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The Importance of Immutability in Employment Discrimination Law

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THE IMPORTANCE OF IMMUTABILITY IN EMPLOYMENT DISCRIMINATION LAW

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ABSTRACT

This Article argues that recent developments in employment discrimination law require a renewed focus on the concept of immutable characteristics. In 2009, two new laws took effect: the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act Amendments Act (ADAAA). This Article's original contribution is an evaluation of the employment discrimination statutes as a corpus of law in light of these two additions.

The Article thoroughly explores the meaning of the term "immutable characteristic" in constitutional and employment discrimination jurisprudence. It postulates that immutability constitutes a unifying principle for all of the traits now covered by the employment discrimination laws. Immutability, however, does not explain why other characteristics that are equally unalterable are excluded from the statutory scheme. Thus, the Article concludes that the employment discrimination laws lack coherence. While the laws extend even to fringe religions, such as white supremacy, they disregard a variety of traits that are fundamental to identity, including sexual orientation, parental status, and others. A focus on the concept of immutability can shed new light on the achievements and limitations of the

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antidiscrimination mandates and serve as an impetus to provide more comprehensive protection to American workers.

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INTRODUCTION

The field of employment discrimination has undergone significant transformation during the past two years. The Genetic Information Nondiscrimination Act (GINA)[1] was enacted on May 21, 2008, and its employment provisions became effective on November 21, 2009.[2] Shortly thereafter, the Americans with Disabilities Act Amendments Act (ADAAA)[3] was signed into law on September 25, 2008, and became effective on January 1, 2009.[4] This Article analyzes how these new legal provisions illuminate the purpose of the corpus of law known as the employment discrimination statutes. It argues that the passage of GINA and the ADAAA, which expand the civil rights laws' antidiscrimination protection based on biological characteristics, requires a renewed focus on the concept of immutable characteristics. The Article offers an original, comprehensive analysis of the meaning of the term "immutable characteristic." It then explores whether the term accurately describes the attributes that are protected by the employment discrimination laws.

The employment discrimination statutes instruct employers that there are particular characteristics that generally may not be considered for purposes of employment decisions. These characteristics are race, color, national origin, sex, pregnancy, religion, age, disability, genetic information, and citizenship status.[5] Is there, however, a unifying conceptual framework that explains the choices we have made concerning the scope of the civil rights laws? Why are employers prohibited from considering some attributes, such as sex or national origin, but not others, such as political viewpoint, appearance, marital or parental status, or sexual orientation?[6] Do

1. Genetic Information Nondiscrimination Act (GINA) of 2008, Pub. L. No. 110-233, 122 Stat. 881.

2. 42 U.S.C. § 2000ff note (Supp. II 2009).

3. ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

4. 42 U.S.C. § 12102 note (Supp. II 2006).

5. *See* Immigration Reform and Control Act, 8 U.S.C. § 1324b(a) (2006); Equal Pay Act, 29 U.S.C. § 206(d)(1); Age Discrimination in Employment Act, 29 U.S.C. §§ 623(a), 631(a); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a); 42 U.S.C.A. §§ 2000ff(4), 2000ff-1(a) (West Supp. 2010); Americans with Disabilities Act, 42 U.S.C. § 12112(a); GINA §§ 201(4), 202(a), 122 Stat. at 906-07.

6. See *infra* Part IV.C for discussion of these five attributes.

GINA and the ADAAA elucidate the nature of protected classifications, or do they cause further obfuscation? In short, what is the project of the employment discrimination statutes?

Certainly, the passions and vicissitudes of politics strongly influence what legislation is passed. Nevertheless, the antidiscrimination endeavor is motivated by a desire to promote fairness and justice. Consequently, this Article argues that careful scrutiny of the laws reveals a distinct theme.

This Article maintains that the concept of immutability brings us closest to an understanding of the antidiscrimination mandates in employment law. It is arguable that the employment discrimination laws are designed to protect discrete and insular minorities with a history of discrimination[7] or to prohibit consideration of traits that are irrelevant to job performance.[8] Each of these theories, however, is flawed, and immutability more accurately describes the characteristics protected by the employment discrimination statutes.

Nevertheless, although immutability explains the included characteristics, it fails to explain some of the most notable exclusions from the statutory scope. In fact, no coherent theory can be developed to elucidate why some unalterable traits are awarded protected status by federal law and others are not.[9] It is noteworthy that some state laws cover traits that are not addressed by federal statutes,[10] but state law varies significantly in scope and contents and thus constitutes a patchwork. Only federal law can provide comprehensive protection to workers across the nation. The recent additions of GINA and the ADAAA may occasion an opportunity to reexamine the purpose of the law and create a more rational and comprehensive legislative protective scheme.

The Article makes several original contributions. Part I, which describes the antidiscrimination laws both before and after 2008, analyzes the ADAAA's revised definition of "disability" and explores whether any lasting physical or mental disabilities will be disqualified from protected status.[11] Part II outlines a variety of theories

7. *See infra* Part II.A.
8. *See infra* Part II.B.
9. *See infra* Part IV.
10. *See infra* Part IV.C.
11. *See infra* Part I.B.2.b.

that have been used to explain the statutory employment discrimination endeavor and demonstrates that prohibiting discrimination based on selected immutable characteristics most accurately describes the laws' achievement. Part III thoroughly explores the meaning of the term "immutable characteristic" in both constitutional and employment discrimination jurisprudence. It formulates two alternative definitions of the term: (1) a characteristic that is an accident of birth, or (2) a characteristic that is unchangeable or so fundamental to personal identity that workers effectively cannot and should not be required to change it for employment purposes.[12] Part IV discusses a variety of traits that are immutable but are omitted from statutory protection and evaluates whether each type of exclusion is reasonable.[13] Part V develops the argument that the concept of immutability can be a liberalizing force that may spur the addition of new protected classifications to the employment discrimination laws.[14] It also analyzes the relevance of immutability to reasonable accommodation and argues that immutability may explain the legislature's ambivalence about the accommodation mandate.[15]

I. PROTECTED STATUS UNDER THE EMPLOYMENT DISCRIMINATION LAWS

The federal employment discrimination laws prohibit discrimination based on the following categories: race, color, national origin, sex, pregnancy, religion, age, disability, genetic information, and citizenship status.[16] This Part will describe the traditional grounds for antidiscrimination protection and the most recent changes to the employment discrimination field embodied in GINA and the ADAAA.

12. *See infra* notes 151-60 and accompanying text.
13. *See infra* Part IV.C.
14. *See infra* Part V.B.
15. *See infra* Part V.C.
16. *See* statutes cited *supra* note 5.

A. The Federal Antidiscrimination Laws: The Pre-2008 Landscape

During the second half of the twentieth century, a variety of federal laws established antidiscrimination mandates to protect American workers. The broadest, Title VII of the Civil Rights Act of 1964 (Title VII), prohibits discrimination based on "race, color, religion, sex, or national origin."[17] Sex discrimination includes adverse decisions made because of "pregnancy, childbirth, or related medical conditions."[18]

Several other laws are narrower in scope. The Equal Pay Act (EPA) addresses salary disparities based on sex.[19] The Age Discrimination in Employment Act (ADEA) protects individuals who are forty years old and older against age discrimination.[20] The Immigration Reform and Control Act (IRCA) prohibits discrimination based on national origin or citizenship status against individuals who are entitled to work in the United States.[21]

The Rehabilitation Act of 1973 (Rehabilitation Act) and the 1990 Americans with Disabilities Act (ADA) are designed to protect workers against discrimination based on disability.[22] The Rehabilitation Act applies only to programs and activities "receiving Federal financial assistance" or "conducted by any Executive agency or by the United States Postal Service."[23] The ADA extended the antidiscrimination mandate to all public and private employers with fifteen or more employees.[24] The laws not only prohibit employers from making disability-based adverse decisions, but also require them to provide reasonable accommodations to qualified individuals with disabilities.[25]

However, the ADA's original definition of "disability" challenged litigants and courts.[26] The ADA defined the term "disability" as: "(A)

17. 42 U.S.C. § 2000e-2(a) (2006).
18. *Id.* § 2000e(k).
19. 29 U.S.C. § 206(d)(1).
20. *Id.* §§ 623(a), 631(a).
21. 8 U.S.C. § 1324b(a).
22. 29 U.S.C. § 794; 42 U.S.C. § 12112(a).
23. 29 U.S.C. § 794(a).
24. 42 U.S.C. § 12111(5).
25. *Id.* § 12112(a), (b)(5)(A); 28 C.F.R. § 41.53 (2010).
26. The Rehabilitation Act's definition of disability is similar to that of the ADA: "a physical or mental impairment which for such individual constitutes or results in a

a physical or mental impairment that substantially limits one or more of the major life activities of ... [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[27] Courts most often interpreted this definition narrowly, finding that various conditions either do not affect a major life activity or are not sufficiently limiting to constitute disabilities under the ADA.[28] For example, one notorious case held that an individual with mental retardation was not disabled for purposes of the ADA.[29] Several studies revealed that ADA plaintiffs won 5 percent or less of cases.[30]

Furthermore, ADA jurisprudence failed to provide satisfying answers to a number of critical questions: (1) What is a major life activity? (2) What does "substantially limits" mean? (3) What precisely must a plaintiff prove to be designated as disabled under the "regarded as" prong of the definition? and (4) Does the ADA's prohibition of disability discrimination include adverse treatment based on an asymptomatic individual's genetic information?[31] To answer these questions and elucidate the scope of legal protection enjoyed by applicants and employees, Congress intervened in 2008 with two additional statutory provisions.

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substantial impediment to employment." 29 U.S.C. § 705(20)(A)(i). Prior to the ADA's enactment, this definition was not controversial, perhaps because governmental employers were less inclined to challenge plaintiffs' disability statuses than private employers who sought to litigate every potentially winnable question. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623 (1999) [hereinafter Crossley, *Kaleidoscope*] (noting that disability status was rarely litigated under the Rehabilitation Act).

27. 42 U.S.C. § 12102(2). See *infra* text accompanying note 63 for the definition of "impairment."

28. *See* ADAAA, Pub. L. No. 110-325, § 2(a), 122 Stat. 3553, 3553 (2008) (discussing a variety of Supreme Court cases that narrowed the definition of "disability" and motivated Congress to amend the ADA).

29. Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 WL 1379986, at *3-4 (11th Cir. May 11, 2007) (holding that the plaintiff was not substantially limited with respect to any major life activity).

30. *See* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 308-09 (2008) (discussing studies concerning ADA case outcomes).

31. *See* ADAAA § 2(a), (b), 122 Stat. at 3553-54 (discussing Supreme Court cases that addressed these questions); Paul Steven Miller, *Is There A Pink Slip in My Genes? Genetic Discrimination in the Workplace,* 3 J. HEALTH CARE L. & POL'Y 225, 238 (2000) (arguing that "[t]he ADA can and should be interpreted to prohibit employment discrimination based on asymptomatic genetic characteristics").

B. The New Additions: GINA and the ADAAA

GINA and the ADAAA focus on bias based on biological characteristics and significantly enhance the antidiscrimination protection available to American workers. This Section will analyze the key provisions of each of the two statutes.

1. The Genetic Information Nondiscrimination Act

The Genetic Information Nondiscrimination Act was first introduced in Congress in 1995 but was passed after thirteen years, in 2008.[32] One reason for the statute's extremely long gestation period may be an absence of evidence that individuals were in fact being subjected to discrimination because of genetic information.[33] GINA prohibits employers from making adverse employment decisions based on genetic information, which is defined as an individual or family member's genetic tests or "the manifestation of a disease or disorder in family members" of an individual.[34] GINA also instructs that employers may not "request, require, or purchase genetic information" about an employee or her family members, with limited exceptions.[35]

The first reported Equal Employment Opportunity Commission (EEOC) charge of discrimination alleging a GINA violation was filed in April 2010.[36] As of this writing, no lawsuits have been commenced, and no GINA decisions have thus far been issued by the courts.

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32. Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 441 (2010).

33. *Id.*

34. GINA, Pub. L. No. 110-233, §§ 201(4), 202(a), 122 Stat. 881, 906-07 (2008) (to be codified at 42 U.S.C. §§ 2000ff(4), 2000ff-1(a)).

35. *Id.* § 202(b), 122 Stat. at 907-08.

36. Emily Friedman, *Pamela Fink Says She Was Fired After Getting a Double Mastectomy To Prevent Breast Cancer*, ABC NEWS, Apr. 30, 2010, http://abcnews.go.com/Health/OnCallPlusBreastCancerNews/pamela-fink-fired-testing-positive-breast-cancer-gene/story?id=10510163.

2. The ADA Amendments Act

The ADA Amendments Act considerably broadened and elucidated the definition of the term "disability."[37] This expansion of the statutory scope was accomplished through a variety of provisions. It is difficult to predict the extent to which the ADAAA will impact ultimate case outcomes, but the ADAAA should make it much easier for plaintiffs to overcome the threshold obstacle of showing disability status. In the future, therefore, litigation will likely focus on the issues of worker qualifications, discriminatory animus, and reasonable accommodation rather than on the particulars of the plaintiff 's impairment.[38]

a. Textual Changes

The ADAAA clarified and expanded the definition of "disability." It lists specific functions that constitute major life activities, though the list is not exclusive.[39] Major life activities include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[40] They also include major bodily functions such as those of the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive" systems.[41]

Perhaps most significantly, the ADAAA liberalized the definition of being "regarded as" having an impairment. Under the new provision, an individual is deemed to have a disability if she has "an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[42] Only "transitory and minor" impairments, namely those lasting six

37. The new definition applies to both the Rehabilitation Act and the ADA. 29 U.S.C. § 705(9)(B) (2006); ADAAA, Pub. L. No. 110-325, § 7(1), 122 Stat. 3553, 3558 (2008).

38. *See infra* note 81 and accompanying text.

39. 42 U.S.C.A. § 12102(1) (West Supp. 2010).

40. *Id.* § 12102(2)(A).

41. *Id.* § 12102(2)(B).

42. *Id.* § 12102(3)(A).

months or less, are excluded from coverage.[43] This language means that anyone who has a long-term physical or mental impairment, regardless of its severity, is included under the "regarded as" prong of the ADA.

The statute's new breadth is emphasized in several additional provisions. The ADAAA specifically instructs that the definition of "disability" is to be interpreted broadly, to the maximum extent allowed by the relevant wording.[44] It also rebukes the courts for having required plaintiffs to show an excessively high degree of limitation in order to meet the "substantially limits" statutory standard.[45] Furthermore, under the ADAAA, impairments are covered so long as they limit one major life activity, and conditions that are episodic or in remission constitute disabilities if they would substantially limit a major life activity in their active state.[46]

A particularly celebrated change is one that rejects the Supreme Court decision in *Sutton v. United Air Lines, Inc.*[47] concerning mitigating measures.[48] The ADAAA clearly establishes that disability status is to be determined without regard to whether a condition's symptoms can be alleviated through the use of medication, behavioral modifications, or devices (other than "ordinary eyeglasses or contact lenses").[49] Finally, the law asserts that the threshold question of whether an individual has a "disability" for statutory purposes "should not demand extensive analysis" and that the focus of attention in ADA cases should be upon whether covered entities engaged in discrimination in violation of the law.[50]

b. How Broad Is the ADA's Post-Amendment Coverage?

