

An Overture to Equality: Preventing Subconscious Sex and Gender Biases from Influencing Hiring Decisions

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INTRODUCTION

In many industries, women are less likely than men to be hired,¹ and research suggests that this is due to subconscious gender bias rather

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1. See, e.g., Gregory Ferenstein, *Study: Men and Women Twice as Likely to Hire a Man for a Math-Based Job*, TECHCRUNCH (Mar. 13, 2014), <http://techcrunch.com/2014/03/13/study-men-and-women-twice-as-likely-to-hire-a-man-for-a-math-based-job> (“We find that without any information other than a candidate’s appearance (which makes sex clear), both male and female subjects are twice more likely to hire a man than a woman.”); Jonathan Rodkin & Natalie Kitroeff, *Women Graduating in Business Get Fewer Job Offers Than Men*, BLOOMBERG BUSINESS (Aug. 28, 2014, 2:48 PM), <http://www.bloomberg.com/bw/articles/2014-08-28/women-graduating-from-business-school-get-fewer-job-offers-than-men> (listing fields in which women are less likely than men to be hired out of college, including investment banking, health care, real estate, government, nonprofits,

than meritorious difference.² To combat this bias, some orchestras use gender-blind auditions to hire their musicians.³ Orchestral hopefuls sit behind a screen to play their pieces, and directors listen to determine whom they want to hire.⁴ Some orchestras require applicants to remove their shoes before walking onstage, as even the perceived sound of high heels can affect a director's decision.⁵ Before instituting gender-blind auditions, the top five American orchestras had fewer than five percent women players.⁶ But once such procedures were put in place, the percentage of women musicians jumped to twenty-five to thirty percent.⁷

The difference between blind and non-blind auditions is not an aberration. In one example, a Swedish study removed identifying features from job applications before presenting them to participating employers.⁸ Researchers hypothesized that anonymizing job applications would result in more equal numbers of men and women hired.⁹ They based this hypothesis on recent research showing that “gender [is] used as [a] screening tool[] in the selection [of candidates for] job interviews, despite [Swedish] anti-discrimination legislation”¹⁰ Ultimately, they concluded:

From our analysis of all information available to the recruiting managers in a data set covering 3,500 applications to more than 100 jobs, we show that employers select interviewees based on gender and ethnicity, which confirms results from previous research. We find no corresponding differences between the groups, however, when anonymous procedures are used. Our analysis suggests that [anonymous application procedures] ha[ve] a statistically significant, and large, policy impact in terms of interview offers. Our

advertising, and media); Aldo Svaldi, *Men Winning More Jobs than Women in Economic Recovery*, DENVER POST (Aug. 5, 2012, 1:00 AM), http://www.denverpost.com/ci_21232645/men-winning-more-jobs-than-women-recovery (“Men have snagged about three of every four of the 2.4 million net new jobs created since the summer of 2009 . . .”).

2. See CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* 54–66 (2010).

3. Curt Rice, *What the World's Best Orchestras Can Teach Us About Gender Discrimination*, CURT RICE (Oct. 1, 2013), <http://curt-rice.com/2013/10/01/what-the-worlds-best-orchestras-can-teach-us-about-gender-discrimination/>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Olof Åslund & Oskar Nordström Skans, *Do Anonymous Job Application Procedures Level the Playing Field?*, 65 INDUS. & LAB. REL. REV. 82, 82 (2012).

9. *Id.*

10. *Id.*

study thus adds to the evidence suggesting that anti-discrimination legislation is not sufficient to prevent discrimination.¹¹

Similarly, American law does not adequately protect against employment discrimination. In discrimination cases, plaintiffs face a very high burden, making claims difficult to win.¹² This is especially true when it comes to subconscious bias. In this Note, I argue that federal legislation is necessary to remedy the effects of subconscious bias by mandating that employers remove all sex and gender markers from job application materials in the preinterview stage of hiring. I will draft a model statute aiming to remove one aspect of gender bias in the hiring process as a step toward gender equality. In Part I, I explain how gender is a social construct by examining sociological data and evaluating neurological studies that claim to establish the existence of inherent behavioral differences between the sexes. Using this information, I argue that subconscious gender bias is problematic in the context of workplace equality. In Part II, I evaluate the current state of anti-discrimination law, showing how subconscious bias claims are nearly impossible to win. Then, in Part III, I propose and draft federal legislation that would require employers to remove gender markers from preinterview application materials in an attempt to stymie subconscious gender bias.

I. THE PROBLEM OF SUBCONSCIOUS GENDER BIAS

In her book, *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Difference*, Cordelia Fine of the University of Melbourne examines the roots of the idea that men and women are inherently different.¹³ Essentially, she argues that social scientific evidence strongly suggests that gender is a social construct rather than a result of sexual differences.¹⁴ Fine scrutinized scores of neurological studies, social science reports, and cultural anecdotes to determine whether there exists sufficient scientific basis for gendered behavior as a result of sex differences.¹⁵ She ultimately concluded that perceived sex differences are the result of shoddy scientific studies and cultural associations rather than inherent neurological differences.¹⁶ In this Note, I use Fine's research as a foundation upon which to examine how subconscious bias applies to women and gender minorities in the employment context.

11. *Id.* at 99.

12. *See infra* Part II.

13. *See generally* FINE, *supra* note 2.

14. *See id.* at 207–13.

15. *See generally id.*

16. *Id.* at 231–39.

A. Conflating Gender and Sex

Gender cues, or characteristics typically indicating gender, are inescapable; they pervade every aspect of life from cradle to grave.¹⁷ From infancy, children are fed cues about their sex and why it is relevant, effectively equating gender and sex from the beginning.¹⁸ The lines between the masculine and the feminine are rigid¹⁹ and correspond directly to the man/woman points on a gender binary.²⁰ For instance, infant boys are dressed in stereotypically masculine clothes with stereotypically masculine colors, while infant girls wear feminine clothes bearing feminine colors.²¹ Yet the practice of gendered accessorizing of young children is a recent phenomenon; before the early twentieth century, all children dressed alike.²² Separate, gendered clothing was a response to fears that allowing girls to be more active would deprive children of gender cues.²³ Put another way, gendered dress was meant to teach children gender boundaries.²⁴ And this worked; indicating gender in this way and others teaches children that there is an innate difference between males and females that translates into natural gender roles and identities.²⁵

From these cues come assumptions about sex and gender, specifically that innate differences exist, giving rise to justifiable gender roles.²⁶ Traditional gender roles place men in the workplace and women in the home, and there is no room for anyone existing outside the strict man-woman gender binary.²⁷ Fine posits that gender inequality has strong roots in the home and traditional ideas of what a successful heterosexual marriage looks like.²⁸ Even in fairly egalitarian marriages in which both partners work, much of the housework and childcare falls on the woman partner.²⁹ This pattern is sometimes referred to as a woman's "second shift" in which she comes home from work only to do more work around

17. *Id.* at 214–25.

18. *Id.* at 207–09.

19. *Id.* at 207.

20. *Id.* at 25. The "gender binary" is a term used to describe the idea that there are only two options for gender and they correspond directly with sex (i.e., all males are "men" and all females are "women," and there is nothing in between). *Transgender FAQ*, GLAAD, <http://www.glaad.org/transgender/trans101> (last visited Mar. 25, 2016).

21. FINE, *supra* note 2, at 207–08.

22. *Id.*

23. *Id.* at 207–09. In fact, gendered accessorizing took the infant-wear industry by storm once scientists learned that babies are extremely sensitive to their environments. *Id.* at 209.

24. *Id.* at 208–09.

25. *Id.* at 211.

26. *Id.* at 25.

27. *See id.* at 78–79.

28. *Id.* at 78.

