

# **Social regulation through anti-discrimination law: the EU and the US compared**

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## **Abstract**

This paper seeks to derive insights into the effect of economic integration on social policy by looking at the application of anti-discrimination rules to social policy categories. The normative motivation for rules prohibiting discrimination in market transactions can be distinguished from the normative basis for nondiscrimination in the relationship between a government and its citizens in social policy. However, the two spheres are closely related. Judicial decision-making, which is of central importance in a federal or multi-level governance structure, mediates this relationship and creates processes of transmission and spillover from market norms to social policy. The paper traces how these spillovers are handled by reviewing cases that have come before the US Supreme Court and the European Court of Justice. It shows that there are some differences in the legal framework in the two polities but also many similarities. However, the spillover process creates more and harder problems in Europe because welfare provisions at the state level are more developed.

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### **1. Introduction**

Courts have a special place in the development of federations and unions of states. Founding treaties and constitutions are incomplete documents, requiring re-interpretation and adaptation to changing conditions. Courts use distinctive techniques in undertaking this process. They create hierarchies of deference to political decisions based on their interpretation of what is constitutive of the union: what the basic norms and principles of its existence are. Locating edicts against discrimination in the hierarchy of deference is particularly complex. A nondiscrimination principle may constitute the polity by establishing that citizens are equal before the law. It may lie at the root of an integrated market, constituting a union by prohibiting protectionism and requiring equal access to markets. It may be understood as a principle of social policy, founding a set of ideas about how to achieve equality in the sense of social inclusion. These three different understandings imply different levels of deference to political decision-making in different contexts.

This paper discusses the issues arising when courts adjudicate on complaints of discrimination in access to social benefits. It argues that the normative motivation for rules prohibiting discrimination in market transactions can be distinguished from the normative basis for nondiscrimination in the relationship between a government and its citizens in social policy. However, judicial scrutiny of discrimination in social policy creates processes of transmission and spillover from market norms to social policy. Put another way, it produces a process whereby social rights are reconstituted as civil rights. To the extent that social rights are subsumed in a market-oriented system in this process, the civil rights created and extended by economic integration may undermine social rights located at the sub-Union level.

The existing literature looks at this issue primarily as it has arisen in cases of discrimination against non-nationals and migrants. Some commentators have advanced the argument that the judicial limitation of governments' powers to discriminate against non-nationals in allocating social benefits could have the effect of reducing redistributive fiscal effort. One version of this argument is put forward by Conant (2008: 46), who suggests that '[b]ecause provisions for social citizenship originate in commitments to national solidarity... judicial efforts to extend them transnationally are contested and [make them] vulnerable to retrenchment'. Furthermore, this development is an 'Americanisation' of social policy, which is conceptualised as giving rise to a limited form of social citizenship because of the dominance of civil citizenship. Similar arguments have been advanced by Leibfried (2005) and Ferrera (2005).

This paper criticises these arguments for their narrow focus. In section 2 below it is argued that discrimination, in the sense of categorisation and distinction-drawing, is much more fundamental to social policy than the arguments based on national solidarity imply. Furthermore, the relevant grounds do not stop with nationality: courts have also scrutinised social policies for gender discrimination, and the newer

grounds of age and disability may also raise issues for social policy. This deepens and intensifies the problem of how nondiscrimination principles might be applied to a government's social policy decisions.

Once we recognise that legitimate discrimination, supported by public values, is central to social policy, then the nature of the tension with the judicial regulation of discrimination can be characterised as follows. A judiciary charged with upholding the principle of nondiscrimination will find itself reviewing the distinctions adopted by the state in conducting social policy. Standards of constitutional review can be formulated to explain how the judiciary should check that the distinctions serve legitimate public purposes. Political and economic integration can put these standards under strain. Political integration may raise questions about whether the purposes pursued by a sub-Union political entity are legitimate, for example if they appear to have a racist or exclusionary motivation. This question has been central to judicial review of state and local social policies in the USA. Economic integration may also create pressure for heightened standards of review. In the EU, antidiscrimination measures have been promoted as part of the process of market integration. This has created a spillover or transmission from the application of antidiscrimination measures to economic relationships (employment, in particular) to the judicial review of nondiscrimination in the conduct of social policy by the member states. While many aspects of this transmission have been progressive and modernising in their effects, it raises both a constitutional issue and an issue about the relationship between civil or economic rights and social rights.

Sections 3 and 4 of this paper discuss the application to social policy of principles developed to combat discrimination in employment in the US and the EU respectively. The basic problem for the courts is as follows. In the course of the 1960s and 1970s, legislatures in both polities (including the EU, by means of directives) sought to abolish sex discrimination in employment. However, governments did not apply the principle of nondiscrimination consistently to social security policies. Cases were brought before both the European Court of Justice (ECJ) and the US Supreme Court (SC) inviting them to review social security legislation for discrimination on grounds of sex, at the same time as employment equality law asserted that sex discrimination by employers should be barred. Subsequently, antidiscrimination law has been extended to additional grounds, including age and disability, creating scope for further challenges to social policies.

