

# NOTES

## ASSUMING RESPONSIBILITY FOR WHO YOU ARE: THE RIGHT TO CHOOSE “IMMUTABLE” IDENTITY CHARACTERISTICS

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*Golinski v. U.S. Office of Personnel Management, a district court case challenging the constitutionality of the Defense of Marriage Act, explicitly adopted a novel definition of immutability under the Equal Protection Clause. Now held in abeyance pending the Supreme Court’s decision in United States v. Windsor, Golinski’s discussion of immutability remains relevant because it articulated the rationale behind a number of recent lower court decisions in equal protection jurisprudence that reach beyond the context of sexual orientation. Such decisions turn away from talismanic protection of immutable characteristics determined by birth, and toward the right of all persons to choose fundamental aspects of their identity. They disavow “biological immutability,”—the traditional view of immutability which refers to a characteristic one cannot change, “determined solely by the accident of birth”—and instead rely on asylum law’s definition of immutability: not exclusively a characteristic one cannot change, but also a chosen characteristic that one should not be forced to change because it is fundamental to identity. This Note argues that asylum law’s “fundamental immutability” standard belongs in equal protection jurisprudence because it resolves inconsistencies in traditional equal protection jurisprudence caused by a biological immutability standard and because it harmonizes recent lower court opinions discussing race- and gender-related equal protection in an era of increased multiracial, intersex, and transgender visibility.*

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INTRODUCTION

Gay rights advocates and opponents tend to hold distinct views on homosexuality’s origins. Advocates commonly contend that sexual orientation is not a choice,<sup>1</sup> while at least one political opponent of gay rights has insisted that “[h]omosexuality . . . [is] about sexual freedom, and they hate to be called on [it].”<sup>2</sup> Coming from the camps that they do, these hardline views of homosexuality as pre-determined compulsion or free choice might strike some as ironic: Liberation was once a watchword of the gay rights movement<sup>3</sup> and freedom isn’t commonly thought of as a dirty word when used by political conservatives. Regardless of the accuracy of either claim, the portrayal of homosexuality as an inborn condition likely serves legally strategic

<sup>1</sup> See *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) (“Ms. Golinski presents evidence that the characteristic of sexual orientation is immutable or highly resistant to change.”); see also *Windsor v. United States*, 833 F. Supp. 2d 394, 401 (S.D.N.Y. 2012) (“Windsor now argues that DOMA should be subject to strict (or at least intermediate) scrutiny because homosexuals as a class present the traditional indicia that characterize a suspect class[, including] . . . an immutable characteristic upon which the classification is drawn . . . .”); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (“No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.”); *In re Balas*, 449 B.R. 567, 576 (Bankr. C.D. Cal. 2011) (“Sexual orientation is a ‘defining and immutable characteristic.’”).

<sup>2</sup> Charles M. Blow, Op-Ed., *Santorum and the Sexual Revolution*, N.Y. TIMES, Mar. 3, 2012, at A19 (quoting former Senator and 2012 Republican presidential primary candidate Rick Santorum in a 2008 lecture at the Oxford Center for Religion and Public Life).

<sup>3</sup> See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1582 (1993) (“Gay liberation in the post-Stonewall days [referring to the Stonewall Riots, a series of demonstrations by members of the gay community against police harassment outside of a New York City gay bar in 1969] was not a civil rights movement to gain equality for homosexuals. Rather, it was a movement focused on the sexual oppression of all people, with the goal of liberating the ‘homosexuality’ in everyone.”).

ends. It brings gays<sup>4</sup> one step closer to suspect class status under the Equal Protection Clause of the Fourteenth Amendment,<sup>5</sup> potentially imperiling any law in the nation that treats gays as a class differently than non-gays. This is because a law that treats people differently based on their membership in a suspect class is subject to heightened judicial scrutiny and must be at least substantially related to an important government interest to avoid being struck down as unconstitutional.<sup>6</sup>

In early 2011, the Department of Justice (DOJ) articulated its own argument in favor of heightened scrutiny for sexual orientation classifications,<sup>7</sup> citing four prongs that must be satisfied for a class to be labeled suspect:

- (1) whether the group in question has suffered a history of discrimination;
- (2) whether individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;”
- (3)

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<sup>4</sup> This Note uses “gay people” or “gays” to indicate individuals who express romantic or sexual affection with someone of the same gender. Gay rights advocates sometimes use the term LGBT (lesbian, gay, bisexual, and transgender) as a more inclusive identifier of sexual and gender minorities. Ms. Golinski’s argument, however, was that she was denied equal protection of the laws based on her homosexual sexual orientation. Accordingly, her claim seeks to establish sexual orientation alone as a suspect classification. *Golinski*, 824 F. Supp. 2d at 979. Some scholars have articulated more expansive grounds for heightened scrutiny that would include other sexual and gender minorities in addition to gay people. See, e.g., William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333 (2010) (contending that the benign nature of both sexual and gender variation argues against the state’s interference in gender and sexual expression). Others argue that non-heterosexual sexual expression may be framed as an identity grounded in difference of gender expression, as opposed to sexual orientation. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 515 (1992) (arguing that “many non-gay people believe that gay men and lesbians exhibit ‘cross-gender’ behavior”); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (characterizing anti-gay animus as traceable to the violation of gender norms); Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CALIF. L. REV. 505, 534 (2008) (arguing that “same-sex sodomy is fundamentally gender transgressive, and thus opposed by the same ideology that enforces women’s gender conformity”).

<sup>5</sup> U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>6</sup> See *Golinski*, 824 F. Supp. 2d at 981 (noting that “courts apply the most searching constitutional scrutiny to those laws that burden a fundamental right or target a suspect class, such as those based on race, national origin, sex or religion,” and that, “[t]o these groups of protected classifications, subject to a heightened scrutiny, the government is required to demonstrate that the classification is substantially related to an important governmental objective”); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.”).

<sup>7</sup> See Press Release, U.S. Attorney Gen. Eric H. Holder, Jr., Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society."<sup>8</sup>

The DOJ cited support from Supreme Court holdings to argue that gays satisfied prongs one,<sup>9</sup> three,<sup>10</sup> and four.<sup>11</sup> But it was the DOJ's support for the second prong that, with the fewest words, made the largest statement. Consisting of only a single sentence, it contended that "a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable,"<sup>12</sup> but then cited to a twenty-year-old secondary source as proof of that growing consensus.<sup>13</sup> The DOJ's modest attempt at a defense of the immutability of homosexuality reflects the lack of definitive consensus on the matter in the biological and social sciences.<sup>14</sup>

Traditionally, courts have used a "biological immutability" standard to assess homosexuality's immutability, relying on the Supreme Court's assertion that an immutable characteristic is one that is "determined solely by the accident of birth . . ."<sup>15</sup> In *Golinski v. U.S. Office of Personnel Management*,<sup>16</sup> however, a district court turned to

<sup>8</sup> *Id.* (internal citations omitted).

<sup>9</sup> *See id.* ("[U]ntil very recently, states have 'demean[ed] the[ ] existence' of gays and lesbians 'by making their private sexual conduct a crime.'" (alterations in original) (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))).

<sup>10</sup> *See id.* (noting that there is abundant evidence that gay people "have limited political power and 'ability to attract the [favorable] attention of the lawmakers,'" including "the adoption of laws like those at issue in *Romer v. Evans* and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation" (citations omitted) (quoting *City of Cleburne*, 473 U.S. at 445)).

<sup>11</sup> *See id.* ("[T]here is a growing acknowledgment that sexual orientation 'bears no relation to ability to perform or contribute to society.'" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality))).

<sup>12</sup> *Id.*

<sup>13</sup> RICHARD A. POSNER, *SEX AND REASON* 101 (1992).

<sup>14</sup> *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) (discussing evidence of scientific consensus that homosexuality is immutable, but nonetheless admitting that conflicting evidence demonstrates fluidity on the continuum of sexual orientation). Citing to a demographic study on sexual orientation, the *Golinski* court noted that ninety-five percent of gay men and eighty-three percent of lesbian respondents indicated that they had experienced no or very little choice in regards to their sexual orientation. *Id.* at 986. It is not difficult to imagine, then, a more skeptical court citing the inverse finding—that five percent of gay men and seventeen percent of lesbian respondents *did* exert choice over their sexual orientation—for the proposition that homosexuality is, in fact, mutable.

