Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union

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I. INTRODUCTION

U.S. judges, activists, and academics have theorized extensively about how the struggle for African Americans' civil rights shapes U.S. law prohibiting discrimination against other groups.¹ Many worry that race jurisprudence has made U.S. discrimination law overly preoccupied with achieving formal equality and has blocked other important goals.² Some feminists argue that analogies to race prevent discrimination law from reaching the "substance of most lived sex inequality," such as low pay in feminized professions and inadequate childcare provision.³ Advocates for the disabled are concerned that race analogies block group-based claims to radically redesign workplaces.⁴ Gay rights activists argue that analogies to race limit the law's focus to immutable traits. As a result, gays and lesbians feel compelled to downplay their orientation, ethnic minorities have to mute their accents, and women must hide their status as mothers.⁵

Are race precedents in fact strong constraints that substantially limit courts' discretion to address other groups' concerns? Or are analogies to race "flexible tools" that advocates and judges can employ or reject depending on their policy agendas?⁶ To date, examining the U.S. historical record alone has not offered a clear answer to these questions.⁷

New comparative evidence permits us to examine how U.S. law might have developed if race did not occupy this dominant position. For four decades, sex discrimination in employment dominated the jurisprudence of the European Court of Justice (ECJ), the highest court of the European Union.

¹ See, e.g., John D. Skrentny, The Minority Rights Revolution 8-9 (2002) ("The Civil Rights Act of 1964... created a tool kit or repertoire of policy models that could be extended again and again and adapted to deal with the problems of groups other than black Americans."); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1289 (1991) (arguing that "[t]he African American struggle for social equality" has "provided the deep structure, social resonance, and primary referent for legal equality, however abstractly phrased").

² See Reva B. Siegel, She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 948, 949 (2002) (arguing that constitutional sex discrimination law focuses disproportionately on formal acts of classification because the U.S. Supreme Court derived it from race discrimination law).


⁵ See Robert C. Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, in Prejudicial Appearances: The Logic of American Antidiscrimination Law 1, 40-41 (Robert Post et al. eds., 2001) (rejecting the dominant color blindness paradigm and proposing instead that "a sociological account" be developed, without "attempt[ing] to argue for any particular set of principles that ought to guide the application of antidiscrimination law"); Yoshino, supra note 5, at 783, 937 (critiquing "a formalistic regime of race-blindness, sex-blindness, and orientation-blindness" but leaving open "the real question... of how to determine which traits will 'count' as traits that ought to be protected" in his alternative model (emphasis omitted)).
The Treaty of Amsterdam expanded the ECJ’s jurisdiction, and the Court decided its first race, disability, age and sexual orientation cases between 2006 and 2009.8

This Article argues that the sequence in which courts adjudicate claims is an important determinant of the doctrines they develop. Because early claims involved race in the United States and sex in the European Union, the doctrinal architectures of the two jurisdictions diverged. Race-blindness, the belief that no socially relevant attributes are intrinsically connected to race, shaped U.S. courts’ answers to key doctrinal questions. In contrast, sex-consciousness guided EU courts’ answers to the same questions. Sex-consciousness is the belief that sex and certain socially relevant attributes are intrinsically connected and worthy of protection under a nondiscrimination framework. Doctrinal choices made in early race and sex cases were subsequently extended to claims brought by other groups through analogical reasoning and linguistic conventions calling for similar interpretations of the same words in different contexts. Early doctrinal choices based on particular understandings of race and sex predict the success (or failure) of current national origin, age, disability, and sexual orientation claims.

Two separate theories, disparate treatment and disparate impact, have been available to employees alleging discrimination in both the United States and the European Union. Disparate treatment theory challenges intentional discrimination. Disparate impact theory challenges employer practices that appear neutral, but have the effect of harming minority groups. The EU analog to disparate treatment is direct discrimination, and the EU analog to disparate impact is indirect discrimination. I use the U.S. terms throughout for clarity, and highlight where the doctrines diverge in the two jurisdictions.

The concept of path dependence helps explain the evolution of employment discrimination doctrine in the United States and the European Union. In path-dependent processes, choices made during critical junctures are reinforced, rather than corrected, and this positive feedback loop results in momentous consequences much later in time. Critical junctures are short intervals during which powerful actors face an unusually broad range of options.9 Judges’ ideologies, legislators’ preferences, and social movements’ efforts have their greatest influence on doctrinal development during critical junctures.

U.S. and EU courts encountered two separate critical junctures in adjudicating employment discrimination claims. At the first critical juncture, plaintiffs questioned what evidence was necessary to prove disparate impact. The test in the two jurisdictions appears very similar: to make out a prima facie case, plaintiffs must show that an employer practice has detrimental effects on a protected group. However, courts interpreted this test differently.

8. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 13, Oct. 2, 1997, 1997 O.J. (C 340) I. Article 13 of the Amsterdam Treaty allows for EU measures to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Earlier treaties only called for measures aiming to achieve equality between men and women.

The U.S. Supreme Court insisted that plaintiffs must identify with substantial specificity the causal link between the employer practice and the harmful effect.10 In contrast, the ECJ effectively held that statistics alone sufficed to establish disparate impact.11 Race-blindness and sex-consciousness influenced these answers. Faced with a statistical disparity, a sex-conscious court can use its own implicit theories about protected differences between men and women to interpret the statistics. In contrast, a race-blind court sees no connection between race and any socially relevant trait. It can therefore attribute racial disparities to a "myriad of innocent causes,"12 and require the plaintiff to supply a detailed theory of causation.

The U.S. requirement that plaintiffs specifically identify the causal connection between an employer practice and the observed harm, and the requirement's absence in EU law, has had dramatic consequences for groups bringing subsequent claims. Because sex, age, and disability often correlate with important features of the workplace environment, EU plaintiffs can challenge practices that U.S. courts shield from scrutiny, including rigid attendance requirements, limited opportunities for part-time work, and segregated bargaining structures. EU law even allows plaintiffs to challenge employer practices that have not yet harmed anyone, based on theories about how particular employment practices have foreseeable differential consequences for protected groups.13

Race-blindness and sex-consciousness also shaped doctrinal choices at a second critical juncture. Courts were faced with classifications based not on a protected status as such, but on traits closely and causally linked to a protected status. In both the United States and Europe, courts were first asked to consider the links between sex and pregnancy. If sex discrimination is prohibited, does this also make classifications based on pregnancy facially discriminatory? Influenced by race-blindness, the U.S. Supreme Court initially answered no, pointing to the fact that many women are not pregnant. Therefore, plaintiffs were required to use disparate impact theory to challenge pregnancy classifications, a doctrine that made plaintiff success less likely.14 Influenced by sex-consciousness, the ECJ held that, since only women could get pregnant, pregnancy classifications were not facially neutral, but...
amounted to disparate treatment.\textsuperscript{15} In the United States, Congress intervened and amended Title VII to protect pregnant workers. Thus, even though pregnancy claims have become covered, the doctrinal distinction between disparate impact and disparate treatment was reinforced in the United States while it became blurred in the European Union.

These early doctrinal choices shape current controversies about how far discrimination law should extend to protect immigrants and same-sex couples. If discrimination on the grounds of national origin is prohibited, are classifications on the grounds of citizenship also facially discriminatory? Similarly, where discrimination on the grounds of sexual orientation is illegal, is the differential treatment of married and unmarried couples facially discriminatory? In the United States, the answer is usually no, because courts treat almost every trait that is not exactly coterminous with a protected status as facially neutral, and apply the disparate impact framework. In contrast, in 2008 the ECJ held that citizenship is closely and causally connected to national origin. In the same year, the ECJ also emphasized that, since only same sex-couples are prohibited from marrying, restricting spousal benefits to married couples is facially discriminatory. The plaintiffs won in both of these cases, in large part because the ECJ adjudicated them under the disparate treatment framework.

In the United States, the distinction between disparate treatment and disparate impact is a solid one, accepted by liberals and conservatives alike.\textsuperscript{16} By contrast, the ECJ often assumes that practices implicating pregnancy, marriage, or citizenship have predictable differential consequences on women, same-sex couples, and ethnic minorities. The ECJ opinions also reflect a moral judgment that employers who put these practices in place with the intent of harming a subset of employees may not be very different from employers who merely disregard their foreseeable consequences.\textsuperscript{17}

However, the conflation of disparate impact and disparate treatment does not systematically favor plaintiffs. In both the United States and the European Union, a limited number of narrow defenses was available initially in disparate treatment cases, while a much broader set of defenses was available in disparate impact cases. In the European Union, the very decisions that conflated the two doctrines allowed for broad defenses formerly confined


\textsuperscript{16} For example, a unanimous Supreme Court recently held that a plaintiff who did not carefully distinguish between disparate impact and disparate treatment theories early in the proceedings, but alleged discrimination generally, could not later introduce disparate impact arguments. Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003); see also Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) (suggesting that disparate impact theory and disparate treatment theory are independent theories, which, in rare cases, may even impose conflicting duties on an employer).

\textsuperscript{17} Two leading antidiscrimination scholars, Robert Post and Barbara Flagg, hint at the possibility of connections between impact and treatment doctrines. See Barbara J. Flagg, "Was Blind but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 960 (1991) ("I conclude with the speculation that [the requirement of discriminatory intent] owes its longevity, at least in part, to its conformity with distinctively white ways of thinking about race discrimination."); Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 CAL. L. REV. 1, 39 (2000) ("I strongly suspect that the insights of the sociological account would soften this sharp and consequential distinction between facially neutral laws and laws that employ explicit racial and gender classifications.").
to disparate impact to be introduced in disparate treatment jurisprudence. Soon after declaring that pregnancy discrimination could be understood as disparate treatment on the grounds of sex, the ECJ suggested that it could nonetheless be justified in some circumstances. In 2008 and 2009, the ECJ extended these broad justifications to disparate treatment to claims of age and disability discrimination, in ways that U.S. courts categorically reject.

To ascertain the relative contributions of politics, culture and precedent to important instances of doctrinal development, this Article introduces new EU cases and revisits key U.S. debates. I limit my analysis to workplace discrimination cases because the ECJ’s jurisprudence has been similarly focused. Differences and similarities in Americans’ and Europeans’ attitudes toward minorities and women, and in court structure and composition, offer new data points from which to evaluate conventional wisdom. Traditional accounts emphasize ideological differences as key drivers of the evolution of U.S. discrimination law. The comparative perspective illustrates that majority and dissenting Supreme Court Justices, as well as liberal and conservative political leaders, often share fundamental assumptions, even in highly politicized cases. Comparative analysis helps identify the historic moments when politics, ideology, and culture mattered most, and helps specify the mechanisms through which doctrinal choices made at early critical junctures were replicated when courts addressed new groups’ claims later on.

In addition, comparative analysis changes our calculations about the costs and benefits of the race-blindness paradigm for groups bringing subsequent claims. Departing from race-blindness does not systematically favor plaintiffs, as U.S. activists often hope. When courts allow plaintiffs to invoke differences, the risk that courts will give defendants similar options increases dramatically. In the European Union, individuals who make claims that courts consider typical of the protected category in which they belong gain greater protection than in the United States. For example, women seeking employment in heavily feminized professions, women seeking expansive childcare-related accommodations, or physically disabled persons seeking sheltered employment benefit more from EU law. In contrast, women seeking employment in male-dominated fields, men planning to prioritize childcare, older persons seeking to work past traditional retirement ages, and physically disabled persons seeking physically demanding jobs, are all advantaged under U.S. law.

II. THEORETICAL FRAMEWORK

Path-dependence claims are relevant to diverse legal arguments. However, while allusions to path dependence are plentiful, careful explanations of path-dependence mechanisms are scarce. This Part has three aims: to explain the mechanisms of path dependence in judicial decisionmaking, to discuss empirical methods appropriate for studying path-dependent processes, and to develop testable implications of path dependence and alternative theories.

Path-dependence theories are not merely arguments that history matters. In many arguments about the influence of past events on the present, we
assume proportionality in cause-effect relationships. For example, if we observe that a law redistributes resources toward a certain group, we might look to history for the moment in time when this group gained great political power and enacted the law in its favor.

In contrast, research on path-dependent processes allows for the possibility that small shifts made at critical junctures can have major consequences that are difficult to reverse. 18

What mechanisms generate self-reinforcing processes in judicial decisionmaking? Scholars have thoroughly explored path dependence mechanisms in economic markets and political processes. In addition, scholars of the judiciary have emphasized the doctrine of precedent, which undoubtedly constitutes a key aspect of any theory of path dependence in courts. This doctrine requires that lower courts follow higher courts' guidance and can thus explain some stability in judicial decisions. 19 Even in jurisdictions with no strict precedent doctrine, the influence of higher courts' rulings on lower courts is significant. And many courts are bound to follow their own prior decisions. 20 More generally, any doctrine that calls for predictability in legal outcomes can slow reform: such doctrines are fundamental to the concept of the rule of law and are found across legal systems. 21

However, arguments about precedents and predictability leave two open questions. First, why do courts not only keep doctrines stable over time, but also expand these doctrines by applying them to new issue areas? To answer this question, the discussion below emphasizes the use of specific interpretation techniques, notably analogical reasoning and conventions calling for the interpretation of the same words in the same way in different contexts.

Second, when path dependent processes lead to poor outcomes, why are they not interrupted? This Article suggests that a key difference between path dependence in courts, markets and legislatures is the existence of correctives. Both economic and political markets contain mechanisms to interrupt path-dependent processes; such mechanisms are much more limited in judicial systems. While path dependence can lead businesses to sell outdated technologies, markets are often structured so as to create incentives for competitors to emerge. While path dependence can lead political processes astray, elections allow for the interruption of self-reinforcing cycles. Instead, courts are typically insulated from analogous correctives. Even in the rare cases when other branches of governments intervene to reverse judicial decisions, the discussion below suggests that important aspects of these decisions can persist.

A. Path Dependence in Markets, Legislatures, and Courts

Different mechanisms generate self-reinforcing cycles in markets, legislatures, and courts. Economists have puzzled over the continuous use of the QWERTY keyboard, the prevalence of North-North intra-industry trade, and the persistence of economic growth or stagnation. To explain these puzzles, they have identified particular dynamics that give rise to path dependence in markets: large set-up or fixed costs that benefit first-comers; learning effects, as products introduced early become familiar and cheap to produce over time; coordination effects, which arise when more actors take similar actions; and self-reinforcing expectations, where market prevalence enhances beliefs of further prevalence.

Path-dependence arguments are more central in politics, and explain the persistence and expansion of both institutions and particular policies. In politics, the central role of collective action presents strong barriers to change, as the costs of change are often concentrated and the benefits diffuse. Moreover, politics can be used to reinforce power asymmetries, such that the actors who benefit from the current set of political arrangements are in a strong position to sustain them. Path dependence in political processes is likely to shape key legal outcomes that result from legislative and executive decisions. For example, scholars of corporate and business laws emphasize that these laws create political incumbents, who in turn use their influence to preserve their economic advantages and stifle change.

However, different mechanisms generate path dependence when policies are made through judicial interpretation, as is the case in the development of discrimination law. Existing research on path dependence in courts emphasizes factors that promote stability and slow down change. Precedent and other doctrines requiring predictability in judicial decisionmaking certainly contribute to stability. Structural features of judicial systems also help explain the slow pace of legal reforms. For example, individual litigants typically only enjoy a small fraction of the benefits of new legal interpretations, and the hierarchical nature of judicial systems raises the costs

27. See, e.g., Paul Pierson, When Effect Becomes Cause: Policy Feedback and Political Change, 45 WORLD POL. 595, 600-01 (1993) (explaining how the structure of policies benefiting the elderly, notably Medicare, created strong incentives for the elderly to join the American Association of Retired People, which, newly strengthened, could lobby for additional benefits for the elderly).
28. See Pierson, supra note 18, at 257-61.
29. Id.
31. See Hathaway, supra note 19, at 622; Suk, supra note 21, at 1324.
of litigation, since many appeals are typically required to achieve law reforms through courts.32

However, two key puzzles remain. First, why are path-breaking court decisions not only preserved, but often reinforced? Second, why are self-reinforcing cycles not interrupted? Particular techniques of legal interpretation, rather than structural features of judicial decisionmaking, help answer the first question. These techniques influence whether a new decision, a deviation from prior doctrine, will be extended into new domains and expanded further. Only some judicial interpretation techniques generate self-reinforcing cycles. For example, deductive reasoning might not work in this way. When faced with a new case, a judge that deduces decisions from theory, be it originalism or social welfare maximization, should not care about the outcome of prior cases. If prior cases erroneously applied the theory, such a judge will correctly apply the theory and reach a different outcome.