29. *Id.* at 80.

the house.³⁰ Some believe the dubious claim that the second shift is not a fairness issue because female hormones produce a pleasurable response to housework.³¹ Ignoring for now the scientific soundness of this idea,³² other, more promising studies surmise that the second shift results from pressure on women to present themselves as good wives.³³ As Veronica Tichenor notes, “[C]ultural expectations of what it means to be a good wife shape the domestic negotiations of unconventional earners and produce arrangements that privilege husbands and further burden wives.”³⁴ In addition, some men take home responsibilities less seriously in response to gendered associations linking women with housework.³⁵

But why is this? Why does one assume gender roles are legitimate even if one knows they are social constructs? To begin to untangle this web, it is essential to separate sex and gender in terms of personal identity.

1. Separating Sex and Gender Identity

Sex and gender are distinct terms with separate meanings.³⁶ According to the American Psychological Association, “sex” is assigned at birth according to phenotypical markers, like genitalia and chromosomal makeup.³⁷ The categories of sex are biologically determined, meaning that a person can be male, female, or intersex, and they³⁸ do not choose which they are.³⁹ “Gender” is a social phenomenon, referring to “attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex.”⁴⁰ Words associated with gender include “masculine,” “feminine,” “man,” and “woman.”⁴¹ Often, one is expected to behave in a manner that arbitrarily corresponds to their sex; that is, they are

30. *Id.*

31. *Id.* at 81.

32. I will assess scientific data *infra* Part I.B.

33. FINE, *supra* note 2, at 82.

34. Veronica Tichenor, *Maintaining Men’s Dominance: Negotiating Identity and Power When She Earns More*, 53 *SEX ROLES* 191, 199 (2005).

35. See FINE, *supra* note 2, at 83.

36. *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Mar. 25, 2016) [hereinafter APA].

37. *Id.*

38. In this paper, I use “them” and “they” as singular pronouns in an attempt at gender neutrality. “They” is an accepted construction of the singular first-person pronoun in the LGBTQIA community. *Tips for Allies of Transgender People*, GLAAD, <http://www.glaad.org/transgender/allies> (last visited Nov. 1, 2014).

39. APA, *supra* note 36.

40. *Id.*

41. *What Do We Mean by “Sex” and “Gender?”*, WORLD HEALTH ORG., <http://apps.who.int/gender/whatisgender/en/> (last visited Mar. 25, 2016).

expected to behave in a gender-normative manner.⁴² There can be some overlap between one's sex and gender when a person identifies with the gender that traditionally corresponds to their sex.⁴³

However, not everyone fits neatly into the "male" or "female" box that adorns almost every administrative form they fill out.⁴⁴ Simply put, these boxes cannot contain identity. Instead, some individuals adopt a loose definition of gender. As Hill and Mays have stated, "Your gender is where you feel the most comfortable, and it can grow and change just like the rest of you. It can include your understanding of your physical body, your understanding of your inner self, and the way you express that self to the world."⁴⁵ Using that definition, it is impossible to confine gender identity to two discrete checkboxes. As such, defining gender with only two options deprives some people of identifying themselves honestly.

Further, gender is fluid; that is, self-concept is not static but malleable.⁴⁶ This could be because the human mind is very susceptible to priming, or introducing gender into the context of a task, discussion, or other activity.⁴⁷ For example, when a person is introduced to a task using gendered descriptors (such as, "on average, men score higher than women on math tests"), they subconsciously recall gender stereotypes, thus affecting their performance of the task.⁴⁸ In the above example, study participants were primed with traditionally masculine or feminine words before rating their enjoyment of mathematics and literature.⁴⁹ When primed with feminine words, women reported more enjoyment in literature (a traditionally feminine activity) than math (a traditionally masculine activity).⁵⁰ But when primed with masculine words, women reported equal enjoyment in both activities.⁵¹ Fine notes that this indicates gender differences appear not because of inherent differences between men and women but instead because of the salience of gender in society.⁵²

Another complicating factor is introduced by stereotype threat. Stereotype threat is the "real-time threat of being judged and treated poorly

42. See APA, *supra* note 36.

43. *Id.*

44. See generally MEL REIFF HILL & JAY MAYS, *THE GENDER BOOK* (2013).

45. *Id.* at 11.

46. FINE, *supra* note 2, at 7.

47. See *id.* at 2-3, 8-9.

48. *Id.* at 8-9.

49. *Id.* at 9.

50. *Id.* at 9-10.

51. *Id.*

52. *Id.* at 25.

in settings where a negative stereotype about one's group applies."⁵³ In fact, "[a] now-substantial literature shows that . . . changing the threat level of the context can have a tangible effect on ability."⁵⁴ For example, researchers at City University of New York posed difficult calculus questions to two groups of students enrolled in advanced math classes.⁵⁵ Both groups received information packets about the exam, but only one group received instructions that stated that the test was meant to determine why some people are better at math than others.⁵⁶ This presented an implicit threat to women students, who were most certainly aware of their perceived inferiority in the subject.⁵⁷ On average, women in this group scored lower than women in the non-threat group.⁵⁸ Researchers concluded that "the standard presentation of a test seemed to suppress women's ability"; but when presented with the same test using gender-neutral terms, the women in the non-threat group outperformed the other group of women and both groups of men.⁵⁹ Further, stereotype threat has been found to affect women when they are required to provide their sex or gender at the beginning of an exam; taking an exam as one of few women in a man-filled room; or taking an exam after watching videos depicting women behaving in a ditzzy and air-headed manner.⁶⁰ Fine posits:

[S]ubtle triggers for stereotype threat seem to be more harmful than blatant clues, which suggests the intriguing possibility that stereotype threat may be more of an issue for women now than it was decades ago, when people were more loose-lipped when it came to denigrating female ability.⁶¹

That is, confusion or indecision about the presence or absence of a threat can affect cognitive function in a way perhaps not experienced when women were openly considered inferior.⁶²

Even without a threat present, deeply entrenched gender stereotypes can still prevail.⁶³ Negative stereotypes can encourage behavior even

53. Claude M. Steele, Steven J. Spencer & Joshua M. Aronson, *Contending with Group Image: The Psychology of Stereotype Threat and Social Identity Threat*, 34 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 379, 385 (2002).

54. FINE, *supra* note 2, at 30.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 31.

59. *Id.*; see also Catherine Good, Joshua Aronson & Jayne Ann Harder, *Problems in the Pipeline: Stereotype Threat and Women's Achievement in High-Level Math Courses*, 29 *J. APPLIED DEVELOPMENTAL PSYCHOL.* 17, 25 (2008).

60. FINE, *supra* note 2, at 32.

61. *Id.*

62. *Id.*

63. *Id.* at 36.

when an explicit threat is not present, therefore masking a person's ability and perpetuating the idea of innate gender differences.⁶⁴ These beliefs allow stereotypes to self-perpetuate and continue to oppress those who do not adhere to traditional gender norms. Given this, it is dangerous to assume gendered qualities match an individual's sex or apparent gender.

2. Assuming Gender in Others

Despite the complex processes involved in a person's gender identity at any given moment, society remains rigidly gendered, and people are socialized to recognize gender cues.⁶⁵ Sociologists have long known about the "in-group bias" phenomenon in which people feel strong kinship with others sharing like traits, which could include race, gender, or even sports fandom.⁶⁶ Often, these traits are arbitrary, but the kinship associated with them is very strong.⁶⁷ For example, one study randomly assigned children in two preschool classrooms to the "red" group or the "blue" group.⁶⁸ Over the next three weeks, all the children wore shirts corresponding to their group's color.⁶⁹ In one classroom, the groups were never mentioned; the children merely wore the shirts.⁷⁰ But in the other classroom, teachers made the two groups relevant: they segregated children by group, referred to them as "Reds" or "Blues," and marked their cubbies with group colors.⁷¹ At the end of the study, researchers "found that being categorized as a Red or a Blue for just three weeks was enough to bias children's views. The children, for example, preferred toys they were told were liked by their own group and expressed a greater desire to play with other [group members]."⁷² While children from both classrooms expressed some preferential behavior toward their group mates, the children in the classroom in which color was salient more strongly expressed their preferences.⁷³ The moral of this story is that children self-socialize; they cobble together clues from their environment to explain how the world works.⁷⁴ When it comes to gender, children

64. *See id.*

65. *See supra* Part I.A.

