European Law Journal, Vol. 7, No. 2, June 2001, pp. 171–195.

Equality and Constitutional Indeterminacy

An Interpretative Perspective on the European Economic Constitution

*Alexander Somek**

Abstract: *It is claimed that European supranationalism represents an unprecedented mode of political association whose point is to maintain what is good about nationality and the nation state by stripping the latter of its adverse effects. In this article, this claim is submitted to a test by examining how different ways of conceiving of anti-discrimination in the context of intra-Community trading law give rise to two different conceptions of the European economic constitution. While the first one is married to the ideal of behavioural anti-discrimination—that is, of affording protection against discriminatory acts by Member States—whose application would seemingly leave the nation state in its place, the other one takes a system of nation states as something that in and of itself engenders systematically discriminatory effects on international trade. According to the latter, effective anti-discrimination presupposes overcoming such a system altogether. Both conceptions of the economic constitution are manifest in Community law, and at first glance it appears as if adherence to the first one would be consonant with supranationality as a special mode of political association. However, owing to internal predicaments arising from the application of the equality principle (understood as a principle protecting against discrimination), the difference between both conceptions cannot be upheld in practice. Since the first conception is constantly undermined by the second in the course of its application, it remains uncertain, at least in this context, whether or not the European nation state is left in place by the European Economic Constitution.*

I Introduction

A The Probing Idea

It is claimed that if European supranationalism represents a new and unprecedented political idea, then the European Community is about maintaining what is good about the nation state by stripping it of its adverse effects.[1] This, at least according to Weiler,

* University of Vienna, Faculty of Law. Parts of this article were presented at the annual meeting of European Tax Lawyers ('Eucotax') in Vienna in April 2000. Thanks are due to Stanley L. Paulson and to Francis Snyder for very helpful comments on earlier drafts.

[1] For a general elaboration of the point that supranationalism is to be understood as a cure for the deficiencies inherent in a system of nation states, see (among others) Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273–299, at 294.

is the point of supranationalism, understood as a normative vision. European supranationalism is not about replacing the nation state with a unified trans-national regime; rather, it is about maintaining the nation state within a community of states and attenuating its undesirable, for the most part discriminatory, effects. Existing boundaries may stay in place, but they are not to be 'abused'.[2]

Thus understood, supranationalism is indeed an alluring political ideal. And yet, there is a recurring predicament. It appears that we do not really know where and how, in the pursuit of communitarian goals, the relevant boundaries are to be precisely drawn without, even if only inadvertently, sacrificing the nation state altogether on the altar of super-national ambitions.[3] This, at any rate, is the problem that I wish to explore in this paper. I explore it with respect to but *one* of the building blocks of European supranationalism, namely the equality principle understood as a principle protecting against discrimination.[4] I am particularly interested in what may be termed the *architectural consequences* of applications of the equality principle. This is what I would like to refer to as the 'probing idea'.

The core of the probing idea is this. Owing to an inherent predicament, the equality principle, understood as a principle protecting against discriminatory treatment, is supplemented by something manifestly different in the course of its application. This, I am confident enough, can be shown on the level of a micro-analysis. As I shall try to explain, the intellectual surplus of the micro-analysis is that it provides the key to a macro-analysis of the European economic constitution,[5] that is, the allocation of regulatory competences governing the Internal Market[6] in the relationship between the European Community on the one hand and Member States on the other.[7] This, at

2 See J. H. H. Weiler, *The Constitution of Europe. 'Do the New Clothes Have an Emperor' and Other Essays on European Integration* (Cambridge University Press, 1999) 249–252, 340–344.

3 For reasons associated with this unpalatable alternative some political philosophers assume that we have good reason to stick to a world of national polities. See, for example, David Miller, *On Nationality* (Oxford University Press, 1995) 162, 182. Miguel Poiares Maduro, *We The Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998) 146, is quite outspoken about this fact: 'The problem with anti-protectionist ideas is that it is not all that clear when a State is disadvantaging its own nationals at the cost of foreign nationals. Moreover, not all benefits accorded to home nationals at the cost of foreign nationals should be considered as protectionist. The core of Member States' policy autonomy and sovereignty is that, in some cases, they may still favour their home nationals even at the cost for foreign nationals (the question is where and how).'

4 For an overview of the different functions performed by the equality principle in European Community law, see Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right' in: P. P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999) 517–554; Alina Lengauer, 'The New General Principle of Non-Discrimination in the EC Treaty as Amended by the Treaty of Amsterdam' (1998) 3 *Austrian Review of International and European Law* 369–395.

5 On the very idea of an economic constitution (*Wirtschaftsverfassung*) and more extensive conceptions thereof, see Christian Joerges, 'European Economic Law, the Nation-State and the Maastricht Treaty' in: R. Dehousse (ed.), *Europe After Maastricht. An Ever Closer Union?* (Law Books in Europe, 1994) 29–62, at 37; Peter Behrens, 'Die Wirtschaftsverfassung der Europäischen Gemeinschaft' in: G. Brüggemeier (ed.), *Verfassungen für ein ziviles Europa* (Nomos, 1994) 73–90; Manfred E. Streit and Werner Mussler, 'The European Constitution of the European Community: From "Rome" to "Maastricht"' (1995) 1 ELJ 5–30.

6 On conceptual complexities arising with respect to that notion, see Kamiel Mortelmans, 'The Common Market, the Internal Market and the Single Market, What's in a Market?' (1998) 35 CMLR 101–136.

7 As Trachtman explains, what he refers to as "Trade and . . . Problems" not merely require the balancing of the interest of commerce against other values of public policy, they also call for choosing the right institution that ought to be in charge of striking the balance in a multi-level institutional system. See Joel P. Trachtman, 'Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9 *European Journal of International Law* 32–85, at 33–34.

least, is the link that I should like to establish—a predicament inherent in the application of the equality principle is reflected in the indeterminacy of the principle governing this constitution.[8]

At the outset, it may be helpful to explain how I shall proceed.

A The Route to an Untidy Ending

In the first part of this paper I shall offer a brief explanation of what it is that makes equality a comparative right and for what reasons the equality principle ought to be distinguished from our intuitions about local principles of distributive justice.[9] Comparative rights give rise to a claim of a person on the ground of a comparison with the situation or the treatment of another person. I then turn to what I take to be the most intriguing feature of such a right, namely, its internal relationship to a certain type of exclusionary reason. Equality is the right to be free from discrimination, and this means that certain reasons may not be used for the defence of behaviour that involves or entails the unequal treatment of some persons. I shall also try to show, however, that at the systematic level pertaining to modern theories of justice the application of the equality principle may give rise to non-comparative rights whose infringement is permissible only by resorting to reasons of proportionality. I thus distinguish two different layers of the legal system at which the equality principle may legitimately claim a central role. At the manifest operative level, equality is a comparative right offering protection against manifold instances of discrimination, whereas at the more latent level of the justification of non-comparative rights equality determines the weight to be attributed to such rights as they are pitted against countervailing considerations of public policy.

My claim that as a *legal* concept the equality principle—despite this second, more latent, layer, to which I will refer as the level of 'systematic discrimination'—is about *behaviour* rather than about bare distributions sets the stage for exploring its internal predicament. It concerns applications and consists in the transposition of the observation of discriminatory behaviour into a balancing of benefits and burdens. Even though the predicament of observing what—at any rate in hard cases—cannot be observed, namely, the attitude of the perpetrator towards the victim of discrimination, is thus seemingly resolved, in that process the meaning of equality as a principle protecting against discriminatory behaviour fades out. It is at this point that the

8 According to Maduro, the Court's jurisprudence in the field of the free movement of goods exhibits three models of the European economic constitution (see *We the Court,* note 3 *supra*, 109–149). First, according to the 'centralised constitutional model' the move from negative to positive market integration marks the shift of competence from the Member States to the Community enacting harmonising legislation. Former Member State competence is indeed transferred to the Community, which is also acting on that competence. Second, the 'competitive constitutional model' is a modification of the first, owing to a decentralised approach to what has taken to be, nevertheless, central regulation. It is not by means of harmonisation, but through the competition between legal orders and the duty of mutual recognition that the least restrictive regime becomes prevalent in the Common Market. Finally, the 'decentralised constitutional model' seems to be more in line with the spirit of normative supranationalism than the others. Member States retain their power of striking the balance between free trade and social policy by their own lights so long as they do not discriminate against nationals from other Member States. Maduro is correct in observing that all three models are simultaneously present in the jurisprudence of the European Court of Justice.

