

THE ANTICLASSIFICATION TURN IN EMPLOYMENT DISCRIMINATION LAW

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ABSTRACT

The distinction between antisubordination and anticlassification has existed since the 1970s and has been frequently invoked by scholars to advocate for certain readings of antidiscrimination law. The anticlassification principle prohibits practices that classify people on the basis of a forbidden category. In contrast, the antisubordination principle allows classification (or consideration of, for example, race or sex) to the extent the classification is intended to challenge group subordination.

*While most scholars writing about antisubordination and anticlassification have done so in the context of equal protection, this Article systematically applies antisubordination and anticlassification values to assess recent developments in employment discrimination law and explore how they might tell us something about the trajectory of employment discrimination jurisprudence. In 2009, the Supreme Court decided *Ricci v. DeStefano*, a landmark Title VII case, and in 2008 Congress passed two new laws: the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act Amendments Act (ADAAA). These changes potentially undermine the very normative foundation of employment discrimination law.*

This Article argues that the major employment discrimination statutes have until recently had a substantial antisubordination orientation, in that they were designed to respond to a history of discrimination and incorporate many provisions that expressly take account of forbidden traits (through doctrines like disparate impact and reasonable accommodation). This Article then explores how recent changes to the Americans with Disabilities Act (ADA), Title VII, and the enactment of GINA may imperil the underlying normative foundation of employment discrimination law by turning toward and emphasizing anticlassification values at the expense of

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employment discrimination's antisubordinationist foundation. The Article concludes by evaluating the turn, questioning whether the antisubordination/anticlassification distinction is the most apt framework for evaluating employment discrimination law, and suggesting a few changes that may help preserve the valuable antisubordination foundations of employment discrimination law.

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INTRODUCTION

Over the last three years, there have been major changes to the corpus of employment discrimination law. The Americans with Disabilities Act Amendments Act (ADAAA)¹ was signed into law on September 25, 2008, and took effect January 1, 2009.² *Ricci v. DeStefano*,³ a landmark Title VII case, was handed down April 22, 2009. The Genetic Information Nondiscrimination Act (GINA)⁴ was enacted May 21, 2008, and its employment provisions took effect November 21, 2009. This Article analyzes how these three changes may portend a shift within the body of employment discrimination law. In particular, it offers an original analysis of how these changes constitute a turn away from antisubordination norms and a turn toward anticlassification principles. It then explores why the anticlassification turn has taken place and whether the turn undermines the very heart of employment discrimination policy.

The antisubordination/anticlassification framework has been invoked widely both to describe and advocate for certain readings of antidiscrimination law.⁵ It has had particular prominence in the context of equal protection jurisprudence. The antisubordination principle generally prohibits practices that “enforce the inferior social status of historically oppressed groups” and allows practices that challenge historical oppression.⁶ In contrast, anticlassification principles prohibit practices that

1. Pub. L. No. 110-325, 2008 U.S.C.C.A.N. (122 Stat.) 3553 (codified at 42 U.S.C. § 12102) (2008).

2. *Id.* at § 8 (“This Act and the amendments made by this Act shall become effective on January 1, 2009.”).

3. 557 U.S. 557 (2009).

4. Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, and 42 U.S.C.) (2008).

5. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 78 (2000) [hereinafter Siegel, *Color Blindness*] (noting this distinction “has dominated arguments about equality in popular, academic, and judicial fora” for over two decades). Reva Siegel has recently argued there is a third perspective on equal protection (“antibalkanization”), found in the opinions of Supreme Court Justices who have esteemed social cohesion in defending their views. See generally Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011). This Article, however, will focus on the traditional justificatory grounds within antidiscrimination law: antisubordination and anticlassification.

6. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) [hereinafter Siegel, *Equality Talk*]. See Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CALIF. L. REV. 935, 960 (1994) (“[T]he antisubordination principle contends that certain groups should not occupy socially, culturally, or materially subordinate positions in society.”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing the Equal Protection Clause prohibits laws or official practices that “aggravate[] . . . the subordinate position of a specially disadvantaged group”). Cass Sunstein has similarly argued against certain types of stereotyping by observing that “the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory that such stereotyping has the

“classify people either overtly or surreptitiously on the basis of a forbidden category.”⁷ Adopting a purely anticlassificationist viewpoint would mean never making use of a forbidden trait (such as race), while an antisubordinationist orientation would allow consideration of the classification as long as it serves antisubordination goals. Where antisubordination theory emphasizes broad, group-based subordination, the anticlassification principle reflects a narrower objective of eliminating individual unfairness.⁸ The antidiscrimination project can be seen as encompassing both antisubordination and anticlassification principles—with each offering its own view of the best way to achieve equality.⁹

While most scholars writing about antisubordination and anticlassification have done so in the context of equal protection (constitutional equality law), this Article applies antisubordination and anticlassification values to understand the antidiscrimination mandate in the context of employment (statutory equality law)—an undertheorized nexus.¹⁰ Antidiscrimination theory provides a useful analytical framework

harmful long-term consequence of perpetuating group-based inequalities.” Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2418 (1994). For other legal scholarship applying antisubordination principles, see CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32–45 (1987); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1514–21 (2d ed. 1988); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) [hereinafter Colker, *Anti-Subordination*]; Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

7. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) [hereinafter Balkin & Siegel, *American Civil Rights*].

8. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 41 (2006) [hereinafter Bagenstos, *Structural Turn*]. See Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1011 n.206 (1993) (“There is indeed a necessary connection between the concept of subordination and groups: one cannot be subordinated, in the structural sense, as an individual.”).

9. While various scholars have used antidiscrimination to mean anticlassification—see, for example, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) and Fiss, *supra* note 6, at 108—I have used the word “antidiscrimination” as a holistic term that refers to the general purposes underlying antidiscrimination law. See Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 10 (“In hindsight, [Fiss’s] choice of words was quite unfortunate, because there is no particular reason to think that antidiscrimination law or the principle of antidiscrimination is primarily concerned with classification or differentiation as opposed to subordination and the denial of equal citizenship. Both antisubordination and anticlassification might be understood as possible ways of fleshing out the meaning of the antidiscrimination principle, and thus as candidates for the ‘true’ principle underlying antidiscrimination law.”).

10. To date, no scholars have devoted attention to what anticlassification and antisubordination theory might tell us about the trajectory of employment discrimination jurisprudence in light of the recent major changes and additions (to employment discrimination law) discussed in this Article. See also Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 600 (2011) [hereinafter Roberts, *GINA as an Antidiscrimination Law*] (noting GINA has failed to attract much attention from antidiscrimination scholars).

for understanding the direction and trajectory of employment discrimination laws. This Article argues that most employment discrimination laws have been oriented around antisubordination, in that they are designed to respond to a history of discrimination and incorporate many provisions that expressly take account of forbidden traits (through doctrines such as disparate impact and reasonable accommodation). To be sure, there has been historical vacillation between anticlassification and antisubordination principles.¹¹ Nevertheless, the confluence of several recent and major changes to employment discrimination jurisprudence constitutes a discernible and clear shift toward anticlassification principles. The natural question is whether this development is desirable or not. The anticlassification turn thus provides an opportunity to reexamine the very purpose of employment discrimination laws and whether the current legislative and jurisprudential schemes are effectuating that purpose.

Part I introduces and places antisubordination and anticlassification principles in their historical context and examines how one may identify a particular law or decision as being aligned with one principle or the other. In Part II, the Article contends that there has been a recent turn toward anticlassification values. This can be illustrated by comparing the histories and policies of the major employment discrimination statutes with the recent, aforementioned changes. First, assessment of Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) demonstrates that employment discrimination law has, as a whole, been antisubordination-oriented. Even though there are certain provisions that are facially anticlassificationist, the laws have been substantially oriented around fighting subordination. Second, the recent changes to the ADA, Title VII, and the enactment of GINA all similarly reflect a turn toward anticlassification values by emphasizing anticlassification provisions and deemphasizing certain antisubordination policies. Part III considers possible theories for why the Legislature and courts may be ambivalent toward antisubordination values and thus support the anticlassification turn. The simplicity of anticlassification values, their support among the public and judiciary, and the perceived irrelevance of certain forms of identity are considered as possible explanations. Part IV considers whether recent changes to the ADA and Title VII, and the enactment of GINA, imperil the underlying normative foundation of employment discrimination law: fighting past and current group subordination. This Part also questions whether the anticlassification/antisubordination paradigm is the most useful framework for making sense of employment discrimination law. Understanding the

11. See *infra* notes 70–85 and corresponding text (considering how Title VII’s claim to either anticlassification or antisubordination has been contested over time).

theoretical and conceptual context for the recent statutory and jurisprudential changes sheds new light on the direction and shortcomings of employment discrimination law and provides guidance on how to ensure American workers are adequately protected from discrimination and harassment.

At the outset, it is worth noting a few things that I am not arguing. First, I am not arguing this is the only anticlassification turn to take place within the nearly fifty-year history of employment discrimination law. Certainly, as mentioned above and shown below, there has been vacillation over time between the salience of anticlassification and antisubordination principles.¹² Second, and similarly, I am not arguing that employment discrimination has been unequivocally oriented around antisubordination. As the next Part illustrates, there are always indeterminacies between anticlassification and antisubordination principles that would belie such a claim. Additionally, even if we are allowed to generalize, the idea that employment discrimination has been oriented only around antisubordination ideals is clearly wrong; there were of course earlier anticlassificationist developments in the corpus of employment discrimination law. In sum, the contribution of this Article is to argue that recent events constitute a turn toward anticlassification principles—even if that turn is a further turn, and/or is situated against a contested backdrop of employment discrimination law.

I. ANTICLASSIFICATION AND ANTISUBORDINATION PRINCIPLES

Antidiscrimination laws are part of public policy, aimed toward achieving social equality.¹³ Put another way, antidiscrimination laws regulate the social practices that create inequality.¹⁴ But fashioning antidiscrimination policy is not simple because there are disagreements over the best way to achieve equality. Various theories have been proffered to *describe why* Congress and courts pass and interpret antidiscrimination laws the way that they do.¹⁵ Such theories have also been wielded to *argue*

12. See *supra* note 11.

13. Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 388 (2008).

14. Siegel, *Color Blindness*, *supra* note 5, at 82.

15. In addition to the anticlassification/antisubordination principles discussed in this article, Robert Post has advanced a “sociological account” of antidiscrimination law. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31 (2000) (arguing law is a social practice that advances certain social norms). Tristin Green advances a “social equality” framework, in which the goal is to “reduc[e] group-based subordination, stigmatization, and intergroup hostility.” Green, *supra* note 13, at 383. Green’s social equality framework is similar to antisubordination principles, but may at times suggest a different result. *Id.* at 390–91. Consider the example of affirmative action. As explained below, antisubordination principles

for certain types of antidiscrimination policies and laws. In sum, such theories provide both descriptive and normative guidance for what types of policies and laws are most likely to achieve long-term equality.

One framework that has been invoked widely both to describe and advocate for certain readings of antidiscrimination law is found in the distinction between anticlassification and antistatutory principles.¹⁶ As noted earlier, antistatutory principles prohibit practices that enforce the social status of oppressed groups and allow practices that challenge oppression.¹⁷ In contrast, anticlassification principles prohibit practices that classify people on the basis of a forbidden category.¹⁸ In the context of race, for example, the anticlassification principle indicts affirmative action and allows facially neutral policies with a racially disparate impact, while the antistatutory principle indicts facially neutral practices with a racially disparate impact and legitimates affirmative action.¹⁹ There is thus sometimes tension between the principles, forcing courts and academic scholars to value one principle over the other. To better appreciate anticlassification and antistatutory principles, it is helpful to examine the context in which they first arose.

A. Historical Emergence

The distinction between anticlassification and antistatutory principles arose in 1976, a critical time in American race history.²⁰ Most overt forms of segregation had been abolished, but there were still challenges to achieving racial integration and avoiding racial stratification. In particular, the Supreme Court faced constitutional questions about two kinds of practices: (1) using racial criteria to integrate formerly segregated institutions; and (2) using facially neutral rules that had a disparate impact on certain racial groups (and thus preserved racial segregation).²¹

To make sense of these questions, the Court needed to identify why *Brown v. Board of Education*²² held segregation was wrong. In particular, did the *Brown* Court invalidate segregation on the ground that it violated an

are generally seen as offering a normative justification for affirmative action. A social equality framework may too be invoked in support of affirmative action, but may also be invoked against affirmative action. *Id.* at 391. Here, the argument is that affirmative action—by exacerbating intergroup tensions and perpetuating stereotypes—militates against genuine social equality. *Id.*

16. See *supra* note 5 and accompanying text.

17. See *supra* note 6 and accompanying text.

18. Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 10.

19. *Id.* at 12.

20. *Id.* at 11.

21. *Id.*

22. 347 U.S. 483 (1954).

anticlassification or antistatutory principle?²³ If so, it might provide cues for what direction race jurisprudence should take. In this historical context, Owen Fiss introduced the antistatutory (or “group-disadvantaging”) principle as a way of understanding *Brown* that would support desegregation efforts which took race into account.²⁴ One example of this understanding was *Brown*’s argument that “[t]o separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁵

Whether *Brown* was built upon antistatutory or antistatutory commitments had very practical implications for antidiscrimination policies, including affirmative action and facially neutral policies with a racially disparate impact.²⁶ Fiss thus sought to guide the Court in what sorts of principles to apply in resolving core jurisprudential questions related to racial equality.²⁷ In building a case for going beyond formal equality, Fiss was simultaneously attempting to equip antidiscrimination jurisprudence to address structural discrimination: the institutional policies, norms, and social practices that contribute to inequality.²⁸

Helen Norton identifies one clear illustration of the divide between antistatutory and antistatutory norms by contrasting Justice Harry Blackmun’s and Chief Justice John Roberts’ opinions on the constitutionality of governments taking race into account to solve certain racial disparities in education.²⁹ Justice Blackmun wrote: “In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”³⁰ In contrast, Chief Justice Roberts wrote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³¹ Antistatutory and antistatutory principles thus play a critical role in the discussion about whether the law ought to consider certain traits, at all, in antidiscrimination jurisprudence.

