Chapter Five
Doctrinal Reconstruction: Cohering Law & Reality

INTRODUCTION

This Project has documented the presence and influence of the conflation within modern culture and legal culture, compared that record to its Native American counterpart, and drawn the critical lessons from these presentations. The inquiry now must turn to how existing anti-discrimination law can be applied in non-conflationary ways to help overcome the sex/gender bigotries that divide and disturb this nation. The question addressed in this Chapter is whether a principled and non-conflationary (re)organization and application of existing rules and concepts can help to discipline ignorant or strategic (mis)uses of the conflation in legal culture. The answer largely is yes, but to arrive at this conclusion requires a shift in the focus of the discussion: having in the preceding Chapters of this Project explored and mapped how conflationary discrimination operates along or within the conflation’s legs, rather than at its endpoints, this Chapter now (re)turns to the conflation’s endpoints to trace in a post-conflationary way how various acts or strains of sex/gender discrimination cluster around sex, gender, and sexual orientation.

Of course, this reconstructive (re)turn to the endpoints is made possible by the deconstructive efforts of the preceding Chapters, which now allow a holistic and contextual post-conflationary analysis of discrimination conventionally thought to be “based” on one endpoint or another. The doctrinal reconstruction presented in this Chapter, in other words, cuts through the conflation—through its legs—to (re)inspect sex, gender, and sexual orientation as sources or targets of discrimination. In this way, the reconstructed categories of discrimination presented below chart the conceptual and analytical sex/gender fields of post-conflationary legal doctrine. This Chapter thus outlines a proposal, guided by the historical and contemporary record of the conflation, that reconstructs and refines existing sources of anti-discrimination law along more sensible, effective, and beneficial lines.

Because this reconstruction is founded on existing doctrine, it does not call for, nor depend on, the operation or enactment of new rules or laws. However, the holistic and contextual reconstruction presented below is dif-
different from the conflationary status quo in two key ways. First, the analysis presented below insists on informed and principled applications of existing rules. Second, this analysis insists on the same regarding established legal and cultural conceptions of sex, gender, and sexual orientation. This approach therefore anchors itself not only to existing rules of law but also to established normative and intellectual understandings of sex, gender, and sexual orientation in order to cohere law with reality in a way that actually helps to check the full gamut of sex/gender discrimination.

Consequently, Part I of this Chapter begins with a look at current sex and gender anti-discrimination law, and its relationship to sexual orientation, to sketch the doctrinal status quo from a conflation-sensitive perspective. Part II then proposes a holistic and contextual approach to doctrinal reconstruction, identifying the requisite reformatory principles, outlining the ensuing substantive or doctrinal results, and noting the practical benefits of this reconstruction. Together, these two Parts of this Chapter show how legal culture can overcome the conflation, and in so doing fulfill its anti-discrimination charge, meet its self-ascribed institutional ideals, and promote sex/gender equality and societal harmony.

I

THE DOCTRINAL STATUS QUO

The law belatedly has been charged with checking our culture’s appetite for sex and gender discrimination. Both Title VII and the Fourteenth Amendment’s Equal Protection Clause also play a role.\(^\text{1071}\) However, this statutory and constitutional anti-discrimination mandate expressly excludes sexual orientation from its reach.\(^\text{1072}\) Therefore, the doctrinal status quo makes discrimination based on sex or gender unlawful but leaves discrimination based on sexual orientation generally unregulated, even if this discrimination is patent and de jure.\(^\text{1073}\)

Within this basic framework, a principled judicial conceptualization of anti-discrimination doctrine remains unrealized for four reasons, each of which is based on a failure to understand the way(s) in which the conflation

\(^{1071}\) Title VII’s prohibition of “sex” discrimination was enacted in 1964. See supra notes 336, 378. The Supreme Court first invalidated a sex-based classification in Reed v. Reed, 404 U.S. 71 (1971). In that case, the Court struck down an Idaho statute favoring men as administrators for decedents’ estates under the Equal Protection Clause of the Fourteenth Amendment. Id. at 76-77; see also infra note 1172.

\(^{1072}\) See, e.g., supra notes 380-87 and accompanying text; see also Hayes, supra note 674 (discussing and critiquing the lack of constitutional protection against discrimination based on minority sexual orientation).

\(^{1073}\) The prevailing legal situation subjects sexual minorities to open, de jure discrimination in multiple contexts. See generally Developments in the Law—Sexual Orientation and the Law, supra note 83 (surveying and analyzing the legal situation of lesbians and gay men in various settings, including employment law, family law, civil rights law, and criminal law); see also generally Michelangelo Signorile, Queer in America: Sex, the Media, and the Closets of Power (1993) (discussing the reasons why even powerful members of society stay in the closet despite the privileges of power, and generally denouncing what it means to be Queer in America today).
operates in modern and legal culture. First, and most generally, gender remains a culturally and legally unstable construct. Second, and more fundamentally, legal culture has not paused to consider the relationship that exists between sex and gender as cultural constructs under Leg One and that therefore should(n't) exist between these constructs as legal concepts. Additionally, legal culture has not informed itself about the social and actual relationships between sexual orientation and sex and gender under the joint operation of Leg One and Leg Two. Finally, legal culture has refused to recognize the compelling logic of the miscegenation analogy, thus blinding itself to Leg Three of the conflation. For these four reasons, the law has failed to comprehend and confront the conflationary dynamics that underlie and define dominant sex/gender biases.

Although this failure has resulted in confused and confusing legal doctrines, a holistic and contextual analysis of sex/gender law and issues reveals that the doctrinal status quo of anti-discrimination law may be categorized into three basic approaches to sex, gender, and sexual orientation: the "traditional notions" approach, the EEOC dichotomy, and the "stereotype" analysis. The first two arise under Title VII, while the last one is applied under the Constitution as well as the statute. All three coexist without any particular order or harmony and, in practice, they sometimes overlap. Indeed, under the conflation's influence, all three approaches are applied in unprincipled and underinclusive ways. But even principled applications of each produce significantly differing levels of protection against sex/gender discrimination. Thus, with these three approaches laid out, we can assess their relative viability as anti-discrimination tools in light of the formal legal mandate to end sex/gender bias and in light of the conflation's impact on the implementation of that mandate under each of these approaches.

A. Sex & Title VII

As noted above, Title VII prohibits discrimination "because of sex" even though the term "sex" is neither defined in the statute nor elucidated in the act's legislative history. Still, in their efforts to conceptualize the nature and scope of "sex" discrimination, the courts have had to address the meaning of the term itself. The courts' efforts have not produced any consistency. Rather, the doctrinal status quo under Title VII is marked by three problematic conceptions of "sex" and of discrimination deemed to

1074. See, e.g., CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 234 (1985) (discussing the widely held view that the term "sex" was incorporated into the Act without substantive discussion when an opponent of the legislation offered it as an amendment, thinking that the amendment would strike legislators as ridiculous and thereby help to defeat the entire bill). But see Freeman, supra note 336, at 164-65, 177-78 (1991) (arguing, somewhat unconvincingly, that the passage of the amendment was more than a fluke).

1075. See supra Chapter Two.

1076. See, e.g., supra Chapter Two, Part II.
be "because of" it. As elaborated below, in practice each of these approaches fails to fulfill the law's formal mandate against sex/gender discrimination.

1. The "Traditional Notions" Approach

The first conception also is the most prevalent: generally, and as illustrated by Strailey, courts have settled on the conclusion that Title VII uses the term "sex" to denote "traditional notions" of "sex." The courts, however, have failed to delineate any concrete definition of what they mean when they invoke this traditional notions approach. Nonetheless, the transsexualism cases show that in legal culture, as in modern culture, the term "sex" traditionally and presently denotes a bio-physical trait of the human body, meaning more specifically the body's external genitalia. The traditional notions invocation therefore fairly may be understood as embracing this historic and contemporary tradition: "sex" signifies external genitalia specifically and primarily.

Of course, an immediate problem with this approach as currently applied is that this type of clarity or specificity is not discernible in the courts' treatment of sex, as witnessed in the cases reviewed in Chapter Two. Instead, the courts' invocation of traditional notions about sex conjures the conflation and spills over into Leg One as well as Leg Two. As in Strailey courts pull both gender and sexual orientation into the "traditional notions of sex" analysis, producing results that are sometimes random and sometimes strategic, but always flawed. Consequently, this first approach has not generated a principled or sensible definitional framework for sex discrimination doctrine.

Even if applied coherently, however, this traditional notions approach necessarily would entail an analysis of sex discrimination that would be so underinclusive as to render Title VII's "sex" provision substantially nugatory. Keeping in mind the lessons from the conflationary past, this "traditional" conceptualization must be seen as extremely narrow in scope because traditional notions of sex are extremely narrow—at most, including only bio-physical traits. Thus, if applied in a principled fashion, a "pure" form of "traditional notions" sex discrimination would encompass primarily discrimination based literally on anatomy or, more specifically, on external genitalia. Even an expansive application of this approach would extend at

1077. The "traditional notions" approach guided the Ninth Circuit in Strailey v. Happy Times Nursery School, Inc., 608 F.2d 327, 329 (9th Cir. 1979) (quoting Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)) ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of "sex" in mind [when it enacted Title VII].") See supra Chapter Two, Part II.C. Of course, given the documented legislative history of the "sex" provision, this imputation of congressional intent is pure, unadulterated fiction. See supra note 1074; see also infra Part II.A.7.

1078. See supra Chapter Two, Part I.A.

1079. See supra Chapter Two.
most to biological or physiological characteristics deemed plausibly attributable to sex, such as (perhaps) physical strength.

Consequently, a principled and non-conflationary application of the traditional notions approach would be severely myopic: sex under a traditional notions standard would fail to protect even gender, thus licensing numerous acts of discrimination occurring along or within Leg One of the conflation. Indeed, this approach effectively constructs a doctrinal non-category because the putative category would be largely swallowed by various excuses and exceptions—such as the sex-plus doctrine, “bona fide occupational qualifications” or “business necessity”—that already are established in law and that affirmatively permit discrimination that actually is based on sex. In other words, these established excuses and exceptions are designed precisely to permit discrimination that is deemed justifiable by biological or physiological differences between men and women, thus making “traditional notions” of “sex” an expressly lawful basis for discrimination in various situations. A principled and non-conflationary application of this approach effectively would provide virtually no actual protection, at least if applied in a consistent manner.

The extreme narrowness of a principled application of the traditional notions approach suggests that Title VII’s prohibition on sex discrimination must mean something more than the traditional notions approach can accommodate with intellectual integrity. Otherwise, the “sex” provision of Title VII would apply primarily to discriminatory acts already deemed permissible, which would make no sense: if applied in a principled and consistent manner, traditional notions of sex discrimination would reduce the statutory provision to legislative surplusage but, as a remedial statute, Title VII is supposed to be given full effect through “liberal” judicial interpretative.

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1080. For instance, as noted earlier, Title VII law may excuse sex discrimination under judicially created concepts, such as the sex-plus doctrine. See supra notes 438-48 and accompanying text. The sex-plus doctrine has undermined Title VII’s remedial mandate because the “plus” may amount to a gender stereotype. See id.

Additionally, sex discrimination may be regarded as lawful under legislatively or judicially created defenses or exceptions, like those for “bona fide occupational qualifications” and “business necessity.” See, e.g., Kay, supra note 378, at 594-622; Omilian & Kamp, supra note 378, at 13:01-04. The former is a complete defense included textually in the statute that, generally, allows discrimination when the employee’s sex is deemed “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e)(1) (1988); see, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329, 335-37 (1977) (upholding minimum height and weight requirements having a disparate impact on women as a bona fide occupational qualification for maximum security prison guards). The second is a case law exception that permits discrimination when the employee’s sex is deemed “reasonably necessary to the normal operation of that particular business or enterprise.” Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); see also Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (shifting burden of proof, forcing plaintiff to show that male employees were not a “business necessity”). See generally William B. Gould, IV, The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response, 64 Tul. L. Rev. 1485, 1485 (1990) (analyzing recent Supreme Court rulings in employment discrimination cases that “retard, if not emasculate” the anti-discrimination gains of recent decades).
tions of its provisions.\textsuperscript{1081} Moreover, whenever possible, courts are supposed to avoid interpretations of statutes that would render any portion of legislation superfluous.\textsuperscript{1082} In short, a principled and consistent application of the traditional notions approach would necessarily serve to contravene well-established rules that are supposed to guide the courts' analysis and construction of Title VII specifically, and legislation generally.

