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Book Reviews

Bottlenecks and Antidiscrimination Theory

BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY. By Joseph Fishkin. New York, New York: Oxford University Press, 2014. 288 pages. \$35.00.

Samuel R. Bagenstos*

Introduction

In American antidiscrimination theory, two positions have competed for primacy.¹ One, anticlassification, sees the proper goal of antidiscrimination law as being essentially individualistic.² The problem with discrimination, in this view, is that it classifies individuals on the basis of an irrelevant or arbitrary characteristic—and that it, as a result, denies them opportunities for which they are otherwise individually qualified. The other position, anti-subordination, sees the proper goal of antidiscrimination law as being more group oriented.³ The problem with discrimination, in this view, is that it helps constitute a social system in which particular groups are systematically subject to disadvantage and stigma. Anticlassification and antisubordination may provide equal support for some aspects of the antidiscrimination project: *Brown v. Board of Education*⁴ can bear both an anticlassification and an

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1. For an introduction to these two positions, which persuasively suggests that they are more interdependent, and less in conflict, than is commonly assumed, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

2. *See id.* at 10 (“Roughly speaking, this [anticlassification] principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race.”).

3. *See id.* at 9–10 (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”).

4. 347 U.S. 483 (1954).

antisubordination reading.⁵ *Loving v. Virginia*⁶ expressly relied on both anticlassification and antisubordination arguments.⁷ But on other key issues—such as disparate impact and affirmative action—advocates of anticlassification theory have squared off against advocates of antisubordination theory.⁸

The stakes in the dispute between anticlassification and antisubordination thus have appeared to be quite high.⁹ Yet there is something that seems inadequate about *both* anticlassification and anti-subordination theories. Adherents to anticlassification theory have not given a good explanation for why an individualist should care about race or sex discrimination any more than discrimination based on eye color, for example. Any explanation of this difference seems necessarily to fall back on the historic wrong and continuing effects of discrimination against racial minorities and women—and the need to continue to disestablish that wrong and those effects. Anticlassification theory thus seems, at bottom, to be rooted in antisubordination-like principles.¹⁰ Antisubordination theory, by contrast, has uncomfortable overtones of group rights, which stand in tension with widespread notions of individualism and merit and which threaten to

5. See Balkin & Siegel, *supra* note 1, at 11–12 (“Cases like *Brown* . . . contained language condemning the practice of classifying citizens by race as well as language condemning practices that enforced subordination or inflicted status harm.” (footnote omitted)); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1474–75 (2004) (proposing that the two doctrines both grew out of the struggle to interpret and implement *Brown*). Professor Bruce Ackerman argues that *Brown* does not implement an anticlassification *or* antisubordination principle but instead reflects an “anti-humiliation” principle. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 128–29, 137–41 (2014). Although it is beyond the scope of this Review to develop the point, I will simply note that I see the anti-humiliation principle as largely reflecting and replicating many of the problems with, the anticlassification principle.

6. 388 U.S. 1 (1967).

7. Balkin & Siegel, *supra* note 1, at 11–12.

8. See, e.g., Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 961 (2012) (treating affirmative action policies as measures serving antisubordination, not anticlassification, purposes); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 40–41 (2006) (distinguishing the treatment of the disparate impact doctrine under anticlassification principles from its treatment under antisubordination principles).

9. I say “appeared to be” because I think there is nothing inherent in antisubordination theory that compels a particular conclusion regarding disparate impact or affirmative action. Nor do I think there is anything in anticlassification theory that compels a particular conclusion on these matters. Cf. Balkin & Siegel, *supra* note 1, at 14–20 (discussing inconsistencies in the implementation and application of the anticlassification principle). I hope to explore these points in future work. For now though, it is enough to note that adherents to anticlassification have tended to line up on different sides from adherents to antisubordination on these matters.

10. Siegel, *supra* note 5, at 1477. For similar discussions of problems with the anticlassification theory, see Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 846–48 (2003); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 120–26.

further underscore and entrench divisions based on race and sex.¹¹ As Reva Siegel has shown, key Supreme Court Justices have responded to that threat by developing a third approach to antidiscrimination theory; an approach she labels antibalkanization.¹² But antibalkanization may be best understood as a pragmatic set of ad hoc compromises between anticlassification and antistatutoryism, rather than a theory on which to build antidiscrimination law.

One of the many contributions of Joey Fishkin's impressive new book is to offer a possible way out of this morass. Professor Fishkin offers an "anti-bottleneck" theory of equal opportunity. Like anticlassification theory, Professor Fishkin's theory is fundamentally individualistic. The theory aims to attack or mitigate the effects of practices that keep individuals from pursuing the full range of opportunities to construct and live out their lives as they choose. Professor Fishkin argues that the fundamental value served by equal opportunity is not equality so much as a form of autonomy or choice.¹³ He contends that we care about equal opportunity because we care about ensuring that people can, to the extent possible, be the authors of their own life stories—that they can formulate, and have means to reach, their own goals for a life well lived.¹⁴ Rather than simply redistributing resources and opportunities to equalize people's chances of fairly competing for or obtaining a set of societally valued outcomes, Professor Fishkin argues that we should structure society so that individuals can effectively choose what sorts of lives and outcomes they value.¹⁵ This goal may well require substantial redistribution of resources. The ability to achieve—or even conceive of—many life plans depends on prior developmental and educational opportunities, as well as financial security.¹⁶ But the goal remains ultimately to promote each individual's effective ability to choose.¹⁷

Because of his concern with promoting individuals' opportunities throughout their life course to choose the kinds of lives they wish to live, Professor Fishkin pays special attention to those social practices that are "bottlenecks"—narrow passages that an individual must traverse to have access to an array of opportunities.¹⁸ The bottleneck concept has wide

11. See, e.g., Siegel, *supra* note 5, at 1472–73 (stating that the anticlassification theory better aligns with the tradition of equal protection "that is committed to individuals rather than groups").

12. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1281 (2011).

13. See JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 46–47, 120–21 (2014) ("[P]art of the distinctive appeal of equal opportunity is that it enables people to pursue goals in life that are to a greater degree their own, rather than being dictated by the limited opportunities that were available to them.").

14. *Id.* at 120–21.

15. *Id.* at 43, 120–21.

16. *Id.* at 124–28.

