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Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach

By
Christopher D. Totten*

I. INTRODUCTION

This Article analyzes the constitutionality of gender affirmative action programs in the United States, Canada, Germany and the European Union. Further, it addresses how the existence of constitutional provisions promoting affirmative action affects public debate in those countries. Germany, Canada, and the European Union have constitutional commitments to at least the maintenance, if not the promotion, of gender affirmative action programs. The United States, on the other hand, has not made a firm, explicit precommitment to such programs in either its Constitution or constitutional jurisprudence.¹

While Canada, Germany and the European Union have increasingly supported notions of substantive equality, positive governmental duties and indirect discrimination in their gender equality jurisprudence, American constitutional jurisprudence in this area has largely espoused contrary notions of formal equality, negative duties and purposive-only discrimination.² Although constitutional

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1. "Constitutional precommitment" is a term of art borrowed from Cass Sunstein. See generally Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637-43 (1991). Sunstein's discussion of constitutional precommitments suggests that he views precommitments as including both textual provisions in constitutions and judicial decisions interpreting such provisions. For example, he comments generally that "constitutional provisions may be facilitative [in the sense of constituting] a decision to take certain issues off the ordinary political agenda." *Id.* at 639. Later on, he also points out that "the decision to constitutionalize the right to abortion [in *Roe v. Wade*] might be justified because it minimizes the chances that this intractable and polarizing question will intrude into and thus disable the political process." *Id.* at 639-40. Similarly, unless otherwise indicated, my own reference throughout the Article to "constitutional precommitments" or "precommitments" will imply both sources for precommitments: textual constitutional provisions and judicial decisions containing interpretations of those provisions.

2. The degree to which German equality jurisprudence supports these concepts remains contested; generally, the jurisprudence of the highest German Federal Constitutional Court supports these concepts more than its American counterpart. Substantive equality recognizes that for individ-

precommitments in Germany, Canada and the European Union permit the highest constitutional courts in those countries to uphold challenged gender affirmative action programs, these courts have not held that the precommitments grant women a positive right to seek judicial enforcement of affirmative action programs in the face of existing societal inequality.³ Conversely, though the United States Constitution and related jurisprudence lack a firm precommitment to gender affirmative action, and the U.S. Supreme Court must overcome significant constitutional hurdles before it finds a gender affirmative action program permissible, American jurisprudence does not unequivocally prevent the United States Supreme Court from upholding such a program.⁴

My findings regarding the implications of constitutional precommitments for gender affirmative action in Germany, the European Union, and Canada, suggest the need for a reassessment of the value of constitutional precommitments. In *Constitutionalism and Secession*, Cass Sunstein posited several reasons why a nation might adopt constitutional precommitments, whether in the form of a textual provision or as part of a judicially developed interpretation of such a provision.⁵ Relevant to gender affirmative action programs, Sunstein argued that a state might choose a constitutional precommitment in order to effectively remove potentially destabilizing debate from a nation's political agenda.⁶ He argues that constitutional precommitments prevent potentially divisive issues, such as religion or abortion, from impeding day-to-day governmental decisions, thereby enabling the democratic process to continue.⁷ Various jurisprudential and political developments in Germany, the European Union, Canada and India illustrate that these countries' constitutional precommitments to gender affirmative action have not taken all, or even most, of the debate regarding this potentially divisive issue out of their respective political arenas.⁸

uals to receive equal treatment in practice, they must often receive different or unequal treatment. Formal equality, on the other hand, forbids any form of discrimination in order to achieve equal treatment.

3. Although technically incorrect, I will refer to the European Union as a country for the sake of convenience. In addition, when I refer to the "constitution" of the European Union, I am using that term loosely to mean the European Community's body of primary law, mainly in the form of treaties, as well as secondary law such as binding directives, whose objectives the Member States must follow.

4. United States Supreme Court jurisprudence suggests that a future holding that such programs are constitutional is unlikely.

5. Sunstein, *supra* note 1, at 637-643.

6. *See id.* at 639.

7. *Id.* at 639-40.

8. Though this Article will primarily focus on the experiences of Canada, Germany and the European Union, India provides an example where a constitutional precommitment has failed considerably in taking debate out of the political arena. Though it is beyond the scope of this Article, one example from the Indian experience merits brief discussion: India's Constitution, in Articles 15(4) and 16(4), allows the State to implement affirmative action programs for the "socially and educationally backward classes of citizens" or for the scheduled castes or Tribes. *See* INDIA CONST. art. 15(4), 16(4). Because of the open-ended nature of the phrase "backward classes", it is not readily apparent who qualifies for preferential treatment under these articles. *See* MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA*, quoted in VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1107, 1111 (1999). Take, for example, the response to the decision by Indian Prime Minister Singh in 1990, acting on a government report, to identify and then set aside a certain,

In the European Union, interpretations of the constitutional precommitment to gender affirmative action by the European Court of Justice sparked debate and even amendment by the Member States and political institutions of the Union. Similarly, in Germany, the precommitment to gender affirmative action did not prevent major political parties from seriously debating this issue. In Canada, although national political actors have not debated the validity of gender affirmative action programs, recent contention and strife over this issue have developed among the general public and provincial leaders despite the existence of a precommitment.

This Article also addresses how the absence of a constitutional precommitment to gender affirmative action has affected discourse on that issue. Though the United States lacks a textual precommitment to gender affirmative action and, in all likelihood, a jurisprudential precommitment as well, American constitutional jurisprudence may reflect a precommitment to formal gender equality. Accordingly, this Article examines how this precommitment has shaped public debate.

II. THE EUROPEAN UNION

The European Court of Justice's ("ECJ") interpretive experience with a directive on gender equality in the workplace and affirmative action has evolved incrementally.⁹ Recently, the ECJ has moved toward an increasingly substantive understanding of equality, perhaps in an effort to conform more closely to the will of the Member States and political institutions of the European Union. This incremental development demonstrates that the European Union's textual precommitment to gender affirmative action did not remove contentious debate from the political arena. In fact, the ECJ's interpretations of this precommitment stirred debate among the political institutions of the Union and the Member States that led to amendments to the original precommitment.

Article 2(1) of binding European Council Directive No. 76/207 provides: "[T]he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."¹⁰ Article 2(4) of the directive states, "This Directive shall be without prejudice to measures to promote equal oppor-

large percentage of government jobs and university openings to the loosely defined "Other Backward Classes." The Prime Minister's mere proposal to implement this aspect of the report led to protests and self-immolation by students, and even contributed to the downfall of the Singh government. See COMPARATIVE CONSTITUTIONAL LAW, *supra*, at 1120, 1121 (citation omitted). No one in India would argue that affirmative action programs violate the Indian Constitution—that debate has been removed from the political arena; however, the debate concerning the operational aspects of affirmative action programs presents as much a source of divisiveness as any debate on the constitutionality of affirmative action would. See *generally id.* at 1047; see also INDIA CONST. art. 15(4), 16(4).

9. While technically affirmative action is referred to as positive action in European Union jargon, I will, for the sake of consistency, employ the former terminology.

10. Council Directive 76/207 art. 2 (1) 1976 O.J. (L 39) 40. Also; Article 1(1) of the Directive reads, "The purpose of this Directive is to put into effect in the Member States the principle of equal

tunity for men and women, in particular by removing existing inequalities which affect women's opportunities."¹¹ Albertine Veldman writes, "This Directive obliges Member States to introduce national legislation prohibiting sex discrimination according to the stipulations set out."¹²

Interpretation of Article 2(4), the provision that deals most directly with gender affirmative action, began with a decision by the ECJ in *Kalanke v. Bremen*. The ECJ in *Kalanke* found that a gender affirmative action measure did not comport with Article 2 where it allowed for an automatic preference in appointment and promotion for women who were equally qualified with men, in employment sectors where women were underrepresented.¹³ Specifically, the ECJ believed that "[n]ational rules [like the German one in *Kalanke*] which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive."¹⁴ Significantly, the ECJ viewed Article 2(4) as a derogation from the individual equality right contained in Article 2(1); therefore, according to the ECJ, 2(4) should be interpreted narrowly as disallowing the automatic preference contained in the German statute under review.¹⁵

The ECJ, in providing such a narrow interpretation of Article 2(4), did not recognize a right to substantive equality. By treating Article 2(4) as a narrow exception to the non-discrimination principle in Article 2(2), the ECJ maintained a formal approach to equality. This approach involves treating similarly situated individuals in the same manner. The ECJ did not take the view that 2(4) allows Member States or political institutions of the European Union to take the positive step of passing remedial legislation aimed at compensating women for past inequalities and improving the situation of women for the future.¹⁶

Arguably, the court could have marshaled existing European Community jurisprudential theories to support this view.¹⁷ In the areas of gender equality

treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. . . ." *Id.* art. 1(1).

11. *Id.* art. 2(4).

12. Albertine G. Veldman, *Preferential Treatment in European Community Law: Current Legal Developments and the Impact on National Practices*, in *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES* 279, 280 (Titia Leonen & Peter R. Rodrigues eds., 1999).

13. Case 450/93, *Kalanke v. Bremen*, 1995 E.C.R. I-3051, 1995 ECJ CELEX LEXIS 9529, at *16.

14. *Id.* at *15-16. The affirmative action measure, according to the ECJ, "substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity." *Id.* at *16.

15. *Id.* at *15 (citation omitted).

16. When used here, the phrase "political institutions of the Union" refers principally to the European Commission, Parliament and Council. For a general discussion of the duties and roles of each of these particular institutions of the Union, as well as their relationship to the Member States, see the European Union website, available at <http://europa.eu.int/inst-en.htm> (last visited Nov. 20, 2002).

17. Indeed, the ECJ in dicta in *Kalanke* acknowledged that Article 2(4) allows measures which are discriminatory in appearance, but which intend to eliminate actual instances of inequality, and that it permits measures that give women a specific advantage in order to improve their ability to compete on the labor market. 1995 ECJ CELEX LEXIS 9529, at *14-15.

and affirmative action, European Community law supports the concept of indirect, or effects-based, discrimination.¹⁸ According to Klaartje Wentholt, the concept of indirect discrimination recognizes that if a gender-neutral measure “affects a considerably larger percentage of women, then a ‘prima facie’ case of indirect discrimination is established.”¹⁹ This framework widens the permissible scope of application for affirmative action in general because it acknowledges and proves discrimination more frequently.

The principal political institutions and Member States of the European Union did not accept the ECJ’s analysis in *Kalanke* of the gender affirmative action provision and extensively debated the matter.²⁰ In fact, the level of debate was such that the European Commission, the political institution of the European Union responsible for making legislative proposals to the European Parliament and Council, decided tentatively to clarify the affirmative action principle in 2(4) through the introduction of an amendment.²¹ The amendment considered proposed priority rules for women provided there was an “assessment of the particular circumstances of an individual case.”²² The Commission believed the amendment would accord with the ECJ’s decision in *Kalanke*.²³

The Commission ultimately abandoned this amendment proposal and decided to await action by the Member States on the gender affirmative action issue at the Intergovernmental Conference at Amsterdam in the summer of 1997.²⁴ At the Conference, an additional paragraph was added to Article 119 of the European Community Treaty, stating:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.²⁵

Though the Member States framed Article 141(4) (Article 119 became Article 141 upon the Treaty’s entry into force) as an exception to the principle of equal treatment and thus it technically keeps in place a structure supporting formal equality, its textual language distinguishes it from Article 2(4) of the Directive.

18. See Case 79/99, *Schnorbus v. Land Hessen*, 2000 E.C.R. I-10997, 2000 ECJ CELEX LEXIS 7741. This decision in the gender equality/ affirmative action area relies directly on the concept of indirect discrimination.

19. Klaartje Wentholt, *Formal and Substantive Equal Treatment: The Limitations and the Potential of the Legal Concept of Equality*, in *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES*, *supra* note 12, at 53, 62.

20. See Veldman, *supra* note 12, at 279, 281.

21. *Id.* at 283.

22. *Id.*

23. *Id.*

24. *Id.* At the Conference, Member States would work, in particular, on formulating the Treaty of Amsterdam. Treaties are significant pieces of primary legislation in the European Union, to which each Member must accede for the treaty to become law. See the European Union website, available at http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html#1 (last visited Nov. 20, 2002).

25. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C-340) 1 (1997) [hereinafter TREATY OF AMSTERDAM].

