THE IMPORTANCE OF IMMUTABILITY

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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, I conclude that the employment discrimination laws lack coherence. While they 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 anti-discrimination 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 Act1 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’ anti-discrimination 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

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origin, sex, religion, age, citizenship status, disability, and genetic information. 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? Do GINA and the ADAAA elucidate the nature of protected classifications or do they further obfuscate the question? 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 anti-discrimination endeavor is motivated by a desire to promote fairness and justice. Consequently, I argue that careful scrutiny of the laws reveals a clear theme.

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

Nevertheless, while 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

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

7 See infra Part II.A.

8 See infra Part II.B.
traits have been awarded protected status by federal law and others have not. It is noteworthy that some state laws cover traits that are not addressed by federal statutes, but state law varies significantly in scope and contents and thus constitutes a patchwork. Only federal law can provide comprehensive protection to residents across the nation. The recent additions of GINA and the ADA may occasion an opportunity to re-examine the purpose of the law and create a more rational and comprehensive legislative protective scheme.

The Article makes several original contributions, including the following. Part I, which describes the anti-discrimination 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. Part II outlines a variety of theories 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 should not be required to change it for employment purposes. Part IV discusses a variety of traits that are seemingly immutable but are omitted from statutory protection and evaluates whether each type of exclusion is reasonable. 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. It also analyzes the relevance of immutability to reasonable accommodation and argues that immutability

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9 See infra Part IV.
10 See infra Part IV.C.
11 See infra Part I.B.2.b.
12 See infra notes 153-160 and accompanying text.
may explain the legislature’s ambivalence about the accommodation mandate.

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. This Part will describe the traditional grounds for anti-discrimination protection and the most recent changes to the employment discrimination field embodied in GINA and the ADAAA.

A. THE FEDERAL ANTI-DISCRIMINATION LAWS – THE PRE-2008 LANDSCAPE

During the second half of the twentieth century a variety of federal laws established anti-discrimination 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, and national origin.13 Sex discrimination includes adverse decisions made because of pregnancy, childbirth, or “related medical conditions.”14 Several other laws are narrower in scope. The Equal Pay Act (EPA) addresses salary disparities based on sex.15 The Age Discrimination in Employment Act (ADEA) protects individuals who are 40 and older against age discrimination.16 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 U.S.17

The Rehabilitation Act of 1973 (Rehabilitation Act) and the Americans with Disabilities Act (ADA), enacted in 1990, are designed to protect workers against discrimination

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based on disability. 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.” The ADA extended the anti-discrimination mandate to all public and private employers with fifteen or more employees. 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.

However, the ADA’s original definition of “disability” challenged litigants and courts. The ADA defined the term “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.

Courts most often interpreted this definition narrowly, finding that various conditions either don’t affect a major life activity or are not sufficiently limiting to constitute


22 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 substantial impediment to employment.” 29 U.S.C. § 705(2)(A)(i) (2006). Prior to the ADA’s enactment, this definition was not controversial, perhaps because governmental employers were less inclined to challenge plaintiffs’ disability status 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) (noting that disability status was rarely litigated under the Rehabilitation Act).

disabilities under the ADA.\textsuperscript{24} For example, one notorious case held that an individual with mental retardation was not disabled for purposes of the ADA.\textsuperscript{25} Several studies revealed that ADA plaintiffs won five percent or fewer cases.\textsuperscript{26}

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? 4) Does the ADA’s prohibition of disability discrimination include adverse treatment based on an asymptomatic individual’s genetic information?\textsuperscript{27} 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.

B. THE NEW ADDITIONS: GINA AND THE ADAAA

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

\textsuperscript{24} See ADAAA, Pub. L. No. 110-325; 122 Stat. 3553 (2008), § 2(a) (discussing a variety of Supreme Court cases that narrowed the definition of “disability” and motivated Congress to amend the ADA).

\textsuperscript{25} Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 WL 1379986, at *3-4 (11th Cir. May 11, 2007) (holding that plaintiff was not substantially limited with respect to any major life activity).


\textsuperscript{27} See ADAAA, Pub. L. No. 110-325; 122 Stat. 3553 (2008), § 2(a) (discussing Supreme Court cases that addressed these questions); Paul Steven Miller, \textit{Is There A Pink Slip in My Genes? Genetic Discrimination in the Workplace}, 3 J. Health Care L. & Pol’y 225, 237 (2000) (arguing that “[t]he ADA can and should be interpreted to prohibit employment discrimination based on asymptomatic genetic characteristics.”).
1. **GINA**

The Genetic Information Non-Discrimination Act (GINA) was first introduced in Congress in 1995 but was passed after thirteen years, in 2008.\(^{28}\) 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.\(^{29}\) 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.\(^{30}\) GINA also instructs that employers may not “request, require, or purchase genetic information” about an employee or her family members, with limited exceptions.\(^{31}\)

The first reported EEOC charge of discrimination alleging a GINA violation was filed in April 2010.\(^{32}\) Thus, no lawsuits have yet been commenced, and no GINA decisions have thus far been issued by the courts.

2. **The ADA Amendments Act**

The ADA Amendments Act (ADAAA) considerably broadened and elucidated the definition of the term

\(^{29}\) Id.
\(^{31}\) Id. at § 202(b).
“disability.”33 The expansion of the statutory scope was accomplished through a variety of provisions. It is difficult to predict the extent of the impact the ADAAA will have on ultimate case outcomes, but the Act should make it much easier for plaintiffs to overcome the threshold obstacle of 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.34

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.35 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.”36 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.37

Perhaps most significantly, the ADAAA liberalized the definition of “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.”38 Only “[t]ransitory and minor” impairments, namely those lasting six months or less, are excluded from coverage.39 This

34 See infra note 77 and accompanying text.
36 Id. § 12102(2)(A).
37 Id. § 12102(2)(B).
38 Id. § 12102(3)(A).
39 Id. § 12102(3)(B).
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.\(^{40}\) It also rebukes the courts for having required plaintiffs to have an excessively high degree of limitation in order to meet the “substantially limits” statutory standard.\(^{41}\) 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.\(^{42}\)

A particularly celebrated change is one that rejects the Supreme Court decision in *Sutton v. United Air Lines, Inc.*\(^{43}\) concerning mitigating measures.\(^{44}\) 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”).\(^{45}\) 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 on whether covered entities engaged in discrimination in violation of the law.\(^{46}\)

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

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\(^{40}\) Id. § 12102(4)(A).


\(^{42}\) Id. §§ 12102(4)(C) & (D).

\(^{43}\) 527 U.S. 471 (1999).