The comparison between the EU and the US shows that there are some similarities in the legal framework within which the courts examine these cases. However, more cases, covering a wider range of situations, have come up in Europe, reflecting the more developed social policies found at state level in Europe. The paper concludes by considering whether we do indeed see an 'Americanisation' of social policy in Europe, and what exactly that might mean. It argues that the Commerce Clause-type jurisprudence produced by market integration in Europe does indeed threaten to promote civil rights over social policy. Because so much social policy is located at member state level in Europe, this process is potentially much more damaging than in the US. The puzzle is that Europe's large and powerful welfare states have not defended their 'states' rights' more effectively.

## **2. National solidarity, nondiscrimination and the welfare state**

Some commentators attach a lot of importance to the process of defining citizens and noncitizens for social policy purposes. Ferrera (2005: 4) has argued that the territorial basis of social protection captures the ‘elementary yet fundamental mechanism through which social solidarity is typically generated: a mechanism which we can term “internal bonding through external bounding”.’ Leibfried (2005: 263) claims that ““citizen-making” through social benefits – demarcating the “outsider” – was a watershed in the history of state-building on the continent’. A central difficulty with these claims is that they imply that the common bond of nationality is the basis for the political acceptability of redistributive policies. This conflicts with most accounts of welfare state policy-making, which instead alert us to the importance of assembling constituencies to support social policies, whether the emphasis is on the necessity of capturing the middle classes (Baldwin 1990) or on the development of solidarity among the working class and its political and industrial mobilisation (Esping-Andersen and Korpi 1984). Theories of the welfare state also highlight the diverse ideational rationales for social provisions: how ideas about contribution, deservingness and need are combined in multiple layers of provision (e.g. through the parallel operation of insurance and assistance) or even combined within the eligibility and entitlement provisions of a single benefit (Bolderson and Mabbett 1995, Hacker 2004).

Studies of policy-making in the welfare state also show that national legislation demarcating outsiders has not shown the clarity of purpose that the ‘national solidarity’ view would suggest. Exclusion of migrants is, if anything, a recent tendency rather than a foundational principle (Sainsbury 2006). The question of who to exclude is far from straightforward: countries have numerous different immigration statuses, covering everyone from visitors, students and temporary workers to permanently resident non-nationals. Social legislation does not demonstrate that policy-makers have taken a coherent and systematic approach to defining the consequences of these distinctions for social entitlements. A great deal more social policy-making effort has gone into defining the ‘internal’ boundaries of eligibility for particular benefits than has been devoted to the ‘external’ boundaries of defining and distinguishing citizens and migrants. Internal boundaries are constituted by, for example, provisions restricting benefits to workers who have paid insurance contributions (a boundary which often *included* migrants while excluding non-working nationals), conditions on behaviour such as requirements for unemployed people to be actively seeking work, and other criteria such as the rules governing medical grounds for claiming disability benefits.

Focusing on these internal boundaries is much more fruitful than the ‘nationality perspective’ in understanding the issues that nondiscrimination raises. Historical institutionalist accounts of welfare state development alert us to the processes of accretion and inertia that influence the definition of welfare entitlements. One consequence of this inertia, particularly noticeable in the field of sex discrimination, is that we find governments legislating against discrimination by employers while maintaining discrimination within their social policies. This inconsistency produces not only a general ‘normative dissonance’, but also some quite specific problems when social insurance provisions are closely tied to employment.

When a court reviews social security legislation in this context, there are several ways of thinking about what it is doing. One possibility is that it applies a ‘market conformity’ principle, which would hold that social policy should comply with the same limitations on discrimination that apply in market relationships. The way in which nondiscrimination principles have been constitutionalised in Europe lends itself to this approach, but it is potentially problematic, because the market conformity principle challenges the whole idea that social policy is in some sense a ‘countervailing force’ to the market, and works on different principles. In the terms used by Conant, market conformity would assimilate social rights to civil rights.

Another way of thinking about the judicial role is the more traditional one of seeing the court as a corrective to certain identifiable failings of the democratic legislative process. The most familiar example is that the court may seek to protect minorities whose interests are not adequately taken into account in a majoritarian process, but a court may also act as a corrective to legislative failings in other ways. For example, if legislative transaction costs are high and legislation is not subject to regular detailed review, it may become out of date. This corrective function may seem to be an improbable role for a court which is bound by precedent and therefore limited in its own ability to update the law, but it is consistent with the idea that legislative instructions are incomplete and need to be filled out and adapted to new social circumstances.

