

Brooklyn Journal of International Law

Volume 21

Issue 3

Symposium:

Women's Rights Are Human Rights: Selected
Articles Dedicated to Women in the International
Human Rights Arena

Article 7

3-1-1996

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Recommended Citation

Monica Bhattacharyya, *From Nondifferentiation to Factual Equity: Gender Equality Jurisprudence Under the German Basic Law*, 21 Brook. J. Int'l L. 915 (2017).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol21/iss3/7>

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FROM NONDIFFERENTIATION TO FACTUAL EQUALITY: GENDER EQUALITY JURISPRUDENCE UNDER THE GERMAN BASIC LAW

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Gender equality issues have been a major focus of German political and public discussion in recent years. One subject of debate has concerned the adequacy of legal protections against sex-based discrimination and sexual harassment. In June 1994, after years of inactivity on the federal level, the German Parliament responded to this debate by passing legislation aimed towards promoting employment opportunities for women in the federal administration¹ and providing protection against sexual harassment in both private and public employment.² The use of preferential treatment programs favoring women in civil service positions has also been an ever-recurring subject of controversy.

The attention to gender issues has taken on constitutional significance as well. As originally adopted in 1949, article 3 of the German Basic Law³ provided:

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1. Gesetz zur Durchsetzung der Gleichberechtigung von Frauen und Männern, art. 1 § 2, 1994 Bundesgesetzblatt [BGBl] I 1406 (F.R.G.).

2. *Id.*, art. 10 § 1, 1994 BGBl I 1412 (F.R.G.).

3. The German Basic Law was promulgated in 1949 as a provisional constitution for the West German states. Drafting was accomplished primarily by the Parliamentary Council, a committee composed of 70 representatives from the 11 West German *Länder* and from Berlin. *See infra* note 9. The Basic Law established West Germany as a "democratic and social federal state," Grundgesetz [Basic Law] [GG] art. 20 (F.R.G.), committed to an enforceable set of fundamental rights. *See generally* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1989); 3 KLAUS STERN, DAS STAATSRICHT DER BUNDESREPUBLIK DEUTSCHLAND (1988). Through the Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, the Basic Law's provisions now apply to all of Germany. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands: Einigungsvertragsgesetz, Aug. 31, 1990, F.R.G.-G.D.R., 1990 BGBl. II 889 [here-

- (1) All persons are equal before the law.
- (2) Men and women shall have equal rights.
- (3) No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.⁴

Paragraphs 2 and 3, both of which specifically address gender, were traditionally understood to guarantee formal equality, or the elimination of legal norms which differentiate on the basis of sex. However, a growing number of commentators in recent years have advocated an approach that would go beyond formal equality to encompass "factual equality."⁵ According to a factual equality approach, the Basic Law's provisions not only require the elimination of sex-based discriminatory laws, but also the activist reform of discriminatory social practices.

Three recent legal events have shifted Germany's constitutional framework in precisely this direction. The first of these events was the Prohibition on Night Work Decision, delivered in January 1992, which presented the Constitutional Court's first explicit approval of a factual equality approach.⁶ The second was a 1993 Constitutional Court decision that, in addressing the interpretation of the German Civil Code's antidiscrimination provision, affirmed and built upon this

inafter Einigungsvertragsgesetz] (Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity).

4. The text of article 3 as it appears in German:

- (1) Alle Menschen sind vor dem Gesetz gleich.
- (2) Männer und Frauen sind gleichberechtigt.
- (3) Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden.

GG art. 3.

5. See, e.g., ANNE BREUER, ANTIDISKRIMINIERUNGSGESETZGEBUNG — CHANCE ODER IRRWEG? (1991); ULRICH MAIDOWSKI, UMGEKEHRTE DISKRIMINIERUNG (1989); UTE SACKSOFSKY, DAS GRUNDRECHT AUF GLEICHBERECHTIGUNG: EINE RECHTSDOGMATISCHE UNTERSUCHUNG ZU ARTIKEL 3 ABSATZ 2 DES GRUNDGESETZES (1991); HEINZ-GERD SUELMANN, DIE HORIZONTALWIRKUNG DES ART. II GG (1994); Sibylle Raasch, *Frauenquoten und Männerrechte*, 25 KRITISCHE JUSTIZ 427 (1991); Spiros Simitis, *Art. 3 des Grundgesetzes: Vom Diskriminierungsverbot zum Gleichstellungsgebot*, 5 DIE NEUE GESELLSCHAFT, FRANKFURTER HEFTE 395 (1989).

6. Judgment of Jan. 28, 1992, Bundesverfassungsgericht [federal constitutional court] [BVerfG], 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 191 (F.R.G.).

approach.⁷ The third and most dramatic event was the amendment to the Basic Law, adopted in October 1994, which added the following language to article 3, paragraph 2: "The state supports the actual achievement of equal rights for women and men and works towards the elimination of existing disadvantages."⁸

This article, after summarizing the traditional doctrinal framework applicable to article 3's gender equality provisions, analyzes the factual equality approach as developed thus far. As will be shown, factual equality provides a significantly different focus for Germany's gender equality jurisprudence. However, many questions regarding its precise content remain to be determined.

I. HISTORICAL BACKGROUND AND THE TRADITIONAL DOCTRINAL FRAMEWORK

A. *Origins*⁹

References to gender equality as a constitutional principle in German law first appeared in the 1919 Weimar Constitution. Article 109, paragraph 2 provided that "[m]en and women have principally the same political rights and duties."¹⁰ Along the same lines, article 119, establishing marriage as a constitutionally-protected institution, stated that "[marriage] is based upon the equal rights of both sexes."¹¹ Nevertheless, these provisions were understood by both courts and commentators as being unenforceable, and thus having merely programmatic significance.¹²

During the drafting of the Basic Law, the wording of the gender equality guarantees became the subject of heated de-

7. Judgment of Nov. 16, 1993, BVerfG, 89 BVerfGE 276 (F.R.G.).

8. "Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin." Gesetz zur Änderung des Grundgesetzes, 1994 BGBl. I 3146 (F.R.G.).