In contrast, reasoning by analogy, “the most familiar form of legal reasoning,”33 can lead to positive feedback cycles because analogies allow a deviation to be extended into many new situations. However, analogical reasoning has substantial fluidity and flexibility. Therefore, while it is often used in ways that expand on prior doctrines, it is sometimes used to cabin existing decisions.

Most surprisingly, the method of interpretation that generated doctrinal expansion in the employment discrimination decisions described below, was, in a large part, textualism. Policy concerns related to race and a judicial philosophy of race blindness motivated the Supreme Court to introduce particular doctrines in race cases. Policy concerns related to sex and sex-consciousness motivated the ECJ to make particular doctrinal choices in sex cases. These concerns about paradigmatic categories help explain the outcomes of critical junctures. Canons of interpretation stating that the same words should be interpreted in the same manner were used to extend these policy choices to new contexts where statutory language involved similar phrasing.34

Second, what happens when these interpretation techniques lead to problematic outcomes, or to policies that displease powerful actors? Why are path dependent processes not interrupted? While markets, and to a lesser extent politics, contain correctives for path-dependent processes, correctives are substantially weaker in judicial systems. In an economic market, when a path-dependent process results in the spread of a low-quality good, incentives exist for competitors to develop a better product, and institutional arrangements, such as credit markets and patents, facilitate this.35 In politics, elections are the mechanism that constrains governments from deviating too

34. See Earl M. Maltz, The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent, 1994 UTAH L. REV. 1353, 1354-58 (developing an argument about linguistic conventions to explain how the disparate impact doctrine was extended from race to sex in the United States).
far from popular preferences. In contrast, judicial decisionmaking is intentionally structured to be insulated; for example, unlike politicians who must constantly worry about losing popular support, judges often have life tenure. Even when legislatures intervene to reverse judicial decisions, the analysis below suggests that important aspects of court doctrines persist. Isolating judicial decisionmaking from popular pressures may have many benefits, but path-dependent doctrinal evolution could be counted among its costs.

B. Examining Path-Dependent Processes Empirically

A central challenge in the path-dependence literature is testing claims about path dependence against alternative explanations. Comparative analysis can be very useful to develop plausible counterfactuals about the consequences of paths not taken. This Article examines doctrinal developments in the European Union and the United States, two jurisdictions that differ on the key independent variable but are otherwise good matches. Multiple testable implications follow, concerning expected variation across jurisdictions, doctrines and protected groups.

The design of this study begins with a “controlled comparison.” Ideally, a controlled comparison involves “the study of two or more instances of a well-specified phenomenon that resemble each other in every respect but one.” EU and U.S. courts differ in one key respect, the consequences of which are the object of this study: U.S. courts began with the race paradigm, while EU courts began with the sex paradigm at historical moments when particular interpretations of race and sex were dominant. The fact that EU law began with sex discrimination law is in many ways accidental. The sex antidiscrimination mandate in the 1957 Treaty of Rome establishing the European Community was a last-minute addition meant to limit barriers to trade and was understood as insignificant at the time. This accident casts

36. For a similar assessment of the key challenges facing the related literature on precedential cascades, see Eric Talley, Precedential Cascades: An Appraisal, 73 S. CAL. L. REV. 87 (1999). “My conclusions [regarding possible empirical verification techniques] are perhaps the most skeptical. For even if precedential cascades seemed plausible on a priori grounds, it is difficult and likely impossible to test for their existence against any number of plausible alternative hypotheses.” Id. at 93. The literature on precedential cascades seeks to explain why rational judges might mimic each others’ decisions, even when they should know better. Such cascades result when the amount of public information, gleaned from the choices of prior decisionmakers, overwhelms any private information, and actors all make the same choice, following the public information and disregarding private cues. See Abhijit V. Banerjee, A Simple Model of Herd Behavior, 107 Q.J. ECON. 797, 798 (1992); Sushil Bikhchandani et al., Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades, J. ECON. PERSP., Summer 1998, at 151, 154.


38. ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 151 (2005); see also Arend Lijphart, The Comparable-Cases Strategy in Comparative Research, 8 COMP. POL. STUD. 158 (1975).

39. In 1957, the Treaty of Rome established the European Economic Community to liberalize trade. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958). French bureaucrats inserted a narrow equal pay clause in this treaty, at a time when the ECJ was expected to hear a small number of trade disputes between EU governments, and to
doubt on possible alternative theories: for example, the ECJ did not begin with sex discrimination cases because the European public in the 1950s had stronger feminist concerns than the U.S. public.

Developing perfectly controlled comparisons of U.S. and foreign legal developments, or any historical event, is impossible.\textsuperscript{40} That said, a comparison of EU and U.S. employment discrimination case law approaches this ideal. As described below, EU and U.S. courts, societies, and political systems are strikingly similar in some respects. They differ in other respects, but their differences do not help explain the divergence in U.S. and EU anti-discrimination doctrine. Moreover, EU and U.S. courts begin with exactly the same doctrine; explicit borrowing leads directly to this identical starting point. Nevertheless, controlled comparisons involving historical case studies are by necessity imperfect. Two methods, within-case comparisons and process-tracing, can complement these comparisons. Whereas quantitative studies often use variation across cases to test their theories, qualitative research typically proceeds by multiplying the testable implications of particular theories by looking within particular cases.\textsuperscript{41} For example, a quantitative researcher might examine the hypothesis that race-blind precedents lead to the rejection of pregnancy accommodation claims by studying antidiscrimination law in many countries of the world and comparing how countries with race-blind precedents and countries with sex-conscious precedents differ on pregnancy accommodation. Instead, a qualitative researcher might look more closely within particular countries and use variation across protected groups and doctrines to test the same hypothesis. More specifically, if race-blind precedents limit pregnancy accommodations, one could hypothesize that they might also limit accommodations for older workers and disabled workers. Or, one could hypothesize that race-blind precedents might limit both plaintiffs’ and defendants’ arguments in similar ways. As with statistical cross-case comparison, one evaluates how congruent observable outcomes are with the tested hypothesis, as compared to how congruent these outcomes are with alternative hypotheses.

Process-tracing is a “method [that] attempts to identify the intervening causal process—the causal chain and causal mechanism.”\textsuperscript{42} Process-tracing emphasizes mechanisms, rather than ultimate effects. “[W]hen X causes Y it may operate so as to leave a ‘signature,’” and thus one may be able to use historical evidence not only to observe whether Y occurred, but also to look for traces of this signature.\textsuperscript{43} Written judicial opinions reveal a large amount

\begin{itemize}
\item[42.] George & Bennett, \textit{supra} note 38, at 206.
\item[43.] Lawrence B. Mohr, The Reliability of the Case Study as a Source of Information, in 2 Advances in Information Processing in Organizations 82-83 (R.F. Coulam & R.A. Smith eds.,
of information in addition to information about the ultimate outcome of the case; one can therefore use them to look for signatures of causal connections between cases. For example, to claim that a connection with a race precedent caused a particular outcome in a sex discrimination case, one might examine whether the race precedent is cited and whether the judge argues that he is applying the cited precedent to new facts. However, because judges might write opinions in order to persuade, rather than in order to explain their thought processes, we might not always find so transparent a citation trail. Conversely, an analogy to a prior case could serve to conceal impermissible reasoning—such as reasoning on the basis of a judge’s personal preferences. As with evidence concerning outcomes, the strongest evidence comes when the causal signature is distinctive and inconsistent with other plausible alternative theories. For example, in a case evaluating the legality of mandatory retirement, the ECJ drew analogies from sex precedents to conclude that it had jurisdiction over such arrangements. While this constitutes evidence that sex precedents shaped the Court’s thinking, even stronger evidence comes from the Advocate General’s position. He argued that the Court should reach a different conclusion—that the age discrimination directive should be read to exclude mandatory retirement from ECJ scrutiny—but conceded that sex precedents point in the opposite direction. Close reading of important cases in Parts III and IV below employ these methods.

C. EU and U.S. Doctrine in Context

U.S. and EU courts reach their decisions in particular times and places. Scholars must therefore disentangle the influence of prior case law, from the influence of contemporary cultural, political, and ideological pressures. This Section introduces some general background about the context in which employment discrimination doctrine developed in the two jurisdictions. Parts III and IV below explore in greater detail how these factors influenced particular cases. A pattern emerges: it is very difficult to use broad theories of cultural, political, or institutional differences to explain the main differences between U.S. and EU employment discrimination doctrine. However, we can use path-dependence frameworks to understand when culture, ideology, and institutional structure have mattered most, and when their influence has been more limited.

Citizens’ attitudes toward particular minority groups likely influence antidiscrimination doctrine to some extent. If Europeans and Americans had very different attitudes about racial minorities, women or immigrants, these different attitudes could lead the two jurisdictions’ doctrines to diverge.

1985).

44. See Case C-411/05, Palacios de la Villa v. Cortefiel Servicios SA, 2007 E.C.R. I-8531, which is discussed below in Subsection IV.C.2.

45. The judges of the ECJ are assisted by eight Advocates General, who are responsible for developing written opinions on how controversies before the Court should be resolved. Advocate General opinions are not binding, but are typically followed. For a further discussion of the role of the Advocate General, see Vlad Perju, Reason and Authority in the European Court of Justice, 49 Va. J. Int’L L. 307, 354-56 (2009).

46. Case C-411/05, Palacios, 2007 E.C.R. at I-8535 (opinion of Advocate General Mazák).
Subsection II.C.1 below explores the available cross-national survey data. Surprisingly, this data suggests that similar stereotypes prevail on both sides of the Atlantic.

In addition, courts in the United States and the European Union are very different, composed of judges with different ideologies, and structured to review legislative decisions with different degrees of deference. However, while hypotheses about differences in courts are plausible, they often point in the wrong direction. For example, civil procedure in the United States and in EU member states differs dramatically, but in ways that should make disparate impact lawsuits much harder in Europe. We see the exact opposite. Subsection II.C.2 below presents some relevant background information on courts in the United States and the European Union, while Subsection II.C.3 mentions plausible alternative theories.

The discussion below suggests why important differences between the United States and the European Union cannot account for the patterns of antidiscrimination cases we observe. The central difficulty is that these patterns are quite complex: EU courts do not uniformly favor plaintiffs, but instead permit certain kinds of claims that would be rejected in the United States and reject other claims that U.S. courts would accept.

The theory of path dependence developed here aims to explain these complex patterns. The path-dependence argument leaves substantial scope for culture, politics, and diverse other factors to influence the outcomes of particular cases. However, path dependence implies that while culture and politics can be very influential during critical junctures, the scope for these influences narrows over time. The Subsections below begin the discussion about cross-national differences and similarities, a discussion that continues in subsequent Parts analyzing particular cases.

1. Citizens' Attitudes Toward Minority Groups

Cultural differences could drive divergence in legal doctrines. For example, a theory of cultural differences might posit that Americans and Europeans have different attitudes toward same-sex couples or immigrants, and courts respond to these attitudes in shaping doctrine. Or, perhaps citizens have different preferences toward appropriate policy solutions. Available cross-national survey data is limited, but does not lend support to theories of major cultural differences across the Atlantic. While stereotypes about different groups are pervasive in both Europe and in the United States, no obvious transatlantic difference appears in the patterns these stereotypes take.

The International Social Science Program (ISSP) and the World Values Survey are the two major sources of cross-nationally comparable public opinion data. The most recent World Values Survey suggests that certain biases are alive and well on both sides of the Atlantic. In 2005, 14% of Americans responded that they would not like "immigrants" or "foreign

47. See also Katerina Linos & Martin West, Self-Interest, Social Beliefs, and Attitudes to Redistribution: Re-Addressing the Issue of Cross-National Variation, 19 EUR. SOC. REV. 393 (2003) (systematically addressing the question of cross-national differences in public opinion on social policy questions).
workers" as neighbors, while 27% responded that they would not like "homosexuals" as neighbors. But U.S. responses do not stand out in comparative perspective. Thirteen percent of German respondents, 15% of British respondents, 15% of Italian respondents and 36% of French respondents mentioned that they would not like "immigrants" or "foreign workers" as neighbors. Fifteen percent of German respondents, 17% of British respondents, 24% of Italian respondents and 29% of French respondents mentioned "homosexuals" among the groups they would not like as neighbors. Similarly, a 1998 ISSP survey indicated that large majorities of both the European and American public believe that "sexual relations between two adults of the same sex" are wrong.

Where available, more specific questions related to employment discrimination also show patterns of cross-national similarity. In the 2005 World Values Survey, respondents were asked whether they agreed with the statement that "when jobs are scarce, employers should give priority to [citizens] over immigrants." This idea was popular in both the United States and Europe: support ranged from 42% in France, to 49% in Germany, 53% in Britain, 58% in the United States, and 64% in Italy.

Searching for cultural differences that might explain early sex-conscious and race-blind cases is harder because cross-nationally comparable surveys only date from the 1980s. In 1985, the ISSP included several questions about race and sex in its first set of surveys. These surveys suggest that race and sex discrimination were perceived to be about equally important in the United States and EU member states where the survey was conducted. In 1987, the earliest year for which comparative data is available, 40% of Americans believed that one's race was essential, very important, or fairly important for getting ahead in life. That placed them at approximately the middle of citizens surveyed in EU countries: 23% of Italian respondents, 25% of Dutch respondents, 49% of British respondents, and 50% of German respondents agreed. Similarly, 38% of Americans believed that whether one was born a man or a woman was essential, very important, or fairly important for getting ahead in life. Seventeen percent of Dutch respondents, 35% of Italian respondents, 35% of British respondents, and 47% of Germans agreed. Again, the U.S. public does not seem to stand out.


49. Only 18% of Italian respondents, 25% of U.S. respondents, 34% of U.K. respondents, and 38% of German respondents answered that sexual relations between two adults of the same sex are "not wrong at all." INT'L SOC. SURVEY PROGRAM, ZA-No. 3190, CODEBOOK: RELIGION II, at 7 (1998), available at http://www.zas.uni-koeln.de/data/en/issp/codebooks/ZA3190_cdb.pdf.


52. Id. at 61.
Alternatively, one could hypothesize that it is not attitudes about the importance of discrimination as such, but rather attitudes about how to respond to discrimination, that divide Americans and Europeans. The 1985 ISSP survey asked whether “[w]omen should be given preferential treatment when applying for jobs or promotions.” This was an unpopular position on both sides of the Atlantic—12% of Americans, as compared to 7% of Britons, 11% of Germans, and 19% of Italians agreed.53

Nor do more nuanced questions about sex and work-family balance suggest that Americans were outliers. The question of attitudes toward part-time work is of particular importance to the discussions that follow, since U.S. and EU courts took different and consequential positions on this issue. One might think that perhaps EU citizens disproportionately prized part-time work as appropriate for women or for women with young children. However, in the earliest available surveys, large majorities of both U.S. and EU respondents believed that married women should work full-time, rather than part-time or not at all, before they had children.54 On the other hand, in the mid-1980s, majorities on both sides of the Atlantic thought married women with children under school age should stay at home, sizeable minorities believed they should work part-time, and only small minorities believed they should work full-time.55

The above statistics, while incomplete, show surprising similarities in EU and U.S. citizens’ attitudes about the prevalence and importance of discrimination and about appropriate government responses. Moreover, workplace patterns that gave rise to early sex discrimination claims were very similar in the United States and in Europe. For example, in the United States, the airline industry was targeted most in early sex discrimination complaints to the Equal Employment Opportunity Commission (EEOC), as well as in National Organization of Women activism, for its practice of requiring women stewardesses to retire upon marriage or reaching a certain age.56 Similarly, the first sex discrimination cases heard by the ECJ concerned exactly this industry practice.57

2. Courts in the United States and the European Union

Even if public opinion in Europe and the United States has been similar, important differences in the court systems of the two jurisdictions could account for the divergence in antidiscrimination doctrine. The discussion that follows highlights key differences in court structure and composition.

