

TITLE VII TO TINDER: LAW’S ANTIDISCRIMINATION
ASYMMETRY AND OCCASIONAL MARKET SUPERIORITY

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I. THE BROAD ASYMMETRY IN ANTIDISCRIMINATION LAW

A. *Identifying the Asymmetry Across Areas of Law*

What happens when an employer uses our identities and affiliations against us? The answer depends on whether these affiliations have the sort of history that brought on legal protection. If the employer thinks artists are unreliable provocateurs who are bound to find deadlines a challenge, the employer can discriminate against them. An employer might also discriminate against members of the Green Party, but here a number of jurisdictions, including California, Minnesota, New York, and the District of Columbia, offer some protection for political affiliation.¹ In most places, however, the employer can proceed as it likes; law does not require every employer to support individuals' attempts to affiliate. Optimistically, we might say that for some commitments or elements of identity it is plausible that as many employers prefer members of a given political party or artists as disfavor them, in which case there is no net drag on these commitments. An optimistic positivist might say that law protects affiliations only when it has reason to think that there is a significant net disadvantage to affiliation, and the affiliation is regarded as worthy of support rather than discouragement. Alternatively, a public choice perspective (returned to below) might explain law's hands-off approach with the observation that co-affiliators have no need to expend resources fighting for protection where there is no net disadvantage to the affiliation. When artists organize it is to gain subsidies, studio space, and other government favors; they seem to feel no need to be included in antidiscrimination laws even though some employers surely disfavor them.

In contrast, large employers (and in many states, even very small ones) know they must be careful not to discriminate along the lines of sex, race, gender, sexual preference, religion, national origin, disabilities, and age.² If

1. A public employer should be more careful because of a potential First Amendment claim that political affiliation or expression led to retaliation or other suppression. *See* Branti v. Finkel, 445 U.S. 507 (1980) (dealing with dismissal rather than hiring based on political affiliation); *Wagner v. Jones*, 664 F.3d 259 (8th Cir. 2011). In the case of private employers, state law is often said to protect political affiliation because some states protect off-duty conduct. But in most places this likely includes active campaigning rather than mere affiliation. *See* Richard Kass, *Political Discrimination in New York*, N.Y. LAB. & EMP. L. REP. (July 14, 2009), <http://www.nylaborandemploymentlawreport.com/2009/07/articles/employment-discrimination/political-discrimination-in-new-york/>. For an excellent discussion of the panoply of statutes, see Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

2. Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers with more than fifteen employees on the basis of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e–2000e-17 (2012). Title II of the Civil Rights Act of 1964 prohibits racial discrimination in “any inn, hotel, motel, or other establishment which provides lodging to transient guests.” *Id.* § 2000a(b)(1). The Fair Housing Act prohibits discrimination based on race, color, religion, sex, familial status, or national origin. 42 U.S.C. §§ 3601–3631 (2012). Examples of state public accommodations laws include N.J.

they manage risks, they will monitor their middle managers. If they discover discrimination against artists, they will check to see whether it is dangerously correlated with sex or another protected category (it does not appear to be so). Where protected categories are concerned, discrimination might be established with the discovery of a smoking gun or simply a pattern, including statistical evidence in the case of a large enough employer.³ For others, law might allow deception in the form of testers, an especially useful tool where the Fair Housing Act rather than employment discrimination is concerned.⁴ In any event, a sensible employer keeps track of these things both to encourage diversity, to make sure that it is not missing great employees through some implicit bias or intentional discrimination by sub-managers, and to guard against potential lawsuits and loss of potential government contracts. The Fair Housing Act does much the same for housing.⁵ In both employment and housing, various state laws extend this project.⁶

Commercial parties, and especially sellers of goods and services, are increasingly caught up in this legal regime, and with somewhat of a broad brush they can be grouped with sizeable landlords and employers. They can be brought in through the public accommodation doctrine or simply found to violate state and local laws that require refusals to sell, for example, to be nonarbitrary and not based on a list of (protected) characteristics.⁷ Here, we get to the asymmetry of my title: buyers and employees are not bound

Stat. Ann. § 10:5-4, -12 (West 2013) and Cal. Civ. Code § 51(b) (West Supp. 2017). Age (over 40) is a protected class under 29 U.S.C. § 631(a)–(b) (2012), and disabilities are captured in 42 U.S.C. §§ 12101–12213 (2012). Political affiliation may rise to the level of identity or, at the other extreme, may be strategic. Smith wants to vote in a primary or gain a judgeship or even a romantic partner—and so he affiliates one way or another. Politicians regularly construct or alter their identities. They go to church more during election season; they exploit photo-ops with smiling spouses and children; and they try to look fit in order to defy age stereotypes. Of course, these are failures of markets as well as politics and are beside the point of this Essay.

3. See *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 817 (5th Cir. 1982) (“The burden may be met solely with statistics if they show a sufficiently great disparity between the employer’s treatment of blacks and of whites—a disparate result. In such circumstances, statistics alone justify an inference of discriminatory motive.”).

4. See *Chi. Lawyers Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008) (“Using the remarkably candid postings on craigslist, the Lawyers’ Committee can identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination.”).

5. See generally Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2762026.

6. See *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996) (federal Religious Freedom Restoration Act did not exempt landlord from California Fair Employment and Housing Act’s ban on housing discrimination against unmarried couples).

7. See *Sisemore v. Master Fin., Inc.*, 60 Cal. Rptr. 3d 719, 741–43 (Cal. Ct. App. 2007) (holding that California’s Fair Employment and Housing Act’s ban on discrimination against any person because of source of income, among other protected categories, is not limited to landlords and tenants).

by the same rules as sellers and employers.⁸ There are many such asymmetries in law, so I can hardly claim that some sort of consistency requires that buyers and sellers face the same rules, but these asymmetries are useful triggers to help us understand the legal system. In the absence of an attractive explanation for an asymmetry, positivists search for evolutionary, public choice, consequentialist, and other explanations, while reformers tend to push for symmetry with baselines formed by what they regard as the highest common denominators.⁹

The asymmetry might have been less striking when nondiscrimination rules in housing, employment, and sales law applied only to large entities. But over time, and in all these areas, the nondiscrimination rules have expanded their reach to modest and in some cases *all* landlords, employers, and sellers.¹⁰ One way to think about this is from the perspective of *incrementalism* in law, a topic discussed below. Consider a law that first applies to manufacturers with substantial government contracts. Imagine that over time the law expands to encompass all manufacturers and sellers of whatever size, but does not grow to cover buyers. In such a case the asymmetry of application when a transaction involves an individual seller and buyer is striking, but explicable by reference to law's evolutionary process. The question, of course, is why it did not expand to cover buyers. One approach is to look at the evolutionary process and explore things like buyers' ability to exempt themselves through the political process. An alternative is to explore the asymmetry itself, especially if the buyer-seller

8. Buyers must beware of § 1981 of the Civil Rights Act of 1866, which prohibits race discrimination in private contracts, and § 1982 of the same Act, which prohibits race discrimination in property transactions. These statutes apply only to race discrimination, however, and have not been applied, in practice, against individual customers. The few cases brought against corporate customers have been easily defended, usually because of an inability to show discriminatory intent. *See, e.g.,* John & Vincent Arduini Inc. v. NYNEX, 129 F. Supp. 2d 162, 169–70, 172 (N.D.N.Y. 2001) (dismissing on the basis of nondiscriminatory reason for defendant refusing to deal with plaintiff); Pippen v. Scales, 822 F. Supp. 305, 311 (M.D.N.C. 1993).