9. For a detailed account of the events leading to the adoption of Article 3's gender provisions, see BARBARA BÖTTGER, DAS RECHT AUF GLEICHHEIT UND DIFFERENZ 160-237 (1990). See also SACKSOFSKY, *supra* note 5, at 323-31.

10. WEIMARER REICHsverFASSUNG [Weimar Constitution] [WRV] art. 109 (former constitution of Germany).

11. WRV art. 119.

12. See JOCHEN HOFMANN, DAS GLEICHBERECHTIGUNGSGEBOT DES ARTIKEL 3 ABSATZ 2 GG IN RECHTSPRECHUNG UND LEHRE 14 (1986); BREUER, *supra* note 5, at 125 n.86.

bate, much of which concerned the effect of these guarantees on marriage and family law.¹³ According to civil code provisions at the time, husbands possessed final decisionmaking authority over almost all aspects of the family and household. For instance, the husband's permission was required in order for any married woman to open a bank account or to hold a job outside the home.¹⁴ Thus, a major goal of reform-minded participants in the Parliamentary Council, in particular representatives of the Social Democratic Party, was to ensure that sex-specific legal norms of this type would be rewritten.

The first draft proposal specifically addressing gender equality was approved by a Parliamentary Council subcommittee in October 1948. According to this draft, paragraph 2 would state that "[m]en and women have the same political rights and duties."¹⁵ This formulation was almost identical to the Weimar Constitution's gender equality clause.¹⁶ Also included in this draft was a version of paragraph 3 which did not include gender-specific language: "No one may be disadvantaged or favored because of his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions."¹⁷

At the next subcommittee session, Social Democratic Party representatives proposed what was to become paragraph 2's final formulation: "Men and women shall have equal rights."¹⁸ These representatives argued that the previously adopted proposal, while guaranteeing equal "political rights and duties" did not extend to private law norms such as family and marriage law.¹⁹ The subcommittee did not adopt the proposed lan-

13. Drafting of the Basic Law took place in two stages. An initial set of proposals was developed in August 1948 at the Herrenchiemsee Conference. The participants were 12 delegates — one from each of the 11 *Länder* in the Western Allied zones and one from Berlin — and 15 accompanying advisors. See STERN, *supra* note 3, at 140-68. No women were included among the participants. BÖTTGER, *supra* note 9, at 175.

Drafting was then taken up by the Parliamentary Council, a committee composed of 70 representatives from the 11 *Länder* and from Berlin. Four of the representatives were women. *Id.* at 169.

14. See BÖTTGER, *supra* note 9, at 233.

15. *Id.* at 179 (quoting Parliamentary Council Record).

16. *Id.* at 173.

17. *Id.*

18. *Id.* at 180.

19. *Id.*

guage. However, under a compromise solution reached at that session, paragraph 3 was amended to include a reference to sex. Thus, at least in theory, paragraph 2 would guarantee women the same political rights, such as the right to vote or to serve as an elected representative, while paragraph 3, guaranteeing that no person would be disadvantaged or favored on the basis of sex, would guarantee equal rights within private law.²⁰

Led by Representative Elisabeth Selbert, the Social Democrats renewed their proposal for the "equal rights" formulation of paragraph 2 before the Parliamentary Council's main committee. As explained by Selbert, paragraph 3's guarantee against being "disadvantaged or favored" on the basis of sex did not go far enough because it could easily be interpreted to permit continuation of the status quo:

It is obvious that one must go further today than was done in Weimar and that women must be given equal rights in all areas [of law] I believe that the current version [of the equality article], 'No one may be disadvantaged or favored because of his sex' does not encompass the meaning of equal rights. I can imagine doctoral students who would prove to us that women are not disadvantaged nor men favored under [the current] civil law.²¹

That Selbert's fears were justified is colorfully confirmed by the statement of a delegate voicing opposition to the introduction of Selbert's "equal rights" language:

This [formulation] initially appears harmless and represents, from a general human and social viewpoint, a self-evident proposition. On the other hand, were it to be anchored on a legal basis within the state's basic law, this clause would have unforeseeable legal and political consequences. Almost all the marriage and family law regulation of the BGB, which have been in force for almost 50 years, would be overthrown and invalidated.²²

20. *See id.* at 181.

21. BREUER, *supra* note 5, at 36 (quoting Proceedings of the Main Committee).

22. BÖTTGER, *supra* note 9, at 183 (quoting the Remarks of Albert Finck, Christian Democratic Party, Parlamentarischer Rat 12:48/345).

The Social Democrats' proposal was rejected at the 17th Sitting of the Parliamentary Council's head committee by a 11-9 vote.²³ However, on January 18, 1949, after massive public mobilization by individuals, women's groups, and labor associations, the committee unanimously adopted the Social Democrats' proposed paragraph 2, in addition to retaining a reference to sex within the language of paragraph 3.²⁴ In order to mitigate the shock to the existing legal structure, the Council adopted a transition rule granting the legislature until March 31, 1953 to replace laws in violation of article 3, paragraph 2.²⁵

The Parliamentary Council officially announced the final version of the Basic Law, including the revised paragraphs 2 and 3 of article 3 on May 23, 1949.²⁶

The proceedings leading to the adoption of article 3's gender provisions show that the focus of reformers was the elimination of sex-specific limitations on women in the areas of marriage and family law. Moreover, in order to counter arguments legitimizing the status quo through reference to "natural differences," the Social Democrats insisted on the equal rights language of paragraph 2 rather than remaining satisfied with paragraph 3's prohibition against being "disadvantaged" or "favored" on the basis of sex. This focus on nondifferentiation would be adopted by the Federal Constitutional Court in its interpretation of article 3's gender provisions.

B. *The Traditional Framework*

During the first four decades of the Basic Law's existence, the Federal Constitutional Court's²⁷ gender equality jurispru-

23. See BÖTTGER, *supra* note 9, at 188.

24. See *id.* at 224-25.

25. GG art. 117, para. 1 provided that: "Existing law conflicting with Article 3 paragraph 2 will remain in force until it has been modified, but not beyond March 31, 1953."