The ADA's antidiscrimination mandate has become expansive since the ADAAA's implementation. The change is so dramatic that employers should rarely succeed in challenging a plaintiff's

43. *Id.* § 12102(3)(B).
44. *Id.* § 12102(4)(A).
45. *Id.* § 12102(4)(B); ADAAA, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008).
46. 42 U.S.C.A. § 12102(4)(C), (D).
47. 527 U.S. 471 (1999).
48. ADAAA § 2(b)(2), 122 Stat. at 3554.
49. 42 U.S.C.A. § 12102(4)(E) (West Supp. 2010).
50. ADAAA § 2(b)(5), 122 Stat. at 3554.

disability status in cases that do not involve a request for reasonable accommodations.[51] Many conditions that, to the surprise of many observers, courts previously deemed not to constitute disabilities should now fall comfortably into the disability category.

Because the ADAAA rejected the Supreme Court's conclusion that conditions that were well-controlled by mitigating measures did not constitute disabilities,[52] individuals with impairments such as epilepsy, diabetes, and learning disabilities, who routinely failed to prove they were entitled to ADA protection,[53] should henceforth enjoy statutory coverage. The existence of medications that alleviate the symptoms of epilepsy and diabetes and techniques to overcome the limitations caused by learning disabilities should no longer be relevant to the disability status analysis. The ADAAA's inclusion of conditions that are episodic should also assist individuals with epilepsy because seizures are generally periodic rather than constant.[54]

Cancer patients and survivors should benefit significantly from the ADAAA, particularly in light of its coverage of illnesses in remission.[55] Courts had traditionally denied ADA remedies in cases involving cancer because plaintiffs faced a Catch-22: they were either suffering from the disease and too sick to be qualified to work, or they were tolerating treatment well or in remission and

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51. For a discussion of reasonable accommodations, see *infra* notes 74-80 and accompanying text.

52. 42 U.S.C.A. § 12102(4)(E).

53. H.R. REP. NO. 110-730, pt. 2, at 20-21 (2008) (discussing cases that would likely be decided differently under the revised standard); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 220 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/44/LRColl2008n44Long.pdf (noting that plaintiffs who used prosthetic devices or who took drugs to control the symptoms of epilepsy, diabetes, or bipolar disorder often were found not to have disabilities); *see, e.g.*, Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1154-58 (11th Cir. 2005) (finding that an individual with diabetes who was insulin-dependent was not disabled for statutory purposes); Brunke v. Goodyear Tire & Rubber Co., 344 F.3d 819, 821-22 (8th Cir. 2003) (concluding that an individual with epilepsy whose medication significantly diminished his seizures did not have a disability); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 629-30 (6th Cir. 2000) (determining that an individual with a learning disability who had found ways to achieve academic success despite his limitations did not have a disability under the ADA).

54. 42 U.S.C.A. § 12102(4)(D); H.R. REP. NO. 110-730, pt. 2, at 19.

55. 42 U.S.C.A. § 12102(4)(D).

thus were not found to have met the statutory standard.[56] Now patients whose cancer is either active or in remission[57] should be included as protected class members. Proposed EEOC regulations state that cancer is an impairment that "will consistently meet the definition of disability" as a condition that substantially limits the major life activity of normal cell growth.[58] Because illnesses in remission are to be considered in their active state for definitional purposes,[59] even cancer in remission should always be deemed a disability. Furthermore, according to the proposed regulations, individuals who are considered to be fully cured of cancer will still be covered by the ADA under the definition's "record of" prong, which applies to anyone who has been diagnosed in the past with a substantially limiting impairment.[60] Therefore, workers with any cancer history, no matter how distant, should be found to be individuals with disabilities under the ADA.

The revised "regarded as" prong of the disability definition[61] is likely to be the most transformative improvement for ADA plaintiffs. The provision extends to any mental or physical impairment that serves as a basis for an employer's adverse decision, regardless of the impairment's impact on the worker,[62] and therefore few if any lasting medical conditions will fall outside of the ADA's sphere. The term "impairment" is not defined in the statute, but the federal regulations provide a far-reaching definition:

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56. For an analysis of how courts treat cancer cases, see Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399 (2001); *see also* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1232 (2003) (discussing the Catch-22 phenomenon).

57. Remission is defined as "[a]batement or subsiding of the symptoms of a disease" or "[t]he period during which the symptoms of a disease abate or subside." THE AMERICAN HERITAGE MEDICAL DICTIONARY 464 (2007).

58. Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. 48,439, 48,441 (Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630.2(j)(5)(B)).

59. 42 U.S.C.A. § 12102(4)(D).

60. 42 U.S.C.A. § 12102(1)(B) (defining "disability" in part as a record of a substantially limiting impairment); Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. at 48,443 (to be codified at 29 C.F.R. § 1630.2(k)(1)(i)).

61. 42 U.S.C.A. § 12102(3).

62. *Id.*

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[63]

Absent the "substantially limiting" requirement, plaintiffs alleging discriminatory employer conduct—as opposed to a need for reasonable accommodation—will generally be able to pass the threshold disability status test with little difficulty.[64] Prior to the ADAAA, individuals with back impairments and cosmetic disfigurements were often denied ADA coverage because the courts did not believe they were substantially limited with respect to a major life activity.[65] Post-ADAAA, however, plaintiffs who were denied employment opportunities because of back abnormalities could likely successfully claim that the employer regarded them as having a musculoskeletal impairment, and those with disfiguring skin ailments or scars could establish that they were regarded as disabled because of their cosmetic deformities.[66] Such plaintiffs would be free of the obligation to prove that their conditions limited their activities in any way.

Still, not all conditions will be covered even under the ADAAA's expanded definition of disability. Most notably, obesity that is not accompanied by cardiovascular or other disease symptoms is likely

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63. 29 C.F.R. § 1630.2(h) (2009).

64. H.R. REP. NO. 110-730, pt. 2, at 18 (2008) (stating that the "regarded as" provision's exception for transitory and minor impairments should be read narrowly and applies to conditions that are no more serious than a "cold or flu").

65. *See* Mahon v. Crowell, 295 F.3d 585, 591 (6th Cir. 2002) (finding—before the ADAAA—that plaintiff's back impairment did not constitute a disability); Gray v. Ameritech Corp., 937 F. Supp. 762, 769-70 (N.D. Ill. 1996) (finding against a plaintiff with psoriasis that produced white, flaking sores on her face and body because she did not meet the disability standard).

66. *See* 29 C.F.R. § 1630.2(l) app. (providing the example of an individual with a facial scar or disfigurement as someone who might be able to prove disability status under the "regarded as" prong of the definition).

to remain excluded,[67] despite evidence that obese individuals experience discrimination in the workplace.[68] Experts have determined that obesity is caused by a "complex interplay of genetic, nutritional, physiological, psychological, environmental, and social factors."[69] Nevertheless, while obesity has a physiological basis, it does not fall clearly into any impairment category.[70] Professor Jane Korn argues that obesity could be considered a cosmetic disfigurement that receives the same treatment as a severe scar,[71] but EEOC regulations provide that "except in rare circumstances, obesity is not considered a disabling impairment."[72] The federal regulations provide the following additional examples of impairments that are considered nondisabling even under the "regarded as" prong because of their typically short duration: "broken limbs, sprained joints, concussions, appendicitis, and influenza."[73] It is conceivable that an employer would make an adverse decision based on one of these conditions, and such a decision would not violate the ADA.

Unlike the disability definition, the law's reasonable accommodation provision was not broadened by the ADAAA.[74] Consequently, plaintiffs will continue to find it challenging to prevail in reasonable accommodation cases. The ADAAA explicitly establishes that employers need not provide reasonable accommodation to individuals who are covered by the ADA only by virtue of being regarded as

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67. Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 211 (2010) (postulating that obesity will remain outside the scope of the ADA).

68. *Id.* at 221; Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 OBESITY 941, 941 (2009) ("Weight bias translates into inequities in employment settings, health-care facilities, and educational institutions, often due to widespread negative stereotypes that overweight and obese persons are lazy, unmotivated, lacking in self-discipline, less competent, non-compliant, and sloppy."); Lucy Wang, Note, *Weight Discrimination: One Size Fits All Remedy?*, 117 YALE L.J. 1900, 1910-21 (2008) (discussing weight discrimination).

69. AM. MED. ASS'N, ASSESSMENT AND MANAGEMENT OF ADULT OBESITY: A PRIMER FOR PHYSICIANS 6 (2003), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/433/booklet1.pdf; *see also* NAT'L INSTS. OF HEALTH, THE PRACTICAL GUIDE: IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS 5 (2000), *available at* http://www.nhlbi.nih.gov/ guidelines/obesity/prctgd_c.pdf.

70. *See* M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1, 62-63 (2010).

71. Korn, *supra* note 67, at 247-48.

72. 29 C.F.R. § 1630.2(j) app. (2009). The regulation does not detail what rare circumstances would render obesity a disability.

73. *Id.*

74. 42 U.S.C. § 12112(b)(5)(A) (2006).

disabled.[75] Plaintiffs seeking reasonable accommodations will, therefore, be required to prove that they are substantially limited in a major life activity, as defined by the ADAAA.[76]

The ADAAA is silent concerning one potential conundrum. There may be plaintiffs who could ameliorate their conditions through mitigating measures such as medication, surgeries, or assistive devices but choose not to do so or cannot afford the cost of such interventions.[77] It is unclear whether such workers would be entitled to reasonable accommodation, and this question will need to be resolved through judicial interpretation.[78] It is possible that courts would deem accommodation in such cases to be "unreasonable" because the plaintiff could have diminished or eliminated the need for it.

Reasonable accommodation plaintiffs will benefit from some of the provisions that relax the definition of disability. The nonexclusive list of major life activities[79] and the instruction that the definition is to be construed "in favor of broad coverage"[80] will make it easier for contemporary reasonable accommodation plaintiffs to prove that they have a disability. Nevertheless, only a subset of plaintiffs who can assert disability discrimination claims under the ADA is eligible for reasonable accommodation.

In addition, the liberalized definition of disability will not guarantee that more plaintiffs will ultimately prevail in ADA cases. Courts may rule against plaintiffs on numerous grounds other than lack of disability status.[81] For example, a court may determine that a plaintiff was not qualified for the job in question, that the employer's adverse decision lacked discriminatory animus and was based on a legitimate factor such as job performance, or that no

75. *See* ADAAA, Pub. L. No. 110-325, § 6(h), 122 Stat. 3553, 3558 (2008).

76. Long, *supra* note 53, at 225.

77. 42 U.S.C.A. § 12102(4)(E)(i)(I) (West Supp. 2010) (discussing mitigating measures).

78. *See* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 217-20 (2010) (questioning whether plaintiffs who could ameliorate their conditions through mitigating measures but chose not to do so will be entitled to reasonable accommodation).

79. 42 U.S.C.A. § 12102(2).

80. *Id.* § 12102(4)(A).

81. Ruth Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, UTAH L. REV. (forthcoming 2011) (collecting data from 200 pre-ADAAA cases and finding that, even before 2009, failure to accommodate was "the most frequent kind of discrimination issue raised in these cases," appearing 36 percent of the time).

reasonable accommodation can be found for the individual. The ADAAA will shift the analysis away from the disability question to more substantive questions of discrimination and spare plaintiffs the indignity of having their cases dismissed because courts do not deem them disabled enough to merit legal protection.

II. FINDING A UNIFYING PRINCIPLE

In light of the passage of GINA and the ADAAA, it is appropriate to reevaluate the basis on which employment discrimination law extends protection to American workers. The question this Article explores is whether any unifying principle explains the choices American law has made with respect to protected classifications. Can employment discrimination law be understood to offer a coherent vision of what types of employer choices should be allowed and disallowed? This Part discusses several alternative unifying principles.

A. Discrete and Insular Minorities with a History of Discrimination

Many commentators and courts have viewed antidiscrimination law as seeking to protect discrete and insular minorities that have suffered a history of discrimination.[82] In the context of constitutional analysis, the famous "footnote 4" in the 1938 case of *United States v. Carolene Products Co.* contemplates that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for

82. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1537 (2000) (discussing Title VII and stating that "skin color (like race) has been and continues to be used as a basis for identifying underrepresented discrete and insular minorities within racial classifications"); Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 U. PITT. L. REV. 295, 363 (2005) (noting that "Title VII and similar laws" brought constitutional "discrimination protections for 'discrete and insular minorities'" into the private sector); Julie Chi-hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 341 (2007) (asserting that "U.S. antidiscrimination law has focused on protecting individuals as members of groups, not individuals' personal rights").

a correspondingly more searching judicial inquiry."[83] Almost half a century later, the Supreme Court further developed the justification for protected status, stating that "the traditional indicia of suspectness" are that "the class is ... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[84]

The Supreme Court's language suggests a two-part test: groups are entitled to protected status if they (1) constitute a discrete and insular minority, and (2) have suffered a history of discrimination. Each of the two factors will be analyzed separately as they apply to the antidiscrimination statutes.

The "discrete and insular minority" framework is a questionable fit for employment discrimination law. The ADA is the only statute that explicitly claimed to protect a discrete and insular minority. Its Findings and Purpose section originally asserted that there are forty-three million Americans with disabilities and that they are "a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness."[85] Ironically, this language was used by courts to justify a narrow interpretation of the term "disability" and frequently to rule against plaintiffs who claimed to have disabilities.[86] The "discrete and insular minority" designation was ultimately rejected by the

83. 304 U.S. 144, 152 n.4 (1938).

84. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (applying rational basis analysis to uphold a school financing system that relied on property taxes to the disadvantage of families that were not wealthy and resided in low property tax base areas); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (finding that older individuals are not a discrete and insular minority with a history of discrimination and upholding a statute that established a mandatory retirement age for state police officers).

85. 42 U.S.C. § 12101(a)(1), (7) (2000) (amended 2008).

86. Sutton v. United Air Lines, 527 U.S. 471, 484 (1999) (stating that the 43 million figure was meant to narrow the category of individuals with disabilities who are covered by the ADA); H.R. REP. NO. 110-730, pt. 2, at 15 (2008) (noting that based on this language, the Supreme Court determined that "the ADA's definition of disability should be interpreted strictly, rather than broadly as Congress had intended"); Cox, *supra* note 78, at 209 ("The Supreme Court had construed this finding as representing a ceiling, rather than a floor, on the number of persons able to bring ADA claims.").