55. Id. at 51.
56. See SKRENTNY, supra note 1, at 114, 118.
However, it proves difficult to connect these differences to the evolution of antidiscrimination doctrine in the two jurisdictions.

A first key difference concerns federalism. For many purposes, the European Union is a supranational organization, rather than a federal state. In the formative decades of the European Community, the position of the ECJ relative to national constitutional courts, and the ability of private litigants to invoke EU law directly, were contested. This structural difference could limit the ability of the ECJ to interpret laws in ways that strengthen individual rights but conflict with member state preferences. Following theories of federalism, we should expect courts in strong federations to show limited deference to member states’ decisions, and federal courts in weak federations to show great deference to member states’ decisions.

However, between 1971 and 2003, 68% of cases challenging national laws or practices in the social policy arena succeeded. More tellingly, when national governments made formal written observations in cases not involving their own legal systems, the Court often ruled in the opposite direction. For example, the United Kingdom submitted written observations in 44% of all cases not involving the U.K. legal system, and the Court ruled consistently with the U.K. position only 58% of the time. These findings “bring into question claims that the ECJ decisions are systematically influenced by the policy positions of member states.” Moreover, in the social policy domain, “the ECJ is nearly as likely (57%) to issue adverse rulings in cases with the highest political and economic impact” as in cases “with a low impact.”

A second hypothesis concerns the structure and political orientation of the Court itself. Perhaps the ECJ allowed pro-plaintiff interpretations to prevail more frequently because its judges have been more liberal or more feminist than their U.S. counterparts. Are ECJ judges particularly sympathetic to employee or women’s issues? The ECJ is sometimes accused of ideological bias, but the typical allegation paints the ECJ as a conservative court intent on promoting free market principles and striking down protectionist measures.

Moreover, the ECJ was an all-male court until 1999. It is also instructive to examine the viewpoints of individual judges. While the US record makes this possible, it is difficult to investigate the ideology of individual judges in the European context, because the ECJ issues unsigned opinions. Advocates General, however, sign their opinions and anecdotal evidence suggests that their interpretations of EU and national law

58. See ALTER, supra note 39.
60. Id. at 86.
61. Id. at 88.
62. Id. Cichowski defines “cases with the highest political and economic impact” as those in which four or more member states file written observations and cases with “low impact” as those in which only one member state files an observation. Id.
64. For a discussion of the possible influence of women law clerks on ECJ opinions before 1999, see generally Sally J. Kenney, Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court, 33 COMP. POL. STUD. 593 (2000).
Path Dependence in Discrimination Law

were not consistently driven by an underlying political ideology. For example, an important difference in the early development of U.S. and EU law concerned the treatment of full-time and part-time workers. U.S. courts have generally been unwilling to consider any comparisons between the two categories of workers, while EU courts have compared the two and dramatically expanded benefits available to part-timers. When interpreting EU law, Advocate General Slynn called for this expansion of protections for part-timers. However, in his prior career on the U.K. bench, he had ruled out such comparisons categorically, stating that a part-time job is “basically a different kind of job” from a full-time job.\(^65\) In summary, important differences in court structure and composition do not straightforwardly connect to the evolution of discrimination doctrine.

3. Other Differences

European and U.S. jurisdictions differ substantially in several other respects. Two that merit particular consideration are background employment law norms and civil procedure principles.

While there is important variation among EU member states, and some variation among U.S. states, in general, EU member states’ employment laws are more likely to offer greater protections to workers. For example, in the United States, antidiscrimination law operates within a system of at-will employment, while many European workers can only be fired for cause. As a direct result, many U.S. antidiscrimination cases concern terminations, while many EU cases concern refusals to hire, terminations during probationary periods, and unequal treatment in the course of the employment relationship.

However, it is more difficult to predict how the fact that a jurisdiction has extensive or limited employment law protections should shape the content of antidiscrimination law. Perhaps the fact that the United States has limited employment law protections is indicative of cultural attitudes or political institutions that disfavor employees; these cultural attitudes or political institutions could in turn limit employees’ abilities to successfully make out claims under antidiscrimination law. Or, we might see the exact opposite: perhaps one should understand employment laws and employment antidiscrimination laws as substitutes: the weaker the set of employment law protections a country has, the stronger the demand for extensive antidiscrimination law. It is even more difficult to connect background employment law norms with the particular, complex distribution of antidiscrimination protections we observe. U.S. courts are more reluctant than EU courts to accept employee prima facie arguments of discrimination, but U.S. courts are more reluctant to accept employer defenses.

European and U.S. jurisdictions also differ dramatically on procedural devices central to discrimination cases. Disparate impact litigation fits the U.S. class action model well because disparate impact claims typically involve allegations and statistics concerning an entire class of employees, rather than

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an individual worker. This type of litigation seems to fit civil law models that emphasize individual claims less well, and yet it has flourished in the European Union since being exported there. Similarly, the burden-shifting rules adopted by the ECJ do not necessarily fit well with the legal traditions of the member states. "[T]he issue of burden of proof . . . is complicated by differences between the adversarial and inquisitorial approaches to be found in the various Member States . . . ." In short, procedural differences, while present, do not seem capable of explaining the two jurisdictions' differing doctrines.

This brief discussion of differences and similarities across the Atlantic can only offer general background material, and point interested readers to scholarship that investigates these factors more closely. Therefore, Parts III and IV below turn to important cases, to examine how diverse ideological motives and doctrinal concerns influenced particular doctrinal choices.

III. ORIGINS AND EARLY DEVELOPMENT OF THE DISPARATE IMPACT DOCTRINE

In the 1960s and 1970s, some employers in both the United States and Europe reacted to new antidiscrimination laws by introducing additional requirements that perpetuated past discrimination. U.S. courts first developed disparate impact theory to limit employers' ability to circumvent race discrimination laws in this way. EU courts first introduced disparate impact theory to limit employers' ability to circumvent sex discrimination laws in similar circumstances. In both the United States and the European Union, disparate impact theory allowed plaintiffs to challenge seemingly neutral employer practices that had a substantial adverse impact on protected groups.

However, in the United States today, many authors consider that the once-powerful disparate impact doctrine is dead. Plaintiffs in employment discrimination cases fare worse than plaintiffs generally, and plaintiffs making disparate impact claims are particularly likely to lose. In contrast, in

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66. See, e.g., Allan G. King & Camille C. Ozumba, Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions, 24 LAB. LAW. 267, 288 (2009) ("Courts often find [the disparate impact] theory conducive to class treatment because all protected group members subjected to such screening have suffered discrimination, irrespective of whether the challenged criteria were the but-for cause of their exclusion from any employment position.").

67. For a more extensive discussion of how civil procedure rules influence employment discrimination claims in U.S. and EU jurisdictions, see generally Suk, supra note 37. See also Suk, supra note 21.

68. See EVELYN ELLIS, EU ANTI-DISCRIMINATION LAW 98 (2005).


71. See Selmi, supra note 69, at 738 (reporting the results of an empirical study, which found that of 130 relevant disparate impact cases appealed between 1984 and 2001, only twenty-five resulted in plaintiff victories (decisions reversed, affirmed, or remanded in favor of the plaintiff), that fourteen of those victories occurred during the period from 1984 to 1985, and that of those twenty-five successes, 60% were remands rather than outright victories).
the European Union, the disparate impact doctrine has flourished, permitting diverse groups to challenge a broad range of potentially discriminatory practices in court and thus make fundamental changes to the structure of European workplaces. This Article attributes this divergence to decisions made at critical junctures decades ago. To illuminate those decisions, this Part reviews key early cases from a comparative perspective.

Contrary to theories about cultural particularities, EU courts did not reference fundamental European values in their first cases. Instead, they borrowed explicitly and directly from U.S. doctrine. In fact, these very first cases did not show European courts to be sex-conscious. In both the United States and Europe, neither courts nor commentators perceived the full significance of the disparate impact doctrine. This is consistent with path-dependence theories that attribute large consequences to small and chronologically distant choices. Section III.A reviews these first cases.

Section III.B explores why U.S. and EU law later diverged. After plaintiffs won substantial victories under the disparate impact theory, defendants in both the United States and the European Union invited courts to clarify the scope of this potentially revolutionary doctrine. Could plaintiffs make out a prima facie disparate impact case by relying exclusively on statistics? In the European Union, courts answered yes; in the United States, they answered no. Instead, U.S. courts introduced the specific practice requirement: to make out a prima facie disparate impact case, an American plaintiff must not only show a statistically significant disparity, but must also identify a specific, facially neutral employment practice and show a causal connection between the specific employment practice and the statistical disparity.

I argue that the paradigmatic categories of sex and race influenced how EU and U.S. courts approached the specific practice question, leading them to arrive at different answers. The sex-consciousness paradigm underlying EU discrimination law portrayed male and female workers as fundamentally different: women’s biological and societal roles were understood to shape women’s preferences and suitability for particular jobs. Moreover, a sex-conscious court was willing to consider at least some of these traits intrinsically linked to the concept of being female, and worthy of protection. Thus, in the European Union, baseline statistics sufficed to make out a prima facie discrimination case because they were implicitly coupled with a theory about men’s and women’s biological and social roles. The ECJ placed the burden on employers to examine whether alternative practices were feasible. In contrast, the race paradigm underlying U.S. discrimination law portrayed black and white workers as essentially interchangeable. No similar implicit theory was easily available and acceptable to explain racial statistical disparities. As a result, U.S. courts introduced a requirement that plaintiffs provide a theory connecting a specific employer practice to the observed disparity pattern. In sum, sex-consciousness on the part of EU courts, and race-blindness on the part of U.S. courts, led to different answers on the specific practice doctrine.
The specific practice requirement is typically presented as a political compromise—a conservative victory in the U.S. Supreme Court that was somewhat tempered by a more liberal Congress' effort to rewrite antidiscrimination law through the Civil Rights Act of 1991. Politics undoubtedly played an important role in the particular outcomes reached at the critical junctures in U.S. and EU debates. However, the comparative perspective highlights that the race paradigm shaped the political positions of both U.S. liberals and U.S. conservatives, while the sex paradigm similarly influenced EU actors with differing political views. Thus, even if liberals had had greater political success in the United States, the doctrinal legacy of the race paradigm would nevertheless remain.

In both the United States and the European Union, doctrinal choices made in early race and sex cases were exported to claims brought by other groups without much consideration of how they might operate in these new contexts. Section III.C explores these processes. Because many workplace features correlate with sex, age, and disability, the specific practice requirement in the United States created even greater hurdles when exported to these claims. In Europe, by contrast, the doctrine more easily permits plaintiffs to make out a prima facie case based on statistics alone. Indeed, EU law now allows plaintiffs to challenge practices that have not yet caused harm but have foreseeable harmful consequences for protected groups.72

A. Origins of Disparate Impact Claims in the United States and the European Union

Modern disparate impact doctrine stems from the U.S. Supreme Court's decision in Griggs v. Duke Power Co.73 Prior to the enactment of the 1964 Civil Rights Act, Duke Power had segregated its workforce, restricting African Americans to its low-paid labor department.74 Once Title VII entered into force, Duke Power introduced a requirement for applicants seeking jobs in better-paid departments either to pass two aptitude tests or to have received a high school degree.75 In Griggs, the Court invalidated these facially neutral tests that were not clearly job-related nor grounded in business necessity because they had a disproportionate impact on African Americans' access to better paid jobs.76

The ECJ directly borrowed this doctrine in Jenkins v. Kingsgate.77 Prior to 1975, Kingsgate, a U.K. clothing manufacturer, paid male and female employees at different hourly rates, but made no distinctions in the pay of full- and part-time workers.78 In November 1975, a month before the Equal Pay Act of 1970 and the Sex Discrimination Act of 1975 became effective, Kingsgate abolished differences between wages for men and women, and

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73. 401 U.S. 424 (1971).
76. Id. at 431-36.
78. Id. at 929 (opinion of Advocate General Warner).
introduced differences in the hourly rates of full-time and part-time workers.79 All but one of the part-time workers at Kingsgate were women.80 The ECJ held that this pay policy would violate EU law if the national court found that it had a disproportionate impact on women.81 The U.K. Employment Tribunal invalidated Kingsgate's policy on these grounds.82

Contemporaries did not immediately understand the consequences of these radical doctrinal shifts. "[U]nlke Brown, Griggs did not garner the big headlines in newspapers when the decision was announced by the Court."83 Similarly, European labor advocates initially read Jenkins and questioned "how far the European Court is committed to a notion of developing women's rights in the labour market."84 Indeed, the far-reaching consequences of these cases were not evident until decades later.85

The evolution of disparate impact doctrine from a modest start into a radically powerful doctrine is in line with the predictions of path-dependence theory, which attributes large shifts to small and chronologically distant precedents. These developments are less consistent with theories that assume proportionality in cause-effect relationships.

The reasoning in Jenkins, and other early European cases, also cast doubt on the cultural differences theory. If the current divergence between EU and U.S. law is due to differences in values, we might expect to see some references to European values in the legal reasoning. We do not. Instead, key players all referenced U.S. precedents as the source of their arguments. Anthony Lester, Ms. Jenkins' lawyer, called his strategy "the Griggs approach."86 Advocate General Warner also referenced Griggs and argued that it was "the correct approach."87 Moreover, he developed a more general methodological point about the appropriateness of borrowing from U.S. law:

As has been observed more than once, the Supreme Court of the United States and this Court often find themselves confronted with similar problems. Although of course the provisions of the United States Civil Rights Act of 1964 that were in question in the Griggs case were worded differently from Article 119 of the Treaty, their essential

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79. Id. at 929-30.
80. Id. at 929.
81. Id. at 926 (judgment).
85. See, e.g., George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297, 1297 (1987) ("The theory of disparate impact is the single most important judicial contribution to title VII of the Civil Rights Act of 1964."); see also Kingsley R. Browne, The Civil Rights Act of 1991: A "Quota Bill," A Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?, 43 Case W. Res. L. Rev. 287, 294 (1993) ("Griggs was, without a doubt, the most significant Title VII case ever decided; indeed, it is almost trite to refer to it as a 'landmark' decision in the law.").
87. Id.
purpose was the same . . . . I draw considerable comfort from finding that my conclusion accords with the conclusions of that court in those cases [Griggs and Dothard].

Similarly, the U.K. Employment Tribunal applying the ECJ judgment in Jenkins cited repeatedly to Griggs. Bilka-Kaufhaus GmbH v. Weber Von Hartz, the second ECJ disparate impact case, spelled out the doctrine more clearly. A different Advocate General, Marco Darmon, was assigned to this case, but he too referenced Griggs, rather than any European values, as the source of the disparate impact doctrine.

It is hard to detect sex consciousness—consciousness of particular obstacles women workers face—in these first ECJ cases. In both Bilka and Jenkins, the ECJ clarified that an employer could justify the differential treatment of part-time and full-time workers if the employer’s intention was to discourage part-time work. Moreover, the Bilka Court stated explicitly that EU law did not require an employer “to take into account the particular difficulties faced by persons with family responsibilities.”

After these initial cases, the doctrine of disparate impact was used to challenge diverse employer practices in both the United States and in the European Union. The employer practices at issue in Griggs and Jenkins were challenged particularly frequently, and with great success. This pattern is consistent with path-dependence theory, which emphasizes how minor early events can result in significant developments over time. Moreover, the ECJ reversed its early difference-blind stance derived from the United States, and gradually developed a sex-conscious jurisprudence, acknowledging special difficulties women faced in balancing work and family. Many theories of cultural difference would predict that stereotypes about women’s roles would decrease over time, and that the European Union and the United States would converge instead of diverge.