The ADA's anti-discrimination mandate has become expansive since the ADAAA's implementation. The change is so dramatic that employers should rarely succeed in challenging a plaintiff's disability status in cases that do not involve a request for reasonable accommodations.47 Many conditions that, to the surprise of many observers, were 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,48 individuals with impairments such as epilepsy, diabetes, and learning disabilities, who routinely failed to prove they were entitled to ADA protection,49 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 inclusion of conditions that are episodic

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47 For a discussion of reasonable accommodations see infra notes 70-76 and accompanying text.
49 Alex B. Long, Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008, 103 NW. U. L. REV. COLLOQUIY 217, 220 (2008) (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); H.R. Rep. No. 110-730, 110th Cong., 2d Sess., pt. 2, at 20-21 (2008) (discussing cases that would likely be decided differently under the revised standard). See e.g. Brunke v. Goodyear Tire & Rubber Co., 344 F.3d 819, 821-22 (8th Cir. 2003) (concluding that individual with epilepsy whose medication significantly diminished his seizures did not have a disability); Collado v. United Parcel Service, Co., 419 F.3d 1143, 1154-57 (11th Cir. 2005) (finding that an individual with diabetes who was insulin-dependent was not disabled for statutory purposes); Gonzales v. National Bd. Of Medical Examiners, 225 F.3d 620, 628-29 (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).
should also assist individuals with epilepsy because seizures are generally periodic rather than constant.\(^{50}\)

Cancer patients and survivors should benefit significantly from the ADAAA, particularly in light of its coverage of illnesses in remission.\(^{51}\) 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 thus were not found to have met the statutory standard.\(^{52}\) Now patients whose cancer is either active or in remission\(^{53}\) should be included as protected class members. Equal Employment Opportunity Commission (EEOC) proposed 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.\(^{54}\) Because illnesses in remission are to be considered in their active state for definitional purposes,\(^{55}\) 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


\(^{51}\) See supra note 50.


\(^{53}\) 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 (Houghton Mifflin Harcourt 2008).


impairment.\textsuperscript{56} 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 is likely to be the most transformative improvement for ADA plaintiffs.\textsuperscript{57} 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, and therefore, few if any lasting medical conditions will fall outside of the ADA’s sphere.\textsuperscript{58} The term “impairment” is not defined in the statute, but the federal regulations provide a far-reaching definition:

(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.\textsuperscript{59}

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.\textsuperscript{60} Prior to the ADAAA, individuals with back


\textsuperscript{57} 42 U.S.C. § 12102(3) (Supp. 2010).

\textsuperscript{58} Id.

\textsuperscript{59} 29 C.F.R. § 1630.2(h) (2009).

\textsuperscript{60} H.R. Rep. No. 110-730, 110\textsuperscript{th} Cong., 2d Sess., 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 “cold or flu”).
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. 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 deformity. 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 to remain excluded, despite evidence that obese individuals experience discrimination in the workplace. Experts have determined that obesity is caused by a “complex interplay of genetic, nutritional, physiological, psychological, environmental, and social

61 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 (N.D. Ill. 1996) (finding against plaintiff with psoriasis that produced white, flaking sores on her face and body because she did not meet the disability standard).

62 See 29 C.F.R. § 1630.2(l), App. (2009) (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).

63 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).

Nevertheless, while obesity has a physiological basis, it does not fall clearly into any impairment category. Professor Jane Korn argues that obesity could be considered a cosmetic disfigurement that receives the same treatment as a severe scar, but EEOC regulations provide that “except in rare circumstances, obesity is not considered a disabling impairment.” The federal regulations provide the following additional examples of impairments that are considered non-disabling even under the “regarded as” prong because of their typically short duration: “broken limbs, sprained joints, concussions, appendicitis, and influenza.” 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. 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 disabled. Plaintiffs seeking reasonable accommodations will, therefore, be required to prove that they are

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67 Korn, supra note 63, at 247-48.


69 Id.


substantially limited in a major life activity, as defined by the ADAAA.\textsuperscript{72}

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.\textsuperscript{73} It is unclear whether such workers would be entitled to reasonable accommodation, and this question will need to be resolved through judicial interpretation.\textsuperscript{74} 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 non-exclusive list of major life activities\textsuperscript{75} and the instruction that the definition is to be construed “in favor of broad coverage”\textsuperscript{76} will make it easier for contemporary reasonable accommodation plaintiffs to prove that they have a disability than it was for pre-2009 plaintiffs. Nevertheless, only a subset of plaintiffs that 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.\textsuperscript{77} For example,

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\textsuperscript{72} Long, supra note 49, at 225.


\textsuperscript{74} See Jeannette Cox, Crossroads and Signposts: The ADA Amendments Act of 2008, 85 IND. L. J. 187, 217-20 (2010) (questioning whether reasonable accommodation plaintiffs who could ameliorate their conditions through mitigating measures but chose not to do so will be entitled to reasonable accommodation).

\textsuperscript{75} 42 U.S.C. § 12102(2) (Supp. 2010).

\textsuperscript{76} Id. at § 12102(4)(A).

\textsuperscript{77} Ruth Colker, Speculation about Judicial Outcomes under 2008 ADA Amendments: Cause for Concern, __ UTAH L. REV. __ (forthcoming 2010) (collecting data from 200 pre-ADAAA cases and finding that even before 2009, failure to accommodate was
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 reasonable accommodation can be found for the individual. The ADAAA’s contribution is that it will shift the analysis away from the disability question to the 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 upon which employment discrimination law extends protection to American workers. The question I wish to explore is whether there is any unifying principle that 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 section 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.78

“the most frequent kind of discrimination issue raised in these cases,” appearing 36% of the time).

In the context of constitutional analysis, the famous footnote 4 in the 1938 case of *United States v. Carolene Products Co.*\(^79\) 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 a correspondingly more searching judicial inquiry.”\(^80\) 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.”\(^81\)

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 it applies to the anti-discrimination 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 Purposes 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

\(^79\) 304 U.S. 144, 153 n. 4 (1938).
\(^80\) Id.
\(^81\) San Antonio Independent School District 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 are not wealthy and reside in low property tax base areas). *See also* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-314 (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).
and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness.”82 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.83 The “discrete and insular minority” designation was ultimately rejected by the ADAAA and no longer appears in the Findings and Purposes provision.84

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.85 Similarly, the Equal Pay Act (EPA) applies to both men and women who are subjected to pay discrimination because of sex.86 The Age Discrimination in Employment Act (ADEA) covers anyone who is forty or

83 Cox, supra note 74, 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”); H.R. Rep. No. 110-730, 110th Cong., 2d Sess., 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”); Sutton v. United Airlines, 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).
85 42 U.S.C. §2000e-2(a) (2006); Fullilove v. Klutznick, 448 U.S. 448, 526 (1980) (asserting that racial discrimination is no less pernicious when the victim is not a member of a racial minority); Dawn V. Martin, 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”).
older\textsuperscript{87} and thus applies to almost half of the American population.\textsuperscript{88}

While 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.\textsuperscript{89} The Equal Pay Act’s Declaration of Purpose explains that the “existence . . . of wage differentials based on sex . . . depresses wages and living standards for employees necessary for their health and efficiency.”\textsuperscript{90} The reality of discrimination, therefore, justified the law’s enactment. The Age Discrimination in

\textsuperscript{88} U.S. Census Bureau, 2006-2008 American Community Survey 3-Year Estimates, 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 Retirement 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., Inc., 758 F.2d 1435, 1442 (11th Cir. 1985) (“[a]ge discrimination is qualitatively different from race or sex discrimination in employment, because the basis of the discrimination is not a discreet 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.”).
\textsuperscript{89}C. Elizabeth Hirsh, Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes, 42 LAW & SOC’Y REV. 239, 269 (2008) (“Title VII was originally introduced to eradicate a history of discrimination against racial minorities, specifically African Americans’); United Steelworkers of America, AFL-CIO-CLC 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”).
Employment Act’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. 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.” Similarly, the ADA emphasizes the history and continuing presence of discrimination against individuals with disabilities in its Findings and Purposes section.