ADAAA and no longer appears in the Findings and Purpose provision.[87]

It is even more difficult to characterize many of the other groups covered by the employment discrimination laws as discrete and insular minorities. Title VII protects all workers against discrimination based on race, color, national origin, religion, and sex, even if they are white, male, and Christian.[88] Similarly, the EPA applies to both men and women who are subjected to pay discrimination because of sex.[89] The ADEA covers anyone who is forty or older[90] and thus applies to almost half of the American population.[91]

Although the "discrete and insular minority" designation does not apply to most classes, a history of discrimination against various groups clearly motivated Congress to pass many of the employment discrimination laws and is often explicitly referenced in statutory language. Title VII is commonly understood to have been designed first and foremost to combat pervasive discrimination against African Americans.[92] The Equal Pay Act's Declaration of Purpose

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87. ADAAA, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3554-55 (2008); H.R. REP. NO. 110-730, pt. 2, at 15.

88. 42 U.S.C. § 2000e-2(a) (2006); Fullilove v. Klutznick, 448 U.S. 448, 526 (1980) (Stewart, J., dissenting) (asserting that racial discrimination is no less pernicious when the victim is not a member of a racial minority); Dawn V. Martin, *911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 37, 70 n.194 (1998-99) ("In the Title VII context, it is not only the discrete and insular minority which is protected against discrimination, but also members of the majority group.").

89. 29 U.S.C. § 206(d) (generally prohibiting pay disparities based on sex).

90. *Id.* § 631(a).

91. U.S. CENSUS BUREAU, 2006-2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES tbl. 50101, *available at* http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S0101&-ds_name=ACS_2008_3YR_G00_ (indicating what percentage of the American population falls into various age groups); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (noting that the elderly are not a discrete and insular minority because old age is "a stage that each of us will reach if we live out our normal span"); Goldstein v. Manhattan Indus., 758 F.2d 1435, 1442 (11th Cir. 1985) ("Age discrimination is qualitatively different from race or sex discrimination in employment, because the basis of the discrimination is not a discrete and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group. Rather, age is a continuum along which the distinctions between employees are often subtle and relative ones.").

92. United Steelworkers of Am. v. Weber, 443 U.S. 193, 246 n.25 (1979) ("The whole purpose of Title VII was to deprive employers of their 'traditional business freedom' to discriminate on the basis of race."); C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239, 269 (2008)

explains that the "existence ... of wage differentials based on sex ... depresses wages and living standards for employees necessary for their health and efficiency."[93] The reality of discrimination, therefore, justified the law's enactment. The ADEA's Statement of Findings and Purpose refers to the hurdles that confront older Americans in the workplace and thus to historical evidence that substantiates the need for legislative intervention.[94] According to the ADEA, older workers experience difficulty in retaining or regaining employment, commonly face arbitrary age limits regardless of their job performance, suffer a disproportionately high rate of unemployment, and are subjected to "arbitrary discrimination in employment because of age."[95] Similarly, the ADA emphasizes the history and continuing presence of discrimination against individuals with disabilities in its Findings and Purpose section.[96]

Nevertheless, the history of discrimination theory, like the discrete and insular minority model, does not apply to all of the protected classes. As noted above, Title VII protects "white men and white women and all Americans."[97] Nonminorities can file reverse discrimination cases even though their communities have not historically been subjected to persistent discrimination.[98]

Furthermore, the passage of GINA and the ADAAA raises new questions about the conceptualization of employment discrimination law as addressing either discrete and insular minorities or a history of discrimination. GINA was enacted despite a dearth of evidence of genetic discrimination in employment.[99] Its Findings section cites only one example of genetic discrimination and promises to "allay ... concerns about the potential for discrimination."[100] Thus,

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("Title VII was originally introduced to eradicate a history of discrimination against racial minorities, specifically African Americans.").

93. Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a)(1), 77 Stat. 56, 56.

94. 29 U.S.C. § 621(a).

95. *Id.*

96. 42 U.S.C. § 12101(a) (2000) (amended 2008).

97. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

98. *Id.*

99. *See* Roberts, *supra* note 32, at 441 (arguing that GINA constitutes preemptive legislation); Laurie A. Vasichek, *Genetic Discrimination in the Workplace: Lessons from the Past and Concerns for the Future*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 13, 39 (2009) (noting that unlike the other employment discrimination statutes, GINA is designed to eliminate discrimination "before it takes root").

100. GINA, Pub. L. No. 110-233, § 2(4), (5), 122 Stat. 881, 882-83 (2008). The cited case is

GINA does not combat an established history of discrimination. Furthermore, because all individuals have a genetic makeup, the statute does not protect a discrete and insular minority. Rather, it prohibits discrimination based on any type of genetic information, whatever the content of that information may be, and consequently covers the entire American population.[101]

Likewise, as noted above, the ADAAA eliminated the statutory language suggesting that individuals with disabilities are a discrete and insular minority.[102] The Findings and Purpose provision retains a discussion of the history of discrimination against those with disabilities.[103] However, because the protected class now includes individuals with any physical or mental impairment other than minor or transient ones,[104] many covered workers will not have conditions that are historically associated with discrimination. GINA and the ADAAA, therefore, make it impossible to characterize the employment discrimination laws as consistently seeking to protect discrete and insular groups that have suffered a history of discrimination.

B. The Formal Equality Model

An alternative conception of employment discrimination law is that it is designed to protect individuals who are well-qualified for a job but may be excluded by employers because of prejudice. Thus, employment discrimination law may be seen as attempting to align jobs with worker qualifications and to eliminate biased consideration of attributes, such as race, that are irrelevant to job perfor-

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Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1272 (9th Cir. 1998) (holding that an employer who administered nonconsensual preemployment tests for sickle-cell trait could be found to violate Title VII).

101. GINA § 202(a), 122 Stat. at 907.

102. ADAAA, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3554-55 (2008); *see also* Crossley, *Kaleidoscope*, *supra* note 26, at 659-65 (critiquing the minority group model of disability).

103. 42 U.S.C.A. § 12101(a) (West Supp. 2010).

104. *Id.* § 12102(3)(A) (explaining that individuals are regarded as disabled for statutory purposes so long as they are subjected to discrimination "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity"). See *supra* Part I.B.2.b for further discussion.

mance.[105] This understanding of the antidiscrimination laws has been described as the "formal equality" model.[106]

In a nonemployment context, a Supreme Court plurality opinion appeared to espouse the formal equality principle when it recognized sex as a suspect criterion because "the sex characteristic frequently bears no relation to ability to perform or contribute to society."[107] In a later race case, Justice Stewart asserted that immutable characteristics "bear no relation to ability, disadvantage, [or] moral culpability."[108]

The formal equality model fits several of the antidiscrimination requirements. Academic commentators have long contended that Title VII is based on the assumption that race is always immaterial to employees' competence and thus, the law attempted simply to level the playing field for minority groups.[109] Several of the other employment discrimination laws explicitly emphasize that the protected class at issue could thrive in employment but for discriminatory exclusion. The ADEA condemns "the setting of arbitrary age limits regardless of potential for job performance."[110] Similarly, the ADA speaks of "the continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity to compete on an equal basis."[111]

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105. William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 175-76 (2007); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 868-69 (2004) [hereinafter Crossley, *Reasonable Accommodation*].

106. Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 580-82 (2002).

107. Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (plurality opinion) (further noting that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members").

108. Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting). The majority upheld the Minority Business Enterprise provision of the Public Works Employment Act of 1977, which provided a 10 percent set-aside for minority group members. *Id.* at 453, 491-92 (majority opinion).

109. Crossley, *Reasonable Accommodation*, *supra* note 105, at 869; Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 314 (2001).

110. 29 U.S.C. § 621(a)(2) (2006).

111. 42 U.S.C.A. § 12101(a)(8) (West Supp. 2010).

Nevertheless, the formal equality model appears less compelling when one considers the reasonable accommodation mandate that applies to disabilities and religious practices. Under the ADA and Title VII, affirmative steps must be taken to facilitate job performance for those who are not capable of functioning in the workplace without certain modifications. The ADA requires employers to provide reasonable accommodations for qualified individuals with disabilities,[112] and it defines a "qualified individual" as one who could perform the essential job functions with or without an accommodation.[113] Title VII establishes a reasonable accommodation requirement to benefit individuals whose religious practices conflict with job requirements,[114] though employers need not bear more than a de minimis burden in providing such accommodations.[115] Thus, Title VII and the ADA prohibit employers from excluding workers who cannot fulfill all job requirements because of religious beliefs or disabilities so long as reasonable accommodations can be provided without undue hardship.[116]

Professor Christine Jolls argues convincingly that other statutory provisions effectively constitute reasonable accommodation mandates as well.[117] The employment discrimination statutes prohibit employers from implementing policies or selection criteria that have a disparate impact on particular protected groups unless these can be justified through a business necessity defense.[118] Thus, employers have been required to abandon employment tests that disadvantaged African Americans and were found not to be sufficiently related to job performance.[119] They also had to relax strict no-beard policies to which some African American men could not adhere

112. 42 U.S.C. § 12112(b)(5)(A) (2006).

113. *Id.* § 12111(8).

114. *Id.* § 2000e(j).

115. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

116. 42 U.S.C. §§ 2000e(j), 12112(b)(5)(A).

117. Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001).

118. 42 U.S.C. § 2000e-2(k)(1)(A) (establishing Title VII's disparate impact prohibition); *id.* § 12112(b)(3) (establishing the ADA's disparate impact prohibition); Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 95-100 (2008) (explaining the ADEA's disparate impact standard); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

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

because they suffered from the skin condition pseudofolliculitis barbae.[120] The disparate impact theory goes beyond requiring employers simply to ignore irrelevant attributes and treat all individuals equally. Instead, it forces employers to forsake facially neutral, preferred procedures in order to avoid creating hindrances to the success of protected class members.[121]

In addition, according to Professor Jolls, the antidiscrimination laws' disallowance of a customer preference defense is likewise akin to a reasonable accommodation requirement.[122] Employers may not be excused from statutory compliance even if they can prove that hiring members of a particular protected class, such as women or minorities, will impact their profitability because customers will be uncomfortable with these employees.[123] For example, in *Fernandez v. Wynn Oil Co.*, the defendant contended that its South American customers would refuse to do business with a female Director of International Operations.[124] The Ninth Circuit, however, instructed that "stereotyped customer preference [does not] justify a sexually discriminatory practice."[125] Accordingly, employers are forbidden to consider designated characteristics even when these are clearly not irrelevant because they will result in a loss of business.

The reasonable accommodation and disparate impact provisions and the rejection of a customer preference defense undermine the persuasiveness of the argument that the employment discrimination laws seek merely to ensure that fully qualified employees are treated equally and are not subjected to differentiation because of employers' blind ignorance and prejudice. Rather, they endorse, at least in theory, a redistribution of resources,[126] obligating employers

120. Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 797-99 (8th Cir. 1993); Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 612-13 (8th Cir. 1991); Jolls, *supra* note 117, at 653 ("[E]mployers may be required by disparate impact law to excuse particular groups of workers ... from facially neutral grooming rules that serve employers' business interests and were adopted solely for that reason.").

121. Jolls, *supra* note 117, at 672 (emphasizing that "disparate impact liability imposes accommodation requirements").

122. *Id.* at 686-87.

123. 29 C.F.R. § 1604.2(a)(1)(iii) (2009) (establishing that the refusal to hire an individual because of client or customer preference constitutes discrimination).

124. 653 F.2d 1273, 1276 (9th Cir. 1981).

125. *Id.* at 1277.

126. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 54 (2004). The article argues, however, that the courts have eviscerated the reasonable accommodation

to absorb certain costs or inconvenience in order to ensure opportunities for protected class members.[127]

C. Immutable Characteristics

A third option is to view the employment discrimination laws as protecting workers based on immutable characteristics.[128] Despite the shortcomings of the formal equality model,[129] it is indisputable that the employment discrimination laws designate particular characteristics as off-limits and immaterial to employers' decision-making processes. The laws, however, do not cover all factors that are intuitively irrelevant, such as musical preferences or eating habits.[130] It is therefore natural to ask whether the protected classifications constitute random choices or embody some cohesive rationale.

The concept of immutability provides a promising approach to answering this question. Race, color, national origin, sex, and age can all be deemed immutable in the sense that they are unchangeable.[131] Citizenship status is unalterable until one becomes eligible for naturalization.[132] Although individuals can theoretically convert to a different religion, many feel that religion is central to their personal identity and that adherence to their religious beliefs and practices is required by higher powers, so that conversion is out of the question.[133] GINA and the ADAAA make the immutability

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mandate to such a degree as "to assimilate ... [it] very closely to a classic antidiscrimination requirement." *Id.* at 42.

127. *See* Crossley, *Reasonable Accommodation*, *supra* note 105, at 873-74.

128. *See, e.g.*, Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 190 (3d Cir. 2009) (asserting that Title VII "protects all individuals from discrimination motivated by the immutable characteristics specified in the statute"); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin.") (emphasis omitted).

129. *See supra* Part II.B.

130. *See supra* note 5 and accompanying text (listing the employment discrimination laws and the characteristics they protect).

131. See *infra* Part III.B.2 for further discussion.

132. *See infra* notes 171-73 and accompanying text.

133. Catarina Kinnvall, *Globalization and Religious Nationalism: Self, Identity, and the Search for Ontological Security*, 25 POL. PSYCHOL. 741, 763 (2004) (discussing the importance of religion as an "identity-signifier[ ]"); Renate Ysseldyk et al., *Religiosity as Identity: Toward an Understanding of Religion from a Social Identity Perspective*, 14 PERSONALITY & SOC.

characterization increasingly compelling. Individuals' genetic make-up and mental or physical impairments are biological attributes and are largely unchosen and unchangeable.[134] These two statutes, therefore, validate and bolster the generalization that the law prohibits employment discrimination based on immutable characteristics.

Yet, a review of case law and legal scholarship reveals that the meaning of the term "immutable characteristic" in the civil rights context is surprisingly murky. Part III explores whether a coherent definition of the term "immutable characteristic" emerges from constitutional and statutory analysis in the field of discrimination law.

III. THE CONCEPT OF IMMUTABILITY

The concept of immutability has been a fixture in both constitutional and statutory analysis of discrimination issues. This Part will develop two different definitions of the term "immutable characteristic," both drawn from constitutional cases. The term can be defined as (1) "an accident of birth";[135] or (2) a characteristic that is either unchangeable in absolute terms or so fundamental to identity or conscience that individuals effectively cannot and should not be required to change it.[136] This Article will explore the applicability of each definition to the traits covered by the employment discrimination statutes and will argue that immutability is a unifying principle that satisfactorily explains the protected classifications.

A. Immutability in Constitutional Analysis

The Supreme Court has referred to the immutability of group characteristics in resolving due process and equal protection questions. The Court has considered the immutability of characteristics

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PSYCHOL. REV. 60, 61 (2010) ("[T]he unique characteristics of religion, including compelling affective experiences and a moral authority that cannot be empirically disputed ... may lend this particular social identity a personal significance exceeding that of membership in other groups.").

