Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers

John Donohue, Yale University
COMMENT

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John J. Donohue III*

I. INTRODUCTION

Judging by the long and growing list of relevant federal initiatives, the demand for legislative measures designed to benefit workers must be quite strong. Federal law facilitates the unionization of workforces, establishes minimum wages, provides for social security, promotes health insurance coverage for workers through favorable tax treatment, provides the right to take unpaid leave for certain family emergencies, and regulates pension plans and worker safety. In addition, an elaborate array of “antidiscrimination measures” has developed to serve two functions: 1) to protect workers from receiving adverse treatment because of their race, sex, religion, national origin, age if over forty, or disability (the “disparate treatment standard”); and 2) to ensure that certain classes of “protected workers” are not adversely affected by employer conduct absent a showing of a strong business justification for the challenged practice (the “disparate impact standard”). Moreover, various states have chosen to augment these substantive federal protections or the remedies available to those denied these protections. Many states have created independent prohibitions against certain forms of wrongful discharge, and all states provide benefits to workers injured on the job.

Note that most of these governmentally mandated benefits are directed to all (or virtually all) workers—and thus are referred to as “universal mandates.” Even the disparate treatment component of the major federal employment discrimination law—Title VII of the 1964 Civil Rights Act—which the public might perceive as protecting only selected groups such as women and

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minorities, is generally comprehensive in its protections. For example, white males have often employed these laws to attack alleged unfair treatment because of race or sex. Such cases are possible because the language of the federal law prohibits discrimination on the basis of race or sex—as opposed to discrimination against racial minorities or women—and thus the disparate treatment standard has been applied symmetrically. But some measures of federal law, notably the disparate impact standard, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), seek to provide specific additional benefits to certain identifiable demographic groups: blacks and other minorities, women, those over forty, and the disabled. Thus, a neutral employment practice that disadvantages white men yet has no business justification is permissible, while the same practice would be unlawful if it were to disadvantage women or minorities. Similarly, refusing to hire anyone under forty is permissible (unless it happens to conflict with Title VII’s disparate impact standard by disproportionately harming women or minorities), but refusing to hire anyone over forty quickly runs afoul of the ADEA. So too, the failure to provide a disabled worker with a reasonable accommodation violates the ADA, while a nondisabled worker can lawfully be denied any reasonable accommodation (with the caveat about the disparate impact standard applying once again).

In her richly nuanced and impressively comprehensive article, Accommodation Mandates, Christine Jolls develops the theoretical framework needed to analyze the effect of this class of laws mandating employers to provide benefits to particular, presumably “disadvantaged,” groups of workers. Specifically, Jolls enriches the existing economic model of universal mandates in order to analyze the impact on wages and employment of these targeted labor-market interventions.

One can easily go on at great length about the virtues of this paper. First, it takes a broad area of disparate elements in the law and develops a unified and

1. But Jolls wisely counsels that even when a law is facially applicable to all workers, it may well impact certain groups more powerfully for a variety of reasons—a point that I build on below in the discussion of sex harassment law. One exception to the general rule of uniform applicability of a federal antidiscrimination law is the Age Discrimination in Employment Act, which does not prohibit discrimination on the basis of age unless a worker is over forty years of age. Still, if anyone stays in the workforce long enough they will at some point become covered by this law, and, in this sense, the applicability is comprehensive across all workers even for this law.

2. I conclude that disparate impact analysis will not protect white males as a matter of theory. I am unaware of any case that has ever addressed the point, and have never seen a case where a white male has sued under the disparate impact doctrine. The first prong of a disparate impact case—finding a practice that adversely affects a member of a protected class—will not be met since white males will not deemed to be “protected” under this doctrine. If white males could be deemed “protected,” then any employment practice that deviated from benchmark percentages in its impact on any group would have to be business justified.

original theoretical framework for analyzing a variety of labor market interventions. Second, Jolls has been extremely meticulous and comprehensive in her analysis, and the piece is a model of clarity and precision. She is careful to begin with the most general analysis and then show how the predictions of theory need to be amended by additional qualifications and caveats. With very little math to tax the reader, Jolls is able to generate the type of crisp conclusions that is the mark of a good work in theoretical economics. Third, since the analysis is so rich and sophisticated, many of the conclusions will not be easily intuited through less rigorous approaches, underscoring the value added of the paper. Fourth, by tying the predictions of theory to the existing empirical literature, Jolls has provided a remarkable blend of theory and empirics that is a model of first-rate scholarship. In any paper of this degree of ambition and scope, there will frequently be points on which commentators could object, but I doubt any reader could fail to see the power and the depth of the analysis taken as a whole.

Section II of this comment will describe the outlines of Jolls’ approach and highlight her major theoretical conclusions. Section III attempts to illustrate the value of her theoretical framework by applying it to a few areas that Jolls did not explore in this paper—the law of sex harassment and disparate impact. Section IV raises some broad questions about why accommodation mandates would be adopted if they don’t entirely advance the interests of their intended beneficiaries as the Jollsian framework suggests. Section V explores some of the limits of partial equilibrium analysis of labor market interventions in light of work examining the distributional impact of minimum wage laws and recent controversial empirical work questioning the theoretical predictions of such analyses. Section VI concludes with some general comments on whether the adoption of accommodation mandates is sensible public policy.