9. An important exception is Tarunabh Khaitan's *A Theory of Discrimination Law*, which sees the law as protecting relatively disadvantaged groups, but doing so asymmetrically because not everyone is a "duty bearer." TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* (2015). In some ways Khaitan's scope is broader than this Essay's. Thus, he includes affirmative action, which is not only asymmetrical (between employers and employees, for example) but takes careful aim, even when nonremedial, and does not, for example, apply to sellers or buyers, except in countries with minority set-aside programs. Khaitan's analysis is positive and normative in parts, and he tries to tackle the basic asymmetry explored here. He finds sellers, employers, and landlords to have "a sufficiently public character" that they should bear the duties assigned by antidiscrimination law. *Id.* at 201. Moreover, he argues that they are in greater control over access to basic goods. *Id.* at 209. The first of these arguments is taken up in Part II.B.1 below; the second seems much less developed than most of Khaitan's argument. It might be fortified by the incrementalism argument developed below, though that approach would be at odds with much of Khaitan's normative strategy.

10. For example, many states are now applying antidiscrimination laws to small businesses. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 42, 370 P.3d 272, 283 (holding that cake shop owner's refusal to create a wedding cake for a same-sex couple violated the public accommodation provision of Colorado's Anti-Discrimination Act).

distinction is found in many areas of law. The first approach focuses on the evolution of law; the second looks for palpable distinctions to explain an apparent asymmetry. On my way to making a point about markets versus law in this Essay, I will be juggling these two approaches rather than settling on one of them.

Before addressing various explanations for the asymmetry, it is useful to emphasize it and view it from several angles. Recent cases or news stories offer focal points. A firm like Chick-fil-A cannot—at least in some states—directly refuse to serve those who present as spouses in same-sex marriages.¹¹ The Trump Hotel could certainly not refuse to serve Muslims or non-Christians more generally. But an individual can surely boycott either of these businesses. Refusals to sell (or employ, which is a form of buying, but I will use the conventional terms) are not treated the same as refusals to buy (or be employed). An individual can choose to work for an employer because that employer shares the individual's affiliation as a white, black, Christian, straight, or artistic person, but the employer cannot exercise a demonstrable preference in the other direction. The asymmetry in employment may seem insignificant because regulating one side of the employment market may do law's work (and note that I have not stated exactly what this work is, but we can think of it as some combination of expression, equal opportunity inducement, and so forth). After all, many of the employers our discriminating employee considers are bound not to discriminate against protected classes, so regulating one side of the market may cause the other to fall into line. With too much affinity on one side, however, the other, regulated side is in danger of unlawful discrimination. Thus, if white Christians gravitate to employment at Chick-fil-A, at some point that employer will look like a discriminator, and might take steps to diversify its work force. Closer to home, if students are attracted to a law school because of law and economics, and other potential students "discriminate" against the school because they do not think they want to be identified, or will not be comfortable, with law and economics, then that institution may end up disproportionately male, because of a correlation between economics majors and sex. The school might offset these personal preferences by offering more scholarship money to women. Legal and reputational concerns play significant roles in this process.

The asymmetry between buyer and commercial seller is hardly unrecognized in the legal literature. Katharine Bartlett and Mitu Gulati label it *Discrimination by Customers* and end up suggesting ways that law

11. For example, California's Fair Employment and Housing Act (FEHA) prohibits direct refusal of service by salespersons due to the prospective person's marital status and sexual orientation, among other protected classes. See *Unlawful Discrimination* n.39, CAL. DEP'T OF CONSUMER AFF. (2012), <http://www.dca.ca.gov/publications/landlordbook/discrimination.shtml#footnote39>.

ought to nudge customers to overcome their biases.¹² Lee Fennell confronts the asymmetry head-on in *Searching for Fair Housing*,¹³ where she is more inclined to use the Fair Housing Act and § 1982 to accomplish the integration that she sees as law's purpose. To take what might be Bartlett and Gulati's best example of nudging, if men's college basketball coaches are more highly compensated than women's because (arguably) the men's game is in most places a much bigger revenue producer, then we ought to worry that the market is in one of several possible equilibria, and that others might be more consistent with law's goals.¹⁴ Perhaps the men's teams attract all the attention because they pay higher salaries, and therefore get more publicity, better coaching, and better players, until the system is self-reinforcing. Bartlett and Gulati suggest that law could require universities to sell basketball tickets in bundled fashion, so that customers would be more likely to attend, and then become enamored of, the women's game.¹⁵ Customers can continue to discriminate at a price; the authors value autonomy and practicality enough to avoid suggesting that law should require fans to spend time watching women's basketball, or to give up watching the game altogether. They prefer nudges over bans and subsidies, perhaps recognizing that the social and private costs of nudges are hard to determine. Fennell's vision of homeseeking is a little more aggressive, but she has a statute or two in the quiver.¹⁶ She would encourage rent-to-own transactions, and would penalize real estate agents who enabled buyers' discriminatory searches.¹⁷ On the other hand, people buy and rent so few homes in their lives that disparate impact analysis is unlikely to be used against discriminatory homeseekers themselves, though Fennell imagines it as useful against apps that enable discrimination.¹⁸

Bartlett and Gulati's discussion (recast and extended presently) has sizeable sellers in mind. Their university sells hundreds of thousands of tickets to tens of thousands of customers. The arguments and remedies they contemplate have less resonance in the sorts of cases that have garnered

12. See Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 249 (2016).

13. See Fennell, *supra* note 5.

14. Bartlett & Gulati, *supra* note 12, at 231–32.

15. There is a modest proposal in a world where some wonder whether there will be such a thing as men's and women's basketball in the future, but the idea is easy to grasp. Note, in passing, that the example involves an educational institution and therefore Title IX, with its own antidiscrimination law. For the most part, this Essay avoids a narrow focus on the details of employment law, free exercise law, housing law, and other law in favor of a perspective that takes in the larger picture, as is plain from my calling various legal distinctions—between buyers and sellers, landlords and tenants, employers and employees—a single asymmetry to be explored.

