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RESEARCH ARTICLE

Equality and its discontents: On the diversity of equality doctrines in comparative perspective

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Abstract

The meaning of equality is highly contested. As a result, courts across different jurisdictions have developed distinct doctrinal approaches to operationalize the concept. This article argues that four primary equality frameworks can be identified, each reflecting not only different understandings of equality but also varying degrees of judicial deference to the legislature and executive. The first is the *equality-as-non-discrimination* model, which predominates in most common law jurisdictions and dominates the theoretical discourse on equality. The second, prevalent in many continental European jurisdictions, is the *equality-as-reasonableness* model, under which courts apply a relatively strict standard of review, even in cases that do not involve suspect classifications. The third, the *positive-equality* model, recognizes that courts can derive positive obligations from the principle of equality. Finally, the *deferential* model largely entrusts the definition and implementation of equality to the legislature and executive. This article highlights the normative strengths and weaknesses of each model, arguing that no single approach holds an absolute normative advantage over the others. Instead, the suitability of a particular model depends on the societal and institutional context in which a court operates.

Keywords: affirmative action; deference; equality; indirect discrimination; reasonableness

Introduction

Equality stands at the center of many contemporary political debates. On the one hand, there is a perceived rise in social inequality.[1] This has not only led to a controversial political debate about how to address such inequality[2] but also to a fierce discussion over

[1]The hypothesis of rising social inequality has been prominently promoted by T Piketty, *Le capital au XXIe siècle* (Editions du Seuil, Paris, 2013).

[2]See, e.g., G Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (Alfred A. Knopf, New York, 2017); R Dixon and J Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 *The University of Chicago Law Review* 369–401; T Khaitan, 'Political Insurance for the (Relative) Poor: How Liberal Constitutionalism Could Resist Plutocracy' (2019) 8 *Global Constitutionalism* 536–70; K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, Princeton, 2019).

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whether this observation is indeed empirically robust.[3] On the other hand, there is an equally intense debate over the vulnerability of certain social groups and adequate means to protect such groups against discrimination. The *Black Lives Matter* movement, calling out continuing racial discrimination,[4] and the *#MeToo* debate, highlighting discrimination against and the sexual harassment of women, have not only drawn attention to existing social injustices but also provoked considerable political backlash.

Considering the pitfalls of political debates around equality, courts must tread carefully when they operationalize the meaning of equality. In this article, I argue that they have found different solutions to this challenge. The article identifies four distinct models of equality which diverge quite significantly.[5] These models are the *equality-as-non-discrimination* model, the *equality-as-reasonableness* model, the *positive-equality* model and the *deferential* approach to equality. I argue that none of these models has an absolute normative advantage over its alternatives. Instead, each has different normative strengths and weaknesses. Which model fits best depends on the societal and institutional context in which the court operates.

The article is largely a conceptual paper that describes the different models and discusses their normative strengths and weaknesses. However, it also has an empirical dimension, arguing that the four models can be observed in judicial practice. It draws on examples from a range of jurisdictions.[6] The assessments of the various jurisdictions discussed are based on an analysis that formed part of a larger comparative project focusing on the systematic examination of the constitutional equality case law of the jurisdictions under review.[7] The article proceeds in three steps. First, it examines the forms of equality norms in domestic constitutions and international human rights treaties. Second, the article recapitulates the international theoretical debate about the meaning of equality. The theoretical disagreement over how best to conceptualize equality gives courts significant leeway when they operationalize the concept. This is analyzed more closely in the third part, which introduces the various approaches to equality and discusses their normative strengths and weaknesses. The final part then advances the argument that there is no one-size-fits-all model for equality. Instead, the best approach depends on the cultural and institutional context in which a court operates.

[3]On the debate, see T Piketty, E Saez and G Zucman, 'Distributional National Accounts: Methods and Estimates for the United States' (2018) 133 *Quarterly Journal of Economics* 553–609 (arguing that there is rising inequality) and G Auten and D Splinter, 'Income Inequality in the United States: Using Tax Data to Measure Long-Term Trends' (2024) 132 *Journal of Political Economy* 2179–227 (arguing that there is not).

[4]On the BLM movement, see, e.g., CJ Lebron, *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford University Press, New York, 2017).

[5]For a different attempt to classify jurisprudential models of equality, see C McCrudden and S Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach* (European Commission, Brussels, 2009), who also identify four models of equality. These models are equality and rationality, equality as protected of prized public goods, non-discrimination, and equality as positive duties. There is some overlap with the models identified in this article, but also some conceptual differences. Furthermore, McCrudden and Prechal focus exclusively on the EU context, while this article draws examples from many aifferent regions in the world.

[6]The examples stem from the following jurisdictions: Brazil, Canada, Colombia, France, Germany, Poland, Singapore, the United Kingdom, the United States, as well as the American and the European Conventions of Human Rights.

[7]For complete empirical results of the project, see N Petersen (ed), *Equality's Guardians: How Courts Conceptualize Equal Protection and Non-Discrimination Guarantees* (Oxford University Press, Oxford, 2025). The data on the coding of the individual judgments of each analyzed jurisdiction can be accessed under: <https://doi.org/10.17879/73998667856>.

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Equality norms in a comparative perspective

Most domestic constitutions and international human rights treaties contain equality norms. The wording of these equality clauses is fairly similar, and they usually come in three different forms.[8] Some equality provisions are formulated as general equality norms, stipulating that everyone is equal before the law. Examples are the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution or Article 24 of the American Convention on Human Rights (ACHR).

Another set of norms is framed as non-discrimination provisions. These protect against distinctions based on certain specifically listed suspect grounds. Some non-discrimination clauses contain exhaustive lists, such as Section 21 of the New Zealand Human Rights Act (in conjunction with Section 19 of the New Zealand Bill of Rights Act), while most include open-ended lists in which the enumerated grounds are merely illustrative. Examples of the latter include Article 14 of the European Convention on Human Rights (ECHR) and Article 3.IV of the 1988 Brazilian Constitution. Finally, many individual rights catalogs combine a general equality guarantee with a non-discrimination guarantee. Examples include Section 15 of the Canadian Charter of Rights and Freedoms, Article 3 of the German Constitution, Article 12 of the Constitution of Singapore and Article 26 of the International Covenant on Civil and Political Rights.

The specific form of an equality norm does not necessarily determine the equality doctrine that a court will apply. A key example of this is the jurisprudence of the U.S. Supreme Court.[9] Through its use of the tiered scrutiny framework, which applies heightened scrutiny to certain suspect classifications, the Court interprets the Equal Protection Clause as a non-discrimination provision. At the same time, non-discrimination norms do not preclude the application of a more stringent standard of review, even in the absence of a suspect classification. As noted, many such provisions contain open-ended lists that allow courts to address distinctions not explicitly enumerated.

The debate on the meaning of equality

While the language of equality norms in domestic constitutions and international human rights treaties is strikingly similar, the theoretical debate over the meaning of equality remains vigorous. Famously, Peter Westen argued in an influential article that equality is an 'empty idea'.[10] According to Westen, for equality to be operationalized as a legal norm, it must reference external standards of justice.[11] As a result, he claimed that equality was tautological and that protecting individual liberties alone was sufficient to safeguard it.[12]

[8]B-O Bryde and MA Stein, 'General Provisions Dealing with Equality' in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, London, 2012) 287, 288–89; M Florczak-Wator, 'Equality Rights' in W Babeck and A Weber (eds), *Writing Constitutions*, Vol. 2: Fundamental Rights (Springer, Cham, 2024) 247, 256.

[9]On the development of the equal protection doctrine of the U.S. Supreme Court, see RM Cover, 'The Origins of Judicial Activism in the Protection of Minorities' (1982) 91 *Yale Law Journal* 1287–316; M Klarman, 'An Interpretive History of Modern Equal Protection' (1991) 90 *Michigan Law Review* 213–318; RH Fallon, 'Strict Judicial Scrutiny' (2007) 54 *U.C.L.A. Law Review* 1267–337.

[10]P Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537–96.

[11]Westen (n 10) 557.

[12]Westen (n 10). See also J Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1988) 217–44; CJ Peters, 'Equality Revisited' (1997) 110 *Harvard Law Review* 1210–64; U Steinhoff, 'Against Equal Respect and Concern, Equal Rights, and Egalitarian Impartiality' in U Steinhoff (ed), *Do All Persons Have Equal Moral Worth? – On Basic Equality and Equal Respect and Concern* (Oxford University Press, Oxford, 2014) 142.

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However, Westen's argument has faced significant criticism. For one, his critique presupposes a formal understanding of equality, thereby excluding substantive conceptions.[13] Moreover, even formal equality can hold independent value, particularly in cases where measures draw distinctions that are plainly arbitrary.[14]

There is ongoing debate in the theoretical literature about the purpose of equality and non-discrimination norms. Many scholars draw a strong connection between equality and human dignity. For instance, Jeremy Waldron contends that equality is rooted in the recognition of every individual's equal self-worth.[15] Similarly, Deborah Hellman argues that non-discrimination norms serve to protect individuals from demeaning treatment.[16] Iyiola Solanke suggests that anti-discrimination laws are designed to guard against stigma[17] while Benjamin Eidelson emphasizes their role in addressing the disrespect shown towards the personhood of marginalized individuals.[18]

In her recent book, Sophia Moreau presents a pluralist theory of discrimination, arguing that the harm of discrimination can manifest in three distinct ways: through the unfair subordination of individuals, the infringement of their deliberative freedom or the denial of access to a basic good.[19] Similarly, Sandra Fredman underscores the importance of substantive equality in her work on discrimination law.[20] She advances a four-dimensional model of substantive equality, comprising a redistributive dimension aimed at redressing existing disadvantages, a recognition dimension focusing on the promotion of dignity and self-worth, a participative dimension fostering political and social inclusion and a transformative dimension facilitating the accommodation of difference and structural change.[21] Additionally, several scholars contend that non-discrimination norms are designed to protect groups that face systemic or structural disadvantages, often arising from biases, discriminatory preferences or pervasive negative stereotypes.[22]

This English-language discussion of equality remains largely theoretical. Most approaches focus on an understanding of equality as a non-discrimination guarantee designed to protect disadvantaged groups. When judicial case law is cited, it predominantly draws on examples from common law jurisdictions. Expanding the focus to include legal scholarship outside of common law systems reveals conceptions of equality that extend beyond non-discrimination. In France, a 'republican' and 'universalist' interpretation of

[13]For such a conception, see, e.g., S Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712–38.

