## CONTENTS

Chapter 1 General Introduction: The Need for a General Decision Model  1 Judicial Assessment of Unequal Treatment	Acknowledgements	xvii
2 Problems Regarding the Judicial Assessment of the Principle of Equality         4           3 The Need for Well-reasoned Decisions on Unequal Treatment         5           4 The Desirability of Developing a Decision Model         7           Chapter 2 A Theoretical Model for Judicial Decision-making on the Principle of Equality         9           1.1 Equality, Comparability, Differentiation and Discrimination         9           1.1.1 The Aristotelian Equality Formula         9           1.1.2 Distinction, Unequal Treatment, Differentiation, Classification and Discrimination         11           1.2 Formal and Substantive Inequality; Direct and Indirect Inequality         12           1.2.1 Formal and Substantive Inequality—Relationship of these Concepts to Formal and Substantive Inequality         13           1.2.3 Other Concepts         14           2 Scope of Application of the Decision Model         16           2.1 Introduction         16           2.2 Open and Closed Models         16           2.3 Situations where a Complaint can be Made about         18           2.3.1 Situations of Unequal Treatment         18           2.3.2 Consequences for the Assessment Methods         21           2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional         22           2.5 Ground of Distinction         25	•	
of Equality	1 Judicial Assessment of Unequal Treatment	1
3 The Need for Well-reasoned Decisions on Unequal Treatment		4
4 The Desirability of Developing a Decision Model         7           Chapter 2 A Theoretical Model for Judicial Decision-making on the Principle of Equality         9           1 Definition of Concepts         9           1.1 Equality, Comparability, Differentiation and Discrimination         9           1.1.1 The Aristotelian Equality Formula         9           1.1.2 Distinction, Unequal Treatment, Differentiation, Classification and Discrimination         11           1.2 Formal and Substantive Inequality; Direct and Indirect Inequality         12           1.2.1 Formal and Substantive Inequality         12           1.2.2 Direct and Indirect Inequality—Relationship of these Concepts to Formal and Substantive Inequality         13           1.2.3 Other Concepts         14           2 Scope of Application of the Decision Model         16           2.1 Introduction         16           2.2 Open and Closed Models         16           2.3 Situations where a Complaint can be Made about Unequal Treatment         18           2.3.1 Situations of Unequal Treatment         18           2.3.2 Consequences for the Assessment Methods         21           2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional         22           2.5 Ground of Distinction         25           2.6 Applicability in Horizontal Relationships </td <td>* '</td> <td></td>	* '	
on the Principle of Equality  1 Definition of Concepts	•	
1 Definition of Concepts       9         1.1 Equality, Comparability, Differentiation and Discrimination       9         1.1.1 The Aristotelian Equality Formula       9         1.1.2 Distinction, Unequal Treatment, Differentiation, Classification and Discrimination       11         1.2 Formal and Substantive Inequality; Direct and Indirect Inequality       12         1.2.1 Formal and Substantive Inequality—Relationship of these Concepts to Formal and Substantive Inequality       13         1.2.2 Direct and Indirect Inequality—Relationship of these Concepts       14         2 Scope of Application of the Decision Model       16         2.1 Introduction       16         2.2 Open and Closed Models       16         2.3 Situations where a Complaint can be Made about Unequal Treatment       18         2.3.1 Situations of Unequal Treatment       18         2.3.2 Consequences for the Assessment Methods       21         2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional       22         2.5 Ground of Distinction       25         2.6 Applicability in Horizontal Relationships       26         3 Contents of the Assessment Model       28         3.1 General Remarks       28		
1.1 Equality, Comparability, Differentiation and Discrimination		O
Discrimination	•	9