9 The latter are explored in Jon Elster, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens* (Sage, 1992).

probing idea comes in. I shall try to show in the second part of the paper that in a multi-jurisdictional context, the micro-dimension of equal protection, that is, the shifting exposition and transposition of the meaning of that principle on a recursive case-by-case basis, reverberates in the macro-dimension of the economic constitution. Whether or not equality is employed and conceived of as a principle offering protection against discriminatory behaviour has an impact on the structure of competence-allocation in the Internal Market. Since, however, the distinction between anti-discrimination and balancing is inherently unstable, as I shall try to make clear, the European economic constitution cannot settle the question whether it is to be dominated by the ethos of removing obstacles to trade or by the ethos of national treatment.[10]

To avoid misunderstanding, I should add that the probing idea explored in the second part of the paper is not rooted in a conceptualist vision of a social world in which communications about what the law comes to in a certain case[11] play a decisive role in shaping social structure. My claim is not that the economic constitution is such and such *on the ground* of a predicament arising in the application of the equality principle. On the contrary, my claim is closer to the belief animating the critical legal scholarship of such authors as Duncan Kennedy or Mark Kelman, who argue that doctrinal indeterminacy offers the linguistic opportunity of affixing ideological stances and political interests to the law.[12] The economic constitution is what it is because doctrinal *constraint* releases the *free play* of ideological visions.[13] This may sound paradoxical, and, indeed, it *is* paradoxical.[14] At the same time, it must not be forgotten that principles of law institute what modern social system's theory refers to as a *Sicht*,[15] that is, a bounded perspective of recognising what there is (or might be) by neutralising that which cannot be observed owing to its mode of recognition. This *Sicht* is transferred to and reproduced in the mode of dealing with architectural problems. Admittedly, the prevalence of a *Sicht* and its relevance to understanding our social world is available only from the internal point of view of a self-reflection of legal thought.

II Equality[16]

A Equality is not a Rule of Distributive Justice

Regardless of whether the subject matter is approached from within the legal system or

---

[10] On the distinction, see J. H. H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in: P. P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 349–375.

[11] I prefer speaking of 'communications that have a legal subject' rather than 'the legal system', which is common in social system's theory. Talk of such a 'system' invites the reification of what in any event should be taken as networks of episodic communications that structure their relevance to each other in contexts of varying degrees of complexity and determinacy.

[12] See Duncan Kennedy, *A Critique of Adjudication (Fin-de-siècle)* (Harvard University Press, 1998); Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987).

[13] On the old insight that structure is enabling and constraining, see Anthony Giddens, *The Constitution of Society. Outline of a Theory of Structuration* (Polity Press, 1984), 174.

[14] See generally Niklas Luhmann, 'Tautologie und Paradoxie in den Selbstbeschreibungen der modernen Gesellschaft' (1987) 16 *Zeitschrift für Soziologie* 161–174.

[15] See, for example, Peter Fuchs, *Intervention und Erfahrung* (Suhrkamp, 1999), 74.

[16] Most of the ideas expressed in this first part of this paper are more fully developed in my forthcoming

from the perspective of a grand theory of justice, it soon turns out that the principle of equality has a simple meaning. It demands that unless there are reasons to the contrary, all persons are to be treated equally.

Thus, if I have given an apple to John, it follows that Jack has a *prima facie* claim to be given an apple too. Since Jack has such a claim, Jill has it, and when Jill has it, Joyce has it, and so forth. Elementary examples such as this help us to determine what equality is not. Equality is not a rule of distributive justice in the sense that its point is to determine what kind of treatment people are entitled to in virtue of some 'natural dimension',[17] such as need, effort, well-being, and so on. The right to equal treatment, which is the normative consequence of the equality principle, would be ill-conceived if it were understood as another expression of the idea that everyone ought to be given according to what is *owed* to them. Otherwise, the fact that I have given an apple to John would be on a plane with the demands following from acknowledging the pressing needs, the meritorious achievements, or conditions of well-being of other persons.[18]

B Equality is a Comparative Right

Granted that equality is not an elementary distributive principle, what else could it then be?

Equality is about what must not be *denied* to other persons on the condition that something has been given to (or taken away from) someone else. We may legitimately deny to everyone what nobody is entitled to on some account of distributive justice. Suppose that according to a libertarian theory of justice—even if not van Parijs' 'real libertarianism'[19]—no one is entitled to welfare benefits. If against this backdrop welfare benefits were only awarded to John and not to Jack, this, even though neither has an entitlement, would amount to a violation of the equality principle. Likewise, the international community could withdraw the protection of human rights from everyone. Evidently, such an action would conflict with human dignity, but it would not count as denying equal protection to all. Assuming that human dignity commands respect for the human rights of *anyone* simply by virtue of a person's belonging to the human race, then respecting the rights of *any* person means respecting them regardless of how other persons are being treated. It follows that human rights must not be denied to some on the ground that in various abject regions of this world those rights do not count for much. Accordingly, respecting human dignity, understood as the principle governing the distribution of human rights, is among those notorious 'reasons to the contrary' that may be invoked to make unequal treatment defensible here.

The gist of this is that denying the protection of human rights to someone provides a perfect example of what *injustice* is. Any person is entitled to what is granted them on the ground of universal rights. Unjustified interference with those rights is unjust. The

book *Rationalität und Diskriminierung. Zur Bindung der Gesetzgebung an das Gleichheitsrecht* (Springer, 2001).

17 I borrow this way of describing the function of patterned principles from Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 156.

18 For a similar observation, see Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) 226–227. See also Harry G. Frankfurt, *Necessity, Volition, and Love* (Cambridge University Press, 1999) 153.

19 See Philippe von Parijs, *Real Freedom for All. What (If Anything) Can Justify Capitalism?* (Oxford University Press, 1995).

rights themselves are not comparative. They give rise to valid claims regardless of the treatment of others. Equality, by contrast, is a *comparative right*.[20] The protection afforded by equality is simply conditional upon the treatment of others. Withholding an entitlement from some and not from others, where granting it is not a requirement of distributive justice, is not unjust. Wanting a reasonable justification, however, it is tantamount to a violation of equality. To forbear for no convincing reason from extending to all what has been granted to (or imposed on) some constitutes a moral harm different from injustice.[21] This type of harm is usually referred to under the rubric of '*discrimination*'. Ascribing a lesser value to the lives or interests of some than the value ascribed to the lives and interests of others is a form of harm that transforms even the most minute unequal treatment into a significantly harmful act,[22] regardless of whether such treatment is motivated by considerations of justice or simply an instance of self-interested behaviour. Equality is a side-constraint on action, not a goal.[23] It is a condition to which any treatment of persons ought to comport.

C Reasons to the Contrary

Having thus distinguished, at any rate in principle, justice and discrimination, I should now like to turn to an elaboration of what is distinctive about equality as a comparative right protecting against discrimination. I want to point out, in particular, that the anti-discrimination principle, which in my opinion provides the best interpretation of the equality principle, erects a barrier against the use of certain reasons for action. The reasons are those showing that the agent does not ascribe equal value to the lives and interests of all.

At the outset I have characterised the equality principle as demanding that all persons are to be treated equally, unless there are reasons to the contrary. This characterisation seemed to carry the implication that giving an apple to John commits me to giving an apple to everyone else. But this is not the case. What it does, however, is to shift the burden of justification to me in this case, namely, respecting my forbearance from giving out bounties to each and everyone. Equality says that I ought to give an apple to everyone else if I have no reason to give the apple to no one other than John. Ordinarily, we assume that we have an abundance of overriding reasons suspending the constraint exercised by the equal treatment principle. If I were to point out, for example, that John is my son or that I have acted in a private setting where one is at liberty to act whimsically or to engage in purely self-interested conduct, we would all agree that I had sufficient reason not to hand out apples to each and everyone, but only to John.[24]

D Equality is about Rational Action

In a legal context, the very fact that people act according to what appears to be

[20] See Kenneth W. Simons, 'Equality as a Comparative Right' (1985) 65 *Boston University Law Review* 387–481, at 394–395

[21] See John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1–21, at 4–5.

[22] See, for example, Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 302.

[23] See Nozick, note 17 *supra*, 28–31.

[24] This is not to say that the duty to treat every person with equal respect does not apply in those contexts. But see Gardner, note 21 *supra*, 3.

rational to them by their own lights, that is, do what they think is best for themselves, is a valid reason for pre-empting the obligation of equal treatment. Doing what one thinks is best for oneself is not in and of itself indicative of ascribing lesser value to the lives of some, at any rate, it is not so long as one expects others to do so as well. This is also true of the way in which we assess the validity of government action. For example, when government decides to implement a system of progressive taxation, the resulting unequal treatment of taxpayers with respect to the tax-rate is perfectly permissible, provided that such a system can be conceived of as a means of raising public revenue. Government need not show that a progressive tax rate is an implication of principles of social justice. In addition, it is under no obligation to prove that it has chosen the most efficient system. All that government has to do in support of unequal treatment is to show that the system implemented can be conceived of as a means that is rationally related to some public end. Similarly, the pursuit of protectionist policies, for example, through the imposition of duties or quotas for certain imported products, reflects perfectly rational behaviour on the part of national governments, for it is domestic prosperity that they are expected to be primarily concerned about. It is also rational for national governments to protect the national industry against competition by designing internal systems of revenue that effectively discriminate against imported goods whenever the cross-elasticity of demand for foreign and similar domestic goods is high.[25]

Thus understood, the basic constraint exercised by the equality right to the effect that there ought to be 'reasons to the contrary' amounts to what in modern constitutional law goes under the name of a 'rational basis test'.[26] This test has a conspicuous virtue. It saves the presumption in favour of equal treatment from becoming a mere tautology. To begin with, this presumption implies that unequal treatment is no valid reason for unequal treatment.[27] The rational basis test adds the condition that for the justification of an inequality to succeed, there ought to be at least one conceivable reason for action other than unequal treatment itself.

