ARTICLES

PROTECTED CLASS GATEKEEPING

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Courts routinely begin their analyses of discrimination claims with the question of whether the plaintiff has proven he or she is a "member of the protected class." Although this refrain may sometimes be an empty formality, it has taken on real bite in a significant number of cases. For example, one court dismissed a claim by a man who was harassed with anti-Mexican slurs because he was of African American rather than Mexican ancestry. Other courts have dismissed sex discrimination claims by LGBT plaintiffs on the ground that LGBT status is not a protected class. Yet other courts have dismissed claims by white people alleging they were harmed by white supremacist violence and straight people alleging they were harmed by homophobic harassment. This Article terms this phenomenon "protected class gatekeeping." It argues that protected class gatekeeping is grounded in dubious constructions of antidiscrimination statutes, and that its routine use prevents equality law from achieving its central aim: dismantling sexism, racism, homophobia, religious intolerance, and other such biases. While past scholarship has identified certain forms of protected class gatekeeping, it has not recognized the scope of the problem or addressed the progressive intuitions that underlie it. Critical examination of protected class gatekeeping is of pressing importance as legislatures, courts, and legal scholars debate new statutory language and doctrinal frameworks for discrimination claims.

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INTRODUCTION

Is it race discrimination to reject a job applicant because he has a last name that "sounds" Hispanic, even if that name turns out to be Italian?[1] Is it sex discrimination to deny a promotion to a man, not simply because he is a man, but because he might wish to be in a romantic relationship with another man?[2] Is it race discrimination to require a white employee to endure a workplace pervaded with racially discriminatory animus against African Americans?[3] Is it discrimination based on sexual orientation to harass a straight man with antigay slurs?[4]

These sorts of protected class membership disputes arise frequently in discrimination cases. Under Title VII of the Civil Rights Act of 1964, the most common method of proving a claim is satisfying the *McDonnell Douglas* test.[5] Courts describe the first element of the

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[1] *See* LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 766 (D. Neb. 1999).

[2] *Compare* Igasaki v. Ill. Dep't of Fin. & Prof'l Regulations, No. 15-cv-03693, 2016 WL 232434, at *3 (N.D. Ill. Jan. 20, 2016), *with* Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 16, 2015).

[3] *See* Jackson v. Deen, 959 F. Supp. 2d 1346, 1348 (S.D. Ga. 2013).

[4] *See* Glinski v. RadioShack, No. 03-V-930S, 2006 WL 2827870, at *2–3 (W.D.N.Y. Sept. 29, 2006).

[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See* Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 756 (2006) ("The *McDonnell Douglas* framework is now the most widely used method for establishing circumstantial evidence of discrimination in Title VII cases.").

prima facie case under *McDonnell Douglas* as a showing that the plaintiff "is a member of a protected class."[6] Yet Title VII does not define any protected classes. Rather, the statute prohibits discrimination where "race, color, religion, sex, or national origin was a motivating factor for any employment practice."[7] This distinguishes Title VII from the Age Discrimination in Employment Act (ADEA), which applies only to those over forty,[8] and the Americans with Disabilities Act (ADA), which, as its title implies, protects only Americans with disabilities.[9]

Reading an extra standing requirement into Title VII, some courts have excluded claims by victims of discrimination who fail to "prove" they are members of racial, gender, religious, or other groups.[10] These courts have refused to recognize (1) discrimination against plaintiffs misperceived as members of certain racial or religious groups,[11] such as South Asian individuals harassed because they were mistakenly thought to be Middle Eastern;[12] (2) discrimination against individuals deemed outside the protected class because their identities are multiracial,[13] fluid,[14] or transitional;[15] (3) discrimination against individuals that courts regard as falling into an unprotected "subclass" because their mistreatment was based on stereotypes that

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6 *See, e.g.*, Littlejohn v. City of New York, 795 F.3d 297, 307 (2d Cir. 2015).

7 42 U.S.C. § 2000e-2(m) (2012). Elsewhere, the statute forbids discrimination on the basis of an "individual's race, color, religion, sex, or national origin." § 2000e-2(a)(1). In any event, both forms of discrimination are prohibited. *See infra* notes 80–81 and accompanying text.

8 29 U.S.C. § 631(a) (2012) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

9 42 U.S.C. § 12102(1) (2012) (limiting protection to those with a substantially limiting physical or mental impairment, those with a record of having such an impairment, and those who were regarded as having such an impairment).

10 *See infra* Section I.C. Sometimes courts use standing doctrine to reach this result as well. *See infra* notes 108–14 and accompanying text.

11 *See* Dallan F. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. 87, 111–16; D. Wendy Greene, *Categorically Black, White, or Wrong: "Misconception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 88 (2013); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1288 (2005).

12 *See infra* note 116 (collecting cases).

13 *See, e.g.*, Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 470 (2010).

14 *See, e.g.*, Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 791 (2015); Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 465 (2012).

15 *See, e.g.*, Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & C.R. L. REV. 651, 653–54 (2009) (discussing discrimination against those with transitional identities such as religious converts and transgender people).

do not affect all members of the protected class;[16] (4) discrimination on intersectional bases, for example, biases against women of color that do not affect white women or men of color;[17] (5) discrimination stemming from relationships[18] or solidarity[19] across racial or gender lines; and (6) discrimination that disregards the target's identity, such as when straight workers are harassed with anti-gay slurs.[20] These cases all reflect a particular way of thinking about equality law—as protecting group rights rather than forbidding grounds for discrimination.

This Article terms the refusal by courts to consider discrimination claims by plaintiffs who have not proven membership in a protected class "protected class gatekeeping." It argues that, in addition to being a dubious exercise in statutory construction, protected class gatekeeping is normatively undesirable. The strongest objections to protected class gatekeeping might at first seem based in anti-classification theories, which posit that the goal of equality law is to enforce "blindness" with respect to certain identities, prohibiting institutions from engaging in all forms of group-based classification.[21] On this theory, judicial efforts to sort plaintiffs into protected classes are themselves discriminatory classifications.

Anti-classification theories tend to come from the political right,[22] but concerns about protected class gatekeeping also resonate with anti-essentialist scholarship on the left. Anti-essentialist scholars question the stability of racial, gender, sexual orientation, and other such identities.[23] Anti-essentialists argue that characteristics such as race, sex, and sexual orientation are not fixed attributes of individuals, but rather are made and unmade in the interactions of individuals, groups, society, and the legal system. On this theory, protected class

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16 *See infra* notes 134–53 and accompanying text.

17 *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150.

18 *See, e.g.*, Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 228–32 (2012).

19 *See, e.g.*, Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1499 (2010); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 67 (2002).

20 *See infra* notes 259–66 (collecting cases).

21 *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. Rev. 1470, 1472 (2004).

22 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

23 I use "anti-essentialist" here as an umbrella term for scholarship that is critical of the notion that identity—in terms of race, sex, or sexual orientation—is a fixed and stable essence. *See infra* Section II.B.

gatekeeping is based on false notions of the stability of identity categories that perpetuate damaging stereotypes.

Concerns about defining in-group and out-group members also resonate with centrists who believe discrimination law should aim to avoid balkanizing social divisions.[24] On this anti-balkanization view, legal interventions should be designed to avoid giving the appearance of a zero-sum system of opportunities. Protected class gatekeeping creates the impression that equality law only assists minority groups at the expense of the majority.

The theory that may explain the persistence of protected class gatekeeping is the principle of anti-subordination, a progressive ideal that sees the goal of discrimination law as remedying harms to subordinated groups.[25] On an anti-subordination theory, it may initially appear that there is no basis for members of a dominant group to claim victim status. But this Article's closer examination reveals that such group-based formalism impedes anti-subordination agendas. For example, consider disapproval of former President Barack Obama based on the belief that he is a Muslim, a form of bias that reflects and perpetuates anti-Muslim attitudes as well as racial stereotypes.[26] Or consider how antigay slurs are often used to harass people who identify as straight.[27] The social meaning and effect of antigay slurs is to reinforce the hierarchy of straight over gay, whether the victim was gay or not. These forms of discrimination should concern anti-subordination theorists. From an anti-subordination perspective, the goal of equality law is to level social hierarchies and eradicate patterns of bias

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[24] *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1278 (2011) (discussing a "perspective on equal protection in the opinions of swing Justices who have voted to uphold and to restrict race conscious remedies because of concern about social divisiveness which, they believe, both extreme racial stratification and unconstrained racial remedies can engender").

[25] *See* Siegel, *supra* note 21, at 1472–73 (describing "the antisubordination principle" as "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups").

[26] *See generally* Todd K. Hartmann & Adam J. Newmark, *Motivated Reasoning, Political Sophistication, and Associations Between President Obama and Islam*, 45 POL. SCI. & POL. 449, 449 (2012) (testing various hypotheses to explain why 20 to 25% of poll respondents misidentify President Obama as a Muslim).

[27] This type of harassment may be a barrier to equal opportunity for any victim. *See, e.g.*, Perry Silverschanz et al., *Slurs, Snubs, and Queer Jokes: Incidence and Impact of Heterosexist Harassment in Academia*, 58 SEX ROLES 179, 179–80, 188 (2008) (surveying 3128 university students about "heterosexist harassment" and concluding "one need not have a minority sexual orientation to be targeted with such abuse" or to suffer adverse mental health and academic consequences as a result). On an anti-subordination theory, equality law should prohibit such harassment not just because it is harmful to individuals, but also because it is a practice that reinforces heterosexual supremacy.

that stand in the way of equal opportunity.[28] Public actors (and those private attorneys general deputized by statute)[29] enforce civil rights law to remedy group-based stratification because broad patterns of inequality are corrosive to society, like threats to public health[30] or the environment,[31] not because particular groups deserve protection. From this perspective, it is not what group a person falls into or how the perpetrator regards the victim that matters, but rather, whether the practice contributes to sexist, racist, or otherwise suspect systems of hierarchy.

This Article proposes that the "protected class" prong of the *McDonnell Douglas* test and other modes of protected class gatekeeping in individual disparate treatment cases be eliminated.[32] Supreme Court precedents in areas including harassment, stereotyping, and "reverse" discrimination demonstrate that "protected class" inquiries are not required for disparate treatment law to function. Disparate treatment law is capable of determining when discriminators have acted on forbidden grounds such as race, sex, and religion without requiring plaintiffs to show that they belong to a particular class.

An examination of protected class gatekeeping is vitally important at this moment for a number of reasons. First, demographic shifts and changing understandings of "protected" identities are likely to increase the temptations for judges to sort plaintiffs into protected and unprotected classes.[33] As a result of protected class gatekeeping, potentially meritorious cases may never get to a jury.[34] For example,

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[28] *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 91–92 (2015) (describing structural theories of discrimination).

[29] *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3–18 (2010).

[30] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) (arguing that "racism is both a crime and a disease" and that "the illness of racism infects almost everyone").

[31] *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1420 (2014) (discussing the environmental law analogy).

[32] Title VII recognizes two primary forms of discrimination: disparate treatment, which requires proof of discriminatory motive, and disparate impact, which only requires evidence that an employment practice "fall[s] more harshly on one group than another and cannot be justified by business necessity." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). This Article's argument is directed at individual disparate treatment claims—the most common type of discrimination case. Courts have developed different legal frameworks for disparate impact and other "systemic claims" that rely on group-based statistics. I analyze the implications of my argument for systemic claims in Section III.B.3.

[33] *See, e.g.*, Levit, *supra* note 14, at 464–65 (discussing how demographic trends in the U.S. population have destabilized the protected classes that are at the basis of U.S. discrimination law).

[34] *See infra* Part I.

some courts deny protection against sex discrimination to LGBT plaintiffs by reasoning that Title VII only prohibits discrimination "against women because they are women and against men because they are men."[35] Because these courts conclude LGBT plaintiffs are outside the "protected class," they refuse to consider whether those plaintiffs might have lost job opportunities due to impermissible sex stereotypes or other forms of sex discrimination.[36] Protected class reasoning must be overcome for the view that anti-LGBT discrimination is sex discrimination to gain wide acceptance.

And yet, protected class reasoning is not necessary or inevitable. Indeed, it is against the weight of authority.[37] One reason that critiques of protected class gatekeeping have been blunted may be that, curiously, none have taken on the full array of anti-subordination arguments in favor of the practice. Without a rebuttal of the anti-subordination impulse that undergirds protected class gatekeeping, many courts find good precedents easy to ignore or distinguish. Anti-subordination theorists might offer nuanced critiques of abolishing the protected class.[38] For example, they might be concerned that the rejection of protected class reasoning would eviscerate affirmative action, which requires the identification of protected class members. But the problem with protected class gatekeeping is not that it recognizes social groups and their members; it is that it regards social groups as rights holders. This Article argues that affirmative action does not require a theory of group rights.[39] Rather, affirmative action finds firm ground in theories that seek to remedy harms to individuals and accomplish social change.

Second, courts and scholars are beginning to revisit *McDonnell Douglas*, asking whether there are more elegant and precise proof frameworks for disparate treatment cases.[40] Some have proposed

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[35] *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (refusing to recognize discrimination against a transgender woman as sex discrimination); *see also* Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 700 (7th Cir. 2016) (reaffirming *Ulane*'s reasoning in a case involving sexual orientation), *reh'g en banc granted, opinion vacated*, No. 15-1720 (7th Cir. Oct. 11, 2016).

[36] *But see, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a transgender plaintiff "established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes").

[37] For every discouraging line of cases cited in this Article, readers will find a "but see" citation pointing to more encouraging precedents.

[38] *See infra* Section III.B.

[39] *See infra* Section III.B.3.

[40] *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) ("Perhaps *McDonnell Douglas* was necessary nearly 40 years ago . . . . By now, however, . . . the various tests that we insist lawyers use have lost their utility."); Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) (criticizing the prima facie case required by *McDonnell Douglas* as a "largely unnecessary sideshow" that has

alternative doctrines that invite further protected class gatekeeping.[41] It is vital that these discussions consider the drawbacks of such approaches and alternatives.

And third, this Article has important implications for debates over how to draft statutes and rules to expressly forbid discrimination on new grounds. Many states have been enacting statutes to prohibit discrimination based on "actual or perceived" sexual orientation.[42] This language draws inspiration from the ADA, which defines the protected class to include those who are "regarded as" disabled.[43] But statutes that specify forbidden grounds rather than protected classes should already prohibit "regarded as" forms of discrimination. This Article's examination of ADA case law illuminates how adding "regarded as" provisions will only invite new forms of protected class gatekeeping. For example, in one ADA case, a court held that an employer did not "regard" a fast food restaurant worker with strabismus—a condition that causes a person's eyes to appear crossed—as having a disability.[44] The reason: The employer's cruelty stemmed from her ignorance of strabismus and her belief that the plaintiff was just "lazy-eyed."[45] "Regarded as" inquiries cause courts to expend effort attempting to divine whether employers truly believed that employees were members of protected classes. One court interpreting a "regarded as" provision in New York's law forbidding discrimination on the basis of sexual orientation dismissed a case because harassers had reason to think the target of their anti-gay slurs was straight.[46] By drafting statutes broadly to prohibit discrimination based on grounds such as sex, sexual orientation, and gender identity, the LGBT rights movement has an opportunity to avoid limitations encountered by past civil rights struggles.

"spawn[ed] enormous confusion and wast[ed] litigant and judicial resources"); Sandra F. Sperino, *Beyond* McDonnell Douglas, 34 BERKELEY J. EMP. & LAB. L. 257, 257 (2013) ("Little by little, courts are gradually eroding the *McDonnell Douglas* test's power through both procedural and substantive means.").

41 *See, e.g.*, *Coleman*, 667 F.3d at 863 (Wood, J., concurring) (proposing a test by which, "[i]n order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason").

42 *See infra* note 207.

43 42 U.S.C. § 12102(1)(C) (2012).

44 Cooper v. CLP Corp., No. 2:13-CV-02152-JEO, 2015 WL 9311964, at *6 (N.D. Ala. Dec. 23, 2015).

45 *Id.* at *5.

46 *See* Glinski v. RadioShack, No. 03-CV-930S, 2006 WL 2827870, at *2–3 (W.D.N.Y. Sept. 29, 2006) (examining evidence regarding harassers' beliefs about a plaintiff's sexual orientation).

This Article proceeds in three parts. Part I describes how courts dismiss discrimination claims due to a plaintiff's failure to demonstrate her membership in a protected class. Using the ADA as a case study, it also demonstrates that the main doctrinal fix advocated by scholars—to add protection for those "regarded as" belonging to protected groups[47]—will lead courts further astray. Part II argues that protected class gatekeeping offends all prevailing normative theories of the means and ends of antidiscrimination law, most obviously the anti-classification, anti-essentialism, and anti-balkanization theories. It then turns to the challenge posed by anti-subordination theories, and argues that an anti-subordination impulse may explain some protected class gatekeeping, but that this impulse runs contrary to the best versions of the theory. Part III proposes that the concept of the "protected class" be abolished for purposes of disparate treatment law in favor of a focus on whether discrimination was based on a forbidden ground. It discusses the doctrinal support for this proposal, and articulates and responds to potential objections. It concludes with a discussion of how disparate treatment law might work without protected class gatekeeping.

I
MISGUIDED PROTECTED CLASS INQUIRIES

This Part begins by describing how courts have interpreted antidiscrimination statutes and doctrine to require that plaintiffs demonstrate they belong to a particular protected class. It then offers a typology of cases in which courts have dismissed claims because plaintiffs were unable to prove membership in the protected class. These courts make two analytical moves: First, they construe statutes to cover only certain "protected classes" such as men, women, African Americans, or white people, and second, they ask whether the plaintiff fell within the right protected class. Behind these moves is a misunderstanding of discrimination law as protecting group rights rather than remedying harm to individuals and transforming institutional patterns.

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47 *See* Onwuachi-Willig & Barnes, *supra* note 11, at 1289; Craig Robert Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 827 (2009); *but see* Flake, *supra* note 11, at 130 (endorsing court interpretations of Title VII that hold that an employer's misperceptions of a plaintiff's self-ascribed identity are simply irrelevant where that employer acted on impermissible motives); Greene, *supra* note 11, at 153 (same).

A. *Symmetry: Groups and Grounds*

Before proceeding further, a few clarifications related to the scope of my argument are in order. First, this Article's argument is limited to those antidiscrimination statutes that, like Title VII[48] and Section 1981,[49] do not contain any provision defining a protected class.[50] Although courts and commentators often speak of antidiscrimination laws in terms of protecting minorities, those laws, for the most part, do not refer to minority groups. Discrimination statutes that define protected classes are the exception rather than the rule.[51] Most antidiscrimination laws are symmetrical with respect to the protected groups, meaning they protect "all people along a certain axis of identity," as opposed to asymmetrical, meaning "protect[ing] only one class of people."[52] Title VII, which applies to employment, and Section 1981, which applies to contracting, forbid race discrimination against racial majority as well as minority group members.[53] Title VII also prohibits sex discrimination against men as well as women.[54] It defines religion broadly to include "all aspects of religious observance

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[48] *See* 42 U.S.C. § 2000e-2(m) (2012) (forbidding discrimination where a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice"); *id.* § 2000e-2(a)(1) (forbidding discrimination against an individual "because of such individual's race, color, religion, sex, or national origin"). This Article's argument also applies to similarly worded state and local employment discrimination rules.

[49] Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (2012). In *McDonald v. Santa Fe Trail Transportation Co.* the Supreme Court rejected a "mechanical reading of the phrase 'as is enjoyed by white citizens'" to exclude claims by white citizens. 427 U.S. 273, 286 (1976) (quoting Section 1981). Instead, the Court held that this phrase is "simply . . . emphasizing 'the racial character of the rights being protected'" and that "the statute explicitly applies to '*all* persons.'" *Id.*

[50] There are also arguments against protected class gatekeeping under other discrimination statutes, such as the Fair Housing Act and Title IX. *See* Fair Housing Act § 804(f), 42 U.S.C. § 3604(b) (2012) (barring discrimination in housing "because of race, color, religion, sex, familial status, or national origin"); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012) (forbidding discrimination in education "on the basis of sex"). This Article does not develop those arguments because I have found few cases in which courts engage in protected class gatekeeping under those statutes. *But see* Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (concluding, based on Title VII cases, that Title IX does not protect transgender individuals).

[51] *See supra* notes 8–9 and accompanying text (discussing the ADA and ADEA).

[52] Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 464–65 (2006).

[53] *McDonald*, 427 U.S. at 296 (holding that Title VII and Section 1981 are symmetrical in their prohibitions on race discrimination).

[54] *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women." (alteration in original) (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983))).

and practice, as well as belief,"[55] including "antipathy to religion."[56] Its prohibition on national origin discrimination has been construed to include discrimination against Americans.[57] This Article's argument does not apply to statutes such as the ADA or ADEA, which, by their terms, define the protected class and therefore require protected class gatekeeping.[58]

Second, this Article does not argue in favor of "reverse" discrimination suits challenging affirmative action or diversity plans. In addition to their symmetry with respect to groups, most antidiscrimination statutes are also symmetrical along a second dimension, with respect to the grounds for discrimination that they forbid.[59] Thus, they apply to direct as well as reverse discrimination, prohibiting biases both for and against certain traits.[60] To illustrate the distinction, consider the ADEA, which is asymmetrical on both dimensions: (1) the statute defines the protected class as people over the age of 40,[61] and (2) it has been interpreted to bar only those biases that favor the younger, not those that favor the older.[62] Or consider the Pregnancy Discrimination Act (PDA), which provides that Title VII's prohibition on discrimination "because of sex" includes discrimination because of pregnancy.[63] The Supreme Court has held that men may sue under this provision if their employers' benefits plans do not cover their spouses' pregnancies.[64] However, in light of the PDA's legislative history, the Court has concluded that the law prohibits only discrimina-

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55 42 U.S.C. § 2000e(j) (2012).

56 Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003).

57 *See, e.g.*, Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 733 (5th Cir. 1986) ("[D]iscrimination based only on one's country of birth, 'whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII.'" (quoting Thomas v. Rhoner-Gehrig & Co., 582 F. Supp. 669, 675 (1984))).

58 *See supra* notes 8–9.

59 *See* Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. (forthcoming 2017) (manuscript at 7–8) (distinguishing between symmetry with respect to classes and symmetry with respect to types of bias).

60 *Id.* Statutes and case law may recognize exceptions to this rule, such as preferences under a valid affirmative action plan. I use "direct" and "reverse" here only in the interests of simplicity, not to suggest that discrimination is always binary and oppositional.

61 29 U.S.C. § 631(a) (2012).

62 Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (holding that the ADEA is "manifestly intended to protect the older from arbitrary favor for the younger" and "does not mean to stop an employer from favoring an older employee over a younger one").

63 42 U.S.C. § 2000e(k) (2012).

64 Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684–85 (1983) (holding it is discrimination for an employer to refuse to cover male employees' spouses' pregnancies while it covers pregnancy for female employees). This case could be explained as simple sex discrimination rather than pregnancy discrimination. The point of this example is just to demonstrate that, conceptually, there are two types of symmetry.

tion against pregnancy, not in favor of it.[65] This Article opposes gatekeeping with respect to who may sue; it does not advocate symmetry with respect to the grounds for discrimination that ought to be forbidden.[66] The question of how the law should define forbidden grounds such as race discrimination is normatively fraught; my argument here is only that the inquiry is not about group rights.[67] This does not foreclose affirmative action. In the United States, affirmative action and diversity programs are justified on bases other than group rights.[68]

And third, this Article's recommendations extend only to individual disparate treatment theories.[69] Because disparate impact law[70] and accommodations[71] are understood as requiring changes to neutral workplace rules and practices, there may be unique arguments related to costs, efficiency, practicality, and political expediency that support limiting their mandates to members of protected groups.[72] While arguments for universalizing the protected class with respect to these other doctrines might be worth making, those arguments are beyond the scope of this Article.