II. OVERVIEW OF JOLLS’ PAPER

Jolls begins her paper with the established partial equilibrium analysis of universal mandates, which she then modifies to assess the impact of the targeted mandates that she refers to as “accommodation mandates.” This established framework is based on the simple price-theoretic model in which the intersection of the supply and demand curves for labor identifies the

4. In yet another paper entitled “Antidiscrimination and Accommodation,” Jolls employs her own framework in examining these areas of antidiscrimination law.

5. The partial equilibrium model examines the impact of mandates on labor markets while holding other markets constant. Conceivably, one could take the analysis further by examining subsequent effects in related product markets, as discussed in Section V below. For example, if an accommodation mandate tended to drive up the price of low-wage workers, one could examine those industries that rely heavily on low-wage labor (for example, the fast-food industry), identify the heavy consumers of the product of this industry, and thus trace through the effects of the change in the low-wage labor market on the consumers who will pay the increased prices.
equilibrium wage and quantity of labor hired. How will this equilibrium change if employers are legally required to add a benefit for every worker? The simplest, perhaps trivial, case is where the law tells every employer to give an annual bonus of, say, $1000 to every worker. The basic economic model says that the demand curve will shift down reflecting the fact that every worker is suddenly less attractive by $1000 than they were previously, and the supply curve will also shift down by the same amount because each job is now suddenly $1000 more attractive to workers. The net effect is that: 1) the wage will fall leaving the worker with the same total compensation (wage plus bonus) that existed prior to the passage of the law; and 2) the quantity of labor hired will remain unchanged.\footnote{Note that the impact of the precisely specified monetary benefit mandate for contracting parties is the easiest to identify because the resulting supply and demand shifts will be the same, and thus offsetting. Most mandated benefits, however, will not be so easily monetized. In these cases, it is likely that the cost of providing the benefit will not be identical to the value of the benefit to the intended beneficiary. As a result, the impact on wages and employment (or price and quantity in the case of sales of goods or services) will depend on whether the cost to the provider is greater than the value to the intended beneficiary, or vice versa. If the cost is greater than the value, then the shift in the demand curve will be greater than that in the supply curve, leading to lower wages and lower levels of employment—that is, the workers are clearly harmed by the mandate. Conversely, if the cost is less than the value, then the shift in demand will be less than the shift in supply, and both employment and net wages (monetary plus the value of the mandated benefit) will rise, even as monetary wages fall.}

Of course, it is easy to see why this Coase-like invariance prediction would not occur in the short run. Some workers would be governed by existing collective bargaining agreements that would prevent the employer from lowering the wage until the end of the contract was reached. Even those workers who were not covered by a union contract might have explicit or implicit contracts that would prevent employers from immediate downward wage adjustments. Nonetheless, over time employers would likely have greater flexibility to respond to the mandated bonus, and one would suspect that they would then lower the wage or reduce future pay increases to offset the mandated bonus. As a result, one might expect that in the long run such a universal mandate would have little or no effect on the total compensation and employment of workers as the simple model predicts.

From this familiar foundation, Jolls launches her comprehensive assessment of accommodation mandates versus mandates directed at workers as a whole. To make this advance, she notes that the accommodation mandate will only directly influence the supply and demand of a portion of the labor market—that governing the intended beneficiaries. Moreover, these intended beneficiaries are generally (and, in the examples that Jolls discusses, uniformly) defined by employment discrimination law to be members of protected classes—for example, the disabled and women of childbearing age. As a result, federal law imposes legal restrictions on lowering wages and reducing
employment for these protected workers, which implies that employers are legally constrained in how they respond to targeted mandates in a way that does not exist when they face universal mandates.

Jolls shows that, because of the failure to consider the impact of antidiscrimination law, naïve extrapolations from the analysis of universal mandates to the targeted mandates that are the focus of her interest can lead to an array of misleading predictions. Jolls analyzes three cases that depend on the extent to which the legal constraints actually impede the employer responses: 1) the wage and employment restrictions of employment discrimination law are both fully binding; 2) the wage restrictions alone are binding; and 3) neither restriction is binding. For each of these three cases, Jolls carefully details how the impact of the targeted mandate is influenced by whether the value of the mandated benefit to the workers is greater or less than the cost to the employer of supplying it. Jolls shows that, unlike the case of the comprehensive mandate discussed above, accommodation mandates have a greater scope for benefiting their intended beneficiaries (at the expense of the so-called "nondisadvantaged workers") when both the wage and employment restrictions of antidiscrimination law are fully effective. Indeed, this finding can hold even when the value of the benefit is less than its cost, which Jolls notes is especially important if the fact of the disadvantage is what leads disadvantaged workers to value the benefit at a lower level because of a lesser ability to pay for it.