17. *Id.* at 127–28.

18. *Id.* at 13, 156–60.

application. College entrance examinations might be bottlenecks,¹⁹ but so too might be race or social-class status.²⁰ Each of these phenomena limits access to many opportunities. When bottlenecks exist, Professor Fishkin urges, equal opportunity demands that society work either to widen them (e.g., by providing improved primary and secondary education that enables more people to succeed on SATs)²¹ or to find a way around them (e.g., by promoting community colleges for those who do not score well on SATs or by eliminating college-degree requirements for jobs for which they are unnecessary).²² Professor Fishkin argues that antidiscrimination law, in particular, should be understood as serving this anti-bottleneck purpose.²³

As Professor Fishkin argues forcefully, nothing in the anti-bottleneck theory rests on a concern with group-based disadvantage, and nothing in that theory purports to accord rights to groups. At the same time, the anti-bottleneck theory resembles the antisubordination theory in its sensitivity to social context. As Professor Fishkin emphasizes, at any given moment in society some practices may be bottlenecks only for members of some groups, and it is appropriate to take account of that—not to provide rights to groups, but simply to ensure that we are protecting all *individuals* in their range of opportunities to choose how to live their lives.

Professor Fishkin's book is fresh, smart, and extremely interesting. It ranges widely across matters of political theory, law, and policy, both in and out of the antidiscrimination context. Professor Fishkin's argument is an appealing one. All serious students of antidiscrimination law—and equality and inequality more generally—must now engage and build on that argument.

Despite its great strengths, I argue in this Review that the anti-bottleneck principle fails as a justifying theory for antidiscrimination law. To be sure, the principle identifies an important normative consideration in justifying and applying the law in this area. Indeed, that principle may even fit some aspects of that law better than do the anticlassification and antisubordination theories. But the anti-bottleneck principle can do no more than that. Its normative underpinnings are too unstable to give clear guidance in how to craft an antidiscrimination regime. Fairly read, it can justify only a slice of the widely defended heartland of antidiscrimination law—and it might plausibly be read to demand quite broad exceptions from the antidiscrimination principle even within that heartland. And the anti-bottleneck principle's apparent accommodation between individual- and group-based understandings of antidiscrimination law, while perhaps clear in principle, is largely illusory in practice.

19. *Id.* at 148–50.

20. *Id.* at 13, 157.

21. *Id.* at 208–09.

22. *Id.* at 146–49.

23. *Id.* at 20–21.

In this Review, I elaborate those points. Part I explains the internal tension at the heart of Professor Fishkin's theory of opportunity pluralism. Part II highlights the degree to which an anti-bottleneck approach would justify only some of the existing applications of antidiscrimination law and would support quite broad exceptions to even those applications that it might seem, on its face, to justify. Part III discusses individualism and groups and argues that an anti-bottleneck approach to antidiscrimination law is likely to confront many of the same problems as an antisubordination theory.

I. The Internal Instability of Opportunity Pluralism

There is a tension at the heart of Professor Fishkin's conception of opportunity pluralism. The value of opportunity pluralism, Professor Fishkin argues, is a fundamentally liberal one of ensuring that individuals can, to the greatest extent possible, decide at any given point in their lives what life goals to pursue and maximize their chances of achieving those goals. Professor Fishkin describes the value as that of "giv[ing] individuals the space to reflect in a more personal and ongoing way about what paths they would like to pursue and what goals in life they value"²⁴ and as that of enabling "each of us to become, in [Joseph] Raz's terms, 'part author of his life.'"²⁵ Professor Fishkin understands that we do not author our lives in isolation—that is why we are only "part author." Rather, "we build our ambitions and goals out of the materials to which we have access."²⁶ Preferences and values, he recognizes, are to a significant extent endogenous to "our developmental opportunities and experiences."²⁷

Professor Fishkin seems to me entirely right on both of these points. Enabling individuals to be authors of their own life stories is an important value. And preferences and goals are to a large extent endogenous to social context. But taken together, these two points mean that the principle of opportunity pluralism can provide no general basis for determining what sorts of interventions, to preserve what sorts of opportunities, are appropriate. Because of the endogeneity of preferences, we cannot simply leave people to choose what they will. An individual's education, family background, and economic station—as well as myriad other elements of the structure of society—will constrain not just the opportunities available to that individual but also the individual's own ability to formulate, and even perceive the possibility of, different life goals. We must therefore intervene to ensure that individuals have the opportunity to perceive and formulate their life goals *and* to remove undue obstacles to pursuing them. But the goal of respecting an individual's choice of how to write the story of that individual's life cannot tell us what opportunities to provide. At least this is true beyond the minimal

24. *Id.* at 17.

25. *Id.* at 121 (quoting JOSEPH RAZ, *THE MORALITY OF FREEDOM* 370 (1986)).

26. *Id.* at 123.

27. *Id.* at 124.

“essential developmental opportunities” such as language acquisition, emotional development, and executive function that are necessary to make virtually any choices of social significance.²⁸ To decide what choices and opportunities to preserve and foster, we need a theory that goes beyond simply respecting an individual’s own life plan.

Professor Fishkin recognizes this problem. He responds by advocating what he calls a thin perfectionism.²⁹ He argues that where we have to choose, we should select interventions that secure a broader rather than a narrower range of opportunities.³⁰ “By breadth,” he says, he “mean[s] not the number of opportunities in the bundle, but the diversity of paths that this bundle of opportunities opens up that leads to valued forms of human flourishing.”³¹ Professor Fishkin gives the example of a child “whose parents believe she is a violin prodigy” and who “do not allow her to go to school or meet other children, or to learn about non-violin pursuits.”³² This child confronts a constrained range of opportunities, and it should be no surprise if she ultimately forms the goal and preference of devoting her life to the violin.³³ After all, what else does she know? By cutting her off from the opportunity to develop any other goals and preferences, we might readily conclude that the child’s parents are limiting her to a narrower range of opportunities than she would have if they permitted her to go to school and live life as a typical child.³⁴ We might reach that conclusion even if allowing her to live life as a typical child diverts her attention from the violin and therefore deprives her of the opportunity to become “the greatest violinist who ever lived.”³⁵

But this response is too facile. The value underlying Professor Fishkin’s theory of opportunity pluralism is not diversity; it is choice—choice about how to write one’s life story. But there is an important respect in which, no matter what we do, our young violinist has no choice. If we allow her parents to force her to devote herself to practicing the violin, then she cannot choose to become anything but a violinist. But if we require her parents to give her a more typical childhood experience, then she will be unable to choose to become a top-flight violinist. Perhaps, if we could put our young violinist in a bastardized form of the “original position,” before her opportunity set forked out into these two different paths, she might say that she would choose the path of complete devotion to the violin.³⁶ Or perhaps it’s simply

28. *See id.* at 124–28 (asserting that society is structured in a way that makes some developmental opportunities essential to proceed along “many or even most of the paths . . . society offers”).