134. See *infra* notes 180-85 and accompanying text for a discussion of circumstances in which impairments and disabilities may to some extent be subject to individuals' control.

135. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

136. *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985).

in determining what level of scrutiny should apply to alleged acts of discrimination.[137] This Section will analyze the use and meaning of the immutability concept in constitutional jurisprudence.

1. The Relevance of Immutability

The Supreme Court has suggested that identification of an immutable characteristic, though not indispensable,[138] can support suspect class status and justify heightened scrutiny. In *Frontiero v. Richardson*, for example, a Supreme Court plurality opinion asserted that "sex, like race and national origin, is an immutable characteristic"[139] and struck down federal statutes that treated male and female spouses of military personnel unequally.[140]

When the Supreme Court has specifically found that the attribute at issue is not immutable, it has declined to apply heightened scrutiny to challenged governmental actions. In *Plyler v. Doe*, which involved a Texas statute that denied state funds to school districts for the education of children who were illegal aliens, the Court noted that undocumented status is not an immutable characteristic because it is the product of intentional conduct.[141] The Court therefore applied rational basis analysis rather than heightened scrutiny to strike down the statute.[142] In *Lyng v. Castillo*, the Court refused to characterize the status of being close relatives as a suspect class because close relatives "do not exhibit obvious, immutable, or distinguishing characteristics."[143] In that case, the Court used rational basis analysis to uphold amendments to the Food Stamp Act that disadvantaged certain families.[144]

Immutability, however, does not guarantee suspect class categorization. In *Frontiero*, the Supreme Court identified disability and

137. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986). See *infra* notes 143-44 and accompanying text for further discussion of the case.

138. Graham v. Richardson, 403 U.S. 365, 372 (1971) (labeling aliens a suspect class without mentioning immutability).

139. *Frontiero*, 411 U.S. at 686.

140. *Id.* at 690-91.

141. 457 U.S. 202, 220 (1982).

142. *Id.* ("It is ... difficult to conceive of a rational justification for penalizing these children for their presence within the United States.").

143. 477 U.S. 635, 638 (1986).

144. *Id.* at 639.

intelligence as immutable but determined that they did not have suspect class status because these attributes could actually affect an individual's competence and functioning.[145] The Supreme Court confirmed its view of mental impairments in *City of Cleburne v. Cleburne Living Center, Inc.*[146] The Court acknowledged the immutability of mental retardation[147] but refused to recognize individuals who suffer from the condition as a suspect class.[148] Likewise, in *Massachusetts Board of Retirement v. Murgia*, the Supreme Court declined to apply heightened scrutiny to evaluate the constitutionality of a statute mandating a retirement age of fifty for state police officers.[149] The Court believed that older individuals, unlike those subjected to discrimination based on race or national origin, are not a discrete and insular minority and "have not experienced a 'history of purposeful unequal treatment.'"[150]

2. The Meaning of Immutability

The next step of analysis is to determine how the federal courts define an "immutable characteristic." A review of Supreme Court and appellate court decisions reveals two primary definitions of immutability.

First, the *Frontiero* Supreme Court decision defined an immutable characteristic as one that is "determined solely by the accident of birth."[151] Thus, immutable characteristics are not the product of "conscious ... action."[152] In *Vieth v. Jubelirer*, the Court noted that political affiliation is not an immutable characteristic because it "may shift from one election to the next."[153] It is noteworthy that *Vieth* is the only post-1986 instance in which the Supreme Court

145. *Frontiero*, 411 U.S. at 686.

146. 473 U.S. 432, 448 (1985) (using rational basis analysis to invalidate a zoning order that required a special permit for a group home for mentally retarded individuals).

147. *Id.* at 442.

148. *Id.* at 442, 446.

149. 427 U.S. 307, 313-14 (1976) (finding that the mandatory retirement statute was rationally related to the state's legitimate public safety goals).

150. *Id.* at 313.

151. Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *see also* Michael M. v. Superior Court, 450 U.S. 464, 477-78 (1981) (Stewart, J., concurring) (referring to immutable characteristics as those with which one is born).

152. Plyler v. Doe, 457 U.S. 202, 220 (1982).

153. 541 U.S. 267, 287 (2004).

analyzed the concept of immutability, and thus some scholars have commented that it may be essentially extinct in Supreme Court jurisprudence.[154] However, the concept has been more frequently contemplated by the appellate courts, and the definition of immutability as an "accident of birth" has been adopted by several of them.[155]

The federal appellate courts have also developed a second understanding of the meaning of "immutable characteristic." Under this formulation, a trait is immutable if it is "so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[156] In other words, a trait is immutable if "changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[157] Thus, according to this approach, an attribute need not be entirely fixed in order to be deemed immutable.

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154. Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 647 (2001) (noting that the concept of immutability has receded in Supreme Court equal protection analysis and may even be considered irrelevant); Marc R. Shapiro, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409, 412 (2002-03) (asserting that the Supreme Court appears interested in "phasing out the immutability concept"); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 490-91 (1998) (criticizing the concept of immutability and arguing for its demise in constitutional analysis).

155. *See* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 638 (7th Cir. 2007) (citing *Frontiero*, 411 U.S. at 686); Eulitt *ex rel.* Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 353 n.3 (1st Cir. 2004) (discussing the definition in a footnote); Lake v. Arnold, 112 F.3d 682, 687 (3d Cir. 1997) (citing Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1243 (3d Cir. 1978)).

156. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000); *see also* Zavaleta-Lopez v. Att'y Gen., 360 F. App'x 331, 333 (3d Cir. 2010) ("[I]mmutable characteristics [are those] such as race, gender, or a prior position, status, or condition, or characteristics that are capable of being changed but are of such fundamental importance that persons should not be required to change them, such as religious beliefs."); Njenga v. U.S. Att'y Gen., 216 F. App'x 963, 996-67 (11th Cir. 2007) (finding that immutable characteristics are fundamental to individual identities or consciences); *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439, 447 (B.I.A. 1987). The *Zavaleta-Lopez* case illuminates an evolution in the Third Circuit's understanding of immutability. In 1997, the court adopted the "accident of birth" definition of immutability in *Lake v. Arnold*, 112 F.3d at 687, but thirteen years later in *Zavaleta-Lopez*, 360 F. App'x at 333, the court articulated a much broader conceptualization of the term.

157. Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (holding that the U.S. Army could not bar a soldier's reenlistment because of his homosexuality).

Professor Samuel Marcosson speaks of "self-concept," which is a "complex mix of cultural, familial, historical, and internal factors."[158] The second definition of immutability is sensitive to the importance of self-concept and embraces the idea that certain characteristics are core to an individual's sense of self and thus must be deemed unalterable.

One might object that the more liberal definition of immutability defies the word's literal meaning and thus should be rejected. This Article would argue, however, that although traits such as religion or pregnancy, which are captured by this definition, may appear objectively mutable to some, they are immutable to others based on their world view and identity. Thus, although to a secular individual religion may appear alterable, pious adherents have martyred themselves in order to avoid violating religious principles.[159] To many devout people conversion is unfathomable, and religious requirements are divinely established. Professor Michael McConnell acknowledged this reality when he wrote the following about Sabbath-keeping Jews who do not work on Saturdays: "It would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God."[160]

Similarly, although it is objectively possible to plan or terminate pregnancies, many individuals do not view these matters as being within their power to decide. For some, family planning is religiously prohibited, and abortion constitutes murder. To such individuals, preventing or ending pregnancy, though readily achievable through medical means, is inconceivable. Consequently, stretching "immutability" to encompass traits that are fundamental to identity is a reasonable approach. There are traits that are objectively mutable but are, in practical terms, unchangeable to

158. Marcosson, *supra* note 154, at 683.

159. Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1603-05 (1986).

160. Michael W. McConnell, *Religious Freedoms at a Crossroads*, 59 U. CHI. L. REV. 115, 125 (1992) (critiquing Justice O'Connor's concurrence in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which the Supreme Court held that a Connecticut statute that required employers to accommodate employees' Sabbath observance without exception violated the Constitution).

particular individuals because of their fundamental beliefs or self-understanding.

B. Immutability in the Employment Discrimination Statutes

Even if the concept of immutability is of limited importance in contemporary Supreme Court constitutional analysis, it is illuminating in the context of the employment discrimination statutes. Both the courts and academic commentators have recognized immutability as a central justification for the antidiscrimination mandates that apply to the workplace.[161]

This Article argues that the notion of "immutable characteristics" explains the protected classifications better than any other principle, especially after the enactment of GINA and the ADAAA. All of the attributes protected by the employment discrimination laws can be deemed to be immutable characteristics under one or both of the definitions described above.[162]

To be clear, this Article argues only that the concept of immutability provides a rationale for the protected classifications encompassed within the antidiscrimination statutes. It acknowledges that the concept of immutability does not explain why certain unchangeable or self-defining traits, such as sexual orientation and parental

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161. *See* Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (holding that an employer's hair length regulation does not violate Title VII because "[h]air length is not an immutable characteristic"); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (holding that Title VII prohibits only discrimination based on "immutable characteristics, such as race and national origin"); Baker v. Cal. Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974) (holding that Title VII addresses discrimination based on characteristics that "the applicant, otherwise qualified, ha[s] no power to alter"); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973) ("Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of *immutable* race, national origin, color, or sex classification."); Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure To Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 454 (2010) ("The federal courts explicitly distinguish between mutable and immutable traits—or status and conduct—when deciding most Title VII cases. In doing so, the courts have routinely held that mutable traits are not entitled to protection under Title VII, and plaintiffs seldom win in these cases."); Roberts, *supra* note 32, at 476-77 ("When invoked within antidiscrimination law, immutability stands for the proposition that entities should not discriminate on the basis of traits that a person did not choose and cannot change or control without serious cost. Not coincidentally, the perceived immutability of race, sex, national origin, disability, and even age has been cited as a reason for protecting those traits.").

162. *See supra* Part III.A.2.

status, are excluded from the statutory scope, and these exclusions will be explored later in the Article.[163] This Section analyzes how each definition of immutability fits the employment discrimination laws' protected classifications.

1. Immutable Characteristics as Accidents of Birth

Many of the characteristics that are covered by the employment discrimination laws are very obviously accidents of birth. Race, color, national origin, genetic makeup, and many disabilities are traits that individuals have from the moment they are born. Age is also determined by birth date. Although sex can be changed, the change requires complicated sex reassignment surgery, which is very rarely undertaken.[164] Therefore, sex can be labeled as determined by accident of birth in all but the most exceptional cases.

The courts have extended Title VII's national origin protection to discrimination based on foreign accents.[165] Although no absolute prohibition is established, the courts have required employers to prove a business necessity defense for adverse decisions related to foreign accents because accents are linked to one's birthplace and are immutable for many people. Thus, in *Carino v. University of Oklahoma Board of Regents*, the Tenth Circuit held that a university violated Title VII by demoting an employee who had been the supervisor of a dental laboratory and had no job performance problems related to his Filipino accent.[166] In *Fragante v. City of Honolulu*, the Ninth Circuit upheld the rejection of an applicant whose heavy accent was likely to create communication difficulties

163. *See infra* Part IV.C.

164. According to one source, only one hundred to five hundred sex reassignment surgeries are performed each year in the United States. L. Fleming Fallon Jr., *Sex Reassignment Surgery*, HEALTHLINE.COM (2004), http://www.healthline.com/galecontent/sex-reassignment-surgery. According to another source, up to one thousand sex reassignment surgeries are performed annually in the United States, while hundreds of additional Americans undergo the operation more cheaply abroad. Lynn Conway, *How Frequently Does Transsexualism Occur?*, http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html (last visited Feb. 18, 2011) (estimating that by 2002 a total of fourteen thousand to twenty thousand U.S. residents had undergone sex reassignment surgery).

165. *See* Fragante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984).

166. *Carino*, 750 F.2d at 816, 819.

in a job with significant public contact,[167] but the court emphasized that "[a]n adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance."[168]

Other protected classifications are less comfortably categorized as accidents of birth. Although many individuals remain members of their religions of birth, a significant percentage of Americans convert to a different religion or choose not to identify with any religion at all.[169] Title VII's prohibition of religious discrimination makes no distinction between individuals who never altered their religious affiliation and those who have.[170]

Citizenship status, like religion, is alterable. The fact that an alien has left her country of origin and is living in the United States is a matter of choice. At the same time, citizenship status can be considered an accident of birth to some extent because the eligibility conditions and timing of naturalization are dictated by law.[171] Thus, legal immigrants must wait a number of years before becoming citizens,[172] whereas persons who are born in this country are automatically citizens.[173] It is noteworthy that IRCA does not protect individuals who could be naturalized but choose not to apply for citizenship within six months of becoming eligible for it.[174]

Finally, although many disabilities are conditions with which people are born, some are products of adversity or risk-taking behavior. Such disabilities, therefore, can develop long after birth and are nevertheless covered by the ADA.[175]

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167. *Fragante*, 888 F.2d at 598.

168. *Id.* at 596.

169. THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), *available at* http://religions.pewforum.org/reports (finding that 28 percent of Americans say they have left the religion with which they were raised and are either members of a different religion or unaffiliated).

170. 42 U.S.C. § 2000e(j) (2006) (defining the term "religion").

171. U.S. Citizenship & Immigration Servs., Citizenship Through Naturalization, http://www.uscis.gov/portal/site/uscis/menuitem (follow "Citizenship Through Naturalization" hyperlink) (last visited Feb. 18, 2011).

172. *Id.*

173. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States ... are citizens of the United States.").

174. 8 U.S.C. § 1324b(a)(3)(B)(I).

175. *See* 42 U.S.C. § 12102(2) (defining "disability").

The idea that the law protects individuals based on characteristics that are acquired by accident of birth is emotionally appealing and compelling. This Article therefore retains "accident of birth" as one of its alternative definitions of immutability.[176] "Accident of birth," however, does not accurately describe several of the characteristics that have been awarded protected status in employment discrimination law. This definition alone is thus underinclusive and requires supplementation.

2. Immutable Characteristics as Unchangeable or Fundamental to Identity

The second definition of "immutable characteristic" offers a more comprehensive characterization of all of the traits that comprise the protected classifications. The understanding of an immutable characteristic as one "that either is beyond the power of an individual to change or that is so fundamental to [individual] identity or conscience" that it is effectively unalterable and "ought not be required to be changed"[177] accurately describes all of the traits that have been elevated to protected status by the employment discrimination laws. As demonstrated above, this more liberal definition is rooted in court precedent and has been accepted by several circuits.[178]

Race, color, national origin, sex, age, genetic makeup, many disabilities, and the citizenship status of those not eligible for naturalization are accidents of birth and cannot be changed.[179] They thus meet both definitions of "immutable characteristic."