Dothard v. Rawlinson, the first U.S. case applying disparate impact doctrine to sex discrimination claims, challenged minimum height and weight requirements. Dothard marks an important extension of Griggs, because it clarified that disparate impact theory was not limited to situations where an employer’s history of discrimination made new reclassification strategies seem suspicious. Yet, the Court extended disparate impact to sex discrimination claims that differed critically from the claims in Griggs “without skipping a beat.”

Cultural theories would predict that in applying disparate impact to sex discrimination for the first time, a court might consider

88. Id. at 936-37.
90. Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 E.C.R. 1607, 1627 (“Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.”).
91. Id. at 1616 (opinion of Advocate General Darmon).
differences and similarities between race and sex. Instead, the *Dothard* Court avoided such comparisons and extended *Griggs* by interpreting the same words in the same way it had before, despite the new context.  

Diverse employer practices have been challenged under the disparate impact doctrine, including experience prerequisites, inquiries into applicants' arrest records, drug tests, and residency requirements. From a comparative perspective, what is most striking is the prevalence of challenges to scored tests initially challenged in *Griggs*. The American Bar Association's 2007 guide to employment discrimination law devotes over one hundred pages to the case law applying disparate impact law to specific employment decisions. Sixty-five percent of these pages are devoted to scored tests.

Similarly, in the European Union, disparate impact doctrine spread to diverse other employer practices, but the initial practice used to reclassify employees in *Jenkins*, part-time status, was challenged with highly disproportionate frequency and success. A long set of cases challenging part-time status classifications followed *Jenkins* and *Bilka*, slowly expanding the doctrine. For example, in *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co.*, the ECJ held that excluding part-time workers from sick pay benefits was discriminatory if it disproportionately impacted women, even though only workers who worked less than ten hours per week were excluded. In *Nimz v. Freie und Hansestadt Hamburg*, the ECJ rejected a collective agreement that gave promotions to part-time workers at a slower rate than full-time workers on the grounds that part-timers acquired skills more slowly. After a long line of cases, the ECJ has ended up considering almost any kind of disadvantageous treatment of part-time workers as "prima facie indirectly discriminatory . . . on the basis that many more women than men are obliged by their domestic responsibilities to opt for part-time work." The principle that differential treatment of part-timers is prima facie discriminatory and requires justification by the employer was finally codified in Council Directive 97/81 on Part-Time Workers. It is striking that over time, classifications once considered entirely legitimate became presumptively illegitimate.

Sex-consciousness can be seen not only in changing case outcomes, but also in changing court rhetoric. Whereas the *Bilka* Court, in the mid-1980s, refused to force employers "to take into account the particular difficulties faced by persons with family responsibilities," by the late 1990s, the ECJ

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98. *See, e.g.*, Carter *v.* Gallagher, 452 F.2d 315, 320 (8th Cir. 1971).
99. *See, e.g.*, Davis *v.* City of Dallas, 777 F.2d 205, 223-25 (5th Cir. 1985).
100. *See, e.g.*, NAACP *v.* Town of Harrison, 940 F.2d 792 (3d Cir. 1991).
102. *See id.* at 161-228.
declared that "Community policy [in the area of sex antidiscrimination law] is to encourage and, if possible, adapt working conditions to family responsibilities." 108

B. Evolution of Disparate Impact in the United States and the European Union

After important plaintiff victories under the disparate impact doctrine, both the U.S. Supreme Court and the ECJ had to determine the scope of the doctrine. In both jurisdictions, a plaintiff must show that an employer's practice has a substantial adverse impact on a protected group. However, it is now substantially easier for plaintiffs in the European Union to make out a prima facie case.

The ECJ only had jurisdiction over sex discrimination cases early on, and over time became more attentive to arguments that sex was fundamentally linked to diverse socially important traits. For this reason, once a plaintiff had shown a substantial disparity in men's and women's employment outcomes, the ECJ did not require plaintiffs to supply a detailed theory of causation linking a specific employer practice to the statistical disparity. The ECJ could infer that observed statistical disparities were related to fundamental and protected traits linked to sex, such as "motherhood." Sex-consciousness thus made it easier for plaintiffs to establish a prima facie case on the basis of statistics alone.

In contrast, U.S. courts first addressed race discrimination claims at a time when the race-blindness paradigm was dominant. Because U.S. courts did not want to assume that race was linked to almost any other trait, they asked that plaintiffs demonstrate with substantial specificity what employer practices caused observed statistical disparities, and how exactly the causal connection worked. They thus introduced the specific practice requirement to U.S. disparate impact doctrine. The paragraphs below present the key cases that established the two jurisdictions' different positions on the specific practice doctrine: Wards Cove 109 in the United States, and Enderby 110 in the European Union.

In the United States, the specific practice requirement had the straightforward and intended consequence of making it more difficult for racial minorities to make out disparate impact claims. However, courts casually and quickly extended it to claims brought by other groups, which magnified its consequences. With regard to women workers, the theory of equal pay for comparable worth, an effort that would have increased pay for women in female-dominated fields, succeeded in Europe but failed in the United States due in part to difficulties resulting from the specific practice requirement. A second consequence of the doctrine concerned accommodations for the disabled. While individual claims would succeed in the United States under the Americans with Disabilities Act, Title VII's potential to reform entire workplaces was radically limited by the specific

practice doctrine. More generally, challenges to background employment norms such as employers’ ability to insist that all workers work full-time, take limited absences, or relocate when the employer so desires, became much less likely to succeed under U.S. law as compared to EU law.


Wards Cove constitutes a critical juncture in the development of U.S. antidiscrimination doctrine because it dramatically increased the probability that courts would require plaintiffs to identify how a specific practice causes particular statistical disparities. In this case, non-white cannery workers filed a class action suit and used statistics to show that non-whites filled the low-paying, unskilled jobs, while whites filled the high-paying jobs. They also alleged that a series of employment practices, including “nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within” led, in aggregate, to the segregated workforce. The Wards Cove majority held it was not enough to point to an aggregate statistical disparity and to questionable employment practices, but that the plaintiffs would have to show how the challenged practices caused the disparity in employment opportunities for whites and non-whites. In addition, the Wards Cove majority made it easier for defendants to rebut prima facie disparate impact claims. Although the 1991 Civil Rights Act repudiated key aspects of the Wards Cove decision, it codified the specific practice requirement, stating that the plaintiff must demonstrate that “each particular challenged employment practice causes a disparate impact.”

The race-blindness paradigm helps explain the majority’s position in Wards Cove. Absent a specific practice requirement, the majority feared that employers would be held liable for diverse “innocent causes that may lead to statistical imbalances in the composition of their work forces.”


112. Wards Cove, 490 U.S. at 647.

113. Id. at 647-48.

114. Id. at 657.

115. More specifically, the Wards Cove majority held that once a plaintiff makes out a prima facie case only the burden of production shifts to the defendant; the burden of persuasion remains with the plaintiff throughout. Id. at 659-60. In addition, the Wards Cove majority held that an employer need not show that the challenged practice is essential to his business, but only that it serves, in a significant way, legitimate employer goals that cannot be equally well served through alternative practices lacking a discriminatory impact. Id. at 660-61.

116. 42 U.S.C. § 2000e-2(k)(B)(i) (2006); see also Appleton v. Deloitte & Touche, L.L.P., 168 F.R.D. 221, 226 (M.D. Tenn. 1996) (“Courts have determined that the [1991] Act did not alter the ‘particularity' aspect of Wards Cove.”). However, the 1991 Act did provide a narrow exception to the specific practice requirement. For cases where the plaintiff “can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” 42 U.S.C. § 2000e-2(k)(B)(i); see also infra note 136.

117. Wards Cove, 490 U.S. at 657.
statement reflects the Court's belief that race should not be connected to any socially relevant characteristics. Because the Court refused to give any content to race, it required the plaintiff to supply the causal connection between the observed statistical disparity and race.

U.S. commentators typically interpret the *Wards Cove* decision and the 1991 Civil Rights Act as the outcome of fierce political battles. The comparative perspective illuminates surprising similarities between American liberals and conservatives and shows how deeply the race-blindness paradigm influenced actors of all political stripes. Many U.S. commentators highlight that *Wards Cove* was a five to four decision; under somewhat different political conditions, the majority position could have been closer to the dissent. However, even Justice Stevens's highly critical dissent does not extend as far as the ECJ view to state that statistical disparities alone suffice to shift the burden of persuasion to the employer. Unlike the ECJ, Justice Stevens concluded that "[e]vidence that virtually all the employees in the major categories of at-issue jobs were white, whereas about two-thirds of the cannery workers were nonwhite, may not by itself suffice to establish a prima facie case of discrimination." Justice Stevens regretted the new specific practice requirement as articulated by the *Wards Cove* majority, but acknowledged that the plaintiff must connect the harm to an act of the employer. According to Justice Stevens, "[i]t is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable." Justice Stevens differed with the majority only on how strong a causal claim was necessary. Unlike the majority, he would have ruled that "[a]lthough the causal link must have substance, the act need not constitute the sole or primary cause of the harm."  

2. **Critical Juncture: The EU Enderby Decision and the Rejection of the Specific Practice Requirement**

*Enderby v. Frenchay Health Authority* marks the critical juncture eliminating the specific practice requirement from EU law; earlier decisions arguably challenged specific employment practices. Ms. Enderby complained that speech therapists employed by the U.K. National Health Service (NHS), who were predominantly female, were paid less than pharmacists, who were predominantly male, while the two groups performed work of equal value. The NHS, as well as the U.K. government, borrowed
explicitly from U.S. law and raised a specific practice objection.\textsuperscript{123} They argued that Ms. Enderby had not explained which employer practice caused the difference in pay; she only pointed to the fact that she was a psychologist rather than a pharmacist.\textsuperscript{124} The NHS had a transparent system of awarding pay, based on collective bargaining processes. While separate collective bargaining processes were set up for speech therapists and pharmacists, no one alleged that these were tainted by sex discrimination.\textsuperscript{125} The ECJ rejected the defendants' argument concerning the specific practice requirement, holding that that aggregate statistical differences were enough to shift the burden of persuasion to the employer. The direct costs of this decision for the NHS reached twelve million pounds sterling.\textsuperscript{126}

Sex-consciousness was critical to the ECJ decision in \textit{Enderby}. Statements by diverse participants in the legal proceedings indicate that an implicit theory about women's social roles was essential to the finding that the plaintiff could rely on statistics alone. Ms. Enderby argued that statistics sufficed because the reason for the statistical disparity was obvious, and the U.K. Court of Appeal referring the case to the ECJ agreed. As the summary of proceedings before the ECJ indicated:

According to the appellant, there is no need to establish any requirement or condition or barrier preventing the women in question from becoming pharmacists or psychologists. As held by the Court of Appeal, the fact that the lower paid group, that of speech therapists, are almost exclusively female is not a 'statistical freak' but is due to the fact that the nature of the work, which allows employees to work part-time, makes it particularly attractive to women and the low pay makes it on the contrary especially unattractive to men.\textsuperscript{127}

In determining whether to insist on a specific practice requirement or not, the U.K. Court of Appeal discussed U.S. precedents on exactly this question, notably \textit{Wards Cove}, and EU precedents that concern the disparate impact theory generally, notably \textit{Jenkins}, and explicitly acknowledged that EU precedents prompted it to depart from U.S. jurisprudence on this point. The court reasoned that prior ECJ decisions had recognized that certain patterns, such as the tendency of women to disproportionately occupy part-time jobs, were "in the nature of things."\textsuperscript{128}

The Advocate General, Carl Lenz, used very similar reasoning, stating that, "[a]ccording to the information before the Court, the fact that speech therapists are almost exclusively women is also at least partly due to the connection between the social role of women and work. The opportunities of

\textsuperscript{123. Id. at 1-5543 to -5544 (report for the hearing).}
\textsuperscript{124. Id.}
\textsuperscript{125. See id. at 1-5572 (judgment) ("[T]here can be no complaint that the employer has applied a system of pay wholly lacking in transparency since the rates of pay of NHS speech therapists and pharmacists are decided by regular collective bargaining processes in which there is no evidence of discrimination as regards either of those two professions.").}
\textsuperscript{126. See Kevin Maguire, Therapists Share £12m in Landmark Equal Pay Victory, GUARDIAN (London), May 8, 2000, http://www.guardian.co.uk/uk/2000/may/08/kevinmaguire.}
\textsuperscript{127. Case C-127/92, Enderby, 1993 E.C.R. at 1-5542 (report for the hearing).}
\textsuperscript{128. Enderby v. Frenchay HA, 1994 I.C.R. 112, 127-28 (C.A.) (U.K.) ("In the present case we are not dealing with a statistical freak.... [I]t is to be remembered that both in Jenkins and in the other cases involving part-time women workers it seems to have been accepted that in the nature of things part-time workers were likely to be mainly women.... ").}
working part-time and of flexible arrangement of working hours are particularly attractive to women." This reasoning led him to conclude that "attention should be directed less to the existence of a requirement or a hurdle by means of which women suffer a disadvantage, and more to the discriminatory result." The ECJ agreed with the Advocate General and ruled for the plaintiffs on the question of whether statistics were enough to make out a prima facie case without elaborating on its reasoning. The ECJ concluded that:

where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

C. Consequences of the Specific Practice Requirement

In the United States, the specific practice requirement weakens employee cases, makes bottom-line defenses impossible, and may deter quota hiring. Many race discrimination cases have failed because the plaintiff could not identify a specific employment practice that linked statistical differences to race. For example, employees who base disparate impact claims on managers' preferences or on informal practices as opposed to company policy often see their claims fail because of the specific practice requirement.

Yet, the specific practice requirement has had the harshest consequences outside the race paradigm. The specific practice requirement was quickly exported to claims brought forth by women, as well as all claims under Title VII, by the 1991 Civil Rights Act. It was also exported, by analogical reasoning, to claims under antidiscrimination statutes resembling Title VII.

130. Id.
131. Id. at I-5573 (judgment).
133. See, e.g., Gullet v. Town of Normal, 156 F. App’x 837, 842 (7th Cir. 2005) (holding that hiring a male full-time street maintenance worker from an all-male waste division was not a company policy but rather a manager’s preference, and thus female plaintiff did not establish a specific employment practice).
134. See, e.g., Mathis v. Wachovia, 509 F. Supp. 2d 1125, 1143 (N.D. Fla. 2007) (holding that the absence of a policy to investigate apparent racial inequities is not considered a company policy sufficient to meet the specific employment practice requirement).
135. While almost all successful disparate impact claims identify a causal connection between a specific practice and a statistical discrepancy, there exist rare cases where employees have succeeded in waiving this requirement by arguing that an employer’s system should be considered as a whole under 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2006). See, e.g., McClain v. Lufkin Indus., Inc, 519 F.3d 264, 275-77 (5th Cir. 2008) (holding that the district court did not err in ruling that the employer’s overall system of subjective determinations for promotions constituted a specific employment practice sufficient for a Title VII disparate impact claim); Munoz v. Orr, 200 F.3d 291, 304 (5th Cir. 2000) ("[W]here a promotion system uses tightly integrated and overlapping criteria, it may be difficult as a practical matter for plaintiffs to isolate the particular step responsible for observed discrimination.").
such as the Age Discrimination in Employment Act (ADEA). This path-dependent application of the specific practice requirement to sex, age, and disability discrimination allowed courts to introduce additional limitations to the scope of disparate impact theory.

A wide range of employer practices can have a disparate statistical effect on a trait that is found disproportionately in protected groups such as women, the elderly, and the disabled. To a difference-conscious court, the causal connection between the protected group and the trait, and thus between the employer’s practice and its disparate impact, is often readily apparent, and worthy of disparate impact protection. To a difference-blind court, the causal connection between the minority group and the trait is often invisible or not protected. In the United States, defendants have successfully argued that certain employer actions do not constitute practices, but are legitimate requirements of the job or background norms that are categorically immune to disparate impact scrutiny.

