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Affirmative Action in the United States and Positive Action in the EU and Austria – A Comparison

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Abstract: Equality is a fundamental principle of democratic society. However, equality in law does not automatically mean equality in opportunity and chances. Insofar, affirmative or positive action measures can be used as a tool to promote broader social mobility and to remedy structural inequalities. In the United States, race-based affirmative action measures, especially regarding the admission to institutions of higher education, have been a controversially discussed topic. Also, in the EU and Austria, the extent of the use of positive action measures has not been without controversy. Thus, this article aims at drawing a comparison between affirmative action in the United States and positive action in the EU and Austria, in particular in light of constitutional law and the existing case law.

Keywords: affirmative action; positive action; equality; gender equality; formal equality; substantive equality; equal protection; discrimination; Austrian constitutional law; U.S. constitutional Law; EU law; integrative measures

I. Setting the Scene …

Equality is a fundamental principle of democratic society. However, its meaning – although appearing to be simple – is ambiguous.[1] The most widespread understanding of this notion is the one of formal equality, which can be traced back to Aristotle.[2] It can also be found in most national constitutions. For example, under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution a governmental body may not deny any person equal protection of its governing laws.[3] Similarly, in Austria, art. 7 para. 1 of the Federal Constitutional Law states that "[a]ll nationals are equal before the law."[4] Also, on the level of

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1 *Fredman,* Substantive Equality Revisited, Vol. 14 International Journal of Constitutional Law 2016, 712 (712).

2 *Fredman,* Vol. 14 Int. J. of Const. Law 2016, 712 (716).

3 U.S. Const. amend. XIV, § 1 cl. 2.

4 Bundes-Verfassungsgesetz (B-VG) BGBl No. 1930/1, as last amended by Bundes-Verfassungsgesetz (B-VG) BGBl I No. 2021/107 (Austria).

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the European Union, the general principle of equality constitutes a common value of EU law.[5] Thus, the principle of equal treatment requires that all persons are treated equally before the law, regardless of race, gender, color, ethnicity, religion, disability, or other characteristics, without privilege, discrimination, or bias.

However, equality in law does not automatically mean equality in opportunity and chances. Insofar affirmative (or positive) action is often used as a tool to promote broader social mobility, including admissions to higher education, employment, governmental contracts and housing or to improve the disadvantaged position of a particular often marginalized social group that traditionally suffered systemic discrimination in a particular society.[6]

In the United States, the question of whether the government is permitted to take race or another suspect classification (such as gender) into account when implementing a remedial measure that aims at overcoming the effects of past discrimination has been a hot topic not only among legal scholars and courts but also in politics.[7] Supporters argue that affirmative action is needed to counteract past discrimination and promote diversity, whereas opponents, for example, argue that affirmative action is discriminatory and replaces an old wrong with a new one, undermines the achievements of minorities, and encourages individuals to identify themselves as victims.[8]

In Austria, and the European Union in general, positive actions have mainly been used in the efforts to achieve the goal of gender equality. Art. 7 para. 2 Austrian Federal Constitutional Law allows for measures to promote factual equality. Similarly, art. 157 para. 4 TFEU (ex-art. 141 TEC)[9] and art. 23 of the EU Charter of Fundamental Rights (CFR) recognize the use of positive action measures as mechanisms to advance women's equality in employment. Yet, positive action measures have traditionally been considered as an exception to the principle of equal treatment for men and women and have to be objectively justified.

We can identify a paradox: On the one hand, discrimination based on certain suspect criteria without objective justification violates the principle of equal treatment. On the other hand, by

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5 Under the EU treaties equality is considered to be a common value (art. 2 TEU), an objective of the EU (art. 3 TEU) and a fundamental right (e.g., art. 20 CFR).

6 It has to be noted that the term "affirmative" or "positive action" is used in different ways. Thus, it can be described as an umbrella concept for different measures and programs. See further *McCrudden,* A Comparative Taxonomy of 'Positive Action' and 'Affirmative Action' Policies, in *Schulze* (ed.), Non-Discrimination in European Private Law (2011) 157.

7 The term "affirmative action" in the U.S. was introduced under Kennedy's presidency in the 1960s. It was also only until then that the government took a more forceful stance to eliminate persistent racism and past discrimination. For example, considered as a milestone, the federal government passed the Civil Rights Act of 1964. This brought significant change to the national equal employment policy by establishing provisions preventing discrimination by public businesses that received federal funds (Title VI) and by private companies (Title VII). See *Carter/Lippard,* The Death of Affirmative Action (2020) 21 et seq. See also for a history of the "broader" affirmative action case law in the U.S. *Lee,* Affirmative Inaction, Vol. 119 Michigan Law Review 2021, 987 (991).

8 See for a summary of some of the arguments *Kellough,* Understanding Affirmative Action (2006) 6 et seq.; see also *Crenshaw,* Framing Affirmative Action, Vol. 105 Mich. Law Rev. 2006, 123 https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1093&context=mlr_fi (last visited December 6, 2021).

9 Official Journal of the European Union, C 202 (2016) 1 (117–118).

taking a suspect criterion such as race or gender out of the equation it makes it sometimes harder to remediate the effects of past discrimination and subordination and to enact laws that treat marginalized groups differently in ways that might be beneficial.[10] This can also be noted when we look at the case law on positive measures by the U.S. Supreme Court, the Austrian Constitutional Court but also the European Court of Justice (CJEU).

Against this backdrop, this article aims at drawing a comparison between affirmative action in the United States and positive action in the EU and Austria. First, this article will briefly outline the legal foundations of U.S. constitutional law under the equal protection clause of the Fourteenth Amendment and then, depict selected case law of the Supreme Court on affirmative action (II.). Then, this paper will turn to a short overview of positive action under EU law and following to the Austrian system of positive action and the respective case law of the Austrian Constitutional Court (III.). Finally, this paper will draw a comparison between those systems (IV.).