This language reveals that Article 141(4), unlike Article 2(4), aims towards substantive equality. For instance, the following phrases from the Article highlight a commitment to a substantive notion of equality: “With a view to ensuring full equality *in practice* between men and women in working life,” “measures providing for *specific advantages* in order to make it *easier* for [women] to pursue a vocational activity,” and “measures to prevent or compensate for disadvantages in [female] professional careers.” By focusing on realizing equality in practice and providing specific advantages, Article 141 strives to achieve substantive equality. It recognizes the need for governments to undertake positive efforts on behalf of women. Furthermore, the language of the Article indicates a clear desire on the part of the Member States to ameliorate the condition of women.²⁶

The Member States present at the Conference also made clear through a non-binding declaration that the amendment aimed principally at advancing the condition of women.²⁷ In *Badeck*, the ECJ noted that this “fourth paragraph of Article 119, being primary Community law, [took priority over] Article 2 para. 4 of [Council Directive No. 76/207].”²⁸ While it is clear that the amendment to Article 119 will require interpretive efforts by the ECJ, especially as to the meaning of “specific advantages,” several ECJ cases decided after *Kalanke* indicate that the court incorporated the outcome of the political debate concerning the broadening of the language and scope of gender affirmative action.²⁹

While still interpreting Article 2(4) of the Directive, the ECJ’s decisions in *Marschall v. Land Nordrhein-Westfalen* and *Badeck* reflect its receptiveness to

26. See TREATY OF AMSTERDAM art. 119(4) (italics supplied); see also TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3, decl. 28 (1997) [hereinafter EC TREATY].

27. See EC TREATY decl. 28. See also Case 158/97, *Badeck and Others*, 2000 E.C.R. I-1875, 2000 ECJ CELEX LEXIS 7739, at *8.

28. *Id.* The Treaty of Amsterdam, and hence article 119(4), came into force on May 1, 1999. See <http://europa.eu.int/abc/obj/amst/en/> (last visited Nov. 20, 2002). Article 119(4) became Article 141(4) upon the entry into force of the Treaty. See <http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf> (last visited Nov. 20, 2002). See also *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *7-8.

29. The ECJ, in the summer of 2000, actually handed down a judgment based, in part, on Article 141(4) of the Treaty of Amsterdam. See Case 407/98 *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539, 2000 ECJ CELEX LEXIS 7740. The ECJ was asked to determine the conformity of a particular national law of a Member State with Community law. *Id.* at *7-12. The national law at issue concerned professor and research assistant posts created and filled in the context of efforts to promote equality in professional life. *Id.* While posts were to be filled, to some extent, according to the individual merits of each candidate, significant derogations were permitted. *Id.* The ECJ found that such a national law, which provides for an automatic preference for a female candidate who is not equal in terms of career qualifications to a male candidate and who only possesses “sufficient” qualifications, and which does not allow for an objective assessment taking account of the specific personal situations of all the candidates, was not in conformity with Article 2(4) of the Directive on equal treatment of the sexes. *Id.* at *35-36. Concerning Article 141(4) of the Amsterdam Treaty, the ECJ noted

even though Article 141(4) EC allows the Member States to . . . adopt measures providing for special advantages . . . in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued.

Id. at *33. Thus, the national provision at issue in *Abrahamsson* was also not in conformity with Article 141 (4) of the Treaty of Amsterdam.

the gender affirmative action political debate.³⁰ In fact, the ECJ's holding in *Marschall* appears to rely upon language in the European Commission's proposed amendment to Article 2(4), which the commission later abandoned in favor of the changes wrought by the Treaty of Amsterdam.³¹ In *Marschall*, a schoolteacher had his application for a promotion to a higher career bracket rejected because an equally qualified woman also had applied, and fewer women than men worked in this bracket.³² The ECJ held that a national priority rule favoring women does not violate Article 2(4) as long as an objective assessment of the criteria of all candidates occurs and if these criteria favor the male, the woman is not preferred.³³ Similarly, the amendment to 2(4) proposed by the Commission would have permitted priority rules provided there was the possibility of "an assessment of the particular circumstances of an individual case."³⁴ Thus, the ECJ aligned itself with the view of the Commission concerning the necessity of savings clauses in priority rules. The ECJ also held the priority rule in *Marschall* did not violate Article 2(4) since it "may counteract the prejudicial effects on female candidates of [certain] attitudes and behaviour . . . and thus reduce actual instances of inequality which may exist in the real world."³⁵

However, those expecting that the ECJ would pursue fully a course of substantive equality for women in *Marschall*, thereby embracing the twin remedial and preventative aims of affirmative action, were mistaken. The ECJ held that Article 2(4) forbids unconditional priorities for women in job selection and promotion because it remains a derogation from the individual right to equality contained in Article 2(1).³⁶ The ECJ still conceived of Article 2(4) as a narrow exception to the equality right in 2(1).³⁷ In addition, commentators complained that in assessing criteria specific to the individual candidates, as required by the

30. See Case 409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, 1997 ECJ CELEX LEXIS 13976; see also Badeck, 2000 ECJ CELEX LEXIS 7739.

31. See Veldman, *supra* note 9, at 284.

32. *Marschall*, 1997 ECJ CELEX LEXIS 13976, at *9.

33. *Id.* at *17.

34. Veldman, *supra* note 9, at 283.

35. *Marschall*, 1997 ECJ CELEX LEXIS 13976, at *16-17. The attitudes and behaviour referred to in this quotation include the following:

prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth, and breastfeeding.

Id. at *16. The ECJ acknowledged that because of these prejudices and stereotypes, "where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates." *Id.*

36. *Id.* at *17. See also Wentholt, *supra* note 19, at 60 (arguing that, because Article 2(4) is viewed as a narrow exception to 2(1), "affirmative action infringes the right of each individual [under 2(1)] to be treated equally"). Thus, the formal approach to equality in Article 2(1) makes "it difficult to justify affirmative action, for affirmative action does not take individual characteristics but rather group characteristics into account. . . . So the goal of preferential treatment for women is contradictory to the condition of not infringing an individual right of a man." *Id.*

37. *Id.*

savings clause in *Marschall*, the types of criteria selected would, themselves, tend to discriminate against women.³⁸

In light of the criticisms still lingering after the ECJ's decision in *Marshall*, one can interpret *Badeck* as an attempt to move the ECJ closer to the understanding of gender affirmative action expressed by the Member States in the Treaty of Amsterdam. The priority rule in *Badeck* that the European Court reviewed contained "binding targets" of two years duration, aimed at "increasing the proportion of women in sectors [of careers] in which [they] are underrepresented."³⁹ The advancement plan in *Badeck* reserved more than half of all available positions for women in each sector where women were underrepresented.⁴⁰ Moreover, this plan called for filling certain academic posts with women in at least the same proportion of women among graduates, holders of higher degrees, or actual students in the relevant discipline.⁴¹ The plan also allocated a set number of training places to women for careers in which women were traditionally underrepresented and that required training.⁴² Lastly, the plan required interviews of a certain number of qualified women in underrepresented career sectors, as well as a set number of women to serve as representatives on collective bodies such as commissions, advisory boards, boards of directors and supervisory boards.⁴³

In addition to target percentages, the plan called for certain criteria to factor into individual selection decisions. One criterion stands out as particularly favorable to women—interruptions in completing job training as a result of looking after children could not negatively affect women in terms of job evaluations or career progression.⁴⁴ The plan further required that hiring decisions do not take into account the applicant's family status or partner's income.⁴⁵ This latter factor prevents discrimination against women for not being perceived as the family "breadwinners."

In *Badeck*, the ECJ upheld under Article 2 the binding target provision generally applicable to cases where women were underrepresented in a specific public job sector, because it was a flexible, conditional quota.⁴⁶ While the gender affirmative action scheme in *Badeck* appears to represent an absolute quota, the fact that the scheme would not apply in cases in which a "particular sex is an indispensable condition for an activity," mitigates this conclusion.⁴⁷ Furthermore, the plan allowed for the following variance from the scheme: "If it is

38. *See id.* *See also* *Marschall*, 1997 ECJ CELEX LEXIS 13976, at *17-18.

39. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *12. Women are deemed underrepresented under the Plan when fewer women than men are employed in *any salary* bracket. *See id.* at *11.

40. *Id.* at *12.

41. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *13-14.

42. *Id.* at *12. This aspect of the plan did not apply if the State exclusively provided the training or if an insufficient number of women submitted applications. *Id.* at *12-14.

43. *Id.* at *14-15, *17.

44. *Id.* at *15-16.

45. *Id.* at *15.

46. *Id.* at *24. Given the nature of this aspect of the provision, the definition of what constitutes a flexible, conditional quota is rather expansive.

47. *Id.*

convincingly demonstrated that not enough women with the necessary qualifications were available, a correspondingly smaller number of posts may be designated for filling by women."⁴⁸ Also, for the women to be preferred through the plan, they had to be equally qualified with the men in the first place.⁴⁹ The court reasoned that the plan did not fix numeric targets uniformly across all sectors; rather, "the characteristics of those sectors and departments [were] to be decisive for fixing the binding targets."⁵⁰ Moreover, according to the ECJ, the provision did not guarantee the selection of a female candidate where the candidates possess equal qualifications.⁵¹ The ECJ noted that the plan did not give preference to women in career sectors where women were not under-represented.⁵² The ECJ also referred to the existence of five other groups of individuals that could "override" the normal priority given to women.⁵³ The fact that this "override" clause qualified the binding target provision dispelled the notion, at least for the ECJ, that the provision led inevitably to the preference of equally qualified women.⁵⁴

The ECJ also permitted the specific provision of the advancement plan dealing with academic posts due to its conditional nature.⁵⁵ It did not "fix an absolute ceiling but fix[ed] one by reference to the number of persons who have received appropriate training [in the relevant academic discipline], which amounts to using an actual fact as a quantitative criterion for giving preference to women."⁵⁶ The fact that the provision influences selection decisions only if candidates possess equal qualifications also played an important role in the ECJ's finding of compatibility.⁵⁷ Moreover, the ECJ believed the provision was limited since "all the selection decisions which have to be made taking into account the [numerical] targets of the women's advancement plan," and "gen-

48. *Id.* at *12-13.

49. *See id.* at *20-21. From the manner in which the questions referred to the ECJ for specific rulings framed the requirements of the advancement plan, it is apparent that women and men must have equal qualifications before the terms of the plan are triggered. In light of a subsequent decision by the ECJ in Case 407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539, 2000 ECJ CELEX LEXIS 7740, the fact that women and men must be equal in this respect before the priority rule applies, is significant. Largely because the affirmative action measure in *Abrahamsson* provided women who were *less qualified* than men with priority, the ECJ found that the measure was not in conformity with applicable Community law. *Id.* at *30.

50. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *24.

51. *Id.* at *25.

52. *Id.*

53. *Id.* at *27-28.

54. *Id.* at *28. These five groups whose existence justified the override of the normal priority given to women had nothing to do with gender, and were based on rules of law covering certain "social aspects." *Id.* at 27. They included, for example, preferences for former employees who left public jobs because of family work, workers who were part-time because of family work and wished to be full-time, former temporary soldiers, seriously disabled persons, and long-term unemployed persons. *Id.* at 27-28. It seems fair to say that women may also benefit from their inclusion into some of these categories, such that the fact that they override the preference for women may be of scant significance in practice.

55. *Id.* at *30-31.

56. *Id.* at *30.

57. *Id.* at *28-29. For a discussion of the apparent importance of this factor in the rationale of the ECJ's decision, see the discussion of the *Abrahamsson* decision *supra* at note 49.

eral considerations as regards the binding nature of a women's advancement plan also apply."⁵⁸ Here, the ECJ ostensibly refers to the indispensability of the sex exception, the underrepresentation requirement, and the five other groups who can override the normal priority in favor of women.⁵⁹

In light of the ECJ's upholding of various aspects of the advancement plan under Article 2, the ECJ in *Badeck* appears to realize a degree of substantive equality between men and women. Though it was not necessary to reach an interpretation of Article 141 (4) of the Treaty of Amsterdam because it found the advancement plan compatible with Article 2,⁶⁰ the ECJ evidently took the Amsterdam provision into account.⁶¹ Indeed, the gender advancement/affirmative action plan upheld in *Badeck* mirrors that provision's call to "ensur[e] full equality in practice between men and women in working life," and "provid[e] for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."⁶²

58. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *30.