### **3. Equal protection and anti-discrimination law in the US**

This section advances an interpretation of how the Supreme Court has scrutinised potentially discriminatory social policy measures passed by state or federal legislatures. The starting point is Sunstein’s (1982) analysis of the Equal Protection Clause of the US Constitution. He suggests that the Equal Protection Clause gives expression to nondiscrimination as a fundamental principle of the rule of law, by stating that everyone is equal before the law. However, this abstract principle of equality does not mean that the law cannot legitimately make distinctions between people, indeed ‘classifications are the stuff of legislation, and legislation that classifies does not, solely by virtue of that fact, offend any sense of “equality”’ (Sunstein 1982: 129). The claim must instead be that people whose situations are relevantly similar should be treated similarly. Conversely, the rule implies that there is some set of reasons for which people can be treated differently: some ‘permissible’ grounds for making distinctions. Sunstein suggests that ‘the Court requires differential treatment to be justified by reference to some public value’ (1982: 131). While this leaves ‘public value’ to be defined, it states the central principle, that public power should be used for public purposes. ‘Legislation may not be merely the adjustment of private interests or the transfer of wealth or opportunity from one person to another; it must be in some sense public-serving’ (Sunstein 1982: 134).

The reality is that interest groups often seek legislation for their own ‘private’ purposes, so the principle might seem to impugn a great deal of ordinary political activity, including activity connected with redistributive social policy. But this depends on the strength of the test applied. For example, a trade restriction may clearly be self-serving for the protected group, but it is generally accompanied by some set of claims about the wider benefits that will accrue from the restriction. A judge may disagree with the analysis behind these claims, but will not have grounds

to impugn the restriction if the weakest, ‘mere rationality’ test of equal protection is applied, provided there is some justification to be advanced that the measure serves a valid public purpose. Generally, courts cannot undertake a full policy analysis or guard against all misguided policy initiatives. However, there may be grounds for applying a heightened level of scrutiny. For example, in a union of states which have bound themselves to minimise trade restrictions, a union-level constitutional court will look more closely at the protected group’s claims that a restriction brings wider benefits.

Under the Equal Protection Clause, one potential ‘trigger’ for applying heightened scrutiny is that the plaintiff is a member of some specially disadvantaged group. It is evident that some groups are particularly vulnerable to political processes producing distinctions which are disadvantageous to them. In the US, policies having a specific impact on the African-American population are subject to the most rigorous scrutiny for this reason. Furthermore, some of the SC’s key decisions in this area concern racial biases in the application of rules relating to fundamental rights such as voting. For example, indirect discrimination arising from literacy tests for voting was deemed to violate the 14<sup>th</sup> amendment. Such cases fit with the need to correct the biases of majoritarianism against certain minority groups.

Some commentators have also interpreted these cases to imply that the equal protection clause is concerned with protecting fundamental rights, such as democratic participation, but this idea has been criticised both conceptually and empirically (Perry 1999: 58-69). The issue is significant for understanding judicial scrutiny of discrimination in social policy, as US courts have generally been reluctant to deem social provisions to be fundamental rights. The importance of determining whether a social policy relates to a fundamental right is not clear in the caselaw. For example, the SC has persistently struck down measures that have excluded aliens from economic opportunities, welfare services and social benefits without always asking whether the exclusions are ‘fundamental’. The Court defended the rights of aliens to obtain financial assistance to pursue higher education in *Nyquist v. Mauclet* with an analysis that focused on the lack of a wider policy justification for excluding this group, rather than on the importance of the right. By contrast, in striking down the exclusion of the children of illegal immigrants from primary education in Texas (*Plyler v Doe*), the Court did rest its argument partly on the idea that primary education is a fundamental right.

Generally, the US courts have been hesitant to strike down social policy distinctions on equal protection grounds. In the 1960s, welfare rights campaigners challenged to AFDC administrative practices which were producing much larger numbers of terminations for black than white recipients, while state policy decisions over the uprating of different benefits left AFDC recipients (who were more likely to be black) worse off than recipients of other benefits such as Aid to the Blind. While some of these challenges were successful, the majority decisions of the Supreme Court rested on other grounds, such as the denial of due process in termination decisions or non-compliance with federal law governing the administration of federal AFDC funds (Davis 1993). The Court was reluctant to challenge rules which had some *prima facie* justification, even though they had an unequal impact. Conversely, where there was no justification, the absence of disproportionate impact on a suspect category did not matter. Thus the Court struck down a provision of the Food Stamp Act that limited

assistance to households consisting of groups of ‘related persons’ because there was no policy purpose to the restriction. The Court took the view that the measure was solely intended to harm a politically unpopular group (people living in ‘hippie communes’), and this was not a legitimate use of public power (Sunstein 1982: 136).