Specifically, Jolls shows that when antidiscrimination law works as it is supposed to—that is, when protected workers do not suffer wage or employment disadvantages—and when the targeted benefit is worth more to the worker than it costs the employer, then the impact of the accommodation mandate is exactly what its supporters would hope: The wages and employment level of the accommodated group will rise. Moreover, Jolls argues that the typical Chicago school response—arguing that the value of the mandate must be less than its costs or the employer already would have supplied it—is not fatal to her optimistic conclusion that accommodation mandates can benefit disadvantaged workers even when the cost of the mandate exceeds its value to workers. The requirement for the optimistic conclusion to go through, however, is that antidiscrimination law is fully effective in protecting the wage and employment levels of the disadvantaged workers who will receive the accommodation mandates. Without the protection of fully effective antidiscrimination law, accommodation mandates will always lower the wages or the employment levels of the disadvantaged workers, or both. Put differently, when antidiscrimination law works in only a partially effective way (by restraining wage discrimination or employment discrimination but not

7. Jolls notes that when employers can simply lower the wage for any worker, the employment constraint will no longer apply, thus leaving us with only three situations to analyze.
both) or is completely ineffective, accommodation mandates hurt their intended beneficiaries. Since the evidence suggests that antidiscrimination law is not fully effective, it is conceivable that Jolls' analysis will be used to marshal a case against enacting most accommodation mandates.

After providing a detailed theoretical evaluation of the impact of accommodation mandates, Jolls then compares the predictions of theory with the existing empirical literature in three selected cases: the ADA, mandated health insurance coverage of maternity-related medical expenses, and the Family and Medical Leave Act (FMLA). In essence, Jolls describes two types of interventions—those designed to mandate benefits for disabled workers (the ADA and the FMLA in that they enable workers to have time off to attend to their own serious illnesses) and those designed to mandate benefits for women (if they become pregnant, or if they use the FMLA to care for relatives). Noting that disabled workers are spread throughout the workforce but that female workers tend to be segregated into largely female occupations, Jolls is able to make the following broad-brush theoretical prediction, which she finds to be buttressed by the empirical literature: Accommodation mandates will tend to impair the employment prospects of disabled workers while leaving their wages intact (or even elevated), and will tend to reduce the wages of female workers without necessarily harming their employment prospects.

One mark of a theoretical economics piece that is destined for success (and many citations) is that it provides a tidy and easily summarized conclusion accompanied by an accessible intuitive explanation. The success will be even greater if the theoretical framework can be applied beyond the subjects directly discussed in the initial piece. On all counts, Jolls has met the criteria for a blockbuster article. Having already given the tidy conclusion—accommodation mandates dampen employment for the disabled without adversely affecting wages and dampen wages for women without adversely affecting employment—I will now offer the intuitive explanation. In a world of imperfectly operating employment discrimination laws, an employer who is suddenly required to provide added benefits to a legally protected class of workers will try to avoid the pain by reducing the wages or the employment of this class of workers. If employment discrimination laws effectively prevent such action, the employer may have to bear at least some pain and will try to shift some of the burden to nontargeted workers by reducing their wages and employment. But it is generally easier to enforce the wage discrimination branch of employment discrimination law than the employment branch—at least if an employer has protected and nonprotected workers in similar

8. The FMLA will accommodate any worker who wishes to use twelve weeks of unpaid leave upon the birth or adoption of a child or to care for an immediate family member who is seriously ill, but Jolls notes that most of those who will accept the leave for these purposes will be women. This social fact enables Jolls to discuss this provision of law as an accommodation mandate (one provided to a select class of workers) rather than as a universal mandate (one provided to all workers).
occupations who can readily compare their salaries. Consequently, one might expect to see employers try to maintain wage equality in the wake of an accommodation mandate but reduce employment of the accommodated group. This is the story that Jolls tells for accommodation mandates designed to benefit the disabled, but she notes that it will not apply in all cases.

To the extent that women congregate in jobs primarily filled by women, the wage constraint of employment discrimination law will be impaired since there will be no ready comparison group to determine the proper wage. In this event, employers will tend to respond to accommodation mandates designed to benefit women by lowering their wages. Once an employer is able to lower the wage of the group, there will be no need to resist hiring its members. Hence, accommodations for the disabled reduce their employment and accommodations of women reduce their wages.

III. APPLYING THE JOLLS FRAMEWORK TO SEX HARASSMENT AND DISPARATE IMPACT LAW

One of the considerable virtues of the broad theoretical framework that Jolls has developed is that it can be applied to a range of mandates beyond those that Jolls specifically addressed. Her framework would seem to apply directly to sex harassment law, but would need some slight modification to be applied to disparate impact law. These issues will be discussed in turn.