As this brief discussion indicates, the traditional notions approach should not be what it has become in practice—the primary conception of sex discrimination under Title VII. Instead, this approach should be recognized as unwarranted and untenable because even principled applications of it would produce unduly underinclusive conceptions of sex discrimination on the merits, and also would require that judges violate established rules of statutory interpretation.

Perhaps to ameliorate these negative consequences, the EEOC and the courts have devised two other approaches which in theory coexist with the traditional notions approach, and which in practice sometimes overlap with it. But, in contrast to the traditional notions approach, these other approaches serve to confirm that Title VII's anti-discrimination charge in fact currently extends well beyond the limits of traditional definitions regarding sex, both in theory and in practice. In other words, the creation and establishment of these two alternatives demonstrates that Title VII's sex provision means more than what the traditional notions approach can accommodate with intellectual integrity because they expressly include gender and, therefore, purportedly protect against discrimination occurring along the full length of Leg One of the conflation. Still, as explained immediately below, these two other approaches also fall short of meeting the law's formal anti-discrimination charge regarding sex (and gender).

2. The EEOC Dichotomy

The next approach to discrimination “because of sex” under Title VII is the dichotomy between sex and gender on the one hand, and sexual orientation on the other. This dichotomy, as discussed in Chapter Two, was

\textsuperscript{1081} After its enactment, the courts promptly decided that Title VII was a remedial statute that ought to be construed “liberally,” \textit{i.e.}, in a way that is solicitous of the claimant. \textit{See, e.g.}, Craig v. Department of Health, Educ. & Welfare, 581 F.2d 189, 192 (8th Cir. 1978); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977); Davis v. Valley Distrib. Co., 522 F.2d 827, 832 (9th Cir. 1975), \textit{cert. denied}, 429 U.S. 1090 (1977); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 131 (6th Cir. 1971).

\textsuperscript{1082} \textit{See, e.g.}, National Insulation Transp. Comm. v. Interstate Commerce Comm'n, 683 F.2d 533, 537 (D.C. Cir. 1982) (noting that “a court must follow the axiom that Congress intended that statutory language be given its plain and ordinary meaning,” and “must, if possible, give effect to every phrase of a statute so that no part is rendered superfluous”). \textit{See generally} Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) (explaining that courts should construe statutory language so as to effect its underlying purpose). In the case of Title VII, the anti-discriminatory purpose appears to be the eradication of sex/gender “stereotypes.” \textit{See supra} note 336 and authorities cited therein on Title VII; \textit{see also infra} notes 1100-10 and accompanying text. As a remedial statute, Title VII therefore is to be construed liberally to ensure that this underlying purpose is fulfilled. \textit{See supra} note 1081.
announced by the EEOC in its seminal sexual orientation ruling, *Refusal to Hire Homosexual Was Not Discrimination.*\(^\text{1083}\) Under the EEOC dichotomy, sex and gender are conflated into one construct or legal concept, while sexual orientation is excluded from this conflation as a distinct construct or concept, defined as a “person’s sexual proclivities or practices.”\(^\text{1084}\) This dichotomy thereby creates two theoretically distinct categories of discrimination: the first category effectively recognizes the conflation’s first leg and groups sex and gender as prohibited bases for discrimination, while the second category refuses to recognize the conflation’s second (or third) leg and makes sexual orientation a permissible basis for discrimination. In this way, the EEOC dichotomy seems designed to protect against discrimination occurring (only) along Leg One of the conflation.

Because the EEOC dichotomy expressly applies to sex and to gender, this approach in theory prohibits discrimination “based” on gender, and thus on gender atypicality. Accordingly, as theory, the EEOC dichotomy should create a greater scope of anti-discrimination protection than is possible under a principled application of the traditional notions approach; the EEOC dichotomy formally purports to reach the *social* sex-based or sex-assigned attributes that make up gender, in addition to the bio-physical attributes that make up sex. As theory, then, the EEOC dichotomy would seem to offer greater anti-discrimination utility than the traditional notions standard, making this approach theoretically preferable.

Nonetheless, the EEOC dichotomy is wanting; indeed, it too is untenable, for one main and two subsidiary reasons. The main reason for the dichotomy’s impracticality is that it substantively sets up a double standard regarding the cultural conflation of sex, gender, and sexual orientation. This substantive double standard, as noted in Chapter Two, accepts certain aspects of the conflation at the cultural level while denying them legal recognition. This disjunction of legal doctrine from cultural practice effectively grants approval to the conflation’s continued operation in modern culture. The *substantive* double standard of the dichotomy is matched by the *analytical* double standard with which the dichotomy is applied in administrative and judicial decisions: the dichotomy’s categorical distinctions regarding sexual orientation are readily ignored in application via the sexual orientation loophole, thereby facilitating sex and gender (as well as sexual orientation) discrimination. The dichotomy’s substantive double standard represents a perversion of anti-discrimination law because it produces results diametrically contrary to the law’s remedial purpose.

The two subsidiary reasons flowing from this double standard compound the problems with this approach. The first of these subsidiary reasons is that the double standard of the EEOC dichotomy depends on actual or willful ignorance regarding the historic and current role of sexual orien-

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1083. See *supra* notes 380-92 and accompanying text.
1084. See *supra* notes 380-90 and accompanying text.
tation in the perpetration and perpetuation of sex and gender discrimination. This approach therefore relies upon the law's actual or willful blindness to social facts for its appearance of utility. The second subsidiary reason is that the protection of social gender under the dichotomy is obtained at the cost of expressly indulging, enforcing, and recycling the conflation of sex and gender—the conflation's first leg. This approach therefore has the long-term effect of reinforcing conflationary suppositions in law and society both because it reifies Leg One and because it ignores Leg Two.

In sum, the EEOC dichotomy is impracticable and ultimately dangerous: it creates a substantive double standard that entails a disjunction of theory and practice, which is perverse because it facilitates discrimination in the name of combatting it; the dichotomy and its substantive double standard in turn affirmatively depend upon ignorance of or blindness to historic and current conflationary realities regarding sexual orientation; and, finally, the dichotomy and its double standard consequently engender and reify conflationary precepts and practices both under Leg One and Leg Two. Each of these three faults is explained more fully below.

a. The Perverse Disjunction of Theory & Practice

The apparent gain of protecting gender as well as sex under this second approach to sex discrimination under Title VII appears mainly in theory because it sets up a definitional double standard\textsuperscript{1085} that, in turn, is matched by a judicially created analytical double standard.\textsuperscript{1086} Consequently, this theoretical anti-discrimination gain is minimized, or entirely lost, in judicial and administrative results and rationales that are inconsistent and disingenuous. The substantive and analytical disjunction of theory from practice gives rise to a proliferation of legally approved sex/gender discrimination that expresses androsexist (and heterosexist) prejudice. This proliferation is perverse because it is generated in the name of combatting the very discrimination that ostensibly is being prohibited.

While this second approach to sex (and gender) discrimination embraces without question or explanation the conflation's first leg as a matter of doctrine, it simultaneously rejects, again without question or explanation, the conflation's second leg. This selective and simultaneous embrace and denial of these two legs creates the dichotomy's definitional double standard, especially with respect to Leg Two, because it denies as a matter of legal doctrine what exists in reality as a matter of societal practice.

Additionally, as Chapter Two shows, conflationary rulings are inconsistent with the dichotomy's substantive definitions, because they employ an analytical double standard in the consideration and disposition of conflationary issues, which similarly gives effect to the conflation's operation cul-

\textsuperscript{1085} See supra Chapter Two, Part II.A.
\textsuperscript{1086} See generally supra Chapter Two, Part IV.
turally while denying its significance legally. The dichotomy’s definitional double standard, in other words, is aggravated by an analytical double standard that relies on the shifting of claims from sex and gender under Leg One to sexual orientation under Leg Two. Thus, the definitional grouping of sex and gender, and the definitional distinguishing of sexual orientation, are confounded by decisional conflationary practices in a way that facilitates rather than diminishes discrimination.

As this summary indicates, both of these double standards stem chiefly from the assertion of artificial legal distinctions that isolate sexual orientation from sex and gender, and that therefore insist on denying the conflation’s second leg. These distinctions, as the legal record amply demonstrates, prove to be unrealistic and unsustainable in practice; given the grip that the conflation has on law and society, the definitional niceties that forcibly separate sexual orientation discrimination from sex and gender discrimination under this approach prove to be untenable as applied. For instance, in the first ostensible sexual orientation case under Title VII, *Smith*, the court, even while citing the EEOC dichotomy, merely dropped a bare reference to the claimant’s perceived social effeminacy before launching into a discussion of sexual orientation.

While expressly citing to this dichotomy, conflationary rulings like *Smith* exonerate androsexist prejudice against social gender atypicality, which occurs along the professedly protected sex/gender regions of Leg One, by recategorizing it as heterosexist sexual orientation discrimination, thereby shifting the claim to the unprotected domains of Leg Two. This shift thus denies cultural reality to manufacture legal fictions that accommodate the very evil ostensibly being fought. Consequently, this approach not only fails to fulfill Title VII’s formal prohibition against sex and gender discrimination, in practice it fans both androsexism and heterosexism.

The other cases reviewed in Chapter Two likewise manufactured issues about sexual orientation when the facts raised direct and palpable sex and gender issues, such as wearing ear jewelry or growing long hair. Indeed, in cases such as *Strailey*, the EEOC itself disregarded or misapplied its own definitional framework when it declined jurisdiction over social gender atypicality claims as if they were about sexual orientation. In each of these instances, the cases clearly presented independent sex and gender claims that did not involve or depend on sexual orientation as defined specifically under this approach—“sexual proclivities or practices”—yet both the EEOC and the courts focused, and ruled, on sexual orientation grounds.

1087. *See supra* notes 416-27 and accompanying text.
1088. *See, e.g., supra* Chapter Two, Part II.C, E-F.
1089. *See supra* notes 472-73 and accompanying text.
1090. At the same time, courts occasionally intercede when the discrimination is against social gender atypicality among women, as in *Hopkins*. Overall, as previously explained, this inconsistency
Moreover, the courts persisted in this error even when the claimants highlighted the problem with numerous and vehement protestations as each litigation unfolded. Remember, for instance, that in *Smith* and *Valdes* the plaintiffs did not self-identify as gay or lesbian, and there was no evidence to suggest that either one was. In fact, both plaintiffs loudly, resolutely, and repeatedly asserted the contrary. In practice, then, the tidy definitional categories posited by the EEOC dichotomy that formally distinguish sexual orientation from sex and gender to deny the second leg of the conflation are easily and insistently ignored in favor of the conflationary conceptions that directly violate the dichotomy’s internal distinctions.

These substantive and analytical double standards therefore combine to make the EEOC dichotomy an unsteady and unreliable approach to sex (and gender) discrimination. The end result is that the EEOC dichotomy as applied creates a giant loophole that in practice licenses not only sexual orientation discrimination, but also sex and gender discrimination. The courts’ analytical double standard, coupled with the EEOC’s substantive double standard, perverts the law because it furthers rather than combats traditionalist sex and gender discrimination. In short, the perverse disjunction of theory and practice under the EEOC dichotomy makes this second approach to sex (and gender) discrimination under Title VII unrealistic, unstable, undefendable and, ultimately, untrustworthy.

perpetuates a male-centric bias in the law, even though it permits discrimination against (feminine) men, because it reinforces the cultural and legal prevalence of maleness or masculinity as the sex/gender ideal, both culturally and legally. See supra notes 584-90 and accompanying text. In practice, this disparity further perverts the substance and purpose of sex and gender anti-discrimination law because it undermines the acceptance of femaleness or femininity as culturally and legally equal to maleness or masculinity.

Of course, consistent and principled applications of the EEOC dichotomy approach specifically to gender (in addition to sex) would serve to protect social gender atypicality among both sexes because the anti-discrimination charge necessarily would be applied with equal and consistent force to effeminacy among men and masculinity among women. And because consistent and principled applications of this approach would protect gender atypicality regardless of sex, the EEOC dichotomy in this way again—but still in theory—compares favorably with the grossly underinclusive traditional notions approach. See supra notes 1077-82 and accompanying text. However, this consistency of application and its potential gains would further wed the law to the conflation; expanded application of this approach would expand its problematic reification of the conflationary status quo, see infra Part I.A.2, and its wide-ranging and pernicious consequences. See generally Chapter Four.

