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The Anti-Bottleneck Principle in Employment Discrimination Law

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THE ANTI-BOTTLENECK PRINCIPLE IN EMPLOYMENT DISCRIMINATION LAW

JOSEPH FISHKIN*

State legislatures and the Equal Opportunity Employment Commission (EEOC) have moved in parallel in recent years to provide new protections for the employment prospects of some surprising groups: people who are unemployed, people who have poor credit, and people with past criminal convictions. These new protections confound our usual theories of what antidiscrimination law is about. These groups are disanalogous in a variety of respects to groups defined by such characteristics as race, sex, and national origin. But the legislators and regulators enacting these new protections were responding to pervasive problems they observed in the opportunity structure of our society—problems of a particular kind that I call bottlenecks. *Essentially, these legal actors judged that poor credit, unemployment, and past criminal convictions were having too outsized an effect on a person's employment prospects. If many or most employers demand good credit, then good credit becomes a serious bottleneck: a narrow place through which workers must pass to reach a wide range of opportunities on the other side.*

This Article argues that the anti-bottleneck principle*—the principle that the law ought to ameliorate severe bottlenecks in the opportunity structure where it can feasibly do so—is not only a way of understanding these new, cutting-edge protections, but also a way of understanding much of the project of Title VII and our existing body of antidiscrimination law. This Article explores the role the anti-bottleneck principle plays in legislators' decisions to enact antidiscrimination laws and in decisions by judges and by the EEOC about how to interpret and enforce such laws. The Article argues that the anti-bottleneck idea is at the heart of both disparate treatment law and disparate impact law—and that it should*

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* Assistant Professor, University of Texas School of Law. For helpful comments on earlier versions of the argument, I would like to thank Karen Engle, Chai Feldblum, Cary Franklin, Willy Forbath, Wendy Greene, Christine Jolls, Angie Littwin, Michelle Rodriguez, Larry Sager, Vicki Schultz, Michael Selmi, Reva Siegel, Nelson Tebbe, Deborah Widiss, Noah Zatz, Mike Zimmer, and the participants in the annual Colloquium on Current Scholarship in Labor and Employment Law; the panel on New Voices in Labor and Employment Law at the Southeastern Association of Law Schools; the faculty workshops at Ohio State and Seattle University; and the Employment Discrimination Law Section panel on "Title VII at Fifty" at the American Association of Law Schools annual meeting. I thank Alejandra Avila, Braden Beard, Molly Barron, Maggie Buchanan, Joseph Keeney, Christopher Larson, and Julie Patel, as well as law librarian Kasia Solon Cristobal, for excellent research assistance.

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cause us to think differently about the function of disparate impact law. The EEOC lawyers who started down the path that led to Griggs v. Duke Power *understood that general ability tests were becoming a major bottleneck in the opportunity structure. By limiting the use of those tests,* Griggs *ameliorated a bottleneck that had arbitrarily constrained the opportunities of many whites as well as blacks.*

Finally, turning from the positive to the normative, this Article defends the central—if previously unacknowledged—role that the anti-bottleneck principle plays in our law of equal employment opportunity. It is a profound challenge for any legal system to promote "equal opportunity" in a world of pervasive difference and inequality, where the mechanisms that perpetuate inequality shift over time. The anti-bottleneck principle turns out to be a strong and surprisingly practical response to these challenges.

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INTRODUCTION

In the past several years, American states and localities have enacted a new wave of employment discrimination statutes aimed at protecting the job prospects of people who are unemployed, who have poor credit, or who have past criminal convictions.[1] The Obama administration, members of Congress, and the EEOC have recently proposed parallel protections in each of these areas at the federal level.[2]

These new statutes are antidiscrimination laws. But they are antidiscrimination laws of a kind that most of our usual theories of antidiscrimination law are hard-pressed to explain.[3] People with criminal convictions, people who are unemployed, and people with poor credit are not groups for whom one would ordinarily expect our law to show particular solicitude. They are disanalogous in a variety of salient respects to groups defined by such characteristics as race, religion, sex, national origin, and age, the groups covered by Title VII and the ADEA. (Indeed it is not entirely clear that persons with poor credit constitute a "group" in any relevant pre-discrimination sense at all.)

Many of these new statutes also confound our usual ways of thinking about antidiscrimination law in another way. Most of the "ban the box" statutes about criminal convictions and most of the statutes about unemployment status do not actually bar discrimination on those grounds in an employer's final decision. Instead these statutes bar employers from erecting certain initial barriers that block the consideration of all such applicants—policies that "no unemployed need apply," or check-boxes on the initial application form asking applicants if they have ever been convicted of a crime (hence the name "ban the box"). An employer

1. *See infra* notes 25–35 and accompanying text.
2. *See infra* notes 27, 33, 39–41 and accompanying text.
3. *See infra* Part V.

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remains free to obtain the information at a later stage in the process and free to decide not to hire the applicant because of it. Such statutes define no "forbidden grounds" for employment decisions. Yet these statutes have an important practical effect. They ensure that an applicant can make it through an initial cut, giving her an opportunity to convince employers that perhaps, despite a past criminal conviction or a bout of unemployment, she is nonetheless the best candidate for the job.

Legislators enacted all these statutes in response to what they viewed as pervasive problems in the opportunity structure—problems of a particular kind that I call *bottlenecks*.[4] Essentially, legislators judged that poor credit, unemployment, or past criminal convictions were having too outsized an effect on a person's employment prospects because too large a proportion of employers either were using or might soon use these criteria to screen their applicants.

Imagine that in a labor market with numerous employers, just one decided to use credit checks to screen potential hires. In that case, there would be no significant bottleneck—and likely no calls for legislation. Plenty of job opportunities would remain open to those with poor credit history.

But now suppose credit checks plummet in price. Or suppose credit bureaus launch a marketing campaign and successfully persuade most employers to use their products to screen applicants. Now the good credit history requirement has become a serious bottleneck: a narrow place in the opportunity structure through which many people must pass if they hope to reach a wide range of opportunities that open out on the other side.

The more *pervasive* the use of a particular test, criterion, or practice across a wider range of job opportunities and firms, and the more *strict* or dispositive its effect on employment decisions, the more severe the bottleneck. (A bottleneck is even more pervasive if its effects extend beyond the employment sphere.) The new wave of antidiscrimination statutes with which I began have the purpose and the effect of ameliorating certain bottlenecks—that is, making them less severe—by making them either less pervasive or less strict or both.

So far, all this may seem an interesting but idiosyncratic tale of a few new cutting-edge statutes. But this Article argues that what I call the *anti-bottleneck principle*—the principle that the law ought to ameliorate severe bottlenecks in the opportunity structure where it can—is far more than

4. *See infra* Part III.

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that. It is a way of understanding a central dimension of the project of antidiscrimination law.

The anti-bottleneck principle is a way of understanding the function of the more familiar, paradigmatic antidiscrimination protections—laws against discrimination on grounds such as race and sex. Race and sex are among the most powerful bottlenecks in the opportunity structure of our society, in the sense that they have broad, pervasive effects, both direct and indirect, on everyone's opportunities. If it is not just a few employers, but lots of them, that evaluate applicants differently or steer applicants and employees into different roles based on race or sex—and especially if such effects are not confined to the world of employment, but extend as well to other domains such as education or housing—then it makes sense to use legal tools such as disparate treatment law and disparate impact law to make these bottlenecks less severe.

In the past several years, the EEOC has moved in parallel with state legislators to scrutinize employers' hiring decisions that turn on credit checks, unemployment, and past criminal convictions.[5] The EEOC's hearings, guidance, and enforcement actions regarding each of these employer practices focus on the practices' possible racial disparate impact. This emphasis reflects the agency's statutory charge: the EEOC's job is enforcing Title VII, not formulating new antidiscrimination legislation. The state legislators, as we shall see, approach the same problems from a different direction. They primarily emphasize not the racial disparate impact of these practices, but rather, their potential to create bottlenecks that many of their constituents—of all races—have difficulty passing through.

But in the end, these seemingly quite different approaches converge. Both the state legislatures and the EEOC invoke multiple arguments for ameliorating the bottlenecks caused by these employer practices. Some of these arguments focus exclusively on the set of people who will, by definition, have trouble passing through the bottlenecks these employer practices create: people with poor credit, people who are unemployed, or people with past criminal convictions. Other arguments, invoked both by state legislators and by the EEOC, focus on the ways these bottlenecks reinforce *other* bottlenecks. Although there are plenty of people with bad credit of every race and every socioeconomic status, bad credit is unevenly distributed: a credit check bottleneck is one that poor people, and members of some racial minority groups, will be especially likely to have trouble

5. *See infra* notes 39–41 and accompanying text.

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passing through. Therefore, a credit check bottleneck will tend to reinforce these larger bottlenecks in the opportunity structure—the structural limits on the opportunities that racial minorities, and the poor, have open to them in our society.

A crucial part of analyzing the severity of any bottleneck is tracing its effects on other bottlenecks in this way. Part—but not all—of why a credit check bottleneck is problematic is the way it reinforces these other, more pervasive bottlenecks that constrain opportunities based on race or class.

Against the backdrop of the Great Recession—which caused unemployment to spike and ruined many people's credit—state legislators and the EEOC, although reasoning from different starting points, have arrived at highly overlapping conclusions. The race-based disparate impact analysis and the non-race-based arguments prominent in state legislative deliberations are complementary. These modes of analysis helpfully foreground different aspects of what is really the same problem, in a way that the anti-bottleneck principle can help us see.

This Article explores the role the anti-bottleneck principle plays in the reasoning of a variety of actors in a variety of contexts: decisions by legislators to enact antidiscrimination laws and decisions by judges and by the EEOC about how to interpret and enforce such laws. It argues that the anti-bottleneck idea is at the heart of both disparate treatment law and disparate impact law—and that it should cause us to think differently about what disparate impact law is and how it functions.

Finally, turning from the positive to the normative, this Article argues that it is good that the anti-bottleneck principle plays a central, if previously unacknowledged, role in our law of equal employment opportunity. Any legal system faces complex challenges when attempting to implement any plausible conception of equal opportunity in a world of pervasive inequalities. The anti-bottleneck principle is a strong and surprisingly practical starting point for responding to these challenges.

Part I of this Article very briefly sets the stage for the argument to follow by explaining the conceptual problem that the anti-bottleneck principle can help us solve.

Part II explores the anti-bottleneck principle by investigating in some depth a new wave of antidiscrimination statutes: ban the box, "no unemployed need apply," and the regulation of employers' use of credit checks in hiring. The legislators and activists behind these statutes enacted them because of concerns that add up to a principle: that law ought to intervene, where it can, to ameliorate severe bottlenecks in the opportunity structure.

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Part III offers an account of this anti-bottleneck principle and shows how applying it in practice involves deciding which bottlenecks are the most severe. This, in turn, requires analyzing the ways one bottleneck reinforces another. This Part offers an initial example of a court employing a version of the anti-bottleneck principle. It then argues that this principle also plays an important role in the EEOC's choices about how to enforce Title VII.

Part IV argues that the anti-bottleneck principle was at the heart of *Griggs v. Duke Power*, the foundational disparate impact case, and that it can help us understand what disparate impact law is really about. Justice Scalia has recently suggested that disparate impact law amounts to a "racial thumb on the scales"—essentially, that the law should be viewed as a form of zero-sum redistribution of opportunities from one racial group to another, and that this raises constitutional difficulties.[6] The anti-bottleneck principle helps us see why disparate impact law in fact does not work that way. Instead, disparate impact law ameliorates certain bottlenecks in the opportunity structure, forcing employers to revise certain practices in ways that promote equal opportunity. This has benefits for people both inside and outside the statutorily protected group who would otherwise have been unable to pass through the relevant bottleneck.

Part V argues that in addition to being, as a positive matter, part of our existing body of antidiscrimination law, the anti-bottleneck principle is a distinctive, and normatively attractive, way of thinking about the project of equal opportunity. This Part responds to some objections to the anti-bottleneck principle, articulates some of its limits, and explores some of its frontiers.

I. THE CHALLENGE: EQUAL OPPORTUNITY AND EMPLOYER DISCRETION

Before we begin in earnest, let us pause for a moment on a necessary preliminary question: to what problem is the anti-bottleneck principle a solution? Why do we need a principle like this one?

The anti-bottleneck principle provides a basis for negotiating a deep conflict between two principles whose fundamental tension defines American employment discrimination law. On the one hand, Americans believe deeply in equal opportunity—although we disagree equally deeply about its contours.[7] On the other hand, we are firmly committed to the idea

6. Ricci v. DeStefano, 557 U.S. 557, 594 (Scalia, J., concurring). *See infra* Part IV.E.

7. *See generally* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 25–40 (2014) (discussing competing conceptions of equal opportunity).

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that employers should generally decide for themselves whom to hire, promote, and fire.

Even at this very high level of abstraction, these two principles are in deep conflict. There are a number of ways to conceptualize equal opportunity. But any coherent conception of equal opportunity, even a narrow one focused solely on meritocracy, is wholly incompatible with a regime in which employees may be hired or fired for any reason or no reason at all—even for such highly un-meritocratic reasons as cronyism, racial bias, or personal pique.

With the exception of a few islands of "for-cause" employment built on civil service rules or collective bargaining, American law offers employees no general guarantee either of meritocratic treatment, or of equal opportunity more broadly conceived. The general rule is employment at will.[8] At the same time, American law does not offer employers the total discretion over personnel decisions that a staunch libertarian might prefer. Instead, American law departs from the general at-will rule selectively, intervening to protect workers and job applicants from *certain* decisions by employers that are inconsistent with equal opportunity, but not other such decisions.[9] We label those certain decisions wrongful discrimination, and we make them subject to legal sanction. Meanwhile, our law permits all other departures from equal opportunity—cronyism, for instance—as part of our commitment to a general regime of broad employer discretion over whom to hire, promote, and fire.[10]

The question of exactly where to draw this boundary—when to enforce some conception of equal opportunity, and when to allow employers to do as they wish—is the fundamental question at the heart of American employment discrimination law. Our answers to this question shape the field. Consider our law of disparate impact. It requires employers to meet a particularly high standard of meritocratic justification for some facially neutral criteria. But only some. Employers need not show that *every* facially neutral criterion they use is job-related and justified by business necessity—only those criteria with a disparate impact on one or more

8. *See generally* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996).

9. Cynthia Estlund argues provocatively that carving out these exceptions to the general at-will baseline actually reinforces that baseline. *Id.*

10. Cronyism is thus actually a *defense* against charges of discrimination, say on the basis of race, in a legal disparate treatment regime focused on race-based intent. *See* Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997).

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statutorily enumerated classes. Similarly, our law of disparate treatment does not bar *every* arbitrary reason, or every reason without a strong business justification, that an employer might have for hiring or firing an employee. Our law only bars reasons that are based on certain specific, enumerated characteristics such as race or sex—and now, in some states, interestingly, credit history. What is behind those selections? Some principle is needed if we are to decide, as a general matter, when equal opportunity ought to trump the broad employer discretion that is the hallmark of our at-will regime.

Our traditional ways of thinking about this problem all focus on the normative or constitutional status of groups. Scholars frame the question in a variety of ways: in terms of which groups are subordinated,[11] which forms of group-based decision-making are "demeaning,"[12] or which group-based classifications history has taught us ought to be illicit.[13] In practice, advocates usually begin not with principle but with analogy, mostly involving race. We have long established that race discrimination is both wrongful and illegal; we draw analogies to race in order to ask whether some other form of group-based discrimination ought similarly to be viewed as wrongful or made illegal.[14] Such analogies are never perfect, because no two groups (and no two forms of discrimination) are ever quite the same. Because there are always differences, this analogical approach leads quickly into a morass of questions familiar—indeed entirely borrowed—from constitutional law. We may ask about immutability, political powerlessness, or a history of discrimination against the group, along with meta-questions about which of these variables or others determine whether a group is analogous in just the right ways to the groups whose protected status is already established in our law.[15]

This kind of reasoning may be inevitable in constitutional law, where the project is to map the reach of heightened scrutiny under the Equal

11. In a classic article, Owen Fiss articulated this "group-disadvantaging" principle of equal protection, now known as anti-subordination, and distinguished it from the anticlassification principle. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

12. *See* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 34–58 (2011) (making the case for this view).

13. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (Roberts, C. J.) ("[W]hen it comes to using race to assign children to schools, history will be heard.").

14. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011) (exploring this dynamic and how it shaped sex discrimination law).

15. These Equal Protection Clause criteria themselves remain deeply contested. For an early canonical formulation, see Justice Powell's majority opinion in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

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Protection Clause and our best guideposts are the groups already receiving heightened scrutiny under that clause. But such reasoning is an imperfect fit at best for our law of employment discrimination. American law often prohibits employment discrimination on grounds that fit poorly or not at all with this equal protection-derived framework: different states bar discrimination on grounds from veteran status[16] to civil union status,[17] from height and weight[18] to place of birth,[19] from whether one receives public assistance[20] to whether one is a smoker or a non-smoker.[21] The federal Genetic Information Nondiscrimination Act of 2008 ("GINA") protects against discrimination on the basis of genetic characteristics that are often unknown to the employee herself and which hardly define any coherent "group" at all—let alone a politically powerless group with a history of discrimination.[22] The new state employment discrimination statutes that are the touchstone of this Article, regarding credit history, unemployment status, and past criminal convictions, further underscore the gap between statutory employment discrimination law and our usual group-based frameworks for thinking about equal protection. We need some principle or principles, other than "follow the Equal Protection Clause," to decide which employment decisions ought to be subject to legal sanction—and also to answer the distinct question of which employment decisions are normatively problematic, meaning that even if they are legal, one ought not to make them.

Some might argue that we need no such principles: instead law ought to require "equal opportunity," perhaps in the form of meritocratic treatment, across the board. On this view, the law should require employers to justify—in terms of something resembling business necessity and job relatedness—not only those facially neutral criteria that have a disparate impact on a statutorily protected group, but *all* criteria and business decisions, full stop.

This proposal is a non-starter because it is simply too intrusive. It runs roughshod over our law's commitment to leaving employers substantial discretion over whom to hire, promote, and fire. Interestingly, as Pauline

16. *See* WASH. REV. CODE ANN. § 49.60.180 (West 2008).
17. *See* CONN. GEN. STAT. ANN. § 46a-81c (West 2009); N.J. STAT. ANN. § 10:5–12 (West Supp. 2013).
18. *See* MICH. COMP. LAWS ANN. § 37.2202 (West 2001 & Supp. 2013).
19. *See* VT. STAT. ANN. Tit. 21, § 495 (2009).
20. *See* MINN. STAT. ANN. § 363A.08 (West 2012); N.D. CENT. CODE § 14-02.4-03 (2009).
21. *See* KY. REV. STAT. ANN. § 344.040 (West Supp. 2012).
22. Genetic Information Nondiscrimination Act of 2008 § 202, 42 U.S.C. § 2000ff-1 (Supp. II 2008).

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Kim has shown, most Americans believe incorrectly that they are entitled under current law to be treated in something like a meritocratic manner, at least once they are incumbent employees.[23] This suggests that our societal commitment to some dimensions of equal opportunity runs deeper than the protection current law provides. Even so, our law reflects a strong commitment to at-will employment. So our law must enforce equal opportunity selectively. The key question, then—an unavoidable question—is what principle should guide the selections. When exactly should the law enforce some conception of equal opportunity, and when should it let employers do as they wish?

The anti-bottleneck principle offered in this Article is an answer to this question. Unlike most other possible answers, it can justify not only laws against discrimination on the basis of characteristics such as race and sex, but also states' and localities' new protections against discrimination on the basis of unemployment status, credit history, and criminal background. Moreover it reveals important continuities among these laws and across the broader terrain we might call the law of equal opportunity. Not only in antidiscrimination law, but also in areas such as education law and disability law, our law often advances an equal opportunity project by targeting relatively severe bottlenecks in the opportunity structure and finding ways to make them less severe.[24]

The best way to understand the anti-bottleneck principle is to see it in action. So let us begin by exploring three sets of new statutes, and the arguments legislators and advocates offered in favor of enacting them.

II. THREE NEW KINDS OF ANTIDISCRIMINATION STATUTES—AND WHY THEY ARE HERE

As recently as early 2007, no legal barriers prevented employers from using credit checks in hiring. Since then, ten states have enacted laws prohibiting this practice in most circumstances;[25] parallel legislation is

23. *See* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 447 (finding that workers systematically and wildly overestimated their rights not to be fired without good cause); *see also* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) (finding, inter alia, that "although the common law rule clearly permits an employer to terminate an at-will employee out of personal dislike, so long as no discriminatory motive is involved, an overwhelming majority of the respondents—89%—erroneously believe that the law forbids such a discharge").

24. This Article only alludes to these broader continuities. For more see FISHKIN, *supra* note 7.

25. *See* Act of Oct. 9, 2011, ch. 724, 2011 Cal. Legis. Serv. (A.B. 22) (codified at CAL. CIV. CODE § 1785.20.5 (West Supp. 2013) & CAL. LAB. CODE § 1024.5 (Supp. 2013)); Employment

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pending in at least twenty more states and the District of Columbia[26] and a federal ban has been introduced in Congress.[27] Laws prohibiting employers from barring unemployed applicants were unheard of as recently as 2010, but were enacted since then in Oregon,[28] New Jersey,[29] Washington D.C.,[30] and localities including Chicago and New York City;[31] they have also been introduced in other states and localities[32] and in Congress.[33] Most of these laws and ordinances merely prohibit employers from advertising that they are barring unemployed applicants entirely—"no unemployed need apply"—but ordinances in New York City, Washington D.C., and Madison, Wisconsin, also prohibit disparate treatment on the basis of unemployment status. Finally, ban the box laws and ordinances aimed at protecting the employment prospects of individuals with past criminal convictions are now in force in eleven

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Opportunity Act, ch. 125, 2013 Colo. Sess. Laws (S.B. 13-018) (codified at COLO. REV. STAT. ANN. § 8-2-126 (West 2013)); Act of July 13, 2011, Pub. L. No. 11-223, 2011 Conn. Pub. Acts 2198 (codified at CONN. GEN. STAT. ANN. § 31-51tt (West Supp. 2013)); Act effective July 1, 2009, Pub. L. No. 1, 2009 Haw. Sess. Laws 793 (codified at HAW. REV. STAT. ANN. §378-2(a)(8) (LexisNexis 2010 & Supp. 2012)); Employee Credit Privacy Act, Pub. L. No. 96-1426, 2010 Ill. Laws 6531 (codified at ILL. COMP. STAT. ANN. 70/10 (West Supp. 2013)); Job Applicant Fairness Act, ch. 28–29, 2011 Md. Laws 196 (codified at MD. CODE ANN. LAB. & EMPL. § 3-711 (LexisNexis Supp. 2012)); Act of May 23, 2013, ch. 76, 2013 Nev. Laws (S.B. 127) (codified at NEV. REV. STAT. § 613.570 (2013)); Act of Mar. 29, 2010, ch. 102, 2010 Or. Legis. Serv. (SB. 1045) (codified at OR. REV. STAT. ANN. § 659A.320 (West 2013)); Act of May 17, 2012, No. 154, 2012 Vt. Legis. Serv. (West) (codified at VT. STAT. ANN. tit. 21, § 495i (Supp. 2012)); Act of Apr. 18, 2007, ch. 93, 2007 Wash. Sess. Laws 344 (codified at WASH. REV. CODE ANN. § 19.182.020 (West 2013)).

26. *See Use of Credit Information in Employment 2013 Legislation*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-info-in-employ-2013-legis.aspx (detailing pending legislation) (last updated Sept. 29, 2014).

27. *See* Equal Employment for All Act, H.R. 645 & S. 1837, 113th Cong. (2013) (federal legislation aimed at prohibiting the use of credit checks as part of employer hiring practices).

28. S.B. 1548, 76th Leg., Reg. Sess. (Or. 2012) (enacted) (codified at OR. REV. STAT. ANN. § 659A.550 (West, Westlaw through 2014 Reg. Sess., Ch. 80)).

29. A.B. 3359, 214th Leg., Reg. Sess. (N.J. 2011) (enacted as amended and passed by the Legislature following Governor's conditional veto) (codified at N.J. STAT. ANN. § 34:8B-1 (West, Westlaw through 2013 Legis. Sess.)).

30. B. 486, 19th Council Period, (D.C. 2012) (enacted May 31, 2012) (codified at D.C. CODE § 32-1362 (2014)).

31. N.Y.C., N.Y. City Council Res. No. 814-A (Mar. 3, 2013) (enacted over Mayor Bloomberg's veto) (codified at N.Y.C., N.Y., ADMIN. CODE §§ 8-102(5), (27) & 8-107(21)); CHI., ILL., MUNICIPAL CODE § 2-160-055 (2013) (effective May 1, 2012). For another local example, see MADISON, WIS., CODE OF ORDINANCES § 39.03 (2014) (amendments enacted December 2013); *see also* A.B. 1450, 2011-2012 Leg., Reg. Sess. (Cal. 2012) (passed but vetoed by Governor).

32. *See* Kristen B. Frasch, *Pushing Back Against Unemployment Discrimination*, HUM. RES. EXEC. ONLINE (July 10, 2013), http://www.hreonline.com/HRE/view/story.jhtml?id=534355659 ("[A]s of May 2013, five states—New York, Pennsylvania, Massachusetts, Iowa and Minnesota—have introduced bills during the 2013 legislative session, with another 17 states considering doing so.").