16. Fennell, *supra* note 5, at 1–2, 33–48 (building argument with Fair Housing Act buttressed by § 1982 of Civil Rights Act of 1866).

17. See *id.* at 42, 58.

18. See *id.* at 48.

much attention even as *Discrimination by Customers* was being written. Think, for example, of the florist, Barronelle Stutzman, in Richland, Washington, who did not want to supply floral arrangements for a long-time gay customer's wedding.¹⁹ The customer, Roger Ingersoll, is free not only to marry the partner he chooses (and to discriminate in this choice) but also to patronize only gay florists or only straight florists or only those in favor of (or against) same-sex marriage. If law were symmetrical, or consistent, then we might expect that the florist is also free to discriminate, and perhaps especially so if the florist's preferences match or seem constitutive of her religious practice. Stutzman's commitments might cause her to discriminate in the very same way that Ingersoll's might have caused him to discriminate (but did not). With symmetry, buyer and seller can choose to discriminate against each other—or law can hold both sides to a nondiscrimination rule. In contrast, law can be asymmetrical either by simply declaring the rule asymmetrical, as is often the case, or by eliding over the asymmetry through the invocation of consumer fraud laws or other state laws that require a commercial florist to serve everyone, or everyone in protected classes, unless there is a nonarbitrary objection to a particular customer. In fact, the law required Stutzman to deliver the flowers and to decorate the ceremony she found objectionable.²⁰ Inasmuch as she had apparently sold to gay customers over the years, and been a nondiscriminatory employer, her objection seems to have been to the same-sex ceremony, but let us pass over that interesting fact and regard discrimination against same-sex marriage as a form of discrimination based on sexual preference. Still, no law requires or imagines that Ingersoll must spread his purchases across gay and straight florists. Viewing the asymmetry from another angle, if Stutzman were the customer and Ingersoll the florist, Stutzman could follow her religious beliefs, and feel true to her identity, by never buying from Ingersoll; she might well think that patronizing a florist whom she knows to be in a same-sex relationship unconscionably helps to support, what is to her, his sinful marriage. Meanwhile, the florist would be bound by Washington's law not to discriminate. There is no legal requirement to be a tolerant or equal-treatment customer. Why the difference? Similarly, a university might work hard to develop a diverse faculty and student body, but nothing stops an individual applicant, whether for a faculty position or student seat, from choosing another university because that one is found to be less diverse in terms of race, sex, or religion. With these examples and citations, I hope to

19. See *State v. Arlene's Flowers, Inc.*, No. 91615-2, 2017 WL 629181 (Wash. Feb. 16, 2017).

20. See Press Release, Alliance Defending Freedom, Wash. Floral Artist's Home, Savings at Risk of State Seizure After Court Ruling (Feb. 18, 2015), <http://www.adflegal.org/detailspages/press-release-details/wash--floral-artist-s-home--savings-at-risk-of-state-seizure-after-court-ruling>.

communicate the idea that we ought to understand the asymmetry not as something present in housing or employment or consumer transactions, but rather as a pattern that plainly stretches across all these areas. From a normative perspective, such as Fennell's, the remedy might well be drawn from statutes applicable to a single area. But from a more positivist perspective, it seems likely that our understanding of the asymmetry should match its scope.²¹

B. Explanations for the Asymmetry

There are at least seven, but maybe as many as ten, ways to think about or "explain" this asymmetry, and of course more than one explanation may be needed or may have motivated legislatures and courts. In order to avoid a long and boring list, I will bundle the approaches, conceding that some readers will disapprove of my merging distinctive elements.

1. Power, Humiliation, Transaction Costs, and the Commerce Clause

A common reaction to the asymmetry, and perhaps the one heard and read most often, is that commercial sellers, landlords, and employers have more *power* than the individuals with whom they deal. Law aims to constrain the powerful, perhaps because it does not trust market forces where there is a power imbalance. If the argument is political, it is a bit surprising, because well-organized groups are often thought to overachieve in the political process, and here it would be the powerless that have succeeded in one legislature after another and in a variety of areas of law. And if the argument is economic, it is questionable; Fennell questions it in the housing market, albeit in a kind of reverse direction.²² There is evidence that homeseekers bring about segregation and that segregation causes harm; dispersed buyers and renters apparently have power.²³ Similar arguments can be made in other markets. In some markets, consumer boycotts reveal hidden power on the buyer rather than seller side. In several job markets potential employees are organized. In the case of law firm hiring, for

21. As will become clear in Part II, it is not always clear how to identify the "buyer" side in this ubiquitous asymmetry. Banks must lend in nondiscriminatory fashion, but borrowers can choose an "ethnic bank" if they like. Is the bank buying promissory notes, or is it selling the use of money so that its customers are the buyers? The latter is more convenient for the analysis here, but there are settings where there is asymmetry that is not easily described as involving legal regulation on the buyer/employee side. And, of course, employees are sellers of labor. With incrementalism now on the table, perhaps the safest thing to say is that the asymmetry is both defined and explained (as argued below in Part II) with reference to which side of the transaction is easier to divide and conquer as law's reach expands.

22. See Fennell, *supra* note 5, at 34.

23. See *id.*

instance, potential employees are empowered through their law schools' career services offices and their umbrella organization. It is too circular to say that these interests bring about legislative rules and market practices that severely penalize discrimination by employers but allow applicants to discriminate, even as we say that this asymmetry is explained by the power held by employers.

An intriguing version of the power argument, best attributed to Bruce Ackerman, is that the buyer who is turned away because of his race, to take the best example, is unfairly humiliated.²⁴ Antidiscrimination law tries to prevent this wrong. In contrast, it is arguable that the buyer who discriminates against a seller does not humiliate the latter, who usually does not know she or he has been demeaned. This humiliation perspective is very successful in explaining law's insistence that even small landlords, otherwise exempt from antidiscrimination law, not advertise their race-based exclusionary intentions.²⁵ The idea also works well for some employee cases, as well, though it explains less as we move through modern antidiscrimination law; disparate impact analysis, for example, is unnecessary and may even generate humiliation.

The origin and development of the doctrine of nondiscrimination in public accommodations can be linked to the humiliation point, or instead thought of as a convenience or hook used to attach the demand for nondiscrimination law to a Commerce Clause platform. Richard Epstein would limit it to cases where there was a public utility or other constraint on entry,²⁶ but over time most academics, and certainly most courts, have become comfortable with an expansive view of the doctrine. If we start with its roots in the hotel industry, then the doctrine can also be understood as one concerning transaction costs. The law requires hotels to serve all travelers, but it does not require patrons to give their business to hotels without regard to the race of the hotel owner.²⁷ It is the buyer-seller distinction again, but perhaps well explained by the fact that discriminatory hotels make travel very difficult for the discriminated-against group. In contrast, discriminating buyers do not greatly inconvenience the hotels. One could argue against this: if businesses (large-scale customers for example) had to show that they did not discriminate against black-owned hotels, there might be more hotels in some parts of the country, and

24. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 137–41 (2014).