B. Statutes and Doctrine

Courts misconstrue Title VII's statutory language, the Supreme Court's *McDonnell Douglas* opinion, and standing doctrine to require protected class gatekeeping.

Title VII and similar statutes require that plaintiffs alleging disparate treatment prove that the discrimination was based on a forbidden ground such as race, color, religion, sex, or national origin. Some courts have read these statutes to include the additional requirement that a plaintiff prove she is a member of the protected class. Prior to

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65 Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285–86 (1987) (interpreting the PDA to prohibit only "discrimination *against* pregnancy" and not "preferential treatment of pregnancy" relative to other medical conditions).

66 For an argument in favor of both types of symmetry, see Schoenbaum, *supra* note 59. For an argument against, see Lawrence Blum, *Moral Asymmetry: A Problem for the Protected Categories Approach*, 16 LEWIS & CLARK L. REV. 647 (2012).

67 The question of how the law should define forbidden grounds will depend on one's normative theory of discrimination. *See infra* Part II.

68 *See infra* Part III.B.3.

69 The implications of this Article's doctrinal and theoretical arguments for systemic disparate treatment and disparate impact are explored *infra* Part III.B.3.

70 *See supra* note 32 (defining a disparate impact claim).

71 Title VII requires accommodation of religious practices and, to some extent, pregnancy. 42 U.S.C. §§ 2000e(j)–(k) (2012).

72 *Cf.* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 644 (2001) (discussing the "old and expansive debate spanning several decades" about the "relationship between antidiscrimination and accommodation").

1991, disparate treatment claims under Title VII were based only in Section 703(a), providing that it was unlawful for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin . . . .[73]

A few district courts understand the italicized language to support the argument that discrimination must be based on an individual's *own* protected characteristic, and thus, a plaintiff must show she is a member of the protected class.[74]

Assuming this interpretation is correct, it does not support protected class gatekeeping, because discrimination against those not falling into particular protected classes is generally inextricable from those plaintiffs' own racial, sexual, or other protected identities.[75] For example, discrimination based on a mistake as to a plaintiff's identity is generally triggered by some protected trait of the plaintiff, such as skin color, or stereotypes about that trait.[76] Discrimination against a white employee for expressing solidarity with Black coworkers is likely based on racial stereotypes about the appropriate bounds of group interaction for members of the white employee's group.[77] Antigay harassment of straight employees is likely based on views about how heterosexual people should act.[78]

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[73] 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added). While Section 703 uses the term "such individual's" at various points, it omits that term at others. *Id.* § 2000e(k)(1) (defining discrimination "'because of sex' or 'on the basis of sex'" and clarifying that those terms include "pregnancy, childbirth, or related medical conditions"); *id.* § 2000e-2(h) (clarifying that seniority, merit, and piecework systems are unlawful if "the result of an intention to discriminate because of race, color, religion, sex or national origin"); *id.* (clarifying that employment tests are unlawful if "intended or used to discriminate because of race, color, religion, sex or national origin"); *id.* § 2000e-2(l) (providing that it is illegal to "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin").

[74] *See, e.g.*, Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755, 2012 WL 1068794, at *4–5 (N.D. Ohio Mar. 29, 2012) (relying on this language to grant summary judgment for the defendant where the plaintiff identified as Black but was harassed with insults implying he was Mexican).

[75] *See* Zatz, *supra* note 19, at 67 ("[C]ourts have failed to conceptualize how men's gender and whites' race could be implicated in interactions with members of other groups.").

[76] For example, in *Burrage*, the Black plaintiff was likely the target of anti-Mexican insults on account of his own race and skin color, and he alleged as much. 2012 WL 1068794, at *4.

[77] *See* Zatz, *supra* note 19, at 109.

[78] *Cf.* C.J. PASCOE, DUDE, YOU'RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL 157 (2007) (discussing how teenage boys reaffirm their masculinity and heterosexuality by using humor to "transform[ ] . . . one another into fags").

Moreover, the argument that Title VII is limited to discrimination based on the plaintiff's own group membership overlooks another provision of the statute.[79] In 1991, Title VII was amended to add Section 703(m), which provides an alternative way for a plaintiff to show discriminatory causation, by "demonstrat[ing] that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice."[80] This motivating factor provision, Section 703(m), includes no limitations based on an individual's own identity.[81] It was enacted to address, among other types of discrimination, cases involving stereotypes.[82] Stereotypes are not just negative views about a group (i.e., refusing to hire a woman on the belief that all women are poor leaders); they may also enforce particular expectations for the individuals assigned to those groups (i.e., refusing to hire a woman because she is not sufficiently feminine).[83] Accordingly,

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[79] In advancing arguments based on statutory text, I do not mean to imply that textualism is the best theory of statutory interpretation. My own view is that statutory interpretation is a dynamic endeavor. *See generally* Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1207 (2011) ("Dynamic statutory interpretation theory suggests that when interpreting ambiguous statutes in unforeseen contexts, the Court should look to evolving, present-day public values derived from the Constitution, statutes, and the common law."); *id.* at 1207 n.14 (collecting citations to works developing dynamic theories of statutory interpretation). Part II of this Article argues that public values counsel against protected class gatekeeping.

[80] Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(m)) (emphasis added). To avoid damages, a defendant may prove, as an affirmative defense, that it would have taken the same action even absent the impermissible discrimination. 42 U.S.C. § 2000e-5(g). In such a case, however, the plaintiff is still entitled to certain forms of declaratory and injunctive relief, as well as attorney's fees and costs. *Id.*

[81] To be sure, the Supreme Court has stated that Section 703(m) is not "itself a substantive bar on discrimination" but rather is a "rule that establishes the causation standard for proving a violation defined elsewhere in Title VII." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2530 (2013). But the Court made this statement to refute the argument that Section 703(m) independently gives rise to retaliation claims even though the statute has a separate provision, Section 704, which covers retaliation. *Id. Nassar* does not suggest that Section 703(m) is limited by the "such individual's" language from Section 703(a). The "such individual's" language is part of Section 703(a)'s causation standard. 42 U.S.C. § 2000e-2(a)(1) (forbidding discrimination against an individual "because of such individual's race, color, religion, sex, or national origin"). Section 703(m) provides an alternative causation standard in stating that a plaintiff may prove discrimination if she "demonstrates race, color, religion, sex, or national origin was a motivating factor." *Id.* § 2000e-2(m). Congress could have included the phrase "such individual's" in Section 703(m), but it did not.

[82] The "motivating factor" framework established by the Civil Rights Act of 1991 is a variation on the framework proposed by Justice Brennan in a case on sex stereotypes. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989) (plurality opinion).

[83] *See infra* notes 393–405 and accompanying text (discussing sex stereotyping jurisprudence).

Supreme Court cases have not given force to the "such individual's" language.[84]

Other courts engaged in protected class gatekeeping reason that Title VII requires a showing of protected class membership because it does not include language extending the protected class to those who are "regarded as" members of particular groups. According to this theory, since Congress included such language in the ADA, its omission in Title VII must be meaningful.[85] But this argument overlooks a key textual difference between the two statutes, namely that the ADA, unlike Title VII, is an asymmetrical statute that defines the protected class of persons with disabilities.[86] Because it defines the protected class as only people with certain mental and physical impairments, the ADA must include a "regarded as" provision if it is to cover plaintiffs who are treated as having such impairments, even if they do not actually have them. While the ADA speaks of "Americans with Disabilities," Title VII does not speak of African Americans, people of color, women, Muslims, or other such classes. As Congress recognized when it enacted the ADA, statutes that do not define any protected classes have no need for "regarded as" provisions.[87] They prohibit grounds for discrimination—such as racial animosity, sex stereotypes, or religious favoritism—regardless of whether the victim falls into some particular group.[88]

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[84] *See infra* notes 406–412 (discussing *Ricci v. DeStefano*, 557 U.S. 557, 574–80 (2009), a case in which white and *Hispanic* firefighters who passed a promotional exam sued to challenge the city's decision to throw out that exam after statistical analysis revealed the exam had a disparate impact on Black and *Hispanic* firefighters); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (paraphrasing Section 703(a) with ellipses in place of the words "such individual's" to hold that "Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women").

[85] *See, e.g.*, Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) ("Title VII protects those persons that belong to a protected class . . . . Congress has shown, through . . . the Americans with Disabilities Act, that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.").

[86] *See supra* note 9 and accompanying text.

[87] *See* Flake, *supra* note 11, at 102 (discussing a Senate committee report stating that the ADA's "regarded as" language "clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority" (quoting 73 S. REP. No. 93-1297, at 17–18 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6373, 6389–90)). Title VI, like Title VII, does not include a "regarded as" provision. 42 U.S.C. § 2000d (2012).

[88] *See, e.g.*, Flake, *supra* note 11, at 100–01 (finding no support for protected class gatekeeping in Title VII's legislative history and arguing that if anything, the congressional record suggests an effort to eradicate forms of bias "*based on* any five of the forbidden criteria: race, color, religion, sex, and national origin" (emphasis added) (quoting 110 CONG. REC. 7213 (1964))).

Courts engaged in protected class gatekeeping rarely cite the statute. More often, protected class gatekeeping emerges from misinterpretation of the Supreme Court's opinion in *McDonnell Douglas Corp. v. Green*.[89] In *McDonnell Douglas*, the Supreme Court confronted the question of how a plaintiff might prove that discrimination was because of race in the absence of direct evidence of discriminatory intent (such as an admission that the employer acted on racist motives).[90] It held that a plaintiff could establish a "prima facie case" by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[91]

At that point, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[92] In the final stage of the analysis, the plaintiff has the burden to demonstrate that the employer's proffered reason is merely a pretext for prohibited discrimination.[93] If a plaintiff demonstrates a prima facie case and has evidence that the employer's justification is not worthy of credence, it is generally inappropriate for a court to take the issue away from the jury.[94] The ultimate question—whether the plaintiff has proven her adverse treatment was caused by discrimination—is one of fact.[95]

In *McDonnell Douglas*, the Court did not purport to establish a mechanical formula for processing every discrimination claim.[96] Indeed, the specific requirements of the prima facie case were tailored to the circumstances of plaintiff Percy Green's case, in which a quali-

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[89] 411 U.S. 792 (1973).

[90] *Id.* at 801–02.

[91] *Id.* at 802.

[92] *Id.*

[93] *Id.* at 805.

[94] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148–49 (2000).

[95] It may be reversible error to instruct a jury on the various steps of *McDonnell Douglas*. *See, e.g.*, Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 118 (2d Cir. 2000) ("The jury . . . does not need to be lectured on the concepts that guide a judge in determining whether a case should go to the jury. . . . [W]hen the district court included these concepts as part of its jury charge by using the *McDonnell Douglas* framework, it created a distinct risk of confusing the jury.").

[96] U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

fied African American was not hired for a position, and the position remained open. Although the Court stated that the first prong of Green's prima facie case was a showing "that he belongs to a racial minority," the Court explicitly stated it did not intend for this showing to be required in every case.[97] Elsewhere in the opinion, the Court made clear that in Title VII, Congress proscribed "[d]iscriminatory preference for any group, minority or majority."[98] The Court explained: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[99] Nonetheless, the standard paraphrase of the first element of the *McDonnell Douglas* prima facie case is that a plaintiff must show "she was a member of a protected class."[100]

Some courts regard the protected class requirement as merely nominal, with the substance of the inquiry having to do with whether sufficient circumstantial evidence exists to suggest discriminatory intent.[101] But others have elevated the prima facie case to a set of formal elements plaintiffs must demonstrate in all instances if their claims are to proceed.[102] Some go so far as to describe protected class membership as an element a plaintiff must *plead*, elevating legal technicalities over social realities to the point of absurdity.[103] For example, one plaintiff, with the Arabic surname "Yousif," alleged his supervisor called him an "Iranian terrorist" and a "Middle Eastern hitman" and told him his "relatives were getting in trouble" during media reports

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97 *McDonnell Douglas*, 411 U.S. at 802 n.13.

98 *Id.* at 800 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

99 *Id.* at 801 (quoting *Griggs*, 401 U.S. at 431).

100 A search of federal circuit and district court opinions in the Westlaw database for the terms "McDonnell Douglas v. Green" and "member of a protected class" yields over 10,000 results as of the date of this publication.

101 *See, e.g.*, Metoyer v. Kansas, 874 F. Supp. 1198, 1203 (D. Kan. 1995) (holding that "the 'membership' requirement of the prima facie case must not be taken too literally" since "Title VII must not be used to promote further racial and ethnic categorization" (quoting Gilbert v. Babbitt, No. Civ. A. 92-1124(NHJ), 1993 WL 468465, at *4 (D.D.C. Oct. 29, 1993))).

102 *See, e.g.*, Lautermilch v. Findlay City Sch., 314 F.3d 271, 275 (6th Cir. 2002) (describing the prima facie case as a set of requisite "elements"); Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *8 (N.D. Ohio Nov. 19, 2012) ("The plaintiff clearly did not meet the prima facie burden under Title VII as he failed to show he was a member of a protected class.").

103 Such formalism is not required by the rules of pleading, which ask whether a claim is plausible, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), not whether a plaintiff has alleged a prima facie case under *McDonnell Douglas*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement.").

about Middle Eastern people.[104] The court dismissed the claim, faulting Yousif for failing to "state in his complaint or the EEOC charge" that he was perceived to be a member of a protected group based on race, color, national origin, or religion.[105]

This strict interpretation of the protected class requirement has drifted to other types of claims as well. Although the Supreme Court has never used anything like the *McDonnell Douglas* test to analyze claims of harassment,[106] some courts have held that "[t]his same 'protected class' limitation also applies to Title VII claims brought under theories of a hostile work environment."[107]

Alternatively, some courts ground protected class gatekeeping in standing doctrine.[108] However, in a 2011 case, *Thompson v. North American Stainless Steel*, the Supreme Court construed standing to bring a Title VII claim broadly, as the statute allows suit by any "person aggrieved," not just a "person claiming to have been discriminated against."[109] In dicta, the Court noted that this provision would not extend to a hypothetical shareholder who sued the "company for firing a valuable employee for racially discriminatory reasons" after the valuable employee's departure led to a decrease in the price of that shareholder's stock.[110] But the reason the hypothetical share-

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104 Yousif v. Landers McClarty Olathe KS, LLC, No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013). *See also* Nieves v. Metro. Dade Cty., 598 F. Supp. 955, 962 (S.D. Fla. 1984) (expressing doubt about whether an employer in Dade County, Florida, knew a man with the Spanish surname "Nieves" was "Hispanic").

105 *Yousif*, 2013 WL 5819703, at *3. *See also* U.S. *ex rel.* Feaster v. Dopps Chiropractic Clinic, LLC, No. 13-1453-EFM-KGG, 2015 WL 6801829, at *6 (D. Kan. Nov. 5, 2015) (dismissing a complaint partly because the plaintiff "does not allege that he belongs to any protected class").

106 Rather, the Supreme Court asks whether the harassment was because of sex or another prohibited ground for discrimination. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–81 (1998).

107 Harder v. New York, 117 F. Supp. 3d 157, 165 (N.D.N.Y. 2015). *See also* Dabney v. Christmas Tree Shops, 958 F. Supp. 2d 439, 457 (S.D.N.Y. 2013) ("In order to make out a prima facie case for hostile work environment, a plaintiff must show that she is a member of a protected class.").

108 *See, e.g.*, Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180 (7th Cir. 1998) (dismissing a claim by a white woman that she suffered emotional harm as a result of rampant racial prejudice in her workplace against African Americans on the ground that, "[a]lthough mental distress may satisfy the actual-injury requirement of Article III, many prudential doctrines limit recovery to the persons whose injuries a statute is designed to avert").

109 *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177 (2011) (upholding the standing of an employee who brought a Title VII action alleging that he was terminated in retaliation for his fiancée's filing of a sex discrimination charge against the couple's mutual employer).

110 *Id.* at 177. In addition to Article III standing, "which consists of injury in fact caused by the defendant and remediable by the court," *id.* at 175–76, *Thompson* asks whether the plaintiff "falls within the zone of interests sought to be protected by the statutory provision

holder would lack standing is not related to his or her race. It is on account of the remoteness of the shareholder's injury under proximate-cause principles.[111] *Thompson* approved of the result in a 1972 Fair Housing Act case that had held that a white resident of an apartment complex had standing to sue the complex's owner for racial discrimination against prospective nonwhite tenants.[112] The injury to the white tenants was not derivative of anyone else's; the white tenants themselves were denied "important benefits from interracial associations."[113] And their injury was not a remote consequence of racial discrimination; racial segregation "affect[ed] 'the very quality of their daily lives.'"[114]

C. Types of Protected Class Gatekeeping

Legal scholarship has focused on a species of protected class gatekeeping that might fall under the heading of "misperception" cases, in which the discriminator mistakenly thought the plaintiff was a member of a protected class.[115] Reasoning that the ADA's text forbids discrimination against those "regarded as" members of protected groups, but other statutes do not, many courts have failed to recognize misperception claims, especially when a plaintiff alleges that he was misperceived as Arab, Muslim, or Middle Eastern.[116] Protected class gatekeeping, however, is not limited to misperception cases.

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whose violation forms the legal basis for his complaint," *id.* at 177–78 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)). *Thompson* rejected the argument that Article III standing and the Title VII "zone of interests" inquiry were co-extensive. *Id.* at 176.

111 The Court has granted certiorari in a pair of Fair Housing Act cases that raise the question of whether, under proximate-cause principles, a city has standing to sue a bank for racially discriminatory mortgage lending that resulted in, among other things, a reduction in the city's tax revenues. City of Miami v. Bank of Am. Corp., 800 F.3d 1262 (11th Cir. 2015), *cert. granted*, 136 S. Ct. 2544 (2016); City of Miami v. Wells Fargo & Co., 801 F.3d 1258 (11th Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

112 *Thompson*, 562 U.S. at 177 (discussing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 206–12 (1972)). *Thompson* does not clarify the outer bounds of standing to sue for discrimination, although, in applying its holding it suggests that factors include whether the plaintiff is part of the same institutional unit charged with discrimination, like the white tenants in *Trafficante* and the betrothed employee in *Thompson*, and whether the harm to the plaintiff was "intended," as in *Thompson*, or just "collateral damage." *Id.* at 178. In any event, by reaffirming *Trafficante*'s result, the Court has made clear the inquiry does not turn on the plaintiff's group membership. *Id.*

113 *Trafficante*, 409 U.S. at 210.

114 *Id.* at 211 (quoting Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 818 (3d Cir. 1970)).

115 *See* Onwuachi-Willig & Barnes, *supra* note 11; Flake, *supra* note 11; Greene, *supra* note 11; Senn, *supra* note 47.

116 *See, e.g.*, Yousif v. Landers McClarty Olathe KS, LLC, No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013) (dismissing case where plaintiff was called an

The following discussion is an effort to catalogue various other types of protected class gatekeeping. It offers a typology to allow those devising new statutory language and proof frameworks to better predict how courts will apply their terms with respect to the protected class. It departs from other treatments of this subject by offering a thorough description of the phenomenon; it analyzes not just those cases in which plaintiffs lost because they could not prove that they *actually* belonged to the right protected group, but also those cases in which plaintiffs lost because they could not prove that their employer *perceived* them as belonging to the right protected group.

The purpose of this discussion is to describe a problematic form of gatekeeping and to demonstrate how it arises from a view that Title VII protects group rights. It is not to suggest that these cases ought to have reached different results. Indeed, many of these cases may have been rightfully dismissed, for reasons including the plaintiff's failure to show that forbidden motives played a causal role in her mistreatment, that her harassment was sufficiently severe or pervasive, or that the defendant was responsible. This Section illustrates how protected class gatekeeping allows courts to skirt these important inquiries.

1. Actual Class Membership

In many cases, courts have dismissed claims because plaintiffs did not actually belong to the protected class, as determined by some purportedly objective standard. These include not only the misperception

"Iranian terrorist" and a "Middle Eastern hitman" but did not allege "that he is Middle-Eastern"); Guthrey v. Cal. Dep't of Corr. & Rehab., No. 1:10-cv-02177-AWI-BAM, 2012 WL 2499938, at *1, *6 n.2 (E.D. Cal. June 27, 2012) (finding no Title VII cause of action where a "Caucasian male who subscribes to the Ananda Marga faith, which is based on the Hindu religion" alleged he was misperceived as Middle Eastern); El v. Max Daetwyler Corp., No. 3:09cv415, 2011 WL 1769805, at *1 (W.D.N.C. May 9, 2011), *aff'd*, 451 F. App'x 257 (4th Cir. 2011) (dismissing Title VII claim where a plaintiff who stated he was a Universalist at one time, and had no religion at another, alleged he was mistaken for a Muslim); Lewis v. N. Gen. Hosp., 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (dismissing claim where a plaintiff alleged he was misperceived as Muslim); Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *1 (N.D. Ga. June 30, 2006) (rejecting perceived-race argument where a plaintiff born in India was harassed with comments suggesting he might be Afghan or Middle Eastern); Butler v. Potter, 345 F. Supp. 2d 844, 846 (E.D. Tenn. 2004) (rejecting perceived-national-origin argument where a plaintiff's supervisor "periodically screamed obscenities at him and accused him of being Indian or Middle Eastern" although he was a "white Caucasian"); *but see* EEOC v. WC&M Enter. Inc., 496 F.3d 393, 398–99 (5th Cir. 2007) (reversing, without explanation, a district court's conclusion that an Indian plaintiff whose coworkers accused him of being a "Muslim extremist" did not show he belonged to a protected group); Arsham v. Mayor of Balt., 85 F. Supp. 3d 841, 845 (D. Md. 2015) (holding that the cases refusing to acknowledge misperception discrimination rest on the "superficially logical, but fundamentally abhorrent argument" that "[a] wrong guess" about a plaintiff's identity shields an employer from liability and collecting contrary precedents).

cases, but also cases of discrimination against plaintiffs whose claims to protected identity status courts reject as inauthentic, discrimination against members of so-called unprotected classes, discrimination on more than one forbidden ground, and discrimination based on affiliations or solidarity with members of classes other than one's own.

a. Inauthentic Class Identities

Some courts engage in protected class gatekeeping to preclude claims by plaintiffs who are not considered authentic members of protected groups. For example, *Leonard v. Katsinas* involved "Chief Illiniwek," the former mascot of the University of Illinois, who was "portrayed by a barefoot student who dances during halftime of various University sporting events in a buckskin costume and feather head dress."[117] The five plaintiffs in *Leonard* considered Chief Illiniwek to be demeaning to Native Americans.[118] They brought a claim under Section 1981[119] alleging race discrimination after they were barred from entering a restaurant where the "Honor the Chief Society," a group dedicated to supporting the Chief, was holding a banquet.[120] Rather than focusing on whether the restaurant's reason was race discrimination or related to some other motive, such as ensuring safety, the court agreed with the defendants' argument that the claim would fail for those plaintiffs who were not members of the "protected class" of Native Americans.[121] It noted only one of the five was a "'card-carrying' Native American, so to speak" with a tribal enrollment card, while the others had only claims of various degrees of Native American heritage and affiliation.[122] With respect to one plaintiff, the court skeptically observed that he "insists that he is at least 1/32 Cherokee Indian," but did not meet the standard of "1/8th Indian blood."[123] The court did not reflect on why any particular "blood quantum" or identity documentation might be prerequisites to discrimination.[124] The court's unstated premise is that only authentic group members are truly harmed by discrimination.