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.” Non-minorities can file reverse discrimination cases even though their communities have not historically been subjected to persistent discrimination.

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. Its Findings section cites only one example of genetic discrimination and promises to “allay concerns about the

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92 Id.
95 Id.
96 See Roberts, supra note 28, 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”).
potential for discrimination.”97 Thus, 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.98

Likewise, as noted above, the ADAAA eliminated the statutory language suggesting that individuals with disabilities are a discrete and insular minority.99 The Findings and Purposes provision retains a discussion of the history of discrimination against those with disabilities.100 However, because the protected class now includes individuals with any physical or mental impairment other than minor or transient ones,101 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 groups that have suffered a history of discrimination.

B. THE FORMAL EQUALITY MODEL

101 Id. at 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.
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 performance. This understanding of the anti-discrimination laws has been described as the “formal equality” model.

In a non-employment 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.” In a later race case, the Supreme Court asserted that immutable characteristics “bear no relation to ability, disadvantage, [or] moral culpability.”

The formal equality model fits several of the anti-discrimination 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.

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104 Frontiero v. Richardson, 411 U.S. 677, 686 (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.”).

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.” 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.”

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, and it defines a “qualified individual” as one who could perform the essential job functions with or without an accommodation. Title VII establishes a reasonable accommodation requirement to benefit individuals whose religious practices conflict with job requirements, though employers need not bear more than a de minimis burden in providing such accommodations. 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.

Professor Christine Jolls argues convincingly that other statutory mandates effectively constitute reasonable accommodation mandates as well.\textsuperscript{114} 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.\textsuperscript{115} Thus, employers have been required to abandon employment tests that disadvantaged African Americans and were found not to be sufficiently related to job performance\textsuperscript{116} as well as no-beard policies to which some African-American men could not adhere because they suffered from the skin condition pseudofolliculitis barbae.\textsuperscript{117} 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.\textsuperscript{118}

In addition, according to Professor Jolls, the anti-discrimination laws’ disallowance of a customer preference defense is likewise akin to a reasonable accommodation


\textsuperscript{116} Griggs, 401 U.S. at 433.

\textsuperscript{117} Badley v. Pizzaco of Nebraska, Inc., 939 F.2d 610, 612-13 (8th Cir. 1991); Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795, 797-99 (8th Cir. 1993); Jolls, \textit{supra} note 114, at 653 (“employers 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.”).

\textsuperscript{118} Jolls, \textit{supra} note 114, at 672 (emphasizing that “disparate impact liability imposes accommodation requirements”).
Employers may not be excused from statutory compliance even if they can prove that hiring members of a particular protected class will impact their profitability because customers will be uncomfortable with women or minorities. For example, in *Fernandez v. Winn Oil Co.*, the defendant contended that its South American customers would refuse to do business with a female Director of International Operations. The Ninth Circuit, however, instructed that “stereotyped customer preference [does not] justify a sexually discriminatory practice.” 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, obligating employers to absorb certain costs or inconvenience in order to ensure opportunities for protected class members.

C. IMMUTABLE CHARACTERISTICS

A third option is to view the employment discrimination laws as protecting workers based on immutable

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119 *Id.* at 686-87.
120 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).
121 *653 F.2d 1273 (9th Cir. 1981).*
122 *Id.* at 1276.
123 *Id.* at 1276-77.
124 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 mandate to such a degree as “to assimilate . . . [it] very closely to a classic antidiscrimination requirement.” *Id.* at 42.
125 Crossley, *supra* note 102, at 873-74.
characteristics.\textsuperscript{126} Despite the shortcomings of the formal equality model,\textsuperscript{127} 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.\textsuperscript{128} 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.\textsuperscript{129} Citizenship status is unalterable until one becomes eligible for naturalization.\textsuperscript{130} 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.\textsuperscript{131} GINA and the ADAAA make the

\textsuperscript{126} See, e.g., Willingham v. Macon Tel. Pub. 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"); Hohider v. United Parcel Service, Inc., 574 F.3d 169, 190 (3rd Cir. 2009) (asserting that Title VII "protects all individuals from discrimination motivated by the immutable characteristics specified in the statute").

\textsuperscript{127} See supra Part II.B.

\textsuperscript{128} See supra note 5 and accompanying text (listing the employment discrimination laws and the characteristics they protect).

\textsuperscript{129} See infra Part III.B.2 for further discussion.

\textsuperscript{130} See infra notes 173-175 and accompanying text.

\textsuperscript{131} 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. PSYCHOL. REV. 60, 61 (2010) (“the unique characteristics of religion, including compelling affective experiences and a moral authority that cannot be empirically disputed . . . may lend this
immutability characterization increasingly compelling. Individuals’ genetic makeup and mental or physical impairments are biological attributes and are largely unchosen and unchangeable.132 These two statutes, therefore, validate and bolster the generalization that the law prohibits employment discrimination based on immutable characteristics.

Yet, a review of caselaw and legal scholarship reveals that the meaning of the term “immutable characteristics” in the civil rights context is surprisingly murky. The next Part 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,” drawn from constitutional cases. The term can be defined as 1) an accident of birth;133 or 2) a characteristic that is either unchangeable or so fundamental to identity or conscience that individuals should not be required to change it.134 I 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 in determining what level of particular social identity a personal significance exceeding that of membership in other groups”).

132 See infra notes 183-186 and accompanying text for discussion of circumstances in which impairments and disabilities may to some extent be subject to individuals’ control.


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, 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” and struck down federal statutes that treated male and female spouses of military personnel unequally.

