

RELIGIOUS NEUTRALITY, *LAÏCITÉ* AND COLORBLINDNESS: A COMPARATIVE ANALYSIS

Stéphanie Hennette-Vauchez[†]

TABLE OF CONTENTS

INTRODUCTION	540
I. A CAVEAT TO COMPARABILITY.....	549
II. MODES OF REASONING.....	551
A. <i>Formalistic Legal Reasoning, Anti-Classification as Symmetry, and the Limited Reach of Anti-Discrimination Law</i>	552
B. <i>Shielding Discrimination from Equality and Anti-Discrimination Law</i>	568
1. The Public/Private Divide as a Limit on Equality Law	568
2. Local Autonomy as a Limit on Equality Law.....	574
III. OUTCOMES.....	578
A. <i>The Othering Intrinsic to Colorblindness and Religious Neutrality</i>	578
B. <i>Overtones of Purity Conveyed by Colorblindness and Religious Neutrality</i>	589
CONCLUSION	593

[†] Professor of Law, Université Paris Nanterre and Senior Member, Institut Universitaire de France, Deputy Director, Centre de théorie et analyse du droit (UMR 7074) – CREDOF. Email to: stephanie.hennette-vauchez@parisnanterre.fr. This Paper was presented at the IACL Conference in honor of Norman Dorsen that was held at Cardozo Law School March 31–April 1, 2019. The author wishes to thank the organizers for the invitation to be part of that event, as well as the participants for useful feedback and questions. Preliminary aspects of the Paper were also presented at the international conference on Critical Race Theory that was organized by Magali Bessone and Isabelle Aubert at the Philosophy Department of Université Paris 1 Panthéon Sorbonne in January 2019. Here again, rich discussions and exchanges were instrumental to the development of the present Paper. I particularly want to acknowledge early discussions with Daniel Sabbagh for encouraging me to move forward with this project, as well as very useful comments on an earlier version by Eric Christiansen and Mathias Möschel. This Paper owes a lot to these three colleagues, even though all imperfections remain mine.

INTRODUCTION

The concept of religious neutrality is on the rise in Europe. Neutrality has become a concept central to European law, both at the level of the European Union (EU) and at the level of the Council of Europe. It also infuses a variety of national legal regimes based on secularism.

Under the European Convention of Human Rights, religious neutrality has indeed assumed center stage in Article 9 (freedom of religion) jurisprudence. The Strasbourg Court has explicitly referred to European States' duty of neutrality and impartiality with respect to religions since a 2000 Grand Chamber ruling,¹ and it has elaborated on that jurisprudence in later cases. For instance, when it upheld France's ban on the niqab, it insisted on "the State's role as the *neutral* and impartial organiser of the exercise of various religions, faiths and beliefs . . . [that] is conducive to public order, religious harmony and tolerance in a democratic society."² It further insisted that the State's duty of neutrality and impartiality is "incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which [they] are expressed."³

Such affirmation of an obligation of State neutrality is quite remarkable in the context of the Council of Europe where a wide variety of state-religion arrangements prevail across forty-seven Member States. Some countries such as Turkey and France certainly have regimes of strict separation in which the concept of State neutrality might be unsurprising, but others have systems of established or official churches (this is the case in the United Kingdom, Norway, and Greece, for instance), while others organize milder regimes of separation that allow various forms of collaboration between State and religious authorities. In Italy for instance, religious marriage automatically translates as civil union; other

¹ Hasan and Chaush v. Bulgaria [GC], App. No. 30985/96, 2000-XI Eur. Ct. H.R. 117.

² S.A.S. v. France [GC], App. No. 43835/11, 2014-III Eur. Ct. H.R. 341, 372, ¶ 127 (emphasis added).

³ *Id.* at 372–73, ¶ 127 ("[T]his duty requires the State to ensure mutual tolerance between opposing groups [T]he role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other").

countries (such as Germany, Belgium, or Spain) can also be read into this third category.⁴

Because it captures and governs a wide and differing range of church-state arrangements, the concept of neutrality that stems from European Court of Human Rights (ECHR) case law is quite broad and variegated. Julie Ringelheim has established that it oscillates between three main understandings: one refers to neutrality as “absence of coercion,” another defines neutrality by the “absence of preference,” and a third one extends to forms of “exclusion of religion from the public sphere.”⁵ The third understanding is however conceptually quite distinct from the former two, especially since it possibly extends to private individuals; it refers to a religious neutrality of the regulated (society) rather than to the religious neutrality of the regulator (the State), and is illustrated, for instance, by the various rulings upholding the French and Belgian “burqa bans.”⁶

A principle of religious neutrality is also emerging at the level of the European Union. The Council of Europe and the European Union (EU) certainly have different *raison d'être*; while the former rests essentially on a human rights paradigm, the latter was built as a space for economic integration and only later took human rights on board. A concept of non-discrimination was, however, always important in the shaping and developing of a European internal market. As anti-discrimination law was considerably strengthened by the adoption of important directives in 2000,⁷ the EU started producing a legal discourse on religious discrimination. It strikingly converges with that of the ECHR, especially

⁴ CHRISTIAN JOPPKE, *THE SECULAR STATE UNDER SIEGE: RELIGION AND POLITICS IN EUROPE AND AMERICA* (2015).

⁵ Julie Ringelheim, *State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach*, 6 OXFORD J.L. & RELIGION 24, 32–33 (2017).

⁶ S.A.S. v. France [GC], 2014-III Eur. Ct. H.R.; Belcacemi and Oussar v. Belgium, App. No. 37798/13, Eur. Ct. H.R. (July 11, 2017), <http://hudoc.echr.coe.int/eng?i=001-175141> [<https://perma.cc/4UW7-3WDU>]; Dakir v. Belgium, App. No. 4619/12, Eur. Ct. H.R. (July 17, 2017), <http://hudoc.echr.coe.int/eng/?i=001-175660> [<https://perma.cc/78QW-PAGF>] [together hereinafter as *Burqa Ban Cases*].

⁷ Council Directive 2000/78/EC, 2000 O.J. (L 303) 16 (establishing a general framework for equal treatment in employment and occupation); Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin). On the main sources of EU Anti-Discrimination Law, see EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUR., *HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW* (2018).

in the ways that it immediately installed a concept of religious neutrality at its very center—from the very first judicial interpretations of “religion” under EU anti-discrimination law. The Court of Justice of the European Union (CJEU) was indeed given its first opportunity to interpret the scope of “religion” under directive 2000/78 as two preliminary references emanating from Belgian and French high courts led the court to clarify whether instances of female Muslim workers having been fired due to their refusal to remove their headscarf in the workplace amounted to religious discrimination. As it was given its first opportunity to interpret the scope of “religion” under directive 2000/78,⁸ the court chose a wide definition of religion, insisting that it included both *forum externum* and *forum internum* dimensions.⁹ It then established the legitimacy of religious neutrality policies in the workplace, finding that internal corporate neutrality policies banning the expression of all convictions or beliefs in the workplace (religious, but also philosophical or political) were legitimate in principle as they stemmed from the right to conduct a business that is guaranteed by Article 16 of the EU Charter of Fundamental Rights (EUCFR).¹⁰

The court ruled that such policies did not amount to direct discrimination, nor did they constitute indirect discrimination as long as they were applied in a consistent and appropriate manner and remained proportionate to the objective they serve. It also ruled that customer preferences could not qualify as “genuine and determining occupational requirement[s]” susceptible of justifying a different treatment based on religion.¹¹ While these rulings have triggered much criticism from the perspective of anti-discrimination law (for they are thought to severely weaken its operation), they also testify to the elevation of the legitimacy of neutrality policies in the workplace, which is a significant shift if not departure from the previous state of legal affairs (and indeed, one that is

⁸ Council Directive 2000/78/EC, *supra* note 7.

⁹ Case C-188/15, *Bougnaoui v. Micropole SA*, ¶ 30 (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0188> [<https://perma.cc/W8L9-85FD>]; Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ¶ 28 (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157> [<https://perma.cc/A9HC-ELQE>].

¹⁰ Case C-157/15, *Achbita*, at ¶ 38.

¹¹ Case C-188/15, *Bougnaoui*, at ¶ 40.

said to considerably lower the standard of human rights protection that prevailed until then in a number of EU Member States).¹²

Interestingly, as both the full veil cases in Strasbourg and the hijab in the workplace ones in Luxembourg show, the notion of religious neutrality has expanded from the public sphere to the private sphere. If initially, it merely required neutrality from the State (its institutions, its legal rules and, at most, its embodiments such as buildings and civil servants), it now tends to be used in a very distinct sense, one that requires religious neutrality from individual people. Rules and policies of neutrality in the workplace can thus be upheld, and there are several other social spaces in which private individuals can be subjected to rules of religious neutrality. This is the case, in several countries, for pupils in schools,¹³ students in universities,¹⁴ and sometimes laypeople on the street¹⁵ or in public spaces generally—not to mention the rules of neutrality that weigh on those individuals who can be said to represent or embody public authority and may thus be subjected to such neutrality rules: such as school teachers,¹⁶ university professors,¹⁷ and also wider groups of civil servants, including nurses.¹⁸

¹² See Mark Bell, *Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace*, 17 HUM. RTS. L. REV. 784 (2017); Elke Cloots, *Safe Harbour or Open Sea for Corporate Headscarf Bans?* Achbita and Bougnaoui, 55 COMMON MKT. L. REV. 589 (2018); Jessica Giles, *Neutrality in the Business Sphere—An Encroachment on Rights Protection and State Sovereignty?*, 7 OXFORD J.L. & RELIGION 339 (2018); Stéphanie Hennette-Vauchez, *Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe*, 13 EUR. CONST. L. REV. 744 (2017); Erica Howard, *Islamic Headscarves and the CJEU: Achbita and Bougnaoui*, 24 MAASTRICHT J. EUR. & COMP. L. 348 (2017); Shannon Riggins, *Limitations on the Right to Manifest Religion in European Private Companies: Achbita v. G4S Secure Solutions NV Under Article 9 of the ECHR and Article 18 of the ICCPR*, 33 AM. U. INT'L L. REV. 977 (2018); Cyril Wolmark, *La Neutralité du Salarié*, REVUE DE DROIT DU TRAVAIL 726 (2018); Raphaële Xenidis, *Shaking the Normative Foundations of EU Equality Law: Evolution and Hierarchy Between Market Integration and Human Rights Rationales* (Eur. U. Inst. Law Working Paper No. 2017/04, 2017).

¹³ Aktas v. France, App. No. 43563/08, Eur. Ct. H.R. (June 30, 2009), <http://hudoc.echr.coe.int/eng?i=001-93697> [<https://perma.cc/U5T6-RA8A>]; Dogru v. France, App. No. 27058/05, Eur. H.R. Rep. 179 (2008).

¹⁴ Şahin v. Turkey, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 173.

¹⁵ Struck down by Ahmet Arslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. (Feb. 23, 2010), <http://hudoc.echr.coe.int/eng?i=001-97380> [<https://perma.cc/X48K-8M6W>]. But see also Burqa Ban Cases, *supra* note 6.

¹⁶ Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447.

¹⁷ Kurtulmuş v. Turkey, App. No. 65500/01, 2006-II Eur. Ct. H.R. 297.

¹⁸ Ebrahimian v. France, App. No. 64846/11, 2015-VIII Eur. Ct. H.R. 99.

However, this increasing elevation of neutrality as a cornerstone of European legal responses to the issues raised by religion in contemporary societies is suspected to play out adversely for specific religious minorities—in particular, Muslim minorities. Some authors argue that the rise of neutrality conceals a strong dimension of Islamophobia “concealed in the principled garb of secularism.”¹⁹ Mathias Möschel has unearthed a “European way of colorblindness” and recalled that it emerged, historically, in reaction to the persecution of Jews; he has also established the ways in which, nowadays, “the issue no longer [is] one of racism but one of religion and secularism.”²⁰ Analyzing ECHR law, Samuel Moyn speaks of a “European devotion to a neutral state”²¹ and underlines the ways in which ECHR case law on freedom of religion seems to systematically play out against Islam: “[o]ne case can be an honest mistake, but an almost unbroken trend demands some other interpretation.”²²

This adverse impact of European neutrality is, in part, implicit. It results from the failure to see the extent to which social norms, as well as a number of the legal rules that actuate them, are deeply embedded in historical and religious structures²³ that have become problematic as religious pluralism has increased in contemporary European societies. Questions such as the “predominant rule of Sunday rest or official annual calendars” are a case in point²⁴ of “nonchalant attitude[s] towards Christian symbols,”²⁵ but there are many others, from the labeling of

¹⁹ Samuel Moyn, *Too Much Secularism? Religious Freedom in European History and the European Court of Human Rights*, in FREEDOM OF RELIGION, SECULARISM AND HUMAN RIGHTS 95, 96 (Nehal Bhuta ed., 2019); see also Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT’L. L. 663 (2011).

²⁰ MATHIAS MÖSCHEL, LAW, LAWYERS AND RACE: CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE 126 (2014); see also *id.* at 110–90 (ch. 4 & ch. 5) (including a study of local bans on headscarves and burqas in Italy).

²¹ Moyn, *supra* note 19, at 95.

²² Moyn, *supra* note 19, at 96.

²³ Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9 (2014) (arguing that the neutrality/secularism discourse of a number of legal actors is merely a screen for conceptions of religious freedom as a public order issue and, therefore, as a tool that ought to be interpreted with respect to a preventive conception of necessity measured with respect to risks of conflict).

²⁴ Stéphanie Hennette Vauchez, *Religious Holidays in Employment—Austria, France & Spain*, 2018 EUR. EQUALITY L. REV., no. 2, at 63.

²⁵ Moyn, *supra* note 19, at 99.

nativity crèches as “not exclusively religious” signs,²⁶ to the acceptance of the presence of crucifixes in public school classrooms.²⁷ But the impact can also be explicit.

This is the case, for instance, when legislation explicitly pits specific religious practices (veiling, avoidance of physical contact, request of exemptions from the general norm) as radical, fundamentalist, or separationist and thus inadmissible on the grounds that they undermine the conditions of “living together”²⁸ that are necessary for a society to hold together.²⁹ This is also the case when an employer’s decision to ban the expression of any conviction by all employees is deemed legitimate as an expression of his or her wish to “project an image of neutrality towards customers [that] relates to the freedom to conduct a business that is recognized in Article 16 of the [EUCFR].”³⁰

It is indeed hardly disputable that all the restrictions to religious freedom that have been upheld by European Courts (both the ECHR and the CJEU) over the years either originate in cases involving Islamic religious practice or signs that disproportionately impact the practice and visibility of Islamic faith (and often both). In Strasbourg, this is certainly the case for the burqa bans that were upheld,³¹ as well as for most of the cases involving the wearing of religious garb—on the street, in schools, in the courtroom, and elsewhere, including the workplace—with the notable exception of the *Eweida v. United Kingdom* rulings in which the Strasbourg court chose rare Catholic cases for strengthening its standard of review.³² In Luxembourg, it is also significant that in two cases involving female workers who had been fired for refusing to remove their

²⁶ CE Ass., Nov. 9, 2016, Rec. Lebon 395223.

²⁷ *Lautsi v. Italy* [GC], App. No. 30814/06, 2011-III Eur. Ct. H.R. 61.

²⁸ Ilias Trispiotis, *Two Interpretations of “Living Together” in European Human Rights Law*, 75 CAMBRIDGE L.J. 580, 580 (2016).

²⁹ See *Burqa Ban Cases*, *supra* note 6.

³⁰ See Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ¶ 38 (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157> [<https://perma.cc/A9HC-ELQE>]; see also *id.* at ¶ 37 (“[I]t should be stated that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.”).

³¹ See *Burqa Ban Cases*, *supra* note 6.

