“Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights

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ARTICLE

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AND THE POLITICS OF (DISABILITY) CIVIL RIGHTS

Samuel R. Bagenstos *

INTRODUCTION .................................................................................................................. 826
I. DEFINING TERMS ............................................................................................................. 833
II. THE FAILURE TO ACCOMMODATE AS "RATIONAL
DISCRIMINATION" ........................................................................................................... 837
   A. The Goal of Antidiscrimination Law: Reducing
      Subordination and Social Inequality ............................................................. 839
   B. Justifying an Employer Mandate ............................................................................ 845
      1. Why Limit Antidiscrimination Law to the
         Forbidden Classifications? ........................................................................... 846
      2. The Problem of Rational Discrimination ....................................................... 848
      3. "Rational" Discrimination as Disguised
         Animus? ........................................................................................................ 852

* Assistant Professor of Law, Harvard Law School. Thanks to David Barron, Betsy
Bartholet, Dick Fallon, Howell Jackson, Christine Jolls, Gillian Metzger, Frank
Michelman, Martha Minow, George Rutherglen, Larry Sager, Joe Singer, Michael
Stein, Steve Willborn, Ernie Young, participants at the Harvard Law School Faculty
Workshop and the University of Texas Constitutional and Legal Theory Colloquium,
and (as always) Margo Schlanger for comments on earlier drafts. Conversations with
Duncan Kennedy and Janet Halley also helped sharpen my thinking on this project
considerably. Thanks as well to Sandra Badin, Monica Mange, and Christopher Park
for outstanding research assistance. Work on this project was supported by the Har-
vard Law School summer research fund and the Labor and Worklife Program at Har-
vard Law School. Thanks to Deans Robert Clark and Elena Kagan and Associate
Dean Howell Jackson for their continued support of my work in the disability area.
C. The Equivalence of Antidiscrimination and Accommodation ........................................... 859
  1. Equivalent Purposes ................................................................. 859
  2. Equivalent Means ................................................................. 863
III. PROBLEMATIZING “RATIONAL DISCRIMINATION” .............................................. 870
  A. An Intrinsic Right to Capitalist Rational Treatment? ........................................... 876
  B. The Weakness of the Employer’s Interest? ......................................................... 880
    1. Libertarian Interests ......................................................................... 881
    2. Laundering Preferences .................................................................... 885
  C. The Nonaccommodating Employer as Representative Surrogate for the Public? ............ 890
    1. Short-Run and Long-Run Effects on “Real Social Resources” ................. 892
    2. “Affective Cultural Meaning” and the Malleability of “Real Social Resources” .. 893
    3. The Non-Fungibility of Discriminatory Tastes? ....................................... 896
  D. Problematizing “Rational Discrimination”
    Generally ......................................................................................... 898
IV. THE USES OF THE ANTIDISCRIMINATION/ACCOMODATION DISTINCTION ........ 901
  A. Accommodation as Extending Civil Rights Law ............................................ 902
  B. Defenders of Civil Rights and the Antidiscrimination/Accommodation Distinction ...... 910
  C. Critics of Accommodation and the Antidiscrimination/Accommodation Distinction ...... 915
CONCLUSION ......................................................................................... 921

INTRODUCTION

In the thirteen years since Congress enacted the Americans with Disabilities Act (“ADA”),¹ many commentators have sought to draw a strong normative distinction between the statute’s mandate to provide “reasonable accommodation” to people with disabilities and the antidiscrimination requirements of the civil rights laws that

emerged in the 1960s and 1970s. This move has been most obvious among those who are skeptical of the ADA. The following passage, from the economist Sherwin Rosen, is typical:

Fundamentally the ADA is not an antidiscrimination law. By forcing employers to pay for work site and other job accommodations that might allow workers with impairing conditions defined by the law to compete on equal terms, it would require firms to treat unequal people equally, thus discriminating in favor of the disabled.  

Those who take this view believe that the ADA is essentially a redistributive scheme—one that “distorts a civil rights measure into what is essentially a mandated benefits program for the disabled.” But it is not just critics who would draw a sharp contrast between accommodation and antidiscrimination requirements. Even supporters of the ADA argue that, unlike Title VII of the Civil Rights Act of 1964—the canonical employment discrimination statute—the ADA allows protected class members to “insist upon discrimination in their favor.”

In this Article, I will take a contrary view. In doing so, I will build on the recent work of Professor Christine Jolls. As I will discuss below, she has attempted (with some success) to show that the effects of accommodation requirements like that in the ADA are likely to be essentially the same as the effects of antidiscrimination requirements: Both types of requirements impose on employers costs that attach to a particular class of employees, and employers are likely to respond to both types of requirements in the same

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4 Carolyn L. Weaver, Incentives Versus Controls in Federal Disability Policy, in Disability and Work: Incentives, Rights, and Opportunities, supra note 2, at 3, 5.


7 The key article is Christine Jolls, Antidiscrimination and Accommodation, 115 Harv. L. Rev. 642 (2001).
way. But Professor Jolls's argument is primarily descriptive and analytic rather than normative; her work has remained agnostic about any general claim of normative equivalence between antidiscrimination and accommodation requirements.\(^4\)

It is fair to say, however, that most commentators are not agnostic. The conventional wisdom, as evidenced by a near-consensus in the literature, seems to be that there is a fundamental normative difference between antidiscrimination requirements and accommodation mandates: Antidiscrimination requirements call on employers to forego acting on illegitimate preferences (like aversive prejudice) that they ought not to have in the first place, while accommodation mandates prohibit employers from acting on the normally legitimate desire to save money. Those who take this view and are skeptical of accommodation mandates believe that one who discriminates is deserving of moral condemnation, while one who simply fails to accommodate should not be condemned. Those who take this view and endorse accommodation mandates acknowledge that the argument for requiring accommodation is more difficult and controversial than the argument for prohibiting discrimination. But in either case, there is a major difference in substance between antidiscrimination requirements and accommodation mandates.\(^9\)

\(^4\) See id. at 684-85. In another recent article, Professor Sharon Rabin-Margalioth similarly makes a descriptive—but not a normative—argument for the equivalence of antidiscrimination and accommodation requirements. Sharon Rabin-Margalioth, Anti-Discrimination, Accommodation, and Universal Mandates—Aren't They All the Same?, 24 Berkeley J. Emp. & Lab. L. 111 (2003).

\(^9\) Numerous articles, from both supporters and skeptics of the ADA's accommodation mandate, draw this sort of distinction. See Stephen F. Befort & Holly Lindquist Thomas, The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law, 78 Or. L. Rev. 27, 75 (1999) (arguing that reasonable accommodation "is a concept alien to most antidiscrimination claims brought under Title VII" and "is, in essence, a form of affirmative action for disabled individuals"); Deborah A. Calloway, Dealing With Diversity: Changing Theories of Discrimination, 10 St. John's J. Legal Comment. 481, 491 (1995) ("Equality in one dimension means inequality in another dimension. Equal employment opportunity is achieved under the ADA by mandating different treatment for individuals with disabilities; different treatment in the form of reasonable accommodations."); John J. Donohue III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 Mich. L. Rev. 2583, 2585-86 (1994) (characterizing antidiscrimination requirements as pursuing the widely endorsed goal of "intrinsic equality" and accommodation requirements as pursuing the more normatively questionable and controversial goal of "constructed equality"); Lisa Eichhorn, Hostile Environment Actions,
Title VII, and the ADA: The Limits of the Copy-And-Paste Function, 77 Wash. L. Rev. 575, 605 (2002) ("In the end, whether the ADA's reasonable accommodation provision represents a subcategory of affirmative action legislation or a different animal altogether, it departs starkly from the formal equality model and necessitates an expanded understanding of civil rights and equal opportunity."); Patricia Illingworth & Wendy E. Parmet, Positively Disabled: The Relationship Between the Definition of Disability and Rights Under the ADA, in Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions 3, 8 (Leslie Pickering Francis & Anita Silvers eds., 2000) ("The genius of the ADA is that it forthrightly melds positive and negative rights, creating a civil rights statute that goes beyond the simplistic equal-opportunity-as-negative-rights model represented by Title VII."); Issacharoff & Nelson, supra note 3, at 314–15; Karlan & Rutherford, supra note 6, at 3; Mark Kelman, Market Discrimination and Groups, 53 Stan. L. Rev. 833 (2001) [hereinafter Kelman, Market Discrimination] (arguing that the law should prohibit "simple discrimination" without limit, but that requirements of accommodation must be limited to the extent that the resources used in accommodation might be better spent on other societal priorities); Linda Hamilton Krieger, Foreword: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 Berkeley J. Emp. & Lab. L. 1, 3–4 (2000) ("The ADA incorporated a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII of the Civil Rights Act of 1964 . . . . The ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect."); S. Elizabeth Wilborn Malloy, Something Borrowed, Something Blue: Why Disability Law Claims Are Different, 33 Conn. L. Rev. 603, 608 (2001) ("The ADA relies on a different vision of equality [than that of Title VII] to address workplace discrimination."); Miranda Oshige McGowan, Reconsidering the Americans with Disabilities Act, 35 Ga. L. Rev. 27, 35 (2000) ("[T]he ADA appears to make a revolutionary break with the old ways of thinking about discrimination while charting a new course of affirmative obligations to ensure real equality."); Rosen, supra note 2, at 21; George Rutherford, Discrimination and Its Discontents, 81 Va. L. Rev. 117, 145 (1995) (finding it "[s]omewhat paradoxical[]" that the ADA defines "the employer's duty not to discriminate" as "includ[ing] the duty to take account of an individual's disability in order to make a reasonable accommodation"); Stewart J. Schwab & Steven C. Willborn, Reasonable Accommodation of Workplace Disabilities, 44 Wm. & Mary L. Rev. 1197, 1199 (2003) (arguing that the ADA "differs fundamentally from Title VII" because of its mandate of reasonable accommodation); Bonnie Poitras Tucker, The ADA's Revolving Door: Inherent Flaws In The Civil Rights Paradigm, 62 Ohio St. L.J. 335, 353 (2001) (referring to the "contradiction between the traditional civil rights label given the ADA and the affirmative action obligation imposed by the Act, which vastly exceeds the traditional nondiscrimination mandate of the civil rights laws the ADA purports to emulate"); J.H. Verkerke, Disaggregating Antidiscrimination and Accommodation, 44 Wm. & Mary L. Rev. 1385, 1387 (2003) (arguing that the categories of antidiscrimination and accommodation draw a meaningful distinction between alternative strategies for defining and remedying employment discrimination and that the ADA's accommodation provisions differ in important ways from preexisting law"); Weaver, supra note 4, at 5; John M. Vande Walle, Note, In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment
One goal of this Article is to challenge that widely held point of view. I have previously suggested, though I did not develop the point, that the ADA’s accommodation requirement is normatively similar to more traditional prohibitions on discrimination. My argument to some extent drew on a broader body of legal scholarship (mainly produced by feminist scholars, and particularly in the context of pregnancy accommodation) that argued that accommodation requirements are necessary to ensure equality, broadly construed. In particular, both the ADA’s accommodation requirement and traditional antidiscrimination provisions aim to overcome systematic patterns of stigma and subordination by targeting a practice of occupational segregation that undergirds those patterns.

In the pages that follow, I will take up these points in greater detail. In particular, I will focus on the major argument asserted by those who urge a strong distinction between antidiscrimination and accommodation requirements—that the nonaccommodating employer’s pursuit of the proper goal of profit maximization makes him less worthy of moral condemnation, and consequently less appropriately subject to stringent regulation, than the discriminating employer. My basic motivation is to demonstrate that the ADA’s accommodation requirement is fundamentally a piece with the core antidiscrimination requirements of Title VII, but I want to make a more general argument about the fundamental normative similarity between antidiscrimination and accommodation. I hope to show that the arguments that have been proffered for a strong normative distinction between antidiscrimination and accommodation are unpersuasive, and that the two modes of civil rights law have a great deal in common both practically and morally. Along the way, I hope to demonstrate that the notion of “rational discrimination”—of which the failure to accommodate is often cited

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11 See infra Section II.C.1.
as an example—is a conceptually unstable basis on which to build any normative theory of antidiscrimination law.

But my goal in this Article is somewhat more ambitious. I will engage the question of why so many people from so many perspectives place so much weight on what is ultimately a shaky normative distinction between antidiscrimination and accommodation. I will contend that the antidiscrimination/accommodation distinction seems to serve an important political function for two somewhat different groups: mainstream liberal supporters of the 1960s civil rights revolution, who hope to protect traditional civil rights laws against the backlash that the ADA has provoked; and more radical leftist critics of identity politics, who hope to preempt liberal challengers by claiming that their critique is not directed at the statutes that emerged from that civil rights revolution. As I will argue, this move ultimately cannot do the work that mainstream liberal civil rights supporters or anti-identitarian leftists hope, but the political uses of the antidiscrimination/accommodation distinction are telling nonetheless.

Although there seems to be a strong consensus in favor of civil rights laws, civil rights supporters are likely to encounter an increasing number of attacks from the political right on the ground that such laws do not pay their way. And leftist critics of identity politics are likely to find that their critiques extend even to the core civil rights laws that they have carefully exempted from criticism. In this sense, I will suggest that the debate over antidiscrimination versus accommodation in the disability arena portends a more basic challenge to civil rights laws. If the center is to hold in this debate, civil rights supporters must honestly and straightforwardly confront the question of the costs and benefits of civil rights laws.

My argument will proceed as follows. Part I will set the stage by defining the crucial terms “antidiscrimination” and “accommodation” as I will use them in this Article. Part II will set out the basic affirmative argument for the normative equivalence between antidiscrimination and accommodation. I will try to show that both

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12 In a different area of civil rights law but in a similar vein, Professor Karen Engle has argued that the debate over granting “special rights” to gays and lesbians portends a more basic challenge that treats all civil rights legislation as improperly granting “special rights.” Karen Engle, What’s So Special About Special Rights?, 75 Denv. U. L. Rev. 1265, 1270 (1998).
sorts of interventions serve the same goals, and that they do so in quite similar ways. In particular, I will contend that accommodation requirements represent nothing more than a specific example of the general prohibition of rational discrimination—a prohibition that is well entrenched in the law.

Part III will consider the obvious rejoinder that the law should not prohibit rational discrimination in any event. It will do so by examining the most well articulated defense in the literature of a normative distinction between antidiscrimination and accommodation requirements—Professor Mark Kelman's contention that antidiscrimination law merely mandates capitalist rationality by requiring employers to treat employees as embodied net marginal product, while accommodation requirements compel employers to treat employees in a capitalist-irrational fashion. Professor Kelman forthrightly argues that the law should limit its unqualified antidiscrimination requirements to cases of irrational discrimination. That argument calls into question not just accommodation requirements but also a broad swath of more traditional antidiscrimination doctrine. In my view, Professor Kelman's argument does not withstand close scrutiny when considered on its own terms, largely because any notion of what constitutes rational discrimination must itself rest on a series of contentious normative judgments.

In Part IV, I will take a step back from these normative questions and consider the political function that an antidiscrimination/accommodation distinction might play. I will argue that both centrist defenders of civil rights law and more politically leftist critics of identity politics might find it attractive for their own political purposes to draw a sharp distinction between antidiscrimination and accommodation, but that the advantages of such a distinction are likely to be illusory. In the end, the lesson is a sobering one for supporters of civil rights, including disability civil rights: Those who wish to defend civil rights laws must defend them as the interventions into the economy that they are, rather than treating them as beyond challenge or defense.

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13 See infra notes 146–50 and accompanying text.
I. DEFINING TERMS

The terms "accommodation" and (particularly) "discrimination" are sufficiently protean that it is necessary to provide some clear and consistent definitions in which to ground analysis. I do not suggest that the definitions I give to these terms are the only possible definitions, or even that they are the "best" definitions in some ontological sense. Indeed, my definitions differ (in ways I will point out when relevant) from those employed by others whose work I discuss. I suggest only that my definitions are the most useful in focusing on the commitment that animates the argument in this Article: the effort to show that there is no sharp normative distinction between the ADA's accommodation requirement and the relatively uncontroversial "heartland" of antidiscrimination law.

Thus, I define "antidiscrimination" requirements as prohibitions on what constitutional law calls "intentional discrimination"\(^\text{14}\) and what Title VII law calls "disparate treatment."\(^\text{15}\) As the United States Supreme Court has explained, such conduct "is the most


\(^{15}\) E.g., Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 & n.15 (1977). The Supreme Court has made clear that there is no difference in substance between "intentional discrimination" and "disparate treatment." See, e.g., Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."). My definition of "antidiscrimination" thus essentially follows Professor Paul Brest's use of the term. See Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 1 (1976). Professor Samuel Issacharoff and Justin Nelson appear to mean roughly the same thing when they use the term "anti-subjugation." Issacharoff & Nelson, supra note 3, at 313–15. As I discuss extensively in Part III, Professor Kelman uses the term "simple discrimination" to mean something considerably narrower than what I describe as the target of "antidiscrimination" law. See Kelman, Market Discrimination, supra note 9, at 840–45. Professor Jolls uses the term "discrimination" more broadly than I do; she uses it to refer to the entire body of discrimination prohibitions imposed by the Equal Protection Clause and Title VII—including, most importantly, the "disparate impact" branch of Title VII law. See Jolls, supra note 7, at 646–51. For the reasons I discuss in the next paragraph, in this Article I do not treat disparate impact law as "antidiscrimination" law, though any argument for the normative similarity between what I call "antidiscrimination" and "accommodation" will almost certainly apply to disparate impact law as well.
easily understood type of discrimination”: “The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.” Although the plaintiff must prove “discriminatory motive,” it is important to note that proof of affirmative animus, dislike, or even irrational stereotypes is unnecessary under black-letter disparate treatment/intentional discrimination law. Whatever the decisionmaker’s ultimate motivation for using a forbidden characteristic in this way—to serve his own animus, cater to the animus of others, employ a statistically effective proxy, or whatever else—he engages in prohibited “disparate treatment” or “intentional discrimination” if he treats someone less well on the basis of that person’s membership in a protected class.

I recognize that my definition of “antidiscrimination” leaves out an important aspect of what we usually call antidiscrimination law—the prohibition on practices that have a disparate impact on members of protected classes and that lack a sufficient business justification. Professor Jolls has argued at length that accommo-

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16 Teamsters, 431 U.S. at 335 n.15.
17 See, e.g., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (“[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”); City of L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (stating that “[e]ven a true generalization about the class” cannot justify discrimination). Judge Kozinski provides a useful example from outside the employment context, and his analysis accords with basic equal protection law:

The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don’t matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza v. County of Los Angeles, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).
tion requirements are essentially identical to disparate impact prohibitions in many cases—though her broader argument that antidiscrimination and accommodation protections are equivalent in their effects does not depend on this comparison. 19 I do not rely on an equivalence between disparate impact prohibitions and accommodation mandates in my argument, however, largely because the disparate impact prohibition is normatively perhaps the most contested aspect of employment discrimination law. 20 Professor Jolls makes an effective descriptive case for the equivalence between disparate impact law and accommodation requirements, and she persuasively argues that disparate impact law is a sufficiently important part of the employment discrimination landscape that we should care about the similarity. 21 But I fear that a normative case for treating accommodation law as continuous with the larger body of antidiscrimination law will not be convincing if it relies on a parallel with the most hotly contested part of that larger body of law. 22 For purposes of this Article, then, my definition of "antidiscrimination law" is limited to prohibitions on intentional discrimination or disparate treatment. That seems to me the widely defended "heartland" of antidiscrimination law, and there is a strong consensus in its favor. 23 I hope to advance the case that the normative argument

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19 See Jolls, supra note 7, at 651–72.
21 See Jolls, supra note 7, at 670–72.
22 Critics of Professor Jolls's argument have focused on this point. They have argued that the disparate impact cases that impose what looks like an accommodation requirement are too marginal to the corpus of employment discrimination law to say anything about whether there is any essential similarity between antidiscrimination and accommodation. See Schwab & Willborn, supra note 9, at 1237–46; Verkerke, supra note 9, at 1402–03.
23 Even prominent conservatives now swear fealty to the antidiscrimination principle thus construed. See, e.g., J. Harvie Wilkinson III, The Rehnquist Court and the Search for Equal Justice, 34 Tulsa L.J. 41 (1998). And even Professor Richard Epstein, whose opposition to employment discrimination laws is total, finds the prohibition on disparate treatment at least relatively tolerable. See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 181 (1992) ("Although the costs of trying disparate treatment cases are substantial, on balance I
for even that core of antidiscrimination law cannot be cleanly distinguished from the normative argument for accommodation requirements like the one in the ADA.

My definition of "accommodation" follows directly from this agenda. When I speak of a requirement of "accommodation," I mean a requirement, like the one in Title I of the ADA, that employers make individualized changes in facially neutral rules, structures, or tasks to enable a protected class member to perform a given job and produce as much output as non-accommodated coworkers. In particular, I refer to a requirement of "reasonable accommodation" that—like the relevant ADA provisions—imposes real, but not unlimited, costs. Although Title VII's requirement to "reasonably accommodate" religious observance and practice has been interpreted to be limited to accommodations that impose only a de minimis cost, the ADA contains no such de minimis limitation. And although many supporters of the ADA argued for a statute that went further, the ADA's "reasonable accommodation" requirement is limited in two important ways: (1) The requested accommodation must be "reasonable," and (2) the em-

have little doubt that these costs, had they been made explicit in the early debates, would have been regarded as acceptable by the Congress that passed the 1964 act. As a practical compromise, moreover, a limitation of Title VII race cases to individual disparate treatment cases would honor the original intentions of the statute while removing most of its heavy costs.

24 See 42 U.S.C. §§ 12111(9), 12112(b)(5) (2000); US Airways v. Barnett, 535 U.S. 391, 397–401 (2002). This definition is somewhat different from that employed by Professor Jolls, largely because she would treat cases in which the failure to accommodate reflects intentional discrimination as "discrimination" but not "accommodation" cases. See Jolls, supra note 7, at 648–49. Under my definition, which accords with that in the ADA, such cases could be analyzed under both the discrimination and failure-to-accommodate rubrics. It is a crucial premise of my argument, however, that a substantial number of failure-to-accommodate cases cannot be described as discrimination cases. If that premise does not hold, then my argument would be substantially easier, for there would obviously be no normative difference between antidiscrimination and accommodation requirements.


28 See S. 2345, 100th Cong. § 7(a)(1) (1988) (original ADA bill, which contained no "undue hardship" provision but instead asked whether the accommodation would "fundamentally alter the essential nature" or "threaten the existence of" the defendant's business); H.R. 4498, 100th Cong. § 7(a)(1) (1988) (same).
ployer must be able to implement it without "undue hardship."\textsuperscript{29} Taken together, these two limitations operate to protect an employer from being called upon to bear accommodation costs that are too great for him to bear comfortably ("undue hardship")\textsuperscript{30} or that are too great, in fairness, to require any employer (or its non-disabled employees) to bear (un-"reasonable" accommodation).\textsuperscript{31} When I use the term "accommodation," I mean it as shorthand for a requirement of "reasonable accommodation without undue hardship" qualified in precisely that way.