29. *Id.* at 186–87.

30. *Id.* at 186–87, 191.

31. *Id.* at 190.

32. *Id.* at 188.

33. *Id.*

34. *Id.*

35. *Id.*

36. I use the concept of the original position here as an analogy. In John Rawls’s canonical statement of the original position, it is one in which individuals do not know their “particular

nonsensical to talk about what our young violinist would value if she were able to abstract from her own life experiences because it is one's life experiences that construct what one values and pursues. Either way, the value of choice does not give us an answer to the question of which opportunity set to make available. There is value in providing a wider array of life paths, but there is also value in providing certain unique life paths. If we always choose the wider array, we may systematically deny individuals the opportunity to choose the unique paths. Any such decision requires a more significant normative assessment of the value of particular life choices. In other words, it requires a thicker version of perfectionism than Professor Fishkin appears willing to defend.

The problem extends even more broadly. Many of the most important questions that we view through the lens of equal opportunity pit one person's choices against another's. Take one of Professor Fishkin's core examples—integration in housing and schools.³⁷ Professor Fishkin is surely right that such integration creates a context that expands many individuals' understandings of the life paths they may wish to pursue—and that expands many individuals' ability to achieve the goals they choose.³⁸ But interventions that require integration will almost certainly override the considered choices of others who wish to live or be educated in a segregated setting.³⁹ If we permit segregation (whether de jure or de facto) we will foreclose a set of opportunities for many individuals to form and pursue particular life plans for which living an integrated life is, practically, a prerequisite. But if we require integration, we will foreclose the opportunity to choose and pursue a life that is in significant respects isolated from those who differ in socially salient ways.

This tension, though not framed in these precise terms, has given rise to one of the most enduring arguments in civil rights law.⁴⁰ And the value of choice gives us no basis to resolve it. We must decide whose choice to endorse: the choice of the person who wants to live an integrated life (and the choices of the person she might become in the future if she has the opportunities an integrated life opens up) or the choice of the person who

inclinations and aspirations" or their "conceptions of their good." JOHN RAWLS, *A THEORY OF JUSTICE* 18 (1971). Here, of course, I'm imagining a world in which we can access our young violinist's inclinations, aspirations, and conceptions of the good before we decide the path on which to place her.

37. FISHKIN, *supra* note 13, at 212–19.

38. *Id.* at 214–17.

39. *See id.* at 214 (noting some parents may expressly or implicitly "care . . . about peer demographics").

40. *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 *STAN. L. REV.* 1205, 1209 (2014) (acknowledging the fundamental objection that "civil rights laws intrude[] too deeply into private decisions").

wants to live a segregated life. To answer this question requires a normative assessment of the value of *particular* choices.⁴¹

Professor Fishkin astutely recognizes this problem. In response, he suggests that the principle of opportunity pluralism should be implemented with “a rough version of prioritarianism.”⁴² Drawing on Derek Parfit’s definition of prioritarianism—that “[b]enefiting people matters more the worse off these people are”⁴³—Fishkin argues that “[p]riority of opportunity holds that broadening someone’s range of opportunities matters more the narrower that range is.”⁴⁴ Thus, when forced to choose between promoting the choices of two individuals whose life plans or potential life plans are in conflict, we should favor the individual whose “current range of opportunities is narrower.”⁴⁵

When we think about racial and economic integration in the United States, Professor Fishkin’s answer seems quite appealing. African-Americans, Latinos, and poor people who live and go to school in circumstances of racial and economic segregation are plainly deprived of a wide range of opportunities—a deprivation that, because of segregation, is likely to ramify throughout their lives.⁴⁶ Promoting integration thus seems like Professor Fishkin’s example of a surtax on wealthy city residents to provide schools to children in a poor rural area—the cost to the already advantaged in opportunity lost is far outweighed by the benefit to the currently disadvantaged in opportunity gained.⁴⁷

But when we put the argument in these terms, we lose what had looked like the distinctive benefit of Professor Fishkin’s opportunity-pluralist theory. That theory was supposed to get us beyond distributive justice.⁴⁸ But it turns out that we cannot address some central applications of the theory

41. Stated in this way, it is easy to see how the problem for Professor Fishkin’s argument is similar to the essential problem confronted by Herbert Wechsler’s argument that free association could not be a neutral principle that justified *Brown v. Board*. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (“Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?”). For an instructive discussion of Wechsler on *Brown*, see Pamela S. Karlan, Lecture, *What Can Brown® Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1053–60 (2009).

42. FISHKIN, *supra* note 13, at 190–91.

43. *Id.* at 191 (quoting Derek Parfit, *Equality and Priority*, 10 RATIO 202, 213 (1997)).

44. *Id.*

45. *Id.*

46. See, e.g., SHERYLL CASHIN, PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA 23–24 (2014) (highlighting the poverty, unemployment, and underperforming schools found in segregated neighborhoods that “create a closed loop of systemic disadvantage”); Richard Rothstein, *The Urban Poor Shall Inherit Poverty*, AM. PROSPECT, Jan. 7, 2014, <http://prospect.org/article/urban-poor-shall-inherit-poverty>, archived at <http://perma.cc/U2J4-SBWD> (highlighting lasting disadvantages that coincide with neighborhood segregation).

47. FISHKIN, *supra* note 13, at 188.

48. *Id.* at 41.

without engaging in an explicitly distributive analysis. And the distributive analysis itself will often be complex. How do we assess the desire for segregation of members of a cohesive religious minority or an ethnic group that is now, but was not always, understood as “white” in the United States?⁴⁹ Individuals in these groups may face continuing prejudice and other external limitations on their opportunities to develop and pursue their own life goals, but they may also be in a position to deny opportunities to others who themselves face limitations on their opportunities. How does the prioritarian distributive analysis help us decide?

