the elimination of one type of group subsidy is just a code for subsidization in the opposite direction.

The Advocate General dismissed the Danish point quoting from a US case:

“... when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair. To insure the flabby and the fit as though

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<sup>43</sup> “[...A]ny difference in treatment based on sex would be permissible only if it were objectively justified. Statistical data based on the life expectancy of the two sexes do not [...] constitute an objective justification because they reflect averages calculated on the basis of the entire male and female population[,] whereas the right to equal treatment in the matter of pay is a right given to employees individually and not because they belong to a particular class.” Commission's view as reported in par. 27 of Court's *Neath* judgment, *supra* note 39, at 6961.

<sup>44</sup> Commission's view as reported in par. 28 of the AG's Opinion, *supra* note 44, at 4913. “[T]here are a number of risk factors which are not taken into account: risks associated with certain occupations, smoking, state of health and so on. Finally, there is no technical necessity for pension schemes to have a distinction based on life expectancies: some pension schemes, and all State pension schemes, use a system of risk compensation which covers differences in the probable lifespan of men and women. The Commission points out that the Supreme Court of the United States has held that similar discrimination in pension schemes is incompatible with the Civil Rights Act 1964.” (*Ibid.*)

<sup>45</sup> See par. 37 of the AG's opinion, *supra* note 41, at 4919-4920

they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one 'subsidy' seem less fair than the other."<sup>46</sup>

This quote is, on one hand, not surprising. The Advocate General borrowed it from *Manhart*, a US decision which can be deemed paradigmatic in ECJ jurisprudence when it comes to States' pension schemes applying gender-based actuarial calculations. Just as the US Supreme Court in *Manhart*, the ECJ tends to hold such pension plans incompatible with the principle of equal pay for equal work, and this was exactly the principled result that the Advocate General thought appropriate in the *Neath* case. On the other hand, the quote is puzzling. The passage is about the natural, logical legitimacy of cross-subsidization – an argument that cuts, in fact, both ways in the *Neath* scenario: it may lead to disallowing the British differential scheme (an equalized lump sum for both genders would be simpler, and a non-objectionable case of cross-subsidization). But it may also lead to upholding it: if cross-subsidization is ok, then what is wrong if the occasional long-lived man subsidizes female retirees?

The quote is, therefore, argumentatively redundant. Out of context, it seems a loose pawn on a different chessboard. Yet the reference to foreign case law serves the rhetorical function of bringing to the attention of the ECJ the weight of US choices on similar fact patterns. The worth and meaning of such judicial borrowings deserve closer attention.

##### 5. *Judicial Borrowings*

The constitutional relationship of the fifteen member States to the EU establishment in Brussels differs significantly from the American model of federalism, and yet the ECJ has often had to tackle constitutional questions which have loomed large in the US Supreme Court's jurisprudence.<sup>47</sup> Interestingly, in the foundational years of the Community, the ECJ has consistently avoided any reference to the American constitutional architecture, and made sure to derive any 'federal' doctrine (supremacy, direct effect, centralized protection of human rights) exclusively from the inner logic of the Treaty of Rome. As the Union takes shape and strength, however, words such as United States and

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<sup>46</sup> *City of Los Angeles, Department of Water and Power v. Manhart*, 435 US 677, at 710; 55 L. Ed 2d 657, at 666, quoted by AG Van Gerven in par. 37 of his opinion, *supra* note 41, at 4920. In footnote 80 (*id.* at 4921) he explained: "[In the United States] it is established that the use of actuarial factors varying according to sex for the calculation of contributions to pension schemes is contrary to the Civil Rights Act 1964 since the ruling of the United States Supreme Court in *Los Angeles Department of Water and Power v. Manhart* [...1978]. In 1983 the Supreme Court ruled that the use of such factors in respect of benefits under such schemes was also caught by the prohibition of discrimination: *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983); see also *Florida v. Long*, 487 U.S. 223 (1988)."

federalism become less of an anathema in the European context. The shift to a single currency provides Europe with an icon of unity just as vivid as the US dollar. The ongoing strife for a Bill of Rights at the core of the EU system reinforces, more or less consciously, the possibility of institutional parallelism. At the judicial level, a sort of twinship between the ECJ and the Supreme Court is at least hinted at by such things as judges' visits across the Atlantic Ocean,<sup>48</sup> or by the establishment of clerking opportunities at the ECJ for American law graduates.<sup>49</sup> To be sure, bulk judicial borrowings from the US are still out of question. Indeed, on issues crucial to the power contest between States and central government, the ECJ and the Supreme Court seem to diverge more sharply than ever: the ECJ exerts ever higher pressure upon reluctant national courts to allow individual monetary claims against the State for breach of the Brussels law.<sup>50</sup> The Supreme Court, much to the contrary, is in the process of curtailing such individual remedies.<sup>51</sup> There is no conscious aspiration to convergence. What has changed, however, is the breadth of resources in the ECJ's library. Quoting from US cases for the sake of argument can now be done. And it is done, occasionally, or perhaps strategically.<sup>52</sup>

On the subject of affirmative action, US case law offers a formidable database. Heaving dealt with the issue more often and more vociferously than any other judiciary, the Supreme Court of the United States has produced, according to changing political winds, a wide range of judicial attitudes towards group protection. There is no univocal lesson to be learned. The story can only be studied, and told, as a complex, non-linear pattern of competing views and interests. The trouble with judicial borrowings is that they may proceed by snapshots, mistaking the detail for the whole picture. Most recently, in the US, the nuanced balancing tests devised in the '80s have given place to a renewed attention to traditional group/individual dichotomies:

“[t]he tension between the individual rights conception of the Equal Protection clause and the disadvantaged group-rights conception is still playing itself out in cases that poignantly raise the moral and legal problems of affirmative action.”<sup>53</sup>

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<sup>47</sup> See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2410 (1991), and George A. Berman, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

<sup>48</sup> See Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000).

<sup>49</sup> The Dean Acheson Legal Internship Program enables American law students to clerk for members of the European Court of Justice.

<sup>50</sup> *Francovich v. Italy*, Cases C-6/90, 9/90 [1991] E.C.R. I-5357.

<sup>51</sup> See e.g. the US Supreme Court decision of February 21, 2001, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

<sup>52</sup> On the strategic selection of comparative borrowings see P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition,”* 51 HASTINGS L. J. 479 (2000).

<sup>53</sup> GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 1362 (2nd edition 2002).

As a snapshot, this late product of old US debates, traveling westward across the Atlantic, has found new youth before the European Court of Justice. Rejuvenation implies oblivion of history, and so it happens that only the most recent mode of affirmative-action jurisprudence –its ultimate fall, rather than its initial rise—makes it before the European Court. The result of such selective judicial borrowings is a reinforcement of the fear of group rights, perceived as foreign creatures, causing the reinstatement of rhetorical dichotomies. The import is remarkable in its irony. A common move in US legal discourse is to demonize group rights as essentially European, an invention of Mussolini inextricably tangled with fascist ideology.<sup>54</sup> On the other hand, the ECJ ostracizes group rights as an aberration of US law that has failed to persuade, in the long run, even its very own proponents.<sup>55</sup> Wherever they land, therefore, “group rights” get bounced back as an unpleasant legacy from overseas.

Circular reasoning is not the only problem of comparative borrowings. Most troubling is the import of conclusions without the argumentative itinerary and the historical experiences that brought them about. Context disappears – from Tocqueville’s to Glendon’s, one may recall multiple comparative accounts of the divergences between communitarian models in the New Continent and in the Old one, but none of them finds echo in the comparative reception of US-born arguments.<sup>56</sup> Most importantly, there is no discussion of institutional competence, or of legitimacy.<sup>57</sup> Is the ECJ institutionally entitled to replace national constitutional courts in the handling of strict scrutiny, identification of compelling state interests, and the like?

## 6. *Style Matters*

The major feature of the Treaty of Nice – the latest round of modifications to the founding Treaty of Rome – is a reform of the judicial system within the EU.<sup>58</sup> The reform addresses the pressing issue of overloaded dockets in many ways, and most noticeably by expanding the adjudicatory role of the

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<sup>54</sup> “[At the time of the New Deal,] odious comparisons to Mussolini’s fascist brand of syndicalism helped to underscore a pervasive American distaste for government recognition of groups. Judicial opinions and lawyers’ arguments are full of references to the contrast between good old American individualism and the treatment of people in old world group terms.” Aviam Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350, 366 (1989).

<sup>55</sup> *Kalanke*, *supra* note 12, at I-3058 n.10 (1995) (opinion of Advocate General Tesaurò).

<sup>56</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835 and 1840) and MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). See also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>57</sup> “Indeed, the U.S. Supreme Court lacks many of the constraints that the ECJ faces and enjoys a greater reservoir of popular support, which bolsters its legitimacy during periods of conflict with other institutions.” LISA CONANT, *JUSTICE CONTAINED. LAW AND POLITICS IN THE EUROPEAN UNION* 218 (2002).

<sup>58</sup> Treaty of Nice, Protocol B on the Statute of the Court of Justice, O.J. C 80/53 (2001)

Court of First Instance.<sup>59</sup> Such changes are likely to guarantee faster and therefore better justice. Joseph Weiler has remarked, however, that the reform fails to cure fundamental flaws in the ECJ's adjudication process: Nice has not carried through the more ambitious task of providing the Union with a judicial body of higher symbolic and practical significance – a Supreme Court of its own right.<sup>60</sup> The main problem lies in the ECJ's cryptic, "Cartesian style, with its pretense of logical reasoning and inevitability of results."<sup>61</sup> The Court – Weiler argues—should more openly take account of national sensibilities, especially when deciding cases of constitutional import; allow for dissenting opinions, which would reveal riddles in the reasoning and force judges to provide explanations; and adopt the more discursive, analytical style typical of the common-law world but also practiced in the old Continent, most notably by the German Constitutional Court.<sup>62</sup>

The time may not have been ripe, in Nice, for such dramatic changes, and judges trained in the civil-law mode may well be uncomfortable with the open law-making style of their colleagues in Washington. Yet the ECJ's discussion of equal protection in the past few years sounds more like oversimplification than Cartesian logic. And Weiler's quest for better, deeper analysis, as necessary to obtain the very respect of national law-makers, points at a major problem with this line of cases. It is remarkable that, for three consecutive times, the ECJ has reviewed affirmative action measures previously enacted by German legislators without really confronting the general picture of group-based preferences in the labor market. The cryptic – and arguably not Cartesian—argumentative technique of the ECJ in that context is clearly not an accident. First, the Court's silence on the larger theme of group entitlements is in line both with the customary judicial style of the Court and with its institutional role of law-enforcer rather than law-maker.<sup>63</sup> Second, it is easy to see how a Court whose legitimacy has been carefully built upon an image of strictly law-based adjudication would not get any closer than necessary to the political debate on affirmative action.<sup>64</sup> Third, the ECJ would not want to venture into territory falling within the jurisdiction *ratione materiae* of the *Bundesverfassungsgericht*,

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<sup>59</sup> See Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, in THE EUROPEAN COURT OF JUSTICE, *supra* note 38, 177, at 212.

<sup>60</sup> Joseph H.H. Weiler, *Epilogue: The Judicial Après Nice*, in THE EUROPEAN COURT OF JUSTICE, *supra* note 38, 215, at 224.

<sup>61</sup> *Id.* at 225.

<sup>62</sup> *Ibid.*

<sup>63</sup> See EEC Treaty Art. 164 (now EC Treaty Art. 220): "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is enforced."

<sup>64</sup> "Whether or not such a policy is desirable or appropriate is however a matter for the legislature, not for this Court, whose role in this case, as in *Kalanke*, is to interpret existing legislation." *Marschall*, Opinion of AG Jacobs, par. 46.

especially considering that the boundaries between the judicial competences of the two Courts have long been an item of contention.<sup>65</sup>

Yet, while understandable, the silence of the Court on the broader implications of *Kalanke*, *Marshall* and *Badeck* leaves the reader justifiably perplexed. The answer provided in those cases is, on its face, simple and consistent. But the scope and workability of the saving clauses pose daunting, unresolved questions. The *Abrahamsson* proportionality formula, in turn, involves the use of balancing tests, a choice amongst diverse screening techniques, and complex definitional efforts. In this light, the Court's silence and the opacity of its formulae assume a different meaning. They seem not so much a stylistic choice, but rather the only plausible course of action for a Court lacking confidence both in its own institutional competence to tackle such matters, and in the ability to find, anywhere in the law of the Union, a univocal answer to the problem of identity-based marginalization.

#### *7. Positive Action Beyond Gender: The New Equality Directives*

The specific prohibition of discrimination based on gender (EC Treaty Article 141) has never been alone in its genre. Acts of discrimination between Community workers on grounds of nationality were black-listed at the very start of the integration project, as clearly in contrast to the idea of a seamless labor market.<sup>66</sup> Discrimination on grounds of nationality was also subject to a general prohibition, ranking among the “Principles” of the Treaty of Rome.<sup>67</sup> In 1999, the Amsterdam reform empowered EC lawmakers to “combat discrimination based on [...] racial or ethnic origin, religion or belief, disability, age or sexual orientation” (EC Treaty Article 13.) Just like the prohibition of gender discrimination, these provisions have a direct impact on the economy of labor, which today is even more central to the agenda of the Union due to the imminence of enlargement.

Article 13 was soon put to use as the legal basis for two new pieces of anti-discrimination legislation. Council Directive 2000/43/EC implements the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>68</sup> Council Directive

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<sup>65</sup> See German Federal Constitutional Court, *Decision Concerning the Maastricht Treaty of October 12, 1993*, 1993 EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT 429.

<sup>66</sup> See Art. 48 EEC Treaty, now Art. 39 EC Treaty.

<sup>67</sup> EEC Treaty Art. 7, renumbered as Art. 6 by the Maastricht Treaty [Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, amending the Treaty of Rome], and now known as EC Art. 12 after the Amsterdam Treaty (*supra* note 3).

<sup>68</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. L 180 p. 22.