II. THE FAILURE TO ACCOMMODATE AS "RATIONAL DISCRIMINATION"

Much of the intuitive force of a distinction between antidiscrimination and accommodation derives from a conventional view of antidiscrimination laws as targeting the paradigm case of racist animus. Racism, all should agree, is a moral and ethical wrong, and this conventional view sees antidiscrimination laws as aiming directly at that wrong. If such a model undergirds antidiscrimination law, then there is an obvious normative difference between antidiscrimination and accommodation, for an accommodation mandate makes employers liable for conduct that need not rest on affirmative animus.

I hope to show in this Part, however, that a narrow, individual-animus-focused model offers an implausible account of antidiscrimination law. To the contrary, I contend that antidiscrimination law aims at a wholesale, not a retail, injustice. When the law prohibits discrimination, I argue, it does so not because it seeks to enforce a uniform norm of ethical conduct on individual employers but because (the forbidden kind of) discrimination contributes to a pattern of social and economic subordination that has intolerable effects on our society. Accommodation requirements like that in

\textsuperscript{29} 42 U.S.C. § 12112(b)(5)(A) (2000). The Supreme Court has recently confirmed that the terms "reasonable accommodation" and "undue hardship" impose analytically separate, though related, limitations on the scope of required accommodation. See US Airways, 535 U.S. at 399–402.


the ADA serve the same purpose. And there is no compelling justification for the argument that it is fair to impose a rule requiring nondiscrimination on an employer but unfair to impose an accommodation mandate on that same employer.

In Section A, I describe the goal I attribute to civil rights laws—in particular, the goal of reducing subordination and social inequality. It is this goal, and not the specific proscription of discrimination, that I believe provides the most compelling moral purpose for antidiscrimination law. In Section B, I turn to a crucial question for anyone who seeks to justify antidiscrimination law: Even if reducing subordination and social inequality is a valid goal—as it plainly is—why is it fair to impose the cost of achieving that goal on individual employers and their customers? It is here that the image of antidiscrimination law as limited to animus-based discrimination seems to gain traction. But I ultimately contend that employers have a moral responsibility that goes beyond simply avoiding conduct that is driven by, or reflective of, animus. Rather, the well-entrenched prohibition of rational discrimination is best justified as resting on the notion that employers who have a choice between participating in a subordinating system and working (at reasonable cost) against such a system have a moral obligation to respond in a way that reduces subordination. As I show in Section C, accommodation requirements rest on the same notion.

At the outset, I should emphasize that the argument in this Part largely takes the form of a coherence argument. I argue that given antidiscrimination law’s general prohibition of rational discrimination against protected classes—and the principles that necessarily underlie that general prohibition—antidiscrimination law also properly requires accommodation. The structure of that argument has two consequences for my exposition that I want to highlight. First, much of what follows in this Part will be familiar to those who are acquainted with current debates in antidiscrimination theory (though I go beyond the extant literature both in drawing out an argument for disability accommodation and, more generally, by focusing on the justification for requiring employers rather than society at large to bear the costs of an antisubordination program). Second, in this Part, I take the notion of rational discrimination as a category that can be identified with relative ease. In the next Part, I hope to show that any definition of rational discrimination
necessarily rests on normative judgments that make the category a less-than-firm conceptual basis on which to ground any antidiscrimination/accommodation distinction.

A. The Goal of Antidiscrimination Law: Reducing Subordination and Social Inequality

Antidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society. Although antidiscrimination law is plainly moralistic, its moralism inheres not in an effort to punish individuals who act on bad thoughts, but in the large-scale project of eliminating subordination and segregation and of enforcing a principle of equal membership in society.\textsuperscript{32} Forbidden discrimination is wrong, in this view, not because it is a violation of personal ethics, but because of its harmful effects in continuing the systematic subordination of socially salient groups. I make no claim of novelty for this view of antidiscrimination law, for it is a major theme of much important work in antidiscrimination theory.\textsuperscript{33} Nevertheless, because this view so significantly underlies my critique of the distinction between antidiscrimination and accommodation, it is useful to set forth the basic argument here.

The view of antidiscrimination law I endorse begins with the premise that social inequality is a major problem in society.\textsuperscript{34} Some


\textsuperscript{33} I cite many of the relevant earlier works in the footnotes that follow. All of these works represent efforts to give content to what Professor Robert Post has called a "sociological account" of antidiscrimination law. See Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 Cal. L. Rev. 1, 30–31 (2000) (arguing that a "sociological account" of antidiscrimination law—which sees that law as aiming to transform social practices and to reconstruct identities—provides a more accurate and compelling account of the development of antidiscrimination law than does an effort to justify antidiscrimination law as requiring mere functional rationality on the part of employers).

\textsuperscript{34} I mean the term "social equality" in much the same way Mickey Kaus uses the term in The End of Equality to refer to "a society in which everyone feels he is, at bot-
socially salient groups (defined by race, sex, disability, or other characteristics) are systematically excluded from important opportunities in society. This systematic exclusion is not necessarily total, but it is nonetheless meaningful. It leads to a number of distinct social harms.

The most obvious of these harms is material inequality. To the extent that people in subordinated groups are more commonly foreclosed from remunerative opportunities, members of that group will have less money, and less of what money can buy, than will others. If public policy should aim to reduce material inequalities—as many people from diverse philosophical perspectives believe—it should target practices, like discrimination, that exclude significant classes of people from remunerative opportunities.

But there are serious limitations to a view that sees material inequality as the primary target of antidiscrimination law. Material inequalities, after all, can be addressed by a range of tax-and-transfer programs. “[I]f the problem is persistent material depri-

\[\text{tom, an equal member,}^\text{[and the community “reciprocate[s]” that feeling. Mickey Kaus, The End of Equality 15–16 (1992). Professor Karst’s argument for a principle of “equal citizenship,” in particular, emphasizes the necessity of social equality especially strongly. See sources cited supra note 32.}^\text{[See, e.g., Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 150–55 (1976); Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2429–30 (1994). Because so many commentators have urged a general distinction between the antidiscrimination and accommodation modes of civil rights law—and have not limited their arguments to the disability context—my argument, too, discusses the general comparison between antidiscrimination and accommodation. Accordingly, I assume for purposes of this argument that disability is sufficiently “like” race and the other forbidden classifications that a disability antidiscrimination requirement can be justified on the same terms as the more traditional antidiscrimination requirements. For a defense of the accuracy of that assumption, see Bagenstos, supra note 10, at 418–45.}^\text{[See prominent efforts from the standpoint of liberal political theory to defend policies that seek to reduce material inequalities, see John Rawls, A Theory of Justice 302 (rev. ed. 1999) and Ronald Dworkin, What is Equality? Part 2: Equality of Resources, 10 Phil. & Pub. Aff. 283 (1981). For a prominent effort from the standpoint of welfare economics to defend such policies, see Abba P. Lerner, The Economics of Control: Principles of Welfare Economics 28–34 (1944).}^\text{[For an argument to this effect, see David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 Geo. L.J. 1619, 1630–31 (1991).}^\text{[For the orthodox argument that tax-and-transfer programs are to be preferred to legal rules as tools of redistribution, see Louis Kaplow & Steven Shavell, Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income, 23 J. Le-}
viation, then the answer is simply redistribution.” But antidiscrimination law eschews that approach in favor of regulatory prohibitions imposed directly on employers. Because the exclusion of members of subordinated groups from remunerative opportunities is not total, antidiscrimination law is a blunt instrument for addressing inequalities of wealth and income. A rich African-American denied a particular job because of his race is entitled to relief, even if he had numerous other richly remunerative opportunities. Those whose material deprivation does not result from an identifiable act of employment discrimination, by contrast, are entitled to no relief, regardless of how disadvantaged they are.

Family structure also presents a problem for the material inequality view. Although some groups targeted for protection by antidiscrimination laws (notably racial minorities) tend to reproduce their material inequalities generation after generation, it is much harder to make such a case for other target groups. Women may earn less in the workplace, for example, but they can marry men who earn more; if they do, they will not be radically deprived of material goods. Individuals with disabilities, as well, may live in families that are materially well-off; such individuals may live comfortably even if they are not able to earn a significant living on their own.

These points suggest that simply eliminating material inequality cannot be the major policy justification for antidiscrimination law. Rather, the major justification stems from the unique injuries that

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40 For a discussion of this issue in the context of accommodation requirements, see Kelman, Market Discrimination, supra note 9, at 883–85.
41 Increasing intermarriage rates obviously have the potential to change this. For a recent discussion of such issues, see Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 36–37 (2003) (“The rates of interracial dating, marriage, and adoption are inching, and in some places rocketing, upward. This trend is, in my view, a positive good. It signals that formal and informal racial boundaries are fading.”).
42 This is not to say, of course, that such dependency is a desirable situation. As I argue below, eliminating that kind of dependency should properly be viewed as one of the key targets of antidiscrimination law. See infra note 52 and accompanying text.
flow from social stigma." As Professor Erving Goffman described in his classic work on the subject, "[b]y definition, of course, we believe the person with a stigma is not quite human. On this assumption we exercise varieties of discrimination, through which we effectively, if often unconsciously, reduce his life chances." The groups targeted for protection by antidiscrimination law are mainly those whose members are stigmatized as less than full citizens. Although stigma results in material inequalities, its effects are much more widespread. Members of society respond to individuals with stigmatized characteristics by "imput[ing] a wide range of imperfections on the basis of the original one." The result is far-reaching. The most important harm of stigma is thus the way it reproduces exclusion and inequality across a range of spheres of public, civic, and social life. The classic example, of course, is the racial stigma associated with, and descended from, Jim Crow. And although stigma does not manifest itself in precisely the same ways when other targeted groups are concerned, the basic outcome is similar: People with disabilities are not just excluded from remunerative employment, for example; they are also denied participation in important governmental functions, excluded from consumer and recreational opportunities in the community, and generally denied equal access to civic life.

This social inequality has effects on the choices made by subordinated group members. Those who believe that they will be denied important opportunities because of their group membership may choose not to develop skills that would enable them to take

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46 Id.
47 See, e.g., Sunstein, supra note 35, at 2430 ("When someone is a member of a group that is systematically subordinate to others, and when the group characteristic is highly visible, insults to self-respect are likely to occur nearly every day. An important aspect of a system of caste is that social practices produce a range of obstacles to the development of self-respect, largely because of the presence of the highly visible but morally irrelevant characteristic that gives rise to lower-caste status."). In a similar vein, see Fiss, supra note 35, at 150–55.
49 See Bagenstos, supra note 10, at 418–45.
advantage of those opportunities. The result may be a vicious cycle of exclusion, in which members of subordinated groups rationally respond to exclusion by failing to develop their human capital, and employers, rationally believing that members of those groups are less likely to have developed their human capital, discriminate even more. Those who (like some women and people with disabilities) can avoid the material deprivations through marital or other familial relationships may pursue those relationships. But the price of such a choice may be assuming a role of dependency—one that may be psychologically degrading and that itself might have the material consequences of making the dependent vulnerable to the domination (physical and otherwise) of another. Finally, where social stigmas impose a group-based harm, individual group members may come to identify strongly with the fortunes of their group as a whole; injuries to individual members may cause psychic harm to other members of the group.

Antidiscrimination law responds to these harms of social inequality by promoting the integration of workplaces and other important areas of civic life. Such integration helps to remove the

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51 See sources cited supra note 50.

52 For a discussion of the potential effects of such dependency, see, for example, Duncan Kennedy, Sexy Dressing Etc.: Essays on the Power and Politics of Cultural Identity 103–04 (1993) and Susan Moller Okin, Justice, Gender, and the Family 134–69 (1989).


54 For an endorsement of integration as a major goal of civil rights law generally, see Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 Geo. L.J. 1 (2000). Other articles more specifically endorse integration as a major justification for disability rights law. See James I. Charlton, Nothing About Us Without Us: Disability Oppression and Empowerment 124–27 (1998) (arguing that integration remains an important goal of the disability rights movement); Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 397 (1991) (arguing that the ADA reflects endorsement of the goal of integration);
stigmatic injury that results from exclusion in a number of ways. According to the time-honored "contact hypothesis," bringing people of different races together to work on common projects in circumstances of relative equality can reduce prejudice and stereotyping. Antidiscrimination law can also provide an incentive for previously excluded groups to develop their human capital and thus can help break the vicious cycle of exclusion. Antidiscrimination law also serves an important expressive purpose by offering to previously excluded groups a tangible invitation of admission as full members of society.

Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts, 54 Cal. L. Rev. 841, 843 (1966) (arguing that disability law "should be controlled by a policy of integrationism—that is, a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so").

This point is a major theme of Cynthia L. Estlund, The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law, 1 U. Pa. J. Lab. & Emp. L. 49 (1998). Views about the correctness of this "contact hypothesis," generally credited to Gordon W. Allport, The Nature of Prejudice (1954), are mixed. Compare, e.g., Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 UCLA L. Rev. 1241, 1279 (2002) (arguing that the contact hypothesis "has proven wildly overoptimistic" but stating that the evidence shows that under certain conditions intergroup contact can reduce prejudice and stereotyping), and Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Cal. L. Rev. 1251, 1331 (1998) ("We also know that simple integration does little to reduce intergroup conflict. In fact, where intergroup competition is present, contact between groups exacerbates, rather than reduces, intergroup bias. At a minimum, for intergroup conflict to subside, members of different groups must become involved in relationships of cooperative interdependence. Some researchers argue that even this is not enough . . . .")}, with, e.g., Estlund, supra note 54, at 23–24 ("[A]s a simple empirical matter, the contact hypothesis has proven to be quite robust over the years. The hypothesis has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings."). The foregoing quotations probably overstate the difference in views regarding the contact hypothesis. The differences really seem to be ones of emphasis: Those who take a negative view focus on the extensive limitations on the circumstances in which the contact hypothesis seems to hold true, while those who take a positive view focus on the degree to which it holds true in those circumstances.

For an argument that this expressive purpose is central to the Equal Protection Clause, properly construed, see Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1 (2000).
B. Justifying an Employer Mandate

To recognize that the goal of antidiscrimination law is to eliminate systematic, class-based subordination is only the first step. To justify using the means of antidiscrimination mandates to reach that goal, one must provide some reason why individual employers must bear the burden—on their associational liberty or their pocketbooks—of eliminating subordination. It is here that the focus on animus-based discrimination seems to gain traction. One way to justify the imposition of such a burden is to assert that the regulated conduct is a moral wrong, so that an employer has no grounds to complain if he or she is prohibited from engaging in that conduct. And there seems to be a broadly shared intuition that animus-based discrimination is itself a moral wrong.

Although an employer inflicts a material injury whenever he or she rejects a job applicant, the desire to inflict that injury is not usually the reason the employer rejects the application. When a refusal to hire does not rest on animus, it typically reflects nothing more than a judgment that the individual is less useful to the enterprise than another employee would be.57 When an employer rejects an applicant out of dislike for the applicant’s race, however, the material injury is the very point of the employer’s action. And that action itself reflects a view of the disappointed applicant as having less moral worth as a person.58 Affirmative race-based animus, most people therefore believe, is “intrinsically immoral,”59 and acting on the basis of such animus seems a far cry from acting on the basis of the apparently legitimate desire to make profits, even if the people who lose out on jobs are similarly injured in both cases.60

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58 See, e.g., Brest, supra note 15, at 6 ("Race-dependent decisions are irrational insofar as they reflect the assumption that members of one race are less worthy than other people.").
59 E.g., Alexander, supra note 57, at 192.
60 In the terms favored by some Kantian theorists, the harm caused by animus-based discrimination seems like an impermissible "end" of the discriminatory conduct, while the harm caused by a profit-maximizing decision seems like a mere "side-effect." For works discussing (and, in some cases, critiquing) this distinction, see Charles Fried, Right and Wrong 20–28, 155–60 (1978); Louis Kaplow & Steven Shavell, Fairness Versus Welfare 344–47 & n.106 (2002); Thomas Nagel, The View From Nowhere 180-
In this Section, I hope to show that it would be a mistake to treat animus-based discrimination as exhausting the category of immoral discrimination. For two major reasons, it should be clear that our civil rights laws do not rest on the principle of affirmative-animus-as-establishing-lack-of-equal-regard. First, such a principle would provide no basis for limiting the coverage of civil rights laws to discrimination based on membership in one of a defined set of protected classes. Any time an employer denies an opportunity to an individual based on an irrational animus—whether that animus is tied to protected-class status or not—the employer's action reflects a view of the individual as lacking equal moral worth. Second, the animus principle does not account for the prohibition of “rational” discrimination. That prohibition is, for good reason, well entrenched in civil rights law.

1. Why Limit Antidiscrimination Law to the Forbidden Classifications?

A theory that sees civil rights law as targeting animus-based discrimination because such discrimination uniquely fails to treat its victims as moral equals faces a major problem: Such a view proves too much. An employer can intentionally seek to harm a particular employee—and thus treat him as less morally worthy—for any number of reasons entirely unrelated to the protected-class status of the employee. An employer may have an irrational animus against people who are six feet tall, who are from St. Louis, or who root for the Blue Devils. Or an employer may simply enjoy exercising power and hurting people in a random and arbitrary fashion. If the moral problem addressed by antidiscrimination law is treating another as less morally worthy, then antidiscrimination law should extend to all of these arbitrary actions by employers. But it does not. Instead, it extends only to employer actions taken to harm individuals on the basis of one of the enumerated forbidden classifications (race, sex, religion, disability, etc.). Antidiscrimination law extends only to the forbidden classifications, I have argued, because it aims not at attacking individual breaches of the norm of

ethical conduct so much as at attacking practices that entrench the systemic subordination of particular groups.\textsuperscript{61}

One might argue that the limitation of antidiscrimination law to specific protected classes is less telling than that. Antidiscrimination law focuses on the protected classes, one could say, not because the moral principle it enforces is limited to discrimination based on protected-class membership, but rather because legal interventions in private morality should be limited to serious social problems. Discrimination against St. Louisians may be just as immoral as discrimination against African-Americans, but because it is not a significant social problem there is no justification for prohibiting it by law—with all the costs and inefficiencies that legal regulation entails.\textsuperscript{62} Under this view, the essential immorality of race discrimination remains the animus-based devaluing of another human being. Although plenty of unregulated conduct violates the same moral principle, no moral principle can be legally enforced in every circumstance in which it might be violated. To say that we prohibit action that violates the anti-animus principle only when it leads to significant social harms, like class-based subordination, is not to say that we prohibit all action that leads to such significant social harms, regardless of whether it violates that moral principle. We could instead recognize two distinct conditions on legal intervention in private choices like discrimination: (1) The private choice must contribute to a significant social problem (to justify legal intervention at all), and (2) the private choice must be an immoral one (to justify placing the burden of regulation on this defendant). Such a view would take the structure of the popular mixed theory of criminal punishment. This theory, most influentially propounded by Professor H.L.A. Hart, asserts that the general aim of a system of punishment should be the utilitarian goal of


\textsuperscript{62} Professor Kelman identifies a number of administrative reasons why antidiscrimination protections might be limited to subordinated group members, even if those laws ultimately seek to enforce a more general principle against animus and irrationality. See Kelman, Market Discrimination, supra note 9, at 860–67. Yet, he concedes that “[t]he [antidiscrimination] norm we recognize is significantly designed as well to protect against the stigma imposed on subordinated group members, and is therefore not purely individualistic as a matter of theory as well as administrative practice.” Id. at 866.
reducing crime, but that even punishment that would increase net utility should not be imposed on one who has done nothing to deserve it in a retributive moral sense.\textsuperscript{63}

It is far from clear that such a theory accurately captures what is wrong with discrimination on the basis of forbidden classifications, however. There seems to be widespread agreement that it is normatively worse to treat someone disadvantageously because of his or her race (and perhaps the other forbidden classifications) than it is to treat someone disadvantageously based on an arbitrary and idiosyncratic animus toward that person as an individual.\textsuperscript{64} The reason, I suggest, derives from the history that attends racial (and the other forbidden) classifications in our society and the resulting social harm that such classifications continue to cause. We prohibit racial discrimination not because it is a specific instance of a general moral problem of arbitrariness but because it is worse than the usual arbitrariness. What makes it worse are the societal effects it causes. As Professor David Strauss writes, “it seems reasonably clear that the person-on-the-street basis for disapproving taste-based discrimination is that it is unfair to subject minority groups to the consequences of that form of animus.”\textsuperscript{65}

2. The Problem of Rational Discrimination

The fact that antidiscrimination law is generally limited to discrimination based on certain forbidden classifications provides some evidence that the animus-based theory does not account for the shape of antidiscrimination law, but it is hardly conclusive. More persuasive is the law’s pervasive prohibition of non-animus-based discrimination. The prohibition of rational discrimination is a central component of antidiscrimination doctrine—and it may be the most important aspect of antidiscrimination law on the ground. The wide degree to which the law prohibits such discrimination


\textsuperscript{64} This point is well captured by Professor Alexander Bickel’s famous statement that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” Alexander M. Bickel, The Morality of Consent 133 (1975). This statement would lose much of its rhetorical punch if the word “race” were replaced by the phrase “any arbitrary factor.”

\textsuperscript{65} Strauss, supra note 37, at 1626 (emphasis added).
strongly suggests that we recognize that contributing to a system of subordination is itself immoral, at least insofar as an employer can avoid doing so at reasonable cost.

Although the most salient image of discrimination is animus-based discrimination (whether based on the animus of employers themselves or the animus of their customers or employees\(^6\)), Professors David Charny and Mitu Gulati have trenchantly observed that many of the "types of discrimination-based problems that we face now are different" from such "taste-based animus."\(^6\) Important present-day problems of discrimination include rational statistical discrimination, in which employers rationally use protected-class status as a proxy for lower productivity.\(^6\) Statistical discrimination may then perpetuate itself by leading members of disadvantaged groups to make counterproductive human capital decisions.\(^6\) Discrimination may also be motivated by the costs employers be-

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\(^6\) Most scholars who have discussed the normative underpinnings of employment discrimination law have had little difficulty attributing to employers the animus of their customers or employees. See, e.g., Donohue, supra note 9, at 2600–01 (arguing that intrinsic equality measures workers based on the "true value of [their] labor" and disregards any preferences customers or coworkers have against associating with particular classes of workers); Owen M. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235, 260 (1971) ("The employer's use of race may be attributable to considerations of wealth maximization, but in each instance the use of race relates to someone's taste for discrimination against blacks. It may not be that of the employer. It may be that of his customers, white workers, other employers, or other sellers."); Kelman, Market Discrimination, supra note 9, at 848–49 (arguing that customer-preference-based discrimination is "simple discrimination" because customers have an obligation to act as rational capitalists just as do employers, and that employers are regulated as the customers' "agents"). For purposes of this Article, I see no need to dispute that attribution. Accordingly, I treat customer- or coworker-preference-based discrimination as animus-based discrimination.

\(^6\) Charny & Gulati, supra note 50, at 67 n.42; see also Strauss, supra note 37, at 1644 (arguing that forms of rational discrimination are the "most likely to persist in a competitive system").