Blind reliance on a conceivable rational basis has, however, its pitfalls. There are many conceivable reasons for action. Actions can be rationalised from different angles and by giving a whole variety of reasons. Therefore, the application of the mere rationality test gives rise to the concern that it does not have adequate 'bite' vis-à-vis the equality principle. As Sunstein explains:[28]

> It merely requires something other than raw political power to justify an exercise of authority. In most respects, this is a trivial constraint, for almost any decision can be justified by reference to some public value. One might, for example, support preferential treatment of the poor on the ground that they have a special need for public assistance; preferential treatment of the rich might be justified on the ground that it provides incentives for more work and investment . . . Everything, in short, is at least potentially lawful.

[25] See, for that matter, Case 168/78, *Commission v France* [1980] ECR 347.

[26] See Hans A. Linde, 'Due Process of Lawmaking' (1976) 55 *Nebraska Law Review* 195–255; Frank I. Michelman, 'Politics and Values or What's Really Wrong with Rationality Review' (1979) 13 *Creighton Law Review* 487–511.

[27] The opposite of equal treatment is unequal treatment. The conditional 'unless there are reasons to the contrary' already presupposes unequal treatment and thus excludes the latter from the set of conceivable justifications.

[28] Cass R. Sunstein, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689–1732, at 1689.

E Equality is the Right to be Free from Discrimination

It is clear, then, that if we wish to avoid seeing the equality principle degenerate into a self-effacing constraint—which may even be invoked to elevate arbitrary action to the dignified level of rationality—we are compelled to move beyond a mere rationality defence. The relevant step is marked by shifting our concern from the *rationality* of action to the *impartial* treatment of people. Impartiality is denied wherever, in the context of unequal treatment, the equal worth of human beings is not respected. I mentioned above that dealing with humans as if their lives and interests were not of equal value is tantamount to discrimination. I take it that this is proscribed by what may be termed the *anti-discrimination principle*. Thus understood, equality *in the end* speaks to the limits set to permissible rational action by the duty to treat each and everyone with equal respect.

The move from rationality to impartiality (and, thus, anti-discrimination) reverses the thrust of the rational basis test. Confronted with unequal treatment, we switch from asking whether the action can be supported with resort to the presence of *some* rational basis to a more searching inquiry into whether it is conceivable that those reasons whose presence would render the action discriminatory are absent. It follows that in the context of determining the scope of the notorious 'reasons to the contrary', *reasons from rationality* and *reasons from anti-discrimination* can be distinguished. While the former are inclusionary—they point to an open set of considerations that can be put forward in support of unequal treatment—the latter perform an exclusionary function. They exclude from the set of conceivable rationalisations that which would conflict with the ascription of equal value to all human lives if it were taken to be the basis of action.

We can thus reformulate the meaning of the equality principle in the following way: if the unequal treatment in question cannot be defended as rational behaviour whose success is independent of the attribution of a lesser value to the life and interests of some people, then all persons are to be treated equally.

This implies that unequal treatment is not permissible where rationality fails. For it is then the case that unequal treatment remains the only conceivable rational purpose of action. Pursuing unequal treatment as an end in itself is, however, ruled out by the equality principle. This is what animates the rationality test. Moving beyond that, the anti-discrimination principle provides the underpinning of more severe restrictions. It is through ordinary moral experience that we implicitly know that some reasons do speak to the very attitude of denying respect or ascribing lesser value to the lives of others.[29] Stereotypes and stubborn prejudice are obvious examples. If such reasons are the only reasons remaining that render a certain course of action *rationally* intelligible, then discrimination has been identified. Racist bias, sexist stereotype, and a cynical attitude toward the poor are among the most prominent cases in which reasons are ruled out as a justification of rational conduct by the anti-discrimination principle.

F Discrimination Presupposes a Normative Context

In order to avoid misunderstanding, I should like to submit the guiding idea that anti-discrimination is concerned with the ascription of lesser value to a test.

[29] For a similar observation, see Gardner, note 21 *supra*, 8.

When I decline to hand out apples to a stranger while giving an apple to my son John, does not my behaviour then imply that I consider the life of the stranger to be less valuable than the life of my son? Does not my preferential treatment of John mean that his life *is* more valuable to me than the lives of strangers?

In a certain respect this is true, in another it is not. It is true in the sense that John and I have a *special* relationship. From the mere fact, however, that I feel affection for John and that my action is a way of expressing my special concern for him, it does not follow that I ascribe lesser value to the life of other human beings. My greater concern for him does not imply lesser respect for them.[30] It does not, at any rate, once my special devotion to my son is accompanied by the expectation that everyone else may also legitimately ascribe priority to the needs of their children. The absence of discrimination, however, hinges on the critical condition that the reciprocity to which I have thus submitted is defensible from a moral point of view. The mutual expectation not to receive special concern for one's own children from strangers, however, would be deeply compromised if as a result of mutually granting each other the liberty of giving priority to the needs of dependants some people end up considerably and systematically worse off than others. Privileging my children at the expense of those who for some reason or other have no access to the benefits arising from special relationships, such as the relationship between parents and their children, would then be transformed into an instance of discrimination. For my action could not be defended by pointing to the reciprocity of *reasonable expectations* about the life prospects of other people. Those who are worse off would have good reasons to consider themselves treated with lesser respect.[31]

G The Social Division of Responsibility

I shall try to reformulate this idea at a more general level. As a morally relevant quality of behaviour, discrimination can only be determined against the background of what Rawls calls the 'social division of responsibility'.[32] I do not wish to dwell on Rawls' particular conception here, or to comment on its virtues and shortcomings. For my purposes, it will suffice to say that the social division of responsibility is not about what we owe to each other, but is rather concerned with what we may legitimately expect one another to do if we wish to avoid social disadvantage.[33] For example, society is not responsible for investing me with great wealth. If I wish to accumulate wealth, society may legitimately expect me to undergo professional training and to avail myself of a position that maximises my earning power in the long run. At the

[30] On the distinction of respect and concern see generally Richard W. Miller, 'Cosmopolitan Respect and Patriotic Concern' (1998) 27 *Philosophy and Public Affairs* 203–224, 209–210.

[31] See Avishai Margalit, *The Decent Society* (Harvard University Press, 1996) 32. It can be seen, therefore, that the discriminatory quality of action is dependent on its normative context. Even though I attend primarily to the needs and wishes of my children for the sole motive of being concerned about their well-being, my actions may amount to discrimination if I should have taken into account that against the institutional backdrop of my action others are thereby made worse off than they might have been if only I had acted differently. By not taking an alternative course of action into account it becomes at least *conceivable* that I ascribe lesser value to the life prospects of others. Once it is not unlikely that my behaviour implies an attitude of neglect or indifference towards others, it is almost impossible for the charge of discrimination to be refuted. This is the basic internal logic of the more searching standard of equal protection scrutiny going beyond the rational basis test.

[32] See John Rawls, *Political Liberalism* (Columbia University Press, 1993) 189.

[33] For that very reason, the expectations constituting the social division of responsibility are not tantamount to general rules giving rise to 'derivative' claims to equal treatment.

same time, however, society may not expect me to invest special efforts in order to afford the costs of professional training while persons from rich families do not have to. If society were indifferent to such inequality of opportunity, I might claim to be a victim of discrimination. Such a claim would mean that society, that is, citizens as a collective body, should have taken precautions against the emergence of such unequal conditions. On this level, the charge of discrimination need not be directed at an individual perpetrator.[34]

It can be seen, then, that discrimination is not just about individual conduct. It is also reasonable to speak of discrimination where the *systematic consequences of a set of institutions* are concerned if that set could have been selected differently or may be altered in the future by us acting as a *collective body*. What lends continuity or coherence to our commitment to anti-discrimination, however, is the vision of the social division of responsibility against which we determine whether or not either *behaviour* or the *choice of a system of institutions* is conceivably based on the ascription of lesser value to the lives and interest of some. Indeed, the idea that my conduct, even though it need not be based on discounting the lives and interests of some, may be a component of an institutional system that, as a whole, engenders such an effect,[35] bridges the gulf between the two different understandings of discrimination.

H Systematic Discrimination and Non-comparative Rights

It makes sense, therefore, to distinguish between *behavioural* and *systematic* discrimination. The former is related to individual conduct, whereas the latter concerns the aggregate affect of actions that may be (legitimately) carried out by individual agents without the slightest discriminatory intent.

