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The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.

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THE POLITICAL ECONOMY OF RECOGNITION: AFFIRMATIVE ACTION DISCOURSE AND CONSTITUTIONAL EQUALITY IN GERMANY AND THE U.S.A.

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I. INTRODUCTION

This paper undertakes a comparative exploration of affirmative action discourse in German and American constitutional equality law. The first task for such a project is to acknowledge an important threshold dilemma. The difficulty in question derives not so much from dissimilarities between the technical legal structures of German and American affirmative action policy. The problem stems rather from the different social grounds and groupings on which those legal structures have been erected. Because German "positive action"[1] applies only to women, gender and its cultural meanings have constituted the paradigmatic subject of the policy. The legal discussion of positive action has always taken its point of reference from broader political debates about the position of women as a social group in contemporary German society. Indeed, in Germany, positive action discourse *is* a discourse about the status of and relations between men and women.

Like German positive action policy, U.S. affirmative law has from its inception included women among its beneficiaries. However, the background social vision and cultural meanings that have informed American affirmative action discourse could not be more different. Although affirmative action policy in the U.S. has always applied to women, questions of gender and gender equality have been marginal to the legal discourse that has grown up around the subject. For example, in the twenty years since the first of its many forays into the field, the U.S. Supreme Court has only once squarely considered the legality of gender-based affirmative action programs.[2] Even then, the Court did not explicitly address the *constitutional* dimensions of gender-based affirmative

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[1] In Germany, as in Europe more generally, "positive action" is the preferred designation for policies that in the U.S. are labeled affirmative action. For an exploration of the conceptual meaning of "positive action" and related terms, see Teresa Rees, Mainstreaming Equality in the European Union 26-48 (1998).

[2] Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 107 S.Ct. 1442 (1987).

action, but confined its discussion to the legitimacy of such programs under Title VII of the Civil Rights Act of 1964.

The relative silence regarding gender-based affirmative action that one finds in U.S. case law can also be seen in the broader political debates of which the Supreme Court's jurisprudence is a part. In the United States, the discussion of affirmative action has revolved almost exclusively around race; conversely, the national conversation about racial equality has increasingly (and rather reductively) focused on affirmative action. To the extent that gender has figured at all in U.S. affirmative action discourse, it has for the most part been trapped in, or refracted through, the interstices of race.[3] The peculiar and persistent prominence of race in American law and politics thus forces a comparative critical analysis of affirmative action discourse in the U.S. and Germany to follow a strategy of inference and indirection.

Accordingly, unlike the discussion of German law which follows it, the account of U.S. affirmative action policy developed here proceeds primarily through an analysis of Supreme Court case law on the constitutionality of race-based affirmative action. After a brief overview of the legal and political context in which U.S. affirmative action was born, I examine the vicissitudes of affirmative action policy in the constitutional jurisprudence of the Supreme Court. Although the relevant decisions have had little or nothing to say about gender as such, a reading of the cases suggests that gender-based affirmative action and contemporary equality doctrine are moving rapidly toward a constitutional collision. The crucial question is whether gender-conscious affirmative action programs will be able to withstand the impact that has so debilitated its race-based counterpart.

My survey of the American constitutional landscape clears the ground for the comparative observations offered in the paper's final section. There I compare and contrast the U.S. judicial discourse on affirmative action with two recent

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[3] An instructive instance can be found in the political skirmishes over Initiative 200, a measure to forbid affirmative action programs in Washington state. In the weeks leading up to the vote, opponents of the proposed initiative organized a campaign focused on the effects it would have on employment and declare educational opportunities for *women* in the state. The strategy was no doubt motivated in part by survey evidence which showed an 11 percent increase in over-all support for affirmative action among respondents who were queried about gender-based, as opposed to race-based versions of the policy. Supporters of the Washington initiative were soon forced to openly play the race card. John Carlson, a talk show host and leader of the initiative campaign, complained that opponents of the measure "are trying to make this a gender issue, rather than an issue of racial preferences, which is most of what is encompassed by [Proposition] 200." Michelle Ackerman, a spokeswoman for the No!200 campaign, responded that "affirmative action is primarily a gender issue in this state. It is a woman's issue. The primary beneficiaries of affirmative action in this state are white women. So that is what we should be discussing." The public relations strategy devised by the opponents of Initiative 200 was ultimately unsuccessful. The measure won the approval of a majority of Washington voters in November, 1998. Sam Howe Verhovek, In a Battle Over Preferences, Race and Gender are at Odds, N.Y. Times, October 20, 1998, at A1. For press accounts of the referenced survey evidence, see L.A. Times, March 30, 1995, at A1; Atlanta Constitution, August 6, 1995, at 1B (Cited in Adeno Addis, On Human Diversity and the Limits of Toleration, *in* Ian Shapiro and Will Kymlicka, Ethnicity and Group Rights 112, 147, at note 33 (1997)).

judgments from the Court of Justice of the European Communities.[4] Although it draws on a common conceptual lexicon, from an American perspective, the positive action jurisprudence of the ECJ seems to charting a very different course than the U.S. Supreme Court. This divergence, I argue, cannot be fully explained by the fact that the European Union (EU)[5] positive action cases have focused exclusively on issues of gender equality. I suggest that the unique political dynamics of the European Union have prodded the ECJ closer toward a more substantive conception of constitutional equality. As we shall see, this structural understanding has (for the most part) been resisted in American law. However, given its still tentative character, one may well wonder whether the ECJ will embrace this substantive approach outside the context of gender. Using the current German debates about race, ethnicity and citizenship as an example, the paper ends with a few remarks on the challenges that EU positive action discourse will likely face in the coming years.

II. THE CONSTITUTIONAL "PRE-HISTORY" OF AFFIRMATIVE ACTION IN THE U.S.

The starting point for any critical account of American affirmative action jurisprudence is the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[6] As Gerald Neuman notes in his contribution to this Symposium, the animating purpose of the Equal Protection Clause was to address the myriad discriminations to which Southern state and local governments subjected their African-American citizens. However, the generality of the language in which the provision was framed quickly led to disputes about its meaning and application. These disputes inevitably made their way to the U.S. Supreme Court. In the decades following its adoption, the Supreme Court increasingly limited the scope of the Equal Protection Clause in a series of doctrinal deformations that culminated in the now infamous decision in *Plessy v. Ferguson*.[7] Deploying an ambiguous "reasonableness" standard, the Court upheld a Louisiana statute requiring railroad companies to provide "equal but separate accommodations for the white and colored races." The *Plessy* Court rejected the argument that state mandated racial segregation on passenger railway trains violated the Equal Protection Clause. In the Court's view, that argument stemmed from two errors. The first alleged error was a failure to distinguish between "civil," "legal" or "political" equality, which were guaranteed under the Fourteenth Amendment, and "social" equality, which was not. The second was the notion, deemed "fallacious" by the Court, that "the

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[4] For the sake of concision, I henceforth refer to this institution as the "Court of Justice" or the "ECJ".

[5] The Treaty on European Union [TEU] of 1991 renamed the "European Economic Community" the "European Union." Although some of the materials to which I refer pre-date the 1991 change, for the sake of consistency, I shall use the more recent designation throughout this discussion.

[6] The Equal Protection Clause reads, in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

[7] Plessy v. Ferguson, 163 U.S. 537 (1896).

enforced separation of the two races stamps the colored race with a badge of inferiority."[8] For the *Plessy* Court, so long as it was not "unreasonable" and applied equally as a formal matter across the color line, state compelled racial discrimination with respect to "social" matters could not be said to contravene the constitutional right to equal protection of the laws.

The Court's interpretation of the Equal Protection Clause drew a stinging rebuke from the sole dissenting justice in *Plessy*. Justice John Marshall Harlan rejected the notion that the Louisiana law's equal applicability to "white and colored citizens" in any way satisfied the requirements of equal protection. For Harlan, the challenged law could not be divorced from its social context. The *Plessy* majority had ignored an incontrovertible social fact: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[9] Although he agreed that the "white race" could rightly consider itself "to be the dominant race in this country," Harlan denied that this social dominance could be read into the text of the Fourteenth Amendment. "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens."[10] Harlan insisted that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." Under the American constitutional order, "all citizens are equal before the law. [. . .] The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."[11]

The *Plessy* decision marked the Court's ratification of a national retreat from policies associated with the post-Civil War Reconstruction that had begun several years before. The decision served as a crucial cornerstone around which state and local governments (not only in the South) constructed a comprehensive system of legalized racial segregation. In the years after *Plessy*, the reach of racial apartheid would extend into almost every area of American life.

The most important doctrinal dimension of *Plessy* lies its limitation of the equality principle to a rule of formally symmetrical treatment. The most important political dimension of the decision was the Court's apparent acquiescence in the fact that its acontextual, formalist interpretation of the equal protection principle would permit (if not encourage) the use of law to maintain the radically unequal material conditions to which Black Americans in the South and elsewhere had historically been consigned. For decades to come, the racial state to which the *Plessy* Court had given judicial legitimacy would remain all but impervious to constitutional attack under the Equal Protection Clause.

The first cracks in the doctrinal edifice the Court had erected in *Plessy* appeared in the late 1930's. In a series of cases challenging the constitutionality of racial segregation in public education, the Court put increasing pressure on

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[8] Id., at 551.

[9] Id., at 557.

[10] Id., at 559.

[11] Id., at 559.

the "separate but equal" approach for which *Plessy* had come to stand. The most famous of these cases was the 1954 decision in *Brown* v. *Board of Education of Topeka*.[12] In *Brown*, the Supreme Court held that state mandated segregation was "inherently unequal" in the field of public school education and thus forbidden under the Equal Protection Clause.

The *Brown* opinion has come to be read as an emphatic rejection of *Plessy*. That claim, however, requires considerable qualification. As an initial matter, the *Brown* Court remained curiously silent about the precise standard of constitutional review under which race-specific laws and policies were to be evaluated. In its 1944 decision in the *Korematsu* case, the Court had held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[13] However, formally speaking, the legal regime of racially segregated public school education at issue in *Brown* was quite different from the exclusion orders challenged in *Korematsu*. By its terms, the "separate but equal" policy that the Court struck down in *Brown* affected *all* racial groups; the exclusion orders upheld in *Korematsu* were much narrower in their reach. Since the *Brown* opinion declined to say whether the Court was adopting the "suspect classification" theory announced in *Korematsu*, it remained unclear whether the rule of "reasonableness" deployed in *Plessy* was still the controlling standard of constitutional review in racial equality law. Further, *Brown* betrayed a stunning lack of clarity regarding the precise normative theory of the Equal Protection Clause that underwrote the opinion. Although *Brown* could and would come to be construed as an endorsement of the "color blindness" principle of Harlan's dissent in *Plessy*, the actual language of the opinion was much more ambiguous. In the era of affirmative action, the *Brown* Court's silence regarding these two aspects of *Plessy* would make its pronouncements on the meaning of constitutional equality an object of heated dispute.

Moreover, a number of contemporary commentators have noted just how much of the underlying formalism of the *Plessy* decision the *Brown* Court left undisturbed.[14] At the doctrinal level, *Brown* left little doubt that the "separate but equal" principle had sustained a mortal blow. At a deeper conceptual level, however, *Brown* in no way challenged the notion that the guarantee of the Fourteenth Amendment was essentially a guarantee of formal legal equality. Nothing in *Brown* provided a constitutional basis for attacking the many and massive material disparities between public schools in white and black neighborhoods which could not be directly attributed to race-based

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[12] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). In the companion case of *Bolling v. Sharpe*, handed down the same day as Brown, the Court invalidated the federal government's maintenance of racially segregated schools in the District of Columbia. Bolling v. Sharpe, 347 U.S. 497 (1954). The Court read the Due Process Clause of the Fifth Amendment to impose limits on the federal government that were substantially the same as those to which the Equal Protection Clause of the Fourteenth Amendment bound the several states.