23. *Id.*

24. See generally Fiss, *supra* note 6; see also Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 12 (noting Fiss, through his group-disadvantaging principle, sought to elaborate the doctrine of *Brown* in ways that “would continue the work of disestablishing racial segregation”).

25. *Brown*, 347 U.S. at 494.

26. Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 12.

27. *Id.*

28. Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 55 (2003).

29. Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 207 (2010).

30. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

31. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

B. Identification

Anticlassification theory generally requires that individuals be subject to the same rules and standards. Over time, the Legislature and courts have ruled that certain aspects of identity are off limits for classification. Prohibiting any consideration of certain traits is the touchstone of anticlassification principles. The anticlassificationist way to achieve equality is to eliminate the consideration of all traits deemed discriminatory when making employment decisions. This position is closely aligned with the formal equality principle that similar cases be treated alike. The anticlassification principle thus shields individuals from all forms of disparate treatment based upon a forbidden trait (including “benign” or “reverse” discrimination).

The anticlassification model is intended to “blind” our ability, over time, to meaningfully distinguish certain traits by proscribing the very consideration of those traits (ideally culminating in a society that is, e.g., colorblind, sex-blind, genome-blind, etc.). Accordingly, pure anticlassification principles would prohibit the preferential treatment of a group, such as minorities, regardless of how the group has been treated in the past by society or employers; preferential treatment only aggravates the goal of moving beyond consideration of those traits. Put another way, how can we be color-blind if we continually take race into account and allow it to guide the implementation of employment policies? Anticlassification principles are relatively easy to identify—but require normative input on the front end to determine what traits are, for decision-making purposes, forbidden traits.³²

In contrast, antisubordination theorists proceed under the assumption that anticlassification and its emphasis on formal equality is not sufficient, for several reasons. First, the anticlassification principle (much like the idea of equality³³) offers no independent normative guidance for what types of traits should not be considered in decision making. This means that more input is required for the substance of antidiscrimination policy—substance that a focus on antisubordination provides. Second, once traits deserving of antidiscrimination protection are identified, it is not enough to simply

32. There are a host of other questions one might ask to decide what is prohibited by a particular anticlassification policy: Does a policy violate the anticlassification principle if group membership is one of several criteria?; What about a policy that employs criteria that predominantly selects members from a certain group?; What harm must the challenged classification inflict?; And to what areas of life does the anticlassification norm apply? Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 16–20 (“[T]he antidiscrimination principle by itself does not make clear what values should guide selection of these implementing rules, nor does it provide sufficient normative guidance to determine the scope of their application.”). *Id.* at 20.

33. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (“Equality is an empty vessel with no substantive moral content of its own.”).

champion nondiscrimination because we are not all “similarly situated.” Even if race were no longer meaningful to most people, merely ensuring nondiscrimination for all will not necessarily compensate for a history of racial subordination. There are structural effects to such a history that a pure meritocracy (assuming one could ever exist) cannot overcome. Antisubordination theory thus demands the removal of all impediments to equality of opportunity.³⁴ Generally speaking, this requires going beyond formal equality since subordinated groups are not similarly situated to those who are privileged. In practice, this means that a subordinated class may need to be treated more favorably than a privileged class to remedy a historic and contemporary lack of opportunities. Similarly, one might consider the disparate impact of any policy on a subordinated class to avoid perpetuating the disadvantaged class’s existing subordination. For antisubordination theorists, the form that remedying the subordination takes is less important than considering group inequality seriously and pursuing equality at every turn (even if the harm to the subordinated group is inadvertent or unintended). The antisubordination model thus encourages policy-makers to address the structural effects of discrimination by implementing certain “positive” practices, such as affirmative action, that can affect the very distribution of resources.³⁵

One might expect anticlassification norms in statutes crafted to combat “irrational” discrimination (Title VII), where antisubordination values will predominate in statutes designed to combat “rational” discrimination (such as the ADA). Of course, even “irrational” discrimination may seem rational on some accounts. For example, certain “hedonic costs” (understood as an increase in negative emotions or a loss of positive emotions) may lead someone to discriminate on the basis of a trait, even if it is not economically efficient.³⁶ This may help account for why Title VII—though seemingly designed to combat irrational discrimination and a statute that holds out the hope of moving beyond the consideration of, for example, race—has also sought to effect the redistribution of resources through policies such as affirmative action, reasonable accommodation (in certain instances), and the disparate impact doctrine.

34. See generally Balkin & Siegel, *American Civil Rights*, *supra* note 7.

35. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1398–99 (1991) (noting that strategies such as affirmative action, reparations, and restrictions of hate speech all “recognize that ours is a non-neutral world in which legal attention to past and present injustice requires rules that work against the flood of structural subordination”).

36. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 *GEO. L.J.* 399, 401 (2006) (arguing people often discriminate against those with mental illness because mental illness tends to produce “‘hedonic costs’—an increase in negative emotions or a loss of positive emotions—in people with mental illness” and this dynamic may, in turn, create hedonic costs for others without mental illness).

C. Indeterminacies

While the above sketch might make anticlassification and antisubordination norms seem discrete and readily identifiable, in practice the two often overlap, creating confusion about which principle is really at work. Indeed, if one sees the two principles as simply different approaches to vindicating antidiscrimination goals, perhaps it makes sense that some civil rights statutes, such as Title VII, will display both anticlassification and antisubordination commitments and, similarly, that the results of certain cases can be justified on either ground. For example, *Brown* can be substantiated by reference to either principle since school segregation involved an express race-based classification that perpetuated racial inequality for certain historically-oppressed groups.³⁷ Accordingly, whether one believed the role of antidiscrimination jurisprudence is to help groups that have been historically oppressed (antisubordination) or to challenge the classification of individuals on the basis of certain forbidden traits (anticlassification), one could justify the proclamation in *Brown* that segregation is wrong.

Equal protection jurisprudence provides a clear example of the indeterminacies present in this debate. A standard account of American equal protection law has been that over the past half century the Court has maintained a commitment to anticlassification values at the expense of antisubordination ideals.³⁸ One example of this perceived commitment is *Washington v. Davis*,³⁹ in which the Court rejected an equal protection challenge to an examination of police officers that disproportionately excluded African-Americans from such positions; the Court held the Equal Protection Clause only addresses intentionally discriminatory government actions.⁴⁰ The Court similarly showed its anticlassification colors when it held, in *Adarand Constructors, Inc. v. Peña*,⁴¹ that the Equal Protection Clause requires strict scrutiny of any governmental efforts to take account of race in government contracting, even if the intent of doing so was to undermine patterns of racial subordination.⁴² Such developments have led

37. Norton, *supra* note 29, at 207 n.25.

38. Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 10; Siegel, *Equality Talk*, *supra* note 6, at 1473 (observing “most would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century”); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009 (2002) (“Current Supreme Court doctrine understands equal protection as an [anticlassification] principle rather than an antisubordination principle . . .”).

39. 426 U.S. 229 (1976).

40. *Id.* at 239–41.

41. 515 U.S. 200 (1995).

42. *Id.* at 235; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to all race-based action by state and local governments).

scholars to claim the anticlassification principle has triumphed in the constitutional sphere.⁴³

Still, it may be an overgeneralization to say unequivocally that the Supreme Court has embraced anticlassification ideals in administering the Fourteenth Amendment. The Court has acknowledged the need at times to take account of race. For example, the Court has approved efforts to reduce racial isolation by drawing school attendance zones with a view toward neighborhood demographics.⁴⁴ The Court has similarly authorized governmental efforts to generate more diverse applicant pools by the targeted recruitment of minority workers.⁴⁵ Indeed, Norton argues the Court has remained reluctant to choose between anticlassification and antisubordination principles in deciding cases that invoke the Equal Protection Clause.⁴⁶ She notes that although the Court has increasingly demanded colorblindness, a majority of justices have “remained unwilling to characterize government’s interest in addressing racial disparities as itself inherently suspicious” when this interest is used to factor race into a governmental decision.⁴⁷ Accordingly, there may be some ambivalence about whether the Court has fully embraced anticlassification norms in the equal protection context.

Additionally, viewing anticlassification and antisubordination values as binary principles may be an oversimplification. As Jack Balkin and Reva Siegel have shown, antisubordination values often live in anticlassification commitments and shape their very meaning.⁴⁸ For example, in the 1970s when the Court recognized that sex-based state action violated the Equal Protection Clause and began to employ anticlassification rhetoric to identify acts of sex discrimination that were unconstitutional, it simultaneously discussed such discrimination as wrong due to its tendency to subordinate women as a group.⁴⁹

Similarly, anticlassification and antisubordination values coexist in the Court’s most recent affirmative action decisions.⁵⁰ In holding in *Grutter v. Bollinger* that public universities could consider race as a factor in the admissions process to enhance the diversity of their student bodies, the

43. See *supra* note 38 and accompanying text.

44. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

45. See generally *Adarand Constructors, Inc.*, 515 U.S. 200.

46. Norton, *supra* note 29, at 211–15 (describing various justices’ apparent attempts to “claim space between the poles of pure anticlassification and antisubordination theory”).

47. *Id.* at 211.

48. Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 10; Siegel, *Equality Talk*, *supra* note 6, at 1477 (“History shows that antisubordination values live at the root of the anticlassification principle—endlessly contested, sometimes bounded, often muzzled.”).

49. Siegel, *Equality Talk*, *supra* note 6, at 1537–38.

50. *Id.* at 1538–40.

Court embraced antisubordination values.⁵¹ For example, the opinion discussed the need to ensure no group is systematically excluded from civic leadership or relegated to second-class citizenship.⁵² The Court noted it was important that members of groups unrepresented in positions of national leadership find the confidence they need to dream, and ultimately, succeed.⁵³

Yet the *Grutter* Court simultaneously emphasized anticlassification ideals through its claims that the Fourteenth Amendment protects individuals (not groups) and in imposing requirements on the admissions process to limit its expressive value; for example, the Court emphasized the need of every applicant to be considered as an “individual.”⁵⁴ The Court thus appears to distance itself from group-based justifications even as it seems to embrace certain antisubordination values.⁵⁵ Even though the decision embodies antisubordination commitments, the Court essentially employs the rhetoric of anticlassification to shield the Equal Protection Clause from concerns about social structure and subordination.⁵⁶ Viewed from the standpoint of the *Grutter* case, one might see anticlassification principles as neutral, sometimes embracing antisubordination values and sometimes advancing other normative interests.⁵⁷ There is thus an interactive and complex relationship between antisubordination and anticlassification ideals.

II. THE ANTICLASSIFICATION TURN

Despite ambiguities in the equal protection context, the corpus of employment discrimination law has traditionally incorporated a normative orientation toward antisubordination principles.⁵⁸ This is of course a generalization. As discussed below, certain statutes have vacillated between an emphasis on anticlassification and antisubordination principles over time.⁵⁹ Nevertheless, this Part analyzes the major historical employment discrimination statutes to show how each was fashioned and

51. *Id.* at 1538.

52. *Id.* at 1539.

53. *Id.*

54. *Id.* at 1540.

55. *Id.* at 1539–40.

56. *Id.* at 1540.

57. As an example of some other interest, one might reasonably see immutability as the unifying principle for what classes we protect via employment discrimination jurisprudence. *See generally* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2010) [hereinafter Hoffman, *Immutability*] (considering immutability as a unifying principle for the traits now covered by employment discrimination laws).

58. *See infra* Part II.A.1–3.

59. For example, Title VII and its jurisprudence has supported various policies over time that may be seen as paradigmatic of either anticlassification or antisubordination principles.

shaped to respond to a history of discrimination and sometimes take account of forbidden traits to effect antisubordination ends. It then argues that three changes—all effective in 2009—indicate Congress and the Supreme Court have turned away from antisubordination values in the area of employment discrimination: (1) the passage of GINA; (2) the amendments to the ADA; and (3) recent Title VII jurisprudence.

*A. Employment Discrimination Laws Have Historically Prized
Antisubordination Values*

The employment discrimination laws have historically been directed toward effecting antisubordination goals.⁶⁰ Indeed, antisubordination norms offer the best unifying explanation for why we protect against some forms of discrimination, but not others.⁶¹ This Part will consider three employment discrimination laws that have been widely-discussed and theorized over the last few decades: Title VII of the 1964 Civil Rights Act (Title VII),⁶² the Age Discrimination in Employment Act (ADEA),⁶³ and the Americans with Disabilities Act (ADA).⁶⁴

1. Title VII

Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin in hiring or discharge, or with respect to “compensation, terms, conditions, or privileges of employment,”⁶⁵ and also makes it illegal to “limit, segregate, or classify” employees in a way that “adversely affect[s]” their employment status because of race, color,

60. Of course, as noted above, there are indeterminacies associated with drawing a line between anticlassification and antisubordination principles and generally attempting to distinguish a statutory provision as supporting one theory or the other. That said, it is possible to identify those provisions that are purely anticlassification-oriented—regardless of what normative precepts animate such a provision. And despite ambiguities, making such distinctions is worthwhile given what it stands to tell us about the future direction of antidiscrimination law and theory.

61. See, e.g., Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 838 (2003) [hereinafter Bagenstos, *Rational Discrimination*] (describing the goal of antidiscrimination law as “reducing subordination and social inequality”). But see Hoffman, *supra* note 57, at 1501 (arguing a “discrete and insular minority” or “history of discrimination” framework is a “questionable fit” for employment discrimination law).

62. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

63. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (2006)).

64. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

65. 42 U.S.C. § 2000e-2(a)(1) (2006).

religion, sex, or national origin.⁶⁶ These prohibitions have been read to cover two different types of unlawful discrimination: disparate treatment and disparate impact.⁶⁷ Disparate treatment claims require proof that the employer intended to discriminate against the complaining party, while disparate impact claims do not require proof of discriminatory intent; disparate impact claims reach employment policies and practices that are non-discriminatory on their face, yet affect protected groups more harshly than others. An employer is also required under Title VII to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship.⁶⁸ Additionally, Title VII's prohibitions against sex discrimination have expanded to cover sexual harassment as well as pregnancy-based discrimination.⁶⁹

Initially, it is worth noting the disparate treatment provisions (proscribing consideration of race, sex, religion, color, and national origin) are on their face anticlassificationist, giving Title VII the strongest claim of the employment discrimination statutes to anticlassification values.⁷⁰ When an employer makes an employment decision on the basis of national origin, regardless of whether it prefers Spaniards or Germans, the employer has discriminated on the basis of national origin. Similarly, when an employer makes an employment decision on the basis of sex, regardless of whether it prefers males or females, the employer has discriminated on the basis of sex. The Supreme Court's decision in *McDonald v. Santa Fe Trail Transportation Co.* (and its recognition of "reverse discrimination") may thus be seen as aligned with anticlassification values by expressly forbidding any race discrimination—even against white persons, who have little history of past discrimination.⁷¹ The legacy of *Santa Fe* has been that

66. *Id.* § 2000e-2(a)(2). Title VII now expressly prohibits employers from using any "particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin" unless the practice is both job-related and consistent with business necessity. *Id.* § 2000e-2(k).

67. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (interpreting 42 U.S.C. § 2000e-2(a)(2) to "proscribe[] not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

68. 42 U.S.C. § 2000e(j).

69. See *id.* § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . ."); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–68 (1986) (establishing the hostile work environment standard for Title VII liability).

70. Of course, "the disparate treatment framework has significant antisubordination effects, but such effects are not required for its application." Kimberly A. Yuracko, *Sameness, Subordination and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857, 859 n.5 (2006). This is consonant with the aforementioned idea that antisubordination values often live in anticlassification policies. Balkin & Siegel, *American Civil Rights*, *supra* note 7, at 10.

71. See generally *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

even a white Anglo Saxon protestant male is generally entitled to protection under Title VII.⁷²

Still, there are substantial antisuordination provisions and policies associated with Title VII. First, and fundamentally, the history of discrimination faced by African-Americans motivated Congress to pass the statute.⁷³ Title VII was thus borne out of a legislative recognition of the need to challenge racial subordination. The U.S. Supreme Court has repeatedly interpreted Title VII as a statute crafted to respond to past discrimination.⁷⁴

The most well-known antisuordination policy associated with Title VII is affirmative action, where a forbidden trait may sometimes be taken into account to achieve antisuordination ends.⁷⁵ Even though Title VII's disparate treatment provision is expressly worded in anticlassificationist terms, the U.S. Supreme Court has held that Title VII does not prevent employers from using race to discriminate under certain circumstances. In *United Steelworkers of America v. Weber*, the Court held Title VII allowed an employer to give a hiring preference to African-American applicants for an on-the-job training program.⁷⁶ Responding to the tension between such an interpretation and the express language of Title VII, the Court emphasized that antisuordination commitments are at the heart of Title VII. In particular, it noted that Congress, in passing Title VII, was primarily concerned with "the plight of the Negro in our economy"⁷⁷ and "open[ing] employment opportunities for Negroes in occupations which

72. See *id.* at 280 (stating that Title VII protects "white men and white women and all Americans").

73. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 246 n.25 (1979) ("The whole purpose of Title VII was to deprive employers of their 'traditional business freedom' to discriminate on the basis of race."); SAMUEL ESTREICHER & MICHAEL C. HARPER, *EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 53 (3d ed. 2008); C. Elizabeth Hirsch, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 *LAW & SOC'Y REV.* 239, 269 (2008) ("Title VII was originally introduced to eradicate a history of discrimination against racial minorities, specifically African Americans . . .").

74. "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (describing Title VII as "a complex legislative design directed at a historic evil of national proportions").

75. Title VII permits properly tailored "affirmative action plan[s] voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." *Weber*, 443 U.S. at 201. See also *Johnson v. Transp. Agency*, 480 U.S. 616, 641–42 (1987) (extending *Weber* to gender-based affirmative action). Title VII also expressly allows for court-ordered affirmative action to remediate past discrimination. In particular, Title VII permits courts, upon finding that an employer is engaging in an unlawful employment practice, to "order such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g)(1) (2006).

76. 443 U.S. at 209.

77. *Id.* at 202.

ha[d] been traditionally closed to them.”⁷⁸ It concluded that such a voluntary effort to abolish traditional patterns of racial segregation and hierarchy was justified given the legislative history and text of Title VII.⁷⁹

The disparate impact doctrine is similarly and intrinsically about antisubordination—and repugnant to an anticlassification view of equal opportunity. This provision takes into account the subordinating effects of a policy even though the policy may be facially neutral and does not illegally classify employees. An employment policy or practice may be neutral, but its effects disproportionately felt by one group.⁸⁰ And in a society that disparages certain overt manifestations of sexism and racism, disparate impact is particularly important; one would expect employers with such tendencies to channel them into covert and less discernible practices.⁸¹ Notably, Title VII’s disparate impact jurisprudence has traditionally only been applied to protect members of historically subordinated groups.⁸²

Additionally, Title VII sometimes requires employers to consider and, in effect, classify through the doctrine of reasonable accommodation. First, as noted above, Title VII expressly requires that employers reasonably accommodate applicants’ and employees’ sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer’s business.⁸³ Second, in the case of sexual or racial harassment, courts have required employers, upon receiving notice of the harassment, to take affirmative steps to curb the harasser’s behavior.⁸⁴ In such situations, the employer is required, essentially, to reasonably

78. *Id.* at 203.

79. *See id.* at 204 (“It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long,’ . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”) (internal citations omitted).

80. 42 U.S.C. § 2000e-2(k).

81. Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 625 (2003) (“In a society that disparages overt manifestations of racism, racist actors often mask their racist intent, making it hard for victims of racism to prove unlawful discrimination.”).

82. Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1528 (2004) (noting all of the disparate impact claims before the U.S. Supreme Court have involved women or minorities and that the “language in those cases repeatedly supports the view that the analysis does not apply to challenges that employer actions have a disparate impact on whites or men”). *See also* Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986) (affirming dismissal of disparate impact case brought on behalf of men since a practice that has a disparate impact on a favored class cannot, under *Griggs*, “operate ‘to freeze the status quo of prior discriminatory employment practices’” and thus Title VII does not permit such suits absent “background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination”) (internal citations omitted).

83. 42 U.S.C. § 2000e(j).

84. Noah Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1359 (2009).

accommodate the victim of harassment,⁸⁵ a requirement that speaks more to the need to stop subordinating behavior than to merely treat employees equally.

In sum, despite Title VII's facially anticlassificationist provisions, the statute also includes substantial antidisubordination goals and provisions, which necessitate that traits sometimes be considered, and employees classified.

2. *The Age Discrimination in Employment Act*

The ADEA prohibits age discrimination against any individual forty years of age or more in hiring or discharge, or with respect to "compensation, terms, conditions, or privileges of employment,"⁸⁶ and also makes it unlawful to "limit, segregate, or classify" older employees in a way that "adversely affect[s]" their employment status because of age.⁸⁷ The ADEA's proscriptions mirror Title VII in both language and structure, and they have been similarly interpreted to bar both disparate treatment and disparate impact discrimination.⁸⁸ Unlike Title VII, however, § 623(f)(1) of the ADEA contains language that significantly narrows its disparate impact coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age."⁸⁹

The ADEA, unlike Title VII, is not even facially anticlassificationist. It does not protect everyone from age discrimination. Instead, the ADEA's prohibition of age discrimination applies only to a certain class of individuals that have historically been frequent targets of employment discrimination: employees who are least forty years old.⁹⁰ Workers under the age of forty have no textually-supported protection under the ADEA, and the U.S. Supreme Court has further clarified that the ADEA does not enable workers under the age of forty to bring a "reverse" discrimination claim.⁹¹ In disallowing such a claim, the Court noted that Congress's goal

85. *Id.*

86. 29 U.S.C. § 623(a)(1) (2006); *id.* § 631(a).

87. *Id.* § 623(a)(2).

88. *Smith v. City of Jackson*, 544 U.S. 228, 235–36 (2005) (interpreting § 623(a)(2), in light of *Griggs* and its consideration of identical text, to cover disparate impact claims).

89. 29 U.S.C. § 623(f)(1). Congress' decision to limit the coverage of the ADEA by including this provision is consistent with the fact that age, unlike race or the other classifications protected by Title VII, often has relevance to an individual's capacity to do certain types of work. *City of Jackson*, 544 U.S. at 240.

90. *Id.* § 631(a) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

91. *See Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 584 (2004) ("We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one."); *id.* at 600.

under the ADEA was a group-based one of protecting middle-aged and older workers, who have historically experienced exclusion from the workforce.⁹² Indeed, this goal of countering the discrimination faced by older workers is reflected in the ADEA's Findings, which note that older workers struggle to retain or regain employment, commonly face arbitrary age limits, experience a disproportionately high rate of unemployment, and are subject to "arbitrary discrimination" in employment because of age.⁹³ Also, as noted above, the ADEA has been interpreted to include disparate impact claims⁹⁴—a doctrine that is an affront to pure anticlassification principles. Accordingly, it appears anticlassification theory has little place within the ADEA framework.⁹⁵

3. *The Americans with Disabilities Act*

Title I of the ADA forbids employers from discriminating against a qualified individual on the basis of a disability in hiring, promotion, training, and other job-related decisions.⁹⁶ The Act defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁹⁷ A "qualified individual" is one who can perform the essential functions of a job either with or without accommodation.⁹⁸ The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.⁹⁹

92. *Id.* at 590–91 ("The prefatory provisions and their legislative history make a case that we think is beyond reasonable doubt, that the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young."). See also Aaron J. Rogers, *Discrimination Against Younger Members of the ADEA's Protected Class*, 89 IOWA L. REV. 313, 349 (2003) (noting the express group structure of the ADEA suggests an antisubordination approach).

93. 29 U.S.C. § 621(a); *Cline*, 540 U.S. at 589–90.

94. *City of Jackson*, 544 U.S. at 232 (holding the ADEA authorizes recovery in disparate impact cases).

95. See Katherine Krupa Green, *A Reason to Discriminate: Curtailing the Use of Title VII Analysis in Claims Arising Under the ADEA*, 65 LA. L. REV. 411, 438 (2004) (noting formal equality theory may not adequately function within the ADEA framework).

96. 42 U.S.C. § 12112(a) (2006 & Supp. IV 2010) ("No covered entity shall discriminate against a qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

97. *Id.* § 12102(1).

98. *Id.* § 12111(8).

99. *Id.* § 12112(b)(5) (noting the term "discriminate against a qualified individual with a disability" includes an unwillingness to make reasonable accommodations); *id.* § 12112(a).

The ADA has the strongest claim of the employment discrimination statutes to being constructed to effect antisubordination purposes (even at the expense of pure anticlassification values). While feminists initially sought formal equality (and only later abandoned this theory as inadequate), disability advocates have long understood the need to go beyond formal equality and identify the structural barriers that shield them from opportunities. The ADA was thus formulated to embody antisubordination values and features policies that take account of disability to effect antisubordination ends.

Initially, the Findings Section suggests Congress had a clear goal of ending subordination when it passed the ADA. It notes a history of discrimination (“historically, society has tended to isolate and segregate individuals with disabilities”) as well as structural factors that have the effect of discrimination (“individuals with disabilities continually encounter . . . architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, [and] exclusionary qualification standards and criteria”).¹⁰⁰ The text of the original ADA included even stronger antisubordination language in its Findings: “[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.”¹⁰¹

Also, the ADA features a provision for reasonable accommodation, a requirement that goes well beyond the general mandates of Title VII and the ADEA that employers may not classify on the basis of certain enumerated traits.¹⁰² Indeed, Samuel Bagenstos has posited that the ADA

100. *Id.* §§ 12101(a)(2), (5).

101. Formerly codified at *id.* § 12101(a)(7). See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 669 (2004) (“Congress framed the ADA as a civil rights remedy rather than as a subsidy program. In doing so, the legislature articulated a group-based antisubordination theory that was to eviscerate practices of systemic subordination.”).

102. See Ruth Colker, *Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J. L. & FEMINISM 213, 221 (1997) [hereinafter Colker, *Affirmative Protections*] (noting reasonable accommodation “does not require only neutral nondiscrimination,” but “seeks to improve the employability of an historically disadvantaged group—people with disabilities”). Of course, there is a well-developed body of literature that advances the claim that reasonable accommodation is not unlike general antidiscrimination requirements. See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Bagenstos, *Rational Discrimination*, *supra* note 61, at 846–47 (arguing antidiscrimination law is aimed at “attacking practices that entrench the systemic subordination of particular groups”). However, there is a significant difference in the way this Article uses the word “antidiscrimination” and how it is used by Bagenstos. Here, this Article sides with Balkin and Siegel that Fiss’s original use of antidiscrimination to mean anticlassification is unfortunate—and, by extension, so is other scholars’ use of antidiscrimination to mean antisubordination. See *supra* note 9 (noting my use of “antidiscrimination” and Balkin and Siegel’s observation that both antisubordination and anticlassification may be understood as ways of vindicating the antidiscrimination principle).

may be understood, via its reasonable accommodation requirement, “as implementing a mild regime of affirmative action.”¹⁰³ Like an affirmative action policy, the accommodation mandate singles out members of a particular group and gives them a benefit (i.e., the right to individualized accommodation) that nonmembers lack.¹⁰⁴ And like an affirmative action program, the ADA’s accommodation mandate “serves remedial, prophylactic, and inclusionary functions.”¹⁰⁵ Reasonable accommodation thus requires a positive act from employers that is designed to create equality of opportunity for a historically subordinated group.

Additionally, the scope of the ADA weds it even more to antisubordination principles than Title VII. Title VII does not limit coverage to members of a historically disadvantaged group. Any individual could bring a lawsuit under race or sex, including a white man alleging “reverse” discrimination.¹⁰⁶ However, only “individuals with disabilities” may bring a claim under the ADA; there is no “reverse” discrimination within disability jurisprudence.¹⁰⁷ Claims of discrimination under the ADA are thus only available to members of a historically disadvantaged group.¹⁰⁸ Moreover, the ADA, much like Title VII and the ADEA, provides a cause of action for disparate impact claims in which a neutral standard or qualification standard has the effect of screening out people with disabilities.¹⁰⁹

All of these examples show how the Legislature and courts have gone beyond simple anticlassification principles to concern themselves with ending group-based inequalities that are perpetuated through the sphere of employment.