26. BÖTTGER, *supra* note 9, at 236.

27. The German Federal Constitutional Court, whose jurisdiction includes cases requiring "concrete judicial review" (*konkrete Normenkontrolle*) and "constitutional complaints," (*Verfassungsbeschwerde*) has played the primary role in determining the judicial significance of Article 3's provisions. Concrete judicial review occurs when a court, in the course of a lawsuit, concludes that a federal or state legal norm violates the Constitution. In such instances, the court must refer the constitutional question to the Federal Constitutional Court for a decision before a final resolution of the case. GG art. 100, para. 1; Bundesverfassungsgerichtsgesetz

dence focused upon the elimination of legal norms which unjustifiably differentiated on the basis of gender. This approach was expressed doctrinally as a presumption against gender-based differentiation, with allowances for such differentiation where justified by "biological or functional" differences. As concluded by the Court in its first case interpreting article 3's gender equality guarantees, "[t]he political question, whether the differences named in Article 3 paragraphs 2 and 3 provide a considerable basis for differentiation in law—a question with respect to which different experienced opinions are possible—is [with these paragraphs] constitutionally disavowed."²⁸

Article 3's presumption against sex-based differentiation was applied by the Court over the next several decades to declare unconstitutional a large number of family and inheritance-related laws. These laws included, for example, a law providing the husband with final decisionmaking authority over decisions affecting the child where the two parents could not agree,²⁹ an inheritance law giving preference to males,³⁰ laws establishing the husband's birth name as the family name,³¹ conflicts of law norms for inheritance and divorce giving priority to the law of the husband's land of citizenship,³² and citizenship laws according to which child would be presumed to take on the citizenship of the father.³³

Despite its commitment to the principle of nondifferentiation, the Federal Constitutional Court delineated two categories of exceptions under which gender-specific legal norms would be permissible. The first category of exceptions, representing a nod to the "separate spheres" ideology against which Elisabeth Selbert had fought during the Basic Law's drafting, were those motivated by "functional" differences "relating to the division of labor within the household."³⁴ This category of

§§ 80-82, 1993 BGBI. I 1473 (F.R.G.). Constitutional complaints may be filed with the Federal Constitutional Court by any person who claims that his constitutional rights have been violated by an action of the state (after exhaustion of other legal remedies). GG art. 93, para. 4(a); Bundesverfassungsgerichtsgesetz §§ 90-95, 1993 BGBI. I 1473 (F.R.G.).

28. Judgment of Dec. 18, 1953, BVerfG, 3 BVerfGE 225, 240 (F.R.G.).

29. Judgment of July 29, 1959, BVerfG, 10 BVerfGE 59 (F.R.G.).

30. Judgment of Mar. 20, 1963, BVerfG, 15 BVerfGE 337 (F.R.G.).

31. Judgment of May 31, 1978, BVerfG, 48 BVerfGE 327 (F.R.G.).

32. Judgment of Feb. 22, 1983, BVerfG, 63 BVerfGE 181 (F.R.G.); Judgment of Jan. 8, 1985, BVerfG, 68 BVerfGE 384 (F.R.G.).

33. Judgment of Apr. 23, 1974, BVerfG, 37 BVerfGE 217 (F.R.G.).

34. Judgment of Dec. 18, 1953, BVerfG, 3 BVerfGE 225, 242 (F.R.G.). While

exceptions played an important role during the 1950s and 1960s in cases addressing pension benefits and child support payments. In a 1963 decision, for example, the Court upheld the constitutionality of a law which made it more difficult for widowers to receive compensatory support benefits than for widows.³⁵ As explained by the Court, the law contemplated making up for the income lost due to the death of the spouse. Consequently, the differential treatment was justified by its "correspondence to the typical division of work between the sexes within the family."³⁶

Similarly, in a decision involving child support, the Court, relying upon the parents' "separate functions with respect to the child," held that the civil code provision requiring the father to bear primary responsibility for child support payments to children born out-of-wedlock did not violate article 3's gender provisions.³⁷ Rather, this division of responsibility derived from the traditional family roles in which "the wife fulfills her duty to contribute to the household by housework, while the man earns the necessary income through employment. Both types of household support are of equal worth and are complementary to each other."³⁸

In the 1970's, the functional differences fell into disrepute and disuse as the Court concluded that the separate spheres model was outdated. As stated by the Court in a 1978 decision:

Above all, the increasing participation of women in the employment process has contributed to the decline of the earlier prevailing view that it contradicts the natural division of labor in marriage and family for the wife to be employed and not to restrict herself to fulfilling her duties in the marriage and family. Correspondingly . . . the model of the wife, which earlier was . . . the housewife, has fundamentally changed Under present circumstances, the division of duties within the marriage is in the first instance a matter

this category of exceptions has been severely criticized, at least one commentator has argued that the Constitutional Court applied the category only in situations where the application would not, in its view, materially disadvantage women. See SACKSOFSKY, *supra* note 5, at 52-63.

35. Judgment of July 24, 1963, BVerfG, 17 BVerfGE 1 (F.R.G.).

36. *Id.* at 5.

37. Judgment of July 21, 1960, BVerfG, 11 BVerfGE 277 (F.R.G.).

38. *Id.* at 280.

for the free decision of the marriage partners, and finds its boundaries only in the care of the children.³⁹

A 1979 decision confirmed the rejection of the housewife model as an outdated stereotype and comprised the Court's first "reverse discrimination" decision. Before the Court was a law which provided working women, but not men, the right to one extra day of paid leave per year in order to take care of household responsibilities.⁴⁰ Reasoning that the law was based on nothing more than the "conventional conception" that it was the duty of the woman to take care of household responsibilities,⁴¹ the Constitutional Court found it unconstitutional.

The second category of exceptions under which gender-specific legal norms would be allowed were those following from "biological differences." This category, while seldom invoked in cases by the Constitutional Court, has been understood primarily as justifying special protections for women during pregnancy.⁴²

After the demise of the functional differences exception in the 1970's, article 3's guarantees became almost exclusively identified with the principle of nondifferentiation. Also at this time, increasing numbers of commentators began noting the limitations of that principle.

