CRS Congressional Research Service • The Library of Congress • Washington, D.C. 20540

June 20, 1990

TO : House Committee on Education and Labor
Attention: Bob Tate

FROM : American Law Division

SUBJECT : Constitutional Challenge to Amendment to Disabilities Legislation

This memorandum responds to your inquiry for a brief analysis of the possible constitutional challenges to an amendment to the proposed Americans with Disabilities Act (ADA). As passed by the House of Representatives on May 22, 1990, H. R. 2273, 101st Congress, contained an amendment offered by Mr. Chapman of Texas exempting from the coverage of the ADA the action of an employer in moving an employee with a communicable or infectious disease of public health significance out of a food-handling position subject to some qualifications relating to the employer's obligation to make reasonable accommodation to offer alternative employment. See CONG. REC. (May 17, 1990, daily ed.), H 2478 - H 2484. In agreeing to send its version of the bill, S. 933, 101st Congress, to conference, the Senate adopted a motion to instruct the conferees to accept the described House amendment. CONG. REC. (June 6, 1990, daily ed.), S 7436 - S 7448.

Both the sponsor of the amendment in the House of Representatives and the sponsor of the motion to instruct in the Senate acknowledged that the object of the amendment was to permit employers to move food handlers with AIDS or HIV infection from positions in which they would come into contact with food. Id., H. 2478 (Mr. Chapman), S 7436 - S 7437 (Mr. Helms). And, indeed, the debate in both Houses was devoted almost exclusively to the AIDS situation.

Because the bill contains a broad prohibition of employer action that treats differently persons with a disability because of that disability and because the amendment under consideration excepts from that broad prohibition employer actions respecting persons with AIDS who would otherwise be covered by the bill's definition of a "qualified individual with a disability," there would be raised the question whether the exception would deny equal protection under the Fifth Amendment's due process clause. All governmental action usually classifies in some way, and the fact that persons may be divided into different classes by legislative prescription does not condemn the statutory provision. The courts rather have developed a series of tests for evaluating the permissibility of governmental classifications, and

the questioned amendment must be analyzed pursuant to the tests enunciated by the judiciary.

The State-Action Problem.- Before subjecting the amendment to analysis, however, we must first consider the issue whether the courts could adjudicate the matter. The Constitution, save for rare provisions, reaches only governmental action, and it does not limit private conduct. E.g., *NCAA v. Tarkanian*, 109 S.Ct. 454, 461 (1988). This amendment does not itself *require* that food handlers with AIDS be barred from positions in which they would come into contact with food; it permits employers to act in this way if they wish without falling afoul of the ADA. Would the "state action" doctrine impede judicial resolution of the question here presented?[1]

"The vital requirement is State responsibility," Justice Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights. *Terry v. Adams*, 345 U.S. 461, 473 (1953). It is clear that a private person who in some respect acts in reliance on statutory authorization is not thereby transformed into a governmental actor. For example, in *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), the Court held that a company, having someone's goods in its possession and seeking to recover the charges owed to it for storage of those goods, could act under a permissive state statute to sell the goods and retain out of the proceeds its charges, and it need not accord the owner any due process observance because its action was not state action. The private conduct is subject to constitutional restraint only if government has exercised coercive power or has provided such significant encouragement, either overt or covert, that the decision is to be deemed to be that of the government. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-547 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).

Thus, a food handler who is transferred or who is discharged because there is no position to which he can be transferred could not sue his employer under a state-actor theory. However, it is possible for such a food handler to sue the governmental official or officials charged with administering the ADA and to seek a declaration that the statutory classification which permitted the employer to inflict harm on him is unconstitutional, which is the usual procedure when it is the government which directly inflicts the harm. The Court has in several cases permitted suits against governmental actors who have rendered some assistance to the private parties who have themselves

---

[1] The "state action" doctrine is most often utilized in the context of the actions or nonactions of the States, but the principle is more accurately a "governmental action" issue, inasmuch as the due process clause of the Fifth Amendment limits only federal action, just as the due process and equal protection clauses of the Fourteenth Amendment limit only the States. The scope and reach of the "state action" doctrine is the same whether a State or the Federal Government is concerned. See *CBS v. DNC*, 412 U.S. 94 (1973).

actually engaged in the harmful conduct. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court heard a suit against state officials and struck down a state program providing free textbooks to private schools insofar as the program gave books to schools set up as racially segregated institutions to avoid desegregated public schools. And in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), the Court approved barring a city from permitting exclusive temporary use of public recreational facilities by segregated private schools because the city action interfered with an outstanding court order mandating desegregation.