[13] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[14] Kimberlé Williams Crenshaw, Color Blindness, History and the Law, *in* The House That Race Built 280, 283-284 (Wahneema Lubiano, ed., 1997); Cheryl I. Harris, Whiteness as Property, 106 Harvard L. Rev. 1710 (1993).

discrimination in education law, even where these structural inequalities could be linked to "racial effects" in areas such as housing, employment, tax, or labor law: the continuing subordinate social and economic status of African-Americans remained beyond the scope of the Equal Protection Clause. While *Brown* may have limited the logic of *Plessy*, it refused to reject *Plessy*'s restriction of the Equal Protection Clause to a guarantee of formal equality. The chief conceptual distinction between the two decisions lies in their differing views regarding the constitutional legitimacy of racial categorization. Where *Plessy* upheld racial classifications so long as they were equally applied on both sides of the color line, *Brown* found such classifications invalid even if their formal impact was the same across the racial divide. Put another way, the *Plessy* Court read the Fourteenth Amendment to permit color-consciousness; the *Brown* Court appeared to read the Equal Protection Clause to require color-blindness. The crucial point to be noted here is that both decisions construe the concept of equality in simple, rather than more complex terms. In *Plessy* and *Brown*, the target of the Fourteenth Amendment was understood to be the formal use of racial *classifications*, not the subordinate material situation of an identifiable racial group or *class*.

III. THE POLITICAL GENEALOGY OF AMERICAN AFFIRMATIVE ACTION LAW

Within a few short decades, the rule of racial non-recognition announced in *Brown* would become the chief battleground in a fierce ideological war over the meanings of constitutional equality, especially with respect to affirmative action. The origins and early evolution of affirmative action policy in the U.S. are myriad and complex. A detailed chronicle of affirmative action is beyond the scope of this paper.[15] For our purposes, it is enough to note the key historical episodes in the policy's elaboration during the 1960's and 1970's, which emerged in response to the ongoing campaign by black Americans and their allies to force the national government to move more quickly along the road of racial progress.

At the national level, the inaugural moment in this history was the 1961 Executive Order signed by President John F. Kennedy. Kennedy's order created the President's Committee on Equal Employment Opportunity (PCEEO), a largely ineffective body whose special mandate was to supervise government contractors in order to ensure that they did not discriminate on the basis of race. The Kennedy Order empowered the PCEEO to take "affirmative action" to prevent the use of race, creed, color, or national origin from entering into the hiring process. Although this language was at base no more than a synonym for color blindness, the important point to be noted here was that it marked the entrance of affirmative action into the lexicon of civil rights discourse.

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[15] For an excellent history of race-based affirmative action policy see John David Skrentny, The Ironies of Affirmative Action: Politics, Culture, and Justice in America (1996).

A second key moment in the early history of affirmative action is President Lyndon B. Johnson's 1965 Executive Order, which established the Office of Federal Contract Compliance (OFCC). Like Kennedy's order, the Johnson Order required that "affirmative action" be taken to promote equal racial opportunities in the field of government contracting. In a series of "special area plans" that were designed to enforce compliance with construction contracts, the OFCC required firms to actively recruit, hire and train applicants from racial minorities. During the Johnson presidency, the notion of affirmative action would gradually evolve into a race-conscious, numbers-oriented policy approach.

Even more important than his Executive Order, however, was Johnson's role in orchestrating the passage by Congress of federal legislation opening up labor markets, public accommodations, and voting rights to racial minorities. The centerpiece of this unprecedented legislation was Title VII of the Civil Rights Act of 1964, which forbade employers "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin."[16] To ensure compliance with Title VII, Congress created the Equal Employment Opportunity Commission (EEOC), which would become the most powerful enforcement agency in the field of civil rights law. Although its enabling legislation specifically prohibited "preferential treatment to any individual or group," in time the EEOC would become frustrated with the limitations of the color-blindness model on which Title VII was based. Those frustrations eventually came to be shared by the federal judiciary. At the EEOC's urging, federal courts gradually began to expand the reach of Title VII by using judicial power not merely to guarantee formal equality of opportunity, but to achieve objective material results. The shift toward this explicitly race-conscious interpretation of Title VII stemmed not so much from a philosophical aversion to the ideal of color blindness as from a pragmatic realization that the language of the legislation still made it possible for employers to engage in racially discriminatory practices that plaintiffs would find it difficult to prove. Affirmative action thus came to be seen as the only realistic response to the inadequacies of the color blindness approach. As the Seventh Circuit Court of Appeals stated in one case, "[w]e believe that [race-conscious] numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of . . . [employers] to move employment practices in the direction of true neutrality."[17] Although neither the EEOC nor the courts had developed anything resembling a coherent theory of the relationship between race-specific affirmative action and the equality principle, the gradual consolidation of a pragmatic consensus regarding the limits of color-blindness represented an important step in the interpretation of Title VII, and in the early history of affirmative action policy.

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[16] Title VII of the Civil Rights Act of 1964, Section 701 et seq., as amended, 42 U.S.C. Section 2003 et seq. Interestingly, the Civil Rights Act was enacted pursuant to Congress' power, under the Commerce Clause of the Federal Constitution, to regulate commerce among the several states. U.S. Const., art. I, § 8, cl. 3.

[17] Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2nd 680, 686 (7th Cir. 1972).

The third and most decisive moment in the formulation of contemporary affirmative action policy was made by President Richard M. Nixon. As one commentator has noted, Nixon "did more than any other president to promote and *institutionalize* affirmative action."[18] It is now generally agreed that Nixon's support of affirmative action stemmed from mixed motives—he saw affirmative action as a wedge with which to drive white Southern and working class Democrats into the arms of the Republican Party.[19] Nonetheless, the fact that race-based affirmative action received its most progressive and explicit formulation by a Republican President did much to secure its ideological legitimacy as a tool for achieving racial equality.

IV. RACE-BASED AFFIRMATIVE ACTION IN THE U.S. SUPREME COURT

By the time the Supreme Court first squarely addressed affirmative action's constitutional dimensions in 1978, it had been adopted in various forms at both the national and state levels. Affirmative action law and policy very quickly grew beyond an initial focus on employment practices and public work contracts to include a number of other areas. Indeed, the Court's first full consideration of affirmative action involved the use of the policy in public university admissions. In *Regents of the University of California v. Bakke*,[20] the Court heard an appeal in a case challenging a program aimed at increasing the enrollment of minority students at the University of California Davis medical school. Under the program, sixteen of the school's seats were reserved each year for members of racial minority groups who were deemed to have suffered economic or educational deprivation. Alan Bakke, a white applicant who had been denied admission to the medical school, filed suit challenging the legality of the Davis admissions policy on constitutional and statutory grounds.

As one study of the subject has noted, the *Bakke* decision provides an exemplary instance of the "divisiveness and fragmentation"[21] that has marked the Supreme Court's interventions in affirmative action policy. In the years since *Brown*, the Supreme Court's racial equality jurisprudence had become a complexly plaited strand of divergent precedents. By the time it took up the issue raised in *Bakke*, the Court's decisions could be read to support at least three different and conflicting interpretations of the Equal Protection Clause. The first interpreted the Constitution to embody a categorical requirement of color blindness. The second took the view that race-conscious classifications may be justified only upon a showing that they will advance compelling government

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[18] Troy Duster, Individual Fairness, Group Preferences, and the California Strategy, 55 Representations 41 (1996) (emphasis in original).

[19] See id.; Skrentny, supra note 15; Kenneth O'Reilly, Nixon's Piano: Presidents and Racial Politics from Washington to Clinton (1995); H.R. Haldeman, The Haldeman Diaries: Inside the Nixon White House (1994); John D. Ehrlichman, Witness to Power: The Nixon Years (1982).

[20] See Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[21] See Michel Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry 168 (1991).

interests, such as the granting of relief to specific victims of demonstrated racial discrimination. The third position held that the Equal Protection Clause does not forbid the use of racial categories which aim to eliminate the continuing current effects of past discrimination.[22] In the words of one commentator, "the first position would seem to bar all racial preferences; the second, to confine them to purely compensatory situations; while the third one would seem to sanction a much broader use of preferential treatment at least in part justified by distributive concerns."[23] In practice, each of these views has entailed radically competing constructions of the constitutional text and rival standards of constitutional review. More fundamentally, each embodies deeply antagonistic understandings of the equality principle itself.

In *Bakke*, four members of of the Court thought that the UC Davis program violated Title VI of the 1964 Civil Rights Act and would therefore have avoided the question of its constitutionality, since the case could be disposed of on narrower statutory grounds. This group of justices was outvoted by the other five members of the Court, who took the view that affirmative action is constitutional in certain circumstances.

However, the *Bakke* majority could not agree on what those circumstances were, or on the appropriate standard of review by which their constitutionality might be assessed. Four of the Justices who voted to uphold the UC affirmative action program would have applied an "intermediate" level of scrutiny to the Davis admission policy.[24] Significantly, this standard had found its first and fullest expression in the Court's gender discrimination jurisprudence.[25] As its name suggests, "intermediate scrutiny" may be situated somewhere between the deferential "rational basis" standard applied in challenges to "ordinary" (typically economic) legislation and the more exacting "strict scrutiny" test that the Court had by then deemed appropriate for race-specific statutes which disadvantage racial minorities. As Justice Brennan wrote in justifying his choice of evaluative standard:

> [Because] of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.[26]

Brennan argued that, in this instance, the use of racial classifications to remedy prior discrimination satisfied the requirements of intermediate scrutiny. On

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[22] See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harvard L. Rev. 1189, 1273 (1987).

[23] Rosenfeld, supra note 21, at 143.

[24] [24] *Bakke*, 438 U.S., at 359; but see id., at 361-62 (suggesting strict scrutiny is proper review standard).

[25] Craig v. Boren, 429 U.S. 190 (1976).

[26] *Bakke*, 438 U.S. at 361.

Brennan's account, the Davis medical school's consideration of the race of student applicants was directed toward a "benign" purpose of removing "the disparate racial impact . . . [produced by] past discrimination."[27] Brennan further noted that no evidence had been adduced that the Davis admissions program stigmatized any group or individual. Accordingly, Justice Brennan and the three of his colleagues who joined his opinion found no violation of the Equal Protection Clause.