Rigid attendance policies, strict probationary requirements, differential treatment of full-time and part-time workers, and separate bargaining for female-dominated and male-dominated groups of workers are not understood as employment practices at all in the United States.

Scholars have criticized this narrowing of antidiscrimination doctrine. For example, Christine Jolls laments the artificial distinction between

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137. See, e.g., Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 583-84 (7th Cir. 2000) (holding that the plaintiff was not fired because she violated any employer policy against pregnancy, but rather because she violated a legitimate policy against absenteeism).

138. See, e.g., id.; Troupe v. May Dep’t Stores Co., 20 F.3d 734, 737 (7th Cir. 1994).

139. See, e.g., Stout v. Baxter Healthcare Corp., 282 F.3d 856, 861-62 (5th Cir. 2002) (holding that the plaintiff did not establish that she would have been treated differently had she violated employer's ninety-day probationary absenteeism policy for any reason other than pregnancy complications, and therefore that she could not establish that the policy discriminated against pregnant women).

140. See, e.g., Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156-57 (7th Cir. 1997) (rejecting part-time worker's Title VII claim because, inter alia, she could not identify a specific practice); see also Payne v. Huntington Union Free Sch. Dist., 219 F. Supp. 2d 273, 281 (E.D.N.Y. 2002) (holding that a part-time, temporary employee must compare herself with other part-time, temporary employees); Brown v. Super K-Mart, No. 98 C 3980, 1999 U.S. Dist. LEXIS 9525, at *13 (N.D. Ill. June 14, 1999) (citing Ilhardt, 118 F.3d at 1155) (holding that full-time and part-time employees are not similarly situated); LaRocco v. Nalco Chem. Co., No. 96 CV 3980, 1999 WL 199251, at *13 (N.D. Ill. Mar. 30, 1999) (citing Ilhardt, 118 F.3d at 1155) (holding that full time and part-time employees cannot be compared); Schallop v. N.Y. State Dep’t of Law, 20 F. Supp. 2d 384, 403 (N.D.N.Y. 1998) (“Comparing women working part-time with men working full-time provides no guidance because it is impossible to discern from those statistics whether any disparity is based on gender or on part-time status, a classification not protected.”); EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1285 (N.D. Ill. 1986) (holding that the disparate impact claim must fail because the EEOC “has not identified any specific, facially neutral policy of Sears which disproportionately excludes women from the jobs at issue”). But see Lovell v. BBNT Solutions, L.L.C., 295 F. Supp. 2d 611, 619 (E.D. Va. 2003) (holding that a part-time plaintiff who worked three-quarters of the hours of a full-time comparator, and often more, could be compared to full-time worker).

141. See, e.g., Beard v. Whitley County REMC, 656 F. Supp. 1461, 1469-71 (N.D. Ind. 1987) (holding that an employer's reliance on market forces in setting wages cannot be labeled a "policy or practice" because "reliance on the market is inherently job related and is a built-in form of business judgment"). aff’d, 840 F.2d 405 (7th Cir. 1988).

142. See Selmi, supra note 69, at 703-05, for a review.
antidiscrimination and accommodation. Michelle Travis rejects workplace essentialism. Michael Stein and Michael Waterstone critique the individualist turn in the accommodation of disabilities and call for the resurrection of group-based disparate impact claims.

How did U.S. law reach this point? And what might it have looked like if sex, rather than race, had been the paradigmatic category? The following paragraphs first track the narrowing of U.S. disparate impact doctrine and then discuss EU cases to illustrate the different path that discrimination law could have taken in the absence of a specific practice requirement in the United States. EU law has evolved to the point where plaintiffs can very easily make out a prima facie case. However, courts leave employers substantial leeway to make out defenses to these claims. U.S. fears that, absent a specific practice requirement, courts would be flooded with antidiscrimination suits forcing employers to resort to quotas have not materialized. Instead, EU employers must simply give serious consideration to alternative employment arrangements, while U.S. employers are categorically shielded from having “background” employment practices scrutinized at all.

1. The Specific Practice Requirement in Sex and Age Discrimination in the United States

The specific practice requirement sometimes operates in similar ways in race and sex discrimination cases. For example, opaque hiring channels can harm diverse groups of outsiders. In Wards Cove, plaintiffs complained of “nepotism, a rehire preference, a lack of objective hiring criteria” and “separate hiring channels.” In Joe’s Stone, plaintiffs complained about word-of-mouth hiring, coupled with an employer’s reputation for hiring men only. In both cases, the specific practice requirement allowed employers to continue to use these non-transparent hiring channels, because neither the minority plaintiffs in Wards Cove nor the female plaintiffs in Joe’s Stone could demonstrate with sufficient particularity how the employers’ hiring practices caused statistical disparities.

The specific practice requirement can be even more burdensome to plaintiffs outside the race discrimination context, because sex, age, and disability often correlate with important features of the workplace environment. U.S. courts have used the specific practice language to draw an additional distinction between background workplace structures, which are immune from scrutiny, and other employer choices, which plaintiffs may be able to challenge. In contrast, EU courts have allowed plaintiffs to make prima facie cases challenging a wider set of workplace structures and have asked defendants to justify these structures as necessary to their businesses. Difference-blindness and difference-consciousness help explain this.

145. Stein & Waterstone, supra note 4, at 864-65.
147. EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1268 (11th Cir. 2000).
divergence; the more conscious of employee differences a court becomes, the less willing it is to assume that any practice should be categorically permitted.

_Dormeyer v. Comerica Bank-Illinois_ illustrates U.S. courts' approach in the context of sex discrimination.\(^{148}\) A female employee argued that a policy of firing employees after a certain number of absences had a disparate impact on pregnant workers. In the view of the court, however, she would fail to make out a disparate impact prima facie case even "if it could be shown that the policy weighed more heavily on pregnant employees than on nonpregnant ones and that it was not justified by compelling considerations of business need."\(^{149}\) This is because the court deemed policies discouraging absenteeism generally legitimate, and declined to enter into an analysis of whether particularly low thresholds could be understood to meet the specific practice requirement. The court arrived at this conclusion by showing how the race analogy failed to cover Ms. Dormeyer's situation. To a race-blind court, the distinction between intentional and unintentional discrimination is straightforward, and a race-blind court can in this way more easily limit disparate impact theory to cases involving pretext. Thus, the _Dormeyer_ court argued that "[t]he concept of disparate impact was developed and is intended for cases in which employers impose eligibility requirements that are not really necessary for the job for which the applicant is being hired, such as requiring that applicants for a job as a dishwasher have a high school education."\(^{150}\)

Similarly, in _Stout v. Baxter Healthcare Corp._, a female employee claimed that the employer's practice of firing employees who miss more than three days had a disparate impact on pregnant employees, and thus violated the Pregnancy Discrimination Act.\(^{151}\) Although the court accepted the argument that this policy was likely to have severely negative consequences on pregnant women, it noted that "all job requirements, regardless of their nature, affect 'all or substantially all pregnant women.'"\(^{152}\)

U.S. courts have also used the specific practice requirement to limit age discrimination suits by rejecting claims against policies considered fundamental to the workplace. For example, in _Finnegan v. Trans World Airlines, Inc._, an employer decided to limit its costs by capping all employees' vacation time at four weeks.\(^{153}\) Employees aged over forty years claimed that the company's policy had a disparate impact on them, since they had accrued more vacation time than younger employees. The _Finnegan_ court accepted that the practice likely had a disproportionate impact, since "virtually all elements of a standard compensation package are positively correlated with age."\(^{154}\) However, it concluded that the plaintiffs were not challenging a specific business practice, but rather "an unavoidable response to adversity."\(^{155}\) The court emphasized that the plaintiffs had failed to make out a

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148. 223 F.3d 579 (7th Cir. 2000).
149. _Id._ at 583.
150. _Id._
151. 282 F.3d 856, 858-59 (5th Cir. 2002).
152. _Id._ at 861.
153. 967 F.2d 1161, 1162 (7th Cir. 1992).
154. _Id._ at 1164.
155. _Id._
disparate impact case on these facts; therefore, the defendants did not need a business necessity defense.\textsuperscript{156} Again, the \textit{Finnegan} court used the lack of analogy with certain race precedents to explain its reasoning. The policies challenged in \textit{Griggs} and \textit{Watson} were policies that had been adopted originally for discriminatory reasons and had not been changed when the employer ceased deliberately discriminating—if he had; for another way of looking at the disparate impact approach is that it is primarily intended to lighten the plaintiff’s heavy burden of proving intentional discrimination after employers learned to cover their tracks.\textsuperscript{157}

It was not as easy to impute employer intent in \textit{Finnegan}; therefore, the plaintiff lost.

\textit{Davidson v. Board of Governors of State Colleges & Universities for Western Illinois University} presents a similar pattern.\textsuperscript{158} A fifty-eight-year-old professor challenged a university’s compensation system as having a disparate impact on older professors. Only professors who obtained higher offers from other employers could get raises. Since younger professors typically were more mobile, this likely had a disparate impact on older professors. Again, the plaintiff was not able to make out a prima facie case of discrimination because the practice he challenged was not understood to be a specific employment practice, but rather, a reasonable employer response to market prices.\textsuperscript{159} In contrast, the ECJ in \textit{Danfoss} was willing to scrutinize whether mobility requirements had a disparate impact on women.\textsuperscript{160}

The Supreme Court affirmed this line of reasoning in \textit{Smith v. City of Jackson}.\textsuperscript{161} In \textit{Smith}, a group of older police officers sued the City of Jackson, alleging that its compensation package awarded larger raises to younger officers.\textsuperscript{162} While a four-Justice plurality held that disparate impact claims were possible under the ADEA, the Court also exported the specific practice requirement, observing that the plaintiffs had “done little more than point out that the pay plan is relatively less generous to older workers than to younger ones. They have not, as required by \textit{Wards Cove}, identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.”\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{156} Id. at 1165 (“We could accept the plaintiffs’ approach to the extent of finding a disparate impact, and then rule that the employer’s business justification was compelling. But that would not be a satisfactory approach. It would mean that every time an employer made an across-the-board cut in wages or benefits he was prima facie violating the age discrimination law. Practices so tenuously related to discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold.”).
\item \textsuperscript{157} Id. at 1164.
\item \textsuperscript{158} 920 F.2d 441 (7th Cir. 1990).
\item \textsuperscript{159} Id. at 445-46; see also Abbott v. Fed. Forge, Inc., 912 F.2d 867 (6th Cir. 1990) (holding that plaintiffs failed to demonstrate that employer’s decision to avoid hiring from a closed plant caused a statistical pattern in which individuals over forty years old were underrepresented).
\item \textsuperscript{160} Case 109/88, Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, \textit{ex parte} Danfoss, 1989 E.C.R. 3199.
\item \textsuperscript{161} 544 U.S. 228 (2005).
\item \textsuperscript{162} Id. at 242.
\item \textsuperscript{163} Id. at 229. It seems that the particularity requirement falls even harsher on ADEA plaintiffs than on Title VII plaintiffs. This is because the analogy was made to \textit{Wards Cove}, rather than to the Civil Rights Act of 1991, which contains a narrow exception to this requirement in section 42 U.S.C. §2000e-2(k)(1)(B)(i) (2006).
\end{itemize}
2. The Absence of the Specific Practice Requirement in Sex and Age Discrimination in the European Union

EU cases illustrate how disparate impact doctrine could have evolved in the absence of the specific practice requirement. Once Enderby established that employees did not need to identify a specific employment practice as the cause of a statistical discrepancy, EU law was used to challenge fundamental aspects of workplace design. For example, Hill and Stapleton challenged employers' preferential treatment of employees who occupied a single position, as compared to employees who shared positions.\(^{164}\) Seymour-Smith suggested that a two-year probationary period could be challenged if it was found to have a disparate impact on women.\(^{165}\) And while the ECJ is generally willing to allow employers to treat seniority as a legitimate criterion on which to base pay decisions, it has allowed for the occasional challenge of pay classifications based on generalizations about experience.\(^{166}\)

The fact that employees in the European Union can more easily make out prima facie cases does not automatically result in the reform of workplace rules, as employers can justify their practices. However, by placing on employers the burden of justifying their practices, EU law prompts them to at least seriously consider employee requests for accommodation. This contrasts sharply with U.S. disparate impact law, which insulates many employer practices from disparate impact scrutiny. Because employer defenses often involve fact-specific determinations, they are often discussed in detail at the national court level rather than at the ECJ. To illustrate the impact of the EU sex antidiscrimination paradigm in the workplace, the discussion below briefly illustrates how it has been applied in the United Kingdom, a jurisdiction not considered employee-friendly by EU standards.

U.K. employers faced with a female employee's request to work part-time must make significant and sincere efforts to accommodate her. In Brown v. McAlpine,\(^{167}\) the Employment Appeal Tribunal dismissed an employee's discrimination claims only after the employer's extensive job-sharing search proved unfruitful. The employee had conceded that her position required full-time coverage,\(^{168}\) and had specified that she was only willing to work Mondays, Tuesdays, and Wednesday mornings.\(^{169}\) The employer advertised the position in various newspapers and on multiple occasions, and approached an employment agency that confirmed the difficulty of arranging the job.

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166. Compare Case C-17/05, B.F. Cadman v. Health & Safety Executive, 2006 E.C.R. I-9583, I-9592 (opinion of Advocate General Maduro) (suggesting that employers can use length of service as a criterion in pay decisions, without special justification), with Case C-1/95, Gerster v. Freistaat Bayern, 1997 E.C.R. I-5253, I-5255 (opinion of Advocate General La Pergola) (suggesting that length of service and experience are not always correlated, and thus employers may sometimes need to justify their compensation criteria in this regard), and Case C-184/89, Nimz v. Freie und Hansestadt Hamburg, 1991 E.C.R. I-297, I-308 to -313 (opinion of Advocate General Darmon) (same).
168. Id. ¶ 11.
169. Id. ¶ 12.
share. 170 Under very similar circumstances in Rosie Mitchell v. Scottish Borders Council, 171 a lower tribunal found the employer’s efforts to find a suitable job-share candidate half-hearted, and granted the discrimination claim. Although the employers in that case had also interviewed candidates, they simultaneously pushed the employee to either accept a lower-grade job as a part-timer or remain full-time until a replacement came up. Similarly, a pilot succeeded in requiring her employer, British Airways, to grant her a fifty percent schedule, even though the airline already had a seventy-five percent part-time schedule and other flexible arrangements in place. 172 British Airways claimed that public safety and business organization reasons necessitated that all pilots work a certain minimum number of hours. 173

How will this jurisprudence extend to the new prohibited grounds of discrimination? It seems that employees will continue to have great ease in making out a prima facie case with no specific practice requirement. While several direct discrimination cases have already been heard by the ECJ on grounds of age, 174 only one case involving disparate impact claims has been decided, Bartsch. 175 This case suggests that the lenient prima facie standards of the sex discrimination cases will likely apply to age claims as well. After Mr. Bartsch’s death, his employer’s pension fund denied survivor benefits to his wife on the grounds that the terms of the retirement pension prohibited payments to a widow or widower who was more than fifteen years younger than the former employee. 176 The German court referring the case to the ECJ found that the age-gap clause could give rise to a disparate impact age discrimination claim “on the basis that the probability of an employee being affected increases with his or her age.” 177 The ECJ, following the advice of the Advocate General, dismissed Ms. Bartsch’s claim on other grounds, since the pension fund’s violation occurred before the transposition deadline of the directive, i.e., before the prohibition of age discrimination entered into force. However, after explaining why this particular case likely failed on a technicality, the Advocate General concluded that Ms. Bartsch would have likely won on the merits of the claim. The reason for this, he argued, was an analogy to the court’s sex discrimination jurisprudence:

To read [the directive article prohibiting age discrimination] as applying only to absolute ages (‘the employer treats a 50-year-old less favourably than a 40-year-old’), would be to

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170. Id. ¶ 13.
173. Id.
176. Id.
177. Id. § 21 (opinion of Advocate General Sharpston).
interpret the principle in that article narrowly. That is not the way in which the Court has interpreted sex discrimination, or any fundamental Treaty-based freedom.\textsuperscript{178}

Perhaps the clearest sign that sex-conscious precedents will make it substantially easier for other groups to make out prima facie cases can be seen in the new definition of disparate impact. EU law now allows plaintiffs to challenge employer practices that have not yet harmed anyone based on theories about how particular employment practices will have foreseeable differential consequences for protected groups.\textsuperscript{179} In contrast, U.S. disparate impact doctrine offers plaintiffs substantially more limited protections. Choices made at a critical juncture decades ago, in response to particular understandings of sex and race respectively, help explain this divergence.