2000/78/EC, in furtherance of the same project, addresses more broadly “discrimination based on religion or belief, disability, age or sexual orientation,” and aims at establishing a general framework for equal treatment in matters of employment and occupation.<sup>69</sup> The preamble to the framework directive makes it clear that gender equality in the work place and equal treatment at large are really pieces of the same puzzle, to be dealt with as a whole, indivisible set of policy questions.<sup>70</sup>

Both directives, which member States are currently in the process of implementing, came to life in the year 2000 – the same in which the ECJ decided against a Swedish instance of affirmative action (*Abrahamsson*). Both directives seem remarkably tolerant of member States’ choices with regard to positive action. They both contain the following provision: “Positive action - With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [the above-listed characteristics].”<sup>71</sup> This text is entirely within the framework of EC Treaty Article 141.4, whereby, again, States are allowed to pursue the strategy of positive discrimination well beyond the limits imposed by a formal conception of gender equality.<sup>72</sup> And just as Article 141.4, it leaves plenty of room for the Court to scrutinize state measures. The only relevant area in which national legislation is controlling and not reviewable, in the Council’s design, is clearly singled out in the “Particular Provisions” of Directive 2000/78: recruitment of police and school teachers in Northern Ireland can allow for preferential treatment of the underrepresented religious minority.<sup>73</sup> It is not clear how the new legislation will coordinate with existing laws on co-terminous fields – most importantly, with the 1976 directive on gender discrimination and with the caselaw of the European Court of Justice in equality matters. It is likely, however, that the rather bulky body of judicial holdings regarding discrimination based on gender will provide starting guidelines for the interpretation of the new directives. This option would promote clarity and uniformity, and has been, for this reason, deemed desirable in academic

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<sup>69</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000 O.J. L 303 p. 16.

<sup>70</sup> In its preamble, the Directive is framed as a follow-up to that “important body of community law,” in particular to Council Directive 76/207/EEC, which has rendered gender equality a well established principle.

<sup>71</sup> Art. 7 Dir. 2000/78/EC and Art. 5 Dir. 2000/48/EC.

<sup>72</sup> Waddington and Bell, *supra* note 21, at 602, notice how the equality directives contain, in fact, a more restrictive language than their model Art. 141.

circles.<sup>74</sup> But it is also an option fraught with risks. The directives attempt to strike a compromise between the need to ensure uniformity in the enforcement of equality, and member States' aspiration to engineer their own models of diverse society. As *Abrahamsson* demonstrates, however, it is far from clear that this delicate architecture may survive challenges before the ECJ. The Court may soon have to face national instances of positive action in fields much more controversial than gender itself, while relying on the rather rudimentary analytical framework developed around women issues.<sup>75</sup>

## II. Equality Revisited: Identity-Based Redistribution in the EU

The commonplace portrait of law's indifference to groups defined by ethnic or religious identity in continental Europe – the very portrait upon which the ECJ grounds its own jurisprudence on positive action - provides only part of the picture. The EU law system displays a much more ambivalent attitude toward group recognition and protection. Ambivalence on such matters is endemic in the EU. Individuals are central to the project of integration, as they are the primary holders of legal entitlements in that system. At the same time, the decline of the very concept of nation-States is essential to the success of the integration project; and as nation-States fade away, sub- or trans-national communities come to the fore seeking enhanced status. The result is an unspoken but constant oscillation, in the EU establishment's practices, between a strong focus on individual rights and an allegedly opposite concern for group-based instances. The traditional ideological bias against legal entitlements based on collective identity coexists with a significant trend in EU law and policies in favor of ethnic, racial or religious groups in need of enhanced protection.

Analogous oscillations are to be detected in the laws and policies of member States – even in those most committed to identity-blindness. I shall draw a few examples of this

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<sup>73</sup> Art. 15.

<sup>74</sup> Waddington & Bell, *supra* note 21, at 602. Cf. Ursula O'Hare, *Enhancing European Equality Rights: A New Regional Framework*, 8 MAASTRICHT J. EUR. & COMP. L. 133, 152 (2001).

<sup>75</sup> That the ECJ may soon be tackling group-based allocations of economic and social rights is, according to some, pure science fiction at best, and at worst a dangerous diversion from the ever challenging chores of basic economic integration (Pierre Pescatore, Guest Editorial: *Nice-Aftermath*, 38 COMMON MKT. L. REV. 265, 267-268 and 271 (2001).) Others consider ethnicity and religious identity as natural, unavoidable themes for the Court in the near future (Kendall Thomas, *supra* note 18, 363-364.)



phenomenon from the legal landscapes of France and Germany – two countries characterized by significantly diverse population *and* by a prevalent rhetoric of legal blindness to faith or ethnicity. The examples are meant to show how both the materiality and the culture of diverse groups find recognition in more or less visible traits of legal systems, along lines that an equality- and rights-based debate is not capable of capturing.

I shall then argue for the overcoming of classic equality constructs, and for a novel conceptualization of positive action. I redefine positive action on the basis of its economic archetype, and locate it along a continuum of multiple forms of *identity-based redistribution of resources*. On this continuum, positive action shares the same logic of many other policies which the ECJ could not, and does not, review in traditional equality terms.

*1. The traditional legal framework of positive action, and the challenge of subsidiarity*

The well-known debate on positive action in western legal discourse is framed in terms of equality. Of course, equality may mean many different things. In its ‘substantial’ version, it may even demand, according to some scholars, the implementation of positive measures to address the historical discrimination of given groups.<sup>76</sup> But in its ever powerful ‘formal’ dimension, equality requires par treatment of all individuals, or differential treatment based on objective individual differences. A general prohibition of discrimination accompanies the principle of equality, and in fact it is often treated as either a synonym or as a necessary corollary of all egalitarian imperatives.<sup>77</sup> The legal status of equality is uncertain. At times it is construed as a right – even a fundamental one, to be enforced by courts whenever invoked by individual victims of discrimination. Other times it appears as a general principle, meant to inspire courts in the enforcement of other rights.<sup>78</sup> In any case, equality is traditionally understood as a mechanism for the protection of individual subjects.

The general prohibition of discrimination operates, analogously, for the protection of individuals. It is particularly forceful when the alleged discrimination is the result of traditional biases against given groups, but it is anyway enforced only to address individual instances of inequality. It is phrased in such broad terms as to outlaw not only ‘negative’ discrimination (whereby minority members are relegated to a less-than-equal status and deprived of entitlements which they would otherwise enjoy), but also ‘positive’ discrimination (whereby a given minority is singled out as beneficiary of special

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<sup>76</sup> See Fredman, *supra* note 6. For a US perspective see Ruth Bader Ginsburg and Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

<sup>77</sup> Advocate General F. G. Jacobs, *Introduction*, in THE PRINCIPLE OF EQUAL TREATMENT IN E.C. LAW, *supra* note 39, 1.

entitlements, which are not available to other individuals.) Against this background, positive action is difficult to frame in legally acceptable terms. Even in its mildest form, it does indeed determine unequal treatment, and it does address issues of collective justice. For positive action to exist, there needs to be a formula capable of restoring the internal consistency of the rule of law.<sup>78</sup> The formula must be justiciable, and designed to screen away those forms of positive action that would compromise the coherence of the equality architecture. In *Abrahamsson*, the ECJ determined that the test of proportionality could accomplish this task, and ensure that States' pursuit of equality by means of positive discrimination does not violate the canons of equality. The core of individual equality is still preserved by means of formal devices. Saving clauses, strict meritocracy, illegality of result-based or "hard" affirmative actions, inadmissibility of firm quotas of representation etc., are all mechanisms meant to assure that the group in need of protection has not taken over, and that all other individuals outside of that group can still rely on the judicial protection of their ultimate right to equal treatment.

In the specific context of EU law, this understanding of positive action leads into a particularly thorny conundrum. Both according to the new equality directives and under EC Treaty Article 141.4, the principle of non-discrimination acts as a floor, rather than as a ceiling. The Union is in charge of prohibiting discrimination in its classic, negative form: no one can be treated differently on the basis of ethnicity, religion etc. At the same time, States can aim at higher degrees of substantial equality by enacting measures of preferential treatment for groups traditionally discriminated against, depending on local context and politics. This construct has the comforting flavor of subsidiarity and the support of considerable *acquis* in the field of gender equality. The problem with this construct is that, as usual, the internal consistency of the floor imposes conceptual limits upon the height and shape of the ceiling. The two are so conceptually tied to each other that the States' freedom to experiment with affirmative group policies, graciously given them by EC legislators, is intrinsically curtailed by the ECJ's equality review.

It is my view that the need for an internally coherent picture, bringing into harmony the ECJ's enforcement of equality and national positive-action policies, is overstated, for both theoretical and empirical reasons. The following paragraphs illustrate this point.

## 2. *The Uncertain Boundaries of Equality in the EU*

The doctrinal architecture that leads the Court to such holdings as *Abrahamsson* rests, ultimately, on the time-honored pillar of formal equality. This pillar, however, is not as well built as it

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<sup>78</sup> Until recently, this was the status of equality in the European Convention of Human Rights, Art. 14. See *infra*.

<sup>79</sup> Antonioli Deflorian, *Affirmative Action in the US*, *supra* note 32, at 100.

seems. There is no coherent vision of equality in the project of European integration.<sup>80</sup> The prohibition of discrimination features only in a few scattered provisions, and it is thanks to the painstaking work of the ECJ that it has developed into “the general principle of equal treatment” as we know it now. The principle is arguably not general, and if measured by standards of coherence, it may not even be an EU principle at all.<sup>81</sup>

There are large fields in which the principle of equality is not meant to control. The year 2000 equality directives illustrate this point. The path to their adoption was paved with the best of intentions. Since 1997, the “European Year Against Racism,” the Union had embarked on a series of projects aimed at combating racial discrimination in all of its forms. It had established the European Monitoring Centre on Racism and Xenophobia in Vienna, and it had adopted, in the voice of the Parliament, a number of (non-binding) resolutions on the fight against racism. The directives, however, resent the hybrid nature of supranationalism, which splits competences between Brussels and state authorities along the often illogical lines of historical development.<sup>82</sup> The coherence of the design is seriously compromised by the impossibility, for EC legislators, of regulating thoroughly the status of third-country nationals residing in the Union.<sup>83</sup> The result is, once more, the coexistence of different standards of equal treatment, depending upon the holding of an EU passport rather than upon universal values.<sup>84</sup>

So far the whole EU establishment has taken it for granted that equal treatment would only pertain to EU citizens, and not to third-country nationals. To be sure, by signing a number of association agreements with third countries, EU members have allowed the nationals of some non-member States to join the club of the non-discriminable. This move has certainly shifted outwards the geographical boundaries of certain Community guarantees. The fact remains, however, that many foreign nationals permanently residing in Europe do not enjoy the reach of the equality principle.

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<sup>80</sup> See Takis Tridimas, *The Application of the Principle of Equality to Community Measures*, in THE PRINCIPLE OF EQUAL TREATMENT IN E.C. LAW, *supra* note 39, 214, at 215: “the Court of Justice does not endorse any particular theory of equality. It does not seek to advance a particular idea of the social good.”

<sup>81</sup> Gráinne De Búrca, *The Role of Equality in European Community Law*, in THE PRINCIPLE OF EQUAL TREATMENT IN E.C. LAW, *supra* note 39, at 13.

<sup>82</sup> Art. 3.2 Dir. 2000/43: “This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.” Art. 3.2 Dir 2000/78 is virtually identical to the one just quoted.

<sup>83</sup> The EC Treaty amendments introduced by the Treaty of Amsterdam in 1999 have increased remarkably the powers of the Community in this respect: see Artt. 61-69 EC on Asylum, Immigration and Other Policies related to the Free Movement of Persons.

<sup>84</sup> See Martin Hedemann-Robinson, *An overview of recent legal developments at Community Level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice*, 38 COMMON MKT. L. REV. 525 (2001).

At the same time, the Court's intervention in equality matters can be quite over-inclusive. In theory, in all those fields which exceed, *ratione materiae*, the reach of Community competence, States would not have to comply with European non-discrimination principles. In practice, this line is not so easy to draw. For instance, some social benefits are covered by the principle of equality, some others are not.<sup>85</sup> The watershed in such cases is given, on an *ad hoc* basis, by policy considerations.<sup>86</sup> More generally, the set of "situations governed by Community law" is still in search of a firm definition.<sup>87</sup> And even when clearly not within that set, a subject matter may be reached by the long arm of equality jurisprudence: social security falls outside the sphere of Community competences; however, the Court has held that States' social security laws cannot discriminate against other member States' nationals.<sup>88</sup> In this respect, the general principle of equality is even more general than allowed by traditional canons of Treaty interpretation.

These uncertainties cast shadows upon the equality-based syllogism motivating the ECJ's holdings on positive action. The picture looks even less clear if one focuses on the axiom that equality must be understood in terms of individual justice, and cannot accommodate instances based upon collective identity. We shall turn now to this aspect of the equality discourse.

### 3. *The theorem of individual rights and its corollary dichotomies*

The legal integration of Europe is traditionally rooted upon an individual conception of rights and entitlements. This feature stems from the Union's historical premises. The EEC was born out of the ashes of WWII. The power of its design relied on the promise that, thanks to economic integration, conflicts of that proportion would be henceforth impossible. The founding fathers of the Community, in whose minds the horrors of the Holocaust were still very vivid, would have been righteously contemptuous of group-based entitlements.

This ideological trait of the late 1940s characterized as well the parallel universe of the Council of Europe. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms had little or nothing to say on the issue of group affirmation, and positive action has never been tested before the European Court of Human Rights. The Convention's non-discrimination clause (Article 14) was conceived as merely accessory to whatever substantive rights might stem from other

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<sup>85</sup> Siofra O'Leary, *The Principle of Equal Treatment on Grounds of nationality in Article 6 EC. A Lucrative Source of Rights for Member State Nationals*, in *THE PRINCIPLE OF EQUAL TREATMENT IN E.C. LAW*, *supra* note 39, 105, at p. 108, referring to *Brown v. Secretary of State for Scotland*, Case 197/86, [1988] E.C.R. 3205; [1988] C.M.L.R. 403.

<sup>86</sup> O'Leary, *supra* note 85, at 108. For other examples, see *Id.* at 120-121.

<sup>87</sup> See *Cowan v. Le Trésor Public*, Case 186/87, [1989] E.C.R. 195, [1990] C.M.L.R. 613, and the critical remarks of O'Leary, *supra* note 85, at 113.

provisions.<sup>89</sup> A recently added Protocol 12 promotes that clause to a fundamental right to non-discrimination. The Protocol's preamble recites that States won't be prevented from taking measures to promote "effective equality," but its main body remains silent on positive action. A half-century later, it is still the case that "the Convention and its control system [...] are based on the collective guarantee of *individual rights* which are formulated in terms sufficiently specific to be justiciable."<sup>90</sup>

In the Community, the original emphasis on individual justice was soon reinforced by some landmark decisions of the ECJ. In the foundational period of the Community, the centrality of individual subjects proved to be a clever State-breaking device, meant to enhance the supranational strength of the "new legal order."<sup>91</sup> By dispensing rights immediately enforceable by individuals, the Community could bypass the filter of States' authority and make their mediation unnecessary. In this light, the doctrine of direct effect represents the quintessential triumph of individuals over their own community of affiliation.<sup>92</sup>

Another ideological drive behind the economic project of integration rested on the solid basis of ordo-liberal theory, and on its faith in untrammelled freedom for market actors. According to that strain of thought, integration was to be achieved by progressively debunking State regulation, and by protecting individual market players from the encroachment of government intervention. Vertical State interference with private enterprise was to be subject to a sort of 'economic due process' clause, and only meant to ensure the enforcement of the rule of (private) law in horizontal transactions. Competition law would contribute to ensuring sufficient leeway for individual action. There is a strong and still powerful connection between individual fundamental freedoms and the 'economic constitution' of the Union.<sup>93</sup>

This conception of equality yields, as necessary byproducts, a number of basic concepts easily reducible to pairs of opposites. First comes the goal of market integration, which presupposes the dismantling of all forms of state regulation, and the protection of market freedom for all *individuals*. In this atomistic view of market actors, there is no room for *groups*, or group justice. In a free market,

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<sup>88</sup> O'Leary, *supra* note 85, at 109.