66. Susan Krauss Whitbourne, Ph.D., *In-groups, Out-groups, and the Psychology of Crowds*, PSYCHOL. TODAY (Dec. 7, 2010), <https://www.psychologytoday.com/blog/fulfillment-any-age/201012/in-groups-out-groups-and-the-psychology-of-crowds>.

67. *Id.*

68. FINE, *supra* note 2, at 228.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 231–32.

quickly learn that masculinity and femininity directly mirror sex.⁷⁵ Because children constantly search for characteristics that define themselves in relation to others,⁷⁶ gender cues will shape their ideas of what sex means and reinforce its importance.⁷⁷

Generalizations about gender rely on the assumption that gender is inextricably linked to sex: men behave aggressively, thereby fueling masculinity, while women behave docilely, exhibiting femininity.⁷⁸ But are they linked? Some scholars claim that men and women are neurologically different, tying gender to sex in some ways; myriad neurological studies claim to have found biological bases for sex differences.⁷⁹ Where do these studies fit with sociological data regarding gender as a social construct?

B. Neurological Gender? Debunking “Neurofallacies” and Innate Difference

Fine examined numerous neuroscientific and sociological studies to determine whether they were methodologically sound and based in fact.⁸⁰ She ultimately concluded that the studies, on the whole, erroneously assumed that sex differences created gender differences.⁸¹ To describe these findings, she coined the term “neurosexism,” a logical fallacy in which one concludes sex differences create immutable gender differences by assuming that gender differences are the result of sex differences.⁸² In her broad search, Fine found no reliable evidence to support the idea that there are innate male and female behaviors.⁸³ In other words, she found no evidence to suggest gender differences are “hard-wired.”

Yet there is no consensus on this issue. One of the most pervasive theories supporting hardwired gender differences involves fetal testosterone levels.⁸⁴ All fetuses start out with “the same unisex primordial

75. *See id.* at 210–11.

76. *Id.* at 212 (“In fact, young children are so eager to carve up the world into what is female and what is male that [researchers] have reported finding it difficult to create stimuli for their studies that children see as gender neutral . . .”).

77. *Id.* at 212–13.

78. *See generally id.*

79. *See id.* at xvi (“[T]he underlying message is the same. Male and female brains are different in ways that matter.”).

80. *See generally id.*

81. *See id.* at 231–39.

82. *See id.* at 154 (categorizing neurosexism as a “subspecialty within the larger discipline of neurononsense”).

83. *Id.* at 231–39.

84. *Id.* at 99–101; *see also* Simon Baron-Cohen, *It’s Not Sexist to Accept That Biology Affects Behaviour*, *GUARDIAN* (May 3, 2010, 10:06 AM), <http://www.theguardian.com/commentisfree/2010/may/03/biology-sexist-gender-stereotypes>.

gonads,” and at the sixth week of gestation, either a gene on the Y chromosome activates “maleness” or the absence of the Y chromosome allows for the development of “femaleness.”⁸⁵ In theory, these testosterone surges create connections in the male brain that are different than those created by the lack of testosterone in the female brain.⁸⁶ Male connections mean that men are better at systematizing, and the different, female connections give women superior emotional intelligence.⁸⁷ Conversely, the existence of sex-specific connections means that men lack empathy and women lack mathematical acuity.⁸⁸

However, major problems with scientific soundness tarnish the bold generalizations drawn from fetal testosterone experiments. Most importantly, fetal testosterone levels are very difficult to test.⁸⁹ Fetal blood is very rarely sampled, meaning that researchers measure the testosterone level in either the mother’s blood or the surrounding amniotic fluid.⁹⁰ As such, without further technological advancement, one cannot know how testosterone affects the fetal brain.⁹¹

Further, “[b]ehavioral differences must be accompanied by neural differences, so the observation of a neural sex difference on its own tells us little to nothing about how the difference developed.”⁹² In other words, neurological differences before birth do not explain observed gendered behavior after birth. “Hence, the existence of a neural sex difference, even one that relates to a behavior known to be influenced by early [fetal hormone] exposure, does not prove that the hormone exposure caused the neural difference.”⁹³ While fetal hormone exposure could play a role in sexual and possibly behavioral development, it should not be considered ultimately determinative of sex differential behavior.⁹⁴

Another theory of innate sex difference revolves around brain scans. Studies examining brain structure, areas of activation under functional magnetic resonance imaging (fMRI), and brain interconnectivity

85. FINE, *supra* note 2, at 100; Melissa Hines, *Gender Development and the Human Brain*, 34 ANN. REV. NEUROSCIENCE 69, 71 (2011), available at <http://facweb.northseattle.edu/avoorhies/Gender/Readings/Development/Gender%20development%20and%20the%20human%20brain.pdf>.

86. FINE, *supra* note 2, at 99 (quoting LOUANN BRIZENDINE, *THE FEMALE BRAIN* (2007)).

87. *See id.* at xix; *see also* Baron-Cohen, *supra* note 84.

88. *See* FINE, *supra* note 2, at 100 (noting Simon Baron-Cohen’s remark and wondering, “[W]hy, in over 100 years of the existence of the Fields Medal, maths’ [equivalent of the] Nobel Prize, have none of the winners ever been a woman?”). Baron-Cohen is a strong proponent of the fetal testosterone theory of sex difference and believes that men are inherently more mathematically competent than women. *Id.*

89. *See id.* at 107–08.

90. *Id.*

91. *Id.* at 108.

92. Hines, *supra* note 85, at 78.

93. *Id.* at 79.

94. *Id.* at 80.

have concluded that not only are there inherent structural differences in male and female brains but also that such differences cause distinct behavior.⁹⁵ For example, one study concluded that women are more intuitive than men because they have a larger corpus callosum, a neural structure that connects both hemispheres of the brain.⁹⁶ Additionally, one author claimed that when women are told that their romantic partner is being electrically shocked, “the same pain areas [of the women’s] brains that had activated when they themselves were shocked lit up when they learned [others] were being strongly shocked.”⁹⁷ In the same paper, the author states that such results have never been replicated in male subjects, strongly suggesting that these neuroimaging studies revealed innate sex differences that translated into gendered behavioral differences.⁹⁸

However, neuroimaging paints an incomplete picture of brain activity and behavior. Because neuroscience (and, with it, neuroimaging) is still relatively new,⁹⁹ it cannot possibly connect neurological activity with behavior in a meaningful way:

The [fMRI] scanners, they say, excel at measuring certain types of brain activity, but are also effectively blind when it comes to the detection of more subtle aspects of cognition. As a result, the pictures that seem so precise are often deeply skewed snapshots of mental activity. Furthermore, one of the most common uses of brain scanners—taking a complex psychological phenomenon and pinning it to a particular bit of cortex—is now being criticized as a potentially serious oversimplification of how the brain works. These critics stress the interconnectivity of the brain, noting that virtually every thought and feeling emerges from the crosstalk of different areas spread across the cortex. If fMRI is a window into the soul, these scientists say, then the glass is very, very dirty.¹⁰⁰

Further, by drawing such strong conclusions from brain scans, researchers ignore the possibility that the neurological activity pictured on the scan is spurious rather than psychologically driven.¹⁰¹ Fine remarks that these studies are “unwittingly projecting assumptions about gender onto the vast unknown that is the brain.”¹⁰² Simply put, “neither structural nor

95. FINE, *supra* note 2, at 142–50, 155–57.

96. *Id.* at 157 (noting conclusions drawn by MICHAEL GURIAN & BARBARA ANNIS, LEADERSHIP AND THE SEXES: USING GENDER SCIENCE TO CREATE SUCCESS IN BUSINESS (2008)).