\(^6\) See supra notes 50–51 and accompanying text.
lieve they will incur in the course of integrating a firm or in managing the conflicts that inevitably arise in a diverse workforce. Although some of these costs might result from the need to respond to the discriminatory tastes of coworkers, others might result simply from the relative ease of enforcing informal workplace norms in a homogeneous workforce. And, as Professor Linda Krieger and others have shown, much disparate treatment “results not from discriminatory motivation, but from a variety of categorization-related judgment errors characterizing normal human cognitive functioning.” Indeed, recent empirical psychological research demonstrates that people in our society constantly make implicit, unconscious, group-based judgments about members of subordinated groups, and that those judgments persist even when explicit attitudes change. Given these psychological findings, ceasing disparate treatment may require something more than simply abandoning an illegitimate preference; it may also require adopting some non-costless technique for cleansing one’s decisionmaking of cognitive bias. In an important recent article, Professor Susan Sturm argues extensively that broad changes to workplace institu-

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70 See, e.g., Estlund, supra note 54, at 28 (“Demographic diversity has also been associated with ‘lower levels of satisfaction and commitment, lower performance evaluations for those who are different, and higher levels of absenteeism and turnover.’ One comprehensive review of the literature recently concluded that ‘the preponderance of empirical evidence suggests that diversity is most likely to impede group functioning,’ particularly in the implementation as opposed to the decisionmaking phase of group performance.”).
71 See Epstein, supra note 23, at 69–72.
72 Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1165 (1995); see also Blasi, supra note 55, at 1243 (noting that the “behavior of real human beings is often guided by racial and other stereotypes of which they are completely unaware”); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 329–44 (1987) (recognizing “mental processes of which we have no awareness that affect our actions and the ideas of which we are aware”); Amy L. Wax, Discrimination as Accident, 74 Ind. L.J. 1129, 1135–45 (1999) (discussing unconscious mental stereotyping and resulting disparate treatment).
tional structures offer the best hope for eliminating current employment discrimination problems.\footnote{See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 465–79 (2001); see also Tristin K. Green, Dis­

crimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 Harv. C.R.-C.L. L. Rev. 91, 95–108 (2003) (arguing that the more subtle discrimination prevalent in the contemporary workplace must be addressed through changes in organizational structure and institutional practices).}

None of the forms of discrimination discussed in the previous paragraph involves animus or active prejudice on the part of the employer. None “rest[s] on judgments of unequal moral worth.”\footnote{Sujit Choudhry, Distribution vs. Recognition: The Case of Anti-Discrimination Laws, 9 Geo. Mason L. Rev. 145, 156 (2000).} In each of these cases, the harmful effect on minorities can readily be described as a mere side effect of the employer’s pursuit of his ultimate end of maximizing profit. The employer has no interest in harming minorities per se; if profits could be maximized without excluding minorities at the same time, the employer would happily do so.\footnote{This is an application of the so-called “counterfactual test” traditionally used to distinguish mere “side effects” of intended action from the intended “means” of achieving a specific result. See, e.g., Dworkin, supra note 60, at 343–45. For discussion of this test and its problems, see Fried, supra note 60, at 23–24.} But under current Title VII law, all of these practices would constitute unlawful intentional discrimination. That result follows from City of Los Angeles Department of Water & Power v. Manor\footnote{435 U.S. 702, 716–17 (1978).} and International Union v. Johnson Controls, Inc.,\footnote{499 U.S. 187, 210 (1991).} which hold that cost is not a valid defense to claims of disparate treatment under Title VII.\footnote{For a discussion of Title VII’s application to discrimination motivated by a rational desire to facilitate informal enforcement of workplace norms, see Epstein, supra note 23, at 70–71. For a discussion of Title VII’s application to discrimination based on unconscious cognitive bias, which concludes that the more persuasive reading of the case law is that disparate treatment based on cognitive bias is actionable as intentional discrimination under current Title VII law—though it may be difficult for a plaintiff to prevail on such a claim given the proof structure created by the Supreme Court—see Wax, supra note 72, at 1146–52. For a discussion of Title VII’s application to statistical discrimination that concludes that “Title VII clearly” prohibits statistical discrimination against protected workers, see Donohue, supra note 9, at 2598.} Pursuant to these holdings, it is clear that the law prohibits statistical discrimination even in cases where it is efficient for an employer to engage in that conduct (in the sense that race or sex is at least somewhat correlated with productivity,
and a more individualized inquiry into a potential employee’s productivity would be sufficiently costly to outweigh the benefit the employer would obtain from identifying productive workers more precisely.\footnote{See Manhart, 435 U.S. at 708 ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."). See generally Johnson Controls, 499 U.S. at 210 ("The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."). A fortiori, antidiscrimination law also prohibits employers from engaging in discrimination to cater to the preferences of current employees or customers to work with or be served by members of a particular race or sex. See, e.g., Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981); Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971).}

It seems apparent that the animus-based theory cannot justify the prohibition on rational discrimination. That prohibition is a well entrenched and central aspect of our antidiscrimination laws in operation.\footnote{One might question whether the Supreme Court’s recent skeptical attitude toward race-conscious affirmative action, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), calls into doubt the picture of antidiscrimination law I paint in the text. After all, the prohibition on rational discrimination is "fundamental[ly] simila[r]" to affirmative action in that it requires employers to take race into account. Strauss, supra note 61, at 130. I agree that there is significant tension between the acceptance of a prohibition on rational discrimination and the skepticism toward affirmative action (a tension that it was Professor Strauss’s major purpose to elaborate, see id.). But the Court has as yet shown no sign of resolving the tension by eliminating the pervasive prohibition of rational discrimination. If anything, the Court’s recent decision in Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (upholding the affirmative action plan used in making admissions decisions to the University of Michigan Law School), suggests a limit to the Court’s skepticism toward affirmative action.} A theory that cannot account for such a significant aspect of our current doctrine can hardly be credited with providing the basic justification for antidiscrimination law.

3. "Rational" Discrimination as Disguised Animus?

Perhaps, though, one can rehabilitate the animus-based theory. Perhaps one can conclude empirically that even if rational discrimination need not rest on judgments of differential moral worth, it in fact rests on such judgments (explicitly or implicitly) in most cases. That, essentially, is the argument that Professor Brest and Professor Owen Fiss offered in their classic articles focusing on
race discrimination. Professor Fiss argued that truly rational discrimination is rare, so that purportedly rational discrimination will often be a mere pretext for animus.\textsuperscript{83} Professor Brest elaborated that “race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.”\textsuperscript{84} Rational discrimination reflects “racially selective sympathy and indifference,” in particular, when the decisionmaker would not engage in the same action, however rational, were the racial identity of the disadvantaged class different. This holds true whether or not the decisionmaker knows that he is being racially selective.\textsuperscript{85} To Professor Brest, racially selective sympathy and indifference is morally the same as affirmative animus, for unequal treatment that results from selective sympathy and indifference “could be justified only if one group were in fact more worthy than the other. This justification failing, such treatment violates the cardinal rule of fairness—the Golden Rule.”\textsuperscript{86}

But the problem with the Brest/Fiss analysis on this point is manifest: It rests entirely on an undefended empirical premise. For the argument is not that, as a formal matter, rational discrimination necessarily reflects an implicit judgment of moral worth. The argument instead is that rational discrimination \emph{often} reflects such a judgment in practice. But neither Professor Fiss nor Professor Brest tries to establish \emph{how} often rational discrimination reflects a judgment of differential moral worth. It is doubtful that they could do so, for the clear rational profit-maximizing explanation for such discrimination would confound efforts to uncover the employer’s “true” motive. And indeed, Professor Fiss concedes that “[s]erious

\textsuperscript{83} See Fiss, supra note 66, at 259–60.
\textsuperscript{84} Brest, supra note 15, at 7.
\textsuperscript{85} See id. at 7–8 (defining “racially selective sympathy and indifference” as “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group”). In a similar vein, Professor Strauss argues that actions that violate his “reversing the groups” test—\textit{viz}., Would the decisionmaker have done the same thing if the identities of the beneficiary and disadvantaged groups had been flipped?—fit any plausible definition of discriminatory intent even if the decisionmaker is unconscious of the bias. See David A. Strauss, Discriminatory Intent and the Taming of \textit{Brown}, 56 U. Chi. L. Rev. 935, 956–65 (1989).
\textsuperscript{86} Brest, supra note 15, at 8.
questions can be raised” about the accuracy of the assumption that purportedly rational discrimination is typically just a pretext for racial animus.\textsuperscript{87} Given the compelling evidence that statistical discrimination is often rational, the assertion that profit-maximizing employers would not engage in it but for animus seems implausible.

As applied to unconscious discrimination, Professor Brest’s theory of “selective sympathy and indifference” takes us well beyond the typical animus/moral-worth theory of antidiscrimination law. A person who discriminates against another because of an unconscious bias is not making an affirmative decision that that individual is less morally worthy than another. Indeed, such a discriminator might honestly believe that the “victim” of discrimination is, and deserves to be treated as, an equal. That is the import of the recent literature in empirical psychology that demonstrates how implicit or unconscious biases persist even in those whose explicit attitudes value equality and the embrace of difference.\textsuperscript{88} If the wrong of discrimination is the intentional devaluing of another’s interests, discrimination based on selective sympathy and indifference hardly fits the mold.

4. An Anti-Stereotyping Principle?

There is another possible defense of the prohibition on rational discrimination and the related theory that selective sympathy and indifference is wrong: an anti-stereotyping principle. Such an argument would, like the animus-based theory, purport to identify conduct that is wrongful irrespective of its effects, but it would focus on a distinct moral flaw in discrimination. The argument would run like this: When an employer intentionally discriminates on the basis of a protected characteristic (race, gender, disability, etc.), he is making a judgment about all members of the disfavored class. He is thus acting on the basis of a stereotype about the group. Such a stereotype is no less a stereotype for being, on average, accurate, nor is it any less a stereotype for being applied unconsciously. A

\textsuperscript{87} Fiss, supra note 66, at 259.

\textsuperscript{88} See, e.g., Banaji et al., supra note 73, at 143 (noting “abundant evidence that stereotypes that operate unconsciously defend their territory fiercely, influencing social interactions even when perceivers are consciously vigilant and motivated to defeat them”).
member of the disfavored race, sex, or disability group can legitimately claim that the employer did not treat him as an individual; the employer treated him as being defined by his race, sex, or disability without stopping to consider whether he was any different than the average member of that group. The employer has thus essentialized members of the disfavored group.\textsuperscript{89}

But any effort to ground the prohibition on rational discrimination in an ethical objection to stereotyping is unpersuasive. For the anti-stereotyping principle proves far too much. Employers (like everyone else) treat individuals as members of groups all the time; we could not manage all of the information in the world if we did not act on the basis of proxies.\textsuperscript{90} Unless we are going to say that we violate an ethical norm every time we treat a person as effectively defined by some seemingly salient characteristic, we cannot hold to a general principle against stereotyping. To justify the prohibition on rational discrimination, then, we must have a theory that explains why stereotyping on the basis of race, gender, disability, and so forth is different from all other stereotyping. One theory that plainly cannot justify the distinction, however, is the notion that racial, gender, or disability stereotyping somehow treats a person as less of an individual than does stereotyping on other bases. All stereotyping treats a person as a member of a group defined by some specific characteristics that do not capture the full range of that person's individuality.

\textsuperscript{89} For an argument to this effect, see Choudhry, supra note 76, at 156–57.

\textsuperscript{90} See, e.g., Brest, supra note 15, at 6 ("Regulations and decisions based on statistical generalizations are commonplace in all developed societies and essential to their functioning. And it is often rational for decisionmakers to rely on weak and even dubious generalizations."); Peter J. Rubin, Equal Rights, Special Rights, and the Nature of Antidiscrimination Law, 97 Mich. L. Rev. 564, 572–73 (1998) ("We routinely and necessarily make decisions on the basis of generalizations about various characteristics of the people we meet. Indeed, conducting the interactions that make up our lives would be an overwhelming and unmanageable task without the ability to do exactly this."); Strauss, supra note 61, at 114 ("Employers engaged in hiring are not the only ones who generalize. People generalize constantly; that is, they observe that a person has one characteristic, and on that basis they infer that he has another. One cannot survive in the world without doing this."). This point is a major theme of Professor Glenn Loury's recent work on the persistence of racial inequality. See generally Loury, supra note 68, at 18–19 ("[W]hether 'race' is a part of the calculation or not, classifying human subjects in this general way is a universal practice, one that lies at the root of all social-cognitive behavior.")).
Indeed, to the extent that different acts of stereotyping can treat people more or less as individuals, a stereotype that is based on one’s membership in a large group is less individualized than a stereotype based on membership in a small group. If the point of antidiscrimination law is to assure that people are treated as individuals, then the law should object more strongly to stereotype-based discrimination against members of majority groups than to such discrimination against members of small minorities. But that result seems obviously perverse. That it seems so perverse is strong evidence that the problem with race, gender, and disability stereotyping is not that it is stereotyping per se but that it is stereotyping that harms minority groups.

Thus, a more plausible theory for what makes stereotyping based on the forbidden classifications of race, gender, and disability worse than other types of stereotyping is that stereotyping based on those classifications causes greater harm to the groups that are persistently on the “wrong” side of society’s stereotypical judgments. As Professor Cass Sunstein writes, “the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory that such stereotyping has the harmful long-term consequence of perpetuating group-based inequalities.”

Race, gender, and disability stereotypes are not likely to be idiosyncratic to a particular employer, nor are they likely to be limited to the employment context. When a person loses out on a job because of such a stereotype, that loss is likely to be only the tip of the iceberg. Similar stereotypes are likely to foreclose other jobs and opportunities in society. A person subject to such a stereotype is therefore likely to face stigmatic and cumulative disadvantage.

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91 Sunstein, supra note 35, at 2418; see also Fiss, supra note 35, at 157–58 (arguing that “‘arbitrary discrimination’ is the species, not the genus,” and that what makes such discrimination wrong is that it “particularly hurt[s] a disadvantaged group”); cf. id. at 123 (noting that while the “foundational concept” of an antidiscrimination principle “is individualistic,” “elements of groupism appear as one moves up the superstructure” of doctrine that implements such a principle).

92 See, e.g., Brest, supra note 15, at 8 (“[B]ecause acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.”); id. at 10 (“The cumulative disadvantage caused by the use of race as a proxy even for legitimate characteristics provides an independent ground for disfavoring nonbenign race-dependent decisions regardless of the integrity of the process by which they were made.”); Sunstein, supra note 35, at 2430 (“In the areas of
Indeed, Professor Fiss himself seems to rely on this point. Aside from the empirical assumption that purportedly "rational" discrimination is frequently a cover for animus, Professor Fiss gives three reasons for prohibiting rational discrimination. First, even outside the customer- and coworker-preference cases, the racial differences that make discrimination rational are themselves the product of earlier irrational discrimination (which, for example, denied opportunities and diminished incentives to develop human capital). Second, "to the victim of the employment decision the appearance of the conduct is identical, whether the use of race is efficiency-related or not." And third, an employer who has the power to work against the underlying problem of cumulative disadvantage, even if it involves "sacrifice," bears "some degree of responsibility"—especially where "[h]olding him legally responsible is not likely to impose crippling costs on any single businessman ('make him go broke,' as opposed to being unable to obtain that marginal dollar)."

These arguments provide a powerful reason to prohibit rational discrimination, even outside the customer- and coworker-preference contexts. But all of them move us well beyond the moralistic focus on animus or the individualistic focus on stereotypes. Rather, they appear to rest on a notion that the primary justification of employment discrimination laws is to protect identifiable groups against practices that cause them cumulative disadvantage—a point Professor Fiss more or less admits. Thus, in Profess—

race and sex discrimination, a large part of the problem is this sort of systemic disadvantage. A social or biological difference has the effect of systematically subordinating members of the relevant group—not because of nature, but because of social and legal practices."). To similar effect, see Strauss, supra note 37, at 1626–30. For an argument to this effect in the disability context, see Bagenstos, supra note 10, at 453–55.

93 See Fiss, supra note 66, at 260.
94 Id.
95 Id. at 261.
96 See id. at 313 (concluding that "the antidiscrimination prohibition is a strategy for conferring benefits on a racial class—blacks"); see also Fiss, supra note 35, at 147 (arguing that interpretation of the Fourteenth Amendment's Equal Protection Clause should be guided by "a theory of primary reference—that blacks were the intended primary beneficiaries, that it was a concern for their welfare that prompted the Clause"); id. at 157 (arguing that the basic concern of equal protection analysis "should be with those laws or practices that particularly hurt a disadvantaged group" by "aggravat[ing] (or perpetuat[ing]) the subordinate position of a specially disadvantaged group").
sor Fiss's view, employers have an obligation to absorb the costs of refraining from rational statistical discrimination against African-Americans because statistical discrimination merely perpetuates and entrenches the group-based inequalities that have resulted from prior discrimination (discrimination that has denied access to education and discouraged development of human capital) and imposes the same stigmatic group-based harm as does irrational discrimination. We impose sanctions on the discriminating employer because he would rather retain some personal benefit (be it the satisfaction of a taste for discrimination or the realization of dollars-and-cents profits) than avoid contributing to a subordinating system.

In other words, Professor Fiss ultimately endorses an argument very much like the one I have offered: The moral wrong of discrimination inheres in an employer's placing his or her own interests ahead of the moral imperative to avoid participating in the system of subordination and occupational segregation. Individual employers have a moral obligation to avoid contributing to such a system because they are the only ones who can take effective action against it, and their actions, when aggregated with those of other employers, are what constitutes the system. Moreover, all employers must have this obligation, or the goal of integration will be left unsatisfied. 97 So long as employers can avoid contributing to the social harms of subordination at a reasonable cost, their continuing contribution to that system is objectionable under moral principles widely endorsed in the tort and criminal law. These bodies of law, after all, impose more than a mere duty to avoid intentional harm. Both in the tort system and in the criminal law, defendants may be liable in an enormous number of cases where they did not intend harm but were simply negligent or reckless. In the tort system, negligence and recklessness liability is widely understood to be consistent with moralistic notions of corrective justice. 98 Although criminal liability for mere negligence is more controver-

97 There is a strong parallel between this argument and Professor Bruce Ackerman's classic argument for imposing a burden of housing code compliance on landlords. See Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Redistribution Policy, 80 Yale L.J. 1093, 1169-74 (1971).
sial, it, too, is entrenched, and there seems to be uniform agreement that reckless conduct is sufficiently deserving of moral condemnation to criminalize it. That is because intentionality is not the only moral principle. When an individual (knowingly or unknowingly) exposes another to harm—particularly a significant harm—for an insufficient reason, that exposure may itself evidence wrongful disrespect of the other as a person. The prohibition on rational discrimination is ultimately justified on a very similar theory.

C. The Equivalence of Antidiscrimination and Accommodation

1. Equivalent Purposes

With this affirmative case for antidiscrimination law in mind, I turn to the basic argument for the normative equivalence of antidiscrimination and accommodation. At the outset, it should be clear that the goals of antidiscrimination and accommodation requirements are parallel, for both seek to dismantle a system of group-based subordination and the patterns of occupational segregation that support that system. Feminist scholars and activists arguing for pregnancy accommodation have long made this point. As Professor Lucinda Finley noted nearly two decades ago, “[m]ost feminists agree that one of the crucial issues to be addressed in order to eliminate the economic and social subordination of women [is how] to make the workplace more accommodating to pregnancy and parenting needs.” Those who argue for legally mandated

99 See, e.g., Fried, supra note 60, at 155–60 (discussing the hypothetical case of the reckless driver colliding with a pedestrian); Dworkin, supra note 60, at 347 (“To know that, say, harm will befall another as a result of what one does, and to go ahead with one’s plans is, at the least, to be willing to accept such harm, and for that one must be accountable to others.”).

100 Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118, 1120–21 (1986). For endorsements of this point from those on both sides of the “equal treatment versus special treatment” debate, see Linda J. Krieger & Patricia N. Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women’s Equality, 13 Golden Gate U. L. Rev. 513, 518–36 (1983), which advocates the “special treatment” position, and Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325, 359–65 (1985), which advocates the “equal treatment” position; see also Mary E. Becker, Prince Charming: Abstract Equality, 1987 Sup. Ct. Rev. 201, 244 (arguing that the problem of guaranteeing women equal access to the workplace “can only be solved by changing workplace policies and practices so that it is easier for women to combine
workplace accommodations for pregnancy contend that such accommodations “place[] women on an equal footing with men and permit[] males and females to compete equally in the labor market.”\textsuperscript{103} The Supreme Court seemed to endorse the point in its decision in \textit{California Federal Savings & Loan Ass’n v. Guerra (“Cal Fed”)}.\textsuperscript{102} In \textit{Cal Fed}, the Court upheld a California statute that required employers to provide (unpaid) maternity leave to women but did not require them to provide equivalent paternity leave to men. Rejecting a claim that Title VII and the Pregnancy Discrimination Act barred such “special treatment” of women, the Court reasoned that the state statute “promote[d] equal employment opportunity” and thus served the goal of equal access to the workplace that underlies federal antidiscrimination law: “By ‘taking pregnancy into account,’ California’s pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.”\textsuperscript{103}

In the disability context as well, the Court has recognized that accommodation serves the goal of equal access to societal opportunities by helping to dismantle a structure of subordination. In \textit{US Airways v. Barnett},\textsuperscript{104} which contains the Court’s most extensive engagement with the ADA’s mandate of reasonable accommodation in employment, Justice Breyer’s majority opinion endorsed the notion of equal access by stating that the statute requires accommodations when they “are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy.”\textsuperscript{105} The Court elaborated on the ar-

\textsuperscript{103} Krieger & Cooney, supra note 100, at 533.
\textsuperscript{102} 479 U.S. 272 (1987).
\textsuperscript{101} Id. at 289. The Court also noted that the state statute did not require employers to limit parental leaves to women; an employer could comply with the statute without any discrimination by providing parental leaves to all of its employees. See id. at 290–91. This point was the sole basis for Justice Scalia’s concurrence in the judgment. See id. at 296 (Scalia, J., concurring).
\textsuperscript{104} 535 U.S. 391 (2002).
\textsuperscript{105} Id. at 397.
argument for assimilating accommodation to antidiscrimination in *Olmstead v. L.C.*, a non-employment ADA case. *Olmstead* involved the ADA's Title II, which prohibits state (or other public) entities, in any of their operations, from discriminating against people with disabilities. The Court held that Title II's prohibition on discrimination requires states to house people with mental disabilities in community settings rather than congregate institutions in certain circumstances, notably

when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

The state had argued that such a requirement of "reasonable accommodation" could not be derived from Title II's prohibition on "discrimination." The state contended that it had not provided community treatment to anyone who lacked a disability, so it could not have discriminated on the basis of disability when it denied such treatment to individuals who had disabilities. But the Court, in an opinion by Justice Ginsburg, rejected this argument and instead concluded that "unjustified institutional isolation of persons with disabilities is a form of discrimination." The Court gave two principal reasons for that conclusion. "First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." And "[s]econd, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." In other words, just as

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108 *Olmstead*, 527 U.S. at 587.
109 See id. at 598.
110 Id. at 600.
111 Id.
112 Id. at 601.
the core applications of antidiscrimination law are justified by the imperative to eliminate group-based stigma and to open opportunities for disadvantaged groups, the requirement of accommodation is justified on precisely the same grounds. Although Olmstead did not involve discrimination in employment, its analysis translates neatly into the employment context.

