The Supreme Court's Understanding of the Sex-Gender Distinction

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Toes tapping both in trepidation and to the beat of the music, I looked around the studio filled with bouncing ponytails. I was 10 years old and the only boy in dance class. Was I nervous because I feared the repercussions of challenging society’s heteronormative gender constructs? Not exactly. My singular focus was on how in the world I could bend my body into an “arabesque.” Yet through the bullying years of middle and high school, my path was hindered by prejudice: friends disappeared, my masculinity was challenged, and my sexuality questioned. Physically, I appeared to be a regular boy, but apparently, I did not act like a boy. At this young age, I learned that chromosomes do not necessarily determine behavior. I learned the difference between sex and gender.

American courts, on the other hand, have not always maintained a clear conceptual distinction between sex and gender. This has proven problematic in cases where one’s sex and gender do not match, even more so than those of a dancing boy. I define the terms sex and gender as commonly used by sociologists and feminists today: sex is determined biologically, while gender is a social construct. One’s sex is male or female, while one’s gender is masculine or feminine. Most of the time, one’s sex and gender performance correspond to make one a socially acceptable man or a woman. But how does the law treat one whose sex and gender performance are incongruous?

For example, Ann Hopkins was a female who defied gender norms by wearing masculine clothing and aggressively pursuing her career; this earned her both success in

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the workplace and criticism from her superiors. Another story comes from Margo Kantaras, who was born a biological female but identified as a man and so Margo underwent surgery to become Michael Kantaras. Michael wanted to marry his girlfriend, but Florida law prohibits same-sex marriage. Michael’s right to marry would hinge on whether he was deemed a man or simply a masculine woman. Then there is Holley Mangold, the first female to play in an Ohio Division III football game. Should Holley, or a similarly situated female with a traditionally masculine interest and skill set, have the right to sue the National Football League to compel it to allow females to play in the league?

These three examples illustrate the interplay between sex, gender, and the law. The law sometimes actively discriminates against one sex on the basis of gender stereotypes. At other times, the law reactively protects against discrimination in the private sector when plaintiffs are treated unfairly because of the incongruity of their sex and gender (masculine females, and feminine males). We see how, to the extent that our relative masculinity and femininity are not necessarily predetermined by our sex, the law’s conception of gender can cut both ways. On one point of the double-edged sword, gender is confining and restrictive because it imposes socially-constructed roles upon us. On the other point, an understanding of gender can be empowering to the extent it authorizes us to divorce traditional notions of masculinity and femininity from biological sex, recasting gender expression as a matter of personal choice.

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This two-sided conception is difficult to accept from a legal standpoint because the law insists that a trait be immutable before extending legal protection. Thus, it may be a strategic mistake to oversimplify and say that sex is immutable, while gender is a mutable matter of choice. (I could not help being born male, but I chose to partake in a traditionally feminine activity by dancing.) Through the lens of immutability, I seek to critically explore the law's treatment of sex and gender. In Part I, I provide the background and trace the court's usage of the sex-gender distinction. In Part II, I analyze the law's reactionary protection of individuals whose gender expression does not match their sexes. In Part III, I analyze the law's reliance on gender stereotypes in formulating proactively discriminatory policies. In my conclusion, I argue that the court ought to become more cognizant of the distinction between sex and gender, and should re-conceptualize the distinction, in order to better serve the needs of our diverse populace.

I. Background

Many credit John Money for coining the terminological distinction between sex and gender in 1955, when he emphasized that gender is actually a role we play. He described sex-adjunctive differences as the narrowest biological differences between male and female sexual anatomy. On the other hand, sex-arbitrary differences are not real sexual differences, but rather socially invented norms that society requires men and women to act

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This concept became known as gender. Two decades later, the Feminist movement of the 1970s popularized the concept of gender. Though I focus on the Supreme Court’s usage of the terms, it is important to consider how these terms are conceived in the population at large. In one example, scholar David Haig conducted a large-scale review of general scholarship and found a sharp increase in the ratio of uses of “gender” to “sex” in the 1970s. That ratio continues to increase and today, “gender” is now used more frequently than “sex” in social science and humanities research. Still, “sex” is used more frequently than “gender” in hard science scholarship, which is understandable given its emphasis on biological sex, rather than social constructs.

Feminist legal scholars’ early use of the “gender” concept only captures one point of the double-edged sword that I seek to analyze. Francisco Valdes explains, “Feminist critiques of law generally… fail to address the underlying premise that sex determines gender.” Scholars often critique the way that femininity is undervalued compared to masculinity, but may take for granted that males become masculine while females become feminine. Judith Butler writes, "I am not permitted to construct my gender and sex willy-nilly." Laws often reinforce stereotypes that cause women like Butler to feel that they cannot escape their gender roles. On the other hand, subsequent scholarship emphasized

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7 See id.
9 See id.
that while one may not be able to change one’s gender “willy-nilly,” there is an element of autonomy or personal identity that can manifest itself in a unique gender expression.\textsuperscript{12}

The law proactively forms policies that differentiate between men and women based on socially constructed gender norms. However, the law also has a reactive role to play in protecting individual gender expression, especially when that gender expression does not align with one’s sex. Zachary Kramer writes, “[a] person’s gender constitutes both societal expectations associated with the person’s sex and, simultaneously, the person’s actual expressed gender.”\textsuperscript{13} Throughout this paper, I refer to the law’s enforcement of those gendered societal expectations associated with one’s sex as “proactive discrimination,” and I refer to the law’s defense of one’s actual, expressed, nonconforming gender as “reactionary protection.” Katherine Franke describes gender as a set of “norms that at once enable and constrain a degree of human agency.”\textsuperscript{14} Where gender constrains human agency, the law engages in proactive discrimination. Where gender enables human agency, the law must engage in reactionary protection. To illustrate this point, I revisit my introductory anecdote: hypothetically, the law could proactively discriminate where a statute requires males to audition for a dance program at a state university while females are automatically admitted based on the gendered assumption that they can dance. The law could also offer reactionary protection for a male dancer when he is fired from a law firm because of his gender nonconformity.