1091. See supra notes 428-34, 591-614 and accompanying text.

1092. Recall, for example, how brazenly the courts have (mis)cast discrimination against social gender atypicality as sexual orientation discrimination: acts of discrimination due to hobbies and mannerisms in *Smith*, due to ear jewelry in *Strailey*, due to attire in *Blackwell*, and due to grooming in *Poe* and *Dreibelbis*, received formal judicial approval as sexual orientation discrimination, even though all of those acts in fact constituted social gender discrimination because they discriminated on the basis of social gender atypicality, rather than on the basis of “sexual practices or proclivities.” See discussion supra Chapter Two.

1093. See supra notes 428-37 and accompanying text.

1094. The ease with which the EEOC dichotomy collapses in practice suggests that the EEOC and the courts simply and completely are unable or unwilling, or both, to withstand conflationary influences in their decisionmaking. In other words, the judicial and administrative record to date offers no reason to believe in or to count on the practical effectiveness of the EEOC approach to sex discrimination under
b. Ignoring History

As noted immediately above, the EEOC dichotomy's breakdown stems largely from its failure to recognize, and to accommodate, the historic and contemporary role of sexual orientation in sex and gender discrimination. However, the theoretical separation of sex and gender on the one hand from sexual orientation on the other is untenable because it is illusory and artificial: this separation ignores the clinical and social history of conflation that has left still-indelible marks on modern culture and legal culture. This approach, and its double standard, thus depend on ignorance regarding conflationary history and reality.

As the discussions in Chapter One and Chapter Two show, under the conflation, social gender atypicality is understood, acknowledged, and treated as a sexual orientation phenomenon, both culturally and legally. Therefore, under the conflation, sexual orientation and gender discrimination are bundled into a single whole, both normatively and intellectually. Given these historical and contemporary social facts, the EEOC dichotomy employs theoretical distinctions that necessarily hinge on actual or willed ignorance of conflationary history and reality: the dichotomy's double standard asserts definitional distinctions that social and legal experience simply does not support and that, given the conflation's omnipresence, are unsustainable as well as unsupportable and unworkable. Accordingly, the EEOC dichotomy is not only impracticable in application, it is historically and conceptually unsound as well.
c. The Reification of the Sex & Gender Conflation

Furthermore, and as pointed out earlier, the EEOC’s formulation of this dichotomy accepts the conflation’s first leg because it expressly conflates sex and gender to create a category of anti-discrimination protection.\textsuperscript{1098} Although this category is more expansive than that under a traditional notions conception of sex, which altogether ignores gender, the dichotomy’s formulation explicitly reifies the conflation of sex and gender. The only (theoretical) gain offered by this approach—protecting gender as well as sex—thus entails a heavy cost: because the conflation as a whole is a highly problematic construct,\textsuperscript{1099} the dichotomy’s unquestioning and unthinking acceptance of its first leg also is highly problematic, and ultimately inadvisable.

For the reasons outlined above, the EEOC dichotomy represents a highly problematic and operationally untenable approach to sex (and gender) discrimination. On the one hand, the conflation of sex and gender under the dichotomy theoretically facilitates protection against social gender discrimination. On the other hand, the dichotomy’s disregard for the role of sexual orientation in the conflation creates a double standard and loophole that ends up validating sex and social gender discrimination, as well as sexual gender discrimination (i.e., sexual orientation discrimination). This dichotomy, in short, is internally inconsistent both as conceived and as applied. The EEOC approach, like the traditional notions approach, therefore has not, and cannot, lend itself to principled (and informed) analyses. Consequently, like the traditional notions approach, this second approach to sex discrimination under Title VII fails to provide effective and consistent protection against sex (and gender) discrimination.

3. The “Stereotype” Analysis

The third approach to the Title VII “sex” provision may be described as the “stereotype analysis.”\textsuperscript{1100} An example of this analysis is provided by Hopkins, in which the Supreme Court described the scope of Title VII’s sex provision as covering the “entire spectrum” of “stereotypes” based on

\begin{itemize}
\item[1098.] See supra notes 382-86 and accompanying text.
\item[1099.] See supra Chapter Four.
\item[1100.] Notably, the Supreme Court has approved this approach in both Title VII and constitutional analysis. For a discussion of rulings employing stereotype analysis in gender cases under the Constitution, see infra notes 1112-26 and accompanying text.
\end{itemize}
Moreover, the high Court specifically embraced and upheld the district court's use and application of this "stereotype" analysis under Title VII. Even earlier, in Los Angeles Dep't of Water & Power v. Manhart, the Supreme Court had pronounced emphatically that, under Title VII, "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions" regarding sex and gender. This third approach thus defines sex discrimination as including the full range of stereotypical gender features that, under the conflation, are attributed to humans on the basis of sex and that, as such, constitute the sex-based gender composite codified at and since the turn of the century by sexologists.

This analysis, like the EEOC dichotomy, on its face extends to discrimination occurring along Leg One, but a holistic and contextual (re)evaluation of this analysis reveals that its principled application covers discrimination occurring along Leg Two as well: applied in a principled manner, and as articulated and applied in Hopkins and Manhart, this stereotype analysis logically would apply to any stereotype that either formally or informally penalizes gender, including stereotypes that penalize gender atypicality. The Court's broad language therefore suggests that a principled and informed application of this stereotype analysis would include stereotypes that, under the conflation's second leg, link social gender atypicality with minority sexual orientation. In other words, if the stereotype analysis does in fact protect against the "entire spectrum" of "stereotypes" that constitute and project gender, then this approach must protect gender atypicality because gender atypicality is about gender regardless, or in spite, of its conflationary association with minority sexual orientation.

Consequently, this stereotype analysis, if applied in a holistic and contextual manner, would provide greater protection against discrimination based on sex than either the traditional notions approach or the EEOC dichotomy; the stereotype analysis, in other words, has the potential to check virulent prejudices, stereotype by stereotype, whether occurring along Leg One or Leg Two. And because its principled application in effect closes the sexual orientation loophole, the stereotype analysis appears best suited (of the three current Title VII approaches) to combat conflation-

1102. 90 U.S. at 255-58.
1104. See supra Chapter One, Part I.A-B.
1105. See, e.g., supra notes 416-27 and accompanying text.
1106. See generally Taub, supra note 582, at 349 (arguing that stereotypical employment practices ought to be considered unlawful per se under Title VII because "attitudinal factors internalized by both employer and employee constitute a primary obstacle to equal employment opportunity" and "are reinforced continually by adverse employment decisions grounded in stereotypical role expectations"). See also supra notes 148 and 247 and authorities discussed therein on internalization.
ary bigotries—this analysis can protect social and sexual gender atypicality regardless of sex, gender, or sexual orientation. Hopkins illustrates that the stereotype analysis is capable of combating gender-atypicality prejudice; it is no coincidence that in cases where courts did not employ this analysis (such as Smith and Strailey), the outcomes condoned the challenged discrimination.\textsuperscript{1107} However, and perhaps for these very reasons, the stereotype analysis approach is not applied in a principled, holistic, and contextual manner.

The potential of the stereotype analysis under Title VII remains unfulfilled because it is applied with varying and apparently \textit{ad hoc} levels of care and vigor. Currently, this analysis is employed in cases implicating at most social gender issues under the conflation’s first leg and always in a way that skirts actual or perceived sexual orientation issues. The stereotype analysis never has been applied successfully to sex/gender stereotypes perceived for one conflationary reason or another as implicating the sexual dimension of gender—sexual orientation: the courts \textit{never} have elected to employ this approach in Title VII cases where they perceived an ostensible sexual orientation issue,\textsuperscript{1108} and, although a couple of district courts have sought to apply this approach under the Fourteenth Amendment, these rulings were overturned on appeal.\textsuperscript{1109}

This uniformity of neglect and avoidance may signal judicial reluctance to apply the powerfully-phrased analysis in perceived (or actual) sexual orientation settings, fearing that it might compel undesired results under Leg Two of the conflation.\textsuperscript{1110} If so, this uniformity of neglect and avoidance underscores how conflationary uses of sexual orientation are results-oriented, and how they impair the fight against sex and gender discrimination along Leg One as well; this neglect and avoidance shows how heterosexism motivates judicial reluctance or refusal to use the approach best suited to combat conflationary sex/gender discrimination that combines heterosexism with androsexism under the joint or combined operation of Leg One and Leg Two. This potent and expansive approach therefore

\textsuperscript{1107} See \textit{supra} Chapter Two.

\textsuperscript{1108} A comprehensive LEXIS search on April 21, 1994 in the Genfed library failed to turn up any instances in which a court had applied the stereotype analysis in a Title VII case involving perceived sexual orientation issues. The search used was “stereotype! w/15 sexual orientation or gay or homosexual or lesbian w/15 Title 7 or Title VII.” This search confirmed manual research conducted previously on the same point, which also produced no results.

\textsuperscript{1109} The district court did apply the stereotype analysis under the Equal Protection Clause in Jantz v. Muci, 759 F. Supp. 1543, 1548-49 (D. Kan. 1991) and, as in Hopkins, this analysis proved effective in countering the conflationary bigotries animating that case. See \textit{supra} Chapter Two, Part III.A. However, the Jantz ruling was reversed by the Tenth Circuit. 976 F.2d 623 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993). A similar scenario occurred in High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1372 (N.D. Cal. 1987), rev’d in part, vacated in part, 895 F.2d 563 (9th Cir. 1990). Both of these cases involved allegations or acknowledgements of same-sex dispositions.

\textsuperscript{1110} See generally Signorile, \textit{supra} note 1073; \textit{Developments in the Law—Sexual Orientation and the Law}, \textit{supra} note 83.
remains only one of three under Title VII, while the narrowest and least
effective approach—traditional notions of sex—continues to enjoy unwar-
ranted primacy.

The end result of this status quo is that the Title VII stereotype analy-
ysis has not realized its potential. Instead, it has been rendered underinclud-
ive and inadequate because it is not applied in a holistic and contextual
manner. Furthermore, the courts continue to use the other two more restric-
tive Title VII approaches to condone discrimination based on stereotypes
that in fact conflate sex, gender, and sexual orientation. Nonetheless, of the
three existing Title VII anti-discrimination approaches, the stereotype analy-
ysis has the most promise in protecting sex and gender from society’s tradi-
tionalist biases, both in theory and in practice—but only if it is applied in a
principled and resolute manner.

B. Gender & the Constitution

The Supreme Court also has employed the stereotype analysis under
the Constitution, and more specifically in Fifth Amendment and Fourteenth
Amendment jurisprudence.1111 It follows that the scope of anti-discrimina-
tion protection under the Constitution via this analysis substantially should
(and does) reflect the scope of the stereotype analysis under Title VII. For
the purposes of describing the doctrinal status quo, however, the main dif-
cference is that, while this stereotype analysis is one of three approaches
under Title VII, it is the primary approach under the Constitution. This
primacy flows from the Supreme Court’s repeated use of the term “gender”
rather than “sex” to frame its constitutional law rulings, and from its general
emphasis on, and specific denunciation of, discrimination based on gender
stereotyping in those rulings.

For instance, in the landmark case Frontiero v. Richardson, the plural-
ity opinion decried the “stereotyped distinctions between the sexes” that are
embedded in American law and society.1112 Likewise, in Stanton v. Stan-
ton, the Supreme Court denounced laws that “coincide[ ] with the role-typ-
ing [that] society has long imposed” to foster and enforce conformity with
traditionalist notions of social gender typicality.1113 In Orr v. Orr, the

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1111. When an act or classification of the federal government is at issue, the Equal Protection
compone nt of the Fifth Amendment may apply. See generally Kenneth L. Karst, The Fifth
Amendment’s Guarantee of Equal Protection, 55 N.C. L. Rev. 541 (1977) (exploring the Supreme
Court’s development of equal protection principles under the Fifth Amendment). Similarly, acts or
classifications of state or local governments may implicate the Equal Protection Clause of the Fourteenth
Amendment. See generally Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37
Calif. L. Rev. 341 (1949) (tracing the rise of equal protection doctrine to constitutional prominence);

1112. 411 U.S. 677, 678-79, 685 (1973) (invalidating a military regulation that presumed that wives
of military personnel qualified for “dependent” benefits, but required husbands of military personnel to
prove their actual economic dependence to so qualify); see also supra note 1111.