Seen from the perspective of the equal-access-to-social-goods argument that animates Olmstead, any assertion that accommodation is merely "redistributive" and therefore less morally justifiable than antidiscrimination succumbs to a classic baseline problem. If one wishes to say, as the critics do, that antidiscrimination law simply restores a just distribution but accommodation redistributes, then one must assume that any distribution reflecting intentional discrimination is unjust and therefore an inappropriate baseline for a determination of whether redistribution is occurring. Eliminating intentional discrimination thus restores a just distribution; it does not require redistribution from that normatively appropriate starting point. But that assumption begs the question. For if a distribution reflecting intentional discrimination is unjust and hence an improper baseline for determining whether redistribution has occurred, why can we not say the same thing about a distribution reflecting the creation of institutions inaccessible to people with disabilities (i.e., one reflecting the lack of accommodation)? By this account, accommodation requirements (like antidiscrimination requirements) simply restore a just distribution; they do not "redistribute." Indeed, this is one of the central claims of

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113 See id. at 600 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984), to the effect that "[t]here can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action") (bracketed phrase inserted by the Olmstead Court).

114 See, e.g., Issacharoff & Nelson, supra note 3, at 310–11.


116 Professors Mike Seidman and Mark Tushnet, as well as Professor Sunstein, make a parallel argument about practices that have a discriminatory effect on racial minorities. The Supreme Court's limitation of constitutional race discrimination claims to cases of intentional discrimination, they contend, rests on a similarly question-begging assumption about what constitutes a neutral baseline. See Seidman & Tushnet, supra note 115, at 110–15; Sunstein, supra note 115, at 897–98.
the disability rights movement." Antidiscrimination and accommodation thus cannot be distinguished on the ground that one requires "redistribution" while the other does not—at least not without a normative argument explaining why (independent of the circular concept of "redistribution") intentional discrimination is unjust while the failure to accommodate is not.

2. Equivalent Means

One possible basis for such a normative distinction involves the different ways in which antidiscrimination and accommodation requirements require employers to act. That antidiscrimination and accommodation serve the same purpose, of course, does not itself mean that the two modes of civil rights law are normatively similar. For there may well be a normative difference in the duties imposed by these two modes of civil rights law. While antidiscrimination and accommodation seek the same goal, there is an obvious operational difference in the way they seek to achieve that goal. An antidiscrimination requirement demands that an employer disregard an individual's protected class status and treat that individual as he would anyone else. An accommodation requirement, by contrast, requires that the employer take account of an individual's protected class status and treat that individual in a way he might not treat anyone else. We might therefore be tempted to say that

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117 See, e.g., Bagenstos, supra note 10, at 428–32. For a philosophical argument consistent with (and seeking to justify) that claim, see, for example, Anita Silvers, Formal Justice, in Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy 13, 129–31 (1998) [hereinafter Silvers, Formal Justice] and Anita Silvers, The Unprotected: Constructing Disability in the Context of Antidiscrimination Law, in Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions, supra note 9, at 126, 139.

118 "Might not" is an important qualification here. Although they capture a common intuition, Professors Pamela Karlan and George Rutherglen go wrong in stating that the ADA gives protected employees the right to "insist upon discrimination in their favor." Karlan & Rutherglen, supra note 6, at 3; see also Malloy, supra note 9, at 609 ("The reasonable accommodation requirement does not simply mandate that a group be treated differently; it requires that each person within a group be treated differently. Accordingly, the ADA expressly contemplates that employers will take affirmative steps on behalf of employees and applicants with disabilities that they do not take for employees without disabilities."). The Supreme Court made the same mistake, I think, when it stated that "[b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially." US Airways, 535 U.S. at 397 (emphasis added). Nothing in the ADA requires
antidiscrimination requirements prohibit certain wrongful acts, while accommodation requirements prohibit mere omissions.\footnote{119} But invocation of the act/omission distinction can hardly solve the baseline problem that plagues the antidiscrimination/accommodation distinction. The act/omission distinction, after all, is the mother of all baseline problems.\footnote{120} Not only is there enormous controversy over whether there is any moral difference between acts and omissions,\footnote{121} but—more to the point here—there is also a great deal of difficulty in deciding whether to characterize a particular transaction as an act or an omission. In particular, there is a strong argument that discrimination—no less than the failure to accommodate—is best characterized as an omission rather than an act. The point is easiest to see in the case of hiring discrimination. As Professor Matt Cavanaugh argues,

>a policy of discrimination does look like a policy of merely omitting to give people something. 'We might happen not to hire any black or female applicants,' employers might say, 'but there is

\footnote{119} Bonnie Tucker hints at this act/omission distinction by suggesting that the ADA, unlike traditional civil rights laws, requires employers "to act as good Samaritans." Tucker, supra note 9, at 339.

\footnote{120} See, e.g., Seidman & Tushnet, supra note 115, passim (showing how, inter alia, the failure of the act/omission distinction underlies the instability of a number of areas of constitutional law).

\footnote{121} For examples of criticisms of the moral relevance of the act/omission distinction from a variety of perspectives, see Kaplow & Shavell, supra note 60, at 344–47 n.106; Steven J. Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev. 673 (1994); Peter Singer, Famine, Affluence, and Morality, 1 Phil. & Pub. Aff. 229, 231 (1972); Ernest J. Weinrib, The Case for a Duty to Rescue, 90 Yale L.J. 247 (1980).
nothing to prevent them starting up their own firms. We wouldn’t do anything to stop that—at least, we wouldn’t treat them any differently than we treat our existing competitors. That proves we aren’t actually trying to do black or female applicants any harm. We have just decided that they aren’t going to get any help from us, which is a different thing altogether.\footnote{122}

If hiring discrimination can be so readily characterized as the mere omission to give a benefit to someone, it is hard to distinguish on act/omission grounds from the failure to accommodate.

This point connects to Professor Strauss’s observation that antidiscrimination laws can easily be described as being not race- (or gender-) blind but race- (or gender-) conscious.\footnote{123} Employers use categorical statistical proxies all the time, but antidiscrimination law brackets out one set of proxies (those based on race, gender, and the other forbidden classifications) and prohibits employers from relying on the proxies in that set.\footnote{124} As Professor Strauss argues in the race context, an antidiscrimination requirement “is race-conscious because it singles out race as a special characteristic and forces people to become conscious of race in a way they would not otherwise be.”\footnote{125} Employers subject to such a requirement are “forced to be race-conscious” themselves: “[T]hey will be aware that racial groups are entitled to different treatment from other groups, because in dealing with them one must alter one’s usual patterns of generalizing about people.”\footnote{126} Accommodation requirements, of course, operate in exactly the same way: They require employers to exempt members of a protected class from the kinds of categorical judgments that employers make about other employees every day.

Even if an act/omission argument does not establish a normative distinction between antidiscrimination and accommodation, per-

\footnote{122} Matt Cavanaugh, Against Equality of Opportunity 171 (2002).\footnote{123} See Strauss, supra note 61, at 100 (arguing that the prohibition against discrimination is “deeply race-conscious; like affirmative action, the prohibition against discrimination reflects a deliberate decision to treat blacks differently from other groups, even at the expense of innocent whites”).\footnote{124} See id. at 111.\footnote{125} Id.\footnote{126} Id. at 114. Professor Peter Rubin argues that this is among the reasons many people see antidiscrimination law as providing “special rights” to favored classes. See Rubin, supra note 90, at 573–74.
haps there is a difference of substance in the distribution of the costs of these two modes of civil rights law. As the Supreme Court has recently emphasized, denial of accommodation is often paradigmatically rational conduct. In the many circumstances where the cost of accommodation makes a worker with a disability less net productive than other workers who are available to fill his position, an employer "could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled." An accommodation requirement therefore imposes costs by requiring employers to act in a way that is (for them at least) irrational.

But this argument cannot distinguish antidiscrimination from accommodation requirements, for antidiscrimination requirements, too, demand that employers act in a way that is (for them at least) irrational. This point follows from the fact that antidiscrimination laws extend beyond prohibiting discrimination motivated by what Professor Gary Becker called a "taste for discrimination"—prejudice against, or ignorance of the productive potential of, members of a group. As I noted above, the laws prohibit employers from engaging in intentional race or sex discrimination even when a rational, non-bigoted, purely bottom-line-oriented employer would engage in that conduct. As Professor Jolls has argued, these aspects of disparate treatment law are "similar to an accommodation requirement in forcing employers to employ certain individuals even though they impose greater financial costs."

Accommodation mandates thus do nothing more than present a special case of the general problem of rational discrimination. The discussion in the previous Section suggests three basic justifications for imposing on employers the obligation to refrain from rational discrimination against members of subordinated groups. First, what purports to be rational discrimination may frequently be

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127 This is a point that Professor Issacharoff, in particular, has consistently emphasized in his work that has challenged efforts to assimilate pregnancy and disability accommodation to antidiscrimination law. See Issacharoff & Nelson, supra note 3, at 340–41; Issacharoff & Rosenblum, supra note 100, at 2214–20.
130 See supra Section II.B.2.
131 Jolls, supra note 7, at 686.
132 See supra Section II.B.4.
nothing more than animus-based discrimination in disguise. Second, even non-animus-based rational discrimination may reflect the phenomenon of "selective sympathy and indifference." And third, even where rational discrimination does not fall into one of the first two categories, it represents an employer's participation in constructing and maintaining the structure of occupational segregation that undergirds a system of subordination—participation the employer could avoid at relatively modest cost. Each of these arguments applies to cases involving the failure to accommodate.

Take animus and selective sympathy first. Many activists and scholars who have provided theoretical justification for the disability rights agenda hold the view that employers make individualized accommodations for people without disabilities all the time, and that the accommodations required by people with disabilities are frequently no more burdensome or costly. Indeed, the cases contain numerous examples of employers refusing to grant accommodations required by people with disabilities even though they have provided very similar accommodations to non-disabled individuals and of employers refusing accommodations that would entail

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133 See, e.g., Robert L. Burgdorf Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 Vill. L. Rev. 409, 530-33 (1997); Hahn, supra note 118, at 189-90. "Equal treatment" feminists made a similar point in the pregnancy-in-the-workplace debate—that employers accommodated conditions with efficiency effects similar to pregnancy all the time, so the failure to accommodate pregnancy was simple discrimination. See, e.g., Williams, supra note 100, at 355-58.


135 See, e.g., Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 783 (6th Cir. 1998) (holding summary judgment for defendant improper where employer "routinely granted medical leave to employees" but rejected disabled plaintiff's request for leave as accommodation); Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998) (holding plaintiff's request for leave to accommodate her disability was reason-
only de minimis costs. In such cases, two explanations are overwhelmingly plausible. The employer’s refusal of accommodation to the individual with a disability may rest on animus against people with disabilities. Alternatively, the refusal may rest on the failure to appreciate the degree to which the requested accommodation is comparable to accommodations the employer gives nondisabled employees all the time—a clear case of selective sympathy and indifference.

In many cases, of course, people with disabilities request accommodations that are clearly more costly than, or otherwise not comparable to, accommodations requested by nondisabled employees. If we expand the time frame of our analysis, though, it becomes apparent that even many of these cases involve selective sympathy and indifference. Requests for modifications to buildings and other physical structures provide the best example here. Physical facilities may be inaccessible to people with disabilities simply because nobody ever considered people with disabilities as possible users of those facilities—and not because it would have been costlier to build accessible structures in the first place. That lack of consideration is the very definition of selective sympathy and indifference. This point itself is in many cases connected to past

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138 See, e.g., Higgins v. New Balance Athletic Shoe, 194 F.3d 252, 257–58, 264–65 (1st Cir. 1999) (holding summary judgment for defendant inappropriate where employer refused to provide employee with a hearing impairment a fan at his workstation—an amenity provided to certain other employees—when “steam-induced perspiration was ruining his hearing aid”).

137 See Bagenstos, supra note 10, at 439–40; Burgdorf, supra note 133, at 530; Chai R. Feldblum, Antidiscrimination Requirements of the ADA, in Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans 35, 36 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); see also Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 59 (1990) (“The assumption of able-bodiedness as the norm is manifested in architecture that is inaccessible to people who use wheelchairs, canes, or crutches to get around.”). For a similar argument in the pregnancy/parenthood accommodation context, see Finley, supra note 100, at 1154–57.

138 Professor Rob Imrie vividly describes the way in which architects have almost willfully subordinated concerns with accessibility to their own conception of their professional role of “‘architect as artist’ and/or rational technicist.” Rob Imrie, Disability
mus-based discrimination: One reason nobody considered people with disabilities as possible users may be that many employers simply excluded people with disabilities from jobs outright. Just as with intentional discrimination, the present-day failure to accommodate thus perpetuates and entrenches group-based inequalities that resulted from past discrimination. Although these accommodations are costly, the costs are really nothing more than the costs of providing a remedy for the failure to take account of people with disabilities at a time when it would have been essentially costless to do so.

There are still many cases in which people with disabilities require accommodations that entail unique and significant costs and that cannot be deemed remedial in this sense. Even here, how-

and the City: International Perspectives 75–79 (1996); see also George A. Covington & Bruce Hannah, Access by Design 15 (1997) ("Designers have been very exclusive about who they design for, the statistical ‘norm’; Joe & Josephine Smith, both perfect in their entirety. Joe & Josephine never aged, never got fat, never tired, never varied in their daily discipline. In fact, they never missed a beat.").

139 See Bagenstos, supra note 10, at 441–42.

140 For elaborations of this argument, see Illingworth & Parmet, supra note 9, at 10 and Silvers, Formal Justice, supra note 117, at 128–31. The costs of retrofitting in such circumstances can be considerable. To take an extreme example from outside the employment context, the United States Court of Appeals for the Third Circuit held in November 1993 that the City of Philadelphia had violated the ADA by failing to install curb ramps when streets were resurfaced after the statute’s January 1992 effective date. See Kinney v. Yerusalim, 9 F.3d 1067, 1069 (3d Cir. 1993). As one commentator subsequently noted, “[r]equiring Philadelphia to implement curb cuts at all of its 80,000 intersections resurfaced since the effective date of the ADA would cost the city $140 million, three times the city’s budget for all street improvements.” Seth J. Elin, Comment, Curb Cuts Under Title II of the Americans With Disabilities Act: Are They Bringing Justice or Bankruptcy to Our Municipalities?, 28 Urb. Law. 293, 320 (1996). Even in the more paradigmatic context of making buildings accessible, retrofitting to full accessibility can be costly—“an average of 3 percent of a building’s value.” U.S. Comm’n on Civil Rights, Accommodating the Spectrum of Individual Abilities 81 (1983). The costs of including accessible features in the initial design of a facility, by contrast, are relatively tiny—“an estimated one-tenth to one-half of 1 percent of construction costs.” Id.

141 For commentators making this point, see, for example, Illingworth & Parmet, supra note 9, at 10. A variety of cases might be cited as illustrations. See, e.g., Lyons v. Legal Aid Soc’y, 68 F.3d 1512, 1515 (2d Cir. 1995) (holding that employer-paid parking space might be reasonable accommodation for an employee whose disability made her unable to take public transportation to work, even though the space cost “$300–$520 a month, representing 15–26 percent of her monthly net salary”); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140–41 (2d Cir. 1995) (Calabresi, J.) (holding summary judgment for defendant inappropriate where plaintiff teacher sought full-
ever, the justification for accommodation requirements tracks one of the justifications for prohibiting rational statistical discrimina-
tion: The employer is the only party in a position to dismantle the structure of occupational segregation that undergirds a system of subordination. At least where the accommodation “is not likely to impose crippling costs on any single businessman,” mandates the accommodation fits comfortably within the duty to avoid contributing to a subordinating system (where such avoidance can be achieved at reasonable cost) that underlies the prohibition on rational discrimination. Indeed, the “reasonable accommodation” requirement, with its obvious allusion to the kind of “reasonable” care that is the touchstone of negligence law, implements that duty quite precisely.

III. PROBLEMATIZING “RATIONAL DISCRIMINATION”

In the last Part, I made what was essentially a coherence argument against the antidiscrimination/accommodation distinction. I focused on the law’s pervasive prohibition of rational discrimination against protected classes, and I argued that there was no clear basis for treating the failure to accommodate differently from rational discrimination. It is possible, however, that one could agree that accommodation requirements present merely a specific application of the general prohibition on rational discrimination yet disagree that the law should unqualifiedly prohibit rational discrimination. That, essentially, is the position Professor Mark Kelman takes in a recent article that builds on his previous work in the

time teacher’s aide as accommodation for her disability and defendant school failed to demonstrate that classroom management was an essential function of plaintiff’s job that would be eliminated as a result of the proposed accommodation); Nelson v. Thornburgh, 567 F. Supp. 369, 376, 382 (E.D. Pa. 1983) (Pollak, J.) (holding public employer was required, as reasonable accommodation, to provide blind plaintiffs with half-time services of a reader, at the cost of “roughly $6,638 per year for each plaintiff”).

142 Fiss, supra note 66, at 261.

143 See, e.g., Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995) (Posner, C.J.) (drawing the parallel between “reasonable accommodation” under the ADA and “reasonable care” in negligence law); David Benjamin Oppenheimer, Negligent Discrimination, 141 U. Pa. L. Rev. 899, 943–44 (1993) (offering the ADA’s requirement of reasonable accommodation as an example of a legal prohibition on negligent discrimination).

144 Kelman, Market Discrimination, supra note 9.
antidiscrimination area. In this Part, I consider Professor Kelman's position at length, for it represents the best and most well elaborated argument that antidiscrimination law should not prohibit (or at least should not unqualifiedly prohibit) rational discrimination. If his argument fails, as I believe it does, it is because of a deep conceptual instability in the notion of rational discrimination itself.

To Professor Kelman, the essence of an antidiscrimination requirement (which he calls a prohibition of "simple discrimination") is the principle of "capitalist rational[ity]." Employers must treat all potential employees "no worse than they treat others who are equivalent sources of money," free from any influences that might lead them astray from that commitment. "In this regard," Professor Kelman writes, "a worker is essentially just her embodied net marginal product," and employers are obligated to treat her as such. Accommodation requirements, by contrast, demand that employers evaluate (some) employees on the basis of their gross output and that employers disregard (some) additional input costs that may be necessary to achieve that output. The nonaccommodating defendant, unlike the discriminating defendant,

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145 See Mark Kelman & Gillian Lester, Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities 195–226 (1997); Mark Kelman, Concepts of Discrimination in "General Ability" Job Testing, 104 Harv. L. Rev. 1157 (1991) [hereinafter Kelman, Concepts of Discrimination]; Mark Kelman, Does Disability Status Matter?, in Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions, supra note 9, at 91; Mark Kelman, Emerging Centrist Liberalism, 43 Fla. L. Rev. 417 (1991) [hereinafter Kelman, Centrist Liberalism]; Mark G. Kelman, Progressive Vacuums, 48 Stan. L. Rev. 975 (1996) [hereinafter Kelman, Vacuums]; Mark Kelman, (Why) Does Gender Equity in College Athletics Entail Gender Equality?, 7 S. Cal. Rev. L. & Women's Stud. 63 (1997). Although Professor Kelman developed many of the points to which I respond in a number of different articles, the recent Market Discrimination and Groups piece offers the most comprehensive and fully developed account of his views to date. See supra note 9. Accordingly, I will typically cite that article only unless there is a particular reason to cite the others.

146 Kelman, Market Discrimination, supra note 9, at 848.
147 Id. at 835.
148 See id. at 841 ("Insofar as the employer or public accommodation owner fails to give the employee or customer something he desires because of traits that are irrelevant to his economic function, he is breaching the duty to avoid simple discrimination.").
149 Id. at 835.
150 See id. at 836–37, 842–44.
attempts to retain (or save) real social resources, resources that could be utilized by themselves for any number of projects (or by others the state designates given its power to tax and spend). These resources are public and objective, and the desire to expend them completely socially legitimate. Moreover, they are intrinsically finite.\footnote{Id. at 853–54 (citation omitted).}

Because the discriminating defendant seeks to act on the basis of illegitimate subjective tastes that we wish nobody had,\footnote{See id. at 854 n.38.} while the nonaccommodating defendant "is simply asking to make one of the typical permissible uses of social resources,"\footnote{Id. at 854 n.37.} Professor Kelman argues that there is a strong normative distinction between antidiscrimination and accommodation claims:

Victims of simple discrimination possess what I will describe as a fairly strong, uncircumscribed "right" to be free from such treatment, while those seeking accommodation possess, in essence, a colorable "claim" on social resources that competes with a variety of other claims on such resources, a policy "argument" to be balanced against other prudential arguments.\footnote{Id. at 834; see also id. at 835 ("[T]he 'simple discrimination' norm establishes a strong entitlement, what rights theorists would consider a side constraint on the conduct of those who would violate the norm."); id. at 837 ("[T]he accommodation norm establishes a distributive claim—what I also described earlier as a policy 'argument' on behalf of those seeking social resources—rather than a right.").}

That distinction rests on a more general differentiation between two different types of intervention in the economy: "distributive mechanisms" and "market perfecters."\footnote{Kelman, Centrist Liberalism, supra note 145, at 443.} Professor Kelman is clear which type should take priority: "First, we perfect the market, then 'policy' claimants (arguing need, arguing subsidization of merit goods, such as subcultural preservation perhaps) tax some of the now-justly earned funds and expend them appropriately."\footnote{Kelman & Lester, supra note 145, at 221.} Because laws against simple discrimination simply perfect the market, he contends, their enforcement should not be "cost-qualified."\footnote{Kelman, Market Discrimination, supra note 9, at 850.} But accommodation mandates fall into the realm of distribution, so
those seeking accommodation should be required to "compet[e] with other would-be distributive claimants." 158

Professor Kelman's argument challenges existing antidiscrimination doctrine in two major ways. First, he would treat prohibitions on "rational" discrimination as accommodation requirements. 159 In his view, any challenge to such discrimination should properly count as nothing more than a "policy 'argument'" for a use of social resources, one that must be weighed against all other possible uses of social resources. 160 That would represent a major change from what is currently required by standard Title VII law, under which there is an unqualified right against (irrational or rational) intentional discrimination.

Second, he would substantially weaken the law's requirement of accommodation. Under current law, when the impact of an accommodation on the employer and other employees is "reasonable" and does not create an "undue hardship" for the employer, the employer is duty-bound to provide it. 161 The employer may not defend his failure to accommodate on the ground that the money required for the accommodation would be better spent building roads, immunizing children, or feeding poor families. Yet Professor Kelman believes the accommodation requirement should compete with other possible uses of social resources in precisely that way: "Because we must expend real resources to meet the demand for accommodation, we compare the value of expending the resources to meet the policy goals of accommodation with the value of expending the resources to meet other social policy aims." 162 Because the ADA's reasonable accommodation requirement does not demand such a showing from plaintiffs, Professor Kelman's argument is best regarded as an attack on that requirement. 163 Indeed, Profes-

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158 Kelman, Centrist Liberalism, supra note 145, at 443.
159 See Kelman, Market Discrimination, supra note 9, at 845–46, 850–51.
160 Id. at 837.
161 See supra Part I.
162 Kelman, Market Discrimination, supra note 9, at 844.
163 Professor Kelman may mean for this policy balance to be struck in the aggregate rather than in individual cases. We (possibly through Congress or an administrative agency) might decide whether money spent in the United States on disability accommodations would, taken all together, be better spent on other social projects. Alternatively, we might decide that certain categories of accommodation (perhaps accommodations for particular disabilities, accommodations with particular positive effects, or
Sor Kelman has previously suggested (in his own work and with Professor Gillian Lester) that the ADA's reasonable accommodation requirement is normatively problematic because it treats an essentially distributive claim on social resources as a "right." 164

Professor Kelman's distinction between "market perfecters" and "distributive mechanisms" has an appealing technocratic ring to it. Who could disagree with an assertion that we should first maximize the size of the pie before dividing it up? To posit a clear distinction

accommodations that did not exceed a defined cost threshold) were, all things considered, worthwhile, and might then require employers to provide only those accommodations. These approaches, too, would effect a major change in current reasonable accommodation doctrine.