³² *Eweida v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, 36516/10, 2013-I Eur. Ct. H.R. 215.

headscarf, the court ruled on the admissibility of neutrality policies within the anti-discrimination law framework.³³

These exclusionary dimensions of the European legal regime of religious neutrality are increasingly read as a shortcoming if not a failure of both the human rights framework and that of anti-discrimination law. Both of them tend to be read as incapable of adapting to the contemporary conditions of pluralism that feature in European polities. Further, this legal regime of neutrality is also read as resting on an exclusionary ideology—one that recalls Said’s Orientalism and pits “the West” against an “Other” that is almost always portrayed throughout to Muslim practices (of veiling, slaughtering, learning, etc.) and couches this opposition into neutral terms:³⁴ secularism, “living together,” and neutrality (indeed), but also *laïcité*, or “republican” traditions—including, in a highly problematic fashion, gender equality.³⁵ Much of the literature that critiques the rise of European neutrality in these terms has paid close attention to the French example that is said to be both emblematic of the ways in which a polity may organize around the central value of *laïcité* and inspirational for the wider European model. Authors such as Joan W. Scott,³⁶ John Bowen,³⁷ or Mayanthi Fernando,³⁸ for instance, have looked at the French regime of *laïcité* in that way, explaining the extent to which it has remained profoundly shaped by the colonial encounter between republican values and Islam and continues to hesitate between outright forms of rejection and discrimination on the one hand and commandments and injunctions to assimilate on the other

³³ See cases cited *supra* note 9.

³⁴ See Moyn, *supra* note 19, at 99 (“A pretextual neutrality in the service of discriminatory results is precisely the syndrome that the thoroughgoing criticism of ‘secularism’ . . . has diagnosed as a glaring form of orientalism.”).

³⁵ On gender equality and republican traditions as harmed by Muslim practices in French law, see Stéphanie Hennette-Vauchez & Elsa Fondimare, *Incompatibility Between the ‘French Republican Model’ and Anti-Discrimination Law? Deconstructing a Familiar Trope of Narratives of French Law*, in ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS 56 (Barbara Havelková & Mathias Möschel eds., 2019); see also Stéphanie Hennette-Vauchez, *Laïcité et Égalité entre les Sexes*, 45 TRAVAIL, GENRE & SOCIÉTÉS (forthcoming 2021); cf. Susanna Mancini, *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism*, 10 INT’L. J. CONST. L. 411 (2012).

³⁶ JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007).

³⁷ JOHN R. BOWEN, *WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2007).

³⁸ MAYANTHI L. FERNANDO, *THE REPUBLIC UNSETTLED: MUSLIM FRENCH AND THE CONTRADICTIONS OF SECULARISM* (2014).

hand.³⁹ Joseph Weiler has similarly read the CJEU *Achbita* ruling as one “following the French tradition.”⁴⁰

This Paper suggests that these dimensions of the current debate over the public expression of religion in Europe echo some aspects of the debate over racial equality in the United States. As it explores the ways in which European debates over religious neutrality and American debates over racial equality respond one to another, it reflects on the extent to which some of the critiques that have been voiced with respect to the notion of colorblindness, which has played an important role in shaping the constitutional debate over race in the United States,⁴¹ may illuminate the role that the legal principle of neutrality might be acquiring in contemporary European law. In particular, the Paper reflects on possible parallels that can be drawn between colorblindness as a cause for the failure of U.S. law to redress (or even address) enduring patterns of racial subordination as well as the mere ideological mask of white supremacy on the one hand,⁴² and the exclusionary dimension of contemporary iterations of religious neutrality in Europe on the other hand.

³⁹ It is thus well established that, while it has historically been a somewhat technical principle, *laïcité* was increasingly substantiated. PHILIPPE PORTIER, *L'ÉTAT ET LES RELIGIONS EN FRANCE. UNE SOCIOLOGIE HISTORIQUE DE LA LAÏCITÉ* (2016). Not only does it now generate obligations of neutrality that are imposed on private individuals—a hermeneutic move that severs its links with the actual affirmation of religious freedom—it is also interpreted increasingly as a principle that individuals are requested not only to respect, but also to adhere to. For instance, an official report by the Ministry of Education's Legal Department that seeks to take stock of ten years of enforcement of the new legal regime created by the Act of 15 March 2004, forbidding religious symbols in public schools, insists that, although the overall assessment is positive, more work remains to be done in order to foster the students' adhesion to the republican value of *laïcité*. For more on this, see Stéphanie Hennette Vauchez, *Is French Laïcité Still Liberal? The Republican Project Under Pressure (2004–15)*, 17 HUM. RTS. L. REV. 285, 299–303 (2017). See also Stéphanie Hennette-Vauchez, *Séparation, garantie, neutralité: les multiples grammaires de la laïcité*, 53 NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 9 (2016).

⁴⁰ Joseph H.H. Weiler, Editorial, *Je Suis Achbita!*, 15 INT. J. CONST. L. 879, 893 (2017).

⁴¹ Colorblindness is not the only perspective present in constitutional reasoning over matters of racial equality. Reva B. Siegel in particular has coined, in addition to the classical anti-classification and anti-subordination perspectives, an “anti-balkanization” paradigm that focuses more on social cohesion than on colorblindness. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*].

⁴² See Frances Lee Ansley, *White Supremacy (And What We Should Do About It)*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 592, 592–95 (Richard Delgado & Jean Stefancic eds., 1997) (“In the following discussion of ‘white supremacy’ I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic, and cultural system in which whites overwhelmingly control power and material resources,

The Paper unfolds in three parts. The first Part is essentially a caveat to the rest of the demonstration, for indeed there seems to be one significant dimension in which the attempted parallel reading of colorblindness and neutrality does not prove operational. In U.S. law, colorblindness has consistently led to the constitutional doctrine of anti-classification. Subsequently, its reach has been contained to explicit racial categories: only when and where there is an explicit legal recognition of a race is the Equal Protection Clause triggered—and the standard of strict scrutiny⁴³ set in motion—by operators of judicial review. Neutrality, by contrast, is hardly an anti-classification device: as it exists and is increasingly elevated in European law, it neither necessarily entails nor requires a juridical prohibition on religious classifications. The first Part of the Paper thus addresses this significant caveat to the comparability of the two legal notions and explains why and how it nonetheless purports to compare the theoretical and scholarly analyses they have triggered (rather than the actual constitutional concepts themselves). By reflecting on the ways in which some of the critical work on colorblindness in American law may illuminate aspects of the current European debate over legal responses to religious pluralism, it engages in a meta-comparison. The second Part of the Paper moves to explore the similar patterns of legal reasoning that judges deploy when mobilizing either colorblindness (in the United States) or neutrality (in Europe). It first insists in particular on the formalistic and a-teleological dimension of the judicial reasoning that both these concepts trigger. It then underlines the importance it reserves to a variety of notions (from the public/private divide to the State/federal one) that hinders the full-fledged application of equality and anti-discrimination law and systematically contains (rather than expands) it. In the third Part, the Paper underlines the similar outcomes of the judicial interpretation of colorblindness and neutrality. Racial and religious othering, including with troubling

conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”).

⁴³ Strict scrutiny is required when state action classifies on the basis of race. *McLaughlin v. Florida*, 379 U.S. 184 (1964). Courts then no longer have to prove that the classification causes harm as under the former interpretations of *Brown*. Strict scrutiny is generally traced back to the famous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) as well as to Justice Black’s dictum in *Korematsu v. United States*, 323 U.S. 214 (1944). It was only positively applied, however, in *Brown v. Board of Education*, 347 U.S. 483 (1954).

concessions to overtones of purity, seem indeed to infuse the case law on both sides of the Atlantic.

I. A CAVEAT TO COMPARABILITY

There is nothing natural or self-evident to legal comparisons: legal systems and rules are essentially a social product and, therefore, there is no particular reason why they should even be comparable. Institutional setups as well as substantial principles may well differ so radically from place to place that the actual operation of comparison of similar concepts across different legal systems might well be pointless—let alone that of different concepts. Furthermore, it could well be argued that rules and principles relating to the legal treatment of the issue of racial inequality in the United States on the one hand and to that of religion (and the public manifestation thereof) in Europe on the other hand provide with particularly ill-suited candidates for comparative work, for the issues of race and of religion have had vastly differing histories—legal and political—across the Atlantic. In light of such immense differences, what, then could possibly be compared in the contemporary legal responses to issues of racial and religious equality in the United States and Europe? This Paper posits that while comparing these actual legal concepts might indeed be impossible or problematic, focusing on the analyses they have triggered is enlightening.⁴⁴ In other words, it engages in a work of meta-comparison rather than comparison itself. It seeks not to compare (American) “colorblindness” and (European) “neutrality” but rather, to take stock of what decades of critical scholarly work on colorblindness in the United States have brought about that might enlighten current legal developments and challenges that European law is facing when confronted with issues of religious diversity.

As a result, this Paper does not dispute nor is it impeded by the fact that the two concepts of colorblindness and neutrality are hardly conceptual or functional equivalents. To the extent that colorblindness is generally associated with the famous excerpt of Justice Harlan’s dissent in the infamous *Plessy v. Ferguson* case ruled by the Supreme Court in 1896 (“[o]ur Constitution is color-blind, and neither knows nor tolerates classes among [its] citizens”),⁴⁵ it could probably be affirmed that

⁴⁴ MÖSCHEL, *supra* note 20 (an important book in the comparative transatlantic perspective).

⁴⁵ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

European law, by and large, operates under a somewhat similar principle of religious-blindness entailing that individuals are not to be subjected to unequal treatment because of their religious beliefs. Legally though, while colorblindness has provided with a historic articulation of what would later be coined an anti-classification requirement under the Equal Protection Clause, there is no such anti-classification dimension to “religion-blindness” (if at all) in European law.

Quite to the contrary, neutrality as it exists in contemporary European law cannot be defined as a ban or prohibition on religious recognition. This is of course self-evident in a number of European countries where there is an official or recognized church: by definition then, one religion enjoys special status—and forms a particular class. At times, this structural element percolates deeply into the legal system and individuals may be defined by their religious affiliation—be it on their identity documents⁴⁶ or for the sake of labor law and the determination of their entitlements to holidays.⁴⁷ Across Europe, however, although religious discrimination is generally prohibited by domestic constitutional rules and/or EU legislation,⁴⁸ not all constitutions have explicit anti-classification provisions. While Italy⁴⁹ and France⁵⁰ do prohibit all forms of religious classification, the Belgian Constitution for instance remains silent on the subject.⁵¹ Basically, then, in Europe, neutrality cannot really be read as a classificatory (or not classificatory)

⁴⁶ This was the case, for instance, in Turkey until 2006. See *Sinan Işık v. Turkey*, App No. 21924/05, 2010-I Eur. Ct. H.R. 341, 358–60, ¶¶ 51–52, 60 (finding that the mention of religion on identity documents amounts to violation of art. 9).

⁴⁷ In Case C-193/17, *Cresco Investigation GmbH v. Achatzi* [GC], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0193> [<https://perma.cc/693M-7JEL>], an Austrian piece of legislation awarded a right to a public holiday on Good Friday only to those employees who were members of one of a particular list of churches. See *id.* at ¶ 39 for a description of the legislation. The Court of Justice ruled that this amounted to direct discrimination. *Id.* at ¶ 51.

⁴⁸ Not to mention other sources, such as the European Court of Human Rights (ECHR) (art. 14) and other international legal rules. Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221.

⁴⁹ COSTITUZIONE [COST.] art. 3 (It.) (“Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali.”).

⁵⁰ 1958 CONST. art. 1 (Fr.) (“France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”).

⁵¹ 1831 CONST. (Belg.).

legal principle. It rather commands that states, as regulators of constitutional principles of equality, pluralism, and tolerance, ensure that all religions are treated equally—including when the starting point is not equal (i.e., when one church enjoys special status).⁵²

It is thus in full awareness of the strong differences between colorblindness and religious neutrality that this Paper engages in an exercise in meta-comparison that seeks to bring some of the main lessons and conclusions of decades of scholarly work on racial equality in the United States into the European legal debates over religious pluralism. In particular, I pay attention here to the ways in which the strongly anti-classificatory dimension of the American constitutional doctrine of colorblindness is generally understood to fail to address and redress the subordination dimension of racial equality. Regardless of the actual ebb and flow of acceptance of and backlash against the anti-subordination dimension of the actual judicial interpretation of the Equal Protection Clause in U.S. law, I wish to take stock of the theoretical arguments and demonstrations pertaining to the shortcomings of a solely anti-classification approach to discrimination in order to suggest that they would be immensely beneficial to contemporary European legal debates over religious pluralism. I thus examine the theoretical critique of the pattern of legal reasoning that the doctrine of colorblindness, as read through a solely anti-classification lens, has generated in American constitutional law in order to highlight a number of parallels with the current operation of European anti-discrimination law with respect to religion (Part III). I then turn to the critique of the outcomes of the judicial interpretation of colorblindness and again suggest that parallels can be fruitfully drawn between the constitutional production and maintenance of white supremacy in the United States and the exclusionary dimension of religious neutrality in Europe (Part IV).

II. MODES OF REASONING

In terms of how American (racial) colorblindness and European (religious) neutrality can be usefully reflected upon simultaneously, I

⁵² See, for instance, the English common law rule sanctioning blasphemy only when it offends the Church of England, or the equivalent Austrian rule similarly restricting the offense of blasphemy to attacks on Christian religions, both of which have been upheld by the ECHR. *Choudhury v. United Kingdom*, App. No. 17439/90, Eur. Comm'n H.R. Dec. & Rep. 12 (1990); *Otto-Preminger-Inst. v. Austria*, App. No. 13470/87, 295 Eur. Ct. H.R. (ser. A) 6 (1994).

wish to suggest that two features of the specific modes of legal reasoning that are triggered by both these principles are worth unpacking. The first is formalism. In constitutional debates over both race in the United States and religious neutrality in Europe, concerns are expressed in relation to the triumph of overly formalistic modes of reasoning that lead to core provisions such as the Equal Protection Clause or anti-discrimination law being interpreted in a way that potentially completely detaches them from their purpose.⁵³ As a consequence, it is not uncommon to encounter actual dishonest or cynical moments in legal interpretation. The second feature is the limited reach of equality and anti-discrimination law that ensues: as legal actors promote a formalistic reading of the provisions of reference, they seem to seize every opportunity to turn unrelated legal principles into shields to the full application of equality law.⁵⁴

A. *Formalistic Legal Reasoning, Anti-Classification as Symmetry, and the Limited Reach of Anti-Discrimination Law*

In terms of patterns of judicial reasoning, the study of contemporary legal debates over religious pluralism in Europe provides a strong sense that European legal actors are strangely stuck in formalistically anti-classificatory interpretations of anti-discrimination law, which a brief examination of their American counterparts' experiences could help them avoid: anti-classification is probably not enough for achieving equality. Indeed, although symmetry and formalism are not necessary consequences of the constitutional concept of colorblindness,⁵⁵ important strands of legal scholarship have established that they actually killed much of the egalitarian promise that they were deemed to convey.

To be sure, colorblindness as a foremost anti-classification device did allow for some progress in terms of racial equality in American law, to the extent that it contributed to the dismantling of the Jim Crow era's explicit de jure segregationist laws and policies. This actually explains why the civil rights movement has a history of cherishing and mobilizing

⁵³ See *infra* Section II.A.

⁵⁴ See *infra* Section II.B.

⁵⁵ See David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that colorblindness can be read as *requiring* race-conscious remedies). For a history of the juridified framing of issues of racial equality and affirmative action, see DANIEL SABBAGH, *L'ÉGALITÉ PAR LE DROIT: LES PARADOXES DE LA DISCRIMINATION POSITIVE AUX ÉTATS-UNIS* (2003).

the semantics of colorblindness. It also explains why the 1954 *Brown v. Board of Education*⁵⁶ ruling is generally associated with the constitutional affirmation of the inadmissibility of de jure racial segregation (as well as with, more generally, that of racial classification), although the ruling itself only applies to the issue of segregation in public schools and remains essentially silent about its exact rationale⁵⁷ (in particular, it does not clarify whether the harm to children is caused by the classification itself or by the subordination that ensues). Whether or not a full-fledged anti-classification normative program was actually present in the Supreme Court's case law as early as 1954, what is clear is that its radicalness led the Court to only very progressively unfold it.⁵⁸ The Court admitted that "additional time [might be] necessary to carry out the ruling in an effective manner,"⁵⁹ only weakly requiring that this be done with "all deliberate speed"⁶⁰ in order to preserve the Court's own legitimacy and/or to prevent (or contain) backlash.⁶¹ Consequently, and regardless of the importance of the *Brown* ruling, it took another decade for the radical notion of colorblindness to actually become law through the adoption of the Civil Rights Act, which forbade discrimination on the basis of race.