25. See 42 U.S.C. § 3604(c) (2012) (making it unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination”).

26. See Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 *STAN. L. REV.* 1241 (2014).

27. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

commerce might be encouraged and social costs reduced. But it is plausible that the public accommodation doctrine can be understood as one that gets at transaction costs, rather than simply as a serious attempt to import the Commerce Clause and federal authority.²⁸

Alternatively, the public accommodation doctrine, and the asymmetry itself, might be seen as following from the observation that businesses owe their existence to the state. The state gives out corporate charters, builds roads that bring patrons to hotels, and so forth. The claim is that in return the state can make demands on businesses that it cannot place on individuals who are pre-state. It is a variety of state action argument, if unmoored from its origins, and perhaps itself an interesting example of legal evolution. Again, it is easy to quarrel with this argument: the states that gave out these charters and roads were hardly the entities that first wanted to impose civil rights laws on businesses, and the state owes its existence to businesses as much as the latter depend on the former. Moreover, individual discriminators also use roads to get to their favored hotels and restaurants. In any event, we can bundle the power, transaction cost, and state action explanations here. The bundle, and its components, suffers from the problem that it does not carry over well to the florist example. As we will see, an evaluation of the various explanations for law's asymmetry is tied to one's view of legal evolution. There is certainly a plausible story that begins with power and transaction costs in order to explain the first steps of modern antidiscrimination law, and then proceeds to expand the reach of such laws to cases that do not neatly fit the arguments that worked well in the early stages.

2. *Incrementalism*

This is as good a place as any to link the discussion to the literature on the tendency of law to change in incremental fashion. Incrementalism, as I call it, may offer an explanation for the asymmetry under inspection in this Part. The claim is that law often creeps along rather than jumps to presumed endpoints. Judges, especially, are encouraged through their legal education and many other means to move step by step, to interpret precedents narrowly, and so forth. Rights are introduced and then expanded. Even legislative programs burst on the scene and then are often expanded in stages. The most optimistic view of this practice hails step-by-step evolution as a wise norm, or even an institutionally embedded practice, on grounds that it encourages caution and makes lawmakers less likely to

28. Khaitan's idea of control over basic needs, discussed *supra* note 9, can be folded into the power and transaction-cost explanations.

make big mistakes.²⁹ It allows citizens to adjust and lawmakers to learn as they go; incremental change is about trial-and-error lawmaking. In both the judicial and legislative arenas, individual actors have less power (to do harm) if they are limited by conventions and doctrines, and required to proceed in small steps. Under this view, the growth of antidiscrimination law over many years and in many stages, from its roots to the florist who is required to supply a same-sex wedding, is unsurprising. Moreover, it may well (but need not) be that law eventually reaches buyers as well.

Another view, drawn from search theory and evolutionary economics, concedes the reality of incremental legal change, but is less confident that it is a good thing.³⁰ A move from point X to Z on some legal spectrum may be optimal (in the eyes of an omniscient observer), but an incremental move from X to Y, in order to test the waters or constrain the lawmaker, might reveal that Y is inferior to X. Y may be inferior, even though Z is superior, but the incremental lawmaker in this case never gets to Z because moving in its direction from X proved a failure. After searching at Y, law returns to X or moves off in another direction, when a move onward to Z would have been superior.

A third view³¹ adopts a public choice perspective, and suggests that interest groups that would like to move from A to G on another spectrum lessen the opposition by moving first from A to B. It is a divide-and-conquer strategy, in which interests now burdened by law at point B join in extending the law up to point C in order that unregulated competitors not benefit. Law might then move past C to D for similar reasons. Incrementalism can be seen in this way as a matter of interest group combinations with a stopping point (all the way at G or somewhere short of that) that has little to do with what is optimal. Antidiscrimination law might reflect this process, as law first applied just to hotels came to be applied in many small steps to virtually all businesses, or as law first applied to very large employers came to be applied to very small ones, with the full support of the large, already regulated employers. In fact, antidiscrimination law with respect to sellers may not go all the way, any more than it has with respect to employers; religious sensibilities have

29. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4 (1999) (arguing that minimalism promotes deliberative democracy); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362–66 (2006).

30. See RICHARD R. NELSON & SIDNEY G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 23–48 (1982); Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 519–22 (2008) (contrasting the “optimal search” approach, which “recommends considerable innovation” in the hunt for a “successful” policy, with the Burkean approach, which “favor[s] incremental change that is regularly evaluated empirically”).

31. See generally Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815 (2010); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

continued to trump antidiscrimination law in employment and, Stutzman the florist aside, the same may be true for commercial sellers.³² And even if antidiscrimination law does expand incrementally to include virtually all commercial sellers, as well as intermediaries that deal with amateur sellers, it should not be expected (under this view) to expand to buyers. Once Walmart is subject to antidiscrimination law, it will want all sellers and employers to be subject to the same laws, but it does not gain (or lose) when buyers are symmetrically made subject to these laws. This third view of incremental change is also mostly positive rather than normative. It is true that if lawmakers and interest groups were forced at the outset to declare the stopping point of some proposed legal change, there would be less change, because opposing interests would know how to defend and would be better organized, but this does not mean that the stopping point is a good one. In order to avoid excessive jargon, I will refer to this public-choice-inspired explanation of incremental legal change as “incrementalism.”

Incrementalism is not entirely orthogonal to the asymmetry under discussion here. From the point of view of that theory of legal change, sellers, employers, and landlords are easily segmented, divided, and conquered, so that a law might start out applying to large-scale employers in a way that makes even hyper-rational small employers believe that they have nothing to lose. (The original example applied incrementalism to disability accommodations, and in that case law proceeded incrementally from very large commercial buildings on down through multi-unit dwellings but did indeed reach a kind of stopping point so that individual homeowners have not been required to retrofit their residences with ramps and elevators.) They gain from the fact that their larger competitors are regulated and they are not. In the long run there is, of course, some probability that incremental change will reach the small employers, but it is a probability, and meanwhile they profit from the fact that their larger competitors are regulated. Meanwhile, the same is probably not true of employees, consumers, and homeseekers. It is harder to divide and conquer these groups if only because the members of each of these groups are similarly situated. If this is the case, then an independent explanation for the asymmetry under examination is that incrementalist strategies work better against sellers, employers, and landlords than they do on the other side. In the case of real estate sales, dividing and conquering began with

32. See *infra* note 38 (discussing churches as employers). Courts would need to distinguish, if that is possible, between homophobia and discrimination rooted in religious edicts. If Stutzman had never knowingly sold to gay customers or supplied same-sex couples' celebrations, because of a genuinely held religious belief, she might have won in state court. It is inconceivable that a court would require a florist who was a Sabbath observer to violate that commitment in order to supply floral arrangements to a Christian or same-sex wedding on a Saturday.

large landlords and moved to real estate brokers, but not to individual sellers or small landlords who live on the premises they rent. Where commercial sellers and employers are concerned, antidiscrimination law first took aim at large players and then moved to smaller ones and, in some states, very small ones. The stopping points, if they are that, are not the same in each area, exactly as incrementalism theory anticipates.³³ I do not want to put too much weight on incrementalism as a stand-alone explanation for the asymmetry we find, but it is at least a feature of the landscape. If the goal is to understand the asymmetry, and multiple variables are permitted, then incrementalism is surely in the picture.