\textsuperscript{12} Kate Bornstein, \textit{Gender Outlaw – On Men, Women and the rest of us}, pg. 51–52, Rutledge, 1994 (emphasizing the fluidity of gender expression).


\textsuperscript{14} Katherine Franke, \textit{The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender}, 144 U. Pa. L. Rev. 1, 3-4 (emphasis added).
a. Quantifying The Court’s Use of Sex and Gender

As a method of quantifying the Supreme Court’s use of the terms “sex” an “gender,” I examined the Historic Supreme Court cases in which these two terms were used, as determined by the Cornell University Law School Legal Institute, and totaled the word count of the two terms. (The results can be found in the appendix.) I used the Institute’s database and analyzed their categories of Historic Gender and Sex Discrimination cases in the 20th Century. I screened out terms like “sexual,” and “same-sex,” because those refer to specific phrases like “sexual harassment” and “same-sex marriage” for which there is no equivalent with the word “gender” in it. I broke down the handful of available cases by decade, and as one can see in Figure 1, in each decade since the 1960s, the use of the term “sex” as compared to “gender” decreased, except for an aberration in the 1990s.

15 http://www.law.cornell.edu/supct/cases/topic.htm
16 I totaled the number of times “sex” and “gender” were used and then looked at the incidence of “sex” as a percentage of that total. In the 1970s for example, the term “sex” occurred 45 times, while the term “gender” occurred 11 times. 45 divided by their total of 56 is .8, meaning 80% of the times that the Court used either term, they used the term “sex.”
Moreover, it is interesting to see the influence of one particular Justice, Ruth Bader Ginsburg, who was appointed by President Clinton in 1993. Within the total times the Court used the terms “sex” and “gender,” the percentage of the term “sex” decreased dramatically from the pre-1993 to the post-1993 data, as shown in Figure 2.
In Figure 3, I include a visual word map of all the terminology used by the Supreme Court in the two-dozen Historic Gender and Sex Discrimination cases, provided by Wordle.com:
One can observe that the Court uses the word “sex” more often than “gender,” as represented visually through their relative size. This makes sense considering how much of the case law revolves around interpreting Title VII’s “because of sex” language.

b. Qualifying The Court’s Use of Sex and Gender

In 1946, Supreme Court Justice William Douglas opined, "The truth is that the two sexes are not fungible,"17 echoing the discreteness of the male and female sexes that was typical of the time period. To understand the social norms that reinforced that lack of fungibility, the Court would need to acknowledge the modern concept of gender. The Supreme Court has not always maintained a clear understanding of the distinction between sex and gender. A century ago, the Supreme Court used the term “gender” for its

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The first clear invocation of the term “gender” in its non-grammatical usage occurred in 1974, just a few years before Sandra Day O’Connor became the first female Supreme Court Justice in 1981. Since then, the Court has often used the words “sex” and “gender” interchangeably, which has manifested itself in muddled opinions. Although Justice Ginsburg has championed the fight against sex-discrimination, she holds some responsibility for the current confusion. She decided “the word ‘sex’ may conjure up improper images” so decided to use “gender” as a synonym.

Somewhat surprisingly, it was Justice Scalia who articulated one of the clearest distinctions between sex and gender, sounding more like a feminist scholar than the most conservative Justice on the bench. In discussing peremptory strikes, Scalia wrote, “Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to

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19 See Kahn v. Shevin, 416 U.S. 351 (1974). The Court arguably used it to refer to the difference between men and women as early as 1917. See Caminetti v. U.S., 242 U.S. 470 (1917), “where the benefit of the Oregon Donation Act was extended by making the words 'single man' used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.”
20 See Mary Anne Case, Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 10 (1995) “This interchangeability of the words "sex" and "gender" has contributed to some analytic confusion between the categories of male and female, on the one hand, and masculine and feminine, on the other.” See also Case, supra note 20, at 17, “Courts toss around the words "gender," "masculine," "feminine," and "sex stereotyping" fairly often in sex discrimination cases. But they do not always use these terms consistently or self-consciously, and they do not always recognize gender issues when such issues are presented.”
21 Ruth Bader Ginsburg, Gender in the Supreme Court: The 1973 and 1974 Terms, 1975 Sup. Ct. Rev. 1, 1 n.1. See also, Ernie Freda, Washington in Brief: Clinton’s Old Underwear Full of Tax Holes, Atlanta J. & Const., Dec. 29, 1993, at A8. (explaining that Ginsburg’s secretary told her, “I’m typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don’t you know those nine men, they hear that word and their first association is not the way you want them to be thinking? Why don’t you use the word ‘gender’? It is a grammatical term and it will ward off distracting associations.”)
female and masculine to male.” Although his conceptual distinction between sex and gender is admirable from a progressive standpoint, it is less impressive that Justice Scalia also sees a distinction between women and persons. Even though the 14th Amendment prohibits the state from “deny[ing] to any person within its jurisdiction the equal protection of the laws,” Justice Scalia maintains that the Constitution does not prohibit sex discrimination.

In the landmark case, Price Waterhouse v. Hopkins, the Supreme Court determined that Price Waterhouse violated Title VII of the Civil Rights Act by using impermissible sex stereotypes to deny Ann Hopkins a promotion. Hopkins was extremely well qualified to make partner, but was denied because of her masculinity – in dress, appearance, and interpersonal skills. In effect, the Court broadened the scope of protection that Title VII provides; previously, an employer was only forbidden from having a “No women need apply” policy, and now an employer is also forbidden from having a “No masculine women need apply” policy (at least when the job requires masculine traits to succeed, depending on how narrowly one interprets the opinion). Even though it is a clear case of discrimination against a female for exhibiting a masculine gender, the Court does not use the terms in that manner. Instead, the Court cites the statute’s “because of... sex” language, but consistently refers to whether one is male or female as one’s gender. To be clear, it is not necessarily incorrect to use “gender” when discussing discrimination between men and

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23 U.S. Constitution, Amendment 14 (emphasis added).
26 A partner encouraged Hopkins to “walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.” 490 U.S. at 235.
women. Title VII was intended to protect women, and because our conception of a “woman” is heavily influenced by gender norms, it may be accurate to call discrimination against women, “gender discrimination.” If we narrowly define sex as one’s chromosomes or alternatively one’s genitalia, then it would be inaccurate to say that a “No women need apply” policy constitutes sex discrimination because there is surely no chromosomal test, or genital inspection. But to be especially clear analytically, it would be useful for the Court to explain that because Ann Hopkins’ masculine gender did not comport with her female sex, Price Waterhouse unlawfully discriminated against her.