Despite its (progressive) role in dismantling de jure racial segregation,⁶² colorblindness proved to have severe limitations with respect to the struggle for racial equality. First, it was intrinsically unable

⁵⁶ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

⁵⁷ In fact, it does not say much or anything remarkable; as Andrew Kull has put it: "[t]he reader who turns to the opinion in *Brown* expecting the vindication, or even an acknowledgement, of Justice Harlan's lonely dissent will in fact find nothing of the sort." He speaks of a "historically and legally jejune" ruling. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 151–52 (1992).

⁵⁸ Ian Haney López notes that "[e]ven during the civil rights era, colorblindness as a strategy for racial emancipation did not take hold. Instead, the courts and Congress dismantled Jim Crow segregation and proscribed egregious forms of private discrimination in a piece-meal manner that banned only the most noxious misuses of race, not any reference to race whatsoever." IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 157 (2006).

⁵⁹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

⁶⁰ *Id.* at 301.

⁶¹ There is of course a long history of massive resistance to racial desegregation. As far as schools, the example of Prince Edward County, Virginia, is emblematic, where the local authorities decided to shut down all public schools for five years rather than integrate them. See CHRISTOPHER BONASTIA, *SOUTHERN STALEMATE: FIVE YEARS WITHOUT PUBLIC EDUCATION IN PRINCE EDWARD COUNTY, VIRGINIA* (2012).

⁶² See, e.g., *Constitutional Law: "Deliberate Speed" Doctrine Applied to Desegregation of Recreational Facilities*, 1963 DUKE L.J. 350.

to tackle, challenge, and question the many proxies for race that lied at the core of racially unequal laws and policies—and, therefore, to address the more deeply entrenched forms of racism and racial inequality. Zoning decisions,⁶³ recruitment policies, criminal sentences⁶⁴—many practices and policies relied on an entrenched racial bias without explicitly relying on racial categories and have thus remained essentially out of reach of the constitutional doctrine of anti-classification. Second, conservative forces progressively succeeded in imposing a symmetrical structure to judicial interpretations of colorblindness, thus turning anti-classification into the exact opposite of anti-subordination.⁶⁵

As Reva B. Siegel has shown, although colorblindness and anti-classification could have been interpreted separately (and, in fact, had been interpreted separately until the end of the 1960s),⁶⁶ post-*Brown* courts progressively started striking down *all* race-conscious remedies on

⁶³ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (Although a zoning decision linked to a construction project in a white upper middle class Chicago suburb will bear more heavily on racial minorities, there is no violation of the Equal Protection Clause because there is no discriminatory purpose.).

⁶⁴ See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that the rule under which Black assailants of white victims will incur capital punishment is not unconstitutional, even though it is established that Georgia sentences such convicted individuals at twenty-two times the rate it orders death for Black assailants who kill Black victims). On the enduring legacy of this obliviousness to the racial impact of criminal law and police practices, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁶⁵ See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*]; see also LÓPEZ, *supra* note 58, at 158 (“[C]olorblindness appealed . . . to those *opposing* racial integration. Enshrouded with the moral raiment of the civil rights movement, this rhetoric provided cover for reactionary opposition to racial reform.”).

⁶⁶ See Siegel, *Equality Talk*, *supra* note 65, at 1500 (“In the 1960s, questions of anticlassification and questions of group status harm were not bifurcated frames of analysis, as they would later come to be.”); *Id.* at 1514 (“Until the 1970s, race-conscious assignment policies were either understood as licit forms of racial classification, or not counted as ‘invidious classifications’ at all.”); *Id.* at 1518 (“[J]udges generally understood the presumption against racial classification as a race-asymmetric constraint . . .”). Siegel also cites *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in which Chief Justice Burger summarized the holdings of lower federal courts in these terms: “School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court.” *Id.* at 1517–18.

the basis that they were forms of classification that *always* ran counter the anti-classification principle—one that no longer allowed for distinctions to be made according to whether the classification at stake was pernicious or benign.⁶⁷ This soon led, in the words of Derrick Bell, to a situation where “a state law or policy designed to increase minority participation in the railway construction industry receives the same judicial scrutiny as a state law requiring black railway passengers to sit in the rear of each car.”⁶⁸ Neil Gotanda further explains that this occurred as strict scrutiny started being triggered not only when ruling on the constitutionality of restrictions that curtailed the civil rights of minorities (e.g., *Brown*),⁶⁹ but also more generally when deciding any kind of racial classification, regardless of its historical and social context⁷⁰ (e.g., *City of Richmond v. J.A. Croson Company*).⁷¹

⁶⁷ See Siegel, *Equality Talk*, *supra* note 65, at 1520; see also DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 46 (4th ed., 2000) [hereinafter BELL, RACE, RACISM AND AMERICAN LAW]. Bell underlines that the ways in which this colorblind/anti-classification conflation of intent and motivation is paradoxical with respect to the very origins of the concept of colorblindness which take back to an era where the treatment of Blacks and whites was objectively asymmetrical. “For Justice Harlan, the constitutional violation stemmed not from the mere fact that Louisiana took race into account as an arbitrary criterion, but that it took race into account in such a manner as to imply the relative inferiority of the excluded class.” *Id.* at 146. Motivation was therefore integral to Harlan’s negative assessment of the rule, which in his view also remains true under *Brown*.

⁶⁸ BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 67, at 132; see also Kimberlé Williams Crenshaw, *Color Blindness, History, and the Law*, in THE HOUSE THAT RACE BUILT: ORIGINAL ESSAYS BY TONI MORRISON, ANGELA Y. DAVIS, CORNEL WEST, AND OTHERS ON BLACK AMERICANS AND POLITICS TODAY 282 (Wahneema Lubiano ed., 1998) (“[T]he same interpretive strategy deployed to legitimize segregation is now being deployed to immunize the racial status quo against any substantive redistribution.”).

⁶⁹ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

⁷⁰ Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 50 (1991) (“The strict scrutiny that developed originally in an atmosphere of governmental attempts to curtail Blacks’ civil rights has been transformed into formal-race scrutiny.”). For a comparative analysis between French and U.S. anti-discrimination law that shows that race-blindness in the United States is “more . . . a strategy for undoing our particular history of racism than . . . a timeless or universal account of equality between all individuals[,]” see Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Anti-Discrimination Law*, 55 AM. J. COMP. L. 295, 344 (2007).

⁷¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). For further illustrations of symmetrical reasoning that subjects race-conscious legal mechanisms aiming at racial integration to the same level of scrutiny than invidious discriminatory ones, see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1925 (2000) (arguing neither treating race as difference to be managed by reasonable standards nor as arbitrary

A third reason why colorblindness progressively appeared to be more of a foe than a friend to actors mobilizing in favor of racial equality was that the focus on racial classification it entailed was found by many to actually divert the attention from the real cause of injustice and/or the preferred aims of the combat for justice. Authors and actors associated with the critical race theory movement were instrumental in this evolution of the debate. Derrick Bell, for instance, wrote influential pieces underlining the ambiguities of the post-*Brown* embrace of colorblindness as a matter of constitutional law and of integration as a matter of educational policy by the civil rights movement.⁷² He denounced the growth of the objective of integration and the ways in which it completely sidelined and obfuscated the more complex and imperative need of Black communities for quality education.⁷³ For all these reasons and more, colorblindness can be seen as a tool of racial inequality rather than an impediment thereto.⁷⁴

From a legal standpoint, there are two main illustrations of these shortcomings, both of which show the extent to which American constitutional racial equality law has retained a deeply formalistic reasoning structure. First, they have led to the containment of the doctrine of anti-classification's reach to explicit legal racial categories. American constitutional law is replete with examples in which the anti-classification doctrine was allowed to strike down explicit racial classifications, such as rules that restricted Blacks and other people of color's access to schools, restaurants, public transportation, fountains,

distinctions that the law should ignore has led to racial justice); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753 (2001).

⁷² See Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976) [hereinafter Bell Jr., *Serving Two Masters*]; Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 *HARV. L. REV.* 518, 518 (1980). Both texts are reprinted in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds., 1995).

⁷³ Bell Jr., *Serving Two Masters*, *supra* note 72, at 515 ("[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. . . . Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer." (quoting W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 *J. NEGRO EDUC.* 328, 335 (1935))).

⁷⁴ LÓPEZ, *supra* note 58.

and the like. But it remained essentially toothless toward more structural impediments to their full access to equality, such as education, fairly diverse neighborhoods, and employment opportunities.

Emblematic in that respect is Justice O'Connor's concurring opinion in *Hernandez v. New York*, in which she insists that juror dismissals that led to the exclusion of all and only Latinos were not to be found unconstitutional because, although they "may have acted like strikes based on race, . . . they were *not* based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."⁷⁵ Neil Gotanda has written an illuminating account of one of the conceptual reasons for this specific shortcoming of the doctrine of anti-classification in which he demonstrates that, throughout American constitutional law, the word "race" refers to differing and indeed diverging meanings. He suggests that contemporary Supreme Court cases no longer use the concept of race that permeated rulings such as *Brown* and *Bakke* but rather a different concept of race that he coins "formal-race," in which racial classification entertains no connection to social reality.⁷⁶ This latter concept sees racial categories a merely formal categories that do not entail or imply any substantive meaning.⁷⁷ Technically, this has meant that the colorblindness/anti-classification's very hermeneutics of the Equal Protection clause have prevented the doctrine from redressing unintentional forms of discrimination. This proved to be especially true when unintentional forms of discrimination resulted from facially neutral

⁷⁵ *Hernandez v. New York*, 500 U.S. 352, 375 (1991) (O'Connor, J., concurring).

⁷⁶ Gotanda, *supra* note 70, at 3–4. Gotanda distinguishes four distinct ways in which the Court has used the word race: status-race, formal-race, historical-race, and culture-race. *Id.*

⁷⁷ This is why Gotanda genealogically traces back this formal concept of race to *Plessy*, in which Justice Brown rejects as a "fallacy" the plaintiff's argument that the segregationist rule at stake "stamp[ed] the colored race with a badge of inferiority." *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). In a formal-race conception, the statute is deemed to say nothing of the inferior status of Blacks. Gotanda, *supra* note 70, at 38. For an illustration of a more contemporary usage of the formal concept of race, Gotanda cites the dissenting opinion by Justice Stewart in *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 12829 (1981) ("The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government."). *Id.* at 6 n.21.

laws and policies.⁷⁸ As long as these laws and policies do not explicitly operate on the basis of suspect (racial) categories, the fact that they may result in excluding disproportionate numbers of one particular racial group has remained essentially irrelevant to the assessment of their constitutionality.⁷⁹

A second shortcoming of formalistic judicial reasoning on racial equality relates to the fact that, because its very definition began and ended over the notion of distinct classes and categories, colorblindness was progressively construed as an impediment to active or remedial measures of racial inequality. Because the mere existence of a category may trigger the colorblind/anti-classification reasoning, judicial reasoning progressively expunged the *raison d'être* of that category from constitutional reasoning on its possible acceptability. As motive was progressively exfiltrated from the constitutional assessment of the admissibility of racial categories, constitutional law deprived itself of the cognitive tools necessary to distinguish between benevolent and invidious forms of classification. As a result, race-conscious mechanisms seeking to increase or favor minorities' access to rights and services were placed at risk of unconstitutionality *because* of the concept of

⁷⁸ "Many of the key mechanisms of white racial rule in U.S. history achieved determinate racist effects without ever having to declare racial intent. These include the three-fifths clause and the fugitive slave provisions in the Constitution, state 'grandfather' clauses, poll taxes and 'understanding clauses,' alien land laws, the Wagner Act, Social Security, and, more recently, the sentencing differential between powder and rock cocaine in the war on drugs, the requirement for picture identification cards in order to vote, placing the governments of economically depressed municipalities under state control, the use of high-stakes testing as a guide to allocating educational resources, and the use of measures of credit worthiness that do not mention race but work to disqualify worthy minority borrowers." George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, in *SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES* 23, 26 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang, & George Lipsitz eds., 2019).

⁷⁹ Just years after the Supreme Court elevated the concept of disparate impact under Title VII employment law, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the use of a qualifying test by the Washington D.C. Police Department that excluded four times as many Blacks as whites could not be struck down, for there was no *intent* to keep Blacks out of office. *Washington v. Davis*, 426 U.S. 229 (1976). In other words, state action may have a racially disparate impact and still be constitutionally acceptable, as long as there is no intention to discriminate. For a recent constitutional and political history of the doctrine of disparate impact, see Reva B. Siegel, *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss's Brennan Lecture*, 106 CALIF. L. REV. 2001 (2018).

colorblindness.⁸⁰ Justices on the bench developed theories of the moral and legal equivalence of all racial categories,⁸¹ be they noxious or remedial. Efforts to promote racial integration in schools,⁸² or to strip away discriminatory bias in government employment,⁸³ were thus put in jeopardy as insufficiently narrowly tailored to their aim.

In the aggregate, these shortcomings have infused much of constitutional reasoning in the field of racial equality in the United States with strictly symmetrical and a-teleological readings of equality. These characteristics are hallmarks of formalistic legal reasoning when it comes to reasoning in the field of equality and anti-discrimination law. In her work on substantive equality, Sandra Fredman insists that to actually redress persistent forms of disadvantage, a distributive dimension must be incorporated into the concept of equality.⁸⁴ As a consequence, legal reasoning ought to be asymmetric: legal rules and mechanisms that rely

⁸⁰ For a much-refined history of these shifts and conflicts of interpretation over the anti-classification and anti-subordination principles that permeate the hermeneutic work that is being done over the Equal Protection Clause, see Ian F. Haney López, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Siegel, *Equality Talk*, *supra* note 65, at 1470.

⁸¹ Justice Thomas similarly wrote that “there is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . In each instance, it is racial discrimination, plain and simple.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring) (citation and internal quotations omitted). The debate is still ongoing, as the highly weakened and uncertain constitutional status of affirmative action measures indicates. These tensions are captured by the famous opposite views of Chief Justice Roberts (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).) and Justice Thomas (“Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education* This approach is just as wrong today as it was a half century ago.” *Id.* (Thomas, J., concurring) (citation omitted)) compared to those of Justice Blackmun (“In order to get beyond racism, we must first take account of race.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978)) and Justice Sotomayor (“The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.” *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting)).

⁸² *Parents Involved*, 551 U.S. 701.

⁸³ *Ricci v. DeStefano*, 557 U.S. 557 (2009); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

⁸⁴ Sandra Fredman, *Substantive Equality Revisited*, 14 INT’L J. CONST. L. 712 (2016).

on (racial) categories to pursue the aim of redressing structural or historical forms of disadvantage cannot be subjected to the same forms and standards of scrutiny as those that classify for segregationist and discriminatory purposes.⁸⁵ Compensatory or preferential treatment is actually a matter of realism that is negatively revealed by the fact that much of the constitutional construction of the admissibility, if not legitimacy of, segregation proceeded from a blatant denial of reality—one that at times hid sheer dishonesty.

