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ESSAY

EQUAL RIGHTS, SPECIAL RIGHTS, AND THE NATURE OF ANTIDISCRIMINATION LAW

*Peter J. Rubin**

"Well, I'm opposed to discrimination in any form, but I don't favor creating special rights for any group. . . . But I'm totally opposed to discrimination. Don't have any policy against hiring anyone for his lifestyle or whatever — we don't have any policy of that kind, never have had in my office or will we have in the future."

—Robert Dole, Republican nominee for President,
October 17, 1996.

I. INTRODUCTION

Despite the continued belief held by most Americans that certain characteristics should not form the basis for adverse decisions about individuals in employment, housing, public accommodations, and the provision of a wide range of governmental and private services and opportunities, antidiscrimination laws have increasingly come under attack on the ground that they provide members of the group against whom discrimination is forbidden with "special rights."

The "special rights" objection has been voiced most strongly, but not exclusively, against laws that seek to prohibit discrimination on the basis of sexual orientation. This line of attack has not always been effective, but it has achieved notable success. To give one recent example, in February 1998, the people of Maine voted to repeal a relatively new state law prohibiting discrimination in employment, housing, public accommodations, and credit on the ba-

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sis of sexual orientation.¹ A leader of that repeal effort subsequently concluded that the vote demonstrated that “[t]he American people rejected the notion of special rights” for gay men and lesbians.²

This special rights argument has not been limited to public campaigns. Indeed, the rhetoric of special rights has now begun to move from popular discourse into the legal analysis of antidiscrimination law.³ This movement presents a threat to efforts to achieve equality in the United States, for it suggests that courts may conflate antidiscrimination laws that essentially mirror the Constitution’s own command⁴ with affirmative action provisions whose constitutionality can be determined under current law only after they have been subjected to searching judicial scrutiny.⁵

Addressing this special rights objection is thus extremely important. It is important in the popular sphere, both because this rhetoric seems to resonate with many people and because it undoubtedly plays a role in shaping popular perceptions of the nature of all antidiscrimination law.⁶ If popular support for the principle of antidiscrimination erodes, the national goal of equality for all individuals without regard to their membership in certain groups will be pushed further from our grasp. And it is important jurisprudentially, because the continued viability of legislative attempts to prohibit discrimination may depend upon blunting its force.

A first purpose of this Essay is to attempt to explain the success of the special rights objection to antidiscrimination law. To some extent the rhetoric of “special rights” or “special entitlements” may be used intentionally by opponents of new or proposed antidiscrimination laws simply to confuse the public about the nature of

1. See Maine Ballot Measure 1 (1997) (repealing 1997 Pub. Law, Ch. 205, formerly codified at ME. REV. STAT. ANN. tit. 5 §§ 4552 and 4553 (West 1997)).

2. Carey Goldberg, *Maine Voters Repeal a Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1 (quoting Randy Tate).

3. See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 298 (6th Cir. 1997), cert. denied, 119 S. Ct. 365 (1998).

4. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (“[In jury selection] the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race.”).

5. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218-30, 237 (1995) (subjecting race-conscious affirmative action plans to strict scrutiny, while leaving open the possibility that such scrutiny will not invariably be found “fatal in fact” (internal quotation marks and citations omitted)).

6. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 300-01 (1994) (describing the way in which rhetoric may shape the public’s understanding of contested policy questions).

those laws.⁷ One of the reasons the claim of special rights is rhetorically powerful is because it tars antidiscrimination law with the brush of racial and gender preferences. Many Americans believe such preferences amount to discrimination against those who do not receive them, and that they are antithetical to the idea of equal treatment for all.

Perhaps because the special rights line of argument has been understood as merely misleading, the most common response to the rhetoric of special rights until now has been that laws against discrimination guarantee *equal* rights, not special rights.⁸ Antidiscrimination law, of course, is animated by the very idea of equal treatment. And, to the extent that the special rights argument gains its force from obfuscation, this defense should, at least potentially, prove effective.

But the powerful and persistent resonance of the idea that antidiscrimination law provides special rights or entitlements to those who are protected suggests that there may be more sustaining the special rights objection than supporters of antidiscrimination law have recognized.

In this Essay I re-examine antidiscrimination law to identify certain characteristics of the law — or of those who seek its protection — that could lead people to be receptive to the idea that an expansion of that law will confer “special” rights or entitlements. Part II identifies three such characteristics that may help explain the popular force of the special rights objection to laws prohibiting discrimination. The first two involve mechanisms by which the law operates, mechanisms that may lead people to believe the law requires the provision of special treatment to members of the protected group. The third involves the persistence of particular normative beliefs about the specific people who seek legal protection against discrimination.

The presence of such characteristics suggests that the language of special rights may reflect and in turn reinforce a perceived truth about antidiscrimination law. Acknowledgment of these characteristics is thus likely to be a necessary prerequisite to any effective attempt to address this increasingly successful line of criticism of and attack on laws against discrimination.

7. See *id.* at 302.

8. See, e.g., Ralph Z. Hallow, *Maine Votes to Repeal Gay Rights Law: Opponents of ‘Special Privileges’ Sense ‘Turning Point,’* WASH. TIMES, Feb. 11, 1998, at A1 (“‘Our opponents say we want special rights, but all we’re seeking is equal rights.’” (quoting David Smith, spokesman for the Human Rights Campaign, a leading gay-rights advocacy group)).

As this Essay will also demonstrate, the same characteristics of the law that can lead people to believe that equal rights laws provide special rights may, ironically, help to explain the failure of those laws to eradicate completely the sense of discrimination felt by those they are intended to protect, in the workplace and elsewhere. Those who are supposed to be protected by laws that prohibit discrimination of course often feel that they receive *less* than equal treatment, despite the laws against discrimination.⁹ A second purpose of this Essay is to suggest some ways — both legal and extra-legal — that these characteristics can be addressed, both so that laws against discrimination will be less susceptible to attack on the ground that they provide those whom they protect with special rights, and so that discrimination laws may be more effective in combating unequal treatment.

Finally, although it is not the primary focus of this Essay, I will briefly argue in conclusion that the special rights objection should not call into question the continued value — or the constitutionality — of antidiscrimination law. Indeed, each of the aspects of antidiscrimination law that may fuel the special rights objection actually reflects in its own way the continuing *disadvantaged* position of the members of the protected class. Far from demonstrating that antidiscrimination laws are no longer useful in assuring equal treatment for protected individuals — either because they are unnecessary or because on balance they do more harm than good — the vitality of the special rights objection actually demonstrates the continued need for such laws.

That antidiscrimination law may nonetheless be seen from some perspectives as providing special entitlements to the protected class in fact suggests only the limited utility of a binary equal rights/special treatment disjunction for purposes of assessing the compatibility of legislative enactments with the command of equal protection. In particular, to the extent one's characterization of a particular provision reflects a normative judgment about the character of the class it protects, the use of these labels may actually invite courts to introduce into their analyses their own stereotyped ways of thinking. Different, more nuanced tools of analysis are therefore needed

9. Cf., e.g., Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 9 N.Y.U. L. REV. 162, 167 (1994) (observing that African Americans are more likely to be fired than white Americans); see also Regina Austin, "A Nation of Thieves": *Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 147-49 (1994) (noting that, despite antidiscrimination laws, African Americans are made to feel like an "outlaw people" when they try to shop in retail stores).

to measure the consistency of any law with the constitutional mandate to provide "equal protection of the laws."

II. BACKGROUND AND ANALYSIS: THE NATURE OF ANTIDISCRIMINATION LAW

Antidiscrimination law is the primary means by which organized society protects individuals against disadvantageous treatment on the basis of their membership in certain groups, archetypally racial or ethnic minority groups. An antidiscrimination law reflects a conclusion that a common characteristic of a group — for example, skin color, gender, or sexual orientation — ought not to form the basis for disqualifying its members from some good, for example, a job, a home, or the opportunity to serve one's country. The legal prohibition against governmental classification on the basis of characteristics like these — characteristics that society has concluded should not matter in certain circumstances — is part of the fundamental law of the United States. It is enshrined in the Equal Protection Clause of the Fourteenth Amendment to the Constitution.¹⁰

In popular discourse, the distinction between laws prohibiting discrimination against members of certain groups and affirmative action laws that provide special benefits to members of these groups is breaking down. Laws to protect members of different groups from discrimination are decried with increasing frequency on the basis that they will provide those groups with "special rights" or preferential entitlements. This characterization is used most frequently to describe the extension of the protection of antidiscrimination law to groups that have not previously been protected. The argument that antidiscrimination laws provide special treatment for members of the group that is, or may be, newly protected from discrimination is thus frequently used to oppose laws that prohibit discrimination on the basis of sexual orientation. For example, the opponents of municipal ordinances in Colorado prohibiting discrimination on the basis of sexual orientation succeeded in enacting Amendment 2 to the Colorado Constitution, a ballot measure that