The third and controlling vote in *Bakke* was that of Justice Louis Powell, who announced the judgment of the Court. Unlike the other members of the *Bakke* majority, Justice Powell took the position that all racial classifications—including those employed to benefit racial minorities—were suspect and thus subject to a uniform standard of heightened or "strict" scrutiny. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[28] Powell conceded that the University of California had a "legitimate and substantial" interest in addressing the present effects of prior discrimination. Nevertheless, he maintained that the Davis program was constitutionally flawed, since it had not been based on any judicial, administrative or legislative findings of prior discrimination. For Justice Powell, although the medical school's interest in securing a diverse student body warranted some consideration of race in the admissions process, that interest could not justify the split system under which white applicants were denied a chance to compete for certain seats. Accordingly, Justice Powell agreed with the four of his colleagues who believed that the existing admissions plan was illegal. Unlike those justices, however, Powell squarely based this conclusion not on statutory, but on Fourteenth Amendment constitutional grounds. On the other hand, Powell joined with Justice Brennan and his colleagues in refusing to enjoin categorically all use of racial classifications. Powell proposed an alternative to the Davis program that would permit a university to view an applicant's race as a "plus," so long as the consideration of race did not effectively "insulate the individual from comparison with all other candidates for the available seats."[29]

Beneath the doctrinal disagreements in *Bakke* lay a more fundamental dispute about the socio-cultural meanings of constitutional equality. The divergent understandings the Court brought to the case found their most revealing expression in the conceptual foundations on which the Justices staked out their positions on the relevant doctrinal issues. In the course of explaining their positions, each of the Justices who wrote in *Bakke* thought it necessary to offer the nation a brief seminar on the racial history of the United States. The lessons they drew from that past, however, differed markedly in accent and emphasis.

Consider in this connection the historical accounts that structure the opinions of Justices Powell and Brennan. Justice Powell conceded that, as an historical matter, the "one pervading purpose" behind the Fourteenth Amendment was

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[27] Id., at 369.

[28] Id., at 291.

[29] Id., at 317.

"the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from those who had formerly exercised dominion over him."[30] Nonetheless, the fact that the Framers of the Equal Protection Clause "conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority' "[31] was, for Powell, far from dispositive in the case at hand. To secure this claim, Powell recurs once more to history. On Powell's historical account:

> During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.[32]

As a rhetorical matter, Powell's conflation of the very different and divergent histories of "racial" and "national" difference in the United States is crucially linked to the doctrinal framework that leads him to reject the UC Davis program on constitutional grounds. For Justice Powell, the entrenched subordination of African slaves and their descendants is essentially no different from the "prejudices" directed at other "minority groups." In this reading of the history of disadvantage in the United States, the very "concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments."[33] To be sure, Justice Powell does concede (in a footnote) that "[n]o one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups."[34] In Powell's view, however, this history of "societal discrimination" does not justify "the artificial line of a 'two-class' theory"[35] that would draw a doctrinal distinction between "benign" and "invidious" racial classifications. Powell also rejected the notion that this "two-class theory" (so-called) could legitimately be deployed to "evaluate the extent of the prejudice and consequent harm suffered by various minority groups"[36] in order to determine "which groups . . . merit 'heightened judicial solicitude' and which [do] not."[37] If the meaning of the Equal Protection Clause is not to be hitched to "the ebb and flow of political forces,"[38] the standard of judicial review in the Court's racial equality jurisprudence must "remain constant."[39] Moreover, "justice"[40] for "innocent persons"[41] such as Allan Bakke

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[30] Id., at 291 (quoting *The Slaughter-House Cases*, 16 Wall. 36, 71 (1873)).
[31] Id., at 293.
[32] Id., at 292.
[33] Id., at 295.
[34] Id., at 296 n. 36.
[35] Id., at 295.
[36] Id., at 296.
[37] Id., at 296-297.
[38] Id., at 298.
[39] Id., at 299.
[40] Id., at 298.

demands a similar constancy in the interpretation of the equality principle itself. As Justice Powell put it, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[42]

In explaining his approach to the case, Justice Brennan offered a markedly different account of the relevant history, and its constitutional implications. Brennan prefaced his discussion of the issues with the reminder that although

> [o]ur Nation was founded on the principle that 'all men are created equal[,]' . . . . candor requires acknowledgment that the Framers of our Constitution . . . openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our 'American Dilemma' . . . . [I]t is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race and color.[43]

Justice Brennan then connected that historical background with the doctrinal question before the Court:

> Claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and . . . need not . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[44]

Because "officially sanctioned discrimination is not a thing of the past,"[45] argued Brennan, the Court did *not* distort the meaning of the Equal Protection Clause in permitting race-conscious policies whose purpose was "not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . . ."[46] For Brennan, this interpretation of the Fourteenth Amendment fully comported with the Court's own precedents. The notion, "summed up by the shorthand phrase '[o]ur Constitution is color-blind,' " that race is always and everywhere constitutionally irrelevant, insisted Brennan, "has never been adopted by this Court as the proper meaning of the Equal Protection Clause."[47] The crucial question was whether the Fourteenth Amendment required all race-based classifications to be assessed under the same strict standard. Brennan thought not, particularly when, as in *Bakke*, the constitutional challenge to the use of racial categories had been brought by a member of a group that lacked any of the "traditional indicia of suspectness" that would warrant heightened scrutiny. As a social group, white Americans are not "saddled with

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[41] Id., at 298.
[42] Id., at 289-290.
[43] Id., at 327.
[44] Id., at 327.
[45] Id., at 327.
[46] Id., at 325.
[47] Id., at 355.

such disabilities, or subjected to such a history of powerful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[48] Accordingly, the more permissive standard of intermediate scrutiny could be appropriately applied to the Davis admissions program.

By failing to produce a majority opinion in *Bakke,* the Court further clouded an already opaque doctrinal landscape. Despite their rhetorical exertions, neither flank of the Court fully came to grips with the fundamental problem presented in *Bakke*. That problem is the root tension between affirmative action in *any* form, on one hand, and the idea of "anti-discrimination," on the other. By the time the Court took up *Bakke*, the normative postulate of anti-discrimination had arguably become *the* mediating principle in judicial interpretation of the Equal Protection Clause.[49] Indeed, it would not be too much to say that the Court's jurisprudence could be read as asserting something like a conceptual connection between equality and anti-discrimination.[50] Over time, the sheer taken-for-grantedness of the contingent, but firmly entrenched connection between these two ideas has become a kind of "common sense" in the Court's approach to race-based affirmative action.

What is the source of the Court's increasingly fierce attachment to the anti-discrimination principle? The animating injunction that informs the anti-discrimination model of equal protection is the notion that "likes must be treated alike." This axiom of equal treatment carries a certain aesthetic attraction and a basic notional simplicity. As a number of commentators have noted, the antidiscrimination norm is both easily formalized and formally realized. After all, as we have seen, the formal conception of equality has a long pedigree in racial equality law. In my view, however, the aesthetic and intellectual enchantments of formalism offer at best a partial account for Court's growing impatience with race-based affirmative action. Whatever its local validity, the formalist account cannot explain why the idea of race-consciousness has increasingly provoked an hostility of a deeper, more ideological kind.

To see why this is so, we may complete this part of our discussion by turning to some of the Court's more recent affirmative action jurisprudence. Since *Bakke,* the Supreme Court has addressed the legitimacy of affirmative action in over a dozen decisions. The crucial turning point in this area of racial equality jurisprudence was the Court's decision in *City of Richmond v. J.A. Croson Co.*[51] *Croson* involved a challenge to a program in Richmond, Virginia that required prime contractors on city public works contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises." The Supreme Court held that the city ordinance under which the program had been adopted violated the Equal Protection Clause. For the first

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[48] Id., at 357.

[49] See Rosenfeld, supra note 21; Owen Fiss, Groups and the Equal Protection Clause, 5 J. Phil. & Pub. Aff. 107 (1976).

[50] Consider, for example, the extent to which the term "anti-discrimination law" has now become synonymous with "equal protection law."

[51] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

time, the Court settled on a unitary standard—the "strict scrutiny" principle—for assessing the constitutionality of race-based affirmative action.

In defending the constitutionality of its public works contracts policies, the Richmond city government had offered evidence that minority-owned businesses in the city had received virtually no city construction contracts, that they rarely held memberships in the network of trade associations through which city contracts were informally brokered, and that the local construction industry had practiced persistent and pervasive discrimination against blacks and other racial minorities. Moreover, as Justice Marshall noted in his dissent from the Court's judgment, the challenged ordinance had been adopted by a city that was the "former capital of the [Southern] Confederacy,"[52] whose "disgraceful history of public and private racial discrimination" had been "richly documented"[53] in litigation challenging invidious racial discrimination in housing, public education, and electoral politics.

At one level, *Croson* marked the triumph of the formal method in the Court's affirmative action jurisprudence. In her opinion for the *Croson* majority, Justice O'Connor did not deny the "sorry history of both private and public discrimination"[54] in the United States. She nonetheless declared that Richmond's attempt to confront the consequences of that historical legacy for its own construction industry was foreclosed by Equal Protection Clause. On the Court's account, the practices whose effects the city had sought to address could not be traced to any "direct evidence of race discrimination on the part of the city in letting contracts, or [to] any evidence that the city's prime contractors had discriminated against minority owned sub-contractors."[55] Rather, the Richmond plan was a policy response to a more generalized species of "[s]ocietal discrimination"[56] in the national construction industry as a whole. The very magnitude of these discriminatory practices rendered them too "amorphous a basis"[57] for a race-specific affirmative action plan such as the Richmond ordinance. For the *Croson* majority, the national dimensions of racial discrimination in the American construction industry did not permit affirmative action by local governments to address the structural effects of that discrimination in their own backyards. According to Justice O'Connor, only Congress was technically empowered under the Fourteenth Amendment to address the effects of past and continuing "societal" discrimination.[58] In a curious twist of judicial logic, the sword that allows the U.S. Congress to address the national consequences of racial wrongs became a constitutional shield against similar legislative action on the part of the state and municipal governments that were closest to the problem.

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[52] Id., at 528.

[53] Id., at 529.

[54] Id., at 499.

[55] Id., at 480.

[56] Id., at 497 (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986)).

[57] Id., at 497 (quoting *Wygant*, 476 U.S. 267, 276 (1986)).

[58] Section 5 of the Fourteenth Amendment authorizes the U.S. Congress "to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5.

As a constitutional matter, this distinction between particularized "individual" discrimination and more generalized "societal" discrimination is not required either by the text or the structure of the Fourteenth Amendment. What, then, is the basis of the *Croson* Court's obdurate refusal to consider "societal" and "individual" discrimination in the same constitutional light? I have argued that, standing alone, the aesthetic and intellectual allure of formalism provides an indequate account of Court's adherence to the anti-discrimination model of constitutional equality. Much the same may be said of the federalism-based justification the Court offers for the divergent treatment of "societal" and "individual" discrimination. To my mind, the *Croson* opinion's stated fealty to the principles of federalism only partially explains its different approaches to these two forms of discrimination.[59] The decision to invalidate the Richmond program has more to do with the political ideology of abstract individualism than it does with the political forms of federal and state governmental power.[60]

How is this claim to be understood? Recall that in *Bakke*, Justice Powell introduces a theme that is sounded in all the Court's subsequent affirmative action decisions. A proper interpretation of the Fourteenth Amendment, Powell asserts, must begin with a recognition that the equal protection to which that text refers is a matter of *individual* rights:

> The guarantees of the Fourteenth Amendment extend to all persons . . . . It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are *personal* rights.'[61]

As we have seen, however, Justice Powell was eventually forced to concede what he so deeply wanted to deny—that equal protection analysis cannot avoid reference to the realities of group life in American society.[62]

The ideological rhetoric of abstract individualism is accorded a similar prominence in the *Croson* decision. For example, at one point in the Court's opinion, Justice O'Connor argues that perhaps the chief defect in the challenged Richmond plan is the degree to which it denies "certain citizens" the opportunity to compete for a reserved percentage of public contracts solely based on their race: "To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a

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[59] Indeed, some six years later, Justice O'Connor would effectively deny that Congress had any more authority to address "society-wide [racial] discrimination" than state or local governments. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 515 U.S. 200 (1995).

