DISAGGREGATING ANTIDISCRIMINATION AND ACCOMMODATION

J.H. VERKERKE

Virtually all contemporary accounts of civil rights laws proceed on the assumption—or argue explicitly for the proposition—that traditional antidiscrimination statutes such as Title VII impose duties on employers that are conceptually distinct from the accommodation requirements embodied in more recent enactments such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).¹ At a purely doctrinal level, this distinction is self-evident. Both the ADA and the FMLA contain specific provisions that have no counterpart in the older statutes.² Moreover, employers’ efforts to comply with accommodation mandates appear to require a fundamentally different strategy than


² See Family and Medical Leave Act § 2612(a)(1)(D) (granting categorical entitlement to leave and reinstatement for “serious health condition[s]”); Americans with Disabilities Act § 12111(8) (providing that employee must be able to perform “essential functions” of the job in question); id. § 12111(9) (requiring the employer to make “reasonable accommodation”); id. § 12111(10)(A) (limiting employer’s obligation when there is evidence of “undue hardship”); id. § 12112(b)(5)(A) (defining discrimination to include a failure to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability”).
they commonly adopt in response to antidiscrimination statutes. Under Title VII, for example, documenting an employee's record of poor job performance ordinarily establishes a legally sufficient defense against charges of discriminatory discharge. That same evidence, however, quite often will be unavailing against the ADA claim of an employee who has requested accommodation. Employers also have a virtually unqualified obligation under the FMLA to permit covered employees to take up to twelve weeks of unpaid, job-protected leave.

Despite these apparent differences, important recent work by Christine Jolls challenges the conventional wisdom that antidiscrimination and accommodation can be distinguished so easily. Her provocative thesis is that significant portions of traditional antidiscrimination law—particularly cases invoking disparate impact doctrine—are best understood as accommodation requirements. Jolls also builds on her prior work analyzing accommodation mandates to show that within a supply and demand framework, even ordinary antidiscrimination provisions may impose costs on employers that are analytically indistinguishable from accommodation costs. From these observations, she concludes that antidiscrimination and accommodation are substantially “overlapping rather than fundamentally distinct categories.”

This bold challenge to the distinctiveness of accommodation mandates conceivably calls into question an essential element of the approach that most scholars have taken to analyzing disability discrimination law. Existing commentary develops at length the theme that the ADA's accommodation provisions depart from the conventional antidiscrimination model. Indeed, Stewart Schwab and Steven Willborn's contribution to this Symposium provides a

3. See, e.g., EEOC v. Prevo's Family Mkt., 5 A.D. Cases 1526, 1529 (W.D. Mich. Aug. 27, 1996) (finding that, with accommodations, plaintiff could have performed the essential functions of his job, and that defendant had discriminated against plaintiff in violation of the ADA).
6. Id. at 652-66.
7. Id. at 684-95.
8. Id. at 645.
paradigmatic example of this approach. Schwab and Willborn carefully analyze both the ADA's conventional antidiscrimination provisions, which they term a "soft" preference on behalf of individuals with disabilities, and the unique features of the ADA's accommodation mandate, which they call a "hard" preference. The sharp distinction between "soft" and "hard" preferences motivates both Schwab and Willborn's analysis of the structure of the statute and their suggestions for doctrinal reform. Moreover, they predict that future developments under Title VII and similar laws will inexorably incorporate significant elements of the ADA's distinctive model of "hard" preferences. If, however, Title VII and other traditional civil rights statutes have required employers, for many years, to accommodate members of groups defined on the basis of characteristics such as race, sex, and religion, then the ADA's duty of accommodation merely extends to individuals with disabilities a form of protection that is already available to other protected classes. Jolls' critique thus potentially undermines both the conventional understanding of accommodation duties and Schwab and Willborn's predictive claim about how traditional civil rights laws will evolve.

My goal in this Article is to reexamine the conventional wisdom about accommodation mandates. Does accommodation differ meaningfully from antidiscrimination, and if it does, how should that difference affect legal policy? Part I considers to what extent antidiscrimination and accommodation are in fact distinct approaches to civil rights protection. Although Jolls' critique demonstrates convincingly the need for greater care in using these terms, I conclude 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. Part II explores how this distinction has influenced the development of employment discrimination law and

10. See Schwab & Willborn, supra note 1, at 1203-04.

11. Id. at 1202-04. Note that Senator Kerry and others have proposed expanding the duty of religious accommodation under Title VII to more closely mirror the contours of reasonable accommodation under the ADA. See, e.g., S. 2071, 104th Cong. (1997) (proposing a bill to amend Title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment and for other purposes).
why it is likely to remain a significant fault line in public debates over civil rights protections.

I. THE CONTENT OF OUR CATEGORIES

As many scholars have observed, even comparatively straightforward statutory language prohibiting employment discrimination applies to a surprisingly diverse array of employer behavior. Section 703(a)(1) of Title VII, for example, makes it an unlawful employment practice for an employer "to discriminate against any individual ... because of such individual’s race, color, religion, sex, or national origin." Despite its simplicity, this provision not only reaches decisions motivated by bigotry and animus, it also prohibits employers from relying on statistically accurate generalizations about protected groups. It banishes customer and coworker preferences as permissible bases for employment decisions. Courts have even interpreted it to require employers to demonstrate a substantial business justification for any practice that creates a disproportionate adverse impact on protected group members. Thus the term "discriminate" covers a multitude of sins, and each type of conduct potentially involves distinct public policy concerns.

Given the complexity inherent in the antidiscrimination category alone, it is reasonable to doubt that any single dichotomous classification such as antidiscrimination and accommodation can

12. See, e.g., Donohue, supra note 1, at 2584 (observing that antidiscrimination "enactments have banned an array of diverse practices").


14. See Logan v. Denny’s, 269 F.3d 559, 574 (2001) (acknowledging that plaintiff had established a prima facie case of racial discrimination).


17. Of course, the Supreme Court sometimes has suggested that the theory of disparate impact derives instead from Title VII, § 703(a)(2). See, e.g., Connecticut v. Teal, 457 U.S. 440, 448-49 & n.9 (1982). Lower courts, however, have not uniformly adopted this interpretation. See, e.g., Colby v. J.C. Penney Co., 811 F.2d 1116, 1126-27 (7th Cir. 1987). In any event, subsequent legislation has codified the judicially developed theory of liability and thus eliminated any debate about its proper statutory source. See 42 U.S.C. § 2000e-2(k).
hope to create conceptual order out of such chaos. Indeed, alternatives abound. Employer conduct may be rational or irrational, efficient or inefficient. Employees' claims may be brought on behalf of an individual or as a class action. We might justify a particular claim because it remedies historical injustice, prevents subordination of a traditionally disadvantaged group, vindicates an ethical principle of equal consideration for all people, remedies a market imperfection, or promotes more equitable distribution of income and wealth.

Each of these distinctions offers important insight into the nature of employment discrimination law and we will return to consider several of them in the discussion that follows. Nevertheless, the categories of antidiscrimination and accommodation have long played a central role in scholarly discussions. For that reason, I begin by defining these terms and exploring how they subdivide the legal landscape.

A. Defining Terms

In both legal and popular usage, the term "antidiscrimination" encompasses two basic impulses.\(^{18}\) The first derives as a historical matter from the norm of color-blindness. It requires what is aptly described as "negative equality" or the elimination of certain illegitimate motives from decision-making processes. For example, a court might apply the ADA to prohibit employers from acting on unfounded stereotypes about individuals who are HIV-positive.\(^ {19}\) Thus, the principle of negative equality bars specific grounds for employment decisions that the law deems illegitimate but otherwise leaves businesses free to manage their affairs as they wish.