10. U.S. CONST. amend. XIV, § 1. For the classic discussion of the prohibition as a matter of equal protection against governmental classification on the basis of certain characteristics, see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 353-56 (1949). "No fully coherent theory . . . has emerged" for defining those characteristics whose use is constitutionally suspect under the Equal Protection Clause, although such factors as immutability, discreteness and insularity, and a history of stereotyping and discrimination have been cited as significant in various Supreme Court opinions. See Peter J. Rubin, Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1148-49 n.15 (1987).

prohibited any such ordinances, largely through arguments that homosexuals should not be given special entitlements.¹¹ Similar tactics were used in the recent successful campaign to repeal by popular referendum Maine's law protecting individuals from discrimination on the basis of sexual orientation.¹²

Perhaps more troublingly, the language of special rights has begun to appear in *legal* discourse concerning laws that prohibit discrimination. In *Romer v. Evans*, in which Colorado's Amendment 2 was invalidated, the Supreme Court explicitly rejected this special rights rhetoric, concluding that "we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights."¹³ This conclusory language, however, was unsupported by clear reasoning. And despite it, the shift in rhetoric away from equal rights and toward special rights has now begun to seep into legal analysis of antidiscrimination laws. In particular, when the Sixth Circuit Court of Appeals recently upheld the constitutionality of a popularly-enacted Cincinnati City Charter amendment that prevents "the City . . . and its various Boards and Commissions" from prohibiting discrimination on the basis of "homosexual, lesbian, or bisexual orientation, status, conduct, or relationship,"¹⁴ it said that the now-proscribed laws against discrimination would have provided "special rights" and "special privileges."¹⁵

The idea that antidiscrimination law provides special rights is not limited to laws designed to protect homosexuals from discrimi-

11. The Amendment to the Colorado state constitution banning such ordinances was struck down on equal protection grounds by the U.S. Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996).

12. See, e.g., Susan Kinzie, PAC's *Moniker Angers Supporters of Gay Rights Law*, BANGOR DAILY NEWS (Bangor, Me.), Oct. 25, 1997, at B8.

13. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

14. CITY CHARTER OF CINCINNATI, OHIO, art. XII.

15. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296, 299-301 (6th Cir. 1997). The Supreme Court denied certiorari in October 1998. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 119 S. Ct. 365 (1998). In an opinion respecting the denial of the petition for certiorari, Justice Stevens wrote that the district court's characterization of the city charter amendment "'merely [to] remove[] municipally enacted special protection from gays and lesbians,'" created "confusion over the proper construction of the city charter." 119 S. Ct. at 365-366 (opinion of Stevens, J., joined by Souter and Ginsburg, JJ., respecting the denial of the petition for writ of certiorari) (quoting *Equality Found. of Greater Cincinnati*, 128 F.3d at 301). He argued that the meaning of the words used by the lower court "differs significantly" from a construction of the provision as "an enactment that 'bars antidiscrimination protection only for gay, lesbian and bisexual citizens.'" 119 S. Ct. at 366 (quoting Petitioners' construction of the amendment). Justice Stevens concluded that the "confusion" caused by what he characterized as these two different state-law constructions of the Cincinnati charter amendment "counsel[ed] against granting the petition for certiorari." 119 S. Ct. at 366.

nation. It has been used to describe the extension to other groups of legal protection against discrimination. For example, in response to a ruling by the United States Court of Appeals for the First Circuit that discrimination against the morbidly obese is sometimes prohibited under the Americans with Disabilities Act, a column in *Time* magazine decried the creation of a "new entitlement."¹⁶

This characterization of laws that prohibit discrimination is particularly remarkable because it is made against a background of familiarity with the operation of such laws. Antidiscrimination laws are not untested; their consequences are not unknown. Rather, antidiscrimination law is a familiar part of the legal landscape. It seems likely therefore that the special entitlement attack on laws that prohibit discrimination has power not merely because it may harness skepticism about affirmative action.¹⁷ The strength of this objection must also reflect some widely felt truth either about those antidiscrimination laws that people have already seen in operation or about the group to whom the law's protection has been or is proposed to be extended.

Understanding the appeal of the special-rights characterization thus requires an examination not only of the *theory* behind antidiscrimination law as it is understood by judges and legislators, but of its practical real-world *effects* on both those subject to it and those protected by it. These effects are important in understanding the reactions to new antidiscrimination laws, reactions both of people who are personally affected by the operation of antidiscrimination laws, and of those who have come into contact only indirectly and anecdotally with these laws' operation. Understanding the strength of the special rights rhetoric also requires an examination of people's attitudes toward and understandings of the characteristics of those who seek the law's protection. The perceived effects of a rule

16. Margaret Carlson, *And Now, Obesity Rights*, *TIME*, Dec. 6, 1993, at 96 (commenting upon *Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993)). Because the Americans with Disabilities Act requires employers in some circumstances to make "reasonable accommodation" for the disabled, it will sometimes directly mandate the provision to the disabled of special treatment. See Pamela S. Karlan and George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *DUKE L.J.* 1 (1996). Reasonable accommodation, however, was not the focus of the First Circuit's decision in *Cook*.

17. Obfuscation, however, clearly accounts for some of its effectiveness. Indeed, Colorado's Amendment 2 was actually written to prohibit "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" from forming "the basis of or entitl[ing] any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." See *Romer*, 517 U.S. at 624. The placement of "claim of discrimination" within a list that included "quota preferences" and other phrases that might suggest an entitlement to affirmative action appears to have been intended to obscure the meaning of the state constitutional amendment.

of nondiscrimination will vary with an individual's perceptions about the nature of the class it protects.

A systematic examination of the mechanisms by which antidiscrimination law operates — something that has not been undertaken before — reveals at least two distinct characteristics of the operation of the law that may result in a perception that antidiscrimination laws create special rights.

First, antidiscrimination law operates by prohibiting those subject to it from taking action with respect to certain individuals on the basis of their membership in one or another group. But the legal compulsion not to discriminate — although it is designed to ensure that members of a particular group are treated in the same way as all other individuals — does not by itself create a world in which the *impulse* toward discrimination is extinguished. The consequence of this is that law alone cannot in all circumstances guarantee equal treatment. Rather it can provide only a second-best solution. One unintended consequence of imposing a rule of nondiscrimination upon a world that still may have the impulse to discriminate is that many of those subject to the law's constraints are likely to feel as though they are required to provide special treatment to members of the protected group. A second, ironically, is that those individuals who are protected by the law are likely to feel that they receive *less* than equal treatment.

This suggests a fundamental limit on the ability of law alone to protect individuals from discrimination, and suggests that legal prohibitions of discrimination can work most successfully only when they are coupled with efforts to utilize other culturally influential tools to reform the attitudes that underlie the myriad human impulses to discriminate.

Second, because antidiscrimination law uses an imperfect legal system to deter and to punish acts of discrimination, it can do so only imperfectly. Transaction costs inherent in litigating questions of discrimination and costs associated with erroneous outcomes in such litigation may lead those subject to the law of antidiscrimination to act differently toward those who are the objects of the law's protection than they would toward anyone else. Again, one result of this second characteristic of the law may be that employers, landlords, colleagues, and the like will develop a sense that the law requires them to provide special treatment to members of the protected class while, again, members of the protected class will perceive that they are still treated less favorably than their peers.

This is a difficult problem to address, because some of these costs relate to the particular opprobrium attached to a finding of unlawful discrimination — opprobrium that is itself one of the goals of antidiscrimination laws. Others of these costs, however, may be addressed — at least in some measure — by rules designed to reduce the transaction costs involved in litigating claims of discrimination.

Finally, the special rights rhetoric may have force in part not because of characteristics of the law, but because of perceived characteristics of those who seek its protection. Indeed, there are many ways in which a failure to share the legislature's conclusion that members of a particular group are, in all morally relevant respects, similar to everyone else, can make a law prohibiting discrimination seem to require the provision of special rights. To the extent the special rights objection resonates because of beliefs of this kind, this problem can most effectively be addressed by integration and education, which may help to eliminate the most virulent forms of prejudice and break down barriers to recognizing our shared humanity.¹⁸

A. *Characteristics of Laws Against Discrimination: The Prohibition on Generalization*

1. *The Impulse to Discriminate*

Laws against discrimination operate by prohibiting decision makers from making decisions based on generalizations regarding particular characteristics. Such generalizations — which in this context are called “stereotypes” — are made a forbidden basis for certain decisions. Employers, for example, are required to base their hiring decisions *not* on stereotypes about members of different racial groups, but upon an assessment of the relevant qualities of each individual applicant.

