AGAINST THE WEIGHT OF AUTHORITY: CAN COURTS SOLVE THE PROBLEM OF SIZE DISCRIMINATION?

I am a fat man.[1] I am not ashamed to admit it, nor am I offended by the term. For me, "fat" can be a simple, neutral descriptor, no different than saying I am fair-skinned or bald or nearsighted.[2] All of these terms can be used negatively, but their meanings do not have to be negative. Fat can also be something more; it can be an identity that plays a strong role in how a fat person relates to him or herself and the world, perhaps as strong an identity as race in some fat people.[3] The nature of this identity, and its

1. At the time of writing, I am 36 years old, 5′9″, and approximately 275 pounds. I have been at or above the top end of normal weight range all my life, and my first recorded weight over 200 pounds. was for my first football weigh-in in seventh grade. My lowest weight as an adult was 245 pounds. My most recent physical placed me well into the normal healthy range in cholesterol, triglycerides, and blood sugar and pressure.

2. In this Note, I will use the term "fat" when describing individuals, their appearance, and the bias of those who discriminate against them. The terms "obese" and "obesity" will be used when referring to doctors or courts that use that term. This is consistent with usage of the terms by the size-acceptance community and many of the works emanating therefrom. *See, e.g.*, SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION 29 n.4 (2000); Elizabeth Kristen, Comment, *Addressing the Problem of Weight Discrimination in Employment*, 90 CALIF. L. REV. 57, 59 n.6 (2002).

3. SOLOVAY, *supra* note 2, at 27.

relationship with more traditional identifiers like race and gender, can be meaningful in determining the place of fat in equal protection theory and jurisprudence and will be examined below. Fat activists and Fat Studies researchers have attempted to both understand how fat people identify themselves in relation to their self-identifications of race and gender and to create a positive identity for fat people that rejects the self-loathing expected of us by mainstream society.[4] Real examples of the fat bias in society abound and a few will be detailed below, but a hypothetical might best drive the idea home to people at the University of Alabama (UA).

The 2011–2012 school year was rife with overdue discussion of the segregated Greek system here at UA.[5] I do not mean to belittle this problem at all (in fact I agree with sentiments published in the student newspaper, the *Crimson White*, that the administration has abdicated a necessary responsibility),[6] but race clearly represents only one facet of any discrimination being engaged in by sororities. I feel quite confident in saying no woman my size or larger would have a snowball's chance on a Bryant–Denny bleacher in August of surviving the first cut of rush. The problem lies in the fact that not only would no one think to discuss this kind of discrimination but that there remains no remedy for it, and many seem to believe there should be no remedy.[7] This Note cannot change society's basic view of fat or fat people and does not purport to engage in some of the more extreme attitudes of the fat acceptance movement, such as celebrating fat in an erotic or pornographic manner,[8] encouraging the intentional gaining of weight,[9] or equating societally pressured weight loss with genocide.[10] Nonetheless, I cannot deny who I am, so I began with a

4. Perhaps the most famous of these is MARILYN WANN, FAT?SO!: BECAUSE YOU DON'T HAVE TO APOLOGIZE FOR YOUR SIZE! (1998). But the strongest academic study on the issue is probably KATHLEEN LEBESCO, REVOLTING BODIES?: THE STRUGGLE TO REDEFINE FAT IDENTITY (2004).

5. *See* Editorial, *Our View: Witt, UA Cannot Defend Systemic Segregation*, THE CRIMSON WHITE (Sept. 19, 2011, 2:03 AM), http://cw.ua.edu/2011/09/19/our-view-witt-ua-cannot-defend-systemic-segregation/; *see also* Amanda Sams, *Visiting Author Discusses Greek Segregation at UA*, THE CRIMSON WHITE (Oct. 3, 2011, 12:05 AM), http://cw.ua.edu/2011/10/03/visiting-author-discusses-greek-segregation-at-ua/.

6. Sams, *supra* note 5.

7. *See, e.g.*, Adam R. Pulver, Note, *An Imperfect Fit: Obesity, Public Health, and Disability Antidiscrimination Law*, 41 COLUM. J.L. & SOC. PROBS. 365, 366 (2008) (arguing that allowing fat people to recover for discrimination would "hinder the construction of negative social norms around obesity").

8. I will not dignify the truly pornographic sites by citing one, but for a milder version, see DIMENSIONS MAGAZINE, http://www.dimensionsmagazine.com (last visited May 16, 2013).

9. FANTASY FEEDER, http://fantasyfeeder.com/cms/index.php (last visited May 16, 2013); *see also* Ben Schott, *Gainers and Feederism*, Post to *Schott's Vocab: A Miscellany of Modern Words & Phrases*, N.Y. TIMES (Mar. 31, 2010, 5:27 AM), http://schott.blogs.nytimes.com/2010/03/31/gainers-feederism.

10. *See, e.g.*, HILLEL SCHWARTZ, NEVER SATISFIED: A CULTURAL HISTORY OF DIETS, FANTASIES AND FAT 324 (1986) (quoting an unnamed member of the Los Angeles Fat Underground, an early activist group); Levye, Comment to *Why Aren't You Angry About WLS?*, BIG FAT BLOG (Aug. 25,

declaration of my own relationship to the problem at hand so that any reader may openly and honestly evaluate my work.

Part I of this Note will introduce the bias against fat people in modern American society and the discrimination faced by the fat. Part II will address the development of equal protection theory and jurisprudence and how it relates to weight discrimination. Part III will examine particular incidents and types of weight discrimination in light of the Equal Protection Clause and how the courts have interpreted it. These two parts will argue that many incidents of weight discrimination would fail the Court's original form of rational basis review. Part IV will briefly examine other potential solutions to the problem, including steps taken to address it by the federal government, as well as state and local governments.

I. SOCIETY'S ANTI-FAT BIAS

One thing that Fat Studies[11] writers are very good at is documenting instances where they feel fat people have been discriminated against. Many have called anti-fat bias one of the last acceptable prejudices;[12] while mainstream society condemns (and sometimes makes illegal) racism, sexism, and, to a lesser extent, homophobia, weight-based prejudice is freely exhibited in public and often by members of the media.[13] Fat writers also decry the unrealistic thin ideal pushed by the media and fashion industry, which they believe exacerbates unhealthy body image and eating disorders among both fat and thin people, such as yo-yo dieting and anorexia.[14] Despite the fact that a majority of Americans are now defined

2008), http://www.bigfatblog.com/why-arent-you-angry-about-wls (providing the second comment on page, arguing that weight loss surgery "is a form of genocide against the fat").

11. "Fat Studies" is an emerging field on many college campuses, often using the Fat Studies Reader edited by Esther Rothblum and Sondra Solovay. THE FAT STUDIES READER (Esther Rothblum & Sondra Solovay eds., 2009). For quick information about the emergence of the field, see Eve Binder, *'Fat Studies' Go to College*, THE DAILY BEAST (Nov. 3, 2010, 6:38 PM), http://www.thedailybeast.com/articles/2010/11/03/fat-studies-colleges-hot-new-course.html.

12. *See, e.g.*, Avery Williams, Comment, *Obesity, Canada's "One Passenger One Fare" Rule and the Potential Effects on the U.S. Commercial Airline Industry*, 74 J. AIR L. & COM. 663 (2009).

13. *See, e.g.*, *Martin Bashir* (MSNBC television broadcast Sept. 27, 2011) (on this broadcast, Martin Bashir not only refused to apologize for his jokes about New Jersey governor Chris Christie's weight, he may be said to have blamed the nation's current economic woes on fat people, giving a statistic for how much money is "wasted" on obesity and stating that he didn't have to tell his audience "how much we need that money").

14. *See, e.g.*, SOLOVAY, *supra* note 2, at 27–28; William Leith, *Health Warning: All Diets Make You Fat*, THE TELEGRAPH (Apr. 11, 2007, 12:01 AM), http://www.telegraph.co.uk/news/features/3632055/Health-warning-all-diets-make-you-fat.html (detailing a study by the University of California about the dangers of yo-yo dieting); *Body Image*, WOMENSHEALTH.GOV, http://www.womenshealth.gov/body-image/eating-disorders/ (showing where the same government that has declared a war on obesity tells us that the "harsh critiques" of society and pressure to be thin can lead to eating disorders) (last updated Sept. 22, 2010).

as overweight or obese by medical standards,[15] it is clear that our society has an intensely negative view of fat people.[16] Fat people often internalize these biases, which causes immense damage to self-esteem[17] and often reinforces psychological issues that may have played a role in weight gain in the first place.[18] One writer has argued that this participation by the victims of bias in their oppression makes fat prejudice different from other forms of bigotry.[19] While this internalization may not be fully unique, it does explain how a nominal majority of people could remain the victims of discrimination; this only happens because fat people discriminate against fatter people and other people of the same size. The stares, jeers, and comments endured by very fat people when they attempt to participate in mainstream society damage all aspects of their public life and may be creating a form of caste.[20]

This anti-fat bias and its internalization have effects that begin at a very young age. For example, a famous interview on the television show 20/20 revealed that several five-year-olds would all rather lose an arm than be fat.[21] In a project reminiscent of Kenneth and Mamie Clark's famous black and white doll study, Susan C. Wooley showed in 1978 that even fat

15. Lydia Saad, *Barely Half of Overweight Americans Working to Shed Pounds: Nearly 6 in 10 Are Overweight but Fewer than 3 in 10 Are Trying to Lose Weight*, GALLUP (Nov. 22, 2006), http://www.gallup.com/poll/25543/Barely-Half-Overweight-Americans-Working-Shed-Pounds.aspx.

16. *See, e.g.*, Ricard Coniff, *I Hate Fat People*, MEN'S HEALTH, Nov. 2010, at 174–82. Although Coniff eventually concludes that hating fat people is a bad idea, his article certainly reveals anti-fat bias, as does a study by the New England Genetics Group in which 11% of respondents say they would abort a child if they knew it had a genetic tendency to be fat, as reported in LAURA FRASER, LOSING IT: FALSE HOPES AND FAT PROFITS IN THE DIET INDUSTRY 47 (1998). Legal scholarship also can exhibit anti-fat bias. *See* Pulver, *supra* note 7, at 366 (essentially defending anti-fat bias and discrimination by arguing that "negative social norms around obesity" serve positive public health purposes).

17. ANN HILL BEUF, BEAUTY IS THE BEAST: APPEARANCE-IMPAIRED CHILDREN IN AMERICA 22–25, 59–62 (1990).

18. Markus H. Schafer & Kenneth F. Ferraro, *The Stigma of Obesity: Does Perceived Weight Discrimination Affect Identity and Physical Health?*, 74 SOC. PSYCHOL. Q. 76 (2011).

19. fatfu, *The Fat Identity. First Attempt: How is Fat Different?*, FAT FU (May 27, 2008), http://fatfu.wordpress.com/2008/05/27/the-fat-identity-part/. This claim is not fully true; though fat people may do so to a greater extent, members of other oppressed groups, such as racial minorities, have written that their groups, consciously or unconsciously, participated in their own oppression. *See, e.g.*, Dana Hamilton, *Report of the Race, Class, Ethnicity, and Gender Working Group*, 70 FORDHAM L. REV. 411, 414 (2001).

20. On the idea of caste, see Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); Bryan K. Fair, *Taking Educational Caste Seriously: Why* Grutter *Will Help Very Little*, 78 TUL. L. REV. 1843, 1844 n.2 (2004). Caste refers to a permanent structural exclusion of people from equal opportunities and mainstream society. Although for Fair, "[c]aste is the legacy of unequal laws and customs," if permanent weight loss is simply unachievable for many people, as both fat activists and a significant number of doctors now believe, society is well on the road to permanently marginalizing very fat people who are, to paraphrase Fair, simply too fat to escape their marginalized status, and many people seem to want to push fat people out of the public square. *See* Fair, *supra*; *see also* FRASER, *supra* note 16, at 61–64.