Among many examples, the notion of privilege or favoritism that infuses much of the constitutional debate over race-conscious remedies of inequality in the United States is highly illustrative of such dishonesty.⁸⁶ In the *Plessy* case, Justice Brown famously insisted that there was a fundamental “fallacy” in Homer Plessy’s argument: “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”⁸⁷ Justice Brown further insisted that such a notion was “not by reason of anything found in the act, but solely because the colored race [chose] to put that construction upon it.”⁸⁸ Earlier in the 1883 *Civil Rights Cases*, when the Supreme Court struck down the first set of federal civil rights laws that sought to protect the rights of Black people to access public facilities on an equal basis, Justice

⁸⁵ Reva Siegel cites a powerful excerpt of a judicial opinion by Judge Wisdom in that respect: “The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.” Siegel, *Equality Talk*, *supra* note 65, at 1520 (quoting *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

⁸⁶ Counterexamples exist, as well. In fact, Justice Harlan’s famous colorblind dissent in *Plessy* rested precisely on his rebuttal of any decontextualized and a-teleological reading of the segregationist rule that was at stake: “Every one knows that . . . [t]he thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.” *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

⁸⁷ *Id.* at 551.

⁸⁸ *Id.* Justice Brown himself would change his mind by the end of his life as he acknowledged that “Harlan ‘assumed what is probably the fact, that the statute had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied [by] or assigned to white persons.’” See KULL, *supra* note 57, at 121 n.32 (alteration in original) (quoting H.B. Brown, *The Dissenting Opinions of Mr. Justice Harlan*, 46 AM. L. REV. 321, 338 (1912)).

Bradley's rhetorical question was equally highly problematic. Justice Bradley asked, "But what has [segregation] to do with the question of slavery?" to claim the inapplicability of the Fourteenth Amendment to the case at stake.⁸⁹ He went on to start infusing the notion that once slavery had been abolished, Blacks were not to request or expect preferential legal treatment, famously insisting that "[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws"⁹⁰ That a piece of civil legislation granting Blacks access to public accommodations on equal footing with white people could be read as turning the former into "the special favorite of the laws" is ironic, indeed.⁹¹ It is ironic in that it equates ending unfavorable treatment with actually enacting preferential treatment.⁹² It is also cynical, as it expresses a notion of unfair and undue preference purportedly enjoyed by Blacks that found political traction in the following years as Jim Crow legislation proliferated between 1890 and 1910 after the invalidation of the federal civil rights laws.⁹³

However problematic, this rhetoric of privilege and favoritism endures to this day. As the Supreme Court's famous *Bakke* ruling started to considerably weaken affirmative action policies taken by universities,⁹⁴ it did so on the grounds of a notion of undue privilege of minority

⁸⁹ The Civil Rights Cases, 109 U.S. 3, 21 (1883).

⁹⁰ *Id.* at 25.

⁹¹ *Id.*; see also Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 16 (1994).

⁹² Compare *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."), with Transcript of Oral Argument at 47, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (Justice Scalia stating that the 1965 Voting Rights Act "perpetuat[es] . . . racial entitlement.").

⁹³ See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955) (describing Jim Crow not as an outright product of post-Civil War legislation, but rather a product of the invalidation of civil rights legislation).

⁹⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also Siegel, *From Colorblindness to Antibalkanization*, *supra* note 41 (providing a thorough reflection on this "diversity" rationale and the ways in which it has allowed some Justices to both uphold and limit race-conscious remedies). See generally Siegel, *Equality Talk*, *supra* note 65.

students, which, in turn, resulted in oppression and disadvantage of the majority. In the words of Justice Powell, an admissions policy that reserved sixteen seats out of one-hundred for disadvantaged minority applicants indeed risked leading to a situation where “innocent persons . . . [were] asked to endure [deprivation as] the price of membership in the dominant majority”⁹⁵ Hence, Justice Powell’s offering of “diversity” was a compromise⁹⁶ “that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles.”⁹⁷ In the words of Justice Mosk of the Supreme Court of California:

⁹⁵ *Bakke*, 438 U.S. at 294 n.34.

⁹⁶ A compromise that critical race theory scholars criticize as a lukewarm liberal concession that maintains the racial unequal status quo. See, e.g., Kimberlé Williams Crenshaw, *Unmasking Colorblindness in the Law: Lessons from the Formation of Critical Race Theory*, in *SEEING RACE AGAIN*, *supra* note 78, at 52, 54 (“Among those who understood the challenge solely from a vantage point of integrating colored bodies into previously white spaces, the constitutionally permissible use of race to enhance ‘diversity’ was defended as a race-conscious exception to colorblindness. Yet this liberal investment in colorblind merit revealed a contradiction that undercut the most powerful arguments to sustain race-conscious projects within the law and society as a whole. The same proponents who supported ‘diversity’ when it came to students in the classroom argued against any substantive valuation of race in the context of recruiting faculty. This liberal ambivalence would come back to undercut affirmative action, creating a confusing rhetorical agenda that decried the absence of fully integrated professions but failed to interrogate the meritocratic baselines that naturalized this maldistribution of opportunity. The baselines that remained uninterrogated figured prominently in the conservative critique of ‘reverse discrimination,’ rendering the remedial exception to colorblindness vulnerable to constitutional assault.”).

⁹⁷ Siegel, *Equality Talk*, *supra* note 65, at 1532; see also *Bakke*, 438 U.S. at 295 (“The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgements. As observed above, the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.”); see also *id.* at 310 (“[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.”). Says Ian F. Haney López, “In a few short paragraphs, Justice Powell erased whites as a dominant group—and conjured instead whites as potential victims in the brave new world of civil rights and racial remediation.” Ian F. Haney López, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61, 74 (2005)

That whites suffer a grievous disadvantage by reason of their exclusion from the University on racial grounds is abundantly clear. The fact that they are not also invidiously discriminated against in the sense that a stigma is cast upon them because of their race, as is often the circumstance when the discriminatory conduct is directed against a minority, does not justify the conclusion that race is a suspect classification only if the consequences of the classification are detrimental to minorities.⁹⁸

This tendency has only strengthened in more recent times. Summing up the past few decades of constitutional attacks on affirmative action, George Lipsitz writes that “[a]nti[-]discrimination law becomes portrayed as race discrimination. Measures designed to secure rights for Blacks are caricatured as making Black people into special favorites of the law. Whites asked to obey the law, conversely, are represented as victims of reverse racism.”⁹⁹

Formalistic legal reasoning that rests on symmetrical and a-teleological forms of reasoning and consequently fails to address (and redress) unintentional forms of discrimination, actively prevents the adoption of positive action measures and does not hesitate to misrepresent the lived realities of those who claim they remain unprotected is a pattern that can also be found in European law. The *Achbita* case, decided by the CJEU in 2017, illustrates the neutralization of anti-discrimination law that can be caused by symmetrical and a-teleological judicial modes of reasoning. When asked whether an internal neutrality policy that prohibited all personnel from expressing any kind of convictions (religious, political, or philosophical convictions, for example) amounted to discrimination, the court first deployed a symmetrical mode of reasoning to determine that such a policy did not constitute direct discrimination.¹⁰⁰ Since the disputed policy prohibited

⁹⁸ *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1163 (Cal. 1976).

⁹⁹ Lipsitz, *supra* note 78, at 41.

¹⁰⁰ Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ¶¶ 30–32 (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157> [<https://perma.cc/A9HC-ELQE>] (“In the present case, the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs. It is not evident from the material in the file available to the Court that the

employees from expressing *any* convictions in the workplace, the court ruled that it treated “all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs.”¹⁰¹

Such symmetrical mode of reasoning verifying that all convictions and all workers are treated equally is, however, debatable with respect to the very goals of anti-discrimination law. It amounts to saying that, in terms of discrimination, as long as all members of a group are discriminated against for expressing their convictions in the workplace—as in *Achbita*—none are discriminated against. Such reasoning also rests on an arguably flawed choice of comparator. In a claim of religious discrimination, as was the case in *Achbita*, the applicant’s situation should be assessed in comparison to situations of people expressing no beliefs rather than to situations of people expressing other kinds of beliefs.

These are some of the reasons why the *Achbita* ruling has been critically received by anti-discrimination law scholars, many of whom have underlined that it provides prejudiced and overcautious employers with a blueprint to avoid dealing with religious pluralism in the workplace and, consequently, discriminate on the basis of religion (or, for that matter, on the basis of philosophical or political beliefs). All they need to do now is implement an overall ban on the expression of all

internal rule at issue in the main proceedings was applied differently to Ms Achbita as compared to any other worker. Accordingly, it must be concluded that an internal rule such as that at issue in the main proceedings does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78.”).

¹⁰¹ Case C-157/15, *Achbita*, at ¶ 30.

convictions,¹⁰² which will not qualify as a form of discrimination.¹⁰³ This normative result of the rulings is also at odds with the project of a pluralist society that infuses the general program of anti-discrimination law in the first place,¹⁰⁴ thus echoing the loss of purpose and a-teleological interpretation of the ways in which anti-discrimination law is supposed to govern the workplace. The wording of the ruling certainly testifies to the fact that, had the company prohibited the expressions of belief corresponding to one particular faith, or even those of religious convictions (as opposed to other types of convictions), the court's symmetrical reasoning might have led to the finding of an instance of discrimination, as not all workers (and/or not all convictions) would have been treated similarly badly.

This case is also a clear illustration of the ways in which formalistic and symmetrical modes of reasoning with respect to equality and non-

¹⁰² In fact, this is precisely what the highest French judicial court eventually ruled as it closed the case subsequent to the CJEU's preliminary opinion: the firing of Ms. Bougnaoui decided by her employer on the basis of customer preferences is deemed illegal (because it is discriminatory) only because the company did not have an internal neutrality policy at the time of the decision. *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., Nov. 22, 2017, Bull. civ. V, App. No. 13/19.855 (Fr.) ("Qu'en statuant ainsi, alors qu'il résultait de ses constatations qu'aucune clause de neutralité interdisant le port visible de tout signe politique, philosophique ou religieux sur le lieu de travail n'était prévue dans le règlement intérieur de l'entreprise ou dans une note de service soumise aux mêmes dispositions que le règlement intérieur en application de l'article L. 1321-5 du code du travail et que l'interdiction faite à la salariée de porter le foulard islamique dans ses contacts avec les clients résultait seulement d'un ordre oral donné à une salariée et visant un signe religieux déterminé, ce dont il résultait l'existence d'une discrimination directement fondée sur les convictions religieuses . . .").

¹⁰³ This ban will not qualify as discrimination to the extent that the ban is objectively justified by a legitimate aim and the means employed are appropriate and necessary. *See* Case C-157/15, *Achbita*, at ¶ 45; *see also* Eva Brems, *European Court of Justice Allows Bans on Religious Dress in the Workplace*, IACL-AIDC BLOG (Mar. 26, 2017), <https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace> [<https://perma.cc/B2SJ-RE54>] ("In that sense, the judgment can be read as a 'how-to' for employers wishing to discriminate against headscarf wearers: introduce a neutrality policy that applies to all types of religious dress; apply it consistently; apply it only to front-office employees; and if you want to dismiss a person, make sure to motivate why you cannot offer that person a back-office job.").

¹⁰⁴ *See* Consolidated Version of the Treaty on European Union art. 2, July 6, 2016, 2016 O.J. (C 202) 17 ("The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.").

discrimination law hinder their ability to address indirect forms of discrimination—ones that do not take the form of direct classification. Anti-discrimination scholars who had tackled the issue before these 2017 CJEU rulings had mostly considered that neutral bans in the workplace would likely constitute “indirect discrimination on the basis of religion, as they seem to disproportionately affect non-Christian faiths, which are more often acquainted with dress codes”¹⁰⁵ This also explains the dominant—if not unanimous—critical tone of scholarly commentary on the 2017 rulings.¹⁰⁶

The court unfolded a highly formalistic reasoning, finding that as long as it (1) pursues a legitimate aim, (2) is appropriate and pursued in a consistent and systematic manner, and (3) is limited to what is strictly necessary, an internal neutrality rule should not lead to indirect forms of discrimination.¹⁰⁷ It lists these three conditions as allowing to rule out an instance of indirect discrimination, but gives no guidance or assessment as to what they truly refer to. For instance: would a supermarket that caters to religious clients by vending religiously vetted foods be “consistent” if they required (religious) neutrality from their personnel? Or: as it rules that as long as a neutrality policy “only covers those employees who interact with customers” it can be deemed necessary, it fails to explain what “interaction” refers to—not to mention the front-office–back-office situation it risks generating.¹⁰⁸ Could a janitor wearing a uniform (and therefore, identifiable as an employee) thus be subjected to such a rule on the grounds that he or she might come across customers, or would that only apply to employees whose job it is to actually speak with customers? All these questions remain unanswered as the court only provided the keywords of an anti-discriminatory checklist but refrained from giving their meaning—thus hindering their actual applicability and effectiveness.

¹⁰⁵ Titia Loenen, *The Headscarf Debate: Approaching the Intersection of Sex, Religion, and Race Under the European Convention on Human Rights and EC Equality Law*, in EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 320–21 (Dagmar Schiek & Victoria Chege eds., 2009).

¹⁰⁶ See sources cited *supra* note 12.

¹⁰⁷ Case C-157/15, *Achbita*, at ¶¶ 37–42.

¹⁰⁸ See Katayoun Alidadi, *Out of Sight, Out of Mind? Implications of Routing Religiously Dressed Employees Away from Front-Office Positions in Europe*, 1 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 87 (2013) (Workers who wish to express their convictions (religious or otherwise) may risk being closeted in back-office jobs.).

European human rights law does not seem to fare much better in this respect, as it has consistently failed to find breaches of the European Convention on Human Rights Article 14 non-discrimination clause in cases involving religious freedom when plaintiffs were Muslim.¹⁰⁹ Its rulings on the burqa bans against France and Belgium epitomize this failure: in all four cases, the applicants were Muslim women who claimed that the bans (both of them phrased in facially neutral terms) amounted to indirect forms of discrimination they experienced as Muslim women. Even though the court did express its concern vis-à-vis growing tendencies of Islamophobia in European societies that weigh on certain categories of the population especially,¹¹⁰ it declined to read the bans as discriminatory on the grounds that they pursued a legitimate aim—one that it famously designed for the occasion, i.e., the conditions of “living together.”¹¹¹ Although these rulings upholding the burqa bans are emblematic, there are many other examples in which the court has declined to find facially neutral laws and policies discriminatory. In that, the ECHR’s case law on religious freedom illustrates that the absence of classification is enough for rejecting a claim of discrimination. The court simply does not look beyond that static conclusion. It does not engage in the more dynamic assessment in terms of (anti-)subordination.

Overall, it seems that European legal standards on religious discrimination are not significantly higher than those defined by the United States Supreme Court that fail to grasp the racially unequal disparate impact of a number of facially neutral legal rules.

¹⁰⁹ Although the court rarely finds violations of Article 14 in conjunction with Article 9 (freedom of religion), the bell does ring differently when plaintiffs are Christian. *See, e.g.,* Thlimmenos v. Greece, App. No. 34369/97, 2000-IV Eur. Ct. H.R. 263 (Greece is found to have breached both Articles 9 and 14 as a Jehovah’s Witness was denied access to a profession for failure to enlist (for religious motives) for military service.).

¹¹⁰ *See, e.g.,* S.A.S. v. France [GC], App. No. 43835/11, 2014-III Eur. Ct. H.R. 291, 378–79, ¶ 149 (“In this connection, the Court is very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010 (see the observations of the Human Rights Centre of Ghent University and of the non-governmental organisations Liberty and Open Society Justice Initiative, paragraphs 98, 100 and 104 above). It is admittedly not for the Court to rule on whether legislation is desirable in such matters. It would, however, emphasise that a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance . . .”).

¹¹¹ For the acknowledgement that the conditions of “living together” can constitute a legitimate aim related to the protection of the rights of others, see *id.* at 371, ¶¶ 121–22.

