

Bragdon v. Abbott, Asymptomatic Genetic Conditions, and Antidiscrimination Law: A Conservative Perspective

Roger Clegg

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jhclp>

 Part of the [Disability Law Commons](#), and the [Health Law Commons](#)

Recommended Citation

Roger Clegg, *Bragdon v. Abbott, Asymptomatic Genetic Conditions, and Antidiscrimination Law: A Conservative Perspective*, 3 J. Health Care L. & Pol'y 409 (2000).

Available at: <http://digitalcommons.law.umaryland.edu/jhclp/vol3/iss2/8>

This Notes & Comments is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Health Care Law and Policy by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Commentary

BRAGDON v. ABBOTT, ASYMPTOMATIC GENETIC CONDITIONS, AND ANTIDISCRIMINATION LAW: A CONSERVATIVE PERSPECTIVE

ROGER CLEGG, J.D.*

INTRODUCTION

The first question addressed in this issue of the Journal of Health Care Law & Policy is whether the Americans with Disabilities Act,¹ as it was interpreted by the United States Supreme Court in *Bragdon v. Abbott*,² makes it illegal to discriminate against people with asymptomatic genetic conditions. Inevitably, however, there is also discussion of whether such discrimination *should* be illegal, if it is not.

But conservative lawyers like myself will insist that these two issues—the former about what the text of the statute means, the latter about what sound policy requires—are distinct. It may make no sense at all for Congress to have written a statute that bans a certain kind of discrimination, but if it did, we must follow it. Conversely, we may all devoutly wish that a certain kind of discrimination be barred, but courts and bureaucrats should not twist a statute to reach this result if that is not its plain meaning.

Accordingly, this Commentary is divided into four parts. The first two are legal, discussing the text of the ADA and its interpretation in *Bragdon v. Abbott*.³ The next two parts, which are much longer, focus on policy. The policy discussion begins with the specific issue of asymptomatic genetic conditions.⁴ But the bulk of the paper returns to first principles and asks when discrimination should be illegal.⁵

* Vice President and general counsel of the Center for Equal Opportunity, a non-profit, Washington, D.C.-based research and educational organization. B.A., Rice University, 1977; J.D., Yale Law School, 1981. Mr. Clegg served as a deputy in the Justice Department's Civil Rights Division from 1987 to 1991. He prepared this paper while also an adjunct professor at George Mason University School of Law, where he taught a course in employment discrimination law.

1. 42 U.S.C. §§ 12101-12213 (1994).

2. 118 S. Ct. 2196 (1998).

3. See *infra* text accompanying notes 6-20.

4. See *infra* text accompanying notes 21-42.

5. See *infra* text accompanying notes 43-82.

I. THE PLAIN MEANING OF THE ADA

The ADA defines “disability” as: “(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.”⁶ The obvious objection to applying this provision to a genetic predisposition for an affliction is that the statute clearly is written to cover present and past impairments but not future ones.

Consequently, one must argue that a genetic predisposition is itself a “physical impairment” under subsection (A). But this is not a plausible reading of the statute’s text. The physical impairment does not exist until the affliction actually develops.

Moreover, even if we decide that a genetic predisposition is itself a physical impairment, one must further point to some “major life activity” that it already “substantially limits.” Suppose one is thirty years old but is likely to die at age forty-five. That does not limit what one can physically do *now*. And so one must claim that one’s relatively imminent death makes some choices less attractive than they would be for someone with a likely longer life. For example, taking a particular job or getting married or having children is more problematic; these major life activities are thus substantially limited by a physical impairment. Again, I think this stretches the statute beyond its breaking point. Indeed, if the possibility of future impairments is a significant limitation on major life activities, then we are all disabled. As discussed later, in a sense we all are, but that is not a plausible meaning for the statute.

Several of the papers—Kaplan;⁷ Liu,⁸ Gostin & Webber;⁹ Rothstein;¹⁰ and Long¹¹—discuss the possibility that subsection (C), “being regarded as having such an impairment,”¹² might provide

6. 42 U.S.C. § 12102(2) (1994).

7. See Deborah Kaplan, *The Definition of Disability: Perspective of the Disabled Community*, 3 J. HEALTH CARE L. & POL’Y 358 (2000).

8. See Eugenia Liu, *Bragdon v. Abbott: Extending the Americans with Disabilities Act to Asymptomatic Individuals*, 3 J. HEALTH CARE L. & POL’Y 399 (2000).

9. See Lawrence O. Gostin & David W. Webber, *Discrimination Based on HIV/AIDS and Other Health Conditions: “Disability” As Defined Under Federal and State Law*, 3 J. HEALTH CARE L. & POL’Y 266 (2000).

10. See Laura F. Rothstein, *Genetic Discrimination: Why Bragdon Does Not Ensure Protection*, 3 J. HEALTH CARE L. & POL’Y 346 (2000).

11. See Clarisa Long, *The Americans with Disabilities Act and Bragdon v. Abbott*, (unpublished manuscript, on file with J. HEALTH CARE L. & POL’Y).

12. 42 U.S.C. § 12102(2)(C) (1994).

coverage for those with genetic predispositions.¹³ But “such an impairment” incorporates the same present or past tense requirement that (A) and (B) do. The employer does not consider the applicant to have an impairment now; he believes only that the applicant will develop one in the future.

II. THE SUPREME COURT’S DECISION IN *BRAGDON V. ABBOTT*

I believe Professor Rothstein’s¹⁴ narrow reading of *Bragdon v. Abbott* is correct. I understand that she is not necessarily endorsing this reading, but I will endorse it.

In holding HIV-positivity to be a “physical impairment” under the ADA, the Court thoroughly described the course of the disease and concluded: “In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection.”¹⁵ This immediate damage to the body distinguishes it from genetic predispositions.