33. *See* Fair Employment Opportunity Act of 2014, S. 1972, 113th Cong. (2014).

states[34] as well as over fifty cities and counties.[35] The details vary, but these laws generally bar employers[36] from asking prospective employees on an application form whether they have been convicted of a crime; some also prohibit employers from running criminal background checks on an applicant until that person is a "finalist" for the position. However, all these laws allow employers to find out at some point whether an applicant has a criminal background and to choose not to hire for that reason in at least some circumstances.[37]

This Part asks a simple question: Why did legislators enact these laws?

If we thought that antidiscrimination law were exclusively about protecting the groups that receive heightened scrutiny under the Equal Protection Clause, we would understand all of these new statutes in a particular way: as efforts to attack certain facially neutral practices because of their disparate impact on protected classes. In particular, one could justify all three of these new sets of statutes by arguing that each takes aim at an employment practice that has a disparate impact on some racial minorities, including African-Americans.[38]

That is part of the story of these laws. It is the part of the story that the EEOC has most emphasized as it has moved, in parallel with the ban the box legislation in the states, to update its own administrative guidance

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34. The state legislatures in California, Connecticut, Colorado, Delaware Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, and Rhode Island all passed statutes to ban the box. In addition, a twelfth state, Illinois, banned the box via administrative order. *See* NAT'L EMP. LAW PROJECT, STATEWIDE BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 2 (2014), *available at* http://www.nelp.org/page/-/SCLP/ModelState HiringInitiatives.pdf; *Governor Bans the Box for Delaware Public Employees*, STATE OF DEL. (May 8, 2014), http://news.delaware.gov/2014/05/08/governor-bans-the-box-for-delaware-public-employees/ (reporting legislation in Delaware to ban the box, signed just as this Article was going to press).

35. *See* NAT'L EMP. LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 2–27 (2014), *available at* http://www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf (listing cities and counties as of January 2014). The jurisdictions include various cities of the Northeast (e.g., Boston, New York, and Philadelphia), Midwest (e.g., Chicago, Cincinnati, and the Twin Cities), the South (e.g., Atlanta, Memphis, Jacksonville, and Tampa), and the West Coast (e.g., Seattle, Multnomah County, Oregon, and many jurisdictions in the Bay Area). *Id.*

36. Some of these laws and ordinances apply only to public employers; others cover public employers and those private employers that are government contractors; still others cover all employers in the jurisdiction, public and private. *See infra* notes 113–14 and accompanying text.

37. These statutes interact in some cases with a different, and older, handful of state statutes that actually prohibit discrimination on the basis of past criminal convictions (with some exceptions). *See infra* note 115.

38. *See infra* notes 73, 89, and 118–31 and accompanying text.

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regarding the use of past criminal convictions in hiring decisions.[39] The EEOC has also held hearings over the past three years about discrimination against the unemployed, and about the use of credit checks in hiring.[40] Unsurprisingly, given the EEOC's statutory charge, the agency is scrutinizing these practices as potential Title VII violations because of their potential racial disparate impact. The EEOC has brought some race-based disparate impact claims under Title VII on this theory,[41] as have some private litigants.[42]

However, most of the activity to date in all three of these areas has been in state legislatures. And there, the racial disparate impact story, while present to some degree, has not been the primary justification legislators have offered for enacting these laws. Advocates and sponsors of these three sets of laws have argued, primarily, that the practices these laws target amount to pervasive, and growing, barriers to employment—barriers that make it very difficult for large numbers of people, of all races, to find a job.[43]

Sponsors and advocates have also emphasized the limited meritocratic justification for each of these practices. That is, they have argued that poor credit, unemployment, or a past (especially long-past) criminal conviction is not effective meritocratic predictors of future job performance or misconduct. However, by itself, that argument is plainly insufficient. Employers' hiring practices are often inconsistent with meritocracy:

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39. *See* EEOC, ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

40. *See* Press Release, EEOC, EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 14, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/2-14-11a.cfm; Press Release, EEOC, EEOC Public Meeting Explores the Use of Credit Histories as Employee Selection Criteria (Oct. 20, 2010), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-20-10b.cfm.

41. *See, e.g.*, Press Release, EEOC, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm (describing recent EEOC lawsuits filed regarding the racial disparate impact of criminal background check policies at BMW and Dollar General). As of this writing, these claims by the EEOC have hit significant roadblocks. *See, e.g.*, EEOC v. Freeman, No. RWT 09cv2573, 2013 WL 4464553 (D. Md. Aug. 9, 2013) (granting summary judgment to the defendant and finding that the EEOC, in order to prevail, needed to identify a more specific practice than the use of credit history and criminal background checks, and prove the disparate impact of that practice); EEOC v. Kaplan Higher Educ. Corp., 122 Fair Empl. Prac. Cas. (BNA) 509, 2014 WL 1378197 (6th Cir. Apr. 9, 2014) (in a credit history disparate impact case, affirming summary judgment to the defendant and finding that the district court properly excluded the EEOC's expert testimony regarding the impact, on the grounds that the expert did not have a reliable method of determining individuals' races).

42. *See, e.g.*, Mayer v. Driver Solutions, Inc., No. 10-CV-1939 (JCJ), 2012 WL 3578856 (E.D. Pa. Aug. 17, 2012) (approving settlement of private class action claim of racial disparate impact of criminal background checks).

43. The remainder of this Part explores this legislative history in detail.

employers sometimes hire friends or family members (or family members' friends, and so on), or decline to give a promotion or a raise to an employee they personally dislike. As Part I discussed, American law does not generally bar such actions. The case for selectively engaging the legal machinery of antidiscrimination law to challenge a given practice or decision requires something more.

This Part argues that there were three key factors that caused legislators to pass antidiscrimination laws regarding credit checks, "no unemployed need apply" policies, and blanket refusals to hire anyone with a past criminal conviction. First, *pervasiveness*—legislators determined that these practices either were already, or risked becoming, sufficiently widespread to amount to severe bottlenecks in the opportunity structure, cutting some people off from a wide range of paths they might otherwise pursue. Second, evidence suggested to legislators that the *number of individuals affected* by these bottlenecks was high and/or rising. Third, it mattered to some legislators that these bottlenecks *reinforce other bottlenecks*—specifically, that these barriers deepen the challenges that poor people and/or racial minorities face in finding jobs.

Although this Part focuses on state legislative activity, its conclusion should cause us to view the parallel federal regulatory activities of the EEOC on these same three fronts in a different light. Unlike state legislatures, the EEOC is simply enforcing Title VII, and is therefore constrained to act against facially neutral employment practices only in cases of disparate impact on the basis of race, sex, and so on. However, the EEOC has many choices to make about *which* of the practices that have a disparate impact should be the subject of hearings, regulatory guidance, and enforcement actions. After all, many practices have a disparate impact on a protected group.[44] Most do not receive such agency scrutiny. As I will discuss, the anti-bottleneck principle appears to play an important role in the EEOC's choices about *which* practices having a disparate impact ought to be the targets of its regulatory processes and its enforcement resources. This is because the EEOC, like the state legislators, is attuned to severe bottlenecks in the opportunity structure and ready to use available legal tools to ameliorate them.

First, let us examine the new state statutes, from the perspective of the advocates who argued for them and the legislators who sponsored and enacted them.

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44. For starters, in a society like ours in which race and poverty are linked to some significant degree, an enormous variety of practices that have a disparate impact on the poor will also have a disparate racial impact.

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A. Credit Checks in Hiring

Employers have been using credit checks for the purpose of evaluating potential hires for many decades; this use of credit information was at least contemplated at the time of the original Fair Credit Reporting Act in 1970.[45] But around the turn of the twenty-first century something changed: this use of credit information became much more widespread. As the State of Vermont prominently noted in the legislative findings section of its recent statute barring the practice: "Employer surveys . . . suggest that over the last 15 years, employers' use of credit reports in the hiring process has increased from a practice used by fewer than one in five employers in 1996 to six of every 10 employers in 2010."[46] Those striking figures come from employer self-reports in surveys conducted by the Society for Human Resource Management (SHRM).[47] The rapidly-rising SHRM survey numbers figured prominently in a number of states' legislative debates about the new laws.[48]

Why did the use of credit checks by employers rise so rapidly in just a decade and a half? While it is impossible to determine precisely which factors were responsible for how much of the increase, two contributing causes are clear. First, the Internet made credit information quicker, easier, and cheaper for employers to obtain. Second, during this period the credit bureaus, in an effort to expand their markets, sold and marketed new credit report products specifically designed for employers.

Credit bureaus sell many kinds of products containing consumer credit information to different markets, from lenders to landlords and even to firms seeking new customers.[49] In the early twenty-first century, credit

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45. *See* Fair Credit Reporting Act, Pub. L. No. 91-508, § 613, 84 Stat. 1114, 1133 (1970) (regulating the use of credit information for employment purposes).

46. Act of May 17, 2012, No. 154, § 1(2), 2012 Vt. Legis. Serv. (West).

47. However, the most recent survey from 2012 actually shows a drop-off from the 2010 peak. *See* SOC'Y FOR HUM. RES. MGMT., SHRM SURVEY FINDINGS: BACKGROUND CHECKING—THE USE OF CREDIT BACKGROUND CHECKS IN HIRING DECISIONS 8 (2012).

48. *See, e.g.*, JUDICIARY COMM., CAL. STATE SENATE, BILL ANALYSIS: A.B. 22, at 4 (June 27, 2011) (summarizing comments in the California legislative debate) [hereinafter CAL. ASSEMB. BILL ANALYSIS]; Rep. Matt Lesser, Statement on Hearing on H.B. No. 5061 Before the Gen. Assemb. Comm. on Lab. and Pub. Emps. (Conn. Feb. 18, 2010), *available at* http://www.cga.ct.gov/2010/LABdata/Tmy/2010HB-05061-R000218State%20Rep.%20Matthew%20Lesser-TMY.pdf; PROF. STAFF OF THE COM. AND TOURISM COMM., FLA. SENATE, BILL ANALYSIS AND FISCAL IMPACT STATEMENT OF S.B. 100, at 4 (2013) (report on pending legislation); *see also* 156 CONG. REC. S3083 (daily ed. May 4, 2010) (statement of Sen. Feinstein) (quoting the same SHRM survey data in introducing amendment barring employers from using credit checks).

49. *See, e.g.*, *Industry Solutions*, TRANSUNION, https://www.transunion.com/direct/industrysolutions.page (last visited Aug. 20, 2014) (describing the services available to firms in many industries to screen residents, customers, debtors, and so on).

bureaus began to market specialized products such as Experian's "Employment Insight"[50] and Equifax's "Persona Plus,"[51] which were aimed specifically at employers interested in using credit information in employment decisions. Credit bureaus also sold credit information as part of more comprehensive background check products marketed by third parties to employers.[52]

The Fair Credit Reporting Act provides that an employer cannot access an employee's or applicant's credit information without that person's consent.[53] However, this protection is largely irrelevant in the hiring context because employers can, and do, make such consent a necessary component of an application for employment. (Employers are also free under the Act to fire current employees who refuse to consent to credit checks.[54]) The Act does contain a requirement that employers notify employees or applicants when they have taken an adverse action on the basis of credit information[55]; it is unclear how often this requirement is actually obeyed.[56] In any case, by 2010 the SHRM's data from firms' self-

50. *Employment Insight*, EXPERIAN, http://www.experian.com/consumer-information/ employment -credit-checks.html (last visited Aug. 20, 2014).

51. Press Release, Equifax, Equifax Delivers Employment Screening to NASD Member Firms (June 27, 2006), *available at* http://www.prnewswire.com/news-releases/Equifax-delivers-employment -screening-to-nasd-member-firms.56976737.html.

52. *See, e.g.*, *PEER Background Credit Check*, USA-FACT, https://www.usafact.com/ background-credit-check-peer-report.asp (last visited Feb. 20, 2014) ("USA-FACT currently provides background credit check reports directly from TransUnion."). Some of these third-party providers are affiliated with the credit bureaus themselves; others are not. Although exploring this topic is beyond the scope of this Article, it appears that credit report products are only the tip of a large iceberg of consumer data-based screening products now being marketed and sold specifically to employers—some of which fall within, and others of which fall outside, current credit reporting law. Regulators and legislators both appear to be stepping up their scrutiny of this broader class of products. *See, e.g.*, Consent Decree, United States v. Spokeo, Inc., No. CV12-05001 (C.D. Cal. June 12, 2012), *available at* http://www.ftc.gov/enforcement/cases-proceedings/1023163/spokeo-inc (resolving FTC action against consumer data company Spokeo for violations of the Fair Credit Reporting Act); Natasha Singer, *Citing Deep Data* Collections, Senator *Opens Inquiry of Information Brokers*, N.Y. TIMES, Oct. 11, 2012, at B3.

53. 15 U.S.C. § 1681b(b)(2)(A)(ii) (2012).

54. *See* Kelchner v. Sycamore Manor Health Ctr., 305 F.Supp.2d 429 (M.D. Pa. 2004), *aff'd*, 135 F.App'x 499 (3d Cir. 2005).

55. 15 U.S.C. § 1681b(b)(3) (2012).

56. Because applicants have no way to know why they were not hired, violations of this provision have been notoriously difficult to detect. *See* Stuart Silverstein, *Applicants: Past May Haunt You*, L.A. TIMES, Mar. 7, 1995, at A1 ("[E]xperts say violations by employers [of this reporting requirement] often go undetected. The result: Many people aren't even aware that their prospects were doomed by a background check."). The Federal Trade Commission has taken some actions in recent years to enforce this reporting provision. *See, e.g.*, Consent Decree, United States v. Imperial Palace, Inc., No. CV-S-04-0963-RLH-PAL (D. Nev. July 13, 2004) (resolving FTC's claim that defendant failed to notify applicants after denying or rescinding offers of employment based on credit information).

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reports suggested that a solid majority of employers were using credit checks in hiring.[57] The practice had become pervasive.

Despite credit bureaus' claims that credit history "provides insight into an applicant's integrity"[58] and predicts which employees will steal from employers and engage in other misconduct,[59] the best social science evidence currently available has not found any relationship between credit history and employee misconduct.[60] This presents a puzzle. Why would a majority of employers, or at least, a majority of those surveyed by SHRM, pay good money for a screening device that has not been shown to be valid for the purpose for which it is supposed to be used?

The most probable answer is that this screening device is cheap and convenient, so if employers believe that it at least *might* be valid, that may be good enough. That is, if an employer believes that screening for poor credit *might* have some degree of performance-predictive validity, then it could be economically rational under some conditions to deploy such a screen.[61] Specifically, it could be rational if the screening device is inexpensive, and one has a large number of relatively similar applicants to

57. *See supra* notes 46–47 and accompanying text.

58. EXPERIAN, *supra* note 50.

59. As Norm Magnuson, Vice President of Public Affairs for the Consumer Data Industry Association, the credit industry trade group, explained to me, assessing general employee traits such as responsibility "[i]s not how employers use credit reports. Instead, they use credit reports to measure the risk of loss to a business . . . ." E-mail from Norm Magnuson to author (Sept. 20, 2012, 8:17 A.M. EST) (on file with the *Washington University Law Review*).

60. Interestingly, while the available, credible evidence consistently fails to find any relationship between credit history and misconduct—the link the credit industry emphasizes—evidence is more mixed regarding the possibility of a relationship between credit history and some elements of job performance. The study that is probably the most methodologically sound to date found no evidence of either correlation. *See* Laura Koppes Bryan & Jerry K. Palmer, *Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?*, 15 THE PSYCHOL-MANAGER J. 106, 106 (2012) (finding that credit data "had no relationship with either performance appraisal ratings or termination decisions"). *But see* Jeremy B. Bernerth et al., *An Empirical Investigation of Dispositional Antecedents and Performance-Related Outcomes of Credit Scores*, 97 J. APPLIED PSYCHOL. 469, 469 (2012) (finding no relationship between credit scores and workplace deviance, but finding a relationship between credit score and certain personality traits, and in addition, between credit score and "task performance" ratings on supervisor questionnaires). The only study of any kind that I have seen pointing toward a relationship between credit problems and workplace misconduct or deviance is Edward S. Oppler et al., *The Relationship Between Financial History and Counterproductive Work Behavior*, 16 INT'L J. SELECTION & ASSESSMENT 416 (2008). This study found a correlation between financial problems and "counterproductive work behavior." *Id.* at 416. However, this study is less credible because unlike the other two studies just cited, it did not use actual credit history data furnished by the credit bureaus.

61. And surely it would seem to firms that it at least *might* be valid, if nothing else because of marketing by the credit reporting agencies themselves. However, it is also possible that the decision to use this screening device is *not* a rational choice at the firm level even in the limited sense outlined above, but human resources departments nonetheless make this choice in an effort to prove that they are carrying out a useful screening function.

deal with, many of whom are basically good enough. In that case, the savings in time and effort that result from culling the pool, even in an extremely imperfect way, exceed any marginal gains in future productivity that might have resulted from giving more of the applications a closer look.

Under those conditions, the logic of *meritocracy* and the logic of *microeconomic rationality* diverge. Meritocracy demands that we search diligently, perhaps expensively, for the most qualified applicants, whereas microeconomic rationality dictates that we employ the least costly method of culling our list, when the additional costs of using any fairer or more valid method exceed the additional benefits. If the story I have just told, emphasizing employers' search costs, accurately describes some employers' reasons for using credit checks to screen applicants, then one would expect to see this practice become more widespread during periods of high unemployment, when there are larger-than-usual numbers of job seekers for each opening. During such periods, one would also expect to see an increase in the number of people screened out by such checks.

In 2007, Washington became the first state to pass a law restricting the use of credit checks by employers, followed by Hawaii in 2009; Oregon in 2010; Connecticut, Illinois, and Maryland in 2011; California and Vermont in 2012; and Colorado and Nevada in 2013.[62] It is far from coincidental that almost all of these bills passed during a period of unusually high unemployment and economic difficulty. As State Senator Dan Harmon, who spearheaded the Illinois bill, argued during the debate in his chamber:

> [H]ow many folks in Illinois have lost their jobs and, as a result of losing their jobs, have gotten into some modest credit problems? They're looking for a job. They're—applying everywhere they can and now employers are looking at their credit history, even though there's no rational relationship to the job they're being hired—you don't need good credit to drive a forklift. You don't need good credit to turn a wrench. But you need a job to get your good credit back.[63]

Harmon went on to suggest that he understood why employers might be ordering these credit checks: "it's convenient."[64] But, he argued, "to look

62. *See supra* note 25.

63. S. Transcript, 96th Gen. Assemb., 2010 Reg. Sess. 119, at 42 (Ill. 2010), *available at* http://www.ilga.gov/senate/transcripts/strans96/09600119.pdf [hereinafter Ill. Senate Transcript].

64. *Id.*

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at credit history is just going to . . . perpetuate a vicious cycle and drive people further down."[65] This "vicious cycle" or "catch-22" argument seemed to strike a chord with a number of legislators in different states whose constituents' credit had been battered by economic distress.[66]

An opponent of the bill in Illinois, State Senator Matt Murphy, responded to Harmon by appealing to the general presumption in American law of employer discretion over whom to hire and promote. "[T]rust the job creator making that decision," he argued, "don't feel compelled to tie their hands with legislation."[67] Even if credit history turns out to be a poor measure of merit, Murphy argued, this hardly justifies "tak[ing] the discretion away from that job creator"[68] to decide whether that is the case. In response, Senator Harmon argued as follows:

> As a matter of public policy, we have decided that there are certain things employers should not consider in making decisions: race, gender, other—other factors. We're saying now that we see this pattern where employers are looking at credit history where it's just not relevant to the job. And people who are in a hole can't get out because of it. We are adding one more factor that employers shouldn't consider unless it's relevant to the job.[69]

The argument here is remarkably straightforward. At the same time, it is an argument that stands outside the traditional, group-based, equal protection-inflected framework through which we usually understand antidiscrimination law. Senator Harmon is placing credit history on a par with race and gender in the sense that all are now forbidden grounds for employment decisions under Illinois law. At the same time, he is making no claim that poor credit is an immutable characteristic, or that those with

65. *Id.*

66. *Id.; see also, e.g.*, Press Release, House Passes Job Applicant Fairness Act, Or. Leg. (Feb. 22, 2010) [hereinafter Oregon Release] (quoting Rep. Tina Kotek stating that "[i]t simply makes no sense to essentially punish a job seeker for not having a job"); CONN. GEN. ASSEMB. LAB. & PUB. EMPS. COMM., JOINT FAVORABLE REPORT: SB-361 (2011), *available at* http://www.cga.ct.gov/2011/JFR/S/2011SB-00361-R00LAB-JFR.htm [hereinafter CONN. BILL REPORT] (statement of Gwen Mills, representing UNITE HERE Locals 34, 217, and 335) (discussing "Catch 22"); *id.* (statement of Sen. Looney) (calling the link between unemployment and bad credit "double jeopardy"); *Hearing on H.B. 31 Before the S. Comm. on Labor*, 2009 Leg., 25th Sess. (Haw. 2009), *available at* http://www.capitol.hawaii.gov/session2009/Testimony/HB31_testimony_lbr_03-19-09.pdf [hereinafter *Hawaii Senate Hearing*] (statement of UNITE HERE Local 5) (calling the use of credit checks "a form of economic segregation, in which job seekers are behind on their bills because they lost a job or their hours were cut, but are still unable to get a job or promotion because they're behind on their bills").

67. Ill. Senate Transcript, *supra* note 63, at 41.

68. *Id.* at 43.

69. *Id.*

poor credit are a discrete and insular minority, a subordinated caste, a politically powerless group, or a group with a history of discrimination. He frames poor credit as nothing more than a situation into which "many folks" fall. He does not posit any stable group of people here—much less a group with a history of discrimination.[70]

Indeed, his claim does not invoke history at all. The claim is simply that "we see this pattern"—now, in the present—of employer conduct, and we further observe that this pattern extends to a sufficiently broad swath of employers that it creates a structural problem ("people who are in a hole can't get out because of it"). Harmon is claiming, essentially, that credit checks have become a bottleneck—one that constrains opportunities severely enough that people are finding it difficult to reach a large swath of employment opportunities that open out on the other side. By itself, Harmon argues, this is a sufficiently good reason to "take the discretion away from that job creator." This makes the use of credit checks different from other employer decisions that are perhaps equally questionable in meritocratic terms, such as a choice to hire the boss's nephew. The use of credit checks creates a more substantial bottleneck, Harmon argues; this gives us sufficient reason to activate the machinery of antidiscrimination law.

This anti-bottleneck argument was not the only argument in favor of credit check restrictions in the ten states that have so far passed such laws. But it was the main argument, and it gained critical strength as the recession wore on, leading to these statutes' enactment. Among the other arguments proponents made were privacy claims,[71] fairness claims related to the fact that many credit reports contain errors,[72] and three types of possible disparate impact arguments, each of which reflects a concern that the credit check bottleneck reinforces another important bottleneck in our society's opportunity structure. Some legislators and civil rights groups argued that the use of credit history has a disparate impact on racial minorities: data from the Federal Reserve strongly suggests that in the

70. Now in fact one could make the argument that there is a long history of discrimination against debtors. But no such claim plays any role in the argument that this legislator is making.

71. *See, e.g.*, WASH. STATE S. COMM. ON CONSUMER PROTECTION & HOUSING, SENATE BILL REPORT: SB 5827, at 2 (2007) [hereinafter WASH. BILL REPORT] (summary of the debate in the bill report) ("People have a right to keep the information in their credit reports private."); Letter from the Leadership Conference on Civil & Human Rights to the U.S. House of Representatives, *Cosponsor the Equal Employment for All Act H.R. 321* (June 21, 2012), *available at* http://www.civilrights.org/advocacy/letters/2012/cosponsor-the-equal.html [hereinafter Leadership Conference Letter].

72. *See, e.g.*, WASH. BILL REPORT, *supra* note 71, at 2; CAL. ASSEMB. BILL ANALYSIS, *supra* note 48, at 4; CONN. BILL REPORT, *supra* note 66 (statement of Sarah Poriss); *Hawaii Senate Hearing*, *supra* note 66 (statement of UNITE HERE Local 5).

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aggregate, black and Hispanic consumers have significantly lower credit scores than whites.[73] Some advocates and legislators also emphasized a different disparate impact issue, one not recognized under Title VII or the law of any state: the class-based impact on the lower middle class and the poor. For instance, proponents of the bill in Washington State argued that credit checks "make[] it more difficult for low-income workers to move into the middle class" and "unfairly penalize lower class and middle class people who have had financial difficulties . . . [and] are often the people who need employment the most."[74] Finally, some pointed out the possible disparate impact on victims of domestic abuse, whose credit abusers sometimes deliberately ruin.[75]

Each of these disparate impact arguments reflects concern on the part of state legislators that the credit check bottleneck reinforces other, more pervasive bottlenecks in our opportunity structure. But the main arguments for these laws focused on the way credit checks of prospective employees restrict the opportunities of people with poor credit. Even many groups with a racial justice mission, whose interest in the credit check issue presumably has some connection to its disparate racial impact, tended not to lead with that argument, but instead emphasized that credit checks create a bottleneck that many people, of all races, have trouble passing through.[76] (Some of the records of state legislative debates contain no discussion of racial disparate impact;[77] in some other states it fell to an

73. *See* BD. OF GOVS. OF THE FED. RES. SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT, at S-2 (2007), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf. The credit report products most employers obtain today do not contain the familiar "scores" used by lenders. Still, it is reasonable to surmise that the disparate impact will be similar, whether or not the credit history is reduced to a numerical score. For examples of such disparate impact arguments in legislative debates, see CAL. ASSEMB. BILL ANALYSIS, *supra* note 48, at 4; Act of May 17, 2012, No. 154, 2012 Vt. Legis. Serv. (West).