The principle of these cases is that, while the private actor does not become a public one through this association with a governmental entity, the governmental actor may be enjoined from becoming too involved in allegedly discriminatory actions by the private party.[2]

The Standing Problem.- Recourse to suit against governmental officials avoids the state-action problem, but it raises another one: the question of plaintiff standing. Standing was not much considered in *Norwood* and *Gilmore*, but in recent years the Court has stiffened its standards.

Standing to sue is rooted in Article III's "case" or "controversy" requirement and is a function of the doctrine of separation of powers, limiting federal courts to their proper role in our tripartite system. *Allen v. Wright*, 468 U.S. 737, 750-752 (1984); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 471 (1982). When a plaintiff lacks standing to bring suit, a court has no subject-matter jurisdiction over the case. The Supreme Court has enunciated a three-pronged inquiry to determine whether constitutional standing exists. First, one must show that he has suffered an injury in fact that is both concrete in nature and particularized to him. *Allen v. Wright*, supra, 755; *Valley Forge*, supra, 482-487; *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Second, the injury must be fairly traceable to the defendant's conduct. *Allen v. Wright*, supra, 757; *Valley Forge*, supra, 472; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Third, the injury must be redressable by alteration of the defendant's conduct. *Allen v. Wright*, supra, 758-759; *Simon*, supra, 41-42; *Warth v. Seldin*, supra, 504-505; *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Conflating somewhat the second and third tests, cf. *ASARCO Inc. v. Kadish*, 109 S.Ct. 2037, 2042-2044 (1989), the Court has denied standing existed in a number of efforts to sue the governmental actor to remedy an injury caused by private action. Thus, poor people who had been denied service at certain hospitals were held to lack standing to challenge IRS policy

---

[2] In *Blum v. Yaretsky*, 457 U.S. 991 (1982), plaintiffs sued public officials, but they objected to the private decisions of the nursing homes in question in discharging or transferring patients, rather than to the changes in Medicaid benefits made by the officials which influenced the private actions, and their suit was lost.

of extending tax benefits to hospitals that did not serve indigents, since they could not show that alteration of the tax policy would cause the hospitals to alter their policies and to treat them. *Simon v. Eastern Kentucky Welfare Rights Org.*, supra. Low-income persons seeking the invalidation of a town's restrictive-zoning ordinance were held to lack standing, because they had failed to allege with sufficient particularity that the complained-of injury, inability to obtain adequate housing within their means, was fairly attributable to the ordinance instead of to other factors, so that voiding the ordinance might not have any effect upon their ability to find affordable housing. *Warth v. Seldin*, supra. See also *Linda R. S. v. Richard D.*, supra (mother of illegitimate child lacked standing to contest prosecutorial policy of utilizing child-support laws to coerce support of legitimate children only, since it was "only speculative" that prosecution of father would result in support rather than jailing).

On the other hand, a suit, such as the one suggested here, seeking to invalidate the amendment, would seem to fall within the Court's test, rather than be bracketed with these examples. The Court has explained that the injury alleged to have been suffered must be fairly traced to the action challenged, that "but for" the action the plaintiff would not have been injured. The test has been otherwise expressed in the standard that there must be a "substantial likelihood" that the relief sought from the judiciary would remedy the harm. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 161 (1981); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72, 74-78 (1978). In the *Duke Power* case, the Court permitted plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification, on a showing that "but for" the passage of the law there was a "substantial likelihood," based upon industry testimony and other material in the legislative history, that the nuclear-power plants would not have been constructed and that therefore the environmental and aesthetic harmed alleged by the plaintiffs would not have occurred. It was the harm engendered by the construction and operation of the plants to which the plaintiffs objected, not the liability limitation, but removal of the latter would likely relieve the former. See also *Bryant v. Yellen*, 447 U.S. 352, 366-368 (1980).

Much less speculation is necessary to show that voiding of the amendment in issue would likely result in a lack of injury or in injured food-handlers obtaining relief. In the absence of the provision, an employer would be much less likely to move such an employee. The existence of a private cause of action would enable the employee to sue the employer for reinstatement and backpay and, if it should become available subsequently, punitive damages, so that the employer would be hesitant to act in the absence of the amendment. Its invalidation could well prevent or remedy any injury.