This actually means that the characteristics whose use is forbidden are treated *differently* from most other human characteristics. We routinely and necessarily make decisions on the basis of generalizations about various characteristics of the people we meet. Indeed, conducting the interactions that make up our lives would be

18. Of course there may be additional reasons for the staying power of the “special rights” rhetoric. For example, some may believe that antidiscrimination law leads inevitably to affirmative action, set-asides, and quotas which many people view as a provision of special rights or entitlements. For others, the language of entitlement may reflect nothing more than resentment against the disfavored class, and an attempt to create a socially acceptable argument against antidiscrimination laws.

an overwhelming and unmanageable task without the ability to do exactly this. Although individuals as a general matter are permitted to draw inferences about others based on generalizations about all kinds of characteristics, when an antidiscrimination law is passed suddenly one characteristic can no longer permissibly be used in decisionmaking, even when it may, in a particular social circumstance, form the basis for an accurate generalization.¹⁹ This is the insight that led Professor Strauss to argue that antidiscrimination laws actually *draw attention to* ethnic background and do not enforce a regime of “colorblindness.”²⁰

Professor Strauss thus posited that laws prohibiting discrimination on the basis of race — and I will in general use for purposes of illustration the archetypal example of laws prohibiting discrimination on the basis of race — indeed provide a type of special right:²¹ those protected by the law are exempted from treatment that is based on generalizations about certain of their characteristics.²²

But the significance of this feature of the law goes far beyond this because the law does not, because it cannot, eliminate the impulse to discriminate, to act on the basis of stereotypes. It does only what it can do: it stops the discriminatory impulse from being given effect.

To the extent that a person believes, despite the passage of a law against discrimination, that a racial generalization is accurate, compliance with antidiscrimination law will make that person feel that members of the protected group are receiving special treatment. And, ironically, as long as that belief in the accuracy of a racial generalization persists, the individual against whom discrimination is prohibited is unlikely to receive — or to feel as if she is receiving — genuinely equal treatment. Rather she is likely to be subjected to a particularly searching kind of scrutiny.

These effects are independent of the content of the racial generalization. They do not depend necessarily on a belief in the inferiority of one or another group and are not necessarily a reflection of resentment about the necessity for providing equal treatment to individuals one may think are unequal. To see the mechanism by

19. See David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 113 (1986).

20. See *id.*

21. Cf. *id.* at 117 (under antidiscrimination law, the characteristic of race is given “special treatment”).

22. Cf. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (court deciding a child custody matter cannot consider genuine potential harm to the child that it would otherwise consider when that potential harm arises from private racial prejudice concerning the remarriage of the child’s mother to a man of another race).

which these effects occur, an example involving a racial generalization, but no racial animus, will be useful.

2. *Discrimination Based on Accurate Generalizations: The Elevator Operator*

After the election in 1992 of many new African-American Members of Congress, there was an allegation that congressional elevator operators discriminated against one of them because she was an African-American woman. Congressional elevator operators are charged with guarding the Members-only elevators at the House of Representatives. They are supposed to know who all the Members of Congress are, and to permit only Members on the elevators. They are supposed to deny entry to anyone who is not a Member.

This is a difficult job, requiring the elevator operators to remember 435 different faces. Cynthia McKinney is a black congresswoman first elected in 1992. (Her black-majority electoral district was subsequently struck down by the Supreme Court in *Miller v. Johnson*.²³ In 1996 she was re-elected from a new, white-majority district that took its place.²⁴) After coming to Congress, her entry to the Members' elevator was repeatedly challenged — indeed, she was similarly challenged by Capitol garage attendants and police officers.²⁵ She charged that these challenges were the result of discrimination.²⁶

And maybe they were nothing more than a direct result of conscious racism. But we can imagine an elevator operator who would say — in good faith — that he was not racist. He did not remember Congresswoman McKinney, but sometimes he doesn't remember other Members of Congress either. He says he treats everyone equally. And maybe he does. (Indeed, we can imagine him saying

23. 515 U.S. 900 (1995).

24. See *Congressional Race Surprise: Blacks Win Despite New Districts*, NEWSDAY, Nov. 11, 1996, at A6.

25. See Bill Turque, *The Class of '92*, NEWSWEEK, Nov. 29, 1993, at 32, 35-38 (describing Congresswoman McKinney's treatment); Maureen Dowd, *The New Women of Washington: Profiles of Women in Powerful Political Positions*, COSMOPOLITAN, Oct. 1994, at 216, 220 (same).

26. See *TV Monitor*, THE HOTLINE, Aug. 26, 1993 (quoting Congresswoman McKinney's response on the Aug. 26, 1993, edition of *Good Morning America* to a question about whether she felt "pigeonholed" by being an African-American woman in Congress) ("I just have a problem gaining recognition, not from my colleagues, but from the support staff. Getting onto Members only elevators, gaining access to the Cannon House Office Building, getting even into committee meetings. The problem is one of having to defend one's presence on the Hill."); Turque, *supra* note 25, at 35 (describing Congresswoman McKinney's complaint to House Sergeant-at-Arms Werner Brandt).

to himself "whatever my racial views, if I want to keep my job I'd have to be crazy to discriminate against black Members of Congress.")

Yet Congresswoman McKinney's complaint is real. How can our elevator operator's vision that he provides equal treatment be squared with the reality that Congresswoman McKinney is *in fact* challenged as she enters the elevator more frequently than her white colleagues?

The answer may have to do with generalization. To begin with, we must examine the elevator operator's view of equal treatment. He lets on the elevator every Representative he remembers. But there's more at work here. He can't remember every Member of Congress. When he is unsure, he has to use other indicia that suggest to him whether the person is a Member or not. In the House Office Building in which he works, the percentage of black women is lowest among the Members of Congress. Immediately before the arrival of McKinney's class of 1992, there had been only twenty-six African Americans in the House; even afterward there were only forty.²⁷ Only ten of the 435 members were black women.²⁸ There is a higher percentage of black women in staff positions, and indeed, in the general population in Washington, than among the Members of Congress. Consciously or unconsciously,²⁹ this circumstance may lead our elevator operator to make race-based generalizations.

When the elevator operator is unsure about a white man in a suit, he may often take the risk of erroneously permitting him to enter the elevator. Some relatively high percentage of the time, he will have correctly permitted a congressman on, avoiding the embarrassment of asking him to identify himself. Undoubtedly he will also make a number of false positive assessments, permitting white men who are not Members to enter the elevator. Indeed, he may often *think* he recognizes the person, so that it may be someone he is sure is a congressman, but who actually is not. (Since not all Members of Congress know each other well, there may, for the same reasons, also be less likelihood that there will be complaints about these errors from other congressional passengers.)

27. See Stephen A. Holmes, *N.A.A.C.P.'s New Hope: Kweisi Mfume*, N.Y.: TIMES, Dec. 11, 1995, at B8.

28. See Laura B. Randolph, *Sisters in the House*, EBONY, Sept. 1994, at 20.

29. Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337-39 (1987) (articulating a cognitive psychological explanation for unconscious racism).

When the elevator operator is unsure about a black woman, however, he is mathematically more likely to be correct if he excludes her.³⁰ For similar reasons, he is unlikely to mistake a black woman who is not a Member of Congress for someone who is, and to admit her erroneously. And, he is more likely to hear complaints from other Members of Congress about his admission to the elevator of black women (even if he is correct every time).

Yet the only way to provide truly equal treatment for black women and white men would be to admit the black women about whom the operator is unsure in the same proportion as the white men about whom he is unsure.³¹

This is not likely to happen for several reasons. It may not even be possible. First, the system is supposed to prohibit admission of people who are not Members of Congress. The "false positives" admitted to the Members-only elevator are not authorized in the first place, so to require admission of additional people about whom the elevator operator is unsure would seem perverse. Even attempting to measure the false positives would be strange in light of the elevator operator's mission. And, as described above, the false positives may be unconscious, in that the operator may think he is admitting only Members of Congress. Simply instructing the elevator operator to ask for identification from everyone about whom he is unsure could still result in his asking black women for identification more often than white men or women. There is thus probably no way to replicate for black female Members of Congress the experience of white male Members of Congress.

Whether the discriminatory treatment is conscious or unconscious, whether it is based on actual probabilities or on distorted racist stereotypes, the law thus usually will be unable to alter in any immediate way an individual's impulse to discriminate. It usually will work only by preventing people from giving effect to their discriminatory impulses.

In light of the probabilities that (we have assumed for present purposes) have resulted in our elevator operator's discriminatory conduct, the most efficient way for him to avoid the charge of dis-

30. Professor Strauss has described discrimination on the basis of accurate generalizations about characteristics as "[r]ational discrimination," . . . a generalization of the economists' notion of "efficient discrimination." Strauss, *supra* note 19, at 108 (citation omitted). To avoid the possible implication — one clearly not intended by Professor Strauss — that in some circumstances racial discrimination might be acceptable as a normative matter, I have chosen to avoid this formulation.

