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EXPLORING THE BOUNDARIES OF ANTIDISCRIMINATION LAW AND EQUALITY IN THE GLOBAL WORKPLACE

Donna E. Young*

I. INTRODUCTION

In the United States, we are accustomed to thinking of our federal Constitution as a near-sacred piece of drafting genius, and that our antidiscrimination laws are among the most successful in the world. Nonetheless, whatever one thinks about the words contained in these important sources of American equality jurisprudence, it is unfortunately the case that their accompanying judicial interpretation has taken such a narrow approach that the promise of these laws has not been realized. Arguably, this narrow approach is a result of judicial reluctance to look to international sources for aid in expanding the interpretive landscape in which civil rights are decided. This paper examines one such source of international antidiscrimination theory, the International Labor Organization, and argues that its principles can guide U.S. antidiscrimination laws.

The reluctance to utilize international sources is not necessarily an indication of hostility to, or lack of interest in, international jurisprudence by the judiciary alone. In fact, some describe such judicial recalcitrance as part of a larger problem of "American exceptionalism," the parochial nature of legal theory in the United States, a quasi-ubiquitous suspicion of anything foreign, and a failure of American law schools to provide rigorous curricular offerings in international and comparative law. One could argue, however, that such reluctance is understandable given that the United States encompasses geographical, cultural and linguistic diversity within its own borders and that it is not necessary to look elsewhere. But others have argued that perhaps a more global approach is nonetheless still necessary. Former Canadian Supreme Court Justice La Forest stated:

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* Professor of Law, Albany Law School. I would like to thank the organizers of the LatCrit International Comparative Law Colloquium, Paris July 27, 2010, Sumi Cho, Margaret Montoya, Frank Valdes, and Robert Westley and Adam Staier for his research assistance. I would also like to express my appreciation to Peter Halewood, Isaac Young and Lucas Young for exploring many boundaries with me.

1. The United States Constitution was a routine campaign reference during the mid-term election of November 2010, especially among Republican and Tea-Party candidates. Its revered status among Representatives of Congress was made clear when it was read on the floor of the House of Representatives on January 6, 2011. See Jennifer Steinhauer, Constitution Has Its Day (More or Less) in House, N.Y. TIMES, January 6, 2011, at A15.


3. Id. at 593 n.43.
I suppose [the failure to examine legal developments in other countries] is normal enough for a great power; especially one with such a wealth and variety of material at home. Even apart from this, habit may prevent American lawyers and judges from seeing the opportunities that lie in comparative analysis. Sometimes American courts may need to remind themselves that this may be a concomitant of, and a source of enrichment, in an interdependent world.\(^4\)

The reluctance to look across borders for persuasive authority extends beyond members of the Supreme Court and has become the focus of Congressional action. For example, in denouncing the use of foreign materials to interpret the constitution, Texas Congressman Poe stated:

As a former Texas judge for over twenty-two years, having heard 25,000 criminal cases, I took the same oath as our Supreme Court justices, to uphold the United States Constitution. Never once did I make a decision based upon the way they do things in other countries. My oath was to our Constitution, not to the Constitution of the member countries of the European Union, such as France. America should not confer with the decisions of any of the hundreds of foreign powers on our planet.\(^5\)

Criticizing Justice Kennedy’s reference to foreign law in his opinion in \textit{Roper v. Simmons}, Congressman Poe continues:

I realize the Constitution is an old document, well over 200 years; but this idea of “evolving standards of decency” is simply ridiculous. Values are timeless. American values are timeless. American standards are timeless, and they are in the Constitution.

The list of decisions against our Constitution . . . is a deep cavern of vile destruction. Other verdicts handed down by the Supreme Court include citations of legal opinions from foreign courts in Jamaica, India and the ultimate beacon of justice, Zimbabwe. Mr. Speaker, has the Supreme Court lost its way?\(^7\)

Nonetheless, a growing number of judges, lawyers, and legal commentators have criticized this aversion to using foreign materials, arguing that the U.S.


\(^5\) 151 CONG. REC. 9075 (2005). \textit{See} H.R. Res. 568, 108th Cong. (2004) (“Resolved, that it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.”). \textit{See also} S. Res. 92, 109th Cong. (2005) (“expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States”).


\(^7\) 151 CONG. REC. 9075 (2005).
Supreme Court is out of step with the practice of many judicial bodies around the world, and is in "danger of isolating the United States from full participation in the family of nations." Though the U.S. Supreme Court has been criticized for failing to consider foreign precedent, several current and recent members of the Court have been quite receptive to foreign and international laws recognizing that the move towards a more global approach to judicial interpretation is inevitable. Moreover, such reluctance to open the interpretive doors has drawn criticism not only from a spectrum of American academics, but also from judges from around the world. Former Canadian Supreme Court Justice, Claire L'Heureux Dube, has argued that "the failure of the . . . [Rehnquist] Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence." As she pointed out more than a decade ago, the continuing reluctance on the part of the U.S. judiciary to consider legal models from abroad is inconsistent with the "globalization" of the "process of judging and lawyering."