3. *Identity and Autonomy*

The discussion in Part I suggests a very different explanation for our asymmetry. An individual has an identity or set of commitments, which law endeavors to let flourish. The idea is pretty close to what the legal literature calls an autonomy interest, or liberty interest,³⁴ though there are as many conceptions as authors. For autonomy to do much work on our asymmetry, the emphasis must somehow be on the regulated party rather than the presumed beneficiary of antidiscrimination law. If X can choose to discriminate against people like Y, then Y suffers a cost. In some cases Y might be able to make choices that remove her from the despised group. If so, her autonomy interest is taxed, or simply negatively affected. Meanwhile, X gains autonomy. If antidiscrimination law applies, then X loses and Y potentially gains. Autonomy might do some work in explaining what is at stake, but it is hard to see how it can help determine the proper amount of law. It certainly cannot explain the asymmetry without many assumptions about the relative gains and losses of the parties. This is not original. Others have already argued that the autonomy thing is too circular for a stand-alone normative theory; the rights we define generally promote some people's autonomy and impinge on others.³⁵

Identity, or at least some versions of it, might seem more promising. Maybe law thinks of the *individual* student or purchaser of flowers as having commitments worth ennobling, but *businesses* are all lumped together and in a world apart from human identity and commitment. The distinction might take seriously, if not too seriously, the legal fiction of a

33. Stopping points depend on interest groups' calculations and dynamics. Groups must assess the significance of a new threat and decide how much to spend on defense. See Levmore, *supra* note 31, at 838, 840–41.

34. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1383 (2009).

35. See Heather M. Whitney, *The Autonomy Defense of Private Discrimination* (Feb. 22, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922241.

corporation (or other business entity), or it might build on the provocative idea that a group is an aggregation of individuals' identities and because these cannot simply be aggregated into a coherent welfare function, the identity interest is simply set aside in a kind of truce among the participants. This is not terribly strange; it is easy to imagine a workplace in which participants agree to forgo all religious expression, for example, in order to advance the sum of all the players' identity interests. But where is the identity interest in discriminating against others? There may not be too many people whose identity is wrapped up in discriminating against some sellers, but it's easier to imagine with respect to employers. Some applicants will not work for a tobacco company, an outspoken supporter of one political party or another, and so forth. And again, if the employer is a large business, then perhaps we do not think of it as having the same kind of identity to maintain or self-discover. But notice the sleight of hand: autonomy was dismissed by thinking of losers on both sides of the transactions and the law. If the picture is one of an individual transacting with a big business, then autonomy would have done a better job explaining the asymmetry. The easy way out is to assert that a large business does not have an autonomy interest. It is true that antidiscrimination law has moved from these transactions to ones involving smaller firms, where there seem to be autonomy or identity claims on both sides, but perhaps that is just the product of incrementalism. The explanation works, but as law evolves it becomes more of a public choice story and less of a coherent theory that could satisfactorily explain most cases.

Still, the identity explanation should not be written off, and arguably it remains superior to autonomy. This is because the very distinction between buyer/seller and employer/employee has rough edges in the right places. Recently, in *Burwell v. Hobby Lobby Stores, Inc.*,³⁶ the Supreme Court allowed a closely held business to express the commitments of its owners, the Green family, who did not want the firm's insurance policy through the Affordable Care Act to cover contraceptives.³⁷ Religious groups, and especially nonprofit organizations, had long been given such leeway, such that churches can discriminate in hiring not just clergy but also teachers and other employees. These should count as successes for an identity-based theory of the asymmetry. Just where the employer's interest in identity is strong, law allows discrimination, even though the identity interest is normally attributed to individual employees (and buyers and roommates) rather than employers, who are thought of as entities without identities. Arguably, the Greens' identity interest in running a closely held company

36. 134 S. Ct. 2751 (2014).

37. *Id.* at 2759.

in a way that reflects their beliefs is stronger than employees' identity interests in working for that company rather than another. It seems unlikely that Hobby Lobby could not fill its stores with nativity scenes, for example. These religious displays express the Greens' identity even as they impose on employees of different religious inclinations. To the extent that law is about enabling commitments, the argument must be that employees can self-select. The overall argument seems plainer when it is about identity-purposed employers, even though they do not have individual interests to match or defeat those on the other side of the transaction. We might even say that law makes some sense. It requires all but tiny or identity-purposed employers (like BYU and Yeshiva University, for example) to afford equal opportunities to workers.³⁸ In turn, buyers and employees are mostly individuals and they can follow their own commitments, knowing that when they look for a job or service their sense of identity will be protected. The argument has some well-known problems, but it cannot be dismissed, especially when we allow for the incremental evolution of law. This leaves us with the inconvenience of the Stutzman-florist matter. Ingersoll's same-sex wedding obviously offended Stutzman, but did it really threaten her identity or process of self-discovery? She was, after all, willing to sell flowers to him for many years, and she reportedly hired gay employees. It seems like the marriage ceremony pushed her over some line, perhaps one related to the emotion of disgust or indignity, but it is a little hard to see how that line coincides with the identity or autonomy argument.³⁹

38. It is hard to generalize here without confronting distinctions in various areas of law. On the one hand, the text's statement overreaches, or is too generous, because it is religious organizations that get to hire and fire as they like, based on religious commitment. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (church free to fire person who ministers, teaches, or carries out its mission, where other employers would be subject to antidiscrimination law); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329–30, 335–36 (1987) (allowing Civil Rights Act exemption in favor of religious organizations to apply even to secular activities in order to avoid governmental interference, so nonprofit could fire employee who did not meet religious requirement). It is unclear how much leeway would be given to other identity-purposed groups. We can surmise that the NAACP's hiring for staff positions would not be governed by disparate impact analysis, and the same might be true for the Friends of the Hebrew University in Jerusalem and the National Organization for Women. On the other hand, if these employers fired someone who no longer fit the identity profile of their constituents, they would have trouble making a bona fide occupational requirement argument, while the LDS Church essentially succeeded. A major league baseball team might hire only male ex-ballplayers for staff positions, but some states would finally step in if one of these employees were fired after abandoning the male category. But the hiring–firing distinction is familiar and has explanations that stand apart from enabling identity choices or self-discovery.