In his dissent, Chief Justice Rehnquist was even more explicit: “The ADA’s definition of disability is met only if the alleged impairment substantially ‘limits’ (present tense) a major life activity.”¹⁶ And, of course, he goes on to reject the contrary argument precisely because “taken to its logical extreme, [it] would render every individual with a genetic marker for some debilitating disease ‘disabled’ here and now because of some possible future effects.”¹⁷ Even the federal regulations and interpretive guidance agree that this cannot be right.¹⁸ Thus, it is unlikely that the courts will find that genetic markers constitute a physical impairment until something gets physically impaired. That is only reasonable.

Bragdon v. Abbott creates other problems for future plaintiffs too. I think that Professor Rothstein is also correct that the Court’s opinion may well be read as not finding reproduction to be a “major life activity” for everyone; that under the opinion many genetic conditions

13. In *Sutton v. United Air Lines Inc.*, 119 S. Ct. 2139, 2149-52 (1999), and *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133, 2137-39 (1999), the Supreme Court recently discussed the “regarded as” language in the ADA.

14. See Rothstein, *supra* note 10, at 331. Rothstein states that the “belief that *Bragdon* resolves the issue of genetic discrimination is not well founded . . .” *Id.*; cf. Liu, *supra* note 8, at 392 (discussing how genetic predispositions could eventually be covered under *Bragdon*); Long *supra* note 11.

15. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998).

16. *Id.* at 2216 (Rehnquist, C.J., dissenting).

17. *Id.*

18. See generally Rothstein, *supra* note 10.

will not be held to affect reproduction at all since neither the partner nor a child is affected; and that many genetic conditions will not be considered "substantially limiting."¹⁹ Once again, I will go further: the opinion not only may be read that way—it should.

Professor Rothstein concludes her paper by stating, "The need for protection against discrimination based on genotype seems obvious . . ." ²⁰ But why is it so obvious that such discrimination should be banned? Let's turn to this policy issue.

III. WHAT IS GOOD POLICY?

Suppose we know that individual X is going to develop an affliction that may make him a less desirable employee for Megacorp. The issue is not whether Megacorp should hire him. The issue is when the federal government should require all the Megacorps out there to hire all the Xs. The fatal conceit of the ADA is its presumption that it is possible to write a one-size-fits-all rule that bureaucrats and judges can apply to all individuals, with all afflictions, working for all companies.²¹

During the statute's passage, U.S. Representative Henry Waxman (D-Cal.) warned that employment decisions under the ADA "may not be based on speculation and predictions regarding the person's ability to be qualified for the job in the future."²² Likewise, another Representative warned, "Under the ADA, such [genetically tested] individuals may not be discriminated against simply because they may not be qualified for a job sometime in the future."²³ But companies frequently base employment decisions on how an employee will perform in the future and speculate about how long an employee will stay and whether he or she has potential to grow in the job. What's wrong with that?

19. See Rothstein, *supra* note 10, at 345.

20. *Id.* at 351.

21. See 42 U.S.C. § 12101(b) (1999):

It is the purpose of the Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

22. 136 CONG. REC. H4627 (daily ed. July 12, 1990) (statement of Rep. Waxman).

23. 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens).

A. *Who Is "Disabled"?*

Technology and medical advances are turning the ADA into an unworkable statute, and it was unwieldy to begin with. As we learn about more afflictions, identify them earlier, even identify the likelihood that they will occur in the future, it becomes more and more clear that we are all disabled, some sooner, some later.²⁴ Of course, we have known all along that eventually everyone becomes disabled, but now we can predict better when and how it will happen.

It has also always been true that many disabilities fall along a continuum. We are not either deaf, on the one hand, or blessed with perfect hearing, on the other. There are many gradations of hearing ability; further, we move along that continuum as we grow older.²⁵

This complexity complicates the task of properly fleshing out the ADA's definition of "disability." At some point the task becomes impossible. Perhaps we are already at that point. And, indeed, many disability advocates argue that this is why the law should worry less about who can and cannot be labeled "disabled." But at least two paths can be taken if the ADA's open-ended definition of disability is not working.

One path is to rewrite the statute, so that it is no longer essential to meet a definition of disability in order to be covered. In other words, if you are discriminated against because of a mental or physical condition of any type, that is enough to bring you into the Act's scope. As Deborah Kaplan puts it: "If the individual has experienced discrimination based on the individual's physical or mental characteristics, then that individual should be able to take advantage of the ADA to redress that discrimination."²⁶ The too-broad use of the "being regarded as" clause of the ADA is, likewise, a means of ensuring that even those who are not disabled can nonetheless sue under the ADA. The issues will be limited to whether the discrimination was justified because no reasonable accommodation was possible.²⁷ What we will

24. See generally Laura Trupin & Dorothy P. Rice, *Disability Statistics Center* (visited Feb. 24, 2000) <<http://dsc.ucsf.edu>> (estimating that overall rate of disability increases from 6% of children and youth to 45% of adults aged 75 and older). "Disability is a normal part of life, experienced by almost everyone, particularly when they get older." *Id.*

25. See *Hearing Loss*, 6 HARV. WOMEN'S HEALTH WATCH 4 (1999).

26. Kaplan, *supra* note 7, at 360.

27. See 42 U.S.C. § 12182(b)(2)(A)(ii) (1999):

[D]iscrimination includes . . .

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would funda-

have, then, is a statute that makes it illegal for employers to refuse to hire anyone unless they can document to federal bureaucrats and judges why it will cost the company too much money to have this person rather than someone else at the job. There are those for whom this scenario does not send a chill up the spine,²⁸ but I am not among them.