Nonetheless, it is surely uncontroversial to suggest that those who engage in comparative analysis have a special responsibility to do so with care. Cultural, religious, and political differences influence legal notions under different legal systems. Therefore, using materials from foreign jurisdictions raises inevitable

8. See, e.g., Claire L’Heureux-Dubé, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15, 16 (1998) ("More and more courts, particularly in the common law world, are looking to the judgments of other jurisdictions . . . .").
10. See, e.g., Harry A. Blackmun, The Supreme Court and the Law of Nations 104 YALE L.J. 39, 45 (1994); Stephen Breyer, Keynote Address, 97 AM. SOC’Y INT’L L. PROC. 265, 266 (2003) ("Ultimately, I believe the ‘comparativist’ view that several of us have enunciated will carry the day—simply because of the enormous value in any discipline of trying to learn from the similar experience of others.").
11. L’Heureux-Dubé, supra note 8, at 37-38 (1998) ("In my view, the most useful judgments for the courts looking to comparative sources are those that use comparative materials themselves, and situate their judgments in the context of international debates and discussions. Decisions which look only inward, which see only the situation in the place where they are rendered, have less relevance to those outside that jurisdiction than decisions which take account of international debates and discussions. American decisions which fail to articulate the similarities with and differences from other countries’ legal systems are less useful than decisions that consider their jurisdiction’s place in the judicial world and consider that place relative to other countries.").
12. See id. at 16.
13. See, e.g., Otto Kahn-Freund, On Uses and Misuses of Comparative Law, 37 MOD. L. REV. 1, 27 (1974) ("[The use of the comparative method] requires a knowledge not only of the foreign law, but also of its social, and above all its political, context."); Roger Blanpain, Comparativism in Labour Law and Industrial Relations, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 3 (Roger Blanpain ed., 2d ed. 1985); Clyde Summers, Comparative Labor Law in America: Its Foibles, Function, and Future, 25 COMP. LAB. L. & POL’Y J. 115, 117 (2003); ROGER BLANPAIN ET AL. EDs., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS 32 (2007); La Forest, supra, note 4 at 220 ("...the use of foreign material affords another source, another tool for the construction of better judgments. Recourse to such materials is, of course, not needed in every case, but from time to time a look outward may reveal refreshing perspectives. The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication. In this era of increasing global interdependence, and in particular of even closer American-Canadian relations, it seems normal that there should be increased sharing in and among our law and lawyers as well.").
14. See generally, id.
questions of translatability. However, there are legal precedents in some jurisdictions that are less susceptible to such concerns. In addition, there are international laws drafted by the United Nations and the International Labor Organization (ILO) that also offer cogent sources of comparison. Because the rich diversity among nations makes comparisons challenging, the International Labor Organization, having examined different models throughout the world and endeavoring to work towards a universal model of equality, is perhaps ideally situated for examination. In its “Decent Work Agenda” the International Labor Organization (ILO) has identified challenges to full workers’ rights and has come up with strategies to address these challenges. It is worth examining whether such an approach can inform attempts at law reform in the United States. An international focus has already buttressed the work done by Feminist and Critical Race Theorists and furthers the interdisciplinary and international agenda of LatCrit theorists and others who have built a substantial body of work critiquing the U.S. approach to antidiscrimination jurisprudence. The purpose of this article is to contrast aspects of the American employment discrimination model with that of the International Labor Organization in order to support a closer collaboration between critical theory and international equality and antidiscrimination approaches.

A significant challenge to any antidiscrimination agenda derives from the various and sometimes conflicting definitions of equality found throughout the world, making it difficult to develop a coherent legal strategy. If defining equality is the necessary first step in designing an antidiscrimination agenda, it has proven to be an illusive task. By comparing various national and international understandings of equality, a theoretical foundation can be designed to address the mechanisms that support employment discrimination and further systemic inequalities. Moreover, defining equality must be the prerequisite for combating discrimination for, without a clear idea of the meaning of “equality,” strategies to eliminate discrimination are left groundless, without a principled starting or end point. Equality then, is one of the measures that can be used to assess the effectiveness of strategies employed to

15. See, e.g., La Forest, The Use of American Precedents in Canadian Courts, 46 ME. L. REV. 211, 214 (1994) (“While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances. . . . [T]he Charter will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master.”).

16. See id. at 218 (“Canada may not be a bad place to look because our traditions, while different enough to encourage different perspectives, share enough common concepts to ensure possible applicability.”); see also Donna E. Young, Racial Releases, Involuntary Separations and Employment At-Will, 34 LOY. L.A. L. REV. 351 (2001) (urging U.S. lawyers, legal scholars, and judges to look to Canadian employment law as a source of information and comparison); Rebecca Lefler, Note, A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia, 11 S. CAL. INTERDISC. L.J. 165, 166-67 (2001) (arguing that Australia and Canada offer appropriate sources of comparison because of their common origins in the British common law, their supreme courts’ similar control over their dockets allowing them to “choose to address cases that contain importance issues facing their countries,” and the comparable and expanding roles played by their judiciaries).


eliminate discrimination.

