Analysis & Impact of SB 190

Current Delaware Law

Delaware law currently prohibits forms of discrimination based on sexual orientation and gender identity in a variety of contexts, including places of public accommodation, housing, and employment.

Tellingly, Delaware's nondiscrimination provisions in the context of public accommodations specifically do not require places of public accommodation to permit full access of the opposite sex "in areas of facilities where disrobing is likely."[1] The statute lists the examples of locker rooms and changing facilities, but the exception could arguably include restrooms as well. The statute states that a "separate or private place" for those identifying as transgender is acceptable.[2]

Within the context of housing, an exemption for religious organizations is provided so that religiously-affiliated entities may separate the sexes in dormitories for safety and privacy reasons.[3]

Again in the context of employment, religious entities are given an exemption in terms of who they hire (in terms of sexual orientation or gender identity only), unless they are hiring a person for a separate business purpose where such business generates business taxable income.[4]

SB 190

SB 190 would enshrine "nondiscrimination" in cases of sexual orientation or gender identity (in addition to race, sex, age, religion, creed, color, familial status, disability, and national origin) into the Delaware Constitution, granting these categories the highest level of protection called "strict scrutiny" and trumping any areas of conflicting state law.

SB190 is unnecessary because protections for the classifications it includes are already protected in other areas of state law. Moreover, it places into the Constitution what many states and municipalities across the country are now realizing do not reduce discrimination but actually punish unsuspecting citizens who are simply trying to peacefully live and work according to their deeply held convictions about marriage and human sexuality.

This means that "discrimination," even in contexts that have always been justified, will likely no longer be justified if SB 190 amends the Delaware Constitution.

Typically, claims of discrimination for sex discrimination are given "intermediate" (or mid-level) scrutiny[5], and claims of discrimination for sexual orientation or gender identity are given lower level scrutiny. For example, courts have recognized that the birth process is unique to the female sex in the context of sex discrimination[6],

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[1] Title 6, § 4504(a).
[2] *Id.*
[3] Title 6, § 4607(g).
[4] Title 19, § 710(7).
[5] *See U.S. v. Virginia*, 116 S.Ct. 2264, 2293 (1996), the Virginia Military Institute (VMI) case, which was hoped by many feminists to heighten the standard of scrutiny for sex discrimination but rather settled for intermediate scrutiny.
[6] *Tuan Anh Ngujen v. I.N.S.*, 121 S.Ct. 2053, 2066 (2001) (holding that a statute that favored the biological mother in a child custody case did not violate equal protection).

and the recent "bathroom" national argument highlights that courts have typically allowed "discrimination" based upon male and female biology in the context of gender identity discrimination.[7]

This means that discrimination between sexes based on legitimate physical/biological differences is generally allowed, and that discrimination based upon gender identity or sexual orientation is permitted on a rational basis. This would not be the case if SB 190 were to pass and amend the Delaware Constitution.

For example, courts have recognized that the birth process is unique to the female sex in the context of sex discrimination[8], and the recent "bathroom" national argument highlights that courts have typically allowed "discrimination" based upon male and female biology in the context of gender identity discrimination.[9]

"Equal Protection" Constitutional Amendments in Other States

No state has passed "sexual orientation" or "gender identity" language into their constitution. The states with ERA's have them as protections against discrimination based on "sex." However, recently, activists have been trying to get "sex" to mean "gender identity" in these ERA's just as the Obama Admin did with Title IX---but no state constitution lists sexual orientation or gender identity directly. All those "nondiscrimination provisions" have been passed as state laws in 18 states only. 29 states have neither sexual orientation nor gender identity provisions.