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117 No. 05-1069, 2007 WL 1106136, at *1 (C.D. Ill. Apr. 11, 2007).

118 *Id.*

119 Section 1981 does not define a protected class. *See supra* note 49.

120 *Leonard*, 2007 WL 1106136, at *1.

121 *Id.* at *13.

122 *Id.* at *2.

123 *Id.* The authority for the court's purported Bureau of Indian Affairs 1/8th-blood-quantum rule is uncertain, as rules for eligibility for federal programs for Native Americans are variable and "murky." Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 252–53 (2008).

124 In an inquiry that was more relevant to the question of whether the plaintiffs experienced discrimination, the court analyzed which plaintiffs did and did not "look[ ]

Another example is *Chaib v. GEO Group, Inc.*, in which plaintiff Nora Chaib, a woman born in France and of Algerian ancestry, alleged she was terminated from her job as a correctional officer based on her race, after coworkers harassed her and posted a document containing the n-word on her computer.[125] Chaib argued that she "'self-identifies' as African American based upon her Algerian ancestry," but her employer contended that she "appears to be Caucasian."[126] The court held that Chaib could not demonstrate she was a member of the protected class of African Americans, because "a person's national origin has nothing to do with race."[127] It pointed to EEOC guidelines, issued for the purpose of racial data collection, that defined "[w]hite" as "[a] person having origins in any of the original peoples of *Europe*, the Middle East, or *North Africa*."[128] Although it acknowledged that racial categories are "social-political constructs," the court did not reflect on whether different definitions of racial discrimination might be appropriate for individual cases as opposed to data collection practices.[129] With accusatory language, the court concluded: "Ms. Chaib cannot *use* her Algerian descent to form the basis of the claim that she is 'African–American' merely because Algeria is

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Native American" and found the evidence to be inconclusive. *Id.* at *2. The case settled before trial. Stipulation for Dismissal, Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136 (C.D. Ill. May 23, 2007).

[125] 92 F. Supp. 3d 829, 832 (S.D. Ind. 2015), *aff'd on other grounds*, 819 F.3d 337 (7th Cir. 2016).

[126] *Id.* at 836. At oral argument, Chaib's lawyer disputed this contention, arguing Chaib's features revealed her North African ancestry and that she only appeared to be white in a photograph. Oral Argument at 28:30, *Chaib*, 819 F.3d 337 (7th Cir. 2016) (No. 31154), https://www.courtlistener.com/audio/14975/nora-chaib-v-geo-group-incorporated/.

I note that the term "Caucasian," while popular with courts, is a troubling euphemism that harkens back to a time when racial differences were thought to have a scientific rather than a social or political basis. *See, e.g.*, Shaila Dewan, *Has 'Caucasian' Lost Its Meaning?*, N.Y. TIMES (July 6, 2013), http://www.nytimes.com/2013/07/07/sunday-review/has-caucasian-lost-its-meaning.html.

[127] *Chaib*, 92 F. Supp. 3d at 836. *But see* Ortiz v. Bank of Am., 547 F. Supp. 550, 560 (E.D. Cal. 1982) ("[T]he notion of 'race' as contrasted with national origin is highly dubious."). While the relationship between race and national origin may not matter under Title VII, which includes both, it may have consequence for other antidiscrimination laws. Section 1981, for example, prohibits only race discrimination, 42 U.S.C. § 1981(a) (2012) (proscribing race discrimination in contracting), and does not include Title VII's caps on punitive and compensatory damages, *id.* § 1981a(a)(1). The definition of "race" under Section 1981 is broad, although it does not reach "nation of . . . origin" or "religion." Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding that Section 1981 forbids discrimination "because of . . . ancestry or ethnic characteristics . . . whether or not it would be classified as racial in terms of modern scientific theory").

[128] *Chaib*, 92 F. Supp. 3d at 836 (quoting *Employer Information Report EEO–1, Instruction Booklet, Appendix*, U.S. EEOC (Jan. 2006), https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm).

[129] *Id.* at 836 (quoting U.S. EEOC, *Race & Color Discrimination*, *in* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION COMPLIANCE MANUAL 3 (2006)).

on the continent of Africa."[130] As this comment suggests, authenticity inquiries may result from the concern that majority group members are engaged in opportunistic efforts to claim minority group status.[131] This concern presumes that the rights at stake belong to particular protected groups, and so may only be vindicated by bona fide group members.

While the number of reported cases in which courts have engaged in racial authenticity inquiries remains small,[132] it has the potential to increase along with the growth of the multiracial population in the U.S. and increasing concerns about racial fraud.[133]

b. Unprotected Classes

Another type of protected class reasoning proceeds as follows: Equality law prohibits only discrimination against, for example, women as women. If a woman has some unprotected "plus factor" about her identity that an employer objects to only in women, such as having short hair, it places her in an unprotected subclass.[134] Or, when a plaintiff alleges a type of discrimination that can afflict some members of both classes, courts fail to see how she might have suffered any prohibited form of discrimination. This logic also extends to cases

130 *Id.* at 837 (emphasis added). Wisely, the court of appeals did not affirm this holding. Instead, it assumed arguendo that Chaib was a member of the protected class, and concluded she did not have sufficient evidence that the decisionmakers who carried out her termination were motivated by race. *Chaib*, 819 F.3d at 342–43.

131 *See* Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 768 (2015) (discussing how concerns about fraud and opportunism motivate legal actors to impose strict definitions of authentic identities).

132 Courts have also suggested the need for protected class gatekeeping with respect to the category "Hispanic." *See* Horton v. Ross Univ. Sch. of Med., No. CIV.A.04-5658 JAG, 2006 WL 1128705, at *4–5 (D.N.J. Mar. 30, 2006) (questioning whether a plaintiff, who identified himself to his employer as a "Hispanic male" on his job application, was a member of the protected class where that plaintiff was "only one quarter Hispanic" and did "not outwardly appear Hispanic"). Others have rejected such authenticity inquiries, reasoning that "Title VII and the implementing regulations make clear that the extent to [ ] which one is or is not a member of a racial or ethnic group is decidedly the wrong question." Gilbert v. Babbitt, Civ. A. No. 92–1124(NHJ), 1993 WL 468465, at *4 (D.D.C. Oct. 29, 1993) (refusing to rule on whether a plaintiff was Hispanic).

133 *Multiracial in America: Proud, Diverse and Growing in Numbers*, PEW RESEARCH CENTER (June 11, 2015), http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/ (discussing the growth in multiracial American adults and their reports of racial discrimination).

134 Some courts will extend protection if the "plus factor" is deemed important enough. *See, e.g.*, Arnett v. Aspin, 846 F. Supp. 1234, 1238–39 (E.D. Pa. 1994) (holding that, under a "sex-plus" theory of discrimination, plaintiffs may prevail "if they can demonstrate that the defendant discriminated against a subclass of women (or men) based on either (1) an immutable characteristic or (2) the exercise of a fundamental right").

about race.[135] Although the Supreme Court has not adopted such reasoning, the idea of the unprotected class persists among lower courts.[136]

Unprotected class arguments are prominent in sex discrimination cases brought by LGBT plaintiffs. While the EEOC has advanced the argument that discrimination on the basis of both transgender identity[137] and sexual orientation[138] are, by necessity, sex discrimination, federal courts are divided on whether to follow suit.[139] Those courts rejecting the EEOC's interpretation reason that Title VII only protects the rights of men and women as groups. The Seventh Circuit has held that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[140] Similarly, in refusing to extend sex discrimination protection to an LGBT plaintiff, the Second Circuit explained:

> [T]he other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion or

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[135] *See* Santee v. Windsor Court Hotel Ltd. P'ship, No. CIV.A.99-3891, 2000 WL 1610775, at *1–3 (E.D. La. Oct. 26, 2000) (dismissing a case by a "black woman with dyed-blonde hair" on the ground that the plaintiff was "not a member of a protected class" because "'hair color' is not a recognized protected class under Title VII" without investigating whether the employer's policy against "extremes in hair color" reflected racial stereotypes or was disparately enforced).

[136] In *Phillips v. Martin Marietta Corp.*, the Supreme Court held that a woman who was not hired because she had preschool-age children could bring a claim for sex discrimination, because the employer had hired men with preschool-age children. 400 U.S. 542, 544 (1971) (per curiam). The Court did not consider the case in terms of the "protected class"; rather, it held that Title VII requires "that persons of like qualifications be given employment opportunities irrespective of their sex." *Id.* at 544.

[137] *See, e.g.*, Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (holding "that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex' and such discrimination therefore violates Title VII" (quoting 42 U.S.C. § 2000e (2012))).

[138] *See* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015) ("'Sexual orientation' as a concept cannot be defined or understood without reference to sex.").

[139] *Compare* Hively v. Ivy Tech Cmty. Coll., S. Bend, 830 F.3d 698, 718 (7th Cir. 2016) (refusing to follow the EEOC's interpretation on the ground that without "a Supreme Court opinion or new legislation, we must adhere to . . . our prior precedent"), *reh'g en banc granted, opinion vacated*, No. 15-1720 (7th Cir. Oct. 11, 2016), *with, e.g.*, Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *8 (N.D. Fla. June 20, 2016) (adopting the EEOC's interpretation with respect to sexual orientation).

[140] Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (denying claim by a transgender plaintiff); *see also Hively*, 830 F.3d at 700 (reaffirming *Ulane*'s reasoning in a case involving sexual orientation). *But see, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a transgender plaintiff "established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes").

> nationality. "Sex," when read in this context, logically could only refer to *membership in a class* delineated by gender, rather than sexual activity regardless of gender.[141]

Because anti-LGBT discrimination may affect both men and women, some courts conclude that it cannot be sex discrimination.[142] These courts understand discrimination to mean impairing the rights of one particular group vis-à-vis another.

Many courts see Congress's failure to enact laws adding LGBT status as a protected class as instructive.[143] This objection often "rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons."[144] Courts state that they are wary of rulings that would turn "homosexuals"[145] and "transsexuals"[146] into protected classes. These courts

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141 Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (emphasis added) (quoting DeCintio v. Westchester Cty. Med. Ctr., 807 F.2d 304, 306–07 (2d Cir. 1986)).

142 *See, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979) (reasoning that men and women are equally burdened by sexual orientation-based discrimination because "whether dealing with men or women the employer is using the same criterion: it will not hire . . . a person who prefers sexual partners of the same sex"). *But see* Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001) (calling *DeSantis* into question to the extent it is inconsistent with the Supreme Court's sex stereotyping jurisprudence); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 211–12 (1994) (pointing out that *DeSantis*'s reasoning requires the artificial premise that gay men and lesbians engage in the same conduct, "homosexual sex," which is different from "heterosexual sex" only because of the sex of the participants).

143 *See, e.g.*, Burrows v. Coll. of Cent. Fla., No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) ("Plaintiff's claim was merely a repackaged claim for discrimination based on sexual orientation, which was not recognized under federal law as a class protected by Title VII.").

144 Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *9 (E.E.O.C. July 15, 2015) (refuting this notion by pointing out that "[w]hen courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of 'people in interracial relationships'").

Other courts have expressed frustration at being asked to draw an arbitrary line. *See, e.g.*, Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 622 (S.D.N.Y. 2016), *appeal docketed*, No. 16-748-cv (2d Cir. Mar. 9, 2016) (refusing to hold that sexual orientation discrimination is sex discrimination on the ground that the Second Circuit has held there is a "line" between those two concepts, and asking the circuit court "whether that line should be erased").

145 Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (holding that Title VII "does not recognize homosexuals as a protected class" and that "[w]hen utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator" because "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality" (quoting Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004))).

146 Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (rejecting an "interpretation of sex that would include transsexuals as a protected class").

envision the rights of such groups as distinct from the rights of men and women.

Protected class reasoning must be overcome for the view that anti-LGBT discrimination is sex discrimination to gain wide acceptance. Courts have long held that discrimination on the basis of failure to conform with gender stereotypes is a form of sex discrimination.[147] But when they frame the question in terms of protected classes, courts fail to see how anti-LGBT discrimination may be a form of impermissible sex stereotyping.[148] As the Sixth Circuit has explained, these courts "superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender nonconformity by formalizing the nonconformity into an ostensibly unprotected classification."[149]

For example, in *Igasaki v. Illinois Department of Financial and Professional Regulations*, the plaintiff, David Igasaki, an attorney, alleged that his supervisor began giving him poor reviews and singling him out for mistreatment after she learned he was gay.[150] Igasaki also alleged he was "criticized for being 'too soft' and 'not aggressive enough,'" in other words, for failing to conform to gender stereotypes with respect to masculine behavior.[151] Yet, the court agreed with the defendant that "what Igasaki has characterized as a sex discrimination claim is in actuality a claim for discrimination on the basis of his sexual orientation, and therefore must be dismissed because sexual orientation is not a protected class under Title VII."[152] Because his complaint alleged that he had not been subjected to mistreatment until his supervisor learned of his sexual orientation, the court concluded it was impossible that gender stereotypes could have played any role.[153]

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147 *See infra* notes 393–405 and accompanying text (discussing cases in which courts have applied sex-stereotyping theories to sex discrimination claims by LGBT plaintiffs).

148 One district court was not persuaded when it considered the EEOC's argument in terms of women and men as protected classes, but it agreed with the alternative argument that sexual orientation discrimination entails sex stereotyping and is therefore prohibited by Title VII. Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *7–8 (N.D. Fla. June 20, 2016).

149 Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).

150 No. 15-CV-03693, 2016 WL 232434, at *3 (N.D. Ill. Jan. 20, 2016).

151 *Id.*

152 *Id.* at *3.

153 *Id.* By denying that sexual orientation can implicate gender stereotypes, the court also may have mistakenly assumed a plaintiff must prove sex was the sole cause of the discrimination. *See supra* note 80 and accompanying text (discussing motivating factor liability).

c. Too Many Protected Classes

Courts also engage in protected class gatekeeping with respect to plaintiffs who face discrimination based on more than one forbidden ground. Rather than allowing claims based on multidimensional forms of bias, such as the stereotypes that might uniquely afflict African American women or Asian men, these courts insist that plaintiffs assert their protected identities one at a time. In one early case, *DeGraffenreid v. General Motors Assembly Division*, a court dismissed a claim because it was not convinced that "black women are a special class to be protected from discrimination."[154] It insisted that the plaintiffs' claims of sex and race discrimination be analyzed independently, fearful of "[t]he prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination."[155] On this understanding, Title VII's protection extends to Black women only insofar as their experiences of discrimination coincide with those of Black men or white women.[156]

DeGraffenreid's class-based reasoning has endured decades of scholarly criticism[157] and many contrary circuit court opinions.[158] One example of *DeGraffenreid*'s persistence is a 2010 case, *Mosby-Grant v. City of Hagerstown*, in which the Fourth Circuit held that an African American woman who had been subjected to a pattern of sexual and racial harassment was required to make out her claims separately.[159] In that case, plaintiff Tiffany Mosby-Grant brought a Title VII harassment claim against the police academy where she had been a student.[160] Mosby-Grant was the only female recruit in her class of

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154 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977).

155 *Id.* at 145.

156 Crenshaw, *supra* note 17, at 142–43.

157 *See* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history*, 95 B.U. L. REV. 713, 727–28 (2015) (describing *DeGraffenreid* as part of the "intersectionality anticanon" and discussing its critics). For examples of these troublingly persistent cases, see Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 214–29 (2006).

158 *See, e.g.*, Cruz v. Coach Stores, Inc., 202 F.3d 560, 572 (2d Cir. 2000) ("[Plaintiff]'s claim finds further support, moreover, in the interplay between the two forms of harassment. Given the evidence of both race-based and sex-based hostility, a jury could find that [the supervisor]'s racial harassment exacerbated the effect of his sexually threatening behavior and vice versa.").

159 630 F.3d 326, 337 (4th Cir. 2010).

160 *Id.* at 328.

sixteen.[161] All of the other recruits were white, except for one biracial man of African American descent.[162]

Mosby-Grant's classmates engaged in a campaign to shun and exclude her that was so extraordinary that, on one occasion, an instructor stated he had "never seen anything like this during [his] time of training."[163] The other recruits refused to partner with Mosby-Grant during training exercises, and engaged in snickering and criticism to undermine her performance during exams.[164] She heard one white recruit tell her biracial male colleague "[w]here I'm from, people like you are strung up from a flagpole."[165] The white recruit also suggested the image of that biracial colleague "being dragged from the back of a truck,"[166] a reference to a recent "racially motivated murder."[167] The other recruits baselessly accused Mosby-Grant of receiving "'special treatment' because she was a woman."[168] They used a variety of racist and sexist slurs, regularly made crude comments about women, and denigrated survivors of domestic violence during a domestic violence training.[169]

While the court readily concluded that Mosby-Grant had sufficient evidence of sexual harassment, it dismissed her racial harassment claim due to a technicality: she had alleged sex and race discrimination in "two distinct counts."[170] Citing *DeGraffenreid*, the court faulted Mosby-Grant for not bringing an additional "'hybrid' sex *and* race claim," as though she had somehow waived the argument that she had suffered both sex and race discrimination.[171] Rather than examining the entire pattern of racially and sexually charged harassment that cumulatively worked to undermine Mosby-Grant's chances of success, the court focused instead on how Mosby-Grant "f[e]ll under more than one protected class."[172] The court saw the need to "pars[e] out" what part of her mistreatment happened because she was a woman and what part happened because she was African American.[173] Even though it recognized that the isolation, bullying, and mistreatment she suffered may have been "motivated by race," the

161 *Id.* at 329.
162 *Id.*
163 *Id.* at 331 (alteration in original).
164 *Id.* at 329–33.
165 *Id.* at 329 (alteration in original).
166 *Id.*
167 *Id.* at 335 n.3.
168 *Id.* at 331.
169 *Id.* at 331–32.
170 *Id.* at 337.
171 *Id.* at 337 n.4.
172 *Id.* at 336.
173 *Id.*

court dismissed the race discrimination claim on the ground that Mosby-Grant had no evidence that the racial component of her harassment was "severe or pervasive."[174] It came to this conclusion by characterizing her racial discrimination claim as no more than "isolated incidents" rather than part of a pattern.[175] While her sexual harassment claim survived, this partial victory may have diminished her prospects for settlement or a win at trial.

That plaintiffs are often asked to parcel out their experiences of discrimination into isolated components based on each "protected class" may be one reason empirical studies show intersectional claims have fared poorly in court.[176]

d. Solidarity Across Class Lines

Another set of cases that flounder on protected class reasoning are those in which animus against minorities harms members of majority groups. Many courts have held that plaintiffs who are not themselves members of the protected class may still bring claims based on their "association with a member of a recognized protected class"[177] or because discriminatory practices denied them "[t]he benefits of interracial harmony" and "equal opportunity" in the workplace.[178] But notwithstanding scholarly support for these intergroup solidarity precedents,[179] other courts continue to narrowly construe this doctrine.[180] These courts see the rights protected by Title VII as belonging to particular groups.

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174 *Id.* at 335.

175 *Id.* at 336. For example, the court examined the white recruit's comment about how "people like [the biracial recruit] are strung up from a flagpole," from the perspective of the white recruit, crediting the white recruit's apology and explanation that he had just "been joking." *Id.* at 329.

176 *See* Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 992 (2011) (concluding, based on "a representative sample of judicial opinions over 35 years of federal employment discrimination litigation" that "plaintiffs who make intersectional claims . . . are only half as likely to win their cases as are other plaintiffs"); *id.* at 1018 (discussing how "the categorical nature of discrimination law creates doctrinal barriers to intersectional claims").

177 *See, e.g.*, Johnson v. Univ. of Cincinnati, 215 F.3d 561, 574 (6th Cir. 2000) (allowing a white male plaintiff to allege race and sex discrimination where he claimed he was punished for his advocacy on behalf of female minority hires as an affirmative action official).

178 *See, e.g.*, Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976) (holding that a white employee may sue to enjoin discrimination directed at Blacks and Hispanic-Americans).

179 *See, e.g.*, Rich, *supra* note 19, at 1502; Zatz, *supra* note 19, at 67.

180 *See, e.g.*, U.S. *ex rel.* Feaster v. Dopps Chiropractic Clinic, LLC, No. 13-1453-EFM-KGG, 2015 WL 6801829, at *6 (D. Kan. Nov. 5, 2015) (dismissing a complaint alleging a racially hostile work environment where the plaintiff failed to specify his racial identity);

For example, in *Jackson v. Deen*, plaintiff Lisa Jackson, a white woman employed as general manager at a restaurant owned by celebrity chef Paula Deen,[181] sued for racial harassment, alleging African American staff were required to use the restaurant's rear entrance and back restrooms, and that her supervisors regularly made racist remarks, including use of the n-word.[182] A corporate officer told Jackson her Sicilian father "'looks like a n*****' and questioned how Plaintiff looked so white."[183] Jackson argued that "the racist atmosphere in the workplace caused her 'immense personal and work related emotional and physical distress' because '[e]mployees came to her to complain and for help, which she felt obligated to give but was unable to fully provide.'"[184] The court dismissed the case because Jackson was "seeking damages for her employer's discriminatory behavior directed toward a class of individuals to which [she] does not belong."[185] Refusing to credit the corporate officer's remarks regarding her father as direct harassment of Jackson, the court concluded the plaintiff was "[a]t best . . . an accidental victim of the alleged racial discrimination."[186] The court saw the plaintiff's com-

Cochran v. Five Points Temps., LLC, 907 F. Supp. 2d 1260, 1270–71 (N.D. Ala. 2012) (dismissing a white employee's racial discrimination claims on the ground that the racially discriminatory environment was not directed at her personally or based on her association with African American coworkers); Brown v. Gojcaj Foods, Inc., No. 09-14537, 2011 WL 6370987, at *8 (E.D. Mich. Dec. 20, 2011) (dismissing a claim by a white plaintiff because he had not alleged "he was discriminated against on the basis of his association with a member of a recognized protected class nor has he pointed to a specific benefit or opportunity he has lost as a result of discrimination against others"); Williams v. Universal Enters., LLC, No. CIV-07-0801-HE, 2008 WL 2390818, at *3 (W.D. Okla. June 9, 2008) (dismissing a claim by a "Caucasian" employee in a case in which he and an African American employee were fired after the white employee reported racial harassment); Jerome v. Midway Holding, Inc., No. CV 03-1913-PHX-MHM, 2007 WL 973968, at *9 (D. Ariz. Mar. 29, 2007) (dismissing race discrimination claims by a woman whose coworkers at a car dealership used almost every imaginable racial epithet to describe job applicants and customers because "[p]laintiff has not established that she is a member of a protected class based on her Caucasian race").

181 *See* Kim Severson, *Deen's Cook Tells of Slights, Steeped in History*, N.Y. TIMES (July 24, 2013), http://www.nytimes.com/2013/07/25/us/paula-deens-soul-sister-portrays-an-unequal-bond.html (discussing the "empire-crushing accusations of racism" against Paula Deen).

182 959 F. Supp. 2d 1346, 1349–50 (S.D. Ga. 2013).

183 *Id.* at 1350 (alteration in original).

184 *Id.* (alteration in original).

185 *Id.* at 1352. The court may have been skeptical of Jackson's claim to emotional distress, but whether Jackson could prove damages is a separate issue. *See, e.g.*, Turic v. Holland Hosp., Inc., 85 F.3d 1211, 1215 (6th Cir. 1996) (holding that, in Title VII cases, "damages for mental and emotional distress will not be presumed, and must be proven by 'competent evidence.'" (quoting Carey v. Piphus, 435 U.S. 247, 263–64 n.20 (1978))).