1113. 421 U.S. 7, 15 (1975) (striking down a child support scheme that mandated payments for male
offspring until the age of 21 but for female offspring only until the age of 18).
Court held that a classification could not be allowed to stand when it “carries with it the baggage of sexual stereotypes”\textsuperscript{1114} that in effect constitute the Euro-American gender composite,\textsuperscript{1115} and emphasized that such classifications “carry the inherent risk of reinforcing stereotypes” constituting the composite.\textsuperscript{1116} In \textit{Personnel Administrator of Massachusetts v. Feeney}, the Court similarly reiterated that constitutional principles prohibit “stereotypic and predefined”\textsuperscript{1117} gender classifications, even though it upheld the challenged classification.\textsuperscript{1118}

Similarly, in \textit{Mississippi University for Women v. Hogan}, the Supreme Court cautioned that “[a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities”\textsuperscript{1119} associated with sex-based gender. Thus, the Court continued, “[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions”\textsuperscript{1120} about (sex and) gender. Finding that the statute at issue “tend[ed] to perpetuate stereotyped view[s]”\textsuperscript{1121} concerning sex-based gender roles, the Court invalidated the statute under the Equal Protection Clause. Most recently, in 1994 the Supreme Court employed the stereotype analysis in its landmark ruling in \textit{J.E.B. v. Alabama ex rel. T.B.},\textsuperscript{1122} which held that the Equal Protection Clause of the Fourteenth Amendment prohibits the use of sex to disqualify potential jurors, reasoning that such disqualifications implicate and perpetuate traditionalist sex/gender stereotypes.\textsuperscript{1123}

These rulings individually and collectively make two salient points regarding the stereotype analysis under the Constitution: first, that gender (rather than sex) defines the reach of the law and the scope of the analysis, and second, that traditionalist stereotypes are the evil to be fought. The Supreme Court’s constitutional holdings thereby establish a broad protection against conflationary sex/gender discrimination that encompasses more than strict or “traditional notions” of sex under Title VII.\textsuperscript{1124} At the very

\begin{itemize}
  \item \textsuperscript{1114} 440 U.S. 268, 283 (1979) (invalidating an alimony scheme that required husbands but not wives to pay alimony upon divorce); \textit{see also} Califano v. Westcott, 443 U.S. 76, 89 (1979) (following \textit{Orr} and holding that a public assistance program that provided benefits to a family upon a father’s unemployment but not upon a mother’s unemployment was unconstitutional).
  \item \textsuperscript{1115} \textit{See supra} notes 122-30 and accompanying text.
  \item \textsuperscript{1116} 440 U.S. at 283.
  \item \textsuperscript{1117} 442 U.S. 256, 279 (1979) (challenging a classification giving public employment preferences to veterans who, it was argued, constituted a class from which women traditionally have been excluded based on gender stereotypes regarding their capacity for military service).
  \item \textsuperscript{1118} \textit{Id.} at 281.
  \item \textsuperscript{1119} 458 U.S. 718, 724-25 (1982) (holding that the exclusion of men from a state university’s School of Nursing violated the Equal Protection Clause).
  \item \textsuperscript{1120} \textit{Id.} at 725.
  \item \textsuperscript{1121} \textit{Id.} at 729.
  \item \textsuperscript{1122} 114 S. Ct. 1419 (1994).
  \item \textsuperscript{1123} \textit{Id.} at 1426-28.
  \item \textsuperscript{1124} This suggestion, however, must be tempered with recognition of the history surrounding the selection of “gender” rather than “sex” for use in constitutional litigation. \textit{See infra} notes 1153-54 and
\end{itemize}
least, these cases show that the constitutional version of the stereotype analysis protects both sex and gender, and thus protects against discrimination occurring along Leg One of the conflation.

However, as under Title VII, the Court has not employed the stereotype analysis in perceived sexual orientation cases under the Constitution. Instead, as under Title VII, the constitutional application of this approach at most protects against social gender discrimination thought to implicate the first leg of the conflation but never against discrimination implicating sexual aspects of gender under the conflation’s second leg. As under Title VII, heterosexist motivations thus vitiate legal rules against conflationary gender discrimination that combines heterosexism with androsexism under the joint operation of Leg One and Leg Two. Accordingly, the stereotype analysis, as currently applied under the Constitution, is underinclusive and inadequate for the same reasons that make it so under Title VII.

C. Sexual Orientation & De Jure Discrimination

This Chapter of the Project thus far has critiqued and compared the relative coverage and shortcomings of the three approaches to sex and gender anti-discrimination law under Title VII and the Constitution. As the discussion makes clear, all three approaches categorically exclude sexual orientation from the analysis, even though it plays a key and consistent role, both socially and legally, as part of the overall sex-based gender composite. Consequently, of the three constructs, or endpoints, that constitute the conflation, only sexual orientation currently provides a lawful basis for unabashedly rank discrimination under any or all of these approaches.

Yet, as previously noted, the legality of sexual orientation discrimination serves as a stepping stone to judicial validation of sex and gender discrimination because the courts, whether through ignorance or calculation, are able simply to (re)categorize social gender discrimination as sexual orientation discrimination, and thus to make the illegal legal. These accompanying text. Indeed, the history of the use of “sex” under Title VII and of “gender” under the Constitution establishes a doubly bizarre scenario that makes it implausible to infer or impute the “intent” underlying or motivating these terms. See supra note 1074; infra notes 1150-58 and accompanying text.

1125. As noted earlier, two district courts were overturned on appeal in their use of stereotype analysis in cases that involved sexual orientation discrimination claims or charges brought under the Fourteenth Amendment, see supra note 1109 and accompanying text, but the Supreme Court itself has not applied this analysis in this context.

1126. See supra notes 1100-10 and accompanying text.


1128. See supra Chapter Two, Part IV.D.
(re)categorizations, as Chapters One and Two of this Project show, are made seemingly rational and superficially justifiable by the conflation because conflationary precepts make the cross-association of social gender atypicality with minority sexual orientation a culturally familiar and legally comfortable norm under the joint operation of Leg One and Leg Two. Judicial and administrative uses of sexual orientation therefore cause the law to misperceive the nature of sex and gender discrimination by occluding the historic and present construction of sexual orientation as the sexual or affectional component of sex-based gender.\footnote{1129}{See \textit{supra}. Chapter One, Part I.B-C and Part II.A-B.} This conflationary (re)categorization of social gender discrimination, and thus the law's (mis)perception of sex and gender discrimination, can occur (and does occur) under all three of the approaches discussed above.

This (mis)perception in turn causes the law to fail to fulfill its charge against sex and gender discrimination. In doing so, the law betrays both substantive and systemic values.\footnote{1130}{See \textit{supra} notes 330-36 and authorities cited therein on substantive anti-discrimination values regarding sex/gender equality and systemic values regarding informed and impartial adjudication of cases.} In sum, the current approval of \textit{de jure} sexual orientation discrimination under all three approaches, whether in statutory or constitutional contexts, is indefensible because it permits formally illegal discrimination occurring along Leg One to be shifted over to Leg Two in a strategic move that reinforces Leg One substantively; this sexual orientation loophole licenses sex and gender discrimination because it allows decisionmakers to overlook, or willfully deny, the way in which the second leg of the conflation joins sex-determined gender with sexual orientation and because it permits the strategic use of Leg Two to uphold the conflationary substance of Leg One.\footnote{1131}{See generally \textit{supra} Chapter Two.}

This sketch of the doctrinal \textit{status quo} shows that all three of these analytical approaches miss the mark, whether applied under Title VII or the Constitution. This conclusion therefore compels consideration of a more sensible and effective alternative—a holistic and contextual alternative—if existing constitutional and statutory mandates against sex and gender discrimination are to be made meaningful in conflationary contexts and controversies. The reconstructed approach to sex-based discrimination outlined below endeavors to provide such an alternative.

\section*{II

\textbf{Principles, Results, \\ & Benefits of Doctrinal \\
Reconstruction}}

At the outset, it may be helpful to note again that the reconstructed version of sex/gender anti-discrimination law expounded below does not call for the creation of new rules or rights. Instead, the proposed recon-
struction builds on existing rules and concepts under both Title VII and the Constitution. Furthermore, this discussion also accepts traditional definitions of sex, gender, and sexual orientation. This Part therefore urges first and foremost a principled and informed application of existing rules to existing constructs; the key new feature of this holistic and contextual doctrinal reconstruction is that it is self-consciously post-conflationary, non-conflationary, and anti-conflationary. In presenting the basic principles, the substantive results, and the practical benefits of this reconstruction, this Part of the Chapter strives to outline the route toward, and the elements of, a framework for anti-discrimination law that is devoted to promoting sex/gender equality in practice both legally and culturally.

A. Basic Principles for Doctrinal Reconstruction

The basic principles to guide reconstructive efforts are, of course, drawn from the conflationary record adduced in the preceding Chapters of this Project. To some extent these principles therefore should be self-evident. And, because they respond to various and inter-connected sex/gender cross-associations, these principles are inter-related.

1. Contextualize the Conflation Holistically

The threshold principle is to contextualize the conflation holistically—as one whole. This threshold and paramount principle thus calls for recognition of the cultural and legal fact that sex/gender discrimination at all times, though in varying ways and degrees, necessarily implicates all three endpoints of the conflation. This principle broadly calls for an end to the various conflationary practices that facilitate and protect the commission of sex/gender discrimination, including (but not limited to): the sexual orientation loophole, the sex-plus loophole, the shifting of claims from Leg One to Leg Two or Leg Three, the EEOC’s substantive double standard, the courts’ analytical double standard, and the “equal discrimination” defense. This principle, in short, calls for recognition that discrimination does not occur on or at the conflation’s endpoints in isolation, and that it occurs along or within the conflation’s legs.

This principle additionally calls for a conscious appreciation of the fact that the conflation is a cultural invention. It does not embody or represent any essential order of human existence. Moreover, it does not safe-
guard any benefits that aid the human condition. It cannot command any due fealty or reverence from the law. This principle, in fact, calls for the opposite: it calls for an anti-conflationary appreciation of the fact that the conflation is a malignant contrivance because it affirmatively visits undue harms upon individuals, upon the legal system, and upon society at large in multiple and demonstrable ways. This threshold principle, calling for contextual and holistic approaches both to sex/gender discrimination and to the conflation itself, thus serves as the prime directive toward doctrinal reform and reconstruction.

2. Observe Conceptual Definitions

The second principle calls for a clear understanding of the historical and current definitions of sex, gender, and sexual orientation. Definitional clarity regarding the conflation’s three endpoints is important for doctrinal reconstruction because it should help to avoid (at least) unwitting entanglements with conflationary cross-associations; definitional clarity will make legal culture more aware and conscious of the conflation’s influence over legal analyses and actions. In this way, definitional clarity should help heighten the law’s awareness of and vigilance for strategic or ignorant deployments of the conflation in the cases brought to it for adjudication from modern culture. In so doing, this principle can help terminate judicial and legal complicity in conflationary wrongdoing.

In turn, this heightened awareness should help make it easier for decisionmakers to avert the confused and confusing rulings that lurch between and among the conflation’s three endpoints without, and sometimes despite, factual or analytical reason. And, over time, this second principle may lead the law beyond the conceptual limits embodied in the conflation, thus freeing the legal imagination to (re)configure the inter-relations of sex, gender, and sexual orientation more realistically and humanely.

3. Acknowledge Definitional Limitations

The third principle follows from and tempers the second in that it mandates a simultaneous acknowledgment of the limitations that afflict all conceptual definitions, including those of the conflation’s three endpoints. The main limitation here, as elsewhere, is that concepts sometimes crumble and often are reinvented in application. This limitation thereby necessitates a sense of multiple consciousness—an ability to consciously comprehend and assimilate simultaneously the concept in theory as well as its limitations in

1139. See supra Chapter Four, Part III.A.5.
1140. See supra Chapter Four, Part II.
1141. See supra Foreword, Part II.
1142. See, e.g., Chapter Two.
1143. For further discussion of post-conflationary possibilities regarding the (re)configuration of these three constructs see Valdes, supra note 9.
application. [1144] This principle thus calls for recognition that, as a practical matter, the conflation creates dynamics of discrimination that easily and chronically transcend and confound conceptual niceties. This principle, in other words, calls upon the law to become and stay alert regarding both the definitions and limitations of sex, gender, and sexual orientation, and to do so simultaneously. Only through this exercise of multiple consciousness will legal institutions and processes be able to track the legal ramifications of both the definitions and their limits in a careful, informed, consistent, and principled manner.