C. The Limits of Nondifferentiation

While nondifferentiation had been useful in addressing many of the barriers to sex equality, it did little to address the problems remaining after sex-specific legal norms had been eliminated. It did not, for example, address the need for stronger antidiscrimination laws, the reorganization of work and family structures, or the possible need for preferential treatment programs in public organizations. As a result, many commentators began to argue that the doctrinal framework used with respect to article 3 should be reconceptualized to

39. Judgment of May 31, 1978, BVerfG, 48 BVerfGE 327, 338 (F.R.G.).

40. Judgment of Nov. 13, 1979, BVerfG, 52 BVerfGE 369 (F.R.G.).

41. *Id.* at 376.

42. See THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ: KOMMENTAR (Dürig, Art. 3, Abs. II Rdn. 13-15 (1973)).

take into account not just formal inequality, but also social inequality.⁴³

The main focal point for the emerging debate has been the admissibility of preferential treatment programs—specifically, preferential treatment regulations adopted by *Länder* governments with respect to civil service employment. The exact form of these regulations varies. In most cases, however, the regulations consist of a tie-breaker rule according to which the female candidate for a position is preferred in situations where a male and a female candidate are equally qualified for a position. Though most of these regulations have been adopted as non-binding guidelines, some have the force of law.⁴⁴

The preferential treatment regulations constitute a logical focal point for discussion because of the direct conflict they pose between a nondifferentiation approach to equality and a “factual equality” approach which focuses on achieving a just distribution of society’s opportunities for women and men. According to the former model, preferential treatment regulations violate the principle of equality because they afford differing treatment to men and women. According to the latter model, preferential treatment regulations may be a necessary step for achievement of equality in situations characterized by great social inequality.

A 1987 decision by the Court represents a turning point between the traditional doctrinal structure and the “factual equality” standard which would be announced by the Court in the 1992 Prohibition on Night Work Decision.⁴⁵ Before the Court was a law allowing women to begin receiving government secured retirement benefits from age 60 and men from the age of 65.⁴⁶ The legislative justification provided was that women have “in many cases had a double career as employee and housewife, a situation which may bring about an early

43. See *supra* note 5.

44. *Länder* governments adopting such programs include Baden-Württemberg, Thüringen, Schleswig-Holstein, Sachsen, Saarland, Rheinland-Pfalz, Nordrhein-Westfalen, Niedersachsen, Hessen, Hamburg, and Bremen. See BERTELSMANN, COLNERIC, PFARR, AND RUST, HANDBUCH ZUR FRAUENERWERBSTÄTIGKEIT § 5.2 (1993) (compilation of preferential treatment regulations on *Länder* level).

In addition, the Green Party and Social Democratic Party, as well as some private companies, have introduced more far-reaching preferential treatment guidelines. *Id.*

45. Judgment of Jan. 28, 1987, BVerfG, 74 BVerfGE 163 (F.R.G.).

46. *Id.*

decline in strength and thus early incapability to carry on a career."⁴⁷

The Federal Constitutional Court held that the law was constitutional. However, rather than invoking either the biological or functional differences exceptions, the Court created a new category of exceptions. Under the new category, unequal treatment would be allowable in order to compensate for "social disadvantages . . . which could be traced to biological difference[s]."⁴⁸ The Court stated that such disadvantages included lower career positions, salaries, and pension expectations due to anticipation by others of a break in a woman's career life for childbearing.⁴⁹ Because the pension law could be justified on the basis of these considerations, it did not violate article 3. While the Court's reasoning in this decision followed the traditional doctrinal framework by recognizing nondifferentiation as the rule from which exceptions would be carved, its recognition of social disadvantage as a relevant factor indicated a growing concern for the achievement of factual, as opposed to formal, equality.⁵⁰

II. FACTUAL EQUALITY

A. *The Prohibition on Night Work Decision*

The Prohibition on Night Work Decision,⁵¹ delivered in January 1992, was the first case to make an explicit break with the Court's traditional approach. At issue was a long-controversial regulation prohibiting women from working after 8:00 p.m. or before 6:00 a.m. on all days, and from working after 5:00 p.m. on days preceding Sundays and holidays.⁵² The

47. *Id.* at 165.

48. *Id.* at 180.

49. *Id.* at 180-81.

50. The following passage from this decision foreshadowed more dramatic developments:

In recent times it has been mentioned, that the gender equality provision, like other fundamental rights, may give rise to . . . a positive duty for the legislature to support and forward its realization [However], whether and to what extent the legislature could be bound . . . to create the conditions for factual equality between men and women need not be decided here.

Id. at 179-80.

51. Judgment of Jan. 28, 1992, BVerfG, 85 BVerfGE 191 (F.R.G.).

52. Arbeitszeitordnung § 19(1) (enacted April 30, 1938). The regulation did not

regulation derived from an 1891 law which, citing interests in "health" and "family life," had set restrictions upon allowable working hours for women.

The Court received submissions on the question of the regulation's constitutionality from various groups representing labor, management, and women's interests.⁵³ The primary argument offered in support of the regulation was the greater physical risk to women, in comparison to men, of night work. The risk was caused, the argument went, not by any inherent weakness of women in comparison to men, but by the likelihood that women, and not men, would also have household and childcare responsibilities. Other supporting arguments included the greater risk to women of sexual harassment and of accidents while travelling to and from the workplace. The arguments presented in opposition to the regulation included the negative effect of the regulation on women's competitiveness in the job market and a rejection of the proposition that the physical risk of night work was greater for women than for men.⁵⁴

The Constitutional Court began its analysis by presenting the applicable legal standards for paragraphs 2 and 3 of article 3. The Court explained that paragraph 3, guaranteeing that "no one may be prejudiced or favored because of his sex," represented the principle of equal legal treatment.⁵⁵ "As a matter of principle, gender—as with the other characteristics named

apply to professional jobs; in addition, exceptions applied to work in certain fields, including health care and theater-related work.

The case was brought before the Court by an employer who, pursuant to the regulation, had been fined 500 DM for using women workers to pack baked goods during night hours.

53. Judgment of Jan. 28, 1992, 85 BVerfGE at 200-03.

54. The regulation was supported by the Bundesminister für Arbeit und Sozialordnung (Federal Minister for Work and Social Organization) and the Deutsche Gewerkschaftsbund (the German Trade Union Federation). Among those opposed were employer organizations and the Deutsche Juristinnenbund (German Federation of Women Jurists).