B. The Turn from Antisubordination to Anticlassification

The additions and changes to the body of employment discrimination laws since 2008 suggest a departure from antisubordination values and a move toward anticlassification principles. The recent amendments to the ADA, the passage of GINA, and significant changes in Title VII

103. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 457 (2000) [hereinafter Bagenstos, *Subordination*].

104. *Id.* at 458.

105. *Id.*

106. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976); Colker, *Affirmative Protections*, *supra* note 102, at 221.

107. Colker, *Affirmative Protections*, *supra* note 102, at 221.

108. *Id.* at 221, 251 (noting the ADA “is framed by an antisubordination approach that grants rights only to people with disabilities”).

109. 42 U.S.C. §§ 12112(b)(3)(A), (6) (2006 & Supp. IV 2010) (noting the term “discriminate against a qualified individual on the basis of disability” includes neutral policies and practices “that have the effect of discrimination on the basis of disability”).

jurisprudence, taken together, indicate that the employment discrimination laws are now focused less on protecting those with a history of discrimination, and more on prohibiting consideration of particular traits in employment decisions.

1. The Americans with Disabilities Act

While the ADA is, for the reasons explained above, an antisubordination statute, the amendments represent a significant turn in the direction of anticlassification principles.

a. The ADA Amendments Act of 2008

The ADA's impact in the employment context has been widely viewed as meager.¹¹⁰ Plaintiffs have typically lost at summary judgment, and usually for the reason that they are not "disabled enough" to merit the ADA's protections.¹¹¹ Empirical work on ADA suits has uncovered that ADA plaintiffs win only approximately five percent of the time.¹¹² Courts have found plaintiffs with serious physical or mental impairments, ranging from mental retardation, to cerebral palsy, to cancer, are not disabled under the ADA.¹¹³

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual" (actual disability); "(B) a record of such an impairment" (record of disability); or "(C) being regarded as having such an impairment" (regarded as disability).¹¹⁴ "Broken out, actual disability contains three principle requirements: first, there must be a *physical or mental*

110. Alex. B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008); Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 213 (2008).

111. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107-08 (1999) [hereinafter Colker, *Windfall*] (concluding that in litigation under Title I of the ADA defendants prevailed in 94% of cases at the federal district court level and in 84% of cases in which losing plaintiffs appealed their judgments). Moreover, the ADA fares considerably worse than its closest statutory analogue, Title VII. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 83-85 (2005). Cf. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 306-07 (2008) [hereinafter Hoffman, *Settling*] (arguing that even though plaintiffs fare poorly in Title I court cases, other key indicators (including EEOC resolutions, settlement statistics, and survey responses of human resources personnel) prove employers are reasonably responsive to Title I claimants).

112. See Hoffman, *Settling*, *supra* note 111, at 308-11 (discussing studies concerning ADA case outcomes).

113. See, e.g., *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App'x 874, 877-78 (11th Cir. 2007) (mental retardation); *Blanks v. Sw. Bell Commc'ns, Inc.*, 310 F.3d 398, 402 (5th Cir. 2002) (HIV-positive status); *Ellison v. Software Spectrum*, 85 F.3d 187, 193 (5th Cir. 1996) (breast cancer).

114. 42 U.S.C. § 12102(1).

impairment; second, the impairment must be *substantially limiting*; and last, the impairment must substantially limit a *major life activity*. The ‘physical or mental impairment’ requirement is rarely an issue in ADA case law.”¹¹⁵ It is the second and third requirements—that the impairment *substantially limit a major life activity*—that has garnered the majority of federal courts’ attention.¹¹⁶ Courts have interpreted these requirements narrowly, frequently finding that conditions are either not substantially limiting or do not affect a major life activity.¹¹⁷ And courts have interpreted “regarded as” claims to require proving one was regarded as having an “actual disability”—thus incorporating the same burdens associated with proving actual disability.¹¹⁸

Congress passed the ADA Amendments Act of 2008 (ADAAA) to strengthen faltering disability protections.¹¹⁹ The first notable change in the amendments was the addition of a broad rule of construction. The U.S. Supreme Court had held the terms “substantially” and “major” must “be interpreted strictly to create a demanding standard for qualifying as disabled.”¹²⁰ Courts often invoked this “demanding standard” rule of construction to support their finding that plaintiffs were not disabled.¹²¹ The amended ADA now provides that “[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this chapter.”¹²²

Second, the amendments expressly overruled Supreme Court precedent that held courts must consider “mitigating measures” when determining whether an impairment substantially limits a major life activity.¹²³ Prior to the amendments, someone who was able to control the symptoms or effects of a particular impairment with medication, behavioral modifications, or other devices would often fail to be protected under the actual disability

115. Areheart, *supra* note 110, at 211.

116. *Id.* at 211–12.

117. See ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(a), 2008 U.S.C.C.A.N. (122 Stat.) 3553 (codified at 42 U.S.C. § 12102) (2008) (discussing Supreme Court cases that narrowed the definition of “disability,” prompting Congress to amend the ADA).

118. Areheart, *supra* note 110, at 212.

119. For further discussion of the ADAAA, see Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203 (2010); Jeanette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187 (2010); Hoffman, *Immutability*, *supra* note 57; Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331 (2010); Long, *supra* note 110; Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937 (2012).

120. *Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3552 (2008).

121. See, e.g., *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 766 (10th Cir. 2006) (emphasizing the need for a demanding standard before applying a technical and demanding analysis to conclude that plaintiff did not have a disability).

122. 42 U.S.C. § 12102(4)(A) (2006 & Supp. IV 2010).

123. *Id.* § 12101(b)(2).

prong of the ADA.¹²⁴ But while medication might prevent conditions from substantially limiting one or more major life activities, it does not necessarily make people less vulnerable to discrimination based upon the myths, fears, and stereotypes associated with their impairments.¹²⁵ The amended ADA now provides “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication, medical supplies, equipment,” etc.¹²⁶

Third, before the amendments, plaintiffs struggled to satisfy the definition for actual disability, especially in showing that the impairment “substantially limits” one or more “major life activities.”¹²⁷ Both of these phrases were frequently interpreted narrowly, with the common result being that people with serious impairments, who expected to be covered under the ADA, had no legal recourse to illegal discrimination.¹²⁸ While the amendments kept the wording for actual disability, they also made several substantial changes that will now make it easier to satisfy the definition. The amendments added two non-exhaustive lists of *per se* major life activities, which now include “working” and (the very broad) “operation of a major bodily function.”¹²⁹ The amendments also note that the judicially-imposed standard for “substantially limits” has created an inappropriately high level of limitation.¹³⁰ The amendments now suggest that courts should devote less attention and analysis to whether an individual’s impairment is a disability under the ADA and more attention to whether entities covered under the ADA have complied with their legal obligations.¹³¹

124. See Areheart, *supra* note 110, at 218–222 (explaining how courts used mitigating measures to narrow the scope of those who had an ADA-worthy disability).

125. *Id.* at 214 (“[H]aving a milder form of disability may not make discrimination any less likely. For example, someone with a very mild case of diabetes likely still requires accommodation and may still engender certain stereotypes, making this person susceptible to discrimination.”).

126. 42 U.S.C. § 12102(4)(E)(i). Ordinary eyeglasses and contact lenses are excepted from this new rule. *Id.* § 12102(4)(E)(ii) (“The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”).

127. Areheart, *supra* note 110, at 212–18 (chronicling how courts’ application of the definition of actual disability excluded vast numbers of potential plaintiffs).

128. *Id.* at 220 (“[F]ederal courts have used the definition of disability with regard to mitigating measures to conclude that individuals with heart conditions, blood cancer, hypertension, hearing impairments, severe depression, mental illness, diabetes, asthma, and epilepsy are not disabled.”).

129. 42 U.S.C. § 12102(2)(B). See also *id.* § 12102(2)(A) (“[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”), (B) (“[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).

130. *Id.* § 12101(b)(5).

131. *Id.*

Finally, the most transformative change was the vastly expanded coverage under the “regarded as” prong. While the “regarded as” prong of Title I is seemingly expansive, the provision has been narrowly interpreted by courts. In particular, courts have required not only that a person be regarded as having a mental or physical impairment (a low bar), but that she also be regarded as having an impairment that substantially limits one or more major life activities (a high bar). By incorporating the definition of actual disability into what must be proven under a “regarded as” claim, courts saddled plaintiffs with all of the difficulties of proving actual disability, plus the difficulties associated with proving that any such conception existed in the “theoretical mind” of the employer.¹³² The result has been relatively weak disability stereotyping jurisprudence.

The ADA now expressly provides that to meet the requirement of being “regarded as” having an impairment, one does not have to show an impairment limits, or is perceived to limit, a major life activity.¹³³ In other words, the “regarded as” prong now covers anyone treated adversely because of an impairment (actual or perceived) without requiring a showing of limitation on bodily functions.¹³⁴ This change is significant in part because courts have historically interpreted “impairment” broadly, but interpreted the “substantially limits” and “major life activities” requirements narrowly.¹³⁵ Eliminating the latter requirements for “regarded as” claims will thus ease the burden of proving disability status and likely make the “regarded as” prong the primary vehicle for discrimination claims.¹³⁶ Indeed, the amendments give nearly universal breadth to the “regarded as” prong.¹³⁷ The only time one would likely now bring a nondiscrimination claim under the “actual disability” or “record of disability” prongs would be where one has been denied reasonable accommodation or modification.¹³⁸

132. Areheart, *supra* note 110, at 212.

133. 42 U.S.C. § 12102(3)(A).

134. *Id.* (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”).

135. Areheart, *supra* note 110, at 211.

136. Barry, *supra* note 119, at 264. *See* 154 CONG. REC. H6058, H6068 (daily ed. June 25, 2008) (joint statement of Reps. Hoyer and Sensenbrenner) (“Any individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation or modification—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.”).

137. Barry, *supra* note 119, at 208 (noting the “regarded as” prong now protects nearly everyone from discrimination based on impairments), 273–74 (same).

138. One may not seek reasonable accommodations under the “regarded as” prong. 42 U.S.C. § 12201(h).

While it is difficult to predict exactly how courts will respond to the amendments, most scholars are optimistic that the new ADA will provide more protection to more people with disabilities. Between the nearly universal scope of the “regarded as” prong and the lowered threshold for determining whether someone has a disability under the actual and record of disability prongs, far more plaintiffs should survive summary judgment. If the amendments indeed have their intended effect, and employers become less successful in challenging a plaintiff’s disability status, the breadth of the statute will soon be its salient feature. The amendments, and especially the changes to the “regarded as” prong, thus represent a step in the direction of universal coverage and protection.¹³⁹

b. The Turn to Anticlassification Principles

The amendments to the ADA represent a turn in the direction of anticlassification principles. First, a shift in the direction of universalism simultaneously represents a move away from a “protected class” or antistatutory-based approach. Extending nondiscrimination coverage to nearly everyone with a mental or physical impairment will of course encompass groups that are not stigmatized, not subordinated, and have not endured a history of discrimination.¹⁴⁰ Indeed, some opposed the ADAAA by arguing the new definition of disability would dilute the scope of the protected class, with the result being that the “truly disabled” would find themselves competing for scarce resources with those who do not fit within the traditionally disabled minority.¹⁴¹

The ADA Amendments resonate with classic anticlassification principles. One may not classify or take into account the trait of disability (which is no longer derived from identifying a subordinated class of disabled minorities). The exemplar of this shift is found in the changes to the “regarded as” prong. The “regarded as” prong now covers anyone

139. See Barry, *supra* note 119, at 207–09 (arguing disability advocates for the original ADA never consciously subordinated universalism in favor of a minority group approach and that they have retained a focus on universal nondiscrimination coverage with the passage of the Amendments); *id.* at 208 (“[t]he ADAAA’s new and improved ‘regarded as’ prong represents a step, albeit a measured one, toward universalism”); Joiner, *supra* note 119, at 366 (arguing the ADAAA will permit claims from people who have no traditionally discernible disability).

140. Hoffman, *Immutability*, *supra* note 57, at 23 (observing the ADA’s protected class now includes many individuals without conditions historically associated with discrimination).

141. *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. 32 (2007) (statement of Camille A. Olson, Seyfarth Shaw LLP), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:39388.pdf (arguing the ADA Restoration Act would disturb the balance Congress struck between a minority of people with disabilities and those with other sorts of impairments, thus “diluting the definition of disability to such an extent that persons who are truly disabled, such as those who are deaf or blind or unable to walk, will find themselves in a long line of plaintiffs”).

regarded as having an impairment and treated adversely because of that impairment, without requiring the individual to make any showing as to the degree of impairment.¹⁴² This means the scope of disability for nondiscrimination purposes is now on the precipice of being universally broad. While the ADA still limits its coverage to a protected class (in contrast to, for example, Title VII's mandate not to consider race or sex whether the applicant or employee is black or white, male or female), the ADA has moved *closer* to what would be a pure anticlassificationist approach that would benefit everyone: protection against discrimination on the basis of a physical or mental *characteristic*.

The most facially explicit proof of the move away from antisubordination norms was the ADA's deletion of the statutory language that noted people with disabilities are a "discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."¹⁴³ The "discrete and insular minority" language had been used by the Supreme Court to support a narrow reading of "disability."¹⁴⁴ It had also later been rejected by the Supreme Court as factually inaccurate.¹⁴⁵ It is thus somewhat natural that some disability advocates felt the need to remove the phrase. The findings and purposes have retained a modest discussion of the history of discrimination against people with disabilities, but the ADA's new protected class will now extend far beyond those individuals with impairments that are historically associated with discrimination.¹⁴⁶

Similarly, the new requirement to disregard "mitigating measures" when determining whether an impairment substantially limits a major life activity represents a departure from clear antisubordination principles.¹⁴⁷ In particular, considering one's ability and opportunity to mitigate an impairment has a direct connection with the degree to which one is

142. 42 U.S.C. § 12102(3)(A) (explaining that individuals are regarded as disabled for statutory purposes so long as they are subjected to discrimination "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity").