21. SOLOVAY, *supra* note 2, at 25.

children prefer thin dolls to fat ones.[22] Discrimination and displays of hatred against fat people often begin during childhood, both in schools[23] and in their own families, and continue in the workplace, where studies have shown that fat workers, especially women, can suffer a wage penalty as great as 24%.[24] In addition, fat people complain of discrimination in medicine and housing and by airlines and other providers of public services.[25]

People may or may not agree that stories of fat discrimination are awful, or that individuals should treat fat people the same as they treat anyone else, but the legal significance of such discrimination remains to be determined. Therefore, we must next turn to the Equal Protection Clause of the U.S. Constitution and the Supreme Court jurisprudence that has interpreted it.

II. THE EQUAL PROTECTION CLAUSE AND THE LEGAL SIGNIFICANCE OF DISCRIMINATION

A. Early Equal Protection Jurisprudence and the Meaning of Irrational Classification

Nothing in the text of the U.S. Constitution or the Bill of Rights originally prevented discrimination against members of particular groups. Although some concept of equal treatment under the law was implicit in the idea that ours was "a government of laws, and not of men,"[26] this theory simply did not extend to marginalized groups, which was made obvious by the fact that the Constitution itself condoned slavery.[27] After the Civil War, however, some forms of discrimination became the concern of the federal

22. *See* Susan C. Wooley et al., *Theoretical, Practical, and Social Issues in Behavioral Treatments of Obesity*, J. APPLIED BEHAV. ANALYSIS, Spring 1979, at 18. For a recap of several similar studies, see Esther D. Rothblum, *The Stigma of Women's Weight: Social and Economic Realities*, 2 FEMINISM & PSYCHOL. 61 (1992) (citing one study that showed college students would rank embezzlers, shoplifters, blind people, and cocaine users ahead of fat people as potential spouses).

23. NAT'L EDUC. ASS'N, REPORT ON SIZE DISCRIMINATION (1994) [hereinafter "NEA REPORT"].

24. Cheryl L. Maranto & Ann Fraedrich Stenoien, *Weight Discrimination: A Multidisciplinary Analysis*, 12 EMP. RESPS. & RTS. J. 9, 19 (2000). Weight discrimination on the job does not go away even among acclaimed professionals; although she ultimately did get the job, U.S. Surgeon General Regina Benjamin endured questions about her weight from critics who feared she would set a poor example as the nation's top medical professional. *See* Jeffrey M. Friedman, *The Real Cause of Obesity*, NEWSWEEK, Sept. 10, 2009, *available at* http://www.thedailybeast.com/newsweek/2009/09/09/the-real-cause-of-obesity.html.

25. *Frequently Asked Questions About Weight Discrimination*, COUNCIL ON SIZE & WEIGHT DISCRIMINATION, http://www.cswd.org/docs/faq.html (last visited May 16, 2013).

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

27. *See* U.S. CONST. art. I, § 2, cl. 3 (the three-fifths compromise).

government with the passage of the Fourteenth Amendment in 1868. Section 1 of the Amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[28]

The amendment clearly grants citizenship to freed slaves on an equal legal footing with all other citizens, but it could also have had a wider purpose. The effective text of the Equal Protection Clause allows no state to deny any person the equal protection of the laws.[29] This could be read to mean that a state, in administering and enforcing its legal and judicial systems, cannot constitutionally use them to perpetuate discrimination, whatever the source of that discrimination. Evidence exists that the framers of the Fourteenth Amendment intended it to lay on the shoulders of the states a broad obligation to prevent discrimination, but the Court has generally not used the Fourteenth Amendment in this fashion.[30]

The Fourteenth Amendment can also be read, and was probably intended, to give Congress the direct power to regulate private discrimination.[31] After the passage of the Amendment, Congress enacted a series of Civil Rights Acts that did just that, prohibiting discrimination in lodging, transportation, theaters, and other public places, ostensibly under the enforcement grant found in Section 5 of the Fourteenth Amendment.[32] The Supreme Court, however, rejected federal enforcement of these acts in the *Civil Rights Cases* of 1883.[33] The Court concluded that the amendment addressed only the states and did not give Congress power to enact federal civil rights legislation; in fact it went so far as to say that African-

28. U.S. CONST. amend. XIV, § 1.

29. *Id*.

30. The Supreme Court came closest to having such a requirement of the states in *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that restrictive covenants that discriminated on the basis of race could not be enforced because the enforcement itself constituted state action.

31. This power to regulate private activity might have been intended under the Citizenship (or Priviliges & Immunities) Clause of the Amendment, rather than the Equal Protection Clause. *See* Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 718 (2003). The Supreme Court rejected this theory in the *Slaughter-House Cases*, 83 U.S. 36 (1873), rendering the Privileges & Immunities Clause of the Fourteenth Amendment essentially meaningless except in a small number of "federal" rights.

32. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

33. Civil Rights Cases, 109 U.S. 3 (1883).

Americans should no longer be "the special favorite of the laws" and that their rights should be protected in the same way as every other man's.[34] This essentially means that every person's rights should, in the first instance, be protected by the state, and the federal courts can step in only when the state itself denies equal protection of the laws. It should be noted, however, that this state action can include the state's enforcement of discriminatory covenants[35] as well as situations where the state has delegated a traditional function or the state has facilitated or encouraged private conduct. For example, in *Burton v. Wilmington Parking Authority*, the Court held that the state's lease of property to a coffee shop could render the state responsible for discrimination by the shop.[36]

After the *Civil Rights Cases* settled the requirement of state action, the Court could still invalidate such action that discriminated against minority groups, and it occasionally did so in cases such as *Strauder v. West Virginia*[37] and *Yick Wo v. Hopkins*.[38] But the Court also had to determine the meaning of the Equal Protection Clause in cases that modern Americans do not normally associate with discrimination. For example, in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, the question concerned the constitutionality of a Texas law that allowed recovery of attorneys' fees against railroads that had not paid certain claims.[39] The law did not impose the award of attorneys' fees on any other class of debtors, nor did it allow a railroad to recover attorneys' fees if the litigation should terminate in its favor.[40] The Supreme Court held that the law violated the Equal Protection Clause, reasoning that it forced one group (railroads) to enter the courthouse on different terms than all other litigants.[41] The Court held that when laws create classifications, necessarily discriminating among citizens to place them in different groups, these classifications "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."[42] The *Ellis* Court also seems to put some burden (probably of production rather than proof) on the state in providing a reasonable basis for the classification, stating that courts should not presume that there is some unknown reason for the classification that

34. *Id*. at 25.

35. *Shelley*, 334 U.S. at 1.

36. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

37. Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down a state law that forbade African-Americans from serving on juries).

38. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (expanding the coverage of the Equal Protection Clause beyond African-Americans for the first time).

39. Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897).

40. *Id*. at 153.

41. *Id*.

42. *Id*. at 155.

renders it permissible, for this would make the protections of the Fourteenth Amendment "a mere rope of sand, in no manner restraining state action."[43]

The concept of reasonable classifications received further elucidation in a famous article entitled *The Equal Protection of the Laws* by Joseph Tussman and Jacobus tenBroek.[44] Tussman and tenBroek, quoting language from *Yick Wo*, pointed out that equal protection of the law necessarily meant the protection of equal laws and that laws that create irrational or unreasonable classifications are inherently unequal.[45] Laws classify whenever they define a group of people subject to some penalty, benefit, or requirement, and such groups are inevitably defined by a particular common trait.[46] In fact, two traits are involved in determining the reasonableness of a legislative classification: the trait that the legislature is meaning to target, which Tussman and tenBroek refer to as the "mischief" that the legislature seeks to address, and the one belonging to those who are actually affected by the law.[47] A truly rational classification is one in which all people who possess or undergo the targeted mischief are actually affected by the law.[48] Equal protection problems occur, however, when the law is either over- or under-inclusive, meaning either that the law affects people who do not possess the targeted trait or that it does not reach all of the targeted mischief.[49] In either case, similarly situated individuals are treated differently by the law, creating a violation of the Equal Protection Clause.[50] For example, if a state required certain qualifications for substitute teachers that included weight limits, the targeted mischief would be unqualified teachers, but fat people who sought such positions would argue that the classification was over-inclusive, because it rejected some teachers who were, in fact, qualified.[51] This type of reasonable classification analysis, stripped of the later addition of levels of scrutiny, would ask whether the trait targeted by the law bore a rational relation to the purpose of the law. While this resembles modern rational basis review,

43. *Id*. at 154. Whether this means something beyond rational basis review will be discussed below, but this language can certainly be contrasted with that from *Nebbia v. New York*, 291 U.S. 502 (1934), where the court said state economic regulation was entitled to every possible presumption in its favor.

44. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

45. *Id*. at 342.

46. *Id*. at 344–45.

47. *Id*. at 346–47.

48. *Id*. at 345. This does not necessarily mean that such a law cannot violate the Equal Protection Clause; a law specifically directed at all African-Americans and motivated by animus against them might be rational in this sense but would still be unconstitutional. See more on this below.

49. *Id*. at 347–48.

50. *Id*.

51. *See* Parolisi v. Bd. of Exam'rs of N.Y., 285 N.Y.S.2d 936 (N.Y. Sup. Ct. 1967).

it may hold more promise for invalidating laws that discriminate against fat people, especially if the Court follows *Ellis* in demanding from the state at least the production of a reason for the law.[52]

B. Footnote 4 and the Levels of Review

Although few people may have recognized it at the time, the Court's equal protection jurisprudence changed forever based on a footnote in *Carolene Products*.[53] Although the statute at issue in this case (which banned certain milk substitutes) received the most deferential level of review, including a presumption of constitutionality, Footnote 4 suggested that such deference may not apply in certain situations.[54] The situations calling for more searching review would include laws that impinge upon rights guaranteed in other parts of the Constitution (such as the Bill of Rights), laws that interfere with the political process that could normally be used to change undesirable laws, restrictions upon the right to vote, and statutes directed against particular religious, national, or racial groups.[55] It goes on to ask "whether prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."[56] The Court has since built a three-tiered system of standards of review. The lowest, most deferential standard of review remains the type of rational basis used in *Carolene Products*, which presumes constitutionality and places the burden of proving irrational classification on the challenger.[57] The second category, known as intermediate scrutiny, requires the government to show that the challenged law furthers an important government interest in a way that is substantially related to that interest.[58] Strict scrutiny, the final category, also places the burden on the government but requires it to show a compelling interest and that the law be narrowly tailored using the least restrictive means to achieve that interest.[59]

---

52. *See* Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897). This is further discussed in Part III of this Note.

53. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

54. *Id*. at 152 n.4.

55. *Id*.

56. *Id*.

57. Some commentators have referred to a separate tier, sometimes called "rational basis with bite." Some, like Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987), argue that employing such a standard abandons traditional rational basis and gives intermediate scrutiny, while others believe, like me, that this type of review actually employs a true rational basis test, rather than giving the legislation in question an automatic pass. *See* David O. Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J., Oct. 1985, at 108, 112, 114 (citing Victor Rosenblum of Northwestern as advocating a fourth tier).

58. *See* Craig v. Boren, 429 U.S. 190, 197–99, 218 (1976).

59. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 219–20 (1995).