31. Indeed, we have to count in this category also those men our elevator operator is sure are members of Congress but who, in reality, are not.

crimination is to memorize the black faces in Congress more carefully than the white ones. There are a relatively small number of black faces,³² and, although it will not stop him from incorrectly admitting a disproportionate number of white men to the elevator, the complaints of discrimination do not stem from these erroneous admissions.³³

From the perspective of the individual bound by the rule of antidiscrimination — in this case the elevator operator — the antidiscrimination command thus actually requires (in the presence of a mathematically accurate generalization) what will feel like the provision of “special treatment” for black Members of Congress on the basis of their race, the characteristic upon which discrimination is now prohibited.³⁴

At the same time, notably, from the perspective of the person against whom discrimination is now prohibited, even a rule of antidiscrimination will not guarantee equal treatment, since he or she will never receive the benefit of the doubt provided to people who belong to the majority group. Black Members may always be admitted to the elevator, but they will also always be more closely examined than Members who are not black.

Indeed, this would be true even if a supervisor ordered an alternative response to complaints from someone like Congresswoman McKinney — requiring the elevator operator to ask for identification even from the Members of Congress he recognizes. In addition, this would lead those who were already Members to feel that the complaints of minority Members of Congress had led to the destruction of part of the system of privilege that they long enjoyed. The black Members of Congress still would never receive the same treatment as had traditionally been given to (white) Members of Congress, *and* they would likely be faced with the additional burden of the resentment of some of their colleagues.

32. Although in our example there are not few enough, apparently, for him simply to remember them without some effort.

33. In fact, it appears that memorization of Congresswoman McKinney's face was indeed the way in which her complaint was addressed. *See* Dowd, *supra* note 25, at 221 (McKinney “had so many frosty exchanges with elevator operators who tried to steer her out of ‘Members Only’ elevators and guards who yanked her by the arm when she bypassed the tourists’ metal detectors, she had to ask the House sergeant-at-arms to give them her picture to study.”).

34. Antidiscrimination laws may be evenhanded, protecting people of all races from discrimination, but they provide what can be perceived as special treatment only for those who without the law would be victims of discrimination, in this case, the black Members of Congress. Since members of the racial majority are not ordinarily victims of discrimination, the law will have little effect with respect to them.

Note that the two effects I have described above — on the individual subject to the law and the individual protected by it — will occur whether the generalization upon which the decision maker would otherwise act is accurate (as it is in the case of mathematical probability facing the elevator operator) or not, so long as the person who would otherwise be discriminating *believes* his generalization is accurate. And indeed, the more accurate people *think* their race-based generalizations are — and thus the more justified their impulse to act upon those generalizations — the more strongly they will be inclined to feel that antidiscrimination law — which prevents their acting on these impulses — requires them to provide protected individuals with special treatment.

This suggests one basis for the view that antidiscrimination laws provide protected individuals with special treatment. It follows from the fact that law alone cannot immediately persuade people that race is not significant, and thus reflects one limit of the power of the law. Antidiscrimination law can prohibit acts of discrimination, but it can play only a limited role — essentially by communicating the message that society has deemed one or another characteristic irrelevant to a particular series of decisions — in removing the impulse to discriminate and in eradicating the views that lead people to have this impulse. Instead of creating a world without discrimination, antidiscrimination law superimposes a behavioral requirement upon a world in which, without the legal restriction, some people *would* discriminate. Law alone can only imperfectly replicate a world without discrimination.

3. *Discrimination Based on Distorted Stereotypes*

The dual effect of the persistence of the impulse to discriminate — the feeling that special treatment is being provided coupled with the feeling that equal treatment is not being received — is exacerbated to the extent that the racial generalization in which a decisionmaker believes but upon which he or she is forbidden to act relates — as racial generalizations, of course, most typically do — to a stereotype about the qualifications or abilities of members of the minority group. If people believe (even unconsciously) that discrimination itself with respect to some good is actually just, they will perceive antidiscrimination law to provide members of the protected group with unjustified deserts, i.e., special treatment.

Thus, for example, the persistent belief held by some people that African Americans are, as a general matter, not qualified to hold particular jobs or not likely to be responsible tenants, or that

women are not likely to take their responsibilities at work as seriously as men, may give rise to a consequent belief that the provision to a particular individual of something inconsistent with that generalization about the group to which he or she belongs — for example, a job or an apartment — is undeserved. If someone believed that a racial generalization that, for example, had previously prevented blacks from serving in a particular job, was completely accurate, he would view the presence of a black person in that job as provision of a special right. The very presence of that person in the workplace would seem, to someone who thought no African American could be qualified for the job, as visible evidence of special treatment.

At the same time, on a personal level, the persistent belief in a stereotype may lead members of the class that is legally protected from discrimination to feel resentment from and close scrutiny by those around them once they have obtained the good that cannot lawfully be denied them on the basis of race. The belief in the validity of a racial generalization or stereotype need not be complete for this effect to be felt. It will be present when a member of the minority group confronts a person who believes that there is *something* to a racial generalization, even if he believes that a particular individual member of a racial minority group may nonetheless be qualified for a particular job or benefit. Such a person may believe that the underrepresentation of members of one group within, for example, a class of jobs reflects some objectively measurable characteristic of members of that group. He may also believe, however, that one or another individual member of that group may, by his definition atypically, not share that characteristic.³⁵

Even when it exists only to this degree, the persistent sense that there is something about membership in a particular group that correlates in general with ability, say to do a job or to live peacefully and responsibly in a house, undoubtedly will contribute to a kind of close scrutiny of any member of that group who serves in that job or lives in that house, regardless of the fact that he or she was found qualified at the time of hiring or sale. The member of the minority group will likely feel that he or she is being singled out for unfair treatment. Similarly, the colleague, employer, landlord, or neigh-

35. This type of partial belief in the validity of a racial stereotype may also in part explain two well-known phenomena: racist argumentation prefaced with the statement that "some of my best friends" are members of the group being disparaged, and the persistence among members of majority groups of the view that there are "good" members of the minority who don't exhibit (or exhibit only weakly) the negative characteristics attributed to the minority group.

bor who harbors this view is likely to count the human imperfections of the minority group member as confirmation of his or her unfitness, noticing imperfections that are neither searched for nor remarked in others. Again, the minority group member will not get the benefit of the doubt extended to everyone else.

Indeed, the law may blunt the impact of the impulse to discriminate — and of the views that lurk behind it — only with respect to conscious decisions, and perhaps even then only with respect to the primary decision targeted by the law, for example, the initial decision whether to hire a person or to sell him property. If a person acts in a nondiscriminatory way *only* because of the law — that is, if his or her impulse to discriminate remains, but is not acted upon — he or she may not in subsequent interactions treat the protected individual the same as he or she treats members of other groups. He or she may discriminate not only in attitude but in substance as well. Those who are subject to the law may not perceive themselves to be intentionally discriminating because they may not even be conscious of providing differential treatment. Thus, yet a further result may be that any complaints about this type of differential treatment may be poorly understood, resented, or felt as yet a further demand for special treatment, rather than as an appropriate request to be treated equally.

Addressing these effects of the imperfect fit between antidiscrimination law and the goal of eradicating discrimination will be difficult. What must be addressed is not some technical problem of legal drafting, but underlying substantive beliefs. The effects of the remaining impulse to discriminate, even in the face of antidiscrimination law, highlight the importance of culturally reinforcing two distinct messages: In contexts where the impulse is based on mathematically accurate generalizations, only a belief in the importance of treating members of the minority group as individuals will counterbalance whatever force the special rights objection gets from the collision between impulse and legal command. In the more typical case where the impulse to discriminate has its genesis in a stereotyped generalization about, for example, ability to do a job, the message must be reinforced that race, gender, sexual orientation, and other similar characteristics are not relevant to the decision in question, the very conclusion that underpins antidiscrimination law in the first place.

This latter message has been blunted with the resurgent view that there are immutable racial differences in such important characteristics as intelligence. The publication, for example, of Charles

Murray's views, first in *The New Republic*,³⁶ and then in the best-selling book *The Bell Curve*,³⁷ contributes to an atmosphere in which it is acceptable once again to demean members of one racial or ethnic group as inferior to members of another. Similarly, the "Different Voice" school of feminist theory, which derives from the work of psychologist Carol Gilligan,³⁸ has played a role in reinforcing the view in our culture that there are immutable differences between men and women, many of which might, indeed, be relevant to ability to perform certain jobs.

Further, the celebration of "political incorrectness," a supposed backlash against a purported hegemony of liberal ideology, in fact has helped to remove the social opprobrium that was, for some period, attached to views that denied the essential equality of all human beings.

In this regard, antidiscrimination laws will work most successfully — and will garner the most support — only to the extent that they operate in tandem with other forces that reinforce the view within our culture that, first, because of the importance of treating as individuals members of groups burdened by negative stereotypes, the particular discrimination at issue is wrong, and that, second, the characteristic at issue is *in fact* not relevant to the decisions with respect to which discrimination is prohibited. The more accurate people *think* their race-based generalizations are (particularly those based on distorted stereotypes) — and thus the more justified their impulse to act upon those generalizations — the stronger will be their inclination to feel that antidiscrimination law provides the protected individuals with an entitlement to something that they don't deserve. Note, however, that to the extent that the effects I have described are the result of *accurate* generalizations that are based on the fact of disproportional racial representation in one or another setting, as, for example, in the case of our elevator operator, the most that can be hoped for is a sense that a higher value is served by avoiding racial generalizations. Education alone will be unable to mitigate completely the "special rights" effects. They will only dissipate to the extent that race no longer correlates with some relevant fact.