II. Affirmative Action in the U.S. Legal System

A. Legal Foundations in U.S. Constitutional Law

Section 1 of the Fourteenth Amendment of the U.S. Constitution guarantees that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Thus, the equal protection clause (EPC) of the Fourteenth Amendment inhibits governmental discriminatory acts.[11]

Traditionally, the Supreme Court has applied in most socioeconomic cases a rational basis review to evaluate the constitutionality of a legal act.[12] If the classification is "rationally related to furthering a legitimate government interest", the law is being upheld against equal protection challenges.[13] The burden of proof is on the challenging party, which must show that there is no rational basis for the law or policy. This approach has been marked by extreme judicial self-restraint and great deference to governmental decisions since it is enough if there might be a "plausible reason" for the congressional enactment. "[W]ether this reasoning in fact underlay the legislative decision" is constitutionally irrelevant.[14]

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[10] See regarding affirmative action in the U.S. *Menand,* The changing meaning of affirmative action, New Yorker (2020) https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action (last visited December 6, 2021).

[11] By a strict interpretation of the wording of the EPC, the Fourteenth Amendment restrains only the state governments. However, the Supreme Court has interpreted the Fifth Amendment Due Process Clause as imposing the same limitation to the federal government. See Bollinger v. Sharpe, 347 U.S. 497 (1954).

[12] *Barron/Dienes,* Constitutional Law in a Nutshell[10] (2020) 340.

[13] United States v. Carolene Products Co., 304 U.S. 144 (1938); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

[14] United States Railroad Retirement Bd. v. Fritz, 449 U.S. 179 (1980).

Regardless of this judicial self-restraint, the Court identified the need for a more searching judicial inquiry when a classification significantly burdens the exercise of a "fundamental right", "restricts the political process" or when legislation is directed at "discrete and insular minorities".[15] Today, when a federal or state government action applies a suspect classification, such as race or national origin (and sometimes alienage) strict scrutiny will be used to assess its constitutionality.[16] Thus, the respective government must demonstrate that the law or regulation is necessary to achieve a "compelling state interest".[17] In addition, a third approach was developed. When a statute discriminates on the basis of gender or on illegitimacy (i.e., children born out of wedlock) the Supreme Court applies intermediate scrutiny. The test is that the challenged law must further an important government interest and must do so by means that are substantially related to that interest.[18]

With a view to the issue of affirmative action, courts started with the school desegregation cases[19] to use race as a factor for remedying past de jure segregation. In *Green v. New Kent County School Board*, the Supreme Court held that it is not enough to stop past discrimination. Rather, it is necessary to undo the effects of past discrimination and then prevent them. Thus, school boards that used to operate state-compelled dual systems (segregated schools) were clearly charged with the duty to take whatever steps might be necessary to convert to a unitary system in which "racial discrimination would be eliminated root and branch."[20] Similarly in *Swann v. Charlotte-Mecklenburg*, the Supreme Court accepted facial classifications based on race as a remedial measure for school desegregation.[21] *Green* and *Swann* stand for the proposition that the remedy to identifiable past discrimination (in public schools) can be broad and explicitly use race as a factor, even fixed ratios, if the motive to classify is integrative. However, as we will see on a later point, this approach became hotly debated in affirmative action cases.

B. Selected Case Law of the U.S. Supreme Court

In light of the above considerations, this article will deal with selected case law of the Supreme Court to determine the status quo of the constitutionality test used for affirmative action measures. Especially the question of the applicable level of scrutiny when considering the constitutionality of affirmative action under the EPC needs to be examined. In the following chapter, the depicted case law concerns affirmative action programs which took race into account. However, as will be seen in the following chapter on positive action in the EU and

15 United States v. Carolene Products Co., 304 U.S. 144 (1938) 152 fn. 4.

16 *Barron/Dienes,* Constitutional Law in a Nutshell[10] 340.

17 See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Washington v. Davis, 426 U.S. 229 (1976); Palmore v. Sidoti, 466 U.S. 429 (1984); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Johnson v. California, 543 U.S. 499 (2005).

18 See for the application of intermediate scrutiny in gender discrimination cases, first, Craig v. Boren, 429 U.S. 495 (1976).

19 Among others Brown v. Board of Education, 347 U.S. 483 (1954) (*Brown I*); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*).

20 Green v. New Kent County School Board, 391 U.S. 438 (1968).

21 Swann v. Charlotte-Mecklenburg, 402 U.S. 43 (1971).

Austria, gender classifications are used for the purpose of compensating women for past discrimination.[22]

One of the first controversially discussed cases regarding an affirmative action program in higher education was *Regents of the University of California v. Bakke*, where the Supreme Court had to consider the validity of special admission's program of the Davis medical school, under which only disadvantaged members of designated minority groups were considered for 16 of 100 places in each year's class.[23] In a 5–4 split, the Court found that the Davis plan violated Title VI of the 1964 Civil Rights Act.[24] Justice Powell, who provided the critical swing vote argued for a violation of both, the EPC and Title VI, stating that the standard of review must be strict scrutiny although whites as a class where the disadvantaged group. Although remediation of societal discrimination might be a legitimate and substantial interest, the medical school was not in the position to enact a remedial measure. Justice Powell concluded that "[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[25] In addition, "the attainment of a diverse student body" could be considered a constitutionally permissible goal for an institution of higher education.[26] Yet, the Davis quota system was based solely on race, which is facially invalid. Insofar, race could simply be an additional factor in a competitive admission process.