Grand theories of social justice, such as Rawls', are concerned, among other things, with the systematic effects of the unintended consequences of individual behaviour. For example, it is well known that in a market economy people with mathematical and verbal skills are usually better off than those who lack such skills. Even though no market participant may actually ascribe lesser value to the lives of people who are, say, nothing but able-bodied and brawny, they are systematically worse off for they are likely to end up working in less well-paid jobs. From the vantage point of an anonymous mechanism coordinating rational individual behaviour, that is, the job market, their efforts and life prospects have lesser value—indeed, a lower cash value—than those of others. Modern theories of justice stipulate that such systematic effects be taken into account from the moral point of view in the process of choosing, if only from a hypothetically assumed 'original position', the basic social and economic institutions of society.[36] To protect those who are likely to end up systematically worse off than others against relative depravation which is occasioned by the system of cooperation, equality, applied to selecting of principles of justice, demands that they be granted a set of non-comparative rights. Unconditional welfare benefits for persons who end up in situations of severe deprivation owing to the contingent operation of the market are an example for such rights.

In a certain respect, all non-comparative rights protect against the systematically discriminatory effects of institutions. Such rights provide a safeguard against the

[34] For a similar observation, see Margalit, note 31 *supra*, 128; see also Gardner, note 21 *supra*, 2.
[35] One might add: in light of what people may be expected to do if they wish to avoid social disadvantage.
[36] See for example, Thomas Pogge, *Realizing Rawls* (Cornell University Press, 1989).

consequences engendered by whole packages of rules whose implementation is likely to result in the incidental, yet systematic imposition of burdens on some persons, even though those affected are not liable for the disadvantages suffered when seen from the perspective of the social division of responsibility. Thus understood, non-comparative rights protect against the threat that one's interests may be neglected, a threat that is an inherently discriminatory feature of a *system* in which, for example, government is granted ample legal powers for the sake of the common good. A liberal society, as is well known from Rousseau's analysis, needs a strong police force for the protection of private property. One of the risks involved in having a strong police force, namely, that the interests of criminal defendants will be systematically neglected, is a sound reason for protecting their rights to bodily and psychological integrity against disproportionate infringements. Similarly, if private property could be taken without adequate compensation this would systematically invite taking from the wealthy regardless of whether their efforts were thus thwarted or not.

It needs to be added that the latent link between *some* non-comparative rights and the protection against systematic discrimination is not severed on the ground of the fact that such rights may be infringed by appealing to *reasons from proportionality*. It is revealing about the depth's of a system's commitment to systemic anti-discrimination under which circumstances an infringement is deemed legitimate if the net gain reaped from the infringement is not out of proportion vis-à-vis the loss suffered by the right-holder.[37] Whatever that may mean, it is clear that reasons from proportionality are non-comparative. Their strength does not depend on whether some right-holders are better off or worse off than others. Ideally, the question of whether a taking of my property is out of proportion as to the public benefit obtained can be resolved without even acknowledging the existence of my neighbours whose property rights remain untouched. At the same time, reasons from proportionality remain within the purview of *systematic* discrimination, provided that they are *eventually* geared to the question of what may legitimately be demanded from a person as a respected member of society.

III Constitutional Indeterminacy

A The Magnifying Glass

At this point I would like to bring to an end what has been, in any case, an intermittent and fragmentary analysis of the basic concepts that are, I believe, indispensable for arriving at a clear and sober understanding of the equality principle. I shall now go on to an exploration of my 'probing idea' according to which there is an intriguing link between the minute complexities arising from applications of the equality principle on the one hand and the indeterminacy of the European economic constitution on the other. I surmise that the application of basic economic liberties[38] operates like a magnifying glass in which conceptual complexities of the equality principle are revealed to be the kernel of structural problems.[39] Since it is this principle that governs

[37] It should be noted that I am referring only to the third component of the tripartite proportionality test of which the other two essentially amount to a more stringent rationality review. For an exposition see Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105–150, 113–114.

[38] For a clear account of the basic economic liberties *qua* equality rights, see Hans D. Jarass, 'Elemente einer Dogmatik der Grundfreiheiten' (1995) 30 *Europarecht* 202–226, at 216.

[39] It should be noted that the effects that the application of basic liberties has on the competence allocation between the Community and the Member States are not considered relevant as to the subsidiarity

the allocation of competence is that field,[40] the prospects for stablising the European Economic Constitution are anything but bright. The emerging indeterminacy is owing to a inexorable *circularity* in the relationship between the protection afforded against behavioural discrimination by the national treatment principle on the one hand and the safeguards against systematic discrimination on the other. I shall explore this circularity later in this section.

B Two Modes of Dividing Up Social Responsibility

I have already drawn a distinction between two types of discrimination, namely, behavioural discrimination on the one hand and systematic discrimination on the other. In respect of the former type, standards of equal protection proper serve as observation schemes concerning the differential treatment of persons. They establish interpretative links between conceivable reasons for action and the ascription of lesser value to the lives or interests of some.[41] The suspicion thus raised by the use of reasons from anti-discrimination that the latter is indeed the case can then only be refuted by resorting to 'objective justifications' whose aim is to demonstrate that unequal treatment is not the purpose but merely the incidental effect of action.

Where non-comparative rights are concerned, with resort to reasons from proportionality (in the narrow sense adumbrated above) systematic discrimination may come into play. Owing to the use of such reasons, obstacle-based approaches implicitly assume a right to market access or at least a right to be free from burdens resulting from *the mere existence* of different national markets. Objective justifications have a different point here. Their claim to validity rests on intuitions about the proper proportion in the relationship between the burden imposed and the benefit achieved.

The contrast with reasons that are put forward in defence of unequal treatment can be made clear even with an eye to the hybrid and borderline cases originating in *Dassonville* and *Cassis de Dijon*.[42] The proportionality test (making obstacles to movement within the Community conditional on the satisfaction of sufficiently weighty 'mandatory requirements') is not about defending the unequal treatment of foreign and domestic products, even though it is *triggered* by the existence of 'dual burden rules'[43]—that is, imported products must be burdened by the requirement of compliance with the technical requirements of the country of destination in addition to fulfilling less demanding requirements of the country of production. Nevertheless, it is hampering access to the Internal Market that matters in the context of the proportionality test and *not* unequal treatment.[44] What may legitimately be perceived as an equal-burden rule from the perspective of the relevant Member State, appearing, then,

principle. See the critical comments by Gráinne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, Jean Monnet Working Papers 7/99 (1999) http://www.law.harvard.edu/programs/JeanMonnet/papers/papers99.html, section III.3.

40 See Maduro, note 3 *supra, 167.*

41 At times, the success of a defence against the charge of discrimination can be assured by adducing some reason other than unequal treatment itself. Contrariwise, the responsibility for raising the suspicion of discrimination is particularly strong if the imposition of an unequal burden—i.e. 'discriminatory effect'—is, as such, taken to be strong evidence for prejudiced or unfair behaviour.

42 See Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837; Case 120/78, *Rewe-Zentrale AG v Bundesmonpolverwaltung für Brandwein*, [1979] 649.

43 See Paul Craig and Gráinne de Búrca, *EU Law. Texts, Cases and Materials* 2nd edn (Oxford University Press, 1998) 611.

44 See Todd J. Friedbacher, 'Motive Unmasked: The European Court of Justice, the Free Movement of Goods, and the Search for Legitimacy' (1996) 2 *European Law Journal* 226–250, at 232.

not to be based on protectionist motives, is submitted to a non-comparative proportionality test if the measure imposes an additional burden on the imported product. The measure is treated as if it was an obstacle to free trade in a unified market place. The obstacle-based approach thus indirectly confers a quasi-non-comparative *right* on importers to access the market. The approach is about the *systematic* disadvantage that may arise in a free trade regime owing to the disparity between different national legal regimes.[45] Clearly such protection cannot be afforded on the basis of the national treatment principle. It is inspired by the vision of the Internal Market 'as an area without internal frontiers in which the free movement of goods, persons, services and capital in ensured' (Article 14 EC), with its own build-in social division of responsibility and the rights derived against its background.[46] This division of responsibility is altogether *different* from a scheme in which the coexistence of nation states is taken for granted and constitutes an unquestioned defence for dual burdens emerging from the disparities among national regimes. It follows that in the context of the European Economic Constitution the protection afforded against discrimination is *not* supported by a unified scheme.