The Court has held that certain classifications always receive strict scrutiny, including those based on race[60] and those that burden a fundamental right, such as marriage.[61] Intermediate scrutiny has been extended to classifications based on gender[62] and familial status.[63] All groups that receive intermediate and strict scrutiny are commonly referred to as "protected" or "suspect" classes, while other, "non-protected" classes receive only rational basis.[64] However, in some cases, the Court has seemed more likely to overturn on rational basis when dealing with an existent group that has faced a history of discrimination, such as the mentally ill[65] and homosexuals,[66] leading some to conclude that these groups are receiving a form of heightened scrutiny, even if the court refers to it as rational basis.[67] In any case, these precedents establish the Court's willingness to look harder at these classifications, even if it is unwilling to declare such classes protected. Another factor which may motivate the Court to searching review of a classification is animus; when hostility toward or hatred of a particular group motivates the government's action, the Court is more likely to subject it to review and rule against it.[68] In order to determine whether fat can be considered a suspect class or whether it may receive "rational basis with a bite," it must be compared with these other groups or traits and with the criteria the Court has developed for declaring a group a protected class.

C. Can Fat Be a Protected or "Quasi-Protected" Class or Receive "Rational Basis with Bite?"

The Supreme Court generally exhibits great reluctance in expanding the number of categories receiving the enhanced protection of being a suspect class.[69] The analysis used in determining whether a particular

60. *Id*.

61. *See* Loving v. Virginia, 388 U.S. 1 (1967).

62. United States v. Virginia, 518 U.S. 515 (1996).

63. Zablocki v. Redhail, 434 U.S. 374 (1978).

64. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985).

65. *See id*. at 450.

66. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

67. *See generally* Pettinga, *supra* note 57.

68. *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996) (striking down a Colorado constitutional amendment that banned subdivisions of the state from enacting resolutions that protected homosexuals from discrimination). *Romer* is also somewhat related to the *Hunter* doctrine, under which the Court takes a searching look at classifications that burden the political process for a particular group, though in *Hunter* itself, the group involved was already a protected class. Hunter v. Erickson, 393 U.S. 385 (1969).

69. *See* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18 (2005) (concerning courts' unwillingness to look with strict scrutiny on laws burdening rights

classification should be considered suspect often begins with comparing the characteristic that defines the class to race, the first type of classification to receive suspect status.[70] One major factor in this analysis concerns the immutability of the class characteristic; in *Frontiero v. Richardson*, for example, it simply noted that sex was an immutable characteristic like race and national origin, "determined solely by the accident of birth."[71] The meaning of immutable is not entirely clear; we know now that gender, for example, can be more fluid than we had supposed and can, in the end, be changed, though this may require physical alteration of the body.[72] The rights of transgendered individuals and the application of the Equal Protection Clause to such individuals has been recently addressed at the circuit court level but remain likely to pose questions that stretch the bounds of equal protection jurisprudence.[73] There remains much debate over the mutability of sexual orientation as well, with those who oppose gay rights arguing that sexual orientation is a simple choice that can be changed at any time while supporters believe it is an immutable, genetic part of a gay person's identity.[74] Likewise, although the Court seems, in *Cleburne*, to characterize mental illness as immutable,[75] this might be challenged by those who believe many mental illnesses can be treated or cured in certain cases.

Poor people represent another potential suspect class that has been thwarted by the requirement of immutability.[76] The Supreme Court in *San Antonio Independent School District v. Rodriguez* refused to hold that wealth was a suspect class and apply strict scrutiny in a school funding case.[77] However, the Court did not hold that poverty could never be a suspect class; rather it seemed to point to two problems in the instant case:

---

of previously convicted persons); Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253 (2006) (discussing the still unsurmounted difficulties in convincing the Supreme Court to recognize homosexuality as a protected class).

70. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

71. *Id*.

72. The relationship of gender (a societal construct in the minds of many) to the physical characteristic of sex is a separate question the Court may eventually have to address. *See* Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (holding that discrimination against transgendered individuals was gender discrimination and could be addressed under the same laws).

73. *Id*. This decision generally accords with other circuit level decisions, none of which discuss the immutability requirement in any depth. *See* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d. 1187 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).

74. *See generally* VERA WHISMAN, QUEER BY CHOICE: LESBIANS, GAY MEN, AND THE POLITICS OF IDENTITY 2 (1996).

75. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–43 (1985) ("They are thus different, immutably so, in relevant respects . . . .").

76. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 (1973).

77. *Id*.

(1) an evidentiary problem marked by the lack of any clear delineation of what was meant by "poor" and "wealthy"[78] and (2) an extent of injury problem because poor kids in Texas were not entirely prevented from going to school, nor were their schools completely devoid of funding.[79] These considerations, as well as the Court's holding that public education did not represent a fundamental right, played a much greater role in the decision than any idea that, because some of the disadvantaged children might rise out of poverty, the condition was not immutable.[80]

In fact, immutability is not discussed in any depth in the opinion, nor is it discussed in depth in any of the other Supreme Court decisions that have recognized *Rodriguez*'s refusal to define the poor as a suspect class. As scholar Henry Rose describes in some depth,[81] later decisions would use the *Rodriguez* case for the proposition that the Court had definitively rejected the idea of the poor as a suspect class.[82] In *Maher v. Roe*, the majority stated "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."[83] As Rose argues, this essentially means that the poor cannot be a suspect class because the Court had not previously identified them as such.[84] In *Harris v. McRae*, the Court went even further, stating, "this Court has held repeatedly that poverty, standing alone, is not a suspect classification"[85] despite the fact that the Court had never explicitly made this holding.[86] Thus the poor were excluded as a protected class without serious discussion by the Court of whether they met the criteria of immutability or a history of discrimination. As Rose notes, law students are often taught as "black-letter law" that the poor are not a protected class, although he believes this should be "an open constitutional question."[87]

Applying the Supreme Court's mutability precedents to weight occasions much debate. No one disputes that weight can and does change over time, but the role of genetics (the "accident of birth"[88] that helped

78. *Id*. at 19–20 ("The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class.").

79. *Id*. at 23 ("[L]ack of personal resources has not occasioned an absolute deprivation of the desired benefit."). For the Court, this distinguished the case from those, such as indigent defendant cases, where the poor person was entirely prevented from obtaining a desired benefit.

80. *Id*. at 36–37.

81. Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407 (2010).

82. *Id*. at 418–19.

83. Maher v. Roe, 432 U.S. 464, 471 (1977).

84. Rose, *supra* note 81, at 418.

85. 448 U.S. 297, 323 (1980).

86. Rose, *supra* note 81, at 419.

87. *Id*. at 407.

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

make gender immutable in *Frontiero*) remains hotly disputed. Americans are bombarded daily with shows like *The Biggest Loser* and advertisements for the fitness and diet industries that advocate a pure personal-responsibility model of weight loss. Many doctors accept this model as well, although most also believe genetics plays an important role.[89] Some doctors, such as Jeffrey M. Friedman, a molecular geneticist at Rockefeller University, believe that genes play the primary role in determining weight, ahead of nutrition and other lifestyle issues. In an article in *Newsweek*, Friedman discussed the genetic role in obesity compared to other conditions:

> Genetic studies have shown that the particular set of weight-regulating genes that a person has is by far the most important factor in determining how much that person will weigh. The heritability of obesity—a measure of how much obesity is due to genes versus other factors—is about the same as the heritability of height. It's even greater than that for many conditions that people accept as having a genetic basis, including heart disease, breast cancer, and schizophrenia.[90]

Friedman believes that most of the variation in weight among people today can be traced to their genes; our sedentary lifestyles and poor diets have made most of us a few pounds heavier, but those pounds are added to a weight that is determined by an "accident of birth," to use the Supreme Court's phrase.[91] Of course some doctors disagree with this, and the personal responsibility model continues to be accepted by much of society, including many fat people. If Friedman and other doctors who agree with him, along with fat activists, fail to convince much of their own community that obesity has a genetic cause, the courts may be unlikely to come to this conclusion.

The cause of obesity, even if definitively determined, can answer only part of the immutability question. The other major question concerns, of course, whether a fat person is definitively capable of changing his or her weight; this could represent a major stumbling block in convincing society, and a court, that weight is immutable. Most people, including many fat people, seem to believe that such change is imminently possible, patronizing the weight-loss industry in this country to the tune of $60.9

89. *See, e.g.*, MAYO CLINIC, http://www.mayoclinic.com/health/obesity/DS00314/DSECTION=causes (last visited May 16, 2013) ("Although there are genetic and hormonal influences on body weight, obesity occurs when you take in more calories than you burn through exercise and normal daily activities.").

90. Friedman, *supra* note 24.

91. *Id.*; *Frontiero*, 411 U.S. at 686.

billion in 2010.[92] According to several studies, however, this money is going down the drain. A UCLA study, for example, found that, while dieters lost weight in the short term, 83% of those followed more than two years gained back more weight than they had lost.[93] This raises another problem known as yo-yo dieting, in which repeated efforts to follow restrictive diets can actually lead to weight gain.[94]

While many doctors might argue that this is because people give up on the diets, or that while diets may not work, real lifestyle changes do, the possibility of permanent weight loss, and the favorability of focusing all treatment of the fat on weight loss remain in debate among the medical community. Some doctors, along with many fat people, now prefer something called "Health at Every Size" or HAES, which rejects the possibility of permanent weight loss and focuses on accepting your body but honoring its cues to stop eating when you are full and to exercise.[95] If these advocates are correct, and permanent weight loss is essentially impossible for most fat people, then the second criterion for immutability may also be met and the possibility of heightened scrutiny for laws affecting fat people remains.

Immutability, however, is not the only factor the Court looks at when determining whether to protect a class with either intermediate or strict scrutiny. The Court also asks whether the class defined by this characteristic has been subjected, as a class, to prolonged discrimination; in *Frontiero v. Richardson* it compared the treatment of women to African-Americans over the course of the nation's history.[96] When this step is satisfied, as it was in *Frontiero*, the Court next determines whether the characteristic "bears no relation to ability to perform or contribute to society."[97] If the Court finds that the characteristic does affect this ability, then the class cannot be considered suspect, because the government may have a rational basis for laws that deal specially with the class.[98] While there is little history of laws that directly prevent fat people's full

92. John LaRosa, *U.S. Weight Loss Market Worth 60.9 Billion: 80% of Dieters Now Do It Themselves, Highest Level Ever*, PRWEB (May 9, 2011), http://www.prweb.com/releases/2011/5/prweb8393658.htm.

93. Traci Mann et al., *Medicare's Search for Effective Obesity Treatments: Diets Are Not the Answer*, 62 AM. PSYCHOLOGIST 220, 221 (2007) (citing David W. Swanson & Frank A. Dinello, *Follow-Up of Patients Starved for Obesity*, 32 PSYCHOSOMATIC MED. 209 (1970)).

94. Leith, *supra* note 14 (detailing a study by the University of California about the dangers of yo-yo dieting).

95. For the basics of HAES, see HAESCOMMUNITY.ORG, www.haescommunity.org (last visited May 16, 2013).

96. *Frontiero*, 411 U.S. at 684–87.

97. *Id*. at 686.

98. This may explain the Court's reluctance in *Cleburne* to apply true intermediate scrutiny to mental illness, because severe mental illness does affect the ability to function in society.

participation in society, discrimination against the fat is real and ongoing, if not increasing. It is unlikely, however, to match the institutional level of racism and sexism that existed for much of our country's history. Nonetheless, as will be discussed in Part III of this Note, an ever-expanding list of state-sponsored or condoned discrimination against fat people exists, and advocates may eventually be able to convince the Court that this meets a threshold level of discriminatory history.