164 See Kelman & Lester, supra note 145, at 212–13, 226; Kelman, Strategy or Principle, supra note 38, at 122–24. Professor Kelman's disquiet with the ADA may be unduly heightened because he shares a common misunderstanding of what the statute requires. In particular, Professor Kelman does not appear to appreciate that the ADA's accommodation requirement does not require universal full accommodation. He asserts that the ADA "as currently formally interpreted" demands "cost-unlimited accommodations at least as long as they do not threaten the viability of the entity that bears them." Id. at 93. I do not know who Kelman thinks has "currently formally interpreted" the ADA as requiring such extensive accommodations, but I think it is clear that—as a matter of textual formalism and authoritative interpretation—Professor Kelman is incorrect. For one thing, by asserting that "reasonableness is defined in terms of entity viability," id. at 93 n.34, he appears to conflate the ADA's two textual limitations on the scope of mandated accommodation: (1) the requirement that the accommodation be "reasonable," and (2) the employer's "undue hardship" defense. See 42 U.S.C. § 12112(b)(5)(A) (2000) (requiring an employer to "mak[e] reasonable accommodations ... unless such [employer] can demonstrate that the accommodation would impose an undue hardship"). Through the undue hardship defense, the ADA excuses an employer from providing accommodation where doing so would place too great a financial burden on the employer's business—though that defense may be triggered well before an accommodation cost threatens the employer's viability. See 42 U.S.C. § 12111(10)(A) (2000) (defining "undue hardship" generally to mean "an action requiring significant difficulty or expense"). But the undue hardship limitation is not the only constraint on the accommodation required by the ADA. As the plain text of the statute makes clear, and as the Supreme Court recently emphasized, the accommodation must also be "reasonable." US Airways v. Barnett, 535 U.S. 391, 400 (2002) (holding that "reasonable accommodation" and "undue hardship" provisions impose distinct limitations on the scope of required accommodation under the ADA). Pursuant to the reasonableness requirement, the plaintiff must show, independent of any particular hardship that this employer might suffer, that the requested accommodation is reasonable "ordinarily or in the run of cases." Id. at 401. The upshot of this requirement is that an employer will not face an unlimited requirement of accommodation even if that employer "is so large or wealthy ... that it may not be able to plead 'undue hardship.'" Vande Zande v. Wis. Dept of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (Posner, C.J.).
between "market perfecting" and "distributive" legislation, however, is to mask the normative and political—indeed, ultimately distributive—choices that underlie any decision about what counts as perfecting the market. At crucial points in Professor Kelman's argument—in defining what impingements on employers' interests properly count as "costs" of legal intervention, and in defining the notion of "marginal product" that lies at the core of his key concept of "capitalist rationality"—Professor Kelman's views about what perfects the market depend on implicit distributive judgments.

Professor Kelman seems to agree that, as a purely normative matter, the employment discrimination laws are best understood as resting on the imperative to eliminate patterns of group-based stigma and subordination rather than on the odd demand for government-enforced capitalist rationality. Yet he insists on a strong normative distinction between antidiscrimination and accommodation. Professor Kelman's acknowledgement that the goal of antidiscrimination law is to break down structures of group-based subordination ultimately undermines the strong normative distinction he draws between simple discrimination, on the one hand, and failure to accommodate (or statistical discrimination), on the other. At the end of the day, what justifies accommodation is the same thing that justifies antidiscrimination—the notion that private actors must bear some costs to avoid contributing to a system of race, gender, or disability segregation and subordination.

In this Part, I begin by discussing Professor Kelman's argument at length. As I note in Section A, Professor Kelman disavows any intrinsic right to "capitalist rational" treatment—and rightly so. But Professor Kelman's utilitarian defense of a distinction between "capitalist irrational" discrimination and nonaccommodation that saves "real social resources" has two major flaws. The first relates to Professor Kelman's argument for disregarding or giving little weight to the interests of discriminating employers. As I argue in Section B, that argument depends on a moral judgment that employers should not gain by contributing to the subordination of a

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165 I recognize the irony here, as Professor Kelman himself has criticized others for making exactly the same sort of move I am attributing to him. See Mark Kelman, A Guide to Critical Legal Studies 286–90 (1987) [hereinafter Kelman, Guide].

166 See infra Section III.A.
disadvantaged group. But such an argument also justifies disregarding or giving little weight to the interests of nonaccommodating employers. The second flaw relates to Professor Kelman's argument that nonaccommodating employers act as representative surrogates for the public who wish to maximize the "real" resources available to society for later distribution decisions. In Section C, I contend that this aspect of Professor Kelman's argument is unduly focused on the short-run effects of accommodation and ignores the degree to which the law could capture and redistribute the utility gained by discriminating employers. But most important, Professor Kelman's argument rests on a highly malleable understanding of "real social resources" that itself incorporates concerns about subordination and proper distribution. As I note in Section D, these problems are not limited to Professor Kelman's argument. They inhere in any argument that attaches normative significance to whether antidiscrimination law prohibits "rational" discrimination. If Professor Kelman's brilliantly crafted exemplar of such an argument cannot avoid these problems, it is doubtful any such argument can.

A. An Intrinsic Right to Capitalist Rational Treatment?

In considering the logic of his argument, it is useful to begin by considering a point on which Professor Kelman does not rely. Recall that what distinguishes antidiscrimination from accommodation in his view is that antidiscrimination requirements prohibit employers from violating individual employees' interest in what he calls "capitalist rational" treatment—that is, in being treated as their "embodied net marginal product." But although the notion of capitalist rationality underlies his antidiscrimination/accommodation distinction, it is important to note that Professor Kelman makes no normative case for any intrinsic right to "capitalist rational" treatment—and for good reason. There would be something a bit disconcerting about an effort to ground modern employment discrimination law normatively in the imperative of "capitalist rationality." Dr. Martin Luther King's dream, after all, was that

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167 Kelman, Market Discrimination, supra note 9, at 835.
168 Even when the Supreme Court upheld the Civil Rights Act of 1964 as an exercise of Congress's power to regulate commerce, it was well recognized that the statute's
his children would be judged not "by the color of their skin but by [the] content of their character"—not by their net marginal product. As Professor Michael Selmi has observed, "[m]ost people would contend that our legal system proscribes discrimination because it is wrong[,] not because it is an inefficient business practice."

It is doubtful that a society that enacted the Civil Rights Act of 1964 and subsequent employment discrimination legislation would, or should, embrace a general right to "capitalist rational" treatment. That employers treat employees as merely "embodied net marginal product" is taken by many to be a problematic tendency in a market economy, one that the law should seek to soften. It would be odd to treat that problematic tendency as a fundamental commitment that the law should enforce against employers who stubbornly insist on viewing their employees as more than contributions to the company's bottom line. Indeed, such employers, like Aaron Feuerstein of Malden Mills, who continued to pay his workers after his factory burned down, are rightly applauded in our popular and political culture. Professor Post's observation about the "dominant conception of American antidiscrimination law"—the notion that the law prohibits discrimination because it is irrational—is apt here:

[I]t is no small irony that American antidiscrimination law, which springs from the noble liberal impulse to protect persons from the indignities of prejudicial mistreatment, should in the end unfold itself according to a logic that points unmistakably toward the instrumentalization of persons. If liberalism seeks to attribute equal dignity to all persons on the basis of a presocial and "universal human potential," American antidiscrimination law, in the context of employment, strangely imagines itself as transmuting

"primary purpose" was "the vindication of human dignity and not mere economics," Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring).

169 Martin Luther King, Jr., I Have a Dream, in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 217, 219 (James Melvin Washington ed., 1986).

170 Selmi, supra note 74, at 1247.

persons at the very moment of their social manifestation into the object of Weberian rationalization. 172

Antidiscrimination law would lose much of its moral force if it were rooted in a requirement that employers treat their workers as nothing more than the embodiment of their cash value to the enterprise.

At least where jobs are scarce, any number of exercises of corporate social responsibility would run afoul of a right to "capitalist rational" treatment. A law firm that treats attorney pro bono hours as if they were billable hours, and makes partnership decisions on a billable-hours basis, is not acting as a rational capitalist under Professor Kelman's formula: An individual who billed 2,000 hours per year working for paying clients, passed over in favor of a person who billed 1,800 paid hours and 300 pro bono hours per year, could legitimately claim that he was denied a benefit for reasons "irrelevant to his economic function;" 173 the firm discriminated in favor of a person with lower net marginal product. To bring the point closer to home, an employer who voluntarily provided accommodations for individuals with disabilities could well violate Professor Kelman's capitalist-rationality norm: A nondisabled individual passed over for a job in favor of an individual with a disability who could produce as much output, but only with a non-costless accommodation, could complain that the employer discriminated against him in favor of a person with lower net marginal product. 174 We might expect the market to punish such transgressions against capitalist rationality, but I know of no one who argues that the law should do so where the market fails.

Unless we are willing to say that law firms should be forbidden to treat pro bono hours as if they were billable, or that employers

172 Post, supra note 33, at 15 (citations omitted).
173 Kelman, Market Discrimination, supra note 9, at 841.
174 Largely for this reason, Professor Sherwin Rosen regards the ADA as a law that mandates, rather than prohibits, discrimination. See Rosen, supra note 2, at 21. Professor Kelman argues that an employer does not commit simple discrimination by complying with a mandate to provide accommodation, because the legal penalty for violating the mandate is essentially a tax and the employer acts in a capitalist-rational fashion by minimizing the sum of accommodation-cost-plus-tax. See Kelman, Market Discrimination, supra note 9, at 842 n.16. At least in the context of competitive employment, however, this argument would not carry over to a voluntarily provided accommodation, and Professor Kelman does not assert that it does.
should be forbidden from voluntarily providing accommodations to employees with disabilities, there can be no generic right to legal protection against "capitalist irrational" treatment. Indeed, Professor Kelman acknowledges that the law does not value—and would not seek to enforce—capitalist rationality for capitalist rationality's own sake. Rather, antidiscrimination law prohibits departures from capitalist rationality in circumstances involving group-based discrimination, for those are the circumstances in which departures from capitalist rationality are likely to result in stigmatic injury or to entrench patterns of group subordination.\textsuperscript{175} Although part of the reason why the law limits its protections in this way is administrative—for example, capitalist-irrational treatment is easier to identify where subordinated groups are concerned\textsuperscript{176}—Professor Kelman acknowledges that there is a substantive reason for the limitation as well: The statute seeks to dismantle a system of subordination. As he explains,

\begin{quote}
[t]he norm we recognize is significantly designed as well to protect against the stigma imposed on subordinated group members, and is therefore not purely individualistic as a matter of theory as well as administrative practice\ldots. We may protect only those we believe suffered discrimination that resulted from subordinate group membership not only because individuals within such groups more typically suffer a private, psychological harm (stigmatic injury) that superordinate group members do not. We might also believe that the failure of members of subordinate groups to reach socially validated positions of power and prestige to which they are entitled will redound negatively on third parties, both within and outside the social group, in ways that unpatterned individual failure does not.\textsuperscript{177}
\end{quote}

As Professor Kelman acknowledges, then, the right to "capitalist rational" treatment is not the sort of transcendent, non-compromisable value on which one could ground a distinction between a strong right to antidiscrimination on the one hand and a weak argument for accommodation on the other. We do not man-

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{175} See Kelman, Market Discrimination, supra note 9, at 866–67. This is, of course, the same point I endorse in Section II.A, supra. \\
\textsuperscript{176} See Kelman, Market Discrimination, supra note 9, at 860–66. \\
\textsuperscript{177} Id. at 866–67.
\end{tabular}
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date universal capitalist rationality; we prohibit departures from capitalist rationality only when they feed group-based stigma and subordination. Accommodation is quite similar in this respect: We do not require universal accommodation; we require accommodation only when the failure to do so feeds group-based stigma and subordination.

B. The Weakness of the Employer's Interest?

Of course, Professor Kelman does not in fact argue that capitalist rationality is a transcendent, non-compromisable value that should be generally enforced by the law. Instead, he makes a more subtle point. He argues that employers have less of an interest in resisting antidiscrimination requirements than accommodation requirements, because the former merely enforce capitalist rationality. Thus, in the utilitarian calculus that Professor Kelman believes underlies any identification of a "right," the interest of potential plaintiffs in freedom from discrimination categorically outweighs that of potential defendants in resisting antidiscrimination requirements. We enforce the principle of capitalist rationality only where departures from that principle feed stigma and subordination, but when capitalist-irrational actions have this effect (as in the case of status discrimination) we stop at nothing to prohibit them. The discriminating employer, after all, acts only on the basis of private preferences that society has declared to be illegitimate. But the nonaccommodating employer does not seek merely to serve some illegitimate interest; he seeks to serve the seemingly appropriate interest in saving money. Accordingly, even when failures to accommodate feed stigma and subordination, our response must necessarily be balanced against and limited by competing considerations.

In this Section, I argue that there is no difference in principle between an employer's interest in avoiding an antidiscrimination requirement and an employer's interest in avoiding an accommodation requirement. In Subsection 1, I note that an employer who engages in simple discrimination has at least a libertarian interest to assert against a prohibition on his conduct. But the argument that the interests underlying antidiscrimination law properly out-

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178 See id. at 836 n.6.
weigh a discriminating employer's liberty interest is structurally very similar to the argument that the interests underlying an accommodation requirement properly outweigh the nonaccommodating employer's pocketbook interest. In Subsection 2, I turn to Professor Kelman's assertion that the preferences employers satisfy by engaging in simple discrimination should be disregarded in any utilitarian calculus. I argue that Professor Kelman's (tepid) invocation of the concept of "preference laundering" does not aid his argument; the same arguments that might lead one to disregard the preferences served by simple discrimination might also lead one to disregard the preferences served by the failure to accommodate.

1. Libertarian Interests

As Professor Kelman acknowledges, even when the employer acts on the basis of a mere "preference," he has at least a libertarian interest in being free from forced association.\(^\text{179}\) If we pursue our antidiscrimination agenda without limit, we must have some good reason for categorically disregarding that interest in negative associational liberty. Professor Kelman gives two reasons why antidiscrimination laws properly disregard defendant-side interests in associational liberty. The first of these seems unpersuasive (or at least incomplete), and the second applies as much to the material interests overridden by accommodation requirements as to the libertarian interests overridden by antidiscrimination laws.

Professor Kelman begins by arguing that actors in the market sphere have a very limited interest in associational freedom: "People who serve customers, or employ workers, are certainly thought to have little interest in the detailed, particular qualities of the customers and workers."\(^\text{180}\) Such a limited liberty interest, he contends, surely cannot outweigh the plaintiff's interest in capitalist-rational treatment. But this point is hardly sufficient to support Professor Kelman's broader argument, for it is essential to that argument that it is not just shareholders and managers but also individual customers and employees who are bound by the principle of capitalist rationality.

\(^{179}\) See id. at 868; see also Fiss, supra note 66, at 253–54 (describing employers' associational liberty interests).

\(^{180}\) Kelman, Market Discrimination, supra note 9, at 869.
One might think that an employer’s act of discrimination based on the preferences of his customers or incumbent workers would be “capitalist rational” under Professor Kelman’s typology. If an employee’s presence will drive away customers, or that employee will be unable to work productively with other employees, that employee’s net marginal product will be smaller than that of other employees. But Professor Kelman, in accord with the near-unanimous view in the cases, does not want to exempt customer- and coworker-preference-based discrimination from the unqualified antidiscrimination prohibition. Accordingly, he argues that customers and coworkers have the same obligation to act as rational capitalists as do employers; we prohibit employers from engaging in customer- or coworker-preference-based discrimination not because employers are acting irrationally, but because they are essentially the agents for customers or coworkers who are violating the injunction to act as rational capitalists.  

This move effectively explains why customer- and coworker-preference-based discrimination is properly targeted by an unqualified prohibition on simple discrimination. But this move also raises major problems for Professor Kelman’s argument for overriding the libertarian claims of discriminating employers. It is plausible to argue that shareholders (or even individual entrepreneurs) give up the negative associational liberty they would otherwise enjoy by choosing to make money in a mass market business “in which dealings [with customers] are likely to be impersonal and distant in any case.” But individuals must work and shop somewhere, and their dealings with service providers and (particularly) coworkers often will be the farthest thing from “impersonal and distant.” Once we treat individual workers and customers as bound by the obligation of capitalist rationality, we cannot so easily write off libertarian claims that antidiscrimination law impermissibly overrides an interest in avoiding forced association.

\[181\] See id. at 848–49.  
\[182\] Id. at 868.  
\[183\] On one reading, this is the whole point of the antidiscrimination laws: to reduce prejudice and stereotyping by putting people of different races (national origins, etc.) into close contact while working on common projects. See supra Section II.A (discussing the contact hypothesis).
Perhaps recognizing this point, Professor Kelman shifts to an argument that a claim of liberty to discriminate is not properly regarded as a claim of “liberty” at all. This argument, however, ultimately rests on the role of discrimination in perpetuating group-based stigma and subordination; it thus increases rather than decreases the parallels between antidiscrimination and accommodation. Professor Kelman contends that an individual who discriminates on the basis of subordinated group status is not “simply trying to live [his] own life in (oddly idiosyncratic) peace.”Rather than “making a claim to ‘liberty’ (if we think of liberty claims as grounded essentially in the right to pursue an inevitably private and particularized life plan)[,] . . . he is essentially making a claim to social power.” He is “seeking to help bolster a particular sociopolitical system,” one in which he is relatively advantaged.

But that formulation places entirely too much weight on the problematic word “essentially.” A person who indulges a taste for discrimination obviously is doing two things: He is going about a life plan of his choosing, and he is doing so in a way that exercises and advances his social power. To say that such a person’s claim of entitlement to discriminate is “essentially” a claim to social power rather than liberty is to assume the conclusion that the imperative to overcome subordination outweighs the individual’s libertarian interest. As Professor Fiss argues, “the frustration of [the discriminator’s] personal preferences must be acknowledged as one price society is willing to pay to achieve the aims of the law.” It is quite hard, however, to defend such a conclusion in terms that do not also justify the frustration of the dollars-and-cents interest of the nonaccommodating employer.

Professor Kelman’s language suggests that any real liberty interest must rest on an atomistic individual judgment that is neither shared by others nor influenced by any broader social interests and that has no effect on others (thus his references to “an inevitably private and particularized life plan” and to “living one’s own life in (oddly idiosyncratic) peace”). But Professor Kelman surely does not mean to say that such an atomistic choice is the only kind of

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184 Kelman, Market Discrimination, supra note 9, at 870.
185 Id. at 869–70.
186 Id. at 869.
187 Fiss, supra note 66, at 254.
liberty worth weighing in the balance—unless he means covertly to say that no liberty is worth weighing in the balance. Professor Kelman, as much as anyone in the legal academy, has been a major advocate of the argument that all of our choices are influenced and constrained to some extent by the broader society.\footnote{See, e.g., Kelman, Guide, supra note 165, at 126–37; Mark Kelman, Choice and Utility, 1979 Wis. L. Rev. 769, 787–88; Kelman, Vacuums, supra note 145, at 977–89.} And in a world marked by the "Butterfly Effect," the reverse is surely true as well—everything we do has some effect on others. In short, there is no such thing as “an inevitably private and particularized life plan” or “living one’s life in (oddly idiosyncratic) peace.” If a real claim to liberty must be grounded in such an isolated existence, then there are no real libertarian claims to weigh against either antidiscrimination or accommodation requirements.

Nor can it be said that all those who engage in taste-based discrimination are in fact “seeking to help bolster” a system of subordination if “seeking” implies a purposive effort to keep the system in place. In a subordinating system, some members of advantaged “majority” groups may engage in discrimination simply because they know they will be punished by others if they do not.\footnote{See Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1040–41, 1050–51 (1995).} Others may engage in discrimination because, so long as a subordinating system is in place, they want to enjoy the benefits as much as any other majority group member.\footnote{See, e.g., Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1758–61 (1993).} Still others may engage in discrimination that “result[s]—often unconsciously—from our tendency to sympathize most readily with those who seem most like ourselves.”\footnote{Brest, supra note 15, at 8.}

It is hard to distinguish nonaccommodators from these categories of discriminators. Like these discriminators, a nonaccommodating employer gains an advantage for himself by engaging in conduct that entrenches the subordinate status of a subordinated group. Whether he does so because he believes people with disabilities deserve their station, because he believes that his individual act of accommodation can make no difference in the broader picture of subordination, or because he is simply indifferent, the
basic act is the same: Rather than spend money on accommodations to avoid contributing to the systematic subordination of people with disabilities, he wishes to keep the money for himself. If the employer's interest in associational liberty to discriminate lacks moral weight, then, as I have argued above, the employer's dollars-and-cents interest in avoiding accommodation lacks moral weight as well.192

2. Laundering Preferences

Professor Kelman does suggest one reason why the discriminating employer's liberty interest might be entitled to less weight than the nonaccommodating employer's dollars-and-cents interest: The nonaccommodating defendant, Professor Kelman argues, seeks to save "real social resources" in the sense that society's aggregate utility will be greater (at least in the short run)193 if there is no accommodation. Simple discrimination, by contrast, wastes social resources by allocating jobs to less productive employees.

But why should the societal utility calculus take into account only the utility that is reflected in dollars and cents?194 Even if simple discrimination results in hiring employees who produce less, the practice may well be efficient if we take into account the utility that private actors gain by indulging their taste for discrimination.195

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192 See supra Section II.C.
193 See infra Section III.C.1.
194 See, e.g., Kaplow & Shavell, supra note 60, at 18. Professors Kaplow and Shavell defend a "notion of well-being" that:
[I]s comprehensive in nature[:] It incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth. Similarly, an individual's well-being reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful.
Id. Professor Kelman has implied that he would endorse a more comprehensive utility calculus. See Kelman, Guide, supra note 165, at 149.
195 [A] Critic would note that Posner has given us no reason to believe that we ought to care only about the valuation of what he calls 'goods'; if people subjectively care about an abstract end state (for example the level of equality in the society they live in), they are wealthier when more of the desired end state is 'produced.' The distinction between desired 'goods' and desired 'moral states' should be wholly arbitrary and unsupportable to a consistent economist.

Id.
It may also be efficient if we take into account the utility employers gain by adopting capitalist-irrational practices that, without discriminatory intent, disproportionately exclude members of minority groups. (To use Professor Kelman's example, an employer might obtain pleasure from hiring his "fishing buddies," who all happen to be white males.) We must therefore have some normative reason for ignoring those aspects of private utility.