B. *Shielding Discrimination from Equality and Anti-Discrimination Law*

It is particularly striking when American constitutional law and European human rights or anti-discrimination law are compared, to see how prompt judicial actors are to invoke a number of legal principles that actually operate as shields preventing the affirmation and application of the Equality Clause (U.S. law or of anti-discrimination law). It is thus not uncommon for courts to refer either to a particular understanding of the public/private divide or to modes of articulation of state/federal (U.S. law) or domestic/transnational (European law) in order to contain and eventually refuse the application of equality and anti-discrimination law.¹¹²

1. The Public/Private Divide as a Limit on Equality Law

To what extent do anti-discrimination norms regulate private relations? The affirmation of anti-discrimination law in the field of employment has marked a major upheaval in terms of limiting private individuals' contractual freedom and autonomy; and in the United States, this is one of the main reasons why the Civil Rights Act has appeared to many as revolutionary as it regulates private action.¹¹³ Consequently, the paradigm of equality and non-discrimination certainly does apply to a wide host of private relations (employment, housing, provision of goods and service, etc.);¹¹⁴ but as it is, the broader theoretical question of its

¹¹² Other authors have underlined these and other factors as explaining the enduring legacy of racial inequality in American constitutional law. See Gotanda, *supra* note 70, at 3 (listing the public/private divide among other "color-blind constitutionalism themes"); see also Cheryl I. Harris, *In the Shadow of Plessy*, 7 J. CONST. LAW, 867, 869 (2005) ("Concepts of neutrality, federalism, and private ordering embraced in *Plessy* still infuse key debates and framings of contemporary constitutional disputes.").

¹¹³ Civil Rights Act of 1964, 78 Stat. 241 (1964). Pub. L. No. 88-353.

¹¹⁴ The American 1964 Civil Rights Act covers public accommodations (hotels, restaurants, theaters, etc.), public facilities, public education, and employment. Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2018). The EU anti-discrimination legislation (i.e., essentially the race directive 2000/43 and the framework directive 2000/78) cover employment, education, the provision of goods and services as well as social protection as far as racial discrimination is concerned, and "only" employment and vocational training as far as religion, disability, age, sexual orientation, and sex are concerned. Council Directive 2000/43/EC, *supra* note 7; Council Directive 2000/78/EC, *supra* note 7.

legitimacy to apply legally to these private relations remains somewhat disputed. With respect to the questions examined here, one question that remains unsettled is the extent to which—or the circumstances under which—(if at all) private organizations (associations, corporations, unions, clubs, etc.) can discriminate on the basis of religion when they make employment or membership decisions? This is certainly a vexing and complex question.

Philosophically, it was strikingly captured early on in the development of the legal paradigm of non-discrimination. In her controversial intervention à propos the Little Rock events,¹¹⁵ Hannah Arendt suggested that “enforced integration is no better than enforced segregation,”¹¹⁶ and subsequently sketched a distinction between the political sphere in which strict equality should be enforced, and the social sphere that she defined as a “hybrid . . . between the political and the private,”¹¹⁷ in which, to the contrary, discrimination ought to be the governing principle. Strikingly, this Arendtian notion that the law should acknowledge its limitations and refuse to impose equality, tolerance, and pluralism in a number of social spaces finds strong echoes in equality and anti-discrimination law—both in the United States and in Europe.

In the United States, references to the public/private divide have been read as commanding limits to the actual scope and application of the Equal Protection Clause since its earliest stages. For many authors, constitutional law should be read as prescribing that discrimination is unconstitutional only in the realm of state action (the constitutional prohibition on discrimination applies only to governmental action), and that discrimination in the private sphere remains outside the scope of the Fourteenth Amendment (which does not empower Congress to pass laws about equality unless they are under the competence of Article I of the original Constitution—usually the Commerce Clause). Hence the highly

¹¹⁵ From the outset, Arendt’s intervention was indeed criticized as the expression of a fundamental misunderstanding of issues related to race. See, e.g., ROBERT PENN WARREN, WHO SPEAKS FOR THE NEGRO? 325–54 (1965) (interview with Ralph Ellison). But see also Hourya Bentouhami, *Le cas de Little Rock: Hannah Arendt et Ralph Ellison sur la question noire*, 30 TUMULTES 161 (2008); Michael D. Burroughs, *Hannah Arendt, “Reflections on Little Rock,” and White Ignorance*, 3 CRITICAL PHIL. RACE 52 (2015). See generally Maribel Morey, *Reassessing Hannah Arendt’s “Reflections on Little Rock”*, 10 L., CULTURE & HUMAN. 88 (2014).

¹¹⁶ Hannah Arendt, *Reflections on Little Rock*, DISSENT, Winter 1959, at 45, 49 (quoting William Faulkner).

¹¹⁷ *Id.* at 51.

sensitive issue of the determination of the limits of state action.¹¹⁸ Hence, also, the importance of a number of constitutionally protected rights that shape and indeed restrain the scope of anti-discrimination law. Neil Gotanda explains that “[u]nder the color-blind mode of constitutional analysis, freedom of contract, freedom of association and speech, and free exercise of religion protect certain racially based acts when made in the private sphere.”¹¹⁹ This has appeared in broad light in a number of controversial rulings limiting the scope and applicability of equality and anti-discrimination law, such as in the *Boys Scouts of America v. Dale* case,¹²⁰ where the Supreme Court held that the organization had the right to exclude homosexuals from membership based on freedom of association and despite the anti-discrimination law requirement requiring equal treatment in public accommodations.¹²¹

The invalidation of the civil rights legislation in 1883 rested precisely on the notion that the Fourteenth Amendment did not empower Congress to regulate private conduct and private rights.¹²² The core of the constitutional challenge in that case was not so much directed towards the merits of the 1875 Civil Rights Acts that prohibited racial discrimination in public accommodations, but rather towards whether Congress had the authority to pass the Act in the first place. As he argued that the Equal Protection Clause could not be a valid ground for the said

¹¹⁸ Symposium, *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

¹¹⁹ Gotanda, *supra* note 70, at 8.

¹²⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *see also* ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOYS SCOUTS OF AMERICA* V. *JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION (2009).

¹²¹ In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court held that the Minnesota Human Rights Act that required the United States Jaycees to admit women as full voting members did not abridge either male members' freedom of intimate association or their freedom of expressive association, as several features of the Jaycees, including its large size, unselective membership, and purpose, placed it outside the sphere of relationships protected by the First Amendment. Of course, this particular issue has grown immensely important especially as freedom of religion has been increasingly used by a number of social actors, in the United States as elsewhere, to claim exemptions from equality and non-discrimination laws. *See also* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, & EQUALITY* (Susanna Mancini & Michel Rosenfeld eds., 2018).

¹²² *Civil Rights Cases*, 109 U.S. 3, 35, 41 (1883) (Harlan, J., dissenting). Justice Harlan, dissenting, insisted that the Thirteenth Amendment's prohibition of slavery enabled Congress to eliminate not only slavery but also its "badges and incidents." *Id.* at 3435. He also argued that inns and other businesses serving the public should be considered quasi-state agencies. *Id.* at 41.

Act since the former's purpose was to abolish slavery whereas the latter intended to tackle segregation,¹²³ Justice Bradley insisted on the difference between legal and social equality. While legal equality might have become a constitutional requirement, he insisted that social equality was a matter of private choice that ought to remain beyond the reach of governmental intrusion.

Later, the ruling in *Plessy* also rests on some understanding of a private sphere that ought to remain protected from governmental intrusion in the name of equality. Justice Brown's opinion is thus based on a distinction between political and social equality—only the former being acceptable, while the latter is manifestly out of reach of the law:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.¹²⁴

Even Justice Harlan's articulation of colorblindness did not fundamentally challenge the consequences of this public/private distinction on the containment of equality law. Scholars that have thoroughly analyzed his opinions converge in identifying two among them that contrast with his otherwise consistent colorblind creed. One of them pertained to a state law punishing interracial adultery more severely than same-race adultery, and the other concerned a decision by a local school board to close a school attended by Black students for financial reasons, while maintaining another school that catered to white students. Linda Przybyszewski reads these two opinions as explainable precisely by the fact that Harlan viewed both the issues of schooling and marriage as too intimate to fall under the scope of equality law: "Although Harlan moved public accommodations out of the category of social rights and into that of civil rights, he shied away from doing the same with the more intimate contact of schooling, which might result in friendships and more, and marriage, in which racial identity would indeed be lost."¹²⁵

¹²³ *Id.* at 21 (majority opinion). In a problematic de-historicization of the structural causes of racial inequality, Justice Bradley asks, "What has [segregation] to do with the question of slavery?" (as if slavery, its abolition, and segregation were not linked). *Id.*

¹²⁴ *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

¹²⁵ LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 87 (1999).

In fact, this is also the reason put forth by numerous scholars who account for the belated granting of certiorari by the Supreme Court to a case challenging anti-miscegenation laws. The Court in fact declined to accept one such case right shortly after ruling on *Brown*. Says Andrew Kull: “*Naim v. Naim* was an embarrassment only because it was out of the question, in 1955, that the Court *uphold* the constitutionality of a law prohibiting interracial marriage”¹²⁶—but also that it strike it down. As is well known, it is not before 1967 that the Supreme Court struck down such statutory prohibitions on interracial marriage.¹²⁷

Such modes of reasoning are, again, echoed in recent developments of European law pertaining to religious pluralism. In the *Achbita* case for instance, the CJEU chose to rely exclusively on the employers’ right to conduct a business elevated by Article 16 of the EU Charter of Fundamental Rights (CFREU),¹²⁸ as it ruled that an employer’s choice to implement an internal neutrality policy prohibiting employees from expressing any kind of belief in the workplace was legitimate in principle. This mode of reasoning not only chooses to rely on a right of corporations to determine their image (akin to what the U.S. Supreme Court could refer to as “freedom of expressive association”), it also failed to make any reference to other rights elevated by the CFREU such as workers’ freedom of religion¹²⁹ or the right to fair working conditions.¹³⁰

As it chose to only refer to the right to conduct a business, the court effectively positioned a shield between the company and anti-discrimination law on the basis of the respect that is legally due to private employers’ choices. Such protection of the private choice via a reference to employers’ and companies’ fundamental rights within the framework of anti-discrimination law effectively insulates the workplace from any robust understanding—let alone application—of anti-discrimination law. In other words, this is a clear example of the ways in which the very framing of the issue as a “private” issue, whose resolution ought to be

¹²⁶ KULL, *supra* note 57, at 160 (referring to *Naim v. Naim*, 350 U.S. 891(1955)).

¹²⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹²⁸ The CJEU ruled that an employer’s choice to “project an image of neutrality” ought to be protected as one aspect of the right to conduct a business. *See* Case C-157/15, *Achbita v. G4S Secure Solutions NV*, 7, ¶ 38 (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157> [<https://perma.cc/A9HC-ELQE>].

¹²⁹ Charter of the Fundamental Rights of the European Union art. 16, 2000 O.J. (C 384) 1, 12; *Id.* art. 10, at 10.

¹³⁰ *Id.*, art. 31, at 15.

determined by the legitimacy of the autonomous choice of an employer to display an image of neutrality, precludes the full application of anti-discrimination law. It is all the more true that the sister ruling to *Achbita* delivered by the court on the very same day¹³¹ only reinforces this interpretation. The combination of the two rulings does indeed read as follows: although they ought not to restrict their employees' freedom of religion on the grounds of their customers' prejudiced preferences, employers (and corporations) can legitimately anticipate such prejudices by internalizing neutrality policies—thereby avoiding any “risk” of interfering with their employees' expression of beliefs and convictions.¹³² In other words, the CJEU has effectively given companies a blueprint that protects them from claims of religious discrimination from the moment they adopt an internal neutrality policy. The result of these important interventions is thus one that delineates “the workplace” as a specific social space that can well be shielded from any robust intervention of

¹³¹ Case C-188/15, *Bougnou v. Micropole SA* (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0188> [<https://perma.cc/68CE-M7R6>]. In the *Bougnou* case, the court was asked to determine whether the firing of (yet another) female Muslim employee because of customer preferences was admissible. *Id.* at 45. In this case, the applicant had been working in a company for several years without any difficulty arising. *Id.* Although her wearing of the hijab had been discussed as she had been employed, it had always been accepted that she wore the hijab. *Id.* After one particular work assignment, however, the client for which she had provided in-house service requested that in the future, the company no longer sent professionals wearing the hijab. *Id.* Her employer subsequently asked her to remove the headscarf and she was fired after refusing to do so. *Id.* In court, her employer's defense rested on customer preferences. More precisely, he claimed that because of these expressed preferences of one of his customers, being unveiled had become a “genuine and determining occupational requirement” for his employees—and that European anti-discrimination law allowed for differential treatment to take place in such circumstances. *Id.* at 3, 5. This of course, was an easy case for the Court of Justice of the European Union (CJEU). It first recalled that it is only “[i]n very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement[,]” (a notion that can be compared to that of bona fide occupational requirements under U.S. anti-discrimination law) and went on to establish that the concept of a “genuine and determining occupational requirement” within the meaning of directive 2000/78 “refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.” *Id.* at 8. It thus answered negatively to the question referred by the French Court of Cassation, thereby indicating that the decision to fire an employee because of a customer's distaste for her religion could amount to religious discrimination. *Id.* at 5; Council Directive 2000/78/EC, 2000 O.J. (L 303) 16, § 23.

¹³² As a matter of fact, this is exactly how the French Court of Cassation, in front of which the *Bougnou* case returned after the CJEU's preliminary reference, reasoned. *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., Nov. 22, 2017, Bull. civ. V, No. 13-19.855.

anti-discrimination law with respect to religion. The fact that this particular social space is by definition a private one, and that the precise legal artifact that effectively shields it away from the operation, and application of anti-discrimination law is the right to conduct a business are further elements that confirm that, in Europe too, the public-private divide is a central element of the limitation of the scope of anti-discrimination law.

2. Local Autonomy as a Limit on Equality Law

There is another cross-cutting legal concept that similarly plays out to restrict and contain the reach of equality and anti-discrimination law principles: that of local autonomy. Both American and European law swarm with cases in which judges have used that concept in order to hold back equality and non-discrimination clauses.

In the United States, the long constitutional history of segregationist legal rules is replete with rulings whereby federal judges, including Supreme Court Justices, have declined to strike them down on the grounds that the issue at stake (be it the regulation of public transportation, educational policy, or other such issues) and related matters belong to the various states. This mode of reasoning is of course structural to American law, given the federal nature of the legal system. It remains noteworthy that it plays out massively on the issues that this Paper contemplates, even though equal protection requirements have been held to apply to the federal government.¹³³ It is also worth noting that “[d]e jure segregation was primarily enacted as a matter of state law[,]”¹³⁴—hence the particular acuteness of the issue of whether federal constitutional law constrained and even forbade legal segregation at the state level.

Again, going back to those opinions written by Justice Harlan that do not match the vibrant colorblind creed he expressed in his famous dissent over the *Plessy* case,¹³⁵ several scholars consider that one of reasons why Harlan did not oppose the decisions of a local board of

¹³³ *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that Fifth Amendment equal protection requirements apply to the federal government).

¹³⁴ *Harris*, *supra* note 112, at 873.

¹³⁵ Scholars that have thoroughly analyzed Justice Harlan’s opinion converge in identifying two of those. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

education to close a school that catered to Black students for financial motives, while maintaining the school attended by white students, had to do with the fact that schooling was, at any rate, a matter belonging to the respective states.¹³⁶ This rationale remains essential throughout much of the constitutional struggles over segregation.

Here again, similar patterns are observable in European law and in particular, in the case law of the ECHR whose religious freedom jurisprudence preserves a significant role of domestic determinations. Here again, there is a structural element to this: the doctrine of the national margin of appreciation has been an instrumental part of the Strasbourg case law since its early years,¹³⁷ and classically allows the court to loosen the hold of European law over domestic determinations and defer to them.¹³⁸ For instance, while the Convention-protected right to private and family life requires that some form of union be legalized and accessible for same-sex couples, states typically remain free to restrict marriage itself to heterosexual unions.¹³⁹ Similarly, although States remain free to consider surrogacy arrangements legal or not, it stems from the right to private life that a child who is legally born out of such

¹³⁶ *Cumming v. Richmond Cty. Bd. of Educ.*, 175 U.S. 528, 545 (1899). A unanimous opinion written by Harlan, reads: “[W]hile all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.” *Id.*

¹³⁷ The early seeds of the doctrine of the margin of appreciation can be found as early as the Belgian linguistics case of 1968. Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, App. No. 1474/62, 6 Eur. Ct. H.R. (Ser. A) (1967).

