TRANSATLANTIC POLICYMAKING IN AN AGE OF AUSTERITY

DIVERSITY AND DRIFT

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Editors

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THE UNITED STATES IS RATHERLY KNOWN AS THE NATION IN WHICH, AS ALEXIS DE TOCQUEVILLE PUT IT NEARLY 170 YEARS AGO, "THERE IS HARDLY A POLITICAL QUESTION IN WHICH THE UNITED STATES HAS NOT ADMIRED ITS JUDICIAL COURTS." THE UNITED STATES HAS A COMPARATIVELY LARGE NUMBER OF LICIT POLICIES, LAWS THAT PROMOTE THE USE OF LITIGATION IN RESOLVING DISPUTES AND IMPLEMENTING PUBLIC POLICY. AMERICAN PUBLIC POLICY USES LICIT POLICIES TO ADDRESS SOCIAL PROBLEMS THAT IN OTHER COUNTRIES ARE HANDLED SOLELY BY BUREAUCRATIC REGULATION AND WELFARE PROGRAMS. THIS USES LICIT POLICIES IS AN OFTEN-OVERLOOKED STRATEGEM OF GOVERNANCE IN THE UNITED STATES, COMPAREABLE TO THE TAX CREDITS AND "PRIVATE SOCIAL BENEFIT" SCHEMES ABOUT WHICH JACOB HABER AND CHRISTOPHER HOWARD HAVE WRITTEN. AS THEY SUGGEST, ARGUMENTS ABOUT THE WEAKNESS OF THE AMERICAN STATE OFTEN MISS TECHNIQUES BY WHICH U.S. PUBLIC POLICY STEERS THE ACTIONS OF NONSTATE ACTORS. LICIT POLICIES STEER BY CREATING INCENTIVES FOR PRIVATE ACTORS TO IMPLEMENT AND ENFORCE LAWS, AN APPROACH THAT IS ATTRACTIVE TO AMERICAN POLITICIANS BECAUSE IT SERVES AS AN ALTERNATIVE TO AN EXPANDED WELFARE-REGULATORY STATE.

It should be no surprise, then, that the United States is the birthplace of a licit approach to the problem of disability. Beginning in the 1960s and 1970s, the disability rights movement aimed to recast disability as a civil rights issue: people with disabilities, the movement argued, suffered more from social discrimination than from their impairments. Like African Americans, they were burdened by social attitudes and structural barriers that excluded them from the mainstream of social life. Further, as with African Americans, the solution to the problems of people with disabilities lay in litigation: they must be given the ability to sue for discrimination. Thus in the United States a series of disability rights laws have provided the right to sue: Section 5 of the 1974 Rehabilitation Act, the 1975 Education for All Handicapped Children Act, and, most prominent of all, the 1990 Americans with Disabilities Act (ADA). Disability rights litigation in the United States has become commonplace, and some plaintiffs—Casey Martin, the professional golfer with a mobility disability, for example—have even become minor media celebrities.

Thus far the story of disability politics fits neatly with the familiar pattern Tocqueville and so many commentators after him have noted, as the United States has embraced a court-oriented approach to basic problems in social policy. But the past few years have seen a new development that, at least in disability policy, may undermine the portrait of American legal exceptionalism: the diffusion of antidiscrimination rights proposals and policies across the globe. Disability organizations, academic lawyers, and activists have used international conferences, publications, and the Internet to spread the key concepts of the disability rights movement. International organizations, most prominently the United Nations, have embraced the new emphasis on inclusion and participation in disability policy pioneered by the United States and have promulgated a series of resolutions and proclamations on disability rights. But many nations have gone beyond "soft" laws to enact enforceable antidiscrimination provisions. In Europe, the crowning example is the European Union's 2000 Equal Treatment in Employment and Occupation Directive. This law was nicknamed the "Horizontal Directive" because it requires all EU nations to adopt antidiscrimination laws across several grounds—"just disability," but also age, religion, and sexual orientation. The Horizontal Directive gives aggrieved individuals the right to bring a complaint against a party that discriminates.

