UNSCRAMBLING THE EGG: SOCIAL CONSTRUCTIONISM AND THE ANTIREIFICATION PRINCIPLE IN CONSTITUTIONAL LAW

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Since the mid-twentieth century, the Court's developing view on the social construction of identity has driven some of the most fundamental changes in modern equal protection jurisprudence. One of these transformations has been the development of what I call the "antireification principle" in the Court's affirmative action cases. Under this principle, an important function of constitutional law is to regulate social meaning in accordance with the view that social categories like race are mere constructs. Guided by the antireification norm, the Court has used judicial review to block state action that, in its estimation, treats false constructs as real, important, or enduring. The Court, however, has been highly selective in its application of the principle outside of the race context. Where gender and sexuality are at issue, the Court has been more than willing to cast existing categories as real and even celebrate them.

This Note describes and questions the Court's selective use of antireification, suggesting that there is no reason, per se, why antireification could not further the goal of social equality in the realms of gender and sexuality. By denying their bases in reality, the Court could—according to the logic of antireification—destabilize all such identity constructs and decrease the harms they cause. This Note proceeds to hypothesize a set of explanations for the Court's selective application of the principle, but ultimately finds each unsatisfying. Finally, it suggests that selective deployment of antireification is symptomatic of inherent contradictions embedded in the structure of contemporary equal protection doctrine, which relies upon fixed identity categories at the same time that it seeks to destroy them.

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INTRODUCTION

> "[T]his guy goes to a psychiatrist and says, 'Doc, my brother's crazy; he thinks he's a chicken.' And the doctor says, 'Well, why don't you turn him in?' And the guy says, 'I would, but I need the eggs.'"
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> —Alvy Singer, *Annie Hall*[1]

Social constructionism—the idea that phenomena commonly perceived as natural or biological are simply products of human social interactions[2]—has given rise to some of the most important transformations in modern equal protection doctrine.[3] Indeed, the denaturalization of categories such as race and gender has fundamentally altered constitutional discourse, inspiring the Supreme Court to reimagine and redefine these identities through its decisions. The influence of constructionist[4] logic on constitutional law is particularly pronounced in the Court's race-based affirmative action cases. In a series of opinions issued since the 1970s, the Court has dismantled affirmative action programs that, in its view, construct race in harmful ways. In the Court's view, by announcing to the public that race "matters,"[5] these programs reify—that is, concretize or make real[6]—existing racial categories, thereby perpetuating the dangerous myth of race.

In its affirmative action jurisprudence, the Court has read into the Equal Protection Clause what I call an "antireification" principle.

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1 ANNIE HALL (20th Century Fox Home Entertainment 1977).

2 *See infra* Part I (describing in greater detail the theory of social constructionism).

3 *See* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 215 (1991) (defining "modern equal protection" as "the period following the switch-in-time in 1937 that signaled the demise of the *Lochner* era").

4 This Note uses the terms "constructionism" and "social constructionism" interchangeably.

5 *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (lamenting that in "our" society, "race unfortunately still matters").

6 In this context, reify means to concretize or make real something that, at bottom, does not exist. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1049 (11th ed. 2003); PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 106 (1966) (describing reification as "the apprehension of the products of human activity *as if* they were something other than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will").

According to this principle, an important function of constitutional law is to regulate social understandings of race to ensure that it is viewed as a social construct rather than something real, inherent, or biological. Exercising this function requires both particular case outcomes and modes of representation. With respect to case outcomes, courts must strike down laws that treat as meaningful, and thus reify, the false and harmful construct of race. With respect to modes of representation, state actors must refrain from acknowledging publicly that racial differences exist—even at the level of lived experience, culture, or access to resources. By taking these measures (so the argument goes), race will disappear from popular consciousness, and racial inequality will be truly eliminated.

This Note identifies the antireification principle at work in the affirmative action cases and explores its theoretical origins in the Court's move toward adopting a constructionist view of race in the mid-twentieth century.[7] It then develops a critique of that principle based upon the Court's failure to apply antireification with equal vigor where gender and sexuality are concerned. As this Note argues, the Court's equal protection jurisprudence has not been organized uniformly around the principle of antireification. Looking across identity categories, we see that while the Justices have aggressively portrayed race as a fiction, they are tethered to the view that gender and sexuality are real.[8] The selective application of antireification is puzzling: There is no reason, per se, why antireification could not further the goal of social equality in the realms of gender and sexuality. Notwithstanding their (debated) biological underpinnings, numerous scholars contend that all of the constitutionally salient identities are socially constructed.[9] By denying their bases in reality, the Court could—according to its own logic—destabilize them and decrease the harms they cause. This inconsistency, which has never been explained, is fundamentally incoherent.

Despite its important role in constitutional law and decisionmaking, social constructionism has been underexplored and undertheorized in legal scholarship.[10] Where addressed, it has often been the topic of derision rather than serious scholarly interest. Scholars have

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[7] *See infra* Part II.A (discussing the historical shift from understanding race as biological to socially constructed).

[8] *See infra* Part II.B (discussing judicial constructions of gender as real); *infra* notes 165–71 and accompanying text (discussing judicial constructions of sexuality in DOMA-related litigation).

[9] *See infra* Part I (describing the literature on the social construction of these identities).

[10] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 946 (1995) (noting "a learned blindness" to the "idea of social construction" in "much of law").

dismissed constructionism as a conservative conspiracy to replace truth with "truth";[11] leftist "pomobabble";[12] and an academic fad that has come and gone.[13] Legal scholarship that takes on constructionism tends to be highly polemical. Critical race theorists have railed against the conservative ends for which social constructionism, brainchild of liberal academia, has been utilized;[14] feminist scholars have critiqued the Court for not being constructionist enough where gender is concerned;[15] others have found the Court to be lacking in constructionist sensibilities across *all* categories of identity.[16] It is also common for scholars to unpack how identity categories have been constructed over time by various institutions, including courts.[17] This body of work is primarily historical, as scholars have been less interested in doctrinal and normative questions such as the degree to which constructionist logic has guided the evolution of constitutional decisionmaking[18] and

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[11] Steven G. Gey, *Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory*, 83 MINN. L. REV. 1707, 1708–10 (1999) (arguing that a "deep[ ] conservatism . . . lies at the core of social constructionism").

[12] Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461, 483–84 (1997) (discussing constructionism as a form of "[p]omobabble").

[13] Suzanna Sherry, *Democracy's Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. F. 7, 10 (2011) (characterizing "postmodern social constructionism" as a "now outdated academic fascination").

[14] Indeed, there has been something of a liberal rejection of the mantra that race is a social construct. Ian Haney López, for example, describes the Court's "depiction of race as ethnicity" as an "intellectual sham" and part of the "reactionary colorblindness" that has led to the demise of affirmative action. *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1063 (2007); *see also* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1456 (2002) (criticizing "progressive race blindness" scholarship and endorsing a vision of race consciousness).

[15] *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) (arguing that recognition of differences between men and women related to reproductive capacity as categorical overstates the difference between socially constructed and biologically rooted gendered distinctions).

[16] *See* Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 632 (2002) (arguing that because courts have been reluctant to consider "social construction" arguments in civil rights litigation, they have been less able to "reach accurate, non-simplistic understandings of identity-based discrimination").

[17] *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xxi (2008) (narrating the "legal construction of White racial identity" through analysis of cases from the early 20th century "in which state and federal courts sought to determine, and thereby partially define[ ], who was White enough to naturalize as a citizen").

[18] Where such theoretical inquiry has been undertaken, it has not focused squarely on the special and important role of constructionism in the development of Fourteenth Amendment jurisprudence. *See* Lessig, *supra* note 10, at 948–49 (exploring the role of "orthodoxy" in First Amendment law—and the law generally—and suggesting four frameworks for the construction of social meaning).

whether constitutional jurisprudence should aim to regulate social meaning.[19] Finally, almost all of this work focuses on one category of identity or another, missing the opportunity to interrogate the Court's disparate treatment of race, gender, and sexuality.[20]

This Note attempts to build a more satisfying account of the role of social constructionism in constitutional law. It posits antireification as a descriptive lens through which to analyze modern equal protection jurisprudence, and as one of the many competing values shaping modern judicial decisionmaking.[21] Antireification is distinct from

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[19] *But see* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 999 (2002) (arguing that because "[r]eligious and gender ideologies . . . legitimiz[e] social dividing practices on the basis of . . . Nature or God . . . thereby violating a congeries of constitutional principles," the Constitution should be read to "'disestablish' sex and gender," limiting the government's "ability to rely upon or reinforce sex or gender beliefs or groups").

[20] While notable exceptions exist, such works have often drawn parallels between the Court's treatment of these categories, rather than explaining or identifying differences. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (finding that in its race, gender, and sexuality jurisprudence, the Court seeks to force individuals to "cover" their identities); *see also* Goldberg, *supra* note 16, at 632 (critiquing the Court's reluctance to consider "social construction" arguments in all forms of civil rights litigation).