¹³⁸ The doctrine is in fact taking an increasing importance as the court seems to have chosen to respond to backlash and contestation over the past decade by a “procedural turn” and a revived doctrine of subsidiarity. Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, 9 J. INT’L DISP. SETTLEMENT 199 (2017); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487 (2014).

¹³⁹ *Schalk v. Austria*, App. No. 30141/04, 2010-IV Eur. Ct. H.R. 409. Even though States ought to legalize some form of same-sex partnership, *Oliari v. Italy*, App. No. 18766/11 (July 21, 2015), <http://hudoc.echr.coe.int/fre?i=001-156265> [<https://perma.cc/G3LJ-PPMD>], they ought to recognize the legal effects of same-sex marriages validly concluded abroad as well, *Orlandi v. Italy*, App. No. 26431/12 (Dec. 14, 2017), <http://hudoc.echr.coe.int/tur?i=001-179547> [<https://perma.cc/4NRP-4JBK>].

an arrangement abroad is entitled to the legal recognition of their parents (genetic and intentional).¹⁴⁰

However, as it has been noted, the ECHR's Article 9 (religious freedom) seems to be one of the Convention articles whose judicial interpretation carves out a particularly important space for states' margin of appreciation.¹⁴¹ In fact, not rarely does the court explicitly refer to the States' "wide"¹⁴² margin of appreciation in matters pertaining to religious freedom. As a result, States have been found to legitimately: require that people appear bareheaded on their drivers' license or passport photographs;¹⁴³ or prevent schoolteachers,¹⁴⁴ university students,¹⁴⁵ and school students,¹⁴⁶ as well as public nurses¹⁴⁷ from wearing a hijab or full-face veils.¹⁴⁸ Each time, the court has found that the States' decision did not exceed their margin of appreciation.

Although the ECHR legal system is emblematic of the ways in which the concept of local autonomy, under the guise of the national margin of

¹⁴⁰ See the saga of French cases: *Mennesson v. France*, App. No. 65192/11, 2014-III Eur. Ct. H.R. 255; *Labassee v. France*, App. No. 65941/11 (June 26, 2014), <http://hudoc.echr.coe.int/eng?i=001-145180> [<https://perma.cc/TC8L-BDT7>]; *Foulon v. France*, App. No. 9063/14 (July 21, 2016), <http://hudoc.echr.coe.int/eng?i=001-164968> [<https://perma.cc/RG83-WP35>]; *Laborie v. France*, App. No. 44024/13 (Jan. 19, 2017), <http://hudoc.echr.coe.int/eng?i=001-170369> [<https://perma.cc/Q95L-JC4G>]; and ultimately, Adv. Opinion No. P16-2018-001 (Apr. 10, 2019); and Cass. AP, Oct. 4, 2019, No. 10.19-053. More recently, see: *C. v. France & E. v. France*, Apps. Nos. 1462/18 & 17348/18 (Nov. 19, 2019), <http://hudoc.echr.coe.int/eng?i=001-199497> [<https://perma.cc/LQ4X-WGEL>].

¹⁴¹ Many Art. 9 ECHR rulings include explicit references to States' margin of appreciation, including: *Şahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R. 173, ¶ 154 ("[T]he Contracting States enjoy a certain margin of appreciation in this sphere [education]."); *Kurtuluş v. Turkey*, App. No. 65500/01, 2006-II Eur. Ct. H.R. 297; *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447; *Dogru v. France*, App. No. 27058/05, ¶ 72 (Dec. 4, 2008), <http://hudoc.echr.coe.int/eng?i=001-90039> [<https://perma.cc/L3HP-MBQC>]; *Ebrahimian v. France*, App. No. 64846/11, 2015-VIII Eur. Ct. H.R. 99.

¹⁴² *S.A.S. v. France* [GC], App. No. 43835/11, 2014-III Eur. Ct. H.R. 341, ¶ 129 ("As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary.'").

¹⁴³ *Mann Singh v. France*, App. No. 24479/07 (Nov. 13, 2008), <http://hudoc.echr.coe.int/eng?i=001-89848> [<https://perma.cc/5UYS-TBDP>].

¹⁴⁴ *Dahlab*, 2001-V Eur. Ct. H.R. 447.

¹⁴⁵ *Şahin*, 2005-XI Eur. Ct. H.R. 173.

¹⁴⁶ *Aktas v. France*, App. No. 43563/08 (June 30, 2009), <http://hudoc.echr.coe.int/eng?i=001-93697> [<https://perma.cc/U5T6-RA8A>]; *Dogru*, App. No. 27058/05.

¹⁴⁷ *Ebrahimian v. France*, App. No. 64846/11, 2015-VIII Eur. Ct. H.R. 99.

¹⁴⁸ *S.A.S. v. France* [GC], App. No. 43835/11, 2014-III Eur. Ct. H.R. 341.

appreciation, operates as a shield to the full application of freedom of religion and the non-discrimination principle, similar observations can be made with respect to EU anti-discrimination law. As several authors had underlined well before the CJEU was given opportunities to interpret “religion” under directive 2000/78, the EU legal order was bound to award some discretion to Member States under anti-discrimination law—if only because of the necessity to respect and allow the significantly divergent domestic approaches to anti-discrimination law in general.¹⁴⁹ Mark Bell, for instance, evoked the court’s commitment to “moral subsidiarity” in the actual operation of EU anti-discrimination law as an important element in accounting for the failure of transnational anti-discrimination legal mechanisms to impose a binding rule of recognition of same-sex marriages.¹⁵⁰ Similar considerations were bound to infuse the reflection on religious non-discrimination if only because of the considerable normative diversity there is on the particular topic throughout EU Member States. In the Netherlands, for example, it has long been deemed unthinkable to refuse to employ a Muslim woman as a public school teacher just because she wears a headscarf,¹⁵¹ whereas in several other countries, such as France,¹⁵² or, to a different extent, Germany,¹⁵³ public school teachers are or can routinely be prevented from any expression of religion.

In sum, some of the lines of criticism that have been addressed to the judicial response to racial inequality and segregation in the United States do seem to fruitfully enlighten some aspects of the legal response that issues of religious pluralism are receiving in Europe today. In particular,

¹⁴⁹ See ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS, *supra* note 35.

¹⁵⁰ MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION 120 (2002).

¹⁵¹ Mark Hill, *Freedom of Religion: Strasbourg and Luxembourg Compared*, in RELIGION AND EQUALITY: LAW IN CONFLICT 32 (W. Cole Durham, Jr. & Donlu Thayer eds., 2016).

¹⁵² Hennette Vauchez, *Is Laïcité Still Liberal?*, *supra* note 39.

¹⁵³ In 2003, the Federal Constitutional Court determined in the *Lutin* case that German states had the power to ban teachers wearing headscarves, as long as they passed specific legislation on the matter that complied with the federal constitution. As the proceedings against Ms. Lutin had not been based on such legislation, she won her case—but it was a Pyrrhic victory, for soon after, German Länder started enacting statutes prohibiting the wearing of headscarves for teachers and other public servants. BVerfG, 2 BVR 1436/02, Sep. 24, 2003, http://www.bverfg.de/e/rs20030924_2bvr143602.html [<https://perma.cc/3UXD-NV37>]. Even though the minority opinion insists that the veil is a symbol of political Islam as well as of the subjugation of women, the majority opinion underlines that the person’s view must be taken into account. For a comparative account, see DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE (2006).

the somewhat cynical and purposeless formalistic interpretation of equality and non-discrimination clauses as well as the readiness of judicial authorities to mobilize various forms of cross-cutting legal concepts (such as the public-private divide or the federal/transnational-local one) similarly result in weakening the strength of these on both sides of the Atlantic. If such similarities have to do with judges' modes of reasoning, it is noteworthy that further ones can be identified in the outcomes that they produce.

III. OUTCOMES

Here again, the starting point of this attempt in meta-comparative analysis lies in the critical theoretical work that has been produced by various strands of American legal scholarship, including critical race theory, with respect to the concept of colorblindness. It is contended here that some of the insights offered by this literature may fruitfully be transposed to the contemporary developments of European law in the face of religious pluralism—especially as they confirm the centrality of the concept of neutrality. There are two main lines of analysis that I thus wish to borrow from critical legal scholarship vis-à-vis the role of colorblindness in the face of racial inequality. First, the affirmation that despite leads to the contrary, colorblindness does not prevent nor eradicate racial othering.¹⁵⁴ Second, the notion that colorblindness conveys notions of racial purity that are or have been instrumental in the preservation of racialized forms of privilege and supremacy. It will be argued here that European neutrality too can be analyzed along those lines, as it contributes to the othering of Muslim minorities and also rests on some versions of purity and “sanitization” of a number of social spaces.¹⁵⁵

A. *The Othering Intrinsic to Colorblindness and Religious Neutrality*

Harlan's famous dissent in the *Plessy* case is instrumental to the demonstration that colorblindness is not an antonym to racial othering. Harlan may well have argued that the Constitution “neither knows nor

¹⁵⁴ *Infra* Section III.A.

¹⁵⁵ *Infra* Section III.B.

tolerates classes among its citizens.”¹⁵⁶ The colorblind norm that he subsequently elevated can be read, following Ian Haney López’s work on “race” as a “relational category,” i.e., one that is not absolute but rather relative.¹⁵⁷ In that sense, “colorblindness” as a constitutional norm could still be accommodated with the empirical (social, moral, etc.) belief that races did exist—and ought not to be coerced into mingling. As a consequence, Harlan’s point might have been a legalistic one (the Constitution ought not to know or tolerate racial classes) but certainly did not extend beyond the legal sphere of reasoning. Nothing in Harlan’s dissent is incompatible with the notion that races do exist to the extent that they organize social life. He merely prescribes what importance and role they should (or should not) be given as far as legal taxonomy. At any rate, other segments of his famous dissent famously support the view that he himself was hardly convinced or committed to the principle he articulated.

To a certain extent, this ambiguity on which Harlan’s dissent lies also has infused much of the later debates on sex and gender. As discrimination on the basis of sex was gradually prohibited in the United States and Europe as in many other parts of the world, a number of judges and legal authorities were led to affirming that any classification on the basis of sex was to be struck down. A robust anti-classification approach of sex discrimination does not, however, dismantle the very existence of the sexes. Neither the admission of women into Virginia Military Institute (United States)¹⁵⁸ nor the inclusion of men in post-natal benefits (EU)¹⁵⁹—to take but isolated examples—have fragilized or destabilized in any way the classification of people as either men or women that thus

¹⁵⁶ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

¹⁵⁷ Ian Haney López writes that races are “not . . . absolute categories, but . . . comparative taxonomies of relative difference.” LÓPEZ, *supra* note 58, at 20. He thus reads the prerequisite cases as a process of the legal production of Whiteness through a series of cases in which judges establish who is non-white.

¹⁵⁸ In U.S. law, the U.S. Supreme Court ruling, in which the Virginia Military Institute’s male-only policy was deemed unconstitutional, was certainly a turning point. *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁵⁹ See, for instance, the striking case in which the court ruled that a father should be entitled to a breastfeeding benefit in equal terms with a mother. Case C-104/09, *Álvarez v. Sesa Start España ETT SA*, [2010] E.C.R. I-8661, ¶ 36; Case C-476/99; *Lommers v. Minister van Landbouw*, [2002] E.C.R. I-2893 (on the equal admissibility of male and female civil servants to spots in daycare facilities, with an interesting reasoning on gender stereotyping and the ways in which it affects both men and women).

continues to govern American and European law. In fact, the very existence of the sexual binary was only later challenged as the issue of the rights of the LGBTQIA emerged.¹⁶⁰ And even then, it can be argued that only the claim by intersex people that an additional category of sex be recognized in order to account for their specific “neither-nor” identity really jeopardized a binary approach to sex. By contrast, indeed, the rights of transgender people to change their legal sex for instance (or to marry, give birth, etc.) do not question the existence of the two categories of male and female; they only imply that people be allowed to circulate from one to another. The claims of intersex people are more radical in that sense, for they question and potentially dismantle the binary itself.¹⁶¹ To a certain extent, one might consider that the real challenge for the sexual binary is the intersex—and potentially then, that the real challenge for racial categories are not the existence of races but that of mixed-race individuals.¹⁶² As the detour via the concept of sex shows, a sex-blind approach to legal norms does not necessarily entail the erasure of sexual

¹⁶⁰ *B. v. France*, App. No. 13343/87, (Mar. 25, 1992), <http://hudoc.echr.coe.int/eng?i=001-57770> [<https://perma.cc/9L3M-J8NL>], is the first case in which the European court rules that the impossibility for transgender people to have their identification documents and civil registers modified is a violation of their right to private life (for another very important case, see *Goodwin v. United Kingdom* [GC], App. No. 28957/95, 2002-VI Eur. Ct. H.R. , ¶ 1). Subsequent to this important ruling, many countries allowed a right of transgender people to change their initially inalterable legal sex; many of them did, however, subject this right on a number of conditions (including prior sterilization) and exterior (medical, judicial) verifications. After many soft law recommendations and policy papers were taken at the level of the Council of Europe during the 2000s (see in particular the work of the Commissioner of Human Rights: *Human Rights of Lesbian, Gay, Bisexual, Transgender and Intersex People (LGBTI)*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/commissioner/thematic-work/lgbti> [<https://perma.cc/6AGZ-L5WC>]), the ECHR clarified that the right to change one’s sex ought not to be subjected to prior invasions on physical integrity. *A.P. v. France*, Apps. Nos. 79885/12, 52471/13 & 52596/13 (Apr. 6, 2017), <http://hudoc.echr.coe.int/eng?i=001-172913> [<https://perma.cc/KXU9-WGYV>]; *Y.Y. v. Turkey*, App. No. 14793/08, 2015-I Eur. Ct. H.R. 461.

¹⁶¹ To a certain extent indeed, the most visible part of the transgender person’s claims long lied essentially with the right to obtain the amendment of the civil status registers and/or identification documents in accordance with their wishes. This claim, however, although it challenged the immutability of sex identity, did not challenge its binary nature. When intersex people claim that their assigned sex be neither male nor female but another (whatever its label), it is the binary itself that is challenged. See HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* (2017); STEFANO OSELLA, *THE LEGAL REGIME OF GENDER IDENTITY: A COMPARATIVE ENQUIRY* (EUI PhD Dissertation, Law, 2019); Stéphanie Hennette Vauchez, *Gender Equality in the ECHR*, in *FRONTIERS OF GENDER EQUALITY* (Rebecca Cook ed., forthcoming 2021).

¹⁶² TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS* (2018).

classes; similarly, a colorblind reading of the Constitution does not necessarily entail that no racial classes exist.

In fact, other excerpts of the famous dissent by Harlan confirm this notion that his colorblind creed was perfectly compatible with racial distinctions and othering. His words relating to the “Chinese race”¹⁶³ are telling in this respect, as he describes it as “a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”¹⁶⁴ He further insists that: “[I]n the eye of the law, there is in this country no superior, dominant, ruling class of citizens,” even though:

[T]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.¹⁶⁵

As stems from these excerpts of Harlan’s famous articulation of colorblindness, this concept does not do away or erase racial categories. Time certainly went by since Harlan famously dissented. It is, however, unclear that all derogatory ways of not only distinguishing races but also inferiorizing some would have become a thing of the past. Contemporary constitutional law as it applies, for instance, to American Indians, appears to be a case in point.¹⁶⁶

With this failure of colorblindness to dismantle racial categories in mind, it is fruitful to mobilize Ian Haney López’s research on early American immigration and naturalization law—and in particular, the

¹⁶³ See Earl M. Maltz, *Only Partially Color-blind: John Marshall Harlan’s View of the Constitution*, 12 GA. ST. U. L. REV. 973 (1996) (analyzing cases dealing with American Indian rights that question Harlan’s record in terms of racial progressiveness); see also Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996), and the refutation of these theses by Eric Schepard, *The Great Dissenter’s Greatest Dissents: The First Justice Harlan, The “Color-Blind” Constitution and the Meaning of His Dissents in the Insular Cases for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006).