Professor Kelman suggests that the utility derived from capitalist-irrational practices with discriminatory effects should be disregarded because that utility rests on tastes that are "arguably illegitimate." To bolster this suggestion, he invokes (but never quite endorses) the utilitarian literature on "laundering preferences." Those who advocate preference-laundering contend that a proper utilitarian social welfare function should disregard preferences that are, in some "general sense, inconsistent with the perspective of the utilitarian." The argument starts with the notion that the premise of utilitarianism is equality of persons—"everybody to count for one, nobody for more than one." To remain true to that premise, preference-launderers argue, utilitarian decisionmakers are duty-bound to disregard from their social welfare calculations any preferences that reject it. Professor Kelman suggests that he agrees with those who argue that "gains that depend on injuring or mistreating others simply ought not to count in constructing such a welfare function."

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196 See Kelman, Market Discrimination, supra note 9, at 891 n.86.
197 Id. at 854.
198 See id. at 854 n.38 (citing Robert E. Goodin, Laundering Preferences, in Foundations of Social Choice Theory 75 (Jon Elster & Aanund Hylland eds., 1986) and John C. Harsanyi, Problems with Act-Utilitarianism and with Malevolent Preferences, in Hare and Critics: Essays on Moral Thinking 89 (Douglas Senor & N. Fotion eds., 1988)). Professor Kelman similarly nodded toward, but did not quite endorse, the notion of preference-laundering in Kelman, Centrist Liberalism, supra note 145, at 430–31.
202 Kelman, Market Discrimination, supra note 9, at 854 n.38.
The preference-laundering idea, however, cannot save Professor Kelman’s distinction between antidiscrimination and accommodation. Even if Professor Kelman is right that a proper utilitarian social welfare function should exclude “gains that depend on injuring or mistreating others,” 203 that point does not effectively distinguish antidiscrimination from accommodation requirements. For the notions of “injury” and “mistreatment” that serve as the fulcrum of Professor Kelman’s preference-laundering principle are sufficiently elastic to embrace the harms an employer causes to another through either discrimination or the failure to accommodate. 204

203 Id. Although I do not pursue the point here, there is a major respect in which Professor Kelman’s argument is incomplete. The entire notion of “laundering preferences” is extremely controversial. Critics of preference-laundering focus in part on matters of detail—such as the inability of the concept’s defenders to come up with any clear, plausible definition of exactly what sorts of preferences should be ignored. See, e.g., Kaplow & Shavell, supra note 60, at 422–26; Louis Kaplow & Steven Shavell, Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency, 110 Yale L.J. 237, 247–48 (2000). They also focus on a more basic point: If the entire appeal of utilitarianism is that everyone’s preferences count, it seems inconsistent with that theory to ignore some preferences because some or even most of us do not like them. See, e.g., Epstein, supra note 23, at 75–76 (“In short, sound judgments about whether a given legal rule is good or bad cannot begin with an untested moral assumption that simply calls some preferences out of bounds before the discussion begins. All have to be taken into account, and when that is done, a powerful case exists for allowing persons to sort themselves voluntarily by inclination and taste.”); R.M. Hare, Comments, in Hare and Critics: Essays on Moral Thinking, supra note 198, at 199, 246 (concluding that “my basic theory seems to require me to include all preferences”); see also Kaplow & Shavell, supra note 60, at 420 (finding preference-laundering “troubling from the perspective of welfare economics because the moral force and appeal of welfare economics lies in promoting the actual well-being of people, not in advancing some hypothetical notion of satisfaction that is distinct from that of the individuals who are the object of our concern”). Professor Kelman, who forthrightly asserts a utilitarian approach to defining rights, see Kelman, Market Discrimination, supra note 9, at 836 n.6, acknowledges the opposition to preference-laundering among some prominent utilitarians, see id. at 854 n.38 (citing J.J.C. Smart, An Outline of a System of Utilitarian Ethics, in Utilitarianism: For and Against 3, 26 (J.J.C. Smart & Bernard Williams eds., 1973)). Yet he makes no argument for why the preference-launderers are right. Indeed, he does not even come out and endorse the idea of preference-laundering. He merely states that the utility derived from simple discrimination should be ignored “[t]o the extent that [the argument for preference-laundering] is true.” Id.

204 Professor Kelman is hardly alone in identifying the class of preferences to be excluded in an unhelpfully broad way. As Professors Kaplow and Shavell point out, arguments for laundering preferences tend to be driven “by particular, provocative examples” and generally fail to provide any clear standard for determining which preferences should be excluded. See Kaplow & Shavell, supra note 60, at 422–26.
Both discriminating employers and nonaccommodating employers adversely affect the material interests of the “victims” of their conduct. To decide whether that adverse effect constitutes “injury” or “mistreatment” requires a normative principle against which to evaluate the wrongfulness of the conduct that caused the harm, but that is the very question at issue.\(^{205}\)

In what way, then, is discrimination wrongful or derogatory of the status of others? This question largely tracks the basic question, discussed in Part II above, of why we prohibit discrimination in the first place. As my analysis above suggested, it might be possible to say that animus-based discrimination is wrongful in a way that the failure to accommodate is not; the former rests on an express determination that the victim’s interests are entitled to less weight than those of others. But an antidiscrimination rule limited to animus-based discrimination would cover only a small fraction of the intentional discrimination that occurs in the world and is prohibited by law.

Indeed, Professor Kelman himself is not satisfied with an antidiscrimination principle that is limited to animus-based discrimination. His definition of discrimination embraces all capitalist irrational treatment of subordinated group members—even if that treatment results from the desire to satisfy wholly neutral tastes (like the desire to hire one’s friends).\(^{206}\) He thus must have some reason for disregarding not only affirmative animus and incorrect stereotypes but also any utility gained from failing to treat employ-

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\(^{205}\) This problem is structurally and substantively similar to the fundamental problem with using Mill’s famous “harm principle” to determine when legal intervention in private choices is appropriate. See John Stuart Mill, On Liberty 9 (Elizabeth Rapaport ed., Hackett Pub’g Co. 1978) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”). For an influential refinement of that principle, see Joel Feinberg, Harm to Others 31–36 (1984). Because much if not all human activity can readily be characterized as setting back someone’s welfare interests, the crucial question in virtually every case will be whether the setback to interests results from wrongful conduct. See id. at 105–14. But that question is inescapably normative and cannot be resolved by reference to some uncontroversial or “objective” concept of harm. For excellent discussions of this problem, from very different perspectives, see Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 71–103 (1998), and Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109 (1999).

\(^{206}\) See Kelman, Market Discrimination, supra note 9, at 891 n.86.
ees as "embodied net marginal product." But the discussion in Section A above should make clear that there is no reason why it is inherently wrong or derogatory of the equal status of others to act in such a capitalist irrational manner. As a result, there is no reason why preferences for capitalist irrational treatment should be categorically disregarded in a utilitarian social welfare function. If an employer gains utility by rewarding employees for being good citizens, good parents, or good softball players, there is nothing "illegitimate" about his preferences, even though in each case he acts in a capitalist irrational fashion.

What makes the preferences that underlie discrimination illegitimate, Professor Kelman seems to believe, is that they instantiate and entrench patterns of stigma and subordination. And that is true whether those preferences either reflect affirmative animus or are essentially neutral desires (like the desire to hire one's friends) that have disproportionate effects on subordinated group members. But if Professor Kelman is prepared to say that the psychic benefit an employer gets from hiring his friends is "illegitimate" when it disproportionately excludes subordinated group members, even in the absence of discriminatory intent, there is no particular reason why a nonaccommodating employer's interest in appropriating to himself "real social resources" should not be regarded as equally illegitimate when it leads to the same patterns of subordination. If that is true, the notion of preference-laundering collapses as a basis for distinguishing antidiscrimination from accommodation. Both discrimination and the failure to accommodate rest on preferences that are illegitimate because, in context, they reflect a belief that a small gain to the employer is more important than withholding support from a system of group subordination. Given the relative stakes, an employer who refuses to provide a reasonable accommodation to an individual with a disability exhibits moral callousness—and fails to treat the individual with a disability "as an equal"—by valuing his own marginal profit more than avoiding the harm of disability subordination.

207 See id. at 866–67.
208 Cf. Dworkin, supra note 201, at 227 (defining "treatment as an equal" as "the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else").
C. The Nonaccommodating Employer as Representative Surrogate for the Public?

In the previous Section, I argued that Professor Kelman’s analysis provides no basis for distinguishing, from the perspective of the strength of the employer’s interest, antidiscrimination from accommodation requirements. The argument for overriding the liberty interests of discriminating employers can readily be adapted to justify overriding the bottom-line interests of nonaccommodating employers, and the preferences on which nonaccommodating employers act may be characterized as illegitimate for reasons quite similar to those that lead Professor Kelman to treat discriminating employers’ preferences as illegitimate. But there is another facet of Professor Kelman’s argument. An employer who resists an accommodation mandate, Professor Kelman contends, is not merely asserting his own interests. Rather, because he seeks to save “real social resources” that (unlike discriminatory tastes) could be taxed away and used for any number of socially valuable projects, he “is acting, in essence, as a representative surrogate for the public, seeking optimal expenditure of these funds.”209 It is here that Professor Kelman’s distinction between “market perfecting” and “redistributive” legislation really drives the analysis. Professor Kelman treats antidiscrimination law as “market perfecting” legislation that expands the pie and therefore must be enforced without limit; by contrast, he treats accommodation requirements as redistributive measures that simply divide up the pie and thus must compete with other possible uses of available resources.

In this Section, I contend that Professor Kelman’s suggestion that antidiscrimination laws expand the pie in a way that accommodation requirements do not is significantly flawed. As a result, Professor Kelman’s employer-as-representative-surrogate argument does not effectively distinguish antidiscrimination from accommodation requirements.210 There are three basic reasons for

209 Kelman, Market Discrimination, supra note 9, at 853–55.
210 An additional point, which I do not press, is that the enforcement of antidiscrimination laws itself imposes “real social costs” that any rational utilitarian maximizer must consider. That is because no law enforcement process is perfect. As Professor Kelman concedes, any antidiscrimination regime necessarily imposes two sorts of costs on all employers. First, employers who are accused of discriminating must devote resources to convincing some decisionmaker (an administrative agency, an arbi-
this conclusion. First, as I argue in Subsection 1, even if a nonac-
commodating employer increases the net social product in the
short run by hiring workers who are currently more productive, the
long-run effects are more ambiguous. In the long run, the failure to
accommodate may actually waste "real social resources." Second,
as I argue in Subsection 2, Professor Kelman's entire notion of
"real social resources" is itself a construct. Where market re-
sponses to workers are intertwined with a system of subordination,
Professor Kelman by definitional fiat treats those market responses
as not constituting part of the workers' net marginal product and
thus not as "real social resources." A parallel argument would also
exclude accommodation costs from consideration as part of work-
ers' net marginal product. Finally, as I argue in Subsection 3, Pro-
fessor Kelman understates (or at least underplays) the degree to
which the government could capture a piece of the utility employ-
ers gain from acting on discriminatory tastes and redistribute it to
other socially worthwhile projects—just as it can with the money
employers gain from failing to accommodate.
1. Short-Run and Long-Run Effects on "Real Social Resources"

Professor Kelman’s conclusion that an employer who resists an accommodation requirement would save social resources seems to follow inexorably from the way he defines simple discrimination and accommodation. An employer violates a prohibition on simple discrimination by favoring less productive over more productive employees. In his view, enforcement of such a prohibition results in a more efficient allocation of resources and a greater net social product. Enforcement of an accommodation requirement, by contrast, requires employers to favor some relatively less productive employees and thus reduces the net social product.

But this picture holds only if we limit our focus to the short run. In the long run, the effects of an accommodation requirement on net social product are more ambiguous. A common (though not uncontroversial) theory holds that people respond to a lack of employment opportunities by underinvesting in their human capital.\(^{211}\)

To the extent that this theory holds true, accommodation requirements may actually lead to a long-term increase in net social product. In particular, that result will occur if the enforcement of an accommodation requirement encourages protected class members to make additional human capital investments and if those new human capital investments increase the long-run productivity of protected class members in a greater amount than the aggregate cost of accommodations decreases overall production in the economy.\(^{212}\)

In the disability context specifically, mandated accommodations may further increase societal efficiency by moving people off of public benefits rolls and into productive work; although employers may be forced to bear some accommodation costs, those costs may be substantially outweighed by the savings to taxpayers that accrue from the reduction of disability benefits rolls.\(^{213}\)

\(^{211}\) See sources cited supra note 50.

\(^{212}\) See Bagenstos, supra note 10, at 464 (arguing that the ADA’s accommodation requirement should have such an effect).

\(^{213}\) On this point, see generally Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform, 44 Wm. & Mary L. Rev. 921, 957–75, 1017–19 (2003) (noting that ADA proponents argued that the statute would reduce the social cost of disability welfare benefits, but observing the minimal effect the statute seems to have had in practice).
Whether the long-run increase in the productivity of protected class members spurred by the availability of accommodations outweighs the decrease in enterprise productivity that results from the cost of providing accommodations is ultimately an empirical question. Professor Kelman does not even advert to that question, much less attempt to answer it. But his conclusion that non-accommodating employers are the representative surrogates for the public seeking to save social resources presumes a negative answer to that question. The absence of any support for that premise strikes at the core of his distinction between antidiscrimination and accommodation.

2. “Affective Cultural Meaning” and the Malleability of “Real Social Resources”

The flaw in Professor Kelman’s argument is not merely empirical. There is in fact a deep conceptual instability at the heart of his key concepts of “net marginal product” and “real social resources.” Although most of Professor Kelman’s article treats those concepts as if they were unproblematic, readily identified, dollars-and-cents categories, they turn out to be more complicated than that. Again, it is Professor Kelman’s argument that discrimination law requires customers—and not just employers—to act as rational capitalists that brings the issue to a head. In “a world in which little that we consume is needed to survive,” Professor Kelman observes that a rational consumer frequently will value goods as much for their “affective cultural meaning” as for “their physical virtues” and will be willing to pay more or less for the same physical goods or services depending on those affective meanings. When an employee helps to produce a cultural/affective meaning that customers value (such as a waiter being obsequious, to use one of Professor Kelman’s examples), we would ordinarily want to treat that value as part of the employee’s marginal product. As Professor Alan Wertheimer argues, it is difficult to make a case for ignoring an employee’s “reaction qualifications”—his ability to elicit positive or appropriate reactions from customers and coworkers—in assess-

214 Kelman, Market Discrimination, supra note 9, at 871.
215 See id. at 871–72.
ing his productivity. Reaction qualifications are the essential productive aspect of many jobs, and a major productive aspect of many others. And "to discount reaction qualifications is narrowly to circumscribe the talents and abilities that can be fruitfully utilized and rewarded."218

A problem arises, though, because a good or service provider's race and gender (and, one might add, disability) may play an important role in the affective cultural value of a given good or service—even independent of the animus or ignorance that defines Professor Becker's "discriminatory tastes."219 Because of cultural associations and practices, for example, anxious airplane passengers might be more readily comforted by female flight attendants than by male flight attendants.220 If customers are permitted to act on the resulting preference for female flight attendants (and employers are permitted to cater to that preference by discriminating against male applicants for such positions), the law will fail to reach a good deal of the occupational segregation that feeds the system of gender subordination.221 But if a rational customer distinguishes among goods based on their cultural/affective meanings, the customers who prefer female flight attendants may well be acting in a capitalist rational way. For once we accept that cultural/affective meanings are part of the value for which customers pay when they

217 See id.
218 Id.
220 See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385, 387 (5th Cir. 1971) (noting that the trial court had found that female flight attendants were better than male flight attendants in "providing reassurance to anxious passengers" but nonetheless rejecting the claim that female sex was a bona fide occupational qualification for flight attendant position). The cultural associations and practices that make people more easily comforted by women than by men are obviously not independent of a system of gender discrimination and subordination, but it is hard to say that they are inherently wrongful or derogatory of the equal worth of individuals in the same way that discriminatory tastes are. For a discussion of this point with which I do not entirely agree, but that raises many of the relevant issues, see Alexander, supra note 57, at 173–76.
221 See Diaz, 442 F.2d at 389 ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.").
purchase goods and services, it is “enormously difficult to decide that an affective reaction to service-delivery people, as well as symbolism that has become attached to the goods themselves, is illegitimate.”

This conundrum threatens to write out of existence Professor Kelman’s basic concept of “simple discrimination.” Once we factor a customer or coworker’s affective cultural responses to an employee into that employee’s net marginal product, a huge number of acts of discrimination may turn out to be capitalist rational. To avoid this result, without ignoring the important role that affective cultural responses play in a rational consumer’s decision calculus, we must have some principle for distinguishing between the cultural-affective responses that should be treated as part of an employee’s net marginal product and those that should not be.

What principle could serve this function? Professor Kelman’s answer is that we should (or at least do) distinguish among cultural/affective responses based on the degree to which those responses instantiate and entrench group-based stigma and subordination. Thus, Professor Kelman argues that we should be more likely to label a customer’s preference for physically attractive service delivery people as capitalist rational “if judgments about attractiveness are not shaped by . . . judgment[s] of the attractiveness of members of different racial or ethnic groups (strong bias) and in fact have no disparate impact on members of these groups (biased impact).” He also argues that “the instinct . . . that attractiveness might conceivably be considered an illegitimate hiring criterion” derives from a concern about gender subordination—that “it is especially important, especially for women (as individuals and as a

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222 Kelman, Market Discrimination, supra note 9, at 871.
223 Cf. Strauss, supra note 61, at 115 (stating that “all forms of discrimination—including such classic Jim Crow measures as segregated schools and public facilities—can, arguably, be assimilated to rational discrimination”).
224 See Post, supra note 33, at 20–30 (discussing how Title VII case law draws this line).
225 Although Professor Wertheimer’s response to this problem is more complicated, it similarly gives great weight to whether “reaction qualifications” entrench a system of subordination. See Wertheimer, supra note 216, at 107–12.
226 Kelman, Market Discrimination, supra note 9, at 872.
social group), to ensure the existence of a substantial desexualized public domain."

The preceding discussion only highlights the malleability of Professor Kelman's notion of employees as "embodied net marginal product." Such a notion treats "marginal product" as defined not by what customers do want but by what customers should want. Because they should not want the cultural/affective value that derives from practices that instantiate and entrench race and gender subordination, Professor Kelman treats that cultural/affective value as irrelevant to the employee's net marginal product (even though that cultural/affective value affects the amount a customer is willing to pay for a firm's goods or services, and even though we treat other kinds of cultural/affective value as central to the employee's net marginal product). But there is also a strong ethical case that consumers or employers should not want to save a little money by avoiding accommodations that are necessary to avoid contributing to disability subordination. As I argued above, the denial of reasonable accommodation exhibits moral callousness and the failure to treat the nonaccommodated individual as an equal. If that is true, then accommodation costs should be treated as irrelevant to the employee's net marginal product as well.

3. The Non-Fungibility of Discriminatory Tastes?

There still seems to be one significant difference between the antidiscrimination and accommodation contexts, however. In a discrimination case, the government's distributive choice is a binary one: Either the defendant can gain utility by satisfying a preference for discriminatory treatment (a taste for discrimination or a desire to hire his friends), or the plaintiff can gain utility by avoiding a stigmatic harm. Once we decide that the plaintiff's interest in avoiding stigmatic harm outweighs the defendant's preferences, the case for government intervention is complete. There is no need to consider any third-party interests, because we could not tax away the utility defendants gain from indulging their preferences even if we wanted to do so. This is so, Professor Kelman argues, because that utility is based on tastes that are "imperfectly fungible" and

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227 Id.
228 See supra Section III.B.2.
“private/subjective.”229 “The state does not try to appropriate, but destroy” that utility.230

In an accommodation case, by contrast, the government’s distributive calculus must always take account of third-party interests. Because the nonaccommodating defendant seeks to save money that we could tax away and spend on important social priorities, the relevant question, unlike in a simple discrimination case, is not whether the defendant’s greater utility is more important than the plaintiff’s interest in freedom from stigmatic harm. Even if we would prefer the plaintiff to the defendant in a binary contest, we still must ask whether there is someone more worthy than either of them to receive the resources that the plaintiff seeks to have spent on accommodation. This is, I think, the upshot of Professor Kelman’s statement that “when the nonaccommodating defendant resists the expenditure of real social resources, she is acting, in essence, as a representative surrogate for the public, seeking optimal expenditure of these funds.”231 If a more deserving third party exists, then society should not mandate the accommodation; it should simply tax the defendant for the cost of the accommodation and transfer the revenue to the more deserving third party.232

Such a distinction between antidiscrimination and accommodation does not withstand scrutiny. As Professor Kelman acknowledges, we could turn discriminatory tastes and other capitalist-irrational preferences that harm protected groups into “real,” redistributable social resources simply by taxing discrimination.233 A variety of methods by which society might capture these gains from discrimination appear in the literature, from Professor Strauss’s quotas-plus-fines approach,234 to Professor Derrick Bell’s fictional “Racial Preference Licensing Act of 1996.”235 There is, of course, virtually no chance that such proposals would ever be enacted, but that is not because of their technical infeasibility. Rather, it is because we have chosen as a society to express a clear commitment to

229 Kelman, Market Discrimination, supra note 9, at 854.
230 Id. at 855.
231 Id. at 854–55.
232 See id. at 854 n.37.
233 See id. at 855 n.39.
234 See Strauss, supra note 37, at 1654–56.
open access to employment for everyone.\textsuperscript{236} To use Professor Kelman's utilitarian terms, our failure to adopt a permit-and-tax approach to discrimination suggests that we view the stigmatic harm caused by subordination as greater than (or not meaningfully commensurable with) the value that we could potentially gain from taxing discriminatory tastes and transferring the proceeds to third parties. If the "state does not try to appropriate, but destroy" the utility discriminators gain from discriminating, it is not because such appropriation is impossible. It is because we have decided as a society that no member of a subordinated group should be deprived of any significant employment opportunity because of discrimination (which discrimination, when it occurs, feeds subordination and stigma). The anticastrate or antisubordination principle—the notion that we ought not to tolerate the existence of socially salient, systematically disadvantaged and stigmatized identity groups—precedes any other principle of distribution.\textsuperscript{237}

But if the failure to accommodate causes similar stigmatic harm to that caused by discrimination—and there is ample reason to believe that it does\textsuperscript{236}—the remedy should be similar as well. Even if it would be practically possible to tax away the gains employers make from failing to provide accommodations and to transfer those gains to worthy projects, we ought not do so, for the failure to accommodate creates and sustains a system of disability subordination. Once again, the purported distinction between antidiscrimination and accommodation collapses.

D. Problematizing "Rational Discrimination" Generally

In this Part, I have focused on Professor Kelman's argument because it represents the most sophisticated effort to defend a norma-


\textsuperscript{237} Professors Kelman and Lester suggest that we do not attempt to tax away the gains from discrimination because discrimination is inherently socially costly; a society interested in maximizing the social product available for private or collective distribution would first prohibit all discrimination and only afterwards consider the claim of those who wish to use some of the resources thus created. See Kelman & Lester, supra note 145, at 221–22. That argument, however, presumes that antidiscrimination laws conserve social resources in a way that accommodation laws do not. As I have argued in previous Sections, that premise is incorrect.