IV. CONNECTING DISPARATE IMPACT AND DISPARATE TREATMENT DOCTRINES

Courts in the United States and the European Union reached a second critical juncture when confronted with pregnancy discrimination claims. Prior to these cases, the distinction between disparate impact and disparate treatment claims was relatively clear in both jurisdictions: treatment claims focused on discriminatory intent, while impact claims focused on discriminatory consequences. However, in both the United States and the European Union, courts found pregnancy discrimination claims challenging to the treatment/impact dichotomy. In the course of answering questions about pregnancy, U.S. courts reinforced the distinction between disparate treatment and disparate impact, while EU courts began to break it down. I argue that race-blindness shaped the position of U.S. decisionmakers, while sex-consciousness shaped the ECJ’s response.

I also argue that these doctrinal choices were subsequently extended to other minorities’ claims, and dramatically influenced the probability that particular allegations would succeed. The ECJ’s conflation of disparate impact and disparate treatment liability has facilitated successes for plaintiffs who make claims that courts consider group-typical, such as women who want to balance family and work responsibilities. In 2008, these precedents allowed for surprising victories in cases involving lesbian, gay, bisexual, and transgender (LGBT) and immigrant rights.

However, the conflation of disparate impact and disparate treatment claims in the European Union does not uniformly benefit plaintiffs. This conflation has also expanded the scope for employer defenses to disparate treatment claims. These defenses were first introduced in pregnancy discrimination cases, and were recently extended to age and disability discrimination case law. In contrast, in the United States, the strict distinction between disparate treatment and disparate impact confines certain broad employer defenses to disparate impact suits.\textsuperscript{180} This pattern, in which certain plaintiffs benefit more from EU jurisprudence, while other plaintiffs benefit

\textsuperscript{178} \textit{Id.} ¶ 103 (footnote omitted).


more from U.S. jurisprudence, is surprising and inconsistent with alternative theories that attribute the divergence of EU and U.S. doctrine to broad cultural differences.

A. Critical Junctures: Pregnancy Discrimination in the United States and the European Union

In General Electric Co. v. Gilbert, the U.S. Supreme Court held that pregnancy classifications should be analyzed under the disparate impact, rather than the disparate treatment framework, because non-pregnant persons could be either male or female.\textsuperscript{181} The plaintiffs in Gilbert challenged an otherwise comprehensive disability insurance plan that excluded pregnancy-related disabilities.\textsuperscript{182} Writing for the Court, Justice Rehnquist rejected the argument that this exclusion constituted disparate treatment of women under Title VII. He reasoned that “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”\textsuperscript{183}

Race-blindness likely influenced this decision. As Serena Mayeri argues, because “discrimination against women did not resemble the prevailing paradigm of racial injustice, many judges had difficulty” recognizing the harm.\textsuperscript{184} The Gilbert standard, that disparate treatment prohibits classifications only when they correlate perfectly with sex, reveals a strong form of difference-blindness. It is difficult to imagine how any socially relevant trait would be exactly coterminous with a protected status.

Gilbert was a controversial decision, resulting in five separate opinions. Nevertheless, I argue that the influence of the race-blindness paradigm is clear in the arguments of both liberal and conservative Justices. Justices sympathetic to pregnant women’s claims reasoned in ways that reinforced the distinction between disparate impact and disparate treatment. More specifically, all but one of the Justices in Gilbert implied that disparate treatment claims require proof of discriminatory intent. Justices Blackmun and Stewart’s concurrences underline that classifications on the basis of pregnancy are not facially discriminatory but could be challenged as having disparate effects on women.\textsuperscript{185} Justice Brennan’s dissent, which Justice Marshall joined, argues that the Gilbert plaintiffs should succeed on both their disparate impact and their disparate treatment claims.\textsuperscript{186} However, discriminatory intent is central to this disparate treatment argument; they emphasize that “General Electric’s discriminatory attitude toward women was a motivating factor in its policy.”\textsuperscript{187} Only Justice Stevens argued, in his dissent, that differential

\begin{itemize}
\item \textsuperscript{181} 429 U.S. 125 (1976).
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id. at 135 (citing Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974)).
\item \textsuperscript{184} See Mayeri, supra note 6, at 1811 (discussing the equal protection challenge to the exclusion of pregnancy claims from an otherwise comprehensive insurance plan in Geduldig, 417 U.S. 484).
\item \textsuperscript{185} See Gilbert, 429 U.S. at 146 (Stewart, J., concurring); id. (Blackmun, J., concurring).
\item \textsuperscript{186} Id. at 148-60 (Brennan, J., dissenting) (outlining the disparate treatment claim in Part II, and the disparate impact claim in Part III).
\item \textsuperscript{187} Id. at 149-50 (quoting Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 383 (E.D. Va. 1974)).
\end{itemize}
Path Dependence in Discrimination Law

In contrast, the ECJ, influenced by sex-consciousness, took a position that was more protective of pregnant women than that of any U.S. Justice. In Dekker v. Stichting Vormingscentrum voor Jong Volwassenen, the ECJ held that pregnancy classifications constituted disparate treatment on the grounds of sex because “only women can be refused employment on grounds of pregnancy.” The Dekker opinion extends greater protections to pregnant women than Justice Stevens’s opinion in Gilbert might have. This is because the ECJ held that an employer could not refuse to hire a pregnant woman even in circumstances where the employer could refuse employment to a man with a foreseeable temporary disability.

In the United States, Congress responded to Gilbert by enacting the Pregnancy Discrimination Act of 1978, which defined sex discrimination to include pregnancy discrimination claims. Nonetheless, these early pregnancy cases constitute critical junctures for the evolution of discrimination doctrine because Gilbert reinforced distinctions between disparate impact and disparate treatment claims, while Dekker began to break them down. A difference-blind framework treats discrimination on the basis of any employee trait under the disparate impact framework without distinguishing between traits that are incidentally connected to a protected status and traits that are intrinsically linked to it. A difference-conscious framework elevates connections between a protected status and certain traits, and uses the disparate treatment framework to analyze these.

How courts distinguish intrinsic connections from incidental ones is critical; to date, the ECJ has applied the disparate treatment framework to traits that are not merely highly correlated with a protected status, but also causally connected. The ECJ recently evaluated the link between immigrant status and ethnic origin, and the link between marital status and sexual orientation. Employing a difference-conscious paradigm, the ECJ held that the unfavorable treatment of immigrants can be challenged as disparate treatment on the grounds of ethnic origin. It also held that the unfavorable treatment of unmarried couples can be challenged as disparate treatment on the grounds of sexual orientation. In contrast, such claims are typically analyzed under the disparate impact framework in the United States, and often fail.

Legislatures in both the United States and Europe could redefine employment discrimination laws to cover immigrants explicitly, and to grant the same benefits to same-sex and opposite-sex couples, just as the U.S. Congress amended Title VII to include pregnancy claims. Until this happens,

188. Id. at 162 (Stevens, J., dissenting).
190. Id. at I-3973.
192. See also Deborah A. Ramirez, Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service, 1993 Wis. L. REV. 761, 763 n.8 (discussing the “super-correlat[ion]” in the relationship between ethnicity and language in the case of Hispanic minorities in related terms).
the framework courts choose to analyze these claims substantially influences their probability of success.

However, the conflation of disparate impact and disparate treatment because of difference consciousness does not systematically favor plaintiffs, as Section IV.C explains. The next major EU pregnancy discrimination case, Webb v. EMO Air Cargo (UK) Ltd, clarified the holding in Dekker by explicitly finding that an employer could not dismiss a pregnant female employee even in cases where it would have dismissed a male employee who required a leave of absence for medical reasons. Revealing a strong form of difference-consciousness, the ECJ argued that “pregnancy is not in any way comparable with a pathological condition” but is nonetheless covered by sex-discrimination prohibitions. At the same time, Webb introduced the possibility of broad defenses, characteristic of disparate impact claims, to disparate treatment claims.

B. How Sex and Race Precedents Shape Other Plaintiffs’ Claims

1. Sexual Orientation Claims

A large number of U.S. states and EU member states prohibit employment discrimination on the basis of sexual orientation, but at the same time forbid gay marriage. Employers in these jurisdictions face a conundrum: how should they treat unmarried same-sex couples in committed relationships? Must employers grant same-sex domestic partners the same benefits they offer married couples? Are employers free to design their benefit packages as they see fit? Or might some employers, notably public employers, be prohibited from offering domestic partner benefits even if they would prefer to do so?

I argue that courts’ decisions on these highly politicized issues depend in large part on the precedents they face, precedents decided decades earlier to address very different situations. More specifically, sex-conscious precedents made it substantially easier for the ECJ to reach a plaintiff-friendly ruling in its first case exploring the prohibition of discrimination on the grounds of sexual orientation. In its 2008 Maruko v. Versorgungsanstalt der deutschen Bühnen ruling, the ECJ held that where national law places life partners and spouses in a comparable situation, offering survivors’ benefits to married spouses but not to domestic partners constitutes disparate treatment on the

194. Id. at 1-3587.
grounds of sexual orientation. If and when federal law prohibits employment discrimination on the basis of sexual orientation, race-blind precedents are likely to make it much harder for U.S. courts to reach similarly broad conclusions.

U.S. and EU courts face an important choice: they can analyze domestic partner benefits using the disparate impact or the disparate treatment framework. Because only committed gay couples cannot benefit from marriage, courts could analyze the denial of spousal benefits as disparate treatment on the grounds of sexual orientation. Alternatively, because the denial of benefits to unmarried couples treats unmarried straight and gay couples alike, courts could reject the disparate treatment argument and use the disparate impact framework. Analysis under the disparate treatment framework increases the probability of plaintiff success.

In Maruko, the ECJ held that the restriction of survivors' benefits to married spouses amounted to disparate treatment of gay partners in committed life partnerships. The plaintiff and some commentators have argued that the Maruko facts could give rise to a claim of disparate treatment by analogy to the Court's earlier decisions on pregnancy. In Dekker, the ECJ had held that "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex." A parallel argument that in Germany, only same-sex partners in a relationship fundamentally equivalent to marriage could be excluded from survivors benefits, likely carried the day in Maruko. Gay rights advocates

celebrated Maruko and highlighted the significance of the ECJ’s usage of the disparate treatment rather than the disparate impact framework.204

Sex discrimination precedents were critical to the Maruko holding in other respects. The EU Framework Directive specifies that it “is without prejudice to national laws on marital status and the benefits dependent thereon.”205 Absent sex discrimination precedents, the ECJ could have easily rejected Mr. Maruko’s claim for partner benefits on the grounds that the benefits of marriage are set by EU member states and that marital status discrimination is not per se prohibited under EU law. However, EU law has long recognized that marital status can intersect with sex discrimination in pernicious ways. As early as 1976, a directive prohibited sex discrimination that takes the form of marital or family status discrimination.206 In later cases, the ECJ ruled that a national law setting preconditions that effectively prohibited transsexuals from marriage, and thus from survivors’ benefits, violated the European sex nondiscrimination principles.207 Following this body of law, the Court in Maruko concluded that it had jurisdiction over partner benefits claims that revealed potential discrimination on the basis of sexual orientation.208

It seems unlikely, however, that U.S. federal courts would give the prohibition of discrimination on the grounds of sexual orientation similarly

204. See, e.g., Renata Goldirova, Same-Sex Couples Score Victory on Pension Rights, EUOBSERVER.COM, Oct. 24, 2008, http://euroserver.com/?aid=25902 (quoting Tadao Maruko’s lawyer, Helmut Graupner, who suggested that “[t]he next case may be one of indirect discrimination, from a country that excludes same-sex partners from the rights and obligations of marriage”); Matthew Vella, A Gay Rights Ruling That’s Not Straight to the Point, MALTA TODAY, May 4, 2008, http://www.maltatoday.com.mt/2008/05/04/n8.html (quoting Europe Region of the International Gay and Lesbian Association (ILGA-Europe) policy officer Silvan Agius, who predicted that the fact that Maruko’s case was decided as a direct discrimination case left the possibility open for a gay couple from a country that did not recognize civil unions to bring a disparate impact claim).


208. Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I-1757, I-1807. Defendants in Maruko raised an additional claim related to the intersection of marriage and employment discrimination law. They claimed that pension benefits accruing to an employee’s partner did not constitute pay; survivors’ benefits do not accrue to the employee and derive from the marriage relationship. Id. at I-1804 to -1805. However, by the time of the Maruko decision in 2008, sex precedents all but foreclosed the option of excluding partner benefits from the definition of pay, and thus from judicial scrutiny. By then, EU law on sex discrimination clearly specified that “a survivor’s pension provided for under an occupational pension scheme, set up under a collective agreement, falls within the scope of Article 141 EC,” despite the fact that, by definition, it accrues to the survivor rather than to the employee. Id. at I-1807. A long line of cases that viewed women in the context of their marital relationships had provided a broad definition of pay that the ECJ eventually applied across protected groups in antidiscrimination law. The ECJ explicitly cited to these cases in Maruko. Id. at I-1806 to -1807. It seems possible that if the ECJ had developed case law based on race, the question of pay accruing to partners would not have arisen as prominently as it did in sex discrimination cases, because marriage would be less central to race discrimination claims. Indeed, a California appellate court has used the distinction between benefits accruing to an employee, and benefits accruing to an employee’s partner, to avoid granting benefits to gay partners under an executive order prohibiting any acts of discrimination on the basis of sexual preference. See Hinman v. Dep’t of Pers. Admin., 213 Cal. Rptr. 410, 419-20 (Ct. App. 1985).
broad scope. While there is substantial variation in how U.S. courts have interpreted state and local laws in evaluating claims concerning domestic partner benefits, this variation is not necessarily encouraging to the LGBT community. Even when state law prohibits discrimination on the basis of sexual orientation, many courts have allowed employers to deny same-sex partners benefits. Some courts have required that employers provide comparable benefits, but used disparate impact theory to reach this result. Tanner v. Oregon Health Sciences University was the first major case in which a public employer's failure to provide health and life insurance benefits to same-sex partners was found to be discriminatory. While the case interpreted an Oregon constitutional provision rather than Title VII, the Tanner court clarified that it was using a disparate impact rather than a disparate treatment framework. The court found that “OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners.” The Tanner decision illustrates that even a liberal court supportive of extending benefits to same-sex partners might see disparate impact theory as the only available doctrinal tool.

These precedents suggest that even if the Employment Non-Discrimination Act is passed, courts are unlikely to interpret it as requiring employers to provide equivalent benefits to same- and opposite-sex couples. The strong distinction between disparate treatment and disparate impact claims evident in U.S. law prohibiting discrimination on the grounds of race, ethnic origin, sex, and age is likely to be extended to sexual orientation claims as well. The comparison with Europe suggests that a different historical trajectory might have resulted in the rapid extension of domestic partner benefits through judicial interpretation.

2. Immigrants' Claims

Both U.S. statutes and EU directives now contain broad prohibitions against race and national origin discrimination, but offer much more limited protections to persons who suffer discrimination on account of their

209. See, e.g., Hinman, 213 Cal. Rptr. at 419-20 (holding that the denial of dental care coverage to the same-sex partner of a state employee did not violate the state constitution or an executive order prohibiting discrimination on the basis of sexual preference); Ross v. Denver Dept of Health & Hosps., 883 P.2d 516, 521 (Colo. Ct. App. 1994) (holding that the denial of healthcare coverage to same-sex partner of state employee does not discriminate on the basis of sexual orientation, since all similarly situated unmarried employees are treated alike); Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992) (same).