[14]K Greenawalt, 'How Empty Is the Idea of Equality?' (1983) 83 *Columbia Law Review* 1167–85; K Greenawalt, '"Prescriptive Equality": Two Steps Forward' (1997) 110 *Harvard Law Review* 1265–90.

[15]J Waldron, *One another's Equals: The Basis of Human Equality* (Harvard University Press, Cambridge, 2017) 66–83.

[16]D Hellman, *When Is Discrimination Wrong?* (Harvard University Press, Cambridge, 2008); D Hellman, 'Equality and Unconstitutional Discrimination' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, Oxford, 2013) 51.

[17]I Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart, Oxford, 2017).

[18]B Eidelson, *Discrimination and Disrespect* (Oxford University Press, Oxford, 2015).

[19]S Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, New York, 2020).

[20]S Fredman, *Discrimination Law* (Oxford University Press, Oxford, 2022) 29–45.

[21]Fredman (n 20) 29–45.

[22]L Alexander, '*What Makes Wrongful Discrimination Wrong? – Biases, Preferences, Stereotypes, and Proxies*' (1992) 141 University of Pennsylvania Law Review 149–219; S Choudhry, 'Distribution versus Recognition: The Case of Anti-Discrimination Laws' (2000) 9 *George Mason Law Review* 145–178.

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equality – skeptical of an emphasis on disadvantaged groups – has been particularly prominent.[23] In Germany, equality is often understood in formal terms, rooted in an Aristotelian conception of justice.[24]

However, these accounts usually focus on individual jurisdictions. This article seeks to integrate these diverse understandings of equality into a common analytical framework, thereby enriching the international discussion with perspectives from jurisdictions beyond the common law tradition. It primarily draws on judicial interpretations of equality observed across different legal systems. The article identifies four distinct models of equality, demonstrating that judicial approaches to equality often diverge from the non-discrimination model prevalent in common law contexts. Finally, it examines the normative strengths and weaknesses of these models to assess whether a gold-standard can be identified for the operationalization of equality.

Classifying competing understandings of equality

When courts operationalize equality, they also implicitly engage with the role of judicial review. There are various ways to conceptualize the relationship between the judiciary and the legislative or executive branches. The legitimacy of judicial review remains a subject of intense debate within legal scholarship,[25] and different legal systems have offered

[23]See, e.g., J Gilbert and D Keane, 'Equality versus Fraternity? Rethinking France and Its Minorities' (2016) 14 *International Journal of Constitutional Law* 883–905; S Hennette-Vauchez and E Fondimare, 'Incompatibility between the 'French Republican Model' and Anti-Discrimination Law? Deconstructing a Familiar Trope of Narratives of French Law' in B Havelková and M Möschel (eds), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press, Oxford, 2019) (critically discussing the principles of republicanism and universalism that are often embraced in the French discussion, arguing that these frameworks support a formal understanding of equality).

[24]See Stefan Huster, *Rechte und Ziele—Zur Dogmatik des allgemeinen Gleichheitssatzes* (Duncker & Humblot, Berlin, 1993); Simon Kempny and Philipp Reimer, Die Gleichheitssätze (Mohr Siebeck, Tübingen, 2012). But in the German literature, there are also approaches focusing on the non-discrimination dimension of equality, see, e.g., S Baer, *Würde oder Gleichheit?* (Nomos, Baden-Baden, 1995); U Sacksofsky, *Das Grundrecht auf Gleichberechtigung — Eine rechtsdogmatische Untersuchung zu Artikel 3 Absatz 2 des Grundgesetzes* (2nd edn, Nomos, Baden-Baden, 1996); AK Mangold, *Demokratische Inklusion durch Recht* (Mohr Siebeck, Tübingen, 2021).

[25]See, e.g., AM Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (Yale University Press, New Haven, 1962); WH Rehnquist, 'The Notion of a Living Constitution' (1976) 54 *Texas Law Review* 693–706; JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980); B Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013–72; A Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849–65; RH Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, New York, 1990); B Ackerman, *We the People: Foundations* (Harvard University Press, Cambridge, 1991); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, 1996); M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, 1999); J Waldron, *Law and Disagreement* (Oxford University Press, New York, 1999); LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Harvard University Press, Cambridge, 2004); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346–406; R Bellamy, Political Constitutionalism. *A Republican Defense of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007); MJ Perry, *Constitutional Rights, Moral Controversy, and the Supreme Court* (Cambridge University Press, New York, 2009); S Gardbaum, 'Are Strong Constitutional Courts always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285–320; D Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (Hart, Oxford, 2015).

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divergent answers regarding the role of courts in the political process. Given that the meaning of equality is contested, its operationalization is not merely a technical exercise. Courts must define the principles of comparability and likeness and determine the extent to which equality encompasses issues such as redistribution and affirmative action. It follows that when courts operationalize equality in different ways, these approaches to equality also reflect distinct understandings of the role of judicial review.

This article identifies four distinct models of equality. These models reflect not only different conceptions of equality but also varying levels of judicial deference to the legislature and the executive. The first model is the *equality-as-non-discrimination* model that we can find in most common law jurisdictions and that is dominant in the theoretical discussion on equality. Courts adhering to this approach focus on distinctions based on certain suspect characteristics. In such cases, they apply a stricter standard of review, whereas distinctions not involving a suspect characteristic are examined under a more deferential standard. Consequently, applicants in equality cases rarely succeed if the challenged distinction does not concern a suspect characteristic.

A second model, prevalent in many continental European jurisdictions, is the *equality-as-reasonableness* model. Under this approach, courts apply a relatively strict standard of review even in cases that do not involve a suspect classification. While this does not preclude differentiated standards depending on whether a suspect distinction is at issue, cases without a suspect classification still have a reasonable chance of success. The third model is the *positive-equality* model, which is even less deferential than the *equality-as-reasonableness* approach. Under this model, courts derive positive obligations from the principle of equality and impose these obligations on the legislature or the executive. The final model, the *deferential* model, largely leaves the determination of the meaning of equality to the legislature and the executive and refrains from subjecting political decisions to strict judicial scrutiny.

Before delving into the discussion of the different models, a few caveats are in order. First, the identified models are only approximations. There are often meaningful differences in the equality doctrines of courts that adhere to the same model. For instance, while both the Supreme Courts of Canada and the United States follow a non-discrimination conception of equality, they have conceptualized this idea in significantly distinct ways. Second, the boundaries between the models are not always clearly defined. A court may largely follow the *equality-as-reasonableness* model, yet still place considerable emphasis on protecting disadvantaged groups from discrimination. Likewise, a court that imposes positive obligations on the legislature may nonetheless adhere to either the *equality-as-non-discrimination* or the *equality-as-reasonableness* model when assessing state measures that distinguish between different groups of individuals. Nevertheless, classifying these models remains useful. Models necessarily simplify by emphasizing key characteristics.[26] We can think of them as analogous to maps: just as a map simplifies complex terrain, a large-scale map offers more detail while a small-scale map provides a broader overview. A map that attempted to depict everything at full scale would be largely impractical.

The equality as non-discrimination approach

The *equality-as-non-discrimination* approach is among the most prominent frameworks in both theoretical discussions of equality and non-discrimination and judicial practice.

[26]See C Engel, 'Öffentlichkeitsarbeit' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. Band IV: Aufgaben des Staates (C.F. Müller, Heidelberg, 2006), para 29.

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This approach primarily targets distinctions drawn on the basis of suspect classifications. When such classifications are involved, courts adhering to this model generally apply a stricter standard of review, giving applicants a reasonable chance of success. Conversely, distinctions not based on suspect classifications are subject to a more deferential standard of review. A well-known example of this approach is the tiered scrutiny framework employed by the U.S. Supreme Court in cases under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Under this framework, the Court applies heightened scrutiny – either strict or intermediate – when evaluating distinctions based on specific suspect classifications. For instance, race[27] and national origin[28] trigger strict scrutiny, while sex[29] and extramarital birth[30] prompt intermediate scrutiny. Although heightened scrutiny does not guarantee that a distinction will be found unconstitutional, challenges are more likely to succeed under this standard.[31] In contrast, in the absence of a suspect classification, the Court applies the more deferential rational basis test.[32] According to a common formulation of the test, an equal protection challenge is unsuccessful 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'.[33] Cases reviewed under the rational basis test rarely succeed.[34]

The equality-as-non-discrimination approach is also widely applied by courts outside the United States, particularly in common law jurisdictions. One example is the equality jurisprudence of the Supreme Court of Canada under Section 15 of the Canadian Charter of Rights and Freedoms.[35] The Canadian Supreme Court has consistently required that distinctions be based on a suspect classification – that is, on grounds either explicitly listed in Section 15 (1) of the Charter or analogous to them.[36] No case under Section 15 (1) has succeeded without involving a suspect classification.[37]

[27]*McLaughlin v Florida*, 379 US 184, 196 (1964).

[28]*Graham v Richardson*, 403 US 365, 371–72 (1971).

[29]*Craig v Boren*, 429 US 190 (1976).

[30]*Clark v Jeter*, 486 US 456, 461 (1988).

[31]See A Winkler, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts' (2006) 59 *Vanderbilt Law Review* 793–871.

[32]On the deferential nature of the rational basis test, see E Chemerinsky, 'The Rational Basis Test is Constitutional (and Desirable)' (2016) 14 *Georgetown Journal of Law & Public Policy* 402.