[21] In locating one of the many substantive values that informs constitutional jurisprudence, this Note participates in a rich scholarly project that has taken place in the wake of political process theory's demise. Political process theory was effectively eviscerated as a coherent descriptive or normative model of modern judicial review in the 1980s and 1990s. Scholars critiquing its descriptive value demonstrated that after *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court almost uniformly failed to incorporate political process insights into its equal protection decisions. *See* Klarman, *supra* note 3, at 248–51. They also pointed out that while post–*Carolene Products* decisions were initially consistent with political process theory, the Court "ultimately exceed[ed] its bounds," first striking down laws held to discriminate against groups like women and African Americans who were fully enfranchised, while prohibiting policies (such as affirmative action) said to discriminate against the most well-represented groups in the political system, white males. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 750 (1991). The theory's normative validity—as a proposal for a value-neutral "representation-reinforcing" mode of judicial review—has also been undermined, with scholars demonstrating the theory to be fundamentally value-laden. *See, e.g.*, Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981) ("[M]ost instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort."); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) ("The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid."). Legal scholarship has now largely abandoned the quest to find a unifying, value-neutral theory of constitutional law that escapes the countermajoritarian dilemma posed by judicial review. *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship* , 90 YALE L.J. 1063, 1065 (1981) (concluding "no defensible criteria exist" for "non-originalist, substantive, value-oriented constitutional adjudication"); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 82 (1988) (same); Mark V. Tushnet, *Darkness on the Edge of Town: The*

anticlassification, which, along with antisubordination,[22] has been a dominant norm in race equality cases for decades.[23] Centrally concerned with protecting individual rights, the anticlassification approach views the Equal Protection Clause as existing to ensure formal equality between groups,[24] and bars state actors from classifying individuals according to a forbidden category, such as race.[25] Since the 1970s, the Supreme Court has increasingly embraced an anticlassification model of the Equal Protection Clause.[26] However, as constitutional scholars have argued, "the discourse of anticlassification conceals other values that do much of the work in determining which practices antidiscrimination law enjoins."[27] One such value, this Note suggests, is antireification, which pursues the goal of equality by demanding the denaturalization and deconstruction of race.

This Note proceeds as follows: Part I explains briefly the theory of social constructionism and describes the sorts of constructionist claims the Supreme Court commonly makes about race, gender, and sexuality. The purpose of this discussion is not to suggest that members of the Court are avid Foucauldians[28] (one suspects they are not), but rather to contend that *all* of these categories are social constructs

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Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1057 (1980) (same).

[22] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (describing antisubordination as "the principle that laws may not 'aggravate' or 'perpetuate' 'the subordinate status of a specially disadvantaged group'") (quoting Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976)).

[23] *See* Angelo N. Ancheta, Bakke*, Antidiscrimination Jurisprudence, and the Trajectory of Affirmative Action Law*, *in* REALIZING BAKKE'S LEGACY 15, 17 (Patricia Marin & Catherine L. Horn eds., 2008) ("[T]he dominant norms that have influenced judicial decision making since *Bakke* can be divided into two basic categories: anticlassification norms and antisubordination norms."); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011) (noting that for decades, scholars and members of the Court have disagreed over whether the Equal Protection Clause is properly interpreted through a norm of anticlassification or antisubordination).

[24] *See* Ancheta, *supra* note 23, at 17 (characterizing "intentional and differential treatment of individuals as the primary measure of inequality" under the anticlassification approach).

[25] Balkin & Siegel, *supra* note 22, at 10 (2003) ("Roughly speaking, the anticlassification principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race.").

[26] Haney López, *supra* note 14, at 987.

[27] Balkin & Siegel, *supra* note 22, at 13 (noting "[i]nconsistency in the ways that courts have implemented the anticlassification principle, over time and in different parts of the law"); *see also* Siegel, *supra* note 23, at 1281 (discussing "antibalkanization" as another equality principle at work in the race cases).

[28] *See infra* note 52 and accompanying text (describing the scholarship of French critical theorist Michel Foucault, who is known for, among other contributions, arguing that sexuality is a social construct).

and therefore amenable to destabilization under the antireification principle. Part II examines the important role of constructionist logic in modern equal protection jurisprudence and explores the logically related development of the antireification principle in race-based affirmative action cases. Part II also analyzes the selective manner in which the Court has applied constructionist logic to cases involving gender and sexuality. Part III posits possible explanations for the Court's failure to apply faithfully the antireification principle to gender and sexuality. These possibilities include empirical claims about the categories themselves, normative claims regarding how best to order society around categories of identity, and doctrinal constraints imposed by the Court's system of tiered levels of review. The Note concludes that no coherent justification for the Court's selective deployment of the antireification principle currently exists and that universal antireification is likely unworkable because contemporary equal protection doctrine requires the existence of fixed identity groups.

I
WHAT IS SOCIAL CONSTRUCTIONISM?

> "Social construction talk is all the rage. But what does it mean and what is its point?"
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> —Paul Boghossian[29]

Social constructionism is a theory of knowledge that considers how social phenomena or objects of consciousness develop in social contexts.[30] To label something a social construct is to "emphasize its dependence on contingent aspects of our social selves."[31] As this definition suggests, constructionism is not a monolithic theory capable of producing just one or another set of political or doctrinal outcomes. Instead, it represents only an "anti-foundational" dialogue whose participants share a set of common concerns and beliefs.[32]

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[29] Paul A. Boghossian, *What Is Social Construction?*, TIMES LITERARY SUPPLEMENT, Feb. 23, 2001, at 6.

[30] BERGER & LUCKMANN, *supra* note 6, at 1 (defining social constructionism as a sociological theory of knowledge).

[31] Boghossian, *supra* note 29, at 6 ("[To call something socially constructed] is to say [it] could not have existed had we not built it. . . . Had we been a different . . . society [with] . . . different needs, values, or interests, we might . . . have built a different . . . thing. . . . The inevitable contrast is with a naturally existing object . . . exist[ing] independently of us . . . . ").

[32] Kenneth J. Gergen, *Metaphor and Monophony in the 20th-Century Psychology of Emotions*, 8 HIST. HUM. SCI. 1, 18 (1995) (describing the emphases of this anti-foundational dialogue as "the social-discursive matrix from which knowledge claims emerge," the "values/ideology implicit within" these knowledge claims, the "modes of

Constructionists take meaning and understanding (usually as mediated through language) as the central facets of human life.[33] These meanings are themselves understood to be products of social interactions in which human beings reach agreement as to what symbolic forms (namely, words) are taken to represent.[34] Processes of "meaning-making" are themselves specific to particular times and places; in other words, they are contingent upon a range of dynamic sociocultural variables.[35] Claims of "essentialism"—the notion that phenomena, like race, have inherent traits that make them what they are—are thus viewed with suspicion.[36] Moreover, social constructionism often takes the form of a political critique of the status quo apportionment of power.[37] With the current state of affairs shown to derive not from nature but from human choice, constructionists argue that more just alternatives are imaginable.[38]

Constructionist claims can be metaphysical or epistemic.[39] Metaphysical claims are directed at facts or objects, which are said to be "real" only because we believe them to be.[40] For example, a constructionist might claim that racial categories do not correspond to a natural reality; rather, there is a natural spectrum of phenotypes with no clearly defined demarcation between groups. Humans then impose

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informal and institutional life sustained . . . by ontological and epistemological commitments," and the "distribution of power and privilege" fostered by particular belief structures).

[33] *See* ANDY LOCK & TOM STRONG, SOCIAL CONSTRUCTIONISM: SOURCES AND STIRRINGS IN THEORY AND PRACTICE 6 (2010); *see also* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 43 (1953) ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.").

[34] LOCK & STRONG, *supra* note 33, at 7.

[35] *See id.* (offering as an example of contingent cultural meaning the differing treatment of modern schizophrenics and the Delphic Oracle who was revered for hearing voices of gods).

[36] *Id.*; *see also* VIVIEN BURR, AN INTRODUCTION TO SOCIAL CONSTRUCTIONISM 5 (1995) (describing antiessentialism as the idea that "[t]here are no 'essences' inside things or people that make them what they are").

[37] *See* LOCK & STRONG, *supra* note 33, at 8 (explaining that social constructionism often takes the form of political critique).

[38] *See id.* (offering as a point of agreement among constructionists a "concern with revealing the operations of the social world . . . so as to change these operations and replace them with something that is more just"); *see also* Michael Lynch, *Towards a Constructivist Genealogy of Social Constructivism*, *in* THE POLITICS OF CONSTRUCTIONISM 13, 20 (Irving Velody & Robin Williams eds., 1998) ("'Construction' for many . . . implies the possibility of reconstruction in accordance with value or purposes that are held to be more desirable than those that are grounded in tradition and bolstered by naturalistic interpretations.").

[39] Boghossian, *supra* note 29, at 6 (distinguishing between metaphysical and epistemic claims made under the rubric of social constructionism and giving examples).

[40] *Id.*

arbitrary distinctions between people clumped together along the spectrum, which they call "races." If humans stopped believing in arbitrary racial categorizations, they would cease to exist.

Epistemic constructionist claims are directed at beliefs.[41] Epistemic claims posit that humans generally do not hold beliefs because of evidence adduced in their favor, but rather because of the role that certain beliefs play in their social lives.[42] For example, we might know facts about human sex differences, such as that women can get pregnant and men cannot. However, a constructionist might claim that the reason we believe in gender has less to do with such evidence of sex difference, and more with the organizing principles that gender provides society, such as a gendered division of labor.[43]

Generations of scholars have explored the construction of race, gender, and sexuality in the United States. By demonstrating the historicity of these categories, scholars reveal them as socially invented rather than naturally or biologically predetermined.[44] In the context of race in the United States, the seminal work is Michael Omi and Howard Winant's *Racial Formation in the United States*.[45] Omi and Winant cast race as a sociohistorical construction the meaning of which has been contested throughout the course of American history.[46] They argue that in the United States, categories of race like "black" and "white" evolved in tandem with the establishment of racial slavery; thereafter, they retained their status as organizing concepts in American society because of ongoing political actions, which they call "racial projects."[47]

Scholars have also produced abundant literature on the social construction of gender.[48] Early feminist scholars attempted to

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[41] *Id.*

[42] *Id.*

[43] *See id.* (explaining the strain of feminist scholarship that exposes gender roles as "not inevitable but . . . rather the product of social choices").