Like many chapters in this book, then, this one features a public policy idea—"disability rights"—that has swept across the Atlantic to fuel political discourse in both Europe and North America. Yet, as the other chapters in this book suggest, common terms of debate do not necessarily lead to convergent outcomes. Like "administrative reform" or "pension privatization," the concepts of disability rights translate differently depending on the structures of national institutions and political alignments. It seems unlikely, for example, that the Horizontal Directive, standing by itself, will lead Europe to American-style disability rights litigation. That is because most European nations thus far lack the legal machinery required to vigorously implement licitious policies. Contingency fees, large verdicts, a corps of litigious plaintiff lawyers—the taken-for-granted requisites of litigious policy in the United States—are in short supply in Europe. Until they appear, disability rights implementation seems poised to take a different direction, indeed several different directions, among European nations. Yet, the adoption of the Horizontal Directive, and the growing embrace of antidiscrimination laws in Europe, creates at least the possibility of a turn to litigation in European social policy.

Scholars in recent years have speculated about the extent to which the American emphasis on litigation could spread to Europe, creating a convergence in public policy style. They have suggested some likely "carriers." Some observers, for example, point to international commercial law, which has brought American and European lawyers into closer contact. Perhaps, it is theorized, American lawyers could infect their European colleagues with a more aggressive, enterprising approach to...
the practice of law, leading to novel, more complex, and more sweeping forms of litigation. In a globalizing, competitive economy, this more aggressive legal style may prove advantageous, so that trade liberalization and the attendant neoliberal policy style might lead to expanded litigation. Other researchers, detecting the "judicialization of politics" in Europe, focus on the proliferation of higher-law constitutionalism and the building of national constitutional courts. Still others look to declining trust in the executive and legislative institutions, the gradual drift from a corporatist to a pluralist mode of interest representation, or the growth of legal capacity within interest groups.

The focus on this chapter is the European Union (EU). The establishment of the European Union creates in Europe some of the same structures that in the United States promote court-oriented public policy, in particular a division of authority analogous to federalism. Federalism creates an incentive for policymakers at the national level to create rights that can be enforced against states and localities. Similarly, within the European Union, politicians at the center can claim credit for delivering benefits to constituencies while passing the burdens on to national-level governments. By creating rights, in this case a right against discrimination on the basis of disability, politicians and bureaucrats in the European Union can satisfy constituencies, extend their role in disability policy, and build the legitimacy of their institution at minimal cost to themselves. These incentives would seem to operate in spheres far beyond disability and thus raise the specter of litigious policymaking across policy realms in Europe. Indeed, the case of disability may be just one small part of a broad rise of "adversarial legalism" that some observers have detected in Europe, both within statutory and EU constitutional law. At the very least, the case of disability suggests that the many national-level institutional and cultural barriers to litigious policies in Europe will be the call for a particular or "relational view of equality."15

In the United States, this movement is sometimes summarized as "from needs to rights" or "from charity to rights."16 In Europe, where there is a much stronger tradition of social rights—rights to welfare payments, technical aids and treatment—it really is a matter of "rights to rights." The differences between the two sets of rights, social and civil, are substantial, however. Social rights are more general norms of state behavior that are not individually enforceable. Civil rights claims are individual demands that can be brought to a court or agency for enforcement and can involve claims against nonstate actors. Moreover, many of the theorists of the civil rights movement argue that the welfareist approach is part of the problem; people with disabilities need to be treated as capable of work. If the civil rights model becomes dominant, all the traditional components of disability policy will have to be rethought and reconceived. Thus, although the reframing of disability is, even in the United States, still in its infancy, it has the potential to transform every aspect of disability policy.

Disability Rights in the United States

How did American disability activists, not a particularly strong constituency, enact into law a major social reform? The story of the American disability rights movement has now been well chronicled by both academics and journalists. Disability historians have located various struggles against forms of disability discrimination throughout the twentieth century—for example, campaigns by the blind to allow guide dogs on public transportation, or protests over inadequate job opportunities for people with disabilities in New Deal work programs. A leader of the blind community, law professor Jacobus ten Broek, conceptualized disability in part as a problem of legal rights and discrimination back in the
But most would concede that the disability rights movement became coherent only after the passage of the 1973 Rehabilitation Act. Stuck into this omnibus law, the main vehicle for federal funding of rehabilitation programs, was Section 504, a single sentence that passed by unnoticed by nearly everyone:

"no otherwise qualified individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."

The initiative for Section 504 came from liberals in Congress and their staffs. They first considered amending the Civil Rights Act of 1964 to bar discrimination on the basis of disability but reconsidered, either because they feared the consequences of opening up the act for amendment or because they recognized that disability was distinctive enough to merit separate treatment. In the hands of the civil rights division of the Department of Health, Education and Welfare, charged with writing the regulations based on Section 504, and the federal courts, called on to interpret it, this obscure sentence became a full-fledged antidiscrimination law. The Ford and Carter administrations upheld implementation of Section 504 regulations, but the Carter administration relented after a celebrated moment in the history of the disability rights movement: a cross-disability sit-in at a San Francisco federal building.