A. Sex Harassment

One might think of the rules prohibiting sex harassment as a type of accommodation mandate in that employers must take special steps to protect primarily female employees from harassing behavior by supervisors or fellow workers. Of course, as in her example of the FMLA mandate granting workers the right to take leave to tend to an ailing relative, the obligation to prevent sex harassment is designed to protect all workers. Nonetheless, the fact that female workers will disproportionately benefit from this employer mandate brings it within Jolls' definition. To apply the Jolls framework in this new area, one first notes that the most likely scenario in the case of mandates directed at women is that, because of gender segregation in the workforce, the restrictions on wage differentials will not be binding. At this point, we are only one step away from predicting the effect of the anti-sex harassment mandate on the wages and employment of women. The deciding factor is whether the cost to the employer of complying with the anti-sex harassment mandate is greater or less than the value of the benefit to female employees.

It is certainly plausible that the value to the female employees is greater, so

10. This is the third scenario in column 1 of Jolls' Table 1. Jolls, supra note 3, at 254.
we can begin with this case. 11 Here the prediction is that the wages of women will fall but their level of employment will rise. Indeed, once we assume that the restrictions on wage differentials are not binding, the Jolls framework predicts that female wages will fall regardless of the relationship between the value of this accommodation and its cost. 12 If the value of the accommodation is less than its cost, then not only will the wage fall but the employment of women will fall as well.

Therefore, the Jolls framework indicates that women will pay for anti-sex harassment mandate with lower wages. Uncertainty remains, however, as to whether the lower relative wages of women are offset by increases in the employment of women (which would be my hunch, as this would be consistent with the observed large increases in female labor force participation in the United States), or whether women suffer the double whammy of lower wages and lower employment (in this case where they value the mandate less than its cost of provision). The notion that sex harassment law has imposed any costs on women is something that is probably not well recognized.

B. Disparate Impact Law

In Section I, I noted that disparate impact law could be thought of as an accommodation mandate under Jolls' definition, in that the doctrine imposes a legal obligation on employers to take special efforts to ensure that their employment practices do not impose reasonably avoidable burdens on women

11. Again, we must confront the Chicago-school argument that this state of affairs cannot happen since the employer would provide the benefit under these circumstances. Posner notes that, while sex harassment is costly to employers as well as female employees, it may persist because the costs of prevention are high, which may explain the need for public enforcement. Richard A. Posner, An Economic Analysis of Sex Discrimination Laws, 56 U. CHI. L. REV. 1311, 1332 (1989). It is not quite clear to me what the savings are from public versus private enforcement in this setting, though, so I am not sure that Posner has provided an effective answer to the Chicago critique. Still, I think it is conceivable that employers will not provide benefits that are "efficient," and Jolls provides a number of arguments for how this can happen. One additional point that she doesn't mention is that sometimes private bargaining cannot achieve the goal of insuring equality or respect (since bribing someone to respect you undermines the very notion of equality that the bribe is seeking to attain). See John J. Donohue III, Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, 56 U. CHI. L. REV. 1337, 1351-52 (1989).

12. This conclusion is premised on the assumption that the cost imposed on the employer from the anti-sex harassment mandate rises with the number of female employees, instead of being just a fixed cost, which might be the case if an effective anti-sex harassment policy could be set up at some expense that would not vary with the number of female employees. Even with such a policy in place, however, the employer would presumably find that increasing the number of female employees would increase the number of demands to accommodate the needs of female employees to be separated from harassers and would expose the employer to increased risk of having to pay compensatory and punitive damages if the policy itself or the actions taken pursuant to a complaint proved legally inadequate in the eyes of a jury.
and minorities. The definition would seem to apply directly to this feature of federal antidiscrimination law, and, therefore, it would seem that the Jolls framework would perfectly govern this case. It turns out to be somewhat more complicated, though, since only post-hiring disparate impact cases will turn out to fit the pattern of the previously discussed examples of accommodation mandates.

To see this, let us begin with the application of the disparate impact doctrine to promotions, layoffs, disciplinary actions, and other employment decisions made subsequent to the initial hiring decision. For example, consider how an employer in a cyclical industry might think about the application of disparate impact doctrine to a possible future massive reduction in force. The employer might realize that the more minorities or women that are part of the workforce, the more complicated any layoff decision will be since efforts must be made to ensure that the layoff does not fall disproportionately on members of a protected group, absent a showing of business justification. Every layoff will take longer to arrange, and invites the possibility of disparate impact litigation claiming that the protected group has been arbitrarily disadvantaged. Accordingly, one might expect that at least some employers in the highly cyclical industry might attach an implicit expected cost to hiring such workers. If so, this response would generate precisely the type of downward shift in demand that Jolls predicted in her analysis of accommodation mandates.

Similarly, consider the perspective of protected workers contemplating a job in this cyclical industry. They might consider the protection of the disparate impact doctrine as something that makes it more likely that they will hold on to their job in a downturn, and this reduction in risk would be reflected in a downward shift in the supply curve, just as Jolls found in her general analysis of accommodation mandates. The point, then, is that for non-hiring cases, the analysis of disparate impact law is identical to Jolls' analysis of accommodation mandates.