97. LOUANN BRIZENDINE, THE FEMALE BRAIN 163 (2007).

98. *Id.*

99. FINE, *supra* note 2, at 154.

100. Jonah Lehrer, *Picturing Our Thoughts*, BOSTON GLOBE (Aug. 17, 2008), http://www.boston.com/bostonglobe/ideas/articles/2008/08/17/picturing_our_thoughts/?page=full.

101. FINE, *supra* note 2, at 150.

102. *Id.*

functional imaging can currently tell us much about differences between male and female minds.”¹⁰³

Overall, much room for doubt exists in these studies because a large number of unknown variables remain.¹⁰⁴ Simplistic conclusions drawn in spite of unknown factors cannot describe the innate abilities and talents of half the world’s population. Neuroscience is complicated, and the human brain cannot be reduced to “male” or “female.” To do so would not only underplay the complexity of the human brain but also discount entirely environmental and genetic influences on human behavior. Further, scientific studies test correlational hypotheses to produce theories. Short of a concrete understanding of each link in the chain between hormonal exposure and behavioral expression, one cannot know for sure if inherent sex differences exist to the point that they give rise to gender, much less affect behavior. As such, neurological sex differences are less hardwired than these studies make them seem, making them unsuitable criteria for a hiring decision.

C. Gender Bias in the Employment Context

As sex and gender workplace discrimination becomes less overt, a substantial body of research reveals a less conspicuous form of discrimination, commonly referred to as second-generation workplace discrimination.¹⁰⁵ Second-generation workplace discrimination describes “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.”¹⁰⁶ Further, “[t]hese interactions influence workplace conditions, access, and opportunities for advancement over time, and thus constitute the structure for inclusion or exclusion.”¹⁰⁷ For example, a discriminating coworker might undermine a woman’s competence at work, comment on her appearance at work, or refuse to work with her if a man is available for the same task.¹⁰⁸ Often, second-generation workplace discrimination takes place within legal boundaries.¹⁰⁹

Like its predecessor in sexist workplace practices, second-generation workplace discrimination is still overt. In this Note, I focus on something subtler: discrimination born from subconscious bias. Subcon-

103. *Id.* at 154.

104. *See id.* at 105.

105. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001).

106. *Id.*; *see also* FINE, *supra* note 2, at 41 (describing “the subtle, off-putting, you don’t belong messages” projected toward women in professional situations) (emphasis omitted).

107. Sturm, *supra* note 105, at 470–71.

108. *Id.* at 470.

109. *Id.* at 474.

scious bias is the result of deeply entrenched ideas about how people of a certain group behave, think, or should behave or think.¹¹⁰ It is not necessarily a conscious effort to discriminate or act upon a prejudice; oftentimes, subconscious bias guides one's choices in a subtle, perhaps unnoticeable way.¹¹¹ For example, studies have shown that when presented with identical résumés, the only difference being the name at the top, people find the man candidate more qualified and competent than the woman candidate.¹¹² In one study, three quarters of participants (who were psychologists themselves) thought the man candidate hireable, while less than half considered the woman candidate hireable.¹¹³

More specifically, assumptions that sex differences give rise to gendered behavior can hurt women's chances of being hired:

[B]oth the descriptive ("women are gentle") and the prescriptive ("women should be gentle") elements of gender stereotypes create a problem for ambitious women. Without any intention of bias, once we have categorized someone as male or female, activated gender stereotypes can then color our perception. When the qualifications for the job include stereotypically male qualities, this will serve to disadvantage women¹¹⁴

In another study, researchers presented undergraduates with a job description and a résumé, and they asked the students to determine whether the candidate was a good fit for the position.¹¹⁵ The job descriptions and résumés were identical for every participant with the exception of the job title and the name.¹¹⁶ Some job descriptions were listed as "executive chief of staff," while others were listed as "executive secretary," and résumés were labeled with either a traditionally male or female name.¹¹⁷ The results of the study "revealed a favoring of, and greater confidence in, female secretaries and male chiefs of staff."¹¹⁸

These findings are not promising. While the Equal Employment Opportunity Commission (EEOC) urges employers to not inquire about

110. See FINE, *supra* note 2, at 4.

111. See *id.*

112. *Id.* at 55.

113. *Id.* (citing Rhea E. Steinpreis, Katie A. Anders & Dawn Ritzke, *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509 (1999), available at <http://advance.cornell.edu/documents/ImpactofGender.pdf>).

114. FINE, *supra* note 2, at 56.

115. *Id.* (citing Monica Biernat & Diane Kobrynowicz, *Gender- and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544 (1997)).

116. FINE, *supra* note 2, at 56 (emphasis omitted).

117. *Id.*

118. *Id.* at 57.

sex or race during the job application process, it does not have a rule expressly forbidding such questions.¹¹⁹ In an effort to close this loophole, some scholars propose regimes that impose an anonymous hiring process.¹²⁰ While the ideas vary in detail, the basic concept is the same: remove all markers of identity from the job application process so that employers can make hiring decisions based on merits rather than overt or entrenched prejudices.¹²¹ In the context of gender, such a scheme might look something like this: on hiring documents, remove names and, of course, the “M” and “F” checkboxes; neutralize as many gender-specific terms as possible; and remove externalities that might indirectly reveal gender. While difficulties in neutralizing some résumé items stand in the way of total anonymization,¹²² they should not preclude action to partially anonymize. No problem is totally solvable; every law is an attempt to mitigate a problem, and if legislators abandoned mitigating efforts, they would have nothing to do. Generally speaking, the law is meant to draw lines and attempt to reach solutions rather than solve problems completely.

Importantly, proponents of gender identification parallel proponents of racial segregation. Gender classification is a modern analog of the “separate but equal” doctrine of *Plessy v. Ferguson*.¹²³ In the seminal case on post-Civil War race relations, the Court declared that if racial minorities felt denigrated by separation, it was only because they chose to feel denigrated.¹²⁴ This attitude was very much in line with traditional

119. *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www1.eeoc.gov/laws/practices/index.cfm?renderforprint=1> (“Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer’s intent to discriminate unless the questions asked can be justified by some business purpose.”) (last visited Mar. 25, 2016) [hereinafter *Prohibited Practices*]. Exceptions are made for bona fide occupational qualifications. *Pre-Employment Inquiries and Gender*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www1.eeoc.gov/laws/practices/inquiries_gender.cfm (last visited Apr. 14, 2015).

120. See David Hausman, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343, 1345 (2012); see also Christopher Cerullo, *Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 141 (2013). See generally Åslund & Skans, *supra* note 8.

121. See, e.g., Rice, *supra* note 3.

122. Åslund & Skans, *supra* note 8, at 100.

123. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

124. *Id.* at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

American values of individuality and self-sufficiency,¹²⁵ but it ignored the reality that the playing field was uneven. In his commencement address to Howard University in 1965, President Lyndon Johnson summed up this concept: “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”¹²⁶ Ignoring his gendered phrasing, the point remains the same: social and institutional inequalities prevent equal access to economic activity. Just as this attitude affected (and continues to affect) minorities in the pre-civil rights era, it affects women and gender minorities today. Equality has not been realized, and to say otherwise is to ignore the vast body of research supporting the idea that people believe that men and women are inherently different (though they cannot say why) and the fact that this erroneous belief has serious repercussions in the real world.¹²⁷ Despite these realities, current law does not sufficiently address the problem of subconscious gender bias.