Alternatively, Zachary Kramer would say that Hopkins’ “anchor gender” did not match her “expressive gender,” because, again, we do not technically know her chromosomal makeup.27 Instead of saying that the employer impermissibly considered Hopkins’ “expressive gender,” the Court uses the phrase “sex stereotypes.”28 To the extent that “sex stereotypes” are the normative assumptions we make about how women should act, the phrase is functionally equivalent to gender. I do not intend to gripe about terminology, but rather focus on the Court’s conceptual understanding of sex versus gender, which Justice Brennan laudably exhibited in this opinion.

In 1998, the Court held that Title VII could apply where discrimination occurred between two people of the same sex in Oncale v. Sundowner Offshore Services, Inc.29 The case had little to do with gender expression but Justice Scalia’s opinion had another surprising quote that sounds like something Goodwin Liu, not Justice Scalia, would say: “Statutory provisions often go beyond the principal evil to cover reasonably comparable

27 See Kramer, supra note 13, at 484.
28 The term comes from the expert testimony of Dr. Susan Fiske, a social psychologist. See 490 U.S. at 235.
evils, and it is ultimately the provisions of our laws rather than the principal concerns of
our legislators by which we are governed.”\textsuperscript{30} By broadening the protective scope of Title VII,
this case further opens the door for claims involving “because of... sex” discrimination,
because it insinuates that we may include discrimination because of biological sex, gender
identity, and possibly one day, sexual orientation.\textsuperscript{31}

In a myriad of other cases since the 1990s, the Court alternates between using
“gender” and “sex” as interchangeable terms, demonstrating how the Court has not
attempted to conceptually differentiate the two. For example, Justice White used the word
“sex” to refer to men and women in \textit{Franklin v. Gwinett County Public Schools}.\textsuperscript{32} Chief Justice
Rehnquist used “gender” to refer to men and women in \textit{United States v. Morrison}.\textsuperscript{33} Finally,
Justice Ginsburg used the terms interchangeably when discussing “single gender
education”\textsuperscript{34} and “single sex schools”\textsuperscript{35} in \textit{United States v. Virginia}. It is doubtful that she
meant to differentiate single sex schools that separate males and females, from single
gender schools that separate masculine cadets from feminine cadets.

In response to the interchangeability of sex and gender in the Court’s opinions, Mary
Anne Case writes, “The two terms have long had distinct meanings, with gender being to
sex what masculine and feminine are to male and female. Were that distinct meaning of
gender to be recaptured in the law, great gains both in analytic clarity and in human liberty

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\item \textsuperscript{30} 523 U.S. at 79.
\item \textsuperscript{31} The Supreme Court is yet to allow sexual orientation into the Title VII umbrella, and only a few lower
courts have entertained that possibility. The “sexual orientation loophole” is discussed in the next section.
\item \textsuperscript{32} 503 U.S. 60 (1992).
\item \textsuperscript{33} 529 U.S. 598 (2000).
\item \textsuperscript{34} 518 U.S. 515, 524 (1996).
\item \textsuperscript{35} 518 U.S. 515, 520 (1996).
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Those great gains, as well as potential pitfalls, are critiqued in the next sections.

II. Reactionary Protection

The doctrinal importance of immutability makes it critical to assess whether sex and gender are immutable. Much of our sex-discrimination case law is driven by a conception of sex as an immutable trait, and gender as a mutable trait. I seek to challenge these categorizations and explore how, within the framework of immutability, broader gender expressions and sexualities can be protected.

A. Immutability doctrine

Whether or not a trait is immutable carries significant legal implications, ranging from equal protection, asylum, and the Civil Rights Act. In large part, this is because our system of justice is designed to punish behavior, not status. Thus, if one suffers discrimination because of one's choice to be in an unpopular group, he or she may have to cope with the consequences. Conversely, if one is born into an unpopular group, then the law will often intervene to protect the rights of that individual. The Supreme Court has affirmed that it is a "basic concept of our system that legal burdens should bear some

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36 Case, supra note 20, at 2.
37 See Franke, supra note 14, at 35.
38 Mathew D. Staver, Homosexual Behavior Should Not Be Accorded Special Protection, National Liberty Journal, Oct. 2002. (http://www.lc.org/radiotv/nlij/nlij1002.htm) "The unifying characteristics of the protected classes within the Civil Rights Act of 1964 include (1) a history of longstanding, widespread discrimination, (2) economic disadvantage, and (3) immutable characteristics... Race, color, sex and national origin all share the same common bond of having immutable characteristics."
relationship to individual responsibility."\textsuperscript{39} Thus, when an individual is not responsible for her inborn trait, the law should not penalize her for that trait.