39. If it does, it would seem to do so in a way that is too costly for law to recognize. If going to the ceremony was the equivalent of a religious person being forced to attend or enter another religion's sacred place (forbidden by some religious laws), Stutzman should have argued that in court, and probably would have won.

4. *Enforcement Costs*

Another approach (our eighth, if you are counting!) understands law to be compromising on its equal opportunity aspirations when enforcement is likely to be difficult. Some authors refer to this as “efficacy,” and put great stock in it.⁴⁰ It was, for example, easy to identify storekeepers and hotels with exclusionary signs and policies in decades past, and harder to find evidence of buyers who refused to buy or lodge with people of a different color or religion. Airbnb faces this issue now, and there are a number of tracking proposals. Where statistical evidence is important, many employers can be evaluated on the basis of applicant pools, interview lists, and eventual job offers, but employee preferences are harder to track, and the number of transactions much smaller. Indeed, where evidence is palpable, as when buyers on Craigslist post discriminatory notices, law steps in as it does for small, “Mrs. Murphy” landlords who can discriminate but not in their written words.⁴¹

The argument has its problems. It is hardly clear that law backs off when enforcement costs are high. Many interventions, ranging from minority set-asides, to EEOC actions, and to school desegregation decrees, have come with predictably high enforcement costs. It is not obvious how a positive theory in this area could rely on enforcement costs. Moreover, in fair housing cases, law uses testers and deception, and this strategy could be deployed at similar cost, and with less (corruptible) targeting, to identify buyers and tenants who discriminate. The asymmetry is thus striking where enforcement costs are comparable.

But perhaps these flaws can be overlooked in light of the larger, surely correct, claim about asymmetrical enforcement costs. It would, for example, be hard work to keep track of consumer purchases in order to ascertain discriminatory practices. Imagine a buyer of books who avoids male (or female) authors. A seller could not refuse buyers of one sex or race, though the seller is free to stock books that appeal to a target audience; similarly, an author could aim for a nondiverse audience and create characters in discriminatory fashion. Perhaps these practices would somehow be understood as critical to identity,⁴² but there is only a weak argument based on enforcement costs. The reader’s purchases are hard to track, but law does not require diversity of the author, and the publisher can also discriminate in many ways, even though enforcement costs would be low. In the housing and employment contexts, testers would be required to

40. See Bartlett & Gulati, *supra* note 12, at 228–38.

41. See Fennell, *supra* note 5, at 27–30.

42. Free expression is not the right argument inasmuch as it does not protect sexual harassment, to take one example.

overcome enforcement problems. In short, the buyer–seller (or employer–employee) asymmetry might reflect differential enforcement costs, but only in a rough way. And if this is the best explanation for law’s evolution, then we ought to expect an expansion of nondiscrimination law where enforcement against buyers, employees, and homeseekers can be accomplished at low cost.

II. MARKETS

A. Law’s Tolerance of Markets

Let us turn, at last, to an argument that I want to take toward the conclusion that markets can sometimes outperform law with respect to law’s presumed nondiscrimination, equal opportunity, or flourishing goal. The argument may or may not also explain the asymmetry explored in Part II. Imagine a university that for some reason hides behind the buyer–seller asymmetry and only buys books by male authors. Enforcement costs in the cause of equal opportunity are low at the outset, though courts might have difficulty at the margin or when constructing a remedy for violations. In any event, the university is probably not violating any law. But presumably it would have an impoverished library, and library users can be expected to pressure the university to diversify its collection. This market correction might be modest, but so would any correction undertaken to conform to a more interventionist law. An optimist might say that law declines to get involved because it saves its energy for cases where market corrections are less likely. It is not a terribly convincing argument; law would also allow the university to use only Christian caterers, and no group would likely notice the discrimination. If the caterers are hired in discriminatory fashion but the food is good and varied, which is to say there is some cultural appropriation, there will be no consumer pressure. The market may be no worse than current law in this case, but it is not a panacea.

In other settings, law might allow markets to function in order to support self-discovery or identity maintenance. If someone’s identity is wrapped up in Jewish culture, he or she might patronize Jewish delicatessens or bakeries. The bakery cannot refuse to sell to outsiders, but the patron can go to this ethnic enterprise as much as he or she likes, even if motivated by animus against other ethnicities. The asymmetry here is not explained by power or transaction costs, and even enforcement costs might be manageable. Law may simply enable the patron’s self-discovery, or religious and cultural identification. This is especially so if we think the identity thing to be asymmetrical itself. Other patrons can flourish by going to a Swedish bakery or a Wonderbread factory outlet, so that everyone can engage in self-discovery. This works so long as the seller does not have a

need to exclude patrons who come from outside the targeted group, in order to create a segregated shopping experience. In fact, the shopping experience will often be segregated, even though law will intervene only if it is openly so. A Jewish or Greek Orthodox bookstore is a place to buy books and religious objects, but it is also a place where one encounters co-religionists with only rare exception. Some patrons go for this experience, and the shopkeeper has no need to announce that outsiders are excluded. No one is deeply offended if an occasional outsider trespasses. The most important example of this market segmentation in favor of identity is the remarkable racial (and, less interesting, religious) segregation found in many churches. If the church announced an exclusionary policy it would lose some of its legal advantages, in the manner of Bob Jones University.⁴³ Most places of worship have no need to be as expressive as Bob Jones, and law does not move against them with disparate impact analysis. Here, law allows markets their freedom, not because markets offer a superior means of accomplishing law's professed goals, but because of political or other impediments to consistency. Nor is this another example of the familiar asymmetry. One can barely imagine a legal system that required the religious bookstore to diversify its inventory so that customers would not be of one type. Instead, the seller is permitted to discriminate, but within limits.