74. WASH. BILL REPORT, *supra* note 71, at 2; *see also* Ill. Senate Transcript, *supra* note 63, at 42 (statement of Sen. Harmon); CONN. BILL REPORT, *supra* note 66 (statements in support); *Hawaii Senate Hearing*, *supra* note 66 (statement of UNITE HERE Local 5); Oregon Release, *supra* note 66.

75. *See, e.g.*, WASH. BILL REPORT, *supra* note 71, at 2. *See generally* Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV 363 (2013).

76. For instance, in June 2012, the Leadership Conference on Civil and Human Rights, along with a broad coalition of civil rights organizations, wrote a joint letter to members of the House of Representatives urging passage of a federal bill that would restrict the use of credit checks by employers nationwide. *See* Leadership Conference Letter, *supra* note 71. The letter discussed every one of the arguments in the previous paragraph, and did not mention race at all until a brief discussion toward the end. *Id.*

77. *See, e.g.*, WASH. BILL REPORT, *supra* note 71 (official summary of arguments in this debate does not include mention of racial disparate impact).

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/6

advocate or an EEOC lawyer to raise the issue at all.[78]) Thus, while the relevance of the racial disparate impact argument to the passage of these statutes should not be dismissed, legislators tended to focus more on the "catch-22" problem and generally on the simple argument that credit checks amount to a bottleneck: that is, that this practice was just making it too difficult for a lot of people to get jobs. The economic downturn meant that far more people than usual were being screened out by credit checks, a fact not lost on advocates of the new laws.[79]

The anti-bottleneck argument depends crucially on the *pervasiveness* of the use of credit checks, as legislators' frequent citations of the SHRM survey data underscore. The higher the proportion of jobs that require good credit, the more serious the problem is.[80] This variable is conceptually separate from the number of individuals affected: even if only a small number of people have poor credit, it would be useful to know whether they are blocked from most jobs or only a few.

This has remedial implications. In order to ameliorate this bottleneck, it is not necessary to eliminate the use of credit checks by employers entirely. Greatly cutting back on the practice, so that only a limited range of jobs involve such checks, will achieve most of the benefits of a total ban (from an anti-bottleneck point of view), while at the same time allowing employers to retain the discretion to use the checks where the gains from doing so seem greatest.

That is the compromise state legislators struck. The various new statutes barring employers from using credit information all contain significant exceptions for situations, which the statutes spell out, in which credit history is a bona fide occupational qualification (BFOQ) for a job. Some statutes make a broad exception for employers that are financial institutions;[81] most exempt positions where employees will have access to

78. *See, e.g.*, CAL. ASSEMB. BILL ANALYSIS, *supra* note 48; CONN. BILL REPORT, *supra* note 66 (statement of Gwen Mills); *Hawaii Senate Hearing*, *supra* note 66 (statement of Stuart J. Ishimaru, Commissioner and Acting Chairman of the EEOC, and Coral Wong Pietsch, representing the Hawai`i Civil Rights Commission).

79. *See, e.g.*, Editorial, *The Credit-History Pariah Class*, N.Y. TIMES, Mar. 25, 2013, at A22 ("[T]he proportion of people with poor ratings—credit scores under 600—has grown from about 15 percent in the years before the recession to about 25 percent in 2011.").

80. This formulation is a bit of an oversimplification. To measure pervasiveness in a more nuanced way we might ask not simply about the number of jobs, but about the different kinds of jobs and paths a person might pursue. A bottleneck is especially pervasive if it affects the pursuit of a wide range of different jobs. In addition, we ought to ask whether a bottleneck extends beyond the employment sphere.

81. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51tt(b)(1), (a)(3) (West Supp. 2013) (exempting all financial institutions); VT. STAT. ANN. tit. 21, § 495i(c)(1)(C) (Supp. 2012) (same); *see also, e.g.*, OR.

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other people's bank account information or large amounts of cash.[82] These BFOQ exceptions cover a significant number of jobs, but a very low proportion of all jobs. These statutes thus balance the goals of, on the one hand, allowing employers to use credit information where they might view it as most valuable to do so, and on the other hand, preventing this practice from becoming so pervasive that it becomes a severe bottleneck in the opportunity structure.

And really this is not so different from the function of the (generally narrower) BFOQ exceptions in Title VII or any antidiscrimination statute. When the law allows a limited BFOQ exception, so that employers may in some cases discriminate on a ground such as sex that is normally forbidden, we are allowing employers to limit *some* opportunities to men or to women while at the same time making sure that such discrimination is confined to a sufficiently narrow band that being a man (or a woman) does not become a severe bottleneck through which one must pass in order to reach a wide range of employment opportunities.

B. "No Unemployed Need Apply"

The new statutes regarding discrimination against unemployed persons in Oregon, New Jersey, Washington D.C., Chicago, New York City, and Madison, Wisconsin, all of which were enacted in 2011–2013, won passage for reasons that were even more tightly tethered to strained economic circumstances. When the Oregon Senate passed its bill in February 2012, the Senate majority put out a press release linking the bill's passage directly to the high unemployment rate: "With Oregon's long term unemployment rate stubbornly high, [this bill] makes sure that applicants can't be prohibited from applying for a job opening solely because they do not currently have a job."[83] In other words, the urgency of the bill was related directly to the large number of individual workers—and perhaps more to the point, constituents—who were unemployed.

REV. STAT. ANN. § 659A.320(2)(a) (West 2013) (exempting "federally insured banks or credit unions"); MD. CODE ANN., LAB & EMPL. § 3-711(a)(2) (West Supp. 2012) (similar).

82. *See, e.g.*, CAL. LAB. CODE § 1024.5 (West Supp. 2013) (inter alia, bank or credit card information and certain other personal information, or access to $10,000 or more in cash); 820 ILL. COMP. STAT. ANN. 70/10(b) (West Supp. 2013) (inter alia, unsupervised access to cash totaling $2500 or more, or authority to enter into contracts); VT. STAT. ANN. tit. 21, § 495i(c)(1)(E) (Supp. 2012) ("financial fiduciary responsibility to the employer or a client"); *id.* § 495i(c)(1)(G) ("access to . . . payroll information"); MD. CODE ANN., LAB & EMPL. § 3-711(c)(2) (West Supp. 2012) (inter alia, "access to personal information" or "an expense account or a corporate debit or credit card").

83. Press Release, Or. S. Democrats, Bill Will Help Level Playing Field for Oregonians Looking for Work (Feb. 15, 2012).

The law's chief sponsor, Senator Diane Rosenbaum (D-Portland), explained that "[a]t a time when the competition for jobs is extraordinarily intense, there are examples of some businesses and recruitment firms telling would-be job seekers that they can't get a job unless they already have a job."[84] Those examples emerged in news accounts beginning in 2010;[85] in 2011 the National Employment Law Project (NELP) conducted a more systematic (but still rather informal) survey of job postings on popular career websites and found substantial numbers of job postings from major employers that specified that candidates "must currently be employed" or used similar language.[86] The NELP white paper was cited widely. In California, for instance, the legislative committee analysis urging passage of another such bill quoted the NELP paper at length.[87] (That bill passed but was vetoed by the governor.) The NELP paper argued that excluding the unemployed creates a "perverse catch-22."[88] It does not mention any disparate impact arguments, although one could certainly argue that such policies have a disparate impact on the basis of race because racial groups have different rates of unemployment.[89]

Although this sounds rather perverse from the point of view of a job seeker, there is a certain economic logic to refusing to consider applicants who are unemployed precisely when unemployment is high. The reason is that when unemployment is high, there are far more applicants per job opening than usual.[90] This increases the administrative burden on employers evaluating applicants. Anything that cuts down on that burden might reduce overall costs. Thus, "with so many applicants for every job opening, screening out the unemployed or the long-term unemployed is a convenient device for reducing the workload associated with the hiring

84. *Id.*

85. *See, e.g.*, Catherine Rampell, *Unemployed, and Likely to Stay That Way*, N.Y. TIMES, Dec. 3, 2010, at B1; *The Hard Truth: Companies Don't Hire Unemployed*, NPR (Dec. 14, 2010, 1:00 PM), http://www.npr.org/2010/12/14/132056874/the-hard-truth-companies-don-t-hire-unemployed.

86. NAT'L EMP. LAW PROJECT, HIRING DISCRIMINATION AGAINST THE UNEMPLOYED: FEDERAL BILL OUTLAWS EXCLUDING THE UNEMPLOYED FROM JOB OPPORTUNITIES, AS DISCRIMINATORY ADS PERSIST (2011) [hereinafter NELP PAPER].

87. KEVIN G. BAKER, COMM. ON JUDICIARY, CAL. STATE ASSEMB., BILL ANALYSIS: A.B. 1450 (2012); *see also, e.g.*, D.C. COUNCIL COMM. ON AGING & CMTY. AFFAIRS, COMM. REPORT: B19-0486 "UNEMPLOYED ANTIDISCRIMINATION ACT OF 2012," at 2 (2012) [hereinafter D.C. COMM. REPORT] (citing and quoting the NELP paper), *available at* http://dcclims1.dccouncil.us/images/00001/20120206130956.pdf.

88. NELP PAPER, *supra* note 86, at 1.

89. *See* U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2012, at 1 (2013), *available at* http://www.bls.gov/cps/cpsrace2012.pdf (reporting a white unemployment rate of 7.2% and a black unemployment rate of 13.8%).

90. The NELP paper notes that the applicants-to-openings ratio peaked in 2009 at 6.9, up from a low of around 1.5 in 2007, during better economic times. *See* NELP PAPER, *supra* note 86, at App. B.

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process."[91] Similar logic might explain the increased use of credit checks during tough economic times as well. It may seem perverse to consider credit history at just the moment when many more people than usual have a checkered credit history, but that is just when employers may be on the lookout for a cheap method of culling increased numbers of applicants.

To be sure, employers would be unlikely to adopt the "no unemployed need apply" device if they imagined it worked no better than random chance. After all, it is not difficult to choose a subset of one's applicants arbitrarily (e.g., by lottery, through the order in which the applications arrived, etc.). But employers might reasonably believe that a policy of "no unemployed need apply" is superior to such methods. Among the unemployed there is some subset of persons who lost their job for causes, such as their own incompetence or misconduct, which would make them less likely to be good employees. Even if the vast majority of unemployed people do not fall into this category—and perhaps during a period of high unemployment, that ratio is even more lopsided—at least a few do. Identifying those few takes effort—calling references, for instance—and is not always successful. Thus, if we have an excessive number of applicants, plenty of whom are basically good enough, it may be micro-efficient to simply exclude all those who are currently unemployed, as a low-cost means of avoiding the small subset who are unemployed for reasons that would lead a firm to prefer not to hire them. Here again, the logic of micro-efficiency diverges from the logic of meritocracy, which would demand calling references and taking other steps that require time and effort to determine which applicant is actually the strongest.

If only one employer decided to exclude the unemployed, that would not much affect anyone's opportunities. But if many employers, collectively representing a significant fraction of the available employment opportunities, were to adopt a "no unemployed need apply" policy, this would create a severe bottleneck through which workers would need to pass if they hoped to find a job. Concern about this possibility—that the "no unemployed need apply" policy either might already be or could become widespread—triggered these legislative responses. As the D.C. City Council explained in its committee report recommending passage of its legislation, "[d]iscrimination against the unemployed has become such a pervasive issue" that many states and localities are now passing laws addressing it.[92]

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91. *Id.* at 5.
92. D.C. COMM. REPORT, *supra* note 87, at 2.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/6

Ordinances in Washington, D.C., Madison, and New York City now actually prohibit disparate treatment on the basis of employment status. But the Oregon and New Jersey statutes and the Chicago ordinance are more modest: they merely prohibit employers from stating that "no unemployed need apply," and similar statements, in job postings and help-wanted advertisements. These statutes do not define current employment status as a ground on which employers must not make hiring decisions. But these statutes may still do something important: they remove a particular kind of initial barrier that would likely prevent nearly all unemployed persons from even attempting to apply for a given job.

The aim here closely parallels the elimination of sex-segregated help wanted advertisements in the 1970s. Those ads might have been convenient; they might have accurately reported the underlying preferences or expectations of many employers and many employees. But they also had a steering effect, making it even less likely that a person of the "wrong" sex would apply for a given opening.[93] The steering effect of statements such as "no unemployed need apply" reinforces the effect of employers' preferences against hiring unemployed applicants by strongly discouraging them from applying in the first place. Eliminating "no unemployed need apply" thus helps open up a more complete range of job opportunities to initial inquiries and applications from people who are unemployed—some small number of whom, at least, will then actually get the jobs, when their other strengths outweigh any negative inference an employer draws from their unemployment status.

These state laws also have a signaling function of another kind: they convey to employers that refusal to hire the unemployed is illegitimate as a matter of public policy. This may cause some employers, at least at the margin, to modify their view of unemployed applicants. In both of these ways, this legislation aims to ameliorate, but not eliminate, the bottleneck.

C. Ban the Box

The movement to "ban the box"—to remove the check box or question from employment applications that asks whether the applicant has ever been convicted of a crime—began to gain real traction around 2005, starting in San Francisco and Boston.[94] (One outlier jurisdiction, Hawaii,

93. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1340–44 (2012).

94. S.F., Cal., Bd. of Supervisors Res. No. 764-05 (Oct. 21, 2005) [hereinafter S.F. Res.]; BOS., MASS., CODE OF ORDINANCES § 4–7 (2012). These measures passed in 2005 and became effective in

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has a ban the box statute that is considerably older; and a number of states have older statutes other than ban the box that limit discrimination against people with criminal records.[95])

Although the local political circumstances varied, it is not a coincidence that many states and localities began to focus seriously on the problem of employment for persons with past criminal convictions in the mid-2000s. These efforts coincided with an unprecedented wave of released prisoners reentering society, a delayed demographic aftershock of the tough-on-crime policies of the 1980s. By the turn of the twenty-first century, the number of federal prisoners being released each year reached "nearly 600,000," the largest number in history.[96] DOJ figures indicated that the proportion of the American adult population that has served time in prison rose from 1.8% in 1991 to 3.2% in 2007 and was continuing to rise rapidly: trends implied a future figure of 6.6% for the cohort born in 2001.[97] Thus, at the start of the new century, the problem of prisoner reentry captured the attention of both scholars and governments.[98] In 2000, U.S. Attorney General Janet Reno called prisoner reentry "one of the most pressing problems we face as a nation"; the Clinton Administration launched "Project Reentry" that year.[99] In his 2004 State of the Union address, President George W. Bush proposed "a four-year, $300 million prisoner re-entry initiative" that aimed to address both employment and housing challenges for newly released prisoners.[100] "America is the land of

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2006. In 2014, San Francisco enacted a ban the box ordinance more comprehensive in scope than this initial 2005 resolution. *See* S.F., Cal., Ordinance 17-14 (Feb. 2014) (applying to public and private employers).

95. *See infra* note 115.

96. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY v, 20 (2003).

97. See THOMAS P. BONCZAR, BUREAU OF JUST. STATS., DOJ, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 4, 7 (2003), *available at* http://www.bjs.gov/content/pub/pdf/piusp01.pdf. These rising DOJ figures are mentioned prominently in the EEOC's 2012 enforcement guidance on past criminal convictions discussed below. *See infra* note 120 and accompanying text.

98. *See, e.g.*, Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, 17 CRIM. JUST. 12 (2002) (describing national and local responses to an issue "getting much attention these days"); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. REV. 255 (2004); MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 2–3 (2005), *available at* http://webcache.googleusercontent.com/search?q=cache:http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf; DEMELZA BAER ET AL., JUST. POL'Y CTR., URB. INST., UNDERSTANDING THE CHALLENGES OF PRISONER RE-ENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER RE-ENTRY PORTFOLIO 4–5 (2006), *available at* http://www.urban.org/uploadedpdf/411289_reentry_portfolio.pdf.

99. *See* Thompson, *supra* note 98, at 260.

100. George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html.

second chance," the President said, "and when the gates of the prison open, the path ahead should lead to a better life."[101]

Against this backdrop, a 2003 empirical study by sociologist Devah Pager[102] attracted significant attention. The study found, using a tester methodology, that checking "the box" on an application for employment had a powerful negative effect on one's chances of being called for an interview.[103] This study was cited in the text of a number of the ban the box ordinances, including San Francisco's.[104] Meanwhile, in 2005, an important report by the Re-Entry Policy Council, a project of the Justice Department and the Council on State Governments,[105] found that people with criminal convictions face extremely pervasive difficulties in finding jobs: it cited survey data showing that "60 percent of employers, upon initial consideration, would not hire a released individual."[106] That is a severe bottleneck by any measure.

During this period the use of criminal background checks by employers appeared to be rising rapidly. News reports of an "explosion" in such checks attributed the increase in part to the fact that, like credit checks, they were becoming cheaper and easier for employers to conduct.[107] Scholars and advocates alike have noted this important effect of

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101. *Id.*

102. Devah Pager, *The Mark of a Criminal Record*, 108 AM J. SOC. 937 (2003).

103. *See id.* at 946–48, 958. Actually, perhaps the most striking result in Pager's study is something else: the evidence of continuing widespread disparate treatment discrimination against blacks. She found that 34% of whites without criminal records received callbacks, 17% of whites with criminal records, 14% of blacks without criminal records, and 5% of blacks with criminal records. *Id.* at 957–59. Thus, race was such a powerful predictor of who would receive callbacks that even the whites *with* criminal records received more callbacks than the blacks *without* criminal records. But this was not the proposition for which Pager's article tended to be cited in debates about ban the box.

104. *See* S.F. Res., *supra* note 94, at 2 ("WHEREAS, According to . . . Devah Pager, author of 'The Mark of a Criminal Record,' individuals with felony records are twice as likely to be denied employment as people without past criminal records."); *see also, e.g.*, Minneapolis, Minn., City Council Res. 2006R-642 (Dec. 22, 2006) (similarly citing Pager in the resolution's "Whereas" section).

105. JUSTICE CTR., COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 293–305 (2005).

106. *Id.* at 294.

107. Ann Zimmerman & Kortney Stringer, *As Background Checks Proliferate, Ex-Cons Face a Lock on Jobs*, WALL ST. J. (Aug. 26, 2004, 12:01 AM), http://online.wsj.com/article/ SB109347 819251301442.html ("The explosion in background checks is occurring in part because technological advances have made them faster and cheaper. Businesses commonly pay $25 to $100 per search, and the price is dropping. Several months ago, SecurTest, a Florida-based applicant-screening company, began offering background checks . . . [for] about $10 per applicant . . . ."). The increase is not unique to the United States. *See generally* Elena Larrauri Pijoan, *Legal Protections Against Criminal Background Checks in Europe*, 16 PUNISHMENT & SOC'Y 50, 52 (2014) (finding that during more or less this same period, from 2002–2011, criminal background checks by employers more than tripled in the U.K. and more than sextupled in Australia, among other jurisdictions).

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technological change,[108] which the EEOC also highlighted in explaining its own decision to update its guidance about criminal background checks (discussed below).[109] Margaret Colgate Love, the former U.S. Pardon Attorney, wrote a report in 2005 on the collateral consequences of criminal convictions that identified employment barriers as "perhaps the most troublesome of the secondary legal consequences of conviction."[110] She argued that in addition to the trends just discussed, "[t]he natural reluctance to hire people with a criminal record has been exacerbated since the 9/11 terrorist attacks."[111] Thus, by the mid-2000s, it was becoming increasingly clear that employers' refusal to hire applicants with a criminal background was a severe bottleneck—and one that might have serious negative social consequences given the large number of individuals involved. Employment became a central focus of a loose "re-entry movement" that joined activists and policymakers interested in helping prisoners re-integrate into their communities.[112]

Some of the first ban the box ordinances applied only to municipal (government) employers; most later measures apply to government contractors as well.[113] Some extend to all public and private employers.[114]

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108. *See, e.g.*, Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 329 (2009) ("With the advancement in information technology and the Internet, individuals' criminal records have never been more easily accessible. The background-check industry is burgeoning."). State Sen. Bobby Joe Champion, the chief sponsor of Minnesota's 2013 statute extending ban the box to private employers, similarly cited the "new and much easier access to records and increased use of them by employers" as a central reason the bill was necessary. Video: S.F. 523 (Champion) Employers Criminal History Reliance for Job Applicants Limitations and Remedies Imposition, at 42:35 (Minn. S. Comm. On the Judiciary Feb. 28, 2013), *available* at http://www.senate.mn/media/media_video_popup.php? year=2013&flv=cmte_jud_022813.flv.

109. *See Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, EEOC, http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm (last visited Aug. 21, 2014) ("Why did the EEOC decide to update its policy statements on this issue? In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.").

110. COLGATE LOVE, *supra* note 98, at 2.

111. *Id.*

112. *See* John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447, 467–70 (2005).

113. *Compare* S.F. Res., *supra* note 94 (city and county employment only), *with* BOS. MASS., CODE OF ORDINANCES § 4.7 (2012) (passed in 2005) (extending CORI reform provisions to the employment practices of vendors doing business with the City of Boston); NEW HAVEN, CONN., CODE OF ORDINANCES tit. III, ch. 2, art. XII (2012) (passed in 2009) (banning the box on applications for vendors and contractors engaged in business with the city); DETROIT, MICH., CITY CODE OF ORDINANCES pt. III, ch. 13, art. I, div. 3 (2013) (passed in 2010) (same); ATLANTIC CITY, N.J. CODE, ch. 30, art. I (2014) (passed in 2011) (same).

114. *See* MASS. GEN. LAWS ANN. ch. 151B, §§ 4(9½), 1(5) (West 2004 & Supp. 2013) (barring both public and private employers in Massachusetts from inquiring into applicant's criminal

These ban the box statutes and ordinances do not actually prohibit employers from refusing to hire a prospective employee because of a past criminal conviction (although a number of states do have older laws that do this).[115] Instead, as the moniker suggests, most of the new ban the box measures merely prohibit employers from asking about convictions *on an initial application form*, thereby enabling some with past convictions to pass through that initial gateway and, perhaps, prove that they are the best qualified applicant for the job despite their past convictions, about which employers are free to inquire at later stages. All the measures include broad exemptions, usually of two kinds: first, the measures exempt cases in which the crime is relevant to the job—so that some types of employers are permitted to ask on an initial application form about certain relevant types of crimes, but not all crimes—and second, certain enumerated categories of jobs are entirely exempt, so that employers may ask on the initial application form about any past convictions.[116]

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background at initial stage of hiring); HAW. REV. STAT. ANN. §§ 378-2, -2.5 (LexisNexis 2010 & Supp. 2012) (banning the box for public and private employers in Hawaii); MINN. STAT. ANN. § 364.021 (West 2012) (prohibiting pre-interview criminal history checks by most public and private employers); R.I. GEN. LAWS § 28-5-7(7) (Supp. 2013) (banning the box for public and private employers). Some local ordinances cover private employers as well. *See* BUFFALO, N.Y., CODE § 154-25 (2013), Newark, N.J., Ordinance 12-1630 (Sept. 19, 2012), PHILA., PA., CODE tit. 9, ch. 9-3500 (2014), SEATTLE, WASH., MUN. CODE ch. 14.17 (2013).

115. Fifteen states currently prohibit some set of employers from refusing to hire on the basis of a past criminal conviction, with various exceptions. Most of these laws appear to have been enacted in the late 1970s or early 1980s, in what may have been a previous wave of significant concern about prisoner reentry. In nine of these states, the bans apply only to public (government) employers, and in some cases, government contractors. *See* ARIZ. REV. STAT. ANN. § 13-904(E) (2010); COLO. REV. STAT. ANN. § 24-5-101 (West 2010 & Supp. 2012); CONN. GEN. STAT. ANN. § 31-51i (West 2011); FLA. STAT. ANN. § 112.011 (West 2008 & Supp. 2013); KY. REV. STAT. ANN. § 335B.020 (LexisNexis 2011); LA. REV. STAT. ANN. § 2950 (2007 & Supp. 2013); MINN. STAT. ANN. § 364.03 (West 2012); N.M. STAT. ANN. § 28-2-3 (2012); WASH. REV. CODE ANN. § 9.96A.020 (2010). Six states' statutes apply to private employers as well. *See* HAW. REV. STAT. ANN. § 378-2(a)(1) (LexisNexis 2010 & Supp. 2012); KAN. STAT. ANN. § 22-4710 (2008); N.Y. CORRECTION LAW §§ 750-755 (McKinney 2003 & Supp. 2013); 18 PA. CONS. STAT. ANN. § 9125 (West 2000); WIS. STAT. ANN. § 111.31 (West 2002 & Supp. 2012); 775 ILL. COMP. STAT. ANN. 5/2-103(A) (West 2011).