The second aspect of the antidiscrimination principle embodies a form of "positive equality" under which firms have an affirmative obligation to use merit-based criteria to make employment decisions. A court implementing a norm of positive equality thus


\(^{19}\) See Bragdon v. Abbott, 524 U.S. 624, 637, 648-55 (1998) (holding that asymptomatic HIV is a disability under the ADA, and remanding to determine whether an HIV-infected patient posed a direct threat to her dentist).
might demand that employers prove that their personnel tests and other selection criteria are significantly related to job performance. Aside from the (often substantial) burden of producing persuasive evidence that the challenged practices serve legitimate business objectives, employers may use any criterion that they are able to defend in conventional meritocratic terms. The norm of positive equality thus allows firms to discharge an individual with a disability who produces less or costs more to employ than other workers.

In contrast, an "accommodation" mandate requires employers to make costly exceptions to their merit-based criteria in order to increase employment opportunities for individuals who otherwise would be excluded. The typical accommodation case involves an individual with a physical or mental condition that interferes in some way with his or her ability to participate fully in the employer's normal operations. For example, a warehouse worker's chronic lower back pain could hinder his ability to lift heavy crates. An accommodation for this condition might require the employer to purchase costly equipment or tolerate some delay or disrupted work flow as a result of the worker's physical limitations. These additional costs would ordinarily justify a firm's decision to discharge this employee, but the legal requirement of reasonable accommodation obliges the employer to make an exception to its normal criteria and incur some cost or loss of productivity as a result.

If, however, a costless change in work procedures would allow this worker to perform his job as effectively as others, then he would need only to invoke the norm of positive equality rather than seek an accommodation. In these circumstances, the employer would be unable to defend on meritocratic grounds the decision to discharge him. The distinction between positive equality and accommodation thus rests on the magnitude of any costs associated

20. See 42 U.S.C. § 12112(b)(6) (incorporating disparate impact standard into the ADA); Belk v. Southwestern Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999) (allowing employer to present evidence of business relatedness for pre-employment test including leg lifts which had a disparate impact on applicant suffering from the residual effects of polio).

21. See, e.g., Pluta v. Ford Motor Co., 110 F. Supp. 2d 742, 751 (N.D. Ill. 2000) (acknowledging that genuine issues of material fact remained as to whether plaintiff was fired from his warehouse job in violation of the ADA).
with permitting an individual with a disability to perform a particular job. If those costs are nonexistent, the norm of positive equality provides sufficient protection. As those costs increase, the case moves into the domain of accommodation.

Taken together, these three categories roughly define a continuum. Efforts to enforce the norm of negative equality provoke the least controversy and resonate most strongly with widely accepted constitutional principles of equal protection. The more demanding notion of positive equality draws its strongest support from the (almost mythical) American commitment to meritocracy. To a greater extent than negative equality, however, the ideal of positive equality also clashes with the laissez-faire values that still distinguish U.S. employment and labor regulation from its far more intrusive European counterparts. At the opposite extreme from negative equality, the concept of accommodation derives support from the ethical value of charity towards those who have suffered some misfortune, from an economic desire to reduce dependency on public disability insurance, and from less widely shared commitments to the broader cause of disability rights. However, accommodation mandates—like related affirmative action measures that extend preferences on the basis of race or sex—tend to create significant tension with the same meritocratic ideals that support both norms of positive and negative equality. As a result, accommodation provisions inevitably provoke greater controversy than efforts to enforce either component of the antidiscrimination principle.

22. See, e.g., Bush v. Vera, 517 U.S. 952 (1996) (holding the creation of majority African-American and majority Hispanic-American voting districts unconstitutional because race had been the predominant criteria in their creation).
The following schematic diagram illustrates how these three categories define regions along a continuum, defined here by a progression from relatively uncontroversial principles towards comparatively contested notions of civil rights:

![Diagram showing Negative Equality, Positive Equality, and Accommodation]

**Figure 1: The Continuum of Civil Rights Norms**

Before applying this framework to the different types of conduct regulated by the ADA, it is worth pausing briefly to compare these conceptual categories to the terminology that other commentators have used to discuss this field.

In their contribution to this Symposium, Schwab and Willborn coin the terms "soft" and "hard" preference, which they define in relation to a baseline of economic equality. Thus, the ADA imposes a soft preference when it prohibits employers from "treat[ing] individuals with disabilities less favorably than other workers of equal productivity and cost."\(^{27}\) As their subsequent discussion of several hypothetical cases makes clear, soft preferences require

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\(^{27}\) See Schwab & Willborn, *supra* note 1, at 1209.
both that employers avoid relying on illegitimate reasons and that they eliminate any employment practices that do not serve the meritocratic ideal of increasing profitability. Schwab and Willborn's terminology thus aggregates both the negative and positive aspects of antidiscrimination into the single category of soft preferences. A hard preference, in contrast, requires "employers to engage in 'affirmative action' by treating individuals with disabilities more favorably than other workers with better cost and productivity characteristics." This category corresponds precisely to the canonical notion of accommodation. Thus the terms "soft" preference and "hard" preference are no more, and no less, than new and evocative labels for the familiar categories of antidiscrimination and accommodation.

Jolls' critique also focuses on precisely this conventional rhetorical dichotomy between "antidiscrimination" and "accommodation." She takes, however, an atypical approach to defining these categories—adopting a doctrinal formulation for one and a conceptual definition of the other. For Jolls, antidiscrimination refers to the overlapping constitutional and statutory prohibitions against discrimination contained in the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, along with subsequent judicial interpretations of these provisions. This definition, though expressed in purely doctrinal terms, corresponds closely to the conceptual category of soft preferences and similarly encompasses both the negative and positive aspects of the antidiscrimination norm. As we will consider in greater detail below, however, including the theory of disparate impact within this doctrinal definition also creates ambiguity about whether the category extends beyond positive equality to encompass some accommodation requirements.

In contrast to her doctrinal approach to defining antidiscrimination, Jolls offers a thoroughly conceptual definition of accommodation:

28. Id. at 1233-37.
29. Id. at 1211.
30. See Jolls, supra note 5, at 646-48.
31. See id. at 647 (referring to disparate impact doctrine).
By an "accommodation" requirement ... I mean a legal rule that requires employers to incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees, such as individuals with (observable) disabilities, and imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership (or "discriminating against" the group in the canonical sense). 32

Although this finely nuanced formulation is a bit difficult to parse, most of its component parts are familiar. Like Schwab and Willborn, Jolls refers to the special costs of accommodation and identifies them by comparing the typical costs firms incur for other employees in the market. She also contrasts decisions made solely on the basis of an individual's group membership and thus excludes from the definition all violations of the norm of negative equality. 33 Significantly, Jolls' hybrid approach holds open the possibility that enforcement under the disparate impact doctrine could give rise to the "special costs" that distinguish accommodation mandates. And as we have already seen, her doctrinal definition of antidiscrimination necessarily incorporates the theory of disparate impact. Careful examination of these definitions thus reveals precisely how Jolls' classifications come to overlap. For the moment, however, it is best to postpone further discussion of the significance of that overlap for the development of civil rights law and policy.