The other path is to repeal the ADA—or, at least, to end its attempt to cover every conceivable disability and instead limit it to a set of narrowly defined, physical disabilities: blindness (carefully defined), deafness (carefully defined), inability to walk, and maybe one or two other afflictions. But it should be acknowledged that the perfect statute is the enemy of the good statute. That is, by attempting to cover every conceivable meritorious disability, the drafters of the ADA have written a statute that inevitably will include too many nonmeritorious ones.²⁹

B. *Asymptomatic versus Symptomatic Discrimination*

Let us assume that there is no difference in principle between requiring the employer to accommodate the genetic predisposition to an illness and requiring the employer to accommodate someone who already has the illness. That still may not mean that the statute should be expanded; it may prove, instead, that the statute should be narrowed. It may prove, by *reductio ad absurdum*, that the statute was misconceived in the first place and ought to be repealed, and, barring that, it may show that the statute should not be made worse than it already is by enlarging it.

Gostin & Webber³⁰ quote Justice Ginsburg in *Bragdon v. Abbott*: “No rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible.”³¹ Justice Ginsburg then adds, “I am therefore satisfied that the statutory and regulatory definitions are well met.”³²

mentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations

28. See, e.g., Elizabeth Clark Morin, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189 (1990) (arguing that the costs associated with implementing the ADA requirements are “trivial” when compared to the benefits).

29. See Roger Clegg, *The Costly Compassion of the ADA*, PUB. INTEREST, Summer 1999, at 100, 111-12 (discussing possible reforms of the ADA).

30. Gostin & Webber, *supra* note 9, at 266.

31. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2213-14 (1998) (Ginsburg, J., concurring).

32. *Id.* at 2214.

That is quite a non sequitur: because a rational statute would say *X*, therefore it says *X*. That is not the way things work in the real world, especially for a statute as broadly and vaguely written as the ADA. It has many consequences to which Congress gave no consideration, rational or otherwise. As Professor Rothstein notes, "The limited legislative history [of the ADA on the issue of genetic conditions] has caused more than one commentator to question whether Congress really thought much about the issue at all."³³ Besides, the ADA is a statute protecting the *disabled* from discrimination, so if a person is not disabled, a rational legislator would not include him within the statute.

But would it otherwise make sense to have a law that prohibited an employer from discriminating against an employee once some affliction was manifest, but not when the affliction was latent? Intuitively, Justice Ginsburg is right that this seems backward. That is, if the idea is to ban irrational discrimination, then it would make even more sense to ban discrimination against those who are symptomless rather than those with symptoms.

On the other hand, in some ways a ban on discrimination only after symptoms have appeared could make sense. It will be easier—since the facts will be much more concrete, much less abstract—to discuss and litigate issues regarding the employee's actual abilities and disabilities, reasonable accommodations, and direct threats when the symptoms are actually present rather than years in advance of them. Moreover, precisely because one would expect more discrimination once the symptoms of the disease actually appear, it is more sensible for the statute to apply at that time. As discussed later, the ADA is really not best explained as a ban on irrational discrimination.³⁴ It is, instead, a ban on discrimination against people we feel sorry for and think are being treated less nicely than we would like, and symptomatic people are more likely to fall into that category than symptomless people.

C. Other Arguments for Protecting "Genetic Disabilities"

Contrary to Deborah Kaplan's assertion, almost no one thinks that people are disabled because they are immoral.³⁵ But there are many employers who believe that a person's mental and physical abilities—and, conversely, disabilities—determine how good an employee

33. Rothstein, *supra* note 10, at 335.

34. See *infra* Section IV.E.

35. See Kaplan, *supra* note 7, at 353 (discussing the moral model of disability wherein many cultures associate disability with sin and shame).

he or she will be. And they are right. That some people will do a better job than others is not a “social construct,” but a fact. Nor is there anything wrong with trying to cure or lessen a disability through medical treatment or rehabilitation.

Many employers may discriminate irrationally, but most will not. If one employer refuses to hire you, there are others. Employers who make poor hiring decisions will lose out. If they make enough bad decisions, they will go bankrupt.³⁶ When a disability is irrelevant to how well a person can perform a job, it is unlikely that employers—individually or, especially, in the aggregate—will want to deny that person a job. In the current economy, in particular, good employees are at a premium, and there is no reason to suppose that employers will act irrationally by refusing to hire people who can make them more profitable.

Likewise, it is just silly to write, as Gostin and Webber do, “Discrimination based on an infectious condition is just as inequitable as discrimination based on race, gender, or disability. In each case, people are treated inequitably not because they lack inherent ability, but solely due to a status over which they have no control.”³⁷ Infectious conditions *can* hamper someone’s inherent ability to do a job and his or her desirability as an employee. Moreover, just because someone has no control over a status—consider intelligence—does not make it inequitable to discriminate on that basis. Conversely, we do have control over our religion and marital status, but I am sure that Gostin and Webber do not believe that this excuses discrimination on those grounds. In all events, it is ridiculous to ignore the moral, historical, and constitutional distinctions between refusing to hire a schoolteacher because she has tuberculosis and refusing to hire her because she is black.

Another policy argument is that if genetic discrimination is not banned, people will be discouraged from having themselves tested, with major public-health consequences.³⁸ But the more of a public-

36. See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (discussing the antidiscrimination principle as it applies to the employment relationship); GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957) (discussing the psychological and sociological causes of discrimination and then analyzing the economic ramifications); see also Michael Kinsley, *Baby Needs a New Set of Genes: Everyone’s Against Genetic Discrimination. Or So They Think*, SLATE (April 19, 2000) <<http://www.Find.Slate.msn.com/code/Archive/Archive.asp>>. Professor Epstein has also written specifically on the issue of genetic discrimination. See Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1 (1994).

37. Gostin & Webber, *supra* note 9, at 270.

38. See, e.g., Matt Ridley, *Hands Off My Genes*, WALL ST. J., Feb. 15, 2000, at A26.

health problem such non-testing might cause, the harder it is to believe that it will happen very often. When people are seriously sick and treatable, most of them want to know about it.