Whether fat affects the ability to perform or contribute to society also engenders heated debate. Some jobs, such as police officers or firefighters, legitimately require a certain level of physical fitness, and protecting fat people from discrimination should not change this.[99] However, in many cases fat people can do everything the job requires,[100] and millions of fat people contribute to society every day. Those who do not may be the victims of discrimination rather than being prevented from contributing by the fact that they are fat; even in jobs that have no physical requirements, such as receptionists and cashiers, many employers refuse to hire fat people. In fact, one study found that 16% of employers would not hire obese women under any circumstances, while 44% would not hire them in certain situations.[101] It seems unrealistic to argue that the fact of being fat hinders a person's ability to do a sedentary desk job, and most fat people are capable of far more than just sedentary jobs. Therefore, fat itself does not prevent most fat people from functioning in society, with the exception of a very small number of extremely obese people who are immobile.[102]

An argument can definitely be made that fat meets the Court's standard for receiving a higher level of scrutiny than rational basis. Genetic studies indicate that it may be immutable in its cause, and diet studies suggest that it is nearly so after the fact. The history of fat discrimination, while today not as strong as that surrounding race or sex, continues to be written. Most fat people do contribute to society, and more would do so if discriminatory barriers were removed. However, all of these criteria are debatable, and as mentioned above, the Court has been extremely reluctant to declare that

99. Fat and HAES advocates, however, might argue that a hard cap on weight would bear no direct relation to physical fitness, and if a person above the listed weight could pass a fitness test, it would be discrimination to deny them. This should be distinguished from jobs where a requirement might legitimately deal with weight itself, for example, because of the weight capacity of a machine that one might work on.

100. On the question of the legitimacy of physical requirements, see *United States v. Virginia*, 518 U.S. 515, 550–51 (1996) (stressing that it is the exclusion of women who can actually meet the physical and psychological demands of Virginia Military Institute that violates equal protection, not the existence of such high standards).

101. W. CHARISSE GOODMAN, THE INVISIBLE WOMAN: CONFRONTING WEIGHT PREJUDICE IN AMERICA 143 (1995).

102. As noted *infra* Part IV, even some extremely obese people, weighing 500 or 600 pounds, are capable of performing certain jobs and have recovered settlements under the Americans with Disabilities Act.

new groups would receive intermediate scrutiny. Even in *Cleburne*, where it invalidated the government action and presumed the immutability of mental illness, the Court refused, at least formally, to expand the number of classes receiving intermediate scrutiny.[103] In addition, Supreme Court equal protection jurisprudence exhibits a tremendous amount of inertia; as noted above, the simple fact that the Court has not recognized a particular group as a protected class has been used as the rationale for continuing to deny such protection, even when the original refusal of recognition rested more on evidentiary failures than an examination of the principles behind equal protection.[104]

This inertia will likely affect the chances of fat people receiving heightened scrutiny just as it has affected the poor. The Court has not directly addressed the level of scrutiny afforded to fat people, but the Ninth Circuit, in holding that obese people may be excluded from juries by peremptory challenges solely on the basis of their obesity, dismissed the idea in a short per curiam opinion: "no court has yet held that discrimination on the basis of obesity is subject to 'heightened scrutiny' under the Equal Protection Clause. We are not surprised, and decline to be the first to so hold."[105] Thus, there is considerable danger that the absence of court protection in the past may become transformed into precedent that such protection should not exist. Many people, presumably including many readers of this Note, believe that fat people should not be afforded protection under the Equal Protection Clause. I would hope, however, that all those trained in the law would agree that fat people should be able to present evidence that we meet the criteria for heightened scrutiny and have a court seriously evaluate that evidence rather than dismissing it based not on binding precedent but on the absence of previous decisions.

A court making a serious effort to evaluate the level of scrutiny to afford to fat people would still probably be unlikely to apply strict or intermediate scrutiny. It seems more likely, however, that fat could be analogized to mental illness and homosexuality and therefore receive a more searching form of rational basis review. Sexual orientation, like fat, engenders much debate on the question of immutability, but in *Lawrence*[106] and *Romer*[107] the Court struck down anti-gay laws as lacking a rational basis, at least when motivated by bias against the group. Government action against the fat is often accompanied by strong official condemnation of fat itself, condemnation which rises to the highest levels of

103. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–43 (1985).
104. *See* Rose, *supra* note 81, at 418–19.
105. United States v. Santiago–Martinez, 58 F.3d 422, 423 (9th Cir. 1995).
106. Lawrence v. Texas, 539 U.S. 558 (2003).
107. Romer v. Evans, 517 U.S. 620 (1996).

government.[108] Whether the Court would see this as animus toward fat people as a group is an open question, but many fat people certainly do see it that way.[109] Mental illness may be denied intermediate scrutiny because of questions about immutability and whether the illness affects the class's ability to function in society, yet it received more searching rational basis in *Cleburne*.[110] Fat can probably make an equal or better case in both areas; Dr. Friedman found that obesity has a higher level of heritability than schizophrenia,[111] and fat probably bears less relation to the ability to contribute to society, given that it is extremely difficult for active schizophrenics to do so. Therefore, if "rational basis with a bite" really is an independent level of scrutiny, it should be applied to laws that discriminate against fat people.

In addressing how fat people should be treated as a class, some attention should also be given to how membership in that class should be defined. Fat may stretch the bounds of traditional equal protection theory because it exists on a sliding scale rather than being a characteristic that one simply does or does not have. Furthermore, this scale applies subjectively; people that one person considers fat might not be fat to another person, and the medical definition of obesity, while more fixed, may not correspond to any particular person's view of what is fat. Not only is the scale itself subjective, but the point along that scale at which one becomes the target of discrimination, or, alternatively, the point at which one needs protection, also varies in a relatively haphazard manner. Poverty also exists along a sliding scale, and, as noted above, evidentiary problems regarding just who fit into the claimed class and how they were discriminated against helped to doom the plaintiffs' cause in *Rodriguez*.[112] Fat activists who want to present an argument for heightened scrutiny will have to deal with this issue; a specific class of fat people must be defined and evidence demonstrating the effect of the claimed discrimination on those people will be needed.

It should be noted that, in reality, race, the prototypical protected class, also exists along a sliding scale; almost everyone has ancestors of multiple races. Courts have avoided dealing with this sliding scale and thus failed to provide a framework for discrimination along dimensions such as height

108. First Lady Michelle Obama's anti-obesity campaign springs to mind. *See* LET'S MOVE!, www.letsmove.gov (last visited May 16, 2013). While I certainly believe that children should be encouraged to eat properly and exercise, more care should be taken to ensure that this does not lead to the bullying of fat children and to protect their already fragile self-esteem.

109. *See, e.g.*, SJ Reidhead, *How Michelle Obama's Anti-Fat Bigotry Will Kill America's Kids*, THE PINK FLAMINGO (June 25, 2011), http://www.thepinkflamingoblog.com/2011/06/25/how-michelle-obamas-anti-fat-bigotry-will-kill-americas-kids/.

110. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–43 (1985).

111. Friedman, *supra* note 24.

112. *See supra* text accompanying notes 73–85.

and weight. For example, in *Plessy v. Ferguson*, the Court did not address whether Homer Plessy's single eighth of African blood was enough to make him a proper subject of the Louisiana law in question.[113] However, there is another perspective from which to address discrimination that occurs along a sliding scale. Every person has a weight (and a height), and, whether or not they are fat, their weight should not cause them to be discriminated against.[114] When the Supreme Court has found that a particular trait, such as race or gender, should not be the subject of discrimination, it has protected that trait even when members of the dominant group have sought such protection.[115]

It remains possible that fat people could, in many situations, be protected under simple rational basis review, as long as that review looks more like the discussion of rational classifications in *Ellis*[116] than the extreme deference of *Carolene Products*[117] and *Nebbia*.[118] If the Court presupposes validity to the extent that it puts its own considerable brainpower to creating a rational basis after the fact, almost every law will have one. However, if it makes the state produce some basis for the rationality of laws that discriminate against fat people, it may find such rationality utterly lacking.[119] If weight were found, in most cases, to be an irrational basis of classification, this would protect people of all weights from such discrimination. This makes the most logical sense; no matter how fat is defined, or whether you believe fat is immutable, weight should be considered an irrational reason to deny a person most jobs, an education, or the right to sit on a jury. Being fat (or skinny), just like being black, being gay, or being female, simply has nothing to do with intelligence, work ethic, or character. The next Part examines how this standard could be applied to particular instances of fat discrimination.

---

113. Plessy v. Ferguson, 163 U.S. 537 (1896).

114. In jurisdictions that protect weight through anti-discrimination statutes, such as Michigan, the protections of the statute are available at any weight. *See, e.g.*, MICH. COMP. LAWS § 37.2102 (1976).

115. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

116. Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897).

117. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

118. Nebbia v. New York, 291 U.S. 502 (1934) (stating that the Court could essentially invent a rational basis if none were particularly forthcoming).

119. As mentioned above, a New York court did just that in *Parolisi v. Bd. of Exam'rs of N.Y.*, 285 N.Y.S.2d 936 (N.Y. Sup. Ct. 1967).

III. STATE DISCRIMINATION AGAINST FAT PEOPLE

A. Fat and the Educational System

The Supreme Court has ruled that education is not a fundamental right,[120] but when the state does provide education, it must do so on an equal basis.[121] While there are, of course, no separate schools for fat children or statutes barring their access to school, fat children do face additional burdens in going to school. The National Education Association (NEA) has recognized that fat children have been discriminated against in education and stigmatized by their experience, and it conducted a 1994 study of weight and size discrimination against students and teachers.[122] Some of these problems are physical; the school may not have large enough desks for a fat student, or access to the school or particular parts of it may be made difficult or impossible (for extremely fat children) by large hills or staircases.[123] Schools are underfunded to remedy these problems and often unresponsive about them; because of the intricacies of determining when obesity is covered under the Americans with Disabilities Act (ADA), schools often argue that no accommodations are required.[124] In an abstract sense, the Supreme Court's requirement that states providing education must do so equally should place on schools a duty to accommodate these students independent of any statutory requirement of the ADA. The Court, however, may actually be quite reluctant to recognize such a duty; even in cases of racial segregation, it has placed the burden of showing segregatory intent on plaintiffs when the segregation is merely de facto, rather than prescribed by law (de jure).[125] Fat plaintiffs would likely find it difficult to establish an intent on the part of school administrators to keep fat children out of school. This problem would be significant in all education cases.

The NEA report, which referred to the environment fat students face as one of "ongoing prejudice, unnoticed discrimination, and almost constant harassment," documents that fat children face unrelenting ridicule from their peers and that this ridicule is often ignored or even fostered by

120. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

121. *See* Plyler v. Doe, 457 U.S. 202 (1982) (holding that the state could not deny education to the children of illegal immigrants); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

122. NEA REPORT, *supra* note 23.

123. *See* SOLOVAY, *supra* note 2, at 17–18 (detailing the difficulties of a child whose mobility was limited by weight in navigating a California school).

124. *See id*. That school did nothing because it said obesity was not a disability. A full discussion of the ADA is beyond the scope of this Note, though some aspects will be mentioned in Part IV.

125. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 201–03 (1973) (providing contrast to de jure segregation cases such as *Brown*, which placed an affirmative duty on school boards in locales with dual systems to desegregate).

adults.[126] The state's duty to provide education on an equal basis may not require them to prevent all bullying of fat students, but it should require both that teachers do not participate in it and that it be officially treated in the same way as the bullying of other groups. An argument can be made analogizing the state's position here to that of the city in *Burton*, where the facilitation of and failure to prevent discrimination allowed for injunctive relief against the state.[127] In addition, many fat students are ill-treated by teachers, who may or may not be well-meaning.[128] Every fat person I know has a horror story about a high school gym class or athletic event at which their weight was either mocked by a teacher or coach or used as a cautionary tale for other students. Physical education can certainly be good for fat children, but at the same time, as Joanne Ikeda and Priscilla Naworski argue, "poor programs can cause children to hate gym class and, consequently, hate physical activity for the rest of their lives."[129]

The discrimination found by the NEA Report did not consist solely of ridicule, and had effects beyond the psyche of fat children. For example, fat students (especially girls) were denied letters of recommendation and entry into prestigious colleges despite test scores and academic achievements equivalent to their thinner peers.[130] Some of this discrimination was open and public. The report mentions the following examples: a drill team that allowed fatter students to practice at school if they were "progressing toward goal weight," but did not let them participate in public; schools that kept fat students off the honor roll and offered prizes to them for losing weight; and teachers who often told students or their parents that the students should lose weight or go on particular diets.[131] Fat children today probably face an even more anti-fat environment than their counterparts in 1994, considering that the country has become more obsessed with weight loss and the government continues to escalate the "War on Obesity."