Other traits are captured only by the second definition. A secularist might deem religion to be alterable, but it is immutable in the worldview of many devout individuals because it is fundamental to their conscience or identity.[180] Thus, the law prohibits employers that are not religious entities from demanding that workers adhere

176. *See supra* text accompanying note 12.

177. *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439, 447 (B.I.A. 1987).

178. *See supra* note 156 and accompanying text.

179. *See supra* Part III.B.1 (discussing which characteristics are accidents of birth and to what extent certain traits can be changed). It should be noted, however, that individuals who are of mixed ancestry may choose to identify as members of a particular population group and not another, and thus may have some control over their racial or national identity.

180. *See supra* note 159 and accompanying text.

to particular religious beliefs in order to obtain or retain employment.[181] Likewise, it is possible to plan or terminate pregnancies, but for particular individuals, doing so would violate core religious or moral beliefs and thus would be unimaginable. Consequently, the law prohibits employers from engaging in pregnancy-based discrimination.[182]

The second definition of immutability also applies to unalterable disabilities that are acquired through accidents or other misfortunes after birth.[183] Moreover, it applies in circumstances in which individuals choose not to mitigate or eliminate disabilities. In some cases, disabilities can be overcome through prosthetic devices, surgeries, or other treatments.[184] Certain individuals, however, may reject opportunities to alter their disabilities, viewing them as valued components of their identity. A well-known illustration is provided by members of the deaf community who decline cochlear implants because they cherish deaf culture and American Sign Language.[185] The deafness of such individuals would now be protected as a disability under the ADA because the statute no longer requires that the question of disability be resolved in light of mitigating measures.[186] In effect, the statute has endorsed the choice of individuals with disabilities who opt to remain in their natural, unaltered state and has deemed penalizing such a choice to be unacceptable.[187] The ADA's post-amendment approach is thus consistent with an understanding of disability in such circum-

181. *See* 42 U.S.C. § 2000e-2(a) (2006) (prohibiting religious discrimination); *see also id.* §§ 2000e-1(a), 2000e-2(e)(2) (creating exemptions for religious corporations, associations, societies, and educational institutions and establishing that they are permitted to restrict their hiring to members of a particular religion).

182. *Id.* § 2000e(k) (defining the terms "because of sex" or "on the basis of sex" to include pregnancy).

183. *See supra* note 175 and accompanying text.

184. *See* 42 U.S.C.A. § 12102(4)(E)(i)(I)-(IV) (West Supp. 2010) (discussing mitigating measures).

185. Cox, *supra* note 78, at 217-18; Bonnie Poitras Tucker, *Deaf Culture, Cochlear Implants, and Elective Disability*, 28 HASTINGS CENTER REP. 6, 6-7 (1998).

186. *See* 42 U.S.C.A. § 12102(4)(E)(i)(I)-(IV) (stating that determinations regarding disabilities shall be made without regard to mitigating measures and describing such measures).

187. *But see supra* notes 77-78 and accompanying text (noting that the ADA is silent as to whether individuals who choose not to mitigate disabilities will be entitled to reasonable accommodation).

stances as being potentially fundamental to one's identity and therefore an immutable characteristic.[188]

By significantly enlarging the scope of statutory protection based on biological attributes to include genetic makeup and essentially all nontransient physical and mental impairments,[189] GINA and the ADAAA make immutability more relevant than ever to the employment discrimination field. Each protected classification can be described as a characteristic that is either unchangeable in absolute terms or that can be effectively unalterable for reasons of identity or fundamental beliefs.

3. Why Should Immutable Characteristics Be Protected?

Having identified immutability as the common theme in the employment discrimination statutes, it is natural to ask why the law would opt to protect unalterable traits. The answer is that the antidiscrimination mandates promote the public policy goals of fairness and, to a lesser degree, efficiency, and attempt to establish appropriate incentives and disincentives for employer and employee conduct.

The fairness or justice concerns are two-fold. First, common sense dictates that it is unjust for workers to suffer ill consequences solely because of traits with which they were born or that they cannot modify. Employers operating behind a Rawlsian "veil of ignorance"[190] would presumably embrace the antidiscrimination mandates in order to minimize the possibility that they themselves would be subjected to discrimination because of particular unalterable attributes. Behind the hypothetical "veil of ignorance," an employer would not know whether she plays the role of decision maker or worker nor which immutable characteristics she possesses. Thus, everyone would fear discrimination and welcome its prohibition.[191]

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188. *See supra* notes 156-60 and accompanying text (discussing the second definition of "immutable characteristic").

189. *See supra* Part I.B.

190. *See* JOHN RAWLS, A THEORY OF JUSTICE 118-23 (1999) (outlining the principles of justice that hypothetical decision makers would choose were they operating behind a "veil of ignorance").

191. *Id.* at 132-33 (hypothesizing that decision makers would wish to maximize benefits for the worst off in the hope of ensuring their own good outcomes if they themselves were to

A second fairness concern relates to safeguarding the personal autonomy of workers with respect to major life decisions. Absent the antidiscrimination laws, employers would be free to make adverse decisions based on a worker's religion[192] or pregnancy.[193] Consequently, employees might feel pressured to change their religious identities or to time, avoid, or terminate pregnancies in order to maximize job opportunities. Employment concerns would thus drive personal decisions in a manner that modern American society perceives as unjust and repugnant.[194]

In some cases, prohibiting discrimination based on immutable characteristics may also serve efficiency. Employers who are blinded by prejudice could refuse highly qualified candidates in favor of less competent nonminorities. Such employers would compromise their productivity and profitability because of bias and thus may actually benefit economically from the antidiscrimination mandates.

Nevertheless, the employment discrimination laws do not consistently promote efficiency for all employers. Some employers are required to provide reasonable accommodations that can be costly or burdensome.[195] Others are forced to abandon preferred employment policies or to hire minorities whose presence might motivate customers to choose to do business elsewhere.[196] In this sense the laws may be seen as shifting costs from workers or public safety net programs to employers.[197]

The employment discrimination laws' focus on immutable characteristics, understood broadly to include traits that are theoretically alterable but fundamental to individual identity, establishes incentives and disincentives that advance the public policy goals of justice and, to a more limited extent, efficiency. Employers

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fare poorly one day).

192. *See* 42 U.S.C. § 2000e(j) (2006) (defining the term religion); *id.* § 2000e-2(a) (prohibiting employers from discriminating on the basis of religion).

193. *See id.* § 2000e(k) (defining the terms "because of sex" or "on the basis of sex" to include pregnancy); *id.* § 2000e-2(a) (prohibiting employers from discriminating on the basis of sex).

194. *See* Corbett, *supra* note 105, at 171 (noting that the determination that something is morally wrong "often leads to either passage or consideration of a legal regulation designed to prohibit or mitigate that wrong").

195. *See infra* note 316 and accompanying text. *But see* Hoffman, *supra* note 30, at 335-36 (suggesting that the cost of many accommodations is minimal).

196. *See supra* notes 122-25 and accompanying text.

197. See *infra* Part V.C for further discussion of these issues.

are prohibited from punishing applicants and employees for possessing traits that are outside of their control or from pressuring them to make critical decisions concerning religion or pregnancy that might be psychologically or otherwise harmful. In addition, the laws are designed to prevent employers from behaving in self-defeating ways by making discriminatory personnel decisions that will compromise their own success.

IV. IS IMMUTABILITY THE WHOLE ANSWER?

Scholars and advocates should accept the concept of immutability as encompassing all of the traits that American employment discrimination law actually protects. The concept does not, however, explain why other traits that are unchangeable or fundamental to personal identity are excluded from statutory coverage. Many characteristics can be described as accidents of birth, unchangeable, or fundamental to individual identity or conscience, and yet, they do not enjoy protected status.

The American legal system generally permits employers a high degree of autonomy to operate as they see fit.[198] This approach encourages entrepreneurs to pursue business enterprises, promising that they are at liberty to build a workforce of their choice and maximize their profitability, with only limited restrictions.[199] The law must, therefore, balance the goal of combating pernicious discrimination against the goal of creating a hospitable environment for American employers.[200] It is only when particular choices are perceived as sufficiently dangerous that legislatures opt to intervene.[201] In addition, legislative choices are influenced by lobbying, interest groups, and those with strong political voices.[202]

198. Corbett, *supra* note 105, at 166.

199. *Id.*

200. *Id.*

201. *See id.* at 162, 171-77 (discussing the factors that determine whether a characteristic will be "covered by discrimination law" and the need to balance those factors against "important goals favoring unregulated employer prerogative").

202. Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 481 (1999) (indicating that civil rights lawyers engage in a variety of activities, including "lobbying for beneficial legislation and regulations, communicating with the press, organizing grass-roots campaigns and training clients seeking to influence the implementation of government policies, ... and building coalitions and bargaining with other interest groups").

The immutable characteristics that are not protected by the employment discrimination statutes fall into three categories. First, there are traits about which employers are unlikely to care and that they probably do not wish to exclude from the workplace.[203] Second, there are instances in which workers and employers may disagree about whether a particular characteristic falls into a protected category, and the law provides no clear answer.[204] Finally, there are attributes that are undoubtedly unchangeable or fundamental to identity and that are associated with discrimination but have not been elevated to protected status for political or other reasons.[205]

This Part will explore each of the three categories of excluded immutable characteristics. In so doing it will contemplate whether these exclusions constitute rational choices or raise significant questions about the coherence of employment discrimination law.

A. Immutable Traits Not Generally Associated with Discrimination

The First Circuit once made the following sweeping assertion: "If America stands for anything in the world, it is fairness to all, without regard to race, sex, ethnicity, age, or other immutable characteristics that a person does not choose and cannot change."[206] Nevertheless, many biological traits that are immutable are not addressed by the employment discrimination statutes. Examples are height,[207]

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203. *See infra* Part IV.A.

204. *See infra* Part IV.B.

205. *See infra* Part IV.C.

206. DeNovellis v. Shalala, 124 F.3d 298, 314 (1st Cir. 1997).

207. *See* Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1088 (2009) (noting that "[i]n 1977, Michigan became the first and still only state to prohibit appearance discrimination in employment, by adding height and weight to the characteristics protected by the Elliott-Larsen Civil Rights Act"). Height requirements, however, may be challenged even under federal law if they are found to be a proxy for sex or national origin discrimination or to have a disparate impact on particular minority groups. *See* Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (finding that the height requirement of 5'2" for State of Alabama prison guards would exclude 33.29 percent of U.S. women between the ages of 18 and 79 but only 1.28 percent of men in the same age range and therefore was sufficient to establish a prima facie case of sex discrimination); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 941-43 (10th Cir. 1979) (remanding on question of whether height requirement had disparate impact on Hispanic applicants); Davis v. County of Los Angeles, 566 F.2d 1334, 1341-42 (9th Cir. 1977) (invalidating a height requirement for firefighters that had a disparate impact on Mexican Americans and was found not to be job related), *vacated as moot*

eye color,[208] blood type,[209] and left-handedness.[210] Clearly, not all unchangeable characteristics are or should be the subject of legislative intervention.

The physical traits listed above are ignored most probably because employers are unlikely to care about them or to make adverse decisions based on them. Generally, there is no motivation for employers to consider these attributes, and excluding them from the workplace would yield no advantage. Thus, in balancing the competing goals of employer autonomy and worker protection,[211] legislatures choose not to intervene with respect to characteristics such as height, eye color, blood type, and left-handedness. It would be unreasonable to crowd the code books with legislation addressing these characteristics when the probability of bias based on these traits is very low.

B. Judgments About What Is Fundamental to Identity

Title VII, like the ADA prior to its amendment,[212] has generated significant debate concerning the boundaries of its protected classifications.[213] In some cases, plaintiffs claim that particular qualities or behaviors are fundamental to their identity even though they cannot clearly be designated as "race," "color," "religion," "sex," or "national origin."[214] These cases blur the Title VII margins, and

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on other grounds, 440 U.S. 625 (1979).

208. *See, e.g.*, Tracy v. Mount Ida Coll., No. 93-12248, 1995 WL 464909, at *2 n.3 (D. Mass. Mar. 17, 1995) (describing a discrimination claim based on eye color as one not prohibited by Title VII); Teri Morris, Note, *States Carry Weight of Employment Discrimination Protection: Resolving the Growing Problem of Weight Bias in the Workplace*, 32 W. NEW ENG. L. REV. 173, 204-06 (2010) (noting that, as a "physical characteristic," eye color "has not risen to the level of requiring legal discrimination protection").

209. *See* Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 345-46 (noting that blood type does not have "the sort of salience" in the United States "that leads to worrisome stereotypical categorizations" and contrasting this observation with the importance of blood type in Japanese culture).

210. de la Torres v. Bolger, 610 F. Supp. 593, 597 (N.D. Tex. 1985) (finding that a left-handed worker did not have a "statutorily cognizable impairment" under the Rehabilitation Act of 1973).

211. *See supra* notes 198-202 and accompanying text.

212. *See supra* notes 26-31 and accompanying text (discussing the ADA's controversial definition of "disability").

213. *See infra* notes 214-43 and accompanying text.

214. *See* 42 U.S.C. § 2000e-2(a)(1) (2006) (listing Title VII's protected classifications).

courts have faced difficult decisions concerning the immutability and protected status of such qualities. The courts' decisions in these cases seem to turn on the degree to which they perceive the qualities or behaviors at issue as truly fundamental to identity rather than as matters of choice and preference.

Several plaintiffs have challenged workplace policies that restrict employees' ability to wear hairstyles that are associated with ethnic identity.[215] In *Rogers v. American Airlines, Inc.*, for example, the plaintiff asserted that wearing corn rows "has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[216] In *Eatman v. United Parcel Service*, Eatman wore dreadlocks because of his Nubian belief system and their "connection to African identity and heritage."[217] Despite litigants' claims that their hairstyles were fundamental to their identities, the courts have held that hairstyles can be modified and that employer grooming policies that restrict them do not violate Title VII.[218]

Nevertheless, in *Rogers*, the court noted that had the airline banned Afros rather than corn rows, it may have violated Title VII because Afro-textured hair is natural to African Americans and thus constitutes an immutable characteristic.[219] The hairstyle decisions are clearly influenced by the concept of immutability and are rooted in the courts' sense that the styles at issue are matters of predilection.

A number of reported cases involve disputes concerning the reach of Title VII's "religion" classification. The term "religion" is generally defined very liberally in American jurisprudence and has been interpreted to include nontraditional and nonorganized religions.[220]

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215. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2002); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981); Carswell v. Peachford Hosp., No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981).

216. *Rogers*, 527 F. Supp. at 231-32.

217. *Eatman*, 194 F. Supp. 2d at 259.

218. *Id.* at 262*; Rogers*, 527 F. Supp. at 232-33; *Carswell*, 1981 WL 224, at *3. *See generally* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1093-94, 1120-24 (2010) (arguing that Title VII's "race" category should include protection of black women's hairstyles because their hair is physically different from white women's hair, and this difference is essentially immutable).