[44] *See, e.g.*, David M. Halperin, *Is There a History of Sexuality?*, 28 HIST. & THEORY 257 (1989) ("Unlike sex, sexuality is a cultural production . . . represent[ing] the *appropriation* of the human body and . . . its physiological capacities by an ideological discourse. Sexuality is not a somatic fact; it is a cultural effect. Sexuality, then, does have a history—though . . . not a very long one.").

[45] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at vii (2d ed. 1994) (describing the "construction and transformation of racial meanings" in the United States and arguing that "concepts of race structure both state and civil society" and "continue[ ] to shape . . . identities and institutions in significant ways").

[46] *Id.* at 53–76.

[47] *Id.* at 58.

[48] *See, e.g.*, SIMONE DE BEAUVOIR, THE SECOND SEX, at xxxviii (H.M. Parshley ed. & trans., Knopf 1993) (1952) (arguing against the essentialization of women as the "eternal feminine"); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF

deconstruct traditional gender roles by arguing that these roles were neither inherent nor biologically determined. In the words of pioneering feminist scholar Simone de Beauvoir, "[o]ne is not born, but rather becomes, a woman."[49] Later work attempted to deconstruct gender altogether. Judith Butler, a founder of the so-called "performativity" movement, argues that gender does not exist in a natural state, but is instead "a compelling illusion" constructed through a series of "iterative acts" or performances.[50] These performances, which can be either individual or collective, create gender and gender roles.[51]

Even more recently, scholars have argued that categories of sexuality are socially constructed.[52] This argument was first popularized by Michel Foucault in his landmark work, *The History of Sexuality*.[53] According to Foucault, sexuality is not a natural fact—a fixed and immovable element of human subjectivity—but rather a "set of effects produced in bodies, behaviors, and social relations by a certain deployment" of "a complex political technology."[54] Foucault's work led to a range of scholarship devoted to demonstrating the historicity of contemporary sexual categories such as "gay" and "straight."[55] The contemporary gay-straight binary, this body of scholarship contends, is a relatively recent historical creation, and the category of the "homosexual" is likely little more than a hundred years old.[56] Prior to

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IDENTITY 9–11 (1990) (analyzing the ways in which the identities of male and female—and the gender binary itself—are thought to emanate from biological sex and to require compulsory heterosexuality); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 113–14 (1989) (arguing that the social meaning of sex is created by the sexual objectification of women whereby they are viewed and treated as objects for satisfying men's desires).

[49] DE BEAUVOIR, *supra* note 48, at 281.

[50] *See* Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 519–20 (1988) ("[G]ender is in no way a stable identity . . . from which various acts proceede [sic]; rather, it is . . . tenuously constituted in time . . . through a stylized repetition of acts. . . . [Gender] must be understood as the mundane way in which bodily gestures, movements, and enactments . . . constitute the illusion of an abiding gendered self.").

[51] *Id.*

[52] *See, e.g.*, 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 12–13 (Robert Hurley trans., Vintage Books 2d ed. 1990) (1976); *infra* notes 56–57.

[53] *See* FOUCAULT, *supra* note 52, at 12–13.

[54] *Id.* at 127.

[55] *See generally* JOHN J. WINKLER, THE CONSTRAINTS OF DESIRE: THE ANTHROPOLOGY OF SEX AND GENDER IN ANCIENT GREECE (1990); BEFORE SEXUALITY: THE CONSTRUCTION OF EROTIC EXPERIENCE IN THE ANCIENT GREEK WORLD (David M. Halperin et al. eds., 1990).

[56] DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY: AND OTHER ESSAYS ON GREEK LOVE (1990) (arguing that the category of homosexuality is only about one hundred years old); GEORGE CHAUNCEY, GAY NEW YORK 13 (2000) ("[I]n important

such time, sexual relations between members of the same sex were conceived of (at least in the United States) as a symptom of gender inversion or as sinful conduct in which anyone might partake.[57]

As this survey has attempted to reveal, constructionism is a broad school of thought encompassing a variety of competing claims about constitutionally relevant identity categories, and is not of a particular political valence. For this reason, the Court's use of social constructionist insights has not proved outcome determinative—as the next section reveals, it has been neither an absolute good, nor an irredeemable evil, when it comes to vindicating liberal ideals in the courts.

II
The Antireification Principle and Its Selective Application

The antireification principle developed in the affirmative action cases represents a logical outgrowth of the sort of constructionist logic at the heart of modern equal protection. The Court has not, however, applied antireification to the contexts of gender and sexuality, even though these identity categories, like race, are socially constructed. This section describes the role of constructionist logic in modern equal-protection case law, charting the Court's selective application of the antireification principle and suggesting how uniform deployment of the principle might alter the doctrine.

A. Race

1. Origins: From Plessy *to* Brown

The conceptualization of racial difference as socially produced (rather than biologically determined) represents the conceptual linchpin of modern equal protection. In pioneering cases like *Brown v. Board of Education*, this conceptualization enabled the Court to bring Jim Crow laws—laws through which the state defined and constructed race—within the realm of "state action" and subject to constitutional scrutiny.[58] Prior to the *Brown* era, Jim Crow segregation was

respects the hetero-homosexual binarism, the sexual regime now hegemonic in American culture, is a stunningly recent creation.").

[57] Chauncey, *supra* note 56, at 13.

[58] According to the state action doctrine, the protections of the Fourteenth Amendment cover only actions undertaken by governmental actors, and not discrimination committed by private individuals. *See* The Civil Rights Cases, 109 U.S. 3, 13 (1883) ("[U]ntil some State law has been passed, or some State action . . . has been taken . . . no legislation . . . under [the Fourteenth] [A]mendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the [A]mendment are against State laws and acts done under State authority.").

understood not as the product of positive law, but as a symbolic gesture that simply memorialized the natural divide that existed between Whites and African Americans.

According to Justice Brown's infamous opinion in *Plessy v. Ferguson*,[59] segregation laws merely implied "a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color . . . ."[60] Given the presumed natural divide between races, the state was neither responsible for segregation nor capable of altering it. As Justice Brown explained, even if a state desired to desegregate such that "the two races meet upon terms of social equality," long-held "social prejudices" regarding race could not be "overcome by legislation."[61] Desegregation would come about only as "the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[62] It would not, in other words, come via state action. *Plessy*'s vision of racial difference as biological and unalterable by state intervention held sway for decades.

Increasingly, however, the Court came to adopt a racial ideology based upon constructionist principles.[63] In this regard, the Court was part of a larger shift in Western thought: By the 1920s, scholars such as the acclaimed anthropologist Franz Boas had popularized the idea that perceived racial differences were cultural rather than biological.[64] Such cultural explanations for racial difference became increasingly appealing after World War II, as the Holocaust cast grave doubt on the wisdom of biological determinism.[65]

Under the Warren Court, constructionist thinking about race became central to equal protection doctrine.[66] Indeed, establishing race as a social construct was foundational to the Court's opinion in

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[59] 163 U.S. 537, 543 (1896) (upholding a state law mandating racial segregation on public trains under the doctrine of "separate but equal").

[60] *Id.* at 543.

[61] *Id.* at 551.

[62] *Id.*

[63] *See* Haney López, *supra* note 14, at 998–1001 (describing the Court's adoption of cultural explanations for race and racial difference after World War II).

[64] *Id.* at 996 ("[S]ocial scientists increasingly rebutted the claim that race explained anything . . . about group or individual temperament, intelligence, or potential. . . . By the 1910s and 1920s, many . . . insisted that race . . . did not exist at all . . . . [T]he real action lay not in the physical realm but instead within the sphere of culture.").

[65] *Id.* at 997–98 (describing the widespread rejection of the racial theories used by the Nazis in their persecution of Jews during World War II).

[66] *See id.* at 998–1001 (describing the adoption by the Warren Court of the view, popularized by sociologist Gunnar Myrdal and others, that "race reflected social rather than biological divisions").

Brown v. Board of Education.[67] For Chief Justice Warren, the recent educational successes of African Americans served as ready proof that racial differences were not innate, but constructed by law, economic disparities, and other sociocultural forces. According to Warren, at the time of Reconstruction, "practically all of the [Black] race were illiterate."[68] But contrary to what many believed at the time, this reality stemmed not from their inferior intellectual capacities, but from situational forces, namely, that the "education of Negroes was forbidden by law in some states."[69] When African Americans were given educational opportunity, they were capable of "outstanding" intellectual success.[70]

This line of constructionist analysis bled into the Court's treatment of arguments related to the original understanding of the Fourteenth Amendment.[71] At the time *Brown* was decided, many legal scholars believed the Amendment was not originally intended to integrate public schools, noting that at the time it was drafted, twenty-four of the then-thirty-seven states required or allowed school segregation.[72] Instead of taking on each of these claims, Chief Justice Warren instead marshaled the logic of social constructionism.[73] According to Warren, the drafters simply had no way of knowing that by the 1950s, "many Negroes [would] achieve[ ] outstanding success in the arts and sciences as well as in the business and professional world."[74] The races, Warren suggests, were simply not as different as the Reconstruction era drafters may have believed. Given the drafters' misconceptions about racial difference, the implication is that original intent was simply not a useful tool of analysis.

With racial difference cast as socially constructed, Jim Crow could be placed squarely within the bounds of state action and

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[67] 347 U.S. 483, 493 (1954) (holding that segregation of students in public schools violates the Equal Protection Clause because separate facilities are inherently unequal).

[68] *Id.* at 490.

[69] *See id.*

[70] *See id.*

[71] *See id.* at 489–90 (noting that the Amendment's history was inconclusive with respect to segregated schools in the modern context because the status of public education at the time was so different: While the "[e]ducation of white children was largely in the hands of private groups," the "[e]ducation of Negroes was almost nonexistent . . . [and] any education of Negroes was forbidden by law in some states").