186 *Jackson*, 959 F. Supp. 2d at 1354. Extracting this comment from the broader context of racially discriminatory harassment, the court saw it is as too isolated to support a Title VII claim. *Id.* at 1354 n.7.

plaint about emotional distress on account of her inability to remedy the restaurant's racial segregation as unrelated to race. Rather than understanding the interest at stake as Jackson's right to engage with her coworkers on nondiscriminatory terms, the court heard a generalized demand for "harmony in the workplace."[187] It held that "[q]uite simply, workplace harmony is not an interest sought to be protected by Title VII."[188]

Another case, *Blanks v. Lockheed Martin Corp.*, arose in the aftermath of "a racially-motivated shooting rampage" by an employee at a Lockheed Martin plant in Meridian, Mississippi.[189] Prior to this event, the shooter had exhibited "extreme racial animosity toward blacks" and had threatened to kill his Black coworkers.[190] The shooter "told others he believed a race war was coming and that he was stocking up on guns and ammunition."[191] On the day of the tragedy, plaintiff David Blanks, a white employee, witnessed the assailant enter the building and begin firing his gun.[192] Aware of the shooter's racial animosity, Blanks rushed to tell two of his Black friends to hide.[193] But when Blanks arrived at their work area, his friends had already been shot, along with a third Black coworker.[194] As Blanks was trying to assist one of his fallen coworkers, he saw the shooter "about ten yards away, facing him, reloading his shotgun."[195] Blanks was terrified that he would be shot on account of his friendships with the Black workers, but the shooter instead walked off toward the work area of another Black employee.[196] Blanks followed in an effort to stop the violence.[197] But before he could kill anyone else, the shooter turned his gun on himself.[198]

Blanks brought suit under Section 1981, alleging that he suffered from emotional distress as a result of the incident, and that his employer was liable for a racially hostile environment.[199] The court

187 *Id.* at 1355.

188 *Id.* The court thus dismissed plaintiff's claim for lack of standing, holding that she fell outside the "zone of interests" protected by Title VII. *Id.*

189 568 F. Supp. 2d 740, 741 (S.D. Miss. 2007). Six employees were killed in the shooting, five of them Black, and eight wounded. David M. Halbfinger, *Death Toll Rises in Plant Shooting*, N.Y. TIMES (July 16, 2003), http://www.nytimes.com/2003/07/16/us/national-briefing-south-mississippi-death-toll-rises-in-plant-shooting.html.

190 *Blanks*, 568 F. Supp. 2d at 746.

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at 746–47.

197 *Id.* at 747.

198 *Id.*

199 *Id.* at 741–42.

dismissed the case on the ground that "a plaintiff lacks standing to recover for injury to third parties from discrimination based on their protected classes, where plaintiff does not belong to that class."[200] The court distinguished cases recognizing the right to interracial association because the shooter did not actually target Blanks due to his interracial friendships.[201] The court concluded:

> Although Blanks may reasonably have feared that [the shooter] would harm him because of his friendship with . . . black employees of Lockheed, the fact is, [the shooter] did not threaten to harm Blanks, verbally or otherwise, and Blanks does not recall [the shooter] ever making a move to harm him, or for that matter, even looking in his direction.[202]

The court understood Blanks' injury to derive from mere sympathy for the protected group.[203] It did not see Blanks' trauma as a direct result of Lockheed's failure to maintain a workplace free from racial violence.

2. *Perceived Class Membership*

Some scholars have argued that the solution is for Title VII to be interpreted to protect those who are "regarded as" belonging to certain identity groups, not just those who "actually" belong to those groups. They describe the problem as "misperception"[204] or "proxy"[205] discrimination and argue the law should penalize the employer who acts on a mistake that a plaintiff is a member of a protected class just as it would the employer who was right about a plaintiff's identity. In making this argument, scholars draw a parallel to the ADA, which covers those who are "regarded as" disabled.[206] This argument has had some influence with state legislatures. Some state statutes include explicit protection for, for example, both those who are "actually" and those who are "perceived as being" members of certain sexual orientation groups.[207]

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200 *Id.* at 743 (emphasis omitted).

201 *Id.* at 744–47 (discussing EEOC v. Miss. Coll., 626 F.2d 477, 482 (5th Cir. 1980)).

202 *Id.* at 747.

203 *Id.* at 743–44 (discussing Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180 (7th Cir. 1998), which held a plaintiff did not have standing to assert a discrimination claim based on "unease at observing wrongs perpetrated against others").

204 *See* Senn, *supra* note 47, at 837.

205 *See* Onwuachi-Willig & Barnes, *supra* note 11, at 1287.

206 *See id.* at 1289; Senn, *supra* note 47, at 830.

207 Ten states include terms such as "actual or perceived" in their definitions of sexual orientation for purposes of antidiscrimination law. CAL. GOV'T CODE § 12926(o) (West 2015); 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West 2015); IOWA CODE ANN. § 216.2(14) (West 2009); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2016); MINN. STAT. ANN. § 363A.03(44) (West 2015); NEV. REV. STAT. ANN. § 613.310(4), (7) (West 2011); N.H.

But this Section demonstrates that adding "regarded as" or "perceived as" language to a statute will not eliminate much protected class gatekeeping, and will open the door to new forms of protected class gatekeeping. Properly interpreted, statutes like Title VII already forbid misperception discrimination. Adding "regarded as" language to a statute will suggest that there is a protected class to be policed, resulting in more cases being dismissed. An examination of ADA cases reveals that the "regarded as" inquiry misdirects the court's attention to the discriminator's views on the appropriate bounds of group membership, asking impossibly specific questions about the unknowable states of mind of often thoughtless decisionmakers and harassers. Moreover, a "regarded as" definition does not redress the harm when a discriminator deliberately misattributes a stigmatized identity to a plaintiff.

a. Lessons from the ADA

The ADA experience does not inspire confidence in "regarded as" inquiries. The ADA, unlike most other discrimination statutes, defines the protected class. It requires that a plaintiff show she has "a physical or mental impairment" that "substantially limits [a] major life activit[y]" or that she was "regarded as having such an impairment."[208] The history of the statute demonstrates that courts will construe "regarded as" claims narrowly. In *Sutton v. United Airlines, Inc.*, the Supreme Court held that for a "regarded as" claim to prevail, the employer "must believe either that one has a substantially limiting impairment that one does not have," for example, the misconception that an employee has AIDS when he does not, "or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting," for example, the misconception that an employee in a wheelchair lacks important cognitive abilities, when she does not.[209] Thus, the Court construed the provision to prohibit discrimination only if the employer *thought* the employee was substantially limited in

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REV. STAT. ANN. § 354-A:2(XIV-c) (2007); N.M. STAT. ANN. § 28-1-2(P)–(Q) (West 2007); R.I. GEN. LAWS ANN. § 28-5-6(11), (16) (West 2014); UTAH CODE ANN. § 34A-5-102(z) (West 2016). Three states define sexual orientation to include those who are "identified with" certain orientations, although it remains to be seen whether courts will interpret this language broadly or narrowly. HAW. REV. STAT. ANN. § 378-1 (West 2013) ("'Sexual orientation' means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences."); N.J. STAT. ANN. § 10:5-5(hh), (rr) (West 2010) (similar); WIS. STAT. ANN. § 111.32(13m) (West 2016) (similar).

208 42 U.S.C. § 12102(1)(A), (C) (2012). It also protects plaintiffs with "a record of such an impairment." *Id.* § 12102(1)(B).

209 527 U.S. 471, 489 (1999).

a major life activity, but not if the employer thought the employee's disability failed to meet that standard. As a result, lower courts made it very difficult for a plaintiff to show she was regarded as disabled.[210]

Sutton was overruled by Congress in the ADA Amendments Act of 2008 ("ADAAA"), which provides that an individual is "regarded as" having a disability if she is subjected to disparate treatment because of an "actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[211] The ADAAA's express purpose was to reduce protected class gatekeeping, refocusing judicial attention on the other requirements for an ADA claim, such as whether the plaintiff was qualified for the job.[212] While the statute no longer asks if the employer thought the employee was substantially limited, it still requires an analysis of whether the employer thought the employee had "a physical or mental impairment."[213]

Some courts interpret this language to require that they ask whether the employer thought the plaintiff had a "physical or mental impairment" or whether the employer had some other mistaken idea about what was wrong with the employee. For example, in *Cooper v. CLP Corp.*, the plaintiff, Orlando Cooper, suffered from strabismus, a disorder that causes a person's eyes to appear to be crossed or misaligned.[214] Cooper worked at a McDonald's restaurant owned by the defendant, where his supervisor called him names including "cock-eyed-ass" and "lazy-eyed."[215] When Cooper requested that she stop, she sent him home early.[216] After a series of other incidents involving this supervisor, Cooper was terminated.[217] The first issue the court addressed was whether Cooper was a member of the protected class of people with disabilities.[218] The court acknowledged that the ADAAA had loosened the definition of "regarded as" to mean only that the employer perceived the employee as having an "impair-

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210 *See, e.g.*, Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 220–24 (2008) (discussing cases following *Sutton* that narrowly construe who counts as "regarded as" disabled).

211 42 U.S.C. § 12102(3)(A) (2012). However, a plaintiff does not qualify as "regarded as" disabled if the impairment is no more than "transitory and minor." *Id.* § 12102(3)(B). Someone who is "regarded as" disabled but not actually disabled is not entitled to accommodation. *Id.* § 12201(h).

212 *Id.* § 12101.

213 *Id.* § 12102(3)(A).

214 No. 2:13-cv-02152-JEO, 2015 WL 9311964, at *2 (N.D. Ala. Dec. 23, 2015), *aff'd on other grounds*, No. 16-10536, 2017 WL 548986 (11th Cir. Feb. 9, 2017).

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.* at *3.

ment."[219] The court also acknowledged that strabismus was indeed a medical condition.[220] But it held that his supervisor's comments, "while cruel and reprehensible, only demonstrate an awareness of Cooper's physical condition. They do not demonstrate that she regarded him as having a physical *impairment*."[221] The court reasoned that "plenty of people with an 'undesirable' physical characteristic are not impaired in any sense of the word."[222]

Other courts have reached similar conclusions in cases in which employers admitted that they fired plaintiffs for being obese.[223] These courts reason that employers attributed the plaintiffs' obesity to personal failings rather than medical conditions, and so those employers did not regard the plaintiffs as having "impairments."[224] Another court concluded that an employer could terminate an employee due to her respiratory problems because that employee did not present her employer with "medical documentation" pointing to the precise causes of her ailment, and therefore, the employer did not regard her as having an impairment.[225]

These examples show that, even after congressional correction, courts narrowly interpret the scope of those "regarded as" falling in the protected class of people with disabilities. Of course, unlike symmetrical discrimination laws, the ADA's terms require some form of protected class gatekeeping.[226] Some might argue that strabismus, obesity, and breathing difficulties are not sufficiently disabling to

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219 *Id.* at *4–5.

220 *Id.* at *4. The court held that Cooper was not actually disabled because his strabismus did not impair his vision or otherwise substantially limit him in any major life activity. *Id.*

221 *Id.* at *6.

222 *Id.* (citing Powell v. Gentiva Health Servs., Inc., No. CIV.A. 13-0007-WS-C, 2014 WL 554155, at *7 (S.D. Ala. Feb. 12, 2014)).

223 *See, e.g.*, *Powell*, 2014 WL 554155, at *7; Spiegel v. Schulmann, No. 03-CV-5088 (SLT)(RLM), 2006 WL 3483922, at *14 (E.D.N.Y. Nov. 30, 2006), *aff'd in part, vacated and remanded in part on other grounds*, 604 F.3d 72, 80 (2d Cir. 2010) (per curiam).

224 *See, e.g.*, *Spiegel*, 2006 WL 3483922, at *13 (dismissing an ADA claim on the ground that the employer did not think the plaintiff's "weight condition was the symptom of a physiological disorder," but rather, the employer was of the view "that fat people are essentially undisciplined and weak, and therefore cannot be in a role in which others are supposed to look up to and respect them"). For a critique of judicial opinions resting on the premise that obesity should not be covered by antidiscrimination law because it is mutable, *see* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 53–62 (2015).

225 Jennings v. AAON, Inc., No. 14-CV-0347-CVE-PJC, 2015 WL 3465834, at *7 (N.D. Okla. June 1, 2015). Medical tests as to the cause of the employee's respiratory problems were inconclusive, and her supervisors speculated that she was suffering from anxiety attacks. *Id.* at *2 & n.3. Although the ADA does not distinguish between physical and mental impairments, the court held that the employer did not regard the employee as having an impairment. *Id.* at *7.

226 *See supra* note 208 (quoting provisions of the ADA that define the protected class).

merit any legal attention. My purpose here is not to critique ADA caselaw; it is to demonstrate that importing "regarded as" language and reasoning from the ADA to Title VII would not eliminate the problem of protected class gatekeeping.

b. Discrimination in Disregard for the Plaintiff's Identity

Symmetrical antidiscrimination laws like Title VII already cover discrimination based on perceptions, and so "regarded as" or "perceived as" provisions are redundant.[227] To be sure, a "regarded as" statutory amendment would make it more difficult for jurists to dismiss claims in which plaintiffs were mistaken for members of protected groups.[228] But it would leave most forms of protected class gatekeeping undisturbed, because it is the rare case in which discrimination is based on simple misperception. Adding a "regarded as" provision to Title VII would not redress cases in which courts see plaintiffs as members of unprotected classes,[229] cases overlooking plaintiffs at the intersections of protected classes,[230] or cases in which plaintiffs were harmed due to their solidarity with protected class members.[231] None of these categories of cases involve a mismatch between the employer's perception of the plaintiff's protected class and her "true" identity.

A "regarded as" solution would not resolve many so-called misperception cases, because those cases do not involve mistaken identities. One of the most often cited misperception cases, *Burrage v. FedEx Freight, Inc.*,[232] involves not simply misperception but also deliberate misattribution of a racial identity to a plaintiff. In *Burrage*, the plaintiff worked as a driver for FedEx.[233] Burrage indicated his origins were "half-African American and half Caucasian," but his supervisors referred to him as "Mexican" and "cheap labor," and taunted him by chanting "Andale, Andale" and "Arriba, Arriba."[234] Although these insults may have been borne of a misperception of

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227 *See supra* notes 85–88 and accompanying text.

228 *See supra* note 116 (collecting misperception cases, many of which rely on the argument that other discrimination statutes, unlike the ADA, do not bar discrimination against those "regarded as" members of the protected class); *supra* notes 117–133 and accompanying text (discussing cases in which courts concluded plaintiffs could not prove they were members of protected classes based on the courts' standards for racial group membership).

229 *See supra* notes 134–153 and accompanying text.

230 *See supra* notes 154–176 and accompanying text.

231 *See supra* notes 180–203 and accompanying text.

232 No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012).

233 *Id.* at *1.

234 *Id.*

Burrage's racial identity due to his skin color,[235] at some point, Burrage explained to a supervisor that he was not in fact Mexican.[236] Burrage even told that supervisor a story about an "ex-girlfriend who had wanted to introduce him to her family as 'Mexican' rather than 'black,'" and how it had offended him.[237] The harassment only worsened; at one point, coworkers drew Burrage's attention to graffiti on a trailer stating that "Mexicans were 'proof that American Indians had sex with buffalos.'"[238] Another time, the supervisor told Burrage, "I don't talk to Mexicans."[239] The court did not chalk all the harassment up to misperceptions; rather, it described some of the harassment as "incomprehensible name calling" that could not "reasonably be considered to have referred to the fact that Burrage's race was African-American or that his skin color was brown, notwithstanding Burrage's conclusory allegations to the contrary."[240] Because Burrage made no claim to Mexican identity, as his harassers knew, the court saw the harassment as trivial rather than implicating Burrage's civil rights.

Other cases falling under the misperception heading may be better categorized as involving a discriminator's ignorance of the plaintiff's identity, such as where a plaintiff alleged she was "asked numerous times what her ethnic background was."[241] In another line of cases, courts allow employers to terminate employees for refusing to engage in prayer because those employees did not announce their precise religious beliefs to their employers.[242] In *Reed v. Great Lakes Companies, Inc.*, the plaintiff, Melvin Reed, worked as the executive housekeeper of a newly opened Holiday Inn in Milwaukee, Wis-

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235 *See id.* (one supervisor told Burrage that he "looked Mexican").

236 *Id.*

237 *Id.*

238 *Id.* at *2.

239 *Id.* at *3.

240 *Id.* at *6.

241 Sears v. Jo-Ann Stores, Inc., No. 3:12-1322, 2014 WL 1665048, at *2 (M.D. Tenn. Apr. 25), *report and recommendation adopted by* 2014 WL 3672113, at *3 (M.D. Tenn. July 23, 2014). *But see* Jones v. UPS Ground Freight, 683 F.3d 1283, 1299–300 (11th Cir. 2012) (refusing to engage in protected class gatekeeping in a case in which a supervisor evinced ignorance about plaintiff's race, stating, "I don't care what race you are, I trained *your kind* before").

242 *E.g.*, Nobach v. Woodland Vill. Nursing Ctr., Inc., 799 F.3d 374, 375, 379 (5th Cir. 2015) (holding that an employer did not discriminate on the basis of religion by firing a nursing home aid "because she refused to pray the Rosary with a patient" because the employee had not explained to her supervisor that it was contrary to her religious beliefs); Reed v. Great Lakes Cos., 330 F.3d 931, 933 (7th Cir. 2003). *But see* Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir. 1993) (holding, in a case in which an employee alleged he was terminated for not sharing his supervisor's Mormon beliefs, that "[w]here discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class factor is inappropriate").

consin.[243] His employer required that he oversee the distribution of Bibles to each hotel room.[244] Not long after he began work, Reed was informed that representatives from the Gideons, an evangelical group dedicated to distributing free Bibles, would be meeting with hotel management.[245] Reed's manager said that "they were going to 'pray with the Gideons,'" which Reed thought was a joke.[246] But when the Gideons arrived, they did insist on "some Bible reading and some praying."[247] "Reed was offended by the religious character of the meeting and left in the middle, to the manager's chagrin."[248] Reed and his manager later had a conflict over whether Reed could be required to attend a religious event, and his manager fired him "for insubordination."[249] Title VII defines religion broadly to include "all aspects of religious observance and practice, as well as belief," and the Seventh Circuit recognized that this "includes antipathy to religion."[250] And yet, the court dismissed the case, because, "Reed at his deposition refused to indicate what if any religious affiliation or beliefs (or nonbeliefs) he has; refused even to deny that he might be a Gideon!"[251] The court concluded that because no one knew Reed's precise religious or nonreligious beliefs, his protected class status could not have been the basis for his termination.[252]

A "regarded as" amendment would affirm the result in *Reed* and support the argument that an employer must have actual knowledge of a plaintiff's religion for discrimination to occur. The Supreme Court has held that under the present version of Title VII, the appropriate inquiry is into the employer's motives, not its knowledge. In its 2015 decision in *EEOC v. Abercrombie & Fitch*, the Court held that a retail store engaged in religious discrimination when it refused to hire Samantha Elauf, a Muslim woman, because she wore a headscarf.[253] Elauf's headscarf would have violated the store's policy forbidding salespeople from wearing "caps."[254] The Court rejected Abercrombie's argument that it was incumbent on Elauf to explain to the store manager that she wore the headscarf for religious reasons and

243 *Reed*, 330 F.3d at 933.
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.* at 934.
251 *Id.*
252 *Id.*
253 135 S. Ct. 2028, 2037 (2015).
254 *Id.* at 2031.

would need an accommodation.[255] Title VII says nothing about knowledge; its "intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge."[256] It was sufficient that the employer admitted that its motive for refusing to hire Elauf was the headscarf, and that it had an unconfirmed suspicion that the headscarf was religious.[257] An actual knowledge rule would create incentives for employers to profess ignorance of religious practices so as to avoid liability.[258] It would require plaintiffs to explain even obvious religious practices at the hiring stage, at the risk of incurring subtle forms of discrimination.

The problem of discrimination that disregards the target's identity is particularly acute in the context of statutory prohibitions on sexual orientation-based discrimination. In many cases, plaintiffs who self-identify as heterosexual allege harassment due to rumors that they were not.[259] The requirement that a plaintiff prove she is a member of a protected class by specifying her sexual orientation here becomes a troubling demand for a plaintiff to "out" herself. When the law asks how the plaintiff was regarded, it requires pointless inquiries

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255 *Id.* at 2033.

256 *Id.*

257 *Id.* at 2033 n.3. The Court did not rule on the hypothetical question of whether an employer might, for example, refuse to hire a person with a beard, where that employer did not "at least suspect[ ]" that he wore the beard for religious reasons. *Id.* The EEOC has said that there would be no liability in such a scenario. *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www1.eeoc.gov//eeoc/publications/qa_religious_garb_grooming.cfm? (last visited Jan. 27, 2017).

258 Some courts ask the odd question of whether an employer had a "reasonable belief" that a plaintiff was a member of the protected class, based on objective evidence. Lebyed v. DTG Operations, Inc., No. 5:08-CV-00438-FL, 2010 WL 1332417, at *8 (E.D.N.C. Jan. 22), *report and recommendation adopted by* No. 5:08-CV-438-FL, 2010 WL 1332458, at *2 (E.D.N.C. Apr. 6, 2010); *see* Greene v. Swain Cty. P'ship for Health, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004) (adopting a standard in which "the employer's reasonable belief and knowledge that the employee is a member of a protected class is central to the employee's claim that she was fired on that basis"). These courts do not explain why the law should give *unreasonable* beliefs about a plaintiff's protected class status a free pass.

259 Under federal law, those cases may be dismissed, as courts reason that perceived sexual orientation is not a protected class. *See* Harder v. New York, 117 F. Supp. 3d 157, 165 (N.D.N.Y. 2015) ("Plaintiff asserts he was subjected to . . . discriminatory treatment . . . as a result of a misperception regarding his sexual orientation . . . . But [Plaintiff] cannot satisfy the first prong of [the *McDonnell Douglas*] test, since Title VII 'provides no remedy for discrimination based upon sexual orientation.'" (quoting Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011))); McKibben v. Odd Fellows Health, Inc., No. 3:123-CV-1560(JCH), 2014 WL 3701022, at *3 (D. Conn. July 25, 2014) (dismissing a case, for a similar reason, where a plaintiff alleged that "rumors around work were that she was gay" and that she was terminated "based on discriminatory animus against her based on her being perceived as gay"). *But see supra* notes 137–53 and accompanying text (discussing federal court cases on whether to adopt the EEOC's position that sexual orientation discrimination is always a type of sex discrimination).

into the beliefs of discriminators about the nature of sexual orientation, including endorsement of stereotypes that discriminators might hold about gender roles and sexuality, or denial of the existence of bisexuality.[260]

For example, a New York statute prohibits discrimination based on sexual orientation, including "perceived" sexual orientation.[261] In a case under that statute, *Glinski v. RadioShack*, a plaintiff alleged that his coworkers insinuated that he was gay, harassing him for listening to "gay boy music," and calling him a "dick smoker."[262] The New York court dismissed the claim because the plaintiff stated "that he is a heterosexual male, was married, fathered a child, is masculine, and has no feminine characteristics, traits, tastes or habits."[263] With respect to the "perceived" sexual orientation issue, the harassers testified that they did not really think the plaintiff was gay, and so the court concluded the plaintiff was not protected.[264] A court interpreting a California statute reached the same result, holding that a plaintiff had failed to establish he "was in the protected class of homosexuals or persons perceived as homosexuals" where that plaintiff testified that "he was not homosexual" and his "coworkers knew he had been married and had a child."[265] By contrast, an Illinois court delved more deeply into the thoughts of harassers to conclude that their antigay slurs demonstrated they believed the plaintiff was indeed gay.[266]

Thus, appending "regarded as" or "perceived as" to the definitional provisions of antidiscrimination statutes leads to new forms of protected class gatekeeping, refracted through the lens of the discriminator's mindset.[267] For those statutes that, unlike the ADA, do not

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[260] *See generally* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 541–71 (2013) (discussing judicial misconceptions about the nature of sexual orientation).