Under the equal protection doctrine of the Fourteenth Amendment, heightened scrutiny has always been afforded to "discrete and insular minorities."\textsuperscript{40} Decades after that monumental footnote was written, the Supreme Court clarified the criteria to determine which groups qualify for heightened scrutiny based upon a three-part test.\textsuperscript{41} To qualify, a group must 1) suffer a history of discrimination, 2) be a powerless minority, and 3) "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."\textsuperscript{42} The immutability requirement has been articulated as "a status into which the class members are locked by the accident of birth."\textsuperscript{43}

The Supreme Court justified granting heightened scrutiny to classifications based on sex because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."\textsuperscript{44} Typically, unlike sex, race, and national origin, gender expression and sexual orientation have been viewed as matters of choice, leading many federal courts to refuse to grant any heightened scrutiny to transgender and queer

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\item \textsuperscript{40} \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 152 n.4 (1938).
\item \textsuperscript{41} \textit{Bowen v. Gilliard}, 483 U.S. 587, 602-603 (1987).
\item \textsuperscript{42} \textit{Id.} The word "or" in the immutability prong implies that the class does not necessarily have to be immutable; it could just have an obvious or distinguishing characteristic. Yet it is doubtful that this third prong of the test is itself a three prong disjunctive test. In articulating this standard, it seems more likely that the words "obvious," "immutable," and "distinguishing," are all trying to get at the same thing. If anything, the inclusion of "obvious," and "distinguishing" may soften the strict immutability requirement by allowing protection to qualities like religion and sex, even though technically, one could change either, depending on how one defines sex. The third prong seems to get at the general sentiment that "Immutability, of course, does make discrimination more clearly unfair." \textit{High Tech Gays v. Defense Indus. Sec. Clearance Office}, 909 F.2d 375, 377 (9th Cir. 1990).
\item \textsuperscript{43} \textit{Sail'er Inn, Inc. v. Kirby}, 485 P. 2d 529, at 540 (1972).
\item \textsuperscript{44} 411 U.S. at 684-86 (1973).
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individuals.\textsuperscript{45}

In the context of asylum law, courts have emphasized that protected social groups must “share a common immutable characteristic,” citing sex and race as examples.\textsuperscript{46} Yet the courts have recently exhibited more flexibility in deciding which groups are eligible for asylum, signaled by the inclusion of queer individuals in the definition of a “particular social group.”\textsuperscript{47} Joseph Landau calls this new standard “Soft Immutability.”\textsuperscript{48} Rather than requiring a trait that is purely determined by genetics, the court has recently extended protection to a trait that “either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”\textsuperscript{49} In Hernandez-Montiel v. I.N.S, for example, a federal court used the term “gay men with female sexual identities” to describe male-to-female transgender individuals.\textsuperscript{50} In reality, these individuals might be more accurately called heterosexual transgender women, not gay men. Yet, without the ability to separate the individual’s male sex from her female gender identity, the court simply calls her “gay.” In the asylum context, self-identification matters less than the perceptions of others, so because of their “imputed gay identity,” transgender individuals

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\textsuperscript{45} Woodward v. United States, 871 F.2d 1068, at 1076. “... Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature...”
\textsuperscript{47} Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990) (interpreting the term “particular social group” to include sexual orientation).
\textsuperscript{49} 19 I. & N. Dec. at 233. (emphasis added)
\textsuperscript{50} 225 F.3d 1084, at 1087, 1093 (9th Cir. 2000).
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ought to receive the same protection that homosexuals do.\textsuperscript{51} Both sexual orientation and gender expression “\textit{should not be required to change}.”\textsuperscript{52} Despite the fact that some courts have embraced a “soft immutability” standard, the immutability of a trait is still relevant to asylum law. Landau acknowledges that even today, many litigators “champion rhetoric sounding in strict immutability in defining their clients”\textsuperscript{53} The author essentially argues that judges should move away from the immutability requirement when dealing with transgender and queer individuals (and some judges have\textsuperscript{54}), but many judges have not. Thus, the extent to which sex, gender, and sexual orientation are considered immutable can still prove determinative in modern asylum law.\textsuperscript{55}

Similarly, in the Title VII context, the Fifth Circuit has explained, “Private employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights.”\textsuperscript{56} In response to the doctrinal importance of immutability, queer advocates have been somewhat successful in convincing judges that one is born gay.\textsuperscript{57} Judge Norris argued that homosexuals cannot change their sexual orientation by querying “whether heterosexuals

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\textsuperscript{51} Landau, \textit{supra} note 48, at 260. “Under the theory of imputed gay identity, transgender asylum seekers need not self-identify as gay or lesbian to gain protection; rather, they need only demonstrate that they are perceived to be so by their persecutors.”

\textsuperscript{52} 19 I. & N. Dec. at 233 (emphasis added).

\textsuperscript{53} Landau, \textit{supra} note 48, at 256, citing Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

\textsuperscript{54} Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

\textsuperscript{55} See also Nicole LaViolette, \textit{Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward}, The, 55 U. Toronto Fac. L. Rev. 1, at 4 (1997), describing the similar situation in Canada, where sexuality was only included when it was determined to be immutable: “Supreme Court classifies sexual orientation as an innate or unchangeable characteristic…”

\textsuperscript{56} Willingham v. Macon Telegraph Publ. Co., 507 F.2d 1084, 1092 (5th Cir. 1975).

\textsuperscript{57} See High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting) “There is every reason to regard homosexuality as an immutable characteristic for equal protection purposes”; Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring) (arguing that homosexuality is immutable for the purposes of asylum).
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feel capable of changing their sexual orientation.” Similarly, one could challenge the assumed mutability of a transgender individual’s gender expression by querying whether a masculine male felt capable of changing his gender expression. If not, it seems a male-to-female transgender individual would have just as much difficulty changing her feminine gender expression.

b. Reactionary Protection for Gender Expression

In her book, Gender Trouble, Judith Butler argues that gender is performative, which problematizes legal protection of gender expression to the extent that the law only protects status, not behavior. Once we realize that gender constructs are imposed on us by society, it can be empowering to realize that “we all possess a degree of sexual agency beyond the rigid determinism of biology.” Yet that same agency, or ability to alter one’s gender “willy-nilly” as Butler put it, makes it hard for the law to justify protection of gender expression. Franke advocates for a “more behavioral or performative conception of sex,” but we ought to be wary of how this could undermine the legal protection that sex currently receives on the basis of its immutability.