[72] *See* Klarman, *supra* note 3, at 252 n.180 (discussing originalist evidence that persuasively suggests that the Fourteenth Amendment did not require desegregation of public schools).

[73] *See Brown*, 347 U.S. at 489 (finding the history of the Amendment to be "inconclusive . . . with respect to segregated schools").

[74] *Id.* at 490 ("As a consequence [of changes in public education], it is not surprising that there should be so little history of the Fourteenth Amendment relating to its intended effect on public education.").

challenged on constitutional grounds. The Court found segregation to be state action that produced constitutionally cognizable harms: Even when purporting to treat Whites and African Americans on formally equal terms, laws requiring racial segregation had "a detrimental effect upon . . . colored children"[75] because segregation policies were "usually interpreted [by all races] as denoting the inferiority of the negro group."[76] As a result, "[a] sense of inferiority" was cast upon African American children, which "affect[ed] [their] motivation . . . to learn."[77] The stigmatic harms produced by segregation were attributable not only to the perceptions of private individuals, but to state action that gave the "sanction of law" to constructions of Black inferiority.[78]

The *Brown* decision thus made clear that going forward the state would be responsible both for how it tangibly treated racial groups relative to one another and for how it constructed those groups. Righting the wrongs of Jim Crow would require attention not only to the realm of the practical, but to the symbolic as well.

2. Antireification and the Affirmative Action Cases

In the *Brown* era, the Court used constructionist insights to root out state action that constructed Blacks as inferior or subordinate to Whites.[79] But by denaturalizing race, *Brown* also suggested the potential for a more complete solution to the problem of racial stratification—the elimination of race altogether. Beginning in the 1970s, the Court began to use constructionist logic in an effort to dismantle the idea of race through an antireification principle. This section traces the deployment and development of antireification in a series of cases involving challenges to educational affirmative action plans.[80]

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[75] *See id.* at 494 (citations and internal quotation marks omitted).

[76] *See id.* (citations and internal quotation marks omitted).

[77] *Id.*

[78] *Id.*

[79] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (arguing that "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy"); *Brown*, 347 U.S. at 494 (arguing that "[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

[80] This Note focuses on the deployment of the antireification norm in a series of educational affirmative action cases, where it is particularly pronounced. The antireification impulse, however, also is evident elsewhere. It has been employed to strike down employment affirmative action statutes. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995) ("Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor." (internal citations and

Under the antireification principle, all racial classifications, even those intended for benign purposes, are subject to strict scrutiny[81] given their tendency to reify race. The first case to go down this particular path was *Regents of the University of California v. Bakke*, in which the Court held that the use of race-based quotas by the University of California's Medical School admissions office violated the Equal Protection Clause.[82] Writing for the majority, Justice Powell argued that "explicit racial classification" had an expressive effect that could not stand constitutional scrutiny:[83] By denying white students the "right to individualized consideration without regard to [their] race,"[84] the quota system "[told] applicants who [were] not Negro, Asian, or Chicano that they [were] totally excluded from a specific percentage of the seats in an entering class."[85] In other words, a quota system announced that race mattered, reifying racial difference and the idea of race itself. Although the Court struck down the challenged program in *Bakke*, it recognized diversity in education as a compelling state interest, keeping open the possibility that other sorts of affirmative action programs might survive strict scrutiny.[86]

The Court's acceptance and conceptualization of the diversity rationale was deeply connected to the goal of antireification. According to Powell, if a school's admissions process afforded all applicants an individual, holistic assessment (as Harvard College's

emphasis omitted)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (referring to "[t]he dream of a Nation of equal citizens in a society where race is irrelevant"). Antireification has also been evident in race equality cases outside of the affirmative action context. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court specifically addressed the way apportionment of electoral districts constructed race. According to the Court, "includ[ing] in one district individuals . . . [of] the same race, but who are otherwise . . . separated by geographical . . . boundaries, and who may have little in common . . . but the color of their skin . . . reinforces the perception that members of the same racial group . . . think alike . . . and will prefer the same candidates." *Id.* at 647. It went on to argue that "[b]y perpetuating . . . [racial stereotypes], racial gerrymander[ing] may exacerbate the . . . racial bloc voting that majority-minority districting is . . . said to counteract." *Id.* at 648.

[81] *See, e.g.*, Johnson v. California, 543 U.S. 499, 509 (2005) (holding that strict scrutiny should be applied to a policy of racially segregating prisoners); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (applying strict scrutiny to a law school admissions policy); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (applying strict scrutiny to an undergraduate admissions policy); Rice v. Cayetano, 528 U.S. 495, 524 (2000) (striking a voting restriction based on ancestry); *Adarand*, 515 U.S. at 229; *Shaw*, 509 U.S. at 645; *J.A. Croson Co.*, 488 U.S. at 508; *see also* Haney López, *supra* note 14, at 987 ("Under [the Court's current] approach, . . . the Fourteenth Amendment demands the highest level of justification whenever the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality.").

[82] 438 U.S. 265, 319–20 (1978).

[83] *Id.* at 319.

[84] *Id.* at 318 n.52.

[85] *Id.* at 319.

[86] *Id.* at 320.

admissions process did), race might be permissibly considered as one factor among many in the admissions decision.[87] Nowhere did Justice Powell suggest that programs employing holistic assessments would yield different statistical results than quota-driven ones. Either scheme would allow schools to admit critical masses of students from minority racial groups and, given the zero-sum nature of admissions, exclude some number of white candidates as a result. The difference between such programs related to the distinct messages sent to the students and the broader public about race—or, in other words, their potential to produce racial reification. In the Court's view, a quota system made race a more salient factor than in the holistic alternative; put simply, it furthered the belief that race was real and significant.[88]

The Court further articulated the antireification principle in 2002, when it heard two challenges to affirmative action policies employed at the University of Michigan: *Gratz v. Bollinger*, which involved the use of racial quotas in the undergraduate admissions system,[89] and *Grutter v. Bollinger*, which involved the use of race as a "plus factor" in the holistic admissions assessments by the university's law school.[90] In accordance with *Bakke*, the Court struck down the quota-driven undergraduate system.[91] However, it upheld the holistic process used by the law school.[92]

In *Grutter*, the antireification principle emerges most dramatically in the Court's reconceptualization of the diversity rationale used to justify the law school's admissions policy. While the Court preserved diversity in higher education as a compelling government interest,[93] it did not rely on the traditional understanding of diversity—that is, that diversity contributes to the "robust exchange of ideas" that is the "essen[ce]" of the "quality of higher education" by bringing together different kinds of students who presumably would bring worldviews reflecting or tracking those differences to classroom discussions.[94] According to Justice O'Connor, diversity did not enhance students' educational experiences per se; it simply dispelled

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[87] *See id.* at 316 ("The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not . . . necessary . . . . An illuminating example is found in . . . Harvard College . . . .").

[88] *See id.* at 318 (distinguishing between programs with facial preferences for race and those that consider race as an aspect of the admissions process).

[89] 539 U.S. 244, 249–50 (2003).

[90] 539 U.S. 306 (2003).

[91] *Gratz*, 539 U.S. at 271–75.

[92] *Grutter*, 539 U.S. at 343.

[93] *Id.*

[94] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

false beliefs about the importance of race by demonstrating that racial group difference did not exist.[95] The law school, she explained, did not "premise its need for [a] critical mass [of minorities] on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."[96] Rather, diversity was necessary so that the law school could "diminish[ ] the force of . . . stereotypes."[97] Affirmative action was necessary because this myth-busting function could not be "accomplish[ed] with only token numbers of minority students."[98]

The Court's account of diversity as a "myth-busting" device would seem to deny that racial difference existed not only as matter of biology, but also at the level of culture or lived experience. Such a denial is difficult to countenance. Experiences shared by members of a particular racial group would seem likely to produce at least some shared viewpoints. And, given the reality of de facto educational segregation[99] and extreme socioeconomic stratification along racial lines,[100] diverse classrooms would likely expose students not only to similarities between the students of different racial groups, but to differences as well. The Court's insistence on the myth-busting model, however, comports with the discursive approach embedded in the principle of antireification: By denying the existence of any racial differences—even cultural or socioeconomic ones—the Court might convince the public that race really does not matter, thereby destabilizing racial categories and ultimately writing race out of existence.

Four years later, the Court reaffirmed the vitality of the antireification principle in *Parents Involved in Community Schools v. Seattle School District Number 1*.[101] Unlike the preceding cases, *Parents Involved* dealt with an affirmative action program employed by elementary and secondary public schools that used race as a "tiebreaker"

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[95] *See Grutter*, 539 U.S. at 333.

[96] *Id.* (internal quotation marks omitted).

[97] *Id.*

[98] *Id.*

[99] *See* GARY ORFIELD, ET AL., UCLA CIVIL RIGHTS PROJECT, *E Pluribus . . .* Separation: Deepening Double Segregation for More Students 9 (2012) (finding that, nationwide, forty-three percent of Latinos and thirty-eight percent of Blacks attend schools where fewer than ten percent of their classmates are White; a full fifteen percent of Black students, and fourteen percent of Latino students, attend "apartheid schools" where Whites make up zero to one percent of the enrollment).

[100] *See* RAKESH KOCHHAR, ET AL., Pew Research Ctr., Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics 1 (2011), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf (finding that the median wealth of White households is twenty times that of Black households and eighteen times that of Hispanic households).