219. *Rogers*, 527 F. Supp. at 232.

220. *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834 (1989) ("[T]he Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious

Courts have opted for this approach in order to avoid infringing upon plaintiffs' First Amendment rights.[221] Thus, courts have found "religion" to encompass Wicca,[222] white supremacist beliefs,[223] and a spiritual faith in the power of dreams.[224] However, in some cases, plaintiffs allege that they have been discharged for deeply held beliefs that are fundamental to their identity, but they are met with resistance from the courts. When courts deem the plaintiffs' views to constitute political ideas or lifestyle choices rather than beliefs that can be categorized as "religious," they refuse to grant litigants Title VII protection. For example, in *Slater v. King Soopers, Inc.*, the district court ruled against a plaintiff who was terminated after organizing a Hitler rally, concluding that the Ku Klux Klan was not a religion that falls under Title VII but rather was "political and social in nature."[225] In *Brown v. Pena*, a case that was predictably deemed to be frivolous, the court ruled against a plaintiff who claimed he was subjected to discrimination because of his "religious" belief that Kozy Kitten Cat Food was contributing to his state of well-being and job performance.[226]

A growing number of plaintiffs have filed cases that allege discrimination based on gender identity or gender expression, which attempt to stretch the meaning of the term "sex" under Title VII.[227]

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sect."); United States v. Seeger, 380 U.S. 163, 185 (1965) (explaining that the term "religion" includes beliefs that are "sincerely held" and that are, in an individual's "own scheme of things, religious").

221. *See* Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (asserting that efforts by the government to draw distinctions between religious and secular beliefs would not be "compatible with the Establishment Clause of the First Amendment").

222. Van Koten v. Family Health Mgmt., Inc., 955 F. Supp. 898, 902 (N.D. Ill. 1997) (finding that Wicca is a religion for Title VII purposes).

223. Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1021-22 (E.D. Wis. 2002) (finding that a white supremacist belief system called "Creativity" was a "religion" within Title VII's meaning).

224. Toronka v. Cont'l Airlines, Inc., 649 F. Supp. 2d 608, 612 (S.D. Tex. 2009) (refusing to dismiss a case in which the plaintiff alleged that he was subjected to discrimination because of his belief in the power of dreams that was linked to his African heritage and was religious in nature).

225. 809 F. Supp. 809, 810 (D. Colo. 1992); *see also* Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1026 (E.D. Va. 1973) (finding that the discharge of an employee for being a member of a racially exclusive organization dedicated to anti-Semitism did not violate Title VII).

226. 441 F. Supp. 1382, 1384-85 (S.D. Fla. 1977) (finding that "plaintiff's belief in pet food does not qualify legally as a religion"), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).

227. *See* DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS

Gender identity refers to individuals' own sense of their gender, regardless of their sex at birth, and gender expression relates to individuals' choices of grooming and conduct that are commonly associated with being masculine or feminine.[228] While early case decisions provided little hope for plaintiffs with nontraditional sex-related claims,[229] some recent courts have been more sympathetic to such litigants.[230] In *Smith v. City of Salem*, the Sixth Circuit held that Title VII prohibited discrimination against a male firefighter who was diagnosed with gender identity disorder and exhibited "gender non-conforming behavior."[231] Several additional courts have ruled in favor of transsexual plaintiffs,[232] though other courts continue to interpret the term "sex" more narrowly.[233] Thus, not all courts construe Title VII as encompassing only the anatomical, biological characteristics of being male or female. The courts that

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ON EQUALITY IN THE WORKPLACE 453 (8th ed. 2010).

228. *Id.* at 455.

229. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that "Title VII does not protect transsexuals"); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (ruling that transsexualism is not included in Title VII); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (finding that Title VII does not extend to discrimination against transsexuals). A transsexual is a person who changes his or her physical sex. AVERY ET AL., *supra* note 227, at 456.

230. AVERY ET AL., *supra* note 227, at 453.

231. 378 F.3d 566, 575 (6th Cir. 2004).

232. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737-38 (6th Cir. 2005) (upholding a verdict for a preoperative male-to-female transsexual who alleged she was demoted from a police officer job in violation of Title VII); Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (holding that the Library of Congress violated Title VII by "refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes").

233. *See, e.g.*, Kastl v. Maricopa County Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009) (finding, based on insufficient evidence, that the employer did not violate Title VII by prohibiting a preoperative transsexual from using the women's restroom until after her sex reassignment surgery was complete); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (concluding that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"); *see also* Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 171 (2009) ("[E]ven though sex discrimination doctrine reaches some types of discrimination against gender nonconforming people, courts have limited this doctrine, especially outside of the sexual harassment context."); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 715 (2010) ("The problem of adequately protecting sexual minorities under Title VII lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex.").

have ruled for nontraditional sex discrimination plaintiffs perceive gender identity and expression as fundamental to individuals' sense of themselves. The clearest illustration of this view is provided by a district court that compared transsexuality to religious conversion. The court argued that just as Title VII prohibits discrimination based on conversion from Christianity to Judaism, it prohibits discrimination because a plaintiff feels compelled to change her sex.[234]

Yet another area of controversy is English-only rules, which prohibit employees from speaking languages other than English at work. A number of commentators have asserted that language is an integral part of cultural identity and that language rights fall under the umbrella of national origin protection.[235] Traditionally, courts have tended to find that rules prohibiting employees from speaking Spanish (or other languages) during work hours did not violate Title VII so long as they did not apply during breaks or to employees who spoke no English at all.[236] Because bilingual employees can communicate in English, the courts viewed speaking a foreign tongue as a choice and as conduct that could easily be controlled and altered by workers.[237]

In the last few years, however, the Tenth Circuit has required employers to prove business necessity to justify English-only rules.[238]

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234. *Schroer*, 577 F. Supp. 2d at 306-07.

235. *See* Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1353 (1997); Mark Colón, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227, 246-50 (2002); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 276-79 (1992); Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 896 (1986); L. Darnell Weeden, *The Less than Fair Employment Practice of an English-Only Rule in the Workplace*, 7 NEV. L.J. 947, 953-55 (2007). *But see* Natalie Prescott, *English Only at Work, Por Favor*, 9 U. PA. J. LAB. & EMP. L. 445, 445-46 (2007) (arguing that "there are important policy reasons to restrict individuals' ability to speak foreign languages at work").

236. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480, 1483, 1489 (9th Cir. 1993); Garcia v. Gloor, 618 F.2d 264, 266, 270-71 (5th Cir. 1980).

237. *Spun Steak*, 998 F.2d at 1487; *Gloor*, 618 F.2d at 270; *see also* James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 745-46 (2007) (arguing that employers should retain discretion to impose workplace language policies).

238. *See* Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1171 (10th Cir. 2007); Maldonado v. City of Altus, 433 F.3d 1294, 1306-07 (10th Cir. 2006).

Thus, such rules are lawful only if the speaking of foreign languages during work hours would cause communication problems in the workplace or would otherwise be disruptive.[239] The Tenth Circuit's approach is consistent with the *EEOC Guidelines on Discrimination Because of National Origin*.[240] By requiring a business necessity defense, the Tenth Circuit shows sympathy for plaintiffs' argument that speaking their native tongue is central to their cultural identity and deserves some level of Title VII protection.

The scope of Title VII's protected classifications remains somewhat blurred at the margins. Plaintiffs have attempted to stretch the meaning of the protected categories by claiming that specific behaviors are immutable within their world view. Furthermore, several scholars have argued that Title VII should be interpreted to include ethnic, cultural, and gender identity traits or even be amended so that the law includes these explicitly. Peter Brandon Bayer argues that "all employment decisions, criteria, terms, conditions, and opportunities that are premised on or implicate race, color, religion, sex or national origin are discriminatory" and should be deemed to violate Title VII.[241] Bayer, therefore, asserts that Title VII should be understood to extend to "grooming styles, attire, and language."[242] Professor Juan Perea proposes that the words "ethnic traits" be added to Title VII's list of protected characteristics and that the phrase be defined to include "language, accent, surname, and ethnic appearance."[243]

The courts, however, have not consistently followed this liberal path. A critique of these decisions and formulation of recommendations concerning the direction the courts should take with respect to each of these issues is beyond the scope of this Article. For my

239. *See Montes*, 497 F.3d at 1171 (affirming summary judgment for employer because "clear and precise communication between the cleaning staff and the medical staff was essential in the operating rooms"); *Maldonado*, 433 F.3d at 1306-07 (reversing summary judgment for the employer because there was scant evidence that use of Spanish by some employees caused communication, morale, or safety problems).

240. 29 C.F.R. § 1606.7 (2010) ("An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.").

241. Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 772 (1987).

242. *Id.* at 774.

243. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 860-61 (1994).

purposes, it is important only to establish that the courts' decisions concerning the qualities and behaviors discussed in this Section appear to depend on the degree to which the judges accept the attributes as unchangeable or fundamental to personal identity as opposed to perceiving them as purely matters of preference.

C. The Most Puzzling Exclusions

The protected classifications are a subset of immutable characteristics that have been deemed to require legal intervention. As discussed in previous sections, a variety of immutable traits, such as height and eye color, are not covered because they are unlikely to constitute reasons for discrimination.[244] Others, such as speaking foreign languages or transsexualism, are ambiguous in terms of immutability and have led to inconsistent court decisions.[245] But several characteristics are plainly immutable, have historically elicited discrimination, are generally irrelevant to job performance, and yet are definitively excluded from statutory coverage. The protection of these traits would be justified under all of the theories of discrimination discussed in Part II, and their exclusion raises serious questions about the coherence of federal employment discrimination law. Five of these will be analyzed below: sexual orientation, appearance, parental status, marital status, and political affiliation.[246]

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244. *See supra* Part IV.A.

245. *See supra* Part IV.B.

246. EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 2 (2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf (explaining that the federal employment statutes "do not prohibit discrimination against caregivers per se"); EEOC, FACT SHEET: DISCRIMINATION BASED ON SEXUAL ORIENTATION, STATUS AS A PARENT, MARITAL STATUS, AND POLITICAL AFFILIATION (2009), *available at* http://www.eeoc.gov/federal/upload/otherprotections.pdf (discussing the Civil Service Reform Act of 1978, which prohibits discrimination based on marital status or political affiliation, and executive orders that prohibit discrimination based on sexual orientation and parental status, all of which apply only to federal employees, and acknowledging that the other federal employment discrimination statutes do not protect workers based on these categories); Rhode, *supra* note 207, at 1048 (explaining that federal law does not prohibit appearance discrimination).

Other categories could be added to the list as well. For example, arrest records are also immutable, as is military service or lack thereof after a certain age, and both should be irrelevant to job performance in most instances. *See, e.g.*, WIS. STAT. § 111.321 (2007) (prohibiting employment discrimination based on arrest record and military service, among

1. Sexual Orientation

According to the federal courts and the EEOC, Title VII does not prohibit employers from making adverse employment decisions based on sexual orientation.[247] Scientific research has not proven conclusively whether sexual orientation is a biological trait that is an accident of birth,[248] but it seems always to be fundamental to personal identity.[249] Moreover, many homosexual individuals report that they experience discrimination in the workplace.[250] As of 2009, twenty-one states and the District of Columbia had recognized the severity of the problem and passed legislation to ban discrimination based on sexual orientation.[251] At the federal level, Congress has repeatedly considered the Employment Non-Discrimination Act,

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other characteristics). For the sake of brevity, however, I will address only the five categories listed in the text above.

247. Simonton v. Runyon, 232 F.3d 33, 35-36 (2d Cir. 2000); AVERY ET AL., *supra* note 227, at 453. The Supreme Court has determined, however, that Title VII does prohibit same-sex sexual harassment. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). Therefore, if a man sexually harasses another man in the workplace, the victim will have a Title VII cause of action. By contrast, if an employer declines to hire an individual because he is gay, the worker will have no federal law cause of action.

248. Clements, *supra* note 233, at 205-06 ("The biological origins of sexual orientation are still being contested and researched."); Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 54-55 (2010) (stating that the many studies and "overwhelming evidence of the failure of conversion or 'reparative' therapy ... seems to indicate a strong biological location for sexual orientation for gay men," but that the evidence is inconclusive for women).

249. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."); *In re* Marriage Cases, 183 P.3d 384, 441 n.59 (Cal. 2008) ("[O]ne's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity." (quoting Brief of the American Psychological Ass'n et al. in Support of Parties Challenging the Marriage Exclusion at 8, *Marriage Cases*, 183 P.3d 384 (No. S147999))).

250. M. V. LEE BADGETT ET AL., WILLIAMS INST., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 2 (2007), *available at* http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf (discussing studies regarding employment discrimination experienced by the LGBT community); DEBORAH J. VAGINS, ACLU, WORKING IN THE SHADOWS: ENDING EMPLOYMENT DISCRIMINATION FOR LGBT AMERICANS 7 (2007), *available at* http://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf.

251. NAT'L GAY & LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. (2009), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09.pdf.

which would extend protected status to sexual orientation, but has never passed it.[252] The Civil Service Reform Act of 1978 and Executive Order 13,087 are federal mandates that prohibit discrimination against gay individuals, but they apply only to federal employees.[253]

2. Appearance

The employment discrimination statutes also fail to prohibit appearance discrimination, and thus, employers may discriminate with impunity against workers whom they consider less attractive than others.[254] Employers may well be motivated to make hiring decisions based on appearance, if they believe that good-looking employees will attract customers or clients.[255]

Employees who are overweight are especially vulnerable to discrimination in the workplace,[256] and the courts have consistently ruled that obesity alone (without associated medical problems) is not a protected characteristic under the employment discrimination

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252. *See, e.g.*, Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 2(2) (2009) (designed to prohibit "employment discrimination on the basis of sexual orientation or gender identity").

253. 5 U.S.C. § 2302(b)(10) (2006) (prohibiting discrimination based on "conduct which does not adversely affect the performance of the employee or applicant or the performance of others"); Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (prohibiting discrimination based on sexual orientation); U.S. OFFICE OF PERS. MGMT., ADDRESSING SEXUAL ORIENTATION DISCRIMINATION IN FEDERAL CIVILIAN EMPLOYMENT: A GUIDE TO EMPLOYEE'S RIGHTS 4 (1999), *available at* http://www.opm.gov/er/address2/Guide04.asp (interpreting the term "conduct" in the Civil Service Reform Act to include sexual orientation).

254. Corbett, *supra* note 105, at 153; Rhode, *supra* note 207, at 1035 (arguing that "discrimination based on appearance is a significant form of injustice, and one that the law should remedy"). Employers who use appearance as a proxy for race, national origin, or disability, however, may be prosecuted for violation of the law.

255. *See* Rhode, *supra* note 207, at 1037-39 (discussing research concerning the importance of appearance and explaining that attractive individuals are treated better in the workplace, school, the criminal justice system, and other environments).