It is important to note that the four dissenting Justices argued that whites as a class are neither the special beneficiaries of the EPC nor have they faced past discrimination on the assumption that they are inferior. Therefore, the test should be intermediate and not strict scrutiny. Benign race-conscious measures are valid, "if the purpose of such programs is to remove the disparate racial impact government actions might otherwise have, and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large."[27] Because "minority underrepresentation is substantial and chronic, and the handicap of past discrimination is impeding access of minorities to medical school", the admission program of the Davis medical school was substantially related to an important government interest in remedying the effects of past discrimination.

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22 Affirmative action based on gender would most likely demand an intermediate standard of review. The classification must be shown to be substantially related to the compensatory goal. Although remedying past discrimination of women is an important government interest, showing that it is sufficiently related to that compensatory purpose can be difficult. Thus, the law needs to be tailored to remedy specific past discrimination against women. Moreover, an affirmative action plan may not rely on gender stereotypes. See, e.g., University for Women v. Hogan, 458 U.S. 718 (1982). Further, it has to be analyzed whether the intent behind the plan is truly gender diversity rather than a mere attempt of gender balancing. See for the issue of gender balancing regarding college admissions *Medley,* "Gender Balancing" as Sex Discrimination in College Admissions, Vol. 51 Harvard Civil Rights - Civil Liberties Law Review 2016, 537.

23 Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

24 Title VI of the 1964 Civil Rights Act contains a prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color or national origin.

25 Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 307.

26 Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 311 et seq.

27 Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 369 (Brennan, J., White, J., Marshall, J., Blackmun, J., concurring in the judgment in part and dissenting in part).

In two subsequent cases concerning affirmative action measures benefitting minority business entities for city construction contracts, the Supreme Court held by Justice O'Connor that the standard of review under the EPC is not dependent on the race of those burdened or benefitted by a particular classification.[28] Thus, strict scrutiny has to be applied for all racial classifications without regard whether they had a benign purpose. In *Adarand Constructors, Inc. v. Peña*, the Court noticed that "strict scrutiny is 'strict in theory, but fatal in fact."[29] Further, it stated that the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the United States is an unfortunate reality, and government is not disqualified from acting in response to it. Nevertheless, a race-based classification must serve a compelling interest and be narrowly tailored.

25 years after *Bakke,* the Supreme Court had to consider the question of whether affirmative action programs in the public educational sphere could meet the strict scrutiny review standard. In 2003, in *Grutter v. Bollinger*, the Supreme Court ruled per Justice O'Connor that the University of Michigan law school's affirmative action admission program did not violate the equal protection clause.[30] The law school engaged in a highly individualized, holistic review of each applicant, giving serious consideration to all the ways the applicant might contribute to a diverse educational environment. Also, it ensured that all factors that could contribute to diversity were meaningfully considered alongside race. In this case, the Court highlighted the "critical mass" argument. The law school sought to enroll a "critical mass" of otherwise underrepresented minorities which was necessary to further its "compelling interest in securing the educational benefits of a diverse student body".[31] Thus, the law school's interest was not simply to assure within its student body a specific percentage of a particular group merely because of its race or ethnic origin but to assemble a class that is both exceptionally academically qualified and broadly diverse.

The dissenting justices, among them Chief Justice Rehnquist Justice Scalia, Kennedy and Thomas, argued that the majority's approach to the strict scrutiny test was unprecedented in its deference. On the one hand, the goal of the admission program was not to attain a critical mass of students but rather to offer admission to minority group applicants in direct proportion to their statistical percentage of applicants in total. And on the other hand, the time limitation on the affirmative action program was much too vague and therefore did not satisfy the strict scrutiny standard.[32]

In the same year, the Court found that undergraduate admission policy of the liberal arts college of the University of Michigan which was based on a point system that automatically granted 20 points to applicant from underrepresented minority groups, violated the EPC.[33]

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28 City of Richmond v. J. A. Croson Co, 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
29 Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) 237.
30 Grutter v. Bollinger, 539 U.S. 306 (2003).
31 Grutter v. Bollinger, 539 U.S. 306 (2003) 333.
32 Grutter v. Bollinger, 539 U.S. 306 (2003) 378 et seq. (Rehnquist, C.J., dissenting).
33 Gratz v. Bollinger, 539 U.S. 244 (2003).

Chief Justice Rehnquist, who delivered the judgement, noted that the policy [although it took other factors in consideration] made race "a decisive factor for virtually every minimally qualified underrepresented minority applicant."[34] As a conclusion, the policy was not narrowly tailored to achieve the asserted compelling interest in diversity. Justice Ginsburg, joined by Justice Souter and Breyer dissented, emphasizing that it is important to distinguish between government actions whose objective is inclusion from those whose purpose is exclusion. Therefore, the admission policy was constitutional.[35]

One of the last cases to be discussed, also concerned an affirmative action undergraduate admission system of the University of Texas at Austin (UT). The admission system contained two prongs: First, as required by the State's Top Ten Percent Law, it offered admission to any student who graduated from a Texas high school in the top 10 % of his or her class. It then filled the remainder of its incoming freshman class, some 25 % on a holistic review containing numerous factors, including race. The Supreme Court, per Justice Kennedy found in 2017, that the race-conscious holistic admissions system survived strict scrutiny under the EPC.[36] Race was used as a "but a 'factor of a factor of a factor' in a holistic-review calculus".[37] The University had to "reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[38] Hence "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause".[39] However, the University of Texas has an ongoing duty to constantly reflect on its admissions policies.[40]

Finally, before turning to the chapter on positive action in the European Union and in Austria, recent developments regarding affirmative action in higher education should be mentioned: In 2014, the non-profit organization Students for Fair Admissions (SFFA) filed a lawsuit in the District Court for the District of Massachusetts against Harvard College's undergraduate admission process, arguing that Harvard engages in impermissible "racial balancing" and thereby discriminates against Asian-American applicants.[41] In late September 2019 – the proceedings were paused to await the decision of the Supreme Court issued in *Fisher II* – the District Court found that Harvard's undergraduate admission process survives strict scrutiny and is in accordance with the principles set out by Supreme Court in its affirmative action case law.[42] Specifically, "[i]t serves a compelling, permissible and substantial interest, and it is

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34 Gratz v. Bollinger, 539 U.S. 244 (2003) 274.