<sup>15</sup> *Frontiero*, 411 U.S. at 686.

<sup>16</sup> 824 F. Supp. 2d 968 (N.D. Cal. 2012). *Golinski* held that laws that classify people based on sexual orientation, like laws that classify people based on race or gender, should be subject to heightened judicial scrutiny. It further held DOMA unconstitutional under that standard. *Id.* at 1002–03. In declaring gays a suspect class, *Golinski* directly

asylum law to define immutability. Dismissing discussion of the biological roots of homosexuality—and presumably the use of biological immutability in heightened scrutiny analysis—*Golinski* quoted Ninth Circuit appeals of asylum claims, and stated plainly that “[s]exual orientation and sexual identity are immutable [because] they are so fundamental to one’s identity that a person should not be required to abandon them.”<sup>17</sup>

Although *Golinski* has been held in abeyance on appeal pending the Supreme Court’s decision in *United States v. Windsor*,<sup>18</sup> a case challenging the constitutionality of the Defense of Marriage Act (DOMA), its discussion of immutability reached beyond the narrower question of DOMA’s constitutionality and urged a broader doctrinal shift in equal protection jurisprudence supported by other lower courts. Yet even before *Golinski* was decided, other lower courts vindicating the rights of transgender plaintiffs in sex-based discrimination claims had implicitly advanced the same shift. This Note argues that the contemporary visibility of multiracial, intersex, and transgender identities demands a reassessment of biological immutability in the equal protection context. In its place, courts should use asylum law’s definition of immutability—referred to as “fundamental immutability”—in the equal protection context. Under this standard, an immutable characteristic is not simply a quality one cannot change, determined at birth. Rather, as a baseline, it is an electable status that one should not be forced to change because it is fundamental to identity.

Part I of this Note uses less common variations of race and sex identity to test the Supreme Court’s assertion that heightened scrutiny applies to race and sex classifications in part because they are unchangeable, inborn characteristics. It documents changes in national demographics and increased activism in the medical profession that have accompanied contemporary visibility of racially

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contradicted Ninth Circuit precedent, see *High Tech Gays v. Def. Indus. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (rejecting suspect classification for gays), and answered a question heretofore left open by the Supreme Court. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning a sodomy statute as a violation of substantive due process, and thus refusing to answer whether gays are a suspect class); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (overturning a sexual orientation-based classification on rational review, and thus refusing to answer whether gays are a suspect class).

<sup>17</sup> *Golinski*, 824 F. Supp. 2d at 987 (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)); see also *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (agreeing with *Hernandez-Montiel* and finding that homosexuality is “a fundamental aspect of . . . human identity”).

<sup>18</sup> *Golinski v. U.S. Office of Pers. Mgmt.*, No. 12-15388 (9th Cir. Dec. 11, 2012) (order holding the case in abeyance pending the outcome of *United States v. Windsor*).

ambiguous, intersex, and transgender individuals—individuals who prove that race and sex are, in certain cases, actually changeable.<sup>19</sup> Knowing this demands either that we exclude these characteristics from suspect classification, exclude these individuals from the heightened scrutiny framework, or look for some other definition for immutability besides the Court’s proffered one: a characteristic “determined solely by the accident of birth . . . .”<sup>20</sup>

Part II turns to asylum law for that alternate definition of immutability and demonstrates how it could be—and in some cases already impliedly is—applied in the equal protection context. Asylum law describes an immutable characteristic as something “that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>21</sup> Part II explains how recent cases that predate *Golinski* vindicated the rights of transgender plaintiffs—who by definition lacked an immutable sex characteristic—and therefore implicitly endorsed the use of fundamental immutability in the equal protection context.

Part III asks and answers whether sexual orientation passes muster under a fundamental immutability standard, bolstering *Golinski*’s argument that it does by relying on both asylum law’s long-standing protection of gay asylees and the Supreme Court’s recent jurisprudence on same-sex sexual activity. Under this standard, courts should cease inquiries into sexual orientation’s biological origins and instead ask whether sexual orientation is so fundamental to individual identity that the government should not be permitted to influence an individual’s choice in the matter by assigning burdens to it.

## I

### THE SOMETIMES MUTABLE NATURE OF RACE AND SEX REVEALS INCONSISTENCIES IN EQUAL PROTECTION DOCTRINE

Nearly thirty years ago, the Supreme Court declared that “sex, like race . . . is an immutable characteristic determined solely by the

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<sup>19</sup> This Note focuses on heightened scrutiny analysis in race and sex—to the exclusion of illegitimacy, alienage, and fundamental rights, other classifications that trigger heightened scrutiny—because they are identity characteristics (along with national origin) that the Court has explicitly declared to be immutable, and thus the most salient classifications for a discussion on homosexuality’s immutability. This Note uses the phrase “sex identity,” instead of “gender identity,” because the courts have generally referred to sex-based classifications—and not gender-based classifications—as suspect under the Equal Protection Clause. See, e.g., *Frontiero* 411 U.S. at 677 (1973).

<sup>20</sup> *Id.* at 686.

<sup>21</sup> *Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

accident of birth . . . .”<sup>22</sup> Decades of criticism from both legal and social science scholars question this assumption and indicate the need for a revision in the Court’s understanding of immutable identity.<sup>23</sup> Building on that criticism, this section presents evidence of shifts in national demographics and activism in the medical profession that have undergirded the increased visibility of racially ambiguous, intersex, and transgender individuals. These individuals explain why the Court’s conception of race and sex as both unchangeable and traceable solely to birth is, in certain cases, wrong: Some people choose their race and sex after their birth.

Examining less common experiences of race and sex identity tests one of the principles on which our understanding of the Equal Protection Clause rests: Presumably, heightened scrutiny is reserved for laws that classify on the basis of immutable characteristics assigned at birth, because “the imposition of special disabilities upon the members of a particular [classification] . . . because of their [immutable characteristic assigned at birth] . . . would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .”<sup>24</sup> In the United States it is intuitively unfair, we feel, to punish someone for something over which they have no control.

But what if race and sex are sometimes mutable characteristics which some individuals choose? In that case, we might conclude either that statutes that classify by race and sex fail the test for suspect

<sup>22</sup> *Frontiero*, 411 U.S. at 686.

<sup>23</sup> See, e.g., E. PATRICK JOHNSON, *APPROPRIATING BLACKNESS: PERFORMANCE AND THE POLITICS OF AUTHENTICITY* (2003) (arguing that the definition of blackness is malleable and constructed through appropriation by individuals and groups); NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* (1998) (exploring how gender separatism in the law facilitates the social construction of gender); Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory, in PERFORMING FEMINISMS: FEMINIST CRITICAL THEORY AND THEATRE* 270 (Sue-Ellen Case ed., 1990) (arguing that gender is the sum of a series of acts engaged in by the performer that in turn reify the internal feeling of gender); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (arguing that race and ethnicity are produced through social acknowledgement of racially coded physical features, voluntary appearance choices, and behaviors); Margaret Shih et al., *The Social Construction of Race: Biracial Identity and Vulnerability to Stereotypes*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 125 (2007) (presenting psychological studies on the relationship between knowledge of racial stereotypes and racial performance). *But see* Julia Serrano, *Performance Piece*, in *GENDER OUTLAWS: THE NEXT GENERATION* 85, 88 (Kate Bornstein and S. Bear Bergman eds., 2010) (arguing that dismissing gender as performance belittles the experience of transgender people, and positing gender as fundamentally “inexplicable, varied, profound, and intricate”).

<sup>24</sup> *Frontiero*, 411 U.S. at 686 (internal quotation marks omitted).

classifications,<sup>25</sup> or that people who do choose their race and sex are not similarly situated to those who do not, and thus fall outside of heightened scrutiny's ambit. The first conclusion, however, contradicts established equal protection jurisprudence: Race and sex classifications always receive heightened scrutiny.<sup>26</sup>

The second conclusion suggests a scenario in which people who choose or change their race and sex identities comprise a distinct class that is unprotected from the same characteristic-based discrimination held to be unconstitutional when aimed at people whose race and sex remain unchanged since birth. Assuming we are untroubled with the normative implication of that conclusion, we might justify it by explaining that the former class of individuals is not similarly situated to the latter: It is constituted by people who choose their race and sex, rather than being assigned those characteristics by birth. Historically, courts have accepted just this reasoning.<sup>27</sup> But a group of recent circuit court decisions reverses this trend, applying heightened scrutiny in service of plaintiffs with mutable sex identities.<sup>28</sup> These recent cases, which are focused on individuals whose identity characteristics fall outside of the traditional meaning of immutable, urge us to reexamine the meaning of immutability in the equal protection context.