But what does equality mean? Can it be or how is it achieved? What is its relationship to discrimination? In addressing these questions, I will contrast the ILO’s attempt to globalize definitions of equality and antidiscrimination principles with the ways in which equality has been articulated in U.S. law in order to point out the pitfalls of defining equality in a narrow or formalistic fashion. In Part II, I outline the basic sources of U.S. antidiscrimination law and examine interpretive problems that have led to a too narrow understanding of equality and discrimination. In Part III, I provide background into a promising international source of interpretation of equality and discrimination, the International Labor Organization’s “Declaration of Fundamental Principles and Rights at Work” and offer some critiques of its approach. In Part IV, I examine the ILO’s approach to equality and discrimination and posit that U.S. antidiscrimination law would benefit from reference to it. The main strength of the ILO approach is not so much that it has come up with the most comprehensive definition of equality. Instead, by providing an aspirational demarcation of what equality encompasses, it keeps open the possibility for member states to develop their own local meanings of equality within a solid international procedural framework. For those in the United States interested in addressing discrimination in employment, then, the ILO provides a global context in which to do so. In Part V, I conclude that equality theorists in the United States can learn from the ILO approach.

II. EQUALITY AND DISCRIMINATION IN THE UNITED STATES

The problem of discrimination and inequality is a problem that has saturated American legal thought and has resulted in a body of American constitutional and anti-discrimination jurisprudence influential around the world.19 Within the United States, these laws have contributed to positive transformation: in the latter half of the twentieth Century, minority civil rights were given recognition under the Equal Protection Clause of the Fourteenth Amendment to the Constitution.20 In 1964, Title VII of the Civil Rights Act was meant to put an end to overt discrimination in employment or at least to deter and punish those who practice it.21 Over the years, the Supreme Court has added substantive content to the meaning of the Equal Protection Clause and to the Civil Rights Act and has developed frameworks for addressing purposeful discrimination in employment.22 By regulating the

19. Anthony Lester, The Overseas Trade in the American Bill of Rights, 88 COLUM. L. REV. 537, 537 (1988) (“Not only have American concepts of freedom shaped the rise of constitutionalism in Europe and elsewhere, but courts overseas refer frequently to U.S. Supreme Court precedents in constitutional cases . . .”); L’Heureux-Dubé, supra note 8, at 18 (1998) (“As the bonds of colonialism loosened, the prominence of American jurisprudence grew throughout the world. This is particularly true in the field of constitutionalism and human rights.”).
22. See Washington v. Davis, 426 U.S. 229, 237 (1976) (holding that disproportionate impact alone is not enough to prove purposeful discrimination under the 14th Amendment equality guarantee unless it clearly establishes intent to discriminate); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (Setting out the nature and order of the burdens of proof for plaintiffs and defendants. This shifting of burdens is known as the McDonnell Douglas burden-shifting framework used for cases relying on
employment relationship, both Constitutional and legislative antidiscrimination laws have contributed to significant changes in workplace demographics in the United States. 23

However, because Title VII and the equality provisions of the Constitution are given effect through judicial interpretation, there is much room for interpretive missteps. For example, many Title VII lawsuits depend on circumstantial evidence requiring judges to make inferences of discrimination, and oftentimes these inferences are made without due attention to the perspective of the person complaining of discrimination. 24 Thus, although with the advent of Title VII plaintiffs now have a legal tool to combat discrimination, they still face interpretive barriers that reveal a somewhat impoverished view of discrimination in all its forms. In addition, systemic racism persists and it does so in a context devoid of any law that is capable of addressing it. 25

Despite its promise, the antidiscrimination model contained in U.S. laws cannot address the myriad ways in which discrimination and exploitation are experienced. Even more troubling is how the model itself perpetuates inequalities in the workplace by encouraging the false idea that discrimination exists only if it fits within the legal framework, and that it is “fixable” only through the narrow antidiscrimination structure recognized by legal actors. Though looking towards international sources to address domestic issues is controversial in the United States, ignoring international trends in equality law may only help to maintain the

24. Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29, 29 (Kimberle Crenshaw & Garry Peller eds., 1995) (arguing that “anti-discrimination law has . . . been ultimately indifferent to the condition of the victim”); Anthony P. Farley, The Poetics of Colorlined Space, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 97, 121 (Francisco Valdes & Jerome M. Culp eds., 2002) ("Race works in mysterious ways. Our civil rights statutes are designed from a 'perpetrator perspective,' not from a 'victim perspective' . . . . The victim perspective focuses on the problem of inequality, while the perpetrator perspective focuses on the problems of fault and causation. The victim lives in a toxic ocean of discrimination, but the perpetrator sees only the nets as problematic. By focusing on the problems of fault and causation, the perpetrator perspective guarantees that discrimination that is not located, litigated, and proved in a court of law will be protected and legitimated as non-discrimination."); Trina Jones, Anti-Discrimination Law in Peril?, 75 MO. L. REV. 423, 424 (2010) (arguing that recent Supreme Court cases have “made it extraordinarily difficult for plaintiffs to win employment discrimination cases based on circumstantial proof”).
25. See JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION (Routledge, 2006) (developing a theory to explain how American institutions reproduce the system of racial hierarchy that was developed in the 17th century and that continues to permeate all social institutions, groups and institutions today).
26. Compare Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts, 98 AM. SOC. INT'L L. PROC. 305, 309, (2004) (“I hope I have made it clear that my belief that use of foreign law in our constitutional decisions is the wave of the future does not at all suggest I think it is a good idea. I do not. The men who founded our republic did not aspire to emulating Europeans, much less the rest of the world.”), John Yoo, Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases, 26 U. HAW. L. REV. 385, 385 (2004) (cautioning against using foreign sources in a
status quo of racial and economic inequality in the United States.\textsuperscript{27}

In addition to the pitfalls inherent in ignoring international sources is the concomitant problem of placing too much faith in the American model without due consideration of its weaknesses. Undermining the universal appeal of an American-type anti-discrimination approach are several limitations in American equality law.\textsuperscript{28} First, American anti-discrimination jurisprudence is based on a formalistic and narrow understanding of equality. The U.S. Supreme Court is largely responsible for this narrow understanding as it is the primary body responsible for giving substance to the legal definition of discrimination. We find examples of this formal approach in international laws, the ILO defines equality in ways invoking the Aristotelean sameness/difference formula. However, because the ILO by its very nature is an entity that encompasses transborder ideals, it has embraced a substantive approach to the definition of equality that is largely missing from the American approach.

Anti-discrimination laws in the United States and elsewhere most commonly address two ways in which inequality presents itself in employment discrimination. First, disparate treatment, refers to inequality that is the result of the intentional conduct of actors motivated by animus. This method of discrimination is often referred to as intentional discrimination and posits that various employment decisions, practices, and conditions of employment are designed to treat employees differently based on their different characteristics. Second is disparate impact, which refers to inequality between the groups not through the intentional behavior of individuals, but as a consequence of assumptions and practices, presumably neutral way that would make them "outcome determinative" and arguing that relying on decisions that interpret a wholly different document runs counter to the notion that judicial review derives from the Court's duty to enforce the Constitution.), and Roger P. Alford, \textit{Misusing International Sources to Interpret the Constitution}, 98 AM. J. INT'L L. 57 (2004) (arguing that using foreign sources as an interpretive aid in constitutional analysis is inadvisable because of its possible destabilizing effect, its rendering ineffective of the Supremacy Clause, and the inevitable referencing of international materials in a haphazard, selective and incomplete way), with Ruth Bader Ginsburg & Deborah Jones Merritt, \textit{Affirmative Action: An International Human Rights Dialogue}, 21 CARDOZO L. REV. 253, 282 (1999), Stephen Breyer, \textit{Keynote Address}, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003) (explaining "why foreign experience is often important to our work"), Michael Rosenfeld, \textit{Constitutional Migration and the Bounds of Comparative Analysis}, 38 N.Y.U. ANN. SURV. AM. L. 67, 68 (2001) (explaining that "comparative constitutional analysis has become necessary and unavoidable"), and Vicki C. Jackson, \textit{Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality, Rights and Federalism}, I U. PA. J. CONST. L. 583, 583 (1999) (arguing for "a broader understanding of what is relevant to U.S. constitutional interpretation, embracing ... judgments reached by the constitutional courts of other nations considering similar problems"").

\textsuperscript{27} Martha Albertson Fineman, \textit{Equality Across Legal Cultures: The Role for International Human Rights}, 27 T. JEFFERSON L. REV. 1, 2 (2004) (arguing that a comparative perspective of the law can "enrich an individual nation's pursuit of equality").

\textsuperscript{28} For purposes of this article, I will focus my critique on the formal equality approach found in antidiscrimination jurisprudence. However, there are other weaknesses in the American approach. For example, in the United States, federal constitution law and antidiscrimination legislation define the grounds of discrimination far too narrowly. Discrimination based on race, color, religion, national origin, age, and disability are actionable, but discrimination based on sexual orientation, marital and family status, and appearance are not. In addition, to the extent that discriminatory employment practices cannot be analogized to conflicts between majority and minority racial groups in formal work arrangements, then the American approach has significantly less impact in the world of work falling outside formal regulation. This is not so much a problem unique to American antidiscrimination law as it is a problem of addressing exploitative work arrangements that are ever-present in the informal sector. As good as any equality regime may be, it cannot easily comprehend arrangements that are outside the bounds of formal regulation.
in purpose, embedded in the ordinary system of governance that may benefit or privilege members of one group at the expense of the interests of another. This second category is sometimes referred to as unintentional discrimination.