35 Gratz v. Bollinger, 539 U.S. 244 (2003) 298 et seq. (Ginsburg, J., dissenting).

36 Fisher v. University of Texas at Austin, 579 U.S. __ (2016) (*Fisher II*). The Supreme Court already had to decide on UT's undergraduate admission system in 2013. The judgement of the Court of Appeals was vacated, and the case was remanded so that the narrow tailoring prong of the strict scrutiny test should be applied in accordance with the *Fisher I* decision. Even after a university has shown that it has a compelling interest in diversity, strict scrutiny "imposes on the University the ultimate burden" of demonstrating the available race-neutral alternatives are inadequate to achieve the desired goal. See Fisher v. University of Texas at Austin, 570 U.S. 297 (2013) (*Fisher I*).

37 Fisher v. University of Texas at Austin, 579 U.S. __ (2016) (*Fisher II*).

38 Fisher v. University of Texas at Austin, 579 U.S. __ (2016) (*Fisher II*).

39 Fisher v. University of Texas at Austin, 579 U.S. __ (2016) (*Fisher II*).

40 See for a current discussion on affirmative action in higher education *Reade,* Talking About Affirmative Action, The University of Chicago Law Review 2021 https://lawreviewblog.uchicago.edu/2020/10/30/aa-sturm/ (last visited December 6, 2021).

41 The SFFA also challenged the admissions policies of the public University of North Carolina at Chapel Hill because it uses race as a factor in admissions. In October 2021, a District Court found the admissions program to be constitutional and not discriminatory. Students for Fair Admissions (SFFA) v. University of North Carolina at Chapel Hill, 1:14CV954 (M.D.N.C. 2019).

42 In February 2021, the Department of Justice withdrew a similar lawsuit against Yale University, claiming that the University discriminated against Asian-American and white applicants. Thereby it reversed a key element of the Trump administration's efforts to undermine race-based college admissions. Cf. *Hartocollis,* The Justice Department Drops Suit Claiming Yale

necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity. Consistent with the hallmarks of a narrowly tailored program, applicants are afforded a holistic, individualized review, diversity is understood to embrace a broad range of qualities and experiences, and race is used as a plus factor, in a flexible, non-mechanical way."[43] This decision was also confirmed by a Court of Appeals in November 2020.[44] In February 2021, the SSFA petitioned to the Supreme Court to review the lower Court's decision on Harvard's admissions practice, asking the Court to decide on two questions: whether Harvard is violating the federal Civil Rights Act; and whether the court should overrule its 2003 decision in *Grutter v. Bollinger*.[45] So far, the Supreme Court has not decided whether it will grant certiorari.[46] In June 2021, the Court requested the U.S. government to file a brief expressing its views on the challenge to Harvard's race-conscious admissions policy.[47] Yet, it remains to be seen how the Court will decide in this matter, in particular against the backdrop of the expanded 6:3 conservative majority of the Supreme Court.

III. Positive Action in EU Law and in the Austrian Legal System

A. The CJEU and Positive Action Measures

Since the 1980s, the European Union has advocated the use of 'positive action' as a mechanism to advance women's equality in employment.[48] Yet, it is notable that EU law does neither contain a definition of positive action nor an obligation for Member States to enact such measures. Rather, it formulates the possibility of positive action as an authorization for Member States to deviate from the principle of non-discrimination.

For instance, art. 157 para. 4 TFEU provides with a view to ensuring full equality in practice between men and women in working life that "the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." Correspondingly, art. 23 CFR lays down that equality between women and men must be ensured in all areas, including employment, work and pay. However, the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages

Discriminated in Admissions, New York Times (2021) https://www.nytimes.com/2021/02/03/us/yale-admissions-affirmative-action.html (last visited December 6, 2021).

43 Students for Fair Admissions, Inc. v. President of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019).

44 Students for Fair Admissions, Inc. v. President of Harvard Coll., 980 F. 3d 157 (1st Cir. 2020).

45 See the petition at https://www.supremecourt.gov/DocketPDF/20/20-1199/169941/20210225095525027_Harvard%20Cert%20Petn%20Feb%2025.pdf.

46 A lower court's decision cannot, as a matter of right, be appealed to the Supreme Court. Thus, a party who is not satisfied with a decision of a lower court, must file a writ of certiorari, i.e., petition the Supreme Court to hear his or her case. If four Supreme Court Justices agree to review the case, the Court will hear the case.

47 See for a case overview: https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/ (last visited December 6, 2021).

48 *McCrudden,* Gender-based positive action in employment in Europe: A comparative analysis of legal and policy approaches in the EU and EEA (2019) 6.

in favor of the under-represented sex. Equally, the various Directives on Equal Treatment of the EU formulate the possibility of positive action as a discretionary measure and not as a legal obligation.[49] The CJEU has traditionally considered positive action measures as an exception to the principle of equal treatment (of men and women).[50]

One of the first – controversially discussed – cases dealing with the issue of the legality of a positive action with the aim of improving women's abilities to compete on the labor market was *Kalanke*. The Court held that because positive measures are an exception to the general rule of equality they have to be interpreted restrictively.[51] Further, art. 2 para. 4 of the Directive 76/207/EEC[52] was "specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life".[53] Yet, EU law precludes national rules that give "absolute and unconditional priority for an appointment or promotion to women.[54]

In the following years, the CJEU clarified its case law and some of the uncertainties *Kalanke* left regarding the question of the legitimacy of quota systems.[55] For example, in *Marshall*, the Court recognized that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life. Thus, the fact that male and female candidates are equally qualified does not mean that they have the same chances.[56] Deciding on the legitimacy of a quota system, the Court pointed out that a national rule which contains a saving clause does not exceed the limits of EU law if it provides for male candidates who are equally qualified as the female candidates a guarantee that the candidates will be the subject to an objective and individual assessment which will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favor of the male candidate.[57] Yet, those criteria must not be discriminatory in

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49 See, e.g., Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 2000/180, 22, allows for positive action to prevent or compensate for disadvantages linked to racial or ethnic origin.