\textsuperscript{238} See, e.g., Bagenstos, supra note 10, at 436–45.
tive distinction between antidiscrimination and accommodation. It should be evident, however, that the problems with Professor Kelman's argument are inherent in any effort to ground a normative theory of antidiscrimination law in the notion that the law's prohibitions should be limited to "irrational" discrimination. Virtually all discrimination is "rational" in the sense that the discriminator effectively seeks to advance some goal by discriminating. A notion of "irrational" discrimination can have value in defining the scope of conduct prohibited to employers, then, only if we have some independent notion of the kinds of legitimate goals that are appropriately considered in evaluating the employer's action. But to come up with such a notion of legitimate goals is itself an inescapably normative exercise.

This point can be seen in other efforts to accord normative significance to the category of rational discrimination. Professor John Donohue, for example, draws a strong normative distinction between two types of antidiscrimination regimes: "intrinsic equality" regimes like Title VII that require employers to reward workers according to the "true value" of their labor; and "constructed equality" regimes like accommodation requirements that seek to define equality by "considering what steps would be necessary to define a fair society" and that thus involve "an effort to go beyond the protections that even a perfectly competitive market would afford." Professor Donohue argues that a goal of "constructed equality" looses employment discrimination law "from the theoretical mooring that the market paradigm provided" and thus

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29 See Strauss, supra note 61, at 113–16. Professor Deborah Hellman distinguishes between two types of discrimination: "proxy discrimination" and "non-proxy discrimination." Deborah Hellman, Two Types of Discrimination: The Familiar and the Forgotten, 86 Cal. L. Rev. 315, 316 (1998). In cases of "proxy discrimination," she says, "the trait by which the [defendant] classifies is used as a proxy for another trait," id., while in cases of "non-proxy discrimination," "the classification is its own end," id. at 318. But she recognizes that even in cases of "non-proxy discrimination" the defendant seeks to serve some purpose by discriminating, as her discussion of her paradigmatic "non-proxy" case of single-sex education makes clear. See id. at 321 ("The administrators of Wellesley College no doubt believe there are important educational benefits to single-sex education, particularly for women. In both proxy and non-proxy cases, there are reasons for the discrimination.").

30 Donohue, supra note 9, at 2600–01.

31 Id. at 2612.

32 Id. at 2585–86.
“moves society away from a conceptually attainable goal to an amorphous objective, which can only be defined through wrangling among conflicts in the political process.” As employment discrimination law has moved toward a paradigm of constructed equality, he continues, “the moral force of antidiscrimination law” has been weakened and the law has begun “to provide avenues for windfall gains rather than opportunities for promoting corrective justice.”

Like Professor Kelman, however, Professor Donohue fails to acknowledge the degree to which his own notion of “intrinsic equality” rests on normative considerations of “what steps would be necessary to define a fair society.” Professor Donohue recognizes that “one cannot look only to a laborer’s physical product to determine his value; one must also look to the preferences of others with regard to associating with that worker.” But he nonetheless believes the law should treat such preferences as irrelevant to the “true value” of a worker’s labor and that a regime of “intrinsic equality” properly disregards such preferences. His argument seems to rest entirely on an analogy to efficient capital markets: Because traders in such a market would not know anything about the individuals from whom they are purchasing securities—and the identity of the previous owner is thus irrelevant to a stock’s value—the identifying characteristics of a worker similarly should be treated as irrelevant to that worker’s value. The analogy is unpersuasive. As the discussion in previous Sections regarding “reaction qualifications” should make clear, in labor markets the identifying traits of a worker are often enormously relevant to that worker’s value and should be considered as part of what he provides to the employer. Professor Donohue therefore must have some normative principle for requiring employers to act as if (some of) a worker’s identifying characteristics were irrelevant to that worker’s value. But that simply brings us back into the murky, political morass

\[\text{Id. at 2610, 2612.}\]
\[\text{Id. at 2612.}\]
\[\text{Id.}\]
\[\text{Id. at 2600.}\]
\[\text{See id.}\]
\[\text{See id. at 2592–93.}\]
\[\text{See supra Section II.C.2.}\]
that Professor Donohue seeks to avoid with his distinction between "intrinsic" and "constructed" equality.

It is surely possible to come up with a normative principle that would give content to the notion of rational discrimination in a way that would distinguish antidiscrimination from accommodation. For example, we could define "rational discrimination" to include any discrimination that is not rooted in animus against members of a protected group. Although there is some force to such a suggestion, I believe it is ultimately unpersuasive for reasons I discussed in Part II and Section III.B. Not only do we generally prohibit much more than simply animus-based discrimination—a fact that gives some indication that such a narrow view of antidiscrimination law would not reflect society's expressed commitments—but more important for the present argument, it is not clear that the logic of prohibiting animus-based discrimination can be so limited. The most plausible argument for prohibiting animus-based discrimination against protected class members rests significantly on the societal effects of such discrimination—the same effects that justify an accommodation requirement.250

IV. THE USES OF THE ANTIDISCRIMINATION/ACCOMMODATION DISTINCTION

In the previous Parts of this Article, I have argued that the normative case for distinguishing accommodation from antidiscrimination requirements is significantly flawed. The most plausible argument remains the one with which we began—that antidiscrimination and accommodation requirements are fundamentally similar, both in their effects and in their normative implications. But an antidiscrimination/accommodation distinction might nonetheless be useful in serving various political purposes. Indeed, I believe (though I cannot prove) that the persistence of a near-unanimous endorsement of such a distinction among legal commentators has a great deal to do with the apparent political uses of the distinction.

In this Part, I discuss some of the political uses of the antidiscrimination/accommodation distinction. The politics are in fact quite complex. For traditional civil rights advocates, the passage of the ADA in 1990 seemed to offer an opportunity to revitalize and reinvigorate civil rights

250 See supra Section II.B.1.
law. At that point, civil rights advocates might have reasonably believed that an antidiscrimination/accommodation distinction could mark a path for further expansion of protections against discrimination on the basis of race and sex, but conservative opponents of expansive civil rights protections soon seized on the antidiscrimination/accommodation distinction in an attempt to delegitimize the ADA. As it became clear that the arguments proffered in opposition to the ADA might spill over to much of Title VII law, however, civil rights advocates developed a strong interest in asserting the distinction even more forcefully than their "opponents." Such a distinction might help to protect the core of civil rights law against the backlash triggered by the ADA. Given the canonical status in American law and culture of Title VII's prohibition against discrimination, many of the ADA's critics developed an equally strong interest in asserting the antidiscrimination/accommodation distinction. Such a distinction might protect them against the charge that their arguments against the ADA would overturn the "Second Reconstruction" of the civil rights era.

But these strategies can be effective only if the antidiscrimination/accommodation distinction holds. If, as I have argued, the distinction is a shaky one, then the implications for civil rights supporters are sobering. For the criticisms that focus today on accommodation requirements are likely to expand their sweep to encompass antidiscrimination law more generally. And civil rights supporters will increasingly be called upon to defend antidiscrimination laws as regulatory measures that, despite their moral goals, have costs and benefits that must be factored into the decision of whether the laws are worthwhile.

A. Accommodation as Extending Civil Rights Law

The enactment of the ADA in 1990 seemed to offer a unique beacon of hope for civil rights advocates in an otherwise dark period. Those advocates had spent most of the 1980s on the defensive. The Reagan Administration, led in its efforts by Assistant Attorney General for Civil Rights William Bradford Reynolds, had undertaken a systematic litigation campaign to reverse many of the expansive remedies civil rights advocates had won in earlier dec-
Although Reynolds was not always successful in his efforts, civil rights organizations were forced to devote an increasing fraction of their litigation resources to defending their previous victories rather than establishing newer and more far-reaching theories of liability. As the courts became more conservative, civil rights advocates increasingly began to lose in their confrontations.

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251 There are various accounts of this campaign from traditional civil rights advocates. See, e.g., Citizens' Commission on Civil Rights, Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term 3 (Susan M. Liss & William L. Taylor eds., 1991) ("During the 1980s, the Reagan Administration attempted to radically alter the quarter-century old bipartisan national commitment to a strong and effective civil rights policy. President Reagan, Attorney General Edwin Meese, Assistant Attorney General William Bradford Reynolds, and others engaged in a campaign to repeal fundamental policies providing for broad coverage of civil rights laws, and sought to reduce the federal government's role in enforcing laws designed to eradicate discrimination and prejudice."); Drew S. Days, III, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv. C.R.-C.L. L. Rev. 309, 313 (1984) ("[The Reagan Administration] has instead taken categorical positions against settled principles of civil rights law, irrespective of the circumstances of any particular case. Furthermore, the administration has often joined private parties seeking to restrict or curtail rules that were established to remedy civil rights violations, rather than serving as the advocate of those subjected to systematic discrimination."); Eleanor Holmes Norton, Equal Employment Law: Crisis in Interpretation—Survival Against the Odds, 62 Tul. L. Rev. 681, 685 n.16 (1988) ("The Reagan administration has challenged federal equal employment policies developed over almost two decades by four different administrations of both parties in all three of the principle enforcement agencies, the EEOC, the Department of Justice (DOJ), and the Office of the Federal Contract Compliance Programs (OFCCP)."; David L. Rose, Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?, 42 Vand. L. Rev. 1121, 1157 (1989) ("While the Supreme Court did not make the sweeping changes urged by [the Reagan] Justice Department, the cumulative effect of the Justice Department's positions was that the lawyers for the executive branch, who had been in the forefront of advocating the civil rights of blacks, other minorities, and women since the days of President Truman, became the advocates for a restrictive interpretation of the civil rights laws."). For an account of this campaign from the inside, see Fried, supra note 20, at 99–131.

22 Examples include Bob Jones University v. United States, 461 U.S. 574 (1983), where the Supreme Court rejected the Reagan Administration's position that racially discriminatory private schools are entitled to tax exemption as charitable organizations under the Internal Revenue Code, and a series of cases that limited affirmative action, though not as much as the Administration had urged. See Fried, supra note 20, at 110–18 (discussing Johnson v. Transp. Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986)). For another example, see California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), where the Court rejected the Administration's position that the Pregnancy Discrimination Act bars a state from mandating that employers provide unpaid pregnancy leave.
with the rollback forces. They were then forced to devote more of their resources to lobbying efforts to obtain civil rights “restoration” laws to overturn their court defeats. Again, this defensive work came at least somewhat at the expense of lobbying efforts to expand civil rights protections and codify new theories of liability.

The disability civil rights community was a major participant in these defensive efforts. The decision in Grove City College v. Bell, for example, had severely constrained enforcement of Section 504 of the Rehabilitation Act of 1973 (at the time, the major federal disability civil rights statute), as well as Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Disability rights groups made up a significant part of the coalition that obtained language substantially overruling Grove City College in the Civil Rights Restoration Act of 1987. And Atascadero State Hospital v. Scanlon, a major case involving states’ immunity from suit under civil rights laws, specifically arose under Section 504, though its implications clearly extended to Title VI and Title IX as well. Disability civil rights organizations again joined the lobbying campaign that obtained legislation overturning Atascadero State Hospital. And such organizations were the

253 See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Grove City Coll. v. Bell, 465 U.S. 555 (1984) (limiting application of antidiscrimination compliance provisions to specific educational programs receiving federal funds as opposed to application on an institution-wide basis); see also infra note 268 and accompanying text (discussing the sexet of decisions in the Supreme Court’s 1988 Term).

254 465 U.S. 555 (1984). Though the case arose specifically under Title IX, the reach of the Court’s decision seemingly extended to other antidiscrimination provisions as well.


259 473 U.S. 234 (1985) (holding that § 504 of the Rehabilitation Act did not unambiguously exact a waiver of state sovereign immunity from suit under the statute as a condition of receiving federal funds).

prime movers behind two pieces of “restoration” legislation: the Handicapped Children’s Protection Act of 1986, which overturned a Supreme Court decision that limited the remedies available to children with disabilities who had been deprived of rights guaranteed under what is now the Individuals with Disabilities Education Act; and the Air Carrier Access Act of 1986, which, in response to a Supreme Court decision exempting most airlines from Section 504, prohibited disability-based discrimination by interstate air carriers.

The two years between the initial proposal and ultimate enactment of the ADA overlapped with the last major defensive civil rights struggle of the 1980s. Senator Lowell Weicker and Representative Tony Coelho filed the initial ADA bill in 1988. In the Term that began that fall, the Supreme Court decided six major cases that drew back from earlier, more expansive understandings of civil rights protection in the race and gender contexts. For the next two years, civil rights organizations devoted the lion’s share of their legislative resources to efforts aimed at overturning those decisions. After a presidential veto, those hard-fought efforts culminated in the enactment of the Civil Rights Act of 1991.
Against this backdrop, the enactment of the ADA in 1990—with substantial Republican support, including key support from the Bush Administration—was striking, for the ADA seemed a doubly expansive civil rights statute. First, it added disability to the list of characteristics broadly protected against discrimination by public and private entities; it thus effectively extended Titles II and VII of the Civil Rights Act of 1964 to disability discrimination. In this respect, the ADA represented the first addition of a new forbidden classification to the broad federal prohibition on private employment discrimination since the enactment of the Age Discrimination in Employment Act in 1967, and it represented the first addition of a forbidden classification to the broad federal prohibition of discrimination by places of public accommodation since the Civil Rights Act of 1964. Second, the protections granted to people with disabilities in a number of respects seemed to go beyond those guaranteed to racial minorities and women under the Civil Rights Act of 1964. The most notable of these, of course, was the broad mandate of reasonable accommodation—a mandate that did not appear in earlier race or sex discrimination statutes.

Providing an account of the Counsel to President Bush; and Peter M. Leibold et al., Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991, 45 Rutgers L. Rev. 1043 (1993), providing an account of staffers to three key moderate Republican senators.

On Republican and Bush Administration support for the ADA, see Thomas F. Burke, Lawyers, Lawsuits, and Legal Rights 72–78 (2002); Bogenstos, supra note 213, at 964–67, 1006–08.

See Krieger, supra note 9, at 1 (“For civil rights lawyers who had toiled through the 1980s in the increasingly barren fields of race and sex discrimination law, the charmed passage of the Americans with Disabilities Act through the U.S. House and Senate and across a Republican President’s desk must have seemed vaguely surreal.”); McGowan, supra note 9, at 31 (“At the time, the ADA’s smooth passage and its requirement that employers make reasonable accommodations for disabilities seemed simply breathtaking. It appeared nothing short of miraculous that this new grant of civil rights to people with disabilities sailed through Congress when affirmative action was under siege, and Congressional Democrats had fought an uphill battle to overturn the Supreme Court’s narrow interpretations of Title VII.”).


See 42 U.S.C. § 12112(b)(5) (2000) (requiring employers to provide “reasonable accommodations” to employees and applicants with disabilities); 42 U.S.C.
Although traditional civil rights groups had taken some time to come around to endorsing disability rights, those groups eagerly endorsed the passage of the ADA in 1990. Traditional civil rights groups played an important role in lobbying for the statute, and its major supporters sought to characterize it as the logical culmination of a civil rights revolution that began with Brown v. Board of Education.

§ 12182(b)(2)(A)(ii) (2000) (requiring places of public accommodation to “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford [their] goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities”). Other respects in which the ADA went beyond prior civil rights statutes include the Act’s broad definition of “public accommodations,” see Robert L. Burgdorf Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv. C.R.-C.L. L. Rev. 413, 500 (1991) (explaining that the ADA public accommodations title extended its coverage “far beyond the public accommodations covered under title II of the Civil Rights Act of 1964”), as well as its extensive and detailed regulation of public and private providers of mass transit services, see Rosalyn M. Simon, Toward Accessible Transportation, in Implementing the Americans with Disabilities Act 299, 301 (Jane West ed., 1996).

The requirement of reasonable accommodation was drawn from the regulations interpreting § 504 of the Rehabilitation Act of 1973. See Alexander v. Choate, 469 U.S. 287, 299–300 & n.20 (1985) (interpreting those regulations to require reasonable accommodations). Title VII had earlier required employers “to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business,” 42 U.S.C. § 2000e(j), but the “undue hardship” exception in that provision had been read so broadly as to render the requirement almost meaningless. See TWA v. Hardison, 432 U.S. 63, 84 (1977) (holding that requiring an employer “to bear more than a de minimis cost . . . is an undue hardship”). By specifically defining “undue hardship” to mean “an action requiring significant difficulty or expense,” 42 U.S.C. § 12111(10)(A) (2000), the ADA plainly disavowed Hardison’s de minimis rule, see US Airways v. Barnett, 535 U.S. 391, 421–24 & n.2 (2002) (Souter, J., dissenting) (discussing ADA’s legislative history on this point), though the Court has held that the ADA did not reject Hardison’s narrow holding that a modification to a seniority rule is ordinarily unreasonable, see id. at 403.

See Percy, supra note 258, at 248 (discussing the “lack of enthusiasm by traditional civil rights groups to accept disabled citizens into the civil rights movement”); Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 44–45 (2d ed. 2001) (noting that traditional civil rights groups in the early 1970s had opposed extension of Title VI of the Civil Rights Act of 1964 to disability discrimination for fear of diminished enforcement capacity).

On the participation of traditional civil rights leaders, see Burke, supra note 270, at 80–81; Nat’l Council on Disability, supra note 258, at 73; and Patrisha Wright & Jane West, When to Hold ‘Em and When to Fold ‘Em: Lessons Learned From Enacting the Americans with Disabilities Act, in Disability Rights Law and Policy: International and National Perspectives 293, 296–97 (Mary Lou Breslin & Sylvia Yee eds., 2002).
of Education\textsuperscript{279} and extended through the Civil Rights Act of 1964.\textsuperscript{280} When the ADA was ultimately enacted, it reasonably could have seemed a promising model for civil rights advocates who hoped to move from defense to offense. Much of the unfinished agenda of the civil rights community could be framed in terms of accommodation—and, indeed, much already had been.\textsuperscript{281} The passage of the ADA represented the first major federal legislative endorsement of the concept of accommodation as a mode of civil rights law. If people with disabilities had the right to accommodation, the obvious question became: Why stop there? Why shouldn't the right to accommodation extend to everyone protected by civil rights laws?\textsuperscript{282} As Professor Krieger has written, passage of the ADA gave hope to “the traditional civil rights community”—“hope not only that the ADA would transform the lives of disabled Americans, but also that the theoretical breakthrough represented by reasonable accommodation theory would eventually play a role in solving other equality problems, which the more broadly accepted equal treatment principle had proven inadequate to address.”\textsuperscript{283}

\textsuperscript{279} 347 U.S. 483 (1954).

\textsuperscript{280} To give one example, in his speech supporting passage of the conference report on the ADA, Senator Harkin (the primary Senate sponsor of the ADA) began by stating that “history is going to show that in 1990, 26 years after the Civil Rights Act of 1964, 43 million Americans with disabilities, gained freedom, dignity, opportunity—their civil rights.” 136 Cong. Rec. 17,366 (1990). He went on to argue that the ADA constituted the logical next step—after the abolition of slavery, the grant of suffrage to women, the passage of the Civil Rights Act of 1964, and the enactment of the Age Discrimination in Employment Act three years later—in our Nation’s unfinished effort to “live[] up to the words of the Declaration of Independence and the Bill of Rights.” Id.

\textsuperscript{281} The most obvious example is pregnancy, and gender issues more generally. See supra Section II.C.1 (discussing earlier claims for accommodation of pregnancy and the social roles of women).

\textsuperscript{282} See Calloway, supra note 9, at 494 (“Demands for extended application of the concepts of reasonable accommodation and equal employment opportunity will challenge this society either to articulate policy reasons for distinguishing disabled individuals from others who require accommodation or to extend these rights to other similarly limited individuals.”).

\textsuperscript{283} Krieger, supra note 9, at 3. Professor Wu provides a recent example, notable for its continuing hope in the face of experience with the ADA. See Frank H. Wu, Yellow: Race in America Beyond Black and White 341 (2002) (“The disability rights movement may be the future of the civil rights movement. The disability rights movement, which had its great success with passage of the Americans With Disabilities Act in 1990, has improved the civil rights movement in many respects.”).
In an article published in the ADA's early days, Professors Pamela Karlan and George Rutherglen (longstanding civil rights advocates) made essentially that extensionist argument. Professors Karlan and Rutherglen heralded the new statute as marking a progressive path over which all of civil rights law might profitably follow. They asserted that the ADA's accommodation mandate was a "profound" innovation that "present[ed] an opportunity to rethink employment discrimination law more generally." For example, employers might be required, under the rubric of accommodating the social roles of women, to "offer increasingly flexible scheduling options that would enable more women with childcare responsibilities to undertake particular jobs." A member of a traditionally underrepresented racial minority group might be required to receive, as individualized "affirmative action," individually targeted training to fill deficiencies in his skill/experience set that resulted from past discrimination. "Employees from the same racial or ethnic group, but with different levels of education, might receive varying forms of training, from quite extensive to none at all." More generally, the ADA model might be extended to become "an open-ended responsibility to enable all workers to enjoy equal employment opportunities by taking account of the particular way in which their membership in a protected class has impaired their full participation in the economy." Such an extended model, Professors Karlan and Rutherglen argued, might "do more to end the continuing effects of past discrimination than the current combination of broad negative prohibitions and bureaucratic class-wide preferences."

Central to Professor Karlan and Professor Rutherglen's extensionist position, however, was the notion that the ADA itself represented a major expansion of the existing civil rights paradigm—not just by expanding the protected class, but also by adding the

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284 See Karlan & Rutherglen, supra note 6, at 41 ("If the duty of reasonable accommodation succeeds for the disabled, it suggests that we might consider a similar model for members of other protected classes.").
285 Id.
286 Id. at 38.
287 Id. at 39.
288 Id. at 40.
289 Id. at 41.
290 Id.
novel reasonable accommodation weapon to the arsenal of civil rights remedies.\footnote{See id. ("The ADA's innovations are profound; the law departs from a finding of prior wrongful discrimination as the predicate for affirmative relief for identified individuals, and imposes a duty to accommodate without a prior finding of wrongdoing.").} It should be clear that the extensionist position does not logically depend upon the view of the ADA as a major expansion of civil rights law. It certainly would be coherent to argue that the ADA's guarantee of accommodation should be extended to all members of all of the protected classes in civil rights law even if that guarantee did not represent a major break from the past. Indeed, one could readily argue, as I have suggested in this Article, that an accommodation requirement represents merely the fullest working-out of the basic underpinnings of the antidiscrimination prohibitions of the Civil Rights Act of 1964, but it is hard to find examples of such an argument being made in the ADA's early days. The impulse to sell the ADA's accommodation requirement as a major break from the past was simply too great.

B. Defenders of Civil Rights and the Antidiscrimination/Accommodation Distinction

As the judicial and societal reaction to the ADA evolved, however, the ADA's accommodation requirement increasingly became an albatross around the neck of civil rights advocates. Professor Krieger notes that "[a]s judicial opinions in [ADA] Title I cases began to accumulate, it became clear that the Act was not being interpreted as its drafters and supporters within the disability rights movement had planned."\footnote{Krieger, supra note 9, at 7.} Although I have previously argued that many judicial interpretations of the ADA are consistent with at least one aspect of the intent of many of the ADA's original supporters—the desire to use the statute to move people with disabilities off of public benefits rolls and into the workplace\footnote{See Bagenstos, supra note 213, at 976–85.}—it is clear that the courts have read the statute far more narrowly than disability rights advocates had hoped.\footnote{See id. at 924–25.} The trend in litigation outcomes itself seemed telling, as ADA employment discrimination plaintiffs had the lowest success rate of any class of plaintiffs in the
federal system except prisoners. At the same time as these judicial trends were becoming apparent, portrayals in the news and entertainment media increasingly depicted the ADA in an unfavorable light. Those portrayals focused on the ADA’s accommodation requirement. They depicted that requirement as giving lazy workers an unfair excuse to avoid unpleasant job tasks and imposing irrational requirements on employers to tolerate disruptive and dangerous employees. And journalists like Walter Olson made the ADA’s accommodation requirement a major target in popular-press attacks on employment law.