116. Most often, the job categories that are entirely exempt include those where other statutes or regulations *require* criminal background checks. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2.5(a), (d) (LexisNexis 2010 & Supp. 2012) (exempting employers in Hawaii where alleged crime "bears a rational relationship" to the job, or where the job is in, inter alia, education, certain mental health services, armed security, or financial services); MASS. GEN. LAWS ANN. ch. 151B, § 4(9½) (Supp. 2013) (exempting employers in Massachusetts where other federal or state laws specifically prohibit the employment of people with past convictions); MINN. STAT. ANN. § 364.09 (West 2012) (exceptions for law enforcement, schools, and certain other categories such as commercial driver, taxi drivers, medicine, and chiropractors). PHILA., PA., CODE tit. 9, ch. 9-3500, § 9-3505 (2014) (exempting employers in Philadelphia if job involves criminal justice system, or if industry regulations require background checks, as in the case of banking and financial services).

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The effect of a ban the box statute or ordinance with all of these exceptions is to make a past criminal conviction a *less severe* bottleneck. Those convicted of particular crimes will remain barred from specific categories of jobs to which the crime is most relevant; a few limited categories of jobs will bar anyone convicted of anything. But for *most* jobs, individuals with past convictions who are otherwise qualified will be able to make it through the initial application stage. They will get a chance to make their case in an interview, which seems likely to result in a more nuanced assessment of the meritocratic relevance of an individual's past conviction than the simple check box. The check box provides employers with an expedient way to discard all applications with past convictions, often before a human being even sees the application. Indeed, some intriguing experimental evidence suggests that speaking to a human being, rather than simply submitting a paper form, does reduce the negative effect of a past criminal conviction (although troublingly, this seems to make much more of a difference for white applicants than for black ones, a problem ban the box does not address).[117]

To employment lawyers and employment law scholars, all this likely sounds a bit familiar. Employers' blanket refusal to hire individuals with past criminal convictions is also a longstanding area of regulation and litigation under the disparate impact provision of Title VII. The EEOC issued policy statements in 1987 and 1990 concerning the use of criminal convictions and arrest records in hiring,[118] the thrust of which was that a blanket refusal to hire anyone with *any* past criminal conviction has a disparate racial impact, and is rather difficult to justify in terms of business necessity, so employers need to take a more nuanced approach, taking into account the nature of the offense, the nature of the position sought, and how much time has passed since the conviction.[119] In 2012, the EEOC issued new guidelines that reiterate these factors, continuing to emphasize that blanket bans on hiring anyone with a criminal conviction violate Title

117. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 102–06 (2007).

118. *See* EEOC, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987), *available at* http://www.eeoc.gov/policy/docs/convict1.html; EEOC, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (1987), *available at* http://www.eeoc.gov/policy/docs/convict2.html; EEOC, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1990), *available at* http://www.eeoc.gov/policy/docs/arrest_records.html.

119. These criteria largely codified those set forth by the Eighth Circuit in *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1298–99 (8th Cir. 1975). Courts have not, however, uniformly accepted the EEOC's framework. *See* El v. SEPTA, 479 F.3d 232, 243–44 (3d Cir. 2007).

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/6

VII, and placing a new emphasis on the importance of individualized assessment.[120] The effect of all these EEOC guidelines is to press employers to ameliorate the past-conviction bottleneck by replacing blanket exclusions with narrower rules that would bar those with past criminal convictions from only some, rather than all, positions.

The EEOC's concern about this bottleneck stems, in the first instance, from its disparate racial impact. The disparate racial impact of mass incarceration is enormous; some have called mass incarceration and its collateral consequences "the new Jim Crow."[121] Racial justice arguments played more of a role in state and local legislative debates about ban the box than in state and local legislative debates about either credit checks or discrimination against the unemployed. Still, even here, state legislators did not frame the problem of re-entry exclusively in racial terms.[122] (And as we will see, neither does the EEOC.[123]) In state and local legislative debates, advocates of ban the box in the states and localities primarily emphasized a more race-neutral set of claims about the importance of not freezing out a significant population of Americans—those with past criminal convictions—from all or nearly all employment opportunities. For reformers in Massachusetts, whose efforts culminated in a 2010 statute banning the box for all public and private employers in the state,[124] the central argument was about the social benefits, primarily in terms of public safety, of "reducing barriers to employment applicants with a criminal history face."[125]

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120. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 39, at V.B.7–V.B.9 & VIII (2012); *id.* at V.B.9, Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity. In 2013, the EEOC initiated two enforcement actions to on the basis of the updated guidelines. *See* EEOC Press Release, *supra* note 41; *see also* Julie Forster, *Pepsi's Bottling Arm to Pay $3 Million to Resolve EEOC Hiring Discrimination Case*, PIONEER PRESS (Jan. 11, 2012, 10:21 PM), http://www.twincities.com/news/ci_19719924 (settling a disparate impact claim about criminal background checks prior to the new guidelines).

121. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

122. Indeed, in some legislative debates, the issue of racial disparate impact does not appear to have been discussed at all. *See, e.g.*, *Hearing on S.B. 4 Before the S. Fin. Comm.*, 2013 Leg., 433rd Sess. (Md. 2013), *available at* http://mgahouse.maryland.gov/house/play/21592fd4f17e4618ae985788 1074eb93/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=3127294 (link to audio file) (at the Finance Committee hearing about Maryland's ban the box bill, speakers made a variety of arguments but race and disparate impact were not mentioned).

123. *See infra* Part III.D.

124. *See* MASS. GEN. LAWS ANN. ch. 151B, § 4(9½) (Supp. 2013).

125. MASS. COMM'N AGAINST DISCRIMINATION, MCAD FACT SHEET: CRIMINAL OFFENDER RECORD INFORMATION ADMINISTRATIVE PROCEDURE REFORMS n.5 (2010), *available at* http://www.mass.gov/mcad/documents/Criminal%20Records%20Fact%20Sheet.pdf (citing BOS. WORKERS ALLIANCE, SUMMARY OF CONFERENCE COMMITTEE FINAL REPORT: S.2220 AND H.4712 (2010)). At the same time, it was not a secret that a number of the advocacy groups pressing for ban

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Philadelphia enacted a similarly broad ban the box ordinance in 2011, covering all public and private employers.[126] In some respects, the racial justice roots of the Philadelphia ordinance were readily apparent: the NAACP played a significant role in pressing for the ordinance's passage,[127] and NAACP President Benjamin Todd Jealous was present at the signing of the bill by Mayor Michael Nutter.[128] But, at the bill signing, both Jealous and Nutter framed their support for the ordinance in race-netural terms. Nutter emphasized individual fairness arguments—people who "have paid their debt to society" deserve "an opportunity to work to provide for their families and should not be discriminated against before they even have a first interview"—and also a policy argument for reintegration rooted in public safety: "Offering jobs to ex-offenders," he argued, "improves the quality of life for all Philadelphians."[129] Jealous made essentially the same arguments.[130]

One way to understand these race-neutral claims is as purely strategic moves. In an ideologically "post-racial" political world, advocates for racial justice may be couching their arguments in race-neutral terms because those terms are politically saleable. There is undoubtedly something to this strategic story. But the relationship between the race-based and race-neutral arguments is more complex.

Sometimes the effect of a bottleneck is most visible or salient when it has a concentrated effect on a racial group. It may be easier to notice, for instance, an all-white freshman class at a university than it is to notice that there are also no poor students in the class—even when these demographic effects might have the same causes, in that there is some crucial bottleneck

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the box legislation were predominantly black or had roots in predominantly black neighborhoods. For instance, the Boston Workers Alliance had its roots in Roxbury—but it, too, framed its mission in race-neutral terms. *See About*, BOS. WORKERS ALLIANCE, http://www.bostonworkersalliance.org/?page_id=2 (last visited Feb. 21, 2014).

126. *See supra* note 114.

127. *See 'Ban the Box' Bill Signed Into Law in Philadelphia*, NAACP, http://www.naacp.org/news/entry/ban-the-box-bill-signed-into-law-in-philadelphia (last visited Aug. 21, 2014).

128. *Id.*

129. Press Release, City of Phila., "Ban the Box" Ordinance Goes into Effect (Jan. 13, 2012), *available at* http://www.cityofphiladelphia.wordpress.com/2012/01/13/ban-the-box-ordinance-goes-into-effect/.

130. *See, e.g.*, *'Ban the Box' Bill Signed Into Law in Philadelphia*, *supra* note 127. The legislative findings section of the ordinance itself mentions the disparate impact issue, but primarily emphasizes the high rate of criminal convictions in Pennsylvania, the even higher rate in Philadelphia, and the problem that "[p]ersons with criminal records suffer from pervasive discrimination in many areas of life—employment, housing, education, and eligibility for many forms of social benefits." PHILA., PA., CODE tit. 9, ch. 9-3500, § 9-3501(1) (2014). The ordinance notes that "[i]t is estimated that approximately one-fifth of Philadelphia's population has some type of Criminal Record." *Id.* § 9-3501(1)(b).

that neither racial minorities nor the poor are making it through. This is part of the argument that Lani Gunier and Gerald Torres advance in their important book *The Miner's Canary*.[131] Structural problems often affect the opportunities of both racial minorities and others. Where this is the case, identifying the forces that cause the exclusion of racial minorities often illuminates broader pathologies that affect others as well. For instance, if many employers refuse on a blanket basis to hire anyone with a past criminal conviction, the effects may be especially keenly felt in certain minority communities, such as the black community in Philadelphia. This concentrated effect concentrates the mind. It gives advocates like Benjamin Jealous a reason to engage with this issue and press for reforms such as ban the box. But ultimately, most of the reasons why we ought not to exclude those with past criminal convictions from all legitimate employment are not race-specific reasons. They apply more broadly.

From the point of view of the anti-bottleneck principle, the race-based and race-neutral approaches to analyzing these bottlenecks are deeply complementary. *Part but not all* of why we ought to care about the exclusion of people with past criminal convictions is that this has the effect of making even more pervasive the bottlenecks constraining the opportunities of people from poor, minority communities where various other constraints already make it quite difficult to find jobs. Each of these modes of analysis can inform and deepen the other. On the one hand, a race-neutral analysis of the past-criminal-conviction bottleneck can help us understand the dynamics that play out in concentrated form in some minority communities. On the other hand, race-based analysis can, like the miner's canary, help to illuminate a bottleneck in the opportunity structure that we might otherwise have ignored.

Because so much of the modern law of antidiscrimination and equal protection focuses on race (and other protected categories), many students of antidiscrimination law reading this Article today will undoubtedly find the race-based disparate impact analysis more familiar and perhaps more appealing, as an analytic approach to phenomena like the past-criminal-conviction bottleneck. But this is not the only way to look at it. Both state legislators and, as we will see, the EEOC itself, also view such phenomena as bottlenecks on their own terms. It is worth taking this latter set of arguments seriously, in part because they have become the central public

131. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

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justification for many new laws. These arguments frame the project of antidiscrimination law itself in a new way, framing such concepts as *discrimination* and *merit* in terms of bottlenecks.

D. Ban the Box as Antidiscrimination Law

Many proponents of ban the box use the word "discrimination" to describe employers' refusal to hire people with criminal convictions. The Philadelphia ordinance uses the word this way: to mean "discrimination" not in any disparate impact sense, but simply *discrimination against people with criminal convictions*.[132] This use of the term "discrimination" often goes along with a claim that when employers discriminate against people with criminal convictions, they judge them on something other than "merit." The Philadelphia ordinance, for instance, states: "This legislation is intended to give the individual with a criminal record an opportunity to be judged *on his or her own merit* during the submission of the application . . . ."[133] It is worth unpacking what "discrimination" and "merit" mean here, and what it would mean to say that a past felony conviction is not part of "merit." After all, one can imagine an employer viewing a clean record (i.e., a lack of past criminal convictions) as an indicator of merit.

On one view, merit means predicted future performance in the job (including possible future misconduct). On this view, merit is an empirical fact about the world. The claim that refusing to hire based on a past felony conviction is not "merit" but "discrimination" is then essentially an empirical claim: a claim that a past felony conviction, like a spotty credit history (in the view of advocates of the credit check bans discussed above), is an ineffective predictor of future performance or misconduct and thus an empirically inaccurate measure of merit.

This empirical point seems debatable. The case that past criminal convictions have *some* predictive value under a variety of circumstances seems intuitively likely to be stronger than the parallel claims on behalf of the predictive value of either unemployment status or credit score. Intuitions may mislead, however. Social science data suggests that after some number of years, ex-offenders are actually no more likely to be arrested for a crime than are members of the general public; the evidence

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132. PHILA., PA., CODE tit. 9, ch. 9-3500, § 9-3501(1)(a) (2014) ("Persons with criminal records suffer from pervasive discrimination in many areas of life—employment, housing, education, and eligibility for many forms of social benefits . . . ."); *see also, e.g.*, S.F. Res., *supra* note 94 ("[A]t least 13 million people nationwide experience lifelong discrimination because of past felony convictions . . . .").

133. PHILA., PA., CODE tit. 9, ch. 9-3500, § 9-3501(1)(k) (emphasis added).

that they will perform worse on the job, even many years later, is even more speculative and uncertain.[134]

But one might instead take a different view of what both "merit" and "discrimination" mean here. Perhaps proponents of ban the box understand the word "merit" in a functional way that embeds certain legal or normative judgments: merit is the set of *legally legitimate* criteria that employers use in deciding whom to hire.[135] "Discrimination," on this view, is not the use of criteria that lack performance-predictive power. Rather, discrimination is the use of criteria that society has decided, for reasons of public policy, to make illicit—whatever their performance-predictive power or lack thereof. On this second view, society can decide to prohibit discrimination against people with criminal convictions—perhaps for reasons of public policy related to the public goods obtained by re-integrating them into the world of employment—just as society can decide to prohibit discrimination on the basis of race. In doing so, society is using law to remove past felony convictions from the basket of factors that count as "merit," factors such as qualifications and work experience, and placing past felony convictions instead into the "discrimination" basket, with characteristics like race or sex. The judgment here is not empirical, but normative or legal.

This second way of defining "merit" and "discrimination"—one that embeds certain legal or normative judgments in these concepts—better comports with the well-established law of disparate treatment. Disparate treatment based on characteristics such as race and sex is prohibited even when it is rational statistical discrimination—that is, even when those characteristics have performance-predictive value. It may be rational, in such cases, but we still prohibit it.[136] And we still call it "discrimination." We have decided as a matter of public policy that (some exceptional situations aside) such characteristics as race and sex are not "merit" *even when they do* have performance-predictive value.

For instance, in a sufficiently racist town, it may be overwhelmingly clear to a retailer that minority clerks will sell a lower volume of goods than white clerks, so that the profit-maximizing strategy is to hire white ones. If "merit" simply means predicted performance and nothing more—

134. *See* Blumstein & Nakamura, *supra* note 108, at 350. The amount of time is the subject of some debate; it appears longer for violent offenses than for property crimes. *Id.* But the probability of re-arrest is at best only a remote proxy for the probability of *workplace* misconduct.

135. A variant of this view would define merit in terms of the employer's *normatively* legitimate criteria.

136. For a helpful discussion, see Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 849–59 (2003).

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and to keep it simple, performance simply means sales volume—then refusing to hire minority clerks under these circumstances would be the meritocratic choice.[137] However, we have decided as a matter of public policy that regardless of performance prediction, race is not "merit," and refusing to hire minority clerks in this situation is wrongful "discrimination." Moreover, we have decided that this decision is not up to employers. Our law embodies a public decision to make an exception to the usual presumption in American law that employers have the discretion to decide for themselves, rationally or not, what counts as "merit." We make that exception in the name of providing an "equal opportunity" to all.

Invoking the idea of equal opportunity here does not begin to untangle the question with which this Article began: *when* should the law restrain employers' discretion to define merit in terms of any criteria they wish? One answer that emerges from the new laws discussed in this Part, regarding credit history, unemployment, and past criminal convictions, is this. Society ought to restrain employers' discretion where employers' exercise of that discretion creates a severe bottleneck in the opportunity structure—even more so where that severe bottleneck also affects a large number of people. Our analysis of severity here ought not to be limited to the employment sphere. The most pervasive bottlenecks of all affect "many areas of life—employment, housing, education,"[138] and so on, making the case especially strong for altering employer practices that reinforce such bottlenecks.

Ban the box illustrates how far this anti-bottleneck principle can take us from the usual frameworks through which we think about

137. In this familiar example, where I have specified that sales volume is affected by discriminatory customer preferences, one might object that "performance" itself is shot through with discrimination because race is functioning as what philosophers call a "reaction qualification." *See generally* Kasper Lippert-Rasmussen, *Reaction Qualifications Revisited*, 35 SOC. THEORY & PRAC. 413 (2009). But the apparently special case of reaction qualifications is not as special as it seems: it is actually quite similar to other cases of (micro-economically) rational statistical discrimination. Suppose an employer believes that members of a particular racial group, on average, went to worse schools, and therefore predicts lower job performance and for that reason prefers not to hire members of this group. Suppose such a prediction were statistically accurate. Even so, most of us would not conclude that membership in some other, more favored racial group is therefore a form of "merit," even though such membership might statistically predict performance. The reason is that we exclude race from "merit" on independent legal or normative grounds—regardless of any predictive power it might have. *See* Bagenstos, *supra* note 136, at 857–59 (discussing arguments for legal prohibitions on rational statistical discrimination); *id. at* 882–83, 894–96, & 900–01 (offering good reasons to doubt that discrimination rooted in customer or co-worker preference is so different from rational statistical discrimination by employers generally).

138. PHILA., PA., CODE tit. 9, ch. 9-3500, § 9-3501(1)(a) (2014).

antidiscrimination and equal opportunity. When someone has been convicted of a crime, they have by definition been judged by a public process to be responsible for their crime. Therefore, from one perspective, people with past criminal convictions are among the least plausible candidates one can imagine for the protections of antidiscrimination law. Far from being a discrete and insular minority, or the sort of group that would be likely to receive heightened scrutiny under the Equal Protection Clause, here is a group that individuals joined of their own accord (or so courts adjudged, case by case)—a set of individuals each of whom we have determined is at least sufficiently culpable that the law ought to punish them. From the point of view of some theories of equal opportunity, these people *had* opportunities, and squandered them; they hardly deserve more opportunities now in the name of equal opportunity.

To be sure, the story of criminal responsibility in the prior paragraph is oversimplified and contested. Some people commit crimes in part because their other opportunities were very limited, perhaps for structural reasons that are not hard to identify. But one need not endorse any such critical perspectives on criminal responsibility, and one need not make any claims at all about desert, to appreciate the simpler point that it may produce bad social consequences to shut those with past criminal convictions out of all job opportunities. When employers refuse to hire people with criminal convictions, they tend to make this bottleneck more severe. When employers instead are open to hiring them, this ameliorates the bottleneck, which creates a variety of positive externalities in terms of the overall reintegration of formerly incarcerated people into society. For many American jurisdictions, that is enough to justify legislation at least nudging, if not pushing, employers to make such choices. There is no need for claims about desert or about whose opportunities were "equal" to whose.

In a small number of cases, both federal and state courts have moved in parallel to legislative efforts to ban the box, striking down as unconstitutional state statutes that *require* discrimination against some sets of individuals with past criminal convictions.[139] These unusual cases are

139. These decisions have relied on the federal Constitution's Equal Protection Clause and state constitutions' equal protection and due process clauses. *See, e.g.*, Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), *aff'd by an equally divided Court*, Carter v. Miller, 434 U.S. 356 (1978) (striking down under the Equal Protection Clause a Chicago ordinance that prevented people with certain offenses from obtaining a public chauffeur's license); Kindem v. City of Alameda, 502 F. Supp. 1108 (N.D. Cal. 1980) (same, ordinance regarding municipal employment of people with criminal convictions); Furst v. N.Y.C Transit Auth., 631 F. Supp. 1331 (E.D.N.Y. 1986) (same as *Kindem*, but transit authority policy); Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003) (striking down on state

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interesting for a number of reasons. They universally purport to apply rational basis review: constitutional doctrine holds that the right to work is not a fundamental right, and that people with criminal convictions are not a suspect class. However, often immediately after announcing this standard of review, which ordinarily is very deferential, each of these courts then applies it with real "bite." Some of the courts frame the problem in terms of overbreadth or a lack of "tailoring": a broad, across-the-board statutory ban is unconstitutional, whereas a more narrowly tailored ban would be constitutional if it linked specific categories of criminal conviction to specific jobs for which they are relevant.[140] In other words, these unusual constitutional cases invalidating laws that require across-the-board bans press legislatures to draw tighter connections between specific crimes and specific jobs. This has the effect of making the bottleneck less severe. The courts deciding these cases cannot agree on a constitutional rationale. Some of the cases are equal protection, others due process; none purports to find either a fundamental right or a suspect class. Instead, the courts deciding these cases appear to be demanding something more than minimally rational tailoring or fit on grounds that amount to the same anti-bottleneck arguments this Part has explored: arguments that broad, across-the-board restrictions on those with criminal backgrounds limit people's opportunities too severely.[141]

The anti-bottleneck principle also diverges in another way from our usual ways of conceptualizing the project of antidiscrimination and equal opportunity. Most of the discussion of ban the box statutes above would have applied without revision to state statutes actually barring employers

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constitutional grounds a statute barring those convicted of certain crimes from working with older adults); Doe v. Saenz, 45 Cal. Rptr. 3d 126 (Cal. Ct. App. 2006) (striking down on federal equal protection grounds a statute barring those convicted of any crime except a minor traffic offense from working in licensed community care facilities for the elderly, foster children, the disabled, etc.); Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. Ct. 2012) (striking down on state due process grounds a ban on employing those convicted of homicide). For an excellent overview of these cases, see Miriam J. Auckerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J. L. SOC'Y 18 (2005).

140. *See, e.g.*, *Kindem*, 502 F. Supp. at 1112.

141. It seems non-coincidental that these cases fall almost entirely during the same two periods—first, the mid-1970s through the 1980s, and second, the past decade or so—in which states also enacted statutory protections for those with criminal convictions. These are also the two critical periods for disparate impact challenges to criminal convictions under Title VII. The EEOC's guidelines on the subject, *see supra* notes 118–20 and accompanying text, are from 1987 and 1990 (largely codifying Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)); the agency updated those guidelines in 2012 and initiated high-profile enforcement actions in 2013. These were two periods in which it was becoming increasingly apparent that past criminal convictions might amount to a severe bottleneck limiting the opportunities of large numbers of people.

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from discriminating on the basis of past criminal convictions (as some states indeed do[142]). Ban the box does not do this. It is a different, subtler intervention, more of a nudge than a shove. Ban the box does not touch the ultimate conception of merit that employers may use in deciding whom to hire. Instead it constrains something else: the rougher conception of merit that is operative *in the initial application screening phase.*

Employers have reason to use different conceptions of merit at many points in the hiring process. To decide where or how to advertise a job requires some very rough conception of what counts as merit for that job. Processing the initial application forms requires some rough conception of merit as well. Some employers decide that at that early stage, it is best to simply put all applications with the box checked in the discard pile. That is what ban the box prohibits—while continuing to allow employers at the final, decisive stage to do as they wish.

From many of the usual perspectives through which we understand antidiscrimination law, this approach seems bizarre. It would be like prohibiting sex-segregated help-wanted ads, but nonetheless allowing employers to discriminate in their final decisions on the basis of sex. If we understand antidiscrimination law in terms of the stigmatic, demeaning harm of discrimination, or in terms of the subordination of groups, or for that matter in terms of the inherent wrongfulness of certain types of classification, there is precious little reason to choose an approach that prohibits discrimination in the initial application form yet allows it in the final decision.

The anti-bottleneck principle begins from a different starting point—one from which this approach could actually make sense. Past criminal convictions are a severe bottleneck in part because employers simply do not want to hire those with past criminal convictions, but also in part for a different and subtler reason: employers are throwing out the applications *of even some people they would ultimately decide to hire*, all things considered. It might seem irrational for employers to decide to throw out the applications of individuals they would ultimately decide to hire. But this is not necessarily the case. The rough conception of merit operative at the initial application stage is never as nuanced as the one in the final evaluation; at the first cut, a simple "no convictions" rubric may well be the micro-efficient choice. Here again, micro-efficiency and meritocracy diverge. Ban the box requires employers to pay for a *more* meritocratic

142. *See supra* note 115.

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hiring strategy than some might otherwise choose, perhaps more meritocratic than micro-efficiency can justify.

Ban the box thus imposes some definite costs on employers, but not the costs one might expect. The costs are mainly search costs, the time and effort involved in interviewing applicants. Whether or not a jurisdiction wishes to impose the (potentially greater) costs on employers of an antidiscrimination regime that actually protects against discrimination on the basis of criminal conviction, the limited step of banning the box does useful work by itself in making a pervasive bottleneck that much less severe.