While the Court has been reluctant to engage in analyses of the impact of ‘facially neutral’ social policy measures, it has subjected the explicit use of racial categories to strict scrutiny. For example, in *City of Richmond v. J. A. Croson Co.* (488 U.S. 469 (1989)) it found that a scheme requiring city contractors to subcontract 30% of their business to ‘minority business enterprises’ was contrary to the equal protection clause. The Court found that the City had failed to demonstrate a compelling government interest in using the racial minority category, that the purpose of the quota was not defined with sufficient precision, and that the design of the scheme and the statistical evidence produced in support of it were flawed. The judges in the majority appear to have been influenced by evidence of black political power in the City of Richmond: there was a black majority on the City Council and the inference that Justice O’Connor (in particular) drew was that this majority had acted in violation of the equal protection clause by using political power to favour its particular interests.

The Court has been divided on the issue of affirmative action, and other cases in this area have gone the other way. From a comparative EU perspective, the interest of these cases lies not in their doctrinal refinements but in the Court’s approach to social policy conducted through market intervention (contract compliance requirements). In the EU, such measures would be scrutinised first and foremost as interferences with market freedoms, an approach which has generally restricted, although not eliminated, the insertion of social provisions in public sector contracts (Fee 2002). However, Union-level supervision of public procurement practices is not nearly so stringent in the US as in the EU. In particular, states enjoy a ‘market participant exemption’ to the anti-protectionist rules of the dormant Commerce Clause, which means that they can favour their own residents if they are participating in the market (usually as purchasers), although they cannot regulate other purchasers in a protectionist way (Regan 1985). Thus *City of Richmond* was scrutinised for its conformity with the constitutional principle of equal treatment, rather than for its consistency with the regulatory system of an integrated market.

Turning to sex discrimination: for a long time, rules that discriminated between the sexes were deemed justifiable in the Court’s equal protection jurisprudence. However, the climate changed during the 1960s, when there was a resurgence in the movement to ratify the Equal Rights Amendment (ERA). While ERA never got through the ratification process, the political environment contributed to the adoption of a more stringent reading of the 5<sup>th</sup> and 14<sup>th</sup> amendments, whereby governments can adopt gender-based distinctions if they are ‘substantially related to’ the objective and derive from an ‘important’ state interest. This test is stronger than mere rationality, but weaker than the ‘suspect classification’ test developed for racial categories (Goldstein 1999: 181-182).

In the 1970s cases of *Weinberger v Wiesenfeld* (420 U.S. 636 (1975)), *Califano v Goldfarb* (430 U.S. 199 (1977)) and *Califano v Westcott* (443 U.S. 76 (1979)), the Supreme Court was asked to rule on the constitutionality of discrimination between the sexes in the federal Social Security system. In *Califano v Goldfarb*, the Court

found that rules resulting in the differential treatment of male and female survivors were in breach of equal protection. The key feature of the majority's decisions in these cases was that the differential treatment of male and female survivors was deemed to be based on 'archaic and overbroad' generalisations and 'assumptions about dependency' that did not conform to modern social realities (430 US 204). The rules were 'an accidental byproduct of a traditional way of thinking about females' (430 US 217). The Social Security system was burdened with rules put in place since 1936, some of which were now outdated. Given the failure of Congress to attend to all the details of updating legislation, the judiciary could step in and expedite the process.

The dissenting opinion of Mr Justice Rehnquist in *Califano v Goldfarb* was more receptive to the SSA's claim that a general rule that assumed that widows were dependent, while requiring widowers to prove dependency, was administratively efficient. Rehnquist argued that the system should not be burdened with the necessity for claimants to prove actual need in all cases; instead, the use of overinclusive categorisations was 'not only tolerable but Solomonic'. To distribute funds precisely in accordance with need would create a 'procedural leviathan consuming substantial amounts of [program] funds in case-by-case determinations of eligibility' (430 US 231). Rehnquist also drew attention to the incremental development of social security legislation, noting that 'the statutory scheme will typically have been expanded by amendment over a period of years, so it is virtually impossible to say that a particular amendment fits with mathematical nicety into a carefully conceived overall plan..'. However, he interpreted this as a reason for judicial tolerance, rather than correction. The legislature should be allowed to continue to muddle through.

In applying the test of justification to distinctions made in social security, the Supreme Court has accepted that social security systems serve public values, without enquiring closely into what these are. Policy-makers may base these distinctions on a misguided analysis and the resulting allocation may be unequal across groups, but this does not mean that the constitutional principle of equal protection is violated. For example, a statute giving preferences to war veterans will tend to favour men over women, as more men are veterans. However, the Court found that this does not mean that the Equal Protection Clause is violated, despite the higher standard of scrutiny given to gender impacts, because the measure has a legitimate public purpose which produces disadvantage for women only incidentally (*Personnel Administrator of Massachusetts v Feeney*, discussed in Sunstein 1982: 139).