For traditional civil rights supporters, these attacks on the ADA’s accommodation requirement presented a more general threat. Although civil rights supporters had largely weathered the assault on their favored remedies during the 1980s, the mood in the judiciary and the country as a whole still was not exceptionally favorable to civil rights enforcement. As Professor Matthew Dil-
ler has observed, that general mood has certainly contributed to the courts' restrictive interpretations of the ADA. But the flip-side of the point is equally important: With the position of civil rights law still precarious, traditional civil rights supporters had an incentive not to add the burden of defending the ADA's accommodation requirement to their already difficult rear-guard action in support of traditional civil rights laws. The imperative to distance traditional civil rights law from the ADA may have seemed all the more urgent in light of the efforts of prominent conservative commentators to argue that the perceived flaws in the accommodation requirement were not unique to that statute but, in fact, reflected more general flaws in employment discrimination law. Professor Epstein argued, for example, that the ADA represents the apotheosis of the fundamentally harmful enterprise of prohibiting discrimination in employment: It "plays out the antidiscrimination game to its end. At bottom are only two pure forms of legislation—productive and redistributive. Antidiscrimination legislation is always of the second kind. The form of the redistribution is covert; it is capricious, it is expensive, and it is wasteful." And though the ADA's accommodation requirement was a major focus of Olson's work—far more than for Professor Epstein—it served as the thin edge of a wedge. Like Professor Epstein, Olson did not treat the accommodation requirement as uniquely bad; to him, even "[t]he seemingly uncontroversial disparate-treatment law... display[ed] all the same vices."

Many traditional civil rights advocates had long feared that "linking hard-won civil rights protections to disabled persons..."
might drag down (or at least warp) the entire edifice they had constructed since 1964.\textsuperscript{304} Indeed, advocates of African-American civil rights had opposed efforts in the early 1970s to extend the protections of the 1964 Civil Rights Act to disability-based discrimination, apparently for that reason.\textsuperscript{305} The Epstein/Olson attack might seem to confirm civil rights advocates’ longstanding fears. Against that backdrop, the antidiscrimination/accommodation distinction might serve a newly important purpose for mainstream civil rights supporters; such a distinction might effect a strategic retreat to more defensible ground. “Sure, the ADA’s accommodation requirement is costly and redistributive,” civil rights supporters might say, “but Title VII is different. Title VII is about fundamental rights, not redistribution of wealth. So let’s not allow the (persuasive) critique of accommodation to distract our attention from the continuing importance of the core of civil rights law.”\textsuperscript{306}

But if civil rights advocates feel driven to accept a strong distinction between antidiscrimination and accommodation in an attempt to protect the “core” of civil rights law against a backlash, that seems a fool’s errand. The parallels between antidiscrimination and accommodation are too plain to ignore, and there will always be an Epstein or an Olson to point them out. Indeed, the notion that intentional discrimination against people with disabilities—and not just the failure to accommodate—can be justified as rational has been an increasingly apparent theme in the Supreme Court’s ADA jurisprudence. In \textit{Board of Trustees v. Garrett},\textsuperscript{307} the Court concluded that it would frequently be rational for an employer “hardheaded—and perhaps hardheartedly”—to deny accommodations to employees with disabilities.\textsuperscript{308} For that reason, the Court concluded that application of the ADA’s employment provisions to states impermissibly required more than does the rational basis requirement of the Equal Protection Clause.\textsuperscript{309} Although the Court’s

\textsuperscript{304} Percy, supra note 258, at 248; see also Ruth O’Brien, Crippled Justice: The History of Modern Disability Policy in the Workplace 114 (2001) (describing the “civil rights community” as “afraid of associating civil rights with disability rights”).

\textsuperscript{305} See O’Brien, supra note 304, at 114; Scotch, supra note 277, at 44–45.

\textsuperscript{306} One can hear echoes of this position in the arguments of Professor Issacharoff, a long-time civil rights supporter, in Issacharoff & Nelson, supra note 3.


\textsuperscript{308} Id. at 367–68.

\textsuperscript{309} Id. at 372–74.
analysis rested on the notion that the refusal to accommodate would be rational, only one of the two companion cases before the Court involved the failure to accommodate.\textsuperscript{310} The other was a straightforward case of intentional discrimination,\textsuperscript{311} yet the Court perceived no relevant difference between the two.\textsuperscript{312} And in \textit{Chevron U. S. A. v. Echazabal},\textsuperscript{313} the Court held that a "spacious" defense of business justification applies not just in disparate impact cases but also in cases of intentional discrimination.\textsuperscript{314} A contrary decision, the Court concluded, would constitute "formalism," for intentional discrimination against people with disabilities might be just as reasonable in some cases as their incidental exclusion through the application of neutral, across-the-board rules.\textsuperscript{315}

It is not hard to envision how similar logic might apply in the context of race and sex discrimination, and a Court that is committed, as Professor Jed Rubenfeld has argued, to an "anti-antidiscrimination agenda,"\textsuperscript{316} can be counted on to perceive the point. Thus, any attempt to defend either antidiscrimination or ac-

\textsuperscript{310} See id. at 362 (describing the case of Milton Ash, who requested daytime shifts and minimal exposure to tobacco smoke as accommodation for his asthma and sleep apnea).

\textsuperscript{311} See id. (describing the case of Patricia Garrett, who was demoted after breast cancer surgery).

\textsuperscript{312} This point has been noted before. See Anita Silvers & Michael Ashley Stein, Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retgressive Logic in Constitutional Classification, 35 U. Mich. J.L. Reform 81, 125 n.266 (2001) (characterizing Garrett as an illustration of "how the salience of instances of great neediness captures attention even when they do not relate to the case in hand").

\textsuperscript{313} 536 U.S. 73 (2002). In the interest of full disclosure, I should mention that I represented Echazabal at the Supreme Court.

\textsuperscript{314} Id. at 80, 86 n.6.

\textsuperscript{315} Id. at 86 n.6.

\textsuperscript{316} Jed Rubenfeld, The Anti-Antidiscrimination Agenda, 111 Yale L.J. 1141 (2002). After the affirmative action and Family and Medical Leave Act (FMLA) decisions of the 2002 term, one obviously has to qualify the assertion that the Court is embarked on an "anti-antidiscrimination agenda." See Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (upholding the University of Michigan Law School's affirmative action policy for admissions against an equal protection challenge); Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (upholding the family care provision of the FMLA as a proper exercise of Congress's authority under § 5 of the Fourteenth Amendment). But after experiencing so many losses in so many significant cases over the past decade (as Professor Rubenfeld details), civil rights advocates can be forgiven for reserving judgment about whether those two swallows portend a new Spring for antidiscrimination law.
commodation law will soon be forced to confront directly the costs imposed by the law and its distributive effects. These costs and effects are fundamentally similar for antidiscrimination and accommodation requirements. Civil rights advocates cannot avoid this fact by simply asserting that traditional antidiscrimination laws do not raise issues of cost or distribution.  

C. Critics of Accommodation and the Antidiscrimination/Accommodation Distinction

It is not only mainstream liberal civil rights supporters who lose an easy out when the antidiscrimination/accommodation distinction breaks down. Those who criticize accommodation mandates—from both the left and the right—lose something as well. Exposing the inadequacy of the antidiscrimination/accommodation distinction shows the broad and destabilizing implications of the arguments asserted by accommodation skeptics. It might be politically useful for those skeptics to assert that their arguments do not call into question the broader corpus of civil rights law. But the analysis in the first three Parts of this Article suggests that such an assertion is too facile. There is a fundamental continuity between antidiscrimination and accommodation, one that resists any effort to draw a clear distinction between the two categories.

Conservative critics of the ADA’s accommodation mandate have actually shown very little interest in sustaining the distinction; their interest has relied upon, at most, using the distinction as a temporary way station on the road to the ultimate goal of delegitimizing all of employment discrimination law. Olson’s argument is exemplary in this respect. Having made the case that accommodation requirements are problematic, Olson quickly turned to an attempt to establish that virtually all restrictions on at-will employment suffer from the same defects. Professor Epstein did not even discuss the ADA until the final substantive chapter of his book-long brief against employment discrimination laws.  

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317 Despite my disagreement with Professor Kelman about many of the matters discussed in this Article, I entirely agree with him on this point. See infra Section IV.C.
318 See supra note 303.
319 See Epstein, supra note 23, at 480–94.
But more left-wing critics of accommodation have continued to insist on the antidiscrimination/accommodation distinction. Professor Kelman's argument provides the best example. For over a decade, Professor Kelman has been critical of what he calls "left multiculturalism" for seeking to "shift attention from economy to culture." By articulating their demands as claims for cultural acceptance, Professor Kelman has charged, left multiculturalists seek (unpersuasively) "to evade the mainstream critiques of socialist intervention." In Professor Kelman's view, one of the principal means by which left multiculturalists have sought to evade these critiques is through "the rhetorically motivated use of antidiscrimination imagery." Although left multiculturalists have some intuitive sense that government intervention in the economy is a good thing (or a self-interest as members of beneficiary groups in defending such intervention), they lack the confidence to defend their proposed interventions in economic terms. Perhaps more important for Professor Kelman, they lack the public-spiritedness to accept that their resource claims must compete with a variety of other worthy uses of society's resources. Therefore, they make "the wise strategic choice to present their demands not as demands for redistributive largesse, competing with other needy claimants in a political world in which such claims are falling on increasingly deaf ears, but as antidiscrimination claims that operate prior to the realm of distributive politics."

That strategic choice may be useful politically because our political culture treats rights (including rights against discrimination) "as (at least partial) side constraints, capable of trumping mere in-

320 E.g., Kelman & Lester, supra note 145, at 208–11.
321 Kelman, Centrist Liberalism, supra note 145, at 437–41.
322 Id. at 440.
323 Kelman, Vacuums, supra note 145, at 993.
324 See id. at 976–77.
325 See id. at 992–94.
326 See id. at 976–77.
327 See id. at 993–94; see also Kelman, Centrist Liberalism, supra note 145, at 443 ("Proposals to reward people for cultural virtues unrewarded in the market should be seen as redistributive pleads, competing with other would-be distributive claimants. Thus far, left multiculturalists have evaded this recognition largely by focusing their political/economic demands on extra-market institutions such as the government and universities. However, one soon runs out of rents for which to compete.").
328 Kelman, Vacuums, supra note 145, at 993.
terests or distributive desires.” But Professor Kelman believes that it fails as a matter of normative policy analysis: “One cannot evade the responsibility to defend (or discard) certain sorts of centralized economic planning by renaming it antidiscrimination law.” To Professor Kelman, characterizing one’s distributive claims as rights to be free from discrimination simply invokes the legal world’s reified view of rights in an effort to “jump the queue” and avoid confronting the inevitable distributive tradeoffs involved in any legislation. In his view, “all legal rules ought to be interpreted fundamentally as explicit or implicit taxes and justified according to their efficacy as either distributive mechanisms or ‘market perfecters,’” and identity groups should not be able to exempt themselves from “competing with other would-be distributive claimants” simply by waving around the label of “discrimination.”

Professor Kelman’s most extensive elaboration of this argument—in his work with Professor Gillian Lester about educational policy for individuals with learning disabilities (“LDs”)—exemplifies his analysis. Professors Kelman and Lester argue that the movement for educational accommodations for people with learning disabilities “had its genesis in the grass-roots mobilization of largely white, middle-class parents in the late 1950s and early 1960s to gain resources for what they perceived as their ‘under-achieving’ children.” Advocates of such accommodations assert that there is some category of “learning disability” that can validly and reliably be distinguished from “garden-variety” lack of academic achievement—a notion of which Professors Kelman and Lester are skeptical as an empirical matter. Arguing that children who have “learning disabilities” are subject to “discrimination,” those advocates urge a substantial reallocation of educational resources in favor of such children—notwithstanding the lack of any strong reason to believe that students with learning disabilities will

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329 Kelman, Strategy or Principle, supra note 38, at 122.
330 Kelman & Lester, supra note 145, at 212.
331 See Kelman, Strategy or Principle, supra note 38, at 120-23.
332 Kelman & Lester, supra note 145, at 226.
333 Kelman, Centrist Liberalism, supra note 145, at 443; see Kelman & Lester, supra note 145, at 221-22.
334 Kelman & Lester, supra note 145, at 4.
335 See id. at 17–36.
benefit from additional resources any more than will other poorly achieving students. Professors Kelman and Lester argue that “the hard evidence for the proposition that local educators radically underestimate the positive impact of remedial efforts aimed at pupils with LDs (particularly relative to other competing interventions) turns out to be very slim.” Accordingly, the rhetoric of “discrimination” is inapt and merely distracts from the effort “to fashion good educational policy in this area.” Professors Kelman and Lester thus assert that “[i]f there are particular gains to certain expensive educational interventions that accrue to some, but not all, students, let those students receive the appropriate interventions.” But one’s need and the potential effects of the intervention, not one’s learning disability status, should be the primary determinant of whether one should receive additional resources.

In the context of such an argument, an antidiscrimination/accommodation distinction seems to serve an important political function. Given the centrality of the civil rights movement to the way many left-of-center Americans understand themselves and their political commitments, any leftist claim that treats antidiscrimination law as illegitimate would seem likely to face intense opposition from a core constituency. The response of leftist minority scholars to the Critical Legal Studies critique of rights illustrates the potential pitfalls. Professor Kelman’s critique of “left multiculturalist” identity politics is obviously strongly influenced by the

336 See id. at 138–52.
337 Id. at 219.
338 Id. at 226.
339 Id.
340 See id.
341 On this point, see, for example, Duncan Kennedy, A Critique of Adjudication (Fin de Siècle) 302–03 (1997).
Critical Legal Studies critique of rights.\textsuperscript{345} The antidiscrimination/accommodation distinction might seem to offer a way for his critique of identity politics to avoid some of the controversy that attended that earlier critique of rights. By drawing a strong distinction between antidiscrimination and accommodation, Professor Kelman can assure his audience that his project does not entail any challenge to "market-perfecting" antidiscrimination laws. He is able to criticize demands for accommodation as "hopping on the (ideological) back of instances of genuine victimization by racism, sexism, able-ism, and cultural stigmatization"\textsuperscript{344} without denying that such "genuine victimization" itself should be unqualifiedly prohibited by antidiscrimination law.

In this respect, Professor Kelman's argument is structurally similar to the arguments of other left-wing critics of left-wing identity politics.\textsuperscript{345} Like Professor Kelman, these critics tend to challenge particular invocations of antidiscrimination law on the ground that those invocations pretermit discussion of important issues of policy "that involve conflicting goals, the allocation of social costs, and inevitable trade-offs."\textsuperscript{346} But also like Professor Kelman, these critics nonetheless make it a point to pledge allegiance to traditional antidiscrimination law. Thus, Professor Richard Ford argues against extending antidiscrimination law to protect "'cultural difference' and 'racially linked traits.'"\textsuperscript{347} But he seems to endorse traditional civil rights laws—and even their expansion—by "relax[ing] the burden of proof on civil rights plaintiffs generally and ad-

\textsuperscript{345} See Andrew Weis, Jumping to Conclusions in "Jumping the Queue," 51 Stan. L. Rev. 183, 215 & n.139 (1998) (book review). It should go without saying that one who endorses the critique of rights associated with Critical Legal Studies need not logically or necessarily also object to identity politics. For an illustration of this point, see Kennedy, supra note 52, at 34-82, which I read as an attempt to integrate the ideas of those who advocate identity politics with that critique of rights.

\textsuperscript{344} Kelman & Lester, supra note 145, at 226.

\textsuperscript{345} Two outstanding volumes collect much of the important work from this perspective. See After Identity: A Reader in Law and Culture (Dan Danielsen & Karen Engle eds., 1995); Left Legalism / Left Critique (Wendy Brown & Janet Halley eds., 2002).

\textsuperscript{346} Richard T. Ford, Beyond "Difference": A Reluctant Critique of Legal Identity Politics, in Left Legalism / Left Critique, supra note 345, at 38, 73. To similar effect, see Janet Halley, Sexuality Harassment, in Left Legalism / Left Critique, supra note 345, at 80, 102 (arguing that prevailing understandings of sexual harassment law pretermit the essential political discussion of the costs and benefits of that body of law).

\textsuperscript{347} Ford, supra note 346, at 41.
mit[ting] additional evidence of intentional racial discrimination.\footnote{348} Professor Janet Halley argues in favor of sending claims of sexual harassment "out of the discrimination paradigm and reducing allegations of sexual cruelties at work to the status of mere evidence, no different in legal value from evidence that someone threw a stapler across the room."\footnote{349} But she seems to endorse the "discrimination paradigm" itself.\footnote{350}

That left-wing opponents of identity politics consistently see the need to profess their support of antidiscrimination law—while at the same time vigorously attacking specific applications of that law—suggests that they understand that any position implying a program of radical civil rights retrenchment would be politically unpalatable. But the ultimate tactical effectiveness of their endorsement of antidiscrimination law depends entirely on the coherence of the distinction such scholars seek to draw between the applications of civil rights law they criticize and the applications they defend. Whether Professors Ford and Halley draw such a coherent line would require a close examination of their particular arguments and is thus beyond the scope of this Article. Regarding Professor Kelman's distinction between antidiscrimination and accommodation, however, it should be clear that the line does not hold. For one thing, even if we assume Professor Kelman's distinction between "distributive mechanisms" and "market perfecters"\footnote{351} to be logically unproblematic, only a fraction of antidiscrimination law can be said to "perfect the market" under his analysis. A significant portion of antidiscrimination law—even of the "core" prohibition on intentional discrimination—continues to be threatened by Professor Kelman's project.\footnote{352} Moreover, the distributive/market-perfecting distinction itself is unstable. As I have argued, the very notion that antidiscrimination laws merely "perfect

\footnote{348}{Id. at 74.}
\footnote{349}{Halley, supra note 346, at 102.}
\footnote{351}{Kelman, Centrist Liberalism, supra note 145, at 443.}
\footnote{352}{See supra Part III.}
the market," even in the narrow sliver of cases involving simple discrimination, is itself dependent on a set of implicit distributive judgments. If all "redistributive pleas" must "compete with other would-be distributive claimants," then there is no principled reason to exempt claims against simple discrimination from the competition.

I should make clear that I do not object to the statement that both antidiscrimination and accommodation requirements alike must be justified in a manner that takes full account of the incidence and distributive effects of their implicit taxes and subsidies. Indeed, I believe that the most effective way for advocates of either antidiscrimination or accommodation to maintain support for these regimes (and I consider myself an advocate of both) is to confront those effects carefully and directly. But for now the important point is that antidiscrimination and accommodation cannot be cleanly distinguished in this regard. One who challenges accommodation mandates must recognize that such challenges implicate antidiscrimination law more generally.

CONCLUSION

The conventional wisdom holds that there is a fundamental normative difference between antidiscrimination and accommodation requirements. In this Article, I have sought to show that the

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353 See supra Section III.C.2 (discussing the malleability of Professor Kelman's notion of an employee's marginal product; that notion defines a worker's productivity not according to what customers do want but according to what they should want).

354 Kelman, Centrist Liberalism, supra note 145, at 443.

355 That is one of the reasons I think Professor Jolls's work is so important, see Christine Jolls, Accommodation Mandates, 53 Stan. L. Rev. 223, 273–82 (2000) (providing an economic analysis of the mechanism by which an accommodation mandate could reduce the relative employment level of protected class members and applying that analysis to the ADA), as is the recent empirical work by labor economists that seeks to determine the consequences of the ADA for the employment of people with disabilities, see Daron Acemoglu & Joshua D. Angrist, Consequences of Employment Protection? The Case of the Americans with Disabilities Act, 109 J. Pol. Econ. 915, 929–48 (2001); Thomas DeLeire, The Wage and Employment Effects of the Americans with Disabilities Act, 35 J. Hum. Resources 693, 700–08 (2000), despite the disquieting implications this body of work has for those (like me) who support the ADA. In previous work, I have suggested that the disquieting implications probably do not represent the whole story, see Bagenstos, supra note 213, at 1018–19, but much more empirical and theoretical work in the practical policy-analytic vein remains to be done in this area.
conventional wisdom is wrong. Accommodation mandates like the one in the ADA serve the same fundamental interests as do antidiscrimination requirements; they impose costs that cannot be meaningfully distinguished from those imposed by antidiscrimination requirements; and they target conduct that is normatively similar to that targeted by antidiscrimination requirements. The persistence of a belief in the normative distinction between antidiscrimination and accommodation may be best explained by the apparent political usefulness of the distinction to a variety of constituencies.

To say that there is no meaningful normative difference between antidiscrimination and accommodation is, of course, not to answer the question whether either mode of civil rights law is a good idea. Defenders of both antidiscrimination and accommodation should be prepared to make their case directly in policy-relevant terms. For disability rights advocates, this means squarely confronting the serious challenges posed by recent empirical work on the ADA. Such advocates must confront the question of cost: Although the cost of accommodations offered by employers prior to the enactment of the ADA (whether voluntarily or in response to earlier, less comprehensive accommodation requirements) was quite low, and some studies of specific employers have shown minimal post-ADA accommodation costs,\textsuperscript{356} has the statute’s implementation of a comprehensive mandate to provide accommodation forced employers in general to provide more expensive accommodations?\textsuperscript{357} These advocates must also confront questions of effectiveness: The unemployment rate for people with disabilities remains virtually unchanged since the ADA’s enactment; indeed, it remained virtually unchanged throughout the economic boom of the late 1990s.\textsuperscript{358} The ADA thus clearly has not been effective in achieving one of its primary goals. Is that a result of restrictive judicial interpretation of the statute, or is it a result of the inherent limitations of antidis-


\textsuperscript{357} For speculation that the ADA’s mandate may have such an effect, see Chirikos, supra note 134, at 94, and Stein, Empirical Implications, supra note 134, at 1677–80.

\textsuperscript{358} For statistics on this point, see Bagenstos, supra note 213, at 1019.
anism laws as tools for significantly increasing employment?\textsuperscript{359} Finally, they must confront the question of perversity: Is the ADA, as a number of respected empiricists have argued,\textsuperscript{360} actually hindering the employment prospects for individuals with disabilities?\textsuperscript{361} Only by forthrightly addressing such questions will disability rights advocates succeed in the broader effort (which I endorse) to bolster support for the ADA's accommodation mandate.

\textsuperscript{359} For a suggestion that the latter explanation is closer to the mark, see id. at 1019–22.

\textsuperscript{360} See sources cited supra note 355.

\textsuperscript{361} For a suggestion that the studies do not establish that the ADA has had a meaningful negative effect on employment for those with disabilities, see Bagenstos, supra note 213, at 1018–19.