### A. *Mutable Race*

The traditional belief that race is an immutable characteristic dependent solely on birth is rooted in the idea that race is defined by lineage, physiognomy, and other physical characteristics.<sup>29</sup>

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<sup>25</sup> See *supra* note 8 and accompanying text (citing the Attorney General's recitation of the test for suspect classification, including the prong that every member of the class must "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" (internal citations omitted)).

<sup>26</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("We note, once again, the core instruction of this Court's pathmarking decisions in *J.E.B. v. Alabama ex rel. . . .* and *Mississippi Univ. for Women . . .*: Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.") (citations omitted).

<sup>27</sup> See *infra* notes 55–56 and accompanying text (describing how some courts have denied heterosexual marriage rights to transgender women by reasoning that, unlike most women, transgender women are born with male-identified chromosomes. The act of choosing their female sex therefore deprives them of access to certain rights guaranteed to women born with female-identified chromosomes).

<sup>28</sup> See *infra* Part II.B (discussing recent circuit court decisions finding a sex-based violation of transgender individuals' Fourteenth Amendment right to equal protection of the laws).

<sup>29</sup> These once dominant biological theories of human differentiation formed the basis of the eugenics movement and have now been discredited. See Rich, *supra* note 23, at 1148–49 ("The belief in stable, morphologically distinct racial groups is a remnant of

Accordingly, a person born to Black parents is Black, or a person with a certain eye shape, hair texture, or skin color is White. This absolutist view holds less force today, however, because a substantial number of Americans of mixed racial lineage present racially ambiguous physical characteristics.<sup>30</sup> These people can choose a particular racial identity that differs depending on the particular social, professional, or legal context.<sup>31</sup>

The law's struggle to keep pace with the growing reality of racial self-identification is tied to the United States's long history of racial subordination. Traditional absolute racial categorizations were essential to legal and social ordering in a society that divided rights by race, determining who was a person and who was property in antebellum America.<sup>32</sup> Most American states prior to the Civil War implemented legal definitions of race, either statutory or judicially constructed, to codify underlying social understandings.<sup>33</sup>

Still, long before contemporary trends of racial self-identification, the law acknowledged that racial identification was not shaped by lineage or physiognomy alone. In the decade leading up to the Civil War, for example, the Virginia legislature—facing increasing outside resistance to the use of slave labor and long prohibited from importing new slaves<sup>34</sup>—debated a proposal to expand its enslaveable population by amending the state definition of Black from having one Black

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biological theories of race and ethnicity that were hegemonic in the scientific community in America until the early twentieth century.”).

<sup>30</sup> See Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3 (“[T]he multiracial population has increased almost 50 percent, to 4.2 million, since 2000, making it the fastest growing youth group in the country.”).

<sup>31</sup> See Camille Gear Rich, *Racial Commodification in the Era of Elective Race: Affirmative Action and the Lesson of Elizabeth Warren* 7–11 (USC Law Legal Studies Paper No. 12–19, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2132685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132685) (using the term “elective race” to explain the individual right to racially self-identify, and describing how different contexts may encourage the same individual to racially self-identify in different ways).

<sup>32</sup> See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 33–34 (1991) (describing a 1705 Virginia Assembly slave code containing rules for classifying offspring based on descent that “marked the first formal establishment of racial categories in colonial America”).

<sup>33</sup> See *id.* at 34 n.137 (listing race-defining state statutes throughout all geographic regions of the continental United States).

<sup>34</sup> In 1807, Congress banned the importation of slaves. See Act of Mar. 2, 1807, ch. xxii, 2 Stat. 426 (1807). The Act itself assumed force in 1808, owing to constitutional restrictions on the power to ban the slave trade. See U.S. CONST. art. I, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .”).

grandparent to having one Black ancestor at any time in history.<sup>35</sup> Virginia's legislative history provides but one example that race was never determined *solely* by birth; it was instead the combination of lineage and historically contingent, mutable social understandings which shape the meaning of that lineage, equating Black racial membership with a Black parent, a Black grandparent, or a distant Black ancestor, as the social context required.<sup>36</sup>

Today, the United States government has essentially abandoned the practice of imposing racial identity on Americans,<sup>37</sup> instead relying largely on voluntary self-identification to keep track of racial data. The government's retreat has left Americans with two principal methods of racial categorization: voluntary self-identification and involuntary identification by third parties, a byproduct of social interaction resulting from an observer's imposition of racial identity as associated with physiognomy. Voluntary racial self-identification is standard in the census, federal recordkeeping measures,<sup>38</sup> and educational programs seeking to attract diverse entrants.<sup>39</sup> Involuntary racial identification occurs when a third party presumptively correlates skin tone or other physical characteristics with an individual's race.<sup>40</sup>

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<sup>35</sup> See Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 631 (2007) (“In 1853, Virginia—for two centuries, the trailblazer in racial definition—debated a proposal to amend its seventy-year-old ‘one-quarter’ rule ‘to declare all persons to be negroes who may be known or proven to have negro blood in them.’” (citations omitted)).

<sup>36</sup> The Court is mindful of this fact, cautiously admitting that “differences between individuals of the same race are often greater than the differences between the ‘average’ individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.” *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

<sup>37</sup> See Gotanda, *supra* note 32, at 34–35 (noting that “[g]overnment’s role [in creating racial classifications] has been less obvious since the Civil Rights Movement[.]” and that “most jurisdictions had abolished mandatory classifications by the 1970s”). See also *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 FED. REG. 58,782, 58,788–90 (1997) (requiring federal agencies’ racial data collection efforts to rely on individual racial self-identification).

<sup>38</sup> Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1107 nn.98–99 (2004) (listing federal programs which mandate or instruct administrators to record participants’ races).

<sup>39</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (identifying attainment of a diverse body of students in higher education as a compelling state interest).

<sup>40</sup> A series of articles published contemporaneously with the drafting of this Note criticized then-Democratic Senate candidate Elizabeth Warren, a law professor at Harvard University, for self-identifying as Native American in law school directories although possessing only one thirty-second part Cherokee heritage. See, e.g., Amy Davidson, *Elizabeth Warren’s Native American Question*, THE NEW YORKER: CLOSE READ BLOG (May 8, 2012, 7:19 PM), <http://www.newyorker.com/online/blogs/closeread/2012/05/elizabeth-warrens-native-american-question.html>. The withering skepticism directed at Warren—the Boston

For the majority of people, the presumption created by an onlooker's perception will likely match an individual's voluntary racial self-identification: Most people will likely accurately identify a person who self-identifies as White based on physical features alone. But for people of racially ambiguous physical characteristics, such as light-skinned Blacks and Latinos, voluntary racial identification is a regular phenomenon of social interaction.<sup>41</sup> Extensive literature documents the accounts of light-skinned individuals who pass as White, voluntarily assuming racially coded patterns of speech and dress.<sup>42</sup> The United States also has a storied legal history that records individuals' attempts to manipulate racial identity through voluntary action, including one of the Supreme Court's most infamous holdings: *Plessy v. Ferguson*.<sup>43</sup>

Homer Plessy insisted in his petition to the Court "that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the White race by its Constitution and laws . . ." <sup>44</sup> Plessy's claim was that the amount of "colored blood" he had—a singular Black grandparent—was so negligible that he was White.<sup>45</sup> Today, modern Americans might assume someone with his physical characteristics—someone in whom "the mixture of colored

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Herald labeled her "Fauxchontas"—illustrates the ongoing significance of third-party assent to individually chosen racial labels. *See id.* The root of the doubt of Warren's claims was not lack of genealogical proof, and Cherokee tribal rules could allow for someone of her lineage to claim membership. But the source of public skepticism may have been based in what some commentators criticized as an abuse of affirmative action by an individual who appeared White by physiognomy. *See id.*

<sup>41</sup> *See, e.g.,* Susan Saulny, *Black? White? Asian? More Young Americans Choose All of the Above*, N.Y. TIMES, Jan. 30, 2011, at A1 ("'I think it's really important to acknowledge who you are and everything that makes you that,' said Ms. Wood, the 19-year-old vice president of the [Multiracial and Biracial Student Association]. 'If someone tries to call me black I say, 'yes—and white.'").