The United States provides prohibitions against conduct falling into one or the other of these categories, but through a series of decisions, the U.S. Supreme Court has limited the scope of disparate impact theory in both constitutional and statutory law by relying on a jurisprudence that is informed by formal, rather than substantive standards of equality and results in a hostility to race and gender based remedial measures and claims of unintentional discrimination. The theoretical foundation for American anti-discrimination law is derived from its conceptualization of equality. Formal equality is very much in evidence in U.S. anti-discrimination law, and perhaps can in part be traced back the principle of employment at will and Lochner-type approaches to employment regulation.

Formal equality has acted as a barrier to ending discrimination. Until the advent of the 1964 Civil Rights Act, the United States had a strict, judicially-sanctioned system of racial segregation in the private workplace. Today, an unofficial system of occupational segregation is in place. Yet, under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, a neutral governmental action that demonstrates no overt racial animus does not constitute discrimination, notwithstanding its disproportionate impact on a particular racial group. This approach is emblematic of the ways in which American law requires that a wrong-doer be identified, overt actions of the wrongdoer reveal racial animus, and that the racial animus is linked to a particular, identifiable wrong. Likes must be treated alike. And in order to remain steadfastly color-blind, one must hold to the idea that membership in a racial group is inconsequential. All people, regardless of race, gender, or ethnic origin must be treated alike. Patterns of systemic inequalities

29. Formal equality is most often articulated in the "similarly situated" test which is a restatement of the Aristotelian principle of formal equality—that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness." See Ethica Nichomaece, trans. W. Ross, Book V3, at p. 1131a-6 (1925). This formal equality framework is premised on the notion that workers are somehow the same regardless of material differences in their lives. In many respects, however, people are not the same. Different life experiences and group membership can influence one's successes or failures. Therefore, members of different racial or ethnic groups, or genders might be different in many important respects, and therefore treating them the same, may not be the same as treating them equally. Formal equality, then, cannot capture the myriad ways in which discrimination is manifested.

30. The concept of at-will employment is based on the principle that employer and employee are equal in terms of bargaining strength and should be left free to end the employment relationship at will. At-will employment is the foundation for all employment law within the United States and is the legal regime under which the vast majority of workers in the United States work. At-will employment pits employer interests of having a flexible workforce (that is, having disposable workers) against the employees' interest in job security. As originally conceptualized, at-will employment required minimal governmental intrusion of the employment relationship because any such imposition of labor standards would impede market freedom. This so-called neutral principle has a very significant racial impact, with African Americans being more susceptible to arbitrary firing than members of other racial groups. See Pauline Kim, Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in and At-Will World, 83 Cornell L. Rev. 105 (1997). See also Donna E. Young, Racial Releases, Involuntary Separations and Employment At-Will, 34 LOY. L.A. L. REV. 351 (2001).


32. See Washington v. Davis, 426 U.S. 229 (1976) (holding that proof of discriminatory impact is not enough to demonstrate a denial of equal protection; rather, a plaintiff must prove that the government employer intended to discriminate against him or her on grounds of race).
do not fit within this narrow approach and cannot be addressed through antidiscrimination law. Superimposed upon an already skewed employment structure, a structure that reveals persistent discrepancies in occupational status is a constitutional jurisprudence that requires a color-blind approach to equality. In other words, any governmental action that makes distinctions based on race whether those distinctions are invidious or benign, must be subject to strict judicial scrutiny. Thus, the Supreme Court has struck blows to affirmative action plans in *Adarand*, and *San Antonio School District*, and, more recently, the Court’s 2009 *Ricci* decision arguably “reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury.” Inherent in the Court’s approach is the elevation of formal equality to an unwarranted level of significance.

Other courts have conceptualized “equality” differently. In its landmark decision, *Andrews v. Law Society (British Columbia)*, interpreting the equality provisions of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court rejected the formal equality approach:

The “similarly situated should be similarly treated” approach will not necessarily result in equality nor will every distinction or differentiation in treatment necessarily result in inequality. . . . [False d]iscrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.

*Andrews* represents a marked departure from the formal equality approach found in American civil rights law. This departure represented a deliberate choice on the part of the Supreme Court of Canada to follow a different path towards equality, one which it recognized as being more in-line with contemporary international understandings of equality.

It is true, however, that the substantive equality approach articulated in *Andrews* can be found in various dissenting opinions in U.S. Supreme Court decisions. For example, in his dissenting opinion in *Adarand*, Justice Stevens expresses his disagreement with the majority approach to equal treatment. He states that “[t]he Court’s explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between ‘invidious’ and ‘benign’ discrimination.” Remedial measures such as affirmative

38. *Id.*
action, which are profoundly color-conscious, are extremely vulnerable in a color-blind/formal equality approach. Moreover, a focus on individual actors without providing an institutional context obscures the effects of political institutions and the legacies of specific political choices and compromises. In an earlier article, I argued that:

Looking at anti-discrimination law from the perspective of the worker reveals that the myriad forms of discrimination experienced in the workplace and beyond is part of a system of subordination that is supported by faith in free markets, and that is not amenable to the narrowly drawn parameters of the American anti-discrimination framework. The framework does, however, fit nicely into a view of discrimination from the perspective of those defending their conduct (the employer, the capitalist, etc.) by treating discrimination as an uncommon, solitary, purposeful act done by someone to someone else. African Americans and other people of color are interested in redress. But if we are living in a post-racial society, one that is blind to race, then widespread redress makes no sense since widespread discrimination is a thing of the past.40

Clearly, we do not live in a “post-racial” America and, consequently, an equality jurisprudence that presupposes that we do provides a poor tool for addressing inequalities in the workplace.