SB 190 appears to be modeled after states' equal protection amendments with an "absolutist" standard, meaning that *any classification* made on the basis of sex, sexual orientation, or gender identity is invalid, regardless of a compelling government interest (including citizens' privacy and safety): "the ERA [Washington equal rights amendment] mandates equality in the strongest terms and absolutely prohibits the sacrifice of equality for any state interest, no matter how compelling."[10]

What SB 190 seeks to do goes further than what any state has done. It is unnecessary and compromises and undermines constitutionally protected freedoms. SB 190 provokes intolerance toward people who have beliefs different than those in political power and would create hostility, disrespect, and conflict. Rejecting SB 190 affirms freedom and promotes mutual respect among all of Delaware's citizens.

The impact of equal protection amendments in other states has been drastic—and most scholars and activists believe that these amendments are actually *underused* at this point but will likely be used in far more contexts in the future. Courts have struck down rules excluding girls from participating in boys' intramural sports, invalidated single-sex admission policies of certain public high schools[11], invalidated gender-neutral laws that have a disproportionate impact on women, and of course **complicated family court proceedings**.[12]

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[7] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ*., 97 F. Supp. 3d 657 (W.D. Pa. 2015). The court held that "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination." *Id*. at 672-73.

[8] *Tuan Anh Ngujen v. I.N.S*., 121 S.Ct. 2053, 2066 (2001) (holding that a statute that favored the biological mother in a child custody case did not violate equal protection).

[9] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ*., 97 F. Supp. 3d 657 (W.D. Pa. 2015). The court held that "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination." *Id*. at 672-73.

[10] *Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 667 P.2d 1092, 1102 (Wash. 1983).

[11] *Commonwealth v. Pa. Interscholastic Athletic Ass'n*, 334 A.2d 839, 842 (Pa. 1975); Newberg v. Bd. Of Pub. Educ., 26 Pa. D. & C.3d 682, 709 (1983).

[12] *See DiFlorido v. DiFlorido*, 331 A.2d 174 (Pa. 1975); *see also Kemether v. Pennsylvania Interscholasitc Athletic Ass'n, Inc.*, No. Civ. A. 96-6986, 1999 WL 1012957, at *20 (E.D. Pa. Nov. 8, 1999) (Holding that disallowing a women referee to officiate at all-boys

In Texas, the Supreme Court also relied on its equal protection amendment to strike down a statute that required a father to prove that it was in the best interest of a child born out of wedlock that he be recognized as a parent.[13] In Maryland, courts decided that the equal protection amendment prohibits all-female or all-male golf tournaments,[14] and that parental obligation for child support must be equal between both parents.[15]

- In some cases, regulations on abortion have been declared violations of equal protection amendments as discrimination based on sex.[16] Abortion regulations may be viewed as "sex discrimination."

Likely Impact of S.B. 190

Based upon the impact of other state equal protection constitutional amendments already, the desire of groups and activists supporting these amendments, and the current legal and political climate, it is safe to say that SB 190 would have a profound and devastating impact upon the state.

The most obvious affected areas would be portions of current state law that carve out reasonable accommodations from discrimination prohibitions in the contexts of sex, sexual orientation, and gender identity. If SB 190 were to become enshrined in the Constitution, its provisions would trump current state law.

First, the exemption that permits a private area be provided for persons identifying as transgender in areas where "disrobing is likely" in places of public accommodation[17] would likely no longer be an exemption. Rather, full access to opposite sex facilities like bathrooms, showers, and changing rooms would likely be required if someone claims to identify as the opposite sex. The exemptions for religious entities in housing[18] and employment[19] would also likely no longer be viewed as acceptable.

Further, Delaware law currently does not include a provision prohibiting "discrimination" in the context of sexual orientation or gender identity in schools. If SB 190 were to pass, schools would certainly be impacted, and the privacy and safety of children in areas like school locker rooms, restrooms, and showers (as well as overnight accommodations) would be compromised. Rights of parents to direct their children's education and upbringing, particularly in when/how their children are exposed to the anatomy of the opposite sex or on issues of human sexuality, will likely be impacted.

Other areas of likely impact include:

- Restrooms, locker rooms, and showers separated by biological sex may be viewed as "gender identity discrimination."
- Single-sex educational institutions, athletic teams, community events, and more may be viewed as "sex or gender identity discrimination."