In the end, Professor Fishkin makes a powerful case that opportunity pluralism is one consideration to which we should attend in making decisions about what justice requires. But, as he candidly acknowledges, it is not the only one.⁵⁰ As the cases get more important and controversial, the opportunity-pluralist principle, and the value of authorship of one’s life that underlies it, becomes less helpful in providing a resolution. This is not a purely abstract point. As I argue in the next Part, this limitation of opportunity pluralism makes it a poor fit with our antidiscrimination laws.

II. What Antidiscrimination Laws Can the Anti-bottleneck Principle Justify?

Although I have argued that the opportunity-pluralist principle cannot resolve the hard cases, the principle plainly points to something important. The chance to serve as part author of one’s life story is one many people seek for themselves, and it is one that seems objectively valuable. Professor Fishkin is persuasive that opportunity pluralism—and the anti-bottleneck principle that he derives from it—offers fresh and useful insight into what is at stake in antidiscrimination law. In particular, it offers a very generative third way of thinking about disparate impact law in employment. Under the law of disparate impact, as announced in *Griggs v. Duke Power Company*⁵¹ and codified twenty years later in the Civil Rights Act of 1991, a hiring criterion is discriminatory if it has a significantly disproportionate impact on a group defined by race or sex and if the employer cannot show that it is “job related . . . and consistent with business necessity.”⁵² Jurists and scholars

49. On the normatively complex interaction between ideas of ethnicity and race, see generally Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

50. See FISHKIN, *supra* note 13, at 156 (recognizing that opportunity pluralism must be “balanced against other values”).

51. 401 U.S. 424, 432 (1971).

52. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). There is some dispute in the literature whether disparate impact law can be applied in cases in which a plaintiff alleges an unlawful impact on whites or men. See, e.g., Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1565 (2004) (concluding that applying the theory to whites or men would be ahistorical but that limiting the theory to minorities and women would fail an equal protection analysis). For what it’s worth, my view is that the language of the Civil Rights Act of 1991 leaves no room for refusing to apply the theory to such cases.

have tended to think of disparate impact law as serving one of two possible functions: evidentiary (smoking out hidden discriminatory intent) or distributive (ensuring that minorities or women are not disproportionately shut out of jobs, at least without a sufficiently good reason).⁵³ The evidentiary function of disparate impact fits well with anticlassification theory, the distributive function with antisubordination theory.⁵⁴ But Professor Fishkin's focus on bottlenecks leads us to a different dimension of disparate impact law. Disparate impact has been a successful theory in only a limited set of employment discrimination cases—primarily those involving certain kinds of hiring or promotion criteria, such as pencil-and-paper tests or height, weight, strength, or agility requirements.⁵⁵ As Professor Fishkin notes, at the time the Court decided *Griggs* such hiring criteria were being adopted widely.⁵⁶ Absent the disparate impact doctrine, a person who performed poorly on, say, the Wonderlic test of general intelligence⁵⁷ would likely be foreclosed from a wide array of good jobs—even if that person would in fact be able to perform well on the job.

Wholly independent of its evidentiary or distributive functions, the disparate impact doctrine has operated to keep tests like the Wonderlic from becoming an unjustified bottleneck to opportunity. And this anti-bottleneck justification in fact lies very close to the surface of Chief Justice Burger's *Griggs* opinion. Much of that opinion describes the problem with overly rigid hiring criteria in terms that do not speak at all of race or sex but rather resonate strongly with a concern about barriers to anyone's opportunity. In one of the most telling passages, Chief Justice Burger explains:

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.⁵⁸

53. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 518–20, 523–25 (2003).

54. The two positions are not symmetrical. An adherent of anticlassification theory will have a difficult time embracing the distributive account of disparate impact, but an adherent of antisubordination theory could readily embrace the evidentiary account.

55. See Bagenstos, *supra* note 8, at 22–24 (observing that courts are less likely to entertain disparate impact challenges to “subjective employment practices” than to more objective tests); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705 (2006) (noting that disparate impact theory has “proved an ill fit for any challenge other than to written examinations”).

56. FISHKIN, *supra* note 13, at 165.

57. The Wonderlic Personnel Test was one of the tests used by Duke Power at issue in *Griggs*. Selmi, *supra* note 55, at 718 & n.69.

58. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

And in the last substantive sentence of the opinion, Chief Justice Burger describes its rule in these terms: “What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.”⁵⁹ It is hard to explain these passages as focusing on either the evidentiary function of the disparate impact doctrine in smoking out hidden discriminatory intent or the distributive function of that doctrine in protecting minorities and women from losing access to opportunities. Rather, these passages focus directly on the problem of tests as an unjustified bottleneck to anyone who cannot pass them but would nonetheless succeed in the jobs to which they control access. The standard theories of disparate impact suppress this key point; Professor Fishkin’s theory highlights it.

Although Professor Fishkin offers an account of disparate impact law that improves on other theories of discrimination, it is not clear that his theory does any better job than anticlassification or antisubordination theories in justifying or explaining the rest of antidiscrimination law.⁶⁰ Indeed, the anti-bottleneck theory actually justifies far *less* of the existing sweep of anti-discrimination law than do those other theories. The anti-bottleneck theory is limited in both the *domains* and the *decisions* within those domains to which it justifies applying an antidiscrimination regime.

Take the domains first. Professor Fishkin’s theory justifies guaranteeing individuals access to those domains that provide opportunities to formulate and achieve goals about how to live one’s life. That theory fits well with a prohibition on discrimination in access to jobs and educational opportunities. As Professor Fishkin amply demonstrates, without a sufficient education many individuals will lack the knowledge and imagination to even formulate, much less achieve, a range of life goals.⁶¹ And economic means are often essential to achieving life goals as well.⁶² Professor Fishkin also shows that racial and economic integration in housing and education can serve an important function in expanding individuals’ sense of the types of life paths from which they might choose.⁶³

Professor Fishkin’s theory thus provides an explanation and justification for applying antidiscrimination rules to employment, education, and housing—though, outside of the disparate impact context, it is not clear that it provides a *better* explanation and justification than do the preexisting theories. But that theory does not fit nearly as well with other core applications of antidiscrimination law. The Voting Rights Act’s rule

59. *Id.* at 436.