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. The Court therefore, applied rational basis analysis rather than heightened scrutiny to strike down the statute. In *Lyng v. Costillo*, the Court refused to characterize the status of being close relatives as a suspect class because close relatives “do not exhibit obvious, immutable, or

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138 Id. at 686.
139 Id. at 690-91.
141 Id. at 220.
142 Id. (holding that “[i]t is ... difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”).
143 477 U.S. 635 (1986).
distinguishing characteristics.”144 The Court used rational basis analysis to uphold amendments to the Food Stamp Act that disadvantaged certain families.145

Immutability, however, does not guarantee suspect class categorization. In *Frontiero*, the Supreme Court identified disability and 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.146 The Supreme Court confirmed its view of mental impairments in *City of Cleburne v. Cleburne Living Center*147 in which it acknowledged the immutability of mental retardation148 but refused to recognize individuals who suffer from the condition as a suspect class.149 Likewise, in *Massachusetts Board of Retirement v. Murgia*,150 the Supreme Court declined to apply heightened scrutiny to evaluate the constitutionality of a statute mandating a retirement age of 50 for state police officers.151 The Court believed that the elderly, 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.’”152

2. The Meaning of Immutability

The next step of analysis is to determine how the federal courts define an “immutable characteristic.” A review of

144 *Id.* at 638.
145 *Id.* at 639.
146 411 U.S. at 686.
147 473 U.S. 432 (1985) (using rational basis analysis to invalidate a zoning order that required a special permit for a group home for mentally retarded individuals).
148 *Id.* at 445.
149 *Id.* at 446.
151 *Id.* at 313-14 (finding that the mandatory retirement statute was rationally related to the state’s legitimate public safety goals).
152 *Id.* at 313.
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.”\(^{153}\) Thus, immutable characteristics are not the product of “conscious . . . action.”\(^{154}\) In *Vieth v. Juberliner*,\(^{155}\) the Court noted that political affiliation is not an immutable characteristic because it “may shift from one election to the next.”\(^{156}\) It is noteworthy that *Vieth* is the only post-1986 instance in which the Supreme Court analyzed the concept of immutability, and thus some scholars have commented that it may be essentially extinct in Supreme Court jurisprudence.\(^{157}\) 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.\(^{158}\)

The federal circuit courts have also developed a second understanding of the meaning of “immutable characteristic.” Under this formulation, a trait is immutable if it is “so

\[^{153}\text{Frontiero, 411 U.S. at 686. See also, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 477-478 (1981) (referring to immutable characteristics as those with which one is born).}\]
\[^{155}\text{Id. at 286-87.}\]
\[^{156}\text{Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 647 (2001) (noting that the concept of immutability has been in decline in Supreme Court equal protection analysis and may even be considered irrelevant); Marc R. Shapiro, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409, 412 (2002-03) (asserting that the Supreme Court appears interested in “phasing out the immutability concept”); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of Don't Ask, Don't Tell*, 108 YALE L.J. 485, 490-91 (1998) (criticizing the concept of immutability and arguing for its demise in constitutional analysis).}\]
\[^{158}\text{See Lake v. Arnold, 112 F.3d 682, 687 (3rd Cir. 1997); Eulitt ex rel. Eulitt v. Maine Dept. of Educ., 386 F.3d 344, 354 (1st Cir. 2004); St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 638 (7th Cir. 2007).}\]
fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."159 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.”160 Thus, according to this approach, an attribute need not be entirely fixed in order to be deemed immutable.

Professor Samuel Marcosson speaks of “self-concept, which is a “complex mix of cultural, familial, historical, and internal factors.”161 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.

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. 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

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159 Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000). See also Matter of Acosta, 19 I. & N. Dec. 211, 233-234 (BIA 1985) (overruled on other grounds by Matter of Mogharrabi, 19 I. & N. Dec. 439, 447 (BIA 1987)) ; Njenga v. U.S. Atty. Gen., 216 Fed.Appx. 963, 966-67 (11th Cir. 2007) (immutable characteristics are fundamental to individual identities or consciences); Zavaleta-Lopez v. Attorney General of U.S., 2010 WL 125852 at 2 (3rd Cir. 2010) (“immutable 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.”).

160 Watkins v. United States 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).

161 Marcosson, supra note 157, at 683.
can be deemed to be immutable characteristics under one or both of the definitions described above.\textsuperscript{162}

To be clear, I argue only that the concept of immutability provides a rationale for the protected classifications encompassed within the anti-discrimination statutes. I acknowledge that the concept of immutability does not explain why certain unchangeable or central traits, such as sexual orientation and parental status, are excluded from the statutory scope, and these exclusions will be explored later in the Article.\textsuperscript{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 of birth. Age is also determined by birth date. While sex can be changed, the change requires complicated sex reassignment surgery, which is very rarely undertaken.\textsuperscript{164} Therefore, sex can be labeled as determined by accident of birth in all but the most exceptional cases.

\footnotesize{\textsuperscript{162} See supra Part III.A.2.\textsuperscript{163} See infra Part IV.C.\textsuperscript{164} According to one source, only 100-500 sex reassignment surgeries are performed each year in the U.S. L. Fleming Fallon Jr, Sex Reassignment Surgery (2004), at http://www.healthline.com/galecontent/sex-reassignment-surgery. According to another source, up to 1000 sex reassignment surgeries are performed annually in the US, while hundreds of additional Americans undergo the operation more cheaply abroad. Lynn Conway, How Frequently Does Transsexualism Occur? (2002), available at http://ai.eecs.umich.edu/people/conway/TS/TSPrevalence.html (estimating that by 2002 a total of 14,000-20,000 U.S. residents had undergone sex reassignment surgery).}
The courts have extended Title VII's national origin protection to discrimination based on foreign accents. Because accents are linked to one's birthplace and are immutable for many people, the courts have required employers to establish a business necessity defense for adverse decisions related to foreign accents. 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. In *Fragante v. City and County of Honolulu*, the Ninth Circuit upheld the rejection of an applicant whose heavy accent was likely to create communication difficulties in a job with significant public contact, 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.”

Other protected classifications are less comfortably categorized as accidents of birth. While many individuals remain in their religions of birth, a significant percentage of Americans convert to a different religion or choose not to identify with any religion at all. Title VII's prohibition of religious discrimination makes no distinction between

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165 See *Carino v. University of Oklahoma Bd. of Regents*, 750 F.2d 815 (10th Cir. 1984); *Fragante v. City and County of Honolulu*, 888 F.2d 591 (9th Cir. 1989), cert denied, 494 U.S. 1081 (1990).
166 750 F.2d 815 (10th Cir. 1984).
167 Id. at 816 and 819.
168 888 F.2d 591 (9th Cir. 1989), cert denied, 494 U.S. 1081 (1990).
169 Id. at 598.
170 Id. at 596.
171 The Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey* (2008), available at [http://religions.pewforum.org/reports](http://religions.pewforum.org/reports) (finding that 28% of Americans say they have left the religion with which they were raised and are either members of a different religion or unaffiliated).
individuals who never altered their religious affiliation and those who have.\textsuperscript{172}

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.\textsuperscript{173} Thus, legal immigrants must wait a number of years before becoming citizens,\textsuperscript{174} whereas persons who are born in this country are automatically citizens.\textsuperscript{175} 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.\textsuperscript{176}

Finally, while many disabilities are conditions with which people are born, some are products of accidents or risk-taking behavior. Such disabilities, therefore, can develop long after birth and are nevertheless covered by the ADA.\textsuperscript{177}

The idea that the law protects individuals based on characteristics that are acquired by accident of birth is emotionally appealing and compelling. I therefore retain “accident of birth” as one of my alternative definitions of immutability.\textsuperscript{178} “Accident of birth,” however, does not accurately describe several of the characteristics that have been awarded protected status in employment

\textsuperscript{173} U.S. Citizenship & Immigration Services, Citizenship Through Naturalization, available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d84d6811264a3210VgnVCM1000b92ca60aRCRD&vgnextchannel=d84d6811264a3210VgnVCM10000b92ca60aRCRD.
\textsuperscript{174} Id.
\textsuperscript{175} U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States . . . are citizens of the United States”).
\textsuperscript{176} 8 U.S.C. § 1342b(3)(B)(i).
\textsuperscript{178} See supra note 12 and accompanying text.
discrimination law. This definition alone is thus under-inclusive 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 is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed”\(^{179}\) accurately describes all of the traits that have been elevated to protected status by the employment discrimination laws.