1.1.1 The Aristotelian Equality Formula 9 1.1.2 Distinction, Unequal Treatment, Differentiation, Classification and Discrimination 11 1.2 Formal and Substantive Inequality; Direct and Indirect Inequality 12 1.2.1 Formal and Substantive Inequality 12 1.2.2 Direct and Indirect Inequality—Relationship of these Concepts to Formal and Substantive Inequality 13 1.2.3 Other Concepts 14 2 Scope of Application of the Decision Model 16 2.1 Introduction 16 2.2 Open and Closed Models 16 2.3 Situations where a Complaint can be Made about Unequal Treatment 18 2.3.1 Situations of Unequal Treatment 18 2.3.2 Consequences for the Assessment Methods 21 2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional 22 2.5 Ground of Distinction 25 2.6 Applicability in Horizontal Relationships 26 3 Contents of the Assessment Model 28 3.1 General Remarks 28		a
1.1.2 Distinction, Unequal Treatment, Differentiation, Classification and Discrimination 11  1.2 Formal and Substantive Inequality; Direct and Indirect Inequality 12  1.2.1 Formal and Substantive Inequality—Relationship of these Concepts to Formal and Substantive Inequality 13  1.2.2 Other Concepts 14  2 Scope of Application of the Decision Model 16  2.1 Introduction 16  2.2 Open and Closed Models 16  2.3 Situations where a Complaint can be Made about Unequal Treatment 18  2.3.1 Situations of Unequal Treatment 18  2.3.2 Consequences for the Assessment Methods 21  2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional 22  2.5 Ground of Distinction 25  2.6 Applicability in Horizontal Relationships 26  3 Contents of the Assessment Model 28  3.1 General Remarks 28		
Classification and Discrimination 11  1.2 Formal and Substantive Inequality; Direct and Indirect Inequality 12  1.2.1 Formal and Substantive Inequality 12  1.2.2 Direct and Indirect Inequality—Relationship of these Concepts to Formal and Substantive Inequality 13  1.2.3 Other Concepts 14  2 Scope of Application of the Decision Model 16  2.1 Introduction 16  2.2 Open and Closed Models 16  2.3 Situations where a Complaint can be Made about Unequal Treatment 18  2.3.1 Situations of Unequal Treatment 18  2.3.2 Consequences for the Assessment Methods 21  2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional 22  2.5 Ground of Distinction 25  2.6 Applicability in Horizontal Relationships 26  3 Contents of the Assessment Model 28  3.1 General Remarks 28		9
1.2 Formal and Substantive Inequality; Direct and Indirect Inequality		11
Indirect Inequality         12           1.2.1 Formal and Substantive Inequality         12           1.2.2 Direct and Indirect Inequality—Relationship of these Concepts to Formal and Substantive Inequality         13           1.2.3 Other Concepts         14           2 Scope of Application of the Decision Model         16           2.1 Introduction         16           2.2 Open and Closed Models         16           2.3 Situations where a Complaint can be Made about Unequal Treatment         18           2.3.1 Situations of Unequal Treatment         18           2.3.2 Consequences for the Assessment Methods         21           2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional         22           2.5 Ground of Distinction         25           2.6 Applicability in Horizontal Relationships         26           3 Contents of the Assessment Model         28           3.1 General Remarks         28		11
1.2.1 Formal and Substantive Inequality       12         1.2.2 Direct and Indirect Inequality—Relationship of these Concepts to Formal and Substantive Inequality       13         1.2.3 Other Concepts       14         2 Scope of Application of the Decision Model       16         2.1 Introduction       16         2.2 Open and Closed Models       16         2.3 Situations where a Complaint can be Made about Unequal Treatment       18         2.3.1 Situations of Unequal Treatment       18         2.3.2 Consequences for the Assessment Methods       21         2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional       22         2.5 Ground of Distinction       25         2.6 Applicability in Horizontal Relationships       26         3 Contents of the Assessment Model       28         3.1 General Remarks       28	± **	19
1.2.2 Direct and Indirect Inequality—Relationship of these Concepts to Formal and Substantive Inequality		
