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Equality in Germany and the United States

EDWARD J. EBERLE*

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* Visiting Professor of Law, Boston University School of Law and Distinguished Research Professor of Law, Roger Williams University School of Law. Copyright by Edward J. Eberle, 2007. All rights reserved. I verify the accuracy of the German language cites and all of the English translations made by me. I would like to thank my research assistants, Carolyn Rowe, Amy Stewart and Ashley Taylor, for their excellent work.

Equality is one of the seminal values of modern society. How we treat people is reflective of the values we cherish, the character of a society and the norms that comprise it. As members of a social contract, all people should have an equal claim to rights, opportunities, and services so that each person can realize and exercise their capacities and dreams, on par with other members of society. But, of course, the difficult question is: how is equality achieved? Is this a matter of individual choice, governmental policy (as determined by the political process), or independent judicial determination? Much will depend on the nature of the polity. Does parliamentary democracy, constitutional democracy, or some other form determine the course of the country?

We will examine the question of equality as determined in two countries that follow a similar model of constitutional democracy: Germany and the United States. In both countries, an independent constitutional court holds the government accountable to the fundamental charter of the society. Each of the charters contain a core norm of equality as a fundamental right. Concentrating on the jurisprudence of the two independent courts—the German Constitutional Court and the United States Supreme Court—we will examine the content and breadth of equality jurisprudence in each country to see how each measures up to satisfaction of this core norm.

Our examination will reveal that the constitutions of both countries demarcate equality in different ways. The German Basic Law (*Grundgesetz*) enumerates at least nine traits for special attention: “No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.”¹ The specificity of the German Basic Law contrasts with the generality of the United States Fourteenth Amendment, which provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”² Accordingly, the German Constitutional Court has a stronger textual tether to enforce equality norms than the United States Supreme Court, which mainly relies on judicial interpretation to determine the range of equality. Nevertheless, both Courts employ judicial reasoning to flesh out the contours of equality. Both Courts identify certain traits as suspect,

1. GRUNDGESETZ (GG) [Basic Law] May 23, 1949, art. 3(3) (F.R.G.), translated in PRESS & INFO. OFFICE (F.R.G.), BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 40 (Christian Tomuschat & David P. Curry trans., 1998). Article 3(2) makes clear that there shall be no gender discrimination: “Men and women shall have equal rights.” *Id.* art. 3(2); Guy Beaucamp, *Das Behindertengrundrecht (Art 3 Abs. 3 Satz 2 GG) im System der Grundrechtsdogmatik*, 15 DEUTSCHES VERWALTUNGSBLATT 997, 998 (2002) (pointing out that the purpose of the demarcated traits in article 3(2) and 3(3) is to protect specified groups from discrimination).

2. U.S. Const. amend. XIV, § 1.

meriting intensive judicial scrutiny. Both Courts apply a sliding scale of review to judge the wide range of classifications made in the law. The nature of sliding scale review is similar, ranging from very intensive scrutiny for suspect traits to a more deferential level of review for socio-economic measures on par with rational basis review. There are differences, however, in the tenor and quality of review. German judicial scrutiny tends to be more intensive and rigorous, across the board, regardless of the trait or classification, thereby containing a degree of rigor that tends to produce a more logically consistent body of law.

The Article will proceed as follows. Part I will describe the methodology and approach of American and German equality law. The constitutional Courts of both countries value equality highly, resulting in strong and well developed jurisprudence. Each of the Courts employ a sliding scale of judicial scrutiny with the degree of scrutiny varying with the trait or personal interest affected by the governmental measure. Strict or extremely intensive scrutiny applies to measures targeting personal traits that especially affect a person's identity, like race, national heritage, or alienage under United States law, and race, sex, gender, language, national origin, disability, faith, religion, or political opinion under German law.³ More deferential judicial review is reserved for matters involving socio-economic measures with an important difference present under German law. The German Constitutional Court probes even matters of a socio-economic dimension rigorously if the law under review affects different groups of people unequally and there is no persuasive justification for the disparity.

We will then turn to an evaluation of the jurisprudence of the German Constitutional Court as measured against that of the United States Supreme Court. Parts II and III will evaluate the Courts' treatment of laws impacting traits of personal dimension; most of these are immutable, people being unable to affect them much, if at all. Under United States law, we call these traits suspect classes, like race, national origin, or alienage.⁴ German law comprises a much broader set of such suspect classes: race, sex, gender, language, national origin, disability, faith, religion or political opinion. Part II will focus on several of these suspect traits apart from gender. Gender equality has received the most

3. GG art. 3, *translated in* PRESS & INFO OFFICE, *supra* note 1, at 40.

4. *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

attention by the Constitutional Court and, thus, will be handled separately in Part III. Under German law, gender based measures are subject to strict scrutiny, as compared to United States law, where gender discrimination is covered under intermediate scrutiny,⁵ which also applies to illegitimacy.⁶ Part IV will evaluate the Courts' treatment of general socio-economic measures. In German law, inequality resulting in disparate treatment of different groups of people cannot be justified unless pursuant to a convincing rationale; the greater the disparity, the greater degree of judicial scrutiny. This level of review is a form of heightened scrutiny, somewhat less rigorous than strict scrutiny but more probing than standard rational basis. Part V will evaluate the Courts' treatment of general socio-economic measures under a lower level of judicial scrutiny, normally referred to as rational basis in United States law. Under United States law, rational basis review essentially means the measure is presumptively constitutional unless there is no plausible justification present.⁷ German law is not quite so deferential. Even standard socio-economic measures are subject to a more probing review if they present overt inequalities. While the nature of this review is not as intensive, the Constitutional Court will evaluate the measure carefully and not presumptively defer to government. Part VI will conclude with comparative observations about the nature and quality of equality jurisprudence in the two countries.

I. EQUAL PROTECTION METHODOLOGY

Crucial to equal protection jurisprudence is the methodology developed by the constitutional Courts, which the courts then employ to circumscribe government according to the core norm of equality. Let us start with the touchstone of the Courts' baseline, the text of the fundamental charters. In the United States, the Fourteenth Amendment sets forth the equality norm, stating it in the typical American constitutional approach of simple but open-ended text: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸ As with most constitutional provisions, it is for the courts to determine with specificity what exactly equality means.

By contrast, the German constitutional charter or Basic Law is significantly more concrete and specific as to what equality means, providing much more textual guidance to the German courts, as is typical of post-World War II constitutions. Article 3 of the Basic Law provides:

-
5. *Craig v. Boren*, 429 U.S. 190, 197 (1976).
 6. *E.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988).
 7. *E.g.*, *Minnesota v. Clover Leaf Creamery Co*, 449 U.S. 456, 461–63 (1981).
 8. U.S. CONST. amend. XIV, § 1.

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- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.⁹

As is apparent from the text of the German charter, there are a fairly substantial number of personal traits demarcated as special equality norms, including gender, “sex, parentage, race, language, homeland and origin, faith, or religious or political opinions.” All of these traits are immutable, except for those involving language, faith, religion, or political opinion, where a person can exert control over. The wide number of demarcated personal traits present in the Basic Law contrasts again with the open ended text of the United States’ Fourteenth Amendment. As with much of American constitutional jurisprudence, it is up to the Supreme Court to identify traits it would regard as suspect. So far, despite over sixty years of Supreme Court jurisprudence, we can identify as suspect classes only traits involving race or national origin¹⁰ and

9. GG art. 3, *translated in* PRESS & INFO OFFICE, *supra* note 1, at 40.

10. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

Under the Court’s application of the color-blind theory, strict scrutiny applies to any racial classification, whether affecting minority or majority racial classifications. The theory first became law in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), where the Court originally applied strict scrutiny to racial classifications singling out minorities for preferable treatment only to state governmental actions. The Court then extended the color blind theory to federal governmental actions as well in *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995). Effectively, this means that affirmative action programs, designed to redress structural inequality of minority racial groups in American society, are now also subject to strict scrutiny. For consideration of affirmative action and especially the color-blind theory, see T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1087–88, 1109–10 (1991); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735–36 (1974); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 18–19 (1991); Kenneth L. Karst and Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 962 (1974); Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 80–81, 96 (1986).

In German law, there has not been much development of race-based affirmative action programs because the society is approximately 92% ethnically German. EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* 49 (2002) [hereinafter EBERLE, *DIGNITY AND LIBERTY*]. Turks comprise the largest ethnic minority, about 1.9 million or roughly 2 percent of the population. *Id.*; see also Volkmar Götz, *Minorities, Human Rights and Peace within the State*, in *STUDIES IN GERMAN CONSTITUTIONALISM* 71, 76 (Christian Starck ed. 1995). However, many Turks

alienage.¹¹ Matters involving expression¹² and other fundamental rights¹³ (besides religion)¹⁴ are also subject to searching judicial review in United States law. However, this occurs mainly because these rights are either specifically enumerated in the Constitution or created through judicial interpretation. By contrast, the Basic Law provides overlapping textual coverage of these types of norms. Faith, religion, and political opinion are set out as protected topics in Article 3, but they also merit independent attention in other provisions of the Basic Law. For example, religious freedom is demarcated for equal protection in Article 3(3), but also substantive protection, on its own in Article 4.¹⁵ Likewise, expressive freedoms are similarly handled. They are independently anchored in Article 5, but also singled out for preference in Article 3(3).¹⁶ There are also other parts of the Basic Law that subsume an equality norm within their zone of protection. For example, Article 33(1) protects

are permanent immigrants, not German citizens. *Id.* German ethnic minorities are quite small. There are about 50,000 Danes, living mainly on the northern border near Denmark; the Slavic people of the Sorbs (also known as Wends) are approximately 50,000 to 80,000, and live mainly in the eastern border states of Saxony and Brandenburg; and there also are about 30,000 Sinti and Roma. *Id.* at 73.

11. *See* Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973) (suspect class treatment for alienage status apply only to state governmental actions, and not federal governmental, and only when state governmental measures cannot be justified under public function doctrine.).

12. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

13. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (marital right to privacy over use of contraceptives treated as fundamental right).

14. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 882–90 (1990). Free Exercise rights subject to a rational basis test of whether the law at issue applies neutrally, to religion or nonreligion; if it does, law is presumptively constitutional; if nonneutral in application, Court will apply a more searching level of scrutiny. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

15. Article 4 of the GG provides:

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed [*Weltanschauung*], shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.
- (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

GG art. 4, *translated in* PRESS & INFO OFFICE, *supra* note 1, at 40.

16. Article 5 of the Basic Law provides as follows:

- (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.
- (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Id. art. 5, *translated in* PRESS & INFO OFFICE, *supra* note 1, at 40.

the equal rights and duties of citizenship;¹⁷ Article 33(2) guarantees equal access to political office;¹⁸ and Article 38(1) protects equality in voting.¹⁹ The integration of rights protections reflects the integrated and systematic approach of German law based on the German legal science of *Begriffsjurisprudenz* (an intellectually coherent set of ideas that comprises a legal system).²⁰

By way of summary, then, we can observe at least three major differences between American and German law. One, German law contains substantially more personal traits demarcated as suspect classes than American law. Two, German law also requires a heightened quality of judicial review when a measure touches upon more than one right, such as, for example, equality and family rights.²¹ Three, German law also applies heightened review to socio-economic measures that impose a great disparity among classes of people. There are other differences as well, which we will examine shortly. A most notable similarity is that both Courts apply a sliding scale of judicial review to examine the wide range of measures gauged under equality. It is possible that the German Court's employment of sliding scale review is due to transplantation from American law, an interesting influence of comparative law.²² Let us now focus on the nature of the two laws.

17. "Every German shall have in every Land the same political rights and duties." *Id.* art. 33(1), translated in PRESS & INFO OFFICE, *supra* note 1, at 55.

18. "Every German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements." *Id.* art 33(2), translated in PRESS & INFO OFFICE, *supra* note 1, at 55.

19. "Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience." *Id.* art. 38(1) translated in PRESS & INFO OFFICE, *supra* note 1, at 57.

20. For explanation of this idea, see Edward J. Eberle, *The German Idea of Freedom*, OR. REV. INT'L L. n.28 (forthcoming).

21. See, e.g., Illegitimate Child Orphan, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 29 1969, 25 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 167 (F.R.G.).

22. See Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284, 289 (1998) (arguing that the German Court adopted the United States Supreme Court's "distinctive levels of scrutiny as its model for [equal protection] review analysis"). The German Court was also following its own line of logic, especially the proportionality principle. *Id.* at 289–90.

The main foreign influences on German equality jurisprudence would appear to be those of the Swiss and United States courts. Switzerland, in particular, was a major influence, especially during the Weimar era. The fundamental norm of binding the legislature to equality norms was derived significantly from the jurisprudence of the Swiss federal

A. *United States Law*

In the United States, the theoretical foundation for sliding scale review comes from the famous theory of Justice Harlan Stone set forth in footnote four of *United States v. Carolene Products Co.*²³ Under this theory, measures with general socio-economic components are subject to only light brush judicial review on the theory that they entail the formation of public policy. Public policy is the province of the political process and, therefore, not appropriate for the judiciary in so far as there is no glaring inequality or lack of justification for the law. Under the formulation of Justice Stone, the purpose of the measure must be “at least debatable”²⁴ for the Court to uphold it. Under modern law, “at least debatable” has been translated into law as a standard demanding simply that “a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest” and the means employed are so rationally related.²⁵

There have been disagreements over just what rational basis review means. Traditionally understood, rational basis means simply that the measure is presumptively constitutional unless there is a glaring irrationality to the measure.²⁶ There have been disputes as to whether the meaning of rational basis review should be determined by actual purpose review (calling for examination of law according to purpose identified in text), plausible purpose review (meaning government must just have a plausible purpose for the measure, whether identified or not), or post hoc justification (government argues to sustain measure based on some reason arising after measure has been implemented).²⁷ Even more controversially, rational basis review has been applied to measures impacting a politically powerless group that possesses an immutable

courts, as was the principle that similarly situated people should be treated the same and that differently situated people could be treated differently. The idea of the arbitrary norm also appears to be derived from Swiss law, which would lead to invalidation of measures that had no valid purpose or no adequate justification. A range of other norms were also transplanted from Switzerland. The United States Supreme Court also played a major role in influencing the German approach to equality law. For discussion of these points, see Konrad Hesse, *Der Gleichheitssatz in der neueren deutschen Verfassungsentwicklung*, 109 ARCHIV DES ÖFFENTLICHEN RECHTS (AOR) 174, 177–78, 194 (1984).

23. 304 U.S. 144, 152–53 n.4 (1938).

24. *Id.* at 154.

25. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

26. *See id.* at 534 (“a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest;” accordingly, the Court struck down the Congressional statute because it excluded from the federal food stamp program unmarried people living together.).

27. For discussion of this dispute, see *U.S. R.R. Bd. v. Fritz*, 449 U.S. 166 (1980).

trait, in this case mental retardation.²⁸ Accordingly, the type of review employed in *Cleburne v. Cleburne Living Center* is commonly referred to as rational basis with bite, meaning the type of review employed is rational basis, but it is employed with a more substantial degree of rigor than conventional rational basis review, as it was applied in *Minnesota v. Clover Leaf Creamery Co.*²⁹

Beyond the low level, judicial deference accorded socio-economic measures, *Carolene Products* also sets out the form of judicial review that courts will employ to judge laws which impact vulnerable people or fundamental rights. Under *Carolene Products*

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes [such as voting, expression, and political association] which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.³⁰

Carolene Products sets out the judicial theory of the New Deal Court and, in particular, the Warren Court.³¹ That is, in matters of governmental use of powers entailing general socio-economic matters, the courts will presumptively defer to the democracy, but in matters that impinge upon fundamental rights or discrete and insular minorities, the courts will

28. *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 441–42 (1985) (unconstitutional to deny permit for operation of a group home for mentally retarded while granting such permits to hospitals, convalescence and old age homes, among others).

