

Table of Contents

<i>Table of Cases</i>	xvii
<i>International Treaties and Conventions</i>	xxv
<i>EU Secondary Legislation</i>	xxvii
<i>Table of International Treaties and Conventions</i>	xxxix
<i>List of Abbreviations</i>	xxxiii
1. Introduction	1
A. Equal Treatment as a Cornerstone of European Integration	3
B. EU Equality Law as a Social Policy with a Transformative Mandate	5
C. EU Equality Law as an (Autonomous) Fundamental Rights Policy	7
1. EU equality law gives expression to the fundamental right to equal treatment	9
2. Why does understanding EU equality law as a fundamental rights policy matter?	12
3. EU equality law as the 'first' fundamental rights policy of the EU	14
D. Equality Law Breaking New Boundaries as an Autonomous EU Fundamental Rights Policy?	17
1. Approach and structure of the book	18
2. Relationship to existing literature on EU equality law	19
3. Equality and non-discrimination in EU law	21
2. Checks and Balances in the Process of Fundamental Rights Law-Making in the EU	22
A. Legislating on Fundamental Rights within a Supranational Legal Order	23
1. Three stages in the regulation of (fundamental) rights	23
(a) The protection of civil and social rights through 'ordinary' laws in Europe	24
(b) 'Uploading' fundamental rights protection to the EU level	24
(c) 'Downloading' fundamental rights protection at the EU level: legislating to give expression to a fundamental right	25
2. Implications of the 'downloading' of fundamental rights protection within the EU legal order	27
(a) Legislation defines the scope of EU political intervention	27
(b) Legislation impacts on the tools available for the protection of fundamental rights	28
(c) Legislation crystallizes a mutation in the function performed by fundamental rights	28
3. The downloading of fundamental rights protection within EU law is only partial	29
B. Debating Systems of Fundamental Rights Protection within a Single Legal Order: Inter-Institutional Tensions	30
1. The interplay between constitution and legislation giving expression to fundamental rights in domestic legal orders	30

(a)	The debate on judicial review: rights as limits versus outcomes of political processes	30
(b)	The positive dimension of fundamental rights: legislative intervention is warranted to ensure their realization	33
2.	Constitutional versus legislative guidance on fundamental rights in the EU	35
(a)	Constitutionalization as inherent in both fundamental rights and EU law-making	36
(b)	The call for political intervention by the EU in matters concerning fundamental rights	36
(c)	Responses to the call for political intervention by the EU in matters concerning fundamental rights	37
3.	Constitutional versus legislative guidance on equality law in the EU	39
C.	Tensions between Domestic and EU Legal Orders in the Process of Europeanization of the Fundamental Rights Discourse	44
1.	Constitutive versus divisive effects of supranationalization of fundamental rights discourse	44
2.	The EU principle of subsidiarity is ill-suited to regulate EU legislative intervention in fundamental rights matters	47
3.	The EU is not a subsidiary organ	49
4.	The supranationalization of equality law-making in the EU	53
D.	Conclusions: The Political Dimension of EU Equality Law-Making	55
3.	EU Equality Law at a Constitutional Crossroads	58
A.	Plurality in the Making of EU Equality Law: Mapping Provisions, Their Functions, and Key Actors	59
1.	The prohibition of discrimination as a constitutional check	61
(a)	The general principle of equality	61
(b)	Equality in the Charter of Fundamental Rights of the European Union	62
(c)	EU membership of select international human rights treaties	63
(d)	Fundamental rights protection within the scope of application of EU law	66
(e)	Fundamental rights, constituent powers, and the Court	67
2.	The prohibition of discrimination as a constitutional check and an EU competence	68
(a)	Treaty provisions performing a dual function: the prohibition of nationality and sex discrimination in relation to pay	69
(b)	The dual function: its implications and institutional actors	70
3.	EU competences to adopt legislation giving effect to the prohibition of discrimination	71
(a)	'Old' branches of equality law: ordinary legislative procedure	71
(b)	'New' branches of equality law: special legislative control mechanisms	73
(c)	The 'invisible' branch of EU equality law	75
4.	Conclusion: constitutional asymmetries	76
B.	Institutional Competition for the Shaping of EU Equality Law	77
1.	The fine line between setting a framework for and hindering political debate	79