In the wake of Section 504, a disability rights movement, complete with academic theorists and a public law organization (the Disability Rights Education and Defense Fund) styled after the National Association for the Advancement of Colored People (NAACP) grew up. The premises of the disability rights model were enunciated and began to be diffused, first in the disability community and among civil rights advocates, then in the wider policy and academic circles. Section 504 covered only federal agencies and those receiving federal funds. In the aftermath of Section 504, a number of state laws creating a general right against discrimination were enacted, but for disability activists these laws were piecemeal, often weakly enforced, and thus unsatisfactory.

Moreover, implementation of Section 504 was considered weak, and there was a backlash against it in the early Reagan administration. In the midst of this, disability activists hit on a marvelous strategy for advancing their rights message. They found that they could pitch the disability rights model to Reaganites as a kind of welfare reform: disability welfare programs, they told Reagan administration officials, reduce disabled people to dependency. By empowering disabled people and releasing them from the chains of government handouts, disability rights laws would launch disabled people "toward independence." 21

That became the basis of a strong alliance between disability activists and Reagan and Bush administration officials. A Reagan administration commission drafted the first (more radical) version of the ADA, and George H. W. Bush endorsed it during his 1988 presidential campaign. Bush's endorsement foreclosed debate over the basic premises of the ADA, after the ADA was introduced into Congress, business interests picked away at the edges of the bill but never contested the rights frame, and the law was enacted with bipartisan support in 1990.

The disability rights movement lacked "fearsome political resources, but its leaders wisely mustered their few advantages. Disability activists had a handy template for both the problem and the solution to disability. They drew on the experiences and imagery associated with the civil rights movement and analogized the problems of disabled people to those of African Americans, in the process gaining the support of the civil rights lobby. The activists were able to sustain this recasting of disability in large part because of the unity of the disability lobby. Despite the extraordinary diversity of the community of people with disabilities, disability groups held together largely on the need for a rights law. But most of all, disability activists benefited from the political virtues of their proposal. The civil rights remedy they suggested had the great advantage of costing the federal government relatively little, by extending rights, politicians transferred most of the costs of the rights laws to state and local governments and the private sector. Indeed, disability activists were able to convince conservatives in the Reagan and Bush administrations that the ADA would save the federal government in the long run because it would help move disabled people off welfare to work. As a result, the ADA, a major social reform, was adopted relatively quickly and by large majorities in both houses of Congress. 22

Implementation has proven another matter. ADA enforcement has deeply disappointed disability activists, as federal courts have interpreted the law narrowly and, in so doing, created a series of barriers for plaintiffs. Moreover, the law has not led to the wholesale transformation of traditional disability policy as its most vigorous advocates had hoped. Supplemental Security Income (SSI) and Social Security Disability Income (SSDI), the two main disability welfare programs, have ballooned in the years following the ADA's enactment, and employment among people with disabilities has continued to fall. 23 Yet in the rest of the world the ADA is considered a groundbreaking law. This is no accident, as American activists have consciously attempted to export the disability rights model, using international organizations, conferences, and field visits to convey the rights message.

**DIFFUSION TO EUROPE**

The effort to export the disability rights message was successful in generating international attention. European disability activists made pilgrimages to the main centers of disability activism in the United States, particularly Berkeley, California, to learn the precepts of the "disability rights model." The arguments and techniques of American disability activists were spread through academic writings and international disability conferences. Lobbied by disability nongovernmental organizations (NGOs), international organizations—most prominently the United Nations—created proclamations and resolutions endorsing the civil rights approach, such as
the 1993 "Standard Rules on the Equalization of Opportunities for Persons with Disabilities."