<sup>42</sup> *See* STEPHEN J. BELLUSCIO, *TO BE SUDDENLY WHITE: LITERARY REALISM AND RACIAL PASSING* (2006) (analyzing passing narratives in American literature from Black, Jewish, and Italian authors); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710–14 (1993) (recounting the author's grandmother's dual identities as a White and Black woman). For additional examples of attempts to voluntarily manipulate racial identity, see IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th anniversary ed. 2006), which details the attempts of various plaintiffs to secure judicial declarations of their whiteness and Harris, *supra* note 42, at 1737–41, which describes the shifting legal conceptions of the White and Black races as reflected in case law seeking to legally define race.

<sup>43</sup> 163 U.S. 537 (1896).

<sup>44</sup> *Id.* at 538.

<sup>45</sup> *Id.*

blood was not discernable”—to be White.<sup>46</sup> If Homer Plessy self-identified as Black and expressed it to others he could dispel that assumption, assuming belief of his claim. But he could just as easily keep silent and choose a White identity, or choose specific contexts in which to assert a White, Black, or mixed racial identity.

Here, it yields an absurd result to interpret the Court literally when it says that in order for a racial classification to be suspect, race must be an immutable characteristic traceable solely to birth: Because Plessy's racial identity would be a matter of personal choice rather than dependant solely on birth, he would presumably fall outside of heightened scrutiny's ambit. But “[r]acial discrimination . . . would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment,”<sup>47</sup> as one court has recognized; nor should it be constitutional as applied to the growing number of Americans who choose to identify as a particular race at their own discretion.

Just as indefensible is the suggestion that these Americans could avoid racial discrimination by keeping silent about their minority racial identity and passing as White. This would grant government the power to impose an individual's racial identity by assigning a penalty to voluntary racial minority self-identification.

### B. *Mutable Sex*

Sex, too, may be a chosen, mutable identity. The experience of intersex people—those born with intermediate sex characteristics—provides proof that sex, like race, is not always determined solely by birth. Although a definitive account of the number of intersex Americans remains elusive, some studies report as many as two percent of all live births present intersex sexual characteristics.<sup>48</sup> Standard medical protocol upon delivery of an intersex child calls for

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<sup>46</sup> See Davidson, *supra* note 40 (discussing skepticism toward Elizabeth Warren's self-identification as Cherokee Indian, despite the fact that she apparently possesses Cherokee ancestry).

<sup>47</sup> *Watkins v. U.S. Army*, 837 F.2d 1428, 1446 (9th Cir. 1988).

<sup>48</sup> Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 151 (2000). In Blackless's study, the count of intersex individuals included chromosomal combinations XXY, XO, XYY, and XXYY, as compared to the XX (commonly associated with female gendered individuals) and XY (commonly associated with male gendered individuals) combinations more frequently found in human sexual differentiation. *Id.* at 152. See also Elizabeth Weil, *What If It's (Sort of) a Boy and (Sort of) a Girl?*, N.Y. TIMES MAG., Sept. 24, 2006, at 50 (reporting ranges of intersex birth from one in every 2000 to one in every 4500 births).

expert examination and sexual assignment.<sup>49</sup> Although intersex individuals rarely exercise a choice as to their assigned sex,<sup>50</sup> some physicians and intersex advocates argue that doctors and parents should delay surgical modifications until the intersex individual is old enough to give informed consent to any physical modifications made to the body.<sup>51</sup> Some intersex individuals never undergo any surgery, choosing instead to live their lives as gendered individuals with ambiguous sex characteristics,<sup>52</sup> or in other cases, never choosing a male- or female-identified gender at all.<sup>53</sup>

Some transgender people also use surgical techniques and hormone therapy to alter particular birth-assigned sex characteristics that are supposedly immutable: to grow or lose hair, modify voice timbre, and change the shape of body parts. Unlike intersex newborns assigned sex shortly after birth, transgender adults are capable of informed consent to their operations. They choose their sex identities through surgery, hormone therapy, cosmetic alteration via application of makeup, and physique modification through physical conditioning.

A majority of states allow transgender people to change their legal names, as well as the sex on their birth certificates.<sup>54</sup> At the same

<sup>49</sup> Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e490 (2006) (describing “optimal clinical management” for intersex individuals).

<sup>50</sup> See Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSGENDER RIGHTS 51, 51–52 (Paisley Currah et al. eds., 2006) (explaining how doctors or parents often presumptively assign genders to children born with chromosomal and gonadal ambiguities leading to external organ anomalies, provoking intense feelings of dissonance and confusion as the children mature).

<sup>51</sup> See Sarah M. Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 THE LANCET 124, 125 (2001) (“This study prompts a re-evaluation of cosmetic genital surgery in children. Most vaginal surgery can be deferred until after adolescence . . .”); *Weil, supra* note 48, at 51–52 (explaining that intersex advocate Cheryl Chase’s “radical” position “that cosmetic genital operations on intersex children should be stopped and that children should be made to feel loved and accepted” as they are has made some headway into medical debates about the care of intersex children).

<sup>52</sup> See *Weil, supra* note 48, at 51 (reporting that, in a group of eleven people at an intersex retreat, “one person . . . did not have an operation, and she alone looks fit and confident, sitting with great posture and seeming at home in her body”).

<sup>53</sup> See Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of . . . [Perceived] Sex,”* 34 N.Y.U. REV. L. & SOC. CHANGE 55, 104–05 n.59 (2010) (describing intersex individuals who reject male/female sex and gender categorizations).

<sup>54</sup> See William Glaberson, *For Transgender People, Name is a Message*, N.Y. TIMES, Jan. 25, 2010, at A12 (“In many courts around the country, what were once risky or shocking name-change requests are becoming more routine as the sting of gender taboo has lost a little of its edge.”); see also John Parsi, *The (Mis)Categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497, 1501–03 (2010) (surveying legal bases for sex changes across the United States and finding that only two states explicitly disallow sex changes on birth certificates).

time, many states—including those that allow for birth certificate changes—deny heterosexual marriage rights to transgender individuals. These states reason that for purposes of marriage, a transgender person’s chromosomal profile is controlling.<sup>55</sup> Yet by this logic, an intersex woman whose chromosomal profile did not match the more common XX variation and who chose to undergo surgery to change her sex from male to female after her original post-birth assignment would also be unable to marry her heterosexual male partner, simply because a doctor chose her gender without her input or consent. Denying her meaningful equal protection of the laws seems to punish her precisely for a characteristic over which she has no control—her assigned sex—and harkens back to the Court’s original explanation for why a suspect classification must focus on an immutable characteristic.<sup>56</sup> Even courts that deny heterosexual marriage rights to transgender people recognize that the sometimes ambiguous nature of chromosomal sex presents an unresolved complication to the Court’s definition of sex as immutable.<sup>57</sup>

If race and sex are not always immutable characteristics determined solely by birth, why do they merit suspect classification? Although addressing sexual orientation, the court in *Golinski v. Office of Personnel Management* found an answer to this question by turning to asylum law, where courts use a different definition of an immutable characteristic: something that a person either “cannot change or should not be required to change because it is fundamental to . . . individual identit[y] or conscience[.]”<sup>58</sup> Applying this definition of immutability, race and sex, even when chosen or changed, are always immutable because the minority of individuals who choose their race and sex should not be required to change something so fundamental to their identity.

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<sup>55</sup> See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999) (“The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.”); see also Parsi, *supra* note 54, at 1504–06 (explaining that several jurisdictions rely on a chromosomal standard to assess sex).

<sup>56</sup> See *supra* note 24 and accompanying text (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), contending that immutability is salient for equal protection purposes because it reflects individuals’ lack of responsibility for the characteristics by which they are classified).

<sup>57</sup> The *Littleton* concurrence mentioned the possibility of an exception to the majority’s holding for intersex individuals. *Littleton*, 9 S.W.3d at 232 (Angelini, J., concurring) (“We must recognize the fact that, even when biological factors are considered, there are those individuals whose sex may be ambiguous. . . . Having recognized this fact, I express no opinion as to how the law would view such individuals with regard to marriage.”).