36. Charles Murray & Richard J. Herrnstein, *Race, Genes and I.Q. — An Apologia*, *NEW REP.*, Oct. 31, 1994, at 27.

37. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994).

38. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

B. *Imperfections in the Legal System That Adjudicates Claims of Discrimination*

There is a second characteristic of the law that may contribute to the strength of the argument that it provides those it protects with a special entitlement. One entitlement or right that antidiscrimination laws *do* undoubtedly provide to those they protect is the right to seek redress for acts of discrimination, usually through lawsuits or grievance procedures.³⁹ Since discrimination typically is wrought against those in the minority, even when antidiscrimination laws are evenhanded — that is, even when they are not written in terms of protecting members of a particular group — this tool for vindication of the right against discrimination is primarily one given to members of the minority.⁴⁰ Although it seems that this right to redress is not itself the special right of which opponents of antidiscrimination law complain — their language appears to be focused on what they claim must be provided to individuals under antidiscrimination law in the real world of, for example, the workplace, rather than on the once-removed world of the courtroom — the existence of this right to redress may create incentives for behaviors which they may perceive as the provision of special rights.

The availability of this tool — the remedy that ensures the vitality of the right not to be discriminated against — may cause those around a protected person to treat him or her differently than they otherwise would. The ancillary effects of the right to sue — or, perhaps even more importantly, anecdotal stories about these effects — may well play a crucial role in creating the impression that antidiscrimination laws provide special rights. And ironically, these same effects may well result yet again in the protected individual feeling that he or she is being treated differently from others, that he or she is in fact provided with different and less than equal treatment.

These unintended consequences of the law against discrimination demonstrate the limit of the power of the law along another axis. For just as the command of antidiscrimination law cannot remove the discriminatory impulse from within the people subject to the law, so the legal system by which antidiscrimination law is en-

39. See, e.g., 42 U.S.C. § 2000e-5 (1994) (setting out procedures for the enforcement of Title VII).

40. Cf. *Hunter v. Erickson*, 393 U.S. 385, 390-91 (1969) (noting that although a city charter amendment removed in an even-handed manner the City Council's power to address without the approval of a majority of the voters discrimination in housing on the basis of "race, color, religion, national origin or ancestry," "the reality is that the law's impact falls on the minority" because "[t]he majority needs no protection against discrimination").

forced can only imperfectly determine when a discriminatory act has actually occurred. There are costs associated with litigating claims of discrimination, and costs associated with the risk of an erroneous adjudication of those claims. These costs are inherently imposed by antidiscrimination laws (as some of them are by *all* laws) that rely on the legal system for their enforcement. These costs create incentives to behavior that are not described in the text of statutes that, by their terms, simply prohibit discrimination on the basis of one or another characteristic. Imperfections in the legal system's ability to adjudicate claims of discrimination cause the law — despite its straightforward language — ultimately to send a message more complex than the simple command of equal treatment.⁴¹

The legal system cannot precisely and costlessly assess the facts that give rise to disputes. Factfinders are not omniscient and human experience is complex. The legal system requires lines to be drawn between lawful and unlawful activity, but it is limited in its ability to draw lines against which conduct can be measured accurately and efficiently.

As trained lawyers we routinely assume away the imprecision and rough edges that are hidden by the judicial system. A judge or a jury makes a binary choice and its finding of fact — which may be arguable or even wrong — is used by the legal system inexorably to impose consequences. Although in addressing many substantive areas of law, law school trains lawyers not to be concerned with errors in deciding questions of fact, the possibility of such errors may be critically important *ex ante* in creating incentives in the real world, and, *ex post*, in determining whether members of society believe the laws under which they live are just and worthwhile.

In the case of antidiscrimination law, the imprecision of the law is heightened by the difficulty of proving or disproving the fact that lies at the heart of what is forbidden by the law, that an action was taken with a discriminatory purpose.⁴² The risk of an erroneous determination is also increased in this context — at least for many

41. Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 632 (1984) (distinguishing “decision rules” designed to guide judicial conduct from “conduct rules” designed to guide public behavior and describing the way in which a decision rule may “as a side effect” send “a normative message” different from that sent by the underlying conduct rule).

42. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993) (“Title VII . . . award[s] damages . . . only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race.”); see also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (holding that the Equal Protection Clause prohibits only intentional discrimination).

Americans — by the kind and degree of opprobrium attached to a finding that one has discriminated.⁴³

As a consequence of the difficulty of proving or disproving intent, the transaction costs involved in defending discrimination suits may lead those required not to discriminate to act in ways that they perceive as providing something extra to members of the protected class.⁴⁴ Erroneous suits could be brought maliciously, or they could be brought because an employee, to use the workplace example, erroneously concludes that some disadvantageous treatment was based on race. A rational employer will try to protect itself from the costs of such erroneous suits. This may lead employers to treat members of a class protected by an antidiscrimination law with kid gloves, or, if the relationship starts to sour, to take special precautions in documenting the interactions between management and the protected employee. The possibility of erroneous claims may at the same time make employees subject to the law against discrimination resentful, making them feel that protected individuals have a weapon — the claim of discrimination — under which they are constantly threatened.

Third parties who perceive the employer's defensive actions — or who hear anecdotes purporting to describe such actions⁴⁵ — may get the impression that protected employees are provided with special treatment: they may appear to be exempt from some of the normal rules of the workplace, or the close scrutiny under which

43. Of course the strength of the stigma attached to a finding of intentional race or gender discrimination — a stigma that relies for its vitality in part on strong antidiscrimination laws — is a remarkable and positive reflection of the strength of the belief in antidiscrimination held by most Americans.

44. A similar effect may be involved in other contexts, for example where doctors face potential liability for medical malpractice. See, e.g., Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. ECON. 353, 354 (1996) (assessing whether the costs of defending malpractice claims and the "fear of reputational harm" may lead doctors "to administer precautionary treatments with minimal expected medical benefit").

45. At least one commentator has suggested that employers will actually retain employees they would rather fire in order to protect themselves from lawsuits brought under employment laws including those prohibiting discrimination. See WALTER OLSON, *THE EXCUSE FACTORY* 290 (1997) (contending that employers will "hold off taking action against problem employees" until they can "depersonalize dismissals" by undertaking them in the guise of "a purely economic layoff," what the author describes as "deadwood elimination by way of forest fires"). I know of no evidence that this practice occurs or that, if it does occur, it is widespread. Nonetheless, people's attitudes may well come to reflect a popular belief that such conduct is taking place. Cf., e.g., Howie Carr, *MCAD Report is Enough to Cause Emotional Distress*, THE BOSTON HERALD, June 12, 1998, at 4 (popular conservative columnist contending that it is extremely difficult to "fire an incompetent member of a politically protected class").

they are put may create the impression that perhaps they do not legitimately belong in the company's workforce at all.⁴⁶

By the same token, the protected employee who finds herself in such a circumstance is likely to feel that she is not receiving equal treatment. She may perceive that she is being treated differently because of the fear of litigation. Some women report, for example, that unlike their colleagues who are men, they never find themselves alone in a closed-door meeting with a particular male superior.⁴⁷ If an employee's interactions with management are more frequent or are more carefully documented than those of other employees, she may also perceive that she is subjected to stricter scrutiny than her colleagues. In addition, the employee may become aware of simmering resentment against her. Not having sought any kind of special treatment, she may be unaware of ways in which the employer or her colleagues think she is being treated specially. Because the resentment will have no other apparent source, she may attribute it to sexism. (And, to the extent that her colleagues attribute her special treatment to her gender, her perception will not be entirely wrong.)

Again, and perhaps unsurprisingly, each of the effects I have identified with respect to the employer, the employee, and her colleagues, will be exacerbated enormously to the extent that the employer or the employee's colleagues do in fact harbor race- or gender-based stereotypes. Scrutiny designed to defend against claims of discrimination may dovetail with precisely the type of strict scrutiny, the absence of any benefit of the doubt, that I described above. At its worst, the result could be a workplace in which the woman or minority employee feels beleaguered.

It may also be that the type of "special" treatment that may be given by employers to members of protected classes in order to pre-

46. Here I describe the effects that fear of litigation may cause at the micro level. At the macro level it may also be that fear of litigation and the costs of defending a suit under Title VII may be leading employers to hire in a way that ensures racial balance in their work force. In this way, they may seek to avoid disparate impact litigation. This is the sense in which some may understand antidiscrimination law to lead inevitably to affirmative action. See *supra* note 18; Schacter, *supra* note 6, at 293 (arguing that the special rights rhetoric deployed in opposition to gay civil rights laws is intended to convey the message that such laws will lead, among other things, to job quotas). My impression, however, is that the special rights objection to antidiscrimination law does not involve anything so straightforward as the creation of quotas for members of the protected class. It appears, rather, to suggest primarily that protected individuals will be entitled under such laws to special treatment of some kind within, for example, the workplace.