D. "Substantially Limits . . . Major Life Activities"

In the wake of *Bragdon v. Abbott*, it is likely that, for those with genetic predispositions, the asserted ADA "major life activity" that has been "significantly limited" will be reproduction.³⁹ It is odd, however, that this limitation will seldom be the reason for an employer's discrimination.⁴⁰ Also, this limitation is mitigated by the possibility of adoption.

There also does not seem to be any way around the statute's requirement of an individualized inquiry to determine whether "the major life activities of such individual"⁴¹ are substantially limited by a disability. This is only commonsensical. How can an eighty-year-old woman claim that she is disabled because of a disease that impairs reproduction in younger women? She is not disabled, even if the younger woman is. This surely is also—contrary to Gostin and Webber—a "morally relevant distinction."⁴²

IV. WHEN SHOULD DISCRIMINATION BE ILLEGAL?

The careful reader will by now have intuited that the author is generally skeptical about the desirability of antidiscrimination laws. The remainder of this Commentary discusses why this is so, not only with respect to asymptomatic genetic conditions, but also with respect to most other personal characteristics—except for race.

A. *Too Much Law*

American antidiscrimination law is a remarkable growth industry. Depending on where you live and whether you are hiring someone, serving him at your business, registering him to vote, admitting him to a public or private school, or renting him an apartment,⁴³ it is now illegal to take into account a person's race, ethnicity, sex, religion, age, disability, language, marital status, children, or sexual orienta-

39. See, e.g., Liu, *supra* note 8, at 397.

40. Cf. Gostin & Webber, *supra* note 9, at 282-83.

41. 42 U.S.C. § 12102(2)(A) (1994) (emphasis added).

42. Gostin & Webber, *supra* note 9, at 270.

43. See 42 U.S.C. § 12112(a); § 2000e (hiring); § 12182(a); § 2000a *et seq.* (public accommodations); § 1971 (voting); § 12182(a); § 1982 (1994) (renting); see also *infra* note 69 (school admissions).

tion, to give just a few examples.⁴⁴ And the list seems likely to keep growing.

Many people—particularly whites—have to beware of another Vietnam syndrome⁴⁵ when it comes to antidiscrimination law. Especially to the extent that they were apologists for state-enforced racial segregation or just AWOL during the civil rights struggle, it is tempting to avoid opposition to ever-expanding guarantees of equality. They do not want to be on the wrong side of history again.

But the new antidiscrimination struggles today are not the same. They are not about race, and usually they are not about state-enforced discrimination. Because they are not about race, the historical, constitutional, and religious and moral dimensions are different; moreover, nonracial factors may, unlike race, have some relevance to a person's entitlement to equal treatment. Because state-enforced discrimination is generally not at issue, principles of freedom and equality—which were on the same side during the struggle against official segregation—compete against one another now. This is not automatically to say that therefore these other kinds of discrimination ought not to be outlawed, too, but it does mean that those who favor such prohibitions cannot honestly claim that the issues are no different now than they were at Selma.

Consider just a few recent developments. The California courts have ruled that a landlord cannot, on religious grounds, legally refuse to rent to an unmarried couple.⁴⁶ Various courts also are in the process of deciding whether the Boy Scouts can exclude girls,⁴⁷ homosexuals,⁴⁸ and atheists.⁴⁹ Recently, a bill making it illegal for private employers to discriminate against homosexuals came within one vote

44. See, e.g., WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 56 (1997); The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 244 (1964) (codified at 42 U.S.C. §§ 2000a-2000h-6 (1994)); see also Edward Felsenthal, *Are Civil-Rights Laws Being Interpreted Too Broadly?*, WALL ST. J., June 10, 1996, at B1.

45. After the Vietnam War, many American strategists were unwilling to consider foreign interventions, even when they would have made sense, because they were afraid of becoming ensnared in "another Vietnam." See WILLIAM SAFIRE, *SAFIRE'S NEW POLITICAL DICTIONARY* 844 (1993).

46. See, e.g., *Smith v. Fair Employment and Hous. Comm'n*, 913 P.2d 909 (Cal. 1996), cert. denied, 117 S. Ct. 2531 (1997).

47. See, e.g., *Yeaw v. Boy Scouts*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997).

48. See, e.g., *Dale v. Boy Scouts*, 734 A.2d 1196 (N. J. 1997), cert. granted, 120 S. Ct. 865 (U.S. Jan. 14, 2000) (No. 99-699); see also, Larry P. Arnn, *Scout's Honor*, WKLY. STANDARD, Mar. 30, 1998, at 14; E.V. Kontorovich, *Scout's Honor*, NAT'L REV., Apr. 6, 1998, at 40; *Scouts Face Bias Charges in California*, WASH. TIMES, Jan. 7, 1998, at A5.

49. See, e.g., *Randall v. Orange County Council, Boy Scouts*, 72 Cal. Rptr. 2d 453 (Cal. Ct. App. 1998); see also Arnn, *supra* note 48, at 14; Kontorovich, *supra* note 48, at 41.

of passing in the Senate;⁵⁰ President Clinton called for its passage in a recent State of the Union address.⁵¹ Another bill recently introduced by Representative Brian Bilbray (R-Cal.) would have made it illegal for an employer to consider anything *except* "factors pertaining to job performance."⁵² Representative Bilbray declared that, under his legislation, not only gays and lesbians but "other traditional victims of prejudice" will now be protected from discrimination.⁵³

While antidiscrimination laws are constantly being proposed and discussed, there is really very little serious thought being given to the most fundamental issue of civil rights policy, namely when the government, as a general matter, ought to make it illegal to treat different people differently. This Commentary concludes that racial discrimination presented an extraordinary dilemma and that in other circumstances there ought to be a very strong presumption in favor of the government leaving the decision whether to discriminate to private actors.

B. *Who Is Equal?*

There are two questions that underlie all antidiscrimination law: Who is equal? Who decides? That is, which personal characteristics should be ignored in a given context, and who should make the decision about whether they should be ignored?