[60] See Paul Brest, Foreword: In Defense of the Anti-Discrimination Principle, 90 Harv. L. Rev. 1, 49-50 (1976). For a brief intellectual history of the idea, see Steven Lukes, Individualism 73-78 (1973). A concise account of the "abstract individual model" is offered in John Skrentny, supra note 15 at 26-28. In what follows, I deploy an analytic distinction between the "formal" and the "abstract individual" model of equality. However, like the cultural common sense on which it draws, the Court's equality jurisprudence in fact often combines (and even collapses) these distinctions. Nonetheless, for heuristic purposes, the differentiation of the two models is analytically useful, so long as one remains mindful that they are rarely so cleanly separable in affirmative action discourse.

[61] *Bakke*, 438 U.S. at 289 (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)) (emphasis supplied).

[62] See discussion supra at 10-11.

rigid rule erecting race as the sole criterion in an aspect of public decision making."[63] Kimberlé Williams Crenshaw has rightly criticized Justice O'Connor's reductive dismissal of race as a meaningful constitutional fact. The *Croson* Court "decided that race would be narrowly construed to basically represent simply skin color—devoid of any historical, political, or economic value."[64] O'Connor then throws this "deracinated" notion of race in the chromatic dustbin. Like hair or eye color, skin color becomes an incidental aspect of the "real" subject of constitutional rights: the abstract, anonymous individual. And yet, like Justice Powell's *Bakke*, the *Croson* opinion is finally unable to sustain the normative claim that race is an empty, inconsequential category in constitutional analysis. When Justice O'Connor sets out to explain why the city's reliance on evidence of statistical disparities in the construction industry is constitutionally irrelevant, she does so in social terms that betray her individualistic ethos. "There are," she writes, "numerous explanations for [the] dearth of minority participation in Richmond's construction sector], including past discrimination as well as both black and white career and entrepreneurial choices."[65] Indeed, O'Connor speculates "*[b]lacks* may be *disproportionately attracted* to industries other than construction."[66] Note the discursive strategy in play here. In a move that is precisely the antithesis of the individualism to which she purports to be committed, Justice O'Connor attributes the absence of "certain citizens" in the construction industry to a shared preference ("disproportionate attraction" to non-construction work). That preference, however, is not just an aggregation of individual choices, but an expression of collective agency. In its zeal to defend the singular conception of the individual and that individual's "personal rights," the *Croson* opinion mobilizes the very discourse of racial group identity ("blacks") and racial group decisionmaking ("black and white career and entrepreneurial choices") that a strict adherence to methodological individualism would rule out of bounds. In short, Justice O'Connor uses a race-conscious, collectivist claim to secure the case *against* such claims.

I have not focused on these moments of performative contradiction in the social vision of *Bakke* and *Croson* for their own sake. I have done so rather because they seem to me to illustrate the limitations of the anti-discrimination principle as a general grammar for thinking about constitutional equality. To my mind, the anti-discrimination principle provides too crude a framework for understanding what is at stake in affirmative action. More precisely, the abstract individualism of the anti-discrimination model misapprehends the decidedly social purpose, meaning and effects of the practices affirmative action policy is designed to address. While the exercise of racial and gender power unquestionably targets individuals, its ultimate object is the subordination of entire social groups. Like the subordinating practices to which it fashions a

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[63] *Croson*, 488 U.S., at 493.

[64] Crenshaw, supra note 14, at 284.

[65] *Croson*, 488 U.S., at 503.

[66] Id.

programmatic response, affirmative action embraces a "group-grounded" perspective toward the idea of equality.[67] To borrow and adapt the words of one commentator, there at least two distinct respects in which the mediating principle of anti-subordination provides an indispensable social perspective on the problem of inequality. First, affirmative action "focuses on society's role in creating subordination."[68] Second, it attends to the ways "this subordination affects, or has affected groups of people."[69] Put another way, affirmative action starts from the proposition that "[i]t is more invidious for women or blacks to be treated worse than white men than for men or whites to be treated worse than blacks or women . . . because of the differing histories and contexts of subordination faced by these groups."[70]

I hope by now to have shown that the current contours of American affirmative action jurisprudence reflect the continuing grip in which the dogma of abstract individualism has held the social imagination of the U.S. Supreme Court. In matters of race, an evident indifference to the concrete social dimensions of inequality has rendered the Court unwilling or unable to take the group-sensitive perspective seriously. Significantly, it was a Supreme Court decision on gender-based affirmative action which suggested—at least for a time—that the group-sensitive perspective on constitutional equality might force its rivals to yield some ground. It is to that decision I next turn.

V. THE GENDER OF AMERICAN AFFIRMATIVE ACTION LAW

The first and only case in which the Supreme Court has devoted exclusive attention to the legality of affirmative action on behalf of women was its decision in *Johnson v. Transportation Agency, Santa Clara County, California.*[71] The issue before the Court in *Johnson* was the legitimacy of gender preferences

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[67] Since I do not wish to be misunderstood, let me make it clear here that the "group-grounded" model of equality I sketch and support here is not an argument for "group rights" as such. Strictly speaking, what I am calling the "group-grounded" model of equality makes no claim about rights at all. Rather, that model provides an analytic framework or an orienting structure for thinking about equality which is distinguishable from the task of rights specification as such. Thus, while the vision of affirmative action I describe here most decidedly endorses a "macro" or "societal" perspective on the equality principle, it does not and need not reject the proposition that the rights guaranteed by the Fourteenth Amendment belongs to the individual. The argument differs from the abstract individual model of equality in insisting that the rights of individuals under a regime of affirmative action may (and inevitably must) be determined with reference to groups. On this point see Ronald Fiscus, The Constitutional Logic of Affirmative Action 57-61 (1992). If the goal of affirmative action is to put race- and gender-based subordination "out of business," then its conception of individual rights ought not be "abstracted" from the positional realities of group life. The concept-figure of putting race and gender "out of business"appears in From Redistribution to Recognition?: Dilemmas of Justice in a 'Postsocialist' Age, *in* Nancy Fraser, Justice Interruptus: Critical Reflections on the "Postsocialist" Condition 11, 20-22 (1997).

[68] Ruth Colker, Anti-Subordination Above All: Sex, Race and Equal Protection, 61 N.Y.U. L. Rev. 1003, 1009 (1986).

[69] Id.

[70] Id.

[71] *Johnson*, 480 U.S. 616 (1987). For a history of the *Johnson* case, see Melvin I. Urofsky, Affirmative Action on Trial: Sex Discrimination in *Johnson* v. *Santa Clara* (1997).

under Title VII of the Civil Rights Act of 1964, as amended. The challenged plan had been voluntarily adopted by the Santa Clara County Transportation Agency, a public employer. The plan aimed, in part, to increase the number of women promoted to positions within traditionally sex-segregated jobs in which women had historically been significantly under-represented.[72] The plaintiff, Paul Johnson, claimed that he had been denied promotion to a road dispatcher position with the county solely on the basis of his sex, in violation of Title VII.

The Supreme Court disagreed. The Court's opinion, written by Justice Brennan, held that the Transportation Agency had not violated the statute in taking the sex of a competing female applicant for the position into account. On Justice Brennan's reasoning, the consideration of gender in order to rectify a " 'manifest imbalance' " that reflected the under representation of women in " 'traditionally segregated job categories' "[73] was not unlawful "sex discrimination" within the meaning of Title VII.

Since no constitutional issue was raised or litigated in the trial court, the *Johnson* Court confined itself to interpretation of the relevant statute. Although Title VII analysis of affirmative action differs markedly from the affirmative action analysis in the constitutional context, the two bodies of law both rely substantially on a common conceptual vocabulary. The Court's interpretation of the statute thus holds important implications for an understanding of the constitutional dimensions of gender-based affirmative action.[74]

In this connection, several aspects of the Court's opinion in *Johnson* merit mention. First, and most notably, the Court's opinion says almost nothing on the question of whether affirmative action plans directed at women should be assessed any differently than race-based affirmative action policy. It should be noted, too, that the *Johnson* Court did not deem it necessary to come to grips with the proposition that affirmative action law is an inappropriate tool for dealing with generalized "societal" discrimination. Although Justice Brennan asserts that women are confronted with "strong social pressures"[75] not to pursue employment prospects in certain types of jobs, he does not directly respond to a central claim made by the dissenting members of the Court. This was the contention that the affirmative action program sustained in *Johnson* was not designed to remedy "identified discrimination" on the part of Santa Clara County, but was instead an impermissible response to the limitations which "societal attitudes" have imposed on women's entry into certain sectors of the labor market.[76]

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[72] The agency's affirmative action plan was not limited to sex. By its terms, the Santa Clara County plan also targeted "minorities" and "handicapped persons." *Johnson*, 480 U.S at 620.

[73] Id., at 631 (quoting Steelworkers v. Weber, 443 U.S. 193, 197 (1979)).

[74] For a similar argument see Rosenfeld, supra note 21 at 197.

[75] *Johnson*, 480 U.S. at 634, n. 12 (Quoting Johnson v. Santa Clara, 748 F.2d 1308, 1313 (9th Cir. 1984)).

[76] See, e.g., id., at 664 (Scalia, J., dissenting)("The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs.").

In short, *Johnson* accorded legitimacy to affirmative action programs undertaken solely to redress the disadvantages that "society-wide" discrimination has historically imposed on women. Under *Johnson*, employers were not obliged to show that their affirmative action policies were based on their own past discrimination. Further, the decision appeared to accept the adoption of "goals" (if not set "quotas") that would gradually remedy the gender "imbalance" or "underpresentation" of women in jobs to which they have historically had little or no access. The *Johnson* Court thus endorses the notion that the equality norm embodied in Title VII does not completely foreclose the affirmative pursuit of gender equity in the workplace. Taken together, these twin aspects of the *Johnson* opinion gesture toward a group-sensitive model of gender equality.

However, at least one element of *Johnson* stands in arguable tension with the account of the decision I have developed here. At one point in the opinion, Justice Brennan categorically dismisses the notion that Paul Johnson was an "innocent victim" of the County's affirmative action policy. On Justice Brennan's account, Mr. Johnson could not claim an "absolute entitlement" to the promotion whose denial had occasioned his complaint: "Denial of the promotion," wrote Justice Brennan, "unsettled no legitimate, firmly rooted expectation on the part of the petitioner."[77] At the same time, the *Johnson* opinion expressly disavowed any suggestion that the Court was allowing Santa Clara County to "unnecessarily [trammel] the rights of male employees or [create] an absolute bar to their advancement."[78] One of the components of the Santa Clara County plan that apparently predisposed the Court to uphold it was the fact that it did not set aside employment opportunities for women, or prevent men from competing for each announced position: "[T]he Agency Plan requires women to compete with all other qualified applicants. *No* persons are *automatically* excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants."[79] Another positive feature of the affirmative action plan in *Johnson*, from the Court's perspective, was the fact that though the plaintiff in that litigation gained nothing, he also lost nothing. Brennan took pains to note that "while [Johnson] in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."[80]

The Court's emphasis on these features of the Santa Clara County affirmative action program suggests that one of the reasons the challenged plan passed judicial muster lay in the fact that it did not totally abandon either the formal or the abstract individual models of equality. Consider in this connection what the *Johnson* Court did not say. The Court expressed no concern about the possibility

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[77] *Johnson*, 480 U.S., at 638. For an extended discussion and critique of the "innocent persons argument" against affirmative action see Fiscus, supra note 67, at 37-50.