I contend that gender expression ought to be protected as an immutable trait under two theories. First, if gender is a set of norms that society forces onto us, then it is not something we have much control over, nor something we are free to change. This argument might better serve to protect masculine men and feminine women since society typically enforces corresponding gender norms onto the sexes, but the gender non-corresponding

875 F.2d at 726.
59 See Butler, supra note 11.
60 Franke, supra note 14, at 8.
61 Id.
individuals are the ones who need better legal protection. Still this argument could serve
gender non-conformers as well. For instance, if parents raise a boy in a feminized context
or a girl grows up with several brothers and no sisters, the children may exhibit
incongruous gender identities through no choice of their own. Theoretically, there is no
principled reason why someone who likes athletic events should also like wearing ties, yet
the point of gender is that one is not always entirely free to choose his or her own interests
because society forces a wholesale gender identity on us. So where the girl with all
brothers inherits a package of masculine characteristics that causes her to be discriminated
against, the socially constructed nature of gender may lead to the conclusion that gender
expression is immutable and ought to be protected.

Secondly, there are many individuals for whom the incongruity of their sex and
gender is so acute that they feel they were born in the wrong body. Transgender
individuals are in a different category from boys interested in dance or girls interested in
sports; they are biological males who identify as women, or vice versa. While we
traditionally conceive of sex as an unchangeable anatomical body characteristic and gender
as mutable, transgender individuals prove the opposite can be true – their gender identity
is immutable, and they can change their anatomically sexed bodies. Franke explains that
most people have a sex identity “inside” their body and a gender identity “outside,” but
transgender individuals experience a gender identity “inside” and express it with a sex
“outside.”

That transgender individuals tend to use surgery to alter their sexed bodies may call
into question whether sex truly is immutable. If sex is defined by the physical male and

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62 Franke, supra note 14, at 35.
female genitalia, modern science has proven that sex can be altered. But, if one defines sex by chromosomes, then the medical advances bear little on the immutability of sex. In Corbett v. Corbett, Judge Ormrod goes into excruciating detail as to the appearance and functionality of a male-to-female transgender individual’s genitalia, concluding that Corbett is not legally a woman. This raises the question, which I pose only partially tongue-in-cheek: what is a legally meaningful vagina? The point is that our understanding of sex as immutable and gender as mutable may oversimplify a complicated reality. The Court has done little to articulate a nuanced understanding of the conceptual distinction between sex and gender, so we are some years away from a resolution to this relative immutability issue.

When courts have refused to extend protection to transgender plaintiffs, they do so by focusing on the plaintiff’s behavioral choices rather than their innate, immutable, identity. In deciding whether a male-to-female transgender was discriminated against, a district court stated, “He is not being refused employment because he is a man or because he is a woman... The law does not protect males dressed or acting as females and vice versa.” The D.C. Appellate court similarly refused Title VII protection to a male whose hair was too long, explaining that the plaintiff “had not been denied employment because he was a male,” emphasizing that he could simply alter his hairstyle. Criminal sumptuary laws have also punished male-to-female transgender individuals, not for being born transgender, but for choosing to wear women’s clothing. Finally, we see a district court refusing to apply Title VII to a masculinely dressed female because "plaintiff's affection for

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pantsuits is not an "immutable characteristic." Thus, when courts situate the issue in the right to engage in an unpopular action, they deny the protection of the law. But if courts did conclude that being transgender was an "immutable characteristic," then transgender individuals would receive heightened protection along the lines that females and racial minorities receive.

The same emphasis on conduct over status is mirrored in the context of sexual orientation. In *Bowers v. Hardwick*, the court narrowly focused on the conduct, while in *Lawrence v. Texas*, the Court focused on the status of homosexuals. The *Lawrence* majority looked beyond the narrow right to engage in sodomy, and spent much of the opinion analyzing the condemnation of homosexuals as a group. Justice O'Connor even voted that homosexuals ought to receive heightened scrutiny based on equal protection.

With regard to Title VII, we see the courts repeatedly declare that discrimination "because of... sex" does not include sexual orientation, largely drawing on the distinction that sex is immutable, while homosexuality is mutable – a behavioral choice that some make. Francisco Valdes calls this the "sexual orientation loophole." Where courts are willing to include gender non-conformity under the Title VII umbrella, bringing up a plaintiff's sexual orientation is "something akin to litigation suicide." Again, we see how sex and race line up on the highly protected immutable side, while sexual orientation and gender are too often erroneously viewed as choices. Franke explains the thought process of one Supreme Court Justice: "Presumably, for Justice Scalia, by their very mutability and

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70 See *Kramer*, *supra* note 13, at 467.
71 See *Valdes, supra* note 10, at 18.
72 See *Kramer*, *supra* note 13, at 490.
cultural contingency, gender-based distinctions are not what ‘discrimination on the basis of sex’ was intended to reach.”

**c. Catch-22 Bind**

The Price Waterhouse court stated, “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” If we read Price Waterhouse broadly, it is a prohibition against requiring that employees conform to their socially prescribed gender roles. If we read the opinion more narrowly, which some lower courts have done, it holds that an employee only has a tenable claim based on gender non-conformity if the employee is placed into a Catch-22. Case writes, “Ann Hopkins, I fear, may have been protected only because of the doubleness of her bind: It was nearly impossible for her to be both as masculine as the job required and as feminine as gender stereotypes require.” The Catch-22 further reflects the Court’s belief that sex is immutable, while gender is mutable. Hopkins may have been able to alter her gender (by acting more femininely as one of her superiors had recommended), but she could not alter her gender to a point that would simultaneously satisfy her employer’s demands for success in the workplace and demands for conforming one’s gender to one’s sex. Hopkins was only placed in this bind because she is female, which is immutable. An effeminate male at Price Waterhouse would not have a similar problem because, according to the Court’s logic, he could simply choose to behave

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73 See Franke, supra note 14, at 9-10.
74 490 U.S. at 251.
76 Case, supra note 20, at 3.
masculinely and satisfy all his employer’s demands. By this logic, Title VII would also protect an effeminate male nurse who gets fired because, through the accident of birth, he was born male and has no hope of successfully completing his feminine job description while also conforming his gender to his sex.