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.\(^{180}\) They thus meet both definitions of “immutable characteristic.”

Other traits are captured only by the second definition. Religion can be altered but is fundamental to individual conscience,\(^{181}\) and thus, the law prohibits employers that are not religious entities from demanding that workers adhere to particular religious beliefs in order to obtain or retain employment.\(^{182}\)


\(^{180}\) See supra notes 164-177 and accompanying text (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.

\(^{181}\) See supra note 131 and accompanying text (discussing the importance of religion to personal identity).

\(^{182}\) See 42 U.S.C. § 2000e-2(a) (prohibiting religious discrimination). See also, 42 U.S.C. § 2000e-1(a) & 2000e-2(e)(2) (creating exemptions for religious corporations, associations, societies, and educational institutions and establishing that they
The second definition of immutability also applies to unalterable disabilities that are acquired through accidents or other misfortunes after birth. 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.\textsuperscript{183} 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.\textsuperscript{184} 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.\textsuperscript{185} 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.\textsuperscript{186} The ADA’s post-amendment approach is thus consistent with an understanding of disability in such circumstances as potentially fundamental to one’s identity and therefore, as an immutable characteristic.

GINA and the ADAAA, which significantly enlarge the scope of statutory protection based on biological attributes to include genetic makeup and essentially all non-transient physical and mental impairments,\textsuperscript{187} make immutability more relevant than ever to the employment discrimination

\textsuperscript{184} Cox, supra note 74, at 217-18; Bonnie Poitras Tucker, Deaf Culture, Cochlear Implants and Elective Disability, 28 HASTINGS CENTER REP. 6, 6-7 (1998).
\textsuperscript{186} But see supra notes 73-74 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).
\textsuperscript{187} See supra Part I.B.
field. Each protected classification can be described as a characteristic that cannot or should not have to be changed by an individual for employment purposes.

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 anti-discrimination 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 which they cannot modify. Employers operating behind a Rawlsian “veil of ignorance”\(^\text{188}\) would presumably embrace the anti-discrimination 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 and which immutable characteristics she possesses. Thus, everyone would fear discrimination and welcome its prohibition.\(^\text{189}\)

A second fairness concern relates to safeguarding the personal autonomy of workers with respect to major life decisions. Absent the anti-discrimination laws, employers would be free to make adverse decisions based on a worker’s religion or pregnancy. Consequently, employees might feel

\(^{188}\) 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”).

\(^{189}\) 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 fare poorly one day).
pressed 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.

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 non-minorities. Such employers would compromise their productivity and profitability because of bias and thus may actually benefit economically from the anti-discrimination 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. \textsuperscript{190} Others are forced to abandon preferred employment policies or to hire minorities whose presence might motivate customers to choose to do business elsewhere. \textsuperscript{191} In this sense the laws may be seen as shifting costs from workers or public safety net programs to employers. \textsuperscript{192}

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

\textsuperscript{190} See supra notes 109-113 and accompanying text. See also, Hoffman, supra note 26, at 335-36 (suggesting that the cost of many accommodations is minimal).

\textsuperscript{191} See supra notes 114-123 and accompanying text.

\textsuperscript{192} See infra Part V.C for further discussion of these issues.
IV. IS IMMUTABILITY THE WHOLE ANSWER?

The concept of immutability should be accepted by scholars and advocates as encompassing all of the traits that American employment discrimination law actually protects. However, the concept does not 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 statutory status.

The American legal system generally permits employers a high degree of autonomy to operate as they see fit. 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. The law must, therefore, balance the goal of combating pernicious discrimination with the aim of creating a hospitable environment for American employers. It is only when particular choices are perceived as sufficiently dangerous that legislatures opt to intervene.

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 which they most probably do not wish to exclude from the workplace. Second, in some instances, workers and employers may disagree about whether a particular characteristic falls into a protected category, and the law provides no clear answer. 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.

This Part will explore each of the three categories of excluded immutable characteristics. In so doing it will contemplate whether these exclusions constitute rational

193 Corbett, supra note 102, at 166.
194 Id.
195 Id.
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.” Nevertheless, many biological traits that are immutable are not addressed by the employment discrimination statutes. Examples are height, eye color, blood type, and left-handedness. 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

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196 DeNovellis v. Shalala, 124 F.3d 298, 314 (1st Cir. 1997).
and 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, 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, has generated significant debate concerning the boundaries of its protected classifications. 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.” These cases blur the Title VII margins, and courts have faced difficult decisions concerning the immutability and protected status of such qualities.

Several plaintiffs have challenged workplace policies that restrict employees’ ability to wear hairstyles that are associated with ethnic identity. In Rogers v. American Airlines, 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.”

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199 See supra notes 193-195 and accompanying text.
200 See supra notes 22-27 and accompanying text (discussing the ADA’s controversial definition of “disability”).
203 Rogers, 527 F.Supp. at 231-32.
wore dreadlocks because of his Nubian belief system and their “connection to African identity and heritage.”

Despite litigants’ claims that their hairstyles were fundamental to their identities, the courts have held that hairstyles are not immutable characteristics and that employer grooming policies that restrict them do not violate Title VII.

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 non-traditional and non-organized religions. Courts have opted for this approach in order to avoid infringing upon plaintiffs’ First Amendment rights. Thus, “religion” has been found to encompass Wicca, white supremacist beliefs, and a spiritual faith in the power of dreams.

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. In such cases, the courts deem the plaintiffs’ beliefs to constitute political views or lifestyle choices that are not entitled to Title VII protection. For example, in *Slater v. King Sloopers*, 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 is “political and social in nature.” 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.

A growing number of plaintiffs have filed cases that allege discrimination based on gender identity or expression, which attempt to stretch the meaning of the term “sex” under Title VII. 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. While early case decisions provided little hope for plaintiffs with non-traditional sex-related claims, some recent courts have been more liberal in their application of Title VII. For example, in *Bellamy v. Mason’s Stores, Inc.*, the court found that discharge of an employee for being a member of a racially exclusive organization dedicated to anti-Semitism did not violate Title VII.