"Discrimination" is treating people differently because of some personal characteristic.⁵⁴ We expect, even encourage, some kinds of discrimination. We do not expect employers to hire simply on a first come, first served basis; we expect interviews, a review of resumes, a reference check. Most of us would not object if the employer decides not to hire someone because the applicant's series of criminal convictions for employee theft and embezzlement demonstrates his untrustworthiness, or because his past employers' accounts of his tendency toward long, unexplained absences suggests that he will be unreliable

50. See John E. Yang, *Senate Passes Bill Against Same-Sex Marriage; In First Test on Hill, Measure to Prohibit Employment Discrimination Is Defeated*, 50-49, WASH. POST, Sept. 11, 1996, at A1; see also S. 2056, 104th Cong. (1996) (a bill to prohibit employment discrimination on the basis of sexual orientation).

51. See 'My Fellow Americans . . . State of Our Union Is Strong,' WASH. POST, Jan. 20, 1999, at A12 (text of State of the Union address).

52. H.R. 963, 105th Cong. § 2 (1997).

53. In an Effort to Curb Discrimination, Bilbray Re-Introduces Workplace Fairness Act (Mar. 6, 1997 press release from Rep. Bilbray's office).

54. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (William Morris, ed. 1973); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (1989).

at his new position, or because his insults and assault of his interviewer call into question his ability to work well with others.

So it is only certain characteristics that we think should not be taken into account. But which ones? There are basically two answers that have been given. The first is that some characteristics are irrelevant, and that taking them into account is therefore irrational. The second justification is that some types of discrimination are immoral because they are unfair. Frequently the proponents of antidiscrimination laws have used both justifications, or shifted back and forth between them, but they are analytically quite distinct.

C. Irrelevant and Irrational

Although the argument that certain characteristics are irrelevant is frequently heard, it does not adequately explain the current system of antidiscrimination laws we have. To begin with, there are many irrelevant characteristics against which it is perfectly legal to discriminate. If I have a pathological aversion to the letter "k," I am free to refuse to hire people whose name begins with that letter. And I am perfectly free to refuse to hire people with a record of abusing animals, even though that characteristic is irrelevant to how well a person can wait on tables.

Conversely, some characteristics clearly are relevant, but it is quite illegal to take them into account. The Americans with Disabilities Act provides the best examples. The cost of building a wheelchair ramp into my restaurant is not "irrelevant," for instance, but it probably will not excuse me from building it.

There is also the question, "Irrelevant to what?" The law categorizes our relationships with people: Joe is our employee, Jill is our customer, Mary is our tenant, Fred is our friend. And certain characteristics that each have will be relevant and others will be irrelevant to their performance as employee, customer, tenant, and friend, respectively. But sometimes our relationships with people are multifaceted. And even when they are not, a given characteristic may be relevant in some larger or different context. The fact that he is an adulterer may be irrelevant to Joe's performance as an employee, but Joe's colleagues must deal with him as a fellow human being, too.

Fortunately, the government has not yet made illegal all discrimination against "irrelevant" characteristics. This would greatly increase the acrimony in our already litigious workplaces (a fact which seems not to have occurred to Representative Bilbray). The government has not bothered to prohibit irrational discrimination unless it is widespread and unpopular enough to merit attention. Pathological fear of

the letter “k” is not widespread; discrimination against blacks was. Some characteristics may be irrelevant to a position but discrimination against them is not widely objectionable. Who cares if puppy-killers get denied jobs?

A less charitable way to put it, however, is that the kinds of discrimination that get prohibited depend to a large extent on political muscle. There is probably less discrimination against homosexuals now than there has ever been—according to the American Enterprise Institute’s Karlyn Bowman, eighty percent of Americans think that homosexuals should not be discriminated against in employment matters⁵⁵—and it is no more or less rational today than it has been in the past, but the gay lobby is more powerful now than it used to be.⁵⁶ And so homosexuals are achieving legislative successes at the state and local level, as well as pushing their congressional agenda.⁵⁷

D. Disparate Impact

A special issue arises when the presence or absence of an irrelevant characteristic may be a good way of telling whether or not a relevant one is present. Conversely, the use of a relevant characteristic may result in the exclusion of a disproportionate number of people who happen to have a particular irrelevant characteristic. What do we do about this?

The law has given a clearer answer in the former situation than in the latter. If you want to hire people with high school diplomas (the relevant characteristic) you cannot use the fact that there is a higher percentage of Hispanic than Anglo dropouts to justify a blanket policy of refusing to hire people who are Hispanic (the irrelevant character-

55. See Erica Cook, *Change Slight in Opinions on Sex, Drugs*, WASH. TIMES, June 24, 1997, at A2; see also David W. Moore, *Public Polarized on Gay Issue*, GALLUP POLL MONTHLY, Apr. 1993, at 30; Gallup News Service Poll, question no.13 (Nov. 21-24, 1996) (noting that 84% of respondents indicate homosexuals should have equal rights, an increase from 56% in 1977).

56. See Michael Weisskopf, *Gay Lobby in Key Test of Strength; ‘Seat at the Table’ of Power at Stake*, WASH. POST, Jan. 27, 1993, at A1.