[33]*FCC v Beach Communications, Inc*, 508 US 307, 314 (1993).

[34]There are certainly some successful cases, but these cases are rare, and, in some cases, they also concern a suspect classification, like sexual orientation, even if the latter does not trigger heightened scrutiny. On rational basis review, see GL Pettinga, 'Rational Basis with Bite: Intermediate Scrutiny by Any Other Name' (1987) 62 *Indiana Law Journal* 779–804; RC Farrell, 'Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans' (1999) 32 *Indiana Law Review* 357–419; M Oshige McGowan, 'Lifting the Veil on Rigorous Rational Basis Scrutiny' (2012) 96 *Marquise Law Review* 377–460; K Yoshino, '*Why the Courts Can Strike down Marriage Restrictions under Rational Basis Review*' (2013) 37 NYU Review of Law & Social Change 331–337; R Holoszyc-Pimentel, 'Reconciling Rational Basis Review: When Does Rational Basis Bite?' (2015) 90 *New York University Law Review* 2070–117; Chemerinsky (n 32); KR Eyer, 'The Canon of Rational Basis Review' (2018) 93 *Notre Dame Law Review* 1317–70.

[35]Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982, ch. 11.

[36]See Law Society of *British Columbia v Andrews*, [1989] 1 SCR 143, 174; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 548–549; *R v Kapp*, [2008] 2 SCR 484, 502; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, 410; *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 557; *Fraser v Canada (Attorney General)*, [2020] 3 SCR 113, 162; *R v Sharma*, 2022 SCC 39 para 31.

[37]For a critical appraisal of the equality case law of the Supreme Court of Canada, see, e.g., CD Bredt and AM Dodek, 'Breaking the Law's Grip on Equality: A New Paradigm for Section 15' (2003) 20 *Supreme Court Law Review* 33–64; PW Hogg, 'What Is Equality? The Winding Course of Judicial Interpretation' (2005)

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Similarly, the U.K. Supreme Court (formerly the House of Lords) follows an *equality-as-non-discrimination* approach when addressing differential treatment under Article 14 of the ECHR. The Court requires that such treatment be based on 'status',[38] a concept referring to grounds either expressly enumerated in Article 14 or analogous to them. Initially, the U.K. Supreme Court interpreted this term narrowly, restricting it to personal characteristics.[39] More recently, however, the Court has taken a broader view, extending the concept beyond traditional suspect classifications.[40] The Court also adjusts the standard of review in its justification analysis depending on the classification involved. For distinctions based on grounds such as sex or sexual orientation, the Court demands 'very weighty reasons'.[41] For others, it applies a more deferential 'manifestly without reasonable foundation' test.[42] In practice, cases not involving suspect classifications rarely succeed.[43]

A key advantage of the equality-as-non-discrimination approach is its capacity to address the 'likeness' challenge posed by Peter Westen.[44] Rather than focusing on whether individuals are alike, it emphasizes the inherently problematic nature of certain distinctions. For example, distinctions based on race are considered problematic regardless of whether the individuals being compared are otherwise similar. However, this approach also presents several difficulties, four of which will be discussed in more detail below.

The first challenge concerns the identification of suspect criteria. While the problematic nature of some criteria, such as race, seems evident, other cases are less clear and require abstract principles to define suspect classifications. The second challenge concerns indirect discrimination. If non-discrimination norms address only direct discrimination, they can easily be circumvented by the use of alternative, facially neutral criteria that are strongly correlated with suspect classifications. Yet, the extent to which indirect discrimination is covered remains a matter of ongoing debate. The third challenge arises in relation to affirmative action. If distinctions based on certain characteristics are

29 *Supreme Court Law Review* 39; SR Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 *Journal of Law & Equality* 81–96; J Koshan and J Watson Hamilton, 'Meaningless Mantra: Substantive Equality after Whithler' (2011) 16 *Review of Constitutional Studies* 31–62; J Koshan and J Watson Hamilton, 'The Continual Reinvention of Section 15 of the Charter' (2013) 64 *University of New Brunswick Law Journal* 19–53; M Eberts and K Stanton, 'The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence' (2018) 38 *National Journal of Constitutional Law* 89–124. For an empirical examination of the early case law, see B Ryder, C Faria and E Lawrence, 'What's Law Good For? An Empirical Overview of Charter Equality Decisions' (2004) 24 *Supreme Court Law Review* 1–34.

[38]*R (Stott) v Secretary of State for Justice*, [2018] UKSC 59, para 8 (per Lady Black); *R (DA) v Secretary of State for Work and Pensions*, [2019] UKSC 21, para 136 (per Lady Hale); *A v Criminal Injuries Compensation Authority*, [2021] UKSC 27, para 22 (per Lord Lloyd-Jones).

[39]See, e.g., *R (Clift) v Secretary of State for the Home Department*, [2006] UKHL 54, para 42 (per Lord Hope of Craighead); *R (RJM) v Secretary of State for Work and Pensions*, [2008] UKHL 63, para 36 (per Lord Neuberger of Abbotsbury).

[40]See, e.g., *R (DA) v Secretary of State for Work and Pensions*, [2019] UKSC 21, paras 38–39 (per Lord Wilson); *Gilham v Ministry of Justice*, [2019] UKSC 44, para 32 (per Lady Hale).

[41]See *R (Steinfeld) v Sceretary of State for International Development*, [2018] UKSC 32, para 20 (per Lord Kerr); *R (SC) v Secretary of State for Work and Pensions*, [2021] UKSC 26, para 118 (per Lord Reed).

[42]On this test, see R O'Connell, 'A Dialogue on Discrimination and Equality: The UK Supreme Court and Article 14 of the ECHR' in B Dickson and C McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Bloomsbury, Oxford, 2021) 279, 290–93.

[43]The only successful case is *Gilham v Ministry of Justice*, [2019] UKSC 44, where the court had to deal with an arguably arbitrary distinction of classes of employees for the purpose of whistleblower protection.

[44]See Westen (n 10).

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inherently suspect, can positive measures intended to benefit disadvantaged groups still be justified? Finally, there is the question of whether the equality-as-non-discrimination approach is under-inclusive, as it may fail to address problematic distinctions that do not involve suspect classifications.

Identifying suspect criteria

The equality-as-non-discrimination approach faces its first major challenge in identifying suspect criteria. When a constitution includes a non-discrimination clause in its fundamental rights catalog, it often enumerates specific problematic grounds of distinction. However, such lists are typically open-ended, allowing courts to expand them. Moreover, some courts apply the *equality-as-non-discrimination* framework even when the relevant constitutional provision is a broader equality guarantee. A prominent example is the Equal Protection Clause of the Fourteenth Amendment, which guarantees 'the equal protection of the laws'. This raises the question of which criteria of distinction warrant a heightened standard of review.

A comparative examination of case law reveals that judicial reasoning in identifying suspect criteria is often apodictic. One influential reference point is certainly the famous footnote 4 in *Carolene Products*, which called for 'more searching judicial inquiry' when 'discrete and insular minorities' are affected.[45] Yet this statement was merely *obiter dictum*. In many cases, the reasoning is more restrained. When the U.S. Supreme Court introduced intermediate scrutiny for sex discrimination in *Craig v. Boren*, Justice Brennan justified the new standard by referring to the Court's earlier decision in *Reed v. Reed*.[46] However, although *Reed* concerned sex-based distinctions, it was decided under rational basis review.[47] Similarly, when the European Court of Human Rights (ECtHR) recognized sexual orientation as a ground for discrimination, it simply stated that sexual orientation is 'a concept which is *undoubtedly* covered by Article 14 of the Convention'.[48]

To better understand what constitutes a suspect criterion, it is helpful to turn to the theoretical literature. Considerable debate exists over what defines the suspect nature of a distinguishing characteristic.[49] In her seminal textbook on anti-discrimination law, Sandra Fredman identifies four factors that may determine the suspectness of a classification.[50] These factors are immutability, access to the political process, dignity and historical disadvantage.[51] Fredman argues that each of these factors has weaknesses and that no single element can definitely determine whether a criterion of distinction should be regarded as suspect.[52] Instead, she proposes that courts consider all of these factors and make a context-sensitive determinations in light of the concrete circumstances of each case.[53]

In his influential monograph *A Theory of Discrimination Law*, Tarun Khaitan advances two cumulative criteria.[54] First, there must be a significant advantage gap

[45] *United States v Carolene Products Co*, 304 US 144 (footnote 4) (1938).

[46] *Craig v Boren*, 429 US 190, 197 (1976).

[47] *Reed v Reed*, 404 US 71, 75–77 (1971).

[48] *Salgueiro da Silva Mouta v Portugal*, ECHR 1999-IX 309, para 28 (emphasis added).

[49] See, e.g., Ely (n 25) 135–79; JM Balkin, 'The Constitution of Status' (1997) 106 *Yale Law Journal* 2313–74; CR Sunstein, 'The Anticaste Principle' (1994) 92 *Michigan Law Review* 2410–55; T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015) 49–62.

[50] Fredman (n 20) 205–18.

[51] Fredman (n 20) 205–18.

[52] Fredman (n 20) 218.

[53] Fredman (n 20) 218.

[54] Khaitan (n 49) 49–62.

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between groups.[55] Second, the distinguishing characteristic must either be immutable or reflect a fundamental choice.[56] The first criterion corresponds to two of Fredman's factors – the lack of access to the political process and historical disadvantage or marginalization.[57] These considerations are indicative of, and reflect, structural disadvantages that certain groups face within society and the political process.