III. THE ILO APPROACH TO RIGHTS AT WORK

The International Labor Organization (“ILO”) has identified the elimination of employment discrimination as fundamental to its “decent work agenda,” an agenda that has become central to the international effort to address globalization’s challenges to full workers’ rights.41 In an important move in 1998, the ILO adopted the Declaration of Fundamental Principles and Rights at Work, a document that embodies an emerging global consensus as to the nature and scope of fundamental workers rights.42 The Declaration’s stated purpose is “to ensure that social progress goes hand in hand with economic progress and development.”43 Examined from the viewpoint of the ILO’s traditional mode of operation, the Declaration’s innovation is apparent in its requirement that Member States, whether or not they have ratified the


41. Decent Work, supra note 17 (“Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.”).


43. Id.
ILO's Core Conventions, submit to the ILO an annual report noting the status of efforts to conform their domestic policies with the Declaration's core principles, the impediments to such implementation and the areas in need of technical assistance.

The substantive innovation of the Declaration is seen in its promise to promote the principles and rights as stated in each of its four core categories of labor standards. These core labor standards are, "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."44 The last in this list, "the elimination of discrimination in respect of employment and occupation," provides fertile ground for examining the innovations of and impediments to the international project of eliminating discrimination in employment. As is the case with respect to all international and regional conventions and agreements, there are challenges inherent in defining some of these essential terms, such as "equality" or "discrimination" that is translatable or transferable across national borders with diverse histories, cultures and expressions of national identity.45 Though an international anti-discrimination approach might be heralded as providing a uniform model, calls for uniformity might be misplaced when dealing with the diversity of the ways in which discrimination manifests itself around the world. In many nations, discrimination routinely reveals itself in brutal and overt acts of violence. Moreover, the formal or informal nature of the employment relationship makes uniform solutions inappropriate. For example, a sex worker in Thailand might experience discrimination in an utterly different way than would a public servant in the United States. The underlying causes of both forms of discrimination might coincide in some small part, but might otherwise vary depending on the different economic and political pressures at play. Poverty in many parts of the world brings about a particularly intense vulnerability to exploitation and discrimination but plays little or no role in the experience of discrimination among wealthier workers. Therefore, the ILO's decent work agenda aims to strike at more than individual complaints of discrimination and focuses instead on social, economic, and political contributions to poverty and inequitable access to jobs.

One might ask, then, to what extent international jurisprudential approaches to equality might help to inform the U.S. anti-discrimination agenda. The answer is mixed. The United States is one of a small number of nations that has failed to ratify two international conventions considered by the ILO to be core conventions on equality46 and upon which the ILO has built its Declaration and its Decent Work Agenda. Therefore, the level of influence that the ILO has within the United States is minimized.

Nonetheless, a comparison between American law and the ILO approach is

44. Id.
45. Nonetheless, there are international models available. See, e.g., Discrimination (Employment and Occupation) Convention, INTERNATIONAL LABOUR ORGANIZATION, June 25, 1958, available at http://www2.ohchr.org/english/law/employment.htm (defining discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation").
helpful in at least three ways. First, since American jurisprudence reflects a formalistic articulation of equality, one that cannot adequately address the challenges of both non-intentional discrimination (both systemic and unconscious) and affirmative action, the ILO approach might provide a more solid theoretical foundation for an anti-discrimination agenda. The ILO has stated that “[e]quality at work means that all individuals should be accorded equal opportunities to develop fully the knowledge, skills, and competencies that are relevant to the economic activities they wish to pursue. Measures to promote equality need to bear in mind the vast diversity in culture, language, and family circumstances, and further take into account the ability to read and deal with numbers.”

Therefore, the ILO recognizes that context plays an important and vital role in addressing claims of inequality.

Second, in its 2011 Report, the ILO describes trends in discrimination from around the world and provides guidance as to how countries should approach discrimination. How other countries are approaching these trends may be used to inform new approaches to similar trends in the United States. For example, the ILO has found that there is an increase in discrimination based on multiple grounds. As Professor Kimberly Crenshaw and others have documented, the problems of interpreting Title VII in ways that do not address the “intersectionality” of discrimination may lead to some unfortunate results. The ILO cautions that there “is a need to address widespread and structural discriminatory practices [in addition to relying on court cases which typically deal only with a specific instance of discrimination on an individual basis].” The ILO has found an increasing trend in multiple forms of discrimination and has begun working towards solutions. It suggests that relying on the private enforcement of civil rights laws through legal action is not in itself sufficient. With that in mind, the ILO has determined that “[x]perience from the work of specialized bodies dealing with equality and non-discrimination reveals that a strategy combining litigation with a strong focus on promoting equality through a variety of measures can enhance their effectiveness. These promotional measures range from awareness-raising campaigns and training activities to practical guidance and research on how to implement equality and non-discrimination legislation.”