<sup>89</sup> The Strasbourg Court has interpreted Article 14 in a rather anodyne fashion: a difference in treatment will be discriminatory if not objectively and reasonably justified by the pursuit of a legitimate State aim through use of proportionate means.

<sup>90</sup> Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 177) (emphasis added).  
<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>

<sup>91</sup> For the periodization, see Weiler, *The Transformation*, *supra* note 47.

<sup>92</sup> On "the central role for the individual" in the constitutionalization of EC law see Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW*, 177, 205 (Paul Craig & Gráinne de Búrca eds., 1999).

<sup>93</sup> See David J. Gerber, *The Transformation of European Community Competition Law?*, 35 *HARVARD INT'L L. J.* 97 (1994).

rights are for individuals only. They are fundamental ‘liberty’ rights, to be protected by *negative* means (i.e. prohibition of all encroachments from either private groups or government) rather than by *positively* channeling the spontaneous forces of the market. Liberty rights are adequately protected by a *formal* enforcement of equality. *Substantive* or factual equality cannot and should not be attained by means of *law*, but perhaps within the separate sphere of *politics*. Put differently, the law will not protect equality of *results*, but only equality of *opportunities*.<sup>94</sup>

Interestingly, no one really believes that liberalism at its starkest is the whole story of Community law. There is ample consensus, even along originalist perspectives, that the project of integration had a more complex soul to begin with, and a more nuanced sense of justice than the one just outlined. Yet, the dichotomies embodied in that discourse survive in the daily practice of Community law: individuals/groups, form/substance, opportunities/results, negative/positive integration, law/politics.

The Charter of Fundamental Rights of the European Union, solemnly proclaimed by the EU’s Heads of State in October 2000 but not (yet) an official source of binding law, is firmly anchored upon an individual conception of rights. It permits derogation from equal treatment of men and women in matters of employment, thereby reflecting the current version of EC Treaty Article 141(4).<sup>95</sup> Separate articles provide for commitment to cultural, religious and linguistic diversity, but not in a language that might suggest the possibility of identity-based claims. The Charter does incorporate social rights, which would certainly lead to the enactment and enforcement of policies at least implicitly designed to address marginalized minorities. The “social,” however, can be perceived as identity-neutral. It does not conflict with the principle of equality in so far as it targets all people who happen to fall below a certain standard of life quality, due to their income. And it is a fundamental tenet of our times that being destitute is (hopefully) a transient condition, rather than an immutable characteristic. It is thanks to this syllogism that the welfare goal of reaching out to those in need is deemed perfectly compatible with the logic of egalitarian regimes. The rhetoric of neutrality, however, hinders the reach and scope of social reform, and puts the Union in the unpalatable role of curbing some social initiatives of State governments.

Public procurement offers a clear example of this phenomenon. The EC has legislated in the field of public procurement with the clear objective to prevent member States from favoring local business and discriminating against firms based elsewhere in the Union. As always, the principle of non-discrimination is achieved by the enforcement of equality, in one of its many incarnations. Here,

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<sup>94</sup> Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 261 (1999).

<sup>95</sup> Art. 23. For a puzzled account of the limited scope of Charter Article 23 see O’Hare, *supra* note 74, at 159.

equality is promoted by anchoring the selection process to purely economic criteria. This serves the purpose, indeed, of kicking national protectionism out of the picture. But it yields, as a (non-necessary) by-product, the elimination of social criteria that States might otherwise have taken into account when choosing the most appealing bid. Exceptionally, “[c]riteria involving social considerations may be used to determine the most economically advantageous tender *where they provide an economic advantage for the contracting authority...*”<sup>96</sup> But social goals *per se* cannot inform the selection process. By this token, minorities cannot benefit from preferential treatment in public procurement. The impossibility of granting minorities any special status in public procurement results, allegedly, from no less than international obligations: the commitments undertaken by the member States in the Agreement on Government Procurement, concluded under the auspices of the WTO, are “incompatible” with quotas or other privileges for special categories of bidders.<sup>97</sup> Preferences of any kind are excluded, moreover, by “the general principle of non discrimination,” this time embodied in Article 3 of Directive 92/50/EEC.<sup>98</sup>

The choice not to allow for identity-based criteria in the selection of tenders is, unquestionably, a political one. It is mandated by reasons of convenience and balance of interests on the international sphere. It is a choice made against the background of plausible alternatives (the US government took a different course and negotiated a derogation in the Agreement on Government procurement, whereby 20% of contracts are reserved for “small minority business.”) Instead, the Commission advertises it as the compelled result of fundamental legal principles in the Community, such as non-discrimination and compliance with the rule of (international) law. This rhetoric stifles, time and again, any debate on the topic.

#### *4. The misleading character of the individual/group dichotomy: positive action as identity-based redistribution.*

The group/individuals dichotomy is truly robust. The entire western legal culture shares the feature of pivoting the law on strictly individual entitlements. Because of deeply held philosophical beliefs, reinforced by historical trauma, the West has long been fearful of collective entitlements, or of any legal characterization of a group that would justify preferential or other discriminatory treatment of individuals on the basis of their affiliation. The fear of groups, and the ensuing need to confer rights exclusively upon individuals, runs so deeply in the collective legal consciousness that it surfaces

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<sup>96</sup> Commission of the European Communities, *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, 2001 O.J. C 333, Par. 53 (emphasis added).

<sup>97</sup> Interpretative communication, *supra* note 96, Par. 50.

<sup>98</sup> Interpretative communication, *supra* note 96, Par. 54.

in completely different contexts, and is invoked to explain or cover often inconsistent results. It is encountered in both civilian and common law systems, recited as a mantra even when unsupported by the letter or the life of the law.

This rhetoric obscures the pervasive need to accommodate particular collective interests or to make up for historical disadvantages of certain groups. Throughout Europe, collective entitlements depending on gender, disability, ethnicity or religion have long since become a definite feature of legal systems. At times, the allowance of special entitlements based on one's shared identity is justified as an exception necessary to pursue legitimate socio-political goals. Other times, group entitlements find their genesis and justification in historical accidents, which make them seem unique and non-threatening aberrations. Most importantly, numerous pockets of special laws based on ethnic or religious affiliation are masked by seemingly neutral distributive criteria.

The persistent emphasis of legal actors on the individual basis of entitlements is often descriptively inaccurate. The fear of groups brings about unnecessary legal fictions, and compels decision-makers to employ doctrinal acrobatics in order to pursue pressing causes of group affirmation. This original framework continues to dominate the discourse of all EU institutions. Even when the interest addressed is undoubtedly a collective one, as in the case of immigration policy or anti-discrimination measures, an individual rights-based approach pervades the official documents of the Union.

Within this conceptual framework, positive action is traditionally pigeon-holed in a footnote to the general principle of individual equality. From that standpoint, it looks structurally at odds with equality, because it involves privileges for a sub-set of citizens with no specific regard to actual differences and similarities between individuals. This view is still dominant in EU discourse, and causes the confinement of positive action within rigid guidelines.

There is, however, a different way to conceptualize positive (or affirmative) action. In any of its practical implementations (with or without saving clauses, and even when limited to the pursuit of equal opportunities rather than results) it can be thought of as a way to redistribute wealth, within a given constituency, from one group of subjects to another. Redistribution of resources may take many forms. Positive action is, indeed, a peculiar form of distribution, as it is based on collective identity rather than upon income or other identity-neutral criteria. But it is not one of a kind. When reduced to this socio-economic archetype, positive action sits comfortably next to other mechanisms of governmental re-allocation of resources, or cross-subsidization amongst different groups defined by nationality, ethnicity, religion etc. Interestingly, these mechanisms do not implicate the language of equality or rights, and seem to be much more compatible with traditional legal canons. I turn now to a (necessarily selective) outline of such mechanisms. My aim here is twofold. By locating positive



action along a continuum of redistributive schemes, I show how individual equality is an insufficient analytical framework for the purpose of determining the legitimacy of such policies. I also raise doubts, both *ratione materiae* and institutionally, on the competence of the ECJ to handle the socio-economic complexity of positive action.

##### 5. *Culture and Welfare as vehicles for identity-based redistribution in EU policies*

In Europe, both among EU institutions and in national establishments, two headings seem capable of hosting *de facto* positive measures for groups (or mechanisms for identity-based redistribution) without much ado: *culture*, and material *welfare*. In the context of EU laws and policies, culture is of particular significance in providing groups with special entitlements, without upsetting in any visible way the assumption of identity-blindness in the distribution of EU resources. Speaking the politically palatable language of “cultures,” EU policy-makers happen to bolster, by means of tangible aids, the meaning and visibility of ethnic, religious or linguistic groups in the Continent. As a matter of fact, the cultural strand of identity discourse is often more advanced amongst EU law makers than in member States’ agendas. Sub- or trans-national groups defined by common language or ethnicity, which fail to identify with traditional nation-State boundaries and struggle for survival, receive close supranational attention. In turn, such groups can perform a healthy State-breaking function and therefore advance the cause of integration. The subject is co-terminous with human rights protection, but differs from HR discourse in so far as it implies necessarily the sheltering of collective identity from atomistic dilution and assimilation. The protection of cultural diversity requires, in other words, positive action by government, surely defying the principle of formal equality. ‘Negative’ anti-discrimination policies will not suffice by definition.

Central to the livelihood of separate cultures is the survival of minority languages. To be sure, the Union’s commitment to minority languages is burdened by institutional limits, and therefore characterized by a high degree of ambiguity. Such limits, however, do not depend at all on concerns for identity-blindness. There is no fear, in this context, of trumping the rights of the majority by aiding identified minorities. The Union’s ambivalence stems, instead, from the complex legacy of the economic integration project.<sup>99</sup> The EU is still struggling to identify a clear balance between the protection of linguistic or ethnic traditions and the seamless integration of the Market. The ECJ’s case law on the protection of minority languages, for instance, contains most significant overtures towards

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<sup>99</sup> Noticeably, the protection of minorities is mandatory for those states who wish to join the Union in the future, but it is not an explicit requirement for current members. See Bruno De Witte, *Politics versus Law in the EU’s Approach to Ethnic Minorities*, EUI WORKING PAPER RSC 2000/4, at 3. Francesco Palermo, *The Use of Minority*

group recognition. Yet the Court feels often compelled to deny the requested degree of protection when granting it would reinforce the visibility of national borders. Two cases, *Groener* and *Bickel-Franz*, illustrate this point.

In *Groener*, the Court showed nuanced sensitivity towards the need to keep the Gaelic language alive among Irish youth. In the words of the Advocate General, that language was “a repository of and a means of transmitting a common cultural heritage.”<sup>100</sup> The Court, therefore, approved the requirement of a Gaelic test for full-time instructors in vocational education. At the end of the day, however, the *Groener* decision forced the local teaching community to embrace a Dutch national, in so far as she met, one way or another, certain aseptically re-defined language requirements.<sup>101</sup> In the more recent *Bickel-Franz* decision, the Court did demonstrate deference towards Italy’s established policy of granting bilingual service, in all administrative and judicial proceedings, to its German speaking minority living in the northern region of South Tyrol. The Court, in fact, stated emphatically that “the protection of a minority may constitute a legitimate aim.”<sup>102</sup> But it also required that the same policy be extended to German-speaking non-residents, who happened to travel in that region. The Italian Government argued to no avail that its rules were meant to “recognize the ethnic and cultural identity” of a given minority,<sup>103</sup> and should not be applied to outsiders. The Court insisted that Austrian and German by-passers were to enjoy the same linguistic privilege. Once more, State legislation precisely designed to erect walls around autochthonous groups was deprived of its own building blocks.

Both *Bickel-Franz* and *Groener* are instances of conflict between the theorem of economic integration, with its corollary of free trade and travel, and the goal of protecting the identity of minorities. In these cases, the Court must dilute collective identities in order to iron out the seams of national boundaries. On the contrary, when market partitions are not immediately at stake the EU is much more generous in its validation of groups’ cultural or linguistic demands. This leads to identity-based redistributions of EU resources, bypassing the conundrum of equality and evading the ECJ’s reach. The Union has engaged in the financing of various actions and programs, meant to support the livelihood of minority languages and culture.<sup>104</sup> Basis for such action has been found either in EC Treaty Article 151 (which asks the Community to contribute to the “flowering of the cultures of the

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*Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EUR. & COMP. L., 299, at 301 (2001).

<sup>100</sup> *Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, Case C-379/87, Opinion of AG Darmon, [1989] E.C.R. 3967, par. 23.

<sup>101</sup> Nathaniel Berman, *Nationalism Legal and Linguistic: The Teachings of European Jurisprudence*, 24 N. Y. U. J. INT’L L. & POL. 1515, 1567-68 (1992).

<sup>102</sup> *Italy v. Bickel and Franz*, Case C-274/96 [1998] E.C.R. I-7637, par. 29.

<sup>103</sup> As per Italian Constitutional Court Decision n. 213 of June 19, 1998.

member States,") or in the more traditional provisions favoring the free movement of workers. For instance, EEC Article 49 (now EC Treaty Article 40) was the basis for Council Directive 77/486, offering mother-tongue education for children of migrant workers. Together with the Council of Europe, the Union inaugurated the new millennium with a "European Year of Languages." During the year 2001 the Commission funded a number of innovative learning projects, covering not only the official languages of the member States but also, most significantly, regional and minority languages.<sup>105</sup>

The Directorate General for Education and Culture is becoming more and more involved in the question of immigrant identities. In cooperation with a number of State universities, for instance, in 1998 the Directorate launched Euromed Heritage, a "regional programme in support of the development of Euro-Mediterranean cultural heritage." The program provides generous Euro funding for such events as the "Unimed Symposium," a conference on the "intangible cultures" of southern Europe, North Africa and the Middle-East. The official web-site of the Directorate, in unmistakably post-modern jargon, defines "intangible culture" as "a set of values linked to the collective memory and to the imaginarity that contribute to the identity of [...] each social group."<sup>106</sup> In all such programs, the wording is airy. Rights –cultural or social— are not implicated. There are no justiciable claims to speak of. But identity-based redistribution of Euro funds occurs indeed.