29. 449 U.S. 456 (1981). In *Minnesota Clover Leaf*, the Court upheld a Minnesota law that required milk be packaged in paper, not plastic, products because the state had provided a plausible reason (environmental) for the measure under standard rational basis review.

30. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (citations omitted).

31. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75 (1980).

employ searching scrutiny. As originally conceived, searching scrutiny is called strict scrutiny, meaning

[T]hat all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions³²

Today, the most rigid scrutiny has been translated into the standard of strict scrutiny, meaning that “classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”³³ Under equal protection law, strict scrutiny applies only to classes identified by the Court as suspect, which, as mentioned, include only race, national origin, and alienage affected by state law. This makes for an extremely narrow set of traits meriting extraordinary judicial review.

The spirited fights³⁴ at the Court over what additional traits should be classified as suspect resulted in a compromise position of listing certain traits as not suspect but “quasi-suspect,” resulting in what is now called intermediate scrutiny. Under intermediate scrutiny, the Court has said: “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”³⁵ Even after *Craig v. Boren*, the fights over the meaning of intermediate continued.³⁶ Beyond gender, the Court has identified only the status of illegitimate or nonmarital children as meriting a form of intermediate scrutiny;³⁷ all other traits are classified as nonspecial and subject to rational basis review. So we can see the Court has been extremely stingy in applying heightened scrutiny.

32. *Korematsu v. United States*, 323 U.S. 214, 216 (upholding the detention of Japanese Americans on the theory of deferral to military authorities in time of war).

33. *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 227 (1995).

34. The main fight concerned gender; *see, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

35. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (finding that Oklahoma law that prohibits sale of 3.2% beer to males under the age of twenty-one but not females is unconstitutional).

36. *Compare* *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (applying intermediate scrutiny to gender classifications very deferentially to uphold facial gender inequality in a criminal statutory rape statute that made it a crime for males under 18 to engage in sex with a minor, but not females under 18 to do the same), *with* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (restoring intermediate scrutiny to a degree of rigor by requiring that for gender differences “[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”).

37. *See, e.g.*, *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that failure to provide support rights for nonmarital children violates equal protection).

By way of summary, we can classify American equal protection jurisprudence as involving a sliding scale of judicial review consisting of: (1) low level rational basis review (which itself can consist of conventional rational basis where it is easy for government to justify the measure to the more exacting rational basis with bite, as in *Cleburne*); (2) intermediate scrutiny (applying to gender and illegitimate children); and (3) strict scrutiny (applying to race and national origin and alienage, but alienage only when state government is acting).

B. German Law

Turning now to German law, we also observe the Constitutional Court's employment of sliding scale judicial review. As phrased by the Court:

Constitutional judicial review entails a sliding scale of judicial control (*abgestufte Kontrolldichte*) that grants varying ranges of legislative discretion. When only the simple prohibition against arbitrariness (*Willkürverbot*) comes into play, a violation of article 3(1) can be established only when the lack of substantiation of the difference in treatment evident is. By contrast, when the Constitutional Court probes measures that impact on groups of people differently or it impacts negatively on fundamental rights, then the disparity can be justified only by a convincing explanation of the nature and weight of the measure (*ob für die vorgesehene Differenzierung Gründe von solcher Art und solchem Gewicht bestehen, dass sie die ungleichen Rechtsfolgen rechtfertigen können*).

At the root of the basis for sliding scale review lie also consideration of the prospective outcomes and possible consequences of the measure. Review of such prognosis contains different standards, from a simple evident standard (*blossen Evidenzkontrolle*) to a stringent substantive review (*strengen inhaltlichen Kontrolle*). Included there as considerations especially are characteristics of the present facts and the significance of the relevant legal matter; furthermore the prognosis discretion depends on the possibilities of the legislature to substantiate satisfactorily the reasons for the decision in a satisfactory time frame.³⁸

38. Transsexual II, BVerfG Jan. 26, 1993, 88 BVerfGE 87 (96–97). The idea of the prohibition against arbitrariness (*Willkürverbot*) was developed by GERHARD LEIBHOLZ in his book *DIE GLEICHHEIT VOR DEM GESETZ* (1925), following the Swiss model. See Hesse, *supra* note 22, at 176–78, 194. For further explanation of the German Court's use of sliding scale review, see *id.* at 190–92.

Equality norms first appeared in *Länder* constitutions, starting with the Napoleon derived constitution of Westfalia in 1808, and the Bavarian constitution also of 1808. South German *Länder* constitutions furthered the equality norm, Bavaria's of 1818, Wuerttemberg's of 1819 and Hessen's of 1820. The 1849 St Paul's Church Constitution concretized equality norms, but was never adopted, a consequence of the failed 1848 revolution. Later the 1850 Prussian constitution also contained equality norms, in response to the 1848 revolution. *Id.* at 174 n.2. The Weimar Constitution of 1919,

What this means is that the levels of scrutiny employed by the Constitutional Court vary from low level testing against the arbitrariness prohibition to intensive judicial control. The simple arbitrariness prohibition calls only for an evident justification of the measure. This is usually easy to meet and thus we would translate this norm into American law as rational basis review. By contrast, the intensive judicial control outlined in *Transsexual II* is akin to American strict scrutiny. *Transsexual II* further provides more substance to German intense or strict scrutiny review:

[j]udicial control is tightened the more the measure impinges upon a personal trait enumerated in article 3(3) [and also article 3(2)] and the greater the danger that the tangible inequality leads to discrimination against a minority. The narrower circumscription of government is not limited to personal related differences. It applies more frequently when an inequality of factual situations directly causes an inequality among groups of people. By only behavior oriented differences, the level of judicial control depends on the extent to which the person affected is in a position through his or her behavior to affect the trait affected. In these cases, the range of legislative discretion is curtailed depending on the degree of the inequality in treatment of persons or facts that negatively affect the exercise of fundamental rights.³⁹

A different phrasing of the German form of strict scrutiny entails the “requirement that differing affects of legal measures can be justified only in so far as satisfaction of the problem can be justified by reasons urgently necessary that do not entail the nature of men and women.”⁴⁰ This phrasing of strict scrutiny relates to gender discrimination under Article 3(2), but can be taken to be the substance of strict scrutiny that applies to other suspect classes as well. The *Night Worker* case also

relying in substantial part on the 1849 St. Paul’s Church Constitution, adopted many equality norms, including the binding of the legislature to equality, equal rights and duties of citizenship, marriage rights, voting rights, and equal protection for men and women. *Id.* at 175–76. The Nazi time put a halt to constitutional norms, including equality. *Id.* at 181. When the allies took control of Germany after World War II, they issued equality proclamations on October 20, 1945. *Id.* at 182. And then, of course, the 1949 Basic Law concretized equality norms.

Each of the constitutions of the German *Länder* contains an equality guarantee today. Among the more interesting, is that of Brandenburg, which provides: “Each person owes every other person respect for his or her dignity.” VERF. BRANDENBURG [CONSTITUTION OF BRANDENBURG] art. 7(2). Newer constitutions also cover homosexuality. For further coverage of this, see Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 252 (1999).

For further discussion of equality in German law, see Hans D. Jarass & Bodo Pieroth, *Grundgesetz fuer die Bundesrepublik Deutschland* 98–151 (6th ed. 2002); *Grundgesetz, Kommentar*, art. 3 (Theodor Maunz ed. 2006); Bodo Pieroth & Bernhard Schlink, *Grundrechte Staatsrecht II* 102–22 (10th ed. 1994).

39. *Transsexual II*, 88 BVerfGE at 96. The tougher nature of socio-economic measures that involve a gross disparity in treatment among similarly situated groups first appeared in BVerfG 1988, 55 BVerfGE 72. For discussion of this point, see Somek, *supra* note 22, at 308–09.

40. *Night Worker*, BVerfG Jan. 28, 1992, 85 BVerfGE 191 (207).

makes clear a notable difference with American law: gender classifications are subject to strict scrutiny in Germany law whereas they are subject to intermediate scrutiny in American law. Based purely on judicial standards, we see that gender discrimination is a higher priority under German law than American law. Having observed that German law contains far more traits grouped as suspect classes than American law,⁴¹ we can conclude that judicial scrutiny of immutable traits, especially those possessed by less powerful members of society, is far more prized in Germany than the United States.

Apart from identifiable suspect classes, strict scrutiny also applies in German law to situations where rights other than equality are implicated. Generally, this occurs in areas like Article 2 personality rights,⁴² family rights,⁴³ or voting and citizenship rights.⁴⁴ Combining equality norms with other rights is akin to the substantive rights component of American equal protection law, starting with cases like *Skinner v. Oklahoma*,⁴⁵ and then prominent in the Warren Court era in cases like *Reynolds v. Sims*,⁴⁶ or *Shapiro v. Thompson*.⁴⁷

When situations entail socio-economic measures, and not suspect classes, German law applies a more deferential level of review. However, there is a major difference between German and American law. German law applies a sliding scale variety of judicial review to socio-economic matters too; the rigor of the review varies with the intensity of the inequality. The most deferential or low-level form of review is the simple requirement that the arbitrariness prohibition not be violated. As stated by the Constitutional Court: “When only the simple prohibition against arbitrariness comes into play, a violation of Article 3(1) can be established only when the lack of substantiation of the difference in treatment evident is.”⁴⁸ Alternatively referred to as the “evident control,”

41. See *supra* text accompanying notes 9–10 and *infra* text accompanying notes 52–53.

42. Transsexual II, 88 BVerfGE at 96–97.

43. Maternity Leave Support, BVerfG Nov. 18, 2003, 109 BVerfGE 64.

44. GG arts. 33(1), 38(1), translated in PRESS & INFO OFFICE, *supra* note 1, at 55.

57. See also, e.g., BVerfG Feb. 21, 1995, 92 BVerfGE 140 (151); BVerfG July 10, 1991, 84 BVerfGE 290 (298).

45. 316 U.S. 535 (1942).

46. 377 U.S. 533 (1964) (stating that right to vote must be based fundamentally on norm of one person, one vote).

47. 394 U.S. 618 (1969) (finding that the imposition of one year residency requirement as precondition to obtaining welfare benefits is unconstitutional).

48. Transsexual II, BVerfG Jan. 26, 1993, 88 BVerfGE 87 (97).

this form of judicial review is most analogous to simple rational basis review in American law.

However, when the degree of inequality is greater concerning groups of people or fact situations, the Constitutional Court significantly ratchets up the rigor of its review to a more intense probing of the measure, its impact, and the reasons for the disparity in treatment. As explained by the Court: “By contrast, when the Constitutional Court probes measures that impact on groups of people differently or it impacts negatively on fundamental rights, then the disparity can be justified only by a convincing explanation of the nature and weight of the measure.”⁴⁹ The level of this review can vary, depending on the inequality at issue; the greater the inequality, the greater the intensity of the review. Translating this to American law, we might characterize the review as varying from rational basis with bite to a more intense scrutiny that might be characterized as intermediate scrutiny. For simplicity purposes, I will refer to the nature of this review as heightened. In this respect, it is clear that German law is more probing generally of any inequality, even those involving general socio-economic matters.

We will now turn to evaluating the equality jurisprudence of the Courts. We will focus primarily on the law of the German Constitutional Court, using Supreme Court jurisprudence as a point of comparison. We will first evaluate cases entailing suspect traits that trigger strict scrutiny analysis in Part II. Because gender cases are a large part of the jurisprudence of the Constitutional Court, they will get separate, extended treatment in Part III as another suspect class. We will then turn to an evaluation of matters involving socio-economic matters, ranging from a form of heightened scrutiny, in Part IV, to a more deferential rational basis, in Part V.

II. STRICT SCRUTINY: TRAITS COMPRISING SUSPECT CLASSES

As observed previously, the generality of the American Constitution does not ordinarily spell out topics for special judicial attention. Instead, the Supreme Court determines the meaning of “equal protection of the laws.” To date, the Court has determined that only traits involving race or national origin⁵⁰ and alienage⁵¹ are suspect classes. German law also

49. *Id.* German law and commentators treat equality analysis as involving proportionality, testing the relationship between ends and means. Proportionality analysis has a long history, going back to the 1950s and an early dissent by Justice Rupp-von Brueneck. For an explanation of this see Baer, *supra* note 38, at 261, 263–64.

50. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

51. *Sugarman v. Dougall*, 413 U.S. 634, 646–47 (1973) (suspect class treatment for alienage status apply only to state governmental actions, and not federal governmental, and only when state governmental measures cannot be justified under public function doctrine).

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demarcates race and national origin as suspect classes. By contrast, the German Basic Law has enumerated far more traits as suspect, including gender, “sex, parentage, race, language, homeland and origin, faith, or religious or political opinions” and disability. Voting rights are also treated as meriting strict scrutiny, as they are in American law, but this is because voting is rooted in an independent constitutional tether, although equality norms apply as well. For now, we will focus on a sampling of the case law of Germany, examining these cases: *Illegitimate Child Inheritance*,⁵² *Illegitimate Child Orphan*,⁵³ *Transsexual II*,⁵⁴ and *Handicapped Student*.⁵⁵

A. Illegitimate Children

Illegitimate children are singled out for special solicitude in Article 6(5) of the Basic Law, which provides: “Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.”⁵⁶ Article 6(5) acts, in essence, as a concretization of the core equality norm set forth in Article 3. The inclusion of a core equality norm in other rights is common in German law, as in voting and family rights matters, and reflects the systematization and comprehensiveness of German jurisprudence. Under Article 6(5), there can be no unequal treatment of illegitimate children in relation to legitimate children. The two cases examined make this clear. In the *Illegitimate Child Inheritance*, the Constitutional Court found unconstitutional, as a violation of Article 6(5), the part of the inheritance law requiring an illegitimate child to establish paternity of the father before the child could establish a claim to inheritance from the father. This violated the equality norm subsumed within Article 6(5), as no such requirement was necessary for legitimate children. Instead, the legislature assumed that legitimate children simply had an advantage to inheritance claims, by reason of their birth from married parents.⁵⁷

52. BVerfG Nov. 18, 1986, 74 BVerfGE 33.

53. BVerfG Jan. 29, 1969, 25 BVerfGE 167.

54. BVerfG Jan. 26, 1993, 88 BVerfGE 87.

55. BVerfG Oct. 1997, 96 BVerfGE 288.

56. GG art. 6(5), translated in PRESS & INFO OFFICE, *supra* note 1, at 41.

57. *Illegitimate Child Inheritance*, 74 BVerfGE at 34, 38–39.

Looking to Article 6(5) as the concretization of an equality norm, the text of Article 6(5) clearly spells out that illegitimate children must be provided with the same opportunities as legitimate children.

Article 6(5) creates a form of positive presumption in favor of illegitimate children; conditions and necessity for any unequal treatment must be convincingly explained and opportunities must be provided to the affected child to address the negative consequences of the treatment so that substantive equality may be achieved. Deviations from this rule in comparison to the rights of legitimate children can be allowed in only two situations: First, when the formal achievement of an equal inheritance position would also impair the protected legal position of another person. And second, when the legal background of a certain norm or norm complex⁵⁸ of the special social situation of the illegitimate child are perceived as different.⁵⁸

Under this norm, there is no justification for the disparity in treatment and the inheritance law was rendered void.

In a second case, *Illegitimate Child Orphan*,⁵⁹ the Constitutional Court found that it was unconstitutional, and a violation of Article 6(5), to deny an illegitimate child orphan a rent subsidy of a level when the father yet lived when such a level is granted to legitimate children. The equality norm subsumed within Article 6(5) again demands this resolution, as administrative officials and courts are thereby obligated “to improve the living conditions of illegitimate children to the level of legitimate children.”⁶⁰ Against that equality norm, the lesser sum calculated as a rent subsidy for illegitimate children in comparison to legitimate children was unconstitutional “because the calculation for the rent subsidy concerning the illegitimate child is made according to then existent family and inheritance law which, in comparison to that made for legitimate children, results in a significant disadvantage.”⁶¹ More fundamental considerations also lie at the root of the inequality.

[T]he situation of an illegitimate child after the death of the father according to current law is far worse as that for a legitimate child; a legitimate child receives the rent subsidy as part of the inheritance from the father, at least as an obligatory portion of the estate; furthermore, legitimate children also have the opportunity to inherit part of the estate of the mother or father’s parents estate, which also can be used in the calculation for living expenses; and finally legitimate children can also obtain a claim for support against the father’s relatives. All of this the illegitimate child lacks; the child only has the claim for the rent subsidy in the limited range set out in section 1712 of the BGB [*Bürgerliches Gesetzbuch* or German Civil Code].⁶²

58. *Id.* at 39.

59. BVerfG Jan. 29, 1969, 25 BVerfGE 167.

60. *Id.* at 191.

61. *Id.*

62. *Id.*

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In short, equality demands equal treatment of children of different parental relationships. Equal conditions and opportunities must be available to all children, regardless of the status of their parents. What matters is the child, not the parental relationship.

The demand for equality in treatment of children of married/unmarried parents is fundamental to German family law. As the Constitutional Court makes clear: "The family in the sense of Article 6(1)⁶³ includes also illegitimate children; thus the relationship of an illegitimate child to his/her mother and relatives doubtless is included in the protection of applicable legal measures."⁶⁴ Thus, the welfare and development of illegitimate children is a critical focus of the social order, as the Constitutional Court makes clear.

Precisely because the illegitimate child is disadvantaged significantly due to the absence of a family structure, will the constitutional order, through means of the legal order and other state support, provide the means to rectify the inequality in resources: illegitimate children should suffer as little as possible from being restrained by parents or social discrimination; these children should as the essence of their own human dignity and with their right of personality development have the same chances, as much as possible, for their own development and place in society as legitimate children.⁶⁵

Here too we can see another example of the integrated approach to rights characteristic of German constitutional. In addition to the incorporation of equality into family law, as previously observed, we also have reliance on norms of Article 1 human dignity, Article 2 personality rights, and the fundamental Social State obligation of Article 20(1).

Human dignity, of course, is the fundamental norm of the German constitutional order, and all fundamental rights are radiations of it. Article 2 personality rights operate in tandem with human dignity to focus the constitutional order on the protection and development of human life and personality. The Social State principle imposes positive obligations on the state to help realize these objectives. The positive dimension to rights in German law is a notable difference with United States law, which requires no obligation on government to help people achieve their lot in life. That is one reason why the German constitutional order is generally referred to as a constitution of human dignity in comparison to the United States constitutional order which is known as

63. "Marriage and the family shall enjoy the special protection of the state." GG art. 6(1), *translated in* PRESS & INFO OFFICE, *supra* note 1, at 41.

64. Illegitimate Child Orphan, 25 BVerfGE at 196.

65. *Id.*

one of liberty. Both the American and German constitutions possess negative liberties, meaning delimitation of official power so people can live their lives as they choose.⁶⁶

In sum, we can see that the status of illegitimacy is given prime attention in the basic charter and the German Court's jurisprudence. A focus on creating an equal playing field for all children, no matter of what parentage, is crucial. A person is to be valued as a person because they are human. Their status is irrelevant. Accordingly, inequalities are not tolerated unless there is a convincing explanation for the disparity.

Under American equal protection law, illegitimacy is subject to intermediate scrutiny, meaning the measure can only be justified if the classification is substantially related to a substantial governmental interest.⁶⁷ Because intermediate scrutiny applies, there is, as the name of the scrutiny suggests, an unevenness and unpredictability to this line of jurisprudence. Generally, however, government may not disadvantage illegitimate children in the dispensation of governmental benefits.⁶⁸ Furthermore, any measure that places a burden on the child solely because the child is illegitimate cannot be justified unless it satisfies the intermediate scrutiny test.⁶⁹ Generally, the Court has invalidated these

66. For fuller treatment of these points, see EBERLE, *DIGNITY AND LIBERTY*, *supra* note 10, at 17–35; Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963 (1997) [hereinafter Eberle, UTAH].

67. *Clark v. Jeter*, 486 U.S. 456 (1988) (invalidating six years statute of limitations for paternity actions by illegitimate children). Prior to *Clark*, the Court had applied a form of rational basis review that judged the measure in question more harshly than standard forms of rational basis. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968). In *Clark*, the Court cemented the standard of review as intermediate scrutiny.

The *Weber* Court acknowledged that “imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.” *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). “[C]lassifications that burden illegitimate children for the sake of punishing the illicit relations of their parents [are invalid], because ‘visiting this condemnation on the head of an infant is illogical and unjust.’” *Clark*, 486 U.S. at 461 (quoting *Weber*, 406 U.S. at 175).

68. See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (“[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.”). See also *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (unconstitutional to deny welfare benefits to illegitimate children while granting such benefits to legitimate children). The benefits are “as indispensable to the health and well-being of illegitimate children as to those who are legitimate.” *Id.* at 621.

69. For example, the Court has rendered invalid statute of limitations shorter than eighteen years in paternity proceedings in order to provide equal treatment to illegitimate children. See, e.g., *Clark*, 486 U.S. 456; *Pickett v. Brown*, 462 U.S. 1 (1983) (invalidating two year statute of limitations for paternity actions by illegitimate children); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (invalidating one year statute of limitations for paternity actions by illegitimate children).

measures unless there is a convincing explanation. Thus, treatment of illegitimacy is roughly similar in both countries in that it merits a form of heightened scrutiny. Two differences appear evident, however. First, German judicial review seems more intense. Second, German law is concerned with creating equal opportunities for illegitimate children through forms of positive state intervention and support, which we might view as a form of affirmative action.⁷⁰

B. Transsexual Equal Protection II

Sex and sexuality are major topics in German law because they are integral to personal self-definition and identity, itself the focus of German law: the nurture and development of human personality. In the *Transsexual Case*,⁷¹ the Constitutional Court determined that a male who underwent a sex change, converting him to a female, has the right to have official records updated to reflect the change in gender. The question of sexual identity “belongs to the most intimate areas of personality, where all official power is removed.”⁷² On a similar theme, in *Transsexual Equal Protection I*,⁷³ the Court invalidated a requirement that an individual must be twenty-five years old before sex changes can be registered.

These themes are taken up again in the third case on transsexuality, *Transsexual Equal Protection II*, where at issue was a law requiring people who underwent sex changes to be twenty-five years old before they can change their names in official records. The asserted purpose behind the law was to allow people a certain amount of time to achieve a

In cases where paternity is established, an illegitimate child can inherit from the father. See, e.g., *Reed v. Campbell*, 476 U.S. 852 (1986); *Trimble v. Gordon*, 430 U.S. 762 (1977).

In adoption proceedings, the Court found that New York law that distinguished between unwed mothers and unwed fathers violated equal protection. *Caban v. Mohammed*, 441 U.S. 380, 381, 385 (1979).

70. *Illegitimate Child Orphan*, 25 BVerfGE 167.

71. BVerfG Oct. 11, 1978, 49 BVerfGE 286. For further evaluation of the case, see EBERLE, DIGNITY AND LIBERTY, *supra* note 10, at 138-39; Eberle, UTAH, *supra* note 66, at 1031.

72. *Transsexual*, 49 BVerfGE at 298.

73. BVerfG Mar. 16, 1982, 60 BVerfGE 123. For further evaluation of the case, see EBERLE, DIGNITY AND LIBERTY, *supra* note 10, at 139; Eberle, UTAH, *supra* note 66, at 1031-32.

level of maturity before the transgendered people were comfortable with the gender change. These reasons were unacceptable to the Court.

The case concerned two people desiring to change sex from female to male, and one from male to female.⁷⁴ Under the law, two options were available. The big solution entailed a sex change operation. The small solution entailed a name change, based generally on gender, without the sex change operation.⁷⁵ The case concerned the constitutionality of the twenty-five year age requirement before the small solution could be pursued. As is common in German law, the case was considered under an integrated theory of rights, most notably Article 1 human dignity and Article 2 personality rights. But the focus of *Transsexual Equal Protection II* was, of course, equality.

We have already observed that *Transsexual Equal Protection II* lays out the form of sliding scale review applicable to equality, as is common in German equal protection jurisprudence.⁷⁶ The question, of course, was under what level of scrutiny should the measure at issue be evaluated. For the Court, this was an easy call. The measure impinged upon a personal trait, here age and sexual identity, which also affected personality rights.⁷⁷ Accordingly, strict scrutiny applied. Under this form of strict scrutiny,

measures that impact on groups of people differently or . . . impact negatively on fundamental rights, then the disparity can be justified only by a convincing explanation of the nature and weight of the measure

[J]udicial control is tightened the more the measure impinges upon a personal trait enumerated in Article 3(3) [and also Article 3(2)] and the greater the danger that the tangible inequality leads to discrimination against a minority. The narrower circumscription of government is not limited to personal related differences. It applies more frequently when an inequality of factual situations directly causes an inequality among groups of people.⁷⁸

Strict scrutiny applied to the case, the Constitutional Court determined, because

the age limitation for the name change concerns a difference that impinges upon a personal trait and one which has considerable affect on general personality rights. Article 2(1) protects in conjunction with Article 1(1) [human dignity] the narrow personal life sphere, in particular the intimate and sexual area, and guarantees to every person the right fundamentally to determine how and in

74. *Transsexual II*, BVerfG Jan. 26, 1993, 88 BVerfGE 87 (92).

75. *Id.* at 87–88.

76. *Id.* at 96–97. See *supra* text accompanying notes 38–39.

77. *Id.* at 97. The Court decided the case under the general equality provision of Article 3(1). *Id.* at 96–98. While Article 3(3) specifies that “[n]o person shall be favored or disfavored because of sex . . .” the Court apparently thought that “sex” was not clearly enough stated so as to cover transsexuality. GG art. 3(3), *translated in* PRESS & INFO OFFICE, *supra* note 1, at 40.

78. *Id.* at 96.

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what way to live his/her life in public. These protections serve the purpose of the transsexuality law. The small solution [name change] allows a person in the special situation of transsexuality time to consider whether to undertake a sex change operation and allow the person time to live in the chosen gender role without publicly disclosing it to third parties or officials.⁷⁹

Considering the impact of the measure on the transsexuals affected, the Court determined this measure “could only be justified under equality norms if reasons are present of such a type and weight that the unequal situation can be justified.”⁸⁰ The Court found no such persuasive justification present and, therefore, found the measure unconstitutional. Evaluating the case further, the Court observed that the twenty-five year age requirement leads to serious burdens on those under twenty-five in that it leads to a higher probability of irreversible transsexuality.⁸¹ Rather than helping the person, the age limitation retards the person’s development. For the Court, a trial period in which the person can live a chosen gender identity as they like before they undertake the dramatic step of a sex change operation was a better solution.⁸²

Comparing the two solutions, big and small, the Court considered the inequality in the situations. Because of *Transsexual Equal Protection I*, a person can undertake the big solution even when under twenty-five years old. But that is not the case with the small solution. Accordingly, the inequality in the two situations imposed a significant burden on transsexuals; no persuasive reason was present to justify the difference.⁸³ Thus, the twenty-five age limitation must be voided to bring it into line with the invalidation of the twenty-five age limitation concerning the big solution.

The purpose of the cases is to facilitate the personal development of those contemplating a sex change. A trial period, especially at a young age, allows the person to experience what it is like to live in a chosen gender role on one’s own terms. This will offer the person the experience of living a chosen gender role, seeing what it is like, and gaining experience before undertaking the big solution of a sex change. This is especially important to those younger than 25, as that is the age where they are most vulnerable. Gaining confidence and learning to overcome

79. *Id.* at 97–98.

80. *Id.* at 98.

81. *Id.*

82. *Id.*

83. *Id.*

burdens is crucial to self-development, particularly to the young.⁸⁴ Given no credible justification for the measure, the Court rendered it void. A twenty-five year age limitation made no sense and was outmoded.⁸⁵

Transsexuality has not been a topic of Supreme Court equal protection jurisprudence.

C. Handicapped Student

The final Constitutional Court case involving a suspect trait other than gender, the topic of the next section, is the *Handicapped Student Case*, which concerned the rights of a student and her parents to determine if she could stay in a regular school or whether she had to go to a special school for disabled students to obtain the special services she needed in order to have a successful education.⁸⁶ The student suffered from spina bifida, a developmental birth defect involving the neural tube,⁸⁷ and wanted to be part of a normal school, integrated with other students, so that she could live a semblance of a “normal” life. The trend, in Germany and the European Union, is to follow just that course; integration of handicapped students with normal students is thought to promote confidence and mental health along with equality.⁸⁸

However, the Court ruled that school officials were justified in sending her to the special school even against her wishes, because only the special school could provide the educational services she needed. The *Handicapped Student Case* is one of the few cases where the government could justify its actions under the severe test of strict scrutiny. The *Handicapped Student Case* is also one of first impression; it is the first time the Court had to rule on the suspect trait of disability since it had been added as an amendment to Article 3(3)(2) of the Basic Law in 1994.⁸⁹ What exactly is a handicap is unclear, as even the scholarly

84. *Id.* at 98–99.

85. *Id.* at 100.

86. BVerfG Oct. 8, 1997, 96 BVerfGE 288. In the United States, the status of being disabled would most likely be handled under some form of rational basis review. The closest case would likely be *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), where the Court held unconstitutional the denial of a permit for operation of a group home for mentally retarded while granting such permits to hospitals and old age homes.

87. Spina bifida means splint spine, in Latin; “incomplete closure of the embryonic neural tube results in an incompletely formed spinal cord.” Spina bifida-Wikipedia, http://en.wikipedia.org/wiki/spina_bifida (last visited Oct. 30, 2008).

88. *Handicapped Student Case*, 96 BVerfGE at 289–90.

89. *Id.* at 300–01. Later decisions concerning disability involved issues of inheritance law, BVerfG Jan. 19, 1999, 99 BVerfGE 341 (356) and rental law, BVerfG: *Treppenhauslifteinbau zu Gunsten eines behinderten Lebensgefährten*, 36 NEUE JURISTISCHE WOCHENSCHRITT (NJW) 2658–59 (2000); Beaucamp, *supra* note 1, at 997–1001. The purpose of specifying disability as a protected class is to create

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literature does not describe it with certitude.⁹⁰ As is common in American law, a case by case determination will ultimately clarify the meaning of Article 3 disability. For purposes of the instant case, however, there was certainly no question that the student was, in fact, disabled.

Faced with an issue of first impression, the Court relied on the principles of equality jurisprudence established under Article 3 in ferreting out the meaning of the newly added part of Article 3(3): “No person shall be disfavored because of disability.”

Article 3(3) [disability trait] relies, to be sure, on the prohibition against discrimination of the earlier Article 3(3) and the present Article 3(3). Therein it is clear that the protection of the general equality norm will be strengthened and state power curtailed the more the measure impacts on certain groups of people, as such personal traits cannot serve as the focus of measures in ways that disadvantage or create an inequality.⁹¹

From here, the Court recognized the explicit addition of disability to article 3 as creating another personal trait of a suspect class variety.

As by the already demarcated traits of Article 3, such as gender, heritage, race or language, [disability] concerns a personal trait of which a person has no or only a limited capacity to affect. . . . Disability is . . . a trait that fundamentally makes life more difficult in comparison to those who are nondisabled. The special situation of disability should not lead to negative repercussions or

affirmative conditions in society so that those disabled can be integrated into society as much as possible on terms equal to other citizens. Thus, the state can take affirmative measures to level the playing field for the disabled, relying on the Social State principle. The concern is achievement of substantive factual equality in society as well as formal equality. *Id.*

Reliance on the Social State principle to achieve substantive justice and equality is a development of the Basic Law. Prior to the Basic Law, the realization of social justice was part of the equality norms of the Weimar Constitution and the Länder constitutions. Hesse, *supra* note 22, at 183.

Legislative intervention to assist people with disabilities started in Europe after the end of World War I, designed to help returning disabled war veterans. Today, German law has adopted a form of quota system, obligating employers to set aside a certain percentage of jobs for those disabled. Employers who do not comply must “pay a fine or levy” that then “goes into a fund to support the employment of disabled people.” Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62, 68 (1996). For a general overview of disability law in Germany, see Martin Kock, *Disability Law in Germany: An Overview of Employment, Education and Access Rights*, 5 GERMAN L. J. 1373 (2004), available at http://www.germanlawjournal.com/pdf/Vol05No11/PDF_Vol_05_No_11_1373-1392_Private_Kock.pdf.

90. Handicapped Student Case, 96 BVerfGE at 301.

91. *Id.* at 302.

exclusions in society nor legal situations. Such negative repercussions must be prevented or overcome.⁹²

Because of the especially disadvantaged status of disabled people, the Court made some adjustment to equality norms. No impairment of the disabled may be tolerated, but preferences may be allowed, in a form of affirmative action. “Only disadvantages of the disabled are prohibited. Advantages designed to equalize the relationship of disabled to nondisabled people are allowed, at least if not inconsistent with constitutional norms.”⁹³ The goal of the Court, as is clear, is to try to the extent possible to create a level playing field for those most disadvantaged in society so they have an opportunity to live their lives and reach their potential on the same terms as others. Certainly, this is a special concern for the disabled, as they are in one of the weakest positions to affect their fates. Underscoring this aim are some of the fundamental norms of the German constitutional order: the rights of dignity, personality, and equality and the commitment to the Social State. Securing human welfare for all people is a preeminent goal of German constitutional law.

The Court then proceeded to focus on how burdens or prejudice can arise in society as concerns the disabled.

An impairment can exist . . . not only through rules or measures that make the situation of a disabled person worse as, for example, lack of access to public facilities or the denial of services that are available to everyone else. Much more can an impairment occur through exclusion from development and career opportunities that cannot be accessed due to lack of necessary support services for the handicapped.⁹⁴

How to answer this question is, of course, difficult because the answer is dependent on the factual situation, the views of experts, and the state of technology, among other factors.⁹⁵ What is clear, however, is that the state has a special responsibility with respect to the disabled.⁹⁶ Special judicial solicitude is accorded those most vulnerable in society.

Turning to evaluation of the facts and special nature of the case, the Court acknowledged that the government has significant discretion, under Article 7, to set educational policy, including over special education. Still, government discretion here is limited by the equality norms of Article 3. Further, the student’s Article 2 personality rights, and her family’s Article 6 family rights were also at issue, as was the state’s special obligation to care for the handicapped under the Social State principle, forming quite a constellation of constitutional norms for the

92. *Id.*

93. *Id.* at 302–03.

94. *Id.* at 303.

95. *Id.*

96. *Id.* at 304.

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Court to consider.⁹⁷ In light of all of these factors, the Court observed that whether a disabled student could be transferred to a special school essentially depends on availability of adequate resources. If sufficient resources are present at a regular school, then no transfer can be made to a special school without violating equality. However, if adequate resources are not available at a regular school, then a transfer to a special school can be made, even against the wishes of the student and parents.⁹⁸ Only in such a situation can a disabled person have the resources available to achieve personal capacities as much as possible.

Still, because disability is a suspect trait, only a strict scrutiny rationale could justify such a transfer to a special education school. As observed by the Court, any such transfer calls for “an extremely convincing explanation.”⁹⁹ Here, the burden placed on the student must be “substantially grounded” and persuasively articulated.¹⁰⁰ Stated differently, the transfer can be justified only pursuant to a “restricted [intense] judicial review.”¹⁰¹ Applying the strict scrutiny standard, and considering the range of factors at issue—educational policy and resources, student and parental choice, the special status of disability and the severity of the condition, and the rationale that lies at the base of the transfer decision—the Court upheld the school officials’ decision to transfer the student to the special education school because, as stated by school officials, the resources and services simply were not present at the regular school and the education of the student could only be enhanced at a special education school.¹⁰² *Handicapped Student* thus represents the rare case where the decision could be justified under strict scrutiny.

Under United States law, the status of disability merits no special judicial solicitude. The closest Supreme Court case is *City of Cleburne v. Cleburne Living Center*, where the Court spoke of the relative social and political powerless of the mentally retarded, but nevertheless applied

97. *Id.* at 303–04.

98. *Id.* at 307.

99. *Id.* at 310.

100. *Id.*

101. *Id.* at 311.

102. *Id.* at 310, 314. For example, the opinion of educational experts determined that the student needed at least five hours of individual instruction in math and also significant individual instruction in science and other classes. These types of services simply were not available in a regular school. *Id.* at 314.

rational basis review to invalidate the city's denial of a building permit for a home for the mentally retarded.¹⁰³

III. GENDER DISCRIMINATION: STRICT SCRUTINY

Gender is demarcated as a trait meriting special attention in Article 3(2), which provides: "Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." An amendment adopted in 1994 now obligates the state "to support and promote gender equality."¹⁰⁴ From the text of Article 3(2), we can discern both the concern for gender equality and the concomitant commitment of the constitutional order to affirmative state action to realize that objective through the principle of the Social State. The state is obligated to create conditions that promote equality in society, principles we have previously recognized in cases like *Transsexual Equal Protection II*¹⁰⁵ and *Handicapped Student*.¹⁰⁶ The explicit, proactive obligation of the state to achieve substantive equality rooted in Article 3(2) creates a textual rooting of affirmative state action, which has been a major focus of German law.¹⁰⁷

Eradicating gender discrimination has been a high priority of the Constitutional Court, forming a major reason why the trait triggers strict scrutiny in contrast to the intermediate scrutiny available under United States law.¹⁰⁸ For the Constitutional Court, what is at issue is simply

103. 473 U.S. 432 (1985).

104. GG art. 3(2), translated in PRESS & INFO OFFICE *supra* note 1, at 40. Justice Renate Jaeger, *The Federal Constitutional Court: Fifty Years of the Struggle for Gender Equality*, 2 GERMAN L.J. 2 (2001), available at <http://www.germanlawjournal.com/article.php?id=35>. The political impact of women's groups was an important influence in the adoption of the amendment. *Id.*

105. BVerfG Jan. 26, 1993, 88 BVerfGE 87.

106. 96 BVerfGE 288.

107. For discussion of the Constitutional Court's approach to affirmative action for gender, mainly women, see Blanca Rodriguez Ruiz and Ute Sacksofsky, *Gender in the German Constitution*, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 149, 156–59 (BEVERLY BAINES & RUTH RUBIO-MARIN, eds., Cambridge Univ. Press 2005), available at <http://assets.cambridge.org/9780521823364/sample/9780521823364ws.pdf>. For discussion of gender equality in Germany, see Monica Bhattacharyya, *From Nondifferentiation to Factual Equality: Gender Equality Jurisprudence Under the German Basic Law*, 21 BROOK. J. INT'L L. 915 (1996).

108. The concern for gender equality has a long history in Germany. It began with the 1919 Weimar Constitution, which was based in significant part on the 1849 Paulskirche Constitution, which arose from the failed 1848 revolution. Among other provisions, the Weimar Constitution guaranteed women the right to vote, in Articles 17 and 22, the rights and duties of equal citizenship, in Article 109(2), equality in issues of marriage, in Article 119(2), and no exclusion of women from the civil service, in Article 128(2). Interestingly, around the same time, in 1920, women achieved the right to vote in the United States with the adoption of the 19th amendment to the Constitution.

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gender discrimination itself; it does not matter if the discrimination affects women or men. The Constitutional Court has been in the field of gender discrimination long before the Supreme Court.¹⁰⁹

A. Men Housekeepers

In *Men Housekeepers*,¹¹⁰ the case concerned whether men could obtain the same benefits accorded to women: one paid day off per month to take care of housekeeping duties. Here, a single man worked as a nurse.¹¹¹ The Court ruled that men should be accorded the same benefits as women.¹¹²

The movement for gender equality was stilled somewhat, with the Nazi takeover in 1933. The Nazi period formed a big impetus for the explicit gender provisions in Article 3 of the Basic Law.

The 1949 Constitution of the German Democratic Republic (or East Germany) also guaranteed equality of gender. Article 7 guaranteed equality of the sexes; Article 18(4) guaranteed equal salaries; and the 1968 Constitution guaranteed equal rights "in all areas of social, state and personal lives," in Article 20(2).

The Constitutional Court has gone through a number of phases in interpreting Article 3 equality provisions to gender. The jurisprudence of the 1950s and 1960s emphasized "natural distinctions between men and women;" these would mainly be biological. In the 1970s and early 1980s, the Court turned to emphasizing formal equality between the sexes. Then, in the 1980s, the Court emphasized substantive equality, obligating the state to enact forms of affirmative action to equalize conditions between men and women. Jaeger, *supra* note 104, ¶ 3; Blanca Rodriguez Ruiz and Ute Sacksofsky, *Gender in the German Constitution*, *supra* note 107, at 153–55.

State or *Länder* Constitutions also have a history, at least as long as 1949, in guaranteeing gender equality. The state of Bavaria was the least solicitous of women in contrast to most of the other states, like North Rhein Westfalia, Bremen and Hessen, which set out many equality protections based on gender.

For detailed treatment of these points, see Ingwer Ebsen, *Gleichberechtigung von Maennern und Frauen* in HANDBUCH DES BUNDESVERFASSUNGSRECHTS 263, 263–67, 290 (Ernst Benda, Werner Maihofer, & Hans-Jochen Vogel eds., 2d ed. 1995).

109. See David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 364 ("Article 117(1) gave legislatures until 1953 to eliminate gender distinctions from the civil code and other laws, but in that year the Constitutional Court affirmed its authority to strike down nonconforming provisions as soon as the grace period expired" (citing 3 BVerfGE 225, 237–48 (1953)). Article 117(1) of the Basic Law provided: "Law which is inconsistent with paragraph (2) of Article 3 of this Basic Law shall remain in force until adapted to that provision, but not beyond March 31, 1953." GG art. 117(1), *translated in* PRESS & INFO OFFICE *supra* note 1, at 102. By contrast, in the United States, the earliest Supreme Court striking down a law based on gender discrimination was *Reed v. Reed*, 404 U.S. 71 (1971).

110. BVerfG Nov. 13, 1979, 52 BVerfGE 369.

111. *Id.* at 370.

112. *Id.* at 378–79.

Relevant to the Court was simply whether men and women shared the same burden of work and housekeeping duties.¹¹³ The law here was based “only on a gender difference and thereby created a constitutionally impermissible difference.”¹¹⁴ Grounding the law on a difference in gender was simply not an adequate constitutional justification. Any such gender difference could only be justified by a “notable basis for the difference in law.”¹¹⁵ No such justifiable difference was present here, as “the double burden of work and housekeeping duties can weigh on men just as severely as on women. This is especially the case for single people, who must maintain their own household.”¹¹⁶ There simply is no biological reason to justify the disparate treatment.¹¹⁷ To rely on the idea that only women are suited to perform housekeeping duties or that women are of a weaker constitution than men is to engage in stereotyping.¹¹⁸ Nor can the law be justified by a difference in social function between the sexes.¹¹⁹ Applying the command of Article 3(2), men and women must be treated the same under this law because there was no persuasive justification for the disparate treatment.¹²⁰

In sum, the Court carefully evaluated all the reasons presented for the preference given to women in obtaining a paid day off in order to take care of housekeeping duties and found them wanting. The law could not be justified by reason of gender difference, weaker physical constitution, biological difference, or social and functional differences.¹²¹ Accordingly, there was no sound explanation for the difference in gender treatment; the law was struck down as unconstitutional, and sent back to the legislature for reconfiguration.¹²² The bottom line for the Court is that a difference in treatment of gender can only be based on “objective

113. *Id.* at 375–77.

114. *Id.* at 374. The origins of the law went back to 1939, with the goal of lessening the burdens of work on women, especially mothers, so that they could devote more of their time to child rearing. The thought was lesser work time would allow more time for house keeping and child rearing duties. *Id.* at 375.

115. *Id.* at 374.

116. *Id.* at 375. A 2004 European study revealed that, in Germany, women perform four hours and eleven minutes of housekeeping duties per day as compared to two hours and twenty one minutes by men. Press Release, Eurostat, Das Leben der Frauen und Maenner in der EU25 aus Sicht der Statistik [The Life of the Women and Men in the EU25 from the View of the Statistics] 29/2009 (Mar. 6, 2006), available at http://ec.europa.eu/justice_home/news/information_dossiers/international_womens_day_06/statistics_men_women_de_06.pdf.

117. *Men Housekeepers*, 52 BVerfGE at 375. A condition like pregnancy would be an example of a valid biological difference between men and women. Ingwer Ebsen, *supra* note 107, at 277.

118. *Men Housekeepers*, 52 BVerfGE at 376.

119. *Id.* at 376–77.

120. *Id.* at 378.

121. *Id.* at 376–78.

122. *Id.* at 379.

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biological and functional (work related) differences based on the nature of the present life relationship between men and women."¹²³ Of these factors, biological differences are rare and will be hard to use as a basis for gender difference. Pregnancy—a condition women can have, but not men—would be one example. Of course, gender stereotype will simply not work. Thus, the main avenue to justify gender difference will be social or other function; but this too will call for a very persuasive justification that will be quite hard to make.¹²⁴

In *Men Housekeepers*, the benchmarks of gender equality jurisprudence are clear. Men and women must be treated equally. Differences in treatment call for a convincing explanation based on biological or functional differences. Stereotypical gender roles are not to be tolerated in modern society. Gender myths and traditions must be eradicated. The cases that follow *Men Housekeepers* build upon these principles in tightening and clarifying the standard of review to be applied to gender discrimination. The threshold case is *Night Worker*.¹²⁵ *Night Worker* concerns the Court's strong commitment to equalize job and social opportunities for men and women. *Night Worker* involves women, as do the next set of cases as well, *Machinist*¹²⁶ and *Firefighter*.¹²⁷

B. Night Worker

Night Worker concerned the constitutionality of a law that prohibited women from working at night. The case was the opposite of *Men Housekeepers*; here women were barred from performing duties that men could perform while in *Men Housekeepers*, men were excluded from benefits available to women. The difference in treatment of gender made no difference to the Court; gender discrimination is gender discrimination; it hardly matters whether it affects men or women. Thus, the law was found unconstitutional, as in *Men Housekeepers*. The case is not notable in the outcome reached. Rather, it is notable for the clarification of the level of scrutiny to be applied to gender discrimination and the goal of the Court in creating equal conditions in society for both genders. *Night Worker* marked a decisive shift in the jurisprudence of the Court; the Court shifted from focusing only on biological or functional

123. *Id.* at 374.

124. For further discussion of this, see Ingwer Ebsen, *supra* note 107, at 280–81.

125. BVerfG Jan. 28, 1992, 85 BVerfGE 191.

126. BVerfG Nov. 16, 1993, 89 BVerfGE 276.

127. BVerfG Jan. 24, 1995, 92 BVerfGE 91.

differences to considering the conditions in society so that men and women could compete on a level playing field. The Court is now concerned as much with achieving substantive as well as formal equality.

The facts of the case concerned a manager of a bakery. She herself did not work at night. However, her employees did, most of whom were women.¹²⁸ The intriguing aspect of the case was that the plaintiff was suing not under Article 3 equality norms, but instead under Article 2 rights to general freedom of action.¹²⁹ Yet, since her female employees who worked at night were in violation of the law barring women from night work, the plaintiff was fined and, therefore, could allege a violation of her Article 2 rights based on her employees' discrimination under Article 3. This is another example of the radiating effect of one fundamental right on another, a version of the Third Party Effect Theory.¹³⁰

Another intriguing aspect of German jurisprudence is that it also involves the influence of European law. Under the jurisprudence of the European Court of Human Rights, enforcing the European Convention on Human Rights, member states must comply with European human rights norms. Here the European Court had ruled that men and women must be treated equally; accordingly, there can be no prohibition on night work for women.¹³¹ In effect, member states like Germany are subject

128. The Work Time Regulation law prohibited women from working between 20:00 and 6:00 on weekdays, and 20:00 and 5:00 on days before Sundays and holidays. *Night Worker*, 85 BVerfGE at 193. A 1989 empirical study showed that about 478,000 females worked at night, around 7.6% of all female employees. *Id.* at 195.

129. Article 2 personality freedoms contain a number of dimensions, including the ability to act in the world as one chooses. A representative case is *Elfes*, BVerfG Jan. 16, 1957, 6 BVerfGE 32, which dealt with the denial of a visa for foreign travel of a right-wing critic. The Constitutional Court ruled that the denial of the visa violated the man's general personality rights. For extended discussion of this dimension of German law, see EBERLE, DIGNITY AND LIBERTY, *supra* note 10, at 62–74; Eberle, UTAH, *supra* note 66, at 981–90.

130. *Night Worker*, 85 BVerfGE at 196, 205–06. For discussion of the Third Party Effect theory, see *infra* note 150 and text accompanying.

131. *Night Worker*, 85 BVerfGE. at 203-04 (citing and discussing ECHR Decision of July 25, 1991, based on European Common Market Directive of February 9, 1976).

The equalizing of conditions for men and women has been an EU project of long-standing. Under the comparable worth doctrine of the EU, men and women must be paid equally for like jobs. The policy started with an EEC 1975 directive. Council Directive 75/117/EEC, 1975 O.J. (L 045) 19.

In Germany, the gender pay gap has narrowed. In 2000, women earned 21.5% less than men. In 2005, the gender gap narrowed to 20.2%, a small step forward. See Institute of Economic and Social Research (WSI), *Narrowing of Gender Pay Gap* (May 5, 2006), <http://www.eurofound.europa.eu/eiro/2006/04/articles/de0604019i.html>. By contrast, the gender pay gap in the United States, in 2002, was 23.8%. Amy Caiazza, April Shaw & Misha Werschkul, *Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Region* p. 5, (INST. FOR WOMEN'S POL. RES.), available at <http://www.iwpr.org/pdf/R260.pdf>.

Up to the age of 30, educational and career opportunities for women are nearly equal to men. Under the age of 30, women hold just about the same number of leadership

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to two constitutional orders: European and national. This is a form of supra-national federalism, one that has been the subject of a wide set of notable and sometimes controversial cases.¹³²

positions as men. However, the equality drops off after age 30, mainly due to the birth of children. See German Embassy Ottawa, *Women in Germany*, http://www.ottawa.diplo.de/Vertretung/ottawa/en/06/Lifestyle_culture/seite_women.html (last visited Aug. 21, 2008); Statistisches Bundesamt Deutschland [German Federal Statistical Office], http://www.destatis.de/allg/e/veroe/blickpkt_women.htm.

The EEC then adopted a 1976 directive on the equal treatment of men and women. Council Directive 76/207/EEC, 1976 O.J. (L.039) 40. The equal treatment of men and women is now regulated by Directive of the European Parliament and of the Council. See Council Directive 2002/73, 2002, O.J. (L. 269) (EC). For evaluation of these measures, see Susanne Hoentzsch, *Discrimination in Individual-Related Employment—A View from Europe and Germany to Canada, Analyzing the Requirements and the Background of the European Anti-Discrimination Directives*, 7 GERMAN L.J. 795 (2006), available at http://www.germanlawjournal.com/pdf/Vol07No10/PDF_Vol_07_No_10_795-818_Articles_Hoentzsch.pdf

In Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, [1995] E.C.R. I-3051, [1996] 1 C.M.L.R. 175, the European Court of Justice ruled that Bremen's requirement that automatically gave priority to women in sections where they are underrepresented (not making up at least one-half of the staff) when both male and female candidates were equally qualified was incompatible with then Council Directive 76/207.

The European Court of Justice also found the German ban on women rendering military service to be in violation of the EU equality directive. Accordingly, Germany amended the Basic Law to now provide, in Article 12(a)(4) that "If, during a state of defense, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the ages of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. *They may under no circumstances be required to bear weapons.*" GG art. 12(a)(4), translated in PRESS & INFO OFFICE *supra* note 1. This means, effectively, that women can now serve in the armed forces, but not with weapons. See Renate Jaeger, *supra* note 104, ¶ 17; Karen Raible, *Compulsory Military Service and Equal Treatment of Men and Women—Recent Decisions of the Federal Constitutional Court and the European Court of Justice (Alexander Dory v. Germany)*, 4 GERMAN L.J. 299, 300 (2003).

132. See, e.g. *Von Hannover v. Germany*, App. No. 59320/00, 40 Eur. H.R. Rep. 1 (2005), which found the Princess Caroline Case, BVerfG Dec. 15, 1999, 101 BVerfGE 361, incompatible with article 8 of the European Convention on Human Rights. The German Constitutional Court found that Basic Law article 5 expressive freedoms outweighed the privacy interests of Princess Caroline when she appeared in the public. But the European Court of Human Rights found, instead, that ECHR article 8 privacy and family rights trumped expressive freedoms.

The battle between the German Constitutional Court and the Court of Justice for the European Union began in a series of cases involving the applicability of human rights to the integration of German and European law. The German Basic Law, of course, has a strong and systematic set of human rights, as we have observed. However, the European legal order does not yet have direct applicability of a human rights catalogue, owing in part to the difficulties of European integration and adoption of a European Constitution. Today, Europe has two legal orders, that of the European Union and of the European Convention of Human Rights. The two are not yet completely integrated.

Turning now to the case, the Court clarified the standard of review for gender discrimination.

[N]o one may be disfavored or favored on the basis of sex. [This norm of equality] reinforces the general equality provision of Article 3(1), in that the range of discretion available to the legislator is narrower. Gender fundamentally may not be used as the basis for a law resulting in unequal treatment, like the other demarcated traits of Article 3(3). That applies also not only when the measure does not result in an Article 3(3) equality prohibited inequality, but also when other goals are pursued.¹³³

The Court then went on to clarify the content of gender equality norms.

Article 3 norms require equality, and these norms extend to social reality as well. The sentence “Men and women shall have equal rights” means not only that legal norms that favor or disfavor gender traits will be abolished, but also sets out to accomplish an equality of the sexes in the future. Equality norms are directed at achieving equal life relationships. Women must have the same career opportunities as men. Overcoming stereotypical roles that create higher burdens or other disadvantages for women are not always successfully achieved through state measures. Factual disadvantages that typically affect women can be ameliorated through the equality norms of Article 3.¹³⁴

The Court was recognizing that equality norms apply not only to legal measures but also the conditions of social reality. Equality is more than just a legal norm; it is a transformative social principle as well. A measure of substantive social equality must proceed in conjunction with

The squabble between the German Constitutional Court and the European Court of Justice begin over enforcement of human rights. In a series of cases referred to as *Solange* (“so long as”), the German Constitutional Court essentially said that European law applied in Germany “so long as” the European law was compatible with the basic rights set out in the Basic Law. In the first case, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle fuer Getreide und Futtermittel (Solange I)*, 1974, 37 BVerfGE 271, 2 C.M.L.R. 540, the German Court concluded that the European Court of Justice had competence to decide issues of European law, but that German human rights law would apply in Germany, notwithstanding the European Court’s ruling, insofar as European law was not compatible with German human rights.

In the second case, *Application of Wuensche Handelsgesellschaft (Solange II)*, 1987, 73 BVerfGE 339, 3 C.M.L.R. 225, the German Court was more accommodating to European law, as the human rights situation had improved in the European Union. Still, the German Court reserved the right to make final judgments on human rights, under German law, insofar as European law was not up to the standards of German law.

In the final case of the triad, *Manfred Brunner et al. v. The European Union Treaty (Solange III)*, 1994, 88 BVerfGE 155, 1 C.M.L.R. 57, the German Court again reserved its authority to challenge European law insofar as European law did not meet the standards of German human rights law.

For extended treatment of these cases and issues, see Mark Killian Brewer, *The European Union and Legitimacy: Time for a European Constitution*, 34 CORNELL INT’L L.J. 555 (2001).

What this battle indicates is that European integration is still a struggle and that there are parallel—national and European—legal orders that are not, as yet, totally integrated.

133. *Night Worker*, 85 BVerfGE at 206.

134. *Id.* at 207.

formal legal equality in order to achieve true equality in society.¹³⁵ In other words, the state is obligated to act proactively, in the form of affirmative actions, to equalize social conditions between men and women. There must be an “adjustment of social roles and relationships” and the “dismantling of social disadvantages.”¹³⁶ Applying these norms to the facts at hand, the Court observed that the case did not entail an equalizing of relations but rather the rectification of a legal inequality. While the law impacts employers, the consequence of the law is that it disadvantages women in comparison to men. Men can work at night, but not women. “That leads to a legal inequality.”¹³⁷

At issue was whether the inequality could be justified. Here the Court explained, “[n]ot every inequality that impinges upon gender violates Article 3(3). Different treatment under rules can often be permissible in so far as they lead to solution of a problem based on the nature of a man or a woman that are urgently necessary.”¹³⁸ The Court stated the standard in a different way as well under Article 3(1): “The general equality norm of Article 3(1) forbids the legislature to treat different group traits differently in legal measures, when the difference cannot be justified by sufficient type and weight.”¹³⁹ This is another example of the interlocking nature of Article 3 norms.

Here the case could not meet that strict threshold, as the Court went on to explain. Night work is detrimental to everyone, the Court observed. It can lead to insomnia, loss of appetite, upset stomach, agitation and nervousness, among other conditions. There is no medical data to document

135. For detailed discussion of the nature of this gender based affirmative action, see Ingwer Ebsen, *supra* note 107, at 270–74, 281–86 (German Court is concerned with achieving factual and social equality in addition to legal equality, aiming to achieve de facto equality. The Court is concerned with eradicating all legal barriers that hamper women. One problem, however, is that utilizing gender affirmative action results in placing burdens on men who are not responsible for earlier inequalities suffered by women. Still, the Court is concerned with overcoming gender stereotypes in society). Forms of gender affirmative action also exist in the *Länder*, see *id.* at 276–77.

In a case involving retirement benefits, the Court ruled that women could opt to retire earlier than men to compensate for past discrimination. BVerfG Jan. 28, 1987, 74 BVerfGE 163.

In addition to gender, the Court also applies forms of affirmation action to traits of illegitimate children and disability, again relying on the Social State principle. See Beaucamp, *supra* note 1, at 1001.

136. Night Worker, 85 BVerfGE at 209.

137. *Id.* at 207.

138. *Id.*

139. *Id.* at 210.

the fact it affects women more than men. Medical data only shows that night work can more detrimentally affect those that have to do housework and child rearing. This affects the body's biorhythms.¹⁴⁰ But that is the case for men (single men and married men who share housekeeping and child rearing duties with their spouse) as well as those who are also faced with the dual burden of job and home, as the *Men Housekeepers Case* makes clear. There is no gender basis for the disparate treatment. Instead, the difference speaks to gender stereotype.¹⁴¹

A further reason given for the law was that night work can be more dangerous to women, on account of crime or other dangers. This too the Court rejected. Instead, "the state should fulfill its obligation to protect women from physical attacks on public streets, and not renege on its commitments, so that women's job opportunities will not be curtailed by working nights."¹⁴² The Court went on to suggest that the state could provide bus service to transport women from home to work at night for safety reasons.¹⁴³ Here again, we can observe the influence of the Social State principle: the state must take measures to secure the welfare of its citizens.

The Court then went on to observe that the prohibition on night work for women would lead to a serious decline of their educational and job opportunities, which in turn would cause a worsening of the position of women in society and the further perpetuation of gender stereotypes.¹⁴⁴ Thus, prohibiting night work would worsen, not benefit, women's lot. For all these reasons, the measure offered no persuasive justification of the difference in treatment of women versus men and was, therefore, unconstitutional.

C. *Machinist*

Machinist concerned the application of a woman to be a machinist, a traditionally male trade.¹⁴⁵ In this respect, *Machinist* had parallels to *Night Worker* in eradicating gender stereotypes, here male roles. Not surprisingly, European law also applied, as a European Union law required

140. *Id.* at 207–08.

141. *Id.* at 208.

142. *Id.* at 209.

143. *Id.*

144. *Id.* at 210.

145. Only 1% of machinists are women. BVerfG Nov. 16, 1993, 89 BVerfGE. 276 (291). The German word is *Maschinenschlosserin*, which could be translated as mechanic or machinist. It appeared she was a trained machinist, having previously completed her education as a school teacher. *Id.* at 279.

that men and women must be given equal chances in job applications.¹⁴⁶ The woman was the only female applicant out of forty; only eight were given interviews, but not she. She was denied an interview because the employer thought that the job of machinist was not appropriate for a woman, as it was too physically demanding.¹⁴⁷

Applying now standard norms developed in *Night Worker*, the Court observed that discrimination based on gender is impermissible, that equality norms apply to society and social conditions as well as legal measures, and that they apply prospectively as well as to present conditions. The overall goal is realization of gender equality in society, both formally and substantively.¹⁴⁸ In this respect, the German Constitutional Court is far more proactive than the United States Supreme Court.

Because *Machinist* involved an employer-employee relationship in the private sector, German constitutional norms applied through the theory of Third Party Effect (*Drittwirkung*). Under Third Party Effect, the values of the Basic Law radiate out and influence interpretation of private law. The effect can also go the other way; private law norms can influence interpretation of constitutional norms, known as the theory of Reciprocal Effect (*Wechselwirkung*).¹⁴⁹ Given that the dispute was a private law matter, the Constitutional Court effectively reviewed the ordinary courts' interpretation of constitutional norms, here equality.

146. *Id.* at 277 (citing European Union law that was incorporated into the section 611 of the German Civil Code (BGB)).

147. *Id.* at 279.

148. *Id.* at 285.

149. The decisive case is *Lüth*, BVerfG Feb. 1, 1995, 7 BVerfGE 198, which involved a communication rights dispute over the right of a film director formerly closely associated with the Nazis to show his new films at a Hamburg film festival. In overturning an injunction prohibiting Lüth from continuing his boycott of the film, the Court delineated the value order of the GG. "This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private Thus, basic rights obviously influence civil law too." *Id.* at 205.

By interpreting basic rights as establishing an "objective" order of values, the Court was stating that those values are so important that they must exist "objectively"—as an independent force, separate from their specific manifestation in a concrete legal relationship. So conceived, objective rights form part of the legal order, the *orde public*, and thereby possess significance for all legal relationships.

For further consideration of the Third Party Effect Theory, see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 811–12 (1997); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 261 (1989).

Ordinary courts must recognize the influence of constitutional norms. In this case, equality demanded that men and women must be treated equally in job opportunities.¹⁵⁰ So in reviewing the decision of the ordinary court, the Constitutional Court concluded that the ordinary court had not taken adequate cognizance of Article 3 equality norms. The ordinary court did not adequately consider the burden imposed on women in the workplace.¹⁵¹ Thus, the case resulted in a violation of Article 3, which requires that a decision cannot be based solely on gender.¹⁵² Gender based decisions are unconstitutional, notwithstanding justifications based on other reasons, unless there are persuasive reasons to justify the gender difference.¹⁵³

D. Firefighter

Firefighter case involved an issue similar to that in *Machinist*: the exclusion of women from the workforce.¹⁵⁴ In this case, the states of Bavaria and Baden-Württemberg limited membership in fire departments to men only, a policy consistent with many German states.¹⁵⁵ As a peculiar measure, the states of Bavaria, Baden-Württemberg, and Saxony raised the amount of a special tax fee used to support the fire department on those residents who did not serve in the fire service. The tax surcharge was applied only to male residents, not female. Of course, all these states employed only men as firefighters.¹⁵⁶ The Constitutional Court declared both measures unconstitutional.

150. *Machinist*, 89 BVerfGE at 285.

151. *Id.* at 286.

152. *Id.* at 288.

153. *Id.* at 288–89.

154. BVerfG Jan. 24, 1995, 92 BVerfGE 91.

155. The German states of Niedersachsen (Lower Saxony), Rheinland-Pfalz, and Thüringen allow women to serve in fire departments. *Id.* at 94. There are also volunteer fire departments in the country. Women commonly serve in volunteer fire departments. Ironically, Bavaria has the largest number of female volunteer firefighters, although females comprise only 2.6% of the force. Eastern German states have the largest percentage of female volunteer firefighters, with Sachsen-Anhalt having the largest percentage at 14%. Overall, female firefighters comprise about 4% of firefighters in Germany. *Id.* at 111.

156. *Id.* at 94. Thüringen also raised the special firefighter fee, applying it only to men residents. But Thüringen allowed both males and females into the fire department. The Baden-Wuerttemberg measure had come up twice before. In the first case, the Constitutional Court ruled that the special fee was unconstitutional as a violation of the equality provisions of Article 3(1). *See* BVerfGE June 1, 1956, 9 BVerfGE 285 (291). A reformulated version of the measure was upheld in the second case on the ground that it applied only to men of a certain age. BVerfG May 15, 1959, 13 BVerfGE 162 (167). Given the *Firefighter* case, it is hard to imagine how the second decision would withstand scrutiny today.

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As is now common in the constitutional law of member states, European norms apply to issues before member states' constitutional courts. Such was the case in *Firefighter*, as the European Court of Human Rights (ECRH) ruled that no one could be forced to perform fire fighting duties.¹⁵⁷ While the ECHR decision did not directly address the issue before the Constitutional Court, the underlying principles of equality were taken into account by the Court.¹⁵⁸

Applying the now standard delineation of the intensive form of review spelled out in *Night Worker*, the Constitutional Court observed that gender based differences could only be justified by an absolutely compelling reason based on biological, natural, or functional gender differences. The equality provisions apply to social reality and not just legal measures, as we have also observed in *Night Worker*. The addition of the explicit gender equality provision in Article 3(2) makes these principles clear. In the *Firefighter* case, the inequality could only be justified by the influence of other constitutional rights, but that was not the case.¹⁵⁹

Considering the facts pointing against the gender equality standard, the Court found no reasons to justify the exclusion of women from fire departments. "There are no compelling reasons on which to limit service in fire departments to men only, in order to address problems that arise on account of the nature of either men or women. Today, there simply is no sound basis on which to exclude women from fire departments based on their physical constitution."¹⁶⁰ Examining the medical data, the Court observed that fire fighting is hazardous due to exposure to heat, smoke, and the burden of carrying heavy equipment.¹⁶¹ All of these factors can jeopardize health, including loss of strength and lower blood circulation.¹⁶² There is a certain case to be made that these dangers affect women more than men.¹⁶³ But these gender based differences are still not persuasive enough reasons to justify the total exclusion of women from firefighting. Women can be tested as well as men to see if

157. *Firefighter*, 92 BVerfGE at 107–08 (citing ECHR judgment of July 18, 1994).

158. *Id.*

159. *Id.* at 109. The main other right here involved was Article 12 occupational freedoms; the Court found no basis in article 12 to justify the exclusion of women from fire departments. *Id.* at 111–12.

160. *Id.* at 109–110.

161. *Id.* at 110.

162. *Id.*

163. *Id.*

they can perform firefighting duties.¹⁶⁴ Testing procedures should control, not gender derived differences. The gender-based treatment of firefighters is even less persuasive because women in fact join volunteer fire departments.¹⁶⁵ Further, with the enhanced technology available and the now common sharing of duties, firefighting is less physically demanding than in the past. Of course, certain exceptions can be made for pregnant women or new mothers.¹⁶⁶

Uncovering the basis of all these justifications for excluding women, the Court concluded, that the justifications revealed nothing other than gender stereotype; the idea that women were not capable of performing firefighting work. This reasoning is simply unacceptable as measured against the equality norms of Article 3, which are designed to achieve equality between men and women in society and eradicate stereotypical gender roles.¹⁶⁷

E. Maternity Leave

A final gender equality case worth considering is *Maternity Leave*, which involved the disparity in paying contributions for maternity leave for small employers (under twenty employees) as compared to larger employers.¹⁶⁸ Payment for maternity leave is required in Germany, all other western countries, and almost all other countries, except the United States.¹⁶⁹ In Germany, women get six weeks before delivery and eight weeks after delivery of children as maternity leave.¹⁷⁰ Payment for

164. *Id.* at 110.

165. *Id.*

166. *Id.*

167. *Id.* at 112.

168. BVerfG Nov. 18, 2003, 109 BVerfGE 64 (2003).

169. *Basic Instincts: Paid Leave for Maternity Is the Norm, Except In . . .*, N.Y. TIMES, Oct. 6, 2007, at C6 (“170 countries offer some paid maternity leave, and 98 of them offer at least 14 weeks off with pay. The United States is not one of them.” The United States is one of only four countries with no paid maternity leave; the others being Liberia, Papua New Guinea and Swaziland).

170. *Maternity Leave*, 109 BVerfGE at 65. The constitutional basis for maternity leave is rooted in the Article 6 family law protections, which provide, in relevant part:

“(1) Marriage and the family shall enjoy the special protection of the state. (2)

The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty (4) Every mother shall be entitled to the protection and care of the community.” GG art. 6, *translated in* PRESS & INFO

OFFICE *supra* note 1, at 41.

The legislature has significant discretion in fixing the fiscal amount and nature of maternity leave to be accorded women. However, protection of the mother takes precedence over all other considerations. This is part of the Social State obligation of the state, under Article 6. *Maternity Leave*, 109 BVerfGE at 85–87. In essence, the State wants to guarantee the security and well being of mothers.

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maternity leave is a shared cost between employers and the government, but since 1968, more of the cost burden has been shifted to employers.¹⁷¹ That was the issue in this case. Small employers employing less than twenty employees participated in a pool of similarly situated employers in which a calculation of costs was made and assessed. Employers with more than twenty employees did not participate in this pooled cost system, but instead paid their share of the maternity leave through a different process. The consequence of this system was that the small employers were assessed a greater proportion of the maternity leave cost than larger employers. The question for the Court was whether the disparity in cost assessment was consistent with the Basic Law.

The Court concluded that the pooling method was not consistent with the constitution, violating Article 3 equality norms and Article 12 occupational freedoms.¹⁷² The measure violated Article 3 because it resulted in discrimination against women in their work life, especially here, of course, for small employers.¹⁷³ While all employers were obligated to share in the cost of maternity leave, the burden was unevenly borne by small employers, which was not consistent with norms of equality. The equality norms also carried over and influenced Article 12 occupational freedoms. Here, the Court concluded that the measure also violated the ability of women in small firms, to act upon their occupational freedoms, illustrating the integrated approach to rights characteristic of the German approach to rights.¹⁷⁴

Examining more carefully the equality aspects of the measure, the Constitutional Court observed that equality norms required fulfillment of equal treatment of men and women in society.¹⁷⁵ "Women must have the same job opportunities as men."¹⁷⁶ Here too these equality notions included the influence of European and international law.¹⁷⁷ The problem in the case was that the assessment of the surcharge only on small employers based on the pooling method could not be justified by an

171. *Id.* at 67.

172. *Id.* at 84–85.

173. *Id.* at 84.

174. *Id.* at 84–87.

175. *Id.* at 89.

176. *Id.*

177. *Id.* See, e.g., Council Directive 76/207, 1976 O.J. (L39) (EC); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 11, U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/34/180/Annex (Dec. 18, 1979).

adequate reason.¹⁷⁸ As presently conceived, the measure resulted in the burden falling disproportionately on women, who are of childbearing age and comprise a large share of the employees of small businesses. Small businesses are thus disproportionately affected by this measure. This constitutes a factual discrimination against women, which is to be avoided as much as possible, notwithstanding the considerable discretion available to the legislature.¹⁷⁹ The legislature is obligated to consider the quality of factual discrimination in the measures it formulates, as this can lead to a form of gender discrimination in the work place.¹⁸⁰ Therefore, the measure was found unconstitutional and had to be refashioned to take account of the impact on such women. As presently fashioned, the measure entailed a significant burden on women¹⁸¹ The Court concluded that the pooling method was a good way to share the costs of maternity leave.¹⁸² However, restricting the pool to only small employers that tended to employ a larger percentage of women than larger employers was inconsistent with Articles 3 and 12. Thus, the Court suggested that the pool be expanded to include larger employers as a way of spreading the risk and dealing with this problem.¹⁸³

F. United States Gender Equality

After race, gender was the next trait the Supreme Court considered for treatment under equal protection. The turn of events was marked by *Reed v. Reed*, where the Court for the first time invalidated a gender classification under the Equal Protection Clause.¹⁸⁴ In *Reed*, the Court invalidated an Idaho intestate provision that preferenced males over females in the administration of the estate. The Court applied rational basis review. In *Frontiero v. Richardson*, the members of the Court engaged in a robust debate as to what level of scrutiny was appropriate to gender discrimination.¹⁸⁵ Writing for four Justices, Justice Brennan

178. Maternity Leave, 109 BVerfGE at 89.

179. *Id.* at 90.

180. *Id.*

181. *Id.* at 90–91.

182. *Id.* at 92.

183. *Id.* at 92–95.

184. 404 U.S. 71 (1971). In United States gender discrimination law, the first sets of cases involved discrimination against males, not females, as this was the strategy of now Justice Ruth Bader Ginsberg in directing the ACLU Women's Rights Project. For description of the ACLU's Women's Rights Project, see ACLU, *Tribute: The Legacy of Ruth Bader Ginsberg and WRP Staff* (2006), available at <http://www.aclu.org/pdfs/ginsburgtribute20060302.pdf>. Some German gender discrimination cases also involve discrimination against males, as in the *Men Housekeepers* case. BVerfG Nov. 13, 1979, 52 BVerfGE 369.

185. 411 U.S. 677 (1973). Part of the uncertainty over what to do with gender discrimination may have been influenced by the vibrant debate over whether to adopt the

argued for strict scrutiny, as in race, on the ground that gender classifications are inherently suspect. Lacking a fifth vote, however, there was no majority for application of strict scrutiny in relation to gender discrimination. This led to the Court's compromise in *Craig v. Boren*, where the Court agreed on the appropriately named intermediate scrutiny as the level of review to be applied to gender, which calls for "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."¹⁸⁶

After *Craig*, the application of intermediate scrutiny was uneven and unpredictable. In some cases, intermediate scrutiny was applied as an intense level of scrutiny which could be referred to as quasi-suspect class.¹⁸⁷ But in other cases, application of intermediate scrutiny seemed to lack rigor, and appeared more akin to a form of rational basis.¹⁸⁸ The confusion in the understanding and application of the standard led the Court in *United States v. Virginia* (VMI) to clarify what intermediate scrutiny means.¹⁸⁹ Under *VMI*, the standard as reformulated is:

The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.¹⁹⁰

So *VMI* clarified that intermediate scrutiny connoted a degree of intensity to the review.

equal rights amendment to the Constitution, guaranteeing "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *Id.* at 687 (quoting Equal Rights Amendment, H.R.J. Res. No 208, 92nd Cong, 2nd Sess. (1972)). The effort failed.

186. 429 U.S. 190, 197 (1976).

187. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (unconstitutional to exclude male from college school of nursing solely on account of his gender); *Caban v. Mohammed*, 441 U.S. 380 (1979) (Court invalidated a New York law granting the mother but not the father of an illegitimate child the right to block the child's adoption by withholding consent).

188. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (constitutional for statutory rape to entail sex with only a female, not a male, under the age of 18); *Parham v. Hughes*, 441 U.S. 347 (1979) (upholding constitutionality of a Georgia statute permitting the mother, but not the father, of an illegitimate child to sue for wrongful death of the child when the father had not formally legitimized the child).

189. 518 U.S. 515 (1996).

190. *Id.* at 533 (alteration in original) (internal quotation marks in original) (citations omitted).

The Court went on to explain the underlying basis for distinguishing between men and women.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.¹⁹¹

VMI’s clarification of intermediate scrutiny applicable to gender raises a number of issues.

First, even after *VMI*, there has been a certain inconsistency in the application of the newly clarified form of intermediate scrutiny. In *Nguyen v. INS*, the Court upheld a federal law that automatically granted U.S. citizenship to a child of unmarried parents whose mother was a U.S. citizen, but not to a child whose father was a U.S. citizen.¹⁹² The Court found that:

the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis. There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype. . . .

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.¹⁹³

The Court placed emphasis on the fact that establishment of parenthood was vital to the attainment of citizenship which, of course, makes sense.

191. *Id.* at 533–34 (alterations in original) (internal quotation marks in original) (citations omitted).

192. 533 U.S. 53 (2001). *But see* *Nevada v. Hibbs*, 538 U.S. 721 (2003) (male state employees can recover money damages from state for its failure to comply with the Family and Medical Leave Act. Here, the state did allow a male employee to take 12 weeks off from work to care for his ailing wife from injuries suffered in a car accident, but he needed more time.).

193. 533 U.S. at 68, 73.

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However, the Court focused on the fact that parenthood was easier to establish by a birth mother than a father.¹⁹⁴

The clear inequality between children born to female American citizens as compared to male American citizens does, in fact, seem to turn the *VMI* standard on its head. As observed by the dissent: “[w]hile the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents.”¹⁹⁵ To the dissent, it appeared that the Court was simply resorting to stereotype. The dissent states:

The claim that [the statute] substantially relates to the achievement of the goal of a “real practical relationship” thus finds support not in biological differences but instead in a stereotype—i.e., “the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.”¹⁹⁶

It appears that the dissent had the better of the arguments. After all, it is hard to justify a difference over American citizenship in biological parents based simply on one as the birth mother and the other as the father. Biological parents are biological parents; it takes both to make a child, and proof of parenthood could just as easily be established by gender neutral means.¹⁹⁷ Furthermore, the child spent time in the United States being raised by his father from the age of six onward, and became a legal permanent resident.¹⁹⁸

Second, there appears to be a difference in the grounds that can justify a disparity among sexes. Under German law, as we have observed, only biological or functional difference can justify a measure that impacts differently on gender. Stereotypical views of gender roles simply will not do, as it was made clear by the Constitutional Court’s rejection of this rationale. Biological differences will be hard to find as a persuasive justification, as we have observed. This leaves primarily a difference in function—mainly work or socially related—as a valid basis for justifying a gender difference which, as we have seen, the Constitutional Court examines quite closely as well.

194. *Id.* at 62–63.

195. *Id.* at 74 (O’Connor, J., dissenting).

196. *Id.* at 88–89 (second alteration in original) (internal quotation marks in original).

197. *Id.* at 81–82.

198. *Id.* at 57, 85. Of course, it may not have helped that the young man, at age twenty two, was convicted of two counts of sexual assault with minor. *Id.* at 57. But as Justice O’Connor observed in her dissent, “[i]n 1997, a DNA test showed a 99.98% probability of paternity, and, in 1998, Boulais [the father] obtained an order of parentage from a Texas court.” *Id.* at 85.

American law is also concerned with eradicating gender stereotype, which appears to be the main focus of the Supreme Court. The Court additionally evaluates biological differences. In this respect, the Courts share a common cause. By contrast, however, in probing these factors, American gender law seems primarily to rely on “inherent” or “real” differences, most of which are physiological or biological.¹⁹⁹ But as observed by the dissent in *Nguyen*, a biological difference may, in fact, rest on stereotype. Social or career functional differences do not seem to play much of a role in United States law. Thus, in this respect, German law would appear to probe much more deeply as to the underlying basis for gender discrimination, aiming to root it out much more systematically than American law.

Third, German law is concerned with achieving both formal and substantive equality for genders. Of course, this mainly applies to women, who have historically been placed in an inferior social position as compared to men. Through the Social State principle, the state is obligated, and the Constitutional Court so orders it, to take measures to achieve substantive equality in society. Effectively, this means German law will invoke affirmative actions measures to remove past social disadvantages women have suffered. No such effort is apparent in American law. The Supreme Court is simply concerned with achieving formal legal equality.²⁰⁰ Men and women can then work it out for themselves as to how to reach their potential.

Finally, in comparison to German law, we can observe a pattern of inconsistent applications of gender equality norms in the United States. Sometimes the scrutiny is probing, sometimes more deferential. German law seems more consistent, both in the standard of review applied and in striving to obtain equal treatment of men and women. German law is concerned with achieving substantive equality between men and women as well as formal equality. Where necessary, the Constitutional Court and government will accord women preferences to attempt to equalize social conditions, in a form of affirmative action.

Interestingly, both Courts seem to have established the level of scrutiny at about the same time, in the later 1970s, with *Craig v. Boren* in 1976 in the United States and *Men Housekeepers* in 1979 in Germany. Possibly, this reflects the women’s liberation movement of that time. A

199. For evaluation of this point, see GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 654–58 (5th ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 680–82 (14th ed. 2001).

200. See, e.g., STONE, *supra* note 199, at 664; Mary E. Becker, *Prince Charming: Abstract Equality*, SUP. CT. REV. 201, 247 (1987); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1555 (1983).

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notable difference, however, is that gender equality receives intermediate scrutiny in the United States, but strict scrutiny in Germany. Part of this may have to do with the explicit textual enumeration of gender in Article 3. Still, race, national heritage, or alienage (all suspect traits subject to strict scrutiny) are not singled out in the opaque language of the Fourteenth Amendment either. The German approach to gender discrimination quite likely also reflects Germany's longer commitment to the principle.²⁰¹ Thus, we might conclude that gender is a higher priority for the Constitutional Court than the Supreme Court. Another interesting similarity between both Courts is that decisions of the 1990s helped to clarify the meaning of the gender equality standard. In the United States, the case was *VMI*; in Germany, it was *Night Worker*. But here too we observe the same difference: *VMI* clarified intermediate scrutiny, *Night Worker* clarified strict scrutiny. Thus, there are both similarities and differences between the two gender equality laws. However, it seems fair to say that German law is both more probing and more logically consistent than United States law.

IV. HEIGHTENED REVIEW OF SOCIO-ECONOMIC MATTERS

We have already observed that German equality jurisprudence employs a sliding scale range of review that varies from a strict scrutiny form that applies to designated immutable personal traits, as described in Parts II and III, to a low-level form of rational basis where the measure can be justified simply by a plausible reason. Like American law, German law divides the methodology of equality jurisprudence around the difference in classification between immutable personal traits (strict scrutiny) and socio-economic measures (heightened or rational basis). But more interesting than this similarity is the difference between the two laws.

In this last category of matters involving socio-economic matters, the level of review in German law varies. First, if the measure triggers a fundamental right other than equality, it results in disparate treatment of similarly situated groups, or both, the Constitutional Court will intensify the degree of its scrutiny and sustain the measure only if quite convincing reasons are present; in essence, this is a form of intensive scrutiny. In United States law, we might actually view this heightened form of review as intermediate scrutiny. I will simply refer to it as heightened review.

201. See notes 107–08 and accompanying text.

Under a more standard form of rational basis review, the Constitutional Court will probe the inequality resulting from the measure and sustain it if there is a sound reason to justify the difference. If neither dramatic inequality nor any other right or group differential is present, the Constitutional Court will sustain the measure if there is a sound explanation.²⁰² What these different levels of socio-economic matters indicate is that the Court varies its scrutiny based on the degree of inequality present. Even review of socio-economic matters can be rigorous. We will now turn to an examination of the sliding scale variety of review applied to socio-economic matters, starting with heightened review.

The nature of heightened review is well captured by the *Retirement Benefits Case*, a case concerning the formula for allocating retirement benefits between public employees and employees who previously had worked in the public sector, but had then left to work in the private sectors.²⁰³ The Court found the measure unconstitutional, as the formula resulted in higher retirement income for public employees as compared to now private employees. Even though this was just a socio-economic measure, the Court nevertheless probed the measure quite intensely based on the unequal treatment of the two generally similarly situated groups and the implication of Article 12 occupational freedoms. As observed by the Court:

The general equality provision of Article 3(1) obligates the legislator, under the constant orientation of justice, to treat essentially equal the same and unequal different. When a difference in dissimilar fact situations is present, and that difference is great, the legislature is indeed obligated only to consider all relevant factors as a matter of justice. By the ordering of large phenomenon, standard and general norms may be necessary. In these situations, present difficulties and injustices may be taken into account when the burden impacts on only a small number of people and the violation of equality is not very severe. However, when the economic consequences of a measure stands in a disproportionate relationship to the standard allied advantages, then the measure is not consistent with the equality norms of Article 3(1).

Even with standard norms, the legislature is subject to strong limitations when the measure impacts on fundamental rights. That is the case here. The partial reduction of expected retirement income affects the Article 12(1) guaranteed occupational freedoms.²⁰⁴

Thus, we can see that the Court will intensify its scrutiny of socio-economic measures when there is significant disparity present in application of the measure or it impacts on fundamental rights. Here, both concerns

202. Transsexual II, BVerfG Jan. 26, 1993, 88 BVerfGE 87, 96–97 (“When only the simple prohibition against arbitrariness comes into play, a violation of Article 3(1) can be established only when the lack of substantiation of the difference in treatment evident is.”).

203. BVerfG July 15, 1998, 98 BVerfGE 365 (1998).

204. *Id.* at 385.

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were implicated. The Court felt that private employees were treated less favorably than public employees in the complicated formula used to calculate retirement benefits and, secondly, that the amount of retirement income had an effect on their occupational freedoms, as the lesser retirement income might hamper their choices in pursuing career objectives.²⁰⁵

The nub of the formula at issue in the case was based, in significant part, on the amount of the salary last earned upon leaving the public job and the length of employment. Another factor was that retirement income was also affected by an increase in the amount of the retirement subsidy, which was then often offset by a reduction in the retirement amount based on living conditions. This formula resulted in wildly disparate retirement incomes, especially between retired public employees and formerly public but then later private employees.²⁰⁶ As stated by the Court, "It is contradictory on the one hand for public employees to receive an especially high retirement living standard amount, but on the other hand those who have left public employ find their living standard function negated."²⁰⁷ This disparity turned the Court's attention to the fundamentals of equality jurisprudence:

The fundamental principle that all people are equal before the law should in the first place prevent any favoring or disfavoring of people. Accordingly, the legislature is subject to strict judicial control of any inequality. By only behavior oriented differences, the nature of judicial control depends on how much those affected are in a position through their actions to influence the factors that result in the difference. On this point, legislative discretion is narrowed the stronger the inequality that exists among people or fact situations that might result in the curtailing of the exercise of protected freedoms. In these cases, the Constitutional Court tests whether the asserted ground for the difference is of such a type and weight so as to justify the disparate treatment.²⁰⁸

In this statement, we can observe the intense form of review that occurs when similarly situated people are treated differently. Certainly there was no implication here of a suspect trait, although as noted Article 12 occupational freedoms were also implicated.²⁰⁹ Still, the Court probed the measure quite intensively. Considering the reasons given for the

205. *Id.*

206. *Id.* at 385–86.

207. *Id.* at 388.

208. *Id.* at 389.

209. The Court ruled that Article 12 occupational freedoms were violated because the disparity in retirement income would dissuade public employees from leaving public employ to enter the private sector. This would inhibit their right to work and also the development of their capacities and free will. *Id.* at 395–96.

measure—applying a uniform formula for retired public employees (which as demonstrated actually was not realized), that private employees can earn more in the private sector than public employees, practicality, or budget concerns—all were rejected as persuasive reasons to justify the discrepancy in retirement income.²¹⁰

Comparing *Retirement Benefits* to American law, we can observe both similarities and differences. The two laws are similar in that if fundamental rights are implicated, heightened scrutiny will apply. However, the laws differ in that if just a gross inequality in the law is present, German law would still apply heightened scrutiny whereas American law would apply rational basis.

Another case involving heightened scrutiny concerned the computation of income levels of a separated married couple for purposes of obtaining state financial aid for university education.²¹¹ In the *Separated Couple University Aid Case*, the couple had been separated for a long time. Ordinarily under German law in such cases, the couple's income is counted separately, not together. That was not the case here, as the applicant for state aid was denied a state subsidy based on the composite income of both spouses, notwithstanding that they had been long separated. The Constitutional Court invalidated the provision as violative of Article 3 equality; the measure discriminated against a group of people, here separated couples, without sound justification. The measure was especially dubious because most other aspects of German law computed long separated couples as having separate, not combined, incomes for purposes of qualifying for benefits; this was the case in areas like welfare, unemployment benefits, salary or tax matters.²¹²

Concern also with the disparate treatment of essentially similarly situated groups of people led to the declaration of unconstitutionality in the *Employee Termination Case*.²¹³ The case involved a disparity in length

210. *Id.* at 391–94.

211. *Separated Couple University Aid*, BVerfG Jan. 10, 1995, 91 BVerfGE 389. Under German law, citizens are entitled to state subsidized support for university education when they do not have adequate financial means to support the costs of university education. The law is known as the federal education support law or Bundesausbildungsförderungsgesetz (known as BAfoeg). The law is part of the social welfare net.

212. *Id.* at 402–03. In a case, 99 BVerfGE 165, involving similar concerns regarding state funding of university education, the Constitutional Court found it unconstitutional to deny a student access to state grants for higher education when the student claimed a status independent of his parents, but the parents income was nevertheless used as part of the calculation to see if the student would qualify for the state grant. In the case, the student was seeking a second education and, under the formula for calculating benefits, the parents' income was not high enough to cover the costs of the education. BVerfG Nov. 10, 1998, 99 BVerfGE 165. The Court found no justifiable reason for the difference in treatment of parent dependent and parent independent students. *Id.* at 178, 181.

213. BVerfG May 30, 1990, 82 BVerfGE 126.

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of notice of termination between physical (blue collar) and nonphysical or mentally skilled workers (white collar). Blue collar workers received two weeks notice of termination; while white collar workers received six weeks notice of termination. When employees were in the employ longer, the length of notice of termination increased. For blue collar employees, ten years employment triggered a two months notice of termination, twenty years employment, three months notice. For white collar workers, five years employment triggered three months notice, and ten years employment, five months notice.²¹⁴ In this case, a woman worked as a tailor in an apparel store for fifteen years. The employer terminated her employment with an eight weeks notice of termination, which occurred by reason of a collective bargaining agreement. Under the collective bargaining agreement, white collar employees employed for fifteen years received six months notice.²¹⁵ Because of the difference in treatment of the two groups of employees, the Court applied heightened scrutiny again.

An unequal treatment of several groups under the same norms is consistent with the general equality norm of Article 3(1) only when the difference between the groups can be justified by reasons of sufficient nature and weight. Disparity in treatment and justifiable grounds must stand in a proportionate relationship to one another. Thereby also to be considered in the balance is whether the inequality will have an effect on basic protected freedoms.²¹⁶

Perhaps a disparity in treatment might be justified when a “generalization impacts negatively only on a small group of people and the inequality is not very severe.”²¹⁷ In this case, there was no adequate justification for the disparate treatment. For example, the idea that white collar workers merit a longer notice of termination period because they are more educated, having invested more time in building a career, is simply not a sufficient basis for the differential treatment.²¹⁸ This justification may have worked in the past, but not today.²¹⁹ The measure affected a large, not small, group of people; hence, it could not be justified on the second rationale either.

214. *Id.* at 128–29 (citing BGB § 622).

215. For coverage of the case, see Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 250 (1999).

216. Employee Termination Case, 82 BVerfGE, at 146.

217. *Id.* at 152.

218. *Id.* at 148–49.

219. *Id.* at 153.

On the other hand, in a second employee termination case, *Small Business Employee Termination*, the Court upheld a law that excluded small business from the employee termination notice law based on the need for clarity and efficiency.²²⁰ Every law has certain elements of generalization; in this case, that ground was sufficient to justify the law.²²¹ Clear rules are needed so the law can function efficiently.²²²

A final case also demonstrates the heightened evaluation of economic measures. In the *Private School Case*, the Constitutional Court ruled that it was unconstitutional for the city-state of Hamburg to subsidize private schools that were religious, ideological, or both at a higher rate per pupil (77%) than private schools that were nonreligious and ideological (25%).²²³ The constitutional basis for the ruling was Article 7(4), which guarantees the right to have private schools, in conjunction with the equality mandates of Article 3. It seemed clear that the measure favored schools that were religious, ideological, or both over nonreligious and nonideological schools, but that was not the basis for the Court's ruling. Instead, the Court looked at the groups affected—private schools—and observed simply that all private schools must be treated the same. In this case, this meant each must get the same financial support based on percentage of pupils.²²⁴ None of the reasons given to justify the difference in treatment of the schools—financial situation, history or tradition and length of existence, rectifying past wrongs committed against religious schools under the Nazi regime, or fiscal concerns—served as an adequate ground on which to justify the disparate treatment.²²⁵

Two other cases involving socio-economic matters further demonstrate the need for a strong justification to explain disparate treatment of groups similarly situated. In a case involving judges of the appellate ordinary courts and the appellate administrative courts of North Rhein Westfalia, the Court found there was no satisfactory explanation to justify the lower pay accorded the President and Vice President of the appellate ordinary courts as compared to the President and Vice President of the appellate administrative courts.²²⁶ Similarly, the Constitutional Court found the disparate payment of World War II veterans benefits accorded German citizens who previously lived in the German Democratic Republic and those that had lived their lives in the Federal Republic of Germany

220. BVerfG Jan. 1, 1998, 97 BVerfGE 169 (182).

221. *Id.* at 182.

222. *Id.*

223. BVerfG Apr. 8, 1987, 75 BVerfGE 40 (43).

224. *Id.* at 71.

225. *Id.* at 70–73.

226. BVerfG June 4, 1969, 26 BVerfGE 100.

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unconstitutional.²²⁷ The lower amount of veterans' benefits could be justified until 1998 on the ground that living standards in the former East Germany were lower than in West Germany. But after 1998, there was no justification for the lower payments to former East Germans as the living standards had reached approximately the same plateau.²²⁸

Finally, matters involving tax law also merit heightened scrutiny when the law impacts disparately on people.

[C]lassifications made in tax laws require special justification because of the severity of their impact. A surprising number of such distinctions have actually been found wanting: discriminatory taxation of chain stores, preferential treatment of vertically integrated firms under the value-added tax, nondeductibility of partners' salaries and of child-care expenses, to name only a few. These decisions stand in sharp contrast to modern decisions in the United States; the Supreme Court has not scrutinized classifications in tax laws with much care since the New Deal revolution.²²⁹

So, what we can observe under German equality jurisprudence is that even mere economic matters can merit a more searching scrutiny than simple rational basis when either the measure impacts disproportionately on two relatively similar groups or when a fundamental right is impacted. In these cases, the Court will uphold the measure only in the face of a demonstrable convincing justification for the difference in treatment. It seems clear that German law possesses a degree of rigor that is more broadly applied as compared to United States law.

Under American equal protection review, mere economic measures ordinarily are treated as presumptively constitutional unless they fail, in the rare case, to satisfactorily demonstrate a rational purpose and means that are rationally related to achievement of that purpose. Few American cases of a socio-economic character fail rational basis. The most notable is probably *Department of Agriculture v. Moreno*, where the Court ruled, under standard rational basis review, that excluding unrelated people who shared an apartment from a federal food stamp program violated equal protection.²³⁰ As observed by the Court: "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically

227. BVerfG Mar. 14, 2000, 102 BVerfGE 41.

228. *Id.* at 58–59.

229. Currie, *supra* note 109, at 368–69 (citations omitted). For citations to the German cases, see *id.* nn.277–82.

230. 413 U.S. 528 (1973).

unpopular group cannot constitute a *legitimate* governmental interest.”²³¹ *Romer v. Evans* is similar, where the Court ruled that an amendment to the Colorado Constitution that, among other things, denied access to the courts to homosexuals for discrimination claims could not meet the lenient standard of rational basis.²³² The Court relied on *Moreno* to observe, again, that government cannot strike out at an unpopular or disfavored group. Of the two cases, *Moreno* fits more naturally into rational basis review because the personal status at issue—unmarried, unattached people living together—was mutable and thus able to be changed by the people themselves. There is some argument that the trait of homosexuality at issue in *Romer* was less mutable and perhaps immutable, although the science on this point is unsettled and controversial. Still, there might be some argument that *Romer* could merit a form of heightened scrutiny, most likely intermediate scrutiny under American law, as political forces were clearly targeting a group of people based on their status. But the Court never had to go that far, as it could dispose of the measure on there simply being no legitimate reason for Colorado so acting.

A more problematic case is *City of Cleburne v. Cleburne Living Center*, where the Court also applied rational basis and found unconstitutional the city’s denial of a permit for the operation of a group home for the mentally retarded.²³³ To the Court, this was a blatant discrimination, since the city had granted permits for operation of hospitals, sanitariums, nursing homes, and convalescent homes. But the inequality is not the problem in the case; the trait is. Here the personal trait is mental retardation, an immutable trait that fits within the *Carolene Products* justification for heightened scrutiny since they are politically powerless. This was the argument of Justice Marshall in his concurrence and partial dissent, but to no avail.²³⁴

V. RATIONAL BASIS REVIEW OF SOCIO-ECONOMIC MATTERS

When no suspect class trait is involved or when no obvious disparity in treatment among groups of people is present, the Constitutional Court will apply the conventionally low-level review of rational basis to ascertain whether the measure in question is constitutional or not. Even here, however, the Court will require a convincing reason to justify disparate treatment of groups of people. The standard of rational basis review, therefore, is somewhat more demanding than the conventional United

231. *Id.* at 534.

232. 517 U.S. 620 (1996).

233. 473 U.S. 432 (1985).

234. *Id.* at 458–73.

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States approach that calls for, simply, a plausible reason²³⁵ or where “the question is at least debatable.”²³⁶

A few cases will suffice to demonstrate the nature of German rational basis review. In a case involving a pharmacy that wanted to continue operating in a railroad station, the Constitutional Court found that officials were justified in shutting down the pharmacy because a pharmacy dealt with the dispersal of medicines and, therefore, was subject to more stringent pharmaceutical regulations as compared to other businesses that operated in the railroad station.²³⁷ To the Court, these were sound reasons for the difference in treatment among businesses. In a case involving fees for children attending kindergarten, the Constitutional Court ruled that the city was justified in applying a sliding scale of fees based on parental income levels.²³⁸ Other social programs, such as social welfare benefits or income tax rates, used income levels; thus, they could also be used for determining kindergarten fees.²³⁹ In a case where a fifteen year old boy wanted to juice up his bicycle by adding a motor so that he could travel as fast as twenty-five kilometers, the Court determined it was permissible for authorities to cite the boy under the criminal law, in contrast to the civil law that handles most traffic violations, because the boy did not qualify yet for a driver’s license, posing dangers to other moving vehicles and pedestrians.²⁴⁰

A veterinarian sued claiming that he was entitled to exemption from being required to testify under oath on the ground that he, like physicians and lawyers, needed to protect confidential information acquired in his practice.²⁴¹ However, the Constitutional Court denied the claim, reasoning that veterinarians simply do not trade in sensitive personal matters as physicians and lawyers.²⁴² This made eminent sense, after all, as veterinarians treat animals, not people. Thus, there are good reasons for the different treatment of veterinarians as compared to legal and medical professionals.²⁴³ In another case involving the reunification of Germany, the Court ruled

235. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972).

236. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)).

237. BVerfG Nov. 29, 1961, 13 BVerfGE 225.

238. BVerfG Mar. 10, 1998, 97 BVerfGE 332.

239. *Id.* at 344.

240. BVerfG Mar. 27, 1979, 51 BVerfGE 60.

241. BVerfG Jan. 15, 1975, 38 BVerfGE 312, 313.

242. *Id.*

243. *Id.* at 323.

that a difference in treatment of the debt burden of a former East German company as compared to a West German company could be justified by the difference in economic standards between the then two Germanys.²⁴⁴

VI. COMPARATIVE OBSERVATIONS

Equality as a seminal value in both German and United States society is led primarily by the constitutional Courts of the two countries. Both Courts have directed the impulse toward realization of equality in society, with the legislatures generally following the Courts' lead. Both Courts have a common commitment to a core component of equal treatment of all people.

There are important similarities between the two laws, mainly reflecting the post-World War II rights revolution. Both the German and American Courts employ a sliding scale of judicial review, with the intensity of the review varying according to whether a suspect class or a fundamental right was involved (strict scrutiny) or the measure simply involved general socio-economic measures (rational basis). Both Courts identify certain traits as suspect, meriting extremely intensive judicial scrutiny. Both Courts prefer, where possible, to defer the formation of public policy to the political process. Both Courts combine equality protections with other substantive rights protections; for Germany, this is part of its comprehensive and integrated approach to rights; for the United States, this is part of the substantive rights component of equal protection law.²⁴⁵

Still, while the Courts seem to be in accord with a general sense over these points, there are important differences. German equality law demarcates far more traits as suspect (for example, race, sex, gender, language, national origin, disability or faith, religious or political opinion) as compared to American law (race, national origin, and alienage). This may have to do with the more explicit text of the Basic Law, as previously observed. But it may also have to do with the German concern regarding every person being of equal worth. Those most vulnerable or most ill equipped to affect society or the political process merit higher attention by the German Court. While the Supreme Court has invoked similar rationales in applying strict scrutiny to suspect classes, it has been far more hesitant to extend the range of suspect classes. Underlying difference in approaches of the two countries over suspect classes and vulnerable people is the German consideration of the degree to which it is within a person's control to affect the measure at issue. In the United States, this is part of the consideration involved in the idea of "discrete and insular

244. BVerfG Apr. 8, 1997, 95 BVerfGE 267.

245. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969).

minorities” or those who are politically powerless in assessing whether a trait might be classified as suspect.²⁴⁶ While this is also true in Germany, the German Court looks into this factor for all people, not just those most vulnerable, in ascertaining what level of scrutiny to apply.

Further assessing treatment of the most vulnerable, the two Courts differ on strategies for achievement of equality. The Supreme Court is mainly concerned with addressing issues of formal, legal inequality. Measures that legally treat groups differently (mainly over traits considered suspect or quasi-suspect) will generally be found to violate equality. But there are deeper issues to be addressed over equal treatment: the socio-economic reality of the society that citizens live within. This is an issue of substantive equality: are equal opportunities and conditions available to all? This question is mainly one that affects vulnerable groups in society, like people grouped by race, gender, illegitimacy, or disability, to name a few.

On this point, there are important differences between the laws of two nations. In the United States, affirmative action is mainly impermissible under the Rehnquist Court’s reconception of race equality.²⁴⁷ One exception is university admissions, where race can be considered as a plus factor aiding the chance of admissions, as other nonracial factors are also so considered, in an individualized assessment of applicants, under application of the strict scrutiny standard.²⁴⁸ Thus, the goal of realizing a degree of substantive equality within society is not a major priority of the Supreme Court.

This is in stark contrast to the German Constitutional Court, whose goal is realization of equality for all people in society. In particular, affirmative state measures are necessary and required for those most vulnerable in society, to rectify past discrimination or to create conditions in present society so that every person can achieve their due. In the law we have observed, the Court has taken a proactive role especially with regard to gender (mainly women), illegitimate children, and those with disabilities. In significant part, this reflects the priorities of the German

246. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

247. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“we hold today that all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

248. *Grutter v. Bollinger*, 539 U.S. 306 (2003). The strict scrutiny standard applied to affirmative action matters is a slightly more lenient standard than conventional strict scrutiny. *Adarand Constructors*, 515 U.S. at 237 (“we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

constitutional order: human dignity, development of personality, and commitment to the Social State; meaning the state is obligated to provide for everyone a certain minimum of security, equal services and opportunities.

Focusing on gender for a moment, we have previously observed how much more comprehensive the German Court's evaluation of matters entailing gender equality is compared to the Supreme Court. The Supreme Court mainly considers gender stereotype and "inherent differences," mainly biological, in assessing whether discrimination is involved.²⁴⁹ The German Court considers these factors as well, but probes even more deeply: social or work functions are carefully considered as well to determine whether discrimination is afoot. This is just another example of the German Court's aim of achieving substantive equality as well as legal.

Another important difference is how the two Courts treat socio-economic measures. We are all familiar with the conventional American approach to socio-economic measures: formation of public policy that does not touch upon an immutable personal trait that allows a person little ability to affect social measures is considered presumptively constitutional and, therefore, almost always upheld.²⁵⁰ Essentially, the Court stays out of the political fray, leaving it to the political process.

The Constitutional Court too prefers to leave the fixing of public policy to the political process. However, the Constitutional Court probes carefully any inequalities, even those involving just socio-economic measures. The nature of review here is sliding, as we have previously observed. It can be quite deferential, involving the arbitrariness prohibition of which, like rational basis review, calls simply for a sound explanation for the measure. But it can also be quite intensive, mainly when the disparity between groups similarly situated is too large. What this shows is that the Constitutional Court is concerned with achieving equality across the board, through society, with respect to all citizens.

The harder nature of the German Court review of socio-economic measures seems reminiscent, in ways, of the Supreme Court during the *Lochner*²⁵¹ era, before the advent of the New Deal Court. In the *Lochner* era, the Court closely reviewed any measure impacting socio-economic matters, under equal protection or due process, and invalidated many of them. Still, there is a major difference here. During the *Lochner* era, the Court mainly focused on matters germane to the economy, such as freedom of contract that primarily benefited employers, but focusing much less on those most vulnerable within society, such as workers or

249. See, e.g., *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

250. Again, a rare exception would be *USDA v. Moreno*, 413 U.S. 528 (1973).

251. *Lochner v. New York*, 198 U.S. 45 (1905).

the poor. By contrast, the German Court applies a rigorous review to equality measures consistently over all areas, suspect class, other personal traits, and socio-economic matters, focusing again on the nature of the inequality. In short, achieving equality seems to be a stronger commitment of the German Court than the American Court.

Another difference is the logic and consistency of the two laws. American law has varied over time. Consider race as an example. In the 1940s and 1950s, race was a suspect class that applied only to minorities, triggering strict scrutiny.²⁵² Then, in the 1970s and 1980s, affirmative action for racial minorities developed and the Court would apply intermediate scrutiny.²⁵³ Finally, in the 1990s, strict scrutiny was applied to any racial classification, majority or minority status.²⁵⁴ Likewise, we have seen the inconsistent application of gender discrimination law under intermediate review.²⁵⁵ By contrast, German gender discrimination law has been applied fairly consistently over the same period. The judicial standard has changed from time to time. But whatever standard the Court applied, it still probed quite carefully for gender discrimination.

There may be several explanations for this. One may be the different natures of the countries' legal systems. The United States system is based on the common law, and this is reflected too in the thought process of the Supreme Court. Under common law reasoning, courts tend to focus on facts, deriving principles therefrom. But different fact scenarios can lead a court to change doctrinal positions, which can lead to a certain inconsistency in the law. By contrast, German law is based on the Roman law. The German version of Roman law calls for developing law into a science, where thinking must occur within a grand, internally consistent body of principles. It is a legal system based on a philosophic scheme.

252. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944).

253. E.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion).

254. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

255. Compare *Craig v. Boren*, 429 U.S. 190 (1976) (holding Oklahoma law that prohibits sale of 3.2% alcohol beer to males under the age of twenty-one but not females is unconstitutional), with *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (applying intermediate scrutiny to gender classifications very deferentially to uphold explicit facial gender inequality in the age requirement-eighteen-of males and females for statutory rape), and *United States v. Virginia*, 518 U.S. 515, 533 (1996) (restoring intermediate scrutiny to a degree of rigor by requiring that for gender differences "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.").

A still more fundamental reason may lie at the root of the two Court's different approaches: the vision of the Constitution they are pursuing, an American constitution of liberty as compared to a German constitution of dignity. Applying these visions to equality jurisprudence, American law mainly still follows the theory of *Carolene Products*: socio-economic measures are the province of the political process and, therefore, the courts will stay out as much as possible. By contrast, matters impinging on discrete and insular minorities or those who are politically powerless will trigger more intensive review by the Court. Essentially, the courts want to stay out of the fray, and leave matters to the democratic process, unless a fundamental right or some other matter of high magnitude is at issue. The nature and quality of the American polity is thus essentially one to be determined by political forces, within the framework of the Constitution; for equality, this means a fundamental right.

By contrast, under the German constitution of dignity the Court is obligated to carry out the vision of the Basic Law: human dignity, development of human personality and guarantee of personal and social security. The focus is on each person who is considered human and, therefore, of equal worth. In our discussion of equality, we can now see that the Court's across the board approach to all equality issues is rooted in the belief that equality for all truly matters, as a seminal value in society. Where those most vulnerable are involved, the Court will require affirmative measures to create equal conditions, an illustration of the proactive approach to realization of equality. In these respects, the Constitutional Court is quite a bit more proactive, intervening in the political process, as compared to the Supreme Court. At bottom, then, we can observe different patterns in the two constitutional orders concerning interpretation and application of equality.