Yet by 2000, within Europe only Britain, Ireland, and Sweden had civil disability rights laws. Some other nations had largely symbolic constitutional or criminal provisions protecting against discrimination, but American-style antidiscrimination laws, where they had been proposed, had been stalled. The slow progress of European disability activists at the national level is unsurprising. They started in an even weaker position than their counterparts in the United States. In Europe, there is no strong civil rights tradition, and in many nations, no civil rights template at all. Thus, unlike their American colleagues, European disability rights activists had a much tougher time explaining their argument to policymakers. They faced the daunting prospect of building antidiscrimination laws and institutions from the ground up, rather than simply building on established practices (Sweden and Britain, two of the three nations that adopted rights laws, had already built antidiscrimination agencies covering gender and race.) Moreover, in contrast with the relatively unified American disability rights movement, in most European nations there are strong, state-supported disability organizations that are ambivalent about, if not hostile to, the civil rights approach. Disability rights activists were sometimes insurgents within their own disability community. For some European disability policy leaders, the whole idea of a judicially based, rights-oriented approach to disability was considered a noxious foreign import.

And yet as national-level rights campaigns were being thwarted, a small network of academics and activists, probably no more than a few dozen, proved far more successful at the EU level. Their campaign began in the early 1990s. Within the European Union, British disability activists were the first to raise nondiscrimination issues, according to European Commission staff. The British campaign for a disability rights law had begun in the 1980s, and the British activists, like their American counterparts, had an evangelical zeal to expand the scope of antidiscrimination policy. Their pleas for action, however, were met with a powerful argument: the treaties that establish the European Union simply did not grant it power in this realm. In Europe, disability rights laws were beyond the European Union's "competence." Indeed, under the traditional view, disability was a matter of 'social policy'—welfare, rehabilitation, and education—a realm in which the European Union was supposed to play only a minor role. The place of the European Union in social policy was a matter of great disagreement and some fluidity, but deliberations surrounding the Maastricht Treaty had emphasized "subsidiarity," leaving less room for EU social policy initiatives.

Nevertheless, nondiscrimination advocates found a way to move forward. As part of a broader policy initiative on social exclusion and joblessness in Europe, the European Union had created a series of "action programs" that funded conferences and information sharing on disability-related issues. The early action programs were criticized for wasting money on ill-considered projects and for failing to involve people with disabilities. This was addressed in "Helios II," a package of grants for research and cross-national consultation on the problems of unemployment among people with disabilities. It was Helios II money that created the European Disability Forum (EDF), an association of member-state disability groups dedicated to the civil rights model. The formation of the EDF was a key move. It became a central resource for European disability rights activists, tying them together in a network and providing a clearinghouse for idea-sharing and advocacy. EDF lobbied both the European Commission and Parliament, producing reports and research designed to promote the disability rights message and arguing that a Europe-wide solution to disability discrimination was appropriate. The first sign of success was a 1993 green paper on European social policy that argued that segregation of people with disabilities, "even with adequate income maintenance and special provision, is contrary to human dignity." This was followed by the Commission's 1994 white paper, the first EU publication to mention discrimination in connection with disability. The white paper also specifically mentions "the positive experience of the European Disability Forum" in building accessibility for people with disabilities. Thus with the arrival of EDF at the EU, disability began to be seen as a matter fit for nondiscrimination policies, a mechanism that the European Union had before considered only in the context of race and gender.

With growing support from within the European Commission, disability rights advocates lobbied to expand EU competence to cover antidiscrimination measures during the 1997 revisions to the EU treaty in Amsterdam. Groups representing racial and ethnic minorities, gays and lesbians, and religious minorities also lobbied for nondiscrimination powers. Although there was discussion about creating a treaty-based, quasiconstitutional right against discrimination, treaty negotiations stalled well short of this. The Amsterdam Treaty did, however, produce Article 13, which specifically granted the European Union competence to take action on discrimination across a range of grounds, including disability.

Armed with the Amsterdam Treaty, disability rights advocates worked within the European Commission to draft a "directive"—a rule requiring nations to make rules. In late 1999, two directives were proposed by the European Commission. The first, covering racial and ethnic discrimination, was broad in scope, governing goods and services, employment, and education. The second, the Horizontal Directive, covered more grounds (religion, sexual orientation, age, and disability) but governed only employment and professional education. The campaign for an EU antidiscrimination measure gained ground during the controversy over the appointment of Jorge Haider to a position in the Austrian cabinet. Haider was a populist right-wing Austrian parliamentarian whose party was widely seen as racist. The Haider appointment served to highlight the new politics of race in Europe, and EU officials resolved to make a strong antiracist statement. The race directive was enacted in June 2000, just seven months after it was introduced. To a large extent, proponents of nondiscrimination policies on other grounds (religion, sexual orientation, age, and disability) simply followed in the wake of the strong push for antiracist action, and the Horizontal Directive was enacted four months later, in October 2000.