57. See David Elliot, *Balance of Power in State Legislatures Slowly Shifting Toward GLBT Equality, Annual 50-State Report Shows* (visited Jan. 25, 2000) <<http://www.ngltf.org.press/121399.html>> (National Gay and Lesbian Task Force Press Release); see generally DAN HAWES, NATIONAL GAY & LESBIAN TASK FORCE, 1999 CAPITAL GAINS & LOSSES: A STATE BY STATE REVIEW OF GAY, LESBIAN, BISEXUAL, TRANSGENDER & HIV/AIDS-RELATED LEGISLATION IN 1999 (1999); ROBERT W. BAILEY, NATIONAL GAY & LESBIAN TASK FORCE, OUT AND VOTING II: THE GAY, LESBIAN AND BISEXUAL VOTE IN CONGRESSIONAL ELECTIONS, 1990-1998 (1999).

istic). Employers have to consider each candidate individually, even if it is cheaper, quicker, or more reliable not to do so.⁵⁸

One might think, therefore, that choosing people on the basis of a high school diploma would be perfectly permissible, even if it turned out that doing so resulted in a disproportionate number of Hispanic applicants being rejected. Well, yes and no. An employer in that situation might be allowed to continue this policy, but only if he can prove that there was a “business necessity” of hiring only people with high school diplomas⁵⁹—even if there was no evidence and no accusation that his requirement was motivated by anti-Hispanic bias. This prohibition of so-called disparate impact discrimination was first promulgated by the antidiscrimination enforcement bureaucracy,⁶⁰ then read into statute by the courts,⁶¹ and finally codified by Congress.⁶² It makes little sense, and it is a powerful engine for quotas, but it is frequently the law.⁶³

E. “Immoral and Unfair” Discrimination

Where private discrimination is not irrational—the characteristic at issue is not “irrelevant”—then under what circumstances is it nonetheless objectionable? The response has been, “When it is immoral and unfair” or—for the more secularly humanized—“When it results in bad social policy.” But this, of course, really just begs the questions: What is immoral and unfair, and what is bad social policy?

The more one considers the issue, the more one concludes that there are simply some people that are pitied more than others. “They can’t help it and we ought to be nice to them” summarizes this approach. We want to help old people and people in wheelchairs, so we

58. The core federal prohibition on employment discrimination with respect to national origin, among other criteria, is found at 42 U.S.C. § 2000e-2(a)(1) (1994).

59. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The *Griggs* decision is the seminal Supreme Court rendering on the “disparate impact” doctrine in antidiscrimination law.

60. See, e.g., Equal Employment Opportunity Commission’s *Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1999). An earlier version was cited in *Griggs*, 401 U.S. at 433 n.9.

61. See *supra* note 59.

62. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified disparate impact causes of action in employment at 42 U.S.C. § 2000e-2(k) (1994).

63. The disparate impact approach has, unfortunately, spread from employment law to many other arenas. The author has discussed and criticized this development in Roger Clegg, *The Bad Law of “Disparate Impact,”* PUB. INTEREST, Winter 2000, at 79.

have made it illegal to discriminate on the basis of age and disability,⁶⁴ even though these are clearly not irrelevant characteristics.

It is interesting to think about whom legislators may feel protective toward next. People who used to be on welfare? People who lack a college degree, or perhaps people who graduated from this college rather than that college? People who have had an abortion? People who are promiscuous? People with certain political views? People convicted of certain crimes—say, “victimless” crimes like drug possession or prostitution? How about discrimination based on hairstyle, body piercing, and tattoos? None of these possibilities is beyond the pale, particularly in our more liberal states, so neither is a ban on discrimination against such people. It is interesting that much of this “immoral” discrimination involves bias against behavior—such as abortion, promiscuity, and crime—traditionally thought sinful.

Just as the “relevance” of a characteristic is really a matter of politics, so too is the decision about the kinds of discrimination that are immoral. The latter get banned even when the characteristics at issue are clearly not irrelevant, so long as enough legislators—perhaps not coincidentally at the urging of powerful constituencies—have decided that taking them into account is nonetheless “unfair.” Maybe it is rational not to build that wheelchair ramp, but Congress wants it built anyway because, it says, disabled people ought to be able to go to any restaurant they like.

F. *Who Decides?*

Which leads us to the second big question: *Who should decide* whether a characteristic is irrelevant or whether it is immoral and unfair to discriminate against those who have it?

The truth is that there are very few characteristics that can be deemed completely irrelevant for all activities. Certainly their relevance or irrelevance will likely vary from situation to situation. This is one reason why the person who decides whether and how to weigh a particular characteristic ought generally to be the person who is nearest to the situation and who has the greatest stake in ensuring that all, but only, relevant characteristics are weighed.

There are other reasons to decentralize this decisionmaking. Sometimes the right to determine if a characteristic is relevant or not and what morality dictates will implicate an important personal freedom. Suppose that two women do not want to have a lesbian house-

64. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1994); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 (1994).

mate and decline to rent an extra room to her. Isn't a decision by the government that they cannot act on their preference a decision that trenches in a serious way on their privacy interests? Yet this coercion is the law in Wisconsin, according to a court in that state.⁶⁵ We saw earlier that, in California, a landlord may not refuse, on religious grounds, to rent to an unmarried couple.⁶⁶ And isn't it important to stigmatize sinful behavior even—especially—if it is not made illegal? We may still love the sinner, but it does him no good to make sin costless.

The Constitution itself would, if followed, help illuminate a path for the federal government to follow in deciding when to make discrimination illegal. The Fourteenth Amendment gives Congress authority to ban discrimination by state and local governments, but not private actors.⁶⁷ Of the likely decisionmakers—the private actors in the marketplace, the federal government, and state and local governments—the latter are most likely to engage in discrimination that ought to be banned.

Thus, it makes sense for the federal government to have a role in banning discrimination by state and local governments. In *The Federalist* No. 10, James Madison foresaw the greater likelihood that smaller political subdivisions would be captured by special interests (“factions,” in those days), and history has borne him out.⁶⁸ Many states went in less than a generation from banning racial minorities from public universities to mandating that they be given preferential treatment.⁶⁹ This is not enlightenment; it is more of the same. Politicians

65. See Wisconsin *ex rel.* Sprague v. City of Madison, 555 N.W. 2d 409 (Wis. Ct. App. 1996). (At Tufts University, a gay student is pushing the school to allow coed dorm rooms, on the grounds that same-sex rooms discriminate against homosexuals. *Notebook*, CHRON. HIGHER EDUC., Mar. 24, 2000, at A53.)