60. Professor Fishkin argues that his theory justifies the broad sweep of antidiscrimination law because race (like the other forbidden classifications) is itself a bottleneck to opportunity. FISHKIN, *supra* note 13, at 174. As I argue in the next Part, this argument ultimately adds nothing to the antisubordination theory.

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

62. *See* FISHKIN, *supra* note 13, at 200–05 (discussing how money acts as a bottleneck by limiting available opportunities and influencing priorities).

63. *See supra* notes 37–38 and accompanying text.

prohibiting discrimination in election procedures,⁶⁴ for example, does not easily fit the anti-bottleneck theory. Rather, as Professor Fishkin has astutely shown in his other work, a prohibition on voting discrimination protects an individual's rights to be treated as a full and equal citizen and to join with other like-minded individuals in seeking to elect the candidates of their choice and influence policy.⁶⁵ These justifications are well captured by anticlassification or antisubordination theory. They have nothing to do with bottlenecks or opportunity pluralism. Similarly, the prohibition on discrimination in private places of public accommodation—the most controversial piece of the 1964 Civil Rights Act⁶⁶—is best justified as preventing humiliation or a harm to equal citizenship rather than as overcoming bottlenecks to opportunity. Although integration may promote opportunity pluralism by providing individuals with models of different life paths, the sorts of interactions that customers experience when they patronize integrated businesses are far more fleeting than the interactions they experience in integrated neighborhoods, schools, or workplaces.⁶⁷

Even within the domains it does reach, the opportunity-pluralist theory would support broad exceptions from antidiscrimination laws. At least since the debate over the Civil Rights Act of 1964, one of the most significant controversies regarding antidiscrimination law has involved the application of that law to businesses whose owners strongly believe (for religious or simply ideological reasons) in discrimination.⁶⁸ That controversy remains especially salient today following the Supreme Court's recent decision in *Burwell v. Hobby Lobby*.⁶⁹ *Hobby Lobby* interpreted the federal Religious Freedom Restoration Act of 1993 (RFRA)⁷⁰ to exempt certain for-profit corporations from the Affordable Care Act provisions ensuring that their employees receive insurance coverage for contraception.⁷¹ That decision will likely give added momentum to an ongoing litigation campaign in which businesses claim that the application of antidiscrimination laws to them—

64. 42 U.S.C. § 1973b (2012).

65. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1298–1300 (2011).

66. Bagenstos, *supra* note 40, at 1206.

67. *Cf.* Bagenstos, *supra* note 10, at 843–44 (explaining that working on common projects in an integrated workplace reduces prejudice and stereotyping); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 22–25 (2000) (describing evidence that intergroup contact reduces prejudice in sustained, cooperative interactions under circumstances of relative equality).

68. *See supra* notes 39–40 and accompanying text.

69. 134 S. Ct. 2751 (2014).

70. 42 U.S.C. §§ 2000bb to bb-4 (2012).

71. *See Hobby Lobby*, 134 S. Ct. at 2785 (holding that “the contraceptive mandate, as applied to closely held corporations, violates RFRA”).

particularly in the context of sexual-orientation discrimination—impairs their free exercise of religion and their freedom of association.⁷²

Business owners seeking religion- or association-based exemptions from antidiscrimination law might find a great deal of support in Professor Fishkin's theory. As I discussed in the previous Part, Professor Fishkin acknowledges that it is not possible to guarantee every individual access to every single opportunity. At an operational level, opportunity pluralism is satisfied if every individual has a sufficiently large range of opportunities from which to choose.⁷³ And Professor Fishkin recognizes that, after some point, the marginal benefit of increasing the opportunities available to an individual must be traded off against the costs of doing so.⁷⁴ Allowing business owners with sincere objections to opt out of an antidiscrimination law is unlikely, these days, to deprive many individuals of any significant opportunities to choose and pursue particular life paths. For every business owner with such objections, there are owners of other similar businesses who will be perfectly willing to provide nondiscriminatory treatment. And allowing business owners with sincere objections to opt out may in fact be necessary to preserve the *owner's* opportunity to choose and pursue a life path that involves commitment to an ideological or religious doctrine that mandates certain forms of discrimination.⁷⁵ An opportunity-pluralist regime, with its basic commitment to ensuring that individuals can be part authors of their lives to the extent possible—without judging what they choose their life story to be—may actually compel extension of the *Hobby Lobby* principle to the antidiscrimination context.

In making this point, I am under no illusions that I am making a devastating critique of Professor Fishkin's argument. Plenty of scholars agree that sincere religious or ideological objectors should have the right to opt out of antidiscrimination laws—at least in a social context in which sufficiently few businesses would opt out that individuals subject to discrimination would continue to have a range of nondiscriminatory businesses to which to turn. Mark Graber has called this the “Lockean Compromise”—“that persons ought to be allowed to discriminate . . . as long as doing so does not burden others.”⁷⁶ And virtually nobody thinks that the

72. See Bagenstos, *supra* note 40, at 1232–40 (examining cases that could broaden First Amendment or RFRA protection to for-profit corporations and limit the ability of the expressive-commercial distinction to protect antidiscrimination safeguards).

73. See *supra* Part I.

74. See *supra* note 47 and accompanying text.

75. Seana Shiffrin does not focus on discrimination, but she makes a more general argument that morally motivated decisions by business owners not to associate with others should, in at least some circumstances, trump regulations that would mandate association. Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 325–27 (2007).

76. Posting of Mark Graber, Professor, Univ. of Md. Francis King Carey Sch. of Law, mgraber@law.umaryland.edu, to conlawprof@lists.ucla.edu (July 21, 2014, 10:13 AM), archived at <http://perma.cc/Q7JQ-DRVN>. I am not sure that Professor Fishkin would agree with that compromise; my point is only that his theory would support it.

antidiscrimination principle should extend to every person or business who hires a worker or sells a good or service. The fifteen-employee threshold for coverage under Title VII⁷⁷ and the private-club and “Mrs. Murphy” exceptions to the federal laws prohibiting housing and public accommodations discrimination⁷⁸ reflect the view that at some point the costs to efficiency and associational interests outweigh the application of antidiscrimination law. But these limitations tend to be justified by the administrative and compliance burdens of applying the antidiscrimination regime to small businesses or by the especially powerful associational interests at stake in determining membership of private clubs or determining whom to allow to spend the night in one’s home.⁷⁹ The Lockean Compromise, informed by Professor Fishkin’s theory, rests on something different. It rests on the lack of a significant practical burden faced by an individual who experiences discrimination at one or several businesses but retains the opportunity to obtain the same services—and, in Professor Fishkin’s terms, pursue the same array of life paths—from other businesses.