C Removing Obstacles

At first glance it may appear, then, that Weiler was right. In his opinion, what lies 'at the heart of international trade regimes liberalising transnational movement of goods, services, investment, and the like'[47] is the *choice* between either restricting their hold to the elimination of discriminatory and protectionist practices or, moving beyond that, banning all unjustifiable obstacles to free trade. Such a choice concerns the *depth* of a commitment to anti-discrimination. The question is whether ruling out discriminatory *behaviour*, even by going so far as to infer discrimination from the protective effects of government policy, is enough here, or whether it will also serve to combat *systematically* discriminatory consequences for trade following from the sheer coexistence of nation states. It has the effect of making international trade more costly than domestic trade. This is the discriminatory effect, as it were, *inherent* in such a system. Obstacle-based approaches prohibit any impediment to unhampered free trade irrespective of whether a legal rule posing an obstacle has a discriminatory or protectionist effect from a behavioural point of view.

Prohibitions on obstacles may either give way to derogations, as is the case for Article XI with respect to Article XX of the GATT,[48] or they may be based on the use of unyielding *per se* rules. Article 25 EC, prohibiting customs duties on imports and exports as well as charges having equivalent effect, is apparently given by the

45 This may appear to be paradoxical, but only because the intuition underlying the non-comparative focus is submerged in combating systematic discrimination. Otherwise, the instrument would be toothless. It is not the treatment of *A* in comparison to the treatment of *B* that matters. Rather, what matters is the overall situation of *A* as compared to the hypothetical situation *A* would be in had a certain obstacle in the path of *A*'s economic activities been removed, with the obstacle being a *systematically discriminatory consequence of the regulatory system in place*.

46 On the distinction between free-trade regimes and a common market, see D. Swann, *The Economics of the Common Market* 7th edn (Penguin, 1992) 11–12. In a free-trade area, states simply agree to remove all customs duties and quotas inhibiting trade among them. A common market goes beyond that by providing, in addition to the free movement of goods, the free movement of factors of production such as capital and labour.

47 See Weiler, note 10 *supra*, at 352.

48 See *ibid.* 356.

European Court of Justice the format of a relentless *per se* rule.[49] As is well known, *per se* rules lend the strongest possible expression to the obstacle-based approach. The way in which Article 25 (formerly Article 12) EC has been interpreted by the European Court of Justice supplies the model case. Article 25 says:

> Custom duties on imports and exports and charges having equivalent effect shall be prohibited between Member States.

In *Commission v Italy*[50] (the case is usually termed the *Statistical Levy* case) the European Court of Justice introduced the obstacle-based approach for every charge levied upon goods crossing an intra-Community border. As to the way it is stated, this approach does not admit of any exception based on an objective justification—in marked contrast to Article XX of the GATT[51] and to measures having equivalent effect to a quota (Article 28 EC). By contrast to regulations governing the flow of commerce in domestic markets, which were, until *Dassonville*, subject to the national treatment principle (with derogations available under Article 30 EC), any charges posing an obstacle to goods entering a national market are deemed to be impermissible regardless of whether or not they are protectionist. In the *Statistical Levy* case, the levy was imposed on exported goods for the purpose of collecting statistical material for mapping the patterns of international trade. The levy had an equal impact on domestic and previously imported goods. No protectionist purpose could be made out. Still, the European Court of Justice held that:

> any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic and foreign goods by reason of the fact that they cross a frontier, and which is not a custom duty in the strict sense, constitutes a charge having equivalent effect . . . even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.[52]

The Court concluded that the prohibition of new custom duties or charges having equivalent effect 'constitutes a fundamental rule which . . . does not permit of any exception'.[53] It appears as if there were no defence available for the imposition of charges having an effect equivalent to a customs duty. All market citizens, or so it seems, have an unyielding negative right to be immune from such charges. The discriminatory effect that is implicit in the coexistence of nation states has to be ruled out.

It is commonplace that with regard to the prohibition of quotas and measures having equivalent effect (Article 28 EC) the application of the obstacle-based approach was extended by the Court beyond point-of-entry regulation to the field of internal

---

[49] Yet, even in this context the European Court of Justice grants a derogation in the narrow area of inspection fees that are collected by a Member State in compliance with mandatory requirements of Community law. For purposes of making this type of 'derogation' appear to be consonant with the general obstacle-approach, the Court maintains that such fees may then not be classified as charges having an effect equivalent to a customs duty (See Case 18/87, *Commission v Germany* [1988] ECR 5427, para 8). They are presented as if they had eluded the catch of Art 25 EC. Nevertheless, this seemingly innocuous departure from the otherwise rigidly applied *per se* rule likens the overall approach to pecuniary barriers to market access to the obstacle-based reading of Art 28 (former Art 30) EC.

[50] Case 24/68, *Commission v Italy* [1969] ECR 193.

[51] There are, in significant contrast to the GATT, no derogations, either for CEEs or for discriminatory taxation.

[52] Case 24/68, para 9.

[53] *Ibid.* para 10.

market regulation.[54] It admits of the well-known open-ended rule of reason granting the fulfilment of 'mandatory requirements' which have been outlined in the jurisprudence of the Court since *Cassis de Dijon*. In the context of market regulation, such requirements are remarkably entangled power-conferring devices. Apparently, the successful invocation of mandatory requirements, such as consumer protection[55] or the creation of cinematographic works[56] preserves the power of Member States to enact legislation. This immunity from invalidation by Community law comes, however, at a high price. An instance of national regulation that is picked up by Article 28 EC and can be defended only by resorting to 'mandatory requirements' triggers Community competence to harmonise national laws and thereby to render more or less uniform what would otherwise remain a legally fragmented market place.[57] The seeming immunity from invalidation transforms Member State regulation into the provisional proxy of what *Community law* considers to be a mandatory requirement that may to be procured either through national laws or Community legislation.

If Weiler is right, the economic constitution in the post-*Keck*[58] age is witness to the gradual universalisation of *obstacle-based approaches to market access* on the one hand and *national treatment for market regulation* on the other.[59] What is new, however, is that whereas the regulation of product characteristics is still perceived to be tantamount to a barrier of access, 'selling arrangements' are taken to be outside of the scope of Article 28 EC and thus the respective regulatory powers, or so it may seem, reallocated to the Member States.[60]

D Supplementing the Commitment to Systematic Discrimination with Some Behavioural Point of View

Custom duties are not necessarily protectionist. They may also cover products for which there is 'no identical, similar, substitutable, or competing domestic item'.[61]

[54] See Friedbacher, note 44 *supra*, 228; Weiler, note 10 *supra*, at 356. As Weiler (at 360) points out, the European Court of Justice could have read Article 28 through the lens of the obstacle-based approach and still have restricted its application to rules governing market access, such as equivalents to zero quotas, that is, a ban on the marketing of certain goods. This would have amounted to a plausible construction of Article 28. However, the Court was apparently carried away be the analogy of trading rules affecting imported products to non-zero quotas, which limit the amount of goods that can be sold in the market. This analogy in not convincing. As Weiler (*ibid.*) explains: 'A regulation which appreciably affects sales but does not differentiate between imports and domestic products is really not equivalent in this sense to a quota larger than zero. This is not simply a formal distinction, but one with great substance. Even when a state regulation affects the volume of sales, the imported product can compete on the domestic market and, if better in quality and price, can displace all its domestic competitors. A non-zero quota does not allow such market competition, and it is very rare to have a non-zero quota imposed on imports and domestic products alike.'

[55] See *Cassis*, para 8

[56] See Cases 60/84 and 61/84, *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para 23.

[57] See J. H. H. Weiler and Nicolas J. S. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence, Part I' (1995) 32 CMLR 51–94, at 76; Norbert Reich, 'The "November Revolution" of The European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 CMLR 459–492, at 481–482; Friedbacher, note 44 *supra*, 239; Weiler, note 10 *supra*, at 362.

[58] See Cases C267/91 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.

[59] See Weiler, note 10 *supra* at 371–372.

[60] See Friedbacher, note 44 *supra*, at 240; Stephen Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification', (1996) 33 CMLR 885–906.

[61] See Weiler, note 10 *supra*, 354.