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210 Id. at 810. See also, Bellamy v. Mason’s Stores, Inc., 368 F.Supp. 1025, 1026 (D.C. Va. 1973) (finding that discharge of employee for being a member of a racially exclusive organization dedicated to anti-Semitism did not violate Title VII).
211 441 F. Supp. 1382 (S.D. Fla. 1977), aff’d, 589 F.2d 1113 (5th Cir. 1979).
212 Id. at 1384-85 (finding that “plaintiff’s belief in pet food does not qualify legally as a religion”).
214 Holloway v. Arthur Andersen, 566 F.2d 659, 663, (9th Cir. 1977) (finding that Title VII does not extend to discrimination
sympathetic to such litigants.\textsuperscript{215} In \textit{Smith v. City of Salem},\textsuperscript{216} the Sixth Circuit held that Title VII prohibits discrimination against a male firefighter who was diagnosed with Gender Identity Disorder and exhibited “gender non-conforming behavior.”\textsuperscript{217} Several additional courts have ruled in favor of transsexual plaintiffs,\textsuperscript{218} though other courts continue to interpret the term “sex” more narrowly.\textsuperscript{219} As fundamental as gender identity and expression may be to individuals’ sense of themselves, not all courts construe Title VII as encompassing more than the anatomical, biological characteristics of being male or female.\textsuperscript{220}
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.\textsuperscript{221} 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.\textsuperscript{222} Because bilingual employees can communicate in English, the courts viewed speaking Spanish as a choice and as


\textsuperscript{222} See, e.g., Garcia v. Gloor, 618 F.2d 264, 266 and 270-71 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); Garcia v. Spun Steak, 998 F.2d 1480, 1483 and 1489 (9th Cir. 1993), cert. denied, 512 U.S. 128 (1994).
conduct that could easily be controlled and altered by workers.223

In the last few years, however, the Tenth Circuit has required employers to prove business necessity to justify English-only rules.224 Thus, such rules would be lawful only if the speaking of foreign languages during work hours would cause communication problems in the workplace or be otherwise disruptive.225 The Tenth Circuit’s approach is consistent with that of the EEOC Guidelines on Discrimination Because of National Origin.226 Nevertheless, while many individuals might feel that speaking in their native tongue is fundamental to their identity, not all have won the sympathy of the courts. The courts have issued inconsistent decisions concerning the extent to which employers may restrict foreign language use in the workplace.

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

223 Gloor, 618 F.2d at 270; Spun Steak, 998 F.2d at 1487. 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).

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

225 See Maldonado, 433 F.3d at 1307 (reversing summary judgment for the employer because there was scant evidence that use of Spanish by some employees caused communication, morale, or safety problems); 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”).

226 29 C.F.R. §1606.7 (2009) (“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”).
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. Bayer, therefore, asserts that Title VII should be understood to extend to “grooming styles, attire, and language.” Juan Perea proposed 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.”

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 purposes, it is important only to establish that controversy remains over the extent to which Title VII protects particular choices that are fundamental to certain individuals’ personal identity but not traditionally considered protected classifications.

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. Others, such as speaking foreign languages or transsexualism, are ambiguous in terms of immutability and have led to inconsistent court decisions.

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228 Id. at 774.
230 See supra Part IV.A.
231 See supra Part IV.B.
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.

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. Scientific research has not proven conclusively whether sexual orientation is a biological trait that is an accident of birth, but it seems always to be fundamental to personal identity. Moreover, many homosexual individuals report that they experience discrimination in the workplace. As of 2009, twenty-one states and the District of Columbia have recognized the severity of the problem and passed legislation

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234 AVERY ET AL., supra note 213, at 453; Simonton v. Runyon, 232 F.3d 33, 35-36 (2nd Cir. 2000). The Supreme Court has determined, however, that Title VII does prohibit same-sex sexual harassment. Oncale v. Sundowner Offshore Services, 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.

235 Clements, supra note 220, 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 the evidence is inconclusive for women).

236 In re Marriage Cases, 183 P.3d 384, 441 (Cal. 2008) (“one'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 amicus brief filed by leading mental health organizations, including the American Psychological Association and the American Psychiatric Association)); 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.”).

to ban discrimination based on sexual orientation. At the federal level, Congress has repeatedly considered the Employment Non-Discrimination Act, which would extend protected status to sexual orientation, but has never passed it. At this time, only federal employees are protected against sexual orientation discrimination by federal mandate under the Civil Service Reform Act of 1978 and Executive Order 13087.

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. Employers may well

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241 Rhode, supra note 233, at 1035 (arguing that “discrimination based on appearance is a significant form of injustice, and one that the law should remedy”); Corbett, supra note 102, at 153. Employers who use appearance as a proxy for race, national origin, or disability, however, may be prosecuted for violation of the law.
be motivated to make hiring decisions based on appearance, if they believe that good-looking employees will attract customers or clients.\textsuperscript{242}

Employees who are overweight are especially vulnerable to discrimination in the workplace,\textsuperscript{243} and the courts have consistently ruled that obesity alone (without associated medical problems) is not a protected characteristic under the employment discrimination laws.\textsuperscript{244} Scientific research has revealed that obesity is a complex condition that “involves the integration of social, behavioral, cultural, physiological, metabolic, and genetic factors.”\textsuperscript{245} Thus, obesity can be

\begin{itemize}
\item \textsuperscript{242} Rhode, supra note233, at 1037-1039 (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).
\item \textsuperscript{243} Korn, supra note 63, at 220-23 (discussing the stigma of obesity); J.D. Latner, \textit{Weighing obesity stigma: the relative strength of different forms of bias}, 32 INT'L J. OBESITY 1145, 1150 (2008) (finding that “weight bias persists”); LR Vartanian, \textit{Disgust and perceived control in attitudes toward obese people}, INT'L J. OBESITY 1,1 (2010) (“Bias and discrimination against overweight and obese people is widespread, affecting domains ranging from employment to romantic relationships”); Wang, supra note 64, at 1910-16 (discussing the “reality of weight discrimination” and studies that conclude that such discrimination is pervasive);
\item \textsuperscript{244} Korn, supra note 63, at 230-35 (discussing the difficulty of proving that obesity is an impairment under the ADA, even after the ADAAA’s enactment); 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”); Greenberg v. BellSouth Telecommunications, 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). \textit{See also supra} notes 63-68 and accompanying text (concluding that the ADAAA is unlikely to change litigation outcomes in obesity cases).
considered immutable in the sense that it has biological components and is very difficult if not impossible to overcome.246

Other aspects of appearance may also be immutable. Although individuals might be able to change their look through grooming choices or even surgical interventions, they may not do so because of financial constraints or because their natural appearance is fundamental to their sense of self.247

Despite evidence of significant appearance-related inequities,248 such discrimination has been largely ignored by state and federal law. To date, only Michigan and the District of Columbia have passed state-level laws that ban appearance discrimination,249 and the category is absent from the otherwise liberal Civil Service Reform Act that protects federal employees.250

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.251 The Family Medical Leave

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246 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”).