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regular season basketball games violates the ERA: "[W]hile a practice may purport to treat men and women equally, if it has the effect of perpetuating discriminatory practices, thus placing an unfair burden on women, it may violate the ERA.").

[13] *In re McLean*, 725 S.W.2d 696, 698-99 (Tex. 1987); *see also R. McG. & C.W. v. J.W. & W.W.*, 615 P.2d 666, 672 (Colo. 1980)

[14] *See State v. Burning Tree Club, Inc.*, 315 Md. 254 (1989), cert. denied 110 S.Ct. 66.

[15] *Rand v. Rand*, 374 A.2d 900 (1977), on remand 392 A.2d 1149.

[16] Wharton, *State Equal Rights Amendments Revisited*, at 1249, *citing* Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey*: *Establishing* Neutrality Principles in State Constitutional Law, 66 TEMP. L. REV. 1151, 1167-68 (1993); *see also N.M. Right to Choose/NARAL v. Johnson*, at 859 (invalidating New Mexico's restrictions on funding medically necessary abortion services based on New Mexico's ERA).

[17] Title 6, § 4504(a).

[18] Title 6, § 4607(g).

[19] Title 19, § 710(7).

- Family law, particularly provisions of family law protecting women and mothers, will likely be impacted such that those laws may be viewed as "sex or gender identity discrimination."
- Persons or entities with sincerely held religious beliefs regarding sex, gender identity, and sexual orientation will likely not be accommodated.
- The ability of businesses to use sex-specific science and data to direct their businesses practices may be impacted.
- Sex-specific dress codes in schools and employment will likely be viewed as "sex or gender identity discrimination."
- The ability of law enforcement to use sex as a means to identify and prosecute criminals may be impacted.

Second Legal Analysis of SB 190

Impact of SB 190

- **SB 190 threatens freedom to live and work according to your convictions.**
  - Laws similar to SB 190 have been used across the country to require citizens to act contrary to their sincerely held beliefs about marriage and human sexuality. These laws fine or punish individuals who happily serve and employ everyone, including those who identify as gay, lesbian, or transgender, but cannot promote messages or participate in events that contradict their convictions. This is because these laws do not simply ensure that everyone is treated equally—they actually unfairly require business owners and other citizens to advance messages and participate in events that conflict with their core beliefs.

- **SB 190 jeopardizes citizens' privacy rights and safety interests, particularly those of women and young girls, by placing into the Delaware Constitution the ambiguous legal concept of "gender identity."**
  - It could force schools to open their restrooms, showers, locker rooms, dormitories, housing arrangements, etc. to members of the opposite sex.
  - It could force camp programs to require that boys and girls share the same sleeping and living quarters.
  - It could force all gyms to open their locker rooms to members of the opposite sex.
    - Consider a disturbing incident that took place in Dallas in 2012. Paul Witherspoon, who now goes by "Paula," is a registered sex offender, and has been convicted of sexual assault against a young girl and indecency involving sexual contact with another girl. In 2012, Witherspoon was reported to the police in Dallas because he was in the women's bathroom. He was ticketed by a Dallas policeman. But because Witherspoon now presents as a woman, his attorney at Lambda Legal (a nationwide advocacy group for LGBT issues) asserted that, under the Dallas gender-identity law, Witherspoon had every right to use the bathroom with women and young girls.[20]

- **SB 190's inclusion of gender identity fosters costly and unfair litigation for employers and business owners.**
  - SB 190 is likely to lead to costly and unreasonable litigation because it implements standards that are impossible for employers and business owners to understand—let alone comply with.

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[20] *See* Ray Villeda, "Transgender Woman: Convictions Irrelevant to Citation: Witherspoon convicted in 1990 for sexual assault of child, indecency with child," NBCDFW, May 12, 2012, *available at* http://www.nbcdfw.com/news/local/Transgender-Woman-Convictions-Irrelevant-to-Citation-149923975.html (last visited Jan. 7, 2016).