50 *Lee,* Grenzen der Maßnahmen zur Förderung faktischer Gleichstellung („positive action"): Die Frage nach deren Rechtsnatur, Zeitschrift für öffentliches Recht 2019, 883 (887).

51 CJEU 17.10.1995, C-450/93, Eckhard Kalanke/Freie Hansestadt Bremen, E.C.R. I-03051 para. 21.

52 Council Directive (EEC) 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L 1976/39, 40. This Directive was repealed by the Directive (EC) 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. L 2006/204, 23.

53 CJEU 17.10.1995, C-450/93, Eckhard Kalanke/Freie Hansestadt Bremen, E.C.R. I-03051 para 18; see CJEU 25.10.1988, Case 312/86 Commission/France, E.C.R. 6315 para 15.

54 CJEU 17.10.1995, C-450/93, Eckhard Kalanke/Freie Hansestadt Bremen, E.C.R. I-03051 para 22.

55 *Ramos Martin,* Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision-Making Positions, Vol. 3 Spanish Labour Law and Employment Relations Journal 2014, 20 (28).

56 CJEU 11.11.1997, C-409/95, Hellmut Marschall/Land Nordrhein-Westfalen, E.C.R. I-06363 para 30.

57 CJEU 11.11.1997, C-409/95, Hellmut Marschall/Land Nordrhein-Westfalen, E.C.R. I-06363 para 33. This approach to quota systems containing a saving clause was reinforced by the CJEU in CJEU 28.3.2000, C-158/97, Badeck, E.C.J. I-1875. Additionally, the Court widened the scope of the applicability of affirmative measures in regard to the access of women to training positions in the public sector. Here, the CJEU surprisingly accepted a rigid quota system for training positions as long as it is not leading to "absolute rigidity".

themselves.[58] Also, the CJEU found a rule which gives automatic preference to a candidate of the under-represented sex to violate EU law.[59]

Notwithstanding, the CJEU also reiterated that affirmative action measures must not be construed in a way that relies on gender stereotypes and perpetuates them. For instance, in *Lommers*, the Court noted that a "measure [...] whose purported aim is to abolish a de facto inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women."[60] In the following years, the Court found positive action measures that were liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties to violate EU law. For example, the Court decided that a Spanish regulation allowing for a breastfeeding leave only for female workers to violate the principle of equal treatment of men and women. The policy in question could not be considered "as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157 (4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons."[61]

Hence, the CJEU seems to embrace to a certain extent a substantive equality concept opposed to a very formal approach to equality.[62] Further, positive action measures need to be in accordance with the principle of proportionality and must not rely on gender stereotypes and perpetuate a traditional distribution of the roles of men and women.

B. Positive Action Measures in Light of Austrian Constitutional Law

1. Legal Foundations in Austrian Constitutional Law

Under art. 7 para. 1 clause 1 Federal Constitutional Law "[a]ll nationals are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded." [63] Thus, the

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58 CJEU 11.11.1997, C-409/95, Hellmut Marschall/Land Nordrhein-Westfalen, E.C.R. I-06363, para 33.

59 CJEU 6.7.2000, C-407/98, Katarina Abrahamsson and Leif Anderson/Elisabet Fogelqvist. E.C.R. I-05539 para 55 et seq.: "[E]ven though Article 141 (4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued. The answer to the first question must therefore be that Article 2 (1) and (4) of the Directive and Article 141 (4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments."

60 CJEU 19.3.2002, C-476/99, H. Lommers/Minister van Landbouw, E.C.J. I-02891 para. 41.

61 CJEU 30.9.2010 C-104/09, Pedro Manuel Roca Álvarez/Sesa Start España ETT SA, E.C.J. I-08661 para. 38.

62 See for more, *de Vos,* The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law, Vol. 20 International Journal of Discrimination and the Law 2020, 62.

63 Within the scope of EU law, the guarantees of art. 7 para. 1 extend to citizens of the EU. Further, art. I para. 1 Federal Constitutional Act on Elimination of Racial Discrimination (Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung, BVG-RD), BGBl 1973/390,

equality principle contains a ban on discrimination, a prohibition of differentiations that are not objectively justified and a general principle of objectivity.[64] Yet, in a situation of structural disadvantages and discrimination based on specific personal traits a merely formal equality approach is insufficient.[65]

Following the example of affirmative actions in the U.S. remedying racial discriminations, the Austrian legislator enacted positive measures in support of women, especially quota systems for recruitments in the civil service or in the University sector. However, the question of the admissibility of such quotas was accompanied by controversial debates.[66] In 1998, an explicit commitment to the equality of women and men was added. Art. 7 para. 2 of the Federal Constitutional Law established the objective of reaching effective equality by the elimination of actually existing inequalities of men and women.[67] Under this provision measures to promote factual equality are admissible.[68] Nevertheless, art. 7 para. 2 does not guarantee individual rights and is, thus, not directly enforceable in domestic courts. The legislator has the objective obligation to pursue gender equality; how he pursues this objective lies in his margin of discretion.[69] In order to reach this objective, it is not enough to reach legal equality between men and women. Rather, the societal inequalities between the genders persisting in society are considered to make measures of "positive discrimination" necessary.[70] Still, the question of the constitutionally imposed limits on such measures remains.[71]

2. Selected Case Law of the Austrian Constitutional Court

For a better understanding of the constitutional boundaries, I want to depict three decisions of the Austrian Constitutional Court from the year 2014 concerning positive action measures.