¹⁶⁴ *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

¹⁶⁵ *Id.* at 559.

¹⁶⁶ Ian Haney López cites a gripping excerpt of a dissenting opinion written by Justice Rehnquist in 1980 in which he “approvingly quoted a description of Indians as ‘fine physical specimens [who] lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.’” López, *supra* note 97, at 13 (Rehnquist, J. dissenting) (alteration in original) (quoting *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)).

ways in which he establishes the relational nature of racial categories that it produced and heavily relied on.¹⁶⁷ López establishes that the legal construction of whiteness was largely the result of labeling candidates to naturalization as “non-whites.” The two categories were largely interdependent; the explicit production of the one (non-whites, in López’s study) simultaneously generated the other.

This goes for both the categories themselves and for the features that were simultaneously associated with them: the production of a largely encompassing category of non-whites in naturalization law¹⁶⁸ not only also results in the shaping of the opposite category of whites, it also generates a discourse of denigration and validation, inferiority and superiority:¹⁶⁹ “because races are constructed diacritically, celebrating Whiteness arguably *requires* the denigration of Blackness.”¹⁷⁰ In other words, the legal construction of racial categories is part and parcel of processes of otherization: as one category is defined and assigned a number of features, another is also oppositionally produced and assigned features. In that, to the extent that colorblindness does not challenge the

¹⁶⁷ LÓPEZ, *supra* note 58, at 30–35. Immigration law explicitly excluded members from certain racial categories from entering the country. In terms of citizenship, the silence of the U.S. Constitution could have activated the English common law principle of *jus soli*, but this is precisely the concept that the Supreme Court denied to *Dred Scott*. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (opinion by Justice Taney) (“[Black people] are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution . . .”). The 1866 Civil Rights Act awarded citizenship to “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . .” Civil Rights Act of 1866, ch. 31, 14 Stat. 27. Later still, the Fourteenth Amendment established that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States.” U.S. CONST. amend. XIV. Although difficulties persisted as children born to non-citizen parents in the United States as well as Native Americans could continue to be denied citizenship until the 1940 Nationality Act. Naturalization also long rested on racial categories as Congress in 1790 restricted naturalization to white people only—hence the fifty-two prerequisite cases establishing that only whites can naturalize (1790–1870) or that whites and Blacks, but not Asians, are eligible (1870–1940s). See LÓPEZ, *supra* note 58, at Chapter 3 and Tables 2 and 3, Appendix A at 165–67.

¹⁶⁸ Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009); Chin, *supra* note 163; see also LÓPEZ, *supra* note 58, at 1 (establishing that immigrants from Mexico or Armenia were deemed “white” whereas those from Hawaii, China, Japan, or Burma fell into the “non-White” category. Others oscillated in-between the two, such as individuals from Syria, India, and Arabia).

¹⁶⁹ “It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or bronze racial color is the hallmark of Oriental despotisms.” LÓPEZ, *supra* note 58, at 39 (quoting *Terrace v. Thompson*, 274 F. 841, 849 (W.D. Wash. 1921)).

¹⁷⁰ *Id.*, at 121. On the oppositional construction of Black and white identity, see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

existence of racial categories, it also does not prevent, halt, or hinder the othering processes that lies at the very principle of racial categories.

Here again, the parallel reading of European developments in the field of religious neutrality requires some effort, for neutrality does not say much about religious classifications. There is, however, considerable traction to the notion that contemporary developments in European law that rest on this concept of neutrality do a lot of work in producing religiously othered communities in Europe; a conclusion that holds especially true for Muslim minorities. As I have established here above, European neutrality has been interpreted over the past two decades so as to allow, if not legitimize, a host of legal restrictions on religious freedom such as policies of neutrality in the workplace, bans on the niqab, bans on the expression of religious beliefs in public schools, etc. Oftentimes, the reasons put forth by domestic and transnational legal actors alike for justifying or upholding these restrictions have either intended to or resulted in “othering” the people and communities who claimed the freedom to engage in the said practices.

This has operated throughout the pitting of a “true meaning” of a particular practice associated with Islam such as, say, veiling against values deemed central to European/Western polities such as: gender equality, secularism, or other more generic and unspecified “republican values.” This, of course, raises a number of issues. One is epistemological and semiotic in nature, for the very possibility of interpreting a sign or practice such as the Islamic veil (or any other religious practice) and associating it with one stable meaning can be doubted.¹⁷¹ Another is legal: as most European legal orders affirm a version of the doctrine of separation between churches and state,¹⁷² it follows that in principle, it is

¹⁷¹ On the variety of meanings from submission to protection, resistance, and protest, see SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 95 (2002) (noting the “complex semiotic of dress codes”); Lama Abu Odeh, *Post-Colonial Feminism and the Veil: Thinking the Difference*, 43 *FEMINIST REV.* 26 (1993). Further, some authors have underlined the challenges experienced by Western societies (institutions and organizations) in interpreting Islam because of differing and potentially diverging structural notions of the public and the private, the religious and the secular, etc. See SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005); Madhavi Sunder, *Piercing the Veil*, 112 *YALE L.J.* 1399 (2003).

¹⁷² *Hasan v. Bulgaria* [GC], App. No. 30985/96, 2000-XI Eur. Ct. H.R. 117, 141–42, ¶ 78 (“[T]he right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”) For domestic illustrations, see, for instance, in the United Kingdom, R

not for secular institutions to interpret, label, or qualify religious beliefs and practices. Despite these serious arguments, however, “the veil” is often given a meaning in European legal discourses that is then pitted against either gender equality, or secularism, or yet other European legal values. Famously in its inadmissibility decision in *Dahlab v. Switzerland*, the ECHR indicated that the circumstances of the applicant (a converted schoolteacher whose students were aged between four and eight and thus deemed “easily influenced”) led to a situation where:

[I]t cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which . . . is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.¹⁷³

In *Ebrahimian v. France*, the court accepted the notion that State neutrality can validly ground restrictions on private individuals’ religious freedoms.¹⁷⁴ In *Achbita*,¹⁷⁵ the CJEU upheld internal neutrality policies based on employers’ right to conduct a business and therefore shape and choose an image of neutrality for their business as valid grounds for restrictions to religious freedom in the workplace. In some countries, yet, other values are opposed to religious freedom. In France, the concept of “essential Republican values”¹⁷⁶ has significantly become quite central to acquisition of nationality cases. There are a number of cases in which judges have considered that women wearing the niqab,¹⁷⁷ men whose

(on the application of *Williamson v. Sec’y of State for Educ. and Emp’t* [2005] UKHL 15 (U.K.), in which a judge refused to interpret religious signs.

¹⁷³ *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447, 463. Such pitting of the veil against gender equality can also be found in other examples. For France, see Stéphanie Hennette-Vauchez, *Laïcité et Egalité entre les Sexes*, 45 TRAVAIL, GENRE ET SOCIÉTÉS (forthcoming 2021).

¹⁷⁴ *Ebrahimian v. France*, App. No. 64846/11, 2015-VIII Eur. Ct. H.R. 99, 130–32, ¶¶ 64–67.

¹⁷⁵ Case C-157/15, *Achbita v. G4S Secure Solutions NV* (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157> [<https://perma.cc/A9HC-ELQE>].

¹⁷⁶ CE Ass., June 27, 2008, Rec. Lebon 286798.

¹⁷⁷ *Id.*

wives wear the niqab,¹⁷⁸ or women refusing to shake hands with representatives of the State during a naturalization ceremony on religious grounds¹⁷⁹ engage in “radical” practices of religion that may lead to their being denied access to French nationality on the grounds that such radical practices run counter to “essential values of the Republic.”¹⁸⁰

Such oppositions between a host of Islamic practices and Western values have thus become significantly present in legal and judicial discourse. They have fed into a process of othering in which legal rules have played an important role. As I have argued elsewhere,¹⁸¹ the very framing of the issue of the niqab as a public policy issue was emblematic of such othering processes; the many steps that led to the 2010 Act that effectively prohibits the concealment of the face in public (and therefore, the wearing of the niqab)¹⁸² consistently “othered” radically pious Muslim women. The parliamentary reports that were written throughout the course of the legislative process are very revealing in that perspective.¹⁸³ For instance, rather than explaining that they sought to tackle the wearing of the niqab as an emerging practice *hic et nunc*, they described it as a practice imported from the Middle East.¹⁸⁴ The very choice of words is illuminating of the process of othering that was at stake in that it was the burqa that was consistently referred to rather than the niqab¹⁸⁵—although the burqa was (and remains) virtually unseen on

¹⁷⁸ CE Ass., Nov. 27, 2013, Rec. Lebon 365587.

¹⁷⁹ CE Ass., Apr. 11, 2018, Rec. Lebon 412462.

¹⁸⁰ Stéphanie Hennette-Vaucher, *Genre et religion: le genre de la nouvelle laïcité*, in LA LOI & LE GENRE. ÉTUDES CRITIQUES DE DROIT FRANÇAIS 715 (Stéphanie Hennette-Vaucher, Marc Pichard, & Diane Roman eds., 2014); Siobhán Mullally, *Gender Equality, Citizenship Status, and the Politics of Belonging*, in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 192 (Martha Albertson Fineman ed., 2011).

¹⁸¹ Stéphanie Hennette-Vaucher, *L'Altra: la straniera: Figura retorica centrale delle 'guerre giuridiche' nel dibattito francese sulla laicità (2004-2013)*, 41 RAGION PRATICA 471 (2013).

¹⁸² Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010, Prohibiting the Concealment of the Face in the Public Space], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

¹⁸³ See ASSEMBLEE NATIONALE, RAPPORT NO. 2262 DE LA MISSION D'INFORMATION SUR LA PRATIQUE DU PORT DU VOILE INTEGRAL SUR LE TERRITOIRE NATIONAL (2010), <http://www.assemblee-nationale.fr/13/rap-info/i2262.asp> [https://perma.cc/5SMJ-Q956].

¹⁸⁴ *Id.* at 25.

¹⁸⁵ The word burqa is generally used to describe a fully covering piece of clothing, that also covers the face including the eyes that are fitted behind mesh screen. By contrast, the niqab leaves the eyes uncovered.

French soil. The choice to refer to one rather than the other creates overtones connoting to the Taliban regime in Afghanistan where women were forced into wearing the burqa from the mid-1990s onwards.¹⁸⁶ Another illustration of the many forms of othering that the 2010 Act simultaneously produced and reproduced can be found in the sanction mechanism that it includes.¹⁸⁷ The main penalty is financial: women who fail to conform to the prohibition to conceal their faces in public can be subjected to a 150-euros fine.¹⁸⁸ But they can also be sentenced to enrollment in a so-called “citizenship internship” (*stage de citoyenneté*). Such training sessions were initially created in 2004 as an alternative to jail sentences applicable for mild criminal convictions.¹⁸⁹ The fact that they were extended to women wearing the niqab is quite interesting in terms of what it reveals from the legislator’s prejudices: if women wearing the niqab are to be trained as citizens, this either means or implies that they are not regarded as citizens in the first place—or minimally, that they are regarded as bad or failed citizens in need of training. Again, a strong othering process is thus at stake here.

This othering process is not merely religion-based. As the secularist norms that disseminate throughout Europe are increasingly questioned in terms of their potentially oppressive or discriminatory impact, some underline the racialization of religion processes that are at stake. Joan W. Scott for instance has described some iterations of secularism as:

[A] mask for the political domination of “others,” a form of ethnocentrism or crypto-Christianity . . . Its claim to universalism . . . has justified the exclusion or marginalization of those from non-European cultures . . . whose systems of belief do not separate public and private in the same way . . .¹⁹⁰

Because of the dominant focus on Islam whenever issues of religious pluralism are raised, and because Muslim groups throughout Europe are mainly of foreign origin, religious minorities are readily associated with

¹⁸⁶ ASSEMBLEE NATIONALE, RAPPORT NO. 2262, *supra* note 183.

¹⁸⁷ Loi 2010-1192 du 11 octobre 2010, [J.O.] Oct. 12, 2010.

¹⁸⁸ Loi 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité [Law 2004-204 of March 9, 2004 Adapting the Justice System to Developments in Crime], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 10, 2004, p. 4567.

¹⁸⁹ *Id.*

¹⁹⁰ SCOTT, *supra* note 36, at 92.

racial categories—by those who discriminate as well as, potentially, by the legal norms that purport to redress such harms. Looking at European law, Titia Loenen establishes that “banning religious symbols in public schools is not really just about guaranteeing the denominational neutrality of schools, but about how the majority society perceives and reacts to the position of its immigrant minority groups of non-Western descent.”¹⁹¹ This is even clearer in countries such as the United Kingdom where some of the domestic legal protection against religious discrimination operates through the Race Relations Acts,¹⁹² as the famous *JFS* case¹⁹³ has shown (an Orthodox Jewish school was found to have discriminated on the basis of race when denying the application of a child whose mother, having converted under the auspices of a non-Orthodox synagogue, was not recognized as Jewish).¹⁹⁴

But such processes also operate at a deeper level. The first paragraphs of Advocate General Julianne Kokott’s opinion in the *Achbita* case are troublingly illuminating in this respect; she opens her remarks delivered in May 2016, arguably at the peak of what Europe was then experiencing as a “migration crisis” with the following words:

There is no need to highlight here the social sensitivity inherent in this issue, particularly in the current political and social context in which Europe is confronted with an arguably unprecedented influx of third-country migrants and the question of how best to integrate persons from a migrant background is the subject of intense debate in all quarters.¹⁹⁵

¹⁹¹ Loenen, *supra* note 105, at 314.

¹⁹² There are three successive Race Relations Acts adopted in 1965, 1968, and 1976. The latter, in particular, covers some instances of religious discrimination. Since the entry into force of the Human Rights Act 1998, religious discrimination is protected on its own grounds. For the broader theoretical point and its empirical illustrations in Britain, see TARIQ MODOOD, *ESSAYS ON SECULARISM AND MULTICULTURALISM* (2019) (especially Section I, discussing the racialization of Muslims / Muslims as “race relations”).

¹⁹³ *R (on the application of E) v. Governing Body of JFS* [2009] UKSC 15 (U.K.).

¹⁹⁴ Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered*, 9 INT’L. J. CONST. L. 200 (2011) (explaining that since the end of the 2010s, a number of cases that used to be labeled as involving allegations of “ethnic” or “racial” discrimination are increasingly framed as “religious”—JFS here being the outlier of this more recent trend).

¹⁹⁵ Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ¶ 2 (Mar. 14, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157> [https://perma.cc/A9HC-ELQE] (opinion of Advocate General Kokott).

The mere fact that she felt it relevant or useful to contextualize a discrimination in the workplace case against the “migration crisis” speaks for itself. There is little doubt that what this reveals is that Muslim minorities in Europe, even when they are integrated and work, are apprehended as coming from migrant backgrounds and in need of (more) integration. And there is little doubt that, had the case not involved a veiled Muslim worker, Advocate General Kokott would not have chosen such elements of contextualization in her opinion. At any rate, those words effectively “other” Ms. Samira Achbita and the likes of her—a point powerfully made, among others, by Joseph Weiler.¹⁹⁶

As has been noted by Mathias Möschel, this opinion is also interesting in that it is underwritten with a process of “white-washing of intersectionality.”¹⁹⁷ Although the issue at stake was the dismissal of a female Muslim employee wearing a headscarf, Kokott failed to see the relevance of the concept of intersectional discrimination; rather, she chose to contextualize the case with respect to the issues of migration and security at the European level. Only one month later, however, the same Advocate General was to mobilize the concept and the literature on intersectionality as it offered its reading of a case involving pension rights of elderly gay men, thus proving that she both knows the concept and retains it as relevant in concrete judicial work.¹⁹⁸ Her failure to mobilize it in the *Achbita* case only henceforth acquires more relief.