[78] *Johnson*, 480 U.S., at 637-638.

[79] Id., at 638 (emphasis supplied).

[80] Id., at 638.

that the right of male employees to individual consideration might in the end have little practical impact on the county's hiring and promotion process. It seemed to be enough for the *Johnson* Court that the Santa Clara plan accorded some minimal degree of formal recognition to the interests of individual male workers. I do not mean to suggest that the *Johnson* opinion's view of the formal and abstract individual models of equality is in no way indistinguishable from the rest of the Court's affirmative action jurisprudence. Such a claim would be overdrawn. I want rather to underscore the felt necessity in *Johnson* to stay inside the normative boundaries of the anti-discrimination principle with which these two models are associated.

This aspect of *Johnson* finds its most symptomatic expression in the Court's incomplete and conflicting theories of affirmative action. In announcing the Court's judgment, Justice Brennan uses two different terms to describe the challenged affirmative action program. On the one hand, Justice Brennan repeatedly characterizes the Santa Clara plan with reference to the concept, or, more precisely, the metaphor of representation. The purpose of the policy, he asserts, was to remedy a problem of "underrepresentation" in the county's workforce.[81] In this model of affirmative action, the issue before the *Johnson* Court is whether Title VII permits the "factor" of "sex" to be "[taken] into account" in considering a (sexually) "representative" individual job candidate. The legality of gender-based affirmative action essentially presents a question about the validity of "sex-consciousness" with respect to the discrete, time-bound act of employee selection. The "underrepresentation" paradigm of the *Johnson* opinion accordingly focuses on the gender identity of the individual worker or the legitimacy of gender differentiation.

The second concept-metaphor Justice Brennan uses to characterize the challenged plan is that of "balance." The goal of Santa Clara policy, Brennan argues, was to rectify an "imbalance" in the country's workforce.[82] In this second model of affirmative action, the precise terms in which the Court casts the question before it do not change. The issue is still whether "sex" may be considered in employment decisionmaking. One can nonetheless detect a subtle but significant shift in the social vision that subtends the Court's answer to that question. Consider in this connection the *Johnson* opinion's exhaustive recitation of statistics about the gender demographics of the Santa Clara County work

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[81] See, e.g., id., at 622 (the goal of the plan was to increase the opportunities for women in job categories in which they were "poorly represented"); id., at 634 (the plan was adopted "for the purpose of remedying underrepresentation" by women in skilled craft jobs); id., at 636 (women were "egregiously underrepresented in the Skilled Craft job category. . ."); id., at 648 (describing the plan as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force").

[82] See, e.g., id., at 626 (the Santa Clara plan was adopted "to address a conspicuous imbalance in the Agency's work force . . ."); id., at 634 (the challenged plan "sought to remedy [the] imbalances" in the job assignments of men and women"); id., at 637 ("given the obvious imbalance" between male and female employees in the skilled craft sector of the county labor force it was "plainly not unreasonable" to consider sex in the decision not to hire Johnson); id., at 639 (the county plan "was intended to attain a balanced work force, not to maintain one).

force.[83] The statistical narratives the Court offers aim to establish something much more meaningful than mere "underrepresentation." Justice Brennan's account of these background statistics stops just short of suggesting a more disturbing record of sexual exclusion and segregation.[84] Like the representational paradigm, the analytic metaphor of "imbalance" is never theoretically developed. Nevertheless, one might describe the different social visions that inform the two concepts in the following terms. The "under-representation" model focuses on agency-sensitive issues such as gender differentiation and the gender identity of workers: its central normative interest is the legitimacy of gender recognition. The "imbalance" approach accents structure-sensitive questions such as gender marginalization and the gendered division of work: its focal normative concern is the legitimacy of gender redistribution. The "under-representation" model thus emphasizes the means or "sex-conscious" techniques that gender-based affirmative action uses. By contrast, the "imbalance" model stresses the ends those means or techniques aim to achieve.

The *Johnson* Court treats the "representation" and "balance" paradigms as though they were simply two expressions of a single idea. I have aimed to show why the two models in fact carry different connotations, which gesture toward two divergent theoretical understandings of the social meaning of affirmative action. In my view, the *Johnson* Court's combined and uneven use of the "underrepresentation" and "imbalance" approaches reflects a deeper indecisiveness about the political vision of affirmative action. Does gender-based affirmative action aim to achieve substantive equality between men and women? Does the anti-discrimination principle help or hinder the realization of that substantive goal? Is the goal of sex-based affirmative action the recognition of women as a socio-cultural group, or is it instead the redistribution of political-economic goals across the "gender-line"? Because it had lacked a structural conception of gender inequality,[85] these were questions the Supreme Court could not answer, or think to ask.[86]

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[83] See, e.g., id., at 621 (detailing the percentages of Santa Clara County's female transportation employees who were "concentrated" in EEOC job categories traditionally held by women); id., at 634 (stating the precise numbers of women in various job classifications at the transportation agency).

[84] See, e.g., id., at 634 (Noting the agency's finding that women were not only concentrated in traditionally female jobs, but "represented a lower percentage in other job classifications than would be expected if such traditional *segregation* had not occurred")(emphasis supplied). In an earlier passage, Justice Brennan recounts (by way of a footnote and without comment) a number of instances in which the woman who received the disputed job promotion, Diane Joyce, was a target of conduct that arguably amounted to unlawful discrimination. Id., at 624 n. 5.

[85] Indeed, the Court does not even once mention the term "equality." The closest the *Johnson* opinion comes to such a reference is in a quotation from the Santa Clara Transportation Agency's affirmative action plan on the inability of the "mere prohibition of discriminatory practices" to attain "an equitable representation of minorities, women and handicapped persons." Id., at 620.

[86] As Nancy Fraser has noted, the pursuit of gender equality, rightly understood, entails demands for both socio-cultural recognition and political-economic redistribution. See Fraser, supra note 67, at 19-20.

In the years since the *Johnson* decision, "the roof seemed to fall in on affirmative action in the high court."[87] The state of affairs in the U.S. thus diverges markedly from Europe, where the development of positive action jurisprudence is still in its foundational stages. Despite their different genealogies, however, the points of contact between U.S. affirmative action law and the European law of positive action reveal a striking doctrinal resemblance. Nonetheless, the very different political dynamics of European constitutional law may soon push ECJ positive action discourse into terrain that U.S. equality jurisprudence has thus far feared to tread.

VI. GENDER-BASED AFFIRMATIVE ACTION IN GERMAN (AND EUROPEAN) LAW

Before discussing the ECJ's positive action decisions, I should situate that Court's jurisprudence within its relevant legal context. From an American legal perspective, three preliminary observations may be briefly made here. The first point, with which I began my discussion, involves the scope of positive action. In Germany, as in Europe generally, positive action policy is confined to women.[88] The second precursory point has to do with the sources of German gender equality law.[89] In national constitutional terms, the gender equality norm was first articulated in the 1949 Basic Law (*Grundgesetz*) of the Federal Republic of Germany. The Basic Law of 1949 contained two provisions regarding sex equality. The first of these was Article 3(3), which prohibits discrimination on various grounds, including sex.[90] Article 3(2) of the Basic Law declared that "[m]en and women shall have equal rights."[91] Although it precedes Article 3(3), this provision was in fact adopted after Article 3(3), in response to a campaign which mobilized thousands of German women to demand gender-specific protection under the Basic Law.[92] The post-reunification revision of the Basic Law included a rewriting of Art. 3(2). In addition to its recognition of the equal rights of men and women, the provision now charges the state to "[promote] the actual enforcement of equality rights for women and men and [work] to remove existing disadvantages."[93]

For purposes of this discussion, however, the most important legal source of German gender equality norms is the transnational law of the European Union. This brings me to a third and final preliminary point. Although the positive action programs at issue in the ECJ decisions I discuss involved statutes adopted

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[87] Urofsky, supra note 71, at 172. It thus bears noting that *Johnson* would most probably fail to capture a majority of votes from the current members of the Supreme Court.

[88] See explanation supra note 1.

[89] A comprehensive survey of the relevant law is Ninon Colneric, Making Equality Law More Effective: Lessons from the German Experience, 3 Cardozo Women's L.J. 229 (1996).

[90] "No one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions." Art. 3(3) GG.

[91] Art. 3(2) GG.

[92] Colneric, supra note 89, at 230. For a history of this episode see Robert G. Moeller, Protecting Motherhood: Women and the Family in the Politics of Postwar West Germany 38-75 (1993).

[93] Art. 3(2) GG, as amended.

at the state or *Länder* level of the German federal system, the permissibility of these programs was ultimately a question of European Union law.[94] That is, the controlling constitutional norms for assessing policies such as Germany's positive action law are those contained in the "constitution" of the European Union. To be sure, no single written document "proclaims itself [to be] the 'Constitution' of the EC or EU."[95] Nonetheless, it is now generally agreed that the Treaty on European Union[96] and interpretations of that Treaty in the Court of Justice of the European Communities[97] represent a constitutional charter for the original European Communities, and of the European Union they have become.[98] Two recent examples of the interplay between European law and German positive action policy are the ECJ's decisions in *Kalanke v. Freie- und Hansestadt Bremen*[99] and *Marschall v. Land Nordrhein-Westfalen.*[100]

The first ruling by the ECJ regarding the validity of gender-based positive action under EU law came in the 1995 *Kalanke* decision. The positive action policy in question had been adopted by the Freie Hansestadt Bremen, Germany.[101] Under the Bremen *Land* Law on Equal Treatment *(Landesgleichstellungsgesetz)*, women candidates received priority over men in competition for jobs in which they had traditionally been underrepresented. The complainant, Eckhard Kalanke, had been denied promotion to a management

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[94] Article 177(2) of the EEC Treaty establishes a referral mechanism whereby courts and tribunals of member-states of the European Union may seek "preliminary decisions" in cases involving EC law. Strictly speaking, a "preliminary decision" by the ECJ is not a disposition of the case referred to it. Rather, a "preliminary decision" is only an authoritative judicial interpretation of the relevant European law, whose application in the particular case is left to the national court or tribunal from which the referral came. For a concise explanation of the "preliminary decision" mechanism, see Leonard Jason-Lloyd and Sukhwinder Bajwa, The Legal Framework of the European Union 33-34 (1997).

[95] James D. Dinnage and John F. Murphy, The Constitutional Law of the European Union 83 (1996).

[96] See Wolf Sauter, The Economic Constitution of the European Union, 4 Colum. J. Eur. L. 27, 29 (1998) (arguing that "[t]he view that the Treaty forms the constitution of the EU may now be almost axiomatic in Community law circles"). See also, Roland Bieber and Pierre Widmer, eds., The European Constitutional Area (1995); G. Federico Mancini, The Making of a Constitution for Europe, 26 Common Mkt. L. Rev. 595 (1989); Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 Am. J. Int'l L. 1 (1981).

[97] See Sauter, supra note 96, at 31.

[98] For a useful if skeptical intellectual history of the "constitutionalization"of European law and the emergence of European constitutionalism see J.H.H. Weiler and Joel P. Trachtman, European Constitutionalism and Its Discontents, 17 J. Intl. L. Bus. 354 (1996); For a discussion of the "Europeanization effect" on the jurisdiction of German Federal Constitutional Court, see Klaus H. Goetz, The Federal Constitutonal Court, *in* 2 Developments in German Politics 96 (Gordon Smith et al. eds., 1996).