In March 2014,[72] the Court had to consider the constitutionality of an amendment to the University Act in 2009[73] that introduced a quota for women of 40 percent for the staffing of the university council, the rectorate and for the composition of collegial bodies such as appointment committees, habilitation committees as well as the nominations for the

lays down the right to equal treatment of non-nationals relative to one another. See ErläutRV 732 BlgNR 13. GP 3; see for a discussion whether art. I para. 1 BVG-RD is also applicable on differentiations between nationals and non-nationals *Pöschl,* § 14 Gleichheitsrechte, in *Merten/Papier* (eds.), Handbuch der Grundrechte VII/12 (2014) 23.

64 *Holoubek,* Art. 7 B-VG, in *Korinek/Holoube/Bezemek/Fuchs/Martin/Zellenberg* (eds.), Bundesverfassungsrecht (2018) Rz 17.

65 *Lee,* Die Ungleichbehandlung beim Zugang zu Gütern und Dienstleistungen (2020) 113.

66 See for a depiction of the different arguments, *Pöschl,* Gleichheit vor dem Gesetz (2008) 391 et seq.

67 In the private sector, the Equal Treatment Act (Gleichbehandlungsgesetz, GlBG) allows for 'positive measures', providing that those measures aim at the promotion of de-facto equality between women and men. In that case they are not to be regarded as sex-related discrimination. Positive measures are therefore allowed but not compulsory.

68 See also art. 4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which states that "temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention". See *Diener,* Art. 4 Allgemeine Kommentierung, in *Schläppi/Ulrich/Wyttenbach* (eds.), CEDAW (2015) para. 41 who argues that art. 4 CEDAW formulates an obligation of states to enact positive measures.

69 *Pöschl,* Gleichheit vor dem Gesetz 391.

70 See ErläutRV 1114 BlgNR 20. GP.

71 Further, it has been argued that art. 7 para. 2 Federal Constitutional Law has to be interpreted in the light of EU law, because otherwise it would be in conflict with art. 157 para. 1 which enshrines the principle of equal pay for male and female workers for equal work or work of equal value. See, e.g., *Holzleithner,* Quotierung und Gerechtigkeit: „Gleichheitsdurchbrechung" als Mittel zur Gleichheitsverwirklichung, Journal für Rechtspolitik (1995) 81 (81).

72 VfGH [Constitutional Court] 12.3.2014, VfSlg No. 19.866/2014 (Austria).

73 Amendment to the University Act 2009 (Universitätsrechts-Änderungsgesetz 2009) BGBl I No. 2009/81 (Austria).

senate.[74] However, the University Act did not prescribe a rigid quota but contained a saving clause, insofar as a lower percentage of women had to be accepted if there were not enough female candidates or if they have made use of their "opting out" possibility.

In light of art. 7 para. 1 Federal Constitutional Law legal differentiations on the basis of sex need particular reasons for an objective justification.[75] Such a reason can be found in measures according to art. 7 para. 2 Federal Constitutional Law which aim at reaching effective equality by the elimination of actually existing inequalities of men and women. Yet, such measures still must be necessary and proportional. In this concrete case, the legislator included a saving clause in the quota system. A nomination proposal does not fail "just" because there are not enough women available who are eligible to be elected. This quota system also cannot lead to a blockade of the democratic process.

At the end, the Constitutional Court upheld this specific quota system at public universities in connection with the intent to implement equal treatment and to promote women. Further, the Court found that within the scope of EU law, the quota system in question did not violate art. 21 and 23 CFR, because it incorporated a saving clause.[76]

In line with this reasoning, the Constitutional Court found in its decision of 27 September 2014, that a separate evaluation of admission test results for the medical school of the University of Vienna ("EMS-test") based on gender did not violate the principle of equal protection under art. 7 para. 1 Federal Constitutional Law.[77] The Court noted that legislative measures that pursue the goal to compensate for structural imbalances between men and women can be objectively justified, even though the criterion "gender" is used as the link for a difference in treatment. However, these measures have to operate within the constitutional boundaries; hence, they must be appropriate, necessary and proportionate.

According to various studies, women have done statistically worse in the "EMS-test" than male candidates. This was also traced back to school education where it has been shown that factual gender differences still exist in math and natural science subjects. The Court found that the gender-specific evaluation of the test results was punctually introduced for the academic year 2012/13 as a time-limited transitional constellation. There was also empiric evidence that other accompanying measures did not remediate the gender discrepancy in test results. As a result, the EMS-test for the academic year 2012/13 was a proportional measure in the sense of art. 7 para. 2 Federal Constitutional Law to remedy a (further) structural discrimination of women regarding the access to medical school.

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74 § 25 para. 4a University Act (Universitätsgesetz, UG). This provision has to be read against the backdrop that gender equality is a guiding principle of universities in the performance of their duties (§ 2 cl. 9 UG).

75 See *Pöschl,* Gleichheit vor dem Gesetz 379 et seq.; *Pöschl,* Verfassungsrechtliche Gleichheit, Arbeitsrechtliche Gleichbehandlung, Unionsrechtliche Antidiskriminierung, Das Recht der Arbeit 2013, 467 (469 et seq.).

76 See also for the issue of quota systems and a saving clause CJEU 11.11.1997, C-409/95, Hellmut Marschall/Land Nordrhein-Westfalen, E.C.J. I-6363; CJEU 28.3.2000, C-158/97, Badeck, E.C.J. I-1875.