of these Concepts to Formal and Substantive Inequality		
Inequality		
1.2.3 Other Concepts 14 2 Scope of Application of the Decision Model 16 2.1 Introduction 16 2.2 Open and Closed Models 16 2.3 Situations where a Complaint can be Made about Unequal Treatment 18 2.3.1 Situations of Unequal Treatment 18 2.3.2 Consequences for the Assessment Methods 21 2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional 22 2.5 Ground of Distinction 25 2.6 Applicability in Horizontal Relationships 26 3 Contents of the Assessment Model 28 3.1 General Remarks 28		13
2 Scope of Application of the Decision Model 16 2.1 Introduction 16 2.2 Open and Closed Models 16 2.3 Situations where a Complaint can be Made about Unequal Treatment 18 2.3.1 Situations of Unequal Treatment 18 2.3.2 Consequences for the Assessment Methods 21 2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional 22 2.5 Ground of Distinction 25 2.6 Applicability in Horizontal Relationships 26 3 Contents of the Assessment Model 28 3.1 General Remarks 28	1 /	
2.1 Introduction		
2.2 Open and Closed Models162.3 Situations where a Complaint can be Made about Unequal Treatment182.3.1 Situations of Unequal Treatment182.3.2 Consequences for the Assessment Methods212.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional222.5 Ground of Distinction252.6 Applicability in Horizontal Relationships263 Contents of the Assessment Model283.1 General Remarks28		
2.3 Situations where a Complaint can be Made about Unequal Treatment		
Unequal Treatment		- 0
2.3.1 Situations of Unequal Treatment 18 2.3.2 Consequences for the Assessment Methods 21 2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional 22 2.5 Ground of Distinction 25 2.6 Applicability in Horizontal Relationships 26 3 Contents of the Assessment Model 28 3.1 General Remarks 28		18
2.3.2 Consequences for the Assessment Methods 21 2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional		
2.4 Manifestations of Unequal Treatment: Formal or Substantive, Direct or Indirect, Intentional or Unintentional		
Substantive, Direct or Indirect, Intentional or Unintentional		
Unintentional		
2.5Ground of Distinction252.6Applicability in Horizontal Relationships263Contents of the Assessment Model283.1General Remarks28		22
2.6 Applicability in Horizontal Relationships263 Contents of the Assessment Model283.1 General Remarks28		
3 Contents of the Assessment Model		
3.1 General Remarks	11 /	
	3.1.1 Introduction	

vii

		3.1.2	Phases of the Assessment
		3.1.3	Design of the Justification or Assessment Model
		3.1.4	Preferential Treatment
	3.2	The R	Requirement of a Legitimate Aim
		3.2.1	Introduction: The Need to Assess the Legitimacy
			of the Aims Pursued
		3.2.2	Uncovering the Aim of a Difference in Treatment
		3.2.3	The Simultaneous Search for Different Goals
			(Plurality of Objectives)
		3.2.4	Substantive Assessment of the Justifiability of the
			Aims Pursued
	3.3		ment of the Relationship Between Goal
			Means
		3.3.1	Introduction
		3.3.2	Over- and Underinclusiveness, or the Assessment
			of the Degree of Fit
		3.3.3	Suitability
		3.3.4	Subsidiarity
		3.3.5	Proportionality in the Strict Sense
			(Narrow Proportionality)
ŀ	The	Test o	of Comparability and the First Phase of Assessment
	4.1		nt of the Comparability Test
	4.2	Deter	mining Comparability
		4.2.1	
		4.2.2	The Need to Establish a Standard of Comparison
		4.2.3	Substantive Assessment of the Standard
			of Comparison
		4.2.4	The Justification Model and the Comparability
			Test: Over- and Underinclusiveness
	4.3	The S	Second Phase of the Assessment: Desirability
		of the	Choice of the Justification Model
		4.3.1	Introduction
		4.3.2	The Desirability of the Choice of the
			Justification Model
		4.3.3	Conclusion: No Comparability Test
	4.4	The 1	Evidential Function of the Comparability Test;
		Alterr	native Tests
		4.4.1	Assessment in the First Phase; Apportionment
			of the Burden of Proof
		4.4.2	First Alternative: Test of Intent or Motive
		4.4.3	Second Alternative: the 'but for' Criterion
		4 4 4	Third Alternative: Test of Disadvantage
		4.4.4	Third Atternative. Test of Disadvantage

iii		CONTENTS		CONTENTS 1X
		2.2.1 Assessment Standards when Judging		3.2.6 The Importance of the Affected Right:
		Comparability	127	Fundamental Interests and Core Rights 187
		2.2.2 Omission of the Comparability Test in		3.2.7 Nature of the Interference