[99] Kalanke v. Freie Hansestadt Bremen, Case C-450/93, 1995 E.C.R. I-3051.

[100] Marschall v. Land Nordrhein-Westfalen, Case C-409/95, 1997 E.C.R. I-6363.

[101] The Bremen statute provided, *inter alia*, that "[i]n the case of an assignment of an activity in a higher pay, remuneration and salary bracket, women who make qualifications equal to those of their male co-applicants shall be given priority [in those sectors where] they are under-represented." Landesgleichstellungsgesetz [LGlG], Bremisches Gesetzblatt [Brem. Gbl.], S.433. (Law on equal treatment of men and women in the public service of the *Land* of Bremen). *Kalanke*, 1995 E.C.R. I-3051, at para. 3.

post in the Bremen Parks Department in favor of a female colleague. After losing an administrative challenge, Kalanke brought suit in the Bremen city and state labor courts. Kalanke contended that he had been unlawfully discriminated against on the basis of sex, in violation of provisions contained in the German Civil Code, the Bremen state constitution, and Articles 3(2) and 3(3) of the German Basic Law.

The case reached the ECJ by way of the German Federal Labor Court (*Bundesarbeitsgericht*), to which Kalanke had appealed after his case was dismissed by both lower German courts. The Federal Labor Court sought a preliminary ruling from the ECJ on whether the Bremen state positive action policy was covered by Sections 2(1) and 2(4) of the European Council's 1976 Equal Treatment Directive,[102] which is part of the EU's social policy program.[103] Article 2(1) states that " . . . the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly"[104] However, Article 2(4) of the Equal Treatment Directive authorizes member-states to adopt and enforce ". . . measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities."[105] The precise question in *Kalanke* was whether the Bremen positive action program contravened the Article 2(1) prohibition on "discrimination . . . on grounds of sex," or was instead a permissible effort under Article 2(4) to "[remove] existing inequalities which affect women's opportunities."

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[102] Council Directive 76/207/EEC, 1976 O.J. (L39) 40 (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).

[103] For more detailed histories and analyses of Article 119 (the new Article 141) of the EC Treaty, on which the Equal Treatment Directive and other elements of EU social policy are based, see Evelyn Ellis, EC Sex Equality Law (1998); Women and the European Labour Markets (Anneke van Doorne-Huiskes et al. eds., 1995). The version of Article 119 that was in force at the time of the *Kalanke* and *Marschall* decisions read: "Each Member State shall ensure . . . and subsequently maintain the applications of the principle that men and women should receive equal pay for equal work." The 1997 Amsterdam Treaty amended Article 119 to read: "Each Member State shall ensure that the principle of equal pay for equal work or work of equal value is applied." By its terms, Article 119 embodies only a norm of equal pay. However, the ECJ has long construed the Article to impose a more general principle of equal treatment. This more liberal construction has also been reflected in the social policy directives of the European Council. With the 1997 revision of the TEU, this broader understanding of the equality concept is now expressly recognized as a fundamental principle of EU constitutional law. In addition to the mentioned amendment, the Amsterdam Treaty added a new provision to Article 119. This provision imposes an obligation on the European Council to "adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value." The new Article 141 thus now includes aspects of equal treatment other than equal pay. They also make it clear that the Council's authority to enact secondary legislation is not limited to prohibitions on sex discrimination, but extends as well to measures that seek to insure equality of opportunity, such as those permitted under Article 2(4) of the Equal Treatment Directive.

[104] *Kalanke*, 1995 E.C.R. I-3051, at para. 15.

[105] Id., at para. 17.

In his Opinion to the Court, Advocate General Tesauro argued that the Bremen policy fell outside the scope of the measures contemplated by Article 2(4).[106] For Tesauro, the fatal flaw in the Bremen plan was that it accorded "absolute and unconditional priority" to women applicants for jobs in those sectors of the public labor force in which they were underrepresented. The Advocate-General contended that this aspect of the challenged gender preference was a derogation from Mr. Kalanke's "individual right" not to be discriminated against on the basis of his sex.[107] Accordingly, the state of Bremen's positive action program could not be reconciled with the principles of sex equality to which Germany and other EU member states were bound by the provisions of the Equal Treatment Directive.

In defending this interpretation of the Equal Treatment Directive, Tesauro began by offering "a few observations on the idea of positive action."[108]

> Positive, or affirmative, action stems from the requirement to eliminate the existing obstacles affecting particular categories or groups of persons who are disadvantaged at work as a result. Positive action is, in particular, *a means of achieving equal opportunities* for minority or, in any event, disadvantaged groups, which generally takes place through the granting of preferential treatment to the groups in question. In taking the group as such into consideration, positive action marks a transition from the individual vision to the collective vision of equality.[109]

The Advocate General's Opinion draws a distinction among three "models" of positive action. The first model, on his account, does not aim to remove "discrimination in the legal sense," but strives rather to address the "condition of disadvantage which characterises women's presence on the employment market."[110] This is the most modest form of positive action, and entails such measures as gender-specific outreach, vocational guidance and training. The second strives to accommodate women who must balance professional and family responsibilities, and to promote a better division of those responsibilities between the sexes. This second form of positive action is reflected in policies regarding flexible working hours, child-care, women who have returned to the workplace after a long absence, or tax and social security policies that take family responsibilities of workers into account.

Tesauro argues that the purpose of these two forms of positive action is to achieve equal opportunities, and "in the final analysis"[111] to attain "substantive

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[106] Opinion of Advocate General Tesauro, Kalanke v. Freie Hansestadt Bremen, Case C-450/93, 1995 E.C.R. I-3051, at para. 29. From an American perspective, one of the more intriguing features of ECJ decisionmaking is the prominent role accorded to its panel of Advocates General. Although Opinions by Advocates General are not binding on the Court, they are deemed to be extremely persuasive. The Advocate General's Opinion is frequently the basis for the Court's own interpretations of EU law, and thus helps illuminate the reasoning behind the ECJ's characteristically terse opinions. See Janet Dine et al., Procedure and the European Court 4 (1991).

[107] Opinión of Advocate General Tesauro, supra note 106, 1995 E.C.R. I-3051, at para. 23.

[108] Id., at para. 8.

[109] Id. (emphasis in original)(footnotes omitted).

[110] Id., at para. 9.

[111] Id.

equality."[112] However, he notes that neither of these versions of positive action expects or pursues an immediate "quantitative increase in female employment."[113] They thus differ radically from the third positive action model, whose central feature is the adoption of "systems of quotas and goals."[114] Tesauro is openly critical of this model of positive action, which in his view has come "to be regarded as a panacea for eliminating existing inequalities in the reality of social life."[115]

> The measure consisting of the imposition of quotas has come up for much discussion, in particular from the point of view of its constitutionality: whilst it is true that it is an instrument which is certainly suitable for bringing about a quantitative increase in female employment, it is also true that it is the one which most affects the principle of equality as between individuals, a principle which is safeguarded in most of the member states legal systems.[116]

Although he notes that the Bremen state positive action program adopted a system of so-called "soft" as opposed to "strict" quotas, Tesauro nonetheless finds it "only too obvious" that "in this case there is discrimination on grounds of sex."[117]

The Advocate General's Opinion makes several comparative references to U.S. affirmative action discourse, all by way of footnoted commentary. Taken together, they offer a revealing glimpse of the social vision that stands behind his approach to the legal issues raised in *Kalanke*. In one of these references, Tesauro writes that the "collective vision of equality" endorsed by positive action draws on a "concept of the group" which "does not find unequivocal favor."[118] The Advocate General describes a "tendency" (he declines to say among whom) "to assert that preferential treatment in favor of certain groups will end up increasing the feeling of inferiority vis-à-vis the majority," which "[triggers] a definitive marginalization of those in whose favor it is done within rigid social cages."[119] Tesauro goes on to note (again without specific

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[112] Id.

[113] Id.

[114] Id.

[115] Id. The Advocate General's typology of affirmative action has not gone unchallenged. As Evelyn Ellis as pointed out, "it is by no means clear that this type of positive action is to be differentiated from all other types in its attempt to remedy historical discrimination; this is surely also the motive for some actions falling into the first two categories, for example, the provision of training for jobs for which women were formerly not trained." Ellis, supra note 103, at 250.

[116] Id.

[117] Id., at para. 10. For a trenchant critique of Tesauro's descriptive and normative accounts of the forms of positive action, see Ellis, supra note 103, at 250-53.

[118] Id., at para. 8, n. 9. Although he does not specifically say so, the sense of the passage in question suggests that Tesauro is describing his understanding of U.S. affirmative action discourse. As a grammatical matter, his account of the critiques of affirmative action policy are all pitched in a curiously passive voice, as in the remark that the "system of quotas and goals" (note the failure to distinguish the two) "*has come to be regarded* as a panacea for eliminating existing inequalities in the reality of social life." Id., at para. 9 (emphasis supplied). However, the overall tone of the Advocate General's Opinion leaves little doubt that the characterized criticisms of U.S. affirmative action policy are not far from his own.

[119] Id., at para. 8, n. 9.

attribution) that "another accusation leveled against preferential treatment in favor of disadvantaged groups" has to do with its adverse efficiency effects on the "social commitment" of the "best" workers.[120] The Advocate General concludes by observing "[i]n Europe, positive action has begun to take hold or, at any event, to become the object of attention at the very time when affirmative action seems to be [in] a state of crisis in its country of origin."[121]

Advocate General Tesauro's remarks do not pretend to speak to the precise legal question the Court was asked to address in *Kalanke*. That, however, does not seem to be their objective. The thrust of Tesauro's comparative observations on the "state of crisis" which has seized U.S. affirmative action discourse is rather more ideological. Put bluntly, it would seem that the goal here is to raise the specter of multiculturalism, which has received a decidedly hostile reception in European circles.[122] Tesauro's pointed evocation of the "dialectical battles"[123] that are raging within U.S. sexual (and racial) politics seems odd when one considers the energy he expends downplaying the significance of the program challenged in *Kalanke*. As we have seen, Tesauro's general account of the nature of positive action is interwoven with a series of claims regarding the different conceptions of equality that ground the "group rights" model of positive action and the "individual rights" paradigm which (on his view) informs the Equal Treatment Directive. At the beginning of his Opinion, Tesauro explains that the individual rights model draws on the concept of "formal" equality, which strives for "equal treatment as between individuals as belonging to different groups."[124] By contrast, the group rights paradigm endorses a concept of "substantive" equality, which seeks "equal treatment between groups."[125]

However, as Tesauro expounds on these drawn distinctions, each term undergoes a destabilizing semantic shift. The Advocate General concedes that Article 2(4) permits EU member states "to implement positive actions," but insists that such policies are authorized "only to the extent to which those actions are designed to promote and achieve equal opportunities for men and women, in particular by removing the existing inequalities which affect women's opportunities in the field of employment."[126]

Three parallel rhetorical moves should be noted here. One crucial manoeuver in this part of the argument focuses on the idea of "equal opportunities." In an

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[120] Id., at para. 8, n. 9. It is not clear here whether "the best" to whom Tesauro is referring are individuals who belong to the group targeted by positive action policy, or those who are members of the group(s) to whom "preferential treatment" is denied.