59. Notably, in characterizing other aspects of the advancement plan in *Badeck* as conditional or optional, the ECJ found them consistent with its laws. In particular, in finding consistent with Community law the provision of the plan concerning the allocation of training places, the ECJ commented that while it may appear to be based on a fixed, inflexible quota allowing greater employment opportunities for women, it also does not apply where there are insufficient applications from women. *Id.* at *34. If there are insufficient applications, "it is possible for more than half of those [training] places to be taken by men." *Id.* Moreover, the ECJ noted the fact that the provision only reserves access to training and not employment slots. *Id.* Lastly, the ECJ pointed out that when the State does not have a monopoly in training places (and therefore the provision applies), men can effectively choose to train at private sector locations. *Id.* at *34-35. The ECJ commented that as a result, "no male candidate is definitively excluded from training. . . . the provision at issue therefore merely improves the chances of female candidates in the public sector." *Id.* Furthermore, regarding the interview provision of the advancement plan, the ECJ found it permissible under Article 2 because it did not guarantee a final result in promotion or appointment but rather "affords women who are qualified additional opportunities to facilitate their entry into working life and their career." *Id.* at *37. While the provision contains fixed rules on the number of women to be called to an interview, the ECJ finds significant that only qualified women are to be interviewed who possess at least equal qualifications to men. *Id.* at *37-38. Lastly, regarding the provision of the plan specifying a desired number of women to serve on collective bodies, the ECJ found that since it is not mandatory, it permits other criteria besides gender to be taken into account. The optional nature of the provision, according to the ECJ, is merely reflective of the fact that many bodies are either elected or determined by legislative provisions. *See id.* at *38-39. Here, the ECJ implied that this aspect of the plan concerning collective bodies would hardly ever be realized without formal amendment to the statutory provisions creating such bodies. *Id.* at *39.

60. The initial finding rendered by the ECJ in *Badeck* concerned the controlling provisions it would apply. As the parties framed their arguments around the compatibility of Articles 2(4) and 2(1) with the advancement plan, the ECJ determined that interpretation of the Treaty of Amsterdam would only be necessary if it found that Article 2 precluded the advancement plan. *Id.* at *19-20. Significantly, the ECJ found the advancement plan to be consistent with Articles 2(1) and 2(4). *Id.* at *38-39. Consequently, no interpretation of Article 141 became necessary.

61. Indeed, the ECJ confirmed in *Abrahamsson* that it had the treaty and substantive equality in mind when it noted that the selection criteria in the advancement plan in *Badeck* sought to achieve substantive rather than formal equality, "in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the underrepresented sex." 2000 ECJ CELEX LEXIS 7740, at *17.

62. TREATY OF AMSTERDAM art. 119 (4).

Several aspects of the case merit highlighting for their support of substantive equality.⁶³ First, in *Badeck*, the rather comprehensive gender affirmative action remedy is a binding target. Notably, the remedy in *Badeck* uses general targets whereas the affirmative action measure in *Marschall* required application on a case-by-case basis.⁶⁴ Second, the “savings clause” in *Badeck*, to the extent it can be termed one,⁶⁵ is not as strong as the one in *Marschall* because it does not require a subsequent and necessary balancing to follow an individual evaluation, while the one in *Marschall* does. Therefore, the savings clause in *Marschall* provides for a more powerful override by allowing the distinct possibility that an equally qualified woman would not be preferred over a man in individual employment selection decisions.⁶⁶ Certainly, the preference in *Badeck* for the five “social” categories of individuals overrides the preference for equally qualified women and the affirmative action scheme does not apply if men are an “indispensable sex” for a given occupation.⁶⁷ Significantly, however, the five categories potentially include a larger percentage of women than men.⁶⁸ Further, the number of careers where men are considered an indispensable sex is very small. Compared with *Marschall*, *Badeck* decreases the likelihood that the preference for a female candidate will be overridden by a male candidate, and therefore lessens the likelihood that substantive equality will be compromised. Under the *Badeck* plan, a woman may “lose out” to another woman (or man) who is in more need of a preference than she. This is less troubling than the significant possibility in *Marschall* of numerous overrides in favor of less sys-

63. Though it is beyond the scope of this Article to provide an extensive textual discussion of the substantive equality provided by an affirmative action plan such as the one in *Badeck*, I will list several other aspects of the plan which facilitate substantive equality: (1) women are deemed underrepresented under the Plan when fewer women than men are employed in *any salary bracket*; (2) the general remedy is to give women more than half of the posts in a public sector in which they are underrepresented, sector being defined as a single salary bracket; (3) the remedy itself is in the form of a binding target in two-year time period intervals; (4) if such targets are not met, measured by a certain proportion of women in appointments and promotions to sectors in which they are underrepresented, “every further appointment or promotion of a man in a sector in which women are underrepresented shall require the approval of the body which has approved the women’s advancement plan.” *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *16.

64. The binding nature of the plan in *Badeck* is noteworthy even though the plan in *Marschall* may also, over a longer period of time, achieve the desired level of representation of women in public sector careers. In *Marschall*, the measure applied only if fewer women than men were employed in the relevant higher grade post in the career bracket, as opposed to in each salary bracket. 1997 ECJ CELEX LEXIS 13976, at *7. Since multiple salary brackets can conceivably exist in a single grade post, the *Badeck* plan is potentially more comprehensive in scope.

65. The ECJ in *Badeck* requires of affirmative action measures “that candidatures are the subject of an objective assessment which takes account of the specific *personal situations* of all candidates.” 2000 ECJ CELEX LEXIS 7739, at *38 (emphasis added).

66. There is a weak version of a savings clause in *Badeck* which permits the evaluation of each individual based on particular employment selection factors; however, some of these factors actually tend to favor women. For a discussion of these factors, see *supra* note 54 and accompanying text. The *Badeck* savings clause, though it does not require a balancing process, as in *Marschall*, does provide for an individual evaluation of candidates. 2000 ECJ CELEX LEXIS 7739, at *38.

67. *Id.* at *12, *27-28.

68. For example, women will frequently be individuals who left public sector jobs because of family work, workers who were part-time because of family work and wish to be full-time again, seriously disabled persons, long-term unemployed persons and, to a lesser extent, former temporary soldiers.

tematically disadvantaged men simply because some indeterminate criterion favored the man.

Finally, the plan in *Badeck* leads to the realization of substantive equality through its framework for the selection of candidates. Indeed, the ECJ squarely accepted the selection criteria used in the plan, even though it acknowledged that, although capable of benefiting men, these criteria generally benefit women.⁶⁹

The debate regarding the precommitment to affirmative action in the European Union continues as a recent ECJ decision involving both Article 141 of the Treaty of Amsterdam and Article 2(4) of the Directive, further delineated the scope of these provisions.⁷⁰ In *Abrahamsson v. Fogelqvist*, the ECJ found that a national law permitting positive discrimination towards men, and automatic preferences for women, as a means to promote equality between men and women in their professional lives, violated Article 2(4) of the Directive and Article 141(4) of the Amsterdam Treaty.⁷¹ The national law evaluated by the ECJ in *Abrahamsson* permitted the selection of a sufficiently qualified woman over a man, even where the man was marginally more qualified, in professions in which women are traditionally underrepresented.⁷² Contrary to the ECJ's holding, Article 141(4) of the Treaty and perhaps even Article 2(4) of the Directive arguably permit such a law. For example, as long as the personal situation of candidates is taken into account, Article 141(4) appears to allow for the preference of female over male candidates where they possess "substantially equivalent" job qualifications. Arguably, this phrase captures the marginally more qualified man from *Abrahamsson*. Given their past responses, *Abrahamsson* may compel the political institutions and Member States of the E.U. to further clarify the precommitment to gender affirmative action. Specifically, they may disagree with the ECJ's interpretation of "substantially equivalent."

The European Union's experience with a constitutional precommitment to gender affirmative action has included dialogue and debate within and between the political institutions of the Union, the individual Member States, and the ECJ. Moreover, a certain level of divisiveness characterized this debate. A pro-

69. *Id.* at *26. In *Abrahamsson*, the ECJ referred to and reaffirmed its holding in *Badeck* that positive and negative criteria which generally favor women can be legitimate. 2000 ECJ CELEX LEXIS 7740, at *30. These criteria included the consideration by employers of childcare and housework when they were part of the qualifications for the job. *Id.* at *31. Apparently, not only did the parties in *Badeck* not challenge these criteria, but the use of such criteria was manifestly permitted. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *26.

70. *See Abrahamsson*, 2000 ECJ CELEX LEXIS 7740.

71. For a more detailed description of the national law under scrutiny in this decision as well as the ECJ's particular findings, *see supra* note 29.

72. *Abrahamsson*, 2000 ECJ CELEX LEXIS 7740, at *33. The ECJ held that affirmative action measures may prefer members of the underrepresented sex only if the candidates possess the same or substantially the same qualifications and an objective assessment is employed. *Id.* at *35-36. The ECJ, however, did not analyze what "substantially equivalent" means. Since historical discrimination against women decreases the potential that they will have equal qualifications with men, a flexible interpretation of the term could yet provide for more substantive equality for women in the European Union.

cess of proposed and formal amendment altered the original precommitment contained in Article 2(4) of European Council Directive 76/207.

The ECJ ruling in *Kalanke* stirred the political institutions of the Union and the individual Member States to debate over the original gender affirmative action precommitment. In response to this debate and to proposed and actual amendments, the ECJ, in *Marschall* and *Badeck*, interpreted the gender affirmative action precommitment more consistently with the will and understanding of the political institutions of the Union and individual Member States.⁷³ Though the textual precommitment to gender affirmative action and subsequent interpretation by the ECJ did not curtail debate over the scope and meaning of gender affirmative action, this debate did not thwart the democratic process. Though not lacking in potentially destabilizing moments within the E.U. system, a reasoned and peaceful exchange of ideas characterized the debate within and between the political institutions of the Union, the individual Member States and the ECJ.⁷⁴ The way in which this exchange about gender affirmative action occurred indicates that the deliberative and checks and balances aspects of federalism, normally regarded as key components of any democratic process, thrive in the European Union. Thus, the precommitment to gender affirmative action in the European Union provoked a debate that proceeded within the framework of the democratic process.

Past experience suggests that the political institutions and Member States should consider, as should all states engaged in constitution-making, the drafting of foundational principles, or precommitments, with the highest degree of precision and foresight possible. Such precision and foresight might decrease potentially divisive debate over basic constitutional provisions, such as Article 141(4) of the Treaty of Amsterdam; however, perhaps even the most masterful drafting would not prevent such debate. Accordingly, constitutional precommitments simply do not function in the fashion suggested by Sunstein in *Constitutionalism*.

III.

GERMANY

As in the European Union, the constitutional precommitment to gender affirmative action in Germany has failed to remove contentious, potentially destabilizing debate from the political arena. Neither textual provisions in the German Constitution nor German constitutional jurisprudence has prevented ongoing political divisions concerning the permissibility of gender affirmative action. While in the European Union subsequent judicial interpretation of the precommitment to gender affirmative action prompted political debate, in Ger-

73. *Abrahamsson* may reflect the extent of how far the ECJ will go in finding national priority rules consistent with European Community law. However, given past responses to ECJ rulings, there is little reason to believe that if the Member States desire a more comprehensive affirmative action plan than the one in *Badeck*, they will be unable to amend the Treaty of Amsterdam.

74. There is simply no reason to believe the debate will not continue in this manner in the future.

many the public debate grew out of the political parties' own conflicting interpretations of the precommitment. Apart from the debate in Germany over the precommitment, recent constitutional jurisprudence in the gender equality area in Germany, though not without its limitations, reflects increasing support for a substantive notion of equality. Indeed, the highest German constitutional court, the German Federal Constitutional Court, has demonstrated receptiveness to gender affirmative action programs.