The Horizontal Directive gave member nations until 2003 to create enforcement systems, but they could get a waiver for age and disability until 2006. The Directive does not specify what procedural forms enforcement should take. It could
be administrative or judicial, or some combination of both. The directive also does not require that compensation be paid to victims, but it does provide substantive standards. It specifies that penalties for discriminatory conduct must be “effective, proportionate and dissuasive.” Moreover, the disability antidiscrimination policy must include some requirement for “reasonable accommodation” of people with disabilities, as in the ADA, and it must forbid “indirect” as well as direct discrimination—provisions that, though seemingly neutral, disproportionately burden people with disabilities. The directive is just one way in which nondiscrimination ideas have influenced EU policy and, some observers think, is not necessarily the most consequential in the short run. That is because it is a “framework” directive, which merely instructs member states that they must take “effective” action against discrimination and specifies some standards. The directive does not create a right against discrimination at the EU level, and it is not clear what the remedy will be if the actions taken by member states are deemed “ineffective.” But the directive is part of a series of actions at the EU level that is changing the terms in which disability policy is debated within Europe.

Already the move to a rights model of disability has spurred the adoption of further laws, some with greater immediate impact than the Horizontal Directive. For example, a new transportation directive requires that member states make their buses accessible to wheelchairs. Disability activists now know that if they are blocked within their home nations, they can lobby the European Union instead, hoping to get a rule that they can then enforce at the national level—the so-called “boomerang” maneuver that Margaret Keck and Kathryn Sikkink have identified in their study of transnational advocacy. Finally, through the creation of the European Disability Forum, the European Union has brought together disability activists from around Europe who can help mobilize EU directives and standards within their home countries. EDF officials have drafted a second, more far-reaching disability directive that would, like the ADA, go beyond employment to cover the accessibility of transport and public facilities, a key concern of the disability rights movement—and a potentially much more expensive matter for national governments.

THE EUROPEAN UNION AS RIGHTS MANUFACTURER

The progress that disability rights activists have made in the European Union can be traced to several factors. First, disability advocates to a large extent rode in the slipstream of growing concern about racism and discrimination on the basis of ethnicity. Once this concern generated the energy necessary to enact an anti-discrimination directive for race, the sponsors of the Horizontal Directive, including disability activists, found their path already paved for them.

Second, there simply was no strong opposition to the reframing of disability as a civil rights issue. The main employer organizations never mounted a campaign against the Equal Treatment Directive, and most member nations that might have had their doubts chose not to push the issue in a visible way. The lack of visible opposition to disability rights proposals is a pattern one sees in all the policies in which such proposals have reached the legislative agenda. Once an issue is conceived as a matter of rights, it is not easy for politicians or even interest groups to oppose them. This may be doubly true when politicians are attempting to “deify rights” to people with disabilities, a particularly difficult enterprise. There are scattered criticisms of the turn to nondiscrimination rights in disability policy, but no one has yet mounted a coherent campaign against it. This is a striking illustration of the fact that new policy ideas, even when advanced by weak political forces, can gain ground when there is no politically effective argument against them.

Perhaps most important for the success of disability advocates, however, was a congruence between their agenda and that of EU officials. The transformation of disability into a matter of civil rights coincided with the institutional interests of the European Union in at least two respects. First, the protection of rights has become a legitimating project for the European Union. With criticism of the European Union’s corruption, bureaucracy, and lack of accountability continuing, many have argued that the European Union needs to go beyond its founding mission of lowering barriers to economic exchange in Europe to reshape its image. One new mission is the protection of rights. There is much talk within the European Union of building a “European citizenship” and much discussion about what that would involve. As T. H. Marshall famously observed, citizenship and rights are intimately related, and some have argued that the creation of EU-protected rights could become part of the foundation of a new European identity. A European Commission committee report in 1996 concluded that “[i]nclusion of civic and social rights in the Treaties would help to strengthen the European Union and promote Europe from being perceived as a bureaucracy assembled by technocratic elites far removed from daily concerns.” By 2000, the European Union adopted a nonbinding Charter of Fundamental Rights; some version of this bill of rights may one day be part of a grand constitutional reform that is being proposed for the union. Below the grand level of the charter, meanwhile, smaller rights are regularly being manufactured at the European Union. Although, for example, the U.S. Congress recently decided not to enact an “airline passengers bill of rights,” the European Union now has such a law, and its provisions are prominently displayed at all European airports. The airline law may be mere symbolism, but it is symbolism that builds the image of the European Union as a rights protector. Similarly, and more substantively, with the passage of the two discrimination directives, the European Union has put itself at the forefront of civil rights protection in Europe—and for gays and lesbians, religious minorities, people with disabilities, and the other groups protected, the European Union suddenly looks like much more than a trade liberalizer.