66. See *supra* note 46 and accompanying text.

67. See U.S. CONST. amend. XIV, §§ 1, 5 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

68. See THE FEDERALIST NO. 10 (James Madison).

69. See TEX. EDUC. CODE ANN. § 51.601 (1999); FLA. STAT. ANN. § 240.2475 (West 1999); CAL. EDUC. CODE § 66205 (Deering 1999). The Center for Equal Opportunity (CEO) has published a series of studies documenting the evidence of racial and ethnic preferences favoring blacks and, to a lesser extent, Hispanics at a number of state universities in North Carolina and Virginia (and, in addition, California, Colorado, Michigan, Washington, and Minnesota, as well as the military academies at West Point and Annapolis). The studies are available from CEO and appear on its website. See CEO, *Center for Equal Opportunity* (visited Apr. 15, 2000) <<http://www.ceousa.org>>. Florida and Georgia apparently acknowledge that they use racial and ethnic preferences, although Florida may soon end its practice. See David Firestone, *University Stands Firm in Using Race in Admissions*, N.Y. TIMES, Oct. 1, 1999, at A14 (noting that the president of the University of Georgia promises to continue preferences); Kenneth J. Cooper, *Fla. Minorities Plan: An Addition*

consistently cater to racial constituencies because it is effective politics to do so. The national government has not been immune in this regard, but as a historical matter it has done better than the states in eschewing the ugliest racial politics.

On the other hand, we should be very nervous about granting a role to the federal government in banning discrimination by private actors. Such discrimination will take place either in the marketplace or in noneconomic relationships. For the latter, individual privacy and liberty interests will typically be at high tide and the federal government's interest and constitutional authority at ebb. When it has acted to ban discrimination by private actors, Congress has typically relied, rather dubiously, on the Commerce Clause,⁷⁰ but even this weak reed is unavailable when noneconomic relationships are at issue.

As to the actions by private actors in the marketplace, how likely is it that the government will be a better judge than the actors of when discrimination is rational? As Nobel economics laureate Gary Becker⁷¹ and, subsequently, others have noted, the marketplace will discipline those who act irrationally: those who indulge a "taste" for discrimination will be at a competitive disadvantage vis-a-vis more rational economic actors. Eyebrows should automatically be raised whenever the government tells a businessman that it knows best how to be more competitive. There is no marketplace to keep the government honest, moreover, and "rent seeking" private actors know this.

G. *Practicalities, Pro and Con*

The most persuasive response to arguments like Becker's is that they are too theoretical. As a practical matter, the counterargument holds, antidiscrimination laws are needed because certain kinds of discrimination are so deeply rooted in our psyches and mores that they will otherwise never be discarded. The threat of social ostracism or

Challenge, WASH. POST, Dec. 22, 1999, at A3 (explaining that the Florida governor has proposed ending preferences there). Texas's use of such preferences has been successfully challenged in court. See *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996). In two instances, state preference policies have been overturned by state ballot initiatives—Proposition 209, passed by California in 1996, and Initiative 200, passed by Washington in 1998. See Tom Brune & Joe Heim, *Initiative 200—New Battle Begins*, SEATTLE TIMES, Nov. 4, 1998, at B1 (discussing Washington's Initiative 200, which was approved by 58% of the voters); Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action Initiatives*, L.A. TIMES, Nov. 6, 1996, at A1 (discussing voter approval of Proposition 209, which eliminates government preferences based on race, ethnicity, and sex).

70. See U.S. CONST. art. I, § 8; see also 42 U.S.C. § 12101(b)(4) (1994) (invoking "the power to enforce the fourteenth amendment and to regulate commerce" as authority for enacting the ADA).

71. See BECKER, *supra* note 36.

the preferences of third parties—like unions, customers, and other employees—may pressure employers not to hire blacks; or it may be wrongly assumed that women are incapable of doing certain kinds of work; or there may be a “gentlemen’s agreement” not to hire Jews. Or, as is sometimes argued, it may be understandable that individual employers will not want to incur the costs of hiring the disabled or elderly, but collectively the results are inefficient and unfair. Moreover, while some generalizations happen to be true—it would seem futile, for instance, to deny that women are more likely than men to interrupt their careers for child bearing and rearing, or that older workers are closer to retirement than younger ones—why not force people to make decisions on an individual basis, rather than allowing them to rely on stereotypes?

But those counseling skepticism about antidiscrimination laws also can marshal strong practical arguments. No one denies that irrational and immoral discrimination sometimes occurs—or that, when it does, it entails social costs. Nonetheless, the fact remains that employers are generally unlikely to act irrationally, especially in the aggregate. Public laws, on the other hand, sweep very broadly, and cannot make case-by-case determinations. The law is a blunt instrument. We are not all stuck with one bad employer. We *are* all stuck with a bad law.

Even at a general level, the practical truth is that the government is unlikely to know better than employers who the most productive employees will be. And it will be the rare case indeed that the federal government should be confident enough of what is and is not “immoral” that it should presume to preempt the judgment of private actors. The practical workings of the private sector are not perfect—but neither are those of the government. Politics will determine what the legislature decides is “irrational” or “immoral.” That is the way the system is designed.

Even if a class of irrationally or immorally discriminated-against employees is identified, a law protecting them will not necessarily make matters better. It will not end all discrimination, and it will inevitably result in some number of spurious regulations, enforcement actions, and lawsuits. The public and private costs of such enforcement will be substantial. Even in the case of race, there has been an enormous difference between the colorblind ideal that was enacted and the actual rules that today are being enforced.