Article 3 of the German Constitution, known informally as the "gender equality guarantee," consists of three parts. Article 3(2) of the German Constitution, in its original form, provides: "Men and women shall have equal rights."⁷⁵ Article 3(1), the general equality clause, stipulates that "[a]ll persons are equal before the law."⁷⁶ Finally, Article 3(3) states, "No one may be disadvantaged or favoured because of his gender, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. . . . [or] his disability."⁷⁷ In 1994, after the reunification of East and West Germany, the Joint Commission of Constitutional Reform drafted an amendment to the existing constitutional gender equality guarantee.⁷⁸ The Commission added the following sentence to Article 3(2): "The State promotes the factual realization of equal rights of men and women and works towards the abolition of existing disadvantages."⁷⁹ The Commission considered this equal rights amendment as a remedy for the disparate treatment of women in former East and West Germany.⁸⁰

Though the Commission agreed on the need for an equal rights amendment, it could not reach consensus on its intended meaning. In particular, during the amendment process and since that time, the Christian Democratic Union ("CDU") and the Social Democrats ("SPD") political parties have vigorously debated the issue of gender affirmative action in the form of quotas:

The reform debate focused on quotas, and it was with this hot topic in mind that the equal rights amendment was formulated, albeit in highly compromised language. The controversy whether the Constitution allows preferential treatment of women, notably in the form of quotas, *continues*.⁸¹

75. GRUNDGESETZ [GG] [Constitution] art. 3 (F.R.G.), translated in ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN, EUROPEAN COMMUNITY AND INTERNATIONAL LAW 138 (1999) [hereinafter, WOMEN, QUOTAS & CONSTITUTIONS]; translation also available at <http://www.lib.byu.edu/~rdh/eurodocs/germ/ggeng.html> (last visited Oct. 30, 2002).

76. GRUNDGESETZ [GG] art. 3(1) (F.R.G.), *supra* note 75.

77. GRUNDGESETZ [GG] art. 3(3) (F.R.G.), *supra* note 75.

78. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 178-180. Peters notes that controversy existed among scholars and politicians about quotas even before the adoption into law of the German Equal Rights Amendment on November 15, 1994. *Id.* at 191. She writes, "Depending on their position . . . proponents of reform of article 3 either wanted to clarify that quotas are permissible or aspired to create such an allowance, while opponents sought to settle that quotas are definitely unconstitutional." *Id.*

79. GRUNDGESETZ [GG] art. 3(2) (F.R.G.), *supra* note 75.

80. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 178-80. Women in East Germany made up a larger percentage of the workforce than in West Germany and enjoyed childcare facilities. *Id.* at 179.

81. *Id.* at 180 (emphasis added).

While the CDU believes the amendment as adopted precludes all quotas, the SPD understands the same amendment to permit them, at least in their soft form.⁸² Scholars and German courts have not clarified the matter. In particular, while the German Federal Constitutional Court has not yet decided a case involving the interpretation of the equal rights amendment, some lower courts have found that “article 3(2) as amended does not authorize quotas.”⁸³ However, even lower court jurisprudence in Germany is inconclusive on the permissibility of quotas.⁸⁴ Thus, the precommitment to gender affirmative action remains subject to an on-going political debate and awaits interpretation by the German Federal Constitutional Court. Anne Peters argues that the Court will have to balance the conflicting constitutional values of freedom from gender discrimination embodied in Article 3(3) with the objective governmental goal of gender equality embodied in Article 3(2).⁸⁵

Peters theorizes that the jurisprudential inquiry to determine the constitutionality of gender affirmative action under Article 3 would proceed by a two-step process: “First, the extent to which dispreferred men may rely on the defensive right to be free from gender discrimination (Article 3(3)) must be examined,”⁸⁶ and second, “constitutional limitations to this right must be

82. “Soft quotas” in the gender context refer to preferences for women as opposed to firm numerical targets.

83. *See id.* at 180 (citing VG Schleswig, 14 NVwZ 724 (1995); VG Arnsberg, 14 NVwZ 725 (1995); OVG Nds., 110 DVBl. 1254, 1257 (1995)). For scholarly interpretation of Article 3(2), *see* SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 169 (1999) [hereinafter, GERMAN CON LAW]. Michalowski and Woods write, “The [Equal Rights Amendment/ Article 3(2)], however, could now be used when arguing in favour of the constitutionality of quota regulations, as these regulations seem to be a possible means of overcoming the factual discrimination of women.” *Id.* For a somewhat contrary scholarly interpretation, *see* WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 178-192. Anne Peters undertakes an incisive analysis of Article 3(2). She chooses four grounds of interpretation arguing that the German Federal Constitutional Court would likely use the same bases in a future case. She concludes, “[L]anguage, legislative history, the amendment’s objective and constitutional structure [do] not reveal clear constitutional support for affirmative action in the form of hiring and promotion quotas. . . . [o]n the other hand, the amendment does not unequivocally preclude such policies.” *Id.* at 190. Peters elaborates further that the amendment is “an objective government goal” and, as such, “does not grant women a subjective [right] to [affirmative action].” *Id.* at 192. As a “constitutional mandate”, it requires “effective . . . implementation of the . . . goal.” *Id.* However, because it “does not specify [actual,] concrete measures” to be taken by the government, the amendment does not strictly require preferential hiring of women. *Id.*

84. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 180.

85. For a detailed explanation of this balancing process, *see id.* at 201-213. The test involves a four-pronged reasonableness or proportionality inquiry: “[T]o qualify as a constitutional limitation on the fundamental right to be free from gender discrimination, the challenged statute must first serve a constitutional objective; it must be suitable and necessary to achieve this goal, and finally it must be equitable under due consideration of the conflicting rights in the concrete situation.” *Id.* at 203-04.

86. *Id.* at 140. As a preliminary matter, Peters explains that German fundamental rights doctrine understands rights as having two characteristics: subjective rights and objective principles. *Id.* at 138, 139. Peters writes that subjective rights “are an entitlement of the individual that must be respected by the government,” and that an individual may seek a remedy before the Federal Constitutional Court for the violation of such rights. *Id.* at 139. Subjective rights include “defensive, negative rights against government interference,” and “may also, under certain conditions, generate a positive entitlement to government action.” *Id.* On the other hand, “as objective principles, fundamental rights constitute a legal framework for the entire state order. . . . [and] thereby influence the

examined.”⁸⁷ This test presumably derives from a textual analysis of the constitutional article, and perhaps from statements gleaned from the constitutional equality jurisprudence of lower courts in Germany as the Federal Constitutional Court has yet to decide any case involving gender quota statutes, or for that matter, any gender affirmative action measure.⁸⁸

By upholding quota schemes, however, German lower courts may have developed an increasingly substantive notion of equality. In particular, two decisions by the lower Federal Labour Court in Germany addressed provisions of the gender equality guarantee.⁸⁹ In both decisions, the Court upheld statutes containing soft quotas as constitutional.⁹⁰ The court, relying on a Federal Constitutional Court decision, held that Article 3(3) did not prohibit gender affirmative action measures: “[M]en’s rights to be free from gender discrimination (article 3(3)) may be limited by the programmatic, positive content of article 3(2), which generally allows measures designed to counteract factual disadvantages that typically affect women.”⁹¹ The court held that Article 3(2) allows for laws containing soft quotas for equally qualified women.⁹² Furthermore, the Federal Labour Court recently upheld another statute containing a preference in hiring for

creation, interpretation and application of all law.” *Id.* The objective principle “exists independently of the . . . bearers of the rights . . . [so t]he individual has no standing to claim a violation of objective principles.” *Id.* Also, Peters believes that because preferential treatment of women infringes upon men’s subjective, personal right to be free from gender discrimination under Article 3(3), “differential treatment of men and women is justifiable only in exceptional circumstances and on narrow grounds that must have a constitutional basis.” *Id.* at 139. Accordingly, for Peters, clause 3(3) mandates heightened judicial scrutiny of gender classifications. *Id.* at 138. *See also* GERMAN CON LAW, *supra* note 82, at 169 (arguing that quota regulations are incompatible with Article 3(3) because it prohibits preferential treatment on the grounds of gender).

87. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 140. According to Peters, this second prong includes four considerations:

First, women have a subjective, arguably positive right to equal protection (article 3(2), sentence 1). Secondly, the objective principle of equal protection, which is likewise embodied in [sentence 1 to article 3(2)] may legitimate affirmative action. Thirdly, the state goal of promotion of equal rights (article 3(2), sentence 2) requires the state to take some forms of affirmative action. Finally limitation of men’s . . . right to be free from discrimination may arguably stem from other constitutional principles such as the principle of the social state.

Id.

88. *Id.* at 140. “The administrative courts of the Lander have, [with some exceptions], found the quota statutes unconstitutional. . . . All the decisions have dealt with soft quotas (preferences for equally qualified women) in government employment, provided for in statutes or regulations.” *Id.* For a discussion of individual cases in these administrative courts, see *id.* at 140-146.

89. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 146.

90. *Id.* The administrative courts of the Lander, on the other hand, continued to hold quota statutes unconstitutional even after the constitutional amendment in 1994 to Article 3(2). *Id.* (citations omitted). Labor courts, which have jurisdiction for contracted employees in the public sector, not for employees with vested employment status as the Lander courts do, have tended to support quotas. *Id.* (citations omitted).

91. *Id.* at 145 (citing Federal Labour Court (Bundesarbeitsgericht-BAG), order of 22 June 1993, 11 NZA 77 (1994)). The court here must be referring to Article 3(2), sentence 1, “Men and women shall have equal rights,” because Article 3(2), sentence 2 was not added as an amendment until 1994.

92. *Id.* at 145 (citing BAG, order of 22 June 1993, 11 NZA 77, 81 (1994)).

equally qualified women where fairness considerations played a role.⁹³ As a conceptual matter, lower courts in Germany support substantive equality.

Although no German Federal Constitutional Court case directly addresses a gender affirmative action measure, there are cases from the Court that signal the beginning of a shift to a substantive notion of equality, and shed light on any future inquiry by the Court into gender affirmative action.⁹⁴ In a 1992 gender discrimination case concerning night-work by female employees (“the night-work case”),⁹⁵ the Constitutional Court stated, “The [first] sentence [of Article 3 (2)] ‘Men and women shall have equal rights’ not only seeks to abolish legal norms that link advantages or disadvantages to gender, but seeks to implement equal rights for the future.”⁹⁶ The Court noted that the clause focuses upon equality of living conditions.⁹⁷ In fact, in dicta in the night-work case, the Court commented that under Article 3(2), women can receive preferential treatment for disadvantages they experience within society.⁹⁸ Moreover, Peters notes, “The Court explicitly called article 3(2) ‘a constitutional mandate to foster equal standing of men and women . . . that extends to social reality.’”⁹⁹ Indeed, these statements suggest that the Court fosters and promotes substantive equality between the sexes. Similarly, the Court may prove receptive to gender affirmative action as a mechanism for realizing this equality.

Nevertheless, Peters comments that scholars of German constitutional jurisprudence recognize that the court’s reference in the night-work case to Article 3(2) as a “‘constitutional mandate’ . . . does not necessarily imply that individual women have a subjective right to governmental promotion of factual equal standing in society.”¹⁰⁰ In fact, without an explicit holding by the Federal Constitutional Court, she argues that one can only understand the mandate from the Court to foster equality between men and women in society as an “objective principle.”¹⁰¹ This understanding of Article 3(2) means the German government must actively support the realization of gender equality, and even gender affirmative action measures only once it or a private entity voluntarily decides to

93. *Id.* (citing BAG, judgment of 2 December 1997, 12 ZTR 419 (1998)).

94. In this regard, there is considerable resemblance to the state of equality jurisprudence in Canada.

95. This case, formally titled *Prohibition on Working at Night Case*, BVerfGE 85, 191 (1992), was decided by the Federal Constitutional Court before the amendment to Article 3(2). GERMAN CON LAW, *supra* note 82, at 173. The case concerned a particular provision of a German employment law that prohibited women from working shifts between 8 p.m. and 6 a.m. *Id.* When an employer was issued a fine for non-compliance, she sued by bringing the constitutional complaint the Court eventually ruled upon. *Id.* The Court ultimately held that the provision of the employment law violated Articles 3(2) and 3(3). *Id.* at 175-76. For a further discussion of the case, *see id.* at 173-76.

96. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 161 (quoting BVerfGE 85, 191, 207 (1992)).

97. *Id.*

98. GERMAN CON LAW, *supra* note 82, at 169 (quoting BVerfGE 85, 191, 207 (1992)).

99. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 161 (quoting BVerfGE 85, 191, 207 (1992)).

100. *Id.* at 161.