[101] 551 U.S. 701 (2007).

in admissions.[102] In a 5–4 decision, the Court struck down the policy.[103] According to Chief Justice Roberts, who wrote for the plurality, "racial balancing . . . effectively assur[ed] that race [would] always be relevant in American life." This sort of reification of race hampered the "ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."[104] The solution to racial discrimination was to begin the process of deconstructing race immediately: "The way to stop discrimination on the basis of race," Roberts explained, "is to stop discriminating on the basis of race."[105]

Justice Kennedy's concurrence was likewise organized around the antireification principle. Kennedy maintained, however, that affirmative action policies could comport with the antireification principle and thereby pass constitutional muster. In his view, affirmative action was permissible, but only when race-neutral alternatives were exhausted.[106] Although these policies would be pursued on a race-conscious basis—that is, with the motivation of achieving racial diversity—Kennedy suggested that they differed in meaningful ways from the "tie breaker" system. First, such policies did not speak of race and therefore did not announce to the public that race mattered.[107] In this respect, they were consistent with the antireification principle. Second, they did not inject government into the role of making racial meanings. According to Kennedy, the state had to be kept out of this business at all costs. "When the government classifies an individual by race," he explained, "it must first define what it means to be of a race."[108] But, because Kennedy believed that individuals are best suited to determine their race, "state-mandated racial label[s]"

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[102] *Id.* at 709–10 (explaining that assignment would go to the student "whose race [would] serve to bring the school into balance" (internal quotation marks omitted)).

[103] Five justices held the school boards did not present any "compelling state interest" justifying the assignment of seats on the basis of race. *Id.* at 789, 748, 791.

[104] *Id.* at 730 (internal citations omitted); *see also id.* at 787 (Kennedy, J., concurring in part and concurring in judgment) ("The enduring hope is that race should not matter; the reality is that too often it does.").

[105] *Id.* at 748.

[106] *Id.* at 790 ("[I]ndividual racial classifications employed . . . may be considered legitimate only if they are a last resort to achieve a compelling interest."). As possible alternatives, he suggested that school boards might employ "strategic site selection of new schools; draw[ ] attendance zones with general recognition of the demographics of neighborhoods; allocate[ ] resources for special programs; recruit[ ] students and faculty in a targeted fashion; and track[ ] enrollments, performance, and other statistics by race." *Id.* at 789.

[107] *Id.* at 789.

[108] *Id.* at 797.

rendered individuals powerless,[109] and were "inconsistent with the dignity of individuals in our society."[110]

The antireification principle expressed in the affirmative action cases represents a logical extension of the kind of constructionism that lies at the heart of modern equal protection doctrine. *Brown* and its progeny were, after all, premised upon the notion that sociocultural forces—including the law, legal opinions, and all manner of state action—constructed what once were thought to be natural differences between Blacks and Whites. If the Court were (at least in part) responsible for constructing race (and therefore its harmful effects), it stood to reason that the Court might, through its doctrine, attempt to recreate race, or simply write it out of existence.

The longstanding role of the antireification principle in Supreme Court discourse brings into question some of the standard critiques of the Court's race-based affirmative action jurisprudence—namely, that the affirmative action cases represent a break with the true meaning and spirit of *Brown v. Board of Education*.[111] But for all the hand-wringing over whether the affirmative action cases kept faith with *Brown*, we might ask instead whether they comport with the Court's logic in a range of cases regarding the construction of subaltern identity categories. As the next sections will argue, those seeking to impugn the logic or sincerity of the Court's affirmative action discourse would be better served by noting the Court's failure to apply an antireification principle to other constitutionally significant identities (gender and sexuality) than quibbling over *Brown*'s true spirit.

B. Gender

In contrast to its jurisprudence on race, the Court has steadfastly maintained that gender difference is real, enduring, and even worthy of celebration. While the Court does recognize ways in which gender is socially constructed, it has never attempted to eliminate gender from popular consciousness as the antireification principle would require. Instead, it has sought only to eradicate certain constructs—or "stereotypes"—that it regards as false or archaic.

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109 *Id.*

110 *Id.*

111 Indeed, the conservative Justices have essentially been accused of turning their backs on the *Brown* opinion. *See id.* at 799 (Stevens, J., dissenting) (accusing the majority of "rewrit[ing] the history" of *Brown*); *id.* at 803–04 (Breyer, J., dissenting) (arguing that the plurality "undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality").

Since the 1970s, the Court has accorded intermediate scrutiny to laws that classify on the basis of gender.[112] As announced in *Craig v. Boren*, intermediate scrutiny requires that laws creating gender-based distinctions involve "important governmental objectives and must be substantially related" to achieving them.[113] The Court's allocation of a new form of heightened review stands in for two important propositions. First, it signifies the Court's suspicion that, in many cases, gender-based classifications reflect and reinforce harmful—and false—constructions of gender. Second, terming the applicable level of review something less than "strict" gives the Court leeway to uphold some gender-based classifications. This denomination stems from the Court's view that gender-based classifications are both less corrosive and more inevitable than racial ones.

But while the Court's allocation of heightened review is symbolically important, what is referred to as "intermediate review" has little descriptive content.[114] Instead, the Court's gender equal protection analysis has revolved around the ways in which particular laws seem to construct gender roles pursuant to stereotypes; laws premised upon gender stereotypes that are illegitimate are constitutionally suspect.[115]

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[112] Craig v. Boren, 429 U.S. 190, 208–10 (1976) (finding under intermediate review that a prohibition on the sale of "nonintoxicating" beer to males under the age of twenty-one and to females under the age of eighteen constituted a denial to males ages eighteen to twenty of equal protection of the laws).

[113] *Id.* at 197.

[114] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567, 570 (1996) (Scalia, J., dissenting) (characterizing the Court's tri-level equal protection jurisprudence as a collection of "made-up tests" that "are no more scientific than their names suggest"); Norman T. Deutsch, Nguyen v. INS *and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 187 (2003) ("The dispute over the proper application of the standard of review in *Nguyen* and *Virginia* is symptomatic of the fact that intermediate scrutiny is a 'made up' rule that has had little effect on the outcome of the decisions. In reality, . . . [it] is a form of rational basis review." (citations omitted)). Notably, even the Court has difficulty describing the test in a uniform manner and, in explaining its own standard, has deviated dramatically from the formulation put forward in *Craig*. *See Virginia*, 518 U.S. at 531 (requiring an "exceedingly persuasive justification" for a gender-based classification).

[115] Scholars have frequently noted the prominent role of stereotype elimination in gender equal protection. *See* David H. Gans, Note, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876 (1995) ("Stereotyping is the central evil that the Court's [gender] equal protection doctrine seeks to prevent."); *see also* Deutsch, *supra* note 114, at 187–88 ("[T]he issues in the gender cases have been whether the classifications . . . are based on legitimate differences between the genders, or . . . based on stereotypical generalizations about . . . males and females; and, even if the former, whether the means are reasonably and rationally related to the ends." (citations and internal quotation marks omitted)); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83 (2010) (arguing that since the mid-1970s, the Court's gender cases have not been marked by a desire to "eradicate[ ] sex classifications from the law, but [instead have embodied] a

Illegitimate stereotypes are those that reflect or are inspired by Victorian (or so-called traditional) gender conceptions.[116] Under the Victorian model—heartily subscribed to by American courts during the nineteenth and early twentieth centuries[117]—men and women were bound to occupy "separate spheres."[118] While men were creatures of the public sphere working as businessmen, politicians, and soldiers, women inhabited the "domestic" sphere, busying themselves as mothers and housekeepers.[119]

In *Frontiero v. Richardson*, an early gender equal protection case, the Court directly took issue with Victorian gender norms.[120] *Frontiero* involved a challenge to a military policy providing that female spouses automatically received benefits, while male spouses had to be shown to be dependent upon their wives for over half of their support.[121] Justice Brennan, writing the plurality opinion, argued that the policy was interpreted against the background of the nation's "long and unfortunate history of sex discrimination"—a history that, as he explained, has been justified by a "romantic paternalism," which "put women . . . not on a pedestal, but in a cage."[122] Sensing a similar sort of paternalism was at play, the plurality struck down the law using strict scrutiny.[123] The Court's crusade to root out laws motivated by Victorian gender norms remained fairly stable, and in the years both before and after *Frontiero*, the Court struck down gender classifications that perpetuated "old notions" about men and women's behavior or proper roles in society.[124]

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far richer theory of equal protection involving constitutional limitations on the state's power to enforce sex-role stereotypes").

116 *See* Franklin, *supra* note 115, at 92–97 (noting the impact of scholars such as John Stuart Mill and his rejection of Victorian gender ideas on the Court's anti-stereotyping approach to gender cases).

117 The most notorious judicial celebration of this Victorian ideal came in *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . [T]he family organization, which is founded in the divine ordinance . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

118 *See* NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND, 1780–1835, at 1–18 (1977) (describing women's subordination to men in the late eighteenth and early nineteenth centuries).

119 *Id.*

120 411 U.S. 677, 684–88 (1973) (plurality opinion).

121 *Id.* at 678–79.

122 *Id.* at 684 (internal quotation marks omitted).

123 *Id.* at 688.

124 *See* Stanton v. Stanton, 421 U.S. 7, 14 (1975) (striking down a Utah statute setting a lower age of majority for women than men); Reed v. Reed, 404 U.S. 71, 74 (1971) (striking down an Idaho statute that favored men over women as executors of estates); *see also* United States v. Virginia, 518 U.S. 515, 519 (1996) (striking down the Virginia Military

In a certain sense, the Court's focus on rooting out Victorian stereotypes, which cast men and women as virtual polar opposites, resonates with antireification. Antireification, after all, demands that state actors engage in particular modes of representation—that when they enter into discourse about socially constructed identities, they refrain from acknowledging that differences exist, even at the level of lived experience, culture, or access to resources. These modes of representation ensure that state actors alter the public discourse in positive ways. In this vein, the Court has focused on the representational or discursive quality of gender-based laws (in other words, the ways in which they construct gender by sending out to the public particular ideas about men and women's essential natures or proper roles in society). Laws that send the wrong messages about gender are thus struck down.