EU officials have a more specific interest in disability rights. The embrace of disability rights has greatly enlarged the EU role in disability policy. As long as disability was defined in traditional ways, there was little role for EU involvement in member state policies. The European Union does not have competence to intervene in social security matters, or education, or caregiving, or even most aspects of
labor policy. Until the 1997 Amsterdam Treaty, the European Commission's Social Affairs Directorate, the unit responsible for disability, could only sponsor research or initiate information sharing among member states. By embracing the rights model, the directorate suddenly had a new mission, one entirely compatible with founding EU principles. If the problem of disability resulted from social exclusion and discrimination, then it was a matter of market barriers, and the European Union has lots of experience in knocking down such barriers. Disability has become one of a number of policy areas in which the Social Affairs Directorate has justified a stronger role for itself by focusing on exclusion. As Employment and Social Affairs Commissioner Anna Diamantopoulou has argued, because "social exclusion imposes costs which an inclusive society can avoid," social policy has become economic policy. This redefinition of disability as an issue of economic competitiveness has a venerable tradition at the European Union: it parallels the primary rationale for EU-level action on gender equality that began in the 1970s. A series of court rulings and directives on gender equality were justified as market integration measures. In the absence of EU-level action, it was argued that nations that continued to discriminate against women might gain a competitive advantage over their more egalitarian neighbors. As with gender, in disability EU action on discrimination has been justified as compatible with the European Union's founding goal of market liberalization.

Armed with the rights model, EU officials can now attack problems such as inaccessible transport systems and public facilities, and discrimination in the marketplace. If disability is a matter of rights and discrimination, then the European Union, and in particular the European Commission, has a central role to play in European disability policy. The development of the Horizontal Directive, and the disability rights agenda at the European Union, nicely fits Mark Kleinman's description of the way the Commission has expanded its powers in social policy:

"The Commission has shown itself to be an "adroit strategist," a "purposeful opportunist."... It utilizes the skills and advantages of a bureaucracy, promoting marginal, incremental change. Day by day, through drafting regulations, Eurocrats construct a public policy formulation for further envisaged integration. Hence, non-binding "soft" law creates preconditions for further action. The Commission's research funding role is crucial in expanding the agenda. Having commissioned relevant research, it is able to act at politically opportune moments."

COMPARISONS/CONCLUSIONS

Scholars have identified federalism as a significant cause of litigious policymaking within the United States. Federalism means that in at least some policy realms the center cannot directly command subnational units. In the United States, for example, policing and schooling are primarily local matters, and the attorney general and secretary of education are relatively powerless to command local police and school districts. There are only two techniques national officials can use to steer localities in these realms: bribery, through the provision of federal aid, and regulation, through the creation of rights. The attraction of the second strategy is clear. By creating rights, politicians at the center do good things for constituencies at little cost to themselves. For activists, meanwhile, the rights strategy allows them to simultaneously make progress across many subnational units—the alternative, of reforming each local unit one by one, is a Herculean task. Thus, the rights strategy in the ADA attracted both disability activists and conservatives in the Bush and Reagan administrations.

The development of the European Union as a social policymaking institution makes it analogous in some respects to the national government in the United States, and thus creates the same incentives for activists and policymakers. The European Union has limited budgetary resources and cannot possibly make a significant impact on a huge policy realm such as disability by spending money. Its main power is to regulate. By embracing disability rights, European Commission staff and European Parliament politicians have vastly expanded their power over the disability field, at little cost. They do not even have to worry much about enforcing the regulations they enact, because those tasks are delegated to national governments—and to private litigants. EU officials get all the credit and little of the blame if the implementation process proves controversial. For disability rights activists, meanwhile, the European Union represents a new political opportunity structure that has led to a new form of organization, the transnational European Disability Forum. The forum has created new capacities and resources for disability activists in Europe, facilitating information sharing among national-level disability groups, the development of new policy proposals, and coordination of political efforts. Taken together, the relationships of the forum, disability-sympathetic parliamentarians, and EC staff is beginning to resemble the "public interest triangle" that scholars observed in the 1960s and 1970s in the United States. Each side of the triangle supports the expansion of disability rights and reinforces the efforts of the others.