		Specific Cases	129	3.2.8 Balancing the Intensity-determining Factors 194
		2.2.3 The Test of Disadvantage as an Alternative	140	3.3 Intensity of the Assessment and Article 14:
		for the Comparability Test	135	The "Very Weighty Reasons" Doctrine 199
	2.3	Assessment of the Presence of a Legitimate Aim		3.3.1 Translating the Margin of Appreciation
	4.5	2.3.1 Determining the Aim of the Distinction		Doctrine into a Very Weighty Reasons Doctrine 199
		2.3.2 Justification of the Aims Pursued		3.3.2 Criterion for the Applicability of the Very
	9.4	Assessment of the Relationship between Goal and Means:	140	Weighty Reasons Doctrine: Ground of
	4.4	Proportionality in the Broad Sense	1.4.4.	Distinction
		2.4.1 Content and Application of the	177	3.3.3 Conclusion
		Goal-means Test and Article 14	1 4 4	4 Conclusions
			144	4.1 Conclusions Relating to the Assessment Methods
		2.4.2 Application of the Goal-means Test with		4.1.1 Introduction
		Respect to Substantive Provisions of the	140	4.1.2 Assessment in the First Phase:
	0.5	Convention		the Comparability Test
	2.5	Suitability	152	4.1.3 The Second Phase of the Assessment:
		2.5.1 The Suitability Test with Respect to Substantive	150	
		Convention Provisions		Application of the Justification Model
	0.0	2.5.2 The Suitability Test with Respect to Article 14		
	2.6	Subsidiarity and Necessity	154	4.2.1 Method of the Court, Levels of Intensity
		2.6.1 Subsidiarity and Necessity with Respect to		and Influence on the Assessment Methods
		Substantive Convention Provisions	154	4.2.2 Factors that Determine the Intensity of
		2.6.2 Subsidiarity and Necessity when Assessing		the Assessment
		against Article 14		
	2.7	Proportionality in the Strict Sense	160	Chapter 4 Assessment by the European Court of Justice
	2.8	A Missing Criterion: Assessment of Over- and		against the Principle of Equality
		Underinclusiveness		1 General
	2.9	Conclusion		1.1 Content and Background of the Principle of
3	Inter	nsity of the Assessment and the Margin of Appreciation	165	Equality in Community Law
	3.1	Introduction	165	1.1.1 The EC Treaty and the Principle of Equality 223
		3.1.1 Content of the Margin of Appreciation Doctrine	165	1.1.2 Background and Meaning of the Principle
		3.1.2 Basis for Accepting the Margin of Appreciation		of Equality in European Law
		Doctrine	166	1.2 Direct and Indirect Distinctions; Formal and
		3.1.3 Significance of the Margin of Appreciation		Substantive Inequality
		for the Intensity of the Assessment	169	1.2.1 Direct and Indirect Distinctions
	3.2	Factors Determining the Scope of the Margin of		1.2.2 Formal and Substantive Inequality
		Appreciation	170	1.3 Horizontal and Vertical Relations
		3.2.1 Introduction		1.4 Nature of the Procedure in which the Equality
		3.2.2 The "Common Ground" Factor: the Existence		Principle Plays a Role
		of a European Consensus	171	1.5 Structure of this Chapter
		3.2.3 The "Better Placed" Argument		2 The Assessment Models
		3.2.4 The Character and the Weight of the Aims		2.1 General Description of the Assessment Models
		Pursued	182	2.1.1 The Assessment Model with Distinctions
		3.2.5 Context of the Measure in Question		Based on Gender

 $\mathbf{X}$ 

	2.1.2	The Assessment Model for Distinctions in the	
		Field of the Common Agricultural Policy	240
	2.1.3	The Assessment Model in the Case of	
		Distinctions Based on Nationality	245
2.2	The H	First Phase of Assessment: Comparability and	
	Disad	vantage	247
	2.2.1	Comparability and Disadvantage with Unequal	
		Treatment Based on Gender	247
	2.2.2	Comparability and Disadvantage in the Field	
		of Agriculture	253
	2.2.3	Comparability and Disadvantage with Unequal	
		Treatment Based on Nationality	260
	2.2.4	Applications of the Comparability Test with	
		Article 90 EC	268
2.3	Assess	ment of the Goal	270
	2.3.1	Assessment of the Goal with Unequal	
		Treatment Based on Gender	270
	2.3.2	Assessment of the Goal with Unequal	
		Treatment in the Field of Agriculture	277
	2.3.3	Assessment of the Goal with Unequal	
		Treatment Based on Nationality	280
	2.3.4	Assessment of the Goal with Article 90 EC	283
	2.3.5	Conclusions	286
2.4		ment of Suitability, Subsidiarity and Proportionality	287
	2.4.1	Assessment of Suitability, Subsidiarity and	
		Proportionality with Unequal Treatment	
		Based on Gender	287
	2.4.2	Assessment of Suitability, Necessity and	