Organizations like Facebook recognize at least 58 different genders, which include designations like "Cis Man," "Cis Male," "Cisgender Male," "Bigender," "Agender," and "Androgynous."[21] Proponents of gender-identity theory also assert that gender varies for some people depending upon time and context.[22] Indeed, some individuals have even taken extreme steps to change their gender identity only to regret the change and seek to undo it.[23]

- But SB 190 will unfairly require employers to discern, understand, and honor all of the many genders with which their employees and customers might identify, and avoid making them feel "discriminated" against because of their identity. Yet few people know what the numerous gender-identity terms mean, and even fewer know how to identify or differentiate between them. Requiring employers and business owners to consider such amorphous, subjective, and fluid concepts, and subjecting them to liability for missteps, is no way to treat the State's job and revenue creators.
- In addition, SB 190 would likely create a number of other unjust situations for employers and business owners.
  - Employers could be subject to lawsuits for refusing to force their employees to address with male pronouns female coworkers who identify as men.
  - Business owners who provide health-care coverage for their employees could be sued for declining to pay for "sex-reassignment" surgeries.
  - A doctor or medical facility that generally performs hysterectomies could be sued for refusing to perform that procedure for someone seeking to "transition" from female to male.
  - And a day-care center or school could face liability for declining to assign teachers who profess a gender different from their biological sex to oversee young children who might be confused by such things.

- **SB 190 is unnecessary because the people of Delaware already respect each other and value the diverse views of their neighbors.**
  - Laws like SB 190 are supposed fixes in search of a problem. With very few exceptions, Americans simply do not refuse to hire, serve, or rent to people because they identify as gay, lesbian, or transgender. Indeed, no evidence indicates that there is a systemic pattern and practice of invidious discrimination in this State that might justify this heavy-handed change to the State's Constitution. <u>It would thus be</u>

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[21] *See* Russell Goldman, "Here's a List of 58 Gender Options for Facebook Users," ABC News, Feb. 14, 2014, *available at* http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/ (last visited Nov. 19, 2015).

[22] *See* Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. CL. & CR. 101, 104 (2006) (noting that "individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.").

[23] *See* Jay Akbar, "The man who's had TWO sex changes," Daily Mail, Jan. 26, 2015, *available at* http://www.dailymail.co.uk/news/article-2921528/The-man-s-TWO-sex-changes-Incredible-story-Walt-Laura-REVERSED-operation-believes-surgeons-quick-operate.html (last visited Nov. 4, 2015); "MTV True Life: Transgender Teens change their minds as adults," GenderTrender, Apr. 5, 2013, *available at* https://gendertrender.wordpress.com/2013/04/05/mtv-true-life-transgender-teens-change-their-minds-as-adults/ (last visited Nov. 4, 2015); Grace Murana, "8 Amazing Stories of Reverse Sex Change," Oddee, Jan. 29, 2015, *available at* http://www.oddee.com/item_99220.aspx (last visited Nov. 4, 2015); Tara Palmeri, "I'm a guy again! ABC newsman who switched genders wants to switch back," NYPost, Aug. 6, 2013, *available at* http://nypost.com/2013/08/06/im-a-guy-again-abc-newsman-who-switched-genders-wants-to-switch-back/ (last visited Nov. 4, 2015); Helen Weathers, "A British tycoon and father of two has been a man and a woman . . . and a man again . . . and knows which sex he'd rather be," Daily Mail, *available at* http://www.dailymail.co.uk/femail/article-1026392/A-British-tycoon-father-man-woman---man---knows-hed-be.html (last visited Nov. 4, 2015).

imprudent to impose a law that has a demonstrated history of overriding constitutional freedoms, privacy rights, and safety interests when no real problem needs to be addressed.

Additional Resources:

SB190 and Victims of Sexual Abuse

How Transgender Law Hurts Women

The gross misappropriation of executive power to utterly remake the meaning of very basic legal terms threatens not only the structure of our government. It threatens the rule of law itself. This distortion of legal language is a particular threat to laws concerning women.