101. *Id.* at 161-62. The language, legislative history, and structure of the provision further support that the first sentence of Article 3(2) embodies an objective principle. *Id.* at 173.

undertake them. However, as Peters notes, “women cannot rely on the objective, positive principle of gender equality before courts to force governmental action. . . . directed at the abolition of factual inequalities in social life.”¹⁰² Women would only gain the right to demand affirmative action by the government if the Court holds that women possess a subjective right to equality. Thus, while the notion of substantive equality finds some support in German constitutional jurisprudence, and lower courts have upheld gender affirmative action programs in the form of quotas, German women presently do not have a constitutional right to demand affirmative action in the face of inequality allowed to exist by the government.

Lastly, Article 3(3) likely prohibits gender-neutral rules having a disparate impact on one particular gender. According to Peters, one “can conclude that the constitutional gender equality clause in principle prohibits indirect discrimination . . . [however] the exact scope of this prohibition is not yet clear.”¹⁰³ Though German case law on indirect discrimination in the gender context is “sparse and incoherent,” recent cases tend to support the notion that constitutional provisions on gender equality prohibit indirect discrimination.¹⁰⁴ As Peters validly points out, the recognition of indirect, effects-based discrimination “adds legitimacy to affirmative action, because affirmative action may remedy indirect discrimination.”¹⁰⁵ Consequently, Article 3(3) presumably improves the prospects for many types of gender affirmative action programs.

In Germany, the constitutional precommitment to gender affirmative action did not remove contentious debate from the political arena. Neither textual provisions in the German Constitution dealing with gender equality and affirmative action, including the equal rights amendment of 1994, nor German constitutional jurisprudence prevented an on-going debate. To the extent this debate may produce instability and divisions within German political society, the constitutional precommitment does not function as contemplated by Sunstein in *Constitutionalism*. In fact, the heated debate between the Christian Democratic Union (CDU) and the Social Democrats (SPD) in Germany over the quota issue represents the existence of continued political divisions concerning gender affirmative action.¹⁰⁶

IV. CANADA

Recently, debate and discord has surfaced within Canada’s political arena over affirmative action despite the presence in Canada of a constitutional

102. *Id.* at 162.

103. *Id.* at 157. According to Peters, scholarship has “pointed out that language, original intent, function and structure of the gender equality clause permit the conclusion that the equal protection clause prohibits indirect discrimination. . . . This conclusion is supported by the 1994 amendment of article 3(2).” *Id.* (citations omitted).

104. *Id.* at 156 (citation omitted). For a discussion of these cases, see WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 156-157.

105. *Id.* at 157.

106. See *supra* note 78.

precommitment to affirmative action. Though national political actors in Canada have not debated the issue of gender affirmative action, evidence shows that the general public and provincial political leaders have questioned the appropriateness of such measures. Therefore, though the precommitment to gender affirmative action in Canada may have prevented debate on this issue from surfacing in Canadian national politics thus far, the precommitment's ability to continue to do so in the future remains in doubt. Indeed, although it has not yet decided a gender affirmative action case, the Supreme Court of Canada's jurisprudence indicates a high likelihood of upholding these programs. Such a decision could intensify national political debate.

Section 15 of the Canadian Charter, Canada's principal constitutional document dealing with individual rights and freedoms, addresses gender equality and affirmative action. It states, "Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹⁰⁷ Section 15(2) states, "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹⁰⁸ The Supreme Court of Canada has not yet decided a case directly on section 15(2), which ostensibly permits and encourages gender affirmative action programs. Recent cases in Canada concerning section 15(1), and one non-Charter case, support a substantive notion of equality and shed light on any future inquiry by the Supreme Court on gender affirmative action.

The Canadian Supreme Court's interpretations of the equality provisions under the Charter suggest receptivity to affirmative action programs.¹⁰⁹ In *Eaton v. Brant County Board of Education*, the Supreme Court found that a decision by an administrative board and Tribunal to place a child in a special education classroom did not violate section 15.¹¹⁰ According to the Court, the board and Tribunal decisions did not impose on the child a burden or disadvantage, though they did distinguish between the child and others based on an educational disability (i.e., a "mental disability" under section 15(1)).¹¹¹ Importantly, the Court pointed out that not every distinction drawn between individuals based on a prohibited ground under 15(1) constitutes discrimination.¹¹² According to the Court, an understanding of equality as "accommodation of differences" leads to the acknowledgement that section

107. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

108. *Id.*

109. Of course, this lack of Supreme Court case law on point is a source of tremendous potential for uncertainty for both the general development of gender equality affirmative action jurisprudence, and specifically for future Canadian jurisprudence on section 15(2).

110. *Eaton v. Brant County Bd. of Educ.*, [1997] S.C.R. 241.

111. *Id.* at 274, 277.

112. *Id.* at 272.

15(1) has two distinct purposes: to prevent discrimination by “the attribution of stereotypical characteristics to individuals,” and “to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.”¹¹³ The Court’s language in *Eaton* affirms the over-all ameliorative dimension of section 15.

The Supreme Court of Canada recently further expounded upon the ameliorative, as well as other, aspects of section 15 of the Charter. In *Law v. Canada*, the Court held that the denial of a female survivor’s pension benefit under the Canada Pension Plan because of the survivor’s age (not, notably, gender) did not violate section 15(1).¹¹⁴ The Court’s reasoning advanced considerably its equality jurisprudence under Section 15(1).¹¹⁵ As part of its section 15 analysis of whether a claimant was subject to differential treatment on the basis of “race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability,” *Law* emphasizes the need for a court to inquire as to whether the unequal treatment provided by a law discriminates in a substantive sense.¹¹⁶ Instances of substantive discrimination violate the overall purpose of section 15(1) of the Charter—to remedy prejudice, stereotyping and disadvantage.¹¹⁷

As *Law* makes clear, section 15 contains a remedial component; therefore, it must also have as one of its intended aims the improvement of the position of disadvantaged groups within society.¹¹⁸ The provision reflects a recognition that real social equality may require disparate treatment of individuals.¹¹⁹ The

113. *Id.* (citing *Andrews v. Law Soc’y of B.C.*, [1989] S.C.R. 143, 169).

114. *Law v. Canada* (Minister of Employment and Immigration), [1999] S.C.R. 497. The Court in *Law*, in developing three broad inquiries a court should undertake in its section 15(1) analysis, employed a multi-layered analysis alluding to purposive, contextual and ameliorative aspects.

115. *Id.*

116. *Id.* at 524. As part of the multi-layered section 15 analysis, a court should inquire whether a law “draw[s] a formal distinction between the claimant and others on the basis of one or more personal characteristics.” *Id.*

117. *Id.* See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). Interestingly, the Court in *Law*, as part of the section 15 inquiry, devoted very little attention to the role of section 1 of the Canadian Charter, which allows the “infringement [of a Charter right if it can] be demonstrably justified in a free and democratic society.” The Court only held that since it had “found no violation of s.15(1) of the Charter, it [was] not necessary to turn to [section] 1.” *Law*, [1999] S.C.R. 497, at 563. The precise role of section 1 in the new section 15 analysis adopted by the Court in *Law* awaits a future case.

118. After surveying statements from previous decisions, including *Eaton*, the Court elaborates on the essential purpose of section 15(1) in deterring discrimination and fostering equality among all groups within society. The Court states,

[T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Law, [1999] S.C.R. 497, at 500.

119. Indeed, the Court later states that the third broad inquiry under section 15(1) analysis is “really . . . a restatement of the requirement that there be substantive rather than merely formal inequality” in order for an infringement of section 15(1) to exist. The Court stated, “Under this alternative view, the definition of ‘substantive inequality’ is ‘discrimination’ within the meaning of the Charter, bringing into play the claimant’s human dignity.” *Id.* at 546-47. Since substantive

Law Court acknowledges that the formal equal treatment of individuals does not always result in substantive equal treatment, and will not, by itself, always suffice. This emphasis on substantive equality and the improvement of disadvantaged groups strongly signals a jurisprudential climate favorable to gender affirmative action programs.¹²⁰

However, the Court in *Law* qualified its findings somewhat, throwing into question whether ameliorative legislation would always comport with section 15. Judge Iacobucci, writing for the majority, pointed out that ameliorative legislation excluding individuals from a historically disadvantaged group will rarely be permitted under section 15.¹²¹ Furthermore, the Court remarked that it was not foreclosing the possibility that a statute ameliorating the position of one group might violate another member of society's rights.¹²² Following this remark, the Court left room for the possibility of novel types and forms of discrimination.¹²³ Thus, while the nature of the equality analysis in *Law* under section 15(1) indicates that the Court will uphold gender affirmative action pro-

inequality triggers a violation of section 15, the resulting remedy would require not simply the institution of a non-discrimination principle but also the disparate treatment of groups to improve a particular group's position within society in an effort to make all groups equal. *Id.* at 529.

120. The Court in *Law*, drawing on its previous jurisprudence, also points out that not all legislative distinctions will conflict with the purposes of section 15:

[D]ifferential treatment will not likely constitute discrimination within the purpose of s.15 (1) where it does not violate the human dignity or freedom of a person or group . . . and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

Id. (emphasis added). Given the correlation between this language and most affirmative action programs, the Court would likely find that such programs do not constitute discrimination and, therefore, do not violate section 15. See also Beatrice Vizkelety, *Adverse Effect Discrimination in Canada: Crossing the Rubicon from Formal to Substantive Equality*, in *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES*, *supra* note 12, at 223, 232 (explaining that since 1995, the Supreme Court of Canada has, through several of its decisions, recognized "the concept of substantive equality and also [shown] a willingness to ensure the amelioration of the situation of disadvantaged groups by imposing, where necessary, a positive duty to act"). As part of its contextual focus under section 15, the Court in *Law* again indicates the probable constitutionality of affirmative action programs under section 15 equality analysis. Linking its purposive analysis to its contextual and comparative approach to section 15, the Court states, "In order to determine whether the fundamental purpose of s.15(1) is brought into play in a particular claim, it is essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant." *Law*, [1999] S.C.R. 497, at 531. The Court lists the following particular contextual factors relevant to the determination of whether a legislative distinction conflicts with the overall purpose of 15(1): any pre-existing disadvantage on the part of the group singled out for the distinction, and the ameliorative purpose and effects of the distinction. *Id.* at 534, 539. For other contextual factors, see *id.* at 537, 540. The latter contextual factor is particularly relevant to the determination of the constitutionality under section 15 of gender-based distinctions, such as those implicated by various affirmative action schemes. After citing Judge Sopinka's opinion in *Eaton* as to the ameliorative aspect of section 15, the Court in *Law* further elaborated that disadvantaged individuals in need of assistance can benefit from the targets of affirmative action-type legislation without violating the dignity of more advantaged individuals. *Id.* at 539. Accordingly, a section 15 violation does not exist if there is no violation of human dignity and, consequently, no discrimination.

121. *Id.* at 539 (citation omitted).

122. *Id.* at 540.

123. *Id.*

grams under section 15(2), the Court gives itself the flexibility to find that 15(2) might prohibit particular, perhaps novel gender affirmative action measures.¹²⁴

One final aspect of *Law* completes the analysis of Canadian equality jurisprudence under section 15(1), and its implications for gender affirmative action. In its discussion of the burden on the claimant under section 15(1), the Court revealed that a section 15(1) claimant may prove discrimination by showing either a discriminatory legislative intent or a discriminatory effect.¹²⁵ Thus, the Canadian Supreme Court recognizes indirect, or effects-based, discrimination. Because affirmative action largely aims at redressing and preventing the asymmetrical effects on men and women of facially neutral laws, such recognition widens the allowable scope for gender affirmative action measures. Indeed, if a court does not acknowledge discriminatory effects, then it will deny justifications for several types of measures aimed at addressing such effects.

Moreover, another Canadian case, though it does not implicate the Charter, illustrates the general receptiveness of the Court to gender affirmative action schemes. In *Canadian Nat'l Ry. Co. v. Canada*, the Canadian Supreme Court upheld a federal human rights tribunal order establishing an affirmative action program designed to remove existing inequalities against women and improve their representation in non-traditional occupations.¹²⁶ As a preliminary matter, the case did not require the Court to interpret the equality provisions in the Charter because the plaintiff originally challenged Canadian National Railway's alleged discriminatory hiring practices on the basis of the Canadian Human Rights Act ("Act"), and not the Charter.¹²⁷ The federal human rights tribunal constituted under the Act required the railway, by the terms of its order, to im-

124. Again, the Court noted that section 15 under most circumstances prohibits ameliorative legislation that excludes disadvantaged groups. *Id.* at 539. Under the new section 15(1) analysis, the Court in *Law* found that although the survivor pension at issue distinguished between groups based on age, the distinction did not violate section 15(1) because it did not involve substantive discrimination. *Id.* at 552-55. It noted that the law did not "reflect or promote the notion that [young people] are less capable or less deserving of concern, respect, and consideration, [given] the dual perspectives of long-term security and the greater opportunity of youth." *Id.* at 559. Furthermore, the Court found the statutory distinction permissible, reasoning that it accords with the ameliorative purpose of 15(1) and that the distinctions drawn by the law corresponded with the different circumstances of older individuals as less likely to remain financially independent. *Id.* at 559-60.