		Proportionality with Unequal Treatment	
		in the Field of Agriculture	290
	2.4.3	Assessment of Suitability, Subsidiarity and	
		Proportionality with Unequal Treatment	
		Based on Nationality	300
2.5	Missin	g Element in the Assessment by the ECJ:	
		ment of the Degree of Fit	305
		the Assessment	307
3.1	Genera	al	307
3.2	Intensi	ity of the Assessment with Unequal Treatment	
		on Gender	308
	3.2.1	Introduction	308
	3.2.2	Factors that Determine the Intensity of	
		the Assessment	309
	3.2.3	Conclusion	309
3.3		ity of the Assessment with Unequal Treatment	
	in the	Field of Agriculture	320

3.3.1       Introduction       320         3.3.2       Factors that Determine the Intensity of the					
Assessment 321 3.3.3 Conclusion 329 3.4 Intensity of the Assessment with Unequal Treatment Based on Nationality 330 3.4.1 Nature and Weight of the Prohibition of Unequal Treatment Based on Nationality 330 3.4.2 Factors which Result in Reduced Intensity of the Assessment 333 3.4.3 Conclusion 340 4 Conclusions 344 4.1 Consequences of the Background of the Prohibition of Unequal Treatment 342 4.1.1 Consequences of the Background of the Prohibition of Unequal Treatment 342 4.1.2 Horizontal and Vertical Relations: Consequences for the Assessment Methods 345 4.1.3 Assessment in the First Phase: Comparability and Disadvantage 346 4.1.4 The Goal of the Distinction 352 4.1.5 Degree of Fit, Suitability, Necessity and Proportionality 353 4.2 Conclusions Relating to the Intensity of the Assessment 357 4.2.1 Gradations or Levels of Intensity 357 4.2.2 Factors that Play a Role in the Determination of the Intensity of the Assessment 359  Chapter 5 Assessment Against the Equal Protection Clause by the Supreme Court 1 Introduction 365 1.1.1 Development and Significance of the Fourteenth Amendment 365 1.1.1 Development and Significance of the Fourteenth Amendment 365 1.1.1 Extension of the Scope to Include Infringements of all Interests and Rights 367 1.1.2 Extension of the Scope from Race to Other Grounds of Distinction 369 1.1.1 Formal or Substantive equality; Direct and Indirect Distinctions 371 1.1.5 Applicability of the Equal Protection Clause in all Situations 375 1.2.1 Consequences of the Federal System and the States 375 1.2.1 Consequences of the Federal System for the			0.0.2		320
3.3.3   Conclusion   329   3.4   Intensity of the Assessment with Unequal Treatment Based on Nationality   330   3.4.1   Nature and Weight of the Prohibition of Unequal Treatment Based on Nationality   330   3.4.2   Factors which Result in Reduced Intensity of the Assessment   333   3.4.3   Conclusion   340   4   Conclusions   342   4.1   Conclusions Relating to the Assessment Method   342   4.1.1   Consequences of the Background of the Prohibition of Unequal Treatment   342   4.1.2   Horizontal and Vertical Relations:   Consequences for the Assessment Methods   343   4.1.3   Assessment in the First Phase:   Comparability and Disadvantage   346   4.1.4   The Goal of the Distinction   352   4.1.5   Degree of Fit, Suitability, Necessity   and Proportionality   353   4.2   Conclusions Relating to the Intensity of the Assessment   357   4.2.1   Gradations or Levels of Intensity   357   4.2.2   Factors that Play a Role in the Determination   367   4.2.2   Factors that Play a Role in the Determination   367   4.2.3   The Court   367   1.1   Background and Scope of the Equal Protection Clause   368   1.1.1   Development and Significance of the Fourteenth Amendment   368   1.1.2   Extension of the Scope to Include   Infringements of all Interests and Rights   367   1.1.2   Extension of the Scope from Race to Other Grounds of Distinction   369   1.1.4   Formal or Substantive equality; Direct   and Indirect Distinctions   374   1.1.2   Relationship Between the Federal System and the States   375   1.2   Relationship Between the Federal System and the States   375   1.2   Relationship Between the Federal System and the States   375   1.2   Relationship Between the Federal System for the			3.3.2	,	