This should be encouraging to those in the United States who have for years known that the “single-axis” framework is insufficient in

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49. Id. at xi (“Discrimination has also become more varied, and discrimination on multiple grounds is becoming the rule rather than the exception. Such trends have been witnessed by equality bodies, which have received an increased number of complaints of workplace discrimination.”).


52. Id.
EXPLORING THE BOUNDARIES

addressing many cases involving multiple grounds of discrimination and that looking at models elsewhere could inform the U.S. approach.

Third, the ILO has specifically recognized that since much work that is done around the world is not officially recognized or regulated as "work," an approach that focuses only on "legal" employment will fall short of addressing the needs of the vast number of people whose work is currently outside the scope of employment laws. This informal market is dominated by people who are poor, members of racial or religious minorities, and/or women. In the United States, antidiscrimination laws cover only those persons who are "employed by an employer." Thus far, this rather circular definition has not been held applicable to sex work and other forms of employment sanctioned by criminal law. In addition, even if the work is legally recognizable as work, enforcement within the informal sector is deficient. Therefore, one of the greatest challenges to fighting inequality in employment is the operation of this parallel arrangement of informal work that is not readily within the reach of national, transnational, or international enforcement mechanisms. The problem of discrimination and its manifestations in the informal sector is a problem that exists on many levels under cover of a wide assortment of private relationships that make the informal sector, by definition, impervious to governmental regulation except, perhaps, through criminal law. Therefore, the ILO has vowed that the Declaration's focus on the four identified core labor principles must not hinder the ILO's ability to address the complex problems facing those who work outside the regulatory framework of national and international enforcement mechanisms. Given the difficulties inherent in the task of eliminating racial discrimination in employment, the ILO's efforts at doing so through the Declaration ought to be taken seriously and measured against national efforts. This is especially true, since the ILO's study of "the impact of globalization on the life and work of people, their families, and their societies" has been targeted in a concentrated global campaign to ameliorate discriminatory work conditions and policies in all forms of work, both formal and informal. The ILO, then, encourages an examination of various national, regional and international laws, arguing that the answers are to be found by looking both within and outside one's borders.

For the most part, the Declaration has been accepted by international labor activists and scholars as a positive step in the ILO's quest to achieve global social progress and economic growth. In fact, the Declaration has achieved near-universal recognition and may be responsible for a 90% ratification rate of the ILO's eight fundamental workers' rights conventions. In setting out the fundamental principles and rights at work, the ILO hopes to maintain a balance between social and economic growth in ways that enable "persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential." Through the Declaration,

54. Id.
57. Preamble to ILO Declaration, supra note 42.
the ILO has developed a mechanism to monitor, assess and address antidiscrimination efforts at the national level. Each country that has adopted the Declaration and that has not yet ratified the applicable Convention is asked to provide periodic updates on its progress in the areas of the four categories. In this way, the Declaration is a promotional document rather than an instrument of enforcement and commits the ILO to help government, employer, and worker constituents to realize the goals of the Declaration.\(^\text{58}\)

However, the Declaration is not without its critics who question its scope and utility. Some commentators have pointed out that some “fundamental” rights are not enumerated in the Declaration and therefore their importance within the ILO’s rights regime is minimized. Of the 187 conventions, the ratification of which binds member states, and the 198 recommendations that are advisory in nature, the Declaration identifies only four core labor standards.\(^\text{59}\) Standards involving subsistence wages, protections against ultra hazardous workplace conditions, and protections for migrant workers are not delineated.\(^\text{60}\) Instead of engaging these two sides of the debate, this essay attempts to focus on the narrower question of how the international labor rights agenda as it has been articulated through the Declaration, can help to inform an American antidiscrimination agenda in the context of addressing the elimination of racial discrimination.

IV. CONCLUSION

The ILO’s 2007 Report, Equality at Work: Tackling the Challenges\(^\text{61}\) provides a broad foundation for examining the ILO’s definition of equality and discrimination and the manner in which the ILO deals with the challenges inherent in combating discriminatory practices. The Report divides the various forms of discrimination into three categories: “long-recognized forms of discrimination.”\(^\text{62}\)

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58. Proponents of the ILO’s new approach point out that the focus on only four “core” labor standards has many advantages. See, e.g., Philip Alston, Core Labour Standards and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457, 459-460 (2004).