Therefore, *per se* rules are notoriously over-inclusive as to their purpose. On their face,[62] they apply also to situations in which a levy is not the systematically discriminatory consequence of the coexistence of national economies. Reliance on them would be unreasonable there. Hence, their use is invariably burdened by having to define limits on the proper sphere of their application.[63] In some instances, the European Court of Justice decided to bypass the application of Article 25, assuming that a levy was part of a general system of internal fees, even in cases where the internal tax was applicable to imported products alone and therefore liable to be identified as a 'charge having equivalent effect'. Otherwise, however, there would have not been any room left for the Member States to impose a tax on goods that were not of their making.[64]

Viewed from this angle, there is reason to assume, then, that the meaning of the obstacle-based approach to Article 25 EC is in the final result spelled out in the provisions concerning discriminatory taxation. The latter are construed in such a way as to allow for justifications that consistently follow a *behavioural* pattern with respect to the politics (legislation, measures) of the Member State.[65] There is an additional and obvious pragmatic reason for this. Even though obstacle-based approaches that rely on strict *per se* rules are notoriously rigid, governments are always likely to discover loopholes and other ways of evading their hold.[66] Obviously, the purpose of Article 90 (former Article 95) EC, prohibiting discriminatory taxation, is to prevent the objectives of Article 25 (and Article 23) from being undermined by discriminatory internal taxation.[67] Outlawing the imposition of charges or levies that are collected owing simply to the fact that goods cross a border 'would be to little avail if it were open to a State to prejudice foreign products once they were *inside* its own territory by levying discriminatory taxes, thereby disadvantaging those imported products which were in competition with domestic goods'.[68] At both paragraphs of Article 90 EC, the commitment to free trade is put to the test. Market access, however, is guaranteed not by vindicating unimpeded movement across borders; rather, it is achieved by protecting imported products against adverse treatment vis-à-vis domestic goods. National treatment is the guiding concern, not the removal of conceivable obstacles. The basic commitment to free trade and its attendant social division of responsibility is thus bolstered by what is different from it, namely, non-discrimination among coexisting

62 Actually, it is the very point of *per se* rules that their 'face' matters.

63 I do not need to dwell on the commonplace that the so-called 'exchange exception' is an attempt at defining the scope of the *per se* rule. The exception is strictly construed in order to make sure that fees collected for services provided by the state are almost by necessity related to the production of a public benefit that is not the mere consequence of a system which by its very nature discriminates against free trade. For a discussion of the difficulties inherent in that approach, see Craig and de Búrca, note 43 *supra*, at 556–558

64 See Case 193/85, *Cooperative Co-Frutta Srl v Admminstrazione delle Finanze dello Stato* [1987] ECR 2085.

65 The fact that an international or supranational trading regime becomes 'softer' when it permits national market barriers on some occasions seems to reflect the fact that behavioural anti-discrimination is its ultimate point. This seems to imply that obstacle-based rules as over-inclusive problem-solvers are laid aside when it comes to the fine-tuning of boundaries defining the margin of discretion that is left to national policies.

66 As Gormely explains, 'the major problem in accepting a discrimination criterion in Art. 30 is that it can all too easily be circumvented by legislation which is on its face applicable to domestic and imported products alike.' Lawrence W. Gormley, '"Actually or Potentially, Directly or Indirectly?" Obstacles to the Free Movement of Goods' (1989) 9 *Yearbook of European Law* 197–208, at 198.

67 See Craig and de Búrca, note 43 *supra*, 561.

68 *Ibid.*

nation states. Consequently, the existence of an obstacle to *marketing* a product in another Member State is legally relevant only if it can be reframed as a measure raising the suspicion of discriminatory behaviour.[69] To establish this claim requires that the measure entail a protective effect—that as a result of its application domestic products are better off on the market than goods from abroad. Once such a protective effect is ascertained, the conceivable reasons supporting the measure are submitted to strict judicial scrutiny.

We may conclude, then, that in Community law the commitment to systematic anti-discrimination is supplemented not just by *some* behavioural point of view, but by the application of anti-discrimination rules whose focus is on behaviour, that is, the policies pursued by Member States. There is a sound reason for this. The commitment to systematic anti-discrimination can only be sustained by outlawing defecting behaviour. Defiance, however, can only be ascertained by looking at behaviour. At bottom, however, systematic and behavioural anti-discrimination do not share the same perspective on the social division of responsibility. One may well wonder, then, whether they can be reconciled in the context of Community law.

E Indirect Discrimination as a Mediating Device

Given that the respective social divisions of responsibility underlying unhampered free trade on the one hand and the coexistence of nation states on the other are, at any rate, in conflict with each other, the Court's jurisprudence appears to have developed a mediating device. The function of this mediating device is to translate the basic terms of the social division of responsibility governing the coexistence of nation states (where traders are burdened with having to comply with non-discriminatory national regulations) into the social division of responsibility of unhampered free trade (where all obstacles to trade are in principle removed). At least in this context, the category of 'indirect discrimination' plays the central mediating role. It does so by introducing the behaviour point of view of the national treatment principle, which is rooted in the coexistence of nation states, into the internal logic of protection against systematic discrimination, which is the hallmark of unhampered free trade.

To begin with, the notion of indirect discrimination—at least seen from the perspective of traditional political liberalism—is better explained as a matter of distributive justice than concerning the harm inflicted by discriminatory behaviour.[70] Thus understood, it is perfectly consonant with protection against systematic discrimination. In cases of indirect discrimination, the discriminatory effect can be only on its surface—for the most part on a statistical level—traced back to the behaviour of governments or states. In the relationship between the purported discriminator and the victim, no clear nexus of wrongdoing can be discerned, not to mention the ascription of lesser value to the life or interests of the person adversely affected. On the contrary, a plausible case can be made that rules protecting against indirect discrimination serve the purpose of lifting *institutional* disadvantage.[71] They redistribute access to positions and resources. The addressees of rules of indirect

[69] This is also part of the *Keck*-proviso according to which a selling arrangement is not caught by Art 28 provided that, among other things, a regulation 'affects in the same manner, in law and in fact, the marketing of domestic products and those form other Member States' (*Keck* para 16).

[70] See Gardner note 21 *supra*, 10–11.

[71] See *ibid.*, 5.

discrimination are thus transformed into agents of redistribution. This is, at any rate not in principle, unfair when it is taken into account that, in the context which is of interest to us, nation states occupy a key position in the 'distributive mechanics'[72] of international trade. Imposing the duty on them of abstaining from conduct engendering systematically discriminatory effects is a simple means of bringing about some pattern of redistribution, such as equal market access in the Internal Market.

But even when the protection against systematic discrimination is the rule, there may be instances in which redistribution via protection against indirect discrimination appears to be unfair, given that nation states may otherwise be forced to relinquish political control for the disproportionally greater benefit of the Internal Market. Thus understood, 'objective justifications' may be understood as 'reasons to the contrary' that can be invoked whenever an *exception* is to be made from the general rule of protection against systematic discrimination. This implies that nation states are not just agents of redistribution, but also the beneficiaries of the equality principle. As Gardner explains in the context of employment relationships:[73]

> To impose direct contributory duties on those *predominantly* in control of . . . institutional factors is simply to interpret their social roles as those of *agents* of redistribution rather than merely those of *subscribers*. By adding a justifiability criterion, the law remains aware that in some cases the agency role could require disproportionate and crippling personal contribution. So the agency role does not eclipse altogether the subscriber role.

Against this background, it can be seen *in which respect* the category of 'indirect discrimination' seems to offer a mediating device. From the vantage point of the coexistence of nation states, reasons that are taken to constitute an 'objective justification' can be invoked to dispel the impression that conduct is discriminatory, whereas from the perspective of unhampered free trade those same reasons provide the basis for making exceptions to the general rule of protection against systematic discrimination. It is the same type of reason seen from two different modes of dividing up the social division of responsibility.

The question is, however, whether this mediating device can succeed. There are strong reasons for doubt, which stem from the *elusiveness of behavioural discrimination*. In the very process of identifying indirectly discriminatory behaviour, the fragile conceptual framework of anti-discrimination disintegrates into a robust commitment to balancing. Even though the latter is the hallmark of the obstacle-based approach, it is constantly shading into the anti-discrimination jurisprudence of the Court.[74] Putting the matter bluntly, the implementation of unhampered free trade supplements behavioural anti-discrimination. From the vantage-point of the social division of responsibility, the latter is the hallmark of the coexistence of nation states. This social division of responsibility, however, is always likely to be dissipated by the internal logic of the social division of responsibility underlying the commitment to unhampered free trade. There is no way of mediating between them, except, as one might speculate, by settling the matter of competence allocation between Community and Member States in advance.

In Table 1, I try to provide an overview of the distinctions that have been relevant in our discussion so far:

[72] *Ibid.*, 10.
[73] *Ibid.*, 11.
[74] For an overview, see de Búrca, 'Principle of Proportionality' note 37 *supra*, 127–145.

Table 1. Two Approaches to Anti-discrimination in EC Law.