47. Cf., e.g., *World News Tonight with Peter Jennings* (ABC television broadcast, Feb. 27, 1998), available in LEXIS, Nexis Library, Transcript No. 98022705 (statement of Professor Vicki Schulz) (describing a company "that will not allow its male supervisors to give evaluations to female subordinates behind closed doors without a lawyer present").

empt any claim of discrimination may be wrongly perceived in actions in which the female or minority employee is rewarded on the merits, when another employee is not. Belief that this kind of behavior is taking place might make those members of the unprotected group who have not been selected for the benefit in question (say a choice assignment) feel better about the way that they have been treated. A decision on the merits that favors a minority employee thus may be rationalized away as a reverse racial preference — a provision of a special right compelled by antidiscrimination law.⁴⁸ In this regard, it may be difficult for a member of a minority group ever to receive appropriate recognition of her achievements.

To the extent this second group of special rights effects is caused by antidiscrimination laws — and to at least some extent belief in these effects seems to be rooted more in urban legend than in fact⁴⁹ — it may be even less remediable — whether through changes in the law or through extra-legal education — than those caused by the persistent belief in race- or gender-based generalizations. Although a breakdown of racial stereotyping doubtless would ease some of these effects, so long as there are costs associated with litigation and a finding of liability, they are likely to persist.

As a first step, additional empirical research is needed into whether and to what extent employers are taking defensive actions in dealings with employees from protected classes. Much of the evidence of such behavior seems to be anecdotal. If these consequences are less pervasive than people think, publicizing that fact may help dampen these “special treatment” effects.

To the extent such behaviors do occur, the employer *could* eradicate some of these problems by treating *everyone* as it treats its protected-class employees, but this is extraordinarily unlikely. The costs — financial and human — would be enormous. It would require a complete transformation of the nature of the workplace and of the employer-employee relationship. Indeed, it is possible that such a transformed workplace, one in which all interactions are carefully documented, etc., might actually be impossible to main-

48. Cf. *Interview — Affirmative Action: Don't Buy the Hype*, LEGAL TIMES, Apr. 10, 1995, at 18 (Interview with Christopher Edley, Associate Director, Office of Management and Budget, Mar. 31, 1995) (observing that when a woman is selected from among 10 applicants for a job, each of the unsuccessful male applicants may conclude that he was a victim of reverse discrimination — and further observing that, indeed, each may be so told by the person who did not hire him if that person concludes this would be easier than telling the truth — even though, had the woman not been hired, only one of them would have gotten the position she was selected to fill).

49. See *supra* note 45.

tain simply as a matter of human nature. And, of course, just as we saw before in the elevator operator example, the woman employee or the member of the racial minority group would *still* not receive the kind of treatment employees had received prior to the institution of the prohibition on discrimination.

Reducing the costs of litigation — for example through the use of systems of alternative dispute resolution — might of course be helpful in some degree. Shifting the burden of proof, too, could reduce these effects, but only at an unacceptably high cost. To continue with the example of employment, once the law prohibits discrimination, the burden of proof regarding unexplained employment actions must lie on one party or the other. At least with respect to race and gender, as recently as 1991 Congress, in an act signed by President Bush, decided that the risk that discriminatory intent lay behind employment actions that had a disparate impact on members of a particular group was great enough to justify placement of the burden of producing a non-discriminatory justification on the employer.⁵⁰ That judgment seems right. The alternative would not make the burden lighter. It would just impose the cost on some who have actually suffered discrimination, leaving more cases of discrimination unredressed, and rendering the law a weaker deterrent of discriminatory action.⁵¹

It also might be useful for proponents of antidiscrimination laws to try to make sure that laypersons understand more clearly the sources of fallibility in the legal system — that there are costs involved in proving the human state of mind, and that the legal system is inherently incapable of perfect accuracy in determining this question. But this would have as a concomitant effect some reduc-

50. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (codified at 42 U.S.C. § 2000e-2 (1994)) (overturning *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)). Of course, Title VII does not directly require race-based hiring to prevent a disparate racial impact. Employers may use any race-neutral hiring policy that is a business necessity even if it has a disparate racial impact on the composition of the employer's work force.

51. The risks of erroneous determinations involved in litigation — coupled with anecdotal evidence that juror sympathy results in indefensible verdicts in favor of plaintiffs — and the inefficient incentives they create are sometimes put forward to justify proposals for the reform of tort law generally. See, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION* 152-66 (1991) (arguing that broad rules of admissibility can mislead juries into incorrectly imposing liability). Although there may be particular procedural features of the legal system that increase the likelihood of an erroneous verdict and that might be modified, some imperfection is inherent in our system of permitting a human jury to make determinations of matters of historical fact, such as intent, that may give rise under various substantive laws to a finding of liability. (And indeed, proposals for the reform of the legal system frequently appear to involve little more than veiled arguments — perhaps ones too objectionable to be made openly — that the costs of that system outweigh its benefits. See, e.g., *id.* at 315-16.)

tion in the deterrent and punitive value of judgments of liability and of the law itself.

C. *The Perceived Character of the People Within the Protected Class*

Finally, it is essential to explore one additional explanation for some of the success of the special rights attack on antidiscrimination laws. This is the possibility that, to some extent, people are receptive to the idea that antidiscrimination law extends special rights to members of particular groups, not because of something about those laws, but because of some widely shared perception about members of the particular groups to whom the protection of antidiscrimination law has been or is proposed to be extended. Although most people who articulate the special rights objection argue at the same time that they *oppose* discrimination,⁵² some do not. It may be that some people view certain groups that antidiscrimination law seeks to protect as *morally unworthy* of protection against discrimination. They may believe that individuals who share one or another characteristic are not fit to be full and equal members of society. As a consequence, these people may understand the adoption of antidiscrimination laws to confer a special right in the sense that those laws' protection is undeserved.

This perception probably plays a substantial role in sustaining the resonance of the special rights message. Indeed, those who argue that laws that prohibit discrimination against homosexuals actually provide special rights have sometimes argued that this is *because* homosexual conduct is disgusting or immoral, and that it therefore forms a *proper* basis for discrimination.⁵³ Much of the objection to laws prohibiting discrimination on the basis of sexual orientation of course comes from those who, for religious or other reasons, believe that homosexuality is sinful, morally repulsive, or disgusting.

52. See, e.g., Second Presidential Debate Between President Bill Clinton and Senator Bob Dole (Oct. 17, 1996) (statement of Senator Dole) (transcript available in LEXIS, Nexis Library, News Group File).

53. Thus, a proposed Washington state initiative that would have prohibited discrimination in employment against homosexuals on the basis of sexual orientation — an initiative that was defeated in 1997 — was opposed at least by some on the ground that it provided “a special right” because “no one has the right to immunity from disapproval or rejection based on character or conduct. You are not protected from being denied services, housing or employment because someone . . . finds your conduct disgusting or immoral.” Larry Rambousek, Letter to the Editor, *Defining Gay Rights*, THE COLUMBIAN (Vancouver, Wash.), Oct. 24, 1997, at B8.

Similarly, another group for whom protection against discrimination has been described as a special entitlement, the morbidly obese, are also undoubtedly widely viewed with disgust by members of our society. Indeed, numerous studies reveal that the public has feelings of "repulsion and disgust" for the obese.⁵⁴

To some extent, the view that members of certain groups are undeserving of protection against discrimination because they are immoral or disgusting may depend upon (although it is of course not fully explained by) a conclusion that they are responsible for their own inclusion in the disfavored category, that membership in the group at issue is the result of a volitional act. Thus, opponents of gay rights argue that homosexuals have chosen a sexual preference — despite the substantial scientific evidence to the contrary⁵⁵ — or that what is objectionable about homosexuals is the voluntary sexual conduct in which they engage.⁵⁶ In this regard, these objections may, at least superficially, appear to reflect the traditional view that one of the signs that discrimination is impermissible is when it is directed against characteristics that, like race, are immutable.⁵⁷

But the deeper objection seems to be to the *character* of the disfavored people themselves. For example, in upholding the Cincinnati City Charter amendment that prevents the City or any of its boards or commissions from prohibiting discrimination against homosexuals and bisexuals on the basis of sexual orientation, the United States Court of Appeals for the Sixth Circuit described as a

54. Jayne B. Korn, *Fat*, 77 B.U. L. REV. 25, 64 (1997) (quoting Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97, 109 (1994)).

55. See e.g., Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817-21 (1984); see also National Conference of Catholic Bishops' Committee on Marriage and Family, *Always Our Children: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers*, reprinted in NATIONAL CATHOLIC REPORTER, Oct. 10, 1997, at 9 ("Generally, homosexual orientation is experienced as a given, not as something freely chosen.").