The Lockean Compromise would allow for much broader exceptions than those written in current law. One who adheres to the anticlassification theory might conclude that every time an individual is denied a discrete opportunity because of his or her race or sex, the denial imposes an injury that is not sufficiently mitigated by the availability of the same opportunity from another business. Although we might make an exception where especially strong associational or other interests appear on the other side, an anticlassificationist might say, the general rule should be that no business may discriminate based on race or sex. An antisubordinationist might agree and argue that the existence of discrimination by individual businesses sends a message that entrenches the subordinated position of already disadvantaged groups.⁸⁰ One can agree or disagree with these arguments. But the key point

77. 42 U.S.C. § 2000e(b) (2012).

78. *Id.* § 2000a(b)(1), (e); *id.* § 3603(b)(2).

79. Professor Emens suggests that the Mrs. Murphy exception is, instead, “a concession to fears of miscegenation.” Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1379 n.332 (2009).

80. See Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3052 (2014). Attempting to draw this distinction, Professor Hellman explains:

The hotel’s refusal to rent a room to a black traveler expresses denigration of him and does so on behalf of an entity with some power in the marketplace. The denial of the traveler’s equal worth is thus forceful. The homeowner’s similar refusal also denigrates, but more softly or quietly, if you will. I am not here emphasizing the effect—that the homeowner is likely to control a much smaller number of available rooms than the hotel owner. This is surely true. But, at the same time, if all homeowners in a region refuse to rent rooms to blacks, the effect could be quite significant. Rather, I am exploring what each merchant *does* in refusing to rent the room. The homeowner, as just one small homeowner who controls her own home, speaks her distasteful message softly and carries a small stick. The hotel owner, by contrast, expresses largely the same message but does so in a loud voice and with a larger stick. His place, as the owner of a business of some size, gives him power in our social system.

is that the anti-bottleneck theory is likely to justify much broader exceptions to the antidiscrimination principle than the anticlassification and anti-subordination theories do. For those who believe in a broader application of antidiscrimination law, that is an argument against the anti-bottleneck theory as a principle to organize this body of law.

III. Of Individuals and Groups

Perhaps, though, the individualism that underlies the anti-bottleneck theory makes it superior to existing theories of discrimination. As I noted in the Introduction, the antisubordination theory suggests a notion of group rights—a notion that is in extreme tension with American traditions of individualism.⁸¹ And although the anticlassification theory *seems* individualistic, at bottom it too must be justified as an effort to protect subordinated or systematically disadvantaged groups.⁸² In contrast to those two theories, Professor Fishkin defends the anti-bottleneck theory as being individualistic all the way down. Because it is concerned with practices that operate as bottlenecks to anyone's opportunities, Professor Fishkin argues, the anti-bottleneck theory is different from the alternative theories because "it does not rest directly on any claims about history or past discrimination"—and, indeed, "it does not require that any 'group' exist at all."⁸³ As a result, he contends the anti-bottleneck principle can "avoid unnecessarily reifying groups."⁸⁴ And it supports interventions (like removing pencil-and-paper testing requirements or "ban the box" laws that limit employers' ability to ask applicants about their criminal records) that might help members of *any* group.⁸⁵ It thus "emphasiz[es] . . . commonality rather than inter-group competition" and "provides a better basis for solidarity than initiatives whose beneficiaries are all members of a particular group."⁸⁶

If true, these points would be powerful arguments for an anti-bottleneck theory of antidiscrimination law. But I do not think they ultimately hold up. Although the anti-bottleneck theory, stated most abstractly, does not depend on the existence of any group, concern with group status and group harm creeps back in the instant Professor Fishkin begins to explain how it would apply concretely. In application, the anti-bottleneck theory overlaps significantly with—and may be best understood as simply a variant of—antisubordination theory. Whether the anti-bottleneck principle can avoid reifying groups and whether it can promote solidarity, are empirical

Id.

81. *See supra* text accompanying note 11.

82. *See supra* text accompanying note 10.

83. FISHKIN, *supra* note 13, at 238.

84. *Id.* at 245.

85. *Id.* at 165–67.

86. *Id.* at 249.

questions. But there are strong reasons to doubt that the principle will succeed in these goals.

Start with the assertion that the anti-bottleneck theory does not depend on the existence of any group. At the highest level of generality, this is surely true. One who wants to ensure that individuals can choose from a range of life goals and paths should, all else equal, be concerned with any practice that limits any individual's opportunities. But all else is not equal. As I have argued throughout this Review, it is simply impossible to achieve the goal of ensuring that every single individual has, at every single point in time, the opportunity to choose from every single possible life path. Professor Fishkin, of course, acknowledges the point.⁸⁷ But once we abandon that utopian goal, we need to know when society should intervene to promote opportunities.

In elaborating the anti-bottleneck principle, Professor Fishkin is attentive to that concern. It is possible for a social practice to constitute a bottleneck only for a single individual. But Professor Fishkin argues that we should be most concerned with those practices that deprive many individuals of opportunities—particularly where they do so arbitrarily.⁸⁸ As he acknowledges, race is a prime example of a pervasive, arbitrary bottleneck.⁸⁹ To the extent that the anti-bottleneck theory justifies a prohibition on race discrimination, it thus largely overlaps with the antistatutory theory, which is precisely concerned with the pervasive denial of opportunity attached to race.⁹⁰ Professor Fishkin argues, however, that this overlap is basically coincidental. Understanding “the long history of practices and government policies of racial subordination,” he says, “can help us understand *why* and *how* race acts as a bottleneck today” and thus “can help

87. See *supra* text accompanying notes 28–31.

88. FISHKIN, *supra* note 13, at 167. What counts as arbitrary here is itself laden with questions of value. In some of his discussion, Professor Fishkin appears to equate arbitrariness with inefficiency. See *id.* at 161 (positing that a legal system theoretically could require employers to provide a business justification for *all* types of business practices that create significant bottlenecks). But an exclusionary practice might well be economically inefficient but serve other goals (such as associational freedom) that we might find sufficiently valuable to justify the bottleneck it causes. Professor Fishkin acknowledges that “[l]egitimacy is not simply a matter of economic efficiency,” and he says that “[a] bottleneck is ‘legitimate’ to the extent that it serves goals that we deem to be legitimate.” *Id.* at 162. But it is unclear what other values might, in Professor Fishkin's view, render a bottleneck legitimate or nonarbitrary.