Union policies have targeted not only the cultural vitality of minorities, but also their material welfare. "The social" is an important piece in the constitutional architecture of the Union, and it finds many incarnations in secondary legislation and policies. Welfare, understood as redistribution of resources in favor of those in need, has seemingly nothing to do with identity, because it targets poverty and exclusion in whichever pocket of society they happen to be. Yet, identity-sensitive criteria are often used to improve the effectiveness of redistributive policies. The European Monitoring Centre on Racism and Xenophobia (EUMC) – an EU "agency" established in 1997—is preoccupied with the reduction of existing discrimination in Europe. By the same token, it is actively involved in the socio-economic promotion of minority groups. Through the EUCM, EU money is spent in connection with policies that identify specific disadvantaged groups on the basis of ethnicity or nationality. This trait of the system is not immediately visible. The EUMC offers indirect but substantial support to a number of projects for the rehabilitation of minorities, which are in turn run by independent and State-funded foundations. Among these projects, coordinated through the EUMC and

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<sup>104</sup> On the Culture 2000 program see Palermo, *supra* note 99, at footnote 6.

<sup>105</sup> Commission Press Release, IP 01/226 (Feb. 19, 2001).

<sup>106</sup> [http://europa.eu.int/comm/external\\_relations/euromed/euromedheritage-proj\\_en.pdf](http://europa.eu.int/comm/external_relations/euromed/euromedheritage-proj_en.pdf), at p. 8 (July 31, 2002).

financed in ways that erase the public-private divide, one finds several forms of positive action in favor of identity-defined groups in the fields of education, housing and employment.<sup>107</sup> That these projects would pass the ECJ's test with flying colors is far from obvious.

As subtler instances of allocation of EU resources on the basis of identity, one may also count regional intervention by means of structural funds.<sup>108</sup> In this context, target areas are defined in purely geographical terms, with no reference to the ethnicity or nationality of their inhabitants. But it is often the case that specific communities, characterized by common values and ethnicity, are in fact singled out as the recipients of EU aid. In Germany, for instance, EU structural funds given to the region of North-Rhine Westphalia are used to bolster local start-up business. This means aiding Turkish immigrants to improve their chances of economic success, by funding *their* education and creating new jobs *for them*. The project is run by the Essen University's Centre for Turkish studies.<sup>109</sup> In such schemes, the opportunities/results divide is particularly difficult to maintain. Along the continuum of identity-based redistribution, this form of intervention is less conspicuous than affirmative action. Yet, it is inspired by the same logic.

I shall now outline, in turn, a few State-run policies which target specific minorities. France and Germany are particularly good sources of examples. Both States host highly diverse communities. Both cling, on the surface, to an identity-neutral version of equality.

#### 6. *Identity-based redistribution in France...*

The model of a color blind, absolutely neutral law is particularly strong in France.<sup>110</sup> Article 2 of the 1958 Constitution assures equality without distinction based on origin, race and religion.<sup>111</sup> This provision carries a lot of weight in public discourse and is taken at face value. Color-blindness is a fundamental imperative for the *République*. The *Conseil Constitutionnel* does not have to deal with

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<sup>107</sup> European Monitoring Centre on Racism and Xenophobia, European Foundation Center and Freudenberg Stiftung, *Funding Minorities and Multiculturalism in Europe. Funders's Activities against Racism and for Equality in Diversity* 208-227 (EFC ed., 2001).

<sup>108</sup> For general provisions on structural funds see Council Regulation No. 1260/99, O.J. L 161/1 (1999).

<sup>109</sup> For this and analogous stories see the Regional Policy – Inforegio website of the European Commission. [http://www.europa.eu.int/comm/regional\\_policy/projects/stories/index\\_en.cfm](http://www.europa.eu.int/comm/regional_policy/projects/stories/index_en.cfm)

<sup>110</sup> Erik Bleich, *The French Model: Color-Blind Integration*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION AND CIVIL RIGHTS OPTIONS FOR AMERICA* (John D. Skrentny ed., 2001) reports on a brief parenthesis of affirmative policies in France in the early '80s. The parenthesis was quickly closed due to the disaggregation of minority groups and due to the self-alienation of the *élite* of French intellectuals following the rise of the *Front National*.

<sup>111</sup> Article 2 of the Constitution of October 4, 1958: "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion."

origin and ethnicity as suspect categories because they do not surface as definitional criteria in French legislation. French is still the only official language.<sup>112</sup> The *République* is not eager to let Brittany or Corse take the centrifugal steps of linguistic and administrative autonomy. Citizenship is still a unitary concept, and justice is still affirmed on individual bases.<sup>113</sup>

There are several reasons for this attitude. The most emotionally charged one is the memory of the Vichy period, during which individuals experienced the denial of basic rights due to their religion or group affiliation. Second, the acknowledgement of different groups of citizens within the French territory would threaten the very existence of the Republic, which, according to the Constitution, is and must remain a unitary State. A third reason lies in the historical strength of egalitarian slogans. Equality (across social classes rather than ethnicities or nationalities) was the philosophical and political engine behind the French Revolution, and is still perceived as the ideological building block of the nation. Until recently, French diplomats would deny the very existence of minorities in France.<sup>114</sup>

Rooted as it is in the unity of metaphysical reason, modern France is historically positioned at odds with the diverse logics of multiculturalism. The French-Republican model of citizenship differs from the German one, because it is not centered on nationality. It is based, instead, on a shared allegiance to a hard core of civic values, allegedly grounded upon the time-honored *Déclaration des droits de l'homme et du citoyen*<sup>115</sup> and observed to this day with some dark interruptions. Immigrants have relatively easy access to naturalization, and in any case their children are granted citizenship *iure soli*. With citizenship comes equality, both formally and in the substance of social benefits. The system is equipped with aggressive anti-discrimination laws reinforced by criminal sanctions,<sup>116</sup> but it leaves no room for positive action plans. Only women, as a 'group,' are the exceptional targets of affirmative measures, but always in rather cautious terms. The possibility of granting women a pre-determined amount of representation is still considered unacceptable. The fear of group rights surfaces

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<sup>112</sup> France's ratification of the European Charter for Regional or Minority Languages would have required amending the Constitution, but that amendment is not on the legislative agenda.

<sup>113</sup> YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 61 (1994).

<sup>114</sup> "Although it has no national minorities on its territory, France [is] conscious of the importance of this question for many participating States": French CSCE Delegate (1991), quoted by Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 25 (David Wippman ed., 1997). France's reservation to the International Covenant on civic and political rights explains that Art. 27 of that Covenant, concerning minority rights, could not apply to the Republic, where everybody enjoyed civic and political rights, and therefore there were no minorities to speak of. See Amaryllis Verhoeven, *How Democratic Need European Union Members Be? Some Thoughts After Amsterdam*, 23 EUR. L. REV. 217, 232 (1998).

<sup>115</sup> *Déclaration des droits de l'homme et du citoyen* du 26 août 1789.

<sup>116</sup> See Article 225 of the French Penal Code.

in the political debate surrounding women's issues. It is commonly argued that, if target mechanisms were allowed for women, one would have to allow quotas for ethnic minorities, homosexuals, etc.<sup>117</sup>

The policy adopted by the *Haut Conseil à l'Intégration* is referred to as *creuset français* – a gallicism for melting pot. Gathering demographic information on group identity, even for census or statistical inquiries, is flatly prohibited. No data is available on the ethnic make-up of the population. To be sure, French laws on immigration have often departed from the principle of neutrality and included elements of ethnic discrimination.<sup>118</sup> But it is not uncommon for immigration laws to be the mirror image and complement of whatever integration policy the State adopts *vis-à-vis* its own citizens.<sup>119</sup>

Anti-discrimination provisions are pervasive in their application. Not even private, non-profit associations may discriminate on the basis of nationality in selecting the beneficiaries of their charitable activities: material aid, if given, is to be for all those in need.<sup>120</sup> The discussion of poverty in main-stream law journals makes no reference to minorities, even though the 'neutral' terms *étrangers* and *exclusion* are singled out as special entries in the tables of contents.<sup>121</sup> A survey conducted in the year 2000 by the National Observatory of Poverty and Social Exclusion, meant to measure the availability of rights for "populations in difficulty," was intentionally run without any reference to nationality or ethnicity. One must read between the lines of the Observatory's report to find an oblique reference to non-French speaking minorities: those who have difficulty reading and writing – the inquiry reveals – have by far the hardest time accessing information on their legal entitlements. At the same time, they are just about the last ones to complain about it.<sup>122</sup>

Stepping down to the level of municipalities, one may find a different picture: ethnicity and nationality do, indeed, feature in town and district regulations, taking many forms and occasionally palatable disguises. There is, of course, no possibility of gathering data on group identity. At the same time, the demographics of a city are intuitively fundamental to any sensible strategy of local

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<sup>117</sup> *France. Liberté, but not égalité*, THE ECONOMIST, Feb. 27, 1999. In the UK, the Labour Party's attempt to introduce women-only electoral lists received the same response (Teles, *supra* note 24, at 1020).

<sup>118</sup> Bleich, *The French Model*, *supra* note 110.

<sup>119</sup> EU law has developed a similar model in designing its external and internal rules of membership: with the introduction of the concept of European Citizenship, "the bestowal of citizenship and rights to citizens of the Member States has been accompanied by processes of exclusion, discrimination and marginalization of long-term resident third-country nationals, immigrants and refugees." Theodora Kostakopoulou, *Nested "Old" and "New" Citizenship in the European Union: Bringing Out the Complexity*, 5 COLUM. J. EUR. L. 389, 411 (1999). This paper focuses on internal rules of membership, where differential treatment is unusual and therefore more significant.

<sup>120</sup> Tribunal Administratif de Marseille, 11 janvier 2000 ([www.rajf.org/ce/tama9804408](http://www.rajf.org/ce/tama9804408)). The charitable association in question, which received funding by the local administration, provided aid only to "citizens."

<sup>121</sup> See e.g. 12 DROIT SOCIAL 1089 (1999).

<sup>122</sup> Hayet Zeggar, *L'accès aux droits des populations en difficulté. Une enquête de l'Observatoire national de la pauvreté et de l'exclusion sociale*, 5 DROIT SOCIAL 535, 536 (2001).

government— no matter how opposed the mayor may be to multicultural ideals. Identifying given pockets of ethnicity within a city as large and sociologically complex as Paris, for instance, is crucial to urban planning. In 1980, the city of Paris instituted an incentive program for larger families: on the occasion of the birth of any child after the second, one parent could take a subsidized one-year family leave.<sup>123</sup> The program excluded alien residents, and as such was challenged on grounds of equality. In the course of that litigation, the local authorities argued, among other things, that a general goal of the program was to achieve a demographic balance among nationalities. By encouraging more French births, the plan would “preserve traditional French values of which Paris is the repository.”<sup>124</sup> In 1989, this plan did not survive the scrutiny of the *Conseil d’Etat*. The sentimental, esthetic or cultural preservation of a town’s identity were not enough to justify unequal allocation of local benefits.<sup>125</sup>

The 1980 plan was grounded upon chauvinistic demographics, and therefore plainly illegal. But local governments may have more defensible goals. The preoccupation of municipalities with the growing tide of multi-ethnicity is well founded. Due to the indisputable fact of late arrival and, more arguably, to socio-economic discrimination, minority groups are on average less wealthy than local nationals. Urban development, if left to blind market forces, drives them together toward low-income areas, where segregation is most probable. Ghettos are likely targets of racist mobilization as well as conceptual nightmares for assimilation theorists. When the stated goal of urban planning is the prevention of ghettos, reverse discrimination on grounds of nationality may become a common and plausible practice. It becomes acceptable, for instance, that subsidized housing be allocated, *pro quota*, to French citizens only.<sup>126</sup>

To be sure, distinctions between citizens and foreigners are still perceived as identity-blind. Given the embracing character of French citizenship laws, which allow for generous naturalizations of ethnic minorities, citizenship per se does not constitute a suspect category in the framework of equality. It can be put to use in demographic planning, and quite effectively at that, because French citizens are most likely of local descent. The next step for social planners is to attempt a distinction *among* French citizens. This time it may be harder not to pierce the veil of neutrality. Yet one finds specific social and economic intervention in favor of the category of “French citizens from

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<sup>123</sup> See John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669 (1993).

<sup>124</sup> *Id.*

<sup>125</sup> Judgment of June 30, 1989 (Ville de Paris v. Levy), Conseil d’Etat (Fr.), reprinted in 6 REV. FR. DR. ADMIN. 578 (1990).

<sup>126</sup> Bleich, *The French Model*, *supra* note 110.

overseas.”<sup>127</sup> And as it happens, in the overseas territories of the *République* virtually no one is of exclusively French descent.

Most explicitly addressed to the protection and advancement of given minorities are the initiatives of the *Fonds d'Action Sociale*.<sup>128</sup> This governmental institute for the integration of immigrants earmarks some of its funds for inter-cultural studies and projects related to cultures of immigration (mainly African and Asian).<sup>129</sup> From the government’s view-point, funds are distributed to private associations, rather than to a given minority determined to affirm its own collective identity. The unitary character of citizenship and the individual basis of entitlements remain formally unquestioned.<sup>130</sup> The fact is that the picture is slowly changing.

According to traditional French politics, the State’s commitment to the ideal of *fraternité* would progressively take care of the socio-economic marginalization of new-comers. Even in scholarly works most sensitive to multiculturalism in contemporary France, one could find traces of this vision: “[T]he ethnic problem in France is not cultural, linguistic, or political, but mostly socio-economic.”<sup>131</sup> *L'affaire des foulards*, in its many instances since the late ‘80s, revealed the fragility of this construct.

It happened all over France that Muslim girls began attending school wearing headscarves – arguably an icon of Islamic fundamentalism.<sup>132</sup> School-masters, occasionally backed up by no less than the Minister of Education, would then keep them out of school for the sake of secularism in education. The country split between outright defenders of republican laicism and fans of post-modern tolerance. At first the *Conseil d'État* declined the government’s request for policy guidelines, leaving the whole matter to the discretion of school masters.<sup>133</sup> But since 1996 the *Conseil*’s answer has been consistent: veiled girls must be allowed in the classroom, in so far as their dressing and posture are

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<sup>127</sup> Association nationale pour l’insertion et la promotion des travailleurs originaires d’Outre-mer (ANT): see Bleich, *The French Model*, *supra* note 110.