248 See supra, notes 242-243.


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. 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 on proof of sex stereotyping or the presence of similarly situated male comparators. The employment discrimination statutes do not include a general non-discrimination 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. Likewise, men who are known to be active caregivers have

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252 29 U.S.C. §§ 2611(4) & 2612(a). Eligible employees are those who have been employed for at least 12 months and have worked at least 1,250 hours during that time. Id. at S 2611(2)(A).

253 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 & 44-45 (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”).

been found to face barriers in the workplace. In 2006, the Center for Worklife Law at the University of California Hastings College of Law issued a report finding a four-hundred percent increase in the number of discrimination cases involving family responsibilities filed in federal courts during the preceding decade. Of the cases, ninety-two percent were filed by women and eight percent were filed by men. Employees won approximately fifty-three percent of the time, and employers prevailed in forty-seven percent of the cases studied.

Although evidence suggests that the problem is not trivial, only a handful of state statutes establish a clear ban on parental-status discrimination. In addition, federal employees enjoy protection under an executive order


256 Mary C. Still, Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities 2 (2006), available at http://www.uchastings.edu/site_files/WLL/FRDreport.pdf. Most cases were filed under Title VII. Id. at 5.

257 Id. at 8.

258 Id. at 13. It is unclear whether employers prevailed because the alleged discrimination was found to be outside the statutory scope or because no discrimination was found.

forbidding discrimination based on status as a parent.\textsuperscript{260} It is possible that the lack of more comprehensive legal protections can be explained by concern that a truly meaningful anti-discrimination mandate to protect parents would involve a reasonable accommodation requirement that would place additional burdens on employers and meet resistance from the business community.\textsuperscript{261}

4. Marital Status

Another attribute that would seem to be an appropriate candidate for legal protection but is ignored by the federal anti-discrimination statutes is marital status.\textsuperscript{262} 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 over single employees.\textsuperscript{263} Other surveys have found

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\textsuperscript{261} See Peggie R. Smith, \textit{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, \textit{supra} note 255, at 1321-26 (analyzing whether reasonable accommodation is an appropriate model to combat caregiver discrimination).


\textsuperscript{263} Robert K. Toutkoushian et al., The Interaction Effects of Gender, Race, and Marital Status on Faculty Salaries, 78 J. HIGHER ED. 572, 572-75 (2007); Bella M. DePaulo & Wendy L. Morris, The Unrecognized Stereotyping and Discrimination Against Singles, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 251, 252 (2006) (“Single men are paid less than their
that unmarried workers feel stigmatized as immature and unstable or believe they face more stringent work demands than married coworkers.\textsuperscript{264}

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.\textsuperscript{265} Many employers institute policies under which they refuse to employ both members of a married couple.\textsuperscript{266} While such a policy may be designed to avoid of favoritism, it can create career crises for some engaged or married couples. Thus, if two co-workers 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.\textsuperscript{267} In one reported case, an employer terminated an employee upon discovering that the worker was living with a girlfriend whom he did not marry.\textsuperscript{268} Another employer refused to hire an individual who was unmarried and pregnant.\textsuperscript{269} 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.\textsuperscript{270}

Twenty-one states and the District of Columbia have state statutes that prohibit marital status discrimination, married male colleagues even when they are of similar age and have comparable work experience”.

\textsuperscript{265} Porter, supra note 262, at 4; Chen v. County of Orange, 96 Cal. App. at 942.
\textsuperscript{266} Porter, supra note 262, at 4-5.
\textsuperscript{267} Chen v. County of Orange, 96 Cal. App. 4th 926, 940-44 (2002) (discussing a large number of cases involving alleged marital status discrimination).
\textsuperscript{269} Cooper v. Mower County Social Services, 434 N.W.2d 494, 498 (Minn. Ct. App. 1989).
though state courts have interpreted the extent of the laws’ protection differently.\textsuperscript{271} In addition, the Civil Service Reform Act of 1978 prohibits the federal government from discriminating against public employees based on marital status.\textsuperscript{272} The absence of this category from the federal statutes that apply to non-federal workers may thus seem surprising.

5. \textit{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. Title VII’s prohibition of religious discrimination may appear natural because it reinforces the value of religious freedom, rooted in the First Amendment.\textsuperscript{273} However, the Supreme Court has recognized a similar link between political affiliation and freedom of assembly, also guaranteed by the First Amendment.\textsuperscript{274} 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.\textsuperscript{275}

\begin{itemize}
  \item \textsuperscript{271} Porter, \textit{supra} note 262, at 15-16. The author also analyzes whether various state statutes apply to no-spouse rules. \textit{Id.} at 17-22.
  \item \textsuperscript{274} Elrod v. Burns, 427 U.S. 347, 347-48 (1976).
  \item \textsuperscript{275} Rutan v. Republican Party of Illinois, 497 U.S. 62, 65 (1990) (invoking 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, \textit{“We Don’t Want Anybody Anybody Sent”}: \textit{The Death of Patronage Hiring in Chicago}, 86 \textit{Nw. U. L. Rev.} 57, 59-64 (1991) (discussing the history of patronage hiring in Chicago and elsewhere).
\end{itemize}
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.\textsuperscript{276} However, only New York and the District of Columbia prohibit discrimination based on political affiliation at the state level.\textsuperscript{277} Therefore, the vast majority of American workers still face the possibility of adverse employment decisions associated with political viewpoint.

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 requirements and their limitations.

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 personal identity that individuals should not be required to change them.\textsuperscript{278} If both meanings of the term are taken into account, immutability is a unifying principle that explains the diverse characteristics that are protected by the employment discrimination laws. Race, color, religion, sex, national origin, age, disability, genetic makeup, and citizenship status are all immutable under one or both of the word’s definitions.

\textsuperscript{278} See supra notes 153-160 and accompanying text.
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. Beyond immutability, however, 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 non-citizens, as well as women, older workers, and those with some but not all disabilities. 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.

The remainder of the protected classifications can be justified by reference to fairness concerns and practical considerations. Non-minorities are permitted to file reverse discrimination cases under Title VII 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. In addition, it would likely be very difficult to draw a bright line separating ethnic groups that have suffered a history of discrimination in the United States from those that have not.

279 See supra Part IV.
280 See supra notes 89-93 and accompanying text. See also, Hoffman, supra note 52, at 1253 (discussing the history of discrimination against people with particular disabilities).
281 See supra notes 96-97 and accompanying text.
283 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (“Title VII tolerates no racial discrimination, subtle or otherwise.”).
284 See University of California Regents v. Bakke, 438 U.S. 265, 295 (1978) (stating that “[t]he concept 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
Post-ADAAA, the ADA, like Title VII, is very inclusive in its scope of coverage, 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. 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. This definition is meant to prevent courts from focusing on the question of which plaintiffs deserve and don’t deserve the ADA’s protection and to provide a “clear and comprehensive national mandate for the elimination of discrimination.”