56. See *supra* note 53; cf. 10 U.S.C. § 654(b)(2) (1994) (codifying the Department of Defense's "Don't Ask/Don't Tell" policy which requires the discharge of any member of the military service who merely "state[s] that he or she is a homosexual or bisexual" purportedly because of a rebuttable presumption that such a person "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts").

57. Of course, immutability has never been the sine qua non of antidiscrimination law. For example, discrimination on the basis of religion does not target an immutable characteristic. By the same token, discrimination against conduct is not inherently immune from legal proscription. One can readily imagine, for example, a prohibition on discrimination against those who participate in particular religious conduct that members of the majority find disgusting or immoral. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-36 (1993) (striking down law "targeting" practice of animal sacrifice by members of the Santeria religion).

"special privilege[] and preference[] . . . the legally sanctioned power [of homosexuals protected by antidiscrimination laws] to *force* employers, landlords, and merchants to transact business with them."⁵⁸ The implication is clear that it would be eminently rational to want not to transact business even at arm's length with a homosexual person. The impression is palpable that one could oneself become soiled or tainted in some way by such contact, and there is no suggestion that this is because of voluntary homosexual conduct, rather than the status of the other person as a homosexual.

The idea of immorality and the potential for corruption is a fascinating component of people's motivation to discriminate against members of one or another group. It was most obviously present in the anti-Jewish ideology of Nazi Germany, which viewed Jews as alien vermin who had infected and could destroy the otherwise pure German nation.⁵⁹ But it is a part of the history of American discrimination on the basis of race as well. Thus, although it is difficult for us today to imagine it, during the period before *Brown v. Board of Education*⁶⁰ one of the strongest bases for the view that segregation should be preserved was the perceived moral corruption of African Americans,⁶¹ and some sense that, as a consequence of this, contact with them could corrupt or contaminate white people.

A description of this sense can be discerned in the 1896 dissenting opinion of the first Justice Harlan in *Plessy v. Ferguson*.⁶² He wrote that the "separate but equal" laws that he would have struck down "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."⁶³ Such laws, he concluded, reflected concern about "the possibility that the integrity of the white race may be corrupted . . . by contact on public highways with black

58. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296 (6th Cir. 1997) (emphasis added).

59. Thus, for example, Heinrich Himmler told SS leaders in 1943 that "[w]e had the moral right, we had the duty . . . to destroy this people We have exterminated a bacterium because we do not want . . . to be infected by the bacterium and die of it." 3 *NAZISM 1919-1945*, at 1200 (J. Noakes & G. Pridham eds., 1988). Similarly, Hans Frank, the Nazi German Administrator of annexed Polish territory stated that Jews "were a lower species of life, a kind of vermin, which upon contact infected the German people with deadly diseases." ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 16 (1986).

60. 347 U.S. 483 (1954).

61. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988) (identifying immorality as one of the traditional negative images of African Americans).

62. 163 U.S. 537 (1896).

63. 163 U.S. at 560 (Harlan, J., dissenting).

people.”⁶⁴ He concluded that, consistent with their proponents’ view of the “degraded” or tainted nature of African Americans, the purpose of such laws was the “humiliati[on of] citizens of the United States of a particular race.”⁶⁵

The same view is described in the Court’s opinion in *Brown v. Board of Education* itself, which speaks of a stigma wrought by segregation so profound that it may be difficult to imagine in our current historical circumstances. There the Court wrote that “[t]o separate [schoolchildren] . . . of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community *that may affect their hearts and minds in a way unlikely ever to be undone.*”⁶⁶

An example from outside the legal sphere may make the case even plainer. One can see the *popular* strength of this sense of disgust as late as 1947 in the reaction of many white spectators to the appearance of Jackie Robinson, the first African-American Major Leaguer, on the same *baseball diamond* as white players. Their conception of black people was reflected in the comments of members of the family of Robinson’s Brooklyn Dodger teammate Pee Wee Reese who expressed the view that, by playing shortstop next to a black second baseman, Reese was “in danger of being contaminated.”⁶⁷

This kind of emotional sense of the immoral or disgusting nature of the members of the group that seeks the protection of the law — and of the risk of contamination and corruption they represent — may play at least some role in the perception that, when they seek protection from discrimination, they seek an unjustified, and thus special, right. Ironically, to the extent that it does, the resonance of the special rights argument is actually evidence of precisely the kind of irrational prejudice that can — as in the case of race — *justify* in the first place a prohibition on discrimination.⁶⁸

Some individuals may hold a somewhat weaker version of the view I have just described. An individual may believe that mem-

64. 163 U.S. at 562 (Harlan, J., dissenting).

65. 163 U.S. at 560, 563 (Harlan, J., dissenting).

66. *Brown*, 347 U.S. at 494 (emphasis added).

67. See JULES TYGIEL, *BASEBALL’S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* 193 (expanded ed. 1997).

68. See *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting that strict scrutiny of certain classifications is justified because “prejudice against discrete and insular minorities” may interfere with the ordinary operation of the political process on which members of such minority groups could otherwise rely for protection); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 731-40 (1985) (arguing that “prejudice” is the key to determining which groups require protection from discrimination).

bers of a particular group are not entitled to full membership in society without necessarily believing that he or she will be corrupted by them. To make this more concrete, imagine you think that gamblers, prostitutes, and homosexuals are all "undesirables" in the same way, and that, consequently, you don't want to associate with any of them.⁶⁹ You would not have to believe that you could be contaminated by these people to believe that giving them protection from discrimination would be undeserved.

And, while some who don't share the normative conclusion about gay men and lesbians reflected in laws prohibiting discrimination against them would doubtless argue that discrimination against them should be permitted, to others a disadvantageous decision made with respect to a gay person may not even be understood as "discrimination" — which may connote a normative judgment that such action is not just — because it treats the disadvantaged person *similarly* to those who are similarly situated.

To go back to our gamblers, prostitutes, and homosexuals example, one who viewed these people as objectionable might not think of a decision not to do business with them as "discrimination," because it would be, in his or her view, the *appropriate* way of treating individuals who have the characteristics these groups share. More important, at least from the standpoint of this Essay, a law prohibiting discrimination against homosexuals might be perceived by such a person to provide them (unlike members of similar groups, prostitutes and gamblers) with a kind of special right, indeed, with something that would seem very much like affirmative action. For until a person shares the conclusion that gay people are the same in all relevant respects as everyone else entitled to full membership in society, the command of antidiscrimination contained in the law may actually force him or her to depart from what he or she perceives as a rule of neutrality with respect to homosexuals.⁷⁰

69. See, e.g., VA. CODE ANN. § 4-37(a)(2)(c) (Michie 1958) (codification of a 1956 law providing for the revocation of a bar's liquor license if it should become a "meeting place" for, *inter alia*, "drunks, homosexuals, prostitutes . . . [or] gamblers").

70. To the extent that one felt that homosexuality rendered a person unfit only with respect to particular public or private goods or services — marriage, say, or employment as a schoolteacher — one might see the provision of special rights precisely in the protection from discrimination granted with respect to those particular goods and services.

The protection of antidiscrimination law may also seem undeserved in a sense related to that described in the text: the sense that it is an unnecessary response to a problem that is not adequately pervasive or important to warrant the same legal prohibition that has been adopted with respect to race- and sex-discrimination. To one who held this belief, the law might seem "special" in the sense that it amounts to "special interest" legislation, rather than legislation that serves a broader, public interest. The idea of the newly protected group as a "special interest" also may dovetail with the prejudiced views about the group described in the text. In this regard, see, for example, Justice Scalia's remarkable dissent in *Romer* where

The Supreme Court in *Romer* appears to have understood the "special rights" objection to laws prohibiting discrimination against homosexuals as the reflection of a view that, because of something in their very nature, gay men and lesbians did not deserve protection from discrimination. The Court said

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. . . .

. . . .

. . . The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies. . . .

. . . [E]ven if, as we doubt, homosexuals could find some safe harbor [from discrimination] in laws of general application [prohibiting "arbitrary discrimination"], we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.⁷¹

Although the Court purported not to make any judgment about discrimination on the basis of sexual orientation *per se* — purporting instead to apply the rational basis scrutiny that would have been applied to a similar discrimination wrought against any group⁷² — the conclusion included in the Court's quoted discussion that Amendment 2 in *repealing pre-existing antidiscrimination laws* ("withdraw[ing] . . . specific legal protection"⁷³) removed protection

he said that "those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities" — he mentions "New York, Los Angeles, San Francisco, and," antilimactically, "Key West" — "have high disposable income," and "possess political power much greater than their numbers, both locally and statewide." *Romer v. Evans*, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting); *see also* 517 U.S. at 647 (Scalia, J., dissenting) (referring to "the geographic concentration and the disproportionate political power of homosexuals"); 517 U.S. at 652 (Scalia, J., dissenting) (arguing that the decision favoring laws prohibiting discrimination on the basis of sexual orientation "reflect[s] the views and values of the lawyer class from which the Court's Members are drawn"). These characterizations — of cosmopolitanism, wealth, and disproportionate power — have unfortunate resonance with those that have historically been used by antisemites to describe Jews.