<sup>128</sup> Fond d’Action Sociale pour les Travailleurs Immigrés et leur Famille. A public corporation set up in 1958, originally meant to support only immigrants, but now reaching out to all disadvantaged groups so as not to stigmatize the immigrants. See OECD Proceedings, IMMIGRANTS, INTEGRATION AND CITIES. EXPLORING THE LINKS, 96-97 (1998).

<sup>129</sup> Erik Bleich, *Re-imagined communities? Education policies and national belonging in Britain and France*, in THE POLITICS OF BELONGING: MIGRANTS AND MINORITIES IN CONTEMPORARY EUROPE 60, 69 (Andrew Geddes & Adrian Favell eds., 1999).

<sup>130</sup> SOYSAL, *supra* note 113, at 61.

<sup>131</sup> JEAN-PHILIPPE MATHY, FRENCH RESISTANCE. THE FRENCH- AMERICAN CULTURE WARS 142 (2000).

<sup>132</sup> See, for a recent example, *Une affaire de foulard au lycée français d’Alexandrie. Une histoire*, in LIBÉRATION, March 23, 2001, at 10.

<sup>133</sup> The *Conseil d’Etat* only provided very general guidelines. Students’ free expression rights could be limited in situations where they infringed on the religious freedom of others, or worked to the detriment of the educational program of the schools. See Judy Scales-Trent, *African Women in France: Immigration, Family, and Work*, 24 BROOKLYN J. INT’L L. 705, footnote 40 and corresponding text (1999).



not provocative or proselytizing.<sup>134</sup> The problem, however, is far from being resolved. School teachers, committed by law to laicism in the classroom, are faced with growing demand for religious expression, including suspended attendance throughout the Ramadan period, scarves and other “ostentatious signs of belonging”.<sup>135</sup> It is harder and harder for schools to live on the assumption that all children are equal, and that the problems of immigrant peoples can be reduced to an economic dimension.<sup>136</sup> Immigrants’ demand for cultural affirmation is growing. While the definitions of their identities become ever more diverse and at times conflicting, there is less and less desire, in their camps, to reunite them under the heading of blind justice. The individual freedoms of religion and expression do not point at viable solutions. Schools have begun to provide children of immigrants with courses of language and culture of origin.<sup>137</sup> This involves identity-based redistribution of resources. Not even France can forever escape the chore of striking ad-hoc balances between individual equality, neutrality and collective identity claims.

#### 7. ...and in Germany

American census officials, labeling most European incomers as white Caucasians, may be unaware that being German is of specific ethnic significance. Yet, being ethnically German may mean a lot, these days, for citizens of Eastern Europe. Russian citizens whose ancestors happened to settled in the Volga valley at the time of Catherine the Great are still considered, *iure sanguinis*, members of the *Volk*, and may easily flee the material uncertainties of contemporary Russia by claiming German nationality. With it comes fast-tracked German citizenship by right, not to mention the bonus of an EU passport. Because of laws predating Nazism and never repealed,<sup>138</sup> German ethnicity and citizenship are still meant to coincide.

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<sup>134</sup> See e.g. Conseil d’Etat, May 20 1996, Ministry of Education v. Outamghart; Ligue Islamique du Nord, M. et Mme. Chabou et autres, 30 LES PETITES AFFICHES 10 (Mar. 10, 1997) (cited by Scales-Trent, *supra* note 133).

<sup>135</sup> See the law proposed on 26 Jan. 2000 by George Sarre, an MDC deputy, to the National Assembly, prohibiting such signs in school (Bill No. 2096), discussed by Guibert Nathalie, *L’école fait face à une montée des revendications identitaires des élèves*, LE MONDE, April 15, 2000.

<sup>136</sup> Hanifa Cherifi, Mediator of national education in the Affaires des Foulard, quoted by Guibert Nathalie, *supra* note 135.

<sup>137</sup> Guibert Nathalie, *supra* note 135.

<sup>138</sup> The Citizenship Law of 1913 [*Reichs- und Staatsangehörigkeitsgesetz v. 22.7.1913* (RGBl., 583)] established descent or *jus sanguinis* as the main basis of German citizenship. It also allowed for naturalization, but only as an exceptional and fully discretionary act of the State. The contempt of *völkisch* ideology following WWII should have prompted the repeal of such provisions. But “the peculiar circumstances of the immediate post-war period – the total collapse of the state, the massive expulsion of ethnic Germans from Eastern Europe and the Soviet Union, and the imposed division of Germany—reinforced [Germany’s self-understanding as an ethnocultural nation.]” William Rogers Brubaker, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 358 (1990) (Ph.D. dissertation, Columbia University).

Against this background, the thought of diverse ethnicities in Germany is commonly associated with immigrant labor, which, in turn, is associated with foreignness. In other words, in the popular iconography, those who are ethnically diverse are, more likely than not, recent immigrants without citizenship. That they may enjoy a different legal status, especially with regard to access to the labor market and social services, is not perceived as a diversion from equality, but rather as the natural by-product of their being aliens.<sup>139</sup>

Until recently, German naturalization has been extremely hard to obtain by western standards. As a result, there is virtually no representation of minorities in politics, in the police force, in the teaching body, or in the judiciary.<sup>140</sup> The recent reform of German immigration law is expected to ease the path to naturalization for large numbers of *Gastarbeiter* (guest-workers), leading to an injection of multi-ethnic citizens of equal status in both Germany and the EU.<sup>141</sup> Significant obstacles for applicants still exist, but the traditional link between German blood and equal civic and political rights will, in the long term, be severed. By decoupling citizenship from German nationality, the newly enacted legislation brings about “a fundamental departure from the ethno-cultural model.”<sup>142</sup> However, the reform does not give in to identity politics or to the very idea of collective entitlements for minorities. It is closer to the French ideal of republican assimilation than to the multicultural projects of the UK or the Netherlands. Among those endowed with citizenship, rights are seemingly allocated on a neutral basis, with no regard whatsoever to ethnicity, religion etc. Naturalization, therefore, is perceived as both necessary and sufficient to gain formally equal access to the cookie jar of civic liberties and welfare opportunities. It is a promise of inclusion, but not of multiculturalism.

The German legal system is, on its face, blind to identity issues. Scholars have argued for positive action in favor of naturalized immigrants,<sup>143</sup> so as to compensate for discrimination and to

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<sup>139</sup> “Unlike the US Constitution, the 1949 German Basic Law [...] contains a systematic demarcation between the rights reserved to Germans and the rights which apply to everyone.” RUTH RUBIO-MARÍN, *IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES* 186 (2000). “A number of individual rights and freedoms, according to the Basic Law, extend to citizens and non-citizens alike. The other rights of the Basic law, eg the freedom of profession, extend to citizens only.” Gilbert Gornig & Christiane Trüe, *Minority Protections in Germany*, 6 *TILBURG FOREIGN L. REV.* 69, 82 (1997). In so far as being an alien is not an immutable characteristic, denying civic and political rights to aliens is acceptable.

<sup>140</sup> Ruud Koopmans & Paul Statham, *Political Claims-Making against Racism and Discrimination in Britain and Germany*, in *COMPARATIVE PERSPECTIVES ON RACISM* 139, 160-161 (Jessika Ter Wal & Mayel Verkuyten eds., 2000).

<sup>141</sup> Gesetz zur Reform des Staatsangehörigkeitsrechts, v. 15.7.99 (BGBl. I S. 1618).

<sup>142</sup> Ruud Koopmans, *Germany and its Immigrants: An Ambivalent Relationship*, 25 *JOURNAL OF ETHNIC AND MIGRATION STUDIES* 627, 644 (1999).

<sup>143</sup> See e.g. WILLIAM A. BARBIERI, *ETHICS OF CITIZENSHIP: IMMIGRATION AND GROUP RIGHTS IN GERMANY* 168 (1998): “The group-related basis of socioeconomic inequality, in short, dictates that the structure best suited to promoting equality will be a model of compensatory justice emphasizing the collective rights to what has euphemistically been called, in India, positive discrimination, and in the United States, affirmative action.”

fight the “indiscriminately assimilating forces of modernity.”<sup>144</sup> To this day, however, positive action has no official implementation on German soil.<sup>145</sup>

Article 3 of the German Federal Constitution, in Paragraph 3, prohibits discrimination on grounds of sex, parentage, homeland and origin, faith, religious or political opinions, and handicap. This provision, per se, does not support affirmative action schemes of any kind. Paragraph 2 of the same article was amended in 1994 to provide cautious endorsement of affirmative schemes in favor of women. It now provides that Government should promote the reinforcement of legal equality of women and men, and work towards the removal of existing disadvantages.<sup>146</sup> But it is clear that no such tools exist to correct discrimination in any respect other than gender. The non-discrimination clause of Paragraph 3 provides singly prejudiced individuals with personal guarantees, but it is not meant to redress the historical disadvantage of given groups. Conceptually, affirmative action is pitted against the fundamental need of protecting individual equality, and is therefore presumed off-limits on German legal soil.<sup>147</sup> Positive discrimination as involved in affirmative schemes, and advocated as indispensable by occasional scholars, would have to be strained through the constitutional filter of equal protection.<sup>148</sup> In this context, there is little room for affirmative schemes in legislative or administrative action.

The picture, however, is more complex.

The Bonn Basic Law is as much a product of German liberal thought as of Christian and Socialist forces. It embodies both the *Rechtsstaat* principle, aimed at protecting individuals from State action, and the *Sozialstaat* principle, which binds the State to redress social injustices.<sup>149</sup> The *Sozialstaat* clause has been of great use in justifying welfare legislation that interferes with individual property rights and other economic freedoms.<sup>150</sup> Substantive equality and welfare for all are at the core

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<sup>144</sup> Barbieri, *supra* note 143, at 172.

<sup>145</sup> This feature places Germany in stark contrast to the British landscape, where race relations have long been a target of legislative intervention.

<sup>146</sup> See Manfred Zuuleg, *Gender Equality and Affirmative Action Under the Law of the European Union*, 5 COLUM. J. EUR. L. 319, 320 (1999).

<sup>147</sup> Baer, *supra* note 94, footnote 179: “The group problem of affirmative action is the central nightmare of German lawyers.”

<sup>148</sup> The usual standard of review for legislation treating differently (or indirectly affecting) certain groups of persons can be sketched as follows: there must be reasons relevant enough to justify the differential treatment, and there must be proportionality between the goals of the legislation and the means used to achieve them. This type of scrutiny is applied with particular rigor when the group is defined on the basis of the personal characteristics listed in Art. 3.3 of the Grundgesetz (sex, parentage, homeland and origin, faith, religious or political opinions, and handicap.) This variable intensity of proportionality review in Karlsruhe may remind American scholars of the sliding scale approach that Justices Stevens and Marshall have envisioned: Somek, *supra* note 34, at 316 and 321.

<sup>149</sup> The *Sozialstaatprinzip* is embedded in Artt. 20 and 28(1) of the *Grundgesetz*.

<sup>150</sup> DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 242 (2<sup>nd</sup> ed. 1997).

of the Basic Law. And because marginalization and diversity are often simultaneous conditions, the German system does, indeed, deal with groups as such. For instance, the fact that children speaking a foreign language be offered proper education in their mother tongue could not be justified by Article 3.3, as the singling out of such children is based on their language or nationality; however, it can be based on the *Sozialstaatsprinzip*.<sup>151</sup> This principle, in other words, is the basis for compensatory action that would not find justification under Article 3.3.<sup>152</sup>

The promotion of culture(s) can also be the reason for conferring privileges upon identity-defined minorities. For instance, in 1988 the *Land* of North Rhine-Westphalia, with the support of the Turkish Government, introduced and financed special Koran classes for Muslim children.<sup>153</sup>

Moreover, the system must allow over- or under-inclusive classifications for the sake of practicality. It is unavoidable, and must be accepted, that most forms of *Typisierung* result in individual cases of unequal treatment.<sup>154</sup> For reasons of administrability of laws and resources, the prohibition of preferential treatment due to homeland or descent can occasionally be lifted. The dispensation of subsidies for refugee organizations is clearly an allocation of resources based upon nationality, yet it is, indeed, permitted.

The list could go on. Many more meaningful examples might be culled from the experience of German municipalities, where the need to address minorities as such, and to provide preferential or compensatory treatment to their members, is particularly visible. But even more interesting are the pockets of ethnicity-based policies which go regularly unchallenged, due to their embeddedness in the Nation's history.

Ethnicity has long been the basis for allocating differential rights within the *Länder* of the Federal Republic. In particular, three different groups of German citizens are officially recognized in Germany as ethnic minorities. The Serbs, a Slavic nationality, live in Saxony and Brandenburg.<sup>155</sup> The *Land* of Schleswig-Holstein hosts a still large Danish community – a legacy of the area's Danish past. German Frisians are the third, less numerous official ethnicity.<sup>156</sup> These communities (all endowed with German citizenship) enjoy veritable group rights, i.e. "rights granted with regard to group

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<sup>151</sup>The question of the compatibility of foreign-language schooling for children of immigrant workers with Art. 3.3 has not yet been an issue: DAS BONNER GRUNDGESETZ: KOMMENTAR, *supra* note 34, at 474-75. See also W. RÜFFNER, BONNER KOMMENTAR ZUM GRUNDGESETZ 322 (Rudolf Dolzer et al. eds., C.F. Müller 2002).

<sup>152</sup>DAS BONNER GRUNDGESETZ: KOMMENTAR, *supra* note 34, at 470-471.

<sup>153</sup>KOMMERS, *supra* note 150, at 471.

<sup>154</sup>RÜFFNER, *supra* note 151, at 65. See also Baer, *supra* note 94, at 256 and footnote 31.

<sup>155</sup>ETHNISCHE MINDERHEITEN IN DER BUNDESREPUBLIK DEUTSCHLAND: EIN LEXIKON 454-464 (Cornelia Schmalz-Jacobsen et al. eds., 1995).

<sup>156</sup>Gornig & Trüe, *supra* note 139, at 74-75.

membership and, primarily, in order to protect the group.”<sup>157</sup> As such they stand in stark contrast to other numerical minorities, whose members may invoke the protection of anti-discrimination laws and individually-based human or civic rights, but no positive measure of group affirmation. Such is the status, for instance, of the roughly 70,000 Sinti and Roma with German citizenship; and it is also the likely condition, in the foreseeable future, of any given group of naturalized immigrants.