To determine whether Hopkins was unfairly discriminated against based on her female sex, we must determine the “similarly situated male” to whom we compare her. Hopkins is a gender non-conforming, masculine, female employed by Price Waterhouse, so should we compare her to a similarly gender non-conforming male, a similarly masculine male, or a male who similarly works for Price Waterhouse?

1. If we compare her to a **similarly gender non-conforming male**, then there is no substantive claim for differential treatment because Price Waterhouse equally disfavors masculine females and effeminate males. Clearly the court did not employ this analysis, because they concluded that there was sex discrimination.

2. If we compare her to a **similarly masculine male**, then Price Waterhouse has discriminated against Hopkins on the basis of her sex because a male who refused to wear make-up and or grow long hair would not be punished for his conduct, but rewarded. I contend this comparative analysis would be the most logical, and justly inclusive of gender non-conformers. Since gender identity is so often out of one’s control, it is unfair to penalize someone because of the immutable incongruity of her sex and gender. At the same time, it is not necessary to establish the immutability of gender to arrive at the conclusion that gender non-conformers should be protected. By essentially saying, “Males can have short hair but females cannot,” Price Waterhouse discriminated against Ann Hopkins on the basis of her immutable sex.
3. If we compare her to a **generic male similarly working at Price Waterhouse**, then there is sex-discrimination because whether the male is masculine or effeminate, he has the “option” of altering his gender performance in a way that would satisfy the employer while Hopkins does not have that “option.” This seems to be the comparison employed by the Court in its analysis of Hopkins’ Catch-22. The Sixth Circuit echoed this logic in refusing protection for a male whose femininity did *not* cause the same tension that Ann Hopkins’ masculinity caused her. “In our case, Dillon’s supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a ‘Catch-22.’” The underlying assumption is that Dillon could have changed his feminine gender expression to align his sex and gender, *and* still fulfill his duties as a postal worker. Yet, as discussed, assuming that gender is mutable ignores the complicated way in which society forces gender onto us, and alternately, the fact that many feel a gender identity that is so innate that it becomes immutable.

To contextualize the immutability doctrine as it relates to sex and gender expression in modern society, one need look no further than the preeminent source of legal wisdom, the hit television show *Glee*. In a recent episode titled, “Born This Way,” the main cast of students learned that there are certain traits that they were born with, which they could not change. Tina complained of her “slanty” Asian eyes, Rachel wished she could change

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77 Price Waterhouse’s unfair treatment of Ann Hopkins would not be the first time simultaneous pressures pulled women in opposite directions. Feminist literature has often discussed the Virgin/Whore Dichotomy where women are expected to ooze sex-appeal without having had sex with anyone. This impossibility is mirrored in the workplace where women are expected to maintain the utmost femininity while somehow producing results that can only be attained by acting masculinely. There are simply not enough hours in the day for Ann Hopkins to put on make-up and bake apple pies, *and* put in the necessary amount of work to satisfy her employer and get to her level. So whether society tells a woman to be a virgin and a whore at the same time, or tells her to be masculine and feminine at the same time, she is unfairly put in an impossible Catch-22 solely because she was born female.

her large Jewish nose, Kurt dealt with being gay, and Emma came to grips with her Obsessive Compulsive Disorder (OCD). By singing “Born This Way,” by notorious gender-bender, Lady Gaga, the cast learned to embrace their immutable characteristics. Race is the most suspect class, in some part because it is the most immutable trait, so any discrimination based on Tina’s Asian eyes or Rachel’s Jewish nose would be subject to the highest level of scrutiny. The fact that Rachel entertained the possibility of a nose-job throughout the episode does not necessarily mean discrimination based on her Jewish appearance is subject to less scrutiny if we adopt the standard that her trait “should not be required to change because it is fundamental to their individual identities or consciences.”\textsuperscript{79} Moreover, much of the protection that queer individuals receive turns on whether courts understand sexual orientation to be an immutable status, or a behavioral choice. Fortunately for Kurt, his schoolmates have a more progressive understanding of his innate queer identity. Finally, Emma’s OCD illustrates that “stigmatized persons are treated less harshly if their stigmatized trait is believed to be beyond personal control.”\textsuperscript{80} So when society gained an understanding that being obsessive compulsive is not just a choice people make but a diagnosable condition, afflicted individuals received more sympathy. Thus, it is a worthwhile goal to resituate gender identity as an immutable trait, in order for it to receive the legal protection and social acceptance that it deserves. We have seen how the evolving terminology reflects a shift in our understanding of gender non-conformity:

society formerly used the term, “cross-dresser” to emphasize the act of cross-dressing, while today we use “transgender” to instead underscore the person’s identity.\(^{81}\)

III. Proactive Discrimination

We have seen how race and sex are analogously immutable so that people born into a disfavored trait receive legal protection. However, this analogy breaks down when looking at the relative difference between races and sexes, because while we recognize no difference between the abilities of African-Americans and whites, we do recognize innate differences between males and females.\(^{82}\) So, even though a female cannot help being born a female, if there is a legitimate difference between males and females, the law is somewhat justified in employing differential treatment.

The law is supposed to treat similarly situated groups the same, and treat differently situated groups differently. With that in mind, the Supreme Court granted heightened scrutiny to sex on the basis that “the sex characteristic... bears no relation to ability to perform or contribute to society.”\(^{83}\) Therefore, laws cannot discriminate against individuals when (a) their trait is immutable, and (b) their trait is unrelated to the matter that the law

\(^{81}\) Of course, today one can cross-dress and not identify as transgender, but I am calling attention to the fact that transgender individuals in the past were simply called cross-dressers.