The permissibility of night work regulations for women was also examined by the European Court of Justice in 1991 and by the Austrian Constitutional Court in March 1992. The European Court of Justice held that a French night work regulation violated the EC directive prohibiting gender-based discrimination in employment. The Austrian Constitutional Court held that the night work regulation was justified by the need to protect women with small children from the harmful physical effects of night work. See Sibylle Raasch, *Gleichstellung der Geschlechter oder Nachtarbeitsverbot für Frauen?*, 25 KRITISCHE JUSTIZ 427 (1992), for a comparative discussion of the German, EC, and Austrian court decisions.

55. Judgment of Jan. 28, 1992, 85 BVerfGE at 206.

in [p]aragraph 3—may not be used as a touchstone for different legal treatment.”⁵⁶ Accordingly, legal norms which treat persons differently on the basis of gender are admissible only “to the extent that they are necessary for the solution of problems which affect only men or only women.”⁵⁷ So defined, paragraph 3 resembled the Court’s traditional approach to article 3’s guarantees.

In contrast, paragraph 2’s guarantee of “equal rights” for men and women had a quite separate content:

Article 3, paragraph 2, so far as it concerns the question of whether a regulation disadvantages women on account of their gender to an unjust end, contains no further or more specific demands [than article 3, paragraph 3]. Article 3, paragraph 2 goes beyond the discrimination prohibition of article 3, paragraph 3 by establishing a command for equal rights which encompasses social reality. The proposition “men and women have equal rights” aims not only to set aside legal norms that advantage or disadvantage based on gender, but to achieve equal rights between the sexes for the future. It aims towards the adjustment of social roles and relationships.⁵⁸

As set forth in this passage, paragraph 2 concerns itself with the achievement of factual equality, namely the “assimilation of social roles and relationships” and “a command for equal rights which encompasses social reality.” Consequently, the focus of paragraph 2 is distinct from paragraph 3’s concern with nondifferentiation.

In accordance with these standards, the Court reasoned that the night work regulation violated article 3’s guarantees. First, the regulation violated paragraph 3’s prohibition of any differential treatment not justified as “necessary for the solution of problems which affect only men or only women.” With respect to the argument that women are physically affected more than men by night work, the Court held that night work is equally harmful for men. “The assumption that women . . . suffer more as a result of night work than men has no reliable

56. *Id.* at 206.

57. *Id.* at 207.

58. *Id.* at 206-07.

support in the findings of medical research."⁵⁹ To the argument that women are affected more because of their household and childcare responsibilities, the Court concluded that "the additional burden of housework and childcare is not a gender-specific characteristic."⁶⁰ Finally, the Court rejected a rationale based on the greater danger women face when returning home from work at night. "The state may not shirk its duty to protect women against violent attacks on public streets by reducing her freedom to work"⁶¹

The Court then went on to find that the regulation was not justified by paragraph 2's goal of factual equality.⁶² Although the regulation would protect many women from the health effects of night work, the Court stated it would also disadvantage women by barring them from certain jobs. Because the regulation would "render the dismantling of social disadvantages for women more difficult," the prohibition of night work was not "legitimized through the command for equal rights contained in Article 3, paragraph 2."⁶³ Therefore, the Court held that as written, the night work regulation was unconstitutional.

The significance of this holding lies not in the result—which could have easily been reached under its traditional approach—but in the reasoning.⁶⁴ By interpreting paragraph 2 in terms of "the adjustment of social roles and relationships" and the "dismantling of social disadvantages," the Court provided its first explicit accommodation of factual equality within the doctrinal framework applicable to article 3. Whereas nondifferentiation had aimed towards ensuring that each person enjoyed the same legal rights, the new standard for paragraph 2 recognized the need for more far-reaching transformations of social structures.⁶⁵ The Court also broke

59. *Id.* at 208.

60. *Id.*

61. *Id.* at 209.

62. *Id.* at 209-10.

63. *Id.* at 209.

64. One can speculate that the Prohibition on Night Work decision was an attractive vehicle because of this fact. By first appearing in a case where it would not make a difference in the outcome, the new standard was incorporated into the existing framework in the least dramatic way possible.

65. See Jürgen Kühling, *Arbeitsrecht in der Rechtsprechung des Bundesverfassungsgerichts*, 4 ARBEIT UND RECHT 126, 129 (1994) (Article 3, paragraph 2 is now directed towards "the alteration of social reality"); Raasch, *supra*

with the past by creating a distinction between its interpretation of paragraph 2 and its interpretation of paragraph 3—paragraphs which, prior to this decision, had been viewed as having identical content. This distinction served the important purpose of allowing the Court to incorporate factual equality into its analytic framework without making obsolete the traditional equal treatment approach. By interpreting paragraph 3 in terms of equal legal treatment and paragraph 2 in terms of factual equality, the Court recognized the validity of each approach.

Since much of the debate surrounding article 3's guarantees has focused on the constitutional status of preferential treatment programs, the difficult question, of course, is how to resolve the potential conflict between equal treatment and factual equality. The Court did not address this question in the Prohibition on Nightwork Decision. However, by finding the night work regulation violated paragraph 3, and proceeding to find that the regulation was not "legitimized" by paragraph 2, the Court suggested that considerations of factual equality would, or at least could, trump equal treatment in cases of conflict. Left unresolved were questions of whether factual equality would always, or only sometimes outweigh equal treatment, and if the latter, what the relevant considerations would be.

B. Decision Interpreting Section 611a BGB

The Constitutional Court reaffirmed and expanded upon its newly-announced factual equality approach in a 1993 decision addressing section 611a of the German Civil Code (BGB) which is the Code's employment discrimination provision.⁶⁶ The case was brought as a constitutional complaint by a woman who had responded to a job announcement placed by the employer, a university professor, for a position as an assistant with a fiber technology research project.⁶⁷ The job description called for a degree in machine tool mechanics or a related

note 54 (characterizing this decision as an important step towards recognition of preferential treatment programs as constitutionally permissible).