Like Jolls, Schwab, and Willborn, other commentators who have discussed the place of accommodation in the scheme of civil rights enforcement use an antidiscrimination category that aggregates both positive and negative equality, and they draw a sharp contrast between this aggregated category and cases involving accommodation. 34 My approach to these issues differs in two ways. First, I emphasize that the antidiscrimination principle encompasses two distinct visions of equality. 35 Disaggregating these two norms

32. Id. at 648.
33. Id. at 649 (excluding from Jolls' definition of accommodation cases in which, for example, "the employer intentionally treated blind employees differently on account of their blindness apart from the resulting need for readers").
34. See generally Issacharoff & Nelson, supra note 1; Krieger, supra note 26.
35. See generally Fiss, supra note 18.
clarifies both the components of antidiscrimination law and how those components relate to accommodation requirements. Second, by arraying regulated conduct on a continuum rather than forcing it into strict dichotomous categories, my analysis provides a richer framework for exploring the subtle relationships among the constituent parts of modern civil rights statutes.

B. Sorting Conduct

So what precisely do these laws prohibit or require? Where along the continuum, from negative equality to accommodation, do the varied aspects of these statutes lie? It is to these questions that we now turn.

The drafters of the ADA borrowed quite self-consciously from the provisions of prior civil rights laws. Enacted in 1990, the statute's core definition of "discrimination" derives directly from the language of Title VII and case law interpreting it. Accordingly, the ADA incorporates both of the earlier law's broad doctrinal approaches to establishing liability—disparate treatment and disparate impact.

The theory of disparate treatment prohibits a wide range of employer conduct that intentionally disfavors any person with a particular protected trait because of that trait. As the Supreme Court has repeatedly described the application of this doctrine under Title VII:

"Disparate treatment" ... is the most 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.

For example, an employer might adopt a facially discriminatory hiring policy that excludes all African Americans, women, or


individuals with disabilities from the workplace. Alternatively, plaintiffs might produce evidence that an employer rarely promotes members of a protected group beyond entry-level positions and that the relevant decision makers have made disparaging remarks about that group. Or an individual may convince a court that her employer's proffered reason for discharging her is untrue and merely a pretext for an impermissible discriminatory motive. In each of these cases, an illegitimate consideration of race, sex, or disability has caused an adverse employment decision. The theory of disparate treatment thus implements the norm of negative equality by prohibiting firms from considering protected traits when making important decisions about their employees.

In contrast, cases of disparate impact focus on whether a facially neutral employment practice that has an adverse effect on members of a protected group can be justified as "job-related for the position in question and ... consistent with business necessity." Although both the ADA and Title VII now expressly codify the disparate impact theory, the doctrine itself developed piecemeal over the course of two decades of judicial decisions in race and sex discrimination cases. The Supreme Court, in Griggs v. Duke Power Co., unanimously endorsed the then-novel idea that Title VII liability could be established without proving that an employer had

38. See, e.g., id. at 338 n.19 (detailing facially discriminatory hiring policies at Los Angeles and Denver terminals); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1221 (N.D. Ohio 1993) (finding that a policy barring diabetic individuals from serving as police officers violated the ADA); Robert J. Grossman, Paying the Price: Events at Rent-A-Center Prove That When Employers Don't Respect HR Today, They'll Pay Tomorrow, HR MAGAZINE, Aug. 1, 2002, at 28 (reporting allegations of sex discrimination suit including statements by CEO J. Earnest Tailey such as: "The day I hire women will be a cold day in hell" and "Get rid of women any way you can").


41. 42 U.S.C. § 12112(b)(6) (incorporating into the ADA the disparate impact standard developed through judicial decisions under Title VII); see also id. § 2000e-2(k) (contemporaneously codifying of the disparate impact theory adopted as part of the Civil Rights Act of 1991 amendments to Title VII).


43. 401 U.S. 424 (1971).
intentionally disfavored members of a protected class. While disparate treatment cases demand proof of the employer's subjective intent, the theory of disparate impact technically requires no proof of an evil motive. Instead, the doctrine requires a plaintiff to make an initial showing that a particular practice has a disproportionate adverse effect on a protected group. Successful proof of adverse impact shifts the burden to the employer to prove that the challenged practice is justified. Finally, the plaintiff has an opportunity to demonstrate that the employer's proffered business justification is merely a pretext, perhaps by presenting evidence that an alternative practice exists which would serve the employer's legitimate purposes just as well, but would exclude fewer members of the protected group. 44

The fact that disparate impact doctrine imposes on employers an affirmative requirement of justification suggests that this theory of liability involves a straightforward invocation of the norm of positive equality. Indeed, some cases are best understood in those terms. The theory of disparate impact, however, has a chameleon-like quality that allows courts to pursue different goals at different times and in different situations. In practice, there are at least three distinct versions of the doctrine: (1) an "objective theory" for uncovering pretextual discrimination, (2) a concerted effort to attack any "arbitrary barriers" to the advancement of protected group members, and (3) a demanding requirement that any exclusionary employment practices be genuinely "necessary" in order to justify them. Various passages in the Griggs opinion can be read to express all three facets of the doctrine, 45 and to some extent, subsequent case law mirrors the Court's own indecisive stance. 46

44. The Supreme Court first announced this tripartite structure in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). As discussed below, subsequent decisions and the codification of disparate impact doctrine in the Civil Rights Act of 1991 have altered some details of this proof structure in ways that are unimportant to the present discussion. See infra note 48.

45. See Griggs, 401 U.S. at 431 ("The evidence ... shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily ...."); id. at 429-30 ("The purpose of Title VII was to achieve equality of employment opportunities and remove barriers ...."); id. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude ... cannot be shown to be related to job performance, the practice is prohibited.").

Nevertheless, careful observers have detected some suggestive patterns in the seemingly disorderly body of decisions. According to George Rutherford's incisive analysis, the most defensible account of disparate impact doctrine casts it as a method of proof that uses objective, rather than subjective, evidence to uncover circumstances in which facially neutral practices serve the pretextual purpose of excluding disfavored groups from the employer's workforce. On this view, the theory of disparate impact derives from the same statutory provisions and serves the same statutory purposes as the disparate treatment doctrine. Both doctrines aim to combat pretextual discrimination. In support of this contention, Rutherford observes that many disparate impact cases have followed a "sliding scale" approach to the employer's defense of business justification—seemingly increasing that burden when pretextual discrimination is more likely and decreasing it when other evidence makes pretext less likely. Thus, he finds that "weak evidence of adverse impact leads the court to impose a weak requirement of business justification." Conversely, "[w]hen the plaintiff has presented compelling evidence of adverse impact, the defendant has usually been held to a higher standard of business justification." Similarly, proving the existence of effective alternative practices with less adverse impact reinforces the suspicion that the challenged practice serves mainly to exclude members of the protected class. On the other hand, the absence of


48. Years after Rutherford's *Virginia Law Review* article was published, a number of controversial Supreme Court decisions interpreting the civil rights laws narrowly, see, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (weakening employers' duty of business justification and shifting the burden of proof to plaintiffs), spurred Congress to amend Title VII. Among other changes, the Civil Rights Act of 1991 codified the theory of disparate impact. See 42 U.S.C. § 2000e-2(k) (2000). The negotiated legislative history for this provision makes it clear that Congress intended to restore the state of disparate impact law to what had existed prior to the Court's decision in *Wards Cove*. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b) (Nov. 21, 1991) (limiting legislative history to an "interpretive memorandum appearing at 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991)"). It is precisely this body of law that forms the basis for Rutherford's analysis of the doctrine.