III. THE ANTI-BOTTLENECK PRINCIPLE

A common thread runs through the arguments that led state legislators to enact all three of these sets of novel employment discrimination statutes. In each case, legislators saw that some variable about a person—good credit, currently being employed, a clean criminal record—was playing (or might soon play) an outsized role in many employers' hiring decisions, to the point that those without the requisite qualification might face sharply constrained employment opportunities. In each case, there were colorable arguments of varying degrees of plausibility that these variables might be performance-predictive, although in each case legislators were skeptical of those arguments. In each case, legislators judged that there were good policy reasons to activate the machinery of antidiscrimination law to restrict substantially—but not eliminate entirely—employers' discretion to use each of these facts about a person in allocating opportunities.

Do these reasons add up to a general principle? This Part will argue that they do. The argument up to this point has repeatedly invoked the anti-bottleneck principle but has not really explained it. This Part gives an account of the principle and suggests that we can see it in action not only in legislative enactments, but also in some aspects of the ways courts and the EEOC reason about how best to interpret Title VII.

This Part thus marks a major turn in the argument, from recent history to theory. The project of this Part is not to reconstruct, as a positive matter, what one or another legislator may have had in mind when enacting any of the new laws discussed in Part I. Rather, the objective here is to build as normatively compelling an account as possible of a general principle—the principle that I call the anti-bottleneck principle—that can explain and justify not only these recent enactments, but also, as the remainder of this Article will argue, much of antidiscrimination law.

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A. The Anti-Bottleneck Principle and the Opportunity Structure

First, a word about what the anti-bottleneck principle is not. It is not a principle about individual desert. Nor is it a principle about group-based justice. Instead the anti-bottleneck principle is structural: its object is the way a society structures and organizes the many different kinds of opportunities it offers.

We can visualize the numerous opportunities available in any society as being arranged in an *opportunity structure*: a lattice of forking and intersecting paths through which individuals pursue different jobs and careers, different goods such as money and prestige, and ultimately, different lives, involving different combinations of forms of human flourishing. The opportunity structure encompasses the world of education and training as well as the world of work; it begins with the developmental opportunities available to children growing up in different environments and extends upward through all the roles in society, including but not limited to jobs, that one might hold as an adult. Individuals must navigate this structure to reach whatever goals they may have.

In any real society, different parts of this opportunity structure are organized in different ways. Perhaps the only paths to high elective office involve intensely competitive, zero-sum electoral competitions, structured in a pyramidal way. A few exceptionally competitive professional career paths may work similarly. Other paths will not have this shape. For instance, the paths that lead to the role of parent depend on various social norms and legal constraints concerning procreation and adoption; these paths do not generally involve any zero-sum competitions for fixed numbers of scarce opportunities.

Although there is great variation and complexity within societies, the overall shape of the opportunity structure also varies from one society to another. Indeed the shape of the opportunity structure is a highly consequential, if rarely noticed, fact about any society. Some societies organize *more* of the paths worth pursuing in a way that involves zero-sum, high-stakes competitions. At one extreme, imagine a society in which a single variable—say, one's score on a standardized test, administered at age eighteen—is completely determinative of one's future life prospects.[143] Unless one scores well on this test, the vast majority of paths

143. This example borrows from and adapts the "warrior society" in Bernard Williams' classic essay, "The Idea of Equality." *See* Bernard Williams, *The Idea of Equality*, *in* 2 PHILOSOPHY, POLITICS AND SOCIETY 110, 126 (Peter Laslett & W. G. Runciman eds., 1962). For a fuller discussion, see FISHKIN, *supra* note 7, at 11–13.

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in the employment sphere are forever closed. The test in this "big test society" is a very extreme example of a *bottleneck*: a narrow place through which people must pass in order to reach many opportunities that fan out on the other side.

There are many questions we might ask about fairness and desert in who passes and who fails the big test. However, the anti-bottleneck principle is not primarily about those questions. Instead, the anti-bottleneck principle draws our attention first to a different, and in some sense prior, structural question: why is the test so "big" in the first place? Why do so many of the paths in this opportunity structure require going through this bottleneck—and must they? Another society might organize opportunities differently: while a few corners of the opportunity structure might turn on a zero-sum test, by and large, a variety of paths lead to most of the valued careers and roles in life, and people can embark on the preliminary steps on those paths at different moments in life. Opportunity structures of this sort are more *pluralistic*, in the sense that they offer people at different points in life a richer plurality of opportunities they might pursue.

Societies also vary along a closely related dimension: in all societies, some characteristics such as race, gender, class, physical appearance, or the geography of where one grew up affect which opportunities are open to any given person, for reasons both direct and indirect. These characteristics, then, act as bottlenecks: society is narrowing opportunities by channeling people into particular sets of life paths deemed appropriate for people like them. At the extreme, we might imagine a society that separated people into hereditary "priest" and "warrior" castes, where members of the two castes have separate, non-overlapping sets of opportunities.[144] Caste membership, in that society, amounts to an extremely powerful bottleneck: an absolute prerequisite for pursuing any opportunity is membership in the correct caste. Similarly, in a society where pursuing one set of opportunities requires being a man, and pursuing another set of opportunities requires being a woman, gender is functioning as a powerful bottleneck. One must be the "right" gender—or, in a less extreme case, it helps a lot to be the "right" gender—to pursue many paths. The severity of such bottlenecks is a matter of degree. In a relatively more *pluralistic* opportunity structure, the bottlenecks are less

144. *See* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1476 (2000) (inventing this useful analogy for sex discrimination).

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severe, with the consequence that people will generally have before them a broader plurality of paths they could pursue.

Most ways of thinking about equal opportunity treat the types of cases in the previous two paragraphs quite differently. The effects of caste or sex on opportunity seem unfair in part because these variables are unchosen demographic facts about a person, whereas a test might instead reflect efforts for which we are responsible.[145] Equalizing opportunity, on most conventional views, is about giving everyone the same chance, regardless of unchosen demographic factors, to *take* the test. If the test is fair, then those who fail *had* their fair opportunity. Similarly, those convicted of crimes might be viewed as having failed a certain sort of test society puts to all its members. When we speak of equal opportunity we typically are speaking about a fair first chance for everyone, not a second chance for those who squandered their first.

And yet, something important is missing from this typical way of framing equal opportunity. To make this illustration as stark as possible, let us imagine that the "big test" is perfectly fair, and furthermore, that those who fail do so entirely because of their own choices not to study hard enough, choices for which (let us suppose) they were entirely responsible. Even in that case, we might ask: is shutting these people out of pursuing any further career opportunities really the best we can do? Is there no normative reason we might want to give people another chance—in the form of a training program, a community college program, an entry-level opportunity in some new field—some path whereby they can find their way out of the dispiriting cul-de-sac in the opportunity structure in which they find themselves stuck?

Opening up such additional paths makes a society's opportunity structure more pluralistic, in the sense that no single test or other single factor has quite so outsized an effect on a person's prospects. In a more pluralistic opportunity structure, different gatekeepers impose different requirements; the most important gatekeepers offer multiple points of entry. From any position in a more pluralistic opportunity structure, even those positions that seem rather bleak, the first steps along a variety of paths remain open. As the statutes in Part I suggest, this idea applies not only to those who may have lost their job or ruined their credit, but even to those who have committed a felony and served time in prison. The principle here is not about judgments of responsibility or desert. It is a

145. However, teasing out the part of anyone's performance that is chosen from the part that is unchosen is an impossible task, in practice and even in ideal theory. *See* FISHKIN, *supra* note 7, at 56–65.

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structural principle about the ways opportunities are organized and the paths that lead from one to another.

B. The Relative Severity of Bottlenecks

In any real society, even a relatively pluralistic one, some requirements will loom large, across many jobs and other fields of endeavor. This is another way of saying bottlenecks are inevitable. For instance, in most societies, including our own, speaking the dominant language is helpful for almost every job and essential for many. In that sense, speaking English is a bottleneck in our society, a criterion individuals must satisfy if they hope to proceed along a wide range of paths that lead to most jobs. Not only do many jobs themselves require English, but many of the prior steps that lead to jobs—educational credentials, other roles and jobs that provide the necessary experience, and so forth—require English proficiency as well. Moreover, the ability to speak and understand the dominant language is relevant far beyond employment. But both within the employment sphere and outside it, public policy choices and antidiscrimination laws, as well as the decisions of numerous private actors, will affect just how severe this bottleneck will turn out to be.

We can measure the *severity* of a bottleneck along two dimensions. First, *strictness*: is this requirement absolute, or is it merely a "plus"? Second, *pervasiveness*: how widespread is the requirement, in terms of the proportion of all paths that lead to desired jobs and other roles, and ultimately, to flourishing lives? For our purposes here, we can use as a rough measure of pervasiveness the *proportion of all jobs* that one must pass through this bottleneck in order to reach.[146] These variables together define the *severity* of a bottleneck. Aside from severity, we also ought to consider how many people will actually be affected by a given bottleneck, and to what degree. People may be affected by a bottleneck either because they will be unable to pass through, or because their efforts to pass through will reshape their lives and their other choices in some important way.

As the example of English proficiency underscores, bottlenecks are an inevitable feature of any opportunity structure. But many choices by firms,

146. A fuller analysis of pervasiveness would require a further step. We ought to ask what proportion of all paths that lead to (different dimensions of) flourishing lives require a person to pass through this bottleneck. In this analysis, jobs are not all that matters; some roles in the family or community may be as or more important. Moreover, some jobs may be so awful that they count for little.

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institutions, and governments can shift the opportunity structure in a *more* unitary or *more* pluralistic direction, by altering the severity of key bottlenecks.[147] In particular, where a bottleneck is severe, such as this English proficiency bottleneck, two strategies can help ameliorate it: (a) creating more paths that enable individuals to pass *through* the bottleneck (here, opportunities to learn English) and (b) creating more paths *around* the bottleneck (here, jobs that do not require English). The ideal balance between these two strategies will shift depending on their feasibility and tradeoffs with other goals.

These two strategies, and the anti-bottleneck principle itself, are addressed not only to governments and policymakers, but to all institutions whose choices affect the shape of the opportunity structure. The question of the appropriateness of *legal* intervention to ameliorate bottlenecks is a function of both the bottleneck's severity and some additional questions: how effective the law will be in ameliorating it, and what other costs that intervention will impose.

Many of the most vivid illustrations of the anti-bottleneck principle come from the world of disability. To take the most obvious example, imagine a world in which most buildings are physically inaccessible to those in wheelchairs. A vast range of paths in the employment sphere and in other spheres of human social life are then inaccessible—literally physically inaccessible—as well. In that situation, the configuration of physical space becomes a severe bottleneck, limiting the opportunities of people whose mode of locomotion the built environment does not support. This bottleneck is quite *strict* because in order to work at a job—and to do other things, such as testify in a courtroom—one definitely needs to be able to enter the building. It is *pervasive* because here we are talking about not just one obscure building that is inaccessible, but large numbers of important buildings. Thus, this bottleneck is sufficiently severe to justify a robust response—even if the number of people affected were not especially large. Moreover, this is a bottleneck that the law is well positioned to ameliorate.

The appeal of the anti-bottleneck principle—the appeal of moving toward a more pluralistic opportunity structure—comes from the idea that people are better off when they have access to a greater range of paths around which they can build a life. The argument here is not about *why* a person ended up stuck, unable to get through a bottleneck. Consider the

147. Bottlenecks are not the only aspect of a society's opportunity structure that makes it more unitary or more pluralistic, but they are enough for our discussion here. For a more detailed discussion, see FISHKIN, *supra* note 7, ch. III.

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"big test" once more. It may be that someone cannot pass the big test because she was born poor, or it may be that she failed for reasons that are entirely her own fault. In reality, it is usually impossible to disentangle the threads of causation in any case, so it is problematic to build theories that depend heavily on such disentangling.[148] Instead of asking questions about responsibility and desert, the anti-bottleneck principle focuses on the shape of the opportunity structure. Regardless of why people may be unable to get through a severe bottleneck, the anti-bottleneck principle holds that it would be good to create some opportunities for them to get through or around it. When an individual has made an early exit from the highways of opportunity, even if this was entirely her own fault, the anti-bottleneck principle suggests that we ought to leave some onramps that would give her a path back on.

A more traditional egalitarian approach to the problem of those who have made their exit from the highways of opportunity would be to redistribute resources to them, especially to those who are the worst off. This is obviously helpful. But individuals who are frozen out of most opportunities—whether because they use wheelchairs, because they failed the big test back when they were eighteen, or because they do not speak English—ought to be able to obtain something other than redistributed resources. They have good reason to seek opportunities to, in John Rawls' formulation, "experienc[e] the realization of self" that comes from developing one's capacities and exercising them in the "skillful and devoted exercise of social duties"; this is "one of the main forms of human good."[149] Such a realization of self requires more than resources: it requires opportunities to be structured in such a way that one has paths one can pursue. The anti-bottleneck principle aims to provide this.

The anti-bottleneck principle is not a flat prohibition on bottlenecks. (That would be impossible in any event.) It is principle that holds that we ought to make the opportunity structure more pluralistic. This principle must be balanced against competing considerations, and sometimes it is outweighed. In the case of any given bottleneck, we might think about those competing considerations in terms of what good, if any, the bottleneck is doing. Specifically, from this perspective, we might conclude that some bottlenecks are more legitimate, in the sense that they serve

148. *See* Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 21 (2003) (discussing the impossibility of "disentangling the respective contributions made by her will, on the one hand, and by unchosen features of her talents and personal circumstances, on the other").

149. JOHN RAWLS, A THEORY OF JUSTICE 73 (Rev. ed. 1999); *see also id.* at 374 (explaining the "Aristotelian Principle" that human beings "enjoy the exercise of their realized capacities").

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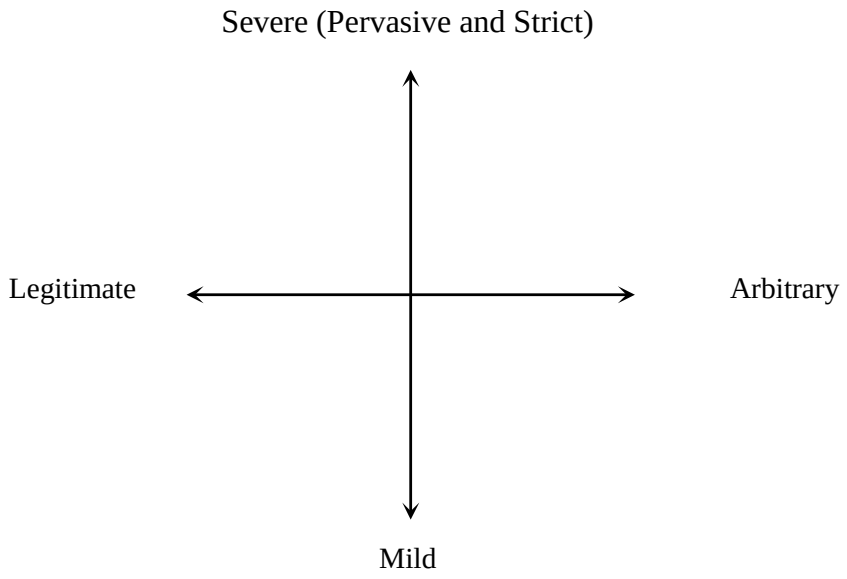
legitimate goals, while other bottlenecks are more arbitrary. Conceptually, just as we can arrange bottlenecks along a spectrum of severity, we might also arrange them along an axis from *legitimate* to *arbitrary*:[150]

CLASSIFYING BOTTLENECKS



In the hiring context, if our bottleneck is a requirement imposed by an employer, we can think of the legitimacy-versus-arbitrariness axis, to a first approximation, as essentially a meritocratic performance prediction. That is, if an employer requires employees to pass a particular test, or obtain a particular qualification, in order to be hired, we might ask: does this actually predict who will better perform the job? The more it does, the more *legitimate* the bottleneck.[151]

The anti-bottleneck principle generally aims to push bottlenecks downward and leftward on the above chart. The case for ameliorating a

150. This chart is a simplification in that "severe" is really a combination of two variables: pervasive and strict.

151. This simple definition leaves some deeper questions unresolved. Performance—and in turn, predicted performance—depends on many variables. For instance, perhaps a job candidate could perform very well if equipped with an assistive device that the employer presently does not provide. The legitimacy-versus-arbitrariness scale can be applied in different ways to this problem, yielding different conclusions. For a fuller discussion of some of the considerations involved in balancing the anti-bottleneck principle against other goals, see FISHKIN, *supra* note 7, ch. III.

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bottleneck is strongest when that bottleneck is as far as possible toward the upper-right corner (severe and arbitrary). Here, a wide range of employers are imposing a requirement that has little performance-predictive value. Opponents of the use of credit checks in hiring are essentially arguing that credit checks fall squarely in the upper right quadrant, and that the law can do something about the pervasiveness of this bottleneck, so it should.

But the anti-bottleneck principle also has force in the upper left and lower right quadrants. In the upper left, a bottleneck is relatively severe but also relatively legitimate. Consider the English-speaking example above. Let us suppose for purposes of argument that there are many jobs for which speaking English is a necessary prerequisite, and that for some but not all of those jobs, there is no good alternative to setting up workplaces in that way. In that case, the solution is not for the law to force employers to hire non-English speakers for jobs that legitimately must require English. Rather, the solution is twofold. First, firms, organizations, and governments ought to provide more opportunities for people to learn English. Public policy can further this goal. Second, employers who are requiring English for jobs where it is *relatively less* important, or not important at all, ought to consider removing this requirement.[152] Each employer that does so helps shift the bottleneck incrementally downward and to the left—downward because the requirement is now slightly less pervasive, and therefore less severe, and leftward because the pool of jobs that continue to require English is now that much more dominated by situations where the requirement is (more) legitimate.

Finally, it is important to view bottlenecks as situated within the opportunity structure as a whole. Imagine an economy in which different employers' business practices and requirements have the collective effect of making it difficult for women to pursue most employment. Suppose some employers engage in disparate treatment against women, while others impose various facially neutral requirements that have a disparate impact on women. Of the latter group, suppose a small handful of employers impose some height requirements, which far more men than women satisfy.

Viewed in isolation, these height requirements are not severe. Only a handful of employers impose them. People who are short, who cannot pass

152. This second strategy raises the potential objection that it may be exactly the bleakness of opportunities for non-English speakers that creates the incentive to learn English. However, there are reasons to be skeptical of paternalistic arguments for limiting opportunity in a world in which the incentives to get through severe bottlenecks, such as this English proficiency bottleneck, are already strong. *See* FISHKIN, *supra* note 7, at 172–73, 183–86.

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through this bottleneck, are not missing out on much; only a few paths are closed to them. However, this bottleneck, although non-severe on its own terms, also contributes to a much larger *gender* bottleneck, in the following sense: in order to pursue most paths in the world of employment in the economy we are imagining, it helps—directly or indirectly—to be male. If we want to do something about this larger gender bottleneck in the opportunity structure, one part of our response might be the tools of antidiscrimination law. Disparate treatment law will impose liability on employers who hire men instead of women. Disparate impact law goes further, taking aim at some facially neutral practices such as the height requirements just discussed, *because of* their connection to the larger gender bottleneck in the opportunity structure.

In both cases, the purpose and effect of these legal interventions is to push the overall gender bottleneck downward and to the left on the chart. Disparate treatment law reduces the total amount of disparate treatment, pressing downward (less pervasive, therefore less severe); and pressing leftward because a slightly higher proportion of what remains will be relatively legitimate (i.e., those rare cases in which sex is a BFOQ). Disparate impact law has exactly the same effect. Consider our height requirement example. As a result of the intervention of disparate impact law, height requirements will be imposed by fewer employers, pushing downward on the chart (less pervasive, therefore less severe). Moreover, more of the cases that remain will be cases in which the requirement really is legitimate, in the sense that the law has judged the requirement to be job-related and consistent with business necessity, a doctrinal test (discussed further below) that presses firmly to the left.[153] Thus, imposing disparate impact liability on the height requirement, subject to a business necessity/job-relatedness defense, helps render *both* the height bottleneck *and* the gender bottleneck relatively less severe and relatively more legitimate.

This point about disparate impact law brings us full circle. Part II showed that the anti-bottleneck principle has force, in the view of some legislators, even outside the usual equal protection-inflected domains of race, sex, and similar characteristics. For bottlenecks like credit score, unemployment status, and past criminal convictions, new statutes such as those discussed in Part II can usefully nudge the opportunity structure in a more pluralistic direction either through prohibitions on consideration of

153. For a real-world version of this height example, see *infra* notes 190–91 and accompanying text.

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these factors, or through subtler interventions that operate only at the initial application stage. Legislators enacting these cutting-edge laws made arguments that we can understand in these terms.

At the same time, a simple prohibition on disparate treatment may be inadequate to the scale and complexity of problems such as the way race and sex function as bottlenecks in our opportunity structure. Those major demographic variables powerfully affect the paths one may pursue, not only in the world of work but also in many other areas of life, for reasons both direct and indirect. Legislative responses to these especially severe and complex bottlenecks may usefully include more than one form of antidiscrimination protection: not only a prohibition on disparate treatment, but also disparate impact laws which challenge facially neutral practices that contribute to the larger bottleneck.

My claim is not that the legislators who enacted Title VII and other antidiscrimination laws crafted these laws with a general anti-bottleneck principle in mind. Those legislators acted for reasons specific to the social and historical contexts in which they operated. Congress enacted Title VII as part of a broader Civil Rights Act that was a response to the civil rights movement and its demands for racial justice. In the employment sphere, Congress was responding to the fact that opportunities for African-Americans in particular were severely limited by discrimination.

But if we view what Congress was aiming to accomplish at a slightly higher level of abstraction, we can understand these aims in terms of the anti-bottleneck principle. That is, the idea of intervening in the opportunity structure to ameliorate the severe constraints African-Americans faced on the opportunities they might pursue is, in a philosophical sense, an instance—a particularly powerful instance—of the anti-bottleneck principle. Stated in these terms, the case for building modern antidiscrimination law in the first place, and overriding employer prerogatives over many employment decisions, turned on the pervasiveness of employment discrimination against African-Americans in particular, as well as the connections between that employment discrimination and broader dimensions of the opportunity structure (education, housing, etc.) that conspired to constrain black people's opportunities in ways that amounted to an extremely severe bottleneck.

As the remainder of this Article will discuss, this way of understanding the project of antidiscrimination law can help us understand the internal logic of a number of aspects of how Title VII and other antidiscrimination laws operate in practice and have developed since their enactment. This is the case in part because, over time, a number of courts have interpreted these antidiscrimination statutes in ways that closely track the anti-

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bottleneck principle. Let us begin by considering one example of a case in which a court, albeit in a somewhat inchoate way, appeared to make use of a version of the anti-bottleneck principle to arrive at what might otherwise seem an unlikely interpretation of Title VII.

C. Situating Bottlenecks in the Opportunity Structure as a Whole: An Initial Example

EEOC v. Consolidated Services Systems[154] concerned a small, Korean-owned cleaning company in Chicago that relied exclusively on word-of-mouth recruiting for its hiring. This recruiting practice resulted, predictably, in a workforce that was composed almost exclusively of Korean immigrants, a group that made up only three percent of the relevant labor market.[155] The EEOC brought a racial discrimination claim under Title VII, alleging that this disparity was intentional. The district court dismissed the claim; in an opinion by Judge Richard Posner, the Seventh Circuit affirmed.[156] The court held that this employer had adopted word-of-mouth recruiting because it was cheap, not because it liked the resulting racial composition of its workforce. Then the opinion took a more interesting turn.

One can imagine a scenario in which, in an ethnically segregated society, most or all employers recruited and hired exclusively by word of mouth. In that case, everyone outside the dominant ethnic group would be entirely frozen out of most employment opportunities. The bottleneck of ethnic group membership would be severe.

Judge Posner saw the situation in *Consolidated Services Systems* as differing quite dramatically from this hypothetical. Neither the overall labor market in Chicago, nor this particular segment of it, was dominated by Korean-owned firms that tended to freeze out non-Koreans. To the contrary, Judge Posner argued, such recent immigrants are themselves "frequent targets of discrimination."[157] Far from limiting opportunity, small immigrant-owned businesses, which often hire mainly co-ethnics, "have been for many immigrant groups, and continue to be, the first rung on the ladder of American success."[158]

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154. EEOC v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993).

155. *Id.* at 235.

156. *Id.* at 238. Because of an earlier Seventh Circuit holding, the EEOC did not attempt to argue on appeal that the word-of-mouth recruiting practice had a disparate impact. *See* EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 299 (7th Cir. 1991).

157. *Consol. Serv. Sys.*, 989 F.2d at 238.

158. *Id.*

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These claims seem irrelevant to the ostensible ground of Posner's decision, which purported to turn on the efficiency of Consolidated's recruiting practice. From the point of view of efficiency, it ought not to matter whether immigrants are targets of discrimination or whether businesses of this kind are "the first rung on the ladder of American success." However, these claims make a great deal of sense in terms of the anti-bottleneck principle, which Posner seems to be acknowledging in an inchoate way.

Posner is suggesting that even though the word-of-mouth recruiting *at this one company* does indeed create a bottleneck through which, as a practical matter, few people other than Korean immigrants can pass, the larger opportunity structure is dominated by just the opposite sort of bottleneck. In a much wider and more significant range of contexts, he suggests, immigrants, including Korean immigrants in particular, have a difficult time passing through bottlenecks that constrain the pursuit of many paths. Against this backdrop, Consolidated's practice does not reinforce any major bottleneck in the opportunity structure, but instead might actually make the opportunity structure more pluralistic.