4. Combat Conflationary Dynamics

The fourth principle calls for recognition of the inevitable: the law must militate against both the conflation and its related discriminatory dynamics if legal rules are to fulfill their formal and established charge of policing sex and gender discrimination. To be effective, holistic and contextual analyses of sex/gender bias must be comprehensive enough to encompass the conflationary dynamics of everyday sex/gender discrimination, as illustrated by the facts of the cases reviewed in Chapter Two. This principle consequently calls upon legal culture to implement with institutional vigor and intellectual integrity the nation’s repudiation of sex/gender discrimination, as embodied in Title VII and constitutional jurisprudence, [1145] specifically in light of the cultural, legal, and comparative lessons from the conflationary record explored in this Project. In other words, this principle calls for a fearless and resolute approach to anti-discrimination law to replace the analytical chaos of current doctrine.

5. Accept the Role of Sexual Orientation

The next principle, which flows from and reinforces the preceding one, calls for long-overdue acceptance specifically of the role that sexual orientation plays in the conflationary dynamics of sex/gender discrimination. In effect, this principle specifically demands that legal culture close the sexual orientation loophole that unjustifiably permits the exoneration of blatant gender discrimination, regardless of sex or of sexual orientation. [1146] This principle thus takes note of a bedrock fact: in order to militate against conflationary bigotries effectively, the law has no choice but to abandon the ignorant or strategic doctrinal severance of sexual orientation discrimination from gender discrimination that is effected analytically through the courts’ double standard and substantively through the EEOC’s definitional

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1144. See, e.g., Matsuda, supra note 77 (discussing the need for law students and lawyers to balance abstracted concepts and their applications in the shifting circumstances of the “real” world).

1145. See supra notes 330 and 335-36 and authorities cited therein on the formal repudiation of sex and gender discrimination under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

1146. See supra notes 428-37 and accompanying text.
dichotomy. This principle calls for legal culture to overcome its disdain of sexual minorities, and to quit using society’s irrational fear and loathing of sexual minorities to justify legal conformance to and ratification of the conflationary status quo.

This principle, in other words, requires the courts to reject the EEOC’s definitional double standard and to refrain from continued use of their analytical double standard. In this way, the vehicle(s) through which decisionmakers shift claims from Leg One to Leg Two, thereby denying the conflation as a matter of law while licensing it as a matter of culture, would be disabled. This principle consequently involves legal sophistication and analytical acknowledgment of the myriad ways in which androsexism and heterosexism collaborate in everyday situations via the conflation to spark and shape legal controversies.

6. Recognize Underpinnings of Hetero-Patriarchy

The sixth principle consequently focuses directly on ideological awareness and sophistication. Specifically, this principle compels recognition of the ways in which androsexist and heterosexist precepts combine to construct and animate the conflation, and thereby to subordinate intentionally and specifically women and sexual minorities. This principle therefore calls for judicial vigilance against the continuing vitality and application of conflationary imperatives that uphold traditionalist active/passive hierarchies boundaries. This principle ultimately calls for a clear understanding that gender is the central device for the simultaneous oppression both of women and of sexual minorities under hetero-patriarchy.

7. Elevate Remedial Purposes Over Fictions of “Intent”

The penultimate principle requires legal culture, and the courts specifically, to elevate the remedial purposes of anti-discrimination law—the eradication of invidious sex/gender bias—over fictional imputations of legislative and constitutional “intent” that in practice cramp the proper reach of existing rules, and that thus undercut the effort to terminate sex/gender bias. This principle applies both under Title VII and under the Constitution. However, this principle is especially urgent under the statute because fictions of intent are used as the chief justification for making the unwarranted and untenable traditional notions approach the primary conception of sex discrimination under Title VII.

Therefore, the first step toward the implementation of this principle is to drop the pretense regarding congressional intent in enacting the “sex” provision of Title VII. This pretense, as noted earlier, holds that Congress

1147. See supra Part I.A.2.a.
1148. See supra Chapter Two, Part VI; see also infra Afterword & Prologue, Part II.D.
1149. See supra Chapter Four, Part I.E.
1150. See, e.g., supra notes 1077-79 and accompanying text.
intended the term to denote "traditional notions" of sex, and thereby makes way for this conceptually underinclusive and historically implausible construction of Title VII. However, the legislative history of the provision shows that sex was included in the statute by amendment strictly as a strategic bluff—a tactic calculated by the amendment's sponsor to defeat the entire bill, and generally understood as such. Thus, the only plausible interpretation of legislative intent regarding "sex" is that there is none.

Concomitantly, this principle calls upon legal culture to recognize that divining an intent behind the Supreme Court's use of "gender" (rather than "sex") in its constitutional law rulings may be equally problematic because the origins of the term in constitutional law are rooted in happenstance. As Justice Ginsburg recently explained, she began using the term "gender" rather than the term "sex" almost by fluke, as part of her litigation strategy to coax judicial acceptance of her pioneering sex/gender arguments:

I owe it all to my secretary... who said, "I'm typing all these briefs and articles for you, and the word sex, sex, sex is on every page..."

"Don't you know that those nine men (on the Supreme Court)—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."

Of course, Ginsburg did, and since then "gender" has become ensconced in constitutional case law as the predominant term used in conjunction with the stereotype analysis.

This use of gender in constitutional cases in turn, and over time, has helped to establish "gender" as the legal term to signify the social dimensions of sex—the attributes and roles that are based on sex and that comprise the gender composite. This particular point recently was made clear by Justice Scalia, whose 1994 dissent in the J.E.B. case sharply points out this sex/gender distinction. Thus, even though the choice of terminology was not originally cognizant of this distinction, the use of "gender" in conjunction with judicial emphasis on stereotyping positions constitutional law to protect against discrimination based on the full range of conflationary stereotypes that make up the gender composite, rather than on the

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1151. See supra note 1077 and accompanying text.
1152. See supra note 1074.
1154. See supra Part I.B.
1155. See supra Foreword, Part II.B; see also supra Chapter One, Part I.B.2; Chapter Two, Part I.A-B.
narrow bio-physical construction of “sex.”\textsuperscript{1157} This terminology therefore is fortuitous: it accurately focuses on gender as the source and object of discrimination.

As this brief discussion shows, given the history of “sex” in Title VII and of “gender” in Equal Protection law, no authoritative “intent” credibly can be inferred or imputed regarding either term. Moreover, as previously noted, “sex,” as used in Title VII, must be deemed to mean something more than external genitalia under conventional norms of statutory interpretation, at least if Title VII is to avoid reduction to absurdity and achieve proper remedial potency.\textsuperscript{1158} Furthermore, as just noted above, the use of gender, though originally idiosyncratic, is both accurate and proper: it is accurate in describing the source and object of conflationary bigotries, and it is proper in helping to focus the law on the conflationary dynamics of discrimination that implicate sex, gender, and sexual orientation. Therefore, this penultimate principle calls upon the law to drop all pretense(s) regarding the fictional(ized) attributions of legal intent underlying either term and forthrightly to employ gender as the more accurate and proper term and concept to identify, describe, and protect the phenomena and cross-associations that come under attack via conflationary acts or strains of discrimination.

8. Apply the “Stereotype” Analysis Holistically & Contextually

The final principle harkens back to the first one, and specifically attempts to bridge the transition from the doctrinal \textit{status quo} to a reconstructed doctrine. This principle thus focuses on the stereotype analysis as the most suitable approach among the three comprising the doctrinal \textit{status quo}.\textsuperscript{1159} The stereotype analysis, as discussed above, offers the most logical and practical means for checking conflationary bigotries of the three current approaches because it is aimed precisely at the eradication of the “entire spectrum” of traditionalist “stereotypes” that underlie the dominant sex/gender system.\textsuperscript{1160} This system, as already discussed, imposes active/passive social/sexual stereotypes on every human at birth based on sex, then enforces these social and sexual stereotypes throughout life in the form of deductive and intransitive gender.\textsuperscript{1161} The dominant sex/gender system additionally insists on viewing minority sexual orientation as a species of

\textsuperscript{1157} This fortuitous choice of terms brings two virtues to the law, albeit unwittingly: first, this terminology facilitates a conceptual as well as a linguistic avoidance of the conflation in constitutional doctrine and, second, on the merits it facilitates invigoration of anti-discrimination law. This terminology, in other words, facilitates recognition of the recurring and inescapable centrality of gender (rather than just sex) in hetero-patriarchal discrimination. \textit{See supra} Chapter Four, Part IV.A.

\textsuperscript{1158} \textit{See supra} notes 1081-82 and accompanying text.

\textsuperscript{1159} \textit{See supra} notes Part I.A-B.

\textsuperscript{1160} \textit{See supra} notes 1100-04, 1111-26 and accompanying text.

\textsuperscript{1161} \textit{See supra} Chapter One, Part I.A.
gender deficiency or deformity that is punishable as such.\textsuperscript{1162} Applied in a holistic and principled manner, the "entire spectrum" consequently would protect against "stereotypes" based on the conflation of sex, gender, and sexual orientation; and this spectrum necessarily includes the stereotypical and conflationary cross-association of social gender atypicality with sexual gender atypicality, or with minority sexual orientation.

In this way, a holistic and contextual application of the stereotype analysis could (re)vitalize the law's sex/gender anti-discrimination commitment, and accord to Title VII the scope and potency that is generally given to statutes of a remedial nature.\textsuperscript{1163} This principle thus uses an informed and disciplined application of the established stereotype analysis as the best approach to sex/gender anti-discrimination law, both in statutory and constitutional contexts, to anchor this doctrinal reconstruction to the doctrinal \textit{status quo}. Accordingly, this principle strives to stay within the basic analytical framework of the \textit{status quo} while still managing to challenge and halt the conflationary bigotries that currently elude the law and that therefore continue to beset this nation.\textsuperscript{1164}

Collectively, these eight principles provide a basis for doctrinal reconstruction, establishing the foundational parameters for a holistic and contextual reformulation of anti-discrimination law. These principles can help to steer the law away from the conflationary follies that have constricted and hobbled anti-discrimination doctrine to date and toward a careful treatment of cases that bring conflationary controversies to the legal system for just and reasoned resolution. These principles, over time, therefore should generate principled and sensible substantive results that effectively curb societal sex/gender discrimination.

\textbf{B. Substantive Results of Doctrinal Reconstruction}

If the eight principles identified above are implemented, the erratic treatment of discrimination thought to be based on sex, gender, or sexual orientation could be reconciled because the discordant trio of approaches under the doctrinal \textit{status quo} would be streamlined into a holistic and principled version of the stereotype analysis. Under the holistic and contextual approach gained with these eight principles, legal culture and doctrine can transcend the confusion surrounding discrimination currently (mis)taken as "based" on sex, gender, or sexual orientation and begin to spot with greater precision where various acts or strains of conflationary discrimination take place along the various legs of the conflation. More specifically, this holistic and contextual approach allows the law to disaggregate the conflationary components of various acts or strains of discrimination, and thereby to identify more clearly which endpoints are more (or less) salient in any given

\textsuperscript{1162} See, e.g., \textit{supra} Chapter One, Part I.B.3.  
\textsuperscript{1163} See \textit{supra} note 1081.  
\textsuperscript{1164} The facts of the cases reviewed \textit{supra} Chapter Two evidence these bigotries.
instance of sex/gender discrimination. Consequently, with these principles firmly in place, litigants and judges could be prodded to argue and adjudicate controversies in a more principled and honest manner because they would not be able to indulge or manipulate the conflationary dimensions of a case at will. In the end, the substantive result would be a body of sensible anti-discrimination doctrine capable of countering the full gamut of conflationary bigotries, in contrast to today’s haphazard mélange of conflicting approaches and clashing rulings.