Many fat activists and writers believe the psychological damage caused by this ridicule matches or exceeds any damage that may come from being fat. Sadly, this is certainly true for teens like April Himes, whose suicide illustrates the problems faced by fat children. Himes repeatedly told teachers and administrators about being teased for her weight and

126. NEA REPORT, *supra* note 23.

127. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

128. Sandra Solovay recounts many tales of ill-treatment by teachers, including forcing fat children to weigh in front of their peers and other acts of stigmatization that contributed to a hostile educational environment. SOLOVAY, *supra* note 2, at 50–55.

129. JOANNE IKEDA & PRISCILLA NAWORSKI, AM I FAT?: HELPING YOUNG CHILDREN ACCEPT DIFFERENCES IN BODY SIZE 43 (1992).

130. NEA REPORT, *supra* note 23. One reason fat students may have difficulty compiling a strong résumé for selective colleges is that they are often discouraged from participating in extracurricular activities, either directly or by the way they are treated in them. *Id*.

131. *Id*.

eventually stopped going to school; when officers came to her home and said she would go to jail if she did not return to school and face the bullying, she killed herself.[132] Regrettably, this outcome is statistically borne out in a study reported in *Science Daily*, which found that teens who were fat, and even those who believed they were obese but medically were not, were more likely to attempt suicide.[133]

The psychological damage done by this ridicule could be increased by the fact that it often comes with the sanction of the state, from teachers and school officials. Many times, ridicule is announced publicly by school officials. Even anti-obesity programs not directed at anyone in particular can carry destructive weight if not administered with care and accompanied by anti-bullying efforts.[134] As Justice O'Connor wrote in another context, messages from the state that support particular beliefs also send a message that some people are outsiders, without full membership in the political community.[135] As in the religious setting, fat children are likely to feel that they are outsiders, not worthy to fully participate in the school community, whenever school officials demonize obesity and extol thinness.

Teachers can be the victims of weight discrimination as well. Although weight discrimination in employment often presents a discrete set of issues that fall under the rubric of the Americans with Disabilities Act, its practice by the state can be addressed under traditional equal protection analysis. This is demonstrated by the abovementioned case of *Parolisi v. Board of Examiners*, in which the trial court overturned on constitutional grounds the Board's denial of a license to a substitute teacher because she was overweight.[136] The Board in this case advanced rationales for the denial of her license that are often heard today, stating that Parolisi's weight could lead to high blood pressure, diabetes, and other ailments, which may lead to absences or early retirement.[137] In addition, the Board argued that she would be incapable of properly dealing with the students in emergency situations, an argument which, as the court stated, "presumes that overweight is inexorably related to agility, something which a lot of football coaches would dispute."[138] After discussing the idea that other professions, such as police officers and firefighters, might reasonably

132. Marilyn Wann, *Telling Kids "Don't Be Fat!" Is a High-Risk Message*, SF WKLY. (Sept. 9, 2011, 7:30 AM), http://blogs.sfweekly.com/exhibitionist/2011/09/marilyn_wann_bullycide.php.

133. *Teens Who Think They're Overweight More Likely to Try Suicide*, SCI. DAILY (May 21, 2009), http://www.sciencedaily.com/releases/2009/05/090520064349.htm.

134. SOLOVAY, *supra* note 2, at 50, 52.

135. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (famously quoted by Justice Stevens in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000)).

136. Parolisi v. Bd. of Exam'rs of N.Y., 285 N.Y.S.2d 936 (N.Y. Sup. Ct., 1967).

137. *Id*. at 939.

138. *Id*.

require stringent physical tests, the court concluded that "obesity, standing alone, is not reasonably and rationally related to the ability to teach or to maintain discipline."[139] Therefore, the court applied rational basis review to this classification that discriminated because of weight, and found it to be invalid.[140]

B. Fat and the Family Courts

News articles in the past few years have made it clear that family courts will also be at the center of the debate over weight discrimination in this country. In late November 2011, an eight-year-old child who weighed over 200 pounds was removed from his home in Cleveland Heights, Ohio, and placed in foster care. The county cited medical neglect as the reason the child was taken.[141] Few details have come out about this case, but it is far from the first time that family courts have dealt with obese children. For example, an Alabama court in a child custody proceeding ordered that a mother place her child, Jimmy, on a diet.[142] The trial judge found Jimmy's weight problematic without a doctor ever prescribing that he go on a diet;[143] he also did not consider the effect of diets on small children, though, to be fair, much of the research on that topic had yet to be conducted.[144] The appeals court stated that "the child's obesity was properly a concern of the court," and that the trial judge did not abuse his discretion because he "could have ascertained from the evidence that the plaintiff was, on the whole, underconcerned about Jimmy's weight problem."[145] The *Fillingim* court, at least, did not mandate a particular weight-loss regimen. An Iowa court ordered a young woman whose mother had recently escaped from an abusive marriage to be removed from the mother's home and placed in an in-patient weight-loss treatment facility.[146] Although that court recognized that the child's main problems stemmed from her mother's recent escape from an abusive marriage and that the

139. *Id*. at 940. While it was also noted that no male teacher had been fired for being overweight, the court did not rest its decision on any form of gender discrimination. *Id*.

140. Unfortunately, the ruling holds no precedential value because it was made by a New York trial court.

141. Marilisa Kinney Sachteleben, *Obese Ohio Child Taken from Parents, Placed in Foster Care*, YAHOO! NEWS (Nov. 28, 2011), http://news.yahoo.com/obese-ohio-child-taken-parents-placed-foster-care-180816812.html.

142. Fillingim v. Fillingim, 388 So. 2d 1010, 1011–12 (Ala. Civ. App. 1980).

143. *Id*.

144. See SOLOVAY, *supra* note 2, at 14. There is still no consensus, but many doctors today believe that while parents should certainly offer children the healthiest food possible, putting prepubescent children on a strict low-fat or calorie-restrictive diet is not a good idea, and may actually make it more likely that these children become fat. *Id*. at 52.

145. *Fillingim*, 388 So. 2d at 1012.

146. *Ex rel*. L.T., 494 N.W.2d 450, 453 (Iowa Ct. App. 1992).

mother was willing to help her daughter overcome those psychological problems, the court affirmed the trial court's designation of the child as a "child in need of assistance" because the mother refused to hospitalize the child in an extreme weight-loss program.[147]

Courts may also be motivated by anti-fat bias when the parents in cases involving fat children are fat themselves. In a New York case, an appellate court upheld the removal of a fat child from her home, a decision that took into consideration the fact that the parents did not meet a gym schedule mandated by the lower court. The mother was obese and had weighed 436 pounds at one point, and the father was confined to a wheelchair.[148] The states of Kentucky, New Mexico, Pennsylvania, and Texas have also used neglect statutes to remove fat children from their parents.[149] This Note does not mean to argue that a court should never take cognizance of a child's weight when determining their best interests; there may be cases of true neglect in some of these situations, where the parents really are not taking care of their child. However, these family court decisions certainly do not take into account the complexity of the causes of obesity and the inherent difficulty of long-term weight loss. Instead, the family courts seem to assume the personal responsibility model of obesity, a model that simplifies a myriad of medical and metabolic factors into a relatively simple balancing of calories approach.[150] As demonstrated in the UCLA study discussed above, strict diets may not only fail but also lead the dieter to gain back more weight than he had lost.[151]

UCSF endocrinologist Dianne Budd, a leading researcher in this field, believes that strict diets can be even more problematic for pre-pubescent children because, not only is it dangerous to place such children on extreme

147. *Id*. at 451–52. During a previous hospitalization, the child lost 24 pounds in one month. *Id*. Doctors typically say that a healthy rate of weight loss is one to two pounds a week, and this is echoed by many fitness advocates. For example, see Andrea Cespedes, *A Healthy Weight Loss Per Week*, LIVESTRONG (Mar. 9, 2011), http://www.livestrong.com/article/76506-weight-loss-per-week/ (citing the rate of weight loss recommended by nutritionists at the Mayo Clinic).

148. *In re* Brittany T., 835 N.Y.S.2d 829, 835, 839 (N.Y. Fam. Ct., 2007); Coyla J. O'Connor, Note, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131, 148 (2008).

149. *In re* D.K., 58 Pa. D. & C.4th 353 (Pa. Ct. Com. Pl. 2002); *In re* G.C., 66 S.W.3d 517 (Tex. App. 2002); Shireen Arani, Comment, *State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 875–76, 879 (2002) (describing how state officials from New Mexico removed a morbidly obese three-year-old child from her home); O'Connor, *supra* note 148, at 142 n.60 (citing A.U. v. Commonwealth, No. 2005-CA-000716-ME, 2006 WL 203538 (Ky. App. Jan. 27, 2006)).

150. O'Connor, *supra* note 148, at 152–53. O'Connor argues that the personal responsibility model leads to individualistic remedies (separating children from families and putting them on diets) when the causes of obesity are often partly social and the remedies offered by courts do not address these more complex factors. The stigmatization of the child and her family is also a major consequence of these court actions.

151. Mann et al., *supra* note 93.

diets, but it virtually guarantees they will become fat adults.[152] If it is true that a majority of dieters fail to keep weight off, then courts may be removing these children for their parents' failure to do what most people would not be able to do.[153] If strict diets are unhealthy for pre-pubescent children, as many nutritionists argue, then the children forced to follow such diets are being harmed rather than helped[154]—especially when the harm of being taken from loving and caring parents (as opposed to those who may actually be neglectful) is considered.

C. Fat and the Criminal Courts

Weight discrimination also prevents fat people from serving as jurors, a basic function of citizens in our republic. Fat defendants may also face bias from juries from which fat people have been excluded, as well as from lawyers and judges. As mentioned above, the Ninth Circuit has held that obese people may be excluded from juries by peremptory challenges, solely because they are obese.[155] This opinion was cited in *Donelson v. Fritz*, a Colorado case that upheld weight- and disability-based peremptory challenges against the argument that recognition of disability under the ADA protected jurors from discrimination.[156] The Colorado court found that a juror's physical disability or discomfort could be a reason to strike her, even when such discomfort was hypothetical and raised by an attorney rather than the juror herself.[157] Obese jurors are often struck by prosecutors, who perceive these jurors as being favorable to defendants, perhaps because of their own stereotypical views of fat people as lazy or indulgent.[158]

In addition, prosecutors know that excluding fat jurors is permissible and readily give this rationale when accused of excluding jurors for impermissible reasons. In *Dolphy v. Mantello*, the African-American defendant objected to the exclusion of the lone African-American in the

152. SOLOVAY, *supra* note 2, at 14, 71.

153. *See Big Fat Facts*, BIGFATBLOG.COM, http://healthread.net/big-fat-facts-obesity.pdf (last updated Mar. 14, 2006). While there is no consensus about the success rate of diets, the oft-cited statistic, even by those trying to sell diet pills and such, is that 95% of diets fail; this comes from a study in 1959 that involved only 100 people. *Id*. at 4. Even the National Weight Control Registry, which documents weight-loss success stories, places the success rate at only about 20%. *Id*. at 6. There are, however, methodological problems in defining "diet" and determining how long weight must be kept off to be a "success." *Id*.

154. R. Morgan Griffin, *Safe Weight Loss for Overweight Kids*, WEBMD, http://www.webmd.com/parenting/raising-fit-kids/weight/safe-weight-loss (last visited May 16, 2013).