The Court's concern with representational effects was particularly evident in *J.E.B. v. Alabama*.[125] In *J.E.B.*, the Court found it impermissible to make peremptory challenges based solely upon a prospective juror's gender because such challenges suggested to the public that gender mattered.[126] Noting that the case record was void of any actual "support for the conclusion that gender alone [was] an accurate predictor of jurors' attitudes," the Court surmised that any strike based upon gender was necessarily motivated by "stereotypes" alone.[127] The Court then held that decisionmaking based solely upon stereotype was unconstitutional because of its representational effects: "When state actors exercise peremptory challenges in reliance on gender stereotypes," explained the Court, the "community is harmed by the State's . . . perpetuation of invidious group stereotypes . . . [that] ratify and reinforce prejudicial views of the relative abilities of men and women."[128] Again, consistent with the principle of antireification, the majority ignored the possibility (suggested by Justice O'Connor in concurrence) that in some instances, gender might track

Institute's males-only admissions policy); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 722–23 (1982) (finding unconstitutional a law excluding men from a state-funded nursing school); Orr v. Orr, 440 U.S. 268, 270–71 (1979) (striking down an Alabama law that required divorced husbands, but not wives, to pay alimony); Califano v. Goldfarb, 430 U.S. 199, 201–02 (1977) (striking down a provision of the Social Security code that granted survivor's benefits to widows and widowers differently); Weinberger v. Wiesenfeld, 420 U.S. 636, 637–39 (1975) (holding unconstitutional a provision of the Social Security Act that allowed benefits to widows while denying them to widowers).

[125] 511 U.S. 127 (1994).

[126] *See id.* at 146.

[127] *Id.* at 138–39.

[128] *Id.* at 140.

relevant, statistical differences in worldviews or life experiences between jurors.[129]

The importance of representational effects in cases like *J.E.B.* is made clear when one considers what the Court was patently *not* interested in, namely, material effects and statistics. Indeed, the fate of gender-based classifications under the Court's equal protection doctrine has not hinged upon whether such laws materially advantaged or disadvantaged women relative to men. In point of fact, many of the laws the Court struck down tangibly benefitted women,[130] including laws granting women, but not men, alimony;[131] laws supplying women, but not men, automatic military spousal benefits;[132] and laws granting women privileged access to educational institutions.[133] Such laws were, in all likelihood, meant to remediate real-life gender inequalities that resulted from the nation's history of sex discrimination.[134] Nor has the Court's adjudication turned upon whether particular gender classifications are based on accurate data about men and women's behavioral patterns or socioeconomic positions. Indeed, many of the laws struck down by the Court were premised on real-life gender differences backed by sound data—for example, the presumption that women, on average, were more likely than men to be dependent upon spousal support.[135]

From an antireification perspective, the correct—and more constitutional—approach for legislators and the judiciary is to ignore

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[129] *Cf. id.* at 149 (O'Connor, J., concurring) ("[O]ur holding [suggests] that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact."); *see also Hogan*, 458 U.S. at 724–25 (stating that sex-based classifications must be free of "fixed notions concerning the roles and abilities of males and females").

[130] *Hogan*, 458 U.S. at 733 (striking down a law excluding men from nursing school); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (striking down a provision of Social Security laws that granted benefits automatically to widows, but required widowers to prove they had been dependent on their wives).

[131] Orr v. Orr, 440 U.S. 268 (1979) (striking down an Alabama alimony law).

[132] Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down a military spousal benefits policy).

[133] *Hogan*, 458 U.S. at 733 (finding unconstitutional a nursing school's policy prohibiting males from enrolling).

[134] *See Orr*, 440 U.S. at 280 (rejecting as a justification for state alimony law the goal of "compensat[ing] women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce").

[135] The assumption that women were more likely than men to be dependent upon spousal support was the basis of many of the laws at issue. *See, e.g.*, *Frontiero*, 411 U.S. at 67 (involving automatic grant of military spousal benefits to wives, but not husbands); *Orr*, 440 U.S. at 268 (involving a law that required divorced husbands, but not wives, to pay alimony); *Califano*, 430 U.S. 199 (1977) (involving federal policy granting benefits automatically to widows, but not widowers, upon the death of their spouses).

gender difference altogether. As the antireification principle instructs, even gender classifications aimed at helping women—by, say, giving them tax subsidies or ensuring all-female access to a particular education institution—should be rejected because they threaten to perpetuate the idea that women are naturally dependent upon men. The same could be argued about laws premised on statistical data about gender difference: Even if it were true that women more commonly pursued nursing than men, passing a law that took account of that difference might perpetuate the view that women were uniquely suited to being nurses, not doctors.

However, the Court has also departed from the ideal of antireification in cases in which gender is at issue in several ways. First, the Court has upheld gender classifications under intermediate scrutiny where it views those classifications as helping to break down "old notions" about gender. For example, in *Schlesinger v. Ballard*, the Court upheld a federal statute granting female Naval officers four more years of commissioned service before mandatory discharge than male officers were allotted.[136] Although the law created a gender-based entitlement similar to the ones struck down in *Frontiero* and other cases, the entitlement put more women into military leadership roles, subverting the paradigmatic Victorian gender stereotype. Under a strict antireification approach, however, the Court would have struck down the law in *Ballard*.

Second, under current doctrine, the Court allows for classification based upon "real,"[137] "physical,"[138] or "biological"[139] differences between men and women. The Court's deference to such classifications[140] represents a profound divergence from the goals of antireification, which would demand that the Court denounce any assertion of real difference for fear that it might reinforce the harmful construct of gender. Not only does the Court acknowledge "real" difference, thereby ensuring that gender will continue as a meaningful social category, it also imbues attributes to women and men that go beyond the

136 Schlesinger v. Ballard, 419 U.S. 498 (1975). *Cf.* Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding the exclusion of women from draft registration on the grounds that that they were also excluded from combat duty).

137 Nguyen v. INS, 533 U.S. 53, 73 (2001) ("The difference between men and women in relation to the birth process is a real one . . . .").

138 United States v. Virginia, 518 U.S. 515, 533 (1996) (explaining that the Court's gender review standard "does not make sex a proscribed classification" because "[p]hysical differences between men and women . . . are enduring").

139 *Nguyen*, 533 U.S. at 73 (justifying gender-based classification on account of women's unique ability to bear children, which the Court refers to as "our most basic biological difference").

140 *See* Kenji Yoshino, *Sex Equality's Inner Frontier: The Case of Same-Sex Marriage*, 122 YALE L.J. ONLINE 275, 277 (2013), http://yalelawjournal.org/2013/02/21/yoshino.html.

biological differences that are used to justify this set of legal classifications.

Nguyen v. Immigration Naturalization Service[141] is illustrative of the Court's "real difference" jurisprudence. *Nguyen* involved a law relating to birth citizenship for children born outside the United States to unmarried parents, only one of whom is an American citizen.[142] Under the law, children with fathers who were U.S. citizens had to present formal proof of paternity before the age of eighteen; those with mothers who were U.S. citizens did not.[143] The Court found the rule justified on account of natural differences between men and women vis-à-vis the birthing process stating that, while "the mother is always present at [her child's] birth," the father "need not be."[144] According to the Court, taking account of this difference not only served the governmental objective of proving parentage, which could be done through a simple DNA test, but guaranteed the "opportunity" for parent and child to develop a meaningful relationship.[145] In all likelihood, the Court relied upon unspoken cultural assumptions about the comparative probability of mothers and fathers to form bonds with their children in upholding the law. As Justice O'Connor argued in dissent, this assumption was based on a stereotype.[146] The Court's assumption was particularly problematic where, as in *Nguyen*, the father could demonstrate that he knew his child, that he was present at birth, and (via DNA testing) that he was the child's biological father.[147]

Under the banner of "stereotype" elimination, the Court has struck down laws that, in its view, construct gender in harmful or misleading ways. In contrast to race, however, the Court has never attempted to eliminate gender from popular consciousness. Instead, the Court explicitly recognizes gender difference as "real."[148] Not only

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141 *See Nguyen*, 533 U.S. at 53.

142 *See id.* at 59–60.

143 *See id.* at 88.

144 *Id.* at 64.

145 *Id.* at 65–67 (noting that while a mother "knows that the child is in being and is hers and has an initial point of contact with him . . . scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority"). Of course, were the state really trying to serve its interest in fostering meaningful relationships between U.S. citizen parents and their foreign-born children, one could likely think of better ways to do so than ensuring just a single encounter at the moment of birth between mother and child.

146 *See id.* at 89 (O'Connor, J., dissenting) (stating that the statute at issue was based "in a stereotype—*i.e.*, the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children" (internal citations omitted)).

147 *See id.* at 57, 89.

148 *See id.* at 73 ("The difference between men and women . . . is a real one . . . .").

does it recognize the existence of inherent differences, which may justify gender-based classifications, it has also maintained that they are "cause for celebration."[149] By treating the construct of gender as real and meaningful, the Court ensures that gender remains an important social category.

C. Sexuality

The Court has neither revealed a desire to eliminate sexuality as a meaningful category of social identity, nor acknowledged the possibility that categories of sexuality (like gender- or race-based ones) might be discursive constructs susceptible to judicial reconfiguration. In short, the antireification principle has not been at play. Indeed, even as the Court has moved toward greater protections for gays and lesbians, it continues to treat categories of sexuality as real, fixed, and dichotomous. The Court's willingness, however, to decide some challenges to sexuality-based classifications on substantive due process, rather than equal protection, grounds suggests the potential for a more critical approach. Whereas under the traditional equal protection analysis, reification of identity categories almost necessarily flows from the judicial finding that a classification is based on an "immutable" trait, under a substantive due process analysis, conduct is divorced from identity or status. By foregrounding conduct, which anyone can engage in, rather than status, a due process analysis could facilitate the destabilization of categories of sexuality as the antireification norm would require.