256. *See* Korn, *supra* note 67, at 220-23 (discussing the stigma of obesity); J.D. Latner et al., *Weighing Obesity Stigma: The Relative Strength of Different Forms of Bias*, 32 INT'L J. OBESITY 1145, 1150 (2008) (finding that "weight bias persists"); L.R. Vartanian, *Disgust and Perceived Control in Attitudes Toward Obese People*, 34 INT'L J. OBESITY 1302, 1302 (2010) ("Bias and discrimination against overweight and obese people is widespread, affecting domains ranging from employment to romantic relationships."); Wang, *supra* note 68, at 1910-16 (discussing the "reality of weight discrimination" and studies that conclude that such discrimination is pervasive).

laws.[257] Scientific research has revealed that obesity is a complex condition that "involves the integration of social, behavioral, cultural, physiological, metabolic and genetic factors."[258] Thus, obesity can be considered immutable in the sense that it has biological components and is very difficult if not impossible to overcome.[259] Over 30 percent of Americans are obese,[260] and most individuals who diet fail to achieve permanent and significant weight reductions.[261]

Other aspects of appearance may also be immutable. Although theoretically individuals might be able to change their look through grooming choices or even surgical interventions, many may not actually be able to do so because of financial constraints or because their natural appearance is fundamental to their sense of self.[262] Despite evidence of significant appearance-related inequities,[263] such discrimination largely has been ignored by state and federal law. To date, only Michigan and the District of Columbia have passed state-level laws that ban appearance discrimination,[264] and

257. *See, e.g*, Greenberg v. BellSouth Telecomms., Inc., 498 F.3d 1258, 1264-65 (11th Cir. 2007) (upholding summary judgment against an employee in part because obesity is rarely a disability under the ADA); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 443 (6th Cir. 2006) (holding "that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition"); Korn, *supra* note 67, at 230-35 (discussing the difficulty of proving that obesity is an impairment under the ADA, even after the ADAAA's enactment); *see also supra* notes 67-72 and accompanying text (concluding that the ADAAA is unlikely to change litigation outcomes in obesity cases).

258. *Executive Summary of the Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults*, 158 ARCHIVES INTERNAL MED. 1855, 1855 (1998); *see also* A. Palou et al., *Obesity: Molecular Bases of a Multifactorial Problem*, 39 EUR. J. NUTRITION 127, 136 (2000) ("The most common forms of human obesity depend on the interaction of many genes ... environmental factors, behavioural habits and lifestyle.").

259. *See* J.M. Friedman, *Obesity in the New Millennium*, 404 NATURE 632, 633 (2000) (stating that "more than 90% of individuals who lose weight by dieting eventually return to their original weight").

260. Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults*, 1999-2008, 303 JAMA 235, 238 (2010).

261. Friedman, *supra* note 259, at 633.

262. *See generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000) (discussing appearance discrimination and analyzing whether it should be covered by the employment discrimination laws).

263. *See supra* notes 254-60 and accompanying text.

264. D.C. CODE ANN. §§ 2-1401.02(22), 2-1402.11(a) (LexisNexis 2001) (prohibiting discrimination based on personal appearance); MICH. COMP. LAWS § 37.2202(1)(a)-(b) (2006) (prohibiting discrimination based on height and weight).

the category is absent from the otherwise liberal Civil Service Reform Act that protects federal employees.[265]

3. Parental Status

Parenthood is lifelong and, for many years, a dominant factor in peoples' lives, but it is addressed only to a very limited extent by federal law.[266] The Family Medical Leave Act provides that employers with fifty or more employees must allow eligible workers twelve weeks of unpaid leave annually for childbirth, adoption, or to care for an immediate family member with a serious illness.[267] In addition, mothers who can show that, unlike fathers, they are disadvantaged in the workplace may be able to prove sex discrimination under Title VII, but their ability to prevail will depend upon proof of sex stereotyping or the presence of similarly situated male comparators.[268] The employment discrimination statutes do not include a general nondiscrimination mandate against parental status discrimination.

Employees, especially women, are justified in worrying that having children may affect their employment prospects. Significant literature has documented the so-called "maternal wall" that blocks mothers' career paths.[269] Likewise, men who are known to be active

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265. 5 U.S.C. § 2302(b) (2006).

266. *See supra* note 246 (discussing lack of protection for caregivers). Title VII's prohibition of pregnancy discrimination does not extend to parental status discrimination. 42 U.S.C. § 2000e(k). *See generally* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 102-10 (2003) (discussing the applicability of a variety of legal theories to discrimination against family caregivers).

267. 29 U.S.C. §§ 2611(4), 2612(a). Eligible employees are those who have been employed for at least twelve months and have worked at least 1250 hours during that time. *Id.* § 2611(2)(A).

268. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (asserting that Title VII does not permit "one hiring policy for women and another for men—each having pre-school-age children"); Chadwick v. Wellpoint, Inc., 561 F.3d 38, 43-45 (1st Cir. 2009) (emphasizing that Title VII "does not prohibit discrimination based on caregiving responsibility," but that the statute is violated "when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities").

269. *See generally* Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1368-77 (2008) (presenting evidence that mothers suffer discrimination in the workplace); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316 & tbl.1

caregivers have been found to face barriers in the workplace.[270] In 2006, the Center for WorkLife Law at the University of California Hastings College of Law issued a report finding a 400 percent increase in the number of discrimination cases involving family responsibilities filed in federal courts during the preceding decade.[271] Of the cases, women filed 92 percent, and men filed 8 percent.[272] Female employees won approximately 53 percent of the time, and employers prevailed in 47 percent of the cases studied.[273]

Although evidence suggests that the problem is not trivial, only a handful of state statutes establish a clear ban on parental status discrimination.[274] In addition, federal employees enjoy protection under an executive order forbidding discrimination based on status as a parent.[275] It is possible that the lack of more comprehensive legal protections can be explained by concern that a truly meaningful antidiscrimination mandate to protect parents would involve a reasonable accommodation requirement that would place additional

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(2007); Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall*, 60 J. SOC. ISSUES 675, 676-77 (2004).

270. Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975) (finding that the Social Security Act's denial of surviving spouse benefits to widowed husbands was based on the false assumption that only women would stay home to care for children, and thus that it violated the Due Process Clause); Victoria L. Brescoll & Eric Luis Uhlmann, *Attitudes Toward Traditional and Nontraditional Parents*, 29 PSYCHOL. WOMEN Q. 436, 443 (2005) (documenting "prejudice against stay-at-home fathers," though not focusing specifically on workplace issues); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1330-31 (2008).

271. MARY C. STILL, CTR. FOR WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 2 (2006), *available at* http://www.worklifelaw.org/pubs/FRDreport.pdf. Most cases were filed under Title VII. *Id.* at 5.

272. *Id.* at 8 & tbl.1.

273. *Id.* at 13 & tbl.6. It is unclear whether employers prevailed because the alleged discrimination was found to be outside the statutory scope or because no discrimination was found.

274. ALASKA STAT. § 18.80.220(a)(1) (2008) (forbidding parental status discrimination); CONN. GEN. STAT. § 46a-60(a)(9) (2009) (prohibiting employers from seeking information concerning individuals' reproductive functions or familial responsibilities); D.C. CODE ANN. §§ 2-1401.01, .02(12), .11(a) (LexisNexis 2008 & Supp. 2010) (prohibiting discrimination based on family responsibilities); N.J. ADMIN. CODE § 4A:7-3.1(a) (2010) (banning discrimination based on familial status).

275. Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2000).

burdens on employers and meet resistance from the business community.[276]

4. Marital Status

Another attribute that would seem to be an appropriate candidate for legal protection but is ignored by the federal antidiscrimination statutes is marital status.[277] Although marital status, like religion, can be changed, it is fundamental to individual identity. Furthermore, undoubtedly, society would not want its members to make decisions about marriage or divorce that are primarily rooted in employment-related concerns.

Some studies have found pay discrepancies favoring married employees over single employees.[278] Other surveys have found that unmarried workers feel stigmatized as immature and unstable or believe they face more stringent work demands than married coworkers.[279]

At the same time, married individuals may also be disadvantaged in the workplace. A common form of marital status discrimination is the no-spouse rule.[280] Many employers institute policies under which they refuse to employ both members of a married couple.[281] While employers may design such a policy to avoid favoritism, it can

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276. *See* Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1492 (arguing that "employers should be required to provide reasonable accommodations for routine parental obligations that conflict with work"); Williams & Bornstein, *supra* note 270, at 1321-26 (analyzing whether reasonable accommodation is an appropriate model to combat caregiver discrimination).

277. 42 U.S.C. § 2000e-2(a) (2006); Rutenschroer v. Starr Seigle Commc'ns, Inc., No. 05-00364, 2006 WL 1554043, at *10 (D. Haw. May 31, 2006); Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 7 (2000).

278. Bella M. DePaulo & Wendy L. Morris, *The Unrecognized Stereotyping and Discrimination Against Singles*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 251, 252 (2006) ("Single men are paid less than their married male colleagues even when they are of similar age and have comparable work experience."); Robert K. Toutkoushian et al., *The Interaction Effects of Gender, Race, and Marital Status on Faculty Salaries*, 78 J. HIGHER EDUC. 572, 573-75 (2007).

279. Wendy J. Casper et al., *Beyond Family-Friendly: The Construct and Measurement of Singles-Friendly Work Culture*, 70 J. VOCATIONAL BEHAV. 478, 481-82 (2007).

280. Chen v. County of Orange, 116 Cal. Rptr. 2d 786, 796-98 (Ct. App. 2002); Porter, *supra* note 277, at 4.

281. Porter, *supra* note 277, at 4-5.

create career crises for some engaged or married couples. Thus, if two coworkers subject to a no-spouse rule choose to marry, one must find a different job.

Marital status has been the subject of state court employment discrimination litigation in many instances.[282] In one reported case, an employer terminated an employee upon discovering that the worker was living with a girlfriend whom he did not marry.[283] Another employer refused to hire an individual who was unmarried and pregnant.[284] In a third case, an employer discharged a married man who was having an affair even though, under company policy, unmarried employees who engaged in promiscuous sexual relationships would not be fired.[285]

Twenty-one states and the District of Columbia have state statutes that prohibit marital status discrimination, though state courts have interpreted the extent of the laws' protection differently.[286] In addition, the Civil Service Reform Act of 1978 prohibits the federal government from discriminating against public employees based on marital status.[287] The absence of this category from the federal antidiscrimination statutes that apply to nonfederal workers may thus seem surprising.

5. Political Affiliation

For some people, political affiliation is as personally defining as religion (if not more so), yet it too is left outside the scope of the employment discrimination statutes.[288] Title VII's prohibition of religious discrimination may appear natural because it reinforces the value of religious freedom, rooted in the First Amendment.[289]

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282. *Chen*, 116 Cal. Rptr. 2d at 796-800 (discussing a large number of cases involving alleged marital status discrimination).

283. Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 546 (Minn. Ct. App. 1986).

284. Cooper v. Mower County Soc. Servs., 434 N.W.2d 494, 498 (Minn. Ct. App. 1989).

285. Slohoda v. United Parcel Serv., Inc., 475 A.2d 618, 619 (N.J. Super. Ct. App. Div. 1984).

286. Porter, *supra* note 277, at 5, 15-16 (citing state statutes). Porter also analyzes whether various state statutes apply to no-spouse rules. *Id.* at 17-22.

287. 5 U.S.C. § 2302(b)(1)(E) (2006).

288. 42 U.S.C. § 2000e-2(a).

289. Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1085-86 (1996) ("The Free Exercise Clause was meant, in part, to protect religious minorities from

However, the Supreme Court has recognized a similar link between political affiliation and freedom of assembly, also guaranteed by the First Amendment.[290] In an environment of political divisiveness and discord, it is entirely possible that employers will take adverse action against workers because of their political viewpoints or allegiances.[291]

Congress has already acknowledged the potential for harm and included "political affiliation" among the protected categories for federal employees in the Civil Service Reform Act of 1978.[292] At the state level, however, only New York and the District of Columbia prohibit discrimination based on political affiliation.[293] Therefore, the vast majority of American workers still face the possibility of adverse employment decisions due to their political viewpoints.

V. THE IMPLICATIONS OF IMMUTABILITY

Immutability is the common thread that runs through the fabric of the employment discrimination statutes. By contrast, the concept of immutability fails to elucidate the exclusion of categories that appear ripe for protected status. This Part analyzes the usefulness of the concept of immutability and the questions it raises about the coherence of the employment discrimination statutory scheme. It also briefly explores whether immutability is informative with respect to the laws' reasonable accommodation requirement and its limitations.

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discrimination.").

290. Elrod v. Burns, 427 U.S. 347, 372-73 (1976).

291. Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990) (involving various political patronage practices concerning the promotion, transfer, recall, and hiring of low-level public employees and determining that it is unconstitutional for these employment decisions to be "based on party affiliation and support"); Cynthia Grant Bowman, *"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 59-64 (1991) (discussing the history of patronage hiring in Chicago and elsewhere).

292. 5 U.S.C. § 2302(b)(1)(E).

293. D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2008 & Supp. 2010); N.Y. LAB. LAW § 201-d(2)(a) (McKinney 2009 & Supp. 2010).

A. Immutability as the Rationale for Protected Status

Immutable characteristics can be defined either as: (a) accidents of birth, or (b) traits that are unchangeable or so fundamental to conscience or personal identity that they are effectively unalterable for individuals and should not have to be changed.[294] If both meanings of the term are taken into account, immutability is a unifying principle that explains the diverse characteristics that the employment discrimination laws protect. Race, color, national origin, sex, pregnancy, religion, age, disability, genetic information, and citizenship status are all immutable under one or both of the word's definitions.

Immutability, however, is not the sole factor that explains the choices American employment discrimination law has made. Clearly, not all immutable characteristics are protected by the statutes.[295] Nevertheless, beyond immutability, a single rationale is impossible to discern. The protected classifications appear to be animated by a combination of theories.

A history of discrimination justifies protection of some groups, including religious, racial, and ethnic minorities, and by extension noncitizens, as well as women, older workers, and those with some but not all disabilities.[296] By contrast, the enactment of GINA was not motivated by a recorded history of discrimination, but rather, by fear of future discrimination based on genetic information.[297]

The remainder of the protected classifications can be justified by reference to fairness concerns and practical considerations. Nonminorities are permitted to file reverse discrimination cases under Title VII[298] because it would be inequitable for the law to prohibit discrimination by whites against blacks and men against women but to tolerate it when the roles of perpetrator and victim are reversed.[299] In addition, it would likely be very difficult to draw

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294. *See supra* notes Part III.A.2.

295. *See supra* Part IV.

296. *See supra* notes 82-96 and accompanying text; *see also* Hoffman, *supra* note 56, at 1253-54 (discussing the history of discrimination against people with particular disabilities).