\(^{82}\) See Franke, supra note 14, at 11 (“Sexual difference is a different kind of difference than racial difference for the purposes of the Equal Protection Clause. Whereas virtually every classification based upon skin color or race is rendered invalid when filtered through the heightened scrutiny standard, only the grossest sexual stereotypes and archaic notions are filtered out by the larger holes in the intermediate screen. These holes reflect the legitimate considerations of real and demonstrated differences between the sexes...”).

\(^{83}\) Frontiero, 411 U.S. at 686.
seeks to regulate.\textsuperscript{84} If the trait \textit{is} relevant, for example if it were proven that males were worse parents, then it might be rational to prefer female parents in custody disputes.

Thus, the sex-gender distinction illuminates an important legal precept: laws are subject to scrutiny in the courts when they are based on assumptions that men are masculine and women are feminine (gender), but laws are justified when they treat men and women differently based on innate biological differences (sex). Since sex receives heightened scrutiny, there must be an especially tight fit between a law’s stated goal and the biological sex difference, meaning any over-inclusivity or under-inclusivity could render a statute unconstitutional.

\textbf{a. Examples}

The Supreme Court in \textit{Michael M. v. Superior Court} decided that a statutory rape law that only punished males was justified based on the danger that girls would suffer through unwanted pregnancies, a biologically impossible danger for males.\textsuperscript{85} If the state articulated its interest based on gender, perhaps that women ought to remain chaste and any premarital sex would necessarily be the fault of sexually aggressive men, then it is likely that the statute would not have survived intermediate scrutiny.

Similarly, exclusion of women from the military cannot be based on a normative assumption that war is not ladylike. Instead, the government typically justifies the discrimination by arguing that males and females are not similarly situated when it comes

\textsuperscript{84} Janet E. Halley, \textit{Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability}, 46 Stan. L. Rev. 503, at 508 (1993-1994). “When a characteristic is both immutable and unrelated to the legitimate purposes at hand, discriminations based on it may suggest unfairness.”

to serving in the military, pointing to the ability of females to get pregnant, the danger that females will be raped, or the innate differences in physical strength. In *Rostker v. Goldberg*, the Supreme Court held that a male-only draft did not violate Equal Protection because males and females were not similarly situated, as females were excluded from ground combat. Thus, the Court permits differential treatment in the draft because there is differential treatment in the combat rules, creating the potential for a vicious cycle in which discrimination justifies discrimination.

In *Reed v. Reed*, the Court invalidated a state law that preferred males to females in determining who appoints an administrator of estates, largely because there is no biological difference between the sexes that could justify such differential treatment.

Since the unstated underlying presumption of the statute was that men are better decision-makers, a socially constructed gender norm, it could not survive scrutiny.

Finally, the Supreme Court upheld a state statute that regulated the working hours of females based on “the difference between the sexes,” citing “maternal functions.” Even a century ago, it is doubtful that the statute would have survived if the state had explicitly relied on gender roles in concluding that a man’s role is to work while a woman’s role is to stay at home. Of course, this general sentiment underscores the entire opinion,

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86 Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 Duke L.J. 771 (2010) (exploring the state’s proffered justification that women can get pregnant during service, as well as Justice Ginsburg’s criticism of that justification.)

87 This is clearly a real danger that ought to be taken seriously, as a recent study found that about a third of female veterans report being raped in the military (Helen Benedict, *The Nation: The Plight of Women Soldiers*, NPR, May 6, 2009: http://www.npr.org/templates/story/story.php?storyId=10384570). At the same time, the classification is under-inclusive because male troops are also capable of being raped.


90 *Reed v. Reed*, 404 U.S. 71 (1971).


92 Id. at 421.
but to survive the legal scrutiny, the Court must find a biological hook – in this case, pregnancy.

When a policy relies on a masculine trait, it is thus unfair to exclude females based on the assumption that females are feminine because “There can be... a world of difference between being female and being feminine.”93 So rather than excluding females altogether, can a policy exclude feminine people? Potentially, yes. "If such an employer rewards masculinity equally in either sex and does not assume that women are less capable of manifesting masculine qualities, it is not engaging in sex discrimination narrowly defined... What the employer is doing is engaging in gender discrimination - favoring the masculine over the feminine rather than the male over the female."94 Case argues that females could raise a disparate impact claim, because females tend to be disproportionately excluded by a policy that rewards masculinity.95 However, that disparate impact argument may essentialize women by its concession that most females are feminine.

Thus, the Court ought to take on a nuanced understanding of the sex-gender distinction because it could lead to the invalidation of laws that discriminate against females based on little more than gendered norms. Franke explains, “Sex-based protective wage and hour rules, divorce, childrearing, and familial support obligations cannot be justified by resort to biological differences between men and women, but rather by cultural norms about the proper social roles for men and women.”96 Policies that survive scrutiny should exhibit the narrowest fit between a biological characteristic of females, which all females have and only females have. To the extent that “the word ‘gender’ has come to be

93 Case, supra note 20, at 11.
94 Id. at 33.
95 Id. at 4.
96 See Franke, supra note 14, at 25.
used synonymously with the word ‘sex’ in the law of discrimination,”97 we are in danger of permitting some policies that ought not to survive scrutiny.

b. Critique of the sex-gender distinction

We have explored the argument that the Court should learn the conceptual distinction between sex and gender so that it can invalidate laws that exclude females based on the assumption that they are feminine. The Court has stated, “There are both real and fictional differences between women and men.”98 However, this argument presupposes that the state can formulate valid discriminatory policies around the real differences. It may not be the case that we can examine a set of policies that treat males and females differently, and clearly say “This is invalid because it is based on a gender norm, while this is valid because it is based on a real sexual difference.”

A wealth of popular literature has been devoted to understanding the differences between males and females, most notably, John Gray’s Men Are From Mars, Women Are From Venus.99 Although Gray largely discusses masculine and feminine tendencies, the certainty with which he writes about the differences in the communication styles of men and women suggest they are actually innate sex differences. In an attempt to answer the question, just how far apart are Mars and Venus, with a more biological approach, Louann Brizendine authored two bestsellers, The Female Brain100 and The Male Brain.101 This

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97 Case, supra note 20, at 2.
100 The Female Brain, Louann Brizendine, Morgan Road Books, 2006.
literature made it more politically correct to say that men and women are naturally different.