[261] N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010).

[262] No. 03-CV-930S, 2006 WL 2827870, at *2–3 (W.D.N.Y. Sept. 29, 2006).

[263] *Id.* at *11 n.12.

[264] *Id.*

[265] Akoidu v. Greyhound Lines, Inc., No. B147046, 2002 WL 399476, at *5–6 (Cal. Ct. App. Mar. 15, 2002).

[266] 1212 Rest. Grp., LLC v. Alexander, 959 N.E.2d 155, 168 (Ill. App. Ct. 2011).

[267] A federal law proposed in 2015 would, in addition to prohibiting sexual orientation and gender identity discrimination, disallow discrimination based on "a perception or belief, even if inaccurate, concerning the race, color, religion, sex, sexual orientation, gender identity, or national origin, respectively, of the individual" or such characteristics "of another person with whom the individual is associated or has been associated." The Equality Act of 2015, S. 1858, 114th Cong. § 1101(a)(1)(A)–(B) (2015); *see also* H.R. 3185, 114th Cong. § 1101(a)(1)(A)–(B) (2015) (same). This language alone would not address most of the forms of protected class gatekeeping listed in this Article. But it is some consolation that the statute specifies that "including" these forms of discrimination does not mean the law is "limited to" only these forms of discrimination. S. 1858 § 1101(a)(3).

define a protected class, such language is redundant. Properly interpreted, statutes that prohibit discrimination "because of" or "on the basis of" a particular trait already include misperception discrimination. As one district court judge put it, "Discrimination based on an individual's perceived sex is discrimination 'because of sex' in the same way that discrimination based on an individual's actual sex is."[268] Adding "perceived" or "regarded as" language to antidiscrimination statutes will suggest that there is a protected class to be policed.

II
THE NORMATIVE CASE AGAINST PROTECTING CLASSES

This Part examines the practice of protected class gatekeeping through the lenses of various normative theories of discrimination law. It argues that, at a theoretical level, group or class protection is not the central aim of any of the most commonly discussed normative theories of discrimination law: anti-classification, anti-essentialism, anti-balkanization, and even anti-subordination. None of these theories support the practice of protected class gatekeeping.

Of course, this does not mean that American equality law is not concerned with social groups and classes—it must recognize social groups to understand how group-based inequality constrains individuals and harms society. But it does not envision social groups as the basic units of analysis or the bearers of rights.[269] The idea of the protected class is that classes themselves have rights to protect. But at the core of American equality law are visions of individual rights rather than group rights, and aspirations to social change rather than class protection.

This Article does not advance a new theory of discrimination, nor does it prioritize any theory. Rather, it recognizes that "the law . . . is

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[268] Martin v. J.C. Penney Corp., 28 F. Supp. 3d 153, 159 (E.D.N.Y. 2014) (Weinstein, J.) (interpreting a New York State rule that forbids discrimination "because of sex" consistently with a New York City law that forbids discrimination based on "actual or perceived" sex in light of the state statute's remedial purpose).

[269] U.S. law recognizes group rights in a number of other contexts, such as with respect to corporate entities, religious groups, and Native American tribes. *See* Taunya Lovell Banks, *What Is a Community? Group Rights and the Constitution: The Special Case of African Americans*, 1 MARGINS 51, 53 (2001). One could imagine a theory of multiculturalism that understands the role of equality law as protecting groups qua groups. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 6 (1995) (arguing that "[a] comprehensive theory of justice in a multicultural state will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or 'special status' for minority cultures"). But this is not the animating vision behind U.S. antidiscrimination law.

a . . . ramshackle institution, full of compromise and contradiction."[270] No area of law embodies just one normative theory or expresses a theory in pure form. This is particularly true of discrimination law, which bears the marks of intense political controversy. I will not endeavor here to defend a single theory as the best fit for antidiscrimination law, as a project of such ambition is well beyond the scope of this critique of protected class gatekeeping. Moreover, arguments for legal change are stronger if supported from multiple perspectives.[271]

Nor do I purport that anti-classification, anti-essentialism, anti-balkanization, and anti-subordination are the original, only, or best justifications for discrimination law. I analyze these principles because of their influence on discrimination case law.[272]

This Part does not aim to resolve all conflicts among the various theories with respect to the correct definition of "forbidden grounds for discrimination."[273] Some of these theories may be more concerned with overt classifications, others with implicit biases and institutional patterns. Some are more concerned about formal rights, others about political possibilities. Some assume status quo baselines are fair, others are premised on the assumption that they are not. Some are more concerned with segregation, others with hierarchy. Some focus

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[270] Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 16 (2000).

[271] *Cf.* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734–35 (1995) ("Perhaps government should seek an 'overlapping consensus' among reasonable people, thus allowing agreements to be made among Kantians, utilitarians, Aristotelians, and others. . . . [P]articipants in law may be unwilling to commit themselves to large-scale theories of any kind, and they will likely disagree with one another if they seek to agree on such theories." (quoting JOHN RAWLS, POLITICAL LIBERALISM 133 (1993)).

[272] Scholars have described other influential principles as well. For example, "opportunity pluralism" looks to ensure not a diversity of people in terms of protected identities, but a diversity of opportunities in terms of education and employment, eliminating those "bottlenecks" in the structure of social advancement that allow only the privileged to pass through. *See* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 1 (2014). Another theory would see the harm of discrimination in its expressive dimensions: that it demeans people by treating them as less worthy of equal respect. *See* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 35 (2008). These theories do not support protected class gatekeeping for many of the same reasons as the anti-subordination theory discussed *infra* Section II.D. Another theory might be "diversity": an umbrella term adopted by institutions to describe efforts at inclusion, particularly affirmative action. *See, e.g.*, ELLEN BERREY, THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE 2–3 (2015). I address many of the institutional concerns underlying a diversity perspective in this Article's sections on anti-balkanization, *infra* Section II.C, and affirmative action, *infra* Section III.B.3.

[273] This Article will offer a preliminary discussion of how inquiries about the definition of discrimination might change without protected class gatekeeping. *See infra* Section III.C.

on correcting discrete harms to individuals, others on transforming diffuse social systems and structures. But none are about protecting classes.

A. *Anti-Classification*

Most obviously, protected class gatekeeping offends anti-classification theories of equality law. The anti-classification principle "holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race."[274] This principle is related to the concept of "formal equality" because it is concerned with present intentions and actions—demanding that like cases be treated alike—rather than accounting for historical, structural, or implicit types of disadvantage.[275] The means and ends of anti-classification efforts are discussed through the metaphor of "blindness," as in "colorblindness."[276] Thus, rules, policies, and decisions ought to operate without regard to irrelevant characteristics such as race or sex, as when orchestras hold auditions with the musician behind a screen so that the performance is evaluated based only on its quality.[277] At the heart of the anti-classification principle is a view of the individual as stripped of all irrelevant group-based identities. The end point of anti-classification theory is a society blind to irrelevant characteristics in its allocation of opportunities, in which individuals are judged by their own merits, choices, talents, and intrinsic worth.[278]

Also undergirding this principle may be a libertarian argument. The ascription of identities by authorities offends the values of individual liberty, dignity, and self-determination. As Justice Kennedy explains:

> When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.

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

275 *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 963 (2012) (discussing the relationship between anti-classification and formal equality principles).

276 *See, e.g.*, *id.*

277 *See* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000).

278 Post, *supra* note 270, at 12–13. Post is critical of this vision "as resting on a conception of the person that reduces her 'to a bundle of abilities, an instrument valued according to its capacity for performing socially valued functions with more or less efficiency.'" *Id.* at 14 (quoting John H. Schaar, *Equality of Opportunity and Beyond*, *in* LEGITIMACY IN THE MODERN STATE 193, 203 (1981)).

> And it is a label that an individual is powerless to change. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.[279]

Extreme versions of the anti-classification argument are often invoked from the political right against all forms of affirmative action, as when Chief Justice Roberts argues that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[280] But the principle may also persuade centrists that racial classifications ought to be constrained to a narrow set of circumstances in which they are necessary to serve other important purposes.[281]

On this principle, protected class gatekeeping is extremely troublesome.[282] The means of group-based classification are offensive to anti-classification theory. Judicial determination of racial and other such classifications constrain individual liberty. Interpretation of the membership prong of *McDonnell Douglas* to preclude claims by people based on race or other protected traits is itself a morally troubling mode of classification.[283] Rather than blindness, protected class gatekeeping spotlights racial and other such classifications and unfairly limits protection only to those who fall into certain groups.

Additionally, protected class gatekeeping does not serve the ends of anti-classification theory: prohibiting overt consideration of impermissible factors such as race and sex to ensure individuals receive merit-based consideration. For this reason, Professor Wendy Greene has described the cases in which courts fail to recognize discrimination based on misperception of a plaintiff's racial identity as "anti-anticlassificationist."[284] But her argument extends beyond the misperception

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279 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

280 *Id.* at 748 (plurality opinion).

281 *See id.* at 796 (Kennedy, J., concurring) (urging government actors to "seek alternatives to classification . . . by race" in all but the most "extraordinary" circumstances).

282 Protected class gatekeeping is also troubling to the related principle of formal equality. Formal equality does not require any concept of group status to function; it simply requires that everyone be treated according to rational market principles or other such purportedly neutral standards. *See* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 838–39 (2001) ("We could protect each individual against market-irrational treatment, without regard either to whether she was a member of a group that had conventionally been subject to mistreatment or to our ability to determine that the actor who treated her irrationally did so on the basis of a group-based ascriptive characteristic.").

283 *Cf.* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1104–05 (2004) (making a similar argument with respect to reverse discrimination cases).

284 Greene, *supra* note 11, at 92.

cases. It is of no matter whether classifications are wrong, applicable to only a subset of the class, intersecting, or intended to advantage the plaintiff's own group. If the aim of equality law is to deter and redress impermissible group-based classifications, it should investigate the motives of decisionmakers to see whether employers are using impermissible classifications, plain and simple.[285] It does not matter whether a discriminator's impermissible classifications are accurate or inaccurate, well-founded or fanciful, benevolent or nefarious.

Some readers may object that anti-classification is a limited understanding of the aims of discrimination law that only addresses discriminatory intent or formal differential treatment. To be clear, this Article does not endorse anti-classification as the best or only understanding of discrimination law; it argues that anti-classification is not about protecting classes.

B. Anti-Essentialism

Anti-essentialists view the ends of discrimination law not as protecting an abstract concept of merit or individual liberty, but as destabilizing institutional practices that reinforce group difference and assign stereotypical roles.[286] Anti-essentialism is critical of the tendency to "reduc[e] a complex person to one trait—the trait drawing that person into membership in a particular group—and then equating that trait with a particular viewpoint and stereotype."[287] Anti-essentialist scholars see group-based identities as constructed and contested through social interaction, not as fixed and stable properties of individuals.[288]

Because of its skepticism toward equality law's foundational categories, anti-essentialism might be thought too blunt an instrument to suggest any directions for legal reform. This Article does not consider

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285 Some courts have recognized as much. *See, e.g.*, Arsham v. Mayor of Balt., 85 F. Supp. 3d 841, 847 (D. Md. 2015) ("Treating certain people less favorably than others on the basis of a protected classification is the essence of disparate treatment. This is true regardless of whether an employer intends to discriminate against an individual expressly because of a protected characteristic or intends to discriminate based on the employer's perception, mistaken or accurate, of an individual's protected characteristic." (citation omitted)).

286 *See* Vicki Schultz, Antidiscrimination Law as Disruption: The Emergence of a New Approach to Understanding and Addressing Discrimination 1 (Feb. 2014) (unpublished manuscript) (on file with author).

287 Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 653 (1996).

288 Anti-essentialists sometimes view identity as "performative," or formed through repeated behaviors, communications, and acts that signify racial or gendered meanings to a community. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1172–86 (2004).

any version of anti-essentialism[289] that would deny the reality and experience of group membership or endeavor to annihilate group identities from all aspects of social life.[290] Rather, it considers those versions of the theory that recognize that the law might employ identity categories as "proxies": provisional labels that serve the ends of undermining stereotypes that limit equal opportunity.[291] These theories are responsive to empirical arguments about how equality law can perpetuate or disrupt stereotypes. They offer reasons to object to both the means and ends of protected class gatekeeping.

Anti-essentialists would object to the means of protected class gatekeeping as a legal rule, for two reasons. First, protected class gatekeeping often works on the assumption that the boundaries of identity groups are fixed and acontextual. But the incoherence of identity group definitions exposes the instability and contingency of those categories.[292] Race, for example, has multiple conflicting definitions based on "appearance, ancestry, reputation, status, performance, science, and associations,"[293] all competing with the right to racial self-identification.[294] Consider the dispute about whether the plaintiffs in *Leonard v. Katsinas* who identified as Native Americans qualified as

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289 Anti-essentialism is not a monolithic theory (how could it be?) and the various threads of anti-essentialism discussed herein do not always lead in the same directions.

290 Anti-essentialist arguments sometimes take the strong form of asserting there is no "there there" to identity, and that race and sex are but cultural ephemera. *Cf.* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 865–75 (2002) (critiquing the "strong" model of performativity). More often, though, they take the weak form of asserting that even if there might be some underlying biological or genetic bases for identity categories, it would be impossible to disentangle those aspects from the social, political, and economic structures that give them meaning, and even more unfathomable to settle upon coherent definitions of the boundaries of those categories with any consistent applications. *See id.*

291 Lauren Sudeall Lucas, *Identity As Proxy*, 115 COLUM. L. REV. 1605, 1613 (2015) (exploring "what equal protection might look like if it were structured to reflect the values identity is intended to serve without explicitly invoking identity categories as a way to delineate permissible and impermissible forms of discrimination"). *See also* Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 603–04 (2012) (discussing a version of "strategic essentialism" in which oppressed groups "develop a general category or essentialized community, such as 'indigenous,' for the purpose of achieving particular political aims"); Schultz, *supra* note 286, at 2 (arguing for a "disruption" approach to equality law in which "the goal of law is not simply to protect *preexisting* groups, but rather to identify and interrupt the institutional policies and practices that tend to *divide people into those groups* by making their race/ethnicity or sex/gender the most salient thing about them within a particular institutional context").

292 Minow, *supra* note 287, at 657–60.

293 Ariela J. Gross, Reply, *Book Review Symposium: What We Do When "Blood Won't Tell," Reviewing Ariela J. Gross, What Blood Won't Tell: A History of Race on Trial in America (2008)*, 83 S. CAL. L. REV. 495, 497 (2010).

294 *See generally, e.g.*, Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1529 (2014).

members of the protected class when not all of them met blood quantum standards or were formally registered with a tribe.[295] Complicating the question is the increase in multiracial individuals who "may assume a host of different racial identities" that "may depend on the point in time or the context."[296] On the view that identities are not fixed and stable, investigations into whether a racial identity is objectively authentic, such as those undertaken by the courts in *Leonard* and *Chaib*, are troubling, because they suggest that racial identity has a natural and unchanging meaning.[297] Professor Kenneth Karst has called the language of "suspect classes" an "abomination" because it places the burden on plaintiffs "to persuade the courts, not just that they have been subjected to discrimination on the basis of someone's characterization of them in, say, racial terms, but also that they are qualified members of a group that, in truth, qualifies as a race."[298]

In addition to rejecting the idea of fixed identity classifications, anti-essentialism is at odds with protected class gatekeeping because it requires courts to police identity claims rather than deferring to a plaintiff's self-determined identity. Anti-essentialists might agree with a modified version of Justice Kennedy's view that "state-mandated" identity classifications are offensive to dignity.[299] As Dean Martha Minow has noted, because membership and belonging are deeply felt issues, "[t]he gaps and conflicts among self-identification, internal group membership practices, and external, oppressive assignments have given rise to poignant and persistent narratives of personal and political pain and struggle."[300] A practical consequence of protected class gatekeeping is ugly "identity adjudication" in which people's claims to identity are judged for their conformity with biological standards and cultural stereotypes.[301]

While they are skeptical of identity classifications, many anti-essentialists do not take the absolute position that the law should never consider groups or employ identity classifications. Rather, they acknowledge that contingent and contextual identity classifications are often necessary to serve the ends of equality law. For example, they might endorse efforts to discern hierarchy and segregation

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295 *See supra* notes 121–24.

296 Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1246 (2014) (discussing social science evidence).

297 *See infra* notes at 117–30.

298 *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 326 (1995).

299 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

300 Minow, *supra* note 287, at 657.

301 Greene, *supra* note 11, at 145–52.

through collection of statistics about race and gender, viewing the "classes" employed by these statistics simply as aggregates: artifacts constructed for purposes of the inquiry into the dynamics of segregation and hierarchy, not essential notions of group identity. An anti-essentialist might endorse certain forms of affirmative action that are designed to break down stereotypes.[302] But protected class gatekeeping in disparate treatment law does not advance the ends of anti-essentialist theory.

On an anti-essentialist theory, the goal of equality law is to undermine systemic social stereotypes. Anti-essentialists object to stereotypes because they are overgeneralizations. A trait, like race or gender, "is at best a rough proxy" for any particular "viewpoint, experience, or political interest and commitment."[303] This perspective overlaps somewhat with intersectionality theory.[304] Overgeneralizations about groups may reflect the experiences of only a subset of group members, as when a women's movement focuses solely on issues like "having it all" in terms of the perfect family and high-profile job—an aspiration far from the minds of those just trying to make it through the day-to-day of low-wage work and reliance on extended family for childcare. From this perspective, the idea of a protected class of "women as women" is incoherent. Stereotypes about gender affect women differently according to their varying social positions. Thus, anti-essentialists are sharply critical of courts' failure to understand discrimination against plaintiffs falling into multiple or unprotected classes.[305]

Another version of anti-essentialist theory might see the problem of discrimination in how it reinforces separate life paths based on race, gender, and other class-based attributes.[306] A variation on the libertarian streak that runs through anti-classification theory—a com-

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302 *See, e.g.*, Vicki Schultz, Reimagining Affirmative Action 34 (Apr. 2015) (unpublished manuscript) (on file with author) (arguing that affirmative action, if undertaken with attention to the psychological and sociological dynamics of group differentiation, can remedy the institutional segregation that drives social stereotyping).

303 Minow, *supra* note 287, at 653–54.

304 *See generally* Crenshaw, *supra* note 17. Intersectionality theory is not necessarily anti-essentialist; it sometimes tends toward celebration of group difference along multiple axes. Nor is anti-essentialist theory necessarily intersectional; it sometimes tends toward myopic focus on single dynamics such as gender. But the two theories are compatible insofar as intersectionality complicates the essential vision of the protected class.

305 *See, e.g.*, Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2497 (1994) (arguing such decisions "reflect[ ] a profound discomfort with the recognition of a complex or multiply constructed subject" and a failure to understand "the way that groups come to be constructed by discriminatory practices").

306 *See* Clarke, *supra* note 131, at 762. My argument is not that all anti-essentialists would agree with this position.

mitment to allow every person to "define her own persona"[307]—intersects with some anti-essentialist work.[308] Anti-essentialists, however, do not seek to liberate the authentic self from the constraints of culture. Rather, they understand the self as produced through interaction with culture. Thus, anti-essentialists are more likely to be skeptical of individuals' own professions of their preferences, asking whether those preferences were developed under conditions of social constraint and limited opportunities.[309] The thick version of autonomy contemplated by this theory would require that the law disable group-based social constraints and widen opportunities, rather than merely eliminating overt classifications.

An objection to identity-based segregation, rather than just stratification, is what differentiates this strand of anti-essentialism from theories of equality concerned only about group-based hierarchy. Professor Mary Anne Case provides the example of "a society with two castes, not upper and lower, not Brahmin and untouchable, but priest and warrior" in which "[t]he two castes are equal in status, but radically different in role."[310] An anti-essentialist would object to this social structure because it locks people into certain stereotypical life paths based on caste, even though both castes are equal in status. Of course, in practice, separate is never equal, and so anti-essentialists and anti-subordination theorists generally agree that segregation is wrong.[311] Because they object to all forms of coercive identity-based segregation, anti-essentialists stress that gender bias harms not only women, but also men, as well as people who transition between, permute, or refuse to adopt gender-based labels.

The misperception cases[312] are disconcerting to anti-essentialists, as the use of stereotypes to attribute an identity to a plaintiff is pre-

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307 *See supra* note 279.

308 For a theory of equality that melds skepticism of essential identities with a liberal commitment to the individual, see FISHKIN, *supra* note 272, at 121 ("[S]ocial structures like a caste system, a class system, or a gender role system, . . . steer us (and in extreme cases, force us) to live out scripts that are the ones society deems appropriate for people like us. From this perspective, part of the distinctive appeal of equal opportunity is that it gives each of us more of a chance to depart from such scripts—for each of us to become, in Raz's terms, 'part author of his life.'" (quoting JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1986)).

309 *E.g.*, Russell K. Robinson, Review Essay, *Uncovering* Covering, 101 NW. U. L. REV. 1809, 1829–39 (2007).

310 Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1476 (2000).

311 Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954) (rejecting "the so-called 'separate but equal' doctrine").

312 *See supra* note 116.

cisely the sort of practice that should be disrupted.[313] Although some anti-essentialists have suggested a "regarded as" fix,[314] their principles require that the law go further than simply asking if a discriminator regarded a plaintiff as a member of the right protected group. Sexist harassment perpetuates stereotypes even if the plaintiff was not a woman and the discriminator did not "regard" that plaintiff as a woman. A variation on the antistereotyping theme is that thinking in terms of protected classes lends itself to reductive ideas about who is the oppressor and who is the oppressed. Members of dominant groups are seen as invariably privileged by dynamics such as racism and sexism, but those dynamics can work to their disadvantage as well. One branch of anti-essentialist scholarship is masculinities studies. The key insights of this field are that (a) masculinity is socially constructed and depends on "race, class, sexual orientation, age, and other identity factors," and (b) expectations for masculine behavior are unattainable for most men, and the social pressures to behave in hypermasculine ways are damaging to girls, boys, women, and men.[315] This view suggests reconsideration of cases holding that, for example, white plaintiffs do not experience direct harm when impacted by violence or segregation in the name of white supremacy.[316] It is not how the perpetrator regarded the victim that matters, but whether the practice was sexist, racist, or otherwise biased in a way that the law should disrupt.

Some readers may object that anti-essentialism fails to grapple with what Minow has called the "dilemma of difference": the question "when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?"[317] Anti-essentialism has an uneasy relationship with doctrines such as religious accommodation that define certain practices as group-based and require that institu-

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313 *See* Karst, *supra* note 298, at 326–27 ("[R]ecognition of the metaphoric quality of race is no impediment to a holding that an actor commits a constitutional or statutory wrong when he discriminates against someone because he assumes his target to be a member of some race—or, as some statutes say, he acts on 'account of' or 'because of' the victim's race. The author of the harm may have a mental picture of race that is not only eccentric but also unrelated to any actual characteristic of his victim—and yet he may deserve to be punished for (or enjoined from) racial discrimination.").