Thus we can see that equal protection challenges to social policies leave some leeway for differential treatment. Furthermore, the Court has not extended its view of suspect grounds to include the 'new' discrimination grounds of age and disability that have been added since the Civil Rights Act of 1964. For example, in the case of *City of Dallas v Stanglin* (490 US 19 (1989)), the SC accepted the City's justification for the use of an age barrier in a government policy (relating to the use of a dance hall). It made it clear that only the test of 'mere rationality' would be applied, and that 'a classification that has some reasonable basis does not offend the Constitution because it is imperfect'.

The discussion so far has concentrated on constitutional equal protection challenges to discrimination at state or federal level. However, the states are also subject to ordinary federal law, up to a point. The position of the states under the Civil Rights Act and the

Americans with Disabilities Act (1990), for example, bears some resemblance to that of EU member states under the various equality directives, and the same question arises of what empowers the federal government to encroach on state policy-making and how far this encroachment can go. Furthermore, as in the EU, the answer to this question partly revolves around defining the sphere of economic integration, which in the US means determining the scope of the Commerce Clause.

In passing the Civil Rights Act, Congress claimed both Commerce Clause authority and authority under section 5 of the 14<sup>th</sup> amendment, which allows it to legislate to put into effect the rights protected by the amendment. However, this latter claim of constitutional authority was overruled by the SC, leaving the Commerce Clause as the source of authorising power for the ‘public accommodations’ provisions of the Civil Rights Act. ‘It translated the question of congressional authority into the relatively simple issue of whether “Congress had a rational basis for finding that racial discrimination .. affected commerce”’ (Post and Siegal 2000: 447, quoting from *Heart of Atlanta Motel v United States*, 379 US 241).

In the ADA, Congress also invoked market-regulatory (Commerce Clause) and section 5 powers. As explained by Percy (1993: 93), ‘[t]he equal protection clause [and thus the claim of section 5 powers to uphold the clause] is particularly relevant to Title II of ADA, which sets requirements concerning nondiscrimination in the public services offered by state and local governments. The [Commerce Clause] ... power is pivotal to Title III, which requires private-sector entities to eliminate discriminatory practices..’. However, the assumption of congressional authority in ADA over social and economic policy in the states came indirectly under challenge from the ‘new federalism’. Leonard (2000) tracks a succession of subsequent cases that reined in congressional authority. These included a case (*Gregory v Ashcroft*, 1991) where mandatory retirement ages for state judges in Missouri were successfully defended against an Age Discrimination in Employment (ADEA) challenge. In *United States v Lopez* (1995), the Court ‘[f]or the first time since 1937, ..struck down a measure as not falling within the commerce power.’ (Leonard 2000: 95) In other cases, the Court limited the ability of individuals to sue a state under a federal measure purportedly based on section 5 of the 14<sup>th</sup> amendment, and ruled that Congress had overreached the application of its section 5 powers in the ADEA. Leonard (2000: 96) argued that this ‘new jurisprudence of federalism creates an environment in which Congress’s power to set standards for state conduct is increasingly limited..’.

More recent commentaries suggest that the wave of new federalism may have ebbed (Savage 2004; Underwood 2006), but it has washed up several distinct ideas about the relationship between constitutional nondiscrimination principles and civil anti-discrimination measures. First, it is noticeable that the distinction between section 5 and Commerce Clause powers is treated by the SC as producing two distinct types of test for discrimination. The SC has closed off the tendency for discrimination grounds that are impugned in employment law or ordinary legislation to spill over and become triggers for special scrutiny in equal protection cases. This closing-off is most evident in the area of age discrimination. By contrast, there was spillover in sex discrimination, manifested in the social security cases. The Equal Pay Act of 1963 had amended the Fair Labor Standards Act (1938) to forbid sex discrimination in payment for substantially equal work; the Civil Rights Act in the following year had extended women’s rights in employment further. Yet the social security rules

continued to incorporate an assumption about women's secondary status in employment, when other federal legislation was communicating to employers that they could no longer treat female employees more adversely than men. Although the opinions do not mention it, it is the Civil Rights Act that permitted the majority in *Califano v Goldfarb* and the other cases to be so definite that the assumptions of the social security rules really were archaic.

More generally, the role played by specific grounds (race, sex, nationality etc) is different according to whether the principle of equal protection is being applied to states or antidiscrimination policies are being applied to market actors. Constitutional nondiscrimination provisions may, like antidiscrimination policies, enumerate grounds, but they do so for different reasons. Constitutional provisions are 'alerts' which flag up the basis for heightened scrutiny, but scrutiny may be possible even without belonging to a listed ground. Antidiscrimination policies, by contrast, identify specific bases for challenging employers' practices and a ground must be specified. This gives rise to another difference, in the way tests for indirect discrimination are applied. In antidiscrimination law, employers can defend indirectly discriminatory practices only on a limited range of grounds. A job requirement or entrance test must be shown to have a real relationship to a person's productivity or suitability for a job if it is to be defended. The constitutional principle of nondiscrimination allows disparate impacts to be justified on a wide variety of reasons, relating to public values or public purposes.