Whether she knew it or not, when Vanita Gupta, the acting head of the Civil Rights Division of the Department of Justice, stated earlier this month that trans women *are* women and trans men *are* men, she was making a metaphysical claim.

Her claim is that men and women are not most fundamentally human persons. Rather, they are minds unmoored from human bodies. But the law does not govern human minds; indeed, it cannot. The law governs human persons, who are always and everywhere embodied. And human bodies are always and everywhere sexed.

Clearly, the most tragic casualties of this latest social experiment are the vulnerable boys, girls, men, and women undergoing medical "treatments" in an attempt to align their given bodies with their troubled minds. Perhaps the second greatest casualty is the rule of law itself. Law, after all, is comprised of language. Indeed, it is adherence to the meaning of language that makes the rule of law possible. Though one may have quibbles with Justice Scalia's brand of originalism, the late justice's view that the people of our constitutional republic are governed legitimately not by legislative intent or judicial sentiment, but by the public meaning of the language of a law at the time of its enactment, has force for precisely this reason: so that we are a people governed by law and not by men.

The gross misappropriation of executive power on the part of the Obama administration to utterly remake the meaning of very basic legal terms—understood by Americans to yield particular meaning until May 2016—threatens not only our structure of government; it threatens the rule of law itself. This distortion of legal language is a particular threat to laws concerning women.

Ejecting the Human Body from Law

When the DOJ uses the word "woman" to include biological men who believe they are women, it is not only changing that particular legal term. It is upending how law works and why it has legitimacy. The particular legal terms the DOJ seeks to change—male and female, man and woman—are foundational to our system of law. They are foundational because our sexed bodies are constitutive of who we are as human persons. In a fanciful

attempt to de-sex the legal terms *men* and *women*, we eliminate bodies from the law. But the law can only govern embodied persons—because those are the only kind of persons there are.
British philosopher Daniel Moody makes this point in his recent book, *The Flesh Made Word*. He writes:
**Sex points to the whole of somebody. If we were to take away John's hands, we would be left with somebody, but to take away John's sex we would need to take away the whole of this body, which would leave nobody. . . . Sex is neither a part of the body nor a property of the body. Sex is the name we use to point toward that thing which the body itself is constituted of. Sex is not something we do. It is something we are.

Unable to redefine the natural realities named Male and Female, [the law] has instead separated its use of those names from the definitions belonging to non-interchangeable sexed bodies. John and Joan continue to be male-sexed and female-sexed and they can still legally access the names Male and Female. But in [law] those names no longer have bodies behind them. In ejecting sex from man-made law we eject whole bodies. [Thus,] Joan's whole body has been left shrouded in a cloak of legal silence, legally invisible.

In the world the DOJ has planned, men and women are no longer governed as embodied persons. Instead, they are "made of language." As Moody puts it, a transgendered man "speaks his 'femaleness' into existence."

But this movement from a law that governs *embodied persons* to a fiction called law that (attempts to) govern individuals' changeable *states of mind* does not affect only those who refer to themselves as "trans." By ejecting the body from law, every individual's legal identity rests not on the reality of his or her given, embodied existence but instead on his or her selected "gender identity." Our legal identity as "male" or "female" in this brave new world is not who we *are*—it is what we have *chosen*. The full consequences of this sort of existential voluntarism at the ground level of the law are unknowable, yet if Nietzsche is to be fully vindicated, they will include a will to power frightful in its impact on the weak and vulnerable. (I'm reminded of when my husband jested at the birth of our first child, "We could even teach her that black was white and white was black." Indeed.)

Erasing Woman
Once the law subordinates the sexed body to a subjectively determined "gender identity," the sexed body becomes *legally invisible*. When Judith Butler, the intellectual guru of the trans movement, channels Nietzsche and states that there is "no doer before the deed," no person or subject before his or her "performative utterance," she is intimating that women as a distinct class should be removed from social understanding, and so, *ipso facto*, from the law. (Transactivists now refuse to refer to abortion as a "women's issue," since men, they claim, can get pregnant too.)