The second criterion concerns the legitimacy of the disadvantage gap. Without this qualification, even competitive electoral systems could be regarded as discriminating against political ideologies that consistently lose. Distinctions based on immutability have long been considered particularly invidious.[58] Characteristics such as skin color or sex are difficult or impossible to change, preventing individuals from easily aligning with the majority.[59] However, immutability alone is too narrow.[60] Characteristics like religion, while technically changeable, form a core part of an individual's identity, making compelled change normatively unacceptable. To account for this, Khaitan includes fundamental choices within the scope of non-discrimination protections.[61]

Despite the strength of these criteria, borderline cases arise in which it is unclear whether a characteristic satisfies both conditions. Consider age: it may generate significant advantage gaps depending on context, and it is immutable in the sense that individuals cannot choose their age.[62] Yet, because most people experience all life stages, age groups are transitory and thus differ fundamentally from characteristics such as race or sex. Comparative judicial practice reflects this ambiguity. Age treated as a suspect characteristic in some jurisdictions, such as the European Union,[63] but not in others.

Nationality presents another complex example. Non-nationals often face disadvantage gaps due to their lack of political power. Although not entirely immutable, acquiring new citizenship can involve significant legal barriers, and many individuals may choose to retain their birth nationality because of its deep connection to their identity. For this reason, the U.S. Supreme Court has applied strict scrutiny to distinctions based on national origin in certain cases.[64] However, distinctions based on nationality are commonly accepted in some contexts. Voting rights are usually (though not universally[65])

[55]Khaitan (n 49) 50.

[56]Khaitan (n 49) 50.

[57]See Khaitan (n 49) 52–56 (Khaitan distinguishes between political, socio-cultural and material disadvantage, but the latter two factors are close to the factor of historical disadvantage discussed by Fredman); Fredman (n 20) 210–14, 217. See also Fiss (n 57) 144–45; Hellman, *Wrong?* (n 16) 14–15; Sunstein (n 49) 2433. On the lack of political power as a decisive characteristic of vulnerability, see W Sadurski, *Equality and Legitimacy* (Oxford University Press, Oxford, 2008) 142–43; V Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions* (Hart, Oxford, 2021) 66; W Sadurski, *Constitutional Public Reason* (Oxford University Press, Oxford, 2022) 251–52.

[58]Fredman (n 20) 206–07.

[59]Balkin (n 49) 2366.

[60]C Albertyn and J Kentridge, 'Introducing the right to equality in the interim constitution' (1994) 10 *South African Journal on Human Rights* 149, 168; Fredman (n 20) 208; Miyandazi (n 57) 61–63.

[61]Khaitan (n 49) 58–59.

[62]For a forceful defence of age as a suspect characteristic, see S Goosey, 'Is Age Discrimination a Less Serious form of Discrimination?', 39 *Legal Studies* (2019) 533.

[63]See, e.g., Case C-144/04, *Mangold*, EU:C:2005:709; Case C-555/07, *Kücükdevici*, EU:C:2010:21; Case C-297/10, *Hennings and Mai*, EU:C:2011:560; Case C-441/14, *Dansk Inustrie*, EU:C:2016:278; Case C-24/17, *Österreichischer Gewerkschaftsbund*, EU:C:2019:373; C-396/17, *Leitner*, EU:C:2019:375.

[64]See *Graham v Richardson*, 403 US 365, 371–72 (1971).

[65]See, e.g., Section 74 of the NZ Electoral Act 1993.

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limited to nationals. Furthermore, only nationals have an automatic right of residence. This ambiguous status of nationality was noted by Lady Hale in *R (Ali) v Secretary of State for the Home Department*, where she observed that '*in the context of immigration*, nationality is not a particularly "suspect" classification'.[66] However, the quote also highlights that there may be other contexts where nationality is a suspect characteristic. This discussion demonstrates that whether a characteristic is considered suspect often depends on context and remains a matter of continuing debate.

Indirect discrimination

Another contentious issue concerns how to address indirect discrimination.[67] Limiting heightened scrutiny for suspect classifications to cases of explicit discrimination would make it easy to circumvent anti-discrimination protections.[68] A decision-maker could simply rely on a facially neutral characteristic closely correlated with a suspect classification to target a disadvantaged group. Consequently, it is widely accepted that intentional discrimination is prohibited even when the criterion appears neutral on its face.[69] However, significant debate remains over the extent to which indirect discrimination is prohibited beyond intentional cases. In the United States, the Supreme Court requires proof of discriminatory intent before applying the heightened scrutiny in constitutional equality cases.[70]

However, discriminatory intent is often difficult to prove.[71] Moreover, there are strong normative reasons to protect disadvantaged groups from indirect discrimination even in the absence of discriminatory intent.[72] Accordingly, the restrictive approach of the U.S. Supreme Court has been largely rejected outside of the United States.[73] Many courts accept that a policy producing a disparate impact on a disadvantaged group[74] can amount

[66]*R (Ali) v Secretary of State for the Home Department*, [2015] UKSC 68, para 57 (per Lady Hale) (emphasis added).

[67]The distinction between direct and indirect discriminations is not always clear-cut, see T Khaitan, 'Indirect Discrimination' in K Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, London, 2017) 34; A Yu, 'Direct Discrimination and Indirect Discrimination: A Distinction with a Difference' (2019) 9 *Western Journal of Legal Studies* 1, 3; N Jain, 'Manufacturing Statelessness' (2022) 116 *American Journal of International Law* 237, 278. One can either focus on discriminatory intent or on whether the measures is facially based on a suspect ground. For the purposes of this argument, I will adopt the latter conceptualization.

[68]See R Siegel, 'Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action' (1997) 49 *Stanford Law Review* 1111–48.

[69]See H Collins and T Khaitan, 'Indirect Discrimination Law: Controversies and Critical Questions' in H Collins and T Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart, London, 2018) 1, 4; Mangold (n 24) 242–46.

[70]See *Wash v Davis*, 426 US 229 (1976); *McCleskey v Kemp*, 481 US 279, 292 (1987).

[71]Ely (n 25) 138. On different ways to prove discriminatory intent, see AZ Huq, 'What is Discriminatory Intent?' (2018) 103 *Cornell Law Review* 1265–84.

[72]See Collins and Khaitan (n 69) 17; GL Neuman, 'Questions of Indirect Discrimination on the Basis of Religion' (2021) 34 *Harvard Human Rights Journal* 177–94; Mangold (n 24) 242–46.

[73]The focus on discriminatory intent has also been challenged in legal scholarship, see, e.g., Klarman (n 9) 312; Siegel (n 68) 1143; RB Siegel, 'Equality Divided' (2013) 127 *Harvard Law Review* 1–94; IF Haney López, 'Equal Protection as Intentional Blindness' in A Richardson Oakes (ed), *Controversies in Equal Protection Cases in America* (Ashgate, Farnham, 2015) 67; Moreau (n 19) 183–208; Fredman (n 20) 259–62; Sadurski, *Equality and Legitimacy* (n 57) 173–74.

[74]On the question of how to determine whether there is a disparate impact, see Khaitan (n 49) 32–34.

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to indirect discrimination even without evidence of intent.[75] For example, the Court of Justice of the European Union (CJEU) has famously held that disadvantaging part-time employees compared to full-time employees constitutes indirect discrimination based on sex, given that most part-time employees are women, while men disproportionately occupy full-time positions.[76]

Even if a disparate impact on a disadvantaged group is considered discriminatory in principle, this does not mean every case is straightforward. Legitimate policy choices can sometimes produce a disparate impact, and it is not always obvious that this constitutes indirect discrimination. Consider a government subsidy program for start-ups. If the program prioritizes AI start-ups to promote future technologies, and the AI start-up sector is male-dominated while female entrepreneurs focus more on fields like health or consumer-goods industries, the program would disproportionately benefit men. Would this constitute indirect discrimination against women?

In judicial practice, courts rarely address this issue explicitly. When they do, it is typically analyzed within the general justification framework. A policy that produces a disparate impact on a disadvantaged group may be justified if it pursues a legitimate aim and is proportionate.[77] However, the proportionality test involves balancing competing normative values, and there are no clear standards for determining how those values and interests should be weighed in a balancing test.[78] In the case of the start-up subsidy scheme, for example, the test offers little guidance on how to balance the goal of investing in future technologies against the principle of equal opportunities for female entrepreneurs.

To address these challenges, several legal scholars have proposed a more theoretically grounded approach.[79] They argue that disparate impact becomes problematic when it reflects structural inequalities in society.[80] Under this framework, the CJEU's jurisprudence on part-time employees[81] is well justified, since women disproportionately work part-time owing to greater childcare responsibilities. This pattern reflects traditional gender roles and, therefore, structural inequalities.

[75]See, e.g., *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143, 174; *Fraser v Canada (Attorney General)*, 2020 SCC 28, para 69; Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607; *D.H. v Czech Republic* [GC], ECHR 2007-IV 241, para 184; *Althammer et al. v Austria*, CCPR/C/78/D/998/2001 (HRCttee, 8 Aug 2003), para 10.2.

[76]Case 96/80, *Jenkins v Kingsgate*, [1981] ECR 911; Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607.

[77]See *D.H.* (n 75), para 196. For an excellent discussion of the judgment and its implication for the treatment of indirect discrimination under the ECHR, see B Havelková, 'Judicial Scepticism of Discrimination at the ECtHR' in H Collins and T Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart, Oxford, 2018) 83.

[78]This is a concern that has been raised for a long time in the normative discussion on proportionality and balancing. See, e.g., B Schlink, *Abwägung im Verfassungsrecht* (Duncker & Humblot, Berlin, 1976); TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 972–76; GCN Webber, *The Negotiable Constitution* (CUP, Cambridge, 2009) 92–93. For recent, more general discussions of proportionality balancing, see VC Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *Yale Law Journal* 3094–3196; J Greene, 'Rights as Trumps' (2018) 132 *Harvard Law Review* 28–132; A Stone Sweet and J Mathews, *Proportionality Balancing and Constitutional Governance* (Oxford University Press, Oxford, 2019).

[79]See Havelková (n 77); Mangold (n 24) 212–14; Neuman (n 72).

[80]Mangold (n 24) 212–14.

[81]See Case 96/80, *Jenkins v Kingsgate*, [1981] ECR 911; Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607.