The most conspicuous attribution of special group rights to the *numerus clausus* of official minorities is to be found at the level of political representation. The electoral laws of the Federal Republic and of several *Länder* provide the political parties of these minorities with an exemption from an otherwise pervasive feature of proportional representation in Germany: the need to gather the votes of at least 5% of the electors in order to gain any seats.<sup>158</sup> If applied to those minorities, the 5% threshold might shut them out of the political forum. Indeed, this exemption has been discussed, and is conceived of, as a privilege based upon ethnicity or nationality.<sup>159</sup> It is a conspicuous diversion from the otherwise equal allocation of voting rights for all citizens, justified by the need to promote a group, compensate for prior discrimination, and preserve its existence as a cohesive community. It stops short of guaranteeing representative quotas, but it is arguably very similar to affirmative action schemes.<sup>160</sup> Official minorities also enjoy a number of educational privileges, regularly financed out of *Länder*'s budgets. Along the spectrum of identity-based redistribution, this is as close as it gets to the logic of affirmative action.

There is no clear reason, other than historical accident, for such wrinkles on the principle of equality. That other minorities have no access to group rights receives a rather outmoded explanation: because they are more recent arrivals to the country, society demands their assimilation in order to preserve social cohesion.<sup>161</sup> Time-honored pockets of diversity have proven, instead, their unthreatening coexistence with the *Volk*. It seems clear, however, that the ongoing decline of the ethnocultural exclusionism in German politics will further dismantle this distinction, revealing the oddity of imposing a *numerus clausus* upon legally recognized groups.

A thorough survey of German instances of group affirmation exceeds the scope of this essay. The above should suffice, however, to do away with the idea that Germany is tied to an identity-blind conception of equality, unwilling and not capable of instituting any forms of privilege for ethnic,

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<sup>157</sup> Gornig & Trüe, *supra* note 139, at 73. The authors explain that special minority rights are not only collective but also individual, as they are enforceable by single members of the minority.

<sup>158</sup> Gornig & Trüe, *supra* note 139, at 108-109

<sup>159</sup> For an explicit discussion of the exemption in terms of “privilege” see the references in Gornig & Trüe, *supra* note 139, at 110, footnote 144. The only qualification here is given by the possibility of opting out of this privilege, by choosing not to identify with the relevant minority.

<sup>160</sup> Gornig & Trüe, *supra* note 139.

<sup>161</sup> ETHNISCHE MINDERHEITEN, *supra* note 155, at 341.

national or religious groups. It should also serve to highlight the *Bundesrepublik's* preference for a decentralized treatment of groups' legal issues.

#### 8. *Culture/Welfare: another self-effacing dichotomy*

Culture and welfare, applied along the lines of the just-illustrated examples, are two very separate strands in the contemporary legal discourse on minorities. Indeed, they are conceived as opposite.

The Welfare dimension pertains to the social and economic rehabilitation of recent immigrants, starting from the assumption that, on average, the materiality of their life is harder. The terms of reference here are access to instruction, employment, social benefits, housing, and financing. Identity is not a traditional feature of this type of discourse. Welfare for an underprivileged group can be conceived of as a neutral project, which identifies addressees on the basis of income rather than belonging.

Culture, on the other hand, has to do with self-identified communities striving for recognition and survival in the face of assimilating pressure. It mainly uses the vocabulary of identity and values. It is used to explore the desirability of a distinct set of legal tools, meant to allow group members to keep their identity pristine, while maintaining their political affiliation with a larger, republican constituency. In this dimension, decision-makers discuss the plausibility of such things as allocation of municipal resources for cultural events, allowance of multi-cultural representation in the media, accommodation of religious preferences as to holidays or dress-code in the work place or in schools, protection of language as expression of values and cohesion, etc. The more a State is willing to use its laws and resources in order to preserve the identity of given communities, the higher it scores on the scale of multiculturalism.

Such scores vary a lot within the EU, but for the most part stay low by US standards. In French jargon, for instance, "assimilation" has been a trendy term until not long ago. This signified the belief that the local melting pot would blend all differences and perhaps nourish, without altering, the notion of French identity. More recently, the term "integration" has become a better label for a system which does, indeed, respect minority identities in many ways. But the integration model is still a far cry from the Anglo-Saxon model of communities. Governments throughout Europe still reject the communitarian ideology sponsored in some academic circles and occasionally supported by the legal system in the US.<sup>162</sup>

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<sup>162</sup> See e.g. Nomi Stolzenberg, *A Tale of Two Villages (or, Legal Realism Comes to Town)*, in *ETHNICITY AND GROUP RIGHTS* 290 (Ian Shapiro & Will Kymlicka eds., 1997).

The traditional European response to marginalization is not culture, or multiculturalism. It is welfare. By this token, the American alternative to communitarian ideals, namely liberalism, is also ostracized on European soil. Liberalism is based on the individualistic dogma of freedom from governmental or communitarian intrusion into one's private affairs and property. One thing on which all corners of continental political thought seem to agree is the rejection of American individualism, at least in its vulgarized version.<sup>163</sup>

Constitutional history illustrates this point. The French revolution was inspired by clearly redistributive motives, and was fraught with promises of collective welfare. Equality came to French life as a choral condition, and was then taken to imply, in its Rousseauvian version, the systemic correction of extreme inequality of wealth and power.<sup>164</sup> The German Federal Constitution, in turn, revolves around the *Sozialstaatprinzip*. To this day, American scholars notice, in Continental systems, a conspicuous tendency to use constitutional tools to promote social and economic betterment of those at the fringes of the community.<sup>165</sup> In the constitutional legacy of Continental Europe, there is a strong imperative to intervene in social matters and to reach out, by law, to the fringes of society. Against this background, the American sensitivity to claims of identity and recognition may be conventionally dismissed as the unfortunate by-product of the shortcomings of US welfare.<sup>166</sup> The Continental focus

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<sup>163</sup> For a more sophisticated analysis see MATHY, *supra* note 131, who points at the growing consciousness and appreciation of diversity on French soil. In his view, "the notion of an absolute incompatibility between French and American views on immigration and multiculturalism is an ideological construct." (p. 157). See also Martin A. Schain, *The Politics of Multiculturalism in France and the United States*, 1999, pp. 12 ff. of the manuscript (on file).

<sup>164</sup> Cynthia A. Vroom, *Equal Protection Versus the Principle of Equality: American and French Views on Equality in the Law*, 21 CAP. U. L. REV. 199, 201-202 and 205-207 (1992).

<sup>165</sup> When studying the French incarnation of the principle of equality, American legal scholars have noticed its predominantly socio-economic meaning. (Observers of the German constitutional experience have made analogous remarks: see Gerald L. Neuman, *Equal Protection, "General Equality" and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 310 (1999)). The *Conseil Constitutionnel*, in its preliminary review of newly-enacted legislation, has often implemented the notion of *égalité* in order to pursue redistributive goals. The US Supreme Court, by contrast, has traditionally applied only a rational basis standard in reviewing economic legislation, leaving in place a number of statutory discriminations between different categories of individuals whenever they would respond to a plausible legislative rationale. Scholars have offered the following account for such a difference: the American principle of equality builds upon classic liberal theory, whereby individuals should be free to pursue their private interests with only such interference from the State as necessary to prevent social strife. The American Revolution was not born out of evident class struggles and did not aim at substantive equality; it only pursued a general commitment to the equal worth of individuals as subjects endowed with inalienable rights. The option of economic and social equality is foreclosed in terms of constitutional discourse.

<sup>166</sup> Mark Tushnet has most recently pointed at the need to reconsider the affirmative action debate along the lines of constitutionalized welfare rights – a move traditionally unthinkable on US soil. See Mark Tushnet, "The Return of the Repressed: Groups, Social Welfare Rights, and the Equal Protection Clause," *Issues in Legal Scholarship*, The Origins and Fate of the Antisubordination Theory (2002): Article 7. <http://www.bepress.com/ils/iss2/art7>

on social justice makes multicultural governance seem not just undesirable but fundamentally not needed.

It is according to this set of tenets that culture and welfare come across as totally separate spheres – the former dealing with rather spiritual matters, the latter with the materiality of redistribution. In practice, it is increasingly accepted that the two spheres are converging. When the experience of economic marginalization overlaps with minority status (as in the context of Parisian housing,) identity –even cultural identity— is a fundamental variable in the welfare equation. State-funded religious schools, use of alternative languages in legal or political fora, subsidized second-language instruction for first- or second-generation immigrants, are at the same time an homage to cultural diversity, and stepping stools for the economic betterment of the excluded. As observed, both the Union and its members engage in action of this hybrid sort. The culture/welfare dichotomy becomes, then, descriptively inaccurate, as it fails to account for numerous policies that clearly fall in between. When culture defines and inspires redistributive policies, welfare is no longer identity-blind.

#### 9. *The question of legitimacy*

At a crucial point in the history of European integration, the ECJ began to write its own chapter on fundamental rights. This judicial move was strikingly radical, as it lacked textual basis in the Treaty of Rome and marked a clear departure from the purely economic enterprise of the ‘50s.<sup>167</sup> At the same time, however, the move fell well within the prediction of neo-functionalist analyses: any integrational effort, no matter how narrowly conceived at its start, would bring about the unavoidable spill-over effect of jurisdictional expansion. Most cautious in its early steps, the ECJ ventured into the uncharted territory of Community fundamental rights by pledging deference to the member States’ established authorities:

“In safeguarding [fundamental] rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States [...]”<sup>168</sup>

For the sake of “uniformity and efficacy”<sup>169</sup> of European law, the Court made also clear that national constitutions would not control the Community’s fundamental rights jurisprudence, which would be ensured within the Community’s very own “structure and objectives.”<sup>170</sup> To this day there is

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<sup>167</sup> Weiler, *The Transformation*, *supra* note 47.

<sup>168</sup> *Nold v. Commission*, Case 4/73 [1974] E.C.R. 491 at 507.

<sup>169</sup> *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, par. 3.

<sup>170</sup> “The protection of [fundamental] rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.” *Id.* (11/70) at par. 4.



no clear solution to the built-in ambiguity of European fundamental rights. The ECJ has long proceeded in the hope that its own views on such issues and those of the several member States' legal actors would never clash. The recent developments – most noticeably the Charter of Fundamental Rights<sup>171</sup> – are not expected to assuage, technically<sup>172</sup> or even symbolically, such worries as expressed by the German Constitutional Court in its *Maastricht* decision.<sup>173</sup> Ruling with, and not against, national courts on fundamental rights is still a must for the ECJ, for unchanged reasons of legitimacy and credibility.

The sphere of equality is no exception. Equality, in the ECJ's jargon, is not only a general principle of community law, but also a "fundamental human right" not to be discriminated against.<sup>174</sup> The fundamental right to equal treatment may be significantly affected by the uncertainty of its own sources. The new EC Treaty Article 13 does not radically change the *status quo*. If non-discrimination were to take a form of its own in EC law, diverging from member States' understanding of equality, the *caveat* of the *Maastricht* ruling might materialize in constitutional disobedience. In dealing with issues of equal protection, and discarding group equality as aberrational, the ECJ cannot be exclusively self-referential. It still needs to look deferent to member States' views. Deference, however, can take many forms, ranging from scrupulous observance to mere lip service.

In 1995, when the Court decided *Kalanke*, deference took the shape of a short, matter-of-fact remark by the (Italian) Advocate General Tesauo:

"[T]he principle of equality as between individuals [...] is safeguarded in most of the member states legal systems."<sup>175</sup>

The statement is remarkably elliptic and begs an explanation. 1995 was in the year in which the Italian Constitutional court ruled out the possibility of establishing electoral quotas meant to increase female political representation.<sup>176</sup> The rhetoric of individual equality enjoyed then much favor in continental Europe. The traditional opposition of both France and Germany to the idea of affirmative action, in spite of occasional overtures to women, seemed still solid enough to allow for

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<sup>171</sup> 2000 O.J. C 364/1.

<sup>172</sup> Koen Lenaerts and Eddy De Smijter, *A Bill of Rights for the European Union*, 38 COMMON MKT. L. REV. 273, 280-281 (2001).

<sup>173</sup> *Supra* note 66.

<sup>174</sup> Case C-13/94, P v. S and Cornwall County Council, par. 22, [1996] C.M.L.R. 247. On the significance of turning principles and interests into individual rights see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 308 (2000).

<sup>175</sup> *Kalanke*, Opinion of AG Tesauo, Par. 9, emphasis added.

<sup>176</sup> Italian Constitutional Court, September 12, 1995, n. 422, *Il Foro italiano*, 1995, I, 3386. More recently, Italy has enacted flexible, non-quota measures to encourage women's participation in politics: L. 3 giugno 1999, n. 157, *Nuove norme in materia di rimborso delle spese per consultazioni elettorali e referendarie e abrogazione delle disposizioni concernenti la contribuzione volontaria ai movimenti e ai partiti politici*, Art. 3, 1° comma: GU 4-6-1999 s.g. - n. 129.

sweeping generalizations.<sup>177</sup> In the United Kingdom, to be sure, some local governments in the 1980s had interpreted equal treatment in the labor market as a need for positive action in hiring policies. By the mid-nineties, however, such British experiments had been somewhat discredited even in their motherland.<sup>178</sup> The Union's monolith of individual equality showed a few cracks on Dutch soil and, as observed, quite major fissures after Sweden's brand-new accession. But the common denominator of member States' constitutional traditions, as perceived in Luxembourg, seemed to correspond to the AG's perception.

To some extent, this perception is still defensible today. But things are changing.

Because marginalization may be due to social biases against given ethnicities or religions, Europe's profound commitment to social instances may need 'suspect categories' as criteria for the identification of disadvantaged groups. Targeting groups of pre-defined identity in order to distribute social benefits such as subsidized housing, education and financing is increasingly within the realm of possibilities. These changes make it more difficult for the ECJ to cling to the coherent vision of individual equality outlined in the context of gender promotion. The short collection of samples in the preceding paragraphs shows that the law of the member States is much more receptive to such things as groups, identity and ethnicity than the dominant rhetoric of individual rights may concede.

In light of this increasingly complex picture, it is worth recalling the guidelines provided by the ECJ when addressing affirmative action in favor of women. Any automatic grant of rights or privileges, depending directly on one's belonging or not to a given group, is illegal as contrary to the principle of equality "as between individuals." Belonging to a group can be a reason for presumptive preferential treatment in so far as automatism is excluded, and flexibility is allowed. If the group is or has been the target of historical discrimination and systemic disadvantages, it is constitutionally sound to provide that group with easier, compensatory access to legal justice or social benefits. But the presumption must be reversed if individual outsiders are in fact worse off than those within the group. In any case the affirmative scheme must aim for a goal that the Court may deem legitimate, and it must satisfy the requirement of proportionality.