155. United States v. Santiago-Martinez, 58 F.3d 422, 422–23 (9th Cir. 1995).

156. Donelson v. Fritz, 70 P.3d 539, 543 (Colo. App. 2002).

157. *Id*. at 544.

158. SOLOVAY, *supra* note 2, at 91.

jury pool, and the prosecutor stated that he excluded her solely because she was obese.[159] The trial judge accepted the prosecutor's argument as a "race-neutral explanation," but the Second Circuit reversed because the trial court did not properly evaluate the credibility of the prosecutor's reasoning since weight, in this case, could easily be a pretext for impermissible exclusion based on race.[160] This result protects minority defendants when weight is used as a pretext for juror exclusion but does nothing to protect the fat potential juror who is actually excluded for being fat. In her article, *A Jury of Your Skinny Peers*, Maggie O'Grady explains the dangers of allowing weight-based peremptory challenges.[161] Using challenges in this way not only raises the possibility of masking impermissible discrimination against other groups, but such use also provides state sanction for anti-fat bias, thereby reinforcing negative stereotypes against fat people.[162]

Fat defendants may also be the victims of state bias; the personal prejudices of their lawyers, who determine the course of a case through their strategic decisions, and judges, who preside over trials, may be impossible to quantify and, of course, vary from individual to individual. However, the exclusion of fat people from the jury box can be examined in light of similar discrimination against African-Americans and women to determine its effect. The Supreme Court has recognized that biases among jury members can deprive defendants of their right to a fair trial since at least 1879, when, in *Strauder v. West Virginia*, it ruled that a state could not systematically exclude African-Americans from juries.[163] This was extended to the use of peremptory challenges in *Batson v. Kentucky* in 1986.[164] The logic brought to mind by these decisions seems fairly clear: if the defendant is a member of a group that is the object of animus in society and no members of that group are on the jury, the defendant may be convicted solely because of the animus, rather than because of legitimate evidence. Yet the Court did not hold in either case that a defendant has a right to members of his or her group on the jury; it held only that the process of determining who is on the jury cannot be discriminatory in certain ways (by statute in *Strauder* and by peremptory challenge in *Batson*).[165]

However, the Court does seem to recognize the broader logical base of its holding, stating that exclusion "undermine[s] public confidence in the

159. Dolphy v. Mantello, 552 F.3d 236, 237 (2d Cir. 2009).

160. *Id*. at 239–40.

161. Maggie Elise O'Grady, *A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias*, 7 STAN J. C.R. & C.L. 47 (2011).

162. *Id*. at 51–54.

163. Strauder v. West Virginia, 100 U.S. 303 (1879).

164. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

165. *See id*. at 85–86 (summarizing the *Strauder* holding as well).

fairness of our system of justice" and stimulates prejudice in the broader society.[166] The Supreme Court has also held that women could not be excluded,[167] and a California state court decision held that people cannot be excluded from juries on the basis of sexual orientation.[168] The California court reasoned that members of particular classes should not be excluded from juries if the group has a common perspective or outlook on society, and excluding them would prevent the jury pool from being a representative cross-section of the community.[169] So, this gives two basic logical theories by which to evaluate whether it should be permissible to exclude fat people from juries. Under the animus theory, the discussion above should make it clear that fat people are members of a group that generates significant hatred in society; fat bias has made people commit all kinds of hateful acts and could easily cause them to find a verdict against a fat defendant, whether the evidence supports it or not.

Under the cross-section theory, the question is whether fat people consider fat part of their identity and experience common attitudes in society as a result of that identity, to the extent that being fat affects a person's essential outlook.[170] This Note argues that this question can be answered in the affirmative. Of course, not every fat person has the same or similar opinion about everything, as is true among members of any community. However, fat people, especially if they have been fat since childhood, do experience a common set of challenges that help shape a worldview that has similar characteristics across other identifying categories. It is true that many fat people reject this identity in themselves, and that it may be less pronounced in those who become fat at a later age, but that should not prevent the recognition that fat people, as fat people, represent a particular group in society. In addition, the fact that fat people (defined as those who are medically considered overweight and obese) make up such a large proportion of society, means that, if the concept of a fat worldview is legitimate, the exclusion of fat people clearly prevents the jury pool from being a representative cross-section of the community. Of course, this brings up definitional problems, such as whether a significant percentage of people are fat enough that attorneys might want to exclude

166. *Id*. at 87–88.

167. Taylor v. Louisiana, 419 U.S. 522, 533–37 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57 (1961), which had upheld a Florida law that women had to register for jury duty, while men were automatically included).

168. People v. Garcia, 77 Cal. App. 4th 1269, 1274 (2000). The federal courts have not agreed, and the Supreme Court denied certiorari to hear a similar challenge in United States v. Blaylock, 421 F.3d 758, 769–71 (8th Cir. 2005), *cert. denied*, 546 U.S. 1126 (2006).

169. *Garcia*, 77 Cal. App. 4th at 1272.

170. *See* LEBESCO, *supra* note 4.

them on that basis, and how fat the defendant must be to be prejudiced by such exclusion. But, regardless, the baseline conclusion remains the same.

IV. REACHING PRIVATE WEIGHT DISCRIMINATION: A LEGISLATIVE SOLUTION

As detailed above, the Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment, regardless of the level of scrutiny the Court applies, reaches only those forms of discrimination that can be considered state action. While state-sponsored discrimination can be important, especially in the three areas discussed above, most of the discrimination against fat people that occurs in this country comes at the hands of private individuals. The same has likely been true of discrimination based on race, gender, and other categories that are now protected by federal, state, and local laws against discrimination. In order to reach private discrimination, Congress has enacted laws such as the Civil Rights Act and the Americans with Disabilities Act, and many states have enacted similar legislation. Similar laws could combat weight discrimination in the private arena, and a few laws are already in place.

A. State and Local Legislation

The most straightforward way to address weight discrimination might be to pass laws declaring discrimination on the basis of weight illegal. A few jurisdictions across the country have done just that. The cities of San Francisco and Santa Cruz each passed ordinances prohibiting weight discrimination after highly publicized disputes in the area.[171] In Santa Cruz, Toni Cassista sued a health food store that essentially admitted to not hiring her because of her weight.[172] The jury found against her after the judge instructed that they must find she would have been hired if not for her weight, and the California Supreme Court refused her request for a new trial under California's disabilities legislation, holding that obesity could never be a disability unless caused by an underlying physiological disorder.[173] The citizens of Santa Cruz responded by creating a very broad city ordinance that "prohibits discrimination on the basis of age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight, or physical

171. S.F., CAL., POLICE CODE art. 33, § 3302 (2002); SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83.10 (1992).

172. Kristen, *supra* note 2, at 59.

173. Cassista v. Cmty. Foods, Inc., 5 Cal. 4th 1050, 1064–65 (1993).

characteristics."[174] Six years later, San Francisco's Human Rights Commission passed a similar ordinance after a prolonged campaign by size activists.[175] This resolution became famous after the case of Jennifer Portnick, a 240 pound certified aerobics instructor who sued Jazzercise when she was denied a position for failing to meet the "looking fit" requirement.[176]

Michigan is the only state that has made weight discrimination part of a general anti-discrimination law; the Elliot–Larsen Civil Rights Act, as amended in 1977, protects weight in its opening section defining civil rights:

> (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.[177]

Weight is thus defined as a protected class in the opening section of the law that recognizes a civil right and defines a cause of action; further provisions explicitly protect fat people against discrimination in labor and employment situations.[178] Other provisions prohibiting discrimination in public accommodations, education, and housing do not mention height and weight; instead, those provisions prohibit discrimination based on "religion, race, color, national origin, age, sex, familial status, or marital status."[179] Therefore, although Section 37.2102 clearly includes weight in reference to discrimination in public accommodations and housing, no claims have been brought in these areas, and even weight discrimination in employment claims are relatively rare under the Michigan statute.[180] In

174. SOLOVAY, *supra* note 2, at 243.

175. Sally E. Smith, *And Justice for All?: A Primer to Size-Related Employment Discrimination*, BBW MAGAZINE, http://www.bbwmagazine.com/work_3_0018.htm (last visited May 16, 2013).

176. Kari Horner, Comment, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589 (2005).

177. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102 (1992).

178. *See id*. at § 37.2202 (for employers); *id*. at § 37.2203 (employment agencies); *id*. at § 37.2204 (for labor organizations); *id*. at § 37.2207 (prohibited practices).

179. *Id*. at § 37.2502.

180. *See* Kristen, *supra* note 2, at 101. On Lexis and Westlaw, I found fewer than a dozen cases primarily concerned with weight discrimination, though other cases mentioned weight along with gender or race.

fact, as late as 1997, a Michigan court stated that "[t]here is no Michigan case law that addresses the issue of weight discrimination."[181]

Still, Michigan's law does afford some protection against discriminating employers. Almost all the reported cases deal with whether the plaintiff's claim can survive summary judgment (which the Michigan courts call summary disposition).[182] Michigan courts apply the same standard for weight-based claims as in all other equal protection claims, and it is a standard borrowed from the federal courts. If the plaintiff presents direct evidence of discriminatory animus that, if believed, would require the conclusion that discrimination played some role in the employer's decision, then the case should survive summary judgment.[183] If the plaintiff's evidence of discrimination is circumstantial, however, the court applies the framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.[184] This requires four showings by the plaintiff:

> (1) that she was a member of a protected class, (2) that she suffered an adverse employment action, (3) that she was qualified for the position, and (4) that others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in the defendant's adverse conduct toward the plaintiff.[185]

The Supreme Court would likely use these two frameworks if national laws that protected fat people were ever put in place. Under this system, the Michigan courts have found that comments suggesting an employee would look better if she lost weight,[186] criticism of an employee's eating habits,[187] and comments by the supervisor to others that the supervisor did not like fat people[188] all served as direct evidence of discrimination.

---

181. Knowlton v. Levi's of Kochville, Inc., No. 190677, 1997 WL 33345022, at *1 (Mich. Ct. App. June 3, 1997).

182. *See id*. (appeals court overturning grant of summary disposition); Figgins v. Advance Am. Cash Advance Ctrs. of Mich., Inc., 476 F. Supp. 2d 675, 686–88 (E.D. Mich. 2007) (denying summary judgment on weight-based discrimination claim); Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 594–95 (Mich. Ct. App. 1998) (overturning lower court's grant of summary disposition), *vacated*, 593 N.W.2d 699 (Mich. Ct. App. 1999).

183. *Cases Involving Direct Evidence of Discriminatory Intent*, 8 EMPLOYMENT COORDINATOR EMPLOYMENT PRACTICES § 107:21 (West).

184. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also Knowlton*, 1997 WL 33345022, at *2.

185. Pinchock v. Gordon Food Serv., Inc., No. 200568, 1998 WL 2016569, at *3 n.2 (Mich. Ct. App. Mar. 10, 1998).

186. *Id*. at *2.

187. *Figgins*, 476 F. Supp. 2d at 680.

