

# PATH DEPENDENCE IN DISCRIMINATION LAW

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## ABSTRACT

*Race analogies are a staple of U.S. anti-discrimination advocacy. However, many worry that race precedents have made U.S. equality law overly formalistic and have blocked sex, disability, age and sexual orientation claims that do not fit neatly into the race-blindness paradigm. Are race precedents severe constraints? Or are they malleable tools? To date, examining the U.S. historical record has not led to a clear answer, or allowed for the development of a practicable alternative to the race-blindness model. New comparative evidence sheds light on these questions. The European Court of Justice (ECJ) developed sex discrimination case law over four decades, and recently decided its first race, age, disability and sexual orientation claims (2006-2009).*

*This Article argues that the sequence in which courts adjudicate claims is an important determinant of the doctrines they develop, and shapes the success and failure of claims subsequent groups bring. The U.S./EU comparison reveals that departing from race-blindness is a double-edged sword. EU equality law offers greater protections to individuals who make claims that courts consider group-typical (e.g., women seeking flexible schedules to take care of children). In contrast, U.S. law benefits atypical workers (e.g., older workers seeking to work past conventional retirement ages). Path dependence arguments show that social movements have substantial opportunities to influence court decisions early on. Once doctrine solidifies, activists are more successful if they redirect efforts away from courts, and towards legislatures and employers.*