Setting gender aside, and replacing it with group definitions culled from the foregoing illustrations, one wonders whether the Court's grid would provide any meaningful guidance to national lawmakers. That the balancing test of the ECJ may do justice to this complexity is far from obvious.

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<sup>177</sup> See *France. Liberté, but not égalité*, *supra* note 117. For an account of judicial hostility to 'hard' affirmative action measures in the German labor market see Colneric, *supra* note 26.

<sup>178</sup> Teles, *supra* note 24.

### III. Positive action beyond ECJ's review

The argument that the ECJ should not review at all positive action policies enacted by member States needs further technical elaboration.<sup>179</sup> In the following pages, I shall explain how the form of judicial restraint that I advocate does not imply the overall withdrawal of the Court from its settled case-law on equality. The EU's heightened commitment to the enforcement of fundamental rights requires, indeed, an even more activist pursuit of human rights policies in Brussels.<sup>180</sup> For the ECJ this means, in turn, enhanced protection of individual members of ethnic or religious minorities against ad-hoc violations of fundamental rights. The Court, however, should decline to hear a different sort of complaint – that of traditionally non-discriminated majorities, determined to offset positive action policies that the national system, through the complexity of its own politics and through its own constitutional filter, has come to approve.

I shall illustrate how the Court has been capable of similar forms of judicial restraint in other politically sensitive areas. I shall further argue that the several prohibitions of discrimination in the EC Treaty do not provide an appropriate match for the complex theme of positive action. The subject finds better analogues in other Treaty provisions, or in new, emerging forms of European governance, which deal more directly with the true scope of positive action – namely, the fight against social exclusion—and open up alternative avenues for an EU-wide dialogue on the rehabilitation of marginalized collective identities.

#### *1. The case for supranational restraint in the judicial review of positive action*

In light of the progressive constitutionalization of fundamental rights in the EU legal system, some scholars see it as imperative for the Court to take a higher, more activist profile in human-rights judicial review.<sup>181</sup> Others encourage the ECJ to improve the quality of its discourse in matters of fundamental rights, so as to bolster its credibility and legitimacy on such issues. The Court – the argument goes—should actively solicit the intervention of member States in order to get a better sense of their constitutional traditions in context. The Court should as well rely on the comparative work of its own research and documentation center, and make such work available to the member States to

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<sup>179</sup> The argument would apply identically to the Court of First instance if its jurisdiction were expanded to include preliminary references under EC Treaty Art. 234 [Consolidated Version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79].

<sup>180</sup> Philip Alston & Joseph H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, in *THE EU AND HUMAN RIGHTS* 3 (Philip Alston ed., 2002).

intensify the dialogue with national actors.<sup>182</sup> These arguments aim at promoting the ECJ to the role of trend-setter in fundamental rights matter, and to bolster its substantive – if not formal—supremacy. They do not expect the Court to shy away from its HR scrutiny in the near or foreseeable future.

I share, for the most part, these views. In the present political context, the goal of removing discrimination by means of rights- or equality-based review is far from being achieved. There is no doubt that the Court can still contribute to the mainstreaming of marginalized communities by reproaching negative discrimination in individual cases. The non-discrimination clauses contained in the EU's association agreements with certain third Countries are still forcing reluctant EU members to extend welfare benefits to immigrant labor. Similar clauses in the EC Treaty, providing the basis for future judicial review of new members' legislation, are likely to prompt similarly meaningful holdings. The traditional form of equality review, with the formidable power of its rhetoric, can still do good work for victims of racial, ethnic or religious bias.

The ECJ's enforcement of equal and individual rights, however, runs out of pragmatist steam in matters of positive discrimination. In the previous Part of this essay, I have offered theoretical and practical reasons for severing identity-based claims from equality law. Positive action, if and where national or subnational communities deem it appropriate, operates above and beyond the plateau of equality. Against this background, I argue for a thorough reconceptualization of positive action within the EU. The relevant normative structure for targeted intervention against the marginalization of given groups is not necessarily to be found in general non-discrimination provisions, such as Articles 6 and 13, but rather in other pockets of EU law especially devoted to targeting social exclusion. In the following pages, I provide technical and conceptual support for this argument.

## 2. *Positive action à la Keck.*

I have highlighted, in the previous Part of this essay, the fundamental connection between the “economic constitution” of the Union and the general principle of equality.<sup>183</sup> To this day, the enforcement of non-discrimination among persons still uses the language and the framework for

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<sup>181</sup> Alston and Weiler, *supra* note 180, at 19 (point 9).

<sup>182</sup> Thomas de la Mare, *Article 177 in Social and Political Context*, in *THE EVOLUTION OF EU LAW*, *supra* note 92, 215, at 240.

<sup>183</sup> Advocate General Tesouro has explained this connection in non-ambiguous terms: “... the principle of equal treatment is fundamental not only because it is a cornerstone of contemporary legal systems but also for a more specific reason: Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market.” Opinion of AG Tesouro in *Assurances du Crédit v. Council and Commission*, Case C-63/89, [1991] E.C.R. I-1799 at 1829. See Tridimas, *supra* note 80, at 218: “ in Community law, equality is not only a constitutional necessity but also a keystone of integration.”

judicial review developed by the ECJ in economic matters. That connection is worthy of further analysis in the specific context of positive action.

In order to promote the integration of the Market, over the course of the past three decades the ECJ has enforced the EEC Treaty's 'commerce clause' of Article 30 (now EC Treaty Article 28) along the following evolutionary lines. With the path-breaking *Dassonville* decision, the Court stated clearly that it would not tolerate any form of national regulation of trade that would discriminate against other member States' goods. As to non-discriminatory regulation, formally affecting local and foreign goods in an identical fashion, *Dassonville* and the later *Cassis de Dijon* holding outlined the Court's own 'rule of reason:' if such regulation had in any way the effect of hindering interstate trade, it would have to be justified in light of 'mandatory interests' of the regulating State. Further, the means for the realization of such interests would have to prove proportionate and necessary, or narrowly tailored, to the regulation's ends.

For many years, this test allowed the ECJ to 'strike down' many forms of State regulation as incompatible with the Treaty of Rome. Such holdings resulted, in varying degrees, in the disempowerment of local governments.<sup>184</sup> The ensuing normative vacuum would at times, but not always, be filled by means of Community regulation.

By the late '80s, the proportionality/necessity review seemed to have acquired a life of its own, up to the point of pushing its own creator way beyond its original design. Traders began to show an "increasing tendency [...] to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules were not aimed at products from other member States."<sup>185</sup> In *Quietlynn*, for instance, British merchants tried to dismantle the license system imposed upon retailers of sex articles, by claiming that the license requirement reduced the volume of sales of imported 'goods.'<sup>186</sup> The proportionality/necessity review, requiring a judicial re-assessment of the very worth of States' regulatory intervention, proved increasingly intrusive upon national policies.

At that point, the Court began to show signs of discomfort in the application of its very own test. Starting a famous judicial saga, certain British retailers challenged national rules preventing them from opening their shops on Sunday. Were such rules narrowly tailored to the (granted) goal of arranging for the collective, simultaneous rest of workers, in light of *local* socio-cultural characteristics? In

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<sup>184</sup> On the "political costs of negative integration" see FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 62 (1999).

<sup>185</sup> Cases C-267 and 268/91, Criminal Proceedings against Keck and Mithouard, [1993] ECR-I-6097, Par. 14.

<sup>186</sup> *Quietlynn Ltd. v. Southend Borough Council*, Case C-23/89, [1990] E.C.R. I-3059. The Court avoided the application of the usual test by finding that the licensing system did not constitute a quantitative restriction at all. *Id.* at I-3081.

explicit deference to national wisdom, the Court strove not to answer the question, and to drop the burden of this ideologically charged inquiry onto the lap of national courts.<sup>187</sup>

Then came the change. In the celebrated *Keck* decision, a French regulation prevented retailers from selling goods below their actual purchase price. Retailers argued before the ECJ that the regulation hindered interstate trade by reducing the volume of French sales of imported products. The Court might have, once more, looked for legitimate State interests justifying the prohibition of sale below cost, and applied in full a *Cassis* analysis. Instead, taking explicit distance from its own settled case law, the Court declined to review the challenged measure. The case rested upon a fine distinction: rules relating to the goods themselves (e.g. packaging or labeling requirements) would indeed fall under the *Cassis* doctrine and require full scrutiny. By contrast, the rule challenged by *Keck* (no sale below cost) was no more than a neutral “selling arrangement,” or modality of sale – allegedly, a totally different category of regulatory intervention. In so far as non-discriminatory, State-mandated selling arrangements would fall outside the scope of Article 30. In other words, they would not have to be reviewed at all.

The doctrinal framework of this holding was not water-tight. Its theoretical balance was unsteady – what is, indeed, a ‘selling arrangement’? The distinction upon which the decision relied was certainly problematic,<sup>188</sup> and has proved of difficulty justiciability in later case.

Nonetheless, prominent scholars have hailed *Keck* as a long overdue confinement of Article 30 to its own proper realm: the elimination of all forms of de-facto protectionism by State regulation. According to Weiler, *Keck* indicates a “willingness on the part of the court openly to acknowledge that its judicial doctrines are rooted in a socio-political and economic reality that changes with time and which calls for revision even of the most hallowed canons.”<sup>189</sup> The hallowed canon in need of revision here was the idea that any hindrance whatsoever of interstate trade would create impermissible obstacles to the thorough economic integration of Europe. Any form of State regulation is always cause for trade diversion or contraction. Even rules relating to selling arrangements, and not to the goods themselves, can affect the volume of merchandise sold, and therefore reduce imports *pro quota*. However, the rules in *Keck* did not offset the principle of non-discrimination of products on the basis of their origin. National protectionism was certainly not at stake. The Court concluded, therefore,

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<sup>187</sup> *Torfaen BC v. B&Q plc*, Case 145/88, [1989] E.C.R. 3851.

<sup>188</sup> CRAIG & DEBÚRCA, *EU LAW*, *supra* note 33, at 620.

<sup>189</sup> J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in *THE EVOLUTION OF EU LAW*, *supra* note 92, 349, at 370. See also MIGUEL POIARES MADURO, *WE, THE COURT. THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* 78 (1998): “The *Keck* decision brought the concept of discrimination back to the heart of Article 30.”

that such rules would be compatible with the logic of the Common Market and properly left to the regulatory vision of national authorities.

The “no-hindrance” pillar of economic integration did not crumble. But it was relieved of architectural burdens that it no longer needed to carry.

The change that I advocate in matters of positive action – an attitude of judicial restraint, in deference to localism—would rest on even firmer ground than the *Keck revirement*, and would bear strong analogies with that judicial move. This change too would prompt the revision (but not the crumbling) of hallowed canons, and relieve the EU principle of equality from the burden of local choices that it is not meant to bear. As in *Keck*, the prohibition of discrimination would stay the same – in the sense that minority groups and each of their members could not undergo biased pejorative treatment – and would continue to rely on the ultimate guarantee of review in Luxemburg. At the same time, the Court would hold back when faced with challenges, brought about by members of non-disadvantaged groups, of national policies tailored to local problems of marginalization and already vetted by local constitutional devices.

### 3. What about rights?

The Union is faced with demands for a higher degree of consistency in the definition of its core values. All of its institutions, and in particular the Court of Justice, are hard pressed to prove their commitment to the rule of law, and to its corollary of equality.<sup>190</sup> The ECJ must be guided by a comprehensive view of justice, and guarantee that EU policies, even when delegated to the member States for implementation, never come to clash with fundamental rights, equal and individual. In a system based on the rule of law, judicial review is the promise that rights will be taken seriously. My argument for the contraction of the ECJ’s scrutiny in matters of affirmative action must therefore grapple with the question of fundamental rights in EU law.

Rights discourse is highly relevant to the debate on affirmative action in two different dimensions. First, positive discrimination on the basis of belonging creates collective entitlements, and demands that the legal system be capable of hosting the category of *group rights*. As observed, this demand often meets with silence or stern disapproval in the official discourse of some member States, where group rights are formally abhorred as at odds with equality. Secondly, there is the issue of protecting the fundamental *individual rights* of those outside of the privileged group. This is the

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<sup>190</sup> See Carol Harlow, *Voices of Difference in a Plural Community*, JEAN MONNET WORKING PAPER NO. 3/00 at III.2: “A further tenet of the formal rule of law principle is the doctrine of equality before the law. Here we have the kernel of the “level playing field” of EC legal rights. Equality as a facet of the rule of law legitimates the EC legal order. [...] Formal equality pays no heed to outcomes.”

stumbling block of such ‘daring’ affirmative schemes as the one at the root of the *Abrahamsson* litigation. Both dimensions of the rights debate require further reflections.

*A. Group rights and beyond.*

In some member States (most notably United Kingdom, Netherlands and Sweden), the language of rights has been put to use for the purpose of accommodating collective interests. These governments share, to some extent, the sense that individual rights are too rough a tool for the design of complex social goals. In this view, “the conception of individual rights... cannot address the sense of injustice that arises ... from structural (economic/social) causation or from the sense of belonging to an oppressed minority.”<sup>191</sup> Ethnic minorities may therefore be granted veritable group rights,<sup>192</sup> taking the shape of enhanced political representation, funding for cultural activities, social benefits, exemption from civic duties, and/or positive action in education and training. The term “rights” here indicates that member of such minorities can claim, both collectively and individually, a given entitlement on the basis of identity or affiliation, and that courts are supposed to uphold such claims. When this is the case, States are said to embrace the model of “multicultural pluralism.” As observed above, Germany and France are not multicultural States in this sense. German governance approaches, at least in its traditional version, a model of “ethnocultural exclusionism,” whereby ethnicity (i.e. German ethnicity) is at the core of civic entitlements. France has long adhered to the model of ‘civic assimilation’ – a label now increasingly replaced by the term ‘integration’ to signify a growing sensitivity towards diversity, while taking distance from the “Anglo-saxon model of communities.”<sup>193</sup> With some notable exceptions, Germany and France tend to deny the possibility of granting group rights.

In Part II above I have discussed the non-conclusive character of dichotomies in equality discourse, highlighted the permeability of *existing* laws to group justice, and pointed out the actual availability of multiple legal schemes for the accommodation of minority interests. I have then offered a different conceptualization of these models. Rather than focusing on the degree of availability of group rights or collective entitlements, enforced and reinforced by courts, I have used “identity-based redistribution” as a unit of measure. By this yardstick, France, Germany and even the Union seem much closer to the multicultural model, in so far as they also acknowledge the relevance of diversity

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<sup>191</sup>Martti Koskeniemi, *The Effect of Rights on Political Culture*, in *THE EU AND HUMAN RIGHTS*, *supra* note 180, 99, at 104.