Ann Fausto-Sterling critiques the “biological versus social determinism” debate and the science used to prove that “however well intentioned, the women’s liberation movement and its fellow travelers want biologically unnatural changes.” She rejects the framework of the debate and argues that much of the research into supposed biological differences is motivated by sexism, and carried out in a scientifically unsound manner.

Judith Butler contends that even theoretically, it is impossible to reduce men and women down to their bare biological differences, without gender norms creeping in. According to Butler, there is no such thing as a neutral sexed body because gender is inevitably and unavoidably mapped onto it.

Franke provides a sharp critique of efforts to conceptually differentiate sex and gender. She argues that though differentiation could invalidate laws clearly based on gender roles, it could also lead to the justification of laws that discriminate based on allegedly “real” sex differences. She concludes, “This disaggregation of sex from gender represents a central mistake of equality jurisprudence.”

I contend that these critiques may be overstated, or at least may lead to impractical results. The Supreme Court demonstrated the kind of careful inspection that discriminatory laws ought to receive in *City of L.A. Dep’t of Water & Power v. Manhart*, in

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103 *Id.* at 4.
104 *Id.* at 11, (blaming “scientists who fail to maintain their objectivity”).
105 See *Butler, supra* note 11.
106 *See id.*
107 See *Franke, supra* note 14.
108 *Id.* at 1-2.
which the City required higher retirement fund contributions from females because on average, females live longer than males.\textsuperscript{109} The Court noted, “There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man.”\textsuperscript{110} This statement would lead a critic of the sex-gender distinction to argue that although the state would not be justified in discriminatory driving requirements, it is problematic that the state \textit{would} be justified in discriminatory policies based on height. Adding fuel to the critics’ fire, the Court notes, “The Department treated its women employees differently from its men employees because the two classes are in fact different.”\textsuperscript{111} At this point, the momentum for justifying a discriminatory law based on real sex differences ceases. The Court explains that although it is a fact that females outlive males, the distinction is both under-inclusive and over-inclusive.\textsuperscript{112} Title VII applies to discrimination against \textit{individuals}, not groups, so the factual group difference is not enough to justify discriminating against individual females who may live a shorter life than their male counterparts. Thus, when we screen out all the “real sex differences” that are in the least bit over-inclusive or under-inclusive, all that is left is egg-donation and sperm-donation, leaving little room for the law to proactively discriminate.

Justice O’Connor illustrates the power of intermediate scrutiny in her dissent in \textit{Nguyen v. INS},\textsuperscript{113} where the majority validated a policy that used sex as a proxy for the ability to prove parentage. Although the discriminatory treatment is grounded in a

\textsuperscript{109} 435 U.S. 702 (1978).
\textsuperscript{110} \textit{Id.} at 707.
\textsuperscript{111} \textit{Id.} at 707-708.
\textsuperscript{112} \textit{Id.} at 708 (“Many women do not live as long as the average man and many men outlive the average woman”).
biological difference between the sexes – the fact that females birth the child, and males are not necessarily present at the birth – sometimes, males are present at the birth with their name documented on the birth certificate, so the policy is over-inclusive. O’Connor explains, “Because we require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.”\textsuperscript{114} Here, a sex-neutral alternative could instead require a lower standard of proof for anyone who was present at the birth, rather than for just females, or a DNA test. The majority dismisses this suggestion as “hollow”\textsuperscript{115} because most of the time, the female and the person present at birth are one in the same, so it is simply a matter of semantics. Yet O’Connor points out that the existence of a sex-neutral alternative should reveal that the policy does not accord with Equal Protection doctrine.\textsuperscript{116}

Thus rather than discriminating against “women” as a group, perhaps Virginia Military Institute should exclude anyone who cannot handle the physical rigor of an intense training camp, and perhaps maternal leave should be granted to anyone who is capable of getting pregnant (because some women are infertile). Maybe labor laws can limit a workday to ten hours for anyone with certain frail health conditions, and laws can give the power to appoint an estate administrator to whoever has the most formal education. But none of these laws can differentiate males and females because the differentiation is based on either gender norms, or sex differences that do not end up having a tight enough fit with the policy’s purported purpose. The aforementioned restatements of well-known policies

\textsuperscript{114} ld. at 78.
\textsuperscript{115} ld. at 64.
\textsuperscript{116} ld. at 82.
are likely to have a disparate impact on one sex, and where the sought after trait bares no relationship to the interest, members of that sex can and ought to be able to pursue a disparate impact claim. But if a sex-neutral policy required anyone who was not present at the birth to take extra steps to prove a parentage relationship, a disparate impact claim from a male must fail because the characteristic (presence at birth) is so closely related to the interest (establishing parentage). Whether a neutral policy discriminates based on an immutable sexual difference or a socially created gender difference, it could have a disparate impact on one sex. Courts should apply closer scrutiny to disparate impact claims based on immutable differences like height requirements, rather than disparate impact claims based on gendered requirements, like the demand for assertiveness at a large firm.

**Conclusion**

Despite Franke's conclusion that, “Ultimately, there is no principled way to distinguish sex from gender,”\(^\text{117}\) it would greatly behoove the Court to gain a functional understanding of the two concepts. Throughout this piece, I have argued that the distinction between sex and gender is complex and clear-cut conceptual differentiation may be impossible. Yet, because of the doctrinal importance of immutability, we ought to appreciate that proactive discrimination along gender lines or loosely fitting sex lines harms individuals who were born into either sex. Furthermore, by better understanding how and why certain immutable characteristics are protected, we can expand the extent to which gender nonconformity is covered by reactionary protection. When the Court takes

\(^{117}\) Franke, *supra* note 14, at 11.
on a nuanced knowledge of sex and gender, we will be one step closer to fulfilling our
guarantee of equality for all citizens.
## Appendix

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