While the doctrinal underpinnings of the Court's sexuality-based jurisprudence have shifted a number of times since the mid-1980s, the Court has consistently failed to treat categories of sexuality as socially constructed. The Court first considered a constitutional challenge to a sexuality-based classification in *Bowers v. Hardwick*.[150] In *Bowers*, the Court upheld a Georgia sodomy law as applied to adults of the same sex, denying the existence of a "fundamental right" for "homosexuals to engage in sodomy."[151] While *Bowers* involved a claimed substantive due process right for adults to engage in a particular type of conduct, the Court's depiction of homosexuals as members of a fixed identity group was critical to the decision. Throughout the opinion, the Court portrayed sexuality as a status that existed separate and apart from conduct. It referred to the plaintiff in the case as

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149 *Virginia*, 518 U.S. at 533 ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . .").

150 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

151 *Id.* at 190.

a "practicing homosexual,"[152] implying that one might be a homosexual person without engaging in any particular pattern of conduct. It also described the law at issue as one barring homosexual sodomy, even though it in fact proscribed sodomy generally, regardless of whether it occurred between members of the same sex.[153] In like fashion, the Court invoked the history of proscriptions against general acts of sodomy, which it argued had "ancient roots," in support of the claim that *homosexual* sodomy was not a right deeply rooted in American history and tradition.[154] Thus, no new due process right could be established.[155]

Ten years later, in *Romer v. Evans*, the Court invalidated a sexuality-based classification on equal protection grounds.[156] According to the Court, Amendment 2 of the Colorado Constitution, which prohibited the accordance of legal protected status to individuals based on their sexuality,[157] swept so broadly that it could only be explained by "animus toward the class it affects," namely, homosexuals.[158] Thus, it failed even rational basis review.[159] While the outcome, tone, and doctrinal foundation of the decision suggested a marked departure from *Bowers*, the Court continued to reify categories of sexuality. As in *Bowers*, the Court constructed the class affected by the law in ways not supported by the record. Notwithstanding the text of Amendment 2, which read "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation," the Court insisted upon referring to the named class as one composed of "homosexual persons or gays and lesbians."[160] By structuring the named class as homosexual persons, and excluding bisexuals, the Court reified the construct of the gay-straight binary.[161]

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152 *Id.* at 188; *see also id.* at 191 (discussing the "constitutional right of homosexuals to engage in acts of sodomy").

153 *See id.* at 186 (quoting the statute, which only stated that "a person" can be guilty of sodomy).

154 *Id.* at 192 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights."(internal citations omitted)).

155 *See id.* at 195–96.

156 517 U.S. 620, 635 (1996).

157 *See id.* at 620, 623, 624 (quoting statute).

158 *Id.* at 632 ("[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

159 *Id.*

160 *Id.* at 624.

161 For further discussion on how "[b]isexual invisibility manifests itself in the studied omission of bisexuality in discussions of sexual orientation," such as occurred in *Romer*, see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 367 n.52 (2000). Yoshino argues that while the *Romer* Court was not "intending to exclude

The Court returned to a substantive due process framework eleven years later in *Lawrence v. Texas*, explicitly overruling *Bowers* and creating what amounted to a substantive due process right to gay intimacy.[162] Again, the Court portrayed sexual categories as fixed, dichotomous markers of identity, which existed separate and apart from the conduct at issue. As the Court explained, "[t]he liberty protected by the Constitution allow[ed] homosexual persons the right to make [the] choice [to engage in gay intimacy]."[163] In other words, the Court implied that a person might be homosexual even without choosing to engage in any particular pattern of conduct.

While *Lawrence* continued to portray categories of sexuality as fixed, real, and dichotomous, aspects of the decision suggested the possibility of a more critical approach to sexuality. First, the Court attempted to correct the historical narrative of persecution relied upon in *Bowers*. Drawing on an amicus brief written by prominent historians of sexuality, Justice Kennedy concluded that "there [was] no longstanding history . . . of laws directed at homosexual conduct as a distinct matter,"[164] and found that "laws targeting same-sex couples . . . did not develop until the last third of the twentieth century."[165] Although the Court did not conclude from this revisionist account that sexuality represented a social construct which, like race, should be dealt with under the antireification principle, its foray into the history of sexuality does suggest that it has the conceptual tools necessary to incorporate constructionist insights into its sexuality jurisprudence.

Second, a substantive due process analysis of sexuality-based classification (as taken in *Lawrence*) would be uniquely amenable to adoption of the antireification principle. Under a substantive due process analysis, the Court could avoid the question of immutability

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bisexuals from its protections," permitting "the homosexual category to absorb bisexuals" represented "itself an example of bisexual invisibility." *Id.*

162 539 U.S. 558, 559 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."); *see also* Matthew Coles, Lawrence v. Texas *& the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 37 (2005) (stating that the "meaning of the *Lawrence* opinion" is that "[p]eople have the right to form intimate relationships involving sex . . . [and g]ay people have that right as much as anyone else"); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1399 (2004) (arguing that *Lawrence*, in overruling *Bowers*, "announce[d] a kind of privatized liberty right that affords gay and lesbian couples the right to intimacy in the bedroom").

163 *Lawrence*, 539 U.S. at 556–67.

164 *Id.* at 568.

165 *Id.* at 570.

embedded in the equal protection framework and treat homosexuality simply as a form of conduct that any individual might engage in. The antireification norm would then demand that the Court strike laws barring homosexual conduct on the ground that they create the illusion that people who engage in such conduct (with whatever frequency) form a fixed group that is distinct from "heterosexuals." Just as the Court strives to eliminate racial constructs from social discourse, it might strive to eliminate sexuality-based ones. In so doing, a series of harms, such as sexual identity-based stigmatization and violence, might be avoided.[166]

Despite the potential for a more critical approach to sexuality using a due process framework, the Court has yet to adopt the antireification principle in its sexuality jurisprudence. Most recently, in *United States v. Windsor*, the Court struck down section 3 of DOMA, but largely on federalism grounds.[167] According to the Court, because DOMA represented a departure from traditional practice of federal deference to state law definitions of marriage, "careful consideration" was required to evaluate its rationality.[168] Under this newfangled standard of review, the Court found that Congress had been improperly motivated by animus.[169]

Given this reasoning, *Windsor* fell far short of ruling that all sexuality-based classifications violate the Constitution.[170] It remains to be seen what standard of review will eventually come to govern state law classifications.[171] The Court has several options open to it. As suggested above, the Court might adopt a substantive due process analysis, and, consistent with the antireification principle, find a fundamental right to enter into same-sex marriage. It might also engage in an equal protection analysis along the lines sketched out in the lower court litigation leading up to *Windsor*. There, proponents of marriage equality had pressed the courts to treat homosexuality as an immutable trait and treat homosexuals as a suspect class.[172]

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166 For a discussion of violence based on sexual identity, see *infra* note 186.

167 United States v. Windsor, 133 S. Ct. 2675 (2013).

168 *Id.* at 2692.

169 *Id.* at 2693 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

170 *See id.* at 2696 (confining its holding to those marriages lawful under state law but barred by federal law).

171 In a decision issued the same day as *Windsor*, the Court dismissed on standing grounds a challenge to a state law ban on gay marriage. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (holding that the official sponsors of California's Proposition 8 lacked Article III standing when public officials had refused to defend it).

172 *See, e.g.*, 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)

Meanwhile, in a somewhat strange political role reversal, defenders of "traditional" marriage had taken up the banner of constructionism, maintaining that sexual orientation was fluid rather than fixed, and that individuals were free to choose their sexual identities.[173] Whichever approach the Court should choose to adopt, it will have to confront some messy questions regarding what sexuality is—and whether the Court can or should be involved in the project of altering social meanings via the norm of antireification.

III
Explaining Selective Antireification

What explains the Court's selective application of the antireification principle? Some might cast selective antireification as little more than a results-oriented manipulation of equal protection doctrine for the purpose of eliminating affirmative action.[174] To be sure, all of the Justices have policy preferences that may influence their reasoning, and it is difficult to ignore the scorn with which some of the Justices view so-called "racial entitlements,"[175] affirmative action in particular.[176] However, antireification cannot be so easily dismissed as a "sham" or cover for the naked policy preferences of the Justices. As

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."); *see also* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012). ("[Plaintiff] presents evidence that the characteristic of sexual orientation is immutable or highly resistant to change."); Transcript of Proceedings at 2035, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2010) (No. 09-2292) (providing expert testimony of Professor Gregory M. Herek regarding the inefficacy of "sexual-orientation-change efforts" and the perception among gays and lesbians that their sexuality was not a choice).

173 Windsor v. United States, 699 F.3d 169, 183–84 (2d Cir. 2012) (noting BLAG's argument that sexuality "may change over time, range along a continuum, and overlap (for bisexuals)"). The Second Circuit avoided the question of immutability, determining instead that sexual orientation was "a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals" thus warranting judicial review. *Id.*

174 Liberal critics have derided the Court's affirmative action doctrine as a cover for the naked policy preferences of the conservative Justices. *See, e.g.*, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L.J. 1141, 1142 (2002) (exploring the existence of an "anti-antidiscrimination agenda" based on a belief that "liberals and minorities have gone too far" in their antidiscrimination policies).