3.4 Intensity of the Assessment with Unequal Treatment Based on Nationality 3.4.1 Nature and Weight of the Prohibition of Unequal Treatment Based on Nationality 3.4.2 Factors which Result in Reduced Intensity of the Assessment 3.4.3 Conclusion 3.4.4 Conclusions Relating to the Assessment Method 4.1.1 Consequences of the Background of the Prohibition of Unequal Treatment 4.1.2 Horizontal and Vertical Relations: Consequences for the Assessment Methods 4.1.3 Assessment in the First Phase: Comparability and Disadvantage 4.1.4 The Goal of the Distinction 4.1.5 Degree of Fit, Suitability, Necessity and Proportionality and Proportionality 4.2.1 Gradations or Levels of Intensity 4.2.2 Factors that Play a Role in the Determination of the Intensity of the Assessment 357 4.2.2 Factors that Play a Role in the Determination of the Intensity of the Assessment 359 Chapter 5 Assessment Against the Equal Protection Clause by the Supreme Court 1 Introduction 360 1.1.1 Background and Scope of the Equal Protection Clause by the Supreme Court 1 Introduction 361 1.1.1 Development and Significance of the Fourteenth Amendment 362 1.1.2 Extension of the Scope to Include Infringements of all Interests and Rights 363 374 375 376 376 377 378 378 379 379 370 370 370 371 371 371 371 371 371 371 372 373 374 374 375 375 375 375 376 376 377 377 377 377 377 377 377 377					
Treatment Based on Nationality   3.4.1   Nature and Weight of the Prohibition of Unequal Treatment Based on Nationality   330   3.4.2   Factors which Result in Reduced Intensity of the Assessment   333   3.4.3   Conclusion   340   4   Conclusions   342   4.1   Consequences of the Background of the Prohibition of Unequal Treatment   342   4.1.2   Horizontal and Vertical Relations:   Consequences for the Assessment Methods   345   4.1.3   Assessment in the First Phase:   Comparability and Disadvantage   346   4.1.4   The Goal of the Distinction   352   4.1.5   Degree of Fit, Suitability, Necessity   and Proportionality   355   4.2   Conclusions Relating to the Intensity of the Assessment   357   4.2.1   Gradations or Levels of Intensity   357   4.2.2   Factors that Play a Role in the Determination of the Intensity of the Assessment   359   355					329
3.4.1 Nature and Weight of the Prohibition of Unequal Treatment Based on Nationality   330		3.4		,	
Of Unequal Treatment Based on Nationality   330					330
3.4.2   Factors which Result in Reduced Intensity of the Assessment			3.4.1		
the Assessment					330
3.4.3       Conclusions       340         4       Conclusions       342         4.1       Conclusions Relating to the Assessment Method       342         4.1.1       Consequences of the Background of the Prohibition of Unequal Treatment       342         4.1.2       Horizontal and Vertical Relations:			3.4.2	•	
4.1 Conclusions Relating to the Assessment Method					
4.1 Conclusions Relating to the Assessment Method					
4.1.1 Consequences of the Background of the Prohibition of Unequal Treatment	4	Cond			
Prohibition of Unequal Treatment		4.1	Concl	9	342
4.1.2 Horizontal and Vertical Relations: Consequences for the Assessment Methods			4.1.1	1	
Consequences for the Assessment Methods				•	342
4.1.3 Assessment in the First Phase: Comparability and Disadvantage			4.1.2		
Comparability and Disadvantage 346 4.1.4 The Goal of the Distinction 352 4.1.5 Degree of Fit, Suitability, Necessity and Proportionality 355 4.2 Conclusions Relating to the Intensity of the Assessment 357 4.2.1 Gradations or Levels of Intensity 357 4.2.2 Factors that Play a Role in the Determination of the Intensity of the Assessment 359  Chapter 5 Assessment Against the Equal Protection Clause by the Supreme Court 1 Introduction 365 1.1 Background and Scope of the Equal Protection Clause 365 1.1.1 Development and Significance of the Fourteenth Amendment 365 1.1.2 Extension of the Scope to Include Infringements of all Interests and Rights 367 1.1.3 Extension of the Scope from Race to Other Grounds of Distinction 369 1.1.4 Formal or Substantive equality; Direct and Indirect Distinctions 371 1.1.5 Applicability of the Equal Protection Clause in all Situations 374 1.2 Relationship Between the Federal System and the States 375 1.2.1 Consequences of the Federal System for the					345
4.1.4 The Goal of the Distinction			4.1.3		
4.1.5 Degree of Fit, Suitability, Necessity and Proportionality				• •	
and Proportionality					352
4.2 Conclusions Relating to the Intensity of the Assessment			4.1.5		
Assessment				<u>*</u>	355
4.2.1 Gradations or Levels of Intensity		4.2	Concl	usions Relating to the Intensity of the	
4.2.2 Factors that Play a Role in the Determination of the Intensity of the Assessment			Assess		