[121] Id., at para. 8, n. 9. In the course of his remarks on the American experience, Advocate General Tesauro cites a number U.S. Supreme Court affirmative action decisions. Interestingly, *Johnson* is not one of them them, even though it has the most obvious relevance to the questions raised in *Kalanke*.

[122] See, for example, Kendall Thomas, Warnung vor der Sackgasse, Der Tagesspiegel November 6, 1998, S.1; William A. Barbieri, Jr., Ethics of Citizenship: Immigration and Group Rights in Germany 50-56 (1998).

[123] Opinion of Advocate General Tesauro, supra note 106, 1995 E.C.R. I-3051, at para. 28.

[124] Id., at para. 7.

[125] Id.

[126] Id., at para. 13.

earlier section of his opinion, Tesauro explicitly links the "equality as opportunity" paradigm to positive action.[127] However, as the discussion proceeds, the Advocate General proceeds to deny the posited connection between the two concepts. "Equal opportunities," he writes, "can only mean putting people in a position to attain equal results . . . ."[128] Having so stipulated, Tesauro then makes the following astonishing assertion. This is the second decisive move. "The very fact that two candidates of different sex have equivalent qualifications implies the fact by definition that the two candidates have had and continue to have equal opportunities: they are therefore on an equal footing at the starting block."[129] To grant women the preferential treatment they receive in a "tie-breaker" situation (of which *Kalanke* is an example) is thus a violation of the norm of equal opportunity (since equally qualified male and female competitors are already at the same "starting block"). The Advocate General acknowledges that "equality as regards starting points alone will not in itself guarantee equal results."[130] He also concedes that "tie-breaker" or "decisional" quotas attempt to correct for the distorting effects on employer decisionmaking of a "social structure which penalizes women" notwithstanding their "merits" or "individual efforts."[131] Tesauro nonetheless maintains that "tie-breaker" quotas do not come within the scope of the Equal Treatment Directive. Why? Because—this is the third and decisive move—such quotas ultimately have nothing to do real, "substantive equality" of opportunity at all. Rather, "tie-breaker" positive action programs seek to achieve "formal, numerical equality" of result. This "formal" conception of equality, the Advocate General tells us, "may solve [sic] some consciences" but it is in fact "illusory and devoid of all substance."[132]

By the end of his Opinion, Advocate General Tesauro's analysis has become hopelessly entangled in its own conceptual scheme. The meanings of "formal equality" and "substantive equality" have been reversed: "real equality" has been detached from the concept of group rights, and aligned instead with the more "fundamental principle" of individual rights.[133] The concept of "positive action" has ceased to be "a means of equal opportunity" and become a mere demand for "an equal share of jobs."[134] Indeed, because they fail to address "the economic, social and cultural model which is at the root of the inequalities" between women and men, the Advocate General finally concludes that the "tie-breaker" measures challenged in *Kalanke* are not very "significant" at all.[135] From this perspective, then, the most objectionable

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[127] Id., at para. 8.

[128] Id., at para. 13 (emphasis supplied).

[129] Id., at para. 13.

[130] Id., at para. 14.

[131] Id., at para. 14.

[132] Id., at para. 28.

[133] Id., at Para. 27.

[134] Id., at para. 26.

[135] Id., at para. 28.

dimension of the Bremen state positive action program is not the boldness, but the modesty of its underlying social vision.

Given the brevity of its judgment in *Kalanke*, we can only speculate about the extent to which the Court of Justice shared the expressed views of Advocate General Tesauro. One point of agreement, however, was clear: like the Advocate General, the ECJ thought the Bremen positive action program was incompatible with EU law. The Court began its judgment with two observations about Article 2(4) of the Equal Treatment Directive, both of which it had made in previous cases. The first point was that Article 2(4) specifically permitted national measures which, "although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances which may exist in the reality of social life."[136] Put another way, Article 2(4) did not forbid member-states from adopting employment-related policies, "including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men."[137] The second point was that Article 2(4) nonetheless had to be interpreted strictly, since it constituted "a derogation from [the] individual right" to equal treatment guaranteed under Article 2(1) of the Equal Treatment Directive.[138] Using this principle of strict interpretation, the Court of Justice concluded that a national rule which accorded women "absolute and unconditional priority" for job appointment or advancement "go[es] beyond promoting equal opportunities and overstep[s] the limits" of Article 2(4). The *Kalanke* Court went on to reject categorically the proposition that positive action was a device for achieving "equal representation of men and women" in a particular workplace. On the Court's account, this "equal representation" model of equality distorted the meaning of Article 2(4). To the extent the Bremen "rule of priority" sought to directly "substitute" equality of representation for equality of opportunity, it impermissibly confounded the means for achieving gender equality with its ultimate end.[139] In short, while equal representation might well be the eventual result of positive action, it could not be used as an intentional tool to get there.

The one respect in which the Court's judgment differed from that of the Advocate General was in the apparent emphasis it laid on the "absolute and unconditional" character of Bremen's positive action law. This was an element of the Bremen policy that the Advocate General had neither mentioned nor discussed in his Opinion. The *Kalanke* Court failed to indicate precisely whether or why the "absolute and unconditional" aspect of the Bremen law was decisive.[140] As a result, the language of the judgment left open the possibility

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[136] Id., at para. 18.

[137] Id., at para. 19.

[138] Id., at para. 20.

[139] Id., at para. 23.

[140] Indeed, it was not at all clear that this was a correct characterization of the Bremen state statute, or, more precisely, of the interpretation the statute had been given in the German national courts. As the ECJ itself notes, in order to render the Bremen law consistent with the sex equality provisions of the German Basic Law, the Federal Labor Court had interpreted the "rule of priority" to permit "exceptions . . . in appropriate cases." *Kalanke*, 1995 E.C.R. I-3051, at para. 9. It thus

that a more qualified and conditional "rule of priority" might well survive a challenge under the equal treatment principle of Article 2(1).

In Germany, the Court's judgment in *Kalanke* met with a chorus of disapproval,[141] whose echoes could still be heard when the Court of Justice was asked for a preliminary ruling on yet another German positive action policy in *Marschall.*

Marschall reached the ECJ on a referral from the Administrative Court (*Verwaltungsgericht*) of Gelsenkirchen, Germany. The case involved a challenge by a teacher named Hellmut Marschall. Mr. Marschall had applied for a teaching position in a public secondary school. The government authority that considered his candidacy informed Mr. Marschall that it intended to appoint a competing female candidate to the post. The decision not to offer the promotion to Mr. Marschall was based on a "rule of priority" contained in the Law of Civil Servants of the *Land* (*Beamtengesetz für das Land Nordrhein-Westfalen*). Under the challenged policy:

> Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, *unless reasons specific to an individual [male] candidate tilt the balance in his favour.*[142]

The question before the Court of Justice was whether a "rule of priority" that contained an explicit "exceptions clause" was permitted under the terms of Articles 2(1) and 2(4) of the Equal Treatment Directive.

Counsel for the Nordrhein-Westfalen state authorities maintained that the sex-specific "rule of priority" had been adopted to address an entrenched inequality in the public employment sector between women and men.[143] This inequality was said to flow from the fact that employers had historically tended to prefer male candidates over equally qualified female candidates for the same post.[144] The *Land* maintained that this gender-preference for male candidates could be traced to the use of "traditional" promotion criteria such as age, seniority, and the fact that a male candidate was the head or sole breadwinner of his household. Nordrhein-Westfalen argued that as a practical matter, the effect of these traditional promotion criteria had been to place women in the *Land* in a position of "disadvantage" across a broad spectrum of the public labor market.[145] Counsel for the *Land* further noted that the permitted exception to its

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seems odd that the Court of Justice nonetheless insists on labelling the *Kalanke* quota "absolute and unconditional." In the *Marschall* case, Advocate General Jacobs was to make much of this contradiction, although without success. See discussion infra at 31-32.

[141] See Ann Donahue, The *Kalanke* Ruling: Gender Equality in the European Labor Market, 18 J. Intl. L. Bus. 730, 746 (1998); Rebecca Means, *Kalanke v. Freie Hansestadt Bremen*: The Significance of the *Kalanke* Decision on Future Positive Action Programs in the European Union, 30 Vand. J. Transnat'l L. 1087, 1124 (1997).

[142] *Marschall*, 1997 E.C.R. I-6363, at para. 3.

[143] Id., at para. 4.

[144] Id.

[145] Id.

positive action law allowed "sufficient flexibility" for departures from the "rule of priority" in order "to take into account any reasons which may be specific to individual [male] candidates."[146] Finally, Nordrhein-Westfalen contended that because the challenged statute did "not guarantee absolute and unconditional priority for women" it came safely "within the limits outlined by the court in *Kalanke*."[147]

Concerned no doubt about the consequences the Court's decision might entail for their own positive action policies, the Commission as well as the Spanish, Austrian, Finnish, Swedish and Norwegian governments intervened in *Marschall* to support the position advanced by Nordrhein-Westfalen. The Finnish, Swedish and Norwegian governments maintained that "the national rule in question promotes access by women to posts of responsibility and thus helps to restore balance to labour markets, which, in their present state, are still broadly partitioned on the basis of gender."[148] In addition to this argument, the Finnish government observed that past experience in that country had shown that "action limited to providing occupational training and guidance for women or to influencing the sharing of occupational and family responsibilities is not sufficient to put an end to this partitioning of labor markets."[149]

In his Opinion on the issues raised in *Marschall*, Advocate General Jacobs urged the ECJ to follow the reasoning of its decision in *Kalanke*. Jacobs saw no meaningful difference between the Nordrhein-Westfalen program and the Bremen state law. The Advocate General did not dispute the claim that EU members could adopt policies to deal with the problem of "structural discrimination" against female workers.[150] He nonetheless insisted that under Article 2(4) of the Equal Treatment Directive, member states were authorized only to take measures that would promote "equal opportunity for men and women". Jacobs started from the "axiomatic" principle that "there is no equal opportunity for men and women in an individual case if, where all else is equal, one is appointed or promoted in preference to the other solely by virtue of his or her sex."[151] The Advocate General took the view that, like the policy in *Kalanke*, the Nordrhein-Westfalen statute went "beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation."[152] The Advocate General contended that this "imposition"of the "equal representation" model of equality rendered the Nordrhein-Westfalen positive action program "contrary to the principle of equal treatment as enshrined in [Article 2(1)]."[153]

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[146] Id., at para. 5.

[147] Id., at para. 17.

[148] Id., at para. 16. The governments of France and the U.K. intervened to argue against the Nordrhein-Westfalen policy. In their view, the "rule of priority" was indistinguishable from the scheme the Court had found impermissible in *Kalanke*. Id., at para. 18.

[149] Id., at para. 16.

[150] Opinion of Advocate General Jacobs, Marschall v. Land Nordrhein-Westfalen, Case C-409/95, 1997 E.C.R. I-6363, at para. 7. This was the first time the term "structural discrimination" had been used in the Court to describe the problem positive action was designed to address.

[151] Id., at para. 32.

[152] Id.

[153] Id.