211. 971 P.2d at 435.

212. Id. at 443.

213. Id.
citizenship. However, in practice, citizenship and national origin discrimination can overlap to a substantial degree. Courts have a choice of addressing this overlap under the disparate impact framework, or the disparate treatment framework. In the United States, race-blindness has led courts to address discrimination based on citizenship under the disparate impact framework, which substantially limits the probability of plaintiff success. The European Union and its member states are not considered particularly welcoming to immigrants. However, in its first case of race and ethnic origin discrimination, the 2008 case Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn, the ECJ held that an employer’s statement that he would not recruit immigrants amounted to disparate treatment on the grounds of racial or national origin. The conflation of disparate treatment and impact doctrines in early pregnancy discrimination cases likely led to substantial benefits for immigrants.

Although the United States is generally considered to be substantially friendlier toward immigrants than the European Union, the U.S. courts’ application of disparate impact doctrine to claims of nationality discrimination has limited plaintiffs’ chances of success. Both EU directives and Title VII distinguish between discrimination on the grounds of national origin or race, which is prohibited, and discrimination on the grounds of citizenship, which is permitted. In Espinoza v. Farah Manufacturing Co., the Supreme Court drew a clear distinction between national origin and citizenship discrimination. While the Espinoza plaintiffs lost, the Supreme Court left open the possibility that other employees could argue that employers’ distinctions on the basis of citizenship were pretextual, or that they had a disparate impact on people of a particular national origin. However, plaintiffs have had difficulty in making out successful prima facie disparate impact cases, even when citizenship and national origin discrimination are intimately linked. For example, in MacNamara v. Korean Air Lines, a treaty provision allowing Korean companies to favor Korean citizens in filling executive positions was found not to violate Title VII, even though the tight


217. While Title VII does not prohibit discrimination on the basis of citizenship, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, protects U.S. citizens and some categories of noncitizens pursuing naturalization from nationality discrimination. However, not only is this prohibition limited in scope to certain categories of workers who already have or are able and willing to pursue U.S. citizenship, but it is also subject to several exceptions, such as the possibility that employers may prefer citizens to aliens when the two are equally qualified. EU law, as described below, also contains separate protections for citizens of EU member states, as well as for long-term residents.


219. Id. at 92 (“Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.”).
connection between Korean citizenship and Korean national origin effectively excluded persons of other national origins from consideration.\textsuperscript{220}

Surprisingly, citizenship discrimination claims might be more likely to succeed in the European Union, now that the ECJ has treated employers' practices against immigrants as disparate treatment on the basis of race or national origin, as \textit{Feryn} illustrates. In this case, the Centrum voor gelijkheid van kansen en voor racismebestrijding (CGKR), the Belgian public body for the promotion of equal treatment, brought proceedings before Belgian labor courts alleging that Feryn, a company that sold and installed sectional doors, had a discriminatory recruitment policy.\textsuperscript{221} The CGKR based its allegations on public statements by the director of Feryn that, while his business was seeking installers, it could not hire immigrants because of customer preferences.\textsuperscript{222} The first question presented to the ECJ was whether a specific statement made by Mr. Feryn constituted discrimination, in the absence of a particular applicant who experienced discrimination. The ECJ held that such a public statement is discriminatory because it likely dissuades qualified candidates from applying for jobs.\textsuperscript{223}

The ECJ did not address directly the question of why employer statements about immigrants can be equated to statements about racial or national origin. This is particularly striking since member states have included in the relevant directive provisions that explicitly allow employers to treat citizens and non-citizens differently.\textsuperscript{224} Many commentators have discussed and criticized this broad exclusion of nationality discrimination claims from the directive.\textsuperscript{225}

\begin{itemize}
\item 220. 863 F.2d 1135, 1146-47 (3d Cir. 1988); see also Damron v. Yellow Freight Sys., 188 F.3d 506 (6th Cir. 1999) (affirming lower court's rejection of a discrimination claim based on plaintiff's U.S. citizenship); Weeks v. Samsung Heavy Indus. Co., 126 F.3d 926, 935 (7th Cir. 1997) (distinguishing between citizenship and national origin discrimination in another challenge of treaty provisions allowing Korea and the United States to prefer their own citizens in filling executive positions); Vasilescu v. Black & Veatch Pritchard, Inc., 155 F. Supp. 2d 1285, 1293 (D. Kan. 2001) (refusing to consider "comments relating to plaintiff's Canadian citizenship" in a suit alleging discrimination on the grounds of national origin, because Title VII does not cover citizenship).
\item 221. See Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, para. 15 (July 10, 2008), http://curia.europa.eu.
\item 222. Id. para. 16. More specifically, on April 28, 2005, Mr. Feryn appeared on Belgian national television and stated: "[W]e have many of our representatives visiting customers . . . . Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: 'no immigrants.' . . . I must comply with my customers' requirements." Id. para. 4 (opinion of Advocate General Maduro).
\item 223. Id. para. 28 (judgment).
\item 224. See Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 3, 2000 O.J. (L 180) 22, 24 (EC). Article 3(2) states that "[t]his Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating . . . to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned." Id. art. 3(2), at 24.
protects for immigrants, as a separate directive protects from
discrimination only immigrants who are also long-term
residents.  

Advocate General Maduro’s opinion suggests that he was aware of the
challenge of conflating immigrant status and national origin, and sought to
elide it. Maduro’s opinion relies heavily on disputed testimony that Mr. Feryn
stated to a Belgian newspaper reporter that “we aren’t looking for
Moroccans.” Even if this disputed evidence were true, it is not clear why a
statement about “Moroccans” would be a clear reference to national origin
rather than nationality.

Earlier pregnancy discrimination cases help explain why the ECJ
perceived such statements as disparate treatment of persons of different
national origin. Because many countries around the world award citizenship
on the basis of parentage, citizenship and ethnic origin are often intricately
connected. Moroccan citizenship status and Moroccan ethnic origin, for
example, are likely closely and causally linked. Since discrimination against
pregnant persons is disparate treatment on the grounds of sex, so
discrimination against immigrants is disparate treatment on the grounds of
ethnic origin. Viewed in this light, the ECJ’s decision in Feryn presents clear
parallels to Dekker, which found disparate treatment on the basis of a trait
intrinsically interwoven with the protected group.

C. Implications for Defendants

The conflation of disparate treatment and disparate impact claims in the
European Union has not been an unmitigated good for plaintiffs. While this
conflation has allowed European workers to challenge a wide range of
employer practices more easily, it has also expanded the scope for employer
defenses to disparate treatment claims.

Initially, in both the United States and the European Union, a limited
number of narrow defenses were available in disparate treatment cases.
Relatively broad defenses, such as “business necessity” were only available
when plaintiffs alleged disparate impact. In the United States, treatment and
impact claims remain separate, and thus these broad defenses are confined to
disparate impact cases.

on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination
Policy?, 30 INDUS. L.J. 1 (2001); EUROPEAN NETWORK AGAINST RACISM, COUNCIL DIRECTIVE
IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RACIAL OR
_ENAR_RD_Syr_Report.pdf (suggesting that overlapping sources of discrimination are not adequately
addressed).

Long-Term Residents, 2004 O.J. (L 16) 44 (EC). “Long-term residents shall enjoy equal treatment with
nationals as regards: (a) access to employment and self-employed activity, provided such activities do
not entail even occasional involvement in the exercise of public authority, and conditions of
employment and working conditions, including conditions regarding dismissal and remuneration.” Id.
art. 11(1)(a), at 49.

227. Case C-54/07, Feryn, para. 3 (opinion of Advocate General Maduro).

defense . . . pertain[s] to disparate-impact claims but not disparate-treatment claims.” (citing Hernandez
v. Hughes Missile Sys. Co., 298 F.3d 1030, 1036-37 & n.19 (9th Cir. 2002)).
In contrast, in the European Union, a broad set of defenses once reserved for disparate impact claims is becoming available in both impact and treatment cases. Judges’ views about women’s biological and social roles both facilitated plaintiffs’ prima facie cases, and at the same time broadened the scope for employer defenses. In *Webb v. EMO Air Cargo (UK) Ltd* and *Birds Eye Walls Ltd v. Roberts*, the ECJ imported defenses previously applicable only to disparate impact into its disparate treatment jurisprudence on sex discrimination. When age and disability discrimination were later prohibited by EU law, this broad set of defenses began to be extended to the new protected groups. As a consequence of sex-conscious precedents, the ECJ scope for defenses to disparate treatment on the grounds of age and disability had become much broader than it would have been under race-blind precedents, as the comparison with U.S. doctrine shows.

1. **Defenses to Discrimination Claims in the United States and the European Union**

In both U.S. and EU law, initially, a very limited set of enumerated defenses was available to disparate treatment claims. In the United States, employers who intentionally treat blacks and whites differently have no affirmative defense. Employers who intentionally treat women and men differently can invoke a narrow affirmative defense—the bona fide occupational qualification defense. In contrast, a much broader set of defenses is available for disparate impact claims. In U.S. doctrine, if the employee has made out a prima facie disparate impact case—that is, shown that a specific practice has a substantial negative effect on a particular group—the employer may defend the practice by showing that it is “job related for the position in question and consistent with business necessity.” The plaintiff can challenge the business necessity claim by showing that an effective alternative practice would have lesser impact.

Business necessity is a relatively broad affirmative defense. Michael Selmi’s study of the success and failure of disparate impact claims in the United States suggests that as an empirical matter, when employers invoke business necessity, “courts readily accept most proffered justifications.” A similar defense is available in the European Union: an employer can defend a practice with a disparate impact by showing that the challenged practice “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” EU courts also accept a relatively broad range of employer contentions. For example, employers’ desires to encourage

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232. *Id.* The same defense is available for disability. 29 C.F.R. § 1630.15(c) (2008). For age discrimination claims, the employer only needs to show that the practice is “reasonable.” 29 U.S.C. § 623(f)(1).
234. Selmi, *supra* note 69, at 705-06.
employers’ desires to encourage full-time work, and employers’ efforts to attract workers who are in short supply have all been deemed legitimate justifications.

U.S. law has kept disparate impact and disparate treatment theories separate, and thus the broad range of business necessity defenses are limited to disparate impact claims. In contrast, in the European Union, Dekker, the pregnancy case that conflated disparate treatment and disparate impact, also contained the seeds of the extension of broad defenses to disparate treatment. As described above, Dekker established that discrimination on the grounds of pregnancy constituted disparate treatment on the grounds of sex. In Dekker, the ECJ also discussed the cost-saving justification proposed by Ms. Dekker’s employer. The ECJ found that cost-saving was not a sufficient justification for disparate treatment of pregnant women, as it would not have been in disparate impact cases. Eliminating one possible justification, however, prompted employers to investigate whether other justifications to sex disparate treatment claims would be possible.

Webb, the next major pregnancy discrimination case, grew out of this context. In that case, the ECJ was asked whether an employer could fire a pregnant woman on the grounds that she could not perform the main task for which she was hired—replacing another woman who was on maternity leave. The Commission explicitly argued that disparate treatment on the grounds of sex could be justified in some circumstances, as did the United Kingdom. The Court held for Mrs. Webb. However, rather than finding categorically that disparate treatment on the grounds of sex could never be justified, the ECJ explained why the justification put forth by this employer was not acceptable. In this regard, the Webb Court highlighted that Mrs. Webb’s contract was for an indefinite period, while the absence would be "purely temporary." This invited many commentators to expect a different holding in the case of employees on fixed-term contracts.

The issue of justification of disparate treatment on the grounds of sex was raised again in Birds Eye Walls. In that case, an employer, Birds Eye Walls, gave different occupational pension benefits to men and women.

239. Id. at 1-3949.
242. Id.
243. See, e.g., Szyszczak, supra note 240, at 864. The Tele Danmark Court resolved this important but narrow question, ruling that pregnant employees were protected from dismissal regardless of whether their contract was of fixed or indefinite duration. Case C-109/00, Tele Danmark v. Handels- og Kontorkulturernes Forbund, ex parte Brandt-Nielsen, 2001 E.C.R. 1-6993, 1-7006. However, the Tele Danmark Court also failed to clarify whether all types of justifications for direct discrimination based on sex would be unacceptable. As in Webb, and indeed citing Webb, the Tele Danmark Court held that the financial loss incurred by an employer, and an employer’s dependence on a woman’s presence at work cannot justify discrimination. Id. at I-7005.
between the ages of sixty and sixty-five. In this interval, women were eligible for a state pension while men were not. The Commission\textsuperscript{244} and Advocate General Van Gerven both believed that this employer practice constituted disparate treatment on the grounds of sex that could, however, be objectively justified.\textsuperscript{245}

Van Gerven presented two arguments in favor of allowing objective justification arguments to be raised in disparate treatment cases. First, he argued that “direct and indirect discrimination cannot in all cases be distinguished from one another,”\textsuperscript{246} and that the “dividing line between direct and indirect discrimination” was “uncertain.”\textsuperscript{247} Second, he reasoned by analogy, listing examples whose inherent plausibility and intuitive appeal likely justified discrimination, at least to Van Gerven and other participants at the 

\textit{Birds Eye Walls} ECJ hearing. These examples were “exclusion of male candidates where an elderly lady seeks a female companion” and “the grant of an allowance for a taxi exclusively to female employees who work at night, on the ground that in contrast to their male counterparts they are harassed on their way home.”\textsuperscript{248} These analogies suggest that judges’ beliefs about male and female social roles drove their willingness to allow employers to treat men and women differently in some circumstances. It seems unlikely that the Advocate General, or other participants in the hearing, would defer as easily to an elderly lady’s preference for a white companion, or to a company’s desire to reserve a taxi allowance to ethnic groups most worried about harassment. The Court ended up agreeing with the Advocate General in substance, accepting the employer’s policy, and declaring that 

\textit{Birds Eye Walls} could in fact give different pensions to men and women. However, the ECJ’s reasoning was not clear; there was no clear statement that disparate treatment on the grounds of sex could be justified.\textsuperscript{249}

This issue resurfaced soon thereafter, in a related challenge to pension plans favoring married female civil servants as compared to married males.\textsuperscript{250} The Commission again advocated that disparate treatment could be justified as established by analogy to the ECJ’s disparate impact jurisprudence.\textsuperscript{251} In this case, following the suggestion of Advocate General Jacobs, the Court sidestepped the issue, because, unlike in 

\textit{Birds Eye Walls}, the particular proposed justification would not have been acceptable in any event.\textsuperscript{252}

While the possibility of justifying measures that harm female plaintiffs is contested, EU law clearly allows for the justification of certain measures that treat women more favorably than men. These are typically justified as

\begin{tabular}{l}
\textsuperscript{244} Case C-132/92, Birds Eye Walls Ltd v. Roberts, 1993 E.C.R. I-5579, I-5604. \\
\textsuperscript{245} Id. at I-5592 to -5596 (opinion of Advocate General Van Gerven). \\
\textsuperscript{246} Id. at I-5593. \\
\textsuperscript{247} Id. at I-5594. \\
\textsuperscript{248} Id. at I-5594 n.23. \\
\textsuperscript{249} Id. at I-5605 (judgment) (holding that men at sixty were not similarly situated to women at sixty, but rather were similarly situated to women at sixty-five). \\
\textsuperscript{250} Case C-7/93, Bestuur van het Algemeen Burgerlijk Pensioenfonds v. Beune, 1994 E.C.R. I-4471. \\
\textsuperscript{251} Id. at I-4492 (opinion of Advocate General Jacobs). \\
\textsuperscript{252} Id. \\
\end{tabular}
derogations to the Equal Treatment directive; Article 2(3) allows member states some freedom in enacting measures related to pregnancy and maternity, while Article 2(4) allows member states some freedom in enacting measures that "promote equal opportunity" and remove existing inequalities. As other commentators have noted, the ECJ has given expansive scope to these exceptions. Evelyn Ellis highlights that the Court's language evolved from usage of the term "maternity," which was used in the directive, to "motherhood." Motherhood is a state of long duration; it would otherwise be difficult to invoke to justify pension policies. In contrast, based on a paradigm that is closer to sex-neutrality than the EU paradigm, U.S. courts would typically reject such measures as discrimination against men.