But the disparate impact doctrine was initially conceived as a means of increasing the hiring of women and minorities, and in this respect the analysis of this doctrine differs from that of the typical accommodation mandate that Jolls discusses. For those typical mandates, the employer was forced to provide a benefit to its workers, and an antidiscrimination law was in place to try to ensure, albeit with uncertain success, that the employer didn’t avoid providing the benefit by simply refusing to hire the intended beneficiaries of the mandate or by fully lowering their wage to shift the full cost to the "accommodated" workers. The disparate impact doctrine in the hiring context will require employers to take explicit steps to increase the hiring of protected workers by eliminating neutral practices that unfairly impede their receiving offers of employment. In so doing, the disparate impact doctrine should generate an upward shift in demand for protected workers—the exact opposite of the effect
of the typical mandate. The bottom line, then, is that the disparate impact doctrine is not precisely analogous to the accommodation mandates that Jolls discusses, in which the mandates have the effect of imposing a cost on the employer (thereby shifting down the demand curve for the targeted group) while providing a benefit to the target group (thereby shifting down the supply curve for this group). While the predicted downward shift in the demand curve resulting from these accommodation mandates may be observed as a response to disparate impact law as applied to post-hiring employment decisions, it is possible that the application of disparate impact law in the hiring context will create an upward shift in the demand curve for the labor of women and minorities. The ultimate effect of the doctrine will then depend on which of the two conflicting tendencies dominates. Consequently, it will be difficult without more information to predict the overall outcome of the doctrine on the wages and employment of protected workers.

Moreover, even if the disparate impact doctrine were only to apply in the hiring context, its effect on the wages and employment of protected workers might differ in the short and long runs. The benefit that protected employees receive from disparate impact law as applied to hiring is embodied in the upward shift in the demand curve with no accompanying downward shift in the supply curve. Therefore, this accommodation mandate should unambiguously increase the employment levels and wages of women and minorities in the short run. In the long run, however, firms might try to locate facilities in areas that would diminish the costs of this mandate, which, given the concentrated geographic location of minorities and the more uniform presence of women, is likely something that can be done for minorities but not for women. Thus, in the long run, this accommodation mandate might conceivably generate at least a partial downward shift in the demand curve for minorities that might somewhat or completely offset the effect of the initial, short-run upward shift in the demand for minority workers.

IV. SOME THOUGHTS ON WORKPLACE MANDATES AND THE REASONS FOR THEIR EXISTENCE

What are we to conclude from the discussion so far about the desirability of various employment mandates? The universal mandates seem completely feckless when the value of the benefit to the worker equals the cost to the employer, and they are positively harmful when the value of the benefit to the worker is less than the cost to the employer. The universal mandate is normatively appealing when the value to the worker is greater than the cost to employer, since then the combined wage plus benefit will enhance

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13. While the employer will bear costs in trying to comply with this portion of the mandate, these are fixed costs and therefore the employer will not experience a downward shift in the demand curve for the protected groups as a result of this mandate as it did in the mandates that Jolls discusses.
compensation for the worker and more such workers will be hired. But some might argue that there will be no such cases because the employer would happily provide the benefit in the first place so the mandate would never be needed. Hence, universal mandates look bad.

And what about the accommodation mandates that Jolls analyzes? She shows that the intended beneficiaries can benefit from such mandates if the employment discrimination law is working effectively. If distributional considerations favor these beneficiaries, these laws could be desirable despite the costs they impose on the nondisadvantaged workers who will subsidize the disadvantaged. But for the reasons Jolls describes at length, it may be too optimistic to think that employment discrimination law will operate to protect the intended beneficiaries of accommodation mandates from offsetting wage and employment reductions. Thus, the accommodation mandates may not look so good either.

But this discussion raises questions about whether we would ever expect to see either universal or targeted mandates, and if so, why? For example, if the analysis of the simple universal mandate with a defined monetary benefit were correct, it would suggest that, apart from the potential short-term considerations that were mentioned, such a law would in fact confer no benefit. Indeed, the simple prediction is that nothing of substance would change. From this, one might be tempted to endorse the following proposition:

Proposition 1: The invariance prediction of the simple model of universal mandates of a defined monetary benefit is correct, and therefore such mandates will not be enacted.

Proposition 1 reflects the simplest story. If it were true, we would be comforted by the accuracy of the seemingly irrefutable economic analysis and by the refusal of legislatures to pursue feckless endeavors. Unfortunately, since such universal mandates are frequently enacted, we know that Proposition 1 is false. For example, much is made of the fact that employers are mandated to pay half of an employee’s social security tax, but of course that is a precisely defined monetary mandate that can be analyzed in the same manner that we saw above. Even if the benefit to the employee is unlinked from the cost to the employer because the social security taxes are channeled through the government, the price theoretic analysis still suggests that there would be no difference if the social security mandated tax was paid either entirely by the employer or entirely by the worker.

This discussion raises some troubling issues, which can be clarified through consideration of two additional propositions:

Proposition 2: The invariance prediction of the simple model of universal mandates of a defined monetary benefit is correct, and yet we still see such mandates enacted.

Proposition 3: That such mandates are frequently enacted should be taken as evidence that the invariance prediction is incorrect.