188. Lamoria v. Health Care & Ret. Corp., 584 N.W.2d 589, 594–95 (Mich. Ct. App. 1998) *vacated*, 593 N.W.2d 699 (Mich. Ct. App. 1999); *see also Knowlton*, 1997 WL 33345022, at *2 (noting

Several plaintiffs, therefore, have made out legitimate claims under Michigan's law. It should be pointed out that the law prohibits all instances of weight discrimination no matter what the weight of the discriminated party. In fact, there is some suggestion that advocates were once more concerned with weight minimums, which were used as a proxy for gender discrimination.[189] The plaintiffs in Michigan cases all claimed discrimination because they were overweight, but their weights varied greatly, with one claiming adverse treatment began when she weighed 180 pounds.[190] Although, for this Note, the actual case could not be found (it may have settled or simply gone unreported), there were media reports that Cassandra Smith, 5′8″, 132.5 pounds, sued the restaurant chain Hooters in 2010 over weight discrimination.[191] However, while even smaller women have fared fairly well in the few cases reported under the Michigan law, men have not.[192] In *Byrnes v. Frito-Lay, Inc.*, the plaintiff's former boss testified that he was "constantly on [the plaintiff's] case about a diet," because his bosses wanted the plaintiff to lose weight.[193] Nonetheless, the federal district court did not find that this was direct evidence of weight discrimination and applied the *McDonnell Douglas* test, finding that plaintiff was not qualified for his job at the time he was terminated.[194]

This disparity between men and women may stem from actual differences in the way fat men and women are treated on the job. Studies attempting to quantify the economic effects of weight discrimination have shown that women experience such discrimination more than men, and that its detrimental effects begin at a lower weight for women. Many of these studies are summarized by Cheryl L. Maranto and Ann Fraedrich Stenoien in their article *Weight Discrimination: A Multidisciplinary Analysis*.[195] They reveal that the average wages of women who are medically classified as overweight and obese are significantly lower than those of "normal" weight women, while men begin to experience a sharp decline in average wages only at the level of "morbid obesity," often defined as either 100 pounds or 100% overweight.[196] Maranto and Stenoien also conducted their

---

where another employee testified that the manager told him the plaintiff was "getting too fat to work on the floor" and that she "didn't look good for business").

189. Alexandra W. Griffin, Note, *Women and Weight-Based Employment Discrimination*, 13 CARDOZO J.L. & GENDER 631, 642 (2007).

190. *Pinchock*, 1998 WL 2016569, at *1.

191. Cynthia Trowbridge, *Mich. Judge Rules Weight Bias Lawsuit Against Hooters Can Proceed*, DIGITAL J. (Aug. 25, 2010), http://digitaljournal.com/article/296596#tab=comments&sc=0.

192. *See, e.g.*, Byrnes v. Frito-Lay, Inc., 811 F. Supp. 286 (E.D. Mich. 1993); Hacker v. City of Mount Clemens, No. 267403, 2006 WL 2739342 (Mich. Ct. App. Sept. 26, 2006).

193. *Byrnes*, 811 F. Supp. at 288.

194. *Id*.

195. Maranto & Stenoien, *supra* note 24.

196. *Id*. at 8–11.

own research and determined that white women suffer a 20% wage penalty when their weight is above standard, but by less than 100 pounds, while for black women in the same group, the penalty is 11.9%.[197] Men who were in this same category did not suffer a penalty, but morbidly obese individuals of both races and genders did.[198]

Maranto and Stenoien use this data to argue that weight discrimination might best be addressed from a "gender-plus" standpoint.[199] Under a gender-plus theory, a woman who felt she was discriminated against because of her weight could bring suit under Title VII of the Civil Rights Act,[200] arguing either that she suffered disparate treatment because of her gender, or that rules and decisions of her employer had a disparate impact on women. Some courts have suggested that women should be able to include other non-protected factors in their gender discrimination claims, in effect arguing that they were fired because they were female and exhibited some other trait.[201] This type of protection from weight discrimination has several limitations, the most obvious being that it would almost never protect men. In fact, if Maranto and Stenoien's statistics are accurate, it would likely be most useful to (white) women who fall into their "mild to moderate obesity" category, where women suffer weight discrimination but men do not.[202]

Even women who are mildly to moderately obese, however, would have major problems making out a claim for disparate treatment, because their claim would fail if they were replaced by smaller women (members of the same protected class), and the employer could defend against their claim by arguing that no discrimination against women was involved; instead, the company simply legally discriminated against fat people.[203] A disparate impact claim makes sense statistically because a higher percentage of women are overweight, and as the research cited above shows, women are more heavily impacted by weight discrimination. However, a court is unlikely to accept that bare statistics, even if reduced to the level of a single company's workforce, create a prima facie case for

197. *Id*. at 19 tbl.IV.

198. *Id*. For white morbidly obese women, the penalty is 24.1%, for black women 14.6%, for white men 19.6%, and for black men 3.5%. *Id*. The differences in gender will be briefly discussed below, while the differences in race are beyond the scope of this Note, and may correspond to attitudes about obesity in specific populations.

199. *Id*. at 20.

200. 42 U.S.C. § 2000e-2 (2006).

201. *See, e.g.*, Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1258–61 (5th Cir. 1969), (Brown, C.J., dissenting from failure to grant rehearing en banc). The *Phillips* case involved a woman who was fired because she was the mother of pre-school-aged children, where men with similar children were employed. *Id*.

202. Maranto & Stenoien, *supra* note 24, at 19 tbl.IV.

203. *See* Griffin, *supra* note 189, at 636.

discrimination.[204] Alexandra Griffin also points out that much of the weight discrimination against women occurs in female-dominated jobs such as waitressing, flight attending, and retail sales, which makes any claim of gender discrimination more difficult because the person hired to replace the discriminated party is also likely to be a woman.[205]

Another approach that would protect fat people of both genders, along with many who are not fat, is to ban all appearance-based discrimination. The District of Columbia's Human Rights Act (DCHRA) takes this approach, including "personal appearance" as a protected class.[206] The law defines "personal appearance" as "the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards."[207] "[B]odily condition or characteristics"[208] would certainly seem to include weight, though the law's exception for standards applied uniformly to groups of people makes fat activists leery because businesses often justify weight discrimination using "professional appearance" standards.[209] Unfortunately, there are no cases in which a court directly addresses the merits of a weight discrimination claim under this law.[210] In one of the two reported cases, the D.C. Court of Appeals upheld summary judment against the plaintiff on her ADA claim, but overturned summary judgment on her EEOC and DCHRA claims after determining that the plaintiff was not required to exhaust administrative remedies and that the claims were timely filed.[211] On remand, the jury returned a verdict for the plaintiff and found that the

204. *Id*. at 640.

205. *Id*.

206. D.C. CODE § 2-1402.11(a) (2012). This broad law bans discrimination based on "sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation" as well as the more standard categories related to age, race, and gender discrimination. *Id*.

207. D.C. CODE § 2-1401.02(22) (2012). An exception is made for "the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual." *Id*.

208. *Id*.

209. *See* SOLOVAY, *supra* note 2, at 99–118 (chapter entitled "Professional Appearance Required").

210. I could find only two reported cases in which a weight discrimination claim was brought under the DCHRA. Flecha De Lima v. Int'l Med. Grp., Inc., No. 01CA6866, 2004 WL 2745654 (D.C. Super. Ct., Civ. Div. Nov. 29, 2004) (concerning a claim against an insurance company for refusing to cover obesity or approve gastric bypass surgery); Ivey v. District of Columbia, 949 A.2d 607 (D.C. 2008).

211. *Ivey*, 949 A.2d at 615.

defendant "verbally harassed [her] based on her personal appearance," but it awarded nominal damages of only one dollar.[212]

Banning discrimination based on appearance resonates from a philosophical standpoint because it rests on the idea that all human beings are equal members of the moral community. Several legal writers have endorsed this viewpoint, including Deborah Rhode, author of the article *The Injustice of Appearance*.[213] For Rhode, such discrimination not only stigmatizes individuals, it perpetuates stereotypes and reinforces group disadvantages, including those associated with race and gender. Prohibiting appearance discrimination would not only alleviate these problems, it would also serve other constitutional values by protecting individual expression, personal liberty, and cultural identity.[214] Rhode also argues that appearance discrimination offends our basic notion that workplaces in America should reward merit.[215] Referring to appearance discrimination as "lookism," Karen Zakrzewski agrees with Rhode, arguing that appearance discrimination causes people to "compete for jobs not based on substantive factors, but on how attractive they are," resulting in a less competent overall workforce.[216] Laws banning appearance discrimination clearly have some supporters, and they would remove the problem of determining what role individual choice plays in obesity because some appearance characteristics are clearly the result of personal choice and these laws still protect them. However, even Rhode recognizes considerable difficulties in enforcing such laws, and some opponents argue that a general ban on appearance discrimination would prevent employers from discharging anyone without fear of a lawsuit, since everyone has unique appearance characteristics.[217] In addition, protection for appearance could only come about through changes in the actual law, since it certainly would not meet the courts' criteria for immutability and could not be protected under the Court's equal protection jurisprudence.

212. Ivey v. District of Columbia, 46 A.3d 1101, 1107 (D.C. 2012)

213. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033 (2009).

214. *Id*. at 1048–59.

215. *Id*. at 1050.

216. Karen Zakrzewski, Comment, *The Prevalence of "Look"ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 434 (2005).

217. Rhode, *supra* note 213, at 1068 (quoting Mario Cuomo as calling a proposed appearance discrimination ban "one law too many").

B. The Americans with Disabilities Act

Two final forms of protection from weight discrimination could flow from the Americans with Disabilities Act (ADA).[218] The first consists of suits brought by those who claim their obesity is in fact a disability, meeting the standards in the ADA and requiring its protection.[219] The second form occurs when fat people claim no disability or accommodation, but bring suits arguing that their employer or another discriminator regards them as disabled. This is known as the perceived disability theory, and essentially argues, "I can do the job fine, but the defendant thinks my weight hampers my doing it in some way."[220] Even though use of the ADA and state disability statutes has been more effective than any other tool in combating weight discrimination, many activists hesitate to accept the idea that fat people are disabled.[221] They believe that disability claims, because they protect only the largest individuals, do not address the underlying problem of weight discrimination, and many argue that they, as fat people, are perfectly able to perform the work they desire to do and should not be treated as disabled.[222] However, because disability laws afford the only real protection available in most of the country, many members of the fat community also advocate their use.

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more [of the] major life activities of [an] individual."[223] In practice, this means that, in order to make a claim for actual disability, the fat plaintiff must show some physiological cause for obesity, otherwise there is no "physical or mental impairment."[224] The plaintiff must then demonstrate that the impairment substantially limits a major life activity such as "seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."[225] The EEOC, which issues guidelines in interpreting the ADA and Rehabilitation Act, originally argued that obesity is not a

218. 42 U.S.C. §§ 12101–12213 (2006). Many states also have disability laws that have very similar standards, and this discussion applies to them as well. There is also a federal law called the Rehabilitation Act with similar standards. 29 U.S.C. §§ 701–794 (2006).

219. *See, e.g.*, Coleman v. Ga. Power Co., 81 F. Supp. 2d 1365, 1365–66 (N.D. Ga. 2000).

220. *See, e.g.*, Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993).

221. SOLOVAY, *supra* note 2, at 129–30.

222. Kristen, *supra* note 2, at 81–82.

223. 42 U.S.C. § 12102(1)(A).

224. *Id.*; *Coleman*, 81 F. Supp. 2d at 1368.

225. 29 C.F.R. § 1630.2(i)(1)(i) (2013). The next section, 29 C.F.R. § 1630.2(2), also includes the impairment of any major bodily function as a "major life activity."

disability except in rare circumstances.[226] However, the EEOC was not always consistent about this, as it argued in an amicus brief in *Cook* that morbid obesity should always be treated as a disability.[227] The *Cook* court, while eventually upholding the plaintiff's favorable jury verdict, declined to hold that morbid obesity (usually defined as either 100 pounds or 100% above "optimal" body weight)[228] would always constitute a disability.[229] Another district court stated in blanket terms that weight cannot be an impairment and included it with such traits as eye color, hair color, and height.[230] While some states, such as New York, have held that morbid obesity always constitutes a disability under their state laws, the results under federal law have been very mixed.[231]

This may change under the amendments to the ADA passed by Congress in 2008, which attempted to clarify and broaden the definition of disability.[232] While the definition remains somewhat vague, Congress expressed the explicit intent to broaden the coverage of the act and ease the requirements for disability.[233] One consequence of the new law can be seen in *Lowe v. Am. Eurocopter*, in which the U.S. District Court explicitly stated that defendants will no longer be able to make the blanket claim that obesity is not a covered disability.[234] For this reason, the plaintiff, who claimed she was fired because her disability impaired her from walking from the general employee parking lot, was able to survive summary judgment.[235] Thus, she was able to demonstrate, at least to a level necessary to survive summary judgment, that she had a physical condition that substantially limited her life activity of walking, without being forced to show that her obesity occurred as the result of an underlying physiological malady. It is unclear whether this result will be generally accepted by

226. 29 C.F.R. § 1630.2(j). This section no longer appears in the C.F.R. *See* Kristen, *supra* note 2, at 83.