66. Judgment of Nov. 16, 1993, BVerfG, 89 BVerfGE 276 (F.R.G.).

67. *Id.* at 279.

field.⁶⁸ The complainant was one of approximately 40 interested applicants and the only female applicant.⁶⁹ She, along with the other applicants who fulfilled the job description requirements, was informed that she would be invited to an interview.⁷⁰ After that communication, however, the plaintiff was never invited to an interview and two of the other applicants were hired.⁷¹ Upon inquiry, one of the professor's assistants informed the complainant that she had not been chosen because the job activities were unsuitable for a woman.⁷² The complainant later received a letter to the same effect from the professor, in which the professor stated that he had been convinced, after the posting of the job notice, that the job activities would be too physically strenuous for a woman.⁷³

The complainant brought an action in labor court for sex discrimination in violation of section 611a BGB, the German Civil Code provision prohibiting sex-discrimination in the initiation of an employment relation.⁷⁴ In defense, the employer contended that the real reason for the rejection was not the complainant's gender, but her lack of sufficient job experience. The earlier communications were an attempt to explain the rejection in as considerate a manner as possible. The labor court found in favor of the employer, concluding that although the plaintiff had proven that she had been treated differently from the other applicants on the basis of gender, the decision not to hire her was justified by the indisputably superior quali-

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. § 611a of the Bürgerliches Gesetzbuch [BGB] provides in pertinent part: The employer may not disadvantage an employee on the basis of sex by an agreement or measure, particularly with respect to the initiation of the employment relation, promotion, or termination. Differential treatment on the basis of sex is permissible, however, to the extent that . . . a particular sex is a necessary requirement for the activity.

Section 611a was enacted pursuant to European Community Directive 76/207 of February 9, 1976, which required member states to pass laws providing protection against sex-based employment discrimination. *See generally* Josephine Shaw, *Recent Developments in the Field of Labour Market Equality: Sex Discrimination Law in the Federal Republic of Germany*, 13 COMP. LAB. L.J. 18 (1991) (discussing the interpretation of § 611a BGB).

fications of the two men hired.⁷⁵ Since the complainant would not have been hired in any case, no actual discrimination had taken place.

The complainant then brought her case to the Federal Constitutional Court, arguing that the labor court's interpretation of section 611a was inconsistent with article 3's guarantees. The Federal Constitutional Court agreed with the complainant. The Court's discussion began by reaffirming the factual equality approach to article 3, paragraph 2. Referring to its language in the Prohibition on Night Work Decision, the Court noted that "[t]he proposition 'men and women have equal rights' aims not only to set aside legal norms that advantage or disadvantage based on gender, but to achieve equal rights between the sexes for the future. It aims towards the assimilation of social roles and relationships."⁷⁶ The Court further stated that although the interpretation of section 611a was primarily a matter for the labor courts, the Constitutional Court had the responsibility of ensuring that their interpretation of section 611a took appropriate account of the "influence" of constitutional rights, and in particular, the "goals of protection" associated with certain constitutional rights.⁷⁷ "With respect to regulations which are intended to fulfill constitutional 'duties of protection,' the constitutional right is violated when the interpretation and application [of the regulations] fundamentally offends the constitutionally-indicated goal of protection."⁷⁸

In accordance with this responsibility, the Court reversed the labor court's decision, holding that its interpretation failed to adequately fulfill article 3, paragraph 2's "goal of protection" (*Schutzzweck*) against sex-based discrimination.⁷⁹ First, the labor court had erred by defining discrimination in terms of the final decision of whether or not to hire. The Court stated that regardless of whether gender made a difference in the final decision of whom to hire, a violation of section 611a takes place if it can be shown considerations of gender affected any point in the hiring process including, for example, the decision

75. Judgment of Nov. 16, 1993, BVerfG, 89 BVerfGE 276, 280 (F.R.G.).

76. *Id.* at 285.

77. *Id.* at 285-86.

78. *Id.* at 286.

79. *Id.*

of whom to interview.⁸⁰ This interpretation was required in order to guarantee an effective protection against discrimination. "If one fails to evaluate the preliminary steps in the hiring process, the employer may render discriminatory actions inconsequential by subsequently offering appropriate grounds for his hiring decision. He would thus have the opportunity, through appropriate arrangements of his hiring procedure, to reduce the chances of women applicants whom, on the basis of gender, he judges to be less qualified"⁸¹

Second, the Court determined that the labor court had erred by implying a violation of section 611a would occur only if discrimination was the *sole* cause of the decision not to hire. Rather, the Court explained, a violation of section 611a takes place as soon as gender is shown to have been one of the set of factors which influenced an adverse employment decision.⁸² Finally, the Court held that the labor court had failed to adequately scrutinize the validity of seemingly appropriate job criteria which, though not included in the job notice, were presented by the employer as justifications for its employment decision. To accept such criteria without a convincing showing by the employer of why such criteria were initially omitted would contradict article 3, paragraph 2's goal of protection against discrimination. Thus, through its interpretation of section 611a, the labor court had "fundamentally misunderstood article 3, paragraph 2's goal of protection."⁸³

Beyond its importance for the interpretation of section 611a, the Federal Constitutional Court's decision in this case added a new dimension to the meaning of article 3's guarantees. By implying a "goal of protection" in article 3, paragraph 2, and applying it to encompass discrimination by private employers, the Court recognized paragraph 2's equality guarantee as one which could not only be asserted against discriminatory treatment by the state, but also against discriminatory treatment by non-state parties. This interpretation expanded the scope of the equality guarantee from a protection against illegitimate state power to a protection against the illegitimate exercise of social power. Moreover, the Court's

80. *Id.* at 287.

81. *Id.* at 287-88.

82. *Id.* at 288.

83. *Id.* at 286.

derivation of a "goal of protection" implied the existence of affirmative obligations for the state to interpret legal norms in a way that gives appropriate effect to the goal of factual equality. While the Prohibition on Night Work Decision had merely suggested that measures aimed towards achieving factual equality would be permissible, this decision implied that such measures would, in fact, be required.