If we think of the church and religious bookstore cases as examples of law's support of self-discovery and identity, then it is noteworthy that law does not go as far as it might in this direction. If he were so inclined, Ingersoll could have exclusively patronized gay florists, and Stutzman could have limited her private and commercial transactions to businesses that opposed same-sex marriage. Law does not facilitate this segregation, or enable this sort of flourishing, as much as it might. No legislature has *required* florists or bakeries to disclose their owners' views on gay marriage. Stutzman would presumably prefer not only to refuse her services at a gay wedding but also to boycott people with whom she so strongly disagrees. She can stay away from a business she does not wish to support, but often she has insufficient information to carry out her boycott. Even legislators who support her position do not help her by requiring disclosure. Perhaps enough legislators value privacy or believe that buyers who care so intensely will ask the right questions. And the more purchases take place over the Internet, with anonymity, the more difficult it is to discriminate or connect identity to purchases. Even where there is a

43. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983) (holding the First Amendment does not prevent IRS from withdrawing tax exemption where organization's practices (in this case a school's and not a church's admission practices) were contrary to government's interest in eliminating racial discrimination).

connection, it is rarely taken to the limit. Thus, church newsletters carry advertisements and suggest to congregants that they patronize its advertisers, but they do not generally refuse advertisements from businesses owned by people of other faiths. A shop that displays a menorah or ichthys is understood to be especially welcoming of some patrons, rather than excluding of others, and in any event our legal system does not require such symbols.

An optimist would say that in fact the cause of self-discovery is advanced by allowing people to keep their identities private. And it goes almost without saying that in this sort of market, tolerance often blooms because over time people find that they have interacted with others whom they would have discriminated against if they had full knowledge at the outset. To the extent that markets are impersonal, or transaction costs high when it comes to gaining information about others, we meet each other on a neutral playing field and then afterwards discover that we were all just human after all, or that some diversity was in fact enriching. Maybe our identity becomes that of a cosmopolitan person rather than a conventional affinity group.

B. Markets (Occasionally) Outperform Law

1. Where Activity Levels Matter

In order to see these various forces in play, let's move to a very different example, the one suggested by my title. Dating apps and online matchmaking services are remarkably open to discrimination. eHarmony is known for Christian dating, but it offers separate tracks for users who want black dating, Jewish dating, and Asian dating. Interestingly, only the Jewish one uses humor to attract users. The gay dating market was quickly dominated by Grindr and it was, in any event, beyond eHarmony's zone of comfort. As part of a settlement reached in a New Jersey case alleging discrimination, eHarmony now enables connections between gay users (its specialized site is compatiblepartners.net).⁴⁴ Bae ("Before anyone else—a dating app for black people")⁴⁵ and MiCrush ("Love en español")⁴⁶ specialize in black and Latino dating respectively, and also facilitate

44. See Joshua Rhet Miller, *eHarmony to Provide Gay Dating Service After Lawsuit*, FOX NEWS (Nov. 20, 2008), <http://www.foxnews.com/story/2008/11/20/eharmony-to-provide-gay-dating-service-after-lawsuit.html>; *eHarmony*, WIKIPEDIA, <https://en.wikipedia.org/wiki/EHarmony> (last modified Feb. 24, 2017); Katherine Weber, *Christian Founder of eHarmony Says Gay Marriage Debate "Damaged Company"*, CHRISTIAN POST (Feb. 18, 2013), <http://www.christianpost.com/news/christian-founder-of-eharmony-says-gay-marriage-debate-damaged-company-90282/>.

45. See Charlotte Alter, *Meet the Young Black Entrepreneurs Taking on Tinder*, TIME (May 23, 2016), <http://time.com/4316495/bae-dating-app-tinder/>.

46. MICRUSH, <http://micrushapp.com/> (last visited Feb. 8, 2016).

refined filtering. Tinder, which is likely to be the most familiar app to law students, allows various filters, but most of the work is done through “swiping.” The user enters some parameters, such as age range, and is presented with an array of potential partners. The user swipes right to signal interest. If both sides show interest in this way, there is opportunity to send messages to one another and eventually to meet. Here, too, nothing in the law or the market stops discrimination. A user can swipe right only when presented with white men who have sailboats in their photos. Tinder does not exactly discriminate but it surely facilitates discrimination by users. Law hardly allows an airline to let its customers choose which flight to take based on the race of flight attendants, with the unselected put out of work, yet that is essentially what Tinder does. The comparison could be made more precise: the airline would not be permitted to offer several flights, and then cancel flights and employment contracts if customers regularly chose the flights offering white crews or female attendants. Tinder, however, allows the user to choose straight or gay, to select by color, religion, school attended, and so forth. It is a free market. Notice that Tinder is a platform, or intermediary, so that we might quibble about who, exactly, is the seller; it is plain that customers can discriminate.

An identity-inspired reader might say that the acceptability of Tinder’s (and its customers’) practices reflects an understanding that dating is essential to many people’s identity; law simply allows users to be themselves. One who was inclined toward the enforcement cost explanation might say that it is too difficult to look into users’ Tinder practices. And then there is always the argument that dating does not involve reliance interests or high transaction costs, or is even not essential to interstate commerce. No doubt lawyers and academic lawyers could make something of each of these arguments, as each resonates in a small way. On the other hand, the humiliation version of the power argument suggests that law will regulate Tinder, or generates the puzzle of why law has not done so already. It is, after all, humiliating to be rejected and to find that many of the people who were demoted through Tinder’s algorithm (because few users swiped right on them) were of one’s own race.

But isn’t there a much better explanation or understanding of when and how law intervenes? Tinder enables discrimination, but it more than offsets this by facilitating moves in the opposite direction, towards a more open and integrated society of the kind law aspires to create or mediate. Tinder’s users feel empowered because they can choose (i.e., discriminate) as they like, but the observational evidence is that many of them experiment once they are on the dating app. There appears to be significantly more cross-

racial and especially cross-faith dating than there would ever be in a world without Tinder and its competitors.⁴⁷

If Tinder hid race or sex, or did the sort of nudging encouraged in other areas of law by champions of government intervention, it would surely attract few customers. It is hard to imagine Tinder without photographs—and indeed a site that tries a “talk first, reveal . . . later” strategy seems to have very few users.⁴⁸ Most dating sites allow some users to make connections based on appearances, and then enable others to begin with appearances but also to use other bits of information to look beyond pictures to the actual person. Double blinding might work to combat discrimination in some markets, but it is hard to imagine for dating. There are other things law or a benevolent dictator might do, but my aim here is not to say what law might do, but to argue that law appears to recognize Tinder’s superiority over conventional antidiscrimination techniques. Members of various ethnic groups date outside their comfort zones much more than they would have in any old matchmaking system. The app provides a market, and just as the Internet makes it much *more* likely that buyers of flowers and other goods do not discriminate—even though they can do so when transacting in person—so too people looking for hookups or longer-term relationships can venture beyond their grandparents’ comfort zone. The market is doing what law never could have done—and if law *had* gone that far, it would be less successful than the market. The market outperforms law even though it begins by flaunting law’s aspirations.

2. *Where Sorting Dominates*

Return now to employment markets and think of law firm recruiting on campus. The law firms that come to interview cannot express a racial, ethnic, or sexual identity preference, and it is reckless for them to ask questions about these things. It looks for a moment that it is like a symphony orchestra trying to shed implicit bias by asking those who audition to perform behind a screen. But law firm hiring is actually the opposite of blinded orchestral auditioning.⁴⁹ First, the law firm itself is not

47. The conclusion is based on discussions with users and industry insiders. I welcome rigorous empirical inquiry, but survey evidence alone is likely to be unconvincing.