89. *Id.* at 173–74.

90. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–09 (1986) (explaining that the antistatutory approach “seeks to eliminate the power disparities between . . . whites and non-whites”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing that the Equal Protection Clause is concerned with the aggravation of “the subordinate status of blacks as a group”); Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 951 (2001) (highlighting that the antistatutory theory is concerned with “requiring the elimination of society's racism”); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428–33 (1994) (contending that an important equality principle within American constitutional law has been the opposition to the caste system created, in part, by discrimination on the basis of race).

us settle on effective responses.”⁹¹ But “[f]rom the perspective of the anti-bottleneck principle, the validity of antidiscrimination statutes covering race is entirely contingent on the empirical reality that race is a bottleneck in the opportunity structure.”⁹² “[I]n principle,” however, it is possible to have a pervasive bottleneck without any sort of group subordination.⁹³

To illustrate the point, Professor Fishkin gives the example of discrimination based on credit histories:

Suppose that credit histories had never been invented; tomorrow someone invents them; and the next day, employers begin to use them to discriminate in hiring. As soon as enough employers do so that the effect is to create a pervasive bottleneck, this should trigger our concern. From the perspective of opportunity pluralism, the fact that people with bad credit now have trouble proceeding along many paths in the opportunity structure is enough, *by itself*, to justify a remedy such as, perhaps, a statute banning the use of credit checks in hiring. There need not be any history of discrimination, and people with poor credit need not know they have poor credit or think of themselves as part of a group of people with poor credit. Indeed, they need not even know what a credit history is. The severity of the bottleneck is sufficient.⁹⁴

This is surely true in principle. But in practice such pervasive bottlenecks are likely to be difficult to disentangle from the sort of group-based subordination that is the target of the antisubordination theory. For one thing, if credit-history discrimination were sufficiently widely adopted to become a pervasive bottleneck for many individuals—and there is evidence that it is beginning to do so⁹⁵—those individuals would not be in the dark about it for long. As credit histories become more important in limiting access to opportunities, knowledge of that fact will spread, and people will begin to understand whether their credit scores have denied them opportunities. As policy entrepreneurs seek protection against credit-history discrimination, they may well seek to develop a group consciousness among those whose credit histories make them likely to lose opportunities.⁹⁶ By the

91. FISHKIN, *supra* note 13, at 238.

92. *Id.* at 239.

93. *Id.* at 238.

94. *Id.*

95. See, e.g., Editorial, *Credit History Discrimination*, N.Y. TIMES, Apr. 22, 2013, http://www.nytimes.com/2013/04/23/opinion/credit-history-discrimination.html?_r=1&_archived_at=http://perma.cc/A43J-FKEP (“About 60 percent of employers use credit checks to screen applicants, even though research has shown that people with damaged credit are not automatically poor job risks.”).

96. For an historical parallel, consider the way that entrepreneurial disability-rights-movement activists successfully worked throughout the 1970s and 1980s to develop a pan-disability consciousness among individuals with a diverse array of physical and mental conditions who did not, at the beginning, see themselves as being part of a single group of people with disabilities. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1008–12 (2003).

time a practice becomes a pervasive bottleneck, then, those who are disadvantaged by the practice might well think of themselves—and be understood by society—as an identifiable, disadvantaged group. If that is true, the anti-bottleneck principle will essentially represent a generalization of the antisubordination principle. It recognizes that *which* groups are subordinated, and how those groups are identified, might change, but it still targets the harm of group-based subordination.

But the connection between the anti-bottleneck principle and the antisubordination principle is even tighter than that. Members of groups that have historically been subject to widespread discrimination and disadvantage are likely to be overrepresented among the individuals who are harmed by those practices (e.g., credit score discrimination⁹⁷) that create pervasive bottlenecks to opportunity. This is in part because of the compounding nature of subordination. As members of racial groups are, for generations, denied opportunities, the opportunities available to members of those groups will be artificially narrowed in the generations to come, and economic disadvantage will come to track racial disadvantage.⁹⁸ It also may reflect “selective sympathy and indifference.”⁹⁹ Businesses and government agencies are most likely to adopt practices that deny opportunities to large numbers of individuals if those who formulate the practice do not sympathize or empathize with those who are likely to be excluded.¹⁰⁰ Because race is so salient in our society, decision makers (who, statistically speaking, are unlikely to be members of minority groups)¹⁰¹ are less likely to be concerned about practices that exclude racial minorities.¹⁰²

And there may also be an important story of political organizing here. The civil rights label is a powerful one in American law and politics.¹⁰³ In order to mobilize the legal and political system to attack a bottleneck, it may

97. See, e.g., SHAWN FREMSTAD & AMY TRAUB, DEMOS, DISCREDITING AMERICA: THE URGENT NEED TO REFORM THE NATION’S CREDIT REPORTING INDUSTRY 11–12 (2011) (noting significant racial disparities in credit scores).

98. For terrific recent discussions of this process, see generally DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014); Tanehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/>, archived at <http://perma.cc/9H2R-SPSU>.

99. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976).

100. See *supra* note 67.

101. See, e.g., *Minority & Female Representation on Fortune 250 Boards & Executive Teams*, RUSSELL REYNOLDS ASSOCIATES, <http://www.russellreynolds.com/content/diversity-in-leadership>, archived at <http://perma.cc/RF88-S95P> (finding that in June 2013, 84.4% of Fortune 250 board seats were held by white directors).

102. This may not even be a conscious process. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952–53 (2006) (discussing evidence of implicit or unconscious bias); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 956–59 (2008) (elaborating on the significance of the same studies).

103. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2852 (2014).

be necessary as a practical matter to make the case that the bottleneck systematically excludes people along the group lines that are the standard concern of civil rights laws. As Professor Fishkin shows, the campaigns for laws restricting the use of criminal background in hiring have followed precisely this model. To be sure, the laws that have passed in several states do not require the plaintiff to show racial discrimination in order to challenge the use of a criminal background check.¹⁰⁴ But the concern that the use of such background checks has a racially discriminatory impact has been a principal motivator of the efforts to get those laws enacted—and a principal argument that advocates of those laws have used to win over legislators.¹⁰⁵ In practice, the law is likely to implement the anti-bottleneck principle largely in those contexts in which the antisubordination principle would lead to the same result.

Professor Fishkin is at pains to emphasize that an anti-bottleneck principle might provide benefits not just to members of subordinated groups but to anyone who is excluded by the bottleneck the law attacks. He points in particular to disparate impact law and laws regulating the use of criminal histories in hiring—two of his prime examples of anti-bottleneck regimes. “Instead of redistributing opportunities from one group to another,” he says, these regimes “focus[] on ameliorating particular bottlenecks that contribute to large group-based disparities. By helping *everyone* through and around those bottlenecks, these cases and statutes provide a more universal form of relief.”¹⁰⁶ True enough, but this does not distinguish the anti-bottleneck principle from the antisubordination principle. After all, the disparate impact doctrine is often thought of as a paradigmatic application of anti-subordination,¹⁰⁷ and the antisubordination principle would support laws limiting the use of criminal history as well. The antisubordination principle holds that the *normative justification* for civil rights laws is found in the value of protecting and advancing the interests of systematically disadvantaged groups. But that principle in no way requires the *operational structure* of civil rights laws to be framed in group-based terms.¹⁰⁸

104. See FISHKIN, *supra* note 13, at 166–67, 244 (discussing these laws).

105. *Id.* at 244.

106. *Id.* at 249.

107. See, e.g., Areheart, *supra* note 8, at 971 (describing disparate impact as being “intrinsicly about antisubordination”).

108. Indeed, some antisubordinationists would argue that framing laws in group-based terms further entrenches widely held societal views of group-based difference and therefore feeds subordination. Justice Ginsburg’s views on sex discrimination might be an example here. See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1341–42 (2012) (Ginsburg, J., dissenting) (describing opposition of “equal-treatment feminists” to pregnancy-only leave laws). Mary Anne Case, who disclaims antisubordinationism, actually makes an antisubordinationist case for avoiding group-based treatment in the sex context in Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1472–74 (2000).

And experience with disparate impact law throws some empirical cold water on Professor Fishkin's hope that universally framed civil rights protections will provide a "basis for solidarity" across groups "[b]y emphasizing . . . commonality rather than inter-group competition."¹⁰⁹ The disparate impact doctrine remains the most controversial aspect of American antidiscrimination law, and it is constantly under political and judicial threat.¹¹⁰ That is true even though hiring practices that are invalidated because of their disparate impact typically exclude many whites and men as well as minorities and women.¹¹¹ Given the social salience of race and sex, the broader public focuses on the primary intended beneficiaries of disparate impact doctrine and continues to view that doctrine as "really," though perhaps inefficiently, distributing opportunities based on race and sex.¹¹² At some level, they are surely right to do so—at least in the context of employment. Unless the number of jobs available expands, any law regulating hiring criteria operates in a zero-sum game.¹¹³ A policy that requires employers to abandon selection practices that disproportionately harm minorities will—if it's working—have the effect of redistributing (some) jobs from non-minorities to minorities. It's the zero-sum nature of the competition that is the fundamental threat to intergroup solidarity, and an antidiscrimination law—whether informed by the antisubordination

109. FISHKIN, *supra* note 13, at 249.

110. *See* Bagenstos, *supra* note 10, at 835 (describing disparate impact as "the most hotly contested part" of antidiscrimination law).

111. *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 & n.12 (1977); FISHKIN, *supra* note 13, at 247.

112. *See* Bagenstos, *supra* note 103, at 2854–55 (asserting that even broad policies, such as economically based affirmative action and flexible work arrangements, are likely to be viewed as targeting specific groups).

113. Note that other applications of the disparate impact doctrine do not have this zero-sum quality. Take, for example, the fair housing context—a context that has generated a great deal of controversy in recent years. *See* Michael G. Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 158 (2014) (noting that the Supreme Court has granted certiorari to consider whether there is a disparate impact cause of action under the Fair Housing Act and that the Department of Housing and Urban Development recently issued regulations addressing the question). When a mortgage lender is found to have set interest rates according to criteria with an unjustified disparate impact, it can solve the problem without taking loans away from anyone who would otherwise receive them or giving anyone less favorable loan terms than they would otherwise receive. *See id.* at 162–64 (describing allegations and the subsequent settlement in one such case). And when a municipality has adopted zoning rules that disproportionately exclude racial minorities (e.g., limiting multifamily housing), it can solve the problem simply by removing those rules. Although doing so may take away from residents the opportunity to avoid living near apartments—or the opportunity to avoid living in an integrated area—it will not exclude anyone who formerly could live in the community. (And it likely will increase the supply of housing available in the community, thus expanding the pie of housing opportunities.) *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 417–19 (2013) (pointing out that a local government's consideration of its zoning ordinances—with the purpose of making sure racial minorities are not disproportionately excluded—does not harm any group and that courts should therefore not be too quick to find that such a practice violates the Equal Protection Clause).

principle, the anti-bottleneck principle, or something else—cannot solve that problem.

Conclusion

Although I have spent the bulk of this Review explaining why, in my view, the anti-bottleneck theory falls short in explaining and justifying antidiscrimination law, I should emphasize once again that *Bottlenecks* is a truly impressive book. Even the most thoughtful and well-informed readers will come away from this book with a richer understanding of equal opportunity and the normative stakes of important legal and policy issues. The flaws in the book's argument—at least as applied to antidiscrimination law—may simply be flaws inherent in antidiscrimination theory itself. Perhaps there is no theory that can explain or justify everything we want to do with the complex body of regulation that is antidiscrimination law. Maybe the best that antidiscrimination theory can provide is a set of goals or considerations that can help us understand what is normatively at stake in disputes relating to that body of law. On that score, Professor Fishkin has served us extremely well.