¹⁹⁶ Weiler, *supra* note 40; see also Stéphanie Hennette-Vauchez, *Nous sommes Achbita*, 55 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 105 (2019).

¹⁹⁷ Mathias Möschel, *If and When Age and Sexual Orientation Discrimination Intersect*: Parris, 54 COMMON MKT. L. REV. 1835, 1850 (2017) (quoting Sirma Bilge, *Plaidoyer pour une intersectionnalité non blanchie* [Advocating for Non-Whitewashed Critical Intersectionality], in L'INTERSECTIONNALITE: POUR UNE Pensee CONTRE-HEGEMONIQUE [INTERSECTIONALITY: FOR A COUNTERHEGEMONIC THOUGHT] 75–102 (Farinaz Fassa, Marta Roca Escoda, & Eléonore Lépinard eds., 2016)).

¹⁹⁸ Case C-443/15, Parris v. Trinity College Dublin, 2016 EUR-Lex CELEX 62015CC0443, (Jun. 30, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CC0443&from=EN> [https://perma.cc/3ZPL-AX8X] (opinion of Advocate General Kokott).

B. *Overtones of Purity Conveyed by Colorblindness and Religious Neutrality*

The previous Section has thus established that the legal racial categories that remained acceptable and relevant for a long period of modern American constitutional law were not weakened or challenged by the concept of colorblindness. Further, I now wish to insist that because racial categories were themselves a “metaphor . . . of purity and contamination,”¹⁹⁹ colorblindness also fed into notions of purity. The biological overtones of social and legal discourses on race are certainly metaphorical, for race is a social construct. The one blood drop rule according to which any trace of African ancestry makes one Black,²⁰⁰ for instance, essentially served to define who is white and why one is indeed. In his thorough analysis of the “pre-requisite cases” and early American naturalization laws,²⁰¹ Ian Haney López has powerfully established that these determinations actually relied on common knowledge more than on science, even in the judicial discourse; judges make determinations about immigrants’ race (white or non-white) based on “common knowledge.”²⁰² Historically, “what people believe” (and, be it the case, an explicit rejection of science) was thus the real foreground of the legal construction of race.

These racial categories were further based on the notion that their purity ought to be maintained. This is clearly expressed by the famous Supreme Court ruling striking down anti-miscegenation laws: as Justice Earl Warren wrote for a unanimous court in *Loving v. Virginia*, he explained that state bans on interracial marriage were “designed to maintain White Supremacy.”²⁰³ Anti-miscegenation laws were indeed

¹⁹⁹ Gotanda, *supra* note 70, at 26.

²⁰⁰ The one blood drop rule had taken legal form in numerous state statutes, although it was sometimes altered, such as the one-eighth rule in Florida and Indiana, and the one-fourth rule in Oregon. LÓPEZ, *supra* note 58, at 83, 118–19.

²⁰¹ In 1790, Congress passed a law restricting naturalization to white persons, a condition that remained until 1952. Ian Haney López has analyzed fifty-two prerequisite cases (including two Supreme Court cases). *Id.* at 49–77.

²⁰² *Id.* at 6364.

²⁰³ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

quintessentially emblematic of the dimension of purity that infused much of American segregationist law and policies. The desire to make human reproduction across racial boundaries illegal proceeded from a desire to maintain racial purity; it followed that: races should not miscegenate, and white and Black blood must not be mixed for racial purity (and in fact, the purity of the white race) to be preserved.²⁰⁴ Neil Gotanda captures this powerfully: “White is unblemished and pure, so one drop of ancestral Black blood renders one Black. Black ancestry is a contaminant that overwhelms white ancestry.”²⁰⁵

Because the existence of distinct and hierarchized racial categories could well be accommodated within the paradigm of colorblindness, so could these notions of racial purity and white supremacy. Important works in the field of critical race theory have indeed presented colorblindness as an actual vehicle of white supremacy. In its more contemporary iterations, colorblindness certainly does not explicitly endorse any notion of purity or supremacy, for indeed, the one “moral triumph” the civil rights movement has enjoyed lies precisely in the dismantling of the legitimacy of white supremacy.²⁰⁶ At the same time, however, it appears that “the dominance of Whites across the range of social, political, and economic spheres continues . . .”²⁰⁷ Hence numerous authors make the correlation between the successes of colorblind ideology in constitutional interpretation and the preservation of the racially unequal status quo.

²⁰⁴ There are some decisions in which courts justify anti-miscegenation laws with reference to the harm they actually prevent, thus echoing the *State v. Brown* rationale for striking down school segregation: “half-breed children . . . have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened . . . with ‘a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.’” *State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)). Reva B. Siegel also cites a case where a federal district court in Maryland used the same line of reasoning for refusing to strike down segregationist rules in public beaches and bathhouses: “[a]t the present stage of social development in the State of Maryland, most (but not all) Negroes are more relaxed and feel more at home among members of their own race than in a mixed group of Negroes and whites; the same is true of whites.” Siegel, *Equality Talk*, *supra* note 65, at 1488 (alteration in original) (quoting *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954)).

²⁰⁵ Gotanda, *supra* note 70, at 26.

²⁰⁶ This is not to petition the remnants of politically active groups of white supremacists in the United States (as elsewhere). My point here, however, is that white supremacy no longer expresses itself openly in *legal* discourse.

²⁰⁷ LÓPEZ, *supra* note 58, at xviii.

Again, this Paper wishes to suggest that some articulations of religious neutrality in Europe also have overtones of purity. Some legal responses to the issues of religious pluralism can indeed be read through a lens of purity—albeit a social more than biological concept of purity.

One example can be taken from a recent ruling by a French administrative appellate court. A young female Muslim adult enrolled in a vocational training session that was to take place inside a building that was otherwise occupied by a public high school. Since the Act of 15 March 2004 (2004 Act), students of public elementary, middle, and high schools are prohibited from manifesting their religious beliefs.²⁰⁸ Based on that prohibition, the school principal denied access to the school to the female adult who wished to attend her vocational training session, and she challenged his decision in court. The court eventually upheld the principal's decision, arguing that the simultaneous presence within the one building of students who are under a prohibition to express their religious beliefs and *one* young adult wearing a hijab could indeed cause trouble and threaten the public order internal to the school.²⁰⁹ Two elements seem particularly noteworthy in this reasoning.²¹⁰

First, what is at stake is the “simultaneous presence” in the school of “students” subjected to the 2004 ban and “*one* young intern.”²¹¹ This line of reasoning strikingly conveys a sanitary paradigm that implies that there should be no contact, no mixing of any sort, between high school students and any number of persons (including a single person) wearing a visible religious sign such as the hijab. It also implies that schools are to be religion-free zones and that their purity as such could be jeopardized by the presence of *one* person wearing the hijab.

Second, this ruling conveys a spatial interpretation of the 2004 Act that produces the norm of schools as religious-free zones. Technically

²⁰⁸ For various assessments of this law, see Patrick Weil, *Why the French Laïcité Is Liberal*, 30 CARDOZO L. REV. 2699 (2009); Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743 (2006).

²⁰⁹ Cour d'appel [CA] [regional court of appeal] Paris, 6e ch., Oct. 12, 2015, No. 14PA00582 (Fr.).

²¹⁰ *Id.* “[Q]ue la présence simultanée, dans l’enceinte d’un même établissement, de ces élèves qui sont soumis, en application des dispositions de l’article L. 141-5-1 du code de l’éducation, à l’interdiction de port de signe manifestant ostensiblement une appartenance religieuse, et d’une stagiaire du GRETA portant un tel signe, était dès lors, dans les circonstances de l’espèce, de nature à troubler l’ordre dans cet établissement’”

²¹¹ *Id.*

speaking, the Act reads as one that should apply to students *qua* students—not to schools as buildings or spaces. It is true that, in France, as civil servants in general are subjected to a requirement of religious neutrality and are thus prohibited from expressing their religious (or other) beliefs in the workplace, most people who work in public schools are religiously neutral; this is true for teachers and professors, but also principals and janitors.²¹² To that extent, as it also subjects the students to the same kind of prohibition, the 2004 Act can be read as banning religion from public schools in general; and indeed, as a number of legal and social actors immediately sought to apply the Act in an expansive manner, one of their rationales was to interpret it as applying not so much to students as users of the public service of education, but rather to schools as spaces that ought to remain religion-free.

A number of schools thus sought to amend their internal rules so as to insert requirements of neutrality applicable to the wider educational community that gravitates around public schools, including external collaborators and, above all, parents; in several instances, it became required from parents who had offered to take part in school activities (typically, by accompanying class outings to museums, cinemas, field days, etc.) that they subject themselves to a rule of religious neutrality. But litigation ensued, and although courts have addressed this issue in many different voices,²¹³ it was established by the Conseil d'Etat in its advisory capacity that the 2004 Act could not be read as a valid legal ground for subjecting parents to such an obligation of religious neutrality.²¹⁴ The Act only subjects students to such an obligation. The tendency to read it spatially as regulating schools as spaces rather than children as students persisted nonetheless, as illustrated by a recent ruling by the Lyon appellate administrative court that referred to “a requirement of [religious] neutrality imposed on parents . . . that only applies when

²¹² This rule of religious neutrality has been articulated more than a century ago and is hardly challenged. Conseil d'État [CE], May 3, 1950, 98284 (Fr.). It has been upheld by the ECHR. *Ebrahimian v. France*, 2015-VIII Eur. Ct. H.R. 99, 126.

²¹³ The reasoning usually went as follows: when they take part in school activities, parents are “participants” to the public service of education and may thus be required to comply with the general obligation of religious neutrality that weighs on all civil servants and public agents. *See, e.g.*, TA Montreuil, 5e and 6e ch., Nov. 22, 2011, 1012015 (Fr.).

²¹⁴ *See* CONSEIL D'ETAT, ÉTUDE DEMANDEE PAR LE DEFENSEUR DES DROITS LE 20 SEPTEMBRE 2013 [STUDY REQUESTED BY THE DEFENDER OF RIGHTS ON SEPTEMBER 20, 2013] (2013) (Fr.). Subsequently, courts have tended to rule that parents could not be subjected to such obligations. *See, e.g.*, TA Nice, 5e ch., June 9, 2015, 1305386 (Fr.).

they participate in activities that take place *inside classrooms* and during which they exercise functions comparable to those of teachers.”²¹⁵ These examples illustrate the ways in which the 2004 Act has partially been hermeneutically pulled towards a notion of schools as pure, cleansed spaces; as harbors that are safe in that they are protected from any expression of religious belief—thus characterizing some interpretations of *laïcité* (neutrality) as related to notions of purity.

Other examples can be found where the overtones of purity are read into biology (blood and citizenship) rather than space. In Germany, for instance, a first instance judgment in an early case pertaining to schoolteachers’ right to wear a headscarf in the workplace is interesting in this respect. Although the plaintiff eventually lost her case, the initial judgment considered a number of elements, among which the fact that the plaintiff was a German-born woman who had been educated in the Lutheran faith was taken as an indication that no radical or fundamentalist intentions should be ascribed to her choice to cover her head.²¹⁶

CONCLUSION

This Paper has argued that some of the analyses of the limits and indeed adverse effects of the ideology of colorblindness in American constitutional law on racial equality are worth transposing in the contemporary European debates on religious pluralism. The Paper’s starting point is the strong and parallel concerns that while colorblindness might have entrenched rather than corrected racial inequality in the United States, some versions of the contemporary elevation of “religious neutrality” in Europe may be producing similarly inequalitarian outcomes. After clarifying the proposed level of analysis (that of a meta-comparison), the Paper first compared American and European judicial reasoning on issues of race and religion, and then examined outcomes. It confirmed that many similarities could be drawn, as judges across the Atlantic rely on similarly formalistic and a-teleological patterns of reasoning that privilege private ordering and

²¹⁵ Cour d’appel [CA] [regional court of appeal] Lyon, 3e ch., July 23, 2019, 17LY04351 (Fr.) (emphasis added).

²¹⁶ Verwaltungsgericht Lüneburg [VG] [Administrative Court of Lüneburg] Oct. 16, 2000, 1 A 98/00, <https://openjur.de/u/311663.html> [<https://perma.cc/EX8L-WYBJ>] (Ger.). I wish to thank Mathias Möschel for directing me to this judgment. See, in particular, *id.* at ¶ 37.

judicial deference to local choices. As a result, processes of othering and overtones of anxieties over the preservation of certain ideas of “purity” that have been documented to infuse American race law can also be found in European religion law.

As the demonstration unfolds, the Paper confirms a familiar trope of comparative methodology: comparing a given model with another renews the observations and analyses one makes about the former. In that sense, the comparison of contemporary European law as it confronts issues related to religious diversity with ongoing North American debates over colorblindness and racial equality gives European scholars an opportunity to ask questions about the European case that might otherwise not be asked—especially as they encounter myths and taboos around the issues of race, inequality, and purity that have been positioned more conspicuously in the U.S. debate. This is not to say that this conversation in the United States is easy or soothed in any way, even in its academic version. But it does take place, whereas in many European countries, it is made all the more difficult that many actors continue to toy with the project of deleting the word “race” from their foundational texts and legislation,²¹⁷ and actively combat the elevation of the word “Islamophobia,” including in human rights bodies and institutions.²¹⁸ European countries also react strongly and adversely against the move of international human rights towards new paradigms in the field of religious discrimination, as shown both by the strong criticism after the United Nations Human Rights Committee found that some disproportionate infringements on religious freedom amounted to intersectional discrimination²¹⁹ and by the consolidation of a significant divergence between the UN approach and that of the European courts of justice.²²⁰ In other words, the comparison with the American

²¹⁷ Again, on European colorblindness, see MÖSCHEL, *supra* note 20.

²¹⁸ ABDELLALI HAJJAT & MARWAN MOHAMMED, ISLAMOPHOBIE: COMMENT LES ÉLITES FRANÇAISES FABRIQUENT LE “PROBLÈME MUSULMAN” [ISLAMAPHOBIA, HOW THE FRENCH ELITES FABRICATE THE “MUSLIM PROBLEM”] (2013).

²¹⁹ U.N. Human Rights Committee, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2662/2015, U.N. Doc. CCPR/C/123/D/2662/2015 (Sept. 24, 2018) (firing of a female Muslim employee who refused to comply with an internal neutrality policy); U.N. Human Rights Committee, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2807/2016, U.N. Doc. CCPR/C/123/D/2807/2016 (Oct. 17, 2018) (burqa ban).

²²⁰ Stephanie Berry, *The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religion by Wearing a Burqa*, EJIL:TALK! (Jan. 3,

constitutional debate operates as an enabler, a facilitator for opening an uncomfortable conversation.²²¹

As uncomfortable as it may be, this conversation is much needed. In the United States, as well as in Europe today, overt instances of racial or religious discrimination are becoming rarer. “Colored only” signposts, as yellow stars attached to coats and jackets, are hopefully a thing we now only see in cinematographic representations of the past or read of in literature. By all accounts, though, racism and prejudice have not disappeared. White supremacy (in both its racial and religious dimensions) endures and requires that we tackle and confront its unconscious dimension.²²² This can only be done if and when we unearth and confront the problematic exclusionary dimensions of even those constitutional principles that we cherish most for their historical and structural centrality to our polities.

2019), <https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa> [<https://perma.cc/J4P6-YMXK>]; see also Frédéric Mégret, *Lost in Translation? Bill 21, Human Rights and Global Legal Pluralism*, MCGILL L.J. (forthcoming 2021) (contrasting debates on *laïcité* in Quebec with international human rights standards).

²²¹ To pastiche the title of: FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Albertson Fineman, Jack E. Jackson, & Adam P. Romero eds., 2009).

²²² Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).