#### **4. The constitutionalisation of equality and nondiscrimination in the EU**

Stone Sweet and Cichowski (2004: 156-7) argue that sex equality law has been 'constitutionalised' in the EU. Key steps in the process by which this occurred were that the ECJ determined that Article 141 (ex-119, the original Treaty article that provided that men and women should receive equal pay for equal work) had direct effect, so that private litigants could challenge measures adopted by their own governments under this article, and that 'equal pay' should be expansively interpreted to include occupational pensions and benefits. Direct effect means that the Treaty article binds governments without the intervention of directives, and indeed overrides inconsistent provisions in directives. In the *Barber* case (C-262/88), the Court ruled that occupational pensions were part of 'pay', broadly defined, and therefore subject to the Treaty provisions on equality. The effect of this decision was to invalidate part of the Occupational Pensions Directive (86/378). This directive had provided, *inter alia*, that family and survivors' benefits were not subject to equality provisions. The decision in *Barber* was constitutional in that the Court limited member states' capacity to legislate in contravention of the principle of equality, even when they acted in concert in the Council.

However, the elevation of sex equality to constitutional status was limited by the nature of Europe's 'economic constitution'. It only applied to member states' regulation of employment relationships, not to their budgetary social security systems. Thus the EU Treaty directly regulated occupational pensions and benefits, while leaving social security to the member states. This was consistent with the established 'division of competence' between the EU institutions and the member states, in which

labour regulation is an appropriate task for the Union but welfare regulation is not (Hervey 1998: 204).

Of more importance to social policy was the succession of directives agreed to implement the principle of sex equality. These measures are the European counterpart of the Civil Rights Act, the ADEA and the ADA. They rely on a similar imperative to the Commerce Clause: the member states shall not regulate in contravention of the measures established by the federation or Union to ensure unrestricted trade. This imperative imposes a ‘market conformity’ requirement on the member states. The division of competence might suggest that this would only apply to employment regulation, not social security, but the close relationship between social security and employment made this distinction hard to sustain. Member states recognised that market conformity would require adjustment to their social policies in Directive 79/7 ‘on the progressive implementation of the principle of equal treatment for men and women in social security’. The Directive could be seen as defensive measure by the member states, that protected unequal state retirement ages from being immediately struck down. On this interpretation, the emphasis was on the word *progressive* (i.e. not immediate): member states allowed themselves six years for implementation. However, there were also opportunities latent in the Directive for it to act as a lever for the application of equality principles to national social security systems.

The market conformity rationale for the Directive was evident in its wording: it applied only to ‘the working population’ and related only to social security provisions covering the ‘classic’ employment-related risks of sickness, invalidity, unemployment and old age. However, it remained for the Court to interpret this wording. In other areas of EU social security law, notably the measures on the social security rights of migrants, the Court had been inclined to take an expansive view of what counted as ‘social security’, thereby ensuring that migrant workers could export their accumulated social entitlements to their home state. Furthermore, the Commission argued for a wide interpretation of the scope of Directive 79/7 on the grounds that the measure would otherwise have a differential impact on member states, according to whether social insurance linked to employment had a large role in their welfare states or not (Hervey 1998: 202).

In practice the Court’s view of whether a social measure was employment-related was often restrictive, but occasionally venturesome. For example, in the case of *Drake* (C-150/85), the ECJ found that the rule that married women could not receive the Invalid Care Allowance was within the scope of the directive (Barnard 2006: 493-4). The Court reasoned that Mrs Drake should be seen as a member of the working population, who had had to interrupt her employment to care for her mother. While *Drake* was an example of egregious discrimination by the British government against married women, there was not really any ‘market conformity’ rationale for correcting this.

The ECJ has also been presented with cases in which a state’s social policy appears to be indirectly discriminatory. The leading examples concern the treatment of part-time workers. If employers offer part-timers disadvantageous terms, this may be seen as indirect discrimination against women. Social security rules which differentiate between full-time and part-time work could be, on the face of it, also impugned as discriminatory. In *Nolte* (C-317/93) and *Megner and Scheffle* (C-444/93), the

exclusion of ‘minor’ (short hours/ low-income) employment from social insurance was scrutinised, but the Court held that indirect discrimination could be justified by considerations of national social policy. Subsequently it has continued to find that the member states enjoy a ‘reasonable margin of discretion’ and that indirectly discriminatory practices will be upheld if this discretion is exercised on the basis of considerations unrelated to sex (Costello and Davies 2006: 1592).