II. CURRENT LAW FAILS TO PROTECT AGAINST SUBCONSCIOUS BIAS

In 1964, Congress enacted Title VII of the Civil Rights Act, which prohibits denying or revoking employment primarily on the basis of race, sex, or other descriptors.¹²⁸ Specifically, § 2000e-2(a)(2) makes it illegal for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”¹²⁹ Because employers can request gender or gendered information on applications,¹³⁰ they have the opportunity to form sex- or gender-based opinions on applicants regardless of the applicants’ qualifications. Subconscious gender bias toward job applicants allows (and, arguably, effectively guarantees) that employers will discriminate against applicants based on sex or gender, thus violating the spirit of Title VII.¹³¹ In order to sue for gender-based hiring discrimina-

125. *See id.* (“If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.”).

126. President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

127. *See generally supra* Part I.

128. 42 U.S.C. § 2000e-2 (2012).

129. *Id.* § 2000e-2(a)(2).

130. *Prohibited Practices, supra* note 119.

131. The “bona fide occupational qualification” exception to Title VII is beyond the scope of this paper. For a more in-depth analysis of how this exception relates to gender, see generally Katie

tion, women can file either a disparate impact claim or a disparate treatment claim.¹³² Under Title VII, gender minorities are not a protected group.¹³³

To win a disparate impact employment claim under Title VII, one must satisfy the test articulated in *Griggs v. Duke Power Co.*¹³⁴ In *Griggs*, a power company attached educational requirements to higher-paying, traditionally white jobs.¹³⁵ Thirteen African-American workers sued under Title VII, and the Court held that, while the educational requirements were facially neutral, they disparately impacted people of color and thus were not allowable under Title VII.¹³⁶ The Court said that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”¹³⁷ In short, to determine that a hiring policy or scheme is impermissible, the court must find that it disparately impacts a group protected by Title VII.¹³⁸

The Court expanded the *Griggs* test in *Wards Cove Packing Co. v. Atonio*.¹³⁹ In *Wards Cove*, a group of workers in unskilled jobs filed a Title VII complaint against a cannery claiming that its hiring practices for skilled positions favored white applicants.¹⁴⁰ The Court articulated three steps a plaintiff must satisfy to win such a claim. First, a plaintiff must make a prima facie showing that a specific employment practice disparately impacts a protected group.¹⁴¹ If the plaintiff succeeds, they move to step two, in which the burden shifts to the employer to justify the practice or show that the practice does not cause a disparate impact.¹⁴² If the employer cannot prove that legitimate business ends justify the practice, they will lose the case.¹⁴³ Should the employer meet this burden, the analysis moves into step three. Here, the plaintiff must show

Manley, Note, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169 (2009).

132. Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee Agency*, 55 ME. L. REV. 241, 246 (2003).

133. 42 U.S.C. § 2000e-2(a) (2012). Title VII also fails to recognize sexual orientation as an impermissible criterion for discrimination. *Id.*

134. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); Higgins, *supra* note 132, at 246.

135. *Griggs*, 401 U.S. at 427–28.

136. *Id.* at 431, 436.

137. *Id.* at 432.

138. Higgins, *supra* note 132, at 247.

139. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657–58 (1989).

140. *Id.* at 646–48.

141. *Id.* at 657.

142. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (2012); *Wards Cove*, 490 U.S. at 658, 660.

143. *Wards Cove*, 490 U.S. at 658, 660.

“the availability of alternative practices to achieve the same business ends, with less [disparate] impact” in order to secure a ruling in their favor.¹⁴⁴ In *Wards Cove*, the Court held that the plaintiffs did not establish a prima facie case of hiring discrimination; as such, it returned a ruling for the employer.¹⁴⁵

In general, the Court has been hesitant to lower the bar for discrimination claims.¹⁴⁶ For example, the Court in *Wards Cove* worried that if a plaintiff did not have to show that specific practices led to discrimination, they would be able to raise judicially inefficient claims over innocent practices.¹⁴⁷ Additionally, the Court has expressed concern about placing too heavy a burden on employers. To mitigate this, when evaluating alternate employment practices (step three of the analysis), the Court prescribed consideration of “[f]actors such as the cost or other burdens of proposed alternative selection devices . . . in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.”¹⁴⁸

Alternatively, a plaintiff could file a disparate treatment claim. The Court laid out the three-step test for disparate treatment in *McDonnell Douglas Corp. v. Green*.¹⁴⁹ First, the plaintiff must establish a prima facie case of discrimination, which includes proof of the employer’s discriminatory intent.¹⁵⁰ For example, a prima facie case could be made by showing that: the plaintiff was a member of a protected group; the plaintiff applied for a job and was qualified; the plaintiff was subsequently rejected; and the position remained open after the rejection.¹⁵¹ Should the plaintiff succeed, they move to step two, in which the burden of proof shifts to the employer to articulate legitimate reasons for the allegedly discriminatory conduct.¹⁵² If the employer succeeds in articulating a reason for the discriminatory conduct, the court moves to step three of the analysis. In step three, the plaintiff must show that the employer’s reasons for the discriminatory conduct are mere pretext.¹⁵³ That is, the plaintiff can still win her claim if she can successfully show that the employer

144. *Id.* at 658.

145. *Id.* at 657.

146. *See, e.g., id.* at 657; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988).

147. *Wards Cove*, 490 U.S. at 657.

148. *Watson*, 487 U.S. at 998.

149. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973).

150. *Id.* at 802; *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 307 (7th Cir. 1988).

151. *McDonnell Douglas*, 411 U.S. at 802.

152. *Id.* Later case law provides a simpler description: “[T]he only issue to be decided at that point is whether the plaintiffs have actually proved discrimination.” *Bazemore v. Friday*, 478 U.S. 385, 398 (1986).

153. *McDonnell Douglas*, 411 U.S. at 804.

acted out of prejudice rather than the reason the employer gave for the discriminatory conduct.¹⁵⁴

However, disparate treatment claims are difficult to win. The burden on employers is light; they must only “produce evidence that ‘raise[s] a genuine issue of fact as to whether [the employer] discriminated.’”¹⁵⁵ Further, “case law reveals a willingness on the part of judges to accept a benign explanation of gender segregation rooted in the voluntary choices of women and men rather than conclude that segregation is a product of discriminatory actions by the employer.”¹⁵⁶ For example, in *EEOC v. Sears, Roebuck & Co.*, the EEOC claimed that Sears routinely preferred men applicants over women applicants for commissioned jobs, giving lower-paying, noncommissioned jobs to women instead.¹⁵⁷ In a lengthy opinion, the Seventh Circuit articulated why it believed that women’s job preferences, not discrimination, were to blame for the gender disparity in commissioned jobs.¹⁵⁸ For one, the court agreed with the district court that women were generally less interested in commissioned jobs because noncommissioned jobs were more comfortable: “Noncommission selling . . . was associated with more social contact and friendship, less pressure and less risk.”¹⁵⁹ In other words, assumptions about inherent sex differences, rather than factual data, won the day.

As *Sears* illustrates, finders of fact make decisions in a cultural context. Attitudes about sex difference or simply the existence of sexism color the decision-making process. If one believes that women are predisposed to timidity in the face of conflict or that women genuinely occupy an equal playing field to men, one is more inclined to believe a pattern of discrimination is justified.¹⁶⁰ Choice is, after all, an American value. How American would it be to find that an employer discriminated on the basis of sex when, in truth, men are just better at the job? A large part of American capitalism is allowing employers the economic free-

154. See *Sears*, 839 F.2d at 308.

155. *Id.* at 309 (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

156. Higgins, *supra* note 132, at 250.

157. *Sears*, 839 F.2d at 307.