2. Justifying Disparate Treatment on the Grounds of Age and Disability

The ECJ recently decided its first age and disability discrimination cases. The political and economic stakes in these cases were very high: Palacios de la Villa v. Cortefiel Servicios SA and Heyday challenged mandatory retirement practices prevalent across European countries, while Mangold v. Helm upset a major German labor law compromise. Coleman v. Attridge Law was the ECJ's first major disability discrimination case. Coleman examined whether unfavorable treatment of a person who does not have a disability, but cares for a disabled person, can constitute disparate treatment on the grounds of disability.

Age and disability discrimination raise important policy concerns that are specific to the elderly and the disabled. Indeed, EU legislation codifies some of these concerns. Nevertheless, the ECJ's first age and disability discrimination cases reveal the continuing influence of doctrinal choices made...
Path Dependence in Discrimination Law
decades ago in response to particular understandings of men and women's social roles. Sex precedents were critical to the ECJ's age discrimination jurisprudence in two ways. On the one hand, sex precedents greatly aided the plaintiffs; absent these precedents, it is unlikely that the ECJ would have reached the merits of the challenges. On the other hand, sex precedents aided the defendants: sex precedents allowed the ECJ to accept much broader defenses than would have been possible otherwise. We observe nuanced case law on age discrimination, not a uniformly pro-employee or a pro-employer jurisprudence that theories of broad cultural differences might predict. The ECJ's case law on disability is much more limited, but resembles the age discrimination jurisprudence in key respects. On the one hand, Coleman is a major plaintiff victory, in that the ECJ held that caretakers of disabled persons are protected by EU law. On the other, the ECJ's language in Coleman suggests that disparate treatment on the grounds of disability can in some cases be justified.

In its first age discrimination case, Mangold, the ECJ evaluated the legitimacy of a German labor law that protected workers under fifty-two years of age from successive fixed-term contracts, but allowed more flexible hiring of older workers. At the time of the alleged discrimination, the EU directive prohibiting age discrimination had not fully entered into force. However, the ECJ declared that "the principle of non-discrimination on grounds of age... is regarded as a general principle of Community law," thus granting it a superior status in the sources of law hierarchy. Consequently, in a ruling heavily criticized by legal commentators and leading politicians, the ECJ found that disparate treatment on the basis of age had occurred.

Elevating age discrimination to a constitutional principle was surprising, given that neither the constitutions of most EU member states, nor international law instruments prohibit age discrimination. However, the ECJ's puzzling decision becomes comprehensible when considered in the context of the Court's sex discrimination jurisprudence. The ECJ had declared multiple times that "the elimination of discrimination based on sex forms part of... [the] fundamental rights" guaranteed by EU law. Thus,
sex precedents can help explain the prohibition of age discrimination as a general principle of EU law.

Despite the newly elevated status of the prohibition of age discrimination and the ECJ’s sympathetic stance toward the plaintiffs, the Court declared that, in certain circumstances, age discrimination can be justified. 274 The introduction of objective justifications for violations of fundamental rights guaranteed by EU law should trouble equality advocates.

The availability of justifications for disparate treatment on the grounds of age points to the direct influence of sex precedents, which leave substantial room for the objective justification of exceptions. In spelling out the scope of defenses to violations of general constitutional equality principles, the Mangold Court turned to sex discrimination cases. Echoing many past sex discrimination cases, the Mangold Court found that Germany’s objective of combating unemployment is a legitimate objective. 275 However, the ECJ held that the German law did not meet the proportionality requirement, and cited sex precedents for support on this point. 276

A closer look at the precedent the ECJ cited suggests that the proportionality scrutiny is much less strict than would be the case under race-neutral precedents. The Mangold Court cites Lommers to establish how proportionality requirements will be interpreted in age-discrimination cases. 277

In Lommers, the ECJ upheld a Dutch measure guaranteeing nursery places to the children of female but not male civil service employees, as long as men who were raising children by themselves could also benefit from the scheme. 278 The paragraph in Lommers referenced by the Mangold Court, paragraph 39, has been interpreted in other sex discrimination cases to mean that affirmative action measures that completely exclude males will not be acceptable, but that measures that give at least some men access to benefits available to all women can be acceptable. 279 The Lommers Court is explicit that it aims to reduce de facto, rather than de jure inequality, and recognizes that in so doing it might “perpetuate a traditional division of gender roles.” 280 Lommers is thus a sex-conscious precedent, and it is this sex-conscious precedent that is exported to define the scope of exceptions to age discrimination.

274. Apparently, EU general equality principles require that “‘comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified’ by the pursuit of a legitimate aim and provided that it ‘is appropriate and necessary in order to achieve’ that aim.” Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981, I-10002 to -10003 (opinion of Advocate General Tizzano); see also id. at I-10036 to -10040 (judgment).

275. See id. at I-10036. Sex precedents calling this a legitimate objective include Case C-77/02, Steinicke v. Bundesanstalt für Arbeit, 2003 E.C.R. I-9027.

276. See Schiek, supra note 272, at 332.


279. See, e.g., Case C-319/03, Briheche v. Ministre de l’Intérieur, 2004 E.C.R. I-8807, I-8817 to -8818 (opinion of Advocate General Maduro) (“Both in Badeck and Lommers, the Court gave specific consideration to the fact that the measures in question did not amount to a total exclusion of male candidates. The Court held that, in order to be compatible with Article 2(4) of Directive 76/207, a measure should meet this negative condition. In fact, in Lommers the Court expressly noted that the measure at issue did not totally exclude male officials from its scope. Otherwise, the positive measure could not be reconciled with the equal treatment principle.”) (footnotes omitted)).

It seems likely that a race-neutral precedent would only allow for much narrower exceptions, or not allow for exceptions at all. The next two age discrimination cases, *Palacios* and *Heyday*, confirmed that broad exemptions would be permissible in EU age discrimination law by highlighting that broad mandatory retirement provisions can be justified. U.S. age discrimination law prohibits mandatory retirement clauses for almost all occupations. In *Palacios*, the ECJ held that Spain’s mandatory retirement laws constituted disparate treatment on the grounds of age but that were justified by public policy rationales involving employment promotion. In *Heyday*, the ECJ held that Britain’s mandatory retirement laws might also be justifiable.

The first step in the *Palacios* inquiry was whether the ECJ could review mandatory retirement clauses in collective agreements. Advocate General Mazák argued that this question should be answered in the negative on policy grounds and in order to faithfully interpret the legislative text’s age discrimination provisions; however, he conceded that sex precedents pointed in the opposite direction. In contrast, the ECJ followed sex precedents and claimed jurisdiction to review mandatory retirement policies, despite a recital in the Framework Directive indicating that member states would likely have preferred a contrary outcome. The recital in question stated, “[t]his Directive shall be without prejudice to national provisions laying down retirement ages.”

The ECJ then decided that mandatory retirement amounted to disparate treatment on the basis of age, and went on to examine whether it could be justified. Following sex precedents, the ECJ ruled that the objective pursued by mandatory retirement legislation was legitimate. “[T]he Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy.” The Court then examined “whether . . . the means employed to achieve such a legitimate aim are ‘appropriate and necessary.’”

Citing to the prior age discrimination case, *Mangold*, which in turn cited to a
sex discrimination case, Lommers, the Court held that the mandatory retirement provision at issue could be objectively justified.

In light of the Palacios and Mangold holdings, a central part of the next age discrimination case, the Heyday challenge, involved the claim made in this Subsection: that the ECJ improperly exports broad defenses available in disparate impact sex cases to disparate treatment claims. The referring court asked whether there exists a significant practical difference between the test for justification in relation to disparate impact, and the test for justification in relation to disparate treatment on the basis of age. The plaintiff, British charity Age Concern, argued that the ECJ should use a stricter test for the justification of age disparate treatment than for sex disparate impact. However, the member states represented at the hearing, the Commission, and the Advocate General all concluded that a less strict standard for justification should be possible, allowing for the justification of the mandatory retirement provision at issue. Advocate Mazák’s recommendation to the ECJ was that the Court not specify the relationship between justification under disparate impact and treatment claims, but instead declare that the mandatory retirement provisions can in principle be justified. The ECJ followed this view.

To specify the scope of the exception, the ECJ again turned to sex discrimination doctrine developed in the disparate impact context. The ECJ’s doctrine on disability is not yet well developed. But concerns that the ECJ is exporting broad exceptions from disparate impact sex discrimination doctrine into disparate treatment disability discrimination doctrine have already emerged. More specifically, in Coleman v. Attridge Law, the ECJ’s first major disability discrimination case, the ECJ introduced the possibility that disparate treatment on the basis of disability could be justified. Ms. Coleman suffered no disability herself, but cared for a disabled child. She alleged that her employer treated her less favorably than caretakers of non-disabled children. The ECJ held that discrimination against caretakers of disabled persons was disparate treatment on the grounds of disability. In this sense, the ECJ expanded the concept of disparate treatment to include discrimination by association. U.S. statutes also prohibit discrimination against the caretakers of the disabled; it is unclear whether, in the absence of such a statute, U.S. courts would have extended protections covering the disabled to their caretakers.

290. Id. at I-10090.
291. See Case C-388/07, The Queen, ex parte Inc. Trs. of the Nat’l Council on Ageing (Age Concern England) v. Sec’y of State for Bus., Enter & Regulatory Reform (Heyday), para. 20 (Mar. 5, 2009), http://curia.europa.eu (“Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the directive?”).
292. See id. paras. 29-34 (report for hearing).
293. See id. paras. 35-41.
294. See id. paras. 42-49.
295. See id. paras. 79-88 (opinion of Advocate General Mazák).
296. See id. para. 88.
297. See id. paras. 51-52 (judgment).
298. See id. para. 51 (drawing an analogy to Case C-167/97, The Queen v. Sec’y of State for Employment, ex parte Seymour-Smith, 1999 E.C.R. 1-623).
In addition to expanding the scope of a disability discrimination prima facie case, the ECJ also introduced the possibility that disparate treatment on the grounds of disability can be justified. In explaining what employers must do following a prima facie case, the ECJ specified that: "[T]he respondents could contest the existence of such a breach [of the equal treatment principle] by establishing by any legally permissible means, in particular, that the employee's treatment was justified by objective factors unrelated to any discrimination on grounds of disability and to any association which that employee has with a disabled person." This language of objective justification comes directly from sex disparate impact cases and includes a broad set of defenses. Because EU disability law is very new, the scope of available defenses remains unclear. However, sex discrimination precedents should give advocates for the disabled reason for concern.

V. CONCLUSION

This Article illustrates how the sequence in which courts adjudicate claims can influence the doctrines they develop. U.S. and EU courts faced very similar questions in developing early employment discrimination doctrine. Race-blindness shaped the answers that U.S. courts offered, while sex-consciousness guided EU courts. Courts extended doctrines developed in these early cases to claims brought by other groups by using analogical reasoning and by interpreting the same words in the same way in different contexts. Interpretation processes that reinforce and expand on early decisions are rarely interrupted, because judicial decisionmaking is often insulated from political pressures. Disability, age, and sexual orientation claims today succeed or fail depending on accidents of historical sequencing.

According chance a central role in the development of the law can be deeply problematic. In economic markets, path-dependent processes often cause inefficiencies; for example, outdated technologies remain in widespread use long after better models are developed. Similarly, when chance plays a large role in the process by which laws are generated, societies are unlikely to get optimal laws—laws that are efficient, fair or culturally appropriate. More fundamentally, however, non-arbitrariness is essential to the rule of law itself. Law can impose severe penalties, or fail to redress major harms; in either case, it should embody and articulate society's moral reasons for influencing individuals' well-being.

Different claimants bear the burden of this arbitrariness in the United States and the European Union. In the European Union, plaintiffs who make claims courts consider typical of their group gain greater protections than in the United States, as a consequence of early sex-conscious precedents. Because of race-blindness norms, U.S. law protects atypical claimants more.

300. See Case C-303/06, Coleman, para. 55.
301. See, e.g., Case C-25/02, Rinke v. Hamburg, 2003 E.C.R. I-8349, I-8384 ("According to settled case-law, a provision involves indirect discrimination against female workers when, although worded in neutral terms, it works to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex . . . .").
Some illustrations clarify this point. Women who want to work in professions
where many other women work gain greater protections under EU law. The
ECJ recognizes comparable worth claims, and allows women to sue to
increase their pay and match the salaries of similarly skilled men. In
contrast, comparable worth claims systematically fail in the United States.

However, women who want to work in fields dominated by men fare
better under U.S. law. For example, U.S. courts often mandate that prisons
adjust workplace conditions to accommodate female guards. In contrast, the
ECJ allows for the prisons to categorically exclude women from guard jobs—even
from administrative posts that involve no contact with inmates. Similarly, the ECJ has upheld broad defenses for police forces operating in
dangerous situations, accepting that female police reservists in Northern
Ireland could be refused firearms training and face contract non-renewal.

Once women are excluded wholesale from certain fields, it is less surprising
for wholesale exclusions of other minorities to follow. Thus, for example,
religious quotas in the Northern Ireland police force do not violate EU
discrimination law. More generally, employers in the European Union can
argue that a particular racial background is an occupational qualification; U.S.
law prohibits this.

While women interested in reconciling work and family benefit from EU
antidiscrimination law, men with similar interests are better protected by U.S.
law. For example, the ECJ has upheld measures restricting childrearing leave
to biological or adoptive female parents, and the reservation of nursery
places for the children of all female employees and only certain male
parents. In contrast, U.S. courts typically reject such measures as
discrimination against men.

Age discrimination cases show similar patterns. In the United States, the
typical age discrimination lawsuit involves a fifty-five-year-old white man
who works in a professional field and wants to keep the high pay and good

304. See MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF
LEGAL MOBILIZATION 48-91 (1994).
305. See, e.g., Hardin v. Synchcomb, 691 F.2d 1364 (11th Cir. 1982) (rejecting the BFOQ
requirement in the prison context); Forts v. Ward, 621 F.2d 1210, 1217 (2d Cir. 1980) (same); Gunther
v. Iowa State Men’s Reformatory, 612 F.2d 1079 (8th Cir. 1980) (same); Harden v. Dayton Human
306. See Case 318/86, Comm’n v. France, 1988 E.C.R. 1-3559, 1-3578 to -3579 (holding that
both warden and managerial head warden positions could be reserved to men, despite the finding that
prison jobs could be structured differently).
(suggesting that member states may allow pension credits to accrue to all mothers but only to fathers
who could prove they were involved in the raising of children).
making childrearing leave available to all females, but only to males who could show they were
disabled, violates Title VII).
benefits that come with seniority. 314 U.S. courts are not particularly sympathetic to these claims. Most recently, in Smith v. City of Jackson, the Supreme Court upheld an employer's policy of giving proportionately larger raises to younger employees. 315 Empirical studies show lower courts to be similarly unsympathetic. 316 Early EU cases suggest that the ECJ will treat these “typical” older workers more favorably. In Mangold, the ECJ held that employers could not offer contracts with worse benefit terms to older workers. 317 The ECJ has also departed from the U.S. jurisprudence by declaring nondiscrimination on the basis of age to be a fundamental principle of EU constitutional law. 318

The tables turn when we look at older workers whom the ECJ considers atypical—sixty-five-year-old workers who seek to work past conventional retirement ages. These atypical workers can face dismissal in Europe, because, as discussed above, the ECJ has upheld broad mandatory retirement policies. In the United States, with few exceptions, these workers can keep their jobs, because mandatory retirement policies are illegal. 319 Accidents in historical sequencing turn out to have significant and surprising consequences.

316. See Selmi, supra note 69, at 748 (stating that, in a large statistical sample, the author did not find a single disparate impact age discrimination law suit that was successful on the merits).