Social policies have also been scrutinised for indirect discrimination in a set of cases where rules on dependents’ allowances have been challenged. These may have a discriminatory impact if, for example, men are more likely than women to qualify to receive the allowances because of the concept of ‘dependency’ used in the social security system. In *Commission v Belgium* (C-229/89), the Commission argued that such differential impact was only justifiable if it arose from differences in the needs of the people affected. In other words, social policy was conceived as a system in which allocations are made according to needs. This corresponds to the productivity defence available against indirect discrimination in employment, where the market sphere is conceived as a system in which rewards are linked to value of output. However, the Court rejected this argument, finding that indirect discrimination could be justified by a range of aims of social policy, not just the aim of allocating according to need, and that member states could decide on these aims (Hervey 1998: 212).

These cases are striking not so much for their outcomes, which have tended to uphold national rules, but for the very fact that they can be brought. Indeed, it is striking how many cases challenging national social policy on anti-discrimination grounds are brought before the ECJ, compared with the number heard by the SC. This may partly reflect the Supreme Court’s capacity for ‘docket control’, but it also demonstrates the continuing uncertainty over the scrutiny that the ECJ will apply. In the eyes of many legal commentators, the Court is too deferential in these cases (see, e.g. Costello and Davies 2006: 1593). This presumably reflects a view that the Court should extend the principle of equality to challenge discrimination in social policy. However, this begs the question of why the evaluation of the ECJ about whether discrimination is justifiable in the light of its (potentially many and varied) policy purposes should take precedence over that of a national legislature.

The salience of this issue increased markedly with the extension of the first part of the Treaty on ‘citizenship of the Union’, including the adoption of a new Article 13, which enables the Council to take ‘appropriate action’ to combat discrimination on a wide range of grounds, including race, age and disability. Soon after, the Race Directive (2000/43 EC) and the Framework Equal Treatment Directive (FETD) (2000/78 EC) were agreed unanimously by the Council. In *Mangold* (C-144/04), the Court found that a regulatory social policy adopted by the German government breached Community norms on age discrimination.

We should not read too much into *Mangold*, which now looks like an aberration. However, several features of the decision are interesting. The case concerned a German law which prohibited fixed-term employment contracts except where there were objective reasons for them. The law did not apply to contracts with workers aged over 52. The ECJ upheld Mangold’s challenge to this rule, based on critical scrutiny of the considerations of German social policy that had led to the adoption of the limit.

The Court applied a relatively strict standard of scrutiny in finding that the discrimination in the provision was not proportionate to its aims. The justification cited by the German government was research which showed that a person over 55 had only a one-in-four chance of re-employment (para 77 Opinion). The Advocate-General drew attention to the difference between 55 and 52, suggesting that research did not really support the policy adopted. This test goes far beyond the requirements of ‘mere rationality’; it suggests that a heightened standard of scrutiny will be applied when a measure relates to the grounds listed in Article 13.

A curious feature of *Mangold* was that the case arose before the FETD came into force in Germany. The Court evaded this problem by finding that non-discrimination was a ‘general principle of Community law’. While the FETD developed the application of this principle, its origins lie ‘in various international instruments and in the constitutional principles common to the Member States’ (para 74, Judgment). This move on the part of the Court has attracted a great deal of legal commentary, much of it critical. It has been questioned whether age equality really is a fundamental principle in international instruments (Schiek 2006). Furthermore, if it is a general principle of Community law, this still implies that the Court can act only against the most manifest instances of discrimination, invoking the ‘hard, legally perfect core, which can be applied as such by a court, without the necessity of further elaboration in directives’ (Jans 2007: 59). It is striking, by comparison with the US, that a rule preventing states from discriminating in their measures to regulate market (employment) relationships has been constitutionalised by the ECJ using an equal protection logic, whereas in the US, congressional attempts to invoke constitutional powers under the 14<sup>th</sup> amendment in support of the Civil Rights Act were rebuffed.

Subsequent age discrimination cases to come before the ECJ have concerned issues around retirement, and the Court has found in favour of the member state. This is not, however, because the Court regards the retirement age as a matter of national social policy to which rules governing market integration do not extend. Recital 14 of the preamble to the FETD states that it is ‘without prejudice to national provisions laying down retirement ages’, but the Court has not taken this statement at face value, arguing that, while member states can set retirement ages, the directive still applies to ‘conditions for termination of employment contracts where the retirement age, thus established, has been reached’ (*Palacios de la Villa* (C-411/05), Judgment para 44). The implication is that the market-regulatory social policies of the member states are subject to European law, regardless of exclusions they may seek to establish. Nonetheless, the Court has then tended to be more deferential than in *Mangold*, finding national measures justified. In *Bartsch* (C-427/06), the Advocate General argued that that direct as well as indirect age discrimination can be justified on grounds of public policy. In his account, the application of the general principle of equality to discrimination on the grounds of age is an evolving and socially-contingent process, in which the Court can scrutinise, but not pre-empt, the way in which a member state chooses to transpose the Directive.