48. Lucia Peters, *‘Willow’ Dating App Has a “Talk First, Reveal Photos Later” Philosophy*, BUSTLE (Aug. 11, 2014), <https://www.bustle.com/articles/35282-willow-dating-app-has-a-talk-first-reveal-photos-later-philosophy>; see also WILLOW, thewillowapp.com (last visited Feb. 8, 2016). Willow seems to appeal to a few people looking for romance, but then to some looking for friends when they relocate. It might be that an offshoot of Tinder would be more successful, because users might want to move back and forth between conversational and visual introductions.

49. Some law firms blind themselves when screening resumes. Employers occasionally use online techniques to go much further in the direction of orchestra screening. An interesting proposal is

behind a screen and it might choose to send interviewers who make good, diverse impressions. Students of color talk openly, even with a white professor, about the color characteristics of the lineup of interviewers they face during callbacks at firms' offices.

From the perspective of the job applicant, law and industry (National Association of Law Placement) rules allow the secreting of identities, but virtually every law student who belongs to a Black Law Students Association puts that on his or her resume; the same is true for members of Outlaw, the Federalist Society, the American Constitution Society, and various other commitments or affiliations. Instead of hiding ethnicities—and even these were often hidden just two decades ago—law students draw attention to them by advertising their multilingual skills and travel experiences. Law bans the box, broadly speaking, but virtually all skilled applicants reveal the very information that employers may not openly seek, with the exception of pregnancy and, occasionally, marital status. What's going on here? Is it the same old buyer–seller distinction with which this Part began? Should this be lawful?

One possibility is that applicants evaluate contexts. In the law school setting, talented students perceive that firms want diversity and so they advertise the diversity they can bring to the workplace. If so, the market is signaling that at least at this level law is unnecessary or has served its purpose. To be sure, law brought about this market reality because the firms' quest for diversity has its origin, if not continued vitality, in law. The claim here is not that we should roll back antidiscrimination law, but that it may have done its work and further progress is made through the market rather than legal interventions.

But there is another explanation for disclosure on applicants' resumes. Law's antidiscrimination strategy is to discourage screening based on race and other identifiers, but applicants may internalize the fact or possibility that there remains plenty of discrimination even in the rarified market of hiring at elite law schools. Faced with a number of potential employers, some of whom might discriminate, good applicants, like users of Tinder, announce who they are and suffer occasional discrimination. If an applicant knows that some firms do not want people like her, along some dimension, she might rationally prefer to sidestep the discriminators and avoid the more expensive route of beginning to work and then experiencing biased feedback and reduced career opportunities. She might disclose at the outset, and then find her way to a firm that prefers her type or is indifferent among types. In such a world, law may hesitate to intrude further, by banning

that if the employer has no information about characteristics like race and sex when it screens and hires, then it should be exempt from ex post Title VII suits. *See generally* David Hausman, Note, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343 (2012). It would be hard to make this work where references and promotions are in the picture.

racial (and other) identifiers. It may recognize that some baseline of antidiscrimination law followed by some market sorting does a better job than would more intensive legal intervention.⁵⁰

C. Markets and the Asymmetry

The dating app example makes clear that law recognizes and tolerates discriminatory practices where there is reason to think that these practices actually lead to less discrimination in the long run. But does the argument here also explain the overarching asymmetry? The argument runs as follows: (1) antidiscrimination law began with public accommodations and large employers; (2) as explained by incrementalism theory, it expanded to include virtually all sellers, employers, real estate developers, and landlords; (3) it did not jump over to buyers and employees because the existing regulation on one side of the market means that most buyers and employees will have some experience with members of groups they would have avoided on their own, and law might hope that experience will break down preconceptions better than legal mandates. In many cases the asymmetry is tolerated, or sticky, because of enforcement costs and an inclination to allow self-discovery; (4) additionally, or alternatively, the same incrementalism mechanism that explains expansion on the seller–employer side suggests less legal expansion on the other side, because buyers and employees are much harder to divide and conquer. The jump to this side (to buyers, employees, tenants) would require including many of them, rather than beginning with a group that can be divided and conquered. In some cases, this last argument seems to contradict the usual public choice claim about dispersed interests, but there is no strong set of interest groups that gains from mandating nondiscriminatory behavior by most buyers and employees.⁵¹

50. Age discrimination offers a challenge to the arguments in this Essay. There is plenty of age discrimination in dating, of course, and we know that employers can choose employees with age in mind so long as they do not say so; enforcement is mostly about firing and promotions rather than hiring statistics. Age is part of one’s shifting identity, and a firm’s age distribution is part of its identity. Asked to describe Google and the Harvard Law School as places to work for engineers and faculty members, respectively, most respondents mention the age profile of employees. Could we ban clues about age? It is difficult, as it is hard to advertise experience on one’s CV without also disclosing approximate age. In this context, there is little market success with sorting because no employer prefers to hire old programmers or associates. A 55-year old looking for a job is in deep trouble. I avoid this example here because I pay attention to it elsewhere, in MARTHA C. NUSSBAUM & SAUL LEVMORE, *AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, REDISTRIBUTION, WRINKLES, AND REGRET* (forthcoming 2017).

51. A simpler if more cynical argument is that voters or legislators prefer to regulate “others,” which is to say firms, rather than individuals like themselves. Incrementalism runs its course where firms are concerned, but is blocked where legislators can see that people like themselves will be directly required to give up choices. This argument is even harder to absorb in a world where organized interests are thought to be the overachievers.

III. CONCLUSION

Tinder is not the only marketplace in which law gives way to markets and seems to recognize their occasional superiority in accomplishing law's own goals. We allow discrimination when doing so encourages a market that plausibly breaks down barriers and allows flourishing faster or better than law could do on its own. This is the interesting story of dating apps. It might also describe current law firm hiring and the new economy more generally. In the law firm case, there is voluntary disclosure, followed more by learning than by sorting. Law may or may not have been the engine that broke down barriers, but at present the market does more work than the law. In the Internet economy, anonymity facilitates learning and open-mindedness, or at least makes discrimination costlier. Markets may occasionally outperform law even when it comes to law's own goals.

If this argument about law's recognizing the occasional superiority of markets casts light on its asymmetrical treatment of sellers and buyers, as well as employers and employees, it is through the pattern of incrementalism with respect to legal change. Sellers and employers, like owners of buildings, may be divided and conquered by motivated interest groups because size is a natural means of division. The same is not true for buyers and employees, for whom law's mandates might need to be imposed in uncomfortably large or politically impossible leaps.