It is difficult to assess the truth of Judge Posner's broad claims about the immigrant experience and his implication that small, immigrant-run firms providing opportunities mainly to co-ethnics actually improve the opportunity structure by helping immigrants overcome the bottlenecks they themselves face. These claims are plausible but debatable; at any rate they were outside the factual record of the case. They were inevitably colored by Judge Posner's own preconceptions about which groups are the real victims of discrimination.[159]

Employment discrimination litigation focuses, by necessity, on the practices of a particular employer. There is usually little evidence of how the bottlenecks at issue in the case fit into the overall opportunity structure, other than evidence of disparate impact. This problem suggests that while the anti-bottleneck principle can usefully play some role in judicial decision-making, it is very important for institutions with broader fact-finding capabilities—legislatures and agencies such as the EEOC—to play the central role in deciding where and how to apply the anti-

159. *See* Ian F. Haney López, *"A Nation Of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1025–28 (2007) (describing the emergence of the argument that in our multi-ethnic "nation of minorities," new immigrants are themselves the real victims of discrimination, and they ought not to bear the burden of remediating the subordination of African-Americans); *id.* at 1017–21 (describing Judge Posner's own early colorblindness arguments, which predate the "nation of minorities" argument but are highly compatible with it).

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bottleneck principle. These legal actors can guide courts toward correct judgments about how to situate the facts before them in the context of the broader opportunity structure, and specifically, the bottlenecks in that structure that are especially severe.

D. EEOC Enforcement Choices and the Anti-Bottleneck Principle

And that is just what these legal actors do. It is not a coincidence that at the same time that state legislatures have been moving to limit employers' use of hiring criteria involving credit checks, unemployment status, and past felony convictions, the EEOC has been moving on all three of those same fronts. In each case, because the practices in question have a racial disparate impact, the EEOC is on firm statutory ground in choosing to examine and regulate them. But numerous practices have a racial disparate impact; why focus in particular on *these* practices?

At the outset of the EEOC's meeting to discuss the regulation of credit checks, EEOC Chair Jacqueline Berrien answered the question this way.[160] "There are several reasons to give special attention to the use of credit checks as a screening tool," she said. "First, at a time when the nation's economic difficulties have spurred an increase in the number of job applicants, the use of credit checks in the hiring process has also increased," rising in a decade from thirty-five percent to sixty percent of employers. (Berrien here quoted the same SHRM survey data that was prominently cited in many state legislative debates and that often appears in the preambles of state statutes restricting the use of credit checks.) "Second, we are becoming increasingly aware of the practice's potential discriminatory impact on workers and job applicants." Finally, she explained, "[a]s economic hardship spreads and the potential of adverse credit history grows, use of credit reports for hiring, promotion or retention decisions could adversely affect employment opportunities for a wide range of applicants and workers." Of these reasons, one (discriminatory impact) ties the practice back to the EEOC's statutory charge. But all three articulate anti-bottleneck concerns. The SHRM data illustrates the *pervasiveness* of the practice, and therefore the bottleneck's severity; the observation about spreading economic hardship evokes the large number of people affected (and is also suggestive of the bottleneck's pervasiveness).

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160. *Transcript: Meeting of October 20, 2010—Employer Use of Credit History as a Screening Tool*, EEOC, http://www.eeoc.gov/eeoc/meetings/10-20-10/transcript.cfm (last visited Aug. 21, 2014).

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These concerns are why credit checks emerged as a natural target for EEOC regulation. And on one level, of course that is the way things work. The EEOC is hardly going to use its scarce enforcement resources to issue regulations about obscure practices that have a disparate impact but that are used by only a few small employers and affect only a small number of people. But EEOC Chair Berrien is not simply making the point that the EEOC should use its resources to address widespread rather than isolated Title VII violations. Instead she is explaining that the EEOC is scrutinizing credit checks in large part because of the bottleneck they create in the opportunity structure as a whole—not exclusively for members of a statutorily protected class. She focuses on the "increasing number of men and women across the country" who are entering or returning to the job market and being subject to credit checks[161]—not only the individuals who are members of a protected class and might have a disparate impact claim. In other words, the EEOC's interest in credit checks is due not only to their substantial disparate impact, but also to the fact that they are creating a new, and potentially severe, bottleneck in the broader opportunity structure that affects a very large number of individuals of all races. Doing something about this bottleneck will disproportionately help groups the statute protects. But it will also help many other people.

A persnickety observer might object at this point that these larger anti-bottleneck concerns are misplaced—that they represent a departure from the EEOC's mission of enforcing its statutes. But this objection is itself misplaced. These anti-bottleneck concerns *are* the EEOC's mission, restated at a high enough level of abstraction. As Berrien put it in that hearing about credit checks: "As the nation's leading enforcer of federal laws prohibiting employment discrimination, the EEOC's ultimate concern is whether these screening practices, devices or tools deny equal employment opportunity to any workers in the country and are keeping qualified and capable people from entering the workplace for unfair reasons."[162] There is no mention of race or sex or national origin or disability in that sentence, and there does not need to be. At this higher level of abstraction, what the EEOC *does* is take aim at barriers that "prevent qualified and capable people" from being hired.[163] Disparate treatment law, disparate impact law, and the law of reasonable

161. *Id.*

162. *Id.*

163. Which reasons exactly should count as "unfair" is a much trickier question, and one dependent on public policy judgments. *See supra* Part II.D (discussing "merit").

accommodation can all be viewed as approaches to implementing this general aim. Thus it should not surprise us to see the EEOC implementing the anti-bottleneck principle in ways that are not wholly confined to a focus on the classes that Title VII directly protects. In such cases the EEOC is finding ways, consistent with its specific statutory charges, to pursue a dimension of its more general mission.

Over the years, the EEOC has used its regulatory powers relatively sparingly in comparison to its powers of direct enforcement. When we look at which facially neutral practices the EEOC has chosen to scrutinize because of their potential disparate impact on protected classes, a pattern emerges. In general, the EEOC's scrutiny has been triggered by a concern about the *pervasiveness* of a given practice or set of practices—and therefore its potential to become a severe bottleneck. Criminal background checks have been the subject of more EEOC guidelines and regulations than any other topic.[164] The EEOC has also issued regulations on such topics as English-Only Rules,[165] which concerned the agency because of their potential to freeze out, from many workplaces, large numbers of workers who are more comfortable speaking languages other than English.

Most recently, the EEOC has held a number of hearings regarding discrimination against caregivers.[166] The EEOC's concern about discrimination against caregivers is in part about the disparate treatment of women, and in part about facially neutral practices that have a disparate impact on women. But the EEOC has consistently framed its interest in the topic of caregiving in more universal terms—specifically, in terms of the bottleneck created by the large set of employers who make it difficult for workers (of any sex) to combine work and family responsibilities. The EEOC framed the problem of caregiving discrimination in terms of "*both* men and women [who] too often face unequal treatment . . . because of their efforts to balance work and family responsibilities"; the Commission focused a great deal on the pervasiveness of the problem.[167] We might restate the problem this way. If a large (and desirable) portion of all possible career paths in the opportunity structure impose something like the "ideal worker" norm, which assumes a worker with no caregiving

164. *See supra* notes 118 & 120.

165. *See* 29 C.F.R. § 1606.7 (2012).

166. *See, e.g.*, *Transcript: Commission Meeting of April 22, 2009—On Best Practices to Avoid Discrimination Against Caregivers*, EEOC, http://www.eeoc.gov/eeoc/meetings/4-22-09/transcript.cfm (last visited Aug. 21, 2014).

167. Press Release, EEOC, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists Tell EEOC (Feb. 15, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/2-15-12.cfm (emphasis added).

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responsibilities and a flow of domestic labor from someone else at home, then this creates a severe bottleneck.[168] The EEOC is explicitly acknowledging this problem, which constrains (in different ways) the choices that *both* men and women face about how to combine work and caregiving as they try to pursue their own conceptions of a flourishing life.

Something like the anti-bottleneck principle has driven the regulatory priorities of the EEOC from the start. In particular, it was part of the logic that led lawyers at the EEOC to press for the regulation of ability testing that led to the creation of disparate impact law. The next Part tells this story, which has important implications for how we ought to understand disparate impact law.

IV. *GRIGGS*, DISPARATE IMPACT, AND THE ANTI-BOTTLENECK PRINCIPLE

What is disparate impact law? From one perspective, it is essentially a form of group-based redistribution of opportunities, a means of shifting opportunities to members of the protected class who brought the disparate impact challenge. Advocates of this understanding often argue that disparate impact is justified (if at all) only as a response to covert disparate treatment that the law cannot easily detect; we are shifting opportunities *back* to those who would have had them in the first place, absent that disparate treatment. This view of disparate impact is not new,[169] but it gained new prominence when Justice Scalia nodded in its direction in *Ricci v. DeStefano*, in a concurring opinion that raised questions about whether disparate impact law, if it means any *more* than this, is even constitutional.[170]

From the perspective of the anti-bottleneck principle, disparate impact law looks entirely different. This Part explains why. More ambitiously, this Part argues that the anti-bottleneck principle is at the heart of how we *ought* to understand disparate impact law. It can help us understand some underappreciated features of how disparate impact law works, as well as how it became part of our law.

Once we see the anti-bottleneck principle at work in disparate impact law, something important comes into focus that we might otherwise miss: Every time plaintiffs win a disparate impact case, they remove or loosen a bottleneck that had unnecessarily constrained the opportunities of many people—not only members of the plaintiff class, but also others who were

168. For a fuller discussion, see FISHKIN, *supra* note 7, at 224–31.
169. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (O'Connor, J., concurring).
170. *See infra* Part IV.E.

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similarly unable to pass through the bottleneck. This feature of disparate impact law would be more than a little odd if disparate impact law were simply a mechanism for group-based redistribution. But it is not. In fact, a version of the anti-bottleneck idea was at work in the process that led both EEOC lawyers and the Supreme Court to embrace disparate impact law in the first place.

A. Bottlenecks and the Origins of Disparate Impact

The black plaintiffs in *Griggs v. Duke Power Co.*[171] famously challenged two requirements that Duke Power used to select candidates seeking promotion from the lowest-skilled job categories to the better, "inside" positions at its Dan River plant: the company required candidates to (1) have a high school diploma and (2) exceed a cutoff score on two intelligence tests.[172]

Neither of these requirements was at all unique to Duke Power—a fact the plaintiffs made sure the courts understood. The plaintiffs noted that Duke Power was only one of many companies that had similarly instituted intelligence testing requirements after Title VII took effect.[173] Indeed, of the various pre-*Griggs* cases the plaintiffs in *Griggs* cited, from the lower courts and the EEOC, that had embraced a disparate impact theory, a strikingly high proportion involved similar testing fact patterns. Quite a few involved exactly the same two so-called "quickie" intelligence tests that were specifically at issue in *Griggs*.[174] The plaintiffs emphasized that if this defendant were permitted to adopt these requirements without any meaningful showing that they were related to a specific job, "*any employer in the country* would . . . be absolutely free" to adopt the same requirements, creating barriers that were potentially "vast" in scope.[175]

This claim by the *Griggs* plaintiffs resonated strongly with the EEOC's earliest regulatory concerns. Very soon after the passage of Title VII in

171. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

172. *Id.* at 426–27. The intelligence tests were the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. *Id.* at 428. The cutoff score was set around the national median for high school graduates. *Id.*

173. *See* Brief for Petitioner at 11, *Griggs*, 401 U.S. 424 (No. 124), 1970 WL 122448 (noting "the increased use of tests since the passage of Title VII"). Duke Power had simply barred blacks from the "inside" jobs up until the effective date of Title VII, on which date the company instituted the testing requirements. *Id.* at 44 (The diploma requirement had been instituted in 1955. *Id.* at 38 n.47.).

174. *Id.* at 6 (describing the Wonderlic and Bennet tests as "quickie 'intelligence' tests"); *see id.* at 19–25 & app.; Brief for the United States as Amicus Curiae at 21 n.24, *Griggs*, 401 U.S. 424 (No. 124), 1970 WL 122637 (gathering cases in which the EEOC had previously imposed a job-relatedness standard on fact patterns that included those two specific tests).

175. Brief for Petitioner, *supra* note 173, at 14, 18 (emphasis added).

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1964, lawyers at the EEOC realized that many companies had begun to use paper-and-pencil ability tests like those at issue in *Griggs* in hiring and promotion—and that as such tests became more widespread, they "proved to be major barriers to minority advancement."[176] Those EEOC lawyers pushed for official guidelines, which the EEOC promulgated in 1966, restricting the use of these tests.[177] Those guidelines underwent a number of revisions in subsequent years,[178] but their core principle from the start was that employers ought to use only "[t]ests selected on the basis of specific job-related criteria."[179] The point of this "job-relatedness" requirement is to ensure that tests relate to *specific* jobs, thereby avoiding the pervasive bottleneck that might arise if many or most employers used the same "general ability" tests to screen candidates for all or most jobs.[180]

The Court adopted this reasoning in *Griggs*. It held that "any tests used must measure the person for the job and not the person in the abstract."[181] By requiring tests to be more specifically tailored to particular jobs, the EEOC and the Court did not eliminate the bottlenecks such tests create. But they ameliorated those bottlenecks, making them less pervasive, and therefore less severe. After *Griggs*, a test might still block access to a particular kind of job. But no single test or cluster of related tests would create the across-the-board impact—the pervasive bottleneck—that the EEOC lawyers had feared.

For both the EEOC and the Court, what mattered about the intelligence test bottleneck and the high school diploma bottleneck at issue in *Griggs* was their relationship to the opportunity structure as a whole—and specifically their power to reinforce a much larger bottleneck that Title VII aimed to disrupt: the fact that to pursue most opportunities and career

176. Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 59–60 (1972).

177. EEOC, GUIDELINES ON EMPLOYMENT TESTING PROCEDURES (1966), *available at* http://njlegallib.rutgers.edu/misc/GETP.pdf.

178. *See, e.g.*, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978), codified at 29 C.F.R. § 1607 (adopting a major revision to the guidelines).

179. GUIDELINES ON EMPLOYMENT TESTING PROCEDURES, *supra* note 177, at 3.

180. *See id.* at 2 (ability tests must measure "knowledge or skills required by the particular job or class of jobs" or must predict performance of "a particular job or class of jobs"). This same concern about "general ability" testing—applied to the civil service—was among the reasons Congress offered for extending Title VII to cover government employees in what became the Equal Employment Opportunity Act of 1972. *See* H.R. REP. NO. 92-238, at 24 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, at 2159 (observing that the civil service was "replete with artificial selection and promotion requirements that place a premium on 'paper' credentials which frequently prove of questionable value as a means of predicting actual job performance," a problem "further aggravated by the agency's use of *general ability tests which are not aimed at any direct relationship to specific jobs*") (emphasis added); S. REP. NO. 92-415 at 14 (similar observations).

181. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

paths in America in 1964, one needed white skin. The Court in *Griggs* traced the contours of important paths through the opportunity structure, explaining why black people would have a harder time than whites passing through the two bottlenecks directly at issue in the case. The Court explained that black people "have long received inferior education in segregated schools,"[182] leaving them less likely to receive a diploma and leaving them without the developmental opportunities they would need for their "basic intelligence" to find the "means of articulation" that would enable them to pass an intelligence test.[183] These connections led the Court to hold that the diploma and intelligence test requirements would indirectly "operate[] to exclude" blacks.[184] Therefore, the Court held, these requirements would fall within the subset of all business practices that the Court would thenceforth subject to a heightened meritocratic filter: the practices must be "shown to be related to job performance"; "the touchstone is business necessity."[185]

This filter, requiring employers to tie tests to *specific* jobs, does two things. First, it presses employers to adopt tests that are, in my terminology above, relatively more legitimate as opposed to arbitrary, because they pass this heightened test of meritocratic validity. Second, it ensures that a particular test is used only for the subset of jobs for which it is specifically relevant, rather than for all jobs—reducing the pervasiveness and therefore the severity of the bottleneck that test creates. In other words, the law presses employment practices both downward and leftward in Figure 1. Duke Power lost its case because it had simply posited that its requirements would "improve the overall quality of the work force."[186] Of course, that may have been true. But the Court required Duke Power to find a way to accomplish this goal that did not, in the process, create such a severe bottleneck.

B. Griggs*' White Beneficiaries*

When we view *Griggs* through the lens of the anti-bottleneck principle, some striking facts about the case come into focus: in particular, the fact that many, probably most, of the direct beneficiaries of *Griggs* were white. According to the Census data cited by the Court, only thirty-four percent

182. *Griggs*, 401 U.S. at 430.
183. *Id.*; *see also id.* at 430 n.6.
184. *Id.* at 431.
185. *Id.*
186. *Id.*

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of white males in North Carolina had high school diplomas.[187] That figure is far higher than the twelve percent of black males with high school diplomas;[188] the difference leads to the disparate impact. But it is important to recognize that the high school diploma requirement screened out not only the overwhelming majority of blacks, *but also the vast majority of whites*. Indeed, though the pool of those excluded by the diploma requirement was disproportionately black, it is likely that in absolute numbers, of the future job applicants who benefited from the removal of this unnecessary bottleneck, the majority were white.[189]

We see this pattern throughout the disparate impact canon, although not always as starkly as in *Griggs*. Disparate impact law has the effect of ameliorating bottlenecks in the opportunity structure. In terms of Figure 1, it presses them downward and to the left; it makes them less severe and at the same time requires them to be more legitimate, at least in the sense of being more predictive of how someone will perform the specific job they are seeking. Changes of this sort have many beneficiaries—some of them members of the protected class that brought the Title VII claim, some not.

This pattern extends beyond ability tests, and it applies even when an employer's criterion has some substantial degree of connection to the performance of the job. For example, in *Boyd v. Ozark Air Lines*, the Eighth Circuit found a disparate impact in an airline's height requirement for pilots, which excluded 93% of women and 25.8% of men.[190] The difference between those two figures was of course the source of the disparate impact liability; because height is not itself a protected characteristic under Title VII, a class of short people would not have stated a valid claim. Nonetheless, short people won out in *Boyd*. Just over a

187. *Id.* at 430 n.6. The Court offers no reason for its unfortunate but unsurprising choice to limit the analysis to "males."

188. *Id.*

189. The specifics depend on the exact racial makeup of the labor market and of subsequent applicant pools at Duke Power specifically, but it is quite likely that the overall set of beneficiaries from the outcome in *Griggs*, while *disproportionately* black, was *majority* white. For instance, if we just use population figures as a proxy, the population without high school diplomas in North Carolina was solidly majority-white, even though disproportionately black.

At the time, this may have been obscured by the fact that the litigation in *Griggs* concerned *current* employees, among whom the impact of the requirements fell much more starkly along racial lines. In part that was because many whites who had already been promoted to "inside" jobs were grandfathered in: many lacked high school diplomas and were not required to meet the new requirements. Indeed there was also some evidence that Duke Power adopted an intelligence test for internal promotions as an alternative that could "free up" some whites without diplomas who had suddenly been "blocked off" from further promotions by the diploma requirement. *See* Brief for Petitioner, *supra* note 173, at 44 (internal quotations omitted).

190. Boyd v. Ozark Air Lines, Inc., 568 F.2d 50 (8th Cir. 1977); *see id.* at 52 n.1.

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quarter of *men* faced a bottleneck that prevented them from being able to apply for pilot jobs.

On remand, Ozark successfully proved that there was a business necessity in its height requirement, given the physical design of the cockpits of its planes, which would apparently have been prohibitively expensive to alter.[191] However, the court found that Ozark's requirement was far stricter than what safety required. It ordered Ozark to loosen the requirement by several inches, rendering many women, and also some men, eligible to pursue the pilot jobs for which they were otherwise qualified but from which they had been barred.[192] *Boyd* illustrates the suppleness of disparate impact law as a tool for ameliorating or loosening bottlenecks: even where a height requirement was necessary in the eyes of the law, disparate impact law was able to separate the job-relevant portion of the requirement from the rest, thereby *loosening* an unnecessary and arbitrary bottleneck so that more individuals, both men and women, were qualified to pass through.

C. Opening Bottlenecks vs. Group-Based Redistribution

How should we understand the role of the white beneficiaries of *Griggs* and the male beneficiaries of *Boyd*? From one perspective, these people are just lucky: they are the incidental beneficiaries of an antidiscrimination statute intended to help someone else. Indeed, from that perspective we might even view these beneficiaries, especially when there are a lot of them, as evidence that our legal remedies were poorly targeted: a significant chunk of remedy seems to be aiding individuals outside the plaintiff class. If we understand disparate impact law as a mechanism of group-based redistribution of opportunity, then the potentially rather large proportion of white beneficiaries of *Griggs* would suggest that our mechanism is not redistributing in an especially efficient way.

But what if disparate impact law is not about the group-based redistribution of opportunities, but instead is about ameliorating bottlenecks? The white beneficiaries of *Griggs* had two important things in common with the black beneficiaries. First, they all were unable to proceed through a bottleneck that Duke Power had created, which the Court determined was an "artificial, arbitrary, and unnecessary

191. Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1064 (E.D. Mo. 1976).
192. *Id.* at 1065.

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barrier[].”[193] Second, they all were actually qualified for the job.[194] In other words, leaving group membership aside, all of these people were in a sense similarly situated. They all stood outside, unable to reach the better “inside” jobs at the plant because they could not squeeze through the arbitrary bottlenecks Duke Power had created. The Court scrutinized those bottlenecks because of their disparate racial impact. But that racial impact is a justification for activating the machinery of antidiscrimination law, not a comprehensive picture of whom the “arbitrary, and unnecessary barrier” kept out.

Here it is important not to be Pollyannaish about the distribution of opportunities. Nothing in *Griggs* increased the number of job openings at Duke Power. Thus, for every individual without a high school diploma who was actually hired as a result of the litigation, it must be the case that someone else who would have been hired—someone *with* a high school diploma—was not. In that sense, all hiring is zero-sum.

However, the story here is not one of a zero-sum redistribution of opportunities from whites to blacks. To whatever extent removing the high school diploma requirement actually altered any of Duke Power’s hiring decisions, it must be the case that in the eyes of those making those hiring decisions, at least some individuals *without* high school diplomas must have turned out to be stronger candidates, all things considered—once the diploma bottleneck was taken out of the picture—than the other individuals *with* high school diplomas who would have been hired, had the diploma requirement remained in place. That is, to the extent that we accept the Court’s holding that this requirement was an arbitrary and unnecessary barrier, we should also accept the counterintuitive proposition that, *in terms of the employer’s own valid criteria*,[195] the law redistributed opportunities from less qualified people to more qualified people by removing the diploma requirement. This had the important additional consequence that the pool of more qualified people also contained more black people.

In other words, in *Griggs*, disparate racial impact was the reason the Court decided to scrutinize Duke Power’s hiring practices. But once that decision was made, eliminating what the court found to be an “arbitrary,

193. *Griggs*, 401 U.S. at 431.

194. By “beneficiaries” I mean those who were actually hired and who would not have been but for *Griggs*. By definition, these were the people Duke Power decided were qualified, once the diploma and IQ test requirements were out of the picture.

195. By *valid*, here I simply mean any criteria other than the one that failed the Court’s business necessity/job-relatedness test.

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unnecessary barrier" had benefits for members of many racial groups who were qualified for the jobs. The Court itself seems to have been aware of these broader benefits, and of the bottleneck in the opportunity structure that its decision was ameliorating:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.[196]

This remarkable passage eloquently articulates a version of the anti-bottleneck principle, as applied to the world of "certificates, diplomas, or degrees." The Court is not suggesting here that "badges of accomplishment" are inherently illegitimate. Far from it: they are, as the Court says, "useful." Nothing in this passage or in the Court's opinion requires employers to disregard diplomas and degrees across the board. The Court's point in this passage is that when such criteria are imposed in an overly strict and overly pervasive way, as "fixed measures of capability," they can so severely constrain opportunities that unfair negative assessments of capability become self-fulfilling. A person who has the ability to perform well—and the potential to develop the skills to perform even better and perhaps advance in their career—will never get the chance if unable to pass through an initial bottleneck. It is in that sense that credential requirements can become "masters of reality."

One can perhaps hear, in this passage, a personal message from Chief Justice Burger, who wrote *Griggs*. Unlike many elite Washington lawyers, Burger attended law school at night at a non-elite school in Minnesota while working during the day at an insurance company. As a result, he had some direct experience with what his first law clerk described as an "elitist perception of some in the legal establishment that a city night law school graduate did not quite fit in with those who had enjoyed a Brahmin's Ivy League education."[197] For Burger, it was surely apparent that having the

196. *Griggs*, 401 U.S. at 433.

197. F. Carolyn Graglia, *His First Law Clerk's Fond Memories of a Gracious Gentleman*, 74 TEX. L. REV. 231, 236 (1995). Burger was a graduate of William Mitchell law school. *See also id.* ("[A]ll his education beyond high school took place in night classes, after working all day in the accounting

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right "certificates, diplomas, or degrees" can function as a significant bottleneck—for many people, of any race—and that such certificates and degrees are not always accurate measures of a person's potential.