62. See id. at 16-37 (discrimination based on gender, race, ethnicity, migrant status, religious, social origin).
newly recognized forms of discrimination,\textsuperscript{63} and "emerging manifestations of discrimination."\textsuperscript{64} In fashioning a global agenda for dealing with workplace discrimination, these categories provide a useful and inclusive delineation of the various bases upon which legal strategies and reforms can be formulated. For the most part, the ILO Report reflects a fairly good understanding of the complexities of how discrimination is manifested in the workplace. For example, the ILO's definition of discrimination includes the idea that discrimination is not just about individual differential treatment, but that it also involves notions of equality in opportunity and social justice. In addition, it acknowledges that work often takes place outside the formal economy.\textsuperscript{65} Moreover, as an international organization, the ILO focuses its efforts on establishing international human rights standards and programs and encourages international cooperation. It must skillfully gather sources of interpretation of legal regimes from countries around the world. This means that the comparative project is important to the work that the ILO does. Arguably, then, it makes sense for international antidiscrimination standards as found in the Declaration to be examined alongside notions of discrimination and equality as these terms are defined in countries such as Canada and the United States. After all, these countries provide plausible comparisons because they demonstrate two well-evolved yet still evolving approaches to the elimination of discrimination within plural, racially diverse societies and because they supply rich and prolific theoretical understandings of equality and rights within legal scholarship.

Given that the United States already has a rich history of legal thought about discrimination and equality, albeit a history with less than auspicious moments,\textsuperscript{66} the international labor regime provides yet another alternative approach to antidiscrimination. The ILO has taken advantage of its position as an international body by collecting information from different countries in order to inform its policies and practices. One question is whether the approaches found in U.S. jurisprudence can in some way inform the discussion of equality and discrimination in the international setting. And, likewise, it is worth asking whether the international approach to equality and discrimination can provide the basis for a more complete anti-discrimination regime in the United States. By focusing on the recent efforts of the ILO, it is apparent that, indeed, international models should be consulted by those interested in broadening the approach by which our antidiscrimination laws are interpreted. In naming its agenda as one that involves "decent work," the ILO aspires to shed light on what should ultimately be of concern—the guarantee of decent work for all. In contrast, American antidiscrimination law addresses only discreet allegations of discrimination. What is needed is a combination of approaches including coordination, planning, and procedures to encourage the guarantee of decent work, and appropriate enforcement mechanisms to address individual cases.

In the global workplace are institutions operating locally and internationally to perpetuate inequality as a result of long-term decisions and choices made within

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\item \textsuperscript{63} See \textit{id.} at 38-47 (discrimination based on age, sexual orientation, disability, HIV/AIDS status).
\item \textsuperscript{64} See \textit{id.} at 48-52 (discrimination based on genetic makeup and lifestyle).
\item \textsuperscript{65} See \textit{Time for Equality at Work: Global Report under the Follow-up to ILO Declaration on the Fundamental Principles and Rights at Work}, \textit{INTERNATIONAL LABOUR ORGANIZATION}, available at (2012).
\item \textsuperscript{66} See, \textit{e.g.}, \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896); \textit{Dred Scott v. Sanford}, 60 U.S. 393 (1856).
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the context of political norms, cultural practices, statements of national identity, and 
global economic pressures. Flexibility is required in order that the ILO can offer 
effective assistance to member states with varying economic, political, social, and 
human resources. Since the international anti-discrimination agenda does not easily 
fit into a "one-size-fits-all" project in which claims of discrimination must fit within 
a narrow set of recognizable circumstances, and further since the international 
agenda must diligently encourage strong protections against discrimination, the ILO 
must provide guidance to member states to fashion their anti-discrimination laws in 
ways that prioritize substantive equality over formal equality.

Setting up a system that is fundamentally promotional might replace some 
of the broader principles articulated in traditional ILO instruments and replace the 
ILO's framework of firm legal obligations. In the name of "flexibility and 
competition," strong arguments have been put forward for treating labor standards as 
impediments to market freedom, and, thus, to the promotion of economic 
development. Therefore, the ILO's approach of utilizing non-binding, "soft" 
protections of the Declaration arguably undermines the laws that exist to protect 
workers and encourages the erosion of a universal standard of workers' rights. The 
favored mechanism becomes part of an extra-legal network of responses—not part of 
a legally binding regulatory scheme.

But even with a legally binding regulatory scheme, definitions of equality 
are subject to political pressures, faulty reasoning, and privileging of dominant 
norms and customs. The definitions will vary across borders and therefore it is 
necessary to be vigilant in understanding how these definitions are being used and 
how we can strengthen implementation of antidiscrimination laws. Though not part 
of "hard" law, several strategies in combination with each other may provide 
workable models. It is clear that neither the ILO approach, nor the U.S. approach to 
equality is without their shortcomings. However, equality theorists within the United 
States can learn from both approaches.

67. See Alston & Heenan, supra note 59, at 101.

68. For example, 1. Transnational networks of workers' organizations have developed to 
strategize and work together across national borders to address many of the problems that go along with 
the "race to the bottom"; 2. Proliferation of corporate codes of conduct - reflecting the move towards 
corporate social responsibility; 3. A reporting mechanism that allows for the ILO and regional transborder 
structures to monitor progress in party nations; 4. Strategies adopted by international funding agencies 
such as the world ban—such as gender mainstreaming, capacity building, non-legal educational strategies 
meant to work at the local level outside the formal legal system.