143. 42 U.S.C. § 12101(a)(7).

144. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 495 (1999) (Ginsburg, J., concurring) ("Congress' use of the phrase ['discrete and insular minority'] . . . is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class.")

145. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (observing that people with disabilities are a "large and amorphous class"—not a "discrete and insular minority"). The Court also concluded Congress did not have enough evidence of "purposeful unequal treatment" to view people with disabilities as politically powerless. *Id.* at 370–72.

146. Hoffman, *Immutability*, *supra* note 57, at 23. *See also* Cox, *supra* note 119, at 206 (arguing the replacement of the "discrete and insular minority" language with new text "weakens the connection between the ADA and the political subordination rationale for disability-related accommodations").

147. *See* Bagenstos, *Subordination*, *supra* note 103, at 496, 533 ("The Court's rejection of the 'ignore mitigating measures' guideline in *Sutton* seems entirely correct . . . both as a matter of reading the statutory language and as a matter of implementing an antisubordination principle.").

disadvantaged, holistically, and thus likely to need the protections of the ADA.¹⁴⁸ Indeed, the rationale behind taking mitigating measures into account had always been that if such measures substantially ameliorate the deficiencies caused by an impairment, one is less likely to be disadvantaged, stigmatized, and subordinated.¹⁴⁹ For example, Justice Ginsburg noted in *Sutton* that “persons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination.”¹⁵⁰ While some examples, such as epilepsy, suggest stigma may endure for even fully controlled or mitigated impairments,¹⁵¹ the stigma for many conditions will dissipate as the symptoms are controlled. The current rule, that mitigating measures should not be considered when determining the severity of an impairment, broadens protection from a relatively small, disadvantaged group to encompass high-functioning individuals less likely to need the ADA.¹⁵²

The other major changes (the new rule of construction, the non-exhaustive lists of *per se* major life activities, and the mandate to lower the bar for “substantially limits”) each has the effect of lowering the threshold for actual and record of disability claims and thus, in effect, similarly extending the ADA’s protections to a very broad group of people. The cumulative result of these various changes may be to expand the ADA from covering a *discrete* and *insular minority* to now protecting a *non-insular* and *non-discrete majority*.

The ADA Amendments are significant not only for what they do, but also for what they do not do. Nearly all of the amendments’ focus is on the definition of disability. Little is done to clarify open questions about the reasonable accommodation mandate, which is the provision of the ADA

148. *Id.* at 497 (“[T]he ability to use mitigating measures will sometimes make an enormous difference in the way society responds to an impairment.”).

149. *See id.* at 485 (noting “[c]orrectable vision impairments and high blood pressure” are common conditions not generally subject to stigma or social bias); SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 41–42 (2009) (noting that because the limitations caused by impairments like myopia, high blood pressure, and monocular vision can be largely overcome thanks to eyeglasses, medication, or bodily adaptations, such impairments are generally not stigmatized (nor are the measures used to overcome these impairments)).

150. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring).

151. Bagenstos, *Subordination*, *supra* note 103, at 501 (noting people have learned “elaborate myths” about epilepsy, and states have historically enacted laws that target epileptics for “institutionalization, sterilization, and bans on intermarriage”).

152. *See Joiner*, *supra* note 119, at 363 (noting the ADAAA now extends protections to individuals who are otherwise substantially limited by their conditions, but through use of aids and adaptive measures “may be able to function just as any other member of society”). This means people who, in practice, suffer from no serious limitation may now be protected under the ADA “simply because they may be disabled in their hypothetical, unmedicated state.” *Id.*

most explicitly directed toward antisubordination ends. The requirement to reasonably accommodate is, in effect, the opposite of anticlassification; an employer is required to classify on the basis of a forbidden trait by providing an accommodation benefit to members of one historically-disadvantaged class.

Congress originally provided very little in the ADA to assist courts in determining whether an accommodation was reasonable.¹⁵³ Moreover, reasonable accommodation decisions are often complex and fact-intensive, and thus tend to provide little guidance in the way of precedent.¹⁵⁴ The fact-intensive nature of reasonable accommodation and lack of precedent might help explain why many judges have, at the summary judgment stage, focused more on the question of whether a plaintiff is disabled and less on whether the accommodation sought was reasonable.¹⁵⁵ Reasonable accommodation issues simply are not easily decided at summary judgment.¹⁵⁶ By focusing on the meaning of disability and adopting a strict interpretation, courts have thus used the strictures of disability as a gatekeeping tool and avoided ruling on issues of reasonable accommodation.

The judiciary's avoidance of reasonable accommodation has left a host of issues unresolved, including whether an employer must reassign an individual with a disability to a vacant position when there is another, more qualified applicant¹⁵⁷ and whether there should be a presumption that allowing an employee to work from home is not a reasonable accommodation.¹⁵⁸ Despite the lack of direction and open questions about reasonable accommodation, the amendments steer clear of retooling the ADA to more effectively spell out what exactly is required with respect to the requirement to reasonably accommodate applicants and employees. The amendments do expand the scope of "actual disability" and "record of disability," which means that more individuals will be entitled to reasonable accommodation. However, they also rule out the possibility that accommodations may be sought under the "regarded as" prong, which, in

153. Long, *supra* note 110, at 228.

154. *Id.* See also Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122 (2010) (arguing the question of what constitutes reasonable accommodation under the ADA "remains severely underdeveloped").

155. Long, *supra* note 110, at 228.

156. Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 336–37 (2001).

157. See, e.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999).

158. See, e.g., *Van Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995).

effect, ties accommodations to medical severity.¹⁵⁹ The amendments also do nothing to help clarify whether specific types of accommodations are reasonable and impose no undue hardship.

Despite the vast evidence to the contrary, there are a few provisions in the amendments that do have an antisubordination ring to them. For example, the decision to except ordinary eyeglasses from the mandate to disregard mitigating measures is centrally about the fact that people with ordinary eyeglasses do not encounter much stigma or subordination on the basis of poor eyesight.¹⁶⁰ Additionally, adding work as a *per se* major life activity constitutes an acknowledgement that impaired people are subordinated through exclusion from the workplace. Still, the amendments, taken as a whole, represent a marked shift from the emphasis on anti-subordination values in the original ADA.

2. *The Genetic Information Nondiscrimination Act*

The recent enactment of the Genetic Information Nondiscrimination Act (GINA),¹⁶¹ underscores the Legislature's shift toward anticlassification values.

a. *The New Statute*

In 2008, Congress passed GINA, which makes it illegal to discriminate against applicants, employees, and former employees on the basis of genetic information.¹⁶² GINA includes a prohibition on the use of genetic information in all employment decisions,¹⁶³ strict limits on the ability of employers and other covered entities to request or to acquire genetic information,¹⁶⁴ and requirements to maintain the confidentiality of any genetic information acquired.¹⁶⁵ Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or

159. Cox, *supra* note 119, at 210 (“[B]y permitting a large number of individuals to sue for disability discrimination, but only a limited subset of that group to sue for reasonable accommodations, the ADAAA may underwrite the perception that ADA accommodations compensate for endogenous biological limitations.”).

160. Bagenstos, *Subordination*, *supra* note 103, at 497–98; Barry, *supra* note 119, at 261–62.

161. Genetic Information Nondiscrimination Act of 2008 (“GINA”), Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified in scattered sections of 26, 29, and 42 U.S.C.).

162. *Id.* § 202.

163. *Id.* § 202(a).

164. *See id.* § 202(b) (noting six exceptions to the general prohibition against requesting or acquiring genetic information).

165. *Id.* § 206.

condition of an individual's family members.¹⁶⁶ Notably, GINA forbids both an employer's acquisition and use of genetic information, requiring a "genome-blind" approach to protecting genetic information.¹⁶⁷ Additionally, GINA does not protect manifested genetic health conditions,¹⁶⁸ once genetic information manifests itself as an impairing condition, GINA's protections end and the ADA's protections (covering impairments that may well have a genetic basis) begin.¹⁶⁹

b. The Turn to Anticlassification Principles

The absence in GINA of certain types of protections represents a noteworthy and anticlassificationist departure from previous employment discrimination statutes. Initially, GINA is missing the history of discrimination that precipitated passage of Title VII, the ADEA, and the ADA. Its findings section, for example, cites only one specific example of genetic discrimination in the workplace¹⁷⁰ and, instead, focuses on allaying fears related to "the potential for discrimination."¹⁷¹ GINA is, in this critical respect, the first antidiscrimination statute of its kind: one that preempts discrimination instead of remedying a history of discrimination.¹⁷² Whereas antidiscrimination law, generally, and employment discrimination statutes, in particular, have looked to discrimination in the past to justify present and future protections, GINA had little to reflect upon since significant

166. *Id.* § 201(4).

167. Roberts, *GINA as an Antidiscrimination Law*, *supra* note 10, at 622 (citing Mark A. Rothstein, *Legal Conceptions of Equality in the Genomic Age*, 25 *LAW & INEQ.* 429, 456 (2007)).

168. Genetic Information Nondiscrimination Act § 210 ("An employer, employment agency, labor organization, or joint labor-management committee shall not be considered to be in violation of this title based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.").

169. Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 *VAND. L. REV.* 439, 454–55 (2010) [hereinafter Roberts, *Preempting Discrimination*]. Still, whether discrimination takes place on the basis of genetic information or a manifested condition may be an ambiguous query where the employer is cognizant of both an employee's genetic information and manifested medical conditions. *Id.* at 455 n.83. The ADA also protects genetic information where it satisfies the requirements for a "regarded as" claim: i.e., where an employer's knowledge of certain genetic information leads to the (mistaken) belief that the employee has a limiting impairment. *Id.* at 444. Additionally, Title VII has been applied in at least one case to protect genetic information that was tied to a particular protected group. *Id.* at 445 (citing *Norman-Bloodshaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998) (holding blood tests for sickle cell violated Title VII)).

170. Genetic Information Nondiscrimination Act § 2(4).

171. *Id.* § 2(5).

172. Roberts, *Preempting Discrimination*, *supra* note 169, at 441 (noting GINA is "the first preemptive antidiscrimination statute in American history").

advances in the area of genetic information have only come recently and have not yet been the impetus for much discrimination.¹⁷³

GINA was instead legislated primarily on the basis of research and immutability justifications.¹⁷⁴ Regarding research, people were concerned that as there are future developments in the realm of genetic information, such information must be protected. Otherwise, people will be fearful of genetic testing and miss out on life-saving knowledge as well as stymie genetic research.¹⁷⁵ Regarding immutability, genetic information seemed, to many, like precisely the type of immutable trait that antidiscrimination law ought to protect.¹⁷⁶ The idea is that, much like race or sex, one cannot control one's genetic makeup, and thus, one should not be subject to disparate treatment on that basis. Accordingly, while lawmakers had research and immutability justifications for protecting genetic information against classification, GINA was not directed toward contravening the current subordination of any group.¹⁷⁷ Indeed, the statute covers all types of genetic information, and every individual has a genetic makeup; the result is that GINA covers everyone. The findings do reference eugenics and forced sterilization laws, but this merely pays lip service to preventing the formation of a genetic underclass. The statute is substantially directed toward anticlassification norms, and there is no indication that any genetic subordination is ongoing.

Additionally, GINA only proscribes intentional discrimination. The text expressly provides that there is no cause of action for practices that have a disparate impact¹⁷⁸—a cause of action under Title VII, the ADEA, and the ADA, which, in each instance, helps protect against covert discrimination. This omission may stem from the fact that, as explained above, GINA was not passed to protect any subordinated group. If disparate impact protection is intended to guard against overt discrimination being channeled into neutral policies and practices with exclusionary effects, perhaps the lack of overt discrimination made covert

173. *Id.* at 440–41.

174. *Id.* at 471–80.

175. *Id.* at 471–74.

176. *Id.* at 476 (“When invoked within antidiscrimination law, immutability stands for the proposition that entities should not discriminate on the basis of traits that a person did not chose [sic] and cannot change or control without serious cost.”). *See also* Hoffman, *Immutability*, *supra* note 57 (weighing immutability as a unifying principle for employment discrimination law).

177. While the findings in GINA cite forced sterilization laws and sickle cell screening as historical abuses of genetic information, GINA § 2, overall evidence of genetic information discrimination was still quite limited in both scope and frequency. Roberts, *Preempting Discrimination*, *supra* note 169, at 463–71.

178. Genetic Information Nondiscrimination Act § 208(a) (“Notwithstanding any other provision of this Act, ‘disparate impact’, as that term is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of genetic information does not establish a cause of action under this Act.”).

discrimination less concerning. Disparate impact protection may have seemed unnecessary since genetic knowledge is young, and there is thus far scant evidence of disparate treatment. Indeed, such an inference is supported by Congress's notation to revisit in 2014 whether GINA ought to support a disparate impact cause of action.¹⁷⁹ In sum, the absence of a disparate impact cause of action under GINA reflects the lack of current subordination on the basis of genetic information.

There also is no provision for reasonable accommodation—despite the fact such a provision could have been integrated into the statute to achieve antisubordination goals. Consider the example of a person with a genetic predisposition to develop carpal tunnel syndrome.¹⁸⁰ GINA employs an anticlassificationist scheme that bars an employer from considering such genetic information and classifying on that basis.¹⁸¹ However, if an employer could consider genetic information, she might well be able to provide an accommodation for the person genetically predisposed to carpal tunnel (such as working longer hours with more frequent breaks or switching positions throughout the day) that would prevent or slow the onset of this particular condition.¹⁸² Nor does the statute allow any positive consideration of genetic information through programs like genetic diversity initiatives.¹⁸³ The anticlassification protections in GINA wholly preclude such antisubordination-oriented uses of genetic information.