As for macroeconomic effects, if it becomes very difficult to fire anyone, and if creating a new position is problematic because the process of hiring is so risky, the result will be a very rigid, inflexible

workforce—thus defeating the goal of fluid and open employment opportunities. The employer's as well as the employee's sense of efficacy has to be considered, for both their sakes. The data are showing that the ADA has not increased the number of disabled people who get hired—perhaps because employers are afraid they'll be sued by disabled employees.⁷² As U.S. Civil Rights Commissioner Russell Redenbaugh—himself blind—recently wrote: “[M]y own fear is that the ADA implementing regulations can have a chilling effect on the hiring of the disabled.”⁷³

Under the ADA, moreover, employers are asked to hire or promote people even when those people are clearly not the best qualified for the job. Granted, such a law may encourage many disabled people to join the workforce, but at a cost to employers and the nondisabled people who are passed over. If the ADA's proponents nonetheless believe that the social gains are worth it, it is troubling that these general gains are paid for out of the pockets of specific individuals and companies, rather than through a broader levy. (At a minimum, for instance, any costs attributable to ADA compliance ought to be compensated with a full tax credit.)⁷⁴

H. *Good Instincts, Bad Law*

The cascade of antidiscrimination laws that have been passed since the 1960s was precipitated by laws aimed at racial discrimination—discrimination that was both irrational and immoral and often government-supported to boot. The passage of subsequent laws involving other personal characteristics has stemmed from their proponents' willingness to claim, however implausibly, that other kinds of discrimination are no different from race. But there are two other reasons why Americans remain sympathetic to antidiscrimination laws.

72. See, e.g., Thomas DeLeire, *The Unintended Consequences of the American with Disabilities Act*, REGULATION, vol. 23, no. 1, 2000, at 21; Walter Olson, *Standard Accommodations*, REASON, Feb. 1999, at 58, 60; Barbara Vobejda, *Survey Finds No Job Gains for Disabled*, WASH. POST, July 23, 1998, at A20; Editorial, *Good Intentions, Bad Results*, INVESTOR'S BUS. DAILY, Oct. 28, 1998, at A7; U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA 274-82 (1998) (statement of Commissioner Russell E. Redenbaugh).

73. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 72, at 280 (statement of Commissioner Russell E. Redenbaugh); see also Editorial, *Americans with Minor Disabilities Act*, WASH. TIMES, Feb. 20, 1999, at C2.

74. Currently only a limited tax credit is available, and only for small businesses. See 26 I.R.C. § 44 (1994); see also Civil Rights Division, U. S. Dep't of Justice, *Tax Incentives Packet on the Americans with Disabilities Act* (visited May 5, 1999) <<http://www.usdoj.gov/crt/ada/taxpack.htm>>; JEFFREY G. ALLEN, COMPLYING WITH THE ADA: A SMALL BUSINESS GUIDE TO HIRING AND EMPLOYING THE DISABLED 102-05 (1993).

The trouble is that while each is rooted in a laudable instinct, both are misguided in this context.

The first factor at work is the erroneous belief that antidiscrimination laws increase freedom. The reasoning goes like this: "We need to protect gays from discrimination, because people should be free to choose a sexual lifestyle, and they should not be penalized for exercising that choice." This is the same instinct, one supposes, that helps support laws prohibiting discrimination based on marital status or whether one has children. People ought to be able to order their own personal lives free from outside interference.

When the government is doing the interfering and penalizing, it is true that individual freedom is being limited (whether that limitation is unjustified is another question). But there is no increase in individual freedom if the government steps in and prohibits a private citizen from freely deciding with whom he would like to engage in a business, contractual, or other relationship. This intervention should bother libertarians as well as traditional conservatives.⁷⁵

A second underlying motivation for the antidiscrimination laws is that some people feel sorry for others and want to help them. But what happens is that *A*, *B*, and *C* feel so sorry for *D* that they vote to force *E* to hire him, even though she would rather not. It would be better if *A*, *B*, and *C* just gave *D* their own money or found a job for him.⁷⁶ Barring that, if spending money on *D* is so necessary as a matter of public policy, then why not recompense *E* when she is forced to do so?⁷⁷

The charitable instinct for equal treatment is not only laudable but deeply ingrained in Western civilization (if that is still considered to be a mark in its favor). All men are created equal.⁷⁸ Let he who is without sin cast the first stone.⁷⁹ We are ultimately neither Jew nor Greek, male nor female, slave nor free.⁸⁰ All men are brothers.⁸¹

But remember the second fundamental question: Who decides? It is one thing for each of us as individuals to decide that we will, on our own, help the downtrodden; that we will ignore the differences

75. See Roger Clegg, *The ENDA Big Government?*, WKLY. STANDARD, Sept. 22, 1997, at 16.

76. Cf. HENRY HAZLITT, *ECONOMICS IN ONE LESSON* 194-95 (1979).

77. See *supra* text accompanying note 74.

78. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

79. *John* 8:7.

80. *Galatians* 3:28; see also *Romans* 10:12; *Colossians* 3:11.

81. See FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* [part II, book VI, ch. 2] quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 1074 (1945); THOMAS CARLYLE, *SARTOR RESARTUS* [book I, ch. 10], quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 379 (1945); JORGE LUIS BORGES, *The Other*, in *COLLECTED FICTIONS* 414 (1998).

between people; that we will be charitable to the less fortunate. But it is quite different—as a political matter, obviously, but as a moral matter as well—to force some people to help some other people because we think it their duty to do so. Jesus did not ask Caesar to levy a redistributive tax so that the rich would be forced to help the poor; He said the rich should do so voluntarily.⁸²

There is no doubt that deep moral questions can be raised when different people are treated differently because of their personal characteristics. But sometimes moral questions are raised as well when a person's characteristics are ignored. And the existence of such questions does not mean that the government should intervene. More likely, it means the opposite.

82. See *Luke* 18:18-27. For another discussion of morality and discrimination issues, see generally Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies*, 141 U. PA. L. REV. 149 (1992).