158. *Id.* at 320–21; see also Higgins, *supra* note 132, at 250–51.

159. *Sears*, 839 F.2d at 320–21.

160. See, e.g., Cate Burlington, *Actual Words My Coworkers Have Said to Me, a Woman in Tech*, QUARTZ (Apr. 10, 2015), <http://qz.com/380163/actual-words-my-coworkers-have-said-to-me-a-woman-in-tech/> (listing comments from male coworkers based on assumptions about sex differences); Lizzie Plaugic, *Twitter Is Facing a Class Action Lawsuit for Gender Discrimination*, VERGE (Mar. 21, 2015, 5:55 PM), <http://www.theverge.com/2015/3/21/8270585/twitter-gender-discrimination-lawsuit-tina-huang> (detailing lawsuit against Twitter for policies that, in effect, promote men over women); Julie Rovner, *Even in Nursing, Men Earn More Than Women*, NPR (Mar. 24, 2015, 11:01 AM), <http://www.npr.org/sections/health-shots/2015/03/24/394915756/even-in-nursing-men-earn-more-than-women> (describing the pay gap between male and female nurses and positing possible sex discrimination).

dom to choose the best people for the job, so it is difficult to reconcile the value of choice with the need for social equality. As one scholar notes,

[A] strong conception of employee choice or agency constrains the scope of employer liability under both disparate impact and disparate treatment models of discrimination and, in turn, limits the effectiveness of antidiscrimination law in dismantling workplace segregation. Relying on the rhetoric of choice, courts regard segregated employment patterns as a product of individual preference rather than illegal discrimination.¹⁶¹

Due largely to cultural factors and the difficulty of succeeding in a discrimination claim, the current state of the law makes it very difficult, if not impossible, to bring a successful subconscious bias claim.

Even so, subconscious gender bias has significant economic effects; like cisgender men, women and gender minorities participate in the national and global economy.¹⁶² Discrimination against these groups both directly and indirectly prevents full economic participation in myriad ways. First, sex and gender discrimination in hiring decisions can prevent qualified women from being hired at all.¹⁶³ When employers face equally qualified candidates, they very likely might choose a man over a woman because of subconscious beliefs about gender roles.¹⁶⁴ Even if men applicants would have only a slight advantage over women applicants, they would still occupy a higher playing field, perpetuating an imbalance in the workforce. Until the scales are balanced, sex and gender should not play any role in the hiring decision.

Second, gender discrimination prevents women's professional advancement.¹⁶⁵ This is not just a problem of overt discrimination; subconscious bias allows employers (regardless of gender) to pass over qualified women candidates in favor of equally or less-qualified men candidates.¹⁶⁶ For example, only 4.8% of Fortune 500 companies have women CEOs.¹⁶⁷ Additionally, “[s]tudies show that business leaders tend to bet-

161. Higgins, *supra* note 132, at 251.

162. See *supra* Part I.C.

163. See generally FINE, *supra* note 2.

164. See *supra* Part I.

165. See FINE, *supra* note 2, at 62–63; see, e.g., Sarah E. Needleman, *Is Workplace Advancement Gender Neutral? Men and Women Disagree*, WSJ BLOGS (Feb. 1, 2010, 1:26 AM), <http://blogs.wsj.com/juggle/2010/02/01/is-workplace-advancement-gender-neutral-men-and-women-disagree/> (“A December 2009 study . . . shows that just 3% of chief executives officers and 13.5% of all executive-officer positions within Fortune 500 companies today are women.”).

166. See *supra* Part I.

167. Caroline Fairchild, *Number of Fortune 500 Women CEOs Reaches Historic High*, FORTUNE (June 3, 2014, 6:00 AM), <http://fortune.com/2014/06/03/number-of-fortune-500-women-ceos-reaches-historic-high/>.

ter prepare men for top jobs than women and that women are disproportionately assigned to oversee change within businesses—jobs that pose greater risk of failure.”¹⁶⁸ Relatedly, a recent article points out that our culture equates professional power with men. The article revealed that a Google search for “CEO” returns dozens of pictures of men and a picture of CEO Barbie (originally a joke photo from *The Onion*)¹⁶⁹ before it showed any actual women.¹⁷⁰ This example reveals a bias against women as powerful leaders or decision-makers. Conscious or not, these beliefs about women’s roles and abilities prevent women from advancing in their careers.

Third, gender discrimination results in unequal pay for women. Women are routinely paid less than men for the same work simply because of their sex or perceived gender.¹⁷¹ Again, discrimination is not always overt; assumptions about gender can inform one’s opinion of an employee’s job performance.¹⁷² To illustrate, some transgender men have experienced different treatment at the office before and after transition.¹⁷³ One man was told by a colleague that his research was much more impressive than his “sister’s” when in fact it was the same person conducting the research.¹⁷⁴ This heightened approval for nothing more than a change in gender presentation suggests how easily and routinely employers and coworkers devalue women’s professional contributions, making it easier to deny them equal pay for the same work.

Finally, gender discrimination fuels unequal economic interactions between market participants. For example, a car dealer might be more willing to bargain with a man than a woman; a manufacturer might prefer to sell to companies headed by men; or a contractor might prefer to deal with a husband instead of his wife. While the sleazy, sexist car salesman undeniably elicits societal disapproval, he would find himself more widely accepted if his sexist decisions were unconscious. The subtly sexist salesman might approach his job with the intention to treat all customers

168. Needleman, *supra* note 165.

169. *CEO Barbie Criticized for Promoting Unrealistic Career Images*, THE ONION (Sep. 7, 2005), <http://www.theonion.com/articles/ceo-barbie-criticized-for-promoting-unrealistic-ca,1787/> (“[One mom] added: ‘Real women in today’s work force don’t have Barbie’s Dream Corner Office. More often than not, they have cubicles—or Dream Kitchens. I mean, what’s next? ‘Accepted By Her Male Peers’ Polly Pocket?’”).

170. Danielle Paquette, *The Uncomfortable Truth About How We View Working Women*, in *One Simple Google Search*, WASH. POST (Apr. 14, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/14/what-one-simple-google-search-tells-us-about-how-we-view-working-women/>.

171. *Your Right to Equal Pay: Understand the Basics*, WHITE HOUSE, <https://www.whitehouse.gov/issues/equal-pay#top> (last visited Apr. 16, 2015).

172. *See supra* Part I.

173. FINE, *supra* note 2, at 54–55.

174. *Id.* at 54.

equally; however, deeply entrenched stereotypes surrounding, for example, patterns of speech common to women, feminine dress, or weight can subconsciously inform his retail approach.¹⁷⁵ In this scenario and many others, subconscious bias drives the behavior of economic participants, resulting in tangible economic consequences.

Despite these serious economic effects, subconscious bias claims remain difficult to raise successfully. As such, Congress must address the demonstrable impact of subconscious gender bias by creating more protection than Title VII jurisprudence currently offers. I believe a law prohibiting sex and gender markers on job application materials would eliminate some effects of subconscious gender bias at the hiring stage and provide more adequate legal protection for women and gender minorities in the workplace.