<sup>58</sup> *Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

## II

### ASYLUM LAW'S DEFINITION OF IMMUTABILITY CURES INCONSISTENCIES IN EQUAL PROTECTION DOCTRINE

Some scholars argue that immutability has no place at all in suspect classification analysis.<sup>59</sup> These critiques seem to have fallen on deaf ears; courts and litigants continue to treat the immutability prong as a live issue.<sup>60</sup> In the sexual orientation context, this results in a factual inquiry into the scientific basis of homosexuality's immutability that ends in a stalemate.<sup>61</sup> *Golinski* sidestepped that debate by changing the definition of immutability from "impossible to change" to "fundamental to identity."<sup>62</sup> In doing so, the *Golinski* court cited to asylum appeals before federal courts.<sup>63</sup>

This Part first presents asylum law's definition of immutability—which this Note refers to as "fundamental immutability"—and explains the original reason behind its adoption by the Board of Immigration Appeals (BIA), the administrative body that adjudicates

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<sup>59</sup> See, e.g., Susan R. Schmeiser, *Commentary: Changing the Immutable*, 41 CONN. L. REV. 1495, 1518–19 (2009) (arguing that the persistent "social and legal ostracism" that defines gay identity is a more valuable marker of identity than immutability); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 557–58 (1998) ("I hope that I have persuaded the reader that the immutability . . . factor[ ] may not be justified either on substantive . . . or processual grounds . . . . [T]hese arguments, if accepted, should convince the reader that the factor[ ] should be discarded . . . .").

<sup>60</sup> See, e.g., Brief on the Merits of Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-307), WL 267026 at \* 56 [hereinafter Brief on the Merits of Respondent] ("Thus, while 'sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth,' . . . the same cannot be said of sexual orientation. For some persons, sexual orientation is fluid."); Brief of Amicus Curiae Frederick Douglass Foundation in Support of Intervenor-Defendant-Appellant and in Support of Reversal, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (Nos. 12-15388, 12-15409), 2012 WL 2338873 at \*3 [hereinafter Brief of Frederick Douglass Foundation] ("In short, sexual orientation could not be considered a suspect or quasi-suspect class without a seismic shift in how the Supreme Court uses the term immutability."). *But see* *Windsor v. United States*, 699 F.3d 169, 183–84 (2d Cir. 2012). The Second Circuit's opinion striking DOMA as a violation of Equal Protection disposed of the immutability prong by declaring it to mean not literal biological immutability, but instead a "sufficiently discernible characteristic." Analogizing directly to the suspect classifications of national origin and illegitimacy—yet conspicuously declining to make mention of either race or gender—the divided circuit panel provided another answer to the immutability inquiry which is beyond the scope of this Note.

<sup>61</sup> See *Golinski*, 824 F. Supp. 2d at 986 (recounting scientific studies presented by both plaintiffs and defendants debating homosexuality's biological or psychological roots).

<sup>62</sup> See *id.* at 987 ("[S]exual orientation is recognized as a defining and immutable characteristic because it is so fundamental to one's identity.").

<sup>63</sup> See *id.* (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) and *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) for the proposition that homosexuality is fundamental to identity).

asylum appeals before they reach a federal court. It then reports on the number of lower court cases that, like *Golinski*, have either implicitly or explicitly adopted fundamental immutability in equal protection analysis. Fundamental immutability, when applied to the established suspect classes of race and sex, resolves the inconsistencies in equal protection jurisprudence suggested by the existence of individuals who choose their race and sex. Two recent circuit court opinions applying heightened scrutiny to sex-based classifications that burdened transgender plaintiffs illustrate this solution.<sup>64</sup> These cases did not explicitly cite to asylum law to satisfy the immutability prong of suspect classification: In fact, they did not discuss the immutability prong at all. But applying fundamental immutability to their analyses explains how these circuit courts, like *Golinski*, satisfied the immutability prong of suspect classification in the face of clear evidence to the contrary. Further, at least one district court has adopted *Golinski*'s immutability analysis outright, borrowing asylum's definition of immutability to defend the use of heightened scrutiny for individuals of ambiguous racial characteristics.<sup>65</sup> Together these cases recognize a shift in equal protection jurisprudence, signaling that even individuals who choose certain fundamental aspects of their identity are entitled to heightened scrutiny under the Equal Protection Clause.

#### A. A Closer View of Asylum Law's Fundamental Immutability

Asylum is a form of immigration status for international refugees who reach United States territory without prior permission to enter.<sup>66</sup> It offers a path to legal residency and eventual citizenship for immigrants who have faced or are reasonably expected to face persecution in their country of origin on account of one of five protected grounds.<sup>67</sup> To file an asylum petition, a petitioner must first identify a social group united by a common, immutable characteristic, and then prove membership in that group. In doing so, the petitioner draws

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<sup>64</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (“[G]overnmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex—must be subject to heightened scrutiny because they embody ‘the very stereotype the law condemns.’” (citing *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994))); *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004) (holding that Smith, who alleged employment discrimination based on his gender identity, “stated a § 1983 claim of sex discrimination, grounded in an alleged equal protection violation”).

<sup>65</sup> *Pedersen v. Office of Pers. Mgmt.* 881 F. Supp. 2d 294, 333 (D.Conn. 2012).

<sup>66</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006) (defining the term “refugee”).

<sup>67</sup> Asylum claims may be put forth under “race, religion, nationality, membership in a particular social group, or political opinion . . . .” *Id.* For brevity’s sake, when this Note uses the term asylum, it refers specifically to asylum by virtue of membership in a particular social group.

classifications around both himself and other individuals.<sup>68</sup> Asylum law comprehends five protected classifications: race, religion, nationality, political opinion, and particular social group. Because the requirement of immutability only explicitly applies to the “particular social group” category, this Note focuses on the membership requirements of that classification.

The 1951 Convention Relating to the Status of Refugees, which established the international obligations of asylum law did not define “particular social group.”<sup>69</sup> Nonetheless, the category necessarily requires a limiting principle. As a starting point for that limiting principle, the United Nations High Commissioner for Refugees states that “a social group cannot be defined *exclusively* by the fact that it is targeted for persecution.”<sup>70</sup> In the United States, the BIA elaborated the grounds for membership in a particular social group by requiring group members to share a “common, immutable characteristic.”<sup>71</sup> *Matter of Acosta*, the BIA decision that first explicitly defined an immutable characteristic for asylum’s purposes, referred to it as something “that the members of the group either cannot change, or should

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<sup>68</sup> When contested by the government, asylum claims are reviewed by the DOJ’s Executive Office of Immigration Review (EOIR), the administrative body responsible for adjudicating immigration violations. At EOIR, an immigration judge (IJ) presides over an adversarial hearing against the federal government in which the applicant bears the burden of establishing her valid asylum claim. If the IJ rejects the asylum application, the petitioner may appeal that decision to the Board of Immigration Appeals (BIA), the administrative appeals court for immigration proceedings. In the event of an adverse BIA determination, applicants may appeal to the federal appeals court in whose jurisdiction the applicant resides. 8 U.S.C. § 1252(a)(2)(D). That appeal may not challenge the merits of the decision alone, but rather must be based on “constitutional claims or questions of law.” § 1252(a)(2)(B)–(D). EOIR jurisprudence—which, in addition to treaty obligations, defines much of the United States’ asylum law—is governed both by administrative regulations issued by the Attorney General (AG) as head of DOJ and EOIR decisions that either the AG or BIA has affirmed and designated as binding precedent. In other words, all EOIR decisions are assumed nonbinding for future cases with similar facts unless the AG or BIA handpicks them to serve as binding law. *See* 8 C.F.R. § 1003.1(g) (2008) (“Selected decisions designated by the Board [and] decisions of the Attorney General . . . shall serve as precedents in all proceedings involving the same issue or issues.”) In this sense, both the AG and BIA exert enormous control over the “common law” of immigration court.

<sup>69</sup> *See* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152 (registered *ex officio* Apr. 22, 1954).