I. Sex & Discrimination

Under a reconstructed framework, sex discrimination would comprise two substantive categories. The first would cover permissible discrimination because it would comprehend instances where anatomy or biology are actually (and reasonably) implicated, rather than used as proxies for gender stereotypes. The second category would cover impermissible discrimination because it would comprehend instances of arbitrary or “naked” discrimination based on genital anatomy. Both of these post-conflationary categories thus cluster around the conflation’s first endpoint and its base—sex.1165

a. Authentic (& Permissible) Sex Discrimination

“Authentic” sex discrimination means discrimination that occurs, literally, because of a person’s external genitalia, or, at most, some other biophysical aspect of the body that may be deemed closely or substantially related to sex. This delineation of sex discrimination ironically mirrors the proper, and narrow, scope of the “traditional notions” approach—if that approach were employed in a principled and consistent manner.1166 And, therefore, this category of sex discrimination also would be narrow and limited.

Under a principled and post-conflationary approach, authentic sex discrimination would be permissible in situations where sex itself was a genuinely and reasonably relevant basis for classification or differentiation, such as the selection of a surrogate mother, the casting of cinematic and theatrical roles, or the employment of an erotic performer. In each of these instances, external genitalia or other biophysical attributes closely connected to sex are authentically relevant because each of these instances (f)actually implicate a “sex” difference. Consequently, permissible sex discrimination under a reconstructed doctrine would dovetail with or be analogous to a principled application of existing, though at the moment poorly managed, concepts such as “bona fide occupational qualification” and “business necessity”: these two concepts, as previously noted, already rec-

1165. See supra Foreword, Part I; Chapter Four, Part IV.A.
1166. See supra notes 1077-82 and accompanying text.
ognize that some (though presumably few) instances or forms of sex discrimination may be lawful.\textsuperscript{1167} Authentic and permissible sex discrimination therefore would help to streamline and harmonize the related but currently disconnected conceptual underpinnings both of “traditional notions” of sex and of these two concepts, which presently try to accommodate the occasional relevance of biological sex to specific circumstances or transactions. This first post-conflationary category of sex discrimination therefore would continue the recognition that sometimes (but rarely) sex literally is relevant to acts of classification or differentiation.

\textit{b. Naked (& Impermissible) Sex Discrimination}

Of course, sex discrimination still could be arbitrary. For instance, discrimination may occur due to someone’s blanket or kneejerk dislike of one sex or another. This type of naked discrimination, though based on “traditional notions” of sex, consequently could not be analogous to a \textit{bona fide} occupational qualification or a business necessity. Rather, this sort of naked sex discrimination would be seen as devoid of any legitimate rationale, a visceral and invidious prejudice that, as such, would not be permissible under standard statutory and constitutional law principles.\textsuperscript{1168} In other words, doctrinal reconstruction would not mean that all sex discrimination would necessarily amount to permissible differentiation. Instead, this doctrinal reconstruction would recognize that “sex” discrimination literally must be based on external genitalia (or other strictly bio-physical traits), and then inquire critically whether such discrimination is permissible because it reflects authentic concerns based \(f\)actually on anatomy or biology, or whether it is impermissible because it is simply arbitrary discrimination due to sex.

\textit{c. The Sex/Gender Proxy}

It also must be noted that apparent sex discrimination could continue to extend or merge into gender realms because, under the deductive/intransitive gender model that governs the Euro-American sex/gender system,\textsuperscript{1169} sex still would determine gender, meaning that sex still could be (mis)used as a proxy for acts or strains of discrimination trained on gender. For instance, the discrimination in \textit{Strailey} unavoidably was based on sex because women, but not men, were allowed to wear ear jewelry.\textsuperscript{1170} However, the discrimination in \textit{Strailey} actually was motivated by and directed at gender, because the object of disfavor was Strailey’s disruption of Leg

\begin{footnotes}
\textsuperscript{1167} See supra note 1080 and accompanying text.
\textsuperscript{1168} See, e.g., notes 1020-23 and accompanying text. See generally Nowak & Rotunda, supra note 366, at 568-73 (discussing Equal Protection law generally); Brest, supra note 991 (addressing race discrimination generally).
\textsuperscript{1169} See supra Chapter Four, Part III.A.1.
\textsuperscript{1170} See supra notes 456-71 and accompanying text.
\end{footnotes}
One with his social gender atypicality. \textsuperscript{1171} Strailey's predicament arose because the deductive/intransitive gender model defines atypicality as deviant and fears it as dangerous. Strailey, in short, was punished because his gender strayed from his sex. Therefore, the discrimination was based \textit{both} on sex and on gender, but was primarily triggered and driven by gender considerations because it was principally aimed at punishing gender atypicality.

Of course, legal culture should expect such conflationary controversies to continue; the conflation will continue to operate normatively and societally, giving rise to acts of discrimination and resultant legal disputes that legal institutions and mechanisms then will be called upon to process. But under a reconstructed and non-conflationary framework, the courts would refuse to share complicity in the conflationary bigotries that such cases project. Thus, legal culture would not reprise the \textit{Strailey} analysis and outcome. Instead, in such instances legal institutions would be prepared to recognize that such scenarios present primarily issues of gender discrimination because they project a sex-based gender stereotype typically calculated to prop up active/passive themes and traditions. In other words, legal institutions would be prepared to recognize that, under the conflation, situations such as \textit{Strailey} necessarily involve sex, but not in a definitive or paramount way; such situations necessarily rely on sex as a proxy for gender because that is the Euro-American custom—to conflate gender with sex.

As this discussion shows, sex discrimination as a reconstructed concept in post-conflationary legal doctrine necessarily would be narrow in scope because, given its traditional and current definition, the construct itself would be understood as narrow. As \textit{Strailey} underscores, this narrowness results directly from the plain fact that acts or strains of discrimination thought to be based on sex in fact are not usually or literally about external genitalia or other biological characteristics, but instead are a projection of the deductive/intransitive gender model. \textsuperscript{1172} Accordingly, a principled,

\textsuperscript{1171} See supra notes 472-88 and accompanying text.

\textsuperscript{1172} The use of sex as a proxy for gender discrimination in \textit{Strailey}, 608 F.2d 327 (9th Cir. 1979), neither unique nor unusual because it simply reflects the larger sex/gender system and its conflationary underpinnings, is aptly illustrative. Another prime example of the sex/gender proxy problem is Reed v. Reed, 404 U.S. 71 (1971), the first case ever to nullify a sex-based classification under the Equal Protection Clause of the Fourteenth Amendment. In \textit{Reed}, the Supreme Court invalidated a statutory scheme that accorded preference to males in the appointment of administrators for decedents' estates. \textit{Id.} at 77. The case may appear "easy"; a pure instance of classification by sex, by anatomy. Yet, the \textit{Reed} classification, like the \textit{Strailey} discrimination, was in fact motivated by, and projected, a gender stereotype. In \textit{Reed}, the gender stereotype concerned the alleged inadequacy of women as business or property managers and the imputed inability of women to understand or handle legal matters.

Without question, the \textit{Reed} stereotype, like the \textit{Strailey} stereotype, was conflationary—recall from Chapter One that women who displayed an interest in business or legal affairs a century ago could have been diagnosed as diseased inverts because this supposed social gender attribute was thought not to correspond to the female sex (and gender) under the active/passive paradigm. See \textit{generally supra} notes 126-139 and accompanying text. Both stereotypes relied on the deductive/intransitive gender model in that both inferred gender from sex, and both thus relied on the active/passive paradigm to impose and
non-conflationary interpretation of "sex" would permit discrimination based actually and reasonably on sex, but not discrimination that either is naked and arbitrary or that uses sex as a proxy for gender.\textsuperscript{1173}

2. Gender & Discrimination

As the findings of this Project show, gender has been, and continues to be, at the center of the conflation.\textsuperscript{1174} Thus, under a reconstructed legal doctrine, gender discrimination would track and cover precisely the reach of gender under the conflation. To make the scope of gender discrimination coextensive with the scope of gender under the conflation requires recognition of the two post-conflationary subtypes of gender discrimination that (f)actually operate in modern culture under the conflation. The first subtype may be deemed social gender discrimination, because it seeks to impose gender typicality in social matters or settings. The second subtype may be deemed sexual gender discrimination, because it seeks to impose gender typicality in sexual matters or settings. These two post-conflationary subtypes thus cluster around the conflation’s second endpoint, and reflect and address the two components or dimensions of deductive/intransitive gender under the conflation.

Of course, these two post-conflationary subtypes of gender discrimination likewise reflect the contours of socio-sexual identity, and for good reason: these two species of gender discrimination press everyone into conformance with conflationary standards that, as discussed earlier, regulate public and private life through the manufacture and imposition of socio-sexual identity.\textsuperscript{1175} Therefore, this reconstruction of gender discrimination would counter across the board the basic precepts of the active/passive paradigm, and its relegation of women and sexual minorities to culturally subordinate positions, both socially and sexually.

a. Social Gender Discrimination

Combatting the social subtype of gender discrimination would require the law to protect the social aspects of gender in "public" matters and settings. This first subtype of reconstructed gender discrimination doctrine therefore would protect against acts or strains of discrimination motivated

\textsuperscript{1173} See supra Chapter Four, Part I.B.

\textsuperscript{1174} See supra Chapter Four, Part IV.A.
by, or targeting deviations from, the social roles or attributes dictated for each sex by the active/passive paradigm in conjunction with the deductive/intransitive gender model. The core social dictate under the active/passive paradigm, of course, is that each human adopt a “correct” gender stance and persona socially and publicly.\textsuperscript{1176} And, because the deductive/intransitive gender model fixes gender permanently according to sex,\textsuperscript{1177} social gender correctness means a social gender stance and persona that permanently positions women as passive or subordinate and men as active or dominant. The social subtype of reconstructed gender discrimination doctrine consequently would be focused primarily on androsexist biases that valorize masculinity over femininity socially.

This subtype accordingly would provide protection in instances like \textit{Smith, Straley, Blackwell,} and \textit{Poe,} because the discrimination in each of those cases was an attempt to enforce social gender stereotypes based on sex, including traditionalist preferences relating to hobbies,\textsuperscript{1178} jewelry,\textsuperscript{1179} fashion or attire,\textsuperscript{1180} and grooming.\textsuperscript{1181} Indeed, a careful and informed post-conflationary application of the prohibition against the social subtype of gender discrimination would have required opposite outcomes for every case reviewed in Chapter Two except \textit{Hopkins,} which was the only case reviewed in which the legal system actually penalized social gender discrimination.\textsuperscript{1182}

Of course, the troubling aspect of \textit{Hopkins,} in light of the other cases and results, is that \textit{Hopkins} halted cultural enforcement of Leg One of the conflation only to allow women to effect maleness. In this way, \textit{Hopkins} combines with the “sissy” cases to continue the traditionalist valorization of masculinity. An evenhanded treatment of social gender discrimination, regardless of sex, therefore is a prerequisite to halting the androsexist skew of the doctrinal status quo.\textsuperscript{1183} Accordingly, this doctrinal reconstruction would necessitate and entail consistent applications of prohibitions against social gender discrimination to protect social gender atypicality among \textit{both} men and women.