The Equal-Protection Challenge.- Of course, that a person claiming injury could sue the appropriate federal official to seek to invalidate the amendment and that he would have standing to bring suit merely gets him in the

courthouse door. The merits of the complaint would be something else, and it is to those issues that we now turn.

Although there is no express equal protection clause limiting the Federal Government, the Court has discerned in the Fifth Amendment's due process clause an obligation that the National Government govern impartially. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977). Federal laws are, therefore, subject to equal protection attack.

"The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions," again to quote Justice Frankfurter. "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).[3] That is, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

Standard of Review.- How, then, do we determine the line between permissible and invidious classification? Over the years, the Court has developed the inevitable tests. Most classifications are judged by what is called the rational-basis standard, which is extremely lenient and is in effect an arbitrariness test. Practically all economic and regulatory legislation is judged by this standard and usually passes. However, a "strict scrutiny" test has also evolved, under which certain "suspect" classifications or line drawing impinging on a "fundamental" interest must be defended by a showing that a classification is "necessary" to further a "compelling governmental interest." Race is the paradigmatic suspect classification, and suffrage is the paramount fundamental interest. Alienage and national origin classifications have merited strict scrutiny, while illegitimacy and sex classifications have received heightened but not necessarily strict scrutiny.[4]

Guidance to the standard of review likely to be accorded distinctions that burden persons with AIDS is afforded by *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In reviewing a zoning ordinance which burdened group homes for the mentally retarded, whereas the great variety of other group-home arrangements were unaffected, the lower court deemed mental

---

[3] That we are here considering the Fifth Amendment due process clause alters nothing in the following analysis. *Buckley v. Valeo*, supra, 424 U.S., 93.

[4] Without overburdening this memorandum with citation of cases, we refer to the discussion and citation in THE CONSTITUTION of the UNITED STATES of AMERICA - ANALYSIS and INTERPRETATION, S. Doc. 99-16, 99th Cong., 1st sess. (1987), 1697-1707 (and 1988 supp.).

retardation a "quasi-suspect" classification; the Supreme Court rejected this designation for a number of reasons and purported to apply rational-basis scrutiny, although as we will note below in fact it actually looked more closely at the classification than this standard would have called for. In any event, the Court found the lowest standard to be appropriate because, among other things, mental retardation was a status that was a legitimate basis for differential treatment, the record of recent lawmaking protective of the mentally retarded negated the claim that they are politically powerless with no ability to protect themselves, and there would arise a difficulty of distinguishing between the mentally retarded and others who have been subjected to some degree of prejudice but not to a degree entitling them to the benefit of strict or intermediate scrutiny for classifications with an impact on them.

Summarizing recently those characteristics of groups or classes which make them "suspect" or "quasi-suspect," the Court noted that "[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Of course, to some extent, persons with AIDS have undoubtedly been discriminated against, but probably no more so than the mentally retarded have been, while, on the other hand, their success in obtaining protective legislation - e.g., the ADA itself and various other laws protecting those with handicaps, as well as other legislation addressed to their plight - suggests that, just as is the case with the mentally retarded, they are politically significant enough to influence the governmental process.

The Rational-Basis Test.- Applying the rational-basis test, however, is not necessarily an easy process. While the great majority of legislative classifications inspected under this standard survive the scrutiny, a significant number do fail. Part of the difficulty is that there are really two tests in operation here, and the Court interchangeably applies one or the other without indicating why it has chosen the one which it is utilizing. One test traces back to *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). In essence, it requires only that a classification not be purely arbitrary; it need not be more than an approximation of fitting the purpose with the means; and, importantly, if any state of facts reasonably can be conceived, by the reviewing court if necessary, that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed. The second test traces back to *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Affording courts a somewhat greater judgmental role, this test requires that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Although most legislative classifications will survive either version of the test, it does make a significant difference in some cases which one is utilized. For example, in *Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), the

Court self-consciously applied the *Lindsley* standard, whereas within three months in *Schweiker v. Wilson*, 450 U.S. 221 (1981), it relied on *Royster Guano* and evaluated whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. Both decisions sustained federal legislation, but the approach would alter the result in a certain number of cases. For example, *Fritz* deferred to a purpose and found it served by the classification, even though the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Congress need not, said the Court, articulate its reasons for enacting a statute. Id., 449 U.S., 179. *Schweiker*, contrarily, examined the statute and its legislative history to ascertain the purpose Congress actually had in mind and then evaluated the relationship between purpose and means. Cf. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 680-685 (1981)(Justice Brennan concurring), and id., 702-706 (Justice Rehnquist dissenting).