125. *Id.* at 543-44 (citing *Andrews*, [1989] S.C.R. 143, at 174).

126. See generally *Canadian Nat'l Ry. Co. v. Canada* (Canadian Human Rights Commission), [1987] S.C.R. 1114. Non-traditional occupations, in the context of this case, mean "occupations in which women have been significantly underrepresented considering their proportion in the workforce as a whole." *Id.* at 1124.

127. *Id.* at 1118. Although the Court in *Canadian Nat'l Ry.* did not address the matter, the plaintiff may have originally proceeded under the Act instead of the Charter by reason of: (1) the lower cost and less formal nature of challenges under the Act; (2) the fact that human rights laws, though not de jure constitutional law, enjoy a quasi-constitutional status before Canadian courts (this reasons works in tandem with the first); and more fundamentally, (3) the Charter's applicability to federal and provincial governments only and not to private sector entities. See John Hucker, *Anti-Discrimination Laws in Canada: Human Rights Commissions and the Search for Equality*, in MAKING RIGHTS WORK 113, 116, 120 (Penny Smith, ed., 1999). Although not indicated, it is possible that Canadian National Railway Co. is a private entity to which the Charter would not apply; however, the company's name implies a connection to at least the federal government. Perhaps the plaintiff was uncertain as to how a court would determine the issue of the railway's public versus private status and chose the safer route of a challenge under the Act. However, it is unclear, assum-

plement a gender affirmative action program in response to its discriminatory hiring practices.¹²⁸ In particular, the measure adopted by the human rights tribunal to correct this systematic discrimination against women required the railway to hire at least one woman for every four non-traditional positions to be filled.¹²⁹ Furthermore, this ratio had to be adhered to over a particular period of time until women filled a certain percentage of non-traditional positions.¹³⁰

Similar to its constitutional equality analysis under section 15, in finding that the human rights tribunal had jurisdiction to implement the above affirmative action program, the Supreme Court in *Canadian Nat'l Ry. Co.* relied on a contextual and purposive approach to statutory interpretation.¹³¹ Specifically, in interpreting the jurisdictional section of the Act that was at issue in the determination of the permissibility of an affirmative action measure, the Court looked to the broad purpose of this section. The Court concluded that the statutory provision permitted special measures that not only prevented future discrimination, but also allowed for remedial steps designed to compensate for past wrongs against women.¹³² As part of its contextual approach, the Court reiterated that the railway had knowingly engaged in a pervasive kind of employment discrimination that resulted in almost no women obtaining non-traditional jobs. This small number itself "perpetuate[d] exclusion and, in effect . . . cause[d] additional discrimination."¹³³ Furthermore, the Court concluded that, given the context of the discrimination at issue, the human rights tribunal's order satisfied the purpose of the Act.¹³⁴

Interestingly, though the recent *Law* decision indicated a decisive turn to substantive equality and recognized the ameliorative aspect of section 15 equality analysis, the Canadian Supreme Court has refrained from declaring that women, or other disadvantaged groups, may successfully bring suit demanding affirmative action from the government in the face of existing inequality.¹³⁵ In *Eldridge v. British Columbia*, the Supreme Court determined that two statutes

ing sufficient financial backing, why the plaintiff could not have proceeded using both avenues simultaneously. *See id.* at 120.

128. *Canadian Nat'l Ry. Co.*, [1987] S.C.R. at 1138.

129. *Id.* at 1127.

130. *Id.*

131. *Id.* at 1141-42.

132. *Id.* at 1142.

133. *Id.* at 1141.

134. *Id.* In holding that the affirmative action measure was permissible under the jurisdictional section of the Act, the Court reasoned that remedying past acts of discrimination and preventing such future acts are not intrinsically distinct concepts that can be neatly separated from each other: "[T]he prevention of systemic discrimination [for the future] will reasonably be thought to require systemic remedies [for past discrimination]." *Id.* at 1145 (citation omitted).

135. Arguably, prior to the definitive turn in *Law* to a contextual, purposive approach to section 15 equality analysis, and its corresponding focus on substantive equality, certain cases in the gender equality area avoided such an approach. *See Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (holding that there was no violation of section 15 where a divorced mother was disallowed from excluding child support payments by ex-husband from her taxable income); *Symes v. Canada*, [1993] 4 S.C.R. 695 (holding that a businesswoman was not allowed to deduct additional child care expenses from her taxable income as a business expense). For a thorough discussion of these cases, *see Mary Jane Mossman, Gender Equality and the Canadian Charter: Making Rights Work for Women?*, in MAKING RIGHTS WORK, *supra* note 127, at 140, 155 (remarking that *Symes* and *Thibaudeau* "confirm the

providing government-funded medical benefits violated section 15(1) because they failed to allow for the provision of sign language interpreters so that deaf persons could achieve equal access to these benefits.¹³⁶ After concluding that effective communication is an indispensable component of medical services, the Court recognized “that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner.”¹³⁷ Consequently, the provision of essentially free medical services by the government to the entire provincial population triggered a corresponding responsibility to ensure that the province provided the deaf sector of that population with sign language interpreters. The Court, while recognizing this right, failed to recognize that sector’s right to a positive remedy by the government in the event of systemic or general inequality.¹³⁸

The Canadian experience with gender affirmative action provides some insightful but ultimately inconclusive evidence as to whether constitutional precommitments remove potentially destabilizing issues from a nation’s political agenda.¹³⁹ First, the Supreme Court of Canada has not directly decided a case on the constitutional provision in the Canadian Charter dealing with gender affirmative action. Second, and consequently, no political branch of government on the national or provincial level has had reason to respond to any Supreme Court interpretation under 15(2). It remains possible that a future interpretation of 15(2) by the Court will spark divisive political debate on the issue.¹⁴⁰

The claim that a future Court decision on gender affirmative action will itself trigger political and other forms of debate has support. Describing the impact of government (though not specifically court) action concerning affirmative action, John Hucker, the Secretary General of the Canadian Human Rights Commission, anticipated public debate as the national government and human rights agencies assume a more redistributive role through their support of affirmative action programs.¹⁴¹ Furthermore, according to the Secretary General, affirmative action programs played a role in the defeat of a political party in a 1995 provincial election.¹⁴²

Comparing the response by political actors to constitutional precommitments in the European Union and Germany, arguably Canada’s current experience reflects a degree of consensus, at least at the federal level, concerning the appropriateness of the constitutional precommitment to gender affirmative action.¹⁴³ The present consensus may reflect either that most political actors and

profound impact of the *status quo* to resist challenges to gendered social relationships among men and women, relationships of hidden power”).

136. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

137. *Id.* at 678.

138. *Id.* (citing *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627).

139. As indicated previously, when I refer to “constitutional precommitments” or “precommitments,” I generally mean both those embodied in constitutional provisions and those developed as a result of interpretation by courts of particular constitutional provisions.

140. *See Hucker, supra* note 127, at 130-131.

141. *Id.*

142. *See id.* at 129-131.

143. Indeed, in Canada, the federal legislature, perhaps out of a desire to adhere to the constitutional precommitment itself, has adopted various laws supportive of affirmative action in the private

their constituents genuinely believe that gender affirmative action is a sound policy for Canada or, conversely, that even though they do not support gender affirmative action, the government must comply with constitutional precommitments. Those in the latter category may believe strongly in the rule of law and specifically doubt the efficacy of tinkering with constitutional provisions.

Commenting on Canadian sentiment, Hucker notes that affirmative action is a “controversial concept . . . which is viewed in some quarters as a necessary extension of human rights principles, in others as a misguided effort at social engineering that undermines the very idea of equality.”¹⁴⁴ This statement supports the notion that the consensus among Canadian national political actors on affirmative action programs, to the extent it exists, results from a shared belief in adhering to constitutional precommitments generally and as embodied in section 15 of the Charter in particular. Notably, it does not support the conclusion that there is absolute normative consensus among Canadians that gender affirmative action programs are inherently valuable.

Any existing consensus among national political actors in Canada concerning gender affirmative action may weaken in the future. Indeed, Canadian public opinion on affirmative action generally has increasingly diverged and political debate has intensified.¹⁴⁵ As political currents evolve, the Canadian precommitment to gender affirmative action may prove unable to remove divisive debate from the political arena.¹⁴⁶

Any future Canadian Supreme Court ruling that deals with gender affirmative action under 15(2) may dissolve the tenuous, existing political consensus at the national level and result in destabilizing debate among Canadian political actors revealing that the consensus on gender affirmative action was illusory. Of course, the distinct possibility exists that a 15(2) affirmative action case in the gender area has not reached the Court precisely because of such a national consensus. In any event, it remains uncertain whether or not the constitutional precommitment in Canada to gender affirmative action will keep potentially destabilizing debate regarding this issue out of the political arena in the future. Present seeds of discord suggest that it will not.

employment context. For example, both the 1986 Employment Equity Act and a new version of the same Act, which came into force in 1996, allow the Canadian Human Rights Commission, a body established by the Canadian Human Rights Act, to institute hiring goals to increase the number of members from designated groups, including women, in order to reflect workforce availability. *See id.* at 126-27. The 1996 version of the Act gives more power to the Commission to force employers to agree to an employment equity plan containing such hiring goals. *Id.* Also, Hucker writes, “[M]any major employers are actively engaged in seeking out members of [disadvantaged groups such as women] in the realization that they constitute a valuable pool of potential recruits.” *Id.* at 130 (citing Margaret Wentz, *The Case for Affirmative Action*, *GLOBE AND MAIL* (Toronto), Aug. 12, 1995, at D7 (arguing that affirmative action programs have never been more widespread or popular)).

144. Hucker, *supra* note 127, at 113.

145. *See generally id.* at 129-31.

146. *Id.* at 129.

V.
THE UNITED STATES

The United States Constitution does not contain an explicit reference to gender affirmative action or even gender equality. This stems from the distinctly unequal status of women at the time of the Constitution's adoption in 1787. In fact, women did not gain the right to vote in the United States until 1920.¹⁴⁷ Consequently, gender equality analysis in the United States emanates from the United States Supreme Court's equal protection analysis. This section discusses the current state of gender equality analysis. It also describes a jurisprudential evolution towards a constitutional precommitment to formal gender equality in the United States and questions whether a similar progression exists towards a precommitment to gender affirmative action. Arguably, Supreme Court jurisprudence has almost entirely removed debate from the political arena concerning formal equality for women. This provides a contrast with the experiences of the European Union, Germany and perhaps Canada, where constitutional precommitments have largely failed to remove contentious debate (albeit on the different issue of gender affirmative action).

As developed by the Supreme Court, equal protection analysis under the Constitution involves interpretation of the Fifth and Fourteenth Amendments. The Court has held that equal protection analysis proceeds in the same manner under both provisions.¹⁴⁸ The Court selects a level of scrutiny to evaluate a challenged statute based on the nature of the classification, such as gender. In *United States v. Virginia* ("VMP"), the Court elevated the level of scrutiny applied to gender classifications:

[T]he reviewing court must determine whether the proffered justification [for the gender classification] is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely in the State. The State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'¹⁴⁹

While gender classifications may be used, according to the Court in *VMI*, to compensate women for past economic discrimination and to foster equal opportunity in employment, such classifications may not be used to place or maintain women in an inferior position in society.¹⁵⁰ Interestingly, the Court noted that as physical differences between men and women are constant, such differences might also justify gender classifications; however, the Court does not specify under what circumstances this is the case.¹⁵¹ Despite this language from the opinion regarding permissible types of gender classifications, benign gender classifications (classifications designed to benefit a particular gender), remain technically subject to the heightened judicial scrutiny referred to in *VMI*. This level of scrutiny approaches, if not meets, the strict scrutiny analysis applied to

147. U.S. CONST. amend XIX.

148. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (citation omitted).

149. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (citations omitted).