<sup>70</sup> U.N. High Commissioner for Human Rights, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

<sup>71</sup> *Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Two additional elements narrow the parameters of group identity in asylum law: social visibility and particularity. *See* C-A-, 23 I. & N. Dec. 951, 955, 959 (BIA 2006). This Note focuses solely on immutability.

not be required to change because it is fundamental to their individual identities or consciences.”<sup>72</sup>

The BIA justified its imposition of the immutability standard with the statutory construction doctrine of *ejusdem generis*, finding that the general term “particular social group” should be interpreted in light of the more specific categories of race, religion, nationality, and political opinion. Searching for common interpretive ground amongst the protected groups, the BIA concluded that all of the listed groups referred to individuals “who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”<sup>73</sup>

The BIA’s conception of immutability thus comprehends two definitions: biological immutability (the traditional standard presumably employed by the Supreme Court) and fundamental immutability, a concept used to designate certain characteristics the BIA feels a state should not force a person to change. This dual-sided definition of immutability cures asylum jurisprudence of the inconsistencies that plague equal protection.<sup>74</sup> For the majority of asylum cases, sex will be an innate characteristic that an individual cannot change. Yet the second definition of immutability—a characteristic one should not have to change because it is fundamental to identity—keeps asylum law from condemning a subset of individuals to persecution based on the same trait it deems worthy of protection in other individuals. Thus, in addition to protecting individuals persecuted on the basis of their birth sex, asylum can also protect intersex and transgender individuals persecuted on the basis of their changed sex. For this second class of individuals, sex remains immutable because it is fundamental to identity, and an individual should therefore not be forced to change it. Instead, individuals should be free to choose the sex their own conscience dictates.<sup>75</sup>

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<sup>72</sup> *Acosta*, 19 I. & N. Dec. at 233.

<sup>73</sup> *Id.* at 233–34. The BIA then listed examples of identity characteristics that would satisfy each type of immutability: “The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.” *Id.* at 233. In doing so the BIA repeated the Court’s error of defining sex as necessarily innate.

<sup>74</sup> See *supra* Part I (explaining how certain individuals choose their race and sex, despite the Court’s assertion in the equal protection context that race and sex are determined solely by birth).

<sup>75</sup> Of course, in the context of sexual orientation, opponents of heightened scrutiny frequently insist that homosexuality is a choice, and insist on defining immutable plainly, as involuntary, unchangeable, and biological. See *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) (noting the defendant’s presentation of evidence of the fluidity of sexual orientation); Brief on the Merits of Respondent, *supra* note 60, at \*56 (arguing that, because homosexuality is not necessarily immutable, gays cannot be a suspect class). But see Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 35–36 (2009)

*B. A Number of Courts Recognize that the Equal Protection Clause Protects the Individual's Right to Choose Fundamental Characteristics of Identity*

Using the fundamental immutability standard enunciated in asylum law, this section explains how fundamental immutability cures inconsistencies in race- and sex-based equal protection jurisprudence. It begins by discussing two recent sex-based equal protection cases addressing discrimination claims made by transgender plaintiffs, wherein circuit courts found that the Equal Protection Clause protects individuals from discrimination on the basis of their sex identity, regardless of their ability to choose it. This section also discusses a district court case that used *Golinski*'s fundamental immutability standard to justify the application of heightened scrutiny in cases of racially ambiguous plaintiffs. Together, these cases stand for the proposition that certain chosen aspects of identity are so fundamental to self that the government may not compel someone to change them. They signal a shift in equal protection jurisprudence away from talismanic protection of unchangeable characteristics determined by birth and toward a new principle: The Equal Protection Clause protects, as a baseline, the right of all individuals to choose fundamental aspects of their identity.

For most individuals, sex may indeed be an unchangeable quality determined by birth. The Fourteenth Amendment, however, is concerned not for most, but "all persons."<sup>76</sup> Knowing this, how can the

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(arguing that "[i]mmutability means different things in different contexts," servicing different principles in asylum and equal protection). Asylum's more expansive definition of immutability enables "courts to differentiate between those who [are] most in need of such protection[ ] and those who [are] not." *Id.* at 36. The narrower definition of immutability in the equal protection context, meanwhile, "appears concerned with whether or not a trait was chosen," *id.* at 39, because equal protection is a process-focused mechanism, standing for the principle that a majority may not abuse the political process to impose its animus-based will on politically unpopular minorities. To ensure this, courts look for an important or compelling reason for the imposition of a burden on a particular class. "[T]he absence of a link between individual responsibility and the classification makes it more likely" that no such reason exists. *Id.* at 40. Helfand's definition of immutability would restrict heightened scrutiny to individuals who lack "responsibility" for their identities, excluding an intersex woman who chooses to claim what she feels is her rightful sex, following a doctor's assignment of one for her; transgender people; racial minority-identified individuals of indeterminate racial physiognomy; and gays, pending evidence that sexual orientation is never a conscious, affirmative decision. This definition betrays the very principle of equal protection that Helfand identifies, exposing politically unpopular racial and sex minorities to animus-based majorities.

<sup>76</sup> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

text of the Equal Protection Clause be reconciled with the Court's insistence that only classes that share an immutable characteristic merit the Clause's intervention with the political process? What limits, if any, should we put on the government's ability to deny equal protection of the laws to individuals who choose their sex? We could, perhaps, justify a different, lower standard of equal protection review for these individuals by focusing on the fact that individuals who choose their sex are not similarly situated to individuals who do not. We might reason that those who choose a different sex than the one they were born with (assuming they were born with a determined sex) do so with full knowledge that they will lose access to the heightened scrutiny standard of the Equal Protection Clause—which nominally protects only immutable sex—and should bear the consequences accordingly.

Recent cases in sex-based equal protection jurisprudence point us to exactly the opposite conclusion. The Eleventh Circuit, in *Glenn v. Brumby*,<sup>77</sup> unambiguously held that sex-based discrimination against transgender people runs afoul of the Equal Protection Clause's prohibition on sex and gender discrimination—precisely because “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.”<sup>78</sup> *Glenn* noted the universal applicability of the Equal Protection Clause, emphasizing that “[b]ecause these [constitutional] protections are afforded to everyone, they cannot be denied to a transgender individual.”<sup>79</sup>

The *Glenn* court focused on the common discrimination alleged in both birth-sex and chosen-sex equal protection claims, citing “a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms”<sup>80</sup> before making plain the basis of its holding: “The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.”<sup>81</sup>

*Glenn* also cited to a geographically diverse array of district and circuit courts, indicating that it was not the first court to “have recognized . . . that sex discrimination includes discrimination against trans-

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<sup>77</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011).

<sup>78</sup> *Id.* (emphasis added).

<sup>79</sup> *Id.* at 1319.

<sup>80</sup> *Id.* at 1316.

<sup>81</sup> *Id.* at 1319.

gender persons. . . .”<sup>82</sup> One of those cases, the Sixth Circuit’s *Smith v. City of Salem*, similarly found a violation of the “right, protected by the Equal Protection [C]lause of the Fourteenth Amendment, to be free from discrimination on the basis of sex” when evaluating a transgender male’s employment discrimination claim.<sup>83</sup>

Both *Glenn* and *Smith* were decided before *Golinski* and neither discussed immutability explicitly. But *Golinski*’s use of fundamental immutability explains how *Glenn* and *Smith*’s defense of a chosen, mutable characteristic can comport with established equal protection jurisprudence. By defining immutability in terms of something an individual either cannot change or should not have to change, asylum law expands the definition of immutability to welcome those people who choose certain fundamental identity characteristics. *Glenn* and *Smith* accept this expansion in the equal protection context as well, applying heightened scrutiny under the Equal Protection Clause to protect from sex-based discrimination the minority of individuals who choose their sex.

More recently, a Connecticut district court cited directly to *Golinski*’s definition of immutability in order to defend heightened scrutiny in cases of mutable race. *Pedersen v. Office of Personnel Management*,<sup>84</sup> struck down DOMA as a violation of equal protection. In dicta, the *Pedersen* court explained that under the biological definition of immutable, “Blacks or African Americans should not be a protected class because a small percentage of African Americans have features which make them indistinguishable from Caucasians or European Americans.”<sup>85</sup> Rather than condone that outcome, the *Pedersen* court adopted *Golinski*’s reasoning that “[w]here there is

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<sup>82</sup> *Id.* at 1317–18; see also *Smith v. City of Salem*, 378 F.3d 566, 576 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659–61 (S.D. Tex. 2008); *Schroer v. Billington*, 424 F. Supp. 2d 203, 211–13 (D.D.C. 2006); *Mitchell v. Axcan Scandipharm Inc.*, No. 05-243, 2006 WL 456173, at \*1 (W.D. Pa. Feb. 17, 2006); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ. 02–1531PHX–SRB, 2004 WL 2008954, at \*2–3 (D. Ariz. June 3, 2004), *aff’d*, 325 Fed. App’x 492 (9th Cir. 2009); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03–CV–0375E(SC), 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003). Besides *Smith*, the cases cited by *Glenn* involved statutory rather than constitutional claims. But as *Golinski* did with asylum’s definition of immutability, the *Glenn* court applied insights from other doctrinal areas in service of a consistent principle of equal protection: the eradication of sex- and gender-based discrimination, regardless of the origin of sex or gender.