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, and pragmatic considerations.

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 identity are disregarded by the federal
statutes. The Article has extensively discussed the examples of sexual orientation, appearance, marital and parental status, and political affiliation.\textsuperscript{289} All of these are immutable under at least one of the term’s definitions,\textsuperscript{290} and none is generally relevant to job performance.\textsuperscript{291} Furthermore, history reveals a record of discrimination with respect to each category,\textsuperscript{292} and employers may well be tempted to discriminate based on all of these attributes.\textsuperscript{293}

Under the current legal regime, employers are prohibited from discriminating against individuals whose “religious beliefs” include white supremacy\textsuperscript{294} but are permitted to discriminate against workers because they are homosexual or obese. There is no logical justification for this discrepancy.

The passage of GINA and the ADAAA should occasion a reevaluation of the limitations of the anti-discrimination 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 always irrelevant to job performance, so their protected status is not justified by other traditional theories of discrimination law.\textsuperscript{295} By enacting GINA and the ADAAA, Congress has shown a willingness to revisit and expand the employment discrimination laws.\textsuperscript{296} These laws, therefore, could

\begin{footnotesize}
\begin{enumerate}
\item See supra Part IV.C.
\item See supra notes 153-160 and accompanying text.
\item See Part II.B (analyzing the validity of the theory that the employment discrimination laws prohibit consideration of traits that are irrelevant to job performance).
\item See supra Parts IV.C.
\item Id.
\item See supra note 208 and accompanying text.
\item See supra notes 96-101 and 109-110 and accompanying text.
\item See supra notes 1-4 (noting that these laws were enacted as recently as 2008).
\end{enumerate}
\end{footnotesize}
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.297 However, if immutability is understood to encompass not only traits that are unchangeable, but also those that are so fundamental to personal identity that they should not have to be changed for employment purposes, the concept of immutability may instead compel the addition of new protected classifications, such as sexual orientation, appearance, 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 cause the

297 See Bayer, supra note 227, at 771-72 (arguing against mutability analysis); Roberto J. Gonzalez, 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); Kenji Yoshino, Covering, 111 YALE L.J. 769, 779 (2002) (criticizing the immutability requirement of anti-discrimination law because it suggests that “the only acceptable defense to a demand for assimilation is the inability to accede to it”).
employer to absorb significant cost or inconvenience. If the employment discrimination laws protect characteristics that are accidents of birth, unchangeable, or fundamental to the employee’s identity, 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’ ambivalence pervades employment discrimination law. The only explicit requirements for reasonable accommodation relate to religion and disability, and both of these are qualified. Employers need not bear more than a de minimis burden to accommodate religious needs and can assert an undue hardship defense to limit their duty of reasonable accommodation under the ADA. Notably, the ADAAA did not heed calls to revisit the reasonable accommodation provision and elucidate its scope. 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.

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

298 See supra notes 109-125 and infra notes 300-305 and accompanying text.
299 See supra notes 153-160 and accompanying text.
303 See Long, supra note 49, at 228-29; Steven B. Epstein, 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”).
embody what are essentially reasonable accommodation requirements, but these are disguised and inexplicit.305

The legislature’s uneasiness is understandable. The reasonable accommodation requirement is an unfunded mandate that shifts the cost of addressing difficulties associated with employees’ immutable characteristics to employers.306 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.307 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.308 In one large study, Susanne Bruyere of Cornell University’s School of Industrial and Labor Relations found that over 93% 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.309 Minnesota and Maryland state agencies file annual reports of ADA accommodations, indicating that they grant the vast majority of requests.310 Research has

305 See supra notes 114-120 and accompanying text.
307 Id. at 340-41, 344.
308 See Hoffman, supra note 26, at 319-26.
310 See Minnesota Management & Budget Annual Reports, 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% of requests for accommodation were granted and 5% were modified in 2009); Department of Budget & Management, Maryland Fiscal Year 2009 Annual Statewide Equal Opportunity Report 4, available at http://dbm.maryland.gov/eeo/Documents/Publications/annual_eeo_
shown that the direct costs of accommodations average a few hundred dollars, which is affordable for most employers.\footnote{311}

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 ninety-one percent reported that they accommodate employees’ religious needs, such as holiday observance.\footnote{312} Fifty-seven percent claimed to allow leaves for religious work, including missions.\footnote{313}

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 upon 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,\footnote{314} improved health care coverage to enhance the functionality of those with impairments,\footnote{315} and other measures.

\section*{VI. CONCLUSION}

Although the concept of immutability may have fallen out of favor in the realm of Supreme Court

\footnotesize{rpt\_fy2009.pdf} (indicating that 88\% of requests for accommodation were granted).

\footnote{311}{See Hoffman, supra note 26, at 335-36 (noting that the studies do not address indirect costs such as “potential absenteeism problems or increased health insurance costs”)}.

\footnote{312}{Karen C. Cash & George R. Gray, A framework for accommodating religion and spirituality in the workplace, 14 ACADEMY OF MANAGEMENT EXECUTIVES 124, 125 (2000)}.

\footnote{313}{Id.}

\footnote{314}{Id. at 358.}

\footnote{315}{Bagenstos, supra note 124, at 26-27 (discussing the role of health insurance in facilitating “independence and labor force participation” for people with disabilities).}
constitutional analysis, 316 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 should not have to be changed for employment purposes, 317 is a unifying principle that accurately describes all of the anti-discrimination statutes' protected classifications. However, in attempting to determine why some immutable characteristics are covered and others are excluded, one can only conclude that this country's employment discrimination framework is somewhat illogical and incoherent. 318

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 or 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. 319 As already recognized by liberal state

316 See supra note 157 and accompanying text.
317 See supra notes 153-160 and accompanying text.
318 See supra Part IV.C.
319 See J. Eric Oliver & Taeku Lee, Public Opinion and the Politics of Obesity in America, 30 J. HEALTH, POL., POL’Y & L 923, 933-34 (2005) (finding that 65% of respondents attributed obesity to lack of willpower to diet and exercise and only 40% believed it had a genetic component); Jane P. Sheldona 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 Gallop poll data showed that in 2001, 40% of Americans believed individuals were born with their sexual orientation, up from 13% in 1977); Donald P. Haider-Markel &
civil rights laws and the Civil Service Reform Act,\textsuperscript{320} coverage of additional traits could promote enhanced fairness, a major policy goal of the employment discrimination statutes.\textsuperscript{321}

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 anti-discrimination mandate in the employment field.


\textsuperscript{320} 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., Netherlands’ Equal Treatment Act, Stb. 230 (Neth.) (1994) (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); Republic of South Africa Employment Equity Act, No. 55 of 1998 , ch 2 §6(1) (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”).

\textsuperscript{321} See supra, Part III.B.3.