Assume that Proposition 2 is correct. This indicts the legislators who adopt
such universal mandates as well as the voters who demand, or are placated by, them. It would seem that voters would have to be ignorant and legislators would have to be either ignorant or venal to enact such universal mandates. Since the ability of the employer to offset the mandate through subsequent wage reduction would seem to be fairly obvious, it is difficult to assail the invariance prediction of universal mandates, which becomes a rather serious indictment of democratic decisionmaking that would spawn such feckless legislation. A strong believer in the wisdom of voters would probably be inclined to adopt Proposition 3 on the grounds that a knowledgeable electorate would not reward legislators for laws that offered no benefit. On this view, the economic model must be incorrect or incomplete—perhaps because empty symbolism is in fact valuable to voters.

The ignorance hypothesis gains support from examples of similarly ineffectual mandates that have been adopted in a somewhat different judicial context where the symbolism argument would seem to carry no weight. For example, class action antitrust litigation is frequently settled by an agreement of the defendants to provide all the victims with coupons providing a percentage discount for the next year or two. Particularly in the manufacturing arena, where the plaintiffs are likely to represent the entire universe of future purchasers and the claim is that all of the sellers have colluded to raise prices, such a settlement is identical to the mandated monetary benefit discussed above: It will leave the future purchasers (the antitrust plaintiffs) and the sellers (the antitrust defendants) in exactly the same position as they would be in the absence of any settlement because of the ability of the sellers to fully offset the mandated percentage price break with a price increase. It would be as though a retailer doubled all of his prices and then announced a fifty percent off “sale.”

The coupon settlements in antitrust and other consumer cases are inexplicable if one thinks that knowledgeable plaintiffs are agreeing to them, but they make perfect sense from the perspective of the defendants and the plaintiffs’ lawyers who negotiate them. In return for taking sizable fees, the plaintiffs’ lawyers can promise the defendants that they will not be harmed by the mandate. At the same time, the plaintiffs will be told that they have won the lawsuit and they will receive the(illusory) prospective price reduction as their reward. Judges may approve the settlements as a way to clear their docket (even though the toleration of the practice will lure other plaintiffs’ lawyers to bring more such actions). Of course, if judges and (oftentimes) business plaintiffs can be fooled by this approach, it may be less surprising that legislated mandates for contracting parties can be enacted, with the politicians reaping the political reward for “aiding” certain constituencies while ostensibly burdening employers who will be willing to go along as the cost of the mandate will simply be passed on to the “intended beneficiary”—the workers.

This discussion is somewhat depressing because it suggests that agents, such as legislators, class action attorneys, and judges, are either ignorantly or intentionally acting against the interests of their principals. If universal
mandates are enacted when it is relatively easy to see they will accomplish nothing, what would we expect of accommodation mandates that would be expected to harm their intended beneficiaries? Obviously, the more a legislative initiative harms a group, the less likely its members would be to support its enactment. At the same time, the more complicated the chain of causal inference, the less likely are group members to perceive that something that on its face would appear to be beneficial will in fact be harmful. It should not be surprising that legislators and voters will not readily intuit the more complicated analysis of accommodation mandates that Jolls seeks to provide. This underscores both the importance of Jolls’ mission in trying to clarify the impact of such legislative actions, and the improbability that this clarification will be widely understood. It does explain, though, why the generally bleak message of the tidy conclusion that I ascribe to Jolls is not itself inconsistent with the fact that groups supporting women and the disabled worked hard to achieve these accommodation mandates and resist any effort to eliminate them—despite the fact that they may well be harmful to the interests of their members.

V. ARE PARTIAL EQUILIBRIUM MODEL PREDICTIONS CONCERNING LABOR MARKET INTERVENTIONS SUPPORTED BY EMPIRICAL WORK?

As noted, Jolls concludes from her theoretical discussion that it is likely that the wage equality mandate of the Americans with Disabilities Act will be effective, but the equal employment requirement will be ineffective. Consequently, the reasonable accommodation requirement of the Act will impose burdens on employers that they will seek to avoid by reducing their employment of the disabled (since they will be unable to reduce the wages of the disabled to keep them equally attractive). My sense is that the theory is right, and Jolls discusses two papers—one by Acemoglu and Angrist and another by DeLeire—that provide empirical support for these conclusions.  

The combination of theory and empirics lining up behind a plausible conclusion mutually reinforces the confidence we can have in each. But the recent flap in labor economics over the impact of minimum wage laws has cast somewhat of a pall over simple price theoretic predictions of the effects of legal interventions into labor markets.

Here is the problem. Simple economic theory predicts that minimum wage laws lower employment. Recent empirical work by two highly regarded empiricists has failed to support this prediction. If one accepts the findings of this new empirical work—and to some, this may be a big “if”—one would have to be skeptical of simple partial equilibrium theory in general. This critique

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would then extend a fortiori to Jolls' work. Let me elaborate on this issue.