<sup>83</sup> *Smith*, 378 F.3d at 576.

<sup>84</sup> 881 F. Supp. 2d 294 (D. Conn. 2012). Ultimately striking DOMA under rational review, *Pedersen* separately held “that homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny.” *Id.* at 333.

<sup>85</sup> *Id.* at 324.

overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic should be considered immutable and an individual should not be required to abandon it."<sup>86</sup>

Although ruling on a sexual orientation–based classification, *Pedersen's* dicta explains how fundamental immutability extends heightened scrutiny not just to individuals whose race is clearly determined and unchangeable due to biology, but also to those for whom race may be a matter of choice. Like *Homer Plessy*, the Black individuals identified by the *Pedersen* court are indistinguishable physically from Whites and can therefore choose their racial identity. But that ability should not deprive them of access to heightened scrutiny under the Equal Protection Clause. That is because race, like sex, is a fundamental identity characteristic that a person should not be forced to change. To hold otherwise would give the government license to compel an individual's race and sex identity through discriminatory classifications.

Ultimately, *Glenn*, *Smith*, *Pedersen*, and *Golinski* represent a growing wave of courts throughout the nation that articulate a singular immutability principle applicable to sex, race, and sexual orientation: Regardless of whether individuals who choose a particular identity represent less common experiences of race, sex, and sexual orientation, the Fourteenth Amendment's applicability to "all persons"<sup>87</sup> demands that they too receive equal protection of the laws. These courts understand that it is not the biological immutability of an identity characteristic—with its emphasis on inability to change and lack of relation to choice—that makes the individuals with that characteristic worthy of protection. It is instead a principle that honors an individual's right to choose certain personal characteristics<sup>88</sup> that

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<sup>86</sup> *Id.* at 326.

<sup>87</sup> See *supra* note 76 (quoting the Fourteenth Amendment).

<sup>88</sup> Among those characteristics, *Glenn* explicitly recognizes the right to come out to an employer as transgender and assume patterns of grooming and dress that counter an outsider's assumption of sex identity. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011). In a racial context, it would presumably include the ability to come out as a racial minority and preemptively counter assumptions of whiteness by indicating identity as a racial minority through hairstyle, dress, or language. The extent of that right, however, remains controversial. For example, at least one court has held constitutional employment consequences for overt expressions of ethnic identity—including, famously, hairstyle. See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (dismissing a complaint that an employer policy against braided hair—cornrows—violated the Fourteenth Amendment). For a defense of constitutional protection of voluntarily chosen physical traits, see Rich, *supra* note 23. Presumably, the right to choose a fundamental aspect of identity and articulate it through action is constrained by other legal and social norms, such as dress codes mandating certain attire or laws confining sexual activity to adults.

are, as the *Golinski* court found, “so fundamental to identity that a person should not be required to abandon them.”<sup>89</sup>

### III SEXUAL ORIENTATION IS A FUNDAMENTAL CHARACTERISTIC OF IDENTITY

The remainder of this Note discusses how a fundamental immutability standard in equal protection jurisprudence should apply to sexual orientation classifications. It begins by explaining that the fundamental immutability standard frees courts from the need to engage in an inquiry into the biological origins of sexual orientation and allows them instead to ask whether government should have the power to compel an individual to choose a particular sexual orientation. It then looks to asylum law and the Court’s recent substantive due process jurisprudence in order to answer the question: Is sexual orientation something so fundamental to identity that the government should not force someone to change it? Ultimately, it argues that the Court’s recent protection of same-sex sexual expression as a fundamental liberty leads to a finding of sexual orientation as a fundamental aspect of individual identity.

#### A. *Asylum Law Holds That Sexual Orientation is a Fundamental Characteristic of Identity*

Asylum law’s dual definition of immutability—a quality that is literally unchangeable or one that an individual should not be forced to change—makes room both for the plain meaning of the term and an expansive understanding of immutability capable of evolving with society’s changing views of deeply held personal values. The BIA phrases this less romantically: “The particular kind of group characteristic that will qualify under this construction [of immutability] remains to be determined on a case-by-case basis.”<sup>90</sup>

Whether or not sexual orientation qualifies as immutable for asylum law’s purposes was decided over two decades ago in *Matter of Toboso-Alfonso*,<sup>91</sup> where the BIA affirmed an immigration judge’s finding that a gay asylum applicant from Cuba had established both the existence of and membership in a particular social group of Cuban homosexuals. In doing so, the BIA took the opportunity to “principally note regarding this issue . . . the immigration judge’s finding that

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<sup>89</sup> *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012) (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)).

<sup>90</sup> *Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1987).

<sup>91</sup> 20 I. & N. Dec. 819, 820 (BIA 1990).

homosexuality is an ‘immutable’ characteristic.”<sup>92</sup> Attorney General Janet Reno later designated the case as precedential, establishing as binding in asylum law the proposition that homosexuality is an immutable characteristic.<sup>93</sup> Crucially, in keeping with asylum law’s definition of immutability as established in *Matter of Acosta*, Toboso-Alfonso could not have been required to prove that his sexual orientation *cannot* be changed; simply put, such definitive proof did not exist. Presumably, however, the immigration judge presiding over his case felt it sufficient that his sexual orientation *should not* be changed.

The Ninth Circuit explicitly made such a finding in the asylum appeal *Hernandez-Montiel v. INS*, the case that *Golinski* would cite twelve years later when applying heightened scrutiny to DOMA.<sup>94</sup> *Hernandez-Montiel* affirmatively stated that “[s]exual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”<sup>95</sup> The Ninth Circuit did not simply conflate asylum law’s two definitions of immutability in a sympathetic effort to extend asylum’s protection to a group that could not show scientific proof of biological immutability. Rather, it went so far as to explicitly maintain the separation of “cannot” and “should not” immutability in its ultimate reasoning: “Because we conclude that [the applicant] *should not* be required to change his sexual orientation or identity, we need not address whether [he] could change them.”<sup>96</sup>

In asylum law, then, the ability of an individual to choose her sexual orientation is immaterial. Regardless of whether an individual *can* choose her sexual orientation, it is inappropriate for the government to condone or perpetrate persecution that would influence that choice. Sexual orientation is instead a decision that should be left to the individual conscience, and, assuming a choice, an identity that government must allow the individual to choose.

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<sup>92</sup> *Id.* at 822.

<sup>93</sup> *Reno Designates Gay Case as Precedent*, 71 INTERPRETER RELEASES 849, 859–61 (1994).

<sup>94</sup> *Golinski*, 824 F. Supp. 2d at 98.

<sup>95</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

<sup>96</sup> *Id.* at 1095 (emphasis added).

*B. The Fundamental Liberty to Engage in Same-Sex Sexual  
Conduct Reflects the Constitutional Understanding that  
Sexual Orientation is a Fundamental  
Characteristic of Identity*

*Golinski's* holding of sexual orientation as immutable also finds support outside of asylum law. The Supreme Court itself, in *Lawrence v. Texas*,<sup>97</sup> signals that sexual orientation is a characteristic that is so fundamental to individual identity that the government should not be permitted to compel an individual's choice. *Lawrence* phrases this proscription on government action in absolute terms: "[T]here is a realm of personal liberty which the government may not enter."<sup>98</sup>

In *Lawrence v. Texas*, the Supreme Court struck a Texas same-sex sodomy statute as a violation of a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>99</sup> It is possible to read *Lawrence* narrowly, as defending only the right to engage in same-sex sexual conduct in the privacy of one's home.<sup>100</sup> But to do so ignores the Court's direct statement in the *Lawrence* preamble that "[t]he instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."<sup>101</sup>

Those transcendent dimensions of liberty house the "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>102</sup> The *Lawrence* majority's inclusion of both "expression" and "certain intimate conduct" within the larger "autonomy of self" creates a nexus: Expression and conduct lead to formation of an autonomous self.<sup>103</sup>

This nexus foreshadowed the *Glenn* court's understanding that some individuals choose to engage in conduct in order to express an identity protected by the Fourteenth Amendment. In *Glenn*, the conduct at issue was the plaintiff's presentation as a woman, including using a female name and coming to work dressed in female attire.<sup>104</sup> But by protecting the *Glenn* plaintiff's right to act in that way, the

<sup>97</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>98</sup> *Lawrence*, 539 U.S. at 578 (2003) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992)).