77 VfGH [Constitutional Court] 27.9.2014, VfSlg No. 19.899/2014 (Austria)

Last but not least, in its decision of 9 December 2014, the Constitutional Court found a positive measure regarding a point system for the conferment of health fund contracts for female medical specialists to be constitutional.[78] The Constitutional Court analyzed the particular measure against the backdrop of the legislative intent to counterbalance a deficiency in the number of female gynecologists, since patients were supposed to have an equal choice between female and male doctors. Specifically, the legislator took into account that – in addition to the professional abilities – the question of trust of the patients in their gynecologist can depend heavily on the gender of the doctor. Thus, there is a legitimate aspiration to have a certain number of female gynecologists. This also constitutes an objective reason in light of art. 7 para 1. Federal Constitutional Law.

The competent Austrian Minster was able to show that at the time in question there was a lack of female gynecologists. At the same time, more than half of the women asked for a female doctor. Consequently, the aim to make up for this counterbalance is an important public interest and the legislator could reasonably suspect that prioritizing women in the conferment of health fund contracts is an appropriate mean to reach this goal. However, the Court also noted that this preferential treatment can only be objectively justified as long as there is a significant lack of female gynecologist. Therefore, this rule can become unconstitutional with the passing of time.

Additionally, the Constitutional Court had to deal with the issue whether the measure in question violated the Equal Treatment Act (GlBG).[79] According to § 8 Equal Treatment Act, measures to promote the equality between men and women in the sense of art. 7 para. 2 Federal Constitutional Law constitute no discrimination under this law. Further, a difference in treatment on the basis of sex shall be permissible where such a characteristic constitutes a genuine and determining occupational requirement.[80] The Court concluded that the best possible patient care and safety in the field of gynecology and having a certain number of female doctors in this field constitute such an objective genuine and determining occupational requirement and is indispensable in the sense of art. 9 para. 2 Equal Treatment Act.

Concluding, the Austrian Constitutional Court evaluates positive action measures against the strict constitutional standard of the principle of equal treatment in the sense of art. 7 para. 1 Federal Constitutional Law. According to the prevailing doctrine, positive action measures have to be objectively justified by an important aim, necessary and proportional. Reaching factual equality between men and women in job applications and the deconstruction of certain prejudices in the future is considered to constitute such an important aim. Quotas can be an appropriate mean to reach this goal. Still, the difficult question is whether they constitute the least severe measure. So far, the Austrian Constitutional Court has not ruled on the question of the constitutionality of quota systems without a saving clause that give women an absolute priority in hiring decisions.[81]

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78 VfGH [Constitutional Court], 9.12.2014, VfSlg No. 19.936/2014 (Austria).

79 Equal Treatment Act (Gleichbehandlungsgesetz) BGBl I No. 2004/66, as last amended by Equal Treatment Act (Gleichbehandlungsgesetz) BGBl I No 2013/107 (Austria).

80 See art. 9 Equal Treatment Act in light of Directive (EC) 2006/54, art. 14 para. 2, O.J. L 2006/204, 23.

81 See also *Berka/Binder/Kneihs*, Handbuch Grundrechte[2] (2019) 589.

IV. Comparison between Affirmative Action in the United States and Positive Action in the EU and in Austria

Reflecting on the above discussed case law leaves us with the question of the differences and similarities between the classification of affirmative or positive action measures in the case law of the U.S. Supreme Court, the CJEU, and the Austrian Constitutional Court.

In the United States, all race-based classifications must pass the strict scrutiny review under the EPC of the Fourteenth Amendment. The Supreme Court also draws no real distinction between measures that are integrative or have an intent (or effect) to segregate. However, the Court also acknowledges the persistence of both the practice and the lingering effects of racial discrimination against minority groups in the United States. Therefore, a government is not disqualified from acting in response to it and to enact a narrowly tailored race-based remedy.[82]

The strict scrutiny approach taken by the Supreme Court is not the only outcome possible in the constitutional evaluation of race-based affirmative action programs. In his famous concurrence, in *Keyes v. School District No. 1* – one of the U.S. school desegregation-cases – , Justice Powell argues for a muscular scope of the EPC.[83] He holds the opinion that there is no neutral whenever state or governmental authorities choose to act. Their acts or omissions are either integrating or segregating. According to Justice Powell, there is a constitutional affirmative duty to integrate and a failure to act accordingly should be treated as a violation of the Fourteenth Amendment. This approach takes into account the still persisting effects of the United States' history of slavery and segregation. The Fourteenth amendment is – when seen in its historical context – not colorblind.[84] Integrative measures that are aimed at undoing the shameful history of subordination and classification could be seen as something completely different than state actions that aim to segregate. This approach also seems to embrace a substantive notion of the equality concept. It has to be noted, that the U.S. Supreme Court applies a more formal concept of equality requiring for strict scrutiny when analyzing race-conscious affirmative action programs.

The CJEU consistently treats positive discrimination as a deviation from the principle of formal equality between men and women. Similarly, according to the case law of the Austrian Constitutional Court, positive action is understood as an exception to the principle of equal treatment (art. 7 para. 1 Federal Constitutional Law). Thus, such measures are regarded to be a discrimination on the basis of sex which need further justification. Measures that aim at reaching effective equality by the elimination of actually existing inequalities of men and women pursue an important public interest. Beyond that, they must be necessary and

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82 City of Richmond v. J. A. Croson Co, 488 U.S. 469 (1989); United States v. Paradise, 480 U.S. 149 (1987).

83 Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) 217 et seq., (Powell, J., concurring in part and dissenting in part).