Further, the case of disability shows that smart, creative activists are reframing social issues as matters of rights while the opposition is more or less dormant—a pattern observed in the United States during the "rights revolution." Indeed, R. Don Kelemen detects the beginnings of an "EU rights revolution" in Europe, of which disability is just one small component. The most celebrated area of expanding litigation is EU constitutional law, and the development of EU constitutional law offers intriguing parallels to the story told in this chapter. The European Union became "constitutionalized" by rulings at the European Court of Justice (ECJ) that gave private parties the right in some cases to enforce the treaty agreements that form the basis of the European Union. This supplemented the main mechanism for keeping member nations in line with their treaty obligations, the European Commission's infringement process. Because the European Commission cannot handle all the infringement complaints that come before it, it has
encouraged private parties to bring such complaints to court and more generally has conducted a campaign to advise citizens, firms, and public interest groups of the opportunity to vindicate European rights in court. Here we see the common element with the disability case: a lack of capacity as the EU level is addressed by giving private parties the right to bring claims against nations. Just as in the United States, the creation of rights to litigate is a way by which a weak center can nonetheless steer the periphery. Multiply this mechanism across realms such as the environment, securities regulation, and civil rights, and it does not seem far-fetched to forecast that courts and law will play a growing role in European social policy.

Yet, there is good reason to be skeptical that American-style adversarial legalism will cross the Atlantic, because European legal systems offer an array of barriers to potential plaintiffs—and alternatives to litigation. Implementation of the Horizontal Directive, for example, will be mediated by national-level legal institutions and practices that discourage litigation. Those institutions and practices vary across Europe, so that implementation, rather than converging on the American model, will likely diverge. Some nations, such as Britain and The Netherlands, have preexisting administrative institutions designed to handle discrimination complaints and will adapt these institutions to meet the requirements of the Horizontal Directive. Others will start from scratch and build a combination of administrative and litigation mechanisms. The case of Sweden, the first continental European nation to adopt a disability rights law that allows individuals to sue, is instructive. Although individual Swedes have the right to bring lawsuits, implementation of the discrimination law is mainly through trade unions and through a specialized government mediator, the disability ombudsman. Sweden, like most European nations, has a "loser pays" rule so that unsuccessful plaintiffs incur not only their own legal fees but also those of defendants. Loser pays systems can under some circumstances encourage litigation, because they allow plaintiffs with small but worthy claims to proceed, knowing that they will win lawyers' fees in addition to a court judgment. But a loser-pays system can also discourage risk-averse plaintiffs, particularly if there is no exception built in for plaintiffs who have low resources to pay a defendant's fees in the event of a loss. Moreover, Swedish law provides comparatively small winnings for a successful plaintiff. Swedish discrimination law has no provision for punitive damages, and "pain and suffering" awards are, by American standards, tiny. There is no provision for an injunction ordering an employer to hire (or rehire) a successful plaintiff and only limited ability to claim lost wages. Because the disability ombudsman and the trade unions have greater capacity than individuals, they can, despite these obstacles, more credibly threaten to sue, but even they are likely to resort to litigation in only a tiny percentage of cases.

Sweden's use of the ombudsman is distinctive, but as plaintiff-unfriendly legal institutions are typical of Europe. Just the lack of a contingency fee—where plaintiffs agree to be paid through a percentage of the winning verdict—represents a major barrier to American-style rights litigation. Could policymakers in the European Union, frustrated with the barriers faced by plaintiffs in discrimination cases, intervene to alter national legal practices toward the more litigious American policy style? In several prominent cases in the late 1980s and early 1990s, the ECJ appeared to do just that. For example, in Marshall II, a British cap on awards in sex discrimination cases was struck down because, the ECJ concluded, it made EU antidiscrimination laws ineffective. In Francovich, the ECJ held Italy responsible for failing to properly transpose a directive and granted damages to a plaintiff damaged by this failure. For a time it appeared that the requirement of an "effective" remedy could become a lever for harmonization of national legal systems. But in subsequent cases, the ECJ appears to have backed off, and the resulting case law on remedies and procedure is complex, even contradictory. Thus, according to Lisa Conant, "national courts have tremendous discretion over remedies and remedies and individuals face unpredictable procedural requirements" in vindicating EU-based rights, and attempts by the European Commission to harmonize rules for remedies and state liability have been turned back by the member states. Although EU institutions have pushed European legal systems in a slightly more litigious direction, it would take a rather large shove to make disability rights enforcement a court-centered enterprise in Europe. Indeed, disability may be one of the realms in which convergence toward American adversarial legalism is least likely, because the legal institutions required to advance it seem most fundamental and resistant to change. Convergence toward the American experience would require the European Union to mandate vastly expanded remedies, abolition of restrictions on contingency fees, and modification of the loser-pays rule. Kelmens sees several developments that could facilitate litigation, including liberalization of rules of standing, changes in the organization of law firms, and expansions in government-supplied legal aid. Whether these developments encourage some disability organizations to bring cases (and employers and managers to defend such lawsuits vigorously), but they are not likely to make nondiscrimination litigation attractive to private parties.