50. Id. at 1321.

51. Id. at 1322-23.
effective alternatives supports the employer's argument that this particular practice is a business necessity.\(^{52}\)

As Rutherglen demonstrates, this "objective theory" provides a convincing rationale for virtually all of the Supreme Court's own disparate impact decisions and readily explains a substantial body of lower court decisions as well.\(^{53}\) He acknowledges, however, that some decisions are better understood as manifestations of a more demanding quest to eradicate all employment practices that have an adverse impact on protected groups.\(^{54}\) For our present purposes in analyzing these cases, it is useful to distinguish between efforts to eliminate only "arbitrary barriers"—those practices that cannot be justified on meritocratic grounds—and an even stricter demand that firms demonstrate the "business necessity" of all employment practices with any exclusionary effect whatsoever.

Cases in the former category clearly invoke the norm of positive equality. An employer may continue to use a practice after offering persuasive evidence that it serves a legitimate business objective. Requiring proof, however, that a practice is truly "necessary"—rather than merely useful or job-related—predictably filters out at least some meritocratic standards and thus requires the employer to incur some cost or loss of productivity in order to avoid the practice's exclusionary effect. For this reason, this third facet of disparate impact doctrine most closely resembles an accommodation requirement.\(^{55}\)

Despite these accommodationist aspects of disparate impact doctrine, which are at least theoretically available to disability discrimination plaintiffs, the ADA is best known for its distinctively demanding duty of reasonable accommodation. The statute requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... unless [they] can demonstrate that the accommodation would impose an undue hardship on the operation of the business."\(^{56}\) Unlike the toothless duty to accommodate

\(^{52}\) Id. at 1325-26.

\(^{53}\) See id. at 1330-31, 1335-36, 1338-40.

\(^{54}\) Id. at 1315-16.

\(^{55}\) It is precisely this feature of some disparate impact cases that leads Jolls to characterize them as accommodation requirements. I return to discuss the significance of this category below. See infra notes 65-71 and accompanying text.

employees' religious practices that is contained in Title VII,\textsuperscript{57} this provision has real bite. Employers must sometimes bear significant costs connected with accommodations.\textsuperscript{58} There can be no doubt that many ADA accommodation cases impose precisely the sort of special costs associated with true accommodation requirements. Firms are perhaps most likely to incur significant costs when they must restructure jobs, modify schedules, acquire equipment, or provide readers or interpreters.\textsuperscript{59} The cost and inconvenience of these measures frequently goes well beyond the sort of assistance they would provide as a matter of course to any valued employee. In short, the statute requires employers to retain covered individuals with disabilities in circumstances in which they would be legally free to discharge other employees. Such legally mandated exceptions to meritocratic standards are the essence of an accommodation requirement.

It is once again helpful to recall that these categories simply define regions on a policy continuum. The following schematic diagram locates different aspects of discrimination doctrine in the space stretching from negative equality through positive equality to accommodation:

\textsuperscript{57} Id. § 2000e(j); see also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding employers may refuse religious accommodation if it imposes more than "de minimis" cost).

\textsuperscript{58} 42 U.S.C. § 12111(9)(B) (stating that required accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations").

\textsuperscript{59} See, e.g., Rascon v. US West Communications Inc., 143 F.3d 1324 (10th Cir. 1998) (refusing to accept the employer's assertion that an employee's five-month leave of absence for a post-traumatic stress disorder constituted an "undue hardship").
Figure 2: Doctrines Across the Continuum

As the diagram makes clear, the three facets of disparate impact doctrine span the full range of the legal policy continuum from negative equality to accommodation. ADA reasonable accommodation doctrine similarly ranges across categorical boundaries. We have seen that truly costless accommodations invoke only the norm of positive equality. Other, more burdensome, accommodations sometimes involve merely "de minimis" costs comparable to those required for religious accommodations, or they may impose higher costs than the most aggressive applications of disparate impact doctrine. In short, these doctrines resist simplistic categorization. As Jolls correctly observes, some aspects of traditional antidiscrimination law—cases imposing a strong "business necessity" requirement—undeniably overlap with the
more recently enacted ADA accommodation mandates. It is thus improper to speak of antidiscrimination and accommodation as strictly distinct categories.

My observation that these policies should be arrayed on a continuum implies another objection to the conventional categorical analysis. Both the public reaction to and the justification for different approaches to civil rights enforcement depend not simply on whether a particular rule can be called an antidiscrimination measure or an accommodation mandate, though those labels often have significant rhetorical power. Instead, legal policies become progressively more controversial and therefore require more specialized justifications as they fall farther towards the accommodation end of the continuum. This analysis suggests yet another reason that we should resist the strict dichotomy between antidiscrimination and accommodation. Uncritical use of the conventional terminology obscures important features of these varied legal requirements.

Despite the strong theoretical case for avoiding simplistic categories, however, there is at least a plausible practical justification for using the terms antidiscrimination and accommodation as a convenient shorthand description of the field. The overwhelming majority of claims that are brought under the traditional civil rights statutes involve disparate treatment and thus rely solely on the norm of negative equality. Disparate impact claims represent but a tiny fraction of all the charges brought to the attention of the EEOC each year. Moreover, as our earlier analysis revealed, most of these cases are best explained by Rutherglen’s “objective theory” or as an attempt to eliminate “arbitrary barriers” to minority advancement. Only a vanishingly small proportion of the overall caseload can realistically be characterized as imposing a strong “business necessity” requirement on employers. Thus, a correspondingly tiny number of disparate impact cases impose

60. See Jolls, supra note 5, at 666 (rejecting the notion that antidiscrimination and accommodation “are fundamentally distinct rather than overlapping notions”).


62. Id. at 1019-21 (detailing decline of class action litigation which implies a reduction in disparate impact claims as well as systemic disparate treatment claims).
anything like an implicit accommodation requirement. For this reason, the genuine overlap between traditional antidiscrimination statutes and accommodation requirements is probably small enough to be disregarded for many purposes.

Comparing the evidentiary requirements for Title VII disparate impact cases and those for ADA accommodation claims tends to reinforce this conclusion. In order to bring an accommodation claim under the ADA, a plaintiff must demonstrate that she has a covered disability and that there exists a reasonable accommodation that would allow her to perform the job she holds or desires. Although ADA plaintiffs often find these proof requirements daunting, a disparate impact case under Title VII arises in even narrower circumstances. A disparate impact plaintiff's prima facie case under Title VII must identify a particular employment practice and prove that the practice has had a practically significant adverse impact on a protected group. Proof of adverse impact ordinarily requires evidence of how the practice has affected a group of sufficient size to allow for reliable statistical inferences. As a result, disparate

63. The cases that Jolls cites tend to confirm this conclusion. She relies in part on grooming cases that challenge restrictions many would characterize as "arbitrary." Indeed some of those cases arise in situations where a court could be suspicious that the practice has a pretextual purpose. She discusses several cases challenging selection criteria in which the appellate court simply reversed summary judgment for the employer and remanded for more careful consideration of the evidence of business justification. These cases are entirely consistent with non-accommodationist interpretations of the disparate impact doctrine. Finally, Jolls refers to cases concerning claims of pregnancy discrimination connected with inadequate leave policies. Once again, some of these cases may involve suspicions of pretextual discrimination. The legal basis for others is at least open to question. And the entire line of cases has been largely superseded by the enactment of the FMLA mandating up to twelve weeks of unpaid leave for, Inter alia, the birth or adoption of a child.