Finally, the scope of GINA is consonant with the anticlassification principle. The coverage afforded by GINA is unlike, for example, the ADA, where coverage is limited to members of a group that has been historically disadvantaged. Because all individuals have a genetic makeup, anyone may potentially sue under GINA for violations relating to their genetic information. Given that all people are potential beneficiaries under GINA, the statute embraces the anticlassification bent toward protecting individual traits rather than the antisubordination bent toward protecting a socially-recognized group or remedying group-based inequality.¹⁸⁴ In

179. *Id.* § 208(b) (“On the date that is 6 years after the date of enactment of this Act, there shall be established a commission, to be known as the Genetic Nondiscrimination Study Commission (referred to in this section as the ‘Commission’) to review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under this Act.”).

180. Roberts, *GINA as an Antidiscrimination Law*, *supra* note 10, at 639.

181. *Id.* at 639.

182. *Id.*

183. *Id.*

184. *Id.* at 632–33.

whole, various key provisions and omissions indicate GINA is largely an anticlassification statute.¹⁸⁵

3. Title VII

While Title VII has been around for decades and has not been amended recently, in 2009, the Supreme Court handed down *Ricci v. DeStefano*,¹⁸⁶ a landmark case with implications that may well extend beyond Title VII to the very constitutionality of a prominent antisubordination policy that reaches across various employment discrimination laws: disparate impact.

a. Disparate Impact Doctrine and *Ricci v. DeStefano*

Title VII proscribes both disparate treatment as well as actions that have a disparate impact upon protected groups. While the statute facially proscribes the consideration of race in employment decisions, the disparate impact provision provides an outlet for taking account of the potentially discriminatory effects of a facially neutral policy or test—even where there is no intent to discriminate.¹⁸⁷ The Equal Employment Opportunity Commission (EEOC) has further clarified the meaning of disparate impact by drafting regulations that provide a four-fifths rule. In particular, the regulations provide:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.¹⁸⁸

An employer may defend against disparate impact liability by demonstrating that the practice is “job related for the position in question and consistent with business necessity.”¹⁸⁹ Where the practice with a disparate impact is an examination, the employer must show the examination tests for successful job performance and that any cutoff or

185. See *id.* at 634 (“Because GINA provides individualized protection, prohibits any consideration of genetic information—positive or negative—and only outlaws intentional discrimination, the statute currently favors anticlassification.”).

186. 129 S. Ct. 2658 (2009).

187. See generally 42 U.S.C. § 2000e-2(k) (2006).

188. 29 C.F.R. § 1607.4(D) (2011).

189. 42 U.S.C. § 2000e-2(k).

rank-ordering of scores reliably screens candidates by ability.¹⁹⁰ Even if the employer's practice satisfies these criteria, its decision to maintain a practice with a disparate impact will still violate Title VII if the plaintiff can prove the existence of a less discriminatory alternative that serves the employer's legitimate needs.¹⁹¹

In *Ricci*, the New Haven Fire Department administered promotional examinations in 2003 to fill vacant lieutenant and captain positions in its fire department.¹⁹² Before doing so, the City hired an outside company to develop the examinations at a cost of \$100,000.¹⁹³ The record showed that the company employed various measures to ensure the results would not unintentionally favor white candidates.¹⁹⁴ Because promotional examinations were infrequent, many firefighters spent months preparing.¹⁹⁵

The contract between the City of New Haven (City) and the New Haven Firefighters' Union required that applicants for lieutenant and captain positions must be screened using written and oral examinations, with the written part accounting for 60% and the oral part accounting for 40% of the applicant's total score.¹⁹⁶ The City had a charter that established a merit system to govern hiring and promotion.¹⁹⁷ That system required the City to fill vacancies with the most qualified individuals, as indicated by job-related examinations.¹⁹⁸ Qualified individuals would be identified after the New Haven Civil Service Board (CSB) certified a ranked list of applicants who passed the test.¹⁹⁹ Finally, the merit system included a "rule of three" in which the hiring authority must fill a vacant position with a candidate from the top three scorers on any certified list.²⁰⁰

The candidates took the examinations in November and December of 2003. Of the applicants who took the captain exam, 64% of white candidates (or 16 out of 25) passed in contrast to the 37.5% of black and Hispanic candidates (or 3 out of 8 for each group) who passed.²⁰¹ Of those applicants who took the lieutenant exam, 58.1% of white candidates (or 25 out of 43) passed compared to just 31.6% of black candidates (6 out of 19)

190. See 29 C.F.R. § 1607.5(H) ("Where cut off scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force.").

191. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (C).

192. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2665 (2009).

193. *Id.*

194. *Id.* at 2665, 2681.

195. *Id.* at 2664.

196. *Id.* at 2665.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (internal quotation marks omitted).

201. *Id.* at 2666.

and 20% of Hispanic candidates (3 out of 15) who passed.²⁰² Applying the Rule of Three to the test-taking for captain, the top 9 scoring candidates for captain would be eligible for an immediate promotion to the rank of captain (for which there were 7 vacancies), and the top 10 scoring candidates for lieutenant would be eligible for an immediate promotion to the rank of lieutenant (for which there were 8 vacancies).²⁰³ Thus, the 19 candidates eligible for promotion to either captain or lieutenant included 17 whites, 2 Hispanics, and zero blacks.²⁰⁴

After anonymous test results (identifying only race and gender) were released—but before certification—the CSB held public hearings over three months to determine whether to certify the results.²⁰⁵ Some firefighters argued the tests should be discarded because the results showed they were discriminatory, and they threatened to sue if the City made promotions based on the results.²⁰⁶ The pass rate of minorities, which was approximately one-half the pass rate for white candidates, fell well below the four-fifths rule established by the EEOC to implement the disparate impact provision.²⁰⁷ Other firefighters said the exams were fair and heavily vetted and threatened to sue if the City failed to make promotions based upon the results.²⁰⁸ Everyone acknowledged that there was a disparate impact upon black and Hispanic firefighters, but there was marked disagreement over whether the tests accurately identified the best candidates or whether there were less discriminatory alternatives.²⁰⁹ The City ultimately declined to certify the results on the basis of concerns about being vulnerable to a disparate impact challenge under Title VII.²¹⁰ Firefighters who believed the exams were fair then sued, arguing the City's refusal to use this test, due to its impact on members of some race and national origin groups, was an act of intentional discrimination that violated Title VII and the Fourteenth Amendment.²¹¹

Plaintiffs' argument was that the City, when it considered the racial effects of a test that was vetted and chose not to certify the results, was intentionally discriminating on the basis of race.²¹² In other words, the City's professed desire to comply with Title VII's disparate impact

202. *Id.* at 2666, 2678.

203. *Id.* at 2666.

204. *Id.*

205. *Id.* at 2667–71.

206. *Id.* at 2664.

207. *Id.* at 2678.

208. *Id.* at 2664.

209. *Id.* at 2667–71.

210. *Id.* at 2669–71.

211. *Id.* at 2671.

212. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151 (D. Conn. 2006).

standard was a pretext for intentional discrimination against white candidates.²¹³ In support of this, the Plaintiffs argued CSB could not identify any particular flaw in the exams and thus it did not have much evidence of less discriminatory and equally-effective selection measures.²¹⁴ Accordingly, the City should have certified the results because there was no other less discriminatory alternative in place.²¹⁵ In response, the City argued it had a good faith belief that it would have violated the disparate impact prohibition in Title VII if it had certified the examination results.²¹⁶ The City argued it could not be liable under Title VII's disparate treatment provision for attempting to comply with Title VII's disparate impact bar.²¹⁷

The district court granted the Defendant's motion for summary judgment, concluding that "[n]otwithstanding the shortcomings in the evidence on existing, effective alternatives, it is not the case that [the City] *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method."²¹⁸ It also ruled that the City's "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent" under Title VII.²¹⁹ The Second Circuit Court of Appeals affirmed the district court's decision and observed that the City's actions were protected since it was "simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact."²²⁰

The Supreme Court, in a 5-4 decision, reversed the grant of summary judgment to the City and instead granted summary judgment for the plaintiffs, given its conclusion that the City had no lawful justification for its race-based decision not to certify the test results.²²¹ The Court began with the premise that the City's actions would violate the disparate treatment prohibition of Title VII absent some valid defense.²²² The Court then noted its need to interpret the statute in a way that gives effect to both the disparate treatment and disparate impact provisions.²²³ This meant it could not adopt the Plaintiffs' position that an employer could never intentionally discriminate in an effort to avoid disparate impact liability.²²⁴

213. *Id.*

214. *Id.* at 156.

215. *Id.*

216. *Id.* at 151.

217. *Id.*

218. *Id.* at 156.

219. *Id.* at 160.

220. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).

221. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009).

222. *Id.* at 2673.

223. *Id.* at 2674.

224. *Id.*

It also could not adopt the City's position that an employer's good faith belief that its actions are necessary to comply with Title VII is enough to justify race-conscious conduct.²²⁵ Adopting the former position would fail to give effect to Congress's decision to codify disparate impact in the 1991 Amendments; adopting the latter position could lead employers to discard the results of legitimate examinations even where there is little evidence of disparate impact discrimination, amounting to a *de facto* quota system in which employers focus on hiring and promotion statistics in order to avoid potential liability.²²⁶

The Court attempted to strike a balance by adopting a "strong-basis-in-evidence" standard to resolve any conflict between the disparate treatment and disparate impact provisions of Title VII.²²⁷ In other words, before the City could "engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."²²⁸ Applying this test, the Court found that while the City was faced with a *prima facie* case of disparate impact (by virtue of the four-fifths rule), that was a far cry from having a strong basis in evidence that the test would ultimately violate Title VII.²²⁹ In particular, the City would only be "liable for disparate-impact discrimination[] if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."²³⁰ The Court concluded there was not a strong basis in evidence to establish that the City's test was deficient in either of these respects.²³¹ First, there was plenty of evidence to indicate the test was job-related and consistent with business necessity.²³² Second, the Court found that the City's only concrete suggestions of less discriminatory alternatives (adjusting the 60/40 weighting or the "rule of three" after receiving the results) would have likely violated Title VII's prohibition against adjusting test results on the basis of race.²³³ Additionally, there was nothing in the record to indicate changing the weighting would have been an equally valid way to determine whether candidates possessed the knowledge and skills necessary for the

225. *Id.* at 2674–75.

226. *Id.* at 2675.

227. *Id.* at 2675–76.

228. *Id.* at 2677.

229. *Id.* at 2678.

230. *Id.* (citing Title VII, 42 U.S.C. §§ 2000e-2(k)(1)(A), (C)).

231. *Id.*

232. *Id.* at 2678–79.

233. *Id.* at 2679–80 (citing Title VII, 42 U.S.C. § 2000e-2(l)).

promotions.²³⁴ Because the Court was able to resolve the case on the statutory question (Title VII), it did not reach the constitutional claim (equal protection).²³⁵

b. The Turn to Anticlassification Principles

Most scholars, as well as the dissent, see *Ricci* as a marked departure from the *Griggs* Court that established disparate impact doctrine and the Congress that codified it in 1991.²³⁶ Where it once seemed clear that considering a practice's racially disparate impact for antisubordination purposes was not the sort of attention to race that threatens equality (and thus disparate impact doctrine was a complement to the prohibition against disparate treatment), this no longer appears to be the case.²³⁷ The *Ricci* case held, for the first time, that an employer's attention to disparate impact against some may in fact be evidence of its disparate treatment of others.²³⁸ In general, this means that employers must be careful when deciding whether to take prophylactic actions to avoid disparate impacts.²³⁹ Specifically, *Ricci* means that employers who utilize diversity efforts to avoid a disparate impact now face potential litigation.²⁴⁰ It is thus possible that *Ricci* will have the effect of disincentivizing employer efforts to voluntarily comply with the disparate impact doctrine.²⁴¹

Prior to *Ricci*, a majority of the Court had never found the government's consideration of antisubordination purposes intrinsically troubling.²⁴² Instead, where the government sought to use sex- or race-based means to effect antisubordination ends, it simply meant heightened scrutiny.²⁴³ In this context, the Court treated the government's attention to race to achieve antisubordination ends with suspicion (thus triggering strict scrutiny) only when race-conscious measures animated differential treatment based on race ("individual racial classifications with immediate

234. *Id.* at 2679.

235. *Id.* at 2681.

236. See, e.g., Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Raising Test Fairness*, 58 UCLA L. REV. 73, 160 (2010) ("*Ricci* arguably reverses [disparate impact doctrine]."); *Ricci*, 129 S. Ct. at 2710 (Ginsburg, J., dissenting); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1353 (2010); Norton, *supra* note 29, at 226.

237. Norton, *supra* note 29, at 223–24, 226.

238. *Id.* at 225; Harris & West-Faulcon, *supra* note 236, at 82; See Primus, *supra* note 236, at 1350 ("[N]o prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment.").

239. Harris & West-Faulcon, *supra* note 236, at 159.

240. Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 264 (2009).

241. Harris & West-Faulcon, *supra* note 236, at 159–60.

242. Norton, *supra* note 29, at 229.

243. *Id.* at 229.

effect on the persons classified”),²⁴⁴ but not when such measures are animated by some other goal, such as racial diversity.²⁴⁵ In *Ricci*, however, the Court “appears to treat a decision maker’s attention to the disparities experienced by members of traditionally subordinated racial groups—that is, its antisubordination ends—as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification.”²⁴⁶ This causes the dissent to conclude that the majority has broken “the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests ‘fair in form, but discriminatory in operation.’”²⁴⁷ The *Ricci* opinion thus represents a turn by the Court away from disparate impact doctrine—by chipping away at the shield employers have when they make a good faith effort to avoid a disparate impact—and, ultimately, a turn away from antisubordination principles.