(a)	Framing the debate in European terms and placing the EU judiciary in a central position: <i>Defrenne II</i>	79
(b)	Consolidating political entrapment: legislative codification of constitutional case law	81
(c)	Bridging the constitutional asymmetry between 'old' and 'new' branches of equality law: <i>Mangold</i> and <i>Küçükdeveci</i>	83
(d)	Incorporating the outcome of the political process back into the constitutional norm?	85
(e)	Conclusions: from pre-empting to hindering political debate	87
2.	Soul-searching: how and where to acknowledge the political dimension of fundamental rights law-making	87
(a)	Discomfort with addressing disagreement at constitutional level	88
(i)	Reluctance by treaty-makers to reverse the Court's case law framed in constitutional terms: the <i>Barber</i> saga	89
(ii)	Reluctance by the judiciary to engage with political guidance framed in constitutional terms: the debate on positive action	91
(iii)	Looking for the appropriate tone and level to address the policy implications of equality law-making	95
(b)	Acknowledging the political limits of principled legislation: lessons from <i>Test-Achats</i>	96
(c)	A clear line between the roles of political institutions and the judiciary?	98
(i)	Declining to broaden the scope of EU equality law through constitutional adjudication: the <i>Grant</i> case	98
(ii)	De-constitutionalizing the perimeters of EU equality law: from <i>Martínez Sala</i> to <i>Breyer</i> et al	99
(iii)	Acknowledging the political dimension of equality law-making and locating the debate at legislative level	104
3.	Conclusions: constitutional design of a fundamental rights policy and institutional dynamics	105
4.	Epilogue: implications for the edifice of EU equality jurisprudence	106
4.	Distinguishing Legislation giving Expression to Fundamental Rights: Lessons from EU Equality Law	110
A.	Resisting Parallelism Based on Overlap between Primary and Secondary Rules: (Fundamental) Social Rights	112
1.	From avoidance to demarcation	113
2.	The boundaries of fundamental rights law-making: draft guidelines	117
B.	Isolated Equal Treatment Clauses: Giving Expression to the Fundamental Right to Equal Treatment?	120
1.	Equal treatment clauses for those involved in flexible forms of employment	121
(a)	Mapping out the equal treatment clauses for the benefit of atypical workers	121
(b)	Equal treatment as a classic legislative choice for the benefit of selected categories of workers	123
(c)	Calls for a coherent interpretation of miscellaneous equal treatment provisions and the risk of constitutionalization	126

(d) From avoidance to demarcation with reference to ‘particularly important principles of EU social law’	130
2. Equal treatment clauses for third-country nationals legally residing in the EU	133
C. EU Equality and Data Protection Law: Parallel Constitutional Designs and Challenges	136
D. Conclusion: EU Equality and Data Protection Law at the Forefront of EU Law-Making on Fundamental Rights?	141
5. The Legislative Embedding of the Governance of EU Equality Law	144
A. The Common Legislative Framework for the Governance of the EU Fundamental Right to Equal Treatment	145
1. The ‘ages’ of the proceduralization of EU equality policy: asserting the ‘transformative’ function of this field of EU law	148
(a) The coming of age of the procedural law of EU equality policy	148
(b) The common procedural law of EU equality policy	150
(i) Access to judicial and/or administrative procedures	150
(ii) Partial shift in the burden of proof	151
(iii) Victimization	152
(iv) Specialized bodies and their relationship to courts	152
(v) Sanctions, penalties, compensation, and reparation	153
(c) Conclusion: EU procedural equality law as a key component of the ‘first’ fundamental rights policy of the EU	154
2. The (still?) ugly duckling: the prohibition of nationality discrimination	155
(a) ‘So the first shall be the last . . .’: the proceduralization of EU nationality discrimination policy	156
(i) Access to judicial and/or administrative procedures	157
(ii) Partial shift in the burden of proof	158
(iii) Victimization	158
(iv) Specialized bodies and their relationship to courts	158
(v) Sanctions, penalties, compensation, and reparation	159
(b) A significant step towards the assertion of the ‘transformative’ function of the prohibition of nationality discrimination	159
(c) Conclusion: the added value of legislative intervention for the enforcement of equal treatment	160
3. The ‘hybridization’ of EU equality law for the purpose of fundamental rights policy-making	162
(a) Hybridization within the anti-discrimination directives	163
(b) Hybridization as part of a broader policy impetus	164
(c) Conclusion: EU legislative intervention contributing to a methodological shift	166
B. Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices	167
1. Interdependency between the reception of EU legal concepts and their enforcement at the domestic level	169
2. Infrastructure for change: the central role of collective actors at the domestic level	171

3. Complementary tools of EU fundamental rights governance: 'hybridization' in action	173
4. Interplay between the domestic sphere and EU law concepts	174
5. Conclusions: EU legislation shaping the governance of EU fundamental rights at the domestic level	176
C. Cross-Fertilization: The Example of Sectoral Fundamental Rights Guardians at the Domestic Level	177
1. The emergence of independent institutions guarding EU fundamental rights	179
(a) EU equality bodies at the domestic level	181
(b) EU Data Protection Authorities at the domestic level	182
(c) Different origins and designs, but independent fundamental rights guardians in both cases	186
2. Towards a coherent legal regime for EU fundamental rights guardians?	187
(a) EU fundamental rights guardians as stakeholders supporting policy-making, not judicial actors	187
(b) Performing their tasks as guardians of fundamental rights independently	192
(i) Judicial and administrative versus fundamental rights authorities	192
(ii) The criterion of 'independence'	193
(iii) Lessons for equality law	196
3. Conclusion: EU equality bodies as independent watchdogs at the domestic level	200
6. Conclusion	201
<i>Index</i>	205