314 *E.g.*, Minow, *supra* note 287, at 677–78.

315 Ann C. McGinley, *Introduction: Men, Masculinities, and Law*, 13 NEV. L.J. 315, 315–16 (2013).

316 *See supra* notes 180–203 and accompanying text.

317 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

tions account for group differences.[318] This Article does not endeavor to resolve the difference dilemma or to make any argument about accommodation. It argues simply that anti-essentialism counsels against protected class gatekeeping in disparate treatment cases.

C. *Anti-Balkanization*

Another challenge to protected class gatekeeping comes from the anti-balkanization perspective.[319] Professor Reva Siegel has described the "anti-balkanization perspective" as an emerging viewpoint that understands the aim of equality law as countering "threats to social cohesion"[320] and "cultivating social bonds that enable groups to relate and identify across difference."[321] Thus, equality law should aim to remedy the marginalization of particular groups as outsiders.[322] But in doing so, it must use "means that do not unduly stimulate group resentment" from insiders.[323] Certain legal rules may appear to create a zero-sum game for opportunities in which wins for minorities are losses for majorities.[324] Relatedly, various minority groups may envision a competition for the spoils of equality law in a metaphorical

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318 Some anti-essentialists may respond that they are skeptical not only of group-based classifications but also of purportedly neutral rules—such as those based on abstract concepts of merit—which do not account for baseline conditions of inequality and reflect the experiences and assumptions of the privileged. The idea of a general perspective that might support universal rules could be yet another troubling form of essentialism.

Other anti-essentialists might turn to the universal, seeking changes to baselines that improve conditions for all. *See* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1244 & n.149 (2011) (discussing how movements on behalf of vulnerable groups may expose practices that are problematic for everyone, yielding universal reforms).

319 *See generally* Siegel, *supra* note 24. Siegel's claim is a descriptive one; she does not advance anti-balkanization as a normative theory. *Id.* at 1351.

320 *Id.* at 1300.

321 *Id.* at 1301.

322 *See id.* at 1352.

323 *Id.* at 1352. Siegel observes this principle at work in the opinions of swing-vote Justices in politically controversial cases on matters such as affirmative action. *Id.* at 1303–48 (discussing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007), and Ricci v. DeStefano, 557 U.S. 557 (2009)). Thus, in *Ricci v. DeStefano*, the Court held that an employer might consider the racially disparate impact of a promotion exam before the exam is given, but not after the results are announced, because invalidating a test after it is given "frustrate[s] the hopes and expectations of those who took it." *Id.* at 1331.

324 Siegel quotes a campaign speech by then-Senator Barack Obama, observing that "[m]ost working- and middle-class white Americans don't feel that they have been particularly privileged by their race. . . . [I]n an era of stagnant wages and global competition, opportunity comes to be seen as a zero sum game, in which your dreams come at my expense." *Id.* at 1349 (quoting Barack Obama, *A More Perfect Union: Address at the National Constitution Center*, *in* THE SPEECH: RACE AND BARACK OBAMA'S "A MORE PERFECT UNION" 243 (T. Denean Sharpley-Whitins ed., 2009)).

"[o]ppression Olympics."[325] In such cases, intergroup resentments may end up undermining efforts to remedy inequality.[326] From this perspective, civil rights law should emphasize "inclusion and commonality" rather than difference.[327] For example, legal rules that appear racially motivated, such as gerrymandering, are likely to increase resentments and prevent the formation of coalitions for change.[328] By contrast, interventions targeted at achieving a capaciously-defined concept of diversity appear more legitimate because they do not draw lines around groups and they highlight their benefits for all.[329]

Protected class gatekeeping has the potential to be balkanizing, calling to mind special, partial, or preferential treatment.[330] For some, the term "protected class" may invoke the idea of Marxist class struggle and redistribution of wealth, transferred over to ideas about race, sex, and other identities. Consider a Missouri statute on school antibullying rules that provides: "Policies shall treat all students equally and shall not contain specific lists of protected classes of students who are to receive special treatment."[331] The rhetoric of "special rights" has long been used to attack laws guaranteeing nondiscrimination on the basis of sexual orientation. In the 1996 decision *Romer v. Evans*, the Supreme Court struck down a Colorado state constitutional amendment that would have forbidden Colorado municipalities from enacting sexual orientation nondiscrimination rules.[332] The amendment had been justified on the ground that nondiscrimination rules granted "homosexuals special rights."[333] The Court found this reading "implausible," as there was "nothing special in the protections" withheld by the amendment.[334] Rather, it understood nondiscrimination rules as "protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[335] More recently, the Louisiana legislature enacted a law adding "police officers" as a protected class under its

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325 *See, e.g.*, Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1045 (2014) (discussing this dynamic in same-sex marriage litigation).

326 Siegel, *supra* note 24, at 1300.

327 *Id.* at 1359.

328 *Id.* at 1302 & n.70.

329 *See id.* at 1302.

330 *See* e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 483–84 (1998).

331 MO. REV. STAT. § 160.775(3) (2016).

332 517 U.S. 620, 623–24 (1996).

333 *Id.* at 626.

334 *Id.* at 626, 631.

335 *Id.* at 631.

hate crimes statute: a new intervention in the divisive political discussion about whether "black lives" or "blue lives" are most at risk.[336]

Experience with the ADA is again instructive. Scholars have long documented a public and judicial "backlash" against the statute, and "most agree that it is fueled, at least in part, by a belief that the ADA is a form of targeted social welfare rather than a general antidiscrimination law."[337] The ADA defines a protected class and provides that a subset of that class—individuals with actual, substantially limiting disabilities—is entitled to reasonable accommodation from their employers.[338] The Supreme Court has thus referred to the statute as granting "preferences."[339] Judges have employed arguments against affirmative action as reasons to narrowly construe the ADA's scope.[340] In the years leading up to the 2008 amendments, courts winnowed down the protected class,[341] prompting Congress to amend the statute's definitions of disability.[342] The ADA's interventions are often imagined as zero-sum, as when a disabled employee is permitted to work the day shift at the expense of his nondisabled coworkers, who must cover the night shift. This is notwithstanding that courts have held the ADA does not require this sort of accommodation.[343] Overlooked are the ways accommodations for disabled employees can benefit those who are not disabled, as when cuts in sidewalk curbs that were mandated for people in wheelchairs also help parents pushing strollers and shoppers pushing carts.[344] Scholars have described

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336 *See* Elahe Izadi, *Louisiana Is the First State to Offer Hate Crime Protections to Police Officers*, WASH. POST (May 26, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/26/louisianas-blue-lives-matter-bill-just-became-law/?utm_term=.8a364249c6ee.

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

338 42 U.S.C. §§ 12102(1), 12112(b)(5)(A)–(B) (2012). Those merely "regarded as" disabled are not entitled to reasonable accommodation. *Id.* § 12201(h).

339 U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

340 Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1048–49 (2000).

341 *See, e.g.*, Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 108–09 (1997); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000).

342 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified at 42 U.S.C. § 12102(4)(A)) (stating that the ADA is to "be construed in favor of broad coverage of individuals").

343 *See, e.g.*, Rehrs v. Iams Co., 486 F.3d 353, 357 (8th Cir. 2007).

344 *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 862 (2008).

myriad ways in which the ADA benefits those without disabilities.[345] They have convincingly demonstrated that the accommodation mandate is not fundamentally different from other types of costs imposed by nondiscrimination laws.[346] And they have pointed out that most people could very well be disabled at some point in their lives.[347] Yet the backlash has not abated.[348] The labor force participation rate of people with disabilities has only declined.[349]

The arguments that appearances matter and that equality law should be framed in ways that emphasize commonality over partiality suggest reasons to eliminate protected class terminology and gatekeeping. Those cases in which courts refuse to acknowledge intersectional forms of discrimination, fail to see how homophobia overlaps with sexism, and disregard how white people might be harmed by racist animus against people of color all create the perception that the law only protects some groups against others.

Some readers may object that, although described as a principle, anti-balkanization is not principled at all.[350] If there is a positive vision of social cohesion at the core of the approach, it is inchoate. The theory's concerns with politics, appearances, and legitimacy might be understood as limiting equality to those contexts in which it converges

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345 *Id.* at 845 (discussing how workplace accommodations benefit "[t]hird parties" by "introduc[ing] different ways of doing things, which sometimes alter and improve the environment for many people"); Travis, *supra* note 337, at 331–77 (discussing benefits, including exposing workers to diverse perspectives, saving taxpayer dollars that would otherwise go to public assistance for unemployed disabled workers, expanding medical privacy for all workers, and helping caregivers for disabled workers).

346 Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 830 (2003) ("[A]rguments that have been proffered for a strong normative distinction between antidiscrimination and accommodation are unpersuasive, and . . . the two modes of civil rights law have a great deal in common both practically and morally."); Jolls, *supra* note 72, at 645 (describing parallels between antidiscrimination and accommodation, such as that both "require employers to incur undeniable financial costs associated with employing the disfavored group of employees").

347 Travis, *supra* note 337, at 332.

348 *See, e.g.*, Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 719–28 (2014) (discussing judicial "backsliding" on the ADAAA).

349 *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1017 (2003) (discussing "prominent empirical analyses of disability employment trends following enactment of the ADA" that "report negative findings"); *Office of Disability Employment Policy*, U.S. DEP'T OF LABOR, www.dol.gov/odep (last visited Dec. 4, 2016) (reporting a rate of labor force participation for disabled workers at 10%, near the lowest since 2008).

350 *Cf.* Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 228, 228 (Deborah Hellman & Sophia Moreau eds., 2013) (describing how anti-balkanization rests on consequentialist arguments about the effects of equality law on social cohesion rather than the moral principle that each person should be treated as an individual).

with the interests of dominant groups.[351] Even more cynically, there may be circumstances in which social cohesion, defined as stability and security, is best advanced through inequality.[352] This Article does not endorse anti-balkanization as a principle; it invokes the theory merely to argue that those concerned with the politics of antidiscrimination law should be wary of protected class gatekeeping.

D. Anti-Subordination

Anti-subordination theorists "argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups."[353] This theory rejects the "perpetrator perspective" that focuses equality law on the question of whether the alleged discriminator acted intentionally to harm a victim out of prohibited animus.[354] On the anti-subordination principle, the law should focus on remedying the disadvantageous conditions affecting the subordinated group, regardless of their cause or the intentions of discriminators.[355] Anti-subordination theory is "thick" in that it is attentive to how historical balances of power translate to present circumstances, how sociological understandings of the relationships between individuals, groups, and society affect the meanings of identities, and how material economic conditions can reinforce identity-based stratification. It is contrasted with the "thin" version of anti-classification theory that sees only formal institutional designations based on protected classifications as problematic.[356] It rejects the view that problems of inequality can be solved entirely by "blinding" institutional processes to identities. Orchestra auditions behind a screen will not give everyone a fair shot if the schools attended by children from

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351 *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

352 For example, social cohesion may be advanced through exclusion or incarceration of outsiders. More mundanely, inequality may not threaten social cohesion so long as those who are subordinated have adjusted their aspirations and preferences to reflect their limited opportunities. *See generally* JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (3d ed. 1987).

353 Balkin & Siegel, *supra* note 274, at 9. Often attributed to Professor Owen Fiss, who called the theory the "group-disadvantaging principle," the principle holds that the law should not reinforce "the subordinate status of a specially disadvantaged group." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 157 (1976).

354 *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978) ("The perpetrator perspective sees racial discrimination not as conditions, but as actions . . . . The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.").

355 *Id.* at 1053.

356 *See supra* notes 274–81 and accompanying text.

traditionally subordinated groups are perpetually underfunded and lacking in music programs.

At first glance, protected class gatekeeping may appear necessary to an anti-subordination approach. Unlike adherents of the other theories described in this Article, an anti-subordination theorist might not be concerned about the means of protected class gatekeeping in assigning group-based identities to individuals.[357] Anti-subordination theorists might consider the rejection of group rights to be part of the ideology of colorblindness that sees whites as an oppressed group.[358] On a political level, allowing privileged group members to bring suit is akin to the "all lives matter" rejoinder to the Black Lives Matter movement, denying the continued relevance of race and racism for the African American community.[359] Anti-subordination theorists might argue discrimination is only a social problem when it afflicts members of historically disadvantaged groups.[360] Members of privileged groups do not suffer injuries from discriminatory practices in ways that reinforce caste systems.[361] For example, while a white person might suffer economically if she is unfairly denied a job, that injury does not compound a pattern of stigma and bias going back generations and reaching across domains of social life from education to credit markets.[362] It does not offend her own sense of racial identity. It is perhaps this anti-subordination instinct, generally unstated, that motivates protected class gatekeeping,[363] and leads progressive jurists

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357 Anti-subordination and anti-classification views most often clash over the means of affirmative action. *See, e.g.*, Balkin & Siegel, *supra* note 274, at 12.

358 *See* Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 8–9 (2015).

359 *See* Barack Obama, Remarks by the President in Arm Chair Discussion on Criminal Justice with Law Enforcement Leaders (Oct. 22, 2015), https://www.whitehouse.gov/the-press-office/2015/10/22/remarks-president-arm-chair-discussion-criminal-justice-law-enforcement ("I think the reason that the organizers used the phrase 'Black lives matter' was not because they said they were suggesting nobody else's lives matter; rather, what they were suggesting was there is a specific problem that is happening in the African American community that's not happening in other communities.").

360 *E.g.*, Kelman, *supra* note 282, at 865–66.

361 *Id.* at 866 ("[W]e are not especially perturbed when a person is denied a job he is entitled to because he reminds the employer of a hated stepfather. . . . We place substantial weight on the fact that the decision not to hire in such a case does not confirm traditional status-based hierarchies, express the social power of one group over another, or demean the victim.").

362 *See* Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 389–90 (2006) (advancing a similar point in support of an argument to limit legal protections against trait-based discrimination to traditionally subordinated group members).

363 There are many explanations, of course. One obvious cause is generalized judicial hostility to the antidiscrimination project and the desire to clear dockets by creating simple

to continue to include language inviting protected class gatekeeping in proposals to reform discrimination doctrine.[364]

These are well-rehearsed arguments against reverse discrimination claims. But as applied to protected class gatekeeping, they fall apart. An anti-subordination theory, if true to its origins in thick social description, should aspire to transformative ends, not protection for groups. If an anti-subordination theory imagines equality law's goal as structural, leveling larger social, political, and economic systems of stratification, there are many reasons to reject protected class gatekeeping.[365] On a structural theory, discriminatory hierarchies are social problems like public health threats[366] and environmental pollution.[367] As the Supreme Court has observed, while a civil rights statute may provide redress to those who have suffered injuries from discrimination, "its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."[368] If undermining systemic patterns of group-based stratification is the aim, legal rules should redress those forms of discrimination that further stratification. Rather than asking whether a particular individual or minority group is deserving of special protection, a transformative version of anti-subordination theory would ask how institutions could be restructured so as to challenge systemic hierarchies.

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rules to screen out more cases. And yet, a wide variety of judges use protected class gatekeeping, including many appointed by presidents from the Democratic party, whom one might not expect to be influenced by such views. *See, e.g.*, Mosby-Grant v. City of Hagerstown, 630 F.3d 326, 336–37 (4th Cir. 2010) (Carter appointee and Clinton appointee); Chaib v. GEO Grp., Inc., 92 F. Supp. 3d 829, 832 (S.D. Ind. 2015) (Obama appointee); Jackson v. Deen, 959 F. Supp. 2d 1346, 1348 (S.D. Ga. 2013) (Clinton appointee); Jerome v. Midway Holding, Inc., No. CV 03-1913-PHX-MHM, 2007 WL 973968, at *3 (D. Ariz. Mar. 29, 2007) (Clinton appointee); Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D. Ga. June 30, 2006) (Clinton appointee). Another explanation is lazy common law reasoning, in which courts engage in rote repetition of poor statutory interpretation and doctrinal arguments. And yet, these oversights ought to have been corrected by the many contrary precedents. A third explanation might be the stubborn persistence of essentialist understandings of traits such as race. *See* Greene, *supra* note 11, at 131. But it does not follow from the ingrained attitude that race is biological to the conjecture that racism is strictly a reaction to obvious, biological traits. This narrow understanding of racism is likely to also be based in instincts about why only certain forms of discrimination are wrong.

364 *See supra* note 41.

365 *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (discussing a structural approach to discrimination that engages government and nongovernment actors in problem solving to influence "social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups").

366 *Supra* note 30 and accompanying text.

367 *Supra* note 31 and accompanying text.

368 Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (citations omitted) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

Rejection of the concept of group rights does not require that anti-subordination theorists accept reverse discrimination claims. An anti-subordination theorist can oppose reverse discrimination theories on the ground that affirmative action creates equal opportunity and dismantles segregation. The questions of "who may bring claims" and "what is discrimination" are distinct.[369] Alternatively, a pragmatic anti-subordination theorist might recognize that the battle for a concept of group rights that would preclude reverse discrimination claims altogether has been lost.[370] In light of that reality, it does not make sense for the law to limit who may challenge practices that harm subordinated groups. Nor does the rejection of protected class reasoning require that theorists adopt an "all lives matter" rationale that would extend a right to merit-based treatment to all workers except where it would be inconsistent with valid institutional purposes.[371] The anti-subordination argument against protected class gatekeeping is that those harmed by discriminatory dynamics such as racism, sexism, religious intolerance, and homophobia should have recourse to the law, whatever their identities.

There are a number of reasons eliminating protected class gatekeeping furthers anti-subordination goals. As an initial matter, many of the victims of protected class gatekeeping are indeed members of subordinated groups, particularly in the unprotected class,[372] intersectionality,[373] and misperception cases.[374] Consider, for example, the dispute over whether an August, 2012, shooting at a Sikh temple in a suburb of Milwaukee, Wisconsin, was a hate crime or random act of gun violence.[375] Perhaps because Sikh men traditionally

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369 *See supra* notes 59–65 and accompanying text.

370 Majority group members already bring reverse discrimination cases. However, abandoning the protected class would justify one type of challenge to affirmative action—suits by minority group members arguing that they were harmed when affirmative action went awry. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2204–12 (2013) (discussing ways that diversity initiatives can harm their beneficiaries, for example, by requiring that minority group members act out their racial identities in ways that appeal to the majority group).

371 *Cf.* Clarke, *supra* note 318, at 1245–49 (critiquing this brand of universalism, because expanded rights are likely to be diluted by employers demanding broader exemptions, and because rules that do not focus on discrimination are unlikely to resolve discrimination).

372 *See supra* notes 137–53 and accompanying text (discussing sex discrimination claims by LGBT plaintiffs).

373 *See supra* notes 154–76 and accompanying text (discussing discrimination claims based on intersections of racism and sexism).

374 *See supra* note 116 (collecting misperception cases); *supra* notes 232–68 and accompanying text (analyzing cases of discrimination in disregard for the plaintiff's identity).

375 *See At Service, Holder Calls Sikh Temple Shooting a Hate Crime*, CNN (Aug. 10, 2012, 6:03 PM), http://www.cnn.com/2012/08/10/us/wisconsin-temple-shooting/.

wear turbans and beards, Sikhs are often confused for Muslims and targeted for Islamophobic violence.[376] The motives of the Milwaukee attacker, a former "front man for a white supremacist rock band," are unknown, as he killed himself after being shot by a police officer.[377] Nonetheless, then-Attorney General Eric Holder called the violence a hate crime, explaining: "In the recent past, too many Sikhs have been targeted and victimized simply because of who they are, how they look, and what they believe."[378] The shooter targeted a minority community with terrorizing violence. That his motive was likely ignorance and misunderstanding of the distinctions between Sikhs and Muslims should be irrelevant to anti-subordination theory, which disparages violence in the name of white supremacy. To give Sikh victims whatever recourse might be available through equality law is to remedy stigmatizing violence against a minority religion, regardless of whether it was the one the attacker intended to harm.

The same moral argument—that the law should condemn harmful actions that express and reinforce the social superiority of certain groups over others—justifies extending this premise to majority group victims as well.[379] And there are also practical arguments in favor of allowing majority group victims to sue. In such cases, injunctive relief requiring the elimination of discriminatory practices and harassment would redound to the benefit of minority group members, and damages awards might deter future anti-minority discrimination. As Professor Camille Gear Rich has written, if majority group plaintiffs are not able to sue, practices that harm minority group members may never be challenged.[380] Minority group members "often possess too little information about their unfair treatment to bring a Title VII claim."[381] They may "believe the social costs incumbent to standing up for their interests are simply too high."[382] And "race discrimination is often carefully hidden from racial outgroup mem-

376 Emma Green, *The Trouble with Wearing Turbans in America*, ATLANTIC (Jan. 27, 2015), http://www.theatlantic.com/politics/archive/2015/01/the-trouble-with-wearing-turbans-in-america/384832/ (discussing survey research on American ignorance about the Sikh religion and quoting the co-founder of a Sikh advocacy organization: "Being Sikh, we have turbans and beards, and we have an image that's associated with some of the most negative aspects of society—a lot of the events that have happened in the last 10 to 15 years, [such as] 9/11." (alteration in original)).

377 CNN, *supra* note 375.

378 *Id.*

379 *Cf.* HELLMAN, *supra* note 272 (offering an expressive theory of the harm of discrimination).

380 Rich, *supra* note 19, at 1503.

381 *Id.*

382 *Id.*

bers."[383] I would add that majority group members may be more likely to succeed in litigation because majority group jurists may better relate to them.[384] Moreover, being a plaintiff in a discrimination lawsuit is no easy path to riches; it is time-consuming, emotionally devastating,[385] high risk,[386] low reward,[387] and damaging to one's career prospects.[388] To suggest that members of subordinated groups ought to do all of the heavy lifting in raising complaints of discrimination, a social problem, is to impose the unfair demand that minority group members do all the work of equality.

It would also create incentives for employers to avoid hiring minority group workers, on the view that any member of a "protected

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383 *Id.*

384 In explaining her historic success in litigating a sex discrimination claim by a male plaintiff challenging a policy that gave benefits to widowed mothers but denied them to widowed fathers, Justice Ginsburg remarked: "Perhaps part of the explanation for Justice Rehnquist's view was his loving involvement in the upbringing of his granddaughters. Perhaps that life experience, more than my lawyer's arguments, led to his decision in favor of the father." Cary Franklin, *Justice Ginsburg's Advocacy and the Future of Equal Protection*, 122 YALE L.J. ONLINE 227, 233 (2013), http://www.yalelawjournal.org/forum/justice-ginsburgs-advocacy-and-the-future-of-equal-protection.

One study found that "[p]laintiffs are more likely to survive the dismissal phase if they are white than if they are a person of color" and that this effect was not explained by whites' success in reverse discrimination cases. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 189–90 (2010). By contrast, women were more likely to survive dismissal than men, an effect that was explained by men's inability to win reverse discrimination suits. *Id.* at 190 & n.7. This study did not separately analyze the success rates of white or male plaintiffs at challenging anti-Black or anti-female forms of discrimination.

385 *See, e.g.*, CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2002) (telling the story of a miner who sued her employer for sexual harassment in a case that lasted fifteen years, during which the class action plaintiffs were excoriated by their small community and subjected to "scorched earth" discovery into painful episodes in their pasts).

386 *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1279 (2012) (describing psychological research demonstrating that "in all but the most compelling factual circumstances, most people believe that some measure of merit—such as effort or ability—is a more likely explanation for why minorities fail").