175 At a recent oral argument, Justice Scalia described Section 5 of the Voting Rights Act as a problematic "racial entitlement." Transcript of Oral Argument at 47, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

176 *See* Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting in part) (contending that policy concerns counsel against the use of affirmative action in institutions of higher education).

this Note has argued, antireification represents a logical extension of the kind of social constructionism that has been at the heart of equal protection jurisprudence for generations.

This Part considers several potential explanations for selective antireification. Subparts A and B posit a set of empirical and normative claims that might justify the selective deployment of antireification and evaluate them. Subpart C posits that universal antireification might be hindered by constraints inherent in the framework of modern equal protection doctrine.

A. Empirical Claims

Selective deployment of the antireification principle may stem from the Court's belief in empirical differences between the nature of race-, gender-, and sexuality-based identities. Perhaps the Court believes that race, as an empirical matter, is less "real" than gender and sexuality.[177] Such a belief would make race a particularly good target for antireification: As something that is not ultimately real, it would be amenable to judicial attempts to denaturalize it via concerted discourse along the lines of antireification. By contrast, it would be a waste of judicial ink to attempt to reconfigure or eliminate categories posited to be more real, for example gender and sexuality.

It is unclear whether, and to what extent, such empirical commitments are driving the Court. Case law reveals that the Court has generally refused to make such claims outright or has referred to them only obliquely.[178] Where the Court has been more explicit about distinguishing, as an empirical matter, race from categories it deems more real (like gender), its analysis has been wanting. In *U.S. v. Virginia*, for example, the Court attempted to distinguish between

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[177] Several scholars have suggested this idea. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1996) ("[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." (quoting Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12)); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 88 (2000) (describing "formal-race discourse" or a "mode of talking about race . . . premised on the view that race is socially and morally irrelevant").

[178] *See, e.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) ("[D]ifferences 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."); Christian Legal Soc'y Chapter v. Martinez, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context [of sexuality].").

race and gender as follows: "[Whereas] [s]upposed 'inherent differences' are no longer accepted as a ground for race . . . classifications[,] . . . [p]hysical differences between men and women . . . are enduring."[179] This assertion, of course, is patently unhelpful: Racial differences can also be physical (in terms of pigmentation or phenotype), and recognition of those differences has endured for centuries.[180]

Justifying selective antireification based on empirical claims about the categories would require more rigorous engagement with science and scholarship than was put forward in *U.S. v. Virginia*. But we might then ask if the Court should be in the business of making such claims in the first place. While it is "emphatically the province and duty of the judicial department to say what the law is,"[181] we do not generally regard that province to include saying what race, gender, and sexuality are. Perhaps such determinations are better left in the hands of legislators. Or, as at least one of the Justices has argued, determinations about the meaning of race and other social identity categories should be made by individuals, not the state.[182]

B. Normative Claims

Another possible explanation for selective antireification is that the Court is making a set of normative claims about the categories. Perhaps the Court is suggesting that social organization along racial lines is somehow worse than social ordering around gender- or sexuality-based categories. Alternatively, it may be suggesting that organization around gender- or sexuality-based categories is actually good for society, regardless of whether the categories are real or not. If the Court wanted to encourage ordering around socially beneficial constructs, it might behoove the Court to treat those constructs as real and celebrate them. While the Court has not made such normative claims explicitly, it has addressed them implicitly. With respect to gender, the Court has made the claim that "'[i]nherent differences' between men and women . . . remain cause for celebration."[183] And,

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179 518 U.S. 115, 533 (1996).

180 *See* GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 141–42 (2002) (arguing that racism has historically depended upon indelible differences between groups, including, but not limited to, pigmentation).

181 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

182 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.").

183 *Virginia*, 518 U.S. at 533.

as scholars have pointed out, the Court has been particularly preoccupied with the evils of racial balkanization.[184]

Such normative assertions are subject to critique. Some might refute the suggestion that racial balkanization produces more dangerous consequences than balkanization along the lines of gender or sexuality. Surely, racial balkanization has produced a history of violence and subordination,[185] but so too has social stratification based on gender-[186] and sexuality-based identities.[187] And while some consider it a noble goal to make categories like race irrelevant, others praise race consciousness in a pluralistic society as healthy and particularly important for groups that have been victims of historical persecution.[188]

C. Doctrinal Constraints

There may also be a strong doctrinal explanation for why the principle of antireification has been cabined to race. One suspects that if universally applied, antireification would undermine the logic and structure of the current system of tiered levels of scrutiny governing equal protection jurisprudence. Indeed, strong-form social constructionism gives rise to something of a paradox in equal protection jurisprudence. On the one hand, it provides an important justification for heightened scrutiny of classifications based on race, gender, or sexuality: If such identity categories ultimately represent mere fictions, they will not generally be rational bases for government classification. On the other hand, strong-form social constructionism seeks simultaneously to deconstruct those categories.

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184 *See* Siegel, *supra* note 23, at 1351 (discussing antibalkanization as an equality principle in race equality cases); *see also Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring) ("Governmental classifications that command people . . . based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.").

185 *See* FREDRICKSON, *supra* note 180, at 49–96 (narrating the rise of "modern racisms": white supremacy and antisemitism).

186 *See generally* JOANNA BOURKE, RAPE: A HISTORY FROM 1860 TO THE PRESENT DAY (2007) (narrating a history of gender-based violence in Western society from the mid-nineteenth century to the present with a focus on how concepts such as "rape" and "rapist" have been conceptualized over time).

187 *See* GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 5–10, 31–36 (1991) (narrating the history of violence against gays and lesbians in the post–World War II era and providing statistics regarding the quantity and nature of such violence).

188 *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1087–88 (1991) ("[R]ecognizing race validates the lives and experiences of those who have been burdened because of their race. . . . Color-consciousness makes blacks subjects and not objects, undermining the durability of white definitions of 'blackness.' [And,] it acknowledges the contributions of black culture . . . .").

Indeed, universal application of the antireification principle poses a fundamental threat to the viability of the current system of tiered levels of review because that system requires that identity categories remain stable and enduring. First, the Court could not readily identify those classes of people singled out for protection by judicial review if their identities were not conceptualized as relatively stable. Second, the existence of fixed identity groups worthy of special protection provides a principle for *limiting* judicial review that is vital for its continued application.[189]

Moreover, the antireification approach is incompatible with equal protection doctrine because attempts to protect "minorities" or other vulnerable classes through judicial review necessarily results in the reification (and ultimately, essentialization) of identity categories. By writing about race, gender, and sexuality—even in the vein of antireification—the Court runs the risk of reaffirming old constructs or giving rise to new ones.[190]

Thus, it may be the case that all identity categories are highly unstable and historically contingent; in other words, not biological, or in any inherent sense, "real." But as much as the Court would like to convince us all—and itself—of this chestnut of social constructionism, in the words of Alvy Singer, it may still "need the eggs."[191] Universal antireification would thus be doctrinally unworkable because, even if they are ultimately fictions, categories of identity (like race, gender, and sexuality) are essential to the continued viability of the Court's equal protection jurisprudence.

CONCLUSION

Since the mid-twentieth century, the Court's developing view on the social construction of identity has driven some of the most fundamental changes in modern equal protection jurisprudence. One of

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[189] Limiting principles constraining judicial review have been recognized as essential to rights enforcement since the New Deal brought an end to the capaciousness of the *Lochner* era. *See* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 52 (1996) ("The New Deal revolution made a state action doctrine necessary because without it, all decisions by the political branches would come under judicial control."); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (arguing that in recent decades, beset by what he calls "pluralism anxiety," the Court has limited the range of those eligible for judicial review, "systematically den[ying] constitutional protection to new groups").

[190] *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 STAN. L. REV. 1, 18–19 (1991) ("To be racially color-blind . . . is to ignore what one has already noticed. . . . [T]he racially color-blind individual perceives race and then ignores it. . . . This pre-existing race consciousness makes it impossible for an individual to be truly nonconscious of race.").

[191] *See supra* note 1 and accompanying text.

these transformations has been the development of what I have called an antireification principle. Under this principle, an important function of constitutional law is to regulate social meaning in accordance with the view that social categories like race are mere constructs. Guided by the antireification norm, the Court has used judicial review to block state action that, in its estimation, treats such false constructs as real, important, or enduring. The Court, however, has been highly selective in its application of the principle outside of the race context. Where gender and sexuality are at issue, the Court has been more than willing to cast as real—and even celebrate—existing categories.

The uneven application of the antireification principle should give us enormous pause. All of these constitutionally relevant categories of identities could be conceived as socially constructed. By denying their bases in reality, the Court could—according to its own logic—destabilize them and decrease the harms purportedly caused by classifying individuals according to crude labels of identity. The Court has never dealt with this fundamental tension. At present, it is difficult to see a coherent empirical or normative justification for the cabining of the antireification principle to just race (or, even more specifically, just affirmative action).[192] Moreover, there is reason to believe that universal application of the antireification principle is doctrinally unworkable given that categories of identity like race, gender, and sexuality—even if they are ultimately fictions—are essential to the continued viability of the Court's current system of tiered levels of review.

This Note has identified the antireification principle in constitutional law and developed a critique based upon the Court's failure to apply that principle to gender and sexuality. It has also suggested antireification's incompatibility with the current equal protection regime. Whatever the validity of this legal critique may be, other important questions remain regarding the value of antireification. Does the Court possess the institutional capability to unilaterally extinguish long-standing, culturally entrenched identity categories—that is, to "age them out" from the bench? Are the goals of racial equality best served by representational techniques that facilitate the denaturalization and deconstruction of race? Future assessments of the antireification principle will likely encompass interrogation of such issues.

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[192] *See supra* Part III (laying out explanations for the Court's selective deployment of antireification).