From this perspective, it is not surprising that the "masters of reality" passage nowhere mentions race. There is no need to. Like Commissioner Berrien, in her comments about the EEOC's enforcement priorities discussed above, Chief Justice Burger is reaching here for a more universal conception of the benefits of reshaping the opportunity structure in the manner Title VII requires. And yet, of course, the reason Title VII has anything to say about the specific high school diploma requirement in *Griggs* is entirely about race.

Race functions here as the "miner's canary," in Guinier and Torres' evocative phrase.[198] The fact that very few black people were making it through the high school diploma bottleneck generated a legal reason to scrutinize that bottleneck, to question whether it was really necessary. That special scrutiny—the business necessity/job relatedness inquiry—is too intrusive for courts to apply to all hiring practices by all employers everywhere. But courts can apply this scrutiny some of the time. Disparate impact law requires that they do so here.

We can understand *that* choice, too, in anti-bottleneck terms. In the larger opportunity structure, *race* operates as a severe bottleneck—for reasons the Court explained in *Griggs* in some detail, reaching out beyond the specific employer to discuss the ways race operated as a bottleneck more broadly.[199] However, the law's response to this larger bottleneck does not simply redistribute opportunities from whites to blacks. Instead it enforces, in a careful and selective way, a conception of equal opportunity in which everyone can compete for desirable jobs on the basis of fair criteria that do not create unnecessary bottlenecks.

That is what the law of disparate impact does in practice. We can see this in any disparate impact case—even *Ricci v. DeStefano*,[200] the case concerning perhaps the most infamous of all efforts to comply with the law of disparate impact. In *Ricci*, the City of New Haven threw out its firefighter promotion test after fearing (or so the City argued) that the test had a disparate impact and could not be justified in terms of business necessity/job relatedness. White firefighters sued. The unusual posture of

department of an insurance company."). I thank Professor Russell Lovell for pointing out to me this aspect of Chief Justice Burger's biography and its relevance to this passage.

198. GUINIER & TORRES, *supra* note 131, at 72–74 (explaining the concept).

199. *See supra* text accompanying notes 182–85.

200. Ricci v. DeStefano, 557 U.S. 557 (2009).

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the case—the test had already been administered, and the races of those individuals up for promotion as a result of the test were known—led a 5–4 majority to portray the City's actions as essentially a ham-fisted attempt to take officer jobs from whites and redistribute them to blacks.[201]

But the real gravamen of the disparate impact claim the City had feared—a claim that, in fact, was later brought, by a New Haven firefighter named Michael Briscoe[202]—was that the test was in various respects an arbitrary and unfair bottleneck. The test was based on written study materials that some applicants could and did obtain "from relatives in the fire service"—those applicants allegedly "had the necessary books even before the syllabus was issued"—while others faced long delays and great expense.[203] Moreover, some of the test questions were allegedly inapplicable to New Haven; and in any event this entire memorization-and-written-test methodology was allegedly outdated, compared to more modern assessment methods that were more effective (and that had less of a disparate impact).[204] This claim—Briscoe's claim—is not exclusively a claim about racial justice. It is a claim about the quality of the test itself; it is an argument that the City should have to use a better test. The reason to require the City *under Title VII* to use a better test is the racial disparate impact. The disparities in study materials, for instance, apparently "fell at least in part along racial lines."[205] But—only in part. Many whites, like the black plaintiffs in *Briscoe*, are "first-generation firefighters without such support networks."[206] They, too, would benefit from a change in the City's assessment process.

Viewing disparate impact law in anti-bottleneck terms yields a conception of what this body of law is about that departs profoundly from the conception of disparate impact law that assumes it is all about group-based redistribution of opportunities. But these are not just two different, equally valid perspectives on disparate impact law. As a positive matter, when our law has faced a fork in the road between these two conceptions of what disparate impact law is about, it has taken the anti-bottleneck path.

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201. *Id.* at 579 (explaining that the City threw out the test because otherwise "too many whites and not enough minorities would be promoted"—and that this "express, race-based decisionmaking" was disparate treatment).

202. *See* Briscoe v. City of New Haven, No. 3:09-cv-1642 (CSH), 2013 WL 4780097 (D. Conn. Sept. 9, 2013) (dismissing Briscoe's claim on the ground that he was not able to show statistically that the 60:40 weighting actually had a disparate impact on black candidates in the first place).

203. *Ricci*, 557 U.S. at 613–14 (Ginsburg, J., dissenting).

204. *Id.* at 614–18.

205. *Id.* at 613.

206. *Id.* at 614 (internal quotations omitted).

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We can see this most starkly in a case like *Connecticut v. Teal*.[207] In *Teal*, the State had imposed a written test on some state agency workers who sought promotion to supervisor. The test had a disparate impact based on race. Connecticut argued that it had compensated for this successfully, through what amounted to an affirmative action program: the State simply hired enough black supervisors so that the "bottom line" was roughly proportional, despite the test's disparate impact.[208] The plaintiffs in *Teal* were black women who had, oddly enough, successfully performed the job on a temporary basis for two years before finding themselves unable to pass through the bottleneck of the written test. They brought a disparate impact claim and won; the Court emphasized that an arbitrary, unnecessary test with a disparate impact *cannot be cured by redistributing jobs from one racial group to another*. This was a profound holding: the Court held that disparate impact law is not, at bottom, about group-based outcomes. Rather, the statute "guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."[209] The statute, as interpreted, favors an approach that removes arbitrary bottlenecks, opening paths for all, over an approach that focuses primarily on group-based redistribution of opportunity.[210]

D. Disparate Impact and Universal Remedies

For disparate impact law to function in an anti-bottleneck way, the remedies in disparate impact claims must be universal. If a court had ordered that *only blacks* were exempted from Duke Power's diploma and testing requirements, or that *only women* were exempted from Ozark Air Lines' height requirement, then the remedy would no longer have the same bottleneck-disrupting power.

Christine Jolls has identified a limited set of disparate impact cases in which courts have ordered remedies for disparate impact claims that seem narrowly targeted to accommodate members of the plaintiff class rather than loosening the bottlenecks that affect individuals both inside and outside the plaintiff class.[211] These cases are a central illustration of Jolls' broader argument about the continuity of disparate impact and

207. Connecticut v. Teal, 457 U.S. 440 (1982).
208. *Id.* at 442.
209. *Id.* at 451.
210. Interestingly, there were also some white plaintiffs in *Teal*. They, too, sued to invalidate the test; their claim was that it violated state civil service laws that required tests to be job-related. *See id.* at 442 n.2.
211. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

accommodation.[212] In the most prominent such case, the Eighth Circuit upheld a finding that the no-beard policy at a Domino's Pizza had a disparate impact on blacks because many black men suffer from pseudofolliculitis barbae (PFB); those with severe PFB cannot shave without causing serious infection.[213] Finding no business necessity,[214] the Eighth Circuit held that Domino's must carve out "a limited exception to its no-beard policy for African American males who suffer from PFB and as a result of this medical condition are unable to shave."[215] This was quite different from the broadest remedy, which would have simply struck down the no-beard policy across the board, for everyone.

But the difference between this holding and a broader remedy is not as stark as it sounds. The most universal remedy would have simply eliminated the no-beard rule. But short of that, the Eighth Circuit could have created an exception to the no-beard rule for *all* PFB sufferers, not only black male PFB sufferers. Interestingly, the court is ambiguous about whether this was, in fact, what it intended to do. The decision refers interchangeably to "those afflicted with PFB" and "members of the protected class who suffer from PFB"; it switches back and forth between "PFB sufferers," and "African American males who cannot shave because of PFB."[216] It may be that the court was simply unaware of the fact that, while approximately fifty percent of black males suffer from PFB, approximately three percent of white males do as well.[217] At any rate it is not clear that limiting the remedy to PFB sufferers *who are black* is lawful: in that case, if a white person with PFB actually appeared, he ought to be able to make out a disparate treatment claim.

The class of disparate impact claims with non-universal remedies is actually quite narrow; remedies like the no-beard PFB carve-out are notable because they are rare. But it is important to be careful here about what we mean by "universal." Jolls argues that all disparate impact remedies are in a sense "accommodation," to the extent that they require

212. *Id.* Jolls' broader thesis about the continuity of disparate impact and accommodation focuses on the point that even universal remedies may impose costs on businesses; in that specific sense, they are like accommodation requirements. (Disparate treatment prohibitions may, of course, impose costs on businesses as well.)

213. Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795 (8th Cir. 1993).

214. *Cf.* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993) (finding business necessity for a no-beard rule in a firefighting job that required employees to wear breathing apparatuses that were apparently incompatible with beards).

215. *Bradley*, 7 F.3d. at 799.

216. *Id.* at 799.

217. *See* Agnessa Gadeliya & Parwathi "Uma" Paniker, *A Prickly Problem*, 119 AM. J. MED. 413, 413 (2004). Nothing in the court's opinion suggests it was aware of this.

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an employer to incur "special costs."[218] For instance, an employer might have to incur the cost of using a more accurate, but also more expensive, test or selection procedure, if the less costly procedure has a disparate impact. But even where the law requires an employer to incur costs only because of group-based disparate impact, the *benefits* of the policy change are ordinarily more universal. The changes made to loosen the bottleneck apply to everyone, not only to members of the statutorily protected group. This is the fundamental disjunction at the heart of disparate impact law: on the liability side, the law is targeted and race-conscious (or otherwise group-conscious) but on the remedy side, the law is universal and race-neutral (with very rare, if any, exceptions).

This same disjunction can sometimes be found in the law of disability accommodation. Almost all accommodations for individuals with disabilities under the ADA involve "special" costs in Jolls' sense—the cost would not have to be incurred but for the employee(s) or other individuals with covered disabilities. Yet these accommodations often provide broad or universal benefits.[219] In particular, disability accommodations often provide benefits that help nondisabled individuals (as well as some individuals with very minor or temporary disabilities who are non-disabled for ADA purposes) who for whatever reason have trouble passing through the same bottlenecks that constrain the opportunities of members of the ADA-protected class. As Elizabeth Emens has noted, "New equipment or an office redesign that makes lifting easier for an employee with a disability may make lifting easier for everyone. Taller dividers on office cubicles to help one employee with a cognitive or psychiatric disability to concentrate may have the same benefit for others . . . ."[220]

Not all disability accommodations work this way. Many provide benefits that are more narrowly targeted at members of the protected class.[221] But the most visible of all disability accommodations in our

218. Jolls, *supra* note 211, at 648.

219. Elizabeth Emens' article, *Integrating Accommodation*, offers a helpful framework for understanding which disability accommodations provide these "third-party" benefits to individuals other than those protected by the ADA, and which accommodations do not. *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008). My focus here is on what she terms "usage" benefits rather than "attitudinal" benefits. *See id.* at 848, 898–902.

220. *Id.* at 850–51 (internal citation omitted).

221. Indeed, in some cases accommodations make things *worse* for those outside the protected class; for example, by redistributing more heavy lifting work to them. Emens argues that disability accommodations sometimes can have far-reaching benefits for non-disabled co-workers even where the initial benefits are targeted rather than universal; for example, because they cause a workplace to discover process changes or technological changes that are initially only available to the disabled

society—the ramps, elevators, and widened physical paths the ADA requires—certainly do work this way. Such physical changes are perhaps the most literal manifestation in our world of the anti-bottleneck principle. Congress enacted these changes because it judged that people with mobility impairments faced severe constraints on their opportunities because they literally could not pass through the gates, the narrow hallways, the stairwells, and so on that led to many important opportunities, both in the employment sphere and in other spheres such as education, housing, and voting.[222] The ADA-mandated changes ameliorate these bottlenecks in ways that make it easier for those with disabilities covered under the law *and everyone else* to pass through and reach the opportunities on the other side.

The disjunction between group-based liability and universal remedies is only sometimes characteristic of the law of disability accommodations, but it is characteristic of disparate impact law in nearly every case. Viewed in terms of its remedies, disparate impact law is quite unlike a system of "bonus points" for members of some group, aimed at redistributing opportunities in a zero-sum way from one group to another. The beneficiaries in a disparate impact case are almost never all members of the same group. But they do have something important in common: they all have difficulty squeezing through a bottleneck of some kind. Disparate impact law, in other words, is a body of law whose remedies highlight a commonality of experience across groups—the experience of being stuck unable to get through some sort of arbitrary and unnecessary bottleneck that business necessity cannot justify.

E. Disparate Impact and Equal Opportunity

In a characteristically pithy bombshell of a concurrence in *Ricci v. DeStefano*, Justice Scalia argued that disparate impact law is in deep tension with the Equal Protection Clause. "[T]he war between disparate impact and equal protection will be waged sooner or later," he wrote, in a passage that attracted wide attention.[223] The problem, Scalia suggested, is that "Title VII's disparate-impact provisions place a racial thumb on the scales" in a way that raises equal protection concerns.[224]

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employee, but are successful enough that employers later make them available more broadly. *See id.* at 855–59.

222. *See, e.g.*, 42 U.S.C. 12101(a)(3), (5) (2012) (the text of the ADA itself, enumerating different spheres in which people with disabilities face pervasive barriers).

223. Ricci v. DeStefano, 557 U.S. 557, 595–96 (Scalia, J., concurring).

224. *Id.* at 594.

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The argument of the preceding pages can help us understand the nature of this "thumb on the scales"—what it is and what it is not. In *Griggs* itself, the case in which the Court built disparate impact law, the new selection procedures that resulted from the Court's decision were as race-neutral as the old. That is, the remedy in *Griggs* did not involve Duke Power treating black applicants any more favorably than white applicants—not as a tiebreaker, not as a "plus factor." Indeed, as discussed above, it is probable that most of the beneficiaries of the decision in *Griggs* to eliminate the high school diploma requirement were white. Moreover, in *Teal*, as we have seen, the Court specifically rejected an effort by a defendant to escape disparate impact liability for its arbitrary and unnecessary test by placing a compensatory "thumb on the scales" of individual decisions, on behalf of black applicants. Such affirmative action programs have their place in American law—but that place is not disparate impact law. Disparate impact law aims not to shift opportunities from one group to another in any zero-sum way, but instead, to alter policies and selection procedures in ways that ameliorate bottlenecks.

Justice Scalia characterizes the "thumb on the scales" differently, by focusing on liability rather than remedy: disparate impact is race-neutral in its remedies, but race-conscious in determining liability. But either way, in the end, the "thumb on the scales" metaphor invokes a baseline of fairness: a fair and impartial scale for the thumb to bias. If a challenged test itself is flawed, then disparate impact law begins to look less like a thumb on the scale and more like a legal means of building a better scale. This is why so much of the disagreement in *Ricci* between the majority and the dissent focused on the merits of the original firefighter test—both in terms of meritocratic performance-prediction, and in terms of something else: whether the test was creating an unnecessary bottleneck that those with inside knowledge and connections would more easily pass through.[225]

Both of these ideas are important elements of our law's conception of equal opportunity. Part of the significance of the anti-bottleneck principle is that it can help us see how disparate impact law operates in practice to promote both. Disparate impact law promotes a conception of equal opportunity that has a significant meritocratic component: any test with a powerful enough meritocratic justification survives any disparate impact challenge. But that is not the whole story. Disparate impact law does not simply say that employers must use the most meritocratic test available. Instead, disparate impact law presses firmly toward the use of tests that are

225. *See supra* notes 202–06 and accompanying text.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss6/6

job-specific rather than general. From its inception, disparate impact law has aimed to prevent any given test, like the IQ tests in *Griggs*, from becoming pervasive bottlenecks that dominate the opportunity structure, greatly limiting the opportunities of those who cannot pass through. This, too, is an important dimension of equality of opportunity.[226]

Some critics of disparate impact law, most prominently Amy Wax, have criticized exactly this feature of disparate impact law, arguing that the law's clear preference for job-specific rather than general tests rests on an empirical "fallacy": an assumption that job-specific tests are always more meritocratically accurate than general ability or intelligence tests.[227] Wax argues that the opposite is the case: "measures of general cognitive ability," she writes, "are generally the best predictors of work performance for all types of positions."[228] Suppose this claim were true. Even so, no test is perfect. For any job or role, there is always a range of possible measures of merit, which can be employed separately or in combination. These measures vary along several dimensions. Some are cheap; others expensive. Some are more accurate than others. Some may be useful mainly for identifying who has a chance to be among the very best performers; others may be useful mainly for separating the poorest performers from the rest. Finally, some measures tend to reinforce pervasive bottlenecks in the opportunity structure, making them even more severe, while other measures do not.

This last dimension is important and unappreciated. Bringing it to light is the project of this Article. Thus, even if it were true that, as Wax asserts, "cognitive ability" tests were excellent predictors of performance across all jobs, opportunity pluralism would still give us one good reason to resist using the same tests everywhere as a universal measure of merit. The widespread or universal use of any single test, or cluster of closely correlated tests, creates an opportunity structure whose *shape* is problematic: a structure in which all prospects depend on passing through a single, very severe bottleneck. Disparate impact law can help us avoid this outcome, even if at the margins this entails some costs in terms of meritocratic performance-prediction.

In other words, meritocracy is one important component of equal opportunity—and by and large, antidiscrimination law tends to promote it.

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226. For a fuller argument that opportunity pluralism amounts to a conception of equal opportunity, see FISHKIN, *supra* note 7.

227. *See* Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 655 (2011).

228. *Id.* at 641.

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But meritocracy is not all there is to equal opportunity. Ameliorating bottlenecks, or avoiding reinforcing them, is also crucial.

To see why, it may be helpful to step outside the employment sphere and consider an analogy from the world of higher education. College admissions officers can select applicants based on a variety of factors, of which the most obvious are high school grades and standardized test scores. One of those two factors—the test scores—tends to create a bottleneck that certain groups of students, including racial minorities, rural students, and the poor, have difficulty passing through. They simply score lower, on average, than affluent, white, suburban students. In the 1990s, when the *Hopwood* decision shut down affirmative action at the University of Texas, this bottleneck suddenly became obvious: the university faced the prospect of admitting very few minority students to its flagship campus.[229] But really, the bottleneck should have been obvious before that. Under the pre-*Hopwood* regime, most of the undergraduates hailed from just ten percent of the high schools in the state; there were entire rural counties that had never sent a single student.[230] Texas' response to *Hopwood* was to adopt a different measure of merit: under the Texas Ten Percent Plan, the flagship campus automatically admits a number of the top graduates of every high school in the state, based on grades alone.[231]

Is this measure more accurate, or more meritocratically predictive of performance, than the old combination of grades and scores? It is very difficult to say. The Ten Percent Plan students have done rather well, confounding predictions that admitting students with low standardized test scores was a recipe for failure.[232] Neither the old measure of merit nor the new is perfectly predictive of performance; no measure of merit ever is. But suppose the new approach were not quite as predictive of performance

229. For a good overview of this history, see Gerald Torres, *We Are On the Move*, 14 LEWIS & CLARK L. REV. 355 (2010). For the *Hopwood* decision, see Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (invalidating the university's affirmative action program).

230. *Id.* at 363.

231. *See* OFFICE OF ADMISSIONS, THE UNIV. OF TEX. AT AUSTIN, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN, REPORT 13, at 11 tbl. 6 (2010), *available at* http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf.

232. *See, e.g.*, Sunny X. Niu & Marta Tienda, *Minority Student Academic Performance Under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 32 EDUC. EVALUATION & POL'Y ANALYSIS 44 (2010). Indeed, in terms of freshman-year grades, over a decade of data, in most years the Top Ten Percent students actually outperformed the non-Top Ten Percent students, even though the non-Top Ten Percent students entered with considerably higher standardized test scores. *See* OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS, *supra* note 231, at 11 tbl. 6 (tracking the two groups' GPAs); *id.* at 10 tbl.4 (comparing their standardized test scores).

as the old. The new approach might still be the better one, all things considered, because maximizing meritocratic accuracy is not the only goal. Another component of equal opportunity, Texas legislators decided, is creating pathways to the state's elite institutions of higher education that do not require passing through a standardized test bottleneck.

Part of why that matters is that the standardized test bottleneck turned out to reinforce a number of other important bottlenecks: specifically, the limited opportunities available to racial minorities, rural students, and the poor. In the Ten Percent Plan, Texas found a way to ameliorate all of these broader bottlenecks, rendering the overall opportunity structure in the state more pluralistic. This is part of the project of equal opportunity, broadly conceived. It is an approach to equal opportunity that has deep continuities with the approaches of *Griggs*, our law of disparate impact, and all the cutting-edge legislation that Part II of this Article described.

V. BOTTLENECKS AND THE PROJECT OF ANTIDISCRIMINATION LAW

A. Why the Anti-Bottleneck Principle?

The anti-bottleneck principle amounts to a distinctive approach to the problem of equal opportunity—one that, as a positive matter, has played a role in our law of disparate impact since that body of law's inception. The anti-bottleneck principle reveals some important continuities among disparate impact law, disparate treatment law, disability accommodations law, and the cutting-edge statutes such as ban the box discussed in Part II. All of these bodies of law renovate the opportunity structure by ameliorating relatively severe bottlenecks that (legislators concluded) the law is in a good position to address.

Thus, the anti-bottleneck principle provides a distinctive and compelling answer to the deep question with which this Article began: which forms of discrimination ought to be viewed as significant and worthy of redress, either normatively or legally? To answer this question we need something more than a principle that everyone should be treated equally, or that employers should only make decisions on merit, rather than on traits that are irrelevant to job performance. On the one hand, our law prohibits discrimination on certain bases even where those traits *are* relevant to job performance—rational statistical discrimination is prohibited by our employment discrimination statutes.[233] On the other

233. *See* Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 926 (2004) ("Race and sex discrimination is frequently

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hand, our law does not prohibit all "irrational" discrimination. Innumerable human characteristics are completely irrelevant to the performance of most jobs, but we do not use law to create liability for discrimination against the red-haired or the green-eyed.[234] We do not make these forms of discrimination illicit. Why?

The anti-bottleneck principle offers an answer to this last question that rests squarely on the interests of individuals. The answer goes like this: Discrimination against the red-haired or the green-eyed does not create a significant bottleneck in the opportunity structure, for the simple reason that it is too rare. Such discrimination may exist somewhere, but it is not close to being pervasive and strict enough to constrain individuals' opportunities significantly. It does not constrain in any meaningful way the paths they might pursue that lead to careers and to flourishing lives.

Discrimination on the basis of the traditional protected categories looks different: each is a category that, as an empirical matter in our society, significantly shapes a person's range of opportunities. The sex-role system provides men and women with strikingly different developmental opportunities, and then further steers them into jobs and social roles. Opportunities differ by race, both because of present discrimination on the basis of race and because of broader sociological and historical factors, such as the link between race and the geography of opportunity, which results in race affecting the developmental opportunities we each experience.[235] If these empirical claims are true enough, for long enough, then it makes sense for societies to use legal tools to ameliorate those bottlenecks. Functionally, this is what legislatures do when they enact antidiscrimination laws, whether or not the legislators themselves view those enactments in these terms. This story, unlike most other possible stories, can tell us what legislatures do when they enact all the new, cutting-edge antidiscrimination laws discussed in Part II, as well as more traditional antidiscrimination laws such as Title VII and the ADEA, and even accommodation laws such as the reasonable accommodation requirement of the ADA.

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a bottom-line rational decision for employers, and the law properly prohibits it even in those circumstances."); *see also id.* at 926, 936–37 (further exploring this proposition and suggesting the Court has introduced some ambiguity about whether this long-established principle applies in the domain of disability); Bagenstos, *supra* note 136.

234. This classic eye color example comes from Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586, 604 (1977).

235. *See, e.g.*, PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013).

This anti-bottleneck story overlaps significantly with, but also departs from, our usual ways of thinking about equal opportunity. It is distinctive in (at least) the following respects from one or more of the alternatives: (1) It does not rest directly on any claims about history or past discrimination; (2) it does not rest on any claims about the intent of the individuals or groups doing the discriminating or the subjective experience of the victims of discrimination; (3) it does not rest on claims about social meaning, such as the question of which forms of discrimination are demeaning or offensive; and, perhaps most distinctively, (4) it does not require that a "group" exist at all. Instead, the focus is entirely on the opportunities open to individuals and the forces that constrain those opportunities. People need not be aware of any connection, let alone a shared group identity or a history, linking themselves to the others who face the same constraint on their opportunities as a result of a discriminatory practice.

It may seem counterintuitive to suggest that we do not need claims about history and past discrimination to decide which forms of discrimination should be subject to legal sanction. To be clear, history is always relevant—but only to the extent that history's effects linger into the present, as they typically do to some substantial degree. The reasons that race is linked with geography and with class today are deeply intertwined with the long trajectory of practices and policies of racial subordination, by both governmental and non-governmental actors. Understanding that history should help us understand why, how, and in what respects race acts as a bottleneck today.[236] History can thus contribute to a nuanced, sociologically informed understanding of the dynamics of bottlenecks in the present.

But in principle there need not be any history of discrimination at all. Suppose credit checks had never existed. Suppose tomorrow they were invented, and the next day employers began to use them to discriminate in hiring. As soon as enough employers did so that the effect was to create a pervasive bottleneck, this ought to trigger our concern. From the perspective of the anti-bottleneck principle, the fact that people with poor credit now have trouble proceeding along many paths in the opportunity structure is enough, by itself, to justify a potential remedy such as a statute banning the use of credit checks in hiring.[237] There need not be any history of discrimination, and people with poor credit need not know they have

236. *Cf.* FISHKIN, *supra* note 7, Part IV.A.