Advocate General Jacobs argued further that the asserted distinction between the Bremen statute challenged in *Kalanke* and the Nordrhein-Westfalen law was more apparent than real. Jacobs contended that the national rule the Court had invalidated in *Kalanke* "was not in fact absolute and unconditional."[154] The Advocate General pointed to language in the ECJ's own judgment in *Kalanke* noting the German Administrative Court's finding "that the rule had to be interpreted 'with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases.' "[155] Jacobs then conceded for argument's sake that an "exceptions clause" might in some circumstances make a given positive action program compatible with the equal treatment principle. Having granted that concession, however, he still denied that the Nordrhein-Westfalen[156] exception would bring the statute within the safe harbor of the Directive. In its arguments to the Court, Nordrhein-Westfalen made much of the fact that its state legislature had deliberately crafted the challenged positive action law "in order to ensure sufficient flexibility and in particular to leave the administration scope for taking into account all sorts of reasons specific" to individual male candidates. The Advocate General noted that the contemplated grounds for departing from the "rule of priority" included "traditional secondary criteria of length of service and 'social reasons' " such as marital status, parental responsibilities, and the like.[157]

> The *Land* of North Rhine-Westphalia has indicated that the national rule at issue in this case is intended to displace the application in selection procedures of 'traditional secondary criteria' which it regards—no doubt correctly—as discriminatory. The proviso however appears to envisage that precisely those criteria may none the less be used where it is invoked, with the result that the post will be offered to the male candidate on the basis of criteria which it is accepted are discriminatory. If an absolute rule giving priority to women on the ground of their sex is unlawful, then a conditional rule which either gives priority to women on the ground of their sex or gives priority to men on the basis of admittedly discriminatory criteria must a fortiori be unlawful.[158]

Seizing on the *Land's* admission that decisionmakers would in effect be allowed to continue the very practices the law was designed to counteract, Jacobs maintained that the permitted exception to the "rule of priority" was as much a violation of the equal treatment principle as the rule itself.

The Advocate General's Opinion appeared to clinch the argument that *Kalanke* had effectively settled the issue presented in *Marschall.* Surprisingly, however, the ECJ took the view that unlike the Bremen statute, the Nordrhein-Westfalen positive action policy was compatible with the relevant provisions of the Equal Treatment Directive. The basic terms of the Court's analysis were essentially the same as the preliminary ruling in *Kalanke.* The chief distinction

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[154] Id., at para. 28.

[155] Id.

[156] Id., at para. 35.

[157] Id., at para. 8.

[158] Id., at para. 36.

between the two judgments lies in the broader social vision of work and gender that underwrites the discussion of positive action in *Marschall.*

Most notable in this connection is the ECJ's greater willingness to attend to the "lived experience" of women in the workplace.

> As the *Land* and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.[159]

In *Kalanke,* the Court of Justice had also recognized the impact of "social attitudes, behaviour, and structures" on women's access to work.[160] However, in *Marschall,* these social facts are given greater accent and emphasis. The chief evidence of their influence can be seen in the "realist" elements of the Court's analysis. As in *Kalanke,* the *Marschall* Court notes that the Equal Treatment Directive explicitly authorizes measures which, though "discriminatory in appearance" are "in fact intended to eliminate or reduce actual instances of inequality which may exist in the *reality of social life.*"[161] However, the *Marschall* decision goes farther than *Kalanke* to acknowledge that these "actual instances of inequality which may exist in the *real world*" may persist even in conditions of formal equality.[162] The *Marschall* Court in effect "pierces the veil" of formal equality it hid behind in *Kalanke.* Drawing on this "realist" understanding of the actual dynamics of gender inequality, the Court pointedly notes that "the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances."[163] It is this "realist" reorientation toward the equality principle which explains the ECJ's conclusion in *Marschall* that measures which "give a specific advantage to women with a view to improving their ability to compete on the labor market and to pursue a career on an equal footing with men" are not necessarily inconsistent with Articles 2(1) and 2(4) of the Equal Treatment Directive.[164] In *Kalanke,* the Court had gone out of its way to dissociate itself from the notion that the formal "equality of opportunity" guaranteed under the Directive might justify the direct pursuit or imposition of substantive "equality of representation."[165] In *Marschall,* the "equal representation" model of equality completely drops out of the Court's discussion of the Equal Treatment Directive. The Court neither affirms nor denies the relevance of the "equal representation"

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[159] *Marschall,* 1997 E.C.R. I-6363, at para. 29.

[160] *Kalanke,* 1995 E.C.R. I-3051, at para. 20.

[161] *Marschall,* 1997 E.C.R. I-6363, at para. 26 (emphasis supplied).

[162] Id., at para. 31.

[163] Id., at para. 30.

[164] Id., at para. 27.

[165] *Kalanke,* 1995 E.C.R. I-3051, at para. 23.

norm: it simply ignores the concept altogether.[166] Given the centrality of the argument against "equal representation" in *Kalanke*, the *Marschall* Court's utter silence on this score is deafening. Put bluntly, it defies credibility to think that the Court of Justice did not know how radically its *Marschall* analysis diverged from the interpretation of the equality principle on which it had insisted in *Kalanke*.

In highlighting the more critical stance the Court of Justice seems to take toward the concept of formal equality, I do not mean to suggest that formalism played no role at all in the reasoning of the *Marschall* decision. To the contrary. One of the most fascinating aspects of the *Marschall* ruling from an American perspective is its uneasy combination of "realist" and "formalist" interpretations of the equality principle. On the one hand, the Court of Justice seems quite willing to accept the proposition that member states may enact gender-based positive action policies in spite of the Equal Treatment Directive's command that "there shall be no discrimination whatsoever" on the basis of sex. In doing so, the *Marschall* Court implicitly endorses the norm of substantive, factual equality it had so emphatically rejected in *Kalanke*.

On the other hand, the *Marschall* judgment reflects the Court's apparent need to declare its continued allegiance to the formalist claims of abstract individualism. The ECJ stressed that it would not countenance positive action programs that (to borrow language from the U.S. Supreme Court opinion in *Johnson*) "automatically exclude [men] from consideration."[167] In an effort to find a meaningful distinction between the Nordrhein-Westfalen positive action program and the Bremen state plan it had struck down in its *Kalanke*, the Court of Justice made much of the fact that the Nordrhein-Westfalen did not *guarantee* women a preference over equally qualified male candidates. On the Court's account, the *Marschall* statute guaranteed all job candidates a formal and "objective assessment which will take account of all criteria specific to the individual."[168] Moreover, noted the Court, the Nordrhein-Westfalen program expressly permitted departures from the "rule of priority" where "reasons specific to an individual [male] candidate tilt[ed] the balance in his favor."[169] It

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[166] The Court's silence seems all the more strange in light of Advocate General Jacobs' pointed and repeated references in his opinion to the importance the ECJ had attached to the distinction between "equal opportunity" and "equality of representation" in *Kalanke*. See, e.g., *Marschall*, 1997 E.C.R. I- 6363, at para. 21 (describing the *Kalanke* Court's express disapproval of the idea that Article 2(4) permitted the substitution of equal representation for equal opportunity); id., at para.25 (discussing the French and U.K. argument that the Nordrhein-Westfalen plan "seeks to impose equality rather than to promote equality" in violation of *Kalanke*); id., at para. 29 (directly quoting the passage from *Kalanke* in which the Court explained the difference between the two conceptions of equality); id., at para. 32 (stating his own conclusion that "the effect of the ruling in *Kalanke* is that any rule which goes beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation is similarly outside and scope of Article 2(4) and hence contrary to the principle of equal treatment in Article 2(1) and in the present state of Community law, unlawful").

[167] *Johnson*, 480 U.S. at 638.

[168] *Marschall*, 1997 E.C.R. I-6363, at para. 33.

[169] Id.

thus differed from the *Kalanke* plan, which, the Court argued, totally disregarded the rights of individuals. Relying on this legal fiction, the Court side-stepped the Advocate General's contention that this posited distinction between the two plans had no basis in fact.[170] Like the U.S. Supreme Court's similar pronouncements in *Johnson*, the ECJ's stubborn insistence that the *Marschall* plan protected the "individual rights" of male candidates seems merely gestural. Like its American counterpart, the European Court of Justice is finally unwilling or unable openly to declare its independence from the formalist constraints of the anti-discrimination principle. It is as though the ECJ could only start the journey "from the individual to the collective vision of equality"[171] by denying that it was moving at all.

VII. THE FUTURE OF EUROPEAN POSITIVE ACTION DISCOURSE

I have argued that the *Marschall* ruling marks the ECJ's first tentative steps toward a more substantive conception of equality. In traveling the distance from *Kalanke* to *Marschall*, the positive action discourse of the Court of Justice has proven to be notably more expansive than that of the U.S. Supreme Court. And yet, the European positive action decisions betray a decided ambivalence toward the claims of substantive equality. As a result, the broader social vision that underlies the ECJ's emergent critique of the anti-discrimination principle remains inchoate and incomplete. The Court's social imagination is "realist" enough to see that in the individual case, "merit" and "individual effort" do not guarantee a woman a "fair chance" in the workplace. That social vision is not yet "realist" enough to fully reckon with the deeper insight that the experience of individual women takes place in a world where the very idea of work is (in the words of one German female civil servant) "over-identified with men."[172] Having glimpsed the degree to which the "actual inequality" at issue in *Marschall* and *Kalanke* reflects the larger structural realities of the gendered workplace, the Court of Justice anxiously lowers the formalist screen of the anti-discrimination principle.

Does the *Marschall* decision mark the outer limits of the ECJ's engagement with the anti-subordination model and its group-grounded vision of equality? As we have seen, EU positive action discourse has thus far confined its consideration of substantive equality to issues of gender. However, recent developments suggest that the future of the substantive equality principle in the ECJ will likely be decided in a very different political context: the domain of race and ethnicity.[173] Toward the end of last year, the newly elected German

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[170] See Opinion of Advocate General Jacobs, Marschall v. Land Nordrhein-Westfalen, Case C-409/95, 1997 E.C.R. I-6363, at para. 32.

[171] Id.

[172] Quoted in Catherine Hoskyns, integrating Gender: Women, Law and Politics in the European Union 119 (1996).

[173] The European Commission has taken the position that the EC Treaty provides no basis for regulating racial discrimination by or within Member States. Dominic McColdrick, International Relations Law of the European Union 100 (1997) (citing Commission of the European Communities,

government announced its intention to reform the country's citizenship policy. Although the fate of the current proposals remains uncertain, some have already argued that the extension of citizenship to Germany's racial and ethnic minorities will require a concomitant extension of positive action beyond its present gender-based boundaries.[174]

Racial and ethnic politics in Germany have long been driven by *Ausländerfeindlichkeit*, an almost visceral antipathy toward non-European foreigners.[175] Given this state of affairs (which is by no means limited to Germany), the explicit introduction of race and ethnicity into European positive action policy may never find a political constituency in Germany. If it does, however, the Court of Justice will be faced with a hard choice. Will the ECJ forge a more robust conception of substantive equality than one finds in *Marschall*, or will European positive action discourse retreat even further into the formalist orthodoxies that have come to govern U.S. law? The answer to this question will depend on the Court's willingness to imagine the significance of positive action for a Europe that will soon be as transracial as it is transnational. One can only hope that the Court of Justice will rise to the challenge, since the prospects for multicultural citizenship in Europe may well determine the future legitimacy of the European Union itself.

White Paper on European Social Policy—A Way Forward for the Union, COM (94) 333, final (July 1994), at para. 25). The EU's non-action on racial discrimination may be laid to the fact that a number of Member States continue vigorously to oppose any effort by the EU to "Europeanize" the field of race relations law. For a critical account of this "policy vacuum" and its implications for EU women's policy (particularly with respect to women of color) see Hoskyns, supra note 172, at 176-191 (1996).

[174] See, e.g., Barbieri, supra note 122, at 167.

[175] Id., at 33.