Purpose.- Central to the rational-basis standard is the concept of purpose. Classifications which are purposefully discriminatory fall before the equal protection clause without more. E.g., *Barbier v. Connolly*, 113 U.S. 27, 30 (1885); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886). Cf. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 n. 40 (1979). But explicit in all the formulations of the tests is that a legislature must have had a permissible purpose, a requirement which is seldom failed, given the leniency of judicial review. It is at this point, of course, that the two different versions of the rational-basis test diverge most significantly. If the Court will simply presume a legitimate purpose that Congress or a state legislature might have had in mind, as in *Fritz*, then there is no inquiry and no danger of invalidation. But where the Court suspects the existence of an impermissible purpose, it resorts to the more inquiring standard of *Royster Guano* and requires a showing of some actual legitimate purpose that motivated the legislature in making the classification at issue.

This tendency is evidenced in several recent decisions. In *Zobel v. Williams*, 457 U.S. 55 (1982), the Court struck down an Alaskan statute that distributed income from oil production to residents of the State in proportions based upon the year in which they became residents. The Court denied that rewarding residents for their contributions to the State, the purported basis for the classification, was a permissible purpose and similarly rejected all other proffered justifications, leaving only the impermissible reason of discriminating against newcomers. Similar distinctions between newcomers and longer-term residents were found to be lacking in legitimate purposes in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), *Williams v. Vermont*, 472 U.S. 14 (1985), and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Not far below the surface of the *Cleburne* decision is the discernable feeling of the Justices that improper motivation was the basis of the ordinance treating the mentally retarded differently than other people. Supra, 473 U.S., 446-447 (majority opinion), 454-455 (Justice Stevens and Chief Justice Burger

concurring), 459-460 & n. 4, 461-465, 473 (Justices Marshall, Brennan, and Blackmun concurring in the judgment in part and dissenting in part). Indeed, Justice White for the majority recurs to *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), in which the Court observed that an objective such as "a bare desire to harm a politically unpopular group" is not a legitimate governmental interest. *Moreno* struck down a provision of the Food Stamp Act which disqualified from participation in the program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household. Examining the legislative history of the provision, the Court found that it "indicate[d] that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." Id., 534. It was in this context that the Court made the statement quoted above.[5] See also *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973).

The legislative history of the Coleman amendment evinces neither a hostility toward persons with AIDS or a desire to harm them nor a fear that the HIV virus can be transmitted to others through infected persons touching food. Presumably, the former would be impermissible, whereas the latter would give rise to a legitimate governmental interest in prevention.[6] Rather, the legislative history indicates that the concern of the proponents of the amendment was the protection of restaurant owners and other businessmen who could lose patronage from fearful customers and potential customers who did not understand or did not believe the medical conclusion that AIDS could not be transmitted through such means as the touching of food. CONG. REC. (May 17, 1990, daily ed.), H 2478 (Mr. Chapman), H. 2479 (Mr. Rose), H 2479 - H 2480 (Mr. Bartlett), H 2480 (Mr. Douglas), H 2482 (Mr. Chapman); but

---

[5] In *Lyng v. Castillo*, 477 U.S. 635 (1986), the Court sustained a somewhat similar classification under the food-stamp program, in which there was lacking the indicia of an improper purpose. This provision distinguished between parents, children, and siblings who live together as a single household, on the one hand, and more distant relatives or groups of unrelated persons who live together, on the other. See also *Lyng v. UAW*, 485 U.S. 360 (1988) (food-stamp provision preventing strikers from qualifying as a consequence of income loss attributable to the strike evinces no legislative desire to harm strikers but rather other legitimate purposes).