387 *See* Nielson et al., *supra* note 384, at 187–88 (analyzing a random sample of 1672 employment discrimination case filings between 1988 and 2003 and concluding that the median settlement amount in the 75 cases for which settlement amounts were disclosed was $30,000, and the median award in the 32 cases in which the plaintiff prevailed at trial was $110,000).

388 *See* Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254, 254 (2001) (discussing experiments demonstrating backlash against members of stigmatized groups who complain of discrimination, "regardless of the objective likelihood that discrimination occurred").

class" is a litigation risk.[389] And it would eliminate incentives for majority and minority group members to form coalitions to challenge discrimination. As Professor Noah Zatz has argued: "Whether women and racial minorities experience discrimination often depends on whether the discriminatory tendencies of a few supervisors or coworkers are amplified or counteracted by other members of the workplace."[390] Majority group members can advance the project of anti-subordination in many ways:

> from initiating grievances over discrimination, chastising coworkers for racist or sexist remarks, supporting a colleague subjected to discrimination, recognizing the value of a professional contribution, offering honest criticism, accepting a [woman or minority group member's] exercise of workplace authority, or avoiding patronizing "protection" from risky but rewarding tasks, to forming social ties across group boundaries.[391]

But if these coworkers are unprotected by the law, they are less likely to work for equality and more likely to remain silent bystanders, or to give in to pressure to exclude outsiders.[392]

Anti-subordination–oriented readers may still be wary of moving from a class-protection to a transformative approach, and concerned about how disparate treatment law might function without protected class gatekeeping. The next Part will address these concerns.

III
REFOCUSING DISCRIMINATION LAW ON FORBIDDEN GROUNDS

This Part argues that discrimination law can function without protecting classes. Supreme Court precedents in areas such as stereotyping demonstrate that the law can identify forbidden motives without protected class gatekeeping. Moreover, courts are already applying a broad understanding of disparate treatment in reverse discrimination contexts. If majority group members who find themselves on the losing end of diversity initiatives are not subjected to protected class gatekeeping, neither should be victims of more traditional forms

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389 *See* Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It's Hard to Fire?*, 45 J.L. & ECON. 41, 41 (2002) (finding evidence of a "sorting effect, which causes firms that are more susceptible to discrimination litigation to substitute away from protected workers").

390 Zatz, *supra* note 19, at 70.

391 *Id.* at 74.

392 *Id.* at 70. *See also* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1049–54 (1995) (offering an economic theory explaining how the production of racial status requires that whites induce intra-group cooperation by sanctioning other whites who break rank).

of bias. Stereotyping and reverse discrimination cases provide a roadmap for how courts might analyze run-of-the-mill cases without engaging in protected class gatekeeping. After describing these precedents, this Part will address some practical objections to eliminating protected class gatekeeping, most of which would come from an anti-subordination perspective. It will close by exploring how some of the cases discussed in this Article might be resolved without protected class reasoning.

A. Precedents

An approach to discrimination law that focuses on prohibiting bias rather than protecting classes could draw on sex stereotyping and reverse discrimination doctrines for support.

Sex stereotyping and harassment doctrines undermine the idea that statutes such as Title VII only protect discrete classes. The Supreme Court has held that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of *men and women* resulting from sex stereotypes."[393] Title VII forbids an employer from acting on descriptive stereotypes, for example, that women are not ambitious, and also prescriptive ones, for example, that woman should not be ambitious.[394] Thus, it protects against gender stereotypes that may affect only certain members of the class of women, such as working mothers.[395] The doctrine recognizes that men face a complementary set of gender stereotypes, for example, those that assume and dictate that men "lack . . . domestic responsibilities."[396] It is of no matter that both groups face stereotypes, that only certain members of either group may be subjected to stereotypical treatment, or that within any given workplace, there may be no similarly situated

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393 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (alteration in original) (emphasis added) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

394 *Id.* at 250 (explaining that an employer who "acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").

395 *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120 (2d Cir. 2004) ("[I]t takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'").

396 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735–36 (2003) (holding that "mutually reinforcing stereotypes" about men and women "created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees").

member of the other group who received preferential treatment. Men too may sue on a sex stereotyping theory:

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.[397]

This is because "Title VII protects persons, not classes."[398] As the Second Circuit explained, "the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace."[399] If the reason was a gender stereotype, it was sex discrimination.

Courts are further eroding the class-protection understanding of disparate treatment as they gradually expand sex discrimination law to encompass sexual orientation bias. In accord with the position recently taken by the EEOC, some courts have rejected the argument that discrimination on the basis of sex means animus toward women or men as a class.[400] As one district court explained, the definition of "sex" is not "male or female," just as the definition of "religion" is not Christianity, Islam, and Judaism.[401] The plain meaning of discrimination on the basis of sex is "related to sex or ha[ving] something to do with sex," a definition that encompasses discrimination based on sexual orientation and gender identity.[402] Applying sex-stereotyping doctrine, some courts reason that "[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."[403] Other courts have not yet been willing to go so far, reasoning that, even if the statute is not about protecting classes, it does

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397 Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 581–82 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). The fact that *Doe* was vacated has not called into question its holding on sex stereotyping. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001).

398 *City of Belleville*, 119 F.3d at 574.

399 *Back*, 365 F.3d at 121 (quoting Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001)).

400 *See supra* notes 137–139 and accompanying text.

401 Fabian v. Hosp. of Cent. Conn., No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at *13–14 (D. Conn. Mar. 18, 2016) (holding that "discrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex.'").

402 *Id.* at 13 (quoting Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 822 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984)).

403 *E.g.*, Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

differentiate between types of *discrimination*, and there may be some types of antigay animus, such as that based on "ideas about promiscuity" or "religious beliefs" that do not reduce to sex discrimination.[404] But at least these courts are on the right track, asking about the nature of bias rather than the nature of identity. Moreover, without a concept of group rights, distinctions between sex- and sexual orientation-based discrimination are proving increasingly untenable.[405]

The Supreme Court's jurisprudence on majority group members harmed by diversity efforts also proceeds without reference to protected classes. *Ricci v. DeStefano*[406] is a good example. In that case, the New Haven fire department gave an exam to determine which firefighters would qualify for promotions.[407] When the results of the exam were that white candidates performed better than Black and Hispanic candidates, the city, concerned about disparate impact liability based on this statistical disparity, decided to ignore the test and give no promotions.[408] White and Hispanic firefighters who alleged they would have been promoted based on the exam then sued for race discrimination.[409] It was of no moment to the Supreme Court whether these plaintiffs fell within a protected class, to which protected class they belonged, or whether members of multiple protected classes, majority and minority groups alike, could sue together about the same act of discrimination. Because the city's express reasons for throwing out the test "were related to the racial distribution of the results" the city was engaged in "race-based decisionmaking" that ran afoul of "Title VII's command that employers cannot take adverse employment actions because of an individual's race."[410] It was not just that

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404 Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 709 (7th Cir. 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720 (7th Cir. Oct. 11, 2016) ("Although it seems likely that most of the causes of discrimination based on sexual orientation ultimately stem from employers' and co-workers' discomfort with a lesbian woman's or gay man's failure to abide by gender norms, we cannot say that it must be so in all cases.").

405 *See id.* at 718 (concluding that the distinction between sexual orientation and sex discrimination is unreasonable, but that the circuit must adhere to its prior precedent absent new legislation or a contrary Supreme Court opinion). At the very least, courts that have abandoned protected class reasoning are not "throw[ing] the baby out with the bathwater" by concluding that LGBT plaintiffs may not even raise gender stereotyping claims because they fall into an unprotected class. *Id.* at 706.

406 557 U.S. 557 (2009).

407 *Id.* at 561–62.

408 *Id.* at 562.

409 *Id.* at 562–63.

410 *Id.* at 579. Thus, the Court held the city was liable for disparate treatment, unless it could prove, as a defense, that it had a strong basis in evidence for believing that the test would have subjected it to liability for disparate impact discrimination. *Id.* at 584. It did not. *Id.*

race had been taken into account, as some considerations of race might be benign "efforts to ensure that all groups have a fair opportunity."[411] But in *Ricci*, race had been used to upset the "legitimate expectation[s]" of the test takers "not to be judged on the basis of race."[412] Whatever one might think of *Ricci*'s distinction between benign and invidious racial considerations (and it is not the task of this Article to defend that distinction), the case demonstrates that Title VII does not require protected class gatekeeping.

Courts might, however, distinguish the aforementioned cases as exceptional because the employers' motivations were explicit. In run-of-the-mill cases in which the evidence is circumstantial,[413] plaintiffs must rely on the *McDonnell Douglas* framework to prove discriminatory causation, and that framework asks for a protected class showing. But it does not have to. Reverse discrimination cases prove this point. In *Iadimarco v. Runyon*, the Third Circuit explained,

> [A]ll that should be required to establish a prima facie case in the context of "reverse discrimination" is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.[414]

A similar rule could very well be applied to the cases discussed in Part I of this Article. In cases in which there is no issue as to the plaintiff's protected class, courts could treat this aspect of the prima facie case as nominal, a mere allegation of fact that goes to the ground for discrimination the plaintiff is alleging, not a requisite element.

Alternatively, courts could adopt the approach of other circuits that require a plaintiff who is a majority group member to show, in lieu of protected class membership, some additional "'background circumstances' that establish that defendant is the 'unusual employer' who discriminates against the majority."[415] Courts that require the "background circumstances" element have not held plaintiffs to an

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411 *Id.* at 585.

412 *Id.*

413 Many commentators argue that while the "first generation" of discrimination entailed explicit exclusions of members of minority groups, today's "second generation" discrimination is more likely to be covert, implicit, and structural. *E.g.*, Sturm, *supra* note 365, at 460.

414 190 F.3d 151, 161 (3d Cir. 1999). *See also* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011) (following the Third Circuit's approach); Byers v. Dall. Morning News, Inc., 209 F.3d 419, 426 (5th Cir. 2000) (applying the *McDonnell Douglas* framework, without modification, to majority group members).

415 *Iadmarco*, 190 F.3d at 161 (describing and rejecting the "background circumstances" test).

onerous burden.[416] Regardless of the choice of legal rule, courts will dismiss cases in which there is scant evidence of discriminatory causation.[417]

A related objection might be that abolishing protected class gatekeeping only defers membership controversies to the pretext or ultimate stage of the causation analysis, in which courts will demand evidence that a discriminator, at the very least, thought the plaintiff was a member of a certain protected class and gave favorable treatment to someone outside that class. Professor Suzanne Goldberg has criticized overreliance on this "comparator" heuristic for discerning discrimination.[418] To be sure, when a plaintiff relies on comparator evidence to show causation, she will need to demonstrate that her employer regarded her as having some protected trait that her comparator did not. Importantly, a comparator is not, and should not be, the only way to demonstrate discrimination.[419] In most of the cases discussed in this Article, there is direct evidence of discriminatory motive in the form of statements by harassers and decisionmakers.[420] Critiques of overreliance on the comparator heuristic aside, a discussion of perceptions of racial and other identities should be a part of the causation question. That is not protected class gatekeeping or even protected class reasoning; it is evidence of an impermissible motivation.

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416 *See, e.g.*, Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993) ("This requirement is not designed to disadvantage the white plaintiff, who is entitled to the same Title VII protection as a minority plaintiff.").

417 The effective difference in these two standards comes down to the following: When courts applying the background circumstances element confront a majority group plaintiff with a thin prima facie case—for example, no more than evidence that he was qualified for a promotion but that it went to a minority—the analysis would end and the case would be dismissed. *See, e.g.*, Adamson v. Multi Cmty. Diversified Servs., Inc., 514 F.3d 1136, 1150 (10th Cir. 2008). By contrast, a thin prima facie case would generally suffice were the plaintiff a minority group member, and the analysis would then proceed to the requirement that the employer come forward with its legitimate, nondiscriminatory reason for favoring another applicant. *Id.* But employers invariably come forward with a purported nondiscriminatory reason at summary judgment. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2271 (1995). Once the employer asserts its reason, if the minority group plaintiff has no evidence to suggest that reason is a pretext for discrimination, the result is likely to be dismissal. It is difficult to imagine a case in which a plaintiff would be unable to demonstrate any "background circumstances" suggesting discrimination, but would ultimately be able to show that an employer's reason for treating her adversely was a pretext for a prohibited form of discrimination.

418 Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 750 (2011).

419 *Id.* at 789 ("[W]hile comparators are one acceptable mode of exposing discrimination, they are certainly not, conceptually or doctrinally, a categorical requirement.").

420 *See id.* at 779 (explaining that evidence of "harassing and/or stereotype-based interactions between the employee and others in the workplace" is typically sufficient to support the inference of discrimination).

Protected class gatekeeping is problematic because it requires, at the outset of the analysis, that a plaintiff establish her bona fide membership in a protected group, an inquiry that invites classifications that are offensive to liberty, reinforces essentialist understandings of identities, and creates the perception of balkanizing social divisions. This inquiry, unmoored from the question of discrimination, thwarts the operation of equality law. It forecloses examination of how institutional practices that harm individuals outside of traditionally protected groups might nonetheless reinforce discrimination. While discussions of class-based identities are inevitable for discrimination law, protected class status should not be a requisite element for a discrimination claim.

B. Objections

Many anti-subordination–oriented jurists and scholars may not yet be persuaded, however, to dispense with the notion of protecting classes, based on three primary objections. First, they might argue that expansion of discrimination law to cover unsympathetic plaintiffs will dilute resources, remedies, and political will for the project of equality law. Second is the concern that without protected class gatekeeping, the *McDonnell Douglas* framework, which is an essential circumstantial method of proof of discrimination for minority groups, will erode. And third, anti-subordination theorists might worry that the critique of identity classification will drift from disparate treatment law to other legal frameworks that rely on statistics about group members and self-identification to do their work, including claims of systemic disparate treatment, disparate impact, and affirmative action. This Section will discuss and address these arguments in turn.

1. Dilution of Benefits by Undeserving Plaintiffs?

Arguments about the extension of civil rights laws to new groups often encounter the objection that extension of such rights will reduce the limited pool of enforcement resources for those who most need protection.[421] This argument, however, is not attuned to the realities of civil rights enforcement. Agencies charged with enforcing civil rights laws, such as the Equal Employment Opportunity Commission, already set priorities and allocate resources accordingly.[422] No matter

[421] *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 117 (1988) (stating that the risk of the "proliferation of antidiscrimination strategies" is that "it further dilutes the benefits received by the historically most disadvantaged groups").

[422] *See, e.g.*, U.S. EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013–16, at 1 (2012), https://www.eeoc.gov/eeoc/plan/

the fate of protected class gatekeeping, agencies will be free to allocate resources according to their enforcement goals. But as this Article has demonstrated, a significant number of claims by plaintiffs outside the "protected class" are currently being brought and litigated in courts, with disparate results. More clarity with respect to the legal rule to be applied in such cases might conserve judicial resources by deterring these forms of discrimination and prompting earlier settlement.

Another slant on this argument is that expanding civil rights law to undeserving and unsympathetic plaintiffs will undermine political support and judicial will for the greater antidiscrimination project.[423] Without popular support for the civil rights agenda, "the coercive force of law will be of little effect. And a business community united in frustration at a bloated civil rights regime could become a powerful political force for reform or even repeal."[424] Employment discrimination law in particular is already on precarious ground with a federal judiciary conditioned to "see employment discrimination cases as trivial or frivolous."[425] Such concerns may be especially relevant in two types of cases involving unsympathetic plaintiffs: plaintiffs perceived to be engaged in racial fraud and plaintiffs perceived to be incidental victims of discrimination.[426]

The 2015 controversy over Rachel Dolezal, a former NAACP chapter president in Spokane, Washington, illustrates concerns about racial fraud. Dolezal lost her position after her parents informed media that she was "a white woman masquerading as black."[427] The stakes of a deception such as Dolezal's seem high in an era in which the entrepreneurial can occasionally market minority identities as

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upload/sep.pdf (discussing enforcement priorities for EEOC investigations, litigation, federal sector oversight, policy development, research, outreach, and education).

423 In making this argument, I do not mean to imply we should lack sympathy for such characters, merely that they provoke controversy.

424 RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 176 (2008).

425 Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012), http://www.yalelawjournal.org/forum/losers-rules (drawing on the author's "seventeen years on the federal bench" to argue that "[a]symmetric decisionmaking—where judges are encouraged to write detailed decisions when *granting* summary judgment and not to write when *denying* it—fundamentally changes the lens through which employment cases are viewed" resulting in "decision heuristics . . . that serve to justify prodefendant outcomes").

426 *See* Greene, *supra* note 11, at 136 ("Courts may be fearful that individuals with deceitful motives will be encouraged to disingenuously frame employment discrimination claims as stemming from misperceptions about their respective identities.").

427 Chris McGreal, *Rachel Dolezal: 'I Wasn't Identifying as Black to Upset People. I Was Being Me'*, GUARDIAN (Dec. 13, 2015, 1:00 PM), http://www.theguardian.com/us-news/2015/dec/13/rachel-dolezal-i-wasnt-identifying-as-black-to-upset-people-i-was-being-me.

forms of human capital that contribute to institutional diversity.[428] Concerns about racial fraud may have animated the decision in *Chaib v. GEO Group, Inc.*, in which the court engaged in protected class gatekeeping to preclude a claim of race discrimination by a woman of Algerian ancestry who allegedly appeared white to her employer,[429] or in *Leonard v. Katsinas*, in which the court held that plaintiffs alleging they had been barred from entering a restaurant because they were Native American had to prove their claims to that status at trial.[430]

Fears of the specter of fraud should be tempered by the fact that there are few examples of reported court cases in which individuals knowingly misrepresented their backgrounds to pass as people of color.[431] Had Dolezal brought suit,[432] she still might have had a claim even if a court had engaged in protected class gatekeeping; she could have argued she was a member of the protected class of white people and that she lost her job on that basis.[433] This Article's question is whether an individual like Dolezal would have a claim if she lost her job on account of biases against people of color—perhaps because she was associated with people of color or was the inadvertent victim of a policy intended to disadvantage people of color. In such cases, advocates might deflect the charge that plaintiffs are unworthy of protection by refocusing attention on the malevolence of the institutions that perpetuate racial discrimination.[434]

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428 *See, e.g.*, Leong, *supra* note 370, at 2172 (discussing how some affirmative action and diversity programs create "a system in which white people and predominantly white institutions derive value from nonwhite racial identity").

429 92 F. Supp. 3d 829, 837 (S.D. Ind. 2015).

430 No. 05-1069, 2007 WL 1106136, at *13 (C.D. Ill. Apr. 11, 2007).

431 *See* Rich, *supra* note 294, at 1525 (discussing "contests over affirmative action programs" in the 1980s "when 'socially white' persons began to mine their genealogical backgrounds to identify a minority relative to qualify for affirmative action benefits" but observing that "many of today's contests over racial self-identification and affirmative action do not bear any similarity to [this] strategic gamesmanship"); *but see* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. (forthcoming 2017) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735958 (arguing, based on anecdotal reports, that Rachel Dolezal's "reverse passing" is not an aberration, but identifying only two examples of litigation involving reverse passing).

432 The NAACP stated that Dolezal's resignation was her own decision, and that the organization was "not concerned with the racial identity of our leadership." Press Release, NAACP Statement on the Resignation of Rachel Dolezal (June 15, 2015), http://www.naacp.org/press/entry/naacp-statement-on-the-resignation-of-rachel-dolezal1.

433 Her employer might argue that her duplicity about her parentage, rather than her racial identity, was the true reason for her termination. But a court might see this as a discriminatory explanation or a pretext.

434 *See, e.g.*, Estate of Amos v. Page, 257 F.3d 1086, 1089 (9th Cir. 2001) (rejecting the argument that a white plaintiff would not have standing to challenge "malevolent" police practices based on anti-Native American discrimination).

Another category of less-than-sympathetic plaintiffs are those courts regard as "incidental" victims of discrimination because they were harmed by discriminatory practices meant to demean groups other than their own.[435] Yet, as Professor Camille Gear Rich argues, cases challenging practices that harm both majority and minority group members may present opportunities for cross-racial understanding rather than backlash.[436] Such cases may make allies out of white people suffering from what Rich describes as "racial fatigue."[437] Those suffering from "racial fatigue" avoid discussions of race for fear "that one insensitive or impolitic comment could result in them being branded as racist" or to avoid the anxiety and self-reflection that would be required to confront subtle forms of bias and racial privilege.[438] They are unlikely to object to racial discrimination because of the social costs of leveling such a serious charge.[439] They may bristle at discussions of white privilege because they see themselves as lacking access to that privilege, most often due to class, but also because of gender, ethnicity, religion, rural backgrounds, sexual orientation, disability, family status, and other reasons.[440] However, when white people find themselves harmed by anti-black racism, it "may signal that there is a breakdown in the coalition of 'whites' necessary to maintain white privilege."[441] Allowing white plaintiffs to sue, perhaps as coplaintiffs with minorities, would facilitate dialogue between the racially marginalized and the racially fatigued. On a political level, it would express that civil rights law can work to level many forms of privilege.

2. *Erosion of* McDonnell Douglas*?*

A related argument against extending civil rights protections to new constituencies is that when the scope of a right is extended more broadly, it is often narrowed in depth.[442] The concern is that eliminating the "protected class" prong of the *McDonnell Douglas* analysis may vitiate the usefulness of that heuristic for discerning circumstantial evidence of discriminatory intent.

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435 *See supra* notes 181–88 (discussing Jackson v. Deen, 959 F. Supp. 2d 1346, 1349–50 (S.D. Ga. 2013)).

436 Rich, *supra* note 19, at 1500.

437 Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 564, 581 (2009) (collecting social science research).

438 *Id.*

439 Rich, *supra* note 19, at 1562.

440 *Id.* at 1566.

441 *Id.* at 1567.

442 *See* Clarke, *supra* note 318, at 1249.

As an initial matter, abolishing the "protected class" need not undermine *McDonnell Douglas* as an option for plaintiffs. Consistent with the prescriptive recommendations of this Article, courts might simply go on applying the *McDonnell Douglas* test in cases in which there is no dispute about whether a plaintiff was regarded as a member of some group, giving no bite to the requirement that a plaintiff be a "member of a protected class."[443] The purpose of the showing would not be to prove that a plaintiff is a group member in any objective sense; it would just be to clarify the alleged ground for discrimination.[444] Or they might replace the protected class showing with a general requirement for background circumstances suggesting discriminatory causation.[445]

The argument in response might be that asking courts to recognize that the "protected class" is a mere formality exposes the lack of utility of the *McDonnell Douglas* heuristic altogether, hastening its demise. An anti-subordination theorist unfamiliar with recent case law might cherish *McDonnell Douglas* as a sort of special merit-protection system for women and minorities.[446] In theory, *McDonnell Douglas* works by eliminating the most common reasons an employer might have for taking action against a plaintiff, and then eliminating the employer's stated reason, so that the plaintiff's race, gender, etc. is left as the logical explanation.[447] The "basic assumption" behind this reasoning is that unexplained workplace misfortunes for women and minorities result from discriminatory intent, because biases against women and minorities are widespread in employment markets.[448] But as anyone who has ever been in a workplace knows, workers of all stripes are regularly subjected to unexplained and unexplainable misfortunes.[449] On this merit-protection reading of *McDonnell Douglas*,

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443 Reverse discrimination cases support such an approach. *See supra* note 414.

444 A defendant might still argue that it did not regard a plaintiff as a member of the group alleged, but this would go to whether discrimination occurred, not whether a plaintiff was a member of the protected class.

445 *See supra* notes 415–16 and accompanying text.