150. *Id.* at 533, 534 (citations omitted).

151. *Id.*

all racial classifications, invidious as well as benign, after *Adarand*.¹⁵² Consequently, gender affirmative action schemes will not likely survive the constitutional test as outlined in *VMI*.

Nevertheless, the *VMI* decision leaves open the possibility that a gender affirmative action measure may survive a constitutional equal protection inquiry. *VMI* involved an admission policy at Virginia's premier military training school that categorically excluded women; accordingly, it was an invidious classification (i.e., a classification designed to harm a particular gender).¹⁵³ The Court has not specifically decided whether this test also applies to benign gender classifications. Since *Adarand*, the Court scrutinizes benign and invidious racial classifications under the strict scrutiny standard.¹⁵⁴ Thus *VMI*, and other constitutional precedent, may produce an unusual result: the Court potentially could uphold benign gender classifications, while denying benign racial ones. This follows from the fact that the Court could potentially apply a lower level of scrutiny to gender affirmative action measures than it does to invidious gender classifications. Indeed, in *Califano v. Webster*,¹⁵⁵ the Supreme Court held that a benign, gender affirmative action measure designed to remedy the effects of past economic discrimination against women satisfied the intermediate scrutiny analysis described above.¹⁵⁶ The fact that a lower burden could apply to a benign gender classification, and not to a benign racial one is unsettling to the extent that equal protection doctrine historically developed with efforts to remedy the disadvantaged position of racial minorities.¹⁵⁷ Further, the Court in *VMI* hinted at a more permissive stance to gender classifications benefiting women. It noted that sex classifications may be used to compensate women for economic disabil-

152. See *Adarand*, 515 U.S. at 224, 226.

153. See *VMI*, 518 U.S. at 519-523, 546-557. Women were actually harmed by their inability to receive the unique educational instruction that the VMI afforded. Though the state of Virginia proposed a separate military school for women, the Court determined that it was "different in kind from [the school for men] and unequal in tangible and intangible facilities." *Id.* at 547.

154. See *Adarand*, 515 U.S. at 224, 226.

155. 430 U.S. 313 (1977). The measure at issue in *Califano* involved a provision of the Social Security Act that had the effect of granting to retired female workers higher monthly old-age benefits than those received by similarly situated male workers. *Id.* at 315, 318. Because benefits under the Act were based on past earnings, and because, according to the Court, women, as a result of discrimination, have traditionally earned less than men, "allowing women . . . to eliminate additional low-earning years from the calculation of their retirement benefits [and not men] works directly to remedy some part of the effect of past discrimination." *Id.* at 318. The Court found that "the reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women", was, under the test of intermediate scrutiny, "an important governmental objective", and the classification was substantially related to the achievement of this objective. *Id.* at 317, 320. Concerning the latter, the Court found the differing treatment of men and women was intended to "compensate for particular economic disabilities suffered by women." *Id.* at 320. The heightened form of scrutiny used in *VMI* for an invidious gender classification differs from the intermediate scrutiny test as applied in *Califano* to a benign classification, insofar as the phrase "exceedingly important justification" is absent from the *Califano* decision. *But see* *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001) (claiming to apply the heightened form of scrutiny from *VMI* to an invidious gender classification but perhaps actually applying a standard of equal protection more similar to rational basis review).

156. *Id.*

157. STONE ET AL., CONSTITUTIONAL LAW 740 (3d ed. 1996)

ities and to promote equal employment opportunity.¹⁵⁸ Consequently, Supreme Court precedent also exists to support the constitutionality of gender affirmative action measures that benefit women.¹⁵⁹

Moreover, the Supreme Court recently threw the level of scrutiny applied to gender classifications into question, perhaps suggesting further support for gender classifications benefiting women. In *Nguyen v. Immigration and Naturalization Service*,¹⁶⁰ the Court purported to apply the standard of heightened scrutiny to an invidious gender-based statutory classification. The classification required that U.S. citizen-fathers, but not similarly situated U.S. mothers, of children born abroad out of wedlock satisfy certain requirements, including legitimation, before the child acquires citizenship.¹⁶¹ The Court in *Nguyen* ultimately held that the gender-based classification satisfied the equal protection clause; however, the Court's analysis of the governmental interest supporting the classification and its means/ ends inquiry indicates that it did not review the classification under heightened scrutiny.¹⁶²

The application of heightened scrutiny usually results in the striking down of the classification under review. In *Nguyen*, this did not occur.¹⁶³ A heightened scrutiny analysis requires an inquiry into the actual, governmental interests and purposes for the discriminatory classification, as well as their importance.¹⁶⁴ The Court's actual application, as the dissent validly points out, fails

158. *VMI*, 518 U.S. at 533 (citations omitted).

159. See also *STONE ET AL.*, *supra* note 163, at 739 ("The [Supreme] Court seems to have taken the view that 'affirmative action' measures disadvantaging men are subject to intermediate scrutiny, and that remedying disparities between men and women, at least if caused by prior discrimination, qualifies as an 'important government [sic] objective' for purposes of that test").

160. See generally *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

161. *Id.* at 59-60. The statute required that the following events occur before fathers of children born abroad out of wedlock transmit citizenship to their children:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
 - (A) the person is legitimated under the law of the person's residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or
 - (C) the paternity of the person is established by adjudication of a competent court.

Id. (internal quotation marks omitted) (quoting 8 U.S.C.A. Sec. 1409 (a)). On the other hand, mothers of children born abroad out-of-wedlock automatically confer citizenship on their children, if "the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." See 8 U.S.C.A. § 1409(c) (1999).

162. The Court stated, "For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Nguyen*, 533 U.S. at 58-60 (quoting *VMI*, 518 U.S. at 533).

163. *Id.* at 69-70.

164. See *id.* at 76 (O'Connor, J., dissenting) (citing *VMI*, 518 U.S. at 533-36). In *Nguyen*, for example, one governmental interest suggested by the Court as justifying the classificatory gender statute is the importance of proving that a biological parent-child relationship exists. However, the Court does not discuss why this interest is important (as required by the *VMI* heightened scrutiny

to discuss the burden of justification under heightened scrutiny analysis, improperly “hypothesizes about the interests served by the statute,” and inadequately explains “the importance of the interests that it claims to be served by the [statutory] provision.”¹⁶⁵ Furthermore, as the dissent points out, “the majority . . . casually dismisses the relevance of available sex-neutral alternatives.”¹⁶⁶ Indeed, these alternatives would support a finding that the classification was not necessary to meet the desired goals of the statute.

Perhaps *Nguyen* signifies that the Supreme Court, while claiming to apply heightened scrutiny to gender-based classifications, will in effect apply a standard more akin to rational basis review. If this accurately reflects a new trend, the Court may uphold gender-based classifications without a close examination of governmental interests and purposes for either their importance or an exceedingly persuasive justification, and by not requiring a tight means/ ends “fit.”¹⁶⁷ Thus, gender affirmative action schemes might stand a chance of being upheld after *Nguyen*. However, because *Nguyen* concerns an invidious gender classification, it remains uncertain whether courts will review benign gender classifications under the heightened scrutiny applied in *VMI*. Furthermore, the appropriate standard for invidious gender classifications remains unclear because the closely divided court in *Nguyen* purported to apply one standard, but effectively applied another.¹⁶⁸

Despite this analysis, a less formalistic interpretation of *Nguyen* leads one to doubt Supreme Court receptivity to gender affirmative action programs. According to Manisha Lalwani, the Court in *Nguyen* perpetuates out-dated stereotypes concerning women and childrearing.¹⁶⁹ The statutory gender

analysis) but rather addresses why mothers and fathers are not similarly situated with respect to proof of biological parenthood; in fact, the dissent points out that the government, through the Immigration and Naturalization Service, did not itself even rely on this interest in justifying the statute. See *id.* at 78-80 (O'Connor, J., dissenting). The other governmental interest for the statute cited by the majority was

the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.

Id. at 64-65. Because, as the dissent explains, the governmental purpose for the statute appears not to have been to ensure such a relationship between child and citizen parent, the “majority’s focus on ‘some demonstrated opportunity or potential to develop . . . real everyday ties,’ in fact appears to be the type of hypothesized rationale that is insufficient under heightened scrutiny.” *Id.* at 84 (O'Connor, J., dissenting). See also *id.* at 75 (O'Connor, J., dissenting) (quoting *VMI*, 518 U.S. at 533) (“Further, a justification sustaining a sex-based classification [under heightened scrutiny] ‘must be genuine, not hypothesized or invented *post-hoc* in response to litigation’”).

165. *Id.* at 78-79 (O'Connor, J., dissenting).

166. *Id.* at 79 (O'Connor, J., dissenting).

167. To uphold a classification under equal protection analysis, rational basis review only requires that some reasonably conceivable state of facts be present to support a rational basis for the classification. *Id.* at 77 (O'Connor, J., dissenting).

168. Justices Kennedy, Rehnquist, Stevens, Scalia and Thomas joined in the majority opinion. Justices O'Connor, Souter, Ginsburg and Breyer joined in the dissenting opinion. There was also a concurrence by Scalia in which Thomas joined. *Id.* at 56.

169. See Manisha Lalwani, *The “Intelligent Wickedness” of U.S. Immigration Law Conferring Citizenship To Children Born Abroad And Out-Of-Wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707, 733 (2002) (explaining that the legitimation of paternity requirement embedded within the

classification reviewed by the Court in *Nguyen* effectively placed financial and emotional responsibility for childrearing on the U.S. citizen mother of a child born abroad out of wedlock.¹⁷⁰ The U.S. citizen father of a similar child, on the other hand, could avoid such responsibility completely by refusing to take the necessary steps under the statute to acquire citizenship for his child.¹⁷¹ By finding this statute constitutional, the Court not only condoned certain, biased stereotypes about women but also “reinforced their legal subservience to men.”¹⁷² Since the Court in *Nguyen* permitted such discrimination against women in U.S. citizenship laws, it is unlikely that the same Court would uphold an affirmative action program designed to advance women in the workplace or other environments.¹⁷³

Additionally, textual analysis of other aspects of American constitutional law disfavors gender affirmative action. The Fourteenth Amendment states: “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁷⁴ Similarly, the Fifth Amendment states: “[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”¹⁷⁵ Arguably, the two amendments only require a state or the national government to abstain from providing unequal treatment. Neither amendment requires a state to take positive action to promote substantive gender equality. Rather, a state must refrain from denying equal treatment to all persons. Consequently, one can characterize the conception of constitutional rights in the United States as negative and formal.

Gender affirmative action, however, requires that a government take positive steps to make certain groups equal in society. Substantive equality between men and women cannot advance in a systematic fashion if the Supreme Court interprets the amendments as barring all disparate treatment.¹⁷⁶ Since gender

statutory scheme under review in *Nguyen*, which had to be satisfied before fathers could acquire U.S. citizenship for their children born abroad out of wedlock, “supported biased stereotypes about women as care-givers and reinforced their legal subservience to men”). The author further explains: “What history does reveal is that legitimation of paternity was a means by which unwed fathers voluntarily took responsibility for their outof wedlock children; in its absence, legitimation acted as a hook by which to burden unwed mothers with care-taking responsibilities.” *Id.* The inclusion of the paternal legitimation requirement within the citizenship statute under review in *Nguyen*, made it possible for U.S. citizen fathers of children born abroad out of wedlock to withhold citizenship for these children and thereby deny them “the same ‘opportunity or potential’ for emotional and financial support available to the children of unwed mothers who acquire automatic citizenship at birth.” *Id.* at 740. The statute thus perpetuates sexual irresponsibility for men and sexual responsibility for women. *Id.* at 739-41. See also *Nguyen*, 533 U.S. at 92 (O’Connor, J., dissenting) (“The majority, however, rather than confronting the stereotypical notion that mothers must care for these [illegitimate] children and fathers may ignore them, quietly condones the ‘very stereotype the law condemns’”).

170. Lalwani, *supra* note 169, at 739-40.

171. *Id.* at 740.

172. *Id.* at 733.

173. *Id.* at 733-34.

174. U.S. CONST. amend. XIV, § 1.

175. U.S. CONST. amend. V.

176. Formal equality does not preclude affirmative action programs; however, the baseline of the U.S. Supreme Court inquiry in the gender equality/affirmative action area is a notion of purely equal treatment of individuals. Consequently, affirmative action measures are subject to “tests of

affirmative action stems from the notion of the government promoting a particular group's equality through positive action, including action that requires unequal treatment of a different group (i.e., men), a negative conception of constitutional equality undermines gender affirmative action schemes. Similarly, a constitutional scheme based on individual rights prevents the development of gender affirmative action programs targeted at a particular group within society (i.e., women).