Most significantly, the *Ricci* opinion could portend the end of disparate impact doctrine altogether. Justice Scalia’s concurring opinion expressly notes this possibility. He wrote that the Court’s resolution of the *Ricci* dispute on statutory grounds “merely postpones the evil day on which the Court will have to confront the [constitutional] question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”²⁴⁸ “Because the standards for determining intentional discrimination are the same for Title VII and equal protection purposes,” the answer to this question could spell the end for Title VII’s disparate impact provision.²⁴⁹ Justice Scalia thus concluded by observing that “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”²⁵⁰

The Supreme Court’s seeming preference for anticlassification values is also evident by its attention to particular types of harms. The majority and concurring opinions focused on unfairness to the individual plaintiffs—the type of harm with which anticlassification theory is typically

244. Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1199 (2007). Carlon calls such classifications “classification[s] with effect” and notes these are what the Court subjects to equal protection review. *Id.* at 1157. Where classifications do not have such an effect—for example tracking racial demographics for census purposes—courts have not considered such classifications suspicious to warrant the application of strict scrutiny. *Id.* at 1158–59.

245. Norton, *supra* note 29, at 240–44.

246. *Id.* at 229.

247. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2710 (2009) (Ginsburg, J., dissenting).

248. *Id.* at 2682 (Scalia, J., concurring).

249. Norton, *supra* note 29, at 230; Primus, *supra* note 236, at 1355.

250. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

concerned.²⁵¹ The majority noted the failure to certify was “to the detriment of individuals” who had studied hard and made personal sacrifices to prepare.²⁵² It emphasized the need to “provide a fair opportunity for all individuals” and viewed the injury as one of derailing the individual firefighters’ “justified[] expectations” regarding the promotional process.²⁵³ Justice Alito’s concurring opinion provided stories of individuals and the particular sacrifices they had made to prepare for the test.²⁵⁴ It even emphasized the need to treat the plaintiffs as individuals—and “not as simply components of a racial . . . class.”²⁵⁵

In contrast, the dissent focused on group-based harms—the type of harms on which antisubordination theory is focused. It began by observing that when Title VII was extended to cover public employees, “municipal fire departments across the country, including New Haven’s, pervasively discriminated against minorities.”²⁵⁶ It then proceeded to recount a history of discrimination against minorities within the profession of firefighting, culminating in its observation that there are still relatively few minorities in supervisory positions.²⁵⁷ The dissent then notes—before proceeding to its fact-specific analysis—“[i]t is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed.”²⁵⁸

In sum, it appears the Court has, in *Ricci*, turned hard toward anticlassification values and away from the antisubordination rationales that once animated disparate impact analyses.

III. WHY THE ANTICLASSIFICATION TURN?

Part III considers *why* there has been a turn toward anticlassification principles. This Part will consider three possible explanations for the turn: (1) the simplicity of anticlassification principles, (2) the popularity of anticlassification principles, and (3) the perceived irrelevance of identity.

251. See Norton, *supra* note 29, at 247–248 (arguing “[t]he *Ricci* majority’s heavy weighting of the reliance interests impaired by disappointed promotion expectations” indicates the Court has “expanded its understanding of the costs to nonbeneficiaries that are sufficiently weighty to trump the benefits of achieving antisubordination ends”).

252. *Ricci*, 129 S. Ct. at 2681.

253. *Id.* at 2677, 2681.

254. *Id.* at 2689 (Alito, J., concurring) (“Petitioner Frank Ricci, who is dyslexic, found it necessary to ‘hir[e] someone, at considerable expense, to read onto audiotape the content of the books and study materials.’ He ‘studied an average of eight to thirteen hours a day . . . , even listening to audio tapes while driving his car.’”) (internal citations omitted).

255. *Id.* at 2682 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

256. *Id.* at 2690 (Ginsburg, J., dissenting).

257. *Id.* at 2690–91.

258. *Id.* at 2691.

A. Simplicity

One explanation for the anticlassification turn is that the anticlassification principle represents an easily stated and basic notion of fairness, and thus naturally has a broad appeal to judges.²⁵⁹ For example, in the context of race, it is simpler to say that because race has no necessary relation to merit, we should not take account of race in designing and implementing antidiscrimination policy; like cases should be treated alike. It is more difficult (and complicated) to carve out and implement exceptions to a prohibition against classifying on the basis of certain traits.²⁶⁰ As David Schwartz notes, “most judges are doubtless not accomplished feminist thinkers, and the language of antisubordination does not come naturally to them.”²⁶¹ Substantive equality is, in this light, more difficult to effectuate than formal equality. Similarly, anticlassificationist reasoning avoids the fact-intensive step of considering the employer’s motives.²⁶² For example, treating genetic discrimination as simply taking account of genetic information in employment decisions is far simpler than analyzing whether an employer considered genetic information in order to disadvantage members of a particular group. Because employers, under GINA, may not consider genetic information at all—even for positive purposes—there is no need to consider employers’ motives. The anticlassificationist prohibitions in GINA are thus seemingly simple to apply.

A related way of considering the appeal of anticlassification principles to judges is to observe that an anticlassification reading “lends itself” to a more “straightforward textual argument.”²⁶³ For example, the words “discrimination because of sex” sound on their face like a bar against classification: one may not disadvantage members of one sex in terms or conditions of employment. However, antisubordination theorists take “discrimination because of sex” to necessitate an inquiry into whether a policy or treatment effects the deprivation or subordination of a class or individual on the basis of sex.²⁶⁴ This latter inquiry is holistic in scope and may require examining legislative history, antidiscrimination theory, and

259. David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1777 (2002).

260. *Id.* (noting a formal equality reading “is easier for judges to apply than antisubordination theory”).

261. *Id.*

262. *Id.* at 1778.

263. *Id.*

264. *See, e.g.,* CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979) (“The only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.”).

social policy—whereas the former inquiry may only necessitate a linguistic parsing of the relevant statutory language.²⁶⁵ An anticlassificationist approach, moreover, may appear more value-neutral, where the application of an antistatutory provision, or an anticlassification provision to effect antistatutory ends, seems more activist.²⁶⁶ This assumption of neutrality is a controversial point, but the ultimate issue is that for most judges it is simpler to never classify on the basis of a particular trait, than to “adopt[] the posture of a critical theorist, deconstructionist, or even a cutting edge theorist of statutory interpretation.”²⁶⁷

B. Popular Support

A second possible explanation for the anticlassification turn is that the anticlassification principle is publically and politically palatable. Legislators and judges have historically been persuaded by popular views in effectuating the antidiscrimination mandate. Beyond the obvious motivations for elected officials, taking unpopular stances to remedy group inequalities may excite further resistance to the issue by heightening the public’s consciousness of the issue.²⁶⁸ Similarly, a court may steer away from redressing subordination through unpopular measures if the potential ruling is removed from public norms.²⁶⁹ In this context, courts are continuously reconstituting and reformulating the law against the backdrop of political contestation.²⁷⁰ Indeed, one can see these dynamics at work in the development of equal protection jurisprudence.²⁷¹ As anticlassification principles became more popular, courts began to reframe equal protection jurisprudence to reflect those values.²⁷² Returning to the

265. Schwartz, *supra* note 259, at 1778.

266. *Id.*

267. *Id.* The author also notes that “courts generally have not accepted antistatutory theory over formal equality theory in discrimination cases.” *Id.* at 1775.

268. Siegel, *Equality Talk*, *supra* note 6, at 1545.

269. *See id.* at 1545–46 (“[A] court seeking to intervene in a status order must make judgments about when and how to proceed, knowing that, in the end, it cannot secure systemic change through brute force; efforts to transform a society through constitutional adjudication require the political confidence and consent of the very groups a court would subject to the force of law.”). *See also* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006) [hereinafter Balkin & Siegel, *Social Movements*] (discussing how social movements and political contestation calls into question the legitimacy of certain practices and causes constitutional principles to become “unstuck”).

270. Balkin & Siegel, *Social Movements*, *supra* note 269, at 947.

271. *See* Jack M. Balkin, Plessy Brown, and Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005) (arguing the popularity of the anticlassification principle helps explain the implementation and development of *Brown*’s progeny); Balkin & Siegel, *Social Movements*, *supra* note 269, at 928–29 (arguing political contestation changes the meaning of constitutional principles).

272. Matthew E. K. Hall, *Bringing Down Brown: Super Precedents, Myths of Rediscovery, and the Retroactive Canonization of Brown v. Board of Education*, 18 J.L. & POL’Y 655, 696 (citing

anticlassification/antisubordination framework, the public is generally more apt to support measures that benefit them directly, and the more a statute embodies anticlassification values the more likely it is that all stand to benefit.

In particular, Title VII and GINA hold out the possibility of providing universal benefits. One would thus expect greater support for both statutes than other statutes that provide a more narrow scope of protection. Still, there are many provisions of Title VII that provide more antisubordination-oriented protections and have been less popular, such as disparate impact doctrine.²⁷³ It may thus be that the Supreme Court in *Ricci* is now interpreting Title VII to accord with the public's sense of the extent to which race should not be taken into account in decision-making. Here, popular support may have something to do with the public's sense of the "continuing relevance, if any, of race to American life."²⁷⁴

In contrast to Title VII, the ADA is limited in scope, in that it only protects workers with a disability. Its limited scope has led to the public's view that disabled employees benefit at the expense of their nondisabled coworkers.²⁷⁵ This has led various scholars, in order to maintain and increase support for the ADA, to write about the various benefits the ADA provides to nondisabled workers.²⁷⁶ All of this may help explain why Congress, attempting to strengthen the statute, chose a means that broadens the statute to nearly universal proportions. If the ADA stands to benefit everyone, why should anyone oppose its protections?

Another reason the anticlassification model may be more popular is closely related to the simplicity rationale. In particular, the anticlassification model purports to administer equality in its "pure" form,

Anderson v. Martin, 375 U.S. 399, 402–04 (1964); *McLaughlin v. Florida*, 379 U.S. 184, 190–92, 196 (1964); *Loving v. Virginia*, 388 U.S. 1, 2, 10–12 (1967)).

273. See Bagenstos, *Structural Turn*, *supra* note 8, at 21–24 (noting judges have proven unwilling to implement disparate impact doctrine with any rigor).

274. Norton, *supra* note 29, at 210. See also Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (discussing post-racialism as "a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.").

275. Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 312 (2009).

276. See, e.g., *id.* ("While ideally the goals of equality and self-sufficiency for individuals with disabilities should be enough to justify the ADA, and the majority's self-interest should not determine disability policy, practical politics may require identifying and highlighting benefits to nondisabled workers to help maintain support for the law."). See also Derrick Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 22 (2004) (arguing that "the interest of blacks in achieving racial equality is accommodated only when that interest converges with the interests of whites in policy-making positions").

as a neutral principle.²⁷⁷ In the context of race, the anticlassification principle suggests that “racial classifications are ‘equally’ injurious to all people and therefore deserving of judicial scrutiny and subsequent distribution of remedies on an ‘equal’ basis.”²⁷⁸ While such an approach obscures who is morally alike or unlike, for purposes of applying the rule,²⁷⁹ the anticlassification model’s idea of “‘elementary fairness’ without redistribution” appeals to many.²⁸⁰ The anticlassification principle blames no one; it does not require inquiry into “whether particular groups in society are subordinated, or, if so, how bad the subordination has been.”²⁸¹ Accordingly, judges have proven unreceptive to policies, such as disparate impact or reasonable accommodation, which, in effect, blame employers for society-wide and structural problems.²⁸²

The anticlassification principle has historically been far more palatable to judges, legislators, and the public majority than the antistatutory principle.²⁸³ The anticlassification principle’s popularity may thus help further explain the anticlassification turn.

C. *The (Ir)Relevance of Identity*

A third explanation for the anticlassification turn—and one that overlaps some with the rationale of popular support—is the perceived irrelevance of certain forms of identity. This may explain the move in *Ricci* and under GINA, but it is less satisfying in the area of disability.

In the area of race, many contend we now live in a post-racial country.²⁸⁴ In particular, many question whether race is still meaningful now that we have elected a black President.²⁸⁵ If those interrogators are

277. Matthew Scutari, Note, “*The Great Equalizer*”: *Making Sense of the Supreme Court’s Equal Protection Jurisprudence in American Public Education and Beyond*, 97 GEO. L.J. 917, 928–29 (2009).

278. *Id.* at 929.

279. *Id.*

280. Schwartz, *supra* note 259, at 1777.

281. Balkin, *supra* note 271, at 1711.

282. Bagenstos, *Structural Turn*, *supra* note 8, at 40–43.

283. *Id.*

284. Angela Onwuachi-Willig, *The Obama Effect: Understanding Emerging Meanings of “Obama” in Anti-Discrimination Law*, 87 IND. L.J. 325, 325–27 (2012). For more on the suggestion that America is post-racial, see Cho, *supra* note 274; Karla Mari McKanders, *Black and Brown Coalition Building During the “Post-Racial” Obama Era*, 29 ST. LOUIS U. PUB. L. REV. 473 (2010); Norton, *supra* note 29; John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009); Michael Selmi, *Understanding Discrimination in a “Post-Racial” World*, 32 CARDOZO L. REV. 833 (2011); Francisco Valdes, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513 (2011).

285. Onwuachi-Willig, *supra* note 284, at 325–27. See also Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1314

correct that our culture is post-racial, it might make sense to take a less “positive” account of racial identity through policies such as affirmative action or disparate impact doctrine.²⁸⁶ This line of reasoning is consistent with prohibiting all racial classifications, much like the emphasis in *Ricci*. Similarly, the anticlassification paradigm supports eradicating policies that target or classify particular racial groups, including affirmative action. One explanation then for the anticlassification turn is the view that we are *post*-identity in the area of race and this warrants paying less purposeful attention to race.

Genetics is a slightly different case. For GINA, one might suggest that we live in a *pre*-genetic country, in that people are not generally familiar enough with others’ genetic markers to stereotype or otherwise draw negative inferences about them based upon their genetic information. There is thus no current genetic underclass to which we must pay special attention to rectify historical inequality. The idea for genetics is then the inverse of that for race; one might argue we are *pre*-identity (not *post*-identity) in the area of genetics—but that this again (like race) merits ignoring genetic information that could be used (positively or negatively) to classify in the employment context.

As suggested above, the explanation of irrelevance is less satisfying in the area of disability. Most would likely observe that disability continues to be quite relevant and that we do not live in a pre- or post-disability world. That said, disability’s relevance might arguably be declining insofar as disability is increasingly an unstable category. The amended ADA now extends well beyond the traditionally “disabled,” which simultaneously makes disability more socially relevant (since its protections now extend to more of us) and less socially relevant (as a uniquely distinguishing factor). The anticlassification turn in this context may thus be best explained by a felt need to expand and generalize the scope of disability—and not by reference to the social salience of disability.