That, however, is not the end of the story. The embrace of nondiscrimination law in Europe can have substantial effects even in the absence of a "litigation explosion." The consequences depend on whether the nondiscrimination ideal, now enshrined in a modest law, will be extended further to reshape other aspects of disability policy. The Horizontal Directive was, even for the national governments, a relatively easy step, because it involved no great governmental costs and no disruption of existing programs. Disability advocates are now pressing for a nondiscrimination law covering programs and services, a policy that might involve huge expenses and much greater social change, especially in transportation. Beyond this, there is the question of whether the nondiscrimination ideal will penetrate European labor and welfare policy. As many observers have noted, there is tension between the civil rights approach to disability and the traditional social welfare disability policies of Europe. Politicians often live with such tensions, and there is no reason to believe that there will be a grand collision between the
rights and social welfare models. But there may be smaller crashes. For example, the sheltered-workshops and wage-subsidy programs that help raise the level of employment among people with disabilities in many European nations do not grant participants standard labor law protections and thus may run afoul of antidiscrimination laws. It is quite conceivable that a judge at the national level, or even at the European Court of Justice, might one day rule them illegal. Even in the absence of widespread American-style discrimination litigation, then, a few key cases might challenge the basic premises of the social welfare approach to disability. At that point there would be no question of the power of the nondiscrimination ideal in European disability policy.

NOTES


10. R. Dan Kelemen's chapter on environmental policymaking in this book raises this specter in another context.


42. Interview with European Commission staff.


45. On the role of political opportunity structures in social movement theory, see Sidney Tarrow, States and Opportunities: The Political Structuring of Social Movements, in Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framing, ed. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996).


49. Kelemen suggests another way in which the structure of the EU encourages the use of courts: the multiple-veto structure of EU institutions both makes it hard to revise policies once enacted into law and gives bureaucrats considerable discretion. This in turn encourages legislators to draft detailed laws and use courts to try to enforce them. Kelemen, "The EU Rights Revolution," 226. Robert A. Kagan and I have proposed similar accounts to explain the use of litigation in American public policy; see Burke, Lawyers, Lawsuits and Legal Rights, and Kagan, Adversarial Legalism: The American Way of Law.


THE HARE AND THE TORTOISE REVISITED

The New Politics of Risk Regulation in Europe and the United States

DAVID VOGEL

INTRODUCTION

In this chapter, I describe and explain an important shift in the pattern of consumer and environmental protection policies in Europe and the United States. From the 1960s through the early 1990s, American regulatory standards tended to be more comprehensive, risk averse, and innovative than in either individual European countries or in the European Union (EU). However, since the mid-1990s, the reverse has often been the case: during the last fifteen years, a number of significant regulatory standards promulgated by the European Union have been more comprehensive, risk averse, and innovative than those adopted by the United States.

To borrow Lennart Lundqvist's formulation, which he used to contrast American and Swedish air pollution control standards during the 1970s, since around 1990 the American "hare" has been moving forward at a tortoise pace, while the pace of the European "tortoise" more closely resembles that of a hare. 1 To employ a different metaphor, in a number of significant respects European and American regulatory politics have traded places. Previously, regulatory issues were more politically salient and civic interests more influential in the United States than in most individual European countries or the European Union. More recently, the reverse has been true. Consequently, over the last ten to fifteen years, the locus of policy innovation with respect to many areas of consumer and environmental regulation has passed from the United States to Europe.

In an essay published in 1990 titled "American Exceptionalism and the Political Economy of Risk," Jasnoff writes that while "the U.S. process for making risk decisions impressed all observers as costly, confrontational... and unusually open to participation," in Europe, "policy decisions about risk, remained, as before, the