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Assessing the start-up subsidy scheme, however, is more complex. One might argue that male dominance in the AI sector reflects gender-based differences in preferences and interests. Yet this explanation oversimplifies the issue. On the one hand, AI might be seen as more deserving of subsidies because political decision-making, like the AI sector, is male-dominated. This could mean that male political dominance shapes policy preferences favoring male-dominated industries. On the other hand, preferences are not inherently male or female but are socially constructed and shaped by cultural expectations. These latter considerations suggest that the subsidy scheme might also reflect structural discrimination. However, the example also underscores the difficulty of applying the concept of structural discrimination in practice – even if it is compelling in theory.

Affirmative action and positive measures to support disadvantaged groups

A third challenge concerns the treatment of positive measures: To what extent is it permissible to draw distinctions based on a suspect classification to benefit disadvantaged groups? This issue has been particularly contentious in the United States, where the Supreme Court applies strict scrutiny to affirmative action policies.[82] In *Regents of the University of California v Bakke*, Justice Powell asserted that '[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination'.[83] Although this does not mean that all affirmative action programs for racial minorities automatically violate the Equal Protection Clause, the high bar set by strict scrutiny is often difficult to meet.[84]

Most jurisdictions outside the United States take a more accommodating stance towards positive measures. For instance, Section 15 (2) of the Canadian Charter was drafted partly in response to the U.S. Supreme Court's restrictive position on affirmative action.[85] However, even in jurisdictions more receptive to such measures, the question of their permissible scope remains contested. Conceptually, there are two principal ways to prevent positive measures from being classified as violations of equality. One approach applies an asymmetric conception of discrimination that excludes positive measures from the definition of discrimination altogether. Alternatively, they can be considered *prima facie* discriminatory but ultimately justified under a justification analysis.

The first approach emphasizes the purpose of non-discrimination norms and advocates for their asymmetric application.[86] If these norms are designed to protect

[82]See *Regents of the Univ of Cal v Bakke*, 438 US 265, 289–91 (1978); *Wygant v Jackson Bd of Education*, 476 US 267, 274 (1986); *Richmond v JA Croson Co*, 488 US 469, 493 (1989); *Adarand Constructors v Pena*, 515 US 200, 222 (1995); *Gratz v Bollinger*, 539 US 244, 257 (2003); *Grutter v Bollinger*, 539 US 306, 321 (2003); *Parents Involved in Cmty Sch v Seattle Sch Dist No 1*, 551 US 701, 720 (2007); *Fisher v Univ of Tex*, 570 US 297 (2013); *Fisher v Univ of Tex II*, 579 US 365 (2016); *Students for Fair Admissions, Inc v President and Fellows of Harvard College*, 600 US 181 (2023). For criticism of this approach, see, e.g., N Gotanda, 'A Critique of "Our Constitution Is Color-Blind"' (1991) 44 *Stanford Law Review* 1; K Yoshino, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"' (1998) 108 *Yale Law Journal* 485; Sadurski, *Equality and Legitimacy* (n 57) 111–124; Khaitan (n 49) 61–62; A McColgan, *Discrimination, Equality and the Law* (Hart, Oxford, 2016) 70–100.

[83]*Bakke* (n 82) 291.

[84]See, most recently, *Students for Fair Admissions, Inc v President and Fellows of Harvard College* (n 82).

[85]WS Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 257.

[86]See Fiss (n 57); Yoshino (n 82); Khaitan (n 49) 61–62. See also JM Balkin and R Siegel, 'The American Civil Rights Tradition: Anticlassification or Antisubordination' (2003) 2 *Issues in Legal Scholarship* 1–17, who distinguish between an 'antisubordination' and an 'anticlassification' principle. While this distinction does

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disadvantaged groups, it follows that individuals outside those groups should not be able to claim discrimination. However, this reasoning has its limitations. Disadvantage is context-dependent and relative: a group may be more disadvantaged than one but less disadvantaged than another. Consider, for example, Asian Americans seeking admission to elite U.S. universities. Arguably, they are socially more disadvantaged than white Americans but less disadvantaged than African Americans. Second, measures that formally disadvantage members of a non-disadvantaged group can still perpetuate harmful stereotypes. Consider, for example, policies granting automatic survivor's benefits to the widows of deceased male employees but denying the same benefits to widowers of deceased female employees.[87] Such rules technically disadvantage men, yet they also reflect and reinforce the problematic stereotype of men as the primary breadwinners.

The second approach focuses on the justification analysis.[88] Under this framework, positive measures benefiting disadvantaged groups are considered *prima facie* discriminatory but may be justified. While this approach offers greater flexibility, it also poses challenges. Notably, courts must develop clear standards for determining which types of positive measures are permissible. The debates surrounding women's quotas and preferential university admissions illustrate the complexity of assessing positive measures on a case-by-case basis, even when they are deemed legitimate in principle. As a result, many courts – even outside the United States – frequently conclude that certain positive measures violate non-discrimination norms. A notable example is the jurisprudence of the CJEU, which has imposed limits on the use of women's quotas in public-sector hiring.[89]

Under-inclusiveness

The final challenge of the non-discrimination model lies in its potential under-inclusiveness. Some scholars contend that focusing exclusively on suspect classifications risks excluding other problematic distinctions from constitutional equality guarantees.[90] Adopting a less deferential standard of review for cases not involving a suspect classification would shift the framework towards the equality-as-reasonableness model, which is discussed below. However, this shift would also introduce the normative issues associated with that approach, particularly the lack of clear standards for justification analysis. Nevertheless, most jurisdictions do not entirely dismiss non-suspect equality claims. Courts adhering to the *equality-as-non-discrimination* model often address instances of arbitrary discrimination. For instance, many successful rational basis cases before the

not only refer to symmetric application, but also has consequences for the treatment of indirect discriminations, it has important implications for the question of symmetric application.

[87]See, e.g., *Weinberger v Wiesenfeld*, 420 U.S. 636 (1975); *Califano v Goldfarb*, 430 U.S. 199 (1977); *Wengler v Druggists Mutual Insurance Co*, 446 U.S. 142 (1980); *Willis v the United Kingdom*, Appl no 36042/97 (ECtHR, 11 June 2002); *Runkee and White v the United Kingdom*, Appl no 42949/98 (ECtHR, 10 May 2007); Case C-147/95, *Dimossia Epicheirissi Ilectrismou (DEI) v Efthimios Evrenopoulos*, [1997] ECR I-2060.

[88]See, e.g., Case C-450/93, *Kalanke*, [1995] ECR I-3051; *D.H.* (n 75), paras 196–204.

[89]Case C-450/93, *Kalanke*, [1995] ECR I-3051, para 22; Case C-409/95, *Marschall*, [1997] ECR I-6363, para 33; Case C-407/98, *Abrahamsson and Anderson*, [2000] ECR I-5539. For a discussion of the CJEU's approach, see U Belavusau and K Henrard, 'A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directive' (2019) 20 *German Law Journal* 614–636; M Bell, 'EU Anti-Discrimination Law: Navigating Sameness and Difference' in P Craig and G De Búrca (ed), *The Evolution of EU Law* (Oxford University Press, Oxford, 2021) 651.

[90]See Chemerinsky (n 32); Greene (n 78) 43–47.

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U.S. Supreme Court arguably address situations of arbitrary administrative or legislative actions.[91] Similarly, international human rights treaty bodies, which generally adhere to a non-discrimination approach, frequently correct arbitrary state conduct. Yet, the concept of arbitrariness remains elusive. It refers to decisions whose unreasonableness is glaringly obvious. However, lawyers can reasonably disagree on where to draw the line between truly arbitrary measures and those that are merely poor policy choices.[92]

The equality as reasonableness framework

The second major framework for understanding equality is the *equality-as-reasonableness* approach. Under this framework, any differentiation between comparable cases – regardless of the specific differentiating factor – raises a *prima facie* equality concern and places a significant burden of justification on the government or legislature.[93] Equality doctrines based on the *equality-as-reasonableness* framework typically build on the Aristotelian principle that like cases should be treated alike and different cases differently.[94] Once a court identifies unequal treatment of similar cases or equal treatment of dissimilar ones, it requires the government or the legislature to provide a justification for the distinction. This framework typically leads to a relatively high number of successful equality claims, even in cases that do not involve suspect classifications. For example, it applies to distinctions between employees and public servants[95] or between pharmacies located in train stations and other retail establishments within the same premises.[96]

Many judicial decisions applying the *equality-as-reasonableness* standard frequently review the rationality of tax and social-benefits legislation. For example, the German Federal Constitutional Court held in its 'pension taxation' decision that taxing public servants' pensions differently from those of employees under the general pension insurance scheme violated the equality clause of the German Constitution.[97] Similarly, the Polish Constitutional Tribunal extended the scope of a special pension scheme for police officers and other uniformed officials.[98] It held that customs officers were comparable to police officers, and excluding them from the scheme violated the constitutional guarantee of equality.[99]

These examples illustrate that the *equality-as-reasonableness* framework is less deferential than the *equality-as-non-discrimination* approach when it comes to cases not involving suspect criteria. In particular, the level of review is more demanding than the

[91]See See Lindsey v Normet 405 US 56 (1972); Eisenstadt v Baird 405 US 438 (1972); United States Dep't of Agric v Moreno 413 US 528 (1973); O'Brien v Skinner 414 US 524 (1974); Logan v Zimmerman Brush Co 455 US 422 (1982); Allegheny Pittsburgh Coal Co v County Com 488 US 336 (1989); Willowbrook v Olech 528 US 562 (2000). But see also, more recently, Armour v City of Indianapolis 566 US 673 (2012), where the Supreme Court has applied a more deferential standard so that it is doubtful whether the Court would still target arbitrary state action.

[92]C Massey, 'The New Formalism: Requiem for Tiered Scrutiny' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 945, 954.

[93]See also McCrudden and Prechal (n 5) 11–17, who identify the same trend under the label "equality and rationality".

[94]See, e.g., BVerfGE 129, 49, at 68 (for the German Federal Constitutional Court).

[95]See BVerfGE 105, 73.