III. REMOVING SEX AND GENDER MARKERS TO COMBAT SUBCONSCIOUS BIAS

As stated in Part II, researchers have addressed Title VII's inadequacy in combating employment discrimination in general and in the context of subconscious bias.¹⁷⁶ One author proposed a voluntary regulatory scheme that would anonymize the entire job application process (including interviews).¹⁷⁷ He noted that anything more stringent than a voluntary program would be politically infeasible, though he provided no explanation for this assertion.¹⁷⁸ However, voluntary regulatory schemes lack the power to seriously address subconscious gender bias.¹⁷⁹ The author claims employers would readily adopt a voluntary regulatory scheme because they could use it to defend against discrimination claims.¹⁸⁰ However, this argument relies on the idea that discrimination suits pose a real problem for employers. This is not always the case. Of the 303,820 suits filed in federal court in 2014, only 12,330 regarded

175. See, e.g., Olga Khazan, *Vocal Fry May Hurt Women's Job Prospects*, ATLANTIC (May 29, 2014), <http://www.theatlantic.com/business/archive/2014/05/employers-look-down-on-women-with-vocal-fry/371811/> (describing how vocal fry, an affect in which the voice drops low in a creaking manner, which is popular among young women, can make others consider the speaker less competent and trustworthy, even though "people with deeper voices are also perceived as more dominant.").

176. See, e.g., Åslund & Skans, *supra* note 8; Cerullo, *supra* note 120; Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 465–66, 469–73 (2006); Hausman, *supra* note 120.

177. See generally Hausman, *supra* note 120.

178. *Id.* at 1345.

179. See *id.*

180. *Id.*

employment practices.¹⁸¹ Further, the majority of these suits were terminated: 260,269 were terminated before judgment and 176,359 were terminated before the pretrial phase.¹⁸² In fact, only 4.2% of employment actions (and 1.2% of all actions) survived until trial.¹⁸³ While discrimination suits are filed, they, like all lawsuits, are costly. The employer-incentive argument ignores the reality that litigation is the exception, not the rule, for workplace discrimination.¹⁸⁴

Federal legislation is necessary to combat subconscious gender bias because employers will not adopt mitigating measures voluntarily, despite arguments to the contrary. The cost of anonymizing job application materials or other administrative burdens to the employer could outweigh the benefits of the affirmative defense provided by the program. Some employers might claim that such legislation impedes their right to contract by interfering with their hiring decisions. Proponents of laissez-faire economics would probably deride the law as an attempt to force the invisible hand of the market, claiming that adverse consequences or economic inefficiencies would result from it. Others might say such legislation is unnecessary, citing either a perceived social sex and gender balance or inherent differences between sexes. However, no such balance exists, and only shaky scientific evidence supports the idea that relevant sex differences do exist.¹⁸⁵ Any inconveniences employers might face pale in comparison to the economic inequalities women and gender minorities face every day. Administrative burdens do not justify preventing women and gender minorities from achieving equality, and generalized libertarian arguments to the contrary fail to consider evidence that a free market operates in favor of privileged groups.¹⁸⁶

181. *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2013 and 2014*, U.S. COURTS, www.uscourts.gov/file/12276/download (last visited Mar. 25, 2016) [hereinafter *Civil Cases Commenced*].

182. *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2014*, U.S. COURTS, www.uscourts.gov/file/10248/download (last visited Mar. 22, 2016).

183. *Id.*

184. See *Employment Litigation and Dispute Resolution*, U.S. DEP'T OF LAB., <http://www.dol.gov/sec/media/reports/dunlop/section4.htm> (last visited Apr. 16, 2015).

185. See *supra* Part I.

186. See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 20 (2010) (“The evidence is not completely consistent, and there is room for debate at the margins. But it’s increasingly clear that trickle-down economics is not working as its proponents promise. Trickle-up economics, by contrast, seems to be working all too well.”); Raizel Liebler, *Information Superhighway Patrol*, BITCH, Spring 2015, at 23–25 (explaining how gendered ideas surrounding legal doctrines work in favor of privileged groups, which can have economic consequences). Liebler describes how the lack of legal protection for online harassment can injure women’s job prospects. *Id.*

Further, state or local legislation will not adequately address the problem of subconscious bias. For anonymization procedures to work, legislation must target businesses in the aggregate. If only some jurisdictions impose such laws, businesses could plausibly relocate to jurisdictions without anonymization laws. Businesses spread across multiple jurisdictions would face difficulty implementing these measures and could institute hiring freezes or close certain branches to avoid compliance. Additionally, subconscious bias affects women and gender minorities everywhere. Without a consistent scheme across jurisdictions, women and gender minorities who transfer between or seek employment in other jurisdictions would encounter difficulties in different economic climates. Only federal legislation will provide everyone protection from demonstrable economic injustice.

I propose a federal statute prohibiting sex or gender markers on job applications. The legislation is drawn narrowly to apply only in the pre-interview phase of the job application process. A possible draft follows:

PURPOSE: To aid in the prevention of wage, job placement, and workplace discrimination based on conscious or subconscious sex or gender bias by forbidding employers from requesting or accessing sex or gender identification in or on any and all parts of the pre-interview phase of the job application process.

Section 1. Definitions for the purposes of this statute:

- (a) The term “gender” refers to attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex.¹⁸⁷
- (b) The term “gender identity” refers to how one expresses oneself in relation to attitudes, feelings, or beliefs about gender.
- (c) The term “sex” refers to a person’s chromosomal makeup as it exists on the twenty-third pair of chromosomes.¹⁸⁸
- (d) “Markers of sex and/or gender” include, but are not limited to: checkboxes marking sex; names insofar as gender is reasonably and readily clear; gendered nouns or pronouns; and gendered job titles or job descriptions.
- (e) “Employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any de-

187. Per APA definition. See APA, *supra* note 36.

188. The twenty-third pair of chromosomes determines sex. *How Many Chromosomes Do People Have?*, U.S. NAT’L LIBRARY OF MED., <http://ghr.nlm.nih.gov/handbook/basics/howmanychromosomes> (last visited Apr. 19, 2015).

partment or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26.¹⁸⁹

(f) The term “person seeking employment” refers to any individual seeking paid work, full- or part-time.

(g) The “job application process” is the process by which an individual seeking employment conveys a firm intention to seek employment with an employer.

(h) The “preinterview stage” of the job application process refers to any paper or online application materials used for a particular employer. This includes, but is not limited to: résumés, application forms, cover letters, and letters of recommendation. Background checks and like searches must be completed through a separate process that does not link candidates to application materials by name, number, or other such markers.

Section 2. No employer or agent thereof shall request, require, or otherwise inquire into the gender identity or sex of any person seeking employment. Additionally, employers and agents thereof must screen job applicants in a way that eliminates sex, gender, and markers of sex and/or gender. Employers or agents thereof reviewing applications must not see or otherwise access said applications before sex, gender, or markers of sex and/or gender are removed. These rules apply only during the preinterview stage of the job application process.

Section 3. Redress. Any person whose sex or gender identity has been requested either directly or indirectly by an employer or agent thereof or whose employer or agent thereof saw or had access to the person’s application materials before sex, gender, or markers of sex and/or gender were removed may seek compensatory and punitive damages pursuant to 42 U.S.C. § 1983. The burden is on the employer to show by clear and convincing evidence that the request or access was in error and wholly without intent to discriminate and that the hiring decision was not affected by sex or gender bias. The employer must also show that its system of anonymization removes sex, gender, and markers of sex and/or gender as thoroughly as reasonably possible.

This legislation is attractive for several reasons. First, this statute allows employers leeway to create schemes to fit their needs. Every business operates differently, and too specific a regulation would prove diffi-

189. The definition of “employer” uses the same wording as the definition for “employer” in the Civil Rights Act. 42 U.S.C. § 2000e(b) (2012).

cult to implement in practice. Open-ended language with a clear purpose will show employers the goal line and enable them to tailor a system to get there. For example, a midsized law firm might use a computer program to tag incoming application materials and replace names with initials and gender identifiers with either a gender-neutral term or a space. For contacting references, employers could either communicate with references in writing¹⁹⁰ or channel all contact through a third party that would remove gender markers and report to those making the hiring decision. The computer system will have stored the name and gender markers, allowing the system to reinsert them once employers have chosen candidates to interview. Such a program would at once block subconscious gender bias and allow candidates to discuss their accomplishments in full at the interview stage. This system would require fine-tuning to address specific concerns of the company in question; however, determining such details is outside the purview of Congress.¹⁹¹

Additionally, anonymization systems created by this legislation would allow affirmative action policies to continue. As long as employers remove applicants' gender markers and save them separately, employers could later use the markers to additionally aid in their hiring decision. If a woman is chosen from her paper application and is denied an interview once the markers have been reinserted, she would have a valid claim under Title VII.¹⁹² As such, this legislation leaves room for both affirmative action policies and Title VII remedies should employers discriminate based on reinserted gender markers.