It is important to realize that the Court's interpretation of article 3, paragraph 2 built upon a distinct strand of German constitutional rights theory which has emphasized the need to protect certain constitutional values against infringement not just by the state, but also by private actors. Although it is accepted that the primary function of basic rights is to provide protection against state power, there is also explicit recognition that certain rights must be protected against the exercise of private power as well. As stated in one leading constitutional commentary, "human freedom is threatened not just through the state, but also through non-state power [I]nsofar as [there is] not to be merely freedom for the powerful, one requires protection against infringements by society."⁸⁴

In the Federal Constitutional Court's most recent abortion decision, for example, proposed legislation which would have relaxed the prerequisites for legal abortions was found unconstitutional because it failed to adequately protect the unborn person's right to life against infringement *by the pregnant woman*.⁸⁵ As stated by the Court, "[t]he Basic Law obliges the state to protect human life, including that of the unborn Legal protection is also owed to the unborn with regards to its mother. Such protection is only possible when the legislator in principle forbids her to interrupt her pregnancy."⁸⁶ Similarly, German labor courts have held that the Basic Law's free speech and freedom of religion guarantees provide protection from undue infringement of these freedoms within private

84. KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 146 (1993).

85. Judgment of May 28, 1993, BVerfG, 88 BVerfGE 203 (F.R.G.).

86. *Id.* at 203. For discussions comparing the treatment of abortion in American and German constitutional law, see Donald Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371; Douglass Morris, *Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany*, 11 HASTINGS INT'L & COMP. L. REV. 159 (1988).

employment contracts.⁸⁷ The Constitutional Court's interpretation of article 3, paragraph 2 as providing protection against discrimination by private employers thus fits into a previously recognized approach.⁸⁸

The Prohibition on Night Work Decision had established factual equality as a goal encompassed by article 3. The Court's 1993 decision addressing section 611a BGB confirmed the factual equality approach to article 3, paragraph 2, and helped to specify its content in two ways. First, by interpreting article 3, paragraph 2 as a protection against discrimination in a private employment relationship, the Court recognized that the principle of factual equality included protection against discriminatory treatment by non-state institutions. Second, by implying from article 3, paragraph 2 a "goal of protection" against societal discrimination, the Court indicated that the goal of factual equality would confer upon the state affirmative duties to act.

C. The 1994 Constitutional Reform

The most recent confirmation of the move to factual equality has taken place on the level of the constitutional text itself. In October 1994, article 3, paragraph 2 was amended to include the following language: "The state supports the actual achievement of equal rights for women and men and works towards the elimination of existing disadvantages."⁸⁹ The

87. See generally FRANZ GAMILLSCHEG, *DIE GRUNDRECHTE IM ARBEITSRECHT* (1989).

88. The interpretation of constitutional rights in terms of protection against social power is analyzed in the German literature under the *Drittwirkung* and *Schutzpflicht* doctrines. The term *Drittwirkung* refers to the influence of constitutional norms on the judicial interpretation of private law (law regulating the general legal relations among private groups and individuals). The term *Schutzpflicht* refers to the affirmative duty of all state organs—including the legislature—to protect certain constitutional values. These doctrines are the subject of growing attention in the German legal literature. See, e.g., ERNST-WOLFGANG BOCKENFÖRDE, *STAAT, VERFASSUNG, DEMOKRATIE* 159-99 (1992); Bernd Jeand'Heur, *Grundrechte im Spannungsverhältnis zwischen subjektiven Freiheitsgarantien und objektiven Grundsatznormen*, 4 *JURISTEN ZEITUNG* 161 (1995); Hans D. Jarrass, *Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts*, 110 *ARCHIV DES ÖFFENTLICHEN RECHTS* 363 (1985). For an excellent discussion in English of the *Drittwirkung* doctrine, and a comparative treatment with the American state action doctrine, see Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 *MD. L. REV.* 247 (1989).

89. Gesetz zur Änderung des Grundgesetzes, BGBl. I 3146 (F.R.G.). In addi-

amendment to paragraph 2 was one of a group of amendments adopted in connection with the Unification Treaty's call for an evaluation of possible changes to the Basic Law.⁹⁰ Pursuant thereto, a Joint Constitutional Commission consisting of 32 members of the Bundestag and Bundesrat was established in November 1991.⁹¹ After nearly two years of debates and hearings, the Commission presented its recommendations to the Parliament. In late September 1994, the Bundesrat and Bundestag adopted some of the Commission's proposed amendments by the necessary two-thirds majorities.⁹² Besides the adoption of the amendment to article 3, paragraph 2, the constitutional amendments adopted included a prohibition of discrimination on the basis of handicap, the adoption of environmental protection as a state goal, and the strengthening of constitutional language pertaining to the powers of the *Länder* and the self-administration rights at the community level.⁹³

tion, Article 3, paragraph 3 was amended to prohibit discrimination on the basis of handicap. *Id.*

90. Article 5 of the Unification Treaty provided: "The governments of both treaty parties recommend that the legislatures of unified Germany, within two years, should deal with questions regarding change or supplementation of the Constitution which have been posed by German unification." *Einigungsvertragsgesetz, supra* note 3.

91. In setting up the Joint Constitutional Commission, Parliament rejected suggestions for the creation of a constitutional council which would comprise members of Parliament as well as representatives from business, science, and other interest groups. Parliament also rejected suggestions for the creation of a constitutional convention whose members would be selected through a popular vote. *See FRAUENRECHTE IM GRUNDGESETZ DES GEEINTEN DEUTSCHLAND 21* (Jutta Limbach & Marion Eckertz-Höfer eds., 1993) (record of the discussion in the Joint Constitutional Commission). Much criticism has been directed towards the lack of public participation in the recent constitutional reform as well as the perceived lack of substantial reform. *See Mäßiges Interesse an der Debatte über die Verfassung, FRANKFURTER ALLGEMEINE ZEITUNG*, Feb. 5, 1994, at 1; *Interview mit Burkhard Hirsch zur Verfassungsänderung, Süddeutscher Zeitung*, June 9, 1994, available in LEXIS, News Library, SDZ File; *Besser als nichts, aber nicht viel, Süddeutscher Zeitung*, Sept. 2, 1994, available in LEXIS, News Library, SDZ File ("This result remains as distant from the mandate of the Unification Treaty as the moon.").