Chapter 5 Assessment Against the Equal Protection Clause by the Supreme Court 1 Introduction			4.2.1	· · · · · · · · · · · · · · · · · · ·	357
Chapter 5 Assessment Against the Equal Protection Clause by the Supreme Court 1 Introduction			4.2.2	•	
by the Supreme Court  1 Introduction				of the Intensity of the Assessment	359
by the Supreme Court  1 Introduction	Chap	ter 5	Asses	ssment Against the Equal Protection Clause	
1.1 Background and Scope of the Equal Protection Clause					
1.1.1 Development and Significance of the Fourteenth Amendment	1	Intro	duction	ı	365
1.1.1 Development and Significance of the Fourteenth Amendment		1.1	Backg	round and Scope of the Equal Protection Clause	365
Fourteenth Amendment			_	· ·	
1.1.2 Extension of the Scope to Include Infringements of all Interests and Rights					365
Infringements of all Interests and Rights			1.1.2		
1.1.3 Extension of the Scope from Race to Other Grounds of Distinction				•	367
Other Grounds of Distinction			1.1.3	-	
1.1.4 Formal or Substantive equality; Direct and Indirect Distinctions				<u>.</u>	369
and Indirect Distinctions 371  1.1.5 Applicability of the Equal Protection Clause in all Situations 374  1.2 Relationship Between the Federal System and the States 375  1.2.1 Consequences of the Federal System for the			1.1.4		
1.1.5 Applicability of the Equal Protection Clause in all Situations					371
in all Situations			1.1.5		
1.2 Relationship Between the Federal System and the States 375 1.2.1 Consequences of the Federal System for the			_		374
1.2.1 Consequences of the Federal System for the		1.2	Relation		
•				- · · · · · · · · · · · · · · · · · · ·	
				•	375

		1.2.2	Application of the Equal Protection Clause	
			to the Federal Government	376
	1.3	Horiz	ontal Effect	379
		1.3.1	The Fourteenth Amendment and the	
			Necessity of State Action	379
		1.3.2	Horizontal Effect: The Civil Rights Act 1964	381
	1.4	Proce	dure of the Supreme Court	383
	1.5	Assess	sment Methods of the Supreme Court	
		and S	Structure of the Chapter	388
2	Asse	essment	Methods	389
	2.1	Gener	ral Survey of the Tests Used by the	
		Supre	me Court	389
		2.1.1	The Rational Basis Test	389
		2.1.2	Rational Basis "with Bite"	393
		2.1.3	The Strict Scrutiny Test	395
		2.1.4		
	2.2	First-p	phase Assessment: Comparability, Disadvantage	
		and I	ntent	401
		2.2.1	Comparability	401
		2.2.2	Direct Unequal Treatment: The Existence	
			of a Classification as a First-phase Test	407
		2.2.3	Indirect Unequal Treatment: Effect and	
			Intent as a First-phase Test	413
	2.3	Assess	ment of the Presence of a Justified Aim	427
		2.3.1	Manner of Establishing the Purpose	427
		2.3.2	Plurality of Purposes	434
		2.3.3	Assessment of the Legitimacy of the Purpose	437
	2.4	Assess	ment of the Relationship Between	
		Purpo	se and Means	448
		2.4.1	Introduction	448
		2.4.2	Assessment of the Degree of Fit	448
		2.4.3	Assessment of Suitability	453
		2.4.4	Assessment of Necessity and Subsidiarity	457
		2.4.5	Assessment of Proportionality in the Strict Sense	460
3	Inter	nsity of	the Assessment	465
	3.1	Introd	uction	465
	3.2	Theor	etical Underpinning of Differentiation in	
		the In	tensity of the Assessment	467
	3.3		s Relating to the Difference in Treatment	470
		3.3.1	Factors Relating to the Disadvantaged Group	470
		3.3.2	Factors Relating to the Ground of Distinction	479
		3.3.3	Balancing of Factors Relating to the	
			Distinction as such	482

	3.4	Impair	rment of Fundamental Rights as Justification	
		_	rict Scrutiny	486
		3.4.1	Recognition of Individual Fundamental	
			Rights as Justification for Strict Scrutiny	486
		3.4.2	Recognition of Political Rights as	
			Justification for Strict Scrutiny	488
		3.4.3	Changes in the Case Law: Constitutional	
			Rights as Basis for Heightened Scrutiny	490
		3.4.4	Seriousness of the Impairment	493
	3.5		Factors Affecting the Level of Intensity	495
		3.5.1	Introduction	495
		3.5.2	Presence of Discretion, Nature of the Policy	
			Field and the Better Placed Argument	496
		3.5.3	Context of the Distinction	497
		3.5.4	Relationship Between the States and the	
			Federal Government; Subsidiarity Argument	499
		3.5.5	Distinctions of an Unusual Character	501
4	Cond	clusions		502
	4.1		usions Relating to the Assessment Methods	502
		4.1.1	<del>-</del>	502
		4.1.2	Assessment in the First Phase: Comparability,	