Accordingly, the increasing emphasis on anticlassificationist politics involves a mix of rationales. The factors of simplicity, public appeal, and social relevance as a distinguishing characteristic have all played some role in the recent shift to emphasize anticlassificationist policies. One might naturally question whether such explanations—even if accurate—are desirable as a normative matter.

(2011) (observing that “Obama as a post-racial figuration is key to the remaking of old debates” about colorblindness and formal equality).

286. See, e.g., Norton, *supra* note 29, at 201 (“characterizing contemporary America as successfully post-racial undermines the central premises of disparate impact theory”).

IV. EVALUATING THE ANTICLASSIFICATION TURN

Given that the principle of anticlassification provides no normative guidance—i.e., nothing within anticlassification theory tells us which classifications should be forbidden—some other value must animate the antidiscrimination principle.²⁸⁷ As Schwartz notes, “[a]ntisubordination arguments are the conscience of Title VII. Theorists must continue to develop these arguments in order to wage the moral battle for proper understanding of antidiscrimination law.”²⁸⁸ In this context, scholars have long argued the proper focus of antidiscrimination law is on combating subordination.²⁸⁹ As noted above, most of the major employment discrimination statutes, excepting GINA, are based on a history of discrimination; it is this past that warrants a protected-class future. However, if employment discrimination law turns away from policies that are directed toward remedying subordination, we may be in danger of delegitimizing the very principle that provides a normative basis for most antidiscrimination laws. Antidiscrimination law may be in danger of losing its identity.

While the anticlassification model may be effective where the culprit of discrimination is easily identified, discrimination has steadily become more covert and structural in nature.²⁹⁰ In other words, it is workplace structures and practices that most often limit the opportunity for historically excluded groups to succeed.²⁹¹ It is in this context—where there are resource inequities and the individual culprit cannot be identified—that the antisubordination model is most effective. Antisubordination approaches, such as reasonable accommodation and disparate impact doctrine, allow us to change the distribution of resources between one group and another by focusing on the relevant trait.²⁹²

Still, evaluating the anticlassification turn is not straightforward. In part, a thorough evaluation requires attention to the indeterminacies associated with anticlassification and antisubordination principles. As noted above, antisubordination values often live in anticlassification commitments. Put another way, anticlassification policies and means can still achieve antisubordination ends. This means that the form of a policy

287. See *supra* notes 32–33, 57 and accompanying text.

288. Schwartz, *supra* note 259, at 1779.

289. See *supra* note 6 (chronicling scholars that have taken this position).

290. See generally Bagenstos, *Structural Turn*, *supra* note 8.

291. *Id.* at 2.

292. See Rogers, *supra* note 92, at 346 (citing Barry Bennett Kaufman, Note, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825, 837 (1983) (identifying situations where antisubordination principles provide a more effective approach)).

(such as whether it prohibits all instances of classification or itself classifies) is arguably less important than the result.

Consider as one example the ADA Amendment's changes, such as eliminating attention to mitigating measures, deleting the "discrete and insular" language in the findings, and expanding the scope of "regarded as" disability. These amendments widen the scope of the ADA's protections by drawing less attention to the relative subordination of ADA claimants. These changes to the scope of disability also, as explained above, move the ADA closer to a purely anticlassificationist and universal approach: protection against discrimination on the basis of a physical or mental *characteristic*. Yet greater access to the ADA's protections, through anticlassificationist means, may still achieve antisubordination ends. In particular, paying less attention to subordination, for the purposes of ADA gatekeeping, may allow more overall access to the ADA's protections and thus better ensure that those who are subordinated on the basis of physical or mental impairments have legal rights.

Accordingly, it may be that anticlassification and antisubordination principles are not fully adequate to evaluate the merits of employment discrimination law, as it is currently situated. A new framework that better sorts out what is normatively desirable from what is not may thus be warranted. Despite the existence of theoretical limitations, each of the statutes discussed above as turning toward anticlassification values could potentially benefit from more attention to antisubordination policies and goals.

A. The Americans with Disabilities Act

To the extent that the deletion of the "discrete and insular" language arises in litigation (as, e.g., proof that the ADA is no longer principally concerned with subordination), disability advocates and judges might emphasize that striking this language was only necessary because it had been interpreted to justify constricting the scope of persons who qualify for the ADA's protections.²⁹³ This effort, intended to ensure courts do not artificially shrink the scope of the ADA, should not be understood to abandon antisubordination rationales: that the ADA responds to social exclusion and the socially imposed limitations people with disabilities experience.²⁹⁴ People with disabilities—even if they are a broad and amorphous group—can still be understood as a politically subordinated

293. Cox, *supra* note 119, at 208–09 (citing H.R. REP. NO. 110-730, pt. 2, at 15 (2008)) (“[S]triking [section 7] was necessary because [it had] been interpreted in a manner that is inconsistent with the intent to protect the broad range and class of individuals with disabilities.”).

294. *Id.* at 209.

minority, much like women, who “comprise over half the population” and are socioeconomically and geographically dispersed.²⁹⁵

Additionally, Congress might amend the ADA to include “*per se* disabilities that are generally stigmatized.”²⁹⁶ Such a move would protect individuals with certain conditions that have resulted in social subordination, regardless of whether those conditions substantially limit one or more major life activities. Currently, courts apply an individualized query for each ADA plaintiff under the actual disability prong to determine whether the alleged disability substantially limits one or more major life activities. This individualized analysis allows the court to take into account anything about the plaintiff that makes her more able, including advanced degrees or workplace success.²⁹⁷ In contrast to the current approach, *per se* disabilities would be automatically covered without any showing of limitation.²⁹⁸ A *per se* list of disabilities was considered in the negotiations over the recent amendments to the ADA, but ultimately omitted in the proposed legislative language.²⁹⁹

295. *Id.* at 208–09. Even though women may share more biological traits than do people with disabilities, the relevant trait is a history of political and social subordination. *Id.* at 209.

296. For more in-depth discussion of this proposal, see Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL’Y REV. 347, 380–82 (2011).

297. Areheart, *supra* note 110, at 215–18.

298. Impairments that are not on the *per se* list would still need to meet the general requirement for showing actual disability: that one must have “a physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(1)(A) (2006 & Supp. IV 2010).

299. The *per se* list in the proposed legislative language read as follows:

Absent, artificial or replacement limbs, hands, feet or vital organs; amyotrophic lateral sclerosis; bipolar disorder; blindness or significant vision loss (as defined in (8)); cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn’s disease; cystic fibrosis; deafness or substantial abnormal hearing loss; diabetes; substantial disfigurement; epilepsy (seizure disorders); coronary heart disease or heart attacks; human immunodeficiency virus (HIV infection) or AIDS; kidney or renal diseases (excluding kidney stones); lupus; major depressive disorder; mental retardation (intellectual disabilities); multiple sclerosis; muscular dystrophy; spinal cord injury; Parkinson’s disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury.

Barry, *supra* note 119, at 270 n.389.

Notably, there are reasons one might disagree with having a *per se* list of impairments. First, a *per se* list could be seen as dividing the disability community into “haves” and “have nots.” Areheart, *supra* note 296, at 381. Second, a *per se* list might incite courts to “ratchet up” the level of severity that is required for impairments that are not included on the *per se* list. *Id.* Despite such drawbacks, the benefits of a *per se* list would be significant: It would ensure the ADA covers conditions that have historically subordinated certain groups with physical or psychological impairments; it would create consistency for certain impairments, such as epilepsy and diabetes, which have been protected only on a notoriously, inconsistent basis; and it would be consonant with the broad remedial intent of the ADA’s framers. *Id.*

B. The Genetic Information Nondiscrimination Act

If GINA is, as explained above, a paradigmatic anticlassification statute, which in many ways eschews more flexible antisubordination values, we might now consider whether the breadth of its protections are sufficient. Jessica Roberts argues GINA would “benefit from incorporating more antisubordination protections.”³⁰⁰ Because GINA outlaws all differential treatment—both positive and negative—on the basis of genetic information, she notes this precludes (1) positive differential treatment on the basis of genetic information as well as (2) protection against facially neutral policies with genetically discriminatory results.³⁰¹

First, allowing positive differential treatment would permit policies that serve antisubordination goals, such as reasonable accommodation and diversity initiatives.³⁰² As the example above of the person genetically predisposed to develop carpal tunnel³⁰³ indicates, there might well be advantages to enabling employers to accommodate employees who are predisposed to develop a particular condition. This would potentially serve both individual goals (helping an employee stay well and an employer maintain the intactness of her workforce) as well as social ones (sharing and/or limiting the welfare-oriented costs associated with the otherwise natural onset and development of a particular, possibly debilitating, condition).³⁰⁴ Notably, employer consideration of genetic information should only be permitted where it is voluntarily disclosed by the employee.³⁰⁵

Second, providing disparate impact protection would more effectively guard against genetic discrimination.³⁰⁶ As an example, Roberts notes that scientists have discovered that a gene associated with height is linked to a genetic variant that predisposes its carriers to heart disease.³⁰⁷ Accordingly, an employer might well decide to impose height requirements as a pretext for discriminating on the basis of the genetic predisposition to develop heart disease.³⁰⁸ Requiring the employer to show that the requirement is both job-related and a business necessity, though, would likely uncover the discrimination. Height requirements—which have historically been

300. Roberts, *GINA as an Antidiscrimination Law*, *supra* note 10, at 601.

301. *Id.* at 632–34.

302. *Id.* at 637–39.

303. *See supra* notes 180–182 and corresponding text (considering how reasonable accommodation under GINA might work).

304. Roberts, *GINA as an Antidiscrimination Law*, *supra* note 10, at 639.

305. Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 GA. L. REV. 705, 715–18 (2012) (discussing the need for such consideration to come from voluntary disclosure).

306. *Id.* at 639–40.

307. *Id.* at 640.

308. *Id.* at 640.

imposed and challenged via sex-based disparate impact claims under Title VII—might now serve as a pretext for genetic discrimination.³⁰⁹ Notably, allowing genetic disparate impact claims would not prevent employers from using some genetically-influenced factors, such as intelligence and aptitude; such factors likely involve the business necessity to hire qualified workers.³¹⁰ Accordingly, one might conclude that the most effective way to prevent a genetic underclass is thus to supplement the existing disparate treatment scheme with disparate impact protection now.³¹¹

C. Title VII

There is little debate that Title VII's disparate impact protections have become weaker with time. But it is difficult to tell how much worse *Ricci* has made things. It may well be that the Supreme Court has not yet made a hard turn away from the antisubordination values that live in the disparate impact doctrine. In particular, it is plausible to read *Ricci* as standing for a quite narrow proposition: that where an employer discards racially disparate test results, which issue from tests that comply with established rules for promotion, that employer is discriminating on the basis of race.³¹² On the other end of the spectrum, one might read *Ricci* broadly to conclude that an employer's attention to disparate impact is going to generally be treated as evidence of disparate treatment.³¹³ At a minimum, the *Ricci* decision increases the evidentiary burden on employers who desire or feel the need to take action in response to employment tests with a racially diverse impact.³¹⁴ Unless the turn is read narrowly, there may be reason to be concerned about the Court's move away from disparate impact doctrine.

The position implicit in *Ricci*, that we no longer must attend to race, is a contentious one.³¹⁵ Scholars have argued that we cannot eliminate race from the American psyche until we understand the structural conditions that cause people to stereotype certain races.³¹⁶ Put another way, even if we reach a place where racism no longer impairs the opportunities available to minorities, social and economic deprivations will continue to do so by reinforcing stereotypes and thus possibly inflaming racist

309. *Id.*

310. *Id.* at 642.

311. *Id.* at 640.

312. Harris & West-Faulcon, *supra* note 236, at 157.

313. *See supra* notes 236–247 and corresponding text.

314. Harris & West-Faulcon, *supra* note 236, at 159.

315. *See supra* note 284.

316. Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2397 (2000).

predispositions.³¹⁷ We also might desire to pay attention to such conditions/deprivations for reasons that are non-instrumental (for example, that they tend to cause misery). Race has historically been a reliable proxy for such deprivations—i.e., the use of race is one way to account for structural deprivations that are often hard to otherwise identify and address.³¹⁸

If any attention to race is now called into question, per *Ricci*, it may imperil employers' ability to refashion and shape policies and practices to challenge structural exclusion and afford true equality of opportunity. There are a couple of possible changes that might allow courts, post-*Ricci*, to take account of racially disparate (and subordinating) effects. First, Congress could amend Title VII to state that "racially attentive" compliance with the law's disparate impact provision does not constitute evidence of disparate treatment in and of itself.³¹⁹ Second, Congress could take its cues from Justice Ginsburg's dissent, which calls on Congress to pass legislation codifying the "good cause" defense (in lieu of the majority's "strong basis in evidence" standard) endorsed by the four dissenters.³²⁰ This would require employers attempting to remedy an adverse impact to show only that they have "good cause" for doing so.

CONCLUSION

The scholarship on antistatutory and anticlassification theory is rich and has deeply informed antidiscrimination jurisprudence. Yet it would be a mistake to think that antistatutory principles will always play a featured role in employment discrimination laws. Congress and the Supreme Court have shown a willingness to eschew antistatutory values in favor of anticlassification protections. The results of this move, as explained above, are mixed.

There are a number of pragmatic steps that can be taken to ensure employment discrimination laws continue to feature effective and useful antistatutory policies, and this Article has suggested several. The current trend to emphasize anticlassification and deemphasize existing antistatutory policies raises the possibility that antistatutory practices and rationales will get lost in a desire for simplicity and popular support. The anticlassification turn may merit an antistatutory response, or employing a new framework altogether, to ensure that employment discrimination law remains effective.

317. *Id.*

318. *Id.*

319. Harris & West-Faulcon, *supra* note 236, at 164.

320. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2697–99 (Ginsburg, J., dissenting).