**Whatever one makes of the merits of feminist identity politics as a whole, to deny that women are a legal class distinct from men is to erase the female body from social, legal, and political consideration. This is deeply problematic for a whole host of reasons, including but not limited to: legislating on and healing from sexual assault (whose perpetrators are disproportionately male);researching and treating women's distinctive nutritional, medical, and pharmaceutical needs; promoting the proven merits of single-sex educational and

sports programs; and creating authentic solutions for those who seek flexible work arrangements in order to prioritize family obligations (the vast majority of whom continue to be women). Radical feminists have taken note, and many of them have written and spoken out against the movement to legally codify transgenderism. Because of this inexcusably "essentialist" perspective, they have been cast out from Gender Studies departments, which have been *trans*-formed by the gender ideology of Foucault and Butler.
But feminism only makes sense if one takes seriously the sexed body—and the reproductive asymmetry inherent therein. As British political theorist and radical feminist Rebecca Reilly-Cooper writes,
Women's oppression has its historical roots and its ostensible justification in female biology and the exploitation of female reproductive labour. Altering the definition of the word "female" so that it now means "any person who believes themselves to be female" is not only conceptually incoherent . . . it also **removes the possibility of analysing the structural oppression of female persons as a class,** by eradicating the terminology we use to describe the material conditions of their existence. . . . If we do not recognize the material reality of biological sex and its significance as an axis of oppression, **women's experience of oppression becomes literally unspeakable**. We lose the terminology and tools of analysis – tools carefully developed by generations of feminists working before us—to make sense of female experience, and of the reality of negotiating a male-dominated world in a female body [emphasis in original].

Those of us who disagree sharply with radical feminists on a whole host of issues must here agree: It is not evidence of biological determinism or essentialism to state the facts of the human body. But it is sexist to deny—or worse, despise—them.

The Truth of Sexual Dimorphism

Male and *female* are the names given to the two sexes according to their potential reproductive function. The reality that some infants are born "intersex" does not deny this; it points to the difficult fact that exceptions in nature do occur, often tragically, and that as a civilized society, we ought to find the most compassionate and medically sound response. The same is true of those who experience sexual dysphoria. But hard cases make bad law: the reality of intersexuality ought not distort the law governing the vast majority of human beings, born as male and female. As Reilly-Cooper puts it: "The fact that some humans are intersex in no way diminishes the truth of sexual dimorphism, any more than the fact that some humans are born missing lower limbs diminishes the truth of the statement that humans are bipedal."

Our distinctive reproductive function is why we distinguish between the two embodied instantiations of humanity at all (though we are also learning more about how sexual difference affects medical treatment as well). When the bodies of men and women are joined in the sexual act—in an act of love, mere consent, or by violent force—women's bodies have the capacity to gestate newly created vulnerable human beings. Men's bodies do not. This reality of reproductive asymmetry, and the serious consequences that can flow from it for women, are the *raison d'etre* of feminism. Each form of feminism seeks to answer the question of how society ought to respond to reproductive asymmetry, given the shared goal of women's authentic freedom and equality.

Before the trans movement appropriated the term "gender" to describe a subjective, chosen, de-sexed identity, "gender" was the term used by most feminists to critique what they understood as the socially constructed overlay on biological sex: the cultural norms and rules a man or woman was to follow based on his or her respective biological sex. Often, these norms cast women as (nurturing) caregivers and men as (aggressive) breadwinners.

The Influence of Justice Ginsburg

The Supreme Court, through the tutelage of Ruth Bader Ginsburg as an advocate and then justice, imported this "gender" critique into its sex discrimination jurisprudence. The high court refers to illicit "gender" bias as "sex-role stereotyping"—in other words, impermissibly impinging on the freedom of men and women to shape their own destinies. The idea that men and women's differentiated reproductive capacities ought not influence how employers (Title VII) or the state (the Equal Protection Clause) treat them is fundamental to US anti-discrimination law.