237. *See, e.g.*, *supra* text accompanying notes 69–70 (remarks of Sen. Harmon regarding the credit check law he sponsored).

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poor credit or think of themselves as part of a group of people with poor credit. Indeed they need not even know what a credit check is. The severity of the bottleneck is sufficient.

B. Objections to the Anti-Bottleneck Principle

That last point underscores perhaps the most radical aspect of the anti-bottleneck principle as an approach to antidiscrimination law: it does not necessarily require any claims about groups. And this leads to an objection to framing antidiscrimination law in terms of the anti-bottleneck principle, which runs as follows: what we really care about in antidiscrimination law is the welfare or the opportunities of groups—in particular, racial groups such as African-Americans. Group-based discrimination was the reason we built antidiscrimination law in the first place; surely, this objection runs, groups are what really matters, so it is either some sort of anachronism or mischaracterization to frame our understanding of antidiscrimination law in terms of bottlenecks.

This objection initially seems to have some real force, but on a deeper level, it may not really be an objection at all. If we move up one level of abstraction we might ask: *Why* does the subordination of a racial group, or any group, matter in the first place? There are various ways to answer that question, but perhaps the most straightforward reason—and certainly a complete and sufficient reason—to care about group subordination is that it affects individuals. Specifically, it shapes and limits individual opportunities.

There are, to be sure, other normative starting points from which one can understand group subordination and its significance. But in the end, in a more fundamental way than each of us is a member of any group, we are all individual human beings. A very strong reason to care about group subordination is because it affects individual human beings. Indeed, if it did not, it is not clear whether we would care about it. Thus, even if the anti-bottleneck principle were the only principle operative in antidiscrimination law—which it plainly is not, as discussed below[238]—much of antidiscrimination law would continue to track group subordination. But it would do so for reasons that are ultimately individualistic.

One advantage of building our understanding of groups and justice on this sort of individualistic foundation is that we minimize the reification of

238. *See infra* Part V.C.

groups and their boundaries. We minimize the need to police the boundaries of group membership for purposes of determining who is covered by antidiscrimination law. Instead of first making sure that someone is really a member of a group, in order to determine whether the law protects them, we need only ask whether a person's opportunities are being constrained by the relevant form of group-based discrimination—that is, by the relevant bottleneck.

Employment discrimination law is in harmony with this idea when it recognizes "regarded as" claims—that is, claims that a person was discriminated against because they were *regarded as* a member of a protected group, regardless of their actual group memberships—and claims by individuals who face discrimination based on their association with members of a protected group or because of their refusal to engage in discrimination against members of the protected group.[239] Regardless of whether they are actually members of the group the statute may aim to protect, such individuals find their opportunities constrained by the form of discrimination the statute prohibits.

From an entirely different perspective, one might object to the anti-bottleneck principle—and to the actual statutes described in Part II of this Article—on the grounds that they are unnecessary, or even counterproductive, because they aim at the kind of problem that the market will fix. That is, on this view, we do not need special antidiscrimination protections for the unemployed, those with past criminal convictions, or those with poor credit because, in a free market, the irrational refusal to hire people from any of these categories will create market opportunities and will ultimately be self-correcting. Specifically, if many employers are refusing to hire those with poor credit, and this has no real justification in terms of the efficiency or productivity of the business, then competitors will have an opportunity: hire those with poor credit, perhaps paying a lower wage, and reap the competitive advantages. The trouble with this objection is that it is really an objection to the entire project of antidiscrimination law—and indeed it is one that illustrates the continuity of the anti-bottleneck principle with traditional antidiscrimination law. This same argument could be made—and was made—as an objection to the project of antidiscrimination law itself, and to the enactment of statutes such as Title VII.[240]

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239. *See generally* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002).

240. To understand the foundations of this line of reasoning, the classic argument that discrimination is inefficient and that non-discriminating firms can take advantage of this can be found

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Finally, from yet another perspective, one might object that what we really need is not an anti-bottleneck principle, but an antidiscrimination law based on class, including disparate impact provisions that would cover class as well as such variables as race and sex. Each of the cutting-edge examples with which this Article began could have been framed—and interestingly, each sometimes *was* framed[241]—in terms of class: discrimination on the basis of credit, unemployment, or past criminal convictions all have a disparate impact on the poor. Perhaps instead of an anti-bottleneck principle, we should just build an antidiscrimination law based on class in addition to our existing body of antidiscrimination law based on such characteristics as race and sex.

This suggestion certainly has some appeal. As I will discuss briefly below, class may be the most pervasive bottleneck in the American opportunity structure. It affects everything from prenatal developmental conditions and early developmental opportunities in childhood through educational opportunities, employment prospects, and everything in between. It is therefore extremely important, from the perspective of the anti-bottleneck principle, to ameliorate this class bottleneck. Many different laws and policies, in areas from education policy to economic policy, provide chances to do this.

However, it is less clear that disparate impact law is the right tool for this job. The problem is that almost everything has a disparate impact based on class: there are very few employment practices of any kind that make distinctions among employees or applicants that do not have some significant class-based disparate impact. Therefore, a body of disparate impact law focused on class would be tantamount to a legal rule that nearly all employment practices must meet the business necessity/job relatedness test.[242] Moreover, not every bottleneck in the opportunity structure does track class. Even if credit scores did not correlate with class background at all, we still ought to be concerned if employers' use of credit history is creating a severe bottleneck.

A virtue of the anti-bottleneck principle is that it allows us to approach the problem of equal opportunity in a retail rather than wholesale way. Instead of focusing *only* on broad-gauge inequalities such as class

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in GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 37, 44–45 (2d ed. 1971).

241. *See supra* note 74 and accompanying text.

242. *But cf.* Kasper Lippert-Rasmussen, *Discrimination: What Is It and What Makes It Morally Wrong?*, *in* NEW WAVES IN APPLIED ETHICS 51, 60 (Jesper Ryberg et al. eds. 2007) (arguing that "indirect" (i.e. disparate impact) discrimination based on class is wrongful, while acknowledging that getting rid of it would require "extremely drastic social changes").

difference, we can also focus on more particular knots in the opportunity structure and how they might be loosened. Where accidents of geography block some people from pursuing most opportunities, we can think about ways to ameliorate this bottleneck even if we cannot conclusively determine whether it is class- or race-linked (although of course, tracing such links could yield more reasons to ameliorate the bottleneck). In a deeply complex and unequal world, it is helpful as both a practical and a theoretical matter to be able to think about equal opportunity from this kind of starting point.

C. Limits of the Anti-Bottleneck Principle

This Article has argued that the anti-bottleneck principle plays a central role in employment discrimination law—not only in the new cutting-edge statutes with which I began, but across the field, in the law of disparate treatment and the law of disparate impact. But I want to be clear about what this Article does not claim. It does not claim that the anti-bottleneck principle is the *only* principle underlying our law of employment discrimination. Employment discrimination law is rich with plural, overlapping, and occasionally contradictory principles, which play various roles in shaping the law's contours.

For instance, within Title VII itself, the anti-bottleneck story fits best with protections against discrimination on the basis of race, color, sex, and national origin. When it comes to protections against discrimination on the basis of religion, the role of the anti-bottleneck principle seems considerably more attenuated. This protection instead seems designed primarily to serve values of religious freedom with their roots in the First Amendment.

To be sure, there are situations where discrimination on the basis of religion could create a severe bottleneck that antidiscrimination law could help ameliorate. These situations are of two general types. First, in some corner of American society, a dominant religious group might control most employment and favor its own members. Second, if prejudice against a particular religious group, say Muslims, were to become sufficiently pervasive, members of that group could face a severe bottleneck akin to that created by pervasive discrimination on the basis of national origin or race. However, even where neither of these situations exists, our law still has independent reason to protect against discrimination on the basis of religion, even of a sporadic and non-pervasive kind. The reason is that this protection helps undergird religious liberty.

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Even outside the religious sphere, a number of principles provide overlapping justifications for various parts of antidiscrimination law. In some cases these help fill lacunae that would result from attempting to explain the whole of antidiscrimination law in anti-bottleneck terms. The most significant of these lacunae is this: by itself, the anti-bottleneck principle has some difficulty explaining our law's evenhandedness with respect to claims by groups that do *not* face a significant bottleneck in the opportunity structure, but rather, indirectly benefit from one.

Consider disparate impact claims brought by whites. White people are not the victims of pervasive discrimination in the United States, and are not likely to be in the foreseeable future. Leaving aside a few advocates' florid fantasies that affirmative action has gone so far that a white man can't catch a break, in reality it is extremely difficult to make the case that there is a severe bottleneck in the opportunity structure through which only (or mostly) non-whites can pass. However, white people are occasionally, sporadically the victims of race-based disparate treatment; and sometimes there are facially neutral employment practices that have a disparate impact on whites. Title VII evenhandedly allows both disparate treatment and disparate impact challenges by any covered group, including whites. Thus, in *Meditz v. City of Newark*,[243] a white man challenged a requirement that non-uniformed city employees reside inside the city limits, on the grounds that this residency requirement had a disparate impact on whites and was not justified by business necessity.

Under Title VII, Meditz states a valid disparate impact claim. The anti-bottleneck principle by itself cannot explain this. (Nor can a number of other principles, such as the anti-subordination principle—there is no good case to be made that whites, suburbanites, or white suburbanites are subordinated.[244]) From an anti-bottleneck point of view, the logic of Meditz' complaint would be that the specific bottleneck through which he cannot pass—the residency requirement—should be subject to the job relatedness/business necessity inquiry because it reinforces a larger

243. Meditz v. City of Newark, 658 F.3d 364 (3d Cir. 2011) (reversing the district court's grant of summary judgment for the City). Such claims are quite rare, for understandable reasons. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 528–29 & nn.149–50 (2003); *id.* at 528 n.149 ("[F]ew facially neutral employment practices have disparately adverse impacts on whites. . . . After all, a historically advantaged group is almost by definition one that has the education, skills, and other resources necessary to succeed in whatever endeavors a society customarily uses to measure the comparative worth of its members.").

244. Indeed, Charles Sullivan has argued that "[a]pplying disparate impact beyond minorities and women is profoundly ahistorical and inconsistent with the theoretic underpinnings of the theory." Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1512 (2004).

bottleneck of discrimination against and limited opportunities for whites. But this larger bottleneck does not exist. For reasons very similar to those Judge Posner articulated in *EEOC v. Consolidated Services Systems*,[245] the residency requirement here appears if anything to *ameliorate* a bottleneck: residents of Newark, not to mention minorities, face limited opportunities overall, for reasons of both race and geography. The residency requirement, like the word-of-mouth recruiting at immigrant-owned firms Judge Posner discusses, may be a minor bottleneck that actually has the effect of making the overall opportunity structure a little more pluralistic. That is, it may be that by reserving some opportunities for people whose opportunities are, overall, more limited, the residency requirement helps ameliorate a bottleneck more severe than any it reinforces.

But the shape of Title VII is not a function of the anti-bottleneck principle alone. The case of disparate impact claims by whites illustrates a principle of evenhandedness that has been incorporated into Title VII at a deep level. To put it simply, any claim black people can make under Title VII, white people can make too. This principle of evenhandedness is not part of every antidiscrimination statute. In particular it is not part of the Age Discrimination in Employment Act (ADEA),[246] which protects only older workers, not younger ones. In interpreting the ADEA this way, the Court inferred reasoning from Congress that was consistent with the anti-bottleneck principle: it explained that there was no evidence before Congress showing *pervasive* discrimination against younger workers—only against older ones.[247] Similarly, the Americans with Disabilities Act does not allow claims by individuals *without* disabilities that they face discrimination on account of *not* having a disability, as a principle of evenhandedness might suggest.[248] But Title VII is different—perhaps because, unlike in the areas of age and disability, the Fourteenth Amendment (at least as now interpreted) might not permit Congress to enact an employment discrimination statute that protected racial minorities but not whites from racial discrimination.

Leaving constitutional law aside, there are some good normative reasons we might want employment discrimination law to adhere to this

245. *See supra* Part III.B.

246. 29 U.S.C. § 623 (2006 & Supp. V 2011).

247. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587–89 (2004) (discussing evidence before Congress that "arbitrary discrimination against older workers was widespread and persistent enough to call for a federal legislative remedy"—while there was no similar evidence of widespread, persistent discrimination against younger workers in favor of older ones).

248. *See* 42 U.S.C. § 12201(g) (2006 & Supp. V 2011); 29 C.F.R. § 1630.4(b) (2013). This provision was added as part of the Americans with Disabilities Amendments Act of 2008.

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principle of evenhandedness even where there is no severe bottleneck to ameliorate. For instance, it may be important for public acceptance of this body of law. Moreover, the gains may be significant and the costs relatively modest. Because there is in fact not all that much discrimination against whites, fair antidiscrimination protections for whites should constrain in only a very small way the prerogatives of employers to use whatever employment practices they would like, and hire and fire whom they wish.[249]

So to review: The claim here is not that we ought to understand the anti-bottleneck principle to be *the* principle of antidiscrimination law, but rather, that we should recognize that this principle plays a central role in antidiscrimination law as we know it. In fact I do not think there is any single principle that can qualify as *the* principle of antidiscrimination law. Anyone who spends significant time teaching or practicing in this area will likely come to see multiple and sometimes contradictory principles at work.

D. Frontiers of the Anti-Bottleneck Principle

If we take the anti-bottleneck idea seriously, it ought to unsettle any assumption that the existing categories of antidiscrimination protection will be fixed for all time. Over time, changes of many kinds—sociological, economic, cultural—will cause some bottlenecks to emerge and become severe, while others fade. Imagine a world, perhaps hundreds of years in the future, or perhaps only in the realm of science fiction, where race truly were *not* a significant bottleneck. This is an imaginative exercise more complex than simply imagining that employers stop discriminating on the basis of race. It is true that we first have to imagine that employers no longer prefer resumes with white names at the top to those with black names at the top.[250] But then we must also imagine that the schools white students attend and the schools black students attend perform equally well, that white and black children and adults have equal access to networks, capital, and so on. In this scenario, from the point of view of the anti-bottleneck principle, it would no longer be necessary for

249. By "fair" here, I mean antidiscrimination protections that include well-crafted exceptions for valid affirmative action plans, so that the protections for whites do not swallow up affirmative action programs that are well designed to ameliorate important bottlenecks in the opportunity structure.

250. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (classic study finding large differences in callback rates by real employers, by manipulating only the name at the top of the resume).

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antidiscrimination law to protect against discrimination on the basis of race. Race would be just like eye color or hair color today: a job-irrelevant detail about a person that is not linked to any larger bottleneck in the opportunity structure.[251] In other words, from the perspective of the anti-bottleneck principle there is nothing fundamental or primordial about a category like race; the argument for antidiscrimination statutes covering race depends on the empirical reality that race acts as a bottleneck in our opportunity structure.[252]

On the other hand, the anti-bottleneck principle also suggests that the law ought to be more attentive to some forms of discrimination it now ignores. For instance, consider appearance discrimination. Empirical evidence suggests that people whom society deems unattractive currently face bias that cuts across many spheres—not only employment but also classrooms, courtrooms, and essentially every arena of human life that involves interpersonal interaction and relationships.[253] Women who are anything other than thin and young face an especially powerful version of this bias.[254] Because empirically this bias appears both strong and pervasive, cutting across many spheres beyond employment, it amounts to a severe bottleneck.

Indeed, it is so severe that one objection to enacting antidiscrimination laws on the basis of appearance is that it is simply not possible to make human beings indifferent to the appearance of others: humans are wired, in a deep way, to care about beauty. But this objection proves too much. We are not blind to any of the variables on which antidiscrimination laws turn. From the point of view of the anti-bottleneck principle, there is no need to aim for a state of affairs in which everyone is indifferent to the appearance of others. In the real world, the function of antidiscrimination law is not actually to make us blind to variables such as race or sex. Instead, antidiscrimination law is a social practice that intervenes in, and attempts

251. In precisely what sense "race" would exist at all, absent *all* the structures of subordination and unequal opportunity that today partly constitute its meaning, is an interesting question for another day.

252. Of course, one would want to be careful about repealing laws precipitously, as one approached this scenario, given the many uncertainties surrounding it. Sliding backward generally seems a greater danger than the harm caused by an unnecessary law. But there comes a point where there truly is no longer a justification, in terms of the anti-bottleneck principle, for such laws.

253. *See* DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 26–28 (2010).

254. *See, e.g.*, *id.* at 30–32, 97–99. Appearance discrimination—and especially weight discrimination—are also deeply intertwined with class. It is expensive to maintain an attractive appearance, and poverty is linked with obesity. These forms of discrimination are also linked with race, given the racially coded beauty norms in our culture. *Id.* at 41–44, 96.

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to limit, other social practices. As Robert Post explains, using sex discrimination as an example, despite the law's ostensible aspiration to eliminate sex discrimination, the real effect of the law is to interact with social practices of sex discrimination in a way that cabins them somewhat.[255] Title VII's prohibition on disparate treatment is not absolute on its own terms,[256] and in any event, not everyone will obey the law. And some who try in good faith not to discriminate will fail. The statute's effect will be to *reduce* the amount of a given type of discrimination in the opportunity structure, not eliminate it.

Although this Article focuses on employment discrimination law, antidiscrimination protections are never the only possible social or legal response to a bottleneck. In general, I have suggested that society's response to a bottleneck ought to be some combination of (1) helping people through a bottleneck, and (2) helping people around a bottleneck, with the correct balance between these two goals depending on countervailing considerations. These countervailing considerations may be completely dispositive in some cases. For instance, the solution to race discrimination is not to enable people more easily to change their race, even if that were easy to do. The reason is that racial identity is too important to people; it is asking far too much to require someone to relinquish their racial identity in order to pursue opportunities in the world. Is appearance the same? Many in the fat rights movement argue that being fat is part of their identity, and that they should not be forced to give this up to pursue opportunities.[257] On the other hand, some people would be more than happy to stop being fat—and many people would be more than happy to stop being unattractive—but they cannot do it. People in that situation might prefer, rather than antidiscrimination protections, some help (perhaps of a financial kind) with changing the characteristic that is causing them to be discriminated against.

This point leads quickly into some uncomfortable territory. Do we really want the solution to harsh and exacting beauty norms to be assistance for people to conform to those same norms? We can imagine a society subsidizing orthodontia to help everyone conform to a norm of perfect teeth, rhinoplasty to help everyone conform to a certain ideal shape

255. *See* ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 22–40 (2001).

256. That is, there is a bona fide occupational qualification exception.

257. *See generally* AMY ERDMAN FARRELL, FAT SHAME: STIGMA AND THE FAT BODY IN AMERICAN CULTURE 137–71 (2011) (discussing the fat activist movement and its arguments for fat acceptance).

of nose, or even breast implants to enable small-breasted women to conform to a larger-breasted beauty norm. But at some point, going down this road begins to seem dystopian. The reason is one that we can best understand in terms of the anti-bottleneck principle itself. By trying to help people through these bottlenecks, we might entrench or give an official imprimatur to increasingly narrow and stringent norms of human physical beauty, thereby making those bottlenecks even more severe. There is no perfect solution here. The best we can do is to tread carefully, attempting to help people both through, and around, the physical appearance bottleneck, keeping in mind that the two goals are partly in conflict. Helping people *around* the bottleneck requires norms, social practices, and perhaps laws that press against appearance discrimination. Helping people *through* requires that in at least some cases society ought to provide—for example through social insurance—the opportunity to ameliorate at least some set of disfiguring conditions.

What we ought not to do is address the appearance discrimination bottleneck in a way that makes the overall opportunity structure less pluralistic, by reinforcing other bottlenecks. One familiar American response to the difficult problem discussed in the previous paragraph is that society ought to *permit* all sorts of cosmetic changes and treatments, but subsidize none of them. This response has a predictable effect. It links appearance ever more tightly with class. If perfect teeth become the norm among everyone except the poor, then less-than-perfect teeth become a marker of poverty. Appearance discrimination is probably already one of the more significant bottlenecks that add up to the deeper, unacknowledged class bottleneck at the heart of the American opportunity structure.

It is difficult to know for sure—it has some real competition—but it is possible that class is the single most severe bottleneck in the contemporary American opportunity structure.[258] In the main, it is a bottleneck built not of disparate treatment on the basis of class, but instead, of all the ways that class constrains developmental opportunities, from the early developmental opportunities of childhood through the educational opportunities, networks, and job opportunities that are linked with class position among adults. Class is a particularly difficult bottleneck for American law to ameliorate—not only, as discussed above, because a law prohibiting disparate impact on the basis of class might be too sweeping to be an attractive legislative response. The larger problem is the background

258. *See* FISHKIN, *supra* note 7, Part IV.A.

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assumptions of American political discourse, which generally eschews serious discussion of class. Under these conditions, perhaps the best we can hope for is that legislators, courts, agencies, and individual gatekeepers such as schools and employers will recognize the problem, and do what they can to ameliorate—or at least not exacerbate—the bottleneck of limited opportunities for those born working-class or poor.

A virtue of the anti-bottleneck principle, in comparison to some other ways of thinking about the project of equal opportunity, is that it makes no impossible demands, such as that everyone from all class backgrounds should have the same opportunities. Instead of describing an end state of equal opportunity and then working backward to find ways to achieve it, the anti-bottleneck principle prompts us to begin with the specific bottlenecks before us, and look for ways to ameliorate them.[259] It is a direction of effort, rather than a goal to be achieved. This makes the anti-bottleneck principle well-suited to the task of pressing against complex social phenomena like the bottleneck of class in American society—phenomena so vast and pervasive that it is difficult even to imagine what unraveling them would look like. Instead of imagining this, and perhaps setting our sights on goals that are unhelpfully utopian, the anti-bottleneck principle lets us make progress in an ameliorative way, inching toward justice incrementally, one change to the opportunity structure at a time.

CONCLUSION

Employment discrimination law is a rich and complex field that cannot accurately be described as the outworking of any single principle. But the anti-bottleneck principle plays a very substantial role in this body of law—one that has not heretofore been acknowledged or understood. The legislators and activists behind the new, cutting-edge antidiscrimination laws discussed in Part II have tended to articulate their aims more or less explicitly in terms of the anti-bottleneck principle; that principle helps us see the significance of a variety of present and possible future antidiscrimination protections whose purpose and appeal would otherwise be obscure.

This Article has made no claim that the legislators who enacted Title VII and our other more traditional antidiscrimination laws similarly articulated their aims in anti-bottleneck terms. However, the project of ameliorating the severe racial constraints limiting African-Americans'

259. *See* Joseph Fishkin, *The How of Unequal Opportunity*, 40 PHIL. TOPICS 27 (2012).

opportunities is one that we can understand, at a higher level of abstraction, as a powerful instance of the anti-bottleneck principle. Viewing Title VII in this way can help us understand why the law of disparate impact works the way it does—why, for example, so many white people in North Carolina without high school diplomas were necessarily the beneficiaries of *Griggs*. They, like many other white people, generally poor white people, before and since, stand to benefit from the removal of "arbitrary, unnecessary barrier[s]" that constrain the opportunities of many people of all races—even when those barriers' impact on racial minorities is what brings them to the attention of the law.

Today, the project of antidiscrimination law is under severe strain, with some scholars beginning to ask whether the entire project is reaching its end at the hands of hostile courts.[260] Disparate impact law is under particularly intense scrutiny, both in employment and in other fields such as fair housing law. Critics of disparate impact law, and advocates of paring back antidiscrimination law more generally, view these bodies of law as essentially in tension with equal opportunity. That is, despite the explicit stated aspirations of these statutes to promote equal opportunity, these critics view them as measures that do little but redistribute opportunities from meritorious individuals who are white, male, able-bodied, and so forth, to other people who are less meritorious but are the special favorites of the law. On this (stylized) view, equal opportunity is what happens when employers are allowed unfettered discretion over their employment decisions, whereas antidiscrimination law tends to make opportunities less equal.

The anti-bottleneck principle can help us see why this story has it almost entirely backward. Equal opportunity is actually in deep tension with the mostly unfettered employer discretion that is the hallmark of American employment law. Selectively, through antidiscrimination law, we sometimes force some employers to hew more closely—and at times more expensively—to norms of equal opportunity. In doing so, we loosen bottlenecks in the opportunity structure. When we do this, the beneficiaries turn out to be surprisingly numerous and diverse. In that sense, we can understand antidiscrimination law as part of a broader and more universal project. This is the project of what we might call the law of equal opportunity: not only employment discrimination law, but also such fields as fair housing law and much of education law. In all these areas,

260. *See, e.g.*, Michael J. Zimmer, *Is The Antidiscrimination Project Being Ended?*, 1 IND. J.L. & SOC. EQUALITY 1 (2013).

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our law intervenes selectively in the opportunity structure, reshaping that structure in ways that open up severe bottlenecks so that people will face fewer constraints on their ability to choose and pursue paths that lead to flourishing lives.

The universality of this project ought to be a source of solidarity rather than divisiveness. All of us face bottlenecks. Any of us may at some point be a direct or indirect beneficiary of the broad changes to the employment landscape that antidiscrimination law has wrought. This is a hard truth to grasp for those who insist on viewing the world of employment exclusively in zero-sum terms. It is one that the anti-bottleneck principle can help us see.

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