84 The metaphor of colorblindness has been introduced by Justice Harlan in his dissenting opinion in *Plessy*, where he stated that "[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537 (1896) 559 (Harlan, J., dissenting).

proportional and must not be constructed in a way to reinforce gender stereotypes or to perpetuate traditional gender roles between men and women. In light of the explicit lip service to gender equality in art. 7 para. 2 Federal Constitutional Law (see also art. 157 para. 4 TFEU and art. 23 FRC), positive action measures could be described not only as an exception but rather as a substantiation of equality.[85] Insofar, both, the CJEU and the Austrian Constitutional Court recognize that sheer de jure equality is sometimes not enough to remedy structural inequalities. However, this does not mean a shift from an individual to a collective understanding of equality. It rather could be understood as a clarification that equality has to be interpreted against the backdrop of societal developments.[86]

The U.S. Supreme Court, the CJEU and the Austrian Constitutional Court regard positive action measures as a deviation from the principle of equal treatment which requires further justification. Insofar, they apply a formal concept of equality where positive action measures are only permissive but not mandatory.[87] Still, it is widely accepted in the case law that equality in law does not automatically mean having the same opportunities and chances. Thus, the principle of equality has to be interpreted not just in a formal sense, but it has to be given a substantive meaning.[88] To reach substantive equality positive action measures can be an appropriate mean to remedy structural discrimination.[89] Where such a measure has no objective and proportional relationship with the legitimate aim pursued it violates the principle of equal protection of the laws.

In particular, in relation to the public interest of remedying structural discrimination underlying an affirmative or positive action we can identify methodological differences in the approach between the Supreme Court and the CJEU as well as the Austrian Constitutional Court: In its older case law concerning integrative race-based measures, the Supreme Court accepted the remediation of societal discrimination as a potential legitimate and substantial interest.[90] Starting with *Grutter v. Bollinger* we can see a shift to the objective of "securing the educational benefits of a diverse student body" regarding the admission to higher education.[91] Yet, the Supreme Court does not allow for quotas and race may only be used as one factor in a holistic-review calculus to pass the strict scrutiny test. Further, the Supreme Court does not differentiate between an integrative or segregative intent underlying an affirmative action. Beyond that, currently the future of affirmative action in the United States seems – against the backdrop of the most conservative composition of the Supreme Court

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85 It is also argued in the literature that positive measures do not constitute a discrimination. *Kucsko-Stadlmayer/Kuras,* Art 157 AEUV, in *Mayer/Stöger* (eds.), EUV/AEUV (2013) 145–154; *Koukoulis-Spiliotopoulos,* Towards a European Constitution: does the Charter of Fundamental Rights "maintain in full" the acquis communautaire? European Review of Public Law 2002, 57. *Lee,* Die Ungleichbehandlung beim Zugang zu Gütern und Dienstleistungen 107 et seq.

86 *Lee,* ZöR 2019, 895 et seq.

87 Yet, even if equality before the law has been established, disadvantage persists, and this disadvantage tends to be concentrated in groups with a particular status, such as women, people with disabilities, ethnic minorities and others. See *Fredman*, Vol. 14 Int. J. of Const. Law 2016, 713.

88 See further *Fredman*, Vol. 14 Int. J. of Const. Law 2016, 712.

89 *Lee,* ZöR 2019, 894.

90 See e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) 237. Further, see also Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 369 (Brennan, J., White, J., Marshall, J., Blackmun, J., concurring in the judgment in part and dissenting in part).

91 See Grutter v. Bollinger, 539 U.S. 306 (2003) 333; Gratz v. Bollinger, 539 U.S. 244 (2003) 270 et seq.; Fisher v. University of Texas at Austin, 579 U.S. __ (2016) (*Fisher II*). The foundations for this argument can already be found in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 311 et seq.

since decades – unclear. It remains to be seen how the U.S. Supreme Court, if it hears the case, will decide in *SFFA v. Harvard*. By contrast, positive action measures in the EU and Austria have predominantly been used to reach full equality in practice between men and women in working life. Art. 7 para. 2 Federal Constitutional Law, art. 157 para. 4 TFEU and art. 23 FRC – differently than the relevant provisions in U.S. law – explicitly allow for the adoption of measures providing for specific advantages in favor of the under-represented sex. In particular, the CJEU and the Austrian Constitutional Court recognize the goal to compensate for structural imbalances between men and women and the deconstruction of certain prejudices in the future as important public interests, even though the difference in treatment is based on the criterion "gender". Both, the CJEU and the Austrian Constitutional Court allow for a quota for women containing a saving clause. Moreover, measures need to constitute the least severe measure to reach the aim of substantive gender equality and be overall proportional.

V. Conclusion

To sum up, as it has been stated at the beginning of this article, equality in law does not automatically mean equality in opportunity and chances. Affirmative or positive action measures can be used as a tool to promote broader social mobility and to remedy structural inequalities. In the United States, race-based affirmative action measures, especially regarding the admission to institutions of higher education, have been a controversially discussed topic. The U.S. Supreme Court does not differentiate between measures that have an integrative or segregative intent. Hence, a university's admission system that uses race as a factor must serve a compelling interest and be narrowly tailored. The Court identified in its case law "the attainment of a diverse student body" as such a compelling interest. Yet, in light of recent developments and the 6:3 conservative composition of the Court, it remains to be seen how it will decide on future affirmative action cases. Also, in the EU and Austria, the extent of the use of positive action measures has not been without controversy. Nevertheless, the promotion of equality between men and women and remedying of structural discrimination of women are recognized – also by the explicit lip service in the respective legal provisions – as legitimate objectives. Beyond that, the measure in question needs to be necessary and proportional and must not be construed in a way reinforcing gender stereotypes. Insofar, positive action measures can be qualified as a substantiation of equality rather than a mere exception of it.