227. Brief for EEOC as Amicus Curiae Supporting Plaintiff at 18, Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993) (No. 93-1093).

228. *Cook*, 10 F.3d at 20 n.1.

229. *Id*. at 22 (proceeding instead on a perceived disability theory).

230. Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997).

231. State Div. of Human Rights v. Xerox Corp., 480 N.E.2d 695, 697–98 (N.Y. 1985) (rejecting the employer's contention that obesity was not a disability, and noting that New York law, unlike federal law, did not require an underlying physical impairment).

232. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009). This was passed in response to the following two cases, not concerning obesity, in which the Supreme Court narrowed the reach of the statute: Toyota Motor Mfg., Ky, Inc. v. Williams, 534 U.S. 184 (2002), and Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

233. Shannon Liu, Note, *Obesity as an "Impairment" for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141, 147 (2010).

234. Lowe v. Am. Eurocopter, No. 1:10CV24-A-D, 2010 U.S. Dist. Lexis 133343, at *22 (N.D. Miss. Dec. 16, 2010).

235. *Id*. at *24 n.7.

courts interpreting the 2008 amendments, but such result makes sense from a theoretical perspective. If, as discussed above, obesity has a genetic component that can be difficult to overcome, then it does not make much sense to discriminate between those who may or may not have a major genetic basis in body structure and metabolism that contributes to their obesity, and those that have an endocrine basis for their obesity that can be medically proven.

Accepting claims such as that by Ms. Lowe will be an important step in fighting weight discrimination, but these actual disability claims still only protect some fat people because the requirement that the obesity substantially limit a major life function remains. It does not necessarily even protect all who meet the definition of morbid obesity because some people can be very fat without it substantially limiting any of the listed life activities. In any case, Maranto and Stenoien showed that fat workers, especially women, suffer from discrimination at a much lower weight and without reference to the limitation of any activity.[236] Therefore, plaintiffs should be able to turn to the perceived disability theory in this situation. Perceived disability allows the plaintiff to recover if the employer regards them as having an impairment that substantially limits a life activity.[237] Prior to the 2008 amendments, courts required plaintiffs to allege that their employer regarded them as suffering from a specified impairment under the statute, not just that the employer regarded them as physically disabled.[238] Since weight alone could not be an impairment, weight discrimination could not be reached under this theory unless the plaintiff could prove that she actually did suffer from some physiological impairment. The perception aspect of the theory came in only as to whether the impairment substantially limited a major life activity; proof that it did so was unnecessary if the plaintiff could show that the defendant regarded such an activity as being limited.[239] Thus, in *Cook*, the First Circuit found that the jury's verdict in the plaintiff's favor could stand because she presented evidence of a physiological disorder of the metabolic and appetite-suppression systems, and the employer regarded this as preventing her from doing the job.[240]

---

236. Maranto & Stenoien, *supra* note 24.

237. Liu, *supra* note 233, at 142–43.

238. Francis v. City of Meriden, 129 F.3d 281, 284 (2d Cir. 1997).

239. Cook v. Rhode Island, Dep't of Mental, Retardation, & Hosps., 10 F.3d 17, 22–24 (1st Cir. 1993).

240. *Id*. at 23. This might present another problem with the requirement of a real impairment: it could allow manipulation by people who get the right doctors to say the right thing. Any fat person probably has a disorder of the "metabolic" and "appetite suppression" systems, but I have serious doubts as to whether other courts would have accepted this so easily. The other judges that cite *Cook*, such as the one in *Coleman v. Ga. Power Co.*, 81 F. Supp. 2d 1365, 1368–69 (N.D. Ga. 2000), do not address whether this would have flown in their courts.

The 2008 amendments to the ADA expanded the possibilities of protection under the perceived disability theory. The "regarded as" prong of the ADA now reads as follows:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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.[241]

Unfortunately, ambiguity still remains as to whether the impairment itself has to be perceived and whether any impairment has to exist. However, the fact that weight can now be considered as an impairment (and morbid obesity virtually always qualifies as one) has opened the door to more perceived disability claims. In addition, the ADA now includes a section directing that it should be interpreted "consistently with the . . . purposes of the ADA Amendments Act of 2008," and those amendments were intended to broaden the scope of coverage.[242] *Lowe* could indicate that courts will be reading this broadly to allow a perceived disability claim, as the Mississippi district court states, "[u]nder the ADAAA, an individual is now not required to demonstrate that the disability she is regarded as having is an actual qualified disability under the ADA or that it substantially limits a major life activity."[243] This could be considered dictum because the court found that Lowe also survived summary judgment on a claim of actual disability,[244] but it could also herald new life for the perceived disability claim.

In two other recent cases, the EEOC has pursued lawsuits on behalf of morbidly obese individuals and has reached settlements with the employers who fired them.[245] A drug rehabilitation facility in Louisiana fired Lisa Harrison from a job managing childcare for children of patients; she weighed 527 pounds.[246] In her initial EEOC charge, Harrison did not claim

---

241. 42 U.S.C. § 12102(3)(A) (2006 & Supp. V 2011).

242. 42 U.S.C. § 12102(4)(B).

243. Lowe v. Am. Eurocopter, No. 1:10CV24-A-D, 2010 U.S. Dist. LEXIS 133343, at *24 (N.D. Miss. Dec. 16, 2010).

244. *Id*. at *27.

245. Press Release, Equal Employment Opportunity Commission, EEOC Sues BAE Systems for Disability Discrimination (Sept. 27, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-27-11a.cfm; *see also* Martha Neil, *Fired for Being Too Fat, Worker Gets $55K Settlement with EEOC's Help*, ABA JOURNAL (July 25, 2012, 11:44AM), http://www.abajournal.com/news/article/fired_for_being_too_fat_worker_gets_55k_settlement_with_eeocs_help/; Dan Fastenberg, *Employer Can't Fire a Worker for Being Obese, EEOC Says*, AOL JOBS (Apr. 18, 2012, 8:59 AM) http://jobs.aol.com/articles/2012/04/18/employer-cant-fire-a-worker-for-being-obese-eeoc-says/.

246. EEOC v. Res. for Human Dev., Inc., 827 F. Supp. 2d. 688 (E.D. La. 2011).

that she was disabled, only that her employer perceived a disability.[247] The EEOC seemed to continue under this theory after Harrison's death, but, in granting partial summary judgment to the Commission, the court ruled that Harrison did have an actual disability.[248] In a previous ruling denying summary judgment to the employer, however, the court did not require the EEOC to prove that Harrison's obesity resulted from an underlying medical condition.[249] After these rulings, the employer agreed to pay $125,000 to Harrison's estate.[250] The EEOC also brought a lawsuit in the case of Ronald Kratz, a 680 pound man who was fired from his job as a forklift operator after asking for a seatbelt extender.[251] The former employer settled for $55,000, and it does not appear that the EEOC intended to argue that Kratz's obesity stemmed from an underlying physiological condition.[252] It is unclear, however, whether the argument would be that morbid obesity without an underlying cause constitutes a disability or that the employer simply regarded Kratz as disabled. Both the EEOC and courts seem to be accepting the former argument, but the fate of the latter with respect to smaller fat people remains in question.

From a philosophical perspective, a perceived disability claim ought to be the type of weight discrimination claim that even people who are not fat would understand and accept. Reasonable minds clearly may differ on the exact causes of obesity and whether it should be considered an actual disability or the result of personal choice, as well as the level of accommodation required for very fat people. However, when a fat person is asking for no accommodation whatsoever, that person wants to work and believes they can do the work, and especially if they have already shown they can do it, then, most people would accept that they should not be discriminated against purely because of their weight. A poll by the Rudd Center for Food Policy and Obesity at Yale supports this conclusion—65% of men and 81% of women polled favored laws to prevent weight discrimination in the workplace.[253] If the statement in *Lowe* is followed by other courts, this kind of claim could be brought by any person who has evidence that their weight was a factor in an adverse employment decision, no matter how fat (or not) they may be.

247. EEOC v. Res. for Human Dev., Inc., No. 2:10-CV-03322, 2012 WL 669435, at *1 n.3 (E.D. La. Feb. 29, 2012).

248. *Id*. at *3.

249. *Res. for Human Dev., Inc*., 827 F. Supp. 2d at 693–94.

250. Fastenberg, *supra* note 245.

251. Neil, *supra* note 245.

252. *Id*.

253. Rebecca M. Puhl & Chelsea A. Heuer, *Public Opinion About Laws to Prohibit Weight Discrimination in the United States*, 19 OBESITY 74 (2010).

However, this open-endedness may also cause some to oppose such a broad reading of the ADA; critics' response could be similar to their reaction to the proposal of anti-appearance discrimination. As Deborah Rhode details, they might focus on a slippery-slope type argument that says perceived disability allows anyone to sue for any negative treatment by an employer.[254] Adam Pulver, writing in the *Columbia Journal of Law and Social Problems*, has a more pointed critique.[255] For Pulver, any effort to expand the coverage of disability laws, or to address weight discrimination in any way, would undermine the public health goal of reducing obesity; in fact, he believes that the social stigma associated with being fat and even discrimination that results from it should remain in place in order to discourage people from becoming obese.[256] While Pulver focuses on why people become fat, many others argue against expanding coverage for fat people on the theory that weight it is not an immutable condition. However, one author, accepting the complex, partially-genetic causes of obesity, argues that weight is immutable, and therefore should be protected, despite focusing her article on why types of discrimination should be limited by immutability.[257] The protections of the ADA, especially if bolstered by strengthening the perceived disability theory, could help combat weight discrimination, and would reach private conduct as well as state action.

V. CONCLUSION

Weight discrimination represents a real and expanding problem in this country. It may be possible for Congress to address it through changes to civil rights or disability laws, and this may be the best way to combat much of the employment discrimination that currently occurs. However, if the Equal Protection Clause is to truly provide the equal protection of the laws to all Americans, the Supreme Court should invalidate many state actions that classify people according to weight. While there are arguments to be made that weight can meet the Court's criteria for becoming a quasi-protected class, as gender is currently viewed, many of these state actions may be invalidated without doing so. Whether one focuses on animus toward the fat and applies "rational basis with a bite," or recognizes, like the New York court in *Parolisi*, that weight most often "is not reasonably

254. Rhode, *supra* note 213, at 1068.

255. Pulver, *supra* note 7.

256. *Id*. at 368–70.

257. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1488 (2011).

and rationally related to . . . ability,"[258] the conclusions is the same: classifications according to weight have no rational basis.

Dargan Ware[*]

258. Parolisi v. Bd. of Exam'rs of N.Y., 285 N.Y.S.2d 936, 940 (N.Y. Sup. Ct. 1967).

* 2013 graduate of the University of Alabama School of Law and future clerk in the chambers of the Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama. The author wishes to thank Professors Bryan Fair, Richard Delgado, and Jean Stefancic for help and/or inspiration for this Note. In addition, I want to thank all of the faculty and students at the University of Alabama School of Law for their teaching, caring, and friendship. I would especially like to thank Professor Carol Andrews, who, in the summer of 2010, taught me very quickly exactly what would be required to succeed in law school, and then helped me develop the tools I needed to do so.