	Sphere of Application	*Social Division of Responsibility*	*Paradigmatic Target*	*Type of Equality Right and Basic Thrust*	*Mediating Device*
Behavioural Anti-discrimination	Behaviour of Agents	Coexistence of Nation States	Direct Discrimination against Non-nationals	Comparative: National Treatment	Indirect Discrimination
Systematic Anti-discrimination	Effects of Systems of Rules	Unhampered Free Trade	Financial or Regulatory Obstacles to Free Movement of Goods	Derivative: Removal of Obstacles	Balancing

F The Paradox of Behavioural Anti-discrimination

In *Humblot,*[75] France was held liable for having imposed a tax scheme that indirectly discriminated against imported cars, for according to the scheme, which was on its face indistinctly applicable to foreign and domestic cars alike, as a matter of fact only imported cars with a higher power rating were subject to an unusually high tax that effectively 'cancel[led] out the advantages which certain cars imported from other Member States might have in the consumers' eyes over comparable cars of domestic manufacture . . .'[77]

The assessment of objective justifications in such a context leaves one in a predicament.[78] It is inherent in the identification of discriminatory *behaviour*. It raises the question of what kind of *good effect* can be understood to have been the *reason* for action and why it is thus lawful to discount the resulting tax disadvantage for foreign products as an 'incidental burden' that is not to be understood as a manifestation of *bad intentions*. In the end, this may come down to attributing a certain *weight* to the pursuit of certain policies. As Weatherill and Beaumont explain, a

[75] Case 112/84, *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367.
[76] *Humblot*, para 15.
[77] *Humblot*, para 15.
[78] Objective justifications are more likely to succeed if both imported and domestic products are more or less equally burdened. On the introduction of a *de facto* derogation clause to the field of taxation in Case 46/80 *SpA Vinal v SpA Orbat* [1981] ECR 77 and Case 21/79 *Commission v Italy* [1980] ECR 1, see Weiler, note 10 *supra*, at 365; Generally, successful objective justifications are those drawing a distinction between goods, for example, with respect to the raw materials used or the production process employed. See Case 140/79 *Chemial Farmaceutici v DAF SpA* [1981] ECR 1, para 14: '. . . Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production process employed. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty and its secondary law and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products.' Interestingly, the Court held that tax incentives for the production in certain areas are an acceptable means of providing regional aid, which is not in conflict with the Treaty. See Case 196/85 *Commission v France* [1987] ECR 1597.

punitively high tax on cars emitting great quantities of toxic fumes may be lawful even if this tax is to the detriment of models imported from other countries.[79] Indirect discrimination according to the capacity to pollute is then taken to be legitimate, for it serves a permissible goal.

The indeterminacy involved in the messy business of distinguishing discriminatory behaviour from the infliction of merely 'incidental burdens' is what motivates the shift to the obstacle-based approach. Reasons that are *good enough* to pursue a permissible goal of public policy in spite of a discriminatory effect are a moving target. Pinning them down is a matter of interpretation. The tight fit between means and ends is, to be sure, helpful in sorting out these ragged regulations, still, for to be 'good reasons', ends also have to have some special importance or urgency. By contrast, the obstacle-based approach does not rest on the distinction between good reasons and bad purposes. This distinction, however, is the basic predicament of anti-discrimination law, for it cannot resolve the *paradox of anti-discrimination* arising from its reflexive application, namely, that even the best reasons can be used together with the worst of purposes. It may come as no surprise, then, that not infrequently the reasoning going on under the name of 'indirect discrimination' is already on its way to shifting over to the obstacle-based approach.[80]

G Shifting to the Obstacle-Based Alternative

This can be shown by looking at *Humblot*. Why should not France be permitted to submit cars with a power rating above a certain threshold to an exceedingly high tax rate in order to promote, for example, traffic safety? Would that not be a permissible and overriding goal even though it only affects cars imported from abroad? The European Court of Justice saw the matter differently. Along with the fact that the higher tax on imported cars did not fit comfortably with the internal logic of the tax scheme applicable to other cars and therefore tended to corroborate an underlying protectionist bias, the Court objected to the fact that the special tax 'reduces the amount of competition to which cars of domestic manufacture are subject . . .'[81] This argument can be read also to say that a competitive car market is the end consonant with the social division of responsibility in the Community and that the national tax is an obstacle to competition—is, for that matter, an instance of systematic discrimination.

For the purpose of bringing about the public good of traffic safety, all *A*s importing a certain type of car have to pay more taxes than do *B*s, whose cars are produced at home. This is indirectly discriminatory, unless it can be shown that the treatment of *A*s is not a consequence of ascribing lesser value to the interests of *A*s. One way of adducing reasons 'to the contrary' is to claim that, after all, traffic safety is an *important* goal of public policy and imposing a comparatively higher tax on all *A*s is an adequate (and maybe even necessary) way of attaining it. In this way we reason from

79 Stephen Weatherill and Paul Beaumont, *EC Law* 2nd edn (Penguin, 1995) 402.

80 For a similar observation that anti-protectionist approaches are complemented by a balancing test, see Maduro, note 3 *supra*, at 163. On balancing in the context of Art 30 (formerly Art 36) EC, see de Búrca, 'Proportionality Principle' note 37 *supra*, 127–145.

81 *Humblot*, para 15.

equality, understood as right protecting against discriminatory behaviour. However, nagging doubts may remain about whether traffic safety, even though there may be some plausible relationship between the reduction of accidents and the setting of disincentives to buy some type of car, is merely a welcome pretence for the pursuit of protectionist goals whenever such a policy has a protectionist effect. It may still be surmised that government would not have chosen to increase traffic safety if it had not been for the discriminatory effect. Indeed, we have all reason to assume that what lends unity and coherence to the goal is that it is, indeed, both, a reason *and* a pretence.[82]

From the angle of an obstacle-based approach that admits of derogations, the matter is cast in different light, and this explains why it is so alluring. The question is simply whether the tax inhibits the free stream of goods. The baseline is that *A* has, just as anyone else has, a right to sell his goods on the market irrespective of the country of origin.[83] The question, then, is whether or not the tax is a necessary means of achieving traffic safety. Answering this question eventually boils down to ascribing greater weight to either the free stream of goods or the goal of traffic safety. Ironically, however, an obstacle test—the 'all-out rallying cry against the ethos of protectionism'[84]—*indirectly* protects against discrimination as seen from the behaviour level. Matters of discrimination *qua* treatment are addressed only indirectly. Dealing with discrimination as if it were an obstacle comes down to extending merely *indirect protection against indirect discrimination*. By definition, discriminatory treatment is not manifest, but could not be identified by the remedy even if it were. I take this to be one of the most precious punchlines of Community law.

H How Shifting could be Avoided

One may well wonder what the difference comes to. It lies in what is *forgotten* when the application of the equality principle crosses over to balancing. The category of 'indirect' discrimination is the marker for this crossing. From the perspective of behavioural anti-discrimination what matters is that the pursuit of a certain goal is a valid reason for unequal treatment. The reason is valid if it does not mean the ascription of lesser value to the lives of some. In cases in which reasons appear to be invariably also pretences, the only way of knowing this is by granting the agent *the liberty to act in spite of irresolvable ambiguity*. In the scenario that is of interest here, we would have to conceive of the nation state as an agent that has been granted the legal power to regulate traffic safety. This, we would understand, is part of its responsibility towards its citizens. Every national government has, we might then conclude, an

[82] See also Maduro, note 3 *supra*, 162.

[83] Indeed, the career of Community law up to *Keck* can be described as the move from anti-discrimination to rights. Again, one has to look at justifications. For example, in the area of free-movement of goods dual burden rules, which are caught by the *Dassonville* formula, a justification of the burden as such is required and not a defence to contend that it does not unduly discriminate against imported goods. Likewise, the exchange-exemption under Art 25 makes room for justifications that are not comparative in nature (see Craig and de Búrca, note 43 *supra*, 574, 555–556, 558). It is a question of giving due consideration to the rights of market participants.

[84] Weiler, note 10 *supra*, 362.

agent-relative reason[85] to enact the respective measures, which are beyond the pale of discrimination if they are *appropriate* to that end.[86]

This style of reasoning from anti-discrimination has an important implication. It says that the nation state has the power to do what it has agent-relative reasons to do from the vantage point of political legitimacy, notwithstanding the fact that the government would not have introduced the measure were it not its the protectionist effect. That is what it takes to recognise the nation state as a *competent* political unit. As long as it is *conceivable* that a measure is well-suited to the pursuit of an end for which the nation state has been given a legal power, the national government may act as it pleases. Otherwise the nation state would be denied recognition as a competent agent. Adopting this position would, however, require that we take a relaxed position on 'indirect discrimination' and grant the nation state a good deal of discretion when it comes to discounting emerging inequalities as mere 'incidental effects'. It is crucial however, that this is the only way of steering clear of the paradox of anti-discrimination, to which I have alluded above. The best of all reasons can be used together with the worst of purposes. Only by granting the nation state the legal power of acting for the best reasons, even though the application of more stringent judicial scrutiny could reveal that those best reasons provide merely a camouflage of bad, namely protectionist, purposes, can the paradox be bypassed in a manner which is, contrary to its disintegration into balancing, not inconsistent with the equality principle proper. *Competence allocation by means of relaxing the standard of equal protection review* would be a method of avoiding the interpretative enigma marked by the paradox. The direction of justification would be thus geared to competence allocation and depart *from there* to anti-discrimination, not the other way round.

An approach giving clear priority to anti-discrimination is not necessarily hostile to free trade. Edmund Kitch[87] argues that the decentralisation thus brought about would not result in an abundance of trade barriers, as this would run counter to the well-understood self-interest of States. They would rather engage in bargaining and cooperation in order to bring about mutually desirable results. Harmonisation by the Community could be understood as an expression of such bargaining processes.