92. The amendment process is governed in Article 79 of the Basic Law. As set forth in Article 79, an amendment to the Basic Law requires the approval of two-thirds of the members in the Bundestag and of the Bundesrat. GG art. 79 (F.R.G.). Any amendment which would alter the principles established in Article 1 (declaring the dignity of man to be inviolable) or Article 20 (establishing the Federal Republic as a democratic and social federal state) is prohibited.

93. *See Die beschlossenen Verfassungsänderungen, Süddeutscher Zeitung*, Sept. 24, 1994, available in LEXIS, News Library, SDZ File. *See generally* Dr. Hans-Jochen Vogel, *Die Reform des Grundgesetzes nach der deutschen Einheit*,

Although the amendment to article 3, paragraph 2 has not yet received attention by the courts, one of the amendment's primary effects will be to offer unimpeachable reinforcement for the Constitutional Court's factual equality approach. The references to "achievement in fact of equal rights" and the "elimination of existing disadvantages" within the amendment's language closely resemble the Federal Constitutional Court's interpretation of paragraph 2 as "a command for equal rights which encompasses social reality." This resemblance was no coincidence. The debates within the Joint Constitutional Commission reveal the deliberate intention on the part of many to support the Constitutional Court's interpretive turn against critics. As stated by one representative:

Article 3, paragraph 2, properly understood, already contains a mandate to the state to guarantee the equal placement of women [*Gleichstellung*] in society. This is consistently emphasized by the Constitutional Court. Nevertheless, [this mandate] is often disputed by the conservatives.⁹⁴

The amendment's language also supports the Constitutional Court's decision addressing section 611a, which implied the need for an activist state to achieve paragraph 2's purposes. The proclamation that "the state supports the achievement in fact of equal rights" and "works towards the elimination of existing disadvantages" emphasizes the pro-active nature of the state's role.

Perhaps the most revealing insights from the recent constitutional amendment process are gained from looking at

DEUTSCHES VERWALTUNGSBLATT, May 1, 1994, at 497, 497-506.

94. FRAUENRECHTE IM GRUNDGESETZ DES GEEINTEN DEUTSCHLAND, *supra* note 91, at 23 (quoting the remarks of Heidrun Alm-Mark (Minister, Niedersachsen)). Similarly, Susanne Rahardt-Vahldieck of the CDU/CSU remarked that:

It is certainly true that Article 3, paragraph 2 already contains a command for equal rights. I definitely see it in that way. And the Constitutional Court seems to see it in a similar manner. There also exist many others, some who see it this way, but also some who do not. And there continues to be disagreement when it comes to legislative measures. Therefore I think an explanatory amendment to this [paragraph] is important for all, particularly for women in this country.

Id. at 33. Christine Hohmann-Dennhardt (Minister, Hessen) explained that: "It has not been such a long time since the proposition that the state has a duty under Article 3, paragraph 2 . . . to create the conditions for equality and equal rights was labeled as obscure I am very happy that judicial interpretation has followed us in this point." *Id.* at 74.

what failed to be included in the amendment's language. One unincorporated item was any explicit guidance regarding the constitutionality of preferential treatment programs. Representatives from the Social Democratic Party had favored the adoption of a statement that "compensation measures" aimed at achieving equality would not violate article 3, paragraph 3's guarantee of equal treatment.⁹⁵ Such language, however, was vigorously opposed by representatives of the conservative Christian Democratic Union and its coalition partner, the Free Democratic Party. Because these members comprised the majority of the Constitutional Commission's members and of the Parliament, no such provision was added.

Also omitted was any further guidance regarding the precise content of paragraph 2's equality guarantee. While there was agreement that gender equality required more than sex-blind legal norms, members of the Joint Constitutional Commission differed sharply over how much more was required. One representative opined that paragraph 2's equality guarantee mandated "equality in social participation . . . and in all dimensions of social and cultural life."⁹⁶ Others endorsed "equality of opportunity" while sharply rejecting any guarantees of "equality of results."⁹⁷ The amendment's language—which refers simply to the "achievement in fact of equal rights"—makes no commitments with respect to this issue.

III. CONCLUSION

The 1992 Prohibition on Night Work Decision, the 1993 decision interpreting section 611a BGB, and the recently adopted constitutional amendment have created a significant shift in the meaning of article 3's gender guarantees. While these guarantees had originally represented a commitment to providing equal treatment, they now represent two distinct conceptualizations of equality. Paragraph 3 embodies the non-differentiation principle. Paragraph 2, on the other hand, rep-

95. *See id.* at 299-300.

96. *Id.* at 62 (quoting the remarks of Representative Wolfgang Ullman (Bündnis 90/Die Grünen)).

97. *Id.* at 34 (quoting the remarks of Representative Hans-Joachim Otto (F.D.P.)).

resents the goal of factual equality. Factual equality, as opposed to nondifferentiation, requires a pro-active role on the part of the state to eliminate unequal social structures and institutions.⁹⁸

Much about the factual equality approach still requires further exposition. Unresolved issues include the enforceability of the legislative branch's duty to act, the relationship between factual equality and other constitutional values, particularly in the context of preferential treatment programs, and most fundamentally, the concrete meaning of factual equality. For while it is accepted that factual equality requires the transformation of existing social structures, the Constitutional Court has not elaborated upon whether factual equality should be viewed in terms of equality of opportunity in an abstract sense, or equality in the distribution of some defined set of social opportunities and resources. Resolution of these questions will occupy the German courts for many years to come.

98. The factual equality approach to Article 3, paragraph 2 offers interesting contrasts with the route taken in United States equal protection doctrine. First, whereas departures from the nondifferentiation principle in U.S. equal protection jurisprudence must be justified as permissible exceptions to the rule, German jurisprudence has now recognized the centrality of an equality principle other than nondifferentiation. Second, whereas the United States Supreme Court has generally required affirmative actions to be remedial, thus requiring a specific showing of past discrimination, the German factual equality approach is explicitly forward-looking. See Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 1 (1986) (discussing the remedial focus of the Supreme Court's opinions in, among other cases, *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)). But see *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (plurality opinion) (accepting broadcast diversity as a sufficient justification for FCC minority preference policies); *Id.* at 601 (Stevens, J., concurring) ("Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. I endorse this focus on the future benefit, rather than the remedial justification, of such decisions."). *Metro Broadcasting* was recently overruled by the Supreme Court. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).