In a legal argument almost certainly unforeseen by the Supreme Court, trans activists look to a 1989 Title VII case, *Price Waterhouse Cooper* v. *Hopkins*, as interpreted by a 2004 Sixth Circuit case, to bolster their legal claim that current sex discrimination law implicitly includes them as a protected class. In *Price Waterhouse Cooper,* the Court held that the defendant firm had impermissibly discriminated on the basis of "gender" by rejecting the plaintiff for promotion because she did not "act like a woman." In 2004, in *Smith* v. *City of Salem*, the Sixth Circuit relied on *Price Waterhouse* to extend anti-discrimination protection to a male fireman who was "transitioning to female" since the government had fired the officer due to his failure to conform to sex stereotypes. Although transgender activists may try to argue otherwise, the court simply said that Smith's identifying as transgender *did not prevent* his anti-discrimination claim.

As it turns out, the Supreme Court itself has offered a limiting principle for sex discrimination that excludes the Obama Administration's current machinations: the sexed body. When Justice Ginsburg joined the high court, she brought along the view that the law could harmonize equality with other values implicit in biological difference. Writing the Court's opinion in the 1996 case that struck down the historic male-only admissions policy of Virginia Military Institute, Ginsburg wrote: "Inherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." Notably, Ginsburg dropped a footnote indicating that women's admission to VMI would require "alterations necessary to afford members of each sex privacy from the other sex" in living arrangements. As of 1996, the privacy accommodations the different sexes would require seemed obvious enough, even to the highest ranking feminist in the land.

The sexed-body-as-limiting-principle is the primary reason the Court (to the chagrin of a conflicted Ginsburg) has not accepted the popular legal theory that abortion regulations ought to be understood as sex discrimination, despite a constant stream of amicus briefs pleading that they do so. The reproductive differences between men and women give rise to permissible statutory distinctions between them, at least as far as the Equal Protection Clause is concerned, when it comes to pregnancy and abortion.

As I have written elsewhere, a legislature does not engage in sex-role stereotyping when it passes a law that is based upon the biological facts of childbearing (for example, that women, and not men, gestate and bear children), but that it is sex-role stereotyping when a law seeks to define traditionally the social roles of men and women in reliance upon those biological facts (for example, because women bear children, they care less about their professional work).
Thus, if the Court remains consistent in its own understanding of sex discrimination, restrained as it is by bodily difference, the Obama administration's wild interpretations will find no shelter there. *All reasons SB190 needs to be rejected in Delaware.*

A Sexual Equality Dependent on Abortion Is to Blame

Radical feminists should be commended for resisting the trans movement's current attempts to erase the female body from our law. But a feminism that embraces abortion as its *sine qua non* must bear part of the blame. It is one thing to claim that traditional gender norms confined women unfairly to roles and traits that denied them the opportunity to use their talents to contribute to the broader community. Few would now disagree with that basic "gender" critique. It is another thing altogether to assert that the equality of the sexes depends on women having the legal authority to destroy the child's body growing within their own body.

Like the transgender's attempt to alter his given body to better fit his ailing mind, the abortion activist seeks to distort women's given bodies to fit into a culture ailing in its hostility to dependent children. For a prior generation of feminists, the biological asymmetry between men and women was a prescription for authentic social change, not a license to distort the wondrous capacity of the female body. Thus, it is no surprise that a society that rejects women's bodies and the bodies of their vulnerable children would now countenance a distortion in the law so great that it portends the ejection of *every* body.

The current gender ideology is an error of the greatest magnitude, a threat to the rule of law, and a derailing of efforts to reshape society to come into accord with the givenness of our vulnerable, imperfect, and deeply sexed bodies. The modern debate about what women's reproductive capacity means for the equality of the sexes has been raging since Susan B. Anthony picked up her pen. This debate ought to continue, undeterred by those who would reject the body—in all its goodness—from our law.

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