297. *See supra* notes 99-101 and accompanying text.

298. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

299. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise.").

a bright line separating ethnic groups that have suffered a history of discrimination in the United States from those that have not.[300]

Post-ADAAA, the ADA, like Title VII, is very inclusive in its scope of coverage,[301] but the expansion of the statutory scope did not result from the conviction that an increased number of impairments are associated with a history of discrimination. Rather, experience had shown that a definition of "disability" that could be interpreted narrowly left plaintiffs with serious conditions, such as cancer and mental retardation, without a remedy for discrimination.[302] Consequently, the ADAAA significantly reduced courts' discretion with respect to determining disability status and opted to cover all physical and mental impairments other than those that are minor and transitory, lasting less than six months.[303] This definition is meant to prevent courts from focusing on the question of which plaintiffs deserve the ADA's protection and to provide a "clear and comprehensive national mandate for the elimination of discrimination."[304]

Immutability is the only unifying principle that explains the employment discrimination statutes' protected classifications. Beyond immutability, the statutory choices can be explained by a combination of a history of discrimination, fear of future discrimination, fairness concerns, pragmatic considerations, and political influences.

B. Immutability as a Liberalizing Force

Although immutability provides a reliable rationale for the protected categories, the concept does not illuminate why other characteristics that are equally unalterable or central to personal

300. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978) (stating that "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments" and that "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals").

301. *See supra* Part I.B.2.b.

302. *See* ADAAA, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3553, 3553 (2008) (stating that Congress's expectation of broad coverage under the ADA had not been fulfilled); *supra* notes 28-30, 56 and accompanying text.

303. 42 U.S.C. § 12102 (2006 & Supp. 2010) (revising the ADA's definition of "disability"); *see supra* Part I.B.2.b (discussing the ADA's broad coverage).

304. ADAAA § 2(b)(1), (5), 122 Stat. at 3554 (explaining the purposes of the ADAAA).

identity are disregarded by the federal statutes. This Article has extensively discussed the examples of sexual orientation, appearance, marital and parental status, and political affiliation.[305] All of these are immutable under at least one of the term's definitions,[306] and none is generally relevant to job performance.[307] Furthermore, history reveals a record of discrimination with respect to each category,[308] and employers may well be tempted to discriminate based on all of these attributes.[309]

Under the current legal regime, employers are prohibited from discriminating against individuals whose "religious beliefs" include white supremacy,[310] but are permitted to discriminate against workers because they are homosexual or obese.[311] There is no logical justification for this discrepancy other than a lack of political will to include these traits within the employment discrimination scheme.[312]

The passage of GINA and the ADAAA should occasion a reevaluation of the limitations of the antidiscrimination statutes' protected characteristics. GINA and the ADAAA breathe new life into the theory of immutability because both grant protected status to individuals based on generally unchangeable characteristics. Moreover, the new additions appear to protect the traits at issue only because they are immutable. Genetic makeup and many disabilities are not necessarily associated with a history of discrimination and are not

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305. *See supra* Part IV.C.

306. *See supra* Part III.A.2.

307. *See supra* Part II.B (analyzing the validity of the theory that the employment discrimination laws prohibit consideration of traits that are irrelevant to job performance).

308. *See supra* Part IV.C.

309. *Supra* Part IV.C.

310. *See supra* note 223 and accompanying text.

311. *See supra* notes 67-70, 252 and accompanying text

312. Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections To Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31, 66 (2002) ("Until the political and social climate becomes more tolerant and accepting, lesbian, gay, bisexual, and transgendered individuals remain in jeopardy every day."); J. Eric Oliver & Taeku Lee, *Public Opinion and the Politics of Obesity in America*, 30 J. HEALTH POL. POL'Y & L. 923, 925 (2005) (reporting results of a survey that found that "as of 2001, most Americans were still not concerned with obesity, were less likely to support most obesity-related policies such as taxing snack foods, and did not approve of treating obesity as a physical disability," and that "[m]ost Americans viewed obesity primarily as a case of individual moral failure rather than the result of the food environment or genetics").

always irrelevant to job performance, so their protected status is not justified by other traditional theories of discrimination law.[313] By enacting GINA and the ADAAA, Congress has shown a willingness to revisit and expand the employment discrimination laws.[314] These laws, therefore, could galvanize support for inclusion of other immutable characteristics as protected classifications.

Some advocates believe that the concept of immutability is excessively rigid and that reliance on it will prevent liberalization of the employment discrimination statutes.[315] However, if immutability is understood to encompass not only traits that are unchangeable in absolute terms, but also those that are so fundamental to personal identity that they are, in practical terms, unalterable for certain individuals, the concept of immutability may instead compel the addition of new protected classifications, such as sexual orientation, parental status, and others.

No cohesive theory can rationalize the employment discrimination laws' exclusion of essentially unalterable characteristics that are irrelevant to job performance and because of which workers are known to suffer discrimination. A more complete understanding of the concept of immutability, as developed in this Article, and the recent rejuvenation of immutability by GINA and the ADAAA could spur a reconsideration and expansion of the covered categories.

C. Immutability and Reasonable Accommodation

The concept of immutability also explains the employment discrimination statutes' apparent ambivalence about the requirement of reasonable accommodation. The duty of "reasonable accommodation" refers to the mandate that employers refrain from excluding protected class members even when hiring or retaining them may

313. *See supra* notes 99-101, 112-113 and accompanying text.

314. *See supra* notes 1-4 (noting that these laws were enacted as recently as 2008).

315. *See* Bayer, *supra* note 241, at 771-72 (arguing against mutability analysis); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 779 (2002) (criticizing the immutability requirement of antidiscrimination law because it suggests that "the only acceptable defense to a demand for assimilation is the inability to accede to it"); Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2221-22 (2003) (proposing that "the 'immutability requirement' be replaced by a dramatically reduced threshold for establishing 'adversity'" in order to enhance cultural rights under Title VII).

cause the employer to absorb significant cost or inconvenience.[316] If the employment discrimination laws protect characteristics that are accidents of birth, unchangeable, or fundamental to the employee's identity,[317] then they address traits for which employers bear no responsibility. Consequently, it is somewhat uncomfortable for the law to demand that employers expend considerable money or tolerate significant inconvenience in order to accommodate employees' needs.

Evidence of Congress's ambivalence pervades employment discrimination law. The only explicit requirements for reasonable accommodation relate to religion and disability,[318] and both of these are qualified. Employers need not bear more than a de minimis burden to accommodate religious needs[319] and can assert an undue hardship defense to limit their duty of reasonable accommodation under the ADA.[320] Notably, the ADAAA did not heed calls to revisit the reasonable accommodation provision and elucidate its scope.[321] By denying reasonable accommodations to individuals who are only regarded as disabled, the ADAAA also made it more difficult for plaintiffs seeking reasonable accommodations to prove disability status than it is for those alleging discrimination in the form of other adverse employment decisions.[322] As previously discussed, additional employment discrimination principles, such as the cause of action for disparate impact and the rejection of a customer preference defense, also embody what are essentially reasonable accommodation requirements, but these are disguised and inexplicit.[323]

The legislature's uneasiness is understandable. The reasonable accommodation requirement is an unfunded mandate that shifts the

316. *See supra* notes 112-27 and accompanying text.

317. *See supra* Part III.A.2.

318. 42 U.S.C. §§ 2000e(j), 12112(b)(5)(A) (2006).

319. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83-84 (1977).

320. 42 U.S.C. § 12112(b)(5)(A).

321. *See* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 478 (1995) (calling upon Congress or the EEOC to "move swiftly and aggressively to create a highly transparent and highly accessible standard"); Long, *supra* note 53, at 228-29.

322. ADAAA, Pub. L. No. 110-325, § 6(h), 122 Stat. 3553, 3558 (2008); *see supra* notes 74-76 and accompanying text.

323. *See supra* notes 117-25 and accompanying text.

cost of addressing difficulties associated with employees' immutable characteristics to employers.[324] Moreover, the burden is unequally distributed because some employers, by chance, will have multiple applicants or employees with disabilities or religious needs, and some will have none.[325] Employers have little control over the onus they will bear to comply with this legal obligation, and its extent will not be linked to any fault or misconduct on their part.

Fortunately, as I have shown in previous work, employers are in fact providing reasonable accommodations to individuals with disabilities.[326] In one large study, Susanne Bruyère of Cornell University's School of Industrial and Labor Relations found that over 93 percent of private employers stated that they had made at least one accommodation for an employee, and over half had implemented multiple measures to accommodate workers with disabilities.[327] Minnesota and Maryland state agencies file annual reports of ADA accommodations, indicating that they grant the vast majority of requests.[328] Research has shown that the direct costs of accommodations average a few hundred dollars, which is affordable for most employers.[329]

Much less evidence is available with respect to reasonable accommodation of religious needs. However, a 1997 survey of fifty-five Fortune 1000 companies found that 91 percent reported that they accommodate employees' religious needs, such as holiday

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324. *See* Issacharoff & Nelson, *supra* note 109, at 317-18.

325. *Id.* at 340-41, 344.

326. *See* Hoffman, *supra* note 30, at 319-26.

327. SUSANNE M. BRUYÈRE ET AL., COMPARATIVE STUDY OF WORKPLACE POLICY AND PRACTICES CONTRIBUTING TO DISABILITY NONDISCRIMINATION 6, 11 (2004), *available at* http://digitalcommons.ilr.cornell.edu/edicollect/104.

328. *See* MINN. MGMT. & BUDGET, 2009 ADA ANNUAL REPORT SUMMARY STATE OF MINNESOTA EXECUTIVE BRANCH AGENCIES 6, *available at* http://www.mmb.state.mn.us/doc/ada/2009AnnualReport.pdf (indicating that 84 percent of requests for accommodation were granted and 5 percent were modified in 2009); 2009 MD. DEP'T OF BUDGET & MGMT. ANN. STATEWIDE EQUAL OPPORTUNITY REP. 4, *available at* http://dbm.maryland.gov/eeo/Documents/Publications/annual_eeo_rpt_fy2009.pdf (indicating that 88 percent of requests for accommodation were granted).

329. *See* Hoffman, *supra* note 30, at 335-36 (noting that the studies do not address indirect costs such as "potential absenteeism problems or increased health insurance costs").

observance.[330] Fifty-seven percent claimed to allow leaves for religious work, including missions.[331]

The concept of immutability elucidates that the employer's duty of reasonable accommodation arises because of traits that are accidents of birth or otherwise unalterable and not because of any wrong committed by the employer. Consequently, it is natural for the law to limit the degree of responsibility placed on employers. This is not to say that the needs of individuals with disabilities should be disregarded. As other commentators have suggested, the government must do its share to support these workers. This support can come in the form of increased tax incentives for employers who hire individuals with disabilities,[332] improved health care coverage to enhance the functionality of those with impairments,[333] and other measures.

CONCLUSION

Although the concept of immutability may have fallen out of favor in the realm of Supreme Court constitutional analysis,[334] it deserves renewed attention in the field of employment discrimination. Immutability, understood broadly to include traits that are so fundamental to personal identity that they are effectively unalterable for some individuals and should not have to be changed for employment purposes,[335] is a unifying principle that accurately describes all of the antidiscrimination statutes' protected classifications. However, if one moves the focus to traits that are excluded from statutory coverage and attempts to understand the rationale for some of these omissions, one can only conclude that this country's employment discrimination framework is somewhat illogical and incoherent.[336]

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330. Karen C. Cash & George R. Gray, *A Framework for Accommodating Religion and Spirituality in the Workplace*, 14 ACAD. MGMT. EXECUTIVES 124, 125 (2000).

331. *Id.*

332. Issacharoff & Nelson, *supra* note 109, at 358.

333. Bagenstos, *supra* note 126, at 26-27 (discussing the role of health insurance in facilitating "independence and labor force participation" for people with disabilities).

334. *See supra* note 154 and accompanying text.

335. *See supra* Part III.A.2.

336. *See supra* Part IV.C.

The influence of politics, lobbying, and interest groups on the legislative process cannot be ignored. Consequently, the statutory gaps may not be surprising and may be explained by a lack of political support, organization, or lobbying strength. However, as a policy matter, it would be desirable for the law in the very personal, sensitive, and socially important area of employment discrimination to be rational and consistent.

A focus on immutability and the recent addition of new protections under GINA and the ADAAA could provide advocates with ammunition to promote the future inclusion of immutable characteristics such as sexual orientation, appearance, parental and marital status, and political affiliation. In the case of obesity and homosexuality, change may come only with a shift in public attitudes and a more widely held belief that these attributes are immutable and deserve protection.[337] The recent passage of the Don't Ask Don't Tell Repeal Act,[338] which will allow gay individuals to serve openly in the military, may signal the beginnings of such a shift with respect to sexual orientation. As already recognized by liberal state civil rights laws and the Civil Service Reform Act,[339]

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337. *See* Donald P. Haider-Markel & Mark R. Joslyn, *Beliefs About the Origins of Homosexuality and Support for Gay Rights: An Empirical Test of Attribution Theory*, 72 PUB. OPINION Q. 291, 295, 302 (2008), *available at* http://faculty.sgc.edu/rkelley/beliefs.pdf (reporting 2003 Pew Research Center data in which 32 percent of respondents linked homosexuality to genetic factors and 2006 Gallup poll data in which 41 percent of those questioned did so); Oliver & Lee, *supra* note 312, at 933-34 (finding that 65 percent of respondents attributed obesity to lack of willpower to diet and exercise and only 40 percent believed it had a genetic component); Jane P. Sheldon et al., *Beliefs About the Etiology of Homosexuality and About the Ramifications of Discovering Its Possible Genetic Origin*, 52 J. HOMOSEXUALITY 111, 114-15 (2007) (reporting that Gallup poll data showed that in 2001, 40 percent of Americans believed individuals were born with their sexual orientation, up from 13 percent in 1977).

338. Don't Ask Don't Tell Repeal Act, Pub. L. No. 111-321 (2010).

339. *See supra* Part IV.C (discussing how these laws treat a variety of categories that are not covered by the federal employment discrimination statutes). Several foreign countries have opted for a more liberal approach as well. *See, e.g.*, Equal Treatment Act, Stb. 230 (1994) (Neth.) (Algemene wet gelijke behandeling, Wet van 2 maart 1994) (providing "protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status" alongside other statutes that prohibit discrimination based on disability and age); Employment Equity Act 55 of 1998 ch. 2, s. 6(1) (S. Afr.) (forbidding discrimination based on "race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth").

coverage of additional traits could promote enhanced fairness, a major policy goal of the employment discrimination statutes.[340]

The concept of immutability, which focuses on the inability to change, could ironically facilitate a transformation of the federal employment discrimination statutory scheme. A commitment to protect workers from discrimination based on immutability, in the full sense of the word, may well lead to a more consistent and complete antidiscrimination mandate in the employment field.

340. *See supra* Part III.B.3.