64. For discussion of the practical implications of any remaining overlap, see supra text accompanying notes 36-59.

65. See EEOC v. United Parcel Serv., Inc., 249 F.3d 557, 562 (6th Cir. 2001) ("To establish a prima facie case of employment discrimination [for failure to accommodate] under the ADA, a plaintiff must show (1) that s/he is disabled; (2) that s/he is otherwise qualified for the position with or without reasonable accommodation; and (3) that s/he suffered an adverse employment action because of his or her disability.").

66. See Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262, 289-90 (D. Conn. 2001). In most respects, the Civil Rights Act of 1991 amendments codified Pre-Wards Cove judicial practice regarding the disparate impact theory. 42 U.S.C. § 2000e-2(k) (2000). However, the provision requiring plaintiffs to identify a specific practice that has caused the adverse impact arguably makes the codified version even more demanding for plaintiffs than preexisting law. Id. § 2000e-2(k)(1)(B)(i).

impact claims may challenge only the limited domain of practices for which plaintiffs are able to gather the necessary data. In contrast, an ADA accommodation claim requires no aggregated data or comparison to the experience of another demographic group. Instead, the individual plaintiff need only develop evidence about her own situation and the ability of her employer to bear any accommodation costs.

Not surprisingly, the evidentiary differences between these two types of claims go a long way towards explaining why ADA accommodation claims filed with the EEOC far outnumber Title VII disparate impact claims.68 Many, if not most, of these disparate impact cases were brought along with disparate treatment claims and thus seem likely to have involved the use of an "objective theory" to attack pretextual discrimination.69 Some cases undoubtedly challenged "arbitrary practices," and a few more imposed a strict requirement of "business necessity" and thus required accommodation.70 As a practical matter, we can therefore think of Title VII and other traditional civil rights statutes as being almost exclusively concerned with negative equality. A small number of cases seek to enforce the norm of positive equality, and an even smaller number can be said to impose a limited form of accommodation mandate. In contrast, cases under the ADA are more evenly distributed across the full spectrum from negative equality to accommodation.71 This striking difference in the nature of claims makes the ADA distinctive and has led other

68. See Paul S. Miller, The EEOC's Enforcement of the Americans With Disabilities Act in the Sixth Circuit, 48 CASE W. RES. L. REV. 217, 228 (1998) (noting that about twenty-eight percent of a total of 64,495 ADA charges involved a claimed failure to accommodate). Thus, a modest estimate of the number of accommodation charges approaches 20,000, while disparate impact claims probably number under 100. See Donahue & Siegelman, supra note 61, at 1019-21.

69. See Rutherglen, supra note 47, at 1320.

70. See RUTHERGLLEN, supra note 46, at 73-76 (describing the Supreme Court's "continued ambivalence" toward the theory of disparate impact).

71. Cases brought under the ADA run the gamut from straightforward allegations that an employer discharged an incumbent employee after discovering that he had a disability, EEOC v. AIC Sec. Investigations, Ltd., No. 92-C-7330 (N.D. Ill. Mar. 18, 1993), to claims based on the failure to accommodate an employee with epilepsy by offering him reassignment, EEOC v. Complete Auto Transit, No. 95-73427 (E.D. Mich. Jan. 6, 1997) (issuing a $5.5 million verdict for plaintiff).
commentators, with some justification, to employ the comparatively simplistic categories of antidiscrimination and accommodation.

C. Competing Categories

We have seen that different aspects of civil rights laws can be arrayed on a continuum from negative equality through positive equality to accommodation. I have suggested that movements along this continuum roughly correspond to variations in the degree of public acceptance accorded different types of claims. Although some aspects of traditional civil rights statutes overlap with the more recently enacted ADA accommodation mandates, the extent of this overlap should not be overstated. In fact, the conventional dichotomy between antidiscrimination and accommodation may be a useful shorthand description of the more complex reality that my analysis reveals.

Although my focus here is on these conventional categories, there are other grounds on which one might distinguish different legal requirements. One common strategy establishes as a baseline the treatment individuals would receive in a certain hypothetical market situation. Legal requirements, on this account, may be used to remedy deviations from the hypothetical outcome or, sometimes, to move beyond that outcome to pursue another social purpose such as distributional equity or the economic integration of disadvantaged groups.

Perhaps the best known and most successful use of a market baseline is John Donohue’s framework of “contingent equality,” “intrinsic equality,” and “constructed equality.”72 In its unregulated state, the labor market delivers equality to each worker that is “contingent” not only on the quality of her work but also on the attitudes of employers, coworkers, and customers towards her personal traits. Features such as vast heterogeneity among workers, the absence of publicly available information on their individual productivity, and substantial barriers to free movement among jobs, mute the market forces that might otherwise exert pressure to combat discriminatory attitudes.73 With this imperfectly

72. Donohue, supra note 1, at 2583.
73. See id. at 2592-97.
competitive environment, Donohue contrasts modern capital markets. As he observes, the market for financial securities achieves a higher level of "intrinsic equality" because relentless economic pressures drive the price of each publicly traded asset towards its true underlying value. Every day, thousands of sophisticated analysts attempt to predict how each asset is likely to perform. Their investigative efforts and their willingness to trade on every scrap of information that they glean simply overwhelm any prejudices and stereotypes that individual traders might hold.

In Donohue's framework, employment discrimination laws initially sought to push the labor market from its natural state of contingent equality towards the higher ideal of intrinsic equality. For example, disparate treatment doctrine prohibits employers from making decisions on the basis of certain protected traits. And courts applying the theory of disparate impact require firms to demonstrate that their practices evaluate workers on the basis of their true productivity. Measures such as these aim to remove the influence of race, sex, disability, and other contingent factors from employment decisions and to force employers to hire and compensate all employees according to their intrinsic worth.

Beyond intrinsic equality, however, lies the concept of "constructed equality." This more expansive notion of equality offers legal protection from productivity-driven market outcomes. For example, it gives rise to claims that the special burdens of childbearing and childrearing, of old age, or of physical and mental disability entitle women, older workers, and individuals with disabilities to preferential treatment in the labor market. According to this argument, fairness requires more than even the intrinsic equality that an idealized competitive market would deliver. The ADA's accommodation provisions, aggressive affirmative action efforts, and FMLA leave requirements are the most prominent legal manifestations of the quest for constructed equality.

Donohue's analysis offers a rich description of the evolving debate over civil rights, beginning with an exclusive focus on achieving

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74. See id. at 2591-93.
75. See id. at 2593.
76. See id. at 2606-09.
77. See id. at 2608-09.
intrinsic equality for African Americans and culminating in more recent scholarly work and legislative measures concerned with pursuing constructed equality. As Donohue observes, market forces “at least push in the direction of intrinsic equality, but they steadfastly resist the attainment of constructed equality.” In other words, even imperfectly competitive labor markets have at least a weak tendency to encourage hiring and compensating workers according to their true productive potential. At the same time, employers with the best and worst intentions alike face a market incentive to avoid legal regulations that require preferential treatment for some workers. These economic influences parallel the pattern of public support noted earlier. Not only must accommodationist policies overcome the entrenched meritocratic values that sustain antidiscrimination measures, they must confront greater market resistance the farther they depart from intrinsic equality. Donohue’s analysis thus tends to confirm the wisdom of thinking about these legal policies on a continuum.