[96]See BVerfGE 13, 225.

[97]BVerfGE 105, 73.

[98]Case K 39/13 (PCT, 3 March 2015).

[99]*Id.*

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rational basis test in the tiered scrutiny model of the U.S. Supreme Court. As the following discussion will show, many of the challenges associated with the *equality-as-non-discrimination* approach do not apply as strongly to the *equality-as-reasonableness* model, as it places less emphasis on suspect classifications. However, it raises different challenges – most notably its susceptibility to Peter Westen's critique of equality as an 'empty formula'.[100]

The role of suspect classifications

Even though courts applying the *equality-as-reasonableness* approach generally show less deference towards distinctions not based on suspect classifications than courts following the *equality-as-non-discrimination* approach, they do not necessarily employ a uniform standard of review. Instead, they often apply a stricter standard of review to distinctions based on suspect characteristics. For example, the German Federal Constitutional Court uses a sliding scale ('tierless') formula to operationalize the general constitutional equality guarantee. According to this formula, it applies a 'continuous constitutional standard of review based on the principle of proportionality'.[101] In practice, the Court mainly distinguishes between two levels of review.[102] Depending on the concrete distinction, it applies either a more 'generous standard of review'[103] or 'a stricter standard of review'[104].

The main difference to the *equality-as-non-discrimination* standard lies in the relative importance of non-suspect distinctions. While successful cases that do not involve a distinction based on a suspect characteristic are rare under the *equality-as-non-discrimination* model, they constitute the majority of successful claims under the *equality-as-reasonableness* model. For examples, although the German Federal Constitutional Court has issued some important decisions concerning discrimination based on sex or sexual orientation,[105] most successful equality challenges to legislation concern distinctions unrelated to a suspect classification – particularly in the areas of tax and social benefits.[106] Similarly, in Poland and France, the vast majority of distinctions found to violate the constitutional equality guarantee are not based on suspect classifications.[107] Consequently, if the success of a case does not depend strongly on whether the differentiating characteristic is qualified as suspect or not, the precise definition of what constitutes a suspect characteristic becomes less relevant.

[100]Westen (n 10).

[101]BVerfGE 129, 49, at 69.

[102]See N Petersen, 'Gleichheitssatz und Einzelfallgerechtigkeit', (2018) 57 *Der Staat* 327, 345.

[103]BVerfGE 129, 49, at 69–70; 132, 372, at 388.

[104]BVerfGE 133, 59, at 87; 138, 136, 184–85. See also BVerfGE 132, 179, at 189–90 ("strict proportionality review").

[105]See, e.g., BVerfGE 10, 59; 15, 337; 21, 329; 37, 217; 63, 181; 84, 9; 113, 1; 114, 357; 132, 72; 147, 1 (regarding sex discrimination); BVerfGE 126, 400; 133, 59 (regarding sexual orientation). For a discussion of the issue of sex discrimination, see Baer (n 24); Sacksofsky (n 24).

[106]See J Pietzcker, 'Der allgemeine Gleichheitssatz', in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, Volume V (C.F. Müller, Heidelberg, 2013), ch 125, paras 116–20; Petersen (n 102) 346–50. See also the dataset referenced above (n 7).

[107]See J Mrozinska, 'France', in Petersen (n 7) 113; J Mrozinska, 'Poland', in Petersen (n 7) 125. See also the dataset referenced above (n 7). For a detailed discussion of equality in France, see Ferdinand Melin-Soucramanien, 'Le principe d'égalité dans la jurisprudence du Conseil constitutionnel. Quelles perspectives pour la question prioritaire de constitutionnalité?' (2010) 29 *Les Nouveaux Cahiers du Conseil Constitutionnel* (Dossier: La question prioritaire de constitutionnalité) 89; Marie-Claire Ponthoreau, *Les principes d égalité et de non-discrimination, une perspective de droit comparé: France* (Parlement européen 2021).

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Indirect discrimination

Because the identification of a suspect criterion is less central under the *equality-as-reasonableness* approach than under the *equality-as-non-discrimination* model, the concept of indirect discrimination has long received little attention. More recently however, courts have recognized that it can nevertheless serve as a useful analytical framework. The German Federal Constitutional Court introduced the concept in a 1997 decision concerning distinctions between full-time and part-time employees in the context of old-age pension benefits for public servants.[108] The Court held that a distinction constitutes indirect discrimination 'based on gender even if the regulation is formulated in a gender-neutral manner, but primarily affects women'.[109] Similarly, the French Constitutional Council recognized the concept of indirect discrimination in the early 2000s.[110] By contrast, the Polish Constitutional Tribunal has, to date, not developed a specific doctrine addressing cases of indirect discrimination.

Affirmative action and positive measures to support disadvantaged groups

Conceptually, positive measures to support disadvantaged groups should not pose significant difficulties under the *equality-as-reasonableness* approach, as such questions can be analyzed within the general justification framework. However, there is no unified approach to positive measures among jurisdictions following this approach. The Polish Constitutional Tribunal has explicitly accepted positive measures for the support of women as 'compensatory privileges' aimed at reducing gender inequality.[111] In Germany, positive measures to achieve gender equality are recognized by Art. 3, para. 2 of the German Constitution. Nevertheless, the Federal Constitutional Court has rarely had the opportunity to rule directly on the issue.[112] By contrast, the French Constitutional Council has, on several occasions, invalidated gender quotas enacted by the legislature and required constitutional amendments to justify them.[113] This jurisprudence reflects a formal and symmetrical understanding of equality often associated with the so-called 'French republican model', which is widely perceived as hostile to the recognition of legal group rights.[114]

Under-inclusiveness

The principal advantage of the equality-as-reasonableness model is that it avoids the problem of under-inclusiveness identified in relation to the equality-as-non-discrimination model. Its less deferential stance towards distinctions that do not involve suspect classifications ensures that all potentially problematic differentiations are subject to scrutiny, extending beyond merely correcting arbitrary measures. However, the standard for

[108]BVerfGE 97, 35, at 43–44.

[109]BVerfGE 97, 35, at 43.

[110]Decision no 2002–463 DC (December 12, 2002).

[111]See, e.g., Cases K 15/99 (PCT, 13 June 2000); K 35/99 (PCT, 5 December 2000).

[112]See S Baer and N Markard, 'Art. 3 Abs. 2 und 3 GG' in PM Huber and A Voßkuhle (eds), *Grundgesetz. Band 1: Präambel, Artikel 1–19* (C.H. Beck, 8th ed 2024), Art. 3, paras 366–75.

[113]See Decision no 82–146 DC (French Constitutional Council, 18 November 1982); Decision no 2001–445 DC (French Constitutional Council, 19 June 2001). Cf. also Decision no 2003–483 DC (French Constitutional Council, 14 August 2003).

[114]See Hennette-Vauchez and Fondimare (n 23) 63–64 (explaining and describing this tendency, while normatively criticizing it).

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assessing distinctions that are not based on suspect classifications remains largely indeterminate. Once a court determines that comparable cases have been treated differently – or that dissimilar cases have been treated alike – courts impose a burden of justification on the government or the legislature. As Westen has demonstrated, the key difficulty lies in determining what constitutes likeness.[115] No two individuals or situations are identical in all respects.[116] The task, therefore, is to identify the relevant characteristics for comparison. Yet the selection of these comparator characteristics entails a normative judgment external to the concept of equality itself.[117]

At first glance, a potential solution to this problem is a broad interpretation of likeness. For instance, the German Federal Constitutional Court typically applies an expansive notion of likeness, ensuring that equality challenges rarely fail at this stage.[118] Instead, the Court shifts the focus to the justification analysis, determining whether the differential treatment is warranted. However, this approach does not resolve the problem – it merely relocates it from the determination of likeness to the justification analysis. The Court's reasoning illustrates this: it holds that unequal treatment can be justified if 'there are […] differences between the two groups of such a nature and such a weight that they can justify different treatment'.[119] This formulation highlights the core problem – it remains unclear how the Court establishes the normative standard for determining whether the differences between the groups are sufficiently significant to justify unequal treatment.

The German Federal Constitutional Court's ruling in the 'pension taxation' case serves as an apt illustration of this point.[120] The case addressed differences in the taxation of pensions for public servants versus those under the general pension insurance scheme. In Germany, most employees are enrolled in the general pension insurance system and contribute income-dependent amounts. Public servants, however, do not pay into that system; their pensions are instead financed through tax revenues. As a result, pensions from the general insurance scheme were partially tax-exempt, while public servants' pensions were fully taxed. The Federal Constitutional Court ruled that this disparity in taxation was unjustified, finding a violation of the constitutional equality guarantee.[121]

The Court emphasized inconsistencies in the pension system, particularly noting that the general pension insurance scheme was heavily subsidized by tax funds.[122] Nevertheless, it is remarkable that the Court – while repeatedly acknowledging the difficulty of comparing the two schemes –[123] still found that they were sufficiently similar to find that the unequal treatment was unjustified. This case demonstrates that the flexibility of the *equality-as-reasonableness* framework not only grants courts substantial discretion but also opens the door to potential judicial overreach. As a result, courts employing this framework assert broader powers of judicial review than those limiting themselves to cases involving suspect classifications.

[115]Westen (n 10) 543–48.

[116]Westen (n 10) 544.

[117]Westen (n 10) 546–47.

[118]See F Wollenschläger, 'GG Art 3' in PM Huber and A Voßkuhle (eds), *Grundgesetz, Band 1: Präambel, Artikel 1–19* (C.H. Beck, Munich, 8th ed 2024), Art. 3, paras 81–82.

[119]BVerfGE 129, 49, at 69.

[120]BVerfGE 105, 73.

[121]BVerfGE 105, 73, at 121.

[122]BVerfGE 105, 73, at 131.

[123]See BVerfGE 105, 73, at 116, 118, 120.