[6] Whether the fear is justifiable, therefore permitting the classification, would not likely be a judicial issue. The Court holds to the view that it is irrelevant whether the legislature is correct about its goal or whether the steps it has taken will promote the goal; the question is whether the legislature "could rationally have decided" as it did. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-470 (1981). See also *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983); *Texaco v. Short*, 454 U.S. 516, 539 & n. 36 (1982); *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 672 (1981).

see H 2481 (Mr. DeLay); CONG. REC. (June 6, 1990, daily ed.), S 7436 - S 7437 (Mr. Helms); but see S 7445 (Mr. Armstrong).

Legislative responses to the fears or prejudices of the community resulting in burdens on or adverse discriminations against a class have been held to be impermissible purposes by the Court. In *Cleburne*, the Court accepted the finding of the lower court that the zoning ordinance reflected the concern of the city council "with the negative attitude of property owners" in the neighborhood, "as well as with the fears of elderly residents of the neighborhood." Supra, 473 U.S., 448. "But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. . . . [T]he city may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some faction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" Ibid. (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

It may well be, therefore, that if the courts should examine the reasons for adoption of the amendment, they might well find that it was impermissibly motivated.

As we have noted above, the Supreme Court has on occasion been unmoved by evidence that Congress or a legislature did not have the purpose attributed to it by the lawyers defending a statute before the Court. In *Fritz*, for example, a purpose was proffered which was evidently not what had been in contemplation when Congress passed the measure. *Railroad Retirement Board v. Fritz*, supra, 449 U.S., 184 (Justice Brennan dissenting). See also *Schweiker v. Wilson*, supra, 450 U.S., 245 (Justice Powell dissenting). The Court observed that it was "constitutionally irrelevant" whether the plausible basis it had accepted was in fact Congress' understanding, inasmuch as the Court had never required a legislature to articulate its reasons for enacting a statute. Id., 449 U.S., 179.

But, as has been noted, *Fritz* and other cases like it are in the line of decisions from *Lindsley* mandating extreme deference. In other cases, the Court has in applying the somewhat more demanding *Royster Guano* standard looked to the actual goal articulated by the legislature in the course of determining whether the means are rationally related to the ends. E.g., *McGinnis v. Royster*, 410 U.S. 263, 270-277 (1973); *Johnson v. Robison*, 415 U.S. 361, 374-383 (1974); *City of Charlotte v. Intl. Assn. of Firefighters*, 426 U.S. 283, 286-289 (1976). The lesson of *Cleburne* would appear to be that when certain classes are subjected to adverse distinctions that bespeaks some indication of impermissible purpose, while it may not heighten the equal-protection standard it uses, the Court is likely to apply with some care the rational-basis test.

The Means-End Fit.- If the Court should accept a public health purpose as undergirding the amendment, the case law instructs that it will not closely examine the purported conclusion that barring persons with AIDS from handling food is necessary to prevent transmission of the disease. The legislative history of the provision contains assertions by opponents that AIDS cannot be transmitted in this fashion, e.g., CONG. REC. (May 17, 1990, daily ed.), H 2478 - H 2479 (Mr. Rowland), H 2479 (Mr. McCloskey; Mr. Waxman), H 2480 (Mr. McDermott); CONG. REC. (June 6, 1990, daily ed.), S 7437 - S 7443, S 7444 (Mr. Harkin), S 7445 - S 7446 (Mr. Durenberger), and the proponents of the amendment acknowledged that the evidence did not show the danger of transmittal in this way. Id., H 2478 (Mr. Chapman), S 7448 (Mr. Helms). The cases indicate that it is generally sufficient if the legislature "could rationally have decided" that a permissible goal would be served by the means. E.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-470 (1981). See also *Lyng v. Castillo*, 477 U.S. 635, 639-643 (1986); *Bowen v. Owens*, 476 U.S. 340, 348-350 (1986).

Again, however, to recur to *Cleburne*, there the Court closely examined the record compiled in the enactment of the challenged zoning ordinance to determine whether legitimate purposes were served by the law. Several perfectly proper public interests had been suggested, and in many rational-basis cases would have settled the matter, but the Court's conclusion after sifting through the record was that the goals were either not served or not well served by the ordinance. To reiterate, it was apparently the presence before the Court of a group of mentally-retarded individuals who were subjected to likely discrimination that caused the Court to apply the somewhat more searching version of the rational-basis test. That is, the Court must ascertain whether the classification has a fair and substantial relation to the permissible goal of the legislature. *Cleburne*, if it is not heightened scrutiny in disguise, represents this strain of equal protection jurisprudence.