With all this talk of market forces, one might reasonably wonder whether the economist’s norm of efficiency provides a useful alternative to more traditional categories. The distinction between efficient and inefficient rules has fascinated many economically oriented commentators whose work relies on the normative premise that if employment discrimination laws promote efficiency then

78. Although his account is persuasive in describing growing demands for regulation to go beyond guaranteeing merely intrinsic equality, Donohue cites no cases to support his claim that courts have embraced the principle of constructed equality in sex and age discrimination cases. See Donohue, supra note 1, at 2611. The essay’s introduction refers to the Pregnancy Discrimination Act (PDA) which has very limited potential to require accommodation. Moreover, the language of the PDA itself explicitly embraces a principle of equal treatment most closely tied to intrinsic equality. See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000). Although a few cases have rejected this limitation, others have curtailed the clause’s reach. The best that can be claimed for this line of cases is that they embody an equivocal endorsement of a limited accommodation requirement that, for larger employers, is now virtually superseded by the FMLA’s leave requirements. Donohue also cites two scholarly articles calling for a more accommodationist legal approach to pregnancy in the workplace. Donohue, supra note 1, at 2608 n.64. Aside from the FMLA and similar state leave statutes, there has been no groundswell of public support or legislative action on such measures. In this respect, the FMLA and the ADA still stand as the most overtly accommodationist statutes.

79. Donohue, supra note 1, at 2610.

80. See supra text accompanying notes 60-61.

81. See Donohue, supra note 1, at 2583-85 (explaining how antidiscrimination laws have evolved and broadened to encompass more protected classes and groups).
they are, at least marginally, more desirable as a result. Scholarly work has shown that prohibitions against race and sex discrimination can accelerate the market's adjustment to a more efficient nondiscriminatory equilibrium, that prohibiting the practice of statistical discrimination may eliminate inefficiently distorted incentives for disfavored groups to invest in their human capital, and that the duty of reasonable accommodation promotes labor market efficiency by preventing excessive employee turnover. Expanding the category of efficient rules tends to bolster the case for those rules. Indeed, legislative debates often focus on the economic losses associated with employment discrimination. No one could reasonably claim, however, that efficiency is an essential characteristic for civil rights measures. Moral and political considerations dominate the public debate while normative economic analysis exerts a secondary influence.

Although efficiency considerations have played a somewhat subsidiary role, Mark Kelman's essay, Market Discrimination and Groups, is a remarkably successful effort to decode the organizing principle of civil rights laws. Kelman begins with the conventional dichotomy between antidiscrimination, which he calls "simple discrimination," and "accommodation." He argues that "[v]ictims of simple discrimination possess ... a fairly strong, uncircumscribed 'right' to be free from such treatment, while those seeking accommodation possess ... a colorable 'claim' on social resources that competes with a variety of other claims on such resources,


83. See Donohue, supra note 1, at 2611-12.

84. For application of this theory to disability discrimination law, see Kelman, supra note 1, at 860; Schwab & Willborn, supra note 1, at 1213.

85. See Verkerke, supra note 82.

86. "[T]he continuing existence of unfair and unnecessary discrimination ... denies people with disabilities the opportunity to compete on an equal basis ... and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." S. 933, 101st Congress § 2(a)(9) (1990) (findings of legislature prior to enactment of ADA).

87. See Kelman, supra note 1.

88. Id. at 834.
a policy ‘argument’ to be balanced against other prudential arguments. According to Kelman, society prohibits simple discrimination and requires accommodation for the same reason—to prevent the subordination of any identifiable social group. In the case of simple discrimination, however, the right is intelligible without referring to a group. Every individual might conceivably have a legal right to “fair” treatment by employers. Nevertheless, prudential considerations dictate that the law should focus enforcement resources on remedying instances of unfair treatment directed towards members of socially sub-ordinated groups. In contrast, Kelman claims that a legal duty to accommodate would be nonsensical if applied generally to all individuals. Instead, the only intelligible justification for accommodation depends on its ability to combat the social and economic subordination of particular groups of citizens.

Kelman’s approach to accommodation duties might well be open to criticism on the grounds that it ignores potential alternative justifications such as the value of charity towards those suffering from misfortune or the dignitary interests of individuals with disabilities. His group-based theory of disability discrimination laws, however, provides a uniquely parsimonious account of both the political history and the doctrinal structure of Title VII and subsequent laws. Kelman explores in considerable detail how the antisubordination norm has influenced the evolution of these laws and the rules governing where their protection begins and ends. Most notable for our present purposes, he emphasizes that the public debate over these measures becomes more heated as they move conceptually farther from the core color-blindness norm of traditional civil rights laws. As Kelman suggests, accommodation and affirmative action requirements command support only when they serve an overriding public purpose. Both rhetorically and

89. Id. at 834 (emphasis added).
90. Id.
91. Id. at 834, 859, 877.
92. Id. at 863.
93. Id. at 834.
94. Id.
95. Id., supra note 1.
96. Id. at 866, 892-93.
97. Id.
substantively, the debate over accommodation has a different character—shifting focus from rights arguments to disputed claims on public resources.

It should be apparent that Kelman's analysis in no way contradicts the approach to defining antidiscrimination and accommodation that has been the subject of this essay. Instead, his anti-subordination theory provides a complementary account of the social forces driving the adoption and enforcement of civil rights laws. In particular, Kelman's conclusions reinforce my own observation that it is possible to draw meaningful distinctions among legal rules at different points along the civil rights policy continuum.

D. Thinking About Costs

Returning now to Jolls' critique of the conventional dichotomy between antidiscrimination and accommodation,98 we can consider her analysis of costs. According to Jolls, the enforcement of antidiscrimination rules sometimes imposes compliance costs on employers that are conceptually and analytically similar to accommodation costs.99 This possibility arises because employers sometimes discriminate in order to maximize profits.100 For example, a firm whose customers would be reluctant to do business with a woman may refuse to hire female sales representatives.101 Or a company whose incumbent employees threaten to sabotage the work of any African-American coworkers might maintain a racially segregated workforce only in order to avoid the losses of productivity that would result from integration.102 As Jolls observes, prohibiting employers from considering customer or coworker attitudes such as these forces firms to suffer either reduced demand for their products and services or lower labor productivity in order to comply with the law.103

98. See Jolls, supra note 5.
99. Id. at 645, 686-87.
100. Id. at 686.
103. See Jolls, supra note 5, at 686.
A conventional response from those who would defend a distinction between antidiscrimination and accommodation asserts that these coworker and customer preferences are illegitimate. Just as society unhesitatingly labels an employer's own animus an illegitimate reason for discriminating against members of protected groups in the public sphere,\textsuperscript{104} so we condemn the same attitudes manifested by consumers and employees.\textsuperscript{105} As Kelman suggests, administrative convenience may dictate that we remedy this form of discrimination indirectly by regulating employers rather than by trying to exert direct control over the behavior of customers and coworkers.\textsuperscript{106} Moreover, we have reason to believe that the prevalence and intensity of these preferences may diminish in response to regulation.\textsuperscript{107} Antidiscrimination laws both reinforce a new social norm of equality and create opportunities for individuals to learn that their underlying prejudice is unfounded. The malleability of these psychic costs of regulation distinguishes antidiscrimination measures from accommodation mandates. Whatever employers may think about its moral status, the economic \textit{costs} of accommodation remain. Firms cannot help but consider those costs in their calculus of labor productivity.\textsuperscript{108}

Of course, it is also true that simply labeling certain costs as "illegitimate" does nothing to eliminate them.\textsuperscript{109} Jolls' analysis correctly identifies the potential that all forms of civil rights protection—from enforcing the norm of negative equality to mandating accommodations—will impose costs on employers.\textsuperscript{110} As Jolls demonstrates, both forms of costs will affect firms' behavior.\textsuperscript{111} Her analysis reveals how these regulations may influence wages and employment levels of protected workers. The predicted effects depend critically on the degree to which legal constraints against

\textsuperscript{104} Statutory exceptions for very small employers (and rooming houses) tend to confirm the idea that although society may now disapprove of discriminatory attitudes in comparatively intimate relationships, our laws prohibit people from acting on those beliefs in broader market contexts. See \textit{supra} note 1.