The question of whether it is appropriate to see the FETD as a market regulation or a statement of basic constitutional values was addressed in the Opinion of A-G Geelhoed in another recent case, *Chacon Navas* (C-13/05). Here the Court was asked to consider whether the definition of disability should be widened to include sickness. Arguing against widening the discrimination grounds and promoting a general

principle of equality, the Advocate General pointed out that the question at issue related to the fields of employment and social policy ‘where the Community has at best shared, but for the most part complementary powers’. It followed that ‘the Court must respect the choices made by the Community legislature’ and not use Article 13 ‘as a lever to correct [...] the decisions made by the Member States in the exercise of powers which they – still – retain.’ (Opinion, paras 52-54) It followed that the Court should stay within the boundaries of directives, rather than invoking the Treaty (Article 13) or other sources of ‘general principles’.

## 5. Conclusion

This paper has analysed the transmission or spillover of antidiscrimination policies applying to economic relationships (employment in particular) onto social policy. This spillover presents a constitutional problem, as it involves courts reviewing the decisions of elected governments. It presents a problem as well for the evolution of social policy and the development of the welfare state, which can be summarised in the idea that civil rights may undermine social rights.

In the situations discussed here, a conflict between civil and social rights arises where discrimination which we would criticise if applied by an employer in market relationships seems less pernicious when applied by an elected government in pursuit of social policy objectives. Age and disability discrimination present examples of this. It is possible to hold strongly that people should not be forced to retire or lose employment rights at a certain age without also regarding it as wrong that age is a criterion in determining eligibility for a pension or benefit. In the area of disability, we may feel that it is wrong for an employer to refuse to employ a person with an impairment, while at the same time supporting an entitlement to benefits arising from that impairment.

When put like this, it seems obvious that discrimination norms do not necessarily travel from market relationships into social policy. However, reality is more complex. Social policy emulates as well as corrects market relationships. Arguably this dual process of mirroring and transforming is fundamental to the way that social insurance, in particular, works. In Europe, the Commission has advanced a method of distinguishing the application of discrimination norms to social policies from their application to market relationships by imposing a ‘needs test’ on what constitutes social policy. However, the implications of this for European welfare states are problematic. Social policies that are narrowly focused on needs may become residualised, compared with those that have wider normative foundations.

Sex discrimination has some specific features that suggest that its application to social policy should *not* be different to its application to market relationships. These features arise from policy-makers’ reliance, in designing social policies, on norms about familial relationships which perpetuated women’s dependent relationship to men and their secondary economic status. To some extent, similar types of normative connection can be found in disability policy, where practices leading to exclusion from employment were linked to the evolution of the disability category in social provision. However, the issue for applying nondiscrimination norms to social policy is not whether such linkages exist, but what the role of courts should be in making the links. The comparison of US and EU jurisprudence on the constitutional application of nondiscrimination norms shows that the Supreme Court is equipped with a much

clearer differentiation between the law applying to constitutional review of state and federal actions (the equal protection clause) and the law applying to economic regulation (the Commerce Clause). However, the latter has a constitutional impact, as it can impugn conflicting state legislation.

The ECJ has parallel powers to strike down state legislation that conflicts with EU rules. The scope of these rules is also ‘economic’, so the legal position would seem to be very similar to the Commerce Clause jurisprudence in the US. However, the potential impact on the member states is much greater in Europe, because of the much wider scope of social policy in the member states and its intricate relationship to employment and labour relations. Thus, the fear that the outcome of applying market-conforming norms in Europe will be the undermining of social rights has some foundation.

However, it cannot be said that the SC’s Commerce Clause jurisprudence explains the underdevelopment of the American welfare state; on the contrary, the extension of Congressional use of Commerce Clause powers has provided the basis for equality-promoting regulatory measures. The establishment of a national minimum wage is the leading example of this. Social policy at the state level has been underdeveloped and even regressive, so the restraint on states created by the Commerce Clause has tended to promote equality and social (as well as economic) integration. The potential for economic integration to have the opposite effect in Europe arises because so much more governmental effort towards equality and integration takes place at state level. The problem in Europe is, therefore, not Americanisation as such, but that the European application of market constitutionalism is potentially more damaging than it has been in the US.

This presents us with a puzzle. In the US, the states have robustly defended their ‘rights’, despite their relative lack of capacity and weak social policy-making. Why have Europe’s states not been more robust in defending their autonomy? The answer may lie in a paradox of size and strength. Welfare states impinge much more significantly on the economy in Europe than in the US. States’ rights provisions that are sustainable in the US, such as the right to discriminate in favour of home suppliers in disbursing state and local government funds, would have a more substantial impact in Europe. This suggests that the European states cannot fully protect their welfare states from the single market because the effect of doing so would be to restrict the integrationist project very greatly. The states’ rights of American social policy minnows have little effect on the economic system; the same is not true of Europe’s big fish.

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