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The positive-equality framework

The third approach is the *positive-equality* framework. Unlike the previous two, it goes beyond addressing state measures that draw distinctions. It also imposes positive obligations on states to actively protect disadvantaged groups. In this respect, it shares similarities with the *equality-as-non-discrimination* model, in which affirmative action is a subject of considerable debate. However, while the affirmative action debate focuses on the extent to which legislatures or other authorities may adopt positive measures favoring disadvantaged groups, the *positive-equality* model grants courts the authority to mandate the government or legislature to implement such protective measures. These obligations can take various forms – for example, requiring the state to protect women against gender-based violence,[124] ensure workplace safety for vulnerable workers,[125] extend existing protections to other disadvantaged groups, or even establish social programs to support individuals from marginalized backgrounds.

This approach is predominantly found in several Latin American jurisdictions, such as Brazil or Colombia, as well as in the jurisprudence of the Inter-American Court of Human Rights (IACtHR).[126] A paradigmatic example is the *Fireworks Factory* case decided by the IACtHR.[127] The case concerned an explosion at a fireworks factory that killed more than sixty workers, most of whom belonged to vulnerable groups – predominantly poor, Black and female individuals. The Court held that Brazil had violated the equality norm under Article 24 of the ACHR. It ruled that this provision guarantees material equality and requires 'the adoption of positive measures of promotion in favor of groups that have historically been discriminated against or marginalized'.[128] The state had failed to 'reverse the situation of structural poverty and marginalization of the fireworks factory workers'[129] and to 'ensure that real measures were taken to protect the life and health of the workers and to guarantee their right to material equality'.[130]

Another illustrative example is *ADO 26*, a case before the Brazilian Supreme Court (*Supremo Tribunal Federal* – STF).[131] In that case, the STF derived a legislative obligation from the constitutional equality clause, requiring the enactment of criminal law provisions to protect victims of homophobia and transphobia.[132] Not every court that derives positive obligations from equality necessarily falls into the *positive-equality* category. For example, the ECtHR has, on several occasions, derived duties to protect[133] and to accommodate[134] disadvantaged individuals from Art. 14 ECHR. However, these positive

[124]See *Maria da Penha Maia Fernandes* v. *Brazil.* Report No. 54/01, Case 12.051 (IACommHR, 16 April 2001).

[125]See *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil (IACtHR, 26 Oct. 2020).*

[126]For a detailed assessment of the case law of the Brazilian STF and the IACtHR, see T Garcia Maia, *Judging Poverty and Inequality in Brazil* (Oxford University Press, Oxford, forthcoming 2026). For the Colombian Constitutional Court, see, e.g., T-025/04 (Constitutional Court of Colombia, 22 Jan 2004); T-192/14 (Constitutional Court of Colombia, 1 April 2014). See also T Garcia Maia, 'Colombia', in Petersen (n 7) 155.

[127]*Fireworks Factory* (n 126).

[128]*Fireworks Factory* (n 126), para 199.

[129]*Fireworks Factory* (n 126), para 200.

[130]*Fireworks Factory* (n 126), para 201.

[131]*ADO 26/DF* (STF, 13 June 2019).

[132]*Id.*

[133]See, e.g., *Cobzaru v Romania*, app no 48254/07, paras 85–101; *Opuz v. Turkey*, app no 33401/02, paras 184–202; *Romanov v Russia*, app no 58358/14, paras 70–74.

[134]See, e.g., Çam v. Turkey, app no 51500/08, para 54.

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obligations are relatively concrete, narrowly defined and far more limited in scope than the positive obligations that were developed by the IACtHR in the *Fireworks Factory* case.

The role of suspect criteria

Because the *positive-equality* model places a strong emphasis on disadvantaged groups, the identification of suspect criteria plays an important role. For example, the IACtHR applies an enhanced level of scrutiny – and even a presumption of discriminatory treatment – if a differentiation is based on a suspect classification.[135] The Colombian Constitutional Court also applies different levels of scrutiny.[136] It employs the strictest level of scrutiny to distinctions based on a suspect classification or affecting groups that are marginalized, discriminated against or manifestly vulnerable.[137] By contrast, the Brazilian Supreme Court applies an equality test that does not formally distinguish between different tiers of review. Nonetheless, it has recognized certain groups as deserving special protection due to historical marginalization.[138] These groups may not be targeted through differentiation based on suspect grounds and may even benefit from positive measures that the court derives from the constitutional equality guarantee.[139]

Positive equality

As already noted, courts adhering to the *positive-equality* model are highly accommodating towards positive measures. On the one hand, they typically accept distinctions based on suspect classifications as justified if such distinctions aim to support disadvantaged groups.[140] However, what is specific for courts following the *positive-equality* framework is that they go beyond merely accepting positive measures enacted by the legislature. In some cases, they extend the benefits of such measures to additional disadvantaged groups.[141] In other cases, they derive independent positive obligations directly from constitutional equality guarantees.[142]

Strengths and weakness of the model

In several respects, the *positive-equality* framework is even less deferential than the *equality-as-reasonableness* model. As David Landau has observed, courts in the Global South often adopt a more interventionist posture to compensate for the deficiencies of dysfunctional political institutions.[143] Structural inequalities are particularly pronounced

[135] *I.V. v Bolivia* (IACtHR, 30 November 2018), paras 240–41.

[136] See Case C-345/19 (Corte constitucional de Colombia, 31 July 2019), paras 18–20.

[137] *Id.*, para. 20.

[138] See *ADI 3.330* (STF, 3 May 2012), paras 37–39.

[139] See, e.g., *Pet. 3.388/RR* (STF, 19 March 2009); *ADI 4.424/DF* (STF, 9 February 2012).

[140] See, e.g., Case C-058/94 (Corte constitucional de Colombia, 17 Feb. 1994); C-671/14 (Corte constitucional de Colombia, 10 Sept. 2014).

[141] See, e.g., Case C-044/04 (Corte constitucional de Colombia, 27 Jan. 2004).

[142] See, e.g., *Véliz Franco v Guatemala* (IACtHR, 19 May 2014); *Velásquez Paiz and others v Guatemala* (IACtHR, 19 Nov. 2015); *Gutiérrez Hernández and others v Guatemala* (IACtHR, 24 Aug. 2017); *Fireworks Factory* (n 126); *ADO 26/DF* (STF, 13 June 2019); T-025/04 (Constitutional Court of Colombia, 22 Jan 2004); T-192/14 (Constitutional Court of Colombia, 1 April 2014).

[143] D Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 321; D Landau, 'Institutional Failure and Intertemporal Theories of Judicial Role in the Global South' in D Bilchitz and D Landau (eds), *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar, Cheltenham, 2018) 31, 36–38; MJ Cepeda

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in Latin America,[144] where the capacity and effectiveness of democratic legislatures are frequently limited.[145] Consequently, many Latin American courts perceive themselves as transformational social actors, playing an active role in redressing these disparities.[146] It is therefore unsurprising that courts in the region have embraced a distinctly non-deferential approach.[147]

However, this broad conception of judicial power entails significant drawbacks, as courts risk assuming functions traditionally reserved for the legislature. In the academic discussion on European integration, some scholars have proposed a useful distinction between *regulative* and *redistributive* measures.[148] They argue that regulatory functions can be effectively strengthened by delegating authority to independent agencies or courts.[149] In contrast, redistributive policies require a higher degree of democratic legitimacy and should therefore remain within the domain of democratic decision-making.[150] While positive measures derived from equality do not always fall squarely within the redistributive category, they often do. When courts mandate the expansion of social programs or the allocation of financial resources for disadvantaged groups, their decisions can have substantial redistributive consequences. This is not inherently illegitimate, particularly in contexts where democratic institutions are severely impaired. However, such interventions impose a heavy burden of justification on the courts.

Moreover, there are multiple strategies for addressing structural discrimination, each involving its own set of trade-offs. Reasonable disagreement may arise, for instance, over whether race- or gender-based quotas constitute appropriate tools to redress discrimination and compensate for historical injustices. Such affirmative action measures can inadvertently reinforce the salience of the very categories they seek to neutralize, potentially entrenching their significance. Additionally, while these positive measures are designed to promote inclusivity, they can also produce exclusionary effects by prioritizing certain disadvantaged groups while overlooking others who, though less disadvantaged, still experience marked inequalities compared to the majority population. It is therefore questionable whether courts are the most suitable institutions to navigate these complex trade-offs. As a result, the legitimacy of a *positive-equality* approach is highly context-dependent. In systems with well-functioning legislatures, there is little need for an

Espinosa and D Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19 *International Journal of Constitutional Law* 548, 561–62. For a critical assessment of arguments from failure, see M Hailbronner, *The Failures of Others: Justifying Institutional Expansion in Comparative Public and International Law* (Cambridge University Press, Cambridge, 2026).

[144]Cepeda Espinosa and Landau (n 144) 562.

[145]Landau, 'Political Institutions' (n 144) 329.

[146]See A v Bogdandy and R Uruena, 'International Transformative Constitutionalism in Latin America' (2020) 114 *American Journal of International Law* 403–442; see also Landau, 'Political Institutions' (n 144) 325. The concept of transformative constitutionalism stems from South Africa, see KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146–188. On the proliferation of the concept, see M Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *American Journal of Comparative Law* 527–565.

[147]See, generally, Landau, 'Political Institutions' (n 144) 347.

[148]M Zürn, *Regieren jenseits des Nationalstaats. Globalisierung und Denationalisierung als Chance* (Suhrkamp, Frankfurt a.M., 1998) 224–25.

[149]G Majone, 'Independence versus Accountability? Non-Majoritarian Institutions and Democratic Government in Europe' in JJ Hesse and TAJ Toonen (eds), *The European Yearbook of Comparative Government and Public Administration* (Nomos, Baden-Baden, 1994) 117, 118–19.

[150]Zürn (n 149) 225.