<sup>99</sup> *Id.* at 558.

<sup>100</sup> See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004) ("[I]n *Lawrence* the Court relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly assumed.").

<sup>101</sup> *Lawrence*, 539 U.S. at 562.

<sup>102</sup> *Id.*

<sup>103</sup> Cf. *supra* Parts I.A–B (explaining how certain individuals choose to articulate their race or sex identity by engaging in conduct associated with a particular race or sex, such as speaking a certain language or wearing a certain style of dress or makeup).

<sup>104</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011).

Eleventh Circuit simultaneously protected her right to *be* a transgender woman without fear of governmental reprisal.<sup>105</sup> *Glenn*, decided after *Lawrence*, demonstrates an understanding that sometimes banning conduct is tantamount to banning identity.

*Lawrence*'s concurring opinion, which would have struck down the Texas statute on equal protection grounds, reaches that point explicitly. Building on the majority's articulation of a nexus between the choice to engage in conduct and identity, it concluded that the Texas statute "is targeted at more than *conduct*. It is instead directed toward gay *persons* as a class."<sup>106</sup> The Ninth Circuit followed this reasoning in a 2005 asylum appeals case, where it cited *Lawrence* extensively before holding that "we see no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts."<sup>107</sup> When the government therefore prohibits an individual from engaging in homosexual acts, it is essentially urging him "to change a fundamental aspect of his human identity."<sup>108</sup> More recently, the Court dispelled any notion that it views gay conduct as distinct from gay identity, stating that "[o]ur decisions have declined to distinguish between status and conduct in this context."<sup>109</sup>

The Court's recent decisions discussing gay sexual expression thus lead to the conclusion that sexual orientation, like race and sex, is indeed so fundamental to the ability to define one's own identity that the law should not compel someone to change it. Accordingly, as with race and sex, courts evaluating whether gays are a suspect class should cease to look for a biological cause when contemplating homosexuality's "immutable" nature. Instead, following the *Golinski* court's lead, they should question whether sexual orientation is immutable not because it is an inborn condition that cannot be changed, but because it is so fundamental to individual identity that a person should not be compelled to change it.

## CONCLUSION

This Note asked a narrow question: In light of the fact that race and sex are not always unchangeable characteristics determined by birth, how can we explain the Court's insistence that they are none-

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<sup>105</sup> See *id.* at 1316 ("A person is defined as transgender precisely because of the perception that his or her *behavior* transgresses gender stereotypes." (emphasis added)).

<sup>106</sup> *Id.* at 583 (emphasis added).

<sup>107</sup> *Karouni v. Gonzalez*, 399 F.3d 1163, 1173 (9th Cir. 2005).

<sup>108</sup> *Id.* (internal citation omitted).

<sup>109</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

theless immutable and therefore merit suspect classification? By highlighting the fact that the traditional suspect classes of race and sex sometimes include elements of choice, this Note sought to explain how the *Golinski* court's adoption of fundamental immutability accords with long-established equal protection jurisprudence. It argues that under *Golinski*'s fundamental immutability standard, courts should eschew stalemated scientific inquiries into homosexuality's origins. Instead, they should assume that sexual orientation can be a choice and ask whether its fundamental importance to individual identity makes it an immutable characteristic. Under that inquiry, courts should find that individuals are entitled to heightened scrutiny under the Equal Protection Clause based on their sexual orientation not because they cannot choose it, but because government should not be permitted to dictate that choice by assigning burdens to it.

This Note leaves to others the larger debate over the desirability of entrusting courts to accurately designate fundamental aspects of identity for the purposes of constitutional law.<sup>110</sup> It also leaves largely unaddressed disagreements over the normative value of a defense of homosexuality based on its biological immutability.<sup>111</sup> But it closes by

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<sup>110</sup> Judicial interference with the democratic process through the use of heightened scrutiny finds courts at their most activist and brings them in direct conflict with the will of the voting majority. We are right to proceed cautiously when considering whether to commit the Constitution to the protection of anti-majoritarian values, and doubly so when relying on such potentially subjective criteria as a court's conception of what is or is not fundamental to an individual's sense of self. Presumably, the three other prongs of the suspect class test would both provide courts with guidance and constrain overtly political judges from abusing their authority when considering "fundamental" identity characteristics for the purpose of suspect classification. See *supra* note 8 and accompanying text (citing the DOJ's conception of the test for suspect classification). Thus any group seeking protection by virtue of a fundamental identity characteristic would also have to show a history of discrimination, political powerlessness, and lack of a legitimate policy objective for assigning legal burdens to the group's members.

<sup>111</sup> The view of homosexuality as traceable to an uncontrollable, biological impulse—and therefore pathological in nature—formerly received official sanction in the American Psychological Association (APA) mental disorder diagnostic manual. See William N. Eskridge, Jr., *Gaylegal Narratives* 46 STAN. L. REV. 607, 632–34 (1994) (recounting gay activists' attempts to remove homosexuality from the APA diagnostic manual). The APA removed it from the manual in 1973, but the conception of homosexuality as pathological in nature remains stubbornly persistent in social imagination. Commentators point out the pitfalls of predicating acceptance on lack of blame for choosing homosexuality. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 567 (1994) ("[T]he argument from immutability, when advanced on behalf of a complex movement, many of whose members *can* change some aspect of their sexuality . . . [is] burdened with an ethical problem . . . : When pro-gay advocates use the argument from immutability before a court on behalf of gay men, lesbians, and bisexuals, they misrepresent us."); Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1015 (2007) ("[T]olerance granted on such a basis would fall short of genuine social acceptance. . . . [H]istory suggests that it is unrealistic to expect any protec-

noting that emphasizing a voluntary origin of gayness prioritizes values of liberty that may suffer from the reduction of gayness to a compulsory, genetic characteristic. In *Lawrence*'s wake, advocates cautioned that the Court's opinion fell far short of a robust defense of gay rights, instead relying on "a narrow version of liberty" that cabined the right to express gay romantic affection to the private bedroom.<sup>112</sup> Perhaps by challenging the view of homosexuality as biological or compulsory in nature and emphasizing in its place the individual's freedom to choose fundamental characteristics of his identity, advocates can help overcome the containment of *Lawrence* to the formalistic right to "private lives in matters pertaining to sex."<sup>113</sup> Perhaps freedom isn't a dirty word.

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tion to be conferred on the basis of alleged biologic causality. . . . [T]he undisputed innateness of skin color does not appear to have a mitigating influence on racism." (quoting William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228, 236 (1993)); Frank Bruni, *Genetic or Not, Gay Won't Go Away*, N.Y. TIMES, Jan. 29, 2012, at SR3 ("[T]he born-this-way approach carries an unintended implication that the behavior of gays and lesbians needs biological grounding to evade condemnation. Why should it?").

<sup>112</sup> See Franke, *supra* note 99 at 1400. By invoking the violation of Hardwick's own bedroom to overturn *Bowers v. Hardwick*, 478 U.S. 1039 (1986), Justice Kennedy reinforces in *Lawrence* an assumed condition of same-sex romantic affection: that it takes place in what Franke characterizes as "the hidden domain of the private." *Id.* at 1407. See also Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 37–38 (2004) (arguing that "*Lawrence* seems deliberately ambiguous in its reach" and that "the Court overturned *Bowers* in minimalist fashion"); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 829 (2010) (agreeing with Franke that "*Lawrence* furthers a narrow vision of acceptable gay sex"). Justice Kennedy's repeated emphasis in *Lawrence* on privacy—and its narrow localization to domesticated rooms shut off from view—in order to find a right grounded in liberty may unconsciously reflect the truism that "[i]t is hard to talk about homosexuality without talking about the symbol of the closet." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1794 (1996).

<sup>113</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).