Second, this statute shows strong government support for gender equality. Congressional hearings detailing the problems of subconscious bias would lay the basis for the statute's purpose, giving courts guidance in interpreting future cases under the law. Such hearings should include extensive evidence of the effects of subconscious gender bias and arguments that current anti-discrimination law does not adequately curb employer bias. Further, congressional action on this issue would be symbolic, showing initiative to eliminate barriers to women and gender minorities in the workplace. The majority of Americans believe in gender

190. This was suggested in Hausman, *supra* note 120, at 1360.

191. Hausman suggests EEOC guidelines that completely anonymize the hiring process from start to finish. Under his system, employers would not be allowed to interview candidates to preserve anonymity. Even though my proposal requires anonymization only in the preinterview stage, his draft guidelines could serve to inspire employers or jurisdictions when instating their own programs. *See id.* at 1360–61.

192. *See* EEOC. v. Sears, Roebuck & Co., 839 F.2d 302, 308 (7th Cir. 1988).

equality,¹⁹³ so this would be an important step for those who believe the government can do more to promote it.

Third, the legislation changes the game for the plaintiff by placing the burden of proof on the employer. In both disparate impact and disparate treatment discrimination suits, the burden begins and ends on the plaintiff.¹⁹⁴ While the burden temporarily shifts to the employer to prove the allegedly discriminatory act was for a legitimate business reason, it ultimately rests on the plaintiff to prove either an effective alternative employment method or discriminatory intent, both difficult, high bars to pass.¹⁹⁵ Under current law, the employer's burden is very light; employers can easily propose a business interest to obfuscate discriminatory intent.¹⁹⁶ A plaintiff bears an especially heavy burden when claiming subconscious bias, as discriminatory intent may not be obvious. This legislation considers both plaintiffs and employers by clearly setting out proscribed behavior and providing an easier-to-obtain remedy for plaintiffs. While the plaintiff would have to state a valid claim upfront,¹⁹⁷ violation of the law would be clear: employers either screen for gender or they do not. However, this proposal does not target gendered questions during interviews; while such questions undeniably discriminate, they are beyond the scope of this Note.

Finally, this statute would make significant strides toward gender equality. While this legislation alone will not abolish the effects of subconscious gender bias in the workplace, it would remove one filter of bias from the job application process. Further, it would alert employers that such bias exists, hopefully incentivizing them to reflect upon their biases during later stages in the application process.

While it will undeniably experience political scrutiny, my proposal is feasible; because legislation like this regulates an economic activity, Congress can act under the Commerce Clause. The Commerce Clause, Article I, § 8 of the Constitution, provides that Congress is empowered “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁹⁸ Jurisprudence in this area allows

193. *Gender Equality Universally Embraced, but Inequalities Acknowledged*, PEW RESEARCH CTR. (July 1, 2010), <http://www.pewglobal.org/2010/07/01/gender-equality/>.

194. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

195. *See, e.g., Wards Cove*, 490 U.S. at 658, 660; *McDonnell Douglas*, 411 U.S. at 802.

196. *See supra* Part II.

197. FED. R. CIV. P. 12(b)(6).

198. U.S. CONST. art. I, § 8, cl. 3.

Congress much discretion to regulate as it sees fit in matters affecting interstate commerce.¹⁹⁹

The Court has indicated that remedying unequal economic participation is a sufficient reason to regulate.²⁰⁰ In *Heart of Atlanta Motel v. United States*, the Court held that hotels could not use race to discriminate against customers, finding that such a policy affects out-of-state travelers, thus impacting the economy and precluding full economic participation of racial minorities.²⁰¹ By overturning this policy under the Civil Rights Act, the Court regulated hotels in the aggregate rather than forcing one hotel to change its policy.²⁰² Therefore, the Court reasoned, all hotels are regulated equally.²⁰³ Similarly, my proposal would regulate all businesses equally under the umbrella of the Commerce Clause. Like in *Heart of Atlanta Motel*, the unequal economic participation of women and gender minorities demonstrably affects interstate commerce. A case-by-case approach to workplace discrimination would not have the significant impact of aggregate regulation. Unlike litigation, legislation under the Commerce Clause has the potential to meaningfully remedy sex- and gender-based economic imbalance.

CONCLUSION

Subconscious bias is just as dangerous as overt discrimination and can have detrimental, life-changing effects. Like in *Heart of Atlanta Motel*, public disclosure of sex and gender in the employment context prevents equal economic participation by women and gender minorities. Consciously or not, gender stereotypes color the perception of an individual;²⁰⁴ therefore, checking the “F” box effectively guarantees one’s heightened scrutiny in the marketplace. Requiring one to distinguish their sex or gender essentially codifies traditional gender roles. Without a law prohibiting sex and gender markers on job applications, the government essentially recognizes the idea that there are inherent, relevant differences between sexes, perpetuating the idea that such differences legitimize discrimination on some level.

199. See, e.g., *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 147 (2003) (holding the federal government can regulate local intersections because they are channels of interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (stating that a segregated restaurant that serves only local customers is not exempt from the Civil Rights Act because the restaurant purchases food from out of state); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (holding Congress can regulate personal production of wheat crops because all personal producers affect interstate commerce in the aggregate).

200. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 271 (1964).

201. *Id.* at 258.

202. *Id.* at 260.

203. *Id.*

204. See *supra* Part I.

When people believe that there are inherent differences between sexes, they lay the groundwork for discriminatory laws and policies. For example, if males and females really do differ in mathematical ability, it suddenly makes sense to pay male engineers more than female engineers. After all, Americans value meritorious achievement; is this not recognition of merit? Politicians tout this kind of thinking all the time, though it is often more subtle.²⁰⁵ Opposing equal pay laws is not discriminatory, according to these politicians and pundits; instead, it protects the freedom to contract.²⁰⁶ Such a philosophy feels eerily similar to *Lochner*-era Supreme Court decisions, which have since been overturned.²⁰⁷ If laissez-faire attitudes unfairly tip the scales in favor of privileged groups in business settings, why support policies promoting these attitudes? Women and gender minorities deserve equal economic participation, and this legislation attempts to provide it. One should not have to play the violin to receive equal consideration.

205. See, e.g., Wesley Lowery, *Senate Republicans Reject Equal Pay Bill*, WASH. POST (Apr. 9, 2014), http://www.washingtonpost.com/politics/senate-republicans-reject-equal-pay-bill/2014/04/09/ce011342-c003-11e3-b574-f8748871856a_story.html (“[Republicans] say that the bill is unnecessary because discrimination based on gender is already illegal.”).

206. *Id.* (““At a time when the Obama economy is already hurting women so much, this legislation would double down on job loss—all while lining the pockets of trial lawyers,” Senate Minority Leader Mitch McConnell (Ky.) said on the Senate floor before the vote.”).

207. *Lochner v. New York*, 198 U.S. 45 (1905), ushered in a libertarian, laissez-faire era in the Court. At that time, the Court promoted a philosophy of “free business,” which effectively protected financial elites and other privileged classes rather than preserving an ideal marketplace. The Court has since discredited the *Lochner* rule. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379, 393 (1937) (“In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.”).