Additionally, a principled and consistent application of prohibitions against social gender discrimination would eschew or transcend the prevalent cross-association of social gender atypicality with minority sexual orientation. By doing so, the legal system can avoid the confused and confusing analyses witnessed in Chapter Two, which (mis)used this cross-association to shift sex/gender claims from Leg One to Leg Two, thereby

\textsuperscript{1176} See supra notes 932-45 and accompanying text.
\textsuperscript{1177} See supra Chapter Four, Part III.A.1.
\textsuperscript{1178} See supra notes 391-99 and accompanying text.
\textsuperscript{1179} See supra notes 456-70 and accompanying text.
\textsuperscript{1180} See supra notes 509-21 and accompanying text.
\textsuperscript{1181} See supra notes 552-60 and accompanying text.
\textsuperscript{1182} See supra notes 571-84 and accompanying text.
\textsuperscript{1183} See supra notes 584-90 and accompanying text.
exonerating the social subtype of gender discrimination via the sexual orientation loophole. A reconstructed doctrine consequently would guard against the imposition of social gender stereotypes that disfavor social gender atypicality itself, regardless of whether such stereotypes were or are viewed as being conflated with minority sexual orientation, and regardless of actual or perceived sexual orientation. A reconstructed doctrine therefore would help to foreclose the shifting of claims from Leg One to Leg Two and help to seal the loophole that currently exonerates androsexist gender discrimination by (re)casting it as (merely) heterosexist sexual orientation discrimination.1185

b. Sexual Gender Discrimination

The second post-conflationary subtype of gender discrimination that would be cognizable under a holistic and contextual reconstruction of legal doctrine would encompass the sexual aspects of gender, and thus would apply in intimate or "private" matters and settings. This sexual subtype of gender discrimination doctrine therefore would protect against acts or strains of discrimination motivated by, or targeting deviations from, the sexual or affectional roles or attributes dictated for each sex by the active/passive paradigm in conjunction with the deductive/intransitive gender model. The core sexual dictate under the active/passive paradigm, of course, is that each coupling as a unit must replicate and symbolize the paradigm.1186 Within each coupling, therefore, each participant must adopt a "correct" gender stance or persona sexually (or "privately") in relation to the other participant.1187 And because the deductive/intransitive gender model imposes gender permanently on the basis of external genitalia, sexual gender correctness means a sexual gender stance or persona that conforms to the sex of the body: men should be active, dominant, and "on top," and women should be passive, subordinate, and "on the bottom." The conjunction of the active/passive paradigm and the deductive/intransitive gender model thus imposes androsexist bias on the sexual or private articulation of gender.

In this way, conflationary active/passive themes and traditions import androsexist biases into sexual or private relations in much the same way that they are injected into social or public relations; the sexual dimensions of gender, in other words, are not only pernicious regarding sexual minorities, they are pernicious regarding women because they valorize the superiority of male masculinity in cross-sex (as well as in same-sex) sexual relations. Therefore, the sexual subtype of reconstructed gender anti-dis-

1184. See supra Chapter Two, Part II.B.5.
1185. See supra Chapter Two, Part III.D.
1186. See supra Chapter Four, Part I.E.1.
1187. See supra notes 936-41 and accompanying text.
1188. See supra Chapter Four, Part IIIA.1.
discrimination law would recognize this traditionalist valorization of male masculinity as a sexual gender stereotype that is biased against women in cross-sex couplings because it reflects androsexist active/passive biases.

Moreover, a reconstructed doctrine likewise would recognize that the intransitive deduction of gender from sex also generates correspondingly traditionalist sexual gender stereotypes biased against same-sex couplings—or, more accurately, biased toward a status quo of culturally and legally institutionalized compulsory heterosexuality. Of course, the heterosexism of sexual gender discrimination also flows from the combined effects of the active/passive paradigm and the deductive/intransitive construction of gender: the former casts the gender of each sex as active or passive in mutually exclusive ways while the latter adheres the sex-based gender assignment permanently, thus requiring a man/woman coupling to create a “correct” active/passive sex/gender fit. Thus, the conjunction of the active/passive paradigm and the deductive/intransitive model of gender frames sexuality in heterosexist as well as androsexist terms.

The sexual subtype of gender discrimination therefore must (re)cognize both species of bias and their conflationary interplay. Without doubt, both forms of bias use gender to delineate and to stereotype what is sexually appropriate or allowed. Without doubt, these stereotypes are androsexist because they derogate women by imputing passive and submissive gender characteristics to the sexualities of women. Without doubt, these stereotypes also are heterosexist because they derogate sexual minorities by imputing disordered or deficient gender characteristics to the sexualities of lesbians, gay men, and bisexuals. In short, this sexual subtype of gender discrimination implicates both androsexist and heterosexist gender stereotypes because hetero-patriarchy uses sex-determined gender dictates to define and delineate sexual (ab)normality.

Finally, under a holistic and contextual reconstruction of gender doctrine, the law would need to recognize and acknowledge that the continuing operation of the conflation in modern culture would continue to generate cases like Smith, Strailey, Blackwell, Dreibelbis, Poe, and Valdes. The difference under a holistic and contextual approach to such cases, again, is that legal culture would decline to share complicity in the perpetration and condonation of either social or sexual gender discrimination. Instead, in such instances legal culture would recognize and confront the cultural operation of the conflation; legal culture, in other words, would understand and respond to the fact that both the social and sexual gender stereotypes discussed above work in tandem in modern culture under the combined operation and impact of Leg One and Leg Two.

1190. See supra notes 958-68 and accompanying text.
1191. See supra Chapter One.
Consequently, this doctrinal reconstruction would engender legal appreciation of gender's central role in these two subtypes of discriminatory stereotypes: because social gender atypicality under Leg One leads to suspicions or conclusions about sexual gender atypicality under Leg Two, and vice versa, acts that constitute social gender discrimination tend to involve or implicate sexual gender discrimination, and vice versa.\textsuperscript{1192} A holistic and contextual post-conflationary perspective would enable the law to understand how these two subtypes of gender discrimination, and the stereotypes that drive them, cluster around gender to combine both in concept and in practice the devaluation, marginalization, and regimentation of both the social and sexual lives and relations of women and of sexual minorities. Therefore, under this doctrinal reconstruction the law would understand that the two subtypes of gender discrimination are mutually reinforcing.

3. Sexual Orientation, Gender & Discrimination

As indicated in the preceding Part of this Chapter, discrimination putatively based on sexual orientation is in concept and practice tightly intertwined with gender discrimination. This discussion inspects the same point but shifts perspectives: rather than view the role of sexual orientation in a reconstructed and post-conflationary understanding of gender discrimination, this discussion considers the role of gender in a reconstructed and post-conflationary understanding of sexual orientation discrimination. Ultimately, the conclusions remain the same, but this shift of perspective permits consideration of, and emphasis on, some relevant points not mentioned immediately above.

As noted in Chapter One, the active/passive paradigm set the stage for the conflation of sex-based gender and sexual orientation by making gender symbolisms applicable in intimate or sexual settings.\textsuperscript{1193} Theories of sexual orientation such as inversion,\textsuperscript{1194} the Third Sex,\textsuperscript{1195} homoeroticism,\textsuperscript{1196} fixation,\textsuperscript{1197} and the current version—gender identity disorder\textsuperscript{1198}—consistently and explicitly make unfettered use of gender to construct sexual orientation definitions and frameworks. Indeed, this record demonstrates an astonishing fact: all Euro-American theories of sexual orientation are in fact built precisely (if not entirely) on gender.

Notably, this record also shows that society generally has embraced the understandings of sexual orientation postulated by these theories.\textsuperscript{1199} Furthermore, legal culture has followed suit in accepting wholesale the con-
flationary understandings of sexual orientation advanced by these theories.\footnote{1200} This record thus establishes the definitive and pivotal, in fact indispensable, role that gender considerations have played throughout history in the Euro-American construction and regulation of sexual orientation. This history of conflation and its continuing legacy underscores the connection between gender and sexual orientation, and the connection between discrimination based on gender to discrimination (thought to be) based on sexual orientation.

This record therefore brings into sharp focus the centrality of gender to the construction of sexual orientation, and underscores the derivative and illusionary character of sexual orientation under this conflationary scheme.\footnote{1201} This history explains why it is conceptually and pragmatically impossible to practice sexual orientation discrimination without simultaneously engaging in gender (or sex) discrimination, and why the reverse is not so. This history also explains why sexual orientation and its connection to gender under Leg Two are used strategically to validate sex/gender traditionalism under Leg One. This history, then, is why discrimination against sexual gender atypicality clusters mostly around gender rather than around sexual orientation: the latter is a by-product of the former, a derivative that is used to express and enforce active/passive sex/gender traditionalism. In fact, little if anything would be left of sexual orientation discrimination once its underlying sex/gender contents are accounted for and disaggregated. And, as discussed next, these points also apply directly to sex and sexual orientation.

\textbf{4. Sexual Orientation, Sex & Discrimination}

Finally, a reconstructed and post-conflationary understanding of sexual orientation discrimination would be cognizant of the conflation’s third leg and its operation in modern culture, which shows that sexual orientation actually and ultimately is sex-based. A simple hypothetical again is illustrative: an erotic interest or inclination toward women connotes one type of “sexual orientation” when imputed to members of the female sex, but connotes a different type of sexual orientation when imputed to members of the male sex. In both of these scenarios, the erotic interest or inclination remains constant—a predisposition or preference for women—but a change of “sex” in the subject with this inclination automatically effects a corresponding change of sexual orientation for the subject.\footnote{1202} Correspondingly, a change of sex in the object of this inclination likewise automatically changes the sexual orientation of the subject.

This “hypothetical”, in fact, echoes the facts and adjudicative results of the \textit{Von Hoffburg} litigation: recall that there a woman’s marriage to a

\footnotesize{
1200. \textit{See supra} Chapter Two.
1201. \textit{See supra} Chapter Four, Part IV.A.
1202. \textit{See generally supra} Foreword, Part I.C.
}
female-to-male post-operative transsexual prompted the Army to discharge her because it refused to recognize the husband's sex change, and therefore the wife was deemed a lesbian and consequently adjudged unsuitable for military service.\textsuperscript{1203} Thus, sexual orientation actually—both culturally and legally—is perceived and defined in direct relation to the sex of a person and that of her or his erotic partners. Under Leg Three of the conflation, sexual orientation actually is perceived and defined in direct and unmediated (by gender) relation to sex.

This point, as previously noted, is further demonstrated by various other phenomena in law and in society, including the linkage of sexual orientation and transsexualism,\textsuperscript{1204} the phrasing, design, and interpretation of sodomy statutes calculated to banish same-sex sexual relations,\textsuperscript{1205} and, in particular, the miscegenation analogy posited in \textit{Strailey} and elaborated by various other commentators since then.\textsuperscript{1206} Accordingly, a reconstructed and post-conflationary understanding of sexual orientation discrimination necessarily would recognize that the sexual orientation construct, in addition to being subsumed into gender, also is directly and immediately sex-based. This point in turn spotlights how sexual orientation discrimination involves or implicates sex discrimination, even in situations where it may

\textsuperscript{1203} See supra notes 681-85 and accompanying text.

\textsuperscript{1204} See, e.g., supra notes 449-54 and accompanying text.

\textsuperscript{1205} Because the only difference between a homosexual act and a heterosexual act is the sex of one of the actors, sodomy statutes that are activated to stigmatize, harass, or oppress sexual minorities effectively use sex to attack minority sexual orientation. For instance, legislatures that wish to strike at minority sexual relations use “sex” to forbid sexual relations where a coincidence of anatomy takes place; in other words, legislatures specify that certain same-sex relations (but not identical cross-sex relations) are forbidden when they want to repress expressions of minority sexual orientation. For a complete listing of sodomy statutes involving cross-sex and same-sex distinctions see Francisco Valdes, \textit{Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct}, 27 Creighton L. Rev. 384, 390 n.14 (1994).

Additionally, courts that feel antipathy for sexual minorities are able to read this sex-based distinction into sodomy statutes that on their face make no such distinction. This judicial scenario was played out perhaps most notoriously in the context of the infamous Georgia sodomy statute. In \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), the statute, which does not on its face distinguish between same-sex and cross-sex sodomy, effectively was understood and applied as an anti-sexual minority measure, and therefore was upheld as constitutional. See Valdes, supra at 389 n.13 (quoting the Georgia sodomy statute in relevant part). However, three years later the same statute was struck down as unconstitutional by a Georgia state court that held it was not applicable to the sexual majority. Valdes, supra, at 446-47 (discussing the ruling in \textit{Moseley v. Esposito}). Through this sort of interpretation other courts likewise have narrowed statutes that on their face do not distinguish between cross-sex and same-sex sodomy to train the statutes on same-sex relations only, and thereby to specifically attack expressions of minority sexual orientation. \textit{Id.} at 446 n.318 (discussing some examples of this narrowed interpretation and application of facially neutral statutes).

These legislative and judicial scenarios thus illustrate how the (non)coincidence of sex in sexual relations is used as a means of reaching and regulation sexual orientation. This statutory and judicial (mis)use of sex to implement heterosexist sexual orientation beliefs therefore illustrates how sexual orientation discrimination actually relies on sex as its conceptual and practical base. See also supra notes 668-69 and authorities cited therein on the “miscegenation analogy,” which advances this same basic point; Chapter Two, Part V.