\textsuperscript{105} See, \textit{e.g.}, Jolls, \textit{supra} note 5, at 685.

\textsuperscript{106} See Kelman, \textit{supra} note 1, at 848.

\textsuperscript{107} See Schwab & Willborn, \textit{supra} note 1, at 1215-18.

\textsuperscript{108} See Jolls, \textit{supra} note 5, at 686; Kelman, \textit{supra} note 1, at 848.

\textsuperscript{109} See \textit{supra} notes 104-05 and accompanying text.

\textsuperscript{110} Jolls, \textit{supra} note 5, at 687.

\textsuperscript{111} Id. at 688.
wage discrimination and against discrimination in hiring and discharge are binding.\textsuperscript{112} In her earlier work on accommodation mandates, Jolls considers several possible combinations and derives predictions for the changes in wages and employment levels for members of the protected group.\textsuperscript{113} One important result is that with binding restrictions on both wage and employment differentials, protected workers are likely to enjoy increased relative employment levels with the same or higher relative wages. Conversely, if legal constraints on employment differentials are not binding, protected workers experience increased or unchanged relative wages but suffer reduced relative employment levels. Finally, Jolls discusses some available empirical evidence which is consistent with the latter scenario.\textsuperscript{114}

In order to determine the significance of costs for our present discussion of antidiscrimination and accommodation, it is important to distinguish positive from normative analysis. Economically-oriented scholars can fruitfully debate positive predictions about how legal regulation will affect wage and employment levels. In this respect, Jolls' framework is a significant advance over prior approaches that ignored the differences between mandates affecting specific groups of workers as opposed to mandates applying to workers as a whole.\textsuperscript{115} For the purposes of normative analysis, however, these predictions carry considerably less weight. Policymakers would no doubt be troubled if, for example, it could be shown that disability accommodations depress both wages and employment levels for individuals with disabilities, or if the costs of antidiscrimination measures had similar effects. So long as the predicted effects are at least ambiguous concerning the welfare of protected workers, however, the mere fact that conventional antidiscrimination provisions impose costs on employers does little to help us decide whether those particular costs are justified. As Jolls recognizes, analysis in a supply and demand framework tells us nothing at all about how the costs imposed by the norms of negative and positive equality may differ in morally relevant ways

\textsuperscript{113} Id. at 263-71.
\textsuperscript{114} Id. at 276-80.
\textsuperscript{115} Id. at 228-26.
from one another and from accommodation costs. So, although her analysis provides valuable insight into the economic constraints that face policy makers in this area, it does not purport to determine how our values and ethical intuitions are translated into basic policy objectives.

The policy continuum presented in this Part provides a richer framework for analysis than the traditional dichotomy between antidiscrimination and accommodation. The continuum highlights the interrelationship among different components of the civil rights laws and better reflects the variability of public support for various forms of liability and remedy. Although Jolls' critique identifies both areas of overlap between the traditional categories and important parallels between the ways that antidiscrimination and accommodation impose costs on employers, careful analysis of the policy continuum shows why even the traditional dichotomy serves as a useful shorthand for many purposes. The overwhelming majority of claims and cases arising under traditional civil rights laws invoke equality norms that may be called antidiscrimination. What is distinctive about the ADA is principally that it gives rise to a distribution of claims divided evenly between antidiscrimination and accommodation. It is thus entirely appropriate to speak of ADA accommodation claims as a significant innovation in civil rights enforcement.

II. GOOD FENCES MAKE GOOD NEIGHBORS

Once we have established that the distinction between antidiscrimination and accommodation is analytically meaningful it is natural to consider whether that distinction does and should affect legal policy. To what extent, if any, should the relationship between these two categories influence political or legal decisions about statutes such as Title VII and the ADA? What difference should it make?

116. See Jolls, supra note 5, at 698 (explaining that her claim about antidiscrimination and accommodation "is not a normative one: it is simply that the two categories overlap as a factual matter").
117. Id. at 684-95.
118. See supra note 1.
A. Section Five of the Fourteenth Amendment

The legal issue to which Jolls devotes the most discussion is the question of whether at least some accommodation mandates might be a proper exercise of Congress' power under Section Five of the Fourteenth Amendment to enforce the constitutional guarantee of equal protection.\textsuperscript{119} What is at stake, of course, is the ability of plaintiffs to recover monetary damages or injunctive relief against states for violating statutory accommodation requirements.\textsuperscript{120} There are at least two distinct ways to approach this question. First, one might be interested in determining as a matter of principle whether Section Five authorizes expressly accommodationist measures. For this inquiry, it can hardly matter whether Congress has gotten away with a little bit of accommodation by means of the disparate impact doctrine.\textsuperscript{121} The question is instead whether the constraints of federalism preclude accommodationist measures that reach so clearly beyond what existing constitutional equal protection doctrine requires. Or perhaps one could develop a normative argument that Congress should be free to define for itself what equal protection means. In either case, the existence of the disparate impact doctrine reveals nothing at all about these underlying normative principles.

If, however, our goal is to predict what the Court will do with a future claim challenging the application of accommodation provisions to state government employees, then we might well look to what it has permitted under Title VII. No case has yet come before the Court that squarely raises the question of whether disparate impact doctrine may be applied against the states. Nevertheless, we may assume for the sake of argument that disparate impact liability would be upheld. What follows from that assumption is considerably less clear.

The legal test that the Court has announced in its recent cases requires that challenged legislation "exhibit congruence and

\begin{itemize}
  \item \textsuperscript{119} See Jolls, \textit{supra} note 5, at 672-84.
  \item \textsuperscript{120} See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
  \item \textsuperscript{121} See Donohue, \textit{supra} note 1, at 2584 (discussing the disparate impact doctrine). The Court will decide this term how these arguments apply to claims brought under the FMLA. See Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001), \textit{cert. granted}, 122 S. Ct. 2618 (2002).
\end{itemize}
proportionality between the injury to be prevented or remedied and the means adopted to that end.\footnote{122} In considering what is congruent and proportional to remedy equal protection violations, it is significant to note that Title VII accommodation requirements are unusual and the exception to normal practice.\footnote{123} One might fairly characterize these exceptional situations as incidental to the main thrust of Title VII. It is, however, obviously impossible to make a parallel argument in defense of the ADA. Although the statute contains all of the elements of traditional antidiscrimination statutes, its accommodation provisions are central to its purposes and form a substantial proportion of the cases arising under the ADA. It is thus unsurprising that the Court has ruled already that Title I of the ADA exceeds Congress' Section Five power to regulate states.\footnote{124} This result rests in large part on the fact that distinctions based on disability receive only rational basis scrutiny under the Equal Protection Clause.\footnote{125} The Court has taken pains to point out, however, that the requirements of Title I include extensive duties of accommodation, and these duties extend far beyond the scope of the constitutional protections afforded to individuals with disabilities.\footnote{126}