71. *Romer*, 517 U.S. at 626-27, 631.

72. *See Romer*, 517 U.S. at 632-36.

73. *Romer*, 517 U.S. at 627.

that was *deserved* (i.e., “safeguards that others enjoy . . . [,] protections [that are] taken for granted by most people either because they already have them or do not need them”⁷⁴) belies that claim. It suggests that the Court understood the special rights objection to be an objection to the normative conclusion that homosexuals are entitled to protection from discrimination. The Court’s rejection of the special rights argument appears to reflect its own conclusion that, as a normative matter, gay men and lesbians are indeed entitled to such protection.

The special rights objection undoubtedly obtains much of its salience from normative beliefs about the justice of protecting the group in question from discrimination. This connection may help explain an apparent paradox: traditionally structured antidiscrimination laws that protect gay men and lesbians are criticized for providing “special rights,” language of disapproval most commonly associated with affirmative action provisions. At the same time, the Americans with Disabilities Act (ADA),⁷⁵ an antidiscrimination law that has an unusual feature requiring “reasonable accommodation” for people with disabilities, that is, actually requiring the disabled to be directly provided with special treatment, appears nonetheless to be more uniformly (albeit not universally) accepted as a “traditional” antidiscrimination law, a law designed to provide equal treatment.⁷⁶ This is perhaps because, as between these two protected groups, the disabled are more widely thought deserving of legal protection from discrimination.

Finally, an even weaker version of the beliefs I have described about the nature of homosexuality is possible, one that would animate yet a different view that may be present to some extent in the rhetoric of special rights. This is the view that one would not oneself discriminate on the basis of sexual orientation, but that it would provide gay people with a “special right” to require others to act in the same way.

This type of rhetoric — I wouldn’t do X, but I wouldn’t deny someone else’s right to — is, at least of late, unfamiliar in the antidiscrimination arena. It is more typical of discourse about civil liberties. Classically we hear people say “I wouldn’t get an abortion

74. *Romer*, 517 U.S. at 631.

75. 42 U.S.C. §§ 12,101-12,213 (1994).

76. Cf. Karlan & Rutherglen, *supra* note 16, at 40 (concluding that “reasonable accommodation” under the ADA is “affirmative action” but that “the affirmative action involved in reasonable accommodations” under the statute “can readily be distinguished from impermissible discrimination”).

myself, but I wouldn't deny someone who felt differently the right to get one." This rhetorical structure reflects a conclusion that the activity — deciding whether to terminate a pregnancy or deciding whether to discriminate on the basis of sexual orientation — has some preferred status, despite the speaker's own conclusion that she should not herself engage in it.

In this perspective, the provision of a right against discrimination might seem "special" because it interferes with what one might view as a more important right not to associate with those who seek the law's protection. The idea that one would not oneself discriminate, but that others should be protected in their decisions to do so, reflects an incomplete belief that the group seeking the law's protection against discrimination (e.g., homosexuals) is analogous in relevant respects to those groups that have archetypally been understood to deserve the protection of antidiscrimination law (e.g., African Americans). Indeed similarly, before society had truly internalized the belief that race was not relevant to the propriety of an individual's full participation in the life of the community, the view held substantial sway that a (white) individual's right not to associate with (black) people on the basis of their race should significantly limit the scope of antidiscrimination law even in the public and commercial spheres.⁷⁷

To the extent the special-rights view is based on a sense that members of a particular group are alien, disgusting, and therefore unworthy of protection, the weapon most likely to weaken it is actually the open integration of members of that group into broader society. Ending the insularity of groups the majority finds degraded can undoubtedly break down the sense that interaction with members of these groups will somehow taint members of the majority. The same is true of those less virulent forms of this belief that a group's members are different in a fundamentally relevant way from others who are entitled to participate fully in society. There is historical evidence that this works. For although there is undoubtedly still anti-black prejudice in the United States, since the adoption in the early 1960s of laws prohibiting racial discrimination and, indeed, the adoption in some quarters of affirmative action plans designed precisely for purposes of racial integration, it is at least clear that the view that African Americans are inherently degraded

77. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (stating that only black schoolchildren's right to associate with white school children could justify the Court's segregation decisions, but "integration forces an association upon those for whom it is unpleasant or repugnant").

or corrupt in some infectious sense is no longer widely held. Nor does one normally hear, at least in recent years, that African Americans ought to be excluded from the social and economic life of the country. Nor indeed does one normally hear that African Americans as a class can properly be excluded on the basis of their race from any avenue of public or commercial life simply to protect the associational rights of others.

III. CONCLUSION

That there are some perspectives from which antidiscrimination law will appear to provide protected individuals with "special" treatment should not be mistaken for a conclusion either that antidiscrimination law has lost its value or that it may appropriately be treated under current doctrine as constitutionally suspect. In fact, each of the characteristics I have catalogued that may lead people familiar with antidiscrimination laws to view them as providing special rights demonstrates the continued need for such laws: The first characteristic — that law operates upon action, not impulse — is only significant where the impulse to discriminate remains strong. The second, which is rooted in the costs of litigating antidiscrimination suits, requires that such claims be plausible, and that a judge or jury might easily be persuaded that a mistaken or wrongful claim had merit. This, too, depends upon the continued widespread presence of discrimination within society.⁷⁸ Finally, the third reflects prejudice, a normative belief that discrimination is appropriate. The presence of such prejudice itself demonstrates the continuing need for a law prohibiting discrimination.

Indeed, the reality that, even in the face of discrimination, a law to prohibit it may have characteristics that can result in the provision of what may seem like special treatment illustrates the limited utility of the equal rights/special preferences distinction the Court has used until now for assessing laws' compatibility with the command of equal protection. What is needed instead is an approach that focuses on the characteristics and operation of the particular law at issue: In what way is it said to require the provision of special treatment? Is this a primary or incidental effect of the law? What injury does the law allegedly inflict? What purpose does it advance?

78. Thus if, for example, a law was passed prohibiting discrimination against people born on odd-numbered days, no one would suggest that the law provided the protected individuals with special rights in the second way I have described because any claim that they brought that they *were* discriminated against on the basis of day of birth would be most implausible.

In this regard the "special rights" label obfuscates more than it clarifies, and has more power as a conclusion than as a tool of analysis. Indeed, to the extent the label reflects a normative judgment about the people the law against discrimination would protect, it will be of little use to a court itself charged with avoiding stereotyped thinking in assessing the constitutional validity of the laws before it. Questions like those outlined above will provide much more information than the words "equal" and "special" about the consistency of any given provision with the command of "equal protection of the laws."

The Constitution itself contains an antidiscrimination command. It would be strange indeed to discover that a statute that operates in a precisely parallel manner might be constitutionally suspect. From certain perspectives laws that prohibit discrimination may be described as requiring (or predictably resulting in) the provision of special rights. But so long as the perspectives from which they can be so described reflect the persistence of a view that members of the protected class are not equal to others, courts should understand the primary effect of such laws to be the prohibition of discrimination. To the extent the special rights effects could ever be cognizable by a court, they ought therefore to be treated as what they are: unintended, incidental, and largely unavoidable consequences of prohibiting those who would discriminate from doing so, costs that are clearly outweighed by the continuing benefits of the legal proscription of discrimination.

In the public sphere, so long as the idea remains powerful that "special rights" are offensive, proponents of laws against discrimination will have to address the characteristics of the law that may lead the special rights objection to have resonance. Antidiscrimination law may be perceived from some perspectives to provide protected individuals with special treatment. A candid explanation of the ways in which this supposedly special treatment is actually worse and different from the treatment members of the majority expect, may help to blunt the force of the special rights objection. In addition, those who would seek to guarantee equal treatment for all must embark on a broader strategy — often discussed, but rarely employed — in which the legal prohibition against discrimination is but one of many cultural mechanisms deployed to achieve that equality. The strength and nature of the special rights objection suggests that law is necessary — both because of its primary effect to prevent and punish discrimination and as an expression of soci-

ety's rejection of such discrimination — but not sufficient to address discrimination.

Failure to proceed with a multifaceted strategy will not only result in the partial failure to eradicate the problem of discrimination, it will leave antidiscrimination law itself increasingly vulnerable to attack not in the courtroom, but in the public arena: expansion and enforcement of the laws against discrimination may become increasingly unpopular, despite a continuing fundamental national belief in the theory of equal treatment. Indeed, as the success and appeal of the special rights rhetoric may reflect, a failure adequately to take into account and address some of the unintended consequences of antidiscrimination laws could ultimately lead to a mistaken and tragic conclusion that these are its primary effects, and that, consequently, the costs of using the law to prohibit discrimination outweigh the benefits.