			Disadvantage and Intent	502
		4.1.3	Assessment of the Purpose	
		4.1.4	Assessment of the Relationship between	
			Purpose and Means	508
	4.2	Conclu	usions in Respect of the Level of Intensity	511
			Levels of Intensity	
			Factors Determining the Level of Intensity	
			sment Against the Principle of Equality	
		Vetherla		
1	Gene			
	1.1	-	ty Provisions in Dutch Law	
			Introduction	
		1.1.2	Article 1 of the Dutch Constitution	518
		1.1.3	Equality Provisions in International Treaties	519
		1.1.4	Equality Provisions in European Law	
		1.1.5	Equality Provisions in Dutch Legislation	523
		1.1.6	The Principle of Equality as General	
			Principle of Proper Administration	525
	1.2		ons in which Distinctions are Made	528
	1.3		and Indirect Distinctions; Formal and	
		Substa	ntive Inequality	529

		1.3.1	Formal and Substantive Inequality	529
		1.3.2		531
	1.4	Horiz	ontal and Vertical Effect	
	1.5	Differ	ences Between the Courts and Tribunals	
		Comp	petent to Assess Unequal Treatment;	
			ture of the Chapter	537
2	Asse	essment	Methods	540
	2.1		ral Description of the Methods of the	
			us Courts Analysed	540
		2.1.1	Assessment Methods of the Dutch Supreme	
			Court—Civil and Criminal Divisions	540
		2.1.2	Assessment of the Dutch Supreme Court—Tax	
			Division	546
		2.1.3	Assessment Methods of the Administrative	
			Law Division	554
		2.1.4	Assessment Methods of the Central Appeals	
			Tribunal	556
		2.1.5	Assessment Methods of the Equal Treatment	
			Commission	561
	2.2	Comp	parability and Disadvantage in Dutch Case Law	564
		2.2.1		564
		2.2.2	The Comparability Test as First-phase Test	565
		2.2.3	The Disadvantage Test as a First-phase Test	573
	2.3		ment of the Aim	586
		2.3.1	Introduction	586
		2.3.2	Establishment of the Aim	587
		2.3.3	Assessment of the Justifiability of the Aim	593
	2.4		ment of the Relationship between Aim	
			Distinction	608
		2.4.1	9 (	
			and Assessment of the Proxy	
		2.4.2	Suitability	614
		2.4.3	Necessity and Subsidiarity	616
		2.4.4	Proportionality in the Strict Sense	622
3			the Assessment	630
	3.1		ion in the Level of Intensity in the Netherlands	630
	3.2		s that Determine the Level of Intensity	634
		3.2.1	Introduction	634
		3.2.2	Factors that Relate to the Division of Powers	634
		3.2.3	Other Factors that may Affect the Level	
			of Intensity	640
	~	3.2.4	The Balancing of the Various Factors	646
4	Con	clusions		647

CONTENTS

	4.1	Conclusions Relating to the Assessment Method	647
		4.1.1 First-phase Assessment: Comparability	
		and Disadvantage	647
		4.1.2 Second-phase Assessment: the Justification Test	651
	4.2	Conclusions Relating to the Level of Intensity	656
		4.2.1 Variation in the Level of Intensity	656
		4.2.2 Factors Determining the Level of Intensity	657
Char	oter 7	Conclusion: Towards a General Assessment Model	
1		oduction	659
2	First	-phase Assessment: Disadvantage as a First-phase Test	662
	2.1	Introduction	662
	2.2	The Comparability Test as First-phase Test	663
	2.3	The Test of Intent as First-phase Test	667
	2.4	The Test of Disadvantage as First-phase Test	669
		2.4.1 The Disadvantage Test as First-phase Test	
		for the General Assessment Model	669
		2.4.2 Structure of the Test of Disadvantage	670
3	Seco	ond-phase Assessment: the Justification Model	675
3	3.1	The Purpose Test	675
	0.1	3.1.1 Introduction	675
		3.1.2 Determination of the Purpose of the Distinction	676
		3.1.3 Assessment of the Justifiability of the Purpose	679
	3.2	Assessment of the Proxy Used and of the Degree	0.0
	9.4	of Fit	683
		3.2.1 Introduction	683
		3.2.2 Assessment of the Proxy	684
		3.2.3 Assessment of the Degree of Fit	685
	3.3	Suitability	687
	3.4	Subsidiarity and Necessity	688
	3.5	Proportionality	691
	5.5	3.5.1 Abstract or Concrete Assessment?	691
		3.5.2 Structure of the Proportionality Test;	031
		Determination of Interests	602
		9	695
4	Τ		
4		el of Intensity	696
	4.1	Introduction: Levels of Intensity	
	4.2	The Factors Determining the Level of Intensity	700
		4.2.1 Group 1. Factors that Concern the Distinction	700
		as such	700
		4.2.2 Group 2. Factors Relating to the Impairment	700
		of Interests	703

## CONTENTS

4.2.3 Group 3. Factors Relating to the Interest	
Pursued, the Policy Field and Position of	
the Opposite Party	707
5 Brief Summary of the Assessment Model	711
Appendices Case Law Bibliography	
Index	761