\textsuperscript{1206} See supra notes 667-79 and accompanying text.
be thought not to involve or implicate gender. In other words, this point brings into focus how and why sexual orientation discrimination clusters around sex even when it (presumably) does not cluster around gender. This point thus underscores the derivative illusionism of sexual orientation.

Although this interrelationship has been urged previously under the anti-miscegenation analogy, the courts steadfastly refused to recognize its validity until the Hawaii Supreme Court's 1993 ruling in *Baehr v. Lewin.* In that case, the court was able to see, and had the conviction to hold, that the prohibition against same-sex marriages literally constituted sex discrimination, rather than sexual orientation discrimination, because the prohibition plainly prevented the union of any two men or any two women, regardless of their sexual orientations. The court therefore scrutinized the cross-sex requirement as a form of potentially unlawful sex discrimination, rather than automatically condoning the cross-sex requirement as a form of lawful *de jure* sexual orientation discrimination. This ruling, currently on remand, thus recognizes explicitly and substantively how Leg Three of the conflation operates culturally. Perhaps more importantly, this ruling also demonstrates how courts can cut through the conflation to avoid complicity in societal (mis)use of this leg to effectuate traditionalist sex/gender prejudices.

As this discussion indicates, the ultimate conclusion regarding sexual orientation discrimination is that prejudice against minority sexual orientation always involves or implicates either gender or sex, and sometimes both gender and sex. Of necessity, then, sexual orientation discrimination

1207. As pointed out earlier under the discussion of the EEOC dichotomy, gender may at times appear to be attenuated from sexual orientation. However, this attenuation is more surface appearance than substantive fact because of the fundamental history and reality that sexual orientation has been, and still is, uniformly constructed as the sexual or affectional component of sex-based gender. *See supra* Chapter One, Part I.B-C and Part II.A-B. In other words, the antecedent fact ignored by the dichotomy's double standard—or any other similar framework—is that minority sexual orientation is problematized precisely because it is associated with gender atypicality, whether socially or sexually. Because of this underlying history and reality, even those aspects of sexual orientation that may be characterized as sexual "practices or proclivities" under the EEOC dichotomy or some other similar framework (and thus theoretically not protected as gender) nonetheless do implicate gender culturally and legally under the conflation. *See supra* notes 1083-97 and accompanying text. *See generally* Chapter Two.


1209. *Id.* at 60-61.

1210. It should be noted that, generally, a significant difference in analysis raised under the anti-miscegenation analogy is in the relative level of constitutional protection accorded to race and sex/gender: basically, race is reviewed and protected more strictly under federal constitutional law principles. *See generally id.* at 64-68; *see also generally NOWAK & ROTUNDA, supra note 1168, at 605, 743. Because statutes discriminating on the basis of race must withstand "strict" scrutiny and statutes discriminating on the basis of sex/gender must withstand only "intermediate" or "heightened" scrutiny, it is conceivable that applications of the anti-miscegenation analogy under federal constitutional law would not lead to the same result in a sex/gender case as in a race case. But, as *Baehr* intimates under its state law analysis, it would be difficult to imagine courts upholding a statute under the federal constitution that, for example, forbids one sex but not another from entering into same-sex unions.

1211. *See supra* Foreword, Part I.D; *see also supra* Chapter Two, Part IV.C. and Chapter Four, Part IV.A.
never operates alone in modern culture. Moreover, the active/passive origins and imperatives of the conflation assure that sex and gender substantively are the preeminent endpoints of discrimination occurring along Legs Two or Three, or sexual orientation discrimination. The origins, configuration, and operation of the conflation thus underscores the derivative and illusionary nature both of sexual orientation and of discrimination thought to be "based" on it. Accordingly, the eradication of sex and gender discrimination will be impossible until legal culture resolves to confront the interplay of sexual orientation with both sex and gender under Leg Two and Leg Three of the conflation. In sum, a holistic and contextual reconstruction of anti-discrimination law, if applied in a principled manner, would preclude all discrimination currently (mis)taken as sexual orientation bigotry.

At the same time, this discussion indicates that the reverse is not so: discrimination targeting and clustering around sex (and gender) does not necessarily involve sexual orientation because this third endpoint is not at all connected to or involved within Leg One. Therefore, it is possible to engage in sex and/or gender discrimination without involving sexual orientation but it is impossible to practice sexual orientation discrimination without involving sex and/or gender. The irony is that anti-discrimination law purports to protect sex and gender but not sexual orientation. The travesty, then, is that the conflationary arrangement of the three constructs ensures the practical impotence and conceptual incoherence of the doctrinal status quo.

This impotence and incoherence, as documented and critiqued in the preceding Chapters of this Project, ultimately is why the conflation does, should, and must matter—and matter so much—to law and society. More specifically, this impotence and incoherence is why the conflation matters to critical legal theory and theorists devoted to the principle of equality in general, and particularly in sex/gender matters. Therefore, after a brief tabulation of the practical benefits to be derived from a holistic and contextual reconstruction of legal doctrine, this Project closes with an Afterword & Prologue that focuses on legal theory and theorists.

C. Practical Benefits of Doctrinal Reconstruction

The benefits of doctrinal reconstruction would accrue to individual litigants, to legal culture, and to society generally in the same way that the costs of the conflationary status quo are inflicted on these three levels. Individuals would be able to obtain greater protection from various acts or strains of conflationary discrimination. Legal culture could develop a coherent and legitimat body of anti-discrimination law. Society at large would be able to enjoy the relative reduction in unbridled hatred that dis-

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1212. See supra Foreword, Part III.
1213. See supra Chapter Four, Part II.
discrimination with impunity tends to sow. Indeed, the only "losers" in the transition from the doctrinal status quo to a reconstructed anti-discrimination framework would be those traditionalist sex/gender forces dedicated to the undisturbed maintenance of androsexist and/or heterosexist biases in law and society.

1. Benefits to Individuals

Under a reconstructed framework, gender would be fully protected because all gender atypicalities would be protected, regardless of whether any particular atypicality was stereotyped as implicating (minority) sexual orientation. Consequently, principled decisionmaking under a reconstructed framework should reduce the presently substantial likelihood that courts will exonerate discrimination based on the social aspects of gender by shifting it from Leg One to Leg Two (or Leg Three) and shrugging it off as (mere) discrimination based on minority sexual orientation. In short, doctrinal reconstruction would help meritorious claimants to secure redress against all conflationary species of sex/gender discrimination, whether deemed based on sex, gender or sexual orientation.

More generally, this holistic and contextual doctrinal reconstruction should benefit all individuals because the consistent protection of gender atypicality should serve to loosen the social and sexual gender strictures that constrain us all.¹¹⁺ This loosening, in turn, should deliver greater individual autonomy and liberty over gender, and thus, in time, produce greater gender diversity and egalitarianism. In due course, doctrinal reconstruction may begin to deliver levels of sex/gender freedom that could approximate the levels of personal liberty and individual autonomy over social and sexual personality known under Native American sex/gender arrangements.¹²⁺ If so, doctrinal reconstruction could help to deliver the systemic and societal benefits flowing from gender autonomy as well.

2. Benefits to Legal Culture

Doctrinal reconstruction could rectify the ignorance that underlies the doctrinal status quo, minimize the irrationality and inconsistency that con-

¹¹⁺ See generally supra Chapter Three; see also supra Chapter Four, Part III. Of course, Strailey and Dreibelbis also provide apt illustrations of the manner in which the conflation constrains individual personality and expression. Under Strailey, any male who wears an earring could be deprived of any recourse for the loss of a job, or a job opportunity, for resisting institutional or cultural enforcement of social gender stereotypes relating to appearance under the joint operation of Leg One and Leg Two. See supra notes 456-82 and accompanying text. Similarly, under Dreibelbis males sporting long hair may have to submit to institutional or state regulations imposed by schools, employers, or others to enforce similar conflationary gender boundaries regarding grooming. See supra notes 541-51 and accompanying text. Thus, even though today popular male entertainers, actors, athletes, and other role models sport ear jewelry and wear long hair, the conflation’s ripple effects may intrude into lives regardless of any particular sex, gender, or sexual orientation. See supra notes 908-20 and accompanying text.

¹²⁺ See generally supra Chapter Three; see also supra Chapter Four, Part III.
flationary rulings breed, and allow courts (and other decisionmakers) to delineate more sensibly, confidently, and effectively the contours of unlawful sex/gender discrimination. Consequently, the law’s claim to informed, principled, and reasoned judgment in cases implicating sex, gender, or sexual orientation could become more than a pose.\textsuperscript{1216} In this way, doctrinal reconstruction could help to end the law’s betrayal both of substantive values relating to sex/gender equality and of systemic or institutional ideals regarding the sensible and just adjudication of conflationary controversies.\textsuperscript{1217}

\subsection*{3. Benefits to Society at Large}

Finally, society as a whole would benefit in various ways from an informed, principled, and non-conflationary approach to sex, gender, and sexual orientation. In working to neutralize conflationary bigotries, the nation could embark on a more honest and practical approach to sex/gender issues generally. In dispelling conflationary biases from the law, the nation also could move decisively to eliminate traditionalist sex/gender bigotries that impede formal and fundamental statutory and constitutional ideals of equality and egalitarianism. The fact that the doctrinal \textit{status quo} ignores these ideas presently generates widespread alienation and divisiveness, which are destructive to the nation as a whole.\textsuperscript{1218} Thus, over time, the fulfillment of formal sex/gender equality promises and ideals should promote the alleviation of sex/gender discord and the enhancement of sex/gender harmony, all to the benefit of society as a whole.

\section*{Conclusion}

Because the conflation has etched minority sexual orientation into the nation’s culture and consciousness as a form of sex/gender problem, sexual orientation discrimination will always have the tendency to work in tandem with sex and gender discrimination in both obvious and subtle, but always persistent and demonstrable, ways. The conflation ensures that sexual orientation discrimination will always have the capacity to impinge on sex and gender, or at least to increase the vulnerability of sex and gender as bases of discrimination, because sexual orientation is a derivative of sex and gender. The conflation, in short, ensures that sex and especially gender cannot and will not be protected fully under any approach to anti-discrimination law so long as sexual orientation is ignored or excluded from the analysis, and so long as it is removed from the law’s actual protection.

The way to overcome current conflationary and discriminatory dynamics is to embark on the difficult though necessary reconstructive effort

\textsuperscript{1216} See \textit{supra} notes 332-36 and accompanying text.

\textsuperscript{1217} See \textit{supra} Chapter Four, Part II.B.

\textsuperscript{1218} See \textit{supra} notes 991-93 and accompanying text.
expounded above. Because the doctrinal status quo at best covers only the conflation’s first leg, this effort must begin with the second leg of the conflation. This effort therefore requires legal culture to address expeditiously, contextually, and holistically the conflation of gender and sexual orientation. More specifically, this effort must be driven by a forthright recognition that sexual orientation plays a key role in gender discrimination precisely because sexual orientation is constructed as the sexual or affectional component of gender; because the two constructs are conflated as social and legal concepts, discrimination targeting either necessarily involves both.

Yet this effort must also be trained on the conflation’s third leg if it is to truly foreclose all forms of sex and gender discrimination. As the preceding discussions show, acts of discrimination that target sexual orientation necessarily involve sex under Leg Three and gender under Leg Two. Thus, discrimination targeting sexual orientation always and necessarily will involve either or both of the conflation’s other two endpoints: sexual orientation discrimination at all times implicates either sex or gender, and sometimes both. To be substantively complete and fully effective, doctrinal reconstruction therefore must address both the respective operations of Leg Two and Leg Three as well as the combined operation and impact of both legs in tandem.

However, the conflation of sex, gender, and sexual orientation recorded and critiqued in this Project suggests more than a crying need for doctrinal reconstruction of existing anti-discrimination law. The interconnected androsexist and heterosexist biases captured in this record suggest a broader unity of interests among women and sexual minorities in rehabilitating the conflationary Euro-American sex/gender system as a whole. For women and sexual minorities within legal culture, this record points to opportunities for collaboration toward mutual civic equality. The Afterword & Prologue that follows this Chapter therefore concludes this Project with a call for the instigation of Queer legal theory as a critical enterprise that, in large part, would be dedicated to reforming the law as a way of helping to liberate everyone, but especially the most oppressed, from the pervasive and traditionalist sex/gender restrictions of the conflation.