<sup>192</sup> According to the definitions provided by Offe, *supra* note 1.

<sup>193</sup> For a “typology of minority incorporation,” and analysis of such terms as exclusion, assimilation, integration and multicultural pluralism see Theodora Kostakopoulou, “*Integrating*” *Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms*, 8 *COLUM. J. EUR. L.* 181, at 184-187 (2002).



and belonging in allocating civic and/or economic benefits. Rights discourse does not capture this dimension, because most forms of identity-based redistribution are not the proper subject of legal claims and would not find judicial recognition as lawfully assigned entitlements.<sup>194</sup> Rather, redistribution is the outcome of political processes which can be juridified only up to a point, and should be treated and understood as such in its many manifestations.<sup>195</sup> The EU system accepts the coexistence of equality and redistribution, and is certainly capable of hosting this complexity. In this light, determining whether or not to allow the category of group rights into a given legal system becomes far less relevant.

*B. Individual rights, positive action and new forms of governance.*

The contraction of the ECJ's review in matters of positive action would imply, indeed, a net loss in terms of judicial remedies. Mr. Marschall or Mr. Anderson – the two male candidates who fell ‘victims’ to positive action schemes in the *Marschall* and *Abrahamsson* cases—would have more limited recourse in Luxembourg. To be sure, their claims would not fall in a legal vacuum. Their respective national systems would not cease to provide time-honored mechanisms of review. Positive action would still be confined within whatever boundaries the local law has established. It could still be subject to procedural and base-line scrutiny before the ECJ. It would exceed the substantive scope of ECJ review, but would not leap onto *praeter- legem* soil.

As a matter of fact, these days many EU devices –most noticeably the Open Method of Coordination (OMC) — seem to bypass judicial review, and to be natural targets for the *praeter- legem* critique. The OMC is an Amsterdam-born device to be applied in matters of employment and, after the Lisbon Summit of the European Council, in the fight against social exclusion<sup>196</sup> – obviously a pertinent heading for positive action measures. Remarkably, the elaboration of policies in this field is designed to occur outside of classic supranational procedures.<sup>197</sup> The Union sets common objectives.<sup>198</sup>

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<sup>194</sup> Mary Ann Glendon, *Rights in Twentieth-Century Constitutions: The Case of Welfare Rights*, 6 JOURNAL OF POLICY HISTORY 140, 147 (1994), notices that in Europe one finds more generous welfare in those states in which economic and social rights have no special constitutional prominence.

<sup>195</sup> According to Carol Harlow, *European administrative law and the Global Challenge*, in THE EVOLUTION OF EU LAW, *supra* note 92, 261, at 281, the increasing juridification of EU politics, which seems to many *the* cure to the democratic deficit of the Union, leads to the perversion of “a juridified society where every relationship is governed by rules and where litigation is all-pervasive.” It also stifles the possibility of a rich and plural political discourse. See also Berman, *The International Law of Nationalism*, *supra* note 114, at 57: “[I]t is simply not possible to construct a neutral approach innocent of differential cultural projections and unimplicated in the partisan imposition of power.”

<sup>196</sup> See EXPRO, *Social Exclusion and Social Protection in the European Union: Policy Issues and Proposals for the Future Role of the EU* (2001), available at <http://www.sbu.ac.uk/euroinst/policyreport.pdf>.

<sup>197</sup> On the development of new forms of social governance see Silvana Sciarra, *Social Values and the Multiple Sources of European Social Law*, 1 EUR. L. J. 60 (1995).

But such objectives are to be reached by means of independently drafted national action plans.<sup>199</sup> The Commission, in turn, has the role of promoting comparisons among different State practices and coordination of national plans. Member States retain anyway a high degree of autonomy and flexibility in targeting such problems as poor housing, educational deficit, and exclusion of groups.<sup>200</sup> The introductory note to the European Council's statement of Common Objectives makes clear that:

“setting appropriate objectives should also involve... developing priority actions in favour of specific target groups (for example, minorities...), with Member States choosing amongst those actions according to their particular situations.”<sup>201</sup>

Themes as delicate as the experimentation of formulae for the coexistence of diverse identities and for mainstreaming marginalized groups find adequate reception within this structure of governance. Clearly, this method leaves no room for immediately chastising national policies running astray of the Commission's guidelines. Nor does it provide judicial remedies for those individuals arguably ignored or penalized by State policies. However, rather than being *praeter legem* or undemocratic, the OMC is premised on a “heightened reliance on national democratic credentials.”<sup>202</sup> In a thoughtful commentary, Oliver Gerstenberg highlights the compatibility of the OMC with the logic of a rule-of-law based system – most importantly, with the need to provide a forum for individual dissenters' complaints:

“If a State is subject to a critical recommendation for breach of policy guidelines, deliberate non-compliance may rather be a response to the ambiguity of the guidelines themselves and may be reinterpreted as a move in an argumentative game, in which new facts – perceptions of situation, need and interest—are being fed into the rolling process of (re)defining the guidelines themselves. Conversely, dissenters within a non-complying State may draw on the pool of arguments underlying a EU-guideline in order to reignite a debate on their Member-State's policy orientation – and in doing so contribute to the emergence of a European public sphere. The OMC stresses, on the one hand, the importance of diversity and context-sensitivity at the national level ... and, on the other hand, the importance of ... a search for a common approach...”<sup>203</sup>

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<sup>198</sup>These Common objectives were identified by the European Council Summit of Lisbon (March 2000).

<sup>199</sup> Member states have dutifully articulated such plans for the first time in the year 2001.

<sup>200</sup>“The OMC is commonly described as a process working in four stages: first, EU ministers agree on policy goals in the policy area concerned; second the guidelines are translated by member states into national and regional policies with specific targets; third, the ministers agree on benchmarks and indicators in order to measure and to compare best practice within the EU and world-wide; fourth, through evaluation and monitoring, member states' performance is assessed, relative to each other and to their declared goals.” Oliver Gerstenberg, *The New Europe: Part of the Problem – or Part of the Solution to the Problem?* 22 OXFORD J. LEGAL STUD. 563 (2002).

<sup>201</sup> [http://europa.eu.int/comm/employment\\_social/soc-prot/soc-incl/com\\_obj\\_en.htm](http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/com_obj_en.htm)

<sup>202</sup> Gerstenberg, *supra* note 200.

<sup>203</sup> Gerstenberg, *supra* note 200. See also Fritz W. Scharpf, *European Governance: Common Concerns vs. The Challenge of Diversity*, Max Planck Institute for the Study of Societies, MPIFG WORKING PAPER 01/6, September 2001, <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp01-6/wp01-6.html>

Structural funds provide an analogous example of deference to member States' choices in redistributive matters. It is at the level of national governments that candidate areas for structural intervention are selected. The Commission's role in the final choice is quite limited, and in any case the judicial review of Commission's decisions in such matters can add very little in terms of substance.<sup>204</sup> Similar forms of development outside the sphere of substantive judicial review are to be found in many pockets of the Treaty. Scholars have noticed how both comitology and independent agencies stand outside of the traditional framework of supranationalism and, most importantly, how much of their daily activity is exempt from judicial scrutiny. Formal-legal accounts of EC law tend to ignore or obscure this fact.<sup>205</sup> The academic argument for further accountability or juridification of new governance calls for tighter procedural control, and for continued protection of constitutional rights,<sup>206</sup> but not for ultimate definition of decisional outcomes.

The question is whether the ECJ can maintain the solidity of its institutional role, while keeping a looser supranational grip on some social aspects of EU governance.

Consolidated practices of adjudication demonstrate that it certainly can. The theme pervading most of the examples above is redistribution of public resources. Redistribution, or distributive justice, is only marginally touched upon by justiciable EC rights. "Social rights" do exist at a supranational level, but at present they do not define the ultimate content of welfare choices implemented nationally or subnationally throughout the Union. The current model can be described as one combining a core of justiciable EC social rights with a set of entitlements which exceed the scope of supranational judicial review. These entitlements, in turn, consist of a combination of social rights granted by national laws and a mix of supranational, State-based or sub-national policies which do not give rise to judicial claims, and materialize within the realm of political action. Against this mixed background, the role for supranational law in welfare matters remains fundamental in both form and substance.

In terms of substance, enforceable EC law can guarantee the achievement of minimum common goals throughout the Union, and ensure the justiciability of core social claims. The Union is currently in the process of articulating its social conscience, and of bringing to the fore the redistributive streak of its economic agenda.<sup>207</sup> Justiciable EC rights reflect the current degree of

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<sup>204</sup> For valuable insights on this topic see Joanne Scott, *Regional Policy: An Evolutionary Perspective*, in THE EVOLUTION OF EU LAW, *supra* note 92, at 625, especially at 632 and 637.

<sup>205</sup> Gráinne De Búrca, *The Institutional Development of the EU: A Constitutional Analysis*, in THE EVOLUTION OF EU LAW, *supra* note 92, 55, at 61.

<sup>206</sup> De Búrca, *The Institutional Development*, *supra* note 205, at 69. Michelle Everson, *Independent Agencies: Hierarchy Beaters?*, 1 EUR. L. J. 180 (1995).

<sup>207</sup> Miguel Poiares Maduro, *Europe's Social Self: "The Sickness unto Death"*, in SOCIAL LAW AND POLICY, *supra* note 6, at 325.

consensus that the supranational forum can provide in matters of welfare benefits for workers and citizens in general.<sup>208</sup> If and when the package of social rights, as defined in the European Charter, becomes enforceable, the substantive role of the European Courts in this respect will be all the more important. But it is clear, at present, that this core does not and cannot define the upper limits of locally designed social measures.

In terms of form, supranational law supplies necessary procedural guarantees for the implementation of new ways of governance. By providing process review on these matters, the European Courts supervise the distribution of responsibilities amongst States and EU institutions as partners in decision-making,<sup>209</sup> with the goal of promoting the democracy and transparency of new governance mechanisms. At this level too, the judicial scrutiny of the European Courts stays essential and non-abdicable.<sup>210</sup>

### **Concluding Remarks**

Identity-based redistribution, as it materializes through positive action schemes, belongs in the list of those welfare devices around which, at present, the ‘classic Community method’ is not likely to yield consensus.<sup>211</sup> The widely different perceptions of multiculturalism in the several member States are certain to become even more diverse in the wake of enlargement. Given the panoply of current arrangements and the multiplicity of political and scholarly proposals on such matters, national and sub-national governments are bound to diverge significantly in their choices of legal or political tools for rehabilitating marginalized groups. Some will resort to legal entitlements reinforced by judicial

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<sup>208</sup> According to some, at present, “it would be neither practical, political, nor desirable for the Community to attempt to create a welfare State at EU level, even post-EMU.” Catherine Barnard, *EC ‘Social’ Policy*, in *THE EVOLUTION OF EU LAW*, *supra* note 92, 479, at 509. In the view of others, it is highly auspicious for Europe to develop a set of enforceable, and not merely programmatic, social rights. Because the logic of integration involves, inevitably, redistribution, the Union should take upon itself the responsibility of achieving consensus on basic lines of distributive justice, and translate such lines in individual entitlements for European citizens. Maduro, *The Sickness*, *supra* note 207.

<sup>209</sup> For an example of judicial review of Commission decisions on structural funds see *An Taisce and WWF (UK) v. Commission*, Case T-461/93, [1994] E.C.R. II-733 and Case C-325/94P, [1996] E.C.R. I-3727, insightfully analyzed by Scott, *Regional Policy*, *supra* note 204, at 625.

<sup>210</sup> Erika Szyszczak, *The New Paradigm For Social Policy: A Virtuous Circle?*, 38 *COMMON MKT. L. REV.* 1125 (2001), points at the need for accountability, transparency and protection of constitutional rights as ways to shed light on the “dark side” of the new forms of governance ( at 1170).

<sup>211</sup> Scott & Trubek, *supra* note 4. See also David M. Trubek and James S. Mosher, *New Governance, Employment Policy and the European Social Model*, forthcoming in *GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* (Jonathan Zeitlin & David Trubek eds., 2003): “Despite some Europeanization in social policy, most of the final decisions on the future of the welfare state will be taken by national governments.” (p. 26 of the typescript, available at <http://wiscinfo.doit.wisc.edu/eucenter/Publications/ztbody.htm>).

protection. Others will boost the political mobilization of minorities without ever juridifying their claims.<sup>212</sup> Others still will devise complex blends of legal and political mechanisms for targeting identity-based marginalization. Along the spectrum of decentralization, some will let municipalities take charge of decision-making in this respect. Others will cling to uniform national policies. Others still will foster transnational solutions.<sup>213</sup> The field is clearly one of “politically salient diversity,”<sup>214</sup> which cannot be reduced to univocal formulae for centralized judicial review.

A *rebus sic stantibus* clause applies here with vigor. Things might change upon achievement of a further stage of integration, with a bulky set of enforceable EC social rights, a thoroughly harmonized immigration policy, and a deeper degree of consensus on the meaning and value of multicultural diversity. With thicker *demos* and clearer *telos*,<sup>215</sup> the jurisdiction of the European courts might go well beyond the task of setting floor-levels of social protection, and move on to the design of ceilings. Judicial scrutiny of positive action might then be plausibly held in Luxembourg. At that point, we would have to worry about striking a new balance between localism and decentralization.<sup>216</sup> At that point, we might want to converge towards one uniform understanding of social justice, or towards one coherent vision of welfare and equality to be ultimately endorsed and protected by one Court.<sup>217</sup> At that point, we might want to focus on how to improve the dialogue between the ECJ and the Union’s periphery, or look at federal experiences in other countries for inspiration on how to deal with diversity. But that is another story.

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<sup>212</sup> For an insistence on political mobilization rather than juridification of claims see Koopmans & Statham, *supra* note 140.

<sup>213</sup> Riva Kastoryano, *Transnational Participation and Citizenship: Immigrants in the European Union*, TRANSNATIONAL COMMUNITIES WORKING PAPER SERIES, Oxford University, December 1998.

<sup>214</sup> Scharpf, *European Governance*, *supra* note 203.

<sup>215</sup> I use these terms in the non-*volkish*, non-organic, but value-driven dimensions conceived by Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219, 253-256 (1995).

<sup>216</sup> In the US, according to some supporters of affirmative action, the recipe for an adequate balance between social experimentation at the periphery and centralized judicial review consists of improving and augmenting the input from local actors into the decision making process of the US supreme court. See Clark D. Cunningham, Glenn C. Loury & John David Skrentny, *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, in 90 GEO. L. J. (2002).