446 *Cf.* Malamud, *supra* note 417, at 2237 (referring to this idea of *McDonnell Douglas* as "a kind of affirmative action, in that it protects members of protected groups from discharge without just cause in any case in which a minimal showing can be made that discrimination could have been the cause, without proof that it was the cause").

447 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." (emphasis omitted)).

448 Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997–98, 1038 (1994).

449 *See* Malamud, *supra* note 417, at 2256–57 (discussing empirical support for this proposition in the form of data on labor arbitrations and from the federal sector).

only members of protected classes are entitled to a favorable evidentiary presumption of discrimination from an employer's unexplained behavior. Such a legal rule would give employers special incentives to ensure that they are treating women and minorities fairly, compensating for general patterns of social disadvantage.

But this is not how *McDonnell Douglas* works. In 1993, the Supreme Court made clear that the inference of discrimination established by *McDonnell Douglas* is not one a court can draw as a matter of law.[450] Rather, once a plaintiff has evidence that suffices under *McDonnell Douglas*, it is up to a fact finder, usually a jury, to decide if discrimination happened. And that jury is not usually instructed on *McDonnell Douglas*—it is simply asked whether the plaintiff proved her mistreatment was caused by unlawful discrimination by a preponderance of the evidence.[451] Moreover, the idea that *McDonnell Douglas* offers special job protection to protected class members is further undermined by the significant number of courts applying an identical evidentiary standard to reverse discrimination plaintiffs.[452] Perhaps there is some risk that, as *McDonnell Douglas* is expanded to more types of plaintiffs, courts will implicitly begin to require a heightened showing of discriminatory mistreatment at summary judgment. But courts have already been proceeding down this path for many years now.[453]

The demise of *McDonnell Douglas* may not be a great loss. Judge David Hamilton of the Seventh Circuit has remarked that the test produces "too many false negatives" with the result that "[s]ummary judgment is too often granted for employers when it is not justified."[454] Additionally, "the result of practice in this area has been that lawyers have been led to act . . . as if *McDonnell Douglas* is the only way to prove discrimination by circumstantial evidence."[455] The Supreme Court has made clear that plaintiffs are not required to use the *McDonnell Douglas* test to survive summary judgment on Title VII claims; all they must do is present sufficient evidence that discrim-

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450 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

451 *See supra* note 95 and accompanying text.

452 *See supra* note 414 and accompanying text.

453 Empirical data demonstrate that courts dismiss Title VII cases by minority group plaintiffs at a high rate, likely because they resist the "basic assumption" and fault minority group plaintiffs for their own misfortunes. Eyer, *supra* note 386, at 1279.

454 David F. Hamilton, *Address to the Association of American Law Schools, Section on Employment Discrimination Law 2013 Annual Meeting on* McDonnell Douglas *and Convincing Mosaics: Toward More Flexible Methods of Proof in Employment Discrimination Cases*, 17 EMP. RTS. & EMP. POL'Y J. 195, 197 (2013).

455 *Id.*

ination was a "motivating factor."[456] The types of proof that establish the "because of" element under *McDonnell Douglas*, such as evidence that the employer's purported nondiscriminatory reason is not worthy of credence, could also be presented without that framework.[457]

3. *Drift to Systemic Theories and Affirmative Action?*

Another argument against abolishing the protected class in individual disparate treatment cases is that this doctrinal move will drift over to eviscerate systemic theories of discrimination, which are dependent on identifying protected class members.[458] Systemic theories of discrimination often rely on statistical evidence of disparities.[459] They come in two varieties. Systemic disparate *treatment* cases allege that a population's demographics are so skewed as to suggest a "pattern or practice" of intentional discrimination.[460] Disparate *impact* cases, by contrast, allege that a certain practice, such as a selection test, screens out a disproportionate percentage of people of a certain

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[456] *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 96 (2003). The 1991 amendments to Title VII added liability if discrimination was just one "motivating factor" for the adverse action against the plaintiff, even if it was not a substantial or determinative factor. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The amendment gives the employer the opportunity to present a partial defense by showing it would have taken the same action against the plaintiff even absent impermissible motives. *Id.* It is true that this amendment is of limited utility at trial, as plaintiffs' lawyers are reticent to request a motivating factor instruction out of fear that if given the option, a jury will "split the baby" and find that the defendant has proven the defense. *See, e.g.*, Ponce v. Billington, 679 F.3d 840, 845 (D.C. Cir. 2012). And yet, "motivating factor" liability still proves useful to defeat summary judgment. *See, e.g.*, Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 887, 892 (11th Cir. 2016) (relying on "motivating factor" liability to deny summary judgment in a case in which a transgender plaintiff alleged discrimination on the basis of sex stereotypes, notwithstanding that plaintiff's inability to prove her case via *McDonnell Douglas*).

[457] Courts and scholars have proposed simplified inquiries that would examine all the evidence of discriminatory causation. *See* Ortiz v. Werner Enters., Inc., No. 15-2574, 2016 WL 4411434, at *5 (7th Cir. Aug. 19, 2016) (proposing a "straightforward" analysis of all evidence of whether discrimination occurred, "[s]tripped of the layers of tests"); *cf.* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 115 (2011). Whatever the framework, a plaintiff can use simple discovery techniques to force an employer to explain its reason for treating the plaintiff adversely. Malamud, *supra* note 417, at 2271. If that reason is false, it might support an inference of discrimination.

[458] Doctrinal moves often drift from one area of the law to another, as part of the process of common law reasoning, in which courts borrow doctrine from inapposite areas to resolve controversies or fill gaps. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650–51 (1989) (borrowing, in a disparate impact case, the standard from disparate treatment case law announced in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977)).

[459] *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 (1977).

[460] *See, e.g.*, *id.* at 336–37 (discussing statistical evidence that presents a prima facie case "that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice").

race, gender, or other such characteristic, and is not justified by a business necessity or other valid interest.[461] Affirmative action may also rely on statistics, because Title VII law allows an employer to voluntarily undertake affirmative action in response to a "manifest imbalance" in an employer's workforce statistics.[462] The argument goes: If the identification of protected class members is verboten, statistical evidence of discrimination cannot even be collected, and these avenues for reforming discriminatory patterns and practices will disappear.[463] Moreover, it will be impossible to identify class members to receive remedies or to define beneficiaries for affirmative action programs. There is no reason such drifts must occur, however, either as a matter of precedent or theory.

At a doctrinal level, the reasons for objecting to protected class gatekeeping in individual disparate treatment cases do not apply with equal force to consideration of data on group disparities. Systemic cases do not require that all plaintiffs be identified at the outset; rather, at the prima facie stage, they rest on statistical showings.[464] To be sure, for those who abide strictly by anti-classification tenets, even a remedial policy based on considerations of racial demographics would be unconstitutional.[465] Yet this view has not prevailed on the Supreme Court, which recently interpreted the Fair Housing Act to include a prohibition on disparate impact discrimination,[466] over the objection that it would raise constitutional questions to read the Act

461 *See, e.g.*, Tex. Dep't of Hous. & Cmtys. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2521 (2015) (upholding the disparate impact theory in the context of housing discrimination).

462 *See, e.g.*, Shea v. Kerry, 796 F.3d 42, 57 (D.C. Cir. 2015) (upholding an affirmative action plan against a Title VII challenge because it "rests on an adequate factual predicate justifying its adoption, such as a 'manifest imbalance' in a 'traditionally segregated job categor[y]'" and "refrains from 'unnecessarily trammel[ing] the rights of [white] employees'" (quoting Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 631 (1986) (alterations in original)).

463 *See, e.g.*, EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 752–53 (6th Cir. 2014) (refusing to accept evidence of systemic discrimination when the underlying data required that experts identify the races of job applicants based on their driver's license photographs).

464 *Teamsters*, 431 U.S. at 360 ("At the initial, 'liability' stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy.").

465 Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."). In *Ricci*, the majority did not reach the constitutional question. *Id.* at 584.

466 Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516–25 (2015).

to include disparate impact liability.[467] In a majority opinion by Justice Kennedy, the Court held "that race may be considered in certain circumstances," for example, to "foster diversity and combat racial isolation with race-neutral tools" that "encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns."[468]

The opinion distinguishes "race-neutral tools," such as incentives to build low-income housing in good neighborhoods, from "explicit racial targets or quotas," which "might raise difficult constitutional questions."[469] Anti-balkanization concerns explain why policies like quotas, or the decision to upset the "legitimate expectations" of test takers by throwing out a test with a disparate impact, are characterized as troublesome discrimination.[470] While remedies for systemic discrimination are often "neutral" forms of injunctive relief that do not require identification of class members, sometimes they require that beneficiaries be identified to receive relief via an affirmative action plan.[471] In such cases, courts require remedies to be carefully crafted to avoid "trammel[ing]" the interests of nonbeneficiaries.[472]

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467 Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115, 1117, 1121 (2016) (arguing that the Supreme Court's opinion in *Inclusive Communities* clarified that disparate impact "does not in and of itself violate the Equal Protection Clause, but that some applications of that prohibition might raise serious constitutional questions," such as if it were used to prompt enactment of racial quotas).

468 *Inclusive Communities*, 135 S. Ct. at 2525.

469 *Id.* at 2512.

470 *See Ricci*, 557 U.S. at 583. The *Ricci* Court was also concerned that the defendant city did not have a strong basis in evidence for believing the test was not justified by a business necessity—a defense to disparate impact liability. *Id.* at 587. In *Inclusive Communities*, the Court emphasized the importance of the parallel "valid interest" defense that limits disparate impact liability "to give housing authorities and private developers leeway to state and explain the valid interest served by their policies." 135 S. Ct. at 2522.

471 Anti-subordination theorists should not object when a member of an *advantaged* group complains of being swept up in practice that has a disparate impact on a *disadvantaged* group. *See* Ferrell v. Johnson, No. 4:09–cv–40, 2011 WL 1225907, at *1 (E.D. Tenn. Mar. 30, 2011) (suit by a white employee of a historically Black university alleging the university system paid employees of historically Black universities less than those doing the same work at other universities). The remedy in such a lawsuit would be to require the employer to cease the practice that has a racially discriminatory disparate impact, regardless of who the plaintiff is. If such cases were class actions, they might result in direct relief to subordinated group members as well.

472 *See, e.g.*, Shea v. Kerry, 796 F.3d 42, 61–62 (D.C. Cir. 2015) (discussing considerations bearing on the permissibility of affirmative action including the type of plan, the degree of benefit or "plus" it bestows, the goals and timeframe of the plan, and the extent to which it "limits opportunities for advancement by non-beneficiaries"); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 375 (1977) (holding that "[e]specially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to

Rejection of protected class gatekeeping in individual disparate treatment cases is unlikely to effect the Court's anti-balkanization–oriented resolutions of these questions.

At a theoretical level, anti-subordination–oriented readers may be concerned about the implications of rejecting group rights for systemic doctrines. But systemic doctrines find their doctrinal footing in individual rather than class rights.[473] To the extent that they reflect anti-subordination aims, they envision institutional change to undermine historic patterns of hierarchy and segregation, not group protection.[474] As Professor Zatz explains, when systemic disparate treatment cases rest on statistics about disparate rates of hiring or promotion based on race or gender, those statistics are not aimed at demonstrating *group* harm; rather, they aim to demonstrate the likelihood that *individuals* were harmed as a result of race or gender.[475] Supreme Court doctrine on disparate impact law reveals that the Court conceives of this doctrine as concerned with group disparities only insofar as they impact individual rights.[476] In *Connecticut v. Teal*, for example, an employer used a promotional test that had a disparate impact on African American workers.[477] After the plaintiffs protested, the employer promoted a disproportionately large number of African Americans, and argued a "bottom line" defense, asserting that the overall racial composition of its workforce was balanced.[478] The Court rejected the "bottom line" defense because the Court conceived of the harm in terms of the injury to the individual plaintiffs who were denied opportunities on account of race.[479] The harm to the plaintiffs

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determine the 'special blend of what is necessary, what is fair, and what is workable'" (quoting Lemon v. Kurtzman, 411 U.S. 192, 200–01 (1973))).

473 *See* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 96 B.U. L. REV. (forthcoming 2017) (manuscript at 22), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730845 (explaining how systemic causes of action do not require a theory of *group* rights; they are premised on harms to *individuals* that result from race or gender).

474 *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (describing the objective of Title VII as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees" and holding that "procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

475 Zatz, *supra* note 473 (manuscript at 24) ("The shift from individualized proof to statistical proof reflects no change in what ultimately is to be proven: that individuals suffered disparate treatment. Instead, the shift simply reflects different methods of detecting those injuries. Nothing is added by characterizing this proof as showing that African Americans have been treated worse 'as a group.'").

476 *Id.* (manuscript at 44–45).

477 457 U.S. 440, 442 (1982).

478 *Id.* at 454.

479 *Id.* at 453–54 ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.").

could not be ameliorated by enhancing opportunities for other members of the plaintiffs' group.[480]

Moreover, individual remedies for systemic discrimination are not premised on group rights; rather, they use group status as "a partial proxy for discriminatory injury."[481] To be sure, because systemic cases rely on aggregate patterns, they cannot identify precisely which individuals were victims of discrimination.[482] But the impossibility of perfectly identifying the class of victims does not counsel against attempting any remedy.[483] Rather, it requires imperfect remedies intended to target, as closely as possible, those individuals who were injured by discrimination. Once liability for systemic discrimination is established, the doctrine requires identification of those plaintiffs who suffered damages based not simply on race, for example, but rather based on who was likely subjected to racial discrimination by that particular institution.[484] The cases described in Part I of this Article do not rely on statistical or any other sort of aggregate methods of proof and so do not require that protected status serve as a proxy for injury.

Nor do proactive affirmative action policies require a concept of group rights. Rather, for private employers, affirmative action may be justified because it is in the public interest[485] of "break[ing] down old patterns of . . . segregation and hierarchy" and "open[ing] employment opportunities."[486] To be sure, the U.S. Supreme Court has recognized that diversity may be a compelling state interest that justifies

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480 *Id.* at 454.

481 Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1179 (2015).

482 Zatz, *supra* note 473 (manuscript at 25). For example, assume "150 black workers applied for promotion; 10 were promoted and the other 140 were not. But for discrimination, 15 would have been promoted and 135 not. Which of the 140 non-promoted employees would have received the other 5 promotions? The statistical analysis does not tell us." *Id.* (quoting Baylie v. Fed. Reserve Bank of Chi., 476 F.3d 522, 524 (7th Cir. 2007)).

483 *See* Zatz, *supra* note 481, at 1167, 1179 (arguing that "[u]nder conditions of uncertainty, *any* approach to liability and remedy will be a blunt tool" and "we have no choice but to confront genuinely difficult questions about how to craft imprecise remedies, remedies that are likely both to withhold relief from some victims of discrimination and also to deliver a windfall to nonvictims on the basis of their protected status").

484 *Id.* at 1164–67 (discussing how remedies for systemic disparate treatment may define the class of beneficiaries in terms including protected statuses as "sensible prox[ies]" for identifying victims of discrimination).

485 *See* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 202 (1979) (describing racial segregation in the American economy as "a serious social problem" and the goals of the Civil Rights Act as "the integration of blacks into the mainstream of American society").

486 *Id.* at 208. As the Court held, Title VII "left employers and unions in the private sector free to take . . . race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories." *Id.* at 197.

affirmative action in education.[487] But it has refused to accept a version of diversity that presumes that minority group members "always (or even consistently) express some characteristic minority viewpoint on any issue."[488] Rather, the aims of diversity may be attaining a "critical mass" of students from minority groups so as to advance "cross-racial understanding," to "break down racial stereotypes," and to allow "[students] to better understand persons of different races."[489] These efforts cannot be accomplished "with only token numbers of minority students."[490] The Court also endorsed the benefits of diversity in terms of educational outcomes for all students[491] and perceptions of institutional legitimacy.[492] Rather than any sort of mechanical assignment of points to group members, the Supreme Court requires that each applicant be given "individualized consideration."[493] This concept of diversity appeals to social and institutional goals. It does not protect groups; indeed, it eschews the notion of an essential group.

C. Applications

This Article's main argument is that whether a plaintiff falls into the protected class is not a productive line of inquiry for disparate treatment law, and courts are better off focusing on the question of whether a discriminator was motivated by forbidden grounds. Readers may remain concerned about how particular discrimination cases might be decided without a concept of group rights. This Article cannot resolve every controversy about how the law should define discriminatory grounds. The precise definition of what it means to discriminate on a ground such as race will depend on one's normative orientation in terms of the various theories discussed in Part II of this Article. This Section offers a preliminary discussion about where the various theories might lead in particular cases. It will discuss three scenarios: (1) those in which plaintiffs were regarded as members of

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487 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (holding that "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper" (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2002))).

488 *Grutter*, 539 U.S. at 333.

489 *Id.* at 330 (alteration in original).

490 *Id.* at 333.

491 *Id.* at 330 (deferring to the law school's judgment that "diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'" (quoting Brief for Am. Educ. Research Ass'n et al. as Amici Curiae at 3, *Grutter*, 539 U.S. 306 (No. 02-241))).

492 *Id.* at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

493 Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

certain identity groups, (2) those in which plaintiffs known to be majority group members were disparaged with anti-minority insults, and (3) those in which members of majority groups were harmed in solidarity with members of minority groups.

Those cases in which plaintiffs faced discrimination because they were regarded as members of certain groups can be resolved simply by focusing on evidence of the nature of the discrimination rather than the plaintiff's class. A number of courts have had no trouble holding that discrimination based on a misperception of the plaintiff's identity is actionable.[494] The Third Circuit has explained, in dicta:

> [I]magine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.[495]

Evidence of this type of discrimination may be direct, in the form of statements about the reasons for the plaintiff's mistreatment, or circumstantial, if, for example, there is evidence that the defendant regarded the plaintiff as a minority group member and showed favoritism towards those perceived as majority group members. This type of discrimination is the most straightforwardly offensive to every theory. It is objectionable under the anti-classification theory because it disregards merit in favor of impermissible grounds, and to anti-essentialist theory because it relies on stereotypes and disregards the plaintiff's self-determined identity. It perpetuates subordination by expressing the principle that certain people, by virtue of their group status, are lesser than others and do not deserve equal inclusion.

More difficult are cases in which discriminatory mistreatment is diffuse. Imagine a workplace in which all workers identified as straight males, and in which terms such as "bitch," "gay," and other gendered insults were everyday occurrences accompanied by severely hostile

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494 *See, e.g.*, *supra* note 116 (collecting misperception cases). Such approaches are consistent with the EEOC's interpretation of Title VII. *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, U.S. EEOC, http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm (last visited Dec. 4, 2016) (describing unlawful discrimination as including "[h]arassing or otherwise discriminating because of the perception or belief that a person is a member of a particular racial, national origin, or religious group whether or not that perception is correct").

495 Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 571–72 (3d Cir. 2002) (accepting a "perception theory" of retaliation in the ADA context, in which a plaintiff was regarded as engaged in protected activity). Some district courts have adopted this reasoning in Title VII cases. *E.g.*, Kallabat v. Mich. Bell Tel. Co., No. 12-CV-15470, 2015 WL 5454889 (E.D. Mich. June 18, 2015).

social isolation and efforts to undermine the work of certain employees. What if a straight woman and a gay man joined this workplace and were subjected to the same campaign of severe or pervasive harassment[496] as one of their straight male coworkers? If the straight male coworker sued and the court engaged in protected class gatekeeping, he would lose. On a protected class theory, this pattern would appear to be "equal opportunity" harassment that affects no one group more harshly than another, as members of each group encounter the same treatment.[497]

If protected class gatekeeping is put aside the question becomes: Was this harassment because of sex (or sexual orientation)? Courts would have to examine the nature of the discrimination, relying on the harasser's statements as direct evidence of motive. On an anti-essentialist view, such a workplace would be discriminatory, as its culture enforces "particular expectations of how . . . men should behave."[498] Those expectations are premised on stereotypes that instruct that minorities are not legitimate workers at the same time that they shape majority group behavior around a set of constrictive norms. Anti-subordination–oriented jurists should object that this harassment demeans women and minority sexual orientations. Such harassment reinforces social inequality by expressing the acceptability of sexist and antigay prejudices in the workplace, reaffirming the harassers' claims to superior social status and privilege, and raising implicit barriers for any potential job applicants who might fall into a disparaged category. An anti-balkanization–oriented jurist would be concerned about how this harassment harms everyone in the workplace, and optimistic about how legal claims might make allies of men and women, straight and LGBT workers.

An anti-classification theorist would have the most trouble seeing discrimination here, due to that viewpoint's association with formal equality—likes appear to be treated alike. But even on an anti-classification theory, the plaintiff could argue that his harassers acted with the intent to classify him: deliberately misattributing disparaged identities to him in order to harass, penalize, and stigmatize. This harass-

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496 Sexual harassment law does not reach the trivial, even if motivated by an impermissible reason. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

497 For an analysis of cases involving claims of "equal opportunity" harassment, see Clarke, *supra* note 260, at 540–41 nn.57–63.

498 Zatz, *supra* note 19, at 66.

ment offends the plaintiff's individual liberty and is a barrier to fair treatment based on merit.

Last are those cases in which majority group members were harmed while standing in solidarity with members of minority groups, such as in *Jackson v. Deen* and *Blanks v. Lockheed Martin*.[499] If the law's aim is avoiding essentialism and subordination, it should enable these plaintiffs to employ the law to challenge racial stereotypes and white supremacy. From an anti-balkanization perspective, "[t]he law should encourage and protect workers who reject discriminatory relationships and who instead adopt Title VII's vision of workplace equality and its catalytic role in eroding other forms of discrimination."[500] Protections for intergroup solidarity would highlight equality law's benefits for all workers.

An anti-classification theory would have more trouble with this scenario. While the white plaintiffs were classified on the basis of race, the discriminator's intent was to exempt them from harm, rather than subject them to harm. For this reason, courts may fail to see their injuries as a direct result of discrimination. And yet, these plaintiffs alleged that they themselves suffered damages as a result of the racial character of the segregation and violence in their workplaces.[501] As debates over affirmative action demonstrate, the anti-classification theory is generally skeptical of both benevolent and malevolent motives for racial classification. There is no reason for it to deviate from that principle in this context.

To be sure, discerning whether discriminators acted on forbidden grounds is a difficult task for law, with indeterminate results. But protected class gatekeeping is not a shortcut around this inquiry. It merely confuses the issue and bars potentially meritorious claims. Even if there is no determinate legal rule to resolve the controversy, it is better that the law ask whether firing a particular worker reinforces subordination, classification, essentialism, or balkanization than to get hung up on whether that worker is a member of the right group.

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499 *See supra* notes 181–203 and accompanying text.

500 Zatz, *supra* note 19, at 66.

501 Whether those plaintiffs can prove damages, *see supra* note 185 (discussing damages for emotional distress); whether their employers were liable, *see generally* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (discussing employer liability for harassment); and whether they could serve as representative parties in a class action, *see* FED. R. CIV. P. 23(a)(4) (requiring that class representatives "fairly and adequately protect the interests of the class"), are separate inquiries.

CONCLUSION

Equality law is riven with disputes over means and ends: anti-classification or anti-subordination, disparate treatment or disparate impact, sameness or difference, universality or particularity, leveling hierarchy or undoing segregation, individual justice or systemic change. This Article does not suggest resolutions to these conflicts; it argues only that, while discrimination law has everything to do with classes, it does not protect them. Protected class gatekeeping finds no support in any of the prevailing views on the proper means and ends of equality law. Disparate treatment law should focus instead on forbidden grounds. While the results of this inquiry may be uncertain, they are preferable to protected class gatekeeping.