I Why Shifting Cannot be Avoided

This, however, has never been part of the ethos of European Community law.[88] One of the reasons why is has not resides in the fact that in the context of basic liberties the resolution of questions of competence allocation presupposes that we know in advance which kinds of behaviour are discriminatory and which are not. The nation state is only competent to implement an internal system of dues if it does not have 'directly or

[85] On the distinction between agent-relative and agent-neutral reasons, see Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986) 152: 'If a reason can be given a general form which does not include an essential reference to the person who has it, it is an *agent-neutral* reason. For example, if it is a reason for anyone to do or to want something that would reduce the amount of wretchedness in the world, then that is a neutral reason. If on the other hand the general reason does include as essential reference to the person who has it, it is an *agent-relative* reason.'

[86] See Maduro, note 3 *supra*, 148.

[87] See 'Regulation and the American Common Market', in A. Dan Tarlock (ed.) *Regulation, Federalism and Interstate Commerce* (Oegeschlager, Gunn Hain, 1981); *idem*, 'Regulation, the American Common Market and Public Choice', (1982) 6 *Harvard Journal of Law and Public Policy* 119.

[88] See Maduro, note 3 *supra*, 157.

indirectly' discriminatory effects. We cannot claim that in spite of indirectly discriminatory effects an excise tax on liquor is not in conflict with Article 90(1) EC, for it is up to the Member States to regulate such matters, unless there is a manifest violation of the national treatment principle. This way of reasoning, which would be consistent with the national treatment principle, is unavailable in the constitutional framework of the Internal Market. As the reasoning collapses from an assessment of indirect discrimination into the obstacle-based approach the reference to the behaviour of an actor that has been invested with certain competences is cancelled out.[89] The reasons on the scale of balancing are, therefore, *agent-neutral reasons*.[90] For an assessment of their relative weight it need not be known for whom they are reasons, *either* for the Member State *or* for the Community.[91] From within the obstacle-based approach the policies that appear to justify restrictions on the free stream of commerce could therefore always be the Community's own policies, for the Community as such, without any internal differentiation and almost by default, commends itself as the proper institutional frame of reference.[92] They are not treated as goals that are pursued by the Member States *qua nation states* as opposed to a supranational institution. It follows that the shift from behavioural anti-discrimination to balancing indicates discontinuity and a *latent transfer of competence*, rather than the existence of a harmonising mediating device.

In the context of the European Community, however, the commitment to systematic anti-discrimination underlying the obstacle-based approach cannot be put up to the hilt either. If it is true, as was indicated at the outset of this article, that European supra-nationalism is a distinct and novel political ideal then it is not about replacing the nation state with a unified transnational regime; rather, it is about maintaining the nation state and attenuating its adverse, discriminatory consequences. The distinction underlying this idea, that is, the differentiation between what is splendid and what is repugnant about the nation state is already an attempt to escape the basic paradox of the European constitution, which is worth pondering. The nation state is to be maintained and not to be maintained at the same time.

If one were to ask, therefore, whether or not the distinction between national treatment and a commitment to unhampered free trade can be upheld it may be tempting to follow Weiler's reconstruction of the Court's jurisprudence. Weiler thinks it would be best if the EC were to adopt the basic model of the GATT using an

89 There is an intriguing misreading within the category of 'indirect discrimination'. Anti-discrimination wishes to make a plausible case for the reasons of behaviour by looking at the effect and the reasons for unequal treatment. It is, however, not about whether one or the other has greater weight than the other. The weight of a social policy may only indicate that ascribing lesser value to the interests of some is not the reason for action. However, even the slightest indication that such behaviour is the case, it would not follow that interests, even those of the highest order, could render unequal treatment permissible. Anti-discrimination does not admit of balancing.

90 See Nagel, *View from Nowhere*, note 84 *supra*, 171, 174; Derek Parfit, *Reasons and Persons* 3rd edn (Clarendon Press, 1987) 27, 104, 143.

91 In the absence of a clear-cut allocation of competences the Court, with respect to the free movement of goods, has adopted a 'majoritarian' approach and upheld social regulations if it they were shared by a majority of Member States. See Maduro, note 3 *supra*, 61–78; *idem*, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in P. Alston, M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999) 449–472, at 451, 454

92 One cannot get to reasons for action simply by the use of agent neutral reasons. See, for that matter, Alexander Somek, 'Begründen und Bestimmen. Das moralische Urteil als Praxis' (1999) 47 *Deutsche Zeitschrift für Philosophie* 383–405.

obstacle approach with respect to entry restrictions, such as charges and quotas, and the national treatment principle governing the imposition of marketing conditions.[93] In his opinion, the old law of obstacles should be downsized to cover only 'those cases where the obstacles result in effective exclusion of products from the market'.[94] This would signify a 'maturation' of the European economic constitution based on the accomplishment of the internal market. It would permit greater tolerance of national regulatory diversity. Market fragmentation would signal the survival of the nation state. Moreover, it would mark the abandonment of the 'artificiality of having different doctrinal regimes for pecuniary regulation and legislative and administrative regulation as well as subdivisions within this last category.'[95] What we would get then on the level of an ideal model, would be tantamount to the abandonment of the coexistence of nation states with regard to market access and mere behavioural anti-discrimination and their continued coexistence as to the regulation of the domestic economic system.

Notwithstanding the great intellectual appeal of Weiler's account, however, in light of what I have tried to show in this article it may be doubted whether the core indeterminacy of the European economic constitution could thus be resolved. Weiler summarises the 'general rule' of what he propounds as a new 'universal field theory' of free movement of goods in the following way:[96]

> National provisions which do not affect in the same manner, in law and in fact, the marketing of domestic products of those from other Member States, must be justified by a public interest taking precedence over the free movement of goods.
>
> . . .
>
> The Special Rule of Free Movement (Article 30): National provisions which prevent access to the market of imported goods must also be justified.

As stated in the first paragraph, the national treatment principle is susceptible to what modern social system's theory has made notorious under the name of a 're-entry' of the distinction into the field that has been created by it.[97] The distinction between national treatment/removal of obstacles is susceptible to replication within the bounds the former. Weiler's formula—and I am aware of the fact that one should not place too much semantic weight on a formula—opens the field within the 'field theory' for re-interpreting the national treatment principle from within in the manner that is typical for the obstacle-based approach. After all, the formula admits of the relevance of indirect discrimination—'in law and in fact'—and a mere balancing of public interests versus burdens without taking the nation state seriously *qua* institutional agent having the *power to discount* incidental effects. Evidently, this is the point where the genius of the obstacle-based approach may set in. There seems no way to prevent self-deconstruction[98] here, other than by beginning where one cannot begin in the context of established Community law, namely, with a conception of the prerogatives of the Member State as a nation state. This would require sifting the good from the

---

93 See Weiler, note 10 *supra*, 358–359, 372–373.

94 *Ibid.*, 373.

95 *Ibid.*

96 *Ibid.*, 372–373.

97 See Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Suhrkamp, 1990) at 83. A similar observation could be made for Maduro's representation re-enforcing reading of the obstacle-based approach. See his *We the Court,* note 3 *supra*, 169–174.

98 See Gunther Teubner, 'Des Königs viele Leiber. Die Selbstdekonstruktion der Hierarchie des Rechts' (1996) 2 *Soziale Systeme*, 229–256, http://www.uni-bielefeld.de/sozsys/deutsch/leseproben/teubner.htm

bad in advance; and this, as is well known, can hardly be done regardless of what a nation state does in particular instances with an internal system of dues or the regulation of technical standards. I think it is reasonable to conclude, then, that constitutional indeterminacy, thus understood, is a remarkable and recurring feature of Community law.

IV Conclusion

In the concluding remarks of his magisterial study of the interpretation of Article 28 (then Article 30) EC, Maduro rightly identifies what appears to be the greatest challenge posed by European integration to the constitutional law of the Member States:[99]

> . . . European integration not only challenges national constitutions . . . it challenges constitutional law itself. It assumes a constitution without a traditional political community defined and proposed by that constitution . . . European integration also challenges the legal monopoly of States and the hierarchical organisation of the law (in which constitutional law is still conceived of as the 'higher law'). Moreover, supremacy of the law is also challenged by concepts such as 'competition among states' or 'competition among legal rules' in which the law is subject to a process of market competition. These and other questions require a new constitutional legal theory.

I concur and would add one additional remark. The challenges posed by European constitutionalism are extensions of old jurisprudential problems, as we have seen from the *Sicht* of legal communications. Sometimes these problems give rise to new insights. Indeterminacy, rather than being something eliminated in the process of legal reasoning, is constantly reproduced by it. It may well be that we have reason to say farewell to a metaphysics that has beset law and legal thought for centuries,[100] that is, the idea that wherever there is law, it has determinate meaning owing to the distinguishing processes of its making.

[99] Maduro, note 3 *supra*, 175.

[100] And not just legal thought, see Gerhard Gamm, *Flucht aus der Kategorie. Die Positivierung des Unbestimmten als Ausgang der Moderne* (Suhrkamp, 1994).