It seems difficult to argue against the view that the simplest example of the general type of theoretical economic analysis that Jolls provides would be the analysis of the impact of an increase in the minimum wage. Beginning with a labor market that is in equilibrium— that is, the supply curve and the demand curve intersect at the prevailing wage—the setting of a minimum wage above this equilibrium level will lead to an elevation in the wage paid to those workers who are able to find or retain employment, since no worker can be hired at less than the mandated wage. This legal intervention in the labor market will eliminate the equilibration of supply and demand, however, as more workers than was previously the case will seek employment at the higher wage and fewer workers will be demanded than was previously the case because the cost of hiring them has risen. As long as the supply and demand curves for labor are not perfectly inelastic, the introduction of the minimum wage will necessarily lower employment under this standard competitive model.

This minimum-wage analysis is simpler and more straightforward than Jolls' work concerning accommodation mandates. If one had doubts about the predictive accuracy of the minimum-wage model, one would almost certainly have greater doubts about the accuracy of Jolls' predictions. Therefore, it is somewhat troubling that recent empirical work by David Card and Alan Krueger has raised doubts about whether the minimum-wage analysis is in fact true.15 Card and Krueger examined the impact of New Jersey's increase in April of 1992 in its minimum wage from $4.25 to $5.05. This was not a trivial increase as the wage rose by over 18.5 percent. Under previous estimates of the elasticity of demand for labor, one might have expected such an increase in the minimum wage would lower the employment of low-wage labor by about 2-4 percent. Yet Card and Krueger found no evidence that employment fell more or grew more slowly in New Jersey, which raised its minimum wage, than it did in the neighboring counties in Pennsylvania, which had no such increase in the minimum wage. Moreover, in 1996, when the federal government raised its minimum wage to the level in New Jersey, there should have been no effect on New Jersey employment but a dampening effect in Pennsylvania as the new higher cost of level took effect. Again, there is no evidence that Pennsylvania did worse than New Jersey in this later period.

One is left with two possible responses to the Card and Krueger work. First, one might reaffirm the predictions of theory and conclude that any

empirical evidence in conflict with the theory, or at least this evidence, is very likely incorrect. In this case, one can embrace the Jolls' analysis without reservation. Second, one can accept the findings of Card and Krueger as true and conclude that the sizeable increase in the minimum wage had no impact on low-wage employment. Accepting the latter would seem to undermine confidence in Jolls' analysis because if we can't believe the predictions of the competitive economic model in the simplest case, how can we accept it in the more complex scenarios that Jolls addressed?16

Thus, believers in the work of Card and Krueger might question the Jollsian framework, while the critics of Card and Krueger might be more inclined to have faith in the theoretical predictions she offers. Other empirical work on minimum wages by Stanford Professor Thomas MaCurdy may provide some additional insights into either the reasons for enactment of employer-mandated benefits or the need to go beyond partial equilibrium analysis in predicting their effects.17 It turns out that in the first instance minimum wage increases transfer fairly sizeable amounts of money to the workers who see their wages rise by virtue of the legal intervention. MaCurdy has estimated that the 1996 increase in California's minimum wage that was implemented by a referendum increased the wages of low-wage workers (after taxes) by an amount that was equal to more than one-third of the state's entire budget for welfare (Temporary Assistance to Needy Families). This might suggest why minimum-wage increases are demanded by low-wage workers since they appear to have attractive distributional consequences—at least from a partial equilibrium analysis. It turns out, though, that a more complex analysis is needed to address this issue.

The transfer of wealth to workers who experienced an increase in wages by virtue of the minimum-wage increase can be paid in any of three ways: 1) the workers themselves pay for the increase; 2) the employers pay out of reduced profits; or 3) consumers of the products of low-wage labor can pay through higher prices of consumed goods. There is some evidence of the first: Some low-wage workers who ostensibly enjoy higher wages as a result of minimum-wage increases actually experience offsetting reductions in other benefits. The employer might make the employee pay for his or her uniform after the minimum-wage increase or pay more for health care or take away some perks, such as free food. Moreover, if the prediction of theory is in fact true and the minimum-wage hike depressing employment, then one way that low-wage workers pay for the minimum-wage increase is through the loss of jobs. But

16. An argument can be made, though, that the findings of Card and Krueger can still be reconciled with the supply and demand framework if the increase in the minimum wage tends to "shock" workers into greater productivity. In this case, the higher productivity would cause an upward shift in the demand curve, thereby potentially eliminating any disemployment effect.

here we again run into the problem of the contrary findings of Card and Krueger.

MaCurdy notes that the evidence does not support the second view that firms will fund the higher wages out of lower profits. The industries that are the large employers of low-wage labor tend to be quite competitive, and there is little opportunity for these firms to fund the increased wages by accepting lower profits.

This leaves consumers as the most likely source of the remaining funding for the higher minimum wages. But which consumers? MaCurdy has examined input-output tables to estimate the increases in prices of final goods that result from the higher cost of low-wage labor. Obviously, goods that are produced with a heavy reliance on the input of low-wage labor will experience greater price increases as a result of the higher minimum wages. One conclusion that emerges from his analysis is that low-income individuals tend to be relatively high consumers of products that are produced by low-wage workers. Thus, to some extent low-income consumers are paying for the transfers of wealth generated by the adoption of the higher minimum wage.