Legislative Discretion.- Another hurdle that a challenger of the amendment would be required to surmount is the principle enunciated by the Court that a legislature need not take care of all of a problem in one step. Under the rational-basis standard, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). See also *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Schilb v. Kuebel, 404 U.S. 357, 364-365 (1971); AFL v. American Sash Co.*, 335 U.S. 538 (1949). That is, a law which goes only so far and no further is not necessarily to be faulted because it could have afforded a much more extensive remedy.

Another aspect of this phase of the question may be found in the Court's distinction between defeating or repealing ameliorative laws, on the one hand, and erecting barriers to the enactment of certain ameliorative legislation, on the other hand. Thus, if a legislature or the electorate defeats, for example, a bill to alleviate racial disparities in schools or housing or if the legislature or the electorate repeals an already enacted law to this effect, the action does not violate the Constitution by placing the imprimatur of state assistance on

private discrimination. *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982). But if the legislature or the electorate structures the political process so that it is more difficult for proponents of racially-ameliorative legislation to pass it than it is for proponents of other legislation to pass theirs, then that is officially discriminatory and denies the equal protection of the laws. *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967).[7]

Legislatures are thus afforded a considerable measure of discretion. They need not act. If they do act, they can straightforwardly repeal what they have enacted. If they act, they need not take care of every aspect of a problem, but they can proceed "one step at a time." Underinclusiveness for these reasons is a permissible result of legislative action.

But it is not at all clear that the contested amendment falls in this discretionary area. It is not that protective legislation for the handicapped has been considered which does not extend to AIDS victims. The bills under study apply to AIDS victims broadly, but the amendment carves out one exception to equal protection. A legislative effort has not been defeated, nor is a law to be repealed. What would result from enactment in its present form would be a law that as to one narrow class of employees affirmatively removes protection that would otherwise exist and opens certain employees to the possible infliction of harm. Moreover, if the courts would so evaluate it, the reason for the exclusion is one which appears to be impermissible under such cases as *Cleburne*.

The difficulty in analysis is that the Supreme Court has not elaborated to any degree its standards for determining when legislative omissions or commissions resulting in underinclusiveness or overinclusiveness result in constitutional violations. However, it may be significant that the amendment is an affirmative provision affecting persons with AIDS, that it is arguably based on impermissible motivation, and that it can be causally connected to the infliction of harm. These circumstances may well remove it from the examples discussed above wherein simple failure to extend the legislation as far as it could have been taken was held not to deny equal protection.

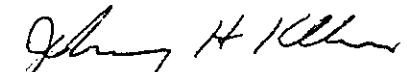
Conclusion.- If the Coleman amendment is enacted, persons who are injured by private employers acting in reliance on the provision would be enabled to challenge its constitutionality. That is, they would have standing to bring an action against the appropriate government official for a declaration that the section is void. What the result on the merits of such an action would be is much more difficult to predict. Under applicable precedents, it appears that the courts would apply the rational-basis standard of equal protection in evaluating the challenge, but, for reasons elaborated above, it also appears likely that they would utilize the somewhat more searching version of that

---

[7] Formally, these are state-action cases, but their principles are obviously relevant in the context of this section of the memorandum.

test. If the courts were to examine the purpose that actually underlay the classification made in this section, it is possible that they could decide the amendment reflected not a legislative fear about the transmission of AIDS but rather a congressional decision that the fear and prejudice of potential customers of restaurants and other similar businesses should be acceded to. The precedents indicate that this purpose appears to be impermissible. Should the courts defer to postenactment arguments about presumed legislative purpose, that is, a concern about the public health effects stemming from the handling of food by persons with AIDS, it is unlikely that the courts would evaluate the validity of the concern or the means adopted to facilitate the protection of the public.

It is therefore not at all evident whether the amendment would be upheld or invalidated. It does appear, however, that the Supreme Court's *Cleburne* decision would constitute guidance to the courts to examine with some care the background of the amendment to ascertain its purpose and the relationship of the means with the purpose, if the purpose determined to have actuated Congress is found to be permissible. In other words, while the outcome is not obvious, it can be said that the usual result of application of the rational-basis test, judicial approval, may well not hold in this instance.



Johnny H. Killian
Senior Specialist
American Constitutional Law