Although distinctions based on race and sex are subject to heightened scrutiny, it seems doubtful that accommodation measures could be defended on those grounds. Any explicit race- or sex-conscious policy would itself be subject to challenge as a breach of the government's own duty of equal protection.\footnote{127} More subtle accommodationist measures would instead fail the Court's analysis of "congruence and proportionality."\footnote{128} The family and medical leave mandated under the FMLA, for example, might arguably bear some relationship to improving the job prospects for women of child-bearing age.\footnote{129} However, the nexus between legislation mandating

\footnote{122} Garrett, 531 U.S. at 365 (quoting City of Boerne, 521 U.S. at 520).
\footnote{123} See Jolls, supra note 5, at 667 (suggesting the idea that antidiscrimination and accommodation are distinct categories "fails to recognize the case law ... imposing accommodation requirements as a matter of Title VII disparate impact law"); supra notes 119-22 and accompanying text.
\footnote{124} Garrett, 531 U.S. at 360.
\footnote{125} See, e.g., id. at 366-67.
\footnote{126} Id. at 372.
\footnote{128} See City of Boerne v. Flores, 521 U.S. 507, 520 (1997); Garrett, 531 U.S. at 365-66.
\footnote{129} See Jolls, supra note 5, at 660-62 (analyzing FMLA leave requirements as a measure
leave that is equally available to men with "serious medical conditions" or with newborn or newly adopted children and the problem of constitutionally prohibited sex discrimination is sufficiently tenuous that the FMLA will almost surely meet the same fate that the ADA suffered in Garrett.\textsuperscript{130} As I have suggested already, the Court's assumed willingness to condone some very limited accommodation under the disparate impact doctrine cannot sustain the overt accommodation requirements of statutes such as the ADA and the FMLA.

B. Affirmative Action

Another notorious flash point of controversy in the debate over civil rights protections is the issue of affirmative action. The term has been used to describe everything from careful efforts to ensure that job recruitment efforts do not neglect schools or areas in which members of minority groups predominate to rigid numerical quotas for hiring, promotion, or layoff.\textsuperscript{131} Public and judicial reaction to these measures likewise ranges from broad support for expanding the pool of minority candidates to fierce controversy over strong forms of preference granted on the basis of protected group membership.\textsuperscript{132}

We have seen that strong accommodation requirements create tension with the meritocratic ideal that underwrites the norm of positive equality. Selecting, on the basis of sex or race, someone who is less qualified, and thus likely to be less productive, similarly offends this meritocratic principle. In the public debate over affirmative action, we observe that policies become progressively

\textsuperscript{130} Thus far, circuit courts are unanimous in holding that the FMLA is not a valid exercise of Congress' Section Five power. See Townsel v. Missouri, 233 F.3d 1094, 1096 (8th Cir. 2000). But see Hibbs v. Dep't of Human Res., 273 F.3d 844, 856 (9th Cir. 2001) (distinguishing FMLA from ADA in that the former was aimed at remedying sex discrimination and deserves strict scrutiny analysis), cert. granted, 122 S. Ct. 2618 (2002).

\textsuperscript{131} See, e.g., United States v. Paradise, 480 U.S. 149, 185 (1987) (holding that state's fifty percent promotion requirement for African Americans was permissible under Fourteenth Amendment); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 573 (1984) (holding that lower court exceeded its power when it approved injunction requiring white employees to be laid off when seniority system would have laid off some black employees).

more controversial as they more closely approach cases of costly accommodation. The source of public resistance is the same in both situations. Preferences on the basis of race and sex, however, also implicate stronger equal protection norms, embodied in the heightened scrutiny of race- and sex-conscious classifications, that disfavor group-based decision making. For this reason, public disapproval of affirmative action tends to be more vehement than opposition to equally preferential forms of disability accommodation. Voluntary measures to assist individuals with disabilities likewise provoke none of the controversy invariably associated with otherwise comparable voluntary preferences for minorities or women. Nevertheless, the overall pattern of reaction to varying degrees of affirmative action preference is entirely consistent with the analysis of accommodation presented here.

C. The Rhetoric of Low Accommodation Costs

A frequently heard claim of disability rights advocates is that the real burden of accommodation costs on employers is very slight. Within the framework of this Article, such claims can be fruitfully understood as an effort to translate accommodation claims into ones invoking the norm of positive equality. As the level of accommodation costs falls towards zero, we move along the policy continuum towards the region of positive equality. I have suggested that most people's moral intuitions about legal requirements respond to movements along this continuum. Advocates of disability rights thus understand quite clearly that moving rhetorically, or even better in real terms, towards the less controversial end of the spectrum serves the political goal of securing support for legislation such as the ADA.

134. See supra notes 119-32 and accompanying text.
135. See, e.g., Jolls, supra note 5, at 650-51 (suggesting that an accommodation requirement that imposes costs for employers may ultimately benefit employees not targeted for the accommodation). For discussion of the available empirical evidence on this question, see Peter David Blanck, The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodation, 46 DEPAUL L. REV. 877, 898-908 (1997).
D. Politics and Judicial Power

Once the political battle has been won, however, the resulting legislation faces another important hurdle before it actually compels employers to make costly accommodations. As countless academic commentators have observed, judicial interpretation of the ADA has significantly limited the coverage and scope of the statute in a variety of ways.136 Courts have expressed no overt hostility to the remedial aims of the legislation. However, the duty of reasonable accommodation seems to trouble many judges for at least two distinct reasons. Most relevant to the analysis presented in this Article, the comparatively controversial nature of accommodation mandates makes courts cautious about extending those duties too far. As other commentators' criticisms make clear, judges have the power to nullify the most aggressive aspects of civil rights enforcement and thus to domesticate novel statutes like the ADA.

The very novelty of the legislation gives rise to a second judicial concern over the difficulties of interpretation. As I have argued in other work, case law has made very little progress in developing a robust doctrine to govern the duty of reasonable accommodation. Rather than face this uncharted doctrinal territory, judges have instead restricted the coverage of the statute by narrowly interpreting the definition of a covered "qualified individual with a disability."137 Whatever their motivation, however, it is difficult to deny that the judicial reaction to the ADA has been considerably more skeptical and resistant than it has been toward more traditional civil rights legislation. This reaction mirrors closely the patterns of public support across the civil rights policy continuum.

136. See, e.g., Kreiger, supra note 26, at 7.
CONCLUSION

We saw in Part I that the concepts of antidiscrimination and accommodation sometimes provide a useful shorthand terminology for civil rights policies at opposite ends of a continuum. However, careful attention to subtle gradations along that continuum can also reveal a more precise picture of the entire distribution of claims under the various statutes. Part II showed that contemporary debates about issues such as Congress' Section Five powers, affirmative action, the level of accommodation costs, and judicial power to interpret civil rights statutes all follow patterns consistent with the analysis in Part I. Although accommodation mandates undoubtedly share some characteristics with more traditional antidiscrimination rules, the policies are, for most practical purposes, meaningfully distinct. Future analyses of these issues should undoubtedly take careful account of the ways antidiscrimination and accommodation may subtly overlap. Neither scholars nor participants in public debates about civil rights policy, however, need to consider abandoning the distinction that has informed so many discussions about these issues.