If a low-income consumer also happened to be a low-wage worker who enjoyed the legally mandated wage increase, then the consumer is better off since the higher wage will more than offset the higher consumer prices that have to be paid. But most low-income individuals will not benefit from the higher minimum wage (since they will not have such a low-wage job). For these individuals, higher prices must be paid without any offsetting increase in income. Therefore, even within the class of the lowest income quintile, some of the distributional consequences of the minimum wage are not entirely desirable. Moreover, since many low-wage jobs that enjoy wage increases when the minimum wage is raised are held by those from higher family-income quintiles, it becomes clear that the minimum wage is not a well-targeted method of subsidizing the earnings of low-income individuals.

While Jolls is analyzing more complex mandates than a simple minimum-wage hike, her partial equilibrium analysis basically stops with the initial round of predictions about the impact. The above discussion examining the impacts in product markets of minimum-wage increases suggests that untangling the distributional consequences of labor market interventions gets very complicated and is generally incomplete without a more comprehensive evaluation of who benefits from the array of employer mandates and who pays for these benefits.

VI. CONCLUSION

Jolls’ work forces us to think broadly about the nature of “disadvantaged” workers, the appropriate role of government in trying to improve their lot, and its success in doing so. Without doubt, African-Americans have been the most “disadvantaged” group in the United States in the sense of having the poorest employment prospects combined with a previous history of oppressive conduct
by governmental entities and the private sector. I noted above that one might think of the disparate impact standard of employment discrimination law as being an accommodation mandate that has attempted to benefit blacks and other protected workers. Overall, the entire edifice of antidiscrimination law has achieved notable success in improving the employment prospects of blacks, particularly in the first decade after passage of the 1964 Civil Rights Act. Moreover, a recent empirical study of measures of perceived well-being across demographic groups in the United States over time suggests that the benefits to blacks from the civil rights movement go beyond narrow economic measures. Thus, while blacks continue to have far lower levels of satisfaction than whites, they have been gaining significantly since this data on self-assessed life satisfaction was first collected in the early 1970s. Specifically, when asked to categorize their own level of happiness into three levels, whites in 1972-1976 were in the happiest category thirty-six percent of the time and only in the least happy category twelve percent, while only twenty percent of blacks fell into the happiest category and twenty-six percent were in the least happy category. By 1994-1998, whites had slipped to only thirty-one percent in the happiest category and had eleven percent in the least happy category, while blacks showed the opposite pattern, with no change in the most happy category, but a substantial drop down to twenty-one percent in the least happy category. Indeed, with the decline in perceived well-being of whites over this same period—query whether this fall is related to the efforts to provide greater justice and fairness for blacks—one may think of civil rights initiatives, among which those in the employment realm are one important part, as narrowing the racial divide in well-being and thereby promoting racial equality.

One might have expected that the concerted legal efforts to eradicate sex discrimination and harassment might have improved the perceived well-being of women over the last thirty years, as it has for blacks. Here the surprising result is that while blacks were experiencing concrete improvements in their material well-being and concomitant gains in perceived well-being, similar evidence of gains by women is far less certain. In fact, to the extent one credits as meaningful self-reports of perceived well-being over time, women have been experiencing declining happiness over the exact period when we might have expected gains paralleling those of black Americans. According to

20. I must confess that I would have thought that the benefits of the improvements in the legal treatment of and economic opportunities available to women would have generated life satisfaction improvements for women similar to those observed for blacks. Indeed, in a published exchange, Richard Posner disagreed with my opinion on this matter by stating that if by reducing the wages of men sex discrimination law propels more wives into the job
Blanchflower and Oswald, measures of the perceived well-being of women declined somewhat over the period from 1972-76 until 1994-98, while those for men were modestly increasing. 

This type of evidence, while certainly not unassailable, at least raises questions about whether employment discrimination law and accommodation mandates are enhancing the well-being of their intended beneficiaries other than blacks. While the studies in question did not specifically address the situation of the disabled, they do raise questions about whether a situation in which the disabled secure wage gains but have reduced employment—which is what Jolls predicted—would be a good trade-off. Specifically, Blanchflower and Oswald found that the average worker is benefited in terms of perceived happiness when personal income rises, but is far more adversely affected by being unemployed. Loading a greater burden on the unemployed disabled workers may not be a desirable tradeoff for the wage gains of the employed disabled.

market, with the result that (since they still bear the principal burden of household production) they work harder, have fewer children, and have less stable marriages, it is not clear that they are better off on balance than they were when their husbands had higher wages and they stayed home.

Posner, supra note 11, at 1335. See Donohue, supra note 11. One must be careful not to read too much into the obviously fragile evidence that women’s overall life satisfaction has diminished, but if it is true, my discussion raises an alternative interpretation to Posner’s conservative position. Specifically, if women are fully paying for the protections of antidiscrimination law through lower wages, then it may not be a surprise that, unlike blacks, they are not experiencing gains in life satisfaction from this legislation.