Not all constitutional scholars, however, view the Fourteenth or Fifth Amendment's equal protection clause as embodying a formal and negative conception of rights. Robin West, in her article *Progressive and Conservative Constitutionalism*, points out that according to progressive constitutionalists, "the equal protection clause not only permits, but positively requires that the community take affirmative steps to achieve substantive [equality]," and "[correct] maldistributions of social power, wealth and prestige."¹⁷⁷ As a general matter, progressive constitutionalists believe that "the state is affirmatively obligated under the [Fourteenth Amendment of the] Constitution to use its legal power to protect its citizens, and protect them equally, from the damage wrought by abusive social power and the damaging hierarchies of race, gender and class to which that power gives rise."¹⁷⁸ Consequently, a constitutional interpretation supportive of a positive right to substantive equality exists among certain scholars. A majority of U.S. Supreme Court judges has yet to adopt a similar line of thought.¹⁷⁹

The predicate for gender affirmative action conflicts with the American practice of accounting only for direct, intentional discrimination under equal protection analysis.¹⁸⁰ Gender affirmative action aims at countering laws with a discriminatory intent and those with a discriminatory effect; consequently, in a constitutional environment like that of the United States, which recognizes only discriminatory intent, gender affirmative action measures have less potential for effecting change in society. The difficulty of proving discriminatory motive in the design of a law results in courts striking down fewer laws as unconstitutional; in turn, legislative bodies employ gender affirmative action less frequently. The United States lacks jurisprudence reflecting the need to effect the systematic amelioration of a disadvantaged group.¹⁸¹ Since gender affirmative

exceptions," such as strict scrutiny or rational basis review, under which deviations from the baseline are permissible for certain groups.

177. Robin West, *Progressive and Conservative Constitutionalism*, 88 U. MICH. L. REV. 641, 693 (1990). For progressive constitutionalists, the equal protection clause "constitutes a commitment to rid the culture of the stultifying, oppressive, and damaging consequences of the hierarchic domination of some social groups by others." *Id.* at 693.

178. *Id.* at 699.

179. See generally *Nguyen*, 533 U.S. 53; *VMI*, 518 U.S. 515.

180. See *Washington v. Davis*, 426 U.S. 229, 242, 248 (1976) (citation omitted) (holding that discriminatory effect alone, while relevant, does not warrant strict scrutiny of a facially neutral law—the plaintiffs must show evidence of discriminatory intent)

181. In his concurring opinion in *Adarand*, Justice Scalia remarked on the amelioration of racial minority groups through affirmative action: "[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." 515 U.S. at 239. The Justice further stated,

action reflects this goal, one cannot characterize the United States' constitutional environment as conducive to measures designed to improve the condition of women in society.

Though there is no precommitment to gender affirmative action or even gender equality in the text of the United States Constitution, the Equal Rights Amendment represents an attempt to amend the Constitution to achieve formal equality between the genders through textual precommitment. It provides a view into the American approach to gender equality. The proposed amendment, never formally adopted into the U.S. Constitution, states: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."¹⁸² Notably, the amendment grants a right phrased in negative terms, and it contains no exception for affirmative action-type measures. The amendment bears little resemblance to the equal rights amendment in Germany, section 15(2) in the Canadian Charter or Article 141 of the Amsterdam Treaty, and one cannot view it from a textual perspective as an amendment designed to promote substantive equality, much less affirmative action.¹⁸³ The concept of formal equality, which the Equal Rights Amendment follows, has a chilling effect on the promotion of affirmative action measures because such measures invariably involve unequal treatment between the genders. A rights structure based on the concept may allow for some limited affirmative action measures, but does not require them.¹⁸⁴ Nevertheless, despite the amendment's failed adoption, constitutional precedent has arguably established its prescribed goal.¹⁸⁵

Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. . . . to pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id. Though Justice Scalia's opinion may not reflect the views of the entire court on ameliorative legislation, it does reflect, in general, a prevalent sentiment in the United States.

182. See *STONE ET AL.*, *supra* note 157, at 742 ("Congress approved and submitted [the Amendment] to the states for ratification [in 1972]. . . . [T]he second [ratification] deadline expired [on June 30, 1982] with only thirty-five of the necessary thirty-eight states having approved the amendment"). Interestingly, the original directive of the European Union dealing with equal treatment of the sexes was drafted in 1976, and allows for an exception to the general equality principle when measures are taken to promote equality between the sexes. See Council Directive 76/207, art. 2 (4) 1976 O.J. (L 39) 40. Later jurisprudence interpreted this exception as permitting certain affirmative action measures.

183. See *Wentholt*, *supra* note 19, at 56.

184. *Id.*

185. Various individuals make this argument. See Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need A Federal Equal Rights Amendment?*, 44 B.B.J. 10 (2000) (noting that "[t]o some extent, this new heightened intermediate scrutiny standard [from *VMI*] indicates that the goals of the Equal Rights Amendment have survived and have been incorporated into judicial analysis of the Equal Protection Clause of the Fourteenth Amendment"). However, the authors agree that an Equal Rights Amendment is still necessary in order to

remove any instability and uncertainty regarding judicial protection of legal equality of women, even as it has developed to this point . . . [a]n Equal Rights Amendment would provide clarity in equal protection jurisprudence, by providing an enduring

The American precommitment experience with formal gender equality contrasts with the functioning of constitutional precommitments to gender affirmative action in the E.U., Germany and perhaps Canada. Unlike the constitutional precommitments to gender affirmative action in Germany and the European Union, the constitutional precommitment to formal gender equality in the U.S. has removed contentious debate, at least on the equality issue, from the political arena. Indeed, United States Supreme Court precedent such as *VMI* took the once controversial and contentious issue of formal equality for women in the United States out of the political arena by raising the level of constitutional scrutiny for discriminatory gender classifications to the level essentially contemplated by the ERA. Absent an exceedingly persuasive justification, a state may not deny women equal treatment. In fact, after *VMI*, the only types of differences between men and women justifying a departure from formally equal treatment for the sexes may be ones of a physical nature.¹⁸⁶ In addition, cases such as *Reed v. Reed*¹⁸⁷ and *Craig v. Boren*¹⁸⁸ contributed to the extinguishing of the debate on the issue of formal equality by closely examining the governmental objectives behind laws discriminating against women as well as the relationship between those objectives and the means used to achieve them.¹⁸⁹ This did not result from any textual constitutional precommitment, such as the contemplated Equal Rights Amendment, but from precedent that gradually developed and supported a comprehensive precommitment to formal gender equality.

weapon that judges can use to encourage open and honest debate about the role of women in our society.

Id. at 28. See also Martha Craig Daughtrey, *Seventy-Five Years Madison Lecture: Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 22 (2000) (pointing out that apparently U.S. Supreme Court Justice Ruth Bader Ginsburg, author of *VMI*, thinks that that decision moves U.S. constitutional jurisprudence to the point that an Equal Rights Amendment would reach).

186. See *VMI*, 518 U.S. at 533; *Nguyen*, 533 U.S. at 53 (upholding an invidious gender classification, which treats mothers and fathers unequally with respect to the conferral of citizenship on children born abroad and out of wedlock, under the *VMI* heightened scrutiny standard, while applying the standard in a way indicative of rational basis review). Apparently, the Court in *Nguyen* justified its upholding of the gender classification under heightened scrutiny review, pointing to relevant physical differences between mothers and fathers with respect to the proof of their children's citizenship status. The Court stated,

There is nothing irrational and improper in the recognition that at the moment of birth—a critical event in the statutory scheme and tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. . . . This is not a stereotype.

Id. at 68.

187. 404 U.S. 71 (1971)

188. 429 U.S. 190 (1976)

189. The Court in *Boren* stated, "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. There is little political debate in the United States over formal equality for women, and, more importantly, the matter itself, apart from perhaps in some academic circles, has not attracted much attention. Perhaps *Nguyen* will begin to attract more public and political attention on this matter since one could read *Nguyen* as holding that men and women are not formally equal with respect to their ability to confer citizenship on children born abroad out of wedlock. See generally *Nguyen*, 533 U.S. 53.

As noted earlier, American jurisprudence may even contemplate a precommitment to gender affirmative action; however, the Supreme Court's decisions in *VMI* and *Nguyen* suggest that it does not.¹⁹⁰ While *Califano* upheld a gender affirmative action scheme under intermediate scrutiny, *VMI* presumably raised the level of scrutiny for all gender classifications, and cast some doubt as to the continued validity of *Califano* in the process. Indeed, *Nguyen* may threaten the Court's precommitment to formal gender equality and stir a renewed debate on formal equality between the sexes.

The United States experience with a precommitment to formal gender equality suggests that under some circumstances, jurisprudential precommitments prove more effective than textual precommitments in removing debate from a political arena. Perhaps this experience indicates that jurisprudential precommitments can remove issues that tend to be less divisive than gender affirmative action from the political arena.

VI. CONCLUSION

The experience of Germany and the European Union with gender affirmative action supports the notion that constitutional precommitments do not remove contentious debate from the political arena. Contrary to Cass Sunstein's hypothesis, European Court of Justice jurisprudence, most notably the *Kalanke* decision, forced the political institutions of the Union and the Member States to debate and eventually amend the original precommitment. In Germany, at the time of the constitutional amendment in 1994 and since, the major political parties have vigorously debated as to whether the precommitment permits the use of quotas or other gender affirmative action measures. However strongly the German Constitutional Court supports the notions of substantive equality and the amelioration of the situation of disadvantaged, this continued debate questions, and perhaps endangers, the entire movement towards the adoption of comprehensive gender affirmative action programs. Although Germany has not experienced political destabilization as a result of this debate, the controversial nature of the issue always carries this potential.¹⁹¹

The Canadian experience with its constitutional precommitment to gender affirmative action presents a less clear picture than in the European Union or

190. *Nguyen* purported to continue the trend of heightened scrutiny for gender classifications. However, it is possible that the *VMI* standard only applies to invidious classifications. In addition, *Nguyen* may signal that the Supreme Court will actually subject gender classifications to a standard of review more akin to rational basis. Although it is speculation, arguably the Supreme Court will uphold gender classifications based on this standard. However, since *Nguyen* did not involve a benign classification such as an affirmative action scheme, this interpretation is open to criticism. Indeed, as noted earlier, aspects of the *Nguyen* decision displays a general lack of receptivity to affirmative action measures.

191. Indeed, India did experience destabilizing effects as a result of the affirmative action precommitment's failure to remove contentious debate from the political arena. The constitutional precommitment to affirmative action in India not only failed to remove divisive debate but it may also have been itself responsible for violence by sectors of the population displeased with the executive's choice of whom to prefer among classes of the population. See *supra*, note 8.

Germany. The facts that no case has reached the Canadian Supreme Court on the Charter clause concerning gender affirmative action and that the federal legislature has adopted various laws supportive of gender affirmative action in the private employment context may indicate that Canada's precommitment engendered consensus. On the other hand, current indicators of potential conflict may prove otherwise. Indeed, debate has begun to surface among provincial leaders and the general public regarding affirmative action despite the existence of a precommitment.

In contrast to Germany, Canada and the European Union, the United States lacks a textual or jurisprudentially-developed precommitment to gender affirmative action; however, its jurisprudence reflects a precommitment to formal gender equality. This results from Supreme Court decisions which applied a heightened level of judicial scrutiny to discriminatory gender classifications. Indeed, this precommitment may have removed this issue from political debate. The American experience with precommitment suggests that under circumstances where the underlying issue is less divisive than affirmative action, precommitments may successfully remove political debate. Also, under these circumstances, jurisprudentially-derived precommitments may be more effective at removing political debate than textual precommitments.

There are various ways in which divisive debate can arise despite the existence of a constitutional precommitment. In the case of the European Union, the debate surfaced as a result of judicial interpretation of the precommitment that conflicted with the framers' intent. In Germany, the debate erupted because of different political parties' interpretations of its precommitment. Moreover, the Canadian experience suggests that the issue of gender affirmative action is so inherently controversial that even if a consensus as to the appropriateness of a precommitment for this issue exists, some level of public debate will inevitably arise.