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interventionist judiciary. Conversely, in political systems characterized by significant legislative or executive dysfunction, a more assertive role of courts in advancing equality may be necessary and justifiable.[151]

The deferential approach

The final framework is the *deferential* approach, which accords significant deference to the legislature in all equality cases. Under this model, courts rarely find a measure incompatible with constitutional equality guarantees. A key example is the jurisprudence of the Singapore Supreme Court, comprising the High Court and the Court of Appeal. Traditionally, the Court of Appeal has emphasized a general presumption of constitutionality.[152] As a result, applicants claiming a violation of the equality clause in Article 12 of the Singapore Constitution must first establish a *prima facie* case of discriminatory intent.[153]

The justification for the deferential approach lies in a particular understanding of the separation of powers. When the meaning of equality is contested, it is seen as the legislature's – not the judiciary's – role to define its substantive content. This principle was articulated in the *Lim Meng Suang* case, a case concerning the criminalization of sexual intercourse between homosexual men.[154] The Court held that it lacked the authority to second-guess the legislature's rationale for such differentiation, emphasizing its reluctance to engage in judicial activism.[155] It reasoned that it was the legislature's responsibility 'to ensure that the Singapore Constitution reflects the prevailing social mores as well as the aspirations of Singapore society'.[156] This reflects the non-confrontational approach of Singapore's judiciary: in several lectures, successive Chief Justices have emphasized that the country's judicial culture prioritizes avoiding conflicts with the political branches.[157]

More recently, the Court has somewhat relaxed its previously rigid deference to the political branches. In *Syed Suhail*, it adopted a more rigorous standard of review for cases that 'affect the appellant's life and liberty to the gravest degree'.[158] Nevertheless, the stringent standards imposed by Singaporean courts continue to place a heavy burden on applicants – one that is rarely overcome in practice. This is reflected in the absence of a single successful equality claim in Singapore's jurisprudence.

[151]See R Dixon, *Responsive Judicial Review* (Oxford University Press, Oxford, 2023) (arguing that courts should be responsive to the environment in which they are operating).

[152]*Ramalingam Ravinthram v. Attorney-General*, [2012] SGCA 2, paras 44–48. For a critical discussion of the principle, see JT-T Lee, 'Rethinking the Presumption of Constitutionality' in JL Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge, Abingdon, 2016) 139.

[153]*Ramalingam Ravinthram* (n 153), para 70.

[154]*Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2014] SGCA 53.

[155]*Lim Meng Suang* (n 155), para 82.

[156]*Lim Meng Suang* (n 155), para 92 (emphasis in the original).

[157]See SK Chan, 'Judicial Review – from Angst to Empathy' (2010) 22 *Singapore Academy of Law Journal* 469–489; SK Chan, 'The Courts and the "Rule of Law" in Singapore' (2012) 2012 *Singapore Journal of Legal Studies* 209–231; S Menon, 'The Rule of Law: The Path of Exceptionalism' (2016) 28 *Singapore Academy of Law Journal* 413–427. See also JL Neo, 'Autonomy, Deference and Control: Judicial Doctrine and Facets of Separation of Powers in Singapore' (2018) 5 *Journal of International and Comparative Law* 461, 481–82 (emphasizing that this approach is in conformity with the Confucian principle of *junzi* that places high trust in government).

[158]*Syed Suhail bin Syed Zin v Attorney-General*, [2020] SGCA 122, at para 63.

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The role of suspect criteria

Even if courts apply a deferential standard of review across the board, the presence of suspect criteria of differentiation can, in theory, still make a difference. It is conceivable that a court applies a very deferential standard when a differentiation does not involve a suspect classification, yet remains prepared to correct particularly egregious suspect distinctions. In practice, however, the Singapore Supreme Court has had very few cases involving suspect classifications. Most prominently, the Court had to deal with a discrimination on the basis of sexual orientation in two cases that were directed against a criminal statute penalizing sexual relations between homosexual men.[159] In the already mentioned *Lim Meng Suang* case, the Court adopted a narrow interpretation of suspect classifications. It reasoned that sexual orientation did not fall under this category because it was not explicitly mentioned in the non-discrimination clause of Art. 12 (2) of the Singapore Constitution.[160]

Indirect discrimination

Under a deferential approach, courts can generally be expected to show reluctance in recognizing indirect discrimination claims involving a disparate impact on disadvantaged groups. This expectation was confirmed in the second *Syed Suhail* case, decided by the High Court of Singapore.[161] The applicants, who were citizens of Malay ethnicity, had argued that their death sentences for drug offenses were discriminatory, as Malays were vastly overrepresented among those convicted of drug-related crimes compared to their share in Singapore's general population.[162] However, the Court required a 'causal link' between the Advocate General's prosecutorial decisions and their ethnicity, finding that the statistical evidence provided by the applicants did not establish such a connection.[163]

Positive measures

While the Singaporean courts are reluctant to recognize claims of indirect discrimination, they are generally accommodating towards positive measures enacted by the legislature or executive. In *Ravi s/o Madasamy*, the Court held that a constitutional amendment designed to increase the likelihood of minority candidates being elected in presidential elections did not violate the non-discrimination clause of Art. 12 (2) of the Constitution because it was justified as a means of ensuring the representativeness of the presidency in a 'multiracial society'.[164]

Informal signalling

The deferential approach of the Singapore Supreme Court does not mean that the courts are entirely powerless when confronting the political branches. Instead, they occasionally employ informal means to signal inconsistencies between government policies and the constitution.[165] This dynamic is illustrated by the recent *Tan Seng Kee* decision.[166] Like

[159] *Lim Meng Suang* (n 155); *Tan Seng Kee v Attorney-General*, [2022] SGCA 16.
[160] *Lim Meng Suang* (n 155), para 102.
[161] *Syed Suhail bin Syed Zin and others v Attorney-General*, [2021] SGHC 274.
[162] *Id.*
[163] *Id.*, para 63.
[164] *Ravi s/o Madasamy v Attorney-General* [2017] SGHC 163, paras 91–92.
[165] Menon (n 158) 420–21.
[166] *Tan Seng Kee* (n 160).

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Lim Meng Suang, this case also concerned the criminalization of sexual relations between homosexual men. However, this time, the Court adopted a more nuanced stance. Rather than ruling on the constitutionality of the provision in the Singapore Criminal Code, it held the law effectively unenforceable, reasoning that the applicants had legitimate expectations that it would not be applied.[167] As a result, the applicants were found to lack standing.[168] In response to this decision, the Singapore legislature repealed the challenged provision – demonstrating its attentiveness to the subtle signals sent by the Court of Appeal.

The deferential approach has significant shortcomings, particularly regarding the effectiveness of judicial review. By placing trust in the political branches to define equality impartially, it presumes that they will do so without bias – an assumption that is not always warranted, even in liberal democracies. Political decisions can be influenced by implicit bias, stereotypes or entrenchment of structural discrimination, especially where disadvantaged minorities lack meaningful representation. In such cases, courts serve an essential corrective function, addressing the 'market failures' of the political process.[169] Yet an overly deferential approach inhibits them from fulfilling this role as guardians of constitutional equality.

Conclusion

The preceding analysis highlights the remarkable diversity in how courts approach constitutional guarantees of equality. Some courts adopt a deferential stance, while others apply a moderate level of deference, focusing primarily on discrimination based on suspect grounds. Some courts take a less deferential approach, employing an *equality-as-reasonableness* framework to assess the rationality of legislative or executive decisions. The most expansive model embraces a positive understanding of equality, asserting that constitutional equality norms impose positive obligations on the state to protect disadvantaged groups.

This diversity of approaches challenges the influential narrative of a global model of constitutional rights[170] – at least for the field of equality. It raises the question of why we do not see a greater convergence in doctrinal approaches. The answer likely lies in the differing normative strengths and weaknesses of the various models. None of the frameworks discussed holds an absolute normative advantage over the others. Rather, their relative merits depend on the cultural and institutional context in which a court operates.

Take, for example, the deferential approach. This model may function effectively in Singapore, but it relies on well-functioning institutions, high levels of social trust and a culture of inter-institutional respect. Therefore, it is difficult to see how this model could serve as a universal template for other jurisdictions. At the opposite end of the spectrum, the *positive-equality* framework emerged in contexts where a long histories of military dictatorship or government repression have fostered a deep scepticism of government authority. In such environments, courts were often tasked with serving as a bulwark

[167] *Tan Seng Kee* (n 160), para 149.
[168] *Tan Seng Kee* (n 160), para 153.
[169] See Ely (n 25) 105–79.
[170] On the global model narrative, see K Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012).

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against authoritarianism, leading to a transformative self-understanding in which they seek to compensate for chronically weak political institutions.[171]

The *equality-as-non-discrimination* framework is most commonly found in common-law jurisdictions. Given their historical trajectories and self-identification as immigrant societies, these jurisdictions tend to be more diverse and pluralistic.[172] In such contexts, the non-discrimination approach provides a framework for managing relationships among different social groups. By contrast, the *equality-as-reasonableness* framework predominates in continental Europe. Many European jurisdictions maintain a strong faith in judicial expertise and uphold a firm conceptual separation between law and politics.[173] This confidence in judicial rationality supports a less deferential approach, reflected in the *equality-as-reasonableness* model.

Consequently, it is difficult to establish a clear normative hierarchy among the various models of equality. The suitability of each framework depends on the cultural and institutional context of the jurisdiction in which it operates. This does not mean that courts never get it wrong. On the contrary, rigorous scholarly engagement with judicial equality jurisprudence remains essential – even if we acknowledge that there is no single, universally correct understanding of equality. Any critique, however, must take into account the specific context and institutional environment in which courts develop their doctrine.

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[171]See above (n 144–148) and accompanying text.

[172]See D Schiek, L Waddington and M Bell, 'A Comparative Perspektive on Non-discrimination Law' in D Schiek, L Waddington and M Bell (ed), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart, Oxford, 2007) 15–17; J Mulder, 'Cultural Narratives and the Application of Non-Discrimination Law' in B Havelková and M Möschel (ed), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press, Oxford, 